

IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

AUG 24 1999

JAMES W. PATTERSON
CLERK

THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

JOHN RUSSELL JACKSON,)
)
) Appellant,)
)
) -vs-)
)
) STATE OF OKLAHOMA,)
)
) Appellee.)

NOT FOR PUBLICATION
No. F-98-825

SUMMARY OPINION

STRUBHAR, PRESIDING JUDGE:

John Russell Jackson, Appellant, was convicted of one count of Murder in the first degree (21 O.S.Supp.1997, § 701.7(A)), following a jury trial in the District Court of Tulsa County, Case No. CF-97-3200, the Honorable E. R. Ned Turnbull, District Judge, presiding. The jury recommended life imprisonment and the trial court sentenced Appellant accordingly. From this Judgment and Sentence, Appellant appeals.

The following propositions of error were considered:

- I. The trial court denied Mr. Jackson access to the shotgun to have test firing and patterning conducted in violation of due process;
- II. The trial court compelled Mr. Jackson's testimony in violation of the Fifth Amendment by forcing him to choose between his right to present a defense and his right to remain silent;
- III. The trial judge violated 22 O.S.1991, § 894 and coerced a verdict when he improperly responded to a note by the jury stating that they were deadlocked without calling the jury into the box or informing counsel about the note; and
- IV. The trial court erred by deviating from the Oklahoma uniform instructions when instructing on Mr. Jackson's alternative defense of heat of passion manslaughter.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we find the error raised in Appellant's second proposition mandates relief. The instant case is similar to *Williams v. State*, 915 P.2d 371 (Okl.Cr.1996) in which this Court reversed because the trial court forced the defendant to testify before the defendant could elicit and put on evidence of self-defense. Although Appellant was not precluded from presenting evidence of self-defense either through cross-examination or in the defense case in chief, the effect of the trial court's ruling during its instruction conference held prior to the defense resting its case in chief, forced Appellant to choose between his right to have his defense considered by the jury and his Fifth Amendment right to remain silent.

"Self-defense is an affirmative defense which must be raised by the defendant unless evidence in the State's case shows the homicide was justifiable. Oklahoma law does not require a defendant to take the stand in order to claim self-defense." *Williams*, 915 P.2d at 376 (footnotes omitted). As such, the *Williams* court concluded "[a] trial court cannot explicitly or **effectively** force a defendant to choose between his Sixth Amendment right to present a defense and his Fifth Amendment right not to testify. *Id.* at 377 (emphasis added). Here, Appellant was "compelled" to testify in the sense that if he chose not to testify he lost the opportunity to have the jury instructed on

his defense of self-defense. The effect of the trial court's ruling was to force Appellant to testify when he had already made a sufficient showing to warrant self-defense instructions and did not wish to take the stand. The trial court's remarks effectively forced Appellant to surrender his Fifth Amendment right in order to assert his right to have the jury instructed. Because the trial court forced Appellant to choose between his rights to his detriment, this case must be reversed and remanded for a new trial.

DECISION

The Judgment and Sentence of the trial court is **REVERSED and REMANDED for a new trial.**

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OPINION BY: STRUBHAR, P.J.

LUMPKIN, V.P.J.: DISSENT

JOHNSON, J.: CONCUR

CHAPEL, J.: CONCUR

LILE, J.: DISSENT

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LILE, JUDGE: DISSENTS

This case is nothing like *Williams v. State*, 1996 OK CR 16, 915 P.2d 371. In *Williams*, the court improperly refused to allow any evidence of self-defense to be admitted until after the defendant had testified to support the defense of self-defense. In this case, the court did not prohibit evidence of self-defense and both parties now agree that there was sufficient evidence to warrant self-defense instructions. Appellant, prematurely, asked the court, in conference, to give self-defense instructions even before the evidence was completed. The court indicated that it did not, at that time, see sufficient evidence to warrant the instruction. The court was probably wrong, but was never asked for a ruling after all of the evidence was in and never made a ruling on the issue. Appellant, assuming that the court would ultimately deny the request for self-defense instructions, elected to testify. The mere advisory opinion of the court, prior to the evidence being completed, was not coercive in the sense of the *Williams* case. Appellant made a voluntary election to testify; gave testimony sufficient to convince the court that self-defense had been adequately raised and the instructions were properly given by the court. Appellant cannot prematurely request the opinion of the court and later complain that he was coerced when he received a candid response. This conviction should be affirmed. I am authorized to state that Judge Lumpkin joins in this dissent.