

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JERMAINE DARNELL JEFFERY,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2009-335

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUL 16 2010

SUMMARY OPINION

LUMPKIN, JUDGE:

MICHAEL S. RICHIE
CLERK

Appellant, Jermaine Darnell Jeffery, was tried by jury and convicted of First Degree Felony Murder (Count I) (21 O.S.2001, § 701.7); Shooting With Intent to Kill After Former Conviction of a Felony (Count II) (21 O.S.Supp.2007, § 652); Feloniously Pointing a Firearm After Former Conviction of a Felony (Count III) (21 O.S.2001, § 1289.16; Leaving the Scene of an Accident With Injury After Former Conviction of Felony (Count IV) (47 O.S.2001, § 10-102); Possession of a Firearm After Former Conviction of a Felony (Count V) (21 O.S.Supp.2007, § 1283); and Eluding a Police Officer After Former Conviction of a Felony (Count VII) (21 O.S.2001, § 540A) in the District Court of Tulsa County, Case Number CF-2007-4861. The jury recommended as punishment life imprisonment in Count I; twenty years imprisonment on Count II; ten years imprisonment on Count III; four years imprisonment and a fine in the amount of \$1,000 in Count IV; five years imprisonment in Count V; and five years

imprisonment and a fine in the amount of \$1,000 in Count VII.¹ The trial court sentenced accordingly; ordering the sentences in count I and II to run concurrently but consecutive to the remaining sentences. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in this appeal:

- I. Appellant's Conviction For First Degree Murder Was Not Supported By The Evidence Because There Was Insufficient Evidence To Prove A Nexus Between The Offense Of Shooting With To Kill And The Death, The Underlying Felony, And The Homicide.
- II. The Evidence Was Insufficient to Support Appellant's Conviction For Shooting With Intent To Kill.
- III. Appellant's Conviction For Shooting With Intent to Kill Must Be Reversed And Dismissed Because This Offense Was Also Used By The State To Serve As The Underlying Felony Supporting Appellant's Conviction For First Degree Felony Murder. Punishing Appellant Twice For The Same Offense Violates Federal And State Constitutional Provisions Prohibiting Double Jeopardy For The Same Crime And Accordingly Appellant's Separate Conviction For Shooting With Intent To Kill Must Be Reversed And Dismissed.
- IV. The Trial Court Committed Reversible Error By Allowing The State To Introduce In Its Case In Chief Evidence of Appellant's Exercise Of His Right To Silence After His Arrest In Violation Of The Fifth And Fourteenth Amendments Of The United States Constitution And Article II, §§ 7, And 21 Of The Oklahoma Constitution.
- V. Reversible Error Was Committed When Officer Debbie Crisp Was Permitted to Recite To The Jury Lashea Brown's and Latia Gray's Out-of-Court Statements At The Crime Scene In Violation Of Appellant's Rights Under The Sixth, Eighth, And Fourteenth Amendments Of The United States Constitution And Article II, §§ 7, 9 and 20 Of The Oklahoma Constitution.

¹ First Degree Felony Murder and Shooting With Intent to Kill are 85% crimes. 21 O.S. Supp. 2007, § 13.1

- VI. Admission Of Irrelevant But Highly Prejudicial Photographs Of The Victim Violated Appellant's Due Process Rights Under the Fifth, Eighth, And Fourteenth Amendments Of The United States Constitution And Article II, §§ 7 And 9 Of The Oklahoma Constitution.
- VII. The Prosecutor Deprived Appellant Of A Fair Trial By Arguing Facts Not In Evidence In His Closing Argument In Violation Of The Eighth And Fourteenth Amendments Of The United States Constitution And Article II, §§ 7 and 9 Of The Oklahoma Constitution.
- VIII. Appellant's Sentence Was Excessive And Should Be Modified.
- IX. Appellant Received Ineffective Assistance of Counsel In Violation Of The Sixth And Fourteenth Amendments Of The United States Constitution And Article II, §§ 7 and 20 Of The Oklahoma Constitution, Because Trial Counsel Failed To Object To Serious Errors And Thereby Failed To Protect The Record For Appellate Review.
- X. The Accumulation of Errors In This Case Deprived Appellant Of Due Process Of Law And Necessitates Reversal Pursuant To The Fourteenth Amendment To The Unites States Constitution And Article II, § 7 Of The Oklahoma Constitution.

After a thorough consideration of these propositions and the entire record before us on appeal including the original records, transcripts, and briefs of the parties, we have determined that count II should be reversed with instructions to dismiss and the judgments and sentences in the remaining counts shall be affirmed.

In Propositions I and II, viewing the evidence in the case in the light most favorable to the State, we find it was sufficient to prove beyond a reasonable doubt that Appellant was guilty of first degree felony murder. *Easlick v. State*, 2004 OK CR 21, § 15, 90 P.3d 556, 559; *Spuehler v. State*, 1985 OK CR 132, ¶

7, 709 P.2d 202, 203-204. A rational trier of fact could have found the essential elements of the underlying felony of shooting with intent to kill beyond a reasonable doubt. *Id.* A sufficient nexus existed between the offense of shooting with intent to kill and the victim's death. Appellant's acts of discharging the firearm at Lockridge, fleeing the scene, and causing Williamson's death by ramming her vehicle with his truck were one, continuous transaction. *Clark v. State*, 1977 OK CR 4, ¶ 16, 558 P.2d 674, 678; OUJI-CR(2d) 4-65 (Supp.2000).

In Proposition III, plain error occurred when the trial court entered convictions for first degree felony murder and the underlying felony, shooting with intent to kill. *Munson v. State*, 1988 OK CR 124, ¶ 28, 758 P.2d 324, 332-33. Felony murder and the underlying offense merge into one offense. *Lambert v. State*, 1999 OK CR 17, ¶ 13, 984 P.2d 221, 228. Appellant's conviction for shooting with intent to kill is reversed and remanded to the District Court with instructions to dismiss.

In Proposition IV, plain error occurred when the state introduced evidence of Appellant's refusal to speak to the investigating officer after Appellant was placed under arrest. *Dungan v. State*, 1982 OK CR 152, ¶¶ 5-7, 651 P.2d 1064, 1065; *Simpson v. State*, 1994 OK CR 40, ¶ 11, 876 P.2d 690, 693. However, we find that this error was harmless beyond a reasonable doubt. *Simpson*, 1994 OK CR 40, ¶ 34, 876 P.2d at 701 (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967)).

In Proposition V, we find that plain error did not occur in the admission of Latia Gray's out-of-court statement. *Simpson*, 1994 OK CR 40, ¶ 11, 876 P.2d at 693. We further find that the trial court did not abuse its discretion in the admission of LaShea Brown's out-of-court statements. *Williams v. State*, 2001 OK CR 9, ¶ 84, 22 P.3d 702, 702. Both statements were admissible under the excited utterance exception to the prohibition against admission of hearsay. *Slaughter v. State*, 1997 OK CR 78, ¶ 36, 950 P.2d 839, 852. Neither of the statements infringed upon Appellant's right to confrontation. LaShea Brown testified at trial. *Stouffer v. State*, 2006 OK CR 46, ¶ 70, 147 P.3d 245, 264. Both statements were given "under circumstances objectively indicating that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency." *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 2273-74, 165 L.Ed.2d 224 (2006).

In Proposition VI, we find that plain error did not occur in relation to admission of the pre-mortem and post-mortem photographs in State's Exhibit numbers 1 and 6. *Simpson*, 1994 OK CR 40, ¶ 11, 876 P.2d at 693. The trial court did not abuse its discretion in admitting the post-mortem photograph in State's Exhibit number 2. *Warner v. State*, 2006 OK CR 40, ¶ 167, 144 P.3d 838, 887.

In Proposition VII, we have reviewed Appellant's claim of prosecutorial misconduct for plain error and find none. *Romano v. State*, 1995 OK CR 74, ¶ 54, 909 P.2d 92, 115. The prosecutor's statements were reasonable inferences on the evidence. *Warner*, 2006 OK CR 40, ¶ 197, 144 P.3d at 891.

In Proposition VIII, we find Appellants sentences are within the applicable statutory ranges and when considered under all the facts and circumstances of the case, are not so excessive as to shock the conscience of the Court. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149; *Freeman v. State*, 1994 OK CR 37, ¶ 38, 876 P.2d 283, 291.

In Proposition IX, we find that Appellant has failed to “show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984).

In Proposition X, we find Appellant was not denied a fair trial by cumulative error. *Ashinsky v. State*, 1989 OK CR 59, ¶ 31, 780 P.2d 201, 209.

DECISION

The judgment and sentences for First Degree Felony Murder, Feloniously Pointing a Firearm After Former Conviction of a Felony, Leaving the Scene of an Accident With Injury After Former Conviction of Felony, Possession of a Firearm After Former Conviction of a Felony, and Eluding a Police Officer After Former Conviction of a Felony are hereby **AFFIRMED**. The judgment and sentence for Shooting With Intent to Kill is **REVERSED** and **REMANDED** to the District Court with instructions to **DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2009), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE CLANCY SMITH, DISTRICT JUDGE

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LEWIS, J.: CONCUR IN RESULT

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