

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

HEATHER ANN JONES, )

Appellant, )

v. )

THE STATE OF OKLAHOMA, )

Appellee. )

NOT FOR PUBLICATION

Case No. F-2012-703

**FILED**  
**IN COURT OF CRIMINAL APPEALS**  
**STATE OF OKLAHOMA**

JUN 12 2014

**SUMMARY OPINION**

**A. JOHNSON, JUDGE:**

MICHAEL S. RICHIE  
CLERK

Appellant Heather Ann Jones was tried by jury and convicted in the District Court of Sequoyah County, in Case Number CF-2010-211, for the crimes of Second Degree Murder (Count 1), in violation of 21 O.S.2001, § 701.8(B), Robbery Committed by Two or More Persons (Count 4), in violation of 21 O.S.2001, § 800, Conspiracy to Commit Robbery by Two or More Persons (Count 5), in violation of 21 O.S.2001, § 421, and Child Neglect (Count 6), in violation of 21 O.S.Supp.2009, § 843.5(C). The jury set punishment at fifteen years imprisonment on Count 1, five years imprisonment for Count 4, a \$2,500.00 fine for Count 5, and one year in the county jail for Count 6. The Honorable J. Jeffrey Payton, District Judge, who presided at trial, sentenced Jones according to the jury's verdict and ordered the sentences to be served concurrently to each other.<sup>1</sup> From this Judgment and Sentence Jones appeals, raising the following issues:

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<sup>1</sup> Under 21 O.S.Supp.2011, § 13.1, Jones must serve 85% of the sentence imposed on Counts 1 and 6 before she is eligible for parole.

- (1) whether the evidence was sufficient to convict her of Second Degree Felony Murder, Robbery, and Conspiracy to Commit Robbery;
- (2) whether it was plain error for the trial court to allow the prosecutor to solicit testimony about statements Jones made during a television news interview after the court held the video recording of that news report was inadmissible because it contained prejudicial hearsay;
- (3) whether the admission of written statements of witness Tyler Hughes to police was erroneous and deprived her of a fair trial and reliable sentencing;
- (4) whether it was plain error for the trial court to admit certain character evidence;
- (5) whether her convictions and sentences for both Robbery and Second Degree Felony Murder, based on larceny from a house, violated her right to be free from multiple punishments;
- (6) whether she was deprived of the effective assistance of counsel; and
- (7) whether the cumulative effect of all errors deprived her of a fair trial.

For the reasons set out below, we reverse Count 4, but otherwise affirm the Judgment and Sentence of the District Court.

**1.**  
**Sufficiency of the Evidence**

After reviewing the evidence in the light most favorable to the State, as we must, we find that any rational trier of fact could have found beyond a reasonable doubt that Jones committed the crimes of second degree felony murder, robbery, and conspiracy to commit robbery. *See Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204. Accepting all reasonable

inferences and credibility choices supporting the verdict, we find the evidence was sufficient to prove Jones had knowledge of her accomplices' intent to rob their victim or commit larceny from his house. We find further that the evidence was sufficient to show that Jones aided and abetted the crime of larceny from a house, the predicate felony upon which the charge of second degree felony murder was based. Although the evidence showed that Jones' accomplices entered the victim's house with his consent, the evidence also showed that the consent was obtained through deception. The proof of deception was sufficient to make the entry unlawful, and thereby satisfy the first element of the crime of larceny from a house.<sup>2</sup> *Cf. Patton v. State*, 1998 OK CR 66, ¶ 42, 973 P.2d 270, 287 (holding that the breaking and entry element for burglary is satisfied by "constructive breaking which occurs when entry is obtained by any other manner, such as fraud, trick, or threats made while being armed with a dangerous weapon").<sup>3</sup>

**2.**  
**Testimony about Television News Interview**

Reviewing for plain error only, we find the trial court did not commit reversible error in permitting a sheriff's investigator to testify about Jones'

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<sup>2</sup> One of the elements of the crime of larceny from a house is that the entry into the house be unlawful. Instruction No. 5-97, OUJI-CR(2d); 21 O.S.2011, § 1723; *Ex Parte Wright*, 1941 OK CR 157, 119 P.2d 97, 98-99.

<sup>3</sup> Courts in other jurisdictions have held the same. See e.g., *People v. Jamieson*, 88 A.D.3d 1298, 1298-1299 (N.Y. App. Div. 2011)(holding that entry to victim's home by means of deception, trickery, or misrepresentation constitutes "unlawful entry" for purposes of second degree burglary); *Davis v. State*, 804 So.2d 1153, 1158-1160 (Ala.Crim.App. 2000)(affirming conviction for murder committed during burglary where statutory element of "unlawful entry" was met where defendant obtained entry by trick, i.e., he pretended to know one of occupants of home).

demeanor during a television news interview. *Lott v. State*, 2004 OK CR 27, ¶ 70, 98 P.3d 318, 340. While the trial judge ruled that the entire video recording of the news report was inadmissible, he obviously did so because Jones' statements on the video were intertwined with irrelevant and hearsay statements made by the news anchor and reporter. Jones' statement, as testified to by the sheriff's investigator without reference to the news anchor or reporter, was a statement by a party, and not hearsay. See 12 O.S.2011, § 2801(B)(2)(a). Additionally, the investigator's testimony about Jones' demeanor did not present a hearsay statement to jurors. Under the hearsay rule, a hearsay statement is an oral assertion, or nonverbal conduct intended as an assertion. 12 O.S. 2011, § 2801(A)(1). Jones' demeanor – described by the investigator as answering questions without crying – was not an assertion. See *Romano v. State*, 1995 OK CR 74, ¶ 8, 909 P.2d 92, 107; *Mayes v. State*, 1994 OK CR 44, ¶ 65, 887 P.2d 1288, 1307. Relief for plain error is not warranted. See *Hogan v. State*, 2006 OK CR 19, ¶ 39, 139 P.3d 907, 923.

### 3.

#### **Written Statements to Police as Hearsay**

Again reviewing only for plain error, we find that, while the trial court erroneously admitted a written statement given to police by a witness who testified at trial, the error does not require reversal. *Young v. State*, 2000 OK CR 17, ¶ 49, 12 P.3d 20, 37. As the State rightly concedes, the written statement admitted as Exhibits 68 and 68A was hearsay and did not qualify for admission under any hearsay exception. But because the substance of the

witness' written statement was substantially the same as his in-court testimony, the statement was merely cumulative to that testimony. If the statement had been excluded, the outcome would remain unchanged. Relief for plain error is not warranted. *See Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923 (holding that relief for plain error requires, among other things, "that the error affected [the defendant's] substantial rights, meaning the error affected the outcome of the proceeding").

**4.**  
**Character Evidence**

Reviewing for plain error, we reject Jones' claim that the trial judge improperly allowed the prosecutor to ask several witnesses about her demeanor after her daughter was shot. *Coddington v. State*, 2006 OK CR 34, ¶ 52, 142 P.3d 437, 451. Several police officers testified that Jones did not appear to be as upset as they would have been if their child had been shot. Jones claims this is improper character evidence. It is not.

Title 12 O.S.2011, § 2404(A) governs the admissibility of character evidence and states in relevant part that "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving action in conformity therewith . . ." 12 O.S.2011, § 2404(A). In other words, improper character evidence is evidence of a defendant's propensity to commit bad acts. Here the testimony about Jones' demeanor in dealing with the injury and death of her child was not evidence of some unrelated bad act from which jurors could infer that she committed the criminal act alleged in this case. The demeanor

testimony was probative of and directly supported the State's burden of proving that Jones willfully or maliciously failed to provide adequate supervision of her child as charged in the child neglect count (Count 6).<sup>4</sup> The evidence of Jones' apparently callous or indifferent demeanor toward her daughter in the immediate aftermath of her shooting is some evidence tending to show that Jones had the requisite intent of willfully or maliciously failing to provide adequate supervision for her daughter when she took her along during a dangerous criminal activity.<sup>5</sup>

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<sup>4</sup> The elements of the offense of child neglect are:

No person may be convicted of neglect of a child unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, a person responsible for the child's health, safety, or welfare;

Second, willfully/maliciously;

Third, failed/omitted to provide;

Fourth, (adequate (nurturance and affection)/food, /clothing, /shelter/sanitation/hygiene/(appropriate education), /(medical/dental/(behavioral health) care/supervision/(appropriate caretakers)/(special care made necessary by the physical/mental condition of the child);

Fifth, for a child under the age of eighteen.

Instruction No. 4-37, OUJI-CR(2d); *see also* 21 O.S.Supp.2010, § 843.5(C).

<sup>5</sup> This type of evidence is similar to consciousness of guilt evidence in which a defendant's actions after a crime suggest that the defendant knew he was guilty (e.g., flight from police or lying about whereabouts at time of offense). Additionally, this Court has consistently found demeanor evidence relevant and admissible in other types of crimes. *See e.g., Andrew v. State*, 2007 OK CR 23, ¶ 58, 164 P.3d 176, 193 opinion corrected on denial of reh'g, 2007 OK CR 36, 168 P.3d 1150 (finding evidence of defendant's demeanor at funeral home was relevant to show consciousness of guilt in prosecution for murder). *Black v. State*, 2001 OK CR 5, ¶ 49, 21 P.3d 1047, 1067 (approving jury instruction requiring jury to consider, among other things, defendant's demeanor in determining whether he intended to kill); *Darks v. State*, 1998 OK CR 15, ¶ 14, 954 P.2d 152, 158 (upholding admission of videotape of defendant's interview with police in prosecution for malice murder because it was "relevant and probative of Appellant's demeanor which was evidence of his guilt or innocence").

There was no error in the admission of this evidence. The claim is denied. See *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

## **5. Multiple Punishment**

Jones' claim that her convictions for conjoint robbery and second degree felony murder with larceny from a house as the predicate felony violate her right to be free from multiple punishments under 21 O.S.2001, § 11 has merit and requires relief. As Jones did not raise this claim in the district court, it is reviewed only for plain error. *Logsdon v. State*, 2010 OK CR 7, ¶ 15, 231 P.3d 1156, 1164.

Jones was found guilty in Count 1 of second degree felony murder with the underlying felony being larceny from a house.<sup>6</sup> She was also found guilty in Count 4 of conjoint robbery (robbery committed by two or more persons). Jones contends that because the larceny and robbery offenses were both based on the conduct of her accomplices in taking money from the victim's pockets and, nearly simultaneously, taking guns from his immediate presence in his bedroom, the larceny and robbery convictions constitute impermissible multiple punishment for the same continuous criminal act of theft.

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<sup>6</sup> Jones was charged in Count 1 with first degree felony murder with the underlying felony being burglary. In addition to first degree felony murder, the jury was also instructed on the lesser offense of second degree felony murder with the lesser felony of larceny from the house being the predicate felony. The jury returned a verdict of not guilty on the first degree felony murder charge, but returned a guilty verdict on the lesser offense of second degree felony murder.

Title 21 O.S.2001, § 11(A) prohibits multiple punishments for a single criminal act.<sup>7</sup> “The proper analysis of a § 11 claim focuses on the relationship between the crimes.” *Head v. State*, 2006 OK CR 44, ¶ 11, 146 P.3d 1141, 1144; *see also Davis v. State*, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126. Section 11 does not bar the charging and conviction of two separate crimes when one crime relates only tangentially to another crime or crimes committed during a continuing course of conduct. *Davis*, 1999 OK CR 48, ¶ 13, 993 P.2d at 127. “Section 11 is not violated where offenses arising from the same transaction are separate and distinct and require dissimilar proof.” *Jones v. State*, 2006 OK CR 5, ¶ 63, 128 P.3d 521, 543.

Based on the evidence presented and the State’s theory of the case, we find these actions cannot be separated into two crimes. Because the criminal acts cannot be separated, the double convictions constitute a substantial violation of Jones’ statutory right to be free from multiple punishment. Relief for plain error is warranted. Jones’ conviction for first degree conjoint robbery must be reversed with instructions to dismiss.

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<sup>7</sup> Section 11 provides in relevant part that:

[A]n act or omission which is made punishable in different ways by different provisions of this title may be punished under any such provisions, . . . but in no case can a criminal act or omission be punished under more than one section of law; and an acquittal or conviction and sentence under one section of law, bars the prosecution for the same act or omission under any other section of law.

6.

**Ineffective Assistance of Counsel**

Jones claims that trial counsel's failure to timely object to a television video news report, certain law enforcement reports, and testimony about her demeanor constituted ineffective assistance of counsel. Jones also claims trial counsel was ineffective for failing to raise a double punishment objection.

To prevail on a claim of ineffective assistance of counsel, an appellant must show both that counsel's performance was deficient and that the deficient performance prejudiced her. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Alverson v. State*, 1999 OK CR 21, ¶ 26, 983 P.2d 498, 510. When a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice alone, that course should be followed. *Id.* at 697, 104 S.Ct. at 2069; *Bland v. State*, 2000 OK CR 11, ¶113, 4 P.3d 702, 731.

To establish prejudice under *Strickland*, "it is not enough for the defendant to show that the [attorney's] errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067. Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," and "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

Jones claims first that trial counsel's failure to object to a television news report allowed snippets of that report containing irrelevant and hearsay statements to be played for the jury before the judge ruled the entire tape inadmissible. Jones asserts the portions of the video that were played for the jury were prejudicial and would not have been heard by jurors had trial counsel objected.

The record shows the prosecutor attempted several times to play the video of Jones' interview with a television news reporter. Each time the video was started, however, it was cut off by the judge because the prosecutor could not move directly to that part of the interview containing Jones' statements alone. In each attempt, the prosecutor started the video where the news anchor was speaking and making irrelevant and potentially prejudicial statements, or where the reporter was speaking and making statements that purported to repeat statements made to her by Jones. During this process, the trial judge admonished jurors to disregard statements on the tape made by anyone other than Jones and finally, very specifically, instructed jurors to disregard any statements made by the news anchor or reporter.

While Jones argues at length about the hearsay and irrelevant content of the video and what jurors **may** have heard, she candidly acknowledges that "the record is not clear as to what portions of the video the jury viewed" (Aplt's Brief at 44). The trial judge ultimately ruled the entire video inadmissible without any objection by counsel. Without making any showing of what jurors

actually heard before the judge intervened and without any showing that jurors disregarded the judge's admonishments concerning the pieces of the video they did hear, Jones fails to meet her burden of affirmatively proving prejudice from counsel's alleged error. Absent a showing of prejudice, one of the two mandatory components of an ineffective assistance claim, there is no basis for relief on this claim. *See e.g., Bland*, 2000 OK CR 11, ¶ 113, 4 P.3d at 731 (finding defense counsel's failure to request certain jury instructions "did not constitute ineffective assistance" where defendant was not prejudiced by counsel's error because "[w]hen a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed") (citing *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069).

Jones claims next that trial counsel was ineffective for failing to object to the admission of the witness' written statement to police. As discussed above, this statement was hearsay and erroneously admitted into evidence. The error was harmless because the witness conveyed substantially the same information to jurors through his own properly admitted testimony. Because the error was harmless, Jones could not have been prejudiced by counsel's failure to object. Again, absent a showing of prejudice, there is no basis for relief for counsel's alleged error. *See e.g., Bland*, 2000 OK CR 11, ¶ 113, 4 P.3d at 731.

Jones claims further that trial counsel was ineffective for failing to object to testimony by various witnesses about her demeanor in the minutes and hours after her daughter was shot. The testimony about Jones' demeanor was properly allowed into evidence. Had trial counsel objected to the testimony, the objection would have been overruled. "We will not find counsel ineffective for failing to raise an objection which would have been overruled." *Marshall v. State*, 2010 OK CR 8, ¶ 67, 232 P.3d 467, 482.

Jones also claims that trial counsel was ineffective for failing to raise a multiple punishment objection to the charges of second degree felony murder and conjoint first degree robbery. Because we reverse Jones' conviction on the robbery count as impermissible double punishment, this claim is moot.

**7.  
Cumulative Error**

Jones requests that if no single error in her case warrants reversal, we review all the errors in the aggregate to determine whether an accumulation of error denied her a fair trial. This Court has held that when there are "numerous irregularities during the course of [a] trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors was to deny the defendant a fair trial." *DeRosa v. State*, 2004 OK CR 19, ¶ 100, 89 P.3d 1124, 1157 (quoting *Lewis v. State*, 1998 OK CR 24, ¶ 63, 970 P.2d 1158, 1176). Jones' trial was not error free. We find, however, that the errors identified do not require relief even considered in the aggregate. Those errors did not render her trial fundamentally unfair, taint the jury's

verdict, or render the sentencing unreliable. All errors were harmless beyond a reasonable doubt, individually and cumulatively. *Jones v. State*, 2009 OK CR 1, ¶ 104, 201 P.3d 869, 894; *DeRosa*, 2004 OK CR 19, ¶ 100, 89 P.3d at 1157. This claim is denied.

### DECISION

Jones' conviction and sentence for first degree (conjoint robbery)(Count 4) is **REVERSED** with instruction to the District Court to **DISMISS**. In all other respects, the Judgment and Sentence of the district court is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2013), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF SEQUOYAH COUNTY  
THE HONORABLE J. JEFFREY PAYTON, DISTRICT JUDGE

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**LEWIS, P.J.: Concur**  
**SMITH, V.P.J.: Concur**  
**LUMPKIN, J.: Concur in Results**  
**C. JOHNSON, J.: Concur**

**RE**