



**ORIGINAL**

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

APR - 2 2020

**TRAVIS MICHAEL LEATHERWOOD, )**

**JOHN D. HADDEN**  
**CLERK**

**Appellant, )**

**NOT FOR PUBLICATION**

**v. )**

**Case No. F-2018-1263**

**THE STATE OF OKLAHOMA, )**

**Appellee. )**

**OPINION**

**ROWLAND, JUDGE:**

Appellant Travis Michael Leatherwood appeals his Judgment and Sentence from the District Court of Kingfisher County, Case No. CF-2017-106, for Murder in the First Degree (Count 1), in violation of 21 O.S.Supp.2012, § 701.7(A), Possession with Intent to Distribute a Controlled Dangerous Substance (Count 2), in violation of 63 O.S.Supp.2012, § 2-401(A)(1), Possession of a Firearm During Commission of a Felony (Count 4), in violation of 21 O.S.Supp.2012, § 1287, Maintaining a Place for Keeping/Selling Controlled Substances (Count 5), in violation of 63 O.S.2011, § 2-404, and Unlawful Possession of Drug Paraphernalia, a misdemeanor (Count

6).<sup>1</sup> The Honorable Paul K. Woodward, District Judge, presided over Leatherwood's jury trial and sentenced him in accordance with the jury's recommendation to life imprisonment without the possibility of parole on Count 1, ten years imprisonment on each of Counts 2 and 4, five years imprisonment and a \$5,000.00 fine on Count 5, and a \$500.00 fine on Count 6.<sup>2</sup> Judge Woodward ordered Counts 1, 2, and 4 to be served concurrently and Count 5 to be served consecutively to those counts.<sup>3</sup> He further ordered Leatherwood to pay restitution of \$3,753.77 to the victim's parents. Leatherwood raises the following issues:

- (1) whether the state failed to prove beyond a reasonable doubt that he was not acting in self-defense;
- (2) whether the district court violated his due process rights by failing to properly instruct the jury;
- (3) whether the district court erred in allowing the State to amend Count 5 of the Information during trial;

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<sup>1</sup> The district court sustained Leatherwood's demurrer to Count 3.

<sup>2</sup> Although Leatherwood's jury convicted him of two counts of Assault with a Dangerous Weapon (Counts 7 and 8), Judge Woodward granted Leatherwood's request for a directed verdict at formal sentencing and dismissed those counts.

<sup>3</sup> In its oral pronouncement of sentence, the district court ordered the sentences to be served consecutively. The written Judgment and Sentence, however, states that Counts 1, 2, and 4 shall be served concurrently, with Count 5 to be served consecutively to those counts.

- (4) whether the evidence was sufficient to convict him of Count 3;
- (5) whether his rights were violated when defense counsel conceded guilt to Counts 5 and 6;
- (6) whether the district court failed to properly assess restitution costs;
- (7) whether he was denied effective assistance of counsel;
- (8) whether his sentence is excessive; and
- (9) whether an accumulation of error deprived him of a fair trial.

We find relief is not required and affirm the Judgment and Sentence of the district court.

### **Facts**

Leatherwood fatally shot Aaron Smith on Halloween 2017. The two had been friends as well as partners in a local marijuana distribution operation. They had a falling out in mid-October when a disgruntled Smith stole a quarter pound of marijuana from Leatherwood, disrupting their operation. Leatherwood viewed Smith's theft as an act of betrayal that adversely affected his ability to sell marijuana and make money. On Halloween night, Smith was at home with his girlfriend, Amber Clayton, and his friend, Devin

Palmer. Leatherwood began sending Palmer messages through Facebook, searching for a vape pen to smoke some THC oil he had made. Smith realized Palmer was exchanging messages with Leatherwood and took Palmer's phone, identified himself, and offered him some sarcastic advice. Leatherwood's offensive reply sparked an exchange of insults back and forth that culminated with Leatherwood calling Smith a coward and suggesting Smith was too afraid to come to Leatherwood's house to settle the matter. Smith, upset over being called a coward, got into his girlfriend's car with her and Palmer and drove to Leatherwood's house. Smith, who was unarmed, entered the house and Leatherwood shot him in the chest with a .22 caliber rifle in the living room. Smith returned to the car and Leatherwood came outside, holding what appeared to be a pistol in each hand and brandishing one of the guns at the car as Clayton put the car in gear and drove away.<sup>4</sup> She rushed Smith to the hospital where he later died.

Various deputies with the Kingfisher County Sheriff's Department arrived at Leatherwood's home to investigate the

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<sup>4</sup> The pistols were airsoft pistols instead of real firearms.

shooting. Leatherwood's mother gave the deputies permission to search the premises. One of the deputies seized the .22 rifle that was propped against the living room wall loaded with a live round with several other live rounds nearby. Deputies searched the living room, without success, for the shell casing. Leatherwood came inside to help locate it, but was of little help. A deputy asked if the casing could be in his pocket and Leatherwood responded curiously that he was not sure. Leatherwood emptied the contents of his pockets and produced the spent shell casing, a live round, and a phone charger. Leatherwood offered no explanation why he had not volunteered the location of the casing. Deputies found the two airsoft pistols in Leatherwood's bedroom along with various items of paraphernalia used to grind and smoke marijuana. They also found some marijuana seeds in a deep freezer tucked in the corner of his bedroom. Outside, deputies searched a parked car that appeared as if it had not been moved for some time. The car reeked of both raw and burnt marijuana. There were numerous baggies, cigarillo packages, and a large bowl containing 227.21 grams of marijuana with a plastic bag over it. One of the deputies opined, based on his training and

experience, that the amount of marijuana suggested it was intended for distribution and that the car was a place where it was stored and frequently consumed.

The search of a detached garaged uncovered another cigarillo package, tobacco contents from emptied cigarillos, several pipes, and another gun. There was a sitting area with a table and a few chairs. On the table was a gas mask that had an odor of burnt marijuana. There was a shelf with six makeshift greenhouse containers, all of which contained soil, and at least two that had small plants. Leatherwood explained that he had not yet planted any seeds and that he was experimenting because he knew marijuana would soon be legal.

One of the deputies interviewed Leatherwood at his home the night of the shooting. Leatherwood described the Facebook conversation he had with Smith and said he was in the kitchen making something to eat when Smith came speeding down his driveway. He claimed he panicked and grabbed his .22 rifle from his bedroom because Smith was bigger than he was. He went to the living room and waited for Smith. He saw Smith get out of the car and run

toward the back door which was the home's customary entry way. Smith walked through the kitchen and met Leatherwood in the living room. Smith continued toward Leatherwood even though he could see the rifle in Leatherwood's hands. Leatherwood said he felt threatened as Smith got closer and, before Smith could say anything, he shot him because he was afraid. Leatherwood maintained he shot Smith in self-defense in a later written statement and at trial.

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

Leatherwood claims his first degree murder conviction must be reversed because of insufficient evidence. He argues the State failed to prove beyond a reasonable doubt that he did not act in self-defense when he shot and killed Smith. We disagree.

“Justifiable homicide in self-defense occurs when one person, not at fault in bringing on the struggle, kills another under apparent necessity to save himself from death or great bodily harm.” *Camron v. State*, 1992 OK CR 17, ¶ 13, 829 P.2d 47, 52. “A person may use deadly force in self-defense if a reasonable person in his circumstances and from his viewpoint would reasonably have believed he was in imminent danger of death or great bodily harm.”

*Mack v. State*, 2018 OK CR 30, ¶ 3, 428 P.3d 326, 327–28. The initial aggressor, or one who voluntarily enters a situation armed with a deadly weapon, cannot claim self-defense. *Id.*, 2018 OK CR 30, ¶ 3, 428 P.3d at 328. Once a defendant presents evidence he acted in self-defense, the State must overcome the defense beyond a reasonable doubt. *Id.* On appeal, we review the evidence in the light most favorable to the State cautious not to substitute our judgment for that of the jury. *Id.* Where there is conflicting evidence, we presume the jury that convicted the defendant resolved any conflicts in the prosecution’s favor. *Id.*

Leatherwood’s jury heard the evidence and understandably rejected his claim of self-defense. A rational jury could reasonably find on this record that Leatherwood provoked Smith by calling him a coward and betting that he would not come to Leatherwood’s home, setting the fatal event into motion. Smith was unarmed when he entered Leatherwood’s home to confront him about his name-calling and, before the two exchanged any words, Leatherwood, who had armed himself, fatally shot Smith. The evidence supported a finding that Leatherwood was the aggressor or, at the very least, voluntarily

entered the conflict armed with a deadly weapon. Therefore, he was not entitled to claim self-defense.

Leatherwood's words and actions after the shooting further support a finding that he did not act in self-defense. Leatherwood sent fifteen text messages from his phone after he shot Smith supposedly out of fear for his life, but he did not call 911 or otherwise call for help. Believing he shot Smith in the arm, Leatherwood told one of the persons with whom he was texting that he meant to shoot Smith in the chest, but things happened very quickly. Declaring his intent was in fact to shoot Smith in the chest can easily be viewed as evidence of a premeditated intent to kill. Leatherwood also spoke to his mother from jail the day after the shooting. His mother said that she knew he was sorry for killing Smith and that it was an accident. Leatherwood replied, "Not exactly, I mean it was pretty on purpose." Ample evidence supports the jury's finding that the State proved, beyond a reasonable doubt, that Leatherwood did not act in self-defense. His first degree murder conviction therefore stands and this claim is denied.

## 2. Jury Instructions

Leatherwood complains the district court erred by failing to submit jury instructions on first degree heat of passion manslaughter. Leatherwood neither requested heat of passion manslaughter instructions nor objected to their omission. Our review of this claim is for plain error only. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. Leatherwood has the burden in plain error review to demonstrate that an error, plain or obvious under current law, adversely affected his substantial rights. *Hammick v. State*, 2019 OK CR 21, ¶ 8, 449 P.3d 1272, 1275. Only if he does so will this Court entertain correcting the error provided the error seriously affected the fairness, integrity or public reputation of the judicial proceedings or represented a miscarriage of justice. *Id.*; 20 O.S.2011, § 3001.1.

The district court must instruct on any lesser included offense warranted by the evidence. *Jones v. State*, 2006 OK CR 17; ¶ 6, 134 P.3d 150, 154 (lesser included instructions should be given if supported by the evidence). The district court should not, however, give a lesser offense instruction unless the evidence would support a

conviction for the lesser offense. *Id.* Accordingly, a district court must decide if a lesser offense instruction is warranted by considering whether sufficient, *prima facie* evidence has been presented which meets the legal criteria for the lesser offense. *Tryon v. State*, 2018 OK CR 20, ¶ 66, 423 P.3d 617, 637-38, *cert. denied*, 139 S.Ct. 1176 (2019); *Ball v. State*, 2007 OK CR 42, ¶ 32, 173 P.3d 81, 90. If so, the instruction should be given. *See Tryon*, 2018 OK CR 20, ¶ 66, 423 P.3d at 638; *Ball*, 2007 OK CR 42, ¶ 29, 173 P.3d at 89. Sufficient in this context simply means that, standing alone, there is some evidence that suffices for proof of the elements of the lesser offense that would allow a jury rationally to find the accused guilty of the lesser offense and acquit him of the greater. *Tryon*, 2018 OK CR 20, ¶ 66, 423 P.3d at 638. Stated another way, *prima facie* evidence is nothing more than “[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced.” Black’s Law Dictionary 598 (8<sup>th</sup> ed. 2004).

The Court in *Tryon* repeated the required elements of First Degree Heat of Passion Manslaughter:

Under Oklahoma law, homicide is manslaughter in the first degree “[w]hen perpetrated without a design to effect

death, and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; unless it is committed under such circumstances as constitute excusable or justifiable homicide.” 21 O.S.2011, § 711(2). “The elements of heat of passion are 1) adequate provocation; 2) a passion or emotion such as fear, terror, anger, rage or resentment; 3) homicide occurred while the passion still existed and before a reasonable opportunity for the passion to cool; and 4) a causal connection between the provocation, passion and homicide.” *Cipriano v. State*, 2001 OK CR 25, ¶ 16, 32 P.3d 869, 874. “The question is whether, in addition to evidence of intent, there was evidence that Appellant killed the deceased with adequate provocation, in a heat of passion, without the design to effect death.” *Id.*

*Tryon*, 2018 OK CR 20, ¶ 70, 423 P.3d at 638. “Adequate provocation” requires more than mere words, threats, menaces, or gestures alone.

*Id.*, 2018 OK CR 20, ¶ 71, 423 P.3d at 639. It involves personal violence by the deceased likely to cause pain, bloodshed or bodily harm. *Id.* “No error occurs from the lack of heat of passion manslaughter instructions where there is no evidence of victim provocation and the requisite resulting emotional response of the perpetrator.” *Washington v. State*, 1999 OK CR 22, ¶ 13, 989 P.2d 960, 968.

The evidence showed Leatherwood was angry with Smith in mid-October for stealing his marijuana and disrupting his drug-

selling business. The week before Smith's death Leatherwood went to Smith's house with several others hoping to instigate a confrontation about the theft with an outnumbered Smith, but Smith hid and was able to avoid them. Leatherwood intentionally baited Smith the fatal night, calling him a coward and suggesting he was too afraid to come over and settle their conflict. Leatherwood purposefully armed himself as he waited to see if Smith would face him. According to Leatherwood, Smith entered the home and walked towards him. Before any words were exchanged, Leatherwood shot Smith. There is no evidence Smith made any threats or gestures or said anything indicating he meant to kill or seriously injure Leatherwood. As noted above, Leatherwood's statement to his mother and text to a friend after the shooting showed his shooting of Smith was deliberate rather than out of fear for his own life and safety. The evidence did not support a finding that Smith engaged in any improper conduct toward Leatherwood which naturally or reasonably would have the effect of arousing a sudden heat of passion within a reasonable person in Leatherwood's position. Moreover, our review of the record reveals a lack of proof showing Leatherwood killed Smith without a

design to effect death. Hence, lesser-included instructions on first degree heat of passion manslaughter were unwarranted. *Black v. State*, 2001 OK CR 5, ¶ 48, 21 P.3d 1047, 1066 (“the Oklahoma definitions of malice and heat of passion show they cannot co-exist[.]”). For these reasons, we find the district court did not err in omitting instructions on first degree heat of passion manslaughter. *See Tryon*, 2018 OK CR 20, ¶ 72, 423 P.3d at 639.

### **3. Due Process**

Leatherwood claims the district court erred by permitting the State to amend the charge of Possession of a Firearm During Commission of a Felony (Count 4) once the prosecution had rested its case. He maintains that the court’s ruling violated his right to due process, specifically fair notice of the charges against him, and that Count 4 should be reversed.

The State originally charged Leatherwood, in relevant part, with cultivating controlled substances (Count 3), possessing a firearm during commission of the felony of cultivating marijuana (Count 4), and maintaining a place for keeping/selling controlled drugs (Count 5). Defense counsel entered a general demurrer after the prosecution

rested. The district court expressed concerns about Count 3 in particular and found it could not survive Leatherwood's demurrer. Because Count 4 was predicated on the felony charge alleged in Count 3, the court also dismissed Count 4. Following a break, the State asked to amend Count 4 of the Information to conform to the evidence, namely reinstate Count 4 and change the underlying felony charge from cultivation to maintaining a place for keeping/selling controlled drugs as alleged in Count 5. Over Leatherwood's objection, the district court allowed the amendment, finding Leatherwood suffered no prejudice from amending Count 4 in that manner. His jury convicted him of both Counts 4 and 5.

A criminal Information "may be amended after plea on order of the court where the same can be done without material prejudice to the right of the defendant...." 22 O.S.2011, § 304. We review the district court's ruling permitting the amendment of Leatherwood's Information for an abuse of discretion. *Behrens v. State*, 1985 OK CR 44, ¶ 11, 699 P.2d 156, 158 (holding district court's decision allowing State to amend Information on day of trial was not abuse of discretion). This Court finds an abuse of discretion only where the

district court's decision is unreasonable or arbitrary and was made without proper consideration of, and is clearly against the logic and effect of, the relevant facts and law. *Bramlett v. State*, 2018 OK CR 19, ¶ 19, 422 P.3d 788, 795.

The issue here is whether amending the Information deprived Leatherwood of fair notice of the charges against him and adversely affected his ability to defend the charges against him. *Patterson v. State*, 2002 OK CR 18, ¶ 23, 45 P.3d 925, 931 (“An accused is entitled to notice of the charge he must be prepared to defend against.”). “A variance between the charge made in the Information, and the evidence or theory presented at trial, is not fatal to the conviction unless it either deprived the defendant of adequate notice of what he had to defend against, or subjects him to double jeopardy.” *Id.* Considering all information made available to the defense before trial, we cannot conclude that Leatherwood was unfairly surprised by the amendment of Count 4. The essential elements of maintaining a place for keeping/selling drugs were the basis of Count 5 and Leatherwood was on notice from the beginning that he would be defending against those elements and the allegation of that conduct. He was on notice

that he was charged with possessing a firearm during the commission of a felony stemming from the fatal shooting of Smith and the subsequent discovery of drugs at his home. Based on this record, Leatherwood had adequate notice sufficient to defend against the amended charge in Count 4. For these reasons, we find the district court did not abuse its discretion in permitting the prosecution to amend Count 4 of the Information by changing the underlying crime from cultivation to maintaining a place for keeping/selling drugs because Leatherwood was not materially prejudiced. This claim is denied.

#### **4. Sufficiency of Evidence**

Leatherwood argues that the State's evidence was insufficient to prove him guilty of Possession of a Firearm During Commission of a Felony (Count 4) and that his conviction must therefore be reversed. He claims the prosecution failed to establish his possession of the .22 rifle was connected to the commission of the felony crime of maintaining a place for keeping/selling controlled substances.

Evidence is sufficient to support a conviction if, viewing the evidence and all reasonable inferences from it in the light most

favorable to the State, any rational trier of fact could find the defendant guilty beyond a reasonable doubt. *Mason v. State*, 2018 OK CR 37, ¶ 13, 433 P.3d 1264, 1269; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04. This Court does not reweigh conflicting evidence or second-guess the fact-finding decisions of the trier of fact; we accept all reasonable inferences and credibility choices that tend to support the verdict. *Mason*, 2018 OK CR 37, ¶ 13, 433 P.3d at 1269. We further recognize that the law makes no distinction between direct and circumstantial evidence and either, or any combination of the two, may be sufficient to support a conviction. *Id.* We examine pieces of evidence together in context rather than in isolation, and we will affirm a conviction so long as, from the inferences reasonably drawn from the record as a whole, the jury might fairly have concluded the defendant was guilty beyond a reasonable doubt. *Id.*

We have long held the prosecution must show more than mere possession of a weapon in order to sustain a conviction for possessing a firearm during commission of a felony. *Ott v. State*, 1998 OK CR 51, ¶ 10, 967 P.2d 472, 476. The Court in *Ott* stated:

In determining whether there is a nexus between the crime charged and possession of a gun, we will review the totality of the circumstances in each case and consider factors which indicate: (1) the weapon was used to actually facilitate the commission of the offense; (2) the weapon was possessed or strategically located to be quickly or easily located for use during the commission of an offense; (3) the weapon was intended to be used if a contingency arose or to make an escape; or, (4) the weapon was to be used either offensively or defensively in a manner which would constitute a threat of harm.

*Id.*

Leatherwood asserts there was no proof that the rifle kept in his house was used in maintaining a place for the keeping or selling of the marijuana located elsewhere on the property. The record showed that Leatherwood was able to retrieve the rifle quickly when he saw Smith approaching his house. Its ready availability supports a finding that it was strategically placed for quick access for protection, including protection of the ongoing marijuana operation conducted in the nearby parked car and garage. Leatherwood used the rifle to shoot Smith in part for stealing his marijuana and disrupting his marijuana business. A rational trier of fact could infer the rifle's placement was strategic and was intended for quick access should a contingency with the drug operation arise. Because the prosecution's

evidence established a sufficient nexus between Leatherwood's possession of the rifle and his ongoing drug operation, this claim is denied.

### **5. Conceding Guilt**

Leatherwood claims he was denied a fair trial by defense counsel's concession of guilt during closing argument to Count 5 - maintaining a place for housing/selling drugs and Count 6 - unlawful possession of drug paraphernalia. Defense counsel's concession, Leatherwood argues, nullified his plea of not guilty to the Information and relieved the prosecution of its burden of proof, thereby denying him due process and a trial by jury. The State counters that defense counsel did not make a complete concession of guilt, but rather made a strategic decision not to challenge the evidence supporting these counts because it was overwhelming and indefensible. Alternatively, the State maintains that this claim fails because Leatherwood has neither shown that his attorney failed to consult him nor that he disagreed with the purported concession strategy.

Defense counsel explained at the beginning of his closing argument that he would initially discuss the non-homicide crimes.

He first addressed Counts 5 and 6, admitting the presence of a controlled dangerous substance maintained by Leatherwood at his house as well as the presence of drug paraphernalia possessed by Leatherwood. He stated, "Those two will be real easy for you to take care of and make a decision on it." Defense counsel went on to contest various elements of the other charged offenses.

Leatherwood's involvement in the sale and consumption of marijuana at his home was not disputed at trial. Leatherwood and Smith were friends who sold marijuana together until shortly before the murder. Their friendship ended because Smith stole marijuana from Leatherwood. Smith's theft was the underlying motive for the shooting. Police found over 227 grams of marijuana in a bowl in a car parked on Leatherwood's property near his house. When asked about the marijuana in the bowl, Leatherwood said he was trying a new method to dry it out. The prosecution introduced numerous texts and Facebook messages regarding Leatherwood's marijuana dealing. Police found numerous items of paraphernalia in Leatherwood's bedroom and garage as well as a video on his phone of him using a gas mask from the garage to smoke marijuana. Leatherwood

apologized to his mother in a phone call from jail for keeping marijuana at the house and he described himself as a “pothead” to a deputy. The night he killed Smith, he was trying to extract THC oil from “ditchweed” and was in search of a vape pen to smoke it.

The evidence of Leatherwood’s guilt for maintaining a place for keeping/selling marijuana and unlawful possession of drug paraphernalia was overwhelming and without any recognized legal defense. Defense counsel understandably argued that the jury’s decision on those charges would be “easy.” His concession strategy was calculated and allowed him to focus on the more serious charges, especially first degree murder, with his credibility intact. Leatherwood sat silently while defense counsel made the challenged argument. He uttered no opposition or disagreement with the concession argument to the court after the jury had retired to deliberate. We have held that the appellant has the burden on appeal “to show that he was not consulted and that he did not agree to or acquiesce in the concession strategy.” *Jackson v. State*, 2001 OK CR 37, ¶ 25, 41 P.3d 395, 400. The record before us supports a finding that Leatherwood was not opposed to the strategy and, at the very

least, acquiesced to it. See *Abshier v. State*, 2001 OK CR 13, ¶ 80, 28 P.3d 579, 598, *overruled on other grounds in Jones v. State*, 2006 OK CR 17, ¶ 12 n. 14, 134 P.3d 150, 155 n. 14.

Nor do we find that counsel's concession argument violated due process or was the equivalent of a guilty plea. *Jackson*, 2001 OK CR 37, ¶ 15, 41 P.3d at 399 (holding concession of guilt is not the equivalent of a guilty plea and is not a *per se* violation of due process). Leatherwood entered a plea of not guilty and exercised his right to trial by jury. He chose not to testify and defense counsel cross-examined the prosecution's witnesses. Leatherwood exercised his right to jury sentencing and was free to plead for mercy. Counsel's partial concession strategy was reasonable and was ostensibly approved by Leatherwood. For these reasons, we reject this claim.

## **6. Restitution**

Leatherwood correctly contends the district court's restitution order must be vacated because the amount was not calculated with reasonable certainty. The State acknowledges that the prosecutor's statement alone regarding the amount of loss attributed to the victim's family is not sufficient for the district court to determine the

amount of loss with reasonable certainty. Accordingly, the district court's restitution order must be vacated and the matter remanded for the district court to hold a proper hearing to determine whether to order restitution in this case and, if so, the amount of the award calculated with reasonable certainty. *Logsdon v. State*, 2010 OK CR 7, ¶ 13, 231 P.3d 1156, 1163-64.

### **7. Ineffective Assistance of Counsel**

Leatherwood claims he is entitled to relief because of ineffective assistance of trial counsel. He faults defense counsel for failing to: 1) investigate the case and present evidence to support his defense of self-defense; 2) object to the restitution award; and 3) object to the jury instructions. *See* Propositions 1, 2, and 6. He also faults defense counsel for conceding guilt on Counts 5 and 6. *See* Proposition 5. He filed with his brief an Application for Evidentiary Hearing on Sixth Amendment Claim.

This Court reviews claims of ineffective assistance of counsel to determine: (1) whether counsel's performance was constitutionally deficient; and (2) whether counsel's performance prejudiced the defense so as to deprive the defendant of a fair trial with reliable

results. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. This Court need not determine whether counsel’s performance was deficient if there is no showing of harm. *See Malone*, 2013 OK CR 1, ¶ 16, 293 P.3d at 207. Moreover, this Court will order an evidentiary hearing only if “the application and affidavits . . . contain sufficient information to show this Court by clear and convincing evidence [that] there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence.” Rule 3.11(B)(3)(b)(i), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2020).

Leatherwood’s claim faulting defense counsel for failing to object to the jury instructions and for conceding guilt are without merit because the underlying claims have been rejected. *See* Propositions 2 and 5, *supra*. Hence, he cannot show on this record that, but for counsel’s actions, the result of his trial would have been different. We have found that the restitution award must be vacated, *see* Proposition 6, and therefore no further relief is warranted in conjunction with this claim.

Leatherwood's claim faulting defense counsel for not investigating the case and presenting evidence to support his defense of self-defense is also without merit. He contends counsel failed to present readily available evidence of the victim's propensity for violence and aggressiveness in order to show his state of mind at the time of the shooting and how a reasonable person would have reacted given the circumstances. He appends to his application for evidentiary hearing extra-record evidence consisting of paperwork for a protective order sought by Smith's ex-girlfriend and affidavits from people who knew both Leatherwood and Smith, attesting that Smith used methamphetamine and had a violent nature. Where nothing in the supplemental materials alters or amplifies in any compelling way the portrait which emerged from the testimony at trial, this Court will find the extra-record materials fail to establish by clear and convincing evidence a strong possibility that trial counsel was ineffective. *Sanchez v. State*, 2009 OK CR 31, ¶ 104, 223 P.3d 980, 1013. Considering the record as a whole, we are unable to find that Leatherwood has satisfied his burden. As discussed above, the evidence showed that Leatherwood was the aggressor who provoked

the altercation that resulted in Smith's death. See Proposition I, *supra*. Smith's prior drug use and violent behavior were of no consequence because Leatherwood was not entitled to the defense of self-defense under the circumstances. None of the persons offering affidavits were present when the shooting occurred and the extra-record evidence does not show that Smith was the aggressor or that Leatherwood somehow reestablished the right of self-defense. See *Williamson v. State*, 2018 OK CR 15, ¶ 56, 422 P.3d 752, 763 (denying request for evidentiary hearing because extra-record evidence of disputes and confrontations between the appellant and victim did not contradict trial evidence or show the appellant acted in self-defense). Because the record fails to establish clear and convincing evidence of a strong possibility that defense counsel was ineffective for failing to utilize the extra-record evidence, Leatherwood's motion to supplement the record and request for an evidentiary hearing, as well as his ineffective assistance of counsel claim, are denied.

### **8. Excessive Sentence**

Leatherwood contends his sentence is excessive primarily because of his youth. He asks the Court to weigh heavily his age at

the time of the crimes (20-years-old) and his general immaturity in evaluating whether his sentence, including a sentence of life imprisonment without the possibility of parole, is excessive. He argues that his age should be taken into account based on the science concerning juvenile brain development and viewed as a factor that diminished his criminal culpability. He further claims that recent legislative enactments lowering the range of punishment for possession of controlled substances with intent to distribute warrant reconsideration and modification of his ten-year sentence for that crime. And finally, he argues the district court abused its discretion when it ordered Count 5 to run consecutively to his other sentences resulting in a sentence of life without the possibility of parole plus five years imprisonment. He maintains his lengthy sentence does not bear a direct relationship to the nature and circumstances of the offenses and was driven by allegations and evidence heard by the jury of other charges that were later dismissed, ineffective assistance of counsel and other procedural mistakes. He asks this Court to favorably modify his sentence.

“This Court will not disturb a sentence within statutory limits unless, under the facts and circumstances of the case, it shocks the conscience of the Court.” *Thompson v. State*, 2018 OK CR 32, ¶ 16, 429 P.3d 690, 694. And, we review the decision to run sentences concurrently or consecutively for an abuse of discretion. *Holtzclaw v. State*, 2019 OK CR 17, ¶ 66, 448 P.3d 1134, 1154.

The jury was well aware of Leatherwood’s age and the circumstances surrounding the incident. His sentence, under the circumstances, does not meet this Court’s “shock the conscience” test as the sentences are within the ranges of punishment provided by law, are supported by the facts, and were not the result of errors committed during trial. Leatherwood provoked Smith by calling him a coward, dared him to a face to face confrontation, and deliberately killed him largely because Smith stole a significant amount of marijuana from their stash and disrupted their criminal enterprise. Nor do we find that the district court abused its discretion by running Count 5 consecutively to his other sentences. Evidence of his separate, ongoing marijuana operation was undisputed.

We also reject Leatherwood's request to modify his ten-year sentence on Count 2 for Possession with Intent to Distribute a Controlled Substance. He asks us, for all intents and purposes, to retroactively apply the lower range of punishment now in effect for that crime. 63 O.S.Supp.2018, § 2-401(B)(2). Under the Oklahoma Constitution, "[t]he repeal of a statute shall not... affect any accrued right, or penalty incurred... by virtue of such repealed statute." Okla.Const. art. 5, § 54. In *Bilbrey v. State*, 1943 OK CR 45, 135 P.2d 999, 1000, we held that a defendant convicted of driving while intoxicated was subject to any penalty imposed by law for the crime on the date of its commission, and any subsequent statute repealing such penalty and making the crime a misdemeanor operates prospectively only. In *Williams v. State*, 2002 OK CR 39, ¶ 4, 59 P.3d 518, 519, we refused to apply an amendment to the habitual offender statute retroactively in the absence of express legislative intent to do so. Based on this authority, we find Leatherwood's sentence on Count 2 requires no modification. This claim is denied.

## 9. Cumulative Error

Leatherwood claims that even if no individual error in his case merits relief, the cumulative effect of the errors committed requires favorable sentence modification. “The cumulative error doctrine applies when several errors occurred at the trial court level, but none alone warrants reversal.” *Tafolla v. State*, 2019 OK CR 15, ¶ 45, 446 P.3d 1248, 1263. Although individual errors may be of insufficient gravity to warrant reversal, the combined effect of an accumulation of errors may require a new trial. *Id.* The commission of several trial errors does not deprive the defendant of a fair trial when the errors considered together do not affect the outcome of the proceeding. *Id.* Moreover, a cumulative error claim has no merit when this Court fails to sustain any of the errors raised on appeal. *Id.* There are no errors, considered individually or cumulatively, that merit relief in this case. This claim is denied.

### DECISION

The Judgment and Sentence of the district court is **AFFIRMED**. Leatherwood’s application for evidentiary hearing on Sixth Amendment claim is **DENIED**. The district court’s Restitution Order

is **VACATED** and the matter is **REMANDED** for a proper hearing. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2020), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF KINGFISHER  
COUNTY, THE HONORABLE PAUL K. WOODWARD,  
DISTRICT JUDGE**

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**OPINION BY: ROWLAND, J.**

LEWIS, P.J.: Concur  
KUEHN, V.P.J.: Concur  
LUMPKIN, J.: Concur in Results  
HUDSON, J.: Concur