

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ANTWAUN DEON LEWIS)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2008-06¹
(Case No. RE-2008-001)

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

APR 17 2009

MICHAEL S. RICHIE
CLERK

OPINION

LEWIS, JUDGE:

Appellant, Antwaun Deon Lewis, was convicted by jury of First Degree Malice Murder, in violation of 21 O.S.2001, § 701.7(C), and Robbery with a Firearm, in violation of 21 O.S.2001, § 801, after former conviction of a felony, in the District Court of Tulsa County, Case No. CF-2006-3141, before the Honorable William C. Kellough, District Judge. In accordance with the jury verdict, Judge Kellough sentenced Lewis to life without the possibility of parole for first degree malice murder and life for robbery with a firearm, ordering that the two sentences be served consecutively to each other.

Prior to this trial, the State had filed a motion to revoke Lewis's five (5) year suspended sentence in Tulsa County Case No. CF-2005-3898. The parties agreed that the jury trial would serve as a revocation hearing. After the trial,

¹ Both cases on appeal F-2008-06 and RE-2008-0011 are consolidated in this appeal.

the judge revoked the suspended sentence in full, ordering that the five (5) years be served consecutively to Tulsa County Case No. CF-2006-3141. From the District Court's Judgment and Sentence and order revoking suspended sentence, Lewis has perfected his appeal to this Court.

FACTS

The facts in this case are not in dispute on appeal. Antwaun Lewis and Peter Campbell arranged to meet Orlando "O.J." Prudom at Ben Hill Park in Tulsa, Oklahoma. After they met at the park Lewis and Campbell shot Prudom several times and took items of property from his pants pocket. Prudom died as a result of his injuries. Further facts will be revealed as they become relevant to the propositions of error.

PROPOSITIONS OF ERROR

Appellant first complains about the bifurcated procedure used during the trial of this case. Appellant, charged with one count of first degree murder and one count of robbery with a firearm, complains because the jury was allowed to find him guilty of both charges after a guilt innocence stage, and then sentence him on both counts after being informed of his prior conviction for possession of a firearm in the commission of a felony. He claims that the jury should have sentenced him on the first degree murder charge during the first stage before being informed of the prior conviction.

In *McCormick v. State*, 1993 OK CR 6, ¶ 40, 845 P.2d 896, 903, this Court stated that, "If the State is not seeking the death penalty and there are

no previous convictions, then we find that bifurcation is not required.” [footnote omitted] Later, in *Carter v. State*, 2006 OK CR 42, ¶ 2, 147 P.3d 243, 244, we interpreted *McCormick* to mean that where the State is not seeking the death penalty and there are no other charged offenses requiring bifurcation under 22 O.S.2001, § 860.1, bifurcation is not authorized.

In both *McCormick* and *Carter*, the defendant was charged only with first degree murder. However, in this case, Appellant was charged with first degree murder and robbery with firearms, as well as being charged with committing these crimes after having been convicted of the felony offenses.

Carter makes it clear that bifurcation is only authorized when there are charges which require bifurcation pursuant to 22 O.S.2001, § 860. Obviously non-capital first degree murder is not a charge which requires bifurcation, because it is a non-enhancable offense. *Carter* ¶ 2, *McCormick* ¶ 40.²

Apparently, because there was a non-enhancable murder charge and an enhancable robbery charge, the trial court decided that the jury should decide punishment for both charges in a second, punishment stage proceeding after evidence of Lewis’s prior conviction had been introduced. This procedure was improper.

² Appellant also cites the unpublished case of *Thompson v. State*, Oklahoma Court of Criminal Appeals, Case No. F-2006-68 (May 22, 2007), because, he claims, it is factually indistinguishable to the case at bar and no other cases are directly on point. See Rule 3.5(C)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2008).

To make it clear, when a defendant is charged with non-capital first degree murder, as well as other felony offenses, and the defendant has prior convictions alleged on a "page 2," the procedure shall be that the jury should decide guilt/innocence and punishment on the non-capital first degree murder charge, and guilt/innocence, but not punishment, for the other counts in the first stage. Punishment for the other counts should be decided during the second stage, where the prior felony convictions are introduced.³

This procedure is necessary, because of the incongruity which would be created if a different procedure is utilized for those only facing a murder charge versus those with a murder charge, as well as other enhancable felonies. An enhancement stage would be created for the non-capital murder charge, where one is not authorized by statute.

In effect, Lewis's murder charge was enhanced by his prior conviction of using a firearm in the commission of a felony. Although Lewis did not object to this procedure at trial, we find that the error, in this case, rises to the level of plain error, and we find that the error was not harmless, as we have grave doubts that his sentencing outcome would be the same if the jury would not have known about his prior conviction before sentencing him on the murder charge. The State, in its response brief suggests, if this Court has grave doubts

³ One exception would be where a defendant testifies and admits his prior convictions in the first stage, thereby waiving the bifurcated proceeding.

about the sentence, we should modify his sentence to life imprisonment. We find that this is an appropriate remedy in this case.

In proposition two, Lewis complains about the introduction of the testimony of a witness by way of a transcript of her testimony during the trial of the co-defendant. Lewis argues that he did not have the opportunity to confront this witness at either trial, thus, he claims that his confrontation rights derived from both the federal and state constitutions were violated.

We first observe that Lewis did not object to this procedure, thus he has waived review for all but plain error. 12 O.S.2001, §§ 2104; *see Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923 (appellant must prove actual error which is plain or obvious, and he must show that the error affected substantial rights which affected the outcome of the proceeding). We find there was no plain error here.

In this case, even absent this testimony, the evidence of guilt was overwhelming. Lewis admitted to killing Prudom in conversations with his girlfriend and in conversations he had with others while he was incarcerated at the Tulsa County jail. Phone calls between Prudom and Lewis occurring just prior the murder were registered on each others phones. A red vehicle Lewis drove to the park was positively identified. A witness who drove Prudom to the park saw two men walk from this vehicle and toward Prudom. This witness heard shots and saw flashes. He saw the two men running back toward their red vehicle and they fired shots at the vehicle he was in. Evidence that two

different firearms were utilized was discovered at the scene: 9 mm shell casings and .40 caliber shell casings. And finally, Prudom's pants pocket was turned inside out and Lewis possessed crack cocaine after the murder, which was taken from Prudom.

In proposition three, Lewis complains about the introduction of numerous photographs of the deceased victim, over the objection of defense counsel. He argues that the unfair prejudice of these "gruesome" photographs outweighed their probative value. We disagree; the test is whether the probative value of said photographs is "substantially outweighed by the danger of unfair prejudice. . . ." 12 O.S.Supp.2003, § 2103; *Bernay v. State*, 1999 OK CR 37, ¶ 18, 989 P.2d 998, 1007. These photographs showed the bloody body of the deceased taken from different angles, his multiple gunshot wounds (upwards of twelve different wounds) and his identifying tattoos.

The introduction of evidence is left to the sound discretion of the trial court; the decision will not be disturbed absent an abuse of that discretion. *Pickens v. State*, 2001 OK CR 3, ¶ 21, 19 P.3d 866, 876. Here, the photographs were not gruesome. The photographs showed the handy work of the defendant, showed the manner of death, and the nature of the crime. The photographs also corroborated the testimony of the medical examiner. The trial court did

not abuse its discretion in finding that the evidence, including the photographs was admissible.⁴

In proposition four, Lewis claims that he was denied effective assistance of counsel, in order to present issues raised in propositions one and two, which were not properly preserved at trial. We held, in discussing proposition one, that the error rose to the level of plain error requiring relief; therefore, his ineffective assistance claim on this issue is moot. In discussing proposition two, we held that the error did not rise to the level of plain error, because Lewis suffered no prejudice to his substantial rights; therefore he cannot support the prejudice prong of a ineffective assistance claim. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)(holding that an appellant must show deficient performance and a resulting prejudice).

In proposition five, Lewis claims that an accumulation of error requires relief in this case. Again, we held that the error addressed in proposition one requires sentencing relief. We find that no further relief is required even when viewing the claimed errors in a cumulative fashion. *Stouffer v. State*, 2006 OK CR 46, ¶ 205-06, 147 P.3d 245, 280.

Finally, in proposition six, Lewis urges this court to reverse the district courts decision to revoke his suspended sentence in Tulsa County Case No. CF-2005-3898, should we grant relief in Tulsa Count Case No. CF-2006-3141,

⁴ We find unavailing Appellant's argument that cause of death and the victim's identity were not disputed at trial. The mere nature of a trial places every element in dispute where the State has the burden of proving every element of the crimes beyond a reasonable doubt.

which formed the basis for the application to revoke. Based on the evidence presented in this trial, we find that the district courts decision to revoke Lewis's suspended sentence was supported by sufficient evidence.

DECISION

Regarding Tulsa County Case No. CF-2006-3141, we hold that, in count one, the judgment is **AFFIRMED**; however, the sentence for count one, first degree murder, is **MODIFIED** from life imprisonment without the possibility of parole to life imprisonment. In count two the both the judgment and sentence are **AFFIRMED**. The sentences in both counts are ordered to run consecutively. We further hold that the revocation of the entire five year suspended sentence in Tulsa County Case No. CF-2005-3898 is **AFFIRMED**. 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.

ATTORNEYS AT TRIAL

DAVID PHILLIPS
ASSISTANT PUBLIC DEFENDER
TULSA COUNTY
423 SOUTH BOULDER, SUITE 300
TULSA, OK 74103
ATTORNEY FOR DEFENDANT

BILL MUSSEMAN
JASON RUSH
ASSISTANT DISTRICT ATTORNEYS
TULSA COUNTY
500 SOUTH DENVER
TULSA, OK 74103
ATTORNEYS FOR STATE

ATTORNEYS ON APPEAL

STUART W. SOUTHERLAND
ASSISTANT PUBLIC DEFENDER
TULSA COUNTY
423 SOUTH BOULDER, SUITE 300
TULSA, OK 74103
ATTORNEY FOR APPELLANT

W. A. DREW EDMONDSON
ATTORNEY GENERAL
DIANE L. SLAYTON
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR APPELLEE

OPINION BY: LEWIS, J.

C. JOHNSON, P.J.: Concur in Part/Dissent in Part

A. JOHNSON, V.P.J.: Concur

LUMPKIN, J.: Concur in Results

CHAPEL, J.: Concur in Part/Dissent in Part

CHAPEL, JUDGE, CONCURS IN PART/DISSENTS IN PART:

I concur in this opinion in all respects except one. I am of the opinion that the introduction of the transcript of the testimony of Shrona Byrd in another trial violates Lewis's right to confrontation and was plain error. Moreover, while there was strong evidence against Lewis I am reluctant to apply an "overwhelming evidence" of guilt standard in assessing the seriousness of a confrontation violation in a case such as this because such an exercise results in no correction of a serious error. There should be some consequence for serious error. I would, therefore, modify the sentence for Count 2, Robbery with a Firearm to twenty (20) years.