



IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ROBERT LAWRENCE LONG, )
Appellant, )
vs. )
THE STATE OF OKLAHOMA, )
Appellee. )

NOT FOR PUBLICATION

No. F-2016-1094

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAR 29 2018

SUMMARY OPINION

KUEHN, JUDGE:

Appellant, Robert Lawrence Long, was convicted by a jury in Comanche County District Court, Case No. CF-2014-608, of Count 1: First Degree Felony Murder (21 O.S.Supp.2012, § 701.7) and Count 3: Possession of a Firearm After Conviction of a Felony (21 O.S.Supp.2012, § 1283(A)), both After Conviction of Two or More Felonies.1 On November 29, 2016, the Honorable Gerald Neuwirth, District Judge, sentenced him in accordance with the jury's recommendation to life imprisonment on Count 1, and eighteen years imprisonment on Count 3. The sentences are to be served consecutively, and Appellant must serve 85% of the sentence on Count 1 before parole eligibility. 21 O.S.2011, § 13.1(1).

Appellant raises ten propositions of error in support of his appeal:

PROPOSITION I. THE STATE'S EVIDENCE WAS LEGALLY INSUFFICIENT TO PROVE ALL THE ELEMENTS OF ATTEMPTED ROBBERY WITH A DANGEROUS WEAPON AND, THEREFORE, ALSO INSUFFICIENT TO SUPPORT MR. LONG'S CONVICTION FOR FIRST DEGREE FELONY MURDER BASED

1 The State charged Appellant alternatively with Malice Murder and Felony Murder in Count 1. Count 2 charged Attempted Robbery with a Dangerous Weapon, which was the predicate for the felony-murder theory in Count 1. Because the jury found Appellant guilty on the felony-murder theory, its "guilty" verdict on Count 2 was superfluous, and the jury was not asked to impose any sentence on Count 2 in the punishment stage of the trial. See Propositions II and III.

ON THAT UNDERLYING FELONY. ACCORDINGLY, MR. LONG'S CONVICTIONS AND SENTENCES SHOULD BE VACATED.

PROPOSITION II. THE TRIAL COURT ERRED IN REFUSING THE JURY'S NOT GUILTY VERDICT FOR ATTEMPTED ROBBERY AND INSTRUCTING THE JURY IN A WAY THAT DIRECTED THE JURY TO FIND MR. LONG GUILTY OF FELONY MURDER AND ATTEMPTED ROBBERY.

PROPOSITION III. MR. LONG'S CONVICTION AND SENTENCE FOR COUNT II, ATTEMPTED ROBBERY WITH A DANGEROUS WEAPON, MUST BE VACATED BECAUSE THE SAME CHARGE SERVED AS THE UNDERLYING FELONY FOR HIS CONVICTION OF FELONY MURDER, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, § 21 OF THE OKLAHOMA CONSTITUTION.

PROPOSITION IV. MR. LONG WAS DENIED AN IMPARTIAL JURY COMPOSED OF A FAIR CROSS SECTION OF THE COMMUNITY AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7, 19, AND 20 OF THE OKLAHOMA CONSTITUTION BECAUSE THE STATE ENGAGED IN A PATTERN OF DISCRIMINATION AND EXERCISED PEREMPTORY CHALLENGES AGAINST FOUR AFRICAN-AMERICAN JURORS WITHOUT SETTING FORTH SUFFICIENTLY RACE-NEUTRAL REASONS FOR THE CHALLENGES.

PROPOSITION V. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO SUPPRESS STATEMENTS MADE BY MR. LONG DURING A CUSTODIAL INTERROGATION, AS HE HAD NOT BEEN ADVISED OF HIS RIGHTS UNDER MIRANDA, WHICH VIOLATED HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE II, §§ 7 & 20 OF THE OKLAHOMA CONSTITUTION.

PROPOSITION VI. THE STATE'S FAILURE TO DISCLOSE EXCULPATORY EVIDENCE REGARDING PHYSICAL CHARACTERISTICS OF ITS INITIAL SUSPECT IN MR. ALLEN'S MURDER VIOLATED MR. LONG'S RIGHT TO DUE PROCESS AND A FAIR TRIAL.

PROPOSITION VII. THE INTRODUCTION OF STATE'S EXHIBIT 82, AN OSBI BALLISTICS REPORT REFERENCING EVIDENCE COLLECTED FROM ANOTHER CRIME NOT PRESENTED DURING MR. LONG'S TRIAL, VIOLATED MR. LONG'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW.

PROPOSITION VIII. MR. LONG WAS DENIED HIS RIGHT TO A FAIR TRIAL BECAUSE THE TRIAL COURT FAILED TO PROVIDE HIS JURY THE MANDATORY INSTRUCTION ON OTHER CRIMES EVIDENCE.

PROPOSITION IX. MR. LONG WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7 AND 20 OF THE OKLAHOMA CONSTITUTION.

PROPOSITION X. THE CUMULATIVE EFFECT OF ALL THE ERRORS ADDRESSED ABOVE DEPRIVED MR. LONG OF A FAIR TRIAL.

After thorough consideration of these propositions, and the record before us on appeal, we affirm Appellant's convictions but vacate the court costs imposed on Count 2. Appellant was convicted of fatally shooting Jimmy Allen during an attempted robbery at a Lawton motel. When he was apprehended, Appellant had gunshot residue on his clothing, as well as blood stains consistent by DNA comparison with the victim's blood. The victim's blood was also found on a pair of tennis shoes found in Appellant's bedroom, and those shoes matched a description of the assailant's shoes given by an eyewitness. Furthermore, bullets found in Appellant's bedroom were the same caliber and brand as shell casings found at the crime scene.

As to Proposition I, the evidence supported the jury's conclusion that the masked gunman who killed the victim had robbery in mind, even though he never got to the point of demanding or taking property. Considering the totality of evidence, no rational juror could have found any other reasonable inference. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 2787, 61 L.Ed.2d 560, 571 (1979); *Weimar v. State*, 1976 OK CR 285, ¶ 17, 556 P.2d 1020, 1024; *Rodgers v. State*, 1973 OK CR 260, ¶ 8, 510 P.2d 992, 993. The evidence supports Appellant's conviction on Count 1, and Proposition I is denied.

In Propositions II and III, Appellant claims he was subjected to double jeopardy or double punishment when the trial court had the jury reconsider its verdicts in the first stage of trial. While it was error to ask the jury to reconsider its "Not Guilty" verdict on Count 2, see 22 O.S.2011, § 918, the jury's verdict of "Guilty" on Count 1

never changed, and is not affected by the trial court's error.<sup>1</sup> Because the trial court recognized the double-jeopardy implications of separate convictions for Felony Murder (Count 1) and the underlying felony (Count 2) (*see Whalen v. United States*, 445 U.S. 684, 693-94, 100 S.Ct. 1432, 1438-39, 63 L.Ed.2d 715 (1980) and *Perry v. State*, 1993 OK CR 5, ¶ 7, 853 P.2d 198, 200-01), it never asked the jury to impose sentence on Count 2. Thus, Appellant has never been "convicted" of Count 2. *Gilmore v. State*, 1910 OK CR 78, 108 P. 416, 417. Appellant concedes that the only "punishment" he has suffered in relation to Count 2 is the imposition of court costs in the amount of \$291.00. To remedy any double-punishment error here, we **VACATE** the court costs imposed on Count 2.

In Proposition IV, Appellant claims the prosecutor's removal of four African-American panelists during *voir dire* indicated racial bias, violating *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Defense counsel challenged each strike, so this claim is preserved for review. The trial court's rulings are reviewed for an abuse of discretion. *Day v. State*, 2013 OK CR 8, ¶ 16, 303 P.3d 291, 300. We give particular deference to the court's rulings in these matters because they involve a number of factors (facial expression, tone of voice, *etc.*) which do not translate to

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<sup>1</sup> In Count 1, the State charged Appellant alternatively with Malice Murder and Felony Murder. The felony-murder predicate, Attempted Robbery with a Dangerous Weapon, was also charged separately as Count 2. Thus, the jury could conceivably have found Appellant guilty of Malice Murder and Attempted Robbery, and Appellant could have been punished for each crime separately. On the Count 1 verdict form, the jury checked "Not Guilty" on Malice Murder and "Guilty" on Felony Murder. On the Count 2 verdict form, the jury initially checked "Not Guilty." After conferring with counsel and over defense objections, the trial court deemed the verdicts improper, and asked the jury to deliberate further. The court's action, while error, was understandable. Because the instructions did not clearly explain the matter, the jury's verdicts might have indicated it either (1) meant to convict on the Malice Murder theory, but checked the wrong box, or (2) understood that a conviction for Felony Murder rendered a separate conviction on the underlying felony (Count 2) superfluous.

the appellate record. *Grant v. State*, 2009 OK CR 11, ¶ 26, 205 P.3d 1, 14. We have reviewed the record and find facially race-neutral reasons for each of the strikes at issue here. Proposition IV is denied.

As to Proposition V, while in custody on other matters, Appellant made statements related to the investigation of this case without first being advised of his right to silence under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). We agree with Appellant that it was error to admit these statements at his trial. The fact that he was being detained on matters unrelated to this case when he made the statements is immaterial, as *Miranda* applies to any custodial interrogation and is not offense-specific. See *Mathis v. United States*, 391 U.S. 1, 4, 88 S.Ct. 1503, 1505, 20 L.Ed.2d 381 (1968). Nevertheless, considering the totality of evidence of Appellant's guilt, we find admission of these statements was harmless beyond a reasonable doubt.<sup>2</sup> *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Arizona v. Fulminante*, 499 U.S. 279, 295, 111 S.Ct. 1246, 1257, 113 L.Ed.2d 302 (1991); *Harmon v. State*, 2011 OK CR 6, ¶ 32, 248 P.3d 918, 933. Proposition V is denied.

As to Proposition VI, the State's failure to preserve a photo array of suspects, shown to an eyewitness shortly after the crime, was not error or misconduct of any sort. The relevant information from the witness's viewing of this array was fully presented to the jury via testimony. The photos themselves were not relevant to the

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<sup>2</sup> Appellant was arrested on an unrelated warrant when police sought to question him about another man, Duncan, who was their initial suspect in this case. Appellant never implicated himself in the shooting; he simply denied knowing Duncan, which was inconsistent with what Appellant's own brother had told police.

jury's task, because (1) Appellant's photo was not among them, and (2) the eyewitness never identified anyone in that array as the suspect. No material, exculpatory evidence was "withheld" from the defense. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963); *Gilson v. State*, 2000 OK CR 14, ¶ 57, 8 P.3d 883, 906. Proposition VI is denied.

As to Propositions VII and VIII, references to a firearm and bullet, unconnected to the charges in this case but vaguely referenced in a report on evidence found in Appellant's bedroom, were not clear suggestions that he had committed other crimes. Put simply, there is nothing *per se* illegal or improper about owning a firearm or ammunition.<sup>3</sup> Hence, no cautionary jury instruction on the limited use of this evidence was necessary. 12 O.S.2011, § 2404(B); *Bear v. State*, 1988 OK CR 181, ¶ 22, 762 P.2d 950, 956. Propositions VII and VIII are denied.

In Proposition IX, Appellant claims his trial counsel rendered constitutionally deficient performance in several ways. To support those claims which rely on information outside the appeal record, Appellant has filed an Application for Evidentiary Hearing on Sixth Amendment Claims, consistent with Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22 O.S., Ch. 18, App. (2018). It is Appellant's burden to overcome the presumption that counsel was reasonably competent and made informed strategic choices. As to the record-based claims, we will only grant relief if the evidence shows (1) that counsel made professionally unreasonable decisions, and (2) that those decisions caused prejudice, *i.e.*, that

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<sup>3</sup> The report was admitted in the first stage of trial, where the jurors remained unaware that Appellant was a convicted felon.

they undermine confidence in the outcome of the trial. *Strickland v. Washington*, 466 U.S. 668, 687, 698-99, 104 S.Ct. 2052, 2064, 2070, 80 L.Ed.2d 674 (1984); *Bland v. State*, 2000 OK CR 11, ¶ 112, 4 P.3d 702, 730-31. As to the claims based on extra-record materials, our task is not to conclusively decide whether trial counsel rendered deficient performance, but only to decide whether the materials show, by clear and convincing evidence, a “strong possibility” that trial counsel was ineffective for failing to utilize or identify the evidence in question, such that further fact-finding, through an evidentiary hearing, is warranted. Rule 3.11(B)(3), *Rules of the Oklahoma Court of Criminal Appeals*. Having considered all of Appellant’s claims, we cannot say trial counsel was ineffective.<sup>4</sup> Proposition IX is denied, and Appellant’s request for an evidentiary hearing is also denied. *Simpson v. State*, 2010 OK CR 6, ¶¶ 53-54, 230 P.3d 888, 905-06.

Finally, as to Proposition X, we have remedied the only error identified; there is no error to accumulate. *Bell v. State*, 2007 OK CR 43, ¶ 14, 172 P.3d 622, 627 Proposition X is denied.

### **DECISION**

Appellant’s request for an evidentiary hearing on Sixth Amendment claims is **DENIED**. Costs imposed on Count 2 are **VACATED**. In all other respects, the

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<sup>4</sup> Specifically we find: (1) Counsel was not ineffective for failing to impeach a detective about whether he considered Appellant a suspect when Appellant was questioned; the undisclosed opinion of the interrogator is not relevant to the admissibility of Appellant’s statements. See *Stansbury v. California*, cited in the discussion of Proposition V. (2) Counsel was not ineffective for failing to present evidence of an alternative suspect. Appellant has not presented any evidence linking that person to the crime, other than that he may have been living near the crime scene; his claim that this person had facial characteristics similar to the assailant is not supported by any witness. (3) Given our resolution of Propositions II and III, counsel’s handling of those issues is moot. (4) Counsel’s failure to object to other-crimes evidence or request instructions thereon was not deficient performance; see discussion of Propositions VII and VIII.

Judgment and Sentence of the District Court of Comanche County is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY  
THE HONORABLE GERALD NEUWIRTH, DISTRICT JUDGE

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**KUEHN, J.:**

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LEWIS, V.P.J.: CONCUR  
HUDSON, J.: CONCUR  
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