

- IV. IT WAS REVERSIBLE ERROR TO PERMIT THE JURY UNLIMITED VIEWING OF APPELLANT'S TAPED STATEMENT OVER DEFENSE COUNSEL'S OBJECTION.
- V. UNDER THE FACTS OF APPELLANT'S CASE, HIS CONVICTION SHOULD BE MODIFIED TO SECOND DEGREE MURDER.
- VI. THE COMBINED ERROR DURING APPELLANT'S TRIAL SERVED TO DENY HIM THE RIGHT TO A FAIR TRIAL GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find that relief is required in response to Proposition Three. McGee's conviction will be reversed and this matter remanded for proceedings consistent with the decision herein.

On or about May 30, 2007, Dusty Ray McGee along with one or both of Patrick Pflueger and Leslie McGee were "scrapping," i.e., stealing metal from an abandoned apartment complex at 2423 East 7th Street, in Tulsa, when John Seeley, a homeless man who was squatting in the apartments, confronted the men and threatened to call the police. The scrappers left, temporarily. Sometime around midnight on May 30, Pflueger and the McGee brothers, along with Pflueger's former girlfriend Candy Lewis, walked over to the apartments where Seeley was squatting, and initiated a brutal and ultimately deadly attack on Seeley.

Wearing his steel toed work boots Dusty McGee was first to start kicking Seeley in the head. Pflueger joined in shortly. Both Dusty McGee and Pflueger urinated on or near Seeley and assaulted him with a stick and a cabinet door. Much of the assault occurred while Seeley was down, or unconscious. Leslie McGee took a few kicks at Seeley during this initial attack, and possibly hit

Seeley with the cabinet, but Leslie McGee was less involved than Dusty McGee and Pflueger.

At some point Seeley was dragged to another apartment where both Dusty McGee and Pflueger continued the assault, using a large television set as a weapon. After the physical assault, prior to leaving the apartment, someone took pictures of the victim with Lewis' cell phone. At this time the victim was still alive, making gurgling sounds.

After the assault Lewis ran from the apartment. Pflueger followed her, and tried to calm her down. Pflueger warned Lewis not to tell anyone of their involvement, threatening her life if she snitched. Rather, Pflueger instructed Lewis to blame it on the Crips. Pflueger is a Blood. Lewis testified that Dusty McGee made the same general threats to her, demanding she not reveal their involvement. Unlike Pflueger, McGee did not attempt to supply Lewis with an alternative version of events.

Upon returning home, Lewis informed her sister of the events she witnessed. After the two spoke, either she or her sister called 911. Law enforcement found Seeley, but not in time to save his life. The 911 operator traced the call, and Lewis was instructed to contact police. She did, and gave a very detailed description of four black perpetrators who she claimed committed the offense. She even picked out the men from a photo array. After investigating this story, the assigned Detectives confronted Lewis with their suspicion that she was lying. She quickly recanted and told the police about the involvement of Pflueger and the McGee brothers. Dusty McGee was

arrested on June 1, 2007, upon returning from work. Leslie McGee was arrested the same day. Pflueger fled the State, and was arrested weeks later.

Dusty McGee gave a statement upon arrest wherein he admitted much of the facts set forth above. He claimed that his intent was to beat Seeley up, not kill him. Recognizing Seeley was still alive after the brutal attack, Dusty McGee claimed he wanted to call an ambulance, but did not because Pflueger threatened him.

During deliberations the jury submitted four notes to the court, seeking guidance relating to the distinction between first and second degree murder. In violation of 22 O.S. 2001, ¶ 894,¹ the trial judge failed to call the parties and the jury back into open court to deal with the questions. A violation of 22 O.S.2001, § 894 creates a presumption of prejudice. This presumption may be overcome if the State can demonstrate that no prejudice occurred.² Where the responses of the trial court are correct, limited in scope, and “essentially the same as would have been given had the statute been strictly followed,” the presumption is overcome.³

Most troubling is the jury question relating to the 85% Rule.⁴ Though first and second degree murder are both 85% crimes,⁵ the jury was only

¹ 22 O.S. 2001, ¶ 894 states:

After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony or if they desire to be informed on a point of law arising in the cause, they must require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to the district attorney and the defendant or his counsel, or after they have been called.

² *Mosco v. State*, 1975 OK CR 130, ¶ 3, 538 P.2d 1132, 1133.

³ *Grayson v. State*, 1984 OK CR 87, ¶ 12, 687 P.2d 747, 749-50.

⁴ 21 O.S.Supp. 2007, § 13.1.

⁵ *Id.*

instructed as to the range of sentence of first degree murder.⁶ During deliberations, the jury asked: "Judge, In second degree murder, after the sentence is set, does he still have to serve 85% of sentence with no chance of early time for good behavior?" The response of the court was: "As indicated in the instructions you will receive further guidance and instructions regarding punishment for second degree murder should that be the result." This question demonstrates that the jury was struggling with the very problem this Court sought to avoid by its holding in *Anderson v. State*.⁷ The inclusion of information pertinent to sentencing for first degree murder, and the failure to instruct on second degree murder could reasonably be interpreted by the jury to mean that first degree murder had the 85% requirement and second degree did not. Clearly the jury was trying to determine whether or not this was so.

A jury should not be required to perform [its] critical and difficult responsibility without the benefit of all significant and appropriate information that would avoid the necessity that it speculate or act upon misconceptions concerning the effect of its decisions. Surely a properly informed jury ensures a fair trial both to the defendant and the Commonwealth.⁸

All of the jury's questions, as a group, indicate that the jury was struggling with the distinction between first and second degree murder.⁹

⁶ Prior to the start of deliberations the trial court and the parties agreed that only if McGee was convicted of second degree murder would the range of sentencing for that crime be explained to the jury.

⁷ *Anderson v. State*, 2006 OK CR 6, ¶21, 130 P.3d 273, 281 (citation omitted).

⁸ *Id.*

⁹ The questions were as follows:

1) Question: "If the verdict is guilty for second degree murder, do we the jury decide the punishment at a later time?" Response: "As indicated in the instructions you will receive further guidance and instructions regarding punishment for Second Degree Murder should that be the result."

2) Question: "In second degree murder, after the sentence is set, does he still have to serve 85% of sentence with no chance of early time for good

Deliberation, and apparently some confusion, centered on: 1) how to define intent; 2) whether McGee was guilty of first or second degree murder; and 3) the sentencing consequences of finding McGee guilty of either first or second degree murder. In fact, the jury informed the court, at one point, that it may be deadlocked over whether McGee was guilty of first or second degree murder.¹⁰ This Court also recognizes that there is a factual basis, in the record, to find second degree murder. In his confession, McGee admits to the beating of Seeley, but claims that he never intended for Seeley to die. It is undisputed that McGee left Seeley in the apartment while Seeley was still alive.

Because juries know about the parole system, and will make determinations based upon the possibility of parole,¹¹ and because this record demonstrates that the jury was struggling with the question of punishment, and specifically the question of the 85% Rule, we cannot say that the presumption of prejudice in failing to comply with 22 O.S.2001, § 894 is overcome in this instance.

behavior...." (emphasis in original). Response: "As indicated in the instructions you will receive further guidance and instructions regarding punishment for second degree murder should that be the result."

3) Question: "Judge, We need the definition in laymens terms of "intent." Response: "Your question regarding a definition of intent. You have all the instructions."

4) Question: "Could we, the jury, please watch the video of Dusty McGee's interview with the police?" Response: The trial court sent the video to the jury and, after, informed counsel, allowing the defense to make an objection for the record.

¹⁰ The jury also asked the court: "If we vote guilty but cannot decide on first degree or second degree and no one is willing to change their mind, what do we do next?" The court did discuss this question with counsel prior to the court addressing the jury.

¹¹ *Anderson v. State*, 2006 OK CR 6, ¶21, 130 P.3d 273 (sentencing).

Because we find reversible error in Proposition Three, the remaining Propositions are moot.¹²

DECISION

The Judgment and Sentence of the District Court is **REVERSED** and the case **REMANDED** for a new trial. 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.

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¹² In Proposition One, McGee raises a *Batson* challenge, *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), arguing that the trial judge erred when he stated there was no presumption of racial bias where defendant is Native American and the struck juror is African American. McGee correctly argues, and the State concedes, that a defendant may object to peremptory challenges based on race even where the defendant and the excluded juror are not of the same race. *Powers v. Ohio*, 499 U.S. 400, 406-416, 111 S. Ct. 1364, 1368-74, 113 L. Ed.2d 411 (1991). The trial court here erred when it held otherwise. Because we reverse on Proposition Three, we need not reach whether McGee established the third prong of *Batson*, requiring evidence of purposeful discrimination.