

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JEROME MONROE,)
)
 Appellant,)
 v.)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

Not For Publication

Case No. F-2006-352

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAY 07 2007

MICHAEL S. RICHIE
CLERK

OPINION

CHAPEL, JUDGE:

Jerome Monroe was tried by jury and convicted of First Degree Murder in violation of 21 O.S.2001, § 701.7, in the District Court of Tulsa County, Case No. CF-2005-102. In accordance with the jury's recommendation the Honorable Thomas C. Gillert sentenced Monroe to life imprisonment without the possibility of parole. Monroe appeals from this conviction and sentence.

Between 6:00 a.m. and 7:00 a.m. on December 24, 2004, Monroe shot his girlfriend, Ronda Doyle, in the face and killed her. The two were in their bedroom. Monroe testified that the gun accidentally went off while he was attempting to break it down and unload it. Doyle and their boarder, Charles Boykin, had been to a party the previous evening, then the three stayed up until 4:30 drinking and playing dominoes. Doyle and Monroe continued to play after Boykin passed out.

After Doyle's death, Monroe tried to conceal the crime. He covered her body with blankets and shut and locked the bedroom door. He told two small children, who saw her that day after her death, that she was sleeping. Over

the course of the next few days Monroe stopped up the bottom of the bedroom door with paper and simmered potpourri on the stove to cover up the increasingly unpleasant odor. Several family members and a minister called and visited the apartment repeatedly over the Christmas holidays. Monroe told them Doyle was shopping, with a friend, gone, out of town, and he didn't know where she was. At one point he told Doyle's sister that she had called and would be back soon. Her family reported Doyle missing on Christmas Day. On the 28th, officers entered the locked apartment as part of the missing person investigation, and found the body. While officers did not find the murder weapon, family members going through things in the bedroom found it the next day.

Monroe saw the officers near the apartment on the 28th and left for San Francisco. Monroe testified that he had locked up the body and lied because he was not sure what to do, and he was scared that, because he was a black man in North Tulsa and had been drinking, officers would not believe the shooting was an accident. He testified that his decision to finally leave the area was spontaneous, and it was coincidental that officers had come to the apartment just at that time.

In his first proposition Monroe claims the trial court erred in refusing his requested instruction on parole eligibility. The jury had the option to sentence Monroe to life or life without parole. By statute, Monroe would have to serve 85% of a life sentence before being eligible to be considered for parole (the 85%

Rule)¹ Although this Court had not yet mandated an instruction on this issue, Monroe asked that jurors be instructed on the 85% Rule requirement. This Court subsequently held in *Anderson v. State* that jurors should be instructed on the 85% Rule in every case to which it applies.² As his appeal is heard after *Anderson*, Monroe receives the benefit of that decision.³ Monroe was in his thirties and had no prior offenses. There was no evidence that he and Doyle had a problematic relationship. The evidence showed that they were getting along well the night before the murder, and planning to move together to California after the holidays. Doyle was shot once in the face. Monroe claimed the shot was an accident. While the physical evidence from the wound, and his subsequent actions, may have cast doubt on that claim, there was no evidence of a struggle preceding the shot. Under these circumstances, we cannot speculate as to the decision a properly instructed jury would have reached. It would be inappropriate for this Court to substitute its judgment for that of a properly instructed jury in this case. The case must be reversed and remanded for resentencing.

In Proposition II Monroe claims he should have received his requested instruction on the lesser included offense of second degree manslaughter. He also claims the trial court should have *sua sponte* instructed on excusable homicide. Monroe did receive an instruction on the lesser included offense of first degree misdemeanor manslaughter. A trial court should instruct on every

¹ 21 O.S.2001, §§ 12.1, 13.1.

² *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273, 282.

³ *Carter v. State*, 2006 OK CR 42, 147 P.3d 243, 244; *Anderson*, 180 P.3d at 283.

lesser included offense supported by the evidence.⁴ First degree misdemeanor manslaughter, as applicable here, required proof that Monroe caused Doyle's death without any design to effect her death, while engaged in reckless handling of a firearm.⁵ Second degree manslaughter requires only an unlawful death procured by a defendant's culpable negligence.⁶ Excusable homicide occurs when a death accidentally results where a defendant is committing a lawful act by lawful and ordinary means with usual and ordinary caution.⁷ In denying Monroe's requested instruction on second degree manslaughter, the trial court noted that, although Monroe claimed the shooting was an accident, he admitted he was trying to break down or unload his gun while he was drunk. The trial court concluded that this evidence might support a finding that Monroe was recklessly handling a gun, but did not support a conclusion that Monroe was culpably negligent. This decision was not an abuse of discretion.⁸ Using the same reasoning, the evidence would not have supported an instruction on excusable homicide. By Monroe's own testimony, he was not using usual and ordinary caution in handling the shotgun when Doyle was shot. The trial court did not err in failing to *sua sponte* give an instruction on excusable homicide.

Monroe also claims in Proposition II that the trial court should have given a limiting instruction on "bad acts" evidence. He is referring to the

⁴ *McHam v. State*, 2005 OK CR 28, 126 P.3d 662, 669-70.

⁵ 21 O.S.2001, § 711.1.

⁶ 21 O.S.2001, § 716.

⁷ 21 O.S.2001, § 731.

⁸ *McHam*, 126 P.3d at 670.

testimony from several witnesses that Monroe lied to Doyle's family from the time of her death to his departure and the discovery of the body. Monroe did not object to this evidence, and in fact testified about it himself. We find no plain error. Monroe appears to suggest that this evidence was admitted to show he was a liar and thus a bad person. The record shows that the State used this evidence to support its claim that Monroe deliberately murdered Doyle and went to lengths to conceal the crime before leaving the state. An admission by conduct is an act committed by a defendant after the commission of a crime, in an effort to conceal evidence of the crime, and may be used to infer consciousness of guilt.⁹ Monroe's attempts after the fact to cover up his crime constitutes an admission by conduct, and may be admitted as substantive evidence of guilt.¹⁰ Admissions by conduct do not require notice under the other crimes doctrine.¹¹ As this was not "bad acts" evidence, the trial court did not err in failing to give the standard limiting instruction.¹²

In Proposition III Monroe claims he received ineffective assistance of counsel. Monroe must show that counsel's performance was so deficient that he did not have counsel as guaranteed by the Sixth Amendment, and that the deficient performance created errors so serious as to deprive him of a fair trial

⁹ *Anderson v. State*, 1999 OK CR 44, 992 P.2d 409, 416; *Camron v. State*, 1992 OK CR 17, 829 P.2d 47, 53.

¹⁰ *Anderson*, 992 P.2d at 416.

¹¹ *Anderson*, 992 P.2d at 416.

¹² In *Camron*, we approved a jury instruction on the use of admission by conduct as consciousness of guilt. *Camron*, 829 P.2d at 53. However, failure to instruct the jury on this point is not reversible error. *Anderson*, 992 P.2d at 416.

with reliable results.¹³ We measure trial counsel's performance against an objective standard of reasonableness under prevailing professional norms.¹⁴ There must be a reasonable probability that, without counsel's errors, the jury would have reached a different result.¹⁵ "A reasonable probability is a probability sufficient to undermine confidence in the outcome."¹⁶ We give great deference to trial counsel's strategic decisions, considering the choices made from counsel's perspective at the time.¹⁷ We will presume counsel's conduct was professional and could be considered sound strategy.¹⁸ This Court will not find counsel ineffective if we find that Monroe was not prejudiced by counsel's actions or omissions.¹⁹ Monroe does not meet this standard.

Monroe first claims that counsel was ineffective for failure to use materials provided in discovery concerning witness Natasha Sims. Monroe filed an Application for Evidentiary Hearing and Motion to Supplement the Record on this issue. He refers to the materials submitted in support of the Application in his arguments for this proposition. These materials are not in the record before this Court. However, the Court reviewed the materials to

¹³ *Browning v. State*, 2006 OK CR 8, 134 P.3d 816, 830, *cert. denied*, __ U.S. __, 127 S.Ct. 406, 166 L.Ed.2d 288 (2006); *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003); *Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052, 2069-70, 80 L.Ed.2d 674, 693 (1984).

¹⁴ *Rompilla v. Beard*, 545 U.S. 374, 380, 125 S.Ct. 2456, 2462, 162 L.Ed.2d 360 (2005); *Wiggins*, 539 U.S. at 521, 123 S.Ct. at 2527.

¹⁵ *Browning*, 134 P.3d at 831.

¹⁶ *Williams v. Taylor*, 529 U.S. 362, 394, 120 S.Ct. 1495, 1513-1514, 146 L.Ed.2d 389 (2000).

¹⁷ *Rompilla*, 545 U.S. at 380-81, 125 S.Ct. at 2462; *Wiggins*, 539 U.S. at 523, 123 S.Ct. at 2536; *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2052; *Hooks v. State*, 2001 OK CR 1, 19 P.3d 294, 317.

¹⁸ *Browning*, 134 P.3d at 831; *Ryder v. State*, 2004 OK CR 2, 83 P.3d 856, 874-75, *cert. denied*, 543 U.S. 886, 125 S.Ct. 215, 160 L.Ed.2d 146.

determine whether they meet the standard required for an evidentiary hearing. They do not.²⁰

According to the affidavit of appellate counsel submitted in support of the application for evidentiary hearing, trial counsel was provided a transcript and copy of an audio police interview with Sims, in which she stated that Monroe told her he was trying to open the gun and it went off.²¹ The prosecutor later provided a discovery summary saying Sims would testify consistent with this interview. However, Sims actually testified that Monroe told her he accidentally shot Doyle while he was cleaning the gun. She also testified that she couldn't remember whether Monroe said he was trying to open it to clean it, but that he said it accidentally went off. Latasha Watkins testified that Monroe told her he was cleaning the gun. Monroe testified that he was trying to open the gun to break it down and unload it when the gun went off. The prosecutor argued vigorously that Monroe had told the two women he was cleaning the gun, but told the jury a different story. Monroe claims that counsel failed to use Sims's statement to police to support his story and counter the State's argument.

Monroe first argues that a discovery violation occurred because he was not told Sims would testify he was cleaning the gun. He describes this as a change in testimony. Discrepancies between testimony and material provided

¹⁹ *Williams*, 529 U.S. at 393, 120 S.Ct. at 1513 (defendant prejudiced where counsel's actions deny him a substantive or procedural right to which he is entitled by law); *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2052; *Hooks*, 19 P.3d at 317.

²⁰ Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007).

²¹ Sims also apparently said, and testified, that Monroe told her he shot Doyle in the chest. Doyle was shot in the face.

in discovery may amount to a discovery violation if the discrepancies are material, would change the theory of the case, or would cause a defendant to change trial strategy.²² Any slight discrepancy between the materials provided in discovery and Sims's testimony does not amount to a discovery violation. While Sims testified Monroe said he was cleaning the gun, she also testified she could not remember whether he said he was trying to open the gun. This statement was not in response to a leading question, but was part of a narrative describing what Monroe told her. Counsel was not ineffective for failing to object to Sims's testimony on the basis of a violation of discovery.

Monroe also claims that, according to counsel's affidavit, Tyrone Stokes told police that Monroe told him the shooting was an accident. Monroe argues that, had counsel moved for a continuance when he realized Sims's testimony differed from her statement, he could have called Stokes. As, according to counsel's affidavit, Stokes made no mention of either cleaning or opening the gun, there can be no prejudice in the failure to call Stokes or otherwise try to use his statement.

Monroe claims counsel should have impeached Sims with her statement to police. Although Sims testified for the State, she was Monroe's friend and her testimony attempted to put him in a good light. Monroe testified he told Sims he was opening the gun and she was mistaken if she remembered the conversation differently. When counsel asked Sims on cross-examination what Monroe told Sims, she said she couldn't remember if he said he was trying to

²² *Stemple v. State*, 2000 OK CR 4, 994 P.2d 61, 68.

open the gun to clean it or what. This was more consistent with Monroe's testimony. The prosecutor argued that Sims and Monroe were telling different stories and implied Monroe was lying, but defense counsel reminded jurors that Sims said she could not remember exactly what Monroe told her, and that he might have said he was opening the gun. Monroe cannot show he was prejudiced by counsel's failure to impeach Sims with her statement to police.

Monroe argues that counsel was ineffective for failing to object to the "bad acts" of his lying about Doyle's death, and failing to request a limiting instruction on other crimes evidence. We found in Proposition II that the jury could appropriately consider this evidence as an admission by conduct, as substantive evidence of consciousness of guilt. We further found that Monroe was not prejudiced by the failure to instruct the jury on the use of evidence of admission by conduct. As this evidence was properly admitted, and Monroe was not prejudiced by the failure to instruct the jury, there is no prejudice.

Monroe claims counsel was ineffective for failing to request a jury instruction on the meaning of life without the possibility of parole. As this case must be remanded for resentencing, this claim is moot.²³

Monroe argues that counsel should have objected to the medical examiner's testimony regarding the likelihood that the shot was a close range or contact wound.²⁴ Monroe testified that he was several feet from Doyle when

²³ I continue to believe that jurors should be instructed that a sentence of life without the possibility of parole means what it says.

²⁴ The State appears to argue that Monroe waived this issue by failing to object to the testimony at trial. The State misses the point of the ineffective assistance of counsel claim. While that failure to object certainly waived the substantive issue surrounding Dr. Sibley's testimony, Monroe is claiming that counsel was ineffective precisely for that failure to object.

the gun accidentally discharged. Dr. Sibley testified regarding the characteristics of close range gunshot wounds. Doyle had an entry wound by the right nostril and no exit wound. The birdshot pellets and shotgun wadding stayed together and made a single wound path which ended near the left inside of her neck. Dr. Sibley testified that these facts were characteristic of close range or contact wounds, where the muzzle was from zero to three feet away at the time of the shot. There was no gunpowder stippling around the wound, which also indicated a very close range or contact wound. However, Dr. Sibley testified there could have been stippling which had disappeared during the decomposition process. He said that, based on the pellet distribution and presence of the wad in the wound, he believed the wound was a contact wound. However, he would not state that with certainty because, given Doyle's state of decomposition, he could not determine whether stippling had been present. This was not, as Monroe suggests, an expert opinion based on a "feeling" or extra-record evidence. Dr. Sibley did not tell jurors that the rules prevented him from going with his "gut feeling", as Monroe claims. Rather, he testified that although in his experience the wound characteristics suggested a contact wound, he would not state it was a contact wound because some evidence on that issue might have been altered by the decomposition process. Dr. Sibley was giving the jury technical or specialized knowledge which could assist them in understanding the evidence. This is what expert witnesses do.²⁵ While his opinion evidence went to the ultimate issue, he did not tell jurors what result

²⁵ *Hooks v. State*, 1993 OK CR 41, 862 P.2d 1273, 1278; 12 O.S.2001, § 2702.

to reach.²⁶ This opinion testimony was proper. As any objection to the testimony would have been overruled, counsel was not ineffective for failing to object.

Monroe claims that counsel failed to object to prosecutorial misconduct. During Monroe's cross-examination, he repeatedly tried to rephrase or failed to answer the prosecutor's questions. On occasion the prosecutor pressed Monroe hard, telling him to listen to and answer the questions being asked. The prosecutor also stated that Monroe was not answering the questions, and later argued to the jury that Monroe was able to readily answer defense counsel's questions but would not answer his, instead saying what Monroe wanted to say. Although defense counsel did object to other questions on cross-examination and some of those objections were sustained, counsel failed to object to either the cross-examination or argument cited in Monroe's brief. Monroe claims the prosecutor was treating him like a child or a "boy", with a patronizing and disrespectful manner. A review of the record shows that Monroe appeared to be avoiding giving answers to the questions on cross-examination. The prosecutor's manner was not, from this record, inappropriately disrespectful, and his argument was a reasonable inference from the evidence. Monroe fails to show he was prejudiced by counsel's failure to object, and counsel was not ineffective.

During closing argument the prosecutor told jurors the shotgun was the first gun young boys across Oklahoma got for Christmas every year, because it

²⁶ *Romano v. State*, 1995 OK CR 74, 909 P.2d 92, 109; 12 O.S.2001, § 2704.

is “about the safest gun you can get”. This was certainly arguing facts not in evidence, and had counsel objected the objection should have been sustained. However, Monroe fails to show that he was prejudiced by counsel’s lack of objection. During Monroe’s cross-examination the prosecutor had Monroe show the jury how the gun worked and thoroughly went through the safety features which were designed to prevent the gun from firing accidentally. While the substance of the improper comment – the shotgun was a common child’s gift – was not in evidence, its import – the gun was designed with safety features to prevent accidental discharge – was before the jury. As this isolated improper argument would not warrant relief, counsel’s failure to object does not constitute ineffective assistance of counsel.

In Proposition IV Monroe claims that the accumulation of error in his case requires relief. We found in Proposition I that Monroe’s jury should have been instructed on the 85% Rule, and the case must be remanded for resentencing. We found no other error requiring relief. Where there is no error, there is no accumulation of error.²⁷

Decision

The Judgment of the District Court is **AFFIRMED**. The Sentence of the District Court is **REVERSED** and **REMANDED** for proceedings consistent with this Opinion. The Application for Evidentiary Hearing is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

²⁷ *Alverson v. State*, 1999 OK CR 21, 983 P.2d 498, 520.

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OPINION BY: CHAPEL, J.

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LUMPKIN, PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the decision to affirm the judgment and sentence but dissent to the remand for resentencing. That the murder weapon was a shotgun, and as the medical examiner testified that the wound was likely a contact wound, it is virtually impossible for the shooting to have occurred accidentally as claimed by Appellant with this particular weapon. Further, there were no questions from the jury about parole or how much time Appellant would actually serve. The only way to apply *Anderson* and the 85% Rule is through speculation and conjecture. The record before us does not warrant a remand for resentencing.