

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JONA ANN MONTGOMERY,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2007-1133

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

FEB 19 2010

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

A. JOHNSON, VICE PRESIDING JUDGE:

Appellant Jona Ann Montgomery was tried by jury in the District Court of Pittsburg County, Case No. CF-2006-372, and found guilty of Second Degree Murder, in violation of 21 O.S.2001, § 701.8 (Count 1), and Leaving the Scene of a Fatality Accident, in violation of 47 O.S.2001, § 10-102.1 (Count 2). The jury fixed punishment at life imprisonment with the possibility of parole on Count 1 and ten years imprisonment on Count 2. The Honorable Thomas M. Bartheld, who presided at trial, sentenced Montgomery accordingly and ordered her sentences to be served concurrently. From this judgment and sentence, Montgomery appeals. We find instructional error requires reversal of Count 1 and Count 2 is affirmed. We address Montgomery's claim requiring relief and two others to prevent error on retrial.

Facts

On Friday night, September 1, 2006, twenty-one-year-old Montgomery sped down a residential street adjacent to the McAlester High School football

stadium as the football game was ending. The area was congested with parked cars and pedestrians leaving the game. Montgomery struck several cars before hitting two children standing next to their parked car. Ten-year-old Kristin Collins died from massive blunt trauma, but her older brother somehow survived. Montgomery fled the scene, leaving her car with her purse and driver's license behind. Both the State's and defense's experts agreed that the cause of the collision was excessive speed.

1. Misdemeanor Manslaughter instruction

Montgomery asks for a new trial based on the trial court's refusal to submit an instruction on Misdemeanor Manslaughter. The State requested a lesser included offense instruction on first degree misdemeanor manslaughter with the underlying misdemeanor being either driving while impaired or driving under the influence. Montgomery objected to a misdemeanor manslaughter instruction and cited the trial court this Court's decision in *Breger v. State*, 1987 OK CR 98, 737 P.2d 1219, 1220, holding that a homicide occurring during the commission of the misdemeanor driving while impaired was negligent homicide and driving while impaired could not serve as the predicate misdemeanor for a charge of misdemeanor manslaughter. The trial court denied the State's request for a misdemeanor manslaughter instruction with the underlying misdemeanor driving while impaired based on *Breger*.¹ Six weeks after Montgomery's trial, this Court overruled *Breger* because the

¹ The trial court denied a misdemeanor manslaughter instruction based on driving while under the influence because of a lack of evidence that Montgomery was under the influence rather than simply impaired.

conclusion in *Breger* was not supported by the language of the misdemeanor manslaughter statute. *Bell v. State*, 2007 OK CR 43, ¶ 5, 172 P.3d 622, 624. We held that driving while impaired could serve as the predicate crime for misdemeanor manslaughter and affirmed Bell's conviction for misdemeanor manslaughter with the predicate crime of driving while impaired. *Id.* Montgomery asks this Court to give her the benefit of the ruling in *Bell* and remand her case for a new trial with appropriate instructions.

The State argues that any error in the trial court's failure to give a misdemeanor manslaughter instruction was invited by Montgomery when she objected to the State's request for the instruction. In the alternative, the State argues that the instruction was not warranted by the evidence and that no rational jury could have acquitted Montgomery of second degree murder and found her guilty of only misdemeanor manslaughter. We disagree and find neither of these arguments persuasive.

Montgomery cannot be faulted for providing the trial court with the law contained in *Breger* that governed her case at the time of trial. To find that Montgomery invited the error because her attorney provided the trial court with the applicable law would discourage candor with the trial court and lead to justice not being served. Nor can the State convincingly maintain that a misdemeanor manslaughter instruction was not warranted when the prosecution requested it below. The elements of misdemeanor manslaughter with the predicate crime of driving while impaired are: 1) the death of a human; 2) occurring as a direct result of an act or event which happened in the

commission of a misdemeanor; 3) caused by the defendant while in the commission of a misdemeanor; and 4) the elements of misdemeanor driving while impaired alleged to have been committed by the defendant are: i) driving; ii) a motor vehicle; iii) on a highway; iv) with impaired ability; v) due to alcohol. See OUJI-CR2d 4-94 and 6-23.

The evidence showed that Montgomery drove her car at excessive speed down a public roadway after consuming alcohol as confirmed by Montgomery's blood alcohol test. Montgomery's jury was given instructions on second degree murder and misdemeanor negligent homicide. A rational jury, however, could have found Montgomery guilty of felony misdemeanor manslaughter for her driving that resulted in the victim's death under the facts presented at trial.

This Court's decision in *Bell*, overruling *Breger*, is controlling. The trial court's refusal to submit misdemeanor manslaughter instructions based on *Breger* was wrong. This case is reversed and remanded for a new trial. See *Griffith v. Kentucky*, 479 U.S. 314, 323, 107 S.Ct. 708, 713, 93 L.Ed.2d 649 (1987)(holding new rule of conduct in criminal prosecutions is to be applied to all cases pending on direct review or not yet final); *Carter v. State*, 2006 OK CR 42, ¶ 4, 147 P.3d 243, 244.

2. Other Crimes Evidence

Montgomery argues that she was denied a fair trial by the admission of irrelevant and prejudicial evidence, namely a make-up bag containing a spoon, syringes, a piece of cotton and a bottle of water (State's Exhibit 11) and

Michelle McGowan's testimony that Montgomery expressed no remorse.² Montgomery objected to the admission of State's Exhibit 11; she did not object to McGowan's statement that she did not appear remorseful.

Officer Dayton testified, over objection, that he found a make-up bag (State's Exhibit 11) in the center console of Montgomery's car and identified its contents. Dayton testified that he associated such items with intravenous drug use and labeled the items as drug paraphernalia. On redirect, he described how these items were used to inject drugs.

The district court rejected Montgomery's argument that the items in State's Exhibit 11 were irrelevant, unnecessary to the State's burden of proof, and were more prejudicial than probative and admitted State's Exhibit 11 under the *res gestae* exception. We review a trial court's decision to admit evidence for an abuse of discretion. See *Eizember v. State*, 2007 OK CR 29, ¶ 99, 164 P.3d 208, 234, *cert. denied*, ___U.S.___, 128 S.Ct. 1676, 170 L.Ed.2d 374 (2008). Evidence of bad acts or other crimes may be admissible under the *res gestae* exception where they form a part of the entire transaction or where there is a logical connection with the offenses charged. *Id.* at ¶ 77, 164 P.3d at

² Montgomery also claims that she was prejudiced by an evidentiary harpoon by Michelle McGowan that Montgomery used drugs prior to the collision. McGowan, a jailhouse informant, failed to abide by the trial court's ruling on Montgomery's motion in limine to exclude Montgomery's statements about drug use. McGowan testified that Montgomery said that her boyfriend was angry with her for "partying" at a friend's house the night of the collision and that there were drugs being used there. (Tr.III 68-69) Montgomery objected and moved for a mistrial. The trial court denied the motion for mistrial because the informant did not specifically state that Montgomery was using drugs. The trial court admonished the jury to disregard McGowan's statement. (Tr.III 71-72) This error is not likely to reoccur on retrial and need not be addressed further.

230. Evidence of another crime or bad act is considered part of the *res gestae*, when: a) it is so closely connected to the charged offense as to form part of the entire transaction; b) it is necessary to give the jury a complete understanding of the crime; or c) when it is central to the chain of events. *Id.*

The State charged Montgomery with unlawful possession of drug paraphernalia in the same Information charging her with second degree murder and leaving the scene of a fatality accident. Montgomery moved to sever the charge of unlawful possession of drug paraphernalia from the other charges, but the trial court denied her motion because the charges stemmed from the same transaction. The State, however, later agreed to dismiss the misdemeanor drug paraphernalia count and try only the two felony counts.

The State's theory was that the collision was caused by a combination of Montgomery's impairment due to alcohol consumption and anger from fighting with her boyfriend that led to her speeding to find him. It was not the State's theory that Montgomery was intoxicated from the use of drugs because the toxicology screen performed on Montgomery's blood sample was negative for eight different groups of drugs. (State's Exhibit 19) The trial court understood the potential for prejudice stemming from the admission of evidence of drug use in this case because it granted Montgomery's motion in limine to exclude statements she made to the jailhouse informant about using drugs prior to the collision. The relevance of the drug paraphernalia evidence, especially after the drug paraphernalia charge was dropped before trial, was minimal and the evidence was not so inextricably intertwined with the charged offenses based

on the State's theory that its omission would have left unanswered questions or the facts incomplete. Given its minimal relevance, evidence that Montgomery possessed drug paraphernalia for drug use was far more prejudicial than probative of an issue in the case. 12 O.S.Supp.2003, § 2403. Under these circumstances, we find that the trial court abused its discretion in admitting State's Exhibit 11.

We also find that evidence concerning Montgomery's lack of remorse should have been excluded. Michelle McGowan, the jailhouse informant, testified, without objection, that Montgomery expressed no remorse when she talked about the collision in jail. Montgomery had filed a motion to exclude testimony about any lack of remorse. The trial court held that it would allow McGowan to testify about what she observed with respect to remorse. The prosecutor raised the issue of Montgomery's lack of remorse during closing argument and asked the jury to consider it. Whether or not Montgomery was remorseful in jail after the incident was not relevant to any issue in the case. 12 O.S.2001, § 2401. Lack of remorse in a non-capital case like this shows only that the defendant is a bad person who does not take personal responsibility for, and is not sorry for, his or her actions. These errors should be avoided on retrial.

3. Photographs and Videotape

Montgomery challenges the trial court's decision to admit three morgue photographs of the victim (State's Exhibits 34-46) and a videotape of the crime scene (State's Exhibits 27). Montgomery objected to the admission of these

exhibits, preserving the issue for review. We review the trial court's decision to admit the photographs and videotape for an abuse of discretion. *See Eizember*, 2007 OK CR 29, ¶ 99, 164 P.3d at 234.

State's Exhibits 34-36 were admitted during the testimony of the medical examiner. These exhibits are enlarged color photographs of the victim's injuries taken at autopsy. State's Exhibit 34 is a photograph of the victim's face, showing multiple abrasions on her forehead and left side of her face. State's Exhibits 35 and 36 are photographs of the victim's body front and back; both these photographs show exposed layers of muscle and fractured bone and the substantial tearing away of the flesh on the victim's legs. The pictures in State's Exhibits 35 and 36 provoke an immediate visceral reaction and are profoundly disturbing. They show the massive damage done to a human body in a vehicle collision with a pedestrian. State's Exhibit 27 is a videotape made by a high school teacher who was filming the football game when the collision occurred. The teacher heard the crash and took his camera to the crime scene and videotaped the area. The videotape depicts the street and vehicles after the collision along with close-up/zoomed-in views of body tissue and blood on a vehicle and the street pavement.³

"Photographs of a corpse may be admissible, among other reasons, to show the nature, extent and location of wounds, to show the crime scene, or to

³ The trial court granted the defendant's motion in limine in part concerning the videotape and excluded a segment taken the day after the collision, showing insects feeding on the victim's flesh. (Mot.Tr.09/26/07 58) Montgomery objected only to those portions of the tape showing the close-up shots of the victim's body tissue and blood. (Mot.Tr.09/26/07 55-56) The trial court allowed the close-up shots taken of the body tissue the evening of the collision.

corroborate the medical examiner's testimony." *Livingston v. State*, 1995 OK CR 68, ¶ 20, 907 P.2d 1088, 1094. "Otherwise relevant photographs should not be admitted if the danger of prejudice substantially outweighs their probative value." *Id.* While it is true that gruesome crimes make gruesome photographs, the question is whether the photographs are so unnecessarily hideous as to produce an unfair impact on a jury. *Id.* Some images are so hideous and repulsive that they provoke an immediate, prejudicially emotional response that can prevent a jury from rationally considering the evidence in the case. *Id.*

The trial court admitted the morgue photographs because they corroborated the medical examiner's testimony and would presumably aid the trier of fact. While the images depicted in the photographs corroborated the medical examiner's testimony about the extent and location of the victim's wounds and cause of death, they were not necessary to the State's case because the same information was contained in the medical examiner's diagram and the cause of death was not an issue. This is one of those few cases where the probative value of photographs of the victim in State's Exhibits 35 and 36 was substantially outweighed by the danger of unfair prejudice given that the victim was a young child and her tragic death was caused by an unintentional car collision rather than some intentional act of the killer. The probative value of the morgue photographs was minimal and the danger of prejudice high. The videotape of the scene was relevant, but the close-up views of flesh were not. The trial court abused its discretion in admitting State's Exhibits 35 and 36 and the portions of the videotape depicting the

close-up views of the victim's body tissue. This error should be avoided on retrial.

DECISION

The Judgment and Sentence of the District Court on Count 1 is **REVERSED and REMANDED for a new trial**. The Judgment and Sentence of the District Court on Count 2 is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2010), the **MANDATE is ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF PITTSBURG COUNTY
THE HONORABLE THOMAS M. BARTHELD, DISTRICT JUDGE

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C. JOHNSON, P.J.: Concur
LUMPKIN, J.: Dissent
CHAPEL, J.: Concur
LEWIS, J.: Concur

RE

LUMPKIN, JUDGE: DISSENT

I must respectfully dissent to the Court's opinion in this case as it disregards rules of appellate review and facts. This failure causes the Court to improperly apply the law as established by the U.S. Supreme Court.

It is woven into the very fabric of the Rule of Law that the law at the time of the crime controls the substantive law that can be utilized to subject a person to criminal penalties. *Bowman v. State*, 1990 OK CR 19, ¶ 3, 789 P.2d 631, 631 ("[i]t is a well established rule of law that the appropriate criminal penalty is the penalty in effect at the time the defendant commits the crime".) Further, a part of that fabric also dictates that the law at the time of the trial in a criminal prosecution controls the procedure that must be utilized in that trial. *Id.*, See also *Sharp v. State*, 3 Okl.Cr. 24, 104 P. 71 (1909).

In this case the Appellant was afforded each of those rights. However, for some reason the Court disregards these rules. The record is clear that at the time of the trial a lesser included offense instruction for the offense of Misdemeanor Manslaughter when the primary charge is Second Degree Murder was not available to the Appellant due to this Court's decision in *Breger v. State*, 1987 OK CR 98, 737 P.2d 1219. The Court now wants to apply a decision, that was handed down after the trial in this case in violation of the basic rules of construction set out above, to say retroactively to the trial judge and parties that even though the trial was properly tried under the law applicable at the time of trial, we are still going to reverse the conviction

because the Court has decided to apply *Bell v. State*, 2007 OK CR 43, ¶¶ 3-5, 172 P.3d 622, 623-24, retroactively to this case.

It is interesting that the Court gives as its authority for this retroactive application of *Bell* the U.S. Supreme Court case of *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). However, *Griffith* says that a new constitutional rule applies retroactively to all cases, state and federal, which are pending on direct review even if the rule is a "clear break" with the past. The decision in *Bell* was not a new constitutional rule; it was the interpretation of amended statutory language that had been changed since the Court's decision in *Breger, supra*. The trial court and each of the parties acknowledged on the record what the law at the time of trial was. In fact it was Appellant's trial counsel who objected to the giving of a Misdemeanor Manslaughter instruction after the State had requested it. As a result, the jury was instructed on the primary charge of Second Degree Murder and the lesser included offense of Negligent Homicide. The Second Degree Murder charge carried a possible sentence of ten years to life and the Negligent Homicide charge has a possible punishment of up to one year in the county jail. The jury was properly instructed they could consider the lesser included offense if they could not find the Appellant guilty of the primary charge. In this case it appears the jury had no difficulty in finding the Appellant guilty of the primary charge and it would not matter what lesser included offense option was provided to them, as they would not have considered it.

The Court's analysis of this issue is further conflicted when it states "A rational jury, however, could have found Montgomery guilty of Felony Misdemeanor Manslaughter for the driving that resulted in the victim's death under the facts presented at trial". That statement is in conflict with our precedent on the standard of reviewing the need for lesser included offense instructions, *i.e.* the evidence is reviewed to determine whether it will allow the jury to first acquit the defendant of the greater offense and, secondly, convict of the lesser offense. See *Eizember v. State*, 2007 OK CR 29, ¶ 111, 164 P.3d 208, 236; *Gilson v. State* 2000 OK CR 14, ¶ 113, 8 P.2d 883, 917; *Hill v. State*, 1998 OK CR 251, ¶ 11, 764 P.2d 210, 213. As the evidence shows in this case, together with the verdict of the jury, the trier of fact could not find a basis to first acquit the Appellant of the primary charge. We look to what the jury actually did, rather than what some fictional jury might have done.

At most, this is an instructional error. As we said in *Carter v. State*, 2006 OK CR 42, ¶ 5, 147 P.3d 243, 244, "we do not automatically reverse a case for instructional error, but rather determine whether the error resulted in a miscarriage of justice or constitutes a substantial violation of a constitutional right. 20 O.S. 2001, § 3001.1; *Ashinsky v. State*, 1989 OK CR 59, ¶ 20, 780 P.2d 201, 207." Unlike *Carter* we have no record that shows there was any doubt or hesitation in the jury's decision that Appellant was guilty of Second Degree Murder. There is no violation of a constitutional right in this case and the conviction should be affirmed.

I also do not find error in the photos, the testimony of Michelle McGowan or the other crimes evidence. As we said in *McElmurry v. State*, 2002 OK CR 40, ¶ 63, 60 P.3d 4, 20-21:

It is not the duty of the court to anesthetize a crime in order to protect a defendant from the natural consequences of his own intentional acts. The State is permitted to re-create the circumstances known to the witnesses that occurred simultaneously with the crime and incidental to it as part of the *res gestae* of the crime. These events can be established by both expert and lay witnesses. *Res gestae* are those things, events, and circumstances incidental to and surrounding a larger event that help explain it.

This was a terrible, horrific crime and the jury had the right to review all the relevant evidence regarding the facts and circumstances in order to be able to determine the crime committed and punishment.

Based on the facts in this case, it appears there was no doubt regarding the conviction pursuant to the precedent of this Court. It seems the underlying issue the Court has with this case is the fact the jury sentenced Appellant to life imprisonment with the possibility of parole on the Second Degree Murder conviction. However, it must be noted that no objection or error has been raised to the conviction in Count II, Leaving the Scene of a Fatality Accident. The range of punishment that was available to the jury on that charge was not less than one (1) year nor more than ten (10) years, or be a fine of not less than \$1,000.00 nor more than \$10,000.00 or by both such fine and imprisonment. The jury selected the maximum prison time of ten (10) years. This appears to be further evidence in the record that the jury never got to the point of considering a lesser included charge in Count I. So, it would seem the

underlying issue the Court has with this case is the sentence of life imprisonment in Count I. Under the facts of this case I do not see how it could meet the test of being so excessive as to shock the conscience of the court as we have set out in *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149. If this Appellant had been firing a gun into this crowd there would be no hesitation in finding that the sentence was appropriate. A typical load for a shell would be approximately a 180 grain projectile, while here we have an approximately 3,000 lb. projectile that was hurled into this crowd. The jury has a right to consider both types of cases with the same seriousness and potential for harm.

Further, if the Court believes that two photographs and a portion of the videotape of the crime caused this jury to recommend a sentence based on an emotional response rather than a reasoned, logical one based on the evidence, then the proper action is to modify the sentence, not reverse and remand for a new trial.

I would affirm the judgments and sentences in both Counts I and II.