

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KRISTOPHER LEE MORPHEW,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F 2007-201

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

OCT 10 2008

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

LEWIS, JUDGE:

Appellant, Kristopher Lee Morphey, was convicted of Second-degree Murder, in violation of 21 O.S.2001, § 701.8, after a jury trial before the Honorable William C. Hetherington, Jr., District Judge, in Cleveland County District Court in Case No. CF-2004-1590.¹ The jury assessed punishment at twenty years imprisonment and the trial court sentenced accordingly. From the Judgment and Sentence, Morphey has perfected this appeal, raising the following propositions of error:

1. Ineffective assistance of trial counsel deprived Mr. Morphey of a fair trial and severely prejudiced him in violation of his Sixth and Fourteenth Amendment rights.
2. The trial court erred on failing to *sua sponte* instruct on second-degree manslaughter.
3. The jury should not have been instructed on second-degree 'depraved mind' murder, the second-degree murder

¹ Morphey was charged and tried for first-degree murder, but the jury acquitted him of that charge, finding instead that he was guilty of second-degree murder.

instruction as given was incomplete, and the evidence was insufficient to support the conviction in any case.

4. The trial court erred in allowing into evidence the incriminating statement Detective Lucas claimed Mr. Morpew made to him while in custody and after he had invoked his right to counsel, in violation of Morpew's Fifth, Sixth and Fourteenth Amendment rights.
5. Prosecutorial misconduct deprived Mr. Morpew of a fair trial.
6. The sentence is excessive.
7. Cumulative error deprived Mr. Morpew of a fair trial, warranting reversal or modification of the sentence.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we reverse Mr. Morpew's Judgment and Sentence and remand the case for a new trial. Because this result is required based upon error alleged in Proposition III, the remaining propositions of error need not be addressed. In his third proposition, Appellant alleges that reversal is required because the jury instruction on the crime of second-degree "depraved mind" murder was flawed. The record reflects that the jury was given the following instruction on the elements of second-degree depraved mind murder:

FIRST: the death of a human;

SECOND: caused by conduct which was imminently dangerous to other persons;

THIRD: the conduct was that of the defendant;

FOURTH: the conduct evinced a depraved mind in extreme disregard of human life;

FIFTH: the conduct is not done with the intention of taking the life of any particular individual.

While this instruction was partially correct, Appellant accurately asserts on appeal that it was incomplete. The instruction required by OUJI-CR 2nd 4-91 includes the following definitions:

You are further instructed that a person evinces a “depraved mind” when he engages in imminently dangerous conduct with contemptuous and reckless disregard of, and in total indifference to, the life and safety of another.

You are further instructed that “imminently dangerous conduct” means conduct that creates what a reasonable person would realize as an immediate and extremely high degree of risk of death to another person.

This Court has long held that the uniform jury instructions shall be used unless they do not accurately state the law. *Malone v. State*, 2007 OK CR 34, ¶ 27, 168 P.3d 185, 198. *See also* 12 O.S.2001, § 577.2. “However, deviation from the uniform instructions does not require automatic reversal.” *Flores v. State*, 1995 OK CR 9, ¶ 5, 896 P.2d 558, 560.

This Court reviews the instructions to determine whether the instruction at issue fairly and accurately states the applicable law. *Id.* When error is committed, reversal is not required unless such error has probably resulted in a miscarriage of justice or constitutes a substantial violation of a constitutional or statutory right. *Id.* *See also* 20 O.S.2001, § 3001.1. The definitions of “depraved mind” and “imminently dangerous conduct” are included within OUJI-CR 2nd 4-91 specifically because this Court deemed them necessary to an accurate and complete instruction on the crime of second-degree “depraved

mind” murder. *Palmer v. State*, 1994 OK CR 16, ¶ 12, 871 P.2d 429, 432-33.² Further, in so ruling, we specifically directed trial courts to instruct accordingly. *Id.* Clearly the trial court’s instructions did not fully state the law regarding second-degree murder, which constitutes error.

Having found error in the trial court’s instructions on second-degree murder, this Court must determine whether plain error occurred, because no specific objection to the instructions appears on the record. We must determine whether this error probably resulted in a miscarriage of justice or constitutes a substantial violation of a constitutional or statutory right.

The record reflects that the jury sent out a note to the judge expressing their confusion about the meaning of second-degree depraved mind murder. The note said, “Please explain the fourth element of 2nd degree murder.” To this request, the trial court responded:

[T]he answer to this question is, is that the fourth element of second-degree murder is as follows: The conduct evinced a depraved mind and extreme disregard of human life. The fourth element of second-degree murder is a self-explanatory element, and there is no further answer that can be given to you. The instructions that you have with regard to the elements of second-degree murder are complete, and to the extent that the fourth one is the one you’re questioning, it is self-explanatory.

The jury was clearly confused about the meaning of conduct which evinces a “depraved mind in extreme disregard of human life,” and the trial court erred when it stated that the instructions on the elements of second-degree murder were complete. As stated above, the instructions were not complete.

² This Court’s ruling in *Palmer* was clarified in *Willingham v. State*, 1997 OK CR 62, 947 P.2d 1074, and changed only as to instruction on the fifth element of second degree murder.

Under these circumstances, the definitions provided in OUJI-CR 2nd 4-91 were absolutely necessary to the jury's determination of whether Appellant was guilty of second-degree depraved mind murder. This is especially true here, where evidence that Appellant acted with contemptuous and reckless disregard is far from overwhelming. Thus, under the facts of this case, the omission of the definitions from the jury instruction on second-degree murder coupled with the trial court's incorrect response to the jury's questions about the same may well have resulted in a miscarriage of justice. This was plain error requiring relief.

DECISION

The Judgment and Sentence of the district court is **REVERSED** and the case is **REMANDED** for a **NEW TRIAL**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2008), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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OPINION BY: LEWIS, J.

LUMPKIN, P.J.: DISSENTS

C. JOHNSON, V.P.J.: RECUSED

CHAPEL, J.: RECUSED

A. JOHNSON, J.: CONCURS

S. TAYLOR, S.C.J.: CONCURS (sitting by designation in lieu of C. Johnson, V.P.J.)

J. REIF, S.C.J.: CONCURS (sitting by designation in lieu of Chapel, J.)

LUMPKIN, PRESIDING JUDGE: DISSENT

I must respectfully dissent to the Court's decision in this case. The Appellant was charged with the crime of Murder, First Degree. The trial judge instructed the jury on Murder, Second Degree, correctly setting out the elements but failing to include within the instructions a definition of the terms contained in the elements given. The jury found the Appellant guilty of Murder, Second Degree. Where is the harm to the Appellant? This is just the type of circumstance the Oklahoma Legislature had in mind when it codified the provisions of 20 O.S.2001, § 3001.1.

No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or for error in any matter of pleading or procedure, unless it is the opinion of the reviewing court that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.

The failure to give the definitions of the terms contained in the Murder, Second Degree, instruction is definitely harmless beyond all doubt, much less a reasonable doubt. In addition, the jury was also instructed on Manslaughter, First Degree. Therefore the jury had several options before it in resolving this case. As we said in *Hogan v. State*, 2006 OK CR 19, ¶¶ 39, 139 P.3d ___, 923, "we will reverse the judgment only where an error in the instructions to the jury has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." I would affirm the judgment and sentence.