

JUN 19 2003

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**  
MICHAEL S. RICHIE  
CLERK

DANIEL KELLY ORCUTT	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
v.	)	
	)	Case No. F-2001-1529
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

**SUMMARY OPINION**

**LILE, VICE PRESIDING JUDGE:**

Appellant, Daniel Kelly Orcutt, was convicted at jury trial of Manslaughter in the First Degree in violation of 21 O.S.1991, § 711, in the District Court of Creek County, Case No. CF-1998-206. The Honorable Donald Thompson, District Judge, sentenced Appellant to fifty (50) years imprisonment and a fine of \$10,000, in accordance with the verdict of the jury. Appellant has perfected his appeal to this Court.

Appellant raises the following propositions of error in support of his appeal:

- I. THE TRIAL COURT'S REFUSAL TO SEQUESTER THE JURY AFTER ENTERING DELIBERATIONS DEPRIVED MR. ORCUTT OF HIS CONSTITUTIONAL AND STATUTORY RIGHTS TO A FAIR TRIAL.
- II. THE PROSECUTOR IMPROPERLY COMMENTED ON MR. ORCUTT'S DECISION NOT TO TESTIFY AT HIS OWN TRIAL.
- III. THE STATE'S FAILURE TO COMPLY WITH DISCOVERY DEPRIVED MR. ORCUTT OF THE ABILITY TO ABLY REPRESENT HIMSELF AT TRIAL.

IV. THE TRIAL COURT IMPROPERLY RESTRICTED MR. ORCUTT'S REPRESENTATION OF HIMSELF AT TRIAL AFTER ALLOWING HIM TO PROCEED AS A *PRO SE* LITIGANT.

V. EVEN IF NO SINGLE ERROR IN THIS CASE WARRANTS REVERSAL, THE CUMULATIVE EFFECT OF THE ERRORS AT MR. ORCUTT'S TRIAL MANDATE A NEW TRIAL.

After a thorough consideration of these propositions and the entire record before us, including the original record, transcripts and briefs of the parties, we find that this case must be reversed and remanded for a new trial as required under the facts and the law.

With regard to Proposition I, we find that the trial court committed reversible error in allowing the jury to separate during deliberations, over the objection of Appellant. Under the circumstances, prejudice is presumed. *Bayliss v. State*, 1990 OK CR 1251, 795 P.2d 1079. The State has the duty to rebut the presumption of prejudice. *Id.*

Appellant, representing himself, objected to the separation of the jury during deliberations, and despite this objection the trial court allowed the jury to separate. The law presumes prejudice. The State was obligated to establish that there was no actual prejudice. This, the State did not even attempt. This error requires that Appellant receive a new trial.

In regard to Proposition II, the statements of the prosecutor were error. Because the case must be retried, we do not proceed to determine whether the error was harmless.

**DECISION**

The Judgment and Sentence of the District Court is hereby **VACATED** and this case is **REMANDED** to the District Court for a new trial.

**ATTORNEYS AT TRIAL**

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**OPINION BY: LILE, V.P.J.**

**JOHNSON, P.J.: CONCURS**  
**LUMPKIN, J. : CONCURS**  
**CHAPEL, J.: CONCURS**  
**STRUBHAR, J.: CONCURS**

**RC**