

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

WILFORD CARL THOMPSON, JR.,)
)
Appellant,)
)
v.)
)
THE STATE OF OKLAHOMA,)
)
Appellee.)

NOT FOR PUBLICATION

Case No. F-2008-5

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUL 24 2009

MICHAEL S. RICHIE
CLERK

OPINION

A. JOHNSON, VICE-PRESIDING JUDGE:

Appellant Wilford Carl Thompson, Jr. was tried by jury and convicted in the District Court of Tulsa County, Case No. CF-2005-4330, of Count 1 - First Degree Murder, in violation of 21 O.S.Supp.2004, § 701.7(A), Count 2 - Possession of a Stolen Vehicle, After Former Conviction of Two or More Felonies, in violation of 47 O.S.2001, § 4-103, and Count 3 - First Degree Burglary, After Former Conviction of Two or More Felonies, in violation of 21 O.S.2001, § 1431. The jury set punishment at Life Imprisonment Without the Possibility of Parole on Count 1 and Life Imprisonment With the Possibility of Parole on Counts 2 and 3. The Honorable Clancy Smith, who presided at trial, sentenced Thompson accordingly, ordering the sentences to be served consecutively. Thompson appeals.

BACKGROUND

On September 13, 2005, 86-year-old Georgia Reeves Sherman was found dead in her home in Tulsa, Oklahoma. Bythelda Drake, a relative, had been

trying repeatedly to reach Mrs. Sherman since the end of August. On September 13, she called the police.

When Officer Steven Sanders arrived that evening, he walked around the Sherman house knocking on doors and peering in windows, unable to rouse anyone inside. He discovered an open window with its screen removed, but was unable to climb through it because debris blocked his entry. When he smelled what he believed to be decomposing human remains, police officers forced entry into the house. Paramedics found Mrs. Sherman's body, in an advanced state of decay, in her bedroom.

At trial the medical examiner estimated she had been dead for approximately two weeks before her body was found. The autopsy found Mrs. Sherman had sustained multiple severe linear skull fractures and a broken mandible. The medical examiner, with the help of a forensic anthropologist, reconstructed Sherman's skull from its broken pieces and ruled that blunt force trauma was the cause of her death.

The testimony at Thompson's murder trial showed that one day near the end of August, Mrs. Sherman ran from her house to her neighbors, the Scotts, across the street. She was frightened and told Mrs. Scott a strange man was following her. When Thompson approached the neighbors' house, Mrs. Sherman pointed to him and insisted she didn't know who he was. Thompson responded that she did know him; he was a relative of hers. Mrs. Scott and her grandson, Ferris Vickers, told Thompson to leave because Mrs. Sherman was afraid of him. Thompson walked away, and Mrs. Sherman went home.

Mrs. Scott remembered seeing Mrs. Sherman's red Chevy Malibu in the driveway that day as she watched her walk back across the street. She never saw the car again. Several witnesses testified that for a period of several weeks beginning near the end of August they saw Thompson driving a red Chevy Malibu, the same make, model and color as Mrs. Sherman's car.

On September 20, 2005, Tulsa police officers found Sherman's missing car at an abandoned house near Thompson's home. While the license plates did not match, police confirmed that the vehicle belonged to Sherman through the vehicle identification number. Police executed a search warrant at Thompson's home and found Thompson hiding in a car in the garage. During an interview following his arrest he admitted that he had been driving Sherman's car for two weeks and that he had switched the license plates. Thompson denied stealing the car or killing Sherman, however. He offered the explanation that he had been given the car by a friend in order to make a drug delivery.

I. JURY INSTRUCTIONS ON LESSER INCLUDED OFFENSES

Thompson argues the district court erred in failing to instruct the jury *sua sponte* on three lesser crimes: Second Degree Murder; First Degree Heat of Passion Manslaughter; and Second Degree Felony Murder. Thompson's failure to request the instructions or object to their omission waives the issue on appeal unless he can show plain error. *See Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. In considering plain error here, we are bound by the clear precept that a trial court has a duty to instruct the jury *sua sponte* on

any lesser included offenses warranted by the evidence presented. *Ball v. State*, 2007 OK CR 42, ¶ 31, 173 P.3d 81, 90; *Glossip v. State*, 2001 OK CR 21, ¶ 28, 29 P.3d 597, 603-04. “[T]he proper test of sufficient evidence for instructions on a lesser-included offense is whether *prima facie* evidence of the lesser offense has been presented.” *Ball*, 2007 OK CR 42, ¶ 32, 173 P.3d at 90.

1. Second Degree Murder

In order to warrant an instruction for Second Degree Murder there must be *prima facie* evidence of: First, the death of a human; Second, caused by conduct which was imminently dangerous to another person; Third, that conduct was that of the defendant; Fourth, the conduct evidenced a depraved mind in extreme disregard of human life; and Fifth, the conduct is not done with the intention of taking the life of any particular individual. 21 O.S.2001, § 701.8(1); Instruction No. 4-91, OUJI-CR (2d). “The essential difference between First and Second Degree Murder is intent to kill.” *Jones v. State*, 2006 OK CR 17, ¶ 8, 134 P.3d 150, 154. “A Second Degree Murder instruction demands evidence that the defendant did not intend to kill the victim.” *Id.* There is no such evidence in this record. Thompson’s attack on Sherman shattered a large section of her skull. Evidence from both the autopsy and the analysis of the blood spatter on the walls of Sherman’s house showed she was struck repeatedly and brutally on her head. The number and severity of those blows supports a finding that Thompson intended to kill. An instruction on Second Degree Depraved Mind Murder was unwarranted by the evidence in this case.

2. First Degree Manslaughter

To warrant an instruction on First Degree Heat of Passion Manslaughter, a record must show *prima facie* evidence of: First, the death of a human; Second, caused by the defendant; Third, the death was not excusable or justifiable; Fourth, the death was inflicted [either] in a cruel or unusual manner [or by means of a dangerous weapon]; and Fifth, when performing the conduct which caused the death, defendant was in a heat of passion. 21 O.S.2001, § 711(2); Instruction No. 4-95, OUJI-CR (2d).

Further, "heat of passion" in the context of manslaughter requires evidence of: First, adequate provocation; Second, a passion or an emotion such as fear, terror, anger, rage, or resentment existed in a defendant; Third, the homicide occurred while the passion still existed, and before there was reasonable opportunity for the passion to cool; [and] Fourth, there was a causal connection between the provocation, the passion, and the homicide. Instruction No. 4-97, OUJI-CR (2d).

Thompson argues that the trial evidence showed he killed Sherman as a result of either his anger at her or his desire to acquire her car. Neither a defendant's anger at a victim nor his being, as Thompson puts it, "car crazy" constitutes evidence of the adequate provocation necessary to justify an instruction on heat of passion. Adequate provocation is "any improper conduct of the deceased toward the defendant which naturally or reasonably would have the effect of arousing a sudden heat of passion within a reasonable person in the position of the defendant." Instruction No. 4-98, OUJI-CR (2d). "In

determining whether the deceased's conduct was adequate provocation, the conduct is judged as a person of reasonable intelligence and disposition would respond to it." *Id.* According to Thompson, he was provoked by Sherman's refusal to recognize him and to give him a glass of water, money, or access to a phone when he asked. Clearly, Mrs. Sherman's response to Thompson's intrusion would not "naturally or reasonably" give rise to a heat of passion in "a person of reasonable intelligence and disposition." *Id.* There was no evidence of adequate provocation; the trial court did not err in failing to instruct the jury *sua sponte* on First Degree Heat of Passion Manslaughter.

3. Second Degree Felony Murder

Thompson also contends that the trial court should have instructed the jury on Second Degree Felony Murder as a lesser included offense of First Degree Felony Murder. The State initially charged Thompson in Count 1 with First Degree Malice Aforethought Murder or, alternatively, First Degree Felony Murder, with First Degree Burglary as the predicate felony. The jury returned a verdict of guilty on both malice aforethought and felony murder theories. (O.R. 179) The State, at the sentencing hearing, dismissed the alternative count of First Degree Felony Murder.¹ Thompson, relying on *Hain v. State*, 1993 OK CR 22, ¶¶ 41-44, 852 P.2d 744, 752, argues that the 'true' predicate felony in this case was larceny of an automobile and that the trial court should have submitted second degree felony murder instructions as well. The

¹ Even if the State had not dismissed the alternative charge of First Degree Felony Murder, this Court would still have viewed the jury's verdict as a conviction of First Degree Malice Aforethought Murder. *Alverson v. State*, 1999 OK CR 21, ¶¶ 80-83, 983 P.2d 498, 521.

rationale in *Hain* is based largely on our decision in *Munson v. State*, 1988 OK CR 124, 758 P.2d 324. In *Munson*, this Court held that in order to determine the predicate felony for a felony murder conviction where more than one underlying felony is charged, "one must look first to the information and second to the evidence." *Id.* at ¶ 28, 758 P.2d at 333. The 'true' predicate felony is "the initial felony which began the chain of events ultimately leading to the victim's death." *Id.* The first felony in the chain of events leading to Sherman's death occurred when Thompson committed First Degree Burglary by breaking and entering Sherman's house while she was inside with the intent to steal her keys so he could take her car. The State correctly alleged First Degree Burglary as the predicate felony; instructions on second degree felony murder were not warranted under these facts. We note also that Thompson repeatedly denied killing Sherman or stealing her car, making any lesser-included offense incompatible with his selected defense. The trial court did not err in failing to instruct the jury *sua sponte* on Second Degree Felony Murder. See *Harris v. State*, 2004 OK CR 1, ¶ 50, 84 P.3d 731, 750; *Crumley v. State*, 1991 OK CR 72, ¶¶ 13 and 14, 815 P.2d 676, 678-79.

Thompson's claim that he was entitled to have the jury instructed on lesser offenses is without merit.

II. SENTENCING PROCEEDING

At the conclusion of the first stage of trial the trial court, without objection, submitted to the jury only the question of guilt or innocence on the three counts charged. The jury returned a guilty verdict on all three counts,

and the trial court, again without objection, proceeded to a second stage wherein the State introduced evidence of Thompson's previous convictions of Possession of a Stolen Vehicle, Kidnapping, and two counts of Robbery with a Firearm. The trial court instructed the jurors that if they found beyond a reasonable doubt that Thompson had been previously convicted of these crimes, they could consider those convictions when determining a sentence for all three counts. Thompson contends the trial court erred when the jury was permitted to learn about his prior convictions when considering his punishment for First Degree Murder. Thompson's failure to object to this procedure waives review except for plain error. *Wood v. State*, 2007 OK CR 17, ¶ 10, 158 P.3d 467, 473, *cert. denied*, 552 U.S. ___, 128 S.Ct. 507, 169 L.Ed.2d 355. To be entitled to relief under the plain error doctrine, Thompson must prove: "1) the existence of an actual error (i.e. a deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceedings." *Id.*

The State concedes that permitting the jury to consider Thompson's prior convictions when determining a sentence on the charge of First Degree Murder was error. We find it to be plain error. Both Thompson and the State cite unpublished cases which hold that permitting the jury to consider evidence of the defendant's prior convictions in the sentencing proceeding of a non-capital First Degree Murder case is error. See *Gregory Thompson v. State*, Case No. F-2006-68 (2007) (unpublished); *Johnson v. State*, Case No. F-2005-1056 (2006)

(unpublished).² The State contends, however, the error under the facts of this case is harmless and that Thompson's jury would have sentenced him to life imprisonment without the possibility of parole regardless of his prior convictions.

There is no doubt that the facts of this case show the commission of a heinous and brutal crime. This Court has noted on several occasions the possible prejudicial effect of prior felony convictions upon a jury's deliberations and decision. *See e.g. Pickens v. State*, 2001 OK CR 3, ¶ 29, 19 P.3d 866, 878 (the reason for bifurcation of trials is to prevent the misuse of prior convictions). We cannot know what Thompson's jury would have done absent knowledge of his prior convictions, but we do know that the jury erroneously considered Thompson's prior convictions in setting sentence. Because Thompson's jury was erroneously instructed to consider prejudicial information in the form of prior convictions in reaching a sentence for the count of First Degree Murder, we find it necessary to modify Thompson's sentence on Count 1 from life imprisonment without the possibility of parole to life imprisonment with the possibility of parole.

III. REASONABLE DOUBT INSTRUCTION

Thompson contends that the trial court erred in failing to define "reasonable doubt" for the jury. This claim has been raised and rejected several times. *See e.g. Thompson v. State*, 2007 OK CR 38, ¶ 35, 169 P.3d

² This Court again held this practice was error in *Lewis v. State*, Case No. F-2008-06 (April 17, 2009) (unpublished).

1198, 1209; *Harris v. State*, 2004 OK CR 1, ¶ 51, 84 P.3d 731, 750-752 (recognizing that “we have long disapproved of attempts by the trial court to define reasonable doubt for the jury”). We decline Thompson’s invitation to re-examine those decisions.

DECISION

The Judgment and Sentence of the District Court on Counts 2 and 3 is **AFFIRMED**. The Judgment and Sentence of the District Court on Count 1 is **AFFIRMED** as **MODIFIED**. This matter is remanded to the District Court with instructions to **MODIFY** Thompson’s sentence on Count 1 from life imprisonment without the possibility of parole to life imprisonment with the possibility of parole, the sentences in Counts 1, 2, and 3 will continue to run consecutively. 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.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE CLANCY SMITH, DISTRICT JUDGE

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OPINION BY: A. JOHNSON, V.P.J.

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

RB

LUMPKIN, JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the Court's decision to affirm the convictions in all three counts and the sentences in Counts 2 and 3. However, I must dissent to the modification of the sentence in Count 1. While there is a technical error in the evidence presented in a bifurcated proceeding, I find the error harmless. There is no evidence the jury was in doubt about the sentence they would give in this horrendous crime involving the brutal beating and killing of a helpless, 86 year old woman. Any error in the procedure utilized is harmless beyond a reasonable doubt. I would affirm the judgments and sentences in all counts.