

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

GREGORY SCOTT THOMPSON, )  
 )  
 Appellant, )  
 v. )  
 THE STATE OF OKLAHOMA, )  
 )  
 Appellee. )

NOT FOR PUBLICATION

Case No. F-2006-68

**FILED**  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

MAY 22 2007

MICHAEL S. RICHIE  
CLERK

**OPINION**

**C. JOHNSON, VICE -PRESIDING JUDGE:**

Appellant, Gregory Scott Thompson, was tried by a jury and convicted of First Degree Felony Murder in the District Court of Oklahoma County, Case No. CF 2003-6542.<sup>1</sup> The jury assessed punishment at life without the possibility of parole. The trial court sentenced Appellant accordingly. From this Judgment and Sentence Appellant has appealed.

**FACTS**

On the evening of November 18, 2003, Randy Davis and Clifford Hamilton went to the home of Laquita Stevenson. Davis and Stevenson had dated on and off in the past but were not presently involved. Rather, Stevenson was currently living with Jerry McQuin, a man she had met four

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<sup>1</sup> The Oklahoma County District Attorney originally charged Randall Davis with First Degree Felony Murder alleging that he, acting conjointly with three unknown males, killed Jerry McQuin while committing the crime of Attempted Robbery with Firearms in an attempt to take from McQuin his car keys. The Information was amended several times and finally charged Davis, Appellant, Jimmy Gatewood and Clifford Hamilton with this same crime. Davis and Hamilton were not bound over for trial and Gatewood entered a guilty plea to the crime of Accessory of First Degree Murder and was sentenced to ten years imprisonment. Only Appellant was tried and convicted of the crime charged.

days earlier. When Davis arrived, McQuin was not there. Stevenson tried to persuade Davis to leave but he was drunk and would not go. After Davis had been there for about twenty minutes, McQuin arrived. McQuin went immediately to a bedroom in the back of the house. McQuin and Davis were each upset about the other's presence at the house but were cordial to one another.

After McQuin arrived, Davis began playing with his cell phone and went out to the front porch where he called someone who he requested come to Stevenson's house. When he came back into the house he was accompanied by Appellant and Jimmy Gatewood. Stevenson asked all four men to leave but they refused. Appellant asked Davis why he had called him over. When Stevenson attempted to leave the room Appellant stepped in front of her and asked where she was going. She inferred that she was going to get a gun. At this point he pulled out a gun which he held down to his side. She told him that he did not scare her because she didn't believe that he would shoot her in front of her cousin, Ashley Tubbs, and her baby who were also present in the house. Appellant put his gun away.

Around this time, Davis pulled Stevenson away from Appellant and told her to tell McQuin to move his car because he had parked it against the bumper of Davis' SUV. McQuin had parked his car behind Davis' SUV in the driveway. Appellant then asked if that was McQuin's car and he went outside with Gatewood and Davis. While they were outside Stevenson did not tell McQuin to move his car but instead attempted to call the police. While she

was doing this Davis came back inside the house and took the phone from her and they went back into the living room. Appellant came into the living room and asked Davis, "So what did you call me over here for? What are we going to do? We fighting, fucking or something?" Davis told him to "Chill out." Davis also said, "There's fixin' to be a killing." Davis, Appellant and Gatewood talked some more about McQuin's car. Then Davis told Stevenson again to tell McQuin to move his car. Stevenson was under the impression that Davis was tired of being there and was ready to leave. She went toward the back of the house to tell McQuin to move his car when Davis pushed past her and went into the bedroom occupied by McQuin to get him. When Davis and McQuin returned to the living room, Appellant and Gatewood had pulled bandanas over their faces. Appellant and Gatewood pulled guns on McQuin and asked him for his car keys. When McQuin responded that his keys were outside the men forced him to go outside.

Inside, Stevenson went to call the police. She could hear the men outside and believed that they were still talking about the car keys. She heard McQuin tell them that the keys were in the house and he yelled, "Baby, give them the keys." Soon thereafter, she heard gunshots and the sound of burning rubber. Outside, McQuin had been shot and his car, a 1981 Caprice, had been pushed out of the driveway, across the street and into a neighbor's yard by Davis' SUV. McQuin died soon thereafter from multiple gunshot wounds.

## PROPOSITIONS

Prior to trial the State filed a Motion in Limine to preclude the defense from introducing or eliciting evidence that the decedent had a large amount of cash and a baggie containing crack cocaine in his pocket when he was killed. A hearing on the Motion in Limine held immediately prior to voir dire reflects that defense counsel objected to the motion arguing that this evidence was necessary to its defense that the victim was killed by a third party perpetrator as a result of a drug deal gone bad and that drug activity in the Stevenson home provided motivation for Stevenson to lie at trial. The trial court granted the State's Motion in Limine. Appellant argues in his first proposition that in so ruling, the trial court effectively denied him his fundamental constitutional right to present a defense.

It is true, as Appellant asserts, that the United States Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986). It is also true, however, that "[i]n the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Gore v. State*, 2005 OK CR 14, ¶ 21, 119 P.3d 1268, 1275, citing *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973). This Court has held that decisions regarding the admissibility of evidence are discretionary with the trial court and will not be disturbed on appeal unless clearly

erroneous or manifestly unreasonable. *Dill v. State*, 2005 OK CR 20, ¶ 5, 122 P.3d 866, 868; *Lott v. State*, 2004 OK CR 27, ¶ 96, 98 P.3d 318, 344.

In the recent case of *Holmes v. South Carolina*, 547 U.S. 319, \_\_\_, 126 S.Ct. 1727, 1732, \_\_\_ L.Ed.3d \_\_\_ (2006), wherein the central issue was the admissibility of defense evidence of third-party guilt, the United States Supreme Court explained:

While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legislative purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.

The Court then went on to note that, “the Constitution permits judges ‘to exclude evidence that is ‘repetitive . . . , only marginally relevant’ or poses an undue risk of ‘harassment, prejudice, [or] confusion of the issues’” *Id.* citing *Crane*, at 689-90, 106 S.Ct. at 2146. This Court has held that in order to be admissible, evidence offered to show that some other person committed the crime must, by some quantum of evidence, which is more than mere suspicion and innuendo, connect another person to the commission of the crime. See *Stouffer v. State*, 2006 OK CR 46, ¶¶ 43-50, 147 P.3d 245, 261-62; *Warner v. State*, 2006 OK CR 40, ¶ 74, 144 P.3d 838, 870; *Gore*, 2005 OK CR 14 at ¶ 24, 119 P.3d at 1276. In the present case, evidence that the decedent had drugs and money in his pants pocket at the time he was killed provided, at best, nothing more than suspicion and innuendo that he may have been killed by a third person as a result of a drug deal gone bad.

We also disagree with Appellant's claim that evidence that the victim had drugs and money in his pocket was relevant to challenge the State's allegation that the victim's car keys were the items sought in the attempted robbery and to impeach Stevenson's testimony. Any probative value that this evidence may have had was substantially outweighed by the danger of confusing the issues and misleading the jury. This evidence was therefore inadmissible for these purposes as well. 12 O.S.2001, § 2403.

In summary, the omission of this evidence did not violate Appellant's right to present a defense or inhibit his ability to challenge the State's theory of the case. Thus, we do not find that the trial court's ruling on the Motion in Limine was an abuse of discretion that denied Appellant a meaningful opportunity to present a complete defense.

In his second proposition Appellant complains that the trial court erred in limiting defense counsel's ability to impeach two of the prosecution's witnesses. He alleges that this limitation violated his constitutional right to confront witnesses against him. While the Sixth Amendment guarantees a defendant the right to cross-examine witnesses, it also allows a trial judge wide latitude to place reasonable limits on cross-examination based upon a variety of concerns. *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986). This Court has noted that distinctions exist between the "core values of the confrontation rights and more peripheral concerns which remain within the ambit of the trial judge's discretion." *Thrasher v. State*, 2006 OK CR 15, ¶ 9, 134 P.3d 846, 849, quoting *United*

*States v. Degraffenried*, 339 F.3d 576, 581 (7th Cir.2003). A trial court's limit on cross-examination for impeachment purposes involves a peripheral concern. *Id.* This Court will review a trial judge's limitations on the extent of cross-examination for an abuse of discretion and where limitations directly implicate the Sixth Amendment right of confrontation, we review the limitation *de novo*. *Id.* at ¶ 8.

Appellant's first complaint is that the trial court improperly limited defense counsel's ability to cross-examine Stevenson for impeachment purposes. The record indicates that Stevenson did not want to testify at trial and was arrested as a material witness. Defense counsel stated that he intended to cross-examine Stevenson about why her demeanor had changed and why she was suddenly willing to testify. The trial court advised defense counsel that if he pursued this line of cross-examination, it would open the door to questions on re-direct through which the prosecution could elicit from Stevenson that she and her family had been threatened by defendant and his friends. We find that the trial court's ruling was not, as Appellant asserts, a limitation on his right to cross-examination. The trial court did not prohibit defense counsel from eliciting important and relevant impeachment evidence, but rather, simply advised defense counsel that this would open the door to less favorable evidence that could be elicited from this same witness by the prosecution.

Appellant next complains that he was denied his constitutional right to confrontation when defense counsel sought to ask Gatewood about a prior

juvenile conviction for concealing stolen property and was precluded from doing so by the trial court. Appellant acknowledges that while evidence of juvenile adjudications is not admissible under 12 O.S.2001, § 2609(D), this section includes an exception to this general rule which provides:

The court in a criminal case may, however, allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

Given the fact that the jury was well aware of Gatewood's involvement in the present case as well as the fact that he entered a guilty plea to a significantly lesser crime with the agreement that he would testify against Appellant, it is clear that his juvenile adjudication for concealing stolen property was not the only means by which defense counsel could call into question the veracity of this witness. Evidence of this prior juvenile adjudication was not necessary for a fair determination of the issue of guilt or innocence and thus, was not improperly excluded.

The evidentiary rulings at issue in this proposition dealt with the peripheral concerns of witness impeachment and we find no abuse of discretion in the trial court's rulings. Limits placed on cross-examination by the trial court were not unreasonable and Appellant was not denied his constitutional right to confront witnesses against him.

In his third proposition, Appellant alleges that his Fifth Amendment right to counsel was violated by the trial court's admission into evidence of his custodial statements. Prior to trial, defense counsel filed a Motion to Suppress

the statements made by Appellant during the custodial interrogation. After a *Jackson v. Denno*<sup>2</sup> hearing, the trial court ruled that the statements made by Appellant after he had been apprised of his *Miranda* rights were voluntarily made and therefore admissible. On appeal, Appellant complains that the trial court's ruling was in error because the statements admitted were made after he had invoked his right to counsel. Upon consideration of the trial court's ruling on Appellant's Motion to Suppress, this Court will conduct a de novo review of the record to determine whether Appellant sufficiently invoked his right to counsel. *Thrasher*, 2006 OK CR 15 at ¶ 12, 134 P.3d at 850.

A defendant in custody who has invoked his right to counsel pursuant to *Miranda v. Arizona*,<sup>3</sup> may not be interrogated further by authorities unless a lawyer is made available or the suspect reinitiates conversation. *Davis v. United States*, 512 U.S. 452, 458, 114 S.Ct. 2350, 2354-55, 129 L.Ed.2d 362 (1994). This Court, however, has noted that, "[t]he Fifth Amendment right to have counsel present during custodial interrogation is not invoked unless a suspect clearly and unambiguously asserts it." *Warner*, 2006 OK CR 40 at ¶ 58, 144 P.3d at 866. Further, Appellant's failure to meet the requisite level of clarity does not require the officers stop the interview. *Thrasher*, 2006 OK CR 15 at ¶ 13, 134 P.3d at 850.

The videotape of the interview at issue reflects that after detectives advised Appellant that he could have a lawyer present with him during the

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<sup>2</sup> 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

<sup>3</sup> 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

interview, Appellant asked if he could have a lawyer “right now.” Detectives responded that he could not – he would have to wait until a court appointed one or he could hire one. Appellant was concerned that the wait would “stretch” him out. He responded, “to hell with an attorney” and he proceeded to talk to the detectives. This exchange does not, as Appellant asserts, reflect an unequivocal assertion of the right to counsel. It reflects an inquiry about the availability of counsel followed by a clear indication by the Appellant that he desired to proceed with the interview without counsel present. Given this exchange along with the whole of the testimony at the *Jackson v. Denno* hearing, we find that the Appellant did not sufficiently invoke his right to counsel and the trial court did not err in finding that his custodial statements were made knowingly and voluntarily. Accordingly, the trial court did not err in denying Appellant’s Motion to Suppress.

Appellant’s fourth proposition of error also concerns the custodial interrogation. He argues in this proposition that because he was not advised at time of his arrest that a murder charge had already been filed, he did not meaningfully waive his Sixth Amendment right to counsel.

“A defendant’s Sixth Amendment right to counsel attaches when formal judicial proceedings, such as a formal charge, preliminary hearing, indictment, information, or arraignment, have been initiated against him.” *United States v. Toles*, 297 F.3d 959, 965 (10<sup>th</sup> Cir.2002). See also *United States v. Gouveia*, 467 U.S. 180, 187-88, 104 S.Ct. 2292, 2297, 81 L.Ed.2d 146 (1984). The

United States Supreme Court has held with regard to the waiver of the Sixth Amendment right to counsel that:

A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

*Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). In *Patterson v. Illinois*, 487 U.S. 285, 296, 108 S.Ct. 2389, 2397, 101 L.Ed.2d 261 (1988) (citation omitted), the United States Supreme Court held that, “[a]s a general matter, then, an accused who is admonished with the warnings prescribed by this Court in *Miranda* has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one.” As the Court pragmatically stated, “whatever warnings suffice for *Miranda*’s purposes will also be sufficient in the context of postindictment questioning.” *Id.* at 298. Clearly the same would hold true for preindictment questioning as well, as the importance of counsel at this stage of the proceedings is much the same.

While we agree with Appellant that the Sixth Amendment right to counsel attaches with the filing of an Information formally charging an individual with the commission of a crime, we do not agree that the failure to advise Appellant that an Information had been filed rendered his waiver of counsel invalid. This is true, in part, because the Information that had been filed at the time of the

custodial interrogation did not charge Appellant but rather charged Randall Davis and three unknown black males. Appellant was not charged by name until the Amended Information was filed on December 8, 2003. This was four days after detectives had interrogated him.

Even if, however, the Information filed at the time of Appellant's custodial interrogation can be found to have been sufficient to charge him, we would find that Appellant knowingly and voluntarily waived his Sixth Amendment right to counsel. As discussed above, detectives advised Appellant that he was under arrest for murder and he was fully advised of his rights under *Miranda* including his right to counsel and the consequences of abandonment of this right. Accordingly, he was advised of the sum and substance of his Sixth Amendment right to counsel and he knowingly and voluntarily waived the same.

Appellant alleges in his fifth proposition that the evidence presented at trial was insufficient to support his conviction for First Degree Felony Murder. This Court reviews challenges to the sufficiency of the evidence in the light most favorable to the State and will not disturb the verdict if any rational trier of fact could have found the essential elements of the crime charged to exist beyond a reasonable doubt.<sup>4</sup> *Head v. State*, 2006 OK CR 44, ¶ 6, 146 P.3d 1141, 1144. *See also Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202,

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<sup>4</sup> Contrary to Appellant's assertion, this Court does not utilize the "reasonable hypothesis" test in cases where the evidence presented was wholly circumstantial. In *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559, we adopted a unified standard of review for direct and circumstantial evidence in claims of insufficient evidence.

203-04. Further, we will accept all reasonable inferences and credibility choices that tend to support the verdict. *Coddington v. State*, 2006 OK CR 34, ¶ 70, 142 P.3d 437, 456.

Appellant first complains that the evidence was insufficient to support his conviction because the State failed to prove that he fired the shots that killed McQuin. It is true that no one saw Appellant kill McQuin and that the murder weapon was never recovered. However, there was sufficient evidence to show that Appellant was a participant in the attempted robbery. Evidence was introduced that Appellant and Gatewood each had a gun when they forced McQuin out of the house and that shortly after they went outside, McQuin yelled for Stevenson to bring him his keys and then gunshots were heard. Although there is no evidence that Appellant fired the fatal shots, there was sufficient evidence to prove that he aided and abetted in the commission of the attempted robbery and, therefore, under the provisions of 21 O.S.2001, § 701.7(B), was properly found to be guilty of First Degree Felony Murder. See *McDonald v. State*, 1984 OK CR 31, ¶ 5, 674 P.2d 1154, 1155-56.

Appellant also complains that the evidence was insufficient because Gatewood's testimony was not sufficiently corroborated. "A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." 22 O.S.2001, § 742. Rather, accomplice testimony must be corroborated with evidence, which

standing alone tends to link the defendant to the commission of the crime charged. *Pink v. State*, 2004 OK CR 37, ¶ 15, 104 P.3d 584, 590. An accomplice's testimony need not be corroborated in all material respects but requires "at least one material fact of independent evidence which tends to connect the defendant with the commission of the crime." *Cummings v. State*, 1998 OK CR 45, ¶ 20, 968 P.2d 821, 830. "Further, circumstantial evidence can be adequate to corroborate the accomplice's testimony." *Id.*

It is clear that Gatewood was an accomplice as he was charged with and bound over for the same crime for which Appellant was tried. *See Anderson v. State*, 1999 OK CR 44, ¶ 23, 992 P.2d 409, 418. Gatewood testified that Appellant had a gun the night of the killing and that he heard some talk about keys before the shots were fired. He testified that although he did not see who shot the victim, he assumed that it was Appellant. Stevenson testified that Appellant and Gatewood forced McQuin out of the house at gunpoint and that they continued to discuss the car keys while outside before McQuin was shot. Although Stevenson's testimony differed from Gatewood's on several points as he denied any involvement in the attempted robbery or the killing, it did provide independent evidence as to at least one material fact tending to connect Appellant with the commission of the crime. As discussed above, that was all that was necessary to adequately corroborate Gatewood's testimony.

Finally, Appellant complains that the State presented insufficient evidence to prove that he was committing attempted robbery when McQuin was shot. The record reflects otherwise. Testimony at trial indicated that when

Davis and McQuin went into the living room, Appellant and Gatewood pulled their guns on McQuin and demanded his car keys. When McQuin responded that his keys were outside the men forced him to go outside. Stevenson could hear the men outside and believed that they were still talking about the car keys. She heard McQuin tell them that the keys were in the house and he yelled, "Baby, give them the keys."<sup>5</sup> Soon thereafter, she heard the gunshots that killed McQuin. This was sufficient evidence from which the jury could have found beyond a reasonable doubt that Appellant was wrongfully attempting to take the victim's car keys from him by force through use of a dangerous weapon.

In light of the foregoing discussion, we find that evidence was sufficient to support the finding by a rational trier of fact that each of the essential elements of the crime charged existed beyond a reasonable doubt. Appellant's fifth proposition is denied.

In his sixth proposition Appellant complains of several errors affecting his sentencing. He first alleges that the trial court erred in bifurcating his trial. The record reflects that after the jury had deliberated for about an hour and fifteen minutes, defense counsel realized and brought to the attention of the trial court that it was error to bifurcate the trial. After extensive discussion, the trial court overruled defense counsel's objection and in a second stage proceeding the State was allowed to present evidence of Appellant's prior

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<sup>5</sup> Ashley Tubbs also testified that she heard McQuin yell, "Baby, give them my keys."

convictions. On appeal, Appellant argues that the trial court's ruling was in error.

Appellant is correct. A bifurcated proceeding is not authorized in First Degree Murder trials where the State has not filed a Bill of Particulars seeking the death penalty except in cases where the State has charged the defendant additionally with other crimes that are subject to enhancement by evidence of former convictions.<sup>6</sup> See *Carter v. State*, 2006 OK CR 42, ¶ 2, 147 P.3d 243, 244. See also *McCormick v. State*, 1993 OK CR 6, ¶¶ 36-42, 845 P.2d 896, 902-03.

Next, Appellant argues that the trial court erred in not instructing the jury that if sentenced to life, he would serve 85% of a life sentence before becoming eligible for parole. The record reflects that Appellant requested an instruction on the 85% Rule but the same was denied by the trial court. After the jury sent out a note during deliberations asking, "How long must you serve before getting parolled [sic] on a life sentence?", defense counsel re-urged its request for an 85% Rule instruction which was again denied. The trial court responded, instead, that the jury had all of the law and evidence necessary for their consideration. Appellant argues on appeal that the trial court's ruling was in error.

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<sup>6</sup> In its Reply Brief, the State has noted that this Court's opinion in *Carter* seems to hold that, "in the event that other charges are filed besides a First-Degree Murder charge, a bifurcated proceeding is apparently allowable." This is true. However, we clarify that only the counts properly subject to enhancement, may be bifurcated. In such a case, the jury is required to decide both guilt/innocence and punishment as to the First Degree Murder charge in the first stage of the trial although, as to the offenses properly subject to enhancement, it will decide guilt/innocence in the first stage and punishment in a second stage.

Appellant is, again, correct. In *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273, this Court granted relief in a case in which the trial court declined to give the jury an instruction on the 85% Rule after the jury had inquired about parole eligibility and the defense counsel specifically requested that they be so instructed.<sup>7</sup> As in the present case, the jury in *Anderson* wanted to know how much time would be served on a life sentence. The Court held:

Since jurors are likely to assume that defendants would become parole eligible at a much earlier point in time, explaining the 85% Rule will avoid unnecessary and unfair prejudice to the defendant—due to juries “rounding up” their sentences, in an attempt to account for their uninformed guesses about the impact of parole. Thus instructing upon the 85% Rule will actually discourage jury speculation, while still respecting the separation between the judicial and executive branches.

*Id.* at ¶ 23. In *Anderson*, the trial court’s failure to instruct accordingly was error.<sup>8</sup> We find the same to be true in the present case.

Finally, Appellant argues that the State improperly introduced evidence of two separate counts from the same conviction in violation of the statutory prohibition against the introduction of transactional priors for purpose of enhancement. 21 O.S.2001, § 51.1(B). We need not, however, discuss the merits of this argument in light of the discussion above wherein we held that bifurcation of Appellant’s trial was error. Under this ruling, evidence of

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<sup>7</sup> In *Anderson* this Court stated that, “[a] trial court’s failure to instruct on the 85% Rule in cases before this decision will not be grounds for reversal.” *Anderson*, 2006 OK CR 6 at ¶ 25. This limitation, however, was subsequently modified to include applying the *Anderson* ruling in cases “pending on direct review at the time *Anderson* was decided to determine whether relief in the form of modification or re-sentencing [is] warranted.” *Carter*, 2006 OK CR 42 at ¶ 4.

<sup>8</sup> The Court concluded that the determination of the application of the 85% Rule to a life sentence would currently be calculated based upon a sentence of 45 years. *Id.* at ¶ 24.

Appellant's prior felony convictions – whether two or three – was inadmissible.

We find that the sentencing errors discussed above require relief. The unauthorized bifurcation of Appellant's trial allowed the jury to hear inadmissible evidence of Appellant's prior convictions. Even with this information, the jury expressed confusion and concern about the length of time Appellant would serve on a life sentence. These errors, considered cumulatively, under the circumstances of this case, warrant modification of Appellant's sentence to life imprisonment with the possibility of parole.

In his seventh proposition Appellant alleges that several failings of his defense counsel denied him his Sixth Amendment right to the effective assistance of counsel. To prevail on an ineffective assistance claim, a defendant must show to a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 698 (1984).

Appellant first claims that defense counsel was ineffective for failing to elicit testimony at trial from the detective in charge of the crime scene that the victim's car keys were found in his pants pocket.<sup>9</sup> Appellant alleges that this information was vital to his defense, as it would have undermined the State's

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<sup>9</sup> Along with his appellate brief, Appellant filed a motion to supplement the record and requested an evidentiary hearing on Sixth Amendment claims pursuant to Rule 3.11(B)(3)(b), *Rules of the Court of Criminal Appeals*, 22 O.S.2001, Ch. 18, App. After thoroughly reviewing the motion along with the attached documents, we find the application fails to set forth the "clear and convincing evidence" necessary under Rule 3.11(B)(3)(b)(i) to demonstrate a strong possibility trial counsel was ineffective in failing to elicit evidence at issue. Therefore, Appellant's request is DENIED.

claim that the car keys were the subjects of the attempted robbery. This evidence does not, as Appellant asserts, impeach the testimony of Stevenson and Tubbs that the victim yelled into the house for Stevenson to bring him the keys. McQuin may have forgotten that he had the keys in his pocket or may have chosen for some unknown reason not to give them to his attackers to his ultimate detriment. We do not find that there is a reasonable probability that, but for counsel's alleged unprofessional error in not eliciting this evidence of dubious significance, the result of the proceeding would have been different.

Tubbs testified on direct examination that when Davis and McQuin came out of the back bedroom and were walking to the front of the house, she heard Davis ask McQuin if he had any "greens." Appellant argues that this was "presumably" a reference to marijuana and it opened the door to further inquiry about drugs. Thus, he claims that defense counsel was ineffective for failing to ask that the trial court reconsider its ruling on the Motion in Limine regarding the drugs and money found in McQuin's pocket. The record reflects, however, that when the prosecutor asked Tubbs what "greens" were, she replied that she did not know. Thus, Appellant's assertion that this was a reference to drugs is unsubstantiated by the record and counsel cannot be found ineffective for failing to re-urge the Motion in Limine.

Finally, Appellant argues that defense counsel was ineffective for failing to object to the bifurcation of the trial in a more timely fashion and for failing to object to the introduction of transactional prior convictions. As we have

remedied the sentencing errors with modification of Appellant's sentence in Proposition VI, this argument need not be addressed.

In his final proposition of error Appellant claims that the trial errors, when considered cumulatively, warrant a new trial or sentence modification. This Court has recognized that when there are "numerous irregularities during the course of [a] trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors was to deny the defendant a fair trial." *DeRosa v. State*, 2004 OK CR 19, ¶ 100, 89 P.3d 1124, 1157, quoting *Lewis v. State*, 1998 OK CR 24, ¶ 63, 970 P.2d 1158, 1176. Upon review of Appellant's claims for relief and the record in this case we conclude that although his trial was not error free, any errors and irregularities, even when considered in the aggregate, do not require reversal because they did not render his trial fundamentally unfair or taint the jury's verdict. We did find, however, in Proposition VI, that errors affecting sentencing require Appellant's sentence be modified from life without the possibility of parole to life imprisonment.

### **DECISION**

The Judgment of the district court is **AFFIRMED**. Appellant's Sentence is **MODIFIED** to life imprisonment. 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.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY  
THE HONORABLE TAMMY BASS-JONES, DISTRICT JUDGE

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**OPINION BY C. JOHNSON, V.P.J.**

LUMPKIN, P.J.: CONCURS IN RESULTS  
CHAPEL, J.: CONCURS  
A. JOHNSON, J.: CONCURS  
LEWIS, J.: CONCURS