IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

MARVIN ROYSTON WHITE,	)	
	)	
Appellant,	)	
	)	NOT FOR PUBLICATION
- vs -	)	
	)	Case No. F-2005-110
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

A. JOHNSON, JUDGE:

Marvin Royston White was tried by jury and found guilty on three counts of first degree manslaughter (misdemeanor DUI) in violation of 21 O.S.2001 § 711, in Case No. CF-2003-433, in the District Court of Grady County. The jury set punishment at twenty years on each count (O.R. 229-230). Associate District Judge John E. Herndon sentenced White in accordance with the jury's verdict and ordered each sentence to run consecutively for a total term of imprisonment of sixty years. White appeals this judgment and sentence raising fourteen propositions of error. These fourteen propositions include seven claims of ineffective assistance of trial counsel, five claims of trial error, one claim of sentencing error, and one claim of cumulative error. White's specific claims consist of the following.

Ineffective Assistance of Counsel

1. Trial counsel was ineffective for failing to request a jury instruction on the defense of involuntary intoxication.

2. Trial counsel was ineffective because his strategy was nothing more than concession of guilt.

3. Trial counsel was ineffective for failing to conduct a meaningful cross-examination of expert witnesses.

4. Trial counsel was ineffective for violating attorney-client privilege by disclosing blood alcohol test results obtained through independent testing conducted by defense retained expert and by failing to conduct meaningful cross-examination of its own expert when that expert was called as witness by State.

5. Trial counsel was ineffective for failing to argue that suppression of blood alcohol test result was warranted because it was drawn more than two hours after fatal crash.

6. Trial counsel was ineffective for failing to object to irrelevant and prejudicial other crimes evidence while simultaneously failing to present good character evidence.

7. Trial counsel was ineffective for failing to poll the jury or move for mistrial after in-court outbursts by victims' family or after "banner" incident outside courthouse.

Trial Error

8. The trial court failed to instruct the jury *sua sponte* on defense of involuntary intoxication.

9. The result of the blood alcohol test blood draw should have been suppressed.

10. The trial court erred by denying a jury instruction on lack of seatbelt use by victims.

11. The trial court erred by failing to instruct the jury that the evidence had to exclude every reasonable hypothesis except that of guilt.

12. The trial court erred by allowing introduction of gruesome and cumulative photographs of victims.

Sentencing Error

13. Three consecutive twenty year sentences are excessive.

Other

14. Cumulative error deprived him of a fair trial.

In connection with his ineffective assistance of counsel claims, White seeks a remand for an evidentiary hearing under Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App.(2001).

After considering the arguments of counsel and the record of the proceedings below on the issue of the involuntary intoxication defense, we find that White's convictions must be reversed and the case remanded for a new trial. Because we reverse and remand for retrial on the involuntary intoxication claim, White's remaining claims of trial and sentencing error are moot, and will not be addressed. White's claims of ineffective assistance of trial counsel are also rendered moot by this decision. For that reason his Rule 3.11 application for an evidentiary hearing is denied.

FACTS

White was the driver of a vehicle involved in a collision that caused the deaths of three people near Tuttle, Oklahoma on Sunday November 23, 2003. At the time of the collision, White was driving home from a weekend hunting trip. The results of blood alcohol tests showed White's blood alcohol level to be between 0.08% and 0.09%. At trial, there was conflicting witness testimony as to whether White smelled of alcohol after the crash. The State introduced evidence that in the two days prior to the fatal crash, White had consumed approximately six cans of 3.2% beer.

White testified that while he had consumed three to four beers the afternoon of the day before the crash, and a dose of Equate Nite Time cold medicine that night, the only alcohol he ingested on the day of the crash consisted of cough syrup that he did not know at the time contained alcohol. White also introduced evidence that he suffered from a medical condition called sleep apnea[1] that caused him difficulty in staying awake while driving. White denied driving under the influence of alcohol at the time of the crash and asserted instead that he must have fallen asleep at the wheel. White explained he had not slept much during the two day trip and explained further that sleep apnea had caused him to fall asleep while driving on other occasions.

As part of his defense, White offered the testimony of Dr. Mark Gilchrist, the physician who treated him for sleep apnea. Dr. Gilchrist testified that White had suffered from severe sleep apnea since at least 1994 and during a sleep study in 2002, had complained of drowsiness while driving. Dr. Gilchrist explained that the sleep deprivation caused by sleep apnea and its resulting daytime drowsiness poses a hazard to driving. He also stated that he advises his sleep apnea patients not to drive or operate heavy machinery. Dr. Gilchrist explained further that alcohol, even in moderate levels, increases the severity of sleep apnea, and for that reason, persons with sleep apnea should not use alcohol.

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[1] Sleep apnea is defined by one medical reference source as "brief periods of recurrent cessation of breathing during sleep that is caused by obstruction of the airway or a disturbance in the brain's respiratory center and is associated especially with excessive daytime sleepiness." *Medline Plus Medical Dictionary*, http://www.nlm.nih.gov/medlineplus/mplusdictionary.html at http://www2.merriam-webster.com/cgi-bin/mwmednlm?book=Medical&va=sleep%20apnea (last visited March 7, 2007).

DISCUSSION

A. Standard of Review

White contends that the trial court judge erred by not instructing the jury *sua sponte* on the defense of involuntary intoxication. This Court normally reviews a trial court's choice of jury instructions for an abuse of discretion. *Cipriano v. State*, 2001 OK CR 25, ¶ 14, 32 P.3d 869, 873. In this instance, however, White neither requested the instruction nor objected to its absence. His claim, therefore, is reviewed only for plain error. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. To establish plain error, an appellant must show: (1) the existence of an actual error (i.e., injury to a substantial right resulting from deviation from a legal rule); and (2) harm or prejudice flowing from the error. *Simpson v. State*, 1994 OK CR 40, ¶¶ 10, 17, 876 P.2d 690, 694, 697. Plain error does not rise to the level of reversible error, however, unless the appellant further demonstrates that the error had a substantial influence on the outcome of the proceeding. *Simpson*, 1994 OK CR 40, ¶ 16, 876 P.2d 690, 697.

B. Analysis

(1) Error

A defendant is entitled to an instruction on any theory of the defense supported by the evidence as long as that theory is tenable as a matter of law. *Cipriano*, 2001 OK CR 25, ¶ 30, 32 P.3d at 876. A jury instruction on a defense should be given when sufficient prima facie evidence is presented to meet the legal criteria for the defense. *See, Jackson v. State*, 1998 OK CR 39, ¶

65, 964 P.2d 875, 892 (*per curiam*)("[w]hen sufficient prima facie evidence is presented which meets the legal criteria for the defense of voluntary intoxication, or any other defense, an instruction should be given. In the context of a defense jury instruction, sufficient means "that, standing alone, there is prima facie evidence of the defense, nothing more." *Id.*, ¶ 5, n.5, 891, n.5. "The evidence of the defense may come from any source and should not be weighed by the trial court." *Id.* "The trial court should leave the weighing of the evidence to the finders of fact." *Id.* "Even if the defendant's evidence is discredited, and wholly self-serving, the jury must be advised of the defendant's theory of defense where there is evidence to support it." *Id.*, ¶ 63, 891. *See also Holt v. State*, 1995 OK CR 2, ¶ 12, 278 P.2d 855, 857.

White contends that considering the evidence produced at his trial in connection with the definition of voluntary intoxication given in the Oklahoma Uniform Jury Instructions, the trial court judge on his own initiative should have instructed the jury on the involuntary intoxication defense. The State argues on the other hand that the evidence was insufficient to support giving that instruction because White's theory of the case was that he was not intoxicated at the time of the crash and that the crash was an accident caused by his sleep apnea.

The jury instruction at issue here, OUJI-CR(2d) 8-42, defines involuntary intoxication as follows:

> Involuntary intoxication is a state of intoxication that has been induced (under duress on the part of another)/(by force of another)/(**by ignorance of the**

> **character of medication or other substances taken, whether the ignorance results from the defendant's own innocent mistake** or from fraud/trickery of another).

(Emphasis added). The Committee Comments to this instruction state that where evidence of intoxication has been introduced, the defendant must produce sufficient evidence to raise a reasonable doubt as to the voluntariness of the intoxication in order to invoke the defense. *Committee Comments*, OUJI-CR 2nd (2006) 8-44 (citing *Wooldridge v. State*, 1990 OK CR 77, ¶ 20, 801 P.2d 729, 734; *Grayson v. State*, 1984 OK CR 87, ¶ 7, 687 P.2d 747, 749).

Here, the State introduced evidence of intoxication (i.e., blood alcohol test results of .08% and .09%, as well as some testimony that White smelled of alcohol at the crash scene). The State also introduced evidence that in the two days prior to the crash White had consumed approximately six cans of 3.2% beer. There was no evidence, however, that on the day of the crash White had consumed any alcohol other that contained in over-the-counter cough/cold medications.

White's defense was that he was susceptible to falling asleep while driving because he suffered from severe sleep apnea, a condition made worse by even moderate amounts of alcohol. White testified that while he had consumed three to four beers the afternoon of the day before the crash, the only alcohol he ingested on the day of the crash consisted of cough syrup that he did not know contained alcohol. Specifically, White testified that at approximately 10:00 a.m. on the day of the collision he took a drink of Vicks Formula 44 and then at approximately 1:00-1:30 p.m. (thirty minutes to an

hour before the collision), he finished off the bottle. White stated that he did not read the label on the cough syrup warning that it contained 10% alcohol and that he was later shocked that the results of the post-crash blood test indicated that he had alcohol in his system. According to White, it was only after the return of the blood alcohol test result that he realized that the alcohol must have come from the cough syrup. In relevant parts, White testified as follows:

> Q. Okay. Do you believe, Royston, that you were ever under the influence of alcohol Sunday [the day of crash]?
>
> A. No, sir. No, sir. I had – Saturday was the only – them three or four beers, four beers. That's the only time I had ever drank anything until I found out that stuff there has some kind of alcohol content, and I had been swigging on that (indicating) that day.
>
> Q. You had been swigging on that for about two weeks, hadn't you? Wasn't that your testimony?
>
> A. Yeah, but probably the last time I took that was – I finished off the last of this bottle like this (indicating) was after I – right after I left Dusty's coming home.

(Tr. 3 at 541). Under cross-examination, White testified as follows:

> Q. Are you familiar with and did you read the conditions on what is introduced as Defendant's Exhibit No. 3 [Vicks Formula 44 packaging]? Because you were saying you drank four fluid ounces [over twenty-four hours] and it says on the front of it very clearly, alcohol ten percent?
>
> A. No, sir, I didn't read it.
>
> Q. You did not?
>
> A. No, sir.

. . .

> Q. So today in front of this jury right now, and we're talking about an issue of respect, respect for the jury and the family and otherwise, do you contest the fact that your blood alcohol content on Sunday, three hours after the accident, was .09 or .08 depending on which test you look at?
>
> A. That's the way they say it is.
>
> Q. You do not contest that result, do you?
>
> A. I question – I've always questioned how it would be that high. I'm not drinking –
>
> Q. But you did not – can you contest that result – you, personally, contest that result?
>
> A. I guess – I guess I'm lost for what you mean. All I know is I have always wondered how my alcohol – how alcohol content could be that high and I had nothing to drink, and the only thing that I had to drink that I later found out had alcohol in it was this stuff here.

(Tr. 3 at 547, 549-550).

White's wife Tammy testified that in the two weeks prior to the hunting trip, White had been suffering from a severe cold and that she purchased and sent him off with a bottle of Equate Nite Time cold medicine and a bottle of Vicks Formula 44. The defense introduced sample packages of Equate Nite Time and Vicks Formula 44 packages through Tammy White. Tammy White testified that the samples were identical to those she sent with her husband on his trip.

White's testimony, corroborated to a certain extent by the testimony of his wife, and the introduction of the cold medication exemplars, shows him

asserting to the jury that the only explanation for his .08%-.09% blood alcohol level on the day of the crash was the result of his ingestion of a medication of whose alcohol-based character he was ignorant. Meager as it is, this is at least prima facie evidence supporting the involuntary intoxication defense. White was therefore entitled to an instruction on involuntary intoxication.

(2) Violation of a Substantial Right

An error is reversible as plain error, however, only if it goes to the foundation of the case or deprives a defendant of a right essential to his case. *Simpson*, 1994 OK CR 40, ¶ 23, 876 P.2d 690, 698. With regard to jury instructions, this Court has held that trial courts are charged with the important duty "to instruct the jury on the salient features of the law raised by the evidence with or without a request." *Hogan v. State*, 2006 OK CR 19, ¶ 39, 139 P.3d 907, 923, citing *inter alia*, *Atterberry v. State*, 1986 OK CR 186, ¶ 8, 731 P.2d 420, 422). In the absence of a request, a trial court's failure to give an instruction on the defendant's theory of defense is not reversible error unless it is of such fundamental nature as to deny the defendant a fair and impartial trial. *Snyder v. State*, 1987 OK CR 121, ¶ 7, 738 P.2d 548, 550. A trial court's failure to instruct on the defendant's theory of the case deprives him of a "valuable right" because "[i]t cannot be said that a fair and impartial trial has been had unless the jury is properly instructed as to the law of the case." *Williams v. State*, 1976 OK CR 225, ¶ 16, 554 P.2d 842, 847 (quoting *Crossett v. State*, 252 P.2d 150, 164, 96 Okla.Crim.App. 209, 222 (1952)). In the

absence of a specific request, "where the instructions do not fully present all the material issues raised, the judgment of conviction will be set aside." *Id.*

In this instance, White was charged with the offense of first degree misdemeanor manslaughter with the underlying misdemeanor being driving a motor vehicle under the influence of alcohol. White's jury was instructed on the "driving under the influence" element as follows:

> If you find that a chemical analysis of the defendant's blood was performed, then the result of this analysis may be considered by you as to the issue of whether the defendant was under the influence of alcohol.
>
> If you are convinced that the amount of alcohol, by weight or volume, in the defendant's blood was eight-hundredths of one percent (0.08%) or greater, then you may find the defendant to have been under the influence of alcohol. If, however, after considering the [blood alcohol] chemical analysis together with all the other evidence in the case, you entertain a reasonable doubt as to whether the defendant was under the influence, then you should find him not to have been under the influence of alcohol

(O.R. 208 (Instruction No. 8)). Despite the fact that evidence had been introduced indicating at least facially that White's blood alcohol level was the result of unknowing ingestion of an alcohol-containing over-the-counter cold medication, this instruction cabined the jury's inquiry solely into a determination of whether White was under the influence of alcohol. Without an additional instruction on the defense of involuntary intoxication, the jury was not given the option to find that White's blood alcohol level, and thus his driving under the influence, was excusable, a possibility with some support in the evidence presented. Given the fact that White essentially conceded he was

driving under the influence (i.e., by admitting to drinking alcohol-containing cough syrup prior to the collision and conceding the 0.08%-0.09% blood alcohol level) but only attempted to negate the element as excusable through ignorance of the alcohol-based character of the cough syrup he ingested, White's defense was substantially impaired by limiting the jury's fact-finding to a determination of whether he was under the influence of alcohol, but not permitting it to determine further on the basis of the evidence whether that condition was excusable.

In this instance, with prima facie evidence of the defense of involuntary intoxication before it, the trial court was duty-bound to instruct the jury on the defense of involuntary intoxication. By not instructing the jury on this point, the judge erroneously denied White his due process right of placing his defense theory before the jury for their decision. This is a violation of a substantial right and is therefore plain error.

(3) Prejudice or Harm

Nevertheless, despite finding plain error, this Court will reverse only if the error had a substantial influence on the outcome or leaves the Court in grave doubt as to whether the error had such effect. *Simpson v. State*, 1994 OK CR 40, ¶ 36, 876 P.2d 690, 702. "An error which has no bearing on the outcome of the trial will not mandate reversal. *Id.* ¶ 13, 695. In cases where this Court has identified instances of jury instruction error, it has often found such errors to be harmless or non-prejudicial (i.e., not outcome determinative) if the evidence of the defendant's guilt was otherwise overwhelming. *See e.g.*,

Cummings v. State, 1998 OK CR 45, ¶ 24, 968 P.2d 821, 831 (finding failure to provide accomplice testimony instruction harmless where evidence of guilt was overwhelming); *Wade v. State*, 1981 OK CR 14, ¶ 12, 624 P.2d 86, 90 (holding that where defendant failed to request accomplice testimony instruction, trial court's error in failing to give it was harmless in view of overwhelming evidence of guilt); *Fowler v. State*, 1989 OK CR 52, ¶ 37, 779 P.2d 580, 587 (holding that trial court's error in failing to use instruction specifically limiting jury's consideration of confession only to person confessing was harmless in light of overwhelming evidence of guilt). White's case is not of this type.

In *Williams v. State*, 1976 OK CR 225, 554 P.2d 842, the defendant was found guilty of negligent homicide for driving a vehicle in reckless disregard for the safety of others. On appeal, this Court found that despite the defendant's failure to clearly articulate a request for an instruction on his defense that his actions were not the proximate cause of the victim's death, the trial court's failure to recognize the issue as properly raised and then instruct the jury accordingly constituted prejudicial error. *Id.* ¶¶ 13-17, at 847. Key to the Court's decision in *Williams* was its reasoning that where the instructions given to the jury do not present all the material issues raised, a defendant is denied a fair and impartial trial. *Id.*

Given the nature of the evidence in this case (e.g., conflicting testimony on the smell of alcohol; no evidence of alcohol consumption within twenty-four hours of crash other than cold medication; and blood alcohol levels of .08%-.09% drawn from the same sample but analyzed by different labs), this is not a

case in which this Court can definitively conclude that the evidence of guilt was overwhelming. But even if the evidence of alcohol impairment was stronger, in this instance, it would not have been outcome determinative. This is because the question addressed by omitted instruction was not whether White was guilty of the alleged culpable conduct (i.e., driving under the influence of alcohol), but instead whether his conduct was excusable (i.e., whether he was involuntarily placed in an intoxicated condition by unknowingly ingesting an alcohol-containing medication). Thus, if the jury had been instructed on White's involuntary intoxication theory, it could have concluded that the conduct was excusable and thereby found him not guilty of the underlying misdemeanor of driving under the influence, even if it found the evidence of alcohol intoxication overwhelming. Because a properly instructed jury could have reached a verdict of acquittal regardless the weight of the evidence of guilty conduct, the trial court's failure to instruct the jury on the defense of involuntary intoxication was not harmless. This is reversible plain error.

DECISION

White's conviction is **REVERSED** and the case **REMANDED** for new trial. White's application for evidentiary hearing is **DENIED** as moot. Under Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18 App. (2005), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

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OPINION BY: A. JOHNSON, J.
LUMPKIN, P.J.: Dissent
C. JOHNSON, V.P.J.: Concur
CHAPEL, J.: Concur
LEWIS, J.: Dissent

RE

LUMPKIN, P.J.: DISSENTS

I must respectfully dissent to the Court's decision to reverse this case as the evidence does not support the giving of an instruction on involuntary intoxication. Involuntary intoxication is a complete defense where the defendant is so intoxicated that he is unable to distinguish between right and wrong, the same standard as applied in an insanity defense. *Jones v. State,* 1982 OK CR 112, ¶ 33, 648 P.2d 1251, 1258. An involuntary intoxication defense is available where the intoxication results from fraud, trickery or duress of another, accident or mistake on the defendant's part, a pathological condition or ignorance as to the effects of prescribed medication. *Id. See also Patton v. State,* 1998 OK CR 66, ¶ 56, 973 P.2d 270, 290. To invoke the defense of involuntary intoxication, the defendant must produce sufficient evidence to raise a reasonable doubt as to the voluntariness of his intoxication. *Patton,* 1998 OK CR 66, ¶ 56, 973 P.2d at 290. That was not done in this case.

Appellant's defense at trial that he was not intoxicated but asleep at the time of the crash is insufficient to warrant an instruction on involuntary intoxication. His alternate defense, that even if he was intoxicated, it was due to cough syrup he ingested is also insufficient to support an involuntary intoxication instruction because his claim that he did not know the cough syrup contained alcohol is not corroborated by any other evidence, he admitted to voluntarily ingesting the cough syrup, and the amount he claimed to have consumed was not shown to be sufficient to have resulted in his intoxication.

In addition, there is absolutely no evidence that at the time of the wreck he was unable to distinguish between right and wrong. Therefore, the evidence did not support even an inference of involuntary intoxication, and the trial court did not err in refusing to give *sua sponte* a jury instruction on involuntary intoxication.

This is a case of DUI Manslaughter. It is not a specific intent crime. The general intent is merely to drive a motor vehicle on a highway while under the influence of an intoxicating substance, which may render a person incapable of safely driving a vehicle. Then, as a result of driving in that condition, an accident involving the death of a person occurs. The facts of this case reveal that Appellant knowingly and voluntarily drove the vehicle that caused the accident involving death of three people while he was under the influence of an intoxicating substance. As the Committee comments to OUJI-CR(2d) 4-94 states, "the misdemeanor-manslaughter rule, like the felony-murder rule, requires no particular mental state on the part of the defendant except that which is required for conviction of the underlying misdemeanor". There is no doubt in this case regarding Appellants driving the vehicle while under the influence of an intoxicating substance. His consciousness of facts and ability to relate them regarding the day in question and the accident reveals he was not incapacitated to the extent he could not distinguish right from wrong. There is no plain error in this case and the judgment and sentence should be affirmed.

LEWIS, JUDGE, DISSENTS:

I respectfully dissent to the majority opinion in this case. I do not believe that Appellant presented sufficient prima facie evidence to warrant the involuntary intoxication defense instruction