

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DARRELL WILLIAMS,)
)
 Appellant,)
 vs.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. F-2012-951

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
APR 22 2014

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

SMITH, VICE PRESIDING JUDGE:

Darrell Williams was tried by jury and convicted of Count II, Sexual Battery in violation of 21 O.S.Supp.2010, § 1123(B); Count IV, Rape by Instrumentation in violation of 21 O.S.Supp.2009, §1111.1; and Count V, Rape by Instrumentation in violation of 21 O.S.Supp.2009, §1111.1, in the District Court of Payne County, Case No. CR-2011-75.¹ In accordance with the jury's recommendation the Honorable Phillip Corley sentenced Williams to one (1) year incarceration in jail on each count. The trial court suspended the sentences and ordered them to run concurrently. Williams appeals these convictions and sentences.

Williams raises seven propositions of error in support of his appeal:

- I. Jury deliberations were infected with prejudicial extraneous evidence denying the Defendant a fair trial, due process of law and the right to confront and cross-examine witnesses;
- II. Bailiffs statement to the jury that they must reach an unanimous verdict resulted in a coerced verdict and denied Mr. Williams a fair trial and

¹ Williams was acquitted of Count I and Count III, charges of rape by instrumentation against separate victims.

due process of law in violation of Oklahoma law and the United States and Oklahoma Constitutions [sic];

III.A suggestive and unnecessary identification procedure created a substantial risk of misidentification and violated Mr. Williams' due process rights under the federal and state constitutions;

IV. Defendant Williams was denied a fair trial when the State suppressed exculpatory and material evidence that would have impeached the testimony of TD and JB and changed the entire portrait of these witnesses [sic] testimony;

V. The District Court's failure to order disclosure of all psychological records obtained after trial and failure to order a new trial based on the non-disclosure records was error;

VI. Mr. Williams was denied effective assistance of counsel in his trial in violation of the Sixth, and Fourteenth Amendments; and

VII. The accumulation of errors deprived Appellant of a fair trial.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we find that the error raised in Proposition I requires reversal.

Williams claims that several jurors made unauthorized visits to the crime scene, and discussed their observations and opinions resulting from these visits, during deliberations. During deliberations, jurors should not be exposed to extraneous prejudicial information or improper outside influence. 12 O.S.2011, § 2606. Extraneous prejudicial information is that which is injected into the deliberation process from outside the trial framework. *Hawkins v. State*, 2002 OK CR 12, ¶ 45, 46 P.3d 139, 148; *Weatherly v. State*, 1987 OK CR 28, ¶ 13, 733 P.2d 1331, 1335. *Cf. Thompson v. Krantz*, 2006 OK CIV APP 60, ¶ 16, 137 P.3d 693, 697 (Oklahoma Supreme Court consistently upheld new trial where jurors considered extraneous evidence in deliberations); *Crane v. Nuttle*, 2005 OK CIV APP 73, ¶¶ 10-11, 121 P.3d 1124, 1126-27 (evidentiary hearing warranted where jurors visited the scene of the crime and used the information in deliberations).

Where misconduct occurs during deliberations, we will presume prejudice. *Wacoche v. State*, 1982 OK CR 55, ¶ 14, 644 P.2d 568, 572.

Williams filed a motion for new trial based in part on this issue. This Court remanded the case for an evidentiary hearing on August 28, 2013. We directed the trial court to consider one question relating to this issue: Whether any jurors made unauthorized visits to the scene of the crimes, and if so, whether they discussed those visits with other jurors during deliberations. The evidentiary hearing was held on September 23, 2013. The trial court completed the findings of fact and conclusions of law on October 15, 2013, and they were filed in this Court on October 18, 2013. On this issue, the trial court ruled:

This Court finds that several jurors made unauthorized visits by the scene of the crimes and that some of the jurors discussed the observations during deliberations.

We give the trial court's factual findings great deference, reviewing them for an abuse of discretion, but we will ultimately determine whether the newly-discovered evidence warrants a new trial. *Salazar v. State*, 2005 OK CR 24, ¶ 19 126 P.3d 625, 630; *Patterson v. State*, 2002 OK CR 18, ¶ 19, 45 P.3d 925, 930; *Glossip v. State*, 2001 OK CR 21, ¶ 33, 29 P.3d 597, 604-05. Where an issue is purely factual, we will defer to the trial court. *Young v. State*, 2000 OK CR 17, ¶ 109, 12 P.3d 20, 48.

The record supports the trial court's findings and conclusions on this question. Two jurors testified that they separately visited the scene of the crime, and other jurors' testimony suggested that more jurors did so. Four jurors

testified that the visits were discussed during deliberations. Testimony showed that discussion of the visits centered on the lighting at the scene and whether the victims could see well enough to identify Williams as the assailant. At least one juror described the lighting he saw and his own opinion based on his personal observations during deliberations, and the jury generally discussed some jurors' independent observations as well as the evidence presented at trial, in reaching their conclusions as to guilt and innocence.

The State does not contest the trial court's findings of fact, but argues that the error was harmless beyond a reasonable doubt. We do not agree. The lighting at the time of the crime was not only material, it was crucial to the State's claim that Williams was the perpetrator, and to Williams' claim that the victims' identification of him was a mistake. The record shows that, in deliberating Williams' guilt, jurors were exposed to and discussed several jurors' personal observations of the scene, made at various times of day and in violation of the trial court's specific instructions.

Insofar as the State's cited cases concern the issue of unauthorized jury site visits, they are distinguishable. In *Black v. State*, we found that an affidavit suggesting that a juror referred to personal experience with a crime scene during deliberations did not support a finding that jurors there relied on extraneous information, and thus did not warrant an evidentiary hearing. *Black v. State*, 2001 OK CR 5, ¶ 69 n.24, 21 P.3d 1047, 1071-72 n.24. In *Karr v. State*, 54 Okla.Crim. 231, 17 P.2d 992, 992 (Okla.Cr. 1933), we specifically found that "there was nothing about the premises that would throw any light on the

homicide” and thus the whole jury’s improper visit to the crime scene during deliberations was “immaterial”. Neither circumstance is present here.

The trial court’s factual findings are supported by evidence. *Wright*, 2001 OK CR 19, ¶ 35, 30 P.3d at 1156; *Glossip*, 2001 OK CR 21, ¶ 20, 29 P.3d at 602. Jurors were exposed to, and discussed, extraneous information on a material issue during deliberations. We cannot find that this error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

In Proposition II, Williams claims that, during deliberations, the bailiff made an unauthorized statement to jurors concerning a unanimous verdict, which affected some jurors’ verdicts. Williams filed a motion for new trial based in part on this issue. This Court remanded the case for an evidentiary hearing on August 28, 2013. We directed the trial court to consider one question relating to this issue: Whether, during jury deliberations, the Bailiff made any unauthorized comments to jurors regarding deliberations, and if so, whether those unauthorized comments affected any individual juror’s verdicts. The hearing was held on September 23, 2013. The trial court completed the findings of fact and conclusions of law on October 15, 2013, and they were filed in this Court on October 18, 2013. On this issue, the trial court ruled:

1. This Court finds that the Bailiff, Barbara Dungan, did not make a statement to jurors about unanimous verdicts during deliberations.
2. The Court finds there is discrepancy as to whether a statement was made by the bailiff about a unanimous verdict. However, if a statement was made, it would have been made prior to the jurors going into the jury room before beginning deliberations.

3. This Court believes even if a statement was made by the bailiff before deliberations that it did not affect individual juror's verdicts. The statements would have been the same or similar to this Court's last instructions to the jury. Therefore this Court finds that jurors Vijayakumar, Barnes and Nack changed their votes from not guilty to guilty because they thought they would have to continue to stay longer, would not be able to persuade the other jurors and they gave in.

The record only partly supports these findings and conclusions. The record does reflect a discrepancy in testimony as to whether the bailiff made a statement regarding a unanimous verdict; three jurors testified she did, one stated he was not in a position to hear any remarks, and the bailiff testified she did not. The record does not support the conclusion that, if any statement occurred, it was not made during deliberations. Two jurors testified that, as they entered the jury room to begin deliberations, and in response to a juror question, the bailiff said something about their being there until they reached a unanimous verdict. A third juror thought the remark might have been made later in deliberations. The fact that jurors may not have begun deliberations is not material. They had just been dismissed from the courtroom to begin deliberations and were on their way into the jury room. There is no "free zone" between the time jurors leave the courtroom and the time the door closes behind them, during which inappropriate comments will not count. *Johnson v. State*, 2004 OK CR 23, ¶¶ 18-19, 93 P.3d 41, 46-47. Under the legal standard set forth in *Johnson*, we cannot hold that during the interval between dismissal from court and the beginning of deliberations, a bailiff may conduct unauthorized communications with jurors regarding deliberations. The record shows that, for the purposes of improper

communication with jurors, any comment was made during deliberations. Thus, we would presume prejudice. *Wacoche*, 1982 OK CR 55, ¶ 14, 644 P.2d at 572.

Finally, the record does not completely support the third conclusion. Three jurors initially testified that the bailiff's comments affected their verdict on at least one count. When questioned by either the prosecutor or the trial court, two jurors testified they had, at least in part, changed their vote because they thought they would have to stay there longer. However, when asked that question by the trial court, juror Nack replied "Because I didn't feel like we had a choice. I felt like we all had to agree, yes." This is not a clear indication that Nack changed her vote because she felt like jurors would have to stay; in the context of her testimony, it appears to confirm her consistent claim that her vote was influenced by the bailiff's statement.

Given the resolution required by the error raised in Proposition I, we need not decide whether, on this record, any communication by the bailiff warrants relief. We encourage trial courts to caution bailiffs regarding any communication to jurors regarding the length and nature of their deliberations, at any time after jurors have been excused to deliberate.

Given our resolution of Proposition I, the remaining propositions are moot.

DECISION

The Judgment and Sentence of the District Court of Payne County is **REVERSED and REMANDED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2014), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF PAYNE COUNTY
THE HONORABLE PHILLIP CORLEY, DISTRICT JUDGE**

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OPINION BY: SMITH, V.P.J.

LEWIS, P.J.: CONCUR
LUMPKIN, J.: CONCUR IN PART/DISSENT IN PART
C. JOHNSON, J.: CONCUR
A. JOHNSON, J.: CONCUR

LUMPKIN, JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the Court's conclusion that the unauthorized visit to the crime scene by several of the jurors was error. However, I dissent to reversing the case on that ground as the record shows the error was harmless beyond a reasonable doubt. The jurors testified that their visit to the scene did not influence their verdict and that their verdict was based upon evidence presented during trial. ¹

Further, while the opinion says the lighting at the time of the crime was material, this was not a case of some unknown person approaching the victim in a darkened area. The victims met Appellant at Outlaws where he invited them to the house party. At the party, they all were in the close confines of the house. Regardless of the lighting, the victims were acutely aware of Appellant as their assailant during his assaults on them and they had no trouble identifying him. Based upon this record, there is no reasonable probability that the jurors' unauthorized visit to the crime scene contributed to their verdict.

¹ "Jurors cannot impeach or contradict their verdict by affidavits or testimony after they have been discharged from the jury." *Wacoche v. State*, 1982 OK CR 55, ¶ 17, 644 P.2d 568, 572. In *Wacoche*, jurors were called to relate to the trial court discussions which occurred during the jury's deliberation. This Court found that improper and a violation of the "the sanctity of the jury room". See also *Hall v. State*, 1988 OK CR 174, ¶ 7, 762 P.2d 264, 266 ("it is a long established rule that jurors are not allowed to impeach the verdict. See *Tanner v. United States*, 483 U.S. 107, —, 107 S.Ct. 2739, 2748-49, 97 L.Ed.2d 90 (1987)"). The jurors' statements in this case are not appropriate evidence upon which to base a finding of prejudice. However, even if they are appropriate for us to consider, no prejudice has been shown.

In Proposition II, I disagree with the conclusion that deliberations begin once the jury leaves the courtroom. Jury deliberations do not begin until the jury has been removed to the jury room and selected their foreperson. *Johnson v. State*, 2004 OK CR 23, 93 P.3d 41 (Lumpkin, J.: concur in part/dissent in part, ¶ 5, 93 P.3d at 49). Here, any comments by the bailiff were made prior to the jury's arrival in the jury room and selection of their foreperson.

Even if deliberations had begun by the time of the bailiff's statement, Appellant has not shown he was prejudiced by the statements. Any statement the bailiff may have made was not any different from the written instructions given to the jury regarding a unanimous verdict. The bailiff merely repeated what the trial court told the jurors in their instructions and was simply what the jurors already knew – they were going to deliberate until they reached a verdict. Additionally, the record of the evidentiary hearing shows that the jurors' verdicts were the product of their own decisions and not any improper outside influence. There has been no claim that the jury's verdict was coerced. I find nothing improper in the bailiff's communication in this case.