

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TWILIA RENAE WISE,)

Appellant,)

v.)

THE STATE OF OKLAHOMA,)

Appellee.)

NOT FOR PUBLICATION

Case No. F-2009-1110

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAY - 4 2011

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

C. JOHNSON, JUDGE:

Appellant, Twilia Renae Wise, was convicted after jury trial in Lincoln County District Court, Case No. CF-2007-156A, of First Degree Felony Murder. The jury assessed punishment at life imprisonment. The trial court sentenced Appellant accordingly.

Appellant raises the following propositions of error:

1. The evidence was insufficient to convict Ms. Wise of First Degree Felony Murder.
2. The trial court committed reversible error by failing to instruct the jury that the testimony of an informer should be examined and weighed with greater care than that of an ordinary witness.
3. The trial court abused its discretion in excluding the sworn statement of Erick Moore.
4. Ms. Wise's conviction must be reversed because the trial court erred in refusing to allow the jury during deliberations to review evidence that had been properly admitted at trial.
5. The trial court coerced a verdict not supported by the evidence by refusing a requested instruction on the lesser offense of Accessory After the Fact.
6. The trial court should have provided the jury with an instruction on the use of exculpatory statements.

7. Prosecutorial misconduct prevented Ms. Wise from receiving a fair trial.
8. Ms. Wise was denied effective assistance of counsel in violation of her rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article II, §§ 7, 9 and 20 of the Oklahoma Constitution.
9. The accumulation of errors deprived Ms. Wise of a fair trial and reliable verdict.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we reverse Ms. Wise's Judgment and Sentence and remand this case to the district court for a new trial based upon error raised in Proposition VIII.¹

Appellant argues in Proposition I that the evidence presented at trial was insufficient to prove beyond a reasonable doubt all of the elements of First Degree Felony Murder. Appellant specifically complains that the only evidence implicating her in commission of the crime for which she was convicted in this case was the trial testimony of Tika Ramos and Amy Latimer. This accomplice testimony, she asserts, was not sufficiently corroborated. We find that the accomplices' testimony was sufficiently corroborated by Appellant's statement to the OSBI agents and accordingly this case need not be reversed with instructions to dismiss. *Glossip v. State*, 2007 OK CR 12, ¶ 42, 157 P.3d 143, 152. Upon finding that the accomplices' testimony was sufficiently corroborated, we find additionally that the evidence presented at trial was sufficient to support Appellant's conviction for First Degree Murder beyond a

¹ Because we are granting relief based upon error raised in Appellant's eighth proposition, we need not address errors raised in the remaining propositions which, if meritorious, do not require that the case be reversed with instructions to dismiss.

reasonable doubt. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04.

In her eighth proposition, Appellant argues that she was denied her Sixth Amendment right to the effective assistance of counsel based upon several alleged failings of her trial attorney. This Court reviews claims of ineffective assistance of counsel under the two-part *Strickland* test that requires an appellant to show: (1) that counsel's performance was constitutionally deficient; and (2) that counsel's performance prejudiced the defense, depriving the appellant of a fair trial with a reliable result. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Davis v. State*, 2005 OK CR 21, ¶ 7, 123 P.3d 243, 246. It is not enough to show that counsel's failure had some conceivable effect on the outcome of the proceeding. Rather, an appellant must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Head v. State*, 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

In support of her proposition, Appellant complains that defense counsel was ineffective for failing to adequately cross examine the accomplices, Ramos and Latimer, on critical issues relating to their credibility. She specifically argues that defense counsel was ineffective for failing to utilize known information that Ramos and Latimer were only charged with Burglary for their involvement in this crime despite the fact that, as the prosecutor argued, each

of these women was as guilty of First Degree Murder as Appellant.² This information was relevant to challenge the credibility of these witnesses and was critical to Appellant's defense given that the evidence that Appellant knew about the planned crime and placing Appellant inside the house where the homicide occurred was provided exclusively by Ramos and Latimer. In her statement to the OSBI agents, Appellant admitted to riding with Ramos and Latimer and sitting inside a car parked in an ally outside a house near Shawnee. She did not admit to participating in the commission of any crime or even having knowledge that a crime would occur. Because of this, defense counsel's failure to elicit from these witnesses that they had only been charged with Burglary for their participation in this crime and thus had significant motive to lie, can be found to have rendered defense counsel's performance constitutionally deficient. There is a reasonable probability that, but for counsel's unprofessional error in not challenging Ramos's and Latimer's credibility with this evidence, the result of the proceeding would have been different.³

² The State argues that counsel was not ineffective for failing to elicit from Ramos that she had only been charged with Burglary because defense counsel noted this fact in closing argument. Counsel did in fact state this once in closing but, of course, the jury could not consider argument as evidence and without properly admitted evidence tending to establish this fact, we presume that they did not. *See Turrentine v. State*, 1998 OK CR 33, ¶ 26, 965 P.2d 955, 968 (juries are presumed to follow their instructions).

³ In conjunction with this claim, Appellant has filed a Rule 3.11 motion for an evidentiary hearing on the issue of ineffective assistance of counsel asserting that counsel was ineffective for failing to utilize known information to challenge the credibility of the State's key witnesses, Ramos and Latimer. Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007). An evidentiary hearing is not required in order to establish that counsel failed to utilize known and available evidence in Appellant's defense at trial.

DECISION

The Judgment and Sentence of the district court is **REVERSED** and **REMANDED** for a **NEW TRIAL**. Appellant's Application for an Evidentiary Hearing on Sixth Amendment Claims is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF LINCOLN COUNTY
THE HONORABLE PAUL M. VASSAR, DISTRICT JUDGE**

APPEARANCES AT TRIAL

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OPINION BY C. JOHNSON, J.

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

LUMPKIN, J.: CONCUR IN PART/DISSENT IN PART

I concur in the Court's decision that the evidence was sufficient to sustain a conviction for First Degree Felony Murder, however, I must dissent to the decision to reverse and remand for a new trial without first testing the alleged extra-record evidence through an evidentiary hearing. The Court jumps to the conclusion a new trial is required without the input that would come from the trial judge as the result of an evidentiary hearing.

The opinion considers the extra-record evidence attached to Appellant's Application for Evidentiary Hearing as part of the record and the opinion sweeps over this fact in footnote No. 3. These *ex parte* attachments have neither been properly identified nor subjected to cross examination. As such the Court cannot use the attachments as substantive evidence regarding the issue raised. *Warner v. State*, 2006 OK CR 40, ¶ 14, 144 P.3d 838, 858. Instead, the attachments only go to the determination whether an evidentiary hearing is required. *Id.*, 2006 OK CR 40, ¶ 14 n.3, 144 P.3d at 858 n. 3.

I agree that Appellant has met his burden under Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011), of showing "there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence." Thus, this issue should be remanded to the district court for an evidentiary hearing upon Petitioner's ineffective assistance of counsel claims. *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888.