

JUL 6 2000

JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL LEWIS DOUGLAS, JR.)
)
 Appellant,)
 v.)
)
THE STATE OF OKLAHOMA)
)
 Appellee.)

Not for Publication
Case No. F-99-558

SUMMARY OPINION

CHAPEL, JUDGE:

Michael Lewis Douglas, Jr., was tried by jury and convicted of Shooting with Intent to Kill in violation of 21 O.S.1991, § 652, in the District Court of Tulsa County, Case No. CF-98-4516. In accordance with the jury's recommendation the Honorable Thomas C. Gillert sentenced Douglas to ten (10) years imprisonment. Douglas appeals this conviction and sentence.

Douglas raises six propositions of error in support of his appeal:

- I. Use of perjured testimony to convict Douglas violates due process;
- II. The flight instruction was improperly given and amounts to plain, reversible error;
- III. Reversible error occurred through the trial court's failure to instruct the jury on the requirement of corroboration of accomplice testimony;
- IV. The prosecutor's summation relied on Douglas's failure to testify, triggering the statutory new trial mandate;
- V. The five hundred dollar fine was not the trial court's original intent and is unauthorized by the jury's verdict; and
- VI. Cumulative errors warrant reversal of conviction and/or sentence.

After thorough consideration of the entire record before us on appeal including the original record, transcripts, briefs and exhibits of the parties, we find Proposition II requires relief. We find in Proposition I that the prosecutor

knowingly used perjured testimony, but the perjury was not material to the case.¹ We find in Proposition III that the trial court should have instructed the jury on Finch's accomplice status, but the presence of corroborating evidence renders this error harmless.² We find in Proposition IV that the term "uncontroverted" was not a comment on Douglas's right to remain silent.³ We find in Proposition V that the "fine" reflected in the Judgment and Sentence is really a \$500 victim's crime fund assessment. This scrivener's error should be avoided in further proceedings below. As we find Proposition II requires reversal and remand, Proposition VI is moot.

In Proposition II Douglas claims the trial court erred in giving a flight instruction. The State's evidence showed Finch and Douglas ran away after Finch shot Grundy. Douglas presented no evidence explaining or denying his departure. The trial court gave the flight instruction, omitting Paragraph 3 concerning the defendant's explanation of his actions.⁴ Although Douglas did not object, we find this constitutes plain error.

¹ *Omalza v. State*, 1995 OK CR 80, 911 P.2d 286, 307; *McCarty v. State*, 1988 OK CR 271, 765 P.2d 1215, 1219; *Hall v. State*, 1982 OK CR 141, 650 P.2d 893, 896-97; *Napue v. People of State of Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)(false testimony about witness's deal with prosecutor went to credibility and was due process violation).

² *Cummings v. State*, 1998 OK CR 45, 968 P.2d 821, 831, *cert. denied*, 526 U.S. 1162, 119 S.Ct. 2054, 144 L.Ed.2d 220 (1999).

³ See, e.g., *Mehdipour v. State*, 1998 OK CR 23, 956 P.2d 911, 916.

⁴ The instruction as given also omitted the modifications required by *Mitchell v. State*, 1993 OK CR 56, 876 P.2d 682, 686. The jury was told that under certain circumstances it could consider flight as evidence of "guilt" rather than "guilt or innocence".

*Mitchell v. State*⁵ held that, while the flight instruction assumes the defendant was at the scene or committed the crime, a flight instruction is proper where a defendant offers an explanation for his departure, either through evidence or in a statement admitted at trial. Under those circumstances a defendant has either admitted the crime or placed himself at the scene.⁶ We emphasized that the flight instruction is appropriate only where the defendant controverts the evidence of flight.⁷ Otherwise, the instruction violates the presumption of innocence. Here, Douglas offered no explanation for his departure from the scene, and the instruction should not have been given. The State mistakenly argues this error was cured by the standard instruction that Douglas was presumed innocent. On the contrary, *Mitchell* does not support this conclusion. The State recognizes that this instruction was error under *Mitchell* and urges the Court to overturn that case, relying on federal court interpretation of our standard instructions as preferable to our own interpretation. The only reason to take that radical step would be to preserve Douglas's conviction, and that is not a legitimate reason to overturn settled and well-supported law.

⁵ 1993 OK CR 56, 876 P.2d 682.

⁶ *Id.* at 684. The State's reliance on *Powell v. State*, 1995 OK CR 37, 906 P.2d 765, *cert. denied*, 517 U.S. 1144, 116 S.Ct.1438, 134 L.Ed.2d 560 (1996), is misplaced; there the defendant placed himself at the scene in a voluntary statement admitted at trial.

⁷ *Id.* at 685.

This Court may determine whether this violation of Douglas's right to the presumption of innocence was harmless.⁸ We have held this error harmless where the flight involved occurred several days after the crime, and evidence showed the defendant did not flee from the scene.⁹ The flight instruction was held harmless in the second stage of a capital trial where evidence overwhelmingly supported each aggravating circumstance, and the erroneous consideration of flight could have had no effect on the jury's imposition of the death penalty.¹⁰ By contrast, Douglas tried to show through cross-examination and argument that he was an innocent bystander and just as surprised as anyone when Finch shot Grundy. However, the jury was instructed that evidence which showed Douglas fled the scene assumed his guilt. Under these circumstances the flight instruction was not harmless; it deprived Douglas of his constitutional and statutory right to the presumption of innocence. This proposition should be granted. The case must be reversed and remanded for a new trial.

Decision

The Judgment and Sentence of the District Court is **REVERSED** and **REMANDED**.

⁸ *Charm v. State*, 1996 OK CR 40, 924 P.2d 754, 766-67, *cert. denied*, 520 U.S. 1200, 117 S.Ct. 1560, 137 L.Ed.2d 707 (1997) (improper flight instruction in second stage of capital trial harmless); *Cooper v. State*, 1995 OK CR 2, 889 P.2d 293, 310, *overruled on other grounds*, *Cooper v. Oklahoma*, 517 U.S. 348, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996); *Mitchell*, 876 P.2d at 685.

⁹ *Cooper*, 889 P.2d at 310.

¹⁰ *Charm*, 924 P.2d at 767.

APPEARANCES AT TRIAL

MARNA S. FRANKLIN
OFFICE OF THE PUBLIC DEFENDER
423 SOUTH BOULDER, STE. 300
TULSA, OKLAHOMA 74103
ATTORNEY FOR DEFENDANT

ERIC M. JORDAN
ASSISTANT DISTRICT ATTORNEY
OFFICE OF DISTRICT ATTORNEY
406 COURTHOUSE
500 SOUTH DENVER AVE.
TULSA, OKLAHOMA 74103
ATTORNEY FOR THE STATE

APPEARANCES ON APPEAL

BARRY L. DERRYBERRY
ASSISTANT PUBLIC DEFENDER
423 S. BOULDER
TULSA, OKLAHOMA 73019
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
DIANE L. SLAYTON
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OKLAHOMA 73104
ATTORNEYS FOR RESPONDENT

OPINION BY: CHAPEL, JUDGE

STRUBHAR, P.J.:	Concur in Result
LUMPKIN, V.P.J.:	Concur in Part/Dissent in Part
JOHNSON, J.:	Concur
LILE, J.:	Dissent

LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the result reached by the Court based on *stare decisis*. See *Mitchell v. State*, 876 P.2d 682 (Okl.Cr.1993). However, I continue in my view the majority did not accurately apply the law in *Mitchell*. *Id.* 686-687. I also dissent to the analysis of Proposition I. The Appellant failed to meet the requirements set out in *Omalza v. State*, 911 P.2d 286, 307 (Okl.Cr.,1995), to show the prosecution knowingly presented perjured testimony. See also *McCarty v. State*, 765 P.2d 1215, 1219 (Okl.Cr.1988). Inconsistency in the testimony, or failure of a witness to confess a crime on the witness stand, are not sufficient to meet the test set out in our caselaw. The prosecutor alerted the jury to the inconsistencies and let them draw their own conclusion. That is the function of the jury.