IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ROBERT SIMPSON EVANS, JR.,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	Case No. F 97-1215
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION ON REHEARING

PER CURIAM:

Robert Simpson Evans, Jr., was tried by jury and convicted of First Degree Child-Abuse Murder (21 O.S. 1991, § 701.7(C) in Comanche County District Court Case No. CRF-96-454. The jury set Evans' punishment at life imprisonment, and the trial judge, the Honorable Allan McCall, District Judge, sentenced accordingly. This Court issued its original Opinion on April 8, 1999, reversing the case with instructions to dismiss. On June 21, 1999, upon motion of the State, we issued an Order Granting Rehearing, because some question decisive of the case and duly submitted by the attorney of record was overlooked by this Court. Rule 3.14(B)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (1998).

In the Petition for Rehearing, the State attacks only that portion of the Opinion which held that there was insufficient evidence to support the

conviction. The State did not request rehearing on the holding that the trial court committed reversible error by denying the defense request to instruct on second-degree murder and by not instructing on second degree manslaughter *sua sponte*. The remainder of the propositions raised by Appellant were not discussed because the conviction was reversed.

Evans raises the following issues in this perfected appeal:

1. The evidence was insufficient as a matter of law to prove Mr. Evans guilty of child abuse murder;

2. Under the facts of this case, the trial court erred in failing to instruct the jury on second degree manslaughter and second degree murder;

3. The instructions to the jury erroneously diminished the *mens rea* element for first degree child abuse murder;

4. Appellant was denied effective assistance of counsel.

The Appellant argues in Proposition I that intent to injure is an element of child-abuse murder, and the evidence is insufficient to prove this element. Evans was charged in a "Second Amended Information" with

> "Murder in the First Degree . . . [in that he did] unlawfully, wilfully and maliciously use unreasonable force to injure, maim and torture one Daquinlin McKnight, . . . from which mortal wounds the said Daquinlin McKnight did then and there languish and die, . . ."

(O.R. 11).[1] The jury was instructed that,

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[1] The charge was incorrectly identified in our original Opinion wherein we stated that, "Evans was charged as follows: '. . . . . Robert Simpson Evans did wilfully, maliciously and intentionally injure, torture and maim, . . .'"

> No person may be convicted of murder in the first degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:
>
> > First, the death of a child under the age of eighteen;
> >
> > Second, the death resulted from the willful or malicious injuring, torturing, or using of unreasonable force;
> >
> > Third, by the defendant.

(O.R. 173)(quoting OUJI-CR 2d, 4-65A). At that time, the statute read, "A person commits murder in the first degree when the death of a child results from the willful or malicious injuring, torturing, maiming or using of unreasonable force by said person . . . ." 21 O.S.Supp.1996, § 701.7(C)(effective November 1, 1996).

By statutory definition the term, "willful," "implies simply a purpose or willingness to commit the act or the omission referred to. It does not require any intent to violate law, or to injure another . . . ." 21 O.S.1991, § 92. We find no compelling reason to disregard the statutory definition in the context of "willful use of unreasonable force." Therefore, we hold child-abuse murder caused by the willful use of unreasonable force is a general intent crime which does not require proof of a specific intent to injure.

Regardless of the fact that a specific intent to injure is not required in the context of "willful use of unreasonable force," we find that the evidence was sufficient for the jury to find that Evans in fact did have such intent. There was medical evidence to support a conclusion that Daquinlin was immersed in

the water twice, at least once with a sleeper on. Evans stated that he placed Daquinlin in the water with his pants off. The amount and location of water on the sleeper indicated that Daquinlin was immersed with the sleeper on. This contradicts Evans' statement that he "didn't really mean to do it, he didn't know the water was that hot."

Evans knew how to bathe Daquinlin from prior experience. He knew Daquinlin took cold baths. And he knew how to operate the faucets. He first tried to blame the baby sitter. Evans came home and Daquinlin soiled his pants. There was sufficient evidence presented so that the jury could have concluded that Evans immersed Daquinlin in the hot water because he soiled his pants.

Based on the above evidence, and a reading of the record, in a light most favorable to the State, we find that there was sufficient evidence for the jury to conclude, beyond a reasonable doubt, that Evans committed the crime of Child Abuse Murder. *See Spuehler v. State*, 1985 OK CR 132, 709 P.2d 202, 204.

With regard to Evans' second proposition, the Court's holding in the Opinion first issued herein must stand because rehearing on these issues was not requested by the State. *See Fite v. State*, 1993 OK CR 58, 873 P.2d 293, 298-99 (only those issues properly raised on rehearing are addressed); *Watkins v. State*, 1992 OK CR 34, 855 P.2d 141, 142; *Stouffer v. State*, 1987 OK CR 166, 742 P.2d 562; *See also* Rule 3.14(C), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (1998)("The overlooked question,

statute or decision must be specifically set forth in the petition [for rehearing]. . . .") For that reason this Court's original holding remains in full force and effect to wit:

> Second-degree murder is a lesser-included offense of first-degree child-abuse murder as charged in this case. Second-degree manslaughter is a lesser included offense as well. Each of these lesser included offenses are supported by the evidence presented at trial, and the trial court committed reversible error by denying the defense request to instruct on second-degree murder, and by not instructing on second degree manslaughter *sua sponte*. *Le v. State*, 1997 OK CR 55, 947 P.2d 535, 546; *Malone v. State*, 1994 OK CR 43, 876 P.2d 707, 711.

Consequently, this case must be reversed and remanded for a new trial.[2]

DECISION

Judgment and Sentence is **REVERSED** and **REMANDED** to the district court of Comanche County with instructions for a **NEW TRIAL**.

ATTORNEYS AT TRIAL	ATTORNEYS ON APPEAL
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[2] We do not reach the merits of Proposition III or IV, as they are rendered moot by this Court's order reversing this case for a new trial.

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OPINION BY: PER CURIAM

STRUBHAR, P.J.: DISSENTS
LUMPKIN, V.P.J.: CONCURS IN PART/DISSENTS IN PART
JOHNSON, J.: CONCURS
CHAPEL, J.: DISSENTS
LILE, J.: CONCURS IN RESULT

Strubhar, P.J.: Dissents

No grounds exist for this Court to grant rehearing in this case.

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

I concur in the Court's analysis and decision that "child abuse murder caused by the willful use of unreasonable force is a general intent crime which does not require proof of a specific intent to injure." However, as I did in the first opinion, I must dissent to the reversal of the judgment and sentence in this case. Especially in light of the decision on rehearing, the judgment and sentence should be affirmed.

CSC 11/02/99

CHAPEL, JUDGE, DISSENTING:

No grounds exist for this Court to grant rehearing in this case. All issues raised in the Petition for Rehearing were fully considered in the original opinion in this case. It has become abundantly clear of late that this Court's rules governing rehearing are a farce and are inconsistently applied based only upon whim. I also dissent to this opinion being issued as a Per Curiam opinion.