IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TONY RAY GIPSON,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F-2011-366
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

LEWIS, VICE PRESIDING JUDGE:

Appellant, Tony Ray Gipson, was tried by jury and convicted of First Degree Malice Murder, in violation of 21 O.S.2001, § 701.7(A), in the District Court of Okfuskee County, case number CF-2009-84, before the Honorable Lawrence W. Parish, District Judge. The jury sentenced Gipson to life imprisonment without the possibility of parole. Judge Parish entered formal judgment and sentenced Gipson in accordance with the jury verdict on May 5, 2011. From the Judgment and Sentence Gipson has perfected his appeal to this Court raising several propositions of error. We conclude, after thorough consideration of the propositions of error and the entire record before us on appeal, including the original record, transcripts, exhibits and briefs of the parties, that the judgment of guilt shall be affirmed; the sentence, however, should be vacated, and the case shall be remanded for resentencing.

Gipson's murder conviction was based on his stabbing of Victor Berryhill during the early morning hours of July 29, 2009, at the Muscogee (Creek) Nation housing complex in Okemah, Oklahoma. Berryhill, who was also known as "A.J.", had been arguing with Tony Gipson's brother, Wesley Gipson, prior to the fatal stabbing at the housing complex home of Tony Gipson's girlfriend, Kerri Flynn.

Earlier, sometime around midnight, Tony Gipson and Flynn got into an argument at Flynn's home. Tony was told to leave and the police were called. The police came out to take a report, but Tony had left the complex. Sometime around 3:00 a.m, while Tony was gone, Berryhill arrived at the home. At that time, Berryhill and Wesley Gipson began arguing about their prowess on the basketball court. They both were drinking alcoholic beverages and continued arguing off and on. They finally moved their argument outside sometime after 4:20 a.m.

Around this time, Tony Gipson came back to the home and noticed his brother and Victor Berryhill arguing outside. Tony tried to go outside and join the argument, but Flynn told him to stay in the home. When Flynn turned her back, however, Tony Gipson grabbed a knife from the kitchen and ran outside toward Wesley and Victor.

Tony jumped on Victor's back and began stabbing him. Victor fell to the ground and Tony and Wesley began kicking him. Another witness, Amos Lovejoy, saw the two kicking Berryhill at around 5:15 a.m. When the two saw Lovejoy, they ran away.

At 5:30 a.m., police received a call of a possible homicide at the housing complex. Officers arrived and found Berryhill lying on the ground, dead. A search for Wesley and Tony Gipson was initiated.

Tony was eventually apprehended and made statements to police. Tony told police that he saw Wesley and Victor arguing. He admitted to jumping on Victor's back and to stabbing and kicking him.

It was determined that Victor Berryhill sustained six stab wounds to his body, two of which would have been fatal. Berryhill also suffered blunt force trauma to his head and neck, which also contributed to his death.

Gipson, at trial, attempted to portray Berryhill as a bully who intentionally started fights with members of his family. He claimed, therefore, that he was provoked and was defending his brother when he stabbed Berryhill.

On appeal, Gipson raises several propositions which he claims entitle him to relief. In his first proposition, Gipson claims that the State of Oklahoma lacked jurisdiction over the criminal act in this case, because Gipson is a member of the Muscogee (Creek) Indian Nation and the land upon which the crime occurred is "Indian country." Gipson argues that the land in question is either a *de facto* informal reservation, or a dependent Indian community.

There is no dispute that at the time this crime occurred, the property on which the crime occurred was owned in fee simple by the Muscogee (Creek) Nation. The history of this tract of land, the history of the Muscogee (Creek) Nation, and the Nation's relationship to this land, is also not in dispute. The

land was transferred, in 2006, to the Muscogee (Creek) Nation pursuant to Enrolled Senate Bill number 1706 (signed by the Governor on May 4, 2006). It was previously held by the Creek Nation Housing Authority (CNHA), a state agency created under the Oklahoma Housing Authority Act, who obtained title to the property in 1973 from the developer of the housing project. Prior to that time the land was initially part of an allotment to a member of the Creek Nation, then several conveyances were made to non-tribal members, before the land became part of a plan to develop low income housing for members of the Creek Nation.

The Muscogee (Creek) Nation is a member of the original Five Civilized Tribes. The location of the murder, historically, is within the boundaries of the land granted, by patent, in fee simple, to the Creek nation by the treaty of 1833. *See Indian Country USA v. Oklahoma*, 829 F.2d 967, 971 (10th Cir. 1987). Much of the land was divided and allotted to individual members of the Creek Nation under the Federal Curtis Act. *Id.* at 978. This specific tract of land was part of the 160 acre allotted to Peter McNac, a full blooded member of the Muscogee (Creek) Nation. Subsequently, the heirs of McNac conveyed their interest in the land, by deed, to non-tribal members with the approval of the McIntosh County Court. In 1973, the CNHA, an Oklahoma state agency, obtained title to the tract in question. Then in 2007, pursuant to Oklahoma Enrolled Senate Bill 1706 (signed by the Governor and filed with the Secretary of the State on May 4, 2006), the assets and liabilities of the CNHA were

transferred to the Creek (Muscogee) Nation, which included transfer of the property in question.

The issue is whether this property in question, owned by the Creek (Muscogee) Nation, is Indian country as defined by Federal Statute.

Title 18 U.S.C. § 1151 defines Indian country as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

The United States Supreme Court in *Alaska v. Native Village of Venetie Tribal Government,* 522 U.S. 520, 527, 118 S.Ct. 948, 953, 140 L.Ed.2d 30 (1998) (hereinafter *Vinetie*), set forth two requirements to determine whether land qualifies as a dependent Indian community under § 1151. First, the land must be an "Indian community" that has been explicitly set aside by Congress (or the Executive, acting under delegated authority) "for the use of the Indians as Indian land." *Id.* 522 U.S. at 527, 531, fn.6, 118 S.Ct. at 953, 955, fn.6. Second, the land must be "under federal superintendence," which "guarantees that the Indian community is sufficiently 'dependent' on the Federal Government that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question." *Id.*

There is little difference in the test for whether land qualifies as a dependent Indian community or whether land is a formal or informal reservation; the focus is on set-aside and superintendence. *See HRI., Inc. v. E.P.A.*, 198 F.3d 1224, 1250 (10th Cir. 2000), *citing Venetie*, 522 U.S. at 528-30, 118 S.Ct. at 953-54. The land in question here fails to meet either of the two *Venetie* requirements.

This Court has decided several cases determining whether a crime has occurred in Indian country.[1] Two cases, reaching different conclusions, are analogous to the present case. First, in *C.M.G. v. State*, 1979 OK CR 39, 594 P.2d 798, this Court held that the Chilocco Indian School was Indian Country as a dependent Indian community. *Id.* ¶ 21, 594 P.2d at 804. This Court reasoned that the land was actually owned by the federal government, set apart for the use of the Indians, and had never been transferred to non-Indian ownership. *Id.* ¶ 15, 594 P.2d at 802-03. Finally, the land was under the superintendence of the government, as the federal government defined how the land was to be used. *Id.* ¶ 12, 594 P.2d at 802.

Then in *Eaves v. State*, 1990 OK CR 42, 795 P.2d 1060, this Court decided a case based on similar facts where a crime was committed in the Osage Tribal Council Housing Authority, which, at the time, was an Oklahoma State agency. Although, this Court utilized a multi-factor test which was

[1] Recently, in *Magnan v. State*, 2009 OK CR 16, 207 P.3d 397, and *Murphy v. State*, 2005 OK CR 25, 124 P.3d 1198, this Court held that partial ownership or a fractional interest in mineral rights by the heirs of an original owner of an Indian allotment, were not sufficient to make land Indian country, as there were no restrictions on alienation of the surface rights. *Magnan*, 2009 OK CR 16, ¶ 25, *Murphy*, 2005 OK CR 25, ¶ 44. Neither of these cases address the specific issue we face here.

criticized in *Venetie*, the result would be the same.[2] The land in question here, like the land in *Eaves*, lost its status as Tribal land by its approved transfer to non-tribal members, from the original allotees and their heirs. The only thing different in this case from the *Eaves* case is that the ownership of the property has been transferred from the state agency CNHA to the sovereign Creek (Muscogee) Nation. Gipson argues that this difference is enough to distinguish the holding in *Eaves*.

At trial the State argued that *Eaves* is controlling and the tract in question is not a dependent Indian Community. On appeal, Gipson argues that *Eaves* is distinguishable, because the tract in *Eaves* was owned by a State agency, the Osage Tribal Council Housing Authority and that the factors utilized in *Eaves* have been superseded by the United States Supreme Court's decision in *Vinetie*.

However, not only was *Eaves* decided based on the "state agency" status of the Indian housing authority, but also several other factors, including "set-aside" and superintendence. *Eaves*, ¶ 8, 795 P.2d at 1062-63. The *Venetie* decision emphasized that the ultimate consideration in determining dependent Indian communities under 18 U.S.C. § 1151, is "set aside" and

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[2] This Court utilized the multi- factor test identified in *United States v. South Dakota*, 665 F.2d 837 (8th Cir.1981). This multi-factor test was also later utilized in *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1545 (10th Cir.1995), after this Court's decision in *Eaves*.

The United States Supreme Court's decision in *Venetie* replaced the multi-factor tests in favor of emphasizing the "set-aside" and "superintendence" requirements. *See HRI, Inc. v. Envtl. Prot. Agency*, 198 F.3d 1224, 1248-49 (10th Cir.2000) (explaining that the Supreme Court disapproved of the Ninth Circuit's multi-factor test, which was similar to the *Watchman* test, for identifying a dependent Indian community); *see also United States v. Arietta*, 436 F.3d 1246, 1250 (10th Cir.2006).

"superintendence," just as it had been utilized in earlier United States Supreme Court cases. *See Oklahoma Tax Comm'n v. Potawatomi Tribe*, 498 U.S. 505, 511, 111 S.Ct. 905, 910, 112 L.Ed.2d 1112 (1991) (holding the test is "whether the area has been validly set apart for the use of the Indians as such, under the superintendence of the Government."); *see also United States v. Pelican*, 232 U.S. 442, 449, 34 S.Ct. 396, 399, 58 L.Ed. 676 (2004) (holding that division of reservations into allotments does not diminish the nature of the land).[3]

Gipson claims that the nature of the land in question is Indian country under § 1151, because the land was set aside for use by Indians and is under federal superintendence. The set aside requirement, he argues, is satisfied because the land was set aside as low income housing for Indians with funding from the federal government, under Housing and Urban Development regulatory schemes and utilizing a trust agreement, executed in 1974. Gipson points out that every person who applies for residency in this housing complex must be a citizen of the Muscogee (Creek) Nation. Gipson argues these factors, property for the use of tribal members, meets the set aside requirement.

The fallacy in Gipson's argument is that this property was not set aside by the federal government. Land is validly set apart for the use of Indians only if the federal government takes some action indicating that the land is

[3] The Court of Appeals of New Mexico recognized that the "as such" language means that the land is set aside for the use of Indians as Indians; not a more narrow interpretation as set aside for use of the land as a reservation or for residence by Indians. *New Mexico v. Dick*, 981 P.2d 796, 800-01 (N.M.App 1999).

designated for use by Indians. *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511, 111 S.Ct. 905, 910, 112 L.Ed.2d 1112 (1991). While the site had to meet certain federal HUD guidelines before it would fund the acquisition of the completed property, the requirements were no different than any HUD funded low income housing project. In fact, the trust agreement, cited by Gipson, does not require that the housing be occupied by Indians. The tribal housing authority, which was initially a public housing authority established by State statute, is authorized to give preference to Indians and tribal members, over non-tribal, low income, persons for utilization of the low income housing, as long as the property meets certain requirements, one of which is tribal ownership of the property. 21 O.S.2001, § 1061(d). It is, therefore, the sovereign tribal authority that sets the property aside for use by Indians in the present case, not the federal government. In fact, the tribe is not restricted to utilizing the property for low income housing for non-Indians. Although the government grants the right of Indian preference to the Indian tribes because of their sovereign nature, the grant of that right in managing their own housing project does not meet the federal set aside requirement. Gipson has not shown that this land has been set aside by the government for the use of Indians as Indian land. The first requirement of *Vinetie* is, therefore, not met.

With regard to the superintendence requirement, Gipson argues, among other things, that the regulations placed on the tribes through the Native American Housing Assistance and Self Determination Act of 1996 (NAHASDA)

amount to superintendency over the land. While the tribe may have received grants pursuant to the (NAHASDA), the issuance of federal aid is in itself insufficient to show federal superintendence. *Venetie*, 522 U.S. at 534, 118 S.Ct. at 956 (federal aid is not indicative of active federal control amounting to superintendence.) This conclusion is consistent with the trend toward tribal self determination and away from federal supervision. *See Venetie*, 522 U.S. at 523-24, 118 S.Ct. at 951. Gipson claims that restrictions on alienation of the land in the HUD declaration of trust and the "Nonintercourse Act" show that the federal government exercises superintendence over the land.

Gipson argues the NAHASDA's stated responsibility and fiduciary duty to provide safe housing for Indians evinces intent to hold superintendence over the land. The regulatory authority exercised over the housing complex is in the form of HUD financing. He also argues that because the land is inalienable without federal approval the superintendence requirement is satisfied.

As stated above, the declaration of trust is a mere agreement that the property cannot be alienated, encumbered or transferred as long as the housing authority is indebted to the government because of loans and grants made to the housing authority. This is no different than any other non-Indian housing project, which makes the government a secured creditor.

The State argues that because the land is held in fee simple by the Creek Nation and not in trust by the federal government for Indian use, it is not Indian country. The solution to the issue is not as simple as the determination of title holder to the land, for the fact that a Tribe owns the land does not

preclude a finding of land being Indian country. *See United States v. Sandoval*, 231 U.S. 28, 48, 34 S.Ct. 1, 6-7, 58 L.Ed. 107 (1913) (holding that the lands owned by the Pueblos, "much like the Five Civilized Tribes, whose lands, although owned in fee under patents from the United States," were dependent Indian communities).

However, the fact that a Tribe owns a low income housing project does not automatically make it Indian country. *See Narragansett Indian Tribe of Rhode Island v. Narragansett Elec. Co.*, 89 F.3d 908, 921-22 (1st Cir. 1996). While the history of the Narragansett tribe is vastly different from the Creek (Muscogee) Nation,[4] the holding reflects the idea that a dependence on government aid does not automatically qualify a tribal housing project for Indian country status. *Id.*[5]

As an aside, we need not decide whether this land is subject to the "Indian Nonintercourse Act" codified at 25 U.S.C.A. § 177, because the restrictions of this act, standing alone are insufficient to show federal superintendence. *See Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073, 1077 (10th Cir. 1993.) Based on the foregoing, we conclude that the housing project in question here is not under federal superintendence.

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[4] The Narragansett Indian Tribe of Rhode Island did not become a federally recognized tribe until 1983, after they had been "detribalized" in the 1880's. *See Carcieri v. Salazar*, 555 U.S. 379, 383, 129 S.Ct. 1058, 1061, 172 L.Ed.2d 791 (2009).

[5] The Court in *Narragansett Elec. Co.* determined, using a multi-factor test, that land purchased by the Narragansett Indian Wetuomuck Housing Authority and transferred to the Narragansett Indian Tribe for a housing project was not Indian country as the land was not "set apart by the federal government for the use, occupancy, and protection of dependent Indian peoples."

Having failed both prongs of *Vinetie*, we hold that the Creek Nation housing complex at issue here is not Indian Country and the State of Oklahoma had jurisdiction over Gipson for purposes of criminal prosecution. Having found jurisdiction was properly exercised by the State of Oklahoma, we will address the remaining propositions.

In proposition two, Gipson argues that the trial court abused its discretion in suppressing an exculpatory, out of court, statement made by the codefendant. Counsel attempted to question O.S.B.I. agent Kurt Titsworth about statements made by codefendant Wesley Gipson. Titsworth testified at preliminary hearing that Wesley Gipson told him that the victim head butted him three times, and Tony came out and jumped on his back. Then, the victim went to the ground, and they started kicking him until he was not moving.

Gipson argues that the out of court statement was admissible pursuant to 21 O.S.2001, § 2804(B)(3). Under this exception, the out of court statement, offered to exculpate the accused, is not excluded by the hearsay rule if, (1) the declarant is unavailable, (2) the statement is contrary to the declarant's penal or pecuniary interests, (3) a reasonable person in the declarant's position would not have made the statements if they were not true, and (4) the statement is supported by corroborating circumstances which clearly indicate the trustworthiness of the statement. *See Pavatt v. State*, 2007 OK CR 19, ¶ 46, 159 P.3d 272, 287.

Initially, we note that trial counsel failed to make the requisite showing that Wesley Gipson would have been unavailable. Counsel argued that Wesley

would invoke his 5th Amendment right against self incrimination; however, the proper procedure was not followed. Wesley was not listed as a defense witness in discovery, and he was not subpoenaed by defense counsel. Defense counsel simply assumed that because Wesley was a charged codefendant, he would invoke his 5th Amendment privilege. Even on appeal, Gipson provides no additional evidence that Wesley would have invoked his right to remain silent if called to testify. For this reason alone, this proposition should fail.

Assuming arguendo that Wesley would have invoked the privilege, the statement would not have been admissible. The statement is neither reliable, nor is it relevant to whether or not Tony Gipson believed that he was acting reasonably in defending his brother.

The statement is not reliable, because it was not corroborated by any other evidence. No other witnesses testified that there was physical contact between Wesley and Victor Berryhill before Tony Gipson became involved, in fact, witnesses testified that they saw no physical contact, and Tony's own statement indicated that he only saw Berryhill get up in Wesley's face. Officers interviewing Tony saw no injuries as a result of the alleged head butting.

The statement was not relevant to show that Tony Gipson acted reasonably in defense of his brother. A person is only justified in using deadly force in defense of another when he has a reasonable belief that the person he is defending is in "imminent danger of death or great bodily harm." *Barnett v. State*, 2011 OK CR 28, ¶ 6, 263 P.3d 959, 962; *Bryson v. State*, 1994 OK CR 32, ¶ 36, 876 P.2d 240, 255.

At no time did Tony Gipson express a belief, reasonable or otherwise, that Wesley was in imminent danger of death or great bodily harm, defined as "serious and severe bodily injury. Such injury must be of a greater degree than a mere battery." OUJI Cr.2d 8-12; *See State v. Madden*, 1977 OK CR 155, ¶ 21, 562 P.2d 1177, 1180-81 (great bodily harm "means great as distinguished from slight, trivial, minor or moderate harm, and as such does not include mere bruises as are likely to be inflicted in a simple assault and battery.").

We find, therefore, that the trial court did not abuse its discretion in suppressing the out of court statement, and Gipson was not deprived of his right to present a meaningful defense because of the suppression.

In a related proposition, proposition four, Gipson argues that the trial court erred in failing to instruct the jury on the defense of "defense of another." As explained above, there was no evidence presented to show that Tony Gipson believed that his brother was in imminent danger of death or great bodily injury when he attacked Berryhill; therefore, the trial court did not abuse its discretion in refusing to give the requested instructions on defense of another and defense of person under the stand your ground law. *See Barnett*, 2011 OK CR 28, ¶ 6, 263 P.3d at 962.

In proposition three, Gipson argues that the trial court erred in allowing improper evidence of his character. He specifically complains about evidence of the fight between Kerri Flynn and himself, which occurred hours before the killing of Victor Berryhill. Counsel objected to the admissibility of this evidence

before trial and during opening statements, when the jury was first exposed to these facts.

The prosecutor told the jury that Kerri Flynn and Tony Gipson got into an argument over a compact disk. Gipson "became violent," and pushed Flynn and hit her. He then hit Flynn's brother, punched holes in the wall and pushed Flynn's mother, Delores Watson. Watson told Gipson to leave and called the police. Gipson pushed her out of the way as he ran from the home.

Flynn testified consistent with the prosecutor's opening, saying that they fought over the compact disk; Gipson pushed her down; she got up and starting hitting Gipson; and Gipson hit her above her right eye. She said Gipson then hit her sixteen year old brother, punched holes in the wall, and threw an ashtray at the wall. Flynn's mother arrived and told Gipson to leave and told him the police were on the way. Gipson pushed her as he left the home.

The police received a domestic call at 2:40 a.m. and arrived at the home shortly thereafter. The police left forms for Flynn and the other witnesses to write statements about what happened. When they returned to pick up the statements, at about 4:00 a.m., they heard Berryhill and Wesley Gipson discussing basketball. Officer Matt Bryan also testified he observed about five holes in the walls during the second visit, and he observed a bump on Flynn's forehead during the first visit.

The State claims the evidence of Gipson's assaults on Flynn and the others was admissible to show why the police were at the home when they

heard the discussions between Wesley Gipson and Berryhill. The State's argument is that the evidence constituted "*res gestae*" evidence, that is, evidence so closely connected to the charged offense as to form part of the entire transaction, which is necessary to give the jury a complete understanding of the crime, or when the evidence is central to the chain of events. *See Eizember v. State*, 2007 OK CR 29, ¶ 77, 164 P.3d 208, 230. Generally, with the *res gestae* exception, the other offense or bad act incidentally emerges during an explanation of the crime or events leading up to the crime which are logically connected to the crime. *Id.* This occurs because the other crime or bad act is inextricably intertwined with the charged offense or offenses. *See Andrew v. State*, 2007 OK CR 23, ¶ 48, 164 P.3d 176, 191.

Officer Bryan was able to testify that he heard Victor Berryhill and Wesley Gipson discussing who could beat the other at basketball. They were not yelling at each other or threatening each other at time. He characterized the discussion as "two friends giving each other a hard time."

While Bryan's observations of an apparent conflict between Victor Berryhill and Wesley Gipson, which might have developed into a fight between the two resulting in Tony Gipson's attack on Victor Berryhill, the specific facts of Tony Gipson's assaultive behavior at the house hours earlier was not relevant to an understanding of the crime he committed against Berryhill. Moreover, the evidence was not closely connected to the charged offense as to form part of the entire transaction, nor was it central to the chain of events. Berryhill was not present during the earlier assaultive behavior. Furthermore,

the attack on Berryhill was neither precipitated by the earlier behavior nor was it dependent on the earlier assaults.

It makes no difference why officers were at the house when they heard the discussion between Victor Berryhill and Wesley Gipson, other than to show that Tony Gipson had a character for violence and acted in conformity to his character when he assaulted Berryhill. This sort of evidence is prohibited. *See Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 26, 241 P.3d 214, 226; and 12 O.S.2001, § 2404(B) (evidence intended to prove a character trait of a person in order to show the person acted in conformity with that trait is prohibited).

While we believe the trial court abused its discretion in allowing this evidence, we must also determine whether the introduction of the evidence was harmful; i.e. whether the evidence resulted in a miscarriage of justice or constituted a substantial violation of a constitutional or statutory right. *See Lott v. State*, 2004 OK CR 27, ¶ 41, 98 P.3d 318, 335.

Here, we do not believe that the evidence affected the jury's determination of guilt, because the evidence of guilt was overwhelming. The jury, however, was also tasked at deciding between two alternative sentences: life in prison with the possibility of parole or life in prison without the possibility of parole. We find that this evidence likely tipped the scales, so that the jury was influenced to sentence Gipson to life without the possibility of parole, we therefore order that Gipson's sentence be vacated and this case remanded to the trial court for resentencing.

Gipson claims, in proposition five, that prosecutorial misconduct deprived him of a fair trial. No trial will be reversed on the allegations of prosecutorial misconduct "unless the cumulative effect was such to deprive the defendant of a fair trial." *Garrison v. State*, 2004 OK CR 35, ¶ 128, 103 P.3d 590, 612.

He first claims that the prosecutor mischaracterized the elements of manslaughter, leading the jury to believe that he had to be incapacitated by the heat of passion so that he did not know what he was doing when he attacked Berryhill. The prosecutor said that manslaughter requires a person to be overcome with a heat of passion, and absence of any intent to kill, explaining that "basically he did it because he lost his mind." There were no objections to these comments, except when the same comments were made during the State's second closing.

There was no evidence of heat of passion arising from adequate provocation, which would support a conviction for the lesser offense of manslaughter. Furthermore, the evidence was overwhelming that Tony Gipson acted with malice aforethought, thus any mischaracterization regarding the elements of manslaughter cannot rise to the level of plain error, and any comments that were met with objections were harmless.

Gipson next claims that the prosecutor improperly utilized evidence of his lack of remorse for the crime in order to argue for the maximum sentence: life without the possibility of parole. Defense counsel objected to the mischaracterization of the comments made by Gipson during his interview with

police. The prosecutor specifically cited to the confession where officers asked Gipson if he wanted to apologize, and Gipson responds, "No one is going to take an apology from me" and he has nothing to say to the Berryhill family, when asked.

This evidence was not relevant to any element of first degree murder, and only tended to show Gipson's character, which was irrelevant in this case. *See Bell v. State*, 2007 OK CR 43 ¶ 8, 172 P.3d 622, 625. Further, evidence in aggravation or for the enhancement of sentence is not allowed in a non-capital first degree murder case. *McCormick v. State*, 1993 OK CR 6, ¶ 40, 845 P.2d 896, 903, *Carter v. State*, 2006 OK CR 42, ¶ 2, 147 P.3d 243, 244. Because, we are ordering that Gipson receive a new sentencing hearing, any error resulting from these comments is moot.

In proposition six, Gipson claims that he was denied his constitutional right to effective assistance of counsel. In order to prevail on an ineffective assistance claim, an appellant must show that counsel made errors so egregious that counsel was not functioning as counsel guaranteed by the Sixth Amendment, and he must show he was prejudiced by the deficient performance – that counsel's errors deprived him of a fair trial with a reliable outcome. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

First, Gipson refers to proposition two where counsel attempted, without success, to introduce Wesley Gipson's out of court statements. Gipson, in order to overcome the waiver argument, claims that counsel was ineffective in

showing that Wesley Gipson was an "unavailable witness." We disposed of that proposition by holding that the statement was not admissible because it was unreliable and irrelevant, even if it was shown that Wesley was an "unavailable witness," thus, Gipson cannot show that he was prejudiced by counsel's failure to show that Wesley was unavailable. Therefore, he cannot show that he was deprived of effective assistance of counsel and this proposition fails.

DECISION

Gipson's conviction for first degree murder is **AFFIRMED**; however, his sentence of life without the possibility is **VACATED** and this case is **REMANDED** for **RESENTENCING**, for the reasons discussed above. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKFUSKEE COUNTY
THE HONORABLE LAWRENCE W. PARISH, DISTRICT JUDGE

ATTORNEYS AT TRIAL

PETER C. ASTOR
TASHA A. STEWARD
INDIGENT DEFENSE SYSTEM
610 SOUTH HIAWATHA
SAPULPA, OK 74066
ATTORNEYS FOR DEFENDANT

MAXEY PARKER REILLY
ASSISTANT DISTRICT ATTORNEY
OKFUSKEE COUNTY
P.O. BOX 225
OKEMAH, OK 74589
ATTORNEYS FOR STATE

ATTORNEYS ON APPEAL

JAMIE D. PYBAS
INDIGENT DEFENSE SYSTEM
P.O. BOX 926
NORMAN, OK 73070
ATTORNEY FOR APPELLANT

E. SCOTT PRUITT
ATTORNEY GENERAL
DONALD D. SELF
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR APPELLEE

OPINION BY: LEWIS, V.P.J.

A. JOHNSON, P.J.: Concurs in Results
LUMPKIN, J.: Concurs in Results
C. JOHNSON, J.: Concurs
SMITH, J.: Concurs in Results

LUMPKIN, JUDGE: CONCURRING IN RESULTS

I concur in the Court's decision but write separately to address the following.

Evidence of other crimes is admissible where it tends to establish absence of mistake or accident, common scheme or plan, motive, opportunity, intent, preparation, knowledge or identity. *Lott v. State*, 2004 OK CR 27, ¶ 40, 98 P.3d 318, 334-335; See 12 O.S.2011, § 2404(B). This Court has recognized that evidence of a defendant's personal disputes with those other than the deceased is relevant to the defendant's state of mind at the time of the homicide. *Phillips v. State*, 1999 OK CR 38, ¶¶ 32-33, 989 P.2d 1017, 1030.

> In *Jackson*, this Court found evidence of the defendant's "whiskey drinking" and personal disputes with those other than the deceased was relevant to the defendant's state of mind at the time of the homicide. 179 P.2d at 930. However, these were incidents which occurred only hours before the homicide which the Court found "[threw] light on the defendant's state of mind at the time of the shooting, and form[ed] a part of an unbroken chain of events leading up to and climaxing with the shooting of [the victim] by the defendant." *Id.*

Phillips, 1999 OK CR 38, ¶ 33, 989 P.2d at 1030; *quoting Jackson v. State*, 1947 OK CR 47, 179 P.2d 924, 931. The evidence must go "to the defendant's state of mind at a time not too remote" from the homicide. *Jackson*, 1947 OK CR 47, 179 P.2d at 931.

Turning to the present case, Appellant's violent incidents with Flynn and her family were relevant to Appellant's state of mind at the time of the homicide. The incidents were not too remote in time. They occurred only

hours before the present offense. The altercations formed part of an unbroken chain of events leading up to and climaxing with Appellant stabbing Berryhill. It is apparent that Appellant held a general ill-will towards others that evening. Although Appellant was absent for approximately three hours, he did not cool down but maintained his violent mood. As soon as Appellant returned to the apartment he violently attacked Berryhill, stabbing him six times. As such, I find that the trial court did not abuse its discretion in admitting this evidence. *West v. State*, 1990 OK CR 61, ¶ 16, 798 P.2d 1083, 1087.