IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RASHAWN GREER,	
Appellant,	**NOT FOR PUBLICATION**
v.	**Case No. F-98-1087**
THE STATE OF OKLAHOMA,	
Appellee.	

SUMMARY OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant, Rashawn Greer, was tried by jury in Tulsa County District Court Case No. CF-98-556 and convicted of First Degree Murder in violation of 21 O.S.1991, § 701.7(C). The jury recommended a sentence of life imprisonment, and the trial judge sentenced Appellant in accordance with this recommendation. Appellant now appeals his conviction and sentence.

Appellant raises the following propositions of error in this appeal:

I. The evidence was insufficient to sustain the conviction;

II. The trial court erred by excluding an important piece of evidence offered by the defense;

III. Appellant was denied a fair trial by the trial court's failure to instruct the jury on lesser forms of homicide which tended to be supported by the evidence;

IV. The jury instructions authorized a conviction without requiring either an intent to injure or the use of unreasonable force; such instructions constituted fundamental error which requires reversal; and

V. Appellant was denied a fair trial by his defense counsel's ineffective assistance.

After a thorough consideration of these propositions and the entire record before us, including the original record, transcripts, and briefs of the parties, we find Appellant was denied a fair trial by his trial counsel's ineffective assistance.

With respect to the first proposition of error, when the State introduces

only circumstantial evidence, this Court will find the evidence is sufficient to prove guilt only if, when viewed in the light most favorable to the State, it rules out every reasonable hypothesis other than guilt. *Miller v. State*, 977 P.2d 1099, 1107 (Okl.Cr.1998).[1] In making this assessment, we accept all reasonable inferences and credibility choices that tend to support the jury's verdict. *Williams v. State*, 721 P.2d 1318, 1320 (Okl.Cr.1986). The jury is the exclusive judge of the weight of the evidence and the credibility of the witnesses testimony. *Romano v. State*, 847 P.2d 368, 379 (Okl.Cr.1993).

Even accepting all reasonable inferences and credibility choices that tend to support the jury's verdict, we find the sufficiency of the evidence in this case to be a close call. Appellant was shown to be a good father who loved his children. He was convicted upon circumstantial evidence, essentially opportunity, his emotional state, the (somewhat conflicting) testimony of three medical experts, and the fact that his fifty-eight day old child received a significant head injury, apparently while under Appellant's sole care. Appellant testified in his own behalf, and his demeanor may have been a key factor in the verdict.

This Court gives great deference to jury verdicts. While we can hypothesize several scenarios which were not completely ruled out in this trial, we cannot say, on this record, that these hypotheses were reasonable. Therefore, we find the verdict sustained by the evidence, when viewed in a light

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[1] I voted to concur in the result in *Miller*, primarily, because of its use of the "reasonable hypothesis test." I have consistently urged the Court to adopt a unified *Spuehler*-type approach to evaluating the sufficiency of the evidence in all cases, whether they contain both direct and circumstantial evidence, or whether they contain entirely circumstantial evidence. See *White v. State*, 900 P.2d 982 (Okl.Cr.1995) (Lumpkin, J., specially concurring). Here, I use the

most favorable to the State.

With respect to proposition two, we find the trial court did not abuse its discretion by ruling the statement made by Appellant's two and three quarter year old daughter was hearsay without an applicable exception. *Stanberry v. State*, 637 P.2d 892, 895 (Okl.Cr.1981). With respect to proposition three, we find the trial court did not err by failing to instruct, *sua sponte*, on the lesser crimes of first degree manslaughter and second degree murder. Appellant did not request these instructions, apparently proceeding under the "all or nothing approach." *Shrum v. State*, 1999 OK CR 41, ¶ 11, __ P.2d __. While Appellant might have been entitled to a first degree manslaughter instruction upon request, there was no plain error in the trial court's failure to propose such instruction on its own, especially considering Appellant's defense that he did not know how or what caused the victim's injury.

With respect to proposition four, while the definition for "unreasonable force" used in this case, i.e. "[m]ore than ordinarily used as a means of discipline[2]," was arguably misleading[3] and understated[4], we find Appellant was not prejudiced by this definition. If indeed Appellant was responsible for the force which was used on the infant, such force was clearly unreasonable.

Finally, we find merit in proposition five. Seven (7) post-autopsy photographs, State's No. 26 through 32, were admitted at trial without any

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reasonable hypothesis test as a matter of *stare decisis*.

[2] This definition was taken from OUJI-CR 4-39.

[3] Appellant argues that just because a force is slightly more than what is "ordinarily used" doesn't necessarily mean it is unreasonable. This argument has some merit. The word "unreasonable" is an objective term, but the words "ordinarily used" may be viewed objectively or subjectively.

[4] In *Fairchild v. State*, 1999 OK CR __, __ P.2d __, we found the term "unreasonable force" was

form of objection from the defense. These photographs are gruesome pictures of the child's head after the medical examiner made an incision from the top of her head down to both ears and then pulled down the infant's skin from the front and back of her head. Several pictures show the medical examiner holding onto the skin as the bloody injuries and skull are examined.

The test for admissibility of photographs is not whether they are gruesome or inflammatory, but whether their probative value is substantially outweighed by the danger of unfair prejudice. *Jackson v. State*, 964 P.2d 875, 897, (Okl.Cr.1998). When dealing with post-autopsy photographs, this Court has to walk a careful line between what is relevant and what is prejudicial. *See, e.g. Alverson v. State*, 983 P.2d 498 (Okl.Cr.1999) (majority opinion found the photos "more amply showed the handiwork of the medical examiner" than they did the underlying injury, but two concurring in result opinions disagreed[5]).

In the instant case, the seven (7) post-autopsy photographs are all gruesome and show the autopsy procedures to a certain degree. Several are cumulative. At least two have no apparent relevance at all.[6] Even assuming, *arguendo,* that one or two post-autopsy photos were admissible, the remaining photographs were not and were highly prejudicial.

Appellant's trial counsel failed to object or seek exclusion of these post-autopsy photographs, and this failure constitutes deficient performance. The

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analogous to battery.

[5] I found the majority opinion went "too far" in its discussion of post-autopsy photographs: "While I agree with the general principal that post-autopsy photographs should be viewed with a certain degree of suspicion because of their potential to be more prejudicial than probative, we must recognize that post-autopsy photographs have their place in certain cases."

[6] Additionally, we find no apparent relevance in the three photographs of the child's body taken before the autopsy, but demonstrating no injuries (State's 22-24).

error was so serious as to deprive Appellant of a fair trial, a trial whose result is reliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). This was a close circumstantial case with somewhat conflicting medical opinions and a defendant who had no history of prior criminal or abusive behavior. The publication of these autopsy photos to the jury, several of which were not even relevant to any issue in the case or were unnecessarily cumulative, and the prejudicial nature was so great that it upset the adversarial balance between defense and prosecution thus rendering the trial unfair and the verdict suspect. We find no valid trial strategy to support their admission.

DECISION

The judgment and sentence are hereby **REVERSED**, and the matter is **REMANDED** to the District Court of Tulsa County for a new trial in accordance with this Opinion.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE THOMAS C. GILLERT, DISTRICT JUDGE

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OPINION BY: LUMPKIN, V.P.J.
STRUBHAR, P.J.: CONCUR
JOHNSON, J.: CONCUR
CHAPEL, J.: CONCUR IN RESULTS
LILE, J.: DISSENT

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