

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ROBERT LARUE JONES,)
)
 Appellant,) NOT FOR PUBLICATION
)
 v.) Case No. F-2006-1339
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAR 27 2008

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

A. JOHNSON, JUDGE:

Appellant Robert Larue Jones was tried by jury and convicted in the District Court of Oklahoma County, Case No. CF-2005-6445, of Robbery with a Dangerous Weapon, After Former Conviction of Two or More Felonies in violation of 21 O.S.2001, § 801. The jury fixed punishment at fifty years imprisonment. The Honorable Virgil C. Black, who presided at trial, sentenced Jones accordingly. From this judgment and sentence Jones appeals, raising the following issues:

- (1) whether the evidence is sufficient to sustain his conviction;
- (2) whether the jury received proper instruction on his defense of alibi;
and
- (3) whether his sentence is excessive.

We find reversal is required and reverse this case for retrial with appropriate instructions.

Jones filed a notice of intent to offer alibi as his defense and requested an instruction on his theory of defense. An instruction on a defense should be given when sufficient, *prima facie* evidence is presented which meets the legal criteria for the defense. See *Malone v. State*, 2007 OK CR 34, ¶ 22, 168 P.3d 185, 196; *Jackson v. State*, 1998 OK CR 39, ¶ 65, 964 P.2d 875, 892 (per curiam). The evidence of the defense may come from any source and should not be weighed by the trial court. *Malone*, 2007 OK CR 34, ¶ 22, 168 P.3d at 197. The trial court erred in refusing Jones's request for an alibi instruction on the basis that Jones failed to produce witnesses other than himself to place him at another location at the time of the robbery. Jones was entitled to an instruction informing the jury of his defense so it could evaluate the evidence. See *Glossip v. State*, 2001 OK CR 21, ¶¶ 28-29, 29 P.2d 597, 603-04; *Novey v. State*, 1985 OK CR 142, 709 P.2d 696, 698. The failure to include an alibi instruction in this case requires reversal.

DECISION

The Judgment and Sentence of the District Court is **REVERSED and REMANDED** with instructions to hold a new trial. Under Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2008), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE VIRGIL C. BLACK, DISTRICT JUDGE

APPEARANCES AT TRIAL

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OPINION BY: A. JOHNSON, J.
LUMPKIN, P.J.: Dissent
C. JOHNSON, V.P.J.: Concur
CHAPEL, J.: Concur
LEWIS, J.: Concur

RB

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LUMPKIN, PRESIDING JUDGE: DISSENT

This Court has been consistent since Territorial days as to the requirements that must be met to receive an instruction on the alibi defense. In *Barbe v. Territory*, 16 Okl. 562 , 86 P. 61, 64 (1906) the court stated:

To entitle the defense of alibi to consideration, the evidence must be such as to show that, at the very time of the commission of the crime charged, the accused was at another place so far away or under such circumstances that he could not, with ordinary exertion, have reached the place where the crime was committed so as to have participated in the commission thereof, and in a criminal prosecution, unless the evidence fills this requirement of law, no instruction on the subject of alibi is necessary to be given by the trial court.

This standard has been used throughout the years by this Court. See *Locke v. State*, 1997 OK CR 43, ¶4, 943 P.2d 1090, 1093, *overruled on other grounds by Burlison v. Saffle*, 2002 OK CR 15, ¶8, 46 P.3d 150, 153; *Honeycutt v. State*, 1992 OK CR 36, ¶ 22, 834 P.2d 993, 999; *Trissell v. State*, 1987 OK CR 107, ¶ 5, 737 P.2d 1228, 1229; *Goodwin v. State*, 1982 OK CR 183, ¶4, 654 P.2d 643, 644; *Leeth v. State*, 1951 OK CR 54, ¶ 70, 230 P.2d 942, 952; *Giles v. State*, 70 Okla. Crim. 72, 104 P.2d 975, 977 (1940).

As we stated in *Kinsey v. State*, 1990 OK CR 64, ¶8, 798 P.2d 630, 632-33, it is not error to “refuse to give an instruction on the defendant’s theory of defense if there is insufficient evidence to support it”. The evidence required is “any competent evidence” sufficient to establish

prima facie proof of the legal defense sought to be offered. As I have stated previously in *Jackson v. State*, 1998 OK CR 39, 964 P.2d 875, 902, (Lumpkin, Judge: Concur in Results),

In deciding whether a defendant has established a *prima facie* proof of the defense using the “any competent evidence” standard, the Court shall determine if the competent evidence presented is good and sufficient on its face. That means evidence which, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the defendant’s claim or defense, and which if not rebutted or contradicted, will remain sufficient to sustain a judgment in favor of the issue which it supports.

Reviewing the evidence presented in this case with the requirements of proof we have mandated for instructions on the defense of alibi as set out in *Barbe v. Territory*, together with the requirement of a *prima facie* proof of that defense by competent evidence, I cannot find the trial court erred in denying the instruction on alibi in this case.

Assuming for argument sake it was error to fail to give the instruction, the error would be harmless. See *Ellis v. Ward*, 2000 OK CR 18, ¶ 4, 13 P.3d 985, 986 (misinstruction of the jury is subject to a harmless error analysis). As the State points out in its brief, “nevertheless, the jury was presented with the alibi evidence and counsel argued that the evidence showed that the defendant was not at the scene of the crime”. The evidence was not sufficient to warrant the instruction and it was certainly not sufficient enough to create a reasonable doubt in the minds of the jurors in this case. I would affirm the judgment and sentence in this case.