IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DUSTIN KYLE MARTIN,	)	
	)	NOT FOR PUBLICATION
Appellant,	)	
	)	
v.	)	Case No. F-2012-1029
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

C. JOHNSON, JUDGE:

Appellant, Dustin Kyle Martin, was convicted after jury trial in Okmulgee County District Court, Case No. CF-2011-412, of Second Degree Felony Murder (Count I) and Accessory to Second Degree Murder (Count II), each After Former Conviction of Two or More Felonies. The jury assessed punishment at life imprisonment on each count. The trial court sentenced Martin accordingly, ordering the sentences be served consecutively.[1] It is from this Judgment and Sentence that Martin appeals to this Court.

Martin raises the following propositions of error:

1. Martin's conviction for Accessory to Second Degree Murder must be reversed because he was also convicted as a principal to that murder, and a person cannot be both principal and accessory to the same crime.

2. The evidence is insufficient to support Mr. Martin's conviction for Accessory to Second Degree Felony Murder.

3. The instructions concerning Accessory to Second Degree Murder were erroneous and tainted the resulting conviction.

4. The introduction of irrelevant and highly prejudicial photographic

[1] Martin must serve 85% of his sentence on Count I before he may be eligible to be considered for parole under 21 O.S.2011, § 13.1.

evidence deprived Mr. Martin of a fair trial.

5. The evidence is insufficient to support a conviction for Second Degree Felony Murder based on Second Degree Burglary.

6. Because the evidence was consistent with the offense of Heat of Passion Manslaughter, the trial court's refusal to give Martin's requested instructions on this offense denied Mr. Martin's right to due process, under the Fourteenth Amendment to the United States Constitution and Article II, § 7 of the Oklahoma Constitution, and constituted reversible error.

7. The introduction of hearsay testimony deprived Mr. Martin of his right to confront witnesses, his right to a fair trial, and his right to a fair and impartial sentencing in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article II, §§ 7, 9, and 20 of the Oklahoma Constitution.

8. The prosecutor's sentencing stage closing argument improperly injected consideration of how sentences should be served. Such comments were so unfair as to deprive Mr. Martin of his due process rights guaranteed by the Fourteenth Amendment and Oklahoma Constitution, Article II, Section 7.

9. Improper victim impact testimony tainted the judge's decision regarding how the sentences were to be served.

10. Consecutive life sentences are excessive under the facts and circumstances and should therefore be modified.

11. The accumulation of error in this case deprived Mr. Martin of due process of law and of a reliable trial in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article 2, §§ 7 and 9 of the Oklahoma Constitution.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm Mr. Martin's Judgment and Sentence on Count I but reverse Count II with instructions to dismiss.

In Proposition I Martin argues that his conviction for Accessory to Murder in the Second Degree in Count II must be reversed because he was

convicted as a principal to Second Degree Murder for the same homicide in Count I. Martin acknowledges that this issue was not raised below and accordingly, will be reviewed only for plain error. *Head v. State*, 2006 OK CR 44, ¶ 9, 146 P.3d 1141, 1144. To be entitled to relief under the plain error doctrine, Burton must prove: (1) the existence of an actual error (i.e., deviation from a legal rule); (2) that the error is plain or obvious; and (3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding. *See Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

The State correctly, and commendably, concedes Martin's claim. That a party to a crime is either a principal or an accessory after the fact is a conclusion dictated by both logic and settled, albeit sparse, case law. *See Vann v. State*, 1922 OK CR 102, 21 Okl.Cr. 298, 304, 207 P. 102, 104 (1922)(holding an accessory under Oklahoma statutes "is not so connected with the crime, and is only connected with the offender and his interests after the offender has committed the original offense"); *Wilson v. State*, 1976 OK CR 167, ¶ 14, 552 P.2d 1404, 1406 (holding that "the offense of accessory to a felony is a separate and distinct substantive crime, and is not a lesser included offense of the principal crime"); *State v. Truesdale*, 1980 OK CR 97, ¶ 4, 620 P.2d 427, 428 (holding that parties to a crime are either principals or accessories after the fact. An accessory is not connected with the original crime but with the offender after the crime has been committed.); *Faulkner v. State*, 1982 OK CR 84, ¶ 17, 646 P.2d 1304, 1308 ("An accessory's guilt is established by acts which occur after a felony has been committed by others. Thus an accessory

has nothing to gain or lose, as far as his guilt is concerned, by coming forward with evidence concerning details of how the felony was committed."). Further, the Committee's Comments to Instruction No. 2-4 OUJI-CR(2d) support this conclusion, stating:

> An individual becomes an accessory under Oklahoma statutory provisions only when that individual becomes associated with the offender and his fate subsequent to the commission of the original offense. One who participated either prior to or during the commission of the offense is liable as a principal.

(Emphasis added.)

The fact that Martin was tried and convicted of Second Degree Felony Murder for his involvement in the actual homicide precludes him from being convicted as an accessory based upon his subsequent acts. His conviction for both crimes was plain error and requires that his conviction for Accessory to Murder in the Second Degree be reversed with instructions to dismiss.

Martin's arguments in Propositions II and III regard only errors alleged to have affected his conviction for Accessory to Murder in the Second Degree in Count II. As noted above Martin's conviction for Accessory to Murder in the Second Degree must be reversed with instructions to dismiss. This ruling renders Martin's arguments in Propositions II and III moot.

In his fourth proposition Martin contends that the introduction of irrelevant and highly prejudicial photographic evidence deprived him of a fair trial. The admission of evidence lies within the sound discretion of the trial court and we will not disturb the trial court's decision absent an abuse of discretion. *Pavatt v. State*, 2007 OK CR 19, ¶ 42, 159 P.3d 272, 286. This

Court has held that:

> [T]he 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." We have recognized that even highly disturbing photographs can be admissible in order to show the nature, extent, and location of the victim's wounds, to establish the corpus delicti, to corroborate the testimony of the medical examiner and other witnesses, and to show the crime.

Webster v. State, 2011 OK CR 14, ¶ 76, 252 P.3d 259, 280 (internal footnotes and quotations omitted).

With the exception of State's Exhibit 10, the trial court did not abuse its discretion in admitting the challenged photographs. Although disturbing, the majority of the photographs were relevant and their probative value was not substantially outweighed by the risk of unfair prejudice. 12 O.S.2011, § 2403; *DeLozier v. State*, 1998 OK CR 76, ¶¶ 22-24, 991 P.2d 22, 28. The quality of the photograph admitted as State's Exhibit 10, on the other hand, was so poor as to have no probative value in establishing any fact at issue. Thus, the trial court abused its discretion in admitting it into evidence. As the evidence was overwhelming and the quality of the photograph so poor as to render it of little prejudicial effect, the error in the admission of this photograph was harmless. *See Mack v. State*, 2008 OK CR 23, ¶ 8, 188 P.3d 1284, 1288. Proposition IV requires no relief.

In Proposition V Martin argues that the evidence presented at trial was insufficient to support his conviction for Second Degree Felony Murder with Second Degree Burglary being the underlying felony. Reviewing the evidence in a light most favorable to the State, we find that a rational trier of fact could

have found each element of the crime charged to exist beyond a reasonable doubt. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04.

Martin argues in his sixth proposition that the trial court erred in refusing his requested jury instruction on the crime of Heat of Passion Manslaughter in the First Degree as a lesser offense. We review a trial court's decision on the submission of lesser offense instructions for an abuse of discretion. *Jackson v. State*, 2006 OK CR 45, ¶ 24, 146 P.3d 1149, 1159. It is true that the trial court must instruct on any lesser offense warranted by the evidence. *Jones v. State*, 2006 OK CR 17, ¶ 6, 134 P.3d 150, 154, citing *Shrum v. State*, 1999 OK CR 41, 991 P.2d 1032 (lesser offense instructions should be given if supported by any evidence). An underlying requirement of *Shrum*, however, is that a lesser offense instruction should not be given unless the evidence would support a conviction for the lesser offense. *Id. See also Harris v. State*, 2004 OK CR 1, ¶ 50, 84 P.3d 731, 750. In the present case an instruction on Heat of Passion Manslaughter in the First Degree was not warranted by the evidence and the trial court did not abuse its discretion in denying this instruction.

In his seventh proposition Martin argues that the expert testimony of the forensic interviewer was irrelevant and hearsay and its admission into evidence violated his rights under the Confrontation Clause. As Martin did not object to this testimony at trial, all but plain error has been waived for review on appeal. *Smith v. State*, 2013 OK CR 14, ¶ 44, 306 P.3d 557, 572. We find that the testimony at issue was neither hearsay nor violative of the Confrontation

Clause. *See* 12 O.S.2011, § 2801(A)(3); *Crawford v. Washington*, 541 U.S. 36, 51-52, 124 S.Ct. 1354, 1364, 158 L.Ed.2d 177 (2004). While the relevancy of the testimony at issue is questionable, upon consideration of the entire record, we find that the forensic interviewer's testimony did not rise to the level of plain error as it did not affect the outcome of the proceeding. Relief is not required.

In Propositions VIII, IX and X Martin asserts, respectively, that error occurred when the prosecutor asked the jury to impose consecutive sentences, that improper victim impact testimony tainted the trial judge's decision to order his two life sentences be served consecutively and that the imposition of consecutive life sentences was excessive under the facts and circumstances of this case. He asks this court to remedy these errors by modifying his sentences to run concurrently. Because we ruled above that Martin's conviction for Accessory to Second Degree Murder must be reversed with instructions to dismiss, modification by running the sentences concurrently is not required to remedy errors alleged in these propositions. Further, Martin's life sentence on Count I, is not excessive and need not be reduced to a lesser term of years. *Rea v. State*, 2001 OK CR 28, ¶ 5 n. 3, 34 P.3d 148, 149 n. 3. (holding that a sentence within the statutory range will be affirmed on appeal unless, considering all the facts and circumstances, it shocks the conscience of this Court).

Finally, upon review of Martin's claims for relief and the record in this case we note again that some of the alleged errors in this case have been remedied by the reversal of Count II, Accessory to Second Degree Murder. Any

remaining errors and irregularities, even when considered in the aggregate, do not require additional relief because they did not render his trial fundamentally unfair, taint the jury's verdict, or render sentencing unreliable. Any errors not contributing to this Court's decision to reverse Count II were harmless beyond a reasonable doubt, individually and cumulatively. *DeRosa v. State,* 2004 OK CR 19, ¶ 100, 89 P.3d 1124, 1157.

DECISION

The Judgment and Sentence of the district court is **AFFIRMED** as to Count I, Second Degree Felony Murder. The Judgment and Sentence on Count II, Accessory to Second Degree Murder, is **REVERSED** with instructions to **DISMISS.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2014), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKMULGEE COUNTY
THE HONORABLE H. MICHAEL CLAVER, DISTRICT JUDGE

APPEARANCES AT TRIAL

CHARLES BARKER
OKLAHOMA INDIGENT
DEFENSE SYSTEM
P.O. BOX 998
OKMULGEE, OK 74447
ATTORNEY FOR DEFENDANT

O.R. BARRIS, III
DISTRICT ATTORNEY
DAVID K. PIERCE
ASSISTANT DISTRICT ATTORNEY
314 WEST 7TH STREET
OKMULGEE, OK 74447
ATTORNEYS FOR THE STATE

APPEARANCES ON APPEAL

LEE ANN JONES PETERS
OKLAHOMA INDIGENT
DEFENSE SYSTEM
P.O. BOX 926
NORMAN, OK 73070
ATTORNEY FOR APPELLANT

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
JAY SCHNIEDERJAN
ASSISTANT ATTORNEY GENERAL
313 N.E. 21st ST.
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR THE STATE

OPINION BY C. JOHNSON, J.

LEWIS, P.J.: CONCUR
SMITH, V.P.J.: DISSENT
LUMPKIN, J.: CONCUR IN PART/DISSENT IN PART
A. JOHNSON, J.: CONCUR

LUMPKIN, JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the Court's decision to affirm Appellant's conviction for Second Degree Felony Murder in Count I and reverse Appellant's conviction for Accessory to Second Degree Murder in Count II, but cannot agree with the discussion of the law concerning the classification of parties to crime. Instead, I agree and join with Vice Presiding Judge Smith that Oklahoma's statutory scheme abrogated the common law distinction between principals and accessories and join her dissent to the extent that she finds that a defendant may be charged and punished as both a principal to a felony and as an accessory to that felony subject to the limitations imposed pursuant to 21 O.S.2011, § 11. *See Conover v. State*, 1997 OK CR 6, ¶¶ 41-44, 933 P.2d 904, 914-15 (contrasting common law theory of parties to a crime with Oklahoma statutory scheme).

However, in the present case the evidence was not sufficient to support Appellant's conviction for Accessory to Second Degree Murder. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204 ("We review sufficiency of the evidence claims in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the charged offense beyond a reasonable doubt."). No person may be convicted of being an accessory to a felony unless the State proves beyond a reasonable doubt each element of the crime of accessory, specifically including the element of: actively concealed or

aided the felony offender. *State v. Truesdell*, 1980 OK CR 97, ¶ 4, 620 P.2d 427, 428 (*overruled on other grounds by State v. Hammond*, 1989 OK CR 25, 775 P.2d 826); 21 O.S.2011, § 173; Inst. No. 2-2, OUJI-CR(2d)(Supp.2013). In order to establish that a defendant actively aided the felony offender the State must prove that the defendant rendered overt active assistance to the felony offender. *Farmer v. State*, 1935 OK CR 8, 40 P.2d 693, 694; Inst. No. 2-4, OUJI-CR(2d)(Supp.2013) (defining "aid" as "[r]ender over personal assistance.").

The State's evidence concerning the offense of Accessory to Second Degree Murder in the present case consisted of Appellant's alteration of his account of the victim's death. Appellant wrote to his co-defendant while they were in jail detailing his love for her and explaining that he wanted to take a deal where he would go to prison and she would receive a suspended sentence. (State's Ex. Nos. 41-46). Thereafter, Appellant wrote a letter to the trial court in an attempt to take responsibility for the victim's death which was contrary to his prior statements and admissions concerning the offense. In the letter, Appellant explained that he was mad at his co-defendant for talking to the police when he blamed her for shooting the victim and burning his body. Importantly, Appellant did not absolve the co-defendant within the letter but acknowledged that she accompanied him to the victim's home and drove the victim's car away from the scene in an attempt to make the circumstances appear to be a robbery. (State's Ex. Nos. 38-39). Although there are arguably some circumstances where the alteration of a prior statement may overtly aid an offender, in the present case, Appellant's alteration of his story was not

legally sufficient to constitute overt active assistance. *Farmer*, 40 P.2d at 694 (holding mere act of telling sheriff a falsehood concerning identity of who committed felony offense did not constitute overt active assistance rendered to the offender).[1] Accordingly, Appellant's conviction for Accessory to Second Degree Murder in Count II must be reversed.

[1] In *Wilson v. State*, 1976 OK CR 167, 552 P.2d 1404, this Court stated in dicta that the defendant's admission to making up a story to protect the identity of the individuals that committed the felony offense was sufficient evidence to justify the filing of a new Information charging the defendant with the offense of accessory to a felony. *Id.*, 1976 OK CR 167, ¶ 16 n. 16, 552 P.2d at 1407 n. 16. Not only is this determination dicta but I note the disparity in necessary proof between the filing of an Information and conviction at trial.

SMITH, V.P.J., DISSENTING:

I cannot join the majority's discussion or resolution of Martin's first proposition of error. Martin's claim is predicated on the common law rule that a party cannot be both a principal and an accessory after the fact to the same crime. The majority finds this notion to be dictated by logic and settled case law. I disagree. The question presented has never been squarely addressed by this Court and the dicta in the cases cited by the majority cannot legitimately be referred to as settled law. An examination of the historical underpinnings of the common law rule and our statutes compel the conclusion that the common law has been abrogated by the Legislature.

As the rule relied upon by the majority has its origins in the English common law, it is necessary to begin with a brief overview of the common law treatment of accessories after the fact. At common law, there were four categories of parties to the commission of a felony: principals in the first degree, principals in the second degree, accessories before the fact, and accessories after the fact. 2 Wayne R. LaFave, *Substantive Criminal Law* 326 (2d ed. 2003). A principal in the first degree was one who actually committed the criminal acts. *Id.* at 327. A principal in the second degree was one who was present at the scene of the crime and who aided, counseled, or encouraged the principal in the first degree in the commission of the offense. *Id.* at 329. The requirement that a principal in the second degree be present at the scene could be satisfied if he was constructively present; although this did not require him to be present at the scene of the crime, it did require him to be

close enough to render actual assistance at the time of the commission of the offense while he aided and abetted. *Id.* For example, one who served as a lookout in aid of a principal in the first degree might be classified as a principal in the second.

Accessories, both before and after the fact, were primarily distinguished from principals by their absence during the commission of the substantive crime. *Id.* at 330, 399. Specifically, accessories before the fact where those who directed, counseled, encouraged or otherwise aided and abetted another to commit a felony before the commission of the offense and who were not present at its commission. *Id.* Accessories after the fact were those who, knowing of a party's commission of a felony, rendered assistance to him in an effort to hinder his detection, arrest, trial, or punishment. *Id.* at 400. There was one exception to criminal liability as an accessory after the fact. A wife was not regarded as criminally liable where she rendered aid to her husband after he committed a crime. *Id.* at 403. The lack of presence was the key in the classification of a party as an accessory because if one acted to aid and abet while at or near the situs of the crime, he was regarded as a principal in the second degree. So long as he was not a principal and also committed separate acts, under the common law one could be both an accessory before the fact and an accessory after the fact to the same crime. *Id.* at 402-03; *see also,* 1 Joel Prentiss Bishop, *Bishop on Criminal Law* 481 (John Zane & Carl Zollman eds., 9th ed. 1923).

Despite whether a party to a felony was classified as a principal in the first degree, principal in the second degree, accessory before the fact or accessory after the fact, all faced the same punishment of death. *Id.* at 331, 403. To limit the imposition of the death penalty, a number of procedural rules were developed at common law in order to shield accessories from such harsh punishment. *Id.* For this reason, the distinctions between accessories and principals remained important. While most of these procedural rules are not relevant to the analysis in the present case, one is. Because accessories after the fact were regarded as committing a crime in the nature of obstruction of justice, they could be granted the benefit of clergy which was not available to accessories before the fact, principals in the first degree or principals in the second degree. *Id.* at 403; 1 William L. Burdick, *Law of Crime* 310 (Matthew Bender & Co., Inc. 1946).

> The doctrine of "clergy," which amounted to exemption from capital punishment, originated in the ancient custom of the secular courts, out of deference to the church, to yield to the ecclesiastical courts the jurisdiction over the persons of churchman. When one in church orders "prayed his clergy", when arraigned upon a criminal charge, he was remanded to the jurisdiction of the ecclesiastical courts where his punishment was slight or nothing. In time, since previously the evidence required to establish one's ecclesiastical office was that the accused should be able to read, the benefit of clergy was extended to all persons who could read. If one could read a psalm correctly he was adjudged to be in orders, and thereupon, after being branded upon the hand, he was discharged.

Burdick, *supra*, at 79-80.

Precisely because an accessory after the fact could escape the death penalty through invocation of the benefit of clergy, it is clearly critical that the common law requirement that the accessory not also be involved in the

commission of the substantive offense, and thus not be regarded as a principal in the second degree. With this history in mind, the question to be answered is what role, if any, does the common law play in the resolution of this issue. Unless modified by constitutional or statutory law, or judicial decisions, the common law remains in effect in aid of the general statutes. *Elliott v. Mills*, 1959 OK CR 22, ¶ 27, 335 P.2d 1104, 1111; 12 O.S.2011, § 2; 22 O.S.2011, § 9. This analysis must begin with our statutes and our decisions construing them.

Under our statutes, there are but two classifications for criminal actors. Section 171 of Title 21 states: "The parties to crimes are classified as: (1) Principals, *and*, (2) Accessories." 21 O.S.2011, § 171 (emphasis added). Section 172 of Title 21 defines principals to a crime as those persons concerned in the commission of the crime whether they directly commit the act constituting the offense or aid and abet in its commission. 21 O.S.2011, § 172. However, distinction remains for accessories after the fact – the only type of accessory recognized by statute – who are defined as "all those persons who, after the commission of any felony, conceal or aid the offender, with knowledge that he has committed a felony and with intent that he may avoid or escape from arrest, trial, conviction or punishment...." 21 O.S. 2011, § 173.

With Section 172, the Legislature abandoned the common law distinctions between accessories before the fact and principals in the first and second degree and subsumed them into a singular category of principal. *Wilson v. State*, 1976 OK CR 167, ¶ 10, 552 P.2d 1404, 1406. While defining

accessories separately, the language of Section 173 is most telling of the Legislature's intent to also abrogate the common law rule that an accessory after the fact cannot also be a principal.

We have recognized that the essential elements of a crime are determined from the statutory provisions defining the offense. *Morrison v. State*, 1990 OK CR 33, ¶ 7, 792 P.2d 1189, 1192. As dictated by the language of Section 173, to support a conviction for the crime of Accessory, the State must prove the following elements: (1) the defendant actively concealed or aided the offender; (2) after the offender had committed a felony offense; (3) the defendant's acts of concealing or aiding were performed with the knowledge that the offender committed the acts constituting a felony offense; and (4) the defendant concealed or aided the offender with the intent that the offender avoid or escape arrest, trial, conviction or punishment. 21 O.S.2011, § 173; *see also* Instruction No. 2-2, OUJI-CR (2d) (2013 Supp.).

The plain language of Section 173 excludes from the elements of the offense the common law requirement that an accessory not be a participant in the substantive offense as a principal and, unlike the common law, makes no exemption from criminal liability for any class of persons who render aid to a felon. When read together with Section 172, nothing in the statutory definitions of principal and accessory render them mutually exclusive. This is further supported by the language of Section 171; had the Legislature intended to render the classifications of principals and accessories exclusive of each other, they would have used the disjunctive "or." The language of our statutes,

without more, indicates an abrogation of the common law rules for accessories after the fact. In fact, it is impossible to wholesale adopt the common law rule with our statutory definitions of principals and accessories. With accessories before the fact treated as principals under Section 172, the common law rule would allow those principals who where formerly classified as accessories before the fact to be punished as accessories after the fact while other principals could not.

Our statutes have effectively abrogated the common law rule that an accessory after the fact cannot be guilty of the substantive crime as a principal. This is not to say that a defendant may always be prosecuted and punished as both a principal and an accessory to the same offense. Section 11 of Title 21 would operate to prohibit a defendant from being punished for both crimes if they arose out of one act. 21 O.S.2011, § 11(A); *Lewis v. State*, 2006 OK CR 48, ¶¶ 3-9, 150 P.3d 1060, 1061-62. This conclusion is not undermined by any prior decision of this Court, as this question has never before been addressed.

Purporting to justify its conclusion by reliance on "settled" case law, the majority relies on language from *Vann v. State*, 21 Okl.Cr. 298, 207 P. 102 (1922), quoted in part again in *State v. Truesdell*, 1980 OK CR 97, 620 P.2d 427, as support for the position that a party cannot both be a principal and an accessory to the same crime. The language relied upon, however, is dicta.

The defendant in *Vann* was convicted as a principal for the crime of Forgery in the First Degree. *Vann*, 207 P. at 102. Vann's codefendants

impersonated a property owner and purported to sell property to the victim by forging the property owner's name to a deed which was then filed and recorded. *Id.* The buyer later became suspect that the person from whom the property was purchased was an imposter and asked the defendant to go with him to the seller's home and identify whether she was in fact the true property owner. *Id.* By an agreement between Vann and the codefendants involved in the forgery, Vann took the seller to the home of the imposter and falsely identified her as the true property owner; in return, Vann was to receive a portion of the proceeds derived from the sale of the property. *Id.*

In addressing a challenge to the sufficiency of the evidence, this Court noted that there was no evidence that the defendant was connected to the original conspiracy or forgery and that his involvement came only after the criminal act of forgery was completed. *Id.* at 103. After setting forth the statutes defining principals and accessories and distinguishing between the two, it was stated:

> Where a criminal statute by express terms defines a crime as the doing of some particular act, the accused will be held amenable for the doing of only such acts as come properly within the definition. An accessory, under our statutes, is not so connected with the crime, and is only connected with the offender and his interests after the offender has committed the original offense. Accessories therefore cannot be guilty of the commission of the main offense.

Id. at 104. Under the evidence, this Court concluded that the defendant's conviction as a principal was not supported by sufficient evidence because his involvement began after the crime of forgery was completed. *Id.*

Vann simply stands for the innocuous position that a defendant's conduct determines whether he was acting as a principal or an accessory and, under the facts of that case, the State's evidence failed to show that the defendant was involved in the commission of the crime before it was completed as was necessary to sustain his conviction as a principal. The language that accessories cannot be guilty of the commission of the primary offense had no bearing on any issue decided by the Court. Certainly, *Vann* did not purport to resolve the question of whether a defendant could be both an accessory and a principal to the same crime.

The language of *Vann* appeared again in *Truesdell*, but still as dicta. There the defendant was convicted of Accessory After the Fact to the crime of Shooting with Intent to Kill, the underlying felony having been committed by the defendant's twelve-year-old son. *Truesdell*, 1980 OK CR 97, ¶ 1, 620 P.2d at 428. At issue was whether the defendant could be guilty of being an accessory where the principal she aided was a minor child who was not charged with a felony offense. *Truesdell*, 1980 OK CR 97, ¶ 5, 620 P.2d at 428. Before addressing the question presented, the Court began by noting the general elements of the crime of accessory and included therewith the quote from *Vann* that "an accessory is not connected with the original crime, but is connected with the offender after the original offense has been committed." *Truesdell*, 1980 OK CR 97, ¶ 4, 620 P.2d at 429. We held that the minor's status as a juvenile was a legal status not a factual status and the defendant's

guilt was determined by whether she aided him regardless of whether or not he was ever charged with a criminal offense. *Id.*

Nothing in *Vann* or *Truesdell* has any application to the question of whether there are circumstances in which a defendant's separate and distinct actions may show him to be both a principal and an accessory at different times. Equally unavailing on this point is the majority's reliance on *Faulkner v. State*, 1982 OK CR 84, 646 P.2d 1304 and *Wilson v. State*, 1976 OK CR 167, 552 P.2d 1404, to bolster support for its conclusion. In *Faulkner*, two defendants were convicted of Robbery with Firearms. *Faulkner*, 1982 OK CR 84, ¶ 1, 646 P.2d at 1306. At trial, one of the State's witnesses testified to incriminating statements made by the defendants during a trip to California after the robbery was committed. *Faulkner*, 1982 OK CR 84, ¶ 14, 646 P.2d at 1307. On appeal it was urged that the trial court erred in admitting the witness' testimony on the grounds that it was not corroborated. *Faulkner*, 1982 OK CR 84, ¶ 15, 646 P.2d at 1307. We concluded that the witness was not an accomplice to the commission of the robbery and was, at most, an accessory. *Faulkner*, 1982 OK CR 84, ¶ 16, 646 P.2d at 1308. We further rejected the position that the testimony of an accessory should be corroborated in the same manner as an accomplice. *Faulkner*, 1982 OK CR 84, ¶ 18, 646 P.2d at 1308. Given that the defendants were neither charged with nor convicted of being accessories, the majority's effort to isolate language from *Faulkner* and use it in a context in which it was not intended is tenuous.

In *Wilson*, the defendant was charged with Murder in the Second Degree but, after jury trial, convicted of Accessory to a Felony as a lesser-included offense. *Wilson*, 1976 OK CR 167, ¶ 1, 552 P.2d at 1404. On appeal, the defendant argued that the trial court erred in instructing the jury on the crime of Accessory to a Felony, because it was not a lesser-included offense. *Wilson*, 1976 OK CR 167, ¶ 3, 552 P.2d at 1405. We agreed. Based on the elements of the crime, we concluded that the crime of Accessory is a separate and distinct substantive crime arising only after the commission of the underlying felony is completed by another. *Wilson*, 1976 OK CR 167, ¶ 14, 552 P.2d at 1406.

The conclusion in *Wilson* is unremarkable and offers no support for the majority's position. It is difficult to conceive of how the fact that the crime of Accessory is separate and distinct from the underlying felony precludes a conviction for both. To the contrary, such circumstances are analytically indistinguishable from those where a defendant is convicted of both Burglary in the First Degree and other offenses committed within the burgled structure. It is precisely because they are separate and distinct criminal acts that we have upheld convictions for burglary and the crimes committed therein. *Taylor v. State*, 1995 OK CR 10, ¶ 45, 889 P.2d 319, 339. The decision of the California Court of Appeals in *California v. Mouton*, 19 Cal.Rptr.2d 423 (Cal.App. 1993), illustrates this point.

In *Mouton* the court rejected a similar claim made by a defendant convicted of Murder in the Second Degree and Accessory to a Felony who urged that his convictions as a principal and an accessory were mutually exclusive,

thus requiring his conviction for Accessory to be dismissed; like Martin's, this claim was predicated on the English common law rule that an accessory after the fact could not also be a principal in the crime. *Mouton*, 19 Cal.Rptr.2d at 428-29.

The facts of that case established that after a verbal altercation in which he was not involved, Mouton and others went to an apartment complex armed with guns to confront those they believed to be causing trouble. *Id.* at 425. While there, an argument ensued between one of Mouton's codefendants and a resident who had asked the men to leave his apartment. *Id.* One of the codefendants fired three shots, hitting and killing a bystander. *Id.* After the commission of the crime, Mouton hid certain physical evidence and gave false statements to police, all intended to shield one of his codefendants from apprehension. *Id.* at 430-31.

The California Court of Appeals rejected application of the common law rule that an accessory cannot also be guilty as a principal to the crime. The court reasoned that California statutes defining principals and accessories were inconsistent with the common law rule and not in themselves mutually exclusive. *Id.* at 429-30. The court held:

> [T]here is no bar to conviction as both principal and accessory where the evidence shows distinct and independent actions supporting each crime. When a felony has been completed and a person knowingly and intentionally harbors, conceals or aids the escape of one of the felons, that person is guilty as an accessory to a felony under section 32, whatever his or her prior participation in the predicate felony.

Id. at 430. Under the facts of the case, the court said:

> [D]efendant's responsibility both as an accomplice to the murder and for the separate and distinct crime of acting as an accessory to a felony was neither logically inconsistent nor legally prohibited. Although defendant was technically convicted of being an accessory to his own crime, in substance he was convicted for two different sets of actions.

Id. at 430-31.

Like the defendant in *Mouton*, Martin participated in two separate and distinct criminal acts. Along with his girlfriend, Martin participated as a principal in the Murder in the Second Degree. After his arrest he implicated himself and his girlfriend in the murder and other crimes. However, after being held in a cell next to her and exchanging letters while awaiting trial, it is of little surprise that Martin began making efforts calculated to allow his codefendant to escape conviction and/or punishment for one or more crimes with which she was separately charged arising out of the same incident. These efforts culminated with a written request to the trial court in which Martin recanted his previous implication of his codefendant in the commission of the crimes and asked that all charges brought against her be dismissed and brought against him.

A critical analysis demonstrates that our statutes abrogate the common law requirement that an accessory not be a participant in the underlying felony as a principal and, through operation of Section 11 of Title 22, would allow a defendant to be prosecuted and punished as both a principal and an accessory so long as he is not punished for the same criminal acts. For these reasons, I must respectfully dissent.

I am authorized to state that Judge Lumpkin joins in the analysis and conclusion that the common law has been abrogated by the Legislature.