**IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA**

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| DANIEL ALLEN MOORE, | ) | |
| | ) | |
| Appellant, | ) | NOT FOR PUBLICATION |
| | ) | |
| v. | ) | No. F-2004-1188 |
| | ) | |
| STATE OF OKLAHOMA, | ) | |
| | ) | |
| Appellee. | ) | |

## OPINION

**A. JOHNSON, J.:**

Daniel Allen Moore, Appellant, appeals his First Degree Murder conviction[1] and sentence of life without the possibility of parole from the District Court of Sequoyah County, Case No. CF-2003-269. He raises seven claims for review. We find no error that merits reversal of his conviction and so affirm the judgment. Jury instruction error, however, compels us to remand this case for resentencing.

### Facts

On June 9, 2003, Appellant shot 24-year-old Garade Jean Girsback in the front yard of a mobile home in rural Sequoyah County where she was babysitting several children. Girsback was the niece of Appellant's wife and with her two daughters had lived on and off with Appellant and his wife for years. Appellant and his wife often provided the primary care for Girsback's

[1] 21 O.S.2001, § 701.7(A).

children when she was unwilling or unable to care for them and were caring for the girls in June 2003.

The evidence showed that Appellant and his wife hosted a barbecue at their home the evening of June 9, 2003 and that Appellant was drinking and shooting guns. Several people there heard Appellant complain about Girsback. One guest testified he heard Appellant say to his wife, "I'm going over there to kill her. Are you with me or not?" Another guest testified he heard Appellant express his anger with the victim by saying he could kill her and that he could blow her head off. Still another guest testified she heard Appellant say he was going to take care of the situation with Girsback. A witness also testified that she had talked on the phone to Mrs. Moore earlier that day and heard Appellant in the background saying not to give Girsback any money because she would spend it on drugs and that her children would be better off without her.

Appellant took loaded guns with him when he and his wife went to see Girsback that evening. She was in the front yard when they arrived and walked over to speak to her aunt. Appellant said that he became angry with her and told her that she needed to use better judgment and put the needs of her own children first. He said that he was holding one of his guns and banging it on the hood of his truck when the gun fired striking Girsback in the chest. The Moores left the scene immediately; neither attempted to help the victim. Appellant disposed of the gun. Later that evening, he told his next door neighbor that he had accidentally shot Girsback and that he was not going to

jail for it. The next morning, he told a Sequoyah County deputy that he meant only to scare Girsback into keeping "her dope head on straight" but had not meant to shoot her. A neighbor walking to her own trailer heard but did not see the shooting. She testified that she heard Girsback scream and then heard the shot, but heard no sound of metal banging on metal before the shot.

The issue at trial was whether Appellant shot Girsback with a deliberate intent to kill her (malice aforethought), whether he was engaged in imminently dangerous conduct in reckless disregard of others (depraved mind), whether he was in the commission of the misdemeanor – reckless conduct with a firearm (misdemeanor manslaughter), or whether her death was the result of his culpable negligence (second degree manslaughter).[2]

## I.
## Omission of Instruction Setting Forth the Range of Punishment for First Degree Murder

In his first proposition Appellant claims his sentence should be modified to life with the possibility of parole to remedy the trial court's failure to instruct the jury on the range of punishment for first degree murder. The State concedes the trial court failed to submit an instruction advising the jury of the punishment options for first degree murder, but argues the omission of the instruction does not warrant relief under the circumstances of this case.

Appellant failed to object to the trial court's instructions; his failure to do so forfeits any error unless he can show plain error. *Hogan v. State,* 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. To be entitled to relief under the plain error

doctrine, Appellant 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. *Id.*

It is the trial court's duty to instruct the jury on the applicable law, including the full range of punishment. *Hicks v. State,* 2003 OK CR 10, ¶ 3, 70 P.3d 882, 883. The trial court below erred in failing to submit an instruction setting forth the range of punishment for first degree murder. The question is whether the error affected Appellant's substantial rights. The State contends relief is not required because defense counsel told the jury the punishment options for first degree murder during closing argument and the jury returned a sentence within the range provided by law.

We disagree. This record supports a finding that the jury was confused about the punishment options for first degree murder and was not provided clarification. When the court convened for the reading of the verdict, the trial court examined the verdict form and found that it did not specify Appellant's punishment. The trial judge sent the jury back to further deliberate its verdict without additional instruction. Within minutes, the jury returned with a verdict finding Appellant guilty of First Degree Murder and fixing his punishment at life imprisonment without the possibility of parole. Only once during trial was the jury told that the punishment options for first degree murder were life imprisonment and life imprisonment without the possibility of

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[2] The trial court instructed the jury on First Degree Malice Murder, Second Degree Depraved

parole.[3] Unlike capital cases, this was not a case where the punishment options for first degree murder were the focus of questioning during jury selection or one of the primary subjects during closing argument. In fact, the prosecutor never argued for life in prison without the possibility of parole, rather he asked at the conclusion of both the State's initial and final closing arguments that the jury sentence Appellant to life in prison. Without instructions setting forth the two options, jurors may well have believed life imprisonment without parole was the only punishment option for first degree murder and that it was the sentence the prosecutor sought given that the maximum punishment for the next serious offense (second degree murder) was life imprisonment. We have no means to determine what a jury in this case would have done if provided a proper instruction setting forth the two punishment options. Under these circumstances we find it necessary to remand this matter to the trial court for resentencing with proper instructions.[4]

## II.
## The Causation Instruction

In his second proposition, Appellant argues that the trial court erred in submitting a causation instruction[5] and that the error was compounded by the

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Mind Murder, First Degree Misdemeanor Manslaughter and Second Degree Manslaughter.

[3]Defense counsel noted the punishment options for first degree murder in closing argument. The jury was instructed that the argument of counsel was for persuasion purposes only and that argument is not evidence. The punishment options for first degree murder were not discussed in front of the jury at any other time, including jury selection.

[4] The necessity to remand this matter for resentencing renders moot any claims related to sentencing error and those claims will not be discussed further.

[5] Instruction 2 provided:

placement of the general closing instructions at the end of the jury instructions. He did not object to the causation instruction or the placement of the general closing instructions and review is for plain error only. *Hogan,* 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

Appellant did not dispute that his conduct caused Girsback's death. For that reason, he claims it was error to submit a causation instruction because the jury might have been confused and believed it could find him guilty of first degree murder without finding that he shot Girsback with a deliberate intent to take her life. We have rejected this claim in several cases. *See Torres v. State,* 1998 OK CR 40, ¶ 44, 962 P.2d 3, 17; *Gilbert v. State,* 1997 OK CR 71, ¶ 51, 951 P.2d 98, 113; *Smith v. State,* 1996 OK CR 50, ¶ 37, 932 P.2d 521, 534. As in these prior cases, Appellant's jury was properly instructed on the state's burden of proof, the elements of first degree murder and the definition of malice aforethought. The instructions when read as a whole accurately state the applicable law and preclude the possibility that the jury may have believed it appropriate to convict Appellant of first degree murder absent a finding of intent. The placement of the general closing instructions does not require a different result in this case. The jury was specifically instructed to "consider the Instructions as a whole and not as a part to the exclusion of the rest." We presume the jury followed it instructions. *Turrentine v. State,* 1998 OK CR 33, ¶ 26, 965 P.2d 955, 968. This claim is denied.

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No person may be convicted of Murder in the First Degree unless his conduct ... caused the death of the person allegedly killed. A death is caused by the

## III.
## The First Degree Manslaughter Instruction

In his third proposition, Appellant argues the trial court's written first degree misdemeanor manslaughter instruction was deficient because it failed to include the elements of the underlying misdemeanor of Reckless Conduct with a Firearm. Because Appellant did not object to the written instructions, review is again for plain error only. *Hogan,* 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

The record shows the trial court read the instructions to the jury in open court, including a lesser included offense instruction on first degree misdemeanor manslaughter complete with the elements of the underlying misdemeanor of Reckless Conduct with a Firearm. The issue then is not whether the jury was instructed accurately and completely, but whether the omission of the elements of Reckless Conduct with a Firearm from the written copy of the first degree misdemeanor manslaughter instruction amounts to plain error warranting relief.

Title 22 O.S.2001, § 893 provides in part that "[o]n retiring for deliberation the jury *may* take with them the written instructions given by the court." (Emphasis added.) We have interpreted § 893 to mean giving the jury the written instructions that have been read by the trial court is not mandatory but permissive. *Cleary v. State,* 1997 OK CR 35, ¶ 60, 942 P.2d 736, 750. The omission of a written copy of an instruction read by the trial court is therefore

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conduct if the conduct is a substantial factor in bringing about the death and the conduct is dangerous and threatens or destroys life.

not error under state statutory law. *Id.* Although we found no statutory violation in *Cleary*, we held the failure to provide a written copy of a second stage death penalty instruction, though inadvertent, was error despite the fact the instruction was read to the jury in open court because of a capital defendant's due process interest in being sentenced based on the law and by a process which facilitates the reliable exercise of sentencing discretion. *Cleary*, 1997 OK CR 35, ¶ 61, 942 P.2d at 750. We noted the practice in Oklahoma was to provide the jury with written copies of the jury instructions for the second stage of a capital murder trial and this practice is part of the process in Oklahoma to ensure a fair and rational sentencing procedure. *Id.* at ¶ 62, 942 P.2d at 750.

This same reasoning applies here. The failure to provide a written copy of an instruction on the elements of a crime may not violate state statute, but it violates a criminal defendant's due process interest in having his jury accurately instructed on the elements of the offenses involved. The practice in this State is to provide the jury with written copies of the jury instructions to ensure correct application of the law. The failure to provide the jury with a complete written copy of the first degree misdemeanor manslaughter instruction, though inadvertent, was error.

This record, however, does not support a finding that the error affected Appellant's substantial rights and necessitates relief. The complete instruction was read to the jury. It was neither so confusing nor so complex that it could not be remembered and applied. In addition, the jury was instructed to

consider first degree manslaughter if it had a reasonable doubt of the defendant's guilt of First Degree Murder and Second Degree Murder. The jury did not have a reasonable doubt of Appellant's guilt of First Degree Murder and thus any omission of the elements of Reckless Conduct with a Firearm in the First Degree Misdemeanor Manslaughter instruction did not affect the verdict because the jury presumably did not consider any offense other than first degree murder. *See Washington v. State,* 1999 OK CR 22, ¶ 16, 989 P.2d 960, 969; *Turrentine,* 1998 OK CR 33, ¶ 26, 965 P.2d at 968. This claim is denied.

**IV.**
**Heat of Passion Manslaughter.**

In his fourth proposition, Appellant claims the trial court erred in failing to instruct the jury on the lesser offense of heat of passion manslaughter. He argues that had the trial court allowed him to testify about the victim's statements to him, he would have been entitled to a heat of passion manslaughter instruction. Because Appellant did not request a heat of passion manslaughter instruction, review is for plain error only. *Hogan,* 2006 OK CR 19, ¶ 38,139 P.3d at 923.

Jury instructions on lesser included offenses need be given only when supported by the evidence. *See Shrum v. State,* 1999 OK CR 41, ¶ 10, 991 P.2d 1032, 1036. To warrant an instruction on heat of passion manslaughter, there must be evidence of adequate provocation, that is, improper conduct of the deceased toward the defendant that would naturally or reasonably have the effect of arousing a sudden heat of passion within a reasonable person in the

defendant's position. *See Washington,* 1999 OK CR 22, ¶ 13, 989 P.2d at 968. Words alone, however offensive or insulting, do not constitute adequate provocation. *See Black v. State,* 2001 OK CR 5, ¶ 51, 21 P.3d 1047, 1067; *see also* OUJI-CR2d 4-98.

Appellant contends the trial court erred in excluding the victim's statements which made him angry causing him to bang his gun on the hood of his truck, and so accidentally shoot the victim. Admission of these statements, no matter how offensive, would have been insufficient to establish adequate provocation to warrant a heat of passion manslaughter instruction. There was no evidence at trial, and Appellant makes no claim on appeal, that the victim's statements were accompanied by any conduct sufficient to establish adequate provocation. For this reason, we find Appellant has failed to show the trial court erred in failing to instruct the jury on heat of passion manslaughter.

Nor can Appellant show that counsel's failure to request a heat of passion manslaughter instruction constitutes ineffective assistance of counsel under these circumstances. This Court reviews claims of ineffective assistance of counsel under the two-part *Strickland* test that requires an appellant to show: [1] that counsel's performance was constitutionally deficient; and [2] that counsel's performance prejudiced the defense, depriving the appellant of a fair trial with a reliable result. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Davis v. State,* 2005 OK CR 21, ¶ 7, 123 P.3d 243, 246. "This Court may address the performance and prejudice components in any order and need not address both if [an appellant] fails to

make the requisite showing for one." *Davis,* 2005 OK CR 21, ¶ 7, 123 P.3d at 246. Because heat of passion manslaughter instructions were not warranted by the evidence, Appellant cannot show that his counsel's performance was constitutionally ineffective. *See Williams v. State,* 2001 OK CR 9, ¶ 118, 22 P.3d 702, 730.

## V.
## Sufficiency of the Evidence

In his fifth proposition, Appellant argues his conviction must be reversed because the State failed to prove beyond a reasonable doubt that he shot Girsback with a deliberate intent to take her life. The question of whether the evidence is sufficient to sustain a conviction is answered by considering the evidence in the light most favorable to the State and determining whether any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *Jones v. State,* 2006 OK CR 5, ¶ 32, 128 P.3d 521, 537. We will not disturb a jury verdict if from the inferences reasonably drawn from the record as a whole the jury might fairly have concluded the defendant was guilty beyond a reasonable doubt. *Davis v. State,* 2004 OK CR 36, ¶ 22, 103 P.3d 70, 78.

Employing that standard here we find the evidence presented was sufficient. The evidence supports a finding that he went to find Girsback armed and with the intent to kill her. His actions following the shooting support a finding that he acted on that intention. Neither he nor his wife tried to help Girsback after he shot her. He disposed of the weapon he used by throwing it into a wooded area in the back of his property. The jury rejected

Appellant's own account that the shooting was an accident, and the evidence is sufficient to justify the jury's verdict.

## VI.
## Appellant's Statements to Police

Appellant argues the trial court erred in admitting his statements to Deputy Fuller and Agent Lyons. He maintains his statement to Deputy Fuller should have been excluded because it was made without the benefit of *Miranda* warnings and his statement to Agent Lyons should have been excluded because he had invoked his right to counsel.

During cross-examination, the prosecutor asked Appellant whether he told Agent Lyons certain things during an interview. When defense counsel objected, the State did not contest that the interview was conducted after Appellant had requested a lawyer. The prosecutor acknowledged the statements could not be used as substantive evidence, but argued the statements could be admitted to impeach Appellant's trial testimony. Ultimately the trial court agreed based on *Harris v. New York,* 401 U.S. 222, 224, 91 S.Ct. 643, 23 L.Ed.2d 1 (1971). The trial court allowed Agent Lyons to testify in rebuttal about the statements Appellant made during the interview.

Following *Harris,* we have also held that "statements inadmissible against a defendant as part of the prosecution's case in chief, because of lack of procedural safeguards, may be used for impeachment purposes to attack the defendant's credibility." *Eddings v. State,* 1992 OK CR 78, ¶ 10, 842 P.2d 759, 762 *quoting Boling v. State,* 1979 OK CR 11, ¶ 11, 589 P.2d 1089, 1093. *See*

*also Wacoche v. State,* 1982 OK CR 55, ¶¶ 37-38, 644 P.2d 568, 575. "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Harris,* 401 U.S. at 226, 91 S.Ct. 646. The trial court admitted Appellant's statements to Agent Lyons to impeach his trial testimony and not as evidence of his guilt. The trial court included a limiting instruction regarding Lyon's testimony in the jury instructions. Based on this record, the trial court did not err in admitting the statements for impeachment purposes and no relief is required.

Appellant further claims that trial counsel was ineffective for failing to request a hearing outside the jury's presence to determine the voluntariness of his statements to Deputy Fuller and Agent Lyons. As discussed above, we use the *Strickland* test to evaluate claims of ineffective assistance of counsel. To prevail, Appellant must show the statements were inadmissible and that their admission affected the outcome of his case. Appellant cannot meet this burden. The trial court did not err in admitting Appellant's statement to Agent Lyons for impeachment purposes.

Nor did the trial court err in admitting Appellant's statements to Deputy Fuller. Deputy Fuller testified that he transported Appellant after his arrest to the Sequoyah County jail. He said that he did not advise Appellant of his rights or question him during the trip. He said that Appellant did make several spontaneous statements about the shooting on the way. It was established by the deputy's testimony that they were about two thirds of the way to the jail

when Appellant asked for a lawyer and that following his request, Appellant said nothing pertinent.

"In post-arrest situations where *Miranda* warnings have not yet been given, a defendant's voluntary statements, not made in response to questioning, are admissible." *Romano v. State,* 1995 OK CR 74, ¶ 19, 909 P.2d 92, 109. The record supports a finding that Appellant's statements were unsolicited and spontaneous. Had defense counsel requested a *Jackson v. Denno* hearing instead of conducting an in-court *voir dire* of the deputy, the result would have been the same and the statement would have been admitted. Thus Appellant cannot show he was prejudiced by trial counsel's actions in this regard and his claim must fail.

## VII.
## Accumulation of Error

In his final proposition, Appellant claims the combination of errors committed at trial justify a modification of his sentence to life imprisonment with the possibility of parole. This Court has recognized that when there are "numerous irregularities during the course of [a] trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors was to deny the defendant a fair trial." *DeRosa v. State,* 2004 OK CR 19, ¶ 100, 89 P.3d 1124, 1157 *quoting Lewis v. State,* 1998 OK CR 24, ¶ 63, 970 P.2d 1158, 1176. We have reviewed Appellant's claims of error in light of the record in this case and have found that error in instructing the jury requires this matter be remanded for resentencing. Any other errors and

irregularities, even when considered together, do not require further relief because they did not render his trial fundamentally unfair or taint the jury's verdict.

**DECISION**

The Judgment of the district court is **AFFIRMED**. The case is **REMANDED** to the district court for **RESENTENCING** with proper instructions on the range of punishment. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF SEQUOYAH COUNTY
THE HONORABLE A.J. HENSHAW, ASSOCIATE DISTRICT JUDGE

**APPEARANCES AT TRIAL**

JOHN SAWNEY
GERALD HUNTER
ATTORNEYS AT LAW
920 EAST CHEROKEE
SALLISAW, OK 74955
ATTORNEYS FOR MOORE

JEFFREY SHERIDAN
DOUGLAS KIRKLEY
ASST. DISTRICT ATTORNEYS
SEQUOYAH COUNTY COURTHOUSE
SALLISAW, OK 74955
ATTORNEYS FOR STATE

**APPEARANCES AT APPEAL**

ALICIA FELTON GEORGE
ATTORNEY AT LAW
P. O. BOX 580
MUSTANG, OK 73064
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL
OF OKLAHOMA
KEELEY L. HARRIS
ASST. ATTORNEY GENERAL
112 STATE CAPITOL BLDG.
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR APPELLEE

**OPINION BY: A. JOHNSON, J.**
CHAPEL, P.J.: Concur
LUMPKIN, V.P.J.: Concur
C. JOHNSON, J.: Concur
LEWIS, J.: Concur in Result

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