IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL JOE WILLIAMS,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2000-1247**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

LUMPKIN, JUDGE:

Appellant Michael Joe Williams was tried by jury in Okmulgee County District Court, case number CRF-1997-188, and convicted of First Degree Malice Aforethought Murder, in violation of 21 O.S.Supp.1996, § 701.7(A). The jury set punishment at life imprisonment without the possibility of parole, and the trial judge sentenced Appellant accordingly. Appellant now appeals his conviction and sentence.

In the early morning hours of June 9, 1997, someone entered Larry Durrett's Okmulgee trailer home and fired three shots at Durrett and his wife Delores while they were in bed asleep. Durrett jumped out of bed and pursued the assailant. Delores heard two more shots, someone leaving the trailer, and a car starting. She went and found her husband standing in the doorway, bleeding from the chest. She ran to the neighbors to call for an ambulance.

Larry Durrett died later at the hospital. The State Medical Examiner testified he had received five gunshot wounds. The cause of death was gunshot

wounds to the chest and abdomen. Five bullet casings were found inside the Durrett home by police investigators.

The next day, the Glenpool police pulled over Debra Smith, due to her erratic driving. Appellant was the front seat passenger. An officer became suspicious when Appellant disobeyed orders to stay by the car and attempted to walk behind the officer. Appellant was handcuffed for the officer's safety.

Smith's driver's license was suspended, and she was arrested on that basis. Appellant could not drive, for his license was also suspended, and so the car was impounded. During a license check, the arresting officer learned Appellant was wanted for questioning in regard to an Okmulgee homicide.

During the car's inventory, officer's found a .22 rifle behind the driver's seat, inside a pair of blue jeans. Officers also found a wallet and identification belonging to Stacy Pearce, drug paraphernalia, suitcases packed with male and female clothing, and a newspaper with a story about Durrett's shooting.

A District Attorney's investigator learned the Glenpool police had Appellant and Debra Smith in custody and went to interview them. Upon seeing the items inventoried from the car, he obtained a search warrant.

A firearm's expert found the casings from Durrett's home matched the rifle found in Debra Smith's car. The rifle belonged to Stacy Pearce's mother.

William Ledford, a friend of the deceased, testified that Appellant came to his home prior to these incidents asking for Larry Durrett in regard to some red phosphorus for making "dope." Ledford also claimed he helped Appellant locate Durrett on the day before the murder. Ledford heard Appellant ask

about a .22 caliber gun. Upon finding Durrett, Ledford overheard Durrett say to Appellant, "I heard you was going to shoot me in the back of the head."

Melinda Noies testified that Appellant told her Durrett owed him chemicals from a drug deal and that he intended to kill Durrett. Robert Frost, a district attorney's investigator, heard similar statements. Appellant called Frost in May of 1997, seeking to become an informant against Larry Durrett. Appellant said he wanted to set Durrett up or kill him.

When interviewed, Appellant claimed Durrett had not held up his end of a drug deal and so he went looking for Durett on June 8, 1997, accompanied by Bill Ledford and Debra Smith. They met Durrett, who agreed to settle up with them the next day. That evening, Stacy Pearce and Appellant met for the purpose of doing crank. They returned to Appellant's parents house at some point that night and discussed going to Kansas to look for a job. Appellant heard from Pearce and Smith two days later. They came and picked Appellant up in Tulsa. Appellant was in Pearce's car and transferred two bags from that car into the car that he and Debra Smith were driving when stopped.

Debra Smith was Larry Durrett's former girlfriend and testified she had an ongoing relationship with him until the day he died. Smith also dated Appellant during the same time. Smith claimed Appellant was jealous about her relationship with Durrett and had threatened to kill them both.

Smith confirmed the story about Durrett not keeping his end of a drug deal with Appellant and Stacy Pearce; Appellant believed Durrett had shortchanged him. Smith testified Appellant had been irate and looking for

Durrett for some time, until Bill Ledford led Appellant to Durrett the day before Durrett was murdered. Smith heard Durrett ask Appellant if he had said he would cut off Durrett's head. Appellant said he had not.

Smith testified that on the evening of June 8, 1997, Appellant and Pearce discussed going to Hanna for a drug deal and then, after meeting up with Tony Boswell, discussed meeting "Roley" in Hanna. Appellant and Pearce left at about 10 p.m. and returned about 3:00 a.m. Smith overheard Appellant and Pearce discussing how Durrett and Boswell had "screwed" them over on the drug deal. Appellant again threatened to kill Durrett. Appellant and Pearce left, and Smith did not hear from them again until the next afternoon, when Appellant called her from Tulsa and asked her to come pick him up.

During their phone conversation, Smith claimed Appellant was talking erratically and said she didn't have to be scared anymore. When she asked Appellant to explain what he meant, Appellant said, "Well, you don't have to worry about him anymore." She was eventually able to get Appellant to admit he was speaking of either Durrett or a man named Carl Brock.

Smith packed an overnight bag and drove to Tulsa to pick up Appellant. They met at an apartment alone. Appellant was "real antsy." He wanted to watch the news and obtain a newspaper, but would not give Smith any details about what was going on. They got into Smith's car and Appellant fell asleep.

Smith drove to Chubby Shaver's house. Shaver then told Smith he had heard a rumor that Larry Durrett had been shot and killed. Smith claims she got hysterical and "fell apart." When the rumor was confirmed, she went to her

car and told Appellant what had happened. Appellant got angry with Smith and told her to settle down. According to Smith, Appellant then informed her he had shot Durrett. He then dropped Smith off at a friend's apartment.

The next day, June 10, Smith claims she met Appellant and Stacy Pearce at the apartment. When she attempted to leave, Appellant grabbed and threatened her, saying she was "neck deep in this." Appellant left her with Pearce and took off in Pearce's car. He returned that afternoon and handed Smith a newspaper story about Durrett's murder. Appellant brought the gun and clothes for he and Pearce. Later that evening, after Pearce had left, Appellant began slapping Smith around while she was taking him to Tulsa to drop him off and then go home. She was then pulled over by the Glenpool police, arrested, and charged as an accessory after the fact on the murder.

Stacy Pearce, a co-defendant to the crime of First Degree Murder in this case, testified without any promises or agreements with the D.A.'s office concerning leniency. He and Appellant had been friends since high school and had agreed to try to make some money off methamphetamine, with Pearce helping to gather the materials. Debra Smith was also involved and had procured Larry Durrett to manufacture the drugs. But Smith landed in jail, and so Appellant wanted to raise money to get her out of jail.

Pearce claimed he, Appellant, and Durrett agreed that Durrett would make the drugs, they would use the money to get Smith out of jail, and split what was left three ways. But Durrett took the chemicals and left. Pearce claimed Appellant was upset by Durrett's actions and said he would kill him.

According to Pearce, he and Appellant eventually hooked up with Tony Boswell, who had plans to manufacture drugs in Hanna. Appellant, Boswell, and Pearce traveled to Hanna. Pearce brought a .22 caliber rifle because he felt things were not right. Upon arriving, the trio was confronted by a group of people and wound up pouring the chemicals out on the ground. Appellant believed Durrett was behind the incident and that Boswell was involved as well. The trio argued in the car about what Boswell knew and whether Durrett was involved. Appellant put the gun to Boswell's head at one point.

Pearce and Appellant then went to Debra Smith's Henryetta apartment, but left again together around 2:30 a.m. They went to Okmulgee, and Appellant told Pearce he wanted to go talk to Durrett. Pearce then drove Appellant to Durrett's trailer. Pearce claimed Appellant took out the gun and stepped out of the car. Pearce believed Appellant intended to go kill Durrett.

Not long afterward, Appellant opened the car door and said, "Let's get the fuck out of here." As they left, Appellant told Pearce he had shot Durrett. They drove to the home of Appellant's parents.

Appellant's mother testified she heard Appellant on the telephone at her home at 2:30 a.m. on the morning Larry Durrett was killed. She also testified that her husband got up at 5:30 a.m. and found Appellant and Pearce drinking coffee at the table. However, her husband had apparently given a statement indicating the time was 3:45 a.m.

In proposition one, Appellant claims Debra Smith and Stacy Pearce were both accomplices to the crime of first-degree murder. He claims Pearce was an

accomplice as a matter of law, and Smith's complicity was a fact question for the jury. Appellant thus claims he was prejudiced by the trial court's failure to instruct the jury, *sua sponte*, that accomplice testimony requires corroboration. He admits his trial counsel did not request such an instruction. We review for plain error. *Simpson v. State*, 876 P.2d 690, 693 (Okl.Cr.1994).

A conviction cannot be had upon the testimony of an accomplice unless that accomplice "be corroborated by such other evidence as tends to connect the defendant with the commission of the offense...." 22 O.S.2001, § 742. Thus, the general rule used by this Court is that accomplice testimony must be corroborated with evidence that, standing alone, tends to link the defendant to the commission of the crime charged. *Wackerly v. State*, 12 P.3d 1, 10-11 (Okl.Cr.2000). There must be at least one material fact of independent evidence that tends to connect the defendant with the commission of the crime. *Id.* The evidence may be direct or circumstantial and need not corroborate all of the material aspects of the crime. *Id.* Where accomplice testimony is corroborated by at least one material fact of independent evidence that tends to connect a defendant with the crime charged, the jury can then infer the accomplice testimony was truthful. *Spears v. State*, 900 P.2d 431, 440 (Okl.Cr.1995).

The test established by this Court to be used in the evaluation of whether a witness is an accomplice is very simple: the witness is an accomplice if "he could be indicted for the offense for which the accused is on trial." *Bowie v. State*, 906 P.2d 759, 763 (Okl.Cr.1995); *Gray v. State*, 585 P.2d 357, 359 (Okl.Cr.1978). However, if evidence is susceptible to alternative findings that the

witness is or is not an accomplice, then the issue is a question of fact to be submitted to the jury under proper instruction. *Bryson v. State*, 876 P.2d 240, 256 (Okl.Cr.1994). When there is no evidence of complicity in the record, this Court may declare the witness is not an accomplice, thus negating the statutory prerequisite for corroboration. *Bowie*, 906 P.2d at 763.

We agree Pearce is an accomplice as a matter of law. The State essentially confesses this point.

Regarding Smith, however, Appellant claims her complicity was a fact question for the jury. The State argues she was not an accomplice at all, for there was no evidence she participated in, encouraged, or could be indicted for the murder. (Smith was indicted for accessory after the fact, not murder.)

Appellant points to the following facts to support his claim that Smith's complicity was a fact question for the jury: at the time Durrett was killed, Smith had a continuing relationship with both Appellant and Durrett, suggesting the possibility of a domestic conflict and "conflicting loyalties" (indeed, Smith testified Appellant and Durrett were extremely jealous of each other, to the point that Appellant had threaten to kill Smith and Durrett); Smith found out on the day before the murder that Durrett was not divorced from his wife, as Smith previously thought; Smith assisted Appellant in locating Durrett on the day before the murder regarding a drug deal gone bad; the drug deal had, supposedly, been intended to raise money to get Smith out of jail, but Durrett had not followed through with it, shortchanged Appellant, and left Smith in jail; Smith had seen Pearce with a .22 rifle on the night of the murder; Smith

admitted lying to police officers about Appellant being with her all night on the night of the murder, after Appellant told Smith that she was "neck deep in it"; Smith was in her car with Appellant when stopped by the Glenpool police; the murder weapon was found in her car, behind the driver's seat; Smith was driving the car; and a suitcase with women's clothing was also found in the car.

While these facts certain give rise to serious suspicions, they do not provide enough evidence to actually indict/charge Smith as an aider and abettor to the crime of murder.[1] There is no real evidence that Smith participated in, planned, or encouraged the murder, only possibilities based upon circumstantial evidence. *See Spears*, 900 P.2d 440 ("Where there is no evidence that a witness participated in, planned, or encouraged the commission of a crime, their mere presence during its commission will not make them an accomplice.") Thus, we find there was no error, and thus no plain error, in failing to give an accomplice instruction in regard to Smith's testimony.

Consequently, although we find plain error in failing to give an accomplice as a matter of law instruction with respect to Pearce's testimony, we find that error was harmless. *See Cummings v. State*, 968 P.2d 821, 831 (Okl.Cr.1998) ("where there is overwhelming evidence of guilt and the presence of sufficient corroborating testimony, the failure to so instruct is harmless."); *Howell v. State*, 882 P.2d 1086, 1092 (Okl.Cr.1994); *Bryson v. State*, 876 P.2d 240, 256 (Okl.Cr.1994). Furthermore, because Smith cannot be considered an accomplice

[1] We realize an indictment/information is merely an unproven accusation. However, for purposes here, we must look at the proof behind those allegations that would lead a prosecutor to reasonably belief he or she will be able to present sufficient evidence at the preliminary hearing to establish probable cause that the defendant committed the charged crime.

to the crime, a juror could infer her testimony was truthful without corroboration, and her testimony could then be used to corroborate Pearce's testimony. *Cummings*, 968 P.2d at 831. In so doing, we find overwhelming evidence of guilt with respect to Appellant, and the failure to give the appropriate accomplice instruction with respect to Pearce was harmless.[2]

In proposition two, Appellant claims he was prejudiced by the prosecutor's "improprieties" during jury selection, i.e., the "repeated use of questions and comments during *voir dire* to arouse the jurors' emotions and unfairly prejudice jurors against" him. He claims the prosecutor took advantage of emotionally-charged topics, like family members of veniremen who had been murdered or involved with methamphetamine. He claims trial counsel was ineffective for not objecting to these instances. (See Proposition IV.)

Having reviewed each of the comments outlined in Appellant's brief, however, we find no error was committed. Jurors come to a jury panel with a variety of experiences, both good and bad. We find the prosecutor did not cross any due process or fairness lines by asking potential jurors about their emotional experiences with drugs and murder and whether they could put those aside. The prosecutor's questions here were appropriate.

In proposition three, Appellant claims he was prejudiced by the improper admission of a jail book-in photograph. He claims the photograph fails to meet the three-prong balancing test set out in *Ingram v. State*, 755 P.2d 120, 121-23

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[2] We reject Appellant's accomplice argument concerning uncharged conspiracy to manufacture and sell drugs between Appellant, Pearce, and Smith that would somehow require corroboration with respect to Smith's testimony about the drug deal gone bad with Durrett, especially when considering Appellant's own statements to police about that matter.

(Okl.Cr.1988). He further claims the photograph was more prejudicial than probative, thereby entitling him to a new trial or modification of his sentence.

Ingram is distinguishable from the present case. There, the Court was concerned with the admission of mug shot photographs of the defendants that witnesses had used to identify the defendant from a photographic lineup. The photos clearly implied the defendant had been involved in prior crimes.

Here, however, the photograph was a book-in photograph taken at the time of Appellant's arrest (although that point was not made entirely clear to jurors). The photograph was not used in photo lineup for witnesses to pick out the perpetrator of a crime, still on the loose, as in *Ingram*. The balancing test in *Ingram* was specifically made applicable to a mug shot used to prove identity in that context, and this is simply not the situation we have here.

Nevertheless, we must still ask whether the photo was relevant, and, if so, whether its probative value was substantially outweighed by the danger of unfair prejudice to the accused. 12 O.S.2001, §§ 2401 & 2403.

The State claims the photo was relevant because it showed Appellant weighed eighty pounds less at the time of the crime. The State also claims the photo was relevant because the murder weapon was found in a pair of blue jeans, which could have been Appellant's, at a time when he was much lighter. It seems the argument, then, is that the book-in photo was useful circumstantial evidence to establish Appellant could have had possession of the gun.

However, we find little, if any, relevancy in the photograph's admission. The blue jeans themselves were not admitted as an exhibit. Instead, we have

only a photograph of the jeans, wadded up with the gun sticking out of them. The book-in photograph does not tend to make it more or less probable that the blue jeans were Appellant's or that he possessed the gun, for we cannot even determine the size of those jeans. Because the photograph was not relevant, we do not even need to apply the balancing test of section 2403. However, due to the circumstances shown below, we find the photo's admission was harmless.

A bench conference was had on the admissibility of the photograph prior to the time it was identified at trial. There, defense counsel argued the photo was not relevant to the issue of whether Appellant was "skinny enough to fit in the pants that were discovered in the car. The officer can testify to that." Defense counsel also claimed the photo was prejudicial because it displayed Appellant in a police setting and showed his tattoos. The trial court, however, ruled the photograph admissible without comment.

Later, when the photograph was shown to a police officer for purpose of showing what Appellant looked like at the time he was stopped, defense counsel did not preserve his objection. As the trial progressed, the State really made no attempt to make a connection between Appellant's increased weight and the size of the jeans.[3] When the book-in photo was actually offered for admission, defense counsel did not object but merely asked to look at the photo one last time. (Tr. III at 360.) He then stated he had "no objections" (although that may have been in reference to other exhibits.) Under these circumstances, we review for plain error only.

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[3] One witness testified he could not tell the size of the men's clothing found in the car.

While the photograph had little or no relevance to any fact of consequence, it also held little, if any, prejudicial impact. The photo shows Appellant as he appeared on the day of his arrest (June 11, 1997), wearing shorts, a tank top shirt, and sandals. He is standing before a board that measures his height and several of his tattoos are noticeable. It is clear he is at the police department, but that is hardly a revelation.

Plain errors go to the foundation of the case. *Simpson*, 876 P.2d at 695. Here, we see only a picture of Appellant as he looked on the day of the crime. It can hardly be said that Appellant was prejudiced because jurors saw him as he would normally appear. The admission of this photo is error, but it did not take away a right essential to the defense. Its admission was harmless.

In proposition four, Appellant claims he was denied his right to effective assistance of counsel. He first restates his previous propositions, i.e., his trial counsel failed to request critical jury instructions, failed to object to prosecutorial misconduct during *voir dire*, and failed to renew an objection to the admission of a jail book-in photo. However, we find, as we did above, there was no prosecutorial misconduct, and Appellant was not prejudiced by trial counsel's failure to request an accomplice as a matter of law instruction with respect to Pearce or failure to renew his request that the book-in photo be excluded from trial. We find no reasonable probability that, but for these unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S.668, 698, 104 S.Ct. 2052, 2070, 80 L.Ed.2d 674 (1984). [4]

[4] Here, the accomplice testimony was not the only direct evidence linking Appellant to the

In the remainder of this proposition, Appellant raises error relating to his trial counsel's withdrawal from the case following trial and alleged failure to carry through with a hearing on Appellant's new trial motion. Appellant claims his trial counsel abandoned him while the motion for new trial was pending. He claims prejudice should be "presumed" as he was "wholly denied counsel."

The circumstances relating to the new trial motion and trial counsel's withdrawal are not clearly spelled out in the record. It appears Appellant's trial counsel, Fred M. Schraeder, announced at the December 1998 sentencing hearing that he would be representing Appellant on appeal. On December 14, 1998, Schraeder filed a notice of intent to appeal. Schraeder later filed a Petition in Error on Appellant's behalf on March 15, 1999. (That filing was untimely, however, and the appeal was dismissed by this Court, causing Appellant to go through the process of seeking an appeal out of time *pro se*.)

On March 24, 1999, Wesley Montgomery, a DOC prisoner and former cellmate of co-defendant Stacy Pearce gave a hand-written affidavit claiming Pearce told him he committed a murder and someone else had been blamed for it. Schraeder attached that affidavit to a motion for new trial filed May 26, 1999.

A July 2, 1999 court minute indicates the hearing on the motion for new trial was passed until August 3, 1999. The record suggests no hearing was ever held on the motion. Attorney Schraeder filed a motion to withdraw from the case on August 6, 1999, mailing the same to the district attorney's office the prior day, along with a proposed order. His motion was granted three days later.

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murder, as was the case in *Freeman v. Class*, 95 F.3d 639, 641-42 (8th Cir.1996). Debra Smith,

Accordingly, this Court ordered the matter to be addressed in an evidentiary hearing, along with other non-record matters raised in Appellant's application to supplement the appellate record or, alternatively, to hold an evidentiary hearing on ineffective assistance of counsel claims, filed pursuant to Rule 3.11(B)(3)(a) & (b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (1999). The evidentiary hearing was held on April 30, 2002 before the Honorable Charles M. Humphrey, District Judge.

Judge Humphrey found Schraeder failed to present the Motion for New Trial to the Court because he had not been fully paid,[5] because he was moving, and because he was curtailing his active criminal law practice at the time. Judge Humphrey noted that Schraeder had testified that he orally advised his client of his withdrawal from the case "which included his representation at the Motion for New Trial." However, Judge Humphrey found there was no written documentation to support Schraeder's claim and that Schraeder had violated a District Court Rule by not sending a copy of his Application to Withdraw or the Order Allowing Withdrawal to Appellant by certified mail.

Regarding the merits of the motion for new trial, Judge Humphrey found Wesley Montgomery is a four time convicted felon, that there was no independent corroboration of his statement, no specific details given by Pearce to Montgomery, and no mention of Appellant. Judge Humphrey found he would

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a non-accomplice, testified that Appellant told her he shot Durrett. We find *Freeman* is distinguishable and thus does not require this Court to find the error requires reversal.

[5] Judge Humphrey further found: Schraeder agreed to represent Appellant through trial for $35,000, but $5,000 was still owed at the time trial was completed; Schraeder discussed handling the appeal, but no written or oral contract was made; no additional funds paid by Appellant's family for appellate purposes; Schraeder withdrew from the case when it became apparent no

not have granted Appellant a new trial on the basis of Montgomery's statement alone.

While the circumstances regarding Schraeder's representation of Appellant following trial and his withdrawal from the case are certainly questionable,[6] we cannot say Appellant was prejudiced thereby. Appellant was able to have his appeal reinstated following Schraeder's blunder, and Appellant was appointed replacement counsel for post-trial purposes. Furthermore, the motion for new trial was based entirely on the word of one jailhouse snitch who allegedly heard unspecific hearsay that did not name Appellant. We agree that this lone statement would not have entitled Appellant to a new trial.

The fee dispute is a possible matter for the Oklahoma Supreme Court and Oklahoma Bar Association, as is Mr. Schraeder's professional burnout and how it may have affected his actions concerning Appellant. Suffice it to say here, however, that Schraeder's actions with respect to the motion for new trial and withdrawal from the case, while deficient, did not prejudice Appellant to such an extent that would cause his assistance to be considered constitutionally ineffective.

One other matter, however, was raised in the application for evidentiary hearing (and extensively addressed at that hearing) and gives us greater concern.

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further money would be paid; and the withdrawal was based upon a valid fee dispute.

[6] We take notice of the fact that Attorney Schraeder was recently disciplined by the Oklahoma Supreme Court, on the complaint of the Oklahoma Bar Association, based upon Schraeder's actions in two unrelated cases occurring during the same time period as Schraeder's representation of Appellant. Both cases involved fee disputes and Schraeder's failure to account for and restore unearned fees. Both cases involved Schraeder's disregard for his clients' right to know the status of his or her case. One case involved failure to filed motions and briefs in a criminal appeal. Schraeder furnished medical proof that he suffered from

Appellant claims his trial counsel refused to represent Appellant if he accepted the State's plea offer and entered a guilty plea. Appellant claims the State offered Appellant a ten (10) year sentence in exchange for a guilty plea to the charge of Manslaughter. He further claims he expressed a desire to accept this plea agreement, but Mr. Schraeder threatened to withdraw from the case if Appellant pled guilty on the basis that Schraeder would not have a defendant enter a guilty plea to a crime he maintained he did not commit.

To support these claims, Appellant attached to his application for evidentiary hearing a series of documents relating to a bar complaint his family filed against Schraeder concerning his representation of Appellant. Therein, a letter from Schraeder, in response to the grievance filed, states as follows:

> As to the allegation that Michael Williams was offered a ten year sentence for a plea—that is correct. Michael Williams consistently and steadfastly denied his guilt in this case. Based upon that continued denial, I advised him that if he wished to take that plea, and that plea required a guilty plea, then he would have to retain another attorney to represent him. I would not then, or ever, have a defendant enter a guilty plea to an offense that he was not guilty of committing.
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> After I told Michael Williams that he needed to retain another attorney if he desired to enter a guilty plea, we proceeded to trial.

This startling admission was the primary reason this Court ordered an evidentiary hearing to be held on matters outside the record pertaining to ineffective assistance of counsel.

During the evidentiary hearing, Schraeder testified Appellant was offered a ten-year sentence in exchange for a plea of guilty to murder (not manslaughter),

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occupational burnout during the time in question. He was ultimately suspended from

an offer he conveyed to Appellant "several times". Schraeder also admitted Appellant wanted to take the deal, but Schraeder advised him as follows:

> if he maintained his innocence[7] to me that if he were to, in fact, plead guilty to something that he did not do, that would constitute perjury and I would be suborning perjury and I was not prepared to, based upon what he told me had happened regarding the night of the killing, stand next to him when he perjured himself... he would have had to perjure himself to get that plea done... it puts me in the position if, in fact, that he continues that he did not, in fact, do it, and I stand next to him and do the Lumpkin form, that, you know, makes be suborning to perjury... I'm not going to be a part of him perjuring himself... he understood that I was adamant, I'm not going to let him perjure himself, and I'm not going to be a party to it, and he elected to proceed in the manner we did... The decision to go to trial was entirely his, up to and including the day before and during trial the decision was his. His other option was if he wanted to enter a plea, he was going to have to find somebody else to represent him. So the decision to go to trial was his.

Schraeder could not recall if there were ever any discussions with Appellant or the district attorney about the possibilities of an *Alford* plea or a no-contest plea, although he thought there probably were. He believed the district attorney's office required a guilty plea and testimony against co-defendant Stacy Pearce.

Clifford J. Smith, then the assistant district attorney handling the prosecution of Appellant's murder case, testified the case was difficult, one that could go either way based upon the strength of testimony of dubious witnesses. He personally came to the conclusion that Appellant was the shooter and proceeded in that fashion. However, due to the lack of evidence, he made an offer on the eve of trial for a ten-year sentence in exchange for a guilty plea to

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practicing law for thirty (30) days and ordered to pay the costs of investigation.

[7] Appellant apparently told Schraeder he was at the scene of the crime, but did not do the shooting and did not know it was going to take place. (E.H. at 13.)

murder[8], not manslaughter. He would not consider an *Alford* or no-contest plea because it might compromise his case against Pearce and Debra Smith.

Smith could not remember how long the offer was on the table; it could have been as little as a few days or as long as a week. But once trial began, it was no longer available.[9] Smith recalled talking to Schraeder at one point and being told Appellant maintained his innocence and therefore rejected the offer.[10] The transcript strongly suggests this communication occurred at a time when the offer was still open, sometime before the trial began, for Smith testified that Schraeder understood that once trial began, there were no offers.

Appellant testified the offer was communicated to him on the day before trial (he thought it was ten years for a plea of guilty to manslaughter). On this day, Schraeder told him if he wanted to take the deal, he would have to retain another attorney to represent him.[11] Appellant claimed he felt pressured by this statement and counsel's statement that he would soon be going home. Appellant testified that he agreed to plead guilty, although he was factually innocent.

Appellant's sister testified she heard this or a similar conversation, although the date was not specified during her testimony. She recalled the offer was ten (10) years for a guilty plea to the crime of manslaughter. Appellant's wife Diane Williams claimed that she heard a similar conversation that occurred during a "break" in the trial, whereby Schraeder was saying he would not stand with Appellant at trial if he took the ten-year deal. Her testimony was somewhat

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[8] Presumably, second degree murder.

[9] Smith believed he was approached once during the trial about whether the offer was still on the table and believed he said it was not.

[10] E.H. at 61-62.

suspect, as she also related, for the first time, that she overheard her husband saying Stacy Pearce was the murderer and that she had seen Appellant in her home at about 2:30 or 3:30 a.m. on the day of the murder and then at about 5:00 a.m. (The crime occurred somewhere between 4:00 a.m. and 4:30 a.m.) This testimony was in conflict with testimony given by Appellant's mother.

Upon hearing all of the evidence at the evidentiary hearing, Judge Humphrey ruled, "Clearly, Schraeder's action in advising his client that he would withdraw from his representation if he entered a guilty plea was highly improper." We agree wholeheartedly with this finding.

However, "[b]ased upon the testimony of Mrs. Williams and the attorney's refusal to testify directly on this point," Judge Humphrey also found Schraeder' s improper advice "came after the trial had commenced, and the State's plea bargain had been withdrawn. Therefore, Williams (sic) decision to go to trial was not influenced by the actions of his trial attorney."

We find Judge Humphrey's second conclusion is not fairly supported by the evidentiary hearing record. Schraeder admitted communicating the plea offer to Appellant "several" times and that Appellant wanted to take the deal, but opted to proceed to trial when told he would have to get a new attorney. All indications are that these conversations took place before "proceeding" to trial.[12]

Judge Humphrey specifically asked Schraeder if his client said I want to take the deal and get ten years before the trial began. Schraeder's answer was evasive. He said the decision to go to trial was always his clients (up to and

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[11] E.H. at 79, 94.

during trial), with the understanding that if he wanted to take the plea, he would have to get another attorney. (E.H. at 49.) There was no follow-up question. However, Schraeder's answer again suggests that Appellant was made aware, before trial, that he would have to get a new attorney if he wanted to take the plea. Furthermore, Schraeder's August 1, 2000 letter to the Oklahoma Bar Association, in response to the grievance filed by Appellant's sister, clearly indicates that these events happened before Appellant proceeded to trial.

Clifford Smith's testimony seems to support the same conclusion. Smith testified Schraeder was aware the offer would be off the table when trial began. He further testified that the offer, which he made to Appellant on the eve of trial, was rejected via Schraeder, who said Appellant was maintaining his innocence. There would be no reason to reject an offer if Schraeder understood it was no longer available. Smith recalled an attempt was made during trial to see if the offer was still available, but the context of his testimony indicates this was a wholly separate incident than when Schraeder communicated the rejection.

Appellant specifically testified that the offer was made on the day before trial, and this was the same day Schraeder threatened to withdraw from the case if he took the deal. The testimony from Appellant's sister was inconclusive on this point, as no one ever asked her when Schraeder's statement relating to his withdrawal was made.

The only testimony supporting the trial judge's conclusion was from the least reliable witness, Appellant's wife, who simultaneously claimed for the first

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[12] Unfortunately, neither of the attorneys attempted to pin Schraeder down about when, exactly,

time that she had seen Appellant at the approximate time of the murder and that Appellant said Pearce was the murderer.

We therefore conclude, based upon the entirety of this record, that Schraeder's statements to Appellant concerning his withdrawal upon a plea of guilty, occurred before trial, at a time when the plea offer was available.

Rule 1.2(a) of the Rules of Professional Conduct, Ok.St.Ann., Title 5, Ch.1, App. 3-A, states, in part, that "[i]n a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify." This rule clearly indicates the decision to plead guilty is the client's and the attorney must abide by that decision.

However, other professional responsibility rules seem to complicate matters, insofar as the issue raised here is concerned. Subsection (c) of Rule 1.2 provides that a lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent...." Rule 1.16(a)(4) provides that a lawyer "shall withdraw from representation of a client if the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent." Rule 3.3(a)(2) states that a lawyer shall not "knowingly fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal act or fraudulent act by the client."

Lying under oath is indeed a criminal or fraudulent act. But it seems to us, in the context of accepting a plea offer, a criminal defense lawyer rarely

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these discussions occurred.

knows exactly what happened at the time of the crime, insofar as his client's actions are concerned. The lawyer forms reasoned opinions and theories based upon the evidence, the statements of witnesses, and the defendant's own statements to counsel. But there is usually more than one way to view the evidence, as the filing of a criminal information demonstrates. Furthermore, it would be foolish to deny the fact that criminal defendants often lie to their own attorneys concerning their criminal culpability, refusing to admit their participation in the crime or their presence at the scene to the very end, even when the evidence suggests otherwise.

This is the problem with Schraeder's position. He accepted his client's confidential version of the circumstances of the crime unconditionally, although he himself was not there. Who is to say that Appellant's decision to admit guilt was not the real truth, especially when you consider the law pertaining to accomplices? Unless defense counsel personally witnessed the crime or has hard proof as to what precisely happened there, he cannot really take the position that his client is committing perjury by pleading guilty.

We find Schraeder's ultimatum to Appellant concerning the guilty plea—that he would have to obtain new counsel if he desired to accept the ten year deal—amounted to deficient performance under *Strickland*. The matter of prejudice is more difficult, however, for there is no way of determining if a factual basis for the plea would have been established or if the trial judge would have accepted the plea.

According to 22 O.S.2001, § 513, there are four types of plea: guilty; not

guilty; *nolo contendere*; and a former judgment of conviction or acquittal of the offense charged. Our cases also recognize a fifth type of plea, the *Alford* plea,[13] in which a defendant pleads guilty, while maintaining his factual innocence. But the evidentiary hearing record here clearly demonstrates that the State's ten-year offer was contingent on a guilty plea, and an *Alford* plea was not available.

The problem, however, is that every plea must contain a sufficient factual basis in order to be accepted by the trial judge. *King v. State*, 553 P.2d 529, 535 (Okl.Cr.1976). Furthermore, the trial judge has the discretion to accept or reject a negotiated plea, even a guilty plea made with an adequate factual basis. *King*, 553 P.2d at 535-36; *State ex rel. Stout v. Craytor*, 753 P.2d 1365, 1368 (Okl.Cr.1988) ("There is no absolute right to have a guilty plea accepted.")

Here, although Appellant testified at the evidentiary hearing that he was willing to plead guilty even though he maintained he was factually innocent, we do not know what words he would have used in attempting to take that plea. Unless he emphatically admitted his guilt there, the trial judge would have been required to reject the plea.[14] Furthermore, even if guilt was admitted, the trial judge may have rejected the plea, based upon the term offered or another reason.

Nevertheless, trial counsel's actions placed Appellant in the position of finding another attorney on the eve of trial, paying that attorney with money he did not have (his family having already paid $30,000), and staying in jail until these events could happen, if he wanted to take the ten year deal. Otherwise, he

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[13] *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S.Ct. 160, 167, 27 L.Ed.2d 162 (1970).

[14] We recognize the Appellant and the State could have entered into a stipulation of fact of what the State's evidence would show the facts to be as a method of establishing the factual basis for

could go to trial and take his chances. The lost opportunity to pursue that plea offer with his retained counsel leads us to conclude Appellant has indeed suffered prejudice by his trial counsel's action, for we have no way of reinstating that plea offer, even by reversing this case and remanding it for a new trial.

These unique facts require this Court to modify Appellant's sentence. Having considered many possibilities, we find Appellant's sentence should be modified to life imprisonment with the possibility of parole. We further find the remaining matters raised in the application for evidentiary hearing[15] and in Appellant's fifth proposition, cumulative error, do not warrant further relief.

DECISION

Appellant's conviction is hereby **AFFIRMED,** but his sentence is **MODIFIED** to life imprisonment with the possibility of parole.

AN APPEAL FROM THE DISTRICT COURT OF OKMULGEE COUNTY
THE HONORABLE CHARLES M. HUMPHREY, DISTRICT JUDGE

APPEARANCES AT TRIAL

FRED SCHRAEDER
P.O. BOX 846
DRUMWRIGHT, OK 74030
COUNSEL FOR APPELLANT

CLIFFORD SMITH
ASSISTANT DISTRICT ATTORNEY
OKMULGEE COUNTY COURTHOUSE
314 WEST SEVENTH STREET
OKMULGEE, OK 74447
COUNSEL FOR THE STATE

APPEARANCES ON APPEAL

S. GAIL GUNNING
1623 CROSS CENTER DRIVE
NORMAN, OK 73019
COUNSEL FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
DIANE L. SLAYTON
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE

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the plea, but the record does not reveal that option was discussed.

[15] Appellant claims his trial counsel failed to investigate and present available evidence at trial, including a ticket Debra Smith received at 3:08 a.m. on the day of the crime and statements made by Appellant's wife. Judge Humphrey found Schraeder conducted his investigation of the case in a competent and professional matter. This ruling was not clearly erroneous.

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

RB

CHAPEL, JUDGE, DISSENTING:

Williams raises four substantive propositions of error. The majority finds merit in three of the four propositions, but denies Williams a new trial, and instead modifies his sentence from life without parole to life with the possibility of parole. Although I agree with much of the analysis in the majority opinion, I cannot agree with the remedy fashioned for the errors which occurred here. I would reverse and remand for a new trial.