

AUG 31 2000

JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOHN THOMAS PIPKIN,)

Appellant,)

v.)

THE STATE OF OKLAHOMA,)

Appellee.)

NOT FOR PUBLICATION

Case No. F-99-1282

SUMMARY OPINION

JOHNSON, JUDGE:

John Thomas Pipkin was tried in Mayes County District Court, Case No. CF 98-245, for Burglary in the First Degree, in violation of 21 O.S. 1991, § 1431, (Count I), and Attempted Rape in the First Degree, in violation of 21 O.S. 1991, § 1114(A)(3)(Count II). The jury trial was held August 3, 1999, before the Honorable James D. Goodpaster, District Judge. The jury returned guilty verdicts on both counts and recommended punishment of ten (10) years imprisonment on Count I and twenty (20) years imprisonment on Count II. On September 27, 1999, Appellant was formally sentenced and Judge Goodpaster ordered the sentences to run consecutively. From that Judgment and Sentence, Appellant filed a timely appeal.

Appellant raised the following propositions of error:

- I. The allegations of the alleged victim were improbable and accordingly needed corroboration. Because the allegations were not properly corroborated under Oklahoma law, the convictions must be vacated;

- II. Because Mr. Pipkin's defense was alibi, the failure to give an alibi instruction was fundamental error, and requires the convictions be vacated and a new trial ordered;
- III. The prosecution's comment on Mr. Pipkin's post-arrest silence violated Mr. Pipkin's fifth amendment rights and denied him a fundamentally fair trial;
- IV. Insufficient evidence existed, as a matter of law, to prove beyond a reasonable doubt the crime of attempted rape; and,
- V. Mr. Pipkin's attorney rendered ineffective assistance of trial counsel by not requested and including an alibi instruction to be given to the jury (sic.).

After thorough consideration of the propositions raised and the entire record before us, including the original record, transcripts, and briefs of the parties, we have determined that Appellant is entitled to relief on Proposition II and the case must be reversed and remanded for a new trial for the reasons set forth below.

In his second proposition of error, Appellant claimed fundamental error occurred and a new trial is warranted, because the trial court failed to give the jury alibi instructions. The Notes on Use for Defense of Alibi instruction, set forth at OUI-CR 8-57 (2d. Ed.) state the instruction is only required if the defendant requests the instruction. However, a criminal defendant must be afforded the opportunity to have the jury consider his theory of defense whether or not he requests instructions on that ground if the evidence produced at trial supports the defense. *Nance v. State*, 1992 OK CR 54, ¶ 9, 838 P.2d 513, 515. Any evidence, without consideration of its veracity in light

of the weight of the evidence, requires that instruction be given so that the jury may make the ultimate decision whether to accept or reject the offered defense. *Nance*, 1992 OK CR 54, ¶ 9, 838 P.2d at 515.

Because the record before this Court does not reflect that Appellant requested an alibi instruction, we review for plain error only. *Howell v. State*, 1998 OK CR 53, ¶ 15, 967 P.2d 1221, 1227. "Plain error denies the accused a constitutional or statutory right, and goes to the foundation of the case. *McGregor v. State*, 1994 OK CR 71, ¶ 34, 885 P.2d 1366, 1383, *cert. denied*, 516 U.S. 827, 116 S.Ct. 95, 133 L.Ed.2d 50 (1995)." *Stemple v. State*, 2000 OK CR 4, ¶ 37, 994 P.2d 61, 70. In this case, we find the failure of the trial court to provide the jury *sua sponte* with the proper instruction regarding the alibi testimony was plain error and warrants reversal of this case. *See also Smith v. State*, 1971 OK CR, ¶ 13, 485 P.2d 771, 774 (wherein this Court held the failure of the trial court to give an instruction concerning the defense of alibi was fundamental error when the defendant's sole defense was that he was elsewhere at the time of the crime). While the jury was not prevented from hearing Appellant's alibi witnesses, it was not instructed specifically about the defense of alibi and may not have given such testimony its proper weight.

Appellant's fifth proposition addresses his trial counsel's failure to request the alibi instruction be given to the jury. In this case, we find trial counsel's failure to request any instruction be given to the jury on Appellant's only theory of defense falls below the objective standard of reasonableness

outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). While there is a strong presumption of "reasonable professional assistance," counsel's failure to request the alibi instruction under these circumstances falls below this standard.

Because reversal of this case and remand for new trial is required, the remaining propositions of error need not be addressed.

Decision

For the reasons set forth above, Appellant's convictions for Burglary in the First Degree (Count I) and for Attempted Rape (Count II) are **REVERSED AND REMANDED FOR A NEW TRIAL.**

APPEARANCES AT TRIAL

EDWARD G. LINDSEY
4143 E. 31ST STREET, SUITE B,
TULSA, OKLAHOMA 74135
ATTORNEY FOR DEFENDANT

CHARLES RAMSEY
ASSISTANT DISTRICT ATTORNEY
P.O. BOX 845
PRYOR, OKLAHOMA 74361
ATTORNEY FOR THE STATE

APPEARANCES ON APPEAL

STEVEN M. PRESSON
ROBERT WADE JACKSON
JACKSON & PRESSON, P.C.
207 WEST MAIN STREET
P.O. BOX 5392
NORMAN, OKLAHOMA 74070-5392
ATTORNEYS FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
JAMES F. KELLY
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OKLAHOMA 73105
ATTORNEYS FOR APPELLEE

OPINION BY: JOHNSON, J.:
STRUBHAR, P.J.: CONCURS
LUMPKIN, V.P.J.: DISSENTS
CHAPEL, J.: CONCURS
LILE, J.: DISSENTS
RC

LUMPKIN, VPJ: DISSENTS

I join in Judge Lile's well reasoned Dissent. In addition, I continue to find the Court's cited authority of *Nance v. State*, 838 P.2d 513 (Okl.Cr. 1993) to be based on inaccurate paraphrasing of the cases cited within that opinion for its holding regarding instructions on a defendant's theory of defense. *Id.* at 517-518 (Lumpkin, VPJ: Concur in Part/Dissent in Part). Due to the fact *Nance* is not legally supportable by the cases it cites as the basis for the decision on when an instruction on a defendant's theory of defense is warranted, this opinion compounds the error of law initiated in *Nance* and perpetuates an illegitimacy in our jurisprudence.

LILE, J.: DISSENTS

The Court acknowledges that because the Appellant did not request an alibi instruction, we review for plain error only. We have defined plain error as errors "which go to the foundation of the case, or which take from a defendant a right which was essential to his defense." Once we have determined that an error at trial is of such magnitude, then we will review that error just as we review error which was properly preserved at trial. *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690.

Our Notes on Use, appearing beneath OUJI-CR 8-57 (2d. Ed.), our Alibi Instruction, inform trial courts that the instruction need not be given unless requested by the defendant. This instruction is in accord with our case law. *Wilkey v. State*, 1998 OK CR 11, 953 P.2d 347; *Stewart v. State*, 1988 OK CR 36, 751 P.2d 745; *Risher v. State*, 1987 OK CR 85, 736 P.2d 1003, cert. denied, 486 U.S. 1061, 108 S.Ct. 2833, 100 L. Ed. 2d 933; *Millwood v. State*, 1986 OK CR 106, 721 P.2d 1322; *York v. State*, 40 Okl. CR 312, 269 P. 323 (1928).

The trial court's failure to give the unrequested alibi instruction in this case did not constitute plain error. The elements of the crimes of which Appellant was convicted each require his presence at the time and place of the events. His presence must be proved beyond a reasonable doubt. In this case, the jury did not believe his wife's testimony that he was asleep on the couch when the crimes were committed. The victim knew the Appellant well from

previous contacts because they were neighbors. She even told him she knew him and he would get in trouble if he didn't stop and he responded that he didn't care if he got in trouble. Appellant's defense was that he didn't commit the crimes charged. This issue was adequately framed by the instructions given by the court.

Even if we found plain error, we would next determine if the error were harmless. It is clear that the jury believed, with good reason, the victim's unwavering identification of a previously known Appellant and equally clear that the jury disbelieved the proffered alibi. The Court opines that the jury "may not have given such testimony its proper weight" because the alibi instruction was not given. No jury could convict in this case without determining that the victim's identification testimony was truthful and that the alibi testimony was false. The error, if any, was harmless. This Appellant had good legal representation and a fair trial.