IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

ELIJAH MORRIS MCCORVEY,

Appellant,

-vs-

STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION
No. F-99-806

OPINION

STRUBHAR, PRESIDING JUDGE:

Elijah Morris McCorvey, hereinafter Appellant, was tried by jury and convicted of Murder in the first degree (21 O.S.1991, § 701.7(A)), in the District Court of Oklahoma County, Case No. CF-97-564, the Honorable Twyla Mason Gray, District Judge, presiding. The jury recommended life imprisonment without the possibility of parole and the trial court sentenced Appellant accordingly. From this Judgment and Sentence, he appeals.

FACTS

On August 7, 1996, Appellant took his wife to Presbyterian Hospital in Oklahoma City suffering from two gunshot wounds. The police were called to investigate due to Mrs. McCorvey's injuries. Oklahoma City police officer Jay Barnett responded to the hospital and located Appellant. Barnett asked Appellant what happened and Appellant said, "we were fighting over the gun last night and she got shot." Following Appellant's response, Barnett arrested Appellant and questioned him no further.

Due to Mrs. McCorvey's precarious condition, Barnett decided to interview her rather than waiting on one of the detectives to arrive. Mrs. McCorvey told Barnett that Appellant shot her. She further stated, "I was struggling with the gun and got shot. I think that's what happened." Mrs. McCorvey could not recall exactly why she and Appellant were struggling over the gun and told Barnett that he would have to ask Appellant. Barnett asked Mrs. McCorvey why Appellant had a gun and she said because they were talking about "problems." She also told Barnett that she was afraid of guns. Barnett concluded his interview so medical personnel could attend to Mrs. McCorvey.

Oklahoma City homicide detective Eric Mullenix arrived not long after and interviewed Mrs. McCorvey as she was being prepared for surgery. When Mullenix asked Mrs. McCorvey who shot her, she asked, "what did my husband tell you." She then told Mullenix that Appellant shot her over "marriage problems." Mullenix was forced to conclude his interview because medical personnel came to take Mrs. McCorvey to surgery.

Mullenix subsequently interviewed Appellant at the police department. Appellant denied intentionally shooting his wife and claimed they were "playing" with the gun when it went off. He said he left the gun with his wife for protection while he went to the store. When he returned, he asked Mrs. McCorvey to hand it to him and he grabbed the gun out of her hand and started spinning it. While he was spinning the gun, he cocked it. Mrs. McCorvey then hit the gun with her

hand and it went off hitting her in the chest. Appellant claimed he froze and Mrs. McCorvey hit the gun again and it went off a second time hitting her in the lower pelvis. Appellant denied that they were fighting and claimed it was an accident. Later in the interview, Appellant admitted he was closer to Mrs. McCorvey when he shot her than he originally told police and that she hit his hand because he was pointing the gun at her. Appellant claimed he did not call 911 or seek immediate medical treatment because Mrs. McCorvey said she was okay and he did not believe she was hurt that badly. He tried to treat her wounds at home with common household first-aid products and took her to the hospital when it was apparent she needed expert medical treatment. Throughout the interview, he maintained the shooting was accidental.

Mrs. McCorvey died almost six months later on January 28, 1997 following extensive medical treatment. Doctors attributed her death to complications resulting from the gunshot wounds. Other facts will be discussed as they become relevant to the propositions of error raised for review.

In his first proposition of error, Appellant argues he was denied a fair trial by the admission of evidence that he had been physically abusive to his wife in the past and that he had shot his son in 1987. He claims the introduction of this other crimes evidence was nothing more than improper propensity evidence designed to prejudice him. Specifically, Appellant alleges this other crimes

evidence was improperly admitted because: (1) the State's *Burks*[1] notice failed to specify what exception would be relied upon for admission; (2) the State's notice was inadequate; (3) there was a lack of visible connection between the other crimes and the instant shooting; (4) evidence of the other crimes was not clear and convincing; (5) the other crimes evidence was too remote; and (6) the other crimes evidence was not relevant and was more prejudicial than probative. During an *in camera* hearing, the trial court overruled Appellant's objections finding the evidence was relevant to prove intent and absence of mistake or accident. The trial court allowed the admission of this other crimes evidence at trial.

Recently in *Welch v. State,* 2000 OK CR 8, ¶ 8, 2 P.3d 356, 365, this Court reiterated:

> Evidence of other crimes or bad acts is not admissible as proof of bad character to show a person acted in conformity therewith but "may ... be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." 12 O.S.1991, § 2404(B). The reason other crimes evidence is so limited and its admission guarded revolves around fairness to the accused who should be convicted, if at all, by evidence of the charged offense and not by evidence of separate, albeit similar, offenses. To be admissible, evidence of uncharged offenses must be probative of a disputed issue of the crime charged, there must be a visible connection between the crimes, evidence of the other crime(s) must be necessary to support the State's burden of proof, proof of the other crime(s) must be clear and convincing, the probative value of the evidence must outweigh the prejudice to the accused and the trial court must issue contemporaneous and final limiting instructions.

[1]*Burks v. State,* 1979 OK CR 10, ¶ 11, 594 P.2d 771, 774-75, *overruled in part on other grounds by Jones v. State,* 1989 OK CR 7, ¶ 7, 772 P.2d 922, 925.

> When other crimes evidence is so prejudicial it denies a defendant his right to be tried only for the offense charged, or where its minimal relevancy suggests the possibility the evidence is being offered to show a defendant is acting in conformity with his true character, the evidence should be suppressed.

(citations omitted).

Appellant first attacks the *Burks* notice filed by the State claiming that it failed to specify what exception would be relied upon for admission of the evidence and that it did not adequately apprise the defense of the substance of the other crimes evidence sought to be admitted. The record before this Court shows the State filed its *Burks* notice some ten months prior to trial advising the defense it intended to offer evidence through relatives that Appellant assaulted and battered his wife during their relationship at dates and times that could not be ascertained as well as evidence that Appellant shot his son. (O.R. 36-49) The notice claims the evidence was being offered to prove motive, opportunity, intent and plan. Attached to the notice were the proposed witnesses' statements to the police in which the witnesses detailed what they knew and saw. This was sufficient to apprise Appellant of the State's intent to offer this evidence at trial and allow him to challenge such evidence prior to its admission. *See Powell v. State*, 2000 OK CR 5, ¶ 65, 995 P.2d 510, 527; *Holt v. State*, 1989 OK CR 21, ¶ 6, 774 P.2d 476, 478. Because Appellant received adequate notice and no unfair surprise appears from this record, this portion of Appellant's claim must fail.

Appellant's remaining complaints essentially attack the relevancy of the other crimes evidence as he claims the other crimes evidence was irrelevant, lacked a visible connection to the instant case, was too remote, was not clear and convincing, lacked probative value and was extremely prejudicial. At trial, Appellant's adult daughter, Yhetta McCorvey, described her father as "controlling" and verbally abusive towards her mother. She testified she saw her father hit her mother after her mother allowed her brother to go on a camping trip. (Tr.III 76, 78) She further testified she had seen her mother with bruises around her mouth and with a black eye, but claimed she never talked to her mother about these injuries. (Tr.III 77) Appellant's adult son, Morris McCorvey, testified his father was psychologically abusive towards the entire family and was physically abusive to his mother on a number of occasions. He claimed his father "knocked [his] mother around" two or three times. Morris recalled one instance in particular where his father accused his mother of having an affair with a man who had befriended Morris and Appellant hit Mrs. McCorvey so hard he knocked her eyeglasses out into the front yard. Morris then relayed the events surrounding his father's shooting of him in 1987. Morris testified that he had become estranged from his father due to his own problems with drugs and crime. However, Morris tried to maintain some contact with his mother despite Appellant's disapproval. When Morris telephoned his mother in 1987, Appellant took the phone away from Mrs. McCorvey and began hitting her with it.

Appellant told them he was going to kill them both. Shortly thereafter, Appellant burst through the door where Morris was staying pushing Mrs. McCorvey in front of him. Appellant pointed a gun at Morris and said "I told you I was going to kill you, didn't I." Appellant then shot Morris twice.

Lastly, Theus McCorvey, Appellant's granddaughter, testified that she visited her grandmother several years before the shooting and Mrs. McCorvey had a black eye. Theus testified she did not ask her grandmother how she received her injury, but opined that her grandmother would have told her if she had fallen. Theus "thought" Appellant may have hit her.

This Court has consistently upheld the admission of evidence of prior altercations between spouses to prove intent. *E.g. Smith v. State,* 1996 OK CR 50, ¶ 20, 932 P.2d 521, 530, *cert. denied,* 521 U.S. 1124, 117 S.Ct. 2522, 138 L.Ed.2d 1023. (1997) (and cases cited therein). Prior instances of ill feeling, threats or physical abuse by one spouse toward another is probative of motive and/or intent. *Id.* Where hostile emotions at a particular time are part of the case to be proved, the existence of the same emotion in the same person at another time is relevant. *Lamb v. State,* 1988 OK CR 296, ¶10, 767 P.2d 887, 891. Based on these cases, the testimony of Yhetta and Morris McCorvey that they witnessed Appellant physically abuse their mother throughout their parents' marriage relationship was relevant to prove intent and absence of mistake. However, the testimony of Yhetta and Theus McCorvey that they saw

Mrs. McCorvey with unexplained injuries and only surmised that Appellant had inflicted them does not meet the requirement that the proof of other crimes evidence be clear and convincing and as such it was more prejudicial than probative. Consequently, it was error to admit this evidence. The impact of this error will be addressed in conjunction with Appellant's cumulative error claim.

Although evidence of prior altercations between the accused and third parties is ordinarily irrelevant, we find the evidence of Appellant's prior shooting incident with his son in the instant case was probative of motive, intent and absence of mistake or accident. Morris testified that when his mother took a turn for the worse, she told him that Appellant had gotten upset with her for seeing Morris and shot her. Because these are the same circumstances that precipitated the shooting of Morris, the evidence of the prior shooting helped to prove Appellant's motive for shooting his wife, the intent he had when he shot her and that the shooting was not an accident. This created a visible connection between the crimes and made the evidence more probative than prejudicial despite the time lapse between the two incidents. Accordingly, we find the trial court did not abuse its discretion in admitting this evidence and that this proposition should be denied. *See Aylor v. State,* 1987 OK CR 190, ¶ 9, 742 P.2d 591, 593.

In his second proposition of error, Appellant claims he is entitled to relief because the trial court failed to give proper lesser-included offense instructions

and limiting instructions concerning other crimes evidence. Because Appellant failed to object, we will review the instructions for plain error. *Hill v. State,* 1995 OK CR 28, ¶ 21, 898 P.2d 155, 163.

First, Appellant claims the trial court erred in giving OUJI-CR2d 10-13, the procedural instruction to be administered when there are no lesser included offense instructions, and by failing to give OUJI-CR2d 10-23, 10-25 through 10-27, the procedural instructions to be administered when the trial court administers one or more lesser included offense instructions. We have long held that where the instructions as a whole adequately state the applicable law, no relief is required. *Reeves v. State,* 1991 OK CR 101, ¶ 47, 818 P.2d 495, 504. A review of the instructions administered in the instant case shows the jury was adequately apprised of its duty to consider the lesser included offense along with the procedure and burdens to be utilized in doing so. As such, no relief is required.

Second, Appellant complains the trial court erred in failing to administer a limiting instruction concerning the other crimes evidence when the evidence was received. Despite the fact that such an instruction was not requested when the evidence was offered, Appellant argues such an instruction is required under *Burks.* As we recently noted in *Powell v. State,* 2000 OK CR 5, at ¶ 68, 995 P.2d at 527, "*Burks* was overruled in part on this very issue." *See also Jones,* 1989 OK CR 7, at ¶ 7, 772 P.2d at 925. Failure to request limiting

instructions waives the issue on appeal unless plain error is found. *Jones*, 1989 OK CR 7, ¶ 7, 772 P.2d at 925. On the record before us, we cannot say the failure of the trial court to give a limiting instruction *sua sponte* when the other crimes evidence was admitted deprived Appellant of a substantial right rising to the level of plain error.

Lastly, Appellant claims the trial court's final limiting instruction was defective because it failed to advise the jury that it could not consider the other crimes evidence as proof of guilt. The administered instruction stated the jurors could not consider the other crimes evidence as proof of the "innocence of the defendant of the specific offense charged in the information," rather than as proof of the guilt or innocence of the defendant. (O.R. 193)

"We have consistently held jury instructions are a matter committed to the sound discretion of the trial court, whose judgment will not be disturbed as long as the instructions, taken as a whole, fairly and accurately state the applicable law." *Omalza v. State,* 1995 OK CR 80, ¶ 52, 911 P.2d 286, 303. For jury instructions to accurately state the law they must provide the jury with ample understanding of the issues presented and the standards to be applied. *Id.* Instructions which are unclear or contain ambiguities and contradictions may confuse and mislead the jury. *See Id.*

In the instant case, the trial court's instruction failed to explicitly advise the jury that the other crimes evidence could not be considered as proof of

guilt. The instruction did advise the jury that the other crimes evidence was received "solely on the issue of the defendant's alleged motive or intent" and that the evidence was to be considered "only for the limited purpose for which it was received." (O.R. 193). The alteration of this instruction coupled with the fact that limiting instructions were not administered when the other crimes evidence was offered leads us to conclude that error occurred. While we find this error is not reversible per se, we will consider it in conjunction with the cumulative error claim.

In his third proposition of error, Appellant claims Amber Haley's presence on the jury which convicted him violated his right to a fair and impartial jury. During voir dire Haley expressed concern over her ability to be impartial given the recent murder of her best friend's mother. Appellant contends Haley's inability to be impartial was so blatant the trial court should have removed her for cause *sua sponte*. Alternatively, Appellant argues his trial counsel should have challenged Haley for cause or exercised a peremptory challenge to have her removed.

The purpose of voir dire is to ascertain whether there are grounds to challenge prospective jurors for cause and to permit the intelligent use of peremptory challenges. *Patton v. State*, 1998 OK CR 66, ¶ 9, 973 P.2d 270, 280, *cert. denied*, ___U.S.___, 120 S.Ct. 347, 145 L.Ed.2d 271 (1999). The questioning process is designed to discover actual and implied bias and

determine whether prospective jurors' views would substantially impair the performance of their duties in accordance with the trial court's instructions and the juror oath. *Fitzgerald v. State*, 1998 OK CR 68, ¶ 31, 972 P.2d 1157, 1170. Whether or not a juror should be excused rests in the sound discretion of the trial court who personally observes the jurors and their responses, and unless such discretion is abused, there is no error. *Simpson v. State*, 1992 OK CR 13, ¶ 19, 827 P.2d 171, 175 (Okl.Cr.1992). In cases where the answers of potential jurors are unclear or equivocal, this Court traditionally defers to the impressions of the trial court who can better assess whether a potential juror would be unable to fulfill his or her oath. *Jones v. State*, 1995 OK CR 34, ¶ 48, 899 P.2d 635, 648, *cert. denied*, 517 U.S. 1122, 116 S.Ct. 1357, 134 L.Ed.2d 524 (1996).

In the instant case the trial court had a lengthy discussion with juror Haley. While Haley initially stated that she thought she would have a difficult time keeping the facts of her friend's mother's murder from influencing her participation on Appellant's jury, Haley later told the trial court she could remember that those circumstances were a separate matter for a separate jury and that she felt she could proceed. Haley's demeanor and responses obviously satisfied the trial court that she would be able to serve as an impartial juror and fulfill her oath. There is no evidence in the record before this Court that

such an impression was erroneous. Therefore, we find the trial court did not abuse its discretion in not excusing Haley for cause.

As for Appellant's claim that trial counsel should have had Haley removed for cause or used a peremptory challenge to remove her, this Court has consistently held that it will not second-guess viable defense tactics. *Perkins v. State,* 1985 OK CR 25, ¶ 14, 695 P.2d 1364, 1368. Defense counsel personally observed the exchange between the trial court and Haley as well as the State's inquiry. Furthermore, he personally questioned Haley as to her ability to listen to all the evidence and determine whether each element of the offense had been proven by the State beyond a reasonable doubt. Defense counsel also learned during questioning that Haley's natural father was in the custody of the Department of Corrections, creating potential sympathy for Appellant. Based on this record, we find Appellant has not established that defense counsel's performance was ineffective according to the two-pronged *Strickland*[2] test. The record indicates neither that defense counsel's decision not to remove Haley from the jury was deficient nor that it prejudiced Appellant subjecting him to an unfair trial. *Stemple v. State,* 2000 OK CR 4, ¶ 56, 994 P.2d 61, 72. Because Appellant has failed to meet his burden, we find this proposition is without merit.

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[2]*Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)(To prevail on a claim of ineffective assistance of counsel, an appellant must show: [1] that trial counsel's performance was deficient; and [2] that he was prejudiced by the deficient performance.)

In his fourth proposition of error, Appellant argues his malice murder conviction must be reversed because the record evidence was insufficient to prove the essential elements of malice and proximate legal causation beyond a reasonable doubt. We review claims attacking the sufficiency of the trial evidence to determine whether a rational trier of fact, viewing the evidence in the light most favorable to the state, could find the essential elements of the crime charged beyond a reasonable doubt. *Spuehler v. State,* 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04. In conducting our review, we defer to the credibility choices made by the trier of fact as long as there is support in the record. *Cannon v. State,* 1995 OK CR 45, ¶ 25, 904 P.2d 89, 100, *cert. denied,* 516 U.S. 1176, 116 S.Ct. 1272, 134 L.Ed.2d 219 (1996).

In the instant case, one of the hotly contested issues was whether Appellant shot his wife with malice aforethought[3] or by accident or while engaging in reckless conduct. To support its theory Appellant shot his wife with malice, the State introduced evidence that Appellant had been physically abusive to his wife in the past, that Appellant shot his son for seeing his wife and that Mrs. McCorvey claimed she and her husband were arguing about her seeing their son when she was shot. Although Appellant claimed it was an accident, he did change his factual account when police accused him of lying and told him that they had never seen someone shot twice accidentally. This

[3] Malice is the deliberate intent to take away the life of another human being. 21 O.S.1991, § 701.7(A).

evidence was sufficient for a rational trier of fact to conclude that Appellant shot his wife with malice.

Appellant also complains the State failed to prove his conduct was the proximate legal cause of his wife's death. Appellant maintains the record supports a finding that gross medical negligence caused Mrs. McCorvey's death rather than Appellant's conduct. He first cites the evidence that Mrs. McCorvey had to undergo a second emergency surgery approximately two weeks after her initial surgery because doctors had failed to close a hole in her colon and "stool" was leaking out. Due to the leakage and resulting infection, doctors had to remove the majority of Mrs. McCorvey's intestines which adversely affected her ability to absorb fluids and nutrition ultimately contributing to her demise. Appellant asks us to infer that the first surgeon was grossly negligent based on this record. Second, he claims medical personnel were grossly negligent when they released Mrs. McCorvey from Jim Thorpe Rehabilitation Hospital to go to her granddaughter's home since she was readmitted to Presbyterian Hospital four days later suffering from dehydration and renal failure.

Although Mrs. McCorvey experienced several medical difficulties throughout her treatment, this record does not support a finding of gross medical negligence or that the State failed to prove Appellant's conduct caused his wife's death. On the contrary, two of Mrs. McCorvey's treating physicians

and the medical examiner attributed her death to complications resulting from the gunshot wounds Appellant inflicted. Dr. Wlodaver testified that during the first surgery the visible hole in Mrs. McCorvey's bowel was repaired and that the remainder looked viable. Regretfully, some eleven days later, doctors discovered massive necrosis of the bowel which required them to remove the majority of Mrs. McCorvey's intestine leading to a myriad of medical complications. The reason for the developing necrosis was not clear. Dr. Maton testified that it was not uncommon to undergo more than one surgery in a trauma case like this one. He said the standard practice is to complete the first operation repairing all the visible damage and then to watch the patient very closely and if they become ill, perform a second surgery as was done in this case. Moreover, there was no evidence medical personnel were negligent in discharging Mrs. McCorvey from rehab to her granddaughter's care. Regardless of where Mrs. McCorvey was living, her prognosis was and remained poor after the removal of her intestines and dehydration was a constant medical battle. As such, based on this record we find the jury's verdict finding Appellant's conduct caused the death of his wife is supported by sufficient evidence and this claim requires no relief.

In Appellant's fifth proposition of error, he contends that, even if no individual error merits reversal, the cumulative effect of the trial errors in his case necessitates either reversal of his conviction or a modification of his

sentence. In addition to the alleged errors identified in his preceding propositions of error, Appellant alleges six other errors he claims must be considered in a cumulative fashion to determine if the accumulation of errors in this case so infected the trial proceedings that he was denied due process of law and a fair trial.

First, Appellant claims the trial court committed plain reversible error by admitting hearsay statements made by the deceased to police and family members under the dying declaration and residual hearsay exceptions. 12 O.S.1991, § 2804 (B)(2) & (5). The record shows the State filed a notice of intent to offer the deceased's hearsay statements to police and family members. (O.R. 50) The trial court held a hearing in which Officer Barnett recounted his interview with Mrs. McCorvey and described her precarious condition. The trial court sustained the State's motion to introduce the deceased's hearsay statements. (O.R. 137) At trial, both Officer Barnett and Detective Mullenix related Mrs. McCorvey's statements during the interviews they had with her after Appellant took her to Presbyterian Hospital. The trial court also admitted the deceased's statements through Morris McCorvey that after Appellant shot her, he went around the house saying, "Free at last. Free at last. Thank God Almighty, I'm free at last."

Title 12 O.S.1991, § 2804 (B)(2) provides: "[i]n a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while

believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death" is admissible. To warrant admission of a statement as a dying declaration, it is not essential that there be an express declaration that the declarant is going to die, or that he has no hope of recovering. *Johnson v. State*, 79 Okl.Cr. 71, 83, 151 P.2d 801, 807 (Okl.Cr.1944). It is sufficient if it satisfactorily appears that he believed he could not survive, whether it be directly proven by the express language of the declarant or from other circumstances of the case, such as the nature and extent of the injuries, his evident danger, the opinion of medical attendants stated to him, or the length of time between the time of statement and death. *Id.*

In the instant case, Officer Barnett testified that when he arrived at Presbyterian Hospital he ascertained that Appellant had shot Mrs. McCorvey twice in the torso some twelve hours earlier. She was in a trauma room where medical personnel were aggressively treating her injuries. Mrs. McCorvey's condition was critical and Barnett was advised that her chances of survival were "not good" so he decided to interview her. Although Barnett described Mrs. McCorvey as barely conscious or coherent, he testified Mrs. McCorvey, who he approximated was in her mid-seventies, knew who she was and seemed oriented. Mrs. McCorvey was able to briefly tell Barnett what happened. Detective Mullenix interviewed Mrs. McCorvey shortly thereafter under these same conditions as she was being prepared for surgery. Although there was no

statement by the deceased of her expectation of imminent death, the record does disclose that her condition was critical and the circumstances were such as to indicate imminent death was a very distinct possibility. Under such circumstances, we cannot say the trial court abused its discretion in admitting the deceased's statements to these officers as dying declarations.

However, there is no evidence in the trial record to establish either directly or by circumstantial evidence that Mrs. McCorvey was under the sense of impending death when she made statements to her son that Appellant claimed he was free after he shot her. The only predicate was that Morris stated his mother made these statements after she "took a turn for the worse." (Tr.III 85) Because the State failed to lay a sufficient foundation to introduce this evidence under the dying declaration exception or that the circumstances surrounding the making of the statement render it inherently reliable so as to satisfy the residual exception, it was error to admit it.

Appellant also complains counsel was ineffective for eliciting from Sgt. Washington that Mrs. McCorvey had said Appellant shot her intentionally. (Tr.II 133). During cross-examination, defense counsel questioned Washington about his report in which he wrote that Mrs. McCorvey had stated that Appellant shot her intentionally. Washington could not recall if he spoke to Mrs. McCorvey personally or whether that was information he received from other officers. Although defense counsel showed Washington's memory was faulty on an

important fact, it is a mystery why defense counsel elicited this testimony given the fact that the State only questioned Washington about his guarding, transporting and booking of Appellant. While we cannot say counsel was ineffective under the *Strickland* standard, this is yet another piece of damaging evidence to which the jury was exposed.

Second, Appellant correctly claims error occurred when he was not allowed to question Morris McCorvey about his wrongful death lawsuit against Appellant to expose Morris' bias and motive for testifying. During cross-examination, defense counsel asked Morris if he was suing his father. The State objected and argued such evidence was irrelevant. (Tr.III 90) Defense counsel argued it went to Morris' motive to testify. (Tr.III 90-91). Although the trial court stated the objection was overruled, the record indicates the trial court misspoke and sustained the objection.

"Exposure of a witness's motive to testify is a proper and important function of cross-examination." *Livingston v. State*, 1995 OK CR 68, ¶ 15, 907 P.2d 1088, 1092-93. "[B]ias is never collateral, and the right to impeach for bias is construed liberally...." Livingston, 1995 OK CR 68, ¶ 15, 907 P.2d at 1093. "Three factors govern the admissibility of this type of evidence: 'it must be (1) relevant, (2) otherwise admissible under constitutional and statutory authority, and (3) its probative value must not be substantially outweighed by the danger of unfair prejudice.'" *Mooney v. State*, 1999 OK CR 34, ¶ 52, 990 P.2d 875, 890

quoting Martinez v. State, 1995 OK CR 52, ¶ 16, 904 P.2d 138, 141, *cert. denied*, ___U.S.___, 120 S.Ct. 1840, 146 L.Ed.2d 782 (2000). Questioning Morris about his pending wrongful death lawsuit against Appellant meets the above criteria and the trial court erred in precluding such questioning.

Next, Appellant claims the trial court erred in refusing second degree manslaughter instructions and failing to administer excusable homicide instructions *sua sponte*. As stated above, instructions on lesser included offenses and defenses need only be given when supported by the evidence. *See Shrum*, 1999 OK CR 41, ¶ 10, 991 P.2d 1032; *Phillips v. State*, 1999 OK CR 38, ¶ 61, 989 P.2d 1017, 1035. We find neither instruction supported by the evidence. *See Dickson v. State*, 1988 OK CR 170, ¶ 3, 761 P.2d 860, 861; *Miller v. State*, 1974 OK CR 117, ¶ 9, 523 P.2d 1118, 1121; Committee Comments to OUJI-CR2d 4-94.

Appellant also claims the trial court's homicide causation instruction was defective. A review of the causation instruction administered in the instant case shows the jury was properly instructed on the issue of causation. (O.R. 189) Therefore, we find no error, much less plain error, and that trial counsel was not ineffective in failing to object to the trial court's causation instruction.

In his final complaint under this proposition, Appellant claims plain error occurred when the trial court allowed the admission of improper, irrelevant and prejudicial comments and opinions by homicide detectives

during their interview with Appellant. Specifically, Appellant challenges the detectives' opinions and statements that from their experience Appellant's shooting of his wife twice could not have been accidental, that nobody would believe it was accidental, that Appellant was lying about what happened, that his story did not make sense and was not believable, that Appellant was not a good liar and that Appellant was not telling the truth. These types of interview techniques do not render confessions involuntary or constitute improper opinion evidence. *See Cannon v. State,* 1998 OK CR 28, ¶ 20, 961 P.2d 838, 846; *Gilbert v. State*, 1997 OK CR 71, ¶ 44, 951 P.2d 98, 112, *cert. denied*, 525 U.S. 890, 119 S.Ct. 207, 142 L.Ed.2d 170 (1998).

Although we cannot agree that every claim Appellant raises resulted in error, the record before this Court exposes several errors. This Court has consistently held that when there have been numerous irregularities during the course of the trial that tend to prejudice the rights of the defendant, we will review the errors to determine if the cumulative effect of all the errors was to deny the defendant a fair trial. *Lewis v. State,* 1998 OK CR 24, ¶ 63, 970 P.2d 1158, 1176, *cert. denied,* ___U.S.___, 120 S.Ct. 218, 145 L.Ed.2d 183 (1999). As discussed above, we have found error in the admission of improper other crimes evidence, hearsay, a lack of proper instruction and erroneous limiting of cross-examination for bias. After reviewing these errors in a cumulative fashion, we

find an accumulation of error that necessitates a modification of Appellant's sentence to life with the possibility of parole.

We turn now to Appellant's supplemental proposition in which he claims the trial court committed plain reversible error by failing to administer a second degree depraved mind murder instruction or alternatively that counsel was ineffective for failing to advocate for such an instruction.[4] He bases his claim partly on this Court's recent decision in *Shrum v. State,* 1999 OK CR 41, ¶ 10, 991 P.2d 1032, and on an unpublished opinion captioned *Orcutt v. State,* Case No. F-98-1135.

In Shrum, this Court adopted the evidence test to determine if lesser-included offense instructions should be given in a homicide case. Under Shrum, "all lesser forms of homicide are necessarily included and instructions on lesser forms of homicide should be administered if they are supported by the evidence." Shrum, 1999 OK CR 41, ¶ 10, 991 P.2d at 1036. In so holding, the *Shrum* court specifically overruled *Willingham v. State,* 1997 OK CR 62, ¶ 28, 947 P.2d 1074, 1081, and held that second degree depraved mind murder was a lesser included offense of first degree malice murder. *Shrum,* 1999 OK CR 41, ¶ 10 n. 8, 991 P.2d at 1036. Following the *Shrum* decision, the *Orcutt* Court reversed and remanded Orcutt's first degree malice murder conviction because the evidence warranted a second degree depraved mind murder

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[4] This Court granted Appellant's motion to add supplemental proposition on February 7, 2000.

instruction. The *Orcutt* court refused to apply the doctrine of waiver because it could reasonably conclude from the record that defense counsel would have requested a second degree depraved mind murder instruction had *Willingham* not been in effect at the time of trial.

In the instant case, the trial court considered administering second degree depraved mind murder instructions in light of *Willingham* which was the law in effect at the time of trial. (Tr.IV 8-12) Defense counsel objected to administering the depraved mind murder instructions because of *Willingham* and also because the State had not requested them. (Tr.IV 9) The prosecutor then correctly articulated the trial court's duty to instruct on lesser offenses supported by the evidence and candidly conceded that the evidence in this case could support a finding of second degree depraved mind murder. (Tr.IV 10-11) The prosecutor noted the difficulty trial courts and this Court were having in determining when to administer lesser offense instructions and that to give second degree depraved mind murder instructions was contra to *Willingham*. Defense counsel then argued they lacked notice to defend against a second degree depraved mind murder charge and the trial court refused to give the instructions. (Tr.IV 12)

This case is distinguishable from *Orcutt*. Like *Orcutt*, the record supports administering the instruction. However, unlike *Orcutt*, defense counsel specifically objected to the instruction based on lack of notice which indicates

he may have defended differently had he known the trial court would have considered second degree murder instructions. Moreover, the trial court was willing and did administer instructions on first degree misdemeanor manslaughter as a lesser included offense. Given the advanced age of the parties involved in a crime that can be characterized as a domestic dispute, defense counsel, as part of a sound strategy, wanted to eliminate the second degree murder option and make the jury choose between first degree murder and first degree manslaughter. Based on this record, we find any error was waived and that defense counsel was not ineffective in failing to advocate for second degree depraved mind murder instructions. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064; *Lumpkin v. State,* 1984 OK CR 71, ¶ 16, 683 P.2d 985, 988. Based on the foregoing, the Judgment of the trial court is **AFFIRMED** and the sentence **MODIFIED** to life imprisonment with the possibility of parole.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE TWYLA MASON GRAY, DISTRICT JUDGE

Elijah Morris McCorvey, Appellant, was tried by jury and convicted of Murder in the first degree (21 O.S.1991, § 701.7(A)), in the District Court of Oklahoma County, Case No. CF-97-564, the Honorable Twyla Mason Gray, District Judge, presiding. The jury recommended life imprisonment without the possibility of parole. The trial court sentenced Appellant accordingly. From this Judgment and Sentence, he appeals. Judgment **AFFIRMED,** Sentence **MODIFIED** to life imprisonment with the possibility of parole.

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

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