

FILED  
 COURT OF CRIMINAL APPEALS  
 STATE OF OKLAHOMA  
 JUN 20 2000  
 JAMES W. PATTERSON  
 CLERK

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

JERRY WAYNE MCKINNEY )  
 )  
                   Appellant, )  
 v. )  
 )  
 THE STATE OF OKLAHOMA )  
 )  
                   Appellee. )

Not for Publication

Case No. F-99-925

**SUMMARY OPINION**

**CHAPEL, JUDGE:**

Jerry Wayne McKinney was tried by jury and convicted of Counts I, II and III, Murder in the First Degree in violation of 21 O.S.1991, § 701.7, in the District Court of McCurtain County, Case No. CRF-98-152. In accordance with the jury's recommendation the Honorable Willard Driesel sentenced McKinney to three life sentences. McKinney appeals these convictions and sentences.

McKinney raises three propositions of error in support of his appeal:

- I. McKinney was denied a fair trial and due process of law by the exclusion of evidence that permitted the State to present a false impression of the facts to the jury;
- II. McKinney's constitutional protection from double jeopardy was violated by retrial following the trial court's declaration of a mistrial during the first trial; and
- III. The trial court erred in ruling as a matter of law that McKinney was not entitled to the defense of self-defense.

After thorough consideration of the entire record before us on appeal including the original record, transcripts, briefs and exhibits of the parties, we find Proposition I requires relief. We find McKinney's double jeopardy claim in

Proposition II is waived.<sup>1</sup> We find in Proposition III that McKinney was the aggressor and not entitled to self-defense instructions.

McKinney admitted he shot the Dwight brothers. In defense, he wanted to show he was upset and angry because the Dwights came looking for him, vandalized his car, and badly injured his friend Bacon. McKinney argued that the attack on Bacon explained why he armed himself and sought the brothers out. The trial court allowed evidence that the Dwights had attacked McKinney. The court rightly prohibited evidence that the Dwights were well known for violence and had many victims in the community. However, at the State's request, the court also prohibited any mention of the attack on Bacon. The prosecution took advantage of this ruling to argue twelve separate times that McKinney killed the Dwights because they busted his windows. Under the narrow circumstances of this case the trial court's ruling, aggravated by the State's argument, misled the jury and denied McKinney a fair trial with a reliable result.

McKinney argues that the evidence about the attack on Bacon should have been admitted as part of the *res gestae*. "Evidence is considered *res gestae* a) when it is so closely connected to the charged offense as to form part of the entire transaction, b) when it is necessary to give the jury a complete

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<sup>1</sup> See *Coppage v. State*, 62 Okla.Cr. 325, 71 P.2d 509, 513 (Okla.Cr.1937) (defendant who failed to object to mistrial waived double jeopardy claim at retrial). I would not apply waiver in deciding this proposition. However, I yield my view to that of the majority.

understanding of the crime, or c) when it is central to the chain of events.”<sup>2</sup> McKinney argued that the fact the Dwights beat up Bacon explained his state of mind and was necessary for the jury to understand the crime. The trial court consistently refused to admit the evidence because McKinney could not show self-defense. However, McKinney explicitly stated he wanted the evidence to go to premeditation and “diminish the elements of murder in the first degree.” He requested an instruction on the lesser included offense of first degree manslaughter. The trial court “reluctantly” gave that instruction, stating it felt that without the lesser included “we would be depriving the Defendant of any defense that he’s attempted to put on here.” Any argument that McKinney was not entitled to the manslaughter instruction must fail; in a murder case, all lesser forms of homicide are included and instructions should be given if supported by the evidence.<sup>3</sup> The evidence of vandalism, while very weak, was sufficient to support McKinney’s request for the instruction.

Without evidence of the attack on Bacon, however, there was no reasonable evidence of manslaughter. “The elements of heat of passion are 1) adequate provocation; 2) a passion or emotion such as fear, terror, anger, rage or resentment; 3) the homicide occurred while the passion still existed and before a reasonable opportunity for the passion to cool; and 4) a causal

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<sup>2</sup> *Rogers v. State*, 1995 OK CR 8, 890 P.2d 959, 971, *cert. denied*, 516 U.S. 919, 116 S.Ct. 312, 133 L.Ed.2d 215 (1995)

<sup>3</sup> *Shrum v. State*, 1999 OK CR 41, 991 P.2d 1032.

connection exists between the provocation, passion and homicide.”<sup>4</sup> Adequate provocation includes improper conduct of the deceased toward the defendant which would reasonably arouse a sudden heat of passion, including acts of serious violence or those calculated to provoke an emotional response.<sup>5</sup> To make sense of McKinney’s claim that he had to seek out the Dwight brothers and resolve this situation, the jury was entitled to hear about his recent discovery that the Dwights had not only vandalized his car but beaten his friend badly after asking for him. As the prosecution effectively argued, no reasonable person would shoot three people in the head just because they broke his car windows.

The trial court admitted evidence that the Dwights vandalized McKinney’s car. The attacks on Bacon and the car were contemporaneous, and McKinney discovered both at the same time – about half an hour before he shot the Dwights. The only valid distinction between the attacks, as the trial court noted, is that one was against McKinney’s personal property while another was against a third party. However, McKinney claimed that both were directed against him, and the attack against Bacon played a significant part in his decision to look for the Dwights. This evidence was relevant to McKinney’s state of mind for murder or heat of passion and the jury should have been allowed to determine its value.

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<sup>4</sup> *Le v. State*, 1997 OK CR 55, 947 P.2d 535, 546, *cert. denied*, 524 U.S. 930, 118 S.Ct. 2329, 141 L.Ed.2d 702 (1998).

<sup>5</sup> OUII-CR (2<sup>nd</sup>) 4-98; Instruction 18, O.R. 237.

The State argues the trial court found sufficient evidence that McKinney was the aggressor to preclude admitting this evidence. The question is not whether there was sufficient evidence to show McKinney committed murder, or even evidence that he was not entitled to a self-defense instruction.<sup>6</sup> The issue is whether prohibition of evidence about the attack on Bacon denied McKinney the chance to present a meaningful manslaughter defense to the jury.

The State exacerbated the misleading effect of the trial court's ruling through closing argument. The prosecutors argued vigorously that McKinney shot the Dwights because they vandalized his car. The prosecutors argued that anyone would be angry about this, but nobody deserved to be executed for vandalism. This persuasive argument was unfair under the circumstances. The evidence explaining McKinney's state of mind was prohibited at the prosecution's request. The prosecution should not have taken advantage of the trial court's ruling to argue facts it knew to be untrue. McKinney had no way to challenge the State's characterization, and no juror faced with those arguments could possibly have found adequate provocation for manslaughter under the instructions. In its understandable desire to avoid trying the victims, the State put McKinney in the worst possible light and prevented the jury from hearing information which bore on a complete understanding of his state of mind. Although the jury was instructed on manslaughter it was not given an opportunity to fairly consider the evidence

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<sup>6</sup> *Le*, 947 P.2d at 546.

supporting a manslaughter defense. Under these circumstances, McKinney was deprived of the ability to present his defense. The trial court abused its discretion in prohibiting evidence of the attack on Bacon. The case must be reversed and remanded for new trial.

### **Decision**

The Judgments and Sentences of the District Court are **REVERSED** and **REMANDED**.

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#### **OPINION BY: CHAPEL, JUDGE**

STRUBHAR, P.J.:	Concur
LUMPKIN, V.P.J.:	Concur in Results
JOHNSON, J.:	Concur
LILE, J.:	Concur in Results