IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DANIEL KELLY ORCUTT,

Appellant,

v.

STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

Case No. F-98-1135

OPINION

CHAPEL, JUDGE:

Daniel Kelly Orcutt was tried by a jury and convicted of First Degree Murder (Count I) in violation of 21 O.S.1991, § 701.7, and Unauthorized Use of a Motor Vehicle (Count II) in violation of 47 O.S.1991, § 4-102, in the District Court of Creek County, Case No. CF-98-206. In accordance with the jury's recommendation, the Honorable Donald Thompson sentenced Orcutt to life imprisonment without the possibility of parole on Count I and to five (5) years imprisonment and a $5,000.00 fine on Count II. Orcutt has perfected his appeal of these judgments and sentences.

Appellant Daniel Orcutt and Bill Hitt, the victim in this case, were drinking buddies who often fought while intoxicated. On May 9, 1998, Orcutt and Hitt began arguing, as was their habit, at Hitt's campsite. Hitt was angry because Orcutt had taken Hitt's truck without permission. Hitt allegedly made threats toward Orcutt, and the men argued on and off as they continued drinking.

Later in the evening, Hitt drove Orcutt and Orcutt's nineteen (19) year old daughter, Christy Price, to her aunt's house so she could change clothes. Price testified that the men argued all the way to her aunt's house and all the way back to the campsite. When they got to the edge of the campsite, Orcutt and Christy got out of the truck and walked while Hitt parked the truck. Christy testified that Orcutt said he was going to "kill the mother fucker," but she

thought he was just rambling because he was drunk and had been fighting with Hitt.[1]

It did not take long before Orcutt and Hitt began arguing again, this time over a bottle of whiskey Hitt accused Orcutt of hiding from him. Orcutt found the bottle in the truck and threw it at Hitt; Hitt then shoved him, Orcutt shoved back, and Orcutt began punching and kicking Hitt until he fell to the ground. Orcutt then ran into the camper looking for Hitt's shotgun.[2] Orcutt could not find the shotgun. Hitt was attempting to get up, so Orcutt took a tire iron out of the back of the truck and beat him until he stopped moving. Orcutt and Christy then fled in Hitt's truck.

They drove non-stop to the panhandle, which took about five hours. Christy testified that her father drank the whole way. After a few days, they abandoned Hitt's truck in Liberal, Kansas, believing this would throw the authorities off and keep them from looking for them in Oklahoma.

Meanwhile, after speaking to witnesses near the scene, authorities secured a warrant for Orcutt's arrest for the theft of Hitt's truck. Deputy Ed Willingham picked Orcutt up on the warrant on May 12. Orcutt smelled of alcohol but appeared sober enough for questioning. Orcutt waived his rights and agreed to speak with Willingham. He told Willingham he and Hitt were fighing over a whiskey bottle; he admitted hitting Hitt with his fists and a tire tool. When Willingham asked Orcutt if he had run over Hitt, he said he may have as he was leaving, and that he had wanted to leave before Hitt got back up. Orcutt wrote out a short statement to this effect that the State admitted as Exhibit 8. In the statement, Orcutt also admitted taking Hitt's truck without permission, stating Hitt was unconscious when he left the scene.

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[1] Tr.II at 45, 65-66.

[2] The defense claimed he sought out the shotgun for fear that Hitt would retrieve it and kill him; the State argued he wanted to "finish him off" with it.

Deputy Willingham testified that when he told Orcutt that Hitt was dead, Orcutt appeared startled and surprised.[3] Willingham drove Orcutt several hours back to Creek County. Orcutt rambled during the drive that he did not intend to kill anyone, and that he figured the old man would just wind up in the hospital.[4]

Two days later, Orcutt asked to speak with Deputy Willingham again. Orcutt told Willingham he had been thinking more about the incident. Again, he recalled hitting Hitt with his fists and a tire tool. He also said he could have run over Hitt two times, once when he backed up and then when he pulled forward, but he still wasn't clear in his mind on that.[5]

The medical examiner testified that the numerous injuries to Hitt's face and head were consistent with injuries inflicted by a tire tool. However, none of these injuries were serious enough to have caused Hitt's death. The medical examiner opined that it was blunt trauma to the chest and abdomen, most probably caused by a vehicle rolling over Hitt, that caused his death.[6] Automobile grease found on the body corroborated this opinion. The medical examiner further stated that if the fatal wounds to the chest and abdomen had been caused by the tire tool, he would have expected to see a characteristic mark left on the body. There were no such mark, leading him to conclude the most probable cause of death was vehicular roll-over.

The defense called three witnesses. Mark Orcutt, Appellant's brother, testified that Christy Price, Appellant's daughter and the State's key witness, was a schizophrenic with a history of mental illness. Timothy Ward, Appellant's nephew, testified that Hitt had previously driven his truck through a campsite and shot at a family who had yelled at him to slow down. Officer Rick Gage

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[3] Tr.III at 169-70.
[4] *Id.* at 174.
[5] *Id.* at 163.
[6] Tr.II at 96-97.

corroborated that this incident occurred, and that he escorted the family out of the camping area, but never interviewed or arrested Hitt because he was not there when the authorities arrived. More facts will be discussed as they become relevant to propositions of error.

Because Orcutt's first proposition of error merits relief, we will address it at the end of the opinion.

In his second proposition of error, Orcutt claims the trial court erroneously admitted a prejudicial photograph into evidence. Orcutt entered a timely objection to the photograph at trial, preserving this error for review.[7]

Photographs are admissible if their content is relevant and their probative value is not substantially outweighed by the danger of unfair prejudice.[8] State's Exhibit 12 was the only photograph of the victim introduced at trial. It showed how the victim was found at the scene of the crime. The photograph displayed the injuries inflicted upon the victim, and facial wounds which the medical examiner testified were caused by animal activity.

Defense counsel's argument that the introduction of this photograph parallels the improper admission of gruesome exhibits in *Jones v. State*[9] is unpersuasive. In *Jones*, a videotape and two photographs of the victim, who was submerged in the Washita river for over a month and badly decomposed at the time of recovery of the body, were improperly introduced into evidence. In this case, on the other hand, State's Exhibit 12 depicted the victim as he was found lying on the ground. Although one could see facial wounds which were caused by animals and not by Appellant, these wounds were not emphasized in the picture, which showed the victim from a distance. Moreover, the medical

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[7] Tr.III at 138-40.

[8] *Smith v. State*, 737 P.2d 1206, 1210 (Okl.Cr.1987), *cert. denied*, 484 U.S. 959, 108 S.Ct. 358, 98 L.Ed.2d 383 (1987).

[9] 738 P.2d 525, 528 (Okl.Cr.1987).

examiner made clear for the jury's benefit that these wounds were caused by an animal and were not a part of Appellant's charged offense. The photograph depicted the scene of the crime, corroborated the medical examiner's testimony, and did not offer a particularly close-up view of the victim. Overall, we cannot find admission of this photograph so prejudicial as to merit relief. We hold the trial court did not abuse its discretion in admitting State's Exhibit 12.[10]

In his third proposition of error, Orcutt argues prosecutorial misconduct deprived him of a fair trial. Specifically, he takes issue with what he calls a change in theories during the State's final closing argument. The State had argued throughout trial and during its first closing that Orcutt alone killed Bill Hitt by beating him and running over him. During the State's final closing, after the defense had closed and did not have another opportunity to respond, the prosecutor argued that another possible inference from the evidence was that Orcutt and his daughter, Christy Price, had planned the murder when she went home to change clothes, possibly so they could take his truck. The defense did not object, waiving all but plain error. We find none here. Interpreting evidence in more than one way is not *per se* improper as long as all interpretations reasonably follow from the evidence.[11] This was another reasonable inference that could have been drawn from the State's evidence.

Orcutt also complains that the prosecutor engaged in misconduct when he argued:

> You know, I am your prosecutor, your chief prosecutor, I serve you. I'm going to give you the witnesses I have, good or bad. I'm not going to hide nothing (sic) from you. You are the people I serve.

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[10] *Williamson v. State*, 812 P.2d 384, 400-01 (Okl.Cr.1991), *cert. denied*, 503 U.S. 973, 112 S.Ct. 1592, 118 L.Ed.2d 308 (1992) (admissibility of photographs is a matter within the trial court's discretion; and absent an abuse of discretion, this Court will not reverse the trial court's ruling).

[11] *McCarty v. State*, 904 P.2d 110, 122 (Okl.Cr.1995), *cert. denied*, ___ U.S. ___, ___ S.Ct. ___, 1999 WL 784703 (Nov. 15, 1999) (finding no error where argument fell within the prosecution's wide latitude to discuss freely, from the State's standpoint, the evidence and reasonable inferences and deductions arising therefrom).

> This is your county. You make that determination of who is innocent or guilty. If I have a bad witness, she comes on the stand, because what we are looking for here is the truth. She was there.[12]

The defense failed to object here as well. We find no plain error. A review of the record reveals the prosecutor was merely responding to defense counsel's attack on Christy Price when he made this age-old argument regarding the state's inability to chose its witnesses. While the prosecutor's comment that he "served" the jurors, taken alone, bordered closely on improper argument, we find that the argument as a whole was not so improper as to have infringed upon Appellant's rights.[13]

In his fourth proposition of error, Orcutt contends the trial court's failure to sequester the jury or to seat an alternative juror denied him a fair trial and due process of law. Trial concluded, and the case was submitted to Orcutt's jury on a Thursday. At the close of the day, the jurors went home for the evening after the court admonished them not to discuss the case with anyone, not to read anything about it, and to avoid all outside influence.[14] The jurors returned the next morning and resumed deliberations. They broke to advise the trial court that one of them was sick. The judge allowed the jurors to go home for the weekend and resume deliberations the following Monday, which was the next working day. Once again, he admonished them not to discuss the case or read or view anything about it.[15] The record is void of any objection on the part of Orcutt to the trial court's decision to allow the jury to separate under these circumstances.

On appeal, Orcutt now claims that under 22 O.S.1981, § 857, the State must prove he was not prejudiced by the separation. This Court has read § 857

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[12] Tr.III at 268.
[13] *McCarty*, 904 P.2d at 122.
[14] Tr.III at 289.
[15] *Id.* at 293.

to mean that once the case has been submitted to the jury, allowing them to separate is presumptively prejudicial to the defendant.[16] However, we have also held that where both the State and the defendant consent to the separation of the jury after final submission, the defendant waives his right to have the jury kept together and will not be heard to complain in this Court that his rights were prejudiced by such separation.[17] In this case, Orcutt did not object to the separation and in fact consented to it. There is no evidence of prejudice from the separation. We find no error in these proceedings.

Orcutt also claims under the rubric of Proposition Four that by failing to seat an alternate juror, the trial court failed to allow for an extended length of deliberations and failed to account for deaths, illnesses, or accidents that the jurors may have encountered during the proceedings. As stated above, Orcutt did not object to releasing the jury on Friday afternoon until the next working day. There was no extended delay in the case due to illness or death or anything else. Therefore, these considerations are entirely immaterial. As stated above, we will not presume prejudice where Appellant consents to the jury's separation.[18] Orcutt has failed to show the jury engaged in any misconduct

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[16] *See, e.g., McCracken v. State,* 887 P.2d 323, 330 (Okl.Cr.1994), *cert. denied,* 516 U.S. 859, 116 S.Ct. 166, 133 L.Ed.2d 108 (1995) ("It has been long held that on the question of separation of the jury before final submission of the case, the burden is on the defendant to show prejudice, but if separation is after final submission, the burden is on the State to show absence of prejudice.")(citing *Martin v. State,* 58 Okl.Cr. 187, 51 P.2d 584 (1935)).

[17] *Whitfield v. State,* 45 Okl.Cr. 397, 283 P. 266, 267 (1929) ("Where the jury are permitted to separate after the final submission of the case upon consent of the state and the defendant, prejudice will not be presumed in favor of the defendant, and the burden will be upon him to show that the jury during such separation was guilty of misconduct to his prejudice."). *See also, McKinley v. State,* 403 P.2d 789, 791 (Okl.Cr.1965) ("when a case has been submitted to a jury and no request is made that they be kept together, and they are allowed to separate without objection being interposed, defendant will be deemed to have waived any objection to such separation, and the error may not be raised for the first time on appeal." – in absence of plain error, judgment and sentence affirmed).

[18] *Whitfield,* 283 P. at 267.

during the separation that prejudiced him.[19] Accordingly, this proposition is denied.

Orcutt next argues in Proposition Five that his convictions are invalid due to juror misconduct. After the jury had been instructed and retired to deliberate, defense counsel informed the trial judge that she just learned one of the jurors had sat next to the victim's daughter on a courthouse bench during the second day of trial. Defense counsel told the judge that when she saw this a few days prior, she did not know that the woman seated next to the juror was related to the victim. If she had known, she would have asked the judge to inquire of the juror. However, her belief was that it was too late to do anything now.

The trial court told defense counsel it was not too late, and that he was open to requests if she had any.[20] He stated, "We would do the same thing right now that we would have done Tuesday if you want something done or if you have any request of the Court."[21] Defense counsel told the court she would think about it over lunch. She opted not to bring it up again.

Defense counsel was the one who saw the alleged improper contact. She did not offer any evidence to support an allegation that the juror had engaged in misconduct, nor did she request a hearing on the matter despite the trial court's assurance he would hold one. We can presume from her failure to ask the trial court to investigate further that what she saw was not alarming enough to cause her to fear her client's rights had been compromised.

We have previously held that reversal is not warranted where the defense neither makes an offer of proof nor presents any evidence to support any finding of unauthorized jury communication.[22] "A defendant must show actual

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[19] *Id.*
[20] Tr.III at 279-280.
[21] *Id.* at 281.
[22] *West v. State*, 617 P.2d 1362, 1367 (Okl.Cr.1980); *Still v. State*, 484 P.2d 549 (Okl.Cr.1971).

prejudice from any alleged jury misconduct and defense counsel's mere speculation and surmise is insufficient premise upon which to cause reversal."[23] Accordingly, we find this proposition of error meritless.

In his sixth proposition of error, Orcutt claims his conviction should be reversed because the evidence was insufficient to support his conviction for first-degree murder, and the state failed to prove he was not acting in self-defense. State of mind is generally proved circumstantially, and whether one had the intent to kill is a jury question.[24] Malice aforethought requires nothing more than the deliberate intention to take the life of another without justification.[25] This intent may be "formed instantly before committing the act by which it is carried into execution."[26]

While there was evidence that Orcutt may have been intoxicated, may have been arguing with Hitt at the time of the killing, and may have recklessly driven the truck over the victim while fleeing, there was also evidence that Orcutt acted with malice aforethought. The following facts support a finding of malice murder: (1) Orcutt telling his daughter "I'm going to kill the mother fucker," referring to Hitt; (2) his flight from the scene; (3) Orcutt's threat to his daughter when she wanted to help Hitt that if she did not leave with him, she would end up just like Hitt; (4) the theft of Hitt's vehicle and flight to another county; and (5) the abandonment of the stolen vehicle in another state in order to elude police. When viewed in the light most favorable to the State, this evidence sufficiently established malice murder.[27]

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[23] *West*, 617 P.2d at 1367; *Hayes v. State*, 397 P.2d 524 (Okl.Cr.1964); *Glasgow v. State*, 370 P.2d 933 (Okl.Cr.1962).
[24] *Jackson v. State*, 964 P.2d 875, 885 (Okl.Cr.1998), *cert. denied*, __ U.S. __, 119 S.Ct. 1150, 143 L.Ed.2d 217 (1999).
[25] *Jackson*, 964 P.2d at 885.
[26] *Id.* (citing 21 O.S.1991, § 703).
[27] *Spuehler v. State*, 709 P.2d 202, 203-04 (Okl.Cr.1985).

Likewise, we find the State carried its burden of proving Orcutt was not acting in self-defense when he killed Hitt. Although Orcutt claimed he was in fear of Hitt, and called witnesses to testify that Hitt had threatened Orcutt in the past and would wildly shoot at people with his sawed-off shotgun, the evidence showed Hitt presented no serious threat to Appellant during the altercation which resulted in his death. Hitt was unarmed during the fist-fight with Orcutt, and was knocked down almost immediately. He lay there, basically incapacitated, while Orcutt found a heavy tire iron, beat him with it, and then ran over Hitt with Hitt's own truck. The jury could properly find Orcutt was not acting in self-defense under these circumstances.[28]

In his seventh and final proposition of error, Orcutt claims his sentence of life without the possibility of parole and a five thousand dollar ($5,000.00) fine, based on his convictions of Murder in the First Degree and Unauthorized Use of a Motor Vehicle, respectively, were excessive. Our resolution of Proposition One below renders this assignment of error moot.

In his first proposition of error, Orcutt claims the trial court committed reversible error when it failed to instruct upon second degree murder. The trial court granted defense counsel's requests for manslaugher, voluntary intoxication and self-defense instructions. The State replies Orcutt has waived all but plain error for failing to also request an instruction on Murder II, and relies solely on *Willingham v. State*[29] which we have since overruled,[30] to argue no error occurred because second degree murder is not a lesser included offense of first degree murder.

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[28] *Camron v. State,* 829 P.2d 47, 52 (Okl.Cr.1992); *Eads v. State,* 640 P.2d 1370, 1371 (Okl.Cr.1982).

[29] 947 P.2d 1074 (Okl.Cr.1997), *cert. denied,* ___ U.S. ___, 118 S.Ct. 2329, 141 L.Ed.2d 702 (1998).

[30] *See Shrum v. State,* 1999 OK CR 41, __ P.2d __, __, 1999 WL 974019 (overruling *Willingham* to the extent that it holds second degree depraved mind murder is not a lesser included offense of first degree malice murder).

We find the doctrine of waiver inapplicable where we can reasonably conclude from the record that defense counsel would have requested an instruction on second degree murder had *Willingham* not been in effect at the time of trial.[31] Moreover, the evidence in this case would have supported a Murder II instruction had *Willingham* not stood as a bar to it. Orcutt's statement and the testimony of Christy Price indicated that Orcutt may have run over the victim inadvertently as he attempted to flee in the victim's truck while intoxicated. This is sufficient evidence of reckless conduct to support an instruction on depraved mind murder.[32]

Because the evidence warranted a second degree murder instruction, and we can reasonably conclude such instruction was withheld because of caselaw then in existence, we cannot in good conscience allow this conviction to stand. Defendants have a right to a jury that is instructed on every lesser degree of homicide supported by the evidence.[33] Orcutt failed to receive an instruction on a lesser included offense that was supported by the evidence.

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[31] The trial in this case took place in September of 1998. *Willingham* was handed down almost a year prior, in October of 1997. The defense diligently requested and received all lesser-included offense instructions and defense instructions supported by the evidence which our caselaw permitted them to receive.

[32] *Palmer v. State,* 871 P.2d 429, 433 (Okl.Cr.1994) (holding a person evinces a depraved mind when he engages in imminently dangerous conduct with contemptuous and reckless disregard of, and in total indifference to, the life and safety of another), *overruled on other grounds by Willingham,* 947 P.2d at 1080-81 (finding one can commit second degree murder even if one had intent to harm victim, as long as there was no intent to kill victim). As discussed above, *Willingham* has also been overruled to the extent that it holds second degree murder is not a lesser included offense of first degree murder. *Shrum,* 1999 OK CR 41, __ P.2d at __. *See also, Dawson v. State,* 647 P.2d 447, 448 (Okl.Cr.1982) (appellant convicted of second degree murder where handling of firearm while intoxicated caused death of a friend).

[33] *Le v. State,* 947 P.2d 535, 546 (Okl.Cr.1997), *cert. denied,* __ U.S. __, 118 S.Ct. 2329, 141 L.Ed.2d 702 (1998) ("the trial court *must* instruct the jury on every lesser included homicide offense supported by the evidence.") (emphasis added); *Malone v. State,* 876 P.2d 707, 711 (Okl.Cr.1994)("the trial court *must* instruct the jury on every degree of homicide where the evidence would permit the jury rationally to find the accused guilty of the lesser offense and acquit him of the greater.") (emphasis added).

Even if the doctrine of waiver did apply, this omission rises to the level of plain error. This Court has said, "The trial court has the duty in a criminal prosecution to correctly instruct a jury on the salient features of the law raised by the evidence, even without a request by the defendant."[34] "The failure in this case to consider all of the applicable law is plain error, as such omission takes from the defendant a right essential to his defense."[35]

Count I must be remanded for a new trial with a properly instructed jury.

Decision

The Judgment and Sentence of the trial court on Count I is **REVERSED** and **REMANDED** for a new trial; Count II is **AFFIRMED.**

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OPINION BY: CHAPEL, J.

STRUBHAR, P.J.:	CONCUR
LUMPKIN, V.P.J.:	DISSENT
JOHNSON, J.:	CONCUR
LILE, J.:	DISSENT

[34] *O.W.M. v. State,* 946 P.2d 257, 262 (Okl.Cr.1997) (citing *Atterberry v. State,* 731 P.2d 420, 422 (Okl.Cr.1986)).

[35] *O.W.M.*, 946 P.2d at 262. (citing *Simpson v. State,* 876 P.2d 690, 698-99 (Okl.Cr.1994)).

LUMPKIN, VICE-PRESIDING JUDGE: DISSENTS

I dissent to the reversal of this case as there is no basis in law or fact for the Court's decision.

In discussing the first proposition of error and the trial court's failure to give a jury instruction on second degree murder, the Court announces that waiver is inapplicable. The reason given, that we can reasonably conclude from the record that counsel would have requested a second degree murder instruction if *Willingham* had not been the law at the time of trial, is pure speculation. I would apply the doctrine of waiver and not try to second guess what defense counsel might have done if the law had been different at the time of trial. Under a plain error review, I find none. The evidence in this case did not support an instruction on second degree depraved mind murder. *See Shrum v. State,* 1999 OK CR 41, ¶ 10, ___ P.2d ___.

I am authorized to state that Judge Lile joins in this dissent.