IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JORDAN MICHAEL HEATHCO,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2013-547**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant, Jordan Michael Heathco, was tried by jury and convicted of First Degree Murder (Count I) (21 O.S.Supp.2009, § 701.7(A)) and Shooting with Intent to Kill (Count II) (21 O.S.Supp.2007, § 652) in the District Court of Kiowa County, Case Number CF-2011-1. The jury recommended as punishment imprisonment for life without the possibility of parole in Count I and imprisonment for life in Count II. The trial court sentenced accordingly and ordered the sentences to run consecutively.[1] It is from this judgment and sentence that Appellant appeals.

FACTS

On January 4, 2011, at approximately 2:00 p.m., Appellant arrived for work at the liquor store on Highway 9 in Hobart, Oklahoma. Appellant's grandmother, Glenda Lyde, owned the store. Appellant had helped Lyde operate the store since his grandfather had passed away 6 years prior.

[1] Pursuant to 21 O.S.Supp.2009, § 13.1, any person convicted for first degree murder or shooting with intent to kill shall be required to serve not less than 85% of any sentence of imprisonment imposed prior to becoming eligible for consideration for parole.

Appellant had longstanding issues with depression, anger, substance abuse, and alcohol abuse and had been prescribed medication for these conditions. Without his medication, Appellant would become angrier and angrier at the smallest perceived slights. Appellant drank approximately 2 to 4 liters of alcohol every day. Despite this, the liquor store's customers knew Appellant as a cheerful and friendly person. He had a positive relationship with many of them.

Appellant relieved Lyde at the liquor store. Before she left, Lyde gave Appellant the inventory order sheet for the day. Appellant appeared unhappy with Lyde's order but did not voice his displeasure to his grandmother. Lyde asked Appellant to call in the order and left for the evening. After Lyde left, Appellant's distress over the order sheet got the better of him. He informed regular customer, John Carpenter, that his grandmother was not doing the sheet correctly and exclaimed "F grandma, I want to choke her." Appellant took a half-pint bottle of Bacardi and slammed it on the counter. He opened the bottle and drank it down. Carpenter stayed for a time and attempted to calm Appellant, but he remained angry.

As the afternoon wore on, Appellant returned to his normal self. He visited with his childhood friend, Rebecca Monday, and frequent customer, Matthew Dean. Monday observed that Appellant was intoxicated but otherwise acted normal. After Monday left, Appellant's friend, Jose Salazar, arrived. Salazar came into the store after he got off of work and hung out with Appellant.

Appellant's father, Michael Heathco, visited the store. Appellant and his sister had argued over her dog at lunch. A few days earlier, Appellant had related that he had gotten into it with a telemarketer that would not quit calling the store. Michael Heathco wanted to speak with Appellant as to whether he was taking his medication. Heathco visited with Salazar but decided to wait until Appellant got home to speak with him.

Matthew Dean had planned a gathering of family and friends at his home in Hobart that evening. Appellant had previously invited Dean to lunch. On Dean's second visit to the liquor store that day, he invited Appellant to attend the family gathering. After Dean left, Appellant asked Salazar to go with him to the get-together and Salazar agreed.

After closing the store, Appellant drove to Lyde's home and dropped off the store's deposit. Lyde noticed that Appellant had been drinking and confronted him. Lyde informed Appellant that he could not be drunk while working at the liquor store. Appellant asked Lyde if she wanted the keys to the store but she declined. Appellant then returned home, grabbed two packs of cigarettes, and informed his father that he was going out.

Salazar rode with Appellant from the liquor store to the gathering at Dean's home. He did not go inside either Appellant's or Lyde's homes but waited in Appellant's truck. Appellant acted normal throughout this entire period of time.

When Appellant and Salazar arrived at the gathering, Dean welcomed them inside his house. Dean's fiancée, Tiffany Guoladdle, and their three

children were inside the home. Tina Guoladdle, Sean Zotigh and their two children were also already there. Appellant and Salazar took seats at the dining room table. Tiffany Guoladdle watched the children in the bedroom. Soon thereafter, Benjamin Wagner arrived with his aunt, Sophia Cordova, her husband, James, and their two children. Appellant knew Tina Guoladdle, Sean Zotigh, and James Cordova from the liquor store but had not been formally introduced to Benjamin Wagner. After the two were introduced, Wagner joked that Appellant would not need to I.D. him at the store any longer.

Everyone engaged in casual conversation and listened to music. Appellant appeared normal and was cheerful. James Cordova spoke with Appellant concerning a problem that Appellant had with the window in his truck. Wagner sat at the dining table across from Appellant. Some of the women sat around the computer desk. Appellant had brought a bottle of Seagram's 7 with him to the gathering and shared it with the others. They passed it from person to person. The bottle was passed around three separate times. Appellant drank heavily during each pass. When the bottle got to Wagner, he asked Appellant if he could remove the plastic spout from the top of the bottle. Appellant handed Wagner his knife. James Cordova chastised both Wagner and Appellant for having the weapon while drinking alcohol. Cordova told Appellant to put the knife away and he complied. Cordova then went into the kitchen.

Salazar cockily asked Wagner "are you a Kweeton?" (a Native American last name from that area). Wagner replied: "No, man. I'm Zotigh. I'm Benjamin.

I'm Benjamin." He shook Salazar's hand. Salazar maintained a hard attitude. Wagner goofily stated "I'm Ben for real, yeah - - oh no. "I'm a - - how about my bang (phonetic), how about my bang (phonetic)." Wagner asked Salazar: "ha, you Kiowa?" Salazar responded in the Kiowa language stating "No. I'm Mexican." Wagner stated "Oh, he's talking Kiowa" and asked Appellant "you from here?" Appellant stated, "Yeah." Although no one else in the room found that this exchange was extraordinary, Salazar noticed that it visibly upset Appellant.

Wagner and Sophia Cordova were sitting next to each other singing along with the music. Salazar asked Wagner "Where you from?" Wagner replied "Cali. Long Beach. Third in line. Third in line." Appellant drew a Glock 40 caliber handgun from his left pocket, chambered a round, and shot Wagner three times. Appellant stood up and walked towards Wagner. When Wagner stood up and took two steps, Appellant shot Wagner twice more. Wagner fell face down on the floor.

Appellant stepped back and pointed the gun at Matthew Dean. Dean was still seated at the table. Appellant walked towards Dean and put the gun in his face. Dean believed that Appellant intended to kill him. He moved his head to one side and shoved Appellant's arm out of the way just as Appellant fired the gun. Then, Dean jumped from his seat and pulled on the gun in an attempt to take it away from Appellant. Salazar also grabbed Appellant's arm and hand. The two men wrestled the gun away from Appellant. The magazine fell on the table. Dean took the gun and threw it under a bush in the front yard.

Appellant exited the house and left in his truck. He drove to the Kiowa County Sheriff's Office. He asked for the Sheriff and then the Undersheriff by name. When they were unavailable he confessed "I've killed some people" to jail trustee, Donny Chancellor, and Dispatcher, Carol Bauer. Bauer took Appellant into custody. Deputy Sean Buffington later interviewed Appellant. Appellant informed Buffington "I did it, didn't I"?

After Appellant shot Wagner, Tina Guoladdle ran into the bedroom and called 911. Emergency medical workers quickly responded to the home and tried to save Wagner's life. They transported Wagner to the hospital where he was pronounced dead. The Medical Examiner's Office determined that Wagner had died from multiple gunshot wounds.

I.

In his first proposition of error, Appellant challenges the form of the verdict the trial court provided to the jury. He contends that the verdict form was incomplete because it omitted a blank for the jury to check to return a simple verdict of not guilty. He argues that this omission operated as a directed verdict.

Appellant acknowledges that he waived appellate review of this issue for all but plain error when he failed to object to the verdict form at trial. *Powell v. State*, 1995 OK CR 37, ¶ 35, 906 P.2d 765, 775-76; *Simpson v. State*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 693; *Kite v. State*, 1973 OK CR 76, ¶ 11, 506 P.2d 946, 949. Plain error review is codified at 12 O.S.2011, § 2104(D). This statutory provision permits this Court to "tak[e] notice of plain errors affecting

substantial rights although they were not brought to the attention of the [trial] court." To be entitled to relief under the plain error doctrine, an appellant must prove: 1) the existence of an actual error (*i.e.*, deviation from a legal rule); 2) the error is plain or obvious; and 3) the error affected his or her substantial rights. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923; *Simpson*, 1994 OK CR 40, ¶¶ 2, 11, 23, 876 P.2d at 693-95. "If these elements are met, this Court will correct plain error only if the error 'seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings' or otherwise represents a 'miscarriage of justice.'" *Id., quoting Simpson*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701. We review Appellant's claim of error pursuant to this framework.

Our statutes do not recognize a plea of not guilty by reason of insanity, instead, the defense of insanity is tendered under a plea of not guilty. Title 22 O.S.2011, § 513 only permits four kinds of pleas to an Indictment or Information, namely: (1) Guilty, (2) Not Guilty, (3) *Nolo Contendere*, and (4) Former Judgment of Conviction or Acquittal. All matters of fact tending to establish a defense other than those listed within § 513 may be given in evidence under the plea of not guilty. 22 O.S.2011, § 519. The legal defense of insanity is recognized throughout our statutes. 21 O.S.2011, § 152(4); 22 O.S.2011, §§ 914, 925, 1161(A)(1). An act committed by a person in a state of insanity cannot be punished as a public offense. 22 O.S.2011, § 1161(A)(1). The defense of insanity may be raised either singly or in conjunction with some other defense. 22 O.S.2011, § 1161(A)(2). To properly raise the defense the defendant must file notice with the court no later than thirty (30) days after

formal arraignment. 22 O.S.2011, § 1176(A). Therefore, when in any criminal action the defense of insanity is interposed, the defendant necessarily stands upon a plea of not guilty.

The defense of insanity is analogous to a confession and avoidance. *Adair v. State*, 1911 OK CR 296, 6 Okl.Cr. 284, 297, 118 P. 416, 422, *overruled in part on other grounds by Tittle v. State*, 1929 OK CR 359, 44 Okl.Cr. 287, 295-96, 280 P. 865, 868; *See e.g. State v. Quigley*, 199 A. 269, 271 (Me. 1938). It does not deny a single allegation in the Indictment or Information but seeks to justify or excuse it. *Id.*, 6 Okl.Cr. at 291, 297, 118 P. at 419, 422; *See e.g. Quigley*, 199 A. at 271 (Me. 1938). However, as a defendant that interposes the defense of insanity stands upon a plea of not guilty, every material allegation in the Indictment or Information is at issue at the time of trial. 22 O.S.2011, § 518.

When a jury acquits a defendant on the ground of insanity, the jury has a clear duty to state in their verdict that they find the defendant not guilty on account of insanity. 22 O.S.2011, §§ 914, 925, 1161(A)(3). In contrast, the verdict upon a plea of not guilty is either "guilty" or "not guilty." 22 O.S.2011, § 914. Therefore, in a case where the defendant has properly raised the defense of insanity, our statutes plainly require that the verdict form should provide the jury with both the option of determining the defendant "Not Guilty" and the option of determining the defendant "Not Guilty by reason of insanity." 22 O.S.2011, §§ 1161(A)(3), 1165.[2]

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[2] Section 1161(A)(3) provides:

The record in the present case reveals that the District Court modified the basic verdict form to include the language "by reason of insanity" following the pre-printed "Not Guilty" blank. *See* Inst. No. 10-14, OUJI-CR(2d) (Supp.2013).[3] Thus, the verdict form did not provide the jury with a pre-printed blank for a simple "Not Guilty" verdict. Although there was no directed verdict in the present case, we find that the trial court's modification of the verdict form constituted an actual error. *Gilson v. State*, 2000 OK CR 14, ¶ 44, 8 P.3d 883, 904. Based on the language of our statutes, the error was plain and obvious and affected a substantial right. Thus, it constitutes plain error. *Simpson*, 1994 OK CR 40, ¶¶ 10-12, 26, 876 P.2d at 694-95, 699.

> When in any criminal action by indictment or information the defense of insanity is interposed either singly or in conjunction with some other defense, the jury shall state in the verdict, if it is one of acquittal, whether or not the defendant is acquitted on the ground of insanity. When the defendant is acquitted on the ground that the defendant was insane at the time of the commission of the crime charged, the person shall not be discharged from custody until the court has made a determination that the person is not presently dangerous to the public peace and safety because the person is a person requiring treatment as defined in Section 1-103 of Title 43A of the Oklahoma Statutes.

Section 1165 provides:

> The provisions of the article on trials, in respect to the duty of the court upon questions of law, and of the jury upon questions of fact, and the provisions in respect to the charge of the court to the jury, upon the trial of an indictment or information, apply to the questions of insanity.

[3] The Oklahoma Uniform Jury Instruction Committee has not formulated a verdict form for the District Courts to use when a defendant interposes the defense of insanity, but instead has drafted a "Form of Verdict instruction [that] simply informs the jury of its duty under 22 O.S.1991, § 914." Committee Comments, Inst. No. 8-34, OUJI-CR(2d) (Supp.2013) ("If you acquit the defendant on the ground of insanity, the verdict must read, 'We, the jury, upon our oath, find the defendant not guilty by reason of insanity.'"). We refer this issue to the Oklahoma Uniform Jury Instruction Committee for its review.

Having determined that plain error occurred, we review to determine whether the error was harmless. *Simpson*, 1994 OK CR 40, ¶¶ 19-20, 876 P.2d at 698 (holding "plain error is subject to harmless error analysis. . . ."). As set forth in *Hogan* and *Simpson*, we will correct plain error only if the error seriously affect the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923; *Simpson*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701. Error in the form of the verdict submitted to the jury does not fall within the very limited class of structural errors which necessarily render a trial fundamentally unfair. *See United States v. Davila*, 133 S.Ct. 2139, 2149, 186 L.Ed.2d 139 (2013); *Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 1833, 144 L.Ed.2d 35 (1999); *Rose v. Clark*, 478 U.S. 570, 578, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986). Instead, error in the form of the verdict is subject to harmless error review. *Gilson*, 2000 OK CR 14, ¶ 44, 8 P.3d at 904; *see also Ellis v. Ward*, 2000 OK CR 18, ¶¶ 3-4, 13 P.3d 985, 986 (holding error in instructions subject to harmless error review.). Under the facts of this case, we conclude that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

We note that the District Court's modification of the basic verdict form conformed to Appellant's defense at trial. Appellant's sole defense was insanity. Defense counsel argued in closing argument that Appellant was legally insane when he committed the acts against Wagner and Dean. He explicitly informed the jurors: "There's not even a not guilty verdict on this . . . because we've

confessed to you that our only verdict we are seeking in this case is not guilty by reason of insanity."

The evidence of Appellant's guilt was such that no rational trier of fact could have returned a simple verdict of acquittal. Appellant wholly admitted at trial that he had shot and killed Benjamin Wagner. He further admitted that he pointed the gun at Matthew Dean and discharged it. Accordingly, we find beyond a reasonable doubt that the complained error did not contribute to the jury's verdict. Proposition One is denied.

II.

In his second proposition of error, Appellant challenges the sufficiency of the evidence. In evaluating the sufficiency of the evidence this Court does not "ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (quotations and citation omitted). "Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.*; *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204.

Appellant contends that the State failed to meet its burden of proving sanity. Oklahoma law exempts from criminal responsibility those who, at the time of the crime, are incapable of knowing the wrongfulness of their act. *Ullery v. State*, 1999 OK CR 36, ¶ 34, 988 P.2d 332, 348; 21 O.S.2011, § 152(4)

However, criminal defendants are presumed sane. *Id.*; *Cheney v. State*, 1995 OK CR 72, ¶ 39, 909 P.2d 74, 85. Thus, the defendant has the burden of raising a reasonable doubt of his sanity at the time of the crime. *Id.; Manous v. State*, 1987 OK CR 239, ¶ 4, 745 P.2d 742, 744. The *M'Naghten* rule is the test for sanity in Oklahoma. *Pugh v. State*, 1989 OK CR 70, ¶ 5, 781 P.2d 843, 844.

> A person is insane when that person is suffering from such a disability of reason or disease of the mind that he/she does not know that his/her acts or omissions are wrong and is unable to distinguish right from wrong with respect to his/her acts or omissions. A person is also insane when that person is suffering from such a disability of reason or disease of the mind that he/she does not understand the nature and consequences of his/her acts or omissions.

Id., 1989 OK CR 70, ¶ 3, 781 P.2d at 843-44; Inst. No. 8-32, OUJI-CR(2d)(Supp.2013). If the defendant establishes a reasonable doubt of his sanity, the presumption of sanity vanishes and it is incumbent upon the State to prove the defendant's sanity beyond a reasonable doubt. *Ullery*, 1999 OK CR 36, ¶ 34, 988 P.2d at 348. The jury determines whether the State has met this burden. *Id.*

Reviewing the record in the present case, we find that Appellant raised a reasonable doubt as to his sanity. Appellant presented testimony from several witnesses establishing that he had a long history of mental health issues. Appellant also presented the testimony of David Tiller, M.D., who diagnosed Appellant with schizophrenia. After interviewing Appellant concerning the events on the night in question, Tiller opined Appellant suffered a delusion that his life was in danger which caused him to be legally insane. Tiller believed that

Appellant had decompensated and was having auditory hallucinations. Appellant informed Tiller that he was in fear of his life after Wagner stated "I'm going to cap your ass" and demonstrated to Tiller how Wagner moved his hands underneath the table. Although Appellant did not explain why he had the handgun in the first place, he claimed that he started shooting to protect himself. Tiller stated that the events that Appellant related did not actually occur, but explained that they were Appellant's reality. Thus, the State was required to prove Appellant's sanity beyond a reasonable doubt.

The test set forth in *Jackson v. Virginia* is the proper standard for determining the sufficiency of the evidence of sanity. *Moore v. Duckworth*, 443 U.S. 713, 714, 99 S.Ct. 3088, 3089, 61 L.Ed.2d 865 (1979). Therefore, we review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found Appellant was sane beyond a reasonable doubt.

All of the evidence suggested that Appellant was able to distinguish right from wrong. Both Tiller and the State's expert witness, Robert Morgan, Ph.D., opined that Appellant was able to distinguish right from wrong at the time of the offenses. Accordingly, the issue is whether Appellant was suffering from such a disability of reason or disease of the mind that he did not understand the nature and consequences of his acts when he shot and killed Wagner and shot the firearm at Dean.

Reviewing the evidence in the light most favorable to the State, we find that any rational trier of fact could have found that Appellant was able to

understand the nature and consequences of his acts when he committed the charged offenses. Dr. Morgan opined that Appellant suffered from depression, anxiety and alcohol abuse but was not legally insane when he committed the offenses. Morgan did not believe that Appellant had suffered a valid hallucination, psychosis or a psychotic event. Thus, the jury had conflicting expert opinions as to Appellant's sanity. It is within the exclusive province of the trier of fact to determine the weight and credibility to be given to the testimony of a witness, reconcile the testimony concerning the motives of the witnesses, weigh the evidence, and resolve conflicts in that evidence. *Plantz v. State*, 1994 OK CR 33, ¶ 43, 876 P.2d 268, 281.

We find that the jury rationally resolved the conflict in the expert witness testimony. Appellant's disclosures to the mental health experts were inconsistent. Morgan noted that the validity indicators on certain tests that the defense experts had given to Appellant indicated that he had exaggerated his symptoms for hallucinations and delusions. He further noted that Appellant had not stated that Benjamin Wagner had a gun when he interviewed him but made this statement to Dr. Tiller a couple of weeks later. Tiller wholly admitted this fact and further admitted that Appellant had been inconsistent in his reporting to him.

Appellant's mental health history corroborated Morgan's opinion that Appellant was sane. Appellant was thirty one years old. He had received mental health treatment since he had been a teenager and had gone to inpatient treatment on three separate occasions. Throughout that period of time,

Appellant's diagnosis consistently remained as mood disorder (depression), intermittent explosive disorder (anger issues) and alcohol abuse. He was prescribed antidepressant and antianxiety medications. Appellant had never been treated for delusions, hallucinations or psychosis. Appellant neither reported nor did the treating professionals note that he had any hallucinations, delusions, or psychosis during his three inpatient stays. Dr. Tiller agreed that there was not any evidence of hallucinations or delusions within Appellant's mental health records.

Appellant's ability to function within the community also corroborated Morgan's opinion. Morgan testified that, if left untreated, an individual suffering from hallucinations or delusions would have trouble functioning in society. It would be difficult for such an individual to maintain a job. The individual's problems would be quite apparent to co-workers, supervisors and anybody in the public with whom they interacted. The evidence established that Appellant had helped his grandmother, Glenda Lyde, operate the family liquor store for the 6 years preceding the offenses. Appellant helped Lyde with the inventory order sheet and interacted with the store's customers. Appellant had a positive relationship with many of the customers. They knew Appellant as a cheerful and friendly person.

Morgan's opinion was further corroborated by the testimony of the individuals that observed Appellant in the hours immediately prior to the offenses. Because she was his grandmother, Lyde knew that Appellant had longstanding mental health issues. She also knew that he took a bottle home

from the liquor store every night. On the day in question, Appellant came into the store and relieved Lyde at 2:00 p.m. Appellant was unhappy with Lyde's inventory order sheet but did not voice his displeasure to his grandmother. Lyde left Appellant to call in the order and close down the store that night. She testified that she would not have left Appellant in charge of the store that day if she had any concerns.

John Carpenter knew Appellant from his weekly visits to the liquor store. He visited the store shortly after 2:20 p.m. on the day in question. Carpenter noticed that Appellant was upset about an inventory sheet. Appellant stated: "F grandma, I want to choke her" and motioned as if he was choking someone with a sheet around the neck. Appellant took a half-pint bottle of Bacardi and slammed it on the counter. He opened the bottle and drank it down. Carpenter stayed for a time and attempted to calm Appellant but he remained angry.

Rebecca Monday had known Appellant her entire life. She visited the liquor store that day and observed that Appellant was intoxicated but otherwise acted perfectly normal. Appellant was able to communicate and transact business with her. He admitted that he had drank an entire bottle of liquor. Monday had seen Appellant intoxicated on other occasions, had spoken with him when he appeared suicidal in the past, and was familiar with his mannerisms. Monday did not have any concerns with the way that Appellant was acting that day.

Matthew Dean knew Appellant from his visits to the liquor store. He visited with Appellant on two separate occasions that day. On the second

occasion, he invited Appellant to attend a gathering at his home. Dean did not observe anything out of the ordinary about Appellant.

Jose Salazar and Appellant were friends. On the day in question, Salazar visited Appellant at the liquor store and stayed with him awhile. When Dean invited Appellant to come to his house, Appellant invited Salazar to come with him. Salazar testified that he did not observe anything unusual about Appellant. He had normal conversations with Appellant. Appellant appeared normal and acted professional with the liquor store's customers that day.

Appellant's father, Michael Heathco, visited the liquor store because he was concerned that Appellant was off of his medication. Michael Heathco related that Salazar was present at the store and he did not observe anything about Appellant that could not wait until he came home that evening.

After closing the store, Appellant drove to Lyde's home and dropped off the deposit. Lyde noticed that Appellant had been drinking and confronted him. Lyde informed Appellant that he could not be drunk while working at the liquor store. Appellant asked Lyde if she wanted the keys to the store but she declined. Lyde did not observe anything about Appellant's person that concerned her, beyond the intoxication, and let him leave. When Appellant returned home, he informed his father that he was going out. Michael Heathco did not confront Appellant or prevent him from leaving the home.

Salazar rode with Appellant from the liquor store to Lyde's home but did not go inside. He rode with Appellant to his home, but, again did not go inside.

Then, Salazar rode with Appellant to the gathering at Dean's home. Salazar testified that Appellant acted normal throughout this entire period of time.

Once inside Dean's home, Appellant spoke with both Dean and Salazar. Dean did not notice anything out of the ordinary about Appellant's person. Tina Guoladdle, Sean Zotigh and James Cordova also knew Appellant from the liquor store. All three observed Appellant when he first arrived. Appellant did not act any different than he usually did. Guoladdle testified that Appellant appeared his regular cheerful self. Cordova had a polite friendly conversation with Appellant concerning the operation of his truck window when he first arrived. Appellant shared his bottle of Seagram's 7 with everyone at the party. The bottle was passed around three separate times. Appellant drank heavily during each pass of the bottle.

Salazar testified that everything appeared normal with Appellant up until the moment that Wagner, Appellant, and Salazar traded exchanges about heritage and affiliation. Salazar noted that Appellant appeared to become upset at something Wagner had said. After Wagner stated "Cali. Long Beach. Third in line. Third in line," Appellant drew the handgun from his left pocket, chambered a round, and repeatedly fired it at Wagner.

Morgan's opinion was further corroborated by the testimony of those who interacted with Appellant following the shooting. Immediately after the offenses, Appellant drove to the Kiowa County Sheriff's office. He asked for both the Sheriff and the Undersheriff by name. When they were unavailable he confessed "I've killed some people" to jail trustee, Donny Chancellor, and

Dispatcher, Carol Bauer. Notably, Appellant did not claim that he acted in self-defense. Both Bauer and Chancellor observed that Appellant was intoxicated. Bauer took Appellant into custody. Deputy Sean Buffington later interviewed Appellant. Appellant informed Buffington "I did it, didn't I"? Buffington also observed indicators that Appellant was intoxicated.

Dr. Tiller did not examine Appellant until after he had been in the jail for 11 months. Appellant was not treated for schizophrenia or psychosis during this period of time. Bauer regularly interacted with Appellant in the jail. She noted that Appellant was a good inmate and did not cause any problems. Dr. Morgan did not observe any signs of hallucination, delusions or psychosis during his observations of Appellant throughout the proceedings.

Appellant's disclosures to Tiller failed to explain his attack on Matthew Dean. Tiller did not relate any hallucination or delusion which Appellant suffered as to Dean. Instead, he simply testified that Appellant's attempt to shoot Dean was part of the delusion involving Wagner.

Reviewing the evidence in the light most favorable to the State, we find that any rational trier of fact could have found that Appellant was sane beyond a reasonable doubt. Proposition Two is denied.

III.

In his third proposition of error, Appellant challenges the sufficiency of the evidence supporting his conviction in Count II for Shooting with Intent to Kill. We review Appellant's claim to determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact

could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 318-19, 99 S.Ct. at 2789; *Easlick*, 2004 OK CR 21, ¶ 15, 90 P.3d at 559; *Spuehler*, 1985 OK CR 132, ¶ 7, 709 P.2d at 203-204. The essential elements of the crime of Shooting with Intent to Kill, as instructed in the present case, are:

First, intentional and wrongful;

Second, discharging a firearm;

Third, with the intent to kill any person.

Inst. No. 4-4, OUJI-CR(2d) (Supp.2012). In reviewing the sufficiency of the evidence, this Court accepts all reasonable inferences and credibility choices that tend to support the trier of fact's verdict. *Roldan v. State*, 1988 OK CR 219, ¶ 8, 762 P.2d 285, 286-87.

Taking the evidence in the present case in the light most favorable to the prosecution, we find that any rational trier of fact could have found the essential elements of the crime of Shooting with Intent to Kill beyond a reasonable doubt. We note that Appellant, through defense counsel, admitted at trial that he pointed a firearm and discharged that firearm at Matthew Dean. On appeal, Appellant now argues that the firearm inadvertently discharged during a struggle over possession of it. We find that it was reasonable for the jury to infer from all the facts and circumstances that Appellant intentionally discharged the handgun with the intent to kill Dean. *Robinson v. State*, 2011 OK CR 15, ¶ 18, 255 P.3d 425, 432; *Hogan v. State*, 2006 OK CR 19, ¶ 22, 139 P.3d 907, 919.

All of the individuals that attended the gathering testified that they observed Appellant repeatedly shoot Benjamin Wagner with a handgun. Tina Guoladdle ran into the bedroom to called 911 and did not observe what followed. Jose Salazar and Sean Zotigh provided a general description of the events. They both related that Appellant pointed the gun at Matthew Dean, Dean grabbed the weapon, and the gun discharged. However, Dean testified in detail as to how he avoided being shot. Dean related that he remained in his seat because he was scared and confused. Appellant turned and stuck the gun in his face. Dean believed that Appellant was trying to kill him, too. He explained that he moved his head and shoved Appellant's arm out of the way as Appellant fired the gun. Then, he got up from his seat and started pulling on Appellant in an attempt to get the gun.

Sophia Cordova, likewise, detailed the events. She testified that Appellant continued to fire the gun at Wagner until Wagner fell to the floor. Cordova related that she was nearby and went to Wagner's side. She saw Appellant turn and step towards Dean. He pointed the gun right at Dean. Appellant pulled the trigger and fired the weapon, but Dean had redirected the weapon. Cordova remained at Wagner's side and the shot narrowly missed her. Cordova observed Dean and Appellant tussle over the gun.

James Cordova also provided a detailed description of the events. He testified that Appellant turned and pointed the gun at Dean. Appellant put the gun within 6 inches of Dean's face. Cordova saw Dean lunge at the gun before

his attention was drawn to his young son. Cordova, next, observed Dean and Salazar grab the gun and take it away from Appellant.

Reviewing the evidence in the present case in the light most favorable to the prosecution, we find that any rational trier of fact could have found that Appellant committed the charged offense beyond a reasonable doubt. Proposition Three is denied.

IV.

In his fourth proposition of error, Appellant contends that he was denied the effective assistance of counsel. This Court reviews ineffective assistance of counsel claims under the two-part test mandated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *Mitchell v. State*, 2011 OK CR 26, ¶ 139, 20 P.3d 160, 190. The *Strickland* test requires an appellant to show: (1) that counsel's performance was constitutionally deficient; and (2) that counsel's deficient performance prejudiced the defense. *Bland v. State*, 2000 OK CR 11, ¶ 112-13, 4 P.3d 702, 730-31 (*citing Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064). Unless the appellant makes both showings, "it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Ryder v. State*, 2004 OK CR 2, ¶ 85, 83 P.3d 856, 875 (*quoting Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064).

When a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed. *Phillips v. State*, 1999 OK CR 38, ¶ 103, 989 P.2d 1017, 1043 (*citing Strickland*, 466 U.S. at

697, 104 S.Ct. at 2069). To demonstrate prejudice an appellant must show that there is a reasonable probability that the outcome of the trial would have been different but for counsel's unprofessional errors. *Bland*, 2000 OK CR 11, ¶ 112, 4 P.3d at 730-31. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 792, 178 L.Ed.2d 624 (2011).

Appellant contends that defense counsel rendered ineffective assistance when counsel failed to investigate and use evidence establishing that Appellant never received the IAAP HANDBOOK OF PSYCHOLOGY that he had requested from his aunt. He argues that this evidence was critical to overcome the implication that Appellant read the book to learn how to fake an insanity defense. Reviewing the record, we find that Appellant has not shown a reasonable probability that the outcome of the trial would have been different but for counsel's failure to use the asserted evidence.[4]

The State cross-examined Dr. Tiller at trial regarding the information that he had reviewed in reaching his opinion on sanity. Tiller testified that he had reviewed some of Appellant's mail. He was also aware that Appellant enjoyed reading and had read a lot of books during the time that he had been in the jail. Tiller affirmed that it was his understanding that Appellant had read CRIME AND PUNISHMENT, some philosophy books, and books on applied psychology during his time in the jail. The State implied some ulterior motive in

[4] We note that the District Court reached the same conclusion but within the context of Appellant's Motion for New Trial.

Appellant's desire to read the psychology book but Tiller stated that there could be any number of reasons why Appellant wanted to read a psychology book.

In redirect, defense counsel clarified Tiller's knowledge of the circumstances. Tiller explained that Appellant had written a letter to his aunt asking for the psychology book. Tiller acknowledged that he did not know if Appellant had ever received the book.

In recross-examination, the State questioned Tiller regarding Appellant's letter exclaiming that the book CRIME AND PUNISHMENT was one of his new favorites and explaining the book's portrayal of psychological problems, including hallucinations, delusions, and insanity. Tiller was thoroughly familiar with the book and agreed that it dealt with the very symptoms with which he had diagnosed Appellant.

In rebuttal, the State introduced testimony from Dr. Morgan that a general psychology book would provide information concerning abnormal behaviors and mental illness. Then, in closing argument, the Prosecutor argued that Appellant wanted to read the psychology book because he wanted to gather information to help with his defense. He further argued that Appellant had fabricated the symptoms that had led to his diagnosis as schizophrenic and wanted to use the book to research the symptoms for mental illness involving auditory and visual hallucinations.

The record on appeal reveals that Appellant did not receive a copy of the IAAP HANDBOOK OF PSYCHOLOGY. Following trial, Appellant filed his Motion for New Trial. Appellant's aunt, Barbara Bell, testified at the hearing held on the

motion. She related that Appellant had requested that she send him a copy of the IAAP HANDBOOK OF PSYCHOLOGY but that she had not sent the book to him because it had been too expensive. Appellant's Mother, Barbara Heathco, testified as to Appellant's hearsay statement made after the trial to the effect that he had never received the book.

However, we find that the evidence which Appellant developed at the hearing was not favorable to his position. Bell identified the letter in which Appellant requested the IAAP HANDBOOK OF PSYCHOLOGY. In the letter, Appellant also requested copies of the following books: THE MANUFACTURE OF MADNESS; EXTRAORDINARY POPULAR DELUSIONS AND THE MADNESS OF CROWDS; PORTABLE NIETZSCHE; THE DEVIL'S NOTEBOOK; SECRET LIFE OF A SATANIST; THE HISTORY OF THE DEVIL AND THE IDEA OF EVIL; and PSYCHOLOGY OF THE UNCONSCIOUS. Bell further identified the letter that she wrote back to Appellant informing him that she had not been able to obtain the book IAAP HANDBOOK OF PSYCHOLOGY from his most recent list because it was too expensive. Bell did not indicate in the letter that she was unable to find the other books that he had listed.

Overall, the evidence and argument concerning Appellant's desire for the applied psychology book were not significant. The jury was not misled as to Appellant's study of psychology while in the jail. The State's elicitation of evidence and argument on the topic were both brief. The evidence concerning Appellant's interest in psychology made up a very small part of the totality of the evidence concerning his sanity. As Appellant has not shown a reasonable probability that the outcome of the trial would have been different had defense

counsel used the evidence developed at the motion hearing, we find that counsel's failure to use the evidence did not amount to ineffective assistance. Proposition Four is denied.

DECISION

The judgment and sentences of the District Court are hereby **AFFIRMED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF KIOWA COUNTY
THE HONORABLE RICHARD B. DARBY, DISTRICT JUDGE

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OPINION BY: LUMPKIN, V.P.J.
SMITH, P.J.: CONCUR IN RESULT
A. JOHNSON, J.: CONCUR IN RESULT
LEWIS, P.J.: CONCUR IN RESULT

RA

JOHNSON, JUDGE, CONCURRING IN RESULT:

I concur in the decision to affirm Counts 1 and 2. I cannot join, however, in the majority's plain error analysis in Proposition 1. We explained our plain error review in *Hogan v. State,* 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. For relief under the plain error doctrine, a defendant must show: (1) error; (2) that is plain; and (3) that affects substantial rights. *Id.* Under the third element of plain error, the burden is on the defendant to show that the obvious error affected substantial rights. In other words, the defendant must show that the error was prejudicial and affected the outcome of the district court proceedings. It is in this analysis that a reviewing court considers the prejudicial impact or harmlessness of the alleged error. Conducting a separate harmless error analysis after finding the existence of the three elements of plain error—as the majority does in this case—does not comport with traditional plain error review. *See United States v. Olano,* 507 U.S. 725, 734-35, 113 S.Ct. 1770, 1777-78, 123 L.Ed.2d 508 (1993). For this reason, I concur in result.

I am authorized to state that Judge Lewis joins this opinion concurring in result.