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

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| JOSE LUIS GARCIA, | ) | |
| | ) | |
| Appellant, | ) | NOT FOR PUBLICATION |
| | ) | |
| v. | ) | Case No. F-2013-1043 |
| | ) | |
| THE STATE OF OKLAHOMA, | ) | |
| | ) | |
| Appellee. | ) | |



**OPINION**

**LEWIS, JUDGE:**

Appellant, Jose Luis Garcia, was convicted by jury of, count one, first degree malice murder in violation of 21 O.S.2011, § 701.7(A), and, count two, conspiracy to commit murder in violation of 21 O.S.2011, § 421, after former conviction of two or more felonies, in the District Court of Comanche County, case number CF-2012-404, before the Honorable Gerald Neuwirth, District Judge. In accordance with the jury verdict, Judge Neuwirth sentenced Garcia to life without the possibility of parole on count one and life on count two, ordering that the two sentences be served consecutively to each other. Garcia has perfected his appeal to this Court.

**FACTS**

This crime occurred at the Lawton Correctional Facility inside unit two-charlie (C-2). This pod is set aside for Hispanic gang members, who pose a threat to the general population.

Sonny Limpy was a new inmate in unit 2-C, and within a few hours of his arrival, he was attacked, stabbed and beaten by other inmates. Limpy died as a result of his injuries. Jose Garcia was one of the inmates charged with murdering Limpy. Garcia and his co-conspirators were part of the "movement," which was an effort to consolidate the Hispanic gangs inside the Oklahoma prison system. Unfortunately, Limpy was a member of the Juarito street gang, which was opposed to the movement.

Santiago Albarado testified that he notified Alonzo Flores about Limpy. Flores was the "boss" or "shot caller" in the pod. Flores was going to make some contacts before deciding what to do about Limpy. Later, a meeting was held, and it was decided that Limpy would be killed. Armando Luna, the second in command, volunteered to do the killing, but Flores said that he had other "soldiers" that he wanted to involve. Another inmate, Ryan Garcia came into the cell during the meeting and tried to talk his way out of being involved, but he was told he had to do it. Albarado was instrumental in obtaining a shank and getting it to Luna. Albarado never saw Jose Garcia meet with Flores or Luna.

Albarado testified that the plan was to attack Limpy under the stairs and drag him into a corner cell where he would be stabbed to death. The plan commenced when Limpy was lured to an area in the corner of the pod, behind a staircase, and invisible to video cameras. While there, the attack on Limpy began. Jesse Balderas testified that at one point, Limpy was trying to escape the corner. Limpy grabbed a railing and Jose Garcia grabbed his feet and tried

to pull him away. Limpy kicked free and was able to flee the corner and run to a door leading to the area where correctional officers were located. By this time, Limpy had been stabbed and was bleeding.

The shank was passed to Ryan Garcia. Flores was yelling for the others to kill him. The next few moments were caught on video. Ryan Garcia caught Limpy by the door and started stabbing. Jose Garcia also became involved again and grabbed Limpy as Ryan was stabbing him. After Ryan stopped stabbing Limpy, Jose Garcia started kicking Limpy as he lay on the ground. Limpy died as a result of his stab wounds.

At that point, correctional officers interceded by spraying a chemical agent into the room, and the inmates dispersed. The pod was locked down with inmates confined to their cells.

At trial, Jose Garcia's theory of defense was that, as part of the prison environment, he had no choice but to become involved in the incident, or possibly face the consequences, which might include death.

**PROPOSITIONS OF ERROR**

In proposition one, Garcia complains about irrelevant and highly prejudicial testimony from Santiago Albarado, naming him as a co-conspirator, even though Albarado had no personal knowledge about this information. As Garcia failed to object to the testimony, any error is waived, except that this Court may take "notice of plain errors affecting substantial rights although they were not brought to the attention of the court this Court may review for plain error." 12 O.S.2011, § 2104.

Plain errors are those errors which are obvious in the record, and which affect the substantial rights of the defendant; that is to say that the error affects the outcome of the proceeding; moreover, this Court will not grant relief for plain error unless the error seriously affected the fairness, integrity or public reputation of the judicial proceeding or otherwise represents a "miscarriage of justice." *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d. 907, 923; *Simpson v. State*, 1994 OK CR 40, ¶ 30, 876 P.2d 690, 700-01.

At trial, Albarado testified about the meeting prior to the murder of Sonny Limpy. Jose Garcia was not involved in the meeting. Albarado testified that he had no idea that Garcia was part of the plan until after everything happened. Albarado's knowledge and opinion was based on the incident and on Jose Garcia's involvement.

Albarado was an admitted member of the "movement." As such, he had some insight about how the organization operated. Albarado's opinion, however, was based on what he observed and not on any specialized knowledge he had obtained. Opinion testimony of a lay witness is permissible under 12 O.S.2011, § 2701, when it is rationally based on the perception of the witness, is helpful to the determination of a fact in issue, and does not require any specialized or scientific knowledge. *Andrew v. State*, 2007 OK CR 23, ¶ 73, 164 P.3d 176, 195. Thus, the evidence was admissible.

This evidence did not invade the province of the jury as it did not tell the jury what conclusion to reach. Albarado never testified that Garcia was party to a pre-arranged agreement based on what he observed. The jury was able to

reach its own independent conclusion that Garcia was part of a conspiracy, for which the evidence was sufficient, as discussed below.

Moreover, the jury observed Garcia's actions on the video and could easily reach their conclusions independently. Even if the introduction of Albarado's opinion was error, the testimony did not affect Garcia's substantial rights under the plain error review. Therefore, no relief is required.

In a related vein, Garcia argues, in part of proposition five, that counsel was ineffective for failing to object to Albarado's testimony. Garcia must show that counsel's conduct was deficient and that he suffered prejudice because of this performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Having found that the evidence was admissible under § 2701, and its admission did not negatively affect Garcia's substantial rights, we further find that Garcia has failed to show that he suffered prejudice because of counsel's failure to object. Thus, his ineffective assistance claim based on the failure to object to Albarado's testimony has no merit.

Garcia argues, in proposition two, that the evidence presented was insufficient to convict him of the charged crimes. In reviewing sufficiency claims, this Court views the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04.

Garcia first argues that the evidence was insufficient to show that he had a prior agreement to commit any acts against the victim, thus the evidence was insufficient and the conspiracy count must be dismissed. Under Oklahoma law, a "conspiracy" is an agreement between two or more persons to commit a crime, plus an overt act in furtherance of that agreement. *See* 21 O.S.2011, §§ 421, 423. The defendant must be a party to the agreement at the time of the agreement or must have knowingly become a party to the agreement after it was made. *See* OUJI-CR 2d 2-17 (1996).

> It is not necessary to prove that the conspirators came together and actually agreed to pursue their purpose by common means, one performing one part and another another [sic]. If one concurs in a conspiracy, no proof of an agreement to concur is necessary to make him guilty . . . one who joins the conspiracy after its formation is liable as a conspirator just as much as those with whom the conspiracy originated.

*Hutchman v. State*, 1937 OK CR 53, 61 Okl.Cr. 117, 128, 66 P.2d 99, 104; *see also Pearson v. State*, 1976 OK CR 297, ¶ 26, 556 P.2d 1025, 1031. "This Court has long recognized that '[t]he crime of conspiracy, by its very nature, is a crime clothed in secrecy and is very seldom proved by direct evidence.'" *Pink v. State*, 2004 OK CR 37, ¶ 30, 104 P.3d 584, 595, *quoting Fetter v. State*, 1979 OK CR 77, ¶ 10, 598 P.2d 262, 265. The existence of a conspiracy, therefore, may be proven through indirect proof and circumstantial evidence. *Id.*

Here, the evidence showed that there was a plan which included several inmates, including Garcia, who may have joined the conspiracy after the initial agreement was consummated. The fact that Garcia appeared at the specified location at the specific time indicates that he was agreeable to the plan. His

participation in trying to confine Limpy to the area hidden from the cameras and his active involvement in the assault, including holding Limpy while another inmate stabbed him, and while yet another conspirator yelled "kill him, kill him" makes it obvious that he was a party to the agreement. We find, therefore, that the State presented sufficient evidence to prove that Garcia was guilty of the crime of conspiracy.

Garcia, in claiming that the evidence was insufficient to prove he was guilty of first degree murder, argues that the evidence did not show that he had a specific intent to kill the victim or that he had "specific knowledge of the intent of the direct perpetrator to kill the victim." Garcia's claim of insufficiency fails under several theories of guilt. First, Garcia's claim ignores the law on coconspirator liability; as a coconspirator, he is liable for the acts of the other coconspirators, which are in pursuance or furtherance of the conspiracy. *Littlejohn v. State*, 2008 OK CR 12, ¶ 14, 181 P.3d 736, 741. The evidence showed that the agreement was to have Limpy killed; the plan was carried out; and Limpy was stabbed to death. As a conspirator, Garcia is just as guilty as the one who administered the fatal blows.

Second, as an aider and abettor, he would be guilty even if there was no prior agreement. The test is whether the State has shown that the accused procured the crime to be done, or knowingly and with criminal intent aided, assisted, abetted, advised or encouraged the commission of the crime. See OUJI-CR 2d 2-5 (2000 Supp.); *Williams v. State*, 2008 OK CR 19, ¶ 87, 188 P.3d 208, 226; *see Glossip v. State*, 2007 OK CR 12, ¶ 39, 157 P.3d 143, 151

(same test); *see also Banks v. State*, 2002 OK CR 9, ¶ 13, 43 P.3d 390, 397 (same). We find that Garcia knowingly and with criminal intent aided, assisted, and abetted the commission of the crime of first degree malice murder. Even if Garcia was unaware of the conspiracy to kill Limpy, he aided in the commission of the murder by restraining Limpy while another stabbed Limpy and others were yelling kill him, kill him. Even though death blows may have been inflicted by someone else under the stairwell, the evidence showed that Garcia was involved in the incident during that time. Garcia's involvement in this crime presents sufficient evidence to show that, at the least, he was a principal to the crime of first degree murder under an aiding and abetting theory.

In proposition three, Garcia complains about the bifurcated procedure used during the trial of this case. Garcia, charged with one count of first degree murder and one count of conspiracy to commit murder, complains because the jury was allowed to find him guilty of both charges after a guilt innocence stage, and then sentence him on both counts after being informed of his multiple prior convictions.[1] He claims that the jury should have sentenced him on the first degree murder charge during the first stage before being informed of the prior conviction. At trial, however, Garcia did not preserve this

[1] Garcia's prior convictions included three counts of assault and battery with a deadly weapon, one count of assault and battery with intent to kill, two counts of intimidation of a witness, one count of possession of a firearm after former conviction of a felony, and one count of first degree burglary.

issue by making an objection to the procedure, thus we review for plain error only.

Under this Court's prior decisions, the procedure utilized in this case constitutes plain error, i.e. there was error which is plain from the record. *Marshall v. State*, 2010 OK CR 8, ¶ 58, 232 P.3d 467, 480; *Carter v. State*, 2006 OK CR 42, ¶ 2, 147 P.3d 243, 244; *McCormick v. State*, 1993 OK CR 6, ¶ 40, 845 P.2d 896, 903.[2] The State argues that the introduction of Garcia's prior convictions during a sentencing stage wherein the jury was determining the sentence for non-capital murder was harmless, because without the evidence the jury would be left to speculate about why he was imprisoned when he committed this crime.

Under our analysis of this issue we find that, although there is error, which is plain on the record, and although Garcia might have been disadvantaged, he cannot show the error has seriously affected the fairness, integrity or public reputation of the judicial proceeding or otherwise represents a "miscarriage of justice."

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2 In *McCormick v. State*, 1993 OK CR 6, ¶ 40, 845 P.2d 896, 903, this Court stated that, "If the State is not seeking the death penalty and there are no previous convictions, then we find that bifurcation is not required." [footnote omitted]. Later, in *Carter v. State*, 2006 OK CR 42, ¶ 2, 147 P.3d 243, 244, we interpreted *McCormick* to mean that where the State is not seeking the death penalty and there are no other charged offenses requiring bifurcation under 22 O.S.2001, § 860.1, bifurcation is not authorized. In both *McCormick* and *Carter*, the defendant was charged only with first degree murder. However, in this case, Garcia was charged with first degree murder and another felony which was enhanced with prior felony convictions.

In *Marshall v. State*, 2010 OK CR 8, ¶ 58, 232 P.3d 467, 480, like the present case, the defendant was charged with non-capital murder and another felony, which was enhanced with prior felony convictions. Although this Court found error, we also found the circumstances and nature of the offense supported the life without parole sentence, thus the erroneous procedure was harmless.

Our conclusion, in most part, is based on a statute, which went into effect after the trial in this case. This statute addresses the use of prior convictions for jury sentencing in non-capital murder cases, and renders moot the procedure outlined in our previous cases. This new procedure found at 21 O.S.Supp.2013, § 701.10-1, reads, in relevant part:

> Upon conviction or adjudication of guilt of a defendant of murder in the first degree, wherein the state is not seeking the death penalty but has alleged that the defendant has prior felony convictions, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to life imprisonment without parole or life imprisonment, wherein the state shall be given the opportunity to prove any prior felony convictions beyond a reasonable doubt. The proceeding shall be conducted by the trial judge before the same trial jury as soon as practicable without presentence investigation.

This new statute makes it clear that, when a jury in a non-capital murder trial is deciding between a sentence of life imprisonment or life imprisonment without the possibility of parole, prior felony convictions are relevant to the sentencing determination.

Prior to this statute, the jury was required to determine a sentence based on the crime alone, unless a defendant testified and exposed his criminal history. Now the jury will decide whether he has prior convictions and whether the prior convictions have relevance in the sentencing decision.[3]

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[3] Legislative enactments like § 701.10-1, "which merely permit the jury to consider certain kinds of evidence for certain purposes, and are applied to conduct committed before enactment, do not raise *ex post facto* concerns." *James v. State*, 2009 OK CR 8, ¶ 6, 204 P.3d 793, 795 [and cases cited therein]; *see also Neill v. Gibson*, 278 F.3d 1044, 1053 (10th Cir.2001) (Oklahoma statutes permitting jury to consider victim-impact evidence in a capital sentencing proceeding, applied to murders committed before enactment, did not raise *ex post facto* concerns).

Garcia was simply denied a procedure the law does not currently recognize. Garcia, therefore, cannot show that he was deprived of a substantial or procedural right to which the law entitles him. Accordingly, this proposition is denied.

Predictably, Garcia also argues, in part of proposition five, that counsel's failure to object to this sentencing procedure constituted ineffective assistance of counsel. In an ineffective assistance of counsel claim Garcia has the burden to show that counsel's conduct was deficient and that he suffered prejudice because of this performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). "[T]he Sixth Amendment right to counsel exists 'in order to protect the fundamental right to a fair trial.'" *Lockhart v. Fretwell*, 506 U.S. 364, 368, 113 S.Ct. 838, 842, 122 L.Ed.2d 180 (1993), *quoting Strickland*, 466 U.S. at 684, 104 S.Ct. at 2062. Any analysis that focuses on a determination that the outcome would have been different without examining whether the result of the trial was fundamentally unfair or unreliable is defective. *Lockhart*, 506 U.S. at 369, 113 S.Ct. at 842. "To reverse a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." *Id.*, 506 U.S. at 370, 113 S.Ct. at 843.

That is precisely the position of this case. Had counsel prevented the jury from learning of the prior convictions before sentencing Garcia for first degree murder, there might have been a reasonable probability that the jury would not have sentenced him to life without the possibility of parole.

Outcome determination alone, however, is not sufficient to make out a claim of ineffective assistance. *Id.* Due to our determination that the legislature has adopted a new procedure in non-capital murder cases, which is contrary to our case law, Garcia would not be entitled to a future sentencing procedure for non-capital first degree murder where the jury is shielded from his history of felony convictions. For these reasons, Garcia cannot show that his sentencing was fundamentally unfair or unreliable, thus his ineffective assistance of counsel claim based on the failure to object to the non-capital sentencing procedure utilized in this case must fail.

Garcia claims, in proposition four, that extraneous information presented during the second stage, sentencing proceeding violated his right to a fair sentencing trial in violation of the United States and Oklahoma Constitutions. There were no objections to the evidence introduced to prove Garcia's prior convictions; in fact, Garcia "stipulated" to the exhibit offered by the State to prove his prior convictions. This Court, therefore, will review for plain error only.

Garcia complains that information contained in State's exhibit 41 contained information about suspended sentences, probation, and probation violations. The exhibit also contained information about other convictions not alleged on the second page of the Information. Garcia's prior convictions are of such a heinous nature, we find that any extraneous information contained in exhibit 41 did not, in any manner, affect the jury verdict in this case. We find,

therefore, that the introduction of this information did not rise to the level of plain error.

Likewise, we find that Garcia cannot show that counsel's conduct in failing to object to this exhibit, or failing to have the exhibit redacted, amounted to constitutionally ineffective assistance under the *Strickland* standard, because Garcia can, in no way, show that the introduction of this extraneous information affected the sentences in this case (argument in proposition five).

In proposition five, Garcia claims that he was denied effective assistance of counsel. His ineffective assistance of counsel claims with regard to the failure to object to Albarado's testimony (proposition one); the failure to object to the two stage procedure (proposition three); and failure to object to the introduction of State's exhibit 41 (proposition four), have been disposed of in the discussion of their respective substantive claims. We will, therefore, discuss his remaining arguments.

Garcia argues that counsel failed to pursue a legally recognizable defense and request instructions on lesser included offenses; and that counsel failed to adequately cross-examine the State's jail house witnesses. Garcia has also filed a motion for an evidentiary hearing setting forth additional information which counsel should have utilized in his preparation for and in his performance at trial, arguing that the failure to utilize the information constituted ineffective assistance of counsel.

Garcia claims that counsel failed to utilize available information to cross-examine State's witness Balderas. This extra-record information is part of the motion for an evidentiary hearing based on this ineffective assistance claim and filed pursuant to Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2014). The information noted is a letter from the prosecutor to the Oklahoma Parole Board asking them to take into consideration Balderas' cooperation when deciding whether he should be paroled. Balderas testified that he discharged his sentence September 16, 2013. However, the letter notes that Balderas was set on the November 2012, parole docket. There is no information to indicate that Balderas was paroled or whether he discharged his sentence; although, Garcia now claims that Balderas' release was two years before his sentence expired. There is no indication in Garcia's pleadings that Balderas was aware that the State wrote a favorable letter to the parole board.

On cross-examination it was revealed that Balderas' was not free on the street, but was to be remanded to Texas on an aggravated robbery conviction. The length of his Oklahoma conviction for kidnapping and assault and battery was never discussed, nor was the fact or reason for his early release.

Counsel could have had a very good reason not to dwell on early release or parole. Garcia was facing either life or life without parole. A discussion about the parole procedure would not benefit him. Reasonable trial strategy does not amount to ineffective assistance of counsel. We find that counsel's conduct in this matter did not fall outside the wide range of acceptable

conduct. Furthermore, Garcia has not provided sufficient information in his motion for an evidentiary hearing to show that a hearing is warranted. See Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2014).[4]

Garcia spends much of this proposition arguing that counsel should have requested instructions on lesser included offenses, instead of arguing for instructions and pursuing a defense of duress. He claims that instructions on second degree murder by imminently dangerous conduct; second degree (felony) murder; first degree misdemeanor manslaughter; and aggravated assault and battery were warranted.

At trial, counsel pursued a defense of duress. On appeal Garcia claims that the pursuit of this defense was futile because duress is not a defense to first degree murder. He claims that, instead, counsel should have pursued theories which would have included requesting instructions on the lesser offenses.

Garcia's main hurdle is to show that the jury could have reasonably acquitted him of the greater charged offense. A defendant is entitled to instructions on lesser offenses if the evidence would permit a rational jury to find him guilty of the lesser offense and acquit him of the greater. *Keeble v. United States*, 412 U.S. 205, 208, 93 S.Ct. 1993, 1995, 36 L.Ed.2d 844 (1973); *Frederick v. State*, 2001 OK CR 34, ¶ 137, 37 P.3d 908, 944. *See Barnett v.*

[4] Garcia also appends information regarding another inmate being charged with a lesser crime to support his argument that counsel should have requested lesser offense instructions. Because charging is largely a matter of prosecutorial discretion, this information is not persuasive in showing that counsel was ineffective.

*State*, 2012 OK CR 2, ¶ 22, 271 P.3d 80, 87; *Cipriano v. State*, 2001 OK CR 25, ¶ 38, 32 P.3d 869, 878 (no basis for lesser offense instructions because no rational jury would acquit him of the greater and find him guilty of the lesser).

Under an ineffective assistance of counsel claim, a review for the failure to request lesser offense instructions is more onerous. We presume counsel's conduct was reasonable.

In our discussion of Garcia's conspiracy conviction, we held that it was clear that there was an agreement between members of the Hispanic gang to kill Limpy. It is also clear that Garcia became a party to this agreement. Furthermore, overt acts were accomplished in pursuit of the agreement, and, finally, Limpy was murdered, with malice aforethought, pursuant to agreement. Thus, Garcia, being a party to the agreement, is liable for the malice murder of Limpy.

Understanding the State's theory and the legal ramifications of conspiracy, no reasonable trier of fact could have both acquitted Garcia of the greater offense of first degree murder and found him guilty of any lesser offense. *See Keeble v. United States*, 412 U.S. 205, 208, 212-13, 93 S.Ct. 1993, 1995, 1998, 36 L.Ed.2d 844 (1973); *Barnett v. State*, 2012 OK CR 2, ¶ 22, 271 P.3d 80, 87; *Cipriano v. State*, 2001 OK CR 25, ¶ 38, 32 P.3d 869, 878. We find, therefore, that the failure to request instructions on the lesser offenses to first degree murder did not amount to ineffective assistance of counsel.

In proposition six, Garcia claims that an accumulation of error requires relief in this case. We find that no relief is required even when viewing the

claimed errors in a cumulative fashion. *Stouffer v. State*, 2006 OK CR 46, ¶ 205-06, 147 P.3d 245, 280.

**DECISION**

The Judgments and Sentences of the district court shall be **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY
THE HONORABLE GERALD NEUWIRTH, DISTRICT JUDGE

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**OPINION BY: LEWIS, J.**

**SMITH, P.J.: Concurs in Results**
**LUMPKIN, V.P.J: Concurs in Results**
**JOHNSON, J.: Concurs**