

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

PHILLIP ANTONIO DAVIS,)
)
 Appellant,)
 vs.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. F-2014-25

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
APR 29 2015
MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

SMITH, PRESIDING JUDGE:

Appellant, Phillip Antonio Davis, was convicted by a jury in Oklahoma County District Court, Case No. CF-2012-6782, of Count 1: First Degree Murder (21 O.S.2011, § 701.7), and Count 2: Possession of a Firearm After Conviction of a Felony (21 O.S.2011, § 1283). On December 18, 2013, the Honorable Cindy Truong, District Judge, sentenced him in accordance with the jury's recommendation to life imprisonment on Count 1, and two years imprisonment on Count 2, and ordered the sentences to be served concurrently.

Davis raises nine propositions of error in support of his appeal:

PROPOSITION I. THE TRIAL COURT DENIED THE RIGHT OF THE APPELLANT TO PRESENT EVIDENCE IN HIS DEFENSE AND THEREFORE DENIED THE APPELLANT'S RIGHT TO A FAIR TRIAL.

PROPOSITION II. THE TRIAL COURT DEPRIVED APPELLANT'S RIGHT TO A FULL DEFENSE AND FAIR TRIAL BY REFUSING TO ALLOW TWO ATTORNEYS TO MAKE A CLOSING ARGUMENT ON BEHALF OF THE APPELLANT.

PROPOSITION III. THE PROSECUTION MADE NUMEROUS STATEMENTS DURING CLOSING ARGUMENT WHICH CONSTITUTED PROSECUTORIAL MISCONDUCT.

PROPOSITION IV. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEYS FAILED TO OBJECT TO IMPROPER PROSECUTORIAL ARGUMENTS.

PROPOSITION V. APPELLANT WAS UNCONSTITUTIONALLY DENIED BAIL AND WAS UNLAWFULLY DENIED THE RIGHT TO A MEANINGFUL *BRILL* HEARING WHEN THE TRIAL COURT ERRONEOUSLY APPLIED THE LAW AT THE BAIL HEARING.

PROPOSITION VI. APPELLANT'S CONVICTION FOR MURDER IN THE FIRST DEGREE SHOULD BE REVERSED AND DISMISSED BECAUSE THE MAGISTRATE DETERMINED THAT THE STATE DID NOT OFFER ANY EVIDENCE OF MALICE AFORETHOUGHT AT THE PRELIMINARY HEARING.

PROPOSTION VII. APPELLANT WAS DENIED DUE PROCESS WHEN THE PROSECUTION CHANGED ITS THEORY AT TRIAL.

PROPOSTION VIII. THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO JUSTIFY A CONVICTION FOR MURDER IN THE FIRST DEGREE.

PROPOSTION IX. THE ACCUMULATION OF ERROR REQUIRES VACATION OF MR. DAVIS' CONVICTION.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm. Appellant was convicted of using a shotgun (which he was prohibited from possessing) to kill Keauce Mustin at the apartment home of Signolia Vaughn. Mustin had been in a relationship with Vaughn, and had been living at her apartment. Vaughn also had an intimate relationship with Appellant during this time. Vaughn testified that in the days before the shooting, she asked Mustin to move out and changed the lock on the front door. She also purchased a pistol with Appellant's advice, and asked Appellant to stay the night at her apartment. Appellant agreed, and brought his own shotgun with him. When Mustin got off work around 2:00 a.m., he went to Vaughn's apartment. Hearing a commotion outside, Vaughn called 911 to report an intruder. While Vaughn was talking to the dispatcher, Appellant retrieved his shotgun and fired a single shot through the living-room window at Mustin, who was standing in front of the window, killing him. After initially claiming he did not know who fired the shot,

Appellant admitted to police that he was the shooter, and claimed the person was trying to open the living-room window when he (Appellant) fired the gun. However, he maintained to police, and Vaughn herself maintained at trial, that they had no idea who the person was. The jury rejected Appellant's claim that the shooting was justified in self-defense, defense of another, and/or defense of habitation.

As to Proposition I, evidence of the victim's drug use and threatening conduct toward Signolia Vaughn was not relevant to whether Appellant's use of deadly force was reasonable under the circumstances, because both Vaughn and Appellant claimed they had no idea who the would-be intruder was. *Davis v. State*, 2011 OK CR 29, ¶¶ 157-160, 268 P.3d 86, 125-26. In any event, the jury did, in fact, hear a fair amount of testimony on these subjects. *Boltz v. State*, 1991 OK CR 1, ¶ 19, 806 P.2d 1117, 1123. Because a witness's possible bias is always a proper inquiry, the trial court erred by not allowing defense counsel to ask Vaughn whether her testimony was affected by the possibility of her being charged in connection with the victim's death. *Davis v. Alaska*, 415 U.S. 308, 318, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347 (1974); *Lankister v. State*, 1956 OK CR 67, ¶ 9, 298 P.2d 1088, 1090. However, this error was harmless beyond a reasonable doubt, because Appellant does not point to any part of Vaughn's testimony that was inconsistent with his own account to police, or which otherwise prejudiced his theory of defense. *Al-Mosawi v. State*, 1996 OK CR 59, ¶¶ 49-51, 929 P.2d 270, 283. Proposition I is denied.

As to Proposition II, the trial court did not err by denying Appellant's request to split his guilt-stage closing argument between two defense attorneys. Because Appellant was not facing the death penalty, the court's ruling on the matter was within its sound discretion. 22 O.S.2011, §§ 831(6), 835. Proposition II is denied.

As to Proposition III, because Appellant did not object to the prosecutor's closing comments at the time they were made, we review this claim only for plain error. *Wackerly v. State*, 2000 OK CR 15, ¶ 44, 12 P.3d 1, 15. Speculation that Vaughn conspired with Appellant to kill the victim, and make it look like a home invasion, was not unbelievable, given the peculiar circumstances surrounding the shooting. We find all of the prosecutor's comments were reasonable inferences from the evidence presented. *Warner v. State*, 2006 OK CR 40, ¶ 179, 144 P.3d 838, 888. Proposition III is denied.

As to Proposition IV, because we have found the prosecutor's closing arguments to be unobjectionable in Proposition III, timely objections to them by trial counsel would have properly been overruled. Therefore, Appellant cannot demonstrate prejudice from counsel's failure to object. Trial counsel was not ineffective. *Strickland v. Washington*, 466 U.S. 668, 687-89, 104 S.Ct. 2052, 2064-65, 80 L.Ed.2d 674 (1984); *Pavatt v. State*, 2007 OK CR 19, ¶ 66, 159 P.3d 272, 292. Proposition IV is denied.

As to Proposition V, the proper avenue for challenging the denial of bail pending trial is by seeking a writ of *habeas corpus*. Rule 1.2(D)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22 O.S., Ch.18, App. (2015); *Hoover v.*

State, 2001 OK CR 16, ¶ 3, 29 P.3d 591, 593. Appellant did not seek such relief when bail was denied. Now that he has been found guilty and sentenced, any challenge to the denial of pre-trial release is moot. See *Perez v. State*, 261 S.W.3d 760, 765 (Tex.App. 2008); *Minniefield v. State*, 569 N.E.2d 734, 735 (Ind.App. 1991). Even assuming error in the trial court's ruling on the matter, Appellant does not explain what remedy would be appropriate at this time. Proposition V is denied.

As to Proposition VI, the magistrate did not err in binding Appellant over for trial. A preliminary hearing is simply a determination that probable cause exists to hold the accused for trial. *Johnson v. State*, 1986 OK CR 187, ¶ 5, 731 P.2d 424, 425-26. By claiming the State presented insufficient evidence of the "malice" element of First Degree Murder, Appellant misinterprets the legal meaning of that term. The State was simply required to show that Appellant shot the victim with the intent to take a human life. 21 O.S.2011, § 701.7(A); *Davis v. State*, 2004 OK CR 36, ¶ 23, 103 P.3d 70, 78. He admitted this conduct; on these facts, whether it was reasonable under the circumstances was for a jury to decide. Proposition VI is denied.

As to Proposition VII, the State's speculation that Appellant and Vaughn conspired to murder the victim (see Proposition III) was a fair inference from the peculiar circumstances surrounding the homicide. However, the State was not required to prove any such agreement or motive to obtain a murder conviction against Appellant. Appellant admitted the homicidal act. His alleged justification was in the nature of an affirmative defense. The defense maintained that

Appellant did not know the identity of the victim at the time of the shooting, and therefore had no ulterior motive to kill him; the State was entitled to argue otherwise on the evidence presented. *Pierce v. State*, 1961 OK CR 2, ¶ 36, 358 P.2d 647, 653. Proposition VII is denied.

As to Proposition VIII, the evidence supporting the charge of First Degree Murder came from Appellant's own admissions to police, corroborated by the physical evidence. The only remaining issue was whether Appellant acted reasonably in defense of self, others, or property. The jury was properly instructed on these affirmative defenses. Having reviewed the evidence in its entirety, we find it sufficient to support the jury's verdict. *Jackson v. Virginia*, 443 U.S. 307, 319-20, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *Brown v. State*, 1994 OK CR 12, ¶ 27, 871 P.2d 56, 66. Proposition VIII is denied.

As to Proposition IX, as we have identified only one error in the preceding propositions, and concluded that the error was harmless beyond a reasonable doubt, there can be no cumulative error. *Hope v. State*, 1987 OK CR 24, ¶ 12, 732 P.2d 905, 908. Proposition IX is therefore denied.

DECISION

The Judgment and Sentence of the District Court of Oklahoma County is **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 OKLAHOMA COUNTY
THE HONORABLE CINDY H. TRUONG, DISTRICT JUDGE

ATTORNEYS AT TRIAL

AARON DRUE JOHNSON
BRITTINI L. JAGERS
JAGERS & JOHNSON, PLLC
414 NW 4TH STREET, STE. 200
OKLAHOMA CITY, OK 73102

WILLIAM HOLLIS, JR.
608 NORTHWEST 8TH ST.
OKLAHOMA CITY, OK 73102

COUNSEL FOR DEFENDANT

DANIEL B. POND
JUSTIN KEMP
ASSISTANT DISTRICT ATTORNEYS
OKLAHOMA COUNTY
DISTRICT ATTORNEY'S OFFICE
OKLAHOMA CITY, OK 73102
COUNSEL FOR STATE

ATTORNEYS ON APPEAL

AARON DRUE JOHNSON
414 NW 4TH STREET, STE. 200
OKLAHOMA CITY, OK 73102
COUNSEL FOR APPELLANT

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
ASHLEY L. WILLIS
ASSISTANT ATTORNEY GENERAL
313 NE 21ST STREET
OKLAHOMA CITY, OK 73105
COUNSEL FOR APPELLEE

OPINION BY: SMITH, P.J.

LUMPKIN, V.P.J.: CONCUR IN RESULTS
JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR
HUDSON, J.: CONCUR