IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RANDY TRENT HARRISON,	)	
	)	NOT FOR PUBLICATION
Appellant,	)	
vs.	)	No. F-2014-134
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

SMITH, PRESIDING JUDGE:

Randy Trent Harrison was tried by jury and convicted of First Degree Manslaughter in violation of 21 O.S.2011, § 711(3), in the District Court of Oklahoma County, Case No. CF-2012-2406. In accordance with the jury's recommendation the Honorable Donald Deason sentenced Harrison to four (4) years imprisonment. Harrison appeals from this conviction and sentence.

Harrison raises six propositions of error in support of his appeal:

I. The evidence produced at trial failed to prove that Randy Harrison committed a violation of Oklahoma law and thus fails to support his conviction and sentence for manslaughter.

II. The trial court deprived Captain Harrison of his constitutional right to present a defense by excluding evidence and expert testimony relating to use-of-force training and policies and by refusing to allow him to call good character witnesses to testify on his behalf.

III. The trial court's dismissal, over defense objection, of Juror Number 11, without first ascertaining if there was in fact manifest necessity to do so, violated Appellant's right to a fair trial by the jury originally empaneled to try his case.

IV. The trial court erred in allowing the State to present evidence that Appellant's engaging in a high speed pursuit of Mr. Scott prior to the fatal shooting was in violation of department policy.

V. The trial court erred in failing to administer to the jury pertinent instructions on salient features of the law raised by the evidence and circumstances of this case.

VI. The accumulation of error in this case deprived Mr. Harrison of due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and article II, § 7 of the Oklahoma Constitution.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we find that the law and evidence do not require relief.

We find in Proposition I that, taking the evidence in the light most favorable to the State, any rational trier of fact could find beyond a reasonable doubt that Harrison caused Scott's death unnecessarily while resisting Scott's attempt to commit the crime of resisting arrest. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559. The State had to show that Harrison caused Scott's death unnecessarily while resisting Scott's attempt to commit the crime of resisting arrest. 21 O.S.2011, § 711(3). Police officers may use force or violence in the performance of a legal duty. 21 O.S.2011, § 643(1). An officer making a lawful arrest may not be prosecuted unless he uses excessive force, meaning force exceeding physical force "permitted by law or the policies and guidelines of the law enforcement entity." 22 O.S.2011, § 34.1(A), (B). The State has the burden to show beyond a reasonable doubt that the defendant's use of deadly force was not justified. Jurors were instructed that an officer may use deadly force when he reasonably believes both (a) the force is necessary to prevent escape or resisting arrest; and (b) at the time, there is probable cause to believe the suspect has committed a crime involving serious bodily harm, or is trying to escape using a deadly weapon, or otherwise indicates that he will endanger human life or inflict great bodily harm. 21 O.S.2011, § 732(2). Harrison's jury was instructed that "unnecessarily" was equivalent to "unlawfully" or "without

legal justification". Harrison did not object to this instruction, which accurately encapsulated the Uniform Jury Instruction Committee Comments discussion. He asked for additional instructions, which were denied.

In *Tennessee v. Garner*, the United States Supreme Court held police may not use deadly force to prevent a suspect's escape without regard to the circumstances. *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S.Ct. 1694, 1701, 485 L.Ed.2d 1 (1985). *Garner* held that deadly force was appropriate where an officer had probable cause to believe the suspect posed a threat of serious physical harm. *Id.* The Court found it was unreasonable for an officer to kill a young, unarmed burglary suspect by shooting him in the back of the head as he fled. *Garner*, 471 U.S. at 21, 105 S.Ct. at 1706. The Court explained in a later case that the "necessity" involved in *Garner* is to prevent serious physical harm to an officer or others, rather than merely a necessity to prevent escape where no threat of serious physical harm is involved. *Scott v. Harris*, 550 U.S. 372, 382 n.9, 127 S.Ct. 1769, 1777 n.9, 167 L.Ed.2d 686 (2007). Excessive force claims should be analyzed under the Fourth Amendment reasonableness standard, considering the totality of the circumstances. *Plumhoff v. Rickard*, 134 S.Ct. 2012, 2020, 188 L.Ed.2d 1056 (2014); *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989). The Court found that the reasonableness test requires a court to balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396, 109 S.Ct. at 1871-72. *Graham* held that the issue is whether the officer's actions were objectively reasonable in light of the facts and circumstances confronting him,

without regard to his underlying intent or motivation. *Graham*, 490 U.S. at 397, 109 S.Ct. at 1872. The Court reaffirmed this test in *Scott v. Harris*, stating that to determine whether the use of force was excessive, "in the end we must still slosh our way through the factbound morass of 'reasonableness.'" *Scott*, 550 U.S. at 383, 127 S.Ct. at 1778. As other jurisdictions have noted, this fact-based test is suited for a jury's determination. *Lytle v. Bexar County*, 560 F.3d 404, 411 (5th Cir. 2009); *Abraham v. Raso*, 183 F.3d 279, 290 (3d Cir. 1999).

Harrison argues that, under the circumstances as he knew them, his actions were objectively reasonable. This argument is not supported by either the evidence or his cited cases. The civilian and police witnesses, other than Harrison, all testified that the victim was not a threat to themselves or anyone else during the chase and when he was hit. In fact, the fatal shot itself posed a danger to the officer closest to the victim. The evidence does not support Harrison's claim that his use of deadly force was lawful and justified.

We find in Proposition II that the trial court did not err in excluding evidence. Harrison claims the trial court erred by excluding evidence regarding his specialized training and police policies, and by excluding witnesses to testify to his good character. He argues these rulings deprived him of the right to present a defense. A criminal defendant has the right to a meaningful opportunity to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986); *Summers v. State*, 2010 OK CR 5, ¶ 62, 231 P.3d 125, 145. When presenting defense witnesses the defendant must comply with rules of procedure and evidence. *Simpson v. State*, 2010 OK CR 6, ¶ 9, 230 P.3d 888, 895. However,

defense evidence may not be excluded by enforcement of rules of evidence "that serve no legitimate purpose or that are disproportionate to the ends they are asserted to promote." *Holmes v. South Carolina*, 547 U.S. 319, 326, 126 S.Ct. 1727, 1732, 164 L.Ed.2d 503 (2006). Admission of evidence is within the trial court's discretion. *Jones v. State*, 2009 OK CR 1, ¶ 39, 201 P.3d 869, 881. An abuse of discretion is any unreasonable or arbitrary action made without proper consideration of the relevant facts and law, also described as a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. We will not disturb a trial court's ruling excluding witness testimony without a clear showing of abuse and resulting prejudice to the defendant. *Simpson*, 2010 OK CR 6, ¶ 9, 230 P.3d at 895.

"[A]n expert witness is someone with specialized knowledge in a particular field, who has acquired this knowledge through study, training, experience, or a combination of these, and who has experience and knowledge in relation to matters [that] are not generally known." *Webster v. State*, 2011 OK CR 14, ¶ 72, 252 P.3d 259, 279 (quotations omitted). Expert opinion testimony is admissible when it helps jurors understand the evidence or determine a fact at issue. 12 O.S.2011, § 2702. Expert opinion may, under some circumstances, embrace an ultimate fact, but may not simply tell the jury what result to reach. *Day v. State*, 2013 OK CR 8, ¶ 11, 303 P.3d 291, 297, *r'hng denied* 2013 OK CR 15, 316 P.3d 931; *Ball v. State*, 2007 OK CR 42, ¶ 15, 173 P.3d 81, 86. A police officer whose testimony is based on logic and common sense rather than specialized knowledge is not testifying as an expert. *Webster*, 2011 OK CR 14, ¶ 72, 252 P.3d at 279. Testimony which concerns a

determination of reasonableness is merely based on logic and common sense, not specialized knowledge. *Bland v. State*, 2000 OK CR 11, ¶¶ 32-37, 4 P.3d 702, 715-16 (expert testimony that defendant's drug dependence affected his actions was irrelevant to objective test of reasonableness for manslaughter). Harrison argues that expert law enforcement officers trained in the use of force would have aided jurors in understanding Harrison's decisions. Harrison's experts were offered to tell jurors that Harrison's actions were reasonable based on his training. That is, they would tell jurors what result to reach. As experts may not simply tell jurors what result to reach, this evidence would not assist the trier of fact and was not admissible. *Simpson*, 2010 OK CR 6, ¶ 9, 230 P.3d at 895. As the evidence was not admissible, the trial court's refusal to admit it did not deny Harrison an opportunity to present a meaningful defense. *Simpson*, 2010 OK CR 6, ¶ 9, 230 P.3d at 895.

Harrison also argues that evidence about the training he received on use of force, and Oklahoma law enforcement agency policies on use of force, were relevant. Relevant evidence is that which tends to make the existence of a fact of consequence to the determination of the action more or less probable. 12 O.S.2011, § 2401. Excessive force is force exceeding the degree of physical force permitted by law *or* the relevant law enforcement policies and guidelines. 22 O.S.2011, § 34.1(B). Harrison argues that, if the policies and guidelines permitted lethal force under these circumstances, that fact would be relevant to the issue of his criminal liability under § 34.1. The record supports the trial court's determination that, because the *Garner* reasonableness standard was included in 21 O.S.2011, § 732, evidence on particular use-of-force policies was irrelevant and might confuse jurors. Jurors were

correctly instructed on the *Garner* objective reasonableness test. The trial court did not abuse its discretion. *Neloms*, 2012 OK CR 7, ¶ 35, 274 P.3d at 170.

Harrison also claims the trial court erred in refusing his request to present witnesses who would testify that he was an honest, law-abiding citizen, was truthful and a man of integrity, and regarding Harrison's professionalism and history within the police department. Despite the trial court's rulings limiting this evidence, Harrison was allowed to call his supervisor and elicit testimony about his initiative, driving skills, knowledge of department procedure, and other aspects of a good performance evaluation given shortly before the crime. Evidence of a pertinent trait of character offered by the accused is admissible under 12 O.S.2011, § 2404(A)(1). This statute does not justify admission of the evidence at issue here. The United States Supreme Court has said a defendant may introduce evidence of a general estimate of good character to show that he would be unlikely to commit the charged crime. *Michelson v. United States*, 335 U.S. 469, 476, 69 S.Ct. 213, 219, 93 L.Ed. 168 (1948) However, the Court notes, such a witness may not testify to a defendant's specific acts, particular dispositions, or benign mental and moral traits. *Michelson*, 335 U.S. at 477, 69 S.Ct. at 219. The character witness may not testify regarding his own independent opinion of the defendant's good character or that, in his opinion, the defendant's character is inconsistent with commission of the crime; his testimony must be restricted to a summary of what he has heard in the community about the defendant's general repute in the community, not the defendant's personality. *Id.* This describes an extremely narrow range of permissible testimony. It is further limited by Oklahoma's enactment of the Rules of Evidence.

Welch v. Sirmons, 451 F.3d 675, 687 (10th Cir. 2006), *overruled on other grounds by Wilson v. Workman*, 577 F.3d 1284 (10th Cir. 2009). As noted above, Oklahoma restricts character evidence to a "pertinent" character trait, meaning one relevant to the charged crime. 12 O.S.2011, § 2404(A)(1). The issue at trial was whether, when Harrison shot Scott, his use of deadly force was objectively reasonable under the circumstances. 21 O.S.2011, § 732. The trial court did not abuse its discretion in ruling that evidence of Harrison's honesty, integrity, and good character were not relevant to this issue. *Jones*, 2009 OK CR 1, ¶ 39, 201 P.3d at 881. This proposition is denied.

We find in Proposition III that the trial court did not abuse its discretion in dismissing Juror No. 11 during deliberations, over Harrison's objection, and replacing her with an alternate juror. A trial judge may replace a sitting juror with an alternate for illness or death. 22 O.S.2011, § 601a. A judge also has the inherent power to substitute a juror for cause. *Miller v. State*, 2001 OK CR 17, ¶ 23, 29 P.3d 1077, 1082-83; *Washington v. State*, 1977 OK CR 240, ¶ 27, 568 P.2d 301, 308. This decision is within the trial court's discretion.[1] *Jones v. State*, 2006 OK CR 5, ¶ 16, 128 P.3d 521, 534. After several hours of deliberation, Juror 11 refused to participate further. The trial court found that there was no hung jury, but that one juror violated the terms of the oath by refusing to engage in deliberations; defense counsel agreed in part. The record, including the affidavit from Juror 11 offered in support of Harrison's motion for new trial, supports the trial court's conclusion. As the jury was not deadlocked, an *Allen* instruction was not appropriate. *Allen v.*

[1] Harrison offers no relevant support for his claim that the discretion must be supported by just cause or manifest necessity.

United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896). Harrison fails to show any prejudice from the trial court's decision, and the record does not support a conclusion that he was prejudiced when Juror 11 was replaced by an alternate during deliberations. The trial court did not abuse its discretion. *Jones*, 2006 OK CR 5, ¶ 16, 128 P.3d at 534. This proposition is denied.

We find in Proposition IV that the trial court did not abuse its discretion in admitting evidence of the Del City Police Department policies regarding high-speed pursuits. *Sanchez v. State*, 2009 OK CR 31, ¶ 58, 223 P.3d 980, 1000-01. Over Harrison's objection, Officer Rule testified that the department policy prohibited high-speed pursuits for a minor traffic violation such as driving left of center, and as a supervisor he would reprimand a patrol officer who engaged in such a chase. He also testified that such a chase might be appropriate, depending on the circumstances surrounding the stop and the driver's actions. Rule did not testify that Harrison violated any department policy, and expressed no opinion on the reasonableness of Harrison's actions. Thus the record does not support Harrison's claim that this evidence encouraged jurors to find him guilty because he violated department policy. This proposition is denied.

We find in Proposition V that jurors were properly instructed. The trial court must instruct jurors accurately on the applicable law. *Soriano v. State*, 2011 OK CR 9, ¶ 36, 248 P.3d 381, 396. We review decisions on instructions for abuse of discretion. *Cipriano v. State*, 2001 OK CR 25, ¶ 14, 32 P.3d 869, 873-74. Harrison did not object to the instructions on the elements of the charged crime, which accurately stated the applicable law under *Garner*. 471 U.S. at 11, 105 S.Ct. at

1701. Harrison argues that the trial court should not have refused his requested instructions regarding the *Garner* requirements. The first requested instruction actually was directly contradicted by *Garner*, which found that the use of deadly force to prevent escape, where the suspect posed no immediate threat to an officer or others, was constitutionally unreasonable. *Garner*, 471 U.S. at 11, 105 S.Ct. at 1701. The instruction would have removed from the jurors their duty to judge the credibility and weight to give each witness, and to determine whether Harrison's decision was objectively reasonable. *Rutan v. State*, 2009 OK CR 3, ¶ 49, 202 P.3d 839, 849. The second instruction added nothing to jurors' understanding and was potentially confusing. The trial court did not abuse its disrection in refusing both instructions. *Cipriano*, 2001 OK CR 25, ¶ 14, 32 P.3d at 873-74. Harrison also claims the trial court should have issued an *Allen* instruction during deliberations. Harrison failed to request such an instruction and we review for plain error. Plain error is an actual error, that is plain or obvious, and that affects a defendant's substantial rights, affecting the outcome of the trial. *Barnard v. State*, 2012 OK CR 15, ¶ 13, 290 P.3d 759, 764. As we found in Proposition III, the jury was not deadlocked, and an *Allen* instruction would have been inappropriate. The trial court did not err in failing to *sua sponte* give an *Allen* instruction and there was no plain error. This proposition is denied.

We find in Proposition VI that no accumulated error requires relief. We found no error in the preceding propositions. Where there is no error, there is no cumulative error. *Parker v. State*, 2009 OK CR 23, ¶ 28, 216 P.3d 841, 849. This proposition is 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 DONALD L. DEASON, DISTRICT JUDGE

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OPINION BY: SMITH, P.J.
LUMPKIN, V.P.J.: DISSENT
JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR
HUDSON, J: DISSENT

LUMPKIN, JUDGE: DISSENT

I respectfully dissent. The majority's opinion fails to adequately address Appellant's claims of error in Propositions Two and Three, neglects to give proper weight to 22 O.S.2011, § 34.1, fails to mention crucial facts in the appellate record, and fails to recognize that the trial court acted prematurely in removing a juror during deliberations.

In Proposition Two, Appellant contends that he was denied his right to present a complete defense when the trial court precluded him from introducing the testimony of two use-of-force experts he had retained as well as testimony concerning his good character. To determine whether an appellant was denied this fundamental right, we must first determine whether the trial court erred in excluding the testimony. *Coddington v. State*, 2006 OK CR 34, ¶ 47, 142 P.3d 437, 451. Then, to establish constitutional error, an appellant must show the evidence was material to the extent its exclusion violated his right to present a defense. *Id., citing United States v. Dowlin*, 408 F.3d 647, 659 (10th Cir. 2005).

The District Court has considerable discretion in the admission or exclusion of evidence. *Pavatt v. State*, 2007 OK CR 19, ¶ 42, 159 P.3d 272, 286. The admissibility of the testimony of expert witnesses is well established.

> "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise." 12 O.S.2001, § 2702. Opinion evidence,

> which may embrace an ultimate issue, is generally admissible. 12 O.S.2001, § 2704. *See also Marr v. State,* 1987 OK CR 173, ¶ 8, 741 P.2d 884, 886. "While expert witnesses can suggest the inferences, which jurors should draw from the application of specialized knowledge to the facts, opinion testimony that merely tells a jury what result to reach is inadmissible." *Romano v. State,* 1995 OK CR 74, ¶ 21, 909 P.2d 92, 109, cert. denied, 519 U.S. 855, 117 S.Ct. 151, 136 L.Ed.2d 96 (1996).

Warner v. State, 2006 OK CR 40, ¶ 22, 144 P.3d 838, 860.

The trial court prohibited Appellant from calling two expert witnesses that he had retained to testify at trial in the present case. Appellant supplied affidavits from the witnesses during the pretrial proceedings. Joe Evans affirmed that he had served for 20 years as a police officer for the City of Edmond. He was the Edmond Police Department's chief firearms instructor for 8 years, was the chief shooting-decision simulation and firearms instructor on staff at CLEET for 4 years. He currently worked for Advanced Interactive Systems providing use-of-force training sessions to law enforcement agencies across the nation. (O.R. 191). Alford Glen McEntire recounted that he had been employed as the chief firearms instructor for CLEET for over 20 years and trained more than 6,500 recruits and had provided advanced firearm training for thousands of certified officers in the State of Oklahoma. (O.R. 192).

The trial court precluded Appellant from introducing testimony from Evans and McEntire concerning: (1) the Council on Law Enforcement Education and Training ("CLEET") standards on use-of-force which operate throughout the State, and (2) Appellant's use-of-force training. The trial court's

determination that this testimony lacked relevance and would confuse the jury was a clearly erroneous conclusion and judgment. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

As Appellant suggests, the language within 22 O.S.2011, § 34.1(B), made the proffered testimony relevant. *Taylor v. State*, 2011 OK CR 8, ¶ 40, 248 P.3d 362, 375–76; 12 O.S.2011, § 2401 ("Relevant evidence is evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). Section 34.1(B) defines "excessive force" and specifically includes within that definition "physical force which exceeds the degree of physical force permitted by law or the policies and guidelines of the law enforcement entity." (emphasis added). Because Evans and McEntire were to testify concerning the CLEET standards which operate throughout the State, and upon which Appellant had been trained, the testimony would have tended to make it more or less probable that Appellant's use of force complied with the statutory definition of "excessive force." The trial court could have easily admonished the jury, at the time of the testimony that the court would instruct them with the law at the conclusion of the evidence, and alleviated any confusion. Therefore, the probative value of the proffered testimony was not substantially outweighed by its prejudicial effect. *Id.*, 2011 OK CR 8, ¶ 43, 248 P.3d at 376; *Mayes v. State*, 1994 OK CR 44, ¶ 77, 887 P.2d 1288, 1310 ("When measuring the relevancy of evidence against its prejudicial effect, the

court should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.")

Evans and McEntire held technical and specialized knowledge which would have assisted the jury to understand the evidence and determine whether Appellant was justified in the use of deadly force against Dane Scott, Jr. *Webster v. State,* 2011 OK CR 14, ¶ 72, 252 P.3d 259, 279 ("this Court has recognized that police officers are [ ] capable of giving expert testimony, based upon their experience and training); *see Welch v. State*, 2000 OK CR 8, ¶¶ 21–23, 2 P.3d 356, 368–369 (recognizing police specialized training and knowledge of homicide investigations); *Cannon v. State,* 1998 OK CR 28, ¶¶ 19–20, 961 P.2d 838 (recognizing police specialized training and knowledge of crime scene investigation). Evan and McEntire both held specialized knowledge concerning the multiple objective factors that are involved in law enforcement shooting decisions as illustrated by their training and experience. Their testimony was both relevant and admissible.

The trial court also precluded the State from presenting Evans' and McEntire's opinions concerning the reasonableness of Appellant's use of deadly force. Because the proffered opinions would have merely told the jury what result to reach, the trial court properly excluded this evidence. *Ball v. State,* 2007 OK CR 42, ¶ 19, 173 P.3d 81, 87 (recognizing that expert witnesses can suggest inferences jurors should draw from facts but opinion which merely tells jury what result to reach is inadmissible).

However, the trial court's exclusion of any testimony from the two experts constituted error. Certainly, the trial court could have caused defense counsel to tailor or limit the expert witnesses' testimony to an admissible form. *See Bland v. State*, 2000 OK CR 11, ¶ 32, 4 P.3d 702, 715 (recognizing that trial court's ruling did not prevent the expert witness from testifying but only limited scope of the expert's opinion). Because Appellant's proffered expert witnesses held technical and specialized knowledge which was relevant and would have assisted the jury to understand the evidence in its determination whether Appellant was justified in the use of deadly force against Scott, the trial court abused its discretion when it precluded the witnesses from testifying.

The trial court also abused its discretion when it excluded the testimony of Appellant's character witnesses. Evidence of a pertinent trait of character offered by an accused is admissible. 12 O.S.2011, § 2404(A)(1). Proof may be made by testimony as to reputation or by testimony in the form of opinion. 12 O.S.2011, § 2405(A). Once the trial court has determined the particular character trait is "pertinent" or relevant, and an essential element of the charge or defense, proof may be made by specific instances of conduct. *Davis v. State*, 2011 OK CR 29, ¶ 158, 268 P.3d 86, 125-26.

The State made Appellant's honesty, integrity, professionalism, and good character pertinent in the present case. During the pretrial proceedings, the prosecutor disclosed that the State's theory of the case was that Appellant's

investigation of Scott was not "officially sanctioned by the Department" but that Appellant had "personally began to engage in surveillance" of the decedent because he believed that he was a "menace to society." (Nov. 14, 2013 Mtn. Tr. 10-11). Then within his very first comments in opening statement, the prosecutor informed the jury that the case was about Appellant crossing the line based upon his "something other than professional" relationship with the decedent. (Tr. II, 11). The State explicitly alleged that the evidence would show that "it became personal, and that's why ultimately this officer used deadly force and killed Dane Scott, Jr., allegedly, unjustifiably." (Tr. II, 11-12). The prosecutor continued with this theme and his final remarks in opening argument included: "He crossed the line from legitimate use of force to homicide. He crossed the line from being professional to being personal." (Tr. II, 29).

During the trial, the State then introduced evidence on this topic. Major Steve Robinson testified that Appellant's investigation was not part of his assigned duties. (Tr. III, 236; Tr. V, 133). The State also introduced Robinson's opinion that Appellant had not been "professional" or "safe" when he fired his service weapon "right past" him. (Tr. III, 253).

At the same time, Appellant's defense against the State's allegations made his character pertinent and relevant. Defense counsel asserted during opening statement that Appellant did "not violate his oath and duty to the people of Del City." (Tr. II, 29).

The trial court permitted Appellant to present the testimony of Deputy Chief, John Smith. Smith testified that Appellant had been authorized to form and work the task force that investigated Scott, Appellant showed "initiative" in his position, and that Appellant's last evaluation was good. Appellant also secured Smith's assessment that Appellant had been a "professional officer" for the ten years preceding Scott's death. (Tr. V, 198-211). However, during cross-examination, the State effectively used Smith to support its opening statement. The State obtained Smith's admission that he gave Appellant favorable evaluations, in part, for the purpose of maintaining pay. The State also introduced Smith's testimony that the task force was not intended to investigate small dealers like Scott, but was intended to investigate drug traffickers. When the State asked Smith if he would have given Appellant a favorable evaluation after the shooting incident, Smith indicated in the negative. (Tr. V, 210-21).

Appellant sought to call three additional character witnesses. He proffered that the witnesses would testify that he was an honest, law-abiding citizen, a man of integrity, and also would have testified about his professionalism and history in the police department. (Tr. VI, 124). Since Appellant's honesty, integrity, professionalism, and general good character were pertinent and necessary to rebut the State's allegations, the trial court abused its discretion when it excluded this testimony.

Reviewing the entire record, the excluded evidence in the present case was material to the extent its exclusion affected the outcome of the trial. Although I do not observe any bias or partiality, the trial court's inconsistent evidentiary rulings effectively deprived Appellant of his right to present a complete defense. The trial court permitted the State to introduce evidence concerning the police department's guidelines for high speed chases (Tr. II, 78-79; Nov. 14, 2013 Mtn. Tr. 18), but denied Appellant's attempt to introduce the CLEET guidelines concerning use of deadly force. The trial court permitted the State's witnesses to testify that they had no fear of Scott during the incident but refused to permit Appellant to cross-examine them about the circumstance of the decedent pointing his gun at Appellant and pulling the trigger. (Tr. VI, 62). The trial court allowed the State to introduce Robinson's opinion that Appellant's discharge of his service weapon was not professional but refused to permit Appellant to cross-examine Robinson concerning his training on employment of lethal force. (Tr. III, 215-17). Despite the fact that the State clearly made Appellant's honesty, integrity, lawfulness, and character for professionalism pertinent, the trial court excluded the testimony of Appellant's character witnesses. The State was allowed to introduce criticism of Appellant's shooting decision by both his immediate supervisor and a subordinate but Appellant was not permitted to introduce favorable opinion testimony on this same point. Because Appellant was denied the meaningful opportunity to

present a complete defense, his conviction should be reversed and the case remanded for a new trial.

In Proposition Three, Appellant contends that the trial court erred when it dismissed juror number 11 during deliberations and over his objection. A trial judge has inherent power to substitute a juror for good cause, however, this discretion must be used with great caution. *Miller v. State*, 2001 OK CR 17, ¶¶ 14, 23-24, 29 P.3d 1077, 1081-83. Our statutes make provision for the replacement of jurors who have become sick. *Coddington*, 2006 OK CR 34, 2 25, 142 P.3d at 446; 22 O.S.2011, § 601a. A juror can also be removed for misconduct. *Id.* Misconduct must be proven by clear and convincing evidence. *Id.*; *Thornburg v. State*, 1999 OK CR 32, ¶ 19, 985 P.2d 1234, 1244.

In *Miller*, this Court found that the trial court had exercised great caution and had a sufficient basis for dismissing the juror. *Id.*, 2001 OK CR 17, ¶¶ 24-26, 29 P.3d at 1083. The trial court, in *Miller*, held an *in camera* hearing with the individual juror, heard the juror's testimony, heard the argument of counsel, and only replaced the juror after determining it would be in the best interest of justice. *Id.*, 2001 OK CR 17, ¶¶ 17-27, 29 P.3d at 1081-83.

In the present case, the trial court did not use great caution when it dismissed juror number 11, but, instead, summarily dismissed the juror. The record reveals that there was a split in the jurors. Although the jury never reported unresolvable deadlock, several jurors were, apparently, not convinced that the State had proven its case. The jury retired to deliberate at 3:40 p.m. on

the sixth day of trial. The trial court returned the jury to open court at 10:10 p.m. to address the foreperson's note that read: "We are stuck with a serious deadlock. There is an item of testimony that we disagree." (Tr. VI, 192). The foreperson advised that the jurors' last vote was 9 to 3 but indicated that there had been some progress in the last hour or two. The foreperson declared that the jurors needed certain testimony to resolve the matter. The trial court returned the jury to deliberation and made efforts to try to address the testimonial dispute. (Tr. VI, 193-94). At 12:40 a.m., the trial court returned the jury to open court to address the foreperson's note stating: "Unfortunately, we are still at deadlock. We have continued to deliberate with some movement. Our vote is 10-1 with one juror refusing to vote." (Tr. VI, 194). The trial court asked and the foreperson affirmed that the juror was "also refusing to participate in the deliberation process." (Tr. VI, 195). By agreement of the parties, the trial court allowed the jurors to go home and rest for the remainder of the night. (Tr. VI, 194-95).[1]

Instead of holding an *in camera* hearing, the trial court assembled the jury in open court the next morning. The trial court asked the foreperson what the failure to participate consisted of and the foreperson stated: "We've tried multiple times to engage in dialogue and to garner an opinion and to help with understanding of the process, and that has been received unfavorably." (Tr. VII, 9). The foreperson alleged that juror number 11 had refused to vote on the last

[1] Because the foreperson continued to represent that progress and movement was ongoing, the jury was not deadlocked, and no instruction on this circumstance was warranted. *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

vote brought to the court. (Tr. VII, 9-10). The trial court then summarily excused juror number 11. (Tr. VII, 10). The jury returned to deliberate with the alternate juror and fairly quickly reached a guilty verdict.

When contacted by a defense investigator after the trial, juror number 11 asserted that she fully participated in the jury's discussions and deliberation. She stated that she voted up and through the 9 to 3 vote. Although she continued to listen and contribute to the deliberations after that point, she informed the other jurors that she had registered her vote twice and didn't need to vote again to state her position. (*See* Motion for New Trial, O.R. 644).

Based upon the very limited inquiry that the trial court conducted during the jury deliberations, there was not a sufficient basis to determine whether the best interests of justice required removal of juror number 11. The trial court did not ascertain whether juror number 11 had actually refused to deliberate and vote, whether the foreperson was simply trying to remove her as an obstacle to obtaining the verdict the foreperson desired, or whether there was some type of misunderstanding or confusion. At a minimum, there should have been an *in camera* hearing with the juror to find out her version of the events. *See United States v. Zabriskie*, 415 F.3d 1139, 1147 (10th Cir. 2005) . Because the trial court's inquiry was not sufficient, the trial court erred when it removed the juror.

The State's assertion that there is no indication which way juror number 11 was leaning and, thus, this error did not prejudice Appellant is not well

taken. It is clear from the record that the trial court's summary removal of the juror prejudiced Appellant. *Jones v. State*, 2006 OK CR 5, ¶ 20, 128 P.3d 521, 535. It is often the defense strategy to seek to seat at least one juror on a panel who would find the State had failed to prove its case beyond a reasonable doubt. In this case, the defense was denied that juror. While the decisions of a trial judge are reviewed for the abuse of discretion, the removal of a juror for misconduct must be based on clear and convincing evidence. That was not done in this case and relief is required.

Whether or not Appellant's use-of-force was justified in this case can only be decided by a trial which provides a jury with all the relevant evidence and, in which, individual jurors' rights to vote their conscience is respected. In this case, Appellant was deprived of such a trial. As such, Appellant's conviction should be reversed and the case remanded for a new trial.

HUDSON, J., DISSENT

I join in Judge Lumpkin's well-reasoned dissent in this case. I write separately to emphasize the magnitude of the prejudice created by the trial court's erroneous removal of juror number 11. This Court's jurisprudence is focused on protecting holdout jurors from judicial interference that coerces a verdict. *See, e.g., Gilbert v. State*, 1997 OK CR 71, ¶ 57, 951 P.2d 98, 114; *Drew v. State*, 1989 OK CR 1, ¶ 19, 771 P.2d 224, 229. Juror number 11's post-verdict statements confirm what is obvious from the trial record, i.e., that the trial court erroneously deprived Appellant of a holdout juror favorable to the defense. "Removal of a holdout juror is the ultimate form of coercion." *Sanders v. Lamarque*, 357 F.3d 943, 944 (9th Cir. 2004).

This case shows why trial judges must conduct an adequate inquiry of alleged juror misconduct arising during deliberations. In the present case, "[a]n adequate inquiry would necessarily involve affording [juror number 11] an opportunity to present [his or her] version of events." *United States v. Zabriskie*, 415 F.3d 1139, 1147 (10th Cir. 2005). Instead of holding an in camera hearing to accomplish this, the trial court summarily dismissed juror number 11. As Judge Lumpkin demonstrates, there is no lawful basis on the record before this Court to support the trial court's removal of juror number 11. Appellant was denied the opportunity to obtain a mistrial due to this error. For this reason alone, he should be granted a new trial.