

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CHRISTIAN CASTRO,)
)
 Appellant,)
 vs.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. F-2014-411

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

NOV - 6 2015

MICHAEL S. RICHIE
CLERK

OPINION

SMITH, PRESIDING JUDGE:

Christian Castro was tried by jury and convicted of Murder in the First Degree (Malice) in violation of 21 O.S.2011, § 701.7, in the District Court of Oklahoma County, Case No. CF-2012-646. In accordance with the jury’s recommendation the Honorable Glenn M. Jones sentenced Castro to life imprisonment without the possibility of parole. Castro appeals from this conviction and sentence and raises three propositions of error in support of his appeal.

On the evening of January 23, 2012, Daryl Davis died from a gunshot wound. The facts surrounding Davis’ murder involve co-workers and transpire over the course of three days, culminating with the murder. The facts are disputed. Castro and Nelson Williams were initially charged as co-defendants. After the preliminary hearing, the charge against Williams was amended to accessory after the fact.

Davis, Castro, Williams and Carl Bennett all worked at Mathis Brothers furniture store. Two days before the murder, January 21, 2012, Castro, Bennett and Davis went to a strip club. During the evening, Castro and Davis left the club to go to Davis’ house for more money. When they returned, Castro, Davis and

Bennett went to the VIP Room. This room had a \$200 cover charge, plus separate charges for private dancers. Bennett said he couldn't afford it, and Castro and Davis offered to pay what Bennett believed would be a reduced-price cover charge. When the club closed, Bennett could not pay his \$200 tab for a dancer; he was arrested for public drunkenness and taken to jail. Castro found Williams and borrowed \$100 for bail money for Bennett. Bennett testified that, while they were at the club, Castro and Davis went to Davis' house to get money because Castro was broke. Bennett testified that Davis said he was hoping Castro would pay him back because he needed the money for rent.

Castro kept a Jimenez .9mm pistol in his car, and on the day of the murder, he and Williams went to buy Williams a Hi-Point .9mm pistol. Castro showed Williams how it worked and gave him some ammunition. At approximately 8:00 p.m. the two went to Mathis Brothers. Williams testified Castro stated that it was either Davis or him, and said, "I've got to get him out of the game." Castro also said he owed Davis money, and Davis wanted it paid. They did not see Bennett but saw Davis in the parking lot. Castro drove Davis to his car, and the two talked for a few minutes. Williams heard Davis say "500 or 250," and Castro tell Davis that someone was bringing him the money he owed Davis. Davis and Castro street-raced, then pulled into a residential neighborhood where Castro said he was meeting his friend with the money. Castro borrowed Williams' phone and returned it; they moved the cars around the corner; Williams dropped and broke his phone; the three men looked on the ground for the battery. As Davis knelt by Castro's car, Williams saw Castro, with his hand in his pocket, glare at Davis. When Davis went

to turn on his own car's headlights, Castro followed, and shot him fatally in the back of the head. The bullet fragment recovered from Davis' head had a right twist; Castro's Jimenez pistol had a right twist, while Williams' Hi-Point had a left twist.

Castro jumped into his car and threw his gun on the passenger floorboard. As he and Williams left, Williams heard Castro say, "I did it, I did it." [Trial Tr. I 171] When Williams picked up Castro's gun, the barrel was hot. [Trial Tr. I 172, 177] Watching news footage, Castro said, "I did it, man, I did it. I'm an OG." [Trial Tr. I 177] Castro demonstrated to Williams how he shot Davis in the back of the head. At Williams' house, Williams gave Castro back his gun, and Williams put his own Hi-Point in a metal box safe in his attic; Williams admitted to police that both guns might be in the safe, and police found them both there the next day. The morning after the murder Castro told Williams, "We're the new hit men in Oklahoma, we're the new hit men, big dog." [Trial Tr. I 178] When they went to work they were interviewed by police, then taken to the police station. After the second interview Williams showed detectives the safe with the guns. [Trial Tr. I 185, II 358, StEx 40, 45-46]

Castro vigorously denied shooting Davis. He testified that, while Davis followed him, Williams told him to pull over in a neighborhood. The men talked, moved the cars, and talked some more, before Castro got a phone call (on his own phone). After Castro ended the call, he heard Williams shoot Davis. He said Williams ran to him, yelling "Let's go", and as they drove away Williams said he shot Davis. At Williams' house, Castro said, Williams brought both guns in and put them on the bed. Castro said he left his gun on Williams' bed and went home. Castro

admitted his gun was in his car before the shooting; he said that Williams took his gun when they got out of the car before Davis was shot. Castro testified that, the night before the shooting, he and Davis had gone to the strip club with Bennett, and that he went home with Davis so Davis himself could get more money. Castro denied borrowing any money from Davis.

Williams was originally charged as a co-defendant with Castro. After Williams' testified for the State at preliminary hearing, his charge was amended to accessory after the fact. At Castro's trial Williams admitted that his charge had been reduced, allowing him to bond out of jail, but testified that he had no deal with prosecutors for his testimony. He said he hoped for a good outcome in his case, and hoped he'd get probation as a result of his testimony. [Trial Tr. I 139-40, II 278] After the trial Williams pled guilty and received an 8-year suspended sentence.

In his first proposition Castro claims his right to due process was violated by the State's use of false testimony, and the State's failure to correct that testimony. Essentially, Castro complains because Williams' testimony at preliminary hearing and trial differed from his attestation of fact for his guilty plea. Castro argues that when testifying at Castro's trial, Williams denied hiding Castro's gun along with his own in the safe in his attic. Entering his guilty plea five months after Castro's trial had ended, Williams signed a plea form which stated, "I was a [sic] accessory after the commission of a First-Degree murder committed by Christian Castro by placing his weapon into an attic space." Castro also raises this in his motion to supplement

the record,¹ and motion for new trial. He includes as exhibits in both motions a copy of Williams' plea form and judgment and sentence. The State argues that this Court should not consider these materials, as they are not part of the record in the case. Castro argues that Williams was charged as a co-defendant, and asserts that the documents are readily available public records. Castro urges the Court to take judicial notice of Williams' guilty plea and its accompanying factual basis pursuant to 12 O.S.2011, § 2202(B)(2) (judicial notice of adjudicative fact which is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned). The submitted material is necessary to determine this issue, and although this statute is seldom used, we find the case here is an appropriate one in which to supplement the record with the extra-record material under our Rules. *Coddington v. State*, 2011 OK CR 17, ¶¶ 18-21, 254 P.3d 684, 697-98; Rule 3.11(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015).

Castro argues that, given this discrepancy, the State knowingly presented false evidence at his trial. This would, if true, violate his right to a fair trial. *Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972); *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959); *Omalza v. State*, 1995 OK CR 80, ¶¶ 77, 911 P.2d 286, 307; *Hall v. State*, 1982 OK CR 141, ¶¶ 16, 650 P.2d 893, 896-97. The State has a duty to disclose false testimony which goes either to the merits of the case or the credibility of the witness. *Hall*, 1982 OK CR 141, ¶¶ 16, 650 P.2d at 897. The burden is on the defendant to show that (a)

¹ Although this motion is titled "3.11(A) Motion to Supplement Direct Appeal Record and Request for an Evidentiary Hearing," Castro does not request an evidentiary hearing.

testimony was false or misleading, (b) the prosecution knowingly used it, and (c) its admission of false testimony was material to guilt or innocence. *Omalza*, 1995 OK CR 80, ¶ 77, 911 P.2d at 307.

Castro relies on *Hall*. There the false testimony – that the witness, who said he didn't know the victim, actually knew and had threatened to kill him – concerned exculpatory evidence the State failed to disclose.² One category of exculpatory evidence is use of perjured testimony about which the prosecutor knew or should have known. *Id.*; *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976). *Hall* then analyzed the issue as one of exculpatory evidence under *Agurs*, asking whether the statement was material and there was any reasonable likelihood that the false testimony could have affected the jury's judgment. In *Hall*, the perjured testimony concerned the credibility of the State's key eyewitness and his relationship to the victim, and was thus material. *Hall*, 1982 OK CR 141, ¶ 33, 650 P.2d at 899.

Castro argues that Williams committed perjury because he testified one way during the trial but made a sworn statement to the contrary when entering his plea of guilty. The defense theory was that Williams, not Castro, shot Davis. Had jurors known Williams was lying, he argues, his testimony would be cast in a different light.

² In an unusual twist, the witness had testified for the State at preliminary hearing and a previous trial which resulted in a mistrial. During *Hall*'s trial, defense counsel wanted to call the witness as a defense witness; *Hall* claimed the witness had committed the crime. Because the witness was unavailable, his testimony at the first trial was admitted. The claim, then, was that the State allowed a material witness to commit perjury in the first trial, that the defense was unable to effectively cross-examine the witness or bring out his perjury or motive for killing the victim, and the defendant was prejudiced when he introduced this testimony into the second trial.

The record does not support Castro's characterization of Williams' testimony. As Castro describes it, Williams' trial testimony was completely different from his sworn statement when he entered his plea. The record shows Williams actually equivocated on this issue at trial. At preliminary hearing, Williams testified he did not, himself, put Castro's gun in the safe. He did say Castro tried to give Williams his gun, he didn't know what Castro did when he left his room and didn't know what happened to Castro's gun, and that Castro [must have] put the gun in the box. [Prelim Tr. 54-55, 82, 111] At trial Williams testified he didn't know what happened to Castro's gun; after he gave the gun back, he left Castro alone in his room and didn't know what Castro did with the weapon. [Trial Tr. I 179-80, 180-81, II 266] Williams admitted he told police that Castro's gun could be with his gun in his gun safe or a curio cabinet; when defense counsel asked whether this was because he put Castro's gun in the attic, he responded, "I don't know." [Trial Tr. II 271-72] Williams said that Castro saw him put his, Williams', gun away in his attic. [Trial Tr. II 279] Williams also testified that, if there were inconsistencies between his preliminary hearing and trial testimony, his trial testimony was true. [Trial Tr. II 302] Williams also testified that he had been truthful on the stand. [Trial Tr. II 301] In closing, the prosecutor argued that jurors could believe either Williams or Castro, and that jurors could decide whether Williams or Castro, or both of them, hid Castro's gun. [Trial Tr. IV 768]

Williams' trial testimony was itself inconsistent and even contradictory on this issue, and it was the duty of the jurors to resolve the inconsistencies in his testimony. *Runnels v. State*, 1977 OK CR 146, ¶ 32, 562 P.2d 932, 936. By

agreement of the parties, the trial court allowed Castro to play Williams' entire recorded statement to police for jurors, who thus had the chance to compare Williams' testimony with his earlier statements. Jurors heard at trial that Williams had told police Castro's gun was with his own; after initially denying that he hid Castro's gun, he said he didn't know if he had done so. When entering his guilty plea, Williams took sole responsibility for hiding the gun, rather than placing blame on or sharing responsibility with Castro. The inconsistent trial testimony did not clearly contradict his later sworn statement at the time of his plea, and we cannot conclude that the trial testimony was clearly false.

Castro has not shown that the State intentionally concealed any inconsistencies and discrepancies in Williams' testimony. The State's pretrial description of Williams' testimony included an assertion that Williams would testify "they hid the guns in the attic over Williams' room." [O.R. I 136-37] Defense counsel reviewed, and played at trial, Williams' interviews with police. Defense counsel thoroughly cross-examined Williams about his statements to police and the whereabouts of Castro's gun, and played Williams' police interview for jurors.

Castro also fails to show that, assuming Williams' trial testimony was false, the prosecutor knew that at the time of trial. Williams testified relatively consistently with his preliminary hearing testimony. He did not complete the paperwork for his plea of guilty, stating the factual basis, until five months after Castro's trial. The prosecutor clearly recognized that Williams' trial testimony was inconsistent on this issue, but the record does not support a conclusion that the

prosecutor knew the testimony could have been false. *Omalza*, 1995 OK CR 80, ¶ 78, 911 P.2d at 307. This proposition is denied.

In connection with Proposition I, Castro filed a Motion for New Trial based on newly-discovered evidence. He refers to Williams' statement of factual basis on his plea form, which, he argues, directly conflicts with Williams' trial testimony. In reviewing this claim we consider (a) could the evidence have been discovered before trial with reasonable diligence; (b) is the evidence material; (c) is it cumulative; and (d) is there a reasonable probability that, had the evidence been introduced at trial, it would have changed the outcome. *Underwood v. State*, 2011 OK CR 12, ¶ 93, 252 P.3d 221, 254-55. The evidence could not have been discovered before trial, and it is not cumulative of anything presented at trial.

However, Castro fails to show a reasonable probability that, had the evidence been introduced, it would have changed the outcome. Castro argues that the evidence would have cast Williams' testimony in a different light. We have already rejected Castro's claim that the subsequent statement shows Williams' trial testimony was false. Jurors knew that Williams' original first degree murder charge had been reduced to a charge of accessory after the fact. As we discuss above, jurors heard Williams' efforts to avoid actually claiming responsibility for hiding Castro's gun. Castro suggests Williams' declaration that he hid the gun would have affected the trial court's refusal to instruct jurors that Williams was an accomplice as a matter of law. He offers no argument for this statement, and fails to show how the trial court's decision could have been affected;³ in Proposition II we conclude

³ In his motion, Castro mistakenly uses the word "accessory" rather than "accomplice".

that the evidence on this issue was conflicting and it was properly a jury question. Castro's Motion for New Trial is denied.

Castro claims in Proposition II that the trial court should have instructed jurors that Williams was an accomplice as a matter of law, not as a matter of fact. Castro claims, and the State appears to agree, that he requested this instruction and the trial court denied it. However, the record shows that Castro requested *both* jury instructions that Williams was an accomplice as a matter of law, and that jurors should decide whether he was an accomplice. [O.R. II 244, 245] Castro did not object when the trial court explained that it would give the latter instruction, not the former, as the evidence did not support an instruction that Williams was an accomplice as a matter of law. As Castro failed to object to the instructions given, we review for plain error. *Barnard v. State*, 2012 OK CR 15, ¶ 13, 290 P.3d 759, 764. 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. *Id.* The court must instruct jurors on the applicable law, and we review the court's decision for abuse of discretion. *Soriano v. State*, 2011 OK CR 9, ¶ 36, 248 P.3d 381, 396. 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. Castro argues that Williams was an accomplice as a matter of law because he had initially been charged with first degree murder as Castro's co-defendant. In exchange for Williams' testimony at preliminary hearing, his charge was amended to accessory after the fact. Castro

argues jurors should have been told they could not convict him unless Williams' testimony was corroborated. He also argues that Williams' testimony was uncorroborated.

A person may be an accomplice as a matter of law or a matter of fact. In a jury trial, the former question is decided by a court, while the latter is determined by the jury. If evidence is uncontroverted that the witness could be indicted for the charged offense, then the trial court must instruct jurors that the witness is an accomplice as a matter of law and his testimony must be corroborated; if the evidence suggests the witness might or might not be an accomplice, the trial court submits that question of fact to jurors. *Postelle v. State*, 2011 OK CR 30, ¶ 22, 267 P.3d 114, 128; *Nunley v. State*, 1979 OK CR 107, ¶ 10, 601 P.2d 459, 462-63. If a witness participates in a crime, but without criminal intent, he is not an accomplice. *Id.*, 1979 OK CR 107, ¶ 11, 601 P.2d at 463. If the witness's own testimony is the only evidence suggesting he is not an actual accomplice, we have held the court should instruct that he is an accomplice as a matter of law. *Nunley*, *id.* at ¶ 12, 601 P.2d at 463. A witness's mere presence at a crime scene is not enough to establish him as an accomplice. *Wilson v. State*, 1994 OK CR 5, ¶ 13, 871 P.2d 46, 50. Even where a witness knows what the defendant intends to do, where the witness does not participate in any way in the commission of a crime he is not an accomplice. *Honeycutt v. State*, 1992 OK CR 36, ¶ 20, 834 P.2d 993, 998-99.

Castro argues that Williams was an accomplice as a matter of law because he was initially charged with murder along with Castro. However, that mere fact does not automatically make Williams an accomplice at law. Castro's and Williams'

testimony directly conflicted as to who shot Davis, and forensic evidence showed the bullet that killed Davis was consistent with Castro's gun, not Williams' gun. That is, some evidence suggested Williams might be an accomplice, but that evidence was not uncontroverted. Under these circumstances, the trial court correctly submitted the issue as a question of fact to the jury. *Postelle*, 2011 OK CR 30, ¶ 22, 267 P.3d at 128. The trial court did not abuse its discretion in refusing to instruct that Williams was an accomplice as a matter of law. This proposition is denied.

In Proposition III Castro claims the evidence was insufficient to support his conviction. The State had to show that Castro unlawfully caused Davis' death with malice aforethought. 21 O.S.2011, § 701.7. The jury determines witness credibility and the weight given to testimony, and we accept all reasonable inferences tending to support a jury's verdict. *Rutan v. State*, 2009 OK CR 3, ¶ 49, 202 P.3d 839, 849. Castro first argues that Williams was an accomplice at law and his testimony was not sufficiently corroborated. In Proposition I we rejected Castro's claim that Williams was an accomplice at law.

Accomplice testimony must be corroborated by evidence tending to connect the defendant with the commission of an offense, which does more than show the commission of the offense or its circumstances. 22 O.S.2011, § 742. Assuming without deciding that jurors found Williams was an accomplice as a matter of fact, the record contains corroborating evidence tending to connect Castro with the commission of the offense. Bennett testified that, while they were at the club, Castro and Davis went to Davis' house to get more money because Castro was out.

Bennett also testified that, the day after they went to the strip club, Davis said he was hoping Castro would pay him back because he needed the money for rent. The dancer from the strip club testified that the bigger of the two Caucasian/Hispanic men that evening appeared to be footing the bill or to have more money than the rest of the party. This supported Williams' and Bennett's testimony that Davis gave Castro money for the strip club. This testimony corroborates Williams' explanation of Castro's motive to shoot Davis. Castro's boss, Martin, testified that Castro and Williams were in the Mathis Brothers parking lot shortly before the crime, Davis pulled up next to them, and they all left. This corroborates Williams' account that they left at the same time Davis did that night. Jurors also saw Mathis Brothers security surveillance video of Castro's car and Davis' car in the Mathis Brothers lot that corroborated Williams' account. Police officers testified that Davis was found next to his open car door; the car's lights were on but the engine was not running. This corroborates Williams' testimony that Davis went to his car to turn the lights on. Williams testified that, after the crime, Castro demonstrated how he shot Davis in the back of the head. This was corroborated by physical evidence that Davis was shot in the back of the head. Castro's gun, which he admitted was in his car before the shooting, was the only gun at the scene consistent with the bullet in Davis' head. Castro himself corroborated much of Williams' testimony regarding the events immediately surrounding the shooting.

Castro also argues there was no evidence that he killed Davis with malice aforethought. "Malice may be formed in the instant before the fatal act, and may be established from the fact of the killing alone." *Robinson v. State*, 2011 OK CR 15, ¶

18, 255 P.3d 425, 432. Evidence showed that Castro owed Davis money, that he went to meet Davis armed, that he encouraged Davis to follow him to a relatively secluded residential area, and that Davis' attention was distracted immediately before Castro shot him. Davis was shot in the back of the head as he knelt in front of Castro. Taking the evidence in the light most favorable to the State, any rational trier of fact could find beyond a reasonable doubt that Castro killed Davis with malice aforethought.⁴ *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559. This proposition is denied.

DECISION

The Judgment and Sentence of the District Court of Oklahoma County is **AFFIRMED**. The Motion to Supplement the Record is **GRANTED**, and the Request for Evidentiary hearing is **DENIED**. The Motion for New Trial is **DENIED**. 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 GLENN JONES, DISTRICT JUDGE

⁴ Castro argues that, where evidence is circumstantial, it must do more than raise a suspicion of guilt. This Court makes no distinction between direct and circumstantial evidence in analyzing a claim of insufficient evidence. *Easlick*, 2004 OK CR 21, ¶ 15, 90 P.3d at 559.

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LEWIS, J.: CONCUR
HUDSON, J.: CONCUR