

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KENSHARI ANDRE GRAHAM,)
)
 Appellant,)
 v.)
 STATE OF OKLAHOMA)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2014-1100

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

FEB 12 2016

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

LUMPKIN, VICE PRESIDING JUDGE:

Appellant Kenshari Andre Graham was tried by jury and convicted of Second Degree Felony Murder (21 O.S.2011, § 701.8), Case No. CF-2013-229, in the District Court of Comanche County. The jury recommended as punishment life imprisonment and the trial court sentenced accordingly. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following proposition of error in support of his appeal:

- I. The trial court committed reversible error by allowing the State to introduce evidence of other crimes and bad acts which had nothing to do with the offense charged, violating Appellant's rights under the Eighth and Fourteenth Amendments to the United States Constitution and Article II, §§ 7 and 9 of the Oklahoma Constitution.

After thorough consideration of this proposition and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that under the law and the evidence the conviction is affirmed but the case is remanded for resentencing.

Appellant was convicted of Second Degree Felony Murder for the murder of Alec McGlory while robbing him at gunpoint of illegal drugs. In his sole proposition of error, Appellant argues that evidence of his participation in a burglary two days after the commission of the murder was improperly admitted other crimes evidence. Defense counsel's objection to the admission of the evidence has properly preserved the issue for our review. This Court reviews a trial court's decision to admit evidence of other crimes for an abuse of discretion. *Neloms v. State*, 2012 OK CR 7, ¶ 12, 274 P.3d 161, 164. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194.

As a general rule, evidence of crimes other than the charged offense is not admissible for the purpose of showing that the defendant is guilty of the particular offense charged. To this rule, however, there are well-settled exceptions. Under 12 O.S. 2011, § 2404(B) evidence of other crimes may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. If evidence is sought to be introduced under this exception, pre-trial notice must be given. *Burks v. State*, 1979 OK CR 10, ¶ 2, 594 P.2d 771, 772 *overruled in part on other grounds*, *Jones v. State*, 1989 OK CR 7, 772 P.2d 922.

Another exception exists for evidence of another crime when both it and the charged offense are so closely linked or connected as to form a part of the

res gestæ. The *res gestæ* exception differs from the other listed exceptions to the evidence rule; in the other exceptions, the other offense is intentionally proven, while in the *res gestæ* exception, the other offense incidentally emerges. *Jones v. State*, 2006 OK CR 5, ¶ 48, 128 P.3d 521, 540; *Neill v. State*, 1994 OK CR 69, ¶¶ 35–36, 896 P.2d 537, 550–51. “*Res gestæ* are those things, events, and circumstances incidental to and surrounding a larger event that help explain it.” *McElmurry v. State*, 2002 OK CR 40, ¶ 63, 60 P.3d 4, 21-22. Pre-trial notice of *res gestæ* evidence is not required. *Eizember v. State*, 2007 OK CR 29, ¶ 81, 164 P.3d 208, 231.

The evidence in this case does not fall under any of the above exceptions. The evidence does not fall under the *res gestæ* exception as the burglary occurred in Oklahoma City two days after the murder occurred in Lawton. There was no evidence the burglary was a part of the drug robbery in Lawton or that it was necessary to give the jury a complete understanding of the circumstances surrounding the murder. The evidence also does not meet the criteria for admission under § 2404(B). The two weapons stolen in the burglary were not connected to the murder. That Appellant committed a burglary two days after committing a murder during a drug robbery was not relevant to showing his motive or intent to commit the murder, his opportunity or plan or even the absence of mistake in committing the murder. Further, evidence showed the murder was complete by the time the burglary was committed.

The trial court admitted the evidence in part as evidence of flight. In

Dodd v. State, 2004 OK CR 31, ¶¶ 33-34, 100 P.3d 1017, 1031, this Court found flight to be a category of post-offense conduct which may be relevant to show the defendant's consciousness of guilt, i.e., his identity as the perpetrator of the charged offense. The Court determined that whether it amounted to immediate departure from the crime scene, subsequent failure to subject himself to legal process, or any attempt to otherwise influence the proceedings against him, a defendant's post-offense conduct may be relevant to establish his identity as the perpetrator of the original offense. Further, in *Mitchell v. State*, 1993 OK CR 56, ¶ 9, 876 P.2d 682, 684 we found flight evidence admissible only where the defendant offers an explanation for his departure from the scene.

Here, evidence of the burglary was more than merely fleeing the scene of the murder and an attempt to avoid detection. The evidence showed the commission of a separate crime. Even if we were to consider evidence of the burglary flight/consciousness of guilt evidence, a review of the revised flight instruction after *Mitchell* would have revealed the lack of evidence to support it as Appellant offered no explanation for his departure from the scene. Further, the instruction given to the jury did not reference flight or consciousness of guilt and instead was the uniform limiting instruction on other crimes evidence.

Evidence of the burglary committed two days after the murder satisfies neither the exceptions to § 2404(B) nor the *res gestae* exception. It was a

separate and independent crime from the murder. Therefore, the trial court abused its discretion in admitting the evidence.

However, this does not end our inquiry. This Court will not reverse a conviction for improper admission of other crimes evidence if it finds that introduction of the evidence was harmless. In non-constitutional situations, an error is harmless unless it had a substantial influence on the outcome, or leaves the reviewing court in grave doubt as to whether it had such an effect. *Simpson v. State*, 1994 OK CR 40, ¶ 36, 876 P.2d 690, 702 (quoting *Kotteakos v. United States*, 328 U.S. 750, 764–765, 66 S.Ct. 1239, 1248, 90 L.Ed. 1557 (1946)).

Here, the defense had pre-trial notice of the evidence. Two witnesses testified to Appellant's confession to the murder. These witnesses were thoroughly cross-examined and remained consistent in their testimony. The jury heard that they were testifying in exchange for the State not prosecuting them for their conduct before and after the victim's death. Evidence showed that Appellant knew of the plan to rob the victim. Testimony showed that Appellant and the victim had been texting for approximately 24 hours before the murder and up until approximately 10 minutes before the murder. Appellant's fingerprints were found inside the victim's car. Evidence showed that Appellant and his buddies were in possession of marijuana taken from the victim. The jury was instructed on the limited use of the burglary evidence. A single brief reference was made to the burglary in the State's closing argument.

Under this record, we find the trial court's erroneous admission of evidence of the burglary does not mandate reversal of the conviction.

However, we cannot say the same about the sentence. Appellant received the maximum sentence of life. Under the record, grave doubts exist that the maximum sentence would have been imposed but for evidence that Appellant stole a bullet proof vest and weapons in an unrelated burglary committed after the murder. Therefore, the case should be remanded to the District Court for resentencing.

DECISION

The Judgment is **AFFIRMED**. The case is **REMANDED TO THE DISTRICT COURT FOR RESENTENCING**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY
THE HONORABLE KEITH B. AYCOCK, DISTRICT JUDGE

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OPINION BY: LUMPKIN, V.P.J.
SMITH, P.J.: Concur in Results
LEWIS, J.: Concur
JOHNSON, J.: Concur in Results
HUDSON, J.: Concur