

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DAWAYLON BERNARD RAINEY,)
)
Appellant,)
)
v.)
)
THE STATE OF OKLAHOMA,)
)
Appellee.)

NOT FOR PUBLICATION

Case No. F 2014-979

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

FEB 10 2016

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

LEWIS, JUDGE:

Dawaylon Bernard Rainey, Appellant, was convicted of two counts of first degree malice murder in violation of 21 O.S.Supp.2012, § 701.7, in Choctaw County district court case number CF-2013-138, before the Honorable Gary Brock, Special Judge. The jury set punishment at life imprisonment on each count, with a \$10,000.00 fine on count two. The trial court sentenced accordingly ordering that the sentences be served consecutively.¹ Rainey perfected an appeal to this Court, and raises the following propositions of error.

1. The trial court failed to properly sequester the jury in this case.
2. The State's use of photographs of the victims while alive in this case was in error.
3. The court should have prohibited the identification of Appellant by Nakeeta Casey and Terry Johnson. Its failure to do so was in error of the law. Its failure to give a cautionary instruction to

¹ Rainey must serve 85% of the sentences rendered for first degree murder before becoming eligible for parole. 21 O.S.2011, § 13.1

the jury regarding eye-witness identification as well as its failure to declare a mistrial regarding this issue only compounded this error.

4. The trial court's flight instruction was in error of the law.

After thorough consideration of Rainey's propositions of error and the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we have determined that the judgments and sentences of the district court shall be affirmed.

In reaching our decision, in proposition one, Appellant complains that the jury was allowed to deliberate in the law library and they were allowed to have their cell phones with them during deliberations, over defense counsel's objection. The trial court instructed the jury to turn off their cell phones and to refrain from looking at the books in the room where they were holding deliberations. While it might have been a great temptation to check phone messages during deliberations, there is no evidence that jurors succumbed to those temptations. In fact, it is presumed that jurors follow their instructions. *Williams v. State*, 2001 OK CR 9, ¶ 44, 22 P.3d 702, 716. There is no evidence that the jurors used extraneous information in reaching their verdict. See *Young v. State*, 2000 OK CR 17, ¶ 109, 12 P.3d 20, 48. This proposition, therefore, must fail.

In proposition two, we find that counsel objected to introduction of the "in-life" photographs; therefore, we review the trial court's introduction of the photographs for an abuse of discretion. *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 14, 241 P.3d 214. An abuse of discretion is shown when the trial

court's conclusion or judgment is clearly against the logic and effect of the facts presented. *Id.* The photographs were properly admitted pursuant to 12 O.S.2011, § 2403, and their relevance was not substantially outweighed by any evidentiary danger. The trial court did not abuse its discretion. Proposition two is denied.

In proposition three, we find that the witnesses' pre-trial identification was not so unduly suggestive to give rise to a substantial likelihood of irreparable misidentification. *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); *Wallace v. State*, 1987 OK CR 268, ¶ 13, 747 P.2d 324, 326. Even a prior suggestive identification will not invalidate a court room identification if it can be established that the identification was independently reliable under a totality of the circumstances. *Pennington v. State*, 1995 OK CR 79, ¶ 33, 913 P.2d 1356, 1366; *Berry v. State*, 1992 OK CR 41, ¶ 13, 834 P.2d 1002, 1005. Here the identification was independently reliable under the facts and circumstances of this case. This proposition is, therefore, denied.

Other propositions raised as sub-propositions in this proposition are waived for Appellant's failure to follow Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014).²

² Briefs shall contain "assignments of error, supported by citations to the authorities, statutes and parts of the record. Each proposition of error shall be set out separately in the brief. Merely mentioning a possible issue in an argument or citation to authority does not constitute the raising of a proposition of error on appeal. Failure to list an issue pursuant to these requirements constitutes waiver of alleged error. See *Armstrong v. State*, 1991 OK CR 34, 811 P.2d 593, 599"

We find, in proposition four, in viewing the instructions to the jury, this Court will not reverse on instructional error unless the error resulted in a miscarriage of justice or constitutes a substantial violation of a constitutional or statutory right. 20 O.S.2001, § 3001; *Carter v. State*, 2006 OK CR 42, ¶ 5, 147 P.3d 243, 244, *citing Ashinsky v. State*, 1989 OK CR 59, ¶ 20, 780 P.2d 201, 207. In this case, the giving of the flight instruction was error as Appellant did not place himself at the scene, nor did he explain his flight from the scene. Based on the facts of this case, the giving of the instruction did not have a substantial influence on the outcome of the case, and this Court is not left in “grave doubt” as to whether it had such an effect. *See Simpson v. State*, 1994 OK CR 40, ¶ 36, 876 P.2d 690, 702. Proposition four is denied.

DECISION

The Judgments and Sentences of the district court are **AFFIRMED**. 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 CHOCTAW COUNTY
HONORABLE GARY BROCK, SPECIAL JUDGE

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OPINION BY: LEWIS, J.

SMITH, P.J.: Concurs
LUMPKIN, V.P.J.: Concurs
JOHNSON, J.: Concurs
HUDSON, J.: Concurs