

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ERICA LASHON HARRISON,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F 2015-121

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

APR 19 2016

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

LEWIS, JUDGE:

Erica Lashon Harrison, Appellant, was charged and tried by jury for the crime of first degree malice murder, in violation of 21 O.S.2011, § 701.7, in the district court of Tulsa County, case number CF-2013-1446, before the Honorable William C. Kellough, District Judge. The jury found Harrison guilty of the lesser offense of first degree manslaughter, in violation of 21 O.S.2011, § 715, and set punishment at twenty-five (25) years imprisonment and a \$10,000.00 fine. The trial court sentenced Appellant in accordance with the jury verdict.¹ Appellant perfected an appeal to this Court, and raises the following propositions of error.

1. The State's evidence failed to disprove Ms. Harrison's defense of self-defense and thus fails to support her conviction and sentence for first-degree manslaughter.
2. The admission of improper character rebuttal evidence deprived Ms. Harrison of a fair trial in violation of her rights to due

¹ Appellant will be required to serve 85% of her term of imprisonment pursuant to 21 O.S.2011, § 13.1.

process of law under the Fourteenth Amendment to the United States Constitution and Article II, Sections 7 and 20 of the Oklahoma Constitution.

3. The admission of gruesome photographs deprived Ms. Harrison of her rights to a fair trial and due process of law in violation of the Fourteenth Amendment to the United States Constitution, as well as Article II, §§ 7, 19 and 20 of the Oklahoma Constitution.
4. Prosecutorial misconduct deprived Ms. Harrison of a fair trial and contributed to an excessive sentence in violation of the due process clause of the Fourteenth Amendment to the United States Constitution and Article II, §§ 7 and 20 of the Oklahoma Constitution.
5. Ms. Harrison was deprived of the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article II, §§ 7 and 20 of the Oklahoma Constitution.
6. Under the unique circumstances of this case, the imposition of a 25-year sentence for manslaughter is excessive and should be modified.
7. The accumulation of error in this case deprived Ms. Harrison of a fair trial and reliable verdict in violation of her right to due process of law pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and Article II, §§ 7 and 20 of the Oklahoma Constitution.

After thorough consideration of Appellant'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 judgment of the district court shall be affirmed, but the sentence shall be vacated and the case remanded to the district court for resentencing.

In reaching our decision, we find in propositions one, that in reviewing sufficiency claims, this Court examines the evidence in a light most favorable to the State and determines whether there was sufficient evidence for any

rational trier of fact to find the essential elements of the offense beyond a reasonable doubt. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556. This Court accepts all reasonable inferences and credibility choices that support the jury's verdict. *Bernay v. State*, 1999 OK CR 37, ¶ 23, 989 P.2d 998, 1008. In a light most favorable to the State, we find that no rational trier of fact could have found that Harrison was in danger of death or great bodily injury, thus, Harrison's self-defense claim fails, and the evidence supports her conviction for the crime of manslaughter.

In proposition two, we find that character evidence was improperly introduced during the State's rebuttal by calling Appellant to testify over her objection. The trial court ruled, and the State concedes that the testimony would not have been proper during the cross-examination of Appellant, thus the same questioning could not have been proper in any alternative means.

Title 22 O.S.2011, § 701, provides,

In the trial of all indictments, informations, complaints and other proceedings against persons charged with the commission of a crime, offense or misdemeanor before any court or committing magistrate in this state, the person charged shall at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him nor be mentioned on the trial; if commented upon by counsel it shall be ground for a new trial.

In this case, Appellant voluntarily testified on her own behalf, thus waiving her rights against self-incrimination. The waiver of her constitutional right against self-incrimination, however, only extends to matters reasonably related to the subject matter of direct-examination. *See Brown v. United States*, 356 U.S. 148, 154-55, 78 S.Ct. 622, 626-27, 2 L.Ed.2d 589 (1958);

McGautha v. California, 402 U.S. 183, 215, 91 S.Ct 1454, 1471, 28 L.Ed.2d 74 (1971). Had Appellant testified about her good character, cross-examination regarding specific instances of conduct would have been proper. *Douglas v. State*, 1997 OK CR 79, ¶ 24, 951 P.2d 651, 663.

We find, therefore, that this method of inquiry into specific instances of conduct was error. The error, however, did not affect the finding of guilt in this case. Appellant was charged with murder and intent was hotly contested. The jury determined that the elements of first degree murder were not present, and convicted Appellant of the lesser crime of manslaughter. The evidence was overwhelming. We cannot find that irregular procedure did not affect the sentence prescribed by the jury. We, therefore, reverse Appellant's sentence and remand the case to the district court for resentencing. Remand for resentencing cures any potential error from the related sub-propositions in this proposition.

In proposition three, we find that Appellant made objections to these photographs thus we review for an abuse of discretion. The trial court's decision in admitting these photographs will not be disturbed absent an abuse of that discretion. *Pickens v. State*, 2001 OK CR 3, ¶ 21, 19 P.3d 866, 876. "Whether to introduce photographs of a homicide victim is a decision largely within the trial court's discretion and this decision will not be disturbed absent an abuse of discretion." *Lockett v. State*, 2002 OK CR 30, ¶ 19, 53 P.3d 418, 425. We find there was no abuse of discretion here. The photographs showed the injuries suffered by the victim from different angles and perspectives, and

the photographs served to assist the medical experts and corroborate their testimony. The photographs also tended to corroborate police officer's testimony about the condition of the victim when they arrived on the scene.

We find, in proposition four, that "[a]llegations of prosecutorial misconduct do not warrant reversal of a conviction unless the cumulative effect was such [as] to deprive the defendant of a fair trial." *Warner v. State*, 2006 OK CR 40, ¶ 197, 144 P.3d 838, 891. Here there was no prosecutorial misconduct. As there were no objections to the alleged misconduct, we review for plain error only. To be entitled to relief under the plain error doctrine, an appellant must prove, first, that actual error occurred, second, which is obvious in the record, and, third, the error affected his substantial rights, meaning the error affected the outcome of the proceeding; moreover, this Court will not grant relief unless the error seriously affected the fairness, integrity or public reputation of the judicial proceeding or otherwise represents a "miscarriage of justice." *See Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

There was no plain error here. The prosecutor did not commit misconduct by commenting on the failure to produce material witnesses, as such comments are proper. *Paxton v. State*, 1993 OK CR 59, ¶ 72, 867 P.2d 1309, 1330. The prosecutor's misstatements of the facts were minor and did nothing to affect the outcome of the trial; therefore, no misconduct occurred. *Bland v. State*, 2000 OK CR 11, ¶ 101, 4 P.3d 702, 728. Lastly, the

prosecutor's cries for justice were not improper and did not deprive Appellant of a fair trial, thus no misconduct occurred.

As the trial was not affected by any of the prosecutor's alleged misconduct, no plain error occurred.

In proposition five, we find that Appellant must show that counsel's conduct was "outside the wide range of professionally competent assistance." *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). An appellant must also show that he was prejudiced by showing that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. Appellant has not shown that trial counsel's conduct fell outside the range of "professionally competent assistance."

In proposition six, we find that the remand for resentencing makes the excessive sentence argument moot. In proposition seven, we find that error has been identified in proposition two, and remand for resentencing is the remedy. There is no other error to accumulate; therefore, no further relief is warranted. *See Bell v. State*, 2007 OK CR 43, ¶ 14, 172 P.3d 622, 627.

DECISION

The Judgment of the district court is **AFFIRMED**. The Sentence, however, is **VACATED**, and the case is **REMANDED** 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 TULSA COUNTY
HONORABLE WILLIAM C. KELLOUGH, DISTRICT JUDGE

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OPINION BY: LEWIS, J.

SMITH, P.J.: Concurs

LUMPKIN, V.P.J.: Concurs in Part/Dissents in Part

JOHNSON, J.: Concurs

HUDSON, J.: Concurs in Part/Dissents in Part

LUMPKIN, VICE PRESIDING JUDGE: CONCURRING IN PART/DISSENTING IN PART

I concur in affirming Appellant's conviction but must, respectfully dissent to the reversal for resentencing. I agree that Appellant has shown that error occurred when the State improperly introduced character evidence through Appellant's testimony in rebuttal. 22 O.S.2011, § 701. However, in light of the largesse in the jury's verdict, I find that Appellant has not shown prejudice resulting from that error. *Pavatt v. State*, 2007 OK CR 19, ¶ 13, 159 P.3d 272, 279 (“[T]his Court is unable to grant relief unless the error complained of ‘has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.’”) (quoting 20 O.S.2011, § 3001.1). The error in the present case was harmless. *Marshall v. State*, 2010 OK CR 8, ¶ 58, 232 P.3d 467, 481.

In fact, the evidence in this case shows only that a cold-blooded Malice First Degree Murder took place. The facts in this case show that the Appellant had a design to affect the death of the victim and there was no issue of heat of passion, as defined by our statutes, to justify or support a First Degree Manslaughter conviction. See 21 O.S.2011, § 711(2). In spite of overwhelming evidence of First Degree Malice Murder, it appears that the jury took into consideration Appellant's claims of prior rapes by the victim when it reduced the crime to the offense of First Degree Manslaughter and only recommended a sentence of twenty-five (25) years. If this Court truly believes the calling of Appellant as a rebuttal witness and going into her character issues impacted

HUDSON, JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in affirming Harrison's conviction. I respectfully dissent, however, to vacating Harrison's sentence and remanding the case for resentencing. Error clearly occurred when Harrison was essentially forced to testify against herself as a rebuttal witness for the State. 22 O.S.2011, § 701. Disturbing as this error may be, the impact of this error under the circumstances of this case was undoubtedly harmless—both as to Harrison's conviction and sentence. *Cooper v. State*, 1995 OK CR 22, 894 P.2d 420, 422 ("This Court will not modify or reverse a conviction unless we find some prejudicial effect resulting from error."); 20 O.S.2011, § 3001.1. The character evidence elicited from Harrison during rebuttal was innocuous in light of the overwhelming evidence of guilt.

Under the circumstances of this case there are no grounds to conclude the error affected the sentence prescribed by the jury. The jury was not so overwhelmed from the error that it could not convict on a lesser included offense. The jury's ability to make nuanced determinations in connection with its guilt-innocence determination refutes the idea that some residual prejudice affected the jury's sentencing verdict. The majority wholly fails to identify the prejudice it believes swayed the jury's sentencing verdict. In this sense, the majority grants sentencing relief based on a showing of error without injury. This approach is inconsistent with our harmless error jurisprudence.