IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LORETTA MARJORIE HAWKS,	)	
	)	NOT FOR PUBLICATION
Appellant,	)	
vs.	)	No. F-2014-764
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

SMITH, PRESIDING JUDGE:

Loretta Marjorie Hawks was tried by jury and convicted of Count I, Murder in the First Degree in violation of 21 O.S.2011, § 701.7(A); Count II, Burglary in the First Degree in violation of 21 O.S.2011, § 1431; Count III, Kidnapping of Arthur Strozewski in violation of 21 O.S.2011, § 741; and Count IV, Kidnapping of Z.S. in violation of 21 O.S.2011, § 741, in the District Court of Cleveland County, Case No. CF-2012-1637.[1] In accordance with the jury's recommendation the Honorable Thad Balkman sentenced Hawks to life imprisonment (Count I); fifteen (15) years imprisonment (Count II); fourteen (14) years imprisonment (Count III); and fifteen (15) years imprisonment (Count IV), to run consecutively. Hawks must serve 85% of her sentences on Counts I and II before becoming eligible for parole consideration. Hawks appeals from her convictions and sentences on Counts I, III and IV.

Hawks raises four propositions of error in support of her appeal:

[1] Hawks was charged jointly with Eddie James Thompson and Sebastian Forest Shepherd. Each of those defendants was tried separately, and each received a sentence of life without parole.

I. The evidence was insufficient to support the verdicts of guilty on Counts 1, 3 and 4, violating Appellant's rights to due process under the 14th Amendment to the United States Constitution and art. II, § 7, of the Oklahoma Constitution.

II. Irrelevant character and sympathy testimony and argument, accusing Appellant of lying and materially mis-characterizing evidence contributed to an unreliable verdict and combined to violate Appellant's rights to fundamental fairness under the 14th Amendment to the United States Constitution and art. II, § 7, of the Oklahoma Constitution.

III. Admitting irrelevant and prejudicial information of Eddie Thompson's cell phone contacts violated Appellant's rights to fundamental fairness under the 14th Amendment to the United States Constitution and art. II, § 7, of the Oklahoma Constitution.

IV. Appellant was denied the effective assistance of counsel guaranteed her by the 6th and 14th amendments to the United States Constitution and art. II, §§ 7 and 20, of the Oklahoma Constitution.

In Proposition I, Hawks claims the State failed to show that she was present for, participated in, or aided and abetted co-defendants Thompson and Shepherd in, the murder or the kidnappings. An aider and abettor is a person who, though not present, is a principal to a crime; while mere presence or acquiescence is not enough, only slight participation in the charged offense is needed. *Glossip v. State*, 2007 OK CR 12, ¶ 39, 157 P.3d 143, 151; *Spears v. State*, 1995 OK CR 36, ¶ 16, 900 P.2d 431, 438. There need not be proof that a defendant participated in each and every element of an offense. *Rosemond v. United States*, 134 S.Ct. 1240, 1246-47, 188 L.Ed.2d 248 (2014). The State had to show that Hawks "procured the crime to be done, or aided, assisted, abetted, advised or encouraged the commission of the crime." *Banks v. State*, 2002 OK CR 9, ¶ 13, 43 P.3d 390, 397. Hawks argues that she herself did not have the intent necessary to convict her for these crimes. Aiding and abetting requires that a defendant intends to associate herself with the specific

crime charged, seeking to make it succeed. *Rosemond*, 134 S.Ct. at 1248. This may be shown by evidence that the defendant had knowledge, in advance, of her co-defendant's intent to commit the charged crime. *Rosemond*, 134 S.Ct. at 1249. The State had to show Hawks aided and abetted Thompson and Shepherd with the personal intent to commit kidnapping and murder, or with knowledge of the perpetrators' intent to commit those crimes. *Banks*, 2002 OK CR 9, ¶ 13, 43 P.3d at 397; *see also Johnson v. State*, 1996 OK CR 36, ¶ 20, 928 P.2d 309, 315.

The State argues that this Court expressly overruled *Johnson* on this issue, and implicitly overruled the language in *Banks* quoting *Johnson* on this issue, insofar as these cases required the State to show either personal intent or full knowledge of the perpetrator's intent. *Williams v. State*, 2008 OK CR 19, ¶ 85, n. 18, 188 P.3d 208, 225, n.18. However, despite the language in the footnote (arguably dicta), it is not at all clear that the Court intended in *Williams* to remove the intent element from aiding and abetting. After a thorough discussion in Williams' federal habeas appeal, the Tenth Circuit rejected this interpretation of note 18. *Williams v. Trammell*, 782 F.3d 1184, 1193-95 (10th Cir. 2015). Citing *Rosemond*, that Court noted that intent to facilitate the offense's commission was a basic requirement of aiding and abetting; the Court also noted that, while apparently overruling *Johnson* in note 18, this Court then applied the *Johnson* intent test to Williams. *Id.* at 1194. In the years since *Williams*, this Court has infrequently discussed aiding and abetting in published cases. In *State v. Heath*, we found that sufficient evidence supported a conclusion that the defendant aided and abetted a crime where "sufficient circumstantial evidence presented from which to infer that Heath was

well aware of the plan to rob Young and that she aided and assisted Atchison in carrying out this plan." *State v. Heath*, 2011 OK CR 5, ¶ 9, 246 P.3d 723, 725. In so doing, we applied an intent requirement for aiding and abetting. Similarly, in *Postelle*, we found sufficient evidence that an accomplice aided and abetted the crime when he left a loaded rifle with the defendants, "suspecting they might well be on their way to Swindle's house intending to shoot him." *Postelle v. State*, 2011 OK CR 30, ¶ 15, 267 P.3d 114, 126-27. This is in line with our longstanding acknowledgement that aiding and abetting has an intent requirement. In *Conover v. State*, we discussed the history of aiding and abetting as it applies to principals to a crime, rejecting the claim that a defendant charged with murder as a principal must himself personally have the specific intent to kill. *Conover v. State*, 1997 OK CR 6, ¶¶ 40-47, 933 P.2d 904, 914-16. We concluded jury instructions were proper where jurors were told "that in order to return a verdict of guilt they must find that Appellant's conduct caused Hardcastle's death and that he intended to take Hardcastle's life, *or* that Appellant aided and abetted co-defendant Welch's acts knowing of Welch's intent to take Hardcastle's life." *Id.* at ¶ 47, 933 P.2d at 916 (emphasis in original).

Jurors were correctly given the standard uniform jury instruction, which sets forth the Oklahoma requirements for aiding and abetting. OUJI-CR 2d 2-6 defines a principal:

> Merely standing by, even if standing by with knowledge concerning the commission of a crime, does not make a person a principal to a crime. Mere presence at the scene of a crime, without participation, does not make a person a principal to a crime.

> One who does not actively commit the offense, but who aids, promotes, or encourages the commission of a crime by another person, either by act or counsel or both, is deemed to be a principal to the crime if he/she knowingly did what he/she did *either with criminal intent or with knowledge of the other person's intent.* To aid or abet another in the commission of a crime implies a consciousness of guilt in instigating, encouraging, promoting, or aiding in the commission of that criminal offense. [Emphasis added.]

This instruction reflects Oklahoma law as found in *Conover* and subsequent cases. It also conforms to the *Rosemond* discussion of the intent requirement for aiding and abetting, as it requires that jurors find, at the least, that the defendant knew the perpetrator had the intent to commit the crime. The State agrees that the instruction sets forth the correct standard, including proof that a defendant aided or abetted another with knowledge of that person's intent to commit the charged crime. However, it is clear from the record that both prosecutors misunderstood the basic law of aiding and abetting, and continually communicated that misunderstanding to the judge and jury throughout the trial. The record is replete with colloquy in *voir dire* and comments in closing argument egregiously misstating the law of aiding and abetting. They consistently omitted the intent requirement for aiding and abetting, going as far as denying that the State had to prove intent; rather, the prosecutors discussed legal principles more suited to felony murder or conspiracy.

Defense counsel never objected to the prosecutors' misstatements of law or attempted to correct them for the jury. This failure to object does not waive this issue for review. Defense counsel properly demurred on the grounds that the State failed to prove intent for aiding and abetting, and the issue is preserved. Rather, the

failure to object contributed to the certainty that, despite the correct instructions, jurors could not have understood or correctly applied the law. Jurors were correctly instructed on the law, and we presume jurors will follow their instructions. *Ryder v. State*, 2004 OK CR 2, ¶ 83, 83 P.3d 856, 875. However, the correct instruction amounted to an isolated correct statement of the law, and was overwhelmed by the prosecutors' repeated misstatements of law. *Florez v. State*, 2010 OK CR 21, ¶ 8, 239 P.3d 156, 158. "Jurors' only frame of reference regarding the meaning of the instruction was the misstatement of law they [repeatedly] heard." *Id.* Given this barrage of misinformation, jurors never had a chance to correctly apply the law.

Hawks complains in this proposition that there was insufficient evidence to convict her of malice murder and kidnapping. As to the Count I charge of malice murder, the record shows that the real error here was the jury's inability to properly consider the evidence as it related to the instructions and the elements of the charged crime. This error is analogous to the one in *Pinkley v. State*, where jurors were incorrectly instructed on the charged crime and thus unable to consider the evidence correctly. *Pinkley v. State*, 2002 OK CR 26, ¶ 13, 49 P.3d 756, 760. Although jurors here were correctly instructed, they were unable to correctly apply the law. In *Florez*, where the prosecutor similarly egregiously misstated for jurors the meaning of a sentencing statute, the only issue was the sentence, the defendant received the minimum sentence, and no relief was required. *Florez*, 2010 OK CR 21, ¶¶ 8-9, 239 P.3d at 158-59. The same cannot be said of this case. Whether the State presented sufficient evidence to show that Hawks knew of her co-defendants' intent to commit malice murder is a question that should first be decided by the

jury, not this Court. Given the prosecutors' repeated misstatements of law, Hawks' jury was unable to properly decide this issue.

This defect, however, did not affect the jury's ability to consider the evidence as it related to Counts III and IV, the kidnapping charges. We find that jurors could infer from the evidence presented that Hawks knew that Thompson and Shepherd intended to kidnap the victims. Taking the evidence in the light most favorable to the State, any rational juror could find the elements of Counts III and IV beyond a reasonable doubt.

Count I must be reversed and remanded for a new trial, where a correctly informed jury may thoroughly consider the evidence as it relates to the law. This proposition is granted as to Count I, and that count is reversed and remanded for a new trial. The proposition is denied as to Counts III and IV, and those counts are affirmed. Hawks does not contest her conviction and sentence for Count II, which is affirmed.

We find in Proposition II that admission of evidence and argument did not improperly prejudice Hawks; given our resolution of Proposition I, we review this claim only for its effect on Counts III and IV. Hawks did not object to this evidence and these comments, 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. We review admission of evidence for an abuse of discretion. *Marshall v. State*, 2010 OK CR 8, ¶ 24, 232 P.3d 467, 474. 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. *Nelŏms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. Hawks complains of admission of evidence, discussion in opening statements, and argument related to witness observations of the victim during and immediately after the crime, Hawks' own character, and inferences jurors could draw from the circumstances surrounding the crime. This evidence was relevant, as it set the scene for the crime and helped jurors understand what occurred. 12 O.S.2011, § 2401. The remarks in opening statement correctly described evidence the State presented to the jury. *Young v. State*, 2000 OK CR 17, ¶ 40, 12 P.3d 20, 36. Use of this evidence in closing argument was within the wide range afforded to parties to discuss the evidence and inferences from it. *Taylor v. State*, 2011 OK CR 8, ¶ 55, 248 P.3d 362, 379. Hawks also complains about testimony from the victim's ex-wife describing telling the children about their father's death, and describing her feelings on entering the crime scene afterwards. Hawks also complains about evidence of her personal appearance on the night of the crimes. While this evidence appears tangentially relevant, at best, to any issue at trial, Hawks fails to show unfair prejudice from its admission, and from its use in argument. In Proposition I, we reviewed the consequences from the State's misstatements of law regarding Hawks' status as an aider and abetter. We conclude that, as to Counts III and IV, the misstatements of law did not unfairly prejudice Hawks, as sufficient evidence was present from which jurors could infer she knew of the intended kidnappings. This proposition is denied.

We find in Proposition III that admission of irrelevant evidence from Thompson's phone did not affect Hawks' trial; given our resolution of Proposition I, we review this claim only for its effect on Counts III and IV. The State admitted a report listing all of the contents of Thompson's phone,[2] including the Internet sites he frequently visited.[3] Hawks did not object to this exhibit and we review for plain error. *Barnard*, 2012 OK CR 15, ¶ 13, 290 P.3d at 764. Relevant evidence is that which tends to make any material fact more or less probable. 12 O.S.2011, § 2401. The record does not support a finding that this evidence was relevant to any issue at trial. However, the record also does not support Hawks' claim that this exhibit was inflammatory and unfairly prejudicial. She argues jurors might have used this evidence of Thompson's unsavory character to conclude she would have known he was a bad person and likely to commit kidnapping. Prosecutors did not mention the contents of this exhibit in closing argument. Before its admission, jurors had heard that Thompson was recently released from prison, participated in stabbing the victim dozens of times, fled the scene, and when captured, he was soaked in the victim's blood – all relevant, admissible evidence which spoke far more eloquently to Thompson's character than the contents of his phone. Hawks has not shown that erroneous admission of this evidence had any effect on the jury's decision. As admission of the evidence did not affect the outcome of the proceeding, there is no

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[2] Logs recording calls between Hawks and Thompson over the two months preceding the crime and of calls made between midnight and 3:52 a.m. on August 30 were admitted without objection. Hawks does not complain about admission of this evidence, which was relevant.

[3] These included "American Indian Mafia", several "Bang" sites including "Bangz White Gurl", "Freaks Only", "Guns", "Legalize Marijuana", "Lesbians", and "Lil G aka Lil Gangster (Double 9 Records)", as well as twelve entries for alcohol sites.

prejudice, and there is no plain error. *Barnard*, 2012 OK CR 15, ¶ 13, 290 P.3d at 764. This proposition is denied.

We find in Proposition IV that trial counsel was not ineffective; given our resolution of Proposition I, we review this claim only for its effect on Counts III and IV. Hawks must show counsel's performance was deficient, and that she was prejudiced by the deficient performance. *Miller v. State*, 2013 OK CR 11, ¶ 145, 313 P.3d 934, 982; *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Counsel's acts or omissions must have been so serious as to deprive Hawks of a fair trial with reliable results. *Harrington v. Richter*, 562 U.S. 86, 104, 131 S.Ct. 770, 787-88, 178 L.Ed.2d 624 (2011). She must show she was prejudiced by counsel's acts or omissions. *Williams v. Taylor*, 529 U.S. 362, 394, 120 S.Ct. 1495, 1513-14, 146 L.Ed.2d 389 (2000); *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067. Where a defendant fails to show prejudice, we will dispose of a claim of ineffective assistance on that ground. *Marshall*, 2010 OK CR 8, ¶ 61, 232 P.3d at 481.

We found in Proposition II that instances of evidence and argument were either properly admitted or did not prejudice Hawks. We found in Proposition III that Hawks was not prejudiced by admission of irrelevant evidence from Thompson's phone. As Hawks cannot show prejudice from counsel's failure to object to this evidence and argument, we will not find trial counsel ineffective. Hawks also argues that, although the record shows trial counsel understood that the crucial issue was her knowledge or intent as an aider and abettor, he did not

argue this to the jury; instead, she says, counsel suggested hypothetical events for which he admitted he had no evidence, and made an argument which opened the door to the State's suggestion to jurors that Hawks' failure to call her children in her defense was evidence of her guilt. The record does not support this claim. Hawks fails to show prejudice from defense counsel's closing argument, and we will not find counsel ineffective. Hawks also claims trial counsel failed to impeach State witnesses with court documents regarding criminal charges related to their veracity. The record contains nothing to support these claims. Proposition IV is denied.

In connection with her argument that trial counsel should have discovered and used evidence of charges filed against two State witnesses, Hawks filed a Rule 3.11(B) motion for an evidentiary hearing. There is a strong presumption of regularity in trial proceedings and counsel's conduct, and Hawks' application and affidavits must contain sufficient information to show by clear and convincing evidence the strong possibility that trial counsel was ineffective for failing to identify or use the evidence at issue. Rule 3.11(B)(3)(b)(i), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016). In deciding whether she meets this test, we must "thoroughly review and consider Appellant's application and affidavits along with other attached non-record evidence." *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905. The Rule 3.11 standard set out above is easier for a defendant to meet than the *Strickland* standard, as a defendant must only provide clear and convincing evidence that there is a strong possibility counsel was ineffective. *Id.* at ¶ 53, 230 P.3d at 905-06. A Rule 3.11 motion must be accompanied by affidavits supporting the allegation of ineffective assistance of

counsel. *Simpson*, 2010 OK CR 6, ¶ 53, 230 P.3d at 905. Although Hawks relies on the information submitted with this motion to support Proposition IV, we do not consider it as part of the appeal, but only in the context of the Rule 3.11 motion. Rather than affidavits, Hawks provides copies of court records from Oklahoma County District Court cases (Exhibits A-G), and certified copies of court records from the Cleveland County District Court. She asks that this Court take judicial notice of the adjudicative facts in Exhibits A-G. 12 O.S.2011, § 2202.

Hawks' trial began on June 11, 2014, in the District Court of Cleveland County. She argues that trial counsel should have found a record of a second degree burglary charge filed against witness Miller, under another name, in Oklahoma County, on April 28, 2014 – six weeks before Hawks' trial. Hawks also argues that trial counsel should have found charges of obtaining hydrocodone by fraud against witness Smith, filed in 2010 in another county; Smith received a deferred sentence for these charges, which were ultimately dismissed. Appellate counsel also appears to suggest that trial counsel should have discovered Smith was charged with the same offense in Cleveland County, two months after Hawks' trial ended. Hawks argues that trial counsel should have impeached these witnesses with these charges, because the witnesses provided crucial evidence of Hawks' statements regarding the crimes. Assuming without deciding that this evidence, if found, could have been used to impeach the witnesses (a matter far from certain), Hawks fails to show, by clear and convincing evidence, that there is a strong possibility counsel was ineffective for failing to discover it.

Also in connection with this proposition, Hawks moves for a new trial based on the newly discovered evidence of Smith's 2010 and 2014 charges. In reviewing this claim we consider whether: (a) the evidence could have been discovered before trial with reasonable diligence; (b) the evidence is material; (c) it is cumulative; and (d) there is 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. Smith's 2010 charges were ultimately dismissed, and the 2014 charges, which were filed after trial counsel withdrew, could not have been discovered before Hawks' trial. However, Hawks fails to show either that the evidence was material or that, had it been used at trial, there was a reasonable probability that it would have changed the outcome. Hawks' request for an evidentiary hearing and motion for new trial are denied.

DECISION

The Judgments and Sentences of the District Court of Cleveland County as to Counts II, III and IV are **AFFIRMED**. The Judgment and Sentence of the District Court of Cleveland County as to Count I is **REVERSED and REMANDED** for a new trial. Appellant's Application to Supplement Appeal Record or alternatively 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. (2016), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY
THE HONORABLE THAD BALKMAN, DISTRICT JUDGE

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

LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in affirming the Judgment and Sentences in Counts II, III and IV. However, I dissent to reversing the conviction in Count I. The opinion reverses the conviction based upon the proposition that the jury was unable to properly consider the evidence in light of the prosecutor's argument and misstatement of the law of aiding and abetting. The record shows this proposition is not only being raised for the first time on appeal, but that it is raised by this Court *sua sponte.* This Court's role is to adjudicate issues raised, not to advocate issues not raised.

No challenges to the prosecutor's statements of the law of aiding and abetting were raised at trial or on appeal. In Proposition I of the appellate brief, under which the majority finds relief is warranted, Appellant challenges the sufficiency of the evidence showing that she was present for, participated in, or aided and abetted her co-defendant in the murder and kidnappings. Appellant does not argue that the jury was unable to properly consider the evidence against her in light of the prosecutor's argument. Further, no claims of prosecutorial misconduct were raised in the appellate brief. Under Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016), the failure to specifically raise a proposition of error in the appellate brief waives the issue for our review. The role of an appellate court and its judges is to adjudicate the propositions of error presented based on the record developed at the trial court and through the attorneys of record. It is not the role of this Court to create reasons for relief. Therefore, as the basis for

relief in this case was not raised in the appellate brief it is not properly before us and cannot serve as a basis relief.

However, even if we were to address the issue raised by the Court, there is no legal reason supporting relief. As the opinion admits, the jury was given the correct uniform instruction on the law of aiding and abetting. The jury was also informed that the law they were to apply in the case was set forth in the jury instructions. In *Boyde v. California*, 494 U.S. 370, 384, 110 S.Ct. 1190, 1200, 108 L.Ed.2d 316 (1990), the United States Supreme Court said:

> ... arguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law.

Further, it is a well established principle that juries are presumed to follow their instructions. *Sanders v. State*, 2015 OK CR 11, ¶ 15, 358 P.3d 280, 285.

In light of this legal presumption, the absence of any objections by defense counsel at trial to the prosecutor's statements, and as we were not in the jury room during deliberations, it is not only a bit presumptuous of us to find the jury was unable to properly apply the law correctly given to them, it is contrary to the law and the record before us. Therefore, I find no legal reason to reverse the conviction in Count I and would therefore affirm that conviction.

LEWIS, J., CONCUR IN PART AND DISSENT IN PART:

I concur in the result to affirm Counts 3 and 4. However, I respectfully dissent from the reversal of the conviction for first degree murder in Count 1; and for reasons stated below, I would reverse and dismiss Appellant's conviction for first degree burglary. The Court today holds that an erroneous line of prosecution statements and arguments, which passed entirely without objection from defense counsel, effectively nullified proper jury instructions and resulted in an unjust conviction for first degree murder. This conclusion exaggerates the influence of trial lawyers on the minds of jurors and inverts the proper standard of prejudice for plain error. The result is a needless reversal based on judicially handpicked errors that had no serious effect on the fairness, integrity, or public reputation of the trial proceedings. *Simpson v. State*, 1994 OK CR 40, ¶ 30, 876 P.2d 690, 701.

The flawed case for reversal ignores or distorts the everyday realities of trial. The presumption that trial jurors follow instructions is warranted by logic and confirmed by experience. Jurors are not so easily carried away by the fleeting, forensic gloss on instructions that yields so readily to critical reappraisal in appellate court chambers. Nor were the court's instructions here a mere "isolated correct statement" of law that was helplessly "overwhelmed" by the closing arguments. The trial court distributed copies of its instructions to jurors, read them aloud in open court, and allowed jurors to "take a copy with you to the jury room." Jurors had the trial court's instructions to guide them throughout deliberations.

Attorneys make arguments at the conclusion of exhausting trials. In these final throes, their discussions of complex legal doctrine and voluminous testimony are invariably partisan, sometimes inartful, and almost necessarily, incomplete. Proper instructions, timely objections, and curative admonitions if appropriate, are the time-honored correctives for the inevitable imperfections in counsels' statements of law or fact to the jury. The Court said in *Simpson* that:

> the decision to correct plain error lies within the sound discretion of the appeals court, and the court should not exercise that discretion unless the error *seriously affects the fairness, integrity or public reputation of judicial proceedings.* In other words, the concept of justice encompasses not only that the innocent should go free, but also *that the guilty should be held accountable.*

Id., 1994 OK CR 40, ¶ 30, 876 P.2d at 701 (*quoting United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 1776-77, 123 L.Ed.2d 508 (1993)(quotations and brackets omitted; emphasis added).

Appellant is clearly guilty of first degree murder. She tacitly concedes that she was justly convicted of first degree burglary—the only count which appellate counsel has declined, somewhat cunningly in my opinion, to challenge on appeal. Even assuming the "real error" divined by the majority occurred in this trial, Appellant's obvious guilt of felony murder, during and in the commission of first degree burglary, renders the alleged errors affecting the element of malice aforethought entirely harmless. Her murder conviction should be affirmed.

First degree murder in Oklahoma is but one offense. *Plunkett v. State*, 1986 OK CR 77, ¶ 21, 719 P.2d 834, 841; *Hain v. Gibson*, 287 F.3d 1224,

1231-32 (10th Cir. 2002). Malice aforethought murder, felony murder, or child abuse murder, for example, are merely different factual ways in which the single crime of first degree murder is committed. Whether an unlawful killing was with malice aforethought, in the commission of a felony, or as a result of child abuse "goes to the factual basis of the crime," but involves no distinct legal categories of guilt. *Powell v. State*, 1995 OK CR 37, ¶ 36, 906 P.2d 765, 775-76 (brackets omitted).

An information charging both malice aforethought murder and the commission of one or more enumerated felonies, *during which the victim's death resulted*, provides adequate notice that the defendant is liable to a first degree murder conviction on any factual basis alleged. *Munson v. State*, 1988 OK CR 124, ¶ 27, 758 P.2d 324, 332; *Hain*, 287 F.3d at 1232-34.[1] The constitutional requirement of jury unanimity applies only to the ultimate conclusion of guilt of the crime charged, *not* to a jury's findings of the factual means by which it was committed.[2] Due process is satisfied where the

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[1] *Lambert v. State*, 1994 OK CR 79, 888 P.2d 494 is not to the contrary. The Court there declined to follow *Munson's* adequate notice rule only because the accused, charged with malice murder and various felonies, elected to testify and admit the charged felonies while denying malice aforethought, and was thus "misled" by the information to his detriment. *See Lambert*, 888 P.2d at 504 fn. 1 (noting that Lambert's co-defendant "did not testify at trial, and is therefore unable to show any prejudice from the failure to charge felony murder in the information, as is present in Appellant's case"); *see also Hain*, 287 F. 3d at 1233-34 (agreeing that information charging malice murder and several predicate felonies was sufficient notice to afford due process in conviction for felony murder).

[2] The Court in *Plunkett, supra,* said: "Here, there is a single crime charged, that is first degree murder. Whether or not it was committed with malice aforethought, or during the commission of a felony goes to the factual basis of the crime. The jury

elements of the crime charged were proven at trial. *Gilson v. State*, 2000 OK CR 14, ¶ 34, 8 P. 3d 883, 902 (*citing Powell, supra*).

Appellant was therefore lawfully charged with, and unanimously found guilty of, every factual element necessary to convict her of first degree burglary-murder.[3] The jury unanimously found the unlawful death of a human being when it convicted Appellant of murder;[4] and it unanimously found Appellant guilty of the first degree burglary *during which* that same human being was killed by her confederates.[5]

Even *if* the prosecutor's statements could have prejudiced the jury's finding of malice aforethought (which is open to serious doubt), they had no serious prejudicial effect on the remaining, unanimous findings establishing

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verdict was unanimous that the appellant committed the crime. Such a verdict satisfies due process."

[3] A person commits the crime of murder in the first degree, *regardless of malice*, when *that person or any other person* takes the life of a human being *during*, or *if the death of a human being results from*, the commission or attempted commission of first degree burglary. 21 O.S.2011, § 701.7(B)(emphasis added).

[4] The jury was instructed, pursuant to OUJI-CR(2d) No. 4-61: "No person may be convicted of murder in the first degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are: *First, the death of a human; Second, the death was unlawful*; Third, the death was caused by the defendant; Fourth, the death was caused with malice aforethought (emphasis added). The unlawful death of a human being here is beyond all doubt. Defense counsel conceded in closing argument that "[t]he evidence is pretty clear. [Appellant's co-defendant] went in through the garage door. It was open. Went upstairs. Stabbed Art 38 times. Killed him."

[5] The victim was fatally stabbed *during* the first degree burglary in which the Appellant participated by entering through a window around 3 a.m., tying up the family St. Bernard, and admitting her confederates to the victim's residence before leaving the scene. Appellant's failure to appeal her conviction for burglary also means that the *mens rea* element necessary to establish that crime is undisputed.

Appellant's guilt of first degree burglary-murder.[6] Because double jeopardy prohibits conviction for both first degree burglary-murder and the underlying burglary, I would simply vacate the burglary conviction, or remand the case with instructions to dismiss it, and otherwise affirm. *Munson v. State*, 1988 OK CR 124, ¶ 28, 758 P.2d 324, 332.[7]

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[6] Even the notion of modifying this murder conviction is a *non sequitur*. Appellant has been convicted of but one crime in the victim's death, first degree murder. The jury's unanimous factual findings are legally sufficient to sustain the judgment of murder; and to show that any supposed error affecting the finding of malice aforethought does not seriously affect the fairness, integrity, or public reputation of this outcome.

[7] Appellant is on notice, and remains in continuing jeopardy of, conviction for a charge of first degree burglary-murder. *Hain*, supra; *Lambert*, 888 P.2d at 505 (recognizing that should State obtain felony murder conviction at re-trial, trial court can abrogate conviction for the underlying felony to avoid double jeopardy); *see also, Alverson v. State*, 1999 OK CR 2, ¶ 83, 983 P.2d 498, 521 (holding that where the jury finds a defendant guilty of murder by explicit finding of malice aforethought, conviction for the underlying felony can be affirmed).