

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DELILA PACHECO,
)
)
 Appellant,)
vs.)
)
THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. F-2014-1029

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
APR 15 2016

S U M M A R Y O P I N I O N

MICHAEL S. RICHIE
CLERK

SMITH, PRESIDING JUDGE:

Appellant, Delila Ann Pacheco, was convicted by a jury in Cherokee County District Court, Case No. CF-2013-535, of First-Degree Child-Abuse Murder (21 O.S.2001, § 701.7(C)). On December 4, 2014, the Honorable Darrell G. Shepherd, District Judge, sentenced her to life imprisonment in accordance with the jury’s recommendation. Appellant must serve at least 85% of this sentence before being eligible for parole.

Pacheco raises six propositions of error in support of her appeal:

PROPOSITION I. THE STATE’S EVIDENCE WAS INSUFFICIENT TO PROVE ALL OF THE ESSENTIAL ELEMENTS OF FIRST DEGREE CHILD ABUSE MURDER; THEREFORE, MS. PACHECO WAS CONVICTED AND SENTENCED IN VIOLATION OF HER RIGHTS TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7 AND 20 OF THE OKLAHOMA CONSTITUTION.

PROPOSITION II. THE STATE’S USE OF AN UNQUALIFIED AND INEFFECTIVE INTERPRETER DURING THE TESTIMONY OF LONGINO PACHECO DENIED MS. PACHECO HER CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO CONFRONT THE STATE’S KEY WITNESS AGAINST HER.

PROPOSITION III. PROSECUTORIAL MISCONDUCT DENIED MS. PACHECO HER DUE PROCESS RIGHTS TO A FAIR JURY TRIAL.

PROPOSITION IV. THE ADMISSION OF INFLAMMATORY, IRRELEVANT, AND CUMULATIVE EVIDENCE DEPRIVED MS. PACHECO OF HER CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

PROPOSITION V. MS. PACHECO 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.

PROPOSITION VI. THE CUMULATIVE EFFECT OF ALL THE ERRORS ADDRESSED ABOVE DEPRIVED MS. PACHECO OF A FAIR TRIAL.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm. Appellant was convicted of intentionally using unreasonable and lethal force against two-year-old A.H. in the early morning hours of December 8, 2013. Appellant and her husband, Longino Pacheco, lived in rural Cherokee County with their three teenage children. A few months before the homicide, Appellant had obtained custody of A.H. and her three-year-old sister, H.H., who were relatives of Appellant. The child, who slept on the floor beside Appellant's bed, died from internal bleeding caused by blunt-force trauma to her liver; she also had many bruises on her face and body. Appellant told police that on the night in question, the child refused to go to sleep, and she (Appellant) had to get up several times to attend to her. By all accounts, the child had some behavioral problems; for example, she would often gag herself to get attention or to keep from falling asleep. Appellant's husband testified that he heard Appellant spank the child in the middle of the night, and that he heard the child say "owie" around the same time. Nevertheless, neither Appellant nor any other member of the family admitted to having any idea how the child was bruised, or what caused her death.

In Proposition I, Appellant complains because there was no direct evidence that she inflicted the victim's fatal injury, willfully or otherwise. Jurors are

entitled to make reasonable inferences from the attendant facts. Given the nature of the fatal injury, the considerable external bruising, and the undisputed fact that the child was in Appellant's care during the night, a rational juror could conclude, beyond any reasonable doubt, that Appellant inflicted the injuries and that they were not accidental in nature.¹ *Day v. State*, 2013 OK CR 8, ¶ 13, 303 P.3d 291, 298; *Drew v. State*, 1989 OK CR 1, ¶¶ 2-9, 771 P.2d 224, 226-27. The evidence, while largely circumstantial, is sufficient to support Appellant's conviction. Proposition I is therefore denied.

The State called Appellant's husband as a witness to offer his observations in the hours before the child's death. The witness's native language is Spanish. In Proposition II, Appellant complains because the trial court employed an unapproved person to interpret the witness's testimony. Rules regarding the certification of courtroom interpreters are found at 20 O.S. §§ 1701 *et seq.* Because Appellant had no objection to the interpreter's involvement below, we review only for plain error. Appellant must show an actual deviation from a legal rule which is plain and obvious, and which affected her substantial rights, *i.e.*, the outcome of the proceeding. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. There is no evidence that the interpreter used in this case had met the requirements of 20 O.S. §§ 1701 *et seq.* Yet we also find nothing in the record to suggest that the interpreter provided inaccurate translation of the witness's testimony, or that the translation prejudiced Appellant. In fact, the State responds by showing that the

¹ The autopsy showed that the victim's liver was lacerated by being pressed against the spine. The Medical Examiner testified that this fatal injury was consistent with having been firmly punched, kicked, or stomped while lying against a firm surface, such as a floor.

witness's trial testimony (as translated) was substantially the same as his testimony at preliminary hearing, where he spoke without the aid of an interpreter. There is no plain error here, and Proposition II is denied.

In Proposition III, Appellant claims the prosecutor committed error by misstating the law, misstating the facts, and evoking sympathy for the victim. Because she did not object to these comments below, we review only for plain error. *Hogan*, 2006 OK CR 19, ¶ 87, 139 P.3d at 935. The prosecutor did tell the jury, at the conclusion of the reading of the Information, that the crime of First Degree Murder is punishable by death, life imprisonment, or life imprisonment without parole. But this was not a misstatement of the law, despite the fact that the State was not seeking the death penalty in this particular case. Furthermore, Appellant fails to explain how she was prejudiced by this comment. From *voir dire* to closing instructions, the jury was properly instructed only on the two (non-capital) punishments available to it. Moreover, the jury recommended the minimum sentence (life imprisonment with the possibility of parole). *See Cooper v. State*, 1995 OK CR 22, ¶ 5, 894 P.2d 420, 422 (trial error was harmless where defendant received minimum sentence available). Similarly, Appellant shows no prejudice from the prosecutor's references to the victim as "little [A.H.]" or "little baby [A.H.];" the evidence supports the jury's verdict, and the sentence it recommended was the most lenient available. *Id.* Finally, the prosecutor's closing comments suggesting how Appellant might have inflicted the child's injuries were based on a reasonable interpretation of the evidence, and were therefore proper. *Hooper v. State*, 1997 OK CR 64, ¶¶ 52-54, 947 P.2d 1090, 1110.

Because we find no plain error in any of the prosecutor's comments, Proposition III is denied.

In Proposition IV, Appellant claims she was denied a fair trial by *post-mortem* photographs of the victim. Trial counsel objected to photographs showing the extensive bruising to the child's body, as well as to photographs of the child's liver. Admission of evidence is generally within the discretion of the trial court, and its ruling will not be disturbed unless the unfairly prejudicial effect of the evidence substantially outweighs probative value. *Webster v. State*, 2011 OK CR 14, ¶ 76, 252 P.3d 259, 280. In this case, the trial court took great pains to have the prosecutor and sponsoring witnesses lay a foundation for the relevance and necessity of each photograph at issue. Several photographs of the victim's body were appropriate, given the sheer number of bruises and their locations. *Browning v. State*, 2006 OK CR 8, ¶ 32, 134 P.3d 816, 837 (photos were not cumulative where they displayed different aspects of the victim's wounds). The two photographs of the child's liver (having been removed during autopsy) were not particularly gruesome. These photographs were probative because the fatal injury simply was not visible from the exterior of the body. *Cole v. State*, 2007 OK CR 27, ¶ 30, 164 P.3d 1089, 1096 (photos of victim's internal injuries, taken during autopsy, were probative since injuries were not otherwise visible). The trial court soundly exercised its discretion here, and is to be commended for its thoughtful handling of this evidentiary issue. Proposition IV is denied.

In Proposition V, Appellant complains that she was denied her right to the effective assistance of trial counsel. She faults trial counsel for (1) not objecting

to the prosecutor's comments raised in Proposition III; (2) not objecting to the use of an uncertified courtroom interpreter as discussed in Proposition II; and (3) not presenting certain evidence which might have implicated Appellant's husband as an alternative suspect in the crime. In connection with these last two claims, Appellant has filed a Notice of Extra-Record Evidence and Application for Evidentiary Hearing, pursuant to Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, 22 O.S., Ch. 18, App. (2016). To prevail, Appellant must show trial counsel provided professionally unreasonable assistance, and a reasonable probability of resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Hanson v. State*, 2009 OK CR 13, ¶ 35, 206 P.3d 1020, 1031.

As to the first claim, none of the prosecutor's comments complained of in Proposition III were found to be improper, and any objections to them would have been properly overruled. Trial counsel cannot be ineffective for failing to make meritless objections. *Eizember v. State*, 2007 OK CR 29, ¶ 155, 164 P.3d 208, 244. As to the last two claims, the extra-record materials Appellant offers simply do not suggest how she was prejudiced by the use of a non-approved courtroom interpreter, nor do they show a reasonable probability that, if trial counsel had utilized known information in a different manner, a jury would have suspected her husband as the real perpetrator of the crime and acquitted her of the charge. *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905-06. Proposition V is denied.

As to Proposition VI, having found only one potential error but no prejudice therefrom (see Proposition II), there can be no error by accumulation. *Hope v. State*, 1987 OK CR 24, ¶ 12, 732 P.2d 905, 908. Proposition VI is therefore denied.

DECISION

The request for an evidentiary hearing is **DENIED**, and the Judgment and Sentence of the District Court of Cherokee County is **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 CHEROKEE COUNTY
THE HONORABLE DARRELL G. SHEPHERD, DISTRICT JUDGE

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OPINION BY: SMITH, P.J.

LUMPKIN, V.P.J.: CONCUR
JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR IN RESULT
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