

- II. PROSECUTORIAL MISCONDUCT DEPRIVED APPELLANT OF A FAIR TRIAL AND FAIR SENTENCING PROCEEDING;
- III. APPELLANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL; and
- IV. CUMULATIVE ERROR DEPRIVED APPELLANT OF A FAIR TRIAL.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we find Proposition I has merit and that the case must be **REVERSED** and the matter **REMANDED** for **NEW TRIAL**.

We find in Proposition I that the trial court failed to sufficiently answer the jury's questions concerning Instruction 22—the uniform instruction defining principals and aiding and abetting. See OUJI-CR (2d) 2-6. And, as a result of such error, there is a reasonable likelihood the jury misapplied the instruction in reaching their guilty verdict.

Jury deliberations in the case began at 10:10 a.m. on October 22, 2015.

At 2:42 p.m. the jury sent out the following question:

Instruction 22: Does criminal intent or commission of a crime refer strictly to the case at hand *or any crime committed?*

(Emphasis added). With the approval of the parties, the trial court responded:

Please refer to Instruction 23 for guidance. All of your instructions are applicable to this case. You have all the information necessary to complete your deliberations. Good luck in your deliberations.

The jury returned to its deliberations only to send out a second question regarding Instruction 22 just 11 minutes later asking:

Does the admission that he was there to commit a crime not listed in the current charges make him principle (sic) to the charged

crime if he is deemed to not have prior knowledge of the crime charged?

(Emphasis added). With the parties' approval, the trial court responded:

You have all the information necessary to complete your deliberations.

Approximately an hour later at 4:22 p.m., the jury sent out a third question reporting the jury was "unanimous on Count 1 but hung on Count 2" and inquiring about their options. In response, the trial court gave the *Allen*² instruction—which comported with OUJI-CR (2d) 10-11—to the jury in open court. The jury later returned with its guilty verdict on Count 1—Assault and Battery with a Deadly Weapon—and not guilty verdict on Count 2—Possession of a Firearm, After Former Conviction of a Felony.

As Appellant did not object to Instruction 22 or the Court's proposed responses to the jury's questions, he has waived all but plain error review on appeal. *Cannon v. State*, 1998 OK CR 28, ¶ 34, 961 P.2d 838, 849. Under the plain error test, an appellant must show an actual error, that is plain or obvious, affecting his substantial rights. *Jackson v. State*, 2016 OK CR 5, ¶ 4, 371 P.3d 1120, 1121. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*; *Stewart v. State*, 2016 OK CR 9, ¶ 12, 372 P.3d 508, 511.

Whether a trial court answers a jury question is, of course, left to the trial court's broad discretion. *Smallwood v. State*, 1995 OK CR 60, ¶¶ 83-84,

² See *Allen v. United States*, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896).

907 P.2d 217, 238; *Boling v. State*, 1979 OK CR 11, ¶ 4, 589 P.2d 1089, 1091; see also 22 O.S.2011, § 894 (allowing for additional instruction during deliberations if there be a disagreement between the jurors as to any part of the testimony “or if they desire to be informed on a point of law arising in the cause[.]”). In the present case, while Instruction 22 in and of itself accurately stated the applicable law and is seemingly unambiguous, the record clearly demonstrates that the jury nonetheless found the instruction to be unclear or confusing. The jury’s second question in particular demanded additional legal guidance and clarification. “When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy.” *Bollenbach v. United States*, 326 U.S. 607, 612–13, 66 S. Ct. 402, 405, 90 L. Ed. 350 (1946). Unfortunately, the trial court’s responses to the jury’s questions in this case did not adequately rectify the jury’s confusion. The trial court’s response to the jury’s first question—referring the jury to Instruction 23 defining criminal intent pursuant to OUJI-CR 2-9—likely added to jury’s confusion and failed to address the jury’s questions. Moreover, the trial court’s response to the jury’s second question offered no discernible guidance or direction despite the jury’s readily apparent and alarming confusion. To clear away the jury’s confusion here, a supplemental instruction to the jury simply advising that an admission to a crime not listed in the current charges could not be utilized to convict Appellant was needed.

Thus, the trial court’s responses to the jury’s questions did not sufficiently clarify Instruction 22 for the jury. In so finding, we caution that

our decision in no way should be read to say that trial judges are required to answer all jury questions with the specificity needed here. Rather, this case presents an extremely unique set of circumstances the likes of which will rarely occur.

We must next determine whether this failure resulted in a reasonable likelihood that the jury misapplied Instruction 22. See *Waddington v. Sarausad*, 555 U.S. 179, 190–91, 129 S. Ct. 823, 831, 172 L.Ed.2d 532 (2009) (to show a federal constitutional error due to an ambiguous jury instruction, a defendant must show (1) the instruction was ambiguous; and (2) there was a reasonable likelihood the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt); *Boyde v. California*, 494 U.S. 370, 380, 110 S. Ct. 1190, 1198, 108 L. Ed. 2d 316 (1990) (proper inquiry for claim that an instruction is ambiguous and thus subject to an erroneous interpretation is whether there is a “reasonable likelihood” that the jury has misapplied the challenged instruction in an unconstitutional manner); *Williams v. State*, 2001 OK CR 9, ¶¶ 75-78, 22 P.2d 702, 721-22 (applying the “reasonable likelihood” standard to determine whether jurors misinterpreted the trial court’s instructions). Although it is conceivable that the jury’s guilty verdict may have had a proper basis, due to the jury’s undeniable confusion we cannot ignore the reasonable likelihood that their verdict rested on a misapplication of Instruction 22.

The jury was clearly confused and struggling to reconcile the State's evidence with Appellant's testimony.³ As noted above, following the jury's second question, the jury reported that they were "unanimous on Count 1 but hung on Count 2." The trial court instructed the jury pursuant to OUJI-CR 10-11 (*Allen Charge*), and approximately an hour later the jury returned a not guilty verdict on Count 2—Possession of a Firearm AFCF. Based on this verdict, it is only logical to conclude that the jury determined Appellant was not in possession of a gun that night, and hence, was not the shooter. Thus, to find Appellant guilty of Count 1—Assault and Battery with a Deadly Weapon—the jury had to find Appellant was a principal to the crime pursuant to Instruction 22. In light of the jury's clear and unresolved confusion regarding Instruction 22, there is a reasonable likelihood that one or more of the jurors determined Appellant was a principal based solely upon his admission that he was at victim's house that night to purchase methamphetamine. Thus, we find plain error occurred.

DECISION

The Judgment and Sentence of the district court is **REVERSED** and **REMANDED** for **NEW TRIAL**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY

³ The jury's confusion was likely ignited by (1) evidence that two, possibly three, other unknown individuals were present and involved in some manner with the shooting incident; (2) the jury's struggle to reconcile Jerome's and Tresa's testimony with that of Appellant; and (3) Appellant's admission that he went to the victim's house to purchase methamphetamine.

THE HONORABLE JAMES M. CAPUTO, DISTRICT JUDGE

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OPINION BY: HUDSON, J.
LUMPKIN, P.J.: DISSENTS
LEWIS, V.P.J.: CONCUR IN RESULTS
JOHNSON, J.: NOT PARTICIPATING
SMITH, J.: CONCUR

LUMPKIN, JUDGE: DISSENTING

I must respectfully dissent. Neither *Bollenbach v. United States*, 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350 (1946), nor *Waddington v. Sarausad*, 555 U.S. 179, 129 S.Ct. 823, 172 L.Ed.2d 532 (2009), set forth a standard requiring the trial court to “adequately rectify the jury’s confusion,” as is applied in the present Opinion. Instead, this standard is made of whole cloth.

In *Bollenbach*, the United States Supreme Court determined that the trial court’s “erroneous presumption” instruction required relief. *Id.*, 326 U.S. at 611, 614, 66 S.Ct. at 404, 406. After the jury became deadlocked, one of the jurors asked if the charged act of conspiracy could be completed after the crime is committed but the trial judge failed to answer the question and made some unresponsive comments. *Id.*, 326 U.S. at 609, 66 S.Ct. at 403. When the jury later asked: “If the defendant were aware that bonds which he aided in disposing of were stolen does that knowledge make him guilty on the second count”, the trial court erroneously informed the jurors that “possession of stolen property in another State than that in which it was stolen shortly after the theft raises a presumption that the possessor was the thief and transported stolen property in interstate commerce, but that such presumption is subject to explanation and must be considered with all the testimony in the case.” *Id.*, 326 U.S. at 609, 66 S.Ct. at 404. The Supreme Court stated:

When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy. In any event, therefore, the trial judge had no business to be ‘quite cursory’ in the circumstances in which the jury here asked for supplemental

instruction. But he was not even 'cursorily' accurate. He was simply wrong.

Id., 326 U.S. at 612–13, 66 S.Ct. at 405 (emphasis added). In concluding that there was a “manifest misdirection” in the circumstances of the case requiring relief, the Supreme Court noted that for seven hours the jury was unable to reach a verdict but reached a verdict of guilty five minutes after the “erroneous presumption” instruction. *Id.*, 326 U.S. at 614, 66 S.Ct. at 406. Because the trial court did not give an erroneous presumption instruction and the instructions accurately stated the law in the present case, *Bollenbach* is distinguishable from the present case.

In *Waddington*, the Supreme Court determined what was necessary to show constitutional error from a jury instruction quoting a state statute. *Id.*, 555 U.S. at 190, 129 S.Ct. at 831.

Even if there is some ambiguity, inconsistency, or deficiency in the instruction, such an error does not necessarily constitute a due process violation. Rather, the defendant must show both that the instruction was ambiguous and that there was a reasonable likelihood that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt. In making this determination, the jury instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record. Because it is not enough that there is some slight possibility that the jury misapplied the instruction; the pertinent question is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.

Id., 555 U.S. at 190–91, 129 S.Ct. at 831–32 (quotations and citations omitted).

Since Appellant has not shown that the challenged reference to the existing instruction was so ambiguous that there was a reasonable likelihood that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt, *Waddington* is also distinguishable from the present case.

I note that the Court has placed an especially troubling circumstance upon the trial courts in this state. Although the Opinion correctly observes that trial judges are not required to answer all jury questions with specificity, the Court requires trial judges to ascertain when a jury finds an instruction to be unclear or confusing. Why else would the jury ask a question in the first place? Every jury question involves a request for clarity or resolution of confusion. By limiting this requirement to the unique set of circumstances of this case, the Opinion only restricts its application to cases involving more than one jury question. This Court should adhere to the long standing principle that jury instructions are sufficient when, read as a whole, they state the applicable law. *Jones v. State*, 2009 OK CR 1, ¶ 63, 201 P.3d 869, 886; *Hogan v. State*, 2006 OK CR 19, ¶ 39, 139 P.3d 907, 923; *McGregor v. State*, 1994 OK CR 71, ¶ 23, 885 P.2d 1366, 1380. That is the rule which this Court has used when it has applied the “reasonable likelihood” standard from *Boyd v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.ed.2d 316 (1990). See *Williams v. State*, 2001 OK CR 9, ¶¶ 75-78, 22 P.3d 702, 722 (noting that instruction was correct statement of law in rejecting challenge under *Boyd*).

The trial court did not give an incorrect instruction in the present case. Instead, the trial judge referred the jury to instruction number 23 which dealt with criminal intent. See Inst. No. 2-9, OUJI-CR(2d) (Supp.2016). This instruction accurately stated the law as did the other instructions in the case. As neither *Bollenbach* nor *Waddington* apply to the present case, we presume the jury followed the trial court's instructions. *Smith v. State*, 2013 OK CR 14, ¶ 38, 306 P.3d 557, 571. As such, I find that Appellant has not shown the existence of an actual error that is plain or obvious. *Tollett v. State*, 2016 OK CR 15, ¶ 4, 387 P.3d 915, 916.

I further note that the Opinion makes too much of the jury's determination of guilt in Count 1 but acquittal in Count 2. Consistency in the verdicts is not necessary. *Gray v. State*, 1982 OK CR 137, ¶ 20, 650 P.2d 880, 884.

The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.

Dunn v. United States, 284 U.S. 390, 393, 52 S.Ct. 189, 190, 76 L.Ed. 356 (1932). "That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters." *Id.*, 284 U.S. at 394, 52 S.Ct. at 191. Instead of applying our existing law the Court seeks to divine the unstated intent and rationale of the jury, which is not the role of this Court.

Appellant has not shown plain error in the instructions in the present case. As sufficient evidence supports Appellant's conviction, the judgment and sentence should be affirmed.