

taken from her purse and threatened to harm them if she spoke about the robbery. Beyond that, Redhat recalled little due to the beating she took and the alcohol she'd consumed that night. However, shortly after the incident, she told one officer that one of the men had threatened to rape her anally if she talked.

Rodney Flores lived across the street from the victim. At the time of the incident, Flores was outside working on his car. He heard gunshots coming from Hernandez's home, then saw three men running from the house to a minivan parked a few houses away. The men jumped inside the minivan and backed away from the crime scene. (Another neighbor also saw these three men running from the home and jumping into a van.) Flores called 911, then went to help Hernandez. Upon entering the home, he found Hernandez and his cousin had been beaten and bound about the hands and feet with duct tape. Hernandez had also been shot and appeared dead.

Officers found evidence of a forced entry and a possible robbery (pulled out drawers, opened cabinets, unwrapped foil packages from the freezer).

The evidence connecting Appellant to the crime came primarily from Appellant's girlfriend Rachel Prior. Prior testified that Appellant, who was unemployed, and his cousin, owner of a minivan, left that night with the stated goal to "make some money." Appellant kept two guns in Prior's bedroom. He returned at about ten p.m., went into the bedroom briefly, then left in a hurry.

According to Prior, Appellant returned between 2 and 3 a.m. He awoke her by placing a gun to her head, then began accusing her of cheating. When she twice denied this accusation, Appellant twice fired a round into the ceiling.

Appellant later calmed down and told Prior he, his cousin, and a third man had gone in the minivan to rob a home that supposedly had a great deal of drugs and money inside. Appellant thought he might have killed someone. He told Prior that after they'd broken into the home, the man would not say where the drugs and money were, so they beat everyone up. Appellant said he'd kicked the woman so hard that she excreted feces onto his boot, then showed Prior the stain. He told Prior they'd threatened to anally rape the woman if she told anyone. When the man kept staring at his face, Appellant fired a shot, then his accomplices shot the man. They then left in the minivan, driving backwards down the street.

Prior later found a pistol inside a red stocking cap in the shed behind her house while cleaning. Her uncle called police, who came and retrieved the gun. Later, Prior told police about what Appellant had told her that night. The gun found at Prior's home matched bullet casings and a projectile found at the crime scene, and DNA on the gun's trigger positively matched Appellant's DNA.

In proposition one, Appellant claims he was denied a fair trial by the admission of highly prejudicial charts of a boot/bruise comparison into evidence. Appellant claims the State was wrongly allowed to make comparisons of a shoe-print shaped bruise found on the decedent to an overlay of a print from a "sample" boot. Appellant alleges prejudice because the State never made any connection between Appellant and the boot.

The boot in question did not belong to Appellant; it had been purchased by a police detective at a local store with the assistance of Appellant's

girlfriend. The evidence at trial indicated the victim had been battered by someone using a pair of “Lugz” brand boots. Ms. Prior indicated that Appellant owned such a pair of boots and was wearing them on the night in question. When those boots were not recovered, Prior helped pick out a similar boot, as she’d helped Appellant buy the boots from Shoe Carnival. According to Prior, the boots were the same brand and similar, to the ones Appellant wore on the night in question, though not necessarily identical.

The State argues, and the record indicates, that the purchased boots were offered as demonstrative evidence. That is, no one was claiming that these were the boots used at the crime scene that night. Rather, the boots were used to assist the State in visually presenting its theory of the case.¹ Appellant’s claims of prejudice or misleading the jury on this point are overblown. The admissibility of demonstrative evidence is a question of legal relevance within the sound discretion of the trial court, whose ruling will not be disturbed on appeal absent an abuse of discretion. *Owens v. State*, 1987 OK CR 24, 747 P.2d 959, 961. We find no abuse of that discretion here by using the purchased boot as demonstrative evidence of the boot used in the crimes.

Nor do we find the relevance of the boots or comparison charts used by the State’s expert was substantially outweighed by the danger of confusing the issues and misleading the jury. 12 O.S.2001, § 2403. The record does not support a claim that jurors were misled by this rather straightforward evidence. While the comparison charts were not particularly strong evidence of

¹ Due to their unique tread, the boots also had some circumstantial value that Appellant was

guilt, especially when compared to much stronger DNA and other evidence that clearly linked Appellant to the crimes, they were not misleading, nor were they prejudicial. And finally, Appellant's bold claim that the "science" behind this testimony somehow decided the verdict is without any serious merit.

In proposition two, Appellant claims plain error occurred when jurors were allowed to take the demonstrative boot/bruise comparison charts and the purchased boot with them as an exhibit during deliberations. Appellant claims this violated *Mitchell v. State*, 2006 OK CR 20, ¶ 59, 136 P.3d 371, which found plain error when the trial court allowed an expert's timeline, offered by the State as a "demonstrative aid," to be admitted as a regular exhibit and thus taken with the jury into deliberations. *See also, Harris v. State*, 2000 OK CR 20, ¶ 18, 13 P.3d 489, 495 (discussing error in allowing demonstrative aid to be used in jury deliberations); *Foster v. State*, 1986 OK CR 19, ¶ 6, 714 P.2d 1031, 1036 (where demonstrative baseball bat was admitted, but there was no prejudice when jurors were told it was not the actual bat used).

The parties spend most of their time here arguing over whether or not those charts (and the boots) qualify as demonstrative aids or as demonstrative evidence or as regular evidence.² But we need not decide that question today, as we find any conceivable error was harmless, as no prejudice resulted—even if these items are considered mere demonstrative aids that shouldn't have been

at the crime scene that night in that he had similar boots and such boots had been used on the victims.

² The boots and the comparison charts are probably best categorized as demonstrative evidence, insofar as they have at least some tendency to circumstantially connect Appellant, through Prior's testimony, to the crimes in question, as per *Foster*, although their primary purpose was demonstrative in nature, i.e., to visually present the State's theory of the case.

submitted to the jury. See *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, 695 (error which has no bearing on the outcome of the trial will not mandate reversal). The boot and boot/bruise comparisons were a sideshow in this trial, as compared to the main attraction of Prior's testimony, the murder weapon, and DNA evidence on the recovered gun. The evidence of guilt was strong, and the boot/bruise comparisons cannot be said to have somehow decided this verdict. Besides, *Mitchell* was reversed for a series of errors, and the demonstrative aid error was therein noted as rather minor.

In proposition three, Appellant complains about evidence of DNA testing from two beer bottles that were collected near the crime scene the day after the murder, near the place where the getaway minivan had been parked. The State tested DNA samples from those bottles and found a DNA "mixture" that could not exclude Appellant as a donor. The State presented those results during its case in chief, and the testimony was admitted.

Appellant claims this evidence was irrelevant and prejudicial because it came under the "cloak" of science. The State, however, claims the evidence made a pertinent fact more probable than would have been the case without the evidence and that the possibility of prejudice was extremely low. 12 O.S.2001, § 2401; 12 O.S.Supp.2003, § 2403.

We tend to agree with the State on this point. The State often presents such evidence in criminal trials in order to show a thorough investigation and that it is not attempting to somehow hide the ball.³ Again, this evidence, as

³ Indeed, had this evidence not been presented, it is likely the defense would have claimed a

compared to stronger evidence admitted in this trial, did not decide the verdict, tip the scales of justice, or somehow confuse the jury. Further, there was some circumstantial relevance to the evidence in that Appellant could not be excluded as a donor of the DNA. We therefore reject this proposition.

In proposition four, Appellant claims his jury should have been instructed about the applicability of the 85% rule to his case, as per *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273, 279. Appellant was tried before *Anderson* was published, however, so the trial court and attorneys were not cognizant of the changes that were about to take place.

The State claims that *Anderson* should not affect this case as it was decided after his trial and language in the opinion suggests a prospective only application.⁴ This Court, however, has granted similar relief under *Anderson* to appeals that were pending when the case was handed down and to regular appeals that were filed thereafter. Accordingly, although the conviction in this case stands, the case must be remanded to the District Court for resentencing.

Concerning proposition five, excessiveness of the sentence, we find that issue is now moot as per our resolution of proposition four.

shoddy investigation or that DNA on the bottle could not be conclusively linked to Appellant.

⁴ I would agree with the State. Indeed, as I pointed out in my concur in part/dissent in part writing in *Anderson*, because the jury sentenced Appellant to life imprisonment *without* the possibility of parole, jurors obviously decided that whatever parole policies might apply to a regular life sentence, Appellant should be ineligible. However, that ship has already sailed and my opinion on this point did not prevail. Thus, as per *stare decisis*, relief is appropriate.

DECISION

The conviction for First Degree Murder is hereby **AFFIRMED**, but the sentence is hereby **REVERSED** and **REMANDED** for resentencing. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE RAY C. ELLIOTT, DISTRICT JUDGE

APPEARANCES AT TRIAL

BERT RICHARD
ASSISTANT PUBLIC DEFENDER
OKLAHOMA COUNTY
PUBLIC DEFENDER'S OFFICE
320 ROBERT S. KERR
611 COUNTY OFFICE BUILDING
OKLAHOMA CITY, OK 73102
COUNSEL FOR APPELLANT

GREG MASHBURN & SUANN CARLSON
ASSISTANT DISTRICT ATTORNEYS
OKLAHOMA COUNTY
DISTRICT ATTORNEY'S OFFICE
320 ROBERT S. KERR
505 COUNTY OFFICE BUILDING
OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE

OPINION BY: LUMPKIN, P.J.
C. JOHNSON, V.P.J.: CONCUR
CHAPEL, J.: RECUSE
A. JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR IN RESULT

APPEARANCES ON APPEAL

KIM CHANDLER BAZE
ASSISTANT PUBLIC DEFENDER
OKLAHOMA COUNTY
PUBLIC DEFENDER'S OFFICE
320 ROBERT S. KERR
611 COUNTY OFFICE BUILDING
OKLAHOMA CITY, OK 73102
COUNSEL FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
THOMAS TUCKER
ASSISTANT ATTORNEY GENERAL
313 NE 21ST STREET
OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE

RB