IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DEANDRE BETHEL,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F-2014-336
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

JOHNSON, JUDGE:

A jury convicted Appellant Deandre Bethel in the District Court of Tulsa County, Case No. CF-2012-660, of First Degree Felony Murder (Count 1), in violation of 21 O.S.2011, § 701.7, Robbery with a Firearm (Count 2), in violation of 21 O.S.2011, § 801, Transporting Loaded Firearm in Motor Vehicle (Count 3), in violation of 21 O.S.2011, § 1289.13, and Public Intoxication (Count 4), in violation of 37 O.S.2011, § 8. The jury assessed punishment at life imprisonment with the possibility of parole on Count 1, five years imprisonment on Count 2, five months imprisonment and a $250.00 fine on Count 3, and thirty days imprisonment and a $100.00 fine on Count 4. The Honorable James M. Caputo, who presided at trial, sentenced Bethel accordingly and ordered the sentences on Counts 1 and 2 to be served consecutively with each other, but ordered Counts 3 and 4 to run concurrently

with each other and concurrently with Counts 1 and 2.[1] Bethel appeals, raising the following issues:

(1) whether the evidence was sufficient to support his convictions for Counts 1 and 2;

(2) whether his conviction and sentence for Robbery with a Firearm must be vacated because the same charge served as the underlying felony for his conviction of felony murder;

(3) whether the district court erred by failing to instruct the jury on the lesser offenses of Second Degree Depraved Mind Murder, Second Degree Felony Murder, and Accessory After the Fact;

(4) whether the district court failed to comply with the law governing contact with jurors during deliberations and failed to advise deadlocked jurors not to surrender their honest convictions concerning the weight of the evidence in order to reach a verdict;

(5) whether he was denied a fair trial by the admission of improper law enforcement opinion testimony that invaded the province of the jury;

(6) whether the admission of an audiotape recording of a jail phone call between Bethel and his mother resulted in a violation of his due process rights;

(7) whether improper victim impact evidence was admitted at trial;

(8) whether Counts 3 and 4 were improperly joined for trial with Count 1 and 2;

(9) whether the district court erred in denying his motion to suppress evidence; and

(10) whether he was deprived of the effective assistance of counsel.

Bethel also submits his Application for Evidentiary Hearing on Sixth Amendment claims.

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[1] Under 21 O.S.2011, § 13.1, Bethel must serve 85% of the sentences imposed on Counts 1 and 2 before he is eligible for parole.

Bethel's convictions on Counts 1, 3 and 4 are affirmed, but Count 2 must be reversed with instructions to dismiss for the reasons discussed below.

1.

Any rational trier of fact could find beyond a reasonable doubt that there was a forceful taking and carrying away of personal property in this case and that Bethel participated in the armed robbery during which the victim was killed. We find that the trial evidence was sufficient to sustain Bethel's convictions for First Degree Murder and Robbery with a Firearm based on the evidence presented in this case. *See Logsdon v. State*, 2010 OK CR 7, ¶ 5, 231 P.3d 1156, 1161; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204.

2.

Bethel's second claim has merit and requires relief. He claims that his conviction for robbery with a firearm must be dismissed because separate convictions for felony murder and the predicate felony in this case violate the Double Jeopardy Clause. *See Brown v. Ohio,* 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); *Harris v. Oklahoma,* 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977); *Perry v. State,* 1993 OK CR 5, ¶ 7, 853 P.2d 198, 200-201 (holding conviction for both felony murder and the underlying felony violates double jeopardy).

The State charged Bethel in Count 1 with the felony murder of Byron Ivory, Jr. that occurred during an attempted robbery involving Ivory and two

other alleged victims. The State charged Bethel in Count 2 with robbery with a firearm for the taking and asportation of personal property from these three individuals. The State elected to charge one count of robbery with a firearm based on the incident that resulted in Ivory's murder instead of charging separate acts of robbery based on the three victims involved. The Information alleged the same actions against the same victims in Counts 1 and 2 resulting in the same act serving as the basis for two crimes in violation of the Double Jeopardy Clause. Under *Brown, Harris* and *Perry,* Bethel's conviction for robbery with a firearm must be reversed and remanded to the district court with instructions to dismiss. *See Harris,* 97 S. Ct. 2912, 2913 ("When, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime, after conviction of the greater one.")

3.

Reviewing the lack of lesser offense instructions for plain error only, we find the district court did not err in failing to submit, *sua sponte,* instructions on second degree depraved mind murder, second degree felony murder and accessory. *See Hogan v. State,* 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923 ("[t]he first step in plain error analysis is to determine whether error occurred"). "This Court has long recognized the rule of law that a defendant is not entitled to instructions on any lesser included offense when he defends against the charge by proclaiming his innocence." *Harney v. State,* 2011 OK CR 10, ¶ 11, 256

P.3d 1002, 1005. Bethel's claim faulting the district court for omitting instructions on lesser offenses is without merit because the omitted instructions were inconsistent with his defense of innocence.

4.

We reject Bethel's claim that the district court's handling of jury questions during deliberations requires relief. The jury sent out four notes during deliberations, with notes 1, 3 and 4 pertaining to housekeeping matters only. The parties agreed on the court's written response to the only substantive note (note 2) submitted by the jury and Bethel did not object to the procedure used in its delivery. Under these circumstances, we review Bethel's claim for plain error only and find none. *Welch v. State*, 1998 OK CR 54, ¶ 42, 968 P.2d 1231, 1245.

Our statutes generally provide that there can be no communication with the jury by the judge or any third person except in open court. 22 O.S.2011, §§ 853, 857, 894. Of course, we have acknowledged that not every communication between the court and jury outside open court is prohibited; in particular, communications with the jury regarding simple housekeeping matters do not violate statutory prohibitions. *Perry v. State*, 1995 OK CR 20, ¶ 26, 893 P.2d 521, 528. Consequently we find no violation of section 894 or error with respect to the district court's handling of notes 1, 3 and 4 dealing with housekeeping matters.

Nor can Bethel establish error and prejudice with respect to the district court's handling of note 2. Title 22, Section 894 states:

> After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony or if they desire to be informed on a point of law arising in the cause, they must require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to the district attorney and the defendant or his counsel, or after they have been called.

22 O.S.2011, § 894. "The purpose of Section 894 is to prevent communications from being made to the jury without the parties being present to protect their interests." *Mollett v. State*, 1997 OK CR 28, ¶ 42, 939 P.2d 1, 11-12 (internal quotations omitted). "This statute has been construed as mandatory only with regard to bringing the jury back into the courtroom, and the determination of whether the jury's request is granted is within the discretion of the trial court." *Cipriano v. State*, 2001 OK CR 25, ¶ 48, 32 P.3d 869, 879.

"When a communication between judge and jury occurs after a jury has retired for deliberations *on a matter within the scope of § 894* and that communication does not comport with § 894's requirements, a presumption of prejudice arises. The presumption may be overcome if, on appeal, this Court is convinced that on the face of the record no prejudice to the defendant occurred." *Smith v. State*, 2007 OK CR 16, ¶ 52, 157 P.3d 1155, 1172 (internal citations and quotations omitted) (emphasis added).

Note 2 asked what the jury should do if it could not reach a unanimous decision on some counts and how to proceed on the counts on which there was

unanimity. The parties and judge agreed a deadlocked jury instruction was premature because the jury had deliberated only a few hours. The district court instructed the jury to continue to deliberate on the unresolved counts. There was no violation of the underlying purpose of § 894 (preventing communications without parties' interests protected) in the handling of note 2 because the parties were consulted and approved the court's response. Bethel agreed that the court could respond in writing rather than returning the jury to open court. Any presumption of prejudice arising from the court's failure to bring the jury back into the courtroom is refuted by the record showing that the district court provided the jury with the response sanctioned by the parties. There is no showing of plain error; this claim is denied.

5.

Bethel was not deprived of a fair trial by the admission of improper "law enforcement" opinion. Contrary to Bethel's claim, the case agent did not vouch for the integrity of the investigation and his testimony was not unnecessarily cumulative, speculative or more prejudicial than probative. *See Postelle v. State,* 2011 OK CR 30, ¶ 31, 267 P.3d 114, 131 (discussing relevancy of evidence); *Harmon v. State,* 2011 OK CR 6, ¶ 48, 248 P.3d 918, 937 (discussing balancing relevancy of evidence against its prejudicial effect). The case agent testified about his part in the investigation and the collection of evidence. He did not comment on the veracity of any witness or tell the jury what result to reach. This claim is denied.

6.

Reviewing for plain error only, we find Bethel has not shown the district court erred in admitting the audiotape of his telephone call to his mother from jail. *See Hogan,* 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. Their conversation was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice. *See Postelle,* 2011 OK CR 30, ¶ 31, 267 P.3d at 131; *Harmon,* 2011 OK CR 6, ¶ 48, 248 P.3d at 937.

7.

The district court did not err in admitting an in life photograph of the murder victim that showed his general appearance and condition while alive. 12 O.S.2011, § 2403. The admissibility of such photographs is settled, and Bethel offers nothing new to warrant a different result in this case. *See Underwood v. State,* 2011 OK CR 12, ¶ 48, 252 P.3d 221, 242-43.

Reviewing for plain error only, we find Bethel has not shown error and prejudice from the presentation of victim impact statements from the victim's father and sister at formal sentencing under 21 O.S.2011, § 142A-8. *See Hogan,* 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

8.

The district court did not err in denying Bethel's motion to sever and allowing Counts 1 and 2 to be joined with Counts 3 and 4 for resolution in a single trial. *See Smith v. State,* 2007 OK CR 16, ¶ 21, 157 P.3d 1155, 1164; *Vowell v. State,* 1986 OK CR 172, ¶¶ 8-9, 728 P.2d 854, 857.

9.

The district court did not err in denying Bethel's motion to suppress evidence because Bethel's arrest for public intoxication was supported by probable cause. *See Coffia v. State,* 2008 OK CR 24, ¶ 5, 191 P.3d 594, 596.

10.

Bethel's ineffective assistance of counsel claim may be disposed of based on lack of prejudice.[2] *See Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Malone v. State,* 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206, *cert. denied,* ___U.S.___, 134 S.Ct. 172, 187 L.Ed.2d 119 (2013); *Head v. State,* 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148. The merits of the substantive claims serving as the basis for this ineffective assistance of counsel claim have been addressed and rejected above. *See* Propositions 3, 4, 5, 6 and 7.

In conjunction with this claim Bethel filed an Application for Evidentiary Hearing on Sixth Amendment claims contemporaneously with his brief, attaching documents to support his claim that trial counsel was ineffective for failing to investigate and present testimony supporting his defense.

This Court will order an evidentiary hearing if "the application and affidavits . . . contain sufficient information to show this Court by clear and

[2] Bethel argues defense counsel was ineffective for failing to object to the district court's response to jury note #2, failing to object to improper opinions offered by the case agent, failing to have the prejudicial portions of his telephone call with his mother redacted, failing to object to the in life photo of the victim and the victim impact statements offered at formal sentencing, and failing to request instructions on lesser related offenses.

convincing evidence [that] there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence." Rule 3.11(B)(3)(b)(i), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015). Having reviewed Bethel's Request for an Evidentiary Hearing to develop this claim and the materials offered to support that request, we find that Bethel has failed to meet his burden. Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015). Therefore, Bethel is not entitled to an evidentiary hearing to further develop his ineffective assistance of counsel allegations, and his motion, as well as this claim, are **DENIED.** *See Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905-06.

DECISION

The Judgment and Sentence of the district court on Counts 1, 3 and 4 is **AFFIRMED**. Count 2 is **REVERSED** and **REMANDED** to the district court with instructions to **DISMISS.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE JAMES M. CAPUTO, DISTRICT JUDGE

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LUMPKIN, V.P.J.: Concur
LEWIS, J.: Concur
HUDSON, J.: Concur

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