IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KASSIE LAKEI BILLS,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F-2009-404
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

A. JOHNSON, PRESIDING JUDGE:

Appellant Kassie Lakei Bills was tried by jury in the District Court of Oklahoma County, Case No. CF-2007-1894, and found guilty of First Degree Murder, in violation of 21 O.S.Supp.2006, § 701.7. The jury set punishment as Life Imprisonment Without the Possibility of Parole. The Honorable Ray C. Elliott, who presided at trial, sentenced Bills accordingly. Bills appeals, raising the following propositions of error:

1. the trial court exceeded its appropriate role in instructing the jury during *voir dire*;

2. the trial court deprived her of her constitutional rights by unduly restricting her ability to examine prospective jurors on the insanity defense during *voir dire*;

3. the trial court violated her constitutional rights by refusing to instruct the jury on the lesser offenses of first degree manslaughter and second degree murder;

4. the trial court abused its discretion by failing to exclude opinion testimony from a police officer;

5. the trial court violated her constitutional rights by allowing the State to introduce irrelevant character evidence that had nothing to do with the offense charged;

6. the admission of a pre-mortem photograph of the victim violated her due process right to a fair trial and that Section 2403 of the Oklahoma Evidence Code is unconstitutional;

7. trial counsel was constitutionally ineffective; and

8. an accumulation of error deprived her of due process of law.

Bills also requests an evidentiary hearing on her Sixth Amendment claims of ineffective assistance of counsel.

For the reasons set out below, we conclude that Bill's conviction should be reversed and remanded to the District Court for a new trial. We also find that her application for an evidentiary hearing should be denied as moot.

DISCUSSION

In her first proposition of error, Bills claims that the trial court made numerous improper comments during *voir dire* that denied her due process and a fundamentally fair trial. Among other things, Bills complains that the trial court judge gave instructions during *voir dire* that were designed to influence the jurors about the necessity of reaching a verdict and that these instructions had a coercive effect on the jury. Because Bills did not object to the instructions, we review only for plain error. *See McElmurry v. State*, 2002

OK CR 40, ¶ 26, 60 P.3d 4, 16-17 (holding that objections to nature or extent of *voir dire* that are not made before start of testimony are waived except for plain error).

"An important aspect of *voir dire* is to educate prospective jurors on what will be asked of them under the law." *Eizember v. State*, 2007 OK CR 29, ¶ 40, 164 P.3d 208, 221. However, a trial court must not influence jurors in their decision making process. *Johnson v. State*, 2009 OK CR 26, ¶ 4, 218 P.3d 520, 522. The Oklahoma Uniform Jury Instructions-Criminal (2d) are comprehensive instructions that follow a chronology designed to give jurors as much information as they need about the trial proceedings. Trial courts should follow the introductory information provided in the Oklahoma Uniform Jury Instructions. If the court determines that jurors should be instructed on a matter not included within the Uniform Jury Instructions, the court may give an instruction that is "simple, brief, impartial and free from argument." 12 O.S.2001, § 577.2. Analogies and examples may be used to illustrate the uniform opening instructions, but trial courts should be objective and careful not to appear to guide the jury to a particular decision. *Johnson*, 2009 OK CR 26, ¶ 4, 218 P.3d at 522.

In this instance, while the trial court judge incorporated material from the uniform instructions into the *voir dire* proceeding, he also included his own additional commentary on the deliberation process. In particular, the court told the prospective jurors:

> [Y]our job is a very narrowly defined responsibility, to see if the State has met their burden to each of the listed elements. Nothing more, nothing less. Otherwise, you're going to be that run-away jury and you may be up there for months trying to reel yourselves in. So that's what I said earlier, when you get up there and if one of your fellow jurors starts to stray off, gets far outside of this narrowly defined responsibility, the other eleven of you have got to go, wait a minute, let's go, we don't want to be up here all day, all week, all month, all year. Let's get the case decided within the rules of what the Judge gave us. Let's play by the rules. You, too, come on in number 12. Okay? Everybody understand? Okay.

(Tr. Vol. 1, 158). Then, a few moments later, he said:

> Jury duty is not rocket science. Okay? Everybody understand the point I'm trying to make? So don't be one of those hard-heads, so to speak. My mother used to call me a hard-head all the time. I never really understood until I became a judge. When the lawyers started calling me that, I kind of understood, maybe. So don't be one of those hard-heads and say, well, you know, there's no way I can figure out what somebody else is intending. Sure you can. Sure you can. You look at all surrounding and attending circumstances.

(Tr. Vol. 1, 169). By making these comments, the trial judge obviously was trying to instruct the jury on how to avoid deadlock. In that sense, these comments are similar to a so-called *Allen* charge that a judge gives to a deadlocked jury.[1] Normally, however, an *Allen* charge, or deadlocked jury

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[1] In *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896), the United States Supreme Court found that a supplemental instruction to deliberating jurors urging them to continue discussing the evidence and to listen "to each other's arguments," but also emphasizing that "the verdict must be the verdict of each individual juror, and not the mere acquiescence in the conclusion of his fellows," was proper. An instruction of this type, issued to a deliberating, but apparently deadlocked jury, is known as an *Allen* charge. The fundamental principle of *Allen* charge jurisprudence is that a defendant has "the right to have the jury speak without being coerced." *United States v. Burgos*, 55 F.3d 933, 936 (4th Cir. 1995)(quoting *United States v. Sawyers*, 423 F.2d 1335, 1341 (4th Cir. 1970)).

instruction, is given only **after** jurors start their deliberations. *See e.g.*, *McCarty v. State*, 1995 OK CR 48, ¶ 51, 904 P.2d 110, 125 ("[t]his Court has, in the past, found no error in the giving of *Allen* instructions after the jury has announced itself to be deadlocked after several hours of deliberation). In *Johnson v. State*, 2009 OK CR 26, ¶ 4, 218 P.3d 520, 522, in a similar situation, this Court reversed and remanded a case for a new trial where, among other things, the trial court's *voir dire* comments "about the deliberation process were premature and effectively a preemptive *Allen* charge." We have the same situation here.

In this instance, the trial court's admonition to jurors not to be "hard-headed" and to reel in fellow jurors who might wander or stray because "we don't want to be up here all day, all week, all month, all year" is obviously a preemptive attempt to head off a deadlocked jury by suggesting that majority-view jurors must be prepared to urge minority-view jurors to abandon their honestly held convictions if maintaining those convictions would impede a decision or prolong deliberations. This is a misstatement of the law as it is set out in Oklahoma's version of the *Allen* charge, known as the Deadlocked Jury Charge at Instruction No. 10-11 OUJI-CR(2d).

Instruction No. 10-11 directs jurors to "give respectful consideration to each other's views" and "resolve any differences and come to a common conclusion" so the "case may be completed." It also tells jurors that no juror "should surrender their honest convictions as to the weight or effect of any evidence solely because of the opinion of other jurors or because of the

importance of arriving at a decision." *Id.* Furthermore, Instruction No. 10-11 tells jurors that "[y]ou may be as leisurely in your deliberations as the case may require and take all the time necessary." *Id.*

To the extent, therefore, that the trial court's *voir dire* comments urged jurors to reach a verdict quickly and urged majority jurors to reel in individual "hard-headed" jurors whose views were impeding a decision, it was a misstatement of the law that was an inherently coercive intrusion into the jury's deliberative process. *See Johnson*, 2009 OK CR 26, ¶ 4, 218 P.3d at 522 ("[i]t is important that each juror make his or her own decision and not be encouraged to abandon their own personal beliefs"); *McCarty v. State*, 1995 OK CR 48, ¶ 51, 904 P.2d 110, 125 (warning that trial court is required to exercise "great caution to say nothing to coerce an agreement or to indicate his feelings in the case"). This was plain error. *See Hancock v. State*, 2007 OK CR 9, ¶ 80, 155 P.3d 796, 815 ("'[p]lain errors are violations of legal rules clear from the appellate record that go to the foundation of the case or take from the defendant a right essential to his defense"). Bills' conviction must be reversed and the case remanded for a new trial.

Because we reverse and remand for a new trial, it is unnecessary to address either Bills' remaining propositions of error or her application for an evidentiary hearing on her claims of ineffective assistance of counsel.

DECISION

The Judgment and Sentence of the District Court is **REVERSED AND REMANDED FOR A NEW TRIAL.** Bills' application for an evidentiary hearing

is **DENIED AS MOOT**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011), 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

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C. JOHNSON, J.: Concur
SMITH, J.: Concur

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