**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

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| LOURINDA (GIVENS) LEGGETT, | ) | NOT FOR PUBLICATION |
| | ) | |
| Appellant, | ) | |
| v. | ) | Case No. F 2000-321 |
| | ) | |
| THE STATE OF OKLAHOMA, | ) | |
| | ) | |
| Appellee. | ) | |

## SUMMARY OPINION

Appellant, Lourinda (Givens) Leggett, was convicted by a jury in McClain County District Court, Case No. CF 98-56, of Manslaughter in the First Degree, in violation of 21 O.S.1991, § 711. on July 19th through 29th, 1999, before the Honorable Candace L. Blalock, District Judge. The jury found Appellant guilty of First Degree Manslaughter, in violation of 21 O.S.1991, § 711. The jury left punishment to the court's discretion. On October 20, 1999, Judge Blalock sentenced Appellant to twenty-eight (28) years imprisonment and ordered the last fifteen (15) years of the term suspended. Appellant filed a motion for new trial. An evidentiary hearing was held January 6, 1999 and the motion was denied February 23, 2000. Appellant then perfected this appeal.

Appellant raises two propositions of error:

1. Considering the unique circumstances present in this case, the decision of trial counsel not to present evidence of battered woman syndrome was unreasonable. As a result, Ms. Givens was denied constitutionally effective assistance of counsel; and

2. Conflicting jury instructions, applicable to different defenses, fatally infected the trial, and the conviction and sentence must be reversed and the case remanded for a new trial.

After thorough consideration of the propositions raised, including the Original Record, transcripts, and briefs and arguments of the parties, we have determined that Proposition One has merit and the Judgment and Sentence of the trial court must be reversed and remanded for a new trial.

We find trial counsel's last minute decision not to call an expert to testify about the battered woman syndrome was not sound trial strategy. Under prevailing professional norms and considering the unique facts of this case, we cannot find this decision was reasonable as it so lessened the strength of Appellant's defense that we cannot have confidence in the jury's verdict. *Strickland v. Washington*, 466 U.S. 668, 669, 104 S.Ct. 2052, 2065-66, 80 L.Ed.2d 674 (1984) Accordingly, we grant relief on Proposition One and hereby order this case reversed and remanded for a new trial. Because we grant relief on this proposition, the remaining propositions of error need not be addressed.

**DECISION**

The Judgment and Sentence in McClain County District Court, Case No. CF 1998-56, is hereby **REVERSED AND REMANDED FOR A NEW TRIAL**.

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**OPINION BY: JOHNSON, P.J.**
LILE, V.P.J. :DISSENT
LUMPKIN, J.:DISSENT
CHAPEL, J.:CONCUR
STRUBHAR, J.:CONCUR

**LUMPKIN, JUDGE: DISSENTS**

This Court has repeatedly held it will not second-guess trial strategy on appeal. *Williams v. State,* 22 P.3d 702, 730 (Okl.Cr.2001); *Welch v. State,* 2 P.3d 356, 377 (Okl.Cr.2000); *Cargle v. State,* 909 P.2d 806, 832 (Okl.Cr.1995); *Smith v. State,* 650 P.2d 904, 908 (Okl.Cr.1982). However, that is exactly what this Court is doing by reversing and remanding this case for a new trial based upon the conclusion that trial counsel's decision not to call an expert to testify as to battered woman syndrome was not reasonable trial strategy. The United States Supreme Court has warned against just such a review through the distorting effects of hindsight in *Strickland v. Washington*:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694.

Similarly in *Le v. State,* 947 P.2d 535 (Okl.Cr.1997) this Court stated:

> This Court will consider counsel's challenged conduct on the facts of the case as viewed at the time and ask if the conduct was professionally unreasonable and, if so, whether the error affected the jury's judgment.

947 P.2d at 556. *See also Williams,* 22 P.3d at 731-32; *Hooks v. State,* 19 P.3d 294, 317 (Okl.Cr.2001); *Malicoat v. State* 992 P.2d 383, 405 (Okl.Cr.2000).

Looking at counsel's conduct under the facts of this case and from counsel's perspective at the time, his decision not to call Dr. Lenore Walker was not only trial strategy, but reasonable trial strategy made in the exercise of sound professional judgment. The State's evidence showed Appellant was a police officer trained in the use of firearms and self-defense. As part of standard police training, she was also trained to handle hostile domestic situations. The State's evidence also showed that Appellant fired 5 shots into the victim who was reclined on the sofa at the time covered by a blanket. Three shots struck the victim's body, and he died as a result of a bullet to his chest. The only evidence that the victim made any movements, threatening or not, toward Appellant came from her own statements. In other words, a cold-blooded, calculated, premeditated murder. The State's evidence showed Appellant bore no physical injuries consistent with her claims of abuse and that Appellant and the victim seemed to be acting normally only hours before the shooting. While defense counsel effectively cross-examined the State's witnesses to create an argument to the trial judge to give the instruction, the State offered no expert witnesses on the issue of the battered woman syndrome and whether or not Appellant suffered from such.

For defense counsel to then call Dr. Walker in its case-in-chief would have opened the door to allow the State to present its rebuttal witness, Dr. Call, who had also evaluated Appellant. Dr. Call did testify at Appellant's

sentencing hearing. His testimony was not beneficial to Appellant's claims of innocence, and is exactly the type of testimony defense counsel would not want a jury to hear prior to determining guilt. Just because a defendant has an expert witness available does not mean a defense attorney is required to call that witness. That decision is a balancing process that is dependent on the evidence presented and whether or not the jury would be positively or negatively impacted by the witness. Counsel's decision to let the case remain a "battle of lay people" instead of a "battle of the experts" was trial strategy well within the bounds of professionalism. Further, despite the absence of any expert testimony, counsel competently presented a defense of battered woman syndrome. Although Appellant herself did not testify, counsel thoroughly cross-examined the State's witnesses on whether Appellant was a battered woman. This Court has held that it is not ineffective to rely on the cross-examination of prosecution witnesses to present a defense. *DeLozier v. State,* 991 P.2d 22, 31 (Okl.Cr.1998); *Phillips v. State,* 989 P.2d 1017, 1048 (Okl.Cr.1999).

In *Shultz v. State,* 811 P.2d 1322, 1327 (Okl.Cr.1991) this Court stated:

> The fact that another lawyer would have followed a different course during the trial is not grounds for branding the appointed attorney with the opprobrium of ineffectiveness, or infidelity, or incompetency. *Williams v. Beto,* 354 F.2d 698, 706 (5th Cir.1965). Absent a showing of incompetence, the Appellant is bound by the decisions of his counsel and mistakes in tactic and trial strategy do not provide grounds for subsequent attack. *Davis v. State,* 759 P.2d 1033, 1036 (Okl.Cr.1988).

811 P.2d at 1327.

Counsel's decision in this case not to call Dr. Walker was an attempt to keep out certain prejudicial evidence. Counsel adequately challenged the State's case and presented an effective defense. That counsel's strategy proved unsuccessful is not grounds for branding counsel ineffective. *Turrentine v. State,* 965 P.2d 955, 971 (Okl.Cr.1998).

Further, counsel's decision did not affect the fundamental fairness of the trial. In fact, Appellant received a greater benefit than she was entitled to as the evidence was insufficient to raise the defense of the battered woman syndrome and consequently jury instructions on such a defense should not have been given. The only evidence that Appellant was a battered woman were her self-serving statements. These statements, unsupported by other evidence, were insufficient to raise the defense of the battered woman syndrome. *See Kinsey v. State,* 798 P.2d 630, 632-633 (Okl.Cr.1990) (a defendant is entitled to an instruction on his theory of defense if it is supported by the evidence and is tenable as a matter of law.) *See also Jackson v. State,* 964 P.2d 875, 900 (Okl.Cr.1998) (Lumpkin, J. concur in result). Thus, Dr. Walker's testimony would not have been admissible anyway due to the lack of evidence in the case to support such a theory as to Appellant's actions. However, trial counsel's advocacy convinced the court to give instructions on the syndrome as the theory of defense.

Having thoroughly reviewed the record, counsel's decision was professionally reasonable under the facts of this case and did not result in a breakdown of the adversarial process. Trial counsel exercised the skill,

judgment and diligence of a competent defense attorney under the circumstances when he employed the strategy to limit the introduction of prejudicial evidence. I disagree with this Court second-guessing the trial strategy undertaken by counsel when trying this case 4 years ago, and dissent to reversing this case on the grounds of ineffective assistance of counsel. Appellant received instructions on the Battered Woman Syndrome, which the evidence did not warrant. The jury had the instructions on the syndrome before them if they believed mercy was warranted, but they did not. This Court should follow the law and affirm the sentence rather than second guessing the jury on both the application of the law to the evidence, and the decision to grant mercy.