IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SAUNDRA KAYE MEDLIN,	)	
Appellant,	)	
-vs.-	)	**No. F-2001-558**
THE STATE OF OKLAHOMA,	)	
Appellee.	)	

ACCELERATED DOCKET ORDER

In the District Court of Canadian County, Case No. CF-1999-155, before the Honorable Edward C. Cunningham, District Judge, a jury found Appellant guilty of Manslaughter in the First Degree by Heat of Passion and assessed her punishment at four years imprisonment. On May 1, 2001, pursuant to this verdict, the District Court entered judgment and sentenced Appellant to a term of four-years in the custody of the Department of Corrections.[1] From her Judgment and Sentence, Appellant has brought this appeal.

Appellant made application for her appeal to be placed upon this Court's Accelerated Docket under Section XI, Accelerated Docket Procedures, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2001). No objection being made by Appellee, the appeal was assigned to the Court's Accelerated Docket. Oral argument was held on May 16, 2002, and the Court duly considered her single proposition of error raised on appeal:

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[1] On December 19, 2001, while her appeal was pending before this Court, the District Court, under the authority granted to it by 22 O.S.Supp.2000, § 982a(A), modified Appellant's sentence. The modification order credited Appellant with all time served on her sentence and suspended execution of that portion of Appellant's sentence that had yet to be served. (Dist. Ct. Order of Dec. 19, 2001.)

Proposition

The trial court erred in instructing the jury on the lesser included offense of Manslaughter in the First Degree because the instruction was not supported by the evidence, no notice was ever given to the defense and Ms. Medlin waived lesser included instructions.

After hearing oral argument and after a thorough consideration of Appellant's proposition of error and the entire record before us on appeal, by a vote of four (4) to one (1), the Court reverses Appellant's Judgment and Sentence with instructions to dismiss. Appellant was charged with Murder in the First Degree with Malice Aforethought for the shooting death of her husband, Jay Medlin. The evidence revealed that in the early morning hours of March 24, 1999, Appellant reached under her bed, retrieved a .38 caliber pistol, walked around to her husband's side of the bed, and at point-blank range emptied her five-shot revolver into her husband's body while he lay asleep. One shot pierced Jay Medlin's skull by entering through the left temple, three shots pierced his heart, and one shot struck beneath the left collarbone. The medical examiner described all of these gunshots, except the one beneath the collarbone, as being "very rapidly fatal" and "nonsurvivable." (Tr. VI 50.)

Appellant defended the Murder I charge with evidence that the homicide, by law, was "justifiable" because it had been committed in the defense of herself and her two minor children. Homicide is "justifiable" when it is committed by one "in the lawful defense of [her] person, or [the person's] child . . . when there is a *reasonable* ground to apprehend a design to commit a felony, or to do some great personal injury, and *imminent* danger of such design being accomplished." 21 O.S.2001, § 733(2) (emphasis added). In *Bechtel v. State*, 1992 OK CR 55, ¶¶ 12-13, 840 P.2d 1, 6, the Court found that evidence a defendant suffered from Battered Woman Syndrome was admissible to show the "reason-

ableness" and "imminence" necessary to establish a homicide was committed in self-defense and hence "justifiable." *See also* Instruction No. 8-47, OUIJ-CR(2d) (Defense of Self-Defense—Battered Women Cases). If a homicide is determined to be "justifiable," there is no murder or other lesser criminal homicide, and no criminal penalty attaches.

At trial, Appellant produced substantive evidence that for most of their marriage of some fifteen years, she was repeatedly assaulted at the hands of the deceased, that she and her children had been physically and verbally abused by the deceased, that police assistance had proven unfruitful or had resulted in further violence against her by the deceased, that she and her children had repeatedly sought to escape from the deceased, and that the deceased successfully prevented Appellant or her children from establishing a life outside of his presence or control. Expert testimony confirmed Appellant met the criteria for one who suffered from the Battered Woman Syndrome.

The deceased had undergone heart surgery approximately three weeks before the shooting. Appellant and the couple's two children testified the deceased's abusive behavior had gotten worse since his surgery. The evidence further revealed that on the night of the shooting the deceased became verbally abusive and threatening to Appellant and their two children, and that he had struck Appellant once on the top of the head with his fist. The evidence, however, did not reveal that this behavior by the deceased on the night of the shooting was so peculiar or so extreme (especially in light of the couple's history) that it would have invoked a heat of passion in Appellant that could render her incapable of forming an intent to kill. Instead, it was Appellant's position that the deceased's increasingly abusive verbal behavior was a sign recognized by Appellant from her previous experiences with him. Appellant

contended this behavior signaled that the deceased would soon revert to violent and physically abusive behavior, and that the killing of her husband was a conscious decision made by her in self-defense to prevent that physical abuse that Appellant reasonably believed to be imminent.

For an offense of Manslaughter in the First Degree by Heat of Passion, there cannot be a design to effect death.[2] The evidence before the jury revealed that Appellant used deadly force upon the deceased and did so with the intent to take his life.[3] Because the evidence presented to Appellant's jury was such that rational jurors could only conclude Appellant intended to kill, the trial court was not presented with circumstances that would permit it to give a jury instruction on Manslaughter in the First Degree by Heat of Passion.[4] This being so, the giving of a First Degree Manslaughter instruction over the objec-

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[2] By definition, Manslaughter I—Heat of Passion is a homicide committed "without a design to effect death." 21 O.S.2001, § 711(2). The principle behind heat-of-passion manslaughter is that the perpetrator is under a passion or emotion so strong, that it prohibits the individual from forming an intent to kill. *See Charm v. State*, 1996 OK CR 40, ¶ 8, 924 P.2d 754, 760 ("The 'passion' necessary to support a manslaughter instruction must be so great as to 'render the mind incapable of forming a design to effect death . . . .'"). Therefore, in order "[t]o warrant a manslaughter instruction, the evidence must 'reasonably suggest that [the accused] committed the murder in the heat of passion and without an intent to kill.'" *Id.*

[3] "[M]ere anger does not remove the homicide from classification as murder. The heat of passion must render the mind incapable of forming a design to effect death before the defense of manslaughter is established." *Walker v. State*, 1986 OK CR 116, ¶ 38, 723 P.2d 273, 284. See also *Hawkins v. State*, 2002 OK CR 12, 73 OBJ 918, __ P.3d ___, wherein the defendant was convicted of first-degree malice murder but argued he should have received an instruction for first-degree, heat-of-passion manslaughter because of evidence presented to the jury that he suffered from "duress and fear and terror." *Id.* at ¶ 31, 73 OBJ at 922. The Court rejected this argument, holding that the evidence did not support such an instruction because it revealed defendant fired four shots into the victim's head while the victim was asleep on a couch, and that "[i]t can hardly be suggested there was no design to effect death here." *Id.* at ¶ 32, 73 OBJ at 922.

[4] A trial court shall "not ask a jury to consider a lesser offense if no jury could **rationally** find both that the lesser offense was committed and that the greater offense was not." *Frederick v. State*, 2001 OK CR 34, ¶ 137, 37 P.3d 908, 943-44 (emphasis in original). *Cf. Malone v. State*, 1994 OK CR 43, ¶ 8, 876 P.2d 707, 711 ("[T]he trial court must instruct the jury on every degree of homicide where the evidence would permit the jury rationally to find the accused guilty of the lesser offense and acquit him of the greater.").

tion of Appellant was error.[5] Such error requires reversal.[6] Moreover, the jury's verdict specifically found Appellant "not guilty" of Murder in the First Degree.[7] (O.R. 124.) For the purposes of double jeopardy, this verdict effectively acquits Appellant of the charge of First Degree Murder.[8] The Constitution therefore mandates the State's murder prosecution be dismissed.

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[5] This Court has held that a trial court in a first-degree murder prosecution, when requested to do so by the State, may give an instruction on a lesser degree of homicide despite a defendant's objection to such an instruction. Nevertheless, before the trial court in such circumstances can give the lesser homicide instruction, the evidence must still be such that it can support a verdict on the lesser degree homicide. *Shrum v. State*, 1999 OK CR 41, ¶¶ 10-11, 991 P.2d 1032, 1036-37.

[6] This point is demonstrated in the decision of *Nickelberry v. State*, 1974 OK CR 81, 521 P.2d 879. *Nickelberry* involved a prosecution for Murder, wherein the Court found, "The only offense which the evidence tended to prove was manslaughter in the first degree arising out of the misdemeanor-manslaughter doctrine." *Id.* at ¶ 14, 521 P.2d at 884. This being the case, the Court concluded it was error for the trial court to instruct on Murder. *Id.* at ¶ 13, 521 P.2d at 883-84. For this reason, the Court reversed the conviction. *Id.* at ¶ 16, 521 P.2d at 884. In so doing, the Court held:

> After examining the record as a whole it is the opinion of this Court that there was insufficient evidence, circumstantial or otherwise, before the trial court which, if believed by the jury, would support a conviction of murder. The trial court should not instruct upon any degree of a crime of which there is no evidence tending to show the defendant's guilt. Therefore the trial court should have eliminated the instruction on murder.

Id. at ¶ 13, 521 P.2d at 883-84 (citation omitted).

[7] This verdict was consistent with the instructions given to the jury. Instruction No. 37 told the jury they should consider the charge of First Degree Manslaughter "[i]f you have a reasonable doubt of the defendant's guilt of the charge of Murder in the First Degree." (O.R. 114.) Instruction No. 44 directed the jury, "If you have a reasonable doubt as to which offense the defendant may be guilty of, you may find her guilty only of the lesser offense." (O.R. 121.)

[8] The United States Supreme Court has observed:

> [A] defendant charged with first-degree murder but only convicted of the lesser included offense of second-degree murder has been acquitted of the greater charge for purposes of the Double Jeopardy Clause. In the event his conviction is reversed on appeal, "a retrial on the first-degree murder charge [is] barred by the Double Jeopardy Clause, because the defendant 'was forced to run the gantlet once on that charge and the jury refused to convict him.'"

Poland v. Arizona, 476 U.S. 147, 152 n.2, 106 S.Ct. 1749, 1753 n.2, 90 L.Ed. 2d 123 (1988) (citations omitted).

IT IS THEREFORE THE ORDER OF THIS COURT that Appellant's Judgment and Sentence in Canadian County District Court, Case No. CF-1999-155, is **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS.**

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 27th day of June, 2002.

DISSENTS
GARY L. LUMPKIN, Presiding Judge

CHARLES A. JOHNSON, Vice Presiding Judge

CHARLES S. CHAPEL, Judge

RETA M. STRUBHAR, Judge

STEVE LILE, Judge

I agree that the doctrine of implied acquittal applies under the facts of this case. Generally, that doctrine does not survive Shuman in the absence of a specific finding of not guilty on the higher offense.

ATTEST:

Clerk

RD

LUMPKIN, P.J.: DISSENT

The trial judge performed his duties here in a professional, meticulous fashion and attempted to follow this Court's decision in *Shrum v. State*, 991 P.2d 1032 (Okl.Cr.1999), which is not a particularly easy task.

When the prosecutor sought, pursuant to *Shrum*, an instruction for heat of passion manslaughter as a lesser-included offense to first degree murder, defense counsel objected, claiming a lack of notice and that the defense was not supported by the evidence. Defense Counsel is to be complimented for making an excellent record to present the issue for review on appeal. Thereafter, the trial judge gave the instruction, as *Shrum* specifically allows, after he found the instruction was warranted by the evidence and that it came as no surprise to the defense. The jury then convicted Appellant on the lesser charge.

The Court now reverses the trial judge's findings, which were supported by the jury's verdict,[1] and unnecessarily adds further confusion to the complex area of law dealing with lesser-included instructions. It is clear the jury did not accept Appellant's theory of self-defense, a complete defense, for there was no "not guilty" verdict.

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[1] Regrettably, the Court's order focuses only on the evidence that supports its decision and disregards the evidence supporting the trial judge's decision. Using cases that address whether or not a trial judge abused his or her discretion by giving an instruction, the Court's order fails to look at the entirety of the evidence to determine the sufficiency of the evidence for giving the instruction or determine if the instruction harmed or benefited the defendant.

Moreover, it is readily apparent the jury reached its verdict based upon the available punishments. Had the jury not been instructed on Manslaughter in the First Degree, Heat of Passion, more likely than not the jury would have convicted Appellant of first degree murder, for the evidence supports that crime.

The real problem, however, is the "catch twenty-two" with which trial courts find themselves confronted as a result of *Shrum*, or at least cases like this where this Court rejects a reasonable attempt to apply its holding. In *Shrum*, the Court abandoned the elements test and instructed trial courts that "all lesser forms of homicide should be administered if they are supported by the evidence." *Shrum*, 991 P.2d at 1036.

If taken to its illogical conclusion, this language presents a conundrum. Malice aforethought murder, by definition, requires the crime to have been committed with a design to effect death, for malice is "that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof." 21 O.S.Supp.1998, § 701.7. (Indeed, according to 21 O.S.1991, § 701.2, a design to effect death is inferred from the fact of killing.) However, misdemeanor manslaughter, heat of passion manslaughter, and second degree depraved mind murder, by definition, all require that the death be committed without a design to effect death, i.e., premeditation. *See* 21 O.S.1991, § 701.8 and 21 O.S.1991, § 711.

And so, in cases where the defendant seems to have clearly intended death, with an opportunity for at least some deliberation, *Shrum* could be read to say give the manslaughter instruction because it is a lesser-related offense, or don't give it because there is no evidence to support it.

Here, a heat of passion manslaughter instruction was warranted by the evidence, for the elements of heat of passion are: 1) adequate provocation; 2) a passion or emotion such as fear, terror, anger, rage or resentment; 3) homicide occurred while the passion still existed and before a reasonable opportunity for the passion to cool; and 4) a causal connection between the provocation, passion and homicide. *Powell v. State*, 995 P.2d 510, 534 (Okl.Cr.2000); *Charm v. State*, 924 P.2d 754, 760, *cert. denied*, 520 U.S. 1200, 117 S.Ct. 1560, 137 L.Ed.2d 707 (1997). The word reasonable suggests an objective test for determining whether or not there was an opportunity for the passion to cool.

The trial evidence revealed long-standing domestic violence by the deceased against Appellant and her children. On the day in question, Jay Medlin had repeatedly threatened to kill everyone in the house. He struck Appellant with his fist and threatened to shoot his sixteen-year-old son. He brought three rifles and two pistols to the couple's bedside and repeatedly loaded and unloaded them in front of Appellant. At times, he fell asleep, but he would then wake up every two to five minutes screaming threats. Appellant thought she was going to have a

heart attack, but her husband would not allow her to go to the hospital. Later Appellant found him standing over the couple's daughter with a gun and making lewd comments at the daughter as she slept. Appellant stated her belief that her husband was going to kill everyone in the house, including his own mother. Further, she said "And I was so scared that he was going to kill my kids, I've been afraid before, but never in my life have I been this afraid. And I got up and closed my eyes and I shot him. I don't even know when the gun stopped firing."

The simple question is whether the homicide occurred while Appellant's passion still existed and before a reasonable opportunity for that passion to cool. This was a jury question under this evidence, for there was surely adequate provocation here, coupled with fear. Just because the victim was asleep when the shooting occurred does not mean she did not act under a heat of passion or that her passion had cooled. *See, e.g., Jackson v. State*, 964 P.2d 875, 899 (Okl.Cr.1998) (Lumpkin, J.: Concur in Result) ("I submit that the concept of heat of passion is fairly embraced and included within the element of pre-meditation... A defendant in his defense could present evidence that he killed the person, knew what he was doing, but had a sudden heat of passion and that passion is what caused the homicide.") Otherwise, using the analysis set out in this opinion, in **any** murder case where the evidence shows premeditation, the defendant is **not** eligible for **any** lesser included offense instruction

Yes, we have a sympathetic victim here. The jury knew that and it was a part of their consideration in reaching their decision under the law. Therefore, I can find no basis in law or fact for overturning this verdict.