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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ORIGINAL

ANGEL MARIE PROCTOR,	)	
Appellant,	)	NOT FOR PUBLICATION
v.	)	Case No. F-2016-82
STATE OF OKLAHOMA	)	
Appellee.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
APR 27 2017
MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

Appellant Angel Marie Proctor was tried by jury for First Degree Murder (Count I) (21 O.S.Supp.2012, § 701.7(A); Kidnapping (Counts II – IV) (21 O.S.Supp.2012, § 741); and Assault and Battery with a Deadly Weapon (Counts V and VI) (21 O.S.2011, § 652(C)), Case No. CF-2013-5818 in the District Court of Tulsa County.[1] In Count I, the jury convicted Appellant of the alternate charge of Felony Murder While in the Commission of Kidnapping (21 O.S.Supp.2012 § 701.7(B)) and recommended as punishment life in prison. Appellant was convicted in the remaining counts as charged and the jury recommended as punishment ten (10) years imprisonment in each of Counts II, III, IV and

[1] Appellant was charged jointly with George Emile July but the cases were severed for trial. Co-defendant July was convicted and that conviction has been upheld by this Court in *July v. State*, Case No. F-2015-188, opinion not for publication, June 6, 2016.

V and five (5) years imprisonment in Count VI. The jury also recommended fines of ten thousand dollars ($10,000.00) in Count I and up to ten thousand dollars ($10,000.00) in Counts II – VI. The trial court sentenced accordingly, ordering the prison sentences to be served consecutively, and the fines assessed at five hundred dollars ($500.00) in each count.[2] It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of her appeal:

> I. The evidence was insufficient to support Appellant's convictions because the State failed to present evidence disproving beyond a reasonable doubt that Appellant was acting under duress when she followed the commands of co-defendant George July during the offenses in question.
>
> II. The jury was improperly instructed with respect to the defense of duress.
>
> III. The improper admission of evidence of other alleged bad acts deprived Appellant of her fundamental right to a fair trial.
>
> IV. Error occurred when the jury was not given a limiting instruction with regard to its consideration of the evidence of other alleged bad acts.

[2] Appellant must serve 85% of her sentence in Count I before becoming eligible for consideration for parole. 21 O.S.2011, § 13.1.

V. Appellant's convictions for both the felony murder of Quinton Shaver, occurring during his kidnapping, and the kidnapping of Quinton Shaver violate the protection against double jeopardy.

VI. Prosecutorial impropriety deprived Appellant of a fair trial.

After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that under the law and the evidence, Count II must be reversed and remanded with instructions to dismiss.

In Proposition I, Appellant challenges the sufficiency of the evidence supporting her convictions arguing that the evidence failed to show beyond a reasonable doubt that she was not acting under duress when committing the charged offenses. We review sufficiency of the evidence claims in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *Davis v. State,* 2011 OK CR 29, ¶ 74, 268 P.3d 86, 111. This Court will accept all reasonable inferences and credibility choices that tend to support the verdict. *Id.* Where there is conflict in the testimony, this Court will not disturb the verdict on appeal if there is competent evidence to support the jury's finding. *Id.,* 2011 OK CR 29, ¶ 83, 268 P.3d at 112-113. The credibility of witnesses and the weight

and consideration to be given to their testimony are within the exclusive province of the trier of facts and the trier of facts may believe the evidence of a single witness on a question and disbelieve several others testifying to the contrary. *Id.*

Title 21 O.S.2011, § 156 sets out the defense of duress:

> A person is entitled to assert duress as a defense if that person committed a prohibited act or omission because of a reasonable belief that there was imminent danger of death or great bodily harm from another upon oneself, ones spouse, or ones child.

Duress is an affirmative defense. *Spunaugle v. State,* 1997 OK CR 47, ¶ 18, 946 P.2d 246, 250, *overruled on other grounds, Long v. State,* 2003 OK CR 14, 74 P.3d 105, 109.[3] The defendant bears the burden to present or elicit sufficient evidence to raise the defense, and if the defendant meets this burden, the burden then shifts to the State to disprove it beyond a reasonable doubt. *Id. See also McHam v. State,* 2005 OK CR 28, ¶ 10, 126 P.3d 662, 667. The threatened danger of death or great bodily harm must be imminent and the defendant's belief that death or great bodily harm is imminent must be reasonable. *Spunaugle,* 1997 OK CR 47, ¶ 18, 946 P.2d at 250. Because duress is a valid defense only to a person under involuntary subjection to the power of a superior, the defense may be

[3] In *Long,* this Court adopted the analysis set forth in my dissent to *Spunaugle* regarding the inapplicability of the defense of duress to first degree malice murder. *See* 2003 OK CR 14, ¶¶ 12-18, 74 P.3d at 108-109.

defeated by a showing that the defendant voluntarily or negligently placed himself in a position to be subjected to the power of a superior. *Id., citing* 21 O.S. §§ 152(7). Likewise, a showing that a defendant failed to avail himself of an opportunity to escape from the situation subjecting him to duress would negate the involuntary subjection element and defeat the defense. *Id.*

In the present case, Appellant presented sufficient evidence to warrant a jury instruction on the defense: nevertheless after hearing the evidence, the jury rejected the defense. Despite Appellant's self-serving testimony to the contrary, the evidence clearly showed that she did not have a reasonable belief of imminent death or great bodily harm and willingly participated in the violent acts inflicted on the victims. The evidence showed that at various times during the criminal episode, she had available weapons and more than one occasion to extricate herself from the situation. Her decision to stay and participate in the violence and not avail herself of the opportunity to escape from the situation negated the involuntary subjection element and defeats the defense of duress. Proposition I is denied.

In Proposition II, Appellant contends her jury was not properly instructed on the defense of duress as they were not instructed that it applied to Count I. This objection was not raised at trial; therefore, we

review only for plain error. *Daniels v. State*, 2016 OK CR 2, ¶ 3, 369 P.3d 381, 383. Under the test set forth in *Simpson v. State*, 1994 OK CR 40, ¶¶ 10, 26, 30, 876 P.2d 690, 694, 699, 701 this Court determines whether the appellant has shown an actual error, which is plain or obvious, and which affects his or her substantial rights. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.* *See Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. *See also Jackson v. State*, 2016 OK CR 5, ¶ 4, 371 P.3d 1120, 1121; *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395.

The jury was instructed on the defense of duress as it applied to the crime of Kidnapping in Counts 2, 3, and 4 and to Assault and Battery with a Deadly Weapon as alleged in Counts 5 and 6. Appellant was charged with First Degree Malice Aforethought Murder in Count I. In *Long v. State*, 2003 OK CR 14, ¶¶ 12, 16-17, 74 P.3d 105, 108-109 this Court held that the defense of duress does not apply to malice aforethought first degree murder. Therefore, no instruction on duress as to Count I was required.

The jury was also instructed on the alternative theory of Felony Murder with the Kidnapping of Mr. Shaver as the underlying offense. Additionally, the jury was instructed that they must find the defendant guilty of Kidnapping Mr. Shaver in order to find her guilty of Felony

Murder predicated upon the Kidnapping and that the defense of duress applied to the Kidnapping. The jury could not have found Appellant guilty of Felony Murder had they found her not guilty of Kidnapping Mr. Shaver due to the defense of duress. Any error in the omission of an instruction specifically setting out the defense of duress to felony murder did not affect Appellant's substantial rights as the jury instructions as a whole adequately stated the applicable law. Finding no error and thus no plain error, this proposition is denied.

In her third proposition of error, Appellant contends the trial court erred in admitting evidence of other bad acts; specifically, evidence that she participated with co-defendant July in the kidnapping and assault of a person called Rowdy the day before the commission of the charged crimes. The State timely filed its Notice of Intent to Introduce Evidence of Other Crimes/Bad Acts seeking to present the evidence under 12 O.S.2011, § 2404(B) to show Appellant's intent and plan to commit the charged offenses and her knowledge and absence of mistake to rebut her defense of duress. Appellant objected to the evidence at a pre-trial hearing. The trial court essentially took the matter under advisement explaining it would let the evidence unfold and would rule on the objection at the time of the testimony.

Two prosecution witnesses testified to the earlier incident with Rowdy. Appellant was cross-examined about the incident. It was also mentioned in the State's closing argument. No objections were raised at any point. Appellant's pre-trial objection was not sufficient to preserve the issue for appellate review; error only occurs when the matter arises during the course of the trial and the trial court incorrectly permits or prohibits the introduction of the contested evidence. *Luna v. State,* 1992 OK CR 26, ¶ 5, 829 P.2d 69, 71. Therefore, our review is for plain error under the standard set forth above. *See Hogan,* 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

When the State seeks to introduce evidence of a crime other than the one charged, it must comply with the procedures in *Burks v. State,* 1979 OK CR 10, ¶ 2, 594 P.2d 771, 772, *overruled in part on other grounds, Jones v. State,* 1989 OK CR 7, 772 P.2d 922. *Eizember v. State,* 2007 OK CR 29, ¶ 75, 164 P.3d 208, 230. *Burks* requires, in part, the State to give a pre-trial notice of the other crimes or bad acts evidence it intends to introduce. "The purpose of the notice requirement is to prevent surprise on the part of the defense and to allow time for the defense to be heard prior to the evidence being placed before the jury." *Id.* When other crimes evidence is so prejudicial it denies a defendant his right to be tried only for the offense charged, or where its minimal

relevancy suggests the possibility the evidence is being offered to show a defendant is acting in conformity with his true character, the evidence should be suppressed." *Id.*

Evidence that Appellant willingly participated in a kidnapping and assault similar to the charged crimes committed the next day was relevant to show her plan and intent to cooperate with co-defendant July in keeping Ashlock hostage and her intentional infliction of violence on Shaver and Farar-Brown. *See Lott v. State,* 2004 OK CR 27, ¶ 42, 98 P.3d 318, 324. Further, the evidence was relevant in rebutting her claim that she participated in the charged offenses only out of fear of co-defendant July. This case is distinguishable from *Wall v. State,* 1988 OK CR 125, 763 P.2d 103 relied upon by Appellant. In *Wall,* this Court found other crimes evidence improperly admitted to refute an anticipated defense and not necessary to support the State's burden of proof. In *Wall,* no *Burks* notice was given and the anticipated defense never materialized. Here, the defense did receive pretrial notice of the other crimes evidence. The anticipated defense of duress was presented to the jury, and the other crimes evidence, showing that Appellant willfully participated in a similar incident the day before committing the charged offenses, was necessary to support the State's burden of proof.

The party opposing the admission of evidence has the burden to show it is substantially more prejudicial than probative. *Welch v. State*, 2000 OK CR 8, ¶ 14, 2 P.3d 356, 368. Here Appellant has not shown that the other crimes evidence was more prejudicial than probative. While the jury did not receive a limiting instruction on the other crimes evidence (see Proposition V below) the evidence was not so prejudicial as to deny Appellant her right to be tried only for the charged offenses. The evidence clearly showed the incident with Rowdy and the incident with Ashlock and the others were separate situations. The crimes committed against Rowdy were much less egregious than those committed the next day against the others. The jury was thoroughly instructed on the crimes on trial, which did not include the incident with Rowdy. After thoroughly reviewing the record, we find the other crimes evidence was properly admitted and there was no error and thus no plain error in its admission. This proposition is denied.

In Proposition IV, Appellant contends the trial court erred in failing to give a limiting instruction on the other crimes evidence. In the absence of any request for such an instruction or objection to its absence, we review only for plain error. *Daniels*, 2016 OK CR 2, ¶ 3, 369 P.3d at 383.

The failure of a trial court to give a limiting instruction *sua sponte* does not automatically constitute reversible error unless it arises to the

level of plain error and meets the plain error test. *See Jones v. State*, 1989 OK CR 7, ¶ 8, 772 P.2d 922, 925, *overruled on other grounds, Omalza v. State*, 1995 OK CR 80, ¶ 98, n. 29, 911 P.2d 286, 310, n. 29. Appellant's only argument for prejudice is that without the limiting instruction, the jury could infer her guilt of the charged crimes based on the other crimes evidence. She emphasizes the instruction allowing the jury to draw such reasonable inferences from the testimony and exhibits as you feel are justified.

The jury was fully instructed on the charged crimes, the conduct comprising those crimes and their legal elements, the State's burden of proof, and the presumption of innocence. The jury was further instructed to give separate consideration to each charge, the law of direct and circumstantial evidence and that of principals. These instructions were sufficient to guide the jury in their review of the evidence. Reading the instructions in context and in their entirety, and in light of the evidence of Appellant's participation in the charged crimes, it is hard to see how the jury could have taken the instruction referenced above and the absence of a specific limiting instruction on the other crimes evidence to find Appellant guilty of the charged offenses based on the other crimes evidence.

The lack of the limiting instruction did not affect Appellant's substantial rights as it did not impact the jury's verdict. *See Anderson v. State,* 1999 OK CR 44, ¶ 16, 992 P.2d 409, 416-17. The failure to give the limiting instruction in this case did not create the type of injury which requires reversal of the convictions. *See Andrew v. State,* 2007 OK CR 23, ¶ 117, 164 P.3d 176, 201. We find no plain error.

In Proposition V, Appellant argues her convictions for felony murder while in the commission of kidnapping Mr. Shaver and the underlying felony of kidnapping Shaver violate the protections against Double Jeopardy. The State agrees that the claim has merit and argues that the Kidnapping conviction in Count II must be reversed and remanded with instructions to dismiss.

"It is abundantly clear that a defendant cannot be convicted of both felony-murder and the underlying felony." *Perry v. State,* 1988 OK CR 252, ¶ 22, 764 P.2d 892, 898 *citing Brown v. Ohio,* 432 U.S. 161, 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977). "Conviction for both crimes would violate the Double Jeopardy Clause of the United States Constitution". *Id. See also Perry v. State,* 1993 OK CR 5, ¶ 7, 853 P.2d 198, 200-01.

Here, the evidence shows the murder occurred during the kidnapping and involved the same conduct in carrying out the kidnapping as charged in Count II. Therefore, convictions for both the felony murder of

Shaver and his underlying kidnapping violate the protections of double jeopardy. The conviction for Kidnapping in Count II is reversed and remanded with instructions to dismiss.

In Proposition VI, Appellant contends she was denied a fair trial by prosecutorial misconduct. Allegations of prosecutorial misconduct do not warrant reversal of a conviction unless the cumulative effect was such as to deprive the defendant of a fair trial. *Warner v. State,* 2006 OK CR 40, ¶ 197, 144 P.3d 838, 891. We have thoroughly reviewed Appellant's allegations of prosecutorial misconduct for plain error and otherwise and find none of the comments deprived Appellant of a fair trial, or had any prejudicial impact on the judgment and sentence.

The prosecutor did not improperly shift the burden of proof by cross-examining Appellant regarding her failure to present witnesses to corroborate her version of events. Reviewing only for plain error, we find no error as the comments merely pointed out that Appellant had access to other witnesses if she so desired. The comments did not draw conclusions from that failure to call witnesses. *See Pickens v. State,* 2001 OK CR 3, ¶ 39, 19 P.3d 866, 880; *Thomas v. State,* 1991 OK CR 58, ¶ 24, 811 P.2d 1337, 1344.

The trial court sustaining defense counsel's objection to the prosecutor's questioning concerning the veracity of Appellant's version of

events as being different from the testimony of the other witnesses cured any error. *See Warner,* 2006 OK CR 41, ¶ 181, 144 P.3d at 889. The State's presentation of the other crimes evidence was proper based upon the court's pre-trial ruling. And the prosecutor's comments in closing argument pertaining to Instruction No. 22 are distinguishable from comments found improper in *Reeves v. State,* 1979 OK CR 104, ¶¶ 9-11, 601 P.2d 113, 116 as they were not expressions of the court's subjective belief regarding Appellant's credibility. The prosecutor's comments were based on the testimony and ultimately within the wide range of discussion permitted in closing argument. *See Sanchez v. State,* 2009 OK CR 31, ¶ 71, 223 P.3d 980, 1004. There is no error thus no plain error.

DECISION

The Judgment and Sentence in **Count II is REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS.** The remaining Judgment and Sentences in Counts I, III - VI are **AFFIRMED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2017), the **MANDATE** is **ORDERED** issued upon the 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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JOHNSON, J.: Concur
SMITH, J.: Concur
HUDSON, J.: Concur

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