IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

NATHAN DAVID SPARKS,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F-2009-525
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAY 13 2011
MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

A. JOHNSON, PRESIDING JUDGE:

Appellant Nathan David Sparks was tried by jury and convicted in the District Court of Osage County, Case No. CF-2002-154, of Second Degree Murder (Count 1), in violation of 21 O.S. 2001, § 701.8(1), Unlawful Delivery of a Controlled Drug (Count 2), in violation of 63 O.S.2001, § 2-401 (B)(2), and Unlawful Removal of a Dead Body (Count 3), in violation of 21 O.S.2001, § 1161(A). The jury set punishment at ten years imprisonment on Count 1, ten years imprisonment and a $5,000.00 fine on Count 2, and one year in the county jail on Count 3. The Honorable J. R. Pearman, who presided at trial, sentenced Sparks accordingly, running the sentences consecutively but suspending the prison sentence on Count 2. From this Judgment and Sentence Sparks appeals, raising the following issues:

1. whether the evidence was sufficient to support a conviction for second degree murder;

2. whether the trial court erred in failing to include *sua sponte* an independent instruction on causation;

3. whether testimony regarding the manufacturing process of methamphetamine was irrelevant or substantially more prejudicial than probative;

4. whether prosecutorial misconduct deprived him of a fair trial;

5. whether he received effective assistance of counsel; and

6. whether cumulative error deprived him of his right to due process of law.

We find relief is not required on Counts 2 and 3 and affirm. We find that relief is required on Count 1 and reverse and remand with instructions to dismiss.

1.

We examined the elements of Second Degree Depraved Mind Murder based upon the defendant's delivery of a controlled dangerous substance where the victim dies as a result of ingesting that substance in *Palmer v. State*, 1994 OK CR 16, 871 P.2d 429, *overruled in part by Willingham v. State*, 1997 OK CR 62, 947 P.2d 1074. In *Palmer* we held that not "every delivery of a controlled dangerous substance resulting in death constitutes second degree murder."[1] *Id.* at ¶ 13, 871 P.2d at 433. Finding sufficient evidence that Palmer engaged in imminently dangerous activity, by giving the victim very pure cocaine after he had witnessed the victim have a nearly fatal acute reaction to cocaine two weeks earlier, we affirmed Palmer's conviction. *Id.*

[1] In 1989, five years after the events in *Palmer*, the Legislature included "unlawful distributing and dispensing of controlled dangerous substances" as one of the enumerated felonies for First Degree Murder. 21 O.S.Supp.1989, § 701.7(B). While the Legislature has decided to provide an avenue by which every delivery of a controlled substance resulting in death may be charged as First Degree Murder, we decline to expand our holding in *Palmer* when a death is charged as Second Degree Murder.

The facts in this case are distinguishable from those in *Palmer*. While Sparks knew the victim was hospitalized a few months before her death, there was no evidence that she was ever hospitalized because of her methamphetamine use. Even when viewed in a light most favorable to the State the evidence presented at trial was insufficient for a rational trier of fact to determine that Sparks' conduct was imminently dangerous. Count 1, therefore, must be reversed and remanded with instructions to dismiss.

2.

Because we dismiss Count 1 we need not address Sparks' second claim.

3.

Some of Officer Parks' testimony regarding the manufacturing of methamphetamine was irrelevant. Because Sparks fails to show how the outcome of the trial would have been different, in light of the overwhelming evidence on Counts 2 and 3, we find no plain error. *See Hanson v. State*, 2009 OK CR 13, ¶ 20, 206 P.3d 1020, 1028, *cert. denied*, 558 U.S. ___, 130 S.Ct. 808, 175 L.Ed.2d 568 (2009)(the plain error doctrine requires that the Appellant show that an error occurred, that it was plain or obvious, and that it affected the outcome of the proceeding).

4.

The question put to Sparks during cross-examination by the State was not asked for an inappropriate purpose and the comments made during closing arguments were fair comments on the evidence. We find no error. *Simpson v.*

State, 2010 OK CR 6, ¶ 25, 230 P.3d 888, 899, *reh'g granted*, 2010 OK CR 12, 239 P.3d 155, *cert. denied*, 562 U.S. ___, 131 S.Ct. 1009 (2010).

5.

Because we reverse Count 1 we do not reach Sparks' claim that trial counsel was ineffective for failing to request a separate causation instruction. Trial counsel was not ineffective for failing to object to alleged instances of prosecutorial misconduct. *See Wackerly v. State*, 2010 OK CR 16, ¶ 11, 237 P.3d 795, 799 (when comments were found not be prosecutorial misconduct trial counsel was not ineffective for failing to object).

6.

We find no further relief is necessary to address Sparks' claim of cumulative error.

DECISION

The Judgment and Sentence of the District Court as to Counts 2 and 3 is **AFFIRMED.** The Judgment and Sentence of the District Court as to Count 1 is **REVERSED** and **REMANDED** with instructions to **DISMISS**. 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 delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OSAGE COUNTY
THE HONORABLE J. R. PEARMAN, DISTRICT JUDGE

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OPINION BY: A. JOHNSON, P.J.
LEWIS, V.P.J.: Concur
LUMPKIN, J.: Concur in Part and Dissent in Part
C. JOHNSON, J.: Concur
SMITH, J.: Concur

LUMPKIN, J.: CONCURRING IN PART/DISSENTING IN PART

I concur in affirming Appellant's convictions in Counts 2 and 3. However, I dissent to the reversal of Count 1. I still believe that because of the known toxic ingredients of methamphetamine that any death caused by the delivery of methamphetamine is subject to prosecution even without the amendment to the murder in the first degree statute.

In evaluating claims of insufficient evidence, this Court "determines whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt." *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204. "[I]f there is evidence from which a jury could conclude that a defendant is guilty, this Court will not interfere with that verdict, even if sharp conflicts in the evidence exist." *Hancock v. State*, 2007 OK CR 9, ¶ 67, 155 P.3d 796, 812; *Vick v. State*, 1988 OK CR 110, ¶ 4, 756 P.2d 1239, 1240). "On appellate review this Court accepts all reasonable inferences which tend to support the jury's verdict." *Rutan v. State*, 2009 OK CR 3, ¶ 49, 202 P.3d 839, 849; *Scott v. State*, 1991 OK CR 31, ¶ 4, 808 P.2d 73, 76.

The opinion fails to take into account numerous facts that, when taken in the light most favorable to the State, establish that a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. The basis for the charge was not simply the distribution of the

controlled dangerous substance to the victim. Instead, it also involved Appellant's knowledge of the victim's significant health problems.

The victim had congestive heart failure, hyperthyroidism, diabetes mellitus, and sickle-cell anemia. The last two years of her life, she took daily medication for these problems. The victim's heart condition left her weakened at times. Approximately nine months before her death, the victim was hospitalized due to her health problems. She remained in the hospital for a week due to complications with her heart. On the date of her hospitalization, Appellant discovered the victim's condition and contacted the ambulance for her transport to the hospital. Appellant testified that the victim was swollen up real bad in a wheelchair.

Appellant knew of the victim's weakened state. Appellant had known the victim for nine years. They were "[r]eal good friends." (Tr. 241). At one point in time, Appellant and the victim were engaged to be married and resided together. Even after they broke off the engagement the victim sometimes stayed at Appellant's home and they remained sexual partners. Both Appellant and his relatives knew of the victim's hospitalization. Appellant testified at trial that the victim's health had slowed her down. When Appellant drew up the syringes of methamphetamine, he pulled up less in the victim's syringe because "I knew she couldn't do as much as me." (Tr. 247).

A reasonable person in Appellant's position would have known that giving the victim the methamphetamine was imminently dangerous and created a high degree of risk of death. *Palmer v. State*, 1994 OK CR 16, ¶ 13, 871 P.2d

429, 433, *overruled in part by Willingham v. State*, 1997 OK CR 62, ¶¶ 22-25, 947 P.2d 1074, 1080-81, *overruled on other grounds in Shrum v. State*, 1999 OK CR 41, ¶ 10 n. 8, 991 P.2d 1032, 1036 n. 8. I would affirm the Judgment and Sentence.

As to proposition three, Appellant waived appellate review of the issue for all but plain error by failing to raise a timely objection to its admission at trial. *Carter v. State*, 2008 OK CR 2, ¶ 13, 177 P.3d 572, 576; *Simpson v. State*, 1994 OK CR 40, ¶ 23, 876 P.2d 690, 698-99. I find that all of the testimony regarding the manufacturing of methamphetamine was relevant. "Relevant evidence need not conclusively, or even directly, establish the defendant's guilt; it is admissible if, when taken with other evidence in the case, it tends to establish a material fact in issue." *Taylor v. State*, 2011 OK CR 8, ¶ 40, 248 P.3d 362, 376. In the present case, the testimony coupled with the other evidence in the case tended to establish the imminent dangerousness of Appellant's act of giving the victim methamphetamine. The probative value of the testimony was not substantially outweighed by the danger of unfair prejudice. 12 O.S.2001, § 2403; *Mayes v. State*, 1994 OK CR 44, ¶ 77, 887 P.2d 1288. Plain error did not occur.

I note that our review in proposition four is only for plain error. Appellant failed to object to any of the alleged instances of prosecutorial misconduct and thus, waived appellate review of the instant challenge for all but plain error. *Romano v. State*, 1995 OK CR 74, ¶ 54, 909 P.2d 92, 115.