IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

EMILY DOWDY,	)	NOT FOR PUBLICATION
	)	
Appellant,	)	
v.	)	Case No. F 2001-171
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

JOHNSON, VICE-PRESIDING JUDGE:

Appellant, Emily Michelle Dowdy, was convicted in Oklahoma County District Court, Case No. CF 1999-3910, of Manslaughter in the First Degree (DUI), in violation of 21 O.S.1991, § 711(1) and 47 O.S.1991, § 11-902. Jury trial was held January 8th – 12th, 2001, before the Honorable Susan Caswell, District Judge. The jury found Appellant guilty and set punishment at twenty-five (25) years imprisonment. Formal sentencing was held on February 8th, 2001. Thereafter, Appellant then filed this appeal.

Appellant raises ten propositions of error:

1. Ms. Dowdy's second trial was barred by the Double Jeopardy clauses of our State and Federal Constitutions.

2. The trial court erred in prohibiting Ms. Dowdy from presenting her involuntary intoxication defense and erred in failing to instruct the jury on this defense.

3. The extreme bias of the trial judge in favor of the State deprived Ms. Dowdy of a fair trial in violation of her Fourteenth Amendment rights to fundamental fairness and due process of law and contrary to Article 2, Section 6 of the Oklahoma Constitution, mandating reversal.

4. The introduction of bad character evidence in the form of Dowdy's "party-girl" lifestyle and baseless allegations of her alcoholism rose to the level of plain error, denied Appellant a fair trial and mandate reversal.

5. The introduction of testimony presented solely to garner sympathy of the victim constituted plain error.

6. Ineffective assistance of trial counsel denied Ms. Dowdy a fair trial in violation of her Sixth and Fourteenth Amendment rights.

7. Prosecutorial misconduct denied Ms. Dowdy a fair trial.

8. The sentence is excessive and should be modified.

9. Failure to instruct on the requested lesser-included offense of negligent homicide constituted reversible error.

10. The accumulation of error warrants relief.

After thorough consideration of the propositions raised and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we have determined that relief is required on Proposition Two for the reasons set forth below.

As an initial matter, we find Appellant's second trial was not barred by principles of double jeopardy because the record demonstrates the State did not deliberately goad defense counsel into requesting a mistrial. *Oregon v. Kennedy*, 456 U.S. 667, 676, 102 S.Ct. 2083, 2089, 72 L.Ed.2d 416 (1982) Proposition One therefore does not require relief.

However, "[a] defendant in a criminal trial deserves to have his day in court, to tell his story, and defend himself against the crimes of which he has been charged." *Malone v. State*, 2002 OK CR 14, -- P.3d ---, (Lumpkin, J. *Concurring in part, dissenting in part*); *see also Carter v. State*, 1962 OK CR

144, ¶ 48, 376 P.2d 351, 359 (defendant denied his day in court where the trial court prevented him from putting his defense theory of intoxication/blackouts before a jury). Further, the right of the accused to confront the prosecution's witness and "to present his own witnesses *to establish a defense is a fundamental element of due process of law.*" (emphasis added) *White v. State*, 1998 OK CR 69, ¶ 12, 973 P.2d 306, 310-311.

In this case, the trial court's *pretrial* decision to preclude Appellant's trial counsel from presenting the defense of involuntary intoxication by limiting Appellant's witnesses' testimony was error, was prejudicial, and denied Appellant of a fundamentally fair trial. Appellant's ability to present sufficient evidence of the defense of involuntary intoxication to warrant a jury instruction was completely thwarted by the trial court's ruling. Accordingly, we find this matter should be **REVERSED AND REMANDED FOR A NEW TRIAL.**

The remaining propositions of error are hereby rendered moot and need not be addressed.

DECISION

The Judgment and Sentence imposed is hereby **REVERSED AND REMANDED FOR A NEW TRIAL.**

APPEARANCES AT TRIAL
MS. BEAU WILLIAMS
ATTORNEY AT LAW
4901 RICHMOND SQUARE
OKLAHOMA CITY, OK 73118
ATTORNEY FOR THE DEFENDANT

APPEARANCES ON APPEAL
J.W. COYLE, III.
COYLE, McCOY, & BURTON
119 N. ROBINSON, SUITE 320
OKLAHOMA CITY, OK 73102
ATTORNEY FOR APPELLANT

CHRISTY REID
CONNIE POPE
ASST. DISTRICT ATTORNEYS
320 ROBERT S. KERR, SUITE 505
OKLAHOMA CITY, OK 73102
ATTORNEYS FOR THE STATE

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
KELLYE BATES
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR STATE

OPINION BY: JOHNSON, V.P.J.

LUMPKIN, P.J:	CONCURS IN RESULT
CHAPEL, J.:	SPECIALLY CONCURS
STRUBHAR, J.:	CONCURS
LILE, J.:	DISSENTS

RC

LUMPKIN, PRESIDING JUDGE: CONCUR IN RESULTS

I concur in the Court's decision to reverse and remand this case for a new trial. However, I write separately to address further why the trial court's decision was error.

While the issue in this case is not whether the evidence was sufficient to warrant a jury instruction on a theory of defense, case law on that subject is instructive. In *Bland v. State,* 4 P.3d 702 (Okl.Cr.2000), *cert. denied,* 531 U.S. 1099, 121 S.Ct. 832, 148 L.Ed.2d 714 (2001) we relied on *Jackson v. State,* 964 P.2d 875, 892 (Okl.Cr.1998), *cert. denied,* 526 U.S. 1008, 119 S.Ct. 1150, 143 L.Ed.2d 217 (1999) and stated:

> [T]his Court held that the test to be used in determining whether the evidence warranted an instruction on voluntary intoxication should be no different from the test used on any other defense. "When sufficient, *prima facia* evidence is presented which meets the legal criteria for the defense of voluntary intoxication, or any other defense, an instruction should be given." Id. "Sufficient in this context simply means that, standing alone, there is *prima facia* evidence of the defense, nothing more." Id. at 904 fn. 5. See also *White,* 973 P.2d at 312 (Lumpkin, J., specially concurring) quoting *Michigan v. Lemons,* 454 Mich. 234, 562 N.W.2d 447, 454 (1997) ("before a defendant is entitled to an instruction on the defense ..., he must establish a *prima facie* case of the ... elements of that defense.") *Prima facie* evidence is defined as:
>
> Evidence good and sufficient on its face. Such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted, will remain sufficient ... to sustain a judgment in favor of the issue which it supports.
>
> *Id.*

4 P.3d at 719-720

Just as it is the defendant's responsibility during trial to present sufficient evidence to warrant a jury instruction on his or her theory of defense, it is the defendant's responsibility in pre-trial proceedings to present sufficient evidence, *i.e.* a *prima facie* case, of his or her theory of defense to show its relevancy and warrant the presentation of that evidence at trial. It is then the trial judge's responsibility to determine whether that defense evidence is sufficient to establish a *prima facie* case to permit the evidence to go before the jury with appropriate instructions on the legal theory of defense.

In the present case, the defense sought to present evidence of intoxication, based upon Appellant's BAC; that she had never suffered from memory loss before and that she had not voluntarily taken anything to cause that to happen, based upon Appellant's own testimony; and evidence from an expert witness (toxicologist) and Appellant's own physician, as to how "date rape drugs" affect the memory and that Appellant's "pristine memory loss" was consistent with the administration of some type of drugs rather than alcohol intoxication. In this case, the defendant's pre-trial recitation of evidence could have been sufficient to establish a *prima facie* case of the defense of involuntary intoxication so that she should have been allowed to present this evidence to a jury. Due to the fact the Appellant was not allowed to go forward with the evidence, we do not know if she would have been able to meet her burden of proof. We do not know if there was any evidence of any drug other than alcohol to support the defense sought. And, we do not know the believability of

the Appellant and if her story was supported or contradicted by the rest of the evidence.

CHAPEL, JUDGE, SPECIALLY CONCURRING:

I agree completely with the decision to reverse and remand this case for retrial, but write separately to note that I would reserve the double jeopardy issue for decision in the event of conviction and appeal upon retrial. See *Oregon v. Kennedy*, 666 P.2d 1316 (1983). I would also order that the retrial of this case be reassigned to a different judge.

LILE, JUDGE: DISSENTS

In this case, the trial court held a hearing on Appellant's proffered defense of involuntary intoxication. There was absolutely no evidence to support that defense. The trial court properly excluded the testimony. *Patton v. State*, 1998 OK CR 66, 973 P.2d 270.

Therefore, I respectfully dissent.