IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LUKE SINCLAIR,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
v.	)	Case No. F-2004-146
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

CHAPEL, PRESIDING JUDGE:

Luke Sinclair was tried by jury and convicted of Murder in the First Degree, in violation of 21 O.S.2001, § 701.7(A), in the District Court of Comanche County, Case No. CF-2002-452. In accordance with the jury's recommendation the Honorable C. Allen McCall sentenced Sinclair to life imprisonment without the possibility of parole. Sinclair appeals from this judgment and sentence, raising four propositions of error.

Sometime between 2:30 a.m. and 3:00 a.m. on October 10, 2002, Sinclair shot James Robbins four times in the chest and killed him. Sinclair, an Army military policeman stationed at Fort Sill, began drinking and visiting with three friends, Tejara, Knight and Gresham, the previous evening in the barracks. The four drove in Sinclair's SUV to the Impact Zone, a club on post for enlisted men, but it was closed. Sinclair then drove the group to Night Trips, a strip bar west of Lawton. They stayed at Night Trips until closing, drinking beer and watching the girls. Robbins, a retired Army veteran, was also in the bar. Robbins was wearing a black beret and Army pins and

insignia. After the bar closed at 2:00 a.m., Robbins and the four enlisted men met in the parking lot. Sinclair and his friends were waiting for the strippers, hoping to meet them for breakfast. Robbins approached the four. He had noticed Sinclair's Hawaii license plates, and began a conversation about being stationed in Hawaii. Robbins wanted to tell Army stories and talk with the soldiers. He asked them to join him at another bar. Sinclair, Tejara, Knight and Gresham thought Robbins was weird. They just wanted to talk to the girls. Because Robbins asked them to come to another bar, they wondered whether he was homosexual. Tejara told Sinclair that Robbins should be shot; Sinclair gave Tejara his (personal, non-Army issue) Glock nine millimeter pistol and suggested he ride with Robbins. Tejara declined and gave back the gun.

When the Night Trips bouncer told everyone to leave the parking lot, Robbins pulled out in his van. He was followed almost immediately by Sinclair and his friends in the SUV. Sinclair said he would get that motherfucker, and Tejara and Gresham egged him on. Nobody in the car thought Sinclair was serious. Sinclair pulled around Robbins's van and stopped in the middle of the road, blocking it. He got out with the Glock, went back to Robbins's open driver's side window, and shot four times. He came back and told Knight to drive. As they neared Fort Sill, Sinclair took the wheel and drove back on post. He told the other three not even to admit having been at Night Trips. Two days later, Tejara told police the story, which Gresham and Knight later confirmed.

Sinclair raises four propositions of error. None directly challenge his conviction. In fact, he refreshingly and accurately admits that the eyewitness

evidence against him is overwhelming. Sinclair focuses on the information given to the jury which, he claims, had an effect on the jury's decision to sentence him to life imprisonment without the possibility of parole. We find merit in Propositions III and IV.

In Proposition I Sinclair claims he should have been allowed to present evidence in mitigation of sentence to the jury. Sinclair did not make this request at trial and has waived all but plain error. There is none. Sinclair admits this Court has held that character evidence, such as mitigating evidence, is not admissible in non-capital guilt or sentencing proceedings.[1] We decline Sinclair's invitation to reconsider this decision. This proposition is denied.

Sinclair claims in Proposition II that he was denied effective assistance of counsel when counsel failed to present available evidence of his non-violent character in support of his "reasonable doubt" strategy. Sinclair must show counsel's performance was so deficient that he did not have counsel as guaranteed by the Sixth Amendment, and that the deficient performance created errors so serious as to deprive him of a fair trial with reliable results.[2] We measure counsel's performance against an objective standard of

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[1] *Malone v. State*, 2002 OK CR 34, 58 P.3d 208, 209. I dissented in *Malone*. I continue to believe that Oklahoma law affording defendants the right to individualized jury sentencing is consistent with proceedings in felony cases which allow jurors to hear mitigating evidence. *Malone*, 58 P.3d at 214 (Chapel, J., dissenting). I yield to my colleagues on the basis of *stare decisis*.

[2] *Hooks v. State*, 2001 OK CR 1, 19 P.3d 294, 317, *cert. denied*, 534 U.S. 963, 122 S.Ct. 371, 151 L.Ed.2d 282; *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003); *Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052, 2069-70, 80 L.Ed.2d 674, 693 (1984).

reasonableness under prevailing professional norms.[3] We give great deference to trial counsel's strategic decisions, considering his choices from counsel's perspective at the time.[4] We presume counsel's conduct was professional and could be considered sound strategy.[5] We will not find counsel ineffective where we determine that the defendant was not prejudiced by counsel's actions or omissions.[6]

Sinclair cannot meet this test. Sinclair offered no specific defense at trial beyond suggesting the State's case left a reasonable doubt of his guilt. Sinclair argues that counsel could have presented testimony from family and colleagues that Sinclair was a peaceful person not known for violence, to bolster his suggestion that Tejara, Knight and Gresham were mistaken (or worse) in testifying that Sinclair was the person with the gun who shot Robbins. Under the Evidence Code, counsel could have offered evidence of Sinclair's character for non-violence.[7] However, the prosecutor would have been entitled to rebut

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[3] *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 2462, 162 L.Ed.2d 360 (2005); *Wiggins*, 539 U.S. at 521, 123 S.Ct. at 2527.

[4] *Rompilla*, 125 S.Ct. at 2462; *Wiggins*, 539 U.S. at 523, 123 S.Ct. at 2356; *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2052; *Hooks*, 19 P.3d at 317.

[5] *Ryder v. State*, 2004 OK CR 2, 83 P.3d 856, 874-75, *cert. denied*, 543 U.S. 886, 125 S.Ct. 215, 160 L.Ed.2d 146; *Patterson v. State*, 2002 OK CR 18, 45 P.3d 925, 929 (2002); *Banks v. State*, 2002 OK CR 9, 43 P.3d 390, 402, *cert. denied*, 537 U.S. 1126, 123 S.Ct. 898, 154 L.Ed.2d 811; *Hooks*, 19 P.3d at 317.

[6] *Williams v. Taylor*, 529 U.S. 362, 393, 120 S.Ct. 1495, 1513, 146 L.Ed.2d 389 (2000) (defendant prejudiced where counsel's actions deny him a substantive or procedural right to which he is entitled by law); *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2052; *Hooks*, 19 P.3d at 317; *Alverson v. State*, 1999 OK CR 21, 983 P.2d 498, 510, *cert. denied*, 528 U.S. 1089, 120 S.Ct. 820, 145 L.Ed.2d 690 (2000).

[7] 12 O.S.2001, § 2404(A)(1); *Michelson v. United States*, 335 U.S. 469, 476, 69 S.Ct. 213, 219, 93 L.Ed. 168 (1948). Such evidence is admissible at the trial court's discretion. We will not speculate on whether Sinclair's trial court would have admitted all, or even a significant portion of, testimony from the fifteen persons who later contacted the trial court before sentencing. While some of these persons had specific stories in which Sinclair eschewed

this evidence.[8] As the State notes, the prosecutor could have used available rebuttal evidence that Sinclair had told Tejara he committed and got away with an armed robbery at a Subway restaurant in Hawaii. Upholding Sinclair's vehement objections, the trial court did not admit this evidence at trial but certainly could have admitted it to rebut any claim that Sinclair was not a violent person.[9] Sinclair suggests this evidence would not have hurt him, since the trial court admitted his more general statement immediately after the crime that it felt good and he had not done this in a long time.[10] Arguably, Sinclair's own statement suggesting he had previously shot and killed someone was worse (in the context of this murder prosecution) than his confession of armed robbery to Tejara. However, we will not second-guess counsel's reasonable strategic decision to avoid character evidence altogether.[11] This decision was doubly reasonable as it (a) avoided any possibility that Tejara's evidence would be introduced, and (b) did not insult the jury's intelligence in the face of the eyewitness evidence that Sinclair shot Robbins.

The State argues that Sinclair was not prejudiced by counsel's failure to present these witnesses because evidence of his guilt was overwhelming. That

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violence or discouraged another from a violent act, most simply generally described his non-violent, peaceful character.

[8] 12 O.S.2001, § 2404(A)(1).

[9] *Dodd v. State*, 2004 OK CR 31, 100 P.3d 1017, 1043; *Douglas v. State*, 1997 OK CR 79, 951 P.2d 651, 663, *cert. denied*, 525 U.S. 884, 119 S.Ct. 195, 142 L.Ed.2d 159 (1998); *Parker v. State*, 1996 OK CR 19, 917 P.2d 980, 987- 88, *cert. denied*, 519 U.S. 1096, 117 S.Ct. 777, 136 L.Ed.2d 721 (1997).

[10] Tejara revealed this comment to prosecutors and defense counsel during the course of the trial, just before he testified. Although both parties treated it as a surprise, in fact Tejara had testified to substantially the same thing in preliminary hearing.

fact alone does not end an inquiry into prejudice – we must still determine whether trial counsel's omission here adversely affected the outcome of the case.[12] This includes both a determination of guilt and sentencing. Sinclair admits that this evidence would have likely had little or no effect on the jury's determination of guilt. He argues that, if the jury had the opportunity to hear evidence of his good character to support his claim of innocence, he would have received a residual benefit when the jury considered his sentence. As Sinclair notes, the prosecutor made repeated attacks on his character during closing argument (see Proposition IV). We do not discount this claim. However, counsel could not have known, when preparing his first-stage defense, that the prosecutor would improperly offer the jury personal criticism of Sinclair's character not based on the evidence. We cannot say that counsel was ineffective for failing to develop and present this evidence, in hopes of influencing the jury's sentencing verdict, when compelling strategic reasons supported counsel's decision to avoid presenting that evidence on the issue of guilt or innocence. This proposition is denied.

Sinclair claims in Proposition III that the trial court erred in failing to instruct the jury that, under Oklahoma law, he would be required to serve 85% of any sentence imposed for murder before being eligible for parole.[13] Sinclair

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[11] *Darden v. Wainwright*, 477 U.S. 168, 186, 106 S.Ct. 2464, 2474, 91 L.Ed.2d 144 (1986); *Dodd*, 100 P.3d at 1043; *Stouffer v. State*, 1987 OK CR 92, 742 P.2d 562, *cert. denied* 484 U.S. 1036, 108 S.Ct. 763, 98 L.Ed.2d 779 (1988).

[12] *Dunford v. State*, 1985 OK CR 81, 702 P.2d 1051, 1055.

[13] In conjunction with this proposition Sinclair requests an evidentiary hearing pursuant to Rule 3.11, arguing that jurors considered extraneous information not presented as evidence during their sentencing deliberations. Rules 3.11(A), 3.11(B)(1), *Rules of the Oklahoma Court of*

claims that, during deliberations, jurors discussed their beliefs that a life sentence would result in Sinclair's release within seven to ten years. Sinclair provides affidavits to support his claim that several jurors based their sentencing decision on this information. Sinclair failed to request this instruction at trial. However, we recently held in *Anderson v. State* that juries should be instructed, in appropriate cases, that a defendant would be required, by statute, to serve 85% of any sentence imposed for murder before becoming eligible to be considered for parole.[14] Sinclair is entitled to relief on this issue as his appeal was pending in this Court when *Anderson* was decided.[15] The case must be reversed and remanded for resentencing.[16]

In Proposition IV Sinclair claims that the accumulation of errors in the previous propositions, combined with inflammatory prosecutorial argument, resulted in an excessive sentence. We found no error in Propositions I or II. In

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Criminal Appeals, Title 22, Ch.18, App. (2005). We construe this Rule 3.11 request as a motion for new trial based on newly discovered evidence. Rule 3.11(B)(b)(3), 2.1(A)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005); 22 OS.2001, §§ 952, 953. Sinclair's claim, that jurors improperly considered inaccurate personal beliefs regarding the probable length of time to be served on a life sentence, does not present a claim of "extraneous information" used during deliberations. For that reason Sinclair's motion is **DENIED**.

[14] 2006 OK CR 6, ¶ 24. *See also* 21 O.S.2001, §§ 12.1, 13.1.

[15] *Griffin v. Kentucky*, 479 U.S. 314, 327, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987).

[16] The State claims that jurors instructed on the rule would be encouraged to speculate about when a defendant might be paroled, and defendants who have parole "factored in" to their original sentence will be less inclined to behave well in prison. This reflects a basic misunderstanding of both the 85% Rule and Sinclair's claim. The issue here is not, as the State suggests, concern about when a defendant *will be* paroled; that would truly be speculation. The issue is when, under Oklahoma law, a defendant is eligible to be considered for parole on a particular sentence. Instruction on the 85% Rule does not allow jurors to "factor in" parole when recommending a sentence, as there is no guarantee that any defendant will be paroled; nor should this instruction discourage inmates from behaving well to be rewarded by parole for good behavior, as the fact of parole eligibility does not itself determine parole. If the State is suggesting that inmates under the 85% Rule have no incentive to behave well because the time at which they become eligible for parole is fixed by statute, then the inmates' quarrel is with the Legislature, not with any jury which may have been instructed on that law.

Proposition III we determined that the jury should have been instructed on the 85% rule. Our remand for Resentencing cures any error in sentencing.[17]

In connection with Proposition IV, we address Sinclair's claim of prosecutorial misconduct, and conclude that the jury was improperly influenced by inflammatory argument.[18] The State's evidence showed that Sinclair had been drinking, became irritated at Robbins, bragged that he'd shoot him, was egged on by his friends, and shot Robbins. While this certainly was sufficient to show malice murder, it also suggests a stupid, impulsive crime. The prosecutor's argument in final closing that Robbins was killed for fun is arguably supported by the evidence, and is thus not error. However, the prosecutor also argued that Sinclair was an empty shell of a man without a conscience, normal emotions, consideration, or concern for others. Sinclair's objection was overruled. The State argued that the most dangerous man was one, like Sinclair, who had no conscience, showed no remorse, and to whom killing meant nothing. None of this was supported by the evidence. There was no evidence regarding Sinclair's feelings about the crime either during the shooting or in its aftermath. Tejara specifically testified that, though Sinclair seemed to him like his normal self immediately after the crime, he was

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[17] Sinclair's Motion to File Supplemental Brief, filed March 22, 2006, is **DENIED**.

[18] We find that the trial court did not abuse its discretion in admitting Sinclair's contemporaneous statement, immediately after the shooting, that it felt good and he hadn't done this in a long time. When the prosecutor asked Gresham whether he agreed that Sinclair was a want-to-be gangster, the trial court sustained Sinclair's objection, curing the error. *Dodd*, 100 P.3d at 1044. It was not error to elicit Gresham's opinion that Sinclair was showing off. The prosecutor's comments about Sinclair's possible criminal history and asking whether jurors wanted him walking around were based on the evidence, particular to Sinclair, and did not amount to societal alarm. His argument that Sinclair took everything from Robbins and

remorseful a day later, before Tejara went to police. We recognize that counsel may discuss reasonable inferences from the evidence, and relief is not warranted unless improper argument affects a defendant's rights.[19] However, these arguments were not reasonable inferences from the evidence presented at trial. The prosecutor's emphasis on Sinclair's evil character was explicitly designed to persuade jurors to lock him up for life and deny him the opportunity for parole. The prosecutor asked jurors whether they wanted Sinclair out and walking around, and urged a sentence of life without parole to avoid that. While Sinclair had made an obscure remark suggesting he had engaged in some criminal activity in the past, he had no prior criminal convictions. The crime here, while unforgivable, was planned and carried out in a matter of minutes. Affidavits supporting Sinclair's 85% Rule claim show that jurors believed that a life sentence would put Sinclair out on the street in a relatively short time. In combination with that erroneous belief, the inflammatory argument about Sinclair's bad character improperly influenced the jury's sentencing determination and resulted in an unfair sentence. Proposition IV is granted and, in combination with error in Proposition III, warrants relief.

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his family was based on the evidence, and did not amount to impermissible victim impact evidence.

[19] *Banks*, 43 P.3d at 401; *Hooks*, 19 P.3d at 314.

Decision

The Judgment of the District Court is **AFFIRMED**. The case is **REVERSED** and **REMANDED** for **RESENTENCING**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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OPINION BY: CHAPEL, P. J.

LUMPKIN, V.P.J.:	CONCUR IN RESULTS
C. JOHNSON, J.:	CONCUR
A. JOHNSON, J.:	CONCUR
LEWIS, J.:	CONCUR IN RESULTS

LUMPKIN, V.P.J.: CONCUR IN RESULTS

I believe this Court should exercise extreme caution when asked to delve into matters occurring during jury deliberations. This opinion takes a relaxed approach to that idea, however, and therefore I part ways with the analysis to the extent that it fails to live up to that important statutory principle.

First, as footnote 13 points out, even if the subject of parole did arise during the jury's deliberations, that subject does not qualify as "extraneous information" under our jurisprudence, as it simply arose as part of jurors' subjectively-held ideas about how the legal system operates. This Court has recognized that "a jury may logically consider the possibility or absence of parole in determining the sentence a capital murder defendant is to receive...." *Cipriano v. State*, 2001 OK CR 25, ¶49, 32 P.3d 869, 879. No matter how hard it may try, this Court simply cannot "police" everything that happens in the jury room.

Second, the details of a jury's deliberations are protected from appellate examination under our statutes:

> Upon an inquiry into the validity of a verdict or indictment, a juror shall not testify as to any matter or statement occurring during the course of the jury's deliberations or as to the effect of anything upon the juror's mind or another juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes during deliberations....

12 O.S. Supp. 2004, § 2606(B). We have interpreted this passage to mean that courts are prohibited from inquiring into any "motives, methods or mental processes" used by jurors in reaching their verdicts. *Young v. State*, 2000 OK CR 17 ¶112, 12 P.3d 20, 48. An individual juror's common knowledge about parole most certainly fits this description. *See Id.* (holding that jurors' discussion of their religious beliefs did not constitute use of extraneous information).

Permitting courts to probe into jury deliberations will likely have negative consequences, as the Oklahoma Supreme Court has noted:

> [A]ll verdicts could be and many would be followed by an inquiry on the part of the defeated litigant, jurors would be harassed and beset in an effort to establish misconduct sufficient to defeat the verdict, and the result would be that the considerations of the jury, intended to a *private* deliberation, would be a constant subject of public investigation to the utter destruction of freedom of discussion and frankness, striking to the core of the jury system.

Short v. Jones, 613 P.2d 452, 456 (Okla. 1980) (emphasis in original). Indeed, this Court has seen an increasing number of cases recently where the parties have been obtaining affidavits from jurors in a deliberate attempt to find error in the jurors' private deliberations.

Accordingly, I write to strongly encourage litigants to refrain from violating the principle set forth in section 2606(B), when bringing matters like the 85% rule's application up on appeal.

And finally, based upon the principle of *stare decisis*, I accede to the application of *Anderson v. State* to cases pending on appeal at the

time of that decision. However, I believe the Court should apply the plain language of *Anderson*, which states:

> While this decision gives effect to the legislative intent to provide juries with pertinent information about sentencing options, it does not amount to a substantive change in the law. A trial court's failure to instruct on the 85% Rule in cases before this decision will not be grounds for reversal.

2006 OK CR 6, ¶25, 130 P.3d 273, 283 (emphasis added). The plain reading of the decision reveals it is not a substantive change in the law, only a procedural change, and it should only be applied in a prospective manner.