IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TONY NEAL DUNCAN,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	No. F-2005-320
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LEWIS, JUDGE:

Tony Neal Duncan, Appellant, was convicted of First Degree Manslaughter in violation of 21 O.S.2001, § 711 in the District Court of Pushmataha County, Case No. CF-2004-12, before the Honorable Lowell R. Burgess, Associate District Judge. The jury assessed punishment at four (4) years imprisonment, and the trial court sentenced accordingly, suspending the last year of the four (4) year sentence.

Duncan has perfected an appeal of the District Court's Judgment and Sentence. In support of the appeal, Duncan raises the following propositions of error:

1. Duncan was denied his right to confront and cross-examine the witnesses against him when the State was allowed to introduce the preliminary hearing transcript of the testimony of Physician's assistant Timothy Lemoy at trial when he did not testify live at trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article II, Sections 7 and 20 of the Oklahoma Constitution.

2. Duncan was denied an impartial judge during his trial in violation of the Fourteenth Amendment to the United States

Constitution and Article II, Section 7 of the Oklahoma Constitution.

3. All evidence relating to the "blood draw" and testing of Duncan's blood must be suppressed.

4. The jury verdict of guilty was unfairly coerced by the trial court giving an "*Allen*" instruction and arrived at unfairly by jurors compromising their views of the evidence.

5. The accumulation of errors resulted in a fundamentally unfair trial.

After thorough consideration of Duncan's propositions of error and the entire record before us on appeal, including the original record, transcripts, exhibits, and briefs, we have determined that the Judgment and Sentence of the District Court shall be reversed and remanded for a new trial based on error raised in proposition one.

In proposition one, we find that the trial court erred when it found that witness Timothy Lemoy's preliminary hearing testimony was admissible in this trial. The trial court first ruled that the transcripted testimony was admissible pursuant to 12 O.S.2001, § 3232(A)(3)(b) as a "deposition of a witness" who resides outside the county where the action is being tried. The trial court also ruled that the evidence was admissible under 12 O.S.2001, § 2803(1)(present sense impression) and § 2803(2)(excited utterance), both of which may be admissible regardless of the availability of the witness.

Section 3232 is located in the Oklahoma Discovery Code, which applies to civil matters, not criminal matters. See 12 O.S.2001, § 3224. Defendants in criminal cases have the right of confrontation under the Sixth Amendment to

the United States Constitution and Article II, § 20 of the Oklahoma Constitution. That right does not extend to civil cases. *See Matter of Rich*, 1979 OK 173, ¶ 13, fn.21, 604 P.2d 1248, 1253, fn.21, *citing Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968).

Neither 12 O.S.2001, § 2803(1) or (2) apply in this case. Preliminary hearing testimony is not a present sense impression nor is it an excited utterance. There is absolutely no evidence that Lemoy made any statements as present sense impressions or excited utterances to the effect that Duncan had an extreme odor of alcohol when he saw him in the Hospital emergency room.

Barber specifically holds that before preliminary hearing testimony is admissible at trial there must be a showing that the witness is unavailable. Here the State concedes that there is no showing that Lemoy was unavailable. In fact, the prosecution excused Lemoy from his subpoena, excusing him from attendance at trial.

In *Barber*, the Supreme Court quotes, *Mattox v. United States*, 156 U.S. 237, 242-243, 15 S.Ct. 337, 339, 39 L.Ed. 409 (1895), and states,

> The primary object of the confrontation clause of the Sixth Amendment was to prevent depositions or ex parte affidavits being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether his is worthy of belief.

Here, the jury had no such opportunity to observe this witness's demeanor and judge his credibility because the prosecution told him that he

did not have to appear at trial. The trial court here found that the prosecution did not procure the witness's absence. On the contrary, the prosecution released this witness from the subpoena's power to compel him to appear and testify in front of the defendant and the jury.

While this error is subject to the harmless error analysis, this Court cannot say the error was harmless beyond a reasonable doubt. *See Littlejohn v. State*, 2004 OK CR 6, ¶ 29, 85 P.3d 287, 298. There is a strong possibility that absent the hearsay evidence, Duncan would not have been convicted of First Degree Manslaughter.

The evidence introduced through Lemoy's preliminary hearing testimony was the only contemporaneous evidence supporting the theory that Duncan was intoxicated at the time of the accident. The only other evidence was testimony about Duncan buying and drinking beer hours before the accident and the test result of 0.01 which was from blood taken six hours after the accident. There was no evidence regarding the amount of alcohol Duncan might have consumed before the accident, or the rate at which the alcohol might have dissipated from Duncan's bloodstream after the accident. Here, witnesses testified that they did not smell alcohol on Duncan at the accident scene, and Lemoy's testimony was the only testimony conflicting with the first responder's testimony.

Because we find that the preliminary hearing transcript was inadmissible in this case and the error does not survive harmless error review, this case must be reversed and remanded for a new trial. Because this case is being

reversed and remanded for a new trial, we find that none of the other propositions require review at this time.

DECISION

The Judgment and Sentence shall be **REVERSED** and this case shall be **REMANDED** to the District Court for a **NEW TRIAL**. 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: LEWIS, J.

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