IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KEYNON MICHAEL OWENS,	)	
	)	
Appellant,	)	
v.	)	Case No. F-2007-1151
	)	Not for Publication
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, JUDGE:

Keynon Michael Owens, Appellant, was charged and convicted of First-Degree Felony Murder, under 21 O.S.Supp.2004, § 701.7(B) (Count II), and of Robbery with a Dangerous Weapon, under 21 O.S.2001, § 801 (Count V), in the District Court of Tulsa County, Case No. CF-2006-2341.[1] In the same case Owens was charged but acquitted by the jury of Shooting with Intent to Kill (Count III) and Robbery with a Dangerous Weapon (Count IV). The victim listed in Counts II and IV was Javier Carranza ("Javier"). The victim listed in Counts III and V was Jesus Carranza ("Jesus"). Joe Gene Sanders was charged as a co-defendant in the case and was tried along with Owens.[2] Brandi Nicole Lindsey was also charged in the case, but pled guilty and testified for the State

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[1] In Count II, Owens was charged with the felony murder of Javier Carranza, with the armed robbery of Javier Carranza as the underlying felony.

[2] Sanders was charged and convicted of Count I, the First-Degree Murder of Javier Carranza, Count III, Count IV, and Count V. In Count I, Sanders was charged with first-degree malice murder and, in the alternative, with first-degree felony murder, with the armed robbery of Javier as the underlying felony. The jury specifically found Sanders guilty under both theories and sentenced him to life without parole on Count I under both theories. In addition, the jury sentenced Sanders to imprisonment for 10 years on Count III and to 20 years on Counts IV and V. The court ordered that Counts I and IV be served concurrently and that Counts III and V be served consecutively to each other and to Counts I and IV.

at the joint trial of Sanders and Owens.[3] In accord with the jury's recommendation, the Honorable Tom C. Gillert sentenced Owens to imprisonment for life on Count II and imprisonment for ten (10) years on Count V, to be served consecutively. Owens is properly before the Court on direct appeal.

The following propositions of error have been raised on appeal:

I. THE EVIDENCE WAS INSUFFICIENT TO FIND MR. OWENS GUILTY BEYOND A REASONABLE DOUBT OF COUNT 2, FELONY MURDER, SINCE THE JURY HAD FOUND MR. OWENS NOT GUILTY OF THE THIRD ELEMENT OF THE OFFENSE OF FELONY MURDER AND/OR IN THE ALTERNATIVE, THE VERDICTS WERE INCONSISTENT.

II. MR. OWENS WAS WRONGLY SENTENCED AND INCARCERATED BY THE TRIAL COURT IN VIOLATION OF THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

III. THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUPPORT MR. OWENS' CONVICTIONS AND THEREFORE, HIS CONVICTIONS VIOLATED THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE 2, SECTION 7 OF THE OKLAHOMA CONSTITUTION.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find that Owens' Count II conviction for first-degree felony murder must be reversed.

Owens raises two claims on appeal alleging "insufficient evidence." In Proposition III, Owens raises a traditional sufficiency-of-the-evidence claim, asserting that the evidence presented at trial was not sufficient to sustain the two charges upon which he was convicted, the felony murder of Javier Carranza (Count II) and the armed robbery of Jesus Carranza (Count V). Proposition I is a different type of claim and not truly an evidentiary sufficiency claim. In Proposition I, Owens argues that the evidence was "insufficient" to

[3] Lindsey was charged along with Owens in Count II and with Sanders and Owens in Counts IV and V. Prior to the joint trial, Lindsey pled guilty to Accessory After the Fact to First-Degree

convict him of Count II, the felony murder of Javier, because the jury acquitted him of Count IV, the armed robbery of Javier, which was charged as the underlying felony in Count II. This Court will take up the traditional sufficiency claim first (Proposition III) and then turn to the consistency of the verdicts claim (Proposition I).

In order to resolve Proposition III, this Court must determine whether, taking the evidence in the light most favorable to the State, a jury could have rationally convicted Owens of the felony murder of Javier and the armed robbery of Jesus.[4] The lengthy argument in Owens' brief about various weaknesses in the State's case—the fact that there was no forensic evidence linking Owens (or Sanders) to the crimes, the inconsistencies in the eyewitness testimony, particularly that of Jesus, the failure to find the gun used, *etc.*—totally fails to evaluate the evidence in the proper manner, *i.e.*, in the light most favorable to the State. Evaluating the evidence from this vantage point, as we must, this Court does not hesitate to conclude that the evidence presented at the joint trial was more than sufficient to sustain Owens' convictions for both the felony murder of Javier and the armed robbery of Jesus.

Taken in the light most favorable to the prosecution, the evidence presented at trial suggested that Owens was recruited by Sanders to assist him in the armed robbery of the Carranzas, who Sanders learned about through a

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Murder and was sentenced to imprisonment for 10 years, with 2 years suspended.

[4] *See Jackson v. Virgnia*, 443 U.S. 307, 319-20, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (evaluate evidentiary sufficiency by determining "whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential

phone call from his girlfriend (Lindsey) earlier that night. The evidence was more than sufficient to infer that Owens knowingly joined the armed robbery plot and that he then actively helped Sanders carry it out: by confronting the Carranzas (along with gun-toting Sanders) at the apartment complex, by actually taking the wallet of Jesus, and by assisting Sanders in the robbery of Javier when Javier fought back. The evidence against Owens was certainly sufficient to sustain his Count V conviction for the armed robbery of Jesus.

Furthermore, and despite the jury's decision to acquit Owens of the armed robbery of Javier (Count IV), the evidence presented at trial was also sufficient to convict Owens of this robbery *and* to convict him of the felony murder of Javier, with this robbery as the underlying felony (Count II). The evidence indicated that Owens and Sanders were working as a team to rob *both* men and that they confronted both men as a team. And the jury was properly instructed on the law of aider/abettor liability. Even though the jury did not convict Owens of the actual robbery of Javier (Count IV), this Court has no doubt that the evidence presented would have been sufficient to have sustained such a conviction. And because Javier was obviously killed during the course of this felony armed robbery—which was accomplished through the joint actions of Sanders and Owens—the evidence would have been more than sufficient to sustain a felony murder conviction against Owens.[5] Proposition III

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elements of the crime charged beyond a reasonable doubt") (emphasis in original); *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04 (adopting *Jackson* standard).

[5] Whether the jury actually convicted Owens of felony murder on the basis of the armed robbery of Javier (as charged in the case), however, is not clear and will be addressed further *infra*.

is rejected accordingly.

In Proposition I, Owens asserts that this Court cannot affirm his conviction for first-degree felony murder (Count II), because the jury acquitted him of the crime that was alleged as the underlying felony to this murder, namely, the armed robbery of Javier Carranza (Count IV). Owens attempts to raise this claim as a sufficiency claim, by arguing that because the jury *did not* convict him of Count IV, there must not have been sufficient evidence to convict him of Count IV. This would then compel the conclusion that there was not sufficient evidence to convict him of Count II, because the Count IV armed robbery is an element of the Count II felony murder. The problem with Owens' analysis is with his starting point. The fact that the jury *did not* convict him of Count IV does not mean that the jury *could not* have rationally convicted him of this crime. In fact, this Court has already found that there was sufficient evidence from which a rational jury *could have* convicted Owens of the armed robbery of Javier Carranza.

Owens' Proposition I claim is that convicting him of Count II but acquitting him of Count IV is logically inconsistent and results in an inconsistent verdict. Owens is correct about this. The jury's verdict is indeed logically inconsistent in this regard. Unfortunately for Owens, the law in this area is well established that this kind of inconsistency, standing alone, does not entitle him to relief.

In *Dunn v. United States*,[6] the Supreme Court took up the issue of

[6] 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed.2d 356 (1932).

logically inconsistent verdicts and concluded as follows: "Consistency in the verdict is not necessary."[7] The Court recognized that "inconsistent verdicts" are often the result of jury nullification and/or compromise.[8] Over 52 years later, in *United States v. Powell*,[9] the Supreme Court re-examined *Dunn* and the issue of inconsistent verdicts and declined to find that the *Dunn* rule has any exceptions under federal law.[10] And in *Gray v. State*,[11] a case decided two years before *Powell*, this Court likewise concluded: "Consistency of multiple verdicts is not the test for assessing the validity of a particular verdict in a criminal case. Rather, a verdict is proper if it is supported by sufficient evidence."[12]

Hence when a jury chooses, for whatever reason, to render a logically inconsistent verdict, the law is well established that relief is not available on appellate review, so long as the evidence presented at trial is sufficient to support any count upon which the jury actually convicted. In other words, if a jury *chooses* to render a logically inconsistent verdict, a defendant will not be entitled to appellate relief upon this basis alone.

This Court cannot overlook the fact, however, that it is *far* from clear that

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[7] *Id.* at 393, 52 S.Ct. at 190.

[8] Justice Holmes, writing for the *Dunn* Court, explained:

> "The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity."

Id. (quoting *Steckler v. United States*, 7 F.2d 59, 60 (2d Cir. 1925)).

[9] 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984).

[10] *Id.* at 69, 105 S.Ct. at 479.

[11] 1982 OK CR 137, 650 P.2d 880.

[12] *Id.* at ¶ 20, 650 P.2d at 884 (citing *Dunn*, 284 U.S. 390, 52 S.Ct. 189, and *Woodard v. State*, 1977 OK CR 218, 567 P.2d 512).

the jury who tried Owens was *choosing* to render an inconsistent verdict. Rather, the record strongly suggests that the jury was struggling to figure out how to interpret the court's felony murder jury instructions and that the jury was, in fact, attempting to render a verdict that was both logical *and* consistent with instructions that the jury found confusing, particularly regarding the felony murder counts and the relationship between Counts II and IV.

In the trial court's opening instructions, the jury was correctly informed that in Count II Owens was charged with the felony murder of Javier Carranza, based upon the fact that Javier was killed during the course of the armed robbery of Javier, and that Owens and Sanders (and Lindsey) were acting "in concert" in this robbery. The jury was also instructed that the alternative felony murder charge against Sanders in Count I was likewise based upon the armed robbery of Javier by the three named co-defendants. These opening instructions were quite clear that the underlying felony for the felony murder charges was the armed robbery of Javier (and only Javier). Hence these instructions were consistent with the amended information filed in the case.

In the court's later, post-evidence instructions to the jury, however, the instructions for the felony murder counts do *not* specify that the underlying felony for these charges is the armed robbery of Javier. In particular, Instruction No. 37 accurately states the elements for the crime of felony murder and incorporates the generic elements for the crime of robbery with a dangerous weapon; but there is no mention of any specific victim(s) of this

robbery.[13] Hence the instructions regarding Count II did *not* require the jury to find that Owens was guilty of the armed robbery of Javier (as charged in Count II), in order to find him guilty of the felony murder of Javier. And this Court, upon a review of the entire record in this case, cannot ignore the fact that the issue of whether the jury could have been confused regarding the elements of Count II is far from merely hypothetical in the current case.

During its deliberations the jury sent four notes to the judge, three of which involved Instruction No. 37 and the felony murder counts in this case.[14] The first of these notes apparently involves only the Count I alternative murder charges against Sanders,[15] but the next two notes appear related to the Count II charge against Owens. The jury's next note (and third overall) reads as follows:

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[13] Instruction No. 37 lists the following as the elements of felony murder in this case:

> First, the death of a human;
>
> Second, the death occurred as a result of an act or event which happened in the defendants' commission of robbery with a dangerous weapon;
>
> Third, the elements of the robbery with a dangerous weapon the defendants are alleged to have been in the commission of are as follows:
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> First, wrongfully;
> Second, attempting to take;
> Third, and carry away;
> Fourth, personal property;
> Fifth, of another;
> Sixth, from the person or the immediate presence of another;
> Seventh, by force or fear;
> Eighth, through use of a loaded firearm.

Neither this instruction nor any of the other final instructions in this case informed the jury that the "another" in this context, *i.e.*, the person robbed, had to be Javier Carranza.

[14] The only other jury note (and the first one sent) simply requested more copies of the instructions. The trial court responded by sending the jury 11 more copies of the instructions. This Court notes that the very fact that the jury in this case requested more copies of the instructions suggests that the jury was serious about its job and wanted to do it correctly.

[15] In this note (the jury's second overall), the jury wrote: "Instruction 37. Second element. Does the intent of the murder matter? If we feel that Javier was killed because the shooter was angry that he ran vs. attempting to take the wallet, is the murder as a result of a robbery or the malice aforethought?" The trial court responded by sending the following note in return: "I

> Can we consider Instruction 37 second element to be the whole robbery of both Javier and Jesus[?]
> We are making the Instruction 47 robbery of Javier separate from Jesus. Is that correct?"[16]

Before the trial court even responded to this note, the jury sent this final note:

> Can we say not guilty for Keynon Owens on Count 4—robbery of w/ dangerous weapon of Javier while at the same time saying guilty for Keenon [sic] Owens on Count 2—felony murder?
> Would that even make sense?

These two notes make quite clear that the jury in this case was struggling with the very issue now before this Court: the relationship between Counts II and IV and whether the jury could convict Owens of Count II (felony murder) even though the jury did not intend to convict him of Count IV (robbery of Javier).

These notes also make quite clear that the jury was confused about who the victim of the robbery was in the felony murder counts *and* that the jury was considering the idea of making the "robbery" for these counts "the whole robbery of both Javier and Jesus," which is contrary to the way the felony murder counts were charged in this case. Finally, and perhaps most telling, the jury's final question—"Would that even make sense?"—strongly suggests that this jury *wanted* to render a verdict that did "make sense" and that was consistent with all of the court's instructions. In other words, these questions indicate that this jury did not want to render an "inconsistent" or illogical verdict.

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cannot answer the question as you have posed it. Notice that the verdict for Count I reads "AND/OR."

[16] The word "both" in this note is underlined twice. Instruction 47 is the uniform instruction for robbery with a dangerous weapon (OUJI-CR 2d 4-144). Sanders and Owens were *both* charged with the armed robbery of both Javier (in Count IV) and Jesus (in Count V).

Unfortunately, the record indicates that the trial court failed to call the parties and the jury back into open court to deal with these significant jury questions, as the court was required to do under 22 O.S.2001, § 894.[17] Instead, the court responded to these final two notes with yet another note, which contained no guidance whatsoever regarding who was the victim of the armed robbery within the felony murder counts or how Counts II and IV are related.[18]

Consequently, this Court finds that the record in this case contains plain error in two regards that directly relate to the current claim. First, the jury instructions clearly failed to require the jury, in accord with the governing information in the case, to find that Owens was guilty of the armed robbery of Javier, in order to find Owens guilty of felony murder in Count II. Second, when the trial court received notes from the jury indicating that the jury was confused about the law and the court's instructions regarding this same Count II, the trial court failed to comply with § 894 or to otherwise offer the jury any guidance in this regard. The potential for prejudice in this context is obvious

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[17] *See* 22 O.S.2001, § 894. Under this provision if a deliberating jury asks a question about a point of law, the trial court is required to bring the jury back into court, and any answer must be given only after the district attorney and the defendant or his counsel have been given notice of the inquiry. *See, e.g., Wilson v. State*, 1975 OK CR 71, ¶¶ 5-7, 534 P.2d 1325, 1327 (per curiam). This Court has held that "[w]hen a communication between judge and jury occurs after a jury has retired for deliberations on a matter within the scope of § 894 and that communication does not comport with § 894's requirements, a presumption of prejudice arises." *Smith v. State*, 2007 OK CR 16, ¶ 52, 157 P.3d 1155, 1172, *cert. denied*, __ U.S. __, 128 S.Ct. 1232, 170 L.Ed.2d 79 (2008) (citing *Wilson*, 1975 OK CR 71, ¶¶ 5-6, 534 P.2d at 1327). This Court notes, however, that although the failure to comply with § 894 was raised in the appeal of Sanders, Owens' co-defendant, it was not specifically raised in the current appeal.

[18] The court's final note stated as follows: "Instruction #47 relates to Count 4 to robbery of Javier Carranza. I don't understand the question concerning Instruction #37. In your question concerning Counts 4 and 2, I cannot advise you how to decide this case."

and substantial. The jury may well have convicted Owens on Count II, the felony murder of Javier, based upon a crime that was not charged as the underlying felony of this murder (the robbery of "both" Carranzas), rather than the crime that was actually charged as the underlying felony (the robbery of Javier only). And where the same jury actually acquitted Owens of this underlying felony, this Court simply cannot sustain his conviction on Count II.

In summary, the jury's verdict in this case regarding Counts II and IV was indeed inconsistent. This inconsistency, standing alone, does not entitle Owens to relief. Nevertheless, this Court declines to affirm Owens' conviction on Count II where plain error in the record, regarding both the jury instructions and the trial court's responses to jury questions on this very topic, indicates that Owens' jury very likely failed to understand that it could only convict him of Count II if it could also conclude, and was willing to find, that he was guilty of the armed robbery of Javier. While a jury is allowed to render an inconsistent verdict, it is not allowed to render a verdict based upon the substitution of its own version of an "underlying felony" crime in the place of the underlying felony crime that was actually charged in a given case. Because this Court's ruling is not based upon a finding that the evidence presented at trial was insufficient to find Owens guilty of felony murder (with the armed robbery of Javier as the underlying felony), we reverse his Count II felony murder conviction without ordering that it be dismissed. And we affirm Owens' conviction and sentence on Count V.

In Proposition II, Owens argues that he was wrongly sentenced to

imprisonment for life on the Count II felony murder count, because this conviction was logically inconsistent with the jury's verdict in acquitting him on Count IV. This Court has already recognized that a jury's verdict need not be logically consistent. Furthermore, this claim is rendered moot by this Court's reversal of Count II.

Decision

Owens' **Count II** conviction for first-degree felony murder is hereby **REVERSED** and **REMANDED** for a new trial. Owens' **Count V** conviction for robbery with a dangerous weapon and his sentence of imprisonment for ten (10) years on this count is hereby **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2009), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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OPINION BY: CHAPEL, J.

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LUMPKIN, J.:	CONCUR IN PART/DISSENT IN PART
LEWIS, J.:	CONCUR

LUMPKIN, JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the affirmance of the judgment and sentence for Count V, Robbery with a Dangerous Weapon. However, I dissent to the reversal of the felony murder conviction in Count II.

It is well established under our case law that a defendant cannot be convicted of felony murder and the underlying felony. *Browning v. State,* 2006 OK CR 8, ¶ 34, 134 P.3d 816, 838; *Alverson v. State,* 1999 OK CR 21, ¶ 81, 983 P.2d 498, 521; *Wilson v. State,* 1998 OK CR 73, ¶ 60, 983 P.2d 448, 463; *Cleary v. State,* 1997 OK CR 35, ¶ 22, 942 P.2d 736, 744; *Tibbs v. State,* 1991 OK CR 115, ¶ 9, 819 P.2d 1372, 1376; *Munson v. State,* 1988 OK CR 124, ¶ 28, 758 P.2d 324, 332; *Castro v. State,* 1987 OK CR 182, ¶ 32, 745 P.2d 394, 405. Therefore, if the jury had convicted Appellant of both Count V, robbery with a dangerous weapon and Count II, felony murder with the underlying felony being the same robbery with a dangerous weapon alleged in Count II, this Court would have upheld the felony murder conviction and vacated the robbery conviction on the grounds the offenses merged. Here, the jury only did what this Court would have done on appeal.

The majority determines that the inconsistent verdicts warrant reversal of the felony murder conviction because the jury did not choose to render inconsistent verdicts and only did so because it did not understand its

instructions. This type of reasoning is not found in *Dunn*[1], *Powell*[2], and *Gray*[3], relied upon by the majority. To the contrary, these cases state that the test for determining the validity of multiple verdicts is not consistency, but whether each verdict is supported by sufficient evidence. I find the majority's conclusion that there was sufficient evidence to convict Appellant of the felony murder with robbery as the underlying felony satisfies that test. Not only is it not necessary to attempt to delve into the minds of the jurors to determine if they really meant to return the verdicts they did, it is also inconsistent with the basic hesitancy of courts to look behind the verdict. Indeed in *Powell,* the Supreme Court stated:

> We also reject, as imprudent and unworkable, a rule that would allow criminal defendants to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity, but of some error that worked against them. Such an individualized assessment of the reason for the inconsistency would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake. Jurors, of course, take an oath to follow the law as charged, and they are expected to follow it . . . Courts have always resisted inquiring into a jury's thought processes, through this deference the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality.

469 U.S. 57, 66-67, 105 S.Ct. 471,477- 478 (internal citations omitted).

Here, this Court has done exactly what the *Dunn* and *Powell* courts said not to do - speculate on what the jury was thinking.

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[1] 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed.2d 356 (1932)
[2] 469 U.S. 57, 185 S.Ct. 421, 83 L.Ed.2d 461 (1984)
[3] 1982 OK CR 137, 650 P.2d 880

If I was to join the majority and speculate on the record, it is just as easy to speculate that the jury resolved any questions it may have had about the instructions (there are no times noted on the jury's notes to the court and we do not know how much time passed between their last note to the court and return of the verdict) and that the inconsistent verdicts were the result of a little juror equity. Additionally, while the majority relies heavily on the jury's notes, Appellant does not even address the jury's notes nor does he argue the jury was in any way confused about what they were to do. He merely argues the evidence was insufficient to support the jury's verdict. Thus, we are presented with another example of the Court *sua sponte* creating an issue that was not raised by an appellant in order to arrive at a desired result.

In order to support its finding of plain error, the majority relies in part on the court's failure to call the parties and the jury into the courtroom to address the jury's notes. This issue was not raised in Appellant's brief. Under 22 O.S. 2001, § 894, the requirement to call the parties back to the courtroom is deemed waived if no objection is raised. *Sherrick v. State*, 1986 OK CR 142, ¶ 15, 725 P.2d 1278, 1284. The record contains no objection by Appellant Owens to the manner in which the court responded to the jury's questions. But, it is interesting to note, this issue was raised in the appellate brief of co-defendant Sanders. However, this Court found the very same record of the joint trial indicated any error was harmless.

Further, the majority asserts the jury instructions in this case were improper. The instructions given in this case were the uniform instructions and

when read in context and in their entirety, were sufficiently clear to inform the jury of the applicable law. In its opinion, the majority infers that upon retrial, the jury instructions are to include the name of the victim. This has never been a requirement from this Court. In fact, this Court consistently finds instructions sufficient when given in exactly this same format. Judge Gillert was not instructing the jury any differently than he has in hundreds of cases over which he has presided and we have affirmed in the past.

Based upon the foregoing, I dissent to the reversal of the felony murder conviction and would affirm both convictions.