IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

EDWIN LEROY SCOBY,	]	**NOT FOR PUBLICATION**
	]	
Appellant,	]	
	]	
v.	]	Case No. F-2010-307
	]	
THE STATE OF OKLAHOMA,	]	
	]	
Appellee.	]	

OPINION

LEWIS, VICE-PRESIDING JUDGE:

Edwin Leroy Scoby, Appellant, was tried by jury in the District Court of Pottawatomie County, Case No. CF-2008-338, and found guilty of murder in the first degree, in violation of 21 O.S.Supp.2006, § 701.7(A).[1] The jury sentenced him to life imprisonment without possibility of parole. The Hon. Douglas Combs, District Judge, pronounced judgment and sentence accordingly. Mr. Scoby appeals.

FACTS

Appellant married Nina Scoby in February, 2008. They established their home in Shawnee and lived together at the time of Nina Scoby's death on August 5, 2008. Around 2:28 a.m. that morning, Shawnee Police Officer Dibble responded to a report that a white male was walking down the street and

[1]In the same case, Appellant pled *nolo contendere* to possession of a firearm after former conviction of a felony, in violation of 21 O.S.Supp.2007, § 1283(A), and was sentenced to twenty-five (25) years imprisonment, concurrent with his sentence for murder.

possibly drunk. She encountered the Appellant lying on his back next to a trash can, speaking on a cell phone. Appellant would not talk to her at first, but eventually hung up the phone and paid attention to the officer. He stated that he had been fighting with his wife and left their house to "cool down." The officer noticed the odor of alcohol and perceived the Appellant as very tense, distracted, and sweating during their interaction. She developed the opinion that he was intoxicated and offered to take him home. Appellant told the officer that his wife or girlfriend was not at the home. She then transported him back to his house and dropped him off at 2:56 a.m. Appellant invited the officer to come inside and listen to music with him, but she declined.

Around 3:00 a.m., Appellant called 911 and told the operator that his wife had shot herself and attempted to shoot him. He stated that he had tried to get the gun away from her but was unable to disarm her. When the operator attempted to connect him with the Shawnee Police Department, the connection failed. Appellant then called back and stated that his wife had shot herself in the side of the neck, and had tried to shoot him. He again said that he had tried to stop her. At 3:02 a.m., Officer Dibble received a dispatch on this reported shooting and returned to the home where she had dropped the Appellant only minutes earlier.

Officer Dibble announced her presence and sought entry to the residence. After no answer for a period of time, Appellant opened the door. His hands were covered in blood. His face and clothing did not appear to be bloody. Officer

Dibble entered the home and observed Nina Scoby's body lying in the middle of a bed in a bedroom. She had a single gunshot wound to her left cheek and considerable loss of blood, which had stained her clothing and the surrounding bedding. Her body was partially covered with a blanket. A black powder replica revolver was on the bed underneath Ms. Scoby's left hand, its barrel pointed toward her feet and roughly parallel to her body.

Appellant knelt next to his wife and began to do mouth-to-mouth resuscitation on her. Officer Dibble directed the Appellant to wait for emergency medical personnel and go to another room. Appellant went across the hallway to the bathroom and wiped his hands with a towel. He then rinsed his hands in the bathtub. At one point, Appellant erupted into a rage and destroyed some furniture in the house. As police removed him from the home, he became angry and said he knew they were going to accuse him. Appellant would later tell investigators that his wife was threatening him while standing with her back to the nightstand, with the gun held in her left hand. He stated that he struggled to disarm her, and the gun discharged in the struggle. He first denied ever touching the gun itself, but later stated that his hand was over the cylinder and caused the gun to fire. He denied moving Ms. Scoby's body or altering the scene, other than admitting he may have lifted her head to open her eyes.

Investigators collected numerous items of evidence, including the .44 caliber black powder pistol, a container of black powder, and a box of lead bullets. They also recovered a shirt which smelled of gun cleaning solvent and a

small bottle of gun cleaning solvent inside a microwave oven, and took swabs from blood stains on the weapon and other items at the scene. Photographs of the bedroom and nightstand area showed several small items and glass bottles sitting upright and undisturbed on the nightstand and no other apparent signs of a physical struggle. The State's forensic expert gave the opinion that the Appellant had altered the crime scene. An OSBI criminalist testified that she was unable to develop any fingerprints. Another criminalist testified that only a small amount of blood was detected on the grip of the pistol. A DNA expert testified that blood from the pull chain on the bedroom ceiling fan matched the known blood sample of the victim. Another criminalist testified that only a small particle of gunpowder residue was located on the victim's left hand, much less than expected if she had discharged the firearm as Appellant described.

The State also presented evidence of the abusive relationship between Appellant and his wife, including testimony from police officers who responded to previous domestic violence incidents. In a February 20, 2008 incident, police in Dodge City responded to a domestic call and found Nina Scoby upset and bloody. They detained Appellant for battery. In June, 2008, a Shawnee police officer found Nina Scoby bruised and upset. Nina Scoby also admitted to scratching Appellant in this incident. Appellant was again arrested for assault and battery. Nina Scoby's grown children also testified to Appellant's verbal tirades and seeing the bruises and injuries left by physical violence. A month before the murder, Appellant purchased the .44 caliber black powder pistol at Orscheln Farm &

Home store in Duncan, Oklahoma. Employees of the Orscheln's store testified how Appellant said that he wanted to get his wife involved in competition shooting; and that while Appellant went out to the car to get a wallet, Nina Scoby confided to an employee of the store that Appellant was mean to her and had hit her.

The medical examiner testified that the victim suffered a contact gunshot wound entering her left cheek and traveling upward, backward, and to the right, eventually lodging in the back of her skull. The bullet lacerated critical brain tissue, causing death. The victim's blood alcohol level at the time of her death was approximately .09. The State also presented testimony that the victim had previously broken her left wrist and did not use her left hand. The State's crime scene expert testified that it was unlikely that the victim handled the long and heavy black powder pistol with her left hand as Appellant described, and that its location under her hand at roughly the level of her waist was inconsistent with evidence that the gun discharged directly into her cheek while the barrel was in contact with her face. These facts, and the location of various blood spatters, including a blood transfer stain on the victim's arm, led the expert to conclude that Appellant had altered the crime scene. Appellant did not testify.

ANALYSIS

In Proposition One, Appellant argues that the trial court erred by failing to instruct on excusable homicide. Counsel's failure to request instructions on excusable homicide waived all but plain error. *Taylor v. State*, 2011 OK CR 8,

¶ 14, 248 P.3d 362, 368. Plain errors are those errors "which go to the foundation of the case, or which take from a defendant a right which was essential to his defense." *Simpson v. State*, 1994 OK CR 40, ¶ 12, 876 P.2d 690, 695. The trial court instructed the jury on the charge of first degree murder and, over defendant's objection, on the lesser-included offense of second degree depraved mind murder. 21 O.S.2001, § 701.8. These instructions properly informed the jury that the State must prove beyond a reasonable doubt that Appellant caused the victim's death with malice aforethought.[2]

Homicide is excusable when committed by accident and misfortune in doing any lawful act, by lawful means, with usual and ordinary caution, and without any unlawful intent. 21 O.S.2001, § 731(2). The question before us is whether the failure to give an instruction on excusable homicide went to the foundation of the case or took from Appellant a right essential to his defense. In *Enoch v. State*, 1971 OK CR 455, 491 P.2d 342, the defendant in a murder trial requested a number of instructions and received an instruction on the lesser offense of manslaughter and the defense of intoxication. He was convicted of manslaughter. The Court found no fundamental error where the

[2] Instruction No. 16, OUJI-CR(2d) 4-60, told jurors no person may be convicted of murder unless he "caused the death of the person allegedly killed. A death is caused by the conduct if the conduct is a substantial factor in bringing about the death and the conduct is dangerous and threatens or destroys life."

trial court failed to give an instruction of the defense of accident or excusable homicide. The Court there said:

> [W]here counsel is not satisfied with instructions that are given, or desires the court to give any particular instructions, or to more definitely or sufficiently state any proposition embraced in instructions, it is the duty of counsel to prepare and present to the court such desired instructions and request that they be given. *In the absence of such a request, the Court of Criminal Appeals will not reverse a case if instructions generally cover the subject matter of inquiry* (emphasis added).

Enoch, 1971 OK CR 455, ¶ 14, 491 P.2d at 345.

In *Thompson v. State*, 1973 OK CR 138, 507 P.2d 1271, this Court reversed the appellant's manslaughter conviction, finding that the denial of instructions on excusable homicide denied a fair trial. The defendant was charged with murder, and argued that the deceased, her violent and intoxicated husband, was killed accidentally while she struggled with her son over a rifle. The trial court instructed the jury on self-defense and the lesser offense of manslaughter. The Court found this was error, as the defendant's claim that the victim was accidentally shot during a struggle between herself and her son was a defense of *excusable*, rather than justifiable, homicide. The opinion in *Thompson* does not state whether the defendant requested proper instructions. *Id.*, 1973 OK CR 138, ¶¶ 1, 12, 27, 507 P.2d 1271-72, 1274, 1276-77.

Appellant has also cited *Dennis v. State*, 1976 OK CR 266, 556 P.2d 617, where the Court reversed Appellant's second degree murder conviction due to the trial court's failure to give proper instructions on excusable homicide. The instructions to the jury in *Dennis* provided:

> [I]f you find and believe from the evidence, beyond a reasonable doubt, that the defendant killed the deceased and that the killing was unlawful, and *not justifiable, or excusable homicide, as those degrees of homicide are defined to you* in these instructions, but you have a reasonable doubt as to whether the defendant is guilty of murder, as that degree of homicide is defined to you, then you should next consider whether the defendant is guilty of Manslaughter in the First Degree, which is a lesser degree of homicide, and which is included in, and may be considered under the Information charging murder.

Dennis, 1976 OK CR 266, ¶ 18, 556 P.2d at 621 (emphasis added).

From this instruction, the Court in *Dennis* inferred "that the trial court intended to instruct on excusable homicide," but that "no instruction on excusable homicide was submitted to the jury." *Id.* The Court reasoned that the evidence at trial was "consistent with the defense theory of a tragic hunting accident and the trial court committed fundamental error in failing to instruct on excusable homicide." *Id.*

We find significant distinctions between these cases and the case before us today. Appellant and his wife had a volatile and violent relationship, indicating Appellant's motive and intent to kill the victim. According to the police officer who first encountered Appellant that evening, he was intoxicated, seemed nervous, and was perspiring. In statements to police admitted at trial, Appellant claimed that his wife shot herself while he was struggling with her to take away the pistol. He admitted they had quarreled earlier that evening. After the shooting, he first denied to police that he had ever touched the gun, but later admitted that he had grasped the cylinder before the gun discharged. Despite this evidence, the pistol was free of any fingerprint ridge detail or blood

except for small areas on the grip and trigger. Other evidence established the presence of gun cleaning solvents and a shirt that smelled of solvents. The amount of powder residue found on the victim's hand was inconsistent with her discharging the firearm as Appellant claimed.

The prosecution's expert witnesses opined that Appellant had attempted to wipe the pistol free of prints, and that other aspects of the crime scene were staged. A small bottle of gun solvent was suspiciously placed inside a microwave oven in another bedroom of the house. Police who arrived on the scene after the shooting noticed that the house did not smell of black powder as if a firearm had recently been discharged in the bedroom, as Appellant claimed. The location of the pistol resting under the victim's outstretched left hand, and the evidence of her limited use of that hand due to its injury, were inconsistent with Appellant's claims about her shooting herself. Finally, although the jury was unaware of Appellant's prior felony conviction, Appellant's possession of the firearm violated Oklahoma law. 21 O.S.Supp.2007, § 1283(A).

We conclude that the failure to instruct on excusable homicide did not go to the foundation of this case or take from Appellant a right essential to his defense. Appellant's claim that his wife was accidentally killed as he struggled with her over a loaded pistol during an alcohol-fueled domestic dispute does not describe an "accident and misfortune in doing any lawful act, by lawful means, with usual and ordinary caution, and without any unlawful intent," as

required to excuse the resulting homicide under law. In *Johnson v. State*, 1973 OK CR 77, 506 P.2d 963, the defendant was charged with murder and convicted of manslaughter in the first degree. He claimed on appeal that the evidence supported an instruction on excusable homicide and that the trial court erred in refusing instructions on this defense. The Court there found the appellant had been illegally carrying the weapon on his person the entire evening of the homicide. *Id.*, 1973 OK CR 77, ¶ 23, 506 P.2d at 966-67. The Court thus found:

> [The] evidence does not support such an instruction. *The evidence by the defense does indicate a showing of an accidental death but the evidence does not show the defendant to be involved in some lawful act, by lawful means, with usual and ordinary caution, without any unlawful intent.* The possession of the firearm, under the circumstances of the instant case, *resulted in a casualty and this possession was unlawful.* Since the defendant admits being engaged in an unlawful act, which resulted in a death, there is no question of fact for the jury in determining whether or not the defendant was engaged in lawful conduct. Therefore, the evidence required to support this instruction was not present and the court properly refused to instruct on excusable homicide.

Johnson, 1973 OK CR 77, ¶ 23, 506 P.2d at 967 (emphasis added).

The Court also observed in *Johnson* that "[i]t is obviously within the legislative intent of an act prohibiting the carrying of a weapon to alleviate or to a degree reduce the danger *of both accidental and intentional deaths.*" *Id.*, 1973 OK CR 77, ¶ 26, 506 P.2d at 967 (emphasis added). Appellant's possession of the pistol in his home as a convicted felon was a felony itself. Appellant's unlawful introduction of a weapon into this turbulent domestic situation in his home, and his reckless participation in a drunken struggle over that illegal weapon, is sufficiently culpable that the resulting homicide, even if unintentional, would

amount to manslaughter or second-degree (depraved mind or felony) murder. 21 O.S.2001, § 701.8. This Court has stated that "[a]ccidental death, to be wholly excusable, must have resulted from the doing of some lawful act." *Johnson v. State*, 59 Okl.Cr. 283, 295, 58 P.2d 156, 162 (1936). No reasonable view of this homicide would deem it wholly excusable under Oklahoma law, and the failure to instruct the jury on excusable homicide did not result in plain error. Proposition One is denied.

Proposition Two argues that the trial court erred by failing to give an instruction on Appellant's exculpatory statement. Appellant requested no such instruction at trial and has waived all but plain error. *Taylor*, 2011 OK CR 8, ¶ 14, 248 P.3d at 368. The uniform instruction on exculpatory statements is No. 9-15, OUJI-Cr(2d), which provides:

> An exculpatory statement is defined as a statement by the defendant that tends to clear a defendant from alleged guilt, or a statement that tends to justify or excuse his actions or presence.
>
> Where the State introduces in connection with a confession or admission of a defendant an exculpatory statement which, if true, would entitle him to an acquittal, he must be acquitted unless such exculpatory statement has been disproved or shown to be false by other evidence in the case. The falsity of an exculpatory statement may be shown by circumstantial as well as by direct evidence.
>
> A statement is exculpatory within the meaning of this instruction only if it concerns a tangible, affirmative, factual matter capable of specific disproof. A statement is not exculpatory within the meaning of this instruction if it merely restates the defendant's contention of innocence.

In *Kinchion v. State*, 2003 OK CR 28, ¶ 14, 81 P.3d 681, 685, this Court found the trial court did not abuse its discretion in refusing to give a jury

instruction on exculpatory statements, reasoning that the appellant's statement to the police was disproved by other evidence. The Court also found that the appellant was not prejudiced, because the jury was fully instructed on the State's burden of proof, the presumption of innocence, and the voluntariness of the defendant's statement. *Id.* Instructions on each of these subjects were given to the jury in this case as well. Appellant has not cited any case where the failure to give this instruction was plain error, nor has he shown that the lack of such an instruction goes to the foundation of the case or denied him a right essential to his defense. This proposition is denied.

In Proposition Three, Appellant argues that the admission of evidence of other crimes, wrongs, or bad acts denied him a fair trial. After giving proper notice as required by 12 O.S.2001, § 2404, the State presented evidence at trial of prior instances of domestic violence between the Appellant and his wife. The State offered this evidence specifically to prove Appellant's motive and intent to kill the victim, and to rebut Appellant's claims that the shooting was accidental. Appellant also argues that the district court's failure to issue a limiting instruction on this evidence was reversible error. We review the admission of such evidence over a timely objection for abuse of discretion. *Andrew v. State*, 2007 OK CR 23, ¶ 23, 164 P.3d 176, 187. The failure to give a limiting instruction on other crimes evidence is reviewed only for plain error. *Jones v. State*, 1989 OK CR 7, ¶ 8, 772 P.2d 922, 925.

Evidence that a defendant committed other crimes is admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. 12 O.S.2001, § 2404 (B); *Andrew*, 2007 OK CR 23, ¶ 41, 164 P.3d at 190. This Court has long held in prosecutions for domestic homicide that "[e]vidence of previous altercations between spouses is relevant to the issue of intent," *Hooker v. State*, 1994 OK CR 75, ¶ 25, 887 P.2d 1351, 1359; and that evidence of ill feeling, threats or similar conduct by one spouse toward another is probative to show motive or intent. *Cheney v. State*, 1995 OK CR 72, ¶ 49, 909 P.2d 74, 87. Again we find that the evidence of Appellant's prior physical abuse of Nina Scoby was relevant to show his motive and intent, as well as the absence of mistake or accident in the shooting.

In *Jones v. State*, 1989 OK CR 7, ¶ 8, 772 P.2d 922, 925, *overruled on other grounds, Omalza v. State*, 1995 OK CR 80, 911 P.2d 286, this Court held that "the intent of the Legislature in enacting Section 2106 of the Oklahoma Evidence Code reflects that the failure of a trial court to give a limiting instruction *sua sponte* does not automatically constitute reversible error unless it arises to the level of plain error." The evidence of Appellant's abuse of the victim was extremely probative of his motive and the intentional nature of the homicide. Such evidence was properly admitted, and the absence of a limiting instruction here is not plain error. No relief is required.

Appellant argues in Proposition Four that certain extraneous definitions in the jury instructions resulted in reversible error. Counsel's failure to object

to these instructions waived all but plain error. *Taylor*, 2011 OK CR 8, ¶ 14, 248 P.3d at 368. The district court gave a portion of Instruction No. 4-108 containing the following definitions:

> Attempt - The action taken by a person, with the state of mind requisite for commission of a crime, by which the person: (a) Purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or (b) When causing a particular result in an element of the crime, does anything with the purpose of causing or with the belief that it will cause such result, without further conduct on his part.
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> Cruel and Unusual Manner - Means of causing death which is aggravated, out of the ordinary, shocking or barbaric.
>
> Dangerous Weapon - Any pistol/revolver.
>
> Direct Result - Immediate consequence which is not separated from its initial cause by other, independent factors.

Appellant argues that because these definitions were extraneous to the issues before the jury and were unnecessary to define any terms used elsewhere in the instructions, the instructions necessarily misled the jury and denied him a fair trial. In *Malone v. State*, 2007 OK CR 34, ¶ 32, n.63, 168 P.3d 185, 199, n.63, the district court in a capital case included extraneous definitions of "special mental element" in the instructions on voluntary intoxication. The Court found no plain error, reasoning that definitions which have no relevance to the remaining instructions would not have confused the jury. *Id.* (*citing Norton v. State*, 2002 OK CR 10, ¶ 18, 43 P.3d 404, 409). We found no plain error in *Davis v. State*, 1994 OK CR 72, ¶ 11, 885 P.2d 665, 668-69, where the trial court gave a uniform instruction setting forth the

elements of first degree murder and a second instruction which defined murder in the language of the statute. Such technical errors call for application of the maxims *surplusagium non nocet*[3] and *utile per inutile non vitiatur.*[4] *Wood v. State*, 3 Okl.Cr. 553, 565, 107 P. 937, 942-43 (1910). We agree with Appellant that these definitions were useless, but find no error warranting relief. Proposition Four is denied.

In Proposition Five, Appellant argues that the district court committed reversible error by holding a bifurcated proceeding in this non-capital first degree murder trial. Appellant's failure to object to the procedure followed by the district court waived all but plain error, which is error going to the foundation of the case or taking from the defendant a right essential to his defense. *Simpson,* 1994 OK CR 40, ¶ 12, 876 P.2d at 695. The district court instructed the jury in the first stage on the charge of first degree murder and the lesser-included offense of second degree murder. When the jury returned a verdict of guilty on the charge of first degree murder, the Court convened a second stage proceeding. The State then introduced evidence of Appellant's two prior felony convictions. The parties then argued their positions regarding the proper sentence for murder. The jury returned a sentence of life without parole.

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[3] "Surplusage does no harm." *Black's Law Dictionary*, 1294 (5th ed. 1979).

[4] "The useful is not vitiated by the useless." *Black's Law Dictionary*, 1386 (5th ed. 1979).

We should begin with the observation that first degree murder is punishable by death, life imprisonment without possibility of parole, or life imprisonment. 21 O.S.Supp.2004, § 701.9. In cases where the State does not seek the death penalty, the punishment for murder is not subject to enhancement based on a defendant's prior convictions. In *McCormick v. State*, 1993 OK CR 6, 845 P.2d 896, the Court held that the statutes requiring bifurcation in first degree murder trials[5] applied only in capital cases; and that trial courts in non-capital murder cases may not introduce evidence of statutory aggravating circumstances, or mitigating circumstances, at jury sentencing. *Id.*, 1993 OK CR 6, ¶¶ 38-39, 845 P.2d 896, 902-03. We held that "[i]f the State is not seeking the death penalty *and there are no previous convictions* . . . bifurcation is not required." *Id.*, 1993 OK CR 6, ¶ 40, 845 P.2d at 903 (emphasis added). The Court found the error in bifurcating Appellant's murder trial was harmless in *McCormick*, where the State introduced only a judgment and sentence to prove a conviction Appellant had already admitted in his first stage testimony, and the jury imposed the minimum punishment of life imprisonment for murder.

In *Cooper v. State*, 1995 OK CR 22, ¶ 3, 894 P.2d 420, 421-22, the Court held that the district court erred by convening a second-stage proceeding in a non-capital first degree murder trial solely for the presentation of victim impact evidence. The Court there stated that "trial courts may not introduce

[5] See 21 O.S.2001, § 701.10.

evidence of aggravating circumstances in cases where the State seeks life without parole, but not death;" and according to the same reasoning, the Legislature never intended to have "a second stage purely for presentation of victim impact evidence" in non-capital first degree murder cases. *Id.*

In *Carter v. State*, 2006 OK CR 42, 147 P.3d 243, the district court bifurcated the appellant's first degree murder trial and the jury sentenced him to life without possibility of parole. The State alleged no additional counts, no prior convictions, and no lesser-included offense instructions were given by the trial court. This Court again held that "bifurcation is not authorized in first-degree murder trials where the State is not seeking the death penalty, *and there are no previous convictions in other counts requiring bifurcation* under 22 O.S.2001, § 860.1. *Id.*, 2006 OK CR 42, ¶ 2, 147 P.3d at 244 (*citing McCormick*, 1993 OK CR 6, ¶ 44, 845 P.2d at 903) (emphasis added). Because we found other error required remand for re-sentencing, the Court did not decide whether this bifurcation error required reversal. *Id.*

In *Marshall v. State*, 2010 OK CR 8, 232 P.3d 467, the defendant was charged with first degree murder and first degree robbery after former conviction of two or more felonies. The district court bifurcated the trial, thus allowing the jury to sentence the appellant for first degree murder—a crime not subject to enhancement—and robbery after two or more prior convictions. In the second stage of trial, the State introduced evidence of seven prior felony convictions. The jury sentenced the appellant to life without possibility of parole for murder and

life imprisonment for robbery. *Id.*, 2010 OK CR 8, ¶¶ 1, 54, 232 P.3d at 471, 480.

The Court in *Marshall* found that this procedure violated *McCormick* and *Carter*.

> [W]hen a defendant is charged with non-capital first degree murder, *as well as other felony offenses, and the defendant has prior convictions alleged on a page 2*, the procedure shall be that the *jury should decide guilt/innocence and punishment on the non-capital first degree murder charge, and guilt/innocence, but not punishment, for the other counts in the first stage.* Punishment for the other counts should be decided during the second stage, where the prior felony convictions are introduced.

Marshall, 2010 OK CR 8, ¶, 57, 232 P.3d at 480 (emphasis added).[6] In *Marshall*, the Court found the error harmless and affirmed the sentence of life without possibility of parole, as the murder involved the brutal beating of an elderly neighbor in a robbery attempt. *Id.*, 2010 OK CR 8, ¶, 58, 232 P.3d at 481.

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[6] Even before the law provided for bifurcation of trials to enhance punishment with prior convictions, courts and prosecutors struggled with the situation presented here. In *Johnson v. State*, 79 Okl.Cr. 71, 151 P.2d 801 (1944), the defendant was charged with murder. The county attorney recognized that the trial jury would ultimately be instructed on the lesser-included offense of first degree manslaughter, which carried a four-year minimum sentence. Because the defendant had a prior conviction, and the lesser-included offense of manslaughter was subject to enhanced punishment, the prosecutor charged him with murder as a habitual offender, a technically incorrect allegation. At a single stage trial, the court instructed the jury on the elements and range of punishment for murder, and the range of punishment for manslaughter after former conviction of a felony. The Court found in *Johnson* that the appellant was properly charged as a habitual offender and the trial court's instructions to the jury were proper. *Id.*, 79 Okl.Cr. at 74-81, 151 P.2d at 803-806. The Court again contemplated the question in *Application of Igo*, 1958 OK CR 85, ¶ 5, 331 P.2d 969, 971, stating that a habitual offender allegation "should not be used by prosecution in capital felonies, *unless it is clear that the court must charge the jury on some included offense.*" (emphasis added).

The situation presented here is analogous in some important ways to the one that confronted the Court in *Marshall.* Here, Appellant was charged in the information only with non-capital first degree murder. The prosecution filed a second page to the information alleging two prior felony convictions.[7] When the trial court decided to instruct the jury on the lesser-included offense of second degree murder, the punishment upon an eventual conviction of this lesser charge was subject to enhancement with Appellant's prior convictions. *Jacobson v. State,* 1984 OK CR 72, ¶ 22, 684 P.2d 556, 561. Thus, the decision to conduct the first stage of the trial by submitting only the question of guilt or innocence on these two offenses was proper under *McCormick, Carter, Marshall,* and 22 O.S.2001, § 860.1.[8] Appellant was effectively "charged," by way of the instructions to the jury, with *both* non-capital first degree murder *and* another—

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[7] Appellant was charged in Count 2 with possession of a firearm after former conviction of a felony. The felon-in-possession charge was never mentioned to the jury in the first stage of trial, and was ultimately resolved with a guilty plea and sentencing by the court. It can play no part in the reasoning for our decision today.

[8] In all cases in which the defendant is prosecuted *for a second or subsequent offense,* except in those cases in which former conviction is an element of the offense, the procedure shall be as follows:

1. The trial shall proceed *initially as though the offense charged was the first offense*; when the indictment or information is read all reference to prior offenses shall be omitted; *during the trial of the case no reference shall be made nor evidence received of prior offenses except as permitted by the rules of evidence; the judge shall instruct the jury only on the offense charged; the jury shall be further instructed to determine only the guilt or innocence on the offense charged, and that punishment at this time shall not be determined by the jury*; and

2. If the verdict be guilty of the offense charged, that portion of the indictment or information relating to prior offenses shall be read to the jury and evidence of prior offenses shall be received. The court shall then instruct the jury on the law relating to second and subsequent offenses, and the jury shall then retire to determine the fact of former conviction, and the punishment, as in other cases (emphasis added).

in this case, lesser-included—offense, the latter being subject to enhancement under 21 O.S.Supp.2002, § 51.1, in a bifurcated trial conducted pursuant to 22 O.S.2001, § 860.1. This seems to be precisely the situation contemplated in *Carter*, 2006 OK CR 42, ¶ 2, 147 P.3d at 244 (*citing McCormick*, 1993 OK CR 6, ¶ 44, 845 P.2d at 903), where the Court held that bifurcation may be proper where defendant is charged with "other counts" requiring bifurcation under 22 O.S.2001, § 860.1.

However, when the jury returned a verdict after the first stage, finding Appellant guilty of first degree murder, the trial court erred by allowing the prosecution to introduce evidence of Appellant's prior convictions in the sentencing stage of trial. The jury's first stage verdict *rejected* the lesser-included offense of second degree murder, eliminating the *only charge* for which enhancement of punishment was authorized by section 51.1. Because Appellant was convicted of non-capital first degree murder, the admission of evidence of his two prior felony convictions amounted to impermissible aggravation evidence and violated the holdings in *McCormick*, *Carter*, and *Marshall*. This was plain error in violation of Appellant's statutory rights.

The remaining question is whether the error requires relief, i.e., whether it had a "substantial influence" on the outcome, or leaves the reviewing court in "grave doubt" as to whether it had such an effect. *Simpson v. State*, 1994 OK CR 40, ¶ 36, 876 P.2d 690, 702. In determining this question, we may ask "what effect the error had or reasonably may have had on the jury's decision,"

and "take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened." *Id.* (*quoting Kotteakos v. United States,* 328 U.S. 750, 765, 66 S.Ct. 1239, 1248, 90 L.Ed. 1557 (1946)). Since this procedural error requires application of the harmless error statute, we will reverse the judgment and sentence only where the error "probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." 20 O.S.2001, § 3001.1

Here we consider the evidence of the turbulent and mutually combative dynamic between the Appellant and his wife; the evidence of death inflicted by a single gunshot wound causing catastrophic injury to the victim's brain, and rapid, if not instantaneous, loss of consciousness. Appellant did not testify at trial, and evidence of his prior convictions, which involved armed robbery and criminal possession of firearms, would not have been presented to the jury in the first stage of trial, or a sentencing stage conducted pursuant to *McCormick* and later cases. In closing argument, the State pointed out the violent nature of Appellant's prior robbery conviction and the fact that his prior weapons conviction involved the same kind of gun as the murder weapon in this case. We do not minimize the enormity of Appellant's crime, nor do we perceive any fundamental miscarriage of justice in a sentencing jury's consideration of a defendant's prior convictions when authorized by law. The Legislature has not authorized such a procedure in cases of non-capital first degree murder. Our cases have acknowledged and enforced this limitation. After careful

consideration of the facts and circumstances, we are in grave doubt that the jury's sentencing decision was substantially influenced by evidence of Appellant's prior convictions. The sentence of life without possibility of parole must be vacated and remanded for re-sentencing.

In Proposition Six, Appellant argues that he was denied the effective assistance of trial counsel. He specifically challenges counsel's failure to (1) request proper instructions on excusable homicide and exculpatory statements; (2) object to improper definitions in the instructions and other crimes evidence; and (3) object to the trial court's improper bifurcation procedure. We address these complaints applying the familiar test required by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). This Court strongly presumes that counsel rendered reasonable professional assistance. Appellant must establish the contrary by showing: (1) that trial counsel's performance was deficient; and (2) that he was prejudiced by the deficient performance. *Spears v. State*, 1995 OK CR 36, ¶ 54, 900 P.2d 431, 445. To determine whether counsel's performance was deficient, we ask whether the challenged act or omission was objectively reasonable under prevailing professional norms. In this inquiry, Appellant must show that counsel committed errors so serious that he was not functioning as the counsel guaranteed by the Constitution. *Browning v. State*, 2006 OK CR 8, ¶ 14, 134 P.3d 816, 830.

Where the Appellant shows that counsel's representation was objectively unreasonable under prevailing professional norms, he must further show that he suffered prejudice as a result of counsel's errors. The Supreme Court in *Strickland* defined prejudice as a reasonable probability that, but for counsel's unprofessional errors, the outcome of the trial or sentencing would have been different. *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068. We will reverse the judgment and sentence only where the record demonstrates counsel made unprofessional errors "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. If the record before us permits resolution of a claim of ineffectiveness on the ground that *Strickland's* prejudice prong has not been satisfied, we will ordinarily follow this course. *Phillips v. State*, 1999 OK CR 38, ¶ 103, 989 P.2d 1017, 1043.

In each of the allegedly unreasonable omissions challenged here, Appellant has not shown prejudice requiring relief. Because we found no plain error in the trial court's failure to instruct the jury on excusable homicide and exculpatory statements, Appellant cannot show that these alleged errors create any reasonable probability of a different outcome at trial. The superfluous definitions given to the jury created no prejudice. The trial court's admission of other crimes evidences was proper, and the failure to issue a limiting instruction was not plain error. Again, Appellant cannot show prejudice under *Strickland.* Because we grant re-sentencing due to the trial court's erroneous

admission of Appellant's felony convictions in the sentencing stage of this non-capital first degree murder trial, Appellant's challenge to counsel's failure to object is moot and requires no additional relief. Proposition Six is denied.

Proposition Seven seeks relief based on cumulative error. We have remedied the only substantial error by remanding this case for re-sentencing. There are no other substantial errors in this case, and no cumulative effect of errors resulting in unfair prejudice to Appellant. *Hope v. State*, 1987 OK CR 24, ¶ 31, 732 P.2d 905, 908. Proposition Seven is denied.

DECISION

The Judgment of the District Court of Pottawatomie County is **AFFIRMED**. The Sentence is **VACATED** and **REMANDED** for re-sentencing. Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2011), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF POTTAWATOMIE COUNTY
THE HONORABLE DOUGLAS COMBS, DISTRICT JUDGE

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OPINION BY LEWIS, V.P.J.
A. JOHNSON, P.J.: Concurs
LUMPKIN, J.: Concurs in Results
C. JOHNSON, J.: Concurs
SMITH, J.: Concurs in Part/Dissents in Part

SMITH, J., CONCURRING IN PART AND DISSENTING IN PART:

I concur in affirming the conviction in this case. However, I would modify the sentence to life imprisonment.