IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

AARON MITCHELL STIGLEMAN, Appellant,	)	NOT FOR PUBLICATION
v.	)	Case No. F-2013-1129
THE STATE OF OKLAHOMA, Appellee.	)	

OPINION

JOHNSON, JUDGE:

Appellant Aaron Mitchell Stigleman was tried by jury in the District Court of Beckham County, Case No. CF-2013-70, and convicted of First Degree Murder in violation of 21 O.S.Supp.2011, § 701.7. The jury set punishment at life imprisonment without the possibility of parole. The Honorable Doug Haught, who presided at trial, sentenced Stigleman accordingly. From this Judgment and Sentence Stigleman appeals, raising the following issues:

(1) whether the refusal of the OIDS executives and the trial court to provide his appointed counsel an expert witness denied him his constitutional right to a fair trial, the effective assistance of counsel and due process of law;

(2) whether the admission of inflammatory, irrelevant, and cumulative evidence deprived him of a fair trial;

(3) whether his right to due process of law and his right to confrontation were violated when the trial court allowed into evidence a number of hearsay statements from the deceased;

(4) whether the trial court committed reversible error by admitting irrelevant and/or highly prejudicial evidence into the record concerning his legal ownership of multiple firearms/weapons and ammunition;

(5) whether the introduction of other crimes evidence deprived him of a fair trial;

(6) whether prosecutorial misconduct denied him a fair trial;

(7) whether he was deprived of the effective assistance of counsel; and

(8) whether cumulative error deprived him of a fair trial.

Stigleman also requests an evidentiary hearing on his Sixth Amendment claims.

We have determined the Judgment and Sentence of the district court must be reversed and remanded for a new trial.[1]

Background

Aaron Stigleman shot and killed his mother, Karen Stigleman, in her home in Elk City on February 13, 2013. At the time of the shooting, Stigleman and his girlfriend, Melissa Pruitt, were staying with Mrs. Stigleman. Although both Pruitt and Stigleman had a history of using methamphetamine, Pruitt was trying to quit and had not used drugs during the week or two that she and Stigleman had been staying with Mrs. Stigleman. During this time Stigleman had methamphetamine in the house and he used it. Pruitt testified that she did not see Stigleman use drugs during the three days immediately prior to February 13 but she also testified that he was away from the house ninety percent of the time. She suspected that he had used drugs during the night on February 12 because on the morning of February 13 he was paranoid and hallucinating as he typically did when he used methamphetamine.

[1] Because relief is required based upon error raised in Propositions 1 and 7 no other propositions of error will be addressed.

Pruitt testified that the morning of February 13 Stigleman had gone into the room where she was sleeping and asked if she wanted to have sex. When she declined, he responded by saying he knew what she and his mother had done to him. He said, "You and my mom poisoned me and y'all are poisoning people in Elk City and killing them." Pruitt told him that he was crazy. Stigleman then went to his mother's room where he screamed accusations that she and Pruitt were trying to kill him. He then walked down the hall and went to his room before returning to his mother's room where he screamed at her three times, "Do you want to die, bitch?" He followed that query by shooting her in the head.

Pruitt, having heard all this, went to the doorway of her bedroom and looked down the hall. She saw Mrs. Stigleman on the floor facedown between her bedroom door and the bathroom. Stigleman started yelling at Pruitt, insisting they had to leave. Pruitt walked into the living room where Stigleman was pacing and shaking uncontrollably. She asked him what was going on and he again accused her and his mother of poisoning him. Pruitt assured him that neither she nor his mother had poisoned him and she attempted to assure him that they would find out who had done that while Stigleman rocked back and forth repeating, "What have I done? What have I done? What have I done?" A siren sounded in the distance and Stigleman directed Pruitt to stand where she could look out the window toward the driveway. He paced around the kitchen island and walked circles around Pruitt for what seemed to her like an hour

and a half. At one point Stigleman flipped the breaker cutting the electricity from the house and the house gradually became very cold. At her first opportunity, Pruitt ran from the house across the street to a neighbor's house where she explained what had happened. The neighbor called 911. When the police arrived, Stigleman ran naked out the front door and down the alley where he was apprehended. Inside, officers found Mrs. Stigleman dead from a single gunshot wound to her head.

Stigleman was brought into the Elk City jail and placed in a detox cell. There, he yelled repeatedly, "My name is Mitch Stigleman. I just killed my mother, Karen Stigleman!"

Discussion

After Stigleman was charged on February 19, 2013, the district court appointed counsel from the Oklahoma Indigent Defense System (OIDS) to represent him. On November 1, 2013, five days before trial was set to begin, defense counsel advised the district court that on August 19, 2013, they had asked OIDS for money to hire an expert witness "to assist counsel in the analysis of the effects and psychoses caused by the use of methamphetamine and other drugs" and that this request had been denied because of lack of funds. Trial counsel requested the district court provide funds for this expert.

Defense counsel's funding request was addressed at a hearing held on November 4, 2013, the day before trial was set to begin. The State objected arguing that the request was too late. In denying that request the court noted

both that it was filed late and that counsel had not shown a clear need for an expert. Stigleman was forced to proceed to trial without the assistance of a mental health expert. He complains on appeal that the refusal by both OIDS and the trial court to provide funding for a forensic psychologist denied him the ability to present a complete defense. These errors, he asserts, denied him his constitutional right to a fair trial and due process of law. He also argues that if this Court determines that his trial attorneys did not do enough to obtain the expert, they should be found to have rendered ineffective assistance.

The United States Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *Gore v. State*, 2005 OK CR 14, ¶ 21, 119 P.3d 1268, 1275 (quoting *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1985). In *Ake v. Oklahoma*, 470 U.S. 68, 82-83, 105 S.Ct. 1087, 1096, 84 L.Ed.2d (1985), the Supreme Court held that "[w]hen the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense ... the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." It was incumbent upon defense counsel to make the threshold showing that insanity was a likely defense and to make a timely request for an expert to assist in the presentation of this defense.

In conjunction with this appeal, Stigleman has filed an application for an evidentiary hearing on his Sixth Amendment claims. *See* Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015). Stigleman attached to his application for an evidentiary hearing affidavits from his trial counsel, from the Division Chief of the Non-Capital Trial Division of OIDS who dealt with the request for an expert, and from a clinical and forensic psychologist hired to conduct a forensic psychological evaluation of Stigleman for purposes of his appeal. That application with its accompanying affidavits contained sufficient information to show by clear and convincing evidence at least a strong possibility that trial counsel was ineffective for failing to timely request an expert and for failing to adequately articulate the need for an expert and that these failures could have affected the outcome of the trial. On May 20, 2015, we remanded the case to the district court of Beckham County for an evidentiary hearing on the ineffective assistance issues regarding the request for expert funding raised in Propositions 1 and 7 of Stigleman's brief.

The evidentiary hearing was held on July 10, 2015. During this hearing the defense presented five witnesses. The first two defense witnesses, Dana Hada and Robert Keith, who represented Stigleman at trial, testified that their defense had focused on mitigating the specific intent element of first degree murder. Although they initially sought the assistance of a toxicology expert to help establish a defense such as voluntary intoxication, the theory of their defense shifted to the possibility of methamphetamine psychosis and an

insanity defense. They determined that they needed an expert to support the theory that Stigleman could not form the requisite intent to commit malice murder because of his chronic use of methamphetamine and perhaps other drugs.

Although counsel did not raise the possibility of an insanity defense in their initial written request for an expert, the subsequent change in the theory of defense and the nature of the expert testimony needed was verbally relayed to Charles Laughlin, Division Chief, OIDS Noncapital Trial Division. Robert Keith spoke with Laughlin several times between the time the request for expert assistance was made and the beginning of trial. Keith learned a week before trial that OIDS would not provide funds for an expert and this foreclosed their ability to present an insanity defense. Hada testified that she believed Stigleman should have been provided an expert and that the failure to do so violated his constitutional rights. Keith was more specific in his testimony about the importance of a mental health expert in Stigleman's case. He testified that having an expert to conduct a comprehensive forensic psychological evaluation of Stigleman would have changed the whole trial. He noted, correctly, that with an insanity defense, after the defense meets the threshold requirement of raising a reasonable doubt about a defendant's sanity, the burden shifts to the State to rebut the presumption of sanity beyond a reasonable doubt. Both defense attorneys testified that a mental health expert's

testimony would have made an insanity defense possible and would have aided in the presentation of the involuntary intoxication defense.

Charles Laughlin, Division Chief of the OIDS Noncapital Trial Division, testified at the evidentiary hearing that the initial request to his office from Hada and Keith was for a toxicologist in relation to a voluntary intoxication defense. The request changed to one for a mental health expert a few weeks before trial when counsel sought to explore the possibility of presenting an insanity defense due to a methamphetamine induced psychosis. Laughlin testified at the hearing that the request for a forensic psychologist rather than a toxicologist as initially requested simply did not come quickly enough for him to secure the required expert in time for trial. Laughlin explained:

> In these types of cases we rely upon the jury – the preliminary hearing transcript and the testimony we receive to see what the witnesses would say with regard to a person's behavior at the time of the event, particularly when you are talking about diminished capacity defenses. There simply wasn't enough time for me to take a request to my executive director that identified the proper theory of defense and to show how an expert would support that theory of defense until shortly before trial when it started to gel. And by that point, it was really too late.

Laughlin stated, "I just didn't internalize that we would be going to a first degree murder trial 60 days after preliminary hearing." When it became clear that Laughlin was not going to be able to secure an expert in time for trial, he advised counsel that they should file an *Ake*[2] motion and request an expert from the district court.

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[2] *Ake v. Oklahoma*, 470 U.S. 68, 82-83, 105 S.Ct. 1087, 1096, 84 L.Ed.2d (1985).

The defense also called Dr. Curtis Grundy to testify at the evidentiary hearing. Dr. Grundy, a licensed psychologist who practiced both clinical and forensic psychology, testified that he had evaluated Stigleman in person for four and a half hours and had reviewed numerous documents including trial transcripts, jail logs and police reports as well as videotapes and audiotapes introduced at trial. Dr. Grundy administered several psychological tests to Stigleman. Two tests designed to detect malingering did not show that Stigleman was malingering. After conducting the in-person evaluation and reviewing all of the relevant materials, Dr. Grundy concluded that at the time of the offense, Stigleman suffered from a stimulant induced or methamphetamine induced psychotic disorder with delusions and hallucinations. Dr. Grundy also agreed that a methamphetamine induced psychotic episode can prevent a person from distinguishing right from wrong as it relates to a specific intent crime. He explained:

> [A] delusion to a firmly held false belief, where the presence of hallucinations, seeing or hearing things, can alter someone's perception of reality to where they aren't seeing external events correctly to where then they may engage in behaviors that are inconsistent with actual reality or perceived events. And it can impact or impair an individual's ability to understand the wrongfulness of their behavior or the nature of their consequences of – of their actions.

Dr. Grundy did not rely solely on Stigleman's self-reporting in reaching the conclusion that he was in a methamphetamine induced psychotic state at the time of the offense. He also relied on the trial testimony of numerous other witnesses who testified about Stigleman's use of methamphetamines and the

testimony describing Stigleman's delusions and hallucinations. Dr. Gundy found it significant that Stigleman told him that he had been using methamphetamine and had not slept for two weeks before the incident. It was reported on the jail log that Stigleman did not sleep for a day and a half after he was placed in custody. This information suggested to Dr. Grundy that Stigleman had been under the influence of a stimulant such as methamphetamine at the time he killed Mrs. Stigleman. He also testified that it is not unusual for a person who has been in a highly psychotic state to be unable to fully recall what happened while they were in that state. Dr. Grundy concluded that in his professional opinion Stigleman did not understand the wrongfulness of his conduct. He stated:

> I think he was operating out of a delusional belief system that he was going to be killed or was being – was actually dying, had been poisoned and that his body was turning into glass or shards and was to explode. It's a very bizarre type of delusional belief, and out of these beliefs he then shot his mother. And I don't think in that context he understood the wrongfulness of it.

Finally, the defense presented the testimony of Dr. Peter Rausch, employed by the Oklahoma Department of Mental Health as a forensic psychologist. Dr. Rausch testified that he had performed a competency evaluation on Stigleman on June 13, 2013.[3] At the time of the evaluation Stigleman was determined to be competent. Dr. Rausch testified that his evaluation did not assess Stigleman's state of mind at the time of the offense

[3] Defense counsel requested a competency examination on April 26, 2013, stating that, "upon conversations had with the Defendant, a doubt has arisen as to the present competency of Aaron Mitchell Stigleman, and that an examination should be performed to determine the present competency of said Aaron Mitchell Stigleman."

nor preclude the possibility that he was insane at the time the crime was committed.

The only witness presented by the State at the evidentiary hearing was Gina Webb, the assistant district attorney who prosecuted Stigleman. Webb testified that the jury heard much of the same evidence upon which Dr. Grundy based his conclusion and she did not think that Dr. Grundy, with "some initials behind his name" would have had a significant effect on the jury's decision. Webb also noted that the jury was instructed on the defense of voluntary intoxication and rejected this defense, sentencing Stigleman to the maximum punishment allowable. She recalled that the jury had been given evidence that Stigleman had been intoxicated and committed criminal acts against his mother in the past. She said the evidence showed that he was angry at his mother and that he knew right from wrong.

At the conclusion of the evidentiary hearing and immediately upon counsel finishing closing arguments, the trial judge announced that he had made his decision and had prepared his written findings of fact and conclusions of law. This document was provided to counsel at that time and then filed in this Court as directed. In that document the district court addressed each of the questions asked in a cursory fashion providing very little detail. Although this Court gives strong deference to the district court's findings and reviews only for an abuse of discretion, we make the ultimate determination. *Littlejohn v. State*, 2008 OK CR 12, ¶ 28, 181 P.3d 736, 745.

See also Wood v. State, 2007 OK CR 17, ¶ 39, 158 P.3d 467, 479; Rule 3.11(B)(b)(iv), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015).

Evidence of methamphetamine psychosis may form the basis for an insanity defense. In *Malone v. State*, 2007 OK CR 34, 168 P.3d 185, there was evidence at trial that the defendant, a long time user of methamphetamine, killed the victim while under the influence of methamphetamine. The defense secured and presented the testimony of an expert witness who was qualified to testify about the science relating to how methamphetamine affects the brain. This witness "explained how when someone is extremely 'intoxicated' on methamphetamine, to the point of 'amphetamine psychosis,' the effect on the person is comparable to paranoid schizophrenia. He explained that like paranoid schizophrenia, amphetamine psychosis can include auditory and visual hallucinations, where an individual will respond to non-existent environmental stimuli or threats." *Malone*, 2007 OK CR 34, ¶ 18, 168 P.3d at 195. While the defense was ultimately unsuccessful, this Court noted that the trial court's decision to instruct the jury on both voluntary intoxication and insanity - based upon the expert's testimony that methamphetamine intoxication is akin to paranoid schizophrenia - even though Malone had given no notice that he would present an insanity defense, was both wise and prudent. *Malone*, 2007 OK CR 34, ¶ 91 n. 172, 168 P.3d at 220 n. 172.

Stigleman's behavior before, during and after the killing, suggested the possibility of a defense based upon methamphetamine psychosis at least as persuasively as the facts presented in *Malone*. These facts were known to Stigleman's defense counsel well before trial. The record shows, however, that counsel neither made the request for funding in a timely fashion nor adequately articulated the need for the necessary expert.

The written request for district court funds for an expert filed on November 1, 2013, one week before trial was set to begin, was misleading at worst and incomplete at best. In this request, trial counsel advised the district court that they had requested expert assistance on August 19, 2013, but did not mention that they had initially asked for the wrong expert. Neither did they note that they had requested funds from OIDS for a forensic psychologist only a few weeks prior to trial. Further, they cited a lack of funds as the reason for the denial rather than the fact that the request for a forensic psychologist was not made in a timely fashion. Additionally, while counsel requested funding to hire an expert "to assist counsel in the analysis of the effects and psychoses caused by the use of methamphetamine and other drugs" they did not specifically advise the court that they were exploring the possibility of raising an insanity defense or cite facts supporting their request for this expert. Defense counsel failed to clarify the reason for their request at the evidentiary hearing explaining only that, "[w]e believe that our defense in this matter would

be substantially helped through expert testimony."[4] We find that defense counsel's request for funding for a forensic psychologist was both untimely and inadequate. Despite the district court's abbreviated findings and conclusions to the contrary,[5] the record shows that defense counsel neither pursued all reasonable avenues to secure funds to hire an expert necessary to support Stigleman's defense nor made necessary and reasonable efforts to secure those funds.

As directed, the trial court next addressed the effect that the expert testimony would have had on the proceedings stating:

> I do not believe expert witness testimony would have effected [sic] the proceedings. The state alleged "pattern of abuse" as a part of the state's case. The defendant testified at length during his trial. He told the jury what affect [sic] methamphetamine had on him. During his testimony, the defendant recalled almost everything that occurred in this incident. The jury was told about the defendant's behavior after the death of the victim. I believe that the film the defendant, at the time of his arrest was shown. All of the facts that have been discussed were presented to the jury. They were given the option of finding a lesser included offense and they were instructed about voluntary intoxication.

The pattern of abuse referenced by the trial court likely refers to the State's evidence that Stigleman had, in the months prior to February vandalized his mother's house and car and attempted to take money from her

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[4] When asked by the district court what kind of expert defense counsel was requesting, Hada could not answer the question with specificity. She responded:

> Judge, I can't remember what the official name we requested was. It would be - - it would be someone in the medical field who would be able to testify as to the effects of methamphetamine and other psychotic drugs on the functioning of the mental areas of the brain, I guess, psychosis that that perhaps would cause from substantial use of those types of things.

[5] The court concluded that "trial counsels [sic] pursued all avenues to secure finds [sic]. They did that by submitting a request for expert witness." The court also found that "trial counsel made necessary and reasonable efforts to secure funds."

business. These incidents, which, incidentally, also occurred during a time when Stigleman was using drugs heavily, neither support nor preclude a finding that he was in a methamphetamine induced psychosis at the time he killed his mother. Further, while it is true that Stigleman testified at length during the trial and recalled much of what happened the morning he killed his mother, the record shows that there was also much he did not recall. This is not inconsistent with Dr. Grundy's testimony about the inability of a person to fully recall events occurring while in a psychotic state.

Finally, the district court noted, as support for its conclusion that an expert witness would not have affected the proceedings, that although the jury was told about Stigleman's behavior after the death of the victim and was shown the video of him running naked through the snow at the time of his arrest they declined to find him guilty of the lesser offense of voluntary intoxication. This is a non sequitur. Without the testimony of a forensic psychologist, the jury was left to rely only on Stigleman's testimony and the testimony of other lay witnesses about Stigleman's drug use and behavior. This testimony was effectively challenged by the prosecutor on cross examination and in closing argument. The prosecutor, understandably, took full advantage of the lack of expert evidence supporting Stigleman's claim of compromised intent telling the jury in closing, "[Y]ou get to decide the credibility of everything. You get to use your common sense on each of you. You get to use

your experience with people who have been on methamphetamine or alcohol and your knowledge and what you saw, what you heard here, each one of you."

Contrary to the trial court's findings, the record does not support the conclusion that expert testimony would not have affected the proceedings. Rather, it underscores the importance of expert testimony to Stigleman's defense. Dr. Grundy's expert testimony would have offered the defense far more than merely a witness with "some initials behind his name." Expert testimony explaining methamphetamine psychosis and its possible effects would have supported Stigleman's defense with far more credibility than Stigleman's own testimony or the testimony of other lay witnesses. It would have supported defense claims that Stigleman experienced hallucinations and delusions because of his heavy long-time use of methamphetamine and it would have allowed the defense to challenge the element of intent to kill by providing evidence that Stigleman could not distinguish right from wrong when he killed his mother because he was in a methamphetamine induced psychosis. This expert testimony was vital to the defenses of both voluntary intoxication and insanity and could likely have had a significant effect on the proceedings.

We address next the district court's conclusion that Stigleman was personally at fault for the failure to secure funding for a forensic psychologist because he refused to waive his right to a speedy trial. In its findings of fact and conclusions the court stated:

> The defendant was personally at fault because he refused to waive right to a speedy trial. I believe that the defendant did not want his

> case continued. The greatest restriction on the trial counsels [sic] was the defendant's behavior during and prior to trial. Had the request for an expert been granted, a continuance would have been required.

The court's conclusion is not supported by the record. Although Hada testified at the evidentiary hearing that at a pretrial docket in September, Stigleman declined trial counsel's request that he waive his right to a speedy trial so that they could get more time to secure an expert, this did not preclude counsel from requesting court funds for an expert just one week before trial or from requesting a change of venue the day before trial. Each request, if granted, would have required a continuance.[6] Just as Stigleman's refusal to waive his right to a speedy trial did not affect defense counsel's decision to request expert assistance or a change of venue, it did not affect the district court's ruling on these motions. The district court denied the motion for change of venue stating only that it could be reasserted after voir dire if they had trouble seating a jury. The court denied the request for funds for an expert noting that it was filed late and, more important, that the need for an expert had not been sufficiently demonstrated. Contrary to the district court's findings, the record does not show that Stigleman's refusal to waive his right to a speedy trial had any impact at all on either the defense attorneys' request for an expert or the district court's denial of this request.

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[6] Although defense counsel did not specifically ask for a continuance in the written request for court funds, counsel did acknowledge at the hearing on this motion that the request would require a delay in the proceedings.

The record before this Court shows that trial counsel's performance was deficient and that Stigleman was prejudiced by his attorneys' actions because there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 693, 104 S.Ct. 2052, 2064, 2067, 80 L.Ed.2d 674 (1984); *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206; *Head v. State*, 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148. We find the district court's findings and conclusions to the contrary to be an abuse of discretion.

DECISION

The Judgment and Sentence of the district court is **REVERSED** and **REMANDED** for a **NEW TRIAL**. Requests by both parties to exceed the Supplemental Brief page limitation are **GRANTED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF BECKHAM COUNTY
THE HONORABLE DOUG HAUGHT, DISTRICT JUDGE

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OPINION BY: JOHNSON, J.
SMITH, P.J.: Concur
LUMPKIN, V.P.J.: Dissent
LEWIS, J.: Dissent
HUDSON, J.: Concur

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LUMPKIN, JUDGE: DISSENTING

I respectfully dissent. To be entitled to relief on his claims of denial of expert assistance and ineffective assistance of counsel, Appellant must show prejudice. Because Appellant has not made that showing in the present case, no relief is required.

As to Proposition One, I note that within 22 O.S.2011, § 1355.4(D), the Oklahoma Legislature has made provision for indigent criminal defendants to receive reasonable and necessary investigative, expert or other services. *Johnson v. Brock*, 1992 OK CR 83, ¶¶ 6-10, 843 P.2d 852, 853; *Fitzgerald v. State*, 1998 OK CR 68, ¶ 16, 972 P.2d 1157, 1166.[1] This Court has recognized that § 1355.4 vested the Executive Director of the Oklahoma Indigent Defense System with the authority to provide reasonable and necessary investigative, expert or other services to an indigent defendant in those counties which do not have separately funded Public Defender's Offices. *Id.* On appeal, an appellant claiming error based upon the lack of expert assistance must demonstrate substantial prejudice from the lack of an expert. *Lewis v. State*, 2009 OK CR 30, ¶¶ 11-12, 220 P.3d 1140, 1144; *Salazar v. State*, 1993 OK CR 21, ¶ 21, 852 P.2d 729; *See also Coleman v. Brown*, 802 F.2d 1227, 1237 (10th Cir. 1986).

Similarly, a showing of prejudice is required before this Court will grant relief on a claim of ineffective assistance of counsel. This Court reviews

[1] I wrote separately in *Fitzgerald* detailing the history of how the Legislature had come to provide a vehicle for addressing the issue of authorization and funding for expert witnesses. *Id.*, 1998 OK CR 68, ¶¶ 1-8, 16, 972 P.2d at 1175 (Lumpkin, J., concurring in results).

ineffective assistance of counsel claims under the two-part test mandated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *Mitchell v. State*, 2011 OK CR 26, ¶ 139, 20 P.3d 160, 190. The *Strickland* test requires an appellant to show: (1) that counsel's performance was constitutionally deficient; and (2) that counsel's deficient performance prejudiced the defense. *Bland v. State*, 2000 OK CR 11, ¶ 112-13, 4 P.3d 702, 730-31 (*citing Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064). Unless the appellant makes both showings, "it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Ryder v. State*, 2004 OK CR 2, ¶ 85, 83 P.3d 856, 875 (*quoting Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. To demonstrate prejudice an appellant must show that there is a reasonable probability that the outcome of the trial would have been different but for counsel's unprofessional errors. *Bland*, 2000 OK CR 11, ¶ 112, 4 P.3d at 730-31. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112, 131 S.Ct. 770, 792, 178 L.Ed.2d 624 (2011).

At this Court's direction, the trial court which heard and tried this case conducted an evidentiary hearing concerning Appellant's claims of ineffective assistance. After receiving this additional evidence, the trial court determined that expert witness testimony would not have had an effect on the proceedings. I find that the trial court's determination is not clearly against the logic and effect of the facts presented. *Littlejohn v. State*, 2008 OK CR 12, ¶ 28, 181 P.3d 736,

745 (recognizing deference given to trial court's findings on remanded issues); *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170 (defining abuse of discretion as determination clearly against logic and effect of facts presented).

In reaching this conclusion, I reiterate the limitation placed on mental health evaluations conducted a substantial period of time after the charged offense. *White v. State*, 1998 OK CR 69, ¶¶ 9-10, 973 P.2d 306, 314 (Lumpkin, J., concurring in result).

> Standard 7–6.6 of the *American Bar Association Criminal Justice Mental Health Standards* provides that "[o]pinion testimony, whether expert or lay, as to whether or not the defendant was criminally responsible at the time of the offense charged should not be admissible." Furthermore, the commentary to that standard provides that an "expert witness should not be permitted to express opinions on any question requiring a conclusion of law or a moral or social value judgment properly reserved to the court or to the jury." And later, that same commentary indicates that "[t]erms like premeditation, malice, and provocation have technical legal meanings concerning which mental health or mental retardation professionals can pretend no expertise."

Coddington v. State, 2006 OK CR 34, ¶ 3, 142 P.3d 437, 462 (Lumpkin, V.P.J., concurring in part/dissenting in part)

Although Dr. Curtis Grundy believed that Appellant had the symptoms of methamphetamine psychosis and met the criteria for insanity, there is not a reasonable probability that the outcome of the trial would have been different had counsel introduced Dr. Grundy's opinion at trial. Appellant's jury was fully apprised as to his methamphetamine use. The trial court instructed the jury concerning the defense of voluntary intoxication but the jurors, using common sense, rejected that defense. Appellant's behavior both before and after the

offense clearly revealed that he understood the wrongfulness of his conduct and was able to formulate the requisite malice aforethought. *Davis v. State*, 2011 OK CR 29, ¶ 76, 268 P.3d 86, 111; *Ullery v. State*, 1999 OK CR 36, ¶ 34, 988 P.2d 332, 348. Prior to the offense, Appellant engaged in a pattern of abuse towards his mother that suggested that he shot her out of malice.[2] Immediately after shooting her, Appellant's behavior exhibited that he understood the wrongfulness of his conduct. Appellant exclaimed "What have I done? What have I done? What have I done?" When the police arrived at his home, Appellant ran and attempted to escape.[3] Appellant further exhibited regret when he repeatedly proclaimed his name and the fact that he had just killed his mother when at the county jail. When Dr. Peter Rausch examined Appellant, he found that he was competent to stand trial. This case is distinguishable from *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). Because Appellant has not shown prejudice from the lack of a mental health expert, I would affirm Appellant's conviction and sentence. *See Marquez-Burrola v. State*, 2007 OK CR 14, ¶ 16, 157 P.3d 749, 756 (*Ake* errors are subject to harmless-error analysis).

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[2] Dr. Grundy agreed that, under the circumstances, Appellant's decision to shoot his mother and not his girlfriend could have been evidence of a rational choice. (Evid. Hrg. Tr. 142).

[3] Grundy believed that Appellant's actions after shooting his mother could have been consistent with nonpsychotic behavior. (Evid. Hrg. Tr. 142-486).

LEWIS, JUDGE, Dissenting:

I would deny Appellant relief and affirm the Findings of Fact and Conclusions of Law of the trial judge.