IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

DONTE LEMAR PAYTON,	)	
	)	**NOT FOR PUBLICATION**
Appellant,	)	
	)	**Case No. F-2016-194**
v.	)	
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

HUDSON, JUDGE:

Appellant, Donte Lemar Payton, was tried and convicted at a jury trial in Oklahoma County District Court, Case No. CF-2014-7586, of Manslaughter in the First Degree, in violation of 21 O.S.2011, § 711(3).[1] The jury deadlocked on punishment. The Honorable Donald L. Deason, District Judge, sentenced Appellant to life imprisonment.[2] Payton now appeals, raising six propositions of error before this Court:

I. THE TRIAL COURT ERRED IN FAILING TO COMPLY WITH THE LAW GOVERNING CONTACT WITH JURORS

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[1] Appellant was originally charged with Murder in the First Degree. However, the jury acquitted Appellant of this charge but convicted him of the lesser-included offense of Manslaughter in the First Degree.

[2] Appellant must serve eighty-five (85) percent of this sentence before becoming eligible for parole. 21 O.S.Supp.2014, § 13.1.

DURING DELIBERATIONS, IN VIOLATION OF OKLA. STAT. TIT. 22, § 894, AND APPELLANT'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7, 19, AND 20, OF THE OKLAHOMA CONSTITUTION;

II. THE COURT'S IMPROPER COMMUNICATION WITH THE JURY INVITED JURORS TO AVOID THEIR DUTY TO ASSESS PUNISHMENT, AND THE JURORS ACCEPTED THE INVITATION, DEPRIVING APPELLANT OF THE RIGHT TO BE SENTENCED BY THE JURY;

III. APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7 AND 20 OF THE OKLAHOMA CONSTITUTION;

IV. UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE, IMPOSITION OF A LIFE SENTENCE IS EXCESSIVE AND SHOULD BE MODIFIED;

V. APPELLANT'S RIGHTS TO PRESENT A DEFENSE AND TO HAVE A JURY DETERMINE HIS GUILT OR INNOCENCE WERE VIOLATED BY THE TRIAL COURT'S ERRONEOUS REFUSAL TO INSTRUCT THE JURY ON SELF-DEFENSE AS APPELLANT'S THEORY OF DEFENSE IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS WELL AS ARTICLE 2, SECTIONS 7, 19 AND 20 OF THE OKLAHOMA CONSTITUTION; and

VI. THE ACCUMULATION OF ERROR IN THIS CASE DEPRIVED APPELLANT OF DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUITON AND ARTICLE II, § 7 OF THE OKLAHOMA CONSTITUTION.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits, the parties' briefs and Appellant's Rule 3.11 application, we find that no relief is required under the law and evidence. Appellant's judgment and sentence is **AFFIRMED**.

Propositions I and II: A presumption of prejudice arises when a communication between a judge and jury occurs after the jury has retired for deliberations. This presumption may only be overcome on appeal if the Court is convinced on the face of the record that no prejudice to the accused occurred. *See, e.g., Givens v. State*, 1985 OK CR 104, ¶ 19, 705 P.2d 1139, 1142; 22 O.S.2011, § 894.[3]

We remanded Appellant's case to district court for an evidentiary hearing on this claim.[4] The record shows the jury was told by the bailiff during deliberations that the trial judge would

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[3] We recently held that the presumption of prejudice does not apply "when the trial court communicates with the jury in writing after affording counsel notice and an opportunity to be heard" and overruled *Givens* to the extent it made any suggestion to the contrary. *Nicholson v. State*, 2018 OK CR 10, ¶ 12, 421 P.3d 890, 895. This ruling does not govern here because Appellant alleges that the trial judge had an unauthorized communication with the jury during deliberations that was undisclosed to counsel.

[4] We granted Appellant's application for evidentiary hearing which was filed pursuant to Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017). In resolving Propositions I and II, we incorporate and discuss the evidence presented at the evidentiary hearing.

impose sentence if the jury was unable to agree on punishment. This communication occurred after the jury found Appellant guilty of the lesser included offense of first degree manslaughter. At the time, the jury was unable to agree on punishment despite several hours of deliberations. The jury's deadlock on sentencing was evident from the last two jury questions sent to the trial judge during deliberations. The jury foreman then confirmed for the trial judge on the record that further deliberations would not assist the jury in reaching a unanimous decision as to punishment.

The trial court utilized 22 O.S.2011, § 927.1 to take from the jury the sentencing verdict in light of their finding of guilty and their inability to agree on punishment. This is a discretionary act of the trial court which we review for abuse of discretion. *Dallas v. State*, 1955 OK CR 93, ¶ 20, 286 P.2d 282, 286; *Bayless v. State*, 1913 OK CR 67, 9 Okl.Cr. 27, 32-33, 130 P. 520, 522. We note from the outset that Appellant did not object to the trial court's responses to the jury's written questions or to dismissal of the jury in light of their apparent deadlock. Appellant did not ask to poll the jurors. Nor did Appellant file a pretrial request for the jury to fix punishment.

When a trial judge is faced with a jury that has retired to deliberate and reached a verdict of guilty, and despite "diligent and sincere efforts, they are unable to agree upon the punishment and so report to the trial judge" then Section 927.1 becomes applicable. *Shanahan v. State*, 1960 OK CR 59, ¶ 18, 354 P.2d 780, 786. The court at that point "shall require the jury to deliberate further after giving the additional instruction that if they then fail to agree they may so state in their verdict and leave punishment to be assessed by the court." *Id.* *See Dean v. State*, 1989 OK CR 40, ¶¶ 8-9, 778 P.2d 476, 478; *White v. State*, 1978 OK CR 32, ¶ 11, 576 P.2d 315, 317.

In the present case, the information conveyed to the jury by the bailiff was a correct statement of the law, was limited in scope "and essentially the same as would have been given had the statute been strictly followed[.]" *Grayson v. State*, 1984 OK CR 87, ¶ 12, 687 P.2d 747, 750. Judge Deason's response to the jury's final written question told the jury to keep deliberating and to try to reach a consensus on punishment. The record shows plainly that the jury was hopelessly deadlocked on punishment at the time of the bailiff's unauthorized communication. However, the jury had

already unanimously found Appellant guilty of first degree manslaughter. On this record we find that the presumption of prejudice was overcome by the State. *Id.*

Appellant fails to show error, plain or otherwise, based upon his unpreserved claims that the trial court took the case from the jury too soon after answering the last written question and that the trial court should have instructed with the Allen charge.[5] To be entitled to relief under the plain error doctrine, Appellant must show the existence of an actual error (i.e., deviation from a legal rule), that is plain or obvious, and that affects his substantial rights, meaning the error affected the outcome of the proceeding. *Bramlett v. State*, 2018 OK CR 19, ¶ 23, 422 P.3d 788, 796. If these elements are met, this Court will correct plain error *only* if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*; 20 O.S.2011, § 3001.1.

The time provided for deliberations was not unreasonable and there was no abuse of discretion in this regard. Appellant fails to

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[5] *See Allen v. United States*, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 2d 528 (1896); *Thomas v. State*, 1987 OK CR 113, ¶¶ 20-21, 741 P.2d 482, 488; *Pickens v. State*, 1979 OK CR 99, ¶¶ 10-11, 600 P.2d 356, 358-59; OUJI-CR (2d) 10-11.

show that the jury was distracted in its sentencing deliberations either from the trial court's failure to give an Allen charge or in the Court's decision to take the case from the jury after confirming on the record that the jury was deadlocked as to punishment. Nor does Appellant show an abuse of discretion from the trial court's decision under Section 927.1 to take the sentencing decision from the deadlocked jury and impose sentence based on the facts of this case. *See Barnes v. State*, 2017 OK CR 26, ¶ 22, 408 P.3d 209, 217 ("Jury instructions are within the discretion of the trial court, and we review for abuse of discretion.") (internal quotation omitted); *Johnson v. State*, 2009 OK CR 26, ¶¶ 4-5, 218 P.3d 520, 522-23 ("trial courts should be objective and careful not to appear to guide the jury to a particular decision. . . . It is important that each juror make his or her own decision and not be encouraged to abandon their own personal beliefs."); *Harris v. State*, 2004 OK CR 1, ¶ 72, 84 P.3d 731, 756 ("Whether a deadlock truly exists . . . must be determined on a case-by-case basis, and the trial court's decision on the matter is accorded substantial deference."); *Ellis v. State*, 1990 OK CR 43, ¶ 8, 795 P.2d 107, 109 ("The length of time a jury deliberates is within the discretion of the trial judge."); *Cole v. State*,

1988 OK CR 288, ¶ 14, 766 P.2d 358, 361 ("The giving of an Allen instruction lies within the discretion of the trial court."). There was no actual error in this regard and, thus, no plain error. Propositions I and II are denied.

Proposition III: To prevail on an ineffective assistance of counsel claim, the appellant must show both that counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). *See Harrington v. Richter*, 562 U.S. 86, 104, 131 S. Ct. 770, 787-88, 178 L. Ed. 2d 624 (2011) (discussing *Strickland* two-part test). Appellant fails to show that trial counsel was ineffective for the claims of ineffectiveness that are based on the existing record on appeal.

Further, Appellant fails to show by clear and convincing evidence a strong possibility that trial counsel was ineffective for failing to present statements at formal sentencing from Appellant's mother, father, aunt, cousin and girlfriend. Appellant's request for an evidentiary hearing, or to supplement the record, on this claim is thus denied. Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of*

Criminal Appeals, Title 22, Ch.18, App. (2018); *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905-06. Proposition III is denied.

Proposition IV: We find that, under the total facts and circumstances of this case, Appellant's sentence is not so excessive as to shock the conscience of the Court.[6] *Duclos v. State*, 2017 OK CR 8, ¶ 19, 400 P.3d 781, 786; *Pullen v. State*, 2016 OK CR 18, ¶ 16, 387 P.3d 922, 928. Simply, this was a senseless and brutal killing. Proposition IV is denied.

Proposition V: We review the trial court's ruling on requested defense instructions for abuse of discretion. *Barnett v. State*, 2011 OK CR 28, ¶ 6, 263 P.3d 959, 962. We require *prima facie* evidence meeting the legal criteria for the defense presented before jury instructions on said defense are warranted. *Davis v. State*, 2011 OK CR 29, ¶ 94, 268 P.3d 86, 114. We have defined *prima facie* evidence as that "which in the judgment of the law, is

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[6] To the extent Appellant attempts to raise a freestanding Eighth Amendment claim with his citation to *Solem v. Helm*, 463 U.S. 277, 292, 103 S. Ct. 3001, 3010, 77 L. Ed. 2d 637 (1983) and his passing statement that "[t]he Eighth Amendment prohibits not only barbaric punishment but also disproportionate punishments[,]" Aplt. Br. at. 34, this claim is so inadequately developed on appeal as to be waived from our review. *Davis v. State*, 2018 OK CR 7, ¶ 32, 419 P.3d 271, 282; Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018).

sufficient to establish a given fact, or the group or chain of facts constituting the defendant's claim or defense, and which if not rebutted or contradicted, will remain sufficient to sustain a judgment in favor of the issue which it supports." *Id.* If *prima facie* evidence meeting the legal criteria of the defense is presented, the instruction should be given. *Id.* A defense instruction "is properly refused if there is insufficient evidence to support it." *Id.*

"Self-defense is an affirmative defense which admits the elements of the charge, but offers a legal justification for conduct which would otherwise be criminal." *Id.*, 2011 OK CR 29, ¶ 95, 268 P.3d at 114. Under Oklahoma law, a person is justified in using deadly force if a reasonable person in the circumstances and from the defendant's viewpoint would reasonably have believed that he was in imminent danger of death or great bodily injury. This is so even if the danger to life or personal security may not have been real. 21 O.S.Supp.2014, § 733; *Davis*, 2011 OK CR 29, ¶ 95, 268 P.3d at 114.

Appellant's own testimony shows that he unreasonably shot the victim after taking the gun away. No reasonable person in the circumstances and from the defendant's viewpoint would

reasonably have believed that he or she was in imminent danger of death or great bodily injury from the unarmed victim. The victim here responded, quite naturally, by raising his left hand when the gun was aimed at him then moved around while being shot from the left side while seated. Appellant testified repeatedly that he opened fire on Canter because he was "scared" but that assertion, standing alone, is insufficient to warrant self-defense instructions. "'The bare belief that one is about to suffer death or great personal injury will not, in itself, justify taking the life of [one's] adversary. There must exist reasonable grounds for such belief at the time of the killing.'" *Davis*, 2011 OK CR 29, ¶ 95, 268 P.3d at 114-15. Instruction on self-defense thus was not supported by *prima facie* evidence because Appellant's testimony uniformly showed no present imminent danger of being attacked or killed by Canter after he was disarmed. The trial court did not abuse its discretion in denying the defense instruction. Proposition V is denied.

Proposition VI: We deny Appellant's request for relief based upon alleged cumulative error. *Neloms v. State*, 2012 OK CR 7, ¶ 40, 274 P.3d 161, 171 (the finding of one error on appeal that was

harmless provides no basis upon which to grant relief for cumulative error). Proposition VI is denied.

DECISION

The Judgment and Sentence of the District Court is **AFFIRMED**. Appellant's *Application for Evidentiary Hearing on Sixth Amendment Claims* is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE DONALD L. DEASON, DISTRICT JUDGE

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OPINION BY: HUDSON, J.
LUMPKIN, P.J.: CONCUR
LEWIS, V.P.J.: CONCUR IN RESULTS
KUEHN, J.: CONCUR
ROWLAND, J.: RECUSE

LEWIS, VICE PRESIDING JUDGE, CONCURRING IN RESULT:

I concur in the result, but write separately to emphasize that plain or obvious error occurred when the bailiff made an unauthorized communication with the jury on a point of law concerning the imposition of the sentence. 22 O.S.2011, §§ 857, 894. I also agree that the record here shows that the jury was hopelessly deadlocked on the question of sentencing, and the error had no serious effect on the fairness, integrity, or public reputation of the proceedings.

Whether the bailiff's statement to the jury was legally correct is beside the point. A bailiff communicates with the jury about whether it has reached a verdict, or when it is time to have dinner, not about points of law. Communications like the ones here were presumptively prejudicial, and would often result in reversal of a conviction or remand for re-sentencing. I encourage trial courts to ensure that personnel understand their obligation under the above cited statutes to refrain from communications about law and procedure with trial jurors.