IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

REVIVAL ASO POGI,	)	
	)	**NOT FOR PUBLICATION**
Appellant,	)	
vs.	)	**No. F-2017-1167**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

KUEHN, VICE PRESIDING JUDGE:

Appellant, Revival Aso Pogi, was convicted by a jury in Oklahoma County District Court, Case No. CF-2014-2570, of First Degree Murder (21 O.S.2011, § 701.7(A)). On November 15, 2017, the Honorable Bill Graves, District Judge, sentenced him to life imprisonment in accordance with the jury's recommendation. Appellant must serve at least 85% of his sentence before parole consideration.

Appellant raises six propositions of error in support of his appeal:

PROPOSITION I. BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT MR. POGI'S CONVICTION, DUE PROCESS REQUIRES HIS CASE TO BE REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS.

PROPOSITION II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INSTRUCT THE JURY ON FIRST-DEGREE MANSLAUGHTER BY RESISTING CRIMINAL ATTEMPT.

PROPOSITION III. THE ADMISSION OF STATEMENTS MADE BY MR. POGI AFTER HE HAD BEEN THREATENED BY AN OFFICER, WAS NOT TOLD WHAT CONSTITUTED WAIVING HIS RIGHTS, AND UNAMBIGUOUSLY INVOKED HIS RIGHT TO REMAIN SILENT VIOLATED THE FEDERAL AND STATE CONSTITUTIONS.

PROPOSITION IV. MR. POGI WAS DENIED HIS FUNDAMENTAL RIGHT TO PRESENT A DEFENSE BY THE TRIAL COURT'S EXCLUSION OF EVIDENCE THAT THE DECEDENT SEXUALLY ASSAULTED ANOTHER INDIVIDUAL UNDER CIRCUMSTANCES NEARLY IDENTICAL TO THOSE IN THE PRESENT CASE.

PROPOSITION V. THE INTRODUCTION OF A GRUESOME AND UNFAIRLY PREJUDICIAL CLOSE-UP PHOTOGRAPH OF THE VICTIM'S FACE COVERED IN BLOOD WHEN MULTIPLE OTHER PHOTOGRAPHS SHOWED THE SAME INJURIES IN A LESS GRUESOME MANNER VIOLATED MR. POGI'S RIGHT TO A FUNDAMENTALLY FAIR TRIAL.

PROPOSITION VI. TRIAL ERRORS, WHEN CONSIDERED IN A CUMULATIVE FASHION, WARRANT A NEW TRIAL.

After thorough consideration of these propositions, and the record before us on appeal, we affirm. Appellant was convicted of killing Steven Qualls at Qualls's Oklahoma City home in April 2014. Qualls's body was discovered by his sister. Blood covered the walls and floors of the home. An autopsy showed not only that Qualls had been beaten with a blunt object, but that he had been stabbed over fifty times with a knife, with such force that his spine had been penetrated and various bones in his body, including his skull, had been chipped by the knife blade. Qualls had methamphetamine in his system when he died; methamphetamine was found in his pocket, and drug paraphernalia was found nearby.

Appellant's wallet and bloody palm-prints were found at the scene. He was apprehended and arrested a few days later. When speaking with police, he first denied any knowledge of the homicide, but eventually admitted killing Qualls, giving a rather vague account of what prompted the attack. At trial, Appellant relayed to the jury his version of events. Again he admitted killing Qualls. He said he had agreed to collect a debt on behalf of his girlfriend, and was picked up by Qualls, who drove him to meet other men; these men assaulted and threatened him over a missing vehicle that he knew nothing about. Appellant said he was then forcibly taken to Qualls's home and held captive by Qualls. While there, Appellant said, he seized an opportunity to free himself and grabbed a knife. Appellant testified that during his struggle with Qualls over the knife, he stabbed Qualls repeatedly, then left the scene. The trial court instructed on the law of self-defense, but the jury rejected that theory and found Appellant guilty as charged.

In Proposition I, Appellant claims the State failed to disprove his claim of self-defense, and contends the evidence does not support a conviction for malice murder. The external circumstances surrounding the commission of a homicide may be considered in deciding whether the defendant deliberately (and unjustifiably) intended to take a human life.

See OUJI-CR (2nd) No. 4-63. The jury was not required to believe Appellant's explanation for what he admitted was an intentional killing. Considering all of the evidence presented, a rational juror could conclude, beyond a reasonable doubt, that Appellant killed Qualls with a deliberate intent to do so, and that his actions were not justified by a reasonable fear of death or great bodily harm. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2788-89, 61 L.Ed.2d 560 (1979); *Spruill v. State*, 2018 OK CR 25, ¶ 9, 425 P.3d 753, 756; *Head v. State*, 2006 OK CR 44, ¶ 6, 146 P.3d 1141, 1144. Proposition I is denied.

As to Proposition II, a trial court's decision on whether to give lesser-offense instructions is reviewed for an abuse of discretion. *McHam v. State*, 2005 OK CR 28, ¶ 21, 126 P.3d 662, 670. No lesser offense instructions are warranted unless a *prima facie* case for that offense has been made – that is, unless there is competent evidence to support each element of that crime. *See Ball v. State*, 2007 OK CR 42, ¶¶ 31-33, 37, 173 P.3d 81, 90-91; *see also Shrum v. State*, 1999 OK CR 41, ¶ 10, 991 P.2d 1032, 1036. The trial court did not abuse its discretion by refusing Appellant's requested instruction on First Degree Manslaughter while Resisting Criminal Attempt (21 O.S.2011, § 711(3)). While Appellant testified that he was worried Qualls might make sexual advances toward

him while he was being held captive, he never claimed that Qualls actually attempted to do so. There was no "criminal attempt" for Appellant to resist, apart from his claim of self-defense, on which the trial court duly instructed. *See Hancock v. State*, 2007 OK CR 9, ¶¶ 102-03, 155 P.3d 796, 820, *overruled on other grounds by Williamson v. State*, 2018 OK CR 15, 422 P.3d 752. Proposition II is denied.

In Proposition III, Appellant claims his post-arrest statement to police was involuntary, and that the trial court erred in allowing the State to offer it in its case in chief. A video recording of the interview is included in the appeal record. The trial court held a pretrial hearing on the matter, but defense counsel did not renew his objection to the statement when it was introduced, waiving all but plain error. *Lowery v. State*, 2008 OK CR 26, ¶ 9, 192 P.3d 1264, 1268. Because this issue involves the Fifth Amendment right to remain silent in the face of custodial interrogation, the burden is on the State to show that any error in admitting the evidence was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967); *Bartell v. State*, 1994 OK CR 59, ¶ 10, 881 P.2d 92, 95.

Appellant advances three separate challenges to the voluntariness of the interview, but we reject all of them. First, while an officer who

adjusted Appellant's handcuffs made an unfortunate comment to ensure Appellant did not attempt to escape, the officer never suggested that Appellant should say anything to detectives; the detectives did not arrive for almost another hour, and Appellant is observed on the video humming to himself while awaiting their arrival.[1] We do not believe this officer's conduct had any effect on the voluntariness of Appellant's subsequent statements. Second, Appellant claims that when the detectives presented him with a form to sign, acknowledging that he had received and understood his rights to silence and to counsel (*see Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)), they failed to explain that he was waiving those rights. But as the form itself explained, and as one detective repeatedly emphasized, signing the form did not require Appellant to talk; it only served as proof that he understood his rights, including the right to stop talking at any time.

Finally, Appellant claims he did, in fact, decide to stop talking shortly after being advised of his right to do so. The video shows that Appellant unequivocally said he wished to terminate the interview. Even after being asked if he had any questions of his own, or whether he

[1] The officer said, "Don't get stupid. If I shoot you in here, it'll make my ears ring."

wanted something to drink, Appellant did not express any desire to continue. Still, one detective continued to ask Appellant questions directly related to the investigation. A suspect's desire to stop custodial interrogation should be "scrupulously honored," and that determination is made on a case-by-case basis. *Michigan v. Mosley*, 423 U.S. 96, 103-04, 96 S.Ct. 321, 326, 46 L.Ed.2d 313 (1975). A suspect's post-request responses to further interrogation cannot be used "to cast retrospective doubt on the clarity of the initial request itself." *Smith v. Illinois*, 469 U.S. 91, 100, 105 S.Ct. 490, 495, 83 L.Ed.2d 488 (1984). Appellant did ask additional questions about the investigation, but only in response to continued custodial questioning by police.

Appellant's right to terminate the interrogation was not scrupulously honored. However, the error in admitting his custodial statements in the State's case in chief was harmless beyond a reasonable doubt. *Arizona v. Fulminante*, 499 U.S. 279, 295, 111 S.Ct. 1246, 1257, 113 L.Ed.2d 302 (1991). The fact that Appellant killed Qualls was strongly established by the physical evidence alone. Appellant then took the witness stand and gave the jury a modified version of what he had told police. The State was able to use Appellant's custodial statements to impeach his credibility, regardless of whether they were admissible in

its case in chief. *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971); *Washington v. State*, 1999 OK CR 22, ¶ 33, 989 P.2d 960, 972; *Eddings v. State*, 1992 OK CR 78, ¶ 10, 842 P.2d 759, 762. And because Appellant received the minimum sentence available, he can demonstrate no prejudicial effect in sentencing. Proposition III is therefore denied.

In Proposition IV, Appellant claims the trial court erred by excluding evidence that Qualls had sexually assaulted another man in the past. We review the trial court's evidentiary rulings for an abuse of discretion. *Pavatt v. State*, 2007 OK CR 19, ¶ 42, 159 P.3d 272, 286. Specific instances illustrating the victim's character traits are only admissible if they are "pertinent" to a charge, claim, or defense. 12 O.S.2011, §§ 2404(A)(2), 2405(B). Where a criminal defendant offers a character trait of the victim to justify his (the defendant's) conduct, the "pertinent" requirement "limits admission of evidence to those traits of character that would have affected the defendant's perception of the threat with which he was confronted." *Davis v. State*, 2011 OK CR 29, ¶ 158, 268 P.3d 86, 125-26. That which is unknown to the defendant prior to his allegedly defensive act is not "pertinent" to whether his conduct was justified or mitigated. *Id.* By offering Qualls's prior misconduct,

Appellant wanted to lend credibility to his own testimony that he was concerned that Qualls might sexually assault him. Yet Appellant did not claim he knew anything about Qualls before the homicide; furthermore, he never claimed Qualls *in fact* assaulted him or attempted to do so. A homicide is not mitigated simply because the killer thinks something might happen in the future. The trial court did not abuse its discretion in excluding this evidence. Proposition IV is denied.

In Proposition V, Appellant complains about a single photograph introduced at trial. Trial counsel's timely objection to this exhibit was overruled, preserving this issue for appellate review. Appellant claims this photograph was unnecessarily gruesome. It depicts injuries that Appellant admitted, under oath, to inflicting; the number of wounds to Qualls's face was relevant to whether Appellant stabbed Qualls out of unjustified malice or in self-defense. *Flores v. State*, 1999 OK CR 52, ¶ 23, 994 P.2d 782, 787. The exhibit did not unfairly tip the scales in an otherwise weak case; the evidence supports the verdict of guilt, and the jury recommended the minimum punishment available. The trial court did not abuse its discretion in admitting this exhibit, and Appellant can demonstrate no unfair prejudice from it. *Glossip v. State*, 2007 OK CR 12, ¶ 80, 157 P.3d 143, 157. Proposition V is denied.

As to Proposition VI, we have determined that the only possible error identified on appeal (*see* Proposition III) was harmless beyond a reasonable doubt. There is no error to accumulate. *Logsdon v. State*, 2010 OK CR 7, ¶ 42, 231 P.3d 1156, 1170. Proposition VI is denied.

DECISION

The Judgment and Sentence of the District Court of Oklahoma County is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE BILL GRAVES, DISTRICT JUDGE

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OPINION BY KUEHN, V.P.J.

LEWIS, P.J.: CONCUR
LUMPKIN, J.: CONCUR IN RESULT
HUDSON, J.: CONCUR
ROWLAND, J.: RECUSED