IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KENDELL PAUL SPARROW,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2017-762**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

ROWLAND, JUDGE:

Appellant Kendell Paul Sparrow appeals his Judgment and Sentence from the District Court of Payne County, Case No. CF-2015-699, for Murder in the First Degree (Malice Aforethought), in violation of 21 O.S.2012, § 701.7. The Honorable Phillip C. Corley, District Judge, presided over Sparrow's jury trial and sentenced him to life imprisonment with the possibility of parole in accordance with the jury's verdict.

Sparrow appeals raising the following issues:

(1) whether the introduction at trial of the preliminary hearing testimony of a witness violated his constitutional right to confrontation and denied him a fair trial; and

(2) whether the evidence was legally sufficient to convict him of the crime charged.

We find reversal is not required and affirm the Judgment and Sentence of the district court.

1.

The trial court admitted the preliminary hearing testimony of a witness upon the finding that the witness was unavailable at trial. Sparrow challenges this decision on appeal arguing that the trial court's ruling was error which deprived him of his constitutional right to confrontation, due process of law, and a fair trial. While Sparrow objected at trial to the introduction of the witness's preliminary hearing testimony on state law grounds, he did not raise a constitutional challenge below. Accordingly, Sparrow has waived review of his constitutional claim for all but plain error. *Tyron v. State*, 2018 OK CR 20, ¶ 38, 423 P.3d 617, 632. *See also Miller v. State*, 2013 OK CR 11, ¶ 104, 313 P.3d 934, 971. To be entitled to relief for plain error, Sparrow must show: "(1) the existence of an actual error (i.e., deviation from a legal rule); (2) that the error is plain or obvious; and (3) that the error affected his substantial rights, meaning the error affected the outcome of the

proceeding." *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

The Sixth Amendment to the United States Constitution requires that in all "criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him." U.S. Const. amend. VI; *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965)("Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment."). In *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 1365, 158 L.Ed.2d 177 (2004), the United States Supreme Court held that the Sixth Amendment's right to confrontation bars the admission of "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." While the Supreme Court did not comprehensively define 'testimonial statements' it did hold that, "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing...." *Id.*, 541 U.S. at 68, 124 S.Ct. at 1374.

As to the first requirement, "a witness is not 'unavailable' for purposes of the ... exception to the confrontation requirement unless the prosecutorial authorities have made a *good-faith effort* to obtain his presence at trial." *Ohio v. Roberts,* 448 U.S. 56, 74, 100 S.Ct. 2531, 2543, 65 L.Ed.2d 597 (1980), *overruled on other grounds, Crawford,* 541 U.S. at 36, 124 S.Ct. at 1354 (citations omitted). "The lengths to which the prosecution must go to produce a witness ... is a question of reasonableness," and "[t]he ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness." *Id.* (quotations omitted). *See also Hardy v. Cross*, 565 U.S. 65, 70, 132 S.Ct. 490, 494, 181 L.Ed.2d 468 (2011) ("The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness.").

We find that the State showed that reasonable good-faith efforts were undertaken prior to trial to locate the witness. Furthermore, defense counsel had adequate opportunity to develop and challenge the witness's testimony during cross-examination at preliminary hearing. Thus, the introduction of the witness's

preliminary hearing testimony did not violate Sparrow's Sixth Amendment right to confrontation or operate to deny him his right to a fair trial. There was no error here, plain or otherwise.

2.

Sparrow also claims that the evidence presented at trial was insufficient to support his conviction for first degree murder because the State did not prove each element of the crime beyond a reasonable doubt. To sustain a conviction for first degree malice murder the State is required to prove that the defendant unlawfully caused the death of another human with malice aforethought. *See* 21 O.S.Supp.2012, § 701.7(A). This Court reviews challenges to the sufficiency of the evidence in the light most favorable to the State and will not disturb the verdict if any rational trier of fact could have found the essential elements of the crime charged to exist beyond a reasonable doubt. *Head v. State*, 2006 OK CR 44, ¶ 6, 146 P.3d 1141, 1144. *See also Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04. In evaluating the evidence presented at trial, we accept the fact-finder's resolution of conflicting evidence as long as it is within the bounds of reason. *See Day v. State*, 2013 OK CR

8, ¶ 13, 303 P.3d 291, 298. This Court also accepts all reasonable inferences and credibility choices that tend to support the verdict. *Coddington v. State*, 2006 OK CR 34, ¶ 70, 142 P.3d 437, 456. The State proved each element of the crime of first degree malice murder beyond a reasonable doubt; this proposition is without merit and relief is not required.

DECISION

The Judgment and Sentence of the district court is **AFFIRMED**. 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 delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE PHILLIP C. CORLEY, DISTRICT JUDGE

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OPINION BY: ROWLAND, J.
LUMPKIN, P.J.: Concur
LEWIS, V.P.J.: Concur
HUDSON, J.: Concur
KUEHN, J.: Concur in Results

KUEHN, J., CONCURRING IN RESULT:

I concur in affirming Appellant's convictions and sentences. I write to discuss the standard of review used to resolve Proposition I. In that proposition, the Majority determines that Appellant waived his claim of constitutional error when he objected to a finding that a witness was unavailable at trial on state law grounds. At trial, defense counsel repeatedly stated that the defendant and his family had either seen the witness or found where he was during the trial, and argued that the State could have done so as well. The Majority recasts this as objections that the State failed to show due diligence, and that the claim of unavailability was made in bad faith. Defense counsel did not specifically mention the Confrontation Clause in his objections. For that reason, I agree that we review the Confrontation Clause claim for plain error. *Miller v. State*, 2013 OK CR 11, ¶ 104, 313 P.3d 934, 971.

However, since (as the Majority admits) the Confrontation Clause claim is a constitutional issue, our plain error review is governed by *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). *Miller*, 2013 OK CR 11, ¶ 106, 313 P.3d at 971-

72. *Chapman* requires that, any error of constitutional importance, whether or not it is preserved for objection, cannot be held harmless unless the State shows that it was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24, 87 S.Ct. at 828. This Court reaffirmed our adherence to *Chapman* in *Bartell v. State*, 1994 OK CR 59, ¶ 10, 881 P.2d 92, 96, and has continued to follow this rule. *See, e.g., Miller, id.* I would therefore review this issue under *Chapman.* Instead, the Majority uses our standard test for non-constitutional plain error. This test differs significantly from *Chapman* in that, after determining an error is present, it places the burden on the defendant to show the error affected his substantial rights. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. This, of course, is precisely what *Chapman* says we should not do where the issue is constitutional in nature.

The first step in either test is to determine whether there was an error at trial. I agree with the Majority that the witness was unavailable. As there was no error, we need not consider whether the State showed any error was harmless beyond a reasonable doubt. I concur in result.