

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF
OKLAHOMA**

KAYLIN MIXON,)
) NOT FOR PUBLICATION
) Case No. F-2017-902
Appellant,)
v.)
STATE OF OKLAHOMA)
)
Appellee.

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

NOV 15 2018

S U M M A R Y O P I N I O N

JOHN D. HADDEN
CLERK

LUMPKIN, PRESIDING JUDGE:

Appellant Kaylin Mixon was tried by jury and convicted of Second Degree Depraved Mind Murder (21 O.S.2011, § 701.8), After Former Conviction of Two or More Felonies, in the District Court of Oklahoma County, Case No. CF-2016-154. The jury recommended as punishment thirty (30) years in prison and the trial court sentenced accordingly, additionally ordering the assessment of a \$100.00 fine. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of his appeal:

- I. The trial court's failure to hearken the jury or at least offer the Defendant an opportunity to have the jury individually polled requires that his conviction be reversed and remanded for a new trial.
- II. Appellant's right to a fair trial consistent with due process of law, as secured to him by the 5th and 14th Amendments to the United States Constitution, as well as Article II, Section 7 of the Oklahoma Constitution, by the admission into evidence exhibits depicting the handiwork of the medical examiner.
- III. The trial court committed plain error in assessing a \$100.00 fine in addition to the punishment set out by the jury.

After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we find that under the law and the evidence no relief is warranted.

In Proposition I, Appellant argues his conviction must be reversed and remanded because the trial court's failure to poll the jury after the first stage guilty verdict denied him the right to a unanimous verdict and violated the provisions of 22 O.S.2011, §§ 921 & 922.

We review only for plain error as this objection was not raised before the trial court. Under the plain error test set forth in *Simpson*

v. State, 1994 OK CR 40, 876 P.2d 690, we determine whether Appellant has shown an actual error, which is plain or obvious, and which affects his or her substantial rights. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.* See also *Bivens v. State*, 2018 OK CR 33, ¶ 11, ___ P.3d ___; *Jackson v. State*, 2016 OK CR 5, ¶ 4, 371 P.3d 1120, 1121; *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395; *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

The record shows that the trial court asked the jury foreperson if the jury had reached a verdict. When the foreperson answered in the affirmative, he was directed to hand the verdict to the bailiff who handed it to the judge to be read aloud. After reading the verdict aloud, the judge asked the foreperson if that was the verdict from the jury, to which the foreperson replied, “yes, ma’am.” The jury was not individually polled as to the verdict, but such was not requested nor was the absence of such met with an objection. No juror raised an objection to the verdict or claimed it was not the verdict of the jury. This procedure sufficiently complies with the dictates of §§ 921 and

922. Appellant's request to overturn *Nichols v. Territory*, Okla., 3 Okla. 622, 1985 OK 46, 41 P. 108 (1895) is not persuasive. Appellant has not made a showing on appeal, nor is any apparent from the record, that the first stage verdict in this case was not a unanimous verdict. This Court will not presume error from a silent record. *Leech v. State*, 2003 OK CR 4, ¶ 4, 66 P.3d 987, 989. We find no error and thus no plain error in the return of the first stage verdict in this case.

In Proposition II, Appellant contends he was denied a fair trial by the admission of State's Exhibits 34 & 35, autopsy photographs of the decedent's head. Appellant admits the photos show the bullet hole through the decedent's skull. However he argues the photos were not relevant and highly inflammatory as the cause of death was not challenged and the photos "depict the handiwork of the medical examiner" and should have been excluded as being substantially more prejudicial than probative. Appellant's objection at trial was overruled, therefore our review on appeal is for an abuse of discretion and absent an abuse of that discretion; this Court will not reverse the trial court's ruling. *Martinez v. State*, 2016 OK CR 3, ¶ 39, 371 P.2d 1100, 1112; *Mitchell v. State*, 2010 OK CR 14, ¶ 57, 235 P.3d 640, 655. An abuse of discretion is any unreasonable or arbitrary

action taken without proper consideration of the facts and law pertaining to the matter at issue or a conclusion or judgment clearly against the logic and effect of the facts presented. *State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194.

Photographs are admissible if their content is relevant and their probative value is not substantially outweighed by their prejudicial effect. *Mitchell*, 2010 OK CR 14, ¶ 57, 235 P.3d at 655. The probative value of photographs of murder victims can be manifested in numerous ways, including showing the nature, extent and location of wounds, establishing the *corpus delicti*, depicting the crime scene, and corroborating the medical examiner's testimony. *Id.* The photos in this case were relevant in showing the nature and extent of the wound and the cause of death. Appellant's argument that the photographs were unduly prejudicial because the manner of death was not disputed has been previously rejected by this Court. *Mitchell*, 2010 OK CR 14, ¶ 57, 235 P.3d at 655 *citing Patton v. State*, 1998 OK CR 66, ¶ 59, 973 P.2d 270, 290. The trial court did not abuse its discretion in admitting State's Exhibits 34 and 35.

In Proposition III, Appellant contends the trial court erred in assessing a \$100.00 fine in addition to the punishment

recommended by the jury. Appellant admits he did not object to the fine at sentencing, thereby waiving all but plain error review. Under the plain error review set forth above, we find no error and thus no plain error. *See Simpson v. State*, 1994 OK CR 40, 876 P.2d 690.

Appellant correctly notes that there is no fine provided in 21 O.S.2011, § 701.8, second degree depraved mind murder. He also acknowledges that 21 O.S.2011, § 64(B) provides that in a felony case, where “no fine is prescribed by law, the court or a jury may impose a fine on the offender not exceeding Ten Thousand Dollars (\$10,000.00) in addition to the imprisonment prescribed.” Additionally, in *Fite v. State*, 1993 OK CR 58, § 11, 873 P.2d 293, 295, this Court determined that 22 O.S. § 991a allows the trial court to impose additional sanctions prescribed by law. Appellant argues that *Fite* should be overruled by the subsequent amendment to § 64 allowing the jury, as well as the judge, to impose a fine.

Contrary to Appellant’s argument, the language of § 64, allowing the judge and the jury to impose a fine in addition to the prescribed imprisonment does not obviate *Fite* and Appellant has not provided sufficient argument for now overruling *Fite*. We find

no error in the trial court's assessment of the \$100.00 fine. Finding no error, and thus no plain error, this proposition is denied.

This appeal is denied.

DECISION

The **JUDGMENT and SENTENCE 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 the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE CINDY H. TRUONG, DISTRICT JUDGE

APPEARANCES AT TRIAL

TONY COLEMAN
ANTUANYA DEBOSE
101 PARK AVE., STE. 300
OKLAHOMA CITY, OK 73102
COUNSEL FOR DEFENDANT

DAVID PRATER
DISTRICT ATTORNEY
MERYDITH EASTER
RYAN STEPHENSON
ASST. DISTRICT ATTORNEYS
320 ROBERT S. KERR, STE. 505
OKLAHOMA CITY, OK 73102
COUNSEL FOR THE STATE

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

APPEARANCES ON APPEAL

JAMES LOCKARD
P.O. BOX 926
NORMAN, OK 73070
COUNSEL FOR APPELLANT

MIKE HUNTER
ATTORNEY GENERAL
OF OKLAHOMA
DONALD D. SELF
ASST. ATTORNEY GENERAL
313 N.E. 21ST ST.
OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE