

AUG 18 2006

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

STATE OF OKLAHOMA,)

Appellant,)

v.)

DEANGELO FAVORS)

Appellee.)

NOT FOR PUBLICATION

Case No. S-2005-1067

SUMMARY OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellee Deangelo Favors and co-defendant Marco Maurice Heath were charged in the District Court of Tulsa County with Shooting with Intent to Kill (Count I) (21 O.S.2001, § 652) and Kidnapping (Count II) (21 O.S. 2001, § 741), Case No. CF-2044- 3299. Appellee was additionally charged with Assault and Battery (Count III) (21 O.S. 2001, § 644). On November 5, 2004, Preliminary Hearing was held. One witness, alleged victim Roberta Verner, was sworn. After the State's direct examination, counsel for Appellee and counsel for co-defendant Heath cross-examined her. At the close of the State's case, counsel for co-defendant Heath announced Iesha Huggins was present and the defense wanted to call her to the stand. The magistrate asked counsel for an offer of proof concerning the relevance of Huggins' testimony. Counsel said that Huggins would essentially testify that Verner had lied and the alleged crimes never occurred. The State objected arguing that Huggins' testimony was not relevant to the preliminary hearing. Citing 22 O.S. 2001, §§ 258 and 259, the magistrate ruled

Huggins' testimony was not relevant for preliminary hearing purposes and denied the defense request to present her as a witness. At the close of the preliminary hearing both defendants were bound over for trial which was subsequently set for October 10, 2005.

On October 10, 2005, the State filed a Motion to Use Transcript of Previous Testimony of Roberta Verner. Also on October 10, 2005, the defense requested a material witness warrant for Iesha Huggins. Co-defendant Heath failed to appear and the case was reset to October 12, 2005. On October 12, trial was passed until October 17, when the matter was again passed to October 18, 2005. On that date, Appellee appeared for jury trial before the Honorable P. Thomas Thornburgh, District Judge. Co-defendant Heath did not appear. At a pre-trial hearing on the State's motion to use Ms. Verner's testimony, Judge Thornburgh, in a very meticulous and well-reasoned analysis, ruled: 1) that Ms. Verner was unavailable to testify within the meaning of 12 O.S. 2001, § 2804(A)(5); and 2) because Ms. Huggins had not been allowed to testify at preliminary hearing, and the defense could not secure her presence at trial, allowing the State to use Ms. Verner's transcript testimony violated Appellee's right to confrontation. The State gave oral notice of its intent to appeal the ruling pursuant to 22 O.S. Supp. 2002, § 1053(5).

Title 22 O.S.Supp.2002, § 1053(5) allows the State to appeal "[u]pon a pretrial order, decision, or judgment suppressing or excluding evidence where appellate review of the issue would be in the best interests of justice." On May 18, 2006, Appellee filed with this Court a Motion to Dismiss State's Appeal and

Combined Brief in Support Thereof. This motion is denied as we find the State's appeal is proper and review of this issue is in the best interests of justice. After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits, and briefs, we have determined that the trial court's decision denying the State's use of Ms. Verner's preliminary hearing testimony should be affirmed.

In appeals prosecuted pursuant to Section 1053, this Court reviews the trial court's decision for an abuse of discretion. *State v. Love*, 1998 OK CR 32, ¶ 2, 960 P.2d 368, 369. An abuse of discretion has been defined as a conclusion or judgment that is clearly against the logic and effect of the facts presented. *Id.* See also *Battles v. State*, 1987 OK CR 19, ¶ 9, 732 P.2d 480, 482 (our standard of review is that where there is evidence to support the findings of the trial court, this Court will not reverse).

In its appellate brief, the State asserts that the District Court's ruling that the transcript of Ms. Verner's preliminary hearing testimony was not admissible because Ms. Huggins had not been allowed to testify at preliminary hearing, and therefore the defendant's right to confrontation was violated was error. The State does not contest the trial court's finding that Ms. Verner was legally unavailable to testify, however, Appellee does and argues the State did not make a good faith effort to locate the witness.

Having thoroughly reviewed the record, we find the trial court's determination that the State exercised due diligence in seeking Ms. Verner was supported by the evidence. See *Primeaux v. State*, 2004 OK CR 16, ¶ 58, 88

P.3d 893, 905; *Manuel v. State*, 1990 OK CR 80, ¶ 9, 803 P.2d 714, 716. Therefore, the trial court did not abuse its discretion in finding her an unavailable witness.

Despite finding Ms. Verner unavailable to testify, the trial court found that under 22 O.S. 2001, § 2804(B)(1) the defense did not have the opportunity for adequate cross-examination of Ms. Verner at preliminary hearing due to the magistrate's exclusion of Ms. Huggins' testimony.

Admission of evidence is left to the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Williams v. State*, 2001 OK CR 9, ¶ 94, 22 P.3d 702, 724. The record reflects the trial court heard argument from defense counsel as well as the prosecutor. Both attorneys and judge reviewed relevant case law from this Court and the United States Supreme Court concerning the purpose of preliminary hearing, the scope of cross-examination at preliminary hearing and the defendant's constitutional right of confrontation.

The trial court's finding, that the magistrate erred when he denied the presentation of testimony from Ms. Huggins, the only other person present at the crime scene who was available at preliminary hearing but not available at trial and that this unfairly limited the defendant's full exercise of his right to cross-examine or impeach Ms. Verner, was fully supported by the record and was not clearly against the logic and effect of the facts and law presented. Accordingly, the trial court's ruling denying the State's use of Ms. Verner's preliminary hearing testimony at trial is affirmed and this appeal is denied.

DECISION

Appellee's **Motion to Dismiss** State's Appeal and Combined Brief in Support Thereof is **DENIED**. The **ruling of the trial court** denying the State's motion to use Roberta Verner's preliminary hearing testimony at trial is **AFFIRMED**. The case is **REMANDED** to the District Court for further proceedings consistent with this opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005), the **MANDATE is ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE P. THOMAS THORNBRUGH, DISTRICT JUDGE

APPEARANCES IN DISTRICT COURT APPEARANCES ON APPEAL

TIM HARRIS
DISTRICT ATTORNEY
SCOTT GENGRAS
ASSISTANT DISTRICT ATTORNEY
500 S. DENVER AVE., STE. 900
TULSA, OK 74103
COUNSEL FOR APPELLANT

TIM HARRIS
DISTRICT ATTORNEY
SCOTT GENGRAS
ASSISTANT DISTRICT ATTORNEY
500 S. DENVER AVE., STE. 900
TULSA, OK 74103
COUNSEL FOR APPELLANT

AARON GOODMAN
ASSISTANT PUBLIC DEFENDER
423 S. BOULDER AVE., STE. 300
TULSA, OK 74103
COUNSEL FOR APPELLEE FAVORS

STUART SOUTHERLAND
ASSISTANT PUBLIC DEFENDER
423 S. BOULDER AVE., STE. 300
TULSA, OK 74103
COUNSEL FOR APPELLEE FAVORS

OPINION BY: LUMPKIN, V.P.J.
CHAPEL, P.J.: CONCUR
C. JOHNSON, J.: CONCUR
A. JOHNSON, J.: CONCUR IN RESULT
LEWIS, J.: CONCUR