

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

CARL DON MYERS,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION
No. F-2005-1011

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP - 6 2007

MICHAEL S. RICHIE
CLERK

OPINION

A. JOHNSON, J.:

Appellant Carl Don Myers was tried by jury and convicted in the District Court of Oklahoma County, Case No. CF-2004-1564, of Count 1-First Degree Murder,¹ Count 2 – First Degree Arson,² Count 3 – Conspiracy,³ Count 4 – Robbery with a dangerous weapon,⁴ and Count 5 – Kidnapping.⁵ The jury fixed punishment at life imprisonment without the possibility of parole on Count 1, 35 years imprisonment on Count 2, ten years imprisonment on Count 3, five years imprisonment on Count 4 and ten years imprisonment on Count 5.⁶ The Honorable Susan P. Caswell, who presided at trial, sentenced Myers accordingly and ordered his sentences to be served consecutively. From this judgment and sentence, he appeals.

¹ 21 O.S.2001, § 701.7(A).

² 21 O.S.2001, §1401.

³ 21 O.S.2001, § 421.

⁴ 21 O.S.2001, § 801.

⁵ 21 O.S.2001, 745.

⁶ Myers was charged jointly with Ricky Hester and Charles Meredith, Jr. Their cases were severed for trial. Hester was convicted of the same five counts as Myers and appeals separately in Court of Criminal Appeals Case No. F-2006-469.

FACTS

Sometime during the early morning hours of March 4, 2003, Richard Hooks was beaten, stabbed multiple times, and left in a burning garage. His body was discovered by the firefighters called to extinguish the fire.

Hooks had been stabbed 14 times. He died from multiple stab wounds and blunt force trauma to his head. The police found the knife used in the killing in Appellant Myers's bedroom closet.

Myers gave a statement to the police and testified in his own defense.⁷

On March 3, the evening before Hooks's death, Myers and Ricky Hester went to a pool hall looking for Richard Hooks. There had been some discussion between Myers and Hester about the fact that Hooks had treated Hester's mother disrespectfully. There was no confrontation at the pool hall. Later, Myers and Hester accompanied Hooks to his residence. Once there Hester raised the issue of Hooks's mistreatment of his mother. He appeared to accept Hooks's explanation without rancor, and the three men left together.

Myers testified that they returned to the pool hall where they stayed until Hooks suggested they find somewhere to use drugs. Myers knew of an vacant house used by drug addicts. He drove to that house by himself to talk to a Robert Black, apparently the dominant occupier of the premises. Black told Myers he could use a back room.

⁷ Myers's statement to police was different from his testimony. Myers told the police that Hester and Hooks started arguing again at the drug house. Myers admitted throwing a punch during the argument. He initially lied to police about the whereabouts of Hester's girlfriend, later admitting she had been with them during the entire evening sleeping in the backseat of his car. In the same interview, Myers admitted hitting Hooks on the legs and feet with the

Black also testified about this conversation with Myers.⁸ He said Myers had told him he and another man intended to “slap” someone, to take his money and his drugs, and then let him go.

When Myers returned to the drug house with Hester and Hooks, the three went in a back door. Sometime thereafter, Black watched Hester cut some kind of cord from curtains in the front room. Later Hester came into the front room to make a deal with another denizen of the premises, Charles Meredith. He promised Meredith drugs in turn for Meredith’s help in subduing Hooks.

Black testified that after Meredith went with Hester to the back room he heard a “loud thud.” He also heard a man’s voice asking, “Why are you doing this?” Black and Meredith left the house together. The two came together later that morning when Meredith asked Black to return to the house to help clean it up.

Myers testified that after he, Hooks, and Hester first entered the house, Hester handed him a wooden stick. Hester, himself, was armed with a large flashlight that he used to hit Hooks on the head, knocking him unconscious. Myers said that when Hester returned to the back room with Meredith, Meredith tied Hooks’s hands behind his back. When Hooks regained consciousness, he asked Myers for help, a plea Myers refused.

wooden stick, that he knew there was going to be a robbery and a fight, and that he knew Hooks was in the garage when they left and that the garage was on fire.

⁸ Black was unavailable at trial. His preliminary hearing testimony was read to the jury.

As to what happened next, Myers said Hester beat Hooks with the wooden stick and stabbed him again and again with a knife. Thereafter, as Hester was occupied in wrapping Hooks in a piece of plastic and a blanket, Myers headed for the door. From the vantage point of his car, he saw someone pulling the wrapped up Hooks to a detached garage. The testimony concerning the next piece of action is not entirely clear.

Myers and Hester drove to a nearby convenience store. While still in the parking lot, Myers watched as Hester carried something back toward the drug house. Next he saw “flickers” (of flame) coming from the garage as Hester ran towards the car, jumped in, and urged Myers to go.

Myers testified that he neither encouraged nor assisted Hester to rob and kill Hooks. He played no part in burning the garage. And he neither lured Hooks to the house nor kept him there.

I. Sufficiency of the Evidence for First Degree Murder

Myers argues his murder conviction must be reversed because the State proved neither that he committed the fatal act, nor that he aided and abetted Ricky Hester in killing Hooks with the intent to kill, nor that he is culpable for the killing as a co-conspirator to murder. We disagree.

This Court reviews the record in the light most favorable to the State to determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Coddington v. State*, 2006 OK CR 34, ¶ 66, 142 P.3d 437, 455. A jury verdict will not be disturbed, when

sufficient evidence supports it, as it is the jury's exclusive province to weigh the evidence and determine the facts. *Jones v. State*, 2006 OK CR 5, ¶ 35, 128 P.3d 521, 538.

Under Oklahoma law, all persons concerned in the commission of crime, whether felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals and are held equally responsible. 21 O.S.2001, § 172. A person aids or abets in a crime when he procures the crime to be done or aids, assists, abets, advises or encourages the commission of the crime. *See Lockett v. State*, 2002 OK CR 30, ¶ 13, 53 P.3d 418, 423. Mere presence or acquiescence, without participation, does not constitute a crime; only slight participation, however, is needed to change a person's status from mere spectator into an aider and abettor. *Id.*

Members of a conspiracy are also responsible for the actions of co-conspirators. “[T]he responsibility of co-conspirators for the language or conduct of those acting with them is not confined to the accomplishment of the common purpose for which the conspiracy was entered into.” *Matthews v. State*, 2002 OK CR 16, ¶ 42, 45 P.3d 907, 921; *Johnson v. State*, 1986 OK CR 134, ¶ 8, 725 P.2d 1270, 1273. Co-conspirators are liable for all declarations made and collateral acts done by members of the conspiracy incident to and growing out of the conspiracy's common design. *Id.* Our case law does not require that a co-conspirator have knowledge of every act of his co-conspirator to be bound thereby. *Matthews*, 2002 OK CR 16, ¶ 43, 45 P.3d at 921. “Once

the agreement is made and the conspirators begin to carry-out their plan, each member is bound by the acts of his co-conspirators that are in furtherance of the conspiracy regardless of each member's actual knowledge of his co-conspirator's actions and statements." *Id.*

There is no direct evidence that Myers stabbed Hooks or caused the blunt force trauma to his head. There is evidence, however, that Myers was present, assisted Hester in attacking Hooks, and had entered into an agreement to rob and attack him. Myers told police that he knew Hester planned to rob and beat Hooks. He participated in the planning of the robbery and secured the drug house where the robbery took place. He lured and transported the victim to the house, where he was robbed and ultimately murdered, knowing that Hester was angry with Hooks earlier in the evening and that a fight was likely. He stood guard while Hester obtained the cord to bind Hooks's hands and the flashlight used to incapacitate him and while Hester enlisted Meredith's aid in binding and gagging Hooks. Myers was present when the robbery occurred and when Hooks was tied-up, fatally beaten and stabbed. He admitted striking Hooks with the wooden stick and breaking it on his feet. Part of the stick was jammed into Hooks's neck and left there. The jury was free to disbelieve Myers's account minimizing his involvement and knowledge and conclude from the circumstances that he played a larger role in the incident. These circumstances include a statement Myers made to Hester's girlfriend about his involvement in the incident, including the fact that they went back to burn the garage down to conceal the murder. Hester and

Myers told her that everything had been taken care of. Though Myers claimed he did not stab Hooks, the murder weapon with Hooks's blood on it was found in his closet. The evidence supports a finding that Myers was a party to a conspiracy to rob, attack, and possibly murder Hooks and that one of his co-conspirators killed Hooks in furtherance of that conspiracy. Under these circumstances, Myers is responsible for Hooks's murder. The evidence also supports a finding that Myers aided and abetted in the murder of Hooks based on his admissions and statements to Hester's girlfriend about his involvement and the accomplishment of their objectives. The trial evidence was sufficient to justify Myers's murder conviction in this case. This claim is denied.

II. Sufficiency of the Evidence for Kidnapping

Myers argues that his extortionate kidnapping conviction must be reversed because the State failed to prove that his intent was to extort money or property from Hooks while he was forcibly seized and confined. We agree. Viewing the evidence in the light most favorable to the State, the evidence showed that Myers and Hester conspired and carried out a plan to rob Hooks and that their intent was to forcibly take Hooks's money and drugs rather than to obtain property through the use of threats.⁹ According to Myers, Hester hit Hooks in the head with a flashlight, knocking him unconscious. Hester then took Hooks's money and drugs and enlisted Meredith's aid in binding Hooks's hands, paying him with drugs. The conspiracy plan was to rob Hooks and take his property, not to merely threaten him to get it. Because the record does

not support a finding that Myers and Hester confined Hooks to extort money, his kidnapping conviction must be reversed with instructions to dismiss.

III. Double Jeopardy

The resolution of Myers's sufficiency of the evidence claim requiring reversal of his kidnapping conviction renders this claim moot. See part II, *supra*.

IV. Sufficiency of the Evidence for First Degree Arson

Myers argues that his first degree arson conviction must be reversed because the State failed to prove that the burned garage was occupied by a "person" because Hooks was already dead when it was set on fire.¹⁰ He cites the medical examiner's testimony that Hooks had no soot in his airway and that his carbon monoxide level was negative to support his contention that Hooks was dead. He contends the dwelling must be occupied by a living

⁹ "Extort" was defined as "Obtain property by the use of threat(s)." (O.R. 277)

¹⁰ No person may be convicted of arson in the first degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, a willful and malicious;

Second, (setting fire to)/burning/(destroying in whole or in part by use of any (explosive device)/accelerant/(ignition device)/(heat-producing device/substance);

Third, (a building/structure)/(the contents of a building/structure);

Fourth, **which was inhabited/occupied by one or more persons;**

Fifth, caused/aided/counseled/procured by the defendant.

person to constitute first degree arson and urges the Court to adopt the reasoning in *State v. Kingsley*, 851 P.2d 370 (Kan. 1993).

Faced with the question of whether a defendant could be convicted of aggravated arson in Kansas when the victim was dead before the fire was set, the court held that aggravated arson requires evidence of a live victim in the dwelling when the fire is set. That court reasoned that the policy behind elevating arson from a class C felony to aggravated arson, a class B felony, is the involvement of risk to human life and safety. *Id.* at 781. “There is no risk to human life or safety when there is no living person in the property.” *Id.* The court thus interpreted the term “human being” as used in the aggravated arson statute to mean a living person. *Id.*

The Kansas court’s reasoning is sound and is equally applicable to Oklahoma’s first and second degree arson statutes. First degree arson in Oklahoma requires that the burned dwelling be occupied by one or more persons while second degree arson is the willful and malicious burning of an unoccupied dwelling. The policy behind dividing the degrees of arson and elevating first degree arson is the involvement of risk to human life. There is no risk to human life or safety when the victim inside the dwelling is dead before the fire is started. Thus there is no rational basis to interpret “person” as other than a living person in the context of the first degree arson statute.

We must now review the evidence to determine if there was any evidence that Hooks was alive when the garage was set on fire. Myers testified at trial that Hooks was still moving around when he was taken to the garage. He was

sure that he was still alive. Minutes later, the garage was set on fire. Viewing the evidence in the light most favorable to the State, we find that the evidence can support a finding that Hooks was alive when the fire was set, dying before the smoke and carbon monoxide overcame him. The jury's verdict is justified based on Myers's testimony.

V.
**Omission of an Instruction Setting
Forth the 85% Rule**

Myers argues that the trial court erred in failing to instruct his jury that he would have to serve 85% of his sentence before he was eligible for parole on his convictions for murder, arson and robbery.¹¹ Myers's attorney failed to offer an instruction on the 85% Rule or to object to the lack of such instruction given to the jury. That failure forfeits any error unless Myers can show plain error. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. To be entitled to relief under the plain error doctrine, Myers must prove: 1) the existence of an actual error (i.e., deviation from a legal rule); 2) that is plain or obvious; and 3) that affected his substantial rights, meaning the error affected the outcome of the proceeding. *Id.*

Myers relies on *Anderson v. State*, in which this Court held that the 85% Rule is a "specific and readily understood concept of which the jury should be informed" when sentencing defendants for qualifying offenses. 2006 OK CR 6, ¶ 25 130 P.3d 273, 283; *see also Carter v. State*, 2006 OK CR 42, ¶ 3, 147 P.3d.

¹¹ Oklahoma's 85% Rule limits parole eligibility for enumerated offenses, including first degree murder, first degree arson and robbery with a dangerous weapon. 21 O.S.Supp.2002, §§§ 12.1-13.1.

243, 244. Myers receives the benefit of that decision because his appeal is heard post *Anderson*. *Lacy v. State*, 2007 OK CR 20, ¶ 6, ___P.3d___(May 23, 2007).

This Court requires trial courts to give juries accurate information about punishment so the jury may carry out its sentencing function. See *Littlejohn v. State*, 2004 OK CR 6, ¶ 10, 85 P.3d 287, 293. In *Anderson*, we held that it was error not to give the defendant's requested instruction on the 85% Rule because the jury should be informed that the offender before them would be required by law to serve 85% of any sentence imposed before he is parole eligible. *Anderson*, 2006 OK CR 6, ¶¶11-13, 130 P.3d at 278. We explained:

Since jurors are likely to assume that defendants would become parole eligible at a much earlier point in time, explaining the 85% Rule will avoid unnecessary and unfair prejudice to the defendant—due to juries “rounding up” their sentences, in an attempt to account for their uninformed guesses about the impact of parole. Thus instructing upon the 85% Rule will actually discourage jury speculation, while still respecting the separation between the judicial and executive branches.

Id. at ¶ 23, 130 P.3d at 282.

In *Roy v. State*, 2006 OK CR 47, ¶ 26, 152 P.3d 217, 226, we found the trial court erred in failing to give an instruction on the 85% Rule, despite no request, and that the instruction error coupled with improper argument by the prosecutor necessitated relief. Unlike *Roy*, there is no claim or evidence of an improper argument by the prosecutor. In *Lacy*, 2007 OK CR 20, ¶ 6, ___P.3d___, we found the lack of instruction was plain error and modified the defendant's sentence.

Under *Anderson* and its progeny, it was error not to instruct Myers's jury on the 85% Rule. Relief for *Anderson* error is not automatic, however, and this Court reviews the record to determine if the lack of instruction affected the sentence. *Carter*, 2006 OK CR 42, ¶ 5, 147 P.3d at 244. In this case, the omission of the instruction did not. The jury considered whether Myers should be eligible for parole in deciding his punishment for first degree murder. The jury decided that Myers should never be eligible for parole based on his involvement in Hooks's murder. The jury did not request additional information in making its decision, indicating that any sentence with the possibility of parole was unwarranted in its view. The sentences Myers received for arson and robbery were reasonable based on the circumstances and reflect the level of Myers's involvement in those crimes. Under the circumstances of this case, the failure to give an 85% instruction is not plain error. This claim is denied.

VI. Consecutive sentences

Myers argues his sentence is excessive. Myers's consecutive sentences do not shock the conscience of this Court based on the facts and circumstances of this case. *Head v. State*, 2006 OK CR 44, ¶ 27, 146 P.3d 1141, 1148 ("A sentence within the statutory range will be affirmed on appeal unless, considering all the facts and circumstances, it shocks the conscience of this Court."). The decision to run sentences concurrently or consecutively is within the trial court's discretion. *Birdine v. State*, 2004 OK CR 7, ¶ 7, 85 P.3d 284, 286. There is nothing in this record to support a finding that the trial

court abused its discretion or that Myers's sentences were the result of error. This claim is denied.

DECISION

The Judgment and Sentence of the district court on Counts 1, 2, 3 and 4 is **AFFIRMED**. The Judgment of the district court on Count 5 is **REVERSED with instructions to DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2007), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE SUSAN P. CASWELL, DISTRICT JUDGE

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OPINION BY: A. JOHNSON, J.

LUMPKIN, P.J.: Concur in Part and Dissent in Part
C. JOHNSON, V.P.J.: Concur
CHAPEL, J.: Concur in Results
LEWIS, J.: Concur

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LUMPKIN, PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in affirming the convictions in Counts 1 – 4. However, I dissent to reversing the conviction in Count 5 as I find the evidence sufficient to support the extortionate kidnapping conviction. Appellant lured the victim away from his home and to the drug house with the express intent of beating and robbing him. The victim was held in the back of the drug house, tied up and hit in the head with the flashlight, knocking him unconscious. Appellant assisted in getting the victim to the drug house and holding him there against his will. Appellant specifically refused the victim's request to let him go. Based on this evidence, a rational trier of fact could find Appellant guilty beyond a reasonable doubt.

Sustaining the conviction for extortionate kidnapping does not lead to a double jeopardy problem with the conviction for robbery with a dangerous weapon. The two crimes were factually distinct and the evidence of one was not used to convict Appellant of the other.

Further, I disagree with the discussion regarding the evidence supporting the arson conviction. The victim was a person as required by the 4th element of the offense, whether he was dead or alive.

Finally, I agree that any error in failing to give an instruction on the 85% Rule was harmless beyond a reasonable doubt. However, this case seems to be another example of this Court's expectation that trial judges should have been clairvoyant about *Anderson*.
