Case No. F-2019-247

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL GARY PARKER, JR.,

Appellant,

vs.

THE STATE OF OKLAHOMA,

Appellee.

Appeal from the
District Court of Tulsa County
District Court Case No. CF-2018-3184

REPLY BRIEF OF APPELLANT

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May 18, 2020

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REPLY BRIEF OF APPELLANT

This Reply Brief is submitted on behalf of Michael Gary Parker, Jr., in reply to the Brief of Appellee filed by the State of Oklahoma on March 3, 2020. Mr. Parker reaffirms and reasserts all arguments advanced in his Brief-in-Chief.[1] However, pursuant to Rule 9.3(C), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011), he replies to the Propositions below.

REPLY TO PROPOSITION I
(*Sufficiency of the Evidence*)

In Proposition I, Appellant argued that reviewing the evidence in the light most favorable to the State, his conviction should be reversed because the State failed to prove beyond a reasonable doubt that he did not act in self-defense when he shot Mr. Wilson. *Brief of Appellant* at 10-14.

In response, the State claims that Mr. Parker was not entitled to an acquittal on the basis of self-defense because "the defense of self-defense is not available to an aggressor such as defendant became when he returned to the after-hours spot armed with a firearm and confronted Mr. Wilson..." *Brief of Appellee* at 12. The evidence does not bear out this assertion. As discussed extensively in the Brief of Appellant, Mr. Parker did not return to the scene of the assault, the 007 Club, looking for Mr. Wilson. Presumably, if he went home to retrieve a weapon to confront Mr. Wilson, as the State suggests, he would have returned to the place where the altercation occurred. *Brief of Appellee* at 14-15. Instead, he reluctantly made plans to go to an after-hours club with his cousins. (Tr.IV 21-23, 44) There was no evidence presented indicating he had any reason to expect to see Mr. Wilson at

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[1] Appellant gives notice that the reply brief in this case was due to be filed by April 12, 2020, pursuant to Rule 4.3, *Rules of the Court of Criminal Appeals*, Title 22, Ch. 18, App. As twenty (20) days for filing remained upon the suspension of all appellate court deadlines falling between March 16, 2020, and May 15, 2020, the pleading is now due to be filed on June 4, 2020 (20 days from May 16, 2020, with May 16 counted as the first day), pursuant to the Third Emergency Joint Order Regarding the COVID-19 State of Disaster, SCAD No. 2020-36, ¶¶ 7-8 (April 29, 2020). Accordingly, Appellant submits his reply brief is timely filed.

this venue. However, he decided to take his own gun to make him feel safer just in case any more trouble arose. (Tr.IV 22-23)

The State relies on the case of *Allen v. State*, 1994 OK CR 13, 871 P.2d 79, to argue that although Mr. Wilson might have been the initial aggressor, when Mr. Parker later went to the after-hours club armed with a deadly weapon he became the aggressor and lost the right to self-defense. *Brief of Appellee* at 16. The facts in *Allen* are distinguishable. In *Allen* the defendant and victim were involved in a dispute and the victim struck the defendant in the face with a garden tool and left the scene. Allen followed the victim to the police station "where she knew the decedent was going to be." 1994 OK CR 13, at ¶ 28, 871 P.2d at 92. As Allen parked her car and got out, she saw the decedent approaching her with the garden rake. Ms. Allen retreated back to her vehicle, but rather than escape, she grabbed a weapon and confronted the victim. *Id.* The Court held that when Ms. Allen followed the decedent, she arguably became the pursuer. Ms. Allen knew where the victim was going and followed her on purpose to re-initiate or prolong the altercation. Once at the police station, when she saw the decedent approach her again with the garden rake, she went to her car. 1994 OK CR 13, at ¶ 32, 871 P.2d at 93. Instead of escaping and leaving the scene, Ms. Allen "withdrew to her own car to retrieve a weapon," an action described by this court as "withdrawing a short distance to obtain a tactical advantage – here, the acquisition of a deadly weapon." (Citations omitted). *Allen v. State*, 1994 OK CR 13 at ¶ 32, 871 P.2d at 93. This Court found that Allen became the aggressor and lost the right of self defense. 1994 OK CR 13 at ¶¶ 28-30, 871 P.2d at 92-93.

Here, after Mr. Wilson initially accosted Mr. Parker, Mr. Parker left the scene and went home. He did not follow Mr. Wilson or return to the 007 Club specifically looking for him. Instead he went to a separate venue with his cousins. (Tr. IV 21-23, 44) Obviously, it was Mr. Wilson who also initiated the second confrontation based

on the location of his vehicle. It is undisputed that Mr. Wilson's vehicle was parked near the front entrance with the engine running and the doors open, supporting Mr. Parker's testimony that he believed Mr. Wilson had spotted him and was coming straight for him. (Tr. II 180-83; III 43, 45; State's Ex. 1)

As Mr. Parker was approaching the front door of the after-hours club, he suddenly saw Mr. Wilson again. (Tr.IV 27-28) Mr. Wilson started acting crazy and cussing at Mr. Parker again. (Tr.IV 29) Mr. Parker saw Mr. Wilson reach for his pocket. Mr. Parker was afraid for his life at that point because he knew Mr. Wilson was carrying a gun. (Tr.III 35-36; IV 29) Mr. Parker felt he felt he had no choice but to shoot at Mr. Wilson. Mr. Parker drew his own weapon and fired, striking Mr. Wilson four times in rapid succession. (Tr. 27-30, 42, 74-75) Mr. Parker reacted in a way that someone in his same circumstance would act. He shot Mr. Wilson in an effort to avoid what he perceived as a life-threatening situation. Mr. Parker acted in protection of himself as a reaction to a perceived threat of great bodily harm by Mr. Wilson, who possessed a deadly weapon. According to the police, this weapon was cocked, loaded, and ready to fire, with a live round in the chamber and the safety off. (Tr.II 171) The law requires only that from all the facts known to him, Mr. Parker "reasonably" believed that use of force was necessary to protect himself from "imminent danger of death or great bodily harm." (O.R. 107; Instruction 8-46, OUJI-CR (2d)).

Given the circumstances that immediately confronted him, the gunshots he inflicted on Mr. Wilson were justified. Contrary to the State's argument, Mr. Parker was clearly **not** the aggressor in this situation.

REPLY TO PROPOSITION II

(Instruction on First Degree Manslaughter Over Defense's Objection)

This assignment of error concerns the trial court's instruction on the lesser offense of first degree manslaughter over the defense's objection. Mr. Parker

argued the trial court abused its discretion by instructing the jury on this lesser offense in light of the fact that there was no evidence to support the lesser included instruction. *Brief of Appellant* at 15-20.

In response, Appellee argues that the trial court properly exercised its discretion in giving these instructions at the request of the State because the evidence supported the offense. *Brief of Appellee* at 19. Appellant set out the reasons why this lesser offense instruction was not appropriate in this case and will not repeat those arguments from the brief as this issue was covered extensively. *See Brief of Appellant* at 17-19. However, in objecting to the manslaughter instruction at trial, defense counsel articulated why the instructions were not warranted in this case:

> I mean, Judge, in the course of this trial, the state's arguments have been that my client did this intentionally by going home, getting his gun, and then going back to the club, expecting to see Mr. Wilson there again, that this was an intentional act. My client, in his statements to Detective Brown, which Detective Brown testified to as well as his testimony today -- my client's testimony today was he was agitated. He did go home, he got a gun for his own protection. He did not do it with the intent of even seeing Mr. Wilson again. He was not angry. There was a time delay, because they left the 007 club, he drove home, got his gun out of the house, he got in his car, he then drove to the after-hours club, was walking in. This wasn't heat of passion. He wasn't -- he even testified -- I was, like, where [sic] you angry? Did you do something because you wanted to punish him or something? And he testified no. There has been no testimony or evidence that he had a heat -- that this rises to the level of heat of passion for a manslaughter instruction.

(Tr.IV 86)

As counsel argued, the evidence at trial failed to support Appellee's argument that Mr. Parker was afflicted by rage, anger, resentment, fear and terror at the time he actually shot the victim. The law requires that "there must no be a reasonable opportunity for the passion to cool." (O.R. 104; Instruction No. 4-100, OUJI-CR 2d) The evidence would not allow the jury to reasonably conclude that Mr. Parker was powerfully affected by his emotions and the heat of passion at this moment "to such a degree as would naturally affect [his] ability to reason and

render [his] mind incapable of cool reflection." *Id.* As defense counsel pointed out, Mr. Parker was not angry when he went to the after-hours club. (Tr.IV 85-86) Further, although Mr. Wilson's actions in pointing his gun at Mr. Parker would obviously have angered and frightened Mr. Parker, after Mr. Parker left the scene there was more than a reasonable opportunity for any passion on his part to cool by the time he encountered Mr. Wilson the second time.

The jury's verdict was obviously a compromise verdict based on the fact that neither the defense nor the prosecution argued the evidence supported a manslaughter conviction during closing arguments as well as the fact that the jury deliberated for more than six hours before reaching a verdict. (Tr.IV 98-138; 143-44; Court's Ex. 3-5) There is no doubt that the jury would have acquitted Mr. Parker outright if the jury had not been provided instructions on this offense. Accordingly, his conviction and sentence should be reversed and remanded for a new trial.

REPLY TO PROPOSITION III
(Trial Court's Failure to Uphold Batson Challenge)

In Proposition III, Mr. Parker objected to the trial court's failure to sustain his objections to the State's exercise of peremptory challenges against three African-American prospective jurors. *Brief of Appellant* at 21-31.[2] In response, the State claims that the proposition is without merit because the "assistant district attorney articulated race-neutral reasons for each of the jurors who were struck, which were clearly supported by the record." *Brief of Appellee* at 24. The State attempts to justify the prosecutor's purported race-neutral reasons for striking every one of the African-American panelists, acknowledging that these purported race-neutral reasons applied to Caucasian jurors who were not struck, but arguing

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[2] Appellee points out that Appellant used the jurors last names a few times when citing to the record and gave the juror's full name on one instance in the brief. *See Brief of Appellee* at footnotes 8, 10. These brief references in the Brief of Appellant to the names of the prospective jurors as they were identified in the record were inadvertent and not an attempt to flout Rule 2.6 (E)(1)(b) of this Court's rules.

that the Caucasian jurors' prior contacts with law enforcement were not "comparable" and did not "hold water" to those contacts revealed by the African-American prospective jurors. *Brief of Appellee* at 28-29. As discussed at length in the Brief of Appellant, these side-by-side comparisons of the African-American panelists who were struck and the Caucasian panelists who were not wholly contradict the State's claim. *See Brief of Appellant* at 28-29. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Miller-El v. Dretke*, 545 U.S. 231, 241, 125 S.Ct. 2317, 2325, 162 L.Ed.2d 196 (2005).

In footnote 11, the State accuses Appellant of flouting this Court's rules by combining two issues in a single proposition. According to the State, "[u]nder Rule 3.5(A)(5), Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2019), combining multiple issues in a single proposition is not proper and results in waiver of the issues." *Brief of Appellee* at 29. In support of this claim, the State cites *Collins v. State*, 2009 OK CR 32, ¶ 32, 223 P.3d 1014, 1023. In that case, unlike here, Collins asserted three substantive claims, including a claim of prosecutorial misconduct and two claims of improperly admitted evidence, within a single proposition of error. *Id.* Likewise, the State's cite to *Cuesta-Rodriguez v. State*, 2011 OK CR 4, ¶ 12, 247 P.3d 1192, 1197 is also unavailing. Cuesta-Rodriguez argued that the trial court erred in failing to instruct the jury during the sentencing stage of his trial that in Oklahoma intoxication can mitigate a crime. This argument was advanced in his brief-in-chief in a single sentence at the end of his claim alleging that the trial court violated his constitutional rights during the guilt phase by refusing to issue a voluntary intoxication instruction. This Court stated that this cursory assertion, made as a passing remark in a longer argument, was not supported by any independent argument or authority, nor was it set out as a

separate proposition of error as required by the Court's rules. *Id.* Here, in contrast, Appellant was not making a separate claim of prosecutorial misconduct but rather using the prosecutor's comments to show his demeanor and attitude and the racial motivation underlying the exercise of his peremptory challenges against the African-American prospective jurors. As discussed in the Brief of Appellant, this is a recognized factor in determining a prosecutor's discriminatory intent. *See Brief of Appellant* at 30-31; *Miller-El v. Dretke*, 545 U.S. at 236; 125 S. Ct. at 2324 (noting that *Batson* requires inquiry into "the totality of the relevant facts about a prosecutor's conduct"), *Batson* v. *Kentucky*, 476 U.S. 79, 93; 106 S.Ct. 1712, 1721, 90 L.Ed.2d 69 (1986) ("In deciding if the defendant has carried his burden of persuasion, a court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.") *See also State v. Tomlin*, 299 S.C. 294, 299, 384 S.E.2d 707, 710, (1989) (The use of a racial stereotype is evidence of the prosecutor's subjective intent to discriminate and clearly violates the mandates of *Batson*.)

The Constitution forbids striking even a single prospective juror for a discriminatory purpose. *Snyder v. Louisiana*, 552 U.S. 472, 478, 128 S.Ct. 1203, 1208, 170 L.Ed.2d 175 (2008). Accordingly, Mr. Parker's case must be reversed and remanded for a new trial. *Batson*, 476 U.S. at 100, 106 S.Ct. at 1725; *Ezell v. State*, 1995 OK CR 71, at ¶ 9, 909 P.2d at 72.

REPLY TO PROPOSITION IV
(Voluntariness of Statement)

In Proposition IV, Appellant argued his statement to Tulsa Police Detective John Brown on July 24, 2018, was the product of coercion because he invoked his right to counsel during the interrogation and this invocation was not scrupulously honored. Appellant argued that based on the totality of the circumstances, his statement was obtained by threats and coercion and by manipulating his

vulnerability regarding his family. Detective Brown suggested that his failure to tell the truth would result in the arrest of his fiancee and trouble for his children. Under these circumstances, Appellant argued his statement was not voluntary and should have been suppressed. *Brief of Appellant* at 31-38.

In response, Appellee acknowledges that the trial court heard extensive testimony from both Detective Brown and Mr. Parker concerning the circumstances of the interrogation during a *Jackson v. Denno* hearing on January 29, 2019. Appellee argues, however, that the "trial court's ruling focused heavily upon the trial court's observations of a recording of this interview" which Appellee notes was admitted as Exhibit 2 during the *Jackson v. Denno* hearing. *Brief of Appellee* at 33. Appellee asserts that "the recording of the interview does not appear to be part of the record on this appeal" and faults appellate counsel for "failing to ensure a complete record on appeal."(citations omitted). What Appellee neglects to acknowledge is that although Exhibit 2 was apparently admitted so the trial court could review it as part of his decision on the motion to suppress, at the conclusion of the hearing, State's Exhibit 2 was withdrawn "per agreement of counsel" and was therefore not made part of the record. (M.Tr. 1/29/19 44) This recording was also not admitted at trial. While appellate counsel does have an obligation to ensure the completeness of the record, this recording was never part of the "record."

REPLY TO PROPOSITION VI B.
(Ineffective Assistance of Counsel)

In his sixth proposition of error, Appellant contends he was denied effective assistance of counsel when, among other things, defense counsel failed to use a critical, available witness who could have provided crucial corroboration of his self-defense claim and rebut the State's argument that there was no evidence the victim was reaching for a gun at the time Mr. Parker shot him. *See Brief of Appellant* at 47-49. However, since the evidence needed to prove the deficient performance of

defense counsel is outside the record, Appellant filed an Application for an Evidentiary Hearing on Sixth Amendment Claim in which he discussed this evidence in detail. In response, the State is critical of the fact that the only affidavit attached to the Application is that of investigator Jolene Perham, recounting Roosevelt Tolon's statements to her. *Brief of Appellee* at 44-45.

Rule 3.11 (B)(3)(b) contemplates that a motion filed under this Rule is simply a request for an evidentiary hearing. This Court has held that attachments to motions to supplement under Rule 3.11 (B)(3)(b) must be in affidavit form. *Dewberry v. State*, 1998 OK CR 10, ¶ 8, 954 P.2d 774, 776. Rule 3.11(B)(3)(b) allows an appellant to supplement the record with affidavits containing the assertions of third parties in order to provide the court with a summary of what these witnesses would testify to if this Court were to grant an evidentiary hearing. *Id.*

Affidavits attached to a request for evidentiary hearing are not considered part of the trial record; only that which is properly presented to the district court during the evidentiary hearing becomes part of the trial record on appeal. *Dewberry v. State*, 1998 OK CR 10, ¶ 8, 954 P.2d 774, 776. The two-fold reasons for this policy are clear. First, the integrity of the appellate record is at stake: "This process allows the Court to maintain the integrity of the record on appeal and limits this Court's consideration to only those items of evidence which are a proper part of the record." *Graves v. State*, 1994 OK CR 23, ¶ 7, 878 P.2d 1075, 1077. Second, because the affidavits attached to an application for evidentiary hearing are, essentially, *ex parte*, the opposing party has not had an opportunity to respond and to test, within the adversarial crucible of trial court proceedings, the veracity and credibility of evidence contained within the *ex parte* affidavits. *See, e.g., Mayes v. State*, 1994 OK CR 44, ¶ 115, 887 P.2d 1288, 1315. This Court has consistently held that matters of this type are submitted and accepted for a very limited purpose, *i.e.*, to make a threshold showing that an evidentiary hearing in the District Court

Thus, if this Court were to grant an evidentiary hearing, Mr. Tolon would obviously be called to testify to his own statement. This affidavit was proferred in accordance with the Rule in order to provide a summary of what counsel would expect him to testify to should a hearing be granted.

CONCLUSION

Based on the preceding errors, discussions of facts, arguments and citations of legal authority, the record before this Court and any errors that this Court may note *sua sponte*, Mr. Parker respectfully asks the Court to reverse his conviction for a new trial, or grant any other relief this Court finds warranted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on _____, 2020, a true and correct copy of the foregoing Reply Brief of Appellant was mailed, *via* United States Postal Service, postage pre-paid, to Appellant at the address set out below, and a copy was served upon the Attorney General by leaving a copy with the Clerk of this Court.

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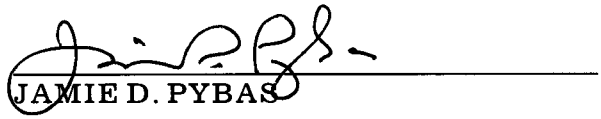

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