IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOHN EDWARD SCHOONOVER,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
v.	)	Case No. F-2003-633
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, JUDGE:

John Edward Schoonover was tried by jury for Child Abuse Murder and convicted of the lesser related offense of Accessory After the Fact to Murder, in violation of 21 O.S.2001, § 173, in the District Court of Mayes County, Case No. CF-1999-271.[1] In accordance with the jury's recommendation the Honorable Dynda Post sentenced Schoonover to seven (7) years imprisonment and a $500 fine. Schoonover appeals from this conviction and sentence.

Schoonover raises nine propositions of error on appeal:

I. John Schoonover's conviction is barred by the statute of limitations and the trial court erred in denying the defense's motion to arrest the judgment on that basis;
II. John Schoonover's conviction was obtained in violation of the Due Process Clause of the Oklahoma and United States constitutions and the trial court erred in denying the defense's motion to arrest the judgment on that basis;
III. The evidence introduced at trial was insufficient as a matter of law to convict Schoonover of the crime of accessory after the fact of murder and

[1] Schoonover was originally convicted, with his wife, on the charge of committing or permitting child abuse murder. This Court overturned that conviction. *Schoonover v. State*, No. F-2001-936 (Okl.Cr. August 15, 2002) (not for publication). The State dropped the "permitting" charge from the Information in the retrial.

IV. the court erred in denying Schoonover's motion to arrest the judgment on that basis;
V. The conviction of John Schoonover on the charge of accessory after the fact of a felony was obtained in violation of Schoonover's statutory and Oklahoma constitutional rights and the court committed error in denying the defense's motion to arrest the judgment on that basis;
VI. The court committed error when it allowed statements from Schoonover's co-defendant that implicated Schoonover to be introduced into evidence;
VII. The court committed error when it allowed the introduction of prior bad acts evidence against Schoonover;
VIII. The court committed error when it repeatedly allowed the introduction of prejudicial evidence;
IX. The court committed error when it failed Schoonover's request for a mistrial; and
X. The totality of the above described errors require this case to be reversed.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs, we find that the law requires reversal. First, from the facts presented at trial, Schoonover has not committed and could not have been charged with the crime of accessory after the fact to murder. Schoonover raises this point in Proposition III, regarding sufficiency of the evidence, and in his reply brief. This is not an evidentiary problem but a charging problem. The trial court explicitly found that the evidence supporting this instruction was testimony suggesting a time delay between Benjamin's injury and his arrival at the hospital, during which the Schoonovers changed Benjamin's clothes or diaper or cleaned him up. In other words, Schoonover's actions supporting the accessory charge were taken immediately after the injury, before treatment began, and more than a day before Benjamin died. To commit the crime of accessory after the fact, a person must, after the commission of a felony, conceal or aid the offender, with knowledge that she has committed a felony, and with intent that she may avoid

or escape from arrest, trial, conviction, or punishment.[2] There must be a completed felony before the defendant takes the actions which support the accessory charge. An accessory's guilt is established by acts which occur after a felony has been committed by others.[3]

The felony of murder is complete when the victim is dead. Thus, to be guilty of accessory after the fact, the defendant must give assistance to the murderer after the death of the victim.[4] The conclusion that the victim's death must precede an accessory's aid to the murderer follows from the English common law tradition.[5] While this is an issue of first impression in Oklahoma, the few jurisdictions which have discussed this issue have confirmed this legal principle.[6] The majority of cases discussing the crime of accessory after the fact to murder treat the necessity of the victim's death as an axiom, without discussion. This is understandable. Common sense underlies the idea that, where a crime requires a death, the death must occur for the crime to be complete.

---

[2] 21 O.S.2001, §173; OUJI-CR (2nd) 2-2.
[3] *Faulkner v. State*, 1983 OK.CR 84, 646 P.2d 1304, 1308.
[4] *See, e.g.*, LaFave, *Substantive Criminal Law* (2nd Ed.), § 13.6(a) (West, 2003); 22 Corpus Juris Secundum § 140, 40 C.J.S. § 28 (West); 40 American Jurisprudence § 25 (2nd Ed.) (West 1999).
[5] *See, e.g.*, I Hale, *Pleas of the Crown* 621 (1st Amer. ed. 1847); 4 W. Blackstone, *Commentaries on the Laws of England* 38 (Chitty ed. 1826); II W. Hawkins, *Pleas of the Crown* 448 (Curwood ed. 1824). *See* discussions in *Little v. United States*, 709 A.2d 708, 711 (D.C.App.1998); *Government of Virgin Islands v. Aquino*, 378 F.2d 540, 543 (C.A.Virgin Islands 1967).
[6] *Little v. United States*, 709 A.2d 708, 711; *United States v. Nystrom*, 39 M.J. 698, 704 n.3 (N.M.C.M.R. 1993); *State v. Chism*, 436 So.2d 464, 468 (La. 1983); *Baker v. State*, 201 S.W.2d 667, 668 (Tenn. 1947). *See also State v. Detter*, 260 S.E.2d 567, 590 (N.C. 1979) (time of death, not time fatal blow is struck, determines liability for accessory after the fact).

The distinction between the crimes of murder and accessory after the fact was explained by the Michigan Court of Appeals:

> "By punishing those who are accessories after the fact the law serves to deter others from hindering the justice process after the fact of the principal crime. Thus, the purpose of making accessory after the fact a crime is to assist society in apprehending those who have committed crimes and to assist in preserving evidence of crimes so that perpetrators of crimes can be brought to society's justice. Such a purpose, while very important and worthwhile to the welfare of society, is not at all the same deterrence–punishment purpose served by making murder a crime."[7]

Benjamin Schoonover did not die until October 31, while the injury and any attempts to conceal it happened on October 29. He was not dead when Schoonover took the actions offered to support the conviction. All the elements of the crime are not present. Schoonover cannot be convicted of accessory after the fact to a murder which had not yet occurred.

In Proposition II, Schoonover correctly claims he was convicted of a crime he had no notice he would have to defend against, in violation of his right to due process. In this case, the defendant's right to notice and due process conflicts with the trial court's duty to instruct on lesser included or lesser related offenses supported by the evidence. The Constitutional right to due process must prevail. In *Parker v. State,* we held the United States and Oklahoma constitutions require that a defendant must be put on notice of the charges he must defend against.[8] We determined that a defendant may receive this notice through the language of the Information, the material available at

---

[7] *People v. Perry*, 554 N.W.2d 362, 369 (Mich. App. 1996)

preliminary hearing, and discovery.[9] Normally, an Information charging a form of homicide is sufficient notice that the defendant may be required to defend against any lesser offenses to that charge. In *Shrum v. State* we held that, if evidence supports an instruction, a trial court must instruct on "any lesser included offense whether the lesser included offense is pled in the Information or not."[10] This is because, since the elements of lesser included offenses are necessarily included in the greater offense charged in an Information, a defendant is presumed to be on notice of lesser included crimes. The same may be true of lesser related offenses, depending on the notice provided to the defendant and the evidence presented at trial.[11] However, we noted in *Shrum* that "[t]he principal impediment to administering instructions on related, but not necessarily included, offenses is the defendant's due process right to notice of the charges against which he must defend."[12]

In deciding to instruct on accessory after the fact to murder over Schoonover's objection, the trial court mistakenly relied on *Glossip v. State,* as

---

[8] 1996 OK CR 19, 917 P.2d 980, *cert. denied,* 519 U.S. 1096, 117 S.Ct. 777, 136 L.Ed.2d 721 (1997).

[9] *Id.*

[10] *Shrum v. State,* 1999 OK CR 41, 991 P.2d 1032, 1034-35.

[11] *See Childress v. State,* 2000 OK CR 10, 1 P.3d 1006, 1012-13 (where language of Information inherently includes language describing lesser related offense, defendant is on notice that he may have to defend against lesser related offense). We have long held that accessory after the fact to murder is a lesser related offense, not a lesser included offense to murder, as the elements of murder differ from those of accessory after the fact to murder. *See, e.g., Wilson v. State,* 1976 OK CR 167, 552 P.2d 1404, 1405-06; *State v. Truesdell,* 1980 OK CR 97, 620 P.2d 427, 428; *Farmer v. State,* 56 Okla. Crim. 380, 40 P.2d 693, 694 (1935); *Vann v. State,* 21 Okla. Crim. 298, 207 P. 102, 103-04 (1922). In *Waddle v. State,* No. F-1999-1357 (Okl.Cr. Dec. 19, 2000) (not for publication), we upheld the trial court's decision to instruct on the lesser related offense of manslaughter over the defendant's objection, where the initial charge was murder.

[12] *Shrum,* 991 P.2d at 1034, citing *Parker.*

the State does on appeal.[13] In *Glossip* we held that, *where a defendant defends on a theory that he assisted the murderer after the fact*, and evidence supports that charge, a trial court should grant his request to instruct on the lesser related offense of accessory after the fact to murder.[14] We noted that this conclusion was reached "under the very specific facts of this case."[15] Under those circumstances, of course, a defendant need not be put on notice that he may have to defend against the lesser related offense, since he raises it himself.[16] However, that was not the case here.

The decision to instruct on accessory after the fact to murder put Schoonover in the same position that this Court condemned in *Lambert v. State.*[17] In that case, the State charged Lambert with malice murder. Lambert testified and admitted to the elements of felony murder, claiming he lacked the intent to kill necessary for malice murder. The trial court subsequently instructed on malice and felony murder. We held this prejudiced Lambert because, without notice that he could be convicted for felony murder, he had admitted that crime in an effort to avoid conviction for the crime with which he was charged. Although the elements of felony murder were contained severally in the Information, Lambert was misled by the specific language of the Information into believing that he was charged only with malice murder. Had

---

[13] 2001 OK CR 21, 29 P.3d 597, 603-04.
[14] *Glossip*, 29 P.3d at 604.
[15] *Glossip*, 29 P.3d at 603.
[16] *Glossip*, 29 P.3d at 604; *Shrum*, 991 P.2d at 1035 (no notice conundrum where defendant defends on a theory that he lacked the necessary intent element of the greater offense and requests a related lesser offense instruction because such a defendant cannot claim lack of notice).

he known differently, he would not have taken the stand and admitted that he committed felony murder. Here, the Information did not contain the elements of the lesser related offense of accessory after the fact to murder. Neither the evidence developed at preliminary hearing, nor the State's discovery materials, nor the evidence developed in the first trial, gave any suggestion that Schoonover would face a charge of accessory after the fact to murder. The State consistently proceeded on a theory that Schoonover was guilty of murder, acting alone or in concert with his wife. The trial court made the decision to instruct on accessory after the fact to murder *sua sponte* at the close of the evidence.[18]

As Schoonover's trial attorney argued, his defense was that he was not present when Benjamin had an accidental fall which resulted in fatal injury. Schoonover did not testify and made no objection to evidence which suggested he might have delayed taking Benjamin to the hospital. Had he known that evidence would be used to support any accessory after the fact charge, Schoonover could have changed his trial strategy to contest the State's timeline and any evidence that he helped his wife cover up the circumstances of Benjamin's injury. Even if accessory after the fact to murder were an appropriate charge, it would have been error to instruct on it without giving Schoonover notice and an opportunity to defend himself against it. Schoonover's conviction for accessory after the fact to murder must be reversed

---

[17] 1994 OK CR 79, 888 P.2d 494, 504.

[18] While the prosecutor stated he requested this instruction, the record shows neither defense counsel nor the trial court received this request.

because (a) not all the elements of the crime were present; and (b) his due process rights were violated when he had no notice that he could be charged with, or should prepare to defend against, that crime. This case must be reversed and remanded for a new trial.

Our resolution of the propriety of the accessory after the fact conviction renders the remaining propositions moot. To assist evidentiary presentation in a retrial, we note that some evidence presented against Schoonover was irrelevant to any issue at trial and was admitted in error.[19] Irrelevant evidence admitted at this trial includes (a) the colloquial explanation of Jeffery Dahmer's identity and actions, and (b) any evidence that Schoonover tried to contact an attorney after Benjamin was hospitalized, or that Schoonover was told he was suspected of child abuse at the hospital, or refused to talk to doctors or left the hospital after being told DHS would investigate. The former has nothing to do with this case. Attempts to contact an attorney after one has been told one is under investigation for a crime show neither knowledge of the crime nor the intent to commit it.[20]

Decision

---

[19] Relevant and admissible evidence is that which has any tendency to make more or less probable the existence of a fact of consequence to the determination of the action. 12 O.S.2001, §§ 2401, 2402.

[20] The trial court admitted this evidence over Schoonover's objections because it had been admitted in the first trial, and this Court did not address it as error in *Schoonover I.* Trial courts are urged to read this Court's opinions precisely. If, in overturning a case on a particular issue, the Court does not address the remaining issues, that says only that the issues are not addressed. It is not an indication of merit.

The Judgments and Sentences of the District Court are **REVERSED AND REMANDED FOR A NEW TRIAL**.

ATTORNEYS AT TRIAL

KEVIN ADAMS
1717 SOUTH CHEYENNE AVENUE
TULSA, OKLAHOMA 74119
ATTORNEY FOR DEFENDANT

DAVE KEASLING
601 SOUTH BOULDER AVENUE
TULSA, OKLAHOMA 74119
ATTORNEY FOR DEFENDANT

CHARLES RAMSEY
ASSISTANT DISTRICT ATTORNEY
MAYES COUNTY COURTHOUSE
PRYOR, OKLAHOMA 74361
ATTORNEY FOR STATE

ATTORNEYS ON APPEAL

KEVIN ADAMS
1717 SOUTH CHEYENNE AVENUE
TULSA, OKLAHOMA 74119
ATTORNEY FOR PETITIONER

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
NANCY E. CONNALLY
ASSISTANT ATTORNEY GENERAL
2300 N. LINCOLN BOULEVARD
STATE CAPITOL BUILDING
OKLAHOMA CITY, OKLAHOMA 73105
ATTORNEYS FOR RESPONDENT

OPINION BY: CHAPEL, J.
JOHNSON, P.J.: CONCUR
LILE, V.P.J.: DISSENT
LUMPKIN, J.: CONCUR IN RESULTS
STRUBHAR, J.: CONCUR

LILE, VICE PRESIDING JUDGE: DISSENTS

I dissent from the Majority's conclusion that acts committed by a defendant before the victim dies cannot constitute accessory after the fact to murder. The better rule to follow is that announced by the U.S. Fourth Circuit Court of Appeals in *United States v. McCoy*, 721 F.2d 473 (4th Cir. 1983). The Fourth Circuit held that if the defendant knew the victim was dying, then the defendant could be convicted of accessory after the fact to murder. *Id.* at 475. If one helps cover up a crime, knowing that the victim is dying, he should not escape accessorial liability simply because the victim has yet to succumb to the mortal blow.

The threshold question in this case is whether the Appellant, before engaging in his accessorial acts, knew the child was dying. The Appellant's conversation with a nurse on the way to the hospital indicates that he knew that the child had severe injuries, including difficulty breathing and some type of seizure. Further, the child was diagnosed at the hospital as having a skull fracture with massive brain swelling. This Court is required to look at the evidence in the light most favorable to the state, and ask if any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Easlick v. State*, 2004 OK CR 21, ¶5, 90 P.3d 556, 558. In so looking, a rational trier of fact could have found, on the basis of the circumstantial evidence presented, that Appellant knew that the child was dying when he delayed

taking him to the doctor in order to cover up evidence of abuse. Appellant's Proposition III should be rejected.

I also dissent from the Majority's conclusion that Appellant lacked sufficient notice of the potential lesser-included offense of accessory after the fact to murder. The Majority relies on *Lambert v. State*, 1994 OK CR 79, 888 P.2d 494. A lesser-included offense instruction is now governed, however, by *Shrum v. State*, 1999 OK CR 41, 991 P.2d 1032, and in light of *Shrum, Lambert* is outdated and was effectively overruled.

In *Lambert*, Lambert was originally charged with Murder in the First Degree, Kidnapping, Robbery with Firearms, and Larceny of an Automobile, and Arson in the Third Degree. *Lambert*, 1994 OK CR 79, ¶1, 888 P.2d at 497. Lambert and his co-defendants kidnapped the victims in the victims' car, robbed them, and placed them in the trunk of the vehicle. *Id.* at ¶¶2-4, 888 P.2d at 497. The victims died in the trunk after the car was set on fire. *Id.* at ¶5, 888 P.2d at 497. At trial, Lambert confessed to participating in the robbery and the kidnapping, but insisted that he objected to setting the car on fire and insisted that he never intended for the victims to die. *Id.* at ¶ 43, 888 P.2d at 503. This confession amounted to a confession to felony murder, and the State requested and received a jury instruction on Felony murder, over Lambert's objection. *Id.* This Court reversed the conviction of felony murder, holding that even though all the elements of felony murder had

been alleged in the indictment, Lambert was misled by the failure to charge felony murder. *Id.* at ¶49, 888 P.2d at 505.

In *Shrum*, Shrum killed his stepfather following an argument and was charged with First Degree Murder. *Shrum*, 1999 OK CR 41, ¶¶2-3, 991 P.2d at 1033. The evidence supported First Degree Manslaughter, and the judge instructed on it as a lesser-included offense of First Degree Murder. *Id.* at ¶12, 991 P.2d at 1037. This Court held that the court can instruct on a lesser-included offense, even if the specific facts of the offense have not been alleged in the Information, and even if the elements are not identical to the greater offense. *Id.* at ¶9, 991 P.2d at 1036. The lesser-included offense must be related to the greater offense and be supported by evidence at trial. *Id.* at ¶8-10, 991 P.2d at 1035-36. This Court further held that to ensure that the defendant received notice of the lesser-included offense, as is constitutionally required, "the trial court should review the Information together with all material that was made available to the defendant at the preliminary hearing and through discovery and determine whether the defendant received adequate notice that the State's case raised lesser related offenses that should be deemed included." *Id.* at ¶ 11, 991 P.2d at 1037.

Under *Shrum*, whether or not the Appellant was misled is no longer an issue; the issue is merely whether the Appellant received reasonable notice. *Lambert* was effectively overruled by *Shrum*. Applying *Shrum* to the case at bar, the Appellant had adequate notice that accessory after

the fact was a possible lesser-included offense. There is no merit to Appellant's Proposition II.

I would affirm.

LUMPKIN, J.: CONCUR IN RESULT

I concur in the results reached by the Court due to the fact I agree the crime of Accessory After the Fact to Murder cannot be committed until after the victim is dead and the crime of murder is complete. However, I continue to find fault with this Court's jurisprudence emanating from *Schrum v. State*, 991 P.2d 1032, 1037 (Okl.Cr.1999) (Lumpkin, V.P.J.: Concur in Results). It is the lack of objective standards spawned by *Schrum* that leads to the error present in this case. We should return to the objective criteria set out in *Willingham v. State*, 947 P.2d 1074, 1079-1083 (Okl.Cr.1997) and *State v. Uriarite*, 815 P.2d 193, 195 (Okl.Cr.1991), to ensure this type of error does not continue to occur in the future.