

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

WARREN BRIAN BRADLEY, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 THE STATE OF OKLAHOMA, )  
 )  
 Appellee. )

NOT FOR PUBLICATION

Case No. F-2014-46

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

MAR 25 2015

**SUMMARY OPINION**

**JOHNSON, JUDGE:**

**MICHAEL S. RICHIE**  
**CLERK**

Appellant Warren Brian Bradley was tried by jury in the District Court of Garvin County, Case No. CF-2012-15, and convicted of Possession of a Controlled Dangerous Substance (Cocaine Base) in the County Jail, After Former Conviction of Two Felonies, in violation of 57 O.S.2011, § 21. The jury assessed punishment at thirty years imprisonment. The Honorable Greg Dixon, who presided at trial, sentenced Bradley accordingly and ordered the sentence to be served concurrently with his sentences in other cases. Bradley appeals, raising the following issues:

- (1) whether the district court abused its discretion in denying his motion for a continuance;
- (2) whether the district court erroneously denied his motion for new trial;
- (3) whether he received effective assistance of counsel;
- (4) whether the State failed to comply with his discovery request resulting in prejudice to the defense;

- (5) whether he was prejudiced by the prosecutor's statements concerning his pre-trial invocation of his Fifth Amendment right to remain silent;
- (6) whether prosecutorial misconduct deprived him of a fair trial;
- (7) whether he was prejudiced during second stage from proof of additional prior convictions not alleged by the State for sentence enhancement;
- (8) whether his sentence is excessive; and
- (9) whether the cumulative effect of all these errors deprived him of a fair trial.

We find reversal is not required and affirm the Judgment of the District Court. Modification of Bradley's sentence, however, is required for the reasons discussed below.

**1.**

The district court did not abuse its discretion in denying Bradley's motion for continuance because he failed to comply with 12 O.S.2011, § 668. *See Marshall v. State*, 2010 OK CR 8, ¶ 44, 232 P.3d 467, 478.

**2.**

The district court also did not abuse its discretion in denying Bradley's motion for new trial based on newly discovered evidence because the new evidence was neither material nor did its omission affect the outcome of trial. *See Underwood v. State*, 2011 OK CR 12, ¶ 93, 252 P.3d 221, 254-255; *Spence v. State*, 2008 OK CR 4, ¶ 8, 177 P.3d 582,584.

3.

Bradley's ineffective assistance of counsel claim may be disposed of based on lack of prejudice.<sup>1</sup> See *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206, *cert. denied*, \_\_\_U.S.\_\_\_, 134 S.Ct. 172, 187 L.Ed.2d 119 (2013); *Head v. State*, 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148. Bradley has not shown a reasonable probability that the result of his trial would have been different but for the actions of defense counsel. This claim is denied.

4.

We reject Bradley's claim that the defense was prejudiced by the State's failure to comply with discovery. The "Request to Staff" form that Bradley claims should have been produced does not fall within the items of required disclosure under 22 O.S.2011, § 2002. The request form initiated the chain of events that resulted in the sheriff searching Bradley and finding drugs on his person. Bradley does not challenge the validity of the search because as an inmate he had no reasonable expectation of privacy. The reason behind the sheriff searching Bradley was a collateral issue. This claim is denied.

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<sup>1</sup> Bradley argues his attorneys failed to investigate and present a defense. Specifically, he claims defense counsel failed to secure and preserve a statement from Garet White whose testimony, he claims, was essential to the defense.

5.

After reviewing Bradley's claim that he was prejudiced by comments and questions concerning his invocation of his right to remain silent, we find no plain error. *See Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. The challenged comment in opening statement did not unequivocally call attention to Bradley's failure to deny guilt and invocation of his Fifth Amendment right. *See Mahorney v. State*, 1983 OK CR 71, ¶ 12, 664 P.2d 1042, 1046. And equally important, the jury was instructed that the prosecutor's statements were not evidence. Nor was there any comment about Bradley invoking his right to remain silent during the prosecutor's questioning of the sheriff because the court interrupted the exchange before the sheriff could fully answer. There was no error here.

6.

Bradley's claim that prosecutorial misconduct denied him a fair trial is without merit. The alleged instances of misconduct were not objected to and are reviewed for plain error only. *See Hancock v. State*, 2007 OK CR 9, ¶ 101, 155 P.3d 796, 820. When the challenged comments of the prosecutor are read in context, considering the corresponding arguments of defense counsel and the strength of the evidence, there is nothing in the challenged comments, individually or cumulatively, that deprived Bradley of a fair trial. *See Harmon v. State*, 2011 OK CR 6, ¶ 80, 248 P.3d 918, 943. This claim is denied.

7.

The State sought to enhance Bradley's sentence based on two prior felony convictions, namely one for aggravated assault and battery (CF-2010-232) and one for maintaining a dwelling for keeping/selling controlled dangerous substances (CF-2011-4). The prosecutor admitted Judgment and Sentence documents reflecting these prior convictions and Bradley stipulated to the authenticity of the exhibits. (State's Exhibits 3 and 4) In addition to the felony conviction for aggravated assault and battery, State's Exhibit 3 listed three misdemeanor convictions.<sup>2</sup> In addition to the felony conviction for maintaining a dwelling, State's Exhibit 4 listed three other felony convictions and one misdemeanor conviction.<sup>3</sup> Bradley argues on appeal that he was prejudiced by the jury's exposure to the additional transactional convictions listed on the Judgment and Sentence documents used for sentence enhancement.

Bradley forfeited review of this claim by failing to object at trial; review is for plain error only. *See Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923 (plain error is error that counsel failed to preserve through a timely trial objection, but upon appellate review, is clear from the record, affected the defendant's substantial rights and requires correction to avoid a miscarriage of justice).

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<sup>2</sup> The misdemeanors were for assault and battery, petit larceny and breach of the peace.

<sup>3</sup> The felony convictions were for possession of methamphetamine, possession of marijuana and tampering with a security camera. The misdemeanor was for possession of drug paraphernalia.

It was error to admit State's Exhibits 3 and 4 showing more than one conviction arising out of a single transaction. *See Miller v. State*, 1984 OK CR 33, ¶ 9, 675 P.2d 453, 455 (holding when felony offenses arise out of the same transaction the State is limited to informing the jury of only "one" of the "convictions arising from the single event.") We reject the State's contention that Bradley suffered no prejudice from this error. The felonies arising from the same transaction were for three serious offenses. Although the prosecutor made no mention of the additional convictions during closing argument, he argued that Bradley refused to follow the rules after being given numerous chances. The argument indirectly called attention to Bradley's other convictions as the prosecutor urged the jury to render a "stiff" sentence based on Bradley's record reflected in the exhibits. The prosecutor also implored the jury to give little, if any, consideration to the small amount of drugs involved in this case and instead focus on Bradley's record. It flies in the face of common sense to conclude the jury's sentence was not adversely influenced by the erroneous exposure to information about seven additional convictions that arose out of the same transactions as the two felonies used for sentence enhancement. Modification of Bradley's sentence from thirty to twenty years because of the error is appropriate.

**8.**

Because sentence modification is required for the plain error stemming from the jury's consideration of transactional convictions in State's Exhibits 3

and 4, no further relief is required based on an excessive sentence claim or a cumulative error analysis.

### DECISION

The Judgment of the district court is **AFFIRMED**. Bradley's sentence is **MODIFIED** to twenty years imprisonment. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF GARVIN COUNTY  
THE HONORABLE GREG DIXON, DISTRICT JUDGE

#### APPEARANCES AT TRIAL

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**OPINION BY: JOHNSON, J.**  
**SMITH, P.J.: Concur**  
**LUMPKIN, V.P.J.: Concur in Part and Dissents in Part**  
**LEWIS, J.: Concur**

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**LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART:**

I concur in affirming the judgment but dissent to the modification of the sentence. Appellant has not shown the error affected his substantial rights and seriously affected the fairness of the judicial proceedings as he must do to warrant relief under a plain error review. See *Simpson v. State*, 1994 OK CR 40, ¶¶ 10, 26, 30, 876 P.2d 690, 694, 699, 701 (under the test for plain error appellant must show an actual error, that is plain or obvious, affecting his substantial rights, and which seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice). See also *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395; *Malone v. State*, 2013 OK CR 1, ¶ 41, 293 P.3d 198, 211-212.

The jury was properly instructed that only two prior convictions could be used to enhance Appellant's sentence. The jury was also properly instructed that with two prior felony convictions, Appellant faced a minimum of 20 years in prison. The 30 years he received was only 10 years above that minimum. Appellant is a habitual felon. His 30 year sentence is not excessive. There is no indication in the record that the jury would have sentenced him to the minimum without the extra information on the additional felonies. This case is distinguishable from *Miller v. State*, 1984 OK CR 33, ¶ 9, 675 P.2d 453, 455-56 and any error is harmless as it did not affect Appellant's substantial rights. Therefore, I find no plain error and no reason to modify Appellant's sentence.