IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES BREWER,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. M-2019-664**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP 24 2020

JOHN D. HADDEN
CLERK

SUMMARY OPINION

LUMPKIN, JUDGE:

Appellant James Brewer appeals his Judgment and Sentence from the District Court of Tulsa County, Case No. CM-2018-4708, for the misdemeanor offenses of Illegal Entry with Unlawful Intent (21 O.S.2011, § 1438) (Count One), Outraging Public Decency (21 O.S.2011, § 22) (Count Two), and Assault on a Police Officer (21 O.S.Supp.2015, § 694(A)) (Count Three). Appellant represented himself at trial with standby counsel. The Honorable April Seibert, Special Judge, presided over Appellant's jury trial and sentenced him, in accordance with the jury's verdicts, to one (1) year in jail and a $250.00 fine for each of Counts One and Two and six (6) months in jail and a $250.00 fine for Count Three. Counts One and Two were

ordered to be served concurrently, but consecutive to Count Three, with no credit for time served. On September 5, 2019, in Case No. PC-2019-593, we granted an appeal out of time.

FACTS

On the afternoon of August 19, 2017, Amanda Bledsaw received a call from one of her children who reported that someone was trying to break into their house. Bledsaw called police and returned to her home. Bledsaw cooperated with police at the scene and relayed what her children told her, but neither she nor her children testified at trial. Rather, the State relied on three of the responding police officers to make its case.

Because the call went out as a first-degree burglary in progress of an occupied dwelling, police response was heavy. At the time police arrived, the suspect was no longer at the scene. Officer Tyler Turnbough testified that information developed at the scene led officers to investigate two window-unit air conditioners located on the back of the home. Accordion-type spacers, used to weather seal around the units, had been pushed in "allow[ing] access to the interior of the house slightly." Turnbough testified the condition of the spacers was "consistent with what [he] was told."

Concerning the suspect, Turnbough testified that "Ms. Bledsaw was familiar with him, knew him to be the neighbor and knew him by name." Officers were also told that Appellant was currently inside the neighboring home.

Officer Melisa Townsend was one of three officers who entered the home to arrest Appellant for first-degree burglary. They obtained consent to enter the home from Appellant's father who also resided at the home. Townsend testified that when officers entered the home Appellant was nude, was prone on the floor with his brother sitting on top of him physically restraining him. Appellant struggled as he was placed in handcuffs. After Appellant's brother was allowed to partially clothe him, Appellant kicked at Townsend and then tried to wrap his leg around her neck. (Tr. 199, 203)

ANALYSIS

In his opening brief, Appellant, represented by counsel, raised four propositions of error. In his first proposition of error, Appellant contends the trial court erred when it refused his request for credit toward his sentences for time served in pre-trial confinement. Usually, whether to give credit for time served is within the discretion of the trial court. *See Shepard v. State*, 1988 OK CR 97, ¶ 21, 756 P.2d 597,

602 ("While it is common practice for the trial judge to give credit for time served, there is no authority mandating such credit or making it abuse of discretion to fail to give it."). However, in *Holloway v State*, 2008 OK CR 14, ¶¶ 8-11, 182 P.3d 845, 847-48, this Court concluded that withholding credit for time served for a defendant who received the maximum punishment violated the Equal Protection Clause where the defendant was financially unable to make bond. Here, the jury did return maximum terms of incarceration for each offense.

Appellant's counsel claims that Appellant was originally charged with a felony offense, which was dismissed and refiled with the misdemeanor offenses at issue. Counsel further claims that while facing the felony charge, Appellant remained in jail because he could not afford bond. Counsel has done nothing, however, to establish that any pre-trial incarceration was the result of poverty.

Indigency is not static. *See* Rule 1.14(A)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020) (indigency is "subject to change" and "shall be continually subject to review"). That Appellant was on May 16, 2019, found indigent for purposes of appeal does not mean he was indigent at the time of his arrest (and detention) some 21 months earlier. This is all the more

true given the fact that Appellant posted bond during pre-trial proceedings. *See Smith v. State*, 2007 OK CR 6, ¶ 6, 155 P.3d 793, 795 (while not dispositive, "the posting of bond is a very significant factor in determining a defendant's indigent status"). Under these circumstances, we are unwilling to simply presume that any pre-trial incarceration Appellant may have experienced as a result of the felony filing was attributable to indigence. Proposition One is denied.

In his second proposition of error, Appellant claims the prosecutor erred in the following ways: 1) by eliciting irrelevant testimony from Appellant concerning Appellant's attitude toward the trial process; 2) by making comments on same during closing argument; and 3) by telling the jury it would not be possible to have testimony "read back" to them during deliberations.

"We evaluate alleged prosecutorial misconduct within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel." *Sanders v. State*, 2015 OK CR 11, ¶ 21, 358 P.3d 280, 286. "Relief is only granted where the prosecutor's flagrant misconduct so infected the defendant's trial that it was rendered fundamentally unfair."

Tafolla v. State, 2019 OK CR 15, ¶ 28, 446 P.3d 1248, 1260.

We have reviewed the challenged conduct and find no error. To the extent Appellant was testifying for his own amusement, or the amusement of others, he may have been motivated to provide answers he believed were comical rather than truthful. Thus, it was relevant to the jury's duty to assess Appellant's credibility and something the prosecutor could legitimately comment on during closing argument. While the prosecutor's comment concerning the representation of testimony during deliberations may have been technically imprecise, Appellant has demonstrated no prejudice. Proposition Two is denied.

In Proposition Three, Appellant claims the evidence was insufficient to support the conviction for illegal entry with unlawful intent. Appellant's jury received OUJI-CR 5-16 which required the prosecution to prove: 1) entering; 2) a building; 3) of another; 4) with the intent to commit (among other possibilities) the destruction of personal property of another.

The test to be applied in determining the sufficiency of the evidence is whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the

essential elements of the crime charged beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04.

Appellant's counsel argues there was insufficient evidence to prove he committed the crime. As to identity, Officer Turnbough was asked the following during direct examination:

> Q. Based on your interviews and your investigation, did you develop a suspect?
> A. We did.
> Q. How did you do that?
> A. The – the mother, Ms. Bledsaw, was familiar with him, knew him to be the neighbor and knew him by name.

The children, who purportedly witnessed the alleged attempted break in did not testify. Nor did their mother, Ms. Bledsaw, who assumedly repeated what she was told by her children to police. "There is a vast difference between supposition and fact. The mere opportunity to commit a crime alone is not evidence of its commission." *Frazier v. State*, 1971 OK CR 301, ¶ 10, 488 P.2d 613, 616. Proof as to who tampered with the air conditioning units is missing from this record. Thus, the evidence was insufficient to convict Appellant of this count. Appellant's conviction for Count One is reversed and remanded with instructions to dismiss.

Appellant next presents a claim of cumulative error. As we have found only that the evidence was insufficient to support Count One, there can be no accumulation of errors. Proposition Four is denied.

Appellant filed a supplemental pro se brief in accordance with Rule 3.4(E), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020), raising 13 propositions of error. In pro se Propositions One, Six, and Seven, Appellant claims his arrest was unlawful. Prior to trial, Appellant filed a motion to quash. As he does on appeal, Appellant contended that his warrantless arrest was not supported by probable cause and was otherwise unlawful because officers did not inform him as to the reason for his arrest as required by 22 O.S.2011, § 199. At the conclusion of the evidence, and after hearing the testimony of arresting officers, the trial court denied the motion.

"The trial court's decision on a motion to quash is reviewed for an abuse of discretion." *State v. Farthing*, 2014 OK CR 4, ¶ 4, 328 P.3d 1208, 1209. 22 O.S.2011, § 196(A)(4) permits an officer to make a warrantless arrest "[o]n a charge, made upon reasonable cause, of the commission of a felony by the party arrested." Here, the officers found evidence in the form of the air conditioning seals to corroborate

the charge Bledsaw made against Appellant. The arrest was not unlawful. *See Stout v. State*, 1984 OK CR 94, ¶ 13, 693 P.2d 617, 622 ("If a police officer arrests a person without a warrant, the arrest is not unlawful if the officer, upon his own knowledge or upon facts communicated to him by others, has reasonable cause to believe the person has committed a felony.").

Compliance with Section 199 was not required under the circumstance because the authority of the officers would have been obvious to Appellant at the time of his arrest. *Heinzman v.* State, 1929 OK CR 548, 283 P. 264, 265. The trial court did not abuse its discretion when it denied Appellant's motion to quash. Pro se Propositions One, Six, and Seven are denied.

In pro se Propositions Two and Three, Appellant takes issue with the charging language of the information with respect to illegal entry (Count One) and assault on a police officer (Count Three), respectively. The challenge as to Count One is moot. Prior to trial Appellant demurred to the information. The trial court denied the demurrer during a hearing held January 28, 2019. We review for an abuse of discretion. *State v. Holloway*, 1973 OK CR 440, ¶ 9, 516 P.2d 1346, 1348.

An Information is sufficient if it gives the defendant notice of what he is being charged with. *Slaughter v. State*, 1997 OK CR 78, ¶ 62 n.8, 950 P.2d 839, 857 n.8. Specifically, this Court will determine "whether the Information gives the defendant notice of the charges against him and apprises him of what he must defend against at trial." *Parker v. State*, 1996 OK CR 19, ¶ 24, 917 P.2d 980, 986. This determination will be made on a case-by-case basis by looking "to the 'four corners' of the Information together with all material that was made available to the defendant at preliminary hearing or through discovery to determine whether the defendant received notice to satisfy due process requirements." *Id.*

We have examined the "four corners" of the Information with regard to Count Three and conclude that the Information was sufficient to place Appellant on notice of what he must defend against and that no due process violation occurred. Pro se Proposition Three is denied.

In pro se Proposition Four, Appellant claims it was error for the trial court to limit his cross-examination of Officer Townsend. The extent and scope of cross-examination is left to the discretion of the trial court. This Court will not disturb the trial court's decision

absent clear abuse resulting in manifest prejudice to the defendant. *Castro v. State*, 1992 OK CR 80, ¶ 26, 844 P.2d 159, 170. The trial court did not abuse its discretion when it acted to prevent Appellant from asking argumentative and repetitive questions. Appellant has not demonstrated manifest prejudice. Pro se Proposition Four is denied.

In pro se Proposition Five, Appellant contends the trial court erred by allowing testimony in the form of hearsay. As the challenged testimony was offered in support of Count One, we find this proposition to be moot.

In Pro se Propositions Eight, Ten, and Eleven, Appellant challenges the sufficiency of the evidence to illegal entry (Count One), outraging public decency (Count Two), and assault upon a police officer (Count Three), respectively. The sufficiency of the evidence as to Count One was addressed in Proposition Three of Appellant's opening brief as were the standards governing such claims.

The jury was instructed that conviction for outraging public decency required the prosecution to prove: 1) willfully; 2) wrongfully; 3) commit an act ... which openly outrages public decency; and 4) is injurious to public morals. Appellant's father testified that Appellant

was naked in his neighbor's front yard. Appellant testified that he was naked in front of Bledsaw and her boyfriend and that the boyfriend struck him in the head. Viewed in the light most favorable to the State, this testimony is sufficient to prove the crime charged beyond a reasonable doubt.

The jury was instructed that conviction for assault on a police officer required the prosecution to prove: 1) an assault; 2) upon a police officer; 3) known by the defendant to be a police officer; 4) without justifiable or excusable cause; and 5) committed while the police officer was in the performance of her duties as a police officer.

We find the testimony of officers Townsend, Turnbough, and Stephens sufficient to prove the crime charged beyond a reasonable doubt. Pro se Proposition Eight is moot. Pro se Propositions Ten, and Eleven are denied.

In pro se Proposition Nine, Appellant claims the trial court erred by denying his request for a directed verdict as to Count Two, outraging public decency. Appellant, by putting on evidence after the State closed its case, waived the demurrer. *Smith v. State*, 1973 OK CR 243, ¶ 25, 509 P.2d 1391, 1397. Pro se Proposition Nine is denied.

In pro se Proposition Twelve, Appellant claims that the definition of "entry" contained in Instruction No. 17, was erroneous. As Count One has been reversed, this proposition is moot.

In his final pro se proposition of error, Appellant claims it was error for the prosecutor to comment on his silence. The voir dire comment Appellant references was not improper. The comment simply told the jurors that if Appellant chose not to testify that fact could not work against him. Appellant did testify and during that testimony he objected several times to questions he believed were outside the scope of direct. Some of these objections were sustained and some were not. To the extent Appellant is complaining that his aversion to answering certain questions equates to silence, the argument has no force. *See Charm v. State*, 1996 OK CR 40, ¶ 50, 924 P.2d 754, 769 ("Cross examination may exceed the scope of direct in order to effect impeachment of a witness's accuracy, memory, veracity or credibility."). Pro se Proposition Thirteen is denied.

DECISION

The Judgment and Sentence in Count One is **REVERSED and REMANDED with instructions to dismiss.** The Judgment and

Sentence in Counts Two and Three are **AFFIRMED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2020), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE APRIL SEIBERT,
SPECIAL JUDGE

APPEARANCES AT TRIAL	**APPEARANCES ON APPEAL**
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OPINION BY: LUMPKIN, J.
LEWIS, P.J.: Concur
KUEHN, V.P.J.: Concur
HUDSON, J.: Concur
ROWLAND, J.: Concur