

MAR - 8 2013

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

MICHAEL DON BRYANT,)
)
 Appellant,)
 v.) Case No. F-2011-1054
) Not for Publication
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

SUMMARY OPINION

SMITH, VICE PRESIDING JUDGE:

Michael Don Bryant, Appellant, was tried by jury and convicted of Grand Larceny, under 21 O.S.2001, §§ 1701 & 1705 (Count I), in the District Court of Logan County, Case No. CF-2010-18.¹ In accord with the jury verdict, the Honorable Phillip Corley, District Judge, sentenced Bryant to imprisonment for 1 year and a fine of \$4,287.61.² Bryant is before this Court on direct appeal.

Bryant raises the following propositions of error:

- I. PROSECUTORIAL MISCONDUCT CONSTITUTED FUNDAMENTAL ERROR AND DEPRIVED MR. BRYANT OF A FAIR TRIAL.
- II. IMPROPER OPINION EVIDENCE BY A STATE'S WITNESS DEPRIVED MR. BRYANT OF A FAIR TRIAL.
- III. THIS COURT SHOULD REMAND MR. BRYANT'S CASE TO THE DISTRICT COURT OF LOGAN COUNTY WITH INSTRUCTIONS TO CORRECT THE AMENDED JUDGMENT AND SENTENCE BY AN ORDER *NUNC PRO TUNC*.

¹ The original Information in this case charged only one count of embezzlement, under 21 O.S.Supp.2004, § 1451(A)(5) & (B)(3). In an Amended Information, grand larceny was charged as an alternative to embezzlement. The Second Amended Information, filed on March 31, 2011, charged only grand larceny, and this was the only crime upon which Bryant's jury was instructed at trial. Nevertheless, the Judgment and Sentence in this case incorrectly states that Bryant was convicted of embezzlement. This error is addressed *infra* in Proposition III.

² At sentencing, the trial court ordered that Bryant be given credit for time served. This order, however, does not appear in the Judgment and Sentence document. This too will be addressed *infra* in Proposition III.

In Proposition I, Bryant asserts that during the State's closing arguments, the prosecutor made two arguments that constitute prosecutorial misconduct. We evaluate such claims to determine whether the challenged actions so infected the defendant's trial that it was rendered fundamentally unfair, such that the jury's verdict cannot be relied upon. See *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872, 40 L.Ed.2d 431 (1974); *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986). Bryant concedes, however, that his counsel did not object to either of these prosecutorial arguments at trial. Thus we review only for plain error.

Bryant first challenges an argument made during the State's initial closing argument, which referred to a "smoke and mirrors defense." He also challenges an argument made during the State's final closing argument, which referred to one of defense counsel's arguments as "ridiculous" and again cautioned the jury not to "fall for the smoke and mirrors" tactics of defense counsel.

Bryant's trial was hard fought over details such as the fact that the various clocks—the one on the safe, the one on the video surveillance system, and actual time—did not match up, even though overwhelming circumstantial evidence established that Bryant removed the McDonald's deposits from the restaurant safe during the seven minutes that the surveillance camera in the office was turned off. (Bryant was standing directly in front of the DVR unit—where this camera could have been turned off, by removing the cable associated with this camera—at the time the camera was turned off. And Tessa Casey testified that Bryant was "fascinated" with this surveillance system and that she had caught

him multiple times “messing with” the cables in the back. The prosecutor was essentially arguing that the jury should not “fall for” defense counsel’s arguments suggesting that the evidence did not support a conviction. This Court rejects Bryant’s claim that the challenged arguments constituted prosecutorial misconduct. They certainly did not render Bryant’s trial fundamentally unfair, nor has Bryant established plain error. Proposition I is rejected accordingly.

In Proposition II, Bryant challenges certain trial testimony from Officer Jason Hamilton. Bryant acknowledges that since defense counsel failed to object to any of this testimony at trial, this Court will review only for plain error. *See, e.g., Harmon v. State*, 2011 OK CR 6, ¶ 48, 248 P.3d 918, 936, *cert. denied*, ___ U.S. ___, 132 S.Ct. 338, 181 L.Ed.2d 211 (2011).

During his testimony Officer Hamilton described his investigation regarding the missing McDonald’s deposits, including his observations regarding the surveillance system at the Guthrie McDonald’s. Hamilton testified that when he looked at the cables connected to the back of the DVR unit, “[i]t was very easy to see which one was askew, which one looked different” and that it was “very easy to put my hand back there, pull the wire out from the inlet, and the screen just went totally black.” Hamilton later testified that the cable associated with the office video camera “appeared as though it was separated. It was prepared for it to be easy to take out. It was already prepared for it to be taken out, just real easy.”³ This Court finds that Hamilton’s lay testimony in this regard was not

³ Hamilton’s testimony that the cable seemed “prepared for it to be easy to take out” seems somewhat strange, since the McDonald’s theft had already occurred—and the cable had already been disconnected and re-connected—but the point of his testimony appeared to be that someone

inappropriate. It certainly did not constitute plain error. Proposition II is rejected accordingly

In Proposition III, Bryant argues that even though the trial court ordered, at his November 18, 2011 sentencing hearing, that he be given “credit for time served,” this order was improperly omitted from his Judgment and Sentence. He asks that his case be remanded and that the district court be ordered to correct the Judgment and Sentence document, through an order *nunc pro tunc*, to accurately reflect the court’s order that he be given credit for time served. The State acknowledges that the district court ordered that Bryant was to be given credit for time served. Strangely, however, both parties fail to recognize that Bryant’s Judgment and Sentence contains a much more fundamental and glaring error: it incorrectly states the crime of which he was convicted. The Judgment and Sentence states that he was convicted of “EMBEZZLEMENT,” under 21 O.S., § 1451, when Bryant was actually convicted of grand larceny, under 21 O.S.2001, §§ 1701 & 1705.

Hence this case should be remanded to the district court to (a) correct the Judgment and Sentence through an order *nunc pro tunc*, accurately reflecting the crime of which Bryant was convicted and (b) to give Bryant credit for time served. See *Mathis v. State*, 2012 OK CR 1, ¶ 34, 271 P.3d 67, 79.

had already tampered with the cable associated with the office camera and that it would not be hard for someone to identify this specific cable, disconnect it, and then reconnect it, in order to turn off the office video camera for a short amount of time.

Decision

Bryant's **CONVICTION** and **SENTENCE** on Count I are hereby **AFFIRMED**. This case is **REMANDED**, however, for correction of the Judgment and Sentence document, through an order *nunc pro tunc* by the district court, to accurately reflect that in Count I Bryant was convicted of Grand Larceny, under 21 O.S.2001, §§ 1701 & 1705, and that the district court ordered that Bryant be given credit for time served. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF LOGAN COUNTY
THE HONORABLE PHILLIP CORLEY, DISTRICT JUDGE

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OPINION BY: SMITH, V.P.J.

LEWIS, P.J.: CONCUR IN RESULTS
LUMPKIN, J.: CONCUR IN RESULTS
C. JOHNSON, J.: CONCUR
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