

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

CLAUDE M. BYRD, III, )  
 )  
 Appellant, )  
 v. )  
 STATE OF OKLAHOMA )  
 )  
 Appellee. )

**NOT FOR PUBLICATION**

Case No. F-2013-327

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

**SUMMARY OPINION**

APR 10 2014

**LUMPKIN, JUDGE:**

MICHAEL S. RICHIE  
CLERK

Appellant Claude M. Byrd, II, was convicted in a non-jury trial of Conspiracy to Commit Robbery with Firearm (Count 1) (21 O.S.2011, § 421); Robbery with a Firearm (Counts 2, 3, & 4) (21 O.S.2011, § 801) and Kidnapping (Counts 5-10) (21 O.S.2011, § 741), Case No. CF-2011-450 in the District Court of Comanche County.<sup>1</sup> The trial court sentenced Appellant to imprisonment for five (5) years in Count I, fifteen (15) years with all but the first ten (10) years suspended in Counts 2, 3, & 4 and ten (10) years in each of Counts 5 – 10, all sentences to run concurrently. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of his appeal:

- I. The State failed to present sufficient evidence to support convictions for First Degree Robbery of Bruton and Sanders, and six convictions for Kidnapping.

---

<sup>1</sup> Appellant will be required to serve eighty-five percent (85%) of his sentences for Robbery with a Firearm (Counts 2, 3, & 4). 21 O.S. 2011, § 13.1.

- II. Convictions and sentences for both Robbery with a Firearm in Counts 2-4 and Kidnapping in Counts 7, 9, & 10 violated Appellant's right to be free from multiple punishment under 21 O.S. § 11.
- III. Defense counsel's ineffective assistance prejudiced Appellant.
- IV. The trial court abused its discretion by admitting irrelevant evidence, violating Appellant's rights to due process and a fair trial.
- V. During sentencing, the trial court committed, what amounts to instructional error, by misapplying the law to the facts of the case, thereby depriving Appellant of a fair trial.
- VI. The cumulative effect of all the errors deprived Appellant of a fair trial.

After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that under the law and evidence, Appellant's conviction in Count 9 is reversed.

In Proposition I, we have reviewed Appellant's challenges to the sufficiency of the evidence to support his convictions in Count 2 (the robbery of Nicole Bruton), Count 4 (the robbery of Corey Sanders) and six (6) counts of kidnapping, in the light most favorable to the prosecution, to determine whether any rational trier of fact could have found the essential elements of the crimes charged beyond a reasonable doubt. *Rutan v. State*, 2009 OK CR 3, ¶ 49, 202 P.3d 839, 849.

All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals and are equally culpable with other principals. *Conover v. State*, 1997 OK CR 6, ¶ 18, 933 P.2d 904, 910-911. See also 21 O.S.2011, § 172. Whether Appellant was in the apartment at the time co-defendant Daly took the personal property of Ms. Bruton and Mr. Sanders in the back bedroom, or whether Appellant arrived seconds later, his participation in the remainder of the acts necessary to carry out the robbery rendered him culpable in the robbery of Ms. Bruton and Mr. Sanders. That participation, which included tying up another person in the apartment and holding the six occupants at gunpoint, was sufficient to support convictions for kidnapping.

Additionally, “[w]hen a conspiracy is entered to do an unlawful act, responsibility is not limited to the accomplishment of the common design. Rather, ‘it extends to and includes collateral acts incident to and growing out of the common design.’ *Johnson v. State*, 1986 OK CR 134, ¶ 8, 725 P.2d 1270, 1273. Here, Appellant and his co-defendants entered into an agreement to rob Mr. Gonzalez. However, in carrying out that plan they encountered several other people in the apartment whom they found it necessary to rob and confine against their will. Appellant was criminally responsible for the acts of his co-conspirators in furtherance of their conspiracy to rob Mr. Gonzalez. *Hatch v. State*, 1983 OK CR 47, ¶ 19, 662 P.2d 1377, 1382.

In Proposition II, Appellant contends that his convictions for both robbery with a firearm (Counts 2-4) and kidnapping (Count 5-10) violate the State statutory prohibition against double punishment. 21 O.S.2011, § 11(A). Appellant committed numerous offenses against six separate people. The offenses in Counts 5, 6, and 8 were committed against different individual victims than in the other challenged counts. Accordingly, we find that the offenses were separate and distinct offenses which do not violate § 11(A). *Hoffman v. State*, 1980 OK CR 35, ¶ 8, 611 P.2d 267, 269-70; *Jennings v. State*, 1973 OK CR 74, ¶ 15, 506 P.2d 931, 935; *Wilson v. State*, 1973 OK CR 43, ¶ 10, 506 P.2d 604, 607.

We further find that Appellant's convictions for Counts 2, 4, 7, and 10 do not violate § 11(A) as they did not arise out of one act. *Logsdon v. State*, 2010 OK CR 7, ¶ 17, 231 P.3d 1156, 1164-65; *Watts v. State*, 2008 OK CR 27, ¶ 16, 194 P.3d 133, 139; *Davis v. State*, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126-27. The offense of robbery with a firearm committed toward Ms. Bruton in Count 2 was complete when Appellant's co-conspirator took the victim's \$10.00 and carried it away for the slightest distance. Inst. No. 4-146, OUJI-CR(2d) (Supp.2013); *Cunningham v. District Ct. of Tulsa Co.*, 1967 OK CR 183, ¶ 24, 432 P.2d 992, 997; *Brinkley v. State*, 1936 OK CR 117, 61 P.2d 1023, 1025. The offense of kidnapping Ms. Bruton as alleged in Count 7 was committed when Appellant's co-conspirator seized the same victim with the intent to confine her inside the apartment. See *Ziegler v. State*, 1980 OK CR 23, ¶ 10, 610 P.2d 251, 254.

We reach the same conclusion as to Counts 4 and 10. The offense of robbery with a firearm of Mr. Sanders as alleged in Count 4 was complete when Appellant's co-conspirator took the victim's \$100.00 and carried it away for the slightest distance. Thereafter, the offense of kidnapping Mr. Sanders as alleged in Count 10 was committed when Appellant's co-conspirators seized the same victim with the intent to confine him inside the apartment. *Id.*

However, we find that Appellant's conviction for the offense of kidnapping Mr. Gonzalez in Count 9 was not a separate and distinct offense from his conviction for robbery with a firearm of Mr. Gonzalez as alleged in Count 3. The State charged Appellant with robbery with a firearm in the taking of the victim's "cash and personal property" in Count 3. Although Appellant took and carried away Mr. Gonzalez's cash very early in the criminal episode, the evidence at trial revealed that Appellant did not complete the taking and carrying away of the victim's personal property before he seized the victim and confined him in the apartment. See *Ziegler*, 1980 OK CR 23, ¶ 10, 610 P.2d at 254. Accordingly, we find that the two offenses violate § 11(A) as they arose from the same act. *Davis*, 1999 OK CR 48, ¶ 13, 993 P.2d at 126-27. Appellant's conviction in Count 9 is reversed.

In Proposition III, we have thoroughly reviewed Appellant's numerous claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984) (counsel is presumed competent to provide the guiding hand that the accused needed, and therefore the burden is on the accused to

demonstrate both a deficient performance and resulting prejudice). *Eizember v. State*, 2007 OK CR 29, ¶ 151-152, 164 P.3d 208, 244. We find Appellant has not shown either deficient performance or prejudice sufficient to warrant relief. Further, we have reviewed Appellant's *Application for Evidentiary Hearing on Sixth Amendment Grounds* pursuant to Rule 3.11(B)(3)(6), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2013) and found he has not shown by clear and convincing evidence a strong possibility that defense counsel was ineffective for failing to fully investigate potential witnesses and for failing to act as an advocate at sentencing. *See Grissom v. State*, 2011 OK CR 3, ¶ 80, 253 P.3d 969, 995.

In Proposition IV, we find no abuse of the trial court's discretion in admitting evidence of co-defendant McLaren's shooting of four people in the apartment as *res gestae*. *See State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194 (an abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented). The evidence merely helped to recreate the circumstances of the charged crimes. *See McElmurry v. State*, 2002 OK CR 40, ¶ 63, 60 P.3d 4, 21-22. Further, the record reflects that in this non-jury trial, the trial judge did not consider co-defendant McLaren's shooting of those in the apartment in determining Appellant's guilt.

In Proposition V, we review only for plain error. To be entitled to relief under the plain error doctrine, Appellant must prove: 1) the existence of an

actual error (i.e., deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923; 20 O.S.2001, § 3001.1. If these elements are met, this Court will correct plain error only if the error “seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings” or otherwise represents a “miscarriage of justice.” *Id.* The trial court appropriately applied the law of conspiracy in determining Appellant’s guilt. *See Hatch*, 1983 OK CR 47, ¶ 19, 662 P.2d at 1382. Finding no error, we find no plain error.

In Proposition VI, as discussed above, we found the law and the evidence necessitate reversing the conviction in Count 9. No other alleged errors, when considered singly and cumulatively, warrant relief. *See Williams v. State*, 2001 OK CR 9, ¶ 127, 22 P.3d 702, 732 (when there have been numerous irregularities during the course of a trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors is to deny the defendant a fair trial).

Accordingly, this appeal is denied.

### **DECISION**

The Judgment and Sentence in **Count 9** is **REVERSED**. All other Judgments and Sentences are **AFFIRMED**. The Application for Evidentiary Hearing on Sixth Amendment Grounds is **DENIED**. 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 the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY  
THE HONORABLE KEITH B. AYCOCK, DISTRICT JUDGE

**APPEARANCES AT TRIAL**

DON HERRING  
3000 CENTER STE. 208  
3000 UNITED FOUNDERS BLDG.  
OKLAHOMA CITY, OK 73112  
COUNSEL FOR DEFENDANT

FRED C. SMITH  
DISTRICT ATTORNEY  
EDDIE VALDEZ  
ASSISTANT DISTRICT ATTORNEY  
COMANCHE COUNTY COURTHOUSE  
315 S.W. 5<sup>TH</sup> ST.  
LAWTON, OK 73501  
COUNSEL FOR THE STATE

**APPEARANCES ON APPEAL**

RAYMOND DENECKE  
P.O. BOX 926  
NORMAN, OK 73070  
COUNSEL FOR APPELLANT

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA  
THEODORE M. PEEPER  
ASSISTANT ATTORNEY GENERAL  
313 N.E. 21<sup>ST</sup> ST.  
OKLAHOMA CITY, OK 73105  
COUNSEL FOR THE STATE

**OPINION BY: LUMPKIN, J.**  
LEWIS, P.J.: CONCUR  
SMITH, V.P.J.: CONCUR IN RESULT  
C. JOHNSON, J.: CONCUR  
A. JOHNSON, J.: CONCUR

RE