

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

RICKY CARLOS COLBERT,)
)
 Appellant,) NOT FOR PUBLICATION
)
 v.) Case No. F 2011-1043
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAR - 7 2013

SUMMARY OPINION

LEWIS, PRESIDING JUDGE:

MICHAEL S. RICHIE
CLERK

Ricky Carlos Colbert, Appellant, was convicted of assault and battery on a police officer in violation of 21 O.S.2001, § 649, after former conviction of two or more felonies, and larceny of merchandise from a retailer in violation of 21 O.S.2001, § 1731, in the district court of Tulsa County, case number CF-2011-318, before the Honorable Tom C. Gillert, District Judge. The jury assessed sentences of twenty-seven (27) years imprisonment and a \$1,000.00 fine on the assault and battery conviction and 30 days in the county jail and a \$200.00 fine on the larceny conviction. Judge Gillert sentenced accordingly, ordering that the sentences be served concurrently. Appellant perfected an appeal to this Court raising the following propositions of error.

1. Appellant was denied his State and Federal rights to the effective assistance of counsel.

2. The trial court erred by not instructing the jury on a lesser-included offense supported by the evidence.
3. Prejudicial error in the admission of evidence requires reversal of Appellant's convictions.
4. Prosecutorial misconduct infected the proceedings and violated Appellant's State and Federal rights to due process.
5. The judgment and sentence on count one contains material and prejudicial inaccuracies and should be modified.
6. Cumulative error requires reversal of Appellant's convictions and sentences.

After thorough consideration of Colbert's propositions of error and the entire record before us on appeal, including the original record, transcripts, exhibits, and briefs, we have determined that the judgment and sentence of the district court shall be affirmed. The case, however, shall be remanded for an order *nunc pro tunc* to correct the Judgment and Sentence.

In deciding proposition one, we find that, Colbert has not shown that counsel's conduct was "outside the wide range of professionally competent assistance." *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). Counsel was prepared with a valid strategy that he continued to explore even when faced with a video of the crime. Whether it was a valid strategy at the time is the question, not whether, in hindsight, it was a good strategy. *See Welsh v. State*, 2000 OK CR 8, ¶ 58, 2 P.3d 356, 377. This Court cannot say the strategy was not valid, as the video does not clearly show Colbert's face, so a facial identification cannot be made from the video.

Colbert's theory of defense at trial (misidentification) is inconsistent with the defense Colbert now advocates, that he committed a lesser-included offense of resisting arrest. See *Grissom v. State*, 2011 OK CR 3, ¶ 35, 253 P.3d 969, 982. Thus, Counsel was not ineffective in failing to request the lesser-included offense instructions. Moreover, contrary to Colbert's argument, counsel did not concede guilt in this case. Counsel disputed that Colbert was the one that committed the crime, a crime that was clearly committed by someone, just not Colbert. This, too, was a valid strategy.

Colbert's final claim of ineffective assistance is that he was misadvised regarding punishment during plea negotiations. In a motion for an evidentiary hearing, Colbert claims that his attorney told him that the crime had a minimum incarceration requirement of 85% of the sentence; therefore, he turned down the State's plea offer. Instead and still believing that the crime was an 85% crime, Colbert decided to exercise his right to trial.

This case is distinguishable from recent United States Supreme Court cases of *Missouri v. Frye*, 566 U.S. ___, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012) and *Lafler v. Cooper*, 566 U.S. ___, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012). In those cases, counsel either failed to convey an offer to his client within the time limitations (*Frye*), or was mistaken about the legal proof necessary to prove the case at trial (*Lafler*). Colbert never indicated a desire to confess guilt and enter a plea of guilty until, and in hindsight, after he was convicted and received a longer sentence from the jury. Colbert's self serving affidavit is insufficient to

meet his burden for the granting of a hearing pursuant to Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Ch 18, App. (2012); therefore, his motion for an evidentiary hearing is denied.

In deciding proposition two, we find that Colbert did not request instructions on lesser included offenses, thus we review for plain error only. *McHam v. State*, 2005 OK CR 28, ¶ 21, 126 P.3d 662, 670. Here, there is no error, thus no plain error. *See Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.¹ Colbert's defense was that he was not the person identified as the offender, and not that he committed some lesser offense.

In proposition three, we find that there was no contemporaneous objection to the introduction of the video recording of the crime. Colbert, therefore, has waived this issue for review. 12 O.S.2011, § 2104. Counsel, after viewing the video, decided to reject the offer of a continuance and continued his trial strategy. The introduction of this video did not amount to plain error. *See Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d. at 923.

We find, in proposition four, that in order for the remarks of the prosecuting attorney to constitute reversible error they must be flagrant and of such a nature as to be prejudicial to the defendant. *Mitchell v. State*, 2011 OK CR 26, ¶ 133, 270 P.3d 160, 189. We find that none of the State's argument amounted to misconduct as the argument was based on the evidence, and

¹ Plain error requires; "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."

moreover, did not prejudice Colbert. *See Mathis v. State*, 2012 OK CR 1, ¶ 27, 271 P.3d 67, 77.

In proposition five, we find that the Judgment and Sentence of the District Court contains substantial irregularities regarding the crime for which Colbert was convicted. We, therefore, remand this case to the District Court for an order *nunc pro tunc* to correct the error which shows that Colbert was convicted of assault and battery with a dangerous weapon, when in fact he was convicted of assault and battery on a police officer.

We find, in proposition six, that there is no individual error requiring relief; therefore there can be no error to accumulate. *Lott v. State*, 2004 OK CR 27, ¶ 167, 98 P.2d 318, 357.

DECISION

This case shall be **REMANDED** to the district court for the issuance of an order *nunc pro tunc* to correct the Judgment and Sentence to reflect the correct crime for which Colbert was convicted. In all other respects, the Judgment and Sentence of the district court shall be **AFFIRMED**. Colbert's motion for a Rule 3.11 evidentiary hearing is likewise **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
HONORABLE TOM C. GILLERT, DISTRICT JUDGE

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OPINION BY: LEWIS, P.J.

SMITH, V.P.J.: Concur
LUMPKIN, J.: Concur
C. JOHNSON, J.: Concur
A. JOHNSON, J.: Concur