

MAY 28 2015

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA
MICHAEL S. RICHIE
CLERK

EDWIN JERMAINE DANIELS,)
)
 Appellant,) **NOT FOR PUBLICATION**
)
 v.) Case No. F 2014-3
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

SUMMARY OPINION

LEWIS, JUDGE:

Appellant, Edwin Jermaine Daniels, was tried by a jury along with his codefendant, Michael Darnell Hilliard, in Tulsa County district court case number CF-2012-4773, before the Honorable James M. Caputo, District Judge.¹ Daniels was convicted of, the following counts in the information:

Counts 1, 10, 18, 20, and 23: first degree burglary, 21 O.S.2011, § 1431.

Counts 2, 11, 15, 21, and 24: robbery with firearms, 21 O.S.2011, § 801.

Count 19: attempted robbery with a firearm, 21 O.S.2011, § 801.

Counts 3, and 25: assault while masked or disguised, 21 O.S.2011, § 1303.

Counts 12, and 16: kidnapping, 21 O.S.2011, § 741.

¹ Hilliard appeals in Oklahoma Court of Criminal Appeals case number F-2013-1146.

At trial the counts were re-identified in an alphabetic manner A-O, identifying the fifteen separate counts. At the conclusion of the trial, Daniels was sentenced as follows:

- A. Count 1: 15 years and a \$10,000 fine
- B. Count 2: 25 years and a \$10,000 fine
- C. Count 3: 15 years and a \$500 fine
- D. Count 10: 20 years and a \$10,000 fine
- E. Count 11: 35 years and a \$10,000 fine
- F. Count 12: 20 years and a \$10,000 fine
- G. Count 15: 25 years and a \$10,000 fine
- H. Count 16: 20 years and a \$10,000 fine
- I. Count 18: 10 years and a \$10,000 fine
- J. Count 19: 10 years and a \$10,000 fine
- K. Count 20: 20 years and a \$10,000 fine
- L. Count 21: 25 years and a \$10,000 fine
- M. Count 23: 17 years and a \$10,000 fine
- N. Count 24: 35 years and a \$10,000 fine
- O. Count 25: 15 years and a \$500 fine.²

The trial court rendered formal sentencing, and ordered that all of the counts be served consecutively. Daniels perfected an appeal to this Court and raises the following propositions of error.

1. The trial court committed plain error by including, within final jury instruction no. 45, language which diluted the State's burden of proof.
2. The trial court committed plain error by instructing the jury that a \$10,000 fine was mandatory upon conviction in addition to imprisonment.
3. Prosecutorial misconduct deprived Appellant of a fair trial.
4. The trial court committed plain error by failing to give jury instruction no. 9-42, OUJI-CR (2d)(Supp.2000) on evidence - credibility of opinion witnesses.
5. The Appellant was deprived of effective assistance of counsel.

² Daniels will be required to serve 85% of his sentences for the robbery with firearms and first degree burglary counts. See 21 O.S.2011, § 13.1(8 and 12)

After thorough consideration of Daniels' propositions of error and the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we have determined that the judgments and sentences of the district court shall be affirmed.

In reaching our decision, we find, in proposition one that there were no objections to the instruction, thus we review for plain error only. *Barnard v. State*, 2012 OK CR 15, ¶ 34, 290 P.3d 759, 769. Plain errors are those errors which are obvious in the record, and which affect the substantial rights of the defendant; that is to say that the error affects the outcome of the proceeding; moreover, this Court will not grant relief for plain error unless the error seriously affected the fairness, integrity or public reputation of the judicial proceeding or otherwise represents a "miscarriage of justice." *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923; *Simpson v. State*, 1994 OK CR 40, ¶ 30, 876 P.2d 690, 700-01.

Moreover, in viewing the instructions to the jury, this Court will not reverse on instructional error unless the error resulted in a miscarriage of justice or constitutes a substantial violation of a constitutional or statutory right. 20 O.S.2001, § 3001; *Carter v. State*, 2006 OK CR 42, ¶ 5, 147 P.3d 243, 244, citing *Ashinsky v. State*, 1989 OK CR 59, ¶ 20, 780 P.2d 201, 207. Moreover, this Court will not reverse based on a faulty jury instruction, provided the instructions, as a whole, accurately state the applicable law. *Postelle v. State*, 2011 OK CR 30, ¶ 38, 267 P.3d 114, 132.

Here the instruction given by the trial court did not affect the outcome of the proceeding, did not result in a miscarriage of justice, and did not lessen the burden of proof clearly stated in the instructions, when read as a whole. There is no plain error here.

In proposition two, we find that no objections were made, but the instruction does constitute plain error. The State concedes that error occurred in the instructions. The error is plain on the record and affected the outcome. The instruction regarding punishment clearly stated that punishment was by a term of years “and a fine of \$10,000 each count.” The general fine statute, 21 O.S.2011, § 64(B), was applicable in this case. Section 64 provides that the jury may impose a fine not exceeding ten thousand dollars in addition to the imprisonment prescribed. Section 64 does not authorize a mandatory fine. We find, therefore, that the fines in counts 1, 2, 10, 11, 12, 15, 16, 18, 19, 20, 21, 23, and 24, should be vacated.

We find, in proposition three, again, that there were no objections to the comments of the prosecutor. There is no plain error here. The prosecutor’s argument urging the jury to use common sense did not constitute error and most certainly did not lessen the burden of proof clearly stated in the instructions. *See Miller v. State*, 2013 OK CR 11, ¶ 125, 313 P.3d 934, 977. Appellant complains about the prosecutor’s question during sentencing argument, “When do you want him back?” This Court has consistently held that it is improper for the State to urge a jury to convict a defendant because he will commit future crimes. *Brewer v. State*, 1982 OK CR 128, ¶ 8, 650 P.2d

54, 58. When, however, the comments do not affect the sentence, the error requires no relief from this Court. *McWilliams v. State*, 1987 OK CR 203, ¶ 16, 743 P.2d 666, 669. The isolated comment did not affect the sentence. Overall, the prosecution argued that these crimes were heinous and that the defendants (specifically Daniels) deserved the maximum sentence available. The comment did not rise to plain error.

In proposition four, we find that no request for an instruction on the credibility of expert opinions was requested, thus we review for plain error. The decision to give cautionary instructions is more often discretionary than it is fundamental. *Short v. State*, 1999 OK CR 15, ¶ 50, 980 P.2d 1081, 1099. Furthermore, if other evidence supports the conclusions reached, then a failure to give a cautionary instruction is not prejudicial. *Id.* Appellant has not shown that the expert testimony was not credible or reliable, or that it was given undue weight by the jury. There is no plain error here.

In proposition five, we find that Appellant must show 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). An appellant must also show that he was prejudiced by showing that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

Appellant cannot show that he was prejudiced by the failure of counsel to object to the instruction outlined in proposition one. His argument regarding counsel's failure to object to the fine portion of the punishment instruction is rendered moot due to this Court's decision to vacate the fine in those counts (proposition two). Further Appellant cannot show that, but for counsel's failure to object to the prosecutor's comments or his failure to request instructions on expert opinion testimony, that a reasonable probability exists that the result of the proceeding would have been different. Appellant's ineffective assistance of counsel claim is, therefore, denied.

DECISION

The judgments and sentences of the district court are **AFFIRMED**, except that the fines in counts 1, 2, 10, 11, 12, 15, 16, 18, 19, 20, 21, 23, and 24, are **VACATED** per our discussion in proposition two. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
HONORABLE JAMES M. CAPUTO, DISTRICT JUDGE

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OPINION BY: LEWIS, J.

SMITH, P.J.: Concur
LUMPKIN, V.P.J.: Concur
JOHNSON, J.: Concur
HUDSON, J.: Concur