



- (3) whether the trial court committed plain error by instructing the jury that a \$10,000.00 fine was mandatory upon conviction for possession of a firearm after former conviction of a felony after two or more previous convictions; and
- (4) whether he was deprived of the effective assistance of counsel.

We find reversal is not required. Judgment and Sentence is affirmed except that the fine imposed on Count 3 is vacated.

**1.**

During direct examination of Tulsa Police Detective Reggie Warren the prosecutor asked Detective Warren about how many robberies take place in Tulsa on the average each year. Defense counsel objected based on relevance and Detective Warren was allowed to answer. Daniels argues on appeal that the trial court erred in allowing this question as it elicited an answer which appealed to societal alarm. The admission of evidence lies within the sound discretion of the trial court and, when the issue is properly preserved for appellate review, we will not disturb the trial court's decision absent an abuse of discretion. *Pavatt v. State*, 2007 OK CR 19, ¶ 42, 159 P.3d 272, 286. While defense counsel did object at trial to the introduction of this evidence, the objection was on grounds different than what is set forth on appeal. Consequently, we review this claim for plain error. See *Pullen v. State*, 2016 OK CR 18, ¶ 4, 387 P.3d 922, 925 (failure to object at trial on the grounds raised on appeal waives review on appeal for all but plain error). To be entitled to relief for plain error, an appellant must show: "(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. See also *Simpson v. State*, 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d 690, 694, 695, 698. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

The question and response at issue here did not reference an increasing crime rate or imply that the jury should make an example of Daniels to send a message to deter other potential criminals. See *McElmurry v. State*, 2002 OK CR 40, ¶ 151, 60 P.3d 4, 34. Rather, taken in context, the question asked was designed to elicit information about how the robbery case assignments were made and handled by the multiple robbery detectives. The question and the answer did not appeal to societal alarm and was not error, plain or otherwise. Relief is not required.

## 2.

Daniels complains prosecutorial misconduct during closing argument deprived him of his right to a fair trial. Although defense counsel objected to one of the comments at issue, the others were not met with contemporaneous objection. The alleged misconduct not objected to at trial is reviewed for plain error only. *Harney v. State*, 2011 OK CR 10, ¶ 23, 256 P.3d 1002, 1007. "[W]e evaluate the alleged 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." *Hanson v. State*, 2009 OK CR 13, ¶ 18, 206 P.3d 1020, 1028. Both sides have wide latitude to discuss the evidence and reasonable inferences therefrom. See *Harmon v. State*, 2011 OK CR 6, ¶ 81, 248 P.3d 918, 943. Relief is only granted where the prosecutor's flagrant misconduct so infected the defendant's trial that it was rendered fundamentally unfair. *Jones v. State*, 2011 OK CR 13, ¶ 3, 253 P.3d 997, 998.

Daniels first complains that the prosecutor misstated the law when he told the jury in closing argument during the punishment stage that they should not start at the minimum punishments allowed but rather add additional years of imprisonment because of Daniels' prior convictions. A prosecutor may comment on the punishment to be given and may make argument based upon the evidence. See *Bernay v. State*, 1999 OK CR 37, ¶ 65, 989 P.2d 998, 1014; *Pavatt v. State*, 2007 OK CR 19, ¶ 63, 159 P.3d 272, 291. Taken in context, the comments at issue were not misstatements of the law but rather fell within the broad range of allowable argument based upon the evidence. These comments were not error, plain or otherwise, and relief is not required.

Daniels also complains that prosecutorial misconduct occurred when the prosecutor, over objection, asked the jury to place themselves in the position of the victims. While this comment did ask the jurors to imagine

themselves in the victims' place, it described the victims' experience and was based on the evidence. This comment was not inappropriate and the trial court did not abuse its discretion in overruling defense counsel's objection. See *Bosse v. State*, 2017 OK CR 10, ¶ 88, \_\_ P.3d \_\_, citing *Browning v. State*, 2006 OK CR 8, ¶ 37, 134 P.3d 816, 839; *Malicoat v. State*, 2000 OK CR 1, ¶ 31, 992 P.2d 383, 401; *Hooper v. State*, 1997 OK CR 64, ¶¶ 52-53, 947 P.2d 1090, 1110. There was no error here and relief is not required.

### 3.

Daniels complains that the trial court erred in instructing the jury that imposition of a \$10,000.00 fine was mandatory upon conviction for possession of a firearm after former conviction of a felony, after two or more previous convictions. Daniels acknowledges that because defense counsel did not object to this instruction review on appeal is for plain error. To be entitled to relief for plain error, an appellant must show: "(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*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. See also *Simpson*, 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d at 694, 695, 698. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at

923. Daniels asserts that the incorrect instruction was plain error and that relief is required.

The trial court instructed the jury that, “[t]he punishment for POSSESSION OF FIREARM AFTER FORMER CONVICTION OF A FELONY after two (2) or more previous convictions is imprisonment in the State penitentiary for a term of three (3) years to life and a fine of ten thousand dollars (\$10,000).” Title 21 O.S.2011, §§ 1283 and 1284 do not impose a fine for possession of a firearm after former conviction of a felony. Furthermore, 21 O.S.2011, § 51.1 does not impose a fine for enhancement of this offense after second and subsequent convictions. A fine may, however, be imposed upon a conviction for this crime under 21 O.S.2011, § 64 but this fine is discretionary and not mandatory. Thus, the trial court’s instruction mandating the imposition of a \$10,000.00 fine was error. We find that the error was plain error; it was an actual error, plain or obvious, and it affected the outcome of the proceeding as the jury followed the instruction and assessed a \$10,000.00 fine as required by the instruction. We also find that relief is necessary because requiring the imposition of a fine not statutorily mandated seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. The \$10,000.00 fine imposed on Count 3 is vacated.<sup>2</sup>

4.

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<sup>2</sup> The State concedes that the instruction erroneously removed discretion from the jury and mandated the imposition of the maximum fine. The State also concedes that this was plain error and that relief is required.

Daniels argues defense counsel rendered constitutionally ineffective assistance at trial. This Court reviews claims of ineffective assistance of counsel to determine whether counsel's constitutionally deficient performance, if any, prejudiced the defense so as to deprive the defendant of a fair trial with reliable results. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206.

Daniels first complains he was deprived of his constitutional right to the effective assistance of counsel because defense counsel failed to object to instances of prosecutorial misconduct alleged in Proposition 2. Defense counsel cannot be found to have rendered constitutionally ineffective assistance for failing to object to these instances of alleged misconduct because, as noted above, the prosecutor's argument was not improper. *See Pavatt*, 2007 OK CR 19, ¶ 66, 159 P.3d at 292 (defense counsel cannot be ineffective for failing to object to unobjectionable argument).

Daniels also contends trial counsel was ineffective for failing to object to the instruction mandating the imposition of a \$10,000.00 fine where such was not authorized by statute. As noted above, this instruction was error. While defense counsel can be found to have rendered constitutionally deficient performance for failing to object to the erroneous instruction, the decision to vacate the fine mandated by the erroneous instruction remedies this error. No further relief is required.

**DECISION**

The Judgment and Sentence of the district court is **AFFIRMED**. The fine imposed on Count 3 is **VACATED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY  
THE HONORABLE KELLY GREENOUGH, DISTRICT JUDGE**

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**OPINION BY: PER CURIAM  
LUMPKIN, P.J.: Concur  
LEWIS, V.P.J.: Concur  
HUDSON, J.: Concur**

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