

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

CHARLES RANDALL HAYES,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

) NOT FOR PUBLICATION

) Case No. F-2018-175

FILED  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

OCT 31 2019

**SUMMARY OPINION**

JOHN D. HADDEN,  
CLERK

**LEWIS, PRESIDING JUDGE:**

Charles Randall Hayes, Appellant, was tried by jury and found guilty of Count 1, the felony offense of manslaughter in the first degree while driving under the influence of drugs, in violation of 21 O.S.2011, § 711;<sup>1</sup> Count 2, the misdemeanor offense of driving under the influence of drugs, in violation of 47 O.S.Supp.2016, § 11-902(A)(4); and Count 3, the misdemeanor offense of driving left of center, in violation of 47 O.S.2011, § 11-306, in the District Court of Tulsa County, Case No. CF-2016-3231. The jury sentenced him to life imprisonment and a \$10,000.00 fine in Count

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<sup>1</sup> Appellant was charged with first degree manslaughter with the underlying misdemeanor alternatives of driving under the influence or driving left of center. At sentencing the State elected that the Judgment and Sentence reflect a conviction of first degree manslaughter with the underlying offense of driving under the influence.

1, one year and a \$1,000.00 fine in Count 2, and ten days and a \$500.00 fine in Count 3. The Honorable Kurt G. Glassco, District Judge, pronounced judgment and ordered the sentences served concurrently.<sup>2</sup> Mr. Hayes appeals in the following propositions of error:

1. Mr. Hayes was denied a fair trial due to prosecutorial misconduct;
2. Mr. Hayes' sentence of life is excessive and should be modified;
3. Mr. Hayes received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article II, §§ 7 and 20 of the Oklahoma Constitution;
4. The accumulation of errors deprived Mr. Hayes of a fair proceeding.

In addition to the above propositions, this Court ordered the parties to address whether Appellant's convictions for both manslaughter in the first degree, while in the commission of a misdemeanor, and underlying misdemeanor offenses are proper. The State concedes that Appellant's convictions for both the felony offense of manslaughter in the first degree while driving under the influence of drugs and the misdemeanor offense of driving under

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<sup>2</sup> Appellant must serve 85% of his sentence in Count 1 before being eligible for consideration for parole. 22 O.S.Supp.2015, § 13.1(3).

the influence of drugs constitute double jeopardy and the misdemeanor offense must be dismissed. We agree. At trial, the State elected to utilize the misdemeanor driving under the influence as the underlying offense for the misdemeanor manslaughter charge. Pursuant to *Thompson v. State*, 2018 OK CR 5, 419 P.3d 261, convictions for both first degree manslaughter and the underlying misdemeanor cannot stand. *Id.* ¶ 9, at 263. We, therefore, order that this misdemeanor count be reversed with instructions to dismiss.

In Appellant's Proposition One, he claims prosecutorial misconduct deprived him of a fair trial. The alleged misconduct was not objected to at trial, and will be reviewed for plain error only. To obtain relief, Appellant must now show that a plain or obvious error in this procedure affected the outcome of the proceeding. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. The Court will correct plain error only where it seriously affects the fairness, integrity, or public reputation of the proceedings. *Simpson v. State*, 1994 OK CR 40, ¶ 30, 876 P.2d 690, 701. Moreover, this Court will not grant relief based on prosecutorial misconduct unless the State's misconduct is so flagrant that it rendered the trial or

sentences fundamentally unfair. *Nicholson v. State*, 2018 OK CR 10, ¶ 18, 421 P.3d 890, 896-97.

Here, there was no plain or obvious error that affected the outcome of the proceeding. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. The cross-examination of Appellant was reasonable based on the direct examination and the facts of this case. *See Stemple v. State*, 2000 OK CR 4, ¶ 48, 994 P.2d 61, 71. The prosecution's statements to the jury during opening statement and closing argument did not amount to error. The prosecution's tactics were within the wide latitude of advocacy. Viewed in the context of the whole trial, the statements did not render the trial fundamentally unfair, so that the jury's verdicts are unreliable. *See Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986); *Sanders v. State*, 2015 OK CR 11, ¶ 21, 358 P.3d 280, 286. Proposition One is denied.

In Proposition Two, Appellant claims that his sentence is excessive and should be modified. This Court will not disturb a sentence within statutory limits unless, under the facts and circumstances of the case, it is so excessive as to shock the conscience of the Court. *Pullen v. State*, 2016 OK CR 18, ¶ 16, 387

P.3d 922, 928. Appellant's sentence does not meet that demanding test, and no relief is warranted.

Appellant claims in Proposition Three that he received ineffective assistance of counsel. We review these claims under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), requiring that Appellant show deficient performance by counsel that prejudiced his defense by denying him a reliable verdict. *Id.*, 466 U.S. at 687. The required showing of prejudice is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, 466 U.S. at 694.

Appellant's proposition rests on counsel's failure to object to any of the alleged prosecutorial misconduct found in his first proposition. In that proposition it was determined that the prosecutor's comments and arguments either were not error or did not render his trial unfair. He cannot show that he was prejudiced by trial counsel's conduct, thus he cannot show that counsel's conduct fell outside the *Strickland* standard.

In Proposition Four Appellant claims the accumulation of errors deprived him of a fair proceeding. We find that there are no individual errors requiring relief. As we find no error that was harmful to Appellant, there is no accumulation of error to consider. *Barnett v. State*, 2011 OK CR 28, ¶ 34, 263 P.3d 959.

### **DECISION**

The judgment and sentence for Count 2 is **REVERSED** and **REMANDED** with instructions to **DISMISS**. Counts 1 and 3 are **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

### **AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY THE HONORABLE KURT G. GLASSCO, DISTRICT JUDGE**

#### **APPEARANCES AT TRIAL**

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OPINION BY: LEWIS, P.J.  
KUEHN, V.P.J.: Concur  
LUMPKIN, P.J.: Concur in Results  
HUDSON, J.: Concur  
ROWLAND, J.: Concur