



IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CHRISTOPHER MICHAEL
HILDEBRANDT,

Appellant,

v.

STATE OF OKLAHOMA

Appellee.

)
) **NOT FOR PUBLICATION**
)
)

) Case No. F-2017-599
)

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

) JUN 28 2018
)

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

Appellant Christopher Michael Hildebrandt was tried by jury and convicted of First Degree Rape of a Child under 14 (Count I) (21 O.S.2011, § 1114(A)(1)); Forcible Sodomy (Count II) (21 O.S.2011, § 888); and Abduction of a Person Under 15 (Count III) (21 O.S.2011, § 1119), in the District Court of Osage County, Case No. CF-2016-101. The jury recommended as punishment imprisonment for twenty-five (25) years in Count I, twenty (20) years in Count II and five (5) years in Count III. The trial court sentenced accordingly,

ordering the sentences to run consecutively.¹ It is from this judgment and sentence that Appellant appeals.

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

- I. The trial court erred in denying Appellant's motion to suppress evidence as the seizure of his vehicle was conducted in violation of his federal and state constitutional rights.
- II. The State's use of peremptory challenges to remove two African American jurors from the jury violated Appellant's rights under *Batson v. Kentucky*, et al., and under the equal protection clauses of the federal and state constitutions.
- III. Appellant was denied a fair trial before an impartial jury when the jurors witnessed an abusive outburst by V.H.'s father and the trial court failed to ascertain the effect on the jury.
- IV. Appellant's convictions should be reversed with instructions to dismiss based on an inadequate chain of custody.
- V. Appellant was denied his due process right to present a defense when he was given insufficient notice of the offenses he was required to defend.
- VI. The evidentiary harpoon by Deputy Sheriff Justin Kling deprived Appellant of a fair trial.

¹ Appellant will be required to serve eighty-five percent (85%) of his sentence in Counts I and II before becoming eligible for parole. 21 O.S. 2011, § 13.1.

- VII. Appellant was denied effective assistance of counsel to which he was entitled under the 6th and 14th Amendments to the United States Constitution and Art. 2, §§ 7 and 20 of the Oklahoma Constitution.
- VIII. Appellant's sentences are excessive.
- IX. The trial court abused its discretion in ordering Appellant to serve his sentences consecutively, therefore resulting in an unconstitutionally excessive sentence.
- X. The trial court had no legal authority to assess prosecution reimbursement costs.
- XI. Appellant's convictions should be reversed as the cumulative effect of errors deprived him 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 the evidence, the only relief warranted is the vacating of the assessment of prosecution reimbursement costs of \$960.00.

In Proposition I, Appellant contends the trial court erred in denying his motion to suppress evidence seized as a result of an illegal search of his car. Appellant asserts that his car was illegally impounded in Washington County by deputies from the Osage

County Sheriff's Office acting outside their jurisdiction and transported to Osage County where it was searched. Appellant argues the evidence seized during the unlawful search must be excluded. The trial court denied the motion to suppress without comment.

We review Appellant's challenge to the trial court's ruling on the motion to suppress for an abuse of discretion. *Johnson v. State*, 2013 OK CR 12, ¶ 8, 308 P.3d 1053, 1055; *State v. Pope*, 2009 OK CR 9, ¶ 4, 204 P.3d 1285, 1287; *Gomez v. State*, 2007 OK CR 33, ¶ 5, 168 P.3d 1139, 1141. 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." *State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194.

The crimes in this case were alleged to have occurred in Osage County. Appellant and his car were located in Bartlesville, Washington County. Deputies from the Osage County Sheriff's Office photographed the car and showed those photographs to the victim's stepfather, who had seen Appellant in the car earlier in the

day. As a result of his identification of the car as belonging to Appellant, the car was impounded and taken to the Osage County Sheriff's office. Based upon separately gathered information, a request for a search warrant was presented to the District Court of Osage County. This information included statements from the victim that a sexual assault had occurred earlier that morning in that car, that the assault had occurred in the car while it was parked at a location identified by the victim, that her stepfather saw Appellant in the car shortly after the time of the alleged assault and confronted him, and the description of the car by the victim and her stepfather. The search warrant was subsequently issued by the District Court of Osage County and Appellant's car was searched. The record reflects the car was not searched until the issuance of the search warrant.

We need not determine whether the Osage County deputies were acting within their jurisdiction in impounding Appellant's car from Washington County because even if they were not, and the car was illegally seized, the subsequent lawfully obtained search warrant rendered the search of the car legal and the seizure of the evidence

therein lawful and admissible at trial.² See *McGaughey v. State*, 2001 OK CR 33, ¶¶ 46-50, 37 P.3d 130, 143-144 (the search of a car pursuant to a legally obtained search warrant acquired after an illegal impoundment and based on evidence gathered independently from the illegal seizure was not tainted by the illegal seizure and therefore admissible). See also *Jacobs v. State*, 2006 OK CR 4, ¶ 7, 128 P.3d 1085, 1087-88 (“discovery of outstanding warrants is a significant intervening event which gives police probable cause to arrest a defendant independent from an illegal stop and seizure”). Under the circumstances in this case, the trial court did not abuse its discretion in denying the motion to suppress.

In Proposition II, Appellant contends he was denied his rights to equal protection when the State exercised peremptory challenges to exclude two minority jurors based on race in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Under *Batson*, the race-neutral reason given by the prosecutor need not rise to the level of justifying excusal for cause, but it must be a clear and reasonably specific explanation of his or her “legitimate reasons” for

² The Osage County deputies secured the assistance of a Washington County law enforcement officer prior to going to Appellant’s residence.

exercising the challenges. *Coddington v. State*, 2006 OK CR 34, ¶ 11, 142 P.3d 437, 443. The trial court's findings are entitled to great deference, and we review the record in the light most favorable to the trial court's ruling. *Id.*

“The critical question in determining whether a [defendant] has proved purposeful discrimination . . . is the persuasiveness of the prosecutor's justification for his peremptory strike . . . ‘implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.’ ” *Coddington*, 2006 OK CR 34, ¶ 11, 142 P.3d at 443 quoting *Miller–El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). Here, the prosecutor's explanations were not “implausible or fantastic justifications.” They do not appear to be racially motivated. Based upon the record before us, the State provided a race neutral explanation for excusing both prospective jurors and the trial court did not abuse its discretion in denying Appellant's *Batson* challenge.

In Proposition III, Appellant contends he was denied a fair trial by an emotional outburst from a spectator, the victim's biological father. The record shows the victim's father confronted Appellant in the courtroom and cursed at him as jurors were leaving the

courtroom. Defense counsel did not request the court hold an *in-camera* hearing to determine the effect of the outburst on the jury or that the court admonish the jury. Now on appeal, Appellant finds the absence of the hearing and/or admonishment reversible error.

Our review on appeal is for plain error. *See Williams v. State*, 2001 OK CR 9, ¶ 55, 22 P.3d 702, 718. Under the plain error test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, we determine whether Appellant has shown an actual error, which is plain or obvious, and which affects his or her substantial rights. 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. *Id.* *See Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. *See also Jackson v. State*, 2016 OK CR 5, ¶ 4, 371 P.3d 1120, 1121; *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395.

The record reflects that neither counsel nor the court could be certain what if anything the jury heard or saw as the outburst occurred as the jury was leaving the courtroom. The prosecutor informed the court that he had personally admonished the victim's father not to come back in the courtroom during the rest of the case

and he did not anticipate him returning to the courtroom. The judge noted that security had been brought in to the courtroom and that the victim's father was excluded from the courthouse and the surrounding grounds during the rest of the trial.

We reject Appellant's comparison of the outburst to a victim impact statement which is not admissible in a non-capital trial and to private communications with a juror. We also reject Appellant's claim he was forced to proceed to trial with a tainted jury. Appellant has not cited any authority requiring the court to admonish the jury or conduct an *in-camera* hearing in such a situation. Here, the spectator was removed from the courtroom and prohibited from returning. Any admonition or *in-camera* hearing could only have served to draw undue attention to the incident. The outburst was of short duration and the trial court took appropriate measures to prevent any unfair prejudice. *See Williams*, 2001 OK CR 9, ¶ 56, 22 P.3d at 717-718; *Ellis v. State*, 1992 OK CR 45, ¶ 13, 867 P.2d 1289, 1297. Accordingly, we find no error in the trial court's failure to inquire of the jury if the outburst had an effect on them or to admonish them. Finding no error, we find no plain error.

In Proposition IV, Appellant contends the trial court erred in admitting testimony from OSBI Criminalist Birchfield when the State did not establish a sufficient foundation and chain of custody that items tested by Birchfield were taken from V.H. This objection was not raised at trial. Therefore our review is for plain error under the standard set forth above. *See Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923 (when a specific objection is made at trial to the admission of evidence, no different objection will be considered on appeal). We find the record reflects a sufficient chain of custody was established to properly admit the physical evidence. *Anderson v. State*, 2010 OK CR 27, ¶ 4, 252 P.3d 211, 212. Appellant's speculation that some impropriety may have occurred goes to the weight of the evidence to be given by the jury and not the admissibility of the evidence. *Id.*

In Proposition V, Appellant contends he was denied his due process rights by the unconstitutionally vague language in Count II. He argues the lack of specificity in the charging language failed to give him notice that he would have to defend against a charge of forcible oral sodomy. Appellant has waived all but plain error review as he did not raise a challenge to the Information before the trial

court and he waived Preliminary Hearing. *Lacy v. State*, 2007 OK CR 20, ¶ 5, 171 P.3d 911, 914. Review of the felony information, together with all of the materials made available to the defense, sufficiently apprised Appellant that he should be prepared to defend against a charge of Forcible Oral Sodomy by placing his mouth on the victim's vagina. *See Parker v. State*, 1996 OK CR 19, ¶ 24, 917 P.2d 980, 986.³ Finding no due process violation, we find no error and thus no plain error in the information charging Count II.

In Proposition VI, we review for plain error, under the standard set forth above, Appellant's claim that he was denied a fair trial by the injection of an evidentiary harpoon by Deputy Kling. *See Soriano v. State*, 2011 OK CR 9, ¶ 41, 248 P.3d 381, 398. Deputy Kling's identification of an item he retrieved from Appellant's car during the execution of a lawful search warrant as a baby blanket does not constitute an evidentiary harpoon. *See Martinez v. State*, 2016 OK CR 3, ¶ 60, 371 P.3d 1100, 1115. The item was never identified with the victim, the testimony did not interject evidence of other crimes

³ It appears the prosecutor in this case failed to proof-read the felony Information before signing it. Prosecutors signing an Information do it under oath and should not leave it to an administrative assistant to know the legal requirements of a criminal charge. Here, there was no Preliminary Hearing, but the Probable Cause Affidavit together with the Information provided adequate notice to the defense.

and there was no resulting prejudice as the jury saw a photograph of the item described by the deputy. We find no error and thus no plain error in the deputy's testimony.

In Proposition VII, we review Appellant's claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to show that counsel was ineffective, Appellant must show both deficient performance and prejudice. *Goode v. State*, 2010 OK CR 10, ¶ 81, 236 P.3d 671, 686 citing *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. See also *Marshall v. State*, 2010 OK CR 8, ¶ 61, 232 P.3d 467, 481. In *Strickland*, the Supreme Court said there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct, *i.e.*, an appellant must overcome the presumption that, under the circumstances, counsel's conduct constituted sound trial strategy. *Goode*, 2010 OK CR 10, ¶ 81, 236 P.3d at 686. To establish prejudice, Appellant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at ¶ 82, 236 P.3d at 686.

Appellant claims he was denied the effective assistance of counsel in the following instances: 1) the failure to request a mistrial after V.H.'s father confronted Appellant in front of the jurors; 2) the failure to object to the forensic report and the OSBI criminalist's testimony regarding the testing of the items from the sexual assault kit; 3) the failure to object to the evidentiary harpoon by Deputy Kling; and 4) the failure to follow appropriate procedure in objecting to the language in Count II.

As seen in this summary opinion, counsel's failure to raise timely objections in the above instances did not prevent this Court from reviewing the allegations of error. See Propositions III, IV, V, and VI. Each allegation of error was reviewed for plain error. In each instance none of the alleged errors were sufficient to warrant relief. Any trial objections raised by counsel would have been overruled. We will not find counsel ineffective for failing to raise objections which would have been overruled. See *Eizember v. State*, 2007 OK CR 29, ¶ 155, 164 P.3d 208, 244. Further, as none of the instances in which counsel failed to raise an objection warranted relief on appeal, Appellant has failed to show how he was prejudiced by counsel's omissions. Appellant has failed to meet his burden of showing a

reasonable probability that, but for any unprofessional errors by counsel, the result of the trial would have been different. Accordingly, we find that Appellant was not denied the effective assistance of counsel.

In Proposition VIII, Appellant argues that his sentences are excessive. The question of excessiveness of punishment must be determined by a study of all the facts and circumstances of each case. *Rackley v. State*, 1991 OK CR 70, ¶ 7, 814 P.2d 1048, 1050. Where the punishment is within the statutory limits the sentence will not be disturbed unless under all 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. Considering all the facts and circumstances of Appellant's case, the sentences are within applicable statutory range and not so excessive as to shock the conscience of the Court.

In Proposition IX, Appellant argues his sentence is excessive because the sentences were ordered to run consecutively. There is no absolute constitutional or statutory right to receive concurrent sentences. 22 O.S.2011, § 976. In fact, sentences are to run consecutively unless the trial judge, in his or her discretion, rules

otherwise, *Id.* See also *Riley v. State*, 1997 OK CR 51, ¶ 1, 947 P.2d 530, 535; *Kamees v. State*, 1991 OK CR 91, ¶ 21, 815 P.2d 1204, 1209. Considering the evidence in this case, the trial court did not abuse its discretion in ordering the sentences to run consecutively. See *Logsdon v. State*, 2010 OK CR 7, ¶ 22, 231 P.3d 1156, 1166.

In Proposition X, Appellant challenges the trial court's authority to order the payment of "prosecution reimbursement costs". We find Appellant correctly asserts that such reimbursement costs are statutorily authorized only when the sentence has been suspended or deferred, see 22 O.S.Supp.2014 §§ 991a(A)(1) & 991c(A), or when the OSBI has been involved in the case, see 22 O.S.Supp.2014 §§ 991a(A)(4) & 991a(A)(5). Here, Appellant's sentences were not suspended or deferred and the OSBI did not participate in the case. We find no authority for the assessment of prosecution reimbursement costs in this case. Therefore, that portion of the Judgment and Sentence is void and the assessment of prosecution reimbursement costs should be vacated. The case is remanded to the District Court for an order consistent with this opinion.

In Proposition XI, Appellant asserts he was denied a fair trial by the cumulative effect of the errors in this case. When numerous

irregularities during the trial 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. *Martinez v. State*, 2016 OK CR 3, ¶ 84, 371 P.3d 1100, 1119. However, such an argument has no merit when this Court fails to sustain any of the other errors raised by Appellant. *Id.*

The assessment of prosecution reimbursement costs, addressed in Proposition X, is the only error warranting relief in this case, and the vacating of the illegal assessment cures the error. No other errors warranting relief have been identified, therefore no further relief is required.

DECISION

The **JUDGMENT and SENTENCE is AFFIRMED, except the case is ordered REMANDED to the District Court for an order vacating the illegal imposition of \$960.00 prosecution reimbursement costs.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018), the **MANDATE is ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OSAGE COUNTY
HONORABLE B. DAVID GAMBILL, ASSOCIATE DISTRICT JUDGE

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

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