

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL LEE JONES,)
)
 Appellant,) NOT FOR PUBLICATION
)
 v.) Case No. F-2010-644
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAR 27 2012

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

A. JOHNSON, PRESIDING JUDGE:

Appellant Michael Lee Jones was tried by jury and convicted in the District Court of Payne County, Case No. CF-2009-416, of Kidnapping, After Former Conviction of a Felony (Count 2), in violation of 21 O.S.Supp.2009, § 741, Possession of Controlled Dangerous Substance (Cocaine) – Second Offense (Count 3), in violation of 63 O.S.Supp.2004, § 2-402(B), and Possession of Drug Paraphernalia (Count 4), in violation of 63 O.S.Supp.2004, § 2-405.¹ The jury recommended as punishment thirty years imprisonment on Count 2, twenty years imprisonment on Count 3, and one year imprisonment and a \$1,000 fine on Count 4. The Honorable Donald L. Worthington, who presided at trial, sentenced Jones accordingly and, following the jury’s recommendation, ordered Jones’s sentences to be served concurrently. From this Judgment and Sentence Jones appeals, raising the following issues:

- (1) whether the trial court properly instructed the jurors;

¹ Jones was found not guilty of Count 1, Rape in the First Degree.

- (2) whether the trial court improperly bifurcated his trial on Count 4, misdemeanor possession of paraphernalia, depriving him of his due process rights to a fair sentencing;
- (3) whether he was denied a fair trial when the prosecutor introduced evidence of other crimes, wrongs and bad acts;
- (4) whether he received effective assistance of counsel;
- (5) whether there was sufficient evidence to convict him of kidnapping;
- (6) whether his sentence is excessive; and
- (7) whether cumulative error deprived him of a fair trial.

Jones also requests an evidentiary hearing on the issue of his Sixth Amendment claim of ineffective assistance of trial counsel.

We find reversal is not required and affirm the Judgment and Sentence of the District Court on Counts 2 and 3. We also affirm the Judgment on Count 4, but vacate the fine for reasons discussed in Section 2.

1. Jury Instructions

Jones cannot show that the trial court's submission of a former version of OUJI-CR 10-2 (Instruction 11), without objection, amounted to plain error.² *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923 (defendant must prove that the error affected his substantial rights, meaning the error affected the outcome of the proceeding, to warrant relief under plain error doctrine).

² Instruction 11 provided:

It is your responsibility as jurors to determine the facts from the evidence, to follow the rules of law as stated in these instructions, to reach fair and impartial verdicts of guilty or not guilty based upon the evidence, *(and to determine punishment if you should find the defendant guilty)* as you have sworn you would do. You must not use any method of chance in arriving at your verdicts, but must base your verdicts on the judgment of each juror. (emphasis added)

Jones's complaint here is nearly identical to the claim we rejected in *Myers v. State*, 2006 OK CR 12, ¶¶ 63-65, 133 P.3d 312, 330. In *Myers*, the trial court submitted an instruction used in single stage trials regarding the jury's duty to determine punishment and an instruction that provided that the issue of punishment was not before the jury in a bifurcated trial. In *Myers* this Court found no plain error because the instructions, taken as a whole, advised the jury of the applicable law including the elements of the crime and the burden of proof. *Id.* at 65, 133 P.3d at 330. The jury was instructed that the issue of punishment was not before them and there were no other instructions concerning punishment. *Id.*³ The same is true in the instant case. The trial court should have omitted the parenthetical phrase about deciding punishment in Instruction 11, but there is no indication that the jury was confused by it or that Jones was otherwise prejudiced.

Jones also complains that Instruction 11 suggested to the jury that it had sworn to find the defendant guilty. The current version of OUJI-CR2d 10-2 has corrected the awkward language of this instruction.⁴ It is clear that

³ The *Myers* Court approved a prospective modification of OUJI-CR2d 10-2 which put in brackets the language "and to determine punishment if you should find the defendant guilty." The Court noted that the Notes on Use following the instruction should make clear that the bracketed language should be used only in non-bifurcated trials. *Id.* at ¶ 66.

⁴OUJI-CR2d 10-2 now reads:

It is your responsibility as jurors to determine the facts from the evidence, to follow the rules of law as stated in these instructions, to reach a fair and impartial verdict of guilty or not guilty based upon the evidence [, and to determine punishment if you should find the defendant guilty] pursuant to your instructions. You must not use any method of chance in arriving at a verdict, but must base your verdict on the judgment of each juror.

Jones's jury did not read Instruction 11 as suggesting it should find him guilty because it found him not guilty on Count 1. On this record, we find the submission of Instruction 11 was not plain error.

Jones also claims the trial court erred in submitting second stage Instruction 30 because he was acquitted of First Degree Rape (Count 1).⁵ Review is for plain error because Jones did not object to the instruction. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. The State concedes that the instruction "probably should have been excluded once the jury returned a not guilty verdict on Count 1." *Appellee's Brief* at 17. The State argues, however, that any error did not affect the sentence imposed because the trial court did not impose the post-imprisonment supervision recommended by the jury, and further, the jury's recommendation of concurrent sentences demonstrates it was not adversely affected. We agree and note it may be reasonably inferred that knowing an offender will be monitored upon release would be a benefit to the defendant and cause a jury to impose a lesser sentence, or at the very least, not a greater sentence. We find no plain error.

⁵ Instruction 30 stated:

A person convicted of the crime of kidnapping involving sexual abuse or sexual exploitation, shall be required to serve a term of post-imprisonment supervision under conditions determined by the Department of Corrections of the State of Oklahoma. The mandatory post-imprisonment supervision shall be in addition to the actual imprisonment.

2. Bifurcation

Jones correctly argues that the trial court improperly bifurcated his trial on the charge of misdemeanor Possession of Paraphernalia. Jones's jury considered guilt or innocence of the charge in Stage 1 and fixed punishment in Stage 2. The bifurcation of this charge allowed the jury to hear evidence of Jones's prior convictions – not relevant to punishment for a misdemeanor – before imposing sentence. *See Perryman v. State*, 1999 OK CR 39, ¶ 13, 990 P.2d 900, 905 (bifurcation is not required for unenhanced charges).

Jones contends prejudice is evident because the jury assessed the maximum penalty and fine for the misdemeanor. The State counters that any error did not result in a miscarriage of justice or constitute a substantial violation of a constitutional or statutory right because all of Jones's sentences were ordered to run concurrently.

It is doubtful that Jones's jury was not influenced by the evidence of prior convictions in its sentencing decision on this misdemeanor offense. Jones, however, has not been prejudiced by the error with respect to the term of years imposed because, as the State points out, the trial court ran Jones's sentences concurrently. *See McCormick v. State*, 1993 OK CR 6, ¶ 42, 845 P.2d 896, 903 (bifurcation error did not require relief where jury imposed minimum sentence and error had no prejudicial effect). The same cannot be said with respect to the fine imposed. We find the appropriate remedy here is to vacate Jones's \$1,000 fine in Count 4. *Perryman*, 1999 OK CR 39, ¶ 15, 990 P.2d at 905; 22 O.S.2001, § 1066.

3. Other Crimes Evidence

We review Jones's claim that it was prosecutorial misconduct to admit other crimes evidence for plain error only and find none. *See Simpson v. State*, 1994 OK CR 40, ¶ 11, 876 P.2d 690, 694-95 (failure to raise objection at trial court level merits only plain error review on appeal). The other crimes evidence at issue here – namely that Jones was involved with and sold drugs, brandished a weapon and threatened the victim and others two days before the incident, and kicked the victim's dog – was inextricably intertwined with the charged counts of rape and kidnapping. The evidence was relevant and key to understanding the events in this case and for that reason not precluded by the general ban on other crimes evidence. *See Eizember v. State*, 2007 OK CR 29, ¶ 77, 164 P.3d 208, 230; *Dixon v. State*, 1977 OK CR 32, ¶ 5, 560 P.2d 204, 206.

4. Ineffective Assistance of Counsel

We reject Jones's claim of ineffective assistance of counsel because he can show neither that trial counsel was ineffective at trial or in her investigation nor that there is a reasonable probability that the outcome of his trial would have been different had trial counsel handled his case differently.⁶ *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Ball v. State*, 2007 OK CR 42, ¶ 59, 173 P.3d 81, 95; *Head v. State*, 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148; *Davis v. State*, 2005 OK CR 21, ¶ 7, 123 P.3d 243, 246.

⁶ Jones claims trial counsel was deficient for failing to: 1) discover and present evidence; 2) request proper sentencing procedures; and 3) object to improper jury instructions.

Having reviewed Jones's Request for an Evidentiary Hearing and the materials offered to support that request, we find that he has failed to show by clear and convincing evidence that there is a strong possibility trial counsel was ineffective for failing to investigate and use available evidence at trial. Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2009). Jones is not entitled to an evidentiary hearing to further develop his ineffective assistance of counsel allegations. His motion is **DENIED**. See *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905-06.

5. Sufficiency of the Evidence

The evidence, viewed in the light most favorable to the State, was sufficient to prove beyond a reasonable doubt that Jones kidnapped J.P. *Logsdon v. State*, 2010 OK CR 7, ¶ 5, 231 P.3d 1156, 1161; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04.

6. Excessive Sentence

Jones's sentences are based on the facts of the case and are within the range of punishment provided by law. Further, the sentences are running concurrently. If a sentence is within statutory limits, this Court will not disturb that sentence unless, under the facts and circumstances of the case, it is so excessive as to shock the conscience of the Court. *Gomez v. State*, 2007 OK CR 33, ¶ 18, 168 P.3d 1139, 1146; *Rea v. State*, 2001 OK CR 28, ¶ 5 n.3, 34 P.3d 148, 149 n.3. Jones's sentence does not meet that test.

7. Cumulative Error

Jones’s sentence in Count 4 must be modified by vacating the fine because of bifurcation error. Other errors committed at trial, even when considered together, did not deny Jones a fair trial. See *DeRosa v. State*, 2004 OK CR 19, ¶ 100, 89 P.3d 1124, 1157. This claim is denied.

DECISION

The Judgment and Sentence of the District Court on Counts 2 and 3 is **AFFIRMED**. The Judgment of conviction and sentence of one-year on Count 4 is **AFFIRMED**; the fine of \$1,000, however, is **VACATED**. 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 delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF PAYNE COUNTY
THE HONORABLE DONALD L. WORTHINGTON, DISTRICT JUDGE

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LUMPKIN, J.: Concur
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