

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LADARIUS BURNELL KELLY,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

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Not For Publication

Case No. F-2016-30

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JAN 19 2017
MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

LUMPKIN, VICE PRESIDING JUDGE:

Appellant, Ladarius Burnell Kelly, was tried by jury and convicted of Robbery With a Firearm (Count) (21 O.S.2011, § 801) and Assault with a Dangerous Weapon (Count 2) (21 O.S.2011, § 645) in the District Court of Tulsa County Case Number CF-2014-4096.¹ The jury recommended as punishment imprisonment for eighteen (18) years and a \$2,500.00 fine in Count 1 and imprisonment for two (2) years and a \$2,500.00 fine in Count 2. The trial court sentenced accordingly and ordered the sentences to run consecutively.² It is from this judgment and sentences that Appellant appeals.

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

- I. The witnesses' identification of Mr. Kelly was inherently unreliable and admission of these identifications violated Mr. Kelly's due

¹ The jury acquitted Appellant of Shooting With Intent to Kill (21 O.S.2011, § 652) in Count 2 but convicted him of the lesser offense of Assault With a Dangerous weapon.

² Any person convicted of Robbery With a Firearm as defined in 21 O.S.2011, § 801 shall be required to serve not less than 85% percent of any sentence of imprisonment imposed prior to becoming eligible for consideration for parole. 21 O.S.2011, § 13.1(8).

process rights under the 5th and 14th Amendments to the United States Constitution and of Art. II, § 7 of the Oklahoma Constitution.

- II. If this Court finds that the witnesses' identification of Mr. Kelly was proper, insufficient evidence was presented to convict Mr. Kelly of Assault with a Dangerous Weapon.
- III. If this Court finds that the witnesses' misidentified Mr. Kelly or that the jury convicted on the theory of aiding and abetting, insufficient evidence was presented to support a conviction.
- IV. The cumulative effect of prosecutorial misconduct constituted fundamental error and denied Mr. Kelly a fair trial.
- V. Mr. Kelly's Fourteenth Amendment Due Process rights pursuant to the United States Constitution were violated when the jury was erroneously instructed as to the range of punishment for fines in Counts I and II.
- VI. Mr. Kelly was denied his right to the effective assistance of trial counsel, in violation of the 6th and 14th Amendments to the United States Constitution and Art. II, §§ 7 and 20, of the Oklahoma Constitution.
- VII. Cumulative errors deprived Mr. Kelly of a fair proceeding and a reliable outcome.

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 Appellant is entitled to relief as to Proposition Five. We vacate the fine in Count 2 and modify the fine in Count 1 to \$2,000.00.

In Proposition One, Appellant contends that impermissibly suggestive identification procedures were used in his case. He concedes that he did not challenge the identification testimony at trial and, thus, waived appellate review of this claim for all but plain error. *Harmon v. State*, 2011 OK CR 6, ¶ 42, 248 P.3d 918, 935. Therefore, we review Appellant's claim pursuant to the

test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, and determine whether Appellant has shown an actual error, which is plain or obvious, and which affects his substantial rights. *Id.*, 1994 OK CR 40, ¶¶ 10, 26, 30, 876 P.2d at 694, 699, 701; *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. 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.*

Reviewing the totality of the circumstances, we find that the photographic identification procedure the police used was not so unnecessarily suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Perry v. New Hampshire*, ___ U.S. ___, 132 S.Ct. 716, 724, 181 L.Ed.2d 694 (2012); *Simmons v. United States*, 390 U.S. 377, 384-85, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968); *See Myers v. State*, 2006 OK CR 12, ¶¶ 24-26, 133 P.3d 312, 323. Accordingly, we find that Appellant has not shown that error, plain or otherwise, occurred. Proposition One is denied.

In Proposition Two, Appellant challenges the sufficiency of the evidence supporting his conviction for Assault With a Dangerous Weapon. We find that, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204. As the testimony revealed that Appellant verbalized his intent to shoot the victim, we find that the jury rationally concluded that Appellant shot the firearm at the

victim with the intent to injure him. *Roldan v. State*, 1988 OK CR 219, ¶ 8, 762 P.2d 285, 286-87 (“This Court on review will accept all reasonable inferences and credibility choices that tend to support the jury's verdict.”). Proposition Two is denied.

In Proposition Three, Appellant raises an alternative challenge to the sufficiency of the evidence. Based upon our determinations in Propositions One and Two, we find that Appellant’s claim is moot.

In Proposition Four, Appellant contends that prosecutorial misconduct denied him a fundamentally fair trial. He concedes that he failed to timely challenge the alleged improper comment at trial and, thus, waived appellate review of his claim for all but plain error. *Malone v. State*, 2013 OK CR 1, ¶¶ 40-41, 293 P.3d 198, 211-12. We review his claim pursuant to the test set forth in *Simpson* and determine whether he had shown the existence of an actual error that is plain or obvious. *Id.*

The prosecutor’s suggestion during closing argument that the jurors might have to explain their verdict to a co-worker was borderline, however, the prosecutor properly focused the jury on the evidence. *Compare* Inst. No. 10-12, OUJI-CR(2d)(Supp.2000) (instructing jurors to contact the District Court if any person, over their objection, becomes critical of their service); *Logsdon v. State*, 2010 OK CR 7, ¶ 38, 231 P.3d 1156, 1169 (holding it is not improper for a prosecutor to argue that jury acts on behalf of society’s interest); *Bland v. State*, 2000 OK CR 11, ¶ 96, 4 P.3d 702, 728 (holding comments which focus on duty of jurors to serve and render verdict based upon evidence are proper).

Taking the prosecutor's comment in the context of the entire record, we find that the cumulative effect of the comment did not deprive Appellant of a fundamentally fair trial. *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872, 40 L.Ed.2d 431 (1974); *Warner v. State*, 2006 OK CR 40, ¶ 197, 144 P.3d 838, 891. As such, we conclude that Appellant has not shown that error, plain or otherwise, occurred. Proposition Four is denied.

In Proposition Five, Appellant contends that, although a fine is permissible under the general statute governing fines, 21 O.S.2011, § 64, the jury instructions incorrectly mandated a fine. He concedes that he failed to timely challenge the instructions at trial and, thus, waived appellate review of his claim for all but plain error. *Daniels v. State*, 2016 OK CR 2, ¶ 3, 369 P.3d 381, 383. We review his claim pursuant to the test set forth in *Simpson* and determine whether he had shown the existence of an actual error that is plain or obvious. *Id.*

As the instruction in the present case mirrored the instruction we recognized as plain error in *Daniels*, we find that Appellant has shown the existence of an error that is plain or obvious. *Daniels*, 2016 OK CR 2, ¶¶ 6-7, 369 P.3d at 384. We further find that this error seriously affected the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *McIntosh v. State*, 2010 OK CR 17, ¶ 9, 237 P.3d 800, 803; *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

Appellant requests modification of the imposed fines. We find that this is the appropriate relief. *See McIntosh*, 2010 OK CR 17, ¶¶ 10-11, 237 P.3d at

803; *Scott v. State*, 1991 OK CR 31, ¶ 14, 808 P.3d 73, 77. We vacate the fine in Count 2 and modify the fine in Count 1 to \$2,000.00.

In Proposition Six, Appellant challenges the effectiveness of his counsel at trial. We find that he has not shown ineffective assistance of counsel pursuant to the two-part test mandated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *Mitchell v. State*, 2011 OK CR 26, ¶ 139, 20 P.3d 160, 190.

Appellant asserts that defense counsel was ineffective for failing to raise the challenge he now presents in Proposition One. He similarly asserts that defense counsel failed to object to the prosecutor's comment which he asserted constituted prosecutorial misconduct in Proposition Four. We reviewed each of these claims of error, and determined that Appellant had not shown that error, plain or otherwise, had occurred. As such, we find that Appellant has not shown a reasonable probability that the outcome of the trial would have been different but for counsel's failure to raise the challenges that he now raises on appeal. *Andrew v. State*, 2007 OK CR 23, ¶ 99, 164 P.3d 176, 198; *Glossip v. State*, 2007 OK CR 12, ¶¶ 110-12, 157 P.3d 143, 161.

Appellant further asserts that defense counsel should have impeached the victim with his testimony from preliminary hearing to the effect that the detective told him that the suspect was in the lineup and affirmed his identification of Appellant. Reviewing the record, we find that counsel did not impeach or secure such testimony from the victim. However, as Appellant wholly admitted that he was present and participated in the crimes, we find

that Appellant has not established that the outcome of the trial would have been different but for counsel's omission. *Harrington v. Richter*, 562 U.S. 86, 112, 131 S.Ct. 770, 792, 178 L.Ed.2d 624 (2011).

Finally, Appellant asserts that defense counsel failed to object to the jury instructions which he asserted constituted error in Proposition Five. We determined in Proposition Five that plain error had occurred and granted relief. As such, we find that this claim is moot. Proposition Six is denied.

As to Proposition Seven, we find Appellant was not denied a fair trial by cumulative error. *Bechtel v. State*, 1987 OK CR 126, ¶ 12, 738 P.2d 559, 561; *Hope v. State*, 1987 OK CR 24, ¶ 12, 732 P.2d 905, 908 (finding single error cannot support accumulation of error claim). Therefore, Proposition Seven is denied.

DECISION

The judgment of the District Court is hereby **AFFIRMED**. The fine in Count 2 is **VACATED**. The fine in Count 1 is **MODIFIED** to \$2,000.00. The sentences are otherwise **AFFIRMED**. This matter is **REMANDED** to the District Court for entry of Judgment and Sentences consistent with this opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE SHARON HOLMES, DISTRICT JUDGE

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OPINION BY: LUMPKIN, P.J.

LEWIS, V.P.J.: Concur
JOHNSON, J.: Concur
SMITH, J.: Concur
HUDSON, J.: Concur in Part Dissent in Part

HUDSON, JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in affirming Kelly's convictions. I respectfully dissent, however, to modifying the fine imposed for Count 1 to \$2,000.00 and vacating the fine imposed for Count 2. As was found in *Daniels v. State*, 2016 OK CR 2, 369 P.3d 381, the instructional error in this case did not result in a miscarriage of justice or violate Appellant's rights. *Id.*, at ¶ 7, 369 P.3d at 384. Plain error did not result and relief is not warranted.