



IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SAMSON MICHAEL MESFUN,
Appellant,
vs.
THE STATE OF OKLAHOMA,
Appellee.

NOT FOR PUBLICATION

No. F-2016-696

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP 21 2017

SUMMARY OPINION

PER CURIAM:

Appellant, Samson Michael Mesfun, was convicted by a jury in Tulsa County District Court, Case No. CF-2014-5994, of the following crimes:

- Count 1 Driving Under the Influence of Alcohol, Subsequent Offense (47 O.S.Supp.2013, § 11-902(A)(2))
Count 3 Transporting an Open Container of Liquor (37 O.S.Supp.2014, § 537(A)(7))
Count 4 Driving Without a License (47 O.S.2011, § 6-112)
Count 5 Driving Left of Center (47 O.S.2011, § 11-306)1

On July 14, 2016, the Honorable James M. Caputo, District Judge, sentenced him in accordance with the jury's recommendation as follows:

- Count 1 Ten years imprisonment and a \$5000.00 fine
Count 3 One year in the county jail and a \$500.00 fine
Count 4 Ten days in the county jail and a \$500.00 fine
Count 5 Ten days in the county jail and a \$500.00 fine

The sentences were ordered to be served consecutively.

Mesfun raises three propositions of error in support of his appeal:

PROPOSITION I. THE TRIAL COURT COMMITTED PLAIN ERROR WHEN THE JURY WAS INCORRECTLY INSTRUCTED AS TO THE APPLICABLE RANGE OF PUNISHMENT FOR COUNT 3, TRANSPORTING AN OPEN CONTAINER.

1 The jury acquitted Appellant of Count 2, Possession of Marijuana (Subsequent Offense).

PROPOSITION II. SEVERAL INSTANCES OF PROSECUTORIAL MISCONDUCT DEPRIVED APPELLANT OF A FAIR TRIAL IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE OKLAHOMA CONSTITUTION.

PROPOSITION III. APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN COUNSEL FAILED TO OBJECT TO INSTANCES OF PROSECUTORIAL MISCONDUCT.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we modify the sentence on Count 3 and affirm in all other respects. As to Proposition I, Appellant contends, and the State concedes, that the jury was erroneously instructed on the punishment range for Count 3, Transporting an Open Container of Liquor. We therefore **MODIFY** the sentence on Count 3 to six months in the county jail and a \$500.00 fine. 37 O.S.2011, § 566(A); *McIntosh v. State*, 2010 OK CR 17, ¶¶ 9-10, 237 P.3d 800, 803.

As to Proposition II, none of the prosecutor's comments that Appellant complains of on appeal were objected to below, so our review is for plain error. "Plain error" is defined as an actual error, which is plain or obvious, and which affects the defendant's substantial rights. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. We will only grant relief if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings, or otherwise represents a miscarriage of justice. *Id.* The prosecutor's cross-examination of Appellant may have been pointed at times, but it was not demeaning or unfair. Cross-examination is meant to test a witness's veracity in an adversarial setting. *See Malone v. State*, 2007 OK CR 34, ¶ 44, 168 P.3d 185, 203-04 (while witnesses should be treated with respect, "[t]his does not mean that a testifying defendant

must be treated with kid gloves”). The prosecutor’s comments, in closing argument, on Appellant’s history of drug- and alcohol-related offenses were not improper. That information had been properly admitted into evidence, and Appellant had discussed his criminal history in his direct examination. The prosecutor’s comments were fair inferences from this evidence.² There is no error, plain or otherwise, here. Proposition II is denied.

In Proposition III, Appellant claims his trial counsel did not render assistance compatible with the Sixth Amendment guarantee of reasonably effective counsel. We will only grant relief if Appellant demonstrates (1) that counsel made professionally unreasonable decisions, and (2) that those decisions caused prejudice, undermining confidence in the outcome of the trial. *Strickland v. Washington*, 466 U.S. 668, 687, 698, 104 S.Ct. 2052, 2064, 2070, 80 L.Ed.2d 674 (1984); *Bland v. State*, 2000 OK CR 11, ¶ 112, 4 P.3d 702, 730-31. A lack of demonstrable prejudice from counsel’s conduct is fatal to an ineffective-counsel claim. *Malone v. State*, 2013 OK CR 1, ¶ 16, 293 P.3d 198, 207. Appellant’s first complaint (counsel’s failure to correct the punishment instruction on Count 3) is moot, since we have already granted relief on the related substantive claim in Proposition I.³ Because we have found nothing improper in the prosecutor’s

² The State was required to prove not just that Appellant had prior convictions, but that he had certain *types* of prior convictions, in order to enhance the sentences on Count 1 (Driving Under the Influence of Intoxicants – Subsequent Offense) and Count 2 (Possession of Marijuana - Subsequent Offense, on which the jury ultimately acquitted). All prior convictions alleged by the State were offered into evidence without defense objection. In closing argument, the prosecutor suggested that Appellant’s conduct when he was pulled over for erratic driving, and his testimony about the event, were influenced by his past experiences in being stopped while driving under the influence of intoxicants.

³ Although the title of Proposition III does not mention this claim, it is raised in Appellant’s argument.

comments and cross-examination, see Proposition II, counsel was not deficient for failing to object, and Appellant cannot demonstrate a reasonable probability that the outcome would have been different if he had. *Sanchez v. State*, 2009 OK CR 31, ¶ 99, 223 P.3d 980, 1012. Proposition 3 is therefore denied.

DECISION

The sentence on Count 3, Transporting an Open Container of Liquor, is **MODIFIED** to six months in the county jail and a fine of \$500.00. In all other respects, the Judgment and Sentence of the District Court of Tulsa County is **AFFIRMED**. 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 the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE JAMES CAPUTO, DISTRICT JUDGE

ATTORNEYS AT TRIAL

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PER CURIAM OPINION:

LUMPKIN, P.J.: CONCUR
LEWIS, V.P.J.: CONCUR
HUDSON, J.: CONCUR

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