

ORIGINAL



IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MARCUS STEPHON MILLER,)
)
 Appellant,)
)
 v.)
)
 STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. F-2016-229

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

NOV 16 2017

SUMMARY OPINION

HUDSON, JUDGE:

Appellant, Marcus Stephon Miller, was charged in Tulsa County District Court, Case No. CF-2014-251, with Count 1: Murder in the First Degree, in violation of 21 O.S.2011, § 701.7; Count 2: Murder in the First Degree, in violation of 21 O.S.2011, § 701.7; and Count 3: Possession of a Firearm While Under DOC Supervision, in violation of 21 O.S.Supp.2012, § 1283. The jury convicted Miller of the lesser offense of Second Degree Murder on Counts 1 and 2 and of the crime charged on Count 3. In second stage proceedings the jury recommended the following sentences—Count 1: twenty-five (25) years imprisonment and a \$2,500.00 fine; Count 2: twenty-five (25) years imprisonment and a \$2,500.00 fine; and Count 3: five (5) years imprisonment and a \$1,000.00 fine. The Honorable Sharon K. Holmes, District Judge, sentenced Miller in accordance with the jury’s recommended terms of imprisonment, ordered the sentences to run consecutively, and declined to give

credit for time served.¹ Miller now appeals, raising seven (7) propositions of error before this Court:

- I. THE TRIAL COURT COMMITTED PLAIN ERROR BY FAILING TO PROPERLY BIFURCATE MR. MILLER'S TRIAL ON COUNT III, DEPRIVING HIM OF HIS DUE PROCESS RIGHTS TO A FAIR SENTENCING UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ART. II, § 7, OF THE OKLAHOMA CONSTITUTION;
- II. THE TRIAL COURT COMMITTED PLAIN ERROR BY FAILING TO PROPERLY BIFURCATE MR. MILLER'S TRIAL ON COUNTS I AND II, DEPRIVING HIM OF HIS DUE PROCESS RIGHTS TO A FAIR SENTENCING UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ART. II, § 7, OF THE OKLAHOMA CONSTITUTION;
- III. MR. MILLER WAS DENIED DUE PROCESS OF LAW WHEN THE TRIAL COURT FAILED TO CORRECTLY INSTRUCT THE JURY IN VIOLATION OF SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7 AND 19 OF THE OKLAHOMA STATE CONSTITUTION;
- IV. MR. MILLER WAS DENIED A FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT;
- V. MR. MILLER'S TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS;
- VI. THE TRIAL COURT'S SENTENCING POLICY WAS AN ABUSE OF DISCRETION BECAUSE IT PUNISHED MR. MILLER FOR EXERCISING HIS RIGHT TO JURY TRIAL BY REFUSING TO CONSIDER GRANTING CREDIT FOR TIME SERVED; and
- VII. THE ACCUMULATION OF ERRORS DEPRIVED MR. MILLER OF A FAIR PROCEEDING.

¹ Under 21 O.S.2011, § 13.1, Miller must serve 85% of the sentences imposed on Counts 1 and 2 before he is eligible for parole.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we find the judgments of the district court on all three counts and Appellant's Count 3 sentence should be **AFFIRMED**. However, we find Appellant's Count 1 and 2 sentences must be **VACATED** and the matter **REMANDED FOR RESENTENCING**.

1.

Appellant asserts the trial court failed to properly instruct and bifurcate his trial as to Count 3—Possession of a Firearm While under the Supervision of the Department of Corrections. As a prior conviction was a necessary element to prove Count 3, Appellant argues Count 3 was specifically excluded from the procedure set forth in 22 O.S.2011, § 860.1. As Appellant failed to object to the manner in which his trial was bifurcated or to the relevant jury instructions now at issue on appeal, he has waived all but plain error review of this claim. *See Simpson v. State*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 693 (holding that “[f]ailure to object with specificity to errors alleged to have occurred at trial, thus giving the trial court an opportunity to cure the error during the course of trial, waives that error for appellate review.”).

To be entitled to relief under the plain error doctrine, Appellant must show an actual error, which is plain or obvious, and which affects his substantial rights. *Baird v. State*, 2017 OK CR 16, ¶ 25, 400 P.3d. 875, 883; *Ashton v. State*, 2017 OK CR 15, ¶ 34, 400 P.3d. 887, 896-97; *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395; 20 O.S.2011, § 3001.1. 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. *Baird*, 2017 OK CR 16, ¶ 25, 400 P.3d. at 883; *Ashton*, 2017 OK CR 15, ¶ 34, 400 P.3d. at 896-97; *Tollett v. State*, 2016 OK CR 15, ¶ 4, 387 P.3d 915, 916; *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

The following procedure is to be utilized in cases such as this one:

Whenever a defendant is charged with multiple counts, one or more which require a prior conviction as an element of the crime, and one or more which do not, trial shall be bifurcated. Those crimes which do not contain the element of former conviction shall be tried to guilt or innocence in the first stage. Those crimes which contain the element of prior conviction shall be tried to guilt or innocence and punishment in the second stage.

Chapple v. State, 1993 OK CR 38, ¶ 18, 866 P.2d 1213, 1217. This was clearly not the procedure utilized at Appellant's trial. Thus, the district court procedurally erred when it instructed the jury in the first stage of trial on the supposed crime of Possession of a Firearm. Nonetheless, we find no prejudice resulted.

The district court's first stage instruction did not reference Appellant's prior conviction and thus "shielded [A]ppellant from prejudicial misuse of his former conviction[] by the jury during their determination of guilt in this multi-count trial." *Chapple*, 1993 OK CR 38, ¶ 18, 866 P.2d 1213, 1217. Moreover, the district court's second stage instructions relating to Count 3, when considered together, adequately instructed the jury on the salient law. See *Hicks v. State*, 2003 OK CR 10, ¶ 3, 70 P.3d 882, 883 ("[A] judgment will not be

disturbed as long as the instructions, taken as a whole, fairly and accurately state the applicable law.”).

Thus, as no prejudice resulted, no plain error occurred. *Haney v. State*, 2011 OK CR 10, ¶ 27, 256 P.3d 1002, 1007 (error that is not prejudicial to the defendant does not equate to plain error). Proposition I is denied.

2.

The record is silent as to when the State allegedly elected to waive any potential enhancement of Counts 1 and 2 through the introduction of Appellant’s prior felony conviction. Moreover, the State’s allegation that Appellant had a prior felony conviction activated the protections provided by § 701.10-1(A) and mandated bifurcation of Appellant’s trial as to Counts 1 and 2. Thus, given the silent record and in view of 21 O.S.Supp.2013, § 701.10-1, we must assume that 1) Appellant’s trial was purposely and properly bifurcated pursuant to 21 O.S.Supp.2013, § 701.10-1; and 2) the determination that Appellant’s prior felony conviction would not be utilized for enhancement purposes occurred after the jury’s first stage verdicts.

Reviewing Appellant’s claim from this frame of reference, we find error occurred. Appellant’s prior felony conviction was *solely* admitted to prove an element of Count 3. While arguably Appellant benefitted from this error,² the focal point of this issue is what actually transpired, not what was permissible. Here, whether done so in error or by choice, the State did not seek to enhance

² Appellant’s prior felony conviction could have been used both as an element of Count 3 and to enhance his Count 1 and 2 sentences. *Kinchion v. State*, 2003 OK CR 28, ¶ 18, 81 P.3d 681, 686.

Appellant's second degree murder convictions. Thus, Appellant's trial should have been trifurcated so that punishment for Appellant's Counts 1 and 2 convictions could be determined prior to introduction of Appellant's prior felony conviction. See *Perryman v. State*, 1999 OK CR 39, ¶¶ 12-15, 990 P.3d 900, 905 (non-enhanced crimes should be tried to guilt or innocence and punishment separate from and prior to the introduction of a prior felony offense).

The remaining question is whether the error requires relief, *i.e.*, whether it had a "substantial influence" on the outcome, or leaves the reviewing court in "grave doubt" as to whether it had such an effect. *Simpson*, 1994 OK CR 40, ¶ 36, 876 P.2d at 702. In determining this question, we may ask "what effect the error had or reasonably may have had on the jury's decision," and "take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened." *Id.* (quoting *Kotteakos v. United States*, 328 U.S. 750, 765, 66 S. Ct. 1239, 1248, 90 L. Ed. 1557 (1946)). Since this procedural error requires application of the harmless error statute, we will reverse the judgment and sentence only where the error "probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." 20 O.S.2011, § 3001.1.

Here, not only was evidence of Appellant's prior conviction erroneously presented to the jury prior to their Count 1 and 2 sentencing determinations, but the prosecutor instructed the jury during closing argument:

As an aside, [Appellant's prior conviction] can't be used to enhance the Second Degree Murder. You can, however, take it into consideration while you're making your decision. In other words, this doesn't make the floor, or the lower number, higher. But you can use this in debating what sentence is appropriate. So we will respect whatever you do. We thank you for your consideration.

Moreover, in the State's final closing argument, the prosecutor additionally commented, "The only rebuttal I have to say, because I couldn't pass, is that you saw how well [Appellant] did on supervision as he suggested to you last time. Keep that in mind, too."³

After careful consideration of the facts and circumstances, we have grave doubt and thus find that the jury's sentencing decisions were substantially influenced by the evidence of Appellant's prior conviction. Thus, we find plain error occurred. Appellant's Count 1 and 2 sentences must be vacated and remanded for re-sentencing.

3.

This claim is a continuation of Appellant's first and second propositions of error. Appellant asserts here that the trial court's failure to properly instruct the jury violated his Sixth and Fourteenth Amendment rights. "Instructions are within the discretion of the trial court." *Tucker v. State*, 2016 OK CR 29, ¶ 25, 395 P.3d 1, 8. The trial judge should instruct jurors on the applicable law, including the elements of the offense and the law applying to that case's evidence. *Day v. State*, 2013 OK CR 8, ¶ 14, 303 P.3d 291, 298. Appellant's

³ The prosecutor's comment was likely in response to defense counsel's remarks relating to post-conviction supervision. Defense counsel, during his closing argument, advised the jury that Appellant would be subjected to post-conviction supervision after he served 85% of whatever sentence the jury imposed. In this regard, defense counsel stated, "[A]ppellant will have the State of Oklahoma making sure he is complying with the rules and conditions of his probation." Defense counsel did not object to the prosecutor's remarks.

failure to object to the instructions as given waives all but plain error review. See *Mitchell v. State*, 2011 OK CR 26, ¶ 102, 270 P.3d 160, 183.

Given the Court's Proposition I findings, Appellant cannot show defects in the challenged Count 3 jury instructions amounted to plain error. See *Tollett*, 2016 OK CR 15, ¶ 4, 387 P.3d at 916 (an appellant must prove plain error). Moreover, Appellant's claim relating to Counts 1 and 2 is rendered moot by the Court's Proposition II determination that his sentences on these counts must be vacated and remanded for resentencing. Hence, Appellant's Proposition III is denied.

4.

"This Court will not grant relief based on prosecutorial misconduct unless the State's argument is so flagrant and that it so infected the defendant's trial that it was rendered fundamentally unfair." *Williams v. State*, 2008 OK CR 19, ¶ 124, 188 P.3d 208, 230. Appellant objected to some of the alleged misconduct, but not to all of it. Where objections were timely made and sustained by the trial court, error was cured. *Hanson v. State*, 2009 OK CR 13, ¶ 19, 206 P.3d 1020, 1028 ("Error is cured where a defendant's objection to improper argument is sustained."); *Armstrong v. State*, 1991 OK CR 34, ¶ 24, 811 P.2d 593, 599 (prosecutorial misconduct cured when trial court sustained objection). Alleged misconduct that was not timely met with objection at trial is reviewed for plain error only. *Mathis v. State*, 2012 OK CR 1, ¶ 24, 271 P.3d 67, 76. No plain error is found to have occurred.

When considered within the context of the entire trial, we find that none of the alleged misconduct, either considered individually or cumulatively, rendered Appellant's trial fundamentally unfair. *Harmon v. State*, 2011 OK CR 6, ¶ 80, 248 P.3d 918, 943 (relief for prosecutorial misconduct will only be granted where the misconduct effectively deprives the defendant of a fair trial or a fair and reliable sentencing proceeding). Relief is thus not warranted and Appellant's Proposition IV is denied.

5.

To prevail on an ineffective assistance of counsel claim, Appellant must show both that counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See also *Harrington v. Richter*, 562 U.S. 86, 104, 131 S. Ct. 770, 787-88, 178 L. Ed. 2d 624 (2011) (discussing *Strickland* two-part standard). A portion of Appellant's claim is rendered moot by this Court's Proposition II determination that his sentences on these counts must be vacated and remanded for resentencing. The remainder of Appellant's ineffective assistance of counsel claims lack merit. Relief is denied for Proposition V.

6.

It is well settled that the sentencing judge in Oklahoma has the discretion in deciding whether to allow a defendant credit for time served in jail before sentencing. *Holloway v. State*, 2008 OK CR 14, ¶ 8, 182 P.3d 845, 847. Further, this Court will presume the district court exercised its discretion

properly unless proven otherwise. *Riley v. State*, 1997 OK CR 51, ¶ 21, 947 P.2d 530, 535. An abuse of discretion by a trial court is “any unreasonable, unconscionable and arbitrary action taken without proper consideration of the facts and law pertaining to the matter submitted.” *Id.*, 1997 OK CR 51, ¶ 20, 947 P.2d at 534-35.

Appellant fails to show an abuse of discretion in this case. The court did not state an unbending policy of refusing to consider credit for time served after a jury trial. “While it is common practice for the trial judge to give credit for time served, there is no authority mandating such credit or making it [an] abuse of discretion to fail to give it.” *Shepard v. State*, 1988 OK CR 97, ¶ 21, 756 P.2d 597, 602. In this case, Appellant offered few good reasons at formal sentencing why credit for time served was warranted. The trial court, was clearly unmoved by Appellant’s plea and rejected it on the merits. Under these circumstances, the trial court did not abuse its discretion in denying Appellant’s request. Relief for Proposition VI is denied.

7.

Aside from finding plain error in Proposition II requiring relief, Appellant’s cumulative error claim as to the remainder of Appellant’s propositions of error lacks merit. This is not a case where, considered together, any instance of error we have identified or assumed to exist affected the outcome of the proceedings and denied Appellant a fair trial. *See Baird*, 2017 OK CR 16, ¶ 42, 400 P.3d. at 886 (a defendant is not denied a fair trial when the errors considered together do not affect the outcome of the proceedings);

Postelle v. State, 2011 OK CR 30, ¶ 94, 267 P.3d 114, 146; *Pavatt v. State*, 2007 OK CR 19, ¶ 85, 159 P.3d 272, 296. Thus, relief for cumulative error is unwarranted and Proposition VII is denied.

DECISION

The Judgments of the district court and Appellant's Count 3 sentence are **AFFIRMED**. Appellant's Count 1 and 2 sentences are **VACATED** and the matter **REMANDED FOR RESENTENCING**. 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 delivery and filing of this decision.

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

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OPINION BY: HUDSON, J.
LUMPKIN, P.J.: CONCUR IN PART/DISSENT IN PART
LEWIS, V.P.J.: CONCUR
KUEHN, J.: CONCUR

LUMPKIN, PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in affirming the convictions in Counts 1, 2 and 3 and in affirming the sentence in Count 3. However, I dissent to remanding the case for resentencing in Counts 1 and 2. I agree that the trial court erred in determining punishment for all three counts in the same proceeding. However, I find this error does not constitute plain error warranting relief.

I read the conclusion of Proposition II to say that we have doubts that the jury's sentencing decision in Counts 1 and 2 was influenced by evidence of the prior conviction. Having doubts about the effect of the prior conviction means any error was harmless as it did not affect Appellant's substantial rights and therefore is not sufficient to warrant remanding the case for resentencing.

Pursuant to 21 O.S.Supp.2013, § 701.10-1, the State could have used the prior conviction to enhance the first degree murder charges in Counts 1 and 2. However, the record indicates the State chose for whatever reason not to seek to enhance Counts 1 and 2. In fact, the prosecutor explained in closing argument that the prior conviction could not be used to enhance Counts 1 and 2. This resulted in Appellant being sentenced as a first time offender. It is hard to find the court's procedural error affected Appellant's substantial rights when Appellant received a

sentence of 25 years in each count, for shooting to death two people, when the possible maximum sentence was life in prison. Further, the prosecutor's comment relied upon in the opinion to support a finding of prejudice was, as admitted in footnote 3, "likely in response" to defense counsel's remarks. This would be invited error from which Appellant cannot benefit. *See Lott v. State*, 2004 OK CR 27, ¶ 102, 98 P.3d 318, 345.

Under the record in this case it is very hard to find Appellant's substantial rights were affected (to support a finding of plain error) and even more difficult to find a miscarriage of justice (if we found plain error and sought to correct such).