

AUG - 5 2006

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA
MICHAEL S. RICHIE
CLERK

ERIC MATTHEW NIMMO,)
) NOT FOR PUBLICATION
Appellant,)
v.) Case No. F 2005-522
)
THE STATE OF OKLAHOMA,)
)
Appellee.)

SUMMARY OPINION

C. JOHNSON, JUDGE:

Appellant, Eric Matthew Nimmo, was convicted by a jury in Tulsa County District Court, Case No. CF 2004-2030 of Robbery by Force, in violation of 21 O.S.Supp.2002, § 791, after former conviction of two or more felonies. Jury trial was held on January 3rd-5th, 2005, before the Honorable Thomas C. Gillert, District Judge. The jury set punishment at thirty-five (35) years imprisonment and imposed a ten thousand dollar (\$10,000.00) fine. Judge Gillert sentenced Mr. Nimmo on January 10, 2005, in accordance with the jury's verdict. He was granted an appeal out of time by this Court on May 23, 2005. See *Nimmo v. State*, PCD 2005-465 (Okl.Cr. May 23, 2005)(not for publication). Thereafter, Mr. Nimmo filed this appeal.¹

Appellant raises eight (8) propositions of error:

1. The evidence at trial was insufficient to support Appellant's conviction;

¹ We granted Appellant's Motion for Supplementation of Record and Request to Remand for Evidentiary Hearing on March 23, 2006. An evidentiary hearing was held on April 21, 2006, and the parties filed supplemental briefs on June 12th and 16th, 2006.

2. Various instances of prosecutorial misconduct, including disparaging remarks directed at Appellant's witnesses and repeated references to the effect that the robbery had upon the victim and the victim's daughter, served to deny Appellant his right to a fair trial pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution;
3. The trial court made a statement when ruling on an objection which could reasonably have been interpreted by the jury as his opinion that one of Appellant's witnesses was not telling the truth. This evidenced a lack of impartiality and served to deny Appellant the right to a fair trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution;
4. The admission of a transactional felony in the second stage was error constituting ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution;
5. Defense counsel's failure to call witnesses to establish that the robbery was committed by another constituted ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution;
6. Appellant received ineffective assistance of counsel in the second stage when his attorney admitted that he had three prior felony convictions;
7. The jury instructions relating to reasonable doubt and circumstantial evidence served to deprive Appellant's right to due process in violation of the Fourteenth Amendment to the United States Constitution; and,
8. The accumulation of error in this case deprived Appellant of due process of law, necessitating reversal pursuant to the Sixth and Fourteenth Amendments to the United States Constitution as well as Article II, § 7 of the Oklahoma Constitution.

After thorough consideration of the entire record before us on appeal, including the Original Record, the transcripts, exhibits, and briefs of the parties, we find Mr. Nimmo's conviction should be and hereby is affirmed, but his sentence modified to twenty (20) years for the reasons set forth below.

Viewing the evidence in the light most favorable to the State, we find a rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *Mitchell v. State*, 2005 OK CR 15, ¶ 51, 120 P.3d 1196, 1209; *Spuehler v. State*, 1985 OK CR 32, ¶ 7, 709 P.2d 202, 203-204. The evidence presented was sufficient to sustain Mr. Nimmo's conviction for robbery by force and Proposition One is denied.

Allegations of prosecutorial misconduct do not warrant reversal of a conviction unless the cumulative effect was such to deprive the defendant of a fair trial. *Taylor v. State*, 2002 OK CR 13, ¶ 4, 45 P.3d 103, 104. The prosecutor's argument suggesting Nimmo would not have been prosecuted if his witnesses had come forward was improper, but standing alone, was not so egregious as to have affected the outcome of the trial. *Bland v. State*, 2000 OK CR 11, ¶ 100, 4 P.3d 702, 728. While trial counsel could have objected to the comments complained of, the asserted errors were not so prejudicial as to have affected the outcome of the case.

In Proposition Three, we find the trial court's response to a defense objection during the testimony of Jennifer Lucas was improper. *Diaz v. State*, 1986 OK CR 167, ¶ 22, 728 P.2d 503, 512 (the trial judge should refrain from comments which indicate his views on the credibility of witnesses or the merits of the case). Juries are easily influenced by remarks of the trial judge, and the greatest care should be observed that nothing is said that can by any possibility be construed as an expression of the trial judge's views respecting the merits of a criminal case. *Dean v. State*, 54 Okla.Crim. 384, 22 P.2d 621.

The trial judge should not express its opinion, either expressly or impliedly, intentionally or otherwise, as to the credibility of any witness, or as to the truth of any matter at issue. *Id.* at 622. The trial judge's response to the defense objection suggested the conclusion the jury should reach on a question upon which the jury could pass. *Id.*

Whether the remarks made by the trial judge are prejudicial must be determined by examining the entire record. *McMahan v. State*, 96 Okl.Cr. 176, 251 P.2d 204, 205. Having examined the entire record, we believe the trial court's remark was not so prejudicial as to have affected the outcome of the trial and no relief is required.

In Proposition Four, Appellant complains the admission of transactional felonies during the second stage of trial was improper and trial counsel's failure to object to their admission constituted ineffective assistance of counsel. We remanded for an evidentiary hearing on this issue and the trial court concluded the admission of transactional felonies was improper, trial counsel did not object to them, and there was a presumption of "an adverse effect on the jury."

We agree. When proving a defendant has two or more felony convictions for the purpose of enhancing punishment, the felony offenses relied upon by the State "shall not have arisen out of the same transaction or occurrence or series of events closely related in time and location." 21 O.S.Supp.2002, § 51.1(B). The burden is on the defendant to establish that the convictions arose out of the same transaction or occurrence or series of events closely related in time and location. *Bickerstaff v. State*, 1983 OK CR 116, ¶ 10, 669 P.2d 778,

780. Had defense counsel imposed a proper objection to the transactional felonies, the prosecutor could not have so strenuously argued a “three-time convicted felon” deserved such a lengthy sentence. The trial court acknowledged the adverse effect on the jury and we therefore find modification of Nimmo’s sentence is warranted. *See Miller v. State*, 1984 OK CR 33, ¶ 10, 675 P.2d 453, 455 (admission of transactional felonies could not be harmless and warranted modification where prosecutor based argument for long prison sentence on number of prior convictions). Accordingly, we hereby modify Appellant’s sentence to twenty (20) years imprisonment.

In Proposition Five, Appellant claims his counsel was ineffective for failing to call witnesses to establish the robbery was committed by another person. We remanded for an evidentiary hearing on the issue and consider the trial court’s findings and the transcript of that hearing in reaching our determination on this issue.

Analysis of this claim begins with the deferential presumption that trial counsel’s performance falls within the “wide range of reasonable professional assistance.” *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984); *Patterson v. State*, 2002 OK CR 18, ¶ 17, 45 P.3d 925, 929. To prevail on the claim that counsel was ineffective, Nimmo must show his counsel’s performance was deficient and that he was prejudiced by that performance. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064; *Matthews v. State*, 2002 OK CR 16, ¶ 28, 45 P.3d 907, 918. Failure to prove either of these requirements is fatal to Nimmo’s claim. “Unless a defendant makes both

showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.” *Strickland, id.*

The trial court concluded, after hearing witnesses at the evidentiary hearing, including the testimony of trial counsel, that trial counsel’s decision not to pursue Honeycutt and Vann was based on sound trial strategy. We afford the trial court’s findings of fact and conclusions of law strong deference, but this Court shall determine the ultimate issue of whether trial counsel was ineffective. Rule 3.11(B)(3)(b)(iv), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006). In this case, we agree with the trial court’s conclusion that trial counsel’s decisions could be sound trial strategy and no relief is required on this claim.

No relief is required on Proposition Six. The comment complained of could be considered sound trial strategy which this Court will not second guess. *Wood v. State*, 1998 OK CR 19, ¶ 60, 959 P.2d 1, 16.

Jury instructions are a matter committed to the sound discretion of the trial court whose judgment will not be disturbed as long as the instructions, taken as a whole, fairly and accurately state the law. *Dill v. State*, 2005 OK CR 20, ¶ 11, 122 P.3d 866, 869. In Proposition Seven, we find the instructions given to the jury relating to reasonable doubt and circumstantial evidence were proper and decline to reconsider our holding in *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556.

Lastly, Appellant's accumulation of error claim does not warrant further relief. See *Lockett v. State*, 2002 OK CR 30, ¶ 43, 53 P.3d 418, 431.

DECISION

The Judgment of the trial court in Tulsa County District Court, Case No. CF 2004-2030, is hereby **AFFIRMED** but the sentence is hereby **MODIFIED** from thirty-five (35) years to twenty (20) years imprisonment. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE TOM GILLERT, DISTRICT JUDGE

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OPINION BY: C. JOHNSON, J.

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LUMPKIN, V.P.J. : CONCURS IN RESULTS
A. JOHNSON, J.: CONCURS
LEWIS, J.: CONCURS

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