

**IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA**

JOSHUA PAUL NOSAK, )  
 )  
 Appellant, ) NOT FOR PUBLICATION  
 )  
 v. ) Case No. F 2011-1045  
 )  
 THE STATE OF OKLAHOMA, )  
 )  
 Appellee. )

**FILED**  
**IN COURT OF CRIMINAL APPEALS**  
**STATE OF OKLAHOMA**  
APR - 5 2013

**SUMMARY OPINION**

**MICHAEL S. RICHIE**  
**CLERK**

**LEWIS, PRESIDING JUDGE:**

Joshua Paul Nosak, Appellant, was convicted of, count one, first degree manslaughter by driving while impaired, or alternatively while driving without a valid driver's license, in violation of 21 O.S.Supp.2009, § 711(1); count two, leaving the scene of a fatal accident, in violation of 47 O.S.2001, § 10-102.1; count three, driving without a driver's license, in violation of 47 O.S.Supp.2009, § 6-303(A); count four, assault with a dangerous weapon, in violation of 21 O.S.Supp.2006, § 645, in the district court of Tulsa County, case number CF-2010-1869, before the Honorable Kurt G. Glassco, District Judge.

The jury assessed sentences of fifty (50) years imprisonment and a \$10,000 fine on count one, ten (10) years imprisonment and a \$10,000 fine on count two, thirty (30) days in jail and a \$300 fine on count three, and ten (10)

years imprisonment and a \$10,000 fine on count four. The trial court sentenced Nosak in accordance with the jury verdict and ordered that the sentences for counts two, three, and four be served concurrently with each other and consecutively with the sentence for count one. The trial court also suspended payment of the fines. Nosak perfected an appeal to this Court raising the following propositions of error.

1. The trial court erred in failing to sustain Mr. Nosak's motion to quash the Information with respect to the alternative charge of first degree manslaughter because the underlying misdemeanor alleged, driving without a valid driver's license, was insufficient to support the charge.
2. The trial court committed reversible error by admitting misleading, irrelevant and/or highly prejudicial evidence into the record in violation of Mr. Nosak's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Oklahoma constitution.
3. Mr. Nosak was denied effective assistance of counsel in violation of his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article II, §§ 7, 9, and 20 of the Oklahoma constitution.
4. The Judgment and Sentence should be corrected by an order *nunc pro tunc*.
5. The accumulation of errors deprived Mr. Nosak of a fair trial and reliable verdict.

After thorough consideration of Nosak's propositions of error and the entire record before us on appeal, including the original record, transcripts, exhibits, and briefs, we have determined that the judgment and sentence of the

district court shall be affirmed. The case, however, shall be remanded for an order *nunc pro tunc* to correct the Judgment and Sentence.

In proposition one, we find that Nosak cannot show that he was harmed by any possible error in the inclusion of an alternate charge that his first degree manslaughter charge could be based on the underlying misdemeanor offense of driving without a valid driver's license. Nosak was found guilty, by jury, of both specific alternative first degree manslaughter theories. The jury found him guilty of first degree manslaughter with the specific underlying offense of driving while impaired by alcohol or drugs. The jury was correctly instructed of the offense as well as the elements of the underlying offense. Because the jury verdict for this offense is sound, he cannot show any prejudice, even if error exists.<sup>1</sup>

In proposition two, we find that there was no contemporaneous objection to the introduction of Nosak's driving record. Review of this issue is, therefore, waived, except that this Court may review for plain error. 12 O.S.2011, § 2104. Our review for plain error leads us to find that no plain error occurred, because the introduction of this evidence did not affect Appellant's substantial rights.<sup>2</sup>

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<sup>1</sup> The verdict in this case does not create the same problem found in *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931), as the verdict was specific and not general in nature. Two of our recent cases support a holding that neither of the alternative theories is infirm. See *State v. Haworth*, 2012 OK CR 12, 283 P.3d 311, and *State v. Ceasar*, 2010 OK CR 15, 237 P.3d 792.

<sup>2</sup> Plain error requires; "1) the existence of an actual error (i.e., deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding." *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d. 907, 923.

*Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d. 907, 923. The introduction of this evidence neither affected the finding of guilt or the sentence in this case, as the evidence was overwhelming and the sentence was clearly based on the crime committed and not on extraneous information.

In proposition three, we find that, Nosak was not prejudiced by counsel's failure to object to the introduction of his driving record. Nosak cannot show that the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), was met in this case. Again, the evidence in this case was clear and overwhelming, and; furthermore, the mere driving record did not affect the sentence garnered in this horrendous crime.

In proposition four, we find that the Judgment and Sentence of the District Court contains substantial irregularities regarding the sentencing for the crimes for which Nosak was convicted. We, therefore, remand this case to the District Court for an order *nunc pro tunc* to correct the error which incorrectly shows that all of Nosak's sentences were ordered to be served consecutively. We find, in proposition five, that there is no individual error requiring relief; therefore there can be no error to accumulate. *Lott v. State*, 2004 OK CR 27, ¶ 165, 98 P.2d 318, 357.

#### **DECISION**

This case shall be **REMANDED** to the district court for the issuance of an order *nunc pro tunc* to correct the Judgment and Sentence to reflect the correct punishment. In all other respects, the Judgment and Sentence of the district

court shall be **AFFIRMED**. 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 the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY  
HONORABLE KURT G. GLASSCO, DISTRICT JUDGE

**APPEARANCES AT TRIAL**

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**OPINION BY: LEWIS, P.J.**

**SMITH, V.P.J.: Concurs**  
**LUMPKIN, J.: Concurs**  
**C. JOHNSON, J.: Concurs**  
**A. JOHNSON, J.: Concurs**

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