

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BRADLEY JOE RAYMOND,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2012-914

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

NOV 15 2013

SUMMARY OPINION

A. JOHNSON, JUDGE:

MICHAEL S. RICHIE
CLERK

Appellant Bradley Joe Raymond was tried by jury in the District Court of McCurtain County, Case No. CF-2011-403, and convicted of Assault and Battery with a Dangerous Weapon, After Former Conviction of Two or More Felonies (Count 1) in violation of 21 O.S.2011, § 645, Domestic Abuse in the Presence of a Minor, After Former Conviction of Two or More Felonies (Count 2) in violation of 21 O.S.Supp.2010, § 644(F),¹ and Domestic Abuse by Strangulation, After Former Conviction of Two or More Felonies (Count 3) in violation of 21 O.S.Supp.2010, § 644 (I).² The jury fixed punishment at life imprisonment on each count. The Honorable Gary Brock, Special Judge, who presided at trial, sentenced Raymond according to the jury's verdict, ordering the sentences in Counts 1 and 2 to be served concurrently and the sentence in

¹ The Amended Information, filed January 26, 2012, refers to 21 O.S. § 644(G) for this charge. The citation to subsection G refers to 21 O.S.2011, § 644, the version of the statute which criminalizes Domestic Abuse in the Presence of a Minor that went into effect November 1, 2011. Raymond committed this crime prior to November 1, 2011, when 21 O.S.Supp.2010, § 644 (F) was in effect and criminalized domestic abuse in the presence of a minor.

² The Amended Information refers to 21 O.S. § 644(J) for this charge. The applicable statute for this charge is 21 O.S.Supp.2010, § 644(I). See n.1, *supra*.

Count 3 to run consecutive to Counts 1 and 2. From this Judgment and Sentence Raymond appeals, raising the following issues:

- (1) whether the trial court correctly instructed the jury on the statutory range of punishment under the Habitual Offender Act on Counts 1, 2 and 3; and
- (2) whether the admission of the State's exhibits for sentence enhancement containing extraneous information about his prior sentences amounted to plain error and adversely affected his sentence.

We find reversal is not required and affirm the Judgment and Sentence of the District Court on Counts 1 and 3. We affirm the Judgment on Count 2, but modify the sentence because of instruction error.

1.

We reject Raymond's claim that the trial court erroneously instructed the jury on the statutory range of punishment under the Habitual Offender Act [21 O.S.2011, § 51.1] on Counts 1 and 3. The record shows that the trial court correctly instructed the jury on Count 1 by submitting instructions under § 51.1 (A)(1)³ and (B)⁴ of the Habitual Offender Act because these sections govern

³ Title 21 O.S.2011, § 51.1 (A)(1) provides:

- A. Except as otherwise provided in the Elderly and Incapacitated Victim's Protection Program and Section 3 of this act, every person who, having been convicted of any offense punishable by imprisonment in the State Penitentiary, commits any crime after such conviction, within ten (10) years of the date following the completion of the execution of the sentence, and against whom the District Attorney seeks to enhance punishment pursuant to this section of law, is punishable therefor as follows:

1. If the offense for which the person is subsequently convicted is an offense enumerated in Section 571 of Title 57 of the Oklahoma Statutes

the range of punishment for offenses, including assault and battery with a dangerous weapon, that are enumerated in Title 57, Section 571. The record also shows that the trial court correctly instructed the jury on Count 3 under the applicable sections of the Habitual Offender Act. See 21 O.S.2011, § 51.1 (A)(3) & (C). Raymond's claim that convictions for domestic abuse by strangulation are exempted from enhancement under the Habitual Offender Act is contradicted by the plain language of the statute and is without merit. See 21 O.S.Supp.2010, § 644 (I).⁵ The trial court in this case fashioned

and the offense is punishable by imprisonment in the State Penitentiary for a term exceeding five (5) years, such person is punishable by imprisonment in the State Penitentiary for a term in the range of ten (10) years to life imprisonment.

⁴ Title 21 O.S.2011, § 51.1(B) states:

B. Every person who, having been twice convicted of felony offenses, commits a subsequent felony offense which is an offense enumerated in Section 571 of Title 57 of the Oklahoma Statutes, within ten (10) years of the date following the completion of the execution of the sentence, and against whom the District Attorney seeks to enhance punishment pursuant to this section of law, is punishable by imprisonment in the State Penitentiary for a term in the range of twenty (20) years to life imprisonment. Felony offenses relied upon shall not have arisen out of the same transaction or occurrence or series of events closely related in time and location. Nothing in this section shall abrogate or affect the punishment by death in all crimes now or hereafter made punishable by death.

⁵ Section 644 (I) provided in relevant part:

I. Any person who commits any assault and battery with intent to cause great bodily harm *by strangulation or attempted strangulation* against [an identified person] shall, upon conviction, be guilty of domestic abuse by strangulation and shall be punished by imprisonment in the custody of the Department of Corrections for a period of not less than one (1) year nor more than three (3) years, or by a fine of not more than Three Thousand Dollars (\$3,000.00), or by both such fine and imprisonment. Upon a second or subsequent conviction, the defendant shall be punished by imprisonment in the custody of the Department of Corrections for a period of not less than three (3) years nor more than ten (10) years, or by a fine of not more than Twenty Thousand Dollars (\$20,000.00), or by both such fine and imprisonment

appropriate instructions on the range of punishment for Counts 1 and 3 based on the controlling subsections of § 51.1. No relief is required.

We agree with Raymond, however, that the trial court erroneously instructed the jury on the statutory range of punishment on Count 2. At the time he committed this offense, Title 21 O.S.Supp.2010, § 644 (F) provided that “[t]he provisions of Section 51.1 of this title [the Habitual Offender Act] shall not apply to any second or subsequent offense.”⁶ The trial court instructed the jury not only on the ranges of punishment specified in § 644 (F) for a first offense (a misdemeanor not subject to enhancement) and a second or subsequent offense, but also the ranges of punishment under § 51.1 for sentence enhancement with Raymond’s prior felony convictions.⁷

⁶ Section 644 (F) provides in relevant part:

F. Any person convicted of domestic abuse as defined in subsection C of this section that was committed in the presence of a child shall be punished by imprisonment in the county jail for not less than six (6) months nor more than one (1) year, or by a fine not exceeding Five Thousand Dollars (\$5,000.00), or by both such fine and imprisonment. Any person convicted of a *second or subsequent* domestic abuse as defined in subsection C of this section that was committed in the presence of a child shall be punished by imprisonment in the custody of the Department of Corrections for not less than one (1) year nor more than five (5) years, or by a fine not exceeding Seven Thousand Dollars (\$7,000.00), or by both such fine and imprisonment. **The provisions of Section 51.1 of this title shall not apply to any second or subsequent offense.**

⁷ Raymond’s jury was given the following options:

- First offense without a previous conviction for domestic assault and battery=6 months to 1 year and/or fine of up to \$5,000.00.
- Without a previous felony conviction=1 to 5 years in prison and/or a fine of up to \$7,000.00
- With one felony conviction=up to 10 years in prison

We are required to construe a statute “according to the fair import of its words taken in their usual sense, in connection with the context, and with reference to the purpose of the provision.” *See Nesbitt v. State*, 2011 OK CR 19, ¶ 20, 255 P.3d 435, 440. Section 644 (F) contained its own enhancement provision for a second or subsequent offense and specifically exempted second or subsequent convictions under this section from enhancement under the Habitual Offender Act. It was error for the trial court to submit the ranges of punishment for sentence enhancement under the Habitual Offender Act for this offense because § 644 (F) expressly barred such enhancement at the time this crime was committed.⁸ Raymond’s sentence on Count 2 must be modified to 5 years imprisonment.

2.

We reject Raymond’s claim that he was prejudiced by the admission of information within the exhibits offered and admitted for sentence enhancement regarding the suspension, revocation and acceleration of his prior sentences. Reviewing for plain error only, we find none. Raymond’s case is distinguishable from *Hunter v. State*, and he cannot show any error from the admission of these exhibits affected the outcome of his case. *See Hunter v. State*, 2009 OK

-With two prior felony convictions=3 years to life imprisonment.

(O.R. 113; Instruction No. 32)

⁸ The version of § 644 that went into effect November 1, 2011, two months after the crimes herein, provided that “[t]he provisions of Section 51.1 of this title shall apply to any second or subsequent offense.” 21 O.S.2011, § 644 (G).

CR 17, ¶¶ 8-10, 208 P.3d 931, 933-934 (plain error is error that counsel failed to preserve through a timely trial objection, but upon appellate review, is clear from the record and affected the defendant's substantial rights). This claim is denied.

DECISION

The Judgment and Sentence of the district court on Counts 1 and 3 is **AFFIRMED**. The Judgment of the district court on Count 2 is **AFFIRMED**, but the sentence is **MODIFIED** from life imprisonment to five years imprisonment. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2013), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF MCCURTAIN COUNTY
THE HONORABLE GARY BROCK, SPECIAL JUDGE

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OPINION BY: A. JOHNSON, J.
LEWIS, P.J.: Concur
SMITH, V.P.J.: Concur
LUMPKIN, J.: Concur in Results
C. JOHNSON, J.: Concur