

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOHN WESLEY REVAR, )

Appellant, )

v. )

STATE OF OKLAHOMA, )

Appellee. )

NOT FOR PUBLICATION

Case No. F-2009-614

FILED  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

SEP 13 2010

SUMMARY OPINION

LUMPKIN, JUDGE:

MICHAEL S. RICHIE  
CLERK

Appellant, John Wesley Revard, was tried by jury and convicted of Robbery With A Dangerous Weapon (21 O.S.2001, § 801), After Two or More Felony Convictions in the District Court of Tulsa County, Case Number CF-2007-3593. The jury recommended as punishment imprisonment for Forty (40) years and the trial court sentenced accordingly.<sup>1</sup> It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in this appeal:

- I. The Trial Court's Denial Of Instructions On A Lesser Included Degree Of Robbery Denied Appellant His Fundamental Fair Trial Rights Under the 5<sup>th</sup> And 14<sup>th</sup> Amendments To The United States Constitution And Under Art. II, § 7 Of The Oklahoma Constitution.
- II. Allowing Repeated Prosecutorial Misconduct Constituted Plain Error Depriving Appellant Of His Due Process Rights To A Fair Trial Under The 5<sup>th</sup> And 14<sup>th</sup> Amendments To The United States Constitution And Under Art. II, §§ 7 And 20 Of The Oklahoma Constitution.

<sup>1</sup> Appellant will be required to serve 85% of his term of imprisonment for Robbery With A Dangerous Weapon pursuant to 21 O.S. Supp. 2007, § 13.1(8).

- III. Allowing Admission Of Extensive Irrelevant And Prejudicial Evidence Of Other Crimes For Which Appellant Was Not On Trial Constituted Plain Error Depriving Him Of His Due Process Rights To A Fair Trial Under The 5<sup>th</sup> And 14<sup>th</sup> Amendments To The United States Constitution And Under Art. II, §§ 7 And 20 Of The Oklahoma Constitution.
- IV. Irrelevant And Prejudicial Information In Connection With Appellant's Former Convictions Constituted Unmistakable References To Probation And Plain Error Which Deprived Him Of His Due Process Rights To A Fair Sentencing Trial Under The 5<sup>th</sup> And 14<sup>th</sup> Amendments To The United States Constitution And Under Art. II, §§ 7 And 20 Of The Oklahoma Constitution.
- V. Combined Deficient And Prejudicial Performance Of Trial Counsel Denied Appellant's Rights to The Effective Assistance Of Trial Counsel Guaranteed By The 6<sup>th</sup> And 14<sup>th</sup> Amendments To The United States Constitution And Art. II, §§ 7 And 20 Of The Oklahoma Constitution.

After a thorough consideration of these propositions and the entire record before us on appeal including the original records, transcripts, and briefs of the parties, we affirm the judgment but modify Appellant's sentence to imprisonment for thirty (30) years.

As to Proposition I, Appellant did not specifically request an instruction upon the offense of second degree robbery thus he has waived appellate review of the alleged error for all but plain error. *Bland v. State*, 2000 OK CR 11, ¶ 49, 4 P.3d 702, 719; *McHam v. State*, 2005 OK CR 28, ¶ 21, 126 P.3d 662, 670; *Turrentine v. State*, 1998 OK CR 33, ¶ 66, 965 P.2d 955, 975. Second degree robbery is a lesser included offense of robbery with a dangerous weapon because the establishment of the essential elements of robbery with a dangerous weapon establishes all the elements to prove second degree robbery.

See *State v. Uriarite*, 1991 OK CR 80, ¶ 8, 815 P.2d 193, 195. We find that an instruction upon second degree robbery was not warranted by the evidence. Prima facie evidence of the lesser included offense, that evidence which would allow a jury rationally to find the accused guilty of the lesser offense and acquit him of the greater, was not presented at trial. *Bland*, 2000 OK CR 11, ¶ 56, 4 P.3d at 719-20; *Frederick v. State*, 2001 OK CR 34, ¶¶ 136-37, 37 P.3d 908, 943-44. The use of a solid steel pipe to repeatedly strike an individual constitutes sufficient evidence of use of a dangerous weapon for purposes of robbery with a dangerous weapon. *Le v. State*, 1997 OK CR 55, ¶¶ 26-28 947 P.2d 535, 548-49; *Smith v. State*, 69 Okl.Cr. 17, 21-23, 99 P.2d 527, 528-30 (1940); *Shirley v. State*, 1970 OK CR 40, ¶¶ 2-5, 467 P.2d 517, 517-18 (1970); *Quarrels v. State*, 1972 OK CR 276, ¶¶ 3-5, 502 P.2d 1293, 1294 (1972). Plain error did not occur.

As to Proposition II, Appellant did not object to the prosecutor's remarks, thus he has waived all but plain error. *Romano v. State*, 1995 OK CR 74, ¶ 54, 909 P.2d 92, 115. We have thoroughly reviewed each of Appellant's allegations of prosecutorial misconduct and while some comments may have tested the bounds of propriety, we find none of the comments deprived Appellant of a fair trial, or had any prejudicial impact on the judgment and sentence. *Warner v. State*, 2006 OK CR 40, ¶ 197, 144 P.3d 838, 891.

As to Proposition III, Appellant did not raise a timely objection at trial to the alleged other crimes and bad acts evidence. Thus, he has waived appellate review of his claim for all but plain error. *Carter v. State*, 2008 OK CR 2, ¶ 13,

177 P.3d 572, 576; *Simpson v. State*, 1994 OK CR 40, ¶ 23, 876 P.2d 690, 698-99.

We find that the trial court properly admitted testimony establishing that Appellant appeared with the victim's truck at a convenience store in Cleveland, Oklahoma approximately one hour after the robbery; was unable to pay for fuel pumped into the vehicle; participated in an attempt to pass one of the victim's checks to pay for the gas; and was identified and apprehended by officers investigating the circumstances of the check. *Eizember v. State*, 2007 OK CR 9, ¶ 77, 164 P.3d 208, 230 (Evidence of bad acts or other crimes may be admissible where they form a part of the "res gestae" of the offenses charged.). This evidence was properly admitted because it led to the officers' identification and apprehension of Appellant as the individual responsible for the charged offense. *Salazar v. State*, 1993 OK CR 21, ¶¶ 26-28, 852 P.2d 729, 736. In light of the victim's reluctance to cooperate with the prosecution, the evidence held additional relevance. 12 O.S.2001, §§ 2401. The evidence tended to prove many of the necessary elements of the offense: (1) wrongful; (2) taking; (3) carrying away; (4) personal property; and (5) of another. OUJI-CR(2d) 4-144 (Supp.2010).

Conversely, the trial court erred when it admitted testimony that Appellant ran away from the officers when they attempted to arrest him on an unrelated felony warrant out of a separate county; led police on a chase throughout the town of Cleveland for the better part of the night; was observed looking into vehicles at the city's maintenance lot where keys are often left in

the vehicles; and probably stole a local resident's pick-up during the time that he was eluding the officers. *Lott v. State*, 2004 OK CR 27, ¶ 41, 98 P.3d 318, 335 (The basic law is well established-when one is put on trial, one is to be convicted-if at all-by evidence which shows one guilty of the offense charged; and proof that one is guilty of other offenses not connected with that for which one is on trial must be excluded.). This testimony did not form part of the *res gestae* of the charged offense. *Warner*, 2006 OK CR 40, at ¶ 68, 144 P.3d at 868. The testimony held little, if any, relevance to the issues of mistake, accident, common scheme or plan, motive, opportunity, intent preparation, knowledge or identity. *Welch v. State*, 2000 OK CR 8, ¶ 8, 2 P.3d 356, 365. Any relevance the evidence held was substantially outweighed by its danger of unfair prejudice. *Id.*; 12 O.S.Supp.2003, § 2403. This testimony simply established Appellant's bad character.

However, we find the improper admission of the testimony concerning Appellant's flight from the felony warrant, attempt to steal a city vehicle, and probable theft of a local resident's truck, the lack of limiting instructions on use of other crimes evidence, and the prosecutor's argument concerning Appellant's acts did not affect the outcome of the first stage of the trial. *Jones v. State*, 1995 OK CR 34, ¶ 55, 899 P.2d 635, 649; *Andrew v. State*, 2007 OK CR 23, ¶ 117, 164 P.3d 176, 205 (omission of limiting instruction of jury's use of other crimes evidence does not require reversal unless the injury affected the outcome of the proceeding); *Romano*, 1995 OK CR 74, ¶ 54, 909 P.2d at 115 (improper prosecutorial argument does not require reversal unless, in light of

the entire record, the comments prejudiced the defendant); 20 O.S.2001, 3001.1. We find that the error is harmless beyond a reasonable doubt. *Lambert v. State*, 1999 OK CR 17, ¶ 49, 984 P.2d 221, 236; *Stouffer v. State*, 2000 OK CR 46, ¶ 67, 147 P.3d 245, 264.

As to Proposition IV, Appellant contends that the prosecutor impermissibly injected probationary references into the second stage sentencing proceedings. Appellant did not raise a timely objection to the introduction of the exhibits or the prosecutor's argument at trial. Thus, he has waived appellate review for all but plain error. *Simpson*, 1994 OK CR 40, ¶ 23, 876 P.2d at 698-99.

The State introduced State's Exhibit Number 4A, an order accelerating Appellant's deferred sentence in Osage County District Court case number CRF-89-142. Likewise, the State introduced State's Exhibit Number 4B, an order revoking Appellant's suspended sentence in the same case. The admission of these exhibits constitutes error as they explicitly informed the jury that Appellant had previously received probationary sentences. *Hunter v. State*, 2009 OK CR 17, ¶ 9, 208 P.3d 931, 933 (reading of Information, explicitly telling jurors that the defendant has previously received suspended sentences, was error.).

The State also introduced six separate judgment and sentences reflecting Appellant's convictions for other felony offenses. (Tr. 412-13, 456-58). Each of the documents were unredacted and reflected Appellant's receipt of partially suspended sentences. (State's Exhibit Nos. 3, 4A, 4B, 5, 6, 7, 8, 9).

Introduction of the judgment and sentence is a proper part of the proof of a former felony conviction. *Camp v. State*, 1983 OK CR 74, ¶ 3, 664 P.2d 1052, 1053-54. Standing alone, the admission of the judgment and sentences does not constitute plain error. *Id.* However, the better practice is for any reference to suspended sentences to be redacted from the exhibits. *Id.*; *Hunter*, 2009 OK CR 17, ¶ 9, 208 P.3d at 933.

We find that the prosecutor's comments were proper. Taken in light of the totality of the closing argument the prosecutor's comments were not an unmistakable reference to probation, pardon or parole. *Darks v. State*, 1998 OK CR 15, ¶ 59, 954 P.2d 152, 167. The prosecutor's argument concerning "chances" was a comment on the number of Appellant's felony convictions. The prosecutor's reference to 19 years was a comment that Appellant had sufficient time after his first conviction to alter his illegal behavior. The prosecutor did not "refer to probation and parole policies in order to influence [the] sentence." *Hunter*, 2009 OK CR 17, ¶ 10, 208 P.3d at 933. The prosecutor's statements were reasonable inferences on the evidence. *Warner*, 2006 OK CR 40, ¶ 197, 144 P.3d at 891.

However, we find that the explicit references to probation in State's Exhibit Numbers 4A and 4B affected Appellant's substantial rights, meaning the error affected the outcome of the sentencing proceeding. *Hogan*, 2006 OK CR 19, at ¶ 38, 139 P.3d at 923; *Simpson*, 1994 OK CR 40, ¶ 24, 876 P.2d at 699; 20 O.S.2001, § 3001.1. Further, the error seriously affected the fairness,

integrity or public reputation of the sentencing proceedings. *Id.*; *Simpson*, 1994 OK CR 40, at ¶ 30, 876 P.2d at 701.

In light of the introduction of the other crimes evidence showing Appellant's bad character, we cannot find the references to probation harmless. *Simpson*, 1994 OK CR 40, ¶¶ 19-20, 876 P.2d at 698 (reversal is not warranted for plain error if the error was harmless.). Reviewing the entire record, we cannot say that we have no grave doubt that the error had a substantial influence on the outcome. *Id.*, 1994 OK CR 40, at ¶ 37, 876 P.2d at 702. Therefore, Appellant's sentence is modified to imprisonment for thirty (30) years.

As to Proposition V, we find that Appellant has failed to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984).

#### DECISION

The judgment is hereby **AFFIRMED**, and the Sentence is **MODIFIED TO THIRTY (30) YEARS IMPRISONMENT**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2010), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY  
THE HONORABLE WILLIAM C. KELLOUGH, DISTRICT JUDGE

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LEWIS, J.: CONCUR IN RESULT  
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