

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DONALD EDWARD TOLLIVER, JR.,)

Appellant,)

v.)

THE STATE OF OKLAHOMA,)

Appellee.)

NOT FOR PUBLICATION

Case No. F-2014-974

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

NOV - 5 2015

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

LUMPKIN, VICE PRESIDING JUDGE:

Appellant, Donald Edward Tolliver, Jr., was tried by jury and convicted of Shooting With Intent to Kill (21 O.S.2011, § 652(A)) in the District Court of Delaware County, Case Number CF-2011-508.¹ The jury recommended as punishment imprisonment for thirty-five (35) years. The trial court sentenced Appellant to imprisonment for thirty-five (35) years with all but the first thirty-two (32) years suspended and ordered Appellant to pay \$10,035.76 in restitution, plus any request for reimbursement Tyson Foods' insurance company might make for a paid claim. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in this appeal:

- I. The trial court erred by not instructing the jury on lesser-included offenses.
- II. The trial court committed prejudicial error in omitting the instruction concerning flight.

¹ Any person convicted of Shooting With Intent to Kill in violation of 21 O.S.2011, § 652 shall be required to serve 85% of any sentence of imprisonment prior to becoming eligible for consideration for parole. 21 O.S.2011, § 13.1.

- III. The cumulative effect of prosecutorial misconduct constituted fundamental error and denied Mr. Tolliver a fair trial.
- IV. There was insufficient proof of the recipient's actual losses to support the restitution order.
- V. Based on all of the facts and circumstances, Mr. Tolliver received an excessive sentence that should be favorably modified.
- VI. Cumulative errors deprived Mr. Tolliver of a fair proceeding and a reliable outcome.

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 have determined that Appellant is entitled to relief as to Proposition Four, but otherwise affirm Appellant's conviction and sentence.

In Proposition One, Appellant contends that the trial court erred when it denied his request for instructions on the lesser offenses of: 1) Assault and Battery with a Dangerous Weapon, 2) Pointing a Firearm, and 3) Reckless Conduct with a Firearm. Reviewing the record, we find that the trial court did not abuse its discretion. *Eizember v. State*, 2007 OK CR 29, ¶ 111, 164 P.3d 208, 236; *Cipriano v. State*, 2001 OK CR 25, ¶ 14, 32 P.3d 869, 873. Appellant took the stand as a witness, claimed that he was innocent of any crime and did not claim that he committed a lesser offense, thus, he was not entitled to instructions on any lesser included offense. *Grissom v. State*, 2011 OK CR 3, ¶ 35, 253 P.3d 969, 982 ("when a defendant, who has a right of election as to several defenses, takes the stand as a witness and makes such admissions as to render every theory of defense unavailable save one, he will be deemed to have elected that

one.”) (citation and quotations omitted); *Harney v. State*, 2011 OK CR 10, ¶¶ 11-14, 256 P.3d 1002, 1005-06 (“This Court has long recognized the rule of law that a defendant is not entitled to instructions on any lesser included offense when he defends against the charge by proclaiming his innocence.”). Proposition One is denied.

In Proposition Two, Appellant contends that the trial court erred when it failed to instruct the jury concerning flight. As Appellant failed to request an instruction upon flight and did not object to the absence of such an instruction, we find that Appellant has waived appellate review of his claim for all but plain error. *Grissom v. State*, 2011 OK CR 3, ¶ 28, 253 P.3d 969, 980; *Romano v. State*, 1995 OK CR 74, ¶ 80, 909 P.2d 92, 120. We review Appellant’s claim pursuant to the test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690. Under this test, an appellant must show an actual error, which is plain or obvious, affecting his substantial rights, and which seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Malone v State*, 2013 OK CR 1, ¶ 41, 293 P.3d 198, 211-212; *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395; *Simpson*, 1994 OK CR 40, ¶¶ 10, 26, 30, 876 P.2d at 694, 699, 701.

As the State introduced evidence of Appellant’s departure from the crime scene in the present case and Appellant offered an explanation for his acts, a flight instruction probably should have been given. *Garrison v. State*, 2004 OK CR 35, ¶¶ 99-103, 103 P.3d 590, 608-09. However, the omission of such an instruction in the present case does not rise to the level of plain error. *Id.*, 2004

OK CR 35, ¶ 103, 103 P.3d at 609. We note that the trial court fully instructed the jury concerning its responsibility to determine the weight and credibility of the testimony and determine the facts from the evidence. *See Hill v. State*, 1995 OK CR 28, ¶ 22, 898 P.2d 155, 163. Further, the evidence of flight was not vital to support the verdict in light of Appellant's numerous threats to kill the victim prior to placing the handgun to her head and pulling the trigger. *Id.* Proposition Two is denied.

In Proposition Three, Appellant contends that prosecutorial misconduct deprived him of a fundamentally fair trial. He concedes that he failed to timely challenge many of the alleged instances and thus waived appellate review of those instances for all but plain error. *Malone*, 2013 OK CR 1, ¶ 40, 293 P.3d at 211-12. We review those claims pursuant to the test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690 and, first, determine whether Appellant has shown an actual error. *Malone*, 2013 OK CR 1, ¶ 41, 293 P.3d at 211-212.

"Allegations of prosecutorial misconduct do not warrant reversal of a conviction unless the cumulative effect was such [as] to deprive the defendant of a fair trial." *Warner v. State*, 2006 OK CR 40, ¶ 197, 144 P.3d 838, 891 (quotations and citations omitted). Prosecutorial comments, like jury instructions, are not reviewed in artificial isolation, but must be judged in the context of the entire record. *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872, 40 L.Ed.2d 431 (1974); *Romano*, 1995 OK CR 74, ¶ 54, 909 P.2d at 116.

Reviewing the record, we find that Appellant has not shown that error occurred. We reject Appellant's claim that the prosecutor argued the merits of the case during opening statement. *Young v. State*, 2000 OK CR 17, ¶ 40, 12 P.3d 20, 36). "The purpose of an opening statement is to inform the jury of the evidence the attorneys expect to present during the trial."); *Newsted v. State*, 1986 OK CR 82, ¶ 7, 720 P.2d 734, 738 ("Comments which argue the merits of the case are not part of a proper opening statement."). As the prosecutor did not engage in full argument but merely stated the State's theory, we find that Appellant has not shown that error, plain or otherwise, occurred. *Battle v. State*, 1970 OK CR 189, ¶ 4, 478 P.2d 1005, 1007 ("This Court has repeatedly held that an opening statement is, and purports to be, no more than an outline of the State's theory and the evidence expected to be offered in support.").

We similarly reject Appellant's claim that the prosecutor improperly asked him if an individual had lied on three separate instances during cross-examination. Appellant failed to object to the first and last of these instances and our review of those challenges is limited to plain error. Although the prosecutor engaged in the undesirable method of impeaching Appellant's testimony through asking him whether other witnesses had lied, this does not constitute error. *Stemple v. State*, 2000 OK CR 4, ¶ 48, 994 P.2d 61, 71; *Ross v. State*, 1978 OK CR 136, ¶ 7, 588 P.2d 1269, 1270. However, we note that the better practice is for prosecutors not to engage in such method of cross-examination. *Id.*

We review Appellant's claim that the prosecutor stated his personal opinion as to Appellant's guilt for plain error. Because the prosecutor's

comments were reasonably based on the evidence and did not seek to have the jury abandon its duty and convict on the prosecutor's own opinion, we find that there was no error, plain or otherwise. *Williams v. State*, 2008 OK CR 19, ¶ 107, 188 P.3d 208, 228.

Appellant argues that on two occasions the prosecutor invoked societal alarm during closing argument. Reviewing the first alleged instance for plain error, we find that Appellant has not shown that error, plain or otherwise, occurred. As the prosecutor did not mention crimes committed by other individuals, argue an increasing crime rate, or ask the jury to make an example out of Appellant but was reasonable argument based on the evidence, the comments were proper. *McElmurry v. State*, 2002 OK CR 40, ¶ 151, 60 P.3d 4, 34.

The prosecutor's comments in the second instance were borderline. *Id.*; compare *Logsdon v. State*, 2010 OK CR 7, ¶ 38, 231 P.3d 1156, 1169. However, we find that the trial court cured any error when it sustained Appellant's objection at trial. *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 sustains objection).

We reject Appellant's claim that the prosecutor improperly shifted the burden of proof during closing argument. The prosecutor properly commented on the absence of any evidence to corroborate Appellant's testimony as to the events following the shooting. *Mitchell v. State*, 1994 OK CR 70, 884 P.2d 1186,

1201-02, *habeas corpus relief granted on other grounds by Mitchell v. Gibson*, 262 F.3d 1036, 1065 (10th Cir. 2001); *Ball v. State*, 2007 OK CR 42, ¶ 58, 173 P.3d 81, 95; *Romano v. State*, 1995 OK CR 74, ¶ 56, 909 P.2d 92, 116; *Pickens v. State*, 1988 OK CR 35, ¶ 8, 751 P.2d 742, 744.

Reviewing Appellant's claim that the prosecutor improperly commented upon his credibility for plain error pursuant to *Simpson*, we find that Appellant has not shown error, plain or otherwise, occurred. Although the prosecutor's reference to Appellant's testimony as a "lie" was borderline, we find that the prosecutor's comments putting Appellant's credibility into question were reasonable comments on the evidence and not a personal expression of his personal belief. *Fritz v. State*, 1991 OK CR 62, ¶ 21, 811 P.2d 1353, 1359; *Spees v. State*, 1987 OK CR 62, 735 P.2d 571, 575; *Crawford v. State*, 1984 OK CR 91, ¶ 17, 688 P.2d 357, 360.

Appellant failed to preserve appellate review of his claim that the prosecutor defined "reasonable doubt" during closing argument, thus, we review for plain error pursuant to the test set forth in *Simpson*. As the prosecutor did not define "reasonable doubt" but properly attempted to dispel commonly held attitudes concerning the standard we find that Appellant has not shown that error, plain or otherwise, occurred. *Taylor v. State*, 2011 OK CR 8, ¶ 47, 248 P.3d 362, 377; *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 62, 241 P.3d 214, 234; *Harris v. State*, 2004 OK CR 1, ¶ 51, 84 P.3d 731, 751-52.

Finally, we find that Appellant has not shown error, plain or otherwise, within his claim that the prosecutor attempted to elicit sympathy for the victim

and align himself with the jury. Nothing within the prosecutor's comments could be interpreted as an overt attempt to garner sympathy for the victim. *Jackson v. State*, 2007 OK CR 24, ¶ 27, 163 P.3d 596, 604; *Warner v. State*, 2006 OK CR 40, ¶ 190, 197, 144 P.3d 838, 890-91. Similarly, nothing suggests that the prosecutor flagrantly attempted to align himself with the jury. *Davis v. State*, 1999 OK CR 16, ¶ 35, 980 P.2d 1111, 1120; *See Also Massingale v. State*, 1986 OK CR 6, ¶ 12, 713 P.2d 15, 17.

Reviewing the entire record in the present case, the cumulative effect of the prosecutors' comments did not deprive Appellant of a fair trial. *Malone*, 2013 OK CR 1, ¶ 43, 293 P.3d at 212; *Romano*, 1995 OK CR 74, ¶ 54, 909 P.2d at 115. Prosecutorial misconduct did not deprive Appellant of a fundamentally fair trial. *Donnelly*, 416 U.S. at 642, 94 S.Ct. at 1871; *Warner*, 2006 OK CR 40, ¶ 197, 144 P.3d at 891. Proposition Three is denied.

In Proposition Four, Appellant contends that the trial court failed to follow the statutory procedures governing the assessment of restitution. Since, Appellant failed to raise the instant challenge before the trial court; we find that he has waived appellate review of this issue for all but plain error. *Simpson*, 1994 OK CR 40, ¶¶ 11, 23, 876 P.2d at 694-95, 698-99. Reviewing the record we find that plain error occurred.

The victim's actual financial detriment was not determined to a reasonable certainty. *Logsdon v. State*, 2010 OK CR 7, ¶ 9, 231 P.3d 1156, 1162; *Honeycutt v. State*, 1992 OK CR 36, ¶ 31, 834 P.2d 993, 1000. The district attorney did not file or present the victim's restitution request form to the trial

court contrary to 22 O.S.2011, § 991f. The victim did not provide any information concerning restitution in the presentence investigation report and did not testify at the hearing.

The only evidence in the record was the exhibit the State introduced at sentencing. This exhibit contained a copy of the victim's Air Evac bill, the health insurance check paid out on that claim, and an explanation of benefits concerning the Air Evac claim. The exhibit also contained the victim's bill from Saint Francis Hospital but there was insufficient evidence to establish the victim's actual financial detriment to a reasonable certainty because there was not any evidence as to whether the victim had received compensation from her health insurance company or any other source as to the Saint Francis bill. *Logsdon v. State*, 2010 OK CR 7, ¶¶ 12-13, 231 P.3d 1156, 1163-64; *Honeycutt v. State*, 1992 OK CR 36, ¶ 33, 834 P.2d 993, 1000; 22 O.S.2011, § 991f(A)(3), (C)(3)(e), (F).

We further find that the District Court improperly ordered Appellant to pay restitution to Tyson Foods' insurance company if it sought reimbursement for the claim it paid. Although Tyson Foods' insurance company paid the largest part of the victim's Air Evac bill, the insurance company was not a "victim" and the funds that the company paid out were not an "economic loss" pursuant to Section 991f. The insurance company did not suffer an "economic loss as a direct result of the criminal act of another person." Instead, the insurance company paid out funds pursuant to a health insurance contract it had entered into with a group of individuals that included the victim.

Accordingly, the District Court's restitution order is vacated and the District Court is directed to conduct new proceedings to determine a proper restitution amount.

As to Proposition Five, we find that, under all the facts and circumstances of the case, Appellant's sentence is not so excessive as to shock the conscience of the Court. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149; *Freeman v. State*, 1994 OK CR 37, ¶ 38, 876 P.2d 283, 291; *Battenfield v. State*, 1991 OK CR 82, ¶ 27, 816 P.2d 555, 565. Proposition Five is denied.

As to Proposition Six, we find Appellant was not denied a fair trial by cumulative error. *Ashinsky v. State*, 1989 OK CR 59, ¶ 31, 780 P.2d 201, 209. Proposition Six is denied.

DECISION

The judgment and sentence is hereby **AFFIRMED**. The District Court's restitution order is **VACATED**, and the case is **REMANDED** on the issue of the victims' loss, for a proper determination in accordance with this opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF DELAWARE COUNTY
THE HONORABLE ROBERT G. HANEY, DISTRICT JUDGE

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OPINION BY: LUMPKIN, V.P.J.

SMITH, P.J.: Concur in Result
JOHNSON, J.: Concur
LEWIS, J.: Concur
HUDSON, J.: Concur