IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

GREGORY DESPAIN,)
Appellant,)
v.)
STATE OF OKLAHOMA)
Appellee.)

NOT FOR PUBLICATION

Case No. F-98-761

SUMMARY OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant Gregory Despain was tried by jury and convicted of Stalking While A Protective Order was in Effect (21 O.S.Supp.1993, § 1173), Case No. CF-97-3863 and Case No. CF-97-2072, in the District Court of Oklahoma County. The jury recommended as punishment imprisonment for four (4) years and three (3) years respectively and the trial court sentenced accordingly. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of his appeal:

> I. Appellant was denied a fair trial and due process of law by the presentation of evidence of other offenses which lacked any connection to the crimes charged and which were more prejudicial than probative; further, Appellant was denied effective assistance of counsel by the failure of his trial attorney to object at the time the evidence was presented.
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> II. Appellant was denied a fair trial and due process of law by the presentation of evidence of an alleged violent offense not encompassed by the crimes charged or by the State's Burks notice.

III. Appellant's judgment and sentence must be modified to correct the erroneous statement that he was prosecuted and convicted under the habitual offender statutes.

IV. The trial court erred in failing to instruct the jury on the lesser included misdemeanor offense of stalking.

V. Appellant was denied his Sixth Amendment guarantee of effective representation by counsel by his trial attorney's abandonment of Appellant at trial.

After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that in Proposition I, the evidence of other crimes was improperly admitted as it was not so distinctive as to create a "signature" method of operation or fall within the common scheme or plan exception. *See Roubideaux v. State,* 707 P.2d 35, 37 (Okl.Cr.1985). Although we find sufficient evidence, apart from the other crimes, upon which the jury could have based their guilty verdict, we find the sentences should be modified to two (2) years in each case, said sentences to run concurrent. In Proposition II, evidence of Appellant's violent behavior was properly admitted as part of the *res gestae* of the offense charged. *See Rogers v. State,* 890 P.2d 959, 971 (Okl.Cr.1995). *See also Shelton v. State,* 793 P.2d 866, 871 (Okl.Cr.1990). Further, although Appellant received notice of the evidence through the victim's preliminary hearing testimony, no notice is required when the offenses are part of the *res gestae. Reyes v. State,* 751 P.2d 1081, 1083 (Okl.Cr.1988). In Proposition III, the judgment and sentence incorrectly states that Appellant has been convicted

and sentenced after former conviction of a felony. This is a scrivener's error which the trial court is directed to correct by an Order *Nunc Pro Tunc* to omit such reference and thereby reflect the true verdict of the jury. *Hayes v. State,* 550 P.2d 1344, 1349 (Okl.Cr.1976). In Proposition IV, the trial court properly refused to give *sua sponte* an instruction on the lesser included offense of misdemeanor stalking. Title 22 O.S.1991, § 60.4 clearly states that a protective order is in full force and effect until rescinded by a court of law. The victim's 1996 reconciliation with Appellant did not vitiate such an order and Appellant knew or should have known the protective order remained in effect. Finally, in Proposition V, Appellant was not denied the effective assistance of counsel as he has failed to show that any error in counsel's failure to raise objections, present additional evidence or further investigate was so great as to render the result of his trial unreliable. *Strickland v. Washington,* 466 U.S. 668, 677-78, 104 S.Ct. 2052, 2059, 80 L.Ed.2d 674 (1984) as clarified by *Lockhart v. Fretwell,* 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). Accordingly, this appeal is denied.

DECISION

The Judgment is **AFFIRMED,** the Sentences are **MODIFIED** to two (2) years in each case, to run concurrent, and the District Court is ordered to prepare an Order *Nunc Pro Tunc* correcting the judgment and sentence to omit any reference to prior convictions.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE WILLIAM R. BURKETT, DISTRICT JUDGE

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OPINION BY: LUMPKIN, V.P.J.
STRUBHAR, P.J.: CONCUR
JOHNSON, J.: CONCUR
CHAPEL, J.: CONCUR
LILE, J.: CONCUR

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