

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DAVID DANIEL KETCHER,)

Appellant,)

vs.)

THE STATE OF OKLAHOMA,)

Appellee.)

NOT FOR PUBLICATION

No. F-2014-286

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAR 24 2015

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

SMITH, PRESIDING JUDGE:

David Daniel Ketcher was tried by jury and convicted of Count II, Eluding a Police Officer after two or more felonies in violation of 21 O.S.2011, § 540A(B); Count III, Leaving the Scene of Collision Involving Property Damage (misdemeanor) in violation of 47 O.S.2011, § 10-102; Count IV, Driving Without a Driver's License (misdemeanor) in violation of 47 O.S.2011, § 6-303; and Count V, Miscellaneous Required Vehicle Equipment (misdemeanor) in violation of 47 O.S.2011, § 12-204, in the District Court of Tulsa County, Case No. CF-2013-3886.¹ In accordance with the jury's recommendation the Honorable Tom C. Gillert sentenced Ketcher to thirty (30) years imprisonment and a \$5000 fine (Count II); a fine of \$500 on each of Counts III and V; and a fine of \$300 (Count IV). Ketcher appeals from the felony conviction and sentence in Count II.

Ketcher raises five propositions of error in support of his appeal:

- I. The evidence was insufficient to prove beyond a reasonable doubt that Appellant committed the crime of eluding a police officer in such manner as to endanger any other person.

¹ Ketcher was acquitted of Count I, first degree burglary.

- II. The trial court erred in failing to instruct on the lesser included offense within Count Two of eluding a police officer, a misdemeanor.
- III. The trial court committed plain error by instructing the jury that a fine was mandatory upon conviction of eluding a police officer (in such manner as to endanger any other person) if the jury found Appellant had one or more prior convictions.
- IV. Prosecutorial misconduct deprived Appellant of a fair trial and a fair sentencing proceeding.
- V. The Appellant was deprived of effective assistance of counsel.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we find that the law and evidence do not require relief.

We find in Proposition I that, taking the evidence in the light most favorable to the State, any rational trier of fact could find beyond a reasonable doubt that Ketcher endangered others while eluding police. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559; 21 O.S.2011, § 540A(B); OUJI-CR 6-30. Video showed Ketcher ran stop signs and sped around corners; immediately before Officer Brown turned on his lights and siren, a family with a stroller crossed an intersection Ketcher had just passed through. Brown testified that the chase through a residential neighborhood reached speeds up to 80 miles per hour, where the speed limit was 25 miles per hour; Ketcher ran stop signs, including one in a high-traffic intersection; pedestrians were present. This proposition is denied.

We find in Proposition II that the trial court did not abuse its discretion in rejecting Ketcher's request to instruct jurors on the lesser included offense of eluding police officers as a misdemeanor. *Barnard v. State*, 2012 OK CR 15, ¶ 20, 290 P.3d 759, 766. An abuse of discretion is any unreasonable or arbitrary action made without proper consideration of the relevant facts and law, also described as a

clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. There is no abuse of discretion where the instructions as a whole accurately state the applicable law. *Barnard*, 2012 OK CR 15, ¶ 20, 290 P.3d at 766. The record supports the trial court's determination that the requested instruction was not supported by the evidence. This proposition is denied.

We find in Proposition III that the trial court incorrectly instructed jurors regarding a mandatory fine. The State concedes that this instruction was error. The statute provides that a person who is guilty of felony eluding by endangering others is punishable by one to five years imprisonment, or a fine of \$1000 - \$5000, or by both fine and imprisonment. 21 O.S.2011, § 540A(B). Ketcher's sentences were enhanced by five prior felony convictions under 21 O.S.2011, § 51.1(C). That statute refers only to enhancement by imprisonment, without independently imposing any fines. Either the trial court or a jury has discretionary authority to impose a fine, up to \$10,000, for any felony conviction under 21 O.S.2011, § 64(B). The jury should have been instructed that it could impose a fine not exceeding \$10,000 on Count II, but not that it was required to do so. The appropriate remedy is to vacate the \$5000 fine on Count II.

We find in Proposition IV that no prosecutorial misconduct prejudiced Ketcher. Both parties have wide latitude to argue the evidence and reasonable inferences from it, and we consider the misconduct in the context of the whole trial. *Bell v. State*, 2007 OK CR 43, ¶ 6, 172 P.3d 622, 624. Misconduct will not warrant relief unless it deprives a defendant of a fair trial. *Pryor v. State*, 2011 OK CR 18, ¶

11, 254 P.3d 721, 726. Ketcher did not object to these statements at trial and has waived all but plain error. *Mathis v. State*, 2012 OK CR 1, ¶ 24, 271 P.3d 67, 76. Plain error is an actual error, that is plain or obvious, and that affects a defendant's substantial rights, affecting the outcome of the trial. *Barnard*, 2012 OK CR 15, ¶ 13, 290 P.3d at 764. Much of the argument of which Ketcher complains was proper argument from the evidence, and Ketcher fails to show he was prejudiced by any of the remarks. We note that, under the unique facts and circumstances of this case, the prosecutor did not make unmistakable reference to pardon and parole, resulting in prejudice to the defendant. *Williams v. State*, 1988 OK CR 75, ¶ 7, 754 P.2d 555, 556; *Richardson v. State*, 1979 OK CR 100, ¶ 19, 600 P.2d 361, 367. This proposition is denied.

We find in Proposition V that trial counsel was not ineffective. Ketcher must show that counsel's performance was deficient and that he was prejudiced by counsel's deficient performance. *Wiley v. State*, 2008 OK CR 30, ¶ 4, 199 P.3d 877, 878; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Counsel's acts or omissions must have been so serious that he was deprived of a fair trial with reliable results. *Harrington v. Richter*, 562 U.S. 86, 104, 131 S.Ct. 770, 787-88, 178 L.Ed.2d 624 (2011). We review counsel's performance against an objective standard of reasonableness under prevailing professional norms, and we will not second-guess strategic decisions. *Harris v. State*, 2007 OK CR 28, ¶ 39, 164 P.3d 1103, 1118; *Rompilla v. Beard*, 545 U.S. 374, 380-81, 125 S.Ct. 2456, 2462, 162 L.Ed.2d 360 (2005). Ketcher must show he was prejudiced by counsel's acts or omissions. *Williams v. Taylor*, 529 U.S. 362, 394,

120 S.Ct. 1495, 1513-14, 146 L.Ed.2d 389 (2000); *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067. We found no prosecutorial misconduct in Proposition IV. As Ketcher was not prejudiced by the prosecutor's closing arguments, counsel was not ineffective for failing to object to them. Ketcher also argues trial counsel should have objected to the inaccurate instruction regarding the fine on Count II. We determined in Proposition III that the instruction was incorrect, and vacated the fine. No further relief is needed.

DECISION

The Judgment of the District Court of Tulsa County is **AFFIRMED**. The Sentences of the District Court of Tulsa County is **AFFIRMED**, but the \$5000 fine as to Count II is **VACATED**. 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 TULSA COUNTY
THE HONORABLE THOMAS C. GILLERT, DISTRICT JUDGE

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OPINION BY: SMITH, P.J.
LUMPKIN, V.P.J.: CONCUR
JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR

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