

**ORIGINAL**



**IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF OKLAHOMA**

**JEROME MATTHEW  
MCCONELL,** )  
 )  
 )  
 **Appellant,** )  
 )  
 **v.** )  
 )  
 **STATE OF OKLAHOMA,** )  
 )  
 **Appellee.** )

**NOT FOR PUBLICATION**

**Case No. F-2019-605**

**FILED  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA**

**SEP 10 2020**

**JOHN D. HADDEN  
CLERK**

**SUMMARY OPINION**

**HUDSON, JUDGE:**

Appellant, Jerome Matthew McConell, was convicted at a bench trial in the District Court of McCurtain County, Case No. CF-2018-72, of one count of Obtaining Merchandise by False Pretenses, in violation of 21 O.S.Supp.2016, § 1541.2. The Honorable Gary Brock, Special Judge, presided at trial and sentenced McConell to thirty months imprisonment. Judge Brock also ordered credit for time served and imposed court costs. McConell now appeals, raising three propositions of error:

- I. APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES WHEN THE TRIAL COURT ALLOWED INADMISSIBLE HEARSAY EVIDENCE;

- II. THE STATE CANNOT INTRODUCE OTHER BAD ACTS WITHOUT A *BURKS* NOTICE. SINCE NO NOTICE WAS PROVIDED, AND THE PRIOR ACT WAS NOT PROVEN BY CLEAR AND CONVINCING EVIDENCE, IT WAS ERROR FOR THE COURT TO CONSIDER THE ACT AS EVIDENCE; and
- III. THE JUDGMENT AND SENTENCE FILED IN THIS CASE DOES NOT REFLECT ACCURATELY THE SENTENCE IMPOSED AND PRONOUNCED BY THE DISTRICT COURT.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we **AFFIRM** the Judgment and Sentence of the district court except the Rules and Conditions of Supervised Probation and the District Attorney Prosecution Reimbursement Fee imposed in this case which are both **STRICKEN** as discussed *infra*.

**Proposition I.** Appellant's objections at trial to the challenged testimony rested solely on state law grounds, and Appellant never claimed at trial that its admission violated his constitutional rights. We thus review his constitutional challenge for plain error. *Tafolla v. State*, 2019 OK CR 15, ¶ 18, 446 P.3d 1248, 1258. Under plain error review, Appellant must demonstrate an actual error occurred, that is plain or obvious, and which affects his substantial rights. *Baird v.*

*State*, 2017 OK CR 16, ¶ 25, 400 P.3d 875, 883. “This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice.” *Brewer v. State*, 2019 OK CR 23, ¶ 4, 450 P.3d 969, 971.

Appellant fails to demonstrate actual or obvious error with this claim. The record shows defense counsel elicited the details of April Smith’s conversation with Aaron Johnson on cross-examination and “even if these statements were inadmissible hearsay, Appellant cannot profit from it for it is his own invited error.” *Washington v. State*, 1999 OK CR 22, ¶ 37, 989 P.2d 960, 973. Because Appellant was responsible for eliciting this testimony, there is no violation of Appellant’s right to confrontation relating to Smith’s testimony and thus no plain error.

Officer Willis’s testimony on direct examination that he independently verified with Johnson that the purchase of the Range Rover was never completed because Appellant had paid for it with an insufficient check constituted plain error because it repeated testimonial hearsay that violated Appellant’s Sixth Amendment right to confront witnesses. *Tafolla*, 2019 OK CR 15, ¶ 22, 446 P.3d at

1259. However, Officer Willis's testimony was cumulative to the earlier testimony from Smith, elicited by defense counsel, conveying Johnson's out-of-court statements about Appellant's sham purchase of the Range Rover. This error was therefore harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 22 (1967); *Tafolla*, 2019 OK CR 15, ¶ 22, 446 P.3d at 1259; *Drennon v. State*, 1978 OK CR 71, ¶ 8, 581 P.2d 901, 903. Proposition I is denied.

**Proposition II.** Evidence concerning Appellant's purchase of the Range Rover in Arkansas was properly admitted *res gestae* evidence. There was no error from the admission of this testimony and, thus, no plain error. *See Hammick v. State*, 2019 OK CR 21, ¶ 16, 449 P.3d 1272, 1277; *Vanderpool v. State*, 2018 OK CR 39, ¶ 21, 434 P.3d 318, 323-24; *Hiler v. State*, 1990 OK CR 54, ¶ 6, 796 P.2d 346, 348-349; *Burks v. State*, 1979 OK CR 10, ¶ 12, 594 P.2d 771, 774. Proposition II is denied.

**Proposition III.** Appellant was ordered to serve a sentence of thirty months imprisonment in the custody of the Department of Corrections with no probationary term. The trial court's imposition of Supervised Rules and Conditions of Probation along with a District Attorney Prosecution Reimbursement Fee were unauthorized under

Oklahoma law and constitutes plain error. This includes the special rule and condition that Appellant not enter a casino prior to paying his court costs. See 22 O.S.Supp.2018, § 983(D); 22 O.S.Supp.2019, § 991a; 22 O.S.Supp.2019, § 991d(A)(1); Section VIII, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020). We find too that the Judgment and Sentence document fails to specify the period of post-imprisonment supervision to be served as required by statute. 22 O.S.Supp.2012, § 991a-21(A). Relief is granted for Proposition III.

### **DECISION**

We **AFFIRM** the Judgment and Sentence of the District Court except the Rules and Conditions of Supervised Probation and the District Attorney Prosecution Reimbursement Fee imposed in this case which are both **STRICKEN**. This matter is **REMANDED** to the trial court with instructions to **MODIFY** the Judgment and Sentence document in accordance with this pronouncement. The District Court is **FURTHER ORDERED** to specify in the Judgment and Sentence a period of post-imprisonment supervision for Appellant within the statutory range provided by 22 O.S.Supp.2012, § 991a-21. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal*

*Appeals*, Title 22, Ch.18, App. (2020), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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

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**OPINION BY: HUDSON, J.**

**LEWIS, P.J.: CONCUR IN RESULTS**  
**KUEHN, V.P.J.: CONCUR IN RESULTS**  
**LUMPKIN, J.: CONCUR IN RESULTS**  
**ROWLAND, J.: CONCUR**