IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DEON LAMAR NELSON,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
v.	)	Case No. F-2004-1096
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, PRESIDING JUDGE:

Deon Lamar Nelson was tried by jury and convicted of two counts of Assault and Battery Upon An Officer of State Court in violation of 21 O.S.2001, § 650.6, in the District Court of Grady County, Case No. CF-2003-390. In accordance with the jury's recommendation the Honorable Richard Van Dyke sentenced Nelson to five (5) years imprisonment and a $1500 fine (Count I), and three (3) years imprisonment and a $1500 fine (Count II), to run consecutively. Nelson appeals from these convictions and sentences.

Nelson raises six propositions of error in his appeal:

I. Consolidation of separate and nontransactional offenses, over defense objection, for prosecution in a single information and jury trial prejudiced Nelson and denied his right to due process of law;

II. The State failed to establish that a defense attorney is an "officer of the court" protected by the provisions of 21 O.S.2001, § 650.6, and there was absolutely no evidence to establish Nelson knew either of his attorneys to be an officer of the court;

III. Admission of prejudicial victim impact evidence including subsequent medical care and treatment speculation regarding future treatment, lifestyle changes and economic loss requires a new trial or favorable modification of the resulting sentences;

IV. The prosecutor's improper interjection of an extraneous source of law into the considerations before the jury resulted in an inflated sentence;

V. Criminal prosecution of Nelson while his competency remained in question and absent a fully informed jury violated due process and constituted fundamental error; and

VI. The cumulative effect of all the errors addressed above deprived Nelson of a fair trial.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find that the law and evidence do not require reversal. Error in Proposition III requires that the sentence for Count I be modified.

We find in Proposition I that joinder of Counts I and II, two separate instances of assault and battery on a court officer, was appropriate.[1] We further find that the jury was not incorrectly instructed to treat both counts as one offense. We find in Proposition II that a court-appointed defense attorney, representing a defendant during court proceedings, is an officer of the court for purposes of the statute prohibiting assault and battery on a court officer.[2] We further find that jurors could reasonably infer from the evidence that Nelson knew anyone working in the courtroom in an official court capacity while court

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[1] 22 O.S.2001, §§ 436, 438, 439; *Cummings v. State*, 1998 OK CR 45, ¶ 15, 968 P.2d 821 *Glass v. State*, 1985 OK CR 65, 701 P.2d 765, 768; *Dodson v. State*, 1977 OK CR 140, 562 P.2d 916, 925 (Brett and Bussey, J., Specially Concurring).

[2] 21 O.S.2001, § 650.6(B). We interpret statutory language according to its plain, ordinary meaning. *Whirlpool Corp. et al v. Henry*, 2005 OK CR 7, 110 P.3d 83, 84; *Byrd v. Caswell*, 2001 OK CR 29, 34 P.3d 647, 649. The plain, ordinary meaning of "including but not limited to" is that "officers of the court" includes more persons or professions than those listed as examples in the statute. By statute, Oklahoma attorneys are officers of the court. Title 5, Ch. 1, App., art. I, § 2 (2001). Nelson cites to *Maxey v. Wright*, 54 S.W. 807 (Indian Terr. 1900. *Maxey* concerned the ability of Indian nations to tax nontribal members. By treaty, the Creek Nation had authority to remove or exclude all white people from its borders, except people "in employment of the government of the United States." The Creeks imposed a tax on white attorneys practicing within their territory. When an attorney refused to pay the tax, the Creeks wanted to remove him, and this suit resulted. The Court held that the attorney was not an employee of the United States government and could be removed. This holding sheds no light on the issue before us. For this reason, Nelson's reliance on a footnote citing *Maxey* in a Supreme Court dissent in an Indian taxation case is also irrelevant.

was in session would be viewed as an officer of the court. Any rational juror could find beyond a reasonable doubt that Nelson knew his victims were officers of the court.[3]

We find in Proposition III that evidence presented to support Count I, consisting of the victim's injuries and prognosis, medical treatment, emotional state, and financial loss was irrelevant. Relevant evidence is that which tends to make any fact of consequence to the action more or less certain probable.[4] To prove the crime of assault and battery on an officer of the court, the State had to show Nelson hit his attorney, knowing he was acting in that capacity, without justifiable or excusable cause. An assault is "any willful and unlawful attempt to offer with force or violence to do a corporal hurt to another."[5] Battery is "any willful and unlawful use of force or violence upon the person of another."[6] The jury was instructed that "any touching of a person regardless of how slight may be sufficient to constitute force." [Instruction 17, OUJI-CR (2nd) 4-28, O.R. 69] The offense does not have injury as an element. Although Nelson failed to object to this evidence, its admission in combination with the prosecutor's closing argument deprived him of a right to a fair sentencing recommendation.[7] In closing, the prosecutor emphasized Bingaman's improper testimony and urged jurors to impose punishment based on his injuries and the attack's effect on his life. Jurors imposed the maximum prison sentence –

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[3] *Dodd v. State*, 2004 OK CR 31, 100 P.3d 1017, 1041-42, *cert. denied*, __ U.S. __, 126 S.Ct. 62, 163 L.Ed.2d 89 (2005).
[4] 12 O.S.2001, § 2401.
[5] 21 O.S.2001, § 641.
[6] 21 O.S.2001, § 642.
[7] 20 O.S.2001, § 3001.1.

five years – for Bingaman, but only recommended a three-year sentence for Smith, who had no injuries. The record suggests the jury's sentence determination was improperly affected by this irrelevant evidence. This Proposition is granted, and Nelson's sentence on Count I is modified to three (3) years.

We find in Proposition IV that, assuming without deciding that the prosecutor's argument was improper, there is no plain error. Nelson fails to show he was prejudiced by the remarks.[8] We find in Proposition V that the trial court did not abuse its discretion in refusing to allow one of Nelson's witnesses at the competency trial.[9] We further find that any rational trier of fact could have found beyond a reasonable doubt that Nelson was competent.[10] We find that Nelson was not prejudiced by irrelevant language in jury instructions and the prosecutor did not err in questioning or closing argument.[11] Nelson's behavior during the pretrial proceedings and trial did not

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[8] 22 O.S.2001, § 3001.1.

[9] *Davis v. State*, 2004 OK CR 36, 103 P.3d 70, 79. The trial court admitted the evidence of his treating psychologist and psychiatrists regarding Nelson's specific medications, what they were prescribed for, his symptoms and diagnosis of mental illness, and the possible effects of mental illness and medication on his competency. The forensic examiner's evaluation was properly admitted as required by statute. 22 O.S.2001, § 1175.4.

[10] *Ryder v. State*, 2004 OK CR 2, 83 P.3d 856, 869 *cert. denied*, 543 U.S. 886, 125 S.Ct. 215, 60 L.Ed.2d 146; *Dodd v. State*, 100 P.3d at 1041-42. The evidence was undisputed that he was mentally ill and that mental illness might have a bearing on his competency. However, the only expert to evaluate him determined he was competent; Nelson's experts specifically testified they had not seen him recently, had no opinion as to his present competency, and had found him competent when medicated when they did see him. The only possible witness from whom jurors could have inferred competence was Nelson himself. Even from a cold record, his testimony is ambiguous as to whether he cannot assist his attorneys or just chooses not to do so.

[11] This Court has held that the jury's knowledge of the pending charge is "essential" to the determination of whether he has the mental capacity to appreciate the nature of the charges against him. *Lambert v. State*, 1994 OK CR 79, 888 P.2d 494, 502; *Campbell v. State*, 1981 OK CR 136, 636 P.2d 352, 355. Arguments that Nelson was playing a game and would not be tried if found incompetent accurately stated the law and were reasonable inferences from the

raise a threshold question regarding his competency, and the trial court did not neglect its ongoing duty to ensure Nelson was competent during his trial.[12] We find in Proposition VI that the error in admission of evidence raised in Proposition III requires sentence modification. We found no error in any of Nelson's other propositions of error. Where there is no error, there can be no cumulative error.[13]

Decision

The Judgments of the District Court are **AFFIRMED**. The Sentence in Count II is **AFFIRMED**. The Sentence in Count I is **MODIFIED** to three (3) years imprisonment and a $1500 fine. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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evidence. *Malicoat v. State*, 2000 OK CR 1, 992 P.2d 383, 401. The standard competency instructions, given to the jury in this case, tell them that under Oklahoma law a person must be competent before being subject to criminal procedures, and cannot be so subject if found incompetent. [Comp. Trial II at 144-45, OUJI-CR (2nd) 11-1].

[12] *Drope v. Missouri*, 420 U.S. 162, 181, 95 S.Ct. 896, 908, 43 L.Ed.2d 103; *Cargle v. State*, 1995 OK CR 77, 909 P.2d 806, 815-16.

[13] *Alverson v. State*, 1999 OK CR 21, 983 P.2d 498, 520.

OPINION BY: CHAPEL, P. J.

LUMPKIN, V.P.J.:	CONCUR IN PART/DISSENT IN PART
C. JOHNSON, J.:	CONCUR
A. JOHNSON, J.:	CONCUR
LEWIS, J.:	CONCUR

LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the decision to affirm the convictions and the sentence in Count II. However, I dissent to the modification of the sentence in Count I. As Appellant failed to object to Mr. Bingaman's testimony concerning his injuries and prognosis, medical treatment, emotional state and financial loss, review is plain error only. *Powell v. State*, 1995 OK CR 37, ¶ 35, 906 P.2d 765, 775. I find no plain error.

Evidence of the victim's injuries was relevant as it tended to show Appellant's use of force or violence in order to prove the charged assault and battery. *See* 12 O.S. 2001, § 2401. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice as the evidence was not misleading, confusing or a surprise to the defense. *See* 12 O.S. 2001, § 2402.

The prosecutor's comments urging the jury to impose sentence based in part on the victim's injuries was properly based on the evidence and well within the range of permissible closing argument. The maximum 5 year sentence recommended by the jury was appropriately based on that evidence. The victim suffered at least 3 blows to the head resulting in serious injury which caused him to miss numerous days of work. If the circumstances and severity of the particular assault and battery and the resulting injury is not relevant in determining punishment, then the punishment for the crime should be a set number of years instead of a range of years. By providing a range of years, it would seem the Legislature has allowed for the consideration of all of the

circumstances establishing the assault and battery, including the victim's resulting injuries. In the present case, evidence showed Mr. Bingaman's injuries were more severe than those received by Mr. Smith, who had no resulting injuries. Therefore, a stiffer sentence was warranted in Mr. Bingaman's case and the jury appropriately recommend as such. I find modification of the sentence in Count I is not warranted.