

ORIGINAL



IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

PHILLIP ERIC WINBUSH, III,)
)
 Appellant,)
)
 v.)
)
 STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. F-2016-994

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JAN 11 2018

SUMMARY OPINION

HUDSON, JUDGE:

Appellant Phillip Eric Winbush III was tried by jury in Comanche County District Court, Case No. CF-2016-994, and convicted of Possession of Controlled Dangerous Substance (Methamphetamine), After Former Conviction of Two Felonies, in violation of 63 O.S.Supp.2012, § 2-402. The jury recommended that Winbush serve eight (8) years imprisonment. The Honorable Mark R. Smith, District Judge, sentenced Winbush in accordance with the jury's verdict, ordered payment of various costs and ordered credit for time served. Judge Smith also ordered the sentence to run consecutive to the sentence imposed in Comanche County Case No. CF-2015-92.

Winbush now appeals, alleging three propositions of error on appeal:

- I. PROSECUTORIAL MISCONDUCT CONSTITUTED ERROR AND DEPRIVED APPELLANT OF A FAIR TRIAL;
- II. THE TRIAL COURT ERRED WHEN IT ASSESSED AN INDIGENT DEFENSE FEE GREATER THAN THAT ALLOWED BY STATUTE; and
- III. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we find that no relief is required under the law and evidence except that the indigent defense fee of \$1,250.00 must be modified as discussed herein. With this sole exception, Appellant's Judgment and Sentence is **AFFIRMED**.

I

Both parties have wide latitude in closing argument to argue the evidence and reasonable inferences from it. Counsel for both parties have "a wide range of discussion and illustration" in closing argument. *Frederick v. State*, 2017 OK CR 12, ¶ 144, 400 P.3d 786, 823 (quoting *Sanchez v. State*, 2009 OK CR 31, ¶ 71, 223 P.3d 980, 1004). Counsel enjoy a "right to discuss fully from their standpoint the evidence and the inferences and deductions arising from it." *Id.* We will not grant relief for improper argument unless, viewed in the context of the whole trial, the statements rendered the trial fundamentally unfair, so that the jury's verdict is unreliable. *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986); *Bosse v. State*, 2017 OK CR 10, ¶ 82, 400 P.3d 834, 863. Notably, Appellant did not object to any of the instances of prosecutorial misconduct now alleged thus waiving review on appeal for all but plain error. *Id.*

To be entitled to relief under the plain error doctrine, Appellant must show an actual error, that is plain or obvious, and that affects his substantial rights. *Baird v. State*, 2017 OK CR 16, ¶ 25, 400 P.3d 875, 883; *Ashton v. State*, 2017 OK CR 15, ¶ 34, 400 P.3d 887, 896-97; *Levering v. State*, 2013 OK

CR 19, ¶ 6, 315 P.3d 392, 395; 20 O.S.2011, § 3001.1. 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. *Baird*, 2017 OK CR 16, ¶ 25, 400 P.3d at 883; *Ashton*, 2017 OK CR 15, ¶ 34, 400 P.3d at 896-97; *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923 (quoting *Simpson v. State*, 1994 OK CR 40, ¶ 30, 876 P.2d 690, 701).

Appellant fails to show actual or obvious error from the challenged comments by the prosecutor. We have held that “[t]he prosecutor should avoid using the term ‘smoke screen’ in describing an accused’s defense.” *Brown v. State*, 1989 OK CR 33, ¶ 12, 777 P.2d 1355, 1358. Nonetheless, we have denied relief when such comments were made in response to defense counsel’s trial arguments, were based on reasonable inferences drawn from the evidence and were not attacks on defense counsel. *Davis v. State*, 2011 OK CR 29, ¶¶ 180-81, 268 P.3d 86, 129; *Warner v. State*, 2006 OK CR 40, ¶ 182, 144 P.3d 838, 889; *Harris v. State*, 2000 OK CR 20, ¶¶ 36-37, 13 P.3d 489, 499; *Wilson v. State*, 1998 OK CR 73, ¶ 100, 983 P.2d 448, 470. In the present case, the prosecutor’s challenged references to various defense arguments as smoke screens and, in one instance, a red herring, were mere attempts to urge the jury to use their common sense and not be swayed by irrelevant or illogical evidence. The prosecutor’s arguments channeled the jury’s attention back to the strong evidence presented by the State showing Appellant’s knowing and intentional possession of the methamphetamine in this case. Taken in context,

the challenged arguments were not attacks on defense counsel and thus do not constitute an actual or obvious error.

There was also no actual or obvious error when the prosecutor told the jury “don’t let defense guilt trip each and every one of you for not holding the defendant responsible for violating the law.” Appellant’s prosecutor did little more here than respond to defense counsel’s comments during her closing argument that the jury was dealing with Appellant’s life and freedom. We have denied relief for similar comments. *Harris*, 2000 OK CR 20, ¶¶ 35, 37, 13 P.3d at 499 (denying relief based on prosecutor’s statement “Don’t let them swindle you into believing that somehow you’re guilty of wrongdoing if you determine he’s guilty[.]”). The prosecutor responded to defense counsel’s arguments and urged the jury to hold Appellant responsible for his actions based on the evidence without guilt or hesitation.

Taken individually or cumulatively, the challenged comments did not deprive Appellant of a fundamentally fair trial in violation of due process. Thus, there is no plain error. Proposition I is denied.

II

Title 22 O.S.2011, § 1355.14(E)(4) provides that the court shall assess a fee of \$1,000.00 for the cost of indigent representation for any felony case tried to a jury. The district court committed plain error by imposing a \$1,250.00 assessment for indigent defense—a point conceded by the State. The Judgment and Sentence must therefore be modified to reflect the appropriate indigent defense fee for this case. Relief is granted for Proposition II.

III

Our resolution of Proposition II renders moot Appellant's ineffective assistance of counsel claim. Proposition III is denied.

DECISION

The Judgment and Sentence of the district court is **AFFIRMED** except the indigent defense fee imposed is **MODIFIED** to \$1,000.00 pursuant to our discussion in Proposition II. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY
THE HONORABLE MARK R. SMITH, DISTRICT JUDGE

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OPINION BY: HUDSON, J.
LUMPKIN, P.J.: CONCUR
LEWIS, V.P.J.: CONCUR IN RESULTS
KUEHN, J.: CONCUR
ROWLAND, J.: CONCUR