

APR - 2 2015

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

DAKOTA JOHN SMITH,

Appellant,

v.

STATE OF OKLAHOMA

Appellee.

NOT FOR PUBLICATION

Case No. F-2014-78

SUMMARY OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant Dakota John Smith was tried by jury and convicted of Robbery with a Dangerous Weapon (21 O.S.2011, § 801) in Case No. CF-2013-107A, in the District Court of Stephens County.¹ The jury recommended as punishment twenty-five (25) years imprisonment and the trial court sentenced accordingly. It is from this judgment and sentence that Appellant appeals.

Having thoroughly considered Appellant's six propositions of error, and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that under the law and the evidence no relief is warranted.

In Proposition I,² Appellant asserts the trial court erred in amending the felony Information during trial from First Degree Robbery to Robbery with a

¹ Appellant must serve 85% of his sentence before becoming eligible for consideration for parole. 21 O.S. 2011, § 13.1.

² Appellant's brief does not contain a summary of each proposition of error as required by Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011). Not wishing to mischaracterize any argument, we have not attempted to summarize the propositions of error, but rather address the substance of the propositions as raised in the appellate brief.

Dangerous Weapon. Appellant admits that he did not raise an objection and therefore our review is for plain error. He argues that plain error occurred and reversal of his conviction is warranted.

Under the test for plain error set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, an appellant must show an actual error, that is plain or obvious, affecting his substantial rights, and which seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*, 1994 OK CR 40, ¶ 10, 26, 30, 876 P.2d at 694, 699, 701. *See also Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395; *Malone v. State*, 2013 OK CR 1, ¶ 41, 293 P.3d 198, 211-212.

Pursuant to 22 O.S.2011, § 304 an Information may be amended, in matter of substance or form at any time before the defendant pleads, without leave, and may be amended after plea on order of the court where the same can be done without material prejudice to the right of the defendant. *Sadler v. State*, 1993 OK CR 2, ¶ 41, 846 P.2d 377, 386; *Finley v. State*, 1981 OK CR 3, ¶ 8, 623 P.2d 1031, 1032; *Walker v. State*, 1977 OK CR 75, ¶ 18, 560 P.2d 1040, 1043. An Information can be amended, even after trial begins, as long as it does not prejudice the defendant. *Lahey v. State*, 1987 OK CR 188, ¶¶ 8-12, 742 P.2d 581, 583; *Munson v. State*, 1978 OK CR 55, ¶ 5, 583 P.2d 511, 513.

The amendment in this case did not mislead or prejudice Appellant in any way. The basic allegations and evidence remained the same. There is no indication in the record that Appellant was confused or misled by the amendment or that it in any way affected his ability to prepare and present a

defense. Both First Degree Robbery and Robbery with a Dangerous Weapon have maximum sentences of life imprisonment, with the minimum punishment for Robbery with a Dangerous Weapon actually five years less than that of First Degree Robbery. The reference on the Judgment and Sentence to First Degree Robbery is a clerical error which can be corrected by this Court remanding the case to the District Court on an Order *Nunc Pro Tunc*. Finding no error, we find no plain error and deny this proposition of error.

In Proposition II, Appellant contends the trial court erred in failing to grant a continuance so the defense could obtain the services of an expert in the area of voice recognition. In order for a motion for a continuance to be proper it must be accompanied by an affidavit in compliance with 22 O.S. 2011, § 584 and 12 O.S. 2011, § 668. *See Waterdown v. State*, 1990 OK CR 65, ¶ 5, 798 P.2d 635, 636. Appellant admits that no affidavit accompanied the motion for continuance in this case. Therefore, the motion was fatally defective. *Id.* However, this Court has held that where no affidavit was prepared and presented, a motion for continuance is addressed to the sound discretion of the trial court and a ruling will not be reversed on appeal unless an abuse of discretion is apparent. *Id.* *See also Douglas v. State*, 1997 OK CR 79, ¶ 56, 951 P.2d 651, 669. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194. When considering the overruling of a

motion for a continuance, we will examine the entire record to ascertain whether or not the appellant suffered any prejudice by the denial. *Waterdown*, 1990 OK CR 65, ¶ 5, 798 P.2d at 636. See also *Ochoa v. State*, 1998 OK CR 41, ¶ 28, 963 P.2d 583, 595; *Bryson v. State*, 1994 OK CR 32, ¶ 31, 876 P.2d 240, 254. It is Appellant's burden to show how he was prejudiced by the denial of the motion for a continuance. *Pankrantz v. State*, 1983 OK CR 62, ¶ 5, 663 P.2d 26, 27.

We find the trial court did not abuse its discretion in denying the motion for a continuance as Appellant had approximately four months, from the date of Preliminary Hearing to the start of trial, to investigate the need for a voice recognition expert. See *Richards v. State*, 1977 OK CR 263, ¶¶ 3-4, 569 P.2d 461, 462 (“[c]onsidering the length of time the defendant had to prepare for trial, [approximately one month] we find no abuse of discretion and find this assignment of error to be without merit.” See also *Maxey v. State*, 1974 OK CR 163, ¶¶ 12-15, 526 P.2d 951, 954 (trial court's denial of motion for continuance was not an abuse of discretion as defense counsel was afforded sufficient opportunity to obtain expert testimony and the defense had failed to show due diligence in procuring the attendance of the witness).

In Proposition III, the admissibility of photographs is a matter within the trial court's discretion and absent an abuse of that discretion; this Court will not reverse the trial court's ruling. *Mitchell v. State*, 2010 OK CR 14, ¶ 57, 235 P.3d 640, 655. Photographs are admissible if their content is relevant and their probative value is not substantially outweighed by their prejudicial

effect. *Id.* Title 12 O.S. 2011, § 2401 defines relevant evidence as “evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence”. “In order to be relevant, the evidence need not conclusively, even directly, establish the defendant's guilt. Any legal evidence from which the jury may adduce the guilt or innocence of the defendant is admissible if, when taken with other evidence in the case, it tends to establish a material fact in issue”. *Patton v. State*, 1998 OK CR 66, ¶ 73, 973 P.2d 270, 293-294.

Here, the issue at trial was whether Appellant robbed the Chisholm Corner convenience store. Photographs showing the heights of other people not considered suspects in the robbery, even in relation to items inside the convenience store, had no tendency to establish Appellant's height to determine if he was the person seen in the surveillance video, and provided no evidence from which the jury could adduce his guilt or innocence. As the evidence was not relevant, the trial court did not abuse its discretion in excluding Defense Exhibits 2, 3 and 5.

In Proposition IV, reviewing the evidence in the light most favorable to the State, we find any rational trier of fact could have found the essential elements of Robbery with a Dangerous Weapon beyond a reasonable doubt. *Rutan v. State*, 2009 OK CR 3, ¶ 49, 202 P.3d 839, 849; *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559.

In Proposition V, we have thoroughly reviewed Appellant's claims of prosecutorial misconduct for plain error. See *Levering*, 2013 OK CR 19, ¶ 6, 315 P.3d at 395; *Malone*, 2013 OK CR 1, ¶ 41, 293 P.3d at 211-212; *Simpson*, 1994 OK CR 40, ¶¶ 10, 26, 30, 876 P.2d at 694, 699, 701. We find the prosecutor's comments in closing argument, including his metaphor of an incomplete puzzle, were not attempts to define the term "reasonable doubt", they did not give the jury an erroneous impression, or prejudice the rights of Appellant. See *Robinson v. State*, 2011 OK CR 15, ¶ 16, 255 P.3d 425, 432; *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 62, 241 P.3d 214, 234; *Johnson v. State*, 1981 OK CR 86, ¶ 4, 632 P.2d 1231, 1233. Further, the prosecutor did not improperly give his personal belief of Appellant's guilt, but detailed the evidence and argued it was sufficient to prove guilt. See *Hanson v. State*, 2003 OK CR 12, ¶ 16, 72 P.3d 40, 50; *Bryson v. State*, 1994 OK CR 32, ¶ 45, 876 P.2d 240, 257. Finding no error in any of the prosecutor's comments, we find no plain error.

In Proposition VI, we find Appellant's 25 year sentence is not excessive. It is within statutory range and appropriate based upon his direct participation in the armed robbery of the Chisholm Corner convenience store. See *Bartell v. State*, 1994 OK CR 59, ¶ 33, 881 P.2d 92, 101 (in considering whether the sentence is excessive, this Court looks to whether the punishment is within the statutory range and if it is, whether, under all the facts and circumstances of the case it is so excessive as to shock the conscience of the Court). Appellant's request for modification based upon the sentences received by co-defendants in

other proceedings is not properly before us. This Court does not engage in a proportionality analysis. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149.

Accordingly, this appeal is denied.

DECISION

The Judgment and Sentence is **AFFIRMED**. The case is **REMANDED** to the District Court for an **Order Nunc Pro Tunc** to reflect a judgment for Robbery with a Dangerous Weapon. 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 STEPHENS COUNTY
THE HONORABLE JOE H. ENOS, DISTRICT JUDGE

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SMITH, P.J.: CONCUR
LEWIS, J.: CONCUR
JOHNSON, J.: CONCUR

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