IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

GREGORY KEITH ALFORD,	)	
	)	
Appellant,	)	**Not For Publication**
	)	
v.	)	**Case No. F-2013-1111**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAY - 4 2015
MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

LUMPKIN, VICE PRESIDING JUDGE:

Appellant, Gregory Keith Alford, was tried by jury and convicted of Aggravated Possession of Child Pornography (21 O.S.Supp.2009, § 1040.12a) in District Court of Beckham County, Case No. CF-2012-55. The jury recommended as punishment imprisonment for not less than fifteen (15) years and a fine in the amount of $10,000.00 payable to the National Center for Missing and Exploited Children. The District Court sentenced Appellant to imprisonment for fifteen (15) years with one (1) year of post-imprisonment supervision and ordered him to pay costs and a $10,000.00 fine to benefit the National Center for Missing and Exploited Children.[1]

Appellant raises the following propositions of error in support of this appeal:

I. The trial court erred when it refused to suppress Appellant's statements.

[1] Any person convicted of child pornography as defined in § 1021.2, 1021.3 of Okla. Stat. tit. 21, shall be required to serve 85% of his or her sentence of imprisonment prior to becoming eligible for consideration for parole. 21 O.S.Supp.2009, § 13.1

II. Because the jurors did not receive an instruction on the voluntariness of Appellant's statements, they never had the opportunity to consider an essential component of his defense.

III. Because the total number of images actually depicting child pornography was less than 100, Appellant's conviction for aggravated possession of child pornography must be modified.

IV. The trial court erred in denying expert funds to defense counsel.

V. The State used inadmissible hearsay to prove an ultimate issue for the jurors to decide.

VI. The prosecutor's introduction of irrelevant evidence of a bad act prejudiced the jurors.

VII. The cumulative effect of the errors in this case deprived Appellant of a fair trial.

VIII. The fifteen year sentence is excessive.

After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts and briefs of the parties, we have determined that reversal of the judgment and sentence is not warranted under the law and the evidence; however, the case must be remanded to remove the diversion of the fine from the State to the National Center for Missing and Exploited Children.

In Proposition One, Appellant contends that his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), were violated when the OSBI Agent failed to advise him of his rights. He argues that a reasonable person in the same circumstances would not have felt free to leave. We find that the trial court did not abuse its discretion when it determined that no Miranda warning was required. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170;

Marshall v. State, 2010 OK CR 8, ¶ 24, 232 P.3d 467, 474; *Gomez v. State*, 2007 OK CR 33, ¶ 5, 168 P.3d 1139, 1141-42. Appellant voluntarily appeared at the police station and left of his own free will following the interview. Based upon all of the objective circumstances of the case, we find that the circumstances of the interview were not the coercive environment to which *Miranda* by its terms was made applicable. *Howes v. Fields*, --- U.S. ---, 132 S.Ct. 1181, 1189-90, 182 L.Ed.2d 17 (2012); *California v. Beheler*, 463 U.S. 1121, 1122–1123, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983); *Oregon v. Mathiason*, 429 U.S. 492, 493-95, 97 S.Ct. 711, 713-14, 50 L.Ed.2d 714 (1977); *California v. Beheler*, 463 U.S. 1121, 1122–1123, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983). Proposition One is denied.

In Proposition Two, Appellant contends that the trial court erred when it failed to instruct the jury with Instruction No. 9-12, OUJI-CR(2d) (Supp.2013), concerning the jury's use of his statement to the OSBI agent. He concedes that he waived appellate review of this claim when he failed to request the instruction at trial but argues that the error rises to the level of plain of error. *See Burgess v. State*, 2010 OK CR 25, ¶ 21, 243 P.3d 461, 465; *Romano v. State*, 1995 OK CR 74, ¶ 80, 909 P.2d 92, 120.

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; *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. "[P]lain error is subject to harmless error analysis." *Id.*, 1994 OK CR 40, ¶ 20, 876 P.2d at 698.

We find that the instructions, as a whole, accurately stated the applicable law in the present case. *Cipriano v. State*, 2001 OK CR 25, ¶ 14, 32 P.3d 869, 873; *Parent v. State*, 2000 OK CR 27, ¶¶ 16, 22, 18 P.3d 348, 351, 353 (finding Instruction No. 9-12, OUJI-CR(2d), outlining jury's role deciding whether or not statement or confession was voluntary so jury can determine weight to give statement should be given where defendant challenges voluntariness of statement); Committee Comments, Inst. No. 9-12, OUJI-CR(2d) (Supp.2014) ("Whether procedural safeguards, such as the giving of *Miranda* warnings, have been satisfied is an issue of law for the trial judge, and should not be presented to the jury."). As such we find that Appellant has not shown the existence of an actual error, let alone, plain error. Proposition Two is denied.

In Proposition Three, Appellant challenges the sufficiency of the evidence supporting his conviction. Taking the evidence in the light most favorable to the prosecution, we find that any rational trier of fact could have found the requisite elements of aggravated possession of child pornography beyond a reasonable doubt. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204. Based upon the descriptive names affixed to the 100 or more images stored within

Appellant's laptop, the opinions of the officers who reviewed the images, Appellant's admission that he kept going back to look at "dirty pictures of young girls," and the actual images themselves, we find that any rationale trier of fact could have found that Appellant possessed 100 or more separate materials depicting children under 18 years of age engaged in sexual acts, lewd acts, or the lewd exhibition of their genitalia for the purpose of sexual stimulation of the viewer. *Osborne v. Ohio*, 495 U.S. 103, 112, 110 S.Ct. 1691, 1698, 109 L.Ed.2d 98 (1990); *Brown v. State*, 2008 OK CR 3, ¶ 8, 177 P.3d 577, 580, 21 O.S.Supp.2009, §§ 1024.1, 1040.12a. Proposition Three is denied.

In Proposition Four, Appellant contends that the trial court's denial of his request for funds to hire an expert qualified to give testimony regarding the ages of the individuals depicted in the images found on his laptop computer violated his right to due process. Appellant did not demonstrate any need for an expert witness before the trial court. *Tibbs v. State*, 1991 OK CR 115, ¶¶ 13-14, 819 P.2d 1372, 1377 (rejecting denial of expert at State's expense claim where appellant alleged only that expert would assist defense).[2] As he has not demonstrated substantial prejudice from the lack of an expert we find that no error occurred. *Caldwell v. Mississippi*, 472 U.S. 320, 323 n. 1, 105 S.Ct. 2633, 2637 n. 1, 86 L.Ed.2d 231 (1985) (finding undeveloped assertions that requested expert would be beneficial insufficient to establish deprivation of due process);

[2] I note that the United States Supreme Court has not extended its holding in *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), to include "any expert which is necessary for an adequate defense." *Munson v. State*, 1988 OK CR 124, ¶ 19, 758 P.2d 324, 330; *Woodard v. State*, 1987 OK CR 202, ¶ 3, 743 P.2d 662, 664; *Rogers v. State*, 1995 OK CR 8, ¶ 1, 890 P.2d 959, 979 (Lumpkin, J., concurring in results); *Hawkins v. State*, 1994 OK CR 83, ¶¶ 1-3, 891 P.2d 586, 599-600 (Lumpkin, P.J., specially concurring).

Munson v. State, 1988 OK CR 124, ¶ 19, 758 P.2d 324, 330; *See also Coleman v. Brown*, 802 F.2d 1227, 1237 (10th Cir. 1986). Proposition Four is denied.

In Proposition Five, Appellants contends that the OSBI agents gave inadmissible hearsay testimony when they relayed information which they had received from the National Center for Missing and Exploited Children. We distinguish those statements the agents related which explained the actions that they took based upon information from the National Center and were not simply to prove the truth of the matter asserted. *Fontenot v. State*, 1994 OK CR 42, ¶ 41, 881 P.2d 69, 82 ("The hearsay rule does not preclude a witness from testifying about the actions he or she took as a result of a conversation with a third party."). The trial court did not abuse its discretion in admitting those statements as the statements did not constitute hearsay. *Marshall*, 2010 OK CR 8, ¶ 24, 232 P.3d at 474; *Primeaux v. State*, 2004 OK CR 16, ¶¶ 38-39, 88 P.3d 893, 902.

However, we find that the trial court abused its discretion when it admitted Agent Chaffin's testimony that the National Center sent him a list indicating that there were known victims in this case as well as Agent Rizzi's testimony that the National Center had sent him three responses indicating that the Center had identified 16 known series within the images retrieved from Appellant's laptop. The agents did not take any action based upon these statements and it is apparent that the State offered the two statements to prove the truth of the matter asserted. *Primeaux*, 2004 OK CR 16, ¶¶ 38-39, 88 P.3d at 902. We find that the admission of these statements constituted error.

Anticipating this finding, the State argues that any error in the admission of the agents' testimony was harmless beyond a reasonable doubt. We agree. *Marshall*, 2010 OK CR 8, ¶ 34, 232 P.3d at 467. The great weight of the evidence, established that the individuals depicted in the images were under 18 years of age. The evidence independent of the improper hearsay sufficiently supports the jury's verdict. *Id.* Accordingly, we find that the admission of the improper hearsay was harmless. *Logsdon v. state*, 2010 OK CR 7, ¶¶ 36-37, 231 P.3d 1156, 1168; *Andrew v. State*, 2007 OK CR 23, ¶ 31, 164 P.3d 176, 189.

Within this proposition, Appellant references that he was denied the opportunity to cross-examine the person who claimed to have identified the persons depicted in the files. As he merely mentions this possible issue and has not fully supported this contention with argument and authority we find that he has waived review of the issue pursuant to Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015); *Murphy v. State*, 2012 OK CR 8, ¶ 23, 281 P.3d 1283, 1291 (refusing to review contention not supported with argument or authority as required by Rule 3.5); *Harmon v. State*, 2011 OK CR 6, ¶ 90, 248 P.3d 918, 946 (finding issue waived under Rule 3.5 where appellant provides no argument or authority). Proposition Five is denied.

In Proposition Six, Appellants contends that the trial court erred when it allowed the State to introduce other crimes evidence contrary to 12 O.S.2011, § 2404(B). He argues that he was prejudiced when the prosecutor introduced evidence concerning his failure to appear for court in the present case and his subsequent arrest through the execution of a search warrant on his home. As

Appellant failed to raise this specific challenge at trial, we find that he has waived appellate review of this issue for all but plain error. *Conover v. State*, 1997 OK CR 6, ¶ 24, 933 P.2d 904, 911; *Short v. State*, 1999 OK CR 15, ¶ 27, 980 P.2d 1081, 1094 ("When a specific objection is raised at trial, this Court will not entertain a different objection on appeal.").

We review Appellant's claim for plain error under the test set forth in *Simpson. Id.*, 1994 OK CR 40, ¶ 10, 876 P.2d at 694. Appellant's post offense conduct of failing to appear for court in the present case and failing to subject himself to the warrant issued for his arrest tended to exhibit his consciousness of guilt, thus, it is not considered other crimes evidence. *Andrew v. State*, 2007 OK CR 23, ¶ 58, 164 P.3d 176, 193; *Anderson v. State*, 1999 OK CR 44, ¶¶ 10–15, 992 P.2d 409, 416; *Honeycutt v. State*, 1988 OK CR 76, ¶ 19, 754 P.2d 557, 561; *Smith v. State*, 1985 OK CR 15, ¶¶ 15-17, 695 P.2d 1360, 1363, *overruled on other grounds, Kaulaity v. State*, 1993 OK CR 40, 859 P.2d 521. As the evidence did not overshadow the issues in the case and distract the jury into punishing Appellant simply for being a bad person, we find that the evidence was admissible. *Dodd v. State*, 2004 OK CR 31, ¶ 36, 100 P.3d 1017, 1031. As Appellant has not shown the existence of an actual error, we find that plain error did not occur. Proposition Six is denied.

As to Proposition Seven, we find that Appellant was not denied a fair trial by cumulative error. *Ashinsky v. State*, 1989 OK CR 59, ¶ 31, 780 P.2d 201, 209; *Bechtel v. State*, 1987 OK CR 126, 738 P.2d 559, 561. In Proposition Five, we determined that the trial court's improper admission of hearsay constituted

harmless error. However, this sole error cannot support an accumulation of error claim. *Hope v. State*, 1987 OK CR 24, ¶ 12, 732 P.2d 905, 908. Therefore, no new trial or modification of sentence is warranted and this assignment of error is denied.

As to Proposition Eight, we find that, under all the facts and circumstances of the case, Appellant's sentence of imprisonment is not so excessive as to shock the conscience of the Court. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149; *Freeman*, 1994 OK CR 37, ¶ 38, 876 P.2d at 930; *Battenfield v. State*, 1991 OK CR 82, ¶ 27, 816 P.2d 555, 565. Proposition Eight is denied.

Although Appellant does not contest the fine which the trial court imposed, we find that the trial court's diversion of the $10,000.00 fine to the National Center for Missing and Exploited Children is unauthorized and void. *Clift v. State*, 1985 OK CR 135, ¶ 3, 708 P.2d 342, 342-43; *Postelwait v. State*, 1924 OK CR 222, 28 Okla. Crim. 17, 22, 228 P. 789, 791. We note that the trial court imposed the fine at sentencing. Thereafter, the trial court decided to honor the jury's recommendation and ordered that the fine be paid to the National Center of Missing and Exploited Children in the Judgment and Sentence. As Appellant did not challenge the imposition of the fine, this matter is remanded to the trial court with directions to amend the Judgment and Sentence to delete all reference to "the National Center of Missing and Exploited Children." *Id.*, 1985 OK CR 135, 708 P.2d 342, 342.

DECISION

Appellant's conviction is **AFFIRMED.** This matter is **REMANDED** to the trial court with instructions to delete all reference to "the National Center of Missing and Exploited Children" from the Judgment and Sentence. 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 BECKHAM COUNTY
THE HONORABLE F. DOUG HAUGHT, DISTRICT JUDGE

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

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