IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOEY LYNN SMITH,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
v.	)	
	)	Case No. F-2013-1180
STATE OF OKLAHOMA	)	
	)	
Appellee.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAY 14 2015
MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant Joey Lynn Smith was tried by jury and convicted of Leaving the Scene of an Accident Involving Injury, After Former Conviction of Two or More Felonies (Count I) (47 O.S.2011, § 10-102(A); Driving with License Suspended (misdemeanor) (Count II) (47 O.S.2011, § 6-303(B)) and Reckless Driving (misdemeanor) (Count III) (47 O.S.2011, § 11-901), Case No. CF-2012-245, in the District Court of Canadian County. The jury recommended as punishment life imprisonment in Count I, and a fine of $100.00 in each of Counts II and III. The trial court sentenced accordingly. It is from this judgment and sentence that Appellant appeals.

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

I. The trial court failed to give a proper Allen instruction.

II. Prosecutorial misconduct denied Appellant a fair trial.

III. The minimum sentencing range for Count I was incorrect.

IV. Appellant's sentence is excessive.

V. Appellant was prejudiced by ineffective assistance of counsel.

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 under the law and the evidence no relief is warranted.

In Proposition I, in the absence of a contemporaneous objection at trial, we review for plain error the *Allen*[1] or deadlock jury instruction given by the trial court. *Hawkins v. State,* 2002 OK CR 12, ¶ 43, 46 P.3d 139, 148. 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. "[P]lain error is subject to harmless error analysis." *Id.*, 1994 OK CR 40, ¶ 20, 876 P.2d at 698. *See 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.

We find the trial court erred in failing to give the uniform deadlock jury instruction, Oklahoma Uniform Jury Instructions – Criminal, (2d) 10-11. 12 O.S.2011, § 577.2. However, this error can be harmless if the instructions given fairly and accurately state the applicable law. *Marquez-Burrola v. State,* 2007 OK

[1] *Allen v. United States,* 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed.528 (1896).

CR 14, ¶ 26, 157 P.3d 749, 758. The instruction in this case fairly and accurately stated the applicable law, there was nothing coercive in the language used, and it was similar to instructions previously upheld by the Court. *See Gore v. State*, 1987 OK CR 63, ¶ 9, 735 P.2d 576, 579; *Day v. State*, 1980 OK CR 94, ¶ 2, 620 P.2d 1318, 1319. The error did not seriously affect the fairness or integrity of the proceedings; therefore we find no plain error.

In Proposition II, the majority of the comments challenged as prosecutorial misconduct were not met with contemporaneous objections and we therefore review those comments for plain error. *Malone v. State*, 2013 OK CR 1, ¶ 40, 293 P.2d 198, 211.

On claims of prosecutorial misconduct, relief will be granted only where the prosecutor committed misconduct that so infected the defendant's trial that it was rendered fundamentally unfair, such that the jury's verdicts should not be relied upon. *Roy v. State*, 2006 OK CR 47,¶ 29, 152 P.3d 217, 227, *citing Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872, 40 L.Ed.2d 431 (1974). We evaluate alleged prosecutorial misconduct within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel. *Mitchell v. State*, 2010 OK CR 14, ¶ 97, 235 P.3d 640, 661; *Cuestra-Rodriquez v. State*, 2010 OK CR 23, ¶ 96, 241 P.3d 214, 243.

Both the State and the defense agree that the prosecutor's questioning of Ms. Noreen on the second day of trial about the back brace she wore was not

proper rebuttal testimony. However, the error did not constitute plain error as it did not seriously affect the fairness, integrity or public reputation of the judicial proceedings or otherwise represent a miscarriage of justice. Reviewing the remaining challenged comments for plain error and a comment which drew an objection, we find no error. The comments were within the permissible bounds of relevant inquiry and closing argument and properly based on the evidence. *See Sanchez v. State*, 2009 OK CR 31, ¶ 71, 223 P.3d 980, 1004. None of the comments were so flagrant and so infected the trial as to render it fundamentally unfair. *Jones v. State*, 2011 OK CR 13, ¶ 3, 253 P.3d 997, 998. Additionally, we find no error and thus no plain error in the admission of the photographs comprising State's Exhibits 8 and 9. *See Mitchell v. State*, 2010 OK CR 14, ¶ 57, 235 P.3d 640, 655.

In Proposition III, we find error occurred in the jury instruction which incorrectly set forth the range of punishment for the offense of leaving the scene of an accident involving nonfatal injury, after former conviction of two or more felonies. Pursuant to 47 O.S.2011, § 10-102(A) and 21 O.S.2011, § 51.1(C), the minimum range of punishment should have been stated as thirty days and not four years. We find this error did not affect Appellant's substantial rights or seriously affect the fairness, integrity or public reputation of the judicial proceedings or otherwise represent a miscarriage of justice. Appellant's life sentence was within statutory range and not impacted by the erroneous statement of the minimum punishment in Count I.

In Proposition IV, we find Appellant's life sentence is not excessive but appropriate based upon the facts and circumstances of the case. *See Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149; *Freeman v. State*, 1994 OK CR 37, ¶ 38, 876 P.2d 283, 291.

In Proposition V, we have reviewed Appellant's claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to show that counsel was ineffective, Appellant must show both deficient performance and prejudice. *Goode v. State*, 2010 OK CR 10, ¶ 81, 236 P.3d 671, 686 *citing Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. *See also Marshall v. State*, 2010 OK CR 8, ¶ 61, 232 P.3d 467, 481. In *Strickland*, the Supreme Court said there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct, *i.e.*, an appellant must overcome the presumption that, under the circumstances, counsel's conduct constituted sound trial strategy. *Goode*, 2010 OK CR 10, ¶ 81, 236 P.3d at 686. To establish prejudice, Appellant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at ¶ 82, 236 P.3d at 686.

Appellant's claims of ineffectiveness are based upon counsel's failure to object to the allegations of error raised in Propositions of Error I – IV. We have thoroughly reviewed those claims of error and found none of them warranted any relief. Therefore, Appellant has failed to establish the prejudice necessary for a finding of ineffectiveness. *See Wiley v. State*, 2008 OK CR 30, ¶ 4, 199

P.3d 877, 878 ("unless the defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable").

Further, we have reviewed Appellant's *Application for Evidentiary Hearing on Sixth Amendment Claim* pursuant to Rule 3.11(B)(3)(6), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015) and found he has not shown by clear and convincing evidence a strong possibility that defense counsel was ineffective for failing to more thoroughly investigate and use evidence of the possible carbon monoxide poisoning as an alibi defense and for failing to obtain records of who had been driving the vehicle on the date and time of the collision in order to rule out one or more theories of defense. Accordingly, the *Application* and this appeal are denied.

DECISION

The Judgments and Sentences are **AFFIRMED**. *The Application for Evidentiary Hearing on Sixth Amendment Grounds* is **DENIED**. 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 CANADIAN COUNTY
THE HONORABLE GARY E. MILLER, DISTRICT JUDGE

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

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LEWIS, JUDGE, SPECIALLY CONCURRING:

I concur with the majority opinion to affirm Appellant's convictions. I write separately to address Proposition I, the deadlock jury instruction. The author argues nothing in the instruction was coercive. I find the instruction given was erroneous, however applying this court's plain error analysis, it did not affect the outcome of the case. I have been authorized to state that Judge Smith joins me in this writing.