IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DARVIN WAYNE GRAY,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2014-322**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

LUMPKIN, VICE PRESIDING JUDGE:

Appellant, Darvin Wayne Gray, was tried by jury and convicted of First Degree Rape by Instrumentation (Count I) (21 O.S.Supp.2009, § 1111.1), After Former Conviction of Two or More Felonies; Forcible Oral Sodomy (Count II) (21 O.S.Supp.2009, § 888), and Lewd Molestation (Count III) (21 O.S.Supp.2009, § 1123), After Former Conviction of Lewd Molestation, in the District Court of Muskogee County, Case Number CF-2011-951. The jury recommended as punishment imprisonment for fifty (50) years in Count I, Life Without the Possibility of Parole in Count II and Life Without the Possibility of Parole and a $250.00 fine in Count III.[1] The trial court sentenced accordingly and ordered the sentences to run concurrently.[2] It is from this judgment and sentence that Appellant appeals.

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[1] Appellant will be required to serve 85% of his sentences for lewd molestation and forcible sodomy. 21 O.S.Supp.2009, § 13.1

[2] Any ambiguity concerning whether the trial court ordered Appellant's sentences to run concurrently or consecutively is clarified through the trial court's issuance of the Judgment and Sentence document which recites that Appellant's sentences are to run concurrently. *LeMay v. Rahhal*, 1996 OK CR 21, ¶¶ 18-20, 917 P.2d 18, 22

In October of 2011, Appellant managed the "Trail of Blood" at the The Castle in Muskogee. The "Trail of Blood" was a Halloween themed maze with different interactive haunted scenes along the path. Appellant was friends with T.G.'s family. Appellant hired the fifteen-year-old T.G. to work even though The Castle required all cast members to be at least sixteen years old. T.G. worked on the weekends. She was assigned to play the role of a shadow in the parachute scene. She dressed in all black and wore costume makeup on her face. T.G. hid behind a parachute hung from the trees and used a leaf blower to cause the parachute to fly out at those that came down the trail.

Appellant sexually abused T.G. while she worked on the "Trail of Blood." He coerced her into staying silent through threats of losing her job, threats of violence, and promises of additional pay.

The first weekend that T.G. worked, Appellant caught her alone in the corral where the staff assembled to get their daily assignments. Appellant hugged T.G., rubbed her back, and touched her chest above her clothes. T.G. was caught off guard. Appellant slipped his hand up T.G.'s shirt and touched her breasts. Appellant stated that T.G. felt better than his wife. T.G. told Appellant that he could not do this because she had a boyfriend. Appellant only stopped when T.G. informed him that she needed to use the restroom.

The second weekend that T.G. worked, Appellant found T.G. alone behind the parachute shortly before the "Trail of Blood" opened. Appellant made T.G. give him a "hand job" and then a "blow job." He also placed his fingers inside her. T.G. told Appellant to stop but he cursed her and told her

that he would fire her if she didn't like it. T.G. continued to come up with reasons why Appellant should stop. In response, Appellant threatened to slice T.G.'s throat if she told anyone what had occurred.

On October 21, 2011, T.G. arrived for her third weekend of work. She went to the parachute scene area as the other workers prepared the trail for the evening. T.G. was alone. Appellant sought her out and found her behind the parachute. He, again, made her give him a "hand job," a "blow job," and stuck his fingers insider her. However, one of the other workers rescued T.G. on this occasion.

Ben Sparks came down the path filling Tiki torches with oil. He spotted two pairs of feet under the umbrella and called out: "Silence means trouble." To which, Appellant chuckled. Sparks entered the parachute area and greeted the pair. T.G. poked her head up above the parachute and, twice, mouthed "Help me" to Sparks. Twenty seconds later, Appellant poked his head up. Sparks was able to persuade Appellant to allow T.G. to help him fill the Tiki torches with oil. T.G. followed Sparks down the path. She visibly fought back her tears and held her breath. Appellant walked off in the other direction. After approximately 50 feet, T.G. openly sobbed. She was unable to speak for approximately ten minutes but, eventually informed Sparks that Appellant had been molesting her on the weekends and buying her silence with her paycheck.

After Sparks' intervention, Appellant frantically searched for T.G. He looked for her on the trail and repeatedly texted her phone. Appellant stated: "We didn't finish but don't tell him." He asked T.G. to call him, apologized and

professed his love for her. In still later texts, Appellant stated: "We need to talk baby if u didn't want to do that u should have said no but can I talk to u." He asked her: "What r u telling people." Eventually, Appellant texted: "U all r getting bonus."

The next morning, T.G. told her mother what had happened and her mother called the Muskogee County Sheriff's Department. Deputy Bill Perry and Investigator Coletta Peyton investigated the incident. Perry spoke with Appellant concerning the allegations. He denied ever being alone with T.G. Peyton recovered the text messages and obtained statements from other witnesses. She went to Appellant's home and interviewed him. Appellant claimed that he thought T.G. was sixteen years old but denied having a sexual relationship with her. Perry asked Appellant why he was behind the parachute with T.G. and Appellant stated that he was helping T.G. get a leaf blower.

In his first proposition of error, Appellant challenges the unanimity of the jury's verdicts and asserts that he did not have sufficient notice of the charges which had been levied against him. He concedes that he did not raise this challenge before the trial court. As such, we find that he has waived appellate review of the claim for all but plain error. *Simpson v. State*, 1994 OK CR 40, ¶¶ 11, 23, 876 P.2d 690, 694-95, 698-99; *Huddleston v. State*, 1985 OK CR 12, ¶ 12, 695 P.2d 8, 10 (plea to information waives all defects except those that go to jurisdiction).

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.

Reviewing the record in the present case, we find that Appellant has not shown the existence of an actual error that is plain or obvious from the record. The State charged Appellant with rape by instrumentation, forcible oral sodomy, and lewd molestation. At trial, the prosecutor presented evidence of more than one act as to each of the charged offenses. The testimony revealed that Appellant had committed two separate acts of rape by instrumentation, two separate acts of forcible sodomy and three separate acts of lewd molestation. These acts occurred over three separate weekends in October of 2011. As each of the acts clearly constituted separate and distinct crimes, the State could have charged Appellant with a total of seven offenses. *See Davis v. State,* 1999 OK CR 48, ¶ 12, 993 P.2d 124, 126; *Ziegler v. State,* 1980 OK CR 23, ¶ 10, 610 P.2d 251, 254. Instead, the State treated the two acts of rape by instrumentation as an ongoing offense, the two acts of forcible sodomy as a second ongoing offense, and the three acts of lewd molestation as a third but separate ongoing offense.

Appellant argues that the State was required to elect which act it relied upon for conviction as to each of the three charged offenses. Election of

offenses is the general rule in this State. *Huddleston*, 1985 OK CR 12, ¶ 16, 695 P.2d at 10-11; *citing Cody v. State*, 1961 OK CR 43, ¶ 38, 361 P.2d 307, 320. However, the State is permitted to treat ongoing offenses as a single act or transaction.

This Court in *McManus v. State*, 1931 OK CR 110, 297 P. 830, announced that "election is not required when the separate acts are treated as one transaction." *Huddleston*, 1985 OK CR 12, ¶ 16, 695 P.2d at 10-11; *Gilson v. State*, 2000 OK CR 14, ¶ 21, 8 P.3d 883, 899. Although this Court has most recently applied the exception to election in the context of child abuse and sexual abuse, this Court has long recognized the prosecution's discretion in the filing of criminal charges. *See Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 64, 241 P.3d 214, 235 ("The decision regarding which criminal charge to bring lies within the wide parameters of prosecutorial discretion."). "Prosecutorial discretion in charging, of course, means more than the power to choose at whim among alternative provisions" but, instead includes "thoughtful consideration of all the facts and circumstances of the particular case." *State v. Haworth*, 2012 OK CR 12, ¶ 18, 283 P.3d 311, 317. The prosecution may charge a single offense but allege several acts that constitute different ways in which the defendant allegedly committed the offense. *Perez v. State*, 1980 OK CR 59, ¶ 4, 614 P.2d 1112, 1114; *Hammons v. State*, 1961 OK CR 61, ¶¶ 15-16, 366 P.2d 111, 114.

In *Turnbow v. State*, 1969 OK CR 92, 451 P.2d 387, this Court found that the State had elected to treat two acts of rape as one offense where the

State charged the defendant with one count of rape despite the fact that the victim had related that the defendant had raped her twice during the same time period. *Id.*, 1969 OK CR 92, ¶ 7, 451 P.2d at 389-90. We reached the same result in both *Scott v. State*, 1983 OK CR 118, ¶¶ 17-19, 668 P.2d 339, 342-43, and *Williams v. State*, 1986 OK CR 101, ¶11, 721 P.2d 1318, 1321.

In *Gilson*, we affirmed the prosecution's discretion in charging separate acts as one offense. *Gilson*, 2000 OK CR 14, ¶ 23, 8 P.3d at 899. This Court recognized that the State could have elected to charge and prove the separate acts as multiple offenses, but it had, instead, elected to charge the separate acts as one continuous act during the time period set out in the felony information. *Gilson*, 2000 OK CR 14, ¶ 23, 8 P.3d at 899. We determined that under the circumstances, the trial court was not required to instruct the jury that they must agree on the specific act supporting the verdict of guilt. *Id.*

Even so, the prosecution's discretion in charging separate acts as an ongoing offense is not unlimited. *See Cuesta-Rodriguez*, 2010 OK CR 23, ¶ 64, 241 P.3d at 235. The defendant must have notice and the record must enable him to plead in bar as to any subsequent prosecution. *Drake v. State*, 1988 OK CR 180, ¶ 7, 761 P.2d 879, 881-82, *citing Dugan v. State*, 1961 OK CR 38, 360 P.2d 833, 834. If there is a basis for the jury to believe that one or more of the acts were committed and a reasonable doubt might exist as to the others, then there must be an election. *Scott*, 1983 OK CR 118, ¶ 19, 668 P.2d at 343; *Shapard v. State*, 1967 OK CR 197, ¶ 128, 437 P.2d 565, 611, *McManus*, 1931 OK CR 110, 297 P. at 831

To determine whether a defendant had sufficient notice of the charges against him, this Court will look to the "four corners" of the Information together with all material that was made available to him at preliminary hearing and through discovery to determine whether the defendant was apprised of what he must defend against at trial or subject to the possibility of being put in jeopardy a second time for the same offense. *Patterson v. State*, 2002 OK CR 18, ¶ 23, 45 P.3d 925, 931; *Parker v. State*, 1996 OK CR 19, ¶ 24, 917 P.2d 980, 986.

Turning to the present case, we find that the State properly elected to treat the two acts of rape by instrumentation as an ongoing offense, the two acts of forcible sodomy as a second ongoing offense, and the three acts of lewd molestation as a third ongoing offense. The State gave Appellant notice of its election. The Information filed in the case alleged:

> COUNT 1: RAPE BY INSTRUMENTATION ~ A FELONY, on or between the 1st day of October, 2011, and the 21st day of October, 2011, by using his finger to penetrate the vagina of T.G., 15 years old, without victim's consent, through the use or threat of force or violence and said defendant not being married to the victim . . .
>
> COUNT 2: FORCIBLE ORAL SODOMY ~ A FELONY, on or between the 1st day of October, 2011, and the 21st day of October, 2011, by placing his penis in the mouth of T.G., 15 years old, who was not capable of giving legal consent due to her age . . .
>
> COUNT 3: LEWD MOLESTATION ~ A FELONY, on or between the 1st day of October, 2011, and the 21st day of October, 2011, by knowingly and intentionally looking upon, touching, feeling the body or private parts of T.G. in a lewd and lascivious manner by having T.G., 15 years old touch and manipulate his penis, when T.G. was under the age of 16 years old and the Defendant was at least 3 years older than the victim.

Although the Information did not explicitly list every act which was later introduced into evidence at trial, those acts were made known to Appellant through preliminary hearing and discovery. The evidence at preliminary hearing was that Appellant had molested T.G. the entire time she worked at The Castle. T.G. testified as to what Appellant would do to her. She related the same acts which she later testified to at trial. Ben Sparks testified as to T.G.'s statements to him at preliminary hearing. The State also made available to Appellant through the discovery process: all of the law enforcement reports; the Sexual Abuse Nurse Examiner's report; and T.G.'s statements to Ben Sparks, T.G.'s mother, her coworker, the Sexual Abuse Nurse Examiner, and the law enforcement officers.

In light of this record, we find that Appellant was sufficiently apprised of what he had to defend against at trial. The Information together with all the material made available to Appellant imparted that the offenses were ongoing and that the State had elected to treat the multiple acts as three separate criminal transactions. Appellant was apprised that the State alleged that he had committed acts of rape by instrumentation, forcible oral sodomy, and lewd molestation on the three weekends that T.G. worked for him on the "Trail of Blood" in October of 2011. We note that the record is adequate to enable Appellant to plead in bar as to any subsequent prosecution for the separate acts of rape by instrumentation, forcible oral sodomy, and lewd molestation which the State elected to treat as ongoing offenses.

We further find that there was no basis for the jury to believe that one or more of the acts were committed and a reasonable doubt might exist as to the others. There was not a great disparity in proof between the separate acts. Because the State properly elected to treat the separate acts of lewd molestation, forcible sodomy, and rape by instrumentation that occurred between the 1st day of October, 2011 and the 21st day of October, 2011, we find that no error, plain or otherwise, occurred.

Even if we were to erroneously determine that plain error had occurred, we would find the error harmless in the present case. The alleged error in the present case is not among the limited class of cases to which structural error has been applied. *Robinson v. State*, 2011 OK CR 15, ¶ 4, 255 P.3d 425, 428, *citing Johnson v. United States*, 520 U.S. 461, 468–69, 117 S.Ct. 1544, 1549–50, 137 L.Ed.2d 718 (1997). Therefore, the harmless beyond a reasonable doubt standard applies. *Bartell v. State*, 1994 OK CR 59, ¶¶ 13–14, 881 P.2d 92, 97; *Simpson*, 1994 OK CR 40, ¶ 34, 876 P.2d at 701, *citing Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

Based upon the record in the present case, we find that any error associated with the State's failure to elect which act it relied upon for conviction as to each of the three charged offenses was harmless beyond a reasonable doubt.[3] We note that the testimony at trial concerning the other acts was otherwise admissible. Appellant had notice of the evidence prior to

[3] The jury instruction setting forth the elements of the offense of lewd molestation did not permit the jury to find that Appellant's acts during the first weekend could constitute the charged offense because the instruction solely limited the jury's consideration as to whether Appellant had forced or required T.G. to touch or feel his body or private parts.

trial. The evidence met several different exceptions to the prohibition against other crimes evidence. *Horn v. State*, 2009 OK CR 7, ¶¶ 38-42, 204 P.3d 777, 786-87 (recognizing admissibility of sexual propensity evidence); *Warner v. State*, 2006 OK CR 40, ¶ 68, 144 P.3d 838, 868 (holding evidence central to the chain of events considered part of *res gestae*); *Huddleston*, 1985 OK CR 12, ¶ 17, 695 P.2d at 11 (finding evidence of other acts admissible under common scheme or plan exception).

We further note that the great weight of the evidence supported the jury's verdicts. Appellant's text messages, when coupled with the testimony of T.G. and Ben Sparks, were tantamount to a confession. Ben Sparks' observations of T.G.'s reaction both during her time alone with Appellant and afterwards wholly corroborated T.G.'s account of the events. The jury's recommendations as to sentence were driven by Appellant's former felony convictions for attempting to obtain money by false pretenses, possession of methamphetamine, and two counts of lewd molestation. In light of the evidence at trial, we find that any error in the present case was harmless beyond a reasonable doubt. Proposition One is denied.

In his second proposition of error, Appellant claims that the trial court erred when it failed to grant his request for a mistrial. He argues that the prosecutor's comment upon his failure to testify requires that he be granted a new trial.

We review a trial court's ruling on a motion for mistrial for an abuse of discretion. *Malaske v. State*, 2004 OK CR 18, ¶ 11, 89 P.3d 1116, 1119; *Knighton*

v. State, 1996 OK CR 2, ¶ 64, 912 P.2d 878, 894 ("decision to grant a mistrial at defense counsel is left to the sound discretion of the trial court."). An abuse of discretion has been defined as a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented or, stated otherwise, any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

"A mistrial is an appropriate remedy when an event at trial results in a miscarriage of justice or constitutes an irreparable and substantial violation of an accused's constitutional or statutory right." *Knighton*, 1996 OK CR 2, ¶ 65, 912 P.2d at 894. A trial court has the duty to declare a mistrial when misconduct or other evidentiary errors have compromised the right to a fair trial and doomed a case to reversal. *Randolph v. State*, 2010 OK CR 2, ¶ 15, 231 P.3d 672, 678. However, "[t]he exercise of this power necessarily involves considerable legal judgment, requiring the application of sometimes complex legal rules and a broad array of factors unique to the trial court setting, including the demeanor of witnesses, the reactions of the jury, the perceived efficacy of admonitions, the cumulative impact of prejudicial errors, and other intangibles." *Id.*

Reviewing the record in the present case, we find that the trial court did not abuse its discretion. The record reveals that the prosecutor commented upon Appellant's failure to testify. In the rebuttal portion of his closing statement, the prosecutor countered defense counsel's argument and asserted that T.G. was

credible. However, he stumbled when he proceeded to argue that the account that Appellant gave the officers was not credible. The prosecutor argued:

> Then ask yourself, What reason does the defendant have to lie? I mean, you didn't hear from him and he has the constitutional right not to testify, which you should honor that. If I was charged with a crime, I probably wouldn't testify either because that's my constitutional right. But what you do have, is you've got his written statement . . . His whole premise is that . . . he was never alone with T[.G.] at all . . . Yet he tells Deputy Peyton, Well, I did go behind the parachute with her to look for the leaf blower. It just doesn't make sense . . . .

The prosecutor's comment was improper. *Dawkins v. State*, 2011 OK CR 1, ¶ 18, 252 P.3d 214, 220 (finding inadvertent comment on defendant's failure to testify nonetheless constituted error); *Bland v. State*, 2000 OK CR 11, ¶¶ 109-10, 4 P.3d 702, 730 (holding prosecution may not comment on defendant's exercise of right to silence).

The trial court's determination that the jury instructions coupled with the prosecutor's subsequent statements cured the error was not a clearly erroneous conclusion. An admonishment to the jury may cure a prosecutor's improper comment upon a defendant's failure to testify. *Bland*, 2000 OK CR 11, ¶ 110, 4 P.3d at 730; *White v. State*, 1995 OK CR 15, ¶¶ 20-22, 900 P.2d 982, 992. A prosecutor's subsequent remarks may also diminish the error. *See Bryan v. State*, 1997 OK CR 15, ¶ 36, 935 P.2d 338, 358.

We note that Appellant failed to take the opportunity to permit the trial court to cure the error with an admonishment and did not object to the comment or move for a mistrial until after the jury had retired to deliberate. *See Malaske*, 2004 OK CR 18, ¶ 11, 89 P.3d at 1119. While making the motion, defense

counsel noted that he was sure that the comment was accidental, the prosecutor had tried to cure the error but stated his belief that the mere statement, standing alone, was grounds for a mistrial. The jury instructions explicitly informed the jurors that they were not to permit the fact that Appellant had not testified to weigh against him in the slightest degree. *See* Inst. No. 9-44, OUJI-CR(2d) (Supp.2010). Appellant has neither argued nor shown that the trial court's determination that the prosecutor's subsequent comments cured the error was clearly erroneous. As such, we find that Appellant has not shown that the trial court abused its discretion when it denied his request for a mistrial.

Even if we were inclined to find that the prosecutor did not cure the unfortunate comment, we would find that the comment was harmless beyond a reasonable doubt. This Court has long recognized that a prosecutor's improper comment upon a defendant's failure to testify is subject to harmless error review. *Bland*, 2000 OK CR 11, ¶ 110, 4 P.3d at 730; *Bryan*, 1997 OK CR 15, ¶ 36, 935 P.2d at 358; *White*, 1995 OK CR 15, ¶ 22, 900 P.2d at 992. The great weight of the evidence strongly supported the jury's determination of guilt and its recommendations as to sentence. Appellant's statements to the investigating officers were contradictory and the prosecutor properly commented on this fact. *Williams v. State*, 2008 OK CR 19, ¶ 107, 188 P.3d 208, 228 (holding no error in prosecutor's argument reasonably based on evidence); *McElmurry v. State*, 2002 OK CR 40, ¶ 42, 60 P.3d 4, 19 (finding prosecutor may introduce defendant's contradictory pre-trial statements against him to establish he is untrustworthy in his other statements). Ben Sparks' testimony corroborated

T.G.'s account. Appellant's text messages to T.G. after Sparks came to her aid provided compelling evidence of Appellant's guilt. Accordingly, we find that the trial court did not abuse it discretion when it denied the motion for mistrial. Proposition Two is denied.

In his third proposition of error, Appellant contends that prosecutorial misconduct deprived him of a fair and reliable trial. Appellant failed to raise a timely objection to any of the instances he now challenges as improper. Therefore, we find that he has waived appellate review of the present claim for all but plain error. *Malone v. State*, 2013 OK CR 1, ¶ 40, 293 P.3d 198, 211.

This Court reviews claims of prosecutorial misconduct for plain error under the standard set forth in *Simpson*. *Id.*, 2013 OK CR 1, ¶ 41, 293 P.3d at 211. The first step of plain error review of a claim of prosecutorial misconduct is to determine whether the prosecutor's comments constitute an actual error. *Id.*, 2013 OK CR 1, ¶ 42, 293 P.3d at 212. The second step is to determine whether the error is plain on the record. *Id.* The third step is to determine whether the appellant has shown that the prosecutor's misconduct affected his substantial rights. *Id.*, 2013 OK CR 1, ¶ 43, 293 P.3d at 212.

Appellant sets forth three separate passages in the transcript wherein he asserts that the prosecutor attempted to align himself with the jury and sought sympathy for the victim. Reviewing the record, we find that the prosecutor's comments were not improper. The prosecutor's statements were not the type of comments which this Court has identified as flagrant attempts by the prosecutor to align himself with the jury. *Davis v. State*, 1999 OK CR 16, ¶ 35,

980 P.2d 1111, 1120; *see Scott v. State*, 1982 OK CR 108, ¶¶ 19-20, 649 P.2d 560, 564. The prosecutor did not overtly seek sympathy for the victim but merely discussed the evidence in the case. *Jackson v. State*, 2007 OK CR 24, ¶ 27, 163 P.3d 596, 604; *Warner*, 2006 OK CR 40, ¶ 190, 144 P.3d at 890. As such, we find that Appellant has not shown the existence of an actual error.

Appellant further asserts that the prosecutor's remarks during closing argument attacked him, commented on his failure to testify and expressed contempt for his person. The passage within the transcript to which Appellant directs the Court does not contain anything resembling the prejudicial remarks that this Court has previously disapproved. *See Dunkle v. State*, 2006 OK CR 29, ¶ 39, 139 P.3d 228, 242; *Mitchell v. State*, 2005 OK CR 15, ¶ 81, 120 P.3d 1196, 1216; *Hanson v. State*, 2003 OK CR 12, ¶ 15, 72 P.3d 40, 49–50. Because Appellant's two statements to law enforcement appeared contradictory, the prosecutor's statements concerning Appellant's credibility were fair comments on the evidence. *McElmurry*, 2002 OK CR 40, ¶ 42, 60 P.3d at 19 (holding State may introduce pretrial statement showing that defendant lied about his involvement in the crime); *Fritz v. State*, 1991 OK CR 62, ¶ 21, 811 P.2d 1353, 1359 (finding prosecutor's references to defendant as "liar" were reasonable comments where evidence showed he had lied on job applications); *Crawford v. State*, 1984 OK CR 91, ¶ 17, 688 P.2d 357, 360 (holding prosecutor may comment on weight of evidence in closing argument);.

Nonetheless, we find that Appellant has shown the existence of an actual error that is plain on the record. In Proposition Two, we determined that the

prosecutor improperly commented upon Appellant's failure to testify. Because the prosecutor's unfortunate comment was harmless, we find that Appellant has not shown that prosecutorial misconduct affected his substantial rights.

Reviewing the entire record, we find that prosecutorial misconduct did not render Appellant's trial fundamentally unfair. *Malone*, 2013 OK CR 1, ¶ 43, 293 P.3d at 212. Proposition Three is denied.

In his fourth proposition of error, Appellant contends that he was prejudiced by ineffective assistance of counsel. This Court reviews ineffective assistance of counsel claims under the two-part test mandated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *Mitchell v. State*, 2011 OK CR 26, ¶ 139, 20 P.3d 160, 190. The *Strickland* test requires an appellant to show: (1) that counsel's performance was constitutionally deficient; and (2) that counsel's deficient performance prejudiced the defense. *Bland*, 2000 OK CR 11, ¶ 112-13, 4 P.3d at 730-31 (*citing Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064).

When a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed. *Phillips v. State*, 1999 OK CR 38, ¶ 103, 989 P.2d 1017, 1043 (*citing Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069). To demonstrate prejudice an appellant must show that there is a reasonable probability that the outcome of the trial would have been different but for counsel's unprofessional errors. *Bland*, 2000 OK CR 11, ¶ 112, 4 P.3d at 730-31. "The likelihood of a different result must be

substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112, 131 S.Ct. 770, 792, 178 L.Ed.2d 624 (2011).

Appellant, first, asserts that defense counsel was ineffective for failing to require the State to make the election set forth as error in Proposition One. We determined in Proposition One that Appellant had not shown that plain error occurred. As such, we find that Appellant has not shown a reasonable probability that the outcome of the trial would have been different but for counsel's unprofessional errors. *Andrew v. State*, 2007 OK CR 23, ¶ 99, 164 P.3d 176, 198; *Glossip v. State*, 2007 OK CR 12, ¶¶ 110-12, 157 P.3d 143, 161.

Second, Appellant asserts that defense counsel was ineffective for failing to timely challenge the prosecutor's comment upon his failure to testify. In Proposition Two, we determined that the prosecutor's subsequent comments coupled with the jury instructions cured the error. Therefore, Appellant has not shown a reasonable probability that the outcome of the trial would have been different but for counsel's failure to request the instruction. *Glossip*, 2007 OK CR 12, ¶¶ 110-13, 157 P.3d at 161.

Third, Appellant asserts that defense counsel was ineffective for failing to object to the instances of prosecutorial misconduct he raised in Proposition Three. We determined in Proposition three that prosecutorial misconduct did not render Appellant's trial fundamentally unfair. Thus, we find that Appellant has not shown defense counsel to have been ineffective. *Id.*, 2007 OK CR 12, ¶ 113, 157 P.3d at 161. Proposition Four is denied.

DECISION

The judgment and sentence is **AFFIRMED.** 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 MUSKOGEE COUNTY
THE HONORABLE MICHAEL NORMAN, DISTRICT JUDGE

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

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JOHNSON, JUDGE, CONCURRING IN RESULT:

I concur in the decision to affirm the Judgment and Sentence in this case. I cannot join, however, in the majority's plain error analysis in Proposition 1 and continue to adhere to the plain error analysis explained in *Hogan v. State,* 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923; *see also United States v. Olano,* 507 U.S. 725, 734-35, 113 S.Ct. 1770, 1777-78, 123 L.Ed.2d 508 (1993). For this reason, I concur in result.