IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JONATHAN LENARD FARR,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F-2014-642
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

JOHNSON, JUDGE:

A jury convicted Appellant Jonathan Lenard Farr in the District Court of Oklahoma County, Case No. CF-2013-2293, of First Degree Murder (Count 1), in violation of 21 O.S.Supp.2012, § 701.7, Assault and Battery with a Deadly Weapon (Count 2), in violation of 21 O.S.2011, § 652, and Shooting with Intent to Kill (Count 3), in violation of 21 O.S.2011, § 652. The jury assessed punishment at life imprisonment without the possibility of parole on Count 1, and life imprisonment on each of Counts 2 and 3. The Honorable Timothy R. Henderson, who presided at trial, sentenced Farr in accordance with the jury's verdict and ordered the sentences to be served consecutively.[1] Farr appeals, raising the following issues:

(1) whether the joinder of charges from two, separate shooting incidents in a single trial deprived him of a fundamentally fair trial;

(2) whether he was denied a fair trial from admission of expert testimony from the firearms examiner; and

[1] Under 21 O.S.2011, § 13.1, Farr must serve 85% of the sentences imposed on Counts 2 and 3 before he is eligible for parole.

(3) whether trial counsel's failure to object to the analysis and testimony of the State's expert witness violated his right to effective assistance of counsel.

We find reversal is not required and affirm the Judgment and Sentence of the district court.

Background

On February 20, 2013, an African American man fired gunshots through the kitchen window of Willis Sullivan's Oklahoma City apartment fatally wounding Michael Wilson and injuring Trivoil Morris. Several witnesses testified they had overheard Appellant Farr, who is African American, threaten to kill Wilson in the days before the shooting over a debt dispute. Two of these witnesses, Willis Sullivan and Blake Nichols, had seen Farr with a black .380 handgun equipped with a red laser pointer a week or so before the murder.

Farr discovered sometime after Wilson's murder that his and his sister's duplex had been burglarized. Farr's sister, Jennifer Farr, telephoned Blake Nichols and accused him of stealing her basketball goal.[2] Heather Nichols, Blake's sister, was upset about the accusations leveled against her brother and telephoned Jennifer to complain. During that conversation, Jennifer Farr accused Heather and Blake of knowing who was responsible for the break-in of her home. Angered by the telephone conversation, Heather sought out Jennifer and found her at an apartment complex where Farr's girlfriend lived. The two had a heated exchange in the parking lot. Heather saw Farr drive by as she

[2] Farr lived with his sister Jennifer in a duplex two doors down from the duplex where Blake Nichols lived with his sister Heather.

and Jennifer argued and Farr called her later asking her not to tell anyone where he was staying out of fear of retaliation for Wilson's murder. She assured him that she would not.

Farr's sister called him on February 24, 2013, and told him to leave his girlfriend's apartment because friends of Michael Wilson were looking for him. She said that Heather Nichols had told them where he was staying. Farr and his girlfriend left in separate cars and went to Jennifer Farr's hotel room. Farr arrived at the hotel room within an hour, but well after the arrival of his girlfriend. Around this same time, Blake Nichols was standing outside his duplex when he noticed a red laser beam shining on his "hoodie." He looked up and saw Farr holding the .380 with the red laser pointer. Farr fired multiple shots at him. Later that day, Heather Nichols collected the shell casings from the site of her brother's attack. The State's firearms examiner compared the casings collected by Heather Nichols with those from Wilson's murder and concluded the casings were fired from the same gun.

Farr's former girlfriend, Rita Banks, provided Farr with an alibi, claiming he was with her when both of the shootings occurred.

1. Joinder

Farr claims that the joinder of Counts 1 and 2 with Count 3 in a single trial violated his rights to a fair trial because the offenses failed to meet the criteria for joinder of offenses. The joinder, he contends, prejudiced him because it was the ballistics evidence and Nichols' testimony identifying him as

the shooter in the second shooting incident that linked him to the earlier murder and assault and battery alleged in Counts 1 and 2. Therefore, he argues, his convictions and sentences should be reversed for new, separate trials.

Farr neither objected to the joinder of the offenses nor moved for severance; review is for plain error only. *See Collins v. State,* 2009 OK CR 32, ¶ 12, 223 P.3d 1014, 1017. For relief under the plain error doctrine, Farr must prove the existence of an actual error that was plain or obvious that affected the outcome of the proceeding. *Hogan v. State,* 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. This Court will correct plain error if these elements are met, but only when the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*; 20 O.S.2001, § 3001.1.

Joinder of offenses is permitted under 22 O.S.2011, § 438. This section provides that multiple offenses may be combined for trial "if the offenses ... could have been joined in a single indictment or information." This Court permits joinder of separately punishable offenses allegedly committed by the accused if the separate offenses "rise out of one criminal act or transaction, or are part of a series of criminal acts or transactions." *Mitchell v. State,* 2011 OK CR 26, ¶ 23, 270 P.3d 160, 170 *citing Glass v. State,* 1985 OK CR 65, ¶ 8, 701 P.2d 765, 768. When there is a series of criminal acts or transactions, "joinder of offenses is proper where the counts so joined refer to the same type of

offenses occurring over a relatively short period of time, in approximately the same location, and proof as to each transaction overlaps so as to evidence a common scheme or plan." *Id.*, 270 P.3d at 170-71.

Farr contends that the joinder of offenses was improper in this case because the evidence of the two shootings did not overlap and because the two incidents did not occur in the same place. We disagree.

The three offenses joined for trial were violent offenses each involving the discharge of a .380 handgun toward people with the two shooting incidents being separated by only four days. As for geographic proximity, the offenses were committed at an apartment complex and duplex located "right down the street on the same main street" from each other. We have previously explained that "*Glass* did not establish an arbitrary maximum distance for determining the proximity nexus necessary for joinder. Rather, *Glass* required only that the offenses occur in 'approximately the same location.'" *Smith v. State*, 2007 OK CR 16, ¶ 25, 157 P.3d 1155, 1165 *quoting Glass*, 1985 OK CR 65, ¶ 9, 701 P.2d at 768. The Court in *Glass* held offenses committed several blocks apart met the proximity requirement and were properly joined for trial. *Glass*, 1985 OK CR 65, ¶ 10, 701 P.2d at 768. Since *Glass*, this Court has found offenses occurring within the same county and offenses occurring within five miles of each other were properly joined together. *See Pack v. State*, 1991 OK CR 109, ¶ 8, 819 P.2d 280, 283; *Middaugh v. State*, 1988 OK CR 295, ¶ 10, 767 P.2d 432, 435. These cases control our decision here. We find the offenses against Farr

were sufficiently close in proximity to support a finding that they occurred in approximately the same location. *See Smith*, 2007 OK CR 16, ¶ 25, 157 P.3d at 1165 (finding two murders committed within the city limits of south Oklahoma City in close proximity to satisfy *Glass* requirement).

Nor are we persuaded by Farr's claim that evidence from the separate shooting incidents did not overlap and evince a common scheme or plan. Farr confuses the standard for admitting evidence of other crimes under the common scheme or plan exception in 12 O.S.2011, § 2404(B) with that for joinder of offenses. Evidence of crimes other than those for which the defendant is on trial may be admitted under the common scheme or plan exception in section 2404(B) when there is a "relatedness between the crimes such that the other crime paved the way for the current offense or the second offense is dependent on the first." *Neloms v. State*, 2012 OK CR 7, ¶ 14, 274 P.3d 161, 164. For joinder of offenses, however, the evidence must show that proof as to each crime overlaps so as to evidence a common scheme or plan. "Requiring overlapping proof of a 'common scheme or plan' contemplates that there be a relationship or connection between/among the crimes in question, such that proof of one becomes relevant in proving the other/others." *Collins*, 2009 OK CR 32 at ¶ 19, 223 P.3d at 1018.

The two shooting incidents in this case were factually intertwined and resulted from Farr's desire to seek revenge on those he believed had wronged him; that is, revenge for Wilson's failure to repay a debt and revenge for

Nichols' sister revealing his whereabouts and exposing him to retaliation for Wilson's murder. Several witnesses were key to both cases. For example, Nichols was not only the victim of the second shooting, but also witnessed Farr threaten to kill Wilson the day before the murder and knew Farr had been in possession of a .380 handgun with a red laser pointer. The firearms examiner identified the kind of weapon involved in both shootings as a .380 and opined that the same gun fired the shell casings recovered at both crime scenes.

Furthermore, the interest of judicial economy was well served by joining these offenses together for trial and Farr cannot demonstrate that he was unfairly prejudiced by the joinder. Contrary to his argument, neither Count 1 nor Count 2 needed to be bolstered by evidence of Count 3. The evidence relating to each offense was convincing and more than ample. Further, the jury was properly instructed to give separate consideration to each charge, that each charge was to be decided based on the law and evidence relevant to that charge, that the jury should not let the verdict in one charge affect the verdict on any other charge, and, finally, that the defendant was presumed innocent and the State had the burden of proving each charge beyond a reasonable doubt. Juries are presumed to follow their instructions. *Ryder v. State,* 2004 OK CR 2, ¶ 83, 83 P.3d 856, 875. For these reasons, Farr is not entitled to relief because he has not shown the existence of an actual error as these offenses were properly joined for trial. *See Hogan,* 2006 OK CR 19, ¶ 38, 139

P.3d at 923 ("[t]he first step in plain error analysis is to determine whether error occurred"). This claim is rejected.

2. Expert Testimony

The State called a firearms examiner from the Oklahoma City Police Department to testify about the ballistics evidence from both crime scenes. The examiner concluded that the same .380 fired the three recovered projectiles. He also concluded that the same .380 fired the collected shell casings. He could not say, however, whether the .380 that fired the projectiles was the same .380 that fired the shell casings. On re-direct examination, the examiner testified he had no doubt about his conclusions. Farr claims the firearms examiner's method of analysis "has become unreliable based on modern manufacturing techniques" making his conclusions misleading. Farr also claims the examiner's statement that he had no doubt about his conclusions amounted to an impermissible statement of scientific certainty. Farr failed to object to the firearms examiner's testimony, review is for plain error only. *See Hogan,* 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

In recent years, both federal and state courts have revisited the admission of expert testimony based on toolmark and firearms identification methodology. *See, e.g., People v. Robinson,* 2013 IL App (1st) 102476, ¶¶ 59-91, 2 N.E.3d 383, 395-402, *cert. denied,* ___U.S.___, 135 S.Ct. 177, 190 L.Ed.2d 126 (2014). This testimony has been the subject of lengthy and detailed

hearings, and measured against the standards of both *Frye*[3] and *Daubert.*[4] These courts have considered scholarly criticism of certain methodology employed in the field, and have occasionally placed limitations on the opinions experts may offer based on the particular methodology employed. These judicial decisions, nevertheless, uniformly conclude toolmark and firearms identification is generally accepted and admissible at trial. Like other jurisdictions, ballistics comparison has long been recognized in Oklahoma as a proper subject of expert testimony. *See Miller v. State,* 2013 OK CR 11, ¶¶ 112-113, 313 P.3d 934, 973-974 (no error in admission of comparison evidence between test-fired bullets and casings from those found at murder scene). And we have explained that expert testimony is not rendered unreliable because the science has been the subject of criticism. *Day,* 2013 OK CR 8, ¶ 8, 303 P.3d at 296.

In this case, the firearms examiner testified about his education, qualifications, experience and method of analysis. He explained in detail the process used in comparing the casings and projectiles in this case. Although he

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[3] *Frye v. United States,* 293 F. 1013, 1014 (D.C.Cir.1923)(holding that novel scientific evidence may be admitted through expert testimony only if it has gained general acceptance in the field to which it relates).

[4] *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) held the admissibility of scientific expert testimony requires a determination that the testimony (1) is based on scientific knowledge, and (2) will assist the trier of fact to understand the evidence or to determine a fact in issue. *Daubert* requires trial judges to determine whether the proffered scientific or technical evidence is reliable by considering (1) whether the technique can and has been tested; (2) whether the technique has been subjected to peer review; (3) the known or potential error rate of the technique; (4) the existence and maintenance of standards controlling the technique's operation; and (5) whether the technique has gained general acceptance in the scientific community.

determined that the projectiles were fired from the same unknown .380, he could not identify the brand used in this case because "numerous brands of firearms were possible." Nor could he determine whether the same .380 that fired the projectiles fired the shell casings as well. Defense counsel thoroughly cross-examined the firearms examiner about the similarity of certain caliber handguns, including the .380, 9 millimeter and .357 SIG, in an attempt to raise doubt about whether the casings and projectiles came from the same gun. Defense counsel also questioned the firearms examiner about the existence of studies examining characteristics of guns manufactured by machine to support an inference that such guns possess insufficient individual characteristics for an expert to identify a particular firearm with a particular projectile or casing. Furthermore, the jury was properly instructed on the burden of proof and on the evaluation of expert testimony. Farr falls far short of showing that the firearms examiner's analysis was unreliable in this case or that he was prejudiced by the examiner's confidence in his conclusions. Farr's jury had ample information to evaluate the firearms examiner's credibility and the validity of his work and we find no relief is required.

3. Ineffective Assistance of Counsel

Farr contends he was deprived of his constitutional right to effective assistance of counsel at trial. He argues that defense counsel was ineffective for failing to object to the firearms examiner's unreliable analysis and testimony. This Court reviews an appellant's claim of ineffective assistance of

counsel to determine whether he has shown that counsel's performance was constitutionally deficient and that such deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206, *cert. denied*, ___U.S.___, 134 S.Ct. 172, 187 L.Ed.2d 119 (2013). Under this test, Farr must not only overcome the presumption of competence but show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Head v. State*, 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148. We reject Farr's ineffective assistance of counsel claim because the firearms examiner's testimony was properly admitted. Farr therefore cannot show any prejudice from defense counsel's failure to object to it. *See Malone*, 2013 OK CR 1, ¶ 16, 293 P.3d at 207. This claim is denied.

DECISION

The Judgment and Sentence of the district court is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE TIMOTHY R. HENDERSON, DISTRICT JUDGE

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LUMPKIN, V.P.J.: Concur
LEWIS, J.: Concur
HUDSON, J.: Concur

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