IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KENNETH DANIEL WELCH,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F-2014-1093
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

JOHNSON, JUDGE:

Appellant Kenneth Daniel Welch was tried by jury and convicted of First Degree Robbery, After Former Conviction of Two Felonies, in violation of 21 O.S.2011, § 798, in the District Court of Carter County, Case No. CF-2014-175. The jury assessed punishment at twenty years imprisonment. The Honorable Dennis Morris, District Judge, sentenced accordingly. Welch appeals, raising the following issues:

(1) whether counsel's failure to request that the district judge recuse denied Welch his constitutional rights to a fair trial and the effective assistance of counsel;

(2) whether the trial court erred by denying his motion to suppress;

(3) whether instructional error deprived him of a fair trial; and

(4) whether the trial court erred by refusing to run his sentence concurrently with sentences imposed in McClain County.

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

1.

We reject Welch's claim that he was deprived of a fair trial due to the trial court's bias against defense counsel and that he was deprived of effective assistance of counsel because counsel failed to request that the trial judge recuse. The record does not support a finding that Welch was prejudiced by the alleged bias or by defense counsel's failure to request that the trial judge recuse. Absent a showing of prejudice, a claim of ineffective assistance of counsel must fail. *See 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.

2.

Immediately prior to trial, Welch filed a motion to suppress the statement he made to Officer Eades after he had been apprehended at gunpoint, handcuffed and was being taken to the patrol car. Welch argued that his statement was made in response to a question likely to elicit an incriminating response which was asked while he was in custody and before he was advised of his constitutional rights.[1] This, he claimed, violated the requirements of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) and required that his statement be suppressed. The State responded that although Welch was in custody and not free to go when he was asked the question by

[1] On the way to the patrol car, Office Eades asked Welch why he had the pickup. Welch responded saying, "How do you know I stole it? I might have borrowed it." After Welch made this statement Officer Eades asked no further questions until Welch had been advised of his rights.

Office Eades, the *Miranda* warnings were not required because the question was asked pursuant to an investigative detention rather than a formal arrest. The motion to suppress was overruled. Welch complains on appeal that this ruling was error. This Court reviews a trial court's ruling on a motion to suppress evidence for an abuse of discretion. *Mitchell v. State*, 2011 OK CR 26, ¶ 13, 270 P.3d 160, 169.

Even if Welch was not under formal arrest the circumstances of the investigative detention in this case were equivalent to a formal arrest. *Ross v. State*, 1992 OK CR 18, ¶ 15, 829 P.2d 58, 62-63 (an investigative detention may involve a significant intrusion upon a person's privacy). This created a situation within the parameters of *Miranda*, and police were required to give *Miranda* warnings before asking him a question likely to elicit an incriminating response. *See United States v. Perdue*, 8 F.3d 1455, 1464-65 (10th Cir. 1993). The trial court abused its discretion in overruling the defense's motion to suppress. We find, however, that in light of the evidence properly admitted at trial, this error did not contribute to his conviction and was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710-11 (1967); *Brown v State*, 1998 OK CR 77, ¶¶ 44, 45, 989 P.2d 913, 927. Relief is not required.

3.

Welch alleges several instances of instructional error. Because counsel neither objected to the instructions given nor requested the instructions Welch

now argues were warranted, Welch has waived review for all but plain error. *Day v. State*, 2013 OK CR 8, ¶ 14, 303 P.3d 291, 298.

The evidence presented at trial did not support an instruction on the lesser offense of possession of a stolen vehicle and the trial court cannot be found to have erred in failing to give the jury this instruction *sua sponte*. *See Harris v. State*, 2004 OK CR 1, ¶ 50, 84 P.3d 731, 750. The trial court's failure to instruct the jury on the voluntariness of Welch's statement was not plain error. Finally, no cautionary instruction was necessary and the trial court's failure to give this instruction was not error. *See McDoulett v. State*, 1984 OK CR 81, ¶ 9, 685 P.2d 978, 980; *Robinson v. State*, 1995 OK CR 25, 56, 900 P.2d 389, 404.

4.

Finally, we find that the trial court did not abuse its discretion in declining to order that the sentence imposed in the present case be served concurrently with sentences previously imposed in the McClain County cases. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

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. (2015), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CARTER COUNTY
THE HONORABLE DENNIS MORRIS, DISTRICT JUDGE

APPEARANCES AT TRIAL

MELANIE BLACKBURN
JAMES GILMARTIN
333 W. MAIN STREET, STE. 435
ARDMORE, OK 73401
ATTORNEYS FOR DEFENDANT

HEATHER COOPER
FIRST ASSISTANT DISTRICT ATTORNEY
JACK COPPEDGE
ASSISTANT DISTRICT ATTORNEY
20 B STREET SW, RM. 202
ARDMORE, OK 73401
ATTORNEYS FOR STATE

APPEARANCES ON APPEAL

TERRY J. HULL
P. O. BOX 926
NORMAN, OK 73070
ATTORNEY FOR APPELLANT

E. SCOTT PRUITT
OKLAHOMA ATTORNEY GENERAL
JENNIFER B. WELCH
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR APPELLEE

OPINION BY: JOHNSON, J.
SMITH, P.J.: Concur
LUMPKIN, V.P.J.: Concur in Results
LEWIS, J.: Concur
HUDSON, J.: Concur

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