

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RICHARD WAYNE KELLUM,

Appellant,

V.

STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

No. F-2014-984

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JAN 20 2016

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

HUDSON, JUDGE:

Appellant Richard Wayne Kellum was tried and convicted by a jury in Bryan County District Court, Case No. CF-2014-216, for the crimes of Count 1: Possession of Methamphetamine, After Former Conviction of Four Felonies, in violation of 63 O.S.Supp.2012, § 2-402; Count 2: Possession of a Firearm After Former Felony Conviction, After Former Conviction of Four Other Felonies, in violation of 21 O.S.Supp.2012, § 1283(A); Count 3: Possession of Marijuana, in violation of 63 O.S.Supp.2012, § 2-402; Count 4: Unlawful Possession of Drug Paraphernalia, in violation of 63 O.S.2011, § 2-405; and Count 5: Public Intoxication, in violation of 37 O.S.Supp.2013, § 8. After a trifurcated trial, the jury found Appellant guilty on all five counts and sentenced Kellum to forty (40) years imprisonment on Count 1; ten (10) years imprisonment on Count 2; a \$1,000.00 fine on Count 3; a \$1,000.00 fine on Count 4; and a \$100.00 fine on Count 5. The Honorable Mark R. Campbell, District Judge, sentenced Kellum in accordance with the jury's verdicts, ordered the sentences to run

consecutively and imposed a \$250.00 presentence investigation fee. Kellum now appeals. He raises the following propositions of error on appeal:

- I. THE SENTENCE WAS EXCESSIVE IN THAT PLAIN ERROR THAT WAS UNOBJECTED TO OCCURED AT THE TRIAL CAUSING THE SENTENCE TO BE EXCESSIVE. IN THE ALTERNATIVE THE JURY WAS GIVEN HIGHLY INFLAMMATORY EVIDENCE THAT CAUSED THE SENTENCE TO BE EXCESSIVE. SAID HIGHLY INFLAMMATORY EVIDENCE WAS UNOBJECTED TO AND PRODUCED A VERDICT INFLUENCED BY PASSION AND PREJUDICE. THE INFLAMMATORY UNADMITTED EVIDENCE OF SEX CRIMES DEMANDS THE REVERSAL AND/OR MODIFICATION OF COUNTS 1 AND 2; and
- II. THERE WAS INEFFECTIVE ASSISTANCE OF COUNSEL IN THAT COUNSEL FAILED TO OBJECT WHEN HIGHLY INFLAMMATORY EVIDENCE WAS INTRODUCED BY THE STATE AND ALLOWED EVIDENCE OF FELONIES TO BE SUBMITTED TO THE JURY THAT WERE NOT SUPPORTED BY THE RECORD AND FINALLY ALLOWED EVIDENCE OF FELONIES TO BE GIVEN TO THE JURY THAT INFLAMED THE PASSIONS OF THE JURY, RESULTING IN AN EXCESSIVE VERDICT ON COUNT 1 AND A CONVICTION ON COUNT 2.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits, the parties' briefs and supporting exhibits, we find that no relief is required under the law and evidence and Appellant's judgment and sentence should be **AFFIRMED**.

Our review of Proposition I is foreclosed by the manner in which Appellant has presented it on appeal. The State correctly notes that Appellant asserts in Proposition I three substantive claims, including an excessive sentence claim and two claims of improperly admitted evidence. This is a clear violation of our rules. Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015) ("Each proposition of error shall be set

out separately in the brief. Merely mentioning a possible issue in an argument or citation to authority does not constitute the raising of a proposition of error on appeal. Failure to list an issue pursuant to these requirements constitutes a waiver of alleged error.”); *Collins v. State*, 2009 OK CR 32, ¶ 32, 223 P.3d 1014, 1023 (“Under our recently revised Rule 3.5(A)(5), combining multiple issues in a single proposition is clearly improper and constitutes waiver of the alleged error.”). Applying Rule 3.5(A)(5), relief for Proposition I is denied.

Relief is also unwarranted for Appellant’s ineffective assistance of trial counsel claim set forth in Proposition II. To prevail on an ineffective assistance of counsel claim, the defendant must show both that counsel’s performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). As summarized by the Supreme Court:

To establish deficient performance, a person challenging a conviction must show that “counsel’s representation fell below an objective standard of reasonableness.” 466 U.S. at 688, 104 S. Ct. 2052. A court considering a claim of ineffective assistance must apply a “strong presumption” that counsel’s representation was within the “wide range” of reasonable professional assistance. *Id.*, at 689, 104 S. Ct. 2052. The challenger’s burden is to show “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.*, at 687, 104 S. Ct. 2052.

With respect to prejudice, a challenger must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*, at 694, 104 S. Ct.

2052. It is not enough “to show that the errors had some conceivable effect on the outcome of the proceeding.” *Id.*, at 693, 104 S. Ct. 2052. Counsel's errors must be “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.*, at 687, 104 S. Ct. 2052.

Harrington v. Richter, 562 U.S. 86, 104, 131 S. Ct. 770, 787-88, 178 L. Ed. 2d 624 (2011) (quoting *Strickland*, *supra*).

Appellant fails to show *Strickland* prejudice in Proposition II. Only one aspect of his ineffective assistance of counsel claim need be addressed here, specifically, trial counsel's failure to object to the “Former Conviction Page” attached to three of the judgments and sentences evidencing Appellant's prior felony convictions (State's Exs. 16, 19, 20). The “Former Conviction Page” advised the jury that Appellant was convicted in 1995 of indecent exposure in two separate Oklahoma County cases not alleged on Page Two of the information or in the Count 2 felonious possession of firearm charge. The “Former Conviction Page” has some of the same information as the form prescribed by Rule 13.8(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015) which requires additional findings concerning priors used for enhancement. The Rule 13.8(A) “Additional Findings” form is to be attached to the written judgment and sentence at the time of formal sentencing. Notably, the model form prescribed by Rule 13.8(A) states: “This Exhibit shall not be admitted into evidence in any future prosecutions.”

There is no question that the “Former Conviction Page” attached to State's Exhibits 16, 19 and 20 should not have been submitted to the jury.

Appellant's prior felony convictions for indecent exposure were not relevant to any of the charged offenses or the Page 2 allegations. Trial counsel was clearly deficient for failing to object. The question becomes whether counsel's failure to object amounts to *Strickland* prejudice. Based on the unique facts presented here, Appellant cannot show a reasonable probability of a different outcome at trial relative to his Count 2 felonious possession of firearm conviction or the sentences imposed on Counts 1 and 2.

Appellant stipulated to the admission of State's Exhibit 16 during Stage 2 of trial. State's Exhibit 16 is the judgment and sentence in Bryan County District Court Case No. CF-2000-373 evidencing Appellant's prior felony conviction for Manufacture of Controlled Dangerous Substance. The only issue during Stage 2 was whether Appellant was guilty on Count 2. In light of the stipulation, the evidence overwhelmingly showed that Appellant was a convicted felon in possession of a chamber-loaded, fully operational .380 semiautomatic pistol at the time of his arrest. Under these circumstances, Appellant fails to show a reasonable probability of a different outcome during Stage 2 had trial counsel objected to the "Former Conviction Page" attached to State's Exhibit 16. Appellant fails to show *Strickland* prejudice with this particular claim.

The more difficult question is whether Appellant was prejudiced in the jury's sentencing verdicts by submission to the jury of the "Former Conviction Page." Although a close case, the circumstances presented here compel a

finding of no *Strickland* sentencing prejudice from counsel's failure to object to the "Former Conviction Page."

Defense counsel stipulated that Appellant had four prior felony convictions, not six—a fact referenced in the trial court's written charge (Tr. 307; O.R. 98) ("The Defendant has admitted that he has four previous felony convictions."). The prosecutor made no reference in closing argument or, for that matter, any other part of trial, to Appellant's indecent exposure convictions. Nor was the "Former Conviction Page" read to the jury. Rather, the prosecutor specifically argued that Appellant had four (4) prior felony convictions being considered for sentence enhancement not including the one used to support his Count 2 felonious possession of firearm conviction.

The prosecutor's closing argument during the sentencing phase made a low-key appeal for the jury to impose a sentence of not less than 30 years imprisonment on Count 1, and the maximum of 10 years imprisonment on Count 2, due to the four prior felony convictions alleged—many of which involved narcotics. The prosecutor argued too that Appellant was a danger to society as evidenced by his possession of a chamber-loaded semiautomatic pistol while passed out, and under the influence, in a running pickup parked in the middle of a public road. The prosecutor urged that the jury could even impose a life sentence on Count 1 if it wanted in light of the evidence. Defense counsel's closing sentencing argument urged the jury to impose a lenient sentence because of Appellant's long-term addiction to narcotics. In rebuttal, the prosecutor rejected defense counsel's call for a lenient prison sentence

considering the many chances Appellant had been given in the past to address his personal issues.

The record shows that the entire debate during the sentencing phase was whether Appellant should be given yet another chance with a lenient sentence or whether the facts of his latest offense, combined with the life of crime evidenced by the four prior felony convictions offered for enhancement, warranted a much tougher sentence. In the present case, the jury understandably accepted the prosecutor's argument that a significant sentence was warranted based on the evidence. If the jury was outraged by anything, it was likely Appellant's more recent prior felony convictions for narcotics-related offenses—including the manufacture of controlled dangerous substances—as opposed to relatively stale indecent exposure convictions not mentioned by the parties which the jury could assume in any event were a product of Appellant's addiction to drugs.

On different facts, trial counsel's deficient performance would require relief. In the present case, however, we can confidently say that trial counsel's failure to object to the "Former Conviction Page" does not present a reasonable probability of a different outcome during the sentencing phase of Appellant's trial. The sentences imposed are fully supported, and explained, by the facts of the case and the four prior felony convictions alleged for enhancement. As such, Appellant fails to show *Strickland* prejudice. Relief is therefore denied for Proposition II.

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 BRYAN COUNTY
THE HONORABLE MARK R. CAMPBELL, DISTRICT JUDGE

APPEARANCES AT TRIAL

JEFF CLARK
125 N. THIRD STREET
DURANT, OK 74701
COUNSEL FOR DEFENDANT

TIM R. WEBSTER
FIRST ASSISTANT DISTRICT ATTORNEY
BRYAN COUNTY COURTHOUSE
117 N. THIRD STREET
DURANT, OK 74701
COUNSEL FOR THE STATE

APPEARANCES ON APPEAL

WARREN GOTCHER
GOTCHER, BEAVER & QUINTON
P.O. BOX 160
MC ALESTER, OK 74502
COUNSEL FOR APPELLANT

E. SCOTT PRUITT
OKLAHOMA ATTORNEY GENERAL
MATTHEW L. WARREN
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
COUNSEL FOR APPELLEE

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