

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TYRONE STUART GOKEY

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

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Case No. F-2014-691

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

FEB - 1 2016

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

LEWIS, JUDGE:

Appellant, Tyrone Stuart Gokey, was tried by jury in the District Court of Ottawa County, Case Number CF-2012-421, and found guilty of Count I, sexual battery, in violation of 21 O.S.2011, § 1123(B); Count II, kidnapping, in violation of 21 O.S.2011, § 741(A); and Count III, robbery in the first degree, in violation of 21 O.S.2011, § 798, all counts after former conviction of two or more felonies.¹ Trial was held on June 10, 2014, the Honorable Robert G. Haney, District Judge, presiding. The jury recommended sentences of forty (40) years imprisonment for Count I, thirty (30) years imprisonment for Count II, and twenty (20) years imprisonment for Count III. Judge Haney sentenced Gokey accordingly, with Counts I and II running consecutively, and Count III running concurrently with Count II. Gokey now appeals raising the following propositions of error:

1. Juror misconduct denied Appellant a fair and impartial jury.

¹ Appellant is subject to serving a minimum of 85% of his sentence for Count III under 21 O.S.Supp.2012, § 13.1(9).

2. Jurors were exposed to information about Appellant's prior suspended sentences.
3. The trial court erred by not requiring the State to elect between acts.
4. Ineffective assistance of counsel denied Appellant a fair trial.

After a thorough review of the record before us, we affirm the Judgment and Sentence of the District Court.

In proposition one, Appellant argues that the district court should have granted his motion for a mistrial due to a juror's independent research of Appellant's criminal record on the Oklahoma Department of Corrections website the night before the defense put on its case-in-chief. Appellant argues that due to this research, the juror was unable to be impartial throughout the remainder of the trial.

A court's decision to grant or deny a motion for mistrial on the basis of juror misconduct is reviewed for an abuse of discretion and the decision will not be reversed unless the decision was clearly erroneous. *Jackson v. State*, 2006 OK CR 45, ¶ 11, 146 P.3d 1149, 1156. The trial court's decision to deny Appellant's motion for a mistrial was not clearly erroneous. Whenever juror prejudice prior to submission of the case to the jury is alleged, the defendant must show by clear and convincing evidence that outside information caused prejudice to the defendant. *Matthews v. State*, 2002 OK CR 16, ¶ 7, 45 P.3d 907, 913; *Wacoche v. State*, 1982 OK CR 55, ¶ 14, 644 P.2d 568, 572; *Tomilson v. State*, 1976 OK CR 206, ¶ 29, 554 P.2d 798, 804. Appellant did not make such a showing at trial, nor does he here on appeal.

Appellant asserts that the juror's research "most likely encouraged [the other] jurors to speculate about the issue of parole, probation, and suspended sentences" and caused them to send out a note regarding parole. This is pure speculation, and the record does not support its adoption. The Appellant must show that the juror's online investigation caused actual prejudice and "defense counsel's mere speculation and surmise is insufficient upon which to cause reversal." *Chatham v. State*, 1986 OK CR 2, ¶ 7, 712 P.2d 69, 71. The juror did not learn anything more from his improper action than what was presented to him by Appellant's counsel at trial the next day. Appellant, therefore, cannot show that he suffered prejudice.

Appellant further argues that the trial court abused its discretion when it failed to question the jurors about information imparted to them by the researching juror. This Court does not reverse such decisions by a trial court absent an abuse of discretion. *Jackson v. State*, 2006 OK CR 45, ¶ 11, 146 P.3d 1149, 1156. The trial court's conclusion based on his questioning of the juror was not unreasonable or without consideration of the facts, nor was it clearly erroneous. Proposition one is denied.

In his second proposition, Appellant argues that the trial court erred by allowing the State to introduce the Judgment and Sentence documents of his prior three convictions, which contained information regarding suspended sentences. Because Appellant did not object to the admission of the evidence during trial, the trial court's decision is reviewed for plain error only. *Simpson v. State*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 699; see *Cooper v. State*, 1991 OK

CR 26, ¶ 16, 806 P.2d 1136, 1139. In order to be successful on his claim of plain error, Appellant must prove “1) the existence of an actual error (i.e., deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding.” *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. The trial court’s decision to allow the evidence should not be overturned “unless it is the opinion of the reviewing court that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.” 20 O.S.2011, § 3001.1.

Appellant relies heavily on *Hunter v. State*, 2009 OK CR 17, 208 P.3d 931 to support this proposition. However, *Hunter* is distinguishable from the case before us. In *Hunter*, the prosecution vocally brought to the jury’s attention the fact that the defendant’s prior convictions had been suspended when it read a supplemental second page of a Judgment and Sentence document during trial. *Id.* ¶ 9, at 933. This Court held that doing so was plain error. *Id.* In the present case, the State did not draw the jury’s attention to Appellant’s prior suspended sentences; the State merely made generalized statements during its closing statements about the evidence that was presented regarding the Appellant’s criminal history. There was no actual error.

Appellant has not shown that the unredacted Judgments and Sentences actually affected the outcome of the trial. Appellant again argues that the note sent out regarding parole and probation indicated the jury’s verdict was influenced by Judgment and Sentence language. Again, Appellant provides

only speculation. The jury's sentence was clearly based on the admissible evidence presented at trial. Having shown no error, it matters not whether the error was plain or obvious, or whether the error affected the outcome of the trial. Proposition two is denied.

Appellant argues in his third proposition that the trial court erred in not requiring the State to elect between acts for Counts II (kidnapping) and III (robbery). Because Appellant did not object at trial, this proposition should be reviewed for plain error. *Simpson*, 1994 OK CR 40, ¶ 30, 876 P.2d at 699.

Appellant points to the State's closing commentary about the jury instructions detailing the elements of each crime as proof that it had not elected between acts charged against the Appellant. Appellant argues that by doing so, his constitutional rights to be put on trial for a single offense and to a verdict in which all jurors concur upon that single offense were violated.

Appellant's argument is weak at best. This Court has held that a defendant's rights to a unanimous verdict are not violated when there are various theories given that can lead to a finding of guilt. *See Gilson v. State*, 2000 OK CR 14, ¶ 38, 8 P.3d 883, 903 (stating that with regard to a guilty verdict for a first degree murder charge, whether the crime was committed through the commission of child abuse or through the permitting of child abuse goes to the factual basis of the crime and not the ultimate finding of guilt), *Rounds v. State*, 1984 OK CR 49, ¶ 26, 679 P.2d 283, 287 (stating that "The constitutional requirement of a unanimous jury verdict applies only to the ultimate issue of the appellant's guilt or innocence of the crime charged, not

the alternative means by which the crime was committed.”), *Blackwell v. State*, 1983 OK CR 51, ¶ 13, 663 P.2d 12, 16 (finding that the defendant was afforded his right to a unanimous verdict when the verdict form returned by the jury read that he was guilty of first degree murder and stating that “[t]he unanimity guaranteed by the constitution is required only with respect to the ultimate issue of the appellant's guilt or innocence of the crime charged and not with respect to alternative means by which the crime was committed.”). “[D]ifferent jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.” *Schad v. Arizona*, 501 U.S. 624, 631-32, 111 S.Ct. 2491, 2497, 115 L.Ed.2d 555 (1991), quoting *McKoy v. North Carolina*, 494 U.S. 433, 449, 110 S.Ct. 1227, 1236-1237, 108 L.Ed.2d 369 (1990) (BLACKMUN, J., concurring) (footnotes omitted).

Appellant specifically points to the second element of Count II and the eighth element of Count III, both of which articulate *alternatives* for meeting that particular element, not choices between offenses as the Appellant suggests. The State during its closing arguments simply explained that each alternative word in the element is a different manner by which the jury could decide that a particular element of a crime had been met. The State's purpose is clear. Proposition three is denied.

Appellant argues in his final proposition that because defense counsel did not object to the admission of the unredacted Judgment and Sentence

documents at trial, Appellant was prejudiced and should have his conviction reversed, or at the very least, sentence modified. Claims of ineffective assistance of counsel are reviewed under the test set out by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Appellant must show that counsel was deficient and Appellant was prejudiced by that deficiency. *Id.*

Appellant has not shown that defense counsel's failure to object to the admission of the unredacted Judgment and Sentence documents prejudiced him in any way. As discussed above, the Judgment and Sentence documents did not encourage the jury to improperly speculate on probation and parole policies, resulting in an unfair trial. As a result, Appellant has failed to meet the second prong of the *Strickland* test. Proposition Four is denied.

DECISION

The Judgment and Sentence of the District Court of Ottawa County 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 OTTAWA COUNTY THE HONORABLE ROBERT G. HANEY, DISTRICT JUDGE

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OPINION BY: LEWIS, J.

SMITH, P.J.: Dissents
LUMPKIN, V.P.J.: Concur
JOHNSON, J.: Concur in Results
HUDSON, J.: Concur

SMITH, P.J., DISSENTING:

Based on the errors set forth in Propositions 1 and 2, I would grant Appellant a new trial.