

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JERRELL OTIS THOMAS,)
)
 Appellant,)
 vs.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. F-2015-374

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

FEB - 2 2016

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

SMITH, PRESIDING JUDGE:

Jerrell Otis Thomas was tried by jury and convicted of Count I, Shooting with Intent to Kill in violation of 21 O.S.2011, § 652(A), Count II, Robbery with a Weapon in violation of 21 O.S.2011, § 801, both after former conviction of a felony, and Count III, Possession of a Firearm After Former Conviction of a Felony in violation of 21 O.S.Supp.2012, § 1283(A), in the District Court of Comanche County, Case No. CF-2014-14. In accordance with the jury's recommendation the Honorable Emmit Tayloe sentenced Thomas to thirty-five (35) years imprisonment (Count I); twenty (20) years imprisonment (Count II); and ten (10) years imprisonment (Count III), to run consecutively. Thomas must serve 85% of his sentences on Counts I and II before becoming eligible for parole consideration. Thomas appeals from these convictions and sentences.

Thomas raises six propositions of error in support of his appeal:

- I. Mr. Thomas has suffered double punishment by his convictions and sentences on Count 1 – Shooting with Intent to Kill, and Count II – Robbery with a Weapon in violation of due process under the 14th Amendment to the United States Constitution and art. II, § 7, of the Oklahoma Constitution.

- II. If this Court finds no violation for Section II, there was insufficient evidence to support convicting Mr. Thomas on Count 2 -- robbery with a Weapon in violation of due process under the 14th Amendment to the United States Constitution and art. II, § 7, of the Oklahoma Constitution.
- III. Mr. Thomas' right to a public trial was violated by the complete exclusion of the public from the trial during the testimony of a key state witness, in direct contravention to the Sixth and Fourteenth Amendments to the United States Constitution and art. II, §§ 7 and 20, of the Oklahoma Constitution
- IV. Mr. Thomas was denied his right to the effective assistance of trial counsel, in violation of the 6th and 14th Amendments to the United States Constitution and art. 2, §§ 7, and 20, of the Oklahoma Constitution.
- V. The trial court abused its discretion when it ordered that Mr. Thomas' sentences be served consecutively.
- VI. Cumulative errors deprived Mr. Thomas of a fair proceeding and reliable outcome.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we find that Count II must be reversed with instructions to dismiss.

We find in Proposition I that, under the unusual circumstances of this case, Thomas' convictions in Counts I and II violate the statutory prohibition against multiple punishment. Section 11 of Title 21 prohibits punishing a person twice for a single act. *Barnard v. State*, 2012 OK CR 15, ¶ 27, 290 P.3d 759, 767; 21 O.S.2011, § 11(A). Thomas did not raise this claim below and has waived all but plain error. *Barnard*, 2012 OK CR 15, ¶ 25, 290 P.3d at 767. Plain error is an actual error, that is plain or obvious, and that affects a defendant's substantial rights, affecting the outcome of the trial. *Barnard*, 2012 OK CR 15, ¶ 13, 290 P.3d at 764. Thomas admits that there is no double jeopardy issue, since the elements of the two crimes are different. He argues that the relationship between the criminal acts shows that he committed only a single act, robbery through use of a weapon.

Normally, convictions for shooting with intent to kill and robbery with a weapon will not necessarily violate § 11. However, the charging language in Count II explicitly describes the mechanism of robbery with a weapon as the act – using a pistol to harm Guajardo – which is charged as a separate crime in Count I. The unusually specific language used in Count II punishes him twice for one act or event, the act of using a gun to rob Guajardo. The State relies on cases in which this Court has found no § 11 violation where a person is convicted of malice murder and robbery, reasoning that the intent to kill the victim was separate from, and unnecessary to, the robbery. Given the specific language directly tying the shooting to the elements of robbery, these cases do not apply here. The State argues that Thomas' actual intent in shooting Guajardo was to eliminate her as a witness. The State admits no evidence supports that conclusion, but argues that Thomas' actions in immediately shooting Guajardo could only have been in order to eliminate her as a witness. This disregards Thomas' own confession as well as the charging language of Count II. Given the facts, combined with the extremely specific language in the Information, shooting with intent to kill and robbery were part of the same action. *Bray v. Page*, 1972 OK CR 53, ¶¶ 10-11, 494 P.2d 339, 340. We affirm Thomas' conviction in Count I for shooting with intent to kill, but his conviction in Count II for robbery with a weapon must be reversed with instructions to dismiss.

Given our resolution of Proposition I, Proposition II is moot.

We find in Proposition III that Thomas' right to a public trial was not violated. Before trial, State's witness West had been threatened by Thomas' sister and other

family members. The prosecutor asked that the sister be barred from the courtroom during West's testimony. The trial court cleared the courtroom of spectators (including the sister), leaving a media representative. Defense counsel initially objected. The trial court asked whether defense counsel would agree that the court had the authority to clear the courtroom as long as the defendant was present and could cross-examine witnesses, and counsel agreed. This waived all but plain error. Because the issue involves a basic constitutional right, we apply the United States Supreme Court's harmless error doctrine, asking whether the State has shown beyond a reasonable doubt that the error did not contribute to the verdict. *Barnard*, 2012 OK CR 15, ¶ 14, 290 P.3d at 764; *Neder v. United States*, 527 U.S. 1, 15-16, 119 S.Ct. 1827, 1837, 144 L.Ed.2d 35 (1999); *Chapman v. California*, 386 U.S. 18, 23-24, 87 S.Ct. 824, 827-828, 17 L.Ed.2d 705 (1967). There is a presumption that trials will be open to the public; this right must be balanced with a defendant's right to a fair trial and the State's interest in protecting vulnerable witnesses, and any closure must be narrowly tailored. *Davis v. Reynolds*, 890 F.2d 1105, 1109 (10th Cir. 1989); *Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 2214-15, 81 L.Ed.2d 31 (1984). The trial court has discretion when, and to what extent, to close the courtroom. *Reeves v. State*, 1991 OK CR 101, ¶¶ 13-14, 818 P.2d 495, 498-99. Where there is clear need to protect a witness from harassment, embarrassment, or physical harm, the trial court may effect a limited closure of the courtroom. *Shipman v. State*, 1982 OK CR 3, ¶ 8, 639 P.2d 1248, 1250. Limited closure is justified where testifying witnesses fear reprisals from a defendant's family. *Id.* at ¶ 4, 1250. A judge should limit exclusion of spectators as necessary to resolve the

particular issues of an individual case. *Elrod v. State*, 1974 OK CR 183, ¶ 8, 527 P.2d 208, 210; *Neal v. State*, 86 Okla. Crim. 283, 192 P.2d 294, 296-97 (Okla. Cr. 1948).

The record shows that the trial court could not, with the information it had, tailor the closing more narrowly. The trial court did not clearly state its findings supporting its decision on the record. We strongly encourage trial courts to make a record explaining any decision to close a courtroom, or to limit spectators. However, the context of the argument and decision are sufficient to support the closure here. As we said in *Reeves*, we cannot presume that the trial court did not consider all the available alternatives to closure of the courtroom, particularly given defense counsel's apparent agreement to the trial court's exercise of its authority. *Reeves*, 1991 OK CR 101, ¶ 17, 818 P.2d at 499. The trial court did not err in clearing non-media spectators from the court while West testified. As there is no error, the State has shown, beyond a reasonable doubt, that there was no error which could have contributed to the jury's verdict. This proposition is denied.

We find in Proposition IV that trial counsel was not ineffective. Thomas must show counsel's performance was deficient, and that the deficient performance was prejudicial. *Miller v. State*, 2013 OK CR 11, ¶ 145, 313 P.3d 934, 982; *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Counsel's acts or omissions must have been so serious as to deprive Thomas of a fair trial with reliable results. *Harrington v. Richter*, 562 U.S. 86, 104, 131 S.Ct. 770, 787-88, 178 L.Ed.2d 624 (2011). He must have been prejudiced by

counsel's acts or omissions. *Williams v. Taylor*, 529 U.S. 362, 394, 120 S.Ct. 1495, 1513-14, 146 L.Ed.2d 389 (2000); *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067. Where a defendant fails to show prejudice, we will dispose of a claim of ineffective assistance on that ground. *Marshall v. State*, 2010 OK CR 8, ¶ 61, 232 P.3d 467, 481. Thomas cannot show prejudice from counsel's failure to request a *Jackson-Denno* hearing, or to object to admission of his confession. Nothing in the record suggests Thomas' confession was coerced, or was not knowing and voluntary, and nothing suggests the confession was not otherwise admissible. Thomas asks this Court to speculate that, because there is no record, a hearing might have found some irregularity, and counsel must have been ineffective for failing to discover what that might have been, by requesting a hearing. We decline to so speculate. Thomas can show no prejudice from counsel's omissions, and this proposition is denied.

We find in Proposition V that the trial court did not abuse its discretion in ordering Thomas' sentences to run consecutively. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. We note that, given our resolution of Proposition I, Thomas' twenty-year sentence for robbery will be vacated. This proposition is denied.

We find in Proposition VI that no accumulated error requires relief. We found that error in Proposition I requires the dismissal of Count II, and this resolution renders Proposition II moot. We found no error in Propositions III, IV or V. Where a single error has been addressed, there is no cumulative error. *Bell v. State*, 2007 OK CR 43, ¶ 14, 172 P.3d 622, 627. This proposition is denied.

DECISION

The Judgments and Sentences of the District Court of Comanche County as to Counts I and III are **AFFIRMED**. Count II is **REVERSED** with instructions to **DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY
THE HONORABLE EMMIT TAYLOE, DISTRICT JUDGE

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OPINION BY: SMITH, P.J.

LUMPKIN, V.P.J.: CONCUR IN RESULT
JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR IN RESULT
HUDSON, J.: CONCUR