IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DEHRIAN EUGENE BERRY WILSON,	)	
	)	**NOT FOR PUBLICATION**
Appellant,	)	
	)	**No. F-2015-147**
v.	)	
STATE OF OKLAHOMA,	)	
Appellee.	)	

SUMMARY OPINION

HUDSON, JUDGE:

Appellant Dehrian Eugene Berry Wilson was tried by a jury in Tulsa County District Court, Case No. CF-2013-452, for Count 1: Robbery with a Firearm, in violation of 21 O.S.2011, § 801; and Count 2: Assault While Masked or Disguised, in violation of 21 O.S.2011, § 1303. The Honorable Mark Barcus, District Judge, presided over Appellant's trial at the conclusion of which the jury found Appellant guilty as charged on both counts and recommended a sentence of ten (10) years imprisonment on Count 1 and five (5) years imprisonment on Count 2. The Honorable Caroline Wall, District Judge, conducted formal sentencing during which she sentenced Wilson in accordance with the jury's verdicts and ordered the sentences for both counts to run consecutively. Wilson now appeals.[1]

Appellant alleges ten propositions of error on appeal:

[1]Wilson is required to serve at least 85% of his sentence for Robbery with a Firearm before being eligible for parole. 21 O.S.2011, § 13.1(8).

I. CONVICTIONS FOR BOTH ROBBERY WITH A FIREARM AND ASSAULT WHILE MASKED VIOLATE APPELLANT'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY;

II. THE TRIAL COURT ERRED BY HAVING A SHOCK RESTRAINT PLACED ON APPELLANT;

III. A POLICE OFFICER IMPROPERLY COMMENTED ON APPELLANT'S RIGHT TO REMAIN SILENT, AND SUCH INFORMATION WAS IRRELEVANT TO THE CASE BEFORE THE JURY;

IV. AN EVIDENTIARY HARPOON DEPRIVED APPELLANT OF A FAIR TRIAL;

V. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL;

VI. THE TRIAL JUDGE ERRED BY FAILING TO INITIATE A COMPETENCY PROCEEDING;

VII. PROSECUTORIAL MISCONDUCT VIA THE ELICITATION OF PREJUDICIAL VICTIM IMPACT EVIDENCE REQUIRES A FAVORABLE MODIFICATION OF THE ROBBERY SENTENCES;

VIII. THE PROTECTIVE SWEEP SEARCH WAS UNLAWFUL IN THIS CASE;

IX. APPELLANT WAS DEPRIVED OF HIS RIGHT TO A SPEEDY TRIAL; and

X. CUMULATIVE ERROR DEPRIVED APPELLANT OF A FAIR PROCEEDING.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we find that no relief is required under the law and evidence. Appellant's Judgments and Sentences are therefore **AFFIRMED.**

1.

There is no plain error arising from the alleged double punishment and double jeopardy violations. *Stewart v. State*, 2016 OK CR 9, ¶ 12, __P.3d__; *Logsdon v. State*, 2010 OK CR 7, ¶ 15, 231 P.3d 1156, 1164. The question is whether the crimes at issue truly arise out of one act. *Sanders v. State*, 2015 OK CR 11, ¶ 6, 358 P.3d 280, 283. The robbery with a firearm charged in Count 1 was completed when Appellant appeared at Christine Bliss's teller counter, put the gun in her face, demanded that she move the credit union's money from her teller drawer to the red backpack, obtained the money and then leaped over the counter and ran to the back of the bank. The assault while masked or disguised alleged in Count 2 was based on Appellant's actions in a completely separate area of the bank where he committed assault with a dangerous weapon while masked against Princess Parker-Jones and Cynthia Diaz, the two drive-thru tellers. There is no violation of 21 O.S.2011, § 11 because the offenses at issue are separate and distinct, requiring dissimilar proof. *Id.* Simply, there were a series of crimes against multiple victims. *Burleson v. Saffle*, 2002 OK CR 15, ¶ 5, 46 P.3d 150, 152; *Clay v. State*, 1979 OK CR 26, ¶¶ 6-7, 593 P.2d 509, 510. There is also no double jeopardy violation. *Wimberly v. State*, 1985 OK CR 37, ¶ 10, 698 P.2d 27, 31. "Because there is no error, there is no plain error." *Bosse v. State*, 2015 OK CR 14, ¶ 43, 360 P.3d 1203, 1223. Proposition I is denied.

2.

Title 22, O.S.2011, § 15 imposes a strong presumption against use of restraints and this presumption "can be overcome only by evidence of a defendant's disruptive or aggressive behavior in court, or an expressed or implied intention to engage in such behavior." *Sanchez v. State*, 2009 OK CR 31, ¶ 30, 223 P.3d 980, 993. Arguably, Appellant's disruptive and obstinate behavior in the courtroom before commencement of voir dire showed an intention by Appellant to engage in disruptive and aggressive behavior during the trial which would pose a safety risk to those in the courtroom. Assuming *arguendo* the trial court's order violated Section 15, however, Appellant must also show that the error had a substantial influence on the outcome of the trial. *Id.*, 2009 OK CR 31, ¶¶ 35-36, 223 P.3d at 995. Appellant cannot meet this standard. There is no indication in the record that the jury ever saw the shock device. Nor could any brief glimpse or awareness by the jury of the shock device be more prejudicial than Appellant's disruptive behavior during the trial or his decision to wear jail clothes for trial. The relatively low sentences imposed by the jury for both counts also do not suggest prejudice from use of the shock device. Proposition II is denied.

3.

Nothing in Corporal Stout's testimony implicated Appellant's privilege not to "be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend. 5. *See Jenkins v. Anderson*, 447 U.S. 231, 235, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980). Corporal Stout's challenged testimony did not

directly and unequivocally call attention to Appellant's right to remain silent. Thus, there is no error. *Mahorney v. State*, 1983 OK CR 71, ¶ 12, 664 P.2d 1042, 1046. Because there is no error, there is no plain error. *Bosse*, 2015 OK CR 14, ¶ 43, 360 P.3d at 1223. Proposition III is denied.

4.

One required element of an evidentiary harpoon is that it was prejudicial to the rights of the defendant on trial. *Mathis v. State*, 2012 OK CR 1, ¶ 28, 271 P.3d 67, 77. On cross-examination, Sgt. Taylor testified there was nothing in the radio traffic regarding the credit union robbery or the call to the residence which led him to believe there was any gang-related activity involved. In light of this testimony, and the overwhelming evidence of guilt presented at trial showing Appellant alone committed the credit union robbery, there is no imaginable prejudice arising from the challenged testimony. Because there is no error, there is no plain error. *Bosse*, 2015 OK CR 14, ¶ 43, 360 P.3d at 1223. Proposition IV is denied.

5.

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). *See Harrington v. Richter*, 562 U.S. 86, 104, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (summarizing *Strickland* two-part test).

First, trial counsel was not ineffective for failing to raise the claims we rejected in Propositions I, II, III and IV. *Jackson v. State*, 2016 OK CR 5, ¶ 13, __P.3d__. Second, trial counsel was not barred from pursuing a strategy conceding guilt in the absence of express consent or acquiescence by Appellant so long as counsel's representation did not fall below an objective standard of reasonableness. *Florida v. Nixon*, 543 U.S. 175, 178-79, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004). The record shows trial counsel's approach was not deficient. Appellant admits that defense counsel informed him of the overall defense strategy prior to trial. Moreover, Appellant was represented by experienced defense counsel who employed a wholly reasonable strategy designed to mitigate punishment in the face of overwhelming evidence of guilt. The reasonableness of this strategy under these circumstances has been recognized in capital cases. *Id.*, 543 U.S. at 191-92; *Grissom v. State*, 2011 OK CR 3, ¶ 34, 253 P.3d 969, 981-82. The wisdom of defense counsel's strategy is seen in the relatively low sentences imposed for the charged offenses. Appellant fails to overcome the strong presumption that counsel's representation was within the wide range of reasonable professional assistance based on the trial strategy employed.[2]

Finally, trial counsel was not ineffective for failing to pursue competency proceedings for Appellant. "Under Oklahoma law, a person is competent to stand trial if he has the present ability to understand the nature of the charges and proceedings brought against him and to rationally assist in his own

[2]Appellant's application for evidentiary hearing on this claim is denied. *See* Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016)

defense." *Grant v. State*, 2009 OK CR 11, ¶ 8, 205 P.3d 1, 8 (citing 22 O.S.Supp.2005, § 1175.1(1)). Criminal defendants are presumed competent and shoulder the burden of proving incompetence by a preponderance of the evidence. *Id.* Appellant presents no evidence to this Court suggesting that he suffers any type of mental illness, let alone evidence creating a doubt as to his competency to stand trial warranting a court-ordered evaluation. 22 O.S.2011, § 1175.3. Instead, the record shows Appellant engaged in obstinate behavior at trial designed to frustrate the trial court's conduct of the trial. Trial counsel investigated Appellant's mental health issues by consulting with family members and by actively monitoring Appellant's conduct during the trial. Under the total circumstances, Appellant fails to show that trial counsel was deficient in his representation. Nor does he show a reasonable probability of a different outcome at trial had defense counsel requested a competency exam. Proposition V is denied.

6.

No plain error arises from the trial court's decision not to initiate competency proceedings. *Valdez v. State*, 1995 OK CR 18, ¶ 7, 900 P.2d 363, 369. In assessing whether there is doubt as to a defendant's present competency, the trial court may rely upon lay witnesses as well as the court's own observations of the defendant. *Phillips v. State*, 1999 OK CR 38, ¶ 10, 989 P.2d 1017, 1025. "Typically, the court will rely heavily on the perceptions of defense counsel, whose job it is to consult with his client personally, explain the proceedings to him, and obtain relevant information from him about how to

proceed." *Grant*, 2009 OK CR 11, ¶ 9, 205 P.3d at 8. The trial court did not abuse its discretion in failing to initiate competency proceedings. *Clark v. State*, 1986 OK CR 65, ¶ 11, 718 P.2d 375, 377. Because there is no error, there is no plain error. *Bosse*, 2015 OK CR 14, ¶ 43, 360 P.3d at 1223. Proposition VI is denied.

7.

"We have held that it is improper for the prosecution to ask jurors to have sympathy for victims." *Powell v. State*, 1995 OK CR 37, ¶ 43, 906 P.2d 765, 777. The testimony from Christina Bliss and Cynthia Diaz was not of this ilk but instead was relevant to prove the charged offenses. The probative value of their testimony was also not outweighed by the danger of unfair prejudice. Because there is no error from this testimony, there is no plain error. *Bosse*, 2015 OK CR 14, ¶ 43, 360 P.3d at 1223. Only Princess Parker-Jones's testimony presents error. The trial court sustained defense counsel's objection and admonished the jury to disregard part of Parker-Jones's last statement, thus curing any error as to this portion of the challenged testimony. *Stemple v. State*, 2000 OK CR 4, ¶ 18, 994 P.2d 61, 67. The balance of Parker-Jones's challenged testimony was not relevant to proving the charged offenses. Nonetheless, because of the overwhelming evidence of guilt in this case and the relatively low sentences recommended by the jury for the charged offenses, Appellant was not deprived of a fundamentally fair trial in violation of due process from the challenged comments. *Cf. Coddington v. State*, 2006 OK CR 34, ¶ 58, 142 P.3d 437, 453 (reviewing admission in a capital trial of an in-life

photograph of a homicide victim for whether appellant was deprived of a fair trial or fair sentencing proceeding as a result of its admission). Thus, there is no plain error because this part of Parker-Jones's testimony did not affect Appellant's substantial rights. *Stewart*, 2016 OK CR 9, ¶ 12. Proposition VII is denied.

8.

Appellant shows no plain error based on the protective sweep conducted by officers at the 1652 North Greenwood residence. *Carter v. State*, 2008 OK CR 2, ¶ 8, 177 P.3d 572, 574-75. "A firmly established principle of constitutional law is that warrantless intrusions into the dwelling are *per se* unreasonable. Exigent circumstances must be proven, by the State, to justify warrantless intrusions into the home." *Lambert v. State*, 1987 OK CR 246, ¶ 12, 745 P.2d 1185, 1187-88 (internal citations omitted). The officers' warrantless entry here was plainly reasonable under the circumstances. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006) ("An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed objectively, justify [the] action.'") (quoting *Scott v. United States*, 436 U.S. 128, 138, 98 S. Ct. 1717, 56 L. Ed. 2d 168 (1978)). There is no Fourth Amendment violation from the protective search conducted here. *Mincey v. Arizona*, 437 U.S. 385, 392-93, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). Proposition VIII is denied.

9.

This Court reviews Sixth Amendment speedy trial claims de novo, applying the four balancing factors established in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101 (1972). *See Ellis v. State*, 2003 OK CR 18, ¶¶ 24-64, 76 P.3d 1131, 1135-41 (as corrected Sept. 10 and Oct. 24, 2003); *Bauhaus v. State*, 1975 OK CR 34, ¶¶ 11-27, 532 P.2d 434, 438-42. The four balancing factors to be weighed are: (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his rights, and (4) the prejudice to the defendant. *Barker*, 408 U.S. at 530, 92 S. Ct. at 2192. "These are not absolute factors, but are balanced with other relevant circumstances in making a determination." *Lott v. State*, 2004 OK CR 27, ¶ 7, 98 P.3d 318, 327. Considering all four of these factors in the present case, we find no speedy trial violation under the federal and state constitutions. Further, there is no statutory violation because Appellant was not held in custody based solely on the charged offense. Rather, he was serving a five year sentence on an unrelated case for much of his pre-trial detention in this case. 22 O.S.2011, § 812.1(A) (speedy trial statute applies where "any person charged with a crime and held in jail solely by reason thereof is not brought to trial within one (1) year after arrest . . . ."). Proposition IX is denied.

10.

Because we found only one error based on the many claims Appellant has raised on appeal, there is no error to cumulate. *Bosse*, 2015 OK CR 14, ¶

86, 360 P.3d at 1235. Relief for Appellant's cumulative error claim in Proposition X is denied.

DECISION

The Judgments and Sentences of the district court are **AFFIRMED**. Appellant's application for evidentiary hearing is **DENIED**. 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 delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE MARK BARCUS, DISTRICT JUDGE
THE HONORABLE CAROLINE WALL, DISTRICT JUDGE

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