IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BILLY CLIFFORD BROWN, JR.,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F-2015-855
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

LEWIS, JUDGE:

Appellant, Billy Clifford Brown, Jr., was convicted by jury of first degree malice murder in violation of 21 O.S.Supp.2012, § 701.7(B), after former conviction of two or more felonies, in the District Court of Tulsa County, case number CF-2014-5068, before the Honorable William Musseman, District Judge. The jury set punishment at life without the possibility of parole and a $10,000.00 fine. Judge Musseman sentenced Appellant in accordance with the jury verdict. Appellant has perfected his appeal to this Court.

FACTS

Officers of the Tulsa Police department responded to an apartment in response to a 9-1-1 call of a stabbing. On arrival, they found Appellant and the victim, Sukey Walters in the apartment. Walters was lying just inside the door, blocking the door, and preventing officers from entering the apartment. Officers asked Appellant to move Walters, so they could enter.

Both Appellant and Walters were covered in blood. Appellant was performing chest compressions on Walters. Walters, however, was

nonresponsive and it was determined that she was deceased. Officers noticed several knives lying around the apartment. One was a butter knife with the blade bent at a 90 degree angle at the handle; another was a steak knife which was covered in blood.

During the investigation it was determined that Walters died of a stab wound to the chest which penetrated seven inches into her body. The path of the stab wound collapsed her right lung, penetrated the right interior pericardium, and penetrated the superior vena cava. The stab wound caused her death. In addition to the stab wound, Walters had several bruises, one of which was consistent with the shape of the bent butter knife. Walters also had a blood alcohol level of .40 percent.

The 9-1-1 call from Appellant revealed that he told the operator that Walters came at him with a knife, they fell, and he pulled the knife out of her. The medical examiner testified that the stab wound was too deep to have been caused by a fall.

A friend of the couple, Erena Moynihan, testified that both Walters and Appellant were alcoholics. Once, when the couple was drinking, she heard Appellant threaten to stab Walters in the heart.

Appellant's expert psychologist testified that Appellant was intoxicated at the time of the incident, and Appellant's judgment and decision making abilities would have been impaired. He also testified that Appellant suffered from mild intellectual disability and mild mental retardation. The expert had no opinion on whether Appellant could form the intent to kill.

PROPOSITIONS

In the first proposition, Appellant argues that the trial court improperly allowed evidence of other crimes. Appellant complains about Moynihan's testimony that she previously heard Appellant threaten to stab Walters in the heart. Testimony indicated that this threat was made within one year of this incident.

Appellant objected prior to trial, but failed to make a contemporaneous objection during trial, thus this Court is limited to review for plain error only. *Hancock v. State*, 2007 OK CR 9, ¶ 72, 155 P.3d 796, 813.; 12 O.S.2011, § 2104(D). To be entitled to relief under the plain error doctrine, an appellant must prove, first, that actual error occurred, second, which is obvious in the record, and, third, the error affected his substantial rights, meaning the error affected the outcome of the proceeding; moreover, this Court will not grant relief unless the error seriously affected the fairness, integrity or public reputation of the judicial proceeding or otherwise represents a "miscarriage of justice." *See Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d. 907, 923.

The State offered this testimony pursuant to 12 O.S.2011, 2404(B), to show absence of mistake or intent. The State completely complied with the notice requirements of *Burks v. State*, 1979 OK CR 10, 594 594 P.2d 771.

Appellant's 9-1-1 recording, indicated that he described the stabbing as an accident. At trial, Appellant surmised that he was too intoxicated to form the requisite intent to kill for a conviction for first degree malice murder. Moynihan's testimony, therefore, was relevant to show intent, and absence of mistake or

accident; both proper under section 2404(B). This evidence was highly relevant to show that he carried out his earlier threats. The trial court also gave the limiting instruction, OUJI-CR 2d 9-9 (2000 Supp.), both contemporaneously with the testimony and with the remaining jury instructions at the conclusion of the trial.

In examining this issue, we find no error in the introduction of this evidence. The probative value of the evidence was in no way "substantially outweighed by the danger of unfair prejudice." *See* 12 O.S.2011, § 2103. Because there is no error in the introduction of this evidence, Appellant cannot overcome his plain error hurdle of showing that actual error occurred which is clear in the record. This proposition, therefore, is denied.

In proposition two, Appellant claims that the prosecutor committed prosecutorial misconduct by attempting to define reasonable doubt during voir dire and by denigrating Appellant's defense of voluntary intoxication. There were no objections to the alleged misconduct, thus we review for plain error. *Grissom v. State*, 2011 OK CR 3, ¶ 68, 253 P.3d 969, 992. Again, in order to show plain error an appellant must prove actual error, which is plain or obvious, and he must show that the error affected substantial rights affecting the outcome of the proceeding. *Martinez v. State*, 2016 OK CR 3, ¶ 14, ___ P.3d ___; *citing Murphy v. State*, 2012 OK CR 8, ¶ 18, 281 P.3d 1283, 1290. Moreover, even where plain error is shown, this Court will remedy the error only if it seriously affects the fairness, integrity, or public reputation of the proceedings or represents a miscarriage of justice. *Id.*

Our review centers on whether "the prosecutor's misconduct is so flagrant and so infected the defendant's trial that it was rendered fundamentally unfair." *Jones v. State*, 2011 OK CR 13, ¶ 3, 253 P.3d 997, 998; *see Warner v. State*, 2006 OK CR 40, ¶ 197, 144 P.3d 838, 891 ("Allegations of prosecutorial misconduct do not warrant reversal of a conviction unless the cumulative effect was such [as] to deprive the defendant of a fair trial.") Here, the comments of the prosecutor did not deprive Appellant of a fair trial.

Appellant's claim that the prosecutor attempted to define reasonable doubt centers around the prosecutor's attempts to distinguish "beyond a reasonable doubt" from "beyond all doubt, any doubt and a shadow of a doubt." The prosecutor asked the jury to "determine whether or not any of their doubts were reasonable." At the conclusion of trial, during closing, the prosecutor again asked the jury to listen to the defendant's argument and determine if the doubts they raise, or doubts the jurors may have, are reasonable.

This type of argument has been approved as a tactic "to dispel commonly held attitudes concerning the definition of reasonable doubt." *Taylor v. State*, 2011 OK CR 8, ¶ 47, 248 P.3d 362, 377.[1] Our examination of the record in this case reveals that the prosecutor's *voir dire* and argument did not deprive Appellant of a fair trial. Thus, there is no plain error here.

[1] While this type of clarifying argument has been approved, this Court has consistently held that the State shall not attempt to define reasonable doubt. *Martinez v. State*, 2016 OK CR 3, ¶ 74, 371 P.3d 1100, ___. The argument in this case, especially with the hypothetical scenarios illustrated in the State's argument, comes precariously close to planting a definition of reasonable doubt in the minds of the jurors, which could constitute prejudicial error.

Appellant next complains that the prosecutor maligned his voluntary intoxication defense by attempting to define the defense. The jest of the prosecutor's argument on this topic was that Appellant had to show that he was too drunk to develop the intent to kill, but not so drunk that he could not physically commit the act of stabbing someone to death. The prosecutor referred to this defense as "Goldilocks drunk."

We find that the trial court gave the proper instructions on Appellant's voluntary intoxication defense which told the jury that the evidence must show that he was too intoxicated to form the intent to kill. The prosecutor did not tell the jury that Appellant had to be so drunk that he passed out to be availed of this defense. When read in the context of the entire argument, we find that this closing argument did not deprive Appellant of a fair trial. The argument was within the wide latitude that parties have to discuss the evidence and reasonable inferences from the evidence. *See Hogan*, 2006 OK CR 19, ¶ 91, 139 P.3d at 936. Thus there was no plain error in this argument.

We find, therefore, that proposition two must be denied.

In proposition three Appellant claims that he was deprived of effective assistance of counsel as guaranteed by the United States and Oklahoma Constitutions. In Oklahoma, ineffective claims are judged by the two prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Goode v. State*, 2010 OK CR 10, ¶ 81, 236 P.3d 671, 686. An appellant must show both deficient performance and prejudice. *Id., citing Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. An appellant must overcome

the strong presumption that, under the circumstances, counsel's conduct fell within the wide range of reasonable professional conduct and constituted sound trial strategy. *Id., citing Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065.

> To establish prejudice, Appellant must show that there is 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 the confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068.

Goode, 2010 OK CR 10, ¶ 82, 236 P.3d at 686.

Appellant's claim is based on counsel's failure to object to the alleged errors outlined in the previous propositions. In our discussion of proposition one, we found that no error occurred. We cannot find that counsel's failure to make a contemporaneous objection to the alleged erroneous introduction of other crimes evidence fell outside the wide range of reasonable professional conduct. Counsel had already made pre-trial objections to the State's notice of their intent to introduce other crimes evidence. The trial court correctly ruled that the evidence was admissible. Counsel's conduct was not ineffective in this respect.

With regard to counsel's failure to object to the prosecutor's voir dire and argument, which he now couches as an attempt to define reasonable doubt, we found that the argument was proper under the law. A failure to object to proper argument cannot fall outside the wide range of reasonable professional conduct. Counsel's conduct was not, therefore, unreasonable.

With regard to the prosecutor's argument against Appellant's voluntary intoxication defense, we found that the argument did not exceed the wide

latitude parties have to discuss the evidence and reasonable inferences therefrom. Thus, counsel's failure to object cannot, again, be called unreasonable.

We find, therefore, that Appellant's claim of ineffective assistance of counsel must be denied.

DECISION

The Judgment and Sentence of the district court shall be **AFFIRMED**. 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 TULSA COUNTY
THE HONORABLE WILLIAM MUSSEMAN, DISTRICT JUDGE

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SMITH, P.J.: Concurs
LUMPKIN, V.P.J: Concurs
JOHNSON, J.: Concurs
HUDSON, J.: Concurs