

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BRIAN EDWARD XAVIER KORONA,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

Case No. F-2015-938

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

NOV 28 2016

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

LEWIS, JUDGE:

Brian Edward Xavier Korona, Appellant, was tried by jury and found guilty of Counts 1 and 2, kidnapping, in violation of 21 O.S.2011, § 741; Count 3, first degree rape, in violation of 21 O.S.2011, § 1115; Count 4, domestic assault and battery by strangulation, in violation of 21 O.S.2011, § 644(J); Counts 6 and 7, violation of protective order, subsequent offense, in violation of 22 O.S.2011, § 60.6; Count 8, larceny of a motor vehicle, in violation of 21 O.S.2011, § 1720; and Count 9, second degree burglary, in violation of 21 O.S.2011, § 1435;¹ in the District Court of Tulsa County, Case No. CF-2014-631. The jury sentenced Appellant to thirty (30) years imprisonment in Counts 1 and 2, thirty-five (35) years imprisonment in Count 3, twenty (20) years imprisonment in Count 4, seven (7) years imprisonment in Count 6, twelve (12) years imprisonment in

¹ The jury acquitted Appellant of Count 5, alleging domestic assault and battery by strangulation. Counts 10, 11, and 12 were dismissed before trial.

Count 7, nine (9) years imprisonment in Count 8, and twelve (12) years imprisonment in Count 9.² The Honorable Patrick Pickerill, Associate District Judge, pronounced judgment and ordered Counts 1, 2, 4, 6, 7, 8, and 9, to be served concurrently with each other, and consecutively to the sentence in Count

3. Mr. Korona appeals in the following propositions of error:

1. The trial court committed reversible error when it read to the jury the portion of the information that charged Appellant with a prior conviction;
2. Appellant's convictions for violation of the protective order and Burglary II violate the United States Constitution and double punishment provisions of Oklahoma Constitution;
3. The prosecutor's comments during closing argument during which she attempted to shift the burden of proof to the defense and evoked societal alarm deprived Appellant of a fair trial in violation of the Fourteenth Amendment of the United States Constitution;
4. It was plain error for the trial court to fail to instruct the jury regarding the limited use of other crimes evidence when it was received and plain error for the trial court to instruct the jury that it could be used for an improper purpose when delivering jury instructions;
5. The trial court committed plain error in admitting the portion of the protective order which referenced Appellant spending time in prison, drug use, and gang ties;
6. The trial court committed plain error when the jury was incorrectly instructed as to the applicable range of punishment for Count 4, domestic abuse by strangulation;
7. Appellant was deprived of the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

² Appellant must serve 85% of his sentence in Count 3 before being eligible for consideration for parole. 21 O.S.2011, § 13.1(10).

Appellant's Proposition One argues that the trial court's mention of the "subsequent offense" allegation in Count 4 during opening instructions to the jury was reversible error. Counsel objected to this reference and moved for a mistrial, preserving the alleged error for review. The prior offense mentioned by the Court in connection with its instruction on the charge Court 4 was clearly an error. 22 O.S.2011, § 860.1 (prohibiting mention of non-element prior offenses in first stage of trial). Violation of a protective order does not include a prior offense as an element; a prior violation is relevant to whether the crime is punishable as a misdemeanor or a felony. *Gamble v. State*, 1988 OK CR 41, 751 P.2d 751. Nevertheless, we find the error was harmless. The mention of the "subsequent offense" allegation was fleeting, and the evidence of Appellant's commission of this offense was overwhelming. No prejudicial error occurred. Proposition One is denied.

In Proposition Two, Appellant argues that his convictions for second degree burglary and two felony violations of a protective order, subsequent offense, violate the prohibition against multiple punishments for a single criminal act under 21 O.S.2011, § 11, and the Double Jeopardy prohibitions of the state and federal constitutions. Counsel failed to object on these grounds in the trial court, waiving all but plain error. *Head v. State*, 2006 OK CR 44, ¶ 9, 146 P. 3d 1141, 1144 (section 11 and double jeopardy claims were waived by failure to object). To obtain relief, Appellant must prove a plain or obvious error affected the

outcome of the proceeding. *Simpson v. State*, 1994 OK CR 40, ¶¶ 2, 11, 876 P.2d 690, 693, 695.

The Court will correct such a plain error only if it “seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings.” *Id.*, 1994 OK CR 40, ¶ 30, 876 P.2d at 700-701. We find no plain or obvious error under section 11, as Appellant’s convictions arise from separate and distinct acts during a continuing course of conduct. *Davis v. State*, 1999 OK CR 48, ¶¶ 12-13, 993 P. 2d 124, 126-27. Nor do these convictions punish the same offense twice in violation of double jeopardy, as each of these crimes contains one or more factual elements that the others do not. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Proposition Two is denied.

In Proposition Three, Appellant claims that certain prosecutorial comments in closing argument denied him a fair trial. We evaluate such claims within the context of the entire trial, considering the prosecutor’s actions, the strength of the evidence, and corresponding defense arguments. We remedy such misconduct only where grossly improper argument renders the trial fundamentally unfair. *Sanders v. State*, 2015 OK CR 11, ¶ 21, 358 P.3d 280, 286. Defense objections to the comments challenged here were sustained, curing any error. *Shelton v. State*, 793 P.2d 866, 871 (Okl.Cr. 1990). The comments did not deny a fair and impartial trial. Proposition Three requires no relief.

Appellant claims in Proposition Four that the trial court's failure to give proper contemporaneous and final limiting instructions on other crimes evidence was plain error, as defined above. There is no plain or obvious error here. Such limiting instructions are generally not required without a timely request from counsel. *Jones v. State*, 1989 OK CR 7, ¶ 8, 772 P. 2d 922, 925. The other crimes evidence here was admitted for proper purposes, and the trial court's final instructions were sufficient to prevent the jury's misuse of this evidence in arriving at its verdicts. Proposition Four is denied.

Proposition Five complains that plain error occurred when the trial court admitted statements contained in a petition for protective order about Appellant's prison record, drug use, and alleged gang membership. We review only for plain error, as defined above. We find that the victim's petition for protective order and the order itself were relevant to show Appellant's motive and intent, as well as the general sequence of events. The victim's extrajudicial statements about Appellant's past acts were not admitted to prove the truth of the matters asserted, and were not as prejudicial to Appellant as the direct evidence against him in the current case. Because any error had no effect on the outcome of the trial, no relief is warranted. *Hooker v. State*, 1994 OK CR 75, 887 P.2d 1351. Proposition Five is denied.

In Proposition Six, Appellant argues the trial court committed plain error in its instruction on the range of punishment for the conviction Count 4,

domestic assault and battery after two (2) or more prior felony convictions. Appellant did not object, and we review for plain error, as defined above.

An incorrect instruction on the range of punishment constitutes plain error. *Scott v. State*, 1991 OK CR 31, ¶ 12, 808 P.2d 73, 77. The State concedes that error occurred here. The unenhanced range of punishment for Count 4 is one (1) to three (3) years imprisonment, and the range after two (2) or more prior convictions (as found by the jury) is three (3) years to life imprisonment. 21 O.S.2011, § 644(J); § 51.1 (C). The trial court instructed the jury that the minimum sentence after two (2) or more prior convictions was nine (9) years imprisonment. The real question is whether this plain error seriously affected the fairness, integrity, or public reputation of the proceedings. We are firmly convinced, from the aggravated facts of this case, that the jury's sentence of twenty (20) years imprisonment on Count 4 was not seriously affected by the incorrect minimum sentence given in the instruction. No relief is warranted. Proposition Six is denied.

Appellant argues in Proposition Seven that trial counsel rendered ineffective assistance by failing to object to the inadmissible statements in the victim's petition for protective order, the improper instruction on other crimes evidence, and the incorrect sentencing stage instructions. Reviewing this claim according to the deficient performance and prejudice analysis of *Strickland v. Washington*, 466 U.S. 668, 690, 694, 104 S.Ct. 2052, 2065, 2068, 80 L.Ed.2d

674 (1984), Appellant has not shown a constitutional violation of the right to counsel. This proposition is denied.

DECISION

The Judgment and Sentence of the District Court of Tulsa County is **AFFIRMED**. Pursuant to Rule 3.15, Rules of the 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 PATRICK PICKERILL, ASSOCIATE DISTRICT JUDGE**

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OPINION BY LEWIS, J.
SMITH, P.J.: Concurs in Results
LUMPKIN, V.P.J.: Concurs
JOHNSON, J.: Concurs
HUDSON, J.: Concurs

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