

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TONY ARTHUR ROBINETTE.

Appellant,

Y.

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

Case No. F-2015-728

28
FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

DEC 9 2016

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

JOHNSON, JUDGE:

Appellant Tony Arthur Robinette was tried by jury in the District Court of Osage County, Case No. CF-2013-311, and convicted of two counts of Child Sexual Abuse (Counts 1 and 2), in violation of 21 O.S.2011, § 843.5. The jury assessed punishment at life imprisonment on each count. The Honorable B. David Gambill, Associate District Judge, who presided at trial, sentenced Robinette accordingly and ordered the sentences to be served consecutively.¹ Robinette appeals, raising the following issues:

- (1) whether hearsay was improperly admitted under § 2803.1;
- (2) whether irrelevant and unfairly prejudicial testimony denied him a fundamentally fair trial;
- (3) whether the trial court failed to properly instruct the jury on jailhouse informant testimony;
- (4) whether prosecutorial misconduct denied him a fair trial;
- (5) whether the evidence was sufficient to prove guilt;

¹ Under 21 O.S.Supp.2011, § 13.1, Robinette must serve 85% of the sentence imposed before he is eligible for parole.

- (6) whether he was prejudiced by ineffective assistance of counsel; and
- (7) whether his sentence is excessive.

Robinette also tendered for filing a request to supplement the record with an evidentiary hearing on his Sixth Amendment claim of ineffective assistance of counsel.

We find reversal is not required and affirm the Judgment and Sentence of the district court.

1.

Robinette argues the introduction of A.M.'s out-of-court statements to her grandmother and the forensic interviewer without first conducting the mandated hearing under 12 O.S.Supp.2013, § 2803.1 requires relief. Review is for plain error because Robinette did not object to the absence of the hearing or to the admission of the testimony below. *See Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. To obtain relief, Robinette must prove that a plain and obvious error affected the outcome of his proceeding. *Id.*

We agree with Robinette that it was error to admit A.M.'s hearsay statements to her grandmother and the forensic interviewer without first conducting the reliability hearing prescribed in 12 O.S.Supp.2013, § 2803.1. We disagree, however, that relief is required. The record in this case is sufficient for us to conduct a meaningful review of the reliability of A.M.'s out-of-court statements. We find that the totality of the circumstances surrounding the statements provides sufficient indicia of reliability to find them

inherently trustworthy and admissible. Thus, we hold that any error in the failure to conduct the mandated hearing under section 2803.1 was harmless. See *Simpson v. State*, 1994 OK CR 40, ¶ 37, 876 P.2d 690, 702.

2.

We review Robinette's claim that he was denied a fair trial by the admission of improper other crimes evidence and evidence that was irrelevant and unfairly prejudicial for plain error only because Robinette did not object to the challenged evidence at trial. See *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

With the exception of two instances, we find the challenged evidence was properly admitted. The record shows that a considerable portion of the challenged evidence was inextricably intertwined with the charged offenses and was properly admitted.² See *United States v. Irving*, 665 F.3d 1184, 1212 (10th Cir.2011); *Eizember v. State*, 2007 OK CR 29, ¶ 77, 164 P.3d 208, 230. The record further shows that admission of A.M.'s hearsay statements to her grandmother and the forensic interviewer was not unduly cumulative. 12 O.S.2011, § 2403. Evidence of Robinette's prior child sexual abuse of his step-daughter was properly admitted under 12 O.S.2011, § 2414 and its probative value was not outweighed by the danger of unfair prejudice. See *Horn v. State*, 2009 OK CR 7, ¶ 27, 204 P.3d 777, 784. Moreover, the record shows Robinette

² This includes A.M.'s testimony concerning an act of abuse Robinette perpetrated against her while committing the acts that were alleged, the observations of Tammie Robinette that raised her suspicions of abuse in the weeks preceding A.M.'s disclosure, and A.M.'s statements to her grandmother and the forensic interviewer about the abuse.

received proper notice of his step-daughter's proposed testimony. Evidence about Robinette's relationship with his wife, Tammie Robinette, was relevant to evaluate her credibility and was not unduly prejudicial. Evidence concerning Robinette's overheard prayers for A.M. to keep her mouth shut was properly admitted as consciousness of guilt evidence and the evidence was highly relevant.

Robinette is correct that it was error to admit evidence concerning his possession of pornography and his crude statement about wanting to have sex with his daughter's aunt. The record does not support a finding, however, that Robinette was unfairly surprised by the evidence or that the evidence affected the outcome of the trial in light of the properly admitted evidence and properly instructed jury. We find that Robinette has failed to establish plain error requiring relief. This claim is denied.

3.

We reject Robinette's claim that the district court erred by failing to give the cautionary jury instruction on jailhouse informants (OUJI-CR2d No. 9-43A) with regard to Bacil Smith, Jr.³ Robinette neither requested the instruction

³ OUJI-CR2d 9-43A provides:

The testimony of an informant who provides evidence against a defendant must be examined and weighed by you with greater care than the testimony of an ordinary witness. Whether the informant's testimony has been affected by interest or prejudice against the defendant is for you to determine. In making that determination, you should consider:

(1) whether the informant has received, been offered, or reasonably expects anything (including pay, immunity from prosecution, leniency in prosecution, personal advantage, or vindication) in exchange for testimony;

nor objected to its omission. See *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

The cautionary instruction on jailhouse informant testimony is necessary when a witness is a “professional jailhouse informant.” *Andrew v. State*, 2007 OK CR 23, ¶ 114, 164 P.3d 176, 200 citing *Wright v. State*, 2001 OK CR 19, ¶ 21, 30 P.3d 1148, 1152. The instruction is directed at “an informant who repeatedly testified on behalf of the State against fellow inmates in order to obtain leniency.” *Wright*, 2001 OK CR 19, ¶ 21, 30 P.3d at 1152. Although Smith and Robinette were housed together in the Osage County Jail, the record does not show that Smith preyed upon Robinette to benefit himself. There is no evidence Smith had acted as an informer in the past and received leniency.⁴ For these reasons, we find the absence of the instruction was not error.

Even if we found Smith’s testimony was the type of jailhouse informant testimony that warranted the uniform instruction, the absence of the instruction in this case does not require relief. The jury heard the circumstances surrounding Smith’s testimony. The jury was also instructed on its responsibility of weighing the credibility of witnesses. The jury had

(2) any other case in which the informant testified or offered statements against an individual but was not called, and whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for that testimony or statement;

(3) whether the informant has ever changed **his/her** testimony/statement;

(4) the criminal history of the informant; and

(5) any other evidence relevant to the informant’s credibility.

⁴ Generally, the prosecution secures the testimony of the informer before moving to dismiss charges or releasing him from jail.

ample information and guidance to make an informed decision about any motivation or prejudice Smith might have had to testify against Robinette. Moreover, Robinette's confession to Smith was not the sole evidence against him and parts of Smith's testimony were corroborated. Any error from the absence of the cautionary instruction was harmless in this case. See *Blunt v. State*, 1987 OK CR 201, ¶ 10, 743 P.2d 145, 148. This claim is denied.

4.

Robinette complains that prosecutorial misconduct deprived him of a fair trial. He contends the prosecutor committed misconduct by failing to provide the required discovery about informant Bacil Smith, Jr., improperly sought sympathy for the victim, invaded the province of the jury, offered a personal opinion of guilt, inflamed the passions and prejudices of the jury, and improperly argued that Robinette would commit future crimes. Review is for plain error only because Robinette did not object at trial to the lack of discovery or to any of the challenged argument. See *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

As discussed in Proposition 3, *supra*, Bacil Smith, Jr. was not a professional jailhouse informant as described in *Andrew*, 2007 OK CR 23, ¶ 114, 164 P.3d at 200 and *Wright*, 2001 OK CR 19, ¶ 21, 30 P.3d at 1152. As such, the prosecution was not required to follow the disclosure requirements for jailhouse informants outlined in *Dodd v. State*, 2000 OK CR 2, 993 P.2d

778.⁵ Even if we found that Smith was a professional informant and that the State should have provided discovery pursuant to *Dodd*, relief would not be required in this case. Robinette admits the prosecution included Smith on its witness list and disclosed he would testify that Robinette admitted abusing the victim while the two were housed together in the county jail. Robinette was allowed to fully cross-examine Smith and he has not shown on appeal that Smith was untruthful about his criminal record. We cannot find on this record that Robinette has shown plain error occurred based on the alleged discovery violation, *i.e.*, that an actual error affected his substantial rights.

Robinette's claim that the prosecutor committed misconduct during closing argument is without merit. "This Court will not grant relief based on prosecutorial misconduct unless the State's argument is so flagrant and that it so infected the defendant's trial that it was rendered fundamentally unfair." *Williams v. State*, 2008 OK CR 19, ¶ 124, 188 P.3d 208, 230. Moreover, "[b]oth parties have wide latitude to argue the evidence and inferences from it, and this Court will only find error where a grossly unwarranted argument affects a defendant's rights." *Coddington v. State*, 2011 OK CR 17, ¶ 72, 254 P.3d 684, 712. Contrary to his claim, the challenged arguments in the cited passages show that the prosecutor engaged in proper argument about the evidence and

⁵ Under *Dodd*, the prosecution is required to disclose the informant's criminal history, any deals present or future the informant has with the State, the specifics of any statement made by the defendant to the informant, the other cases in which the informant testified or offered statements even though not called, whether the informant had ever recanted testimony and any other information relevant to credibility. *Dodd*, 2000 OK CR 2, ¶ 25, 993 P.2d at 784.

inferences therefrom, the credibility of the witnesses, and the appropriate punishment. Robinette has not shown the challenged remarks were grossly unwarranted and amount to plain error. This claim is denied.

5.

Evidence is sufficient to support a conviction if, viewing the evidence and all reasonable inferences from it in the light most favorable to the State, any rational trier of fact could find the defendant guilty beyond a reasonable doubt. *Coddington v. State*, 2006 OK CR 34, ¶ 70, 142 P.3d 437, 456; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04. This Court will not weigh conflicting evidence or second-guess the fact-finding decisions of the jury. See *Day v. State*, 2013 OK CR 8, ¶ 12, 303 P.3d 291, 298. Applying this standard in the instant case, we find that any rational trier of fact could find beyond a reasonable doubt that Robinette was a person responsible for the health, safety or welfare of A.M. and was guilty of Child Sexual Abuse based on the evidence presented at trial. Robinette's convictions may stand.

6.

Robinette's ineffective assistance of counsel claim may be disposed of based on lack of prejudice.⁶ See *Strickland v. Washington*, 466 U.S. 668, 687,

⁶ Robinette argues defense counsel was ineffective because he failed to object to the admission of the hearsay statements of A.M. (Prop. 1), failed to object to other crimes evidence (Prop. 2), elicited evidence Robinette was an abusive husband, failed to use impeachment evidence (3.11 motion), failed to request or object to the absence of a jailhouse informant instruction (Prop. 3), failed to object to lack of discovery regarding jailhouse informant testimony and instances of prosecutorial misconduct (Prop. 4), and failed to challenge the sufficiency of the evidence on the ground that Robinette was not a person responsible for A.M.'s health, safety or welfare (Prop. 5).

104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206; *Head v. State*, 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148. The merits of the substantive claims serving as the basis for this ineffective assistance of counsel claim have been addressed and rejected above.

In conjunction with this claim Robinette tendered for filing a Request To Supplement Record Pursuant to Rule 3.11, attaching three affidavits to support his claim that trial counsel was ineffective for failing to use evidence to impeach Tammie Robinette and Bacil Smith, Jr.⁷ This Court will order an evidentiary hearing if “the application and affidavits . . . contain sufficient information to show this Court by clear and convincing evidence [that] there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence.” Rule 3.11(B)(3)(b)(i), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016). Having reviewed Robinette’s Request to develop this claim and the materials offered to support that request, we find that Robinette has failed to meet his burden. Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016). Therefore, Robinette is not entitled to an evidentiary hearing to further develop his ineffective assistance of counsel allegations, and his motion, as well as this claim, are **DENIED**. See *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905-06.

⁷ The Clerk of this Court is directed to file Robinette’s Request To Supplement Record.

7.

Robinette's sentence is supported by the facts of the case and is within the range of punishment provided by law. This Court will not disturb a sentence within statutory limits unless, under the facts and circumstances of the case, it is so excessive as to shock the conscience of the Court. *Gomez v. State*, 2007 OK CR 33, ¶ 18, 168 P.3d 1139, 1146; *Rea v. State*, 2001 OK CR 28, ¶ 5 n.3, 34 P.3d 148, 149 n.3. Robinette's sentence does not meet that test, and no relief is warranted.

DECISION

The Judgment and Sentence of the district court is **AFFIRMED**. The Clerk of this Court is directed to file Robinette's Request To Supplement Record Pursuant to Rule 3.11. That Request, however, 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 OSAGE COUNTY THE HONORABLE B. DAVID GAMBILL, ASSOCIATE DISTRICT JUDGE

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LUMPKIN, V.P.J.: Concur
LEWIS, J.: Concur
HUDSON, J.: Concur

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