

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KIMBERLY DAWN WENTHOLD,

Appellant,

v.

STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

No. F-2015-235

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

DEC 9 2016

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

HUDSON, JUDGE:

Appellant Kimberly Dawn Wenthold was tried and convicted by a jury in the District Court of Cleveland County, Case No. CF-2013-1443, for the crimes of Count 1: First Degree Manslaughter, in violation of 21 O.S.2011, § 711; Counts 2 and 3: Causing Great Bodily Injury While Operating a Motor Vehicle Under the Influence of an Intoxicating Substance, in violation of 47 O.S.Supp.2012, § 11-904(B); and Count 4: Person Involved in an Injury Accident Under the Influence of an Intoxicating Substance, in violation of 47 O.S.Supp.2012, § 11-904(A)(1). The jury recommended Wenthold serve twenty-three (23) years imprisonment on Count 1, two (2) years imprisonment and a fine of \$3,000.00 on Count 2, nine (9) years imprisonment and a fine of \$5,000.00 on Count 3, and one year imprisonment and a fine of \$1,000.00 on Count 4. The Honorable Tracy Schumacher, District Judge, sentenced Wenthold according to the jury's verdicts and ordered Counts 1, 2 and 3 to run

concurrently and Count 4 to run consecutively to Count 1.¹ Wenthold now appeals.

Appellant alleges four propositions of error on appeal:

- I. THE PRESENTATION OF IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE, IN THE FORM OF REPEATED REFERENCES TO APPELLANT'S PRESCRIPTION DRUG HISTORY, DEPRIVED APPELLANT OF A FAIR TRIAL IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AS WELL AS ARTICLE 2, § 7, OF THE OKLAHOMA CONSTITUTION;
- II. PROSECUTORIAL MISCONDUCT DEPRIVED APPELLANT OF A FAIR TRIAL IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 2, § 7, OF THE OKLAHOMA CONSTITUTION;
- III. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HER RIGHTS UNDER THE SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7, 9 AND 20 OF THE OKLAHOMA CONSTITUTION; and
- IV. THE ACCUMULATION OF ERRORS DEPRIVED APPELLANT OF A FAIR TRIAL.

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 and Appellant's judgment and sentence should be **AFFIRMED**.

1.

Appellant argues the State improperly presented evidence regarding valid prescriptions for other drugs which were not present in Appellant's system at the time of the crash, as well as evidence documenting her prescription history

¹ Appellant must serve at least 85% of her Count 1 sentence before parole eligibility. 21 O.S.2011, § 13.1(3).

for the drugs that were at issue. Appellant maintains the State had no legitimate purpose in offering this evidence, arguing the challenged evidence was irrelevant propensity evidence and therefore inadmissible. Appellant further contends that even if this evidence was marginally relevant, its probative value was substantially outweighed by the danger of unfair prejudice.

Appellant's first contention focuses primarily on three (3) empty hydrocodone prescription pill bottles, bearing her name, included within State's Exhibit 72.² Appellant failed to object to the admission of this challenged evidence on the grounds now asserted on appeal. Appellant has therefore waived review of all but plain error. *Mitchell v. State*, 2016 OK CR 21, ¶ 29, ___ P.3d ___. Under the plain error test, an appellant must show an actual error that is plain or obvious, affecting their substantial rights. *Jackson v. State*, 2016 OK CR 5, ¶ 4, 371 P.3d 1120, 1121. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*; *Simpson v. State*, 1994 OK CR 40, ¶¶ 10, 26, 30, 876 P.2d 690, 694, 699, 700-01. No such error occurred here.

The blood draw performed after the crash showed the presence of two substances, Xanax and Phentermine, in Appellant's system on September 2, 2013. Thus, the question for the jury was whether these drugs rendered Appellant incapable of safely driving a motor vehicle at the time of the crash. While the challenged evidence involved other medications—both prescription

² Appellant also references the admission of other empty pill containers, along with loose pills found within Appellant's vehicle, after the crash.

and over-the-counter—this evidence was relevant to show the thoroughness of the State’s overall investigation and collection of evidence. *Martinez v. State*, 2016 OK CR 3, ¶ 38, 371 P.3d 1100, 1111, *cert. denied*, (U.S. Oct. 31, 2016). Although the challenged evidence was not necessarily probative of Appellant’s ability to safely drive at the time of the crash, this was an issue for cross-examination regarding the weight of the evidence. *Id.*

Moreover, any error that may have occurred did not affect Appellant’s substantial rights, especially when viewed in conjunction with the overwhelming evidence of guilt presented in this case. Evidence of Appellant’s doxycycline (an antibiotic) prescription along with the over-the-counter supplements was clearly innocuous. Any potential danger of unfair prejudice only relates to the admission of the empty hydrocodone prescription bottles. No such prejudice resulted here. The pill bottles clearly showed the hydrocodone prescriptions had been filled several months prior to the crash in April and June of 2013. Additionally, through her testimony, Appellant was ultimately able to provide legitimate reasons for needing and receiving prescriptions for hydrocodone. Appellant has thus failed to show plain error in the admission of this challenged evidence.

Next, Appellant timely objected to Don Vogt’s testimony concerning Appellant’s prescription history, along with admission of the Prescription Monitoring Program (PMP) report, chronicling this history. Thus, Appellant preserved this issue for appeal. “This Court has recognized that ‘rebuttal testimony is permitted to explain, repel, disprove, counteract or contradict facts

or evidence given by the adverse party regardless of whether such evidence might have been introduced in the State's case-in-chief or whether it is somewhat cumulative.” *Miller v. State*, 2013 OK CR 11, ¶ 133, 313 P.3d 934, 979 (quoting *Spencer v. State*, 1990 OK CR 49, ¶ 6, 795 P.2d 1075, 1077). This Court reviews a trial court’s decision to admit rebuttal testimony for an abuse of discretion. *Id.*, 2013 OK CR 11, ¶ 135, 313 P.3d at 980; see also *Martinez*, 2016 OK CR 3, ¶ 39, 371 P.3d at 1112. An abuse of discretion is a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

No abuse of discretion occurred here. Vogt’s testimony, along with the admission of the redacted PMP report outlining Appellant’s prescription history, was appropriate in rebuttal to counteract and discredit testimony given by Appellant’s expert witness, Dr. Jorg Pahl, as well as Appellant’s own testimony. Relief is denied for Proposition I.

2.

Relief for prosecutorial misconduct will be granted only if “the State’s argument is so flagrant and so infects a defendant’s trial that the trial is rendered fundamentally unfair.” *Williams v. State*, 2008 OK CR 19, ¶ 124, 188 P.3d 208, 230. “[W]e evaluate alleged prosecutorial misconduct within the context of the entire trial, considering not only the propriety of the prosecutor’s actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel.” *Hanson v. State*, 2009 OK CR

13, ¶ 18, 206 P.3d 1020, 1028. “Both 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.

Appellant failed to timely object to the two alleged instances of misconduct now cited on appeal. She has therefore waived review on appeal of all but plain error. *Mathis v. State*, 2012 OK CR 1, ¶ 24, 271 P.3d 67, 76.

First, the record does not support Appellant's claim that the State improperly “paraded” an in-life photograph of Cadence Gordon in front of the jury during closing arguments in an attempt to garner sympathy for the young victim. The only reference made to the purported behavior occurred at Appellant's sentencing hearing on March 11, 2015, wherein defense counsel requested a new trial on this basis. The trial court, without first seeking a response from the State, promptly and summarily denied Appellant's motion.

This Court has found that an in-life photograph of a victim may be appropriate and admissible at trial. *Martinez*, 2016 OK CR 3 ¶¶ 41-2, 371 P.3d at 1112. Moreover, such admission does not deprive a defendant of a fair trial or sentencing proceeding. *Id.* at ¶ 42. Here, Appellant did not contest the admission of the in-life photograph, nor does Appellant now claim on appeal that there is anything *per se* inappropriate or prejudicial about the photograph. In light of the silent trial record and the summary manner in which the trial court swiftly rejected Appellant's contention at sentencing, Appellant's claim that the State improperly utilized the photograph to garner sympathy cannot

be found to have merit. Additionally, the jury was properly instructed not to allow "sympathy, sentiment or prejudice" to enter into their deliberations, which cured any potential error. *See Garrison v. State*, 2004 OK CR 35, ¶¶ 117-119, 103 P.3d 590, 610-611 (juries are presumed to follow their instructions). No error, plain or otherwise, has been demonstrated.

Second, the prosecutor's argument referencing the trial court's ability to run sentences concurrently was plain and obvious error. *See Trice v. State*, 1993 OK CR 19, ¶ 47-51, 853 P.2d 203, 217-18 (it is not for the jury to consider whether sentences should be run concurrently or consecutively). However, Appellant's substantial rights were not affected as no prejudice resulted. *Brewer v. State*, 2006 OK CR 16, ¶ 13, 133 P.3d 892, 895 (relief is not warranted unless "in light of the entire record, a defendant has suffered prejudice"). The State actually argued for a stiffer sentence, referencing the imposition of a thirty (30) year as well as a fifty (50) year sentence for Count 1. Despite these references, the jury recommended a twenty-three (23) year sentence, which falls on the lower end of the statutory range of punishment. 21 O.S.Supp.2006, § 715 (punishment for manslaughter not less than four (4) years). Given the total facts and circumstances of this case, we find the prosecutor's argument did not impact the jury's sentencing recommendation. *See Harmon v. State*, 2011 OK CR 6, ¶ 80, 248 P.3d 918, 943 (claims of prosecutorial misconduct are evaluated within the context of the entire trial). Relief for Proposition II is therefore denied.

3.

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). The Appellant must show that there is a reasonable probability that but for the errors, the result of the trial would have been different. *Cartwright v. State*, 1985 OK CR 136, ¶ 6, 708 P.2d 592, 594 (citing *Strickland*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Referencing her Proposition I and II arguments, Appellant asserts she was denied effective assistance of counsel by defense counsel's failure to timely object. No plain error affecting Appellant's substantial rights was found to occur. Thus, Appellant has failed to show the results of the trial would have been different had defense counsel objected. *Rutan v. State*, 2009 OK CR 3, ¶ 80, 202 P.3d 839, 855. Relief is denied for Proposition III.

4.

Relief for cumulative error is unwarranted as this is not a case where, considered together, the instances of error we have identified or assumed to exist affected the outcome of the proceedings and denied Appellant a fair trial. See *Postelle v. State*, 2011 OK CR 30, ¶ 94, 267 P.3d 114, 146; *Pavatt v. State*, 2007 OK CR 19, ¶ 85, 159 P.3d 272, 296. Relief is denied for Proposition IV.

DECISION

The judgment and sentence of the district court is **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 delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY
THE HONORABLE TRACY SCHUMACHER, DISTRICT JUDGE

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