

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES CURTIS COX,)
)
 Appellant,)
 vs.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. F-2016-55

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JAN 31 2017

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

SMITH, JUDGE:

James Curtis Cox was tried by jury and convicted of Counts I and II, Sexual Abuse of a Child in violation of 10 O.S.Supp.2006, § 7115,¹ in the District Court of Tulsa County, Case No. CF-15-2168. In accordance with the jury's verdict the Honorable William D. LaFortune sentenced Cox to twenty-five (25) years imprisonment and a fine of \$5,000.00 (Count I), and life imprisonment and a \$5,000.00 fine (Count II), to be served consecutively. Cox must serve 85% of his sentences before becoming eligible for parole consideration. Cox appeals from these convictions and sentences.

Cox raises three propositions of error in support of his appeal:

- I. Appellant was deprived of effective assistance of counsel.
- II. Plain error occurred when the trial court failed to give a limiting instruction to the jury regarding the limited use of other crimes evidence at the time it was admitted.
- III. Plain error occurred when the trial court misapplied the law and gave improper consideration to witnesses' victim impact statements.

¹ The Amended Information and Judgment and Sentence both state that Cox violated Section 843.5 of Title 21. At the time of Cox's trial, this was the correct statute for the crimes charged. However, at the time the crimes were committed, the sections had not been renumbered, and Section 7115 of Title 10 was in effect and applies to Cox's case.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we find that Cox's sentences must be modified to run concurrently.

We find in Proposition I that trial counsel was not ineffective. Cox raises five subpropositions. He raises two of these claims separately as substantive propositions of error; we do not review the other claims substantively, but only in the context of ineffective assistance. Cox must show that counsel's performance was deficient, and that the deficient performance was prejudicial. *Miller v. State*, 2013 OK CR 11, ¶ 145, 313 P.3d 934, 982; *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Counsel's acts or omissions must have been so serious as to deprive Cox of a fair trial with reliable results. *Harrington v. Richter*, 562 U.S. 86, 104, 131 S.Ct. 770, 787-88, 178 L.Ed.2d 624 (2011). Cox must show he was prejudiced by counsel's acts or omissions. *Williams v. Taylor*, 529 U.S. 362, 394, 120 S.Ct. 1495, 1513-14, 146 L.Ed.2d 389 (2000); *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067. Where a defendant fails to show prejudice, we will dispose of a claim of ineffective assistance on that ground. *Marshall v. State*, 2010 OK CR 8, ¶ 61, 232 P.3d 467, 481. Cox fails to show prejudice from counsel's acts or omissions in his allegations in subpropositions I-IV. As there is no prejudice, we will not find counsel ineffective. *Id.* We determine in Proposition III that one of the substantive errors underlying Proposition I,

subproposition V requires relief. We need not reach the issue of ineffective assistance as to that claim.

Cox first claims that trial counsel should have made contemporaneous objections to the propensity and other crimes evidence when it was offered. Cox did not raise this claim as a separate substantive proposition, but attempts to argue that the evidence should not have been admitted because it was unduly prejudicial under 12 O.S.2011, § 2413 and *Horn v. State*, 2009 OK CR 7, ¶ 40-41, 204 P.3d 777, 786-87. That is not the question in this proposition. Our review is limited to the issue of whether Cox was prejudiced by counsel's failure to object to the evidence – whether this omission deprived him of a fair trial with reliable results. *Richter*, 562 U.S. at 104, 131 S.Ct. at 787-88. Cox claims that, without this evidence, jurors could have disbelieved the victim's testimony, given her troubled home life and the possibility that she was rebelling against home and school as she entered her teen years. He argues that the propensity evidence, and evidence of other bad acts, unfairly prejudiced jurors against him. On the contrary, K.F.'s testimony was clear and believable, and supported by her mother, sister, aunt and a counselor. In addition, jurors saw Cox's interview with police and could judge his truthfulness and demeanor, comparing it with the victim's testimony. Cox fails to show that trial counsel's omission deprived him of a fair trial with reliable results.

Cox argues that counsel should have requested the redaction of his videotaped interview with Detective Egan. Although he argues that portions of the videotape were improper or prejudicial and should not have been admitted, he does not raise that as a separate substantive proposition. Our review is limited to the

issue of whether counsel's failure to object to the evidence deprived Cox of a fair trial with reliable results. *Id.* Cox fails to show that he was prejudiced when trial counsel failed to request redaction of questions and comments that include common interrogation techniques. *Bernay v. State*, 1999 OK CR 37, ¶ 30, 989 P.2d 998, 1009. He also fails to show prejudice from counsel's failure to object to admission of his statements regarding his sexual history, particularly his habit of failing to bond with numerous previous adult sexual partners. As there is no prejudice, counsel is not ineffective.

Cox claims trial counsel should have objected to prosecutorial misconduct during closing argument. Although he argues in this proposition that the prosecutor made improper comments and misstated the law, he did not raise this as a separate substantive proposition of error. Our review is limited to the issue of whether Cox was prejudiced by counsel's failure to object to the comments. *Richter*, 562 U.S. at 104, 131 S.Ct. at 787-88. Cox complains of three lines of argument. We do not determine the substantive issue of whether these comments were not based on the evidence or were otherwise improper. Cox has not shown that he was prejudiced by counsel's failure to object to the prosecutor's argument.

Cox raises two other subpropositions. We found in Proposition II that Cox was not prejudiced by the failure to give contemporaneous limiting instructions when the propensity and bad acts evidence was admitted, and there was no plain error. We will not find counsel ineffective for failing to request the instruction. We found in Proposition III that plain error occurred when the trial court improperly relied on inadmissible victim impact evidence in sentencing. We recommend in that

proposition that Cox's sentences should be modified to run concurrently; no other relief is required. This proposition is denied.

We find in Proposition II that Cox has failed to show he was prejudiced by the trial court's failure to *sua sponte* give contemporaneous limiting instructions when propensity and bad acts evidence was introduced. While other crimes evidence should be accompanied by a contemporaneous limiting instruction, a trial court is not required to give the instruction *sua sponte*, and if a party does not request the instruction the claim is reviewed for plain error. *Jones v. State*, 1989 OK CR 7, ¶ 8, 772 P.2d 922, 925, *overruled in part on other grounds by Omalza v. State*, 1995 OK CR 80, 911 P.2d 286. Plain error is an actual error, that is plain or obvious, and that affects a defendant's substantial rights, affecting the outcome of the trial. *Barnard v. State*, 2012 OK CR 15, ¶ 13, 290 P.3d 759, 764. Jurors received a limiting instruction at the close of the evidence, and in argument the prosecutor told jurors that their decision regarding guilt should be based only on the evidence pertaining to K.F. As there is no prejudice, there is no plain error. *Powell v. State*, 2000 OK CR 5, ¶ 68, 995 P.2d 510, 527. This proposition is denied.

We find merit in Proposition III, and Cox's sentences must be modified to run concurrently. Cox argues that, at sentencing, the trial court (a) should not have received or considered the victim impact statements, and (b) misapplied the law in refusing to run the sentences concurrently. We review these claims for plain error. The record fails to support Cox's claim that the trial court misapplied the law in ordering that his sentences run consecutively. However, the trial court should not have considered the contested victim impact evidence. As the State admits, neither

Dawn nor Michelle were victims of the charged crime in this case. The State suggests that erroneous admission of these statements was harmless because the record shows the trial court would have run the sentences consecutively without considering the improper evidence. This claim is not supported by the record. In explaining his decision, the trial court explicitly, twice, stated that he relied in part on the victim impact testimony, and considered it in making his sentencing decision. The trial court commented that he had heard “all the victims that testified, and it was clear to the Court from their testimony and the emotions that were shown and now these victim impact statements that just basically bolster what I saw. . . .” We cannot say that the trial court was not influenced by the improperly admitted statements. This error was an obvious actual error that affected Cox’s substantial rights. *Barnard*, 2012 OK CR 15, ¶ 13, 290 P.3d at 764. This proposition is granted.

DECISION

The Judgments and Sentences of the District Court of Tulsa County are **AFFIRMED**. The Sentences are **MODIFIED** to run concurrently. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017), 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 D. LAFORTUNE, DISTRICT JUDGE

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LEWIS, V.P.J.: CONCUR IN RESULTS
JOHNSON, J.: CONCUR
HUDSON, J.: CONCUR