IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DEMARCO MANTELL BIRCH,	)	
	)	**NOT FOR PUBLICATION**
Appellant,	)	
vs.	)	**No. F-2016-306**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

SMITH, JUDGE:

Appellant, DeMarco Mantell Birch, was convicted by a jury in Washington County District Court, Case No. CF-2013-131, of Trafficking in Methamphetamine (63 O.S.2011, § 2-415). Upon finding that Appellant had previously been convicted of two or more drug-related felonies, the jury imposed the mandatory sentence of life imprisonment without possibility of parole. 63 O.S.2011, § 2-415(D)(3). On March 30, 2016, the Honorable Russell Vaclaw, Associate District Judge, sentenced Appellant in accordance with the jury's verdict. This appeal followed.

Appellant does not challenge the sufficiency of the evidence to support his conviction or the appropriateness of his sentence.[1] Appellant's only complaints involve the way in which jury selection was conducted. Proposition I contains his substantive complaint. In Proposition II, Appellant claims he was denied his constitutional right to reasonably effective counsel, because his trial attorney failed to correct the perceived problem advanced in Proposition I.

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[1] During a traffic stop on April 18, 2013, a quantity of methamphetamine was found in the vehicle Appellant was driving. The State alleged and presented evidence that Appellant had previously been convicted of eleven drug-related felony crimes. While the jury in this case also found Appellant guilty as charged of two misdemeanor traffic offenses, the trial court took no action on them at formal sentencing, and the Judgment and Sentence does not mention them.

At the beginning of *voir dire*, the trial court told the prospective jurors:

> Now, as we go through this process ... we're going to ask questions that touch upon your qualifications. In no way do we try to embarrass anyone or cause anyone to feel humiliated by having to give an answer... . Therefore, if we should ask a question ... that touches on a sensitive subject or something that you do not wish to discuss openly in court, please bring it to my attention and we will go back into chambers and discuss it as privately as possible.

Two panelists responded to the court's invitation.[2] In chambers, each related information that they did not wish to disclose in open court. One had a close relative who had been convicted of serious crimes; the other had a close relative who had been the victim of serious crimes. Both panelists ultimately served on Appellant's jury. Although defense counsel took part in the *in camera* discussions, Appellant complains that he was not informed he had the right to as well.

A criminal defendant's right to a fair trial includes the right to be present at, and be allowed to participate in, all critical stages of that trial; *voir dire* is considered a critical stage. *Gomez v. United States*, 490 U.S. 858, 873, 109 S.Ct. 2237, 2246, 104 L.Ed.2d 923 (1989); *Lockett v. State*, 2002 OK CR 30, ¶ 12, 53 P.3d 418, 422. However, a defendant does not have an absolute constitutional right to be present at every *in camera* discussion, even if it involves jurors or prospective jurors. *Dodd v. State*, 2004 OK CR 31, ¶ 20, 100 P.3d 1017, 1027–1028; *Miller v. State*, 2001 OK CR 17, ¶ 31, 29 P.3d 1077, 1083. The Due Process Clause of the Fifth Amendment guarantees the accused the right to be present, "to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."

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[2] A third panelist was summoned by the court for an *in camera* discussion after the court received word that he had made comments to others suggesting bias. This panelist ultimately did not serve on Appellant's jury, and he plays no part in our analysis.

Snyder v. Massachusetts, 291 U.S. 97, 108, 54 S.Ct. 330, 333, 78 L.Ed. 674 (1934), *overruled on other grounds, Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). Generally, a defendant who fails to complain when he knows that conferences are taking place in his absence, waives any right to complain later. *United States v. Gagnon*, 470 U.S. 522, 529-530, 105 S.Ct. 1482, 1485-86, 84 L.Ed.2d 486 (1985). We have often denied complaints about a defendant's absence from some proceeding or another because we have found no resulting prejudice. *See e.g. Jones v. State*, 2006 OK CR 5, ¶ 70, 128 P.3d 521, 544; *Lockett*, 2002 OK CR 30, ¶¶ 11-12, 53 P.3d at 423.

Here, neither Appellant nor defense counsel expressed any concern over the court's announcement that panelists could discuss sensitive matters in chambers. Defense counsel was present during the conferences in question; these exchanges were transcribed and are part of the record before us. The information related by the panelists in those hearings was the kind one might reasonably wish to shield from public disclosure. Defense counsel actively participated in these conferences, asking questions of each panelist. Both panelists assured the court and counsel that their ability to be fair to both parties was not compromised by the experiences they related in private.

Appellant waived any right to be present during these colloquies by failing to object at the time. We reject his suggestion that the right cannot be waived without some specific ritual. The trial court "need not get an express 'on the record' waiver from the defendant for every trial conference which a defendant may have a right to attend." *Gagnon*, 470 U.S. at 528, 105 S.Ct. at 1485. Because Appellant never

complained below, the only remaining consideration is whether he was so prejudiced by the way the matter was handled that some sort of relief is warranted.

Appellant never claims that either panelist was removable for cause due to bias or other infirmity. Certainly nothing in the *in camera* colloquies (or elsewhere) suggests that conclusion. The concerns related in chambers had nothing to do with Appellant personally.[3] Nevertheless, he suggests that his personal observation of each panelist, during their brief *in camera* appearances, was the only way to ensure that he could effectively assist counsel in deciding whether to remove either panelist with a peremptory challenge. We disagree.

Given the brevity and limited scope of these conferences, we are confident that defense counsel could ably communicate their essence to Appellant, and we have no reason to believe that counsel did otherwise. Appellant had ample time to observe each panelist, in open court, before and after these events. The exchanges occurred on the morning of the first day of trial. There was a least one mid-morning break after that, and then a lunch break. After the lunch break, defense counsel began his *voir dire*, and he interacted directly with each panelist at issue here. Before passing the panel for cause and exercising peremptory challenges, counsel

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[3] In *Gagnon*, the juror's concerns were *directly* related to one of the four defendants. During a trial recess, the bailiff told the court that one juror was concerned because defendant Gagnon was sketching portraits of the jurors. Gagnon's defense counsel actually suggested the *in camera* hearing, and the court allowed counsel to participate. After a few questions, counsel said he was satisfied with the juror's answers. The hearing was made part of the record, but no objection to how the matter was handled, or to the juror's fitness to continue serving, was ever made until after the defendants were convicted. *Gagnon*, 470 U.S. at 523-24, 105 S.Ct. at 1483. The Supreme Court concluded that the defendants' failure to insist on personally being present during the colloquy waived any subsequent complaint. *Id.* at 529, 105 S.Ct. at 1486.

specifically asked to confer with his client.[4] Under these circumstances, we do not believe Appellant's ability to participate in deciding which panelists to remove was (to quote *Snyder v. Massachusetts*) "thwarted" by his absence from the *in camera* discussions themselves. Using the test expressed in *Gagnon*, we find no reason to believe that Appellant's absence from these hearings substantially affected "the fulness of his opportunity to defend against the charge." *Gagnon*, 470 U.S. at 526, 105 S.Ct. at 1484. Appellant has failed to demonstrate any hint of prejudice. *Jones*, 2006 OK CR 5, ¶ 70, 128 P.3d at 544. Proposition I is therefore denied.

In Proposition II, Appellant claims he was denied his Sixth Amendment right to reasonably effective counsel. Specifically, he faults trial counsel for not advising him that he had a right to be present during the *in camera* colloquies discussed in Proposition I. Appellant has submitted an Application for Evidentiary Hearing consistent with Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, 22 O.S., Ch. 18, App. (2017). To support that request, Appellant has attached his own affidavit stating he was never informed of his right to be present at these hearings, and insisting that he would have attended, had he known that he could.

To warrant relief, Appellant must show both that trial counsel rendered deficient performance – *i.e.*, that he made a professionally unreasonable error – and a reasonable probability that the error affected the outcome of the trial. *Strickland v. Washington*, 466 U.S. 668, 690, 694, 104 S.Ct. 2052, 2065, 2068, 80 L.Ed.2d 674 (1984). Where a defendant fails to show prejudice, we can dispose of an

[4] Appellant contends that his absence from the *in camera* colloquies cannot be deemed harmless because he was *also* not present when the court actually received the parties' peremptory challenges. However, Appellant does not claim he was, in fact, unable to confer with counsel about which panelists to strike peremptorily.

ineffective-assistance claim on that ground alone. *Marshall v. State*, 2010 OK CR 8, ¶ 61, 232 P.3d 467, 481.

We have already examined the substantive claim in Proposition I, and found no evidence that Appellant was prejudiced by his absence from the proceedings discussed therein. The assertions in Appellant's Rule 3.11 affidavit go only to the "deficient performance" prong of the *Strickland* standard; Appellant does not offer any suggestion as to how the outcome would have been different if he had, in fact, attended the hearings. Because we find no reasonable probability of prejudice, we need not consider whether counsel's conduct amounts to "deficient performance."[5] *Marshall, id.* at ¶ 61, 232 P.3d at 481. Appellant's affidavit does not show a strong possibility that he was denied his Sixth Amendment right to reasonably effective counsel. Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals.* The Application for Evidentiary Hearing is **DENIED**, and Proposition II is also denied. *Simpson v. State*, 2010 OK CR 6, ¶ 54, 230 P.3d 888, 906.

DECISION

The Application for Evidentiary Hearing on Sixth Amendment Claim is **DENIED**, and the Judgment and Sentence of the District Court of Washington County is **AFFIRMED**. 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.

[5] Of course, we make no insinuation that it was. The purpose of Rule 3.11(B)(3)(b) of our *Rules*, allowing defendants to supplement the record with new material, is not to decide if counsel was deficient, but only to decide if there exists such a strong possibility of same that additional fact-finding at the district-court level is warranted. *See Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905-06.

AN APPEAL FROM THE DISTRICT COURT OF WASHINGTON COUNTY
THE HONORABLE RUSSELL C. VACLAW, ASSOCIATE DISTRICT JUDGE

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