



IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STEVEN RICHARD REAVES,)
)
 Appellant,)
 vs.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. F-2016-437

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAY 25 2017

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

SMITH, JUDGE:

Steven Richard Reaves was tried by jury and convicted of Count I, Trafficking in Illegal Drugs (methamphetamine) in violation of 63 O.S.2011, § 2-415; Count II, Unlawful Possession of a Controlled Drug with Intent to Distribute (morphine) in violation of 63 O.S.Supp.2012, § 2-401; Count III, Possession of a Firearm After Former Conviction of a Felony in violation of 21 O.S.2011, § 1283; Count IV, Possession of a Controlled Drug without a Tax Stamp in violation of 68 O.S.2011, § 450.1; Count V, Unlawful Possession of Drug Paraphernalia in violation of 63 O.S.2011, § 2-405; Count VI, Unsafe Lane Change in violation of 47 O.S.2011, § 11-309; Count VII, Unlawful Possession of a Controlled Drug (Clonazepam) (misdemeanor) in violation of 21 O.S.2011, § 2-402; and Count VIII, Possession of a Firearm While in the Commission of a Felony in violation of 21 O.S.2011, § 1287, all after former conviction of two or more felonies, in the District Court of Tulsa County, Case No. CF-2015-1693. In accordance with the jury's recommendation the Honorable William D. LaFortune sentenced Reaves to sixty-four (64) years imprisonment on each of Counts I, II, III, IV, and VIII; one (1) year in county jail on

each of Counts V and VII; and ten (10) days in county jail (Count VI). The sentences in Counts I and II run consecutively, and Counts III-VIII run concurrently. The trial court waived the fines recommended by jurors on each felony count. Reaves appeals from these convictions and sentences.

Reaves raises four propositions of error in support of his appeal:

- I. The trial court committed plain error by incorrectly instructing the jury on the range of punishment for trafficking methamphetamine.
- II. The trial court erred when it permitted the prosecutor in closing argument to use a demonstrative aid not supported by any testimony to illustrate constructive possession of illegal drugs.
- III. Prosecutorial misconduct during closing argument deprived Appellant of a fair trial.
- IV. The Appellant was deprived of effective assistance of counsel.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we find that the law and evidence do not require relief.

We find in Proposition I that, although jurors were incorrectly instructed on the range of punishment in Count I, this error requires no relief. Reaves was charged with eight prior offenses, only one of which was a drug offense, and his sentence was enhanced under 21 O.S.2011, § 51.1. Title 63 O.S. 2011, §§ 2-415(C)(4)(a), (D)(1), punishes a first offense for trafficking in methamphetamine as provided in 63 O.S. 2011, § 2-401. Section 2-401(B)(2) provides that, for any Schedule I-IV CDS, punishment for a first offense is two years to life; § 2-401(D)(2) provides that, for any second and subsequent offense, a person shall be punished as a habitual offender under 21 O.S.2011, § 51.1. However, because Reaves had more than twenty grams of methamphetamine, he is subject to the special

provisions of 63 O.S.2011, § 2-415(D). If a person violates § 415 by trafficking in 20 grams or more of methamphetamine, as codified in § 2-415(C)(4)(a), he is subject to punishment for a first offense at “[n]ot less than twice the term of imprisonment provided for in Section 2-401 of this title.” § 2-415(D)(1). This would be four years to life, combining § 2-401(B)(2) and 2-415(D)(1). For a second offense, the punishment is “twice the minimum term for a first time offender to life imprisonment.” 21 O.S. 2011, § 51.1(A)(2). Combining § 2-401(B)(2) and 2-415(D)(1) for a four-year minimum, this would result in a minimum sentence of eight years. For a second or subsequent offense, punishment is “three times the minimum term for a first time offender to life imprisonment.” 21 O.S.2011, § 51.1(C). Combining § 2-401(B)(2) and 2-415(D)(1) to get a four-year minimum, this would result in a minimum sentence of twelve years. This is the sentencing scheme under which Reaves was charged. His jury should have been instructed that the minimum sentences for trafficking were four years (first offense), eight years (second offense) and twelve years (subsequent offenses).

The confusion stems from a separate section, 63 O.S.2011, § 2-401(G)(1), which is specific to methamphetamine manufacture or attempt to manufacture, or possession of precursor substances. This section provides for punishment of seven years to life for a first offense. 63 O.S.2011, § 2-401(G)(2). The record suggests that the trial court mistakenly gave the range of punishment for methamphetamine manufacture under 2-401(G)(1), rather than trafficking under § 2-415(D)(1). The State argues this instruction was correct, because § 2-401(G) applies here. The State misreads the statute. Subsection (G) does not criminalize possession of

methamphetamine; rather it applies to persons who manufacture or attempt to manufacture methamphetamine, or who possess *a precursor substance listed in 63 O.S.2011, § 2-322*, used in the making of methamphetamine. Reaves was not charged with possessing any precursor substances, or with methamphetamine manufacture; he was charged with and clearly possessed a large quantity of the finished drug. This error in instruction, with an inaccurate minimum sentence for a first offense, threw the § 51.1 calculations off as well.

However, the record shows Reaves was not prejudiced by this error. The incorrect numbers in the sentencing ranges for trafficking were for the minimum sentences. Jurors recommended 64 years on each felony count. This number is so far above the minimum sentences possible that this Court cannot conclude that Reaves was prejudiced by the misinstruction. Reaves also complains that jurors were incorrectly instructed on the possible fines. As the trial court waived the fine on Count I, Reaves suffered no prejudice from any possible error, and the Court need not further consider that issue. No relief is required, and this proposition is denied.

We find in Proposition II that the trial court did not abuse its discretion in allowing the prosecutor to use demonstrative aids in closing argument. *Young v. State*, 2000 OK CR 17, ¶ 47, 12 P.3d 20, 37. An abuse of discretion is any unreasonable or arbitrary action made without proper consideration of the relevant facts and law, also described as a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. Counsel for both parties are granted wide latitude in argument

to use demonstrative aids, even though the aids may otherwise not be admitted and not taken to the jury room during deliberations. *Miller v. State*, 1998 OK CR 59, ¶ 52, 977 P.2d 1099, 1110. In any event, Reaves fails to show he was prejudiced by the prosecutor's demonstration. *Cheatham v. State*, 1995 OK CR 32, ¶ 31, 900 P.2d 414, 424. This proposition is denied.

We find in Proposition III that Reaves was not prejudiced when the prosecutor referred to some of his prior offenses as "violent" during closing argument at the third stage of trial. Parties have wide latitude to discuss the evidence and inferences from it, and we will not grant relief unless grossly unwarranted argument affects the defendant's rights, prejudicing him to the point he is deprived of a fair trial. *Bell v. State*, 2007 OK CR 43, ¶ 6, 172 P.3d 622, 624. We review challenged comments in the context of the whole trial, considering the arguments of both parties and the strength of the State's evidence. *Taylor v. State*, 2011 OK CR 8, ¶ 55, 248 P.3d 362, 379. Jurors were instructed that argument was not evidence. *Williams v. State*, 2001 OK CR 9, ¶ 20, 22 P.3d 702, 711. The Judgments and Sentences, which plainly stated the names of the offenses, were properly admitted in support of the alleged second page. *Stewart v. State*, 2016 OK CR 9, ¶ 17, 372 P.3d 508, 512. The prosecutor did not discuss or allude to the actual facts underlying the prior offenses. This proposition is denied.

We find in Proposition IV that trial counsel was not ineffective. Reaves 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 Reaves 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). He 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. Reaves claims trial counsel should have objected to Supplemental Instruction 3. We found in Proposition I that jurors were incorrectly instructed on the range of punishment for trafficking in methamphetamine. However, we also found this error was harmless. As Reaves was not prejudiced by trial counsel's omission, we will not find counsel was ineffective.

Reaves also claims trial counsel should not have successfully requested Supplemental Instruction 4, given in the third stage of trial. This instruction told jurors that, if convicted of trafficking, Reaves would be ineligible for most earned credits in prison. Reaves did not raise this as a substantive claim of error. Our inquiry in this proposition is not whether Supplemental Instruction No. 4 was accurate or appropriate, but whether counsel's act in requesting it deprived Reaves of a fair trial. He wholly fails to show prejudice from counsel's act. He argues that, because earned credits were mentioned, jurors were encouraged to speculate on the length of time he would serve both on Count I and on the other felony counts. Even if this itself were anything more than speculation, there is no indication in the

record that (a) this happened or (b) it was to Reaves' detriment. Trial counsel was not ineffective, and 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 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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OPINION BY: SMITH, J.

LUMPKIN, P.J.: CONCUR IN RESULTS
LEWIS, V.P.J.: CONCUR
JOHNSON, J.: NOT PARTICIPATING
HUDSON, J.: CONCUR