ORIGINAL

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DANIEL BRYAN KELLEY,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**No. F-2015-963**
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

HUDSON, JUDGE:

Appellant Daniel Bryan Kelley was tried and convicted by a jury in the District Court of Tulsa County, Case No. CF-2015-694, for the crimes of Count 1: Rape by Instrumentation, After Former Conviction of Two Felonies, in violation of 21 O.S.2011, § 1114(A)(6); and Count 3: Assault and Battery, in violation of 21 O.S.2011, § 644.[1] The Honorable William J. Musseman, District Judge, presided over the trial. The jury recommended Kelley be sentenced for Count 1 to twenty (20) years imprisonment and a $5,000.00 fine. Kelley waived his right to a presentence investigation, and Judge Musseman sentenced Appellant in accordance with the jury's Count 1 recommendation and imposed a ninety (90) day sentence on the misdemeanor Count 3 to run concurrent with Count 1.[2] Judge Musseman further imposed four (4) years of

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1 Count 2—Indecent Exposure—was dismissed at the State's request at the conclusion of Appellant's preliminary hearing.

2 Appellant must serve at least 85% of his Count 1 sentence before parole eligibility. 21 O.S.Supp.2014, § 13.1(10).

post-imprisonment supervision and ordered Kelley register as a sex offender. Kelley now appeals.

Appellant alleges seven propositions of error on appeal:

I. THE DISTRICT COURT RULING DENYING APPELLANT'S REQUEST TO PRESENT EVIDENCE OF THE VICTIM'S PRIOR STATEMENT TO POLICE THAT THE CRIME OCCURRED AT A DIFFERENT LOCATION VIOLATED THE CONFRONTATION CLAUSE AS WELL AS APPELLANT'S RIGHT TO A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT;

II. THE OVERWHELMING AMOUNT OF HEARSAY ADMITTED IN VIOLATION OF THE OKLAHOMA EVIDENCE CODE AND THE CONFRONTATION CLAUSE OF THE UNITED STATES CONSTITUTION REQUIRES THE REVERSAL OF APPELLANT'S CONVICTION;

III. DETECTIVE ERIC LEVERINGTON'S TESTIMONY QUOTING THE HEARSAY STATEMENTS OF ABSENT WITNESS RICHARD PUTZ CONSTITUTED AN EVIDENTIARY HARPOON OR THE FUNCTIONAL EQUIVALENT THEREOF;

IV. IT WAS ERROR FOR THE DISTRICT COURT TO ADMIT A JUDGMENT AND SENTENCE FROM KANSAS IN THE SECOND STAGE OF APPELLANT'S JURY TRIAL;

V. VARIOUS INSTANCES OF PROSECUTORIAL MISCONDUCT SERVED TO UNDERMINE APPELLANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSITUTION;

VI. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; and

VII. THE ACCUMULATION OF ERROR IN THIS CASE REQUIRES REVERSAL OF APPELLANT'S CONVICTION.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits, the parties' briefs and the

application for evidentiary hearing and supporting exhibits, we find that no relief is required under the law and evidence as to Appellant's convictions and his judgments are therefore **AFFIRMED.** Appellant's Count 3 sentence for misdemeanor Assault and Battery is **AFFIRMED**. However, as discussed below, Appellant's sentence for Count 1 is **REVERSED AND REMANDED FOR RESENTENCING.**

1.

Appellant raised below the issue of admitting the proffered extrinsic evidence under 12 O.S.2011, 2613(B) and consequentially his confrontation claim; thus, these issues are properly preserved for appellate review. However, Appellant never sought admission of the proffered extrinsic evidence pursuant to 12 O.S.2011, 2804.1—the residual exception to the hearsay rule—nor did he argue that exclusion of this evidence would impermissibly obstruct his right to present a defense. Thus, Appellant has waived review of these claims for all but plain error review. *Pickens v. State*, 2001 OK CR 3, ¶ 31, 19 P.3d 866, 878 (when a defendant makes a specific objection at trial, no different objection will be considered on appeal). "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." *Mitchell v. State*, 2016 OK CR 21, ¶ 24, 387 P.3d 934, 943. *See also Jackson v. State*, 2016 OK CR 5, ¶ 4, 371 P.3d 1120, 1121. We find no error—plain or otherwise—resulted from the trial court's exclusion of the proffered extrinsic evidence.

Title 12 O.S.2011, § 2613(B) specifically provides "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon." As defense counsel failed to question the victim at preliminary hearing regarding this evidence, Appellant's proffered evidence was clearly not admissible pursuant to § 2613(B). Moreover, the trial court's exclusion of the proffered extrinsic evidence pursuant to this rule did not violate Appellant's right to confrontation.

In reaching this determination, we find the following factors to be dispositive of Appellant's confrontation claim: (1) Appellant had access to the allegedly inconsistent statement prior to preliminary hearing; (2) Appellant had ample opportunity to cross-examine the victim regarding this evidence at preliminary hearing; (3) the victim was unavailable to testify at Appellant's trial because she had passed away; and (4) as conceded by Appellant, the victim's preliminary hearing testimony was properly admitted at trial. Thus, no violation of Appellant's right to confrontation occurred. *See Crawford v. Washington*, 541 U.S. 36, 53–56, 124 S. Ct. 1354, 1365-67, 158 L. Ed. 2d 177 (2004) (Out-of-court statements by witnesses that are testimonial are barred, under the Confrontation Clause, unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses); *Hanson v. State*, 2009 OK CR 13, ¶¶ 8-12, 206 P.3d 1020, 1025-27 (same); *Thompson v. State*, 2007 OK CR 38, ¶¶ 22-26, 169 P.3d 1198, 1206-07 (an unavailable witness's

preliminary hearing testimony subsequently introduced at trial that was given in circumstances that closely approximated a typical trial in which defense counsel had ample opportunity to cross-examine the witness satisfies defendant's right to confront a witness).

Additionally, as Appellant sought admission of the proffered evidence to impeach the deceased victim, not as proof of a fact of consequence, the proffered extrinsic evidence was not admissible under 12 O.S.2011, § 2804.1—the so-called residual or catch-all hearsay exception. 12 O.S.2011, § 2804.1(A)(1); *see also Mitchell v. State*, 2005 OK CR 15, ¶ 33, 120 P.3d 1196, 1206.

Lastly, exclusion of the proffered evidence did not impinge on Appellant's right to present a complete defense. "Whether Appellant was denied the right to present a defense ultimately turns on whether the evidence at his disposal was admissible." *Pavatt v. State*, 2007 OK CR 19, ¶ 45, 159 P.3d 272, 287; *see also Simpson v. State*, 2010 OK CR 6, ¶ 9, 230 P.3d 888, 895. As set forth above, the proffered extrinsic evidence was inadmissible and its exclusion did not violate Appellant's right of confrontation. Moreover, the materiality of the evidence was not such that its exclusion affected the trial's outcome. *See Coddington v. State*, 2006 OK CR 34, ¶ 47, 142 P.3d 437, 451 (for a defendant to prove his right to present a defense was violated, he or she must show the excluded evidence was material and its exclusion affected the trial trial's outcome). Thus, Appellant has failed to prove his right to present a defense was violated. Proposition I is denied.

2.

"[T]he admissibility of evidence is within the discretion of the trial court, which will not be disturbed absent a clear showing of abuse, accompanied by prejudice to the accused." *Simpson*, 2010 OK CR 6, ¶ 9, 230 P.3d at 895. Appellant failed to properly preserve for appellate review many of his challenges to evidence he contends were inadmissible hearsay. Thus, these unpreserved claims will be reviewed for plain error only. *Mitchell*, 2016 OK CR 21, ¶ 24, 387 P.3d at 943. Upon review, we find no plain error.

Detective Leverington's testimony relating to Richard Putz's identification of Appellant as the perpetrator was not hearsay as it was not offered for the truth of the matter asserted. 12 O.S.2011, § 2801(A)(3); *Primeaux v. State*, 2004 OK CR 16, ¶ 39, 88 P.3d 893, 902 ("Statements not offered to prove the truth of the matter asserted are generally admissible."). J.W.'s statements to Detective Leverington identifying Appellant as her attacker in the photographic lineup, did not amount to plain error. J.W. knew Appellant by name and positively identified Appellant at the preliminary hearing. Thus, Appellant's identity was not at issue at trial and any error in the admission of this evidence did not affect Appellant's substantial rights, *i.e.*, the outcome of the proceeding. *See Lahey v. State*, 1987 OK CR 188, ¶ 26, 742 P.2d 581, 585. Furthermore, any potential error that may have resulted from Detective Leverington's testimony describing J.W.'s account of the rape by instrumentation was cured by the trial court's preemptive admonishment. *See Harris v. State*, 2000 OK CR 20, ¶ 39, 13 P.3d 489, 500 ("[A]n admonishment to the jury is presumed to

'cure' most errors, unless the error was so prejudicial that the error undoubtedly would taint the verdict.") (quoting *Koehler v. State,* 1986 OK CR 110, 721 P.2d 426, 427).

Additionally, the paramedic's challenged hearsay testimony was properly admitted for purposes of medical diagnosis or treatment pursuant to 12 O.S.2011, § 2803(4). *See White v. Illinois,* 502 U.S. 346, 356, 112 S. Ct. 736, 743, 116 L. Ed. 2d 848 (1992) ("a statement made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility[.]"). Moreover, a portion of the SANE nurse's testimony recounting J.W.'s account of Appellant inserting the beer bottle into her vagina was admissible too under § 2803(4). The remainder of the SANE nurse's challenged testimony actually served to impeach J.W.'s preliminary hearing testimony, and as such was not offered to prove the truth of the matter asserted. 12 O.S.2011, § 2801(A)(3). Hence, admission of all of this evidence was proper and did not violate Appellant's right to confrontation. *Crawford,* 541 U.S. 36, 59-60 n.9 (Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted). Proposition II is denied.

3.

Appellant failed to object to the Detective Leverington's challenged testimony thus waiving all but plain error review. *Mathis v. State,* 2012 OK CR 1, ¶ 28, 271 P.3d 67, 77. No actual error, plain or otherwise, is found to have

occurred here. Detective Leverington's testimony, conveying Richard Putz's comments identifying Appellant as the suspect, did not equate to an evidentiary harpoon. *See Anderson v. State*, 1999 OK CR 44, ¶¶ 36, 37, 992 P.2d 409, 421; *Pierce v. State*, 1990 OK CR 7, ¶ 14, 786 P.2d 1255, 1260. Detective Leverington's testimony was responsive to the prosecutor's question; his response was not willfully jabbed or calculated to prejudice the defendant; and, the challenged testimony did not interject any evidence of other crimes. Proposition III is denied.

4.

To prove the existence of Appellant's prior Kansas conviction for Aggravated Battery, the State introduced a journal entry of judgment from Kansas—State's Exhibit 25. Although Appellant raises this issue for the first time on appeal, we find plain error as this evidence alone was insufficient to prove Appellant's Kansas conviction was a felony under Oklahoma law.

A foreign conviction may be utilized to enhance punishment for a subsequent crime committed in Oklahoma if the prior foreign conviction—at the time it was committed—would have been a felony in this State punishable by imprisonment in the penitentiary. *Fischer v. State*, 1971 OK CR 120, ¶¶ 7, 9, 483 P.2d 1165, 1168. "It is the characterization under Oklahoma law which is determinable as to whether or not the foreign offense would be a penitentiary offense in Oklahoma." *Fischer*, 1971 OK CR 120, ¶ 7, 483 P.2d at 1168.

State's Exhibit 25—admitted to prove the existence of Appellant's prior Kansas conviction—shows Appellant was convicted of Aggravated Battery in

violation of K.S.A. 21-3414(a)(1)(C). Section III of the journal entry provides the offense was a Level 7 Felony. While the Kansas judgment provides the offense occurred on September 3, 2003, no information is provided regarding the particular facts of Appellant's crime. Moreover, the State did not present any supplemental evidence to establish the particular facts of Appellant's Kansas crime. Thus, we are left with comparing K.S.A. 21-3414(a)(1)(C) with any applicable Oklahoma statutory provisions covering the same conduct. *See Millwood v. State*, 1986 OK CR 106, ¶ 6, 721 P.2d 1322, 1324 (State was entitled to enhance punishment for Oklahoma conviction using prior conviction arising from general court-martial for the offenses of rape and sodomy where rape and sodomy were defined in the Uniform Code of Military Justice with language "remarkably similar" to the counterpart Oklahoma statutes). To conduct this comparison, we look to the applicable law in effect—in Kansas and Oklahoma—at the time Appellant committed the aggravated battery. *Fischer*, 1971 OK CR 120, ¶ 9, 483 P.2d at 1168 (it is the time of the conviction which is determinable).

The relevant version of the applicable Kansas statute is K.S.A.1993 Supp. 21-3414(a)(1)(C).[3] Section 21-3414(a)(1)(C) defines aggravated battery as "*intentionally causing physical contact* with another person when done in a

[3] K.S.A. 21-3414(a)(1)(C) was repealed on July 1, 2011 and re-codified under K.S.A. 21-5413 with an effective date of July 1, 2011. Prior to its repeal and re-codification, K.S.A. 21-3414(a)(1)(C) had not been amended since 1993. As the legislative history for K.S.A. 21-3414 prior to the 2011 re-codification was not readily available, we rely on *State v. Ultreras*, 296 Kan. 828, 849, 295 P.3d 1020, 1034 (2013) for the relevant 1993 version of K.S.A. 21-3414. The defendant in *Ultreras* was convicted of three (3) counts of aggravated battery, in violation of K.S.A. 21-3414. His convictions stemmed from a June 2, 2007 bar fight. Thus, the 1993 version of 21-2414 was applicable to Ultreras's case.

rude, insulting or angry manner *with a deadly weapon*, or in any manner whereby *great bodily harm*, disfigurement or death *can be inflicted.*" (emphasis added). While comparable to Oklahoma's 21 O.S.Supp.1999, § 645 (Assault, Battery, or Assault and Battery with Dangerous Weapon)[4] and 21 O.S.Supp.2002, § 646 (Aggravated Assault and Battery Defined),[5] the statutes are not "remarkably similar" enough for Appellant's Kansas conviction to be used for enhancement purposes without proof of the specific conduct that lead to Appellant's conviction.

Comparing Oklahoma's 21 O.S.Supp.1999, § 645 with K.S.A. 21-3414(a)(1)(C), we cannot ignore the significant variance in the necessary *mens rea*. Title 21 O.S.Supp.1999, § 645 requires the actual "intent to do bodily harm" or alternatively the "intent to injure"; whereas, K.S.A. 21-3414(a)(1)(C) merely requires the intent to cause "physical contact with another person."

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4 Section 645 provides:

> Every person who, *with intent to do bodily harm* and without justifiable or excusable cause, commits any assault, battery, or assault and battery upon the person of another with any sharp or *dangerous weapon*, or who, without such cause, shoots at another, with any kind of firearm or air gun or other means whatever, with intent to injure any person, although without the intent to kill such person or to commit any felony, upon conviction is guilty of a felony punishable by imprisonment in the State Penitentiary not exceeding ten (10) years, or by imprisonment in a county jail not exceeding one (1) year.

(emphasis added).

5 Section 646 provides:

> A. An assault and battery becomes aggravated when committed under any of the following circumstances:
> 1. When great *bodily injury is inflicted* upon the person assaulted; or
> 2. When committed by a person of robust health or strength upon one who is aged, decrepit, or incapacitated, as defined in Section 641 of this title.
> B. For purposes of this section "great bodily injury" means bone fracture, protracted and obvious disfigurement, protracted loss or impairment of the function of a body part, organ or mental faculty, or substantial risk of death.

(emphasis added).

Additionally, a battery charged pursuant to 21 O.S.Supp.1999, § 645 involves the use of "any sharp or dangerous weapon." While one of the "alternative means of aggravated battery"[6] pursuant to K.S.A. 21-3414(a)(1)(C) includes use of a "deadly weapon," we have no proof that Appellant's conduct resulting in his Kansas conviction actually involved any type of weapon. Thus, we cannot conclude his conduct would have been a felony in this State pursuant to 21 O.S.Supp.1999, § 645.

We likewise find 21 O.S.Supp.2002, § 646 and K.S.A. 21-3414(a)(1)(C) differ in a manner too significant to ignore. Section 646 requires that "great bodily injury [be] inflicted"; whereas, K.S.A. 21-3414(a)(1)(C) merely requires that the physical contact *can* result in "great bodily harm ... be[ing] inflicted." Thus, without proof that Appellant's specific conduct actually inflicted great bodily injury—versus could have resulted in great bodily harm—we cannot conclude his Kansas conviction constituted a felony under Oklahoma law at the time it was committed.

Thus, we find plain error occurred when State's Exhibit 25 was erroneously admitted into evidence and used to enhance Appellant's punishment for his Count 1 conviction. While Appellant asks that we modify his sentence to ten (10) years, we find that under the circumstances presented here remand for resentencing is appropriate.[7]

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6 *See Ultreras*, 296 Kan. at 849-50, 295 P.3d at 103-34 (The structure of the statute signals that the legislature has defined . . . alternative means of aggravated battery.").

7 Notably, Appellant is not seeking modification or reversal of his Count 3 assault and battery misdemeanor conviction. Aplt. Br. 10 ("[Appellant] is not concerned about his assault and battery conviction; he has already served his time for that offense.").

5.

Appellant failed to timely object to the alleged instances of prosecutorial misconduct now cited on appeal. He has thus waived all but plain error review of this claim. *Mathis v. State*, 2012 OK CR 1, ¶ 24, 271 P.3d 67, 76. Our initial inquiry is whether these challenged comments were a plain and obvious violation of the law. *Jackson*, 2016 OK CR 5, ¶ 4, 371 P.3d at 1121. They were not. The prosecutor's comments—taken in context along with defense counsel's corresponding argument—did not minimize the State's burden of proof or improperly shift the burden to Appellant. The prosecutor's repeated use of the challenged phrase "what's reasonable" related to the prosecutor's argument regarding reasonable inferences the jury could glean from the State's evidence. This argument in no way was an attempt by the State to minimize the reasonable doubt standard. Moreover, the prosecutor's query pondering what evidence showed the victim was lying did not erroneously shift the burden of proof onto Appellant. The prosecutor's rhetorical question was made in direct response to defense counsel's similar query, "So why would [the victim] lie?" The prosecutor followed-up this question by referencing evidence presented and subtly arguing the reasonable inferences that could be drawn therefrom. "Comments, which were 'invited' and did no more than respond substantially in order to 'right the scale', do not warrant reversing a conviction." *Warner v. State*, 2006 OK CR 40, ¶ 182, 144 P.3d 838, 889. Appellant has shown no error, plain or otherwise, in the challenged comments. Proposition V is denied.

6.

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, 2064, 80 L. Ed. 2d 674 (1984). *See also Harrington v. Richter*, 562 U.S. 86, 104-05, 131 S. Ct. 770, 787-88, 178 L. Ed. 2d 624 (2011) (summarizing *Strickland* two-part test).

In Proposition II, we found no error resulting in prejudice was caused by the admission of the challenged hearsay evidence. Given no prejudice was shown, trial counsel cannot be found to have been ineffective. *Malone v. State*, 2013 OK CR 1, ¶ 16, 293 P.3d 198, 207.

In Proposition III, we found the Detective Leverington's challenged testimony did not meet the criteria necessary to constitute an evidentiary harpoon or the functional equivalent of one. Thus, trial counsel cannot be found to have been ineffective for his failure to object. *Logan v. State*, 2013 OK CR 2, ¶ 11, 293 P.3d 969, 975 ("The omission of a meritless claim . . . cannot constitute deficient performance; nor can it have been prejudicial.").

In Proposition IV, we found plain error occurred when State's Exhibit 25 was erroneously admitted into evidence and used to enhance Appellant's punishment for his Rape by Instrumentation (Count 1) conviction. This Court's finding of error dictates Appellant's sentence be vacated and remanded for resentencing. Thus, Appellant's ineffective assistance of counsel claim

related to this error has been rendered moot. *Lewallen v. State*, 2016 OK CR 4, ¶ 12, 370 P.3d 828, 831.

Finally, in Proposition V, we found the prosecutor did not commit prosecutorial misconduct during closing arguments by seeking to minimize the State's burden of proof or improperly shifting the burden to Appellant. Again, "where there is no error, one cannot predicate a claim of ineffective assistance of counsel upon counsel's failure to object." *Frederick v. State*, 2001 OK CR 34, ¶ 190, 37 P.3d 908, 955.

Proposition VI is denied.

7.

Having found plain error requiring Appellant's Count 1 sentence be vacated and the matter remanded for resentencing, we limit our review of Appellant's cumulative error claim to the guilt stage of his trial. Upon review, we find relief 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*, 2011 OK CR 30, ¶ 94, 267 P.3d at 146; *Pavatt*, 2007 OK CR 19, ¶ 85, 159 P.3d at 296. Proposition VII is denied.

DECISION

The judgments of the district court are **AFFIRMED**. Appellant's Count 1 felony sentence is **REVERSED AND REMANDED FOR RESENTENCING.** Appellant's Count 3 sentence for misdemeanor Assault and Battery 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 delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE WILLIAM J. MUSSEMAN, DISTRICT JUDGE

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