ORIGINAL

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

GERALD NUCKOLLS,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**No. F-2015-1064**
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

HUDSON, JUDGE:

Appellant Gerald Nuckolls was tried by jury in the District Court of Tulsa County, Case No. CF-2014-4543, and was convicted of Count 1: Sexual Battery, in violation of 21 O.S.Supp.2013, § 1123(B); and Count 2: Indecent Exposure, in violation of 21 O.S.2011, § 1021(A).[1] The jury recommended four (4) years imprisonment as punishment for each count. The Honorable William D. LaFortune, District Judge, presided over the trial and pronounced judgments and sentences in accordance with the jury's verdicts. Judge LaFortune ordered both counts to run consecutively.

Nuckolls now appeals. He raises the following propositions of error on appeal:

> I. THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON PRIOR INCONSISTENT STATEMENTS OF THE COMPLAINING WITNESS, [A.A.];

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[1] Counts 1—2 were based on crimes committed against A.A. on September 16, 2014. Counts 3—4 of the Information were dismissed prior to trial. Counts 5—6, however, were joined for trial with Counts 1—2 and alleged Sexual Battery and Indecent Exposure committed against a separate victim, J.T., on March 9, 2014. However, the jury acquitted Nuckolls on Counts 5—6.

II. THE TRIAL COURT'S RESTRICTION ON CROSS-EXAMINATION VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION;

III. THE TRIAL COURT ERRED BY REFUSING TO REDACT PORTIONS OF THE VIDEO RECORDING OF APPELLANT'S INTERROGATION;

IV. PROSECUTORIAL MISCONDUCT DENIED APPELLANT OF A FUNDAMENTALLY FAIR TRIAL;

V. APPELLANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL; and

VI. THE TRIAL COURT FAILED TO PROPERLY INSTRUCT THE JURY THAT APPELLANT WOULD RECEIVE THE ADDITIONAL PUNISHMENT OF SEX OFFENDER REGISTRATION IF FOUND GUILTY.

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 Judgments and Sentences should be **AFFIRMED**.

I

We review a trial court's decision concerning jury instructions for an abuse of discretion. *Mitchell v. State*, 2016 OK CR 21, ¶ 24, 387 P.3d 934, 943. An abuse of discretion is defined as "a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *State v. Keefe*, 2017 OK CR 3, ¶ 7, __P.3d.__ (quoting *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.d3 161, 170). Appellant's challenge to the trial court's ruling based on the sole prior inconsistent statement cited during the instructions conference, i.e., A.A.'s testimony concerning "setting up" Appellant, is

preserved for our review. However, the additional complaints about alleged prior inconsistent statements made by Appellant for the first time on appeal are waived 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*, 2016 OK CR 21, ¶ 24, 387 P.3d at 943.

Appellant fails to show an abuse of discretion based on the victim's statement to the detectives about "setting up" Appellant. The issue here is whether the record shows A.A. made a prior inconsistent statement warranting instruction with OUJI-CR 9-20. *See* 12 O.S.2011, §§ 2607, 2613. A.A. sufficiently explained the challenged statement to the detectives. Under the total record, the trial court did not abuse its discretion in finding there was no prior inconsistent statement in relation to A.A.'s testimony and in refusing to instruct with OUJI-CR 9-20.

Appellant fails to show plain error from omission of the OUJI-CR 9-20 instruction based on A.A.'s testimony about Appellant urinating behind her garage and Lauren Graham being a prostitute. Appellant fails to show on appeal that he questioned A.A. about these alleged inconsistencies, let alone gave her an opportunity to admit, deny or explain them. Under Section 2613, this is fatal to these particular claims. *See Rogers v. State*, 1986 OK CR 96, ¶

10, 721 P.2d 805, 808; Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017).

Appellant too fails to show plain error from the trial court's failure to provide OUJI-CR 9-20 based on A.A.'s testimony about pulling down her dress to show Appellant her tattoo. A.A. explained the seeming inconsistency with her preliminary hearing testimony. Moreover, her previous statement to the detectives about pulling her dress down to show the tattoo, of course, *was* consistent with her trial testimony. There is no plain or obvious error affecting Appellant's substantial rights.

Finally, we fail to see any inconsistencies arising from A.A.'s trial testimony about whether she was flirting with Appellant. Because there is no error, there is no plain error. Proposition I is denied.

II

As discussed in Proposition I, the trial court did not abuse its discretion in finding no prior inconsistent statement in relation to A.A.'s testimony about "setting up" Appellant. As there was no prior inconsistent statement, there was no basis to attack A.A.'s testimony by showing the videotape of her prior statement and, thus, no violation of Appellant's rights under the Confrontation Clause.

Appellant's complaint about the trial court's refusal to allow him to confront A.A. with the contents of a civil petition filed on her behalf by an attorney against Appellant and the Tulsa County sheriff based on the charged offenses also does not reveal error. The real issue here is whether the trial

court's limits on Appellant's inquiry into A.A.'s bias violated Appellant's confrontation rights. "'The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.'" *Delaware v. Van Arsdall*, 475 U.S. 673, 678, 106 S. Ct. 1431, 1435, 89 L. Ed. 2d 674 (1986) (quoting *Davis v. Alaska*, 415 U.S. 308, 315-16, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 (1974)). We have held that bias evidence is never collateral. *Beck v. State*, 1991 OK CR 126, ¶ 12, 824 P.2d 385, 388. "Unlike the strict restrictions placed on most other forms of impeachment evidence, a witness may be cross-examined about any matter tending to show his bias or prejudice." *Id.*

Along these lines, we have recognized and adhere to the Supreme Court's view that "the exposure of a witness' motivation in testifying is a proper important function of the constitutionally protected right of cross-examination." *Id.*, 1991 OK CR 126, ¶ 13, 824 P.2d at 389 (citing *Van Arsdall*, 475 U.S. at 683, 106 S. Ct. at 1437). The Supreme Court has held that a trial judge nonetheless retains "wide latitude" to impose "reasonable limits" on defense counsel's inquiry into a prosecution witness's potential bias. *Van Arsdall*, 475 U.S. at 679, 106 S. Ct. at 1435. Such limits may be based upon "concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Id.* "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on

the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" *Id.*, 475 U.S. at 680, 106 S. Ct. at 1436 (quoting *Davis*, 415 U.S. at 318, 94 S. Ct. at 1111). *See Beck*, 1991 OK CR 126, ¶ 13, 824 P.2d at 389.

Defense counsel sought to impeach A.A's credibility with the contents of a civil suit which she neither signed nor verified. Its use had the potential to unfairly confuse the issues in the case. More fundamentally, Appellant was able to make a record from which to argue why A.A. might have been biased, i.e., potential monetary gain arising from her recently filed civil suit against Appellant and his former employer, the Tulsa County sheriff, based on the charged offenses. Under the total circumstances presented, Appellant fails to show a Sixth Amendment violation based on the trial court's imminently reasonable limitation on A.A.'s cross-examination. Proposition II is denied.

III

Our review of Proposition III is foreclosed by the manner in which Appellant has presented it on appeal. Appellant asserts two discrete substantive legal claims in this proposition of error addressing different aspects of the challenged evidence, i.e., the admissibility of alleged other crimes or bad acts evidence discussed in his confession *and* the alleged lack of corroboration for Appellant's confession to these other crimes or bad acts. This is a clear violation of our rules. Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017); *Collins v. State*, 2009 OK CR 32, ¶ 32, 223 P.3d 1014, 1023. Applying Rule 3.5(A)(5), the claims contained in

Appellant's third proposition of error are waived from review. Proposition III is denied.

IV

Both parties have wide latitude in closing argument to argue the evidence and reasonable inferences from it. We will not grant relief for improper argument unless, viewed in the context of the whole trial, the statements rendered the trial fundamentally unfair, so that the jury's verdict is unreliable. *Darden v. Wainwright,* 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986). Here, Appellant did not object to the prosecutor's comments now challenged on appeal. He has therefore waived review on appeal of all but plain error. *Barnett v. State,* 2011 OK CR 28, ¶ 8, 263 P.3d 959, 962.

The challenged comments represent reasonable inferences based on the record evidence—something wholly permissible during closing argument. *See Pavatt v. State,* 2007 OK CR 19, ¶ 65, 159 P.3d 272, 292. Further, the prosecutor may comment on the veracity of a witness when it is supported by the evidence. *Turrentine v. State,* 1998 OK CR 33, ¶ 63, 965 P.2d 955, 975; *Smallwood v. State,* 1995 OK CR 60, ¶ 37, 907 P.2d 217, 229. That is all the prosecutor did here. The challenged remarks were reasonable comments on the evidence which put into question Appellant's credibility.[2] Taken

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[2] Appellant also cites comments by the prosecutor during closing argument concerning the veracity of A.A., J.T. and Appellant's fiancé. Aplt. Br. at 30-31. Appellant does not make specific arguments challenging these particular comments by the prosecutor. To the extent Appellant seeks to challenge these comments as prosecutorial misconduct, he has waived these claims from appellate review. Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals,*

individually or collectively, they did not deny Appellant a fundamentally fair trial in violation of due process. As such, there is no plain or obvious error affecting Appellant's substantial rights. Relief is denied for Proposition IV.

V

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). *See Harrington v. Richter*, 562 U.S. 86, 104, 131 S. Ct. 770, 787-88, 178 L. Ed. 2d 624 (2011) (summarizing *Strickland* two-part standard). Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017) allows an appellant to request an evidentiary hearing when it is alleged on appeal that trial counsel was ineffective for failing to utilize available evidence which could have been made available during the course of trial. *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905-06. This Court reviews the application along with supporting affidavits to see if it contains sufficient evidence to show this Court by clear and convincing evidence that there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence. Notably, this standard is less demanding than the test imposed by *Strickland*. *Id.*

In the present case, Appellant is not entitled to an evidentiary hearing for his ineffective assistance counsel claims which are based on non-record

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Title 22, Ch.18, App. (2017); *Coddington v. State*, 2011 OK CR 17, ¶ 89, 254 P.3d 684, 716; *Frederick v. State*, 2001 OK CR 34, ¶ 30, 37 P.3d 908, 923. We do, however, consider these particular passages from the prosecutor's argument in conjunction with Appellant's specific claim that the prosecutor referred to him as a liar during closing argument

evidence[3] because he fails to show by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence. Rule 3.11(B)(3)(b)(i), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016). The text messages attached to Appellant's affidavit reveal statements by Appellant—not Ms. Nation—concerning the date of their breakup. Moreover, defense counsel attacked Nation's credibility, and attempted to show bias, by questioning her about her on-again, off-again relationship with Appellant after his first arrest; the fact she and Appellant had finally broken up; her refusal to let Appellant see his infant son and the custody battle which ensued; and her parents' withholding of financial support when she resumed the relationship with Appellant after he made bond. An evidentiary hearing is not warranted for this issue.

Appellant's complaint that trial counsel was ineffective for failing to question A.A. about the application to revoke the suspended sentence she admitted receiving for her misdemeanor bogus check conviction also does not warrant an evidentiary hearing. Appellant ignores that defense counsel attempted to do so but the trial court disallowed the inquiry. All things considered, Appellant's application for evidentiary hearing on his ineffectiveness claims is **DENIED**.

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[3] Appellant's *Motion to Supplement Appeal Record*, in which Appellant presents the non-record evidence supporting these particular claims, comes to this Court in a manila envelope attached to his *Motion to File and Maintain Attached Pleading with Exhibits Under Seal* filed on June 21, 2016. We address the motion to seal in section VII below.

Appellant's remaining ineffectiveness claims, which are based on the existing record, also lack merit. In Proposition II, we found no error from the trial court's limitations on Appellant's cross-examination of A.A. Defense counsel was not rendered ineffective by these reasonable court-ordered limitations. In Proposition IV, we found the prosecutor's arguments constituted reasonable comment on the evidence and, thus, no plain error. Similarly, trial counsel was not ineffective for failing to make meritless objections to the prosecutor's closing argument. *Jackson v. State*, 2016 OK CR 5, ¶ 13, 371 P.3d 1120, 1123. Proposition V is denied.

VI

We recently rejected Appellant's claim that he was entitled to an instruction telling the jury he would be required to register as a convicted sex offender under Oklahoma law in case of conviction. *Reed v. State*, 2016 OK CR 10, ¶¶ 14-19, 373 P.3d 118, 122-23. Proposition VI is denied.

VII

Finally, Appellant's *Motion to File and Maintain Attached Pleading with Exhibits Under Seal*, filed with this Court on June 21, 2016 is **DENIED**. From the outset, we observe that Appellant has failed to comply with the Open Records Act's requirement that a party seeking to file protected materials place those materials in a sealed manila envelope clearly marked with the caption, case number as well as the word "CONFIDENTIAL." 51 O.S.Supp.2012, § 24A.29(A)(3). *See also Malone v. State*, No. PCD-2014-969, slip op. (Okl.Cr. Jan. 30, 2015) (unpublished) (discussing this requirement). Appellant's manila

envelope containing the Rule 3.11 application is not marked "CONFIDENTIAL" as required. Nor does the envelope itself independently bear the caption and case number. Appellant's failure to comply with Section 24A.29 means Appellant's Rule 3.11 motion was an open record from the day of its filing, subject to public inspection and copying.

We note too that Appellant cites no authority to support this request. Appellant's motion was filed before our new Rule 2.7, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (formally establishing procedures for sealing the record) took effect on November 1, 2016. Regardless, Appellant does not cite, let alone discuss, the provisions of the Open Records Act which require all court records to be considered public records unless they fall within a statutorily prescribed exception in the Act or are otherwise identified by statute as confidential. 51 O.S.Supp.2014, § 24A.30; *Nichols v. Jackson*, 2001 OK CR 35, ¶ 10, 38 P.3d 228, 231.

Turning to the merits of Appellant's request, Section 24A.29 of the Open Records Act provides that any order directing withholding or removal of pleadings from the public record shall contain "a statement that the court has determined it is necessary in the interests of justice to remove the material from the public record[.]" Section § 24A.30 provides that if confidentiality is not required by statute, the court may seal a record or portion of a record "only if a compelling privacy interest exists which outweighs the public's interest in the record."

The sum total of the information implicated by Appellant's request is contained in the seven-word statement of the venue for his affidavit, found at the upper left-hand corner of the affidavit filed in support of his Rule 3.11 motion. *See Slay v. State ex rel. Dept. of Public Safety*, 2000 OK 11, ¶ 9, 997 P.2d 160, 163. Appellant provides no explanation—and none is apparent—how his safety or privacy rights are implicated by the public filing of the argument or other materials contained within the Rule 3.11 motion which are exclusive of the statement of the venue on Appellant's affidavit. The public, by contrast, has an overriding and compelling interest in prompt and reasonable access to court records—a policy enshrined in the Open Records Act. *See Oklahoma Ass'n of Broadcasters, Inc. v. City of Norman*, 2016 OK 119, ¶ 15, 390 P.3d 689, 694. Towards that end, Section 24A.30 requires that courts "[u]tilize the least restrictive means for achieving confidentiality" when sealing court records. Taking Appellant's request as it is presented, namely, as a request to seal the entire Rule 3.11 motion, we easily find that Appellant fails to meet the standards set forth in the Open Records Act for sealing this pleading.

Appellant's scant arguments to this Court likewise do not support even a limited redaction of the statement of the venue information in Appellant's affidavit. 51 O.S.Supp.2015 § 24A.5(2); *Nichols*, 2001 OK CR 35, ¶ 15, 38 P.3d at 232. *See also* Rule 2.7(E), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017) ("Materials will not be sealed under these rules when a reasonable redaction will adequately resolve the issue."). Notably, the information in Appellant's affidavit does not name the specific place where he is

serving his sentence. Nor does Appellant specify in his motion to seal the arrangements made for Appellant's out-of-state confinement such as whether Appellant was incarcerated under a different name, his security classification, the type of facility to which Appellant is assigned or whether he is subject to some form of protective custody like solitary confinement. We simply have not been given sufficient information about Appellant's current circumstances to ascertain whether his privacy interests in redacting the county and state information from his Rule 3.11 affidavit outweigh the compelling public interest in access to the complete, unadulterated court filing.

Assuming *arguendo* one *could* ascertain the location of the out-of-state facility where he is being held based on the information in his Rule 3.11 affidavit, Appellant nonetheless fails to show how disclosure of this information would affect him. The whole point of moving Appellant to an out-of-state facility no doubt was to segregate him from inmates he may have arrested in the past *and* to house him in a geographic locale where media accounts of Appellant's crimes were virtually non-existent. Appellant fails to demonstrate how the statement of the venue information in Appellant's affidavit filed with this Court would find its way to Appellant's out-of-state location, let alone implicate his safety, such that the interests of justice would require even a limited redaction of his Rule 3.11 affidavit.

Under these circumstances, Appellant's *Motion to File and Maintain Attached Pleading with Exhibits Under Seal* is **DENIED** and the Clerk is **DIRECTED** to file Appellant's *Motion to Supplement Appeal Record.*

DECISION

The Judgments and Sentences of the district court are **AFFIRMED**. Appellant's *Motion to File and Maintain Attached Pleading With Exhibits Under Seal* is **DENIED**. The Clerk is **DIRECTED** to file Appellant's *Motion to Supplement Appeal Record*. Appellant's *Motion to Supplement Appeal Record* is also **DENIED**. 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 D. LA FORTUNE, DISTRICT JUDGE

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OPINION BY: HUDSON, J.
LUMPKIN, P.J.: CONCUR
LEWIS, V.P.J.: CONCUR
JOHNSON, J.: NOT PARTICIPATING
SMITH, J.: SPECIALLY CONCURS

SMITH, JUDGE, SPECIALLY CONCURRING:

I continue to urge that the jury be advised of the fact that upon conviction, in addition to any sentence imposed, Defendant will by law be required to register as a sex offender.