IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STEVEN ARNOLD ROGERS,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**No. F-2016-5**
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

HUDSON, JUDGE:

Appellant Steven Arnold Rogers was tried and convicted by a jury in Woodward County District Court, Case No. CF-2014-142, for two counts of Engaging in Sexual Exploitation of a Child Under 12, in violation of 21 O.S.2011, § 843.5(I). The jury recommended Rogers be sentenced to thirty-five (35) years imprisonment and a $2,500.00 fine on each count. The Honorable Justin P. Eilers, District Judge, sentenced Rogers to the jury's recommended terms of imprisonment, ordered the sentences to run consecutively, but lowered the jury's recommended fines to $1,000.00 for each count.[1] Judge Eilers further imposed various costs and fees and ordered Rogers register as a sex offender. Rogers now appeals.

Rogers now appeals and raises six propositions of error:

I. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS EVIDENCE SEIZED AS A RESULT OF THE SEARCH OF APPELLANT'S HOME;

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

II. APPELLANT WAS DENIED DUE PROCESS WHEN THE TRIAL COURT FORCED HIM TO USE A PEREMPTORY CHALLENGE TO REMOVE AN UNQUALIFIED PERSON FROM THE JURY PANEL;

III. THE TRIAL COURT ERRED IN ADMITTING PHOTOGRAPHS FOR WHICH THE UNFAIR PREJUDICIAL EFFECT SUBSTANTIALLY OUTWEIGHED THE PROBATIVE VALUE;

IV. THE TRIAL COURT ERRED WHEN IT ALLOWED THE APPELLANT TO READ A STATEMENT PURPORTEDLY WRITTEN BY HIM AND WHICH PROBATIVE VALUE DID NOT OUTWEIGH ITS PREJUDICIAL EFFECT;

V. APPELLANT WAS PREJUDICED BY INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL FAILED TO REQUEST A PRELIMINARY JACKSON V. DENNO HEARING; and

VI. THE CUMULATIVE EFFECT OF ALL THESE ERRORS DEPRIVED APPELLANT OF A FAIR AND IMPARTIAL PROCEEDING.

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 judgment and sentence should be **AFFIRMED**.

1.

Appellant did not file a pre-trial motion to suppress the evidence seized as a result of the search. Moreover, Appellant failed to specifically object to the admission of the challenged evidence on this basis at trial. *See Phillips v. State,* 1999 OK CR 38, ¶ 66, 989 P.2d 1017, 1036 ("It is the duty of counsel to aid the court in avoiding error by raising specific objections at trial, thus giving the trial court the opportunity to correct any error."). Appellant has thus waived all but plain error review. *Marshall v. State,* 2010 OK CR 8, ¶ 47, 232 P.3d

467, 478. "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. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*; *Stewart v. State*, 2016 OK CR 9, ¶ 12, 372 P.3d 508, 511.

Appellant's method of evaluating in isolation the circumstances set forth in the search warrant affidavit is contrary to this Court's totality of the circumstances approach utilized to evaluate the sufficiency of a search warrant affidavit. *Marshall*, 2010 OK CR 8, ¶ 49, 232 P.3d at 479. Utilizing the correct approach, we find the underlying facts and circumstances laid out in the affidavit, including the conversation overheard by Investigator Tanio, provided the issuing magistrate with a "substantial basis for concluding that probable cause existed" to issue the warrant. *Id.* We accordingly find no error—plain or otherwise—resulted from the trial court's admission of the evidence seized from Appellant's home. Proposition I is denied.

2.

Appellant preserved his for-cause challenge to Juror Walker by using a peremptory challenge against him and identifying Juror Logan as the juror he would have instead excused had he not been forced to remove Walker. *Eizember v. State*, 2007 OK CR 29, ¶ 36, 164 P.3d 208, 220. Walker was a retired correctional officer with the Department of Corrections. At that time,

Walker was working for the Chamber of Commerce supervising inmates on work details from 7:00 a.m. to 3:00 p.m. Walker indicated he was basically "performing the same function [he] did as a correctional officer." Consequently, given his job description, Walker should have been excused for-cause pursuant to 38 O.S.2011, § 28(D). *Rojem v. State*, 2006 OK CR 7, ¶¶ 28-31, 130 P.3d 287, 294-95.

Despite our finding of error, "this Court will not grant relief based on the improper denial of a challenge for cause unless the record affirmatively shows that the erroneous ruling reduced the number of the appellant's peremptory challenges to his prejudice, and he must demonstrate that he was forced, over objection, to keep an unacceptable juror." *Id.* 2006 OK CR 7, ¶ 37, 130 P.3d at 295 (quoting *Matthews v. State,* 2002 OK CR 16, ¶ 16, 45 P.3d 907, 915). No such prejudice is shown to have resulted in this case.

Appellant asserts Juror Logan was "unacceptable" because he claimed he had never received junk email wanting to sell him stuff that was "objectionable." From this innocuous response, Appellant summarily argues Logan was "unacceptable because the case involved images of child pornography." Appellant provides no reasoning for this vast leap in logic. Objectionable junk email was never a topic or an issue in Appellant's trial. Moreover, the entire jury pool offered a response similar to Juror Logan's when they were asked more specifically as a group whether "[a]nybody had any of the objectionable [emails] where they want to sell you different things, sex things or whatever?" Thus, Appellant fails to show how Juror Logan's response to an

immaterial issue rendered him unacceptable. Appellant's Proposition II is denied.

3.

"Photographs are admissible if their content is relevant and their probative value is not substantially outweighed by their prejudicial effect." *Davis v. State*, 2011 OK CR 29, ¶ 86, 268 P.3d 86, 113. The admission of photographs is a matter within the trial court's discretion. *Id.* This Court will not reverse the trial court's ruling absent an abuse of that discretion. *Id.* "An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue." *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. No such abuse is found to have occurred here.

Appellant argues the challenged pictures—State's Exhibits 8A-8A, 8J, 8L—were both irrelevant and unfairly prejudicial. The relevancy of the challenged photographs was born out of Appellant's trial strategy which implied Appellant's wife had put the photographs that formed the basis of the Appellant's charges on his cell phone. The eleven photographs now at issue were admitted to demonstrate that there were photographs of children on Appellant's cell phone that were not also on Appellant's wife's phone. Appellant challenges this finding of relevancy arguing that 1) there is no evidence the photographs are pictures of children; and 2) the photographs are not pornographic.

As to whether the photographs are of children, Appellant did not specifically object to the photographs on this basis thus waiving this aspect of his claim for all but plain error review. *See Marshall,* 2010 OK CR 8, ¶ 47, 232 P.3d at 478; *Phillips,* 1999 OK CR 38, ¶ 66, 989 P.2d 1017, 1036. No error, thus no plain error is found. While there is no definitive evidence—one way or the other—as to the age of the individuals in the pictures, based on the body shape, development, size and clothing of the individuals depicted in the photographs, it is reasonable to conclude these individuals were prepubescent children at the time the photographs were taken.[2]

As to the non-pornographic nature of the challenged photographs, the trial court took great care to ensure that the probative value of the photographs was not outweighed by their prejudicial effect. The eleven photographs were selected from the approximately 470 images the State initially sought to admit. Again, the selected photographs were admitted specifically to counter Appellant's trial strategy, which put at issue whether Appellant actually participated in the pornographic photographing of children under the age of 12 or was framed by his wife. While the photographs selected depict clothed children—several of them in only their underwear or a swimsuit—the photographs are nonetheless sexual in nature as they focus on the chest, crotch area and bottoms of the children. The admission of these less disturbing photographs struck a delicate balance between providing the State with the ability to refute Appellant's defense strategy while concurrently

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2 Notably, the faces of the individuals in the pictures appear to have been intentionally cropped out.

avoiding the risk of Appellant being unfairly prejudiced by the jury viewing multiple images of child pornography. Thus, the non-pornographic nature of the photographs did not render the evidence irrelevant.

Finally, we are unconvinced by Appellant's contention that the challenged photographs were unfairly prejudicial. As discussed above, the trial court took great care to ensure the evidentiary value of the selected photographs was not outweighed by their prejudicial effect. Thus, given the circumstances presented herein, Appellant fails to show the trial court abused its discretion. *See* 12 O.S.2011, § 2403; *Mitchell v. State*, 2010 OK CR 14, ¶ 71, 235 P.3d 640, 657 ("When measuring the relevancy of evidence against its prejudicial effect, the court should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value."); *Robedeaux v. State*, 1993 OK CR 57, ¶ 60, 866 P.2d 417, 432 ("The fact that evidence may arouse prejudice does not in itself require its exclusion if the evidence is otherwise relevant."). Proposition III is denied.

4.

We review the trial court's admission of Appellant's prior written statement—describing how he masturbated while watching his ex-wife molest a young girl—for an abuse of discretion. *Neloms*, 2012 OK CR 7, ¶ 25, 274 P.3d at 167. No abuse of discretion is found to have occurred.

Appellant opened the door to the use of character evidence when he testified that he did not find young girl's sexually attractive. This testimony thus invited inquiry into the veracity of his statement or assertion. *Douglas v.*

State, 1997 OK CR 79, ¶ 25, 951 P.2d 651, 663. "[R]ebuttal testimony is permitted to explain, repel, disprove, counteract or contradict facts or evidence given by the adverse party regardless of whether such evidence might have been introduced in the State's case-in-chief or whether it is somewhat cumulative." *Miller v. State*, 2013 OK CR 11, ¶ 133, 313 P.3d 934, 979 (quoting *Spencer v. State*, 1990 OK CR 49, ¶ 6, 795 P.2d 1075, 1077). There is no requirement that this impeachment evidence has to also fall within one of the exceptions listed in 12 O.S.2011, § 2404(B). *Douglas*, 1997 OK CR 79, ¶¶ 28-30, 951 P.2d at 663-64.

The challenged evidence was additionally admissible as a prior inconsistent statement. 12 O.S.2011, § 2613. Just prior to the admission of the challenged evidence, Appellant testified that it was his wife's idea to "do what [they] did" to the young victims in this case and that he had not done the "same kind of thing" with his ex-wife. Admission of Appellant's prior written statement was therefore proper to rebut this testimony, as well as his earlier testimony that he was not sexually attracted to young girls.

Thus, as Appellant voluntarily opened the door to this evidence, we find the trial court did not abuse its discretion when it allowed the State to impeach Appellant with his prior statement relating to a prior bad act. Moreover, the trial court properly instructed the jury pursuant to OUJI-CR (2d) 9-21—impeachment by prior bad acts—which clearly set forth the limited manner in which the jury could utilize this evidence. Proposition IV is denied.

5.

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).

No doubt the best practice is for a *Jackson v. Denno*[3] hearing to be held pretrial. Hindsight being 20/20, either Appellant or the State should have requested such a hearing in this matter. However, given this did not occur, Appellant now bears the burden of proving that there is a reasonable probability that, but for defense counsel's failure to request such hearing, his statements would have been suppressed and the result of his proceedings different. *Williams v. State*, 2001 OK CR 9, ¶ 111, 22 P.3d 702, 728, *as corrected* (June 21, 2001). Having reviewed any and all information contained within the record relating to the voluntariness of Appellant's statements, we find Appellant has failed to meet his burden.

Moreover, the voluntariness of Appellant's waiver ultimately was a fact question to be resolved by the jury and the trial court properly instructed the jury accordingly. *Coddington v. State*, 2006 OK CR 34, ¶ 34, 142 P.3d 437, 448. The trial court instructed the jury pursuant to OUJI-CR (2d) 9-12—Voluntary Statement by Defendant—instructing the jury, *inter alia*, that they

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3 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964).

could not consider Appellant's statements unless they determined his statements were made voluntarily. The jury, having viewed the three video clips from Appellant's video recorded interview, was amply able to evaluate Appellant's demeanor in these clips and assess the voluntariness of his statements. And, having done so, the jury's finding of guilt further evidences the improbable likelihood that the trial court would have found Appellant's statements involuntary.

Thus, as Appellant has failed to meet his burden by showing his statements would have been suppressed, Appellant's ineffectiveness of counsel claim can be disposed of on the ground of lack of prejudice. *Bland v. State*, 2000 OK CR 11, ¶ 113, 4 P.3d 702, 731. Appellant's Proposition V is denied.

6.

Upon review, we find relief is unwarranted as this is not a case where, considered together, any instance of error we have identified or assumed to exist affected the outcome of the proceedings and denied Appellant a fair trial. *See Postelle v. State*, 2011 OK CR 30, ¶ 94, 267 P.3d 114, 146; *Pavatt v. State*, 2007 OK CR 19, ¶ 85, 159 P.3d 272, 296; *Lott v. State*, 2004 OK CR 27, ¶ 167, 98 P.3d 318, 357. Proposition VII is denied.

DECISION

The Judgment and Sentence of the district court 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 WOODWARD COUNTY
THE HONORABLE JUSTIN P. EILERS, DISTRICT JUDGE

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LEWIS, V.P.J.: CONCUR