

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DWIGHT ALBERT CROSS,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2016-702

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

NOV - 2 2017

SUMMARY OPINION

PER CURIAM:

Appellant Dwight Albert Cross was tried by jury in the District Court of Tulsa County, Case No. CF-2014-5287, and convicted of Lewd or Indecent Proposal to a Child, in violation of 21 O.S.Supp.2013, § 1123. The jury assessed punishment at five years imprisonment and a \$10,000.00 fine. The Honorable Doug Drummond, District Judge, who presided at trial, sentenced accordingly and ordered two years of post-imprisonment supervision.¹ Cross appeals, raising the following issues:

- (1) whether the district court erred by failing to instruct the jury on his theory of defense of sentencing entrapment;
- (2) whether the district court erred by failing to instruct the jury on the lesser included offense of solicitation of prostitution;
- (3) whether prosecutorial misconduct denied him a fair trial;
- (4) whether the district court abused its discretion by failing to dismiss a disqualified juror; and

¹ Under 21 O.S.2011, § 13.1, Cross must serve 85% of the sentence imposed before he is eligible for parole.

(5) whether he was denied the effective assistance of counsel at trial.

We find reversal is not required and affirm the Judgment and Sentence of the district court.

1.

The district court did not abuse its discretion in refusing Cross' requested instruction on the defense of Sentencing Entrapment because the evidence was insufficient to warrant the instruction. *See Ball v. State*, 2007 OK CR 42, ¶ 29, 173 P.3d 81, 89 ("A theory of defense instruction is properly refused if there is insufficient evidence to support it.")

2.

Cross' claim—that the district court's refusal to give his requested instruction on the lesser offense/defense theory of Solicitation of Prostitution—requires no relief.

We explained instructions on a defendant's theory of defense in *Ball v.*

State:

Our law protects a defendant's right to an instruction on his theory of defense where there is evidence to support it, even if the evidence is discredited. A theory of defense instruction must embrace a defense recognized in law, which either exonerates guilt or reduces the charge to a lesser included offense. A theory of defense instruction is properly refused if there is insufficient evidence to support it. When *prima facie* evidence meeting the legal criteria for the defense is presented, an instruction should be given. The evidence may come from any source and should not be weighed by the trial court.

Ball, 2007 OK CR 42, ¶ 29, 173 P.3d at 89 (citations & footnote omitted).

It was the district court's duty to submit instructions on the crimes the evidence in every reasonable view suggested and Cross' testimony supported an instruction on Solicitation of Prostitution. *See Ball*, 2007 OK CR 42, ¶ 36, 173 P.3d at 91. The district court's refusal of Cross' requested instruction was an abuse of discretion. *See id.* The question becomes whether this instructional error requires reversal. *See Ball*, 2007 OK CR 42, ¶ 37, 173 P.3d at 91. It does not. Reversal of a criminal judgment for misdirection of the jury is disallowed unless the error "has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." 20 O.S.2011, § 3001.1.

Analysis of errors on appeal permits a broader perspective about their likely impact on the outcome at trial. *See Ball*, 2007 OK CR 42, ¶ 39, 173 P.3d at 92. Hence, we consider this instructional error in light of all the trial evidence and other instructions. *Id.* Cross' testimony was but a fleeting and contradictory fraction of the trial evidence. The remaining evidence amply proved Cross' guilt beyond a reasonable doubt. The jury instructions properly stated the presumption of innocence and the prosecution's burden to prove beyond a reasonable doubt the elements of the charged offense, including the element that Cross believed the alleged prostitute he solicited was under 16 years of age. The lesser included offense that was submitted also required a finding that the person solicited was under 16-years-old. These instructions cast upon the prosecution the burden to prove that the alleged prostitute was

underage, and in effect required the jury to implicitly pass upon Cross' theory of defense. In light of the evidence as a whole and the remaining instructions, the refused instruction on Solicitation of Prostitution would not have changed the outcome. Denial of Cross' requested instruction did not contribute to the verdict and provides no ground for reversal. This claim is denied.

3.

Reviewing Cross' prosecutorial misconduct claim for plain error only, we find none.² To be entitled to relief for plain error, an appellant must show: "(1) the existence of an actual error (i.e., deviation from a legal rule); (2) that the error is plain or obvious; and (3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding." *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. *See also Simpson*, 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d at 694, 695, 698. This Court will correct plain error only if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

This Court grants relief on a prosecutorial misconduct claim when the misconduct effectively deprived the defendant of a fair trial or a fair and reliable sentencing proceeding. *Harmon v. State*, 2011 OK CR 6, ¶ 80, 248 P.3d 918. 943. In making that determination, we evaluate the prosecutor's arguments

² Cross argues the prosecutor defined reasonable doubt, encouraged the jury to render a verdict based on fear, emotion and sympathy, and engaged in improper argument equating the jury's job with conviction and recommending conviction for Indecent Proposal rather than the lesser offense because Indecent Proposal was an 85% crime. None of the challenged remarks were met with a contemporaneous, specific objection making review of the claim for plain error only. *See Malone v. State*, 2013 OK CR 1, ¶¶ 40-41, 293 P.3d 198, 211.

within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel. *Id.* Relief is warranted only where the prosecutor's flagrant misconduct so infected the defendant's trial that it was rendered fundamentally unfair. *Jones v. State*, 2011 OK CR 13, ¶ 3, 253 P.3d 997, 998.

The challenged comments—taken individually and collectively—did not deny Cross of a fair trial in violation of due process. This claim is denied.

4.

We reject Cross' contention that the district court erred in seating Juror H. because he was a convicted felon. Cross has forfeited this claim by failing to object and review is for plain error only. *See Browning v. State*, 2006 OK CR 8, ¶¶ 8-10, 134 P.3d 816, 828-29. Under 38 O.S.Supp.2015, § 28(C)(5), convicted felons are disqualified from jury service. The challenged juror stated he was on a deferred sentence. A deferred sentence is not a conviction unless it is accelerated and the trial court pronounces judgment and sentence. *See Nesbitt v. State*, 2011 OK CR 19, ¶ 12 n.4, 255 P.3d 435, 438 n.4; *Belle v. State*, 1973 OK CR 438, ¶ 11, 516 P.2d 551, 552. The juror's deferred sentence had not become a conviction and did not disqualify him from serving as a juror. Based on the juror's answers that he would be fair and follow the law, he was not subject to removal for cause. The district court did not err in allowing the juror to serve. *See Hogan*, 2006 OK CR 19, ¶ 39, 139 P.3d 907 ("The first step in

plain error analysis is to determine whether error occurred.”). This claim should be denied.

5.

Cross contends trial counsel was ineffective for failing to object to a disqualified juror as argued and rejected in the preceding claim and for failing to object to the Amended Information, which amended the original charged crime of Attempted Lewd or Indecent Proposal to a Child to the crime of Lewd or Indecent Proposal to a Child.

Cross has not shown a reasonable probability that but for counsel’s alleged unprofessional errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. We find Cross was not denied his constitutional right to the effective assistance of counsel.

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 TULSA COUNTY
THE HONORABLE DOUG DRUMMOND, DISTRICT JUDGE**

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OPINION BY: PER CURIAM
LUMPKIN, P.J.: Concur in Results
LEWIS, V.P.J.: Concur
HUDSON, J.: Concur

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