



IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JARVIS JONES,)
Appellant,)
vs.)
THE STATE OF OKLAHOMA,)
Appellee.)

NOT FOR PUBLICATION

No. F-2016-665

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

NOV 16 2017

SUMMARY OPINION

PER CURIAM:

Jarvis Jones was tried by jury and convicted of Count I, Felony Murder in the First Degree in violation of 21 O.S.2011, § 701.7; Count III, Conspiracy to Commit a Felony (Larceny from a House) in violation of 21 O.S.2011, § 1727; and Count IV, Felony Possession of a Firearm After a Juvenile Adjudication in violation of 21 O.S.2011, § 1283, in the District Court of Oklahoma County, Case No. CF-2013-6570.1 In accordance with the jury's recommendation the Honorable Timothy R. Henderson sentenced Jones to life imprisonment and a fine of \$10,000.00 (Count I); five (5) years imprisonment and a fine of \$2,000.00 (Count III); and four (4) years imprisonment and a fine of \$5,000.00 (Count IV). Jones must serve 85% of his sentence on Count I before becoming eligible for parole consideration. Jones appeals from these convictions and sentences.

Jones raises six propositions of error in support of his appeal:

1 Count II, Attempted Robbery with a Dangerous Weapon, was dismissed at the end of the trial.

- I. The uncorroborated testimony of accomplices was legally insufficient to convict Appellant of felony murder in the first degree, therefore, the Court must reverse the conviction.
- II. The trial court committed reversible error by allowing the State to improperly bolster the testimony of Aron Gaines, Ravan and Ashlee Craig, Demarkus Long, and Justin Woody with out-of-court statements in violation of Mr. Jones's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and article II, Sections 7 and 20 of the Oklahoma Constitution.
- III. Appellant was deprived of a fair trial by the prosecutors' reliance on facts not in evidence.
- IV. Mr. Jones has been subjected to multiple punishments, which requires that the conviction for possession of a firearm must be dismissed as it violates Oklahoma's prohibition against double punishment.
- V. Mr. Jones received ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and article II, Sections 7, 9, and 20 of the Oklahoma Constitution.
- VI. The accumulation of errors deprived Mr. Jones of a fair trial and the due process of law secured to him by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and article 2, Sections 7, 19, and 20 of the Oklahoma Constitution.

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 the accomplice testimony was corroborated. Accomplice testimony must be corroborated by evidence that, standing alone, tends to connect the defendant with the commission of the offense. 22 O.S.2011, § 742; *Postelle v. State*, 2011 OK CR 30, ¶ 13, 267 P.3d 114, 126; *Pink v. State*, 2004 OK CR 37, ¶ 15, 104 P.3d 584, 590. This helps ensure that a defendant is not falsely accused by a person equally culpable "in order to seek clemency, or for motives of revenge or any other reason." *Postelle*, ¶ 13, 267 P.2d at 126. While evidence need not corroborate every material aspect of accomplice testimony, there must at least be independent evidence of one material fact tending to connect the defendant with

the commission of the crime. *Id.* The evidence in corroboration must connect the defendant with the crime itself, not just with other perpetrators, and cannot require any accomplice testimony in order to establish that link. *Id.*; *Pink*, 2004 OK CR 37, ¶ 14, 104 P.3d at 590. Accomplice testimony may be corroborated by circumstantial evidence. *Simpson v. State*, 2010 OK CR 6, ¶ 13, 230 P.3d 888, 896; *Stemple v. State*, 2000 OK CR 4, ¶ 65, 994 P.2d 61, 73. Even slight evidence which does more than raise a suspicion of guilt will be sufficient to corroborate accomplice testimony. *Cullison v. State*, 1988 OK CR 279, ¶ 9, 765 P.2d 1229, 1231. A defendant's admissions and attempts to conceal the crime may be used as corroborating evidence. *Postelle*, 2011 OK CR 30, ¶ 18, 267 P.3d at 127-28. The State presented physical evidence, witness testimony, and Jones's own statements which sufficiently corroborated material facts from the accomplice testimony, and tended to connect him with the commission of the crimes. This proposition is denied.

We find in Proposition II that the State did not improperly bolster the accomplices' testimony. Admission of evidence is within the trial court's discretion. *Myers v. State*, 2006 OK CR 12, ¶ 16, 133 P.3d 312, 322. Jones failed to object to the testimony or exhibit and we review for plain error. 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. *Barnard v. State*, 2012 OK CR 15, ¶ 13, 290 P.3d 759, 764. Prior consistent statements are admissible only where (a) there is a suggestion that the witness has been unduly influenced, or has recently fabricated his trial testimony, and (b) the prior consistent statement was made before the improper influence occurred, or the time when the witness had a motive to lie. *Myers*, 2006

OK CR 12, ¶ 16, 133 P.3d at 322; 12 O.S.2011, § 2801(B)(1)(b). The consistent statement must have been made before the start of any source of bias, interest, influence or incapacity that prompted a charge of recent fabrication or undue influence. *Tome v. United States*, 513 U.S. 150, 158, 115 S.Ct. 696, 701, 130 L.Ed.2d 574 (1995).

Through cross-examination and in argument, Jones suggested that each of the accomplices had been offered and accepted a deal for their testimony, which gave each one a recent motive to fabricate his or her testimony. In response, the prosecutor elicited evidence that each witness's testimony was consistent with statements each witness had previously made to police, before he or she had received a deal. This is an illustration of precisely the circumstances under which a prior consistent statement should be admitted. On appeal, Jones argues that the second prong of the test cannot be met because, since each witness was involved in the crime, each had a motive to lie from their very first statement. Jones was free to argue this to jurors. However, that is not the question contemplated in *Tome* and *Myers*; we rejected a similar claim in *DeLozier v. State*, 1998 OK CR 76, ¶¶ 17-18, 991 P.2d 22, 27. The legal issue for admissibility under § 2801(B)(1)(b) is whether Jones alleged at any point that the witnesses *recently* fabricated their testimony, and whether prior consistent statements predated that alleged fabrication and thus rebutted that allegation. Jones made such allegations, there were such statements, and the trial court did not abuse its discretion in admitting them. *Myers*, 2006 OK CR 12, ¶ 16, 133 P.3d at 322. There was no error and thus no plain error. This proposition is denied.

We find in Proposition III that there was no error in argument. Both parties in argument have wide latitude to fully discuss the evidence and inferences from it. *Ashton v. State*, 2017 OK CR 15, ¶ 48, 400 P.3d 887, 899. We will not grant relief unless errors in argument render a trial so fundamentally unfair that we cannot rely on the jury's verdict. *Webster v. State*, 2011 OK CR 14, ¶ 81, 252 P.3d 259, 281. During closing argument, the prosecutor played a previously admitted surveillance video for jurors and commented on what he saw. The trial court denied Jones's objection that the prosecutor was testifying, ruling that the prosecution could comment on what it believed the evidence showed. On appeal, Jones claims that the prosecutor argued facts not in evidence, since no witness testified to the contents of the video or specifically identified the people in it. On the contrary, the prosecutor was properly arguing based on inferences from the evidence. As the prosecutor's argument was reasonably based on the evidence, the trial court did not abuse its discretion in denying Jones' objection. *Ashton*, 2017 OK CR 15, ¶ 49, 400 P.3d at 899. This proposition is denied.

We find in Proposition IV that Jones was not subjected to multiple punishments. Jones was convicted in Count I of first degree felony murder, with the underlying felony of attempted robbery with a dangerous weapon. He was convicted in Count IV of possession of a firearm after a juvenile adjudication. Jones argues that these convictions violate Oklahoma's statutory provision against multiple punishment for the same crime, 21 O.S.2011, § 11. He did not raise this objection at trial and has waived all but plain error. *Barnard*, 2012 OK CR 15, ¶ 25, 290 P.3d at 767. 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. *Id.*, 2012 OK CR 15, ¶ 13, 290 P.3d at 764. Section 11 prohibits multiple punishment for a single criminal act. We focus on the relationship between the crimes, and will not find § 11 is violated where the offenses are separate and distinct, requiring dissimilar proof. *Sanders v. State*, 2015 OK CR 11, ¶ 6, 358 P.3d 280, 283. Jones argues that these two offenses constitute a single act because he used the gun to attempt to rob the householder, and that attempted robbery led to his felony murder conviction. While a judge must always review the facts of each case, a felon in possession charge (similar to Jones's charge of possession of a firearm after a juvenile adjudication) is complete as soon as the felon possesses the gun, and any other acts he commits may result in additional criminal charges without violation of § 11. *Sanders*, 2015 OK CR 11, ¶ 8, 358 P.3d at 284. There is no error, and thus no plain error. This proposition is denied.

We find in Proposition V that trial counsel was not ineffective. He 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). Jones must show he was prejudiced by counsel's acts or omissions, and we may dispose of his claim if he fails to do so. *Marshall v. State*, 2010 OK CR 8, ¶ 61, 232 P.3d 467, 481; *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. We will not second-guess strategic decisions, and consider whether counsel's judgment or

advice was completely unreasonable, bearing no relationship to a possible trial strategy. *Martinez v. State*, 2016 OK CR 3, ¶ 81, 371 P.3d 1100, 1118. Jones argues that defense counsel was ineffective in opening and closing. He first claims counsel was ineffective because he failed to make an opening statement. While defense counsel may choose to make an opening statement, he is not required to do so; this is a strategic decision. *Taylor v. State*, 2000 OK CR 6, ¶ 38, 998 P.2d 1225, 1235, *abrogated on other grounds* by *Malone v. State*, 2007 OK CR 34, 168 P.3d 185. Jones not only fails to cite specific authority for his claim, he fails to show how he was prejudiced by trial counsel's decision to forego opening statement. *Id.* Jones also argues that trial counsel failed to "marshal the evidence" in closing argument. He admits that counsel argued the theory of the defense, and reminded jurors that the accomplice testimony must be corroborated. Jones never explains what defense counsel should have done differently. He fails to show he was prejudiced by trial counsel's closing argument. As there was no prejudice from either the closing argument made by trial counsel, or trial counsel's failure to make an opening statement, we will not find counsel was ineffective.

Jones argues trial counsel should have objected to the admission of his accomplices' prior consistent statements, and other evidence supporting their testimony. We found in Proposition II that this evidence was properly admitted. As there can be no undue prejudice from the properly admitted evidence, we will not find counsel ineffective for failing to object to it. Finally, Jones claims that counsel should have presented mitigating evidence to the trial court at the formal sentencing hearing. He claims that counsel should have investigated his medical

records, which would have shown that he was mentally ill and cooperated with treatment; this, he argues, would show that he could be rehabilitated. Nothing in the record supports this claim, and Jones completely fails to show how presentation of mitigating evidence could have had any effect on the sentences imposed by the trial court. Trial counsel was not ineffective, and this proposition is denied.

In connection with this claim Jones filed a Rule 3.11(B) application for an evidentiary hearing. Rule 3.11(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017). There is a strong presumption of regularity in trial proceedings and counsel's conduct, and the application and affidavits must contain sufficient information to show by clear and convincing evidence the strong possibility that trial counsel was ineffective for failing to identify or use the evidence at issue. Rule 3.11(B)(3)(b)(i), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017). We "thoroughly review and consider Appellant's application and affidavits along with other attached non-record evidence." *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905. The Rule 3.11 standard set out above is easier for a defendant to meet than the *Strickland* standard, as a defendant must only provide clear and convincing evidence that there is a strong possibility counsel was ineffective. *Id.* at ¶ 53, 230 P.3d at 905-06. A Rule 3.11(B) motion must be accompanied by affidavits supporting the allegation of ineffective assistance of counsel. *Simpson*, 2010 OK CR 6, ¶ 53, 230 P.3d at 905. Jones attaches an affidavit from the defense investigator, stating she received Jones' medical records from Moore Counseling Center, and a copy of a psychological evaluation from that Center which was made on February 20, 2008, when Jones was thirteen years old. Jones

wholly fails to show how, even if trial counsel had found these records and presented them to the trial court, it could have made any difference in his sentence. He argues that the trial court could have run his sentences concurrently. The jury recommended the mandatory minimum life sentence on Count I, and a total of nine years on the other two counts. Jones fails to show how concurrent, rather than consecutive, sentences could have any significant effect. Jones has not shown by clear and convincing evidence the strong possibility that trial counsel was ineffective for failing to find and use this material, or for failing to call other unspecified witnesses. The Application for Evidentiary Hearing is denied.

We find in Proposition VI that no accumulated error requires relief. Where there is no error, there will be no cumulative error. *Malone v. State*, 2013 OK CR 1, ¶ 74, 293 P.3d 198, 218. This proposition is denied.

DECISION

The Judgment and Sentence of the District Court of Oklahoma County is **AFFIRMED**; the Application for Evidentiary Hearing on Sixth Amendment Claim is **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 the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE TIMOTHY R. HENDERSON, DISTRICT JUDGE

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PER CURIAM OPINION:

LUMPKIN, P.J.: CONCUR
LEWIS, V.P.J.: CONCUR
HUDSON, J.: CONCUR