IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JONATHAN RAY THOMAS,	)	NOT FOR PUBLICATION
Appellant,	)	
v.	)	Case No. F-2016-132
THE STATE OF OKLAHOMA,	)	
Appellee.	)	

SUMMARY OPINION

LEWIS, VICE-PRESIDING JUDGE:

Appellant, Jonathan Ray Thomas, was tried by jury and found guilty of Count 1, assault and battery with a deadly weapon, in violation of 21 O.S.2011, § 652; and Count 2, possession of a firearm after former conviction of a felony, in violation of 21 O.S.Supp.2014, § 1283, in the District Court of Tulsa County, Case No. CF-2015-4530. The jury sentenced Appellant to life imprisonment in Count 1 and ten (10) years imprisonment in Count 2. The Honorable William Musseman, District Judge, pronounced judgment and ordered the sentences served consecutively.[1] Mr. Thomas appeals in the following proposition of error:

1. The trial court abused its distraction [sic] allowing the admission of State's Exhibits 18 and 19 as proper impeachment evidence;

2. The trial court committed plain error when it incorrectly instructed the jury that Exhibits 18 and 19 could be used as substantive evidence of guilt;

[1]Appellant must serve 85% of the sentence in Count 1 before being eligible for consideration for parole or earned credits. 21 O.S.Supp.2014, § 13.1(5).

3. Several of the prosecutor's comments during closing argument were improper and deprived Appellant of a fair trial in violation of the Fourteenth Amendment to the United States Constitution;

4. Appellant was deprived of the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution when counsel failed to object to the sufficiency of the information.

Appellant argues in Proposition One that the trial court abused its discretion by allowing the admission of State's Exhibits 18 and 19 as impeachment evidence. We review the admission of evidence over a timely objection for abuse of discretion. An abuse of discretion is a clearly erroneous judgment, contrary to the logic and effect of the facts presented. *Neloms v. State,* 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. The admission of Appellant's statements on cross-examination to attack the credibility of his direct testimony was not an abuse of discretion, and no relief is required. *Boling v. State,* 1979 OK CR 11, ¶ 11, 589 P. 2d 1089, 1093. Proposition One is denied.

Appellant argues in Proposition Two that the trial court erred by instructing the jury to determine whether his statements were voluntary, and allowing the jury to consider his prior inconsistent statements as substantive evidence. Counsel raised no objections on these grounds below, waiving all but plain error. *Simpson v. State,* 1994 OK CR 40, ¶¶ 2, 23, 876 P.2d 690, 692-93, 698. To obtain relief, Appellant must show that a plain or obvious error affected the outcome. *Hogan v. State,* 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. The Court will correct plain error only where it seriously affects the fairness,

integrity, or public reputation of the proceeding. *Simpson*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701.

We find the instruction that the jury determine whether Appellant's statements were voluntary before considering those statements clearly benefited Appellant, and was not plainly erroneous. Though the State would concede error in the failure to instruct on the limited "impeachment" purpose for which the jury should consider prior inconsistent statements offered against Appellant on cross-examination, we find these non-hearsay admissions by a party are not subject to the rule of limited admissibility for extrajudicial, prior inconsistent statements by other witnesses. 12 O.S.2011, § 2801 (B)(2)(a); *Omalza v. State*, 1995 OK CR 80, ¶ ¶ 13, 39, 911 P.2d 286, 296, 300 (recognizing that non-hearsay statements allowed by specific provisions of the Evidence Code are admissible as substantive evidence); *Douglas v. State*, 1997 OK CR 79, ¶ 50, 951 P. 2d 651, 668 (non-hearsay admissions by a party may be admitted and "considered on the issue of guilt"). There was no plain or obvious error in the trial court's instructions. Proposition Two is denied.

Proposition Three argues that the prosecutor committed reversible error in closing argument. Because counsel did not object, our review is for plain error. We grant relief only when a prosecutor's misconduct effectively deprives the defendant of a fair trial or sentencing. *Harmon v. State*, 2011 OK CR 6, 180, 248 P.3d 918, 943. No relief is warranted here. Proposition Three is denied.

Proposition Four argues that counsel was ineffective in failing to object to the errors identified in Propositions Two and Three. Appellant must therefore demonstrate that trial counsel's performance was unreasonably deficient; and a reasonable probability that, but for the deficient performance, the outcome of the trial would have been different. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Because we find that Appellant's belated objections would have been properly overruled, Appellant has shown neither deficient performance nor prejudice. Proposition Four is without merit.

DECISION

The Judgment and Sentence 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
HONORABLE WILLIAM MUSSEMAN, DISTRICT JUDGE

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OPINION BY LEWIS, V.P.J.
LUMPKIN, P.J.: Concur in Part / Dissent in Part
HUDSON, J: Concur
KUEHN, J.: Concur in Results

LUMPKIN, V.P.J.: CONCURING IN PART/DISSENTING IN PART

I concur in affirming Appellant's convictions and sentences, however, I cannot acquiesce in the analysis of Proposition Two. A criminal defendant's statement obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), is inadmissible as substantive evidence of the defendant's guilt.

Since Appellant failed to object to the trial court's instruction, we review the trial court's instruction for plain error under the test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690. *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395. Under this test, an appellant must show an actual error, which is plain or obvious, and which affects his substantial rights. *Id.*; *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. 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.*

The State correctly concedes that Appellant has shown the existence of an actual error in the present case. After the trial court found that Appellant's otherwise voluntary statements to the police were inadmissible because of a *Miranda* violation, the trial court permitted the State to impeach Appellant with his prior statements when he testified at trial. However, the trial court then erred when it instructed the jurors that they could consider Appellant's prior statements as substantive evidence.

If we were to simply review the admissibility of the defendant's former statements under 12 O.S.2011, § 2801, we would find that they are admissible as substantive evidence of his guilt under the party's own statement exception pursuant to § 2801(B)(2)(a). However, this matter is controlled by United States Supreme Court precedent. The Supreme Court has determined that, although inadmissible in the State's case, a criminal defendant's statement obtained in violation of *Miranda* is admissible for impeachment purposes. *Harris v. New York*, 401 U.S. 222, 224–26, 91 S. Ct. 643, 645–46, 28 L. Ed. 2d 1 (1971). Since *Harris*, the Supreme Court has not expanded this rule. *Kansas v. Ventris*, 556 U.S. 586, 594, 129 S. Ct. 1841, 1847, 173 L. Ed. 2d 801 (2009); *Oregon v. Hass*, 420 U.S. 714, 723, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975). Therefore, Appellant's prior statements were solely admissible for impeachment purposes and the jury could not consider them as substantive evidence of his guilt. *See Sykes v. State*, 1977 OK CR 311, ¶ 5, 572 P.2d 247, 249 (holding defendant's prior inconsistent statements given in violation of *Miranda* were not introduced as proof of matter asserted but solely for purpose of impeachment).

The State further correctly notes that plain error did not occur because the error was harmless. The failure to give a limiting instruction on impeachment evidence is considered harmless where, as in the present case, the evidence does not form a substantial part of the State's case. *Douglas v. State*, 1997 OK CR 79, ¶ 91, 951 P.2d 651, 676; *Sykes*, 1977 OK CR 311, ¶ 7, 572 P.2d at 249. The trial court's error did not seriously affect the fairness, integrity or public reputation of the judicial proceedings or otherwise

represents a miscarriage of justice in this case. *Levering*, 2013 OK CR 19, ¶ 6, 315 P.3d at 395. Instead, the error was harmless beyond a reasonable doubt. *Simpson*, 1994 OK CR 40, ¶ 34, 876 P.2d at 701, *citing Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

KUEHN, J., CONCURRING IN RESULTS:

I agree that all Propositions should be denied, but disagree with the analysis of 12 O.S.2011, § 2801(B)(2)(a) in Proposition Two.

The trial judge correctly found Appellant's two statements to police were inadmissible. The statements were excluded because of *Miranda*[1] violations as the trial court determined that the statements were not free and voluntary. The trial court also correctly concluded that the statements could be used for impeachment purposes if the Defendant took the stand and "opened the door." However, I believe the trial court then erred by instructing the jury that, if they determined the statements were voluntary, that they could be considered as substantive evidence.

When the Appellant took the stand and testified, he was impeached in cross examination with the statements made to the police. The statements are not inconsistent statements under 12 O.S.2011, § 2801(B)(2)(a). I disagree with the majority's conclusion that they could have been admitted under the statute for substantive purposes under *Omalza v. State,* 1995 OK CR 80 ¶¶ 13, 29, 911 P.2d 286, 296, 300 (finding inconsistent statements that are made under oath are admissible as substantive evidence because of the "significant safeguards" in place under § 2801(B)(2)(a)) and *Douglas v. State,* 1997 OK CR 79, ¶ 50, 951 P.2d 651, 668 (finding that a Defendant's attempts to influence witnesses, after a specific finding by the trial court, can be admitted as substantive evidence). I believe that the situation is controlled by *Harris v.*

[1] 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

New York, 401 U.S. 222, 224 (1971), where the United States Supreme Court found that a statement excluded in the State's case-in-chief for a *Miranda* violation used on cross-examination of a Defendant can be used as impeachment evidence, but not as substantive evidence of guilt.

The majority then analyzes the Appellant's statements under 12 O.S. 2011 §2801(B)(2)(a) and finds the statements of the Appellant are also party admissions and non-hearsay. Therefore, the majority concludes the statements are also admissible and can be considered substantive evidence after the trial court and then the jury determines voluntariness. Again, I disagree. Arguably, the same "significant safeguards" can be assumed to be found in party admissions as in inconsistent statements. These safeguards lend inherent trustworthiness to the admission of hearsay or help to classify a statement as non-hearsay. "The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility." *See* Fed. R. Evid. 801(d)(2) (Advisory Comm. Notes).

Problematic, however, is that during the *Jackson v. Denno*[2] hearing the trial court found the statements were involuntary. The "significant safeguard" built into 12 O.S.2011, § 2801(B)(2)(a) is not present when a court rules the

[2] 378 U.S. 368, 84 S. Ct. 1774 (1964).

statements were involuntary. Without a safeguard, there is no inherent trustworthiness. The majority seems to mandate an additional finding that the Appellant has to show he was "abused or threatened" to find the statements involuntary. The trial court ruled the statements involuntary based on *Miranda*[3] violations, and that alone takes the statements out of the realm of substantive evidence. Therefore, they should not have been considered for anything other than the true purpose for which they were admitted, for impeachment.

Notwithstanding the decision to admit the statements as substantive evidence, I find the error does not seriously affect the fairness, integrity, or public reputation of the proceeding. The jury was able to weigh the evidence, the inconsistency of the statements and the testimony of all witness to reach a guilty verdict. As well, the Appellant's testimony regarding the events and the statements made involuntarily were not a "substantial part" of the Appellant's case. The statements at issue, even if taken as true by the jury, were not necessary for the State to prevail with the verdict of guilt.

[3] 384 U.S. 436, 86 S. Ct. 1602 (1966).