IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

GARY PATRICK CIANCIO,	)	
	)	
Appellant,	)	
v.	)	No. F-2011-568
	)	Not for Publication
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

SMITH, JUDGE:

Gary Patrick Ciancio, Jr., Appellant, was tried by jury and convicted of Child Abuse by Injury (Count I), in violation of 21 O.S.Supp.2010, § 843.5(A), in the District Court of Pittsburg County, Case No. CF-2010-401. In accord with the jury verdict, the Honorable Thomas M. Bartheld, District Judge, sentenced Ciancio to imprisonment for 25 years and a fine of $5,000.[1] The serving of this sentence is subject to the "85% Rule," under 21 O.S. Supp.2009, § 13.1(14). Ciancio is properly before this Court on direct appeal.

Ciancio raises the following propositions of error:

I. THE ADMISSION OF IMPROPER CHARACTER EVIDENCE AND EVIDENCE OF "BAD ACTS" DEPRIVED MR. CIANCIO OF THE RIGHT TO A FAIR TRIAL.

II. MR. CIANCIO FAILED TO RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT.

Ciancio was charged by Amended Information with one count of Child Abuse by Injury, under 21 O.S.Supp.2010, § 843.5(A), during the time period of September 19-22, 2010. Two specific acts of child abuse were named in the Information: (1) "burning C.D. on the hand with a cigarette lighter, causing 1st and

[1] Ciancio was also ordered to pay costs and a PSI fee of $250.

2nd degree burns," and (2) "hitting [C.D.] on the lower back, hips, and buttocks area, causing severe purple contusions and petechiae." The evidence presented at Ciancio's trial was more than sufficient to establish that Ciancio committed these acts upon C.D. and that C.D. was injured thereby.

C.D. reported to numerous persons that the severe burn on his right hand, discovered on September 22, 2010, was caused by Ciancio burning him with a cigarette lighter and that the severe bruising on his right buttock, side, and lower back, which was discovered at the same time, was caused by Ciancio spanking him with a black belt. Ciancio denied causing any of C.D.'s injuries and presented a case at trial that the observed injuries were not caused by him, *i.e.*, that the burn was caused by C.D. touching a hot pot in the kitchen and that the bruising was caused by C.D. jumping off of furniture and other things and repeatedly landing on his right side, while the family was at the lake in Eufaula the previous weekend. Nevertheless, C.D.'s consistent statements at the time, as well as his trial testimony, more than adequately established that the source of his injuries was his mother's boyfriend, Ciancio.[2] Yet Ciancio's three-day trial included substantial amounts of other evidence that was not relevant to these specific charges and that reflected very poorly on Ciancio (and also C.D.'s mother, Jones).

In Proposition I, Ciancio argues that the State was allowed to present improper and irrelevant character and "bad acts" evidence, that this evidence was unduly prejudicial, that the State did not provide adequate pre-trial notice of this evidence, and that Ciancio's jury was not given any kind of limiting instruction

[2] And the testimony of nurse practitioner Cynthia Sanford further supported this conclusion.

about how such evidence could be considered. *See* 12 O.S.2001, § 2404; 12 O.S.Supp.2003, § 2403; *Burks v. State*, 1979 OK CR 10, 594 P.2d 771, *overruled on limited grounds by Jones v. State*, 1989 OK CR 7, ¶ 8, 772 P.2d 922, 925. Since none of these challenges were raised at trial, however, this claim has been waived, and we review only for plain error.

In Proposition II, Ciancio acknowledges that "most" of the evidence challenged in Proposition I was introduced without objection from his counsel. In fact, defense counsel failed to object to *all* of the now-challenged evidence addressed herein. Hence this Court focuses its analysis on Ciancio's Proposition II ineffective assistance claim. In order to establish ineffective assistance of counsel, Ciancio must demonstrate that the performance of his counsel was deficient and unreasonable and that he was prejudiced thereby.[3] And to establish prejudice, Ciancio must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[4]

The State presented evidence to Ciancio's jury that in addition to burning C.D. with the lighter and severely bruising him by spanking him with the belt, Ciancio would punish C.D. (and his sister B.R.) by making them eat red peppers, making C.D. bite into a bar of soap, dragging C.D. out of bed and kicking him, and that Ciancio threatened to give the children "a swirly" in the bathroom. The State also presented evidence that after telling C.D. to "shut up" and making C.D. dance, Ciancio hit C.D. on the head with a paintball gun. These incidents were not alleged

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[3] *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Williams v. Taylor*, 529 U.S. 362, 390-91, 120 S.Ct. 1495, 1511-12, 146 L.Ed.2d 389 (2000).

[4] *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. And a "reasonable probability" in this context "is a probability sufficient to undermine confidence in the outcome." *Id.*

as part of the child abuse count charged against Ciancio and apparently did not injure C.D., but they certainly painted a negative picture of Ciancio and his character as a "care provider" and were unfairly prejudicial, particularly regarding Ciancio's sentence. The suggestion that Ciancio may have threatened to break down a door during a fight with Jones was likewise potentially prejudicial.[5]

The State insists—based entirely upon an affidavit written by a police officer (who did not testify) about what B.R. allegedly said in her interview with Sharon Godwin—that the various other acts of abuse presented at trial were *res gestae* to the crimes of abuse charged.[6] This Court notes, however, that even according to the affidavit, B.R. stated that she was not present when the alleged events happened, and, furthermore, that the officer's recollection of what B.R. said was not consistent with either B.R.'s trial testimony or with Godwin's account of what B.R. said during the same interview. More importantly, the officer's hearsay-on-hearsay account of what B.R. said is likewise inconsistent with C.D.'s statement to Godwin that the incident where Ciancio hit him on the head with a paintball gun occurred the day before Ciancio burned him. The affidavit is likewise inconsistent with C.D.'s repeated statement that Ciancio burned him with the lighter because he "wasn't listening"—not because he was crying. This Court will not strain to find the

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[5] Ciancio further complains that the State presented irrelevant evidence that he and Jones were unemployed and began living together shortly after they began dating; however, this Court does not find that such evidence was likely to have prejudiced Ciancio at trial.

[6] The affidavit from Officer Elijah Hass, which was attached to the Information in the case, states that on September 22, 2010, Hass "watched from the other room via closed circuit television," while Sharon Webb (*i.e.,* Sharon Godwin) interviewed both C.D. and B.R. According to Officer Hass's recollection of what B.R. said, B.R. seemed to link the events of C.D. being burned with him getting hit by the paintball gun and getting red peppers. Hass wrote: "B.R. stated that C.D. got burned because he was crying when he got hit with a paintball gun and he got hit with a paintball gun because he was crying because they were going to make him eat red peppers." However, the very next sentence of Hass's affidavit continues, "B.R. stated that she was not there when this happened."

challenged evidence to be *res gestae* to the specific criminal acts charged herein on the basis of a single, hearsay, unsubstantiated, and contrary-to-actual-evidence statement in an affidavit, when none of the evidence presented at trial suggested that the other acts of arguable abuse were at all connected to, intermingled with, or part of a chain of events with the charged acts. *See Rogers v. State*, 1995 OK CR 8, ¶ 21, 890 P.2d 959, 971 (describing evidence considered to be *res gestae*).

Perhaps most potentially prejudicial at trial (and quite unfairly so) were various references to concerns about possible sexual abuse by Ciancio—none of which were objected to by defense counsel. Sharon Godwin testified that a second forensic interview was done of C.D., this time "for sexual abuse," after "sexual abuse was brought up during the case." Although defense counsel clarified with Godwin that sexual abuse was not charged in the case against Ciancio, counsel failed to clarify with Godwin that there was apparently no evidence whatsoever that Ciancio had sexually abused C.D. (or B.R.) or even an allegation that he had done so. Hence the repeated references to potential "sexual abuse" and a "sexual abuse interview" done by Godwin were potentially quite unfairly prejudicial to Ciancio.

Later in Ciancio's trial, evidence was brought out by both the State and defense counsel that C.D. may have been sexually abused by a *previous* boyfriend of Jones'—in whose care she left her children while she was away at military school. But this evidence was also entirely irrelevant to the charges against Ciancio and seemed likely to create additional, prejudicial sympathy for the victim, C.D., for potential crimes committed against him by someone else, and may well have contributed unfairly to the sentence of 25 years given by the jury in this case.

This Court is quite disturbed by the amount of irrelevant character evidence and other improper evidence that was allowed into evidence at Ciancio's trial, which was not objected to and was sometimes further developed by Ciancio's own counsel.[7] This Court is convinced that this evidence did not impact the jury's finding of guilt against Ciancio, which was well supported by the evidence presented at trial and by the victim's consistent statements about how he was injured by Ciancio. We need not decide Ciancio's Proposition I claim regarding whether the trial court's failure to exclude this evidence (and failure to give the jury a limiting instruction on this evidence), *sua sponte*, amounted to plain error. Rather, this Court finds that defense counsel's total failure to object to this improper and potentially prejudicial evidence, as well as counsel's further development of some of this improper evidence, constituted inadequate performance of counsel and that there is a reasonable probability that this improperly admitted evidence unfairly increased the sentence that Ciancio received from the jury for his single-count conviction of Child Abuse by Injury. Consequently, this Court finds that Ciancio has established ineffective assistance of trial counsel and that his sentence of imprisonment for 25 years should be modified to imprisonment for 15 years.

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits, we find that Ciancio's conviction should be affirmed, but that his sentence should be modified to imprisonment for 15 years.

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[7] This Court is also troubled by the fact that no *Burks* notice was filed in the case, the fact that no *Burks* hearing was held, and the fact that Ciancio's jury was never instructed regarding the limited purpose(s) for which the now-challenged evidence could potentially be considered in this case.

DECISION

Ciancio's Child Abuse by Injury **CONVICTION** is **AFFIRMED**, but his **SENTENCE IS MODIFIED** to imprisonment for 15 years. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2012), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF PITTSBURG COUNTY
THE HONORABLE THOMAS M. BARTHELD, DISTRICT JUDGE

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OPINION BY: SMITH, J.

A. JOHNSON, P.J.:	CONCUR
LEWIS, V.P.J.:	CONCUR IN RESULTS
LUMPKIN, J.:	CONCUR IN PART/DISSENT IN PART
C. JOHNSON, J.:	CONCUR

LUMPKIN, JUDGE: CONCURING IN PART/DISSENTING IN PART

I concur in the Court's decision to affirm the conviction, however, I dissent to the modification of the sentence in this case.

The Opinion fails to properly apply plain error review in Proposition One. As noted in the Opinion, Appellant waived appellate review of the instant challenge by failing to timely challenge the evidence at trial. The Opinion reviews Appellant's allegations of error under the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, this Court reviews for plain error under the analysis set forth in *Hogan v. State*, 2006 OK CR 19, 139 P.3d 907.

> To be entitled to relief under the plain error doctrine, [an appellant] must prove: 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.

Murphy v. State, 2012 OK CR 8, ¶ 18, 281 P.3d 1283, 1291 (quotations and citations omitted). Only if the appellant shows all three elements will the Court review the error on appeal. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923; *Simpson v. State*, 1994 OK CR 40, ¶¶ 12, 30, 876 P.2d 690, at 695, 701.

Applying this analysis to the present case, Appellant has not shown the existence of an actual error in the majority of the complained of instances. The evidence concerning other instances in which Appellant punished C.D. and his sister was admissible under both the intent and the absence of mistake or accident exceptions to the general prohibition against other crimes evidence set

forth in 12 O.S. 2011, § 2404(B). *Cole v. State*, 2007 OK CR 27, ¶¶ 12-21, 164 P.3d 1089, 1094-95; *Lott v. State*, 2004 OK CR 27, ¶ 40, 98 P.3d 318, 334-335. In the present case, Appellant explained C.D.'s burned hand was an accident. He claimed that C.D. touched a hot pan. (Tr. I, 241-42; Tr. II, 70, 183). At trial, Appellant presented testimony that C.D. burned his hand by touching a hot pan and injured his bottom jumping on furniture and other things at the home of Appellant's mother. (Tr. I, 75; Tr. II, 187-89, 200-02, 228-29, 235-48). As the challenged evidence tended to negate Appellant's defense that the injuries were the result of an accident and tended to show that, in fact, Appellant willfully caused C.D.'s injuries, the evidence was properly admissible. *Cole*, 2007 OK CR 27, ¶¶ 12-21, 164 P.3d at 1094-95. As Appellant has not shown the existence of an actual error, plain error did not occur.

Appellant cannot be heard to complain about the admission of testimony reflecting that a previous boyfriend of C.D.'s Mother had sexually abused C.D. *Williams v. State*, 2008 OK CR 19, ¶ 45, 188 P.3d 208, 220; *Lougin v. State*, 1988 OK CR 21, ¶ 7, 749 P.2d 565, 567. Appellant first brought out this testimony during his cross-examination of the nurse practitioner and later questioned C.D.'s Mother regarding the circumstance. As such, any error in its admission would constitute invited error for which no relief is required. *Mooney v. State*, 1999 OK CR 34, ¶ 39, 990 P.2d 875, 887; *Hooper v. State*, 1997 OK CR 64, ¶ 20, 947 P.2d 1090, 1100. In addition, the testimony did not constitute other crimes evidence as it was neither evidence of Appellant's character nor proof that

Appellant was guilty of another offense. *Lott*, 2004 OK CR 27, ¶ 40, 98 P.3d at 334. As Appellant has not shown the existence of an actual error, plain error did not occur.

The Mother's testimony concerning her dating and living arrangement with Appellant, Appellant's anger issues, an instance where Appellant threatened to force his way into their bedroom, and her marriage to Appellant approximately one month after C.D. disclosed Appellant's physical abuse did not constitute improper other crimes evidence. Instead, this testimony was evidence of the Mother's bias, credibility and motivation for testifying. *Warner v. State*, 2006 OK CR 40, ¶ 30, 144 P.3d 838, 862 (finding that inquiry into a witness's bias, credibility and motivation for testifying, and bias is always relevant). The Mother repeatedly denied C.D.'s account and testified inconsistent with the testimony of both her children. The exposure of the jury to facts and inferences relating to the Mother's reliability, bias and motivation were a proper important function at trial. *Beck v. State*, 1991 OK CR 126, ¶¶ 12-13, 824 P.2d 385, 388-89. As Appellant has not shown the existence of an actual error, plain error did not occur.

Although *Burks v. State*, 1979 OK CR 10, 584 P.2d 771, requires the filing of a formal notice document advising an appellant of the State's intent to introduce other crimes or bad acts evidence, there was no error in the present case as Appellant had sufficient notice of the evidence to ensure against surprise. *Wisdom v. State*, 1996 OK CR 22, ¶¶ 32-33, 918 P.2d 384, 393-94; *Drew v. State*, 1989 OK CR 1, ¶ 22, 771 P.2d 224, 229. The majority of the

challenged evidence was listed within the Probable Cause Affidavit and the State's discovery responses, including the witnesses expected testimony, which were filed of record in the case. (O.R. 3-5, 44-48). All of the children's statements and the recordings of the forensic interviews were turned over to Appellant. (O.R. 45). The report DHS made containing all of the witnesses' statements was also provided to Appellant. (O.R. 44). Finally, some of the evidence was disclosed in the State's Motion for Intent to Use Hearsay and the hearing held upon this motion. (O.R. 50; 3-21-2011, Tr. 72-73). Because Appellant has not shown that he was surprised by the challenged evidence he has not shown the existence of an actual error. *Drew*, 1989 OK CR 1, ¶ 22, 771 P.2d at 229-30. As Appellant has not shown the existence of an actual error, plain error did not occur.

Due to the fact Appellant did not request that the trial court give a limiting instruction concerning the other crimes evidence, the trial court's omission of such an instruction does not constitute error. *Id.* 1989 OK CR 1, ¶ 23, 771 P.2d at 230 ("This Court has repeatedly held that a trial court is not required to give a limiting instruction unless one is requested."); s*ee also Anderson v. State*, 1999 OK CR 44, ¶ 12, 992 P.2d 409, 415 (finding that limiting instruction for other crime evidence is required when requested). As Appellant has not shown the existence of an actual error, plain error did not occur.

In the sole instance where Appellant has shown the existence of an actual error that is plain or obvious, Appellant has not shown that the error

affected the outcome of the proceeding. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. Sharon Godwin's testimony that a second forensic interview for sexual abuse was conducted after the forensic interview for physical abuse was held and that C.D.'s sister was given a sexual abuse examination constituted impermissible other crimes evidence and did not fall within any of exceptions set forth in § 2404B. This actual error was "quite clear and obvious despite the absence of any objection." *Simpson*, 1994 OK CR 40, ¶ 26, 876 P.2d at 699. However, Godwin's testimony did not affect the outcome of the case. The State clarified with Godwin that DHS had not asked the District Attorney's Office to prosecute for any sexual abuse. (Tr. I, 295). Appellant clarified through cross-examination of Godwin that neither her report nor the trial were about sexual abuse. (Tr. II, 53). The jury watched the recorded forensic interview of C.D. (Tr. I, 286). C.D. did not disclose any sexual abuse. (State's Ex. No. 1). To the contrary, he repeatedly denied that anyone had sexually abused him. (State's Ex. No. 1). Neither C.D. nor his sister made any mention of sexual abuse during their testimony. Their testimony as to Appellant's physical abuse of C.D. was wholly corroborated by the testimony of the nurse practitioner. Applying the third step of plain error review, Appellant has not shown that this error affected the outcome of the proceeding. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. As such, plain error did not occur in the admission of any of the challenged evidence.

Having determined that Appellant has not shown the existence of plain error, we turn to his claims of ineffective assistance of counsel in Proposition

Two. Appellant's claims of ineffective assistance are based upon counsel's failure to object to the evidence challenged in Proposition One. As discussed, the majority of this evidence was properly admitted. Therefore, Appellant has not shown that he was prejudiced by counsel's failure to challenge the evidence at trial. *Bland v. State*, 2000 OK CR 11, ¶¶ 117-18, 4 P.3d 702, 731-32 (*applying Strickland*, 466 U.S. at 698, 104 S.Ct. at 2070, 80 L.Ed.2d at 700). Appellant has not shown that there is a reasonable probability that the result of the trial would have been different had counsel objected to Godwin's testimony about the sexual abuse interview and examination. *Id.* As determined above, this evidence did not affect the outcome of the trial. Appellant has failed to establish prejudice from any of counsel's omissions. *Phillips v. State*, 1999 OK CR 38, ¶ 103, 989 P.2d 1017, 1043. As such, no relief as to his conviction or his sentence is required.