IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

ANTONIO HERMAN CERVANTES,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F 2012-1131
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LEWIS, PRESIDING JUDGE:

Antonio Herman Cervantes, Appellant, was convicted of sixty-nine counts of child sexual abuse in violation of 10 O.S.Supp.2006, § 7115(E), and one count of child physical abuse in violation of 10 O.S.Supp.2007, § 7115(A), in Oklahoma County district court case number CF-2009-6889, before the Honorable Kenneth C. Watson, District Judge.[1] The jury set punishment at forty (40) years imprisonment on each count. The trial court sentenced accordingly and ordered that the counts be grouped so that counts two through thirty-three would run concurrently with each other; counts fifty-two through seventy-two would run concurrently with each other; counts seventy-seven through eighty-nine would run concurrently with each other; and counts ninety, and ninety-seven through ninety-nine would run concurrently with each other. Those four groups of counts were ordered to run consecutively

[1] The convictions for these crimes against a child require that Cervantes serve 85% of his sentence before becoming eligible for parole. 21 O.S.Supp.2004, § 13.1(14).

with each other. Cervantes perfected an appeal to this Court and raises the following propositions of error:

1. The trial court committed reversible error by failing to give proper jury instructions at appellant's trial.

2. At least sixty-two of Mr. Cervantes' sixty-nine convictions for child sexual abuse violate constitutional prohibitions against double punishment and double jeopardy.

3. The trial court failed to act as impartial tribunal at jury trial resulting in prejudice to Mr. Cervantes.

4. Antonio Cervantes was denied his constitutional right to a speedy trial, requiring dismissal of this case.

5. Appellant's prior felony convictions were wrongly alleged and improperly proven resulting in prejudice to Mr. Cervantes.

6. The Judgment and Sentence filed herein should be corrected by an order *nunc pro tunc* to accurately reflect the verdict of the jury and the oral order of the trial court.

7. Mr. Cervantes was denied effective assistance of counsel.

8. Prosecutorial misconduct deprived Mr. Cervantes of a fair trial, created fundamental error, and resulted in an excessive sentence.

9. Consecutive service of Appellant's sentences is excessive under the facts and circumstances of his case.

10. The cumulative effect of all these errors deprived Appellant of a fair trial and warrants relief for Antonio Cervantes.

After thorough consideration of Cervantes' propositions of error and the entire record before us on appeal, including the original record, transcripts, exhibits, and briefs, we have determined that the judgment and sentence of the district court shall be affirmed. The Judgment and Sentence filed in the

original record, however, shall be corrected by order *nunc pro tunc* to reflect the correct sentencing pronouncement of the district court.

In deciding proposition one, we find that there were no objections to the instructions given to the jury, nor were specific instructions requested by Cervantes, thus this Court is limited to review for plain error only. *See Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d. 907, 923. To be entitled to relief under the plain error doctrine, an appellant must prove, first, that actual error occurred, second, which is obvious in the record, and third, the error affected his substantial rights; meaning the error affected the outcome of the proceeding; moreover, this Court will not grant relief unless the error seriously affected the fairness, integrity or public reputation of the judicial proceeding or otherwise represents a "miscarriage of justice." *Id.*

Here, the instructions regarding the separate charges, elements, burdens of proof, and verdicts, when taken as a whole, fairly and accurately state the applicable law; therefore, there is no actual error. *See Hanson v. State*, 2003 OK CR 12, ¶ 25 72 P.3d 40, 53. Cervantes has failed to meet the threshold requirement of plain error review. With regard to the instructions on sentencing issues (minimum incarceration requirements and post-incarceration supervision), we find that the failure of the trial court to instruct, *sua sponte*, on these issues did not affect the outcome of this trial, thus Cervantes has failed to show plain error occurred. Proposition one is denied.

In proposition two we find that the evidence was sufficient to show that separate acts were committed. *Gregg v. State*, 1992 OK CR 82, ¶ 27, 844 P.2d

867, 878. Acts are separate if a sufficient gap exists between each occurrence. *Id.; see Doyle v. State*, 1989 OK CR 85, 785 P.2d 317, 324; *Hepp v. State*, 1988 OK CR 8, 749 P.2d 553, 554; *Colbert v. State*, 1986 OK CR 15, 714 P.2d 209, 212 (all affirming separate offenses even though the violations occurred within minutes of one another).

In proposition three, we find that none of the comments by the trial court which forms the basis for Cervantes' proposition were met with objections during trial, thus we review for plain error only. After reviewing the comments we find that they certainly do not overcome the presumption of impartiality that every tribunal is due. *Frederick v. State*, 2001 OK CR 34, ¶ 175, 37 P.3d 908, 951; *Carter v. State*, 1994 OK CR 49, ¶ 13, 879 P.2d 1234, 1242.

In deciding proposition four, we utilize a four-part balancing test to determine whether a defendant was denied a speedy trial. We examine (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) the prejudice to the defendant in not receiving a speedy trial. *See Lott v. State*, 2004 OK CR 27, ¶ 7, 98 P.3d 318, 327, *citing Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972). This Court balances these four factors with other relevant circumstances in making a determination. *Id.*

The State concedes that the length of the delay, thirty-four months, is sufficient to trigger an examination of the remaining factors. *See Ellis v. State*, 2003 OK CR 18, ¶ 30, 76 P.3d 1131, 1136. We will, therefore, examine the reasons for the delay, the second prong in the *Barker* analysis, to determine

whether the reasons are reasonable. *See Lott*, 2004 OK CR 27, ¶ 10, 98 P.3d at 328; *see also Ellis*, 2003 OK CR 18, ¶ 48, 76 P.3d at 1139 (determining that "valid reason" or "appropriateness of the cause of the delay" or "good cause" all have essentially the same meaning and require the Court to ascertain what is causing the delay and then to ask if the cause is reasonable). The Supreme Court "places the burden on the state to provide an inculpable explanation for delays in speedy trial claims." *Jackson v. Ray*, 390 F.3d 1254, 1261 (10th Cir.2004); *citing Barker*, 407 U.S. at 531, 92 S.Ct. at 2192 ("focusing its evaluation of the delay on 'the reason the government assigns to justify the delay'"). "[E]very circuit court to address the question has held that *Barker* places the burden to explain the delay on the State." *Jackson*, 390 F.3d at 1261, fn.3.

Deliberate delay weighs heavily against the government. Neutral reasons, like negligence or crowded courts, weigh slightly in a defendant's favor, for "ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Barker*, 407 U.S. at 531, 92 S.Ct. at 2192. And a "valid reason, such as a missing witness, should serve to justify appropriate delay." *Id.; Ellis*, 2003 OK CR 18, ¶ 47, 76 P.3d at 1139.

The reasons for the delays are somewhat vague and not very well documented. No one preserved a sufficient record so that this Court can determine the specific reasons for each continuance. Continuances, however, were largely due to the necessity of obtaining or appointing different attorneys for Cervantes. First, the public defender's office was allowed to withdraw

because of a conflict and a conflict attorney was appointed. This attorney had scheduling conflicts and later became ill, which resulted in more continuances (at the request of defense counsel). No evidence exists as to whether or not Cervantes acquiesced in these continuances. Actually there is no evidence that Cervantes was present when these continuances were granted. Ultimately, another attorney was appointed and soon after the trial commenced.

The majority of the continuances were due to Cervantes' conflicts with defense counsel, defense counsel scheduling conflicts, or defense counsel illness. The State had no control over these continuances. The prosecution only requested two continuances. In looking at the entirety of the delay, it can hardly be said that the delays in this case were deliberate attempts by the State to sabotage Cervantes' rights.

Even though Cervantes, *pro se*, asserted his right to a speedy trial soon after being charged, the record is devoid of any other assertion of his rights. Other than a pro se letter to the trial court filed in December 2011 wherein he requests subpoenas be issued to witnesses, complains about his attorney and finally cites to a speedy trial right in his closing paragraph.

The final factor is the prejudice to the appellant. The presumptive prejudice arising from a lengthy delay is always a factor to be considered in applying the *Barker v. Wingo* analysis. *Doggett v. United States*, 505 U.S. 647, 655-56, 112 S.Ct. 2682, 2692-93, 120 L.Ed.2d 520 (1992). In cases of extreme delay, criminal defendants need not present specific evidence of prejudice.

Jackson, 390 F.3d at 1263, *citing Doggett*, 505 U.S. 647, 655, 112 S.Ct. 2686, 2693, 120 L.Ed.2d 520 (1992).

In *Jackson v. Ray*, the 10th Circuit considered a case involving a delay of four years and four months. The 10th Circuit held that the four and one-third-year delay was insufficient to presume prejudice occurred; consequently, Jackson was required to make a particularized showing of prejudice. *Jackson*, 390 F.3d at 1263-64 (a delay of less than six years is insufficient to trigger the presumption of prejudice rule found in *Doggett*).

The 10th Circuit considered the three interests that the speedy trial right was designed to protect when assessing whether Jackson made a particularized showing of prejudice. *Id.* at 1264. The three factors are (1) prevention of oppressive pretrial incarceration, (2) minimization of the accused's anxiety and concern, and (3) minimization of the possibility that a delay will hinder the defense. *Id.; see Barker*, 407 U.S. at 532, 92 S.Ct. at 2193. Impairment of the defense is the most important interest and the appellant bears the burden of showing prejudice. *Jackson*, 390 F.3d at 1264; *citing, United States v. Loud Hawk*, 474 U.S. 302, 315, 106 S.Ct. 648, 656, 88 L.Ed.2d 640 (1986).

Despite the lengthly delay in *Jackson*, and despite all of the factors weighing against the State, the 10th Circuit found no speedy trial violation because Jackson "failed to establish any grounds . . . to find prejudice as to any other protected interest." *Jackson*, 390 F.3d at 1267.

In this case, Cervantes has not made a showing that he was prejudiced by the delay. He does not even try to make a claim that his defense was impaired by the delay. His only claim is oppressive pre-trial incarceration and living under a cloud of suspicion for a significant period of time as prejudicial. Even so, he makes no particularized showing of how he was affected by the incarceration and asks us to assume that these two factors caused him prejudice. Nothing indicates that Cervantes suffered any prejudice at all. This Court is reluctant to find a speedy trial violation where there is absolutely no prejudice. *Id.* at 1276, *citing United States v. Brown*, 600 F.2d 248, 254 (10th Cir.1979).

In conclusion, weighing the compilation of continuances, the four factors, and the circumstances involved in this case, we find that Cervantes' speedy trial rights were not violated. We find that the first factor, the length of the delay, weighs in favor of Cervantes; the second factor, reason for the delay, is at best neutral; the third factor, assertion of the right, weighs in favor of Cervantes; and the fourth factor, prejudice to Cervantes, weighs in favor of the State. After considering all the factors, we find that Cervantes was not deprived of his speedy trial rights.

In proposition five, we find that there were no objections to the methods of proving his prior convictions; therefore, we, again, are limited to review for plain error only. Cervantes complains about portions of the documents used to prove his prior convictions which indicate that he received a suspended sentence. The documents were introduced during the first stage when

Cervantes testified. He further testified that he was on probation for previous crimes and that the probation was revoked. We can find no error in the documents showing that he received a probated sentence for previous felony convictions.

In this proposition, Cervantes also complains that three of his prior robbery convictions arose out of a single transaction. The defendant has the burden to show that the prior convictions arose out of the same transaction or occurrence. *Cooper v. State*, 1991 OK CR 26, ¶ 13, 806 P.2d 1136, 1138. Cervantes has not met this burden, thus he cannot show that the admission of separate prior convictions was error.

In proposition six, we find that the Judgment and Sentence reflects a forty (40) year sentence on count one, when in fact Cervantes was acquitted of this count. Additionally, the Judgment and Sentence reflects that counts 2-33 run together; counts 52-72 run together; counts 77-90 run together; counts 97-98 run together; and count 99 is separate; each of these separate groups run consecutively to each other.

The oral pronouncement was that counts 2-33 would run concurrently with each other; counts 52-72 would run concurrently with each other; counts 77-89 would run concurrently with each other; and counts 90, 97-99 would run concurrently with each other; then these four separate groups of counts were ordered to run consecutively with each other.

We, therefore, order that this case be remanded to correct the Judgment and Sentence to reflect the correct oral pronouncement of the sentence.

In proposition seven, we find that a claim of ineffective assistance requires that an appellant show that his attorney's actions fell below reasonable standards and that the appellant was prejudiced by the actions. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Cervantes claims he was deprived of effective assistance of counsel due to the failure to object to the jury instructions (proposition one); for failing to have the prior judgment and sentences completely redacted and for failing to object to the transactional prior convictions (proposition five); for failing to re-urge his Motion to Quash at trial; and for failing to object to prosecutorial misconduct and the introduction of prejudicial evidence (proposition eight). He further complains that counsel failed to properly claim that the multiple convictions constituted a violation of the double jeopardy clause (proposition two).

Cervantes has not shown how counsel's conduct fell below reasonable standards or how the conduct resulted in prejudice. We determined in discussing the substantive claims that either no error occurred or that Cervantes was not prejudiced by any potential error argued in the separate propositions by way of our plain error review. Cervantes, therefore, cannot claim that he was prejudiced by counsel's actions in regard to these propositions. Additionally, Cervantes neither argues that the pre-trial motion to quash has merit, nor does he support the claim, with argument or authority, that the failure to re-urge the motion at trial constitutes ineffective assistance.

Consequently, we find that Cervantes was not denied effective assistance of counsel.

In proposition eight, we review the alleged misconduct in context with the entire trial, including opening statement, the evidence, and defense counsel's corresponding arguments. *Hanson v. State*, 2009 OK CR 13, ¶ 18, 206 P.3d 1020, 1028. This Court will not reverse a trial on the allegations of prosecutorial misconduct unless an appellant is deprived of a fair trial, due to the cumulative effect of the misconduct. *Garrison v. State*, 2004 OK CR 35, ¶ 128, 103 P.3d 590, 612. In examining the allegations of misconduct, we conclude that Cervantes was not deprived of a fair trial due to any of the prosecutor's actions.

In proposition nine, we find that the sentences in this case do not shock this Court's conscience. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149. Finally, in proposition ten, we have found no individual error requiring relief; therefore there can be no error to accumulate. *Lott*, 2004 OK CR 27, ¶ 165, 98 P.2d at 357.

DECISION

The Judgment and Sentence of the district court shall be **AFFIRMED**. The case, however, is **REMANDED** to have the Judgment and Sentence corrected, by order *nunc pro tunc*, to reflect the correct sentence imposed by the trial court. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
HONORABLE KENNETH C. WATSON, DISTRICT JUDGE

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SMITH, V.P.J.: Concurs in Results
LUMPKIN, J.: Concurs
C. JOHNSON, J.: Concurs in Results
A. JOHNSON, J.: Concurs