IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MARIO LENARD PHENIX,	)	NOT FOR PUBLICATION
	)	
Appellant,	)	
	)	
v.	)	Case No. F-2012-567
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

O P I N I O N

C. JOHNSON, JUDGE:

Appellant, Mario Lenard Phenix, was convicted by a jury in Tulsa County District Court, Case No. CF-2011-13, of Count 1: First Degree Murder (21 O.S.Supp.2009, § 701.7); Count 2: Shooting with Intent to Kill (21 O.S. Supp.2007, § 652(A)), After Conviction of a Felony; and Count 3: Possession of a Firearm After Conviction of a Felony (21 O.S.Supp.2009, § 1283). On May 30, 2012, the Honorable James Caputo, District Judge, sentenced Appellant in accordance with the jury's recommendation as follows: Count 1, life imprisonment without parole; Count 2, life imprisonment; and Count 3, ten years imprisonment. The district court ordered all sentences to be served consecutively. This appeal followed.

The charges in this case stem from a domestic incident on December 31, 2010, involving Appellant, his former girlfriend Breaun Pennington, Pennington's friend Nicholas Martin, and Martin's friend Alex Shaw. Appellant fatally shot Martin and wounded Shaw using the same firearm. The State

presented evidence that Appellant was angry that Pennington had ended their brief relationship. Pennington testified that on the evening of the shooting, while she was on a date with another man, Appellant called her cell phone and threatened to kill her and her date. Later in the evening, Pennington's date dropped her off at a local club, where she spent the rest of the evening with friends.

When the club closed in the morning hours of December 31, Pennington got a ride home from Anthony Hubbert. Several other people (Martin, Shaw, and two female friends of Pennington's) were also in the car. After dropping off the other two women, Hubbert drove to Pennington's home. An unknown vehicle was parked in her driveway. Appellant exited the car and asked the men what they were doing in the company of his girlfriend. According to Shaw, Martin responded angrily, walking up very close to Appellant and yelling at him. Appellant backed away; Pennington went inside her home, while Shaw yelled at Martin to get back in the car so they could leave.

Appellant then got back in his car and positioned it to block Hubbert's exit from the cul-de-sac. Martin and Shaw got out of Hubbert's car and demanded that Appellant get out of their way. As Martin walked toward Appellant's car, Appellant, standing by the open driver's door, fired two gunshots in Martin's direction. Shaw, who was behind Martin, was shot in the arm. Martin punched Appellant, and as the two men wrestled and fell into the open passenger compartment of Appellant's car, Appellant fired several more

shots. He then pushed Martin out of his car, closed the driver's door, and sped away. Hubbert and Shaw drove Martin to a local hospital, where he later died from multiple gunshot wounds. According to Hubbert and Shaw, neither they nor Martin had any firearm in their possession that night.

Appellant was apprehended about two weeks after the shooting. In a custodial interrogation, he admitted waiting in front of Pennington's home on the night in question. His account of the initial confrontation with Martin was fairly consistent with the accounts given by Hubbert and Shaw. However, Appellant denied blocking the men's exit from the cul-de-sac, and denied that the firearm used in the shooting belonged to him. Appellant claimed that his car stalled in the street, preventing exit, and that Shaw threatened to "beat his ass and pull him out of his car." Appellant claimed that Martin and Shaw approached him, and that Martin was armed with a gun. Appellant claimed he was able to grab Martin's gun, and that he shot Martin as they wrestled around and inside the passenger compartment of Appellant's car.

Appellant did not testify at trial. With regard to Counts 1 and 2, the jury was instructed to acquit Appellant if the State did not disprove, beyond a reasonable doubt, that he acted in self-defense. Furthermore, the jury was instructed that regardless of whether it believed Appellant acted in self-defense, if it had a reasonable doubt that he was guilty of First Degree Murder, it could consider the lesser alternatives of Second Degree Murder (21 O.S.2011, § 701.8) and First Degree (Heat of Passion) Manslaughter (21 O.S.2011, §

711(1)). As evidenced by their verdict, the jury rejected the self-defense theory, as well as the lesser alternatives to First Degree Murder.

Appellant does not challenge the sufficiency of the evidence to support his convictions. He does, however, advance several claims of error which, he believes, entitle him to a new trial or sentence modification. In his first proposition, Appellant claims the trial court erred in failing to provide the jury with the option of convicting him of a lesser form of homicide: First Degree Manslaughter by Resisting Criminal Attempt, 21 O.S.2011, § 711(3). Because Appellant did not ask the trial court for this instruction, we review the court's omission to give it for plain error only. *Postelle v. State*, 2011 OK CR 30, ¶ 86, 267 P.3d 114, 144-45.

Instructions on lesser related offenses should only be given if a rational juror could have acquitted the defendant of the greater charge, and convicted him of the lesser one. *McHam v. State*, 2005 OK CR 28, ¶ 21, 126 P.3d 662, 670. Manslaughter by resisting criminal attempt is committed when a homicide is "perpetrated unnecessarily either while resisting an attempt by the person killed to commit a crime, or after such attempt shall have failed." 21 O.S.2011, § 711(3). The term "unnecessarily," as used in the statute, is equivalent to "unlawfully" or "without legal justification." *See* OUJI-CR (2d) 4-102, Committee Comments. "An 'unnecessary' killing constituting first-degree manslaughter would thus be found under circumstances where the defendant did not initiate the difficulty, yet honestly but unreasonably believed either that

he is in danger of injury, or that slaying is the only way to prevent injury." *Id.* In the version of events Appellant gave to police, he was set upon by Martin and Shaw without justification, and Martin, armed with a gun, was fatally shot after Appellant wrested that gun from him. Appellant claims that a rational juror could have concluded that by shooting Martin, he was resisting an unlawful attempt by Martin (with the help of Shaw) to assault him.

The problem with Appellant's argument is that his version of events, if believed, supported an outright acquittal and nothing less. Under Appellant's theory (in which the firearm belonged to Martin), Appellant did not use unreasonable force to resist a mere criminal assault; he used deadly force to resist a deadly assault, with a deadly weapon brought to the argument by the victim himself – and that response, if believed by the jury, would be entirely justifiable under Oklahoma law. Appellant would have been justified in using the same degree of force to repel Martin's attack, as Martin allegedly threatened to use on Appellant in the first instance. 21 O.S.2001, § 733; *Davis v. State*, 2011 OK CR 29, ¶ 95, 268 P.3d 86, 114-15.

Under the scenario Appellant advanced, his culpability was not mitigated, it was exonerated. The jury was duly instructed to acquit Appellant of homicide, if it had a reasonable doubt that he might have been in reasonable fear of death or great bodily injury.[1] We do not believe any rational juror could

[1] As we have noted, the trial court also gave the jury the option of finding Appellant guilty of Second Degree (Depraved-Mind) Murder (21 O.S.2011, § 701.8) or First Degree (Heat of

have acquitted Appellant of First Degree Murder, and instead found him guilty of the form of manslaughter advanced for the first time here. *McHam*, 2005 OK CR 28, ¶ 21, 126 P.3d at 670. The trial court did not plainly err here. Proposition 1 is denied.

In Proposition 2, Appellant claims the trial court erred in the way the trial was structured. Appellant faced three felony charges. The sentences on two of them were enhanceable with Appellant's prior felony conviction; the third (Count 1, First Degree Murder) was not. Without objection by either party, the trial court had the jury decide Appellant's guilt on Count 1 in the first stage of the trial, but the jury did not consider the appropriate sentence for First Degree Murder until after it had received evidence of Appellant's prior conviction. Ultimately, the jury imposed the maximum sentence available to them on Count 1 (life imprisonment without parole).

For many crimes in Oklahoma, the defendant's criminal history is relevant to enhance the available sentence. In that situation, the trial is usually bifurcated into a guilt stage and a punishment stage, so that evidence not normally relevant to the determination of guilt (criminal history) does not taint the jury's deliberations on that issue. *See generally* 21 O.S.2011, § 51.1; 22 O.S.2011, § 860.1.

But unless the State seeks the death penalty, the punishment options for

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Passion) Manslaughter (21 O.S.2011, § 711(1)). We express no opinion on whether either of these alternatives was supported by the evidence.

First Degree Murder are only two – life imprisonment, with or without the possibility of parole – and there is presently no statutory procedure for enhancing a non-capital, First Degree Murder sentence with prior felony convictions.[2] *McCormick v. State*, 1993 OK CR 6, ¶ 40, 845 P.2d 896, 903; *Carter v. State*, 2006 OK CR 42, ¶ 2, 147 P.3d 243, 244; 21 O.S.2011, §§ 701.7-701.10. If the defendant is charged with non-capital First Degree Murder, as well as other crimes which *are* enhanceable with prior convictions, the murder charge should be tried to completion (guilt and punishment) *before* evidence of the prior convictions is offered to enhance sentence on the other crime(s).[3] *Marshall v. State*, 2010 OK CR 8, ¶ 57, 232 P.3d 467, 480-81.

Because Appellant did not object to the procedure used at his trial, we review this claim for plain error. *Marshall*, 2010 OK CR 8, ¶ 55, 232 P.3d at 480. That is, we must consider whether there was a deviation from a legal rule, and if so, whether it is an obvious error which affected the defendant's substantial rights, such that failure to correct the error would seriously affect the "fairness, integrity or public reputation of the judicial proceedings," or

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[2] However, the Court notes that under recent amendments to the law, effective November 1, 2013, juries will be allowed to consider the defendant's prior felony convictions in aggravation of sentence for non-capital First Degree Murder. Laws 2013, SB 1036, c. 6, § 2 (to be codified at 21 O.S. § 701.10-1).

[3] In fact, the procedure used in this case was made slightly more complicated by Count 3, the firearm-possession charge, which required Appellant's prior conviction as an element of the offense. Thus, Counts 1 and 2 were tried to guilt-innocence in the first stage; in the second stage, the prior conviction was offered, Count 3 was completed as to guilt-innocence, and punishment was decided as to all three charges. *See Chapple v. State*, 1993 OK CR 38, ¶18, 866 P.2d 1213, 1217.

otherwise represent a miscarriage of justice. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923 (citation omitted); *see also Marshall*, 2010 OK CR 8, ¶ 58, 232 P.3d at 481.

The State concedes that an error occurred, but argues that it did not prejudice Appellant, given the circumstances surrounding the murder itself. We, however, are not confident that the error was harmless beyond a reasonable doubt. In the guilt phase of the trial, the prosecutor conceded that according to the testimony of the State's own witnesses, the murder victim was somewhat aggressive during the altercation with Appellant.[4] The prosecutor's punishment-stage arguments asked the jury to consider Appellant's prior conviction when assessing punishment for the murder charge.[5] We conclude

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[4] The prosecutor told the jury:

> Let's look at some of this evidence. A question for you, the only question, is whether or not the State's theory is true or Mr. Phenix was defending himself. I'm going to even bring up points that [defense counsel] didn't bring up to build the case for self-defense today because there is a lot to consider and this is an intimidating atmosphere. Ask yourselves, Alex and Nicholas, were they aggressors? Yes, undisputed. When they walked up on that car that night, they were ready to beat somebody down. Alex didn't deny it. Anthony didn't deny it. No question. We've got a problem, ladies and gentlemen. The State has a problem because its victims were five seconds away from becoming aggressors and nobody disputes that. Nobody hid that from you this week. But remember the question isn't was Nicholas an aggressor. The question isn't even was Alex an aggressor. The question was, did [Appellant] have the right to shoot two human beings. Was he the aggressor?

[5] The prosecutor told the jury:

> [W]hen you walk out of this courtroom, you know Mario Phenix. You know what he is, who he is. He's a murderer. He is a cold-blooded murderer. But to top that off, this isn't his first rodeo. He's been here before. And you ask yourself ... what is aggravating about Mario Phenix? What gets you from point A to point B? You're supposed to consider this and determine whether or not he's a convicted felon. I submit to you he's a convicted felon. What that does is when

that evidence of Appellant's prior felony conviction may have improperly influenced the jury's sentence recommendation on Count 1. *Compare Marshall*, 2010 OK CR 8, ¶ 58, 232 P.3d at 481 (bifurcation error was harmless beyond a reasonable doubt, where defendant robbed his elderly neighbor, and beat in his skull with a hammer). Accordingly, we **MODIFY** the sentence on Count 1, First Degree Murder, to life imprisonment (with the possibility of parole).

In Proposition 3, Appellant claims he was unfairly prejudiced by evidence that he committed other bad acts. Specifically, he complains about Breaun Pennington's testimony that he once pushed her against a wall, and that on the night of the shooting he called and threatened to kill her and her date. In accordance with *Burks v. State*, 1979 OK CR 10, ¶ 12, 594 P.2d 771, 774, the State gave pretrial notice that it intended to offer the prior assault on Pennington, as well as Appellant's guilty plea to physically abusing a previous girlfriend. Before trial, the prosecutor clarified that he did not, in fact, plan to offer evidence of Appellant's violence against a different girlfriend, at least not in his case in chief. The prosecutor maintained that Appellant's prior assault on Pennington, and his telephonic threat to kill her and any man she was with, were admissible as tending to show motive for the instant crimes. The trial court agreed, over defense objection.

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you have a prior conviction, you bump up.

Appellant first complains that the prosecutor withdrew the written *Burks* notice, and that in any event, that notice did not specify the State's intention to offer the telephonic threat. This claim is meritless. The pretrial colloquy shows that the prosecutor intended to withdraw only the domestic-abuse incident involving a woman other than Pennington. The *Burks* notice mentions the telephonic threat in its recitation of the facts – part of the entire chain of events on the night of the homicide – suggesting the prosecutor believed the threat was part of the *res gestae*, such that no *Burks* notice was even needed to admit it. *Williams v. State*, 1988 OK CR 75, ¶ 5, 754 P.2d 555, 556. And Appellant does not claim he was surprised by any of this evidence.

In similar prosecutions for violence in a domestic context, we have held that prior altercations between the defendant and the victim may be relevant on the issue of intent.[6] *See Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 27, 241 P.3d 214, 226, and cases cited therein. The testimony in question tended to support the State's theory that when Pennington ended her relationship with Appellant, he was willing to respond with violence. The testimony also tended to undermine Appellant's claim that the murder weapon belonged to the victim. The evidence in question was properly admitted. *Cuesta-Rodriguez*, 2010 OK CR 23, ¶ 27, 241 P.3d at 226. Proposition 3 is denied.

In Proposition 4, Appellant complains about several comments the

[6] While the trial court used the label of "motive" to describe the relevance of this evidence, the terms "motive" and "intent" were used interchangeably during the *in camera* discussion.

prosecutor made in closing argument. Most of these comments were not objected to, and we review those only for plain error. *Washington v. State*, 1999 OK CR 22, ¶ 40, 989 P.2d 960, 974. As to claims of prosecutor misconduct generally, we note that both parties are permitted considerable latitude to discuss the evidence and reasonable inferences therefrom. *Pavatt v. State*, 2007 OK CR 19, ¶ 63, 159 P.3d 272, 291. Prosecutorial misconduct will only be grounds for relief if, taken as a whole, that conduct denied the defendant a fair trial. *Warner v. State*, 2006 OK CR 40, ¶ 197, 144 P.3d 838, 891.

Appellant first complains that the prosecutor repeatedly referred to him as a "coward" in closing arguments. Because Appellant did not object to these references at the time, we review them only for plain error, and find none. The prosecutor's word choice fairly described the State's position as to how Appellant made a threat to Pennington, armed himself with a gun, waited at her home to carry out that threat, shot unarmed victims, immediately left the scene, and then hid from authorities for almost two weeks. *Cf. Malicoat v. State*, 2000 OK CR 1, ¶ 32, 992 P.2d 383, 401 (prosecutor's repeated description of the defendant as a "monster" in closing argument did not amount to plain error). We find no plain error here.

Appellant next complains that the prosecutor improperly appealed to the jurors' emotions in guilt-stage closing argument. None of these comments were objected to at the time, and we do not find them so egregious as to rise to the

level of plain error.[7] *Taylor v. State*, 2011 OK CR 8, ¶¶ 55-56, 248 P.3d 362, 379.

Finally, Appellant alleges several improprieties in the punishment-stage closing argument. He complains that in asking the jury to render a sentence of life without parole on Count 1, the prosecutor improperly sought sympathy for the homicide victim and his family; that the prosecutor misstated the law regarding the meaning of "life imprisonment without parole"; and that the prosecutor improperly asked the jury to consider his prior felony conviction as warranting a sentence of life without parole on Count 1. Because we have already found it necessary to modify the sentence on Count 1 to life imprisonment with the possibility of parole (see Proposition 2), these claims of error are moot. Proposition 4 is denied.

In Proposition 5, Appellant alleges error in the trial court's response to a question from the jury, during punishment-stage deliberations, about the

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[7] The prosecutor told the jurors they were in a unique situation because, "no less than 20 feet from where you sit, sits a murderer. Soak that in. It's rare." This comment, while melodramatic, was brief, and falls within the latitude given to both parties in their arguments to a jury. The prosecutor also made a brief reference to a highly-publicized trial in another state involving a claim of self-defense ("You've all read the news. Even George Zimmerman stood over Travon Martin's dead body after he shot him because he believed enough in his self-defense to say something"). This comment focused on a single factual aspect of the case, as it related to the issues of flight and consciousness of guilt; the prosecutor was not commenting on more substantive matters, such as legal justification for the homicide. Finally, the prosecutor's reference to "gangs" did not prejudice Appellant in any way. The prosecutor merely refuted any speculation that the *victim* was in a gang ("What evidence have you heard that [the victim] had a gun[?] ... Oh, he must be this big gang banger.... He cleans trash cans. He sweeps floors. Does that sound like Suge Knight to you?").

meaning of a sentence of "life imprisonment without parole."[8] Again, our decision to modify Appellant's sentence on Count 1 (see Proposition 2) renders this claim moot.

Finally, in Proposition 6, Appellant claims he was prejudiced by his trial counsel's deficient performance. We review such claims under the two-part test mandated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Appellant must demonstrate that counsel's performance was constitutionally deficient, and that the deficient performance prejudiced him. *Id.* As to the first part of the test, we presume that counsel's conduct fell within the wide range of reasonable professional assistance; Appellant must show there was no reasonable strategic justification for it. *Id.* at 689, 104 S.Ct. at 2065. If Appellant cannot show any prejudice from the conduct he points to, we need not evaluate whether that conduct was professionally reasonable. *Id.* at 697, 104 S.Ct. at 2069. To demonstrate prejudice, Appellant must show a reasonable probability that the outcome of the trial would have been different, but for counsel's alleged errors. *Malone v. State*, 2013 OK CR 1, ¶ 16, 293 P.3d 198, 207. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, — U.S. —, 131 S.Ct. 770, 792, 178 L.Ed.2d

[8] The jury's note asked: "Does a sentence of life without parole mean that the term of prison is capped at 45 years or will it last for the remainder of his natural life?" The trial court's response was: "A sentence of life without parole means the defendant will be imprisoned without the possibility of parole." Appellant did not object to the court's response at the time.

624 (2011).

First, Appellant claims that at trial, witness Hubbert related facts which were inconsistent with his preliminary hearing testimony, and that trial counsel should have impeached Hubbert's credibility accordingly. We fail to see any material inconsistency between Hubbert's recollections, nor do we see any material difference that a perceived inconsistency would have made in the outcome of the trial.[9]

Appellant also observes that at trial, Hubbert testified to seeing Martin throw a punch at Appellant after the first few shots were fired. At preliminary hearing, Hubbert said that after the first two shots, the two men were arguing, but he did not specifically mention Martin punching Appellant. Again, any "inconsistency" between these two accounts did not materially prejudice Appellant. First, the two accounts are not truly at odds with each other. Witnesses are usually not permitted to give long, detailed narratives; their answers usually depend on exactly what questions are asked of them. Furthermore, the version Hubbert gave at trial was arguably more helpful to Appellant's self-defense theory than the version he gave at preliminary hearing, as it tended to show Martin was not just argumentative, but physically

[9] At trial, Hubbert recalled that when Appellant first confronted Martin and the others outside Pennington's home, he said something to the effect of, "Are ya'll fucking with Breaun?" At preliminary hearing, Hubbert said he could not recall the exact words Appellant used, but he remembered Appellant's statement "was like that Breaun ... was his girlfriend." Pennington's recollection at trial was that Appellant said, "'What are ya'll doing with my girl?', and stuff like that."

aggressive toward Appellant during the altercation. Simply put, Hubbert's trial testimony corroborated the account that Appellant himself gave to police about being punched by Martin. Trial counsel thus had no reason to discredit this aspect of Hubbert's trial testimony. Appellant was not prejudiced by counsel's failure to impeach Hubbert's testimony in the way he describes. *Browning v. State*, 2006 OK CR 8, ¶ 16, 134 P.3d 816, 831-32.

At trial, defense counsel attempted to impeach witness Shaw's credibility using a perceived inconsistency between Shaw's trial testimony and his initial statement to police. Appellant now claims counsel was deficient for failing to ensure that Shaw was among the witnesses specifically identified in the jury instructions on Impeachment by Prior Inconsistent Statement. Having reviewed the record, we do not believe the witness's statements reveal an inconsistency of such gravity or materiality as would cast any doubt on the outcome of the trial.[10] *Browning, id.*

Next, Appellant faults trial counsel for not objecting to other-crimes evidence (evidence of his past physical altercations with Pennington), or at least requesting a instruction on the limited use of that evidence. Because the evidence was properly admitted (see Proposition 3), counsel could not be

[10] Although Shaw's statement to police is not made a part of this record, he apparently told them that he did not actually see a gun in Appellant's hand, as he was not looking in that direction at the time. At trial, Shaw attempted to explain that answer. He clarified that he never actually saw the gun itself, but maintained that he did see Appellant reach into his car, pull something out, and point it in Martin's direction just before the shots rang out. Neither version is consistent with Appellant's claim that he (Appellant) wrested the gun from Martin himself.

deficient for failing to object to it.[11] *Randolph v. State*, 2010 OK CR 2, ¶ 23, 231 P.2d 672, 680. While counsel did not request a limiting instruction on the use of this evidence, that omission did not rise to the level of plain error in these circumstances.[12] *Jones v. State*, 1989 OK CR 7, ¶ 10, 772 P.2d 922, 925, *overruled on other grounds, Omalza v. State*, 1995 OK CR 80, ¶ 98, 911 P.2d 286, 310.

During Appellant's police interview, the detective mentioned that he was facing a charge for firearm possession, in addition to first-degree murder. The interview was recorded and played for the jury in the guilt stage of the trial. Appellant claims this comment let the jury know about his criminal history prematurely, before the punishment stage of the trial, and that trial counsel was ineffective for failing to have the comment redacted from the recorded interview. We disagree. The detective's comment made no reference to the requirement of a prior felony conviction in general, or Appellant's criminal history in particular. The reference had no bearing on the outcome of the

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[11] Counsel filed a general motion *in limine*, but did not specify the prior incidents mentioned in the State's *Burks* notice. In any event, counsel did verbally object to the evidence at a pretrial hearing, where the incidents were ruled admissible. Counsel did not renew his objection when Pennington testified about the incidents.

[12] As is discussed in Proposition 3, Appellant's prior altercations with Pennington were admitted because they reflected on his possible motive for the shootings, and were relevant to whether he harbored an intent to kill. In that connection, the jury was properly instructed that it could consider "external circumstances" – such as "words, conduct, demeanor, motive, and all other circumstances connected with a homicidal act" – in deciding whether Appellant harbored an intent to kill. OUJI-CR 4-63.

trial.[13] *Malone*, 2013 OK CR 1, ¶ 16, 293 P.3d at 207.

Next, Appellant complains about an allusion to parole made during the punishment-stage closing argument. The allusion was made not by the prosecutor, but by defense counsel himself. The jury was led to believe that Appellant would only serve 40-60% of any sentence imposed for Possession of a Firearm, After Conviction of a Felony.[14] The jury imposed the maximum sentence for this count. Having reviewed the statement in context, we can find no sound strategic reason for it. *See Hunter v. State*, 2009 OK CR 17, ¶ 10, 208 P.3d 931, 933 ("We have long held that parties should not refer to probation and parole policies in order to influence a sentence"). There is a reasonable probability that the comment inflated the jury's sentence recommendation on Count 3. We therefore **MODIFY** the sentence on Count 3, Possession of a Firearm After Conviction of a Felony, from ten years imprisonment to seven years imprisonment.

Appellant's remaining claims of ineffective assistance are meritless. Because we have concluded that an instruction on the lesser related offense of First Degree Manslaughter by Resisting Criminal Attempt was not warranted

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[13] While it is a crime for a felon to possess a firearm, there are other situations where firearm possession is illegal, without regard to the possessor's criminal history. *See e.g.* 21 O.S.2011, § 1289.18 (possession of a sawed-off shotgun or rifle); 21 O.S.2011, § 1272 (carrying a concealed pistol without a handgun license); 21 O.S.2011, § 1289.13 (transporting a loaded firearm).

[14] "Then you consider the next charge, the Possession of [a] Firearm After Former Conviction of a Felony. If he was even given the – if you give him the – say just – cut it down and give him five years, that's half of the max on Possession After Former Conviction of a Felony because it carries up to ten years. *Even if you were to give him five years on that, that would add an additional two or three years to his sentence.*" (Emphasis added.)

(see Proposition 1), counsel was not deficient for failing to ask for it. *Cruse v. State*, 2003 OK CR 8, ¶¶ 6, 11 67 P.3d 920, 922, 923. Because we found no error, plain or otherwise, in the prosecutor's comments (see Proposition 4), trial counsel was not deficient for failing to make timely objections to them. *Hanson v. State*, 2009 OK CR 13, ¶ 39, 206 P.3d 1020, 1032. Because we have already determined that Appellant's sentence on Count 1 should be modified, his charge that trial counsel should have objected to the bifurcation error (see Proposition 2) and to the court's response to the jury's question on the meaning of "life imprisonment without parole" (see Proposition 5) are moot. *Malone v. State*, 2007 OK CR 34, ¶ 115, 168 P.3d 185, 230.

DECISION

As to Count 1, the Judgment of the district court is **AFFIRMED**, but the Sentence is **MODIFIED** to **LIFE IMPRISONMENT WITH THE POSSIBILITY OF PAROLE**. As to Count 2, the Judgment and Sentence is **AFFIRMED**. As to Count 3, the Judgment is **AFFIRMED**, but the sentence is **MODIFIED** to seven years imprisonment. 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 TULSA COUNTY
THE HONORABLE JAMES CAPUTO, DISTRICT JUDGE

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LEWIS, P.J.: CONCUR IN RESULTS
SMITH, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR IN RESULTS
A. JOHNSON, J.: CONCUR

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