IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DESHAUNTE DEVON COULTER,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2012-721**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, JUDGE:

Appellant, Deshaunte Devon Coulter, was tried by jury and convicted of Robbery with a Dangerous Weapon (21 O.S.2011, § 801), in the District Court of Wagoner County, Case Number CF-2012-45. The jury recommended as punishment imprisonment for thirty (30) years. The trial court sentenced accordingly and ordered Appellant to pay restitution in the amount of $2,300.00 in addition to costs and fees.[1] It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in this appeal:

I. Admission of other crimes evidence prejudiced the jury, deprived Mr. Coulter of his fundamental right to a fair trial, and warrants reversal of the sentence.

II. The State's DNA evidence should have been excluded because the State failed to give proper notification or turn over all of the expert's material, which prejudiced Mr. Coulter's proceedings.

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[1] Any person convicted of Robbery with a Dangerous Weapon as provided for in 21 O.S.2011, § 801 shall be required to serve not less than eighty-five percent of any sentence of imprisonment imposed prior to becoming eligible for consideration for parole. 21 O.S.2011, § 13.1(8).

III. Prosecutorial misconduct deprived Mr. Coulter of a fair trial as guaranteed by the United States and Oklahoma Constitutions and caused the jury to render an excessive sentence.

IV. Mr. Coulter's sentence is excessive.

V. The trial court failed to properly assess restitution costs, which resulted in an excessive amount being assessed against Mr. Coulter.

VI. The cumulative effect of all the errors addressed above deprived Mr. Coulter of a fair trial.

After a thorough consideration of these propositions and the entire record before us on appeal including the original records, transcripts, and briefs of the parties, we have determined that Appellant is entitled to relief as to Proposition Five, but otherwise affirm Appellant's conviction and sentence.

In Proposition One, Appellant contends that the trial court erred when it permitted the State to introduce other crimes evidence in both its case-in-chief and in rebuttal. As Appellant failed to timely challenge this testimony at trial, we find that Appellant has waived appellate review of this issue for all but plain error. *Simpson v. State*, 1994 OK CR 40, ¶¶ 11, 23, 876 P.2d 690, 694-95, 698-99; *Short v. State*, 1999 OK CR 15, ¶ 27, 980 P.2d 1081, 1094 ("When a specific objection is raised at trial, this Court will not entertain a different objection on appeal."). Therefore, we review the claim for plain error pursuant to the test 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. *See Simpson v. State*, 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d 690, 694, 695, 698; 20 O.S.2001, § 3001.1. If these elements are met, this Court will correct plain error only if

> the error "seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings" or otherwise represents a "miscarriage of justice." *Simpson*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701 (*citing United States v. Olano*, 507 U.S. 725, 736, 113 S.Ct. 1770, 1779, 123 L.Ed.2d 508 (1993); 20 O.S.2001, § 3001.1.

Id., 2006 OK CR 19, ¶ 38, 139 P.3d at 923. We first determine whether Appellant has shown the existence of an actual error. *Id.*, 2006 OK CR 19, ¶ 39, 139 P.3d at 923.

Turning to the officers' testimony in the State's case-in-chief, we find that Appellant has not shown the existence of an actual error. As neither officer made a specific reference to Appellant's involvement in other offenses or bad acts, their testimony did not constitute other crimes or bad acts evidence. *Eizember v. State*, 2007 OK CR 29, ¶ 75, 164 P.3d 208, 230; *Howell v. State*, 1994 OK CR 62, ¶ 21, 882 P.2d 1086, 1091; *Nuckols v. State*, 1984 OK CR 92, ¶ 39, 690 P.2d 463, 470-71. Giving the officers testimony its maximum probative force and the minimum prejudicial value, we find that the testimony was not substantially more prejudicial than probative. *Mayes v. State*, 1994 OK CR 44, 887 P.2d 1288, 1309-10. Therefore, we find that Appellant has not shown the existence of an actual error.

We further find that Appellant has not shown the existence of an actual error as to the State's rebuttal evidence. Neither the police dispatcher nor the jail administrator made a specific reference to Appellant's involvement in other offenses or bad acts, therefore, their testimony did not constitute other crimes or bad acts evidence. *Freeman v. State*, 1988 OK CR 192, ¶ 3, 767 P.2d 1354, 1355 (defining impermissible bad act evidence as act that carries a certain

stigma that could influence a jury); *Nuckols*, 1984 OK CR 92, ¶ 39, 690 P.2d at 470-71. Appellant cannot complain about the witnesses' testimony specifically referencing his incarceration while awaiting trial in this matter as he specifically introduced this testimony. *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. We further find that the State's rebuttal evidence was proper and its probative value was not substantially outweighed by the danger of unfair prejudice. *Luna v. State*, 1991 OK CR 86, ¶¶ 6-8, 815 P.2d 1197, 1199-1200. Therefore, we find that Appellant has not shown the existence of an actual error. Plain error did not occur. Proposition One is denied.

In Proposition Two, Appellant contends that the State violated discovery and his right to Due Process as established in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1191, 10 L.Ed.2d 215 (1963), when it failed to provide him with discovery of the DNA expert's lab notes. As Appellant failed to request discovery of the lab notes, failed to allege a discovery violation, and failed to raise a timely objection to the admission of the DNA evidence at trial, we find that Appellant has waived appellate review of the present claim for all but plain error. *Torres v. State*, 1998 OK CR 40, ¶ 18, 962 P.2d 3, 12; *Cheatham v. State*, 1995 OK CR 32, ¶ 45, 900 P.2d 414, 427 (finding that ruling on motion *in limine* is merely advisory and objection must be made at the time the evidence is sought to be introduced to properly preserve alleged error).

We review Appellant's claim for plain error pursuant to the test set forth in *Hogan* and first determine whether Appellant has shown the existence of an

actual error. *Hogan*, 2006 OK CR 19, ¶¶ 38-39, 139 P.3d at 923. We find that Appellant has not shown the existence of an actual error in the present case.

Where the State intends to use an expert as a witness at trial, the defendant is entitled to a copy of any report the expert has compiled. *Hamill v. Powers*, 2011 OK CR 26, ¶ 10, 164 P.3d 1083, 1087; 22 O.S.2011, § 2002(A)(1)(d). Generally, the State need not disclose the prosecution witnesses' work papers. *Allen v. State*, 1993 OK CR 49, ¶ 13, 862 P.2d 487, 491. The State wholly complied with § 2002(A)(1)(d), as well as the procedure for the admission of DNA evidence set forth in 22 O.S.2011, § 751.1, when it provided a copy of the Criminalist Examination to Appellant more than five (5) days prior to the preliminary hearing in the present case. We note that the District Court has the authority to intervene and modify the discovery process as unique circumstances warrant. *Hamill*, 2007 OK CR 26, ¶ 14, 164 P.3d at 1088-89 (*citing* 22 O.S.2011, § 2002(E)). However, Appellant did not make use of this procedure. He did not timely request discovery of the lab notes from the district court but, instead, sought to quash the State's use of the DNA evidence because the notes were not introduced into evidence at the preliminary hearing. Accordingly, we find that the State did not violate discovery or the provisions for the use of DNA evidence.

We further find that Appellant has not demonstrated a *Brady* violation. Appellant has neither established that the State suppressed evidence favorable to him nor has he demonstrated that the lab notes were material. *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490 (1995);

Burton v. State, 1988 OK CR 92, ¶ 5, 754 P.2d 1215, 1216. Therefore, we find that plain error did not occur. Proposition Two is denied.

In Proposition Three, Appellant claims that prosecutorial misconduct deprived him of a fundamentally fair trial. Appellant failed to challenge the prosecutor's comments at trial, thus, he has waived appellate review of these claims for all but plain error. *Romano v. State*, 1995 OK CR 74, ¶ 54, 909 P.2d 92, 115. Reviewing Appellant's claim for plain error under the test set forth in *Hogan*, we find that Appellant has not shown that an actual error occurred. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

We determined in Proposition One that neither officer testified as to the other crimes evidence that the trial court excluded in its pretrial ruling. As Appellant has not shown that the State purposefully or deliberately violated a pretrial ruling, we find that the State did not engage in prosecutorial misconduct and plain error did not occur. *Mitchell v. State*, 2006 OK CR 20, ¶¶ 89-94, 136 P.3d 671, 706-07.

We further find that the prosecutor did not engage in improper "civic duty" or "societal alarm" argument in closing argument. *Logsdon*, 2010 OK CR 7, ¶ 38, 231 P.3d at 1169; *McElmurry v. State*, 2002 OK CR 40, ¶ 151, 60 P.3d 4, 34; *McCarty v. State*, 1988 OK CR 271, ¶ 13, 765 P.2d 1215, 1220. As the prosecutor's argument was reasonably based upon the evidence and did not inform the jury that it had a duty to convict Appellant based upon the prosecutor's own personal sense of justice or seek to have the jury make an example of Appellant, the prosecutor's argument was proper. *See Warner v.*

State, 2006 OK CR 40, ¶ 190, 144 P.3d 838, 868. Accordingly, plain error did not occur. Proposition Three is denied.

In Proposition Four, Appellant contends that his sentence is excessive. We find that Appellant's sentence is within the statutory range of punishment and under all the facts and circumstances of the case is not so excessive as to shock the conscience of the Court. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149; *Freeman v. State*, 1994 OK CR 37, ¶ 38, 876 P.2d 926, 930; *Wyatt v. State*, 1988 OK CR 58, ¶¶ 12-13, 752 P.2d 1131, 1134. Proposition Four is denied.

In Proposition Five, Appellant contends that the trial court failed to follow the statutory procedures governing the assessment of restitution. Appellant did not raise the instant challenge before the trial court. Therefore, he has waived appellate review of the challenge for all but plain error. *Simpson*, 1994 OK CR 40, ¶ 11, 876 P.2d at 694. Reviewing Appellant's claim under the test set forth in *Hogan*, we find that Appellant has shown the existence of an actual error. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

At sentencing, the damage to the victim was not determined with "reasonable certainty." *Logsdon*, 2010 OK CR 7, ¶¶ 9-10, 231 P.3d at 1162; 22 O.S.2011, § 991a (A)(1)(a). The assistant district attorney did not present the "official request for restitution form" including all invoices, bills, receipts, and other evidence of injury, loss of earnings and out-of-pocket loss as required by 22 O.S.2011, § 991f(E)(3). The assistant district attorney did not otherwise provide any evidence as to the amount of the victim's actual loss at sentencing.

The record is silent concerning whether the victim had received compensation from other sources. *Id.*; 22 O.S.2011, § 991f(F). Although there was testimony at trial concerning the amount of cash that Appellant took, it appears that the trial court failed to consider the cash that was recovered during the investigation of the offense and returned to the store.

As the State failed to present any evidence at Appellant's sentencing hearing concerning the actual financial detriment suffered by the victim, we find that this error is also plain or obvious from the record. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. Because the actual financial detriment suffered by the victim was not determined, we further find that the error affected the outcome of the proceeding and seriously affected the fairness, integrity or public reputation of the judicial proceeding. *Id.*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923 (*citing* 20 O.S.2001, § 3001.1). Accordingly, we find that plain error occurred. The district court's restitution order is vacated and the district court is directed to conduct new proceedings to determine a proper restitution amount.

As to Proposition Six, we find Appellant was not denied a fair trial by cumulative error. *Ashinsky v. State*, 1989 OK CR 59, ¶ 31, 780 P.2d 201, 209; *Bechtel v. State*, 1987 OK CR 126, 738 P.2d 559, 561. Proposition Six is denied.

DECISION

The judgment and sentence is hereby **AFFIRMED.** The District Court's restitution order is **VACATED**, and the case is **REMANDED** on the issue of the

victims' loss, for a proper determination in accordance with this opinion. 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 WAGONER COUNTY
THE HONORABLE DARRELL G. SHEPHERD, DISTRICT JUDGE

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SMITH, V.P.J..: CONCUR
C. JOHNSON, J.: CONCUR
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