IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ANTONIO CATALINO MYRIE,	]	**NOT FOR PUBLICATION**
	]	
Appellant,	]	
	]	
v.	]	Case No. F-2013-137
	]	
THE STATE OF OKLAHOMA,	]	
	]	
Appellee.	]	

SUMMARY OPINION

LEWIS, PRESIDING JUDGE:

Antonio Catalino Myrie, Appellant, was tried by jury and found guilty of burglary in the second degree, in violation of 21 O.S.2001, § 1435, in the District Court of Tulsa County, Case No. CF-2008-6224.[1] The jury sentenced Appellant to thirty-five (35) years imprisonment and a $10,000.00 fine. The Honorable William Kellough, District Judge, sentenced Appellant accordingly. Mr. Myrie appeals in the following propositions of error:

1. The trial court abused its discretion in denying Appellant's motion to suppress the State's DNA evidence. This error denied Mr. Myrie his right to a fair trial and warrants relief;

2. The trial court's denial of Appellant's motion for a continuance in the instant case constitutes an abuse of discretion and reversible error;

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[1] Appellant was acquitted of Count 1, first degree arson. This Court reversed Appellant's convictions from the first trial, where he was found guilty of both arson and burglary.

3. The trial court's failure to declare mistrial sua sponte in the instant case constitutes an abuse of discretion and reversible error;

4. The State's introduction of inadmissible hearsay denied Mr. Myrie his right to a fair trial and warrants relief;

5. The $10,000 fine assessed against Mr. Myrie was the result of an erroneous jury instruction. Therefore the Court should vacate or favorably modify the fine;

6. Prosecutorial misconduct constituted fundamental error and deprived Mr. Myrie of a fair penalty phase of trial;

7. Appellant's 35-year sentence is excessive and should shock the conscience of this Court. Thus, this Court should grant relief to Mr. Myrie in the form of a favorable sentence modification;

8. The cumulative effect of all these errors deprived Mr. Myrie of a fair trial and warrants relief.

Propositions One, Two, and Three raise related challenges to the trial court's refusal to: (1) suppress the State's DNA evidence; (2) grant Appellant a continuance to re-test certain DNA evidence originally believed to be lost; and (3) declare a mistrial so the DNA evidence, discovered just before trial, could be re-tested. We review the trial court's decisions to admit or exclude evidence and grant or deny a continuance for abuse of discretion. *Hancock v. State*, 2007 OK CR 9, ¶ 72, 155 P.3d 796, 813; *Douglas v. State*, 1997 OK CR 79, ¶ 56, 951 P.2d 651, 669. Appellant made no request for a mistrial, limiting our review of Proposition Three to plain error. *Simpson v. State*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 692.

An abuse of discretion is a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *C.L.F. v. State*, 1999 OK CR 12, ¶ 5, 989 P.2d 945, 946. Appellant has not shown that the trial court's denial of his motions to suppress the DNA evidence or delay the trial was clearly erroneous, or that he suffered any prejudice from the denial of this chance to further test the DNA. The jury's acquittal of the charge of setting a fire inside the building indicates it had a reasonable doubt that Appellant entered the building; and convicted him instead on evidence that he drove an accomplice to the scene intending to aid and abet the burglary. A new DNA test would not alter these facts, or make an acquittal of burglary reasonably probable even with a favorable DNA test, which is purely speculation. *Rojem v. State*, 2006 OK CR 7, ¶¶ 25-26, 130 P.3d 287, 293-94 (finding no prejudice where further DNA testing would not produce exculpatory result and outcome of further testing was speculative). Propositions One, Two, and Three are denied.

In Proposition Four, Appellant argues that the trial court admitted improper hearsay testimony identifying Appellant's friend, "Ton" Ramon, as a former employee of the Name Brand Clothing Store; a fact which, along with Appellant's statements, was incriminating. We review the admission of this evidence for abuse of discretion. Appellant did not object to earlier testimony connecting Ramon to Name Brand Clothing, and the challenged testimony, if hearsay, was merely cumulative. Proposition Four is denied.

In Proposition Five, Appellant argues that the trial court erred by instructing the jury that the punishment for burglary, after two or more prior convictions, was "imprisonment in the State penitentiary for a term of from six years to life *and* a fine of up to $10,000." Because counsel failed to object to the instructions, we review only for plain error. To obtain relief for plain error, a defendant must show: (1) an actual error; (2) that is plain or obvious; (3) affected the outcome of the proceeding. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. The State agrees that this instruction indicated a fine was mandatory when the fine was optional, resulting in plain error. We have consistently vacated the fine under these circumstances in recent unpublished decisions, and will do so here. Proposition Five is granted.

Appellant's Proposition Six argues that prosecutorial misconduct denied a fair penalty phase of trial. Counsel failed to object to the alleged instances of misconduct, waiving all but plain error, as defined above. *Simpson v. State*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 693. The decision to correct plain error lies within the sound discretion of the Court, to be exercised only where the error seriously affects the fairness, integrity or public reputation of judicial proceedings. *Id.*, 1994 OK CR 40, ¶ 30, 876 P.2d at 700-701.

Without objection, the State presented evidence of seven (7) prior felony convictions dated between 1999 and 2005, with sentences totaling approximately twenty-nine (29) years. Three of the State's exhibits specifically referred to suspended sentences. The prosecutor also referenced the number

and length of these prior sentences in closing argument, and without explicit mention of probation or parole, made several references to Appellant being released before the expiration of those sentences. We condemned this type of evidence and argument as plain error in very similar circumstances in *Hunter v. State*, 2009 OK CR 17, 208 P.3d 931.

The State concedes that the un-redacted exhibits and the prosecutor's comments run afoul of *Hunter*, but argues no relief is warranted. We agree. Evidence of Appellant's seven (7) prior convictions in the decade preceding his arrest for this crime, including a ten (10) year prison sentence marked "all time in custody" received in 2005, made it obvious that he had not served his entire sentences before committing a new crime. We find the number and type of convictions sustained, rather than improper emphasis on probation or parole policy as such, explain the jury's thirty-five (35) year sentence, where the maximum sentence was life imprisonment. Because the sentence was not unfairly increased by references to probation or parole policy, we conclude the errors did not seriously affect "the fairness, integrity or public reputation of judicial proceedings." *Simpson*, 1994 OK CR 40, ¶ 30, 876 P.2d at 700-701. Proposition Six is therefore denied.

In Proposition Seven, Appellant argues that his thirty-five (35) year sentence is shocking to the conscience. We find the sentence is within the statutory range of punishment and reasonable in light of Appellant's prior criminal history. No relief is warranted. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34

P.3d 148, 149 ("shock the conscience" is appropriate standard for review of excessiveness of sentence).

In Propositon Eight, Appellant seeks relief due to cumulative error. We vacated the fine imposed under an improper instruction, and found no relief was warranted for the violations of *Hunter v. State*. We find no accumulation of error unfairly prejudiced Appellant's trial or sentencing. *Parker v. State*, 2009 OK CR 23, ¶ 28, 216 P.3d 841, 849. This proposition is denied.

DECISION

The Judgment and Sentence of the District Court of Tulsa County of thirty-five (35) years imprisonment is **AFFIRMED.** The fine of $10,000.00 is **VACATED.** Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2014), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE WILLIAM C. KELLOUGH, DISTRICT JUDGE

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OPINION BY LEWIS, P.J.
SMITH, V.P.J.: Concurring in Part/Dissenting in Part
LUMPKIN, J.: Concurs
C. JOHNSON, J.: Concurring in Part/Dissenting in Part
A. JOHNSON, J.: Concurs

SMITH, V.P.J., CONCURRING IN PART AND DISSENTING IN PART:

I agree that Myrie's conviction should be affirmed, and that the fine imposed should be vacated. I disagree with the majority's conclusion in Proposition VI. The majority admits that exhibits were erroneously admitted which included information on Myrie's previous suspended sentences. In and of itself, this error might be harmless. Merely listing the terms of imprisonment, including suspended sentences, on a Judgment and Sentence for a prior offense will not require relief. *Mathis v. State*, 2012 OK CR 1, ¶ 31, 271 P.3d 67, 78. However, the prosecutor exacerbated this error by, as the majority admits, referring to the number and specific length of the prior sentences in closing argument. The prosecutor also told jurors that Myrie was "clearly out, committing more crimes, within a year", that he was "out again, picked up two more", that he "managed to stay out of prison for three years", and that he "managed to get out, back on the streets". The prosecutor also stated, "Total number of years in sentence this defendant has received since his 18th birthday, 29 years. Total number of years in 2008 that the defendant has been 18, ten years. He managed to pick up 29 years of convictions in seven separate cases before he had been 18 for ten years." The prosecutor then argued Myrie had not learned his lesson, needed "a stiff penalty and punishment, and that's what you're here for today."

The majority admits, "We condemned this type of evidence and argument as plain error in very similar circumstances in *Hunter v. State*, 2009 OK CR 17, 108 P.3d 931." [Slip Op. at 5] In fact, we condemned precisely this type of

evidence and argument. The majority apparently distinguishes the improper argument in this case because the prosecutor did not actually say the words "suspended sentence" or "probation". *Hunter* did not create a category of magic words which must not be uttered; nor does it permit unmistakable improper inferences and references which do not use those magic words. In holding that parties should not refer to probation and parole policies to influence a sentence, *Hunter* noted, "in context, the entire argument shows the prosecutor urged jurors to sentence Hunter on the basis of improper as well as legitimate concerns." *Hunter*, 2009 OK CR 17, ¶ 10, 108 P.3d at 933-34. That is exactly what occurred here.

Plain error is an actual error, that is plain or obvious, and that affects a defendant's substantial rights, affecting the outcome of the trial. *Barnard v. State*, 2012 OK CR 15, ¶ 13, 290 P.3d 759, 764. Myrie had a right to have his sentence determined free from improper sentencing influences. I cannot find that the admission of information about Myrie's suspended sentences, coupled with the highly improper argument here, had no effect on his sentencing. Although the State requested a sentence of thirty years, the jury recommended thirty-five. This is not only greater than the number requested by the prosecutor, it is almost six times the minimum sentence. Taking into account his prior convictions, I would modify Myrie's sentence to twenty (20) years.

I am authorized to state that Judge Charles Johnson joins in this concurring in part and dissenting in part opinion.