IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

AARON M. HOLMES,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2013-668**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, JUDGE:

Appellant, Aaron M. Holmes, was tried by jury and convicted of Possessing A Firearm After Felony Conviction (Count 3) (21 O.S.Supp.2009, § 1283), After Former Conviction of Two or More Felonies in the District Court of Craig County, Case Number CF-2011-152. The jury recommended punishment as life imprisonment and a $10,000.00 fine. The trial court sentenced accordingly.[1] It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in this appeal:

I. The prosecutor erred by instructing the jurors to consider evidence from the first stage of the trial.

II. Ineffective assistance of counsel deprived Appellant of a fair trial.

III. Information regarding time served on prior charges unfairly influenced the jury to render an excessive sentence.

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[1] The jury acquitted Appellant of the offenses of Robbery With a Firearm (Count 1) (21 O.S.2001, § 801) and Assault and Battery With a Dangerous Weapon (Count 2) (21 O.S.Supp.2006, § 645).

IV. The sentence was excessive.

V. Cumulative error deprived Appellant 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 Three and modify his sentence.

In Proposition One, Appellant contends that the prosecutor misled the jury regarding its consideration of the first stage evidence in the second and third stages of the trial. As Appellant failed to raise this challenge before the trial court, we find that he has waived appellate review of the claim for all but plain error. *Malone v. State*, 2013 OK CR 1, ¶ 40, 293 P.2d 198, 211. We review Appellant's 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.

Hogan, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

We find that Appellant has not shown the existence of an actual error in the present case. *Malone*, 2013 OK CR 1, ¶ 42, 293 P.2d at 212. Although the

jury acquitted Appellant of the offenses which did not require proof of a prior felony conviction in the first stage of the trial, the prosecutor properly reincorporated or resubmitted the first stage evidence during the second and third stages of the trial. *See Taylor v. State*, 2011 OK CR 8, ¶ 18, 248 P.3d 362, 370; *Stout v. State*, 1984 OK CR 94, 693 P.2d 617, 627; *State v. Chatman*, 1983 OK CR 146, ¶ 6, 671 P.2d 56, 57. The record reveals that the prosecutor did not explicitly state or impliedly suggest that the jurors could consider the first stage evidence that solely focused on the acquitted offenses. To the contrary, the language that the prosecutor actually used limited the jury's consideration of the first stage evidence in the later stages of the trial.[2] Accordingly, we find that the prosecutor did not mislead the jury. *Florez v. State*, 2010 OK CR 21, ¶ 6, 239 P.3d 156, 158; *Langley v. State*, 1991 OK CR 66, ¶ 24, 813 P.2d 526, 531. Plain error did not occur. Proposition One is denied.

In Proposition Three, Appellant contends that the prosecutor improperly told the jurors about his prior suspended sentences. As Appellant failed to raise this challenge before the trial court, we find that he has waived appellate review of the issue for all but plain error. *Hunter v. State*, 2009 OK CR 17, ¶ 8, 208 P.3d 931, 933. Reviewing this claim pursuant to 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. The longstanding rule is that the parties are not to encourage jurors to speculate about probation, pardon or

[2] We commend the prosecutor for his efforts to ensure Appellant's right to a fundamentally fair trial as to this instance.

parole policies. *Florez*, 2010 OK CR 21, ¶ 4, 239 P.3d at 157; *Hunter*, 2009 OK CR 17, ¶ 10, 208 P.3d at 933; *Anderson v. State*, 2006 OK CR 6, ¶ 11, 130 P.3d 273, 278. Although it does not constitute plain error for the State to introduce a judgment and sentence which indicates that the defendant received a suspended sentence (*Camp v. State*, 1983 OK CR 74, ¶ 3, 664 P.2d 1052, 1053-54), this Court has found that it is plain error for the prosecutor to read an Information which explicitly tells the jurors that the defendant has received suspended sentences and then call the jury's attention to the suspended sentences while discussing punishment in closing argument. *Hunter*, 2009 OK CR 17, ¶ 9-10, 239 P.3d at 933-34. In the present case, each of these circumstances occurred. Therefore, we find that error occurred.

As to the second step of plain error review, we find that the error asserted was plain or obvious. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. The error in the present case was quite clear or obvious despite the absence of any objection based upon the prosecutor's repeated, unmistakable references to Appellant's suspended sentences. *Simpson*, 1994 OK CR 40, ¶ 26, 876 P.2d at 699.

Turning to the third step of plain error, we find that the error in the present case affected Appellant's substantial rights and seriously affected the fairness, integrity or public reputation of the trial. *Id.*, 1994 OK CR 40, ¶¶ 24-25, 30, 876 P.2d at 699, 701. As the prosecutor used the fact of Appellant's suspended sentence to influence the jury as to punishment we find that the

error affected Appellant's substantial rights and seriously affected the fairness, integrity or public reputation of the trial.

Having determined that plain error occurred, we must determine whether said error was harmless. *Id.*, 1994 OK CR 40, ¶¶ 19-20, 876 P.2d at 698 (reversal is not warranted for plain error if the error was harmless.). As the jury recommended the maximum punishment for the offense, we cannot say that we have no grave doubt that the error had a substantial influence on the outcome. *Id.*, 1994 OK CR 40, at ¶ 37, 876 P.2d at 702. We find that modification of Appellant's sentence to imprisonment for thirty (30) years is appropriate relief. *Hunter*, 2009 OK CR 17, ¶ 11, 239 P.3d at 934; *Scott v. State*, 1991 OK CR 31, ¶ 14, 808 P.3d 73, 77.

In Proposition Two, Appellant contends that he was denied his right to effective assistance of counsel because counsel failed to object to the prosecutor's actions challenged in Propositions One and Three. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). We determined in Proposition One that plain error had not occurred. Accordingly, we find that counsel's failure to raise this challenge at trial did not amount to ineffective assistance. *Glossip v. State*, 2007 OK CR 12, ¶ 112, 157 P.3d 143, 161; *Ball v. State*, 2007 OK CR 42, ¶ 60, 173 P.3d 81, 96; *Wood v. State*, 2007 OK CR 17, ¶ 37, 158 P.3d 467, 479. Our determination in Proposition Three that the prosecutor's comments constituted plain error requiring modification of Appellant's sentence renders his claim of ineffective assistance of counsel based upon this same error moot.

Appellant further contends that trial counsel was ineffective for failing to establish that one of the felony convictions the State used to enhance his punishment arose from the same transaction or occurrence as the felony conviction the State used as the predicate for his conviction.[3] *See Chapple v. State*, 1993 OK CR 38, ¶ 17, 866 P.2d 1213, 1217. Simultaneous with the filing of his brief, Appellant filed his Application for An Evidentiary Hearing pursuant to Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014), and subsequently filed his Motion to Supplement Application for Evidentiary Hearing. Our determination in Proposition Three that plain error requires modification of Appellant's sentence renders this claim of ineffective assistance, his Application and his Motion moot.[4] Proposition Two is denied.

As to Proposition Four, we find that Appellant's excessive sentence claim is moot. In Proposition Five, we find that Appellant was not denied a fair trial by cumulative error. *Williams v. State*, 2001 OK CR 9, ¶ 127, 22 P.3d 702, 732; *Ashinsky v. State*, 1989 OK CR 59, ¶ 31, 780 P.2d 201, 209; *Bechtel v. State*, 1987 OK CR 126, ¶12, 738 P.2d 559, 561. Proposition Five is denied.

DECISION

Appellant's conviction for Possessing a Firearm After Felony Conviction is **AFFIRMED** but the Sentence is **MODIFIED** to imprisonment for thirty (30) years.

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[3] We note that Appellant had two other prior felony convictions in addition to the challenged conviction. *See Cooper v. State*, 1991 OK CR 26, ¶ 13, 806 P.2d 1136, 1139.

[4] Although they are not part of the record on appeal, the Court Clerk is directed to keep a copy of both Appellant's Application and his Motion. *See* Rule 1.13(K), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014).

This matter is remanded to the District Court for entry of Judgment and Sentence consistent with the Opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma 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 CRAIG COUNTY
THE HONORABLE TERRY H. MCBRIDE, DISTRICT JUDGE

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OPINION BY: LUMPKIN, J.
LEWIS, P.J.: CONCUR IN RESULT
SMITH, V.P.J..: CONCUR
A. JOHNSON, J.: CONCUR

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