IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DALE LYNN TAYLOR,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
v.	)	Case No. F-2014-500
	)	
STATE OF OKLAHOMA	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, VICE PRESIDING JUDGE:

Appellant Dale Lynn Taylor was tried by jury and convicted of Second Degree Rape (21 O.S.2011, § 1116), After Former Conviction of a Felony, in Case No. CF-2013-38, in the District Court of Marshall County. The jury recommended as punishment twenty (20) years imprisonment and the trial court sentenced accordingly. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of his appeal:

I. The State improperly used a stale prior conviction to enhance Appellant's sentence.

II. Improper admission of propensity evidence denied Appellant of his fundamental right to a fair trial.

III. The cumulative effect of prosecutorial misconduct constituted fundamental error and denied Appellant a fair trial.

IV. Appellant was denied his right to the effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Art. 2, §§ 7, 9, and 20 of the Oklahoma Constitution.

V. Cumulative errors deprived Appellant of a fair proceeding and a reliable outcome.

After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that under the law and the evidence the conviction should be affirmed but the sentence should be modified to fifteen (15) years.

In Proposition I, we review for plain error Appellant's claim that his sentence was improperly enhanced with a stale prior conviction. Under the test for plain error set forth in *Simpson v. State*, 1994 OK CR 40, ¶¶ 10, 26, 30, 876 P.2d 690, 694, 699, 701, an appellant must show an actual error, that is plain or obvious, affecting his substantial rights, and which seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *See Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395; *Malone v. State*, 2013 OK CR 1, ¶ 41, 293 P.3d 198, 211-212.

Appellant's sentence was enhanced with a 1992 conviction carrying a thirteen year sentence. Based upon the record before us, the offense on trial was committed ten years, one month and twenty-four days after the latest date for discharging the sentence on the previous conviction. Therefore, under 21 O.S.2011, § 51.1, the previous conviction was more than ten years old and could not be properly used for enhancement purposes.

This error affected Appellant's substantial rights as he was sentenced to five years more than allowed for a first offense of second degree rape. *See* 21 O.S.2011, § 1116 (range of punishment for a first offense of second degree rape is

one to fifteen years). This plain error requires relief in the form of sentence modification. Under 22 O.S.2011, § 1066, this Court has the power to reverse, affirm or modify the sentence or remand for resentencing. As addressed in Proposition II, the jury learned the details of the crime which was the basis for the 1992 conviction in properly admitted sexual propensity evidence. The jury was instructed on the range of punishment for a second offense and recommended a sentence of ten years over the minimum. Based upon this record, we find Appellant's sentence should be modified to fifteen (15) years in prison, as he requested in his brief.

In Proposition II, we consider several challenges to the admission of the sexual propensity evidence. Initially, Appellant finds error in the trial court's failure to state on the record, his balancing of the factors as suggested by *Horn v. State,* 2009 OK CR 7,¶ 27, 204 P.3d 777, 784. Appellant's timely challenge has properly preserved the issue for our review. The admission of evidence is left to the sound discretion of the trial court, which we will not disturb absent an abuse of that discretion. *Goode v. State*, 2010 OK CR 10, ¶ 44, 236 P.3d 671, 680. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194.

The trial court held a pre-trial hearing to address the admissibility of the sexual propensity evidence but failed to make a record of its findings regarding

the factors identified in *Horn*. The court's omission does not warrant relief as our review of the record shows the trial court conducted the proper analysis, thoughtfully considered the parties' arguments and properly concluded the probative value of the evidence outweighed its prejudicial effect.

Giving the propensity evidence its maximum reasonable probative value and its minimum reasonable prejudicial effect, *see Harmon v. State*, 2011 OK CR 6, ¶ 48, 248 P.3d 918, 937, we find the trial court did not abuse its discretion in admitting the evidence. Testimony by C.C. of a prior rape committed against her by Appellant was clear, concise and consistent. The evidence was relevant to show Appellant's propensity to commit a sexual offense. The jury was properly instructed on the limited use of the evidence. *See Johnson v. State*, 2010 OK CR 28, ¶ 15, 250 P.3d 901, 905.

Appellant also complains that he received inadequate notice that C.C. would testify to more than one prior rape, and that he was surprised by her testimony that it happened multiple times. This objection was not raised at trial, therefore we review only for plain error. *See Levering*, 2013 OK CR 19, ¶ 6, 315 P.3d at 395. We find no error as Appellant was provided sufficient pre-trial notice of C.C.'s testimony. Further, good cause existed to excuse the State from the 15 day requirement in 22 O.S.2011, § 2413 as the State's final witness list only gave more detailed testimony expected of a known witness and did not substantially alter the evidence against Appellant. *See Stemple v. State*, 2000 OK CR 4, ¶ 22, 994 P.2d 61, 67. Finding no error, we find no plain error.

Finally, Appellant challenges the authentication of State's Exhibits 1 and 2, the felony Information and Judgment and Sentence on Revocation of a Suspended Sentence in the 1992 conviction. We review only for plain error. *See Levering,* 2013 OK CR 19, ¶ 6, 315 P.3d at 395. Under 21 O.S.2011, § 2902(4) the documents were self-authenticating and did not require extrinsic testimony. C.C.'s testimony regarding the documents was not necessary to their admission. Therefore, we find no error and thus no plain error in the admission of State's Exhibits 1 & 2.

Having thoroughly reviewed Appellant's claims of error regarding admission of the sexual propensity evidence, we find no error, plain or otherwise, warranting relief.

In Proposition III, we have thoroughly reviewed Appellant's numerous claims of prosecutorial misconduct. On claims of prosecutorial misconduct, relief will be granted only where the prosecutor committed misconduct that so infected the defendant's trial that it was rendered fundamentally unfair, such that the jury's verdicts should not be relied upon. *Roy v. State,* 2006 OK CR 47,¶ 29, 152 P.3d 217, 227, *citing Donnelly v. DeChristoforo,* 416 U.S. 637, 645, 94 S.Ct. 1868, 1872, 40 L.Ed.2d 431 (1974). We evaluate alleged prosecutorial misconduct within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel. *Mitchell v. State,* 2010 OK CR 14, ¶ 97, 235 P.3d 640, 661; *Cuestra-Rodriquez v. State,* 2010 OK CR 23, ¶ 96, 241 P.3d 214, 243. We have long allowed counsel

for the parties a wide range of discussion and illustration in closing argument. *Sanchez v. State*, 2009 OK CR 31, ¶ 71, 223 P.3d 980, 1004. We will reverse the judgment or modify the sentence only where grossly improper and unwarranted argument affects a defendant's rights. *Id.*

Only one of the challenged comments was met with a timely objection. In this instance, the prosecutor did not argue facts in evidence, but appropriately referenced the victim's testimony regarding Appellant's conduct immediately after the rape. Counsel enjoy a right to discuss fully from their standpoint the evidence and the inferences and deductions arising from it. *Id.*, 2009 OK CR 31, ¶ 71, 223 P.3d at 1004.

The remaining instances we have reviewed for plain error and find none. *Williams v. State*, 2008 OK CR 19, ¶ 105, 188 P.3d 208, 228. Reading the challenged comments in the context in which they were made, we find no error as the comments were based on the evidence and well within the wide range of discussion and illustration permitted in closing argument. *See Mitchell*, 2010 OK CR 14, ¶ 97, 235 P.3d at 661. Many of the comments were made in response to arguments of defense counsel and did no more than respond substantially in order to "right the scale". *Warner v. State*, 2006 OK CR 40, ¶ 182, 144 P.3d 838, 889. Further, the prosecutor did not call Appellant a liar but did properly comment on the veracity of his testimony. *See Smallwood v. State*, 1995 OK CR 60, ¶ 37, 907 P.2d 217, 229. Other instances in which Appellant asserts the prosecutor argued facts not in evidence were properly

based on the evidence. Having thoroughly reviewed Appellant's claims of prosecutorial misconduct, we find no error, plain or otherwise, warranting relief.

In Proposition IV, we review Appellant's claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to show that counsel was ineffective, Appellant must show both deficient performance and prejudice. *Goode,* 2010 OK CR 10, ¶ 81, 236 P.3d at 686 *citing Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064. *See also Marshall v. State,* 2010 OK CR 8, ¶ 61, 232 P.3d 467, 481. In *Strickland,* the Supreme Court said there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct, *i.e.,* an appellant must overcome the presumption that, under the circumstances, counsel's conduct constituted sound trial strategy. *Goode,* 2010 OK CR 10, ¶ 81, 236 P.3d at 686. To establish prejudice, Appellant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.,* at ¶ 82, 236 P.3d at 686.

Appellant's claims of ineffectiveness are based upon counsel's failure to object to the allegations of error raised in Propositions of Error I – III. In Proposition I, we found Appellant's 1992 conviction was improperly used for enhancement purposes and modified Appellant's sentence. Any claim of counsel ineffectiveness is therefore rendered moot. *See Roy,* 2006 OK CR 47, ¶ 28, 152 P.3d at 227 (court's grant of relief based on erroneous sentencing instruction

rendered moot corresponding claim of ineffective assistance based on failure to object to instruction).

In Propositions II and III we thoroughly reviewed Appellant's claims of error and found none warranting relief. Therefore, Appellant has failed to establish the prejudice necessary for a finding of ineffectiveness. *See Wiley v. State*, 2008 OK CR 30, ¶ 4, 199 P.3d 877, 878 ("unless the defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable").

Finally, in Proposition V, Appellant argues the accumulation of errors denied him a fair trial. This Court has repeatedly held that a cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by Appellant. *Williams v. State*, 2001 OK CR 9, ¶ 127, 22 P.3d 702, 732. However, when there have been numerous irregularities during the course of a trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors is to deny the defendant a fair trial. *Id.* We have found error in Proposition I regarding the use of Appellant's 1992 conviction for enhancement purposes and modified his sentence. No further errors have been found warranting relief. In viewing the cumulative effect of the error in Proposition I, we find it does not require reversal of this case as it was not so egregious as to have denied Appellant a fair trial on guilt or innocence. *Id.* Therefore, no relief beyond the modification of the sentence is warranted.

DECISION

The Judgment is **AFFIRMED.** The Sentence is **MODIFIED** to fifteen (15) years in prison. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF MARSHALL COUNTY
THE HONORABLE WALLACE COPPEDGE, DISTRICT JUDGE

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OPINION BY: LUMPKIN, V.P.J.
SMITH, P.J.: Concur in Results
LEWIS, J.: Concur in Results
JOHNSON, J.: Concur in Results
HUDSON, J.: Specially Concur

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HUDSON, J., SPECIALLY CONCURS

This case illustrates the importance of accurate jury instructions to the trial process. Because of the very nature of trial work, the job of preparing and finalizing the written charge is often left for the end of trial when the parties—and no doubt the court—may be distracted with other tasks. Under these difficult circumstances, it is easy to overlook even the most basic, obvious errors in the proposed instructions. I write separately, in part, to emphasize the need for trial judges, prosecutors and defense attorneys to devote the needed time and study to ensure that only appropriate instructions are provided to the jury.

Our task on appeal is different. Simply, we must determine the appropriate remedy for the instructional error which occurred below. I agree that the trial court committed plain error by instructing the jury on the wrong range of punishment. I further agree that Appellant's twenty (20) year sentence must be modified as a result. The difficulty here is deciding the appropriate remedy—i.e., remanding Appellant's case to the district court for resentencing or modifying Appellant's sentence outright. *See* 22 O.S.2011, § 1066 (this Court has the power to reverse, affirm or modify the sentence or remand for resentencing).

Appellant argues primarily that we modify his sentence to the bare minimum—one year imprisonment. Appellant says it is impossible to know what sentence a properly instructed jury would select. Reply Br. at 3-4. The State argues, by contrast, that Appellant's sentence be modified to the

maximum available punishment—15 years imprisonment. Because the jury's 20 year sentence was not based on any evidence that was subsequently found inadmissible, the State argues the modified sentence should be as close to the jury's 20 year sentence as possible. State's Br. at 9-10.

On different facts, remand for resentencing might be appropriate. However, remand for resentencing in this case could serve most notably to penalize the victim who would be forced at a resentencing trial to testify a second time about the sexual attack she endured at the hands of Appellant. While it is always possible the parties could come to an agreement on remand as to the appropriate sentence, there is no guarantee this would happen. Thus, sentencing modification is the appropriate avenue in this case. Based on my review of the record, the one year sentence requested by the defense on appeal is far too low for the second degree rape for which Appellant stands convicted. The 15 year sentence championed by the State comes closest to what Appellant's jury found was appropriate based on the evidence. Thus, I conclude that modification of Appellant's sentence to 15 years imprisonment is appropriate under the circumstances presented here.