IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BOBBY DEWAYNE RAY,	)	NOT FOR PUBLICATION
Appellant,	)	
v.	)	Case No. F-2015-720
THE STATE OF OKLAHOMA,	)	
Appellee.	)	

SUMMARY OPINION

LEWIS, VICE-PRESIDING JUDGE:

Appellant, Bobby Dewayne Ray, was tried by jury and found guilty of Count 1, second degree burglary, in violation of 21 O.S.2011, § 1435; and Count 2, impersonating an officer, in violation of 21 O.S.2011, § 264, in the District Court of Leflore County, Case No. CF-2013-391. The jury found Appellant committed Count 1 after former conviction of two (2) or more felonies and sentenced Appellant to fifteen (15) years imprisonment and a $1,500.00 fine in Count 1, and one (1) year in jail and a $100 fine in Count 2. The Honorable Jonathan K. Sullivan, District Judge, pronounced judgment and ordered the sentences served concurrently. Appellant appeals in the following propositions of error:

1. The conviction of Mr. Ray, based on an impermissibly suggestive identification procedure, was a violation of due process, requiring that his convictions be reversed and remanded with instructions to dismiss;
2. The fine assessed Appellant was based upon an erroneous jury instruction and thus should be vacated.

In Proposition One, Appellant argues that his in-court identification by the victim eyewitness was tainted by a suggestive pre-trial identification and violated

due process; and that without this evidence, the charge of burglary must be dismissed due to insufficient evidence. Trial counsel failed to object when the identification was made in open court, and waived all but plain error. *Harmon v. State*, 2011 OK CR 6, ¶ 42, 248 P.3d 918, 935; *Simpson v. State*, 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d 690, 694, 695, 698. Appellant must therefore demonstrate that the in-court identification was plain or obvious error. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. We will correct plain error only when it seriously affects the fairness, integrity, or public reputation of the proceedings or represents a miscarriage of justice. *Murphy v. State*, 2012 OK CR 8, ¶ 18, 281 P.3d 1283, 1290.

An eyewitness's identification at trial, if tainted by a prior photographic identification that was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification," violates due process of law. *Harmon*, 2011 OK CR 6, ¶ 43, 248 P. 3d at 935-36. Here, we find the officer's use of a single photograph of Appellant, where no exigent circumstances justified that procedure, was unnecessarily suggestive. *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). However, based on the totality of the circumstances, including the witness' opportunity to view the suspect at the time of the crime; her degree of attention; the accuracy of her prior descriptions; the level of certainty demonstrated at the confrontation; and the short time between the crime and the confrontation, we find the suggestive procedure did not create a very substantial likelihood of irreparable misidentification. *Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

There was no plain or obvious error in admitting the victim's in-court identification and related evidence. Reviewing the trial evidence in the light most favorable to the State, we further conclude that any rational trier of fact could find the elements of second degree burglary proven beyond a reasonable doubt. *Spuehler v. State,* 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203. Proposition One is therefore denied.

Proposition Two argues that the trial court's instruction on the fine in Count 1 was plain error, as defined above. We recently held that an instruction telling jurors a fine was mandatory, when the fine was optional, was plain error. *Daniels v. State,* 2016 OK CR 2, ¶ 6, 369 P.3d 381, 384. The Court held the error was harmless in *Daniels* because the jury imposed the maximum fine. The jury here imposed only a $1,500.00 fine, indicating that it probably would have imposed an even lower amount, or no fine at all, under a correct instruction. As we have done in several unpublished cases involving the same error, the fine here is vacated.

DECISION

The fine of $1,500.00 in Count 1 is **VACATED**. The judgment and sentence is, in all other respects, **AFFIRMED**. Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App. (2017), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF LEFLORE COUNTY
HONORABLE JONATHAN K. SULLIVAN, DISTRICT JUDGE

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OPINION BY LEWIS, V.P.J.
LUMPKIN, P.J.: Concurs in Result
JOHNSON, J.: Concurs
SMITH, J.: Concurs
HUDSON, J: Concur in Part/Dissent in Part

HUDSON, JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in affirming Ray's convictions. I respectfully dissent, however, to vacating the fine of $1,500.00 imposed for Count 1. Appellant argues in Proposition Two that the fine be vacated because the instruction given to the jury was erroneous as it "mandated" a fine. Appellant cites our recent decision in *Daniels v. State*, 2016 OK CR 2, ¶ 6, 369 P.3d 381, 384 for support.

In *Daniels*, we found the written instruction used—which was similar to the one used here—mandated a fine. However, because the jury recommended the maximum fine of $10,000.00 (when they could have recommended much less), we ruled the instructional error did not result in a miscarriage of justice. In other words, we rationalized that it was the jury's intent that Daniels be fined, not because they felt mandated to do so by an erroneous and ambiguous instruction, but because they thought it proper and just as evidenced by recommending the maximum allowable fine.

Using similar logic to that employed in *Daniels*, I believe we can discern the intent of the jury in this case and find the instructional error harmless. While the jury did not impose the maximum fine permitted, the fine recommended was significant enough to show the jury's desire and intent to fine Appellant—not because they felt it was required but, rather, because they believed it was just and proper to do so.

While I believe the result we reached in *Daniels* was correct, in retrospect we failed to see the forest for the trees. I fear a strict and narrow application of *Daniels* will have unintended consequences and will unnecessarily thwart

justice in many instances. *Daniels* should not be construed as limiting this Court's ability to find harmless error in only those instances in which the jury recommended the maximum fine. A more rational approach is to presume the jury intended to fine the defendant unless the fine imposed was trivial, *e.g.*, $1.00, $10.00 or perhaps $100.00. In truth, if the jury was misled to believe imposition of a fine was mandated, they could simply impose a fine in the amount of one cent or even zero, which would certainly be indicative of their belief that a fine was mandated but not warranted.

Here, a fine of $1,500.00 is not so trivial as to demonstrate, under *Daniels*, that the jury imposed the fine due to the instructional error. Thus, the instructional error was harmless. I would affirm the judgment and sentence in all respects.