IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RICKY NOLAN ENNIS,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**No. F-2015-909**
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

HUDSON, JUDGE:

On March 14, 2012, Appellant, Ricky Nolan Ennis, pled guilty in two Washington County District Court cases: Case No. CF-2011-445—Burglary in the Second Degree, in violation of 21 O.S.2011, § 1435; and Case No. CF-2011-450—Domestic Assault and Battery by Strangulation, in violation of 21 O.S.2011, § 644. Sentencing was delayed to allow Ennis time to complete the Regimented Inmate Discipline (RID) Program. On October 17, 2012, the trial court deferred sentencing in each case for five (5) years, ordered that the deferred sentences run consecutively to each other, and imposed a $500.00 fine in each case.

On April 28, 2015, the State filed an Application to Accelerate Deferred Judgment in both cases alleging Ennis violated the terms of his probation by committing new crimes as charged in Washington County District Court Case No. CF-2015-148.

Between August 31 and September 2, 2015, Ennis was tried by jury in Case No. CF-2015-148 for the crimes of Count 1: Kidnaping, in violation of 21

O.S.Supp.2012, § 741; Count 2: Assault and Battery with a Dangerous Weapon, in violation of 21 O.S.2011, § 645; Count 3: Assault and Battery in the Presence of a Minor, After Former Conviction of a Crime of Domestic Abuse, in violation of 21 O.S.Supp.2014, § 644(G); and Count 4: Threatening to Perform an Act of Violence, in violation of 21 O.S.2011, § 1378(B). The trial was combined with the hearing on the State's application to accelerate.

The jury found Ennis not guilty on Count 1, guilty of the lesser offense of Assault and Battery on Count 2, and guilty as charged on Counts 3 and 4. The jury recommended Ennis be sentenced to ninety (90) days imprisonment and a $1,000.00 fine on Count 2, five (5) years imprisonment and a $7,000.00 fine on Count 3, and six (6) months imprisonment and a $1,000.00 fine on Count 4. The Honorable Curtis DeLapp, District Judge, who presided at trial, found Ennis violated the terms of his probation in Case Nos. CF-2011-445 and CF-2011-450.

At the sentencing hearing on October 14, 2015, the trial court sentenced Ennis according to the jury's verdict in Case No. CF-2015-148. The trial court too accelerated Ennis' deferred sentences in Case No. CF-2011-445 to seven (7) years imprisonment and in Case No. CF-2011-450 to three (3) years imprisonment. The trial court ordered each count from all three cases to run consecutively to one another, and ordered Ennis to pay restitution in the amount of $8,505.74 in Case No. CF-2015-148. Ennis now appeals.

Ennis raises eleven (11) propositions of error before this Court:

I. THERE IS NO INDICATION THAT MR. ENNIS WAS EVER ADVISED OF HIS RIGHT TO APPEAL THE GUILTY PLEAS

ENTERED IN WASHINGTON COUNTY CASES CF-2011-455 AND CF-2011-450; ACCORDINGLY, THE ACCELERATIONS MUST BE REVERSED;

II. THERE IS NO INDICATION THAT MR. ENNIS EVER ENTERED A PLEA TO THE CHARGES LEVELED OR EVEN HAD A HEARING IN THE APPLICATION TO ACCELERATE;

III. THE TRIAL JUDGE CONSIDERED INFORMATION OUTSIDE WHAT THE STATE ALLEGED AS THE BASIS FOR THE ACCELERATION;

IV. THE PHOTOGRAPHS PRESENTED AT TRIAL WERE CUMULATIVE AND MORE PREJUDICIAL THAN PROBATIVE;

V. THE TRIAL JUDGE ERRED BY FAILING TO GRANT THE MOTION TO MERGE THE CONVICTIONS ON THE BASIS OF DOUBLE JEOPARDY;

VI. INEFFECTIVE ASSISTANCE OF COUNSEL DEPRIVED APPELLANT OF A FAIR TRIAL AND DUE PROCESS OF LAW;

VII. PROSECUTORIAL MISCONDUCT DEPRIVED APPELLANT OF A FAIR TRIAL;

VIII. THE TRIAL COURT FAILED TO REQUIRE PROOF OF THE RECIPIENT'S ACTUAL LOSS TO SUPPORT A RESTITUTION ORDER, THEREFORE THIS COURT MUST VACATE OR REMAND THE MATTER TO THE DISTRICT COURT FOR A PROPER HEARING ON RESTITUTION;

IX. THE SENTENCES WERE EXCESSIVE BECAUSE THE JURY WAS MISLED BY AN UNNECESSARY AND FACTUALLY INCORRECT STIPULATION;

X. INFORMATION REGARDING TIME SERVED ON PRIOR CHARGES UNFAIRLY INFLUENCED THE JURY TO RENDER AN EXCESSIVE SENTENCE; and

XI. CUMULATIVE ERROR DEPRIVED APPELLANT OF A FAIR TRIAL.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we

find Appellant's Judgments and Sentences should be **AFFIRMED**, but the matter must be remanded to the District Court for a proper proceeding on the determination of restitution.

I.

Proposition I is not properly before this Court and, thus is denied. Appellant never filed motions to withdraw his guilty pleas in Case Nos. CF-11-445 and CF-11-450, either after the pleas were entered or after his deferred sentences were accelerated. When a defendant has not sought to withdraw his plea, the scope of review of an acceleration proceeding is limited to the validity of the acceleration order. Rule 1.2(D)(5)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015). Appellant has not filed an application for post-conviction relief seeking a certiorari appeal out of time, the proper method to attempt to withdraw his pleas and challenge his convictions and sentences. *Lewis v. State*, 2001 OK CR 6, ¶¶ 5-6, 21 P.3d 64, 65.

II.

Defense counsel did not object or otherwise express any surprise that the hearing on the State's applications to accelerate had been conducted simultaneously with the jury trial. Thus, Appellant has waived all but plain error review of Proposition II on appeal. *See Simpson v. State*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 693 (holding that "[f]ailure to object with specificity to errors alleged to have occurred at trial, thus giving the trial court an opportunity to cure the error during the course of trial, waives that error for appellate review."); *cf. Coddington v. State*, 2011 OK CR 17, ¶ 69, 254 P.3d 684, 711

(reliance on a trial court's statements does not exempt a defendant from his obligation to timely object in order to preserve the issue for appellate review).

To be entitled to relief under the plain error doctrine, Appellant must show an actual error, which is plain or obvious, and which affects his substantial rights. *Baird v. State*, 2017 OK CR 16, ¶ 25, __P.3d.__; *Ashton v. State*, 2017 OK CR 15, ¶ 34, __P.3d.__; *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395; 20 O.S.2011, § 3001.1. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Baird*, 2017 OK CR 16, ¶ 25; *Ashton*, 2017 OK CR 15, ¶ 34; *Tollett v. State*, 2016 OK CR 15, ¶ 4, 387 P.3d 915, 916; *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

A review of the record sufficiently demonstrates the parties' awareness that the trial court had coupled the hearings on the State's applications to accelerate with the trial of Appellant's new charges in Case No CF-2015-148. Thus, Appellant fails to show actual or obvious error. Moreover, assuming arguendo error, that is due notice was not provided, Appellant is unable to demonstrate prejudice, *i.e.*, plain error affecting his substantial rights. *See Beller v. State*, 1979 OK CR 64, ¶ 4, 597 P.2d 338, 339 (outlining due process requirements in matters of acceleration); *Degraffenreid v. State*, 1979 OK CR 88, ¶ 14, 599 P.2d 1107, 1110 ("The scope of due process is not as broad in a revocation proceeding as it is in an original criminal proceeding."). Thus, no due process violation can be shown. Proposition II is denied.

III.

The record clearly demonstrates the trial court found Appellant had violated his dual probation based solely on the evidence presented at the hearing/trial. The challenged information Judge DeLapp provided to the jury after his ruling does not overcome the presumption that the trial court only considered competent and admissible evidence in reaching its decision. *See Long v. State*, 2003 OK CR 14, ¶ 4, 74 P.3d 105, 107 (Court presumes that "when a trial court operates as the trier of fact, that only competent and admissible evidence is considered in reaching a decision); *see also Tollett*, 2016 OK CR 15, ¶ 4, 387 P.3d at 916 (an appellant must prove plain error). Proposition III is denied.

IV.

"Photographs are admissible if their content is relevant and their probative value is not substantially outweighed by their prejudicial effect." *Davis v. State*, 2011 OK CR 29, ¶ 86, 268 P.3d 86, 113. The admission of photographs is a matter within the trial court's discretion. *Id.* This Court will not reverse the trial court's ruling absent an abuse of that discretion. *Id.* "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." *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. No such abuse occurred here.

Appellant does not challenge the relevancy of the photographs, but instead argues that certain photographs of the victim's injuries were unfairly

duplicative and thus prejudicial. Upon review, we find the challenged photographs were not so unduly repetitive that the jury could not view them impartially. The duplicative nature of these photographs is minimal at best. Each of the photographs shows a different aspect of the victim's injuries, or different injuries altogether. *See Browning v. State*, 2006 OK CR 8, ¶ 32, 134 P.3d 816, 837 (holding that photographs that show different aspects of a victim's wounds are not cumulative in nature). Moreover, the photographs were not particularly gruesome in any way. Thus, admission of the photographs was neither needless nor inflammatory. *See Warner v. State*, 2006 OK CR 40, ¶ 168, 144 P.3d 838, 887 (defendant bears the burden of showing the admission of duplicative photographs was needless or inflammatory). As the prejudicial effect of the photographs did not substantially outweigh their probative value, we find the admission of the photographs was not an abuse of discretion. Proposition IV is denied.

V.

Appellant's convictions in this case for Assault and Battery (Count 2) and Domestic Assault and Battery in the Presence of a Minor (Count 3) do not violate the statutory proscription against multiple punishments contained in 21 O.S.2011, § 11 or the double jeopardy clause. Appellant's Count 2 and Count 3 crimes did not arise out of one act, but were separate and distinct offenses requiring different proof. *Logsdon v. State*, 2010 OK CR 7, ¶ 17, 231 P.3d 1156, 1165 ("Where there is a series of separate and distinct crimes, . . . Section 11 is not violated."); *Doyle v. State*, 1989 OK CR 85, ¶ 16, 785 P.2d

317, 324 ("Merely because the crimes were committed in rapid succession does not negate the fact that separate crimes were committed, so long as a separation does exist."). Additionally, each of the crimes requires proof of a fact which the other does not. 21 O.S.Supp.2014, §§ 644(B), (G); *Watts v. State*, 2008 OK CR 27, ¶ 16, 194 P.3d 133, 139 (citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 2d 306 (1932)). We thus find the trial court's denial of Appellant's motion for merger was not an abuse of discretion. *See Sanders v. State*, 2015 OK CR 11, ¶ 4, 358 P.3d 280, 283 (defining abuse of discretion). Proposition V is denied.

VI.

To prevail on an ineffective assistance of counsel claim, Appellant must show both that counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *See also Harrington v. Richter*, 562 U.S. 86, 104, 131 S. Ct. 770, 787-88, 178 L. Ed. 2d 624 (2011) (discussing *Strickland* two-part standard). Appellant's ineffective assistance of counsel claims lack merit as Appellant fails to make the requisite showing under *Strickland*. Relief is denied for Proposition VI.

VII.

Appellant failed to timely object to the alleged instances of misconduct now cited on appeal. He has thus waived all but plain error review of this claim. *Mathis v. State*, 2012 OK CR 1, ¶ 24, 271 P.3d 67, 76. Relief will be granted for prosecutorial misconduct only where it effectively deprives the

defendant of a fair trial or sentencing. *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 96, 241 P.3d 214, 243. "[W]e 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." *Hanson v. State*, 2009 OK CR 13, ¶ 18, 206 P.3d 1020, 1028. Appellant fails to show the prosecutor's alleged misconduct, individually or cumulatively, deprived him of a fair trial or sentencing. *Cuesta-Rodriguez*, 2010 OK CR 23, ¶ 96, 241 P.3d at 243. Thus, there is no plain error. Proposition VII is denied.

VIII.

Appellant argues the district court's restitution order must be vacated because the district court failed to follow the governing statutory procedures.[1] Because Appellant did not object to the manner or amount of the restitution award below, he has waived appellate review of the instant challenge for all but plain error. *Simpson*, 1994 OK CR 40, ¶ 11, 876 P.2d at 694.

Under 22 O.S.2011, § 991f(C), a district court shall order a convicted defendant to pay restitution if the crime victim suffered compensable injury, such as incurred medical expenses and loss of wages. The amount may be up to three times the amount of economic loss suffered as a direct result of the defendant's criminal act. 22 O.S.2011, § 991f(A)(1). Although a defendant may be ordered to pay restitution for economic loss as defined by Section 991f, an order of restitution may only include those losses which are determinable with

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1 At sentencing, the district court ordered Appellant to pay restitution in the amount of $8,505.74 to the victim.

"reasonable certainty." 22 O.S.2011, § 991a(A)(1)(a). "A 'reasonable certainty' must be more than an approximation, estimate, or guess. Inherent in the definition of reasonable certainty is the requirement of proof of the loss to the victim." *Logsdon*, 2010 OK CR 7, ¶ 9, 231 P.3d at 1162 (internal citations omitted). The record must reflect a basis for the trial judge's determination of a victim's loss or the decision will be deemed arbitrary and found to violate Section 991a. *Honeycutt v. State*, 1992 OK CR 36, ¶ 33, 834 P.2d 993, 1000.

Title 22 O.S.2011, § 991f(E)(3) requires the district attorney to provide the court an official request for restitution form, completed and signed by the victim, which includes "all invoices, bills, receipts, and other evidence of injury, loss of earnings and out-of-pocket loss. This form shall be filed with any victim impact statement to be included in the judgment and sentence." The victim in this case did not testify to her financial losses during trial or at sentencing and the record does not reflect that the restitution request form, along with required supporting documentation, was presented to the court. Clearly there was some consideration of restitution amongst the parties given the court imposed a very specific amount; however, the basis for the award is not in the discernible record before us.[2] We therefore cannot conclude that the restitution amount, ordered by the district court, was determined with reasonable certainty and must consider the order of restitution to be arbitrary.

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2 The State asks this Court take judicial notice of Appellant's presentence investigation report as it appears to contain the underlying basis for the district court's restitution order. However, as is acknowledged by the State, this Court is statutorily prohibited from considering the presentence investigation report on appeal. *See* 22 O.S.2011, § 982(D) ("The presentence investigation reports specified in this section shall not be referred to, or be considered, in any appeal proceedings.").

This is plain error which requires the restitution order be vacated and the case remanded to the district court for a proper determination on the issue of the victim's loss.

IX.

Appellant contends an incorrect and misleading stipulation announced by the trial court in relation to the admission of State's Exhibit 42a resulted in the jury recommending Appellant be sentenced to the maximum sentences allowable on each of his three convictions in Case No. CF-2015-148. As Appellant failed to object to the trial court's announcement, he has waived all but plain error review of this claim. No such error occurred here. Appellant's assertion is speculative at best. *See Fulgham v. State*, 2016 OK CR 30, ¶ 17, ___ P.3d ___ (the Court "cannot blindly make the leap necessary to find prejudice . . . based on speculation alone"). Appellant wholly fails to show how the trial court's announcement caused the jury to punish Appellant more harshly. *See Malone v. State*, 2013 OK CR 1, ¶¶ 41, 43, 293 P.3d 198, 211-12 (under the plain error doctrine, an appellant must prove error affected his substantial rights). While the trial court's announcement was awkward, ultimately the court's announcement—erroneous or not—was of no consequence. Proposition IX is denied.

X.

The longstanding rule is that the parties are not to encourage jurors to speculate about probation, pardon or parole policies. *Florez v. State*, 2010 OK CR 21, ¶ 4, 239 P.3d 156, 157; *Hunter v. State*, 2009 OK CR 17, ¶ 10, 208 P.3d

931, 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 1) read an Information which explicitly tells the jurors that the defendant has received suspended sentences, and then 2) 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.

While the jury did receive information that Appellant had previously received a deferred sentence, the prosecutor did *not* urge the jurors during his brief closing argument to sentence Appellant on this basis. Moreover, the record contains no indication that the jury was impacted by this sentencing information. Given the brutal nature of Appellant's offenses in this case, coupled with his prior history of domestic abuse, Appellant has not shown that the admission of State's Exhibit 42a seriously affected the fairness, integrity or public reputation of the trial or otherwise represents a miscarriage of justice. Therefore, there was no plain error and relief is not required. *Mitchell v. State*, 2016 OK CR 21, ¶ 30, 387 P.3d 934, 945; *Levering*, 2013 OK CR 19, ¶ 6, 315 P.3d at 395. Proposition X is denied.

XI.

We found plain error in Proposition VIII which requires that the district court's restitution order in Case No. CF-2015-148 be vacated and the case

remanded to the district court for a proper determination on the issue of loss. As for the remainder of Appellant's propositions of error, upon review we find relief is unwarranted as this is not a case where, considered together, any instance of error we have identified or assumed to exist affected the outcome of the proceedings and denied Appellant a fair trial. *See Postelle v. State*, 2011 OK CR 30, ¶ 94, 267 P.3d 114, 146; *Pavatt v. State*, 2007 OK CR 19, ¶ 85, 159 P.3d 272, 296; *Lott v. State*, 2004 OK CR 27, ¶ 167, 98 P.3d 318, 357.

DECISION

The Judgments and Sentences of the district court are **AFFIRMED**. The District Court's restitution order in Case No. CF-2015-148 is **VACATED** and the case is **REMANDED** to the District Court for a proper determination on the issue of loss in accordance with this opinion. 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 WASHINGTON COUNTY
THE HONORABLE CURTIS DeLAPP, DISTRICT JUDGE

APPEARANCES AT TRIAL

KRISTI SANDERS
415 S.E. DEWEY AVE., SUITE 302
BARTLESVILLE, OK 74003
COUNSEL FOR DEFENDANT

JARED SIGLER
ASSISTANT DISTRICT ATTORNEY
420 S. JOHNSTONE AVE.
BARTLESVILLE, OK 74003
COUNSEL FOR THE STATE

APPEARANCES ON APPEAL

LISBETH L. McCARTY
P.O. BOX 926
NORMAN, OK 73070
COUNSEL FOR APPELLANT

E. SCOTT PRUITT
OKLAHOMA ATTORNEY GENERAL
KEELEY L. MILLER
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
COUNSEL FOR APPELLEE

OPINION BY: HUDSON, J.
LUMPKIN, P.J.: CONCUR
LEWIS, V.P.J.: CONCUR

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