

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

ROBERT AARON RODGERS,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

) Not For Publication

) M-2018-267

) FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
AUG - 8 2019

JOHN D. HADDEN
CLERK

SUMMARY OPINION

KUEHN, VICE PRESIDING JUDGE:

On January 17, 2017, Appellant was charged in Grady County District Court with Domestic Abuse - Assault and Battery, in violation of 21 O.S.Supp.2014, § 644(C) in Case No. CM-2017-36. Appellant was found guilty following a jury trial and the Honorable Timothy A. Brauer, Special Judge, sentenced him according to the jury's recommendation to a \$1,000 fine. Appellant appeals.

Appellant raises three propositions of error in support of his appeal:

- I. MR. RODGERS WAS DENIED A FAIR TRIAL BECAUSE THE TRIAL COURT REFUSED TO INSTRUCT ON HIS THEORIES OF DEFENSE.

II. THE ADMISSION OF IRRELEVANT AND PREJUDICIAL EXPERT TESTIMONY ON DOMESTIC ABUSE WAS PLAIN ERROR ENTITLING MR. RODGERS TO A NEW TRIAL.

III. THE AUDIO TAPE SPONSORED BY CINDY TRAPP FAILED TO MEET THE REQUISITES FOR ADMISSIBILITY. ADMISSION OF THIS EVIDENCE DENIED MR. RODGERS A FAIR TRIAL.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits, and briefs, we find that the law and evidence do not require relief.

In his first proposition, Appellant argues he is entitled to a new trial because the trial court denied his request that the jury be instructed on defense of another and defense of property. Trial court decisions denying requested jury instructions are reviewed for an abuse of discretion. *Hogan v. State*, 2006 OK CR 19, ¶ 46, 139 P.3d 907, 926. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the issue; a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

Appellant argues the evidence at trial showed the victim was both a danger to herself and others as well as an imminent danger to

his property. Based on this evidence, Appellant maintains Judge Brauer abused his discretion when he denied Appellant's request to have the jury instructed on defense of another and defense of property.

Appellant was not entitled to an instruction on the use of nondeadly force in the defense of property. In order for this instruction to be given, evidence must have been presented to show "a reasonable person, in the circumstances and from the viewpoint of the defendant, would reasonably have believed the danger of interference to be imminent." Instruction No. 8-16, OUJI-CR (2d) (Supp. 2018).

Appellant fails to establish any unlawful interference with his personal property either occurred or was imminent. The evidence at trial was that, at a minimum, the victim had some interest in, and was allowed to drive, the vehicle. Further, OUJI-CR (2d) No. 8-16 requires this interference to be imminent. Imminent danger was not present where the victim was in bed and the vehicle was blocked from leaving. Judge Brauer did not abuse his discretion in denying Appellant's request for OUJI-CR (2d) No. 8-16.

Appellant has also failed to establish he was entitled to an instruction on the use of nondeadly force in the defense of another. This instruction states in part:

A person is justified in using force in defense of another if that person reasonably believed that use of force was necessary to protect another from imminent danger of bodily harm. Defense of another is a defense although the danger to the personal security of another may not have been real, if a reasonable person, in the circumstances and from the viewpoint of the defendant, would reasonably have believed that another was in imminent danger of bodily harm.

Instruction No. 8-4, OUJI-CR (2d) (Supp. 2018). Appellant's contention that other drivers were in imminent danger of bodily harm if he did not take the victim's keys from her is without merit. The victim was in bed, her car was blocked in by Appellant's truck, and according to Appellant the victim would not leave to go to work for approximately 36 hours.

Appellant does not cite to any portion of the record or other authority that support his claims regarding the denial of these jury instructions. Proposition I is without merit and is denied.

At Proposition II, Appellant argues Amanda Grayson's testimony was irrelevant and that the probative value of this testimony was "substantially outweighed by the danger of unfair

prejudice, confusion of the issues, misleading the jury, and undue delay.” Ms. Grayson was presented by the State and allowed to testify at the jury trial as an expert on domestic violence.

Appellant made no objection to Ms. Grayson’s testimony at trial and Appellant has therefore waived appellate review of the issue for all but plain error. To be entitled to relief under the plain error doctrine, 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, ¶¶ 11, 23, 876 P.2d 690, 694-95, 698; 20 O.S.2011, § 3001.1. To establish plain error, the Appellant must first prove an actual error occurred. Appellant fails to establish any error in this case.

Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” 12 O.S.2011, § 2401. However, it “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” 12 O.S.2011, § 2403. When making this determination,

this Court “should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.”

Harmon v. State, 2011 OK CR 6, ¶ 48, 248 P.3d 918, 937, as corrected (Apr. 1, 2011)(citations omitted).

The Oklahoma Legislature addressed testimony such as Ms. Grayson's in 22 O.S.2011, § 40.7, stating the following:

In an action in a court of this state, if a party offers evidence of domestic abuse, testimony of an expert witness concerning the effects of such domestic abuse on the beliefs, behavior and perception of the person being abused shall be admissible as evidence.

The Legislature has determined that when a party introduces evidence of domestic abuse, the testimony of a domestic abuse expert does assist the trier of fact in understanding the evidence; and expert testimony concerning the effects that domestic abuse has on the beliefs, behavior, and perception of the person being abused is probative concerning the issues of the case. 22 O.S.2011, 40.7; 12 O.S.2011, 2702. *See also Harris v. State*, 2004 OK CR 1, ¶¶ 35-39, 84 P.3d 731, 747-48.

Allowing Ms. Grayson's testimony the maximum reasonable probative force and the minimum reasonable prejudicial value, the testimony's probative value was not substantially outweighed by its

prejudicial effect. *Harmon*, 2011 OK CR 6, ¶ 48, 248 P.3d at 937. The expert's testimony held probative value concerning Appellant's intent. *Harris*, 2004 OK CR 1, ¶¶ 35-39, 84 P.3d at 747-48. The testimony also assisted the jury in understanding the victim's behavior following Appellant's attack. *Id.* The testimony is not confusing or misleading and did not cause undue delay. Appellant fails to establish any error and Proposition II is without merit and is denied.

Appellant's Proposition III contends, based on the best evidence rule, that the trial court erred when it admitted the duplicate of a recording of a conversation between the victim and Appellant. *See* 12 O.S.2011, § 3002. He contends that serious issues exist regarding the integrity of the duplicate recording and that its admission was unfair. Appellant objected to the admission of this evidence in the trial court on the basis of relevance, not based on the best evidence rule. As a result, Appellant has waived review of this issue for all but plain error. *Simpson*, 1994 OK CR 40, ¶¶ 11, 23, 876 P.2d at 694-95, 698.

The best evidence rule allows the admission of duplicates under certain circumstances. 12 O.S.2011, § 3003. Section 3003 states:

A duplicate is admissible to the same extent as an original under this rule or as may otherwise be provided by statute unless:

1. A genuine question is raised as to the authenticity of the original; or
2. In the circumstances it would be unfair to admit the duplicate in lieu of the original.

Appellant's claim that this recording lacks integrity or authenticity is not supported by the record. While the evidence was a recording of the original taped conversation, there is no indication in the record it lacked authenticity. To the contrary, the victim's uncontested testimony was that this recording was an exact duplicate of the recorded conversation.

Further, Appellant's claim that the admission of this recording was unfair because only portions of the recording are audible is without merit. The trial court took steps to ensure the jury was not misled by the recording when it admonished the jury "[u]nless you can hear what's being said on the tape you're not to speculate what might have been said or not said on that point unless a witness testifies what was said or unless you can hear it on the tape." The jury is presumed to have followed the trial court's instructions. *Davis*

v. State, 2018 OK CR 7, ¶ 10, 419 P.3d 271, 277; *Jackson v. State*, 2007 OK CR 24, ¶ 16, 163 P.3d 596, 602.

Appellant has not established actual error occurred and Proposition III is denied. *Simpson*, 1994 OK CR 40, ¶¶ 11, 23, 876 P.2d at 694-95, 698; 20 O.S.2011, § 3001.1.

DECISION

The Judgment and Sentence of the trial court is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF GRADY COUNTY, THE HONORABLE TIMOTHY A. BRAUER, SPECIAL JUDGE

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LUMPKIN, J.: CONCUR

HUDSON, J.: CONCUR

ROWLAND, J.: CONCUR

RA/F