

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

APR 11 2019

LAWRENCE RAYMOND SILVER, JR.,

JOHN D. HADDEN
CLERK

Appellant,) NOT FOR PUBLICATION

v.

) Case No. F-2017-1189

THE STATE OF OKLAHOMA,

Appellee.)

SUMMARY OPINION

ROWLAND, JUDGE:

Appellant Lawrence Raymond Silver, Jr., appeals his Judgment and Sentence from the District Court of Pottawatomie County, Case No. CF-2017-41, for Solicitation for First Degree Murder in violation of 21 O.S.2011, § 701.16. The Honorable John Canavan, Jr., District Judge, presided over Silver's jury trial and sentenced him, in accordance with the jury's verdict, to thirty-seven years imprisonment. Silver appeals raising the following issues:

- (1) whether cumulative prosecutorial misconduct deprived him of a fair trial;
- (2) whether the trial court's imposition of three years post-imprisonment supervision was improper;
- (3) whether he was denied effective assistance of counsel; and

(4) whether cumulative errors deprived him of a fair trial.

We find relief is not required and affirm the Judgment and Sentence of the district court.

1.

Silver argues he was denied a fair trial because of prosecutorial misconduct. None of the challenged statements drew an objection below. A prosecutor's conduct not met with objection is reviewed for plain error only. *Harney v. State*, 2011 OK CR 10, ¶ 23, 256 P.3d 1002, 1007.

“[W]e evaluate the alleged 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. Both sides have wide latitude to discuss the evidence and reasonable inferences therefrom. *Harmon v. State*, 2011 OK CR 6, ¶ 81, 248 P.3d 918, 943. Relief is only granted where the prosecutor's flagrant misconduct so infected the defendant's trial that it was rendered fundamentally unfair. *Jones v. State*, 2011 OK CR 13, ¶ 3, 253 P.3d 997, 998. It is

the rare instance when a prosecutor's misconduct during closing argument will be found so egregiously detrimental to a defendant's right to a fair trial that reversal is required. *See Pryor v. State*, 2011 OK CR 18, ¶ 4, 254 P.3d 721, 722.

There is nothing in any of the challenged comments, individually or cumulatively, that exceeds the wide latitude parties have to discuss the evidence and reasonable inferences from it. The record reveals the prosecutor's challenged remarks, read in context, are not improper. There was no error, plain or otherwise. This claim is denied.

2.

The trial court sentenced Silver to serve a term of three years post-imprisonment supervision upon his release from prison. Silver argues on appeal that this term of post-imprisonment supervision is allowed only upon conviction for certain enumerated sex crimes. *See* 22 O.S.Supp.2017, § 991a(A)(1)(f). He argues that because he was not convicted of one of the listed crimes he could only be sentenced to a term of post-imprisonment supervision "for a period of not less than nine (9) months nor more than one (1) year following confinement...." *See* 22 O.S.Supp.2012, § 991a-21(A).

The State responds, agreeing that the trial court was without authority to order three years of post-imprisonment supervision, and was limited to imposing nine months to one year of post-imprisonment supervision. The State advises that on September 7, 2018, the trial court issued a Second Amended Judgment and Sentence which struck the language imposing three years of post-imprisonment supervision and instead sentenced Silver to a period of nine months to one year of post-imprisonment supervision. The Second Amended Judgment and Sentence was filed in the district court on September 7, 2018. The State requests that this Court take judicial notice of the Second Amended Judgment and Sentence pursuant to 12 O.S.2011, § 2202. We do so and find that Silver's request for relief on this issue is moot as the error has been corrected. This claim is denied.

3.

Silver argues defense counsel rendered constitutionally ineffective assistance at trial. This Court reviews claims of ineffective assistance of counsel to determine whether counsel's deficient performance, if any, prejudiced the defense so as to deprive the

defendant of a fair trial with reliable results. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. Under this test, Silver must affirmatively prove prejudice resulting from his attorney's actions. *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067; *Head v. State*, 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148. "To accomplish this, it is not enough to show the failure had some conceivable effect on the outcome of the proceeding." *Id.* Rather, Silver must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* This Court need not determine whether counsel's performance was deficient if there is no showing of prejudice. See *Malone*, 2013 OK CR 1, ¶ 16, 293 P.3d at 207.

Silver argues that defense counsel provided constitutionally ineffective assistance because counsel failed to object to the prosecutorial misconduct alleged above in Proposition 1. None of the alleged instances of prosecutorial misconduct were found to be

meritorious. Defense counsel cannot be found to have rendered ineffective assistance of counsel for failing to object to proper argument.

In conjunction with this claim, Silver filed a motion to supplement the record and application for evidentiary hearing on claim of ineffective assistance of counsel contemporaneously with his brief attaching a supporting affidavit and transcript. This Court will order an evidentiary hearing if “the application and affidavits . . . contain sufficient information to show this Court by clear and convincing evidence [that] there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence.” Rule 3.11(B)(3)(b)(i), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019). Having reviewed Silver’s request for an evidentiary hearing to develop his claim and the materials offered to support that request, this Court finds that he has failed to meet his burden as he has not shown a strong possibility that the outcome of his trial would have been different. Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019). Silver is not entitled to an evidentiary hearing to further

develop his ineffective assistance of counsel allegations, and his motion, as well as this claim, is denied. *See Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905-06.

4.

Silver asserts that even if no individual error in his case merits reversal, the cumulative effect of the errors committed warrants a new trial or sentence modification. The cumulative error doctrine applies when several errors occurred at the trial court level, but none alone warrants reversal. Although each error standing alone may be of insufficient gravity to warrant reversal, the combined effect of an accumulation of errors may require a new trial. *Martinez v. State*, 2016 OK CR 3, ¶ 85, 371 P.3d 1100, 1119. Cumulative error does not deprive the defendant of a fair trial when the errors considered together do not affect the outcome of the proceeding. *Baird v. State*, 2017 OK CR 16, ¶ 42, 400 P.3d 875, 886. A cumulative error claim is baseless when this Court fails to sustain any of the alleged errors raised on appeal. *Id.* There were no errors, either individually or when considered together, that deprived Silver of a fair trial. This claim is denied.

DECISION

The Judgment and Sentence of the district court is **AFFIRMED**.

Application to Supplement Appeal Record or in the Alternative Remand for Evidentiary Hearing on Sixth Amendment Claims is **DENIED**. 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 delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF POTAWATOMIE COUNTY THE HONORABLE JOHN CANAVAN, JR., DISTRICT JUDGE

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OPINION BY: ROWLAND, J.

LEWIS, P.J.: Concur

KUEHN, V.P.J.: Concur

LUMPKIN, J.: Concur in Part and Dissent in Part

HUDSON, J.: Concur

LUMPKIN, JUDGE: CONCURRING IN PART/DISSENTING IN PART

I concur in affirming Appellant's conviction. However, I respectfully dissent to the majority's disposition of Proposition Two. This Court cannot extend its jurisdiction to take notice of evidence which is not part of the record on appeal. See *Moss v. District Court of Tulsa County*, 1989 OK CR 68, 795 P.2d 103, 105 (finding preliminary hearing magistrate could not extend jurisdiction and take judicial notice of presentence investigation report in the court file). "Proper judicial notice requires that the matter is one of common knowledge, it is settled beyond a reasonable doubt and the knowledge must exist within the jurisdiction of the court." *Id.* Because the Second Amended Judgment and Sentence is not a matter of common knowledge, settled beyond a reasonable doubt, with such knowledge existing within the knowledge of this Court's jurisdiction, we should not be taking judicial notice of the document. The State alleges that the document is now a part of the District Court record. Thus, the proper avenue to incorporate the document into the record is for the State to seek to supplement the record pursuant to Rule 3.11(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18,

App. (2019) (allowing supplementation with matters presented and included as a part of the trial court record). Since the State has conceded that error occurred within Proposition Two and the Second Amended Judgment and Sentence is not properly before us, the Court should remand this matter to the District Court to correct the excessive post-imprisonment supervision period which it imposed. See 22 O.S.Supp.2012, § 991a-21(A) (setting non-sex offense post-imprisonment supervision period range as not less than nine (9) months nor more than one (1) year.”).