

MAY 23 2019

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

JOHN D. HADDEN
CLERK

JOE ZACHARIAS HARP,

Appellant,

v.

STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

Case No. F-2017-863

SUMMARY OPINION

HUDSON, JUDGE:

Appellant, Joe Zacharias Harp, was convicted in a nonjury trial of Child Sexual Abuse, in violation of 21 O.S.Supp.2014, § 843.5(E), in Creek County District Court Case No. CF-2015-15 (O.R. 18). The Honorable Joe Sam Vassar, District Judge, presided at trial and sentenced Harp to thirty (30) years imprisonment (O.R. 63-67).¹ Judge Vassar further imposed a three (3) year term of post-imprisonment supervision.

Harp now appeals, raising five (5) propositions of error before this Court:

¹ Harp must serve not less than eighty-five (85) percent of his sentence before becoming eligible for parole. 21 O.S.2011, § 13.1(14).

- I. BECAUSE JEOPARDY ATTACHED WHEN MR. HARP ENTERED A PLEA OF NO CONTEST AND THE TRIAL COURT ACCEPTED HIS PLEA AND ENTERED A FINDING OF GUILT, THE SUBSEQUENT TRIAL AND SENTENCE VIOLATED THE CONSTITUTIONAL AND STATUTORY PROHIBITIONS AGAINST DOUBLE JEOPARDY;
- II. MR. HARP WAS PREJUDICED BY THE IMPROPER ADMISSION OF CHILD HEARSAY STATEMENTS;
- III. BECAUSE THE TESTIMONY OF [THE VICTIM] WAS INCREDIBLE AND UNBELIEVABLE, CORROBORATION WAS REQUIRED. THE TESTIMONY WAS NOT ADEQUATELY CORROBORATED AND, THEREFORE, THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION;
- IV. MR. HARP WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL, IN VIOLATION OF THE 6th AND 14th AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ART. II, § 7, 9, AND 20, OF THE OKLAHOMA CONSTITUTION; and
- V. CUMULATIVE ERRORS DEPRIVED MR. HARP OF A FAIR PROCEEDING AND A RELIABLE OUTCOME.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we find that no relief is required under the law and evidence. Appellant's judgment and sentence is **AFFIRMED**.

Proposition I: On February 28, 2017, Harp entered a blind plea of no contest to his child sexual abuse charge.² The trial court accepted the plea, ordered a pre-sentence investigation, and set formal sentencing for May 10, 2017. On May 10, 2017, Harp's sentencing hearing was continued at Harp's request to June 28, 2017. A subsequent court minute shows that on June 28, 2017, Harp's case was set for non-jury trial on August 3, 2017. Harp appeared for his non-jury trial on August 3, 2017, and announced, without objection, that he was ready to proceed to trial.

In Proposition I, Harp alleges that jeopardy attached when the trial court accepted his plea of no contest. "Claims of violations of double jeopardy protections are waived where they were not raised in the trial court." *Barnard v. State*, 2012 OK CR 15, ¶ 25, 290 P.3d 759, 767 (quoting *Head v. State*, 2006 OK CR 44, ¶ 9, 146 P.3d 1141, 1144). Harp has thus waived appellate review of this claim for all but plain error review. To show plain error, Harp must show an actual error, which is plain or obvious and that affects his substantial rights. *Baird v. State*, 2017 OK CR 16, ¶ 25, 400 P.3d 875, 883. "This Court will only correct plain error if the error

² The record does not contain a plea of guilty summary of facts form.

seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice.” *Id.*

While the record is silent as to whether Harp requested and was permitted to withdraw his plea and proceed to trial, this is the only logical scenario given that Harp appeared for his non-jury trial and announced ready, without objection. The absence of an objection in this case speaks volumes given that trial counsel, Sheri Eastham, represented Harp throughout the entirety of the proceedings below. Based on the record provided, Harp fails to show actual or obvious error. *Hiler v. State*, 1990 OK CR 54, ¶ 12, 796 P.2d 346, 350 (“defense counsel has a duty to ensure that [a] sufficient record is provided to determine issues raised on appeal”); *Hubbard v. State*, 2002 OK CR 8, ¶ 7, 45 P.3d 96, 102 (“This Court will not assume error from a silent record.”). Proposition I is denied.

Proposition II: Harp challenges the trial court's admission of child hearsay statements made by the victim to Kathy Bell, a Sexual Assault Nurse Examiner (SANE), and Deputy Underwood. The admission of evidence is within the trial court's discretion. *Neloms*

v. State, 2012 OK CR 7, ¶ 25, 274 P.3d 161, 167. Harp argues specifically that the trial court abused its discretion when it admitted the victim's hearsay statements without first conducting a mandatory reliability hearing as mandated by 12 O.S.Supp.2013, § 2803.1.

While Harp objected at trial to the admission of the victim's statements to Bell on the basis of hearsay, he failed to object on the basis advanced here, i.e., that no hearing was held. Harp entered no objection to Deputy Underwood's testimony. Harp has thus waived appellate review of this claim for all but plain error review. *Brown v. State*, 2008 OK CR 3, ¶ 11, 177 P.3d 577, 580; *Simpson v. State*, 1994 OK CR 40, ¶ 11, 876 P.2d 690, 695.

The State concedes that omission of the hearing constituted error but argues that these errors were harmless since the statements bore sufficient indicia of reliability and, thus, were admissible. We agree. *Simpson*, 1994 OK CR 40, ¶ 2, 876 P.2d at 693. The record on appeal affirmatively establishes that Harp had written notice of the State's intention to introduce the challenged

evidence at trial.³ If the trial court had heard the same evidence in-camera, there is no doubt that the judge would have found the child hearsay statements were admissible. Moreover, this was a non-jury trial before an experienced trial judge. “We presume, when a trial court operates as the trier of fact, that only competent and admissible evidence is considered in reaching a decision.” *Long v. State*, 2003 OK CR 14, ¶ 4, 74 P.3d 105, 107.

Based upon the record in the present case, the error associated with omission of the mandated reliability hearing did not affect Harp’s substantial rights and was harmless. *Simpson*, 1994 OK CR 40, ¶ 37, 876 P.2d at 702; *J.J.J. v. State*, 1989 OK CR 77, ¶ 5, 782 P.2d 944, 945-46. Proposition II is denied.

Proposition III: Harp argues the victim’s testimony was so vague and unbelievable that it required corroboration in order for a conviction to be had. A conviction for sexual assault crimes “may be sustained upon the uncorroborated testimony of the prosecuting witness, *unless* such testimony appears incredible and so unsubstantial as to make it unworthy of belief.” *Ray v. State*, 1988

³ The State filed a detailed Notice of Intent to Introduce Child Hearsay on July 24, 2017, which encompassed the victim’s statements to both Bell and Deputy Underwood.

OK CR 199, ¶ 8, 762 P.2d 274, 277 (emphasis added). “If the record reveals the testimony of the [prosecuting witness] is clear and believable and is not inconsistent, incredible or contradictory, we will not interfere with the fact finder's verdict.” *Id.*

Harp's claim challenges the believability of the victim's testimony. This alone is not a proper basis for corroboration. *Martin v. State*, 1987 OK CR 265, ¶ 6, 747 P.2d 316, 318 (“The question of improbability [in a victim's allegations] must arise from something other than the believability of the victim's testimony.”). Moreover, the record shows the victim's testimony was consistent and credible throughout the trial and thus worthy of belief. The victim's testimony was lucid and clear and her veracity was thoroughly tested on cross-examination. She provided specific details that lent credibility to her account. In addition, the victim's testimony was somewhat corroborated by the SANE nurse even though corroboration was not required. Moreover, Deputy Underwood could not recall any inconsistencies between the victim's trial testimony and what she revealed during the forensic interview. Thus, based on the evidence, the trial court rationally

concluded that the victim's claim of sexual abuse was worthy of belief.⁴

Having reviewed the evidence in the light most favorable to the State, sufficient evidence was presented at trial to allow any rational trier of fact to conclude beyond a reasonable doubt that Harp sexually abused the victim as charged. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 2788-89, 61 L. Ed. 2d 560 (1979); *Mitchell v. State*, 2018 OK CR 24, ¶ 11, 424 P.3d 677, 682; *Davis v. State*, 2011 OK CR 29, ¶ 74, 268 P.3d 86, 111; *Young v. State*, 2000 OK CR 17, ¶ 35, 12 P.3d 20, 35. Proposition III is denied.

Proposition IV: Harp contends trial counsel had the duty to either make a record regarding the circumstances surrounding his plea, or assert Harp's right to be free from double jeopardy. To prevail on an ineffective assistance of counsel claim, the appellant

⁴ The trial court clearly found the victim's testimony believable. In rendering his verdict, Judge Vassar stated:

We have testimony of a child which can always be worrisome, but in this case I find that the child's testimony was imminently believable. I believe that she was telling the truth, that when she did not know the truth didn't state anything.

(Tr. 60-61).

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, 2064, 80 L. Ed. 2d 674 (1984). See *Harrington v. Richter*, 562 U.S. 86, 104, 131 S. Ct. 770, 787-88, 178 L. Ed. 2d 624 (2011) (summarizing *Strickland*, *supra*).

Appellant fails to show that counsel was ineffective. Harp appeared for his non-jury trial and announced ready, without objection. In Proposition I, we found the only logical conclusion was that Harp had requested and was permitted to withdraw his plea and proceed to trial. Harp has not provided any supporting documentation, affidavit or other evidence to counter this conclusion. Harp's argument is conclusory and speculative and does not carry his burden to prove his claim of ineffectiveness. *Fulgham v. State*, 2016 OK CR 30, ¶ 18, 400 P.3d 775, 780-81 (rejecting speculative and conclusory ineffective assistance claims). Proposition IV is denied.

Proposition V: We find no merit to Appellant's cumulative error claim. *Hanson v. State*, 2009 OK CR 13, ¶ 55, 206 P.3d 1020, 1035. Proposition V is denied.

DECISION

The Judgment and Sentence of the District 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 delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CREEK COUNTY
THE HONORABLE JOE SAM VASSAR, DISTRICT JUDGE

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OPINION BY: HUDSON, J.

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| LEWIS, P.J.: | CONCUR |
| KUEHN, V.P.J.: | CONCUR |
| LUMPKIN, J.: | CONCUR |
| ROWLAND, J.: | CONCUR |