

DAVID WAYNE ELLIS,)
)
 Appellant,)
)
 v.) Case No. F-2018-103
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAY 16 2019

JOHN D. HADDEN
CLERK

SUMMARY OPINION

LEWIS, PRESIDING JUDGE:

David Wayne Ellis, Appellant, was charged with first degree murder in violation of 21 O.S.Supp.2012, § 701.7, in the District Court of Tulsa County, Case No. CF-2016-5175. Appellant was tried by jury and found guilty of the lesser offense of manslaughter in the first degree, heat of passion, in violation of 21 O.S.2011, § 711(2), after former conviction of two or more felony offenses. The jury set punishment at life imprisonment. The Honorable William D. LaFortune, District Judge, pronounced judgment and sentence accordingly granting credit for time served.¹

¹Appellant must serve 85% of his sentence before being eligible for consideration for parole. 21 O.S.Supp.2015, § 13.1(3).

Mr. Ellis appeals in the following propositions of error:

1. The State failed to prove beyond a reasonable doubt that Mr. Ellis was not acting in self-defense when the decedent was stabbed;
2. The prosecutor engaged in misconduct when she referred to the decedent's death as a "murder" during trial;
3. Mr. Ellis was denied the constitutionally guaranteed effective assistance of counsel;
4. The decedent's photograph admitted at trial over defense counsel's objection was unfairly prejudicial as it did not accurately depict the decedent prior to his death.

In proposition one, Appellant claims the State failed to prove that he was not acting in self-defense when he stabbed the decedent. This Court reviews challenges to the sufficiency of the evidence in the light most favorable to the State and will not disturb the verdict if any rational trier of fact could have found the essential elements of the crime charged to exist beyond a reasonable doubt. *Head v. State*, 2006 OK CR 44, ¶ 6, 146 P.3d 1141, 1144. *See also Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04. In evaluating the evidence presented at trial, we accept the fact-finder's resolution of conflicting evidence as long as it is within the

bounds of reason. See *Gilson v. State*, 2000 OK CR 14, ¶ 77, 8 P.3d 883, 910; *Day v. State*, 2013 OK CR 8, ¶ 12, 303 P.3d 291, 298.

Where the jury has been properly instructed, this Court looks to the entire record to determine whether the evidence, in a light most favorable to the State, supported the jury's verdict. *Hancock v. State*, 2007 OK CR 9, ¶ 57, 155 P.3d 796, 811, *overruled on other grounds by Williamson v. State*, 2018 OK CR 15, 422 P.3d 752. Even where sharp conflicts in the evidence exist, and a defendant has raised a defense of self-defense, we look to determine if evidence supports the verdict. *Id.* 2007 OK CR 9, ¶ 67, 155 P.3d at 812.

Here, the State presented sufficient evidence to prove that Appellant committed first degree manslaughter, heat of passion, beyond a reasonable doubt, and the evidence disproved self-defense. In a light most favorable to the State, Appellant confronted the victim with a butcher knife after threatening to stab him. Appellant was the aggressor and was not reasonably in fear of death or great bodily injury. The State clearly proved that Appellant was not acting in self-defense. This proposition is denied.

Appellant claims in proposition two that improper statements by the prosecutor during witness examination denied him a fair trial. He complains that the prosecutor improperly referred to the decedent's death as a murder. He further argues that this was an improper characterization because it was the jury's duty to determine whether the decedent's death was a murder, manslaughter, or the result of an act of self-defense. Counsel failed to object so review is for plain error only. 12 O.S.2011, § 2104, (a court may take "notice of plain errors affecting substantial rights although they were not brought to the attention of the court.")

To be entitled to relief for plain error, an appellant must show: "(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." *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. *See also Simpson v. State*, 1994 OK CR 40, ¶¶ 2, 11, 23, 876 P.2d 690, 694, 695, 698. 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. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

The prosecutor's characterization of this killing as murder was not error. Appellant was charged with murder, however, the prosecutor was not expressing a personal belief about the crime. The jury was properly instructed that it was their duty to come to a verdict based on the evidence. In fact, the jury rejected a murder theory and found Appellant guilty of heat of passion manslaughter. There is no plain error here.

Next, in proposition three, Appellant argues he was denied the effective assistance of counsel. We review this claim under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), requiring that Appellant show not only that counsel performed deficiently, but that Appellant was prejudiced by it. *Id.*, 466 U.S. at 687. In this "highly deferential" inquiry, evidence of deficient performance must overcome a strong presumption that counsel's actions constituted sound trial strategy. *Id.*, 466 U.S. at 689. Prejudice to the defense occurs when counsel's deficient performance creates a reasonable probability that the result of the proceeding would have been different. "A reasonable probability is

a probability sufficient to undermine confidence in the outcome.”
Id., 466 U.S. at 694.

Appellant first claims that counsel was constitutionally ineffective because he failed to object to the instances of prosecutorial misconduct. We found that no error occurred in determining proposition two. There is, therefore, no basis for an ineffective assistance of counsel claim.

Next he claims counsel was ineffective for failing to impeach the State’s witness with a prior inconsistent statement. The statements cited by Appellant are merely summaries by an investigative officer. There were other wholly consistent statements made at the time of the crime. Counsel’s conduct was clearly a reasonable strategic decision that does not fall outside reasonable bounds of advocacy. Appellant’s ineffective assistance of counsel claim is denied.

Finally, in proposition four, Appellant claims the admission of the decedent’s photograph over defense counsel’s objection was unfairly prejudicial as it was not an accurate depiction of the decedent prior to his death. The admission of evidence lies within the sound discretion of the trial court and, when the issue is

properly preserved for appellate review, we will not disturb the trial court's decision absent an abuse of discretion. *Pavatt v. State*, 2007 OK CR 19, ¶ 42, 159 P.3d 272, 286. An abuse of discretion is a clearly erroneous conclusion and judgment, contrary to the logic and effect of the facts presented. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

Appellant objected at trial to the in-life photograph of the victim (State's exhibit 66). Counsel argued that the photograph was of "a much younger individual . . . before alcohol and methamphetamine had taken much of his vibrance."

In reviewing the exhibits especially the medical examiner's photographs in comparison to the in-life photograph, there doesn't seem to be as much difference as Appellant argues. This photograph was an accurate representation of the decedent at the time of his death.

These types of photographs are admissible under 12 O.S.2011, § 2403 ("in a prosecution for any criminal homicide, an appropriate photograph of the victim while alive shall be admissible evidence when offered by the district attorney to show the general appearance and condition of the victim while alive.") This

photograph was admissible and the relevance of this photograph was not “substantially” outweighed by any danger of unfair prejudice. There is no abuse of discretion here.

DECISION

The judgment and sentence 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.

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY THE HONORABLE WILLIAM D. LAFORTUNE, DISTRICT JUDGE

APPEARANCES AT TRIAL

BRIAN BOEHEIM
CIERA FREEMAN
616 S. BOSTON, STE. 307
TULSA, OK 74119
ATTORNEYS FOR DEFENDANT

JULIE MOSS
SEAN WATERS
ASST. DISTRICT ATTORNEYS
500 S. DENVER
TULSA, OK 74103
ATTORNEYS FOR THE STATE

OPINION BY: LEWIS, P.J.
KUEHN, V.P.J.: Concur
LUMPKIN, J.: Concur
HUDSON, J.: Concur
ROWLAND, J.: Concur

APPEARANCES ON APPEAL

ARIEL PARRY
P.O. BOX 926
NORMAN, OK 73070
ATTORNEY FOR APPELLANT

MIKE HUNTER
ATTORNEY GENERAL
TESSA L. HENRY
ASST. ATTORNEY GENERAL
313 N.E. 21ST
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR APPELLEE