



<sup>1</sup> Under 21 O.S.Supp.2015, § 13.1, Guy must serve 85% of his sentence of imprisonment before he is eligible for parole consideration.

- (3) whether the trial court erred in giving the instruction on mandatory post-imprisonment supervision; and
- (4) whether he was denied effective assistance of counsel.

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

**1.**

Guy argues that the trial court erred in failing to instruct the jury that the victim's prior inconsistent statements at preliminary hearing could be used as substantive evidence for determining guilt or innocence. "It is settled law that trial courts have a duty to instruct the jury on the salient features of the law raised by the evidence with or without a request." *Hogan v. State*, 2006 OK CR 19, ¶ 39, 139 P.3d at 923 (citing *Atterberry v. State*, 1986 OK CR 186, ¶ 8, 731 P.2d 420, 422). See also *Soriano v. State*, 2011 OK CR 9, ¶ 36, 248 P.3d 381, 396. Because the record does not show that trial counsel either objected to the trial court's failure to give the instruction at issue or request the same, review on appeal is for plain error. See *Rutan v. State*, 2009 OK CR 3, ¶ 78, 202 P.3d 839, 855. 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*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. “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.” *Stewart v. State*, 2016 OK CR 9, ¶ 25, 372 P.3d 508, 514. *See also* 20 O.S.2011 § 3001.1 (“No judgment shall be set aside or a new trial granted by an appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury ... unless it is the opinion of the reviewing court that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.”).

Defense counsel argued that the victim’s trial testimony was inconsistent with his preliminary hearing testimony and requested that the jury be given OUJI-CR (2d) (Supp.2009) 9-20 on impeachment by prior inconsistent statements. The trial court agreed that the instruction was warranted and gave it as requested. However, the second paragraph of this instruction, advising the jury that they

could consider the prior inconsistent statement from preliminary hearing for proof of innocence or guilt, was omitted. We find under the facts of this case this omission was not plain error and relief is not required.

## 2.

The trial court instructed the jury on return of verdict – prior convictions (first stage)<sup>2</sup> and lesser included offenses – second degree burglary.<sup>3</sup> Guy argues on appeal that the trial court erred in giving the instruction on return of verdict – prior convictions (first stage) because it unnecessarily advised the jury that the issue of punishment was not before them at this time, was inconsistent with the lesser included offenses instruction, and misdirected the jury on how to deal with the charged crime of robbery with a dangerous weapon. Because this objection was not met with objection at trial review for all but plain error has been waived. *See Rutan*, 2009 OK CR 3, ¶ 78, 202 P.3d at 855. To be entitled to relief for plain error, an appellant must show plain error under the analysis set forth in *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. This Court will only

---

<sup>2</sup> OUJI-CR (2d) (Supp.2000) 10-15.

<sup>3</sup> OUJI-CR (2d) (Supp.2003)10-24.

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. *Id.* The instructions at issue do not conflict with one another and did not misdirect the jury. The fact that both advised the jury that the issue of punishment was not yet before them was not error, plain or otherwise. This proposition is without merit.

### 3.

The trial court instructed the jury on mandatory post-imprisonment supervision under OUJI-CR (2d) 10-13C. The Notes on Use provide that this instruction should only be given when the defendant is charged with listed offenses involving sexual abuse or sexual exploitation. Guy asserts that this instruction was not warranted in his case because the charged crime was not one of the listed offenses. Again, because he did not object to this instruction below, we review the claim for plain error on appeal. *See Rutan*, 2009 OK CR 3, ¶ 78, 202 P.3d at 855. To be entitled to relief for plain error, an appellant must show plain error under the analysis set forth in *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. 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. *Id.*

The instruction on mandatory post-imprisonment supervision was not warranted and the State concedes that it was given in error. However, this error did not affect Guy's substantial rights; it did not affect the outcome of the trial. Accordingly, it did not rise to the level of plain error and relief is not required.

#### 4.

Guy contends that he was denied constitutionally effective assistance of counsel by numerous failings of defense counsel. This Court reviews claims of ineffective assistance of counsel *de novo*, to determine whether counsel's constitutionally 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, Guy 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.

The merits of most of the claims underlying Guy's ineffective assistance of counsel challenge have been rejected in the preceding propositions of error. In his remaining claim Guy argues that defense counsel rendered constitutionally ineffective assistance for failing to reassert his pretrial motion to dismiss at the start of trial and at sentencing. In rejecting his pretrial motion to dismiss pursuant to 21 O.S.2011 §11, the trial court found that his prosecutions for possessing a stolen vehicle in Payne County and in Tulsa County for robbery with a dangerous weapon did not constitute double punishment. He also asserts that trial counsel was ineffective for failing to request at the start of trial that the trial court take judicial notice of Payne County documents showing his conviction for possession of a stolen vehicle. Guy has shown neither that defense counsel's performance was deficient for these alleged failings nor that he was prejudiced by the alleged failings.

In conjunction with this claim, Guy filed an application for evidentiary hearing and motion to supplement the record attaching

supporting affidavit and documents. 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 Guy’s request for an evidentiary hearing to develop his claim and the materials offered to support that request, we find 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). Therefore, Guy 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.

### **DECISION**

The Judgment and Sentence of the district court is **AFFIRMED**.  
The Application for Evidentiary Hearing and Motion to Supplement



the Record 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 TULSA COUNTY  
THE HONORABLE DAWN MOODY, SPECIAL JUDGE**

**APPEARANCES AT TRIAL**

SOFIA JOHNSON  
ASSISTANT PUBLIC DEFENDER  
423 S. BOULDER, STE. 300  
TULSA, OK 74013  
COUNSEL FOR DEFENDANT

JULIANNE G. BURTON  
KEVIN KELLER  
ASSISTANT DISTRICT  
ATTORNEYS  
500 S. DENVER, NINTH FLOOR  
TULSA, OK 74103  
COUNSEL FOR STATE

**OPINION BY: ROWLAND, J.**

LEWIS, P.J.: Concur  
KUEHN, V.P.J.: Concur  
LUMPKIN, J.: Concur in Results  
HUDSON, J.: Concur

**APPEARANCES ON APPEAL**

RICHARD COUCH  
TULSA COUNTY PUBLIC  
DEFENDER'S OFFICE  
423 S. BOULDER, STE. 300  
TULSA, OK 74013  
COUNSEL FOR APPELLANT

MIKE HUNTER  
ATTORNEY GENERAL  
OF OKLAHOMA  
DIANE L. SLAYTON  
ASSISTANT ATTORNEY  
GENERAL  
313 N.E. 21ST STREET  
OKLAHOMA CITY, OK 73105  
COUNSEL FOR APPELLEE