

ORIGINAL



IN THE COURT OF CRIMINAL APPEALS OF
THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

FEB - 6 2020

JOHN D. HADDEN
CLERK

SHELLEY JO DUNCAN,)
)
Appellant,)
)
v.)
)
THE STATE OF OKLAHOMA,)
)
Appellee.)

NOT FOR PUBLICATION

Case No. F-2018-1267

SUMMARY OPINION

ROWLAND, JUDGE:

Appellant Shelley Jo Duncan appeals her Judgment and Sentence from the District Court of Johnston County, Case No. CF-2017-31, for Lewd Acts with a Child, in violation of 21 O.S.Supp.2015, § 1123.¹ The Honorable Mark Campbell, District Judge, presided over Duncan's jury trial and sentenced her in accordance with the jury's recommendation to six years imprisonment.² Duncan appeals raising the following issues:

¹ Duncan was a teacher in the Tishomingo school system, but was never the victim's teacher. She was charged with an incident that occurred in her classroom and the prosecution admitted evidence of another incident days before to show motive, intent, and common scheme or plan. There was a change of venue in this case and Duncan's jury trial was held in Cleveland County.

² Under 21 O.S.Supp.2015, § 13.1, Duncan must serve 85% of her sentence of imprisonment before she is eligible for parole consideration.

- (1) whether the district court erred by denying a motion to strike two jurors for cause;
- (2) whether there was improper commentary on her right to remain silent;
- (3) whether the alleged victim was credible and the evidence sufficient to sustain her conviction;
- (4) whether the use of improper other crimes evidence deprived her of a fair trial;
- (5) whether she received effective assistance of counsel;
- (6) whether prosecutorial misconduct deprived her of a fair trial;
- (7) whether her sentence is excessive and should be modified; and
- (8) whether the accumulation of errors deprived her of a fair trial.

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

1.

Duncan claims the district court erred by denying her motion to strike two prospective jurors for cause, namely S.M. and J.S. The defense completed its questioning in *voir dire* and asked the court to remove S.M. and J.S. for cause because unspecified responses indicated they could not be fair to Duncan. The district court denied

these for-cause challenges without explanation. Generally, we review the district court's ruling on for-cause challenges for an abuse of discretion affording the ruling broad deference. *See Tryon v. State*, 2018 OK CR 20, ¶ 30, 423 P.3d 617, 631, *cert. denied*, ___U.S.___, 139 S.Ct. 1176, 203 L.Ed.2d 215 (2019); *Brown v. State*, 2018 OK CR 3, ¶ 87, 422 P.3d 155, 173. We will find an abuse of discretion only when a district court's decision is not supported by the facts or law concerning the matter. *Hammick v. State*, 2019 OK CR 21, ¶ 15, 449 P.3d 1272, 1277; *Tryon*, 2018 OK CR 20, ¶ 31, 423 P.3d at 631.

The district court did not abuse its discretion in denying Duncan's for-cause challenge of S.M., who served on her jury, based on the challenged responses cited on appeal. The record shows that S.M.'s responses did not affirmatively establish that his views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath. *See Tryon*, 2018 OK CR 20, ¶ 28, 423 P.3d at 630. The district court was able to observe and hear his responses and was in a superior position to make the credibility determinations critical to determining S.M.'s qualifications to serve. The record demonstrates that a sufficient

vetting of this prospective juror's views occurred and that the district court's ruling on Duncan's for-cause challenge should be honored on appeal.

The record shows that the defense removed J.S. with a peremptory challenge and that she did not serve on Duncan's jury. Defense counsel neither identified which remaining panelists were unacceptable nor requested additional peremptory challenges after the court denied the for-cause challenges and the parties had exercised their peremptory challenges. Duncan's failure to identify unacceptable panelists and request additional peremptory challenges renders her claim with respect to J.S. unpreserved. *Smith v. State*, 2013 OK CR 14, ¶ 26, 306 P.3d 557, 568. Accordingly, even if the district court's ruling on Duncan's for-cause challenge with respect to J.S. was in error, she is not entitled to relief because she cannot show error plus injury since J.S. did not serve. *Mitchell v. State*, 2018 OK CR 24, ¶ 24, 424 P.3d 677, 685 ("We have long followed the principle that there must be error plus injury to warrant relief on appeal.") For the foregoing reasons, this claim must be rejected.

2.

Duncan claims she was denied a fair trial because of impermissible comments on her right to remain silent. She argues comments that she never participated in an interview with the lead investigator, either before or after arrest, were irrelevant, implied she was guilty, and violated the self-incrimination clause of the Fifth Amendment. The State pleads necessity as justification, arguing that the majority of the prosecutor's inquiry was within the bounds of acceptable questioning and necessary to counter Duncan's assertion that not only was the investigation shoddy and inadequate but also that there had been a rush to judgment. The State contends that the prosecutor's one impermissible question was left unanswered because of a sustained objection and that any error was therefore cured. Duncan did not raise this constitutional objection below and review is for plain error only. *See Barnes v. State*, 2017 OK CR 26, ¶ 6, 408 P.3d 209, 213; *Lamb v. State*, 1988 OK CR 296, ¶ 12, 767 P.2d 887, 891. Duncan has the burden in plain error review to demonstrate that an error, plain or obvious under current law, adversely affected her substantial rights. *Hammick*, 2019 OK CR 21,

¶ 8, 449 P.3d at 1275. This Court will correct plain error provided the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings or represented a miscarriage of justice. *Id.*

An agent with the Oklahoma State Bureau of Investigation investigated the allegation against Duncan because the Tishomingo police chief was personally acquainted with her. The agent met with the police chief and obtained the victim's cell phone. The police chief was under the impression that Duncan was willing to surrender her cell phone for inspection so the agent contacted her. Duncan denied saying she would surrender her cell phone and she refused to turn over her cell phone to him. Duncan challenges the prosecutor's subsequent questions about whether the agent attempted to set up an interview with her before her arrest. The agent explained that he dealt with her attorney after his initial contact with Duncan about surrendering her cell phone. He spoke with the attorney about setting up an interview, noting an interview was never actually scheduled. During the agent's later testimony, the prosecutor asked again about his attempt to set up an interview with Duncan to discuss the text messages between her and the victim. The agent essentially repeated

his previous testimony. Over defense counsel's asked and answered objection, the agent said he spoke to Duncan's attorney and because her attorney was busy with other matters for the next week, a time was not decided. Because the attempt to schedule an interview occurred pre-arrest, there was no comment on Duncan's post-arrest silence. Nothing about this testimony hinted that Duncan did not participate in an interview prior to her arrest because she invoked her right to remain silent. In fact, defense counsel followed up on the interview issue emphasizing Duncan's willingness to cooperate. Defense counsel confirmed that Duncan had told the agent that she wanted "to help and cooperate" but preferred to operate through her attorney. Counsel also elicited from the agent that there was nothing wrong with a suspect working through an attorney, suggesting the decision was a wise one. Because there was no comment on her right to remain silent, Duncan has shown no error stemming from these inquiries.

The prosecutor also asked the agent about attempts to interview Duncan after her arrest. The line of questioning ended with the agent saying he tried to set up an interview, but it never came to fruition.

Duncan's evidence showed that an interview was never scheduled because of her surprise arrest on September 16, 2016, which led to her distrust of the agent and the fading of her willingness to cooperate.

In *Bland v. State*, 2000 OK CR 11, ¶ 110, 4 P.3d 702, 730, the Court stated:

Generally, the prosecution may not comment on the defendant's post-arrest silence. *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S.Ct. 2240, 2245, 49 L.Ed.2d 91 (1976); *Parks v. State*, 765 P.2d 790, 793 (Okla.Cr.1988). However, error may be harmless where there is overwhelming evidence of guilt and the defendant is not prejudiced by the error. *White v. State*, 900 P.2d 982, 992 (Okla.Cr.1995). Error may also be "cured" where the trial court sustains the defendant's objection and admonishes the jury. *Id.* In this case, any error was cured by Appellant's objection and the trial court's admonishment to the jury to disregard the comment.

The district court sustained defense counsel's objections to the questions with the potential to elicit responses concerning Duncan's right to remain silent, namely the agent's lack of confidence a timely interview would take place and the agent's willingness to interview Duncan had she been willing. Those questions were left unanswered eliminating the need to admonish the jury to disregard any improper response. The agent's testimony related to "post-arrest silence"

consisted of two statements that he tried, without success, to set up an interview through Duncan's lawyer after her arrest. There was no suggestion that Duncan was read her constitutional rights after her arrest and refused to answer questions based on the invocation of her right to remain silent. Nor does Duncan identify any attempt by the prosecutor to use her "silence" as an indicator of guilt. Because there was no impermissible comment on her post-arrest silence, Duncan has not shown the commission of an error and this claim is denied. *Hogan v. State*, 2006 OK CR 19, ¶ 39, 139 P.3d 907, 923 ("The first step in plain error analysis is to determine whether error occurred.")

3.

Duncan argues the evidence was insufficient to prove her guilt beyond a reasonable doubt because the victim's testimony was not corroborated and was unworthy of belief. This claim is without merit.

Evidence is sufficient to support a conviction if, viewing the evidence and all reasonable inferences from it in the light most favorable to the State, any rational trier of fact could find the defendant guilty beyond a reasonable doubt. *Coddington v. State*,

2006 OK CR 34, ¶ 70, 142 P.3d 437, 456; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04. This Court does not reweigh conflicting evidence or second-guess the fact-finding decisions of the jury; we accept all reasonable inferences and credibility choices that tend to support the verdict. See *Day v. State*, 2013 OK CR 8, ¶ 12, 303 P.3d 291, 298; *Coddington*, 2006 OK CR 34, ¶ 70, 142 P.3d at 456. 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. See *Ray v. State*, 1988 OK CR 199, ¶ 8, 762 P.2d 274, 277. If the record reveals the testimony of the purported victim is clear and believable and is not inconsistent, incredible or contradictory, we will not interfere with the fact finder's verdict. *Id.*

Duncan focuses on a school assignment in which the victim wrote a letter containing falsehoods. The isolated incident, according to Duncan, demonstrated the victim is a liar and therefore cannot be considered a credible witness. She further challenges the plausibility of the circumstances surrounding the two instances of physical contact described by him. She contends the proximity of other people

to them during the alleged physical acts, as well as his failure to notice Duncan's readily visible tattoos/scars on her torso, calls into question the truthfulness of his account.³ She also attacks the forensic interview based on criticisms leveled by a defense expert about the leading manner in which the interview was conducted.

The victim was consistent in his account of his relationship with Duncan, including the two instances of physical contact. The sheer number of texts they exchanged at all times of the day and night supported a finding that Duncan crossed suitable adult/teenager boundaries with him. Duncan's willingness to cross boundaries was further demonstrated by her offer to give him the answers to his algebra homework. The text messages that were exchanged were flirtatious and escalated in the days before the physical encounters were uncovered. The references to communicating via SnapChat, the messaging application the victim's parents forbade him to have and whose messages disappear, also increased during this time period. The content of the text messages was inconsistent with an adult

³ Duncan refers to her husband's testimony about her physical scars and tattoos from her first trial that ended in mistrial. He did not testify at this trial and it was not established she had such markings.

simply mentoring a 14-year-old boy and attempting to build self-confidence and esteem as Duncan claimed.

The record in this case shows that the victim's testimony was lucid, clear, and reasonably consistent. His credibility, as well as the circumstances surrounding the instances of physical contact, were thoroughly explored. His memory and veracity were tested on cross-examination. The jury was able to observe his demeanor and body posturing during the forensic interview and at trial. He provided sufficient details lending credibility to his account. That he provided additional detail about the incident at trial does not render his testimony incredible or unworthy of belief. He was certain about the encounter with Duncan in her classroom. Whether the classroom acts could have taken place as he described goes to the weight of the evidence. Moreover, Duncan's jury was free to consider the opinions of her expert witness concerning the forensic interview and give those opinions any weight it deemed appropriate. The strengths and weaknesses of all the evidence, including Duncan's character witnesses, was presented for the jury to consider.

We cannot find on this record that the victim's testimony was so incredible or so unsubstantial as to make it unworthy of belief. *See Gilmore v. State*, 1993 OK CR 27, ¶ 12, 855 P.2d 143, 145; *Ray*, 1988 OK CR 199, ¶ 8, 762 P.2d at 277. The jury rationally concluded that the victim's claim was credible. Viewing the trial evidence in the light most favorable to the State, we hold that the victim's testimony provided sufficient evidence to support Duncan's conviction. This claim is denied.

4.

Duncan argues she was denied a fair trial from the admission of other crimes evidence, namely that she had used methamphetamine in the past. The reference to her former drug use was in one of the thousands of texts she exchanged with the victim. Duncan concedes it was the defense who submitted the exhibit without redacting the drug reference. She nevertheless argues the evidence was more prejudicial than probative.

Duncan invited any error from the admission of the drug reference by offering Defense Exhibit 12. It is well settled that this Court will not grant relief for error invited by the defendant. *Cuesta-*

Rodriguez v. State, 2010 OK CR 23, ¶ 73, 241 P.3d 214, 237. This claim is denied.

5.

Duncan contends she is entitled to relief because of ineffective assistance of trial counsel. She faults defense counsel for failing to remove S.M. from her jury panel with a peremptory challenge, for failing to present the testimony of her husband and daughter, for discussing her request for counsel and right to remain silent, and for failing to redact the drug reference in Defense Exhibit 12. This claim is without merit.

This Court reviews claims of ineffective assistance of counsel to determine: (1) whether counsel's performance was constitutionally deficient; and (2) whether counsel's performance prejudiced the defense so as to deprive the defendant of a fair trial with reliable results. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. This Court need not determine whether counsel's performance was deficient if there is no showing of harm. *See Malone*, 2013 OK CR 1, ¶ 16, 293 P.3d at 207.

Duncan cannot show the necessary prejudice to prevail. As discussed in Proposition 1, S.M.'s responses did not affirmatively show actual bias against Duncan. The parties exercised peremptory challenges off the record. Without knowing which panelists were struck by defense counsel, Duncan cannot show that defense counsel's strikes were unreasonable or unsound. We must indulge the strong presumption that defense counsel made a reasonable strategic decision and removed other seemingly more offensive panelists with the defense's peremptory challenges. *Bivens v. State*, 2018 OK CR 33, ¶ 32, 431 P.3d 985, 996 (noting the burden is on the appellant to show that counsel's conduct violated the presumption of reasonableness/sound trial strategy); *Lee v. State*, 2018 OK CR 14, ¶ 14, 422 P.3d 782, 786 (stating appellate court will not second-guess matters concerning trial strategy provided there is a reasonable basis for counsel's actions); *Davis v. State*, 2005 OK CR 21, ¶ 8, 123 P.3d 243, 246 (stating decisions on use of peremptory challenges is generally a matter of trial strategy). Defense counsel's strategy not to call Duncan's daughter and husband as witnesses will also not be second-guessed. Both testified at her first trial that ended

in mistrial and Duncan maintains their testimony was helpful to her. The impact of their testimony, however, cannot be evaluated. We simply cannot ascertain whether either was willing to testify similarly at the second trial, whether either was an effective witness during the first trial, and whether their testimony played a role in the first jury's inability to reach a verdict. We must again indulge a strong presumption that counsel's decision not to call these witnesses was reasonable, sound trial strategy and Duncan offers only conjecture, rather than proof, to support her claim. Defense counsel's decision to discuss Duncan's choice to deal with police through her attorney also falls within the ambit of reasonable trial strategy and Duncan has not shown otherwise. Contrary to her claim, counsel's references to her attorney were not comments on her right to remain silent. Nor can Duncan show a reasonable probability that the outcome of her trial would have been different had defense counsel redacted the isolated drug reference in Defense Exhibit 12. The reference was buried within thousands of text messages and was not a focal point or outcome-determinative issue that affected the jury's evaluation of

the primary evidence. Because Duncan has failed to show prejudice from defense counsel's actions, this claim is denied.

6.

Duncan argues she was denied a fair trial because of prosecutorial misconduct during closing argument. She claims the prosecutor made improper comments to bolster the credibility of the victim, offered personal opinions of guilt, and attempted to shift the burden of proof. She insists the alleged improprieties infected her trial with unfairness and require reversal. Duncan objected to only one instance now challenged on appeal. Comments not met with a contemporaneous objection will be reviewed for plain error only. See *Mitchell*, 2018 OK CR 24, ¶ 30, 424 P.3d at 686.

This Court will not grant relief on a claim of prosecutorial misconduct unless the misconduct effectively deprived the defendant of a fair trial or a fair and reliable sentencing proceeding. *Harmon v. State*, 2011 OK CR 6, ¶ 80, 248 P.3d 918, 943. We evaluate claims of prosecutorial error “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.” *Lee*, 2018 OK CR 14, ¶ 6, 422 P.3d at 785. We have long recognized that both parties enjoy a “wide latitude in closing argument to argue the evidence and reasonable inferences from it.” *Lamar v. State*, 2018 OK CR 8, ¶ 54, 419 P.3d 283, 297. It will be the rare instance when a prosecutor’s misconduct during closing argument will require relief. *Bramlett v. State*, 2018 OK CR 19, ¶ 36, 422 P.3d 788, 800.

A review of the challenged comment purportedly amounting to improper vouching shows that the prosecutor did not engage in either improper bolstering or vouching of the victim. *See Taylor v. State*, 2011 OK CR 8, ¶ 57, 248 P.3d 362, 379 (quoting *Browning v. State*, 2006 OK CR 8, ¶ 43, 134 P.3d 816, 841 (“Vouching occurs when a prosecutor expresses a personal belief in a witness’s credibility, either through explicit assurances or by implying that other evidence, not presented to the jury, supports the witness’s testimony.”)) The prosecutor reminded the jury of the earlier discussion during jury selection that perpetrators neither have a particular look nor act a particular way in public to combat the defense’s portrayal of Duncan as an upstanding person. The prosecutor argued the victim’s

testimony proved Duncan's wrongdoing and the prosecutor went on to discuss the victim's demeanor and lack of motivation for accusing Duncan. There was no impermissible vouching and the challenged remark fell within the wide latitude the parties have to discuss the evidence.

The same is true for the prosecutor's remarks Duncan claims constitute personal opinions of guilt. The record shows the prosecutor's remarks, read in context, were nothing more than statements that the State had met its burden of proof based on the victim's testimony. Duncan has failed to show error, plain or otherwise, from these challenged remarks.

Lastly, the record does not support Duncan's assertion that she was denied a fair trial because of improper remarks that shifted the burden of proof. The prosecutor argued that Duncan's evidence did not show that her encounter with the victim in her classroom did not occur the way the victim claimed. The district court overruled defense counsel's objection based on burden shifting, but took the opportunity to admonish the jury that the argument of counsel was not evidence and that the court would give the law to be followed in

its instructions. The district court correctly instructed the jury on the burden of proof and we presume the jury followed its instructions. *Davis v. State*, 2018 OK CR 7, ¶ 10, 419 P.3d 271, 277. The district court's admonition cured any possible error and this claim requires no relief. *Bosse v. State*, 2017 OK CR 10, ¶ 86, 400 P.3d 834, 864.

7.

Duncan contends her sentence of six years is excessive and should be modified to a suspended sentence in the interests of justice. In support of her excessive sentence claim and modification request, she cites her lack of criminal history, the hardship her absence has on her family, and her past contributions to her community.

"This Court will not disturb a sentence within statutory limits unless, under the facts and circumstances of the case, it shocks the conscience of the Court." *Thompson v. State*, 2018 OK CR 32, ¶ 16, 429 P.3d 690, 694. Duncan's jury heard the evidence and fixed a sentence at the lower end of the range of punishment. The judge considered all of the reasons and evidence proffered by Duncan on appeal and acted within his discretion in rejecting her request to

suspend her sentence. *See Riley v. State*, 1997 OK CR 51, ¶ 20, 947 P.2d 530, 534. Based on this record, we find Duncan’s claim of excessive sentence is without merit because it does not meet the “shock the conscience” test. This claim is denied.

8.

Duncan claims that even if no individual error in her case merits relief, the cumulative effect of the errors committed requires either a new trial or favorable sentence modification. “The cumulative error doctrine applies when several errors occurred at the trial court level, but none alone warrants reversal.” *Tafolla v. State*, 2019 OK CR 15, ¶ 45, 446 P.3d 1248, 1263. Although individual errors may be of insufficient gravity to warrant reversal, the combined effect of an accumulation of errors may require a new trial. *Id.* The commission of several trial errors does not deprive the defendant of a fair trial when the errors considered together do not affect the outcome of the proceeding. *Id.* There are no errors, considered individually or cumulatively, that merit relief in this case. This claim 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. (2020), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT
OF JOHNSTON COUNTY
THE HONORABLE MARK CAMPBELL, DISTRICT JUDGE**

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KUEHN, V.P.J.: Concur

LUMPKIN, J.: Concur

HUDSON, J.: Concur