

ORIGINAL



**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

WAYNE WILLIAM WHITE,

Appellant,

vs.

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

No. F-2018-321

**FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA**

MAY 23 2019

S U M M A R Y O P I N I O N

**JOHN D. HADDEN
CLERK**

KUEHN, VICE PRESIDING JUDGE:

Appellant, Wayne William White, was convicted by a jury in Wagoner County District Court, Case No. CF-2014-341, of Stalking (21 O.S.2011, § 1173(B)(1)), After Conviction of Two or More Felonies. On March 20, 2018, the Honorable Darrell G. Shepherd, District Judge, sentenced him to twenty years imprisonment, in accordance with the jury's recommendation. This appeal followed.

Appellant raises two propositions of error in support of his appeal:

PROPOSITION I. THE TRIAL COURT ERRED IN FAILING TO REQUIRE THE PROSECUTION TO "ELECT BETWEEN ACTS."

PROPOSITION II. BY FAILING TO REQUIRE THE PROSECUTION TO ELECT BETWEEN ACTS, COUNSEL FAILED TO DELIVER THE EFFECTIVE ASSISTANCE OF COUNSEL REQUIRED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE II, SECTION 20 OF THE OKLAHOMA CONSTITUTION.

After thorough consideration of these propositions, the briefs of the parties, and the record on appeal, we affirm. Appellant was convicted of harassing his estranged girlfriend over a period of several months, in violation of a victim's protective order. As to Proposition I, the crime of Stalking requires the State to prove that the defendant "repeatedly" followed or harassed another person. 21 O.S.2011, § 1173 (A), (B); OUJI-CR (2nd) No. 4-30. "Harass" is defined for purposes of this statute as a "pattern or course of conduct directed toward a person that would cause a reasonable person to suffer emotional distress and that actually causes emotional distress to the victim." 21 O.S.2011, § 1173(F)(1); OUJI-CR (2nd) No. 4-31. The State presented evidence that Appellant repeatedly called the victim, left threatening messages and voice mails for her, and vandalized her property. Appellant claims that because the State was not required to specify which acts it relied upon to constitute the alleged "pattern or course of conduct," his jury could have disagreed on which discrete acts were proven, thereby compromising his constitutional right to a unanimous verdict. He did not raise this issue below, so our review is only for plain error.¹ *Thompson v. State*, 2018 OK CR 32, ¶ 7, 429 P.3d

¹ Plain errors are those errors which are obvious in the record and affect the substantial rights of the defendant – that is, the error affects the outcome of the proceeding. *Daniels v. State*, 2016 OK CR 2, ¶ 3, 369 P.3d 381, 383.

690, 692-93. We find no error, plain or otherwise. The constitutional right to a unanimous verdict refers to the ultimate finding of guilt, not to the means by which an element of the crime may be satisfied. *Schad v. Arizona*, 501 U.S. 624, 631-33, 111 S.Ct. 2491, 2496-97, 115 L.Ed.2d 555 (1991); *Gilson v. State*, 2000 OK CR 14, ¶ 41, 8 P.3d 883, 903; *Blackwell v. State*, 1983 OK CR 51, ¶ 13, 663 P.2d 12, 16. Appellant was not denied his right to juror unanimity. Proposition I is denied.

In Proposition II, Appellant claims trial counsel was constitutionally deficient, for failing to demand that the State elect which acts it relied upon to constitute the “pattern or course of conduct” required to establish the offense. Appellant must demonstrate that counsel made a professionally unreasonable decision, and that the decision undermines confidence in the outcome of the trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Bland v. State*, 2000 OK CR 11, ¶ 112, 4 P.3d 702, 730. For reasons explained in Proposition I, the State was not required to elect among the many times Appellant harassed his victim. Because any demand for election would have properly been denied, Appellant cannot show any prejudice from trial counsel’s omission; and absent prejudice, Appellant cannot

establish that counsel was deficient. *Cruse v. State*, 2003 OK CR 8, ¶ 11, 67 P.3d 920, 923. Proposition II is denied.

DECISION

The Judgment and Sentence of the District Court of Wagoner County 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 WAGONER COUNTY
THE HONORABLE DARRELL G. SHEPHERD, DISTRICT JUDGE

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OPINION BY KUEHN, V.P.J.

LEWIS, P.J.: CONCUR
LUMPKIN, J.: CONCUR
HUDSON, J.: CONCUR
ROWLAND, J.: CONCUR