



ORIGINAL

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

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

JUN 13 2019

JOHN D. HADDEN
CLERK

JOSEPH GREEN STOKER,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

Case No. F-2018-531

SUMMARY OPINION

ROWLAND, JUDGE:

Appellant Joseph Green Stoker appeals his Judgment and Sentence from the District Court of McIntosh County, Case No. CF-2017-108, for Rape by Instrumentation (Count 1), in violation of 21 O.S.2011, § 1111.1 and Lewd Molestation (Count 2), in violation of 21 O.S.Supp.2013, § 1123. The Honorable James R. Pratt, Associate District Judge, presided over Stoker's jury trial and sentenced him, in accordance with the jury's verdicts, to ten years imprisonment on each count. Judge Pratt ordered the sentences to be served consecutively. Stoker appeals raising the following issues:

- (1) whether the trial court denied him his constitutional right to present a defense;
- (2) whether he was prejudiced by prosecutorial misconduct;

- (3) whether he was denied his constitutional right to the effective assistance of counsel; and
- (4) whether the trial court erred by ordering fees and costs be taken out of his prison account each month.

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

1.

Stoker complains that the trial court denied him his constitutional right to present a defense by not allowing him to call his listed witnesses. We review the trial court's evidentiary rulings for an abuse of discretion. *See Jackson v. State*, 2006 OK CR 45, ¶ 48, 146 P.3d 1149, 1165.

The United States Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984)). A defendant's due process right under the Fifth Amendment and the right to compulsory process under the Sixth Amendment include the right to present witnesses in his own defense. *United States v. Dowlin*, 408 F.3d 647, 659 (10th Cir.

2005). See also *Washington v. Texas*, 388 U.S. 14, 18-19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967). "The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense This right is a fundamental element of due process of law." *Washington*, 388 U.S. at 19, 87 S.Ct. at 1923. See also *Coddington v. State*, 2006 OK CR 34, ¶ 46, 142 P.3d 437, 450-51. This constitutionally guaranteed right to present a complete defense, however, is not without limitation. "In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Gore v. State*, 2005 OK CR 14, ¶ 21, 119 P.3d 1268, 1275, (citing *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973)). Further, the admissibility of evidence is within the discretion of the trial court, which will not be disturbed absent a clear showing of abuse, accompanied by prejudice to the accused. See *Jackson*, 2006 OK CR 45, ¶ 48, 146 P.3d at 1165. See also *Tryon v. State*, 2018 OK CR 20, ¶ 51, 423 P.3d 617, 635.

The State argued below that the evidence the defense intended to produce was irrelevant and inadmissible under the rape shield statute at 12 O.S.2011, § 2412. The trial court noted that even when evidence is not precluded by section 2412, the defendant must meet certain procedural requirements before such evidence may be introduced.

Section 2412(C)(1) sets forth the following requirements:

If the defendant intends to offer evidence described in subsection B of this section, the defendant shall file a written motion to offer such evidence accompanied by an offer of proof not later than fifteen (15) days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties by counsel for the defendant and on the alleged victim by the district attorney.

The trial court excluded the evidence after finding that Stoker had not met the requirements necessary to the introduction of the evidence at issue; he had not filed a written motion to offer this evidence accompanied by an offer of proof within fifteen days before trial. This ruling was not an abuse of discretion.

2.

Stoker complains that prosecutorial misconduct deprived him of his right to a fair trial. Because the comments at issue were not met with objection at trial review on appeal is for plain error only. *Harney v. State*, 2011 OK CR 10, ¶ 23, 256 P.3d 1002, 1007. 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. 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.*

“[W]e evaluate the alleged misconduct 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.” *Hanson v. State*, 2009 OK CR 13, ¶ 18, 206 P.3d 1020, 1028. Both sides have wide latitude to discuss the evidence and reasonable inferences

therefrom. *Harmon v. State*, 2011 OK CR 6, ¶ 81, 248 P.3d 918, 943. Relief is only granted where the prosecutor's flagrant misconduct so infected the defendant's trial that it was rendered fundamentally unfair. *Jones v. State*, 2011 OK CR 13, ¶ 3, 253 P.3d 997, 998. It is the rare instance when a prosecutor's misconduct during closing argument will be found so egregiously detrimental to a defendant's right to a fair trial that reversal is required. See *Pryor v. State*, 2011 OK CR 18, ¶ 4, 254 P.3d 721, 722.

Stoker argues that the prosecutor used *voir dire* to lead the jurors to pre-judge the case against him by arguing that the primary witness had no motivation to lie. Stoker complains that the prosecutor's argument in *voir dire* presented the facts and the alleged victim in a light favorable to the State improperly bolstering the witness's credibility.

"The purpose of *voir dire* examination is to discover whether there are grounds to challenge prospective jurors for cause and to permit the intelligent use of peremptory challenges." *Tryon*, 2018 OK CR 20, ¶ 12, 423 P.3d at 626-27 (quoting *Harmon v. State*, 2011 OK CR 6, ¶ 7, 248 P.3d 918, 927). "There is no abuse of discretion as long

as the *voir dire* examination affords the defendant a jury free of outside influence, bias or personal interest.” *Harmon*, 2011 OK CR 6, ¶ 7, 248 P.3d at 927. In *Bench v. State*, 2018 OK CR 31, ¶ 90, 431 P.3d 929, 957, this Court held that argument is impermissible vouching if the jury could reasonably believe that the prosecutor indicated “a personal belief in a witness’s credibility, either through explicit personal assurances of the witness’s veracity or by implicitly indicating that information not presented to the jury supports the witness’s testimony.”

In the present case, the prosecutor gave no personal assurances that the witness would be telling the truth nor did he imply that information not presented would support her testimony. Rather, the prosecutor asked questions designed to discern how the jury would judge the witness’s credibility. The comments were not error. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. Relief is not required.

3.

Stoker contends that he was denied constitutionally effective assistance of 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, Stoker 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. "To accomplish this, it is not enough to show the failure had some conceivable effect on the outcome of the proceeding." *Id.* Rather, Stoker must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* This Court need not determine whether counsel's performance was deficient if the claim can be disposed of on the ground of lack of prejudice. *See Malone*, 2013 OK CR 1, ¶ 16, 293 P.3d at 207.

Stoker complains that defense counsel rendered constitutionally ineffective assistance by failing to object to prosecutorial misconduct and for failing to follow proper evidentiary procedure to ensure that

defense witnesses would be able to testify. Stoker has failed to demonstrate prejudice from either of these alleged deficiencies; his claim for relief is denied.

4.

The Judgement and Sentence entered against Stoker ordered that \$5.00 be taken from his prison account each month to satisfy costs and fees. Stoker complains on appeal that the trial court did not have the authority to require payment of the assessed costs and fees prior to his release from prison. He requests this Court remand the matter to the district court with instructions to remove the order that \$5.00 a month be taken from his account to pay court costs. Defense counsel did not object to the imposition of fees and costs or argue that the trial court did not have the authority to require payment toward the assessed costs and fees while Stoker was still incarcerated. For this reason, this claim will be reviewed for plain error only. *Hubbard v. State*, 2002 OK CR 8, ¶ 7, 45 P.3d 96, 99.

Stoker acknowledges that the trial court had the authority to assess costs and fees and order him to report back to the court within 180 days of his release from prison to schedule a hearing on his

ability to pay the costs and fees. He asserts, however, that the trial court did not have the authority to require payment of the assessed costs and fees prior to the 180 day period pursuant to 22 O.S.Supp.2016, § 983b.

In its response the State cites to 57 O.S.Supp.2014, § 549 which addresses the powers and duties of the State Board of Corrections. Section 549(A)(4) provides that the State Board of Corrections has the duty to “establish the percentages of [inmates] wages which shall be available for appropriation ... for payment of costs and expenses for criminal actions against such inmate....”

Section 983b concerns persons released from prison and is inapplicable because Stoker has not yet been released from prison. Section 549 allows a percentage of prison wages to be used to satisfy assessed costs and fees. *See Webb v. Maynard*, 1995 OK 125, ¶ 15, 907 P.2d 1055, 1059-60 (Section 549 “permits the prisoner to discharge court costs and victim compensation fees during incarceration” while Section 983 applies “when the court costs and victim compensation fees are not paid before release from prison.”). As there is a statutory mechanism allowing for the apportionment of a

percentage of wages earned while in prison to satisfy assessed fees and costs, the trial court's inclusion of this requirement in the Judgement and Sentence is not unauthorized insofar as it applies to wages earned while in prison. Stoker has not shown error and this proposition 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 delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF McINTOSH COUNTY
THE HONORABLE JAMES R. PRATT,
ASSOCIATE DISTRICT JUDGE**

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OPINION BY: ROWLAND, J.

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