

ORIGINAL



* 1 0 4 4 6 8 6 4 1 6 *

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

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

OCT 31 2019

JOHN D. HADDEN
CLERK

LESLIE ANNE GREGERSEN,

Appellant,

v.

STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

No. F-2018-623

SUMMARY OPINION

HUDSON, JUDGE:

Appellant, Leslie Anne Gregersen, was tried and convicted by a jury in the District Court of Bryan County, Case No. CF-2015-663, of Conspiracy Against State or Subdivision, in violation of 21 O.S.2011, § 424. The jury recommended a sentence of four years imprisonment. The Honorable Mark R. Campbell, District Judge, sentenced Gregersen in accordance with the jury's verdict and imposed various costs and fees. Judge Campbell also ordered credit for time served. Gregersen now appeals and alleges the following propositions of error:

- I. THE EVIDENCE WAS INSUFFICIENT TO SHOW THE EXISTENCE OF A CONSPIRACY;

- II. THE ADMISSION OF EVIDENCE OF OTHER CRIME WAS ERROR BECAUSE THE STATE NEVER FILED A NOTICE OF INTENT TO OFFER EVIDENCE OF OTHER CRIMES;
- III. DEFENSE COUNSEL WAS INEFFECTIVE;
- IV. A COMMENT BY THE TRIAL JUDGE ALLOWED A JURY TO SHIRK RESPONSIBILITY FOR SENTENCING;
- V. THE JURY WAS IMPROPERLY INSTRUCTED AS TO PUNISHMENT BY THE TRIAL JUDGE'S RESPONSE TO A JURY QUESTION;
- VI. THE SENTENCE WAS EXCESSIVE;
- VII. THE TRIAL JUDGE ABUSED HIS AUTHORITY BY SETTING A DEADLINE ON PLEA BARGAINING; and
- VIII. CUMULATIVE ERROR DEPRIVED APPELLANT OF A FAIR TRIAL.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we find that no relief is required under the law and evidence. Appellant's judgment and sentence is **AFFIRMED**.

Proposition I. Taken in the light most favorable to the State, sufficient record evidence was presented to allow any rational trier of fact to find beyond a reasonable doubt that Appellant committed the crime of conspiracy as charged in this case. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); *Davis*

v. State, 2011 OK CR 29, ¶ 74, 268 P.3d 86, 111; *McGee v. State*, 2005 OK CR 30, ¶ 3, 127 P.3d 1147, 1149; *Young v. State*, 2000 OK CR 17, ¶ 35, 12 P.3d 20, 35. Proposition I is denied.

Proposition II. Appellant objected on the grounds now tendered to James Tiemann's testimony that Appellant pulled a .22 revolver on him that resulted in domestic violence charges being filed for which Tiemann was acquitted. Appellant has thus preserved this claim for our review. The admission of this testimony is reviewed for abuse of discretion. See *Baird v. State*, 2017 OK CR 16, ¶ 38, 400 P.3d 875, 886. The balance of the challenged evidence, however, either drew no objection or drew different objections than made on appeal. Our review of these claims is for plain error only. *Chadwell v. State*, 2019 OK CR 14, ¶ 9, 446 P.3d 1244, 1247; *Harmon v. State*, 2011 OK CR 6, ¶ 36, 248 P.3d 918, 934.

To be entitled to relief under the plain error doctrine, Appellant must show the existence of an actual error (i.e., deviation from a legal rule), that is plain or obvious, and that affects her substantial rights, meaning the error affected the outcome of the proceeding. *Bramlett v. State*, 2018 OK CR 19, ¶ 23, 422 P.3d 788, 796. If these elements are met, "[t]his 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.* (quoting *Stewart v. State*, 2016 OK CR 9, ¶ 25, 372 P.3d 508, 514); 20 O.S.2011, § 3001.1.

Appellant fails to show error, plain or otherwise, with any of the challenged testimony. The challenged testimony amounts to properly admitted *res gestae* evidence. In *Eizember v. State*, 2007 OK CR 29, ¶ 77, 164 P.3d 208, 230, this Court explained that evidence is considered *res gestae*, when: “a) it is so closely connected to the charged offense as to form part of the entire transaction; b) it is necessary to give the jury a complete understanding of the crime; or c) when it is central to the chain of events.” *Id.* (quoting *Warner v. State*, 2006 OK CR 40, ¶ 68, 144 P.3d 838, 868, *overruled on other grounds by Taylor v. State*, 2018 OK CR 6, 419 P.3d 265). “*Res gestae* are those things, events, and circumstances incidental to and surrounding a larger event that help explain it.” *McElmurry v. State*, 2002 OK CR 40, ¶ 63, 60 P.3d 4, 22. *Accord Vanderpool v. State*, 2018 OK CR 39, ¶ 24, 434 P.3d 318, 324.

The challenged evidence emerged incidentally to establish the full dynamic of the relationship between Appellant and Tiemann at

the time of the shooting. This evidence was necessary to give the jury a complete understanding of the events they were to hear about during the trial. The probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. Under the total circumstances, the evidence was properly admitted and there was no error, plain or otherwise, from its admission. Pretrial notice under *Burks v. State*, 1979 OK CR 10, 594 P.2d 771, is not required for properly admitted *res gestae* evidence. *Eizember*, 2007 OK CR 29, ¶ 81, 164 P.3d at 231. Proposition II is denied.

Proposition III. To prevail on an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). *See also Harrington v. Richter*, 562 U.S. 86, 104, 131 S. Ct. 770, 787-88, 178 L. Ed. 2d 624 (2011) (summarizing *Strickland* two-part test). Appellant fails to show *Strickland* prejudice with any of her ineffectiveness claims. Proposition III is denied.

Propositions IV and V. Appellant failed to object below to the trial court's response to the jury's question during deliberations. Our

review of these propositions of error is thus limited to plain error. *Andrew v. State*, 2007 OK CR 23, ¶ 126, 164 P.3d 176, 202, *overruled on other grounds*, *Williamson v. State*, 2018 OK CR 15, 422 P.3d 752. Appellant fails to show actual or obvious error from the trial court's answer to the jury's question. The jury was correctly advised that its role was to recommend a sentence within the limits set forth in the instructions that the trial court would impose at a later date. The trial judge's response did not mislead the jury to believe that the responsibility for imposing sentence lie elsewhere or otherwise distract the jury from its duty to determine punishment. See 22 O.S.2011, § 926.1 ("the jury may, and shall upon the request of the defendant assess and declare the punishment in their verdict within the limitations fixed by law, and the court shall render a judgment according to such verdict, except as hereinafter provided."); 22 O.S.Supp.2017, § 991a (trial court has discretionary power, *inter alia*, to suspend sentences); *Trevino v. State*, 1987 OK CR 89, ¶ 6, 737 P.2d 575, 577-78 (trial judge acted properly in advising jury that the court was not bound to accept recommendations submitted on the verdict form for probation, supervision or restitution and ordering further deliberations); *Wofford v. State*, 1982 OK CR 83, ¶ 13, 646

P.2d 1300, 1303 (jury's recommendation of a suspended sentence as part of verdict is nonbinding and may be treated as mere surplusage by the trial judge).

We observe too that the trial court advised counsel for both parties, upon receipt of the jury's question, of its proposed answer and the parties had no objection. The record further shows that the trial court answered the jury's question in writing. Thus, this is not a case where, as Appellant suggests, a presumption of prejudice arises based upon the trial court's communication with the jury. *Nicholson v. State*, 2018 OK CR 10, ¶ 12, 421 P.3d 890, 895. While the record shows that the trial court failed to ensure that the jury's note was made part of the record, a sufficient record was created at formal sentencing concerning the jury question and the parties' agreement with the trial court's answer to the question. Propositions IV and V are denied.

Proposition VI. Appellant's sentence does not shock the conscience and is not excessive. *See Baird*, 2017 OK CR 16, ¶ 40, 400 P.3d at 886; *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149. Proposition VI is denied.

Proposition VII. Appellant fails to show error, plain or otherwise, from the trial court's setting of a deadline for the acceptance of negotiated pleas. From the outset, it is unclear how Appellant was in any way harmed by the setting of this deadline. The record shows that Appellant expressly rejected the State's plea offer of a ten year suspended sentence at the felony disposition docket and requested a jury trial at that time which was granted by the trial court. Appellant suggests she was prejudiced because the prosecutor may have offered a nolo contendere plea that would have resolved the case but for the plea deadline. This claim, like any suggestion that Appellant would have accepted such a plea offer, is utter and complete speculation. Proposition VII is denied.

Proposition VIII. We deny relief for cumulative error. *Tafolla v. State*, 2019 OK CR 15, ¶ 45, 446 P.3d 1248, 1263 ("A cumulative error claim is baseless when this Court fails to sustain any of the alleged errors raised on appeal."). Proposition VIII 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 BRYAN COUNTY
THE HONORABLE MARK R. CAMPBELL, DISTRICT JUDGE

APPEARANCES AT TRIAL

JAMES THORNLEY
ATTORNEY AT LAW
124 NORTH THIRD
DURANT, OK 74701
COUNSEL FOR DEFENDANT

EMILY REDMAN
DISTRICT ATTORNEY
TIM WEBSTER
ASSISTANT DISTRICT ATTORNEY
BRYAN COUNTY
117 NORTH THIRD
DURANT, OK 74701
COUNSEL FOR THE STATE

APPEARANCES ON APPEAL

LISBETH L. MCCARTY
OKLA. INDIGENT DEFENSE
SYSTEM
P.O. BOX 926
NORMAN, OK 73070
COUNSEL FOR APPELLANT

MIKE HUNTER
OKLA. ATTORNEY GENERAL
KEELEY L. MILLER
ASST. ATTY. GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
COUNSEL FOR APPELLEE

OPINION BY: HUDSON, J.

| | |
|-----------------------|--------------------------|
| LEWIS, P.J.: | CONCUR IN RESULTS |
| KUEHN, V.P.J.: | CONCUR |
| LUMPKIN, J.: | CONCUR |
| ROWLAND, J.: | CONCUR |