



ORIGINAL

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

JOSE M. DIAZ,
Appellant,

v.

STATE OF OKLAHOMA,
Appellee.

NOT FOR PUBLICATION

Case No. F-2018-77

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

AUG 29 2019

JOHN D. HADDEN
CLERK

SUMMARY OPINION

HUDSON, JUDGE:

Appellant, Jose M. Diaz, was tried and convicted by a jury in Tulsa County District Court, Case No. CF-2016-4434, for the crime of Assault and Battery with a Deadly Weapon, in violation of 21 O.S.2011, § 652(C). The jury recommended a sentence of thirty years imprisonment. The Honorable Kelly Greenough, District Judge, presided at trial and sentenced Diaz in accordance with the jury's verdict.¹ Diaz now appeals, raising three propositions of error before this Court:

- I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED IMPROPER VICTIM IMPACT EVIDENCE,

¹ Under 21 O.S.Supp.2015, § 13.1, Diaz must serve a minimum of 85% of his sentence before he is eligible for parole.

DEPRIVING APPELLANT OF A FAIR TRIAL IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION;

- II. THE PROSECUTORS' IMPROPER ARGUMENTS DURING CLOSING CONSTITUTED PROSECUTORIAL MISCONDUCT AND DEPRIVED APPELLANT OF A FAIR TRIAL IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION; and
- III. CUMULATIVE ERROR DEPRIVED APPELLANT OF A FAIR TRIAL IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

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. We review the trial court's decision to admit evidence for an abuse of discretion. *Tryon v. State*, 2018 OK CR 20, ¶ 38, 423 P.3d 617, 632. Appellant preserved his challenge to Karl Lee's testimony by renewing at trial a previous objection that testimony from the victim's parents would amount to irrelevant and unfairly prejudicial testimony that merely elicited sympathy for the victim. However, our review of Appellant's challenge to Dr. Michael Charles's testimony is limited to plain error. At trial, Appellant

objected to Dr. Charles's testimony on grounds that it was cumulative to the paramedics' testimony. Appellant did not complain that Dr. Charles's testimony amounted to improper victim impact testimony. Failure to make the same objection on appeal as at trial waives all but plain error review. *Baird v. State*, 2017 OK CR 16, ¶ 17, 400 P.3d 875, 881.

To be entitled to relief for plain error, 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. *Baird*, 2017 OK CR 16, ¶ 25, 400 P.3d at 883.

Appellant fails to show an abuse of discretion concerning the admission of Mr. Lee's testimony. He further fails to show actual or obvious error concerning the admission of Dr. Charles's testimony. First, evidence concerning the extent, and lasting effect, of the victim's injuries was relevant to show the willful and purposeful use

of force or violence used against the victim, consistent with the definitions of assault and battery given to Appellant's jury. Second, this evidence was also relevant to show that the manner in which Appellant used the two-pound sledgehammer against the victim was likely to produce death or great bodily harm and thus was relevant to prove the third element of the crime, i.e., that the sledgehammer used by Appellant was a deadly weapon. See *Fox v. State*, 1976 OK CR 307, ¶ 18, 556 P.2d 1281, 1284 (the manner in which a hammer was employed, the repeated blows to the head and the pursuit of the victim by the defendant were all sufficient circumstances to recognize it as a deadly weapon); *Beeler v. State*, 1959 OK CR 9, ¶ 18, 334 P.2d 799, 806 ("Some weapons, under particular circumstances, are so clearly lethal that the court may declare them to be such as a matter of law . . . all others are lethal or not, according to their capability to produce death or great bodily harm in the manner in which they are used[.]"). Testimony concerning the extent, and lasting effect, of the victim's injuries was especially relevant to the State's burden of proof considering that police never recovered the weapon used in the attack. Under these circumstances, the challenged evidence was relevant, the danger of unfair prejudice was outweighed by its

probative value and the challenged testimony was not cumulative. There is no error, plain or otherwise, surrounding the admission of the challenged testimony of Mr. Lee and Dr. Charles. Proposition I is denied.

Proposition II. Appellant did not object to the prosecutor's challenged comments during the State's first closing argument. Appellant thus has waived review on appeal for all but plain error as to these comments. *Lamar v. State*, 2018 OK CR 8, ¶ 54, 419 P.3d 283, 297. Appellant did, however, challenge the prosecutor's argument made during the State's final closing thus preserving this claim for our review. *Id.* Both parties have wide latitude in closing argument to argue the evidence and reasonable inferences from it. We will not grant relief for improper argument unless, viewed in the context of the whole trial, the statements rendered the trial fundamentally unfair, so that the jury's verdict is unreliable. *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471, 91 L. Ed. 2d 144 (1986); *Lamar*, 2018 OK CR 8, ¶ 54, 419 P.3d at 297.

Taken in context, Appellant was not deprived of a fundamentally fair trial in violation of due process from the challenged comments. The vast majority of the prosecutors'

challenged comments represented reasonable comment on properly admitted evidence. At one point, the trial court sustained an objection to the prosecutor's argument concerning the victim not being able to have children but defense counsel did not request an admonishment. Because defense counsel did not request an admonishment which would have cured this particular error, we cannot provide relief. *Slaughter v. State*, 1997 OK CR 78, ¶ 110, 950 P.2d 839, 869. "When a trial court sustains an objection, most error is cured." *Id.* Considering the totality of the prosecutor's comments here, and the instruction given to the jury to not let sympathy, sentiment or prejudice enter into their deliberations, we find that this isolated error arising during the prosecutor's final closing was cured. Proposition II is denied.

Proposition III. We deny relief for Appellant's cumulative error claim. *See Pavatt v. State*, 2007 OK CR 19, ¶ 85, 159 P.3d 272, 296 (reciting cumulative error standard). Proposition III 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 the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE KELLY GREENOUGH, DISTRICT JUDGE

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OPINION BY: HUDSON, J.

LEWIS, P.J.: CONCUR

KUEHN, V.P.J.: CONCUR

LUMPKIN, J.: CONCUR

ROWLAND, J.: CONCUR