

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

**ANTHONY PHILLIP MILLER, JR., )**

**Appellant, )**

**v. )**

**THE STATE OF OKLAHOMA, )**

**Appellee. )**

**NOT FOR PUBLICATION**

**Case No. F-2019-54**

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

JAN - 9 2020

JOHN D. HADDEN  
CLERK

**SUMMARY OPINION**

**ROWLAND, JUDGE:**

Appellant Anthony Phillip Miller, Jr. appeals his Judgment and Sentence from the District Court of Tulsa County, Case No. CF-2018-694, for Child Sexual Abuse – Child Under 12, in violation of 21 O.S.Supp.2014, § 843.5(F). The Honorable Doug Drummond, District Judge, presided over Miller’s jury trial and sentenced him, in accordance with the jury’s verdict, to twenty-five years imprisonment. The trial court also ordered Miller to serve a term of ten years post-imprisonment supervision.<sup>1</sup> Miller appeals raising the following issues:

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<sup>1</sup> Under 21 O.S.Supp.2014, § 13.1, Miller must serve 85% of his sentence of imprisonment before he is eligible for parole consideration.

- (1) whether prosecutorial misconduct deprived him of a fair trial;
- (2) whether he was denied the effective assistance of counsel: and
- (3) whether cumulative error deprived him of a fair trial.

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

**1.**

Miller complains that prosecutorial misconduct during closing argument deprived him of his right to a fair trial. Miller objected to all but one instance of alleged misconduct now challenged on appeal. The comment not objected to below will be reviewed for plain error. *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.

First Miller complains that misconduct occurred when the prosecutor asked the jury in closing argument to punish him for exercising his right to a jury trial. Only one comment was problematic

and this occurred when the prosecutor argued that Miller was putting the victim through trauma by requiring her to testify repeatedly about the assault and be subject to cross-examination. This comment was met with objection and the objection was sustained but the jury not admonished.

As noted by Miller, this Court condemned a similar comment in *Barnes v. State*, 2017 OK CR 26, 408 P.3d 209. In *Barnes*, the prosecutor told the jury that the defendant had a right to a jury trial but explained that the exercise of this right was not mandatory. He then stated, “[i]f you’re a defendant and you’ve got evidence that’s overwhelming against you, you can plea to the charge, you can plead guilty.” *Id.* 2017 OK CR 26, ¶ 7, 408 P.2d at 213. The prosecutor in *Barnes* went on to argue that the defendant’s decision to exercise his right to a jury trial forced the 84 year old victim to relive what had happened to her. *Id.*

In *Barnes* we held that “a defendant’s decision to exercise this constitutionally protected right is a factor which cannot be used against him at trial to influence the jury in their guilt or sentencing determinations.” *Id.* 2017 OK CR 26, ¶ 10, 408 P.3d at 214 (citing

*Griffin v. California*, 380 U.S. 609, 615, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)). The Court found that the prosecutor's comment was "a direct attack on the Appellant's constitutional right to trial" as the prosecutor "expressly referenced Appellant's decision to invoke his right to a jury." *Id.* 2017 OK CR 26, ¶ 11, 408 P.3d at 214. After determining in *Barnes* that the prosecutor's comment was constitutional error, the Court noted that this error was subject to harmless error analysis under *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967)). *Id.* 2017 OK CR 26, ¶ 12, 408 P.3d at 215. Because the defendant in *Barnes* confessed to the crime charged this Court found that error was harmless beyond a reasonable doubt as to guilt. The Court could not find that the constitutional error was harmless beyond a reasonable doubt as to the assessment of punishment; the jury recommended, and the defendant received, the maximum sentence possible. We remanded the case to the district court for resentencing.

Although the comment at issue in the present case was clearly not as egregious as that at issue in *Barnes*, the comment improperly implied Miller's exercise of his constitutional right to a jury trial.

However, given the evidence presented at trial, including Miller's confession to the private detective and the fact that the jury assessed the minimum punishment allowed under the law, we find that this error was harmless beyond a reasonable doubt, and requires no relief.

Miller also complains that the prosecutor commented on the exercise of his right to remain silent. In his voluntary, non-custodial, pre-arrest interview with the police, Miller declined to answer many of the officer's questions responding that he could neither confirm nor deny the allegations. The prosecutor noted this in closing argument adding that Miller, "sure as hell wasn't going to go give [the same information he gave to the private detective] to the police." Defense counsel objected and the objection was overruled.

In *Salinas v. Texas*, 570 U.S. 178, 133 S.Ct. 2174, 186 L.Ed.2d 376 (2013) (plurality opinion), the defendant answered some questions but remained silent when asked others by a police officer during a pre-custody and pre-*Miranda* interview. The prosecutor argued the defendant's silence suggested his guilt. The Supreme Court held in a plurality opinion that the defendant's Fifth

Amendment rights were not violated because the defendant did not “expressly invoke the privilege against self-incrimination in response to the officer’s question.” *Id.* 570 U.S. at 181, 133 S.Ct. at 2178 (Alito, J., for the plurality). While the plurality opinion only garnered three votes, two other justices, Thomas and Scalia, concurred in the opinion but stated that pre-custodial silence did not give rise to self-incriminating testimony, even if [the defendant] had invoked his Fifth Amendment rights. *Id.* 570 U.S. at 192, 133 S.Ct. at 2184 (Thomas, J., Concurring) (“[The defendant’s] claim would fail even if he had invoked the privilege because the prosecutor’s comments regarding his precustodial silence did not compel him to give self-incriminating testimony.”).

Miller is in the same factual position as the defendant in *Salinas*. Given the Supreme Court precedent in *Salinas*, we cannot find that the trial court abused its discretion in overruling Miller’s objection to the prosecutor’s comment in closing argument. Relief is not required.

## 2.

Miller 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, Miller 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, Miller 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.

Miller complains that defense counsel rendered ineffective assistance because, during opening statement, counsel told the jury that Miller would testify and explain the circumstances that led him to make a false confession. Later, the defense rested without calling any witnesses, and in closing argument, the prosecutor reminded the jury of defense counsel's unkept promise. The record reflects that defense counsel did not explicitly promise the jury that Miller would testify but rather she told them that she 'anticipated' that he would testify. The record reflects that when defense counsel made the statement in opening that she anticipated Miller would testify Miller actually did plan to testify. It was only later, after the State rested, that Miller, after speaking with counsel, changed his mind. This appears to have been a strategic decision. Miller has shown neither that defense counsel's performance was deficient nor that he was prejudiced by the alleged failing. This claim of ineffective assistance of counsel is denied.

### 3.

Miller asserts that even if no individual error in his case merits reversal, the cumulative effect of the errors committed warrants a new trial or sentence modification. The cumulative error doctrine applies when several errors occurred at the trial court level, but none alone warrants reversal. Although each error standing alone may be of insufficient gravity to warrant reversal, the combined effect of an accumulation of errors may require a new trial. *Martinez v. State*, 2016 OK CR 3, ¶ 85, 371 P.3d 1100, 1119. Cumulative error does not deprive the defendant of a fair trial when the errors considered together do not affect the outcome of the proceeding. *Baird v. State*, 2017 OK CR 16, ¶ 42, 400 P.3d 875, 886. There were no errors, either individually or when considered together, that deprived Miller of a fair trial. 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 TULSA COUNTY  
THE HONORABLE DOUG DRUMMOND, DISTRICT JUDGE**

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**OPINION BY: ROWLAND, J.**

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