

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

CECIL BENJAMIN MATHENA,

Appellant,

vs.

THE STATE OF OKLAHOMA,

Appellee.

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NOT FOR PUBLICATION

No. F-2014-220

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

MAY 28 2015

**SUMMARY OPINION**

**SMITH, PRESIDING JUDGE:**

MICHAEL S. RICHIE  
CLERK

Cecil Benjamin Mathena was tried by jury and convicted of Count I, First Degree Robbery in violation of 21 O.S.2011, § 797; Count II, Aggravated Assault and Battery in violation of 21 O.S.2011, § 646; and Count III, First Degree Burglary in violation of 21 O.S.2011, § 1431, in the District Court of Tulsa County, Case No. CF-2012-762. In accordance with the jury's recommendation the Honorable Tom C. Gillert sentenced Mathena to fifteen (15) years imprisonment and a \$10,000 fine (Count I); five (5) years imprisonment and a \$500 fine (Count II); and twelve (12) years imprisonment and a \$10,000 fine (Count III). The sentences in Counts I and II run concurrently with one another and consecutively to the sentence in Count III. Mathena must serve 85% of his sentences on Counts I and III before becoming eligible for parole consideration. Mathena appeals from these convictions and sentences.

Mathena raises five propositions of error in support of his appeal:

- I. There was insufficient evidence to convict Mr. Mathena of robbery in the first degree.
- II. Mr. Mathena's sentences are excessive and should be modified.

- III. Mr. Mathena was denied a fair trial due to prosecutorial misconduct.
- IV. Mr. Mathena received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and article II, §§ 7 and 20 of the Oklahoma Constitution.
- V. The accumulation of errors deprived Mr. Mathena of a fair trial.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we find that the law and evidence do not require relief.

We find in Proposition I that, taking the evidence in the light most favorable to the State, any rational trier of fact could find beyond a reasonable doubt that Mathena carried away Burgess's property. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559; 21 O.S.2011, § 797; OUJI-CR 4-141. The jury decides the weight and credibility to give evidence, and we will not disturb a verdict supported by the evidence even where evidence conflicts. *Rutan v. State*, 2009 OK CR 3, ¶ 49, 202 P.3d 839, 849. We accept all reasonable inferences tending to support the jury's verdict. *Id.* Mathena acted together with Conner and is accountable as a principal for his own and Conner's actions. *State v. Heath*, 2011 OK CR 5, ¶ 8, 246 P.3d 723, 725. This proposition is denied.

We find in Proposition II that, under the facts and circumstances of this case, the trial court did not abuse its discretion in sentencing Mathena to consecutive terms, and the sentences are not excessive. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170; *Burgess v. State*, 2010 OK CR 25, ¶ 22, 243 P.3d 461, 465. An abuse of discretion is any unreasonable or arbitrary action made without proper consideration of the relevant facts and law, also described as a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts. *Neloms*,

2012 OK CR 7, ¶ 35, 274 P.3d at 170. The victim testified that Mathena kicked and beat him until he was unconscious, and evidence showed Mathena participated in robbing the victim as he lay unconscious and injured. This proposition is denied.

We find in Proposition III that no prosecutorial misconduct prejudiced Mathena. Regarding argument, both parties have wide latitude to argue the evidence and reasonable inferences from it, and we consider the alleged misconduct in the context of the whole trial. *Bell v. State*, 2007 OK CR 43, ¶ 6, 172 P.3d 622, 624. Misconduct will not warrant relief unless it deprives a defendant of a fair trial. *Pryor v. State*, 2011 OK CR 18, ¶ 11, 254 P.3d 721, 726. Mathena did not object to the statements of which he complains at trial and has waived all but plain error. *Mathis v. State*, 2012 OK CR 1, ¶ 24, 271 P.3d 67, 76. Plain error is an actual error, that is plain or obvious, and that affects a defendant's substantial rights, affecting the outcome of the trial. *Barnard v. State*, 2012 OK CR 15, ¶ 13, 290 P.3d 759, 764. Mathena argues that information about the victim's health was irrelevant and merely encouraged jurors to sympathize with the victim. On the contrary, the evidence was relevant; Mathena was convicted of aggravated assault and battery, committed by a robust person "upon one who is aged, decrepit, or incapacitated." 21 O.S.2011, § 646(A)(2). In addition, Mathena fails to show how he was prejudiced by the testimony, and the record shows no prejudice.<sup>1</sup> Where there is no prejudice,

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<sup>1</sup> Insofar as Mathena may claim there was error other than the one described above, he offers no transcript citations for this unsupported suggestion, and we will not search the transcript for error. Rule 3.5(A)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015); *Coddington v. State*, 2011 OK CR 17, ¶ 89, 254 P.3d 684, 716; *Logsdon v. State*, 2010 OK CR 7, ¶ 41, 231 P.3d 1156, 1169-70.

there is no plain error. *Barnard*, 2012 OK CR 15, ¶ 13, 290 P.3d at 764. This proposition is denied.

We find in Proposition IV that trial counsel was not ineffective. Mathena must show that counsel's performance was deficient and that he was prejudiced by counsel's deficient performance. *Wiley v. State*, 2008 OK CR 30, ¶ 4, 199 P.3d 877, 878; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Counsel's acts or omissions must have been so serious that he was deprived of a fair trial with reliable results. *Harrington v. Richter*, 562 U.S. 86, 104, 131 S.Ct. 770, 787-88, 178 L.Ed.2d 624 (2011). We review counsel's performance against an objective standard of reasonableness under prevailing professional norms, and we will not second-guess strategic decisions. *Harris v. State*, 2007 OK CR 28, ¶ 39, 164 P.3d 1103, 1118; *Rompilla v. Beard*, 545 U.S. 374, 380-81, 125 S.Ct. 2456, 2462, 162 L.Ed.2d 360 (2005). Mathena must show he was prejudiced by counsel's acts or omissions. *Williams v. Taylor*, 529 U.S. 362, 394, 120 S.Ct. 1495, 1513-14, 146 L.Ed.2d 389 (2000); *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067. Mathena claims trial counsel failed to object to prosecutorial misconduct. We found in Proposition III that Mathena was not prejudiced by the prosecutor's argument and questions. As there was no error, we will not find counsel ineffective for failing to object.<sup>2</sup> This proposition is denied.

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<sup>2</sup> Insofar as Mathena may be claiming trial counsel was ineffective for reasons other than the one described above, he does not specifically describe other claims, and we will not search the transcript for error. Rule 3.5(A)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015); *Coddington*, 2011 OK CR 17, ¶ 89, 254 P.3d at 716; *Logsdon*, 2010 OK CR 7, ¶ 41, 231 P.3d at 1169-70.

We find in Proposition V that no cumulative error requires relief. We found no error in the previous propositions. Where there is no error, there is no accumulated error. *Parker v. State*, 2009 OK CR 23, ¶ 28, 216 P.3d 841, 849. This proposition is denied.

### **DECISION**

The Judgment and Sentence of the District Court of Tulsa County is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY  
THE HONORABLE TOM C. GILLERT, DISTRICT JUDGE

#### **ATTORNEYS AT TRIAL**

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**OPINION BY: SMITH, P.J.**  
LUMPKIN, V.P.J.: CONCUR  
JOHNSON, J.: CONCUR  
LEWIS, J.: CONCUR

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