IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

EARNEST EUGENE PADILLOW,	)	
	)	NOT FOR PUBLICATION
Appellant,	)	
vs.	)	No. F-2014-22
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUN - 9 2015
MICHAEL S. RICHIE
CLERK

OPINION

SMITH, PRESIDING JUDGE:

Earnest Eugene Padillow was tried by jury in a consolidated trial in the District Court of Tulsa County. He was convicted in Case No. CF-2010-3621 of Count I, Rape in the First Degree in violation of 21 O.S.2001, § 1114, and Counts II and III, Rape By Instrumentation in violation of 21 O.S.Supp.2007, § 1111.1, all after former conviction of a felony. In Case No. CF-2011-3957 Padillow was convicted of Counts I and II, Rape in the First Degree in violation of 21 O.S.2001, § 1114, both after former conviction of a felony. In accordance with the jury's recommendation the Honorable William J. Musseman sentenced Padillow in Case No. CF-2010-3621 to life imprisonment without the possibility of parole (Count I) and twenty (20) years imprisonment on each of Counts II and III. In Case No. CF-2011-3957 Padillow was sentenced to twenty (20) years imprisonment (Count I) and life imprisonment without the possibility of parole (Count II); Padillow must serve 85% of his sentence on Count I before becoming eligible for parole consideration. All sentences run consecutively. In addition, Padillow was held in direct contempt of court for his actions during the trial and sentenced to six (6) months in the county

jail, consecutively to the other sentences. Padillow appeals from these convictions and sentences and raises four propositions of error in support of his appeal.

In August of 2007, Padillow sexually abused his nine-year-old great-niece, S.G. Over the course of a single day, he took her to another child's birthday party, followed her into the bathroom, and put his penis in her vagina. S.G. asked unsuccessfully for another ride home. Padillow then took her to his house. While he took a shower, she tried to leave. Padillow stopped her. When S.G. asked to go home, he had her lay on his bed to watch a movie, rubbed her buttocks, then put his finger in her vagina. S.G. again asked to go home. Padillow warned her not to tell anyone and took her home; on the way, Padillow rubbed S.G.'s arms and legs and she wet her pants. Padillow brought a pair of pajamas with them to S.G.'s house. Her mother told her to take a bath and put them on. The pajama pants had a hole in the crotch. While S.G., Padillow, her mother and her sister lay on the floor, and her mom and sister fell asleep, Padillow put his finger in S.G.'s vagina again. S.G. told her mother that Padillow touched her. The allegations were not reported to police until about a year later, but S.G. was too emotionally fragile to cooperate. The investigation was halted until, in 2010, Padillow's twelve-year-old cousin D.S. claimed that Padillow sexually abused her.[1]

In August 2011, Padillow babysat his niece, 11-year-old D.P., and her siblings. While D.P. was on the couch, Padillow sat down beside her, lifted a blanket which was over her, and put his finger in her vagina. He told her that if she told anyone he wouldn't love her anymore. In September 2011, Padillow visited D.P.'s

[1] The charge involving D.S. was dismissed, and D.S.'s testimony was properly admitted as propensity evidence under 12 O.S.2011, § 2414. Padillow does not complain about this evidence.

house, saying they'd get something to eat. He took her to his house. D.P. said her stomach hurt and she felt sick. Padillow told her to go lay down in the back bedroom. He came in, began to take off her clothes, and told her he wouldn't hurt her. Using lubricant, he put his penis in her vagina, ejaculated, and told her to clean herself up. Padillow asked D.P. to promise not to tell anyone if he bought her supper, but when she got home she told her sisters. She tried to tell her mother, but Padillow, who had come in with D.P., followed them throughout the house. Finally D.P's sister told her mother they needed to go to the hospital because Padillow did something to D.P. As they tried to leave, D.P. heard Padillow ask them to try and work it out, saying he didn't want to go to jail for the rest of his life. Padillow could not be excluded as a contributor to DNA found on external genital and anal swabs from D.P., and a fluid testing presumptively positive for seminal fluid was on the external genitalia swabs and on D.P.'s underpants.

The record shows Padillow had a contentious relationship with his attorneys from the very beginning – no matter who they were. His cases were filed separately. Padillow was originally charged with abusing D.S. and S.G. in CF-2010-3621, and represented by an attorney from the Tulsa County Public Defender office. He bonded out of jail, committed the offenses against D.P., the second case was filed, and he was represented by a different attorney from the Tulsa County Public Defender office in the second case. Padillow expressed dissatisfaction with both those lawyers. At least one other Public Defender Office attorney was involved in the case. After several discussions, and an incident one of his attorneys witnessed, in which Padillow committed an action resulting in a misdemeanor charge against

him, the trial court removed the Tulsa County Public Defender Office and appointed conflict counsel, Stephen Lee and Mark Cagle. The record reflects Padillow's relationship with these two included at least one profane outburst and one assault during pretrial conferences. Padillow finally informed the trial court that he could not agree with defense counsel's trial strategy, and insisted on representing himself. Padillow began the trial representing himself with standby counsel Lee and Cagle. However, he asked that Lee and Cagle be re-appointed to represent him during voir dire, after the State had passed the panel for cause and Padillow had begun questioning the panel. The trial court granted this request.

Before the State rested Padillow offered the trial court a handwritten motion to dismiss his counsel, claiming that Cagle and Lee were ineffective. This motion was denied, the State rested, Padillow called his first witness, and there was a lunch break. Padillow had expressed his intention to testify. After lunch and before jurors returned, his attorneys made a record that Padillow would not cooperate in preparing his trial testimony and wanted to represent himself. Padillow explained that he wanted to recall particular witnesses who had either already testified for or been subpoenaed by the prosecution. Padillow stated that he wanted to call the witnesses whether or not he was represented by counsel. The trial court denied the request, noting that some witnesses had testified, been subject to cross-examination, and released by counsel, and that defense counsel had not subpoenaed any of the proposed witnesses. The jurors returned and Lee called Padillow to the stand. In front of the jury, Padillow got up as if to walk to the stand, but instead attacked Cagle, jumping on him violently. Padillow also tried to attack

Lee. The attack broke chairs at the defense table. Lee and the deputies separated Padillow from Cagle. Deputies subdued Padillow and removed him from the courtroom through the main entrance.

The trial court made a record, in front of the jury, that Padillow's actions constituted a knowing waiver of his right to be present and his right to testify. The defense rested, and the jury retired. Outside the jury's presence the trial court gave a fuller description of the attack. The trial court stated that it was clear that the attack had an impact on the jury, but that having watched the incident and the jury, the court believed the incident would not impact the trial. The court noted that jurors did not become emotional, cry, or even gasp. Based on these observations, the trial court did not grant a mistrial. Lee continued to represent Padillow, making zealous and thorough closing arguments. Neither Lee nor the prosecutor mentioned the courtroom attack in closing.

In Proposition I, Padillow argues that his removal from the courtroom during the trial violated his constitutional right to be present during his trial. An accused has the right to confront witnesses. U.S. Const. amend. VI, Okla. Const. art II, § 20. This means the accused has the right to be present in the courtroom at every stage of trial where his presence has a reasonably substantial relation to his opportunity to defend himself. *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 1484, 84 L.Ed.2d 486 (1985); *Faretta v. California*, 422 U.S. 806, 819, n. 15, 95 S.Ct. 2525, 2533, n. 15, 45 L.Ed.2d 562 (1975).

However, a defendant may, by his disruptive behavior, forfeit the right to be present in the courtroom. *Illinois v. Allen*, 397 U.S. 337, 343, 90 S.Ct. 1057, 1060-

61, 25 L.Ed.2d 353 (1970). Removal is warranted, and a defendant waives his right to be present, if his behavior is "so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Id.* Before removing a defendant for inappropriate conduct, a trial court must warn the defendant that he may be removed if he continues to disrupt the courtroom. *Id.* Furthermore, a defendant who shows himself willing to resume proper courtroom conduct may reclaim his right to be present. *Id.*

We review the trial court's decision to remove a defendant from the courtroom for abuse of discretion. *Allen,* 397 U.S. at 347, 90 S.Ct. at 1062-63. 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 v. State,* 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. Padillow neither objected to his removal nor asked to return to the courtroom. This issue is subject to harmless error review. *Rushen v. Spain,* 464 U.S. 114, 117 n.2, 104 S.Ct. 453, 455 n.2, 78 L.Ed.2d 267 (1983). Because the alleged error violated a basic constitutional right, we apply the United States Supreme Court's harmless error doctrine, asking whether the State has shown beyond a reasonable doubt that the error did not contribute to the verdict. *Barnard v. State,* 2012 OK CR 15, ¶ 14, 290 P.3d 759, 764; *Neder v. United States,* 527 U.S. 1, 15–16, 119 S.Ct. 1827, 1837, 144 L.Ed.2d 35 (1999); *Chapman v. California,* 386 U.S. 18, 23–24, 87 S.Ct. 824, 827–828, 17 L.Ed.2d 705 (1967).

We find that there was no error in Padillow's removal from the courtroom. In *Allen*, the Court noted that "flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case." *Allen*, 397 U.S. at 343, 90 S.Ct. at 1061. This Court has held there was no abuse of discretion when a defendant was removed after engaging in repeated violent outbursts before trial began. *Owens v. State*, 1988 OK CR 209, ¶ 11, 762 P.2d 962, 965. Although Owens was not informed he could return to the courtroom if he behaved, we found no abuse of discretion because his "fit of temper" was calculated to delay the proceedings. *Id.* at ¶ 8, 762 P.2d at 965. Padillow's violent attack on his attorney was more egregious than the behavior in *Owens*, and was the culmination of a series of violent and disruptive events. As we said in *Owens*, "*Illinois v. Allen* does not stand for the proposition that a trial judge must cater to every whim and fancy that such a disruptive defendant can create." *Id.* at ¶ 11, 762 P.2d at 965.[2]

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[2] Padillow cites other jurisdictions for his argument that a warning is mandatory before a defendant can be removed. However, these cases do not support his claim. Only one of his cited cases which require a warning involved violent physical attacks. The Georgia Supreme Court held that a trial court was justified in removing the defendant from the courtroom after a violent struggle, but should have offered him the opportunity to return earlier than that opportunity was offered. *State v. Fletcher*, 314 S.E.2d 888, 889-90. By contrast, the Alaska Supreme Court found that, where a defendant had been both violent and disruptive in pretrial proceedings, the trial court did not abuse its discretion in both barring him from the courtroom and requiring him to testify by telephone, even after the defendant asked to return, when he was unable to behave. *Douglas v. State*, 214 P.3d 312, 321-22 (Alaska 2009). Addressing a similar situation, where a defendant was removed after striking and injuring defense counsel, the Court of Appeals of Michigan distinguished violent attacks from other disruptions, noting, "Defendant should not be permitted 'one free swing' at his attorney." *People v. Staffney*, 468 N.W.2d 238, 240 (Mich. Ct. App. 1990). The Tenth Circuit has upheld permanent removal of a defendant for nonviolent outbursts where the defendant had numerous warnings, was offered several chances to remain, and continued to disrupt the proceedings. *United States v. Nunez*, 877 F.2d 1475, 1478 (10th Cir. 1989).

The trial court did not abuse its discretion in removing Padillow from the courtroom and finding that he waived his right to be present.

Padillow argues that he should have been given the chance to return to the courtroom for first-stage closing arguments and the entire second stage. He claims he was deprived of the chance to aid in his own defense and to be present when verdicts were returned. A defendant may waive his right to be present by his actions. *Clark v. State*, 1986 OK CR 65, ¶ 9, 718 P.2d 375, 377. While a defendant has a right to be present at the verdict return, that right may be waived when a defendant voluntarily chooses to be absent. *Diaz v. United States*, 223 U.S. 442, 456, 32 S.Ct. 250, 254, 56 L.Ed. 500 (1912). Padillow's decision to violently attack defense counsel, rather than testify, constituted a voluntary absence and waiver of his right to be present.[3] Any error in failing to give Padillow a chance to return for a promise of good behavior is harmless beyond a reasonable doubt. *Barnard*, 2012 OK CR 15, ¶ 14, 290 P.3d at 764. Padillow fails to show how his presence would have aided his defense, and the record supports our finding (and the trial court's conclusion) that, beyond a reasonable doubt, his absences for arguments, second stage and the verdict returns did not affect the verdict. We cannot agree with Padillow's claim that he should be allowed to benefit from his calculated disruptive behavior. *Owens*, 1988 OK CR 209, ¶ 10, 762 P.2d at 965. Proposition I is denied.

In Proposition II Padillow claims his constitutional right to testify on his own behalf was violated when he was removed from the courtroom during the trial. A defendant has the right to testify under the United States and Oklahoma

[3] Padillow again relies on cases from other jurisdictions in which the defendant was removed for verbal outbursts, not violent behavior.

constitutions. *Rock v. Arkansas*, 483 U.S. 44, 49, 107 S.Ct. 2704, 2708, 97 L.Ed.2d 37 (1987); U.S. Const, amend. XIV; Okla. Const. art. II § 20. This right may be limited by "legitimate interests in the criminal trial process." *Rock*, 483 U.S. at 55-56, 107 S.Ct. at 2711-12. It may be waived by a defendant's disruptive conduct. *United States v. Nunez*, 877 F.2d 1475, 1478 (10th Cir. 1989); *see also State v. Chapple*, 36 P.3d 1025, 1034 (Wa. 2001). We review the decision that a defendant has waived his right to testify through disruptive conduct for abuse of discretion. *United States v. Gillenwater*, 717 F.3d 1070, 1076 (9th Cir. 2013); *Douglas*, 214 P.3d at 318. After Padillow's removal from the courtroom, the record does not show that he asked to come back in and testify. Defense counsel did not object to Padillow's removal, and did not further raise the issue of his ability to testify. He has waived all but plain error. As this issue involves denial of a basic constitutional right, we again apply the United States Supreme Court's harmless error doctrine. *Barnard*, 2012 OK CR 15, ¶ 14, 290 P.3d at 764.

Recently, the Supreme Court of Wisconsin has held that a defendant may forfeit his right to testify through disruptive conduct that is incompatible with assertion of that right. *State v. Anthony*, 2015 WI 20, ¶ 53, 860 N.W.2d 10, 21. In *Anthony*, the defendant was argumentative and insisted on giving testimony both inadmissible and prejudicial to himself, in direct violation of the trial court's order; the trial court concluded he had waived the right to testify, and the Wisconsin Supreme Court agreed. *Anthony*, 2015 WI 20, ¶ 65-72, 860 N.W.2d at 24-25. Both Padillow and the State rely on a Ninth Circuit case, *United States v. Ives*, which held that a defendant must be warned that his actions might result in losing his right to

testify before a court can find he has waived that right by his conduct. *United States v. Ives*, 504 F.2d 935, 942 (9th Cir. 1974), *vacated*, 421 U.S. 944, 95 S.Ct 1671, 44 L.Ed.2d 97 (1975), *reinstated in relevant part*, 547 F.2d 1100 (9th Cir. 1976). In *Ives*, the defendant's disruptions caused a mistrial. In the second trial, over the course of several days, he engaged in numerous disruptions, including two violent incidents; the trial court removed Ives, then allowed him to return several times before determining that Ives had waived his right to testify. *Ives*, 504 F.2d at 942-945. The Ninth Circuit, giving great deference to the trial court's observations, left it to the trial court's discretion to determine whether a disruption is so serious that it constitutes a waiver. *Ives*, 504 F.2d at 942; *see also Douglas*, 214 P.3d at 319; *Chapple*, 36 P.3d at 1034.

Padillow attacked defense counsel after he rose to go to the witness stand. That is, Padillow was aware of his right to testify and was acting on it when he changed direction and chose to create a violent disruption. This act supports the trial court's conclusion that Padillow decided to waive his right to testify. The trial court did not abuse its discretion in finding that Padillow, through his conduct, waived his right to testify. Because there is no error, we need not conduct a harmless error analysis. Proposition II is denied.

In Proposition III, Padillow claims the trial court erred in finding him in direct contempt of court without providing him an opportunity to be heard. Direct contempt is disorderly behavior committed during court, in its immediate view and presence, including any breach of the peace which interrupts court proceedings, and may be summarily punished after an opportunity to be heard. 21 O.S.2011, §§

565, 565.1(A). A trial court may summarily impose immediate and significant punishment for direct contempt of court without a formal written charge. *Autry v. State*, 2007 OK CR 41, ¶ 10, 172 P.3d 212, 214. However, before imposing such punishment, the trial court must warn the offender it intends to institute contempt proceedings. 21 O.S.2011, § 565.1(B)(2). If it is clear, from an offender's identity and the character of his disruptive conduct, that the conduct was willfully contemptuous, summary punishment need not be preceded by a warning. 21 O.S.2011, § 545.1(B)(1). The Oklahoma Constitution mandates an opportunity to be heard on any finding of contempt. Okla. Const. art. II, § 25. The opportunity to be heard includes, at a minimum, the right to be advised of the contempt charge, a reasonable opportunity to defend or explain the charge, the right to be represented by counsel, and the right to testify and call witnesses. *Minter v. State*, 1988 OK CR 282, ¶ 5, 765 P.2d 803, 805, *overruled on other grounds, Zeigler v. State*, 1991 OK CR 25, 806 P.2d 1131. On appeal, while deferring to the trial court's factual findings, we review the legal basis for the court's decision *de novo*. *Hogg v. State*, 2008 OK CR 8, ¶ 4, 181 P.3d 724, 725.

Padillow claims that he received no notice of the trial court's intention to hold him in contempt, and that he had no opportunity to be heard. After the second stage verdicts were returned, the trial court told defense counsel that it intended to cite and sentence Padillow for direct contempt at sentencing. At sentencing, the trial court found Padillow guilty of contempt and sentenced him to six months in the Tulsa County Jail, to be served consecutively to and after his other sentences. Based on the record, regardless of whether the trial court's announcement to

counsel was sufficient notice, it is clear Padillow was not given an opportunity to be heard on the contempt citation. The State concedes this, but asks this Court to remand the case for the trial court to hold a hearing on the contempt citation. This avenue is certainly open to this Court. However, given Padillow's other convictions and sentences, we conclude that the interest of judicial economy is better served by resolving the error on appeal. For that reason we reverse Padillow's citation for direct contempt and vacate his sentence of six months in the Tulsa County Jail. This proposition is granted.

In Proposition IV Padillow claims that several of the Judgment and Sentence documents contain errors that must be corrected. As the State concedes, the Judgment and Sentence for Case No. CF-2010-3621 shows incorrect sentences for Counts II and III, while the Judgment and Sentence for Case No. CF-2011-3957 reflects guilty pleas on Counts I and II when Padillow was tried by jury on both counts. Both cases are remanded to the District Court of Tulsa County for Orders *nunc pro tunc*.[4] *Mathis v. State*, 2012 OK CR 1, ¶ 34, 271 P.3d 67, 79; *Neloms*, 2012 OK CR 7, ¶ 44, 274 P.3d at 172. In Case No. CF-2010-3621, the Judgment and Sentence should reflect that Padillow was sentenced to life imprisonment without the possibility of parole on Count I, and twenty (20) years imprisonment on each of Counts II and III. In Case No. CF-2011-3957, the Judgment and Sentence should show that Padillow was tried by jury and convicted of Counts I and II. This proposition is granted.

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[4] The State mistakenly argues that Padillow must first seek corrections in the District Court, and be denied relief, before raising the issue of scrivener's errors on appeal. The State's reliance on *Grimes v. State* is misplaced; *Grimes* is limited to scrivener's errors occurring in the context of revocation appeals, not direct trial appeals. *Grimes v. State*, 2011 OK CR 16, ¶ 21, 251 P.3d 749, 755.

DECISION

The Judgments and Sentences of the District Court of Tulsa County in Case Nos. CF-2010-3621 and CF-2011-3957 are **AFFIRMED**. The citation for direct contempt of court is **REVERSED** and the six (6) month sentence for that citation is **VACATED**. Both cases are **REMANDED** to the District Court for an Order *Nunc Pro Tunc*; in Case No. CF-2010-3621, the Judgment and Sentence should reflect that Padillow was sentenced to life imprisonment without the possibility of parole on Count I, and twenty (20) years imprisonment on each of Counts II and III; in Case No. CF-2011-3957, the Judgment and Sentence should reflect that Padillow was tried by jury and convicted of Counts I and II. 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 WILLIAM J. MUSSEMAN, JR., DISTRICT JUDGE

ATTORNEYS AT TRIAL

STEPHEN LEE
MARK CAGLE
406 S. BOULDER AVENUE
TULSA, OK
COUNSEL FOR DEFENDANT

BEN FU
JULIE DOSS
ASSISTANT DISTRICT ATTORNEYS
500 S. DENVER AVENUE
TULSA, OK
COUNSEL FOR STATE

ATTORNEYS ON APPEAL

ROBERT W. JACKSON
P.O. BOX 926
NORMAN, OK 73070
COUNSEL FOR APPELLANT

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
THOMAS LEE TUCKER
ASSISTANT ATTORNEY GENERAL
313 NE 21ST STREET
OKLAHOMA CITY, OK 73105
COUNSEL FOR APPELLEE

OPINION BY: SMITH, P.J.
LUMPKIN, V.P.J.: CONCUR
JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR IN RESULT
HUDSON, J: CONCUR