

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ALLEN DALE SMITH,)
)
 Appellant,)
 v.)
 STATE OF OKLAHOMA)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2014-398

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUL 13 2015

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

LUMPKIN, VICE-PRESIDING JUDGE:

Allen Dale Smith was tried by jury and convicted in Count 1, Child Sexual Abuse (21 O.S.2011, § 843.5(F)); Count 2, Unlawful Possession of Controlled Dangerous Substance (marijuana-misdemeanor) (63 O.S.2011, § 2-402); and Count 3, misdemeanor Unlawful Possession of Drug Paraphernalia (63 O.S.2011, § 405) in the District Court of Canadian County Case, No. CF-2012-705. The jury found defendant guilty on all three charges and recommended punishment for twenty (20) years imprisonment and \$5,000.00 fine on Count 1, six (6) months imprisonment in county jail and a \$1,000.00 fine on Count 2, and \$500.00 fine on Count 3. The trial court sentenced in accordance with the jury's recommendation ordering the sentences to run concurrently. From this judgment and sentence Appellant has perfected this appeal.

Appellant raises the following propositions of error in support of his appeal:

- I. The prosecutor's appeal to the jury's sympathy for the victim deprived Appellant of a fair trial.

- II. The trial court committed fundamental error by giving two instructions which were not relevant to this case, but which greatly prejudiced Appellant.
- III. The trial court erred in failing to suppress Appellant's statement introduced as State's Exhibit 1.
- IV. Appellant's was deprived of effective assistance of counsel when his attorney failed to argue that Appellant's statement should be suppressed because the promises of help made to him in exchange for his statement made the statement involuntary and thus inadmissible.

After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that under the law and the evidence no relief is warranted.

In Proposition One, we find the prosecution's remarks did not inflame the jury's passions or prejudices against the defendant. Because trial defense counsel did not object to the remarks, this Court reviews for plain error. *Simpson v. State*, 1994 OK CR 40, ¶¶ 2, 23, 11, 876 P.2d at 692-93, 694-95, 698-99.

Under *Simpson*, an appellant must show an actual error, that is plain or obvious, affecting his substantial rights, and which seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*, 1994 OK CR 40, ¶¶ 10, 26, 30, 876 P.2d at 694, 699, 701; *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395; *Malone v. State*, 2013 OK CR 1, ¶ 41, 293 P.3d 198, 211-212. "[P]lain error is subject to harmless error analysis." *Id.*, 1994 OK CR 40, ¶ 20, 876 P.2d at 698.

The remarks made by the prosecutor were not so flagrant as to prejudice the defendant. *Willingham v. State*, 1997 OK CR 62, ¶ 47, 974 P.2d 1074, 1084 *overruled on other grounds by Strum v. State*, 1999 OK CR 41, 991 P.2d 1032; *See also Collins v. State*, 758 P.2d 340, 341 (Okl.Cr.1988). Furthermore, the comments fell within the wide latitude of discussion permitted both the state and the defense in closing argument. *Cole v. State*, 2007 OK CR 27, 164 P.3d 1089, 1101; *Short v. State*, 1999 OK CR 15, ¶ 72, 980 P.2d 1081, 1104. No error thus no plain error. Proposition I is denied.

In Proposition Two, we find the trial court did not commit plain error by providing jury instructions with definitions on incest and inanimate object. As in Proposition One, trial defense counsel did not object to the remarks, this Court reviews for plain error. *Simpson v. State*, 1994 OK CR 40, ¶¶ 2, 23, 11, 876 P.2d at 692-93, 694-95, 698-99.

The trial court provided the uniform jury instruction, OUJI-CR 4-40D, which is the jury instruction for definitions in crimes against children. The jury instruction contained definitions of both incest and inanimate object, but also defined other terms regarding crimes against children. Including the definitions is error because of the lack of relevant nature of the definitions included in the instruction. Looking at the jury instructions given as a whole, the jury could rationally determine that not all the definitions given in the jury instruction applied to the elements of the crime with which Appellant was charged. *Jones v. State*, 2009 OK CR 1, ¶ 63, 201 P.3d 869, 886. Therefore, the extra definitions are considered as surplus. *Graves v. State*, 1977 OK CR 158, ¶ 24,

563 P.2d 646, 652. While error exists it did not affect Appellant's substantial rights or the outcome of the proceeding, therefore no plain error. Proposition II is denied.

In Proposition Three, we find the trial court did not abuse its discretion in failing to suppress State's Exhibit 1. This Court reviews the trial court's admission or exclusion of evidence for abuse of discretion. *Williams v. State*, 2001 OK CR 9, ¶ 94, 22 P.3d 702, 724. Appellant claims State's Exhibit 1 should have been suppressed because the exhibit was Appellant's confession that was not given voluntarily. After reviewing the exhibit in totality of the circumstances this Court finds the confession was given voluntarily. *Salazar v. State*, 1993 OK CR 21, ¶ 12, 852 P.2d 729, 733. *See also Smith v. State*, 2007 OK CR 16, ¶ 44, 157 P.3d 1155, 1170. Moreover, this Court also finds the statement was not given under the promise of immunity or induced by a reward or benefit. *Myers v. State*, 2000 OK CR 25, ¶ 55, 17 P.3d 1021, 1034. Proposition Three is denied.

In Proposition Four, we find Appellant received the effective assistance of counsel. Appellant argues that his motion to suppress should have argued the premise that officers induced Appellant to give his statement through their promises. To show ineffective assistance of counsel one must show counsel gave a deficient performance and resulting in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Bland v. State*, 2000 OK CR 11, ¶ 112, 4 P.3d 702, 730-31.

Appellant fails to show deficient performance or prejudice by trial counsel's failure to argue a point not raised in the motion to suppress. Therefore, this proposition is denied. *Randolph v. State*, 2010 OK CR 2, ¶ 23, 231 P.3d 672, 680.

DECISION

The Judgments and Sentences are **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2014), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CANADIAN COUNTY
THE HONORABLE GARY E. MILLER, DISTRICT JUDGE

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