

FILE COPY

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CHARLES ALLEN DYER,)
)
 Appellant,)
 vs.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. F-2012-506

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

OCT 30 2013

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

SMITH, VICE PRESIDING JUDGE:

Charles Allen Dyer was tried by jury and convicted of Child Sexual Abuse in violation of 21 O.S.Supp.2009, § 843.5(E), in the District Court of Stephens County, Case No. CF-2010-17.¹ In accordance with the jury's recommendation the Honorable Joe H. Enos sentenced Dyer to thirty (30) years imprisonment. Dyer must serve 85% of his sentence before becoming eligible for parole consideration. Dyer appeals from this conviction and sentence.

Dyer raises four propositions of error in support of his appeal:

- I. Mr. Dyer failed to receive the effective assistance of counsel guaranteed by the Sixth Amendment of the United States Constitution and Article II, Section 20 of the Oklahoma Constitution;
- II. The admission of improper character evidence and evidence of "bad acts" deprived Mr. Dyer of the right to a fair trial;
- III. The trial court erred when it refused to permit Dr. Ray Hand to testify for the defense; and
- IV. Mr. Dyer should be afforded relief on the basis of cumulative error.

¹ Dyer's original trial, in April 2011, resulted in a mistrial when jurors could not agree on a verdict. Dyer's second trial, on January 23, 2012, ended in a mistrial when there was an inadvertent improper communication with several jurors.

OCT 31 2013

FROM: COURT OF
CRIMINAL APPEALS

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 Dyer did not receive ineffective assistance of counsel. Dyer 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). He must show counsel's acts or omissions were so serious that he was deprived of a fair trial with reliable results. *Harrington v. Richter*, 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). For the Court to reach Dyer's claims of deficient performance, he must show he was prejudiced by counsel's acts or omissions. *Williams v. Taylor*, 529 U.S. 362, 394, 120 S.Ct. 1495, 1513, 146 L.Ed.2d 389 (2000); *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067. Dyer argues that, to meet this standard, the evidence doesn't have to disprove the State's evidence as long as it undermines confidence in the trial's outcome. However, although Dyer does not have to show the omitted evidence would have disproved the State's case, he must show a reasonable probability that, without counsel's errors or omissions, the result of the proceeding would have been different. *Richter*,

131 S.Ct. at 788. Dyer fails to show prejudice from counsel's strategic decision not to call certain witnesses, and he cannot meet this standard.

Dyer changed defense attorneys between the first and second mistrials, and the same attorney represented him in his second mistrial and this trial. Original counsel called several witnesses which current defense counsel chose not to call. The record shows that this was a strategic decision on counsel's part. Upon reviewing the prior testimony of those witnesses, we will not second-guess that decision. The record shows that (a) the majority of the evidence to which they testified was admitted through other witnesses in this trial; (b) some of the evidence had little or no relevance to the issues at trial; and (c) Dyer cannot show he was prejudiced by the omission of any of these witnesses. As he cannot show prejudice, we will not find counsel ineffective.

Dyer filed a Rule 3.11 Application for Evidentiary Hearing in connection with this claim. There is a strong presumption of regularity in trial proceedings and counsel's conduct, and Dyer's application and affidavits must contain sufficient information to show by clear and convincing evidence the strong possibility that trial counsel was ineffective for failing to identify or use the evidence at issue. Rule 3.11(B)(3)(b)(i), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013). In deciding whether Dyer meets this test, we must "thoroughly review and consider Appellant's application and affidavits along with other attached non-record evidence." *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905. The affidavits Dyer includes with his application represent evidence not presented at trial, which support two of the claims he makes in Proposition 1. The evidence

discussed in these affidavits and their attachments had little if any relevance to issues raised at trial, and may have been prejudicial to Dyer. Dyer has not shown by clear and convincing evidence a strong possibility that trial counsel was ineffective for failing to use this evidence. The Application for Evidentiary Hearing is **DENIED**.

We find in Proposition II that the trial court did not abuse its discretion in allowing Valerie Dyer's testimony about their marriage and details of Dyer's relationship with the child victim, H.D. *Neloms v. State*, 2012 OK CR 7, ¶ 12, 274 P.3d 161, 164. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the issue; 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. Valerie testified along similar lines in Dyer's two previous trials. In each, he objected; both times the objections were overruled. Dyer argues that these previous objections, in different trials, preserved this issue for review. He is mistaken. As he did not object to the testimony in this trial, he has waived all but plain error. He must show an actual error, that was plain or obvious, and that the error affected his substantial rights, affecting the outcome of the trial. *Barnard v. State*, 2012 OK CR 15, ¶ 13, 290 P.3d 759, 764.

A person should be convicted only by testimony of the charged crime, but evidence of other crimes or bad acts may be admissible to show absence of mistake or accident, common scheme or plan, motive, opportunity, intent, preparation, knowledge and identity. *Marshall v. State*, 2010 OK CR 8, ¶ 38, 232 P.3d 467, 477; 12 O.S.2011, § 2404(B). Evidence of an act which carries a prejudicial stigma with

jurors is subject to § 2404(B). *Rutan v. State*, 2009 OK CR 3, ¶ 74, 202 P.3d 839, 854. The State must give notice of its intent to use other crimes evidence, and the trial court must give a limiting instruction regarding its use. *Burks v. State*, 1979 OK CR 10, ¶¶ 12, 17, 594 P.2d 771, 774-75. Regarding the lack of a *Burks* notice, Dyer does not argue he was surprised by the evidence. *Rutan*, 2009 OK CR 3, ¶ 75, 202 P.3d at 854-55. Dyer argues that any marginal relevancy was substantially outweighed by the danger of unfair prejudice. He relies on *Coates v. State*, 1989 OK CR 16, 773 P.2d 1281. In *Coates* the Court concluded the admission of an abundance of highly inflammatory evidence of other crimes or bad acts required reversal. The analogy is not apt. While the evidence of bad acts in *Coates* had no relevance to the charges, Valerie's testimony had some relevance to the issues at trial. Defense counsel elicited some of this evidence through cross-examination of Valerie, and through his own witnesses, including Dyer himself. The entirety of Valerie's testimony about her history with Dyer, and Dyer's history with H.D., seems to support Dyer's defense. Dyer claimed he did not commit the crimes, and that Valerie coached H.D. to accuse Dyer because she was angry with him. Dyer argues that the prejudicial effect was exacerbated because jurors were not given a limiting instruction on the use of the evidence. We review the trial court's decisions regarding instructions for abuse of discretion. *Soriano v. State*, 2011 OK CR 9, ¶ 10, 248 P.3d 381, 387. Dyer failed to request this instruction and we review for plain error. *Postelle v. State*, 2011 OK CR 30, ¶ 86, 267 P.3d 114, 145. Much of this evidence involved neither other crimes, bad acts, nor acts carrying a prejudicial stigma. The trial court was not obliged to give a limiting instruction as to that

evidence. The testimony that Dyer hit Valerie's stomach while she was pregnant may have carried a stigma which could prejudice Dyer. However, he fails to show any prejudice from the absence of a contemporaneous limiting instruction as to this evidence. The jury received a general limiting instruction on the use of other crimes evidence. [O.R. 396] As there was no prejudice, there is no plain error. *Rutan*, 2009 OK CR 3, ¶ 78, 202 P.3d at 855.

In Proposition III Dyer complains that, before the first mistrial, the trial court ruled he could not present an expert witness, Dr. Hand, regarding the way in which H.D.'s forensic interview was conducted. Nothing in the record shows that Dyer asked to offer Dr. Hand's testimony before this third trial, or asked the trial court to reconsider the first pretrial ruling in this trial. Before the second mistrial the trial court stated that its ruling on any previous motions, with the specific court minutes outlining the rulings, would stand. The trial court made this same announcement at the start of this trial, specifically referring to the previous ruling on the admissibility of child hearsay statements. Dyer apparently believes that this announcement preserved this issue for appeal. He is mistaken. Defense counsel never filed a separate witness list, and did not specifically say he intended to call the witnesses on the witness list from the first mistrial. He did not call Dr. Hand; did not list him as a witness; did not ask to call him; did not ask the trial court to reconsider its previous ruling concerning Dr. Hand; and did not make any offer of proof stating that he wanted to call Dr. Hand or what he would say if called to testify. This Court is reviewing issues raised in Dyer's last, full, trial, not incidents which occurred before his first mistrial. As nothing indicates Dyer ever intended to

call Dr. Hand in this trial, and there is no offer of proof regarding any ruling prohibiting Dr. Hand's testimony from the third trial, there is nothing for this Court to review.

We find in Proposition IV that there is no accumulated error. We found no error in Propositions I or II. Proposition III contains no issue before the Court. Where there is no error, there is no cumulative error. *Parker v. State*, 2009 OK CR 23, ¶ 28, 216 P.3d 841, 849.

DECISION

The Judgment and Sentence of the District Court of Stephens County is **AFFIRMED**. Appellant's Application for Evidentiary Hearing is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF STEPHENS COUNTY
THE HONORABLE JOE H. ENOS, DISTRICT JUDGE

ATTORNEYS AT TRIAL

AL HOCH
HOCH & ASSOCIATES
803 ROBERT S. KERR
OKLAHOMA CITY, OK 73106
COUNSEL FOR DEFENDANT

JAMES WALTERS
CARRIE E. HIXON
ASSISTANT DISTRICT ATTORNEYS
101 S. 11TH STREET, ROOM 303
DUNCAN, OK 73533
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
JUDY KING
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OKLAHOMA 73105
ATTORNEYS FOR APPELLEE

OPINION BY: SMITH, V.P.J.

LEWIS, P.J.: CONCUR IN RESULT

LUMPKIN, J.: CONCUR

C. JOHNSON, J.: CONCUR

A. JOHNSON, J.: CONCUR