IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

JAMES EARL DARTON,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F-2013-11
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

LEWIS, PRESIDING JUDGE:

Appellant, James Earl Darton, was tried by jury and convicted of first degree (malice) murder (count one) in violation of 21 O.S.Supp.2009, § 701.7(A); possession of a firearm after former conviction of a felony (count two) in violation of 21 O.S.Supp.2009, § 1283; and domestic assault and battery (count three), second offense, in violation of 21 O.S. Supp.2010, § 664(C), in the District Court of Tulsa County, case number CF-2011-2064, before the Honorable William C. Kellough, District Judge. The jury sentenced Darton to life, without the possibility of parole, and a $10,000.00 fine on count one, twenty years imprisonment and a $5,000.00 fine on count two,[1] and ten years imprisonment and a $2,500.00 fine on count three. Judge Kellough sentenced Darton in accordance with the jury verdict, ordering that counts two and three run concurrently with each other, but consecutively with the sentence in count one.

[1] Count two was enhanced by another former felony conviction.

From the Judgments and Sentences, Darton has perfected his appeal to this Court raising three propositions of error. After thorough consideration of the propositions of error and the entire record before us on appeal, including the original record, transcripts, exhibits and briefs of the parties, we find that the Judgments and Sentences of the district court shall be affirmed, with the exception that the sentence for count three shall be modified.

Kimberly Ragland was found shot to death in the passenger seat of her car at Heller Park in Tulsa sometime during the night of May 8-9, 2011. Before she was discovered, others in the park heard gun shots and saw an African-American male running from the area.

Ragland and Darton were in some type of dating relationship. Ragland was the manager at the Saddlebrook Apartments. Darton lived at the apartments with Tammy and Larry Davis, whom he considered parental figures in his life. Darton was a dealer in crack-cocaine and the Davis's were addicts. They allowed Darton to sell crack-cocaine from their apartment, and he supplied them crack-cocaine.

A week prior to her murder, Ragland was in an altercation with another of Darton's girlfriends, Brittany Slade. Darton was involved in the altercation, as well, and Darton and Ragland hit each other. Ragland sought a protective order. The protective order prevented Darton from coming to the apartment complex to see his family and to make his living selling cocaine.

On May 8, Darton was at the apartment complex during the day. He approached Ragland and tried to apologize for the assault, but Ragland would

not accept the apology and Ragland left. Later that afternoon, Darton was at the Davis's apartment, the occupants were smoking crack cocaine. Ragland called and told Tammy Davis she was coming over to bring Davis her laundry. Ragland was concerned that Darton was at the apartment. Tammy Davis, in anticipation of Ragland's arrival, told Darton that he needed to leave. Darton reluctantly complied, and Ragland arrived at about 9:30 p.m. Five minutes later, Darton came in from the balcony, walked up to Ragland, and hit her in the head. Darton was accompanied by another man, "Polo."

Darton told Tammy Davis and Polo to go into the bedroom. James Davis was already in the bedroom, asleep. They stayed in the bedroom for over two hours. Tammy Davis heard Darton and Ragland fighting. She heard Darton hit Ragland at least two more times, and she heard a taser, or stun-gun, being activated. Ragland was begging for Darton to stop, and asked Darton to let her go. Darton told her she couldn't leave, because her car tires were flattened. When the Davis's came out of the bedroom they saw Ragland slumped on the floor. Her face was covered in blood. There was blood on the floor, the wall, and the television. Darton was standing there with a stun-gun in one hand and a pistol in the other.

Brittany Slade and "Peaches" (Polo's girlfriend) had arrived at the apartment sometime during the evening. Brittany brought the stun-gun that was used on Ragland. While Ragland was slumped on the floor, Darton shocked her with the stun-gun to see if she was still alive. He then told the two girls to take her to the bathroom and clean her up.

Darton and Polo smoked marijuana while Ragland was being cleaned up. When Ragland came back into the living room, James told her not to tell anyone about the beating, and he offered to take her home. Ragland left with Darton at about midnight. Slade, Peaches, and Polo had left together about ten minutes before Darton and Ragland left.

The clothing Darton was wearing when he left, matched the description of the man fleeing the park. The witnesses also testified that Darton was wearing gloves on this evening.

On May 19, Darton and Slade came to the police station for questioning. Darton admitted to seeing Ragland on May 8. He said he tried to apologize for hitting her earlier in the week. He said he left the Davis's that night with Slade and went to his home in Sand Springs. Slade, however, told police that she left the Davis's that evening with Peaches and Polo in her own truck. After the interviews, Darton was arrested for the murder of Ragland.

Darton is now before this Court, after having perfected his appeal, asking that his convictions and sentences be reversed.

In his first proposition, Darton claims his sentence for domestic assault and battery was improperly enhanced by the enhancement provisions of 21 O.S.Supp.2002, § 51.1. The State concedes that § 51.1 did not apply to domestic assault and battery at the time Darton committed this offense.

There were no objections to the punishment instructions given, thus we review this claim under a plain error review. *See Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d. 907, 923. To be entitled to relief under the plain error

doctrine, an appellant must prove, first, that actual error occurred, second, which is obvious in the record, and, third, the error affected his substantial rights, meaning the error affected the outcome of the proceeding; moreover, this Court will not grant relief unless the error seriously affected the fairness, integrity or public reputation of the judicial proceeding or otherwise represents a "miscarriage of justice." *Id.* We find that the error is plain and obvious, and the error clearly affected Darton's substantial rights.

Darton was convicted of domestic assault and battery, second and subsequent; in addition, the jury was instructed that they could use his prior felony conviction to enhance his punishment. The punishment for domestic assault and battery is found at 21 O.S.Supp.2010, § 644(C). Section 644(C), at the time of this offense, specifically stated that the provisions of "Section 51.1 of this title shall not apply to any second or subsequent offense." Subsequent to the offense, but prior to trial, the statute was amended to read, "The provisions of Section 51.1 of this title shall apply to any second or subsequent offense."

Darton claims that the later provision was utilized, and the use of § 51.1 to enhance his punishment amounts to a violation of the *ex post facto* provisions of the United States and Oklahoma Constitutions. An *ex post facto* violation occurs when a statute increases the punishment after the crime has been committed. *See Murphy v. State*, 2012 OK CR 8, ¶ 42, 281 P.3d 1283, 1294.

At the time of this offense, domestic assault and battery, second or subsequent, carried a punishment of not more than four (4) years. Darton was sentenced to ten (10) years, which was the maximum amount the jury was instructed they could assess (utilizing the § 51.1 formula). Because § 51.1 was not applicable to domestic assault and battery, second and subsequent, at the time Darton committed this offense, we find that an *ex post facto* violation has occurred. Consequently, we find that modification of Darton's sentence for this offense is proper. *See Watts v. State*, 2008 OK CR 27, ¶ 7, 194 P.3d 133, 136; *Applegate v. State*, 1995 OK CR 49, ¶ 8, 904 P.2d 130, 134. The record clearly indicates the jury intended to give Darton the maximum punishment for this offense, thus we order that Darton's sentence be modified from ten (10) years imprisonment to four (4) years imprisonment.

Darton next claims, in proposition two, that the trial court erred when it failed to exclude evidence that he was a drug dealer. The State sought to introduce this evidence under the provisions of 12 O.S.2001, § 2404(B), which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

The trial court allowed the evidence over Appellant's objection and instructed the jury that the evidence was relevant to show intent and motive. Appellant preserved this issue at trial by making the contemporaneous objection, thus we review the introduction of this evidence under an abuse of

discretion standard. An abuse of discretion is defined as a clearly erroneous conclusion, going against the logic and effect of the facts presented. *See Stouffer v. State*, 2006 OK CR 46, ¶ 60, 147 P.3d 245, 263.

Now, on appeal, Appellant argues that the evidence was purely improper character evidence, the introduction of the evidence was substantially outweighed by the danger of unfair prejudice, and that the evidence was not necessary to the State's burden of proof. The State initially argues that the evidence of Darton's drug dealing at the apartment complex was part of the *res gestae* of the charges. *See Eizember v. State*, 2007 OK CR 29, ¶ 77, 164 P.3d 208, 230 (defining *res gestae* evidence). The State further argues that the trial court did not abuse its discretion in finding that the evidence was admissible to show motive and intent.

Our examination of the introduction of this evidence under the later analysis leads us to the conclusion that the trial court did not abuse its discretion in its finding that the evidence was relevant to show motive and intent, the relevance was not substantially outweighed by the danger of unfair prejudice, and the evidence was necessary to the State's case. We find it unnecessary to examine the evidence under the former, *res gestae*, theory, as the "other crimes evidence" analysis resolves the issue.

The State theorized that Darton killed Ragland because she filed for, and received, an emergency victim's protective order against him. The protective order prevented him from being near Ragland, who was the manager at the

apartments where he sold crack cocaine. This protective order prevented him from making money at the location where his customers expected to find him.

Prior to introducing evidence of Darton's drug dealing, the trial court gave the uniform limiting instruction on other crimes evidence. *See* OUJI CR 2d 9-9 (2000 Supp.) The State did not go in to detail about his drug dealings. Instead, the State elicited testimony from Tammy Davis who testified that she and her husband allowed Darton to deal drugs from her apartment; however, things changed because of the protective order.

Darton was extremely angry that Ragland reported the assault and received a protective order. The protective order prevented Darton from coming to the Davis's apartment while Ragland was at the apartment complex. Darton considered Tammy and Larry Davis to be his "family" and they considered Darton to be their son.

Tammy Davis testified that Darton was mad because the protective order separated him from his "family" and from the place he made his living. Davis stated, "It hurt his pocket book." She specifically testified that the protective order kept him from making money selling crack cocaine.

The injury to Darton's pocket book because of the diminished income Darton would receive by being prevented from selling drugs at the apartments where Ragland was the manager, at least in part, was clearly motivation for the killing. The motivation also, circumstantially, provided the intent necessary for the first degree murder charge. Darton, at some point, decided that he had to

get Ragland out of the picture, permanently, so that he could continue his illegal operations at the Davis's apartment.

Darton seems to argue that the drug dealing was not necessary to the State's burden of proof, because motive is not an element of the crime and because the mere drug dealing does not give someone an intent to kill. In certain situations that may be true, but Darton asks us to focus on certain aspects of this case without looking at the whole picture. We refuse to do so.

The whole picture is that Ragland's interruption of Darton's drug dealing operation was a valid theory of motive for the killing of Ragland. The evidence was relevant and necessary so that the jury could have a better understanding of Darton's intent and his motive, and so, they too, could see the whole picture.

Motive, while not an element of first degree murder, informs the jury that the defendant has a reason, real or imagined, for committing the crime of first degree murder. This evidence provided a reason for the murder, provided evidence of Darton's intent to kill, and shed light on the entire relationship between the parties involved in this case, again, giving the jury a view of the whole picture. Thus, the evidence was relevant and necessary to the State's case. Furthermore, we find that evidence was not substantially outweighed by any of the dangers identified in 12 O.S.2011, § 2403. We find, therefore, that the trial court did not abuse its discretion in allowing admission of the "other crimes" evidence.

Finally, in proposition three, Darton argues that he was deprived of effective assistance of trial counsel. To prove that trial counsel was ineffective,

an appellant must show that counsel's conduct was "outside the wide range of professionally competent assistance." *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). An appellant must also show that he was prejudiced by showing that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

Darton first claims that counsel was ineffective for calling him a "jerk" both in opening statement and in closing argument. Darton argues that our cases criticizing prosecutors for derogatory name calling should be applied equally to defense counsel. *See Malicoat v. State*, 2000 OK CR 1, ¶ 32, 992 P.2d 383, 401. We decline to follow this analogy.

This Court has held that, far from constituting ineffective assistance, a strategy to concede certain facts may be appropriate to establish credibility with the jury. *See Sanchez v. State*, 2009 OK CR 31, ¶ 99, 223 P.3d 980, 1012. In this case, it was hard for counsel to deny that Darton had gotten into a fist fight with Ragland in the past, and she received an emergency protective order after this fight. He even admitted to police that he tried to apologize for hitting her. Ragland rebuffed his apology, and witnesses said Darton was as angry as they had ever seen him. Counsel's strategy was reasonable, allowing the jury to believe that he might have hit Ragland in the past, and might have, in fact, been a jerk toward Ragland. Even so, counsel argued, someone else killed her

that evening, after they had left the apartment separately. We find counsel was not ineffective in utilizing this strategy.

Next, Darton claims that counsel was ineffective in not objecting to the testimony of Detective Michael Zenoni. Zenoni was asked if Polo's story was consistent with the stories of the Davis's. Zenoni testified that his story was consistent. Polo did not testify at trial. Darton calls this testimony "vouching" and a violation of the confrontation clause.

The substance of Polo's statement was not introduced at trial. Evidence was introduced, however, that Polo was present with Darton when Darton entered the apartment and started beating on Ragland. Darton seems to argue that, because Polo was present at the scene, and the fact that the jury was informed that his statement was consistent with Tammy and Larry Davis, the jury was more prone to believe the Davis's testimony. Furthermore, Darton argues that Polo's statement was testimonial, thus he was denied his right to confront Polo.

The testimony was offered to show why the investigation narrowed on Darton and away from others that were at the apartment that evening and why he was arrested after making his statement denying involvement. No details of the statement were revealed, thus there was no hearsay. Moreover, Darton has wholly failed to show that he was prejudiced by this testimony. We find that counsel was not ineffective for failing to object to this limited testimony.

Next, Darton claims that counsel was ineffective during the second stage for failing to have a judgment and sentence redacted to omit references to alias

names of "Polo" and "Frankie Lee Holliday." This jury was privy to this second stage evidence only in sentencing Darton on the firearms charge, for which he received twenty (20) years imprisonment. The only possible prejudice is that jury may have been informed that Darton had lied about his identity in the past, by claiming the name of his best friend, Frankie Lee Holliday, also known as (aka), "Polo." Such prejudice, in this case, is mere speculation. Darton cannot show that there exists a reasonable probability that the result of the proceeding would have been different had counsel requested redaction. There was no ineffective assistance here.

Finally, Darton claims counsel was ineffective in failing to object to the instructions regarding the domestic assault and battery range of punishment, which he raised as a substantive claim in proposition one. In discussing proposition one, we found error in the instruction, which resulted in an illegal sentence, and we modified the sentence as a result. Darton's ineffective assistance claim based on this proposition is, therefore, rendered moot.

In conclusion, we find that counsel's conduct did not fall below reasonable standards, nor was Darton prejudiced by the strategic choices and actions of his attorney, thus his ineffective assistance of counsel claim fails.

DECISION

The Judgments and Sentences of the district court shall be **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 TULSA COUNTY
THE HONORABLE WILLIAM C. KELLOUGH, DISTRICT JUDGE

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SMITH, V.P.J.: Concurs
LUMPKIN, J.: Concurs
C. JOHNSON, J.: Concurs
A. JOHNSON, J.: Concurs

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THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

ORDER CORRECTING OPINION

This Court has been informed of a scrivener's error in the above styled Opinion handed down on February 26, 2014. The first sentence of the "**DECISION**" paragraph should be amended to read: "The Judgments and Sentences of the district court shall be **AFFIRMED**, except that the sentence for count three shall be **MODIFIED** from ten (10) years imprisonment to four (4) years imprisonment." This amendment reflects the decision in the body of the Opinion resolving proposition one.

IT IS THEREFORE THE ORDER OF THIS COURT that the opinion in the above styled cause shall be corrected.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 12th **day of** March**, 2014.**

DAVID B. LEWIS, Presiding Judge

CLANCY SMITH, Vice Presiding Judge

GARY L. LUMPKIN, Judge

CHARLES A. JOHNSON, Judge

ARLENE JOHNSON, Judge

ATTEST:

Clerk