ORIGINAL

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL RAY DAWKINS,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2021-211**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, JUDGE:

Appellant, Michael Ray Dawkins, was tried by jury and convicted in the District Court of Oklahoma County, Case No. CF-2017-6315 of: Count 1, Assault and Battery with a Deadly Weapon, in violation of 21 O.S.2011, § 652;[1] Count 2, Felon in Possession of a Firearm, in violation of 21 O.S.Supp.2014, § 1283; and Count 3, Maiming, in violation of 21 O.S.2011, § 751, all after former conviction of two or more felonies. The jury returned a guilty verdict on all counts with sentences of forty-five years imprisonment on Count 1, twenty-five years imprisonment on Count 2 and forty-five

[1] Appellant will be required to serve 85% of his sentence on this count before becoming eligible for parole consideration. 21 O.S.Supp.2015, § 13.1.

years imprisonment on Count 3. The trial court sentenced Appellant in accordance with the jury's verdict and ordered the sentences in Counts 1 and 3 to run concurrently with one another, but consecutively to Count 2.[2]

From this judgment and sentence, Appellant appeals and raises the following propositions of error:

I. THE TRIAL COURT VIOLATED MR. DAWKINS' CONSTITUTIONAL RIGHT TO AN ATTORNEY OF HIS CHOICE.

II. MR. DAWKINS WAS SUBJECTED TO DOUBLE PUNISHMENT BY HIS CONVICTION[S] OF ASSAULT AND BATTERY WITH A DEADLY WEAPON AND MAIMING.

III. THE TRIAL COURT IMPROPERLY INTRODUCED HEARSAY STATEMENTS.

IV. MR. DAWKINS WAS DENIED DUE PROCESS AND A FAIR TRIAL WHEN THE TRIAL COURT IMPROPERLY ADMITTED IRRELEVANT EVIDENCE UNDER THE EVIDENTIARY CODE.

[2] Appellant also received six-month sentences and payment of a $500.00 fine on each of three contempt charges as a result of his disrespectful and disruptive behavior during these proceedings. The trial court ordered the sentences in this case to run consecutively to his contempt sentences.

V. THE TRIAL COURT FAILED TO GIVE A PROPER LIMITING INSTRUCTION AT THE TIME NUMEROUS WITNESSES PRESENTED "OTHER CRIMES" EVIDENCE.

VI. MR. DAWKINS WAS DEPRIVED OF HIS CONSTITUTIONAL AND STATUTORY RIGHT TO A SPEEDY TRIAL.

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, Appellant is not entitled to relief.

I.

In his first proposition, Appellant claims he desired to obtain new counsel on the first day of trial, but the trial court refused to allow him to do this. Review of this claim is for an abuse of discretion as Appellant raised the claim in the trial court. *Dixon v. State*, 1993 OK CR 55, ¶ 11, 865 P.2d 1250, 1252. An abuse of discretion is a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented or, stated otherwise, any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue.

Neloms v. State, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170 (internal citation and quotation marks omitted). "This Court has recognized valid reasons for discharge of an appointed counsel and appointment of new counsel; they include demonstrable prejudice against the defendant, incompetence, and conflict of interest. Neither a personality conflict nor disagreements over the conduct of the defense constitute valid reasons." *Brown v. State*, 2018 OK CR 3, ¶ 20, 422 P.3d 155, 163.

The record shows that by the time of trial, Appellant was on his third attorney, Michael Arnett. Prior to the commencement of trial, the court made a record regarding the State's final plea offer and Appellant's rejection of that offer.[3] Arnett advised the court that he recommended Appellant accept the offer and when Appellant rejected the offer, he recommended Appellant enter a blind plea rather than go to trial. Arnett's reasoning in making these recommendations was that Appellant had eight cases pending in Oklahoma County and that even if he was convicted on only two or three cases, the sentences

[3] On the Friday before trial began, the State offered Appellant thirty-five years to do, presumably on each count and running concurrently to each other, but consecutively to his ten year sentence in a federal case.

would all run consecutively to each other. This would guarantee Appellant would never get out of prison. The trial court explained to Appellant that his attorney offered him good advice, but Appellant disagreed, disingenuously arguing that he did not know much about his "case situation" or the potential sentences he faced upon conviction. The trial court responded to Appellant's argument, reminding Appellant of his prior convictions and the ten year sentence he faced in federal court.[4] Appellant insisted he wanted to go to trial.

Arnett and Appellant conferred and Arnett announced to the trial court that Appellant wanted to discharge him as his attorney. The State objected and the trial court determined Arnett diligently represented Appellant in the case and denied Appellant's request to discharge Arnett. Thereafter ensued a barrage of disrespectful and disruptive behavior by Appellant toward the trial court. To summarize, Appellant cursed, made threats, demanded to be removed from the courtroom, refused to put on street clothes and falsely told the trial court he had another attorney on "standby" to

[4] The record reflects Appellant has a voluminous criminal record.

represent him. Arnett spoke with Appellant and the next morning, Appellant advised the trial court he wished to be present during his trial and made no further mention of seeking another attorney.

Based upon the above record, Appellant had no valid reason for seeking discharge of his attorney. He simply disagreed with Arnett's sound advice to enter a blind plea and seized upon the ruse of seeking another attorney in order to delay his trial proceedings. There was no abuse of discretion in the trial court's refusal to allow Appellant to obtain new counsel. Proposition I is denied.

II.

In Proposition II, Appellant maintains his convictions for both assault and battery with a deadly weapon and maiming violate the prohibition against multiple punishments for a single act found in 21 O.S.2011, § 11. Although the State raised this issue initially at sentencing, defense counsel agreed and also argued that all of Appellant's convictions violated Section 11. Thus, we review this claim for an abuse of discretion as set forth in Proposition I. The State concedes this error and we agree.

In this case, there was only a single act of shooting Krystal Traylor which resulted in her injuries. "If the crimes truly arise out

of one act, Section 11 prohibits prosecution for more than one crime, absent express legislative intent." *Barnard v. State*, 2012 OK CR 15, ¶ 27, 290 P.3d 759, 767. Accordingly, Appellant's conviction on Count 3, Maiming, should be reversed with instructions to dismiss. *See Sanders v. State,* 2015 OK CR 11, ¶ 12, 358 P.3d 280, 284 (where two convictions violated Section 11, Court dismissed the one with lesser punishment).[5]

III.

Proposition III challenges the admission of Traylor's statement to police at the crime scene identifying Appellant as the man who shot her. He contends the statement was inadmissible hearsay. Review of this claim is for an abuse of discretion as set forth in Proposition I since Appellant objected to this evidence below. *Thompson v. State*, 2019 OK CR 3, ¶ 19, 438 P.3d 373, 379.

"[12 O.S.2001, §] 2801(B)(1)(c) makes extrajudicial identification testimony admissible as substantive evidence—both by the identifier and third parties present at the prior identification—so

[5] While Appellant received identical forty-five year sentences on these counts, and the punishment range for both crimes is up to life imprisonment, Maiming is not an enumerated crime under 21 O.S.Supp.2015, § 13.1. Therefore, Maiming carries a lesser punishment.

long as the declarant testifies at trial and is subject to cross-examination concerning the statement. *Davis v. State*, 2018 OK CR 7, ¶ 26, 419 P.3d 271, 281.

When police came upon the rural crime scene and discovered the injured Traylor, they asked her what happened and who shot her. She identified Appellant as the man who shot her. Traylor testified to this at trial and was cross-examined. There was no abuse of discretion in the admission of Traylor's statements identifying Appellant as the man who shot her. Proposition III is denied.

IV.

In his fourth proposition, Appellant argues the trial court improperly admitted evidence of his prior bad acts. He specifically complains of one instance of a prior shooting involving another girlfriend's mother and one instance of his prior physical abuse of Traylor in this proposition. We review the claim for plain error as Appellant lodged no objection at trial. W*all v. State*, 2020 OK CR 9, ¶ 31, 465 P.3d 227, 235. As set forth in *Simpson v. State*, 1994 OK CR 40, ¶¶ 2, 11, 23, 30, 876 P.2d 690, 693, 694-95, 698-701, we determine whether Appellant has shown an actual error, which is plain or obvious, and which affects his or her substantial rights. This

Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701.

Generally, evidence of a defendant's prior bad acts or other crimes is inadmissible to show that he or she acted in conformity therewith on a particular occasion. 12 O.S.2011, § 2404(A). In *Kirkwood v. State*, 2018 OK CR 9, ¶ 5, 421 P.3d 314, 316, this Court held as follows regarding admission of evidence pursuant to the exceptions found in Section 2404(B):

> Evidence of other crimes must be (a) probative of a disputed issue of the charged crime; (b) there must be a visible connection between the crimes; (c) the evidence must be necessary to support the State's burden of proof; (d) proof of the evidence must be clear and convincing; (e) the probative value of the evidence must outweigh its prejudicial effect; and (f) the trial court must instruct jurors on the limited use of the testimony at the time it is given and during final instructions.

In this case, Appellant's defense was that he was in another state at the time of the shooting. The first bad act evidence involved Appellant's prior abuse of Traylor. On August 21, 2017, Traylor testified she got into an argument with Appellant. As she walked

away, Appellant grabbed her by her neck and began strangling her. As he did so, he forced Traylor to the ground and hit her in the face. "Evidence of previous altercations between spouses or those involved in a close or dating relationship is relevant to show motive and intent." *Bramlett v. State*, 2018 OK CR 19, ¶ 21, 422 P.3d 788, 795. When weighing the probative value of this evidence against its prejudicial effect, the evidence is given "its maximum probative force and minimum reasonable prejudicial value." *Brewer v. State*, 2019 OK CR 23, ¶ 9, 450 P.3d 969, 972. This evidence was plainly admissible pursuant to show motive and intent. In addition, the State is entitled to offer evidence to counter a defendant's defense to the crime charged. *See Cole v. State*, 2007 OK CR 27, ¶ 23 n.5, 164 P.3d 1089, 1102 n.5 (evidence of prior crimes was admitted "more as a matter of discrediting a defense than proving action in conformity with past character."). This evidence was also admissible to counter Appellant's defense of complete innocence.

Regarding the second bad acts evidence, the State presented evidence that on February 17, 2017, Appellant appeared at the home of Carolyn Wilson, mother of his then girlfriend, Tykisha Jones. He demanded to see Jones, but Wilson refused to allow him into her

home, knowing Jones was afraid of Appellant. Upon being denied access to Jones, Appellant became enraged, stormed away and threatened to kill everybody, including Jones and Wilson. As Appellant drove away from the residence, Wilson saw Appellant pull out a gun and fire multiple shots at her vehicle.

The evidence of the Wilson altercation showed Appellant's ready use of firearms when he was angry with his girlfriends. *See Moore v. State,* 2019 OK CR 12, ¶ 17, 443 P.3d 579, 584 (finding admission of similar acts relevant and proper since the more often an unusual event happens, the more likely it is that a later occurrence of the event is not the result of mistake or accident).

Giving the evidence its maximum probative force and minimum prejudicial value and the fact that the jury received appropriate instruction on its proper use, there was no error in the admission of this evidence. *See Marshall v. State,* 2010 OK CR 8, ¶41, 232 P.3d 467, 477 ("This probative value [of other crimes evidence] was not substantially outweighed by the danger of unfair prejudice in light of the instruction given to the jury limiting their consideration of the evidence."). Proposition IV is denied.

V.

In Proposition V, Appellant contends the trial court erred in failing to instruct the jury with a contemporaneous limiting instruction regarding other crimes evidence. Review of this claim is for plain error as set forth in Proposition IV as Appellant failed to request said instruction. *Rutan v. State*, 2009 OK CR 3, ¶ 78, 202 P.3d 839, 855. Jury "[i]nstructions are sufficient where they accurately state the applicable law." *Runnels v. State*, 2018 OK CR 27, ¶ 19, 426 P.3d 614, 619.

At the close of the evidence, the trial court issued Instruction No. 9-9, OUJI-CR (2d), properly limiting the jury's consideration of the other crimes evidence presented. This Court presumes the jury followed its instructions. *Sanders*, 2015 OK CR 11, ¶ 15, 358 P.3d at 285. Furthermore, the truly important evidence against Appellant was not the other crimes evidence; it was Traylor's identification of Appellant as the man who shot her. Indeed, in opening and closing argument, the prosecutor reminded the jury that the focus of the State's case was what occurred to Traylor on the night of the crime and not the other crimes evidence which was offered simply to show Appellant's motive, identity, knowledge, absence of mistake, etc.

Based upon the overwhelming evidence of Appellant's guilt, no error occurred because the jury did not receive the contemporaneous limiting instruction. *Cf. Levering v. State*, 2013 OK CR 19, ¶ 18, 315 P.3d 392, 397 (finding no error in the failure of the trial court to give a limiting instruction regarding use of consciousness of guilt evidence based upon the evidence presented against the defendant). Proposition V is denied.

VI.

Proposition VI seeks relief based upon Appellant's claim he was denied his right to a speedy trial. Review of this claim is for plain error as set forth in Proposition IV since Appellant failed to raise this claim at trial. *Cf. United States v. Gomez*, 67 F.3d 1515, 1521 (10th Cir. 1995) (reviewing unpreserved constitutional speedy trial claim for plain error). We analyze Sixth Amendment speedy trial claims utilizing and applying the four balancing factors established in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). *See Lott v. State*, 2004 OK CR 27, ¶ 7, 98 P.3d 318, 327. The four balancing factors are: (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his rights, and (4) the prejudice to the defendant. *Barker*, 407 U.S. at 530. "These are not absolute factors, but are balanced

with other relevant circumstances in making a determination." *Lott*, 2004 OK CR 27, ¶ 7, 98 P.3d at 327.

Considering the first factor, the record shows Appellant was arrested on October 12, 2017, and his trial began on October 5, 2020. The almost three year delay requires inquiry into the remaining three factors set forth in *Barker*. *See Ellis v. State*, 2003 OK CR 18, ¶ 29-30, 76 P.3d 1131, 1136-37 (generally any delay beyond one-year is sufficient to necessitate review).

We next examine the second factor, the reasons for the delay, to determine whether they are reasonable. *Lott*, 2004 OK CR 27, ¶ 10, 98 P.3d at 328. *See also Ellis*, 2003 OK CR 18, ¶ 48, 76 P.3d at 1139 (determining that "valid reason" or "appropriateness of the cause of the delay" or "good cause" all have essentially the same meaning and require the Court to ascertain what is causing the delay and then to ask if the cause is reasonable). Delay caused or agreed to either by the defendant or his counsel is "charged against the defendant. . . . whether counsel is privately retained or publicly assigned[.]" *Vermont v. Brillon*, 556 U.S. 81, 91 (2009). The Supreme Court's speedy trial cases have recognized that criminal defendants "may have incentives to employ delay as a 'defense tactic': delay may

'work to the accused's advantage' because 'witnesses may become unavailable or their memories may fade' over time." *Id.* at 90 (quoting *Barker*, 407 U.S. at 521).

Appellant's preliminary hearing transpired on December 11, 2017 and pretrial was set for January 31, 2018. The record indicates that attorney Ken Watson and Assistant Public Defender Bonnie Blumert represented Appellant at various points until Appellant requested a continuance of the pretrial so he could hire other counsel. The pretrial was reset for April 4, 2018. Arnett entered his appearance in the case on February 9, 2018, and the pretrial was reset by agreement to July 11, 2018. On that date, the pretrial was again reset by agreement to October 3, 2018, as Appellant was awaiting indictment on federal charges. There were four more continuances by agreement due to Appellant's federal charges, from October 3, 2018 until December 16, 2019. Between July 10, 2019, and December 16, 2019, it appears from the record that Appellant was in federal custody.

The first trial setting was for April 20, 2020. This setting was continued by agreement due to state mandated Covid restrictions until June 15, 2020. The trial was continued again due to state

mandated Covid restrictions until August 17, 2020. On August 14, 2020, a court minute reflects that Appellant contracted Covid or his Covid status could not be determined and the trial court continued the trial to October 5, 2020, the date upon which the trial actually commenced. From this record it is plain that Appellant was to blame for the majority of the delays in the trial of his case. This factor weighs against him.

The third factor also weighs against Appellant as he never asserted a speedy trial claim in the trial court. While Appellant did complain about his attorney's performance on the first day of trial, he did not complain that he was denied a speedy trial. This factor weighs against Appellant.

When the final factor is examined, prejudice to Appellant because of the delay, we find this factor weighs against Appellant. *Barker* sets forth three types of prejudice which may occur in denial of the right to a speedy trial: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker*, 407 U.S. at 532. The most important one is the last. *Id.* The record demonstrates Appellant had competent legal representation

throughout the course of his case. Appellant cites nothing in the record which demonstrates he suffered any impairment of his defense. The record fails to show Appellant suffered any prejudice because of the lapse of time which occurred prior to trial. He only complains of his continuous incarceration since the date of his arrest.[6] Having thoroughly examined the record, we find Appellant was not denied his right to a speedy trial. Proposition VI is denied.

DECISION

The Judgment and Sentence of the district court on Counts 1 and 2 is **AFFIRMED**. Count 3 is **REVERSED** and **REMANDED** with instructions to dismiss. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2022), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

[6] Notably, Appellant had serious charges pending against him in several additional cases in Oklahoma County and he was serving a federal sentence. Thus, his likelihood of being released on bail was zero.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, THE HONORABLE AMY L. PALUMBO, DISTRICT JUDGE

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HUDSON, V.P.J.: Concur
LEWIS, J.: Concur
MUSSEMAN, J.: Concur