IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SARAH LYNNE GANIS,)
)
Appellant,) **NOT FOR PUBLICATION**
v.
Case No. F-2004-293
STATE OF OKLAHOMA
)
Appellee.)

SUMMARY OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant Sarah Lynne Ganis was tried by jury and convicted of nine counts of Child Neglect (10 O.S.Supp.2002, § 7115), Case No. CF-2003-451, in the District Court of Carter County. The jury recommended as punishment twenty-five (25) years imprisonment in each of Counts I–VI, and forty (40) years imprisonment in each of Counts VII-IX. The trial court sentenced accordingly, ordering the sentences to run consecutively. It is from this judgment and sentence that Appellant appeals.

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

I. There was insufficient evidence to convict Appellant of Child Neglect as charged in Counts I-III and VII-IX.

II. Instructional error denied the jury proper guidance for the required elements and theory of defense.

III. Simultaneous convictions for three counts of Child Neglect for a failure to provide on each of two dates and one time period violated the prohibitions of double jeopardy and double punishment.

IV. The parade of unfairly inflammatory testimony and photographs which were probative to no contested issue requires reversal or sentence modification.

V. Admission of other crimes evidence prejudiced the jury, deprived Appellant of a fundamentally fair trial, and warrants modification of the sentence.

VI. Trial error and the interest of justice require favorable modification of Appellant's sentence.

VII. Prosecutorial misconduct and/or the cumulative effect of legal error denied Appellant a fair trial.

After a 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 reversal is not warranted, but the sentence should be modified.

In Proposition I, despite conflicts in the testimony, we find the evidence sufficient to support the jury's verdicts in Counts I-III and VII-IX. See *Easlick* v. State, 2004 OK CR 21, 90 P.3d 556, 559.

In Proposition II, we recognize that Jury Instruction No. 2 was a non-uniform instruction. However, any error in giving this instruction on the "parental standard" was harmless, as it did not result in a miscarriage of justice or constitute a substantial violation of a constitutional or statutory right. See *Phillips* v. State, 1999 OK CR 38, ¶ 73, 989 P.2d 1017, 1037-1038, citing 20 O.S.1991, § 3001.1. The instruction did not lessen the State's burden of proving the elements of the offense beyond a reasonable doubt, and the instructions as a whole accurately stated the applicable law.

Further, Appellant was not entitled to an instruction on her theory of defense that the instances of neglect were isolated incidents as such a theory was not supported by the law or the evidence. See *Cipriano* v. State, 2001 OK CR 25, ¶ 30, 32 P.3d 869, 876. Any error in failing to give specific limiting instructions on impeachment evidence or expert opinion testimony did not impact the fundamental fairness of the trial or deprive Appellant of a substantial right. See *Lott* v. State, 2004 OK CR 27, ¶ 56, 98 P.3d 318, 338. Other instructions adequately guided the jury on their consideration of the weight and credibility of witnesses' testimony. As for the expert opinion testimony, the result of the trial did not hinge on their testimony. Testimony from each of the experts was corroborated by non-expert witnesses.

Additionally, trial counsel's failure to object to any of the alleged errors was not sufficient to constitute ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) as Appellant has failed to show the required prejudice. See Black v. State, 2001 OK CR 5, ¶ 65, 21 P.3d 1047, 1070-71.

In Proposition III, we find Appellant's convictions for nine counts of child neglect on three occasions does not violate the prohibition against double jeopardy as three separate victims were involved on three different occasions. See Burleson v. *Saffle,* 2002 OK CR 15, ¶ 5, 46 P.3d 150, 153; Rogers v. State, 1995 OK CR 8, ¶ 28, 890 P.2d 959, 973; Johnson v. State, 1982 OK CR 135, ¶ 5, 650 P.2d 875, 876. Her convictions also do not violate the prohibitions against double punishment under 21 0.S.2001, § 11, as the acts of neglect (although

involving similar conduct) were separate and distinct, occurring at different times and not merely one act of neglect. See *McElmurry* v. State, 2002 OK CR 40, ¶ 82, 60 P.3d 4, 24; Mooney v. State, 1999 OK CR 34, ¶ 16, 990 P.2d 875, 883; Davis v. State, 1999 OK CR 48, ¶¶ 13-14, 993 P.2d 124, 126-27; Hale v. State, 1995 OK CR 7, 888 P.2d 1027.

In Proposition IV, we find the photographs admitted into evidence were relevant and their probative value was not substantially outweighed by the danger of unfair prejudice. See Phillips, 1999 OK CR 38, ¶ 47, 989 P.2d at 1033. Any error in admitting testimony concerning the condition of the children's bodies as a result of the fire is not grounds for reversal. When considered in light of the evidence of Appellant's neglect of her children, it did not have a substantial influence on the outcome of the trial. See *Simpson* v. State, 1994 OK CR 40, ¶ 36, 876 P.2d 690, 702.

In Proposition V, evidence that Appellant was receiving Temporary Aid to Needy Families, food stamps, aid from Women with Infant Children, that DHS was paying for her children to attend daycare so she could work or look for a job, and that Appellant was not employed and not actively seeking employment yet she still took her children to daycare all emerged as the facts of this case came out and was not other crimes evidence. It was res gestae evidence that was so closely connected to the child neglect charges as to form part of the entire transaction and it gave the jury a complete understanding of the crime. See *McElmurry,* 2002 OK CR 40, ¶ 63, 60 P.3d at 21-22; Rogers, 1995 OK CR 8, ¶ 21, 890 P.2d at 971; Fontenot v. State, 1994 OK CR 42, ¶ 47, 881 P.2d 69, 83.

Evidence that Appellant had been fired from her job because someone allegedly stole property from her patient came out during her cross-examination and was proper impeachment evidence challenging her credibility. Further, as the alleged other crimes evidence was properly admitted at trial, counsel was not ineffective for failing to raise objections to the evidence. See Bland v. State, 2000 OK CR 11, ¶ 112 n. 11, 4 P.3d 702, 730-731.

In Proposition VI, after reviewing all the facts and circumstances of the case, we find Appellant's sentence is excessive. See Rea *v.* State, 2001 OK CR 28, 34 P.3d 148, 149. Accordingly, the sentence is modified to run all counts concurrently.

In Proposition VII, we have thoroughly reviewed the allegations of prosecutorial misconduct. The comments are generally based on the evidence and within the wide range of argument permitted in closing argument. Bland, 2000 OK CR 11, ¶ 97, 4 P.3d at 738. Any error in particular comments was not so egregious as to have affected the outcome of the trial or deprive Appellant of a substantial right. *Id.,* 2000 OK CR 11, ¶ 90, 4 P.3d at 726. Accordingly, Appellant has failed to show any prejudice from trial counsel's failure to object and therefore has not established ineffective assistance of counsel. Black *v.* State, 2001 OK CR 5, ¶ 65, 21 P.3d 1047, 1070-71. Additionally, as none of the errors alleged throughout the appeal have warranted relief, a cumulative error argument has no merit. See *Conover v.* State, 1997 OK CR 6, ¶ 81, 933 P.2d 904, 923.

DECISION

The Judgment is **AFFIRMED.** The Sentence is **MODIFIED to run all counts concurrently.** Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CARTER COUNTY
THE HONORABLE THOMAS S. WALKER, DISTRICT JUDGE

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CHAPEL, P.J.: CONCUR IN RESULT
C. JOHNSON, J.: CONCUR
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