IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DEWIGHT DEJUAN JASPER,	)	
	)	
Appellant,	)	**Not For Publication**
	)	
v.	)	**Case No. F-2013-36**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, JUDGE:

Appellant, Dewight Dejuan Jasper, was tried by jury and convicted of Conspiracy (Count 1) (21 O.S.2011, § 421); Kidnapping (Count 2) (21 O.S.2011, § 741; Attempted First Degree Rape (Count 3) (21 O.S.2011, § 115); and First Degree Robbery (Count 4) (21 O.S.2011, § 797), in the District Court of Jackson County, Case Number CF-2012-55.[1] The jury recommended as punishment imprisonment for ten (10) years and a $5,000.00 fine in Count 1; imprisonment for twenty (20) years in Count 2; imprisonment for twenty-two and one-half (22 ½) years in Count 3, and ten (10) years in Count 4. The trial court sentenced accordingly and ordered the sentences to run consecutively.[2] It is from this judgment and sentence that Appellant appeals.

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

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[1] Appellant was charged with First Degree Rape in Count 3 but the jury found him guilty of the lesser offense of Attempted First Degree Rape.

[2] Any person convicted of First Degree Robbery as defined in 21 O.S.2011, § 797 shall be required to serve not less than eighty-five percent of any sentence of imprisonment imposed prior to becoming eligible for consideration for parole. 21 O.S.2011, § 13.1(9).

I. Because the evidence produced at trial failed to prove beyond a reasonable doubt an agreement to commit the crime of rape, Appellant's conviction for Conspiracy must be reversed for insufficient evidence.

II. Because there was no evidence of confinement, or an intention to confine, beyond that which was necessarily part and parcel to the Attempted Rape, Appellant's convictions for both Attempted Rape and Kidnapping violate the prohibition against double punishment for one act under Title 21, Section 11.

III. Appellant's conviction for First Degree Robbery must be reversed because it was secured in violation of the prohibition against Double Jeopardy under both the State and Federal Constitutions.

IV. Plain error occurred when the trial judge incorrectly instructed the jury as to the sentencing range for First Degree Robbery.

V. Admission of irrelevant but highly prejudicial evidence violated Appellant's Due Process rights under the Fifth, Eighth and Fourteenth Amendments of the United States Constitution and Article II, §§ 7 and 9 of the Oklahoma Constitution.

VI. Appellant's trial was infected throughout with inadmissible hearsay that, when accumulated with other errors in the case, deprived him of a fair trial.

VII. Appellant was denied the reasonable effective assistance of counsel guaranteed him by the Sixth Amendment.

VIII. Under the facts of this case, imposition of consecutive sentences totaling sixty-two-and-a-half years is excessive and should be modified.

IX. The Accumulation of error in this case deprived Mr. Jasper of Due Process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article II, § 7 of the Oklahoma Constitution.

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 Appellant is entitled to relief as to Proposition Four, but otherwise affirm Appellant's convictions and sentences.

In Proposition One, Appellant challenges the sufficiency of the evidence supporting his conviction for Conspiracy in Count 1. We review the evidence in the light most favorable to the prosecution, to determine whether any rational trier of fact could have found the essential elements of the charged offense beyond a reasonable doubt. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204. Based upon the witnesses' description of the circumstances, the co-conspirator's testimony, and Appellant's confession in the present case, any rationale trier of fact could have found beyond a reasonable doubt that Appellant and the co-defendant entered into an agreement to rape the victim. *Powell v. State*, 2000 OK CR 5, ¶ 72, 995 P.2d 510, 528; *Roldan v. State*, 1988 OK CR 219, ¶ 8, 762 P.2d 285, 286-87; *Fetter v. State*, 1979 OK CR 77, ¶ 10, 598 P.2d 262, 265. Proposition One is denied.

In Proposition Two, Appellant challenges the sufficiency of the evidence as to his conviction for Kidnapping in Count 2. Reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of Kidnapping, including an intent to confine, beyond a reasonable doubt." *Easlick*, 2004 OK CR 21, ¶ 15, 90 P.3d at 559; *Scott v. State*, 1991 OK CR 31, ¶ 4, 808 P.2d 73, 75-76; *Spuehler*, 1985 OK CR 132, ¶ 7, 709 P.2d at 203-204; Inst. No. 4-144, OUJI-CR(2d) (Supp.2012).

Appellant further argues that his convictions for both Kidnapping and Attempted Rape violates 21 O.S.2001, § 11. He asserts that there was not any evidence of an intent to confine beyond the intent to rape. Appellant concedes

that he did not raise this challenge before the trial court. Accordingly, we find that he has waived appellate review of this issue for all but plain error. *Head v. State*, 2006 OK CR 44, ¶ 9, 146 P.3d 1141, 1144. We review the claim for plain error pursuant to the test set forth in *Hogan v. State*, 2006 OK CR 19, 139 P.3d 907.

> To be entitled to relief under the plain error doctrine, [an appellant] must prove: 1) the existence of an actual error (i.e., deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding. *See Simpson v. State*, 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d 690, 694, 695, 698; 20 O.S.2001, § 3001.1. If these elements are met, this Court will correct plain error only if the error "seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings" or otherwise represents a "miscarriage of justice." *Simpson*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701 (*citing United States v. Olano*, 507 U.S. 725, 736, 113 S.Ct. 1770, 1779, 123 L.Ed.2d 508 (1993); 20 O.S.2001, § 3001.1.

Id., 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

We find that Appellant has not demonstrated the existence of an actual error as he has not shown that his convictions for Kidnapping and Attempted Rape arose out of one act. *Davis v. State*, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126-27. The record reveals that the offenses were separate and distinct crimes. *Id.*, 1999 OK CR 48, ¶ 12, 993 P.2d at 126; *Doyle v. State*, 1989 OK CR 85, ¶¶ 16-17, 785 P.2d 317, 324 (holding kidnapping did not merge into rape, for double punishment purposes, "merely because the crimes were committed in rapid succession."). Appellant's commission of the offense of Kidnapping was complete before he committed a perpetrating act towards the commission of the offense of Rape. *Id.*, 1999 OK CR 48, ¶ 11, 993 P.2d at 126 (recognizing that

even crimes which are "means to some other objective" or "tend to facilitate some ultimate crime" are not prohibited if they are separate and distinct); Inst. Nos. 2-11, 2-12, OUJI-CR(2d) (Supp.2012). Plain error did not occur. Proposition Two is denied.

In Proposition Three, Appellant contends that his conviction for First Degree Robbery is barred by the prohibition against Double Jeopardy. Appellant concedes that he did not raise this challenge before the trial court. Accordingly, we find that he has waived appellate review of this issue for all but plain error. *Head*, 2006 OK CR 44, ¶ 9, 146 P.3d at 1144. We review Appellant's claim under the test set forth in *Hogan* and first determine whether he has shown the existence of an actual error. *Hogan*, 2006 OK CR 19, ¶¶ 38-39, 139 P.3d at 923.

As Kidnapping, Attempted Rape, and First Degree Robbery each contains an element not contained in the other, we find that Appellant has not shown the existence of an actual error. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932); *Head*, 2006 OK CR 44, ¶ 15, 146 P.3d at 1146; Inst. Nos. 2-11, 4-141, 4-144 OUJI-CR(2d) (Supp.2012). Appellant's convictions for Kidnapping, Attempted Rape, and First Degree Robbery are clearly separate and distinct acts which are separately punishable. *See Nowlin v. State*, 2001 OK CR 32, ¶¶ 2, 10, 34 P.3d 654, 655-56; *See United States v. Mathis*, 673 F.2d 289, 293-94 (10th Cir. 1982); *United States v. LeMon*, 622 F.2d 1022, 1024 (10th Cir. 1980). Plain error did not occur. Proposition Three is denied.

In Proposition Four, Appellant contends that the jury was incorrectly instructed as to the sentencing range for First Degree Robbery in Count 4. Appellant concedes that he waived appellate review of this claim for all but plain error when he failed to challenge the trial court's instruction to the jury. *See Burgess v. State*, 2010 OK CR 25, ¶ 21, 243 P.3d 461, 465; *Romano v. State*, 1995 OK CR 74, ¶ 80, 909 P.2d 92, 120.

Reviewing for plain error pursuant to *Hogan* we find that Appellant has shown the existence of an actual error. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. This Court has determined that the ten (10) year minimum sentence for robbery in the first degree provided in Title 21, Section 798, was repealed by implication with the passage of Title 21, Sections 800 and 801. *Ridgway v. State*, 1933 OK CR 54, 22 P.2d 932, 932-33. As this Court has repeatedly held that the minimum punishment for first degree robbery is five (5) years, we find that Appellant has shown that the error is plain or obvious. *Id.*; *Coleman v. State*, 1975 OK CR 135, ¶ 12, 540 P.2d 1185, 1186; *Peters v. State*, 1971 OK CR 161, ¶ 10, 483 P.2d 765, 766; *Meschew v. State*, 1953 OK CR 165, 264 P.2d 391, 393-94. We further find that the error affected Appellant's substantial rights. *Id.*; *Scott*, 1991 OK CR 31, ¶ 12, 808 P.3d at 77 (holding improper instruction on range of punishment fundamental error that may be raised for the first time on appeal); *Hogan*, 2006 OK CR 19, at ¶ 38, 139 P.3d at 923; *Simpson*, 1994 OK CR 40, ¶ 24, 876 P.2d at 699. Further, the error seriously affected the fairness, integrity or public reputation of the trial. *Id.*; *Simpson*, 1994 OK CR 40, at ¶ 30, 876 P.2d at 701.

Reviewing the entire record, we cannot say that we have no grave doubts that the plain error had a substantial influence on the outcome of the trial. *Simpson*, 1994 OK CR 40, ¶¶ 19-20, 37, 876 P.2d at 698, 702. The jury recommended the minimum sentence under the incorrect sentencing range, therefore, we find that modification of Appellant's sentence for First Degree Robbery in Count 4 to five (5) years is the appropriate relief. *McIntosh v. State*, 2010 OK CR 17, ¶¶ 10-11, 237 P.3d 800, 803; *Scott*, 1991 OK CR 31, ¶ 14, 808 P.3d at 77.

In Proposition Five, Appellant contends that certain evidence was substantially more prejudicial than probative. He claims the victim's testimony that she was "set up" by Appellant, his co-conspirator and Anthony Flemons was inadmissible and highly prejudicial. Appellant failed to challenge the admission of this evidence at trial, therefore, we find that he has waived appellate review of this issue for all but plain error. *Simpson*, 1994 OK CR 40, ¶¶ 11, 23, 876 P.2d at 694-95, 698-99. Reviewing Appellant's claim for plain error pursuant to the test set forth in *Hogan*, we find that Appellant has not shown the existence of an actual error. *Id.*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. The victim's conclusion was properly based upon her personal observations. *Welch v. State*, 2000 OK CR 8, ¶¶ 18-20, 2 P.3d 356, 368. As it tended to establish the conspiracy between Appellant and his co-conspirator, we find that the testimony's probative value was not substantially outweighed by the

danger of unfair prejudice. *Goode v. State*, 2010 OK CR 10, ¶ 31, 236 P.3d 671, 678. As such, plain error did not occur.

Appellant further cites as error, the prosecutor's impeachment of Anthony Flemons with his recorded statements to the investigating officers. The trial court found that the evidence was properly admissible to refresh Flemons' memory and as evidence of a prior inconsistent statement. We find that the trial court did not abuse its discretion in admitting this evidence. *Marshall v. State*, 2010 OK CR 8, ¶ 24, 232 P.3d 467, 474. Although the prosecutor called Flemons to testify, the State was permitted to impeach its own witness with his prior inconsistent statements and reveal his bias, credibility and the motivation behind his testimony. *Warner v. State, 2006 OK CR 40, ¶ 30, 144 P.3d 838, 862*; *Omalza v. State*, 1995 OK CR 80, ¶¶ 45, 48-49, 911 P.2d 286, 302; *Smith v. State*, 1988 OK CR 292, 766 P.2d 1007, 1008. As Flemons provided the opportunity for the victim to meet Appellant and his co-conspirator, we find that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *Goode*, 2010 OK CR 10, ¶ 31, 236 P.3d at 678. Proposition Five is denied.

In Proposition Six, Appellant contends that his trial was rendered fundamentally unfair by the admission of hearsay evidence. As Appellant did not raise this challenge at trial, we find that he has waived appellate review of this issue for all but plain error. *Short v. State*, 1999 OK CR 15, ¶ 27, 980 P.2d 1081, 1094 ("When a specific objection is raised at trial, this Court will not entertain a different objection on appeal."). Reviewing for plain error under the

test set forth in Hogan, we find that Appellant has not shown the existence of an actual error. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. Anthony Flemons' prior inconsistent statements offered to impeach his testimony did not constitute hearsay. *Hancock v. State*, 2007 OK CR 9, ¶ 95, 155 P.3d 796, 818; *Omalza*, 1995 OK CR 80, ¶¶ 48-49, 911 P.2d at 302; *Smith*, 1988 OK CR 292, 766 P.2d at 1008. The record reveals that the victim's description of the events set forth in the OSBI Sexual Assault History Form was made for the purposes of medical diagnosis or treatment, and therefore fell within the well-known medical diagnosis or treatment hearsay exception. *Kennedy v. State*, 1992 OK CR 67, ¶ 11, 839 P.2d 667, 670; *Drake v. State*, 1988 OK CR 180, ¶ 15, 761 P.2d 879, 882; 12 O.S.2011, § 2803(A)(4). The Delinquent Petition filed against the co-conspirator and the Journal Entry of Adjudication establishing that he had stipulated to certain allegations of the State was properly admissible to permit the jury to assess the co-conspirator's credibility. *Nickell v. State* 1994 OK CR 73, ¶¶ 11-15, 885 P.2d 670, 674-75; *See Reed v. State*, 1983 OK CR 12, ¶¶ 6-8, 657 P.2d 662, 664. As the co-conspirator appeared and testified, the United States Supreme Court's opinion in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), was not implicated in the present case. *Shelton v. State*, 1990 OK CR 34, ¶ 22, 793 P.2d 866, 873. As the probative value of the evidence was not substantially outweighed by the dangers of unfair prejudice, we find that plain error did not occur. *Goode*, 2010 OK CR 10, ¶ 31, 236 P.3d at 678. Proposition Six is denied.

In Proposition Seven, Appellant contends that he was denied his right to effective assistance of counsel because defense counsel failed to object and preserve for appellate review the claims of error raised in Propositions Two through Six of his brief. Our determination in Proposition Four that plain error required modification of Appellant's sentence for First Degree Robbery renders his claim concerning counsel's failure to preserve appellate review of this issue, moot. As Appellant's other claims of error did not rise to the level of reversible error, we find that counsel's failure to object did not amount to ineffective assistance. *Glossip v. State*, 2007 OK CR 12, ¶ 112, 157 P.3d 143, 161 (*citing Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)); *Ball v. State*, 2007 OK CR 42, ¶ 60, 173 P.3d 81, 96; *Wood v. State*, 2007 OK CR 17, ¶ 37, 158 P.3d 467, 479.

As to Proposition Eight, we find that each of Appellant's sentences are within the statutory range of punishment and under all the facts and circumstances of the case are not so excessive as to shock the conscience of the Court. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149; *Freeman v. State*, 1994 OK CR 37, ¶ 38, 876 P.2d 926, 930; *Wyatt v. State*, 1988 OK CR 58, ¶¶ 12-13, 752 P.2d 1131, 1134. The trial court did not abuse its discretion when it ran the sentences consecutively. *Riley v. State*, 1997 OK CR 51, ¶ 21, 947 P.2d 530, 535; *Kamees v. State*, 1991 OK CR 91, ¶ 21, 815 P.2d 1204, 1208-09. Proposition Eight is denied.

As to Proposition Nine, we find that Appellant was not denied a fair trial by cumulative error. *Ashinsky v. State*, 1989 OK CR 59, ¶ 31, 780 P.2d 201,

209; *Bechtel v. State*, 1987 OK CR 126, 738 P.2d 559, 561. In Proposition Four we determined that plain error occurred when the trial court instructed the jury concerning the range of punishment for First Degree Robbery in Count 4 and determined that the sentence should be modified to the minimum punishment of imprisonment for five (5) years. However, this sole error cannot support an accumulation of error claim. *Hope v. State*, 1987 OK CR 24, ¶ 12, 732 P.2d 905, 908. Therefore, no new trial or modification of sentence is warranted and this assignment of error is denied.

DECISION

The Judgment and Sentence of the District Court on Counts 1 through 3 is **AFFIRMED.** Appellant's conviction for First Degree Robbery in Count 4 is **AFFIRMED** but the Sentence is **MODIFIED** to imprisonment for Five (5) years. This matter is remanded to the District Court for entry of Judgment and Sentence consistent with the Opinion. 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 JACKSON COUNTY
THE HONORABLE RICHARD DARBY, DISTRICT JUDGE

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SMITH, V.P.J.: CONCUR
C. JOHNSON, J.: CONCUR IN PART/DISSENT IN PART
A. JOHNSON, J.: CONCUR

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