IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CRISTOPHER LYN KIBBE,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F-2011-1059
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

A. JOHNSON, JUDGE:

Appellant Cristopher Lyn Kibbe was tried by jury in the District Court of Canadian County, Case No. CF-2010-220, for the crimes of Attempted Second Degree Burglary, After Former Conviction of Two or More Felonies in violation of 21 O.S.2001, § 1435 and 21 O.S.2001, § 42 (Count 1), Second Degree Burglary, After Former Conviction of Two or More Felonies in violation of 21 O.S.2001, § 1435 (Count 2), Driving with a Revoked License in violation of 47 O.S.Supp.2009, § 6-303(B)(Count 3), and Conspiracy to Commit Second Degree Burglary, After Former Conviction of Two or More Felonies in violation of 21 O.S.2001, § 421 (Count 4). The Honorable Gary E. Miller, District Judge, presided at trial. Judge Miller affirmed Kibbe's demurrer to Count 4 at the conclusion of the State's case. The jury found Kibbe guilty on Counts 1, 2 and 3 and set punishment at twenty years imprisonment on Counts 1 and 2, and a $100 fine on Count 3. Judge Miller sentenced according to the jury's verdict and ordered the sentences to be served concurrently. From this Judgment and Sentence Kibbe appeals, raising the following issues:

(1) whether the trial court erred in overruling his motion for mistrial after evidentiary harpoons by the prosecution rendered his trial fundamentally unfair;

(2) whether his convictions must be reversed with instructions to dismiss because they are based upon insufficient evidence;

(3) whether constitutional and reversible error occurred when the trial court excluded exculpatory statements made by Kibbe and admitted only those that were inculpatory, forcing him into the unacceptable position of having to choose between exercising two constitutional rights;

(4) whether errors in admission of evidence require reversal of his convictions or modification of his sentences;

(5) whether his sentence for attempted burglary in the second degree is excessive as a matter of law and must be modified because the jury's sentencing verdict is outside the statutory range;

(6) whether his state and federal rights to due process and fair sentencing were violated by improper argument and tactics of the prosecutor; and

(7) whether cumulative error requires reversal of his convictions and sentences.

We find reversal is not required and affirm the Judgment and Sentence of the District Court on Counts 2 and 3. On Count 1 (attempted second degree burglary), we affirm the Judgment, but modify the Sentence to a term of imprisonment of ten years.

1.

Kibbe claims that a police officer injected prejudicial evidentiary harpoons into the trial and that the trial judge erred by not ordering a mistrial in response to those harpoons. Some of the testimony was objected to and some was not. We find that the trial judge neither committed plain error nor

abused his discretion by denying Kibbe's motions for a mistrial. *See Knighton v. State*, 1996 OK CR 2, ¶ 64, 912 P.2d 878, 894 (holding that a trial court abuses it discretion by denying a motion for mistrial when its ruling "is clearly made outside the law or facts of the case"); *Simpson v. State*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 693 ("[f]ailure to object with specificity to errors alleged to have occurred at trial, thus giving the trial court an opportunity to cure the error during the course of trial, waives that error for appellate review unless the error constitutes fundamental error, i.e. plain error").

2.

Kibbe claims the evidence was insufficient to support his convictions because the testimony of his accomplice Charles King was not sufficiently corroborated and because there was no evidence of his intent to steal or commit a felony inside either of the two businesses he was accused of breaking into. We find that King's testimony was sufficiently corroborated. We also find that there was sufficient evidence to establish facts from which the jury could reasonably infer the requisite intent. *See Pink v. State*, 2004 OK CR 37, ¶ 15, 104 P.3d 584, 590 (holding that accomplice testimony must be corroborated with evidence which standing alone tends to link the defendant to the commission of the crime charged); *Cummings v. State*, 1998 OK CR 45, ¶ 20, 968 P.2d 821, 830 (holding that an accomplice's testimony need not be corroborated in all material respects but requires "at least one material fact of independent evidence which tends to connect the defendant with the

commission of the crime"); *Rogers v. State*, 1995 OK CR 8, ¶ 32, 890 P.2d 959, 974 (holding that if as little as one material fact in accomplice's testimony is supported by independent evidence, the jury may have inferred he spoke the truth as to all and that "circumstantial evidence can be adequate to corroborate the accomplice's testimony"); *Sellers v. State*, 1991 OK CR 41, ¶ 31, 809 P.2d 676, 686 ("If the accomplice is corroborated as to one material fact or facts by independent evidence tending to connect the defendant with the commission of the crime, the jury may from that infer that he speaks the truth as to all."); *Morrison v. State*, 1990 OK CR 33, ¶9, 792 P.2d 1189, 1192 ("[b]ecause intent is a state of mind, it will be proved by circumstantial evidence, if at all"); *Lindsey v. State*, 1983 OK CR 147, ¶ 5, 671 P.2d 57, 59 ("Intent, in practically all cases, must be shown by the inference arising from the facts shown. We do not think that, from a practical standpoint, it is correct to say that it is 'a conviction on circumstantial evidence,' where all salient facts of the case (including the facts on which the inference itself rests) are directly proved, and only the intent with which proved acts were committed is a matter of inference")(quoting with approval *Love v. State*,72 S.E. 433 (Ga.App. 1911)); *Bellows v. State*, 1976 OK CR 26, ¶5, 545 P.2d 1303, 1304 (holding that "intent may be inferred from the commission of the crime itself and the absence of some evidence to the contrary").

3.

Kibbe claims that the trial court erred by denying him the opportunity to inquire during cross-examination of a police officer about exculpatory statements Kibbe made to him and his partner. Kibbe contends that the trial court's ruling on the State's hearsay objection to portions of the officers' testimony about what Kibbe said when they interviewed him violated his constitutional rights to present a defense and his constitutional right to confront witnesses by precluding him from eliciting exculpatory statements that were made by him to the officers.

The trial transcript shows that the trial court allowed defense counsel to question the officers extensively about exculpatory statements made to them by Kibbe during the course of their interview with him. Numerous times the officers testified that Kibbe told them that: (1) he was at Credit Cars to drop off a payment; (2) the large amount of cash found in his car was from a loan related to a workers compensation settlement; and (3) the pry bars were in the car because he used them in his work as a roofer. Jurors also heard from the officers that Kibbe denied having anything to do with the attempted break in at Credit Cars, even though he was there, and that he denied being at Johnnie's Grill at all.

After all these exculpatory statements were allowed into evidence by the judge, it is not clear just what additional exculpatory statements were excluded

by the judge's ruling. Kibbe did not make an offer of proof identifying additional statements he hoped to elicit from the officers. Nor does he identify in his brief here any exculpatory statements that he could have elicited from the officers. It is an appellant's burden to show the existence of an actual error. *See Simpson v. State*, 1994 OK CR 40, ¶13, 876 P.2d 690, 695 ("not only error, but error plus injury is necessary before this Court will reverse a conviction"); *McIntire v. State*, 1946 OK CR 16, 166 P.2d 111(syllabus)("[o]n appeal from conviction, burden is upon appellant to show both error and prejudice resulting therefrom"). In this instance, Kibbe fails to show error, and so fails to demonstrate that his constitutional rights were violated by the trial court's ruling.

4.

Kibbe claims he was denied a fair sentencing proceeding as a result of the prosecutor's cross-examination of his wife. Specifically, Kibbe complains that the prosecutor asked her "I think you mentioned Chris has three other kids with someone else?" to which she answered "Yes"(Tr. Vol. 3 at 445). After which, the prosecutor asked "[i]f Chris owed a child support lien of about $7,800, would any of that be due to you?", to which she answered "No." (Tr. Vol. 3 at 445). Kibbe did not object to the questions or answers about children and possible child support arrearages. He did, however, move for a mistrial on the grounds that the question about the child support lien was an evidentiary harpoon. While the trial court judge denied the motion, he did instruct the

jury to disregard the question about child support because it was not relevant to the case. According to Kibbe, the trial court judge erred by not granting the mistrial motion because the cautionary instruction to the jury was inadequate to cure the error.

While complaining of this alleged evidentiary harpoon, Kibbe fails to note that it was actually he who introduced evidence of the child support lien. He did so by introducing a letter from his workers compensation attorney, James Self, to Kibbe's friend Jerrod Laska. The letter to Laska stated that Self had been instructed by Kibbe to withhold $4000 from Kibbe's anticipated workers compensation settlement to repay Laska's loan to Kibbe. The letter explicitly declared that "Mr. Kibbe currently has a child support lien and that repayment to you is subject to the child support lien, my attorney's fees and costs in this matter." (Def. Exhibit 2). The letter was offered by Kibbe in support of his defense that the cash found on him after the Johnnie's Grill burglary was money loaned to him by Laska, not money taken from the restaurant.

Because the evidence complained of was actually introduced by Kibbe as part of his defense, Kibbe cannot now complain that the prosecutor's mention of the evidence was an evidentiary harpoon and that he was prejudiced by it. The error, if any, was invited by Kibbe, and invited error cannot provide the basis for relief. *See Ellis v. State*, 1992 OK CR 45, ¶ 28, 867 P.2d 1289, 1299 (holding that error invited by defense counsel cannot serve as basis for reversal because defendant cannot invite error and then seek to profit from it); *Pierce v.*

State, 1990 OK CR 7, ¶ 10, 786 P.2d 1255, 1259 (("[w]e have often recognized the well established principal [sic] that a defendant may not complain of error which he has invited, and that reversal cannot be predicated on such error").

Kibbe claims next that the trial court admitted irrelevant and prejudicial evidence during the sentencing phase of his trial when the court admitted his un-redacted penitentiary pack.[1] The penitentiary pack contained not only the judgment and sentence documents from Kibbe's prior convictions, but also contained parole, probation, and suspended sentence information about those offenses. When the pack was offered into evidence, defense counsel stated "[n]o objection, Your Honor" (Tr. Vol. 3 at 417, 429). Because Kibbe did not object, we review the admission of the Penitentiary Pack for plain error only. *See Hunter v. State*, 2009 OK CR 17, ¶ 9, 208 P.3d 931, 933 (holding that disclosure of information about probation or parole to jury is error subject to plain error review when no objection raised to disclosure).

During the sentencing phase of Kibbe's trial, Officer James Nicolle sponsored the Penitentiary Pack, State's Exhibit 15, and read portions of it aloud to the jury. His reading consisted of the case number, county, and crime of conviction from each judgment document contained in the pack. The complete pack, however, was entered into evidence and presumably made available to jurors during their deliberations.

[1] A penitentiary pack or "pen pack" is a package of materials about a convicted person that is created and maintained by the Department of Corrections. The package typically contains judgment and sentence documents, photographs, and fingerprints of the convicted person.

The State does not contest that inclusion of the parole, probation, and suspended sentence information in the penitentiary pack was error. *See Hunter v. State*, 2009 OK CR 17, ¶ 9, 208 P.3d 931, 933 (holding that disclosure of probation or parole information to jury is plain error); *Marks v. State*, 1981 OK CR 134, ¶¶ 4-5, 636 P.2d 349, 350-351 (approving of trial court limiting items admissible from "pen pack" by removing any document making reference to parole or acceleration of deferred sentence); *Stringfellow v. State*, 1987 OK CR 233, ¶ 5, 744 P.2d 1277, 1279-1280(holding that jury must never be advised that accused has been paroled in previous case). The State does argue, however, that the error was harmless.

Here, Kibbe's claim must fail under plain error analysis because the error was, as the State asserts, essentially harmless and therefore, Kibbe cannot show a substantial violation of a statutory or constitutional right. That is, Kibbe fails to show that even if the improper information about parole and suspended sentences had been redacted from the penitentiary pack, the result of the trial would have been different.

The judgment and sentence documents contained in the penitentiary pack showed that Kibbe had convictions from eight prior cases, all of which were for burglary or closely related property crimes (e.g., burglary, concealing stolen property, false declaration of ownership to pawnbroker). Based on this extensive history of identical, or closely related criminal activity, it is highly unlikely the jury would have returned lower sentences on either of the burglary

counts in this case even had the evidence of Kibbe's parole or suspended sentences for some of these prior convictions been redacted from the penitentiary pack. Lacking any proof that the error affected the outcome of the jury's sentencing verdict, and given the overwhelming evidence of multiple prior convictions for the same types of criminal conduct, this error does not warrant relief for plain error.

Kibbe also claims that the trial court erred by admitting evidence of his prior convictions in Canadian County Case Nos. CF-96-653 and CF-654 to enhance his sentence as a prior convicted felon because those convictions arose from the same transaction. He also claims that the trial court similarly erred by admitting evidence of his convictions in Canadian County Case Nos. CF-96-81, CF-96-96, CF-96-97, and CF-97-21 because, according to Kibbe, those convictions all arose from the same set of circumstances. Kibbe objected to the use of these convictions as evidence in the trial court where he contended, as he does here, that only one conviction from each of these two groups of convictions could be used to enhance his sentence under 21 O.S.2011, § 51.1(B), which governs sentencing for second and subsequent felony convictions. The trial judge overruled the objection.

This Court reviews a trial court's evidentiary rulings for an abuse of discretion. *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 14, 241 P.3d 214, 224. "An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at

issue." *State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194. An abuse of discretion has also been described as "a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *Id.*

When challenging multiple convictions used for sentence enhancement under 21 O.S.2011, § 51.1(B), the appellant bears the burden of proving that the prior convictions all arose out of the same transaction or occurrence. *Mornes v. State*, 1988 OK CR 78, ¶13, 755 P.2d 91, 95. The mere fact that the prior convictions were consecutively numbered, or that appellant pled guilty to the crimes on the same day, is insufficient to meet appellant's burden of presenting evidence that the convictions arose from the same transaction or occurrence. *Id.*

In this instance, Kibbe points to State's Exhibit 15 and Volume 3, pages 449-454 of the trial transcript as showing that cases CF-96-653 and CF-654, and cases CF-96-81, CF-96-96, CF-96-97, and CF-97-21, arose from the same transactions or were a series of events closely related in time and location. The cited transcript pages show that defense counsel argued and asserted to the judge that the cases were related, but counsel offered no evidence of the underlying facts of any of the cases. State's Exhibit 15, the penitentiary pack, contains the judgment and sentence documents for each of these convictions. Other than showing that Kibbe pled guilty to each of the charged offenses on the same date for the convictions in each group, none of the judgment and

sentence documents, nor any of the other documents contained in Exhibit 15, provide any information about the underlying facts of any of the convictions. This then was the evidence before the trial court judge at the time he ruled on Kibbe's objection.

With no evidence of any of the facts or circumstances for any of the convictions before him, there was no basis for the trial judge to conclude that any of the convictions arose from the same transaction or were part of a series of events that were related in time and place. The trial judge's ruling comported with the facts, or lack of them, shown by the evidence, or lack of it. The trial judge did not abuse his discretion by overruling Kibbe's objection to the multiple prior convictions used to enhance his sentence.

5.

Kibbe claims that his sentence on the attempted burglary charge (Count 1) is excessive because he was sentenced outside the statutory range for attempted second degree burglary after conviction of one felony. The State concedes the error, and agrees that Kibbe's sentence on this count should be reduced from twenty years to ten years.

The record shows that the trial court instructed the jury on the correct range of punishment for Count 1. Specifically, the jury was instructed that if Kibbe was found to have had two or more prior felony convictions the range of punishment for attempted second degree burglary was four years to life imprisonment. The jury was also instructed that if Kibbe was found to have

one prior felony conviction, the range was zero to ten years imprisonment. On the verdict form, jurors first concluded that Kibbe was guilty after two or more felonies and specified a sentence of twenty years imprisonment. But, the foreperson marked through that verdict with an "X" and his initials. The foreperson then marked guilty after one prior felony and set punishment at twenty years imprisonment. The verdict was read aloud at the conclusion of the trial, but neither party objected because apparently, neither party examined the verdict form. Nor was the error raised at the sentencing hearing where the trial court sentenced Kibbe to twenty years on each count. Where an objection to an error is not raised at trial, the error is waived and reviewed only for plain error. *See Simpson v. State*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 693 ("[f]ailure to object with specificity to errors alleged to have occurred at trial, thus giving the trial court an opportunity to cure the error during the course of trial, waives that error for appellate review unless the error constitutes fundamental error, i.e. plain error").

In this instance, both Kibbe and the State acknowledge that twenty years imprisonment is outside the statutory range applicable to the charge of attempted burglary after one prior felony conviction, and that the maximum sentence applicable in this instance, therefore, is ten years imprisonment. The parties are correct in their assertions. *See* 21 O.S.2001, § 1436 (setting punishment for second degree burglary as not exceeding seven years and not less than 2 years); 21 O.S.2001, § 42 ("If the offense so attempted be

punishable by imprisonment in the penitentiary for four (4) years or more, or by imprisonment in a county jail, the person guilty of such attempt is punishable by imprisonment in the penitentiary, or in a county jail, as the case may be, for a term not exceeding one-half (1/2) the longest term of imprisonment prescribed upon conviction for the offense so attempted"); 21 O.S.Supp.2002, §51.1(A)(3)(" If such subsequent offense is such that upon a first conviction the offender would be punishable by imprisonment in the State Penitentiary for five (5) years, or any less term, then the person convicted of such subsequent offense is punishable by imprisonment in the State Penitentiary for a term not exceeding ten (10) years").

Because the sentence imposed exceeds the statutory maximum, it is self-evident that the sentence was the result of plain or obvious legal error and that the error was a substantial violation of Kibbe's due process right to be punished for his crime with a term of imprisonment within the statutory range, This error is plain error of the type affecting the fairness and integrity of the sentencing proceeding. *See Hogan v. State*, 2006 OK CR 27, ¶ 38, 139 P.3d 907, 923 ("To be entitled to relief under the plain error doctrine, [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. 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."). Kibbe is entitled to relief on this claim.

As a remedy for the error, Kibbe requests only that his sentence on Count 1 be modified to a term within the statutory sentencing range. He does not, however, request any specific term of imprisonment. The State, on the other hand, while conceding the error, requests that the sentence be reduced to a term of imprisonment of ten years, the maximum for the offense. We modify Kibbe's sentence on Count 1 to a term of imprisonment of ten years. *See* 22 O.S.2001, § 1066 ("[t]he appellate court may reverse, affirm or modify the judgment or sentence appealed from, and may, if necessary or proper, order a new trial or resentencing"); 22 O.S.2001, § 928.1 ("[i]f the jury assesses a punishment, whether of imprisonment or fine, greater than the highest limit declared by law for the offense of which they convict the defendant, the court shall disregard the excess and pronounce sentence and render judgment according to the highest limit prescribed by law in the particular case").

6.

Kibbe claims the prosecutor engaged in prosecutorial misconduct by: (1) introducing an evidentiary harpoon about back child support; (2) introducing improper penitentiary pack material as evidence; (3) raising improper argument about multiple prior convictions arising from a single transaction; and (4) raising the improper societal alarm argument in closing.

As discussed above, the evidence of Kibbe's back child support was introduced by Kibbe, not the prosecutor. The prosecutor's questioning of a witness about it, therefore, cannot constitute an evidentiary harpoon or prosecutorial misconduct. Also, as discussed above, introduction of the suspended sentence materials in the penitentiary pack was not reversible plain error because it likely had no effect on the outcome of Kibbe's sentencing. Consequently, having already found that, in light of the entire record, Kibbe suffered no prejudice from the improperly introduced penitentiary pack evidence, reversal is not warranted for prosecutorial misconduct. *See Brewer v. State*, 2006 OK CR16, ¶13, 133 P.3d 892, 895 ("[r]eversal is not required unless in light of the entire record, a defendant has suffered prejudice").

Kibbe argues next that the prosecutor committed misconduct by introducing evidence and argument about several of Kibbe's prior convictions because all those convictions arose from the same criminal transactions. As discussed above, Kibbe has not met his burden of showing that the multiple prior convictions he complains of actually arose from the same transaction. Because he provides no basis to find that the multiple prior convictions actually arose from the same transaction, there is no basis to conclude that the prosecutor's use of those convictions as evidence and reference to them in argument constituted prosecutorial misconduct.

Kibbe also claims that the prosecutor raised the improper societal alarm argument during closing argument by stating that the community was

victimized by Kibbe's crimes. "The prohibited 'societal alarm' argument is one that mentions crimes committed by other persons and not attributable to the defendant on trial such as arguments that the crime rate is increasing." *McElmurry v. State*, 2002 OK CR 40, ¶ 151, 60 P.3d 4, 34. "The 'societal alarm' argument is therefore irrelevant to the guilt or punishment of the defendant on trial except that it implies that the jury should 'make an example' out of the defendant on trial to deter other potential criminals." *Id.* In this instance, the prosecutor did not mention any crimes committed by other persons. Nor did he suggest that the jury should punish Kibbe to deter other criminals. The prosecutor's comment was focused squarely on Kibbe's crimes. The prosecutor's argument was not misconduct.

7.

Kibbe claims that an accumulation of error denied him a fair trial. Although we have found two errors, one (improper pen pack evidence) is clearly harmless and the other (sentence length), will be fully remedied by modifying Kibbe's sentence to ten years for Count 1. Accordingly, we find that in the aggregate, these errors did not render Kibbe's trial fundamentally unfair or taint the jury's verdict.

DECISION

The Judgment and Sentence of the district court is **AFFIRMED** for Counts 2 and 3. The Judgment is **AFFIRMED** for Count 1, but the Sentence is **MODIFIED** to a term of imprisonment of ten years. 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 delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CANADIAN COUNTY
THE HONORABLE GARY E. MILLER, DISTRICT JUDGE

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LUMPKIN, J.: Concur
C. JOHNSON, J.: Concur

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