IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

WILLIAM TODD LEWALLEN,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2017-189**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

ROWLAND, JUDGE:

Appellant William Todd Lewallen was tried by jury and convicted of Child Neglect, After Former Conviction of Two or More Felonies, in violation of 21 O.S.2011, § 843.5(C), in the District Court of Tulsa County, Case No. CF-2012-5174. The jury assessed punishment at twenty-three years imprisonment. The Honorable Mark Barcus, District Judge, sentenced Lewallen accordingly. Lewallen appealed his Judgment and Sentence to this Court in Case No. F-14-1063. In a published opinion, this Court affirmed Lewallen's judgment but vacated his sentence and remanded the cause to the district court for resentencing. *Lewallen v. State*, 2016 OK CR 4, 370 P.3d 828. At the conclusion of Lewallen's resentencing trial, the jury assessed punishment at fourteen years imprisonment. The Honorable Kelly Greenough, District Judge,

who presided over the resentencing trial sentenced Lewallen accordingly.[1] Lewallen appeals his sentence, raising the following issue:

(1) whether the trial court erred when it denied him the right to testify in his own defense during trial.

We find relief is not required and affirm the judgment and sentence of the district court.

Prior to his resentencing trial Lewallen filed a Notice of Intent to Present Evidence. Acknowledging that he had not testified or presented live testimony at his first jury trial, Lewallen requested that he be allowed to testify at his resentencing trial. The State objected and the trial court denied Lewallen's request both prior to the resentencing trial and after Lewallen's offer of proof at the resentencing trial. Lewallen argues on appeal that the ruling denying his request to testify at his resentencing trial was structural error which denied him his fundamental right to testify in his own defense.

Structural errors are those which affect the conduct of the entire trial, "undermine the fairness of a criminal proceeding as a whole," and cannot be separated from it for the purpose of analysis. *Robinson v. State*, 2011 OK CR 15, ¶ 3, 255 P.3d 425, 428, (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 81, 124 S.Ct. 2333, 2339, 159 L.Ed.2d 157 (2004)). *See also Duclos v. State*, 2017 OK CR 8, ¶ 10, 400 P.2d 781, 784. While most constitutional errors can be harmless, structural error requires automatic reversal. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Johnson v.*

[1] Under 21 O.S.2011, § 13.1, Lewallen must serve 85% of the sentence imposed before he is eligible for parole.

United States, 520 U.S. 461, 468-69, 117 S.Ct. 1544, 1549-50, 137 L.Ed.2d 718 (1997). "There is a strong presumption that errors which occur during trial are subject to harmless error analysis, as long as a defendant is represented by counsel and is tried by an impartial judge." *Robinson*, 2011 OK CR 15, ¶ 4, 255 P.3d at 428, (citing *Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 1833, 144 L.Ed.2d 35 (1999)). Lewallen's argument that denial of the right to testify is structural error requiring a presumption of prejudice is unpersuasive; the claimed error in the present case does not fall within any of the limited class of constitutional error cases which the Supreme Court has labeled structural error.[2]

It is true, however, that the United States Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986) (quoting *California v. Trombetta*, 467 U.S.479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984)). A defendant's due process right under the Fifth Amendment and right to compulsory process under the Sixth Amendment include the right to present witnesses in his own defense. *United States v. Dowlin*, 408 F.3d 647, 659 (10th Cir. 2005); *see also Washington v. Texas*, 388

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[2] In *Johnson v. United States*, 520 U.S. 461, 468-69, 117 S.Ct. 1544, 1549-50, 144 L.Ed.2d 35 (1999), the Supreme Court noted that structural errors have been found in only a "very limited class of cases: *See Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (a total deprivation of the right to counsel); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (lack of an impartial trial judge); *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (unlawful exclusion of grand jurors of defendant's race); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (the right to self-representation at trial); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (the right to a public trial); *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (erroneous reasonable-doubt instruction to jury)."

U.S. 14, 18-19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967). "The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense . . . . This right is a fundamental element of due process of law." *Washington,* 388 U.S. at 19, 87 S.Ct. at 1923. S*ee also Coddington v. State,* 2006 OK CR 34, ¶ 46, 142 P.3d 437, 450-51. Also inherent in this right to present a defense is the right to testify on one's own behalf. *Faretta v. California,* 422 U.S. 806, 819, n. 15, 95 S.Ct. 2525, 2533 n. 15, 45 L.Ed.2d 562 (1975)(the right to testify on one's own behalf is a right "essential to due process of law in a fair adversary process"). This constitutionally guaranteed right to present a complete defense, however, is not without limitation. "In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Gore v. State,* 2005 OK CR 14, ¶ 21, 119 P.3d 1268, 1275, (citing *Chambers v. Mississippi,* 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973)). Further, the admissibility of evidence is within the discretion of the trial court, which will not be disturbed absent a clear showing of abuse, accompanied by prejudice to the accused. *Jackson v. State,* 2006 OK CR 45, ¶ 48, 146 P.3d 1149, 1165.

In *Rock v. Arkansas,* 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987), the case upon which Lewallen most heavily relies, the United States Supreme Court specifically addressed an issue related to limitations placed on a criminal

defendant's right to testify at trial. In *Rock*, the issue before the Court was whether Arkansas' evidentiary rule prohibiting the admission of hypnotically refreshed testimony violated petitioner's constitutional right to testify on her own behalf as a defendant in a criminal case. The Court initially noted that, "[a]t this point in the development of our adversary system, it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense." *Rock*, at 49, 107 S.Ct. at 2708. Indeed, the Supreme Court acknowledged that the right of the accused to "present his own version of the event in his own words" is "even more fundamental to a personal defense than the right of self-representation." *Rock*, at 52, 107 S.Ct. at 2709. However, the Court went on to state that "the right to present relevant testimony is not without limitation" and "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Rock*, at 55, 107 S.Ct. at 2711, (quoting *Chambers*, at 295, 93 S.Ct. 1046). "In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify." *Rock*, at 56, 107 U.S. at 2711.

This Court has cautioned that "resentencing proceedings should not be viewed as a second chance at revisiting the issue of guilt." *Rojem v. State*, 2006 OK CR 7, ¶ 56, 130 P.3d 287, 299. Resentencing proceedings are unique; the original jurors who heard evidence relating to guilt/innocence are gone and have been replaced with jurors who are not familiar with that evidence. *Rojem*,

2006 OK CR 7, ¶ 53, 130 P.3d at 298. The resentencing jurors are told that the defendant has already been found guilty and they are only asked to assess punishment. While this Court has specifically held that a defendant has no right to present mitigating evidence in the sentencing phase of a non-capital case, s*ee Malone v. State*, 2002 OK CR 34, ¶¶ 5-7, 58 P.3d 208, 209-10, we do not ask the jurors to assess punishment without the benefit of knowing the acts they are punishing. *See Rojem*, 2006 OK CR 7, ¶ 55, 130 P.3d at 299 (jurors in a resentencing proceeding will always be able to consider the weight of the evidence in deciding punishment). Accordingly, relevant evidence properly admitted in the prior trial is admissible in the resentencing trial. Title 22 O.S.2011, § 929(C)(1) specifically addresses the introduction of evidence in a non-capital case remanded for a new sentencing proceeding before a jury providing and states:

> All exhibits and a transcript of all testimony and other evidence properly admitted in the prior trial and sentencing shall be admissible in the new sentencing proceeding. Additional relevant evidence may be admitted including testimony of witnesses who testified at the previous trial.

The evidence of Lewallen's medical condition and his consumption of prescribed medication as well as its effect on his ability to clean his house and care for his children was introduced in his original trial and was introduced through the testimony of State's witnesses at the resentencing trial. This evidence was relevant to show Lewallen's resentencing jury the facts upon which his conviction was based and to allow them to make an informed decision regarding the assessment of his sentence. The evidentiary restrictions

relied upon by the trial court in its decision to disallow Lewallen's proffered testimony at the resentencing trial, however, were neither arbitrary nor disproportionate to the purposes they were designed to serve. Lewallen was not precluded from testifying at his resentencing trial because he had not testified at the original trial. Rather, the trial court ruled against his request because his proffered testimony went to guilt or innocence and its mitigation value was not relevant to sentencing. The trial court denied Lewallen's request based upon the most basic rule of admissibility, i.e., the rule of relevancy. 12 O.S.2011, § 2402. The trial court's ruling did not deny Lewallen the right to present a defense; it excluded the admission of irrelevant evidence. There was no structural error, no constitutional error, and no abuse of discretion by the trial court in excluding this evidence. Relief is not required.

DECISION

The Sentence of the district court is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE KELLY GREENOUGH, DISTRICT JUDGE

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OPINION BY: ROWLAND, J.

LUMPKIN, P.J.:	Concur
LEWIS, V.P.J.:	Concur in Results
HUDSON, J.:	Concur
KUEHN, J.:	Concur