ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

SHWUAN CORTEZ POWELL,	)	
	)	**NOT FOR PUBLICATION**
Appellant,	)	
	)	
v.	)	**Case No. RE-2019-702**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

PER CURIAM:

Appellant Shwuan Cortez Powell appeals from the revocation in full of his concurrent nine-year suspended sentences in Case No. YO-2014-2 in the District Court of Nowata County, by the Honorable Carl G. Gibson, Associate District Judge.

Appellant was charged as a youthful offender in Case No. YO-2014-2 with Count 1: Robbery With a Weapon; and Count 2: Burglary in the First Degree. Judge Gibson denied Appellant's motion for certification as a juvenile at the preliminary hearing. The State filed a motion for imposition of an adult sentence at District Court arraignment before Judge DeLapp. Judge DeLapp granted the

State's motion for imposition of an adult sentence. Appellant was convicted and sentenced on each count to fifteen years, with the sentences to run concurrently and suspended except for the first six years to serve.

Sometime after Appellant's prison term, the State filed a motion to revoke Appellant's suspended sentences alleging he violated probation by committing the new offense of Intimidation of Witness as charged in Nowata County District Court Case No. CF-2019-84.[1] Judge Gibson conducted the revocation hearing in conjunction with Appellant's preliminary hearing in Nowata County District Court Case No. CF-2019-84.[2] Judge Gibson found Appellant violated his probation and revoked his concurrent nine-year suspended sentences in full. Appellant appeals asserting five propositions of error.

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[1] The State filed an amended motion to revoke Appellant's suspended sentences alleging he violated rules 1, 5, 11 and 15 of his conditions of probation.

[2] The State only presented evidence of the alleged violation of Intimidation of a Witness. Other facts will be discussed in the analysis of the propositions of error below.

ANALYSIS

In Proposition I, Appellant claims the evidence presented at his revocation hearing was insufficient to prove by a preponderance of the evidence that he violated probation by committing the crime of Witness Intimidation, under 21 O.S.Supp.2013, § 455(A). Subsection 455(A) refers to two separate actions a defendant may take to commit the crime of Witness Intimidation: (1) willfully preventing or attempting to prevent a person from testifying; and (2) threatening harm through force or fear to prevent a witness from testifying or causing the witness to alter his or her testimony. *State v. Bradley*, 2018 OK CR 34, ¶ 14, 434 P.3d 5, 10-11. Under the first option, a person may be convicted of witness intimidation if the State proves the elements of: First, willfully; Second, attempting to prevent; Third, a person who witnesses a reported crime; Fourth, from testifying. *Id.*; *see also* OUJI-CR 3-39. Thus, contrary to some of Appellant's arguments, a person may be convicted of witness intimidation without threatening harm through force or fear.

Alyssa Powell filed a police report that her husband, Appellant's brother, had domestically abused her and that criminal charges were

being filed based on those allegations. Ms. Powell testified at the revocation hearing that Appellant knew about the report and that he willfully contacted her on multiple occasions regarding the criminal allegations. Ms. Powell testified that Appellant didn't want Ms. Powell to file the criminal charges against his brother and tried to talk her down from pursuing the prosecution, which necessarily includes testifying. *See Pinkley v. State*, 2002 OK CR 26, ¶ 8, 49 P.3d 756, 759. We find that a rational trier of fact could have found from this evidence that the State proved by a preponderance of the evidence the crime of Witness Intimidation and that Appellant violated probation as a result. *Sams v. State*, 1988 OK CR 137, 758 P.2d 834. Appellant has therefore not established that Judge Gibson abused his discretion by finding that Appellant violated his probation. *Jones v. State*, 1988 OK CR 20, ¶ 8, 749 P.2d 563, 565. Proposition I is denied.

In Proposition II, Appellant claims Judge Gibson abused his discretion by denying his request to continue the revocation hearing. Appellant requested the continuance after the State presented its evidence and rested and after Appellant's demurrer to the evidence

was denied. Appellant asked for the continuance to call a witness who was present when Appellant intimidated Powell at a convenience store. Appellant argues the continuance would not have prejudiced the State and that denial of the continuance prevented him from preparing and presenting witnesses in his defense. In Proposition IV(A), Appellant also claims his counsel was ineffective by failing to properly request a continuance. 22 O.S.2011, § 584 and 12 O.S.2011, § 668. Appellant claims his counsel did not provide the necessary affidavit describing the facts the witness would have proven.

This Court has long held that the decision to grant or deny a motion for continuance is left to the trial court's sound discretion, and we will not disturb that ruling absent proof of error and prejudice. *Alexander v. State*, 2019 OK CR 19, ¶ 6, 449 P.3d 860, 864; *see also Waterdown v. State*, 1990 OK CR 65, ¶¶ 4-5, 798 P.2d 635, 637-38. Appellant provided nothing in this appeal to show what the witness's proposed testimony would be or how he was prejudiced. *See* Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021). Appellant has not established

an abuse of discretion in the denial of the motion for a continuance, nor has he shown that his trial counsel was ineffective. *Alexander*, *supra*; *Hanson v. State*, 2009 OK CR 13, ¶ 35, 206 P.3d 1020, 1031 (an appellant must affirmatively prove prejudice resulting from his attorney's actions). Propositions II and IV(a) are denied.

In Proposition III, Appellant argues that the State made misleading and inaccurate arguments during the sentencing portion of the revocation hearing. In Proposition IV(B), Appellant argues his counsel was ineffective for failing to object to the State's arguments and failing to correct the procedural history. Appellant contends this prosecutorial misconduct and ineffective assistance of counsel caused his revocation judge to be misinformed and resulted in an excessive revocation.

During the sentencing portion of the revocation hearing, the State argued, based on the seriousness of the crimes, that "[t]hrough the youthful offender system [Appellant] was able to get a, in my opinion, a very advantageous sentence . . .." (9/18/19 Tr. 28). The prosecutor said he didn't know "what programs or anything [Appellant] may have gone through in the YO program," but typically,

a defendant is sentenced as an adult when they turn eighteen years and five months old. (9/18/19 Tr. 28-29). The prosecutor then stated that "[a]pparently the Court in this particular matter decided to send [Appellant] to prison after completion of the YO program." (9/18/19 Tr. 29). After discussing that Appellant was breaking the law just four months after being released from prison, the State's attorney made this final argument:

> "Essentially he's - - he's had a chance. He - - he was given a chance through the YO program, had to have been. He was send [sic] to prison. He gets out, and he's immediately trying to intimidate a State's witness. I'm asking for full revocation."

(9/18/19 Tr. 29). Judge Gibson's finding was that he "agrees with the State of Oklahoma and at this time revokes in full the sentence." (Tr. 31).

In this case, Appellant was charged as a youthful offender but was neither convicted nor sentenced in the youthful offender system. After a preliminary hearing, the State filed a motion for imposition of an adult sentence that was granted. *See* 10A O.S.2011, § 2-5-208. Subsequently, Appellant entered a plea of guilty and was convicted and sentenced as an adult. Appellant was never placed in a youthful

offender program. Thus, contrary to the State's arguments, he was never "given a chance through the YO program" and could not have completed such a program before sentencing.

The State's closing arguments in this matter were thus misleading and inaccurate. However, the alleged prosecutorial misconduct was not met with contemporaneous objection and will be reviewed for plain error only. *Tafolla v. State*, 2019 OK CR 15, ¶ 28, 446 P.3d 1248, 1260. Under this analysis, relief is only granted where the alleged misconduct so infected the revocation hearing that it was rendered fundamentally unfair. *Id.* It is the rare instance when a prosecutor's misconduct during closing argument will be found so egregiously detrimental to a defendant's right to a fair hearing that reversal is required. *Id.* We cannot find that any alleged misconduct, in this case, rose to the level of plain error. Early in the process, Judge DeLapp legally found Appellant to be an adult, and therefore, no probationary period would have ever been afforded to the Appellant.

In a similar vein, Appellant's counsel cannot be considered ineffective unless his performance (1) was constitutionally deficient,

in that he made errors so serious he was not functioning within the wide range of reasonable professional assistance; and (2) prejudiced the defense, in that counsel's errors were so serious as to deprive Appellant of a fair revocation hearing and to cause the result to be unreliable. *Strickland v. Washington*, 466 U.S. 668, 687(1984). Under the facts and circumstances of this case, we cannot find that any errors by Appellant's counsel were so serious as to deprive Appellant of a fair revocation hearing or cause Judge Gibson's decision to be unreliable. *Id.* Even with the incorrect statements regarding probation, the judge would have, if correctly informed, found Appellant was sentenced as an adult early in the process. Knowing this, it cannot be logical that Judge Gibson would have given him leniency in sentencing after committing a new crime.

DECISION

The order of the District Court of Nowata County revoking Appellant's concurrent nine-year suspended sentences in Case No. YO-2014-02 is **AFFIRMED**. Under Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF NOWATA COUNTY, THE HONORABLE CARL G. GIBSON, ASSOCIATE DISTRICT JUDGE

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OPINION BY: PER CURIAM
ROWLAND, P.J.: Concur in Part and Dissent in Part
HUDSON, V.P.J.: Concur
LUMPKIN, J.: Concur
LEWIS, J.: Specially Concur

ROWLAND, P.J., CONCUR IN PART/DISSENT IN PART:

The prosecutor in this case asked that Powell's suspended sentence be revoked in full based on his new crime and the fact that Powell had been given a chance at leniency through the youthful offender system, which he failed before being bridged to the adult system. The prosecutor suggested that Powell had failed to take advantage of programs or treatment available within the youthful offender system and that the court should consider that in deciding how much of Powell's suspended sentence to revoke.

In fact, Powell had never been through the youthful offender system, but rather had been sentenced as an adult from the outset. Powell's lawyer, appearing not to know the procedural history of his client's case, let these factual inaccuracies go unchallenged. After finding probable cause to bind Powell over on the new crime, the magistrate announced he would sustain the state's motion to revoke and then asked for a sentencing recommendation from the State. It was at this point that the prosecutor made the above argument. After hearing from defense counsel, the Court then stated, "And show the Court at this time agrees with the State of Oklahoma and at this time revokes in full the sentence."

I would grant relief based upon Proposition IV, alleging ineffective assistance of counsel for defense counsel's failure to object to the prosecutor's inaccurate factual recitation and argument based thereon. To prevail on a complaint of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). *See also Eizember v. State*, 2007 OK CR 29, ¶ 152, 164 P.3d 208, 244. There is at least a reasonable probability that had the magistrate not been misinformed that Powell had a prior failure in the youthful offender system the result would have been something less than a full revocation.

I would affirm the magistrate's decision revoking Powell's suspended sentence but remand this case for resentencing. The extent to which Powell's sentence should be revoked, should be decided in a proceeding without inaccurate factual statements from the prosecution, and with representation by a lawyer who knows

enough about his client's case to dispute and correct such statements.

LEWIS, JUDGE, SPECIALLY CONCURRING:

While I am troubled by misleading and inaccurate statements by the prosecutor in this case, I agree with the majority opinion that they did not deny Appellant a fair revocation hearing.