

**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

SHIRON DESHANE DAVIS,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

) NOT FOR PUBLICATION
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) Case No. F-2018-1045
)
)

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAR - 5 2020

JOHN D. HADDEN
CLERK

SUMMARY OPINION

LEWIS, PRESIDING JUDGE:

Shiron Deshane Davis, Appellant, was tried by jury and found guilty of Count 2, domestic assault and battery resulting in great bodily injury, after former conviction of two or more felonies, in violation of 21 O.S.Supp.2014, § 644(F); Count 4, child neglect, after former conviction of two or more felonies, in violation of 21 O.S.Supp.2014, § 843.5; Count 6, domestic assault and battery in the presence of a minor child, after former conviction of two or more felonies, in violation of 21 O.S.Supp.2014, § 644(G); and Count 7, violation of a protective order, a misdemeanor, in violation of 22 O.S.2011, § 60.6, in the District Court of Tulsa County, Case No. CF-

Appendix A.

2016-3321.¹ The jury sentenced Appellant to four (4) years imprisonment in Count 2, twenty-two (22) years imprisonment in Count 4, and one (1) year in jail for each of Counts 6 and 7. The trial court merged Count 6 with Count 2, but otherwise pronounced judgment according to the verdicts, and ordered the sentences served consecutively.² Mr. Davis appeals in the following propositions of error:

1. The trial court erred in failing to instruct, *sua sponte*, on the lesser included offense within Count Two (domestic assault and battery resulting in great bodily injury) of domestic assault and battery;
2. The evidence was insufficient to prove beyond a reasonable doubt that Appellant committed the crime of domestic assault and battery resulting in great bodily injury as charged in Count 2;
3. The trial court erred in failing to merge the child neglect conviction (Count 4) and the violation of protective order conviction (Count 7) into the conviction for domestic assault and battery resulting in great bodily harm (Count 2) to comply with 21 O.S.2011, § 11 (specific statutes in other chapters as governing-acts punishable in different ways);

¹ The jury acquitted Appellant of Count 1, assault and battery with a dangerous weapon, Count 3, kidnapping, Count 5, possession of a firearm after former conviction of a felony, and Count 8, possession of a firearm while in commission of a felony.

² Appellant must serve 85% of his sentence in Count 4 before being eligible for consideration for parole. 22 O.S.Supp.2015, § 13.1(14).

4. The Appellant was deprived of effective assistance of counsel;
5. The trial court erred in giving a modified instruction No. 4-37, OUJI-CR(2d) (Supp.2015) (Neglect of Child-Elements) to the jury.

Appellant argues in Proposition One that the trial court erred by omitting to instruct on the lesser offense of domestic assault and battery. Appellant did not object to this omission or request different instructions at trial, waiving all but plain error. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. He must therefore show a plain or obvious error in the trial court's omission to instruct on domestic assault and battery affected the outcome. We will remedy a plain or obvious error only when it seriously affects the fairness, integrity, or public reputation of the proceedings. *Simpson v. State*, 1994 OK CR 40, ¶ 30, 876 P.2d 690, 701. The prevailing test requiring lesser included instructions is whether, under the trial evidence, any rational juror could have acquitted the defendant of the greater offense and convicted him only of the lesser. *McHam v. State*, 2005 OK CR 28, ¶ 21, 126 P.3d 662, 670. Appellant fails to show plain or obvious error in the trial court's omission of a lesser offense

instruction on domestic assault and battery. Proposition One is denied.

In Proposition Two, Appellant argues that the evidence was insufficient to prove beyond a reasonable doubt that he committed domestic assault and battery resulting in great bodily injury. We review the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could find the essential elements of the crime charged beyond a reasonable doubt. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04. The evidence here is legally sufficient. Proposition Two is denied.

In Proposition Three, Appellant argues that his convictions and sentences for domestic assault and battery with great bodily harm, child neglect, and violating a protective order arise from a single criminal act, and that two of these three convictions violate the multiple punishments limitation in 21 O.S.2011, section 11. He failed to object on this ground at trial or sentencing, waiving all but plain error as defined above. Appellant has not shown a plain or obvious violation of section 11. *Davis v. State*, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126-27. Proposition Three requires no relief.

Appellant claims in Proposition Four that he was denied the effective assistance of counsel by counsel's failure to object to errors raised in Propositions One and Three. We review this claim under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), requiring that Appellant show counsel's representation was unreasonably deficient and that Appellant was prejudiced, meaning that, but for the deficient performance, there is a reasonable probability that the outcome would have been different. Appellant's complaints do not satisfy the *Strickland* standard. Proposition Four is without merit.

In Proposition Five Appellant argues the trial court erred by modifying the instruction on the elements of child neglect to permit his conviction for neglect as an "other person," when the testimony showed he was a parent to four of the children involved. The trial court modified the instruction despite trial counsel's argument that the instruction was adequate. We therefore review the trial court's ruling for abuse of discretion. An abuse of discretion is a clearly erroneous conclusion and judgment, contrary to the logic and effect of the facts presented. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. We find no abuse of discretion here, and no conceivable

likelihood that the minor modification of this instruction unfairly contributed to Appellant's conviction for child neglect. Proposition Five is denied.

DECISION

The judgment and sentence is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY THE HONORABLE WILLIAM LaFORTUNE, DISTRICT JUDGE

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



IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

SHIRON DESHANE DAVIS,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

Case No. CF-2016-3321

Judge Tracy Priddy

DISTRICT COURT
FILED

APR 20 2020

DON NEWBERRY, Court Clerk
STATE OF OKLA. TULSA COUNTY

ORDER DISMISSING PETITIONER'S
APPLICATION FOR POST-CONVICTION RELIEF

Petitioner's Application for Post-Conviction Relief comes before this Court for consideration under the Post-Conviction Procedure Act, 22 O.S. §§ 1080-1089. This Court has reviewed the Application, the State's Response, and the record in rendering its decision. This Court finds that the Application fails to present any issue of material fact requiring a formal hearing with the presentation of witnesses and the taking of testimony; this matter can be decided on the pleadings and records reviewed. *Johnson v. State*, 1991 OK CR 124, ¶ 10, 823 P.2d 370, 373-74. Also, this Court finds it unnecessary to appoint counsel for Petitioner. See 22 O.S. § 1082.

STATEMENT OF THE CASE

A Tulsa County jury convicted Shiron Deshane Davis, Petitioner, of (Count Two) Domestic Assault and Battery Resulting in Great Bodily Injury AFCF; (Count Four) Child Neglect AFCF; (Count Six) Domestic Assault and Battery in the Presence of a Minor Child AFCF; and (Count Seven) Violation of a Protective Order. It recommended four years' imprisonment for Count Two, twenty-two years' imprisonment for Count Four, and one year of imprisonment for Counts Six and Seven. The trial court sentenced petitioner in accordance with the jury's recommendation, but merged Counts Six and Two. It further ordered that all sentences run consecutively.

Petitioner timely appealed his judgment and sentence, raising five propositions of error:

1. The trial court erred in failing to instruct, *sua sponte*, on the lesser-included offense within Count Two (Domestic Assault and Battery Resulting in Great Bodily Injury) of Domestic Assault and Battery;
2. the evidence was insufficient to prove beyond a reasonable doubt that Appellant committed the crime of Domestic Assault and Battery Resulting in Great Bodily Injury as charged in Count Two;
3. the trial court erred in failing to merge the Child Neglect conviction (Count Four) and the Violation of Protective Order conviction (Count Seven) into the conviction for Domestic Assault and Battery Resulting in Great Bodily Injury (Count Two) to comply with 21 O.S.2011, § 11 (specific statutes in other chapters as governing-acts punishable in different ways);
4. the Appellant was deprived of effective assistance of counsel; and
5. the trial court erred in giving a modified instruction No. 4-37, OUJI-CR(2d) (Supp.2015) (Neglect of Child-Elements) to the jury.

Davis v. State, F-2018-1045 at 2 – 3 (Okla.Cr., Mar. 5, 2020)(not for publication). The OCCA affirmed. *Id.* at 6.

Now, Petitioner submits his Application for Post-Conviction Relief.

DISCUSSION

This Court must dismiss the Application. Oklahoma's Post-Conviction Procedure Act, 22 O.S. §§ 1080 – 1089, provides that the District Court may dismiss an Application when satisfied "on the basis of the application, the answer or motion of respondent, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings." 22 O.S. § 1083(B). Accordingly, dismissal on the pleadings and record is improper where there exists a material issue of fact. *Id.*

The Application is fit for dismissal. Petitioner raises two propositions of error¹ for review:

- I. The State offered no proof that Petitioner was a parent "after being alleged to be victim kids father";

¹ It is difficult to navigate the Application. The Application itself is not consistently paginated, or paginated at all in some places. Hereinafter, this Court refers to each page sequentially and contiguously, irrespective to Petitioner's pagination scheme. Additionally, Petitioner states that he has eight propositions of error, but only offers three. Application at 2. Part B of his Application states that his first proposition is Proposition 6. *Id.* It appears that Petitioner is counting the propositions raised on direct appeal as his first five. This Court hereinafter refers to as his sixth proposition as his First Proposition, *et. seq.*

- II. Petitioner suffered ineffective assistance of counsel for failing to object to multiple punishments from a single criminal act; and
- III. trial counsel was ineffective for failing to object to the omission of a lesser-included offense instruction.

Application at 2, 20, and 35. Because all of these claims could have been raised on direct appeal, the doctrines of waiver and *res judicata* foreclose relief. Accordingly, the Application fails to present a material issue of fact for this Court to consider, and no purpose would be served by further proceedings.

The District court is not a substitute for an appellate court, and Oklahoma's Post-Conviction Procedure Act does not direct this Court to act in such a capacity. The OCCA has held that post-conviction procedure "provides petitioners with very limited grounds upon which to base a collateral attack on their judgments." *Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973 (citing 22 O.S. § 1086). The doctrine of *res judicata* bars further review of issues previously raised and ruled upon, and the doctrine of waiver precludes relief for issues which could have been raised, but were not. *Id.* See 22 O.S. § 1086; *King v. State*, 2001 OK CR 22, ¶ 4, 29 P.3d 1089, 1090; *Webb v. State*, 1992 OK CR 38, ¶ 6, 835 P.2d 115, 116, *overruled on other grounds*, *Neill v. State*, 1997 OK CR 41, ¶ 7 n. 2, 943 P.2d 145, 148 n. 2. Fundamental to post-conviction procedure is the premise that it "was neither designed nor intended to provide applicants another direct appeal." *Id.* See *Coddington v. State*, 2011 OK CR 21, ¶ 2, 259 P.3d 833, 835 ("The post-conviction process is not a second appeal.").

The First Proposition is waived. Petitioner argues that the State failed to offer any proof that he was the father of the victim's child. Application at 3. More specifically, he argues that "[t]he Courts an my attorney's failed to get a paternity test done under the uniform parentage act to protect me after being accused of being victims kids dad & after dispute of being the parent." *Id.* at 3. In support, he relies explicitly upon a dispute about his paternity during the preliminary hearing. *Id.* at 10 – 19. This reliance illustrates the ripeness of the claim for direct appeal. The OCCA even noted in its discussion of Proposition Five that "the testimony showed the [Petitioner] was a parent to four of the children involved." *Davis*, at 5. So, the issue could have been raised on direct appeal, but was not. Accordingly, the doctrine of waiver forecloses relief.

The Second Proposition is *res judicata*. Petitioner's Second Proposition assails the effectiveness of trial counsel, namely counsel's failure to object to "multiple punishments arising

from a single criminal act at trial and sentencing.” Application at 20. He relies upon appellate counsel’s argument “that I was sentenced & punished multiple times from a single act, an that single act was dom. a & b in the presence of a minor.” *Id.* Appellate counsel did raise the issue in the context of trial counsel’s performance, which the OCCA found without merit. *Davis*, at 5. To the extent that Petitioner’s claim is not subject to *res judicata*, he fails to indicate why it could not have been adequately raised on direct appeal; the doctrine of waiver forecloses review of this claim as well.

The Third Proposition is waived as well. Petitioner asserts that he was deprived effective assistance of counsel for “failure to object to the omission of a lesser included, ‘Domestic assault and battery’ warranted by evidence, and failure to request different instruction at trial (failure to preserve legal rights)... ‘sua sponte’ ...”. Application at 35. He argues that counsel was ineffective for failing to argue for such an instruction, but also that counsel was ineffective for failing to object to the instruction’s absence.” *Id.* Again, appellate counsel actually raised this matter in Petitioner’s Fourth Proposition on direct appeal. The OCCA found that trial counsel’s failure to object to errors articulated in the first proposition raised on direct appeal—that jurors were not instructed on the lesser-included offense—did not meet the *Strickland* standard for ineffective assistance. *Davis*, at 5. To the extent that Petitioner argues counsel’s failure to object denied him his Sixth Amendment right to effective counsel, the matter is *res judicata*; to the extent he argues that counsel was ineffective for failing to seek a lesser-included offense instruction, Petitioner fails to show why the claim could not have been adequately raised on direct appeal. Accordingly, the doctrines of *res judicata* and waiver preclude review.

CONCLUSION

The doctrine of waiver and *res judicata* foreclose review of the Application’s three propositions of error. Petitioner fails to show why the claims could not have been adequately raised on direct appeal. Consequently, the Application fails to advance a material issue of fact for this Court to consider and no purpose would be served by further proceedings. This Court accordingly dismisses the Application for Post-Conviction Relief.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Petitioner's Application for Post-Conviction Relief is **DISMISSED**.

SO ORDERED this 16 day of April, 2020.


TRACY PRIDDY
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

This Court certifies that on the date of filing, a true and correct copy of the above and foregoing Order was placed in the United States Mail with sufficient postage affixed thereto, addressed to:

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-&-

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DON NEWBERRY, COURT CLERK

BY: 

Deputy Court Clerk