

In each of Appellant's cases, his common-law wife, Tina Williams, was the alleged victim of the Domestic Abuse. In CM-2004-278, the abuse was alleged to have occurred on February 3, 2004, and in CM-2004-2765, another incident of abuse was alleged for December 15, 2004. Although on each occasion, Mrs. Williams had told responding police officers that Appellant assaulted her, at trial she testified that she got into a fight with her aunt on February 3rd and that on December 15th she had fell over her children's bicycles while going down some stairs into her garage.

In Proposition I, Appellant cites error in the trial court permitting the State, over Appellant's hearsay objections, to offer police officer testimony about statements that Mrs. Williams had made to the officers during their investigations. Claiming this evidence constituted prior inconsistent statements, the State elicited the evidence to impeach Mrs. Williams' trial testimony that Appellant had not caused her injuries. Because Mrs. Williams' trial testimony was that she was intoxicated when she spoke to police and did not recall making the statements but did not deny making them, Appellant concludes the prior statements are not "inconsistent" with her testimony as required for the impeachment by prior inconsistent statements.

There is authority for concluding that a witness who testifies that they cannot remember making a prior statement can be impeached by proof of their prior statements.² That being so, Appellant has not made a clear showing of

² See *Douglas v. State*, 1997 OK CR 79, ¶¶ 88-89, 951 P.2d 651, 676 (where State's witness was called to testify about a shooting outside her apartment but claimed "she could not remember anything and stated that she did not want to be in court," Court held police officer who interviewed witness after the shooting could properly testify about what witness had told him she had seen and heard outside her apartment where such was offered to impeach witness with prior inconsistent statements); see also *United States v. Rogers*, 549 F.2d 490, 495-96 (8th Cir. 1976) (discussing authorities that have concluded that witness' denial of recollection and evasive answers can qualify as being inconsistent with prior statements, and wherein the Circuit Court concluded, "The trial judge must be accorded reasonable discretion in determining whether a claim of faulty memory is inconsistent with statements previously given.").

any abuse of discretion by the trial court; hence, he has not shown merit in this portion of his Proposition I.³

The remaining portion of Appellant's Proposition I asserts error in the District Court having failed to instruct the jurors that they could only consider the testimony about Mrs. Williams' prior statements in determining her credibility and that they were prohibited from considering them as proof of innocence or guilt.⁴ Because Appellant did not request this instruction or object to the instructions given at trial, review is limited to plain error.⁵

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."

Hogan v. State, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923 (citation omitted).⁶ Applying these conditions to Appellant's cases, we find they are met as concerns Appellant's conviction for the December 15th offense alleged in CM-2004-

³ *Hill v. State*, 1995 OK CR 28, ¶ 26, 898 P.2d 155, 164 ("A trial court's decision to admit evidence will not be disturbed absent a clear showing of abuse of discretion accompanied by prejudice.").

⁴ See Instruction No. 9-20, OUI-CR (2d) (Supp. 2008).

⁵ See *Lay v. State*, 2008 OK CR 7, ¶ 24, ___ P.3d ___ (OkI.Cr. Feb. 12, 2008) (where defendant did not request instruction or object to the instructions given at trial, his claim was waived for all but plain error); *Norton v. State*, 2002 OK CR 10, ¶ 17, 43 P.3d 404, 409 ("because trial counsel failed to object to the jury instruction, we review only for plain error"). In Appellant's matter, his trial counsel filed proposed jury instructions; however, the District Court failed to follow the requirements of 22 O.S.2001, §§ 831(5) & 856, requiring it mark the instructions asked and refused. Nevertheless, Appellant's brief concedes that those requested instructions did not include the appropriate limiting instruction. (Appellant's Brief at 13.)

⁶ See also *Carter v. State*, 2006 OK CR 42, ¶ 5, 147 P.3d 243, 244 ("We do not automatically reverse a case for instructional error, but rather determine whether the error resulted in a miscarriage of justice or constitutes a substantial violation of a constitutional or statutory right.").

2765, but that they are not met as concern his conviction in CM-2004-278 for the February 3rd offense.

In *Leeks v. State*, 95 Okl.Cr. 326, 332, 245 P.2d 764, 770 (1952); the Court recognized that when “a large part of the state’s evidence consisted of evidence offered for impeachment purposes of the state’s own witnesses,” it “become[s] the positive duty of the court to limit the consideration of such evidence as going only to the credibility of the witnesses and not to be considered as substantive evidence by the jury.” In Appellant’s matter, we have grave doubt whether the jury would have found evidence sufficient to convict in CF-2004-2765 were it known by them that they could not consider the statements made by Mrs. Williams to the investigating officer on December 15th as proof of Appellant’s guilt. Those statements constituted the only evidence linking Appellant to Mrs. Williams’ December 15th injuries—injuries that the investigating officer acknowledged could be consistent with a fall such as that which Mrs. Williams had testified to at trial as the cause of her injuries.

Not so for the State’s evidence of Mrs. Williams’ February 3rd injuries in CM-2004-278. In that case, the evidence revealed that a 911 call resulted in the dispatch of Norman police to a home near Mrs. Williams’ residence. At this neighbor’s home, police observed Mrs. Williams wearing a bloody shirt with fresh bruises on her lips, arms, and forehead. She had patches of hair missing and a “glob of [hair] hanging from the bottom of her hair.” Police had arrived only minutes after the 7:58 A.M. dispatch to find Appellant alone in Mrs. Williams’ residence. There was no sign of the aunt that Mrs. Williams’ trial testimony accused of committing the assault.

Admitted at trial as exhibits were over 40 photographs taken by police of the interior of the Williams home depicting what the officers observed that day.

The exhibits and police testimony revealed the following signs of a recent struggle within the home: blood smears and splatters on the floor and walls; clumps of pulled hair in the kitchen and bedroom matching the appearance of Mrs. Williams' hair; a telephone cord pulled from the kitchen wall and a broken phone receiver; a chair, ashtray, and trashcan all overturned. Police found a jacket belonging to Appellant on the couple's bed. The jacket had fresh bloodstains on its sleeve. As one of the responding officers escorted Mrs. Williams back to her residence, Mrs. Williams became scared, despite the fact that police had secured Appellant in the back of a patrol car. Officers testified that Mrs. Williams was fearful of making a complaint against Appellant.

Because the State presented extensive evidence about the February 3rd offense that was wholly independent of the evidence about Mrs. Williams' prior statements, we have no reasonable doubt that the outcome of Appellant's trial in CM-2004-278 would have been the same had the pretermitted impeachment instruction been given to Appellant's jury. We therefore do not find Proposition I presents plain error as concerns Petitioner's conviction in CM-2004-278.

As concerns Appellant's sufficiency of the evidence claim in Proposition II, the Court finds that this independent evidence of the February 3rd offense was sufficient for rational jurors to find beyond a reasonable doubt that Appellant committed each of the elements of an offense of Domestic Battery against Mrs. Williams. This is not so for the limited evidence of the December 15th episode that runs towards guilt. That evidence was insufficient for any rational juror to find guilt beyond a reasonable doubt.⁷ Accordingly, Appellant's conviction in CF-2004-2765 must be reversed with instructions to dismiss.

⁷ When determining a sufficiency of the evidence claim on appeal, "the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed. 2d 560 (1979).

Proposition III claims prosecutorial misconduct in three comments made during closing argument. Concerning the first two comments, we do not find they are reasonably construed as vouching for the credibility of the police witnesses or as giving the prosecutor's personal opinion about the truthfulness of the complainant's testimony.⁸ Appellant also complains that the prosecutor attempted to elicit sympathy for the victim. There was no objection to this particular statement, and we therefore review only for plain error. "Reviewing the comments for plain error, we reverse only if the comments had 'a "substantial influence" on the outcome,' or leave the reviewing court 'in "grave doubt" as to whether it had such an effect.'" *Hancock v. State*, 2007 OK CR 9, ¶ 101, 155 P.3d 796, 820, *quoting Simpson v. State*, 1994 OK CR 40, ¶ 36, 876 P.2d 690, 702. The prosecutor's comment cited by Appellant as error does not rise to this level.

DECISION

The Judgment and Sentence of the District Court of Cleveland County, in Case No. CM-2004-278 finding Appellant, Michael David Williams, guilty of Domestic Abuse (a misdemeanor) and sentencing him on November 22, 2006, to a fine of \$1,000.00 and one (1) year confinement is **AFFIRMED**, but the Judgment and Sentence in CM-2004-2765 is **REVERSED WITH INSTRUCTIONS TO DISMISS**. Upon receiving the mandate, the District Court shall correct its Judgment and Sentence to reflect the vacating of Appellant's convic-

⁸ *Smallwood v. State*, 1995 OK CR 60, ¶ 37, 907 P.2d 217, 229 ("It is well established that it is improper to call a witness or defendant a 'liar' or to say that he or she is 'lying.' Nevertheless, it is permissible to comment on the veracity of a witness when such is supported by the evidence.") (citations omitted); *Nickell v. State*, 194 OK CR 73, ¶ 7, 885 P.2d 670, 673 ("Argument or evidence is impermissible vouching only if the jury could reasonably believe that the prosecutor is indicating a personal belief in the witness' credibility, either through explicit personal assurances of the witness' veracity or by implicitly indicating that information not presented to the jury supports the witness' testimony.").

tion in CF-2004-2765; however, in doing so it shall leave intact the \$1,000.00 fine in CF-2004-278. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2008), **MANDATE IS ORDERED ISSUED** upon the filing of this decision.

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Chapel, J.: Concurs in Results
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