

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

EDWARD THOMAS BROWN,)
)
 Appellant,)
 v.)
 STATE OF OKLAHOMA)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2014-334

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAY 20 2015

SUMMARY OPINION

LUMPKIN, VICE PRESIDING JUDGE:

MICHAEL S. RICHIE
CLERK

Appellant Edward Thomas Brown was tried by jury and convicted of Assault and Battery with a Deadly Weapon (Count I) (21 O.S.2011, § 652); Conspiracy to Commit Larceny of a Motor Vehicle (Count II) (21 O.S.2011, § 421); and Attempted Larceny of a Motor Vehicle (Count III) (21 O.S.2011, § 1720), Case No. CF-2011-7020, in the District Court of Oklahoma County. The jury recommended as punishment imprisonment for twenty-six (26) years in Count I, eighteen (18) months in Count II, and three (3) years in Count III. The trial court sentenced accordingly, ordering all sentences to run concurrently. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of his appeal:

- I. The evidence adduced at trial was legally insufficient to convict Appellant, as the testimony of Ashley Allen, an accomplice, was not corroborated, and because there was no evidence of an agreement, required for conviction of a conspiracy.
- II. Plain and fundamental error occurred when the trial court failed to instruct the jury either on the requirement that

Ashley Allen's testimony be corroborated or that they should take great care in assessing the reliability of her bargained for testimony.

- III. The trial court erred in allowing the State to present DNA evidence against the accused, because the minimal probative value of that evidence was far outweighed by the danger of unfair prejudice, misleading the jury and confusion of the issues.
- IV. Appellant was denied the constitutionally effective assistance of counsel to which he was entitled.
- V. The accumulation of error in this case deprived Appellant of due process of law in violation of the Fourteenth Amendment to the United States Constitution and Article II, § 7 of the Oklahoma Constitution.

After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that under the law and the evidence no relief is warranted.

In Proposition I, we find Ashley Allen's accomplice testimony was sufficiently corroborated by other independent evidence connecting Appellant with the commission of the charged crimes so that the jury could infer her testimony about the entire incident was truthful. See 22 O.S.2011, § 742; *Postelle v. State*, 2011 OK CR 30, ¶ 15, 267 P.3d 114, 126. Viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt Appellant was guilty as charged. *Rutan v. State*, 2009 OK CR 3, ¶ 49, 202 P.3d 839, 849; *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559.

Additionally, we find the circumstantial evidence of Appellant's agreement to steal the victim's car sufficient to support the conviction for conspiracy to commit larceny of a vehicle. See 21 O.S.2011, §§ 421 and 423; *Pink v. State*, 2004 OK CR 37, ¶ 30, 104 P.3d 584, 595-595; *State v. Davis*, 1991 OK CR 123, ¶ 10, 823 P.2d 367, 369-370.

In Proposition II, the record reflects no requests were made for jury instructions on accomplice testimony nor were any objections raised to the absence of those instructions. Therefore, we review their omission only for plain error. *Eizember v. State*, 2007 OK CR 29, ¶ 110, 164 P.3d 208, 236. Under the test for plain error set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, an appellant must show an actual error, that is plain or obvious, affecting his substantial rights, and which seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*, 1994 OK CR 40, ¶ 10, 26, 30, 876 P.2d at 694, 699, 701. "[P]lain error is subject to harmless error analysis." *Id.*, 1994 OK CR 40, ¶ 20, 876 P.2d at 698. See *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395; *Malone v. State*, 2013 OK CR 1, ¶ 41, 293 P.3d 198, 211-212.

The evidence showed that Allen was an accomplice as a matter of law, because she was originally charged with the crime, therefore the trial court erred in failing to give the uniform instructions on accomplice testimony and the need for corroboration. This error should have been plain and obvious as the court and counsel are deemed to know the law.

Did this error affect the outcome of the trial? This Court has held that where there is overwhelming evidence of guilt and the presence of sufficient corroborating testimony, the failure to give an accomplice instruction is harmless error. *Cummings v. State*, 1998 OK CR 45, ¶ 24, 968 P.2d 821, 831 (“where there is overwhelming evidence of guilt and the presence of sufficient corroborating testimony, the failure to so instruct is harmless”). See also *Howell v. State*, 1994 OK CR 62, ¶ 28, 882 P.2d 1086, 1092; *LaFevers v. State*, 1991 OK CR 97, ¶ 27, 819 P.2d 1362, 1368-69; *VanWoundenberg v. State*, 1986 OK CR 81, ¶ 27, 720 P.2d 328, 337-338.

Here, as addressed in Proposition I, there was sufficient circumstantial evidence, apart from Allen’s testimony, to find Appellant guilty of the charged crimes. In addition, there was no evidence that Allen knew of Appellant’s plan or intent. Therefore, the failure to instruct the jury on the necessity for corroboration of accomplice testimony was not plain error.

Further, Appellant’s complaint that the trial court erred in failing to *sua sponte* give Oklahoma Uniform Jury Instruction Criminal 2d 9-42 on the credibility of opinion witnesses is without merit as the record reflects that instruction was given to the jury.

In Proposition III, we find the trial court did not abuse its discretion in admitting the DNA evidence. See *Davis v. State*, 2011 OK CR 29, ¶ 156, 268 P.3d 86, 125 (the admission of evidence is left to the sound discretion of the trial court and will not be disturbed absent an abuse of discretion). Evidence that Appellant could not be excluded as a contributor to DNA found on the revolver

used in the crime was relevant and the relevance was not outweighed by the danger of unfair prejudice. 12 O.S.2011, §§ 2401 & 2403. See also *Postelle v. State*, 2011 OK CR 30, ¶ 31, 267 P.3d 114, 131.

In Proposition IV, Appellant contends he was denied the effective assistance of counsel by counsel's failure to request jury instructions on accomplice liability regarding Ashley Allen's testimony. We review Appellant's claims under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to show that counsel was ineffective, Appellant must show both deficient performance and prejudice. *Goode v. State*, 2010 OK CR 10, ¶ 81, 236 P.3d 671, 686 citing *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. See also *Marshall v. State*, 2010 OK CR 8, ¶ 61, 232 P.3d 467, 481. In *Strickland*, the Supreme Court said there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct, *i.e.*, an appellant must overcome the presumption that, under the circumstances, counsel's conduct constituted sound trial strategy. *Goode*, 2010 OK CR 10, ¶ 81, 236 P.3d at 686. To establish prejudice, Appellant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at ¶ 82, 236 P.3d at 686.

In Proposition II, we reviewed for plain error the trial court's failure to *sua sponte* instruct the jury on accomplice liability. We found no plain error as there was sufficient other evidence, apart from Allen's testimony, to find Appellant guilty of the charged crimes. Therefore, Appellant has not shown that

but for counsel's failure to request the instructions, the result of his trial would have been different. Defense counsel's failure to request the accomplice instructions did not constitute ineffective assistance. See *Gilson v. State*, 2000 OK CR 14, ¶ 166, 8 P.3d 883, 926-927 citing *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069 (when a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed).

In Proposition V, while we have found certain errors occurred in this case, none of them, when considered singly, warranted relief. When considered cumulatively, these errors still do not warrant relief as none were so egregious or numerous as to have affected Appellant's substantial rights and denied him a fair trial. See *Williams v. State*, 2001 OK CR 9, ¶ 127, 22 P.3d 702, 732. Therefore his request for a new trial is denied.

DECISION

The Judgments and Sentences are **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2014), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE JERRY D. BASS, DISTRICT JUDGE

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JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR
HUDSON, J.: CONCUR

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