IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DANIEL LEE RAMIREZ,	)	
	)	NOT FOR PUBLICATION
Appellant,	)	
vs.	)	No. F-2014-988
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

SMITH, PRESIDING JUDGE:

Daniel L. Ramirez was tried by jury and convicted of Count I, First Degree (Felony) Murder in violation of 21 O.S.2011, § 701.7(B); and Count II, Assault and Battery with a Deadly Weapon in violation of 21 O.S.2011, § 652(C), in the District Court of Oklahoma County, Case No. CF-2012-5014. In accordance with the jury's recommendation the Honorable Ray C. Elliott sentenced Ramirez to life imprisonment (Count I) and twenty (20) years imprisonment (Count II), to run consecutively. Ramirez must serve 85% of his sentences before becoming eligible for consideration for parole. Ramirez appeals from these convictions and sentences.

Ramirez raises six propositions of error in support of his appeal:

I. Appellant's due process rights were violated by the admission into evidence of his custodial statements obtained in violation of his privilege against self-incrimination.

II. Appellant's trial was infected with improper and inadmissible opinion testimony, which invaded the province of the jury and denied him a fair trial and the due process of law secured to him by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 2, Sections 7, 19 and 20 of the Oklahoma Constitution.

III. The trial court's error in defining by negative reference the concept of reasonable doubt for the jury deprived Appellant of a fair trial.

IV. Prosecutorial misconduct in the State's final summation violated Appellant's rights to due process of law and a fair trial, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

V. Appellant was denied the reasonably effective assistance of counsel guaranteed him by the Sixth Amendment.

VI. The accumulation of error in this case deprived Mr. Ramirez of due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article II, § 7 of the Oklahoma Constitution.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we find that the law and evidence do not require relief.

We find in Proposition I that Ramirez did not unequivocally invoke his right to remain silent in his police interview. Ramirez did not object to admission of his statements to police, waiving all but plain error. Plain error is an actual error, that is plain or obvious, and that affects a defendant's substantial rights, affecting the outcome of the trial. *Barnard v. State*, 2012 OK CR 15, ¶ 13, 290 P.3d 759, 764. Because the issue involves a basic constitutional right, we apply the United States Supreme Court's harmless error doctrine, asking whether the State has shown beyond a reasonable doubt that the error did not contribute to the verdict. *Barnard*, 2012 OK CR 15, ¶ 14, 290 P.3d at 764; *Neder v. United States*, 527 U.S. 1, 15–16, 119 S.Ct. 1827, 1837, 144 L.Ed.2d 35 (1999); *Chapman v. California*, 386 U.S. 18, 23–24, 87 S.Ct. 824, 827–828, 17 L.Ed.2d 705 (1967).[1]

[1] Ramirez appears to misunderstand the standard of review. He admits the issue is waived, but asks this Court to review the claim for fundamental error. This Court determined in *Simpson v. State* that "fundamental error" and "plain error" refer to the same thing, and that "fundamental error" will not mandate reversal, but is still reviewed for injury or prejudice. *Simpson v. State*, 1994 OK CR 40, ¶¶ 19 & 23, 876 P.2d 690, 698. When an error of constitutional dimension is presented (errors often referred to as "fundamental"), the State must show it is harmless beyond a reasonable doubt. *Bartell v. State*, 1994 OK CR 59, ¶ 10, 881 P.2d 92, 95. The State also misstates the standard of review, failing to note the constitutional magnitude of the error.

Once a suspect invokes his right to remain silent when questioned by police, interrogation must cease. *Michigan v. Mosley*, 423 U.S. 96, 100-101, 96 S.Ct. 321, 325, 46 L.Ed.2d 313 (1975) (*quoting Miranda v. Arizona*, 384 U.S. 436, 473-74, 86 S.Ct. 1602, 1627, 16 L.Ed.2d 694 (1966)). The invocation of rights must be unambiguous and unequivocal; a suspect must say, for example, that he wants to remain silent or does not want to talk with police. *Berghuis v. Thompkins*, 560 U.S. 370, 381-82, 130 S.Ct. 2250, 2259-60, 176 L.Ed.2d 1098 (2010). Where the State establishes that *Miranda* warnings were given and understood by a suspect, who thereafter makes an uncoerced statement, the person will have implicitly waived his *Miranda* rights. *Id.*, 560 U.S. at 384, 130 S.Ct. at 2261-62. If a suspect invokes his right to silence, questioning may resume if, under the totality of the circumstances, police scrupulously honor the suspect's initial assertion of his right. *Warner v. State*, 2006 OK CR 40, ¶ 51, 144 P.3d 838, 865. We have found a second interrogation permissible where it occurs at least several hours later, is preceded by fresh *Miranda* warnings, and is conducted by a different officer. *Warner*, 2006 OK CR 40, ¶ 52, 144 P.3d at 865-66; *Storm v. State*, 1987 OK CR 82, ¶ 9, 736 P.2d 1000, 1002; *Robinson v. State*, 1986 OK CR 86, ¶ 6, 721 P.2d 419, 421-22.[2]

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[2] The State compares the facts here to the situation in *Dunkle v. State*, 2006 OK CR 29, 139 P.3d 228, but the two cases are wholly dissimilar. In *Dunkle*, the defendant was read the *Miranda* warnings and agreed to give a statement. Less than four hours later, while Dunkle was still in custody, she agreed to another interview with a different officer, who did not re-advise her of the *Miranda* warnings. We found the warnings provided in the first interview informed the defendant of her rights before the later interrogation. *Dunkle*, 2006 OK CR 29, ¶ 20, 139 P.3d at 236. The difference, of course, is that Dunkle *agreed to talk to officers* after first hearing the warnings – she waived her rights; Ramirez did not. The State also mistakenly compares this to *Berghuis v. Thompkins*, 560 U.S. 370, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010). In *Berghuis*, the Court held there was no unambiguous assertion of the right to remain silent where the defendant said nothing at all regarding his intentions to speak. 560 U.S. at 381, 130 S.Ct. at 2259-60. Here, Ramirez certainly stated that he did not wish to speak at the time he was being questioned.

The record shows that after hearing *Miranda* warnings Ramirez said either, ""I don't wish to speak right now," or "I'll remain silent at this time." In either statement, the first phrase is unambiguous and unequivocal. However, the phrases "at this time" or "right now" are important qualifying statements. They leave open the possibility that at some other time Ramirez would be willing to talk to officers. By adding a qualifying phrase Ramirez made an ambiguous statement. The detective did not act unreasonably or wrongly in approaching Ramirez again. Because only fifteen minutes passed between the first and second interview, the detective did not need to repeat the *Miranda* warnings before further questioning Ramirez. Ramirez' first, ambiguous, statement shows that he understood he did not have to talk to Easley. Because Ramirez did not unequivocally invoke his right to remain silent, the trial court did not abuse its discretion in admitting his statements to police. As there was no error, the State has shown beyond a reasonable doubt that no error contributed to the verdict. *Barnard*, 2012 OK CR 15, ¶ 14, 290 P.3d at 764. This proposition is denied.

We find in Proposition II that opinion testimony was properly admitted. Ramirez did not object to the testimony and has waived all but plain error. *Barnard*, 2012 OK CR 15, ¶ 13, 290 P.3d at 764. There is none. Admission of evidence is within the trial court's discretion. *Goode v. State*, 2010 OK CR 10, ¶ 44, 236 P.3d 671, 680. Lay opinion is admissible where it is rationally based on the witness's perception, helps give jurors a clear understanding of either the witness's testimony or the determination of a fact in issue, and is not based on scientific, technical or other specialized knowledge. 12 O.S.2011, § 2701. Police officers may give opinion

testimony that is based on their training and experience. *Webster v. State*, 2011 OK CR 14, ¶ 72, 252 P.3d 259, 279; *Simpson v. State*, 2010 OK CR 6, ¶ 34, 230 P.3d 888, 900-01. Based on his investigation of the crime, the detective formed the opinion that none of the other persons present at the scene fired the shots and killed the victim. Ramirez is correct that it was not improper for him to suggest that one of these people was the shooter. However, it was not improper for the prosecution to counter this suggestion with testimony based on the police investigation. This helped jurors determine a fact in issue and was proper under § 2701. Whitebird's opinion that Ramirez was the shooter was also not improper. It did not tell jurors what result to reach – Whitebird did not say that jurors must find Ramirez guilty – but was based on his specialized knowledge and his investigation of the crime. *Cannon v. State*, 1998 OK CR 28, ¶ 20, 961 P.2d 838, 846. The trial court did not abuse its discretion in admitting the evidence. There was no error, and thus no plain error. This proposition is denied.

We find in Proposition III that there was no error in *voir dire* instruction. During *voir dire*, the trial court told jurors that "beyond a reasonable doubt" did not mean "beyond all doubt" or "beyond a shadow of a doubt". Ramirez did not object to this and has waived all but plain error. *Barnard*, 2012 OK CR 15, ¶ 13, 290 P.3d at 764. There is none. We have often held that prosecutors may distinguish the phrase "reasonable doubt" from these other phrases, ensuring that jurors do not hold the State to an impermissibly high burden of proof. *See, e.g., Robinson v. State*, 2011 OK CR 15, ¶ 16, 255 P.3d 425, 431-32; *Taylor v. State*, 2011 OK CR 8, ¶ 47, 248 P.3d 362, 377; *Myers v. State*, 2006 OK CR 12, ¶¶ 57-58, 133 P.3d 312, 329. It is

not error for the trial court to do the same thing. As there was no error, there is no plain error. This proposition is denied.

We find in Proposition IV that no error in the State's closing argument requires relief. Both parties have wide latitude to argue the evidence and inferences from it. *Bell v. State*, 2007 OK CR 43, ¶ 6, 172 P.3d 622, 624. We will not grant relief for error unless a grossly unwarranted argument affects the defendant's rights, prejudicing him to the point he is deprived of a fair trial. *Id.*; *Browning v. State*, 2006 OK CR 8, ¶ 35, 134 P.3d 816, 839. Ramirez objected to one comment, preserving that error for review. We review the remainder for plain error. *Mathis v. State*, 2012 OK CR 1, ¶ 24, 271 P.3d 67, 76. When considering a claim of misconduct in argument, we consider whether the prosecutor was responding to arguments made by defense counsel. *Taylor*, 2011 OK CR 8, ¶ 55, 248 P.3d at 379; *Browning*, 2006 OK CR 8, ¶ 43, 134 P.3d at 840-41. Responding to the defense argument that Anthony Ramirez could have shot Chavez, the prosecutor argued that neither the State nor the defense could have presented a witness to say that Anthony had a gun, because it didn't happen and wasn't true. The record shows this argument was based on the evidence of Anthony's actions adduced at trial, and did not constitute the prosecutor's personal opinion.

Ramirez correctly argues that the prosecutor misstated the law. Defense counsel argued in closing that Anthony Ramirez could have given Ramirez the gun, after committing the crime himself, for Ramirez to dispose of it. The prosecutor responded that this would still make Ramirez guilty of felony murder. This is not the case; taking the gun after the crime was committed would have made Ramirez

an accessory after the fact.[3] "Prosecutors should not misstate the law in closing argument." *Florez v. State*, 2010 OK CR 21, ¶ 6, 239 P.3d 156, 158. Ramirez did not object to this comment, waiving all but plain error. The misstatement of law is an actual error, that is plain or obvious, and the first two factors in the test for plain error are met. *Barnard*, 2012 OK CR 15, ¶ 13, 290 P.3d at 764. However, Ramirez fails to show that the error affected his substantial rights, and it did not affect the outcome of the trial. *Id.* As Ramirez fails to show he was prejudiced by the error, such that it affected the outcome of his trial, there is no plain error. *Id.*

Ramirez argues that the State repeatedly shifted the burden in closing argument. Ramirez failed to object to all but one of these comments; as the issue involves a basic constitutional right, we apply the United States Supreme Court's harmless error doctrine. *Barnard*, 2012 OK CR 15, ¶ 14, 290 P.3d at 764. The State may argue that the defendant has the ability to call witnesses or present evidence, and may also argue that the State's evidence is uncontroverted. *Myers*, 2006 OK CR 12, ¶ 61, 133 P.3d at 329. However, the State may not shift the burden of proof by arguing "that the defendant had failed to produce evidence or to prove something that he was required to prove." *Roy v. State*, 2006 OK CR 47, ¶ 44, 152 P.3d 217, 231-32; *see also Browning*, 2006 OK CR 8, ¶ 40, 134 P.3d at 840 (error to argue that the defense should have presented evidence to explain the crimes). Much of the argument about which Ramirez complains was in response to defense counsel's closing argument. In context, most of the comments (that the only evidence came

[3] The State seems to recognize this in its reply brief. Rather than argue that the prosecutor was correct, the State merely claims that other evidence showed Ramirez was guilty of felony murder. This argument addresses any prejudice from the error, not the accuracy of the prosecutor's argument.

from the State, and the defendant could have called various witnesses or presented particular evidence) were, although sometimes very poorly phrased, comments on Ramirez' ability to subpoena witnesses and present evidence, or on the uncontroverted nature of the State's evidence. We strongly caution prosecutors to avoid argument, even in response to defense counsel, which appears to suggest the defendant is obliged to present evidence.

In addition, the prosecutor twice crossed the line, arguing that defense counsel could or should have presented "something exculpatory, something that would mitigate the position of their defendant in this crime," and evidence "if it was going to mitigate the situation and exculpate his client." These comments squarely shifted the burden by telling jurors Ramirez had a duty to present evidence of his innocence. Ramirez, of course, had no obligation to present anything exculpatory or mitigating, or any evidence at all. This is a serious error, and we do not minimize it. However, in determining whether these two comments require relief, we take into consideration the entire course of the trial, including the remainder of the prosecutor's actions and the strength of the evidence. *Taylor*, 2011 OK CR 8, ¶ 55, 248 P.3d at 379. The jury was correctly instructed on the burden of proof in *voir dire* and at the close of the evidence. We presume jurors will follow their instructions. *Ryder v. State*, 2004 OK CR 2, ¶ 83, 83 P.3d 856, 875. Furthermore, the circumstantial evidence against Ramirez was strong, and he does not claim the evidence was insufficient to convict. Considering the trial as a whole, the State has shown beyond a reasonable doubt that these improper statements did not

contribute to the verdict. *Barnard*, 2012 OK CR 15, ¶ 14, 290 P.3d at 764. No relief is required. This proposition is denied.

We find in Proposition V that trial counsel was not ineffective. Ramirez must prove that counsel's performance was deficient, and that the deficient performance was prejudicial. *Miller v. State*, 2013 OK CR 11, ¶ 145, 313 P.3d 934, 982; *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Counsel's acts or omissions must have been so serious as to deprive Ramirez of a fair trial with reliable results. *Harrington v. Richter*, 562 U.S. 86, 104, 131 S.Ct. 770, 787-88, 178 L.Ed.2d 624 (2011). He must have been prejudiced by counsel's acts or omissions. *Williams v. Taylor*, 529 U.S. 362, 394, 120 S.Ct. 1495, 1513-14, 146 L.Ed.2d 389 (2000); *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067. Where a defendant fails to show prejudice, we will dispose of a claim of ineffective assistance on that ground. *Marshall v. State*, 2010 OK CR 8, ¶ 61, 232 P.3d 467, 481. Ramirez argues that trial counsel was ineffective for asserting a violation of his right to remain silent at questioning, and for waiving the issue by failing to object to admission of the statements. We found in Proposition I that Ramirez did not unequivocally invoke his right to remain silent. Ramirez claims trial counsel was ineffective for failing to object to the detective's opinion testimony, and to the errors in closing argument raised in Proposition IV. We found in Proposition II that the detective's testimony was relevant and admissible. We found in Proposition IV that the majority of the prosecutor's comments were not improper; we further found that a misstatement of law did not rise to plain error, and burden-shifting comments did

not require relief. As Ramirez cannot show he was prejudiced by trial counsel's acts and omissions, we will not find counsel ineffective. *Marshall*, 2010 OK CR 8, ¶ 61, 232 P.3d at 481. This proposition is denied.

We find in Proposition VI that accumulated error does not warrant relief. We found no error in Propositions I, II, III or V. In Proposition IV, we found that improper comments did not require relief. Ramirez' trial was fairly conducted, and the errors found in Proposition IV, taken together, do not require relief. *Brumfield v. State*, 2007 OK CR 10, ¶ 37, 155 P.3d 826, 840. This proposition is denied.

Separately from his appeal, Ramirez filed a motion for new trial. He contends that his conviction should be reversed based on newly-discovered evidence that Anthony Ramirez actually shot Chavez. In considering this motion, we determine: "(1) whether the evidence could have been discovered before trial with reasonable diligence; (2) whether the evidence is material; (3) whether the evidence is cumulative; and (4) whether the evidence creates a reasonable probability that, had it been introduced at trial, it would have changed the outcome." *Underwood v. State*, 2011 OK CR 12, ¶ 93, 252 P.3d 221, 254-55. Ramirez offers an affidavit from Betty Rayas, his longtime friend and neighbor. She avers that on August 6, 2012, she saw a post on Anthony Ramirez' Facebook page stating that "someone was killed and he hoped he did not kill that guy last night." Rayas avers that the post was deleted before she could preserve it in a screen shot. Assuming this evidence could have been admitted at trial, Ramirez fails to show it satisfies the factors for a new trial listed above. Arguably, the evidence could not have been discovered before trial and was material; it was not cumulative to any evidence presented at trial.

However, Ramirez completely fails to show a reasonable probability that the evidence would have changed the outcome of the trial. Not only was there no evidence that Anthony committed the crimes, several witnesses testified that he did not have a gun, and eyewitnesses put him too near the door to have fired the shots based on the forensic evidence. On the other hand, several witnesses put Ramirez at the scene, in the right place, gun in hand, immediately before the shots. Three witnesses shortly afterward heard Ramirez admit to killing someone (though he treated it as a joke), and evidence showed he tried to get rid of a gun after the crime. This Court can resolve this motion based on the supplementary material presented by Ramirez. Rule 2.1(A)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015). Ramirez' motion for new trial is denied.

DECISION

The Judgment and Sentence of the District Court of Oklahoma County is **AFFIRMED**; the Motion for New Trial is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE RAY C. ELLIOTT, DISTRICT JUDGE

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