

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

AUSTIN LEE OLINGER,

 Appellant,

v.

THE STATE OF OKLAHOMA,

 Appellee.

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) **NOT FOR PUBLICATION**
)
) **Case No. F-2016-209**
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)
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FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
APR - 4 2017
MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

Appellant, Austin Lee Olinger, was tried by jury and convicted of Murder in the First Degree – Felony Murder (Count 1) (21 O.S.Supp.2012, § 701.7(B) and Conspiracy to Commit a Felony (Count 2) (21 O.S.2011, § 421) in District Court of Pottawatomie County Case Number CF-2015-395. The jury recommended as punishment imprisonment for life in Count 1 and eight (8) years in Count 2. The trial court sentenced Appellant accordingly and ordered the sentences to run consecutively. It is from these judgments and sentences that Appellant appeals.¹

Appellant raises the following propositions of error in this appeal:

- I. Prosecutorial misconduct deprived Mr. Olinger of his rights to due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article II, §§ 7 & 20 of the Oklahoma Constitution.

- II. The trial court abused its discretion by failing to hold a Harjo hearing to determine the admissibility of co-conspirator hearsay statements, violating Mr. Olinger’s right to due

¹ Appellant is required to serve 85% of his sentence of imprisonment for First Degree Murder prior to becoming eligible for consideration for parole. 21 O.S.2011, § 13.1.

process under the Fifth and Fourteenth Amendments to the United States Constitution, and Article II, § 7 of the Oklahoma Constitution.

- III. The trial court committed instructional error.
- IV. The trial court abused its discretion by admitting improper victim impact testimony at the sentencing hearing, thereby violating Mr. Olinger's right to due process under the Fifth and Fourteenth Amendments to the United States Constitution, and Article II, § 7 of the Oklahoma Constitution.
- V. Mr. Olinger received ineffective assistance of counsel, violating his rights under the Sixth and Fourteenth Amendments to the United States Constitution, and Article II, § 20 of the Oklahoma Constitution.
- VI. Cumulative errors deprived Mr. Olinger of a fair trial.

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 neither reversal nor modification of sentence is warranted under the law and the evidence.²

In Proposition One, Appellant contends that prosecutorial misconduct deprived him of a fair trial. He concedes that he waived appellate review of his claims of prosecutorial misconduct when he failed to challenge the prosecutor's comments at trial. Therefore, we review Appellant's claim pursuant to the test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, and determine whether Appellant has shown an actual error, which is plain or obvious, and which affects his substantial rights. *Jackson v. State*, 2016 OK CR 5, ¶ 4, 371 P.3d 1120, 1121; *Malone v. State*, 2013 OK CR 1, ¶ 41, 293 P.3d 198, 211-212. This Court

² We note that Appellant's brief fails to comply with Rule 3.5(C)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017), as it fails to include citations to this Court's official paragraph citation form.

will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*; *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

Focusing on a select portion of the trial transcript, Appellant argues that the prosecutor improperly vouched for the credibility of State's witnesses, Ramie Brown and Cody Taylor. Reviewing the entirety of the prosecutor's comments, we find that Appellant has not shown the existence of an actual error. *Applegate v. State*, 1995 OK CR 49, ¶ 22, 904 P.2d 130, 137 (holding this Court reviews entire closing argument when determining claim of prosecutorial misconduct). As the prosecutor explicitly sought to have the jurors determine the credibility of Brown and Taylor based upon the evidence at trial, we find that impermissible vouching did not occur. *Nickell v. State*, 1994 OK CR 73, ¶ 7, 885 P.2d 670, 673. The jury could not have reasonably believed that the prosecutor indicated a personal belief in the witnesses' credibility. *Warner v. State*, 2006 OK CR 40, ¶ 24, 144 P.3d 838, 860.

Plucking select sentences from the prosecutor's argument, Appellant further argues that the prosecutor attempted to dissuade the jury from following the trial court's lesser included offense instructions. Reviewing the entire record, we find that Appellant has not shown the existence of an actual error. The prosecutor's argument suggesting that "the evidence, the facts, [and] the confession," did not support the elements of the lesser offense but instead supported the first degree murder charge was proper in all respects. *Duckett v.*

State, 1999 OK CR 61, ¶ 42, 919 P.2d 7, 19-20 (holding prosecution is free to point out how the evidence did not support lesser included instruction so long as argument did not nullify court's instructions). Since the prosecutor urged the jurors to follow the law and base their decision upon the evidence a trial, we find that the prosecutor did not seek to nullify the lesser offense instruction. *Tobler v. State*, 1984 OK CR 90, ¶¶ 26-27, 688 P.2d 350, 356 (holding prosecutor's statement, jury should simply acquit rather than convict of lesser included offense, was improper as it was clear attempt to persuade jury away from following court's instruction). Thus, we conclude that Appellant has not shown that error, plain or otherwise, occurred.

Reviewing the entire record in the present case, the cumulative effect of the prosecutors' comments did not deprive Appellant of a fair trial. *Malone*, 2013 OK CR 1, ¶ 43, 293 P.3d at 212. Prosecutorial misconduct did not deprive Appellant of a fundamentally fair trial. *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868, 1871, 40 L. Ed. 2d 431 (1974).

In a single sentence within this claim of error, Appellant argues that the trial court failed to properly guide the jurors when answering a note from the jury asking about consecutive sentences. As Appellant neither set out this claim as a separate proposition of error in his brief nor properly argued the claim with citation to the record and authority, we find the issue is waived pursuant to Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016); *Murphy v. State*, 2012 OK CR 8, ¶ 23, 281 P.3d 1283, 1291 (finding

petitioner waived appellate review of issue which he failed to set out as a separate proposition of error). Proposition One is denied.

In Proposition Two, Appellant contends that the trial court failed to hold a hearing and determine the admissibility of the co-conspirator's hearsay statements under 12 O.S.2011, § 2801(B)(2)(e) in accordance with this Court's opinion in *Harjo v. State*, 1990 OK CR 53, 797 P.2d 338. He concedes that he failed to object to the absence of such a hearing, thus, waiving appellate review of this claim for all but plain error. Therefore, we review Appellant's claim pursuant to the test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, and determine whether Appellant has shown an actual error, which is plain or obvious, and which affects his substantial rights. *Tollett v. State*, 2016 OK CR 15, ¶ 4, 387 P.3d 915, 916; *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

The testimony which Appellant challenges was the in-court direct testimony of his co-conspirators, Cody Taylor and Ramie Brown. As the co-conspirators' in-court testimony was sufficient independent evidence of the conspiracy and Appellant's participation in it, we find that the trial court was not required to hold a *Harjo* hearing. *Hackney v. State*, 1994 OK CR 29, ¶ 4, 874 P.2d 810, 813 ("*Harjo* rule requiring independent evidence before the admission of a co-conspirator's statements does not apply to the direct in-court testimony of a co-conspirator."); *Huckaby v. State*, 1990 OK CR 84, ¶¶ 13-14, 804 P.2d 447, 451; *Johns v. State*, 1987 OK CR 178, ¶¶ 9-11, 742 P.2d 1142, 1146-47.

Taylor and Brown properly testified concerning their own participation in the conspiracy and their observations of the other co-conspirators' conduct." *Id.*;

Johns, 1987 OK CR 178, ¶¶ 9-11, 742 P.2d at 1146-47. They properly related Appellant's out-of-court statements as they constituted a "party's own statement" pursuant to 12 O.S.2011, § 2801(B)(2)(a). See *Phillips v. State*, 1999 OK CR 38, ¶ 51, 989 P.2d 1017, 1033 ("A defendant's own statements are not hearsay."). Similarly, they properly testified concerning their co-conspirators' statements made in furtherance of the conspiracy pursuant to 12 O.S.2011, § 2801(B)(2)(3). See *Omalza v. State*, 1995 OK CR 80, ¶ 13, 911 P.2d at 295-96 ("A statement which is offered against a party and made by his coconspirator during the course and in furtherance of their conspiracy is admissible and is not hearsay."). Therefore, we find that Appellant has not shown that error, plain or otherwise, occurred. Proposition Two should be denied.

In Proposition Three, Appellant contends that the trial court erred when it instructed the jury to determine whether Taylor and Brown were accomplices. He asserts that the trial court should have instructed the jury that Taylor and Brown were accomplices as a matter of law.³

Appellant concedes that he waived appellate review of this claim when he did not object to the instruction at trial. *Daniels v. State*, 2016 OK CR 2, ¶ 3, 369 P.3d 381, 383. Therefore, we review Appellant's claim pursuant to the test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, and determine whether Appellant has shown an actual error, which is plain or obvious, and which affects his substantial rights. *Id.*

³ Appellant's challenge goes to both his conviction for Conspiracy and his conviction for First Degree Felony murder. (Brf, at 28-29). *Pink v. State*, 2004 OK CR 37, ¶ 32, 104 P.3d 584, 596.

As discussed in Proposition Two, Taylor, Brown and Appellant were co-conspirators. As such, it was not necessary for the trial court to instruct the jury concerning corroboration of their testimony. *Pink v. State*, 2004 OK CR 37, ¶¶ 29, 32, 104 P.3d 584, 594, 595-96 (“Oklahoma law does not require that coconspirator testimony be evaluated according to the independent corroboration requirement that applies to accomplice testimony.”). We further note that a trial court’s failure to instruct the jury that a witness was an accomplice as a matter of law does not constitute plain error when the jury was instructed to determine whether or not the witness was an accomplice whose testimony could not support conviction unless corroborated by other evidence. *Moss v. State*, 1994 OK CR 80, ¶ 46, 888 P.2d 509, 520. Therefore, we find that Appellant has not shown that error, plain or otherwise, occurred. Proposition Three is denied.

In Proposition Four, Appellant contends that the trial court admitted improper victim impact testimony at sentencing. He argues that the victim’s fiancée was not authorized under 21 O.S.Supp.2014, § 142A-8 to give a victim impact statement. He further argues that the fiancée’s mother was not authorized to serve as a family representative and impermissibly added to the statement when she read it at the hearing.

Appellant concedes that he waived appellate review of this claim when he did not object to the statement at sentencing. *Murphy v. State*, 2002 OK CR 24, ¶ 42, 47 P.3d 876, 885. Therefore, we review Appellant’s claim pursuant to the test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, and determine whether Appellant has shown an actual error, which is plain or obvious, and

which affects his substantial rights. *Tollett*, 2016 OK CR 15, ¶ 4, 387 P.3d at 916. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*; *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

Although the challenged evidence was improper, we find that Appellant has not shown that error, plain or otherwise, occurred. Appellant has not clearly established that the trial court relied upon this evidence in reaching its sentencing determination, thus, we find that he has failed to overcome the presumption that the trial court acting as trier of fact only considers competent and admissible evidence in reaching its decision. *Magnan v. State*, 2009 OK CR 16, ¶ 51, 207 P.3d 397, 412; *Long v. State*, 2003 OK CR 14, ¶ 4, 74 P.3d 105, 107.

Even if we were to determine that error occurred, Appellant has not shown that the alleged error seriously affected the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. Appellant did not put forth any positive basis at sentencing to overcome the presumption of consecutive sentences. *Beck v. State*, 1970 OK CR 207, ¶¶ 7-9, 478 P.2d 1011, 1012 (when a judgment and sentence is imposed in one or more cases on the same date for separate offenses and the judgment does not specify that sentences shall run concurrently, sentences must be served consecutively); *Riley v. State*, 1997 OK CR 51, ¶ 21, 947 P.2d 530, 535 (unless proven otherwise, we will presume the trial court's decision to run the sentences consecutive is in compliance with the law). As the trial judge simply followed the jury's

recommendation as to punishment and ordered the sentences to run pursuant to the operation of law, we find that the alleged error was harmless. 21 O.S.2011, § 61.1; 22 O.S.2011, § 976. Proposition Four is denied.

In Proposition Five, Appellant challenges the effectiveness of defense counsel. He asserts that trial counsel was ineffective for failing to raise the challenges set forth in Propositions One through Four at the time of trial. We determined that Appellant had not shown plain error in those propositions. As such, we find that he has not shown ineffective assistance of counsel under the two-part test mandated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *Andrew v. State*, 2007 OK CR 23, ¶¶ 99-100, 164 P.3d 176, 198; *Glossip v. State*, 2007 OK CR 12, ¶¶ 110-12, 157 P.3d 143, 161. Proposition Five is denied.

As to Proposition Six, we find Appellant was not denied a fair trial by cumulative error. *Ashinsky v. State*, 1989 OK CR 59, ¶ 31, 780 P.2d 201, 209 (“[A]n accumulation of error argument will be rejected where all of the alleged errors are meritless.”); *Bechtel v. State*, 1987 OK CR 126, ¶ 12, 738 P.2d 559, 561. Proposition Six is denied.

DECISION

The Judgment and Sentence of the District Court is hereby **AFFIRMED**. Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2017), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF POTTAWATOMIE COUNTY
THE HONORABLE JOHN CANAVAN, JR., DISTRICT JUDGE

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JOHNSON, J.: Concur
SMITH, J.: Concur
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