IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TONY PRECILIAND OVERTON, *Appellant,* v. THE STATE OF OKLAHOMA, *Appellee.*	)	**NOT FOR PUBLICATION** Case No. F-2015-1107

SUMMARY OPINION

LEWIS, VICE-PRESIDING JUDGE:

Appellant, Tony Preciliand Overton, was tried by jury and found guilty of Count 1, first degree murder, in violation of 21 O.S.2011, § 701.7; Count 3, first degree burglary, after former conviction of two (2) or more felonies, in violation of 21 O.S.2011, § 1431; and Count 5, robbery with a dangerous weapon, after former conviction of two (2) or more felonies, in violation of 21 O.S.2011, § 801, in the District Court of Oklahoma County, Case No. CF-2013-1097. The jury sentenced Appellant to life imprisonment in Count 1, and twenty (20) years imprisonment each in Counts 3 and 5.[1] The Honorable Don Deason, District Judge, pronounced judgment and ordered the sentences served consecutively. Mr. Overton appeals, raising the following propositions of error:

[1]Appellant must serve 85% of the sentences in each count before being eligible for consideration for parole or earned credits. 21 O.S.2011, § 13.1(1).

1. The trial court's refusal to remove prospective juror Munson for cause, denied Appellant a fair trial and due process of law;
2. The State exercised peremptory challenges based on race, violating *Batson v. Kentucky* and constitutional guarantees of equal protection;
3. The admission of testimonial hearsay regarding the DNA forensic analysis violated Mr. Overton's confrontation and fair trial rights under the federal and state constitutions;
4. The admission of testimony that exceeded the scope of permissible opinion testimony violated Appellant's due process under the under the federal and state constitutions;
5. The erroneous admission of misleading, irrelevant and highly prejudicial evidence violated Mr. Overton's state and federal constitutional rights to due process and a fair trial;
6. Prosecutorial misconduct denied Mr. Overton's right to due process and right to a fair trial under the federal and Oklahoma constitutions;
7. Mr. Overton was denied effective assistance of counsel in violation of his federal and state constitutional rights.

Proposition One challenges the trial court's denial of a defense challenge for cause to remove a prospective juror. Appellant preserved this error by removing the juror with a peremptory strike, requesting an additional peremptory when his challenges were exhausted, and identifying a juror unacceptable to him that he would have removed. *Eizember v. State*, 2007 OK CR 29, ¶ 36, 164 P.3d 208, 220. We review this ruling for abuse of discretion, which is shown by a clearly erroneous conclusion, contrary to the logic and effect of the facts presented. *Warner v. State*, 2001 OK CR 11, ¶ 6, 29 P.3d 569, 572; *C.L.F. v. State*, 1999 OK CR 12, ¶ 5, 989 P.2d 945, 946. Reasonable doubts of a prospective juror's impartiality must be resolved in favor of the accused, in both the trial court and on appellate review. *Hawkins v. State*, 1986 OK CR 58, ¶ 5, 717 P.2d 1156, 1158. From the identified

juror's responses, we conclude that the trial court abused its discretion and should have disqualified the juror for actual bias. 22 O.S.2011, § 659(2). However, Appellant has not shown that this error forced him, over objection, to keep an unacceptable juror, and thus he suffered no prejudice from this error. *Rojem v. State*, 2006 OK CR 7, ¶ 38, 130 P.3d 287, 296; *Hawkins*, 1986 OK CR 58, ¶ 6, 717 P.2d 1156, 1158. Proposition One is denied.

Proposition Two argues that the prosecutor used peremptory strikes to remove prospective jurors based on their race, in violation of the Equal Protection Clause of the Fourteenth Amendment. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Appellant also argues that the trial court's failure to require a race-neutral reason for one of the struck jurors was reversible error. We review the trial court's denial of a timely *Batson* challenge to determine whether the ultimate finding of non-discrimination in the prosecution's peremptory strike is clearly erroneous, taking the record in the light most favorable to the trial court's conclusion. *Black v. State*, 2001 OK CR 5, ¶ 31, 21 P.3d 1047, 1061. Appellant waived any error in the State's apparently inadvertent omission to state a race-neutral reason for one of the struck jurors at the time of Appellant's *Batson* challenge. *Black v. State*, 1994 OK CR 4, ¶ ¶ 17-18, 871 P.2d 35, 41. We review this complaint only for plain error, requiring that Appellant show a plain or obvious error that affected the outcome of the trial. We will remedy plain error only when it seriously affects "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.

Finding no clear factual or legal error in the trial court's conclusion that the prosecution's reasons were race-neutral and its strikes were not based on intentional racial discrimination, the denial of Appellant's *Batson* challenges must be affirmed. *Hernandez v. New York*, 500 U.S. 352, 369-70, 111 S. Ct. 1859, 1871, 114 L. Ed. 2d 395 (1991). Appellant has not demonstrated that the prosecution plainly or obviously used peremptory strikes to remove one or more jurors on the basis of race, or that the apparently inadvertent error in the State's failure to provide a race-neutral reason for the strike of a single minority juror affected the outcome of the proceeding. No relief is required. Proposition Two is denied.

Proposition Three argues that the admission of a police detective's hearsay testimony about DNA profile comparisons contained in two reports[2] prepared by a non-testifying criminalist violated the Confrontation Clause of the Sixth Amendment, as recently interpreted in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354,, 158 L.Ed.2d 177 (2004) and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). The State concedes this testimony and evidence was plainly admitted in error, and we agree. *Miller v. State*, 2013 OK CR 11, ¶ ¶ 94-105, 313 P.3d 934, 967-71 (testimony of substitute forensic pathologist who related findings of another pathologist who conducted autopsy violated right to confrontation); *Marshall v. State*, 2010 OK CR 8, ¶ ¶ 20-31, 232 P.3d 467, 473-76 (testimony of substitute criminalist who related DNA findings of

[2] Appellant tendered a motion to supplement the record with copies of the DNA reports pursuant to Rule 3.11(A), 22 O.S.Supp.2015, Ch. 18, App., which allows the Court to direct a supplementation of the record when necessary to determine an issue. The motion is hereby **GRANTED** and the Clerk is directed to file the motion and supplement the original record with these reports.

another criminalist violated right to confrontation). We must therefore determine from the other evidence presented at trial whether the error in admitting this evidence was harmless beyond a reasonable doubt. *Id.*, 2010 OK CR 8, ¶ 31, 232 P.3d at 476. From Appellant's admissions and trial testimony, evidence of Appellant's fingerprints on a broken cell phone at the crime scene as described by a witness, testimony identifying Appellant as one of the two perpetrators, and other direct and circumstantial evidence, we conclude that the constitutional error here was harmless beyond a reasonable doubt, and requires no relief. Proposition Three is denied.

Proposition Four argues that the improper police testimony on DNA and opinion testimony on the credibility of a surviving eyewitness to the crime violated the Evidence Code and denied Appellant a fair trial. Absent a timely objection, our review in both instances is limited to plain error, as defined above. The State concedes that its detective witness was not qualified to testify about the methodology and results of DNA comparisons. Such testimony plainly violated the Evidence Code, *see* 12 O.S.2011, § 2702 (permitting expert and opinion testimony from witness "qualified as an expert . . . by knowledge, skill, experience, training, or education"), but in light of proper evidence independently supporting the verdicts, this statutory error did not seriously affect the fairness, integrity, or public reputation of the trial. The remainder of the challenged testimony briefly described a responding officer's encounter with, and first impressions of, the surviving witness. This was not plainly admitted in error and could not have significantly affected the outcome at trial. Proposition Four requires no relief.

In Proposition Five, Appellant again argues that the admission of certain evidence and testimony was reversible error. Absent a timely objection, our review is limited to plain error. We have already concluded that the erroneously admitted DNA evidence was harmless. The relevance of the remaining challenged evidence was not substantially outweighed by unfair prejudice or other countervailing factors, and Appellant has shown no plain or obvious error in admitting it at trial. 12 O.S.2011, § 2401-2403. Proposition Five is denied.

In Proposition Six, Appellant claims that prosecutorial misconduct violated his right to a fair trial and due process. Few of the challenged instances drew any objection at trial, waiving all but plain error. Relief will be granted for prosecutorial misconduct only where it effectively deprives the defendant of a fair proceeding. *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 96, 241 P.3d 214, 243. We evaluate the prosecutor's actions within the context of the trial, considering the strength of the evidence and corresponding arguments and tactics of defense counsel. *Hanson v. State*, 2009 OK CR 13, ¶ 18, 206 P.3d 1020, 1028. Counsel may "discuss fully from their standpoint the evidence and the inferences and deductions arising from it" without fear of reversal or sanction. *Frederick v. State*, 2001 OK CR 34, ¶ 150, 37 P.3d 908, 946. After reviewing all of the instances of alleged misconduct, the Court concludes that prosecutorial misconduct did not deny the Appellant a fair and impartial trial. Proposition Six is without merit.

In Proposition Seven, Appellant argues he was denied the effective assistance of counsel by counsel's unreasonable failure to object to the DNA and other testimony improperly admitted at trial, as well as the prosecutorial misconduct

alleged in Proposition Six. Reviewing this claim according to the two-pronged deficient performance and prejudice standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), we find no relief is warranted.

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. (2017), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
HONORABLE DON DEASON, DISTRICT JUDGE

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OPINION BY LEWIS, V.P.J.
LUMPKIN, P.J.: Concurs in Part/Dissents in Part
JOHNSON, J.: Concurs
SMITH, J.: Dissents
HUDSON, J: Dissents

LUMPKIN, PRESIDING JUDGE: CONCURRING IN PART/DISSENTING IN PART

I agree that Appellant's convictions and sentences should be affirmed, however, I must dissent to the manner in which the Court arrives at this decision.

As to Proposition One, I write to clarify what constitutes an "unacceptable juror" for the purposes of determining prejudice from the improper denial of a challenge for cause. *Engles v. State*, 2015 OK CR 17, ¶ 10, 366 P.3d 311, 314 ("This Court will reverse a conviction based on a denial of a challenge for cause only where the erroneous ruling reduced the appellant's peremptory challenges and he was forced, over objection, to keep an unacceptable juror."). An "unacceptable" or "objectionable" juror is one who actually sat and decided the appellant's fate and was challengeable for cause. *Frederick v. State*, 2001 OK CR 34, ¶¶ 54-56, 37 P.3d 908, 927 (*citing Ross v. Oklahoma*, 487 U.S. at 84, 86, 108 S.Ct. at 2276, 2277, 101 L.Ed.2d at 87, 88 (1988); *Matthews v. State*, 2002 OK CR 16, ¶¶ 16-17, 45 P.3d 907, 915 (holding juror who did not participate in deliberations did not constitute unacceptable juror).

The term "unacceptable" means a juror who cannot be fair and impartial. *Hanson v. State*, 2003 OK CR 12, ¶ 2, 72 P.3d 40, 56 (Lumpkin, J., concurring in results). This includes jurors who are biased. *Warner v. State*, 2001 OK CR 11, ¶ 10, 29 P.3d 569, 574. It is not sufficient if a juror is merely shown to be undesirable. *Rojem v. State*, 2006 OK CR 7, ¶ 37 n. 10, 130 P.3d 287, 295 n.

10. Instead, the appellant must point to a juror whose presence on the jury prevented him from having a fair trial. *Jones v. State*, 2009 OK CR 1, ¶ 34, 201 P.3d 869, 880; *see also Engles*, 2015 OK CR 17, ¶ 12, 366 P.3d 311, 315 (holding Appellant failed to show prejudice from counsel's omission to specify unacceptable jurors "because the jurors who served were fair and impartial.").

In the present case, Appellant has not shown that the specified juror was "unacceptable," *i.e.*, prevented him from having a fair trial. Since the jurors who served were fair and impartial, I agree that Appellant suffered no prejudice.

Turning to Propositions Three, Four, and Five, it is without question that Appellant has shown that the police detective's testimony regarding the DNA evidence constituted error. *Marshall v. State*, 2010 OK CR 8, ¶¶ 26-31, 232 P.3d 467, 474-76 (*citing Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309-11, 129 S. Ct. 2527, 2531-32, 174 L. Ed. 2d 314 (2009)). The detective's testimony violated the Confrontation Clause and substantially misled the jury concerning DNA analysis and identification. *Id.* However, the real issue in this case is whether those errors require relief.

This Court has long recognized that violations of the Confrontation Clause are subject to harmless error analysis. *Id.*, 2010 OK CR 8, ¶ 31, 232 P.3d at 476; *Bartell v. State*, 1994 OK CR 59, ¶¶ 21-23, 881 P.2d 92, 99-100. When the Confrontation Clause violation involves the improper admission of evidence, this Court must determine, in the context of the other evidence presented, whether the error in admitting the testimony was harmless beyond

a reasonable doubt. *Id.*; *Bartell*, 1994 OK CR 59, ¶ 21, 881 P.2d at 99 (holding the Court examines remaining evidence to determine whether use of improperly admitted evidence was harmless beyond a reasonable doubt). This is consistent with the test that the United States Supreme Court set forth in *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed. 2d 302 (1991). *Bartell*, 1994 OK CR 59, ¶ 21, 881 P.2d at 99. The appellate court, as it does with the admission of other forms of improperly admitted evidence, simply reviews the remainder of the evidence against the defendant to determine whether the admission of the evidence was harmless beyond a reasonable doubt. *Fulminate*, 499 U.S. at 310, 111 S.Ct. at 1265.

Applying this standard to the present case, I agree that the trial court's erroneous admission of the detective's testimony was harmless beyond a reasonable doubt. The great weight of the evidence at trial tended to identify Appellant as the robber who broke the female victim's cellphone during the deadly beating of the male victim.

The fingerprint evidence in the present case had a much more dramatic effect than the DNA evidence. Law enforcement officials discovered Appellant's fingerprints on the female victim's cellphone. (Tr. II, 42, 117-18, 124, 165-70). Based upon the discovery of this evidence, the police detective interviewed Appellant concerning the offenses.

The State introduced a copy of the video of this interview at trial. Appellant denied any knowledge concerning the offenses, however, he repeatedly went to great lengths to distance himself from the circumstances

prior to being told of the actual events. A witness down the street from the victim's home recounted that the two men had fled on bicycles. (Tr. III, 6-8). Without any discussion of this fact, Appellant denied the ability to ride a bicycle. Despite the fact that the detective had not disclosed the location of the incident, Appellant denied being anywhere near the victim's home on Southwest 19th Street. He stated that, with the exception of one instance a month prior to the interview, he had not been south of the Oklahoma River since 1989. (State's Ex. No. 47).

When the detective confronted Appellant with the fact that his fingerprints were discovered on the cellphone, Appellant speculated: "Maybe I knew the girl before. Maybe she went down to Mulligan Flats and I used her phone." Since the detective had never mentioned that a female was involved in the offenses, Appellant's statement operated as a significant admission. The detective pointed out this fact and Appellant's concern with this circumstance became readily apparent. Appellant, then, proceeded to claim that despite his admitted homelessness, he had been selling a couple of ounces of weed a week but only to females. He repeatedly denied knowing the woman involved. The interview concluded with Appellant's sullen declarations that he was going to prison and his admission that: "I've never been honest." (State's Ex. No. 47; Tr. III, 128).

The female victim confidently identified Appellant as the white, older robber, at trial. (Tr. II, 34). While other evidence possibly called this identification into question, Appellant readily matched the initial descriptions

which the female victim and her son had given to the officers. (Tr. II, 34, 63-64; Tr. III, 19-20, 42).

During his initial interview, Appellant disclosed that he had been staying in a tent behind the home of a woman named, Kayla Johnson. When the officers went to that location to search for Appellant's cellphone, they discovered that, Tony Garner, a male staying in Johnson's home, matched the description of the second robber. (Tr. II, 6-8; Tr. III, 19-20, 59-60). The female victim testified that as the two robbers beat the male victim the older robber exclaimed, "you beat the wrong bitch out of some money." (Tr. II, 43).

Appellant's admission concerning the cellphone came into play, again, during his second interview with the detective. The State also introduced a copy of the video of this interview at trial. When the detective asked Appellant if he wanted to change anything, Appellant declared: "Yeah, I liked to change my fingerprints being found on that phone." He thereafter tried to explain away his admission in the first interview. Acknowledging receipt of a copy of the police reports, Appellant claimed that he had sold weed to the female victim and referenced her by her first and last name. He recounted that he sold her weed on 10 occasions and exchanged a couple of phone calls during all but one of those instances. He denied being sexually involved with the woman and asserted that they were just friends. When the detective stated that he had checked the first interview and determined that he had not told Appellant that a woman was involved, Appellant stated that he "recognized the phone subliminally." Appellant also asserted that he was in Pauls Valley on the date

of the robbery and had come into contact with the police while visiting his friend's home. (State's Ex. No. 48).

Appellant's claims were inconsistent with the remainder of the evidence but consistent with his assertion of not being an honest individual. The female victim testified that she had not allowed Appellant to use her phone and had never been to the store where Appellant claimed he had sold her weed. (Tr. II, 65-66). The detective obtained both Appellant's and the female victim's cellphone records. He testified that there was not a single call or text message between the two phone numbers. (Tr. III, 79-81). The Pauls Valley Department denied any contact with Appellant on the date in question. (Tr. III, 81-82).

The fingerprints on the subject cellphone tended to be more consistent with the breaking of the phone during the robbery as opposed to Appellant's claim of using the phone to make a phone call. Appellant's hands appeared blackened and filthy during his first interview. (State's Ex. No. 47). Fingerprints were readily observable on part of the cellphone in the photographs which the police took at the crime scene. (State's Ex. No. 31). The criminalist that examined the prints on the phone determined that they were not from the same hand. Instead, the prints matched Appellant's right middle finger and his left index finger. (Tr. II, 42, 117-18, 124, 165-70). The location of the prints on the phone were consistent with the breaking gesture which Appellant made during the second interview. (State's Ex. Nos. 31, 48; Tr. III, 73).

The State also introduced a recording of Appellant's phone call to his brother from the county jail. Contrary to his statement to the detective,

Appellant informed his brother, in vulgar terms, that he had engaged in sex acts with the female victim. (State's Ex. Nos. 48-49; Tr. III, 73-75). Appellant acknowledged this inconsistency at trial. (Tr. III, 130). He conceded that his statement to his brother was not truthful but claimed that he had made the statement out of anger towards the police. (Tr. III, 118-19).

Appellant divulged his four prior felony convictions at trial. (Tr. III, 110). He also admitted that he was friends with Garner and that they both stayed at Johnson's home during the same time frame. (Tr. III, 119). He testified that he had been mistaken and conceded that he had not been in Pauls Valley on the day in question. (Tr. III, 119). On cross-examination, Appellant admitted that the detective had never mentioned that it was a female's cellphone prior to his suggestion that maybe he had used the girl's phone. Appellant could not explain why he had said it was a girl. (Tr. III, 128).

Reviewing the remainder of the evidence against Appellant, the admission of the detective's testimony regarding the DNA evidence was harmless beyond a reasonable doubt. The chain of events unleashed by the officers' discovery of Appellant's fingerprints on the female victim's cellphone thoroughly established Appellant's identity as the older, white robber. Appellant is not entitled to relief.

I also dissent to the majority's use of Rule 3.11(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016) in granting Appellant's motion to supplement the record. Rule 3.11(A), does not allow parties to bolster a trial record with extra-record evidence, documents, or opinions. *Day v. State*,

2013 OK CR 8, ¶ 10, 303 P.3d 291, 297. Instead, Rule 3.11(A) allows this Court to supplement the record on appeal with items admitted during proceedings in the trial court but not included in the record on appeal. *McElmurry v. State*, 2002 OK CR 40, ¶ 167, 60 P.3d 4, 36 (holding Rule 3.11(B) strictly limits supplementation under Rule 3.11(A) to matters which were presented to the trial court).

In contrast, Rule 3.11(B) allows review of evidence concerning "allegations arising from the record or outside the record or a combination of both" as set out in *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905–906. We review the affidavits or attachments solely for the purpose of determining whether an evidentiary hearing is warranted. *Warner v. State*, 2006 OK CR 40, ¶ 14 n.3, 144 P.3d 838, 858 n. 3. If such a hearing is required, then the parties may supplement the record at the evidentiary hearing. *Id.*, (finding it improper to determine appeal based upon *ex parte* affidavits); *Dewberry v. State*, 1998 OK CR 10, ¶ 9, 954 P.2d 774, 776 ("It is the record from this evidentiary hearing which will be that which supplements the trial court record on appeal."); *Anderson v. State*, 1986 OK CR 57, ¶ 7, 719 P.2d 1282, 1284. (finding affidavits submitted to this Court with appellant's request for evidentiary hearing remain outside the record).

As Appellant has not alleged ineffective assistance pursuant to Rule 3.11(B) but seeks to bolster the record with non-record evidence under Rule 3.11(A), his request is improper. I would deny the motion for supplementation.

HUDSON, JUDGE: DISSENT

I respectfully dissent to the majority opinion's decision to affirm Appellant's convictions. Appellant's trial was fraught with error. The most prominent of these are (1) the trial court's failure to remove prospective juror Munson (Proposition I); (2) the admission of DNA evidence through Detective Lanham's testimony in violation of the Confrontation Clause (Proposition III); (3) the admission of improper police "expert" testimony that exceeded the bounds of permissible opinion testimony (Proposition IV); and (4) the prejudicial admission of Detective Lanham's highly misleading misquote of Appellant's statement (Proposition V). While these errors when viewed in isolation may not necessitate relief, I find their combined effect deprived Appellant of a fair trial and thus warrant relief. *See Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 110, 241 P.3d 214, 246 (when there have been prejudicial irregularities during the course of a trial, relief is warranted if the cumulative effect of all the errors denied Appellant a fair trial); *Pavatt v. State*, 2007 OK CR 19, ¶ 85, 159 P.3d 272, 296 (same). While a finding of cumulative error is undoubtedly rare, there comes a point in which no more error can be swept under the harmless error rug. This is such a case. Overton's convictions should be reversed and the matter remanded for new trial.

I am authorized to state that Judge Smith joins in this writing.