IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOEL ROBERT GIEFER,	)	
	)	**NOT FOR PUBLICATION**
Appellant,	)	
vs.	)	**No. F-2016-543**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

SMITH, JUDGE:

Appellant, Joel Robert Giefer, was convicted by a jury in Tulsa County District Court, Case No. CF-2014-6101, of First Degree Murder (21 O.S.Supp.2012, § 701.7(A)). On June 16, 2016, the Honorable Sharon K. Holmes, District Judge, sentenced him to life imprisonment without possibility of parole, in accordance with the jury's recommendation. This appeal followed.

On December 1, 2014, after an argument about the payment of rent, Appellant beat his roommate, Ted Kissel, to death with a wooden baseball bat. A mutual friend, Troy Braswell, testified that several times in the past, Appellant had made comments about killing Kissel. These comments were also heard by Braswell's girlfriend. After the homicide, Appellant text-messaged Braswell, "I did it." Braswell drove to the house Appellant shared with Kissel. Appellant was sitting calmly on the living-room couch. He told Braswell there was "a lot more blood than I thought there would be." He said he planned to dispose of Kissel's body the next morning when the neighbors were away. Braswell left and promptly called police.

At trial, Appellant testified that he attacked Kissel in self-defense. Appellant

claimed that Kissel demanded rent money from him, then tried to stab him with a knife. The trial court instructed the jury on the defense of self-defense, and on the lesser-related offense of First Degree Manslaughter committed in a heat of passion. The jury rejected those options, and found Appellant guilty as charged.

In Proposition I, Appellant claims he was denied a fair trial by references to his refusal to talk to police after his arrest. The prosecutor elicited testimony from a police detective that after Appellant was arrested, taken to the police station, and asked if he would like to explain what happened, Appellant declined to speak without first consulting an attorney. The prosecutor revisited this testimony briefly in closing argument. Defense counsel not only failed to object to these comments, he asked about them himself during Appellant's testimony.

The Fifth Amendment to the United States Constitution guarantees that a criminal suspect cannot be compelled to give evidence against himself. When police seek to question a suspect in custody, they are generally required to inform him of his right to silence and to consult with counsel before speaking – the well-known *Miranda* warning. *See Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The constitutional right to remain silent has little practical meaning, however, if the State can point to a defendant's post-*Miranda* silence as evidence of his guilt, or to impeach his own testimony. Thus, direct references to a defendant's silence after *Miranda* warnings for those purposes violate the promise of the Fifth Amendment. *Griffin v. California*, 380 U.S. 609, 611-12, 85 S.Ct. 1229, 1231-32, 14 L.Ed.2d 106 (1965); *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S.Ct. 2240, 2245, 49 L.Ed.2d 91 (1976); *Kreijanovsky v. State*, 1985 OK CR 120, ¶ 6, 706 P.2d 541, 543-

44. *See also Parks v. State*, 1988 OK CR 275, ¶ 11, 765 P.2d 790, 793 ("The *Miranda* warnings imply that the exercise of the right to remain silent will carry no penalty"). Because such comments involve a constitutional right, we review them under the standard announced in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Except for the rare "structural" error (such as a biased judge, or the denial of counsel) which requires reversal without any showing of prejudice, constitutional errors warrant relief unless the reviewing court can "declare a belief that [the error] was harmless beyond a reasonable doubt."[1] *Id.* at 24, 87 S.Ct. at 828; *see also Bartell v. State*, 1994 OK CR 59, ¶¶ 12-19, 881 P.2d 92, 96-99.

We find the evidence of Appellant's guilt to be overwhelming. First, the fact that Appellant beat Kissel to death with a baseball bat was never disputed. Appellant's claim that he acted in self-defense was undermined by his statements before the homicide, his statements and actions after the homicide, and the physical evidence itself. According to more than one witness, Appellant had made several comments in the preceding days about wanting to harm or kill Kissel, including a specific reference to beating him in the head with a "Louisville Slugger." Immediately after the homicide, Appellant texted his friend Braswell, "I did it." Far from evincing shock, surprise, or remorse at what he had done, or offering any rational explanation, this comment suggests the successful completion of a planned task. Appellant's subsequent statements to Braswell – his surprise at the amount

[1] Not only did the prosecutor in *Chapman* make numerous references to the defendants' silence "with machine-gun repetition" and "from beginning to end" in closing argument, but the trial court specifically instructed the jurors that they could draw adverse inferences about the defendants' guilt from that silence. *Chapman*, 386 U.S. at 19, 26, 87 S.Ct. at 825, 829.

of blood, his plan to dispose of Kissel's body – are equally chilling. Rather than call the police to report a justifiable homicide, Appellant tried to clean the crime scene. When police came to check on Kissel's welfare, Appellant lied to them, pretending that Kissel was away. While Appellant claimed at trial that Kissel was the initial aggressor, he admitted continuing to beat Kissel after he was down and defenseless. As for the knife Kissel allegedly used to start the altercation, it was found in Appellant's possession, not Kissel's; and while the crime scene (including Kissel's own hands) were covered in blood, the knife was clean. Also, Appellant's account was somewhat at odds with spontaneous exclamations that he made to police at the scene.[2] Considering the totality of the evidence, we are confident, beyond any reasonable doubt, that references to Appellant's post-*Miranda* silence did not contribute to the verdict. *Kreijanovsky*, 1985 OK CR 120, ¶ 8, 706 P.2d at 544; *Martin v. State*, 1983 OK CR 168, ¶ 16, 674 P.2d 37, 41. Proposition I is therefore denied.

In Proposition II, Appellant claims he was prejudiced by the manner in which the jury was instructed on the lesser-related offense of First Degree Manslaughter. Initially, the trial court rejected Appellant's requested instructions on Second Degree (Depraved Mind) Murder and First Degree (Heat of Passion) Manslaughter. However, during the reading of the final instructions, the court paused, took a brief recess, conferred with counsel, and decided to instruct the jury on First Degree Manslaughter as a lesser option after all. Appellant appears to claim that the

[2] While Appellant essentially claimed at trial that he was defending himself from Kissel's assaults with a knife, when police first placed him under arrest Appellant exclaimed, "He hit me first. He made me do it." Appellant made no mention of a knife at that time.

court's explanation to the jury for this pause in the proceedings, coupled with a few other comments made during the trial, evince some sort of judicial bias against the viability of lesser alternatives to the charge, and that the sentiment was telegraphed to the jurors.

We disagree. The court's explanation for the pause in proceedings does not support any such inference. To the contrary, jurors could reasonably infer that the court, after further thought, decided that a lesser-offense option *was* warranted – else the court would not have added it.[3] The court's comments during *voir dire* were simply benign.[4] We find no evidence of judicial bias here. *Stouffer v. State*, 2006 OK CR 46, ¶ 10, 147 P.3d 245, 256. Proposition II is denied.

In Proposition III, Appellant claims he was prejudiced by suggestions that he had committed crimes not charged – specifically, theft and marijuana use. *See generally* 12 O.S.2011, § 2404(B) (evidence that a person committed crimes, other than the one for which he is being tried, is not admissible to show he is a bad person who deserves punishment, although it may be admissible for other reasons). He bases this claim on testimony that marijuana was found in the home he shared with Kissel, and testimony that Kissel suspected one of Appellant's associates of taking money and perhaps other property from Kissel's bedroom. Appellant did not

---

[3] When resuming the reading of the instructions, the court told the jury:

> The Court and the attorneys took a brief recess and I need to give the jurors an explanation. The Court, after hearing further argument of the attorneys, felt that the interest of justice required me to include some other instructions that we hadn't previously included, so that's what the delay was.

[4] During jury selection, defense counsel began discussing lesser alternatives to First Degree Murder. The court interrupted him, saying that any lesser-offense option would be given to the jury at the close of the case "if the evidence warrants it." Later, when a prospective juror asked about lesser-offense options, the court simply said, "We're not there yet."

object to these comments below, so we review them only for "plain error," which requires Appellant to show an actual deviation from a legal rule, which is plain and obvious, and which affected the outcome of the trial. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

Marijuana was found at the home Appellant shared with Kissel; but in his own testimony, Appellant said that when he came home on the evening of the homicide, Kissel was smoking marijuana, which explained its presence. Although Appellant's friend, Braswell, testified that he, Kissel, and Appellant had been known to smoke marijuana on occasion, it was actually defense counsel who elicited that information, in the context of showing that on the day of the homicide, Appellant declined Braswell's invitation to smoke. The suggestion that someone may have been stealing from Kissel or rummaging through his room did not directly implicate Appellant, and was so vague that we fail to see any prejudice in it.[5] Simply put, the prosecutor did not attempt to use insinuations of other criminal activity to justify a verdict of guilt. We can confidently conclude that Appellant was not unfairly prejudiced by this evidence. *Neloms v. State*, 2012 OK CR 7, ¶ 18, 274 P.3d 161, 165. Proposition III is denied.

In Proposition IV, Appellant claims the evidence presented at trial was insufficient to support a conclusion that he killed Kissel with malice aforethought. Appellant's jury was instructed on the law of self-defense, and on the lesser-related offense of First Degree Manslaughter committed in a heat of passion. Given

[5] A neighbor testified that Kissel had expressed concern about "other people coming over ... and taking stuff, money, different stuff," and that Kissel asked the neighbor to watch for any strange activity at the house he shared with Appellant.

Appellant's statements before the homicide, his statements and actions after the homicide, his attempts to hide and destroy evidence, and reasonable inferences from the crime scene (all of which are discussed in Proposition I), a rational juror could easily conclude that Appellant killed unjustifiably and with premeditation. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 2787, 61 L.Ed.2d 560 (1979); *Marquez-Burrola v. State*, 2007 OK CR 14, ¶ 23, 157 P.3d 749, 758; *Easlick v. State*, 2004 OK CR 21, ¶ 5, 90 P.3d 556, 557-58. Proposition IV is denied.

In Proposition V, Appellant claims his trial counsel was ineffective for (1) failing to object to comments on his post-*Miranda* silence, and to suggestions of other crimes; and (2) failing to have Appellant examined for mental-health issues which might have supported a defense to the charge. To prevail on an ineffective-counsel claim, Appellant must show (1) that counsel made professionally unreasonable decisions, and (2) that those decisions prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Tate v. State*, 2013 OK CR 18, ¶ 38, 313 P.3d 274, 284. Failure to meet both requirements is fatal to an ineffective-counsel claim. *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206.

As to the first claim, we considered the related substantive errors in Propositions I and III. The prosecutor's references to Appellant's post-*Miranda* silence were error; they, and defense counsel's failure to object, are equally inexplicable. Nevertheless, given the strength of the evidence, we found these errors harmless beyond a reasonable doubt. Similarly, we concluded that brief references to marijuana use, and to possible wrongdoing by some unknown associate of

Appellant's, were not unfairly prejudicial. Absent a reasonable probability of prejudice, we will not grant relief on a claim that trial counsel performed deficiently. *Malone, id.* These claims are therefore denied.

The argument that counsel should have investigated Appellant's mental health is predicated on the fact that Appellant was unemployed and depressed over the breakup of his marriage, made shocking statements about harming his roommate before he actually killed him, and claimed at trial to have been diagnosed with bipolar disorder. No other substantive evidence was presented below that Appellant was legally insane – unable to distinguish right from wrong[6] – or that he was otherwise burdened with any mental problems relevant to a cognizable defense to First Degree Murder. On appeal, Appellant complains that such evidence should have been presented, but he fails to show that such evidence exists, much less that trial counsel failed to investigate the matter sufficiently. We cannot find trial counsel deficient on pure speculation.[7] *Cole v. State*, 2007 OK CR 27, ¶ 8, 164 P.3d 1089, 1093. Appellant fails to show either that counsel performed deficiently, or a reasonable probability that any deficient performance resulted in prejudice. Proposition V is denied.

Finally, in Proposition VI, Appellant claims the cumulative effect of all errors identified above warrants reversal. The only error established by the record is the prosecutor's reference to Appellant's post-*Miranda* silence, and we found that error

---

[6] *See* 21 O.S.2011, § 154.

[7] Appellant also claims that "a declaration of the defense of duress" would have affected the jurors' perspective of events. We believe this to be a typographical error, as we are unable to see the relevance of a duress defense in these circumstances.

harmless beyond a reasonable doubt. Proposition VI is denied. *Hope v. State*, 1987 OK CR 24, ¶ 12, 732 P.2d 905, 908.

DECISION

The Judgment and Sentence of the District Court of Tulsa County 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 the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE SHARON K. HOLMES, DISTRICT JUDGE

ATTORNEYS AT TRIAL

HEATH HARRIS
PACIFIC PALACE
1910 PACIFIC AVE., STE. 15100
DALLAS, TX 75201
COUNSEL FOR DEFENDANT

JOHN DAVID LUTON
FIRST ASST. DISTRICT ATTORNEY
ALISA HOPKINS
ASSISTANT DISTRICT ATTORNEY
500 SOUTH DENVER
TULSA, OK 74103
COUNSEL FOR THE STATE

ATTORNEYS ON APPEAL

LISBETH L. MCCARTY
INDIGENT DEFENSE SYSTEM
P.O. BOX 926
NORMAN, OK 73070
COUNSEL FOR APPELLANT

MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA
JAY SCHNIEDERJAN
ASSISTANT ATTORNEY GENERAL
313 NE 21ST STREET
OKLAHOMA CITY, OK 73105
COUNSEL FOR APPELLEE

OPINION BY: SMITH, J.
LUMPKIN, P.J.: CONCUR IN RESULTS
LEWIS, V.P.J.: CONCUR
JOHNSON, J.: NOT PARTICIPATING
HUDSON, J.: CONCUR

LUMPKIN, PRESIDING JUDGE: CONCURRING IN RESULT

I concur in the results reached but cannot agree with the merits review afforded to Propositions One and Two. As Appellant failed to raise an objection before the trial court, he waived appellate review of the challenges that he now raises on appeal for all but plain error. *Daniels v. State*, 2016 OK CR 2, ¶ 3, 369 P.3d 381, 383. This Court reviews such claims pursuant to the test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, and determines 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 v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. 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.* I do not see any error in the present case much less an error rising to the level of plain error under *Simpson* and *Hogan*.