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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ISAIAH JAMIL WALKER,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**No. F-2015-937**
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
DEC - 7 2017

SUMMARY OPINION

HUDSON, JUDGE:

Appellant, Isaiah Jamil Walker, was tried by a jury and convicted in Cleveland County District Court, Case No. CF-2014-584, for Count 1: First Degree Felony Murder, in violation of 21 O.S.Supp.2012, § 701.7(B); Count 2: Robbery After Former Conviction of Two or More Felonies, in violation of 21 O.S.2011, § 801; Count 3: Burglary in the First Degree After Former Conviction of Two or More Felonies, in violation of 21 O.S.2011, § 1431; and Count 4: Possession of a Firearm After Former Felony Conviction, in violation of 21 O.S.Supp.2012, § 1283(A).

The jury recommended the following sentences—Count 1: life imprisonment; Count 2: twenty (20) years imprisonment; Count 3: twenty (20) years imprisonment; and Count 4: three (3) years imprisonment. The Honorable Lori Walkley, District Judge, sentenced Walker in accordance with the jury's verdicts and ordered the terms of confinement for all four counts to

run concurrently with credit for time served.[1] Walker now appeals, raising nine (9) propositions of error before this Court:

I. THE STATE'S EVIDENCE WAS LEGALLY INSUFFICIENT TO PROVE ALL THE ELEMENTS OF FIRST-DEGREE BURGLARY AND, THEREFORE, ALSO INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR FIRST DEGREE FELONY MURDER BASED ON THAT UNDERLYING FELONY. ACCORDINGLY, APPELLANT'S CONVICTIONS AND SENTENCES ON COUNTS I AND III SHOULD BE VACATED AS THEY ARE IN VIOLATION OF HIS DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7 AND 20 OF THE OKLAHOMA CONSTITUTION;

II. THE EVIDENCE WAS INSUFFICIENT TO CORROBORATE THE TESTIMONY OF APPELLANT'S CO-DEFENDANTS IN COUNT I, FELONY MURDER, COUNT II, ROBBERY, AND COUNT III, BURGLARY;

III. CONVICTIONS FOR BOTH FELONY-MURDER AND BURGLARY, FIRST DEGREE, VIOLATE THE DOUBLE JEOPARDY CLAUSE WHERE THE PREDICATE FELONY FOR THE MURDER CONVICTION WAS BURGLARY, FIRST DEGREE, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, § 21 OF THE OKLAHOMA CONSTITUTION;

IV. THE EVIDENCE WAS INSUFFICIENT TO CONVICT APPELLANT OF COUNT II, ROBBERY, FIRST DEGREE;

V. THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY FAILING TO INSTRUCT THE JURY ON THE LESSER OFFENSES OF SECOND-DEGREE DEPRAVED MIND MURDER, FIRST-DEGREE MANSLAUGHTER (MISDE-MEANOR), AND ACCESSORY AFTER THE FACT, IN VIOLATION OF APPELLANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

[1] Under 21 O.S.2011, § 13.1, Walker must serve 85% of the sentences imposed on Counts 1, 2 and 3 before becoming eligible for parole.

AND ARTICLE II, §§ 7 AND 20 OF THE OKLAHOMA CONSTITUTION;

VI. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO INSTRUCT THE JURY ON VOLUNTARY INTOXICATION, IN VIOLATION OF APPELLANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7 AND 20 OF THE OKLAHOMA CONSTITUTION;

VII. APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7 AND 20 OF THE OKLAHOMA CONSTITUTION;

VIII. ADMISSION OF RUSTY WOOTEN AND MICHAEL TUBBY'S INTERVIEWS WITH DETECTIVE FREUDIGER VIOLATED APPELLANT'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7, 9, AND 20 OF THE OKLAHOMA CONSTITUTION; and

IX. THE CUMULATIVE EFFECT OF ALL THE ERRORS ADDRESSED ABOVE DEPRIVED APPELLANT OF A FAIR TRIAL.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we find that no relief is required under the law and evidence with respect to Appellant's Judgments and Sentences on Counts 1, 2 and 4 which are **AFFIRMED**. The Judgment and Sentence on Count 3, Burglary in the First Degree, however, is **REVERSED** with instructions to **DISMISS**.

I

"We review sufficiency of the evidence claims in the light most favorable to the prosecution to determine whether any rational trier of fact could have

found the essential elements of the crime beyond a reasonable doubt." *Davis v. State*, 2011 OK CR 29, ¶ 74, 268 P.3d 86, 111 (citing *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 2787, 61 L. Ed. 560, 571 (1979) and *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04). This analysis requires examination of the entire record. *McDaniel v. Brown*, 558 U.S. 120, 131, 130 S. Ct. 665, 672, 175 L. Ed. 2d 582 (2010); *Young v. State*, 2000 OK CR 17, ¶ 35, 12 P.3d 20, 35. "This Court will accept all reasonable inferences and credibility choices that tend to support the verdict." *Davis*, 2011 OK CR 29, ¶ 74, 268 P.3d at 111.

Taken in the light most favorable to the State, sufficient evidence was presented at trial to allow any rational trier of fact to find beyond a reasonable doubt the essential elements of Count 1, First Degree Felony Murder, which includes the underlying felony of Burglary in the First Degree as charged in Count 3. Proposition I is denied.

II

The non-accomplice testimony, and admissions by Appellant, served as independent evidence corroborating the accomplice testimony of Gary Harris, Jason Harris and Montie Jones. 22 O.S.2011, § 742. This evidence corroborated each accomplice's testimony as to one material fact by independent evidence tending to connect the accused with the commission of the burglary, robbery and murder in this case. This evidence does more than merely connect Appellant with the other perpetrators or raise a suspicion of guilt. *Postelle v. State*, 2011 OK CR 30, ¶ 13, 267 P.3d 114, 126; *Glossip v.*

State, 2007 OK CR 12, ¶ 40, 157 P.3d 143, 152; *Cullison v. State,* 1988 OK CR 279, ¶ 9, 765 P.2d 1229, 1231; *Pierce v. State,* 1982 OK CR 149, ¶ 6, 651 P.2d 707, 709. Proposition II is denied.

III

The State concedes that Appellant's convictions for both Count 1, First Degree Felony Murder, and Count 3, First Degree Burglary, violate the Double Jeopardy Clause. As discussed above, the underlying felony supporting the Count 1 felony murder charge was first degree burglary alleged in Count 3. Appellant's first degree burglary conviction must therefore be reversed with instructions to dismiss. *Lambert v. State,* 1999 OK CR 17, ¶ 13, 984 P.2d 221, 228; *Perry v. State,* 1993 OK CR 5, ¶ 7, 853 P.2d 198, 200-01. *See Harris v. Oklahoma,* 433 U.S. 682, 682-83, 97 S. Ct. 2912, 2912-13, 53 L. Ed. 2d 1054 (1977). Relief is granted for Proposition III.

IV

Taken in the light most favorable to the State, sufficient evidence was presented at trial to allow any rational trier of fact to find beyond a reasonable doubt that Appellant was guilty of the Count 2 robbery charge. *Davis,* 2011 OK CR 29, ¶ 74, 268 P.3d at 111. Proposition IV is denied.

V

Appellant did not request instruction on any lesser offenses at trial for Count 1. He has therefore waived review of this claim on appeal for all but plain error. *Simpson v. State,* 2010 OK CR 6, ¶ 16, 230 P.3d 888, 897; *McHam v. State,* 2005 OK CR 28, ¶ 21, 126 P.3d 662, 670; *Huntley v. State,* 1988 OK

CR 28, ¶ 5, 750 P.2d 1134, 1135. To be entitled to relief under the plain error doctrine, Appellant must show an actual error, which is plain or obvious, and which affects his substantial rights. *Baird v. State*, 2017 OK CR 16, ¶ 25, 400 P.3d 875, 884; *Ashton v. State*, 2017 OK CR 15, ¶ 34, 400 P.3d 887, 896-97; *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395; 20 O.S.2011, § 3001.1. 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. *Baird*, 2017 OK CR 16, ¶ 25, 400 P.3d at 884; *Ashton*, 2017 OK CR 15, ¶ 34, 400 P.3d at 896-97; *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923 (quoting *Simpson v. State*, 1994 OK CR 40, ¶ 30, 876 P.2d 690, 701).

The determination of which instructions shall be given to the jury is a matter within the discretion of the trial court. There is no abuse of discretion where the instructions as a whole accurately state the applicable law. *Frederick v. State*, 2017 OK CR 12, ¶ 72, 400 P.3d 786, 811. Appellant acknowledges that the trial court offered to instruct on first degree misdemeanor-manslaughter as well as the crime of accessory. He further acknowledges personally rejecting the trial court's offer of instruction on these lesser related offenses.

We have held that where the district court proposes lesser included offense instructions supported by the evidence and the defendant objects, "the defendant shall have the right to affirmatively waive any lesser included offense instruction that the evidence supports and proceed on an 'all or nothing

approach.'" *Spence v. State*, 2008 OK CR 4, ¶ 5, 177 P.3d 582, 583 (quoting *Shrum v. State*, 1999 OK CR 41, ¶ 11, 991 P.2d 1032, 1036-37). That is precisely what happened here. Confronted with the trial court's *sua sponte* offer of instructions on the lesser offenses of first degree misdemeanor-manslaughter and accessory, Appellant affirmatively waived those instructions in the hopes of an outright acquittal. The record shows Appellant was fully aware of the perils of this all-or-nothing approach. Under these circumstances, the trial court was not required to instruct on these lesser offenses and there was no abuse of discretion. *Spence*, 2008 OK CR 4, ¶ 9, 177 P.3d at 584.

Moreover, the defense at trial was that Appellant was innocent of the charged offenses. "When a defendant defends against a criminal charge by proclaiming innocence, he is not entitled to instructions on any lesser included offense. This rule applies whether the defendant presents his defense through his own testimony at trial as well as when the theory of defense is presented through statements of counsel." *Frederick*, 2017 OK CR 12, ¶ 73, 400 P.3d at 811. *See also Harney v. State*, 2011 OK CR 10, ¶ 11, 256 P.3d 1002, 1005; *Gilson v. State*, 2000 OK CR 14, ¶ 119, 8 P.3d 883, 918.

Based upon the foregoing, Appellant was not entitled to instructions on the lesser offenses of second degree depraved mind murder, first degree misdemeanor-manslaughter and accessory. Thus, there was no actual or obvious error and, thus, no plain error. *Baird*, 2017 OK CR 16, ¶ 23, 400 P.23d at 883. Proposition V is denied.

VI

We review a trial court's refusal to instruct on the defense of voluntary intoxication for abuse of discretion. *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 11, 241 P.3d 214, 223. Before a voluntary intoxication instruction is given, the evidence must be sufficient to establish a prima facie case that the defendant was intoxicated to the point he was unable to form the specific criminal intent element of the charged offense. *Cuesta-Rodriguez v. State*, 2011 OK CR 4, ¶ 7, 247 P.3d 1192, 1195 (denying rehearing).

Here, the evidence shows at best Appellant drank alcohol in the hours leading up to the killing. Nonetheless, Appellant provided a detailed, lucid account of the events surrounding the murder. And his behavior and interaction with the police after being arrested does not suggest intoxication of any kind. Under the total circumstances, an instruction on voluntary intoxication was unwarranted. *See Bland v. State*, 2000 OK CR 11, ¶ 51, 4 P.3d 702, 718; *Jackson v. State*, 1998 OK CR 39, ¶¶ 69-70, 964 P.2d 875, 892. Proposition VI is denied.

VII

To prevail on an ineffective assistance of counsel claim, Appellant must show both that counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *See also Harrington v. Richter*, 562 U.S. 86, 104, 131 S. Ct. 770, 787-88, 178 L. Ed. 2d 624 (2011) (discussing *Strickland* two-part standard). Appellant fails to show counsel's performance

was deficient. Appellant's application for an evidentiary hearing is also **DENIED**. The district court's proposed jury instructions, which included the proposed lesser offense instructions on misdemeanor-manslaughter and accessory, were included in the trial record for our review. Further, these proposed instructions were fully discussed on the record. Appellant thus fails to show by clear and convincing evidence a strong possibility that counsel was ineffective for failing to utilize non-record evidence. Rule 3.11(B)(3)(b)(i), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016); *Sanders v. State*, 2015 OK CR 11, ¶ 30, 358 P.3d 280, 287-88; *Simpson*, 2010 OK CR 6, ¶ 53, 230 P.3d at 905-06. Proposition VII is denied.

VIII

Appellant's confrontation challenge to Detective Freudiger's testimony that "none of the statements made by the co-defendants were consistent with Appellant's statements[,]" Aplt. Br. at 47-48, is waived from review on appeal. The passage cited from the record by Appellant in support of this claim does not reveal testimony from Detective Freudiger at all but, instead, a bench conference. Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016); *Logsdon v. State*, 2010 OK CR 7, ¶ 41, 231 P.3d 1156, 1169-70.

Further, Appellant's challenge to Detective Freudiger's testimony "that Jason Harris, Rusty Wooten, and Michael Tubby had said Appellant was the shooter" and that Wooten "mentioned it several times during his interview[,]" Aplt. Br. at 48, also does not warrant relief. Appellant ignores that he elicited

the cited testimony—not the State. Indeed, the cited passages arose during the defense cross-examination of Detective Freudiger. *Washington v. State*, 1999 OK CR 22, ¶ 37, 989 P.2d 960, 973 ("The other statements about which Appellant complains were elicited by him during cross-examination. Even if these statements were inadmissible hearsay, Appellant cannot profit from it for it is his own invited error."). Proposition VIII is denied.

IX

We have rejected in this appeal all of Appellant's claims except for his challenge to the Count 3 burglary conviction. Thus, there is no error to accumulate. *Neloms v. State*, 2012 OK CR 7, ¶ 40, 274 P.3d 161, 171. Proposition IX is denied.

DECISION

The Judgments and Sentences on Counts 1, 2, and 4 are **AFFIRMED**. The Judgment and Sentence on Count 3, Burglary in the First Degree, is **REVERSED** with instructions to **DISMISS**. Appellant's Application for Evidentiary Hearing on Sixth Amendment Claims is **DENIED**. 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 CLEVELAND COUNTY
THE HONORABLE LORI WALKLEY, DISTRICT JUDGE

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LUMPKIN, P.J.: CONCURS
LEWIS, V.P.J.: CONCURS