

confinement for all counts to run consecutively.¹ Stillwagon now appeals, raising five (5) propositions of error before this Court:

- I. THE PROSECUTION FAILED TO PROVIDE SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT COMMITTED THE CRIMES OF INDECENT OR LEWD ACTS TO A CHILD UNDER SIXTEEN YEARS OF AGE AND ATTEMPTED RAPE;
- II. THE TRIAL COURT ERRED WHEN IT DID NOT INSTRUCT THE JURY AS TO THE NECESSITY OF REQUIRING CORROBORATION;
- III. APPELLANT WAS DENIED HIS DUE PROCESS RIGHT TO A FAIR TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7 AND 20 OF THE OKLAHOMA CONSTITUTION DUE TO PROSECUTORIAL MISCONDUCT;
- IV. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7, 9, AND 20 OF THE OKLAHOMA CONSTITUTION; and
- V. 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. Appellant's Judgments and Sentences are therefore **AFFIRMED**.

¹ Under 21 O.S.2011, § 13.1, Stillwagon must serve 85% of the sentences imposed on Counts 3 through 8 before he is eligible for parole.

I.

Appellant contends the testimony of DB1 and DB2 was so “inconsistent and incredible” that it could not support Appellant’s convictions. Appellant further asserts his convictions cannot stand because DB1 and DB2’s testimony was not corroborated. Appellant fails to reference relevant parts of the record to support his claims. Rather, Appellant merely “incorporates all matters set forth in his Statement of the Case and Statement of the Facts.” Pursuant to Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Ch. 18, App. (2016), the brief of an appellant must contain “[a]n argument, containing the contentions of the appellant, which sets forth all assignments of error, supported by citations to the authorities, statutes and **parts of the record.**” (emphasis added). Failure to adhere to these requirements “constitutes waiver of [the] alleged error.” Rule 3.5(A)(5). The manner in which Appellant has structured his brief leaves this Court in the precarious position of developing his argument for him. This we cannot do. As a result, Appellant has waived review of his Proposition I claims. See *McElmurry v. State*, 2002 OK CR 40, ¶ 128, 60 P.3d 4, 30 (defendant’s failure to quote from, or point to, any pages in the transcript resulted in waiver of the issue); *Armstrong v. State*, 1991 OK CR 34, ¶ 24, 811 P.2d 593, 599 (“We will not search the record to find the errors an appellant attempts to raise.”).

Despite Appellant’s waiver of this issue, we nonetheless alternatively find Appellant’s claims fail when reviewed on the merits. Taken in the light most favorable to the State, sufficient evidence was presented at trial to allow any

rational trier of fact to find Appellant guilty of the crimes of Indecent or Lewd Acts with a Child Under the Age of Sixteen and Attempted Rape. See *Davis v. State*, 2011 OK CR 29, ¶ 74, 268 P.3d 86, 111 (providing the standard of review for a sufficiency of the evidence claim). Moreover, contrary to Appellant's assertions, DB1 and DB2's testimony was neither incredible nor inherently improbable and thus corroboration of their testimony was not required. *Jones v. State*, 1988 OK CR 281, 765 P.2d 800, 802 ("A conviction may be sustained upon the uncorroborated testimony of the victim unless such testimony appears incredible or so unsubstantial as to make it unworthy of belief."). Proposition I is denied.

II.

Appellant argues the trial court should have *sua sponte* instructed the jury that **if** they found the victims' testimony "incredible, inconsistent or thoroughly impeached," the jury was required to find corroboration of the alleged victims' testimony before they could convict Appellant. Appellant did not object to the instructions given at trial and did not request such an instruction. Thus, Appellant has waived on appeal all but plain error review of this claim. See *Mitchell v. State*, 2016 OK CR 21, ¶ 24, 387 P.3d 934, 943 (failure to object to instructions given waives all but plain error review).

To be entitled to relief under the plain error doctrine, Appellant must show an actual error, that is plain or obvious, and that affects his substantial rights. *Baird v. State*, 2017 OK CR 16, ¶ 25, 400 P.3d 875, 883; *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; *Ashton*, 2017 OK CR 15, ¶ 34; *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). Appellant fails to show an actual or obvious error.

“Instructions are within the discretion of the trial court.” *Tucker v. State*, 2016 OK CR 29, ¶ 25, 395 P.3d 1, 8. The trial judge should instruct jurors on the applicable law, including the elements of the offense and the law applying to that case’s evidence. *Day v. State*, 2013 OK CR 8, ¶ 14, 303 P.3d 291, 298. In the present case, as discussed in Proposition I above, the testimony of DB1 and DB2 was not incredible or inherently improbable. Consequently, corroboration of their testimony was not required. See *Gilmore v. State*, 1993 OK CR 27, ¶ 11, 855 P.2d 143, 145 (corroboration is only required for admission of a victim’s testimony where the testimony is so unsubstantial and incredible as to be unworthy of belief); *Pierce v. State*, 1990 OK CR 7, ¶ 42, 786 P.2d 1255, 1266 (rape conviction may be had on a victim’s uncorroborated testimony where the victim’s testimony is not inherently improbable or unworthy of belief); *Salyer v. State*, 1988 OK CR 184, ¶ 22, 761 P.2d 890, 895 (“[C]orroboration is required in lewd molestation, sodomy and rape cases only when the victim’s testimony is so incredible or has been so thoroughly impeached that a reviewing court must say that the testimony is clearly

unworthy of belief.”). The trial court’s failure to instruct, *sua sponte*, on corroboration was thus not an abuse of discretion. No actual or obvious error resulted from the omission of this instruction. Proposition II is denied.

III.

We initially find that Appellant failed to properly raise for this Court’s review several of the claimed instances of prosecutorial misconduct. See Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016) (providing that an argument must be “supported by citations to the authorities, statutes and *parts of the record*” (emphasis added)). Appellant’s failure to comply with Rule 3.5(A)(5) constitutes waiver of these alleged errors. Moreover, Appellant failed to timely object to most of the alleged instances of misconduct now cited on appeal. He has thus waived all but plain error review of this claim. *Mathis v. State*, 2012 OK CR 1, ¶ 24, 271 P.3d 67, 76. Despite Appellant’s waiver of these alleged errors—by failing to timely object, failing to comply with Rule 3.5(A)(5), or both—we find these claims when reviewed on the merits fail as they did not render Appellant’s trial fundamentally unfair. *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 96, 241 P.3d 214, 243 (relief is granted for prosecutorial misconduct only where it effectively deprives the defendant of a fair trial or sentencing).

“[W]e evaluate alleged prosecutorial misconduct within the context of the entire trial, considering not only the propriety of the prosecutor’s actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel.” *Hanson v. State*, 2009 OK CR 13, ¶ 18, 206

P.3d 1020, 1028. Appellant fails to show the prosecutor's alleged misconduct, individually or cumulatively, deprived him of a fair trial or sentencing. *Cuesta-Rodriguez*, 2010 OK CR 23, ¶ 96, 241 P.3d at 243; see also *Brewer v. State*, 2006 OK CR 16, ¶ 13, 133 P.3d 892, 895 (reversal is not required unless in light of entire record defendant suffered prejudice). Thus, there is no plain error. Proposition III is denied.

IV.

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's ineffective assistance of counsel claims lack merit as Appellant fails to make the requisite showing under *Strickland*. Relief is denied for Proposition IV.

V.

In his final proposition of error, Appellant alleges cumulative error as a basis for relief on appeal. "A cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by Appellant. Even when there have been procedural irregularities during the course of a trial, relief is warranted only 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 (internal citations omitted). There are no errors, considered individually or

cumulatively, that merit relief in this case. *Jones v. State*, 2009 OK CR 1, 104, 201 P.3d 869, 894; *DeRosa v. State*, 2004 OK CR 19, 100, 89 P.3d 1124, 1157. Accordingly, relief for cumulative error is unwarranted.

DECISION

The judgments and sentences of the District Court are **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
THE HONORABLE CINDY H. TRUONG, DISTRICT JUDGE

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LEWIS, V.P.J.: CONCUR
KUEHN, J.: CONCUR
ROWLAND, J: RECUSE