

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

KIWANE HOBIA,

Appellant,

v.

STATE OF OKLAHOMA

Appellee.

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Case No. F-2016-1039

**FILED**  
**IN COURT OF CRIMINAL APPEALS**  
**STATE OF OKLAHOMA**

FEB 15 2018

**S U M M A R Y O P I N I O N**

**LUMPKIN, PRESIDING JUDGE:**

Appellant Kiwane Hobia was tried by jury for First Degree Felony Murder (Count I) (21 O.S. 2011, § 701.7(B)) and Conspiracy (Count II) (21 O.S.2011, § 421) in the District Court of Pottawatomie County, Case No. CF-2015-395D. Appellant was found guilty of the lesser included offense of Second Degree Felony Murder (21 O.S.2011, § 701.8(2)) in Count I and the jury recommended as punishment thirty (30) years imprisonment. Appellant was found guilty as charged in Count II and the jury recommended as punishment ten (10) years in prison. The trial court sentenced accordingly, ordering the sentences to run consecutively. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of his appeal:

- I. The trial court committed reversible error by refusing to redact Appellant's videotaped confession and allowing the admission of testimony hearsay.
- II. The trial court abused its discretion by admitting improper victim impact testimony at the sentencing hearing, thereby violating Appellant's right to due 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 plain error by failing to instruct the jury that Cody Taylor and Ramie Brown were accomplices as a matter of law in violation of Appellant's Fourteenth Amendment due process rights pursuant to the U.S. Constitution.
- IV. Prosecutorial misconduct deprived Appellant 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 and 20 of the Oklahoma Constitution.
- V. Appellant received ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article II, §§ 7, 9, and 20 of the Oklahoma Constitution.
- VI. The accumulation of errors deprived Appellant of a fair trial, and the due process of law secured to him by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article II, §§ 7, 19 and 20 of the Oklahoma Constitution.

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 under the law and the evidence no relief is warranted.

In Proposition I, Appellant contends the trial court erred in refusing to redact a statement made by co-defendant/co-conspirator Austin Olinger referenced during his (Appellant's) videotaped interview with police. (State's Exhibit 31). Appellant asserts the statement was testimonial hearsay which violated his rights under the Confrontation Clause. Appellant admits the statement would not have affected the guilt determination but argues that it did

impact sentencing claiming the jury relied on Olinger's statement to recommend the thirty year sentence for second degree felony murder. The State concedes the statement was improperly admitted but argues that any error was harmless in light of the other evidence of guilt.

The record shows that during Appellant's interview with police, Detective Wilson repeatedly questioned Appellant with accounts of the crime allegedly provided by co-defendants/co-conspirators Ramie Brown, Cody Taylor, and Austin Olinger. Following a break in the interview, Wilson returned to Appellant and said, "I have one more question. I asked Austin [Olinger] . . . why aren't you worried that that [Olinger's gun] could have been the gun? . . . He [Olinger] doesn't know if you shot him or if Immanuel shot him? . . . He said that you told him no I didn't shoot him because the gun doesn't work." Appellant denied that he said the only reason he didn't shoot was because the gun malfunctioned. He said, "I had my hand like this the whole time, never once did I squeeze the trigger." In demonstrating, Appellant motioned having his finger on the trigger but with the gun in his lap. (S.E. 31).

Prior to the admission at trial of the DVD copy of the interview, the defense raised an objection to the admission of Olinger's statement and argued that any statement by Olinger was inadmissible hearsay and as Olinger was not available to testify and as Appellant did not have the opportunity to cross-examine Olinger on the statement, its admission was a violation of Appellant's confrontation rights under *Crawford v. Washington*. The defense requested that any statements by Olinger be redacted from the videotaped interview. The State responded that

Olinger's statements were not testimonial in nature and that the statements were not being offered for the truth of the matters asserted but merely as interrogation techniques and therefore the hearsay rule was inapplicable. The trial court agreed with the State and found the statement was not the kind contemplated by *Crawford* and admitted the taped interview in its entirety.

Appellant's continuing objections to the admission of the non-redacted video interview properly preserved the issue for our review. *Davis v. State*, 2011 OK CR 29, ¶ 156, 268 P.3d 86, 125. We review the trial court's evidentiary rulings for an abuse of discretion. *Id.* An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194.

"The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.' We have held that this bedrock procedural guarantee applies to both federal and state prosecutions." *Crawford v. Washington*, 541 U.S. 36, 42, 124 S.Ct. 1354, 1359, 158 L.Ed.2d 177 (2004) *citing Pointer v. Texas*, 380 U.S. 400, 406, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). *See also Mitchell v. State*, 2005 OK CR 15, ¶ 15, 120 P.3d 1196, 1202 *citing* U.S. Const. amends. VI and XIV; Okla. Const. art. 2, § 20 (in both state and federal criminal prosecutions, an accused has a right "to be confronted with the witnesses against him.")). Under *Crawford*, 541 U.S. at 68, 124 S.Ct. at 1374 a testimonial, out-of-court

statement offered against an accused to establish the truth of the matter asserted may be admitted only where the declarant is unavailable and where the accused has had a prior opportunity to cross-examine the witness. *See also Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 30, 241 P.3d 214, 227.

Olinger's purported statement in the present case is an out-of-court statement and testimonial - having been allegedly made during police interrogation where there was not an ongoing emergency. *Crawford*, 541 U.S. at 52, 124 S.Ct. at 1364 ("[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard"). *See also Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 2273-2274, 165 L.Ed.2d 177 (2004) (statements are "testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."). However, the focus of State's Exhibit 31, the video-taped interview, was Appellant's statement, not any techniques used by the detective to obtain the statement.

However, Olinger's purported statement was not offered for the truth of the matter asserted, but to see how Appellant would respond to the detective's questioning regarding a statement (purportedly) made by Olinger about Appellant. Appellant's response was to deny that he had made the remark and maintain that he kept the gun in his lap and simply did not pull the trigger. Olinger's purported statement is therefore not classic hearsay falling under the purview of *Crawford*. The Confrontation Clause "does not bar the use of

testimonial statements for purposes other than establishing the truth of the matter asserted". *Crawford*, 541 U.S. at 59, fn. 9, 124 S.Ct. at 1369, fn. 9. While both parties assert that Detective Wilson testified at Preliminary Hearing to the truth of Olinger's purported statement, he did not so testify at trial. Our concern at this juncture is the purpose for which the statement was admitted at trial. Statements offered to show that they were made or that certain actions resulted from a conversation with third persons do not qualify as hearsay. *Stouffer v. State*, 2006 OK CR 46, ¶ 76, 147 P.3d 245, 265. Olinger's purported statements served to elicit a response from Appellant and demonstrate the effect of the out-of-court statement on Appellant and to explain why certain events occurred. Because Olinger's purported statements were not offered to establish the truth of the matter asserted, the Confrontation Clause does not apply. See *U.S. v. Cromer*, 389 F.3d 662, 676 (6<sup>th</sup> Cir. 2004).

Even if we were to find admission of Olinger's purported statement violated Appellant's rights under the confrontation clause, such an error can be found harmless. *Cuesta-Rodriguez*, 2010 OK CR 23, ¶ 40, 241 P.3d at 230; *Hunt v. State*, 2009 OK CR 21, ¶ 12, 218 P.3d 516, 519. "The standard for constitutional violations is well-known: reversal is in order unless the State can show the error was harmless beyond a reasonable doubt". *Simpson v. State*, 1994 OK CR 40 ¶ 34, 876 P.2ds 690, 702 citing *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967)). Even without Olinger's purported statement, the jury heard Appellant admit in his police interview to full participation in the plot to rob the victim of the drugs by force and fear.

Olinger's purported statement did not implicate Appellant in the crime any more than Appellant's own statements. In addition to Appellant's own statements, the jury heard from co-defendant and co-conspirators Ramie Brown and Cody Taylor about Appellant's participation in the plan to rob the victim.

Further, despite the fact the jury received instructions on co-conspirator joint liability and aiding and abetting, the jury found Appellant guilty of second degree felony murder with the underlying crime of Attempted Grand Larceny in the Night Time – a crime which did not require force or fear or the use of a firearm (the subject of Olinger's purported statement). By its verdict, the jury chose to believe Appellant's version of events – that he merely possessed the gun and did not point it at anyone – over Olinger's purported statements that Appellant pointed the gun and only failed to shoot because the gun malfunctioned. And as the State argues, if the jury had believed Appellant meant to shoot the victim, it could have found him guilty of first degree felony murder with a minimum sentence of life in prison instead of second degree felony murder with a recommendation for a thirty year sentence. Clearly, the jury did not give Olinger's purported statement much weight. Given the weight of evidence against Appellant, and the conviction of the lesser charge and relatively light sentence, any error in admitting Olinger's purported statement

was harmless beyond a reasonable doubt and there is no cause to remand the case for resentencing.<sup>1</sup>

In Proposition II, Appellant contends the trial court admitted improper victim impact testimony at the sentencing hearing. He argues that the victim's fiancée, Ms. Ledford, 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, Ms. O'Connor, 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 testimony at trial. *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 or her substantial rights. 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.* See *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. See also *Jackson v. State*, 2016 OK CR 5, ¶ 4, 371 P.3d 1120, 1121; *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395.

Title 21 O.S.Supp.2014, § 142A-8 limits victim impact statements to victims or the members of the immediate family of a victim; neither a fiancée nor

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<sup>1</sup> Appellant's passing references in this proposition of error to prosecutorial misconduct and ineffective assistance of counsel are not sufficient to raise the issues for appellate review under Rule 3.5(A)(5), *Rules of the Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017).



a mother-in-law are authorized to give a victim impact statement. A family representative who does not fit into the victim or immediate family member categories is not authorized to testify about the effects of the death on the family. *Goode v. State*, 2010 OK CR 10, ¶ 64, 236 P.3d 671, 683–84. Because Ms. Ledford was not within the categories of individuals authorized to give a victim impact statement at trial, and as Ms. O'Connor was not a proper family representative, we find that the challenged evidence was not properly admitted.

However, we find that Appellant has not shown the existence of an actual error – that being that the improperly admitted testimony affected his substantial rights. 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 the sentencing hearing to overcome the presumption of consecutive sentences. *Beck v. State*, 1970 OK CR 207, ¶¶ 7-9, 478 P.2d 1011, 1012; *Riley v. State*, 1997 OK CR 51, ¶ 21, 947 P.2d 530, 535. The trial judge simply followed the jury's recommendation as to

punishment and ordered the sentences to run pursuant to the operation of law.  
21 O.S.2011, § 61.1; 22 O.S.2011, § 976.

As for the court's refusal to give credit for time served, it is a common practice for the trial judge to give credit for time served; however, there is no authority mandating such credit or making it an abuse of discretion to fail to give it. *Shepherd v. State*, 1988 OK CR 97, ¶ 21, 756 P.2d 597, 602. Here, Appellant was convicted of the lesser offense of second degree felony murder. He received a sentence of thirty years – far below the maximum of life; despite the fact the evidence showed Appellant was a full participant in the conspiracy to rob the victim and by his own admission had possession of a fully loaded weapon. Based upon the strong evidence of guilt, the sentences do not shock the conscience of this Court. As Appellant has not shown that any alleged error affected the outcome of the trial, we find no plain error occurred and this proposition is denied.

In Proposition III, we find no plain error occurred in the trial court's failure to instruct the jury that Cody Taylor and Ramie Brown were accomplices as a matter of law. *See Jackson*, 2016 OK CR 5, ¶ 4, 371 P.3d at 1121. The evidence showed that 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.").

Any error in the omission of the instruction did not affect the outcome of the trial. See *Moss v. State*, 1994 OK CR 80, ¶ 46, 888 P.2d 509, 520 (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.) Here, the jury received instructions on principal liability, which is what is required for an actor to be an accomplice, and the uniform instructions on the law of accomplices. Additionally, Appellant's statements to law enforcement substantially agreed with the accounts of both Taylor and Brown and provided sufficient corroborating evidence so that the omission of the instruction was harmless. See *Bryson v. State*, 1994 OK CR 32, ¶ 39, 876 P.2d 240, 256 (failure to give the proper instruction is harmless if sufficient corroborating evidence was presented at trial."). Therefore, we find Appellant has not shown error, plain or otherwise, in the omission of an instruction on accomplice as a matter of law.

In Proposition IV, we have reviewed Appellant's claims of prosecutorial misconduct under the plain error standard of review and find no error affecting his substantial rights. See *Jackson*, 2016 OK CR 5, ¶ 4, 371 P.3d at 1121. "[I]n any proceedings before tribunals of this state, there is a general obligation upon attorneys to operate in good faith, whether through their pleadings or otherwise." *Pitts v. State*, 2003 OK CR 21, ¶ 12, n. 9, 78 P.3d 551, 555 n. 9 (citing Rule 3.3, *Rules of Professional Conduct*, 5 O.S.2001, ch. 1 app.3-A). We review challenged

comments in the context in which they were made. *Warner v. State*, 2006 OK CR 40, ¶ 173, 144 P.3d 838, 888.

Reading in context the prosecutor's comments made during the hearing on the motion to suppress regarding statements attributed to Olinger by Detective Wilson, we find no error. The prosecutor did not misrepresent the facts and there is no indication the argument was made in bad faith or designed to intentionally mislead the court. The trial court, having tried co-defendant Olinger's case, was well aware of the facts.

We also find no error in the prosecutor's closing arguments now challenged on appeal. Comments that Olinger, Mitchell and Appellant all pulled out their guns during the attempted robbery were reasonable inferences on the evidence. *Sanchez v. State*, 2009 OK CR 31, ¶ 71, 223 P.3d 980, 1004 (this court has long allowed counsel for the parties a wide range of discussion and illustration in closing argument.) Any misstatement of the evidence was slight and not sufficient to have affected the outcome of the trial. *See Langley v. State*, 1991 OK CR 66, ¶ 24, 813 P.2d 526, 531. Appellant was convicted of Second Degree Felony Murder, a crime not dependent on the operability the weapon in Appellant's possession at the time of the crime.

Comments to the effect that the guns in the possession of Appellant and Olinger were loaded with a bullet in the chamber, and "that means when you pull the trigger that gun is going to fire" were also reasonable comments on the evidence. Although Appellant said he did not fire the gun in his possession but kept his finger on the trigger, this raises the question of why he would do so if he

did not know whether the gun worked. Again, any error in this statement did not affect the outcome of the trial. Having thoroughly reviewed the allegations of prosecutorial misconduct, we find no plain error affecting Appellant's substantial rights or the outcome of the trial. This proposition is denied.

In Proposition V, Appellant contends counsel was ineffective for failing to raise the challenges set forth in Propositions I, II, III and IV of the appellate brief. We review Appellant's claims under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to show that counsel was ineffective, Appellant must show both deficient performance and prejudice. *Goode v. State*, 2010 OK CR 10, ¶ 81, 236 P.3d 671, 686 citing *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. See also *Marshall v. State*, 2010 OK CR 8, ¶ 61, 232 P.3d 467, 481. In *Strickland*, the Supreme Court said there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct, i.e., an appellant must overcome the presumption that, under the circumstances, counsel's conduct constituted sound trial strategy. *Goode*, 2010 OK CR 10, ¶ 81, 236 P.3d at 686. To establish prejudice, Appellant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at ¶ 82, 236 P.3d at 686.

Having thoroughly reviewed the allegations raised in Propositions I, II, III and IV and finding no errors warranting relief, we find Appellant has failed to show a reasonable probability that but for counsel's failures to object, the outcome of the trial would have been different. See *Frederick v. State*, 2001 OK

CR 34, ¶ 189, 37 P.3d 908, 955 (where there is no error, one cannot predicate a claim of ineffective assistance of counsel upon counsel's failure to object).

In Proposition VI, Appellant argues the accumulation of errors denied him a fair trial. This Court has repeatedly held that a cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by Appellant. *Williams v. State*, 2001 OK CR 9, ¶ 127, 22 P.3d 702, 732. However, when there have been numerous irregularities during the course of a trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors is to deny the defendant a fair trial. *Id.* Any errors found in this case did not require relief, and when considered cumulatively, do not require reversal or modification of the sentence.<sup>2</sup>

Accordingly, this appeal is denied.

### 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 the delivery and filing of this decision.

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

#### APPEARANCES AT TRIAL

KAREN BYARS  
320 N. BROADWAY  
SHAWNEE, OK 74801  
COUNSEL FOR DEFENDANT

#### APPEARANCES ON APPEAL

RHIANNON SISK  
OKLAHOMA INDENT DEFENSE  
SYSTEM  
P.O. BOX 926  
NORMAN, OK 73070

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<sup>2</sup> Appellant's "alternative" argument of excessive sentence is a separate allegation of error which our rules require to be raised in a separate proposition of error. Rule 3.5(A)(5), *Rules of the Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017). The failure to do so waives review on appeal.

COUNSEL FOR APPELLANT

RICHARD L. SMOTHERMON  
DISTRICT ATTORNEY  
ADAM PANTER  
ABBY NATHAN  
ASSISTANT DISTRICT ATTORNEYS  
331 N. BROADWAY  
SHAWNEE, OK 74801  
COUNSEL FOR THE STATE

MIKE HUNTER  
ATTORNEY GENERAL OF OKLAHOMA  
THEODORE M. PEEPER  
ASSISTANT ATTORNEY GENERAL  
313 N.E. 21<sup>ST</sup> ST.  
OKLAHOMA CITY, OK 73105  
COUNSEL FOR THE STATE

OPINION BY: LUMPKIN, P.J.  
LEWIS, V.P.J.: Concur  
HUDSON, J.: Concur  
KUEHN, J.: Concur  
ROWLAND, J.: Specially Concurring

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**ROWLAND, JUDGE, SPECIALLY CONCURRING:**

I concur entirely with the summary opinion in this case, and write separately to more fully discuss Proposition I. The rule in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) bars the admission of testimonial hearsay unless the declarant is unavailable and the accused has had a prior opportunity to cross-examine the witness. The statements obtained by the detective in this case from Hobia's co-defendant are unquestionably testimonial, but they are not hearsay because they were not "offered in evidence to prove the truth of the matter asserted." 12 O.S.2011, § 2801(A)(3). On the contrary, they were offered to add context to Hobia's own statements in the recording and to show their effect, if any, upon him. The Confrontation Clause simply is not implicated by allowing the jury to view a recording wherein a detective confronts the defendant with a non-testifying co-defendant's version of the events, where, as here, the statements attributed to the co-defendant were not offered for the truth of the matter asserted. Indeed, the value of such an interrogation technique does not depend upon the truth of the statement; confronting a suspect with a statement that is not true may still have the effect of prompting some response and it is the response that has value rather than the veracity of the statement that prompted it. This also proves the evidentiary point that the false statement is not hearsay because it cannot be offered for its truth. The purpose of these non-hearsay statements is to make the defendant's statements intelligible as an admission and to place his statements in context.



A recent collection of cases from various state and federal courts admitting recorded interviews where the interviewing officer confronts a suspect with out-of-court statements can be found in *United States v. Whittle*, 223 F. Supp. 3d 671, 677 (W.D. Ky. 2016), *aff'd*, No. 16-6821, 2017 WL 5041085 (6th Cir. Nov. 3, 2017)(unpublished). This is not to say that anything an interviewing detective chooses to say during a recorded interview is admissible to show context, and “[a]d hominem attacks, accusations of lying, and general posturing may be standard in police interrogations, but they have little evidentiary value....” *United States v. Collins*, 575 F.3d 1069, 1074 (10th Cir. 2009)(noting that “[i]nvoking the word “context” does not permit an end-run around the hearsay rules such that the government may smuggle into evidence all interviewer statements.”) Furthermore, even interviewer statements which are not so inflammatory, but which do not add context to the defendant’s own statements, should not be admitted by the trial court because they fail to meet the basic relevance standard of 12 O.S.2011, § 2401. The interviewer’s statements here, however, were not solely attacks or accusations leveled at Hobia, and thus the district court did not abuse its discretion in admitting the statements contained in Hobia’s recorded interview.