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

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| MARK ANTHONY CLAYBORNE, | ) | |
| | ) | |
| Appellant, | ) | NOT FOR PUBLICATION |
| | ) | |
| v. | ) | Case No. F-2011-509 |
| | ) | |
| THE STATE OF OKLAHOMA, | ) | |
| | ) | |
| Appellee. | ) | |



**OPINION**

**A. JOHNSON, JUDGE:**

Appellant Mark Anthony Clayborne was tried by jury in the District Court of Oklahoma County, Case No. CF-2009-1007, and convicted of Perjury by Subornation (Count 1), in violation of 21 O.S.2001, § 504, and Allowing the Production of a False Exhibit (Count 3), in violation of 21 O.S.2001, § 453. The jury fixed punishment at four years imprisonment on Count 1 and two years imprisonment on Count 3.[1] The Honorable Richard G. Van Dyck, who presided at trial, sentenced Clayborne according to the jury's verdict and ordered the sentences to be served consecutively. From this Judgment and Sentence Clayborne appeals, raising the following issues:

(1) whether the trial court committed reversible error both procedurally and substantively in answering the jury's question about rebuttal evidence;

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[1] Count 1 also charged Clayborne's co-defendant Cecilia Anna Talavera-DeMadrid with subornation of perjury, a count to which she later pled no contest. Count 2 charged Clayborne's co-defendant Claudia Aguilar with perjury. That charge was later amended to suppression of evidence, a misdemeanor, a charge to which she pled guilty. Count 4 charged Talavera-DeMadrid with possession of a controlled substance (i.e., hydrocodone), a charge that was later dismissed.

(2) whether the prosecutor's discovery and ethical violations in the Herrera trial estopped it from prosecuting Mr. Clayborne;

(3) whether Clayborne's conviction for preparing a false exhibit must be vacated as being based on a defective charging information, insufficient evidence, and a defective jury instruction, and because of this, the subornation of perjury conviction should also be set aside;

(4) whether lack of corroboration of accomplice witness testimony on the subornation of perjury charge requires that the conviction for that offense be vacated;

(5) whether Clayborne's convictions should be reversed because he was denied the right to present evidence in his defense by being denied access to audiotapes of the Herrera trial;

(6) whether Clayborne's convictions for both subornation of perjury and preparing a false exhibit constitute impermissible multiple punishment for the same act in violation of 21 O.S. § 11;

(7) whether prosecutorial misconduct in closing arguments deprived him of a fair trial; and

(8) whether the accumulation of error requires vacation of convictions or other sentence modification.

We find reversal is not required on Count 1, the subornation of perjury count, and affirm that judgment and sentence. We find reversal is required, however, on Count 3, the false exhibit count, and therefore reverse that judgment and sentence.

**FACTS**

Clayborne was a lawyer who had represented a defendant, Jose Cruz Herrera, charged with selling drugs in Oklahoma City to a police officer on February 12, 2007. When that case went to trial in Oklahoma County in February, 2008, Clayborne presented an alibi defense for his client.

He called Herrera's cousin, Claudia Aguilar, to testify that at the time the drugs were allegedly sold in Oklahoma City, Herrera was with her in Mexico. Furthermore, she testified she had made a video of their time in Mexico. Clayborne introduced the video as a trial exhibit. It was particularly powerful evidence because the video tape included a clearly visible date stamp that, if reliable, confirmed Herrera's alibi. In rebuttal, prosecutors called OSBI Agent Alan Salmon, a forensic video analyst, who testified the date stamp had been altered.

The jury found Herrera guilty.

Following the Herrera trial, the State charged attorney Clayborne with subornation of perjury and allowing the production of a false exhibit, witness Claudia Aguilar with perjury, and Clayborne's legal assistant, Cecilia Anna Talavera-Demadrid with subornation of perjury.

At Clayborne's trial, his accomplices Aguilar and Talavera-Demadrid testified for the prosecution. Agent Salmon repeated his expert opinion that the video's date was a fake. And Cindy Truong, a prosecutor in the Herrera case, testified that the prosecution had known the video date was falsified but did not inform Clayborne of Agent Salmon's expert opinion because the prosecution had no duty to disclose rebuttal testimony to the defense.

During their deliberations, jurors sent a note to the judge that said:

> ADA Truong said in her testimony that it was not necessary to inform defense counsel [at the Herrera trial] of Mr. Salmon's findings since he was a rebuttal witness. Is this legally correct?

(Tr. Vol. 8 at 1268). After consulting with defense counsel and the prosecutor, and over defense counsel's objection, the trial judge answered the jurors' question by return note, which stated:

> Parties in criminal cases are not required to give advance notice or discovery on rebuttal witnesses.

(Tr. Vol. 8 at 1273). The jury found Clayborne guilty on both counts.

## DISCUSSION

### 1.
### Jury Question

Clayborne claims that the trial court judge erred by answering the jurors' question by written note rather than summoning them into open court and answering their question there as required by 22 O.S.2001, § 894. Section 894 clearly and unambiguously requires that if jurors seek clarification on a point of law, they must be brought into the courtroom and their question answered in the presence of the parties. The language of the statute is clear. The trial judge erred by answering the question by note. But Clayborne makes no showing of prejudice resulting from this error, and none is apparent on the face of the record. The error was, therefore, harmless. *See Givens v. State*, 1985 OK CR 104, ¶ 19, 705 P.2d 1139, 1142 (holding that "[w]hen a communication between a judge and jury occurs, after the jury has retired for deliberation, a presumption of prejudice arises," and holding further that the "presumption may be overcome if, on appeal, this Court is convinced that, on the face of the record, no prejudice to the defendant occurred."); *see also Smith v. State*, 2007

OK CR 16, ¶ 52, 157 P.3d 1155, 1172 (finding that trial judge erred by answering jury question with note, but finding no prejudice on face of record, holding that reversal was not warranted).

Clayborne did object, however, to the substance of the note and argued in the trial court, as he does here, that the note misstated the law. Consequently, the real issue before us is Clayborne's claim of jury instruction error. Ordinarily, this Court reviews such a claim for an abuse of discretion, and does so by reviewing the challenged instruction to determine whether it correctly stated the applicable law. *See Dill v. State*, 2005 OK CR 20, ¶ 11, 122 P.3d 866, 869 ("Jury instructions are a matter committed to the sound discretion of the trial court whose judgment will not be disturbed as long as the instructions, taken as a whole, fairly and accurately state the applicable law."). Such review, however, presupposes that the matter being instructed on is properly before the jury in the first place.

In this instance, the question of whether or not the State had a duty to disclose its alibi rebuttal evidence to Herrera in Herrera's trial for drug trafficking was a legal question with no material relevance to any issue in Clayborne's trial for subornation of perjury and producing a false exhibit. While the matters at issue before Clayborne's jury, arose from his conduct at Herrera's trial, the issues being tried at Clayborne's trial concerned whether or not Clayborne suborned perjury and allowed production of a false exhibit.

Proof of the elements of these crimes was not dependent in any way on whether or not the State disclosed rebuttal evidence in Herrera's trial.[2]

The instruction given Clayborne's jury did address testimony given at Clayborne's trial (i.e., testimony from the prosecutor at Herrera's trial that she had no duty to disclose rebuttal evidence to the defense at that trial), but that testimony concerned a question of law that arose in Herrera's trial that had no relevance to the charges against Clayborne. The simple fact that testimony about some aspect of Herrera's trial was allowed into evidence at Clayborne's trial does not mean that it was relevant evidence, and does not mean that Clayborne's jury required an instruction on whether the testimony given at Herrera's trial was legally correct.

The trial judge's instruction about the State's disclosure obligations was not relevant to any material issue in Clayborne's trial. We find, therefore, with no grave doubt, that the jury's question and the judge's answer to it, right or wrong, had no effect on the outcome of Clayborne's trial. The error, if any, was harmless.

**2.**
**Discovery**

Clayborne claims the prosecution's alleged discovery violations and associated misconduct at the Herrera trial estopped the State from prosecuting

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[2] Furthermore, Clayborne did not raise any recognized affirmative defense to the charges, much less any defense to which the State's failure to disclose rebuttal evidence in Herrera's trial was relevant. Indeed, Clayborne does not explain how he (Clayborne) could use a violation of Herrera's due process rights as a defense at his own trial for crimes that are separate and distinct from those committed by Herrera.

him for suborning perjury and producing a false exhibit. He provides no authority and little argument for this novel claim, one based on an unexplained estoppel theory that he should be immune from prosecution for his criminal acts as lawyer at the Herrera trial because the State allegedly failed in its discovery obligations to defendant Herrera at that trial. This claim is waived because it is unsupported by authority or argument. *See* Rule 3.5(A)(5), Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2013); *Slaughter v. State*, 1997 OK CR 78, ¶ 53, 950 P.2d 839, 854 ("In his brief, Appellant initially seems to advance a question of acceptability of the witnesses' theories in the scientific community. However, after initially advancing the argument, he fails to further discuss it. He also fails to support his argument with relevant citation of authority. Consequently, he has waived this portion of his argument for review by this Court."); *Layman v. State*, 1988 OK CR 260, ¶ 7, 764 P.2d 1358, 1360 ("Appellant's counsel concedes there is no relevant authority to support the "equitable estoppel" theory upon which he relies as grounds for vacating his monetary penalties, and we will not search the books for authority to support it.").

In connection with his claim that the State was estopped from prosecuting him as a result of its alleged discovery and disclosure violations at the Herrera trial, Clayborne also asserts that the trial court erroneously denied his motions and objections to exclude the testimony of Herrera prosecutors Truong and Rowland, and Agent Salmon. Clayborne supports this claim by the

following quote from *United States v. Russell*, 411 U.S. 423, 431-432, 93 S.Ct. 1637, 1643, 36 L.Ed.2d 366 (1973), where the United States Supreme Court said:

> [w]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction. . .

Clayborne's argument seems to be that the State's failure to disclose Agent Salmon's rebuttal testimony at Herrera's trial was such an egregious violation of Herrera's due process rights that the trial court should have invoked the exclusionary rule against the State in Clayborne's subsequent trial to exclude not only Agent Salmon's testimony but the testimony of ADAs Truong and Rowland. Other issues aside, the main problem with this argument is that it is based on the premise that a violation of Herrera's due process rights at Herrera's trial warrants application of the exclusionary rule as a sanction against the State in Clayborne's trial. Clayborne does not, and cannot, claim that **his** due process rights were violated at Herrera's trial, and Clayborne provides neither argument nor authority to show how he is derivatively entitled to an exclusionary rule remedy for a violation of Herrera's due process rights. Unsupported by argument or authority, this novel claim is waived. *See Guy v. State*, 1989 OK CR 35, ¶16, 778 P.2d 470, 474 ("An appellant must support his or her proposition of error by both argument and citation of authority. If this is

not done and a review of the record reveals no fundamental error, we will not search the books for authority to support appellant's bald allegations.").

### 3.
### Charging Information, Sufficiency of Evidence, Jury Instruction

#### a. Information

Clayborne claims that the charging information was fatally defective because 21 O.S.2001, § 453 proscribes "preparation" of a false exhibit, but the Information nowhere alleged that he actually or constructively "prepared" a false exhibit. According to Clayborne, the Information merely alleged that he moved into evidence an exhibit he knew had been falsified. Clayborne did not challenge the sufficiency of the Information before he entered his plea, and when he did so belatedly after his plea, it was by motion to dismiss on grounds other than those raised here. This claim waived. *See Davis v. State*, 1982 OK CR 95, ¶ 7, 647 P.2d 450, 452 ("[t]he appellant, by entering a plea of not guilty, however, waived all defects in the information except those which go to jurisdiction"); *Atkins v. State*, 1977 OK CR 150, ¶ 18, 562 P.2d 947, 949 ("if the motion to quash is not filed before a plea is entered to the indictment or information the defendant waives any defect in the information that could have been raised by motion to quash").

#### b. Sufficiency of the Evidence

Clayborne claims next that the evidence was insufficient to support a conviction for preparing a false exhibit. This Court reviews a challenge to the sufficiency of the evidence in the light most favorable to the State, and will not

disturb the verdict if any rational trier of fact could find the essential elements of the crime charged beyond a reasonable doubt. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204 (citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

Clayborne contends that the evidence was insufficient to show that he "prepared" the false content of the altered videotape that was introduced as an exhibit at Herrera's trial because, according to Clayborne, the trial evidence showed that the video was actually recorded by Cynthia Aguilar's sister in Mexico and the false date stamp was superimposed on the video by someone else.

The charging statute, 21 O.S.2011, § 453 provides:

> Any person guilty of falsely preparing any book, paper, record, instrument in writing, or other matter or thing, with intent to produce it, or allow it to be produced as genuine upon any trial, proceeding or inquiry whatever, authorized by law, shall be guilty of a felony.

Clayborne reads this statute narrowly as limiting culpability for "falsely preparing" an exhibit to the person who actually inserts the false content into the item to be produced at trial. This Court has never so held. Under Clayborne's construction of the statute, delegating the production of the false content of a trial exhibit to another, would always allow an unscrupulous party to escape criminal liability for producing a false trial exhibit, an absurd result that the Legislature certainly did not intend. *See People v. Bhasin*, 97 Cal.Rprtr.3d 708, 714 (Cal. App. 2009)(construing language of similar

California false exhibit statute and stating "[t]o conclude that section 134 narrowly defines the preparation of a document to requiring that the person actually physically create the document would both be absurd and defeat the objective of the statute").

A more natural reading of this statute, one that gives effect to the Legislature's intention, is that it encompasses all physical acts of "falsely preparing," not just preparation of the false content. In this case, therefore, even if it is assumed that Clayborne did not personally insert the false date stamp into the videotape, the evidence showed that he "prepared" the videotape for introduction as an exhibit in several ways. First, Clayborne's handwritten editing list, found with the original videotape, was evidence of preparation. Second, the transfer of selected portions of the videotape to DVD through the services of a video technician was another step in preparation of the trial exhibit containing false information. Third, the marking of the DVD as Defense Exhibit 8, and its production at trial were both preparatory steps necessary for introducing the false content of the video into the Herrera trial. A proper reading of Section 453 supports our conclusion that the evidence was sufficient for jurors to find beyond a reasonable doubt that Clayborne "prepared" the false videotape for production at trial.

Clayborne also argues under this sub-proposition that the evidence was insufficient to show that he knew the video's date stamp was falsified. According to Clayborne, "[t]he 'circumstantial evidence' relied on by the State to

show the requisite knowledge and intent on Mr. Clayborne's part is unconvincing" (Aplt's Brief at 29). We disagree. While the evidence of Clayborne's knowledge was circumstantial, it was sufficient for a rational trier of fact to find guilty knowledge beyond a reasonable doubt.

**c. Jury Instruction**

Clayborne also claims that the jury instruction on the charge of preparing a false exhibit was defective for not including a knowledge element. There is no Oklahoma Uniform Jury Instruction for this offense, and this Court has never addressed this crime in any published case. Lacking a OUJI or case law from this Court, the trial court judge crafted a jury instruction with the assistance of Clayborne and the State. Clayborne requested an instruction with the following elements:

> First, knowingly;
> Second, preparing;
> Third, a false exhibit;
> Fourth, to be produced into evidence as genuine at trial.

(O.R. at 740). The trial judge rejected Clayborne's requested instruction and instead used an instruction listing the following elements:

> First, preparing;
> Second, a false exhibit;
> Third, with the intent of allowing its production as evidence;
> Fourth, at trial.

(Instruction No. 28, O.R. at 877). Clayborne argues that the judge's instruction misstated the law because if read literally the instruction would permit

conviction on the charge if the accused innocently prepared an exhibit that was in fact false, intending that it be produced in evidence.

Again, the charging statute, 21 O.S.2011, § 453 provides:

> Any person guilty of falsely preparing any book, paper, record, instrument in writing, or other matter or thing, with intent to produce it, or allow it to be produced as genuine upon any trial, proceeding or inquiry whatever, authorized by law, shall be guilty of a felony.

On its face, this statute lacks any requirement that the preparation of the false exhibit be knowing. In that regard, the statute is similar to 21 O.S. § 1272, which criminalizes the possession of certain offensive weapons (e.g., switch-blade knives, metal knuckles), without any requirement that the possession be knowing. In *Dear v. State*, 1989 OK CR 18, ¶ 6, 773 P.2d 760, 761, This Court held that the offense of Unlawfully Carrying a Weapon, in violation of 21 O.S. § 1272, implicitly contained an element that the defendant must have knowledge of the crime. The *Dear* court explained its holding as follows:

> It does not appear that, in an attempt to regulate the carrying of weapons, the legislature established "knowingly" as an element of the offense. **However, criminal *intent* is the essence of all criminal liability**. We therefore hold that it was not the intent of the legislature, in enacting this statute, to convict one who has no guilty intent or knowledge. We further hold that where there is evidence of lack of knowledge, however slight, and the defendant relies on it as his defense, an instruction covering same must be given to the jury where properly requested by the defendant.

*Dear*, 1989 OK CR 18, ¶ 6, 773 P.2d at 761 (internal citation omitted, emphasis added).

Applying the principle announced in *Dear* that "criminal *intent* is the essence of all criminal liability," and assuming, as in *Dear*, that it was not the intent of the Legislature in enacting 21 O.S.2011, § 453, to convict an accused who had no guilty intent or knowledge that an item prepared as trial exhibit was false, section 453, like section 1272, must be read to implicitly contain an element that the accused had knowledge of the crime. *Williams v. State*, 1977 OK CR 119, ¶ 11, 565 P.2d 46, 49, *overruled on other grounds, Lenion v. State*, 1988 OK CR 230, 763 P.2d 381)("When the statute is silent, knowledge and criminal intent are generally essential if the crime involves moral turpitude, but not if it is *malum prohibitum*.").

Nevertheless, under *Dear*, a knowledge instruction is not always required in such cases, but is given only when there is some evidence of lack of knowledge and the defendant relies on the lack of knowledge as his defense. *See Dear*, 1989 OK CR 18, ¶ 6, 773 P.2d at 761 ("We further hold that where there is evidence of lack of knowledge, however slight, and the defendant relies on it as his defense, an instruction covering same must be given to the jury where properly requested by the defendant."); *see also Williams v. State*, 1977 OK CR 119, ¶ 11, 565 P.2d 46, 48, *overruled on other grounds, Lenion v. State*, 1988 OK CR 230, 763 P.2d 381)(same). In this instance, there was some evidence, albeit very slight and to a large extent discredited, that Clayborne did

not have knowledge of the altered nature of the video. Specifically, Claudia Aguilar testified at Clayborne's trial that when she was in Clayborne's office before Herrera's trial and had expressed her concern about the date stamp in the white box on the video, Clayborne told her that he had taken the video to experts who had determined that there was nothing wrong with it. In particular, Aguilar testified as follows:

> Q. Okay. What did Mr. Clayborne say when you mentioned the white boxes or stripes to him?
>
> A. (By Interpreter) That the video was fine. That he had taken the video with two specialist [sic] and there was nothing wrong with the video.

(Tr. Vol. 2 at 360). Cecilia Talavera-DeMadrid, who acted as an interpreter for the conversation between Clayborne and Aguilar, recounted Clayborne's statement similarly:

> Q. Did Mr. Clayborne tell Ms. Aguilar during that conversation anything about any other evidence he had that the tape was genuine?
>
> A. Um, he did tell her that he had taken the tape to two specialists and that he had it checked and that it was okay.

(Tr. Vol. 6 at 856). Further questioning of Talavera-DeMadrid raised doubt about Clayborne's assertion that he had taken the video to experts for verification of its validity:

> Q. Did you see any appointments on Mr. Clayborne's calendar where he would have talked to, visited, or interviewed these two specialists?

A. No, sir.

Q. Did you see any letters, invoices, bills, or checks where Mr. Clayborne retained the services or consulted with any specialists?

A. No, sir.

Q. Did you see any reports from anyone that was a specialist regarding the VHS tape that Ms. Aguilar delivered to Mark Clayborne?

A. No, sir.

Q. Did you see any subpoenas or witness lists which contained the names of any persons who could have been video specialists?

A. No, sir.

Q. Do you have any knowledge that in fact Mr. Clayborne did consult with any specialists regarding the authenticity of the Aguilar VHS tape?

A. No, sir.

(Tr. Vol. 6 at 856-857). In any event, testimony about Clayborne's statement that the video checked out as authentic, even though discredited, was some "slight" evidence of his lack of knowledge of the falsity of the date stamp on the video. This very slight evidence is all that is required under *Dear* for an entitlement to a knowledge instruction. Clayborne's jury should have been instructed that knowledge was an element of the offense. The trial court's refusal to instruct was legal error that rises to the level of an abuse of discretion by the trial court judge. *See Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 2047, 135 L.Ed.2d 392 (1996)("[a] district court by definition

abuses its discretion when it makes an error of law); *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170 ("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 [and] [a]n abuse of discretion has also been described as a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented.")(internal citation and quotation marks omitted).

This error does not require automatic reversal. This Court will not set aside a judgment or grant a new trial on grounds of misdirection of the jury unless it is our opinion that the error has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right. 20 O.S. 2001, § 3001.1. In the context of the harmless error analysis prescribed by 20 O.S. 2001, § 3001.1, this Court held in *Simpson v. State*, 1994 OK CR 40, ¶ 36, 876 P.2d 690, 702, that trial court error does not require reversal where "we have no 'grave doubts' [the] failure had a 'substantial influence' on the outcome of the trial."

Given that the overwhelming weight of the evidence was sufficient to support a reasonable inference that Clayborne knew the video was altered, it is unlikely in the extreme that his single self-serving statement to his two accomplices that he had taken the video to experts for analysis, would have resulted in a different outcome, even if jurors had been properly instructed that knowledge of the video's falsity was an element of the offense. We have no

grave doubt, therefore, that the error in omitting the knowledge element from the jury instruction had any substantial influence on the outcome of the trial. The trial court's error in omitting the knowledge element from the jury instruction on the false exhibit charge was harmless.

**4.**
**Accomplice Testimony**

Clayborne claims that the evidence was insufficient to prove the elements of subornation of perjury because the testimony of accomplices Claudia Aguilar and Cecilia Talavera-DeMadrid was not corroborated. According to Clayborne, Aguilar and Talavera-DeMadrid could not have corroborated each other because they were accomplices, and according to Clayborne, neither Aguilar's nor Talavera-DeMadrid's testimony was corroborated by Aguilar's boyfriend Jose Ramirez because he was thoroughly impeached.

Title 22 O.S.2011, § 742, provides that "[a] conviction cannot be had upon the testimony of an accomplice unless [she] be corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances thereof." In *Pierce v. State*, 1982 OK CR 149, ¶ 6, 651 P.2d 707, 709, this Court held that accomplice testimony only need be corroborated in one material fact by independent evidence in order to be sufficient. The Court further held that if the accomplice

is corroborated by one material fact, the jury may infer that she speaks the truth as to all. *Pierce*, 1982 OK CR 149, ¶ 6, 651 P.2d at 709.[3]

While Clayborne attacks the credibility of Jose Ramirez as a corroborating witness, he completely ignores the testimony of Jose Aguilar, Claudia Aguilar's father. Jose Aguilar testified that several days before the start of Herrera's trial he accompanied his daughter to Clayborne's office where she told Clayborne, through Talavera-DeMadrid, that she was afraid and did not want to testify. Jose Aguilar testified that Clayborne responded to his daughter's concern by saying there was nothing to worry about because two experts already looked at the video. This evidence is clearly corroboration of a material aspect of Claudia Aguilar's testimony that she had communicated her concerns about the authenticity of the video to Clayborne. It also corroborates Cecilia Talavera-DeMadrid's testimony that Aguilar had communicated those concerns to Clayborne.

Further, Jose Ramirez's testimony, even if impeached in some way, also corroborated Claudia Aguilar's and Cecilia Talavera-DeMadrid's testimony in several material respects, if believed by the jury. Ramirez testified that on February 24, 2008, he accompanied Aguilar, his girlfriend, to Clayborne's office where he, together with Aguilar, Talavera-DeMadrid and Clayborne, watched the video. Ramirez asked Talavera-DeMadrid, who was again acting as an interpreter, to relay his concern about the "white thing" [the date stamp] on the

[3] The trial court judge instructed the jury that Claudia Aguilar and Cecilia Talavera-Demadrid were accomplices who could not corroborate each other and whose testimony could only be considered if their testimony was corroborated by independent evidence.

video to Clayborne. Clayborne responded that the video had been taken to two experts and that "[t]here was no problem." At that same meeting Ramirez testified Claudia Aguilar told Clayborne that she did not want to testify because she was not the one who filmed the video. Ramirez also recalled that Clayborne told Aguilar to say that she was the one who filmed the video.

The testimony of Jose Aguilar and Jose Ramirez provided jurors with corroboration of at least one material fact of Claudia Aguilar's and Cecilia Talavera-DeMadrid's testimony, if not more. Aguilar's and Talavera-DeMadrid's testimony was sufficiently corroborated to prove the elements of subornation of perjury.

**5.**
**Audiotapes of Herrera Trial**

Clayborne claims the trial court judge violated his right to present a defense by denying him access to the court reporter's audio tapes of Claudia Aguilar's testimony from the Herrera trial. Clayborne contends that the audio tapes, not the transcripts made from those tapes, were the best, the only, evidence of the manner in which Aguilar testified at the Herrera trial because the tapes showed her demeanor and tone. According to Clayborne, the tapes, if presented as evidence at his trial, "would have undercut Aguilar's [sic] credibility as a witness against Mr. Clayborne, and would have supported his defense that he did not know the date stamp on the video evidence had been altered, since Aguilar gave no hint of that either in the substance of her testimony or its tone" (Aplt's Brief at 38).

The trial court denied Clayborne's request for access to the audio tape for use as evidence by relying on Rule 2.2(D), *Rules of the Oklahoma Court of Criminal Appeals*, which defines the transcript prepared by the court reporter as the official record of the trial proceeding in the record on appeal, and provides that recordings of the trial proceedings, if they exist, may be made available in case of extreme necessity to supplement inadequate transcripts. Rule 2.2(D) is a procedural rule of this Court governing the form and content of the record on appeal. It is not an evidentiary rule governing the availability or admissibility of trial court audiotapes in trial court proceedings. The trial court erred by relying on Rule 2.2(D) to deny Clayborne's request to use the audiotapes as evidence at his trial in lieu of the transcripts.

Nevertheless, while we disagree with the trial court's reason for denying access to the audiotapes, we find that the ultimate result was correct. Specifically, the trial court should have resolved this claim by finding that the audio evidence of Aguilar's demeanor at Herrera's trial simply was not relevant at Clayborne's trial and therefore was not admissible.

"Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." 12 O.S.2011, § 2401. Or, as this Court stated in *Behrens v. State*, 1985 OK CR 44, ¶ 14, 699 P.2d 156, 158, "[t]he test of relevancy is whether the evidence has any tendency to make more or less probable a material fact in issue."

As discussed above, Clayborne asserts in his brief-in-chief that the audiotapes of Aguilar's testimony "would have supported his defense that he did not know the date stamp had been altered, since Aguilar gave no hint of that either in the substance of her testimony or its tone" (Aplt's Brief at 38). This assertion exposes the lack of relevance of the audio tape evidence. If neither the substance nor tone of Aguilar's testimony gave any hint that Clayborne did not know the date stamp had been altered, it simply had no relevance to Clayborne's lack of knowledge defense because the recorded testimony proved nothing. That is, the mere fact that Aguilar's taped demeanor at Herrera's trial provided no evidence of Clayborne's lack of knowledge is not evidence that he lacked such knowledge. *See Quynh Truong v. Allstate Ins. Co.*, 227 P.3d 73, 84 (N.M. 2010)("It is axiomatic in both science and law that "an absence of evidence is not evidence of absence.")(citing *Commonwealth v. Heilman*, 867 A.2d 542, 547 (Pa.Super.Ct. 2005)(observing that the failure to detect a defendant's DNA at the crime scene would not establish that he had not participated in the crime)). Furthermore, Aguilar's credibility at the Herrera trial was not at issue at Clayborne's trial. Aguilar admitted at Clayborne's trial that she perjured herself. And, because Aguilar testified at Clayborne's trial, Clayborne's jurors were able to assess her demeanor for themselves without needing to hear her recorded testimony from another trial.[4]

[4] It is doubtful that much of Aguilar's demeanor or tone could be gleaned from the audiotapes of her testimony at the Herrera trial because she testified through an interpreter.

The trial court judge did not err by denying Clayborne's request to access the tapes for evidentiary use.

**6.**
**Multiple Punishment**

Clayborne claims that his convictions for both subornation of perjury and preparing a false exhibit violate the statutory prohibition against multiple punishments for the same act found at 21 O.S.2011, § 11. Clayborne acknowledges that he did not raise this claim in the trial court. The claim is therefore waived and reviewed only for plain error. *Head v. State*, 2006 OK CR 44, ¶ 9, 146 P.3d 1141, 1144.

The proper analysis of a claim raised under Section 11 is to focus on the relationship between the crimes. *Davis v. State*, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126. If the crimes "truly arise" out of one act, Section 11 prohibits prosecution for more than one crime. *Davis* , 1999 OK CR 48, ¶ 13, 993 P.2d at 126. "One act that violates two criminal provisions cannot be punished twice, absent specific legislative intent." *Id.*

Focusing on the relationship between the two charged acts in this case, it is apparent that Clayborne completed an act of preparing a false video exhibit with intent to produce it at trial the instant he gave the original videotape to the video technician at Creative Photo Video for transfer to DVD. The subornation of perjury crime, on the other hand, started at some point in time before trial when Clayborne directed Aguilar to testify that she shot the video, but was not complete until the instant Clayborne asked the question at trial

that elicited Aguilar's false testimony. Clearly then, the crimes of preparing a false exhibit and suborning perjury were separate crimes based on separate acts because they consisted of discrete acts of initiation and consummation that were committed at different times and different places. We find no error, hence no plain error. *See Hogan v. State*, 2006 OK CR 19, ¶ 39, 139 P.3d 907, 923 ("The first step in plain error analysis is to determine whether error occurred.").

**7.**
**Prosecutorial Misconduct**

Clayborne raises numerous claims of prosecutorial misconduct occurring during the prosecutor's closing argument. Some were objected to and some not. We address just two of these claims because they require relief.

Clayborne claims that in closing argument the prosecutor misstated video technician Ashley Klunk's testimony with regard to the white box containing the date stamp. According to Clayborne, the prosecutor told jurors that Klunk's testimony was that she told Clayborne "that's an edit," referring to the white date box. Clayborne did not object to this alleged misstatement. The claim is therefore waived and reviewed only for plain error. *Bland v. State*, 2000 OK CR 11, ¶ 89, 4 P.3d 702, 726.

The trial transcript shows that the prosecutor did misstate Klunk's testimony. Klunk never said she told Clayborne that the white box was actually an edit. Rather, she testified only that she told Clayborne, in response to a general question asked by him, that superimposing information on a video

is something that she or anybody could do with video editing software. In this instance then, the prosecutor's statement that Klunk told Clayborne "that's an edit," was an obvious misstatement of the evidence.

Under plain error analysis, after finding an error such as this, the Court reviews the error to determine whether it affected the defendant's substantial rights by affecting the outcome of the proceeding. *Hogan v. State*, 2006 OK CR 27, ¶ 38, 139 P.3d 907, 923. More specifically, this Court has held that "[w]hen [a prosecutor's] comments are based upon facts not introduced into evidence, or, . . . are minor misstatements of facts entered into evidence, we review the totality of the evidence to determine whether the remark could have affected the outcome of the trial." *Bear v. State*, 1988 OK CR 181, ¶ 7, 762 P.2d 950, 957 (quoting *Cunningham v. State*, 1987 OK CR 280, ¶ 7, 748 P.2d 520, 522); *see also Bland v. State*, 2000 OK CR 11, ¶ 101, 4 P.3d 702, 728 ("a minor misstatement of fact will not warrant a reversal unless, after a review of the totality of the evidence, it appears the same could have affected the outcome of the trial"). Here, the misstatement of fact was not minor, and could have affected the outcome of the trial.

In this instance, the prosecutor misstated Klunk's testimony on a material fact dealing with Clayborne's knowledge of the falsity of the video. As discussed above with regard to the defective jury instruction, Clayborne's knowledge of the falsity of the video date stamp was an element of the charged offense. Moreover, it appears to have been the essence of his defense (i.e., that

he lacked knowledge of the video's falsity). If Klunk testified that she told Clayborne that the white box was an edit, as the prosecutor told jurors she did, that testimony would have been especially significant because it would have been the only direct evidence of Clayborne's knowledge of the falsity of the video's date. If jurors took that misstated evidence as fact, it would have been powerful direct evidence of Clayborne's guilty knowledge, and may well have swayed jurors toward conviction in a case otherwise built entirely on circumstantial evidence of guilty knowledge.

Clayborne also complains that the prosecutor improperly argued that in his viewings of the video, not a single person he had watched the video with failed to think there was something wrong with it. Clayborne objected to this argument, but the trial judge neither sustained nor overruled the objection. Instead, the judge simply told the prosecutor to "move on."

Here, the prosecutor advanced an argument that was not based on any evidence presented at trial. Rather, in making this argument, the prosecutor invoked the opinions of anonymous persons who did not testify as well as his own personal opinion of the evidence. Furthermore, this statement impliedly bolstered or vouched for the testimony of Claudia Aguilar and Cecilia Talavera-DeMadrid, accomplices, who testified that Aguilar told Clayborne that she was concerned about the appearance of the white date box in the video. In either situation, advancing an argument based on evidence from outside the trial record, or advancing an argument based on personal opinion, or stating a

personal opinion in an effort to vouch for or bolster the credibility of a witness, was improper.

"Allegations of prosecutorial misconduct will not cause a reversal of judgment or modification of sentence unless their cumulative effect is such as to deprive the defendant of a fair trial and fair sentencing proceeding." *Jones v. State*, 2006 OK CR 5, ¶ 76, 128 P.3d 521, 545 (quoting *Spears v. State*, 1995 OK CR 36, ¶ 60, 900 P.2d 431, 445). Furthermore, "[t]his Court looks at the entire record to determine whether the cumulative effect of improper conduct by the prosecutor prejudiced an appellant causing plain error. *Id.* Given that both arguments were improper, and given that both improper arguments purported to add weight to the evidence of Clayborne's guilty knowledge, an element of the offense upon which the jury was erroneously instructed, we cannot reasonably conclude that Clayborne received a fair trial on this count. This count must be reversed.

**8.**
**Accumulation of Error**

Clayborne claims that the accumulation of errors in his case requires reversal of his convictions on both counts, or at least a modification of his sentences to run them concurrently. Given that the errors identified here relate only to the false exhibit count, the count which we reverse, this claim is moot.

## DECISION

The Judgment and Sentence of the district court is **AFFIRMED** as to Count 1 (Perjury by Subornation). The Judgment and Sentence of the district court is **REVERSED** as to Count 3 (Allowing the Production of a False Exhibit). Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2013), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE RICHARD G. VAN DYCK, DISTRICT JUDGE

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**OPINION BY: A. JOHNSON, J.**
**LEWIS, P.J.: Concur in Results**
**SMITH, V.P.J.: Concur**
**LUMPKIN, J.: Concur in Part and Dissent in Part**
**C. JOHNSON, J.: Concur**
RA

**LUMPKIN, JUDGE: CONCURING IN PART/DISSENTING IN PART**

I concur in affirming the Judgment and Sentence as to Count 1 but must dissent to the reversal of Count 3. The Opinion finds that Appellant is entitled to relief as to Count 3 based upon (1) the trial court's omission of a jury instruction upon knowledge, and (2) prosecutorial misconduct which occurred in closing argument denied him a fair trial. However, I find that no error occurred.

Appellant raised his jury instruction claim in Proposition Three of his brief. Within this proposition, Appellant raised four completely unrelated claims under the nebulous argument that his "conviction for Preparing a False Exhibit must be vacated for several reasons." (App. Brf. 20). Appellant's lumping of four propositions together violates Rule 3.5(A)(5), *Rules of the Court of Criminal Appeals*, 22 O.S., Ch. 18, App. (Supp.2013). Under Rule 3.5(A)(5), combining multiple issues in a single proposition is clearly improper and constitutes waiver of the alleged errors. *Collins v. State*, 2009 OK CR 32, ¶ 32, 223 P.3d 1014, 1023. This Court does not address assertions of error that are not separately set out as a proposition of error in the brief. *Cuesta-Rodriquez v. State*, 2011 OK CR 4, ¶ 12, 247 P.3d 1192, 1197 (denying rehearing) (holding assertion of error in jury instructions was not addressed because the appellant failed to set it out in a separate proposition of error). Thus, the Opinion should not reach the merits of Appellant's jury instruction claim.

Nonetheless, I cannot agree that the trial court erred when it refused to instruct the jury that "knowingly" was a requisite element of the offense of preparation of a false exhibit. An instruction upon criminal intent or knowledge is only required where there is evidence of lack of knowledge, the defendant relies upon lack of knowledge as his defense, and the defendant properly requests such an instruction. *Dear v. State*, 1989 OK CR 18, 773 P.2d 760, 761. In the present case, there was no evidence that Appellant lacked knowledge that the exhibit was false. Appellant's statement to Claudio Aguilar that he had taken the video to experts who had determined that there was nothing wrong with it was not evidence of Appellant's lack of knowledge. Instead, Appellant's statement was evidence of his intent to deceive. The evidence established that Appellant had not had the video examined by experts for the purpose of determining its authenticity. He merely had it edited and copied. As Appellant's statement to Aguilar was shown to be a deception, Appellant's statement was actually evidence of his knowledge of the falsity of the exhibit. As there was no evidence of lack of knowledge, Appellant had no right to the instruction and the trial court did not error.

As to Appellant's prosecutorial misconduct claim, I note that the third step of plain error review of a claim of prosecutorial misconduct is to determine whether the prosecutor's misconduct affected the appellant's substantial rights, *i.e.*, rendered the trial fundamentally unfair. *Malone v. State*, 2013 OK CR 1, ¶ 43, 293 P.3d 198, 212. This Court evaluates the alleged misconduct within the context of the entire trial, including the propriety of the prosecutor's

actions, the strength of the evidence against the defendant and the corresponding arguments of defense counsel. *Hogan v. State*, 2006 OK CR 19, ¶ 88, 139 P.3d 907, 935. Relief is only granted where the prosecutor's misconduct is so flagrant and so infected the defendant's trial that it was rendered fundamentally unfair. *Jones v. State*, 2011 OK CR 13, ¶ 3, 253 P.3d 997, 998.

In the present case, the two isolated statements did not render Appellant's trial fundamentally unfair. Plain error did not occur and no relief is required.

As to Proposition One, I note that the Opinion fails to apply plain error review to Appellant's claim that the trial court failed to follow the procedure set forth in 22 O.S.2001, § 894. Defense counsel was present when the trial court formulated the answer to the jury's note but did not challenge the trial court's failure to summon the jury into open court. Thus, Appellant waived appellate review of this claim for all but plain error. *Simpson v. State*, 1994 OK CR 40, ¶ 23, 876 P.2d 690, 698. Plain error did not occur.

I further note that the Opinion appropriately determines that the trial judge's instruction about the State's disclosure obligations constituted harmless error under the State statutory harmless error standard set forth in *Simpson*. *Id.*, 1994 OK CR 40, ¶¶ 36-37, 876 P.2d at 702.