



IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DAVID RUBLE, II,)
Appellant,)
vs.)
THE STATE OF OKLAHOMA,)
Appellee.)

NOT FOR PUBLICATION

No. F-2016-843

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

DEC 14 2017

SUMMARY OPINION

KUEHN, JUDGE:

David Ruble II was tried by jury and convicted of Count I, Felony Murder with the predicate Attempted Robbery by Firearm in violation of 21 O.S.2011, § 701.7; and Count III, Conspiracy to Commit Robbery with a Firearm in violation of 21 O.S.2011, § 421, in the District Court of Tulsa County, Case No. CF-2014-2691.1 In accordance with the jury's recommendation the Honorable William D. LaFortune sentenced Ruble to life imprisonment (Count I) and ten (10) years imprisonment (Count III), to run consecutively. Ruble appeals from these convictions and sentences.

Ruble raises five propositions of error in support of his appeal:

- I. The trial court's erroneous rulings on challenges for cause deprived Appellant of his full complement of peremptory challenges to use at his discretion and prevented his ability to remove objectionable jurors. As a result, two objectionable jurors were ultimately seated on Appellant's jury in violation of the Sixth and Fourteenth Amendments to the United States Constitution and article ii, Section 7, 19, and 20 of the Oklahoma Constitution.
II. The cumulative effect of prosecutorial misconduct constituted plain error and deprived Appellant of a fair trial.
III. The trial judge erred in not instructing the jury on lesser offenses.

1 Count II, Attempted Robbery with a Firearm, was dismissed.

- IV. Mr. Ruble 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.
- V. The accumulation of errors deprived Mr. Ruble 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, Sections 7, 19, and 20 of the Oklahoma Constitution.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we find that the law and evidence do not require relief.

We find in Proposition I that the trial court did not abuse its discretion in denying Ruble's challenges for cause. We review a judge's decision whether to excuse a juror in *voir dire* for abuse of discretion. *Jones v. State*, 2009 OK CR 1, ¶ 14, 201 P.3d 869, 877. An abuse of discretion is any unreasonable or arbitrary action made without proper consideration of the relevant facts and law, also described as a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. We defer to the trial court's personal observations of prospective jurors. *Postelle v. State*, 2011 OK CR 30, ¶ 48, 267 P.3d 114, 135. Our appellate review ultimately focuses, not on the jurors who were excused, but on the jurors who heard the evidence and rendered a verdict. *Jones*, 2009 OK CR 1, ¶ 33, 201 P.3d at 880. A defendant must show that the trial court's ruling prejudicially reduced his peremptory challenges, and that he was forced, over objection, to keep an unacceptable juror. *Rojem v. State*, 2006 OK CR 7, ¶ 37, 130 P.3d 287, 295. Defense counsel must specifically explain on the record why the juror is unacceptable. *Hanson v. State*, 2003 OK CR 12, ¶¶ 11-12, 72 P.3d 40, 48-49. While

trial counsel named the two jurors he would have removed had he had more peremptory challenges, he made no record as to why those jurors were unacceptable. Thus, this issue has not been properly preserved. Moreover, the record does not support any claim that jurors were untruthful, dishonest, or biased.² This proposition is denied.

We find in Proposition II that no prosecutorial misconduct prejudiced Ruble. Ruble did not object to many of the comments or questions of which he complains, and we review those for plain error. *Mathis v. State*, 2012 OK CR 1, ¶ 24, 271 P.3d 67, 76. Plain error is an actual error, that is plain or obvious, and that affects a defendant's substantial rights, affecting the outcome of the trial. *Barnard v. State*, 2012 OK CR 15, ¶ 13, 290 P.3d 759, 764. We review the statements to which Ruble did object for abuse of discretion. *Mathis*, 2012 OK CR 1, ¶ 24, 271 P.3d at 76. Regarding argument, both parties have wide latitude to fully discuss the evidence and inferences from it. *Ashton v. State*, 2017 OK CR 15, ¶ 48, 400 P.3d 887, 899. We will not grant relief unless errors in argument render a trial so fundamentally unfair that we cannot rely on the jury's verdict. *Webster v. State*, 2011 OK CR 14, ¶ 81, 252 P.3d 259, 281. The record does not support Ruble's claim that the prosecutor invoked sympathy for the victim. Ruble's objection to a single irrelevant question was sustained, curing any error. *Johnson v. State*, 2013 OK CR 12, ¶ 16, 308 P.3d 1053, 1057. The prosecutor made several arguments referring explicitly to Ruble's actions and the facts of the case. These did not, as he claims, amount to

² Ruble also claims jurors were biased by the pretrial publicity. He does not develop this claim with citation to authority or argument, and it is not properly raised. Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017).

societal alarm, which refers to general arguments about deterrence of crime, the crime rate, or making an example of the defendant in order to discourage other potential crimes. *Logsdon v. State*, 2010 OK CR 7, ¶ 38, 231 P.3d 1156, 1169. Most of the other comments made were reasonable inferences from the evidence. Ruble fails to show prejudice from comments about his supposed financial circumstances or the “forever” nature of the crime. The record does not support any conclusion that this argument had any effect on the jury’s finding of guilt, and he received the minimum sentence. This proposition is denied.

We find in Proposition III that the trial court did not err in failing to *sua sponte* instruct the jurors on the lesser included offenses of second degree depraved mind murder and second degree felony murder. He did not request these instructions and we review for plain error. *Simpson v. State*, 2010 OK CR 6, ¶ 16, 230 P.3d 888, 897. A trial court should instruct jurors on any lesser offense supported by the evidence. *Barnett v. State*, 2012 OK CR 2, ¶ 18, 271 P.3d 80, 86. However, lesser included instructions are not appropriate where a defendant claims he was innocent. *Harney v. State*, 2011 OK CR 10, ¶ 10-11, 256 P.3d 1002, 1005. Ruble’s defense was that he was not involved in the crime, and was innocent of the charges. He was not entitled to instruction on lesser included offenses. This proposition is denied.

We find in Proposition IV that trial counsel was not ineffective. He must show that counsel’s performance was deficient, and that the deficient performance was prejudicial. *Miller v. State*, 2013 OK CR 11, ¶ 145, 313 P.3d 934, 982; *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003);

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Ruble must show he was prejudiced by counsel's acts or omissions, and we may dispose of his claim if he fails to do so. *Marshall v. State*, 2010 OK CR 8, ¶ 61, 232 P.3d 467, 481; *Williams v. Taylor*, 529 U.S. 362, 394, 120 S.Ct. 1495, 1513-14, 146 L.Ed.2d 389 (2000); *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067. We found in Proposition III that Ruble was not entitled to instructions on lesser included offenses. Hence, trial counsel was not ineffective for failing to request them. We found in Proposition II that Ruble was not prejudiced by prosecutorial misconduct; thus counsel was not ineffective for failing to object to the questions and comments. Trial counsel was not ineffective and this proposition is denied.

We find in Proposition V that no cumulative error requires relief. Where there is no error, there is no accumulated error. *Malone v. State*, 2013 OK CR 1, ¶ 74, 293 P.3d 198, 218. In this proposition, Ruble also suggests his sentences, running consecutively, shock the conscience. This should have been raised in a separate proposition, as it concerns excessive sentence rather than cumulative error. Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017). This proposition is denied.

DECISION

The Judgment and Sentence of the District Court of Tulsa County is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE WILLIAM D. LAFORTUNE, DISTRICT JUDGE

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KUEHN, J., OPINION:

LUMPKIN, P.J.: CONCUR IN RESULTS
LEWIS, V.P.J.: CONCUR
HUDSON, J.: CONCUR
ROWLAND, J.: CONCUR

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