ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

DAKOTA JOE SPAINHOWER,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	Case No. F-2017-1031
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

LEWIS, PRESIDING JUDGE:

Appellant, Dakota Joe Spainhower, was tried by jury and convicted of first degree murder, in violation of 21 O.S.Supp.2012, § 701.7(A), in the District Court of Creek County (Bristow), case number CF-2016-282, before the Honorable Joe Sam Vassar, District Judge. The jury set punishment at life imprisonment without the possibility of parole and Judge Vassar pronounced judgment and sentence according to the verdict. Mr. Spainhower now appeals raising the following propositions of error:

1. The trial court abused its discretion by concluding that Mr. Spainhower's *Miranda* waiver was knowing and intelligent and that his statements during custodial interrogation were voluntary;

2. The State's evidence was insufficient to prove the essential elements of the crime of first degree malice aforethought murder;

3. Prosecutorial misconduct denied Mr. Spainhower his due process right to a fair jury trial;

4. Mr. Spainhower was deprived of the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution;

5. The cumulative effect of all the errors addressed above deprived Mr. Spainhower of a fair trial.

FACTS

Both Appellant and the victim D.L.[1] worked at the Pizza Hut in Bristow, Oklahoma. They both worked a shift on July 18, 2016, and ended their shift at about 10:00 p.m.

D.L. gave Appellant a ride home. Later that evening, D.L.'s parents noticed that he had not arrived home and his car was not home. They started looking for him and contacted the police.

At about 10:05 p.m., Appellant's mother heard a noise outside. She looked but could not see anything. Appellant called to let her know that he and a friend were outside.

[1] D.L., a juvenile, will be referred to by his initials pursuant to Rule 7.5(E), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019).

She went outside and saw her son in the front yard. At first, she didn't see any vehicles. Appellant told her not to come out to where he was. She did, however, go out there and saw a car parked and a body lying next to the car. She asked Appellant about it and he said it was a bag.

She went inside to get her phone and Appellant followed her. She then saw that he had blood on him. He told her that D.L. tried to rob him and D.L. stabbed him. Appellant said he stabbed D.L. several times in return.

She found her cell phone, but Appellant grabbed it from her. When she tried to go outside, Appellant grabbed her. He let her go, but when she tried to go outside again, he blocked her path.

When she was finally able to get outside, she headed to the ambulance service down the street. Appellant followed her and tried to stop her by picking her up; she screamed and yelled; he put his hand over her mouth and nose. She went limp and he carried her to a lot and put her down. Finally, she was able to get up and make it to the ambulance service screaming for help.

Scott Forrester, a paramedic with the ambulance service, heard Ms. Spainhower scream. She was yelling for someone to call

the police and she told Forrester what happened. The police were contacted.

After that, Cory Walker, also an employee at Pizza Hut, saw D.L.'s car being driven by a shirtless Appellant. Appellant tried to turn his head away, but Walker was sure it was him.

On that same night, Appellant went to Vivian Johnson's house looking for her grandson, Dre-Von Johnson. Appellant told her that someone was trying to jump him and take his money. She let him in. Appellant was wearing shorts and no shirt. She noticed that he had a cut on his hand that was bleeding, but it wasn't a bad cut in her opinion.

Appellant asked if he could wash up and she let him. She told Appellant to call the police but he didn't want to deal with the police and seemed upset. She called Dre-Von and he came to the house.

Dre-Von took Appellant to Christopher Stock's house. Stock had been contacted by the police at about midnight on the 18th. They told him to call Appellant and have him come over. When Appellant was dropped off, the police arrived and took Appellant into custody.

Detective Kevin Webster was called in to work this case. He first went to the Appellant's house and noticed a large pool of blood near the driveway. He then went to the police station and met with Appellant.

Webster began his interview with Appellant by giving him the *Miranda* warning. Appellant acknowledged that he understood his rights and he chose to answer questions.

Appellant told Webster that D.L. tried to rob him and he got stabbed in the hand. He said that he grabbed the knife and broke it. He used the blade and stabbed D.L. a couple of times. He said he didn't know where D.L. or his car was. He did, however, have the keys to D.L.'s car in his pocket. The keys had blood on them. When officers finally found D.L.'s car, they found copious amounts of blood inside, but no body.

After finding the car, at about 3:00 or 4:00 a.m., Webster called the Oklahoma State Bureau of Investigation (OSBI) for assistance investigating the missing person and possible homicide case. Two agents, Derick White and Kevin Garrett, arrived at about 6:00 a.m. Garrett went into the station and found Appellant sitting

in the station's "day room." Appellant was not handcuffed or restrained in any way.

The agents were briefed on the case by Webster and began questioning Appellant. Appellant told the agents that D.L. drove him home and, as he was getting ready to get out, D.L. attempted to stab him with a knife and rob him. Appellant said he held up his left hand and was stabbed in the hand. Appellant then grabbed the blade, broke it off, and he stabbed D.L. several times in the chest area.

According to Appellant, he pinned D.L. against the driver's door and took the keys from the ignition so D.L. couldn't get away. Appellant got out of the car and walked toward his house. He looked back and saw D.L. lying next to the car.

Appellant told the agents that when he told his mom that D.L. tried to stab him, he freaked out and wouldn't let her call the police. When his mom got to the ambulance station, he turned around and went back home.

Initially, Appellant told the agents that when he got back home, D.L. and the car were gone. The agents told Appellant that they would get cell phone records to show where he had been.

Appellant finally admitted that D.L. was still alive on the ground, so he put him in the car and drove him to a secluded bridge.

Appellant then agreed to take them to the bridge. Once there, the agents found D.L. under the bridge, deceased, and began collecting evidence at the scene.

Later investigation revealed that a small kitchen knife was missing from Pizza Hut. Employees identified a similar knife at trial. Initially, no broken blade was found in D.L.'s car, but later the blade was found by a wrecker service while cleaning the vehicle.

According to the medical examination, D.L. was stabbed eight times, cut thirty-seven times, and suffered numerous blunt force injuries. Among the stab wounds, D.L. was stabbed in the right side of his neck, injuring his right jugular vein. He was also stabbed in the left upper chest, injuring his left jugular vein and in the left chest, injuring the left lung.

ANALYSIS

Appellant's proposition one claims the trial court abused its discretion by concluding Appellant's *Miranda* waiver was knowing and intelligent and that statements made by him during custodial interrogation were voluntary.

The trial court conducted a hearing and ruled, pursuant to *Jackson v. Denno*,[2] that the challenged statements were voluntary. A confession is voluntary when it is the product of an essentially free and unconstrained choice by its maker. *Crawford v. State*, 1992 OK CR 62, ¶ 28, 840 P.2d 627, 635 (citing *Malloy v. Hogan*, 378 U.S. 1, 7, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653 (1964)). A court must look to the totality of the surrounding circumstances, both the characteristics of the accused and the details of the interrogation to determine whether the maker's will was overborne. *Id.* The dispositive inquiry is whether police misconduct contributed to the confession. *Gilbert v. State*, 1997 OK CR 71, ¶ 42, 951 P.2d 98, 111; *Colorado v. Connelly*, 479 U.S. 157, 164, 107 S.Ct. 515, 520, 93 L.Ed.2d 473 (1986). The burden is on the State to show, by a preponderance of the evidence that the confession was voluntary, when the admissibility of a statement or confession is challenged. This Court will not disturb the trial court's ruling if it is supported by sufficient evidence that appellant knowingly and intelligently waived his rights and understood the consequences of his waiver. *Rosteck v. State*, 1988 OK CR 11, ¶ 4, 749 P.2d 556, 558.

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[2] 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

Appellant argues that his mental impairments, lack of education, and the length of his questioning are factors which made it impossible for him to have made a knowing and informed decision to waive his constitutional rights to counsel and to remain silent. He argues that he was not fully aware of the rights he was abandoning or the consequences of the decision to abandon them.

Appellant argues that his initial interview, at the police station with Detective Webster, might have lasted for two to three hours beginning at about 12:30 a.m. He was again interviewed by Agents Kevin Garrett and Derek White for about five hours sometime after 6:00 a.m. White noted that Appellant had a significant speech impediment and Appellant told him that he had a learning disability and had attended special education classes in school. Appellant also told White that he had recent suicidal thoughts and believed people were out to get him. Appellant told White that he felt threatened by Detective Webster.

During the time Appellant was at the police station he was not handcuffed and not deprived of food, water or rest. The record is not clear whether he was interrogated the entire time he was at the station, especially during the time he was initially taken into

custody at about 12:30 a.m. and the time OSBI investigators arrived at the station at about 6:00 a.m.

Appellant initially told investigators about the stabbing and told them that D.L. left the scene while Appellant was scuffling with his mother. It wasn't until an hour into his questioning by the OSBI agents that he confessed to taking D.L. to the bridge and leaving him there.

There is nothing in the *Jackson v. Denno* hearing to lead this Court to find that the trial court abused its discretion in allowing the admission of this confession. There was sufficient evidence to show it was voluntary. *Crawford*, 1992 OK CR 62, ¶¶ 28-30, 840 P.2d at 635. We find Appellant's confession was not the result of police misconduct nor was the confession a result of Appellant's low education level or immaturity. This proposition is denied.

In proposition two Appellant argues the State's evidence was insufficient to prove the essential elements of first degree malice aforethought murder. Evidence is sufficient to support a conviction if, viewing the evidence and all reasonable inferences from it in the light most favorable to the State, any rational trier of fact could find the defendant guilty beyond a reasonable doubt. *Coddington v.*

State, 2006 OK CR 34, ¶ 70, 142 P.3d 437, 456; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04. This Court will not weigh conflicting evidence or second-guess the fact-finding decisions of the jury. *See Day v. State*, 2013 OK CR 8, ¶ 12, 303 P.3d 291, 298. Applying this standard in the instant case, we find that any rational trier of fact could find beyond a reasonable doubt that Appellant was guilty of first degree murder based on the evidence presented at trial. *See Logsdon v. State*, 2010 OK CR 7, ¶ 5, 231 P.3d 1156, 1161; *Spuehler*, 1985 OK CR 132, ¶ 7, 709 P.2d at 203-04.

Appellant stabbed D.L. eight times, some of those in areas holding organs vital to life. D.L. had numerous defensive wounds to his hands and his left arm. He had injuries to his head, neck, and torso. He was stabbed in his right neck area striking the right jugular vein, the left upper chest striking his left jugular vein, and in the chest numerous times, one of which struck his left lung.

Appellant fought to keep his mother from calling 911 when she discovered that something bad had happened, he told her that D.L. had tried to rob and stab him, so he took the knife and stabbed him numerous times.

He admitted driving D.L. to a remote bridge and hiding his body under the bridge knowing he was severely injured and bleeding profusely. Even more telling is the fact that earlier he had questioned his coworker whether he would have the guts to stab someone.

These external circumstances are sufficient to show that Appellant intended to kill D.L.. *See* 21 O.S.Supp.2012, § 701.7. Premeditation is inferred from the fact of killing, unless the circumstances raise a reasonable doubt whether such design existed. 21 O.S.2011, § 702. *Hooks v. State*, 1993 OK CR 41, ¶ 21, 862 P.2d 1273, 1280. Further, premeditation sufficient to constitute murder may be formed in an instant. *Id.* Finally, malice aforethought may be proven by circumstantial evidence. *Id.*

Here, the evidence is sufficient to show that Appellant committed the crime of first degree murder.

In proposition three Appellant claims prosecutorial misconduct during closing argument deprived him of a fair trial. Counsel objected to some instances, but not to others. Instances of misconduct absent an objection are reviewed for plain error only. 12 O.S.2011, § 2104 (a court may take "notice of plain errors

affecting substantial rights although they were not brought to the attention of the court.") To be entitled to relief for plain error, an appellant must show: "(1) the existence of an actual error (i.e., deviation from a legal rule); (2) that the error is plain or obvious; and (3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding." *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. *See also Simpson v. State*, 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d 690, 694, 695, 698. 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. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

When reviewing claims of prosecutorial misconduct constituting error, this "Court grants relief for prosecutorial misconduct only when it is so flagrant that it renders the trial or sentencing fundamentally unfair." *Nicholson v. State*, 2018 OK CR 10, ¶ 18; 421 P.3d 890, 896-97; *Williams v. State*, 2008 OK CR 19, ¶ 124, 188 P.3d 208, 230. "[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." *Nicholson,* 2018 OK CR 10, ¶ 18, 421 P.3d at 896-97; *Hanson v. State,* 2009 OK CR 13, ¶ 18, 206 P.3d 1020, 1028. Both sides have wide latitude to discuss the evidence and reasonable inferences therefrom. *See Harmon v. State,* 2011 OK CR 6, ¶ 81, 248 P.3d 918, 943. It is the rare instance when a prosecutor's misconduct during closing argument will be found so egregiously detrimental to a defendant's right to a fair trial that reversal is required. *See Pryor v. State,* 2011 OK CR 18, ¶ 4, 254 P.3d 721, 722.

The first comment challenged as misconduct was in response to defense counsel's argument that the evidence left "unanswered questions" regarding what happened relative to premeditation, intent and malice aforethought. The prosecutor suggested that questions are unanswered because "the only people who can tell you that are deceased or don't have to testify." An objection by trial counsel was sustained and the jury was admonished to disregard the comment. Generally an admonishment cures any error. *See Cheatham v. State,* 1995 OK CR 32, 900 P.2d 414, 425 (when an improper comment is presented to a jury, an admonishment to the

jury by the court that the comment is not to be considered will cure any error). We find that the admonishment was sufficient to cure the error.

Next, Appellant argues that the prosecutor misstated the law with regard to second degree murder by saying that second degree murder required no intention to kill a specific person. There was no objection to this statement.

The argument, taken as a whole, was not error. The prosecutor was merely stating that the last element of second degree murder required that Appellant's conduct was not done with the intention of taking the life of any particular individual. If Appellant intended to kill anyone and caused the death of D.L., Appellant would be liable for malice murder. These are correct interpretations of the law.[3]

Appellant next claims that the prosecutor engaged in improper dialogue with a juror during closing argument. Here, a juror answered a question posed by the prosecutor based on the evidence and used to refute Appellant's story. He posed the question what would happen if a person "held a knife blade that's

[3] *See Jackson v. State*, 2016 OK CR 5, ¶ 8, 371 P.3d 1120, 1122-23.

two and a half inches long and stab[bed] someone two and a half inches deep with them struggling? . . . the dominant hand of the assailant would be what?" A juror answered "cut." The prosecutor continued on with his argument. There was no objection.[4] Appellant claims that the juror should have been immediately admonished by the prosecutor.

Appellant cites no case directly on point. This inadvertent verbal agreement with the prosecutor's argument was just that, inadvertent. We find no plain error.

Lastly, Appellant argues that the prosecutor improperly attempted to invoke sympathy for the victim on multiple occasions during the second closing argument. The prosecutor spoke of parenting, to the point of recounting his own parenting style. Initially, Appellant objected, but the initial objection was overruled. The prosecutor continued on without objection.

The unfortunate argument was a recitation on the miracle of children, both Appellant and the victim, and how children have to be instructed. He went on to use the evidence and instructions to

[4] The case cited by the litigants, *Fields v. State*, 1961 OK CR 75, 364 P.2d 723, contains a Scrivener's error in the citation. It is cited correctly here.

show the jury how they should find Appellant guilty of first degree murder and set punishment at life without parole. This argument, while troubling, did not render the trial or sentencing fundamentally unfair. There was no plain error here.

Later, the prosecutor, in discussing punishment, began to argue D.L.'s loss of years. This line of argument was met with objection which was sustained, and the jury was admonished by the trial court. Again, we find that the admonishment cured any error. Appellant's claim of prosecutorial misconduct is denied.

In proposition four Appellant claims he was denied the effective assistance of counsel. This Court reviews ineffective assistance claims with the two-pronged test of *Strickland v. Washington*, 466 US 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), requiring that the appellant show both unreasonably deficient performance by counsel and resulting prejudice, in the form of an unreliable verdict or sentence. *Id.*, 466 U.S. at 687, 104 S.Ct. at 2064.

Appellant argues that counsel was ineffective for failing to object to the prosecutor's misconduct identified in proposition three. The misconduct identified in the previous proposition for

which defense counsel failed to lodge an objection did not affect the outcome of this trial. This Court finds that the prejudice prong of *Strickland* is not met by Appellant in the failure to object.

Next, Appellant claims that counsel was ineffective because he provided no documentation to support his argument that Appellant could not have knowingly waived his *Miranda* rights because he lacked the intelligence to do so. Here, appellate counsel has filed a motion for supplementation of the record with extra-record evidence and a request for an evidentiary hearing pursuant to Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019).

This Court reviews a Rule 3.11(B)(3)(b) motion to determine whether the appellant has provided sufficient information to show this Court by clear and convincing evidence that there is a strong possibility trial counsel was ineffective for failing to utilize or identify the evidence at issue. *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905-06. This standard is less demanding than the test imposed by *Strickland*. *Id.*

Appellant presents school records and an affidavit from his aunt to show that he has low intelligence, would test low on

standardized intelligence tests, was on an individualized treatment plan at school, and struggled in the public education system. These records do not support by clear and convincing evidence that there is a strong possibility that counsel was ineffective for failing to identify or utilize the proffered evidence. *Id.*

The trial court was well aware of Appellant's learning disability and his speech impediment. The trial court record shows that Appellant was intelligent enough to understand his rights, further he was able to provide a detailed account of his version of the events and never wavered from those accounts. He was intelligent enough to know that what he did was wrong and that the police would blame him, so he attempted to prevent his mother from calling the police. Appellant's age and his low intelligence did not contribute to his inability to waive his *Miranda* rights in a way that would cause this Court to doubt that his waiver was knowing and voluntary. Appellant's motion to supplement the record and motion for an evidentiary hearing is, therefore, denied.

Appellant's proposition five claims the cumulative effect of all the errors addressed above deprived him of a fair trial. We find that there are no individual errors requiring relief. As we find no error

that was harmful to Appellant, there is no accumulation of error to consider. *Barnett v. State*, 2011 OK CR 28, ¶ 34, 263 P.3d 959, 970.

DECISION

The Judgment and Sentence is **AFFIRMED**. Appellant's request to supplement the record and application for an evidentiary hearing are **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CREEK COUNTY
THE HONORABLE JOE SAM VASSAR, DISTRICT JUDGE

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HUDSON, J: Concur
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