ORIGINAL

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MARCUS DEWAYNE BOYD,	)	
	)	**NOT FOR PUBLICATION**
Appellant,	)	
	)	
v.	)	**Case No. F-2018-147**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, JUDGE:

Appellant, Marcus Dewayne Boyd, was tried by jury and convicted of Count A, First Degree Murder, in violation of 21 O.S.Supp.2012, § 701.7,[1] Counts B-E, Shooting with Intent to Kill, in violation of 21 O.S.2011, § 652(A) and Count F, Possession of a Firearm After Former Conviction of a Felony, in the District Court of Tulsa County Case Number CF-2016-3995. The jury recommended as punishment imprisonment for life in Count A, twenty years in Counts B-E and two years in Count F. The trial court sentenced

---

[1] Appellant must serve 85% of his sentences in Counts A-E before becoming eligible for consideration for parole. 21 O.S.2011, § 13.1. We cannot discern why letters were used for the counts rather than numbers, but we refer to the counts as reflected in the Information.

Appellant accordingly and ordered the sentences run consecutively. It is from these judgments and sentences that Appellant appeals.

Appellant raises the following propositions of error in this appeal:

I. Appellant's rights to due process and a fair trial were violated by the improper admission of bad character evidence.

II. The prosecutor improperly impeached defense witness Deisha Ewell with evidence of the bad character of her relatives and associates.

III. The photographic lineup procedures in this case were so suggestive that they violated Appellant's due process rights and required that his convictions be reversed.

IV. The State's suppression of favorable evidence in violation of due process of law denied Appellant a fair trial.

V. The State improperly impeached defense witness Ashaela Phillips with evidence that she had previously been convicted of misdemeanor shoplifting.

VI. The trial court erred in requiring Appellant to stand trial while wearing a restraining device without a proper showing that such restraint was necessary under the facts of the case.

VII. Appellant was deprived of the reasonably effective assistance of counsel, guaranteed him by the Sixth Amendment to the United States Constitution.

VIII. The accumulation of error in this case deprived Appellant of due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article II, § 7 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 neither reversal nor modification of sentence is warranted under the law and the evidence.

In Proposition One, Appellant contends the trial court erred when it admitted bad character evidence. He asserts that evidence concerning his gang affiliation denied him due process and a fair trial. Contrary to the assertion contained in Appellant's brief, defense counsel objected prior to the testimony of Corporal Rusty Brown, supervisor of the Tulsa Police Department's organized gang unit. Therefore, our review is for an abuse of the trial court's discretion. *Davis v. State*, 2011 OK CR 29, ¶ 86, 268 P.3d 86, 113. An abuse of discretion has been defined as a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented or, stated otherwise, any unreasonable or arbitrary action taken without proper consideration of the facts

and law pertaining to the matter at issue. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161,170 (internal citation and quotation marks omitted). Reviewing the record, we find that the trial court did not abuse its discretion when it determined that the gang affiliation evidence was admissible.

Section 2404(B) of the Oklahoma Evidence Code prohibits the introduction of other crimes, wrongs, or acts to prove the character of a person. "The basic law is well established-when one is put on trial, one is to be convicted -if at all- by evidence which shows one guilty of the offense charged; and proof that one is guilty of other offenses not connected with that for which one is on trial must be excluded." *Lott v. State*, 2004 OK CR 27, ¶ 40, 98 P.3d 318, 334. However, if a defendant's conduct is part of the *res gestae* of the charged offense, then it is not considered other crimes or bad acts evidence. *Rogers v. State*, 1995 OK CR 8, ¶¶ 20-21, 890 P.2d 959, 971. Evidence is considered part of the *res gestae* when: a) it is so closely connected to the charged offense as to form part of the entire transaction; b) it is necessary to give the jury a complete understanding of the crime; or c) when it is central to the chain of events. *Jackson v. State*, 2006 OK CR 45, ¶ 28, 146 P.3d 1149, 1160. "This Court has found that

evidence of gang involvement or affiliation may be admitted when it is 'fundamental to understanding what happened and why it happened.'" *Vanderpool v. State*, 2018 OK CR 39, ¶ 24, 434 P.3d 318, 324 (quoting *Thompson v. State*, 2007 OK CR 38, ¶ 34, 169 P.3d 1198, 1209).

Appellant's affiliation with the Red Mob Bloods was so closely connected to the charged offenses as to form part of the entire transaction and was central to the chain of events. The evidence at trial showed that Appellant belonged to the Bloods, while Smith, a passenger in Bean's car, was a member of the Crips. Appellant clearly recognized Smith as a member of the rival gang, Crips, as shown by his statement identifying himself as a Blood when he exited the car. The subject evidence was necessary to give the jury a complete understanding of the crime, *i.e.*, what happened and why it happened. *See Thompson*, 2007 OK CR 38, ¶ 34, 169 P.3d at 1209 (finding gang affiliation was "fundamental to understanding" the appellant's motive in shooting the unarmed fifteen-year-old victim). There was no abuse of discretion in the admission of the gang affiliation evidence.

To the extent Appellant claims a due process violation

associated with the admission of the subject evidence, we review the claim for plain error since he did not raise this claim in the trial court. *See Tryon v. State*, 2018 OK CR 20, ¶ 94, 423 P.3d 617, 644 (where appellant raised a due process claim on appeal which was not presented in the trial court, this Court found review was for plain error only). Under the plain error test set forth in *Simpson v. State*, 1994 OK CR 40, ¶¶ 2, 11, 23 30, 876 P.2d 692-95, 698-702, we 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.*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701. *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; *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. As set forth above, the gang affiliation evidence was properly admitted. Therefore, no error, much less plain error occurred. Proposition One is denied.

In Proposition Two, Appellant argues the prosecutor improperly impeached defense witness Deisha Ewell. His first complaint

concerns questions regarding prosecutions of her relatives and associates, allegedly utilizing extrinsic evidence, and his second complaint concerns questions about her kidnapping case.

We find Appellant has waived review of this claim for all but plain error as he raises a different claim in this appeal from the one he made in the trial court. *Bench v. State*, 2018 OK CR 31, ¶ 140, 431 P.3d 929, 966. Reviewing Appellant's claim pursuant to the test for plain error set forth above in *Simpson*, 1994 OK CR 40, 876 P.2d 690, we find no error, therefore no plain error, occurred in the impeachment of Ewell.

"Bias is a term used in the common law of evidence to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party." *U.S. v. Abel*, 469 U.S. 45, 52, 105 S. Ct. 465, 469, 83 L. Ed. 2d 450 (1984) (internal quotations omitted). This Court recognizes that exposure of a witness's motivation to lie is a proper purpose of cross-examination, as well as whether the "relations between the witness and the party to whom he serves is such that it may lead the witness to slant his testimony in favor [of]

or against a party." *Beck v. State*, 1991 OK CR 126, ¶ 13, 824 P.2d 385, 389.

We find Ewell's testimony that her relatives and associates were Red Mob Blood members who had been prosecuted by ADA Shields was certainly relevant to her bias and motivation in testifying for Appellant that a State's primary witness was lying. Accordingly, the trial court's determination that the prosecutor could properly question Ewell regarding her relatives' associations with the prosecutor or his office was not erroneous.

Because this line of questioning concerned the issue of Ewell's bias, which is never a collateral matter, the prohibition against extrinsic evidence of specific instances of conduct found in 12 O.S.2011, § 2608(B), does not apply. *Young v. State*, 1998 OK CR 62, ¶ 44, 992 P.2d 332, 343. In any event, there was no extrinsic evidence of the prosecutions or convictions admitted. The prosecutor merely asked Ewell if she knew whether ADA Shields or his office had prosecuted some of her relatives or associates. There was no error, plain or otherwise, in this line of questioning.

With regard to Ewell's kidnapping case, the record demonstrates that the defense opened the door to the entire subject

of Ewell's kidnapping charge. During her direct examination, Ewell spontaneously disclosed that she went to jail. Thereafter, defense counsel asked Ewell why she went to jail and she admitted she took her son, who was in a relative's custody, from his daycare and was charged with kidnapping. She testified she knew her actions were wrong and she harbored no ill feelings toward the State.

On cross-examination, the prosecutor asked Ewell about the circumstances of her kidnapping charges, including why she did not have custody of her child. The prosecutor asked Ewell if her parental rights were terminated based upon allegations of child sexual abuse against the baby's father. Ewell responded negatively and the prosecutor asked her why she pleaded guilty to the kidnapping charge if she maintained custody of her child.

"[W]hen a defendant opens up a field of inquiry on direct examination, he may not complain of subsequent cross examination of the same subject." *Ashinsky v. State*, 1989 OK CR 59, ¶ 15, 1989 780 P.2d 201, 206. Moreover, "[a] witness who offers one-sided versions of his own past conduct subjects himself to cross-examination aimed at showing the jury that he is not telling the whole truth about that conduct, and therefore, cannot be trusted to

tell the truth about other matters either." *Dodd v. State*, 2004 OK CR 31, ¶ 73, 100 P.3d 1017, 1039-40. Ewell's testimony on direct examination minimized the nature of the kidnapping charge and she denied harboring any animosity toward the State. Accordingly, the prosecutor was entitled to delve further into this subject. There was no error, plain or otherwise, in the prosecutor's impeachment of Ms. Ewell. Proposition Two is denied.

In Proposition Three, Appellant maintains that the photographic lineup, shown by police to Bean and D.P., was improperly suggestive. Appellant failed to object at trial to the witnesses' identifications; therefore, this Court will review the claim for plain error as set forth above in *Simpson*, 1994 OK CR 40, 876 P.2d 690. *Harmon v. State*, 2011 OK CR 6, ¶ 42, 248 P.3d 918, 935. Having reviewed the record regarding the lineup, we find there was no error and thus, no plain error.

The lineup included Appellant and five other African-American males, all of whom bear similar physical characteristics to those of Appellant. "[S]ubstantial compliance with physical similarity guidelines" is all that this Court requires in compiling lineups. *Leigh v. State*, 1985 OK CR 41, ¶ 5, 698 P.2d 936, 937. Any difference in

the darkness of the photographs is of no relevance to the propriety of the lineup. *Cf. Clayton v. State*, 1992 OK CR 60, ¶ 55, 840 P.2d 18, 33 (where all men shown in the lineup bore similar physical characteristics, the fact that the appellant's picture had a white border did not render the lineup impermissibly suggestive).

Appellant's complaint that both Bean and D.P. saw pictures of him prior to their out-of-court identifications does not implicate Appellant's due process rights because police were not involved in the prior viewing. Due process only safeguards against an impermissibly suggestive lineup resulting from improper police conduct. *Perry v. New Hampshire*, 565 U.S. 228, 239-44, 132 S. Ct. 716, 724-28, 181 L. Ed. 2d 694 (2012). The lineup was not impermissibly suggestive and the witnesses' identifications were properly admitted. Therefore, no error occurred. Proposition Three is denied.

Appellant mistakenly seeks to utilize documents attached to his motion filed pursuant to Rule 3.11(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019), to support this proposition. Rule 3.11(B) allows supplementation of the record with extra-record materials only with regard to ineffective

assistance of counsel claims. *See Coddington v. State*, 2011 OK CR 17, ¶ 20, 254 P.3d 684, 698 (Rule 3.11(B) does not allow supplementation of the record with extra-record materials in support of a substantive claim not involving ineffective assistance of counsel). Moreover, even when a Rule 3.11(B) motion is properly filed, it is only for the purpose of determining if the case should be remanded for an evidentiary hearing on the issue. Appellant should have filed a motion for new trial alleging newly discovered evidence pursuant to 22 O.S.2011, §§ 952 and 953 or pursuant to Rule 2.1(A)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019). Accordingly, these documents are not properly before this Court for consideration with regard to Proposition Three.

In his fourth proposition, Appellant claims the State failed to disclose an agreement with Bean regarding his pending criminal cases in violation of the tenets of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Because this claim involves a mixed question of law and fact, we review the claim *de novo*. *Gates v. State*, 1988 OK CR 77, ¶ 19, 754 P.2d 882, 886-87.[2]

---

[2] While I continue to maintain my views concerning the dangers of *de novo* review, expressed in my separate writing in *Seabolt v. State*, 2006

In *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196-97, the Supreme Court held that:

> the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

The Supreme Court extended *Brady* to require the prosecution to disclose both exculpatory and impeachment evidence regardless of defendant's request in *United States v. Bagley*, 473 U.S. 667, 682 (1985). In *Bagley*, the Supreme Court set forth the test for materiality: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, 473 U.S. at 682, 105 S. Ct. at 3383.

The question is "whether in [the absence of the suppressed evidence the defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 1566, 131 L. Ed. 2d 490 (1995). In

---

OK CR 50, 152 P.2d 235 (Lumpkin, V.C.J., dissenting), I accede to *stare decisis* in this case.

Jones v. State, 2006 OK CR 5, ¶ 51, 128 P.3d 521, 540-41, this Court held, "To establish a *Brady* violation, a defendant must show that the prosecution suppressed evidence that was favorable to him or exculpatory, and that the evidence was material."

The record shows Bean admitted on direct examination that he had three criminal cases pending in Tulsa County, which he incurred after June of 2016, to-wit: second-degree burglary, unauthorized use of a motor vehicle and possession of drugs with intent to distribute. He testified that after the charges were filed, the State offered him "four in" (Tr. III 76). He testified that when he received the State's offer, he had already identified Appellant as the shooter. Bean denied that the State promised him anything in exchange for his testimony.

Appellant again attempts to utilize a document attached to his motion filed pursuant to Rule 3.11(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019), to support this proposition. As previously stated, Rule 3.11(B) allows supplementation of the record with extra-record materials only with regard to ineffective assistance of counsel claims. We reiterate, Appellant should have filed a motion for new trial alleging newly

discovered evidence pursuant to 22 O.S.2011, §§ 952 and 953 or pursuant to Rule 2.1(A)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019). Accordingly, this document is not properly before this Court for consideration with regard to Proposition Four.

Based upon the record, we find Appellant has failed to show the State suppressed evidence favorable to him as required by *Brady, Bagley* and *Jones*. That Bean ultimately received a more favorable plea bargain than originally offered by the State does not mean the later plea bargain was in existence at or prior to the time Bean testified. *Cf. Bell v. Bell,* 512 F.3d 223, 234 (fact that the witness received assistance following a trial, where he testified for the State, does not mandate a finding that the witness had a pre-existing deal with the State in exchange for his testimony).

Additionally, we find the evidence was not material. Even excluding Bean's evidence, there was ample evidence presented in support of Appellant's guilt. D.P. identified Appellant as the shooter, Appellant's statement to police contradicted other evidence presented in the case and the cell tower evidence belied Appellant's alibi evidence. Given all of the evidence adduced in this case, there

is no reasonable probability that the outcome of the trial would have been different had the jury known Bean would receive less than the "four in" on his criminal cases. As nothing in the record supports Appellant's *Brady* claim, Proposition Four is denied.

In his fifth proposition, Appellant contends Ashaela Phillips was improperly impeached with evidence of her misdemeanor shoplifting conviction. He acknowledges this Court's precedent which holds that convictions for crimes of stealing involve dishonesty and are admissible pursuant to 12 O.S.2011, § 2609(A)(2).[3] Appellant invites this Court to overturn its precedent and place a narrower limitation on the use of prior convictions to impeach a witness under Section 2609(A)(2). We decline this invitation.

Appellant failed to object to the admission of this evidence at trial; therefore, this Court will review the claim for plain error as set forth in *Simpson*, 1994 OK CR 40, 876 P.2d 690. *Vanderpool*, 2018 OK CR 39, ¶ 21, 434 P.3d at 323-24. Pursuant to Section 2609(A)(2), "[e]vidence that any witness has been convicted of a

---

[3] In 2000, the Legislature amended Section 2609 and switched subsections 1 and 2, so that currently Section 2609(A)(2) allows admission of a conviction for a crime involving dishonesty regardless of punishment.

crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment." This Court holds that theft crimes involve dishonesty. *See Mason v. State*, 1988 OK CR 113, ¶ 7, 756 P.2d 612, 614 ("Because the offense of larceny of an automobile is an act of stealing 'universally regarded as conduct which reflects adversely on a man's honesty and integrity,' we find that [the conviction for that crime] was properly admitted under 2609(A)(1) as a crime involving dishonesty or a false statement.") (quoting Robinson v State 1987 OK CR 195, ¶ 11, 742 P.2d, 1088). Thus, even a misdemeanor conviction for a theft crime may be admitted properly. *See Collins v. State*, 2009 OK CR 32, ¶ 23, 223 P.3d 1014, 1019 (finding Section 2609(A)(2) "permits impeaching witness credibility with evidence of any conviction (even misdemeanors) involving dishonesty or false statement . . . ").

The purpose behind impeachment evidence based upon a conviction involving dishonesty is to "show background facts which bear on whether a jury ought to believe [the witness] as opposed to adverse witnesses." *Robinson v. State*, 1987 OK CR 195, ¶ 11, 743 P.2d 1088, 1091. Larceny of merchandise pursuant to Oklahoma law includes the element that the taking and carrying away of the

merchandise must be by fraud or stealth. Instruction No. 5-104, OUJI-CR (2d). Phillips' conviction of larceny of merchandise, or shoplifting, which involved fraud or stealth, qualifies as a background fact bearing upon her credibility. There was no error, and certainly no plain error, in the prosecutor's impeachment of Phillips with her misdemeanor shoplifting conviction. Proposition Five is denied.[4]

In his sixth proposition, Appellant claims the trial court made him wear an ankle restraint without requiring a proper showing of necessity. Defense counsel objected to use of the restraint on Appellant. Accordingly, this Court's review is for an abuse of discretion. *Ochoa v. State*, 2006 OK CR 21, ¶ 30, 136 P.3d 661, 669. We utilize the definition of abuse of discretion set forth above in *Neloms*, 2012 OK CR 7, ¶ 35, 274 P.3d at 170.

In *Deck v. Missouri*, 544 U.S. 622, 624, 125 S. Ct. 2007, 2009, 161 L. Ed. 2d 953 (2005), the Supreme Court held that the Constitution forbids the use of visible shackles during the guilt and penalty phases of a capital trial unless their use is justified by an

[4] Appellant's invitation to reconsider our precedent in this regard is based upon holdings of other federal and state courts and is unpersuasive.

essential state interest specific to the defendant on trial, such as a concern for courtroom security. Similarly, Oklahoma law provides that no person charged with a public offense shall "be subjected before conviction to any more restraint than is necessary for his detention to answer the charge, and in no event shall he be tried before a jury while in chains or shackles." 22 O.S.2001, § 15.

In *Sanchez v. State*, 2009 OK CR 31, ¶ 34, 223 P.3d 980, 994, this Court held that before a defendant can be tried while wearing a restraint, the trial court must make a finding that "the defendant has engaged in disruptive or aggressive behavior in connection with the proceedings, or made an express or implied threat to disrupt the proceedings or endanger public safety during the trial."

Reviewing the record, we find the trial court abused its discretion in requiring Appellant to wear a restraint during trial. The record reflects the trial court held a hearing regarding use of the ankle restraint upon the Appellant. There was no evidence presented that Appellant engaged in "disruptive or aggressive behavior in connection with the proceedings," or made any threats to disrupt his trial or endanger the public as required by *Sanchez*. There was also no evidence presented that Appellant posed a

security risk. Therefore, the record fails to establish justification for use of the ankle restraint on Appellant and the trial court's decision was an abuse of discretion. *Ochoa*, 2006 OK CR 21, ¶ 30, 136 P.3d at 669.

However, where the restraints are not visible, the burden is on the defendant to demonstrate that he was prejudiced. *See Ochoa*, 2006 OK CR 21, ¶ 32, 136 P.3d at 670. As in *Ochoa* and as admitted by Appellant, there is no evidence in the record that Appellant's jury saw the ankle restraint. There is also no evidence that the presence of the ankle restraint in any way prevented Appellant from assisting his counsel or participating in his trial. Appellant does not allege that he suffered any type of detriment because he wore the ankle restraint. Accordingly, Appellant has failed to show that this error prejudiced him, *i.e.*, that it "had a substantial influence on the outcome of the proceeding[.]" *Ochoa*, 2006 OK CR 21, ¶ 32, 136 P.3d at 670. Proposition Six is denied.

In his seventh proposition, Appellant contends his counsel was ineffective for a variety of reasons, including his failure to object or raise claims stemming from the issues addressed in Propositions One, Two, Three and Five. This Court reviews ineffective assistance of

counsel claims under the two-part test mandated by the United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). *Malone v. State,* 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. The *Strickland* test requires an appellant to show: "(1) that counsel's performance was constitutionally deficient; and (2) that counsel's deficient performance prejudiced the defense." *Id.*, (citing *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064).

We begin our analysis with the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. Appellant must overcome this presumption and demonstrate that counsel's representation was unreasonable under prevailing professional norms and that the challenged action could not be considered sound trial strategy. *Id.* When a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed. *Bland v. State*, 2000 OK CR 11, ¶ 113, 4 P.3d 702, 731 (citing *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069). To demonstrate prejudice an appellant must show that there is a reasonable probability that the outcome of the trial would have been

different but for counsel's unprofessional errors. *Id.*, 2000 OK CR 11, ¶ 112, 4 P.3d at 731. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter,* 562 U.S. 86, 112, 131 S. Ct. 770, 792, 178 L. Ed. 2d 624 (2011).

Because we have found no errors in Propositions One, Two Three and Five, Appellant has not shown his counsel's performance was deficient or that he suffered any prejudice based upon the errors alleged therein. *See Harris v. State,* 2007 OK CR 28, ¶ 41, 164 P.3d 1103, 1118 ("As we have found no error in the previous propositions, counsel cannot be ineffective for failing to raise objections to issues contained therein.").

Appellant additionally asserts that his counsel was ineffective for failing to investigate and utilize available evidence as follows: failing to present a cell phone expert, failing to present additional alibi evidence and failing to further impeach Bean and D.P. Contemporaneous with the filing of his Brief, Appellant filed his *Application for Evidentiary Hearing on Sixth Amendment Claim.* Appellant asserts that he is entitled to an evidentiary hearing under Rule 3.11(B)(3)(b,) *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2019).

This Court reviews an application under Rule 3.11(B)(3)(b) pursuant to the analysis set forth in *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905–906. We review and consider an appellant's application and affidavits along with other attached non-record evidence to determine whether the appellant has shown clear and convincing evidence of a strong possibility that counsel was ineffective and should be afforded further opportunity to present evidence in support of his claim. *Id.*

Appellant argues his counsel was ineffective for failing to hire a cell phone expert. He seeks to supplement the record under Rule 3.11(B)(3)(b) with additional evidence in support of this claim. Citing "Exhibit A" (Declaration of Robert Aguero) and "Exhibit A-1" (Drawings illustrating the material discussed in Exhibit A) he seeks an evidentiary hearing concerning his allegation that defense counsel was ineffective for failing to hire a cell phone expert. Reviewing these exhibits, we find Appellant has not shown a strong possibility that counsel was ineffective for failing to hire a cell phone expert to testify at trial.

As shown by the record, the significance of the cell phone evidence was not to show Appellant was at the scene of the murder

when it occurred. Rather, its significance lay in the fact that it showed Appellant's cell phone was moving on the night of the murder in contravention of his evidence to the contrary. Appellant repeatedly claimed that he never left Phillips' house, both in his statement to police and in his testimony. Like the State's witness, Aguero also concludes that Appellant's cell phone was moving on the night of the murder (Exhibit A, p. 2). Accordingly, we find that Appellant has not shown "a strong possibility that trial counsel was ineffective for failing to" present a cell phone expert. *See Bench*, 2018 OK CR 31, ¶ 201, 431 P.3d at 977 (the appellant failed to meet the *Simpson* standard where "the great majority of [the witness's] information was actually presented to the jury and his ultimate conclusions might have actually supported the State's case . . . ").

Appellant further seeks to supplement the record under Rule 3.11(B)(3)(b) with additional evidence in support of his claim that counsel was ineffective for failing to conduct a proper investigation to support the alibi defense. Citing "Exhibit D" (Affidavit of Diamond Reed), "Exhibit E" (Affidavit of Bobby Davis) and Exhibit "H" (Affidavit of Tojmon Johnson), he seeks an evidentiary hearing concerning the alleged failure. Having reviewed these attachments, we find that

Appellant has not shown a strong possibility that counsel was ineffective for failing to properly investigate Appellant's alibi defense.

Both Reed (Exhibit D) and Davis (Exhibit E) acknowledge speaking with defense counsel. Thus, counsel was aware of these witnesses and knew what their testimony would be. Counsel's decision not to call them as witnesses was clearly made as part of his trial strategy. *See Snow v. State*, 1994 OK CR 39, ¶ 17, 876 P.2d 291, 296 (where counsel was aware of witnesses who he did not call, "the decision not to call them must be considered reasonable trial tactics. Reasonable trial tactics, even those which ultimately are not successful, are not grounds for finding trial counsel ineffective.").

The content of Exhibits D and E further lends support to a finding that trial counsel made the strategic decision not to call Reed and Davis as witnesses. In Exhibit D, Reed never states he left the house on the night of the murder. However, Appellant testified Reed did leave the house that night and suggested he took Appellant's cell phone with him. Furthermore, Reed admits in Exhibit D that defense counsel did not call him because of his "background," *i.e.,* his Red Mob gang affiliation. If Reed's testimony were inconsistent with that of Appellant regarding whether he left the house the night of the

murder, Appellant's testimony that Reed was responsible for the movement of his cell phone would have been discredited. Counsel's decision not to call Reed was reasonable. *Cf. Davis*, 2011 OK CR 29, ¶ 209, 268 P.3d at 134 (It is reasonable for counsel to keep "counterproductive" information from the jury).

With regard to Exhibit E, Davis states he went to Phillips' house alone shortly after the shooting and did so to play dominoes. He further states he asked Reed, Phillips and Appellant if they heard gunshots. However, as shown in the record, Phillips testified Davis came with his girlfriend, Phillips' neighbor, to Phillips' house later on the night of the shooting. She further testified the neighbor told her about the shooting and seeing crime scene tape at the location. Additionally, Phillips never mentioned a dominoes game. Again, Davis's testimony was inconsistent with that of Phillips. Pursuant to *Davis*, it was reasonable for defense counsel not to call Davis given that his testimony would have contradicted that of Phillips.

Concerning Exhibit H, Johnson's affidavit, it is replete with hearsay. About the only non-hearsay statements contained in the affidavit are Johnson's statements that he called Reed's cell phone and spoke with Reed on the night of the murder. As he spoke with

Reed, he heard Appellant in the background and exchanged a couple of sentences with him. Johnson does not give the time of the phone call, nor does he state where Reed and Appellant were at the time of the call. This affidavit, filled with non-specific hearsay, does not provide clear and convincing evidence that there is a strong possibility trial counsel was ineffective for failing to investigate and present Johnson as a witness. *Frederick v. State*, 2017 OK CR 12, ¶ 166, 400 P.3d 786, 827, *overruled on other grounds in Williamson v. State*, 2018 OK CR 15, 422 P.3d 752 (affidavit submitted in conjunction with the appellant's Rule 3.11(B)(3)(b) application, which contained non-specific hearsay material, was insufficient to meet the clear and convincing standard of *Simpson*).

Appellant finally seeks to supplement the record under Rule 3.11(B)(3)(b) with additional evidence in support of his claim that counsel was ineffective for failing to adequately impeach Bean and D.P. After reviewing this additional evidence, we find that Appellant has not shown a strong possibility that counsel was ineffective for failing to utilize this evidence to impeach Bean and D.P.

In Exhibit "F" (Affidavit of DeJordan Bean), Bean states the photograph of Appellant contained in the lineup was the only one

that resembled his recollection of the shooter's appearance. He further states he told the prosecutor that he was not 100 percent positive of his identification of Appellant as the shooter, and the prosecutor implied Bean might be charged if he did not identify Appellant as the shooter. In Exhibit "G" (Affidavit of DeJordan Bean), Bean states he understood that if he testified for the State, he would receive a deal in his pending cases. He states he was told he would receive a better deal than the State initially offered in those cases, but the terms of the deal were never specified.

As demonstrated by the record, defense counsel's cross-examination of Bean was extensive. He questioned Bean about inconsistencies between his testimony and his statement to police and about his pending charges. Counsel elicited from Bean that his initial description of the shooter to police differed from the one he gave in his testimony. Bean also testified on cross-examination that he lied to police about ten times and changed his description of the shooter's car. Trial counsel further elicited from Bean that a family member showed him a picture of Appellant two days prior to the time he viewed the lineup and that he thought Appellant's picture

exhibited the "same build, same description" as the shooter, but he did not "know" for sure.

With regard to D.P., the record reflects that defense counsel's cross-examination of her spanned in excess of forty pages. Counsel pointed out numerous inconsistencies between D.P.'s and Bean's testimony about the events of June 28, 2016. He elicited several concessions from D.P. including that the first time she spoke to police, she claimed she could not identify the shooter and did not tell police about what the shooter said. D.P. also admitted she might have identified Appellant as the shooter after seeing his picture on Facebook. Counsel questioned D.P. about her recorded police interview where she told police the shooter's car had a metal tag, while at trial, she testified it had a paper tag and whether she told police during the interview that she could not identify the shooter. After counsel refreshed D.P.'s memory with the recording of the interview, D.P. admitted she told police she "didn't get a good look at either [shooter] because I got hit" and "I didn't get to see who the shooter was." D.P. admitted on cross-examination that about six weeks before trial, she pleaded guilty to false impersonation based upon lying to a police officer.

As shown by the record, counsel's cross-examination and impeachment of both Bean and D.P. was thorough and extensive. The fact that the jury was not persuaded by counsel's cross-examination to acquit Appellant does not equate to ineffective assistance of counsel. *See Miller v. State*, 2013 OK CR 11, ¶¶150-52, 313 P.3d 934, 983 (thorough extensive cross-examination of witness negated the appellant's claim that counsel was ineffective for failing to utilize available evidence to further impeach witness). *See also Underwood v. State*, 2011 OK CR 12, ¶ 87, 252 P.3d 221, 253 ("Counsel's decision not to ask different questions, or ask questions in a different way, will not be second-guessed."). Regarding Appellant's contention that counsel should have somehow gotten Bean to testify that he believed he would receive a better deal than what the state initially offered him on his pending cases, counsel expressly asked him whether he hoped to avoid prison time in exchange for testifying in the present case. Bean responded that he did not. Given Bean's answer, there was nothing more counsel could do.

Appellant also alleges in this application that counsel was ineffective for failing to corroborate Ewell's testimony as it related to

her relationship with D.P. No such allegation is contained in Appellant's brief. Therefore, this claim is waived. *See Warner v. State*, 2006 OK CR 40, ¶ 205, 144 P.3d 838, 893, *overruled on other grounds in Taylor v. State*, 2018 OK CR 6, 419 P.3d 265 (where an argument within a brief in support of a request for evidentiary hearing is not contained in the appellate brief, the argument is waived).

Since Appellant has not shown clear and convincing evidence of a strong possibility that counsel was ineffective based upon the allegations contained in his Rule 3.11 application, we find that he has not shown entitlement to an evidentiary hearing on his claims of ineffective assistance of counsel. Appellant's application is denied.

In his final proposition, Appellant claims the combined errors in his trial denied him of due process. Only one error was found in Proposition Six, that the trial court abused its discretion in ordering Appellant to wear an ankle restraint during trial. As shown in that proposition, however, the error was harmless and did not affect Appellant's substantial rights. Therefore, relief on a cumulative error basis is not warranted. *See Neloms*, 2012 OK CR 7, ¶ 40, 274 P.3d 161, 171 (where one harmless error occurred during trial, "there is

no accumulation of error upon which to base a finding of cumulative error"). Proposition Eight is denied.

DECISION

The Judgment and Sentence of the District Court is hereby **AFFIRMED**. The Application for Evidentiary Hearing pursuant to Rule 3.11(B)(3)(b) is **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 the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE JAMES M. CAPUTO, DISTRICT JUDGE

APPEARANCES AT TRIAL

BRIAN MARTIN
1331 SOUTH DENVER AVENUE
TULSA, OK 74119
COUNSEL FOR DEFENDANT

ISAAC SHIELDS
JULIANNE BURTON
ASST. DISTRICT ATTORNEYS
500 SOUTH DENVER
TULSA, OK 74103
COUNSEL FOR THE STATE

APPEARANCES ON APPEAL

JAMES H. LOCKARD
KATRINA CONRAD-LEGLER
P.O. BOX 926
NORMAN, OK 73070
COUNSEL FOR APPELLANT

MIKE HUNTER
ATTORNEY GENERAL OF OKLA.
CAROLINE E. J. HUNT
ASST. ATTORNEY GENERAL
313 N.E. 21ST ST.
OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE

OPINION BY: LUMPKIN, J.

LEWIS, P.J.: Concur
KUEHN, V.P.J.: Concur in Result
HUDSON, J.: Concur
ROWLAND, J.: Concur

RA

KUEHN, V.P.J., CONCURRING IN RESULT:

I concur with the results reached in this case, but wish to point out that in Proposition I, the Majority purports to treat an unpreserved constitutional error in exactly the same manner as any other error. (Slip Op. at 5-6) Review of a claim of constitutional error, preserved or not, places the burden on the State to show any error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). The Majority's deployment of the standard "plain error" test neglects the fact that the burden on the prejudice question shifts to the State for these kinds of claims. The first order of business is always to determine if an error actually occurred. *See White v. State*, 2019 OK CR 2, ¶ 17, 437 P.3d 1061, 1068. But failing to recognize the *Chapman* standard when it is invoked promises faulty analysis by the Court in the future, when an unpreserved error of constitutional significance really *does* plainly appear in the record.