IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

MOSI ABASI DENNIS,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	Case No. F-2018-248
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

LEWIS, PRESIDING JUDGE:

Appellant, Mosi Abasi Dennis, was tried by jury and convicted of first degree (felony) murder, in violation of 21 O.S.2011, § 701.7(B), and Count 2, conspiracy to commit robbery with a dangerous weapon, in violation of 21 O.S.2011, § 421, in the District Court of Oklahoma County, case number CF-2015-6232, before the Honorable Ray C. Elliott, District Judge. The jury set punishment at life imprisonment without the possibility of parole on Count 1, and ten years imprisonment on Count 2. Judge Elliott pronounced judgment and sentence according to the verdict and ordered the sentences served consecutively. Mr. Dennis now appeals raising the following propositions of error:

1. A *Batson* violation was committed when the trial court excused a minority juror but did not excuse a white juror with the same excluding factors claimed by the State;

2. The Appellant was deprived of a fair trial when the prosecution's closing argument called for the jury to put themselves in the shoes of the co-conspirator;

3. The post-mortem photographs of the victim and the wounds suffered, should not have been entered into evidence for they deprived the Appellant of a fundamentally fair trial in that the prejudicial value outweighed the probative effect;

4. The evidence presented at trial was insufficient to find the Appellant guilty of felony murder in the first degree;

5. The trial court erred in not providing a lesser included instruction on second degree felony murder and in doing so deprived the Appellant of a fundamentally fair trial;

6. Even if individual errors do not merit reversal of the Appellant's conviction, the cumulative effect of these errors deprived him of a fair trial requiring the reversal of the Appellant's conviction.

FACTS

Sharmain Stelly conceived a plan to rob Antonio Walker of OxyContin and money. She enlisted the aid of Appellant. Chakara Redd and Larry Mathis were also involved to some extent.

The four got together on the evening of July 24, 2015. Mathis was driving Redd's car with Appellant, Redd, and Stelly as passengers. They went to Walker's house where Stelly went inside and bought one pill. She asked if she could bring in her friend to buy some pills.

During the planning, Stelly thought Walker would be alone, but Becky Bazemore was there visiting Walker.[1] Walker's father, Kenneth Walker, was in the living room.

Stelly walked out of the house and told the others that they should abandon the plan because of the presence of Bazemore and Walker. Appellant refused to abandon the plan and he convinced the others to let him continue.

Stelly and Appellant went back to Walker's bedroom where Appellant tried to buy a large quantity of OxyContin. Bazemore thought Appellant, Stelly and Walker were friendly with each other, but Walker refused to sell the pills.

At one point Stelly left the room. Soon after, Bazemore heard a loud noise and Appellant and Walker were on the floor with

[1] Walker is a paraplegic and has limited mobility.

Appellant pointing a pistol at Walker's head. Appellant was trying to grab Walker's pills and Walker was begging "please don't do it."

Appellant also pointed the pistol at Bazemore and told her to shut up, as she was screaming. Bazemore moved away and crouched in the corner of the room to protect herself.

Kenneth Walker stepped into the doorway and asked what was going on. Appellant pointed the pistol at him and fired a shot. The shot struck Kenneth in the chest. Appellant then fled the room, stepping over Kenneth as he left.

Walker told Bazemore to hand him his pistol. He retrieved his pistol and fired a shot down the hall to make sure Appellant was gone. Walker denied that he had sold pills to Stelly at any time.

ANALYSIS

Appellant claims in proposition one that a *Batson* violation was committed when the trial court excused a minority juror, but did not excuse a white juror for the same excluding factors claimed by the State. The Equal Protection Clause forbids challenging potential jurors solely on the basis of their race. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). "No matter the

race or gender of a defendant, either party may contest the opposing party's use of peremptory challenges, if those challenges result in deliberate exclusion of potential jurors by gender or race, denying the parties a jury composed of a cross-section of the community and violating his right to equal protection." *Day v. State*, 2013 OK CR 8, ¶ 15, 303 P.3d 291, 299. To properly preserve a *Batson* claim, objection to the removal of a potential juror must be made immediately and before the challenged juror is finally excused. *McElmurry v. State*, 2002 OK CR 40, ¶¶ 35-36, 60 P.3d 4, 18. Here, defense counsel made a timely objection at trial.

In *Batson* the Court set forth a three-step process to determine whether the exercise of a peremptory challenge violates the Equal Protection Clause. First, the defendant must make a *prima facie* showing that the prosecutor exercised a peremptory challenge on the basis of race. *Mitchell v. State*, 2011 OK CR 26, ¶ 41, 270 P.3d 160, 173. Whether a defendant has made a *prima facie* showing is a question of fact to be decided by the trial judge upon consideration of all relevant circumstances including the race of the veniremen which have been excused, the race of those remaining, and the prosecutor's questions and statements during *voir dire* examination.

Mitchell, 2011 OK CR 26, ¶ 46, 270 P.3d at 174-75. If the defendant meets his burden of making a *prima facie* showing, the second step of the analysis requires that the prosecutor provide a race-neutral reason for excusing the potential juror. *Id.* The trial court then determines whether the defendant carried his burden to prove purposeful discrimination. *Day*, 2013 OK CR 8, ¶ 15, 303 P.3d at 299.

Here, the prosecutor elicited race neutral reasons for the peremptory. Juror S.B. had family members who had been arrested and convicted. She expressed ideas which indicated that she believed that the convictions were due to "guilt by association." Appellant claims that another juror had a similar background but was not excused, so the reasons are invalid.

This same or similar background argument has been rejected by this court. "[R]acially-motivated discrimination is not established simply because panelists of different races provide similar responses, and one is excused while the other is not." *Grant v. State*, 2009 OK CR 11, ¶ 28, 205 P.3d 1, 15. Moreover, in this case the prosecutor did not excuse all racial minorities from the jury

panel, which indicates there was no racial discrimination. *Cruse v. State*, 2003 OK CR 8, ¶ 7, 67 P.3d 920, 923.

With these principles in mind, we review the trial court's ruling for an abuse of discretion, as the trial court is in the best position to consider the demeanor of the panelist in question and the sincerity of the prosecutor's explanation. *Grant*, 2009 OK CR 11, ¶ 26, 205 P.3d at 14. There was no abuse of discretion. The prosecution gave an adequate race neutral reason, which was not disputed by defense counsel. Appellant has not met his burden to prove any discriminatory intent. Appellant's proposition one is denied.

In proposition two Appellant claims prosecutorial misconduct during closing argument deprived him of a fair trial. There was no objection by defense counsel at trial. 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.") Appellant must now show that these unpreserved errors were plain or obvious and affected the outcome of the proceeding. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907,

923. The Court will correct plain error only where it seriously affects the fairness, integrity, or public reputation of the proceedings. *Simpson v. State,* 1994 OK CR 40, ¶ 30, 876 P.2d 690, 701.

This Court will not grant relief based on prosecutorial misconduct unless the tactics are so flagrant that the resulting convictions or sentences are fundamentally unfair. *Nicholson v. State,* 2018 OK CR 10, ¶ 18, 421 P.3d 890, 896-97.

Appellant argues that the prosecutor attempted to elicit sympathy for the co-conspirator, Stelly. In reality, the prosecutor was trying to show why Stelly might have given inconsistent statements. The prosecutor was trying to show that she was fearful of the defendant and would possibly cover for him at first. Although he used the phrase, "Put yourself in her shoes," this did not automatically implore the jurors to have sympathy for her.

There was no improper argument here; this proposition is denied.

Next, in proposition three, Appellant claims the post-mortem photographs of the victim and his wounds should not have been allowed into evidence. He argues the photographs were admitted

solely to evoke the sympathy of the jury; that they were more prejudicial than probative. Counsel made proper objections to preserve this issue on appeal.

"Photographs are admissible if their content is relevant and their probative value is not substantially outweighed by their prejudicial effect." *Davis v. State*, 2011 OK CR 29, ¶ 86, 268 P.3d 86, 113. The admission of photographs is a matter within the trial court's discretion. *Id.* This Court will not reverse the trial court's ruling absent an abuse of that discretion. *Id.* "An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue." *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. This review is deferential.

Appellant claims that because the injuries are uncontested that the photographs are somehow irrelevant. The mere fact the injuries are uncontested does not render photographs thereof inadmissible. *Davis*, 2011 OK CR 29, ¶ 89, 268 P.3d at 113. Moreover, the photographs were not so gruesome that their prejudicial effect substantially outweighed their probative value. 12 O.S.2011, § 2403.

The photographs showed the gunshot wounds and blood associated with such a wound. The photographs showed the handiwork of the defendant and the nature of the crime. The photographs were also utilized to assist the medical examiner in the testimony describing the cause of death.

The trial court did not abuse its discretion in the admission of the photographs, thus this proposition is denied.

In proposition four Appellant argues the State's evidence was insufficient to prove the essential elements of first degree (felony) murder with the underlying felony of robbery with a dangerous weapon. He claims the State failed to prove the third element—that the felony murder was caused by a defendant in the commission of a robbery. 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 (felony) 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 203-204.

The evidence in a light most favorable to the State proved that Appellant shot the victim. There was an agreement between the parties that they would rob Antonio Walker of his OxyContin prescription. During this robbery, Appellant pulled Walker to the ground and pointed a gun to his head. Appellant also pointed the gun at Bazemore. Kenneth Walker came to the bedroom and asked what was going on. Appellant then turned toward Kenneth and shot him. The evidence is sufficient to show that Appellant committed the crime of first degree (felony) murder. Proposition four is denied.

In proposition five Appellant challenges the trial court's refusal to give his requested instructions on the lesser included offense of second degree felony murder. This Court reviews a trial court's decision on which instructions are given to a jury, including lesser offense instructions, for an abuse of discretion. *Simpson v. State,*

2010 OK CR 6, ¶ 16, 230 P.3d 888, 897. *State v. Iven*, 2014 OK CR 8, ¶ 6, 335 P.3d 264, 267. "An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the issue; a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts." *State v. Iven,* 2014 OK CR 8, ¶ 6, 335 P.3d at 267.

It is true that the trial court must instruct on any lesser offense warranted by the evidence. *Jones v. State*, 2006 OK CR 17, ¶ 6, 134 P.3d 150, 154, citing *Shrum v. State,* 1999 OK CR 41, 991 P.2d 1032 (lesser offense instructions should be given if supported by any evidence). An underlying requirement of *Shrum*, however, is that a lesser offense instruction should not be given unless the evidence would support a conviction for the lesser offense. *Id. See also Harris v. State*, 2004 OK CR 1, ¶ 50, 84 P.3d 731, 750.

Appellant claims that the trial court should have given instructions on second degree felony murder with the predicate offenses of possession of a controlled dangerous substance and larceny from a house at nighttime.

Appellant's theory at trial was that there was no conspiracy to rob Walker of his drugs, and he was never part of the agreement to rob Walker. He also theorized that there was no robbery actually taking place just prior to Appellant leaving Walker's bedroom; that there was no predicate offense of robbery occurring when the shooting took place. He also theorized that Walker fired the only shots that night.

The trial court gave instructions on the crimes of first degree felony murder with the underlying felony of attempted robbery with a dangerous weapon and conspiracy to commit the felony of robbery with a dangerous weapon.

Appellant has not shown that the trial court's decision was clearly against the logic and effect of the facts presented. The facts indicated that Appellant had a firearm and he attempted to rob Walker of his drugs. No rational jury could have acquitted him of the charged offense. *Keeble v. United States*, 412 U.S. 205, 208, 93 S.Ct. 1993, 1995, 36 L.Ed.2d 844 (1973); *Bench v. State*, 2018 OK CR 31, ¶ 73, 431 P.3d 929, 954. *Frederick v. State*, 2001 OK CR 34, ¶ 137, 37 P.3d 908, 944. *See Barnett v. State*, 2012 OK CR 2, ¶ 22, 271 P.3d 80, 87; *Cipriano v. State*, 2001 OK CR 25, ¶ 38, 32

P.3d 869, 878 (no basis for lesser offense instructions because no rational jury would acquit him of the greater and find him guilty of the lesser). Appellant's proposition five, therefore, is denied.

Appellant's proposition six 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, 969.

DECISION

The Judgment and Sentence is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE RAY C. ELLIOTT, DISTRICT JUDGE

APPEARANCES AT TRIAL
BONNIE BLUMERT
TOM HURLEY
320 ROBERT S. KERR, STE 611
OKLAHOMA CITY, OK 73103
ATTORNEYS FOR DEFENDANT

DAN GRIDLEY
KYLE PEPPLER
ASST. DISTRICT ATTORNEYS
320 ROBERT S. KERR, STE. 505
OKLAHOMA CITY, OK 73103
ATTORNEYS FOR STATE

APPEARANCES ON APPEAL
M. MICHAEL ARNETT
3133 N.W. 63RD STREET
OKLAHOMA CITY, OK 73116
ATTORNEY FOR APPELLANT

MIKE HUNTER
ATTORNEY GENERAL
JAY SCHNIEDERJAN
ASST. ATTORNEY GENERAL
313 N.E. 21ST ST.
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR APPELLEE

OPINION BY LEWIS, P.J.
KUEHN, V.P.J.: Concur
LUMPKIN, J.: Concur in Results
HUDSON, J: Concur
ROWLAND, J.: Recuse