IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

DERRICK LAMONT GARRETT,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**No. F-2018-481**
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

HUDSON, JUDGE:

Appellant, Derrick Lamont Garrett, was tried and convicted by a jury in the District Court of Oklahoma County, Case No. CF-2016-8850, of Count 2: Kidnapping, in violation of 21 O.S.Supp.2012, § 741; and Count 3: Burglary in the First Degree, in violation of 21 O.S.2011, § 1431.[1] The jury recommended a sentence of twenty years imprisonment on each count. The Honorable Ray C. Elliott, District Judge, presided at trial and sentenced Garrett in accordance with the jury's verdicts.[2] Judge Elliott ordered both sentences to run consecutively to each other.

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[1] Garrett was acquitted of Count 1: Murder in the First Degree.

[2] Under 21 O.S.Supp.2015, § 13.1, Garrett must serve a minimum of 85% of his sentence on Count 3 before becoming eligible for parole.

Garrett now appeals, alleging the following six propositions of error:

I. BECAUSE "INTENT TO STEAL" IS NOT AN ENUMERATED MENS REA OF FIRST DEGREE BURGLARY, APPELLANT'S CONVICTION FOR BURGLARY IN THE FIRST DEGREE MUST BE DISMISSED;

II. THE STATE'S EVIDENCE WAS INSUFFICIENT TO PROVE APPELLANT'S GUILT BEYOND A REASONABLE DOUBT, MAKING THE EVIDENCE INSUFFICIENT TO SUPPORT CONVICTIONS FOR KIDNAPPING AND BURGLARY;

III. THE TRIAL COURT'S EXCLUSION OF INFORMATION THAT MS. CASTRO IDENTIFIED A DIFFERENT PERSON DURING HER EXTRA-JUDICIAL PHOTOGRAPHIC LINE-UP VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW AND TO PRESENT A DEFENSE IN VIOLATION OF THE FEDERAL AND STATE CONTITUTIONS;

IV. THE TRIAL COURT'S REFUSAL TO GIVE THE JURY THE CAUTIONARY EYEWITNESS IDENTIFICATION INSTRUCTION, WHERE EYEWITNESS TESTIMONY WAS THE CRITICAL ELEMENT OF THE STATE'S CASE, DENIED APPELLANT A FAIR TRIAL BEFORE A PROPERLY INSTRUCTED JURY;

V. APPELLANT WAS DENIED AN IMPARTIAL JURY COMPRISED OF A FAIR CROSS-SECTION OF THE COMMUNITY WHEN THE STATE OF OKLAHOMA EXERCISED PEREMPTORY CHALLENGES AGAINST MINORITY JURORS IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE OKLAHOMA CONSTITUTION; and

VI. TRIAL ERRORS, WHEN CONSIDERED IN A CUMULATIVE FASHION, WARRANT A NEW TRIAL.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we find that no relief is required under the law and evidence. Appellant's judgment and sentence is **AFFIRMED**.

Proposition I. Appellant specifically requested the instructions he now challenges on appeal. The instructions reflected the specific allegations set forth in the Count 3 charge. Appellant's instructional claim is thus barred from review by nearly one-hundred years of decisional authority from this Court holding that a defendant may not complain on appeal of instructions he requested at trial. *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 101, 241 P.3d 214, 244; *Kerr v. State*, 1954 OK CR 131, ¶ 29, 276 P.2d 284, 291; *Moore v. State*, 1923 OK CR 64, 25 Okl.Cr. 54, 68, 218 P. 1106, 1111; *Allen v. State*, 1919 OK CR 153, 16 Okl.Cr. 136, 146, 180 P. 564, 567.

Assuming *arguendo* this claim was not waived, Appellant still fails to show plain error from the instructions given. *See Gordon v. State*, 2019 OK CR 24, ¶ 38, __P.3d__ (reviewing instructional challenge on appeal for plain error where defendant did not object to the jury instructions and did not request additional instructions).

Under the plain error test, "we determine whether Appellant has shown an actual error, which is plain or obvious, and which affects his or her substantial rights." *Id.*, 2019 OK CR 24, ¶ 16. 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. *Baird v. State*, 2017 OK CR 16, ¶ 25, 400 P.3d 875, 883; 20 O.S.2011, § 3001.1.

The instructions defined the "with intent to steal" element given for the burglary charge here by utilizing the essential elements of the crime of larceny from a house. *See* 21 O.S.2011, § 1701; 21 O.S.2011, § 1723; *State v. Cooper,* 2018 OK CR 40, ¶ 17, 434 P.3d 951, 956. There is no actual or obvious error from the instructions given or, for that matter, the allegations contained within the Count 3 charge. Appellant was not charged with, or convicted of, a common law crime or some other non-statutory offense. There is thus no plain error. Proposition I is denied.

Proposition II. The issue in this proposition is whether, taken in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crimes beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct.

2781, 2789, 61 L. Ed. 2d 560 (1979); *Davis v. State*, 2011 OK CR 29, ¶ 74, 268 P.3d 86, 111. This analysis requires examination of the entire record. *Young v. State*, 2000 OK CR 17, ¶ 35, 12 P.3d 20, 35. "This Court will accept all reasonable inferences and credibility choices that tend to support the verdict." *Davis*, 2011 OK CR 29, ¶ 74, 268 P.3d at 111. Further, the law makes no distinction between direct and circumstantial evidence and either, or any combination of the two, may be sufficient to support a conviction. *Miller v. State*, 2013 OK CR 11, ¶ 84, 313 P.3d 934, 965, *overruled on other grounds by Harris v. State*, 2019 OK CR 22, ¶ 69, __P.3d__. Taken in the light most favorable to the State, sufficient record evidence was presented at trial to support Appellant's convictions for first degree burglary and kidnapping. Proposition II is denied.

Proposition III. "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *United States v. Scheffer*, 523 U.S. 303, 308, 118 S. Ct. 1261, 1264, 140 L. Ed. 2d 413 (1998) (quoting *Rock v. Arkansas*, 483 U.S. 44, 56, 107

S. Ct. 2704, 2711, 97 L. Ed. 2d 37 (1987). Appellant fails to show a federal constitutional violation in the present case because he fails to show anything arbitrary or disproportionate about Detective Easley being disallowed from testifying about identifications made outside of his presence and for which he had no personal knowledge. Appellant ignores that his right to present relevant testimony is not unlimited and "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Rock*, 483 U.S. at 55, 107 S. Ct. at 2711. That is precisely what happened here: the trial court disallowed inadmissible testimony that failed both the witness competency and hearsay rules. *See* 12 O.S.2011, §§ 2602, 2801-2802, 2803(8), 2805. We did not hold in *Davis v. State*, 2018 OK CR 7, 419 P.3d 271 that a witness lacking personal knowledge of the identifier's selections at the prior identification could merely regurgitate what a third party who was present told them had happened. Proposition III is denied.

Proposition IV. We review the trial court's decision concerning instructions for abuse of discretion. *Davis*, 2018 OK CR 7, ¶ 7, 419 P.3d at 277. Based on the record evidence, the trial court did not abuse its discretion in failing to include OUJI-CR (2d) 9-19, the

cautionary instruction relating to the use of eyewitness testimony, in the written charge. *See Webb v. State*, 1987 OK CR 253, ¶ 10, 746 P.2d 203, 206 (describing the factors to consider when determining whether cautionary instruction for eyewitness testimony is necessary); *Summers v. State*, 1985 OK CR 98, ¶ 16, 704 P.2d 91, 93 (same). Proposition IV is denied.

Proposition V. The trial court did not abuse its discretion in overruling Appellant's challenges, based on *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69, 80 (1986), to the State's use of peremptory strikes to remove prospective jurors D.C., R.D. and R.S. The record shows Appellant wholly failed to carry his burden to prove purposeful discrimination in light of the prosecutor's race-neutral explanations for removing all three of these prospective jurors. *See, e.g., Flowers v. Mississippi*, __U.S.__, 139 S. Ct. 2228, 2243-44, 204 L. Ed. 2d 638 (2019); *Purkett v. Elem*, 514 U.S. 765, 768, 115 S. Ct. 1769, 1771, 131 L. Ed. 2d 834 (1995); *Batson*, 476 U.S. at 96-97, 106 S. Ct. at 1723-24; *Frederick v. State*, 2017 OK CR 12, ¶ 35, 400 P.3d 786, 804, *overruled on other grounds, Williamson v. State*, 2018 OK CR 15, ¶ 51, 422 P.3d 752, 762; *Day v. State*, 2013 OK CR 8, ¶ 15, 303 P.3d 291, 299; *Grant v. State*, 2009 OK CR 11, ¶

26, 205 P.3d 1, 14. Appellant also fails to show error, plain or otherwise, from the State's removal of two other unidentified prospective jurors. Defense counsel did not object below to the State's use of peremptory challenges against these jurors and did not make a record identifying these particular jurors. *See Cruse v. State*, 2003 OK CR 8, ¶ 7, 67 P.3d 920, 922 ("*Batson* claims are waived if not raised at trial."). Proposition V is denied.

Proposition VI. Because we found no error in the preceding propositions, there is no error to cumulate. *Holtzclaw v. State*, 2019 OK CR 17, ¶ 68, 448 P.3d 1134, 1155. Proposition VI is denied.

DECISION

The Judgment and Sentence of the district court 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.

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

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OPINION BY: HUDSON, J.
LEWIS, P.J.: CONCUR
KUEHN, V.P.J.: CONCUR IN RESULTS
LUMPKIN, J.: CONCUR IN RESULTS
ROWLAND, J.: RECUSE