

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES AUSTIN BROWN JR.,)
)
 Appellant,)
 vs.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. F-2014-555

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUL 16 2015

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

SMITH, PRESIDING JUDGE:

James Austin Brown, Jr., was tried by jury and convicted of Counts I and II, First Degree Manslaughter in violation of 21 O.S.2011, § 711, in the District Court of Okmulgee County, Case No. CF-2010-195. In accordance with the jury's recommendation the Honorable Kenneth E. Adair sentenced Brown to fifteen (15) years imprisonment and a fine of \$5000 on each count, to run consecutively. Brown must serve 85% of his sentences before becoming eligible for consideration for parole. Brown appeals from these convictions and sentences.

Brown raises four propositions of error in support of his appeal:

- I. The trial court improperly admitted irrelevant and highly prejudicial evidence, depriving Mr. Brown his right to a fair trial.
- II. Mr. Brown was denied a fair trial due to prosecutorial misconduct.
- III. Mr. Brown received ineffective 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.
- IV. The accumulation of errors deprived Mr. Brown of a fair trial.

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 admitting a photograph, State's Exhibit 14. *Taylor v. State*, 2011 OK CR 8, ¶ 43, 248 P.3d 362, 376; *Jones v. State*, 2009 OK CR 1, ¶ 56, 201 P.3d 869, 885. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law, a clearly erroneous conclusion and judgment, which is clearly against the logic and effect of the facts presented. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. Photographs may be admissible to show the nature and extent of injuries, to corroborate the testimony of the medical examiner, and corroborate testimony regarding the crime scene. *Taylor*, 2011 OK CR 8, ¶ 43, 248 P.3d at 376. We have often said that gruesome crimes make for gruesome photographs. *Cole v. State*, 2007 OK CR 27, ¶ 29, 164 P.3d 1089, 1096. This alone will not make them inadmissible, as long as they are not so unnecessarily hideous or repulsive that jurors cannot view them impartially. *Hain v. State*, 1996 OK CR 26, ¶ 45, 919 P.2d 1130, 1143. This photograph was relevant to show the condition of the victims' car. It is the only picture to show the destruction caused at the point of impact, and corroborates the testimony regarding the crime scene. This photograph is not so horrible as to provoke an immediate visceral reaction or prevent jurors from considering it impartially. *Livingston v. State*, 1995 OK CR 68, ¶ 18, 907 P.2d 1088, 1094. This proposition is denied.

We find in Proposition II that prosecutorial misconduct did not deprive Brown of a fair trial. Brown claims that prosecutors engaged in improper questioning. The trial court sustained Brown's objections to all the incidents he raises on appeal, curing any error. *Johnson v. State*, 2013 OK CR 12, ¶ 16, 308 P.3d 1053, 1057.

Regarding argument, both parties have wide latitude to argue the evidence and inferences from it, and we consider any misconduct in the context of the whole trial. *Bell v. State*, 2007 OK CR 43, ¶ 6, 172 P.3d 622, 624. Misconduct will not warrant relief unless it deprives a defendant of a fair trial. *Pryor v. State*, 2011 OK CR 18, ¶ 11, 254 P.3d 721, 726. We review a trial court's decisions concerning argument for abuse of discretion. *Underwood v. State*, 2011 OK CR 12, ¶ 75, 252 P.3d 221, 250. Brown did not object to the arguments or questions at issue, and we review this claim 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. The prosecutor's repeated requests that jurors speak for the victims, and repeated references to the victims' mothers and families, improperly encouraged jurors to sympathize with, and put themselves in the place of, the victims and their mothers. However, there is no plain error. Brown has failed to show that the improper argument affected his substantial rights or deprived him of a fair trial. The evidence overwhelmingly supports the jury's decision to convict Brown on both counts. Regarding punishment, the range of punishment for first degree manslaughter is four years to life. 21 O.S.2011, § 715. The prosecutor asked that Brown never get out of prison, requesting a total of 106 years imprisonment. Despite this, jurors recommended fifteen years on each count. These are relatively light sentences, considering jurors found Brown killed two people, and are far less than the prosecutor's request. The record does not support a conclusion that this

improper argument had an effect on the jury's sentencing recommendation. This proposition is denied.

We find in Proposition III that trial counsel was not ineffective. To succeed on a claim of ineffective assistance of counsel, Brown must show that counsel's performance was deficient and that he was prejudiced by counsel's deficient performance. *Miller v. State*, 2013 OK CR 11, ¶ 145, 313 P.3d 934, 982; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Counsel's acts or omissions must have been so serious that he was deprived of a fair trial with reliable results. *Harrington v. Richter*, 562 U.S. 86, 104, 131 S.Ct. 770, 787-88, 178 L.Ed.2d 624 (2011). We review counsel's performance against an objective standard of reasonableness under prevailing professional norms, and we will not second-guess strategic decisions. *Harris v. State*, 2007 OK CR 28, ¶ 39, 164 P.3d 1103, 1118; *Rompilla v. Beard*, 545 U.S. 374, 380-81, 125 S.Ct. 2456, 2462, 162 L.Ed.2d 360 (2005). For the Court to reach Brown's claims of deficient performance, he must show he was prejudiced by counsel's acts or omissions. *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. Brown cannot meet this test. We found no error in Proposition I. In Proposition II we found that, given the evidence against Brown and the recommended sentences, improper questions and comments did not affect his substantial rights and there was no plain error. Had defense counsel objected, and preserved the error, Brown's substantial rights would still not have been affected and no relief would have been required. As the outcome would not have changed, we will not find defense counsel ineffective for failing to

object to argument, or for failing to request that jurors be admonished when objections to improper questions were sustained. This proposition is denied.

We find in Proposition IV that there is no accumulated error. We found no error in Propositions I or III. We found in Proposition II that improper questioning and argument did not affect Brown's trial and did not rise to plain error. Where there is no error, there will be no cumulative error. *Malone v. State*, 2013 OK CR 1, ¶ 74, 293 P.3d 198, 218. This proposition is denied.

DECISION

The Judgment and Sentence of the District Court of Okmulgee County is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKMULGEE COUNTY
THE HONORABLE KENNETH E. ADAIR, DISTRICT JUDGE

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JOHNSON, J.: CONCUR

LEWIS, J.: CONCUR

HUDSON, J.: CONCUR