

- III. Appellant received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments of the United States Constitution and Article II, §§ 7 and 20 of the Oklahoma Constitution.
- IV. Mr. Daniel's rights to due process and a fair trial under the Fourteenth Amendment to the United States Constitution and Article II, §§ 7 and 20 of the Oklahoma Constitution were violated by the improper admission of bad character evidence.
- V. The accumulation of error in this case deprived Mr. Daniel of due process of law in violation of the Fourteenth Amendment to the United States Constitution and Article II, § 7 of the Oklahoma Constitution.

After a thorough consideration of these propositions and the entire record before us on appeal including the original records, 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 challenges the sufficiency of the evidence supporting his conviction. He argues that Alicia Rosales was an accomplice whose testimony was not corroborated, her testimony could not be properly considered in the determination of guilt, and without Rosales testimony the evidence was insufficient to support his conviction.

The evidence as to whether Rosales was involved in Melissa Bost's death or was merely a bystander was susceptible to alternative findings. *See Nunley v. State*, 1979 OK CR 107, ¶ 10, 601 P.2d 459, 462-63. Regardless of Rosales' classification, we find that her testimony was sufficiently corroborated, as there was at least one material fact of independent evidence that tends to connect Appellant with the commission of the crime. *Glossip v. State*, 2007 OK CR 12, ¶

41, 157 P.3d 143, 152; *Cummings v. State*, 1998 OK CR 45, ¶ 20, 968 P.2d 821, 830. Appellant's confession to Waylon Adcock, his admissions to the other witnesses, and the forensic evidence recovered from his home clearly tied Appellant to the offense. *Postelle v. State*, 2011 OK CR 30, ¶ 18, 267 P.3d 114, 127-28.

As Rosales' testimony was sufficiently corroborated, the jury was free to consider all of the testimony presented at trial. *Glossip*, 2007 OK CR 12, ¶ 42, 157 P.3d at 152. Taking the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the charged offense beyond a reasonable doubt. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204. Proposition One is denied.

In Proposition Two, Appellant challenges the trial court's admission of the law enforcement officers' testimony concerning the Luminol testing in his home. Appellant concedes that he failed to properly preserve appellate review of this issue and has thus forfeited appellate review of the claim for all but plain error. Accordingly, we review Appellant's claim for plain error pursuant to the test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690.

Under *Simpson*, an appellant must show an actual error, that is plain or obvious, affecting his substantial rights, and which seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*, 1994 OK CR 40, ¶¶ 10, 26, 30, 876 P.2d at 694, 699, 701; *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392,

395; *Malone v. State*, 2013 OK CR 1, ¶ 41, 293 P.3d 198, 211-212. “[P]lain error is subject to harmless error analysis.” *Id.*, 1994 OK CR 40, ¶ 20, 876 P.2d at 698.

In the present case, we find that Appellant has not shown the existence of an actual error. As the Luminol testing evidence showed the presumptive indication of the presence of blood, established that Appellant may have washed the victim’s blood from the surfaces of his home, and tended to negate Appellant’s explanation for the state of his home, it was relevant and admissible. *Dodd v. State*, 2004 OK CR 31, ¶ 62, 100 P.3d 1017, 1037; *Robedeaux v. State*, 1993 OK CR 57, ¶ 22, 866 P.2d 417, 425; *Patton v. State*, 1998 OK CR 66, ¶¶ 72-74, 973 P.2d 270, 293-94. Although some of the items were later subjected to a presumptive blood test at the Oklahoma State Bureau of Investigation’s laboratory with differing result, the Luminol testing evidence did not mislead the jury. The State’s witnesses made the limitations of Luminol testing explicitly clear. *Id.*, 2004 OK CR 31, ¶ 63, 100 P.3d at 1037. Giving the Luminol evidence its maximum reasonable probative force and its minimum reasonable prejudicial value, we find that the evidence’s probative value was not substantially outweighed by the danger of unfair prejudice. *Mayes v. State*, 1994 OK CR 44, ¶ 77, 887 P.2d 1288, 1310. Plain error did not occur. Proposition Two is denied.

In Proposition Three, Appellant raises several claims of ineffective assistance of counsel. We find that he has not shown that defense counsel was ineffective pursuant to 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). *Mitchell v. State*, 2011 OK CR 26, ¶ 139, 20 P.3d 160, 190.

Appellant challenges counsel's failure to preserve appellate review of his challenge to the Luminol testing evidence. We determined in Proposition Two that admission of this evidence did not constitute plain error. As such, counsel's omission did not amount to ineffective assistance. *Glossip*, 2007 OK CR 12, ¶ 112, 157 P.3d at 161; *Ball v. State*, 2007 OK CR 42, ¶ 60, 173 P.3d 81, 96.

Appellant further challenges counsel's omission to request accomplice instructions concerning the testimony of Alicia Rosales. We find that Appellant has not demonstrated that counsel's representation was unreasonable under prevailing professional norms and could not be considered sound trial strategy *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066. Defense counsel explicitly informed the trial court that Appellant did not want accomplice instructions for the strategic reason that he did not want the jury to believe that Rosales was an accomplice. Because we determined that Rosales' testimony was sufficiently corroborated, we further find that Appellant has not shown a reasonable probability that the outcome of the trial would have been different had defense counsel requested accomplice instructions. *Id.*, 466 U.S. at 694, 104 S.Ct. at 2068.

Appellant raises several challenges which are predicated in whole or in part on matters outside the record. Appellant challenges counsel's omission to

impeach Rosales with her prior criminal convictions. He further challenges counsel's omission to present the testimony of David Meadows, Derek Vassar, and Esther Chavez. Simultaneous with the filing of his brief, Appellant filed his Application for Evidentiary Hearing on Sixth Amendment Claims pursuant to Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015). He seeks to supplement the record with five Affidavits from his appellate investigator purporting to set forth what the testimony or evidence would show, as well as an affidavit from Appellant's wife, Esther Chavez, setting forth what she would have allegedly testified to if she had been called as a witness at trial. Reviewing the attached materials, we find that Appellant has not established that he was denied his right to effective assistance of counsel as set forth in *Strickland. Simpson v. State*, 2010 OK CR 6, ¶¶ 53-54, 230 P.3d 888, 905-906. Consequently, Appellant's application is **DENIED**.

Many of the witnesses at trial testified concerning Rosales' lifestyle and behavior. Defense counsel relentlessly questioned Rosales about all the differing statements she gave to the police. As the evidence at trial ably permitted the jury to determine Rosales credibility, we find that Appellant has not shown a reasonable probability that the outcome of the trial would have been different had defense counsel impeached Rosales with her prior criminal convictions. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

Defense counsel adequately developed through cross-examination of Detective Tommy Uptergrove, the testimony that Appellant now asserts that Meadows and Vassar would have supplied. Therefore, we find that Appellant

has not shown defense counsel to be ineffective for omitting to call Meadows and Vassar as witnesses. *Cruse v. State*, 2003 OK CR 8, ¶ 13, 67 P.3d 920, 923 (“[D]efense counsel cannot be said to be ineffective for avoiding cumulative or redundant witnesses.”).

We find that Appellant has not shown that he was prejudiced by counsel’s omission to call Appellant’s wife, Esther Chavez, as a witness at trial. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. In light of the evidence at trial concerning Bost’s habit of maintaining her fingernails in the years preceding her murder and the condition of her nails at the time of her death, we find that there is not a reasonable probability that the outcome of the trial would have been different but for counsel’s omission to call Chavez as a witness. *Id.*, 466 U.S. at 694, 104 S.Ct. at 2068. We further find that Chavez’s proposed testimony concerning Appellant’s relationship with Bost was not favorable to Appellant as it would have tended to substantiate the State’s theory of the case and affirm Appellant’s motive for killing Bost. As such, we find that Appellant has not shown that counsel was ineffective. *Simpson v. State*, 2010 OK CR 6, ¶ 54, 230 P.3d at 906. Proposition Three is denied.

In Proposition Four, Appellant contends that the facts of his arrest for possession of Crack with intent to distribute in Tillman County while travelling with Bost in her car constituted inadmissible other crimes evidence which deprived him of a fair trial. Reviewing the record, we find that the trial court did not abuse its discretion when it determined that this evidence was properly admissible. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170; *Marshall*

v. State, 2010 OK CR 8, ¶ 24, 232 P.3d 467, 474. The challenged evidence explained the relationship between the drug dealing Bost and Appellant, who was a user. Coupled with Appellant's numerous admissions, the evidence tended to provide Appellant's motive for stabbing and killing Bost. The trial court instructed the jury regarding its limited consideration of the evidence.² As such, we find that the evidence's probative value was not substantially outweighed by the danger of unfair prejudice. *Mayes*, 1994 OK CR 44, ¶ 77, 887 P.2d at 1310. Proposition Four is denied.

As to Proposition Five, we find Appellant was not denied a fair trial by cumulative error. *Ashinsky v. State*, 1989 OK CR 59, ¶ 31, 780 P.2d 201, 209; *Bechtel v. State*, 1987 OK CR 126, 738 P.2d 559, 561. Proposition Five is denied.

Subsequent to the filing of his Brief-in-Chief, Appellant filed his Motion for New Trial and Request for Evidentiary Hearing on Newly Discovered Evidence Regarding Juror Misconduct. As his motion was filed within one year of imposition of Judgment and Sentence we find that it is properly filed. *Underwood v. State*, 2011 OK CR 12, ¶ 91, 252 P.3d 221, 254; 22 O.S.2011, § 953; Rule 2.1(A)(3), *Rules of the Oklahoma Court of Criminal Appeals*, 22 O.S., Ch. 18, App. (2015).

² Appellant argues that the prosecutor misused the challenged evidence in closing argument. As Appellant merely mentions this possible issue and has not fully supported this contention with argument and authority we find that he has waived review of the issue pursuant to Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015); *Murphy v. State*, 2012 OK CR 8, ¶ 23, 281 P.3d 1283, 1291 (refusing to review contention not supported with argument or authority as required by Rule 3.5); *Harmon v. State*, 2011 OK CR 6, ¶ 90, 248 P.3d 918, 946 (finding issue waived under Rule 3.5 where appellant provides no argument or authority).

Appellant asserts that he has newly discovered evidence that a female juror failed to disclose that her son had formerly been in a relationship with witness Mindy Wedgeworth. We find that Appellant has not shown that he is entitled to a new trial based on juror misconduct. *Coddington v. State*, 2006 OK CR 34, ¶ 25, 142 P.3d 437, 446; *Warner v. State*, 2006 OK CR 40, ¶ 18, 144 P.3d 838, 859. There is no indication that the juror deliberately withheld information pertinent to a specific inquiry. *Warner*, 2006 OK CR 40, ¶ 16, 144 P.3d at 859; *Edwards v. State*, 1991 OK CR 71, ¶ 13, 815 P.2d 670, 674. The trial court did not simply ask the jurors if they knew any of the listed witnesses but, instead, asked if the jurors had a connection to any of the witnesses that was so close that it would affect their ability to consider the witness' testimony. The attenuated nature of any relationship between the juror and the witness was not such that the juror could have been expected to disclose the information in response to the court's question. *Id.*, 2006 OK CR 40, ¶¶ 16, 19, 144 P.3d at 859. Consequently, Appellant's motion is **DENIED**.

DECISION

The judgment and sentence is hereby **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 JACKSON COUNTY
THE HONORABLE RICHARD B. DARBY, DISTRICT JUDGE

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SMITH, P.J.: CONCUR
JOHNSON, J.: CONCUR
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