IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

RUSSELL LEE HOGSHOOTER,	)	
	)	**NOT FOR PUBLICATION**
Appellant,	)	
	)	**Case No. F-2016-761**
v.	)	
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	
	)	

OPINION

HUDSON, JUDGE:

Appellant, Russell Lee Hogshooter, was tried and convicted by a jury in Oklahoma County District Court, Case No. CF-2014-7491, of Count 1: Conspiracy to Commit Murder in the First Degree and/or Robbery in the First Degree, in violation of 21 O.S.2001, § 421; Count 2: Murder in the First Degree, Malice Aforethought, in violation of 21 O.S.Supp.2009, § 701.7(A); and Counts 3-7: Murder in the First Degree, Felony Murder, in violation of 21 O.S.Supp.2009, § 701.7(B).[1]

[1] Appellant was charged in all seven counts with acting in concert with Denny Edward Phillips, Jonathan Cochran and David Tyner. Cochran and Tyner entered guilty pleas and were convicted and sentenced before Appellant's trial. Appellant and Phillips, charged separately in CF-2012-5130 with the same counts, were tried jointly. The jury convicted Phillips and recommended the

The jury recommended a sentence of thirty-five years imprisonment on Count 1 and life imprisonment without the possibility of parole on Counts 2 through 7.[2] The Honorable Timothy R. Henderson, District Judge, presided at trial and sentenced Appellant in accordance with the jury's verdicts. Judge Henderson further ordered the sentences to be served consecutively. Appellant now appeals.

FACTS

This case arises from the murders of Casey Barrientos, Jennifer Ermey, Milagros Barrera, Barrera's unborn child, Brooke Phillips and Brooke's unborn child.[3] At the direction of Denny Phillips, their murders were carried out by Appellant, David Tyner and John Cochran, who went to Barrientos' southwest Oklahoma City home in the early morning hours of November 9, 2009, with the purpose of robbing and killing Barrientos. Barrientos was a drug dealer, dealing

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same sentences that it did for Appellant. Phillips' appeal is pending before this Court under Court of Criminal Appeal Case Case No. F-2016-741.

[2] The State filed a Bill of Particulars and sought the death penalty on Counts 2 through 7. Though the jury found the existence of aggravating circumstances, it nonetheless recommended sentences of life without parole on each of the murder counts.

[3] We refer to Brooke Phillips by her first name to avoid any confusion with codefendant Phillips.

in marijuana, cocaine and methamphetamine, and was known to regularly have large amounts of drugs and money in his residence.

Phillips and Tyner were associated with each other through the Indian Brotherhood ("IBH") gang. Phillips was a purported "war chief," second-in-command, of the IBH gang, and Tyner was his "prospect" to join the gang. Both Phillips and Tyner had friendly as well as business relationships with Barrientos that related to Barrientos's sale of illicit drugs. Phillips, who lived in Salina, was also a drug dealer, selling marijuana and cocaine in northeast Oklahoma. Barrientos was a supplier to Phillips's drug business.

In contrast, Tyner's business relationship with Barrientos was akin to that of employer/employee. At the direction of Phillips, Tyner worked in Oklahoma City as Barrientos's bodyguard.[4] Tyner began working for Barrientos in the summer of 2009. During his employ, Tyner would run drugs "back and forth" to Phillips. He also learned where Barrientos kept drugs in his house and observed that Barrientos stashed his money throughout the house. Tyner shared

[4] As an IBH prospect, Tyner understood that he had to do anything Phillips asked of him, or there would be consequences.

this knowledge with Phillips. Tyner left Barrientos's employ in early October 2009 and returned to Salina. Barrientos had crossed two different cartels who were looking for him, and the situation had become "too hot" for Tyner. Barrientos thought Tyner was only taking a few weeks off, but Tyner had no intention of returning.

Notably, at this time, Phillips and Barrientos's relationship had begun to deteriorate due to disagreements concerning a motorcycle and a Dodge Charger. There was also tension between the two caused by Barrientos selling Phillips some cocaine that was not as "pure" as Barrientos represented. Phillips later decided to take Barrientos "out" and take over his drug business.

Late in the evening of November 8, 2009, or early on November 9th, Phillips directed Tyner to go to Oklahoma City to check on a drug shipment that Barrientos was supposed to receive. Tyner understood that Cochran and Appellant would be riding with him so they could look for a person named "Yellow Dog". Unbeknownst to Tyner, however, Phillips recruited Cochran on November 8th for a job—robbing a drug dealer in Oklahoma City. Needing the money, Cochran agreed. Cochran and Appellant had been "real good friends" for years. Cochran became acquainted with Phillips through

Appellant and was aware that Phillips was part of the IBH. It appeared to Cochran that Phillips was in charge of the robbery plan because he was the one doing most of the talking.

Ultimately, Tyner, Cochran and Appellant drove together to Oklahoma City in a white vehicle.[5] Phillips followed them in a Dodge Charger. Both Cochran and Appellant had .380 handguns. Tyner had a "bigger handgun." Cochran and Appellant also had knives. In Oklahoma City, Tyner dropped Cochran and Appellant off a few blocks from Barrientos's house before going there himself. When Tyner arrived, Barrientos was not home, but Jose Fierro was. Fierro had been Barrientos's friend since childhood and sold cocaine and marijuana for him. After spending the evening in a bar with Barrientos, Jennifer Ermey and Milagros Barrera, Fierro returned to Barrientos's home with Brooke Phillips, whom he picked up on the way after she called him. They arrived between 2:00 and 2:30 a.m.

After Fierro let Tyner in Barrientos's residence, Tyner called Phillips, who told him to stay there and wait for Barrientos. Barrientos arrived thirty to forty minutes later with Ermey and

[5] Tyner testified they drove a white Pontiac Grand Prix that belonged to Phillips and his girlfriend, Lisa Thomas.

Barrera, and according to Tyner, ten to fifteen other people. Tyner called Phillips again and advised him there was a party at the house. Phillips told him to stay there because "they"—Tyner, Cochran, Appellant and Phillips—"were going to rob [Barrientos] tonight and kill him." Tyner testified this was first he knew of Phillips's plan. Tyner told Phillips he was not going to harm any women. In response, Phillips warned Tyner that he would have Tyner's "family touched" that night. Tyner understood that to mean his family would be killed if he did not do as Phillips said.

Thereafter, Tyner talked "with the people for a little bit and [then] went into the bathroom trying to figure out what [he] was going to do." At that time, everyone had left except for Fierro, Barrientos, Ermey, Barrera and Brooke. While in the bathroom, Tyner attempted to call Appellant, but could not reach him. Meanwhile, Appellant had climbed over Barrientos's back yard fence. Tyner, still in the bathroom, heard gunshots and when he walked out, Barrientos came at him with an X-Acto knife. Tyner shot Barrientos and then proceeded to shoot everyone else in the room—Barrientos, twice in the chest, Ermey, in the head, and Barrera, in the head. All three

went down. Tyner then saw Appellant, who told him to look for the money.

When the melee began, Fierro ran toward the garage. Seeing Fierro, Tyner dropped his weapon and ran after him. Tyner had almost caught up with Fierro when Fierro dove under the garage door. Before Fierro escaped, Tyner told him he "didn't have no beef with him." Tyner stated that he could have caught Fierro but let him go because he wanted someone on his side when Fierro went to the police. Tyner then went back inside Barrientos's house to look for the money.

Cochran was inside the house when Tyner returned. Cochran apparently struggled to get over the fence. After hearing gunshots, Cochran found a tree to help him over the fence, hearing more gunshots as he crossed the yard. When Cochran entered the house, he observed two bodies lying on the floor to his left. Cochran also witnessed Tyner chasing Fierro and saw Appellant as he pulled a knife from Barrientos's throat.[6] According to Cochran, when Tyner returned inside the house from chasing Fierro, he and Cochran

[6] Tyner testified he was aware Barrientos was stabbed in the neck after Tyner shot him. Appellant took a necklace Barrientos had been wearing.

unsuccessfully attempted to open Barrientos's safe. Tyner also found some money in a sock drawer that he did not tell the others about at that time.

While going through the house, Tyner saw Brooke by herself lying on the floor in the front room. She was incoherent and bleeding from her head and neck. Brooke was moaning and making "hurt noise[,]" so Tyner kicked a cell phone that he saw on the floor over in her direction. Tyner didn't know what happened to Brooke and stated that he did not kill her. Appellant subsequently entered the room and said something to Tyner about the safe. Tyner left the room and eventually went back outside to the car. When he got to the car, Cochran was already there.

Cochran also came upon Brooke while going through the house. Brooke was badly injured, bleeding with her eye hanging out. Brooke was on her knees and Appellant was standing beside her holding her by her hair. She was screaming, asking them why they were doing this, asking them to stop, and offering them the money she had. Appellant directed Cochran to "shoot the bitch." Cochran pointed the gun in Brooke's direction, but purposely shot to the side to miss her.

Cochran then told Appellant that he was out of bullets. Thereafter, Cochran returned to the car.

After both Cochran and Tyner were back at the car, Appellant briefly returned, retrieved a gas can from the trunk of the car and then went back inside the house. After a while, Cochran walked toward the front door of the house to check on Appellant, but before he got there "the windows shattered and the house explode[d]." Appellant ran out through the garage and the three men drove away. The house was on fire when they left.

The men took Interstate 40 and stopped near Wewoka, where Appellant had some land. There they buried the weapons and burned their clothes. The group met Phillips at his house in Salina around 8:00 or 9:00 a.m. Tyner gave Phillips $10,000.00 that he had taken from Barrientos's house, and Phillips split the money up. Appellant left Phillips's house in the Grand Prix, and when he returned to Cochran's house later, he no longer had the car.

Phillips told Tyner to "lay low," so Tyner left town for a couple of days, first going to Arkansas and then Tennessee. Fierro spoke to the police and identified Tyner as a suspect, focusing law

enforcement's attention on Tyner and his associates. Tyner turned himself in to authorities on November 17, 2009.

Additional facts will be presented when relevant to the discussion below.

ANALYSIS

Proposition I. Citing 22 O.S.2011, § 439,[7] Appellant complains that severance of his trial from codefendant Phillips was warranted because he was prejudiced by the joint trial.

As set forth in *Ochoa v. State*:

> Where two defendants have "mutually antagonistic defenses," separate trials ought to be held and compelling joinder of trials may result in reversible error. . . . [However,] "it is not enough that the defenses of the co-defendants are inconsistent, in conflict or are otherwise unreconcilable. To be considered 'mutually antagonistic,' the two theories of defense must be in direct contravention and the parties must each place blame with the co-defendant." . . . The Court has further stated "one defendant's attempt to cast blame on the other is not in itself a sufficient reason to require separate trials," and "[m]ere conflicting defenses, standing alone, do not constitute the showing of prejudice necessary for judicial severance."

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[7] Title 22 O.S.2011, § 439 provides:

> If it appears that a defendant . . . is prejudiced by joinder of . . . defendants in an indictment or information or by such joinder for trial together, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide whatever other relief justice requires.

Ochoa, 1998 OK CR 41, ¶ 29, 963 P.2d 583, 595-96, *overruled on other grounds by Davis v. State*, 2018 OK CR 7, ¶ 26 n.3, 419 P.3d 271, 281 n.3 (internal footnotes and citations omitted).

Appellant acknowledges on appeal that joinder in this case "may not fit into the definition of antagonistic defenses for severance purposes[.]"[8] Appellant asserts, however, that severance was necessary due to "the extensive evidence presented against [ ] Phillips that was inferred onto [Appellant]." He argues this evidence "should certainly be considered a manifestation of the extreme prejudice that [he] was forced to endure" as a result of his joint trial with Phillips.

The record, viewed in its entirety, confirms that the defenses presented by Appellant and Phillips were not mutually antagonistic. Both defendants argued they were not guilty of the charged offenses and focused their attack on undermining the credibility of the State's witnesses, particularly Tyner and Cochran. While the defendants may have obliquely cast aspersions on one another at times, neither

[8] Notably, at the July 20, 2015 hearing on the State's joinder motion, both counsel admitted their clients did not have mutually antagonistic defenses within the very narrow definition applied by this Court.

directly engaged in finger-pointing or blame. *See Hammon v. State*, 1995 OK CR 33, ¶ 11, 898 P.2d 1287, 1292.

We further find meritless Appellant's claim of prejudice due to the "disparity of evidence" against Phillips as opposed to Appellant as such disparity is insufficient to serve as a legal ground for severance in this case. *Cooper v. State*, 1978 OK CR 96, ¶ 7, 584 P.2d 234, 237. His complaint that evidence against Phillips was prejudicially "inferred against" him likewise fails. *Cooper*, 1978 OK CR 96, ¶ 6, 584 P.2d at 237 ("[W]here two or more defendants are charged with acting in concert, as here, evidence against each is available against the others.").

Under the total circumstances presented here, Appellant fails to make the requisite showing of prejudice necessary for judicial severance. The trial court did not abuse its discretion in denying Appellant's motion to sever. Proposition I is thus denied.

Proposition II. Appellant complains that the trial court erred in requiring him to share nine separate peremptory challenges with codefendant Phillips. Appellant complains that his defense was inconsistent with Phillips' and, thus, under 22 O.S.2011, § 655, he

was entitled to nine separate peremptory challenges.[9]

The trial court denied Appellant's request for separate peremptory challenges. After Appellant and Phillips exhausted their peremptory challenges, the trial court also denied their request for an additional challenge. Appellant has thus properly preserved this issue for appellate review.

Pursuant to 21 O.S.2011, §§ 622[10] and 655, codefendants tried together in a single trial must share peremptory challenges unless their defenses are inconsistent. *Nickell v. State*, 1994 OK CR 73, ¶ 20, 885 P.2d 670, 675-76. The record shows in the present case that the defenses presented by Appellant and his codefendant, Phillips, were not inconsistent. Each denied any participation in the crimes.

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[9] Title 22 O.S.2011, § 655 states:

> In all criminal cases the prosecution and the defendant are each entitled to the following peremptory challenges: Provided, that if two or more defendants are tried jointly they shall join in their challenges; provided, that when two or more defendants have inconsistent defenses they shall be granted separate challenges for each defendant as hereinafter set forth.
>
> First. In prosecutions for first degree murder, nine jurors each.
>
> Second. In other felonies, five jurors each.
>
> Third. In all nonfelony prosecutions, three jurors each.

[10] Title 22 O.S.2011, § 622 provides that "[w]hen several defendants are tried together they cannot sever their challenges, but must join therein."

While both argued they were not guilty, neither attempted to exculpate themselves by inculpating the other in the crimes. Thus, there was no inconsistency in their defenses. *See Davis*, 2018 OK CR 7, ¶ 13, 419 P.3d at 278; *Nickell*, 1994 OK CR 73, ¶ 21, 885 P.2d at 676; *Carter v. State*, 1994 OK CR 49, ¶ 16, 879 P.2d 1234, 1243.

It was not error to compel Appellant and his codefendants to share peremptory challenges. Proposition II is denied.

Proposition III. David Tyner, having previously pled guilty to his participation in the murders, testified for the State at trial. On direct examination, Tyner briefly testified, *inter alia*, regarding his short time serving in the United States Marine Corps. Tyner joined the Marines following college. He "got in trouble early in [his] career for fighting, and they sent [him] to mental health." Tyner was put on "a bunch of different psych medications," but when he was deployed to Iraq, he was sent "cold turkey," off his medications. His military career ended because he "got in trouble in Iraq and they sent [him] back." He subsequently received an honorable discharge. On cross-examination by Phillip's counsel, Tyner acknowledged that he had some psychological issues while he was in the Marine Corps, which included both homicidal and suicidal thoughts. However, he denied

his homicidal thoughts were directed at his fellow Marines or that he ever threatened to kill any of his fellow Marines.

Appellant's counsel on cross-examination attempted to delve further into Tyner's mental health issues while in the Marines. The State objected as to relevance when counsel tried to broach the topic of Tyner's "homicidal thoughts and homicidal ideations" and his "mental breakdown at boot camp[.]" The State argued that what happened in 2003 was not relevant to what Tyner did in 2009 when the murders occurred. At the bench, counsel provided the trial court with the following overview of information contained in Tyner's military records that related to his mental health:

> Judge, I can tell you that he indicates he had a mental breakdown. He's seeing, for example, black figures that tell him to do very evil things. He has very violent thoughts. He's put on a series of mental health medications. This is all before he's deployed. He's deployed and taken off those mental health medications. He sees whatever he sees during this deployment. In addition to his homicidal thoughts he starts having suicidal thoughts. He is returned to the States and leaves the Marines with what I assume, based on his testimony, was in fact a — an honorable discharge, but it's due to these mental health issues and his acting out. He doesn't treat any of these mental health issues throughout the years. And then we end up with him as a — as a cage fighter/IBH pledge and is being sent allegedly to commit these crimes.

(Tr. VII 12).

Counsel argued this information went to Tyner's character evidence for "truthfulness or untruthfulness," asserting "[i]t goes to bias [and] credibility." Counsel further contended the State was erroneously "trying to close the door on something that they've opened [on direct]." Ultimately, the trial court ruled the evidence was inadmissible character evidence under 12 O.S.2011, § 2608 because it did not go to Tyner's truthfulness or untruthfulness. Judge Henderson, however, allowed counsel to inquire into Tyner's military discharge and the reasons for it.

Thereafter, counsel asked Tyner if his discharge was "based in part on the fact that [he had] had homicidal tendencies or thoughts[,]" and he answered in the affirmative. Counsel also elicited from Tyner that when he committed the crimes, he was not "suffer[ing] from any mental health defects or diseases[,]" was not "on any mental health medications[,]" and was not "receiving mental health treatment[.]" The trial court, however, sustained the State's objections to questions about: (1) whether Tyner had been treated with any "psych meds[;]" 2) whether he had ever been diagnosed with a personality disorder; and 3) when he last received mental health treatment. Nonetheless, Tyner subsequently testified he had taken

"psych-med pills" before—the last time being a couple of years before the murders. Yet when counsel later inquired whether Tyner's psychological issues had ever affected his "ability to perceive what was going on[,]" the State objected again on relevance grounds. Judge Henderson sustained the objection as to the form of the question, but advised counsel he could ask Tyner "specifically what he did, what he was thinking, [and] the actions that he took." Tyner's mental health records, on which the defense counsel's excluded questions were based, were admitted as Court's Exhibit 3.

In his third proposition of error, Appellant claims the trial court erred when it restricted Appellant's cross-examination of Tyner with his military mental health records. Appellant asserts these "records contain both exculpatory and impeachment material that the jury should have been able to consider." Appellant argues the curtailment of his cross-examination of Tyner violated his right to confrontation, to due process, and to present a defense. Appellant's objections and offers of proof at trial preserved these issues for appellate review.

This Court has acknowledged that "'a defendant has a right to present competent evidence in his own defense, and . . . rules of evidence may not arbitrarily impinge on that right.'" *Lamar v. State*,

2018 OK CR 8, ¶ 49, 419 P.3d 283, 296 (quoting *Pavatt v. State*, 2007 OK CR 19, ¶ 42, 159 P.3d 272, 286); *see also Coddington v. State*, 2006 OK CR 34, ¶ 82, 142 P.3d 437, 458 (the rules of evidence "may not be applied mechanistically to defeat the ends of justice"). Nonetheless, the Sixth Amendment allows a trial judge to place reasonable limits on a defendant's right to cross-examine witnesses. *Levering v. State*, 2013 OK CR 19, ¶ 20, 315 P.3d 392, 398. This Court "generally review[s] a trial judge's limitations on the extent of cross-examination for an abuse of discretion." *Id.* "An abuse of discretion is any unreasonable or arbitrary action made without proper consideration of the relevant facts and law, also described as a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts." *State v. Hodges*, 2020 OK CR 2, ¶ 3, 457 P.3d 1093, 1095 (quoting *State v. Hovet*, 2016 OK CR 26, ¶ 4, 387 P.3d 951, 953). However, "where limitations directly implicate the Sixth Amendment right of confrontation, we review the limitation *de novo*." *Thrasher v. State*, 2006 OK CR 15, ¶ 8, 134 P.3d 846, 849 (citing *Scott v. State*, 1995 OK CR 14, ¶ 28, 891 P.2d 1283, 1294). To determine whether the Confrontation Clause has been violated,

> we look to see whether there was sufficient information presented to the jury to allow it to evaluate the witness and whether the excluded evidence was relevant. . . . "[W]e 'distinguish between the core values of the confrontation right and more peripheral concerns which remain within the ambit of the trial judge's discretion.'" *United States v. Degraffenried*, 339 F.3d 576, 581 (7th Cir. 2003) quoting *United States v. Saunders*, 973 F.2d 1354, 1358 (7th Cir. 1992)). "Limiting the right to cross examine for impeachment purposes involves a peripheral concern." *Id.*

Thrasher, 2006 OK CR 15, ¶ 9, 134 P.3d at 849.

The Supreme Court has held that "'exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.'" *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986) (quoting *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974)). The trial court may nonetheless still impose reasonable limits on such questioning for the reasons discussed above. *Van Arsdall*, 475 U.S. at 679. The focus of the Supreme Court's caselaw is on the Confrontation Clause's guarantee of "'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *Id.* (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20, (1985) (per curiam)) (emphasis in original).

Upon review, we find the trial court's limitations on the cross-examination were reasonable. Title 12, Section 2608(B)(1) permits inquiry into specific instances of conduct if they are probative of and "[c]oncern the witness's character for truthfulness or untruthfulness[.]" 12 O.S.2011, § 2608(B)(1). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." 12 O.S.2011, § 2401.

There was no evidence that Tyner was suffering from any mental illness during the time frame surrounding the commission of these murders or at the time of Appellant's trial in 2016, which may have caused him to lie. Tyner's documented mental health issues arose in August 2003 while in the Marines—approximately six years prior to the murders in this case. That Tyner suffered from mental health issues, which led to his honorable discharge from the Marines, was not hidden from the jury. The extent and specifics of those mental health issues simply did not make it more or less probable that Tyner was being truthful or untruthful in his trial testimony. The trial court did not abuse its discretion by curtailing further inquiry into this

issue on cross-examination. *Levering*, 2013 OK CR 19, ¶¶ 20-21, 315 P.3d at 398.

Nor was the excluded evidence exculpatory or otherwise admissible impeachment evidence as Appellant argues. Appellant's reliance on *Browning v. Trammel*, 717 F.3d 1092 (10th Cir. 2013) is unpersuasive.[11] In *Browning*, a key witness for the State had been *recently* diagnosed[12] after the crimes with having "a severe mental disorder." *Browning*, 717 F.3d at 1094. According to the undisclosed records in the State's possession, the witness "blurred reality and fantasy, suffered from memory deficits, tended to project blame onto others, and had an assaultive, combative, and even potentially homicidal disposition." *Id.* The Tenth Circuit found the witness's undisclosed psychiatric reports contained favorable, material evidence that was both exculpatory and impeaching. *Id.* at 1105-06. Given Browning's defense that the witness had motive to kill her adoptive parents and was complicit in their murders, evidence of the witness's homicidal disposition was found to be exculpatory. *Id.* at

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[11] Notably, Appellant solely relies on *Browning* in his brief in chief to support his Proposition III claims.

[12] The witness's diagnoses came eight months after the crimes. *Browning*, 717 F.3d at 1107.

1097-98, 1105. Evidence that the witness suffered from memory deficits was also found impeaching as it went to her capacity to observe and remember events both at the time of the event and at the time of trial. *Id.* at 1105. Addressing the materiality of the evidence, the court found the witness was indispensable to the State and "Browning's fate turned on her credibility." *Id.* at 1106.

Here, unlike in *Browning*, Tyner's "disposition to kill" was not at issue. He admitted his involvement in the murders. Moreover, the excluded evidence was not admissible to show Tyner had motive to the kill the victims, as Appellant speculates on appeal. Appellant's sparse argument in this regard suggests the evidence would have provided the jury with an alternative explanation as to why Tyner killed the victims, i.e. to show Tyner did not kill the victims because Appellant directed him to do so, but rather acting in conformity with the homicidal thoughts he had while in the Marines, Tyner did so of his own volition. To find the underlying details of Tyner's homicidal disposition are exculpatory in this manner is far too conjectural given the circumstances of this case. Tyner's documented mental health issues occurred several years prior to the crimes at issue here. There was no evidence that Tyner was suffering from any mental illness

during the time frame surrounding the commission of these murders or at the time of Appellant's trial. On cross-examination, Tyner denied he was suffering from any mental health defects or diseases at the time of the murders. And when asked if he was "receiving mental health treatment" at the time he committed the crimes, he answered, "No sir." Thus, to the extent any of the excluded information contained in Tyner's military records might have reflected on his ability to perceive the events surrounding the murders, Appellant's counsel was nonetheless bound by Tyner's answers and could not offer extrinsic evidence, including his mental health records, to impeach Tyner. 12 O.S.2011, § 2608(B); *Jones v. State*, 1989 OK CR 66, ¶ 20, 781 P.2d 326, 330.

Additionally, unlike *Browning*, Appellant was provided with Tyner's service records. From these records, collectively Appellant and Phillips were able to elicit from Tyner that he suffered mental health issues while in the Marines; that his psychological issues at that time included both homicidal and suicidal thoughts and tendencies; that he was discharged due to these issues; and that he had taken "psych-med pills" in the past, but not at the time of the crimes. Counsel was also able to elicit admissions from Tyner that

he was upset with victim Casey Barrientos and that his reasons for testifying for the State were suspect. The jury thus had sufficient information to evaluate Tyner's testimony. *Levering*, 2013 OK CR 19, ¶ 21, 315 P.3d at 398.

Under the circumstances presented here, Appellant was not deprived of his right to present a defense, nor was he deprived of his due process rights or his right to confrontation of witnesses, by trial court's challenged limitations on the cross-examination of Tyner. Proposition III is denied.

Proposition IV. Appellant challenges the admission of State's Exhibit 182—a letter prepared by Deanna Cox, a former branch manager of Express Employment Professionals (EEP). The letter was introduced through the testimony of Norma Espinoza as a business record pursuant to 12 O.S.2011, § 2803(6) to establish Appellant's phone number.[13] Appellant's objections at trial preserved this issue

[13] The cellular phone records for Tyner and Phillips contained a common phone number ending in 8084 to where calls were placed. Investigator Darren Gordon, with the Oklahoma County District Attorney's Office, was unable to obtain subscriber information for the 8084 number because it was a prepaid account. However, he was able to obtain call detail records for the number. He called the numbers on the list to try to determine to whom the call number belonged and discovered one of the numbers was to EEP. Other evidence established the number placed calls to both Phillips and Tyner around the time of the murders,

for appellate review.[14] This Court "review[s] a trial court's decision to admit or exclude evidence for an abuse of discretion." *Ashton* v. State, 2017 OK CR 15, ¶ 26, 400 P.3d 887, 895, *overruled on other grounds by Williamson v. State*, 2018 OK CR 15, ¶ 51 n.1, 422 P.3d 752, 762 n.1; *see also Bramlett v. State*, 2018 OK CR 19, ¶ 30, 422 P.3d 788, 798.

Section 2803(6) provides an exception to the hearsay rule for business records if they are "kept in the course of regularly conducted business activity, and if it was the regular practice of that business activity to make the record[.]". 12 O.S.2011, § 2803(6). "The rationale behind this exception is that business records 'have a high degree of reliability because businesses have incentives to keep accurate records.'"[15] *United States v. Ary*, 518 F.3d 775, 786 (10th Cir. 2008) (quoting *United States v. Gwathney*, 465 F.3d 1133, 1140

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pinging off the same cell towers in southwest Oklahoma City that victim Brooke's cell phone was pinging at the time of the murders.

[14] Appellant's counsel objected that the letter was hearsay and did not fall within the business records exception at an *in camera* hearing; at the time it was introduced at trial; and during his cross-examination of the sponsoring witness.

[15] Notably, Oklahoma's business record hearsay exception is consistent with Section 803(6) of the Federal Rules of Evidence.

(10th Cir. 2006)).[16] Thus, records made and kept in the normal course of business, "as shown by the testimony of the custodian or other qualified witness," are not excluded as hearsay, "unless the source of information or the method or circumstances of preparation indicated lack of trustworthiness." 12 O.S.2011, § 2803(6); *Middaugh v. State*, 1988 OK CR 295, ¶ 13, 767 P.2d 432, 435–36; *see also Lewis v. State*, 1978 OK CR 12, ¶ 10, 574 P.2d 1063, 1066 (records kept in the usual course of business are generally considered reliable).

In the present case, Espinoza testified she is a staffing consultant for EEP, a temporary staffing service. In her job responsibilities, Espinoza is familiar with the records maintained by EEP. As per EEP protocol, when an individual seeks employment with EEP, he or she must fill out a job application and provide, *inter alia*, their personal information, including a phone number where they can be reached. Applicants must also supply two forms of identification as prescribed by the Federal I-9 employment eligibility

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[16] *See also Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 33, 241 P.3d 214, 227 ("Business . . . records 'are generally admissible absent confrontation . . . because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.'" (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009)).

verification form to verify their identity. Once an application has been received by EEP and the applicant's identity has been verified, a staffing consultant, such as Espinoza, enters the information into an electronic database, Quest IV, which keeps the applicant's personal information and work history. The information is maintained in the Quest IV database to facilitate contact with applicants when a job becomes available, as well as for payroll and tax purposes. Access to Quest IV is limited to certain employees, one of whom is Espinoza. While EEP only kept paper applications for three years, the electronic record of applications could be kept indefinitely in the Quest IV database. The business process outlined by Espinoza was the same for the time period of 2007 to 2009.

According to Espinoza, EEP routinely receives employment verification requests several times a week. When a request comes in, Espinoza, or someone else in her position, pulls up the individual's information on Quest IV and enters it onto whatever form the requesting party has provided. If a form is not provided, the information is taken from the database and entered onto a document bearing EEP letterhead. The standard business practice at EEP is not to print something directly from the Quest IV database, but to

take the information from Quest IV and enter it onto a different document.

The Oklahoma County District Attorney's Office contacted EEP in 2013 requesting information on Appellant. Espinoza was personally aware that EEP had received a subpoena for this purpose. She knew and personally verified that the Quest IV database was accessed, and a letter was prepared documenting Appellant's relevant information contained therein. The letter was prepared in June 2013, close in time to when the request was received. Espinoza verified the authenticity of the letter's contents. She testified that State's Exhibit 182, the letter written on EEP letterhead, was an accurate copy of information contained in Quest IV, which was routinely done when a request for information on a former employee was received. Though the letter was prepared by Cox, the branch manager, Espinoza reiterated that she accessed the database herself and verified the information contained in the letter was accurate. Espinoza verified the information both when the subpoena was received, and a few weeks prior to trial. Espinoza recited Appellant's first-listed phone number, ending in 8084. Appellant had worked two short-term jobs for EEP, which indicated that the phone number

he provided was accurate as EEP was able to contact him for the jobs. Notably, since Appellant submitted his application to EEP, the Quest IV database had not experienced a system crash requiring the information be rebuilt.

On appeal, Appellant does not challenge the fact the information contained in the Quest IV database was kept in the regular course of business by EEP, nor does he challenge Espinoza's qualification to testify to the information contained therein. Appellant instead claims the letter, which was prepared from data contained in the database, was not a record kept in the regular course of EEP's business, but rather was a document created at the request of law enforcement "simply for this case." Appellant thus argues the letter was inadmissible hearsay.

Given that businesses routinely utilize electronic data storage, i.e. databases, for record keeping, it is remarkable that this Court has never directly addressed whether evidence compiled from a computer database may be admissible as a business record if it meets the criteria of § 2803(6). We now find that it may. The business record here is the Quest IV database. *See United States v. Channon*, 881 F.3d 806, 811 (10th Cir. 2018) (recognizing a database was the

actual business record); *United States v. Keck*, 643 F.3d 789, 797 (10th Cir. 2011) ("In the context of electronically-stored data, the business record is the datum itself, not the format in which it is printed out for trial or other purposes."). Appellant's focus on the physical letter (State's Exhibit 182) is thus misplaced. *See Channon*, 881 F.3d at 811 (A "business record[ ] in one form may be presented in another for trial.").

In the present case, the business record, the Quest IV database, was simply presented in another form, a letter. The question thus becomes whether the database, i.e. "the source of information[,]" or the "method or circumstances" by which the database was made, i.e., its "preparation," indicate "trustworthiness." 12 O.S.2011, § 2803(6). If so, and the letter accurately reflects the information found in the underlying database, then admission of State's Exhibit 182 pursuant to the business records exception was proper. Nothing in the record here indicates the Quest IV database lacks trustworthiness. Moreover, the record clearly shows State's Exhibit 182, the letter, accurately reflects the information found in the Quest IV database. That the letter was prepared at the request of law enforcement is inconsequential. Again, the business record here is the Quest IV

database, not the letter. The database was not created specifically for use at trial. *See Bullcoming v. New Mexico*, 564 U.S. 647, 670 (2011) (observing that business records created specifically for the administration of an entity's affairs are generally admissible and not testimonial); *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 34, 241 P.3d 214, 228 (reasonable to expect medical examiner's autopsy report will be used in a criminal prosecution and thus would be testimonial for Sixth Amendment confrontation purposes). Rather, EEP utilized the Quest IV database for the administration of EEP's affairs, "not for the purpose of establishing or proving some fact at trial." *Id.*

For these reasons, the trial court did not abuse its discretion when it admitted State's Exhibit 182. Proposition IV is thus denied.

Proposition V. Appellant challenges the admission at trial of multiple "pre-mortem" photographs of Casey Barrientos. He complains that the admission of State's Exhibits 4, 5 and 225, all of which were in-life photographs of Barrientos, deprived him of a fundamentally fair trial in violation of due process and "injected passion, prejudice, and other arbitrary factors into the proceedings."

"The admissibility of photographic evidence, as with all evidence, is reviewed under an abuse of discretion standard." *Bench v. State*, 2018 OK CR 31, ¶ 59, 431 P.3d 929, 952, *cert. denied*, __U.S.__, 140 S. Ct. 56 (2019); *see also Moore v. State*, 2019 OK CR 12, ¶ 25, 443 P.3d 579, 586. Appellant only objected to the admission of State's Exhibit 4 and 225. Our review of his claim concerning State's Exhibits 5 is thus limited to plain error. *Vanderpool v. State*, 2018 OK CR 39, ¶ 37, 434 P.3d 318, 326; *Davis v. State*, 2011 OK CR 29, ¶ 87, 268 P.3d 86, 113.

To be entitled to relief for plain error, Appellant must show: (1) the existence of an actual error (i.e., deviation from a legal rule); (2) that the error is plain or obvious; and (3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding. *Musonda v. State*, 2019 OK CR 1, ¶ 6, 435 P.3d 694, 696. 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.*; *Baird v. State*, 2017 OK CR 16, ¶ 25, 400 P.3d 875, 883. Appellant fails to show any error, actual or otherwise, occurred.

In criminal homicide cases, 12 O.S.2011, § 2403 of the Oklahoma Evidence Code allows the admission of "an appropriate photograph of the victim while alive . . . to show the general appearance and condition of the victim while alive." An appropriate pre-mortem photograph is one in which the photograph's probative value outweighs its prejudicial effect. *Bosse v. State*, 2017 OK CR 10, ¶ 52, 400 P.3d 834, 854; *Hogan v. State*, 2006 OK CR 19, ¶ 64, 139 P.3d 907, 931.

The crux of Appellant's claim is the constitutionality of § 2403.[17] This Court has repeatedly rejected these claims. *Bench*, 2018 OK CR 31, ¶ 153, 431 P.3d at 969 (and cases cited therein); *see also Martinez v. State*, 2016 OK CR 3, ¶¶ 40-42, 371 P.3d 1100, 1112, *cert. denied*, __U.S.__, 137 S. Ct. 386 (2016). Appellant's argument raises nothing new and we decline to revisit these decisions.

Appellant further complains the admission of three in-life photographs of Barrientos went beyond what § 2403 permits. Appellant, however, makes no clear argument that the trial court abused its discretion in admitting State's Exhibits 4, 5 and 225, but

[17] Appellant asserts the admission of even a single in-life photograph of a victim should be prohibited as they are more prejudicial than probative.

rather generally asserts the admission of any in-life photograph of a homicide victim, when not relevant to some material issues in the trial, is prejudicial and deprives a defendant of his right to due process. We find no abuse of discretion in the admission of these exhibits. The trial court specifically admitted State's Exhibit 4 pursuant to § 2403 to show Barrientos's general appearance in 2009. Upon review, we find this photograph was appropriate and properly admitted under the statute. Moreover, State's Exhibits 5 and 225 were otherwise admissible to corroborate witness testimony.[18] *See Martinez*, 2016 OK CR 3, ¶ 46, 371 P.3d at 1112 (photographs may be probative in many respects, including to corroborate witness testimony); *Stouffer v. State*, 2006 OK CR 46, ¶ 111, 147 P.3d 245, 269 (same).

Appellant fails to show actual error, plain or otherwise. Proposition V is denied.

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[18] State's Exhibit 225 was admitted to corroborate Tyner's testimony relating to a necklace Barrientos had been wearing when he was killed, which Tyner last saw in Appellant's possession after the murders. This picture depicts Barrientos wearing the necklace and holding it up to display it for the photograph. State's Exhibit 5 is a photograph of Tyner, codefendant Phillips and Barrientos together at a pool hall. It was admitted without objection to corroborate Tyner's testimony regarding the relationship between Tyner, Phillips and Barrientos, which was both friendly and business.

Proposition VI. Appellant challenges the admission at trial of State's Exhibits 35, 37-38, 58-60, 106, 119-120, 122-123, 126, 136-139, 143-146, 148-150, 152-153, 155-156, 160-165, 169, and 172-175—photographs of the victims' bodies at the scene and during the autopsies. Appellant argues the photographs were overly gruesome, more prejudicial than probative, and prejudiced his right to a fair trial. Appellant objected to the admission of each of these photographs, thus preserving this claim for appellate review.

Again, we review the trial court's admission of photographic evidence for an abuse of discretion. *Tryon v. State*, 2018 OK CR 20, ¶ 56, 423 P.3d 617, 636. "Photographic exhibits are subject to the same relevancy and unfair prejudice analysis as any other piece of evidence." *Moore*, 2019 OK CR 12, ¶ 25, 443 P.3d at 586 (citing 12 O.S.2011, §§ 2401-2403). Notably, Appellant does not contest the relevancy of the challenged photographs, but merely complains "there were other equally probative and far less prejudicial means to demonstrate . . . the cause and manner of [each victim's] death[ ] in this case." We thus review the photographs to determine "whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or needless

presentation of cumulative evidence." *Id.*, 2019 OK CR 12, ¶ 25, 443 P.3d at 586 (quoting *Martinez*, 2016 OK CR 3, ¶ 46, 371 P.3d at 1113).

There is no doubt that several of the photographs were gruesome and disturbing. After all, "[g]ruesome crimes make for gruesome photographs." *Id.*; *Tryon*, 2018 OK CR 20, ¶ 56, 423 P.3d at 636. Yet the gruesome nature of the photographs alone "does not make them inadmissible 'so long as they are not so unnecessarily hideous or repulsive that jurors cannot view them impartially.'" *Moore*, 2019 OK CR 12, ¶ 28, 443 P.3d at 586 (quoting *Bosse*, 2017 OK CR 10, ¶ 48, 400 P.3d at 853). None of the photographs at issue here can be described as *unnecessarily* hideous or repulsive. The photographs "accurately depict[ ] the reality of the defendant's crime[s], what he did to the victim[s], and how he left the crime scene." *Webster v. State*, 2011 OK CR 14, ¶ 80, 252 P.3d 259, 281. "[T]he State was not required to downplay the violence involved or its repercussions." *Moore*, 2019 OK CR 12, ¶ 28, 443 P.3d at 586 (quoting *Jones v. State*, 2009 OK CR 1, ¶ 57, 201 P.3d 869, 885). Moreover, considered both individually and collectively, the photographs were not unfairly prejudicial. Nor were they

cumulative.[19] That there were so many photographs is a direct consequence of Appellant's participation in the murder of six victims and the sum of the injuries inflicted upon them. The probative value of the challenged photographs was not substantially outweighed by their potentially prejudicial effect.

We find no abuse of discretion from the trial court's admission of the challenged photographs. Appellant thus fails to show he was denied a fundamentally fair trial based on their admission. Proposition VI is denied.

Proposition VII. Appellant alleges in his seventh proposition of error that prosecutorial misconduct deprived him of a fundamentally fair trial. Appellant specifically complains the prosecutor asked leading questions, elicited sympathy, and argued facts not in evidence.

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[19] The record shows the trial court took special care to ensure the photographs admitted were not cumulative to each other. In admitting many of the photographs, the court was careful to note that each photograph depicted a different injury which had not been previously shown to the jury. *See Browning v. State*, 2006 OK CR 8, ¶ 32, 134 P.3d 816, 837 ("Because each photograph showed a different aspect of the victims' wounds, they were not cumulative in nature.").

We will not grant relief for alleged prosecutorial misconduct unless, viewed in the context of the whole trial, the misconduct rendered the trial fundamentally unfair, so that the jury's verdict is unreliable. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) ("The relevant question is whether the prosecutors' [misconduct] so infected the trial with unfairness as to make the resulting conviction a denial of due process.") (internal quotations omitted); *Tryon*, 2018 OK CR 20, ¶ 137, 423 P.3d at 654; *Sanders v. State*, 2015 OK CR 11, ¶ 21, 358 P.3d 280, 286. For claims of prosecutorial misconduct objected to at trial, we review the trial court's rulings concerning the alleged misconduct for abuse of discretion. *Bosse*, 2017 OK CR 10, ¶ 82, 400 P.3d at 863. We review those that drew no objection for plain error, and relief will only be granted if the prosecutor's misconduct so infected Appellant's trial as to render it fundamentally unfair. *Frazier v. State*, 2020 OK CR 7, ¶ 14, __P.3d__; *Revilla v. State*, 2019 OK CR 30, ¶ 12, 456 P.3d 609, 614.

Appellant preserved all but two of his leading-question claims with objections on that basis at trial. Appellant, however, failed to object to any of the instances in which he now alleges the prosecutor

improperly sought sympathy for witness Tyner, two of the victims,[20] and the victims' families. Moreover, Appellant has forfeited review of his complaint that the prosecutor argued facts not in evidence by failing to accurately cite to the applicable portion of the record containing the alleged error. Rule 3.5(A)(5) and (C)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2020) (requiring appellants to support their arguments with citations to "authorities, statutes and *parts of the record*") (emphasis added); *Musonda*, 2019 OK CR 1, ¶ 5, 435 P.3d at 695-96 (and cases cited therein). "We will not search the record to find the errors an appellant attempts to raise." *Armstrong v. State,* 1991 OK CR 34, ¶ 24, 811 P.2d 593, 599.

Upon review, we find Appellant fails to show prosecutorial misconduct from any of the challenged conduct. As to Appellant's complaint that the prosecutor improperly used leading questions to elicit evidence, the trial court sustained defense counsel's objections to two of the challenged questions and additionally warned the prosecutor not to lead his witness as to

[20] Appellant asserts the prosecutor improperly tried to elicit sympathy for victims Brooke Phillips and Millie Barrera.

another. The trial court's actions cured any error. *See Mack v. State*, 2008 OK CR 23, ¶ 9, 188 P.3d 1284, 1288 ("Error is cured where a defendant's objection to improper argument is sustained.). Moreover, no prejudice resulted from yet another contested question, as the prosecutor in response to defense counsel's objection, agreed his question was leading and re-phrased it before the witness was able to answer. *Carter v. State*, 1974 OK CR 68, ¶ 10, 521 P.2d 85, 88 (no prejudice where objections were made and sustained before question was answered). As to the remaining questions preserved for appellate review, we find the trial court properly overruled defense counsel's objections as the questions were not leading. *Powell v. State*, 2000 OK CR 5, ¶ 78, 995 P.2d 510, 529 (leading questions are those "which suggest the answer to the witness[,]" and they "should not be asked [ ] by the party placing [the witness] upon the stand."). Finally, Appellant fails to demonstrate plain error as to the two purported leading questions that drew no objection.[21] *Gordon v. State*, 2019 OK CR 24, ¶ 42, 451 P.3d 573, 585 (holding there was no plain error where the Appellant fails to show prejudice).

[21] Notably, Appellant's claim that the prosecutor improperly used leading questions is not accompanied by a specific claim of prejudice resulting from such behavior.

As to Appellant's unpreserved complaint that the prosecutor improperly attempted to garner sympathy for witness Tyner, two of the victims, and the victims' families, we find after close review that the prosecutor's challenged questions and argument at issue did not rise to the level of plain error. The jury was instructed not to allow sympathy, sentiment or prejudice enter into their deliberations. "Juries are presumed to follow their instructions." *Sanders*, 2015 OK CR 11, ¶ 15, 358 P.3d at 285 (citing *Williams v. State*, 2001 OK CR 9, ¶ 43, 22 P.3d 702, 716); *see also Garrison v. State*, 2004 OK CR 35, ¶ 119, 103 P.3d 590, 611 (finding any error in improper argument harmless where the jury was instructed not to let "sympathy, sentiment or prejudice enter into their deliberations.").

All things considered, Appellant was not denied a fair trial by prosecutorial misconduct. Contrary to Appellant's generalized assertion, this is not a case where "the prosecutor's flagrant misconduct so infected the defendant's trial that it was rendered fundamentally unfair." *Chadwell v. State*, 2019 OK CR 14, ¶ 10, 446 P.3d 1244, 1247. Proposition VII is denied.

Proposition VIII.[22] Appellant argues in his eighth proposition of error that his trial counsel was ineffective for failing to adequately preserve issues presented in Propositions I-VII.[23] We find this claim is waived from our review. Appellant's brief fails to raise his claims of ineffective assistance properly under our rules. Propositions of error must be set forth separately, and include specific claims and argument, supported by citation to authority and to the record. We thus find he has forfeited appellate review of the issue. Rule 3.5(A)(5) and (C)(6), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2020) (an appellant's contentions must be "supported by citations to the authorities, statutes and parts of the record") ("Failure to present relevant authority in compliance with these requirements will result in the issue being forfeited on

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[22] Due to a scrivener's error by appellate counsel, what should be Proposition VIII was mislabeled as Proposition IX in Appellant's brief in chief. This error further resulted in what should be Proposition IX being mislabeled as Proposition X.

[23] Notably, due to another scrivener's error, appellate counsel erroneously lists Propositions I-XIII. Appellant only presents nine propositions of error on appeal in total. Of those nine, only the first seven raised issues that were dependent on defense counsel timely objecting to preserve the claims for appeal. Moreover, of those seven, defense counsel raised timely and repeated objections and requests, preserving the issues for appellate review as to Propositions I, II, III, IV and VI. Defense counsel also preserved a portion of Appellant's Propositions V and VII claims.

appeal."); *Bench*, 2018 OK CR 31, ¶ 96, 431 P.3d at 958. "Merely mentioning a possible issue in an argument or citation to authority does not constitute the raising of a proposition of error on appeal." Rule 3.5(A)(5); *see also Stouffer*, 2006 OK CR 46, ¶ 126, 147 P.3d at 270 (citing Rule 3.5 and stating "[i]t is well established this Court will not search the record to support the appellant's unsupported assignments of error, nor review allegations of error, which are not supported by legal authority").

We alternatively find no merit to Appellant's ineffective assistance claim. To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See also Harrington v. Richter*, 562 U.S. 86, 104–05 (2011) (summarizing *Strickland* two-part test). We have denied relief for the various grounds alleged in Propositions I, II, III, IV, V, VI and VII. Based upon our resolution of those issues, Appellant fails to show *Strickland* prejudice, i.e., that there is a reasonable probability of a different outcome at trial but for defense counsel's deficient performance. *Strickland*, 466 U.S. at 694; *see also Kelley v. State*,

2019 OK CR 25, ¶ 4, 451 P.3d 566, 569 (Appellant bears the burden to "affirmatively prove prejudice resulting from his appellate attorney's actions" or inaction.); *Frederick v. State*, 2001 OK CR 34, ¶ 189, 37 P.3d 908, 955 ("It is well established that where there is no error, one cannot predicate a claim of ineffective assistance upon counsel's failure to object."). Appellant's Proposition VIII is thus denied.

Proposition IX. Appellant claims in his final proposition of error that relief is warranted based on cumulative error. This is simply not a case where numerous irregularities during Appellant's trial tended to prejudice his rights or otherwise deny him a fair trial. *Tryon*, 2018 OK CR 20, ¶ 144, 423 P.3d at 655. Thus, having found no substantive errors on appeal that affected Appellant's trial rights, we deny Appellant's cumulative error claim. *Tafolla v. State*, 2019 OK CR 15, ¶ 45, 446 P.3d 1248, 1263. Proposition IX 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. (2020), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE TIMOTHY R. HENDERSON, DISTRICT JUDGE

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LUMPKIN, J.: CONCUR IN RESULTS
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