IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOSEPH RANDAL ARNDT,	)	
	)	
Appellant,	)	FOR PUBLICATION
	)	
v.	)	Case No. F-2011-473
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

A. JOHNSON, JUDGE:

Appellant Joseph Randal Arndt was tried by jury in the District Court of Tulsa County, Case No. CF-2008-5422, and was convicted of Robbery with a Firearm, in violation of 21 O.S.2001, § 801.[1] The jury fixed punishment at twelve years imprisonment.[2] The Honorable Bill Musseman, who presided at trial, sentenced Arndt according to the jury's verdict. From this Judgment and Sentence Arndt appeals.

Arndt's claim in his second proposition—that he was denied his right to cross-examine co-defendant Johnson—requires discussion and relief.[3] Because we find reversal is required on that claim, we do not address his other claim.

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[1] Arndt was tried together with his co-defendant, Jeremy Lee Johnson, who appeals separately in Case No. F-2011-466.

[2] Under 21 O.S.Supp.2011, § 13.1, Arndt must serve 85% of the sentence imposed before he is eligible for parole.

[3] Arndt has requested oral argument in this matter. We find oral argument unnecessary and his request is denied.

BACKGROUND

Arndt, his co-defendant Jeremy Johnson and Michael Buckner arranged to meet Mahdi Ouni in the parking lot of a Tulsa apartment complex on October 26, 2008. Their purpose was to buy marijuana from him. The three arrived together in Buckner's Suburban. When Ouni arrived he got in the backseat of that vehicle with Arndt and handed Johnson, in the driver's seat, the marijuana. Johnson handed the marijuana to Buckner seated next to him. Buckner weighed the marijuana, found the amount less than agreed, and reacted by pulling out a gun and shooting Ouni twice in the face. Arndt pushed Ouni out of the Suburban and Johnson drove off.

Johnson had set up the drug deal with Ouni earlier that day. Buckner, who believed he had been cheated by Ouni in the past, had said in Arndt's presence that he would take the marijuana without paying if the amount was "short," that is, less than represented. According to the testimony of Taylor Bradbury, Arndt had participated in the conversation with Johnson and Buckner about taking the drugs and voiced no objection to that plan. Arndt knew Buckner always carried a gun, and voluntarily accompanied him to the meeting place knowing the plan was to take the drugs without payment if the quantity was short. The marijuana was divided up after the robbery and shared with Arndt.

Johnson and Arndt were arrested without incident, but Buckner was shot and killed by police when they tried to apprehend him. Ouni survived and testified against Johnson and Arndt at their joint trial.[4]

Confrontation Clause

Arndt contends the trial court denied him the right to cross-examine co-defendant Johnson in violation of the Confrontation Clause. He argues that he should have been allowed to cross-examine Johnson about his testimony that he saw Arndt in the back seat of the Suburban with a sawed-off shotgun and that Buckner told Arndt to push Ouni out of the truck and shoot him.[5] Arndt's contemporaneous objection to the testimony based on *Bruton*[6] was overruled because the court found that the instruction to consider each defendant's testimony only against him resolved the issue. Arndt maintains that Johnson's

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[4] Arndt and Johnson were originally charged with shooting with intent to kill in addition to armed robbery, but the shooting charge was dismissed.

[5] It is worth noting that the State played both Johnson's and Arndt's taped police interviews during its case-in-chief, but Arndt does not complain about the admission of these statements. He contends that Johnson's taking the stand rendered any confrontation objection to the statements in his interview moot. *Arndt's Brief* at 17-18 n. 24. Arndt raised a *Bruton* issue with respect to Johnson's interview prior to its presentation to the jury. He asked that Johnson's statement about his possessing a gun and a "suggestion that Mr. Arndt may have been getting ready to fire that gun" be excluded. The court found that instructing the jury not to consider the evidence against Arndt would cure any confrontation problem. The court noted the late request to redact the statement and Arndt said he would request the instruction in the alternative. The district court instructed the jury not to consider Johnson's taped interview against Arndt. Arndt stood on his earlier objection prior to the admission of the interview.

[6] *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). *Bruton* stands for the proposition that an accused's sixth amendment right of confrontation is violated when a non-testifying co-defendant's statement which inculpates the accused is admitted into evidence at their joint trial. *Id.* at 127–28, 88 S.Ct. at 1623.

testimony was prejudicial because it showed the jury that he anticipated violence and came prepared for the robbery.

Neither Arndt nor Johnson filed a motion to sever.[7] Both testified at trial on their own behalf, but did not cross-examine each other. Arndt acknowledges that there is no ruling by the district court judge on the record precluding the attorneys from cross-examining the other co-defendant. He maintains, however, that such a ruling must have been made. As support for this position, he cites 1) defense counsel's reference during the hearing on the motion in limine about Johnson's interview that unless Johnson testified they would have no ability to cross-examine him; and 2) a reference by defense counsel during the jury instruction conference that Johnson's testimony about the shotgun should not be used against Arndt "particularly since we were not allowed to cross-examine Mr. Johnson." The State counters that because the record reflects no such decision by the district court, this claim has no merit. There was no objection to the alleged unrecorded ruling on the record and Arndt made no demand to cross-examine Johnson during his testimony. Our review is therefore for plain error only. *See Mitchell v. State,* 2011 OK CR 26, ¶ 72, 270 P.3d 160, 179; 12 O.S.2011, § 2104; *see also Simpson v. State,* 1994 OK CR 40, ¶ 23, 876 P.2d 690, 698 (plain error is error that counsel failed to preserve through a trial objection, but upon appellate review, is clear from the record and affected the defendant's substantial rights).

[7] Arndt argues that despite a failure to seek severance, the confrontation problem could have been resolved by permitting his attorney to cross-examine Johnson.

Whether a defendant's right of cross-examination applies only to witnesses called by the State, or is equally applicable to witnesses called by a co-defendant, including the co-defendant himself, appears to be a question of first impression for this Court. Other courts that have considered the issue have held that a defendant may cross-examine *any* witness who offers testimony adverse to him. *See State v. Nieves,* 534 A.2d 1231, 1232 (Conn.App.1987)(emphasis added) and cases cited therein. As the court in *Nieves* explained:

> The cases and text writers analogize this right to a party's conditional right to impeach his own witness, thereby recognizing a right of cross-examination substantially narrower than that applicable to prosecution witnesses. A condition precedent to this special right of cross-examination is that the testimony of the witness actually must be opposed or contrary to the position of the defendant. *United States v. Mercks,* 304 F.2d 771, 772 (4th Cir.1962); *State v. Mason,* 215 S.C. 457, 56 S.E.2d 90 (1949); *People v. Braune,* 363 Ill. 551, 2 N.E.2d 839, 841 (1936).

Id.

The *Nieves* court found that cross-examination of a co-defendant "should be barred if the co-defendant's testimony is not adverse to the interests of the defendant." *Id.* at 1233.

Similarly, the Fourth Circuit stated in *United States v. Crockett*, 813 F.2d 1310, 1314 (4th Cir. 1987):

> Trial courts need not assess the adverse nature of testimony according to formalistic categories—by whether a co-conspirator was called by the government, or is testifying on his own behalf or on behalf of a codefendant. The critical matter is not the formal status of a witness but the actual content of his testimony.

The court in *Crockett* found that a defendant is not entitled to cross-examine a co-defendant if the co-defendant's testimony is not adverse.[8] *Crockett*, 813 F.2d at 1313; *see also United States v. Mercks*, 304 F.2d 771, 772 (4th Cir. 1962)(holding a defendant has a right to cross-examine a co-defendant only if the co-defendant's testimony was incriminatory).[9] This approach is consistent with recent rulings of the Supreme Court concerning the right of confrontation. *See Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) and progeny. In *Crawford*, the Supreme Court held that under the Confrontation Clause, testimonial hearsay statements may be admitted against the accused in a criminal trial only when the declarant is unavailable to testify and the defendant has been provided confrontation, *i.e.*, had a prior opportunity to cross-examine the declarant. *Id.*, 541 U.S. at 68, 124 S.Ct. at 1374. Whether a hearsay statement is "testimony" against the defendant, triggering the constitutional requirement of an opportunity for cross-examination depends on whether the statement is adverse and incriminating. *See Taylor v. State*, 2011 OK CR 8, ¶ 33, 248 P.3d 362, 373.

In *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), a seminal co-conspirator cross-examination case, the Supreme Court

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[8] The Court observed in *Crockett that* "a number of circuits have held that no violation of the confrontation clause occurs where a codefendant's statement could fairly be understood not to incriminate the accused." 813 F.2d at 1314 (citing *United States v. Porter*, 764 F.2d 1, 16 (1st Cir.1985); *United States v. Webster*, 734 F.2d 1048, 1054 n. 6 (5th Cir.); *United States v. Lane*, 752 F.2d 1210, 1216 (7th Cir.1985); *United States v. Jenkins*, 785 F.2d 1387, 1393 (9th Cir.1986)).

[9] Arndt concedes that he would have had no right to confront Johnson had Johnson's testimony merely corroborated his own. *Appellant's Brief* at 21.

underscored the purpose of the Confrontation Clause. There, in a joint trial, the government introduced the earlier confession of one defendant as evidence against his co-defendant Bruton. Because the defendant whose confession had been admitted did not take the stand, Bruton had no opportunity to cross-examine him. The Court held that admission of the confession violated Bruton's right to confrontation. Underlying the Court's ruling was the view that Bruton had a right to test and impeach prejudicial evidence and to put the government to its proof. It was the inability to probe "incriminating extrajudicial statements" that implicated Bruton's confrontation rights.[10] 391 U.S. at 126, 88 S.Ct. at 1622. These values, however, do not arise when a co-defendant's testimony is not incriminating.

We recognize that *Bruton* pertains to the statements of a nontestifying co-defendant. The fact that Johnson was a testifying co-defendant, however, does not render these principles inapplicable to the present case. In both situations, the accused has a Sixth Amendment right to confront a co-defendant in order to challenge an incriminatory statement. The trial court must, as a preliminary matter, determine whether such a right is present, and if it is whether the statement is in fact incriminatory. The only difference between the two situations is the course that should be taken once a co-defendant's statement

[10] The Court found that instructions to the jury that the challenged confession could be used only against the co-defendant who made it and must be disregarded with respect to Bruton could not cure the error in that case. *Bruton,* 391 U.S. at 135-36, 88 S.Ct. at 1627-28. Confrontation Clause error, including *Bruton* error, is subject to harmless error analysis. *See Cuesta-Rodriguez v. State,* 2010 OK CR 23, ¶ 40, 241 P.3d 214, 230, *cert. denied,* ___U.S.___, 132 S.Ct. 259, 181 L.Ed. 151 (2011) (confrontation clause errors are subject to harmless error analysis); *Bowers v. State,* 1975 OK CR 217, ¶ 12, 542 P.2d 950, 953 (Bruton error is subject to harmless error analysis).

is found to incriminate the accused. When a co-defendant testifies at trial, the trial court must allow cross-examination; where the co-defendant does not testify, the trial court should either exclude the statement or insist upon an appropriate redaction. It is clear, however, that the trigger for the right of confrontation is an incriminatory statement.

In this case before us, most of Johnson's testimony, like Arndt's, placed the blame on Buckner for the shooting. Both Johnson and Arndt professed ignorance of any plan to rob Ouni and both insisted that Ouni was paid for the drugs. Understanding this to be the state of the defense, the trial court was correct to find that Arndt had no right to cross-examine Johnson because his testimony was not incriminating. Once Johnson took the stand and made statements incriminating Arndt, however, the trial court should have given Arndt the opportunity to cross-examine him. Johnson's testimony that Arndt had a sawed-off shotgun during the robbery was clearly incriminating, especially since Arndt defended the charge by claiming he knew nothing of any plan to rob Ouni. The prejudice from this testimony was exacerbated by the prosecutor's use of Johnson's testimony about the gun to bolster the case against Arndt in closing argument. The jury was left with the impression from Johnson's testimony that Arndt would have shot Ouni had Johnson not sped away. We cannot find on this record that the court's instruction to the jury to disregard Johnson's incriminating statements against Arndt was an effective cure. We find that it was plain error for the trial court to deny Arndt the

opportunity to cross-examine Johnson once Johnson made incriminating statements and Arndt objected to them. Relief is required.

DECISION

The Judgment and Sentence of the district court is **REVERSED and REMANDED** for a new trial consistent with this opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2013), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE BILL MUSSEMAN, DISTRICT JUDGE

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OPINION BY: A. JOHNSON, J.
LEWIS, P.J.: Concur
SMITH, V.P.J.: Dissent
LUMPKIN, J.: Concur in Part and Dissent in Part
C. JOHNSON, J.: Concur

SMITH, V.P.J., DISSENTING:

I cannot join the majority's discussion or resolution of Proposition II. The majority reviews that claim for plain error and finds that denial of Arndt's right to cross-examination requires reversal. In order to reach this conclusion the majority finds that Arndt's right to cross-examination was denied. Nothing in the record supports this finding; there is no record that the trial court prohibited Arndt from cross-examining his co-defendant. The first step in plain error analysis is to determine whether error occurred. *Barnard v. State*, 2012 OK CR 15, ¶ 13, 290 P.3d 759, 764. I cannot find any error from this record.

LUMPKIN, JUDGE: CONCURING IN PART/DISSENTING IN PART

I concur in the Opinion's interpretation of the right to cross-examination under the Confrontation Clause but dissent to the reversal of Appellant's conviction as he waived appellate review of his Confrontation Clause claim.

The Confrontation Clause of the Unites State Constitution requires that a criminal defendant be afforded the opportunity to cross-examine any witness who testifies against him or her.

> "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel."

Pointer v. Texas, 380 U.S. 400, 405, 85 S.Ct. 1065, 1069, 13 L.Ed. 923 (1965), *quoting Turner v. Louisiana*, 379 U.S. 466, 472-473, 85 S.Ct. 546, 550, 13 L.Ed.2d 424 (1965). In *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965), the separately tried co-defendant took the stand, gave his name and address, but refused to answer any question concerning the alleged crime. *Id.*, 380 U.S. at 416, 85 S.Ct. at 1075. Under the guise of refreshing the co-defendant's memory, the prosecutor read the co-defendant's alleged confession which tended to incriminate the defendant. *Id.* The United States Supreme Court determined that since the co-defendant refused to answer any questions concerning the alleged crime, the defendant's right of cross-examination secured by the Confrontation Clause was violated. *Id.*, 380 U.S.

at 416-19, 85 S.Ct. at 1075-76. In *Bruton v. U.S.*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), the United States Supreme Court determined that introduction of the incriminating extrajudicial statements of a non-testifying co-defendant violated the defendant's right of cross-examination secured by the Confrontation Clause. *Id.*, 391 U.S. at 126. 88 S.Ct. at 1622. It is clear from the Supreme Court's decisions that the Confrontation Clause "applies to 'witnesses' against the accused-in other words, those who 'bear testimony.'" *Crawford v. Washington*, 541 U.S. 36, 51, 24 S.Ct. 1354, 1364, 158 L.Ed.2d 177 (2004) (citation omitted). Therefore, when a co-defendant testifies in a joint trial and bears testimony against the defendant, the Confrontation Clause requires that the defendant be afforded the opportunity to cross-examine the co-defendant concerning the adverse testimony.

However, in the present case, Appellant waived appellate review of his Confrontation Clause claim. Although Appellant knew the substance of his co-defendant's statement to the police, he failed to request that his trial be severed from the co-defendant's trial. Instead, both Appellant and his co-defendant proceeded to trial with the same defense, *i.e*, claiming that they did not know their deceased compatriot was going to rob and shoot the victim. *Collins v. State*, 2009 OK CR 32, ¶ 12, 223 P.3d 1014, 1017 (failure to object to joinder or file motion for severance waives appellate review for all but plain error). There is no record of Appellant requesting an opportunity to cross-examine the co-defendant either before, during or after the co-defendant's testimony. Appellant did not make an offer of proof concerning what cross-examination

would reveal. *See Mitchell v. State*, 2011 OK CR 26, ¶ 72, 270 P.3d 160, 179 (failure to make offer of proof waives appellate review for all but plain error). Appellant failed to challenge the co-defendant's testimony as violating the Confrontation Clause. *Hammon v. State*, 2000 OK CR 7, ¶ 32, 999 P.2d 1082, 1091 (failure to challenge witnesses' testimony as violating Confrontation Clause waives appellate review for all but plain error). He failed to request a mistrial on this basis. As noted in the Opinion, there is no ruling by the trial court precluding Appellant from cross-examining the co-defendant.

Normally, an appellant's failure to raise a challenge in the trial court would limit our review to looking only for "plain error," *i.e.*, 1) the existence of an actual error; 2) that is plain or obvious; and 3) that affected the defendant's substantial rights. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923, *citing Simpson v. State*, 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d 690, 694, 695, 698; 20 O.S.2001, § 3001.1. Yet in some cases, even plain-error review is not possible, because the record does not include enough information for the reviewing court to make a decision. In *Douma v. State*, 1988 OK CR 19, 749 P.2d 1163, this Court determined that it had "no way to determine the issue raised" where the defendant "failed to make an offer of proof" as to what additional questioning of the State's witness would have shown. *Id.*, 1988 OK CR 19, ¶ 12, 749 P.2d at 1167.

Based upon defense counsel's obscure comments during the hearing on the motion *in limine* and the jury instruction conference, the Opinion assumes a ruling by the district court judge that was not on the record. However, this

Court has repeatedly held that it is the defendant's responsibility to present this Court with sufficient record to address any claim brought on appeal. *Dollar v. State*, 1984 OK CR 1, ¶ 7, 674 P.2d 48, 50; *Claunch v. State*, 1972 OK CR 255, ¶ 9, 501 P.2d 850, 852; *Stickney v. State*, 1975 OK CR 212, ¶ 7, 541 P.2d 1359, 1361. This Court will not assume error from a silent record. *Welch v. State*, 1998 OK CR 54, ¶ 41, 968 P.2d 1231, 1245.

In the present case, the record is simply insufficient for a fair determination. *See Pierce v. State*, 1972 OK CR 82, ¶ 6, 495 P.2d 407, 409 (defendant's complaint of evidence obtained from illegal search was not reviewable on appeal, as he failed to raise the issue in the trial court, and could not present a sufficient record to determine the question). It simply cannot be determined whether Appellant was denied the opportunity to cross-examine the co-defendant. As such, Appellant waived appellate review of the present claim.

Even under an erroneous application of plain error review, Appellant is not entitled to relief. The second step of plain error review is to determine whether the error is plain on the record. *Malone v. State*, 2013 OK CR 1, ¶ 42, 293 P.3d 198, 212, *citing Glossip v. State*, 2007 OK CR 12, ¶ 81, 157 P.3d 143, 157. To show that an error was plain or obvious, an appellant must demonstrate "that the error at trial [was] quite clear and obvious despite the absence of any objection." *Simpson*, 1994 OK CR 40, ¶ 26, 876 P.2d at 699. Again, there is no record of Appellant either requesting the opportunity to cross-examine the co-defendant or challenging the co-defendant's testimony as violating the Confrontation Clause. Appellant has not shown how the trial

court was to know that he desired to cross-examine the co-defendant. There were strategic reasons why Appellant would not want to cross-examine the co-defendant. Both Appellant and the co-defendant testified that they did not know their deceased compatriot was going to rob and shoot the victim. As such, it was not quite clear and obvious that Appellant was denied the opportunity to cross-examine the co-defendant absent an objection or request on the record. Thus, Appellant cannot show plain error on the record before the Court.

As the record is simply insufficient to permit review of Appellant's claim, the claim is waived. Therefore, I would affirm Appellant's Judgment and Sentence.