IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TRAVIS LEE DANLEY,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F-2010-203
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
FEB - 9 2012
MICHAEL S. RICHIE
CLERK

OPINION

A. JOHNSON, PRESIDING JUDGE:

Appellant Travis Lee Danley was tried by jury in the District Court of Tulsa County, Case No. CF-2008-4515, and found guilty of First Degree Murder (Counts I and II), in violation of 21 O.S.Supp.2006, § 701.7, Second Degree Arson (Count III), in violation of 21 O.S.2001, § 1402, Larceny from a House (Count IV), in violation of 21 O.S.2001, § 1723, and Larceny of an Automobile (Count V) in violation of 21 O.S.Supp.2002, § 1720.[1] The jury set punishment at Life Imprisonment Without the Possibility of Parole and a $10,000.00 fine on Counts I and II, twenty-five years imprisonment and a $20,000.00 fine on Count III, eight years imprisonment and a $1,000.00 fine on Count IV, and twenty years imprisonment on Count V. The Honorable Clancy Smith, who presided at trial, sentenced Danley accordingly and ordered

[1] The Information and Judgment and Sentence mistakenly cite 21 O.S.2001, § 1707 as the statutory reference for Count IV-Larceny from a House, when Danley was, in fact, charged with and convicted of a violation of 21 O.S.2001, § 1723. This matter will be discussed in greater detail in Note 4, *infra.*

his sentences to run consecutively. Danley appeals, raising the following issues:

(1) whether it was error for the district court to deny his motion for mistrial after the jury heard testimony that he was on probation and prohibited from traveling to Oklahoma;

(2) whether the evidence was sufficient to establish the offense of larceny from a house in Count IV;

(3) whether prosecutorial misconduct denied him due process and the right to a fair trial;

(4) whether he was denied effective assistance of counsel; and

(5) whether cumulative error denied him his rights to due process and a fair trial.

FACTUAL BACKGROUND

On August 31, 2008, Danley fatally shot Michael Reeder and David Lujan at Reeder's home in Sperry, Oklahoma. Lujan and Danley had been friends for some time and Reeder was a family friend of Danley's family. The three spent the weekend drinking and socializing together. The motive for the shooting was explained by Jay Chew, Danley's uncle. Chew testified that Danley telephoned him around 11:00 p.m. on August 30, 2008, and said, "If Mike calls me a little bitch again, there's going to be problems," (Tr. 563) and a neighbor of Reeder's testified there had been a disagreement earlier that day about Danley's use of Reeder's four wheeler.

After the shooting, Danley attempted to conceal his crime by pouring gasoline on and around the bodies of his victims setting them ablaze. Danley then took some of Reeder's clothes, several of his guns, and Reeder's Chevrolet

Z-71 pickup truck and drove to the home of his uncle, Rueford Kennedy, and his wife, Summer, in Joplin, Missouri. Summer Kennedy testified that Danley had come in the house and said, "I'm f****d. Everyone is going to know that I was there, everybody is going to know I did this." (Tr. 536) Danley told the Kennedys he had fought with the victims and Reeder had called him names. (Tr. 538) Danley admitted killing Reeder, describing how he put a shotgun under Reeder's chin and pulled the trigger as Reeder slept. (Tr. 538-39) Danley also told them he had shot David Lujan, mentioning he used gold brand shotgun shells in both killings. (Tr. 539) A gold brand shotgun shell was recovered at the crime scene. (Tr. 222) Danley also told the Kennedys he had set the house on fire and taken Reeder's guns and pickup truck. According to Summer, Danley was upset and crying. She believed he was drunk because of his slurred speech and the odor of alcohol about him. (Tr. 542) Danley left the Kennedys after telling them he was going to kill himself. (Tr. 545)

Danley's stepfather, Frank Chew, searched for Danley after Oklahoma authorities notified him that they were looking for Danley in connection with the murders of Reeder and Lujan. Chew also learned (presumably from the Kennedys) that Danley had threatened to kill himself. He found Danley in a van next to Reeder's pickup truck in the alley behind Danley's grandmother's house. Chew said that Danley appeared "lost" and was initially unresponsive when told about the telephone call from the Oklahoma authorities. When Chew pressed him about the situation, Danley said, "Let's get this taken care of" and asked Chew to drive him to Miami, Oklahoma. (Tr. 505) Chew testified

that, on the way to Miami, he heard Danley say that he had shot Lujan, but said it seemed more like a question than an admission. Chew heard Danley say later that it was like watching something happening on a video game. (Tr. 507) Chew admitted that he wrote in his statement to police that Danley said he had "snapped" after arguing with the victims and shot them. (Tr. 509).

Patricia Crouch testified that Danley's biological father, George Richard Danley, had come to her home in late August of 2008 and asked to store some items in her shed. A few days later, police officers found Reeder's guns in that shed and some of his clothes in a spare room inside Crouch's home.

Danley's defense at trial was voluntary intoxication.[2] He testified about the alcohol and drugs he consumed throughout the day and evening before the murders. He recalled many events from that day, but said he had no recollection of the shootings because he blacked out that night from intoxication. He recalled nothing about shooting the victims, setting fire to the house or taking Reeder's guns. His first memory after his blackout was waking up in Joplin when his stepdad roused him. Although not convinced that he had shot the victims during the gap in his memory, he was prepared to accept that the evidence tended to prove that he was responsible.

[2] The district court also submitted instructions on first degree manslaughter and second degree murder. (O.R. 193-95)

DISCUSSION

1. Motion for Mistrial

Danley complains that the district court erred in denying his motion for mistrial. He argues that Jay Chew's testimony about the advice he gave Danley over the phone – namely that he should not respond to Reeder's name calling with actions that would get him into trouble because he was on probation – constituted an evidentiary harpoon and impermissible other crimes evidence.[3] Danley objected to the testimony and requested a mistrial. The district court denied Danley's request for mistrial and admonished the jury to disregard Chew's testimony. Danley contends that because the district court's admonition was insufficient to cure the prejudice he suffered from the admission of this testimony, his motion for mistrial should have been granted.

We review the district court's ruling on a motion for mistrial for an abuse of discretion. *See Jackson v. State,* 2006 OK CR 45, ¶ 11, 146 P.3d 1149, 1156. "A mistrial is an appropriate remedy when an event at trial results in a miscarriage of justice or constitutes an irreparable and substantial violation of an accused's constitutional or statutory right." *Knighton v. State,* 1996 OK CR 2, ¶ 65, 912 P.2d 878, 894. This Court need not labor over the various elements of what constitutes a true "evidentiary harpoon" in the context of this case or whether the admission of this testimony violated 12 O.S.2001, § 2404.

[3] The prosecutor asked Chew about the telephone call he received from Danley concerning the hostility between Danley and the victims to establish motive and to elicit Chew's belief that Danley was not intoxicated. Chew quoted Danley as saying, "If Mike calls me a little bitch again, there's going to be problems." (Tr. 563) Chew testified that he told Danley, "Well, Travis, you know, you're in the State of Oklahoma, you can't get in trouble, you're on probation. You're not even supposed to be there." (Tr. 564)

See, e.g., Bruner v. State, 1980 OK CR 52, ¶ 16, 612 P.2d 1375, 1378-79 (listing six features of what constitutes an "evidentiary harpoon"). Danley cannot show that the district court's decision denying his motion for mistrial was clearly outside the law or facts in this case and resulted in prejudice. *See Taylor v. State,* 2011 OK CR 8, ¶ 43, 248 P.3d 362, 376 (An abuse of discretion is a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented.); *Grissom v. State,* 2011 OK CR 3, ¶ 25, 253 P.3d 969, 979, *cert. denied,* ___U.S.___, ___S.Ct.___, ___L.Ed.2d___, 2011 WL 4915314 (2011) (holding error alone does not reverse convictions in Oklahoma, but error plus injury).

Chew's single remark was the only reference to probation in the record. The prosecutor told the court during the bench conference concerning Chew's testimony that the remark caught him by "total surprise" and that he had examined Danley's record and found no evidence that he was on probation. (Tr. 564) The court admonished Danley's jury as follows:

> Ladies and gentlemen, the State of Oklahoma is not aware of any probation that the defendant was on. There's no allegation that he has any prior charges or any prior convictions of any kind. The defendant doesn't know of any probation or what the witness is talking about; if there was some traffic ticket or something that may have caused him to say that.
>
> I'll ask you to disregard it. It has no bearing on what we're doing here today.

(Tr. 565)

Danley claims that the admonition was insufficient to purge the taint of such prejudicial evidence. We disagree. We have found in most cases that an

admonishment cures error resulting from the admission of improper testimony at trial. "Specifically, this Court has repeatedly held that an admonishment cures the error from improper testimony or an improper comment at trial, unless the improper testimony or comment was such that it appears to have 'determined' the result of the defendant's trial." *Harmon v. State,* 2011 OK CR 6, ¶ 39, 248 P.3d 918, 935, *cert. denied,* ___U.S.___, 132 S.Ct. 338, ___L.Ed.2d___ (2011) (*quoting Parker v. State,* 2009 OK CR 23, ¶ 26, 216 P.3d 841, 849); *see also Al–Mosawi v. State,* 1996 OK CR 59, ¶ 59, 929 P.2d 270, 284.

We do not hesitate to conclude that the district court's admonishment cured any error from the admission of Chew's testimony in this case. Danley's jury convicted him based on strong evidence that he intentionally shot the two victims rather than the solitary and isolated reference to probation that it was specifically told to disregard because the parties believed the testimony was untrue. We find on this record that the district court did not abuse its discretion in denying Danley's motion for mistrial. This claim is rejected.

2. Sufficiency of the Evidence

Danley argues, and the State agrees, that his conviction for larceny from a house is not supported by sufficient evidence. The Information filed in this case alleged that Danley committed the crime of Larceny from a House by:

> Unlawfully, feloniously, and willfully enter[ing] into a certain house located at 2904 E. 106th St N in the City of Sperry, Tulsa County, Oklahoma, occupied by and in possession of Michael Shawn Reeder and did then and there take, steal and carry away multiple clothing items and guns with the unlawful, larcenous and felonious intent then and there on the part of said defendant to

deprive the owner thereof permanently and to convert the same to his own use and benefit.[4]

(O.R. 23)

Danley's jury was instructed that in order to convict him of Larceny from a House, it had to find the following elements beyond a reasonable doubt: 1) unlawful; 2) entry; 3) taking; 4) carrying away; 5) personal property; 6) of another; 7) from a house; 8) by stealth; and 9) with the intent to deprive permanently. (O.R. 186)

The evidence at trial was uncontroverted that Danley was present at Reeder's house as a guest. There was no evidence of unlawful entry. His conviction for Larceny from a House based on unlawful entry cannot stand. *See Logsdon v. State*, 2010 OK CR 7, ¶ 5, 231 P.3d 1156, 1161; *Spuehler v. State*,

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[4] The Information cited 21 O.S.2001, § 1707 which provides:

> When it appears upon a trial for grand larceny that the larceny alleged was committed in any dwelling house or vessel, the offender shall be guilty of a felony punishable by imprisonment in the State Penitentiary not exceeding eight (8) years.

The uniform instruction lists the elements of grand larceny in a dwelling house under § 1707 as: 1) taking; 2) carrying away; 3) personal property; 4) of another; 5) (valued at more than $50/500)/(from the person); 6) committed in a dwelling/vessel; 7) by fraud/stealth; and 8) with the intent to deprive permanently. OUJI-CR(2d) 5-95.

The charging language and the elements instruction given in this case pertain to violations of 21 O.S.2001, § 1723, which provides:

> Any person entering and stealing any money or other thing of value from any house, railroad car, tent, booth or temporary building shall be guilty of larceny from the house. Larceny from the house is a felony.

The uniform instruction lists the elements of a larceny committed under § 1723 as: 1) unlawful; 2) entry; 3) taking; 4) carrying away; 5) personal property; 6) of another; 7) from a house/(railroad car)/tent/booth/(temporary building); 8) by fraud/stealth; and 9) with the intent to deprive permanently. OUJI-CR(2d) 5-97.

1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204 (appellate court will uphold a verdict of guilt if, after reviewing the evidence in the light most favorable to the State, any rational trier of fact could find the elements of the charged crime beyond a reasonable doubt.)

Danley admits the evidence proved he took items from Reeder's home. He maintains, however, that his conviction may be modified only to a conviction for petit larceny because the State presented no evidence concerning the value of the property taken. The State argues that Danley's conviction should be modified to a conviction for grand larceny in a dwelling house under 21 O.S.2001, § 1707. The State maintains that the jury could infer the value of the guns taken was at least $500.00 "based upon common sense" and that a felony conviction is supported by the evidence. Without evidence of the value of the property taken, we agree with Danley that his conviction must be modified to a conviction for petit larceny and his sentence modified to six months in the county jail.

3. Prosecutorial Misconduct

Danley contends that prosecutorial misconduct denied him a fair trial. "This Court will grant relief only where the prosecutor's misconduct is so flagrant and so infected the defendant's trial that it was rendered fundamentally unfair." *Jones v. State,* 2011 OK CR 13, ¶ 3, 253 P.3d 997, 998. Parties have great latitude to make arguments and inferences from the evidence. *Mack v. State,* 2008 OK CR 23, ¶ 9, 188 P.3d 1284, 1289.

First, Danley argues that it was improper and unprofessional for the prosecutor to ask him on cross-examination, "[w]hat ought to happen . . . to a guy who shoots two people in bed?" (Tr. 840) Defense counsel objected and the district court judge answered back that the question invaded the province of the jury. The prosecutor moved on to another line of inquiry that was not met with objection. (Tr. 840) The judge, in effect, sustained Danley's objection and her response informed the jury that the question was improper because it invaded the province of the jury. Sustaining defense counsel's objection cured any error. *See Mack,* 2008 OK CR 23, ¶ 9, 188 P.3d at 1289 (holding error is cured where a defendant's objection to improper argument is sustained).

Danley's second and third complaints allege that the prosecutor intentionally confused the jury about the defense of voluntary intoxication by equating it to an insanity defense and that the prosecutor made remarks that improperly shifted the burden of proof. Only one of these challenged remarks drew an objection which the district court overruled. Review of the unchallenged remarks is for plain error only. *Jones,* 2011 OK CR 13, ¶ 3, 253 P.3d at 998.

The record shows that the prosecutor did not mislead the jury about Danley's intoxication defense or the State's burden of proof. The prosecutor emphasized the evidence that supported the State's theory of the case and questioned the strength and credibility of the evidence supporting Danley's intoxication defense. Furthermore, the jury was properly instructed on both the defense of voluntary intoxication and the burden of proof and we presume

the jury followed its instructions. *See Harmon,* 2011 OK CR 6, ¶ 70, 248 P.3d at 941. On this record, Danley has not shown that the prosecutor's tactics or argument were fundamentally unfair. This claim is denied.

4. Ineffective Assistance of Counsel

Danley argues that he was denied effective assistance of counsel. Specifically, he claims counsel was ineffective for failing to request an instruction informing the jury to give separate consideration to each offense and for failing to object to victim impact statements at formal sentencing.

This Court reviews claims of ineffective assistance of counsel *de novo,* to see whether counsel's constitutionally deficient performance, if any, prejudiced the defense so as to deprive the defendant of a fair trial with reliable results. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Davis v. State,* 2005 OK CR 21, ¶ 7, 123 P.3d 243, 246. Under this test, Danley must not only overcome the presumption of competence but show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Head v. State,* 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* We need not determine whether counsel's performance was deficient if the claim can be disposed of on the ground of lack of prejudice. *See Ball v. State,* 2007 OK CR 42, ¶ 59, 173 P.3d 81, 96.

Danley's complaint that trial counsel was ineffective for failing to request an instruction that his jury consider each charged crime separately is

unpersuasive. While the Uniform Jury Instructions-Criminal may now contain an instruction on this issue, no such instruction existed, nor was one required, at the time of Danley's trial.[5] The addition of an instruction on separate consideration of offenses was prompted by a claim raised in *Smith v. State,* 2007 OK CR 16, ¶ 38, 157 P.3d 1155, 1168-69 and a decision in an unpublished case (*Johnson v. State,* Case No. F-2008-1171 (unpublished) (Jan.6, 2010)). This Court rejected Smith's claim that his jury failed to give separate consideration to each murder count charged because there was nothing in the record to indicate that the jury was unable to "compartmentalize" the evidence on each offense and the trial court specifically instructed the jury to give separate consideration to each offense. *Smith,* 2007 OK CR 16, ¶ 38, 157 P.3d at 1168-69. The *Smith* court found the claim lacked merit based in large part on the trial court's instruction, and the Court said nothing about requiring the submission of a "separate consideration" instruction in future cases. *Id.* In *Johnson,* the Court considered an improper joinder of offenses claim and held that a "separate consideration" instruction, like the one in *Smith,* should be given where joinder of offenses occurs. *Slip op.* at 3. The *Johnson* Court referred the matter to the Oklahoma Uniform Jury

[5] After Danley's trial, the Oklahoma Uniform Jury Instruction Committee approved OUJI-CR(2d) 9-6A and noted that it should be given if two or more charges against the same defendant are tried together. OUJI-CR(2d) 9-6A provides:

> You must give separate consideration for each charge in the case. The defendant is entitled to have **his/her** case decided on the basis of the evidence and the law which is applicable to each charge. The fact that you return a verdict of guilty or not guilty for one charge should not, in any way, affect your verdict for any other charge.

Instruction Committee (Criminal) and the Committee promulgated OUJI-CR(2d) 9-6A. *Slip op.* at 3-4 n.6.

Nothing in the record before us indicates that Danley's jury was unable to compartmentalize the evidence with regard to each count in this case. Nor does Danley point to anything in the record to support his allegation that the failure of his counsel to request this instruction prejudiced him. The jury was repeatedly instructed that each element of each crime charged had to be proven beyond a reasonable doubt. On this record, we find Danley has failed to meet his burden to prove ineffective assistance of counsel.

Danley also argues that trial counsel was ineffective for failing to object to victim impact statements at formal sentencing. We disagree. The statements from the victims' daughters presented at formal sentencing were properly admitted under 22 O.S.Supp.2008, § 984.1 (now renumbered as 21 O.S.2011, § 142A-8). Counsel cannot be faulted for not objecting to admissible evidence. This claim is denied.

5. Cumulative Error

Danley claims that even if no individual error in his case merits reversal, the cumulative effect of the errors committed requires that his case be reversed and remanded for a new trial. The cumulative error doctrine applies when several errors occurred at the trial court level, but none alone warrants reversal. *DeRosa v. State,* 2004 OK CR 19, ¶ 100, 89 P.3d 1124, 1157. Although each error standing alone may be of insufficient gravity to warrant reversal, the combined effect of an accumulation of errors may require a new

trial. *Id.* Cumulative error does not deprive the defendant of a fair trial when the errors considered together do not affect the outcome of the proceeding. Moreover, a cumulative error claim has no merit when this Court fails to sustain any of the errors raised on appeal. *See Jones v. State,* 2009 OK CR 1, ¶ 104, 201 P.3d 869, 894. Danley's conviction and sentence for Larceny from a House (Count IV) must be modified because of insufficient evidence. Other errors committed at trial, if any, even when considered together, did not deny Danley a fair trial. This claim is denied.

DECISION

The Judgment and Sentence of the District Court on Counts I, II, III and V is **AFFIRMED.** Danley's conviction for Larceny from a House in Count IV is **MODIFIED** to Petit Larceny and his sentence of eight years imprisonment and $1,000.00 fine is **MODIFIED** to six months in the county jail. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2012), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE CLANCY SMITH, DISTRICT JUDGE

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C. JOHNSON, J.: Concur
SMITH, J.: Recuse