IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

HENRY WARREN KWE KWE,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2019-417**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

ROWLAND, JUDGE:

Appellant Henry Warren Kwe Kwe appeals his Judgment and Sentence from the District Court of Tulsa County, Case No. CF-2016-4098, for Conjoint Robbery (Count 1), in violation of 21 O.S.2011, § 800; Shooting with Intent to Kill (Count 2), in violation of 21 O.S.2011, § 652(A); Possession of a Sawed-Off Shotgun (Count 4), in violation of 21 O.S.2011, § 1289.18; and Leaving Scene of a Collision Involving Injury (Count 5), in violation of 47 O.S.2011, § 10-102.[1] The Honorable Sharon K. Holmes, District Judge, presided over Kwe Kwe's jury trial and sentenced him in accordance with the jury's verdict to nine years imprisonment and a $2,500.00 fine on Count 1,

[1] Count 3 charged only Kwe Kwe's co-defendant, Quanta Jamil Cole.

twenty-eight years imprisonment and a $1,800.00 fine on Count 2, two years imprisonment and a $600.00 fine on Count 4, and one year imprisonment and a $600.00 fine on Count 5. Judge Holmes ordered the sentences to be served concurrently,[2] as well as awarded credit for all time served. Kwe Kwe raises ten claims on appeal:

(1) whether his convictions for both conjoint robbery and shooting with intent to kill violate 21 O.S.2011, § 11;

(2) whether his conviction for shooting with intent to kill must be reversed because of insufficient evidence;

(3) whether his conviction for possession of a sawed-off shotgun must be reversed because of insufficient evidence;

(4) whether the State's failure to prove the shotgun exceeded 18 inches before modification requires reversal;

(5) whether 21 O.S.2011, § 1289.18(A) is unconstitutionally overbroad on its face;

(6) whether the district court failed to consider the required statutory factors in assessing the victim's compensation assessments;

(7) whether he was denied a fair trial because of improper victim impact statements;

(8) whether prosecutorial misconduct deprived him of a fair trial;

[2] Under 21 O.S.Supp.2015, § 13.1, Kwe Kwe must serve 85% of his sentence of imprisonment on Counts 1 and 2 before he is eligible for parole consideration.

(9) whether he received the effective assistance of trial counsel; and

(10) whether the accumulation of errors deprived him of a fair trial.

We affirm the Judgment and Sentence of the district court on all counts. The Victim Compensation Assessment, however, for Count 4 must be vacated for reasons discussed in this opinion.

1.

Kwe Kwe claims his convictions for both conjoint robbery and shooting with intent to kill constitute multiple punishment for a single act in violation of 21 O.S.2011, § 11(A). He maintains that shooting the victim was the force to effectuate the robbery and therefore his action cannot be punished twice, requiring dismissal of one of the two convictions. Kwe Kwe failed to object on this basis below, waiving review of this claim for all but plain error. *See Tafolla v. State,* 2019 OK CR 15, ¶ 37, 446 P.3d 1248, 1261. Kwe Kwe has the burden in plain error review to demonstrate that an error, plain or obvious under current law, adversely affected his substantial rights. *Hammick v. State,* 2019 OK CR 21, ¶ 8, 449 P.3d 1272, 1275. This Court may correct plain error provided the error seriously affected the fairness, integrity or public reputation of the judicial

proceedings or represented a miscarriage of justice. *Id.*; 20 O.S.2011, § 3001.1.

We analyze Section 11 claims by focusing on the relationship between the crimes, considering (1) the particular facts of each case; (2) whether the facts set out separate and distinct crimes; and (3) the intent of the Legislature.[3] *Sanders v. State,* 2015 OK CR 11, ¶ 8, 358 P.3d 280, 284; *Davis v. State,* 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126. If the crimes "truly arise" out of one act, Section 11 prohibits punishing the act twice or under more than one statute. *Davis,* 1999 OK CR 48, ¶ 13, 993 P.2d at 126.

The State charged Kwe Kwe by second amended Information with conjoint robbery accomplished "by means of force and/or fear" by "threatening [the victim]." The elements instruction for conjoint robbery, however, omitted any reference to fear and listed only a

[3] Section 11 provides in relevant part that:

> [A]n act or omission which is made punishable in different ways by different provisions of this title may be punished under any such provisions, . . . but in no case can a criminal act or omission be punished under more than one section of law; and an acquittal or conviction and sentence under one section of law....

taking "by force."[4] The two prosecutors trying the case addressed the shooting during each of their portions of the closing argument. During the first closing argument, the prosecutor argued that the robbery occurred after the victim was shot, i.e., the robbers shot the victim first and then took her purse containing her phone and keys. She also said that the robbery and the shooting were "happening together." In addressing force in relation to the robbery specifically, she stated, "By force. Ladies and gentlemen, [the victim] was shot in the back with a shotgun. I don't know how much more forceful it gets." In the final closing argument, however, the other prosecutor argued the victim was shot to preclude her from identifying her robbers, stating "they intended to kill her so that she would not ever make them be accountable." The district court defined force in the jury instructions as follows:

> Force, of any degree, used to obtain or to retain possession of property or to prevent or to overcome resistance to its taking. Force used only as a means of escape is not sufficient to establish robbery.

(O.R. 338; OUJI-CR2d 4-146 (Supp.2012)).

---

[4] The elements included: 1) wrongful; 2) taking; 3) carrying away; 4) personal property; 5) of another; 6) from the immediate presence of another; 7) by force; 8) committed by two or more persons.

The evidence showed that Kwe Kwe initiated the robbery with his two accomplices by asking the victim repeatedly for money as well as suggesting she accompany them to an ATM, while one of his accomplices displayed a weapon. Realizing the gravity of her situation, the victim tried to draw attention to herself and to remove herself from the situation. She made noise and turned away from her robbers, most likely to flee, and one of the robbers shot her in the back with a shotgun. The plain view of the accomplice's weapon was the force of some degree that overcame her resistance and caused her to abandon any interest in her property and seek to escape. Hence, the shooting was not the force that parted her from her property but rather was to stifle her efforts to escape or obtain help and to eliminate a witness so the robbers would not be caught or identified. The fact the robbers absconded with her purse after the shooting was incidental under these circumstances and did not make the shooting part and parcel of the robbery. Though the crimes were committed during a continuing course of overlapping conduct, we find that the robbery and shooting were separate and distinct. Conviction and punishment for these crimes therefore does not offend Section 11. *See Tafolla,* 2019 OK CR 15, ¶ 38, 446 P.3d at

1261; *Davis*, 1999 OK CR 48, ¶¶ 12-13, 993 P.2d at 126-27. This claim is denied.

2.

Kwe Kwe argues his shooting with intent to kill conviction must be reversed and dismissed for insufficient evidence. He contends the prosecution failed to prove beyond a reasonable doubt either that he was the shooter or that he aided and abetted the shooter with an intent to kill. He maintains that without evidence placing a gun in his hands or evidence showing he somehow, by act or counsel, aided or encouraged the shooter, he may not be held responsible as a principal. He posits that the jury wrongly convicted him despite the lack of evidence of aiding and abetting because the prosecutor made statements that confused aiding and abetting liability with conspiracy liability.[5] This claim is without merit.

Evidence is sufficient to support a conviction if, viewing the evidence and all reasonable inferences from it in the light most favorable to the State, any rational trier of fact could find the defendant guilty beyond a reasonable doubt. *Mason v. State*, 2018

[5] The State neither alleged Kwe Kwe was part of a conspiracy nor was the jury instructed on co-conspirator liability.

OK CR 37, ¶ 13, 433 P.3d 1264, 1269; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04. This Court does not reweigh conflicting evidence or second-guess the fact-finding decisions of the jury; we accept all reasonable inferences and credibility choices that tend to support the verdict. *Mason*, at ¶ 13, 433 P.3d at 1269. We further recognize that "the law makes no distinction between direct and circumstantial evidence and either, or any combination of the two, may be sufficient to support a conviction." *Id.* (quoting *Mitchell v. State*, 2018 OK CR 24, ¶ 11, 424 P.3d 677, 682. We examine pieces of evidence together in context rather than in isolation, and we will affirm a conviction so long as, from the inferences reasonably drawn from the record as a whole, the jury might fairly have concluded the defendant was guilty beyond a reasonable doubt. *Mason*, at ¶ 13, 433 P.3d at 1269.

Any person who directly commits the act constituting the offense or aids and abets in a crime's commission is a principal. 21 O.S.2011, § 172. In order to convict the accused for aiding and abetting in a crime, the State must show that he or she procured the crime to be done, or aided, assisted, abetted, advised or encouraged its commission. *Williams v. State*, 2008 OK CR 19, ¶ 87, 188 P.3d

208, 226. Although mere presence or acquiescence, without participation, does not constitute a crime, "only slight participation is needed to change a person's status from a mere spectator into an aider and abettor." *Id.* The district court submitted the uniform instructions on aiding and abetting that correctly set forth the law.

The State had to prove that Kwe Kwe knowingly and with criminal intent aided and abetted in the commission of shooting with intent to kill. Criminal intent is nothing more than a design to commit a crime or to commit acts the probable consequences of which are criminal. Kwe Kwe was the leader in the robbery and he explicitly directed the victim to be quiet before asking for money, pointing to her purse when she said she had none, and then suggesting she accompany them to an ATM. The victim noticed the robber to Kwe Kwe's left was holding a weapon and she tried to draw attention to herself for help. When she turned away, one of the men shot her in the back and one grabbed her purse in their getaway. The trial evidence, viewed in the light most favorable to the prosecution, sufficiently established Kwe Kwe could be convicted as a principal. He instigated the robbery and perpetrated it with an armed partner. He later admitted to possessing a shotgun and police found two sizes

of shotgun shells in his car. Jurors could fairly infer that Kwe Kwe was well aware his confederate was armed. He shushed the victim from the beginning, evidencing an intent to avoid detection for his criminal misconduct. Despite inconclusive evidence of the actual shooter's identity, the circumstantial evidence supported a finding that Kwe Kwe, at the very least, possessed a common desire with his armed confederate to avoid apprehension at all costs and a rational jury could find, beyond a reasonable doubt, that he aided and encouraged his armed accomplice in the crime of shooting with intent to kill. *See Lockett v. State,* 2002 OK CR 30 ¶ 14, 53 P.3d 418, 423 (holding rational jury could find defendant aided and abetted sex crimes committed by accomplices during a home invasion the defendant orchestrated). Moreover, Kwe Kwe fled from police to hide a sawed-off loaded 20-gauge shotgun on a rooftop before turning himself in to the police less than twelve hours after the robbery/shooting. Although there was no evidence the victim was shot with Kwe Kwe's shotgun, he refused to account for his whereabouts at the time of the robbery and made statements evidencing some knowledge of the event. His post-offense conduct lent further support of his involvement in the crime. Because the

evidence was sufficient to show he aided and abetted in the crime of shooting with intent to kill, his conviction may stand. This claim is denied.

3.

Kwe Kwe argues his conviction for possession of a sawed-off shotgun must be reversed and dismissed for insufficient evidence. He contends the prosecution failed to prove beyond a reasonable doubt that the barrel of the firearm he possessed was *less than* 18 inches. This claim is governed by the same rules concerning sufficiency of the evidence claims cited in the previous proposition. This claim is without merit.

Title 21 O.S.2011, § 1289.18(A) states:

> "Sawed-off shotgun" shall mean any firearm capable of discharging a series of projectiles of any material which may reasonably be expected to be able to cause lethal injury, with a barrel or barrels less than eighteen (18) inches in length, and using either gunpowder, gas or any means of rocket propulsion.[6]

The officer who collected Kwe Kwe's shotgun identified State's Exhibit 18 as the shotgun he collected. He explained that the gun was a 20-gauge single shot sawed-off shotgun and that the original

[6] This version of Section 1289.18(A) was in effect when Kwe Kwe was charged.

barrel had been shortened and modified from its original configuration. The lead detective testified that 18 inches is the measurement that determines whether or not a weapon is sawed-off. He stated that "[t]he length measured from inside the barrel must be greater than 18 inches to prove a weapon is not 'sawed-off'." The detective explained that he inspected the firearm and it did not exceed 18 inches. Kwe Kwe claims the detective's testimony was insufficient to show the firearm was *less than* 18 inches and did not exclude the possibility the shotgun was exactly 18 inches and therefore not sawed-off.

Jurors saw the shotgun in person and heard testimony concerning its modifications and barrel length. The district court instructed the jury that a sawed-off shotgun, among other things, was a gun "designed with a barrel more than eighteen inches in length which has been reduced to less than eighteen inches in length." Kwe Kwe never challenged his possession of a sawed-off shotgun and his attorney referred to the shotgun as sawed-off at trial as well as conceded guilt on that charge during closing argument. Viewing the direct and circumstantial evidence in the light most favorable to the prosecution, a rational jury could find, beyond a

reasonable doubt, the necessary elements. Accordingly, we find that Kwe Kwe's conviction for possession of a sawed-off shotgun may also stand.

4.

Kwe Kwe argues his conviction for possession of a sawed-off shotgun must be reversed and dismissed because the prosecution failed to prove beyond a reasonable doubt that the barrel of the shotgun was longer than 18 inches prior to its modification. This claim is governed by the same rules concerning sufficiency of the evidence claims cited previously. This claim is likewise without merit.

Under the statute in effect when Kwe Kwe was charged with possessing the shotgun, the prosecution was not required to prove the original length of the barrel prior to modification. 21 O.S.2011, § 1289.18(A). Effective November 1, 2019, well after the commission of the instant crime, the legislature amended the definition of sawed-off shotgun to exclude "any weapon so designed with a barrel less than eighteen (18) inches in length, provided it has an overall length of twenty-six (26) inches or more." 21 O.S.Supp.2019, § 1289.18(A). There is nothing in the amended Section 1289.18, express or otherwise, to suggest the legislature intended the amendment to be

retroactive. *See State v. Hurt,* 2014 OK CR 17, ¶ 11, 340 P.3d 7, 9 (stating Court construes statutory amendments as having prospective operation unless the intent for retroactive application is necessarily implied from the language used). That Kwe Kwe's jury was instructed that a sawed-off shotgun was one that was "designed with a barrel more than eighteen inches in length which has been reduced to less than eighteen inches in length" was of no consequence. *See Norton v. State,* 2002 OK CR 10, ¶ 18, 43 P.3d 404, 409 (holding inclusion of definition of a term that was not an element of the charged offense was "superfluous" and a harmless, technical error because the instructions as a whole accurately stated the applicable law). Kwe Kwe's jury had to find under the instruction that the shotgun was less than 18 inches in length and the prosecution presented sufficient evidence of that fact. Any error in the definition of a sawed-off shotgun in this case was harmless. For these reasons, we reject Kwe Kwe's sufficiency of the evidence challenge. This claim is denied.

5.

Kwe Kwe argues 21 O.S.2011, § 1289.18 is unconstitutionally overbroad because it applied to any gun under 18 inches thereby

incorporating protected functioning handguns.[7] His failure to raise this claim below waives the issue for appellate review for all but plain error. *See Engles v. State*, 2015 OK CR 17, ¶ 2, 366 P.3d 311, 313 (reviewing vagueness challenge not raised at trial for plain error only).

We have long held that statutes are presumed constitutional and the burden to prove otherwise rests on the party attacking the constitutionality of the statute. *Arganbright v. State*, 2014 OK CR 5, ¶ 15, 328 P.3d 1212, 1216. It is also well settled that "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *State v. Howerton*, 2002 OK CR 17, ¶ 18, 46 P.3d 154, 158 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973)). *See also Wilkins v. State*, 1999 OK CR 27, ¶ 6, 985 P.2d 184, 185 (holding same); *State v. Johnson*, 1992 OK CR 72, ¶ 3, 877 P.2d 1136, 1139

---

[7] The version of Section 1289.18(A) at issue read:

> "Sawed-off shotgun" shall mean any firearm capable of discharging a series of projectiles of any material which may reasonably be expected to be able to cause lethal injury, with a barrel or barrels less than eighteen (18) inches in length, and using either gunpowder, gas or any means of rocket propulsion.

(holding same). We examine Kwe Kwe's conduct without regard to hypothetical applications of the law. *See Johnson,* 1992 OK CR 72, ¶ 5, 877 P.2d at 1139.

Kwe Kwe was not convicted of possessing a protected handgun. The firearm he possessed was a 20-gauge sawed-off shotgun, whose barrel, originally somewhat longer, had been modified and reduced to less than eighteen inches. Kwe Kwe did not dispute at trial either his possession of the gun or its status as sawed-off. Because Section 1289.18(A) was constitutionally applied to Kwe Kwe's possession of the 20-gauge shotgun whose barrel had been modified to less than 18 inches, we will not entertain his constitutional overbreadth challenge that the statute may conceivably be applied unconstitutionally to others in situations not before us.[8] This claim is denied.

6.

Kwe Kwe argues the district court's $600.00 Victim Compensation Assessment ($150.00 per count) must be vacated because the district court ordered the assessment without

[8] Section 1289.18 has since been amended to cure the facial deficiency claimed by Kwe Kwe. 21 O.S.Supp.2019, § 1289.18.

considering the statutory factors outlined in 21 O.S.2011, § 142.18(A).[9] He further maintains that only two of his four convictions qualify for the assessment, namely his convictions for conjoint robbery and shooting with intent to kill (Counts 1 and 2). He requests the Court either remand the matter for a proper hearing or modify the assessment to the minimum of $50.00 on each of Counts 1 and 2. Kwe Kwe did not object to the assessment below and appellate review is for plain error only.

Title 21 O.S.2011, § 142.18(A) requires the district court to charge a victim compensation assessment (VCA) between $50.00 and $10,000.00 against any person convicted of a felony involving criminally injurious conduct. When calculating the VCA, the district

---

[9]Section 142.18(A) reads:

> In addition to the imposition of any costs, penalties or fines imposed pursuant to law, any person convicted of, pleading guilty to or agreeing to a deferred judgment procedure under the provisions set forth in the Oklahoma Statutes for a felony involving criminally injurious conduct shall be ordered to pay a victim compensation assessment of at least Fifty Dollars ($50.00), but not to exceed Ten Thousand Dollars ($10,000.00), for each crime for which the person was convicted or for which the person agreed to a deferred judgment procedure. In imposing this penalty, *the court shall consider factors such as the severity of the crime, the prior criminal record, the expenses of the victim of the crime, and the ability of the defendant to pay, as well as the economic impact of the victim compensation assessment on the dependents of the defendant.*

(Emphasis added).

court must consider "the severity of the crime, the [defendant's] prior criminal record, the expenses of the victim of the crime, and the ability of the defendant to pay, as well as the economic impact of the victim compensation assessment on the dependents of the defendant." *Id.*

In *Walters v. State*, 1993 OK CR 4, 848 P.2d 20, this Court held that a district court abuses its discretion when it fails to consider the statutory factors. The *Walters* court held that the Legislature, through these factors, specifically channeled the discretion of the district court in calculating and assessing the VCA. *Id.* at ¶ 15, 848 P.2d at 25. The Court refused to presume that the statutory factors were considered by the district court absent evidence in the record that addressed each factor and we remanded that case for a hearing in which the district court could consider all the factors. *Id.* at ¶ 17, 848 P.2d at 25.

In Kwe Kwe's case, the severity of the robbery and shooting were addressed when the victim testified during trial. The victim's expenses were touched upon when she testified about her hospital stay, surgeries, and her ongoing health issues. The circumstances surrounding his vehicle collision were addressed through various

witnesses. Although Kwe Kwe's pauper's affidavit is not in the record, he was originally appointed a public defender and later a conflict defender. The record also reveals that the district court properly ordered, received and considered a presentence investigation report (PSI). Under 22 O.S.Supp.2017, § 982, the Department of Corrections shall include in a PSI:

> a voluntary statement from each victim of the offense concerning the nature of the offense and the impact of the offense on the victim and the immediate family of the victim, the amount of the loss suffered or incurred by the victim as a result of the criminal conduct of the offender, and the age, marital status, living arrangements, financial obligations, income, family history and education, prior juvenile and criminal records, associations with other persons convicted of a felony offense, social history, indications of a predisposition to violence or substance abuse, remorse or guilt about the offense or the harm to the victim, job skills and employment history of the offender.

A properly conducted PSI addresses the statutory factors for the imposition of a victim compensation assessment. Although this Court is not permitted on appeal to refer to or consider information contained in a presentence investigation report, 22 O.S.Supp.2017, § 982(E), nothing prevents us from considering the district court's act of ordering and relying upon such a report that, by statute, shall

contain fixed information.[10] Hence, a district court necessarily considers all of the factors set forth in assessing a VCA under 21 O.S.2011, § 142.18(A), when the court receives and considers a presentence investigation report under Section 982.

Because the record shows that the district court properly ordered, received and considered a presentence investigation report, we have no trouble finding that the district court properly considered each of the factors set forth in Section 142.18(A) in imposing the VCA on Counts 1, 2 and 5.[11] We cannot, however, find that a VCA was warranted on Count 4 – Possession of a Sawed-Off Shotgun. Section 142.18(A) requires the district court to charge a VCA against any person convicted of a felony which "results in bodily injury, threat of bodily injury or death to a victim." 21 O.S.2011, § 142.3. Without proof the shotgun Kwe Kwe possessed was the one used in the robbery/shooting, we cannot find that his crime of possession

---

[10] Defense counsel noted a scrivener's error and contested two statements dealing with the factual summary of the robbery. Defense counsel did not voice any objection about the completeness of the PSI or its reporting of information relevant to a VCA.

[11] Best practice, of course, is for the district court to make a full record at the sentencing hearing of the statutory factors concerning a VCA.

involved criminally injurious conduct. Accordingly, we affirm the district court's VCA on Counts 1, 2 and 5, and vacate the VCA on Count 4.

7.

Kwe Kwe claims he was denied a fair trial from the admission of improper victim impact evidence. He claims it was error for the prosecutor to elicit testimony from the victim about her injuries, including their post-crime effects, and for the prosecutor to discuss the victim's lasting injuries during closing argument. According to Kwe Kwe, the only reason for the evidence and argument was to "invoke the prejudice and passions of the jury." Because he did not object to either the evidence or argument below, appellate review is for plain error only.

Although victim impact evidence is inadmissible in a non-capital trial except at the formal sentencing hearing, the evidence Kwe Kwe challenges was relevant and did not constitute inadmissible victim impact evidence. We restated the rules of relevancy in *Martinez v. State*, 2016 OK CR 3, ¶ 37, 371 P.3d 1100, 1111:

> Relevant evidence is evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable

> than it would be without the evidence. It need not conclusively or directly establish guilt if, when taken with other evidence in the case, it tends to establish a material fact in issue. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or needless presentation of cumulative evidence.

(citations omitted). A district court should give evidence its maximum reasonable probative force and its minimum prejudicial value when measuring its relevancy versus its prejudicial effect. *Vanderpool v. State,* 2018 OK CR 39, ¶ 34, 434 P.3d 318, 326.

The State alleged the crime of shooting with intent to kill in Count 2, or in the alternative, assault and battery with a deadly weapon. The challenged evidence demonstrated the severity of the victim's injuries and tended to prove the required intent to kill necessary for conviction. In addition, the alternative charge required the prosecution to prove an assault and battery with an "instrument designed or constructed to cause death or great bodily injury." The victim's testimony about her injuries and treatment tended to show the lethality of the weapon that caused her injuries. That Kwe Kwe did not dispute the manner and extent of her injuries did not relieve the prosecution of its burden to prove each and every element of the charged offenses and any alternative beyond a reasonable doubt.

Based on this record, Kwe Kwe cannot show any error from the admission of this testimony. *See Hogan v. State,* 2006 OK CR 19, ¶ 39, 139 P.3d 907, 923 (stating "[t]he first step in plain error analysis is to determine whether error occurred"). Nor can he show the prosecutor misused this evidence in closing argument by asking the jury to consider the impact of the shooting on the victim. *See Lamar v. State,* 2018 OK CR 8, ¶ 54, 419 P.3d 283, 297 (noting that both parties enjoy a "wide latitude in closing argument to argue the evidence and reasonable inferences from it"); *Croan v. State,* 1984 OK CR 69, ¶ 10, 682 P.2d 236, 238 (finding prosecutor's argument that the rape of the victim had affected her life and would continue to affect her life forever was within the wide latitude of permissible argument). Because Kwe Kwe has not established the commission of obvious error, he is not entitled to relief and this claim must be denied.

8.

Kwe Kwe argues he was denied a fair trial because of prosecutorial misconduct. Kwe Kwe's objections to the challenged remarks below preserved this claim for appellate review. This Court will not grant relief on a claim of prosecutorial misconduct unless the

misconduct effectively deprived the defendant of a fair trial or a fair and reliable sentencing proceeding. *Harmon v. State*, 2011 OK CR 6, ¶ 80, 248 P.3d 918, 943. We evaluate claims of prosecutorial error "within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel." *Lee v. State*, 2018 OK CR 14, ¶ 6, 422 P.3d 782, 785. As previously mentioned, both parties enjoy a "wide latitude in closing argument to argue the evidence and reasonable inferences from it." *Lamar*, 2018 OK CR 8, ¶ 54, 419 P.3d at 297.

Kwe Kwe claims the prosecutor erred by arguing about the role of the defense expert's testimony, asking the jury to disregard evidence, and defining reasonable doubt. Defense counsel objected to the challenged remarks and the district court sustained almost all of them. We have held that "[e]rror is cured where a defendant's objection to improper argument is sustained." *Mack v. State*, 2008 OK CR 23, ¶ 9, 188 P.3d 1284, 1289. A review of the record shows that not only did the district court halt the prosecutor's complained-of statements, the court properly instructed the jury from the beginning that argument by the attorneys is not evidence. The court

also submitted accurate instructions on evaluating witness's credibility, eyewitness identifications, and the burden of proof. The district court's rulings that ended the prosecutor's questionable arguments coupled with its accurate instructions remedied any error. The record further shows that the district court correctly overruled two of defense counsel's objections because the remarks, read in context, fell within the wide latitude the parties have to discuss their cases. This claim is denied.

9.

Kwe Kwe claims he is entitled to relief because of ineffective assistance of trial counsel. He faults defense counsel for failing to raise a Section 11 multiple punishment challenge regarding Counts 1 and 2, failing to challenge the constitutionality of 21 O.S.2011, § 1289.18(A), and for failing to object to either the victim compensation assessments or the alleged victim impact evidence. *See* Propositions 1, 5, 6, and 7. This claim requires no relief.

This Court reviews claims of ineffective assistance of counsel to determine: (1) whether counsel's performance was constitutionally deficient; and (2) whether counsel's performance prejudiced the defense so as to deprive the defendant of a fair trial with reliable

results. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. This Court need not determine whether counsel's performance was deficient if there is no showing of harm. *See Malone*, 2013 OK CR 1, ¶ 16, 293 P.3d at 207.

Kwe Kwe's claim must fail for lack of prejudice. The merits of the underlying claims have been considered and rejected in the previous propositions of error. The only exception is our conclusion that the district court erroneously imposed a $150.00 VCA on Count 4 which we vacate. Kwe Kwe cannot otherwise show there is a reasonable probability the outcome of his case would have been different had defense counsel raised a Section 11 claim, challenged the constitutionality of 21 O.S.2011, § 1289.18(A), objected to the alleged victim impact evidence, or challenged the VCA on Counts 1, 2, and 5. This claim is therefore denied.

10.

Kwe Kwe claims that even if no individual error in his case merits relief, the cumulative effect of the errors committed requires reversal or modification of his conviction. "The cumulative error doctrine applies when several errors occurred at the trial court level,

but none alone warrants reversal." *Tafolla,* 2019 OK CR 15, ¶ 45, 446 P.3d at 1263. Although individual errors may be of insufficient gravity to warrant reversal, the combined effect of an accumulation of errors may require a new trial. *Id.* The commission of several trial errors does not deprive the defendant of a fair trial when the errors considered together do not affect the outcome of the proceeding. *Id.* Other than the erroneous assessment of the $150.00 VCA on Count 4, there are no errors, considered individually or cumulatively, that merit further relief in this case. This claim is denied.

DECISION

The Judgment and Sentence of the district court is **AFFIRMED**. The Victim Compensation Assessment of $150.00 on Count 4 is **VACATED**. 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 delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, THE HONORABLE SHARON K. HOLMES, DISTRICT JUDGE

APPEARANCES AT TRIAL

BRIAN BOEHEIM
CIERA FREEMAN
ATTORNEYS AT LAW
616 S. BOSTON AVE.; SUITE 307
TULSA, OK 74119
COUNSEL FOR DEFENDANT

RAYMOND PENNY
GINNY JOHNSON
ASST. DISTRICT ATTORNEYS
500 S. DENVER, SUITE 900
TULSA, OK 74013
COUNSEL FOR STATE

APPEARANCES ON APPEAL

DANNY JOSEPH
APPELLATE DEFENSE
COUNSEL
P.O. BOX 926
NORMAN, OK 73070
COUNSEL FOR APPELLANT

MIKE HUNTER
ATTY. GENERAL OF OKLAHOMA
KEELEY L. MILLER
ASST. ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
COUNSEL FOR APPELLEE

OPINION BY: ROWLAND, J.
LEWIS, P.J.: Concur
KUEHN, V.P.J.: Concur
LUMPKIN, J.: Concur
HUDSON, J.: Concur