



imprisonment on Count VI, twenty years imprisonment on Count VII, and ten years imprisonment on Count VIII. The trial court ordered that the sentences in Counts I, III, and IV be served consecutively. The court further ordered that the sentences in Counts II, V, VI, VII, and VIII be served concurrently with each other and Count III. The sentences in Counts I and III are subject to the 85% Rule under 21 O.S.2011, § 13.1.

Allen appeals from these convictions and sentences and raises ten proposition of error in support of his appeal:

- I. THE CHARGES ASSOCIATED WITH THE JANUARY 19, 2013, ALLEGATION OF ROBBERY WITH A FIREARM IN COUNTS ONE AND TWO SHOULD HAVE BEEN SEVERED FROM THE OTHER COUNTS AT TRIAL. APPELLANT WAS PUT ON TRIAL FOR MULTIPLE UNRELATED OFFENSES, AND WAS THEREFORE DENIED THE RIGHT TO A FAIR TRIAL IN VIOLATION OF 22 O.S. 2011, § 439 AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.
- II. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION IN COUNT FOUR, SECOND DEGREE ROBBERY. THE VICTIM OF THE PURSE SNATCHING WAS UNABLE TO IDENTIFY APPELLANT AS THE PERSON WHO TOOK HER PURSE.
- III. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION IN COUNT FIVE, LARCENY FROM PERSON. THE VICTIM OF THE PURSE SNATCHING WAS UNABLE TO IDENTIFY APPELLANT AS THE PERSON WHO TOOK HER PURSE.
- IV. APPELLANT'S CONVICTIONS IN COUNT FIVE FOR LARCENY FROM PERSON AND COUNT EIGHT FOR POSSESSION OF A STOLEN CREDIT CARD VIOLATE STATUTORY AND CONSTITUTIONAL PROHIBITIONS AGAINST DOUBLE PUNISHMENT.
- V. APPELLANT'S CONVICTIONS IN COUNT SIX FOR POSSESSION OF A FIREARM AFTER FORMER CONVICTION OF A FELONY AND COUNT SEVEN FOR POSSESSION OF A FIREARM AFTER FORMER CONVICTION OF A FELONY VIOLATE CONSTITUTIONAL AND STATUTORY PROVISIONS AGAINST DOUBLE PUNISHMENT.
- VI. APPELLANT'S CONVICTIONS IN COUNT TWO FOR POSSESSION OF A FIREARM AFTER FORMER CONVICTION OF A FELONY AND COUNT SIX FOR

POSSESSION OF A FIREARM AFTER FORMER CONVICTION OF A FELONY VIOLATE STATUTORY AND CONSTITUTIONAL PROHIBITIONS AGAINST DOUBLE PUNISHMENT.

- VII. THE REFERENCE BY CORPORAL STOUT TO OTHER CRIMES CONSTITUTED AN EVIDENTIARY HARPOON WHICH SERVED TO UNDERMINE APPELLANT'S RIGHT TO A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.
- VIII. INSTANCES OF PROSECUTORIAL MISCONDUCT DEPRIVED APPELLANT OF HIS RIGHT TO A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.
- IX. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
- X. THE ACCUMULATION OF ERROR IN THIS CASE DEPRIVED APPELLANT OF A FAIR TRIAL AND DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

After thorough consideration of the entire record before us, including the original record, transcripts, and briefs, we find Appellant's conviction and sentence for Possession of a Firearm After Former Conviction of a Felony in Count VI should be reversed and remanded with instructions to dismiss. Appellant's remaining convictions and sentences are affirmed.

In his first proposition of error, Allen contends that the crimes charged in Counts I and II should have been severed from the remaining counts for trial. To preserve a claim of improper joinder, the defendant must object to the manner in which the charge is filed prior to arraignment or file a motion to sever the counts for trial. *Collins v. State*, 2009 OK CR 32 ¶ 12, 223 P.3d 1014, 1017. Allen failed to properly preserve this claim waiving all but plain error. *Id.* To establish plain error, Appellant must prove: (1) the existence of an actual error; (2) that the error is plain or obvious; and (3) that the error affected his substantial rights, meaning that the

error affected the outcome of the proceedings. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. We find no error. The crimes arose out of a series of criminal acts such that they were properly joined and Allen was not prejudiced thereby. *Collins*, 2009 OK CR 32, ¶ 14, 223 P.3d at 1017; 22 O.S.2011, § 439. Proposition I is denied.

In Propositions II and III, Allen argues that the evidence was insufficient to support his convictions in Count IV<sup>1</sup> and V. Reviewing the evidence in a light most favorable to the prosecution, we find that a rational trier of fact could have found, beyond a reasonable doubt, that Allen committed each of the crimes as charged. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559. Propositions II and III are denied.

In Propositions IV through VI, Allen contends that he has been subjected to multiple punishments in violation of Section 11 of Title 21 and the Double Jeopardy Clause. Allen did not raise these arguments in the trial court and, therefore, has waived all but plain error. *Head v. State*, 2006 OK CR 44, ¶ 9, 146 P.3d 1141, 1144. Regarding his convictions for Larceny from a Person in Count V and Possession of a Credit/Debit Card Belonging to Another in Count VIII, we find that the Legislature intended to allow multiple punishments to be imposed. 21 O.S.2011, §§ 1550.34, 1550.36. As the Legislature intended multiple punishments,

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<sup>1</sup> Within his fourth proposition of error, Allen suggests that the crime charged in Count IV should have been severed for trial. Our Rules require that an Appellant set forth his claims in separate propositions and support each with legal argument and citation to relevant authority; failure to do so constitutes a waiver of the alleged error. Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014). In his first proposition, Allen challenged only the joinder of Counts I and II with the remaining counts for trial and made no attempt to show that Count IV should have been severed as well. Thus, to the extent Allen attempts to assert an improper joinder claim as it relates to Count IV, his claim has been waived.

there is neither a violation of Section 11 of Title 21 nor the Double Jeopardy Clause. *Missouri v. Hunter*, 459 U.S. 359, 368, 103 S.Ct. 673, 679, 74 L.Ed.2d 535 (1983); *Lewis v. State*, 2006 OK CR 48, ¶¶ 3-9, 150 P.3d 1060, 1061-62. There was no actual error and, therefore, no plain error in Allen's convictions and sentences on these counts. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. Proposition IV is denied.

In Proposition V, Allen contends that he has been subjected to multiple punishments in Counts VI and VII because the same handgun formed the basis for both charges. The State correctly concedes this issue. We have recognized that possession of a firearm is a continuing course of conduct that, absent evidence showing that the possession was interrupted, cannot be charged as multiple crimes occurring at discrete moments in time. *Hancock v. State*, 2007 OK CR 9, ¶ 117, 155 P.3d 796, 823. In light of our decision in *Hancock*, Allen's convictions in Counts VI and VII run afoul of Section 11, as there was no evidence to suggest that Allen's possession of the handgun was interrupted. Allen's conviction for Possession of a Firearm After Former Conviction of a Felony in Count VI is reversed and remanded to the District Court with instructions to dismiss. Our resolution of this issue renders Allen's claim in Proposition VI moot.

In Proposition VII, Allen contends he was denied a fair trial by an evidentiary harpoon. We review only for plain error, as Allen failed to object to the challenged statement at trial. *Mathis v. State*, 2012 OK CR 1, ¶ 28, 271 P.3d 67, 77. However, there was no error, and certainly no plain error, because the detective's statement

was not an evidentiary harpoon. *Anderson v. State*, 1999 OK CR 44, ¶¶ 36-37, 992 P.2d 409, 421. Proposition VII is denied.

Allen next argues that he was denied a fair trial by prosecutorial misconduct during closing arguments of the first and third stages of trial. Claims such as these must be evaluated within the context of the trial as a whole; consideration must be given to the propriety of the prosecutor's actions, corresponding arguments of defense counsel, and the strength of the evidence. *Taylor v. State*, 2011 OK CR 8, ¶ 55, 248 P.3d 362, 379. No relief is warranted unless the cumulative effect of the improper comments deprived the appellant of a fair trial. *Andrew v. State*, 2007 OK CR 23, ¶ 128, 164 P.3d 176, 202. Only one of the challenged statements of the prosecutor was met with timely objection; those which were not are reviewed only for plain error. *Id.*

After thorough consideration of the challenged arguments of the prosecutor, Allen is not entitled to relief. Save one, the comments complained of were not error or were cured by the trial court's action in sustaining defense counsel's objection and admonishing the jury. *McElmurry v. State*, 2002 OK CR 40, ¶ 146, 60 P.3d 4, 33. While the hypothetical juror conversation did improperly appeal for an emotional response by the jury, *Pryor v. State*, 2011 OK CR 18, ¶ 6, 254 P.3d 721, 723, these arguments were neither so flagrant nor so infected the trial to render the proceedings fundamentally unfair. *Jones v. State*, 2011 OK CR 13, ¶ 3, 253 P.3d 997, 998. Proposition VIII is denied.

In Proposition IX, Allen avers he received ineffective assistance of trial counsel where counsel failed to raise proper objections to preserve for appellate review the

claims raised in Propositions I, V, VI, VII, and VIII. Claims of ineffective assistance of counsel are reviewed under the two-part test announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. To establish constitutionally deficient performance by counsel, the appellant must show that counsel's representation was objectively unreasonable under prevailing professional norms. *Wiley v. State*, 2008 OK CR 30, ¶ 5, 199 P.3d 877, 879. In addition, appellant bears the burden to establish prejudice resulting from the errors of counsel. To do so, he must show there exists a reasonable probability that, but for the errors of counsel, the result of the trial court proceedings would have been different. *Id.*

Our disposition of Propositions V and VI renders moot Allen's challenge to the efficacy of counsel predicated thereon. Counts I and II were properly joined and tried together with the remaining counts and the statement made by the detective was not an evidentiary harpoon. Reviewing the instances of prosecutorial misconduct, all but one of the challenged statements to which no objection was raised at trial were proper. Therefore, Allen can make no showing of objectively unreasonable performance and resulting prejudice based on trial court's failure to raise these objections in the trial court. *Eizember v. State*, 2007 OK CR 29, ¶ 155, 164 P.3d 208, 244 (stating "Trial counsel will not be found ineffective for failing to raise objections which would have been overruled.") While one of the prosecutor's arguments was improper, it did not rise to the level of plain error. Thus, Allen cannot show resulting prejudice necessary to establish a claim of ineffective assistance of counsel. *Young v. State*, 2008 OK CR 25, ¶ 36, 191 P.3d 601, 610-11

(finding that appellant could not satisfy his burden of establishing resulting prejudice under *Strickland* where the underlying substantive claim is reviewed for plain error and none found to exist); *see also Eizember*, 2007 OK CR 29, ¶ 153, 164 P.3d at 244. Proposition IX is denied.

Finally, we find Allen is not entitled to relief on his claim of cumulative error. “A cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by Appellant. However, when there have been numerous irregularities during the course of a trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors is to deny the defendant a fair trial.” *Mitchell v. State*, 2011 OK CR 26, ¶ 151, 270 P.3d 160, 191 (internal citation omitted). While certain errors did occur in this case, considering the errors in a cumulative fashion, no relief beyond that which we have already granted is warranted. Proposition X is denied.

### **DECISION**

The Judgment and Sentence of the District Court of Tulsa County is **AFFIRMED IN PART, REVERSED IN PART**. The conviction and sentence for Possession of a Firearm After Former Conviction of a Felony in Count VI is **REVERSED** and **REMANDED** with instructions to **DISMISS**. Appellant’s remaining convictions and sentences are **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2014), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY  
THE HONORABLE TOM GILLERT, DISTRICT JUDGE**

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**OPINION BY: SMITH, V.P.J.**

LEWIS, P.J.: CONCUR  
LUMPKIN, J.: CONCUR  
A. JOHNSON, J.: CONCUR