



4. Appellant's convictions for both felony murder and first degree burglary constitute double jeopardy.
5. The cumulative effect of all trial errors warrants a new trial.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm in part and vacate in part. Appellant and two accomplices burglarized a dwelling. During the burglary, the homeowner fatally shot one of the accomplices and injured Appellant. While in jail awaiting trial, Appellant made incriminating statements in phone conversations, which were recorded and played for the jury.

As to Proposition 1, during *voir dire* the prosecutor offered hypothetical situations to explain how the felony murder rule, and the law on accomplice liability, expanded culpability for homicides that occurred without premeditation. The record shows several panelists had qualms about these rules. The hypotheticals illuminated legal concepts that were central to the case, and helped the parties and the court determine whether the prospective jurors could follow the law. Defense counsel's objections to the hypotheticals were properly overruled. *Thompson v. State*, 2007 OK CR 38, ¶ 33, 169 P.3d 1198, 1208-09. Proposition 1 is denied.

As to Proposition 2, the trial court denied defense counsel's request to introduce an unsworn statement, purportedly made by the surviving accomplice, that it was he who had planned the burglary. Appellant offered no

specifics about the statement from which the trial court (or this Court) could properly determine its trustworthiness. See 12 O.S.2011, § 2804(B)(3). More fundamentally, Appellant has failed to show the relevance of this information. It did not tend to exculpate him under any recognized legal theory, and exculpatory value is a prerequisite for admissibility. *Id.*; see also 21 O.S.2011, § 172 (all those concerned in the commission of a crime, whether they directly commit the act or aid in its commission, are equally culpable). The trial court did not abuse its discretion by excluding this evidence. *Cooper v. State*, 1983 OK CR 154, ¶ 14, 671 P.2d 1168, 1173. Proposition 2 is denied.

In Proposition 3, Appellant claims two of the prosecutor's peremptory strikes violated *J.E.B. v. Alabama*, 511 U.S. 127, 131, 114 S.Ct. 1419, 1422, 128 L.Ed.2d 89 (1994), which bars peremptory removal of prospective jurors based solely on gender. As to State's Strike No. 4, Appellant did not challenge her removal on gender-based grounds at the time, so review is only for plain error. *Cruse v. State*, 2003 OK CR 8, ¶ 7, 67 P.3d 920, 922-23. Appellant's only gender-based challenge came with State's Strike No. 8. The prosecutor gave the same explanations for both panelists; the explanations made reference to gender, but did not rely exclusively on that fact. Absent a showing of pretextual motive, the explanation for a peremptory strike is not objectionable even if it is based on "characteristics that are disproportionately associated with one gender." *J.E.B.*, 511 U.S. at 143, 114 S.Ct. at 1429. Furthermore, as to each panelist, the prosecutor offered a second reason, completely gender-

neutral, that was relevant to the case, and which defense counsel did not further challenge. We afford considerable deference to the trial court's assessment of whether purposeful discrimination was shown, and cannot say that the court's acceptance of the prosecutor's explanations was clearly erroneous.<sup>2</sup> *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S.Ct. 1203, 1207-08 (2008). Proposition 3 is denied.<sup>3</sup>

As to Proposition 4, Appellant was convicted separately of First Degree Felony Murder in the commission of a First Degree Burglary (Count 1), as well as the burglary itself (Count 2). The elements of Count 2 are entirely subsumed within Count 1. Because Appellant did not raise this claim below, we review it for plain error. *Kinchion v. State*, 2003 OK CR 28, ¶ 11, 81 P.3d 681, 684. The State concedes that this violates constitutional protections against double jeopardy. *Whalen v. United States*, 445 U.S. 684, 688, 100 S.Ct. 1432, 1436, 63 L.Ed.2d 715 (1980); *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed.2d 306 (1932); *Perry v. State*, 1993 OK CR 5, ¶ 7, 853 P.2d 198, 200-01. Contrary to the State's position, a double-jeopardy error is not rendered harmless by concurrent sentencing. *Ball v. United States*,

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<sup>2</sup> The jury that was ultimately empaneled included nine women and three men. The prosecutor had no known record of gender discrimination, and gender did not play any identifiable role in the offense. These factors are relevant to our review of the trial court's ruling. *Bland v. State*, 2000 OK CR 11, ¶¶ 14-16, 4 P.3d 702, 711-12.

<sup>3</sup> In conjunction with this Proposition, Appellant has tendered a "3.11(A) Motion to Supplement Direct Appeal Record," and asks this Court to accept it for filing pursuant to Rule 3.11(A), *Rules of the Oklahoma Court of Criminal Appeals*, 22 O.S., Ch. 18, App. (2013). Appellant's request is **DENIED**.

470 U.S. 856, 864-65, 105 S.Ct. 1668, 1673, 84 L.Ed.2d 740 (1985); *see also Perry*, 1993 OK CR 5 at ¶ 1, 853 P.2d at 199 (relief granted for identical Double Jeopardy violation, even though trial court had ordered all sentences to be served concurrently). Accordingly, Appellant's conviction in Count 2, First Degree Burglary, is **VACATED** on Double Jeopardy grounds.

As to Proposition 5, because we have remedied the only identifiable error (Proposition 4), there can be no error by accumulation. *Bell v. State*, 2007 OK CR 43, ¶ 14, 172 P.3d 622, 627. Proposition 5 is denied.

### **DECISION**

As to Count 1, First Degree Felony Murder, the Judgment and Sentence of the district court is **AFFIRMED**. Count 2, First Degree Burglary, is **VACATED**. 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 the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY  
THE HONORABLE CINDY H. TRUONG, DISTRICT JUDGE

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**OPINION BY C. JOHNSON, J.**

LEWIS, P.J.: CONCUR IN RESULTS

SMITH, V.P.J.: CONCUR

LUMPKIN, J.: CONCUR IN RESULTS

A. JOHNSON, J.: CONCUR

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