TABLE OF APPENDIX

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

BRIAN N. TERRY,	)	
	)	NOT FOR PUBLICATION
Appellant,	)	
v.	)	Case No. F-2024-85
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

Appellant Brian N. Terry was tried by jury and convicted of three (3) counts of First Degree Rape (Counts 1-3) (21 O.S.2021, § 1114(A))[1]; three (3) counts of Forcible Sodomy (Counts 5-7) (21 O.S.2021, § 888(A)); Kidnapping (Count 8) (21 O.S.2021, § 741); and Stalking (misdemeanor) (Count 9) (21 O.S.2021, § 1173) in the District Court of Tulsa County, Case No. CF-2022-1651. The jury returned sentences of imprisonment for five (5) years in each of Counts 1 and 3; ten (10) years in Count 2; one year in each of Counts 5, 6, and 7; two (2) years in Count 8; and a one-thousand-dollar ($1,000.00) fine in Count 9.

[1] The trial court sustained a demurrer to the First-Degree Rape charge in Count 4.

The trial court suspended the fine in Count 9, but otherwise sentenced accordingly, ordering the sentences to run consecutively with credit for time served.[2] Appellant appeals from this conviction and sentence and raises the following propositions of error:

I. The State presented insufficient evidence to sustain a conviction for the felony of Sodomy as charged in Count Six;

II. The jury was given contradictory information in the instructions as to Count Six;

III. [Appellant] was denied a fair trial by prosecutorial misconduct;

IV. [Appellant] was denied a fair trial before an unbiased jury when the trial court denied [Appellant's] challenges for cause against jurors number 10 and 15, RP and LG;

V. [Appellant] was denied the effective assistance of counsel;

VI. The accumulation of errors deprived [Appellant] of a fair trial.

After thorough consideration of these propositions and the entire record before us on appeal including the original record,

[2] Appellant must serve 85% of his sentence in Counts 1, 2, 3, 5, 6, and 7 before becoming eligible for consideration for parole. 21 O.S.2021, § 13.1.

transcripts, and briefs of the parties, we have determined that under the law and the evidence, no relief is warranted.

In Proposition I, Appellant challenges the sufficiency of the evidence supporting the conviction for forcible sodomy in Count 6. Specifically, he argues that A.S.'s testimony was insufficient to prove the required element of penetration. *See Hicks v. State,* 1986 OK CR 7, ¶ 7, 713 P.2d 18, 20 (penetration is an essential element of sodomy).

In challenges to the sufficiency of the evidence, this Court follows the standard of review set forth in *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *Easlick v. State,* 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559; *Spuehler v. State,* 1985 OK CR 132, ¶ 7, 79 P.2d 202, 203-04. *See Cochlin v. State,* 2020 OK CR 23, ¶ 4, 479 P.3d 534, 536. Under this test, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Cochlin,* 2020 OK CR 23, ¶ 4, 479 P.3d at 536 (quoting *Jackson,* 443 U.S. at 319; *Easlick,* 2004 OK CR 21, ¶ 5, 90P.3d at 558; *Spuehler,* 1985 OK CR 132, ¶ 7, 709 P.2d at 203-04). "This Court must accept all reasons, inferences, and credibility choices

that tend to support the verdict." *Id.* (citing *Taylor v. State,* 2011 OK CR 8, ¶ 13, 248 P.3d 362, 368).

In prosecution for forcible sodomy, we "do not require graphic testimony concerning the actual penetration but will review the evidence as a whole to see if 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Bales v. State,* 1992 OK CR 24, ¶ 5, 829 P.2d 998, 999 (quoting *Simms v. State,* 1987 OK CR 67, ¶¶ 11-12, 735 P.2d 344, 347). *See also Commander v. State,* 1987 OK CR 43, ¶ 5, 734 P.2d 313, 315 ("[t]he testimony need not be graphic; it is sufficient if there is some testimony to show penetration."). Proof of any penetration, however slight, is sufficient. *See Hicks,* 1986 OK CR 7, ¶ 7, 713 P.2d at 20 (citing 21 O.S. § 887).

A.S. testified in part that Appellant forced her to "put my mouth on his butt and perform oral sex on him." Leah Oliver, the SANE nurse, testified that during the SANE exam, she asked A.S. very pointed questions about penetration of different parts of her body and Appellant's body. Oliver testified that A.S. told her "[h]e made her give him head, suck his balls, eat him out anally." Considered together, this testimony generally conveys the idea of penetration. Considering the

entirety of A.S.'s testimony, her descriptions of the act sufficiently established the element of penetration.

The credibility of witnesses and the weight and consideration to be given to their testimony are within the exclusive province of the trier of facts. *Wall v. State,* 2020 OK CR 9, ¶ 20, 465 P.3d 227, 233-34; *Bland v. State,* 2000 OK CR 11, ¶ 29, 4 P.3d 702, 714. "It is well settled that where there is competent evidence from which the jury could reasonably conclude the defendant was guilty as charged, this Court will not interfere with the verdict despite a conflict in the evidence from which different inferences may be drawn." *Palmer v. State,* 1994 OK CR 16, ¶ 14, 873 P.2d 429, 433. Viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt the State proved the element of penetration and the evidence was sufficient to support a finding of guilt of forcible sodomy. This proposition is denied.

In Proposition II, Appellant again raises a challenge to Count 6 and argues that the jury instructions were contradictory on a material fact. Specifically, he argues that it was contradictory to inform the jury that he was charged in Count 6 for having A.S. "put her mouth **on** his anus" (emphasis added), but then instruct them that the elements of

forcible sodomy required "penetration of the anus". Appellant asserts that "[d]ue to the contradictory information contained in the instructions, the jury was not provided an ample understanding of the issues presented and the standards to be applied to a material issue", and as such his conviction in Count 6 should be reversed.

As Appellant did not raise this objection at trial (defense counsel even specifically stated he had no objection to the instruction) review on appeal is only for plain error. *Arce v. State,* 2023 OK CR 9, ¶ 13, 530 P.3d 472, 477-78. Under the plain error test set forth in *Simpson v. State,* 1994 OK CR 40, ¶¶ 10, 26, 30, 876 P.2d 690, 694, 699, 701 and *Hogan v. State,* 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923 this Court determines whether the appellant has shown an actual error, which is plain or obvious, and which affects his or her substantial rights. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *See also Chadwell v. State,* 2019 OK CR 14, ¶ 4, 446 P.3d 1244, 1246; *Bivens v. State,* 2018 OK CR 33, ¶ 11, 431 P.3d 985, 992.

It is the trial court's duty to fully instruct the jury on the applicable law. *Jones v. State,* 2009 OK CR 1, ¶ 63, 201 P.3d 869, 886.

Jury instructions are sufficient if when read as a whole they state the applicable law. *Id.* "It is implicit that in order for jury instructions to accurately state the law they must provide the jury with ample understanding of the issues presented and the standards to be applied." *Omalza v. State*, 1995 OK CR 80 ¶ 52, 911 P.2d 286, 303. "When instructions are self-contradictory on material issues and cannot be harmonized, plain error occurs." *Id.*

The jury was instructed, both verbally before the presentation of evidence, and in writing, after the presentation of evidence, on the charges against Appellant in the words of the felony Informations. This included language in Count 6 that A.S. was forced to "put her mouth on his anus". After being informed of the charges, the jury was instructed, both orally and in writing, that the felony Information was only the formal method of accusing the defendant of a crime and was not evidence of guilt.

In the written instructions given at the close of evidence, the jury was also informed that the following instructions "contain all rules of the law that are to be applied by you in this case, and all the rules of law by which you are to weigh the evidence and determine the facts in issue in deciding this case and in reaching a verdict." The jury was

then instructed on the statutory elements of the charged offenses with the proviso that no one could be convicted of the charged offenses unless the State proved each of those elements beyond a reasonable doubt. This included Instruction No. 32 which properly set out the elements of Forcible Sodomy pursuant to 21 O.S. § 887, 888(A). See Oklahoma Uniform Jury Instruction Criminal (2d) 4-128. The jury was further instructed that "any sexual penetration, however slight, is sufficient to complete the crime."

Appellant has failed to show how any inconsistencies between terms used in the felony Informations and jury instructions misled or confused the jury as to what was required to find guilt. The difference between the charging information and the requirements for a finding of guilt were repeatedly and explicitly explained to the jury. "Juries are presumed to follow their instructions." *Zafiro v. U.S.*, 506 U.S. 534, 540-41 (1993) (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987); *Sanders v. State*, 2015 OK CR 11, ¶ 15, 358 P.3d 280, 285. Appellant has not shown the jury had any problems in following their instructions.

Reviewing the instructions in their entirety, the jury was properly instructed on the applicable law. Therefore, we find no error and thus

no plain error. *See Mitchell v. State,* 2018 OK CR 24, ¶ 22, 424 P.3d 677, 684 ("[t]his Court will deny relief on a claim of jury instruction error when the jury instructions, as a whole, accurately state the applicable law"). This proposition is denied.

In Proposition III, Appellant claims the prosecutor improperly vouched for the credibility of A.S. on numerous occasions during closing argument. However, no objections were raised by defense counsel at any point in the State's closing on the grounds of improper vouching. Therefore, our review on appeal is for plain error under the standard set forth above. *Oliver v. State,* 2022 OK CR 15, ¶ 4, 516 P.3d 699, 704-705.

We evaluate alleged prosecutorial misconduct 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. *Sanders,* 2015 OK CR 11, ¶ 21, 358 P.3d at 286. We will reverse the judgment or modify the sentence only where grossly improper and unwarranted argument affects a defendant's rights. *Id.*

"It is error for the State to personally vouch for the credibility of its witnesses." *Nickell v. State,* 1994 OK CR 73, ¶ 7, 885 P.2d 670, 673.

"Argument . . . is impermissible vouching only if the jury could reasonably believe that the prosecutor is indicating a personal belief in the witness' credibility, either through explicit personal assurances of the witness' veracity or by implicitly indicating that information not presented to the jury supports the witness' testimony." *Id.* (quoting *United States v. Bowie,* 892 F.2d 1494, 1498 (10th Cir.1990). *See also Oliver,* 2022 OK CR 15, ¶ 5, 516 P.3d at 705 (citing *Bench v. State,* 2018 OK CR 31, ¶ 90, 431 P.3d 929, 957).

Appellant directs us to specific comments made during the second portion of the State's closing argument where the prosecutor said that A.S. was honest. Appellant also makes a general reference to "other opportunities" which the prosecutor had "to make the very same argument that A.S. was honest." He references four (4) pages in the transcript but does not identify the specific comments to which he is now objecting, nor does he make any further argument as to why the comments are improper. This conclusory statement of error without development of any argument has waived that part of the claim for our appellate review. See Rule 3.5.(A)(5)), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2025) (requiring argument in support of a proposition of error supported by citation of

authorities, statutes and parts of the record). *See Knapper v. State*, 2020 OK CR 16, ¶ 89, 73 P.3d 1053, 1080 (finding claim waived where inadequately developed).

We have reviewed the comments specifically challenged by Appellant and find they do not constitute improper vouching. Reviewing the comments in context, and in light of defense counsel's closing argument we find the comments proper as 1) they were made in response to arguments raised in defense counsel's closing argument, *Oliver*, 2022 OK CR 15, ¶ 17, 516 P.3d at 707; ("[t]he prosecution may [] properly respond to the defense theory or to the defense characterization of the State's case"); 2) they were based on the evidence and within the wide range of discussion allowed in closing argument, *Bench*, 2018 OK CR 31, ¶ 123, 431 P.3d at 963. ("[c]ounsel are permitted to fully discuss from their standpoint the evidence, the inferences and deductions arising from it"); and 3) the prosecutor did not tell the jury to abandon its duty to consider the evidence and convict based only on the prosecutor's opinion, *Williams v. State*, 2008 OK CR 19, ¶ 107, 188 P.3d 208, 228 ("the prosecutor is not telling the jury to abandon its duty and convict based on the prosecutor's own opinion.").

Having thoroughly reviewed Appellant's challenges, we find the prosecutor's conduct was not so improper or prejudicial so as to have infected the trial so that it was rendered fundamentally unfair. The prosecutor's comments were not personal assurances of the victim's credibility, and did not urge the jury to divert from its duty to decide the case on the law and the evidence. We find no error, and thus no plain error. This proposition of error is denied.

In Proposition IV, Appellant asserts the trial court abused its discretion when it refused his requests to dismiss prospective jurors R.P. and L.G. for cause. Appellant argues that the trial court's ruling forced him to use peremptory challenges to remove the two prospective jurors from the jury which exhausted his peremptory challenges. A request for additional peremptory challenges to strike A.K. and K.P. from the jury was denied, leaving A.K. and K.P., who Appellant calls "unacceptable", on the jury. Appellant asserts he was prejudiced by their service on the jury.

"In order to properly preserve for appellate review an objection to a denial of a challenge for cause, a defendant must demonstrate that he was forced over objection to keep an unacceptable juror.'" *Nolen v. State*, 2021 OK CR 5, ¶ 97, 485 P.3d 829, 852-53 (quoting *Eizember v.*

State, 2007 OK CR 29, ¶ 36, 164 P.3d 208, 220). "This requires a defendant to excuse the challenged juror with a peremptory challenge and make a record of which remaining jurors the defendant would have excused if he had not used that peremptory challenge to cure the trial court's alleged erroneous denial of the for cause challenge.'" *Id.* Appellant has properly preserved for appellate review his challenge to the jury.

"The United States Supreme Court has held that, '[i]n essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors.'" *Nolen*, 2021 OK CR 5, ¶ 111, 485 P.3d at 856 (quoting *Irvin v. Dowd*, 366 U.S. 717, 722, (1961)). "This guarantee includes the right to be tried by jurors who are capable of putting aside their personal impressions and opinions and rendering a verdict based solely on the evidence presented in court." *Id.* "The decision of whether to disqualify a prospective juror for cause lies within the sound discretion of the trial court." *Nolen*, 2021 OK CR 5, ¶ 98, 485 P.3d at 853 (citing *Mitchell v. State*, 2010 OK CR 14, ¶ 19, 235 P.3d 640, 647). "The trial court's decision will not be overturned absent a finding of an abuse of discretion." *Id.*

"We give broad deference on appeal to the trial court's rulings on for-cause challenges." *Tryon v. State*, 2018 OK CR 20, ¶ 30, 423 P.3d 617, 631. "The trial court is vested with considerable discretion in matters involving selection of jurors, because it is able to personally observe the panelists, and take into account a number of non-verbal factors that do not transfer well, if at all, to the transcript page." *Grant v. State*, 2009 OK CR 11, ¶ 17, 205 P.3d 1, 11. *See also Mitchell*, 2010 OK CR 14, ¶ 19, 235 P.3d at 647-48 ("we "generally defer to the impressions of the trial court, which can better assess whether a potential juror would be unable to fulfill his or her oath").

Appellant argues that R.P. should have been removed for cause because "he had clear leanings toward the State," his "history as a sexual abuse victim", and his "hesitation in responding to questions regarding his ability to be a fair juror." Regarding prospective juror L.G., Appellant argues he should have been excused for cause because of his "express leanings for the State" and affirming that even without knowing anything about the case, he was leaning towards the State, that it wasn't even a "50-50 balance" for the defendant.

To determine if the trial court properly ruled on a challenge for cause, this Court will review the entirety of the prospective juror's *voir*

dire examination, and not just isolated answers. *Underwood v. State,* 2011 OK CR 12, ¶ 37, 252 P.3d 221, 240; *Gilbert v. State,* 1997 OK CR 71, ¶ 26, 951 P.2d 98, 108. "We will reverse the lower court's ruling on a for-cause challenge where there is no support for it in the record." *Tryon,* 2018 OK CR 20, ¶ 31, 423 P.3d at 631. Reviewing the entirety of the *voir dire* of R.P. and L.G., and not just isolated responses as urged by Appellant, we find the trial court did not abuse its discretion in refusing to excuse either prospective juror for cause. Both R.P. and L.G. said they could be fair and impartial, and as their *voir dire* examinations progressed, it became clear that each could set aside his personal experiences and render a fair and impartial verdict based solely on the evidence admitted in court. *See Tryon,* 2018 OK CR 20, ¶ 35, 423 P.3d at 631 (finding no abuse in trial court's denial of for cause challenge where "*voir dire* made it evident that he could in fact set aside his personal experiences and render a fair and impartial verdict based solely on the evidence admitted in court"). Any ambiguities or inconsistencies in L.G.'s responses to counsel were resolved through the trial court's additional questioning. Having personally observed L.G.'s demeanor throughout *voir dire,* the court found his responses credible and insufficient to excuse for cause. *Id.,*

("[h]aving benefit of observing [the prospective juror's] demeanor throughout voir dire, the court found her responses credible and insufficient to excuse her for cause.")

Our review of the totality of the *voir dire* examinations of both R.P. and L.G. supports the trial court's decision not to remove them for cause.

Further, Appellant has failed to show that he was prejudiced by the service of A.K. and K.P. on the jury. "Any claim of jury partiality must focus on the jurors who ultimately sat." *Frederick v. State*, 2017 OK CR 12, ¶ 15, 400 P.3d 786, 800, (overruled on other grounds by *Williamson v. State*, 2018 OK CR 15, ¶ 5, n.1, 422 P.3d 752, 762 n. 1). Appellant must establish prejudice in order to warrant relief. *Id* (citing *Rojem v. State*, 2006 OK CR 7, ¶ 36, 130 P.3d 287, 295).

Appellant has not provided any argument supporting his claims that A.K. and K.P. were "unacceptable" jurors and "should not have been permitted to serve." The record of *voir dire* shows that defense counsel objected to A.K.'s service because of "mental health background" and to K.P's service because he had relatives who were prosecutors and two other family members who were crime victims.

The relevant question in this situation is whether "as a result of the trial court's rulings, Appellant was forced, over objection, to keep an 'unacceptable' juror." *Davison v. State,* 2020 OK CR 22, ¶ 54, 478 P.3d 462, 476. "An 'unacceptable juror'—which the Court has at times referred to as a juror who is 'undesirable' to the defendant's position—means a trial juror: (1) who served over the defendant's objection after the trial court denied the defendant an additional peremptory to remove the juror as unacceptable; (2) who voiced views or opinions in *voir dire* that raise a reasonable doubt about the juror's bias against the defendant and/or the defendant's position; and (3) whom any reasonable attorney in the position of defense counsel would have removed with a peremptory." *Id.* 2020 OK CR 22, ¶ 56, 478 P.3d at 476.

We have thoroughly reviewed the *voir dire* of both A.K. and K.P. and find nothing in their responses indicating that either of them could not be a fair and impartial juror. *See Grant v. State,* 2009 OK CR 11, ¶ 22, 205 P.3d 1, 12 (prospective juror assured court that police officers she came in contact with while working at a restaurant would have no impact on her ability to serve as a juror). The "mental health background" of Juror A.K. can only refer to her saying she had taken

a mental health class as part of occupational therapy training. She made no other references to any issues with her personal mental health. Defense counsel's general comment before the trial court regarding A.K. that "there were other questions and answers that did not sit well with me" does not support a conclusion that any reasonable attorney in defense counsel's position would have removed her with a peremptory.

As for K.P., he said both an aunt and uncle were prosecutors, another aunt had been raped in 2000 and yet another aunt was murdered in 1995. In response to questioning by the court and both counsel, K.P. said there was nothing about his personal experiences that would cause him to favor or disfavor one side over the other, and that having prosecutors in his family would not make him biased towards or against the defendant in any way. K.P. provided no reasons why his family relationships and experiences would cause him to be biased.

Having thoroughly reviewed Appellant's claims of error in context of the entire *voir dire*, we find Appellant has failed to show that as a result of the trial court's denying his request to excuse R.P. and L.G.

for cause that he was denied a fair and impartial jury by the inclusion of A.K. and K.P. on the jury. This proposition is denied.

In Proposition V, Appellant contends he was denied the effective assistance of counsel by counsel's failure to object to the prosecutor's vouching for the credibility of A.S. during closing argument.

We review Appellant's claim of ineffective assistance under the standard set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). *Sanders,* 2015 OK CR 11, ¶ 29, 358 P.3d at 287. In order to show that counsel was ineffective, Appellant must show both deficient performance and prejudice. *Id* (citing *Strickland,* 466 U.S. at 687). In *Strickland,* the Supreme Court said there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct, *i.e.,* an appellant must overcome the presumption that, under the circumstances, counsel's conduct constituted sound trial strategy. *Sanders,* 2015 OK CR 11, ¶ 29, 358 P.3d at 287. To establish prejudice, Appellant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* A reasonable probability is a probability sufficient to undermine the confidence in the outcome. *Id.* (citing *Harrington v. Richter,* 562 U.S.

86, 111–112 (2011)). When a claim of ineffective assistance of counsel can be disposed of on the ground of lack of prejudice, that course should be followed. *Strickland*, 466 U.S. at 696.

In Proposition III, we addressed Appellant's claims of improper vouching and found no grounds for relief. We found the prosecutor's comments were within the range of discussion allowed in closing argument as the comments were: 1) made in response to comments made during defense counsel's closing argument; 2) based on the evidence; and 3) did not give the jury personal assurances of the victim's credibility, and did not urge the jury to divert from its duty to decide the case on the law and the evidence. As the comments were not improper, any objection by defense counsel would have been overruled. Counsel will not be found ineffective for failing to raise objections that would have been overruled. *Coffman v. State*, 2022 OK CR 23, ¶ 15, 519 P.3d 101, 107.

Based upon the record before us, Appellant has failed to show a reasonable probability of a different outcome at trial if counsel had raised the objections he now finds appropriate. Counsel's conduct did not constitute the kind of serious professional error that amounts to deficient performance under *Strickland*. As Appellant has shown

neither deficient performance nor prejudice under *Strickland,* his claim of ineffective assistance of counsel is denied.

In Proposition VI, Appellant argues the cumulative effect of the errors addressed above denied him a fair trial. Appellant "respectfully requests" this Court reverse his conviction or in the alternative favorably modify his sentence.

This Court has held that a cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by Appellant. *Gillioms v. State,* 2022 OK CR 3, ¶ 44, 504 P.3d 613, 623. Finding no errors in this appeal warranting relief, we find no relief is warranted by the accumulation of errors. This proposition is denied.

DECISION

The **JUDGMENT and SENTENCE is AFFIRMED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2025), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE DAWN MOODY, DISTRICT JUDGE

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HUDSON, J.: Concur
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