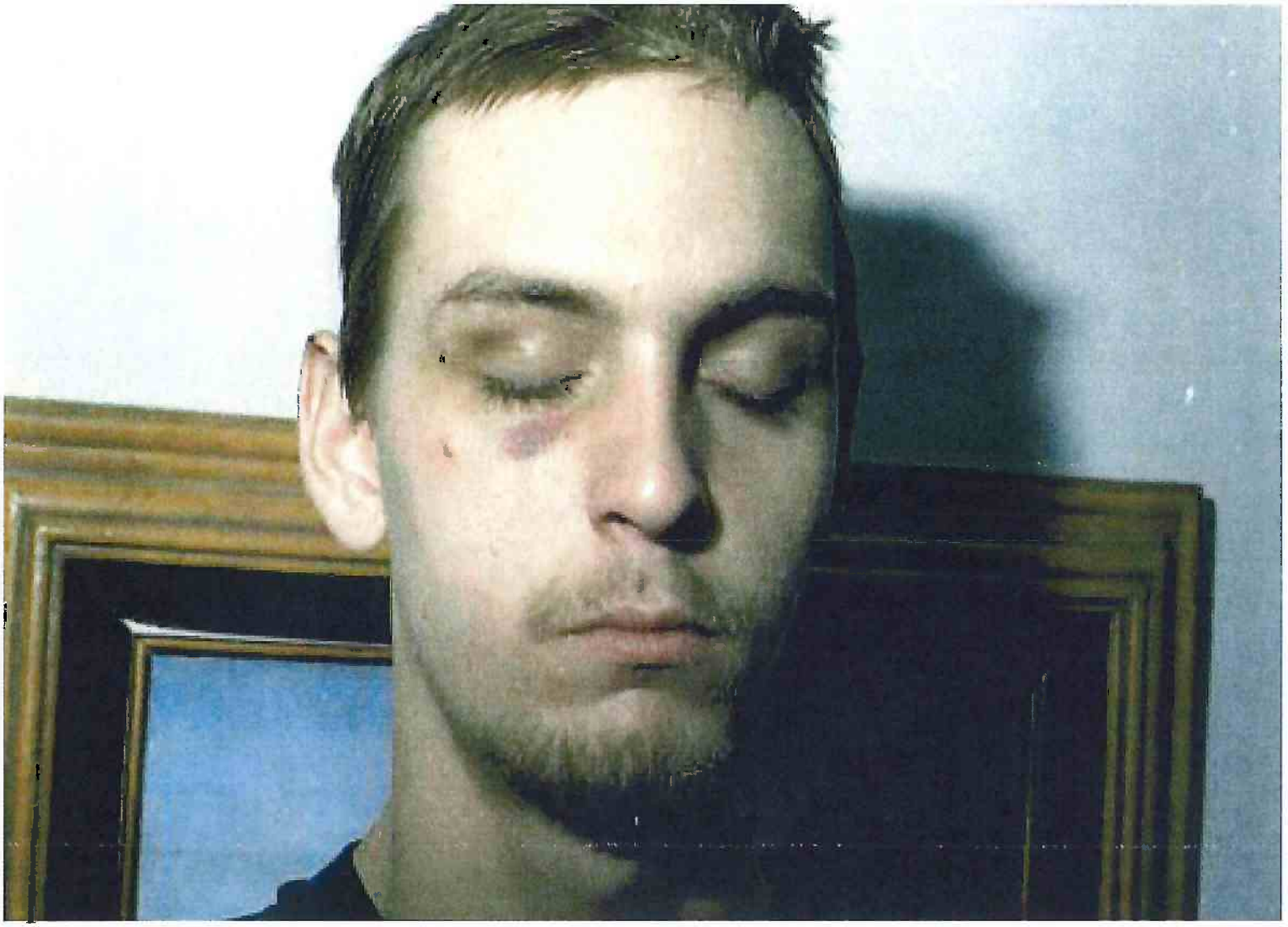

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[34] **Homicide**
⊂=Matters related to facts in evidence

Testimony of witnesses, who observed interaction between defendant and accomplice, that accomplice had no outside income and he appeared to be dependent on defendant was not character evidence, but rather, was proper evidence presented so jury could understand why defendant was able to employ accomplice to commit murders.

Cases that cite this headnote

[35] **Sentencing and Punishment**
⊂=Contract killing

There was sufficient evidence that defendant promised to pay accomplice for killing victim, as would support sole aggravating circumstance of murder for remuneration in prosecution for first degree murder; although defendant claimed that murder was only method to steal money from victim's car, defendant knew there would be money under seat and simple burglary of car would have been sufficient, and defendant wanted victim dead and knew that accomplice would do it for promise of a large payoff. 21 Okl.St.Ann. § 701.12.

Cases that cite this headnote

[36] **Sentencing and Punishment**
⊂=Presentation and reservation in lower court of grounds of review

State's utilization of two witnesses, victim's daughter and victim's widow, to read their own statements and statements of five other immediate family members was not plain error during sentencing phase of capital murder prosecution. 21 Okl.St.Ann. § 701.10(C).

Cases that cite this headnote

[37] **Sentencing and Punishment**
⊂=Contract killing
Sentencing and Punishment
⊂=Lack of significant prior record

Sentence of death was not imposed on murder defendant, who was found to have committed murder for remuneration, as a result of any arbitrary factor, passion, or prejudice; defendant presented mitigating evidence, which was summarized and listed in instruction to jury, including fact that defendant did not have any significant history of prior criminal activity, was amenable to prison setting and would pose little risk, and had continuous, gainful employment from age 16 to his arrest, and trial court instructed jury that it could decide if other mitigating circumstances existed and could consider other circumstances as well.

1 Cases that cite this headnote

***147** An Appeal From The District Court Of Oklahoma County Before The Honorable Twyla Mason Gray, District Judge
RICHARD EUGENE GLOSSIP, Appellant, was tried by jury for the crimes of Murder in the First Degree in Case No. CF–97–244 in the District Court of Oklahoma County before the Honorable Twyla Mason Gray, District Judge. Glossip was sentenced to death, and he perfected this appeal. Judgment and Sentence is **AFFIRMED.**

Attorneys and Law Firms

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OPINION

LEWIS, Judge.

¶ 1 Appellant, Richard Eugene Glossip, was charged with the First Degree (malice) Murder in violation of 21 O.S.Supp.1996, § 701.7(A), on January 14, 1997, in Oklahoma County District Court Case No. CF–97–244. The instant appeal arises from a trial occurring in May and June 2004, before the Honorable Twyla Mason Gray, District Judge.[1] The State filed a Bill of Particulars and alleged, during sentencing, the existence of two aggravating circumstances: (1) that the person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration; and (2) the existence of the probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society. *See* 21 O.S.2001, § 701.12(3) and (7).

¶ 2 The jury found Glossip guilty of first degree (malice) murder, found the existence of the murder for remuneration aggravating circumstance, and set punishment at death. Judge Gray formally sentenced Glossip in accordance with the jury verdict on August 27, 2004.

I. FACTS

¶ 3 In January of 1997, Richard Glossip worked as the manager of the Best Budget Inn in Oklahoma City, and he lived on the premises with his girlfriend D–Anna Wood. Justin Sneed, who admitted killing Barry Van Treese, was hired by Glossip to do maintenance work at the motel.

¶ 4 Barry Van Treese, the murder victim, owned this Best Budget Inn and one in Tulsa. He periodically drove from his home in Lawton, Oklahoma to both motels. The Van ***148** Treese family had a series of tragedies during the last six months of 1996, so Mr. Van Treese was only able to make overnight visits to the motel four times in that time span. His usual habit was to visit the motel every two weeks to pickup the receipts, inspect the motel, and make payroll.

¶ 5 The State presented testimony about the physical condition, financial condition, and the day to day operations of the motel. At the beginning of 1997, Mr. Van Treese decided to do an audit of both motels after it was determined that there were shortfalls. Before Mr. Van Treese left for Oklahoma City, Donna Van Treese, Barry's wife, calculated Glossip's net pay at $429.33 for the period ending January 5th, 1997, because Glossip had $211.15 in draws.[2] On January 6, 1997, she and Mr. Van Treese reviewed the books and discovered $6,101.92 in shortages for the Oklahoma City motel in 1996. Mrs. Van Treese testified her husband intended to ask Glossip about the shortages.

¶ 6 Sometime in December, Mr. Van Treese told Billye Hooper, the day desk manager, that he knew things needed to be taken care of, and he would take care of them the first of January. Hooper believed Van Treese was referring to Glossip's management of the motel.

¶ 7 Justin Sneed, by all accounts, had placed himself in a position where he was totally dependent on Glossip. Sneed started living at the motel when he came to Oklahoma City with a roofing crew from Texas. Sneed quit the roofing crew and became a maintenance worker at the motel. He made no money for his services, but Glossip provided him with a room and food. Sneed admitted killing Mr. Van Treese because Glossip offered him money to do it. The events leading up to the killing began with Van Treese's arrival at the motel on January 6.

¶ 8 Van Treese arrived at the Best Budget Inn in Oklahoma City on January 6, 1997, around 5:30 p.m. Around 8:00 or 9:00 p.m., Van Treese left Oklahoma City to go to the Tulsa Best Budget Inn to make payroll and collect deposits and receipts. Hooper testified Van Treese was not upset with Glossip and did not say anything to her about shortages before he left for Tulsa. Van Treese did tell Hooper he planned to stay for a week to help remodel rooms.

¶ 9 William Bender, the manager of the Tulsa motel, testified that Mr. Van Treese was very upset. He had never seen him that angry. Van Treese inspected the daily report for the motel, and he checked to see if the daily report matched rooms actually occupied. He told Bender that there were missing registration cards, missing receipts and unregistered occupants at the Oklahoma City motel.

¶ 10 He told Bender that he told Glossip that he had until Van Treese arrived back at Oklahoma City to come up with the missing receipts. Then he was going to give Glossip another week to come up with the missing registration cards and to get the receipts in order. He also told Bender that if Glossip were fired Bender would manage the Oklahoma City motel. Van Treese left the Tulsa motel and arrived back at the Oklahoma City motel

at about 2:00 a.m. on January 7.

¶ 11 Sneed, also known as Justin Taylor, testified that in exchange for maintenance work, Glossip let him stay in one of the motel rooms. Sneed said he only met Van Treese a few times, and he saw him at the motel with Glossip on the evening of January 6, 1997. Sneed testified that around 3:00 a.m. on January 7, 1997, Glossip came to his room. Glossip was nervous and jittery. Glossip wanted Sneed to kill Van Treese and he promised him $10,000.00 for killing Van Treese. Sneed testified that Glossip had asked him to kill Van Treese several times in the past and the amount of money kept getting bigger and bigger.

¶ 12 Glossip suggested that Sneed take a baseball bat, go into Van Treese's room (room number 102), and beat him to death while he slept. Glossip said that if Van Treese inspected the rooms in the morning, as he intended to do, he would find that none of the work had been done. Glossip told ***149** Sneed that both of them would be out of a job.

¶ 13 Sneed went over to the Sinclair Station next door and bought a soda and possibly a snack. He then went back to his room and retrieved the baseball bat. Sneed said he went to Van Treese's room and entered using a master key that Glossip had given him. Van Treese woke up and Sneed hit him with the bat. Van Treese pushed Sneed, and Sneed fell into the chair and the bat hit and broke the window. When Van Treese tried to get away, Sneed threw him to the floor and hit him ten or fifteen times. Sneed also said that he pulled out a knife and tried to stab Van Treese a couple of times, but the knife would not penetrate Van Treese. Sneed received a black eye in the fight with Van Treese. He later told others that he fell in the shower and hit his eye.

¶ 14 A long time resident of the motel, John Beavers, was walking outside when heard strange noises coming from room 102. He then heard the glass breaking. Beavers believed there was a fight going on in room 102.

¶ 15 After Sneed killed Van Treese he went to the office and told Glossip he had killed Van Treese. He also told him about the broken window. Sneed said that he and Glossip went to room 102 to make sure Van Treese was dead. Glossip took a $100 bill from Van Treese's wallet.

¶ 16 Glossip told Sneed to drive Van Treese's car to a nearby parking lot, and the money he was looking for would be in an envelope under the seat. Glossip also told him to pick up the glass that had fallen on the sidewalk.

¶ 17 Sneed retrieved the car keys from Van Treese's pants and drove Van Treese's car to the credit union parking lot. He found an envelope with about $4000.00 cash under the seat. He came back and swept up the glass. He put the broken glass in room 102, just inside the door. He said that Glossip took the envelope from him and divided the money with him. He also testified that Glossip helped him put a shower curtain over the window, and he helped him cover Van Treese's body. According to Sneed, Glossip told him, that if anyone asked, two drunks got into a fight, broke the glass, and we ran them off. Sneed testified that Glossip told him to go buy a piece of Plexiglas for the window, and some Muriatic acid, a hacksaw, and some trash bags in order to dispose of Van Treese's body.

¶ 18 D–Anna Wood testified that she and Glossip were awakened at around 4:00 a.m. by Sneed. She testified that Glossip got out of bed and went to the front door. When he returned, Glossip told her that it was Sneed reporting that two drunks got into a fight and broke a window. She testified that Glossip then returned to bed.

¶ 19 Glossip told police during a second interview, that Sneed told him that he killed Van Treese. He denied ever going into room 102, except for assisting with repairing the window. He said he never saw Van Treese's body in the room.

¶ 20 The next morning, Billye Hooper arrived at work and was surprised to see that Glossip was awake. She also noticed that Mr. Van Treese's car was gone. She asked Glossip about the car, and Glossip told her that Mr. Van Treese had left to get supplies for remodeling rooms. A housekeeper testified that Glossip told her to clean the upstairs rooms, and he and Sneed would take care of the downstairs, where room 102 was located.

¶ 21 Later that afternoon, employees found Mr. Van Treese's car in a credit union parking lot near the motel, and a search for Van Treese began. Glossip and D–Anna Wood were at Wal–Mart shopping. They returned to the motel, because Hooper paged them and told them to come back. The police were contacted sometime after Mr. Van Treese's car was found.

¶ 22 Cliff Everhart, who worked security for Mr. Van Treese in exchange for a 1% ownership, was already at the motel. He told Sneed to check all of the rooms. Sneed indicated that he did so. Everhart, Glossip and Wood drove around looking for Van Treese in nearby dumpsters and fields.

¶ 23 Everhart and Oklahoma City Police Sgt. Tim Brown began discussing Glossip's conflicting statements, so they

decided to *150 check room 102 on their own. At about 10:00 p.m. they discovered Van Treese's body in his room. Sneed had already left the motel that afternoon, and he was not apprehended until a week later. Glossip was taken into custody that night, questioned and released. The next day, Glossip began selling his possessions. He told people he was leaving town. However, before he could leave town, he was taken into custody again for further questioning.

¶ 24 Subsequent searches revealed that Sneed possessed approximately $1,700.00 in cash, and that Glossip possessed approximately $1,200.00. Glossip claimed this money came from his paycheck and proceeds from the sale of vending machines and his furniture.

II: VOIR DIRE ISSUES

¶ 25 Glossip claims, in proposition nine, that the trial court committed errors during voir dire. Glossip is not claiming that he was forced to keep an unacceptable juror, but that the trial court abused its discretion in removing some jurors for cause. The first claim regards the method the trial court used in determining whether jurors had the ability to impose the death penalty.

¶ 26 Glossip attacks the trial court's use of the question whether jurors could give "heartfelt consideration to all three sentencing options." Glossip argues that this question is at odds with the uniform question "can you consider all three legal punishment options—death, imprisonment for life without parole or imprisonment for life—and impose the one warranted by the law and evidence?" *See* OUJI–CR 2d 1–5 (1996). Regardless of the language used, Glossip must show that the alleged improper language affected his trial in a negative way.

¶ 27 Glossip claims his trial was unfair because this incorrect language caused two jurors, who had reservations about the death penalty, to be erroneously excused because they expressed an inability to consider all three punishment options equally. One of these jurors stated, "I would not be able to give the death penalty equal consideration as a sentencing option."

¶ 28 The trial court asked this juror, "So your reservations about the death penalty are such that regardless of the law or the facts or the evidence, you would not consider imposing a penalty of death." The juror, unequivocally answered, "That's correct." She was then removed for cause without objection.

¶ 29 The next juror Glossip mentions stated that she wanted to do her "civic duty," but was having "a problem with the death penalty." The trial court also asked this juror, "do you believe that your concerns about the death penalty are such that regardless of the law and the evidence, you would not be able to give equal consideration to all three sentencing options." This juror, stated, "I do." This juror was removed for cause without objection from trial counsel.

¶ 30 Glossip complains about the use of the language "equal consideration" used by the trial court, parroted by the first juror and repeated by the trial court to the second juror. Glossip claims that this Court has never required "equal consideration" be given to all three sentencing options. *See Frederick v. State,* 2001 OK CR 34, ¶¶ 52–53, 37 P.3d 908, 926–27.

¶ 31 However, despite the holding in *Frederick,* this Court has held, in *Jones v. State,* 2006 OK CR 17, ¶ 14, 134 P.3d 150, 155, that "A major purpose of *voir dire* in a capital case is to reveal whether jurors will consider all three punishment options equally. A juror who cannot should be excused for cause." *See also Hanson v. State,* 2003 OK CR 12, 72 P.3d 40, 48 (cited in *Jones, supra*).

[1] ¶ 32 The proper standard for determining when prospective jurors may be excluded for cause because of their views on capital punishment is whether their views would prevent, or substantially impair, the performance of their duties as jurors in accordance with the instructions and their oath. *See Ledbetter v. State,* 1997 OK CR 5, ¶ 4, 933 P.2d 880, 885; *also see Wainwright v. Witt,* 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985).

[2] ¶ 33 This standard does not require that a prospective juror's incompetence to serve be established on the record with "unmistakable *151 clarity." *Wainwright,* 469 U.S. at 424–25, 105 S.Ct. at 852. We must give great deference to trial judges in matters regarding jury selection. *See Patton v. State,* 1998 OK CR 66, ¶ 16, 973 P.2d 270, 281–82; *Ledbetter,* 933 P.2d at 885.

[3] ¶ 34 In the present case, because there was no objection to the removal of these two jurors, any error must rise to the level of plain error. Here there is no such error. The first juror was unequivocal in her statement that she could not impose the death penalty. The second juror expressed concerns about her ability to impose the death penalty at a very early stage in the voir dire process stating that she couldn't impose death. This juror asked for more time to consider whether she would consider the death penalty if the law and facts warranted such a penalty. She vacillated back and forth and finally stated that she could not

consider the death penalty equally. We find that based on the entire voir dire, the trial court did not abuse its discretion in removing these two jurors.

[4] ¶ 35 In this proposition, Glossip also claims that a person serving a deferred sentence was improperly removed for cause. This juror raised her hand and later approached the bench when the trial court inquired whether anyone had "ever been charged with or accused of a crime." She was not completely honest with the trial court, until the trial court indicated that it knew about this juror's history of two different deferred sentences, one of which she was currently serving. The trial court expressed concern about the juror's ability to be fair and impartial in a criminal case when she, herself, had been prosecuted by the State. This juror agreed that it bothered her, and asked "what can I do about it?"

¶ 36 This juror agreed that she would be better suited for a non-criminal case. Before excusing her for cause, the trial court allowed defense counsel to object. The trial court stated that it had "a real problem with people who are on a deferred sentence sitting as jurors. They've got a lot at stake...." Although the trial court made a blanket statement about all persons currently serving a deferred sentence, the trial court believed this juror would be biased because she was currently serving a deferred sentence. The trial court, did not abuse its discretion in finding that this juror could not be fair and impartial and removing her for cause.

III: FIRST STAGE ISSUES

¶ 37 In proposition one, Glossip claims that the State presented insufficient evidence to convict him of first degree murder. Glossip claims that Justin Sneed's testimony was not sufficiently corroborated. Glossip also claims that the State's evidence regarding motive was flawed.

[5] ¶ 38 When the sufficiency of evidence is challenged on appeal, this Court will determine, whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *See Easlick v. State,* 2004 OK CR 21, ¶ 5, 90 P.3d 556, 559. This test is appropriate here where there was both direct evidence and circumstantial evidence supporting the conviction. *See Spuehler v. State,* 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203.

[6] ¶ 39 For Glossip to be convicted as a principal in Van Treese's murder, the State had to establish that he either committed each element of first degree malice murder or that he aided and abetted another in its commission. 21 O.S.2001, § 172. Aiding and abetting requires the State to show "the accused procured the crime to be done, or aided, abetted, advised or encouraged the commission of the crime." *Spears v. State,* 1995 OK CR 36, ¶ 16, 900 P.2d 431, 438. Direct evidence supporting Glossip's commission of the crime came from admitted accomplice Justin Sneed.

[7] ¶ 40 There is no question that Justin Sneed was an accomplice to the murder of Barry Van Treese, and for Glosssip's conviction to stand Sneed's testimony must be corroborated by some other evidence tending to connect Glossip with the commission of the crime. ***152** *Spears,* 1995 OK CR 36, ¶ 27, 900 P.2d at 440; 22 O.S.2001, § 742.[3] Even entirely circumstantial evidence may be sufficient to corroborate an accomplice's testimony. *Pierce v. State,* 1982 OK CR 149, ¶ 6, 651 P.2d 707, 709; *see also Wackerly v. State,* 2000 OK CR 15, ¶ 23, 12 P.3d 1, 11.

[8] ¶ 41 To be adequate, the corroborative evidence must tend in some degree to connect the defendant to the commission of the offense charged without the aid of the accomplice's testimony. Even slight evidence is sufficient for corroboration, but it must do more than raise a suspicion of guilt. *Cullison v. State,* 1988 OK CR 279, ¶ 9, 765 P.2d 1229, 1231.

[9] [10] ¶ 42 If the accomplice's testimony is corroborated as to one material fact by independent evidence tending to connect the accused to the commission of the crime, the jury may infer that the accomplice speaks the truth as to all. *Fleming v. State,* 1988 OK CR 163, ¶ 8, 760 P.2d 208, 210; *Pierce,* 1982 OK CR 149, ¶ 6, 651 P.2d at 709. However, corroborative evidence is not sufficient if it requires any of the accomplice's testimony to form the link between the defendant and the crime, or if it tends to connect the defendant with the perpetrators and not the crime. *Frye v. State,* 1980 OK CR 5, ¶ 31, 606 P.2d 599, 606–607.[4] The jury was properly instructed, according to the law in effect at the time of trial, on accomplice testimony and corroboration of the testimony.[5]

¶ 43 In this case, the State presented a compelling case which showed that Justin Sneed placed himself in a position where he was totally dependent on Glossip. Sneed testified that it was Glossip's idea that he kill Van Treese. Sneed testified that Glossip promised him large sums of cash if he would kill Barry Van Treese. Sneed testified that, on the evening before the murder, Glossip offered him $10,000 dollars if he would kill Van Treese

when he returned from Tulsa. After the murder, Glossip told Sneed that the money he was looking for was under the seat of Van Treese's car. Sneed took an envelope containing about $4,000.00 from Van Treese's car. Glossip told Sneed that he would split the money with him, and Sneed complied. Later, the police recovered about $1,200.00 from Glossip and about $1,700.00 from Sneed. The most compelling corroborative evidence, in a light most favorable to the State, is the discovery of the money in Glossip's possession. There was no evidence that Sneed had independent knowledge of the money under the seat of the car. Glossip's actions after the murder also shed light on his guilt.

¶ 44 The State points out four other aspects of Glossip's involvement, other than the money, which point to his guilt: motive, concealment of the crime, intended flight, and, as alluded to earlier, his control over Sneed.

¶ 45 Glossip claims that the State's evidence of motive was unsubstantiated and disputed. However, the State presented sufficient evidence to show that Glossip feared that he was going to be fired as manager, because the motel accounts had shortages during the end of 1996. Cliff Everhart told Mr. Van Treese that he thought that Glossip was "pocketing a couple hundred extra" every week during the quarter of 1996. Billye Hooper shared her concerns about the motel with Van Treese. Van Treese told her that he knew he had to take care of things. It was understood that Van Treese was referring to Glossip's management.

¶ 46 The condition of the motel, at the time of Van Treese's death, was deplorable. Only half of the rooms were habitable. The entire motel was absolutely filthy. Glossip was the person responsible for the day to day operations ***153** of the motel. He knew he would be blamed for the motel's condition.

[11] ¶ 47 The State concedes that motive alone is not sufficient to corroborate an accomplice's testimony. *See Reed v. State,* 744 S.W.2d 112, 127 (Tex.Cr.App.1988).[6] However, evidence of motive may be considered with other evidence to connect the accused with the crime. *Id.* Glossip's motive, along with evidence that he actively concealed Van Treese's body from discovery, as well as his plans to "move on," connect him with the commission of this crime. Evidence that a defendant attempted to conceal a crime and evidence of attempted flight supports an inference of consciousness of guilt, either of which can corroborate an accomplice's testimony. *See People v. Avila,* 38 Cal.4th 491, 43 Cal.Rptr.3d 1, 133 P.3d 1076, 1127 (2006); *also see Smith v. State,* 245 Ga. 168, 263 S.E.2d 910, 911–12 (1980) (evidence that a party attempted to conceal his participation in a crime is sufficient to corroborate the testimony of an accomplice).

¶ 48 The State presented an enormous amount of evidence that Glossip concealed Van Treese's body from investigators all day long and he lied about the broken window. He admitted knowing that Sneed killed Van Treese in room 102. He knew about the broken glass. However, he never told anyone that he thought Sneed was involved in the murder, until after he was taken into custody that night, after Van Treese's body was found. Glossip intentionally lied by telling people that Van Treese had left early that morning to get supplies. In fact, Van Treese was killed hours before Glossip claimed to have seen Van Treese that morning. Glossip's stories about when he last saw Van Treese were inconsistent. He first said that he last saw him at 7:00 a.m.; later he said he saw him at 4:30 a.m. Finally, he said he last saw him at 8:00 p.m. the night before Van Treese's death, and he denied making other statements regarding the time he last saw Van Treese.

¶ 49 Glossip also intentionally steered everyone away from room 102. He told Billye Hooper that Van Treese had left to get materials, and that Van Treese stayed in room 108 the night before. He told Jackie Williams, a housekeeper at the motel, not to clean any downstairs rooms (which included room 102). He said that he and Sneed would clean the downstairs rooms. He told a number of people that two drunken cowboys broke the window, and he tried to implicate a person who was observed at the nearby Sinclair station as one of the cowboys.

¶ 50 He told Everhart that he would search the rooms for Van Treese, and then he told Sneed to search the rooms for Van Treese. No other person searched the rooms until seventeen hours after the murder, when Van Treese's body was discovered.

¶ 51 The next day, Glossip began selling all of his belongings, before he admitted that he actively concealed Van Treese's body. He told Everhart that "he was going to be moving on." He failed to show up for an appointment with investigators, so the police had to take him into custody for a second interview where he admitted that he actively concealed Van Treese's body. He said he lied about Sneed telling him about killing Van Treese, not to protect Sneed, but because he felt like he "was involved in it."

¶ 52 Glossip argues that all of this evidence merely proves, at best, that he was an accessory after the fact. Despite this claim, a defendant's actions after a crime can

prove him guilty of the offense. Evidence showing a consciousness of guilt has been used many times.[7]

¶ 53 Here, all of the evidence taken together amounts to sufficient evidence to, first, corroborate Sneed's story about Glossip's involvement ***154** in the murder, and, second, the evidence sufficiently ties Glossip to the commission of the offense, so that the conviction is supported.

[12] ¶ 54 In proposition two, Glossip claims that the State presented irrelevant and highly prejudicial evidence during the first stage of trial. He claims that the State attempted to elicit sympathy for the victim and for Sneed. However, trial counsel failed to object to any of the testimony Glossip now claims was improper. Therefore, he has waived all but a review for plain error. *Coddington v. State,* 2006 OK CR 34, ¶ 52, 142 P.3d 437, 451–52. Plain error is that error which goes to the foundation of the case or takes away a right which is essential to a defendant's case. *Mitchell v. State,* 2005 OK CR 15, ¶ 47, 120 P.3d 1196, 1209.

¶ 55 Glossip first argues that the testimony of Donna Van Treese, the victim's spouse was irrelevant to the first stage of trial. He ties this testimony with the introduction of the "in-life" photograph, which was met with an objection.

¶ 56 Donna Van Treese, during first stage, described the victim as a fifty-four year old man, who had quit smoking six years prior, had gained weight, was balding, and had gray hair. He grew a full white beard and when he shaved it off; his daughter cried and begged him to grow it back. The "in-life" photograph shows Mr. Van Treese without the beard.

¶ 57 Mrs. Van Treese was allowed to testify that the months prior to his death, a series of tragedies had occurred which included the death of her mother. After this death the family took a long trip in a motor home to several States. During this trip Mr. Van Treese felt an urgent need to get home. When they arrived home, they learned that Mr. Van Treese's mother was scheduled for heart by-pass surgery that very morning. She did not survive the surgery.

¶ 58 The purpose of this testimony was to show why Mr. Van Treese was not involved in the day to day operations of the motel in the months preceding his death. It was meant to show how the motel could slip into physical and financial disrepair without his knowledge.

[13] ¶ 59 During the first stage, several witnesses described Mr. Van Treese as a loving, kind, and generous person who on many occasions allowed people to stay at the motel when they were down on their luck. This testimony was coupled with evidence that Mr. Van Treese had a temper and would explode with anger towards employees. Although this testimony may have been irrelevant to the first stage, it did not rise to the level of plain error. This evidence did not deprive Glossip of a fair trial.

[14] ¶ 60 Evidence that Mr. Van Treese was a ham radio operator was relevant to the identification of his vehicle, as the vehicle was found at the credit union parking lot with an amateur radio operators personalized license plate. The evidence about his diabetes was relevant to show why Mrs. Van Treese called people to initiate a search as soon as she heard about him being missing, and to explain why the discovery of his car was troublesome.

[15] ¶ 61 In this proposition, Glossip also claims that the State introduced irrelevant evidence he claims was intended to evoke sympathy for Justin Sneed. The defense theory was that Sneed killed Mr. Van Treese without any influence from Glossip. They presented this theory in opening statement by first describing Sneed as a remorseless, confessed killer, and then, throughout the opening, presented a story showing how Sneed acted alone.

¶ 62 The State portrayed Sneed as a person with low intellectual ability, and a child like demeanor. They presented testimony about his background, and his growing up in a single parent home, having a child early in life, dropping out of school after the eighth grade, coming to Oklahoma City with a roofing crew, and quitting that to work at the motel in exchange for rent. This was all meant to show how he placed himself in a position to be dependent on Glossip. Although there was some lay opinion evidence regarding whether Sneed had the personality that would allow him to kill Mr. Van Treese on his own, this testimony comprised only a ***155** small portion of the State's case. This testimony did not rise to the level of plain error.

[16] ¶ 63 Next, in this proposition, Glossip claims that the State introduced irrelevant evidence regarding the remedial measures taken after Mr. Van Treese's death to show the condition of the motel. Glossip argues that this evidence was an indictment on the way Mr. Van Treese ran the motel, rather than relevant to show that Glossip had a reason to kill Mr. Van Treese.

¶ 64 The evidence included testimony that Mr. Van Treese's brother Kenneth Van Treese bought new towels and linens for the motel, replaced forty mattresses, and

disposed of broken furniture. It was brought out during this testimony that Glossip never had the authority to buy new linens and towels. There was plenty of evidence that the motel was not in good repair when Mr. Van Treese died. Glossip could have believed that he would be fired because of the condition of the motel, whether he was responsible for the condition or not. The evidence was admissible and the jury could give it whatever weight they thought appropriate. There is no error here.

¶ 65 In proposition three, Glossip claims that the State used demonstrative aids to overly emphasize certain portions of witnesses' testimony. He claims that the posters (1) placed undue influence on selected testimony, (2) were the equivalent of continuous closing argument, and (3) violated the rule of sequestration. Glossip also claims that the trial court erred in refusing to include the posters as part of the trial record.

[17] ¶ 66 We will, first, address the trial court's exclusion of these demonstrative aids as part of the record. Defense counsel requested that these poster sized note sheets be preserved by the trial court for appellate review, but the trial court refused the request. Then defense counsel requested that they be allowed to photograph the exhibits for their own records, but again the trial court refused. The trial court insisted that everything that the prosecutor wrote on the pads was in the record; however, the analysis of the pages in the transcript where notations were made tells a different story. We are extremely troubled by the trial court's attitude toward defense counsel's attempt to preserve the demonstrative aides for appellate review.[8]

¶ 67 While it is incumbent on the moving party to make a sufficient record so that this Court can determine the content and extent of these documents, the trial court must allow counsel to make sufficient proffer so that the issues can be preserved. *See Ross v. State,* 1986 OK CR 49, ¶ 18, 717 P.2d 117, 122. This Court will not assume error from a silent record.[9] However, this was not a case where evidence or testimony was not allowed to be introduced at trial.

¶ 68 This is a case where demonstrative aids were made by the prosecution, placed before the jury and utilized extensively during trial and closing argument. Even though these aids were utilized extensively during trial, the trial court rejected any attempt by defense counsel to preserve the "demonstrative exhibits" for future appellate review.

¶ 69 If a trial court is going to allow these types of demonstrative aids during trial, the trial court shall assume the responsibility of insuring that these aids are made a part of the record, as court's exhibits, when asked. The total recalcitrance of the trial court to allow a record to be made creates error in itself.

***156** ¶ 70 Here, the only way to determine what was on the posters, *in toto,* is to search the record and note where it appears that the prosecutor was writing on the note pad. According to the record cited, the prosecutor made notes of significant testimony on a large flip chart sized easel pad. This pad was left up for the jury to view during trial over trial counsel's objection which was made after the second day of testimony.

¶ 71 The record is not clear whether these pads stayed up during the entire trial. Glossip asserts that they stayed on display from witness to witness from the first day of testimony to the last with no citation to the record. Glossip cannot say what was written on the poster sized pad sheets. (Trial counsel apparently informed appellate counsel that there were twelve of these poster sized note sheets plastered around the courtroom at the conclusion of the trial).

¶ 72 Glossip claims that the posters were "taped up to various places in the courtroom and remained in full view of the jury and all subsequent witnesses throughout the trial." Glossip's citations to the record do not support this specific factual claim.

¶ 73 Glossip admits that he has found no cases on point in Oklahoma, and only cites to a Kentucky case that he cites as saying,

> It is one thing to allow a party to make a chart or summary or other demonstrative aid for use while a witness is testifying. It is quite another 'to allow a particular segment of testimony to be advertised, bill-board fashion,' after that witness has completed his or her testimony.

Lanning v. Brown, 377 S.W.2d 590, 594 (Ky.1964). The chart displayed in *Lanning* was a poster sized chart noting the list of special damages claimed by the party in a personal injury case. The Court held that the display of the chart was harmless, because the damages were not in substantial dispute. The Kentucky court noted a dearth of precedent on this point.

¶ 74 In *Miller v. Mullin,* 354 F.3d 1288, 1295 (10th Cir.2004), the Court noted a risk of using transparencies during closing argument. The court noted that "[a]n inherent risk in the use of pedagogical devices is that they may 'unfairly emphasize part of the proponent's proof or create the impression that disputed facts have been conclusively established or that inferences have been

directly proved.' " *Id., citing United States v. Drougas,* 748 F.2d 8, 25 (1st Cir.1984).

[18] ¶ 75 In viewing the entire record, we cannot say that the posters affected the outcome of this trial. Both sides utilized the poster tactic during trial, although, the State seemed to utilize more posters than the defense. There is no argument that the posters did not contain factual information, and they were utilized to assist the jury in understanding the testimony, considering the trial court's instructions against note-taking. Any error in the utilization of these posters was harmless.

[19] ¶ 76 In proposition ten, Glossip claims that the statute allowing an "in-life" photograph of the homicide victim is unconstitutional on its face and the photograph was inadmissible because any relevance was substantially outweighed by the danger of harm.

¶ 77 Glossip's claim challenges the constitutionality of the amended 12 O.S.Supp.2003, § 2403, arguing the admission of an "in-life" photograph without regard to relevance or the evidentiary balancing test violates due process. Glossip maintains that the blanket admissibility of such photographs unnecessarily risks exposing jurors to prejudicial information. This issue was thoroughly discussed in *Coddington v. State,* 2006 OK CR 34, ¶¶ 53–57, 142 P.3d at 452–53. In *Coddington* this Court upheld the first-stage admission of a single, pre-mortem photograph of the victim.

¶ 78 The legislature has seen fit to make the admission of a photograph of the victim while alive relevant in a homicide case "to show the general appearance and condition of the victim while alive." 21 O.S.Supp.2003, § 2403.

> We presume that a legislative act is constitutional; the party attacking the statute has the burden of proving that it is not.... We construe statutes, whenever reasonably possible, to uphold their constitutionality.... A statute is void only when it is so vague that men of ordinary intelligence ***157** must necessarily guess at its meaning....

Hogan v. State, 2006 OK CR 19, ¶ 63, 139 P.3d 907, 930 [citations omitted] (discussing this same issue regarding admission of an "in life" photograph during second stage).

¶ 79 Contrary to Glossip's claim, § 2403 only allows the admission of one "appropriate" photograph. 12 O.S.Supp.2003, § 2403. We held, in *Hogan,* that photographs which violate the balancing test of § 2403 would be inadmissible. *Hogan,* 2006 OK CR 19, ¶ 64, 139 P.3d at 931; *see Coddington,* 2006 OK CR 34, ¶ 56, 142 P.3d at 452–53. Here, the State offered, in the first stage, an innocuous portrait of Van Treese, taken during the September preceding his death. The photograph was offered "to show the general appearance and condition of the victim while alive" in accordance with the statute. Other than the fact that Barry Van Treese had a beard at the time of his death, the photograph depicted his appearance just before his death. The photograph met the guidelines of the statute, and its probative value was not substantially outweighed by the danger of unfair prejudice.

[20] [21] ¶ 80 The admission of this evidence, as with all evidence, is reviewed under an abuse of discretion standard. The introduction of evidence is left to the sound discretion of the trial court; the decision will not be disturbed absent an abuse of that discretion. *Pickens v. State,* 2001 OK CR 3, ¶ 21, 19 P.3d 866, 876. An abuse of discretion is "a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *C.L.F. v. State,* 1999 OK CR 12, ¶ 5, 989 P.2d 945, 946. The trial court did not abuse its discretion in admitting the photograph.

IV: PROSECUTORIAL MISCONDUCT

[22] [23] ¶ 81 In proposition four, Glossip alleges several instances of what he calls prosecutorial misconduct. We first note that no trial will be reversed on the allegations of prosecutorial misconduct unless the cumulative effect was such to deprive the defendant of a fair trial. *Garrison v. State,* 2004 OK CR 35, ¶ 128, 103 P.3d 590, 612. Much of the allegations here were not preserved at trial with contemporaneous objections, thus we review for plain error. We will not find plain error unless the error is plain on the record and the error goes to the foundation of the case, or takes from a defendant a right essential to his defense. *Simpson v. State,* 1994 OK CR 40, ¶ 23, 876 P.2d 690, 698.

[24] ¶ 82 Glossip's first series of claims attack the prosecution's argument as a misrepresentation of facts and misleading the jury. He first claims that the prosecutor committed misconduct when arguing that the absence of Glossip's fingerprints in room 102 amounted to evidence of guilt. There was no objection to these comments, thus we review for plain error only.

¶ 83 Here the prosecutor was merely arguing that, as manager of the motel and as a person who was responsible for repairs in every room, it was very suspicious that none of his fingerprints were found in the room. This was a fair inference from the evidence. The prosecutor was not arguing that Glossip selectively removed fingerprints after the crime, but was arguing that the absence of his fingerprints in the room, even ones that might have been left there under innocent circumstances was unusual. There is no plain error here.

¶ 84 Glossip next argues that the prosecution's argument that only Glossip, and not Sneed, had a motive to kill Mr. Van Treese amounted to misconduct. Again, defense counsel did not object. The State was merely arguing that Sneed had no reason to kill Mr. Van Treese other than the offer of money from Glossip. Again this is a fair inference from the evidence. There is no plain error here.

[25] ¶ 85 Next, Glossip argues that the prosecutor mislead the jury when arguing that the defense of "accessory after the fact" was baseless, because the State did not charge him with accessory after the fact to murder. In fact, the State did, initially charge Glossip with accessory to murder and Sneed with murder in separate Informations. The State then dismissed the accessory Information and added Glossip as a co-defendant with Sneed on the murder Information.

***158** ¶ 86 The State argued that it did not charge Glossip with accessory to murder, because he was guilty of the "big boy offense of Murder in the First Degree." Actually, the State did not pursue prosecution of Glossip for accessory, because they alleged he was guilty of first degree murder. The method of prosecution and the filing of charges is discretionary with the prosecution. Here the prosecutor is merely arguing that Glossip is guilty of murder, regardless of his defense that he only acted after the fact in attempting to cover up the crime. The argument, again, is properly based on the evidence adduced at trial.

[26] ¶ 87 The prosecutor argued that the lesser related offense instruction relating to accessory to murder was only given because defense counsel requested it. Glossip objected to this argument and the trial court admonished the prosecutor. Juries are to consider lesser related offenses, only if they have a reasonable doubt that a defendant has committed the greater offense. OUJI–CR 2d 10–27 (1996); *Graham v. State,* 2001 OK CR 18, ¶ 6, 27 P.3d 1026, 1027. The jury was properly instructed on the method of reviewing greater and lesser offenses. These instructions properly channeled the jury's decision making process and cured any error.

¶ 88 Glossip next argues that the prosecution attempted to elicit sympathy for the victim and his family during first stage of trial through evidence and argument. This argument relates to proposition two where Glossip argues that victim impact evidence was introduced through the testimony of first stage witnesses. Our resolution of proposition two also resolves this issue.

[27] ¶ 89 Next, Glossip argues that the prosecution introduced false or misleading testimony. This argument touches on the fact that the Tulsa motel was in just as much financial trouble as the Oklahoma City motel. Glossip argues that the prosecutor made an offer of proof that Van Treese was going to fire the Tulsa manager as well as Glossip, because of the shortages in Tulsa. Mrs. Van Treese testified that they were going to take care of the Oklahoma City motel first. However, the Tulsa manager, Bender, testified that Mr. Van Treese wanted to move him to the Oklahoma City motel. Glossip claims that both of these scenarios cannot be true, so the prosecution presented false evidence.

¶ 90 The fact that the Van Treeses discussed firing both managers was not in conflict with the fact that they were going to fire Glossip first, move Bender to the Oklahoma City motel to take Glossip's place while managers were sought for both motels. This claim has no merit.

[28] ¶ 91 Next, Glossip claims that the prosecutor implied that additional evidence existed. During the re-direct examination of witness Kayla Pursley, Glossip claims that the prosecutor inferred that this jury would not hear everything she said to the police because she could not remember what she told police. The prosecutor did not allow Pursley to refresh her memory with the police report and tell the jury what she told police. No objection was made to this questioning at trial.

¶ 92 As indicated by the State, this questioning was to rebut the defense's cross-examination where counsel brought up the fact that she testified to things not in the police report because she remembered these things after talking to the police. The prosecutor was merely attempting to show that Pursley was testifying from her memory and not from the police report. The fact that the jury was deprived of this evidence due to a lack of memory was not indicative of more evidence damaging to Glossip. This claim does not rise to the level of plain error.

[29] ¶ 93 Glossip also claims misconduct occurred during the penalty phase of trial. He first claims that the

prosecutor misstated the law regarding the appropriate punishment by arguing that death is appropriate because society, the Van Treese family, the Glossip family, and the justice system is "worse off" because of Richard Glossip. The State also argued that Glossip was a "cold-blooded murderer" and "cold-blooded murders in the State of Oklahoma we punish with death." The prosecutor went on to argue that "He chose the option of murder in the face of other options and that makes death ***159** the appropriate option." There were no objections to these arguments.

¶ 94 Glossip also cites to the prosecutor's argument inferring that no one would be here, except for the actions of Richard Glossip, including the statement, "you [the jury] wouldn't be here making this tough decision." Again there was no objection.

¶ 95 Glossip claims that the prosecutor unfairly denigrated Glossip's mitigating evidence by pointing out that while he is awaiting trial he gets his niece to come visit him so he can bring her to trial so she can testify. The prosecutor also pointed out the fact that other mitigation evidence was from a 23–year–old detention officer. The prosecutor pointed out the fact that Sneed was about that age and he buddies up to this young kid so he can have a witness to say he is not violent. There was no objection to this argument.

¶ 96 Defense counsel did object during the next citation of alleged misconduct. The prosecutor used the victim's photographs as props, placed them on defense table, and said "I don't have a problem with taking this blood and putting it right over here. Because this is where it goes." Counsel's objection was aimed at the prosecutor "throwing things on our table." Defense counsel said the prosecutor should give them to the jury. The objection was overruled. The objection was not based on the argument but on where the prosecutor was placing the photographs. Because he raises a different argument here, we can review for plain error only.

¶ 97 All of the alleged misconduct came during the State's second closing, after defense counsel stated that the State wants "Richard Glossip's blood to flow" (to which a State's objection was sustained). Defense counsel also told the jury that this was a decision that they would have to live with; the State would put this case away and forget about it. Defense counsel also argued that the State sees Richard Glossip as a person with no social redeeming value—ignoring the fact that he had a normal life, was a hard worker and supported his family.

¶ 98 It must be noted, that the State alleged two aggravating circumstances: continuing threat; and murder for remuneration. Most of the argument, from both sides, was in an attempt to show whether Glossip was a continuing threat to society. The continuing threat aggravating circumstance requires a jury to determine whether it is probable that a defendant will commit future criminal acts of violence that would constitute a continuing threat to society.

¶ 99 All of the prosecutor's arguments were proper comments on the evidence in order to show that, based on the circumstances of this crime, Glossip was a continuing threat to society. Obviously, the jury did not accept the prosecutor's argument, because they did not find that Glossip was a continuing threat.

V: INEFFECTIVE ASSISTANCE OF COUNSEL

[30] ¶ 100 In proposition five, Glossip claims that he was denied effective assistance of counsel during both stages of trial.[10] In order to show that counsel was ineffective, Glossip must show both deficient performance and prejudice. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).[11] In *Strickland,* the Court went on to say that 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, ***160** counsel's conduct constituted sound trial strategy. *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065.

[31] ¶ 101 To establish prejudice, Glossip must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068.

[32] ¶ 102 In the context of a capital sentencing proceeding, the relevant inquiry is "whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland,* 466 U.S. at 695, 104 S.Ct. at 2069.

[33] ¶ 103 He first claims that counsel was ineffective for failing to utilize Justin Sneed's videotaped interview to impeach Sneed and Detective Bemo. Glossip points out that this Court, in our Opinion reversing Glossip's original conviction, stated that "[t]rial counsel's failure to utilize important impeachment evidence against Justin

Sneed stands out as the most glaring deficiency in counsel's performance." *Glossip,* 29 P.3d at 601.

¶ 104 One would believe that if this Court stated an attorney was ineffective (to the point of requiring reversal) for failing to utilize one piece of evidence to impeach witnesses, the new attorneys on retrial would utilize the evidence. That is, unless counsel at the second trial is either banking on his ineffectiveness garnering his client another trial or he made a strategic decision not to introduce the tape and only question witnesses about the statements on the tape. The third possibility is that the failure to utilize this one piece of evidence is not the sole reason counsel was found to be ineffective during the first trial. This Court trusts that the first reason is invalid. Counsel's use of the contents of the tape to cross-examine witnesses, without introducing the tape, was a valid strategy. Furthermore, the failure to utilize the tape during the first trial was one of many reasons why this Court found there was ineffective assistance of trial counsel during the first trial.[12] Even though these two trials encompass the same subject, similar strategic decisions occurring during both trials, might not result in the same conclusion by this Court.[13]

¶ 105 The videotaped interview was not introduced into evidence during this trial, thus it is not a part of the record. Glossip has filed a motion for an evidentiary hearing pursuant to Rule 3.11, *Rules of the Court of Criminal Appeals,* Title 22, Ch. 18, App. (2006), in order to supplement the record.

¶ 106 Glossip admits that trial counsel cross-examined both Sneed and Bemo regarding the circumstances of the interview, statements made during the interview and discrepancies between current testimony and statements on the tape. Counsel was not ineffective for utilizing this strategy.

¶ 107 Glossip next argues that trial counsel failed to utilize readily available evidence (other than the video tape mentioned above) to cross-examine witnesses. Glossip clams that counsel was ineffective for failing to utilize financial records concerning the victim's Tulsa motel to show that the "over $6,000.00 shortage" at the Oklahoma City motel was not unusual. Counsel did attempt to introduce this evidence, but the trial court ruled it inadmissible. Counsel did not try to impeach witnesses with the documents.

¶ 108 Part of the State's theory was that Glossip wanted Van Treese killed so he could take over the management of both motels: Oklahoma City and Tulsa. The State also presented evidence that Glossip was going to ***161** be confronted about the $6,000.00 shortage. Furthermore, evidence was presented that Glossip did not want Van Treese to discover the condition of the motel.

¶ 109 The shortages at the Tulsa motel, while relevant to show that the $6000.00 shortage was not unusual, was not relevant to show that Glossip intended to have Van Treese killed because he feared termination. His fear was based on the condition of the motel, the missing registration cards, and missing money at the Oklahoma City motel.

[34] ¶ 110 Glossip next claims that counsel was ineffective, because counsel failed to object to improper character evidence introduced by the State. This evidence concerned testimony about the character of Justin Sneed as a follower who would not have killed the victim unless someone put him up to it. When counsel did object, an objection was overruled and the State elicited testimony that Sneed "would have probably done anything for Glossip. He was that dependent on him."

¶ 111 Several witnesses observed Sneed and Glossip interact with each other. They testified that Sneed had no outside income and he appeared to be dependent on Glossip. This evidence was not character evidence. This was proper evidence presented so the jury could understand why Glossip was able to employ Sneed to commit the murders.

¶ 112 Next, Glossip claims that counsel was ineffective for failing to object to the evidence complained about in proposition two. We found above that this evidence did not rise to the level of plain error; we further find that the failure to object did not amount to ineffective assistance, as this evidence did not affect the outcome of the case.

¶ 113 Next, Glossip claims that counsel was ineffective to object to instances of prosecutorial misconduct set forth in proposition four. Any misconduct that might have occurred did not affect the outcome of this case, so there can be no ineffective assistance of counsel.

VI: SECOND STAGE ISSUES

[35] ¶ 114 In proposition six, Glossip claims there was insufficient evidence to support the sole aggravating circumstance of murder for remuneration. Murder for remuneration, in this case, requires only that Glossip employed Sneed to commit the murder for payment or the promise of payment. 21 O.S.2001, § 701.12.

¶ 115 Here, Glossip claims that Sneed's self-serving

testimony was insufficient to support this aggravating circumstance. Glossip claims that the murder was only a method to steal the money from Van Treese's car.

¶ 116 The flaw in Glossip's argument is that no murder needed to occur for Sneed and Glossip to retrieve the money from Van Treese's car. Because Glossip knew there would be money under the seat, a simple burglary of the automobile would have resulted in the fruits of their supposed desire. The fact is that Glossip was not after money, he wanted Van Treese dead and he was willing to pay Sneed to do the dirty work. He knew that Sneed would do it for the mere promise of a large payoff. There was no evidence that Sneed had any independent knowledge of this money.

¶ 117 There is sufficient evidence that Glossip promised to pay Sneed for killing Van Treese.

¶ 118 In proposition seven, Glossip claims that the jury instructions defining the jury's role in determining punishment were flawed. Glossip first argues that the jury should have been instructed, as requested by trial counsel, that the aggravating circumstances must outweigh the mitigating circumstances beyond a reasonable doubt. He claims, relying on *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), that the failure to give this instruction resulted in a death sentence that is unconstitutional and unreliable. This Court has consistently rejected this argument, and Glossip has presented no new argument which would cause this Court to reconsider our previous decisions. *See Mitchell v. State,* 2006 OK CR 20, ¶ 81, 136 P.3d 671, 704.

¶ 119 Glossip next argues that the trial court's instruction which defines mitigating evidence as factors which "in fairness, sympathy, ***162** and mercy, may extenuate or reduce the degree of moral culpability or blame" impermissibly narrows the characterization of mitigation. He claims this definition excludes evidence about a defendant that may warrant a sentence less than death, because the evidence may not lessen his moral culpability or blame. The trial court rejected trial counsel's requested instructions.

¶ 120 The trial court gave the uniform instructions on mitigating evidence, OUJI–CR 2d 4–78 and 4–79 (1996), as well as others, which included a list of mitigating evidence and additional instructions which allowed the jury to consider other mitigating circumstances if found to exist. This Court has previously analyzed these instructions and determined that they are appropriate. *Rojem v. State,* 2006 OK CR 7, ¶ 57, 130 P.3d 287, 299. This Court will not revisit the issue here.

[36] ¶ 121 In proposition eight, Glossip claims that the State was allowed to introduce improper victim impact evidence. Oklahoma's desire to allow victims of violent crimes some type of influence in the sentencing of criminal defendants has led to different statutes. 22 O.S.2001, §§ 984 and 984.1 allows the use of "victim impact statements" and 21 O.S.2001, § 701.10(C) allows the use of "victim impact evidence."

¶ 122 Title 21 O.S.2001, § 701.10(C) pertains only to capital sentencing proceedings. The State may present "victim impact evidence" about the victim and the impact of the murder on the family of the victim. The clear language of section 701.10(C) limits the type of victim impact evidence allowable in a capital sentencing procedure. This section is not as encompassing as 22 O.S.2001, §§ 984 and 984.1. Section 984 reads in part:

> "Victim impact statements" means information about the financial, emotional, psychological, and physical effects of a violent crime on each victim and members of their immediate family, or person designated by the victim or by family members of the victim and includes information about the victim, circumstances surrounding the crime, the manner in which the crime was perpetrated, and the victim's opinion of a recommended sentence;

Section 984.1 states that,

> Each victim, or members of the immediate family of each victim or person designated by the victim or by family members of the victim, may present a written victim impact statement or appear personally at the sentencing proceeding and present the statements orally. Provided, however, if a victim or any member of the immediate family or person designated by the victim or by family members of a victim wishes to appear personally, such person shall have the absolute right to do so.

22 O.S.2001, § 984.1(A). "Members of the immediate

family" means the spouse, a child by birth or adoption, a stepchild, a parent, or a sibling of each victim. 22 O.S.2001, § 984.

¶ 123 This Court has stated that both "victim impact statements" and "victim impact evidence" are admissible in a capital sentencing procedure. This includes a victim's rendition of the "circumstances surrounding the crime, the manner in which the crime was perpetrated, and the victim's opinion of a recommended sentence." See 22 O.S.2001, § 984; *Dodd,* 2004 OK CR 31, ¶ 95, 100 P.3d at 1044.

¶ 124 However, evidence may be introduced that "is so unduly prejudicial that it renders the trial fundamentally unfair" thus implicating the Due Process Clause of the Fourteenth Amendment. *Lott,* 2004 OK CR 27, ¶ 109, 98 P.3d at 346, *quoting Payne v. Tennessee,* 501 U.S. 808, 825, 111 S.Ct. 2597, 2608, 115 L.Ed.2d 720 (1991).

¶ 125 During the second stage the State presented two witnesses. These two witnesses, the victim's daughter and the victim's widow, met the definition of "immediate family members." These two witnesses read their own statements and statements of other immediate family members. Glossip now claims that this procedure violated our previous case law on victim impact evidence. Glossip argues that the State should have only been allowed to introduce testimony of immediate family members or present a representative to read all of the statements, not both. *See Lott v. State,* 2004 OK CR 27, ¶¶ 110–11, 98 P.3d 318, 347 (family members ***163** may testify or they may designate a family representative to testify in their behalf). Intermingled in this proposition are comments that Mrs. Van Treese's statement was more akin to a statement made by a family representative, rather than a personal statement addressing the impact of the death on her personally. Glossip argues that either her statement should have been admitted as a representative, or the State should have presented the personal testimony of immediate family members, not both.

¶ 126 The issue here is whether an immediate family member can both testify on their own behalf and represent other members of the immediate family. In *Lott,* two members of the immediate family testified—the victim's son and daughter. Another witness also testified—the victim's granddaughter who was a "representative." She testified about the impact of the death on the entire family (even though she was not a member of the "immediate family"), her father and her aunts and uncles. (Her father and one of her aunts were the two witnesses who also presented victim impact evidence).

¶ 127 Glossip also cites *Grant v. State,* 2003 OK CR 2, ¶ 59, 58 P.3d 783, 797, *judgment vacated on different grounds in Grant v. Oklahoma,* 540 U.S. 801, 124 S.Ct. 162, 157 L.Ed.2d 12 (2003)[14] where this Court held that it is error for one person to read the statement of another. This Court, in Grant stated,

> In *Ledbetter v. State,* 1997 OK CR 5, ¶¶ 37, 933 P.2d 880, 893, we recognized the fact that "a person designated by the victim or by family members of the victim" may present victim impact statements. However, we held that the legislature intended that the "person chosen to present the victim impact statement" should use his "own thoughts or observations to express the impact of a death on survivors of the victim." *Ledbetter,* 1997 OK CR 5, ¶ 38, 933 P.2d at 893. In *Ledbetter,* our holding allowed the chosen person to observe family members and to use those observations in the statement; however, that person may not receive aid in the composition of the statement from outside sources. *Ledbetter,* 1997 OK CR 5, ¶ 39, 933 P.2d at 893.

¶ 128 Nevertheless, in *Grant* we held that the error did not rise to the level of plain error as the evidence was presented in a more sterile manner than if each of the writers of the statements had taken the stand and read their own statements.

¶ 129 The State cites *Hooks v. State,* 2001 OK CR 1, ¶ 37, 19 P.3d 294, 313. In *Hooks,* this Court held that a representative, who is not an immediate family member, may be the representative, and if they give testimony about the impact of the murder on themselves, the testimony can be harmless where the testimony makes up a small part of the victim impact evidence. This Court went on to say that a family member can give victim impact testimony on behalf of several immediate family members, as long as that testimony is otherwise admissible.

¶ 130 Trial counsel objected to victim impact evidence in a pre-trial motion and hearing. During the second stage, an in camera hearing was held and the parties went through the statements. Defense counsel made objections to some of the language in some of the statements and the trial court redacted the statements. However, counsel specifically stated that he had no objection to the two witnesses reading the statements of the remaining "immediate family members." Therefore, any claim regarding the method of victim impact evidence presentation is waived, except that error which is plain error.

¶ 131 We find that Glossip was not harmed by the State's

utilization of two family members to read the statements of five others. This Court will not second guess trial counsel's sound trial strategy. There is no plain error here.

VII: MANDATORY SENTENCE REVIEW

[37] ¶ 132 We found above that there was sufficient evidence to support the finding of ***164** the statutory aggravating circumstance of murder for remuneration. After reviewing the entire record in this case, we find that the sentence of death was not imposed because of any arbitrary factor, passion, or prejudice. Glossip presented mitigating evidence, which was summarized and listed in an instruction to the jury:

> 1. The defendant did not have any significant history of prior criminal activity;
>
> 2. The defendant is 41 years of age;
>
> 3. The defendant's emotional and family history;
>
> 4. The defendant, since his arrest on January 9, 1997, has been incarcerated and has not posed a threat to other inmates or detention staff;
>
> 5. The defendant is amenable to a prison setting and will pose little risk in such a structured setting;
>
> 6. The defendant has a family who love him and value his life;
>
> 7. Has limited education and did not graduate from high school. He has average intelligence or above. He has received his G.E.D.;
>
> 8. After leaving school, the defendant had continuous, gainful employment from age 16 to his arrest on January 9, 1997;
>
> 9. The defendant could contribute to prison society and be an assistance to others;
>
> 10. Prior to his arrest, the defendant had no history of aggression;
>
> 11. The defendant was not present when Barry Van Treese was killed.
>
> 12. The defendant has no significant drug or alcohol abuse history.

¶ 133 In addition, the trial court instructed, that the jury could decide that other mitigating circumstances exist and they could consider them as well.

¶ 134 We can honestly say that the jury's verdict was not born under the influence of passion, prejudice or any other arbitrary factor, and the evidence supported the jury's findings of the aggravating circumstances. *See* 21 O.S.2001, § 701.13. Glossip's convictions and his sentences should be affirmed. We find no error warranting reversal of Glossip's conviction or sentence of death for first-degree murder, therefore, the Judgment and Sentence of the trial court is, hereby, **AFFIRMED.**

C. JOHNSON, V.P.J.: concurs.

LUMPKIN, P.J.: concurs in results.

CHAPEL and A. JOHNSON, JJ.: dissents.

LUMPKIN, Presiding Judge: Concur in Result.

¶ 1 I concur in the results reached by the Court and most of the analysis. However, I do disagree with the analysis on a couple of points.

¶ 2 First, the Court errs by citing as authority for the decision rendered cases from other states that are not valid precedent for this Court. The jurisprudence from this Court is more than sufficient to sustain the analysis and decision of the Court. Thus, that case law should be cited and not cases from irrelevant states.

¶ 3 Second, while I agree the trial court's failure to preserve the demonstrative aids for the record in this case was error, I cannot find error in the use of them in this case. These demonstrative aids, i.e. poster sheets with contemporaneous listing of accurate statements by witnesses, were nothing more than group note taking. And, this Court has pushed note taking with a missionary zeal. While individual note taking cannot be monitored for individual accuracy, this group note taking was monitored by the court and the accuracy ensured. The notes were not overly emphasized because as demonstrative aides, they were not allowed to be taken into the jury room.

CHAPEL, Judge, Dissenting:

¶ 1 I dissent from today's decision because I disagree with the majority's treatment of Proposition III and the result reached on this claim. I also write to note that although I

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

RICHARD GLOSSIP,

Petitioner - Appellant,

v.

ANITA TRAMMELL, Warden, Oklahoma State Penitentiary,

Respondent - Appellee.

No. 10-6244
(D.C. No. 5:08-CV-00326-HE)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **GORSUCH**, **MURPHY**, and **O'BRIEN**, Circuit Judges.

An Oklahoma jury found Richard Glossip guilty of first degree murder and sentenced him to death. On direct appeal, the Oklahoma Court of Criminal Appeals ("OCCA") affirmed Glossip's conviction and death sentence. *Glossip v. State*, 157 P.3d 143 (Okla. Crim. App. 2007). After exhausting his state post-conviction remedies, Glossip filed the instant 28 U.S.C. § 2254 habeas corpus petition in federal district court. The district court denied habeas relief in an

*This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

because the record makes clear Glossip is not entitled to habeas relief even if this court proceeds to the merits of the claim. 28 U.S.C. § 2254(b)(2) (providing a habeas petition "may be denied on the merits, notwithstanding the failure of an applicant to exhaust" state court remedies); *Webber v. Scott*, 390 F.3d 1169, 1175 (10th Cir. 2004) ("The question of whether the OCCA reached the merits need not be decided, however, because Webber's claim fails with or without according the state court's decision AEDPA deference.").

Because Glossip does not contend the prosecution's use of the posters impinged upon a specific constitutional right, he is entitled to habeas relief only if the use of the posters "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Matthews v. Workman*, 577 F.3d

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[2](...continued)
allowed the prosecution to emphasize testimony it deemed important. Furthermore, as the district court observed, the OCCA "was generally, if not specifically, aware of [the posters'] contents." District Ct. Order at 25. This awareness was based on passages from the record that revealed where the prosecutor made notes of "significant testimony." *Glossip*, 157 P.3d at 156. Given that the accuracy of the testimony memorialized on the posters has never been challenged and the OCCA's general familiarity with the content of the posters and the entire trial transcript, it appears difficult to conclude the OCCA acted unreasonably in proceeding on the record before it. *See id.* That being the case, Oklahoma argues convincingly that Glossip cannot prevail unless he can meet the standards set out in § 2254(d). Since he has not identified any clearly established Supreme Court case law governing the display of demonstrative aids during trial, he cannot satisfy this standard. *House v. Hatch*, 527 F.3d 1010, 1021 (10th Cir. 2008) ("Absent controlling Supreme Court precedent, it follows ineluctably that the [state court's] decision . . . cannot be either 'contrary to, or [ ] an unreasonable application of, clearly established Federal law.'").

1175, 1186 (10th Cir. 2009) (quotation omitted). For all those reasons set out by the district court[3] in denying Glossip habeas relief on this claim, we conclude the answer to that question is an unequivocal "no." Although there is no need to recapitulate the district court's thorough analysis, a few points are worth

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[3]Although this court adopts the district court's thorough analysis and rejection of this claim of error, we depart from the district court as to one narrow point. In analyzing this claim, the district court assumed the existence of error and assessed the harmfulness of the error using the "substantial and injurious effect" standard set out in *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). As this court made clear, however,

> A prosecutor's remarks to the jury can create constitutional error in one of two ways. First, [those remarks] can prejudice "a specific right, such as the privilege against compulsory self-incrimination, as to amount to a denial of that right." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). In such a case, we review the harmfulness of the error using *Brecht*'s "substantial and injurious effect" standard. Second, even if the prosecutor's improper remarks do not impact a specific constitutional right, they may still create reversible error if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly*, 416 U.S. at 643. The Supreme Court has instructed us that "the appropriate standard for review of such a claim on writ of habeas corpus is 'the narrow one of due process, and not the broad exercise of supervisory power.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (quoting *Donnelly*, 416 U.S. at 642).

Matthews v. Workman, 577 F.3d 1175, 1186 (10th Cir. 2009) (citations omitted); *see also Miller v. Mullin*, 354 F.3d 1288, 1295 (10th Cir. 2004) (recognizing a habeas argument based on the use of a visual aid at trial was analogous to an assertion of improper argument). Thus, rather than assuming error and applying *Brecht*, the most appropriate course in this case is to determine whether the use of the posters at trial resulted in a constitutional violation. To answer that question, this court focuses on whether the use of the posters rendered Glossip's trial fundamentally unfair.

emphasizing. As noted by the district court, the overwhelming majority of the posters memorialized statements Glossip made to multiple individuals in the days immediately following the murder. Glossip never denied making these statements. In fact, his defense was that while he might have been involved in an attempt to hide the murder, he was not involved in its commission. Importantly, as Glossip argued during his closing argument, none of those statement connected him to Van Treese's murder. Further, the posters were not admitted into evidence and were not sent to the jury room during deliberations. As this court made clear in *Miller v. Mullin*, use of demonstrative exhibits is within the sound discretion of the trial judge. 354 F.3d 1288, 1295 (10th Cir. 2004). "[T]he ability of an appellate court to overturn discretionary rulings on direct review is severely constrained. It is even more attenuated on habeas review." *Id.* at 1296. Given the large number of witnesses (twenty-six witnesses testified during the guilt phase), it was not fundamentally unfair for the trial court to allow the use of posters to assist the jury in understanding, and keeping track of, the testimony. This is especially so considering that Glossip had the same opportunity to use such demonstrative exhibits and, in fact, utilized the same technique on several occasions during witness testimony. *Glossip*, 157 P.3d at 156.

The poster memorializing Sneed's testimony is a slightly closer question. That poster was the only one which included statements directly connecting Glossip to Van Treese's murder. It reflected the crux of the prosecution's case

and represented a synopsis of Sneed's highly disputed testimony implicating Glossip in the murder. Nevertheless, as is true of the other posters, Glossip has never challenged the accuracy of the poster and the poster was not submitted to the jury during deliberations. Most importantly, Sneed was the prosecution's principle witness. Like the district court, we think it is beyond doubtful that the jury would have needed any reminder as to the central points of Sneed's testimony. Furthermore, Sneed testified very late in the trial, only a few days before the case was submitted to the jury. Thus, the poster memorializing Sneed's testimony was not displayed in front of the jury for an extended time period. Finally, although it did not provide a limiting instruction, the trial court specifically instructed the jury at the beginning of trial, and in the written charge, (1) that the prosecution had the burden of providing evidence that establishes guilt beyond a reasonable doubt; and (2) that evidence consists of testimony received from witnesses under oath, together with stipulations and exhibits admitted during the trial. Given this trial context, we safely conclude the Sneed poster did not render Glossip's trial fundamentally unfair.

Because the use of the posters in this case, considered together and in the context of the entire proceeding, did not render Glossip's trial unfair, their use did not deprive Glossip of his Fourteenth Amendment right to due process.

prosecutorial misconduct claims "through AEDPA's forgiving lens." *Matthews*, 577 F.3d at 1186. An examination of the trial transcript reveals a heavily contested penalty phase with the parties' evidentiary submissions centering almost exclusively around the question whether Glossip was a continuing threat to society. As noted by the OCCA, when viewed through this lens, the prosecutor's comments reasonably relate to Glossip's arguments regarding the existence of that aggravating factor. *Glossip*, 157 P.3d at 159. Furthermore, the jury's rejection of the continuing threat aggravator makes it difficult to argue the prosecutor's arguments led the jury to decide the case on the basis of anything other than the evidence presented.

That leaves only one potential error: the prosecutor's statements indicting her view that death was the appropriate punishment. Those comments, however, were not the major focus of the prosecutor's second closing and were not overly dramatic. Furthermore, one of the comments was specifically followed by a statement that no matter the prosecutor's views, it was the jury's view that really mattered. This error did not render that phase fundamentally unfair.

III. Ineffective Assistance of Counsel

Glossip was granted a COA on three claims of ineffective assistance of counsel: (1) failure to use effectively at trial a videotaped statement Sneed made

to police in 1997; (2) failure to object to acts of prosecutorial misconduct; and (3) failure to use at trial Sneed's competency report.[7]

A. Sneed's Videotaped Statement

1. Background

a. OCCA Decision

> [Glossip] . . . claims that counsel was ineffective for failing to utilize Justin Sneed's videotaped interview to impeach Sneed and Detective Bemo. Glossip points out that this Court, in our Opinion reversing Glossip's original conviction, stated that "[t]rial counsel's failure to utilize important impeachment evidence against Justin Sneed stands out as the most glaring deficiency in counsel's performance." *Glossip*, 29 P.3d at 601.

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[7]In his habeas petition, Glossip raised seven discrete claims of ineffective assistance. He received a COA to raise on appeal only the three claims identified above. In an order issued by this court well before Glossip filed his opening brief, Glossip was informed that any request to further expand the COA must be filed within ten days. Glossip never filed a request to expand the COA. Nevertheless, Glossip renews in his appellate brief "his request for a COA on his entire claim of ineffective assistance." Appellant's Br. at 72. He does not, however, offer this court any reason to grant that request. Instead, he merely asserts as follows: "[G]iven the scope of the existing COA, Mr. Glossip will address only those portions of the ineffective assistance of counsel claims [upon which he obtained a COA]." *Id.* Because Glossip failed to timely move for an expanded COA and failed to offer any reason this court could conclude these additional claims satisfy the statutory standard set out in 28 U.S.C. § 2253(c)(2), Glossip's request for an expanded COA is **denied**. *See Romano v. Gibson*, 278 F.3d 1145, 1155 (10th Cir. 2002).

Alternatively, Glossip asserts that even if we deny his request for an expanded COA, the remaining claims should "be part of the court's analysis when addressing the cumulative error claim for which there is a COA." *Id.* This court has already rejected such an approach to conducting cumulative error review in the context of habeas appeals. *Young v. Sirmons*, 551 F.3d 942, 972-73 (10th Cir. 2008).

> One would believe that if this Court stated an attorney was ineffective (to the point of requiring reversal) for failing to utilize one piece of evidence to impeach witnesses, the new attorneys on retrial would utilize the evidence. That is, unless counsel at the second trial is either banking on his ineffectiveness garnering his client another trial or he made a strategic decision not to introduce the tape and only question witnesses about the statements on the tape. The third possibility is that the failure to utilize this one piece of evidence is not the sole reason counsel was found to be ineffective during the first trial. This Court trusts that the first reason is invalid. Counsel's use of the contents of the tape to cross-examine witnesses, without introducing the tape, was a valid strategy. Furthermore, the failure to utilize the tape during the first trial was one of many reasons why this Court found there was ineffective assistance of trial counsel during the first trial. Even though these two trials encompass the same subject, similar strategic decisions occurring during both trials, might not result in the same conclusion by this Court. [Footnote 13: During the first trial, trial counsel indicated he would use the tape to impeach Justin Sneed, but when the time came, "counsel failed to utilize the video tape at all." *Glossip*, 29 P.3d at 601. In this case, trial counsel questioned both Bemo and Sneed about inconsistencies between prior statements and current testimony.]
>
> The videotaped interview was not introduced into evidence during this trial, thus it is not a part of the record. Glossip has filed a motion for an evidentiary hearing pursuant to Rule 3.11, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2006), in order to supplement the record.
>
> Glossip admits that trial counsel cross-examined both Sneed and Bemo regarding the circumstances of the interview, statements made during the interview and discrepancies between current testimony and statements on the tape. Counsel was not ineffective for utilizing this strategy.

Glossip, 157 P.3d at 159-60 (footnote omitted).

b. District Court Decision

The district court began its analysis of this aspect of Glossip's claim of ineffective assistance by engaging in an extended discussion of the appropriate standard of review. Noting the OCCA possibly resolved this claim by reference to Oklahoma Appellate Rule 3.11, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2006), the district court concluded it must review the claim de novo. *See Wilson v. Workman*, 577 F.3d 1284, 1290-93, 1299-1300 (10th Cir. 2009) (en banc) (holding that an OCCA resolution of a claim of ineffective assistance based on Rule 3.11 did not amount to an "adjudication on the merits" entitled to AEDPA deference). It then moved on to deny habeas relief on the merits:

> Petitioner claims his attorneys were derelict in failing to impeach both Sneed and Detective Bemo with the videotape of Sneed's interview with Detectives Bemo and Cook. He points out that the OCCA reversed his first conviction in large part because his trial counsel did not use the video. The state appellate court found after petitioner's first trial that his attorney's failure to use "important impeachment evidence against Justin Sneed [stood] out as the most glaring deficiency in counsel's performance." *Glossip v. State*, 29 P.3d 597, 601 (Okla. Crim. App. 2001). However, contrary to petitioner's assertion, his attorneys in his 2004 trial did not "again fail[] to use this critical piece of evidence to cross-examine Justin Sneed and Det. Bemo." While they did not seek to introduce the tape itself into evidence, unlike petitioner's counsel in his 1998 trial they did confront Sneed with various discrepancies and inconsistencies between his 1997 videotaped interview and subsequent testimony. Bemo also was asked on cross about his interview techniques and whether his questions to Sneed were suggestive.

Petitioner concedes his trial counsel cross-examined both Sneed and Bemo in the 2004 retrial about the circumstances of the interrogation and discrepancies between the videotaped statements and Sneed's later trial testimony. He argues, though, that "whenever the witness denied the differences in the testimony or was unsure about what was said in the initial interview on January 14, 1997, counsel simply let it go. If the jury had been allowed to view the videotape of Mr. Sneed's interview, there would have been no question what Mr. Sneed and the detectives said and why." Petitioner asserts Sneed's testimony on "the videotape *was* entirely different" from what he stated on the stand and that "counsel's failure to play [the tape] for the jury left the impression it was not."

Petitioner asks the court to engage in what the Supreme Court has specifically warned against—using hindsight to second guess his attorney's tactical decisions. Simply because defense counsel's impeachment may have fallen short of perfection does not mean it "'fell below an objective standard of reasonableness.'" *Welch*, 607 F.3d at 702 (quoting *Strickland*, 466 U.S. at 688). Defense counsel questioned Sneed about the many inconsistencies between his 2004 trial testimony and prior statements. Sneed admitted (1) he did not tell (or think he had told) Detectives Bemo and Cook about the hammer/boiler room incident; (2) that he had previously stated that the amount he was to be paid for the murder was $7,000; (3) that he did not tell the detectives during the interview that Glossip had removed a $100 bill from the victim/Van Treese's wallet; (4) that he could not remember if he had told them about the acid, the trash bags or the hacksaw; and (5) that he had denied stabbing Van Treese. Many of the discrepancies between Sneed's statements to the police and his in-court testimony were confirmed by Bemo during his cross-examination, including that Sneed did not tell the police that Glossip had removed a $100 bill from the victim's wallet or mention the boiler room incident. Bemo could not recall if Sneed had informed them about the hacksaw or muriatic acid.

As petitioner asserts, playing the tape might have clarified what Sneed did and did not tell the officers during the initial interview. However, defense counsel clearly made the point that Sneed's story had changed and in ways that made Glossip more culpable. Having reviewed the videotape of Sneed's initial interview with the police, the interview transcript and the trial transcript, the

court concludes defense counsel was not constitutionally ineffective for failing to impeach Sneed by playing the videotape at trial.

Petitioner also contends, though, that the videotape would have "convey[ed] to the jury how clearly and unambiguously the detectives telegraphed to Mr. Sneed that they wanted him to inculpate Mr. Glossip." As mentioned before, the court does not "determine counsel's effectiveness through a rear view mirror." *Welch*, 607 F.3d at 703. "The Supreme Court requires [the court] to make 'every effort . . . to eliminate the distorting effects of hindsight' by indulging in a strong presumption counsel acted reasonably." *Id.* (quoting *Strickland*, 466 U.S. at 689).

Defense counsel's decision not to introduce the video was reasonable trial strategy. Playing the tape would have shown that Bemo told Sneed several times that he knew he did not commit the murder by himself and that others, particularly Glossip, were saying he acted alone. However, it also would have allowed the jury to hear Sneed explain, once again, how Glossip masterminded the murder. Contrary to petitioner's characterization of the interview, the officers' questioning was not sufficiently manipulative to make it evident from viewing the videotape that, but for their suggestions, Sneed would not have implicated Glossip in the murder of Barry Van Treese. Through his cross examinations of Bemo and Sneed, defense counsel was, though, able to elicit testimony that supported Glossip's theory that Bemo influenced Sneed to identify Glossip as his accomplice. Bemo admitted that at the beginning of his interview with Sneed he specifically told him that he "knew that this crime was committed by more than just himself," that he "personally did not think that he was the only one involved in this homicide," and that "Glossip was the one who was laying it on him the heaviest as far as pointing the finger at [him]." Having viewed the videotape and examined the trial transcript, the court concludes petitioner has not shown that defense counsel's handling of the tape and his cross-examinations of Sneed and Bemo "'fell below an objective standard of reasonableness.'" *Welch*, 607 F.3d at 702 (quoting *Strickland*, 466 U.S. at 688).

District Ct. Order at 59-63 (footnotes and citations omitted).

2. Analysis

a. Standard of Review

Although the parties expend a considerable number of pages briefing the appropriate standard of review for this issue, this court's recent decision in *Lott v. Trammell* resolves the question. 705 F.3d 1167, 1211-13 (10th Cir. 2013). *Lott* began by noting that this court, sitting en banc, held in 2009 that "a federal court does not owe deference to the OCCA's rejection of an ineffectiveness claim under the OCCA Rule 3.11 standards." *Id.* at 1211 (quotation and alterations omitted) (discussing *Wilson*, 577 F.3d at 1300). *Lott* concluded, however, that *Wilson* was no longer good law given the OCCA's subsequent decision in *Simpson v. State*, 230 P.3d 888 (Okla. Crim. App. 2010). 705 F.3d at 1212. According to *Lott*,

> In *Simpson*, the OCCA made clear that Rule 3.11 obligates it to "thoroughly review and consider [a defendant's Rule 3.11] application and affidavits along with other attached non-record evidence." 230 P.3d at 905. Thus, even in cases, such as *Wilson*, where the OCCA summarily disposes of a defendant's Rule 3.11 application without discussing the non-record evidence, we can be sure that the OCCA in fact considered the non-record evidence in reaching its decision. Such a conclusion, we note, is entirely consistent with the Supreme Court's repeated admonitions that AEDPA's deferential standards of review "do[] not require that there be an opinion from the state court explaining the state court's reasoning." *Harrington v. Richter*, 131 S. Ct. 770, 784 (2011). The OCCA's decision in *Simpson* also clarifies that the interplay of Rule 3.11's "clear and convincing" evidentiary standard and its "strong possibility of ineffectiveness" substantive standard is "intended to be less demanding than the test imposed by *Strickland*." 230 P.3d at 906. In other words, the OCCA in *Simpson* has now assured us that "when [it] review[s] and den[ies] a request for an evidentiary hearing on a claim of ineffective assistance under the standard set forth in

> Rule 3.11, [it] necessarily make[s] the adjudication that Appellant has not shown defense counsel to be ineffective under the more rigorous federal standard set forth in *Strickland*." *Id.* Consequently, it is plain to us, as a matter of federal law, that any denial of a request for an evidentiary hearing on the issue of ineffective assistance of counsel filed pursuant to OCCA Rule 3.11 . . . operates as an adjudication on the merits of the *Strickland* claim and is therefore entitled to deference under § 2254(d)(1).

705 F.3d at 1213. *Lott* makes clear, then, that even assuming the OCCA resolved Glossip's claim of ineffective assistance pursuant to Rule 3.11, that resolution is nonetheless an "adjudicat[ion] on the merits" subject to the heightened AEDPA standards set out in 28 U.S.C. § 2254(d)(1).

b. Analysis

This court's review of counsel's performance is "highly deferential." *Hooks*, 606 F.3d at 723. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Byrd v. Workman*, 645 F.3d 1159, 1168 (10th Cir. 2011) (quotation omitted). Glossip bears a heavy burden in that he must overcome the presumption his counsel's actions were sound trial strategy. *Id.* Furthermore, because this is a § 2254 proceeding, Glossip faces an even greater challenge. *Id.* ("[W]hen assessing a state prisoner's ineffective-assistance-of-counsel claims on habeas review, we defer to the state court's determination that counsel's performance was not deficient and, further, defer to the attorney's decision in how to best represent a client." (quotation and alteration omitted)).

Because *Strickland* sets out a general standard, "a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). For that reason, our review of Glossip's habeas claim of ineffective assistance is "doubly deferential." *Id.* Glossip does not come close to satisfying this exacting standard. For those reasons set out by the district court in concluding, under a de novo standard, that counsel's performance was not deficient, the OCCA's decision denying Glossip relief is not unreasonable.

In arguing to the contrary, Glossip contends the video of the interview would have revealed the detectives manipulated Sneed into implicating him in the murder. Like the district court, however, this court's review of the trial record reveals counsel was able to effectively cross-examine Detective Bemo by eliciting testimony supporting the theory Bemo influenced Sneed to identify Glossip as his accomplice. Trial counsel asked Bemo on cross-examination about his interview techniques[8] and whether his questions to Sneed were suggestive. Bemo admitted

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[8]In that regard, trial counsel began by eliciting from Detective Bemo testimony that he could be perceived as intimidating:

> Q. . . . You are a pretty good-sized fellow and have kind of a deep voice. You can kind of intimidate some people. Would you agree?
>
> A. I've been told that, yes.

(continued...)

he told Sneed (1) at the beginning of the interview that Glossip was pointing the finger at Sneed and (2) he did not believe Sneed was the only one involved in the homicide.[9] Defense counsel also effectively cross-examined Detective Bemo as

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[8](...continued)
Counsel then proceeded to question Detective Bemo about a technique he used when he thought more than one person might be involved in a homicide:

> Q. The technique—that is a technique, is it not, to—if you think it's more than one person that's involved, that you tell somebody you're interviewing that basically you better speak now because if he tells us something, he's liable to get the deal and you're not going to get the deal; isn't that true?
>
> A. Yes, it is.
>
> Q. And it is an opportunity that many people take to get the deal, and the better deal, if you will, in a case?
>
> A. In some cases, yes.

[9]Counsel elicited the following testimony from Detective Bemo:

> Q. At the beginning of the interview with Justin Sneed, did you tell him that you had some things that you wanted him to listen to before you said anything to him?
>
> A. Yes.
>
> Q. And didn't you tell him specifically that you knew that this crime was committed by more than just himself?
>
> A. Yes.
>
> Q. And you told him that you personally did not think that he was the only one involved in this homicide?
>
> A. That's correct.

(continued...)

to whether these statements were "suggestive in nature" and whether Sneed could have been influenced by them.[10] Glossip nevertheless asserts the video is such

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[9](...continued)

Q. In this interview before—or at least at some point in time before then end of the interview, you told him that Mr. Glossip was under arrest?

A. Yes, I did.

Q. And you also told him that Mr. Glossip was the one who was laying it on him the heaviest as far as pointing the finger at Justin Sneed who committed the homicide?

A. Yes, I did.

[10]Counsel elicited the following testimony from Detective Bemo:

Q. We talked at the very beginning of our questions this afternoon about interrogating, interrogators' techniques and how an interrogator can lead a witness to a—in a particular direction. Was that the intent in your interview of Mr. Sneed in making these comments to him at that time?

A. Was it my intent to lead him?

Q. Yes, sir.

A. No.

Q. Do you agree with me that they are suggestive statements?

A. I don't think they are. They were factual statements.

Q. Factual statements can still be suggestive in nature, can they not?

A. Sure.

(continued...)

powerful evidence of police manipulation of Sneed that the failure to show the video to the jury is indefensible. Having reviewed the video, we conclude, as did the district court, that "the officers' questioning was not sufficiently manipulative to make it evident from viewing the videotape that, but for their suggestions, Sneed would not have implicated Glossip in the murder of Barry Van Treese." District Ct. Order at 62-63. That being the case, trial counsel could have reasonably concluded his cross-examination of Bemo gave the defense all the benefits it would have received with the admission of the video without any of the risks associated with its actual production.

Nor is Glossip correct in asserting it was necessary to admit the video to effectively cross-examine Sneed as to the numerous inconsistencies in his statements regarding the circumstances surrounding the murder. The transcript reveals trial counsel's cross-examination of Sneed effectively conveyed to the jury that Sneed's testimony had conveniently evolved from the time of his first statement to police to Glossip's second trial, seven years later. *See id.* at 61 (cataloging Sneed's admissions as to inconsistencies in his testimony). Trial

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[10](...continued)

Q. And Justin Sneed, having heard your comments, suggesting as they were, do you think he would not have been influenced in his responses to the actual questions you were ask[ing] about the homicide?

A. I don't know. I don't know if he could have been influenced or not.

counsel was able to adduce evidence as to the inconsistencies in Sneed's testimony without adducing a video in which Sneed explained how Glossip masterminded Van Treese's murder.

Given all this, the OCCA's determination that counsel did not perform deficiently by referencing the video in the cross-examination of Sneed and Bemo without adducing the video itself is not wrong, let alone unreasonable. *Harrington*, 131 S. Ct. at 786-87 (holding that as a condition for obtaining federal habeas relief, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement"). Accordingly, Glossip is not entitled to habeas relief on this claim of ineffective assistance.

B. Failure to Object to Misconduct

1. Background

a. OCCA Decision

On direct appeal, Glossip argued his trial counsel was ineffective in failing to object to several instances of prosecutorial misconduct, specifically including those instances of alleged misconduct analyzed above. In resolving this claim, the OCCA simply stated that because Glossip's misconduct claims failed on the merits, this claim of ineffective assistance likewise lacked merit. *Glossip*, 157

P.3d at 154, 158, 161 ("Any misconduct that might have occurred did not affect the outcome of this case, so there can be no ineffective assistance of counsel.").

b. District Court Decision

The district court's resolution of this issue was appropriately terse:

> Having determined the OCCA properly concluded . . . that the alleged prosecutorial misconduct did not deprive petitioner of a fair trial, the court finds the OCCA reasonably applied the *Strickland* standard in determining that trial counsel was not ineffective for failing to object to the claimed misconduct.

District Ct. Order at 67.

2. Analysis

Glossip asserts that because the OCCA unreasonably denied him relief on his claims of prosecutorial misconduct, it likewise unreasonably concluded he was not prejudiced by trial counsel's failure to object to those same instances of misconduct. Given that this court has concluded Glossip is not entitled to habeas relief on his claims of misconduct, it follows he is likewise not entitled to relief on this claim of ineffective assistance of trial counsel.

C. Sneed Competency Evaluation

1. Background

a. OCCA Decision

For the first time in his state court petition for post-conviction relief, Glossip argued that his trial counsel was ineffective in failing to obtain, and cross-examine Sneed with, a 1997 court-ordered psychiatric evaluation. Glossip

argued the evaluation would have shown, in contrast to the prosecution's arguments at trial, that "Sneed was an individual that could think for himself and commit crimes without [] Glossip's guidance." District Ct. Order at 87 (quotation omitted). The OCCA denied relief in an unpublished summary opinion, concluding the claim was "merely an attempt to expand on claims made on direct appeal; therefore the claim is barred." Nevertheless, the OCCA went on to hold that the claim also failed on the merits because "the introduction of the information would not have changed the outcome of this case."

b. District Court Order

> [It is unclear whether the OCCA reviewed the competency evaluation in resolving this claim.] Therefore, the court will review petitioner's claim . . . *de novo* under the *Strickland* standard.
>
> The examiner states in the psychiatric evaluation that Sneed said he had been kicked out of school in the eighth grade for fighting and that he "had a year's probation as a juvenile for burglary of a house and a bomb threat." Petitioner argues . . . this information would have demonstrated that Sneed was not the subservient person portrayed by the State.
>
> Considering the evidence of Sneed's immaturity and dependency on Glossip . . . in conjunction with the minimal information in the psychiatric evaluation relied on by petitioner, the court concludes Glossip has failed to demonstrate a reasonable probability of a different outcome at either stage of the proceeding if trial counsel had presented evidence that, at some time in his youth, Sneed had made a bomb threat and burgled a house. There is no indication whether Sneed committed those offenses by himself or whether he was influenced to participate by someone else. Petitioner has failed to provide any information regarding the crimes except that they occurred at some unspecified time.

> As Glossip has not shown the required prejudice resulting from his counsel's alleged failure to investigate he is not entitled to relief under *Strickland* . . . .

District Ct. Order at 87-89 (citation and footnotes omitted).

2. Analysis

Glossip asserts the district court erred in concluding he was not prejudiced by counsel's failure to utilize Sneed's competency evaluation at trial. In so arguing, Glossip claims the evaluation would have gone far in discrediting the prosecution's trial theory (i.e., that Sneed was easily manipulated by Glossip into murdering Van Treese). Sneed's arguments in this regard are unconvincing.[11] The evidence adduced by the prosecution "presented a compelling case" that Sneed "was totally dependent on Glossip." *Glossip*, 157 P.3d at 152.[12] The

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[11]Although the OCCA's adjudication of this claim is almost certainly entitled to AEDPA deference, this court need not address the question because Glossip cannot prevail even if we review de novo the question whether Glossip has satisfied *Strickland*'s prejudice prong. *Webber v. Scott*, 390 F.3d 1169, 1175 (10th Cir. 2004) ("The question of whether the OCCA reached the merits need not be decided, however, because Webber's claim fails with or without according the state court's decision AEDPA deference.").

[12]This court's independent review confirms the OCCA's characterization of the trial record. The district court summarized the evidence regarding Sneed's immaturity and dependency on Glossip in resolving Glossip's challenge to the evidence supporting his murder conviction:

> Kayla Pursley [testified] that [Sneed] "was very childlike," was dependent on Glossip for food and cigarette money, and "had no one else at all once his parents had [taken his brother back to Texas and] left him there." Cliff Everhart testified that "Justin was Richard's puppet," who did what Glossip told him to do and came to Glossip if

(continued...)

competency examination does precious little to counter that evidence. Although the examination indicates Sneed had a troubled childhood involving serious criminal conduct, there is simply nothing in the report casting doubt on his immaturity or suggestibility.

The competency report is so devoid of factual background that it is impossible to even guess at the circumstances surrounding Sneed's youthful criminal conduct. That being the case, it is just as likely (A) the criminal conduct alluded to in the report is consistent with the overwhelming trial evidence of Sneed's suggestibility, as it is (B) the criminal conduct alluded to in the report is indicative of some heretofore unreported streak of initiative on the part of Sneed. *See* District Ct. Order at 88-89 ("There is no indication whether Sneed committed those offenses by himself or whether he was influenced to participate by someone

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[12](...continued)
he needed something. Sneed testified that, after his brother returned to Texas in late October or November, 1996, he was without friends or family, was dependent on Glossip for food, had no income, and had quit his roofing job, which he had taken to support his daughters, because he "got entangled with a little bit of drugs and stuff like that when I come up here, so I just kind of lost sight of what my goal and my purpose was." Sneed said he quit his roofing job, which paid about $500 a week, because his stepbrother told him "that he had a deal with Richard Glossip that we could work at the motel and still stay at the motel and, you know, it sounded like a good idea when he was first talking about it so we jumped on it, and I just kind of went along with the ride."

District Ct. Order at 9 (citations omitted).

else."). Given the strength of the prosecution's evidence of Sneed's dependence on Glossip, there is no probability, let alone a "reasonable probability," that admission of the relatively benign competency report would have altered the outcome of either stage of Glossip's trial. *Strickland*, 466 U.S. at 694 (holding that to demonstrate a deprivation of the Sixth Amendment right to counsel, a petitioner must show, inter alia, "a reasonable probability that, but for counsel's unprofessional errors, the result of the case would have been different"). Because Glossip cannot show "sufficient prejudice," his ineffective assistance claim "necessarily fails." *Hooks*, 606 F.3d at 724 (quotation omitted).

IV. Murder-For-Remuneration Aggravator

A. Background

At the conclusion of the penalty phase, the jury found Glossip employed Sneed to murder Van Treese "for remuneration or the promise of remuneration." *Glossip*, 157 P.3d at 147; *see also* Okla. Stat. tit. 21, § 701.12(3) (setting out parameters of Oklahoma's murder-for-remuneration aggravating circumstance).[13]

---

[13]To establish the murder-for-remuneration aggravator under Oklahoma law, the prosecution must prove "[t]he person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration." Okla. Stat. tit. 21, § 701.12(3). This aggravating circumstance applies "where a defendant has been hired or has hired another person to perform an act of murder." *Plantz v. State*, 876 P.2d 268, 284 (Okla. Crim. App. 1994). It does not apply where the murder is committed to facilitate a robbery, even when the murder is planned in advance. *See Boutwell v. State*, 659 P.2d 322, 328 (Okla. Crim. App. 1983).

The jury's finding was supported by Sneed's specific testimony at trial that Glossip offered him $10,000 if he would immediately kill Van Treese. *Glossip*, 157 P.3d at 148-49 (summarizing Sneed's trial testimony). On direct appeal, Glossip asserted the murder-for-remuneration aggravator was not supported by sufficient evidence. *Id.* at 161. In particular, Glossip argued Sneed's self-serving testimony was not credible. *Id.* He further asserted the only credible explanation for the events surrounding Van Treese's murder was theft gone awry. *Id.* In rejecting Glossip's assertions, the OCCA concluded as follows:

> Glossip claims there was insufficient evidence to support the sole aggravating circumstance of murder for remuneration. Murder for remuneration, in this case, requires only that Glossip employed Sneed to commit the murder for payment or the promise of payment. 21 O.S.2001, § 701.12.
>
> Here, Glossip claims that Sneed's self-serving testimony was insufficient to support this aggravating circumstance. Glossip claims that the murder was only a method to steal the money from Van Treese's car.
>
> The flaw in Glossip's argument is that no murder needed to occur for Sneed and Glossip to retrieve the money from Van Treese's car. Because Glossip knew there would be money under the seat, a simple burglary of the automobile would have resulted in the fruits of their supposed desire. The fact is that Glossip was not after money, he wanted Van Treese dead and he was willing to pay Sneed to do the dirty work. He knew that Sneed would do it for the mere promise of a large payoff. There was no evidence that Sneed had any independent knowledge of this money.
>
> There is sufficient evidence that Glossip promised to pay Sneed for killing Van Treese.

Glossip, 157 P.3d at 161.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

RICHARD GLOSSIP,	)	
	)	
Petitioner,	)	
vs.	)	NO. CIV-08-0326-HE
	)	
RANDALL WORKMAN,	)	
	)	
Respondent.	)	

ORDER

In 1998 petitioner Richard Glossip was convicted in Oklahoma state court of first degree murder. Glossip was sentenced to death but his conviction was reversed by the Oklahoma Court of Criminal Appeals ("OCCA") based on ineffective assistance of trial counsel.[1] He was retried and was again convicted of first degree murder and sentenced to death.[2] Glossip filed a direct appeal and the OCCA, with two judges dissenting, affirmed his conviction and sentence. After the OCCA denied his petition for rehearing and application for state post-conviction relief, Glossip filed this federal habeas action. In addition to his petition for writ of habeas corpus, petitioner filed a motion requesting an evidentiary hearing.[3]

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[1] *Glossip v. State, 29 P.3d 597 (Okla. Crim. App. 2001) ("Glossip I").*

[2] *The state filed a bill of particulars charging that Glossip should be punished by death due to the existence of two aggravating circumstances: 1) the murder was committed for remuneration or the promise of remuneration and (2) the existence of a probability that the petitioner would commit criminal acts of violence that would constitute a continuing threat to society. The jury found the murder for remuneration aggravator.*

[3] *With certain exceptions noted subsequently, the OCCA resolved on the merits each of the claims petitioner asserts in his habeas petition. This court addressed respondent's assertion that Ground III was unexhausted in its May 26, 2010, Order.*

is no indication whether Sneed committed those offenses by himself or whether he was influenced to participate by someone else. Petitioner has failed to provide any information regarding the crimes except that they occurred at some unspecified time.

As Glossip has not shown the required prejudice resulting from his counsel's alleged failure to investigate he is not entitled to relief under Strickland based on the conduct of his trial counsel. That conclusion precludes petitioner from succeeding on his claim of ineffective assistance of appellate counsel.

Ground XII– Ineffective Assistance of Counsel – Judicial Bias

Petitioner asserts in Ground XII that his trial and appellate counsel were constitutionally deficient for failing to assert at trial and argue on appeal that his due process rights were violated as a result of judicial bias. He claims that because "[a]t one or more times during the trial, Judge Gray expressed emotion, by crying or tearing up," he was "tried in a court that through its expressed emotion was biased." Habeas petition, p. 178.[121]

The OCCA rejected Glossip's claim in an unpublished decision denying his application for post-conviction relief. OCCA Opinion Denying Post-Conviction Relief,

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[121] *As the "first suggestion of the court's bias," habeas petition, p. 178, petitioner cites the trial judge's statement on the record at the bench, just before the defense was to begin its first stage opening argument:*

> *Thanks for your patience with me this morning. I explained to the jury my situation because I didn't want them to think that it was a comment on the evidence. I told them I'd like to proceed this morning and if I find I just can't concentrate on the evidence or that I'm just sitting up here unable to control my emotions, then I'll just be honest with you guys and tell you I've got to go home. Okay?*

Tr. Vol. IV, p. 5.

Glossip v. State, No. PCD-2004-978 (Dec. 6, 2007) (unpublished). In its order, the corrt discussed the Strickland standard and then proceeded to consider petitioner's various allegations of ineffective assistance. The OCCA found petitioner had failed to "show that the trial court's emotional state affected [the] trial by indicating a bias for or against any party." OCCA Opinion, slip op. at 6. It also concluded that "[t]he extra-record documents do not show, by clear and convincing evidence there is a strong possibility that Glossip was prejudiced by the trial court's action." *Id.*

While the OCCA adjudicated the merits of petitioner's ineffective assistance/judicial bias claim, as noted in conjunction with Ground V, the standard of review applied, at least with respect to the non-record evidence, was that found in Oklahoma Appellate Rule 3.11(B)(3)(b), rather than Strickland. Therefore, the court has conducted a *de novo* review of petitioner's claim of counsel error. Strickland requires that Glossip establish "[1] that counsel's performance was constitutionally deficient and [2] that counsel's deficient performance prejudiced the defense, depriving the petitioner of a fair trial with a reliable result." Bland, 459 F.3d at 1030 (quoting Boyd, 179 F.3d at 913).

The trial judge's affidavit is among the documents submitted to the OCCA in conjunction with petitioner's application for post-conviction relief. In it the judge explains that about five minutes before the trial was to commence she was told by a friend that his sister, the judge's "dear friend," had died early that morning.[122] State's response to

[122] *Petitioner did not refer to the trial judge's affidavit in his habeas petition.*

application for post-conviction relief, Exhibit 1. She informed counsel of the situation and told them she was going to explain to the jury what happened and why the trial had been delayed, to which "[t]he attorneys agreed." *Id.* She then stepped into the jury room, which was adjacent to the room in which counsel were sitting, and told the jury that she had just learned of the unexpected death of a close friend and that "any emotion [she] might show was not a commentary on the evidence or anything to do with Mr. Glossip's trial."[123] *Id.* In her affidavit the judge also stated that "Other than that morning, I may have been tear-eyed a couple of times during the testimony. Mr. Van Treese was beloved by his family. It was hard knowing their loss and the violent way he died. However, I did not cry at any time during the trial." *Id.*

Petitioner does not specify whether he is claiming actual bias or the appearance of bias.[124] He also does not identify in his petition when during the trial the judge was emotional[125] or how her actions affected or were perceived by the jury. His vague assertion

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[123]*The judge stated that the attorneys could easily hear what she said to the jury. State's response to application for post-conviction relief, Exhibit 1. Petitioner's assertion that trial counsel was ineffective for not objecting "[u]pon notice of this conversation," habeas petition, p. 179 n.44, lacks merit, as the record reflects that trial counsel agreed to the judge's conversation with the jury and was in a position to hear it.*

[124]*With respect to a claim of the appearance of bias, the Tenth Circuit has held that "because the Supreme Court's case law has not held, not even in dicta, let alone 'clearly established,' that the mere appearance of bias on the part of a state trial judge, without more, violates the Due Process Clause, [a petitioner] cannot establish his entitlement to federal habeas relief under the standards outlined in § 2244(d)(1)." Welch, 451 F.3d at 701 (internal quotation and citation omitted).*

[125]*An attorney with the Oklahoma Indigent Defense System ("OIDS") submitted an affidavit relating her conversations with several jurors. One juror was reported as having stated that "[h]e observed the judge crying during the trial when they got into details. It was not a big cry, maybe*

that "[h]er emotions could have influenced the jury by indicating her opinion as to the merits of the evidence or the credibility of a witness," habeas petition, p. 178, is inadequate to demonstrate that the judge had "'actual bias against the defendant or [an] interest in the outcome of his particular case.'" Welch, 451 F.3d at 699 (quoting Bracy v. Gramley, 520 U.S. 899, 905 (1997)).

Petitioner also appears to have mischaracterized his underlying claim. Rather than judicial bias, he essentially is asserting juror bias based on the trial court's purported comments on the evidence. See Chanthadara, 230 F.3d at 1247. He has not, though, shown that the jury was exposed to the judge's assessment of any aspect of the case. Regardless of how the issue is framed, petitioner's counsel was not ineffective for failing to raise the issue of bias, judicial or juror, at trial or on appeal. Habeas relief is denied on this ground.

Ground XIII– Cumulative Error

In Ground XIII, petitioner asserts that the "cumulative effect of errors denied Mr. Glossip substantial statutory and constitutional rights," habeas petition, p. 181, without specifying the claimed errors. The State contends the OCCA rejected petitioner's cumulative error claim on the merits in Glossip's state postconviction proceeding and its application of federal law was reasonable under AEDPA.[126] However, as the court has assumed the OCCA

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just one tear." Habeas petition, Appendix, Attachment 12. Another juror stated, when interviewed by an investigator with OIDS that "[a]t least one time during the trial," during the second stage, he witnessed the judge crying and saw her blow her nose. Id., Attachment 13.

[126]The State also argues that cumulative error claims are not cognizable on habeas review due to the lack of Supreme Court precedent. However, the Tenth Circuit has repeatedly recognized the cumulative error doctrine. See e.g., Matthews, 577 F.3d at 1195 n.10.

did not adjudicate petitioner's claim based on the posters and has assumed that the trial court's evidentiary ruling resulted in constitutional error, the OCCA's cumulative error review is not accorded AEDPA deference.

If only constitutional errors are considered when conducting a cumulative error analysis, *see e.g.,* Matthews, 577 F.3d at 1195 n.10, there is nothing to aggregate as only one constitutional error was found (the trial court's decision pertaining to the posters). However, if individual trial errors that, alone, have not been found to amount to constitutional violations are aggregated with the constitutional error, *see e.g.*, Malicoat, 426 F.3d at 1261-62, petitioner still is not entitled to habeas relief.

Having considered the record as a whole, the court concludes that the cumulative effect of the prosecutor's various errors – her introduction of victim impact testimony, argument related to the giving of the lesser related offense instruction and remarks that the death penalty was the only appropriate sentence – when combined with the trial court's erroneous evidentiary ruling, is not such "that collectively [the errors] can no longer be determined to be harmless." Welch, 607 F.3d at 7087 (internal quotation omitted). Therefore, petitioner is not entitled to habeas relief on this ground.

Evidentiary Hearing

Petitioner requested an evidentiary hearing with respect to his claim predicated on the State's use of posters (Ground III) and allegations of ineffective assistance of counsel (Grounds V, XI, and XII). Because the claims could be resolved on the basis of the existing record, an evidentiary hearing was unnecessary. *See* Hooks, 606 F.3d at 731. Petitioner's

motion will therefore be denied.

Conclusion

Having rejected petitioner's grounds for relief, his petition for writ of habeas corpus [Doc. # 25] is **DENIED**. His motion for evidentiary hearing [Doc. #42] is also **DENIED**.[127]

IT IS SO ORDERED.

Dated this 28th day of September, 2010.

JOE HEATON
UNITED STATES DISTRICT JUDGE

[127] *By separate order, the court granted respondent's motion to expand the record [Doc. #60].*

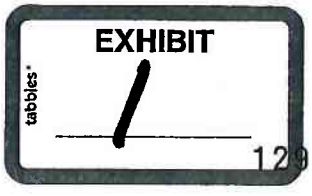
Affidavit of Connie Smothermon

STATE OF OKLAHOMA)

COUNTY OF CELEVELAND)

Affiant, being duly sworn upon oath states as follows:

1. My name is Connie Smothermon. During May and June, 2004, I was an Assistant District Attorney for the Oklahoma County District Attorney's Office.
2. Assistant District Attorney Gary Ackley and I were the prosecutors assigned to the retrial of Richard Glossip.
3. During the course of the trial, attorneys for both the State and the Defendant utilized white sheets of paper from an easel board and magic markers to create demonstrative aids of witness statements.
4. The demonstrative aids used by the State and Defense were on identical pieces of paper and the same marker was used.
5. The jury was able to see all the demonstrative aids of the State and the Defense at the time they were created. At no time, however, were all of the demonstrative aids on display for the jury at the same time. When a poster created during witness testimony was full of writing, it was removed from the easel board. I recall these posters, for the most part, being taped to the edge of the State's counsel table facing the jury. This side of the table did not face the witness stand. Several of these posters ended up being taped over one another because of space limitations on that side of the table. Some of the State's posters may also have been taped to the back side of a large rolling chalk or marker board that was in Judge Gray's courtroom. The writing on these particular posters would not have been visible to anyone in the courtroom but the jury would have seen Mr. Ackley or myself putting them there. I would point out that the defense demonstrative aids were taped to the front of the large rolling chalk or marker board. When not in use, the easel board itself was positioned so the sheets were out of the view of testifying witnesses.
6. The State's demonstrative aids were not visible by any other witnesses other than the witness testifying at the time the demonstrative aid was being made.
7. Some of the demonstrative aids contain notes from more than one witness. That portion of the papers pertaining to other witnesses was covered so that the testifying witness could only see the portion of the paper created during their testimony. The only reason there are two witnesses on one piece of paper is for paper conservation. No witness saw the statements of another witness. All State demonstrative aids were out of sight of the witnesses.



8. At least one of the Defense demonstrative aids, depicting a denial by Sneed that he killed the victim, was visual to other witnesses and to the jury over three days of trial.
9. Only the demonstrative aids identified below as being used in closing were used during that portion of the trial by the State. No other demonstrative aid was visible to the jury during that time.
10. No demonstrative aid was introduced into evidence or sent back to the jury room with the jurors.
11. The State's demonstrative aids were only used at the following times with the following witnesses:

#1 Written at Top: "Richard Glossip (Intent)"

Used only in the State's opening statement and closing argument.

#2 Written at Top: "Going to get fired" with up arrow along the left side

Used only in the State's closing argument.

#3 Written at Top: "Glossip's Statements To: Officer Tim Brown after 7 pm Jan 7" and "I'm not sure when I last saw Barry because I was tired"

Created during the Direct Examination of Tim Brown. Additional notes taken during Officer Brown's testimony are on posters #4 and #5.

#4 Written at Top: "Glossip's Statements To: Tim Brown after body found" and "Glossip and D-Anna thought all along Justin had something to do with Mr. Van Treese being missing but didn't want to say until he was sure"

Written about half way down page: "To Cliff Everhart" and "He had seen Barry on the 6th and he went to Tulsa."

The top portion was created during the direct examination of Officer Tim Brown. Additional notes made during Officer Brown's testimony are on posters #3 and #5

The bottom portion was created during the direct examination of Cliff Everhart. While Mr. Everhart was on the stand, the top portion of the paper was covered so that Mr. Everhart could not see the notes written with Officer Brown. Mr. Everhart could only see the notes written during his testimony.

#5 Two posters taped together

Written at Top of First Poster: "Glossip's Statements To: Officer Tim Brown, Jan 7 4:30 pm" and "Seen Mr. Van Treese 7am that morning walking through parking lot -- normal for him to walk around when there"

Written at Top of Second Poster – "Richard Glossip's Statements To: Mrs. VanTreese"

The two posters were created separately. They were taped together for the purpose of cross-examination of the defendant, which never took place because he did not testify. They have been kept taped together because that is how they last appeared. They were not taped together during witness testimony.

The first poster was created during the direct examination testimony of Officer Tim Brown.

The top of the second poster was created during the direct examination testimony of Donna Van Treese.

The bottom of the second poster, starting with "D-Anna Wood" and "Justin said 2 drunks broke a window & I told him to clean it up" was created during the direct examination testimony of D'Anna Wood. While Ms. Wood was on the stand, the top portion of the paper was covered so that Ms. Wood could not see the notes written with Mrs. Van Treese. Ms. Wood could only see the notes written during her testimony.

#6 Written at Top: "Glossip's Statements To: Jackie Willams" and "When the owner comes – stay in your room"

Written about halfway down page: "To Kayla Pursley" and "There was a fight between 2 drunks and they had thrown a footstool through the window."

The top statements were written during the direct examination of Jackie Williams.

The bottom half of the poster was created during the direct examination of Kayla Pursley. While Ms. Pursley was on the stand, the top portion of the paper was covered so that Ms. Pursley could not see the notes written with Mrs. Williams. Ms. Pursley could only see the notes written during her testimony. Additional notes taken during Ms. Pursley's testimony are recorded on #7.

#7 Written at top: "Glossip's Statements To: Kayla Pursley Jan 7th +/- 8:30 am " and "They needed to get the stuff to fix the window"

Written about two thirds down the page: "To Michael Pursley" and "Knew window had been broken."

The top portion was written during the direct examination of Kayla Pursley. These are in addition to the notes taken on poster #6.

The bottom portion was created during the direct examination of Michael Pursley. While Mr. Pursley was on the stand, the top portion of the paper was covered so the Mr. Pursley could not see the notes written with Ms. Pursley. Mr. Pursley could only see the notes written during his testimony.

#8 Written at the Top: "Glossip's Statements To: John Beavers 7th 9-10 am" and "Barry rented the room & it was his problem"

Written about a third of the way down the page: "To Billye Hooper" and "Expressed pleasure Barry was finally off property"

The top statements were written during the direct examination of John Beavers.

The bottom two-thirds of the poster was created during the direct examination of Bylle Hooper. While Ms. Hooper was on the stand, the top portion of the paper was covered so the Ms. Hooper could not see the notes written with Mr. Beavers. Ms. Hooper could only see the notes

written during her testimony. Additional notes taken during Ms. Hooper's testimony are recorded on poster #9.

#9 Written at Top: "Glossip's Statements "To: Billye Hooper Jan 7th +/- 8:45 am" and "Barry left about an hour ago to go get breakfast and some materials to start on room"

Written during the direct testimony of Billye Hooper. Additional notes taken during Ms. Hooper's testimony are on poster #8.

#10 Written at the Top: "Glossip's Statements To William Bender Jan 8th between 8:00 a.m. + 10:30 a.m." and "Police had questioned him all night = they thought he had done it"

Created during the direct examination of William Bender.

#11 Written at Top: "Richard Glossip's Statements to Justin Sneed"

Created during the direct examination of Justin Sneed.

Further not sayeth affiant.

Connie Smothermon

Connie Smothermon

Signed and sworn in my presence.

Bobbie Foster

Notary Public

BOBBIE FOSTER NOTARY PUBLIC IN AND FOR STATE OF OKLAHOMA #07008673 • September 6, 2011

Commission expires: SEP. 06. 2011

AUG. 24. 2010

Date

October 9, 2014

Dear Pardon and Parole Board:

Hopefully the following will still be able to be inserted into the packet for the upcoming clemency hearing for Richard Glossip on Oct. 24th. So sorry for the delay. I am Kenneth's wife, Linda.

Victims of crimes are often the forgotten survivors. The loss is something that is truly had to quantify. There are, and will always be the 'what ifs'. Every holiday, birthday, special occasion, life accomplishment, marriage, and birth is a reminder that Barry wasn't able to be with us as we marked these life events.

Barry was a unique individual and contributed so much to all who knew him. A testament to the kind of man he was is the fact that all of his seven children have accomplished much in his absence. Much of the credit for their success must also be given to his wife, Donna VanTreese, because she has had to shoulder the responsibility for their well being without help from Barry. Barry would be very proud of all his children and grandchildren that he was never able to meet and love.

I loved Barry as a brother. He was fun to be around, always had a positive attitude and I don't remember ever seeing him loose his temper or say anything bad about anyone. We had many fun times together and I treasure the memories. When Barry worked at Brookside Bank in Tulsa, I would often load our daughter, Stacie into the child seat on the back of my bike and we would ride a couple miles to the bank so she could see her Uncle Beemy. She still talks about that. He always greeted us with a big smile and his infectious laugh. I still miss his sense of humor.

I also know that when Barry was murdered, it changed my husband Ken's life in a profound way. He enjoyed and loved his brother so much and looked to him for advice and counseling when it came to business matters. They had a very loving relationship and I know he misses him everyday and would give anything if he could still see him walk through the door and they could sit down and get caught up on what's been going on and share some laughs together. That's the other thing about Barry, he laughed A LOT. He was a happy guy.

Long story short, it's been almost 18 years since we lost Barry through a cruel and heinous act and it's no easier today than it was then. In many ways it's worse because the loss is so profound and senseless. I hate to think about how Barry must have suffered as he lay bleeding to death and wondering 'why'? That is the question that remains unanswered all these years later. It hurts to know that all those he left behind will always have a piece of their hearts missing.

Losing a loved one is never easy. It's even harder when that loved one is murdered and his life is cut short, not by illness or accident, but by a willful evil act of another individual. I often have thought about how I will feel when Richard Glossip finally answers for his crime. I won't feel happy about it, but I will feel that justice was done for Barry, and we, as a family stayed the course for him with love and in remembrance.

Linda VanTreese