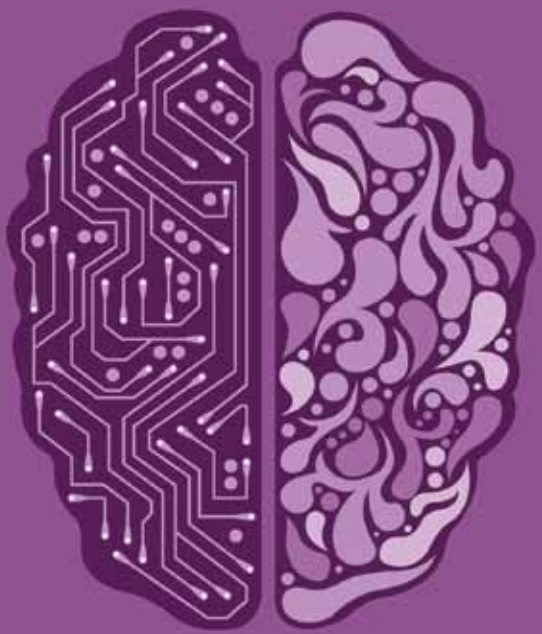
THE OKLAHOMA BAR
Journal
Volume 89 — No. 6 — 2/24/2018

Court Issue

HALF-DAY PROGRAM



INTERRUPT YOUR UNCONSCIOUS BIASES AND MAKE BETTER DECISIONS

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3/3

Oklahoma Bar Center - Live Webcast Available

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PROGRAM PRESENTER:

Kathleen B. Nalty, Esq., President, Kathleen Nalty Consulting, LLC

Kathleen Nalty is an expert in helping organizations develop inclusion strategies to eliminate hidden barriers to success for employees in underrepresented groups. She is an engaging speaker and trainer with a deep passion for assisting individuals and organizations in making changes needed to retain and advance female and diverse talent. While she consults in all industries and sectors, Kathleen has developed a particular expertise in the legal industry, having spoken nationally on behalf of the Center for Legal Inclusiveness and the Minority Corporate Counsel Association. She provides in-depth training sessions on diversity and inclusion as well as unconscious bias.

Despite our best intentions, research shows we all have it – unconscious, unintentional bias. Unconscious attitudes and beliefs are shaped by all kinds of influences – some of which we would not agree with or accept on a conscious level. Yet, these unconscious thoughts influence decision-making and can have a profound impact in the workplace and practice of law – on retention; productivity; relationships with colleagues, clients, judges, witnesses and jurors; as well as people's careers. The key is to learn how to recognize your own unconscious biases as well as practical ways to interrupt them.

Attendees will create their own personal action plans after learning: How unconscious biases are formed; The ways that implicit cognitive biases can show up in the legal workplace; How to recognize and interrupt your own biases; How to successfully navigate any hidden barriers caused by unintentional bias, and How organizations can institute systemic changes to interrupt bias and foster a more inclusive environment that will allow diversity to thrive.

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THE OKLAHOMA BAR
Journal

Volume 89 – No. 6 – 2/24/2018

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Oklahoma Bar Association

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2018 OK 2

Establishment of Uniform Mileage Reimbursement Rate for Expenses Paid from the Court Fund

SCAD-2018-6. January 16, 2018

ORDER

By reason of the inconsistency in mileage reimbursement rates between the State Travel Reimbursement Act, Title 74 O.S. § 500.4 and the rate of reimbursement for state employees, Title 74 O.S. § 85.45l, for expenses paid from the court fund, the Court directs that uniform rate should be established for the purpose of consistency to assist the accounting and budgeting process in the district courts.

Pursuant to this order all mileage which is reimbursed by the court fund, including, but not limited to jurors, interpreters and witnesses, shall be computed at the standard mileage rate prescribed by the State Travel Reimbursement Act, Title 74 O.S. § 500.4.

The 2018 mileage rate prescribed in the State Travel Reimbursement Act is 54.5 cents per mile.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 16th day of January, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

CONCUR: COMBS, C.J., GURICH, V.C.J., KAUGER, WINCHESTER, EDMONDSON,

COLBERT, REIF, and WYRICK, JJ.

2018 OK 3

In re: Amendments to the Code of Judicial Conduct, 5 O.S. 2011, ch. 1, app. 4.

SCAD-2018-7. January 16, 2018

ORDER

Rule 4.6 of the Code of Judicial Conduct, 5 O.S. 2011, ch. 1, app. 4, is hereby amended as shown with markup on the attached Exhibit "A." A clean copy of the new rule is attached as Exhibit "B." The amended rule is effective immediately.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 16th day of January, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

CONCUR: COMBS, C.J., GURICH, V.C.J., KAUGER, WINCHESTER, EDMONDSON,

COLBERT, REIF, and WYRICK, JJ.

Exhibit "A"

Code of Judicial Conduct

Chapter 1, App. 4

Rule 4.6 STATEMENT OF CANDIDATE FOR JUDICIAL OFFICE

RULE 4.6

STATEMENT OF CANDIDATE FOR JUDICIAL OFFICE

(A) In all judicial elections within ten (10) days after formally announcing and/or qualifying for election or reelection (whichever is earlier) to any judicial office in the State of Oklahoma, all candidates, including incumbent judges, shall forward written notice of such candidacy, together with the candidate's correct mailing address, current telephone number, e-mail address, facsimile (telefax) number and actual physical address to the Administrative Director of the Courts.

(B) Upon receipt of the notice, the Administrative Director shall by Certified Mail, Return Receipt Requested, or by electronic mail, read receipt requested, cause to be distributed to each candidate who has filed a notice copies of the following:

(1) The Code of Judicial Conduct

(2) Summaries of all previous Formal Advisory Opinions, if any, issued by the Judicial Ethics Panel which relate in any way to campaign conduct and practices.

(3) The Acknowledgment Form

(C) The Acknowledgment Form shall be executed and returned by regular mail by the candidate to the Administrative Director of the Courts within ten (10) days of its delivery to the candidate as shown by the Certified Mail Receipt or by the electronic mail, read receipt.

(D) The Acknowledgment Form shall certify that the candidate has received, has read, and understands the requirements of the Oklahoma Code of Judicial Conduct and agrees to comply with and be bound by the Code during the course of his/her campaign for the judicial office. The Acknowledgment Form shall be in substantially the following form:

STATEMENT OF CANDIDATE FOR JUDICIAL OFFICE

I, _____, a candidate for judicial office in the State of Oklahoma, have received, have read, understand and agree to comply with the Oklahoma Code of Judicial Conduct during the course of my campaign for judicial office. I specifically understand that if I were to violate the terms of the Code I would be subject to ~~dicipline~~discipline under the Code or under the Rules of Professional Conduct for lawyers.

_____

Date

_____

Signature of Candidate

(E) The failure of a candidate to file the notice as required in Rule 4.6(A) or to file the Acknowledgment Form as required in Rule 4.6(C) shall constitute a Per Se Violation of Canon 4 of the Oklahoma Code of Judicial Conduct and will be a basis for discipline under the Code.

(F) Upon request, the documents executed by a candidate for judicial election in accordance with this Rule shall be made available to the Oklahoma Supreme Court, The General Counsel of the Oklahoma Bar Association, The Professional Responsibility Panel on Judicial Elections and the Council on Judicial Complaints.

Exhibit "B"

Code of Judicial Conduct

Chapter 1, App. 4

Rule 4.6 STATEMENT OF CANDIDATE FOR JUDICIAL OFFICE

RULE 4.6

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_____

Date

_____

Signature of Candidate

(E) The failure of a candidate to file the notice as required in Rule 4.6(A) or to file the Acknowledgment Form as required in Rule 4.6(C) shall constitute a Per Se Violation of Canon 4 of the Oklahoma Code of Judicial Conduct and will be a basis for discipline under the Code.

(F) Upon request, the documents executed by a candidate for judicial election in accordance with this Rule shall be made available to the Oklahoma Supreme Court, The General Counsel of the Oklahoma Bar Association, The Professional Responsibility Panel on Judicial Elections and the Council on Judicial Complaints.

2018 OK 4

In re: Amendments to the Rules for Management of the Oklahoma Court Information System, 20 O.S. 2011, ch. 18, app. 2.

SCAD-2018-8. January 16, 2018

ORDER

Rule 3 of the Rules for Management of the Oklahoma Court Information System, 20 O.S. 2011, ch. 18, app. 2, is hereby amended as shown with markup on the attached Exhibit "A." A clean copy of the new rule is attached as Exhibit "B." The amended rule is effective immediately.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 16th day of January, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

CONCUR: COMBS, C.J., GURICH, V.C.J., KAUGER, WINCHESTER, EDMONDSON,

COLBERT, REIF, and WYRICK, JJ.

Exhibit "A"

District Courts shall pay the Oklahoma Court Information System the installation, operation, maintenance, repair, and access costs for its services. The funds shall be paid from the court fund of the District Court or from the District Court Clerk Revolving Fund to the Administrative Director of the Courts, and those funds shall be deposited in the Oklahoma Court Information System Revolving Fund. 20 O.S.Supp. 1994 § 1316.

In addition to payment for necessary equipment and its installation the District Courts shall be charged fees for: 1. Access to a telecommunications network known as OneNet; 2. Access to the Wide Area Network provided by O.C.I.S.; and 3. Case-tracking services. The amount of the fees shall be reasonable and set by the Administrative Director of the Courts upon approval by the Chief Justice of the Supreme Court. 20 O.S.Supp.1994 § 1315. The Administrative Director of the Courts shall issue a monthly statement to each District Court receiving services from the Oklahoma Court Information System. Id.

Access to O.C.I.S. or any of its services by county law libraries in counties having a population of less than three hundred thousand (300,000) shall be in accordance with the Rules for Management of County Law Libraries, 20 O.S.Supp.1998 Ch. 17, App. Access to O.C.I.S. or any of its services provided by O.C.I.S. to a county law library in a county having a population of three hundred thousand (300,000) or greater shall be pursuant to an agreement approved by the Chief Justice. The Administrative Director of the Courts shall establish reasonable fees for providing access to O.C.I.S. or any of its services to county law libraries in counties having a population of 300,000 or greater, and such fees shall be subject to the approval of the Chief Justice.

Exhibit "B"

District Courts shall pay the Oklahoma Court Information System the installation, operation, maintenance, repair, and access costs for its services. The funds shall be paid from the court fund of the District Court or from the District Court Clerk Revolving Fund to the Administrative Director of the Courts, and those funds shall be deposited in the Oklahoma Court Information System Revolving Fund. 20 O.S.Supp. 1994 § 1316.

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2018 OK 10

IN RE: AMENDMENTS TO THE OKLAHOMA UNIFORM JURY INSTRUCTIONS FOR JUVENILE CASES

S.C.A.D. No. 2018-11. January 30, 2018

ORDER ADOPTING REVISED OKLAHOMA UNIFORM JURY INSTRUCTIONS AND VERDICT FORMS FOR JUVENILE CASES

¶1 The Court has reviewed the recommendations of the Oklahoma Supreme Court Committee for Uniform Jury Instructions for Juvenile Cases to adopt proposed amendments to existing jury instructions and to add a new jury instruction codified as Instruction No. 3.19A. The Court finds that the revisions to the OUJI-JUV Instructions, Statutory Authority, Committee Comments, and Notes on Use should be adopted.

¶2 It is therefore ordered, adjudged and decreed that the instructions shall be available for access via the Internet from the Court website at www.oscn.net and provided to West Publishing Company for publication. The Administrative Office of the Courts should notify the Judges of the District Courts of the State of Oklahoma regarding our adoption of the instructions set forth herein. Further, the District Courts of the State of Oklahoma are directed to implement these instructions effective January 30, 2018.

¶3 It is therefore ordered, adjudged, and decreed that the proposed amendments to OUJI-JUV Nos. 2.7, 2.7A, 3.4, 3.6, 3.11, 3.13, 3.14, 3.19 and 3.23, their Statutory Authority, Committee Comments, and Notes on Use, and the new proposed Instruction, OUJI-JUV No. 3.19A, its Statutory Authority, and Notes on Use, as set out and attached to this Order, are hereby adopted. The Court authorizes the attached OUJI-JUV instructions to be published.

¶4 The Court declines to relinquish its constitutional and statutory authority to review the legal correctness of these authorized instructions or verdict forms when it is called upon to afford corrective relief.

¶5 The amended OUJI-JUV instructions shall be effective January 30, 2018.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THE 29th DAY OF JANUARY, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

Combs, C.J., Gurich, V.C.J., Kauger, Edmondson, Colbert, Reif, and Wyrick, JJ., concur.

Winchester, J., not voting.

Juvenile Instruction No. 2.7

Instructions for Verdict Forms

[**Use for cases where only one ground for termination is alleged.**] If you find that the State has proved by clear and convincing evidence that the parental rights of the parent, [**NAME**], to the child, [**NAME**], should be terminated on the statutory ground that [**Set forth ground for termination** – *E.g.*, the rights of the parent to another child have been terminated, and the conditions that led to the prior termination of parental rights have not been corrected], you should sign and return the verdict form entitled Terminate Parental Rights for that parent and that child. Otherwise, you should sign and return the verdict form entitled Do Not Terminate Parental Rights for that parent and that child.

OR

[**Use for cases where multiple grounds for termination are alleged**.] If you find that the State has proved by clear and convincing evidence that the parental rights of the parent, [**NAME**], to the child, [**NAME**], should be terminated on one or more statutory grounds,

you should sign and return the verdict form entitled Terminate Parental Rights for every such statutory ground for that parent and that child. It is not necessary that the same five people sign each verdict form. If you find that the State has not proved by clear and convincing evidence that the parental rights of the parent, [**NAME**], to the child, [**NAME**], should be terminated on any statutory ground, you should sign and return the verdict form entitled Do Not Terminate Parental Rights for that parent and that child.

Notify the Bailiff when you have arrived at a verdict so that you may return it in open court.

Notes on Use

If the petition or motion for termination of parental rights was filed by the child's attorney, rather than the district attorney, under 10A O.S.Supp.2014 § 1-4-901(A), this Instruction should be modified accordingly. If any of the alleged grounds for termination is the failure of the parent to correct a condition that led to the deprived adjudication of the child, Juvenile Instruction No. 2.7A should be used instead of or in addition to this Instruction, along with the verdict form in Juvenile Instruction No. 2.8A.

Committee Comments

Okla. Const. art. VII, § 15 provides that "no law . . . shall require the court to direct the jury to make findings of particular questions of fact." The Oklahoma Supreme Court addressed the application of Okla. Const. art. VII, § 15 to Oklahoma's comparative negligence statutes in *Smith v. Gizzi*, 1977 OK 91, 564 P.2d 1009. The Supreme Court held that the comparative negligence statutes did not violate art. VII, § 15, because they did not require a special verdict. The Supreme Court reasoned that under a general verdict, the jury must know the effect of its answers to special findings, and that if the jury did not know the effect of its answers, the verdict would be a special verdict that would violate Okla. Const. art. VII, § 15. 1977 OK 91, ¶¶ 11-12, 564 P.2d 1009, 1012-13. Under *Smith v. Gizzi*, a verdict that specified the grounds for termination of parental rights, would be constitutional as long as the jury knew the effect of its answers to special findings regarding the specific grounds for termination. A number of Oklahoma Court of Civil Appeals cases have decided that it is necessary for the trial judge to specify the grounds for termination of parental rights in the journal entry of judgment in order to facilitate appellate review. *See In re C.T.*, 2003 OK CIV APP 107, ¶ 6, 82 P.3d 123, 125; *Bales v. State ex rel. Dep't of Human Services*, 1999 OK CIV APP 96, ¶ 8, 990 P.2d 309, 311. *See also Matter of S.B.C.*, 2002 OK 83, ¶ 7, 64 P.3d 1080, 1083 (appellate court must find clear and convincing proof of grounds for termination of parental rights to affirm). Having the jury specify in its verdict the grounds it finds for termination of parental rights will facilitate the trial judge's preparation of the journal entry of judgment.

~~There is also a line of Oklahoma Court of Civil Appeals cases that have decided that when termination is ordered under 10 O.S. Supp. 2014, § 1-4-904(5) on the ground of failure to correct a condition that led to the deprived adjudication of the child the jury instruction and verdict forms must specify each condition that the parent failed to correct. *See In re B.W.*, 2012 OK CIV APP 104, ¶ 37, 293 P.3d 986, 996; *In re T.J.*, 2012 OK CIV APP 86, ¶ 48, 286 P.3d 659, 72; *In re R.A.*, 2012 OK CIV APP 65, ¶ 17, 280 P.3d 366, 372. *See also In re A.F.K.*, 2014 OK CIV APP 6, ¶ 7 & n.5, 317 P.3d 221, 225 (commending trial court for providing verdict forms that included lines for checkmarks for the jury to identify each condition that the parent failed to correct); *In re J.K.T.*, 2013 OK CIV APP 70, ¶ 4 & n.3, 308 P.3d 183, 185 (affirming termination order where verdict form included lines for checkmarks that the jury used to identify each condition that the parent failed to correct). *But see In re L.S.*, 2013 OK CIV APP 21, ¶ 10, 298 P.3d 544, 547 (affirming termination order neither the verdict nor order listed the conditions that the parent failed to correct but the jury instructions listed the conditions). The Committee recommends that in cases where termination is sought on the ground of failure of the parent to correct conditions, the trial court should provide verdict forms that include lines for checkmarks for the jury to use to identify each condition that the parent failed to correct.~~

Juvenile Instruction No. 2.7A

Instructions for Verdict Forms for Failure to Correct Conditions

If you find that the State has proved by clear and convincing evidence that the parental rights of the parent to the child should be terminated on the statutory ground that the parent has failed to correct one or more conditions that led to the finding that the child was deprived after the parent had been given at least three (3) months to correct the conditions, you must indicate this finding by putting a check mark on the line next to each uncorrected condition on the verdict form entitled Terminate Parental Rights for that parent and that child given to you, and then sign and return the verdict form. Otherwise, you should sign and return the verdict form entitled Do Not Terminate Parental Rights for that parent and that child.

Notify the Bailiff when you have arrived at a verdict so that you may return it in open court.

Notes on Use

This Instruction should be used if any of the alleged grounds for termination is the failure of the parent to correct a condition that led to the deprived adjudication of the child. The trial judge should prepare a verdict form that identifies one or more conditions that the parent is alleged to have failed to correct and directs the jury to check the applicable condition or conditions that the parent failed to correct. An example of such a verdict form for failure to correct one or more conditions is found at Juvenile Instruction No. 2.8A, *infra*.

Committee Comments

~~See Committee Comments to Juvenile Instruction No. 2.7, *supra*~~. The Oklahoma Supreme Court held in *In re T.T.S.*, 2015 OK 36, 373 P.3d 1022, that the jury instructions, verdict forms, and the final journal entry of judgment in termination actions for failure to correct conditions which led to the deprived adjudication of a child must "identify, ***with particularity,*** those conditions which a parent failed to correct." *Id*. ¶ 20, 373 P.3d at 1030 (emphasis in original). Prior to the *T.T.S*. case, there had been a split of authority among the different divisions of the Oklahoma Court of Civil of Appeals over whether it was necessary to specify the conditions that a parent failed to correct. Id. ¶ 13, 373 P.3d at 1027 ("This issue has been resolved inconsistently by several panels of COCA.").

Juvenile Instruction No. 3.4

Failure to Correct Conditions

The State seeks to terminate the parent's rights on the basis of failure to correct the **condition/conditions** that led to the finding that a child is deprived. The State alleges that the following **condition/conditions has/have** not been corrected:

a. [Specify condition, e.g., exposure to substance abuse];

b. [Specify condition, e.g., exposure to domestic violence]; and

c. [Specify condition, e.g., failure to provide a safe and stable home].

In order to terminate parental rights on this basis, the State must prove by clear and convincing evidence each of the following elements:

1. The child has been adjudicated to be deprived;
2. The parent has failed to correct the **condition/conditions** that caused the child to be deprived;
3. The parent has had at least three months to correct the **condition/conditions**; and,
4. Termination of parental rights is in the best interests of the child.

Statutory Authority: 10A O.S.Supp. ~~2010~~2016 § 1-4-904(B)(5).

Notes on Use

The trial judge should give Juvenile Instruction No. 3.5, *infra,* along with this Instruction.

Committee Comments

The Oklahoma Supreme Court held in *In re T.T.S.*, 2015 OK 36, 373 P.3d 1022, that the jury instructions, verdict forms, and the final journal entry of judgment in termination actions for failure to correct conditions which led to the deprived adjudication of a child must "identify, ***with particularity,*** those conditions which a parent failed to correct." *Id*. ¶ 20, 373 P.3d at 1030 (emphasis in original). Prior to the *T.T.S*. case, there

had been a split of authority among the different divisions of the Oklahoma Court of Civil of Appeals over whether it was necessary to specify the conditions that a parent failed to correct. *Id*. ¶ 13, 373 P.3d at 1027 ("This issue has been resolved inconsistently by several panels of COCA.").

Juvenile Instruction No. 3.6

Previous Termination of Rights to Another Child

The State seeks to terminate the parent's rights on the basis that a child has been born to a parent whose parental rights to another child have already been terminated before. In order to terminate parental rights on this basis, the State must prove by clear and convincing evidence each of the following elements:

1. The child has been adjudicated to be deprived;
2. The parent's parental rights to another child have been terminated before;
3. The conditions which led to the prior termination of parental rights have not been corrected; and,
4. Termination of parental rights is in the best interests of the child.

The State alleges that the following **condition/conditions has/have** not been corrected:

a. [Specify condition, e.g., exposure to substance abuse];

b. [Specify condition, e.g., exposure to domestic violence]; and

c. [Specify condition, e.g., failure to provide a safe and stable home].

Statutory Authority: 10A O.S.2011 § 1-4-904(B)(6).

Notes on Use

The trial judge should modify the jury instruction in Juvenile Instruction No. 2.7A, *supra*, and the verdict form in Juvenile Instruction No. 2.8A, *supra*, to refer to the basis that a child has been born to a parent whose parental rights to another child have already been terminated before, instead of a failure to correct conditions, and give the modified versions of Juvenile Instruction Nos. 2.7A and 2.8A along with this Instruction.

Juvenile Instruction No. 3.11

Definition of Heinous and Shocking Abuse

"Heinous and shocking abuse" includes, but is not limited to, aggravated physical abuse that results in serious bodily, mental, or emotional injury. "Serious bodily injury" means injury that involves:

a. a substantial risk of death,

b. extreme physical pain,

c. protracted disfigurement,

d. a loss or impairment of the function of a body member, organ, or mental faculty,

e. an injury to an internal or external organ or the body,

f. a bone fracture,

g. sexual abuse or sexual exploitation,

h. chronic abuse including, but not limited to, physical, emotional, or sexual abuse, or sexual exploitation which is repeated or continuing,

i. torture that includes, but is not limited to, inflicting, participating in or assisting in inflicting intense physical or emotional pain upon a child repeatedly over a period of time for the purpose of coercing or terrorizing a child or for the purpose of satisfying the craven, cruel, or prurient desires of the perpetrator or another person, or

j. any other similar aggravated circumstance.

Statutory Authority: 10A O.S.Supp.~~2010~~2016 § 1-1-105(~~31~~33).

Juvenile Instruction No. 3.13

Definition of Neglect

"Neglect" means:

a. the failure or omission to provide any of the following:

(1) adequate nurturance and affection, food, clothing, shelter, sanitation, hygiene, or appropriate education,

(2) medical, dental, or behavioral health care,

(3) supervision or appropriate caretakers, or

(4) special care made necessary by the physical or mental condition of the child,

b. the failure or omission to protect a child from exposure to any of the following:

(1) the use, possession, sale, or manufacture of illegal drugs,

(2) illegal activities, or

(3) sexual acts or materials that are not age-appropriate, or

c. abandonment.

Neglect does not include the parent's selecting and depending upon spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination, for the treatment or cure of disease or remedial care of a child.

Statutory Authority: 10A O.S.Supp.~~2010~~2016 § 1-1-105(~~46~~47).

Juvenile Instruction No. 3.14

Definition of Heinous and Shocking Neglect

"Heinous and shocking neglect" includes, but is not limited to:

a. chronic neglect that includes, but is not limited to, a persistent pattern of family functioning in which the caregiver has not met or sustained the basic needs of a child which results in harm to the child,

b. neglect that has resulted in a diagnosis of the child as a failure to thrive,

c. an act or failure to act by a parent that results in the death or near death of a child or sibling, serious physical or emotional harm, sexual abuse, sexual exploitation, or presents an imminent risk of serious harm to a child, or

d. any other similar aggravating circumstance.

"Sexual abuse" includes, but is not limited to, rape, incest and lewd or indecent acts or proposals made to a child, as defined by law.

"Sexual exploitation" includes but is not limited to, allowing, permitting, or encouraging a child to engage in prostitution, as defined by law, by a person responsible for the health, safety, or welfare of a child, or allowing, permitting, encouraging, or engaging in the lewd, obscene, or pornographic, as defined by law, photographing, filming, or depicting of a child in those acts.

Statutory Authority: 10A O.S.Supp.~~2010~~2016 § 1-1-105(2)(b)-(c), (~~3~~234).

Juvenile Instruction No. 3.19

Abuse Subsequent to Previous Abuse or Neglect

The State seeks to terminate the parent's rights on the basis of abuse subsequent to previous **abuse/neglect** of the child or a sibling of the child. In order to terminate parental rights on the basis of abuse subsequent to previous **abuse/neglect**, the State must prove by clear and convincing evidence each of the following elements:

1. The child has been adjudicated to be deprived;

2. The parent has previously **abused/neglected** the child or a sibling of the child or failed to protect the child or a sibling of the child from **abuse/neglect** that the parent knew or reasonably should have known of;

3. After the previous **abuse/neglect**, the parent has abused the child or a sibling of the child or failed to protect the child or a sibling of the child from abuse that the parent knew or reasonably should have known of; and,

4. Termination of parental rights is in the best interests of the child.

Statutory Authority: 10A O.S.Supp.~~2010~~2016 §§ 1-4-904(B)(10)~~, 1-1-105(2), 1-1-105(46)~~.

Notes on Use

The trial court should select the appropriate definitions or parts of the definitions that are supported by the evidence.

Juvenile Instruction No. 3.19A

Definition of Failure to Protect

Failure to protect a child from abuse or neglect means the failure to take reasonable action to remedy or prevent child abuse or neglect.

Failure to protect a child from abuse or neglect includes the conduct of a non-abusing **parent/guardian** who:

1. Knew the identity of the **abuser/(person who neglected the child)** but **(lied about)/concealed/(failed to report)** the child **abuse/neglect**; or
2. Otherwise failed to take reasonable action to end the **abuse/neglect**.

Statutory Authority: 10A O.S.Supp.2016 § 1-1-105(25).

Notes on Use

The trial judge should give this Instruction along with Juvenile Instruction Nos. 3.11 and 3.14 through 3.19, when the State seeks to terminate the parent's rights on the basis of the parent's failure to protect the child from heinous and shocking abuse or neglect.

Juvenile Instruction No. 3.23

Conditions from Previous Deprived Adjudication Have Occurred Again

The State seeks to terminate the parent's rights on the basis that the **condition/conditions** that led to a previous deprived adjudication of **(the child)/(a sibling of the child) has/have** occurred again. In order to terminate parental rights on this basis, the State must prove by clear and convincing evidence each of the following elements:

1. The child has been adjudicated to be deprived in this case;
2. There has been a previous deprived adjudication of **(the child)/(a sibling of the child)**;
3. The **condition/conditions** that led to the deprived adjudication in this case **was/were** the subject of the previous deprived adjudication, and the parent was given an opportunity to correct the **condition/conditions** in the previous case; and,
4. Termination of parental rights is in the best interests of the child.

The State alleges that the following **condition/conditions has/have** not been corrected:

a. [Specify condition, e.g., exposure to substance abuse];

b. [Specify condition, e.g., exposure to domestic violence]; and

c. [Specify condition, e.g., failure to provide a safe and stable home].

Statutory Authority: 10A O.S.Supp.2016 § 1-4-904(B)(14).

Notes on Use

The trial judge should modify the jury instruction in Juvenile Instruction No. 2.7A, *supra*, and the verdict form in Juvenile Instruction No. 2.8A, *supra*, to refer to the basis that the conditions which led to a previous deprived adjudication of the child have occurred again, instead of a failure to correct conditions, and give the modified versions of Juvenile Instruction Nos. 2.7A and 2.8A along with this Instruction.

2018 OK 14

AMERICAN HONDA MOTOR COMPANY INC., a foreign corporation, Petitioner, v. THE HONORABLE NORMAN THYGESEN, Respondent.

No. 116,394. February 13, 2018

APPLICATION TO ASSUME ORIGINAL JURISDICTION AND PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

¶0 Petitioner is an automobile manufacturer and is the defendant in a manufacturer's-product-liability action in which the Respondent is the presiding judge. Respondent sanctioned Petitioner for its inability to supply the plaintiff

in the underlying action with certain electronic data that pertained to the design process of the vehicle at issue, data that Petitioner asserts was lost pursuant to its data-retention policy. Petitioner now seeks the intervention of this Court, claiming that the Respondent's sanction order was not authorized by law. We hold that under the circumstances, 12 O.S.2011 § 3237(G) prohibits the trial court from entering sanctions against Petitioner.

ORIGINAL JURISDICTION ASSUMED; WRIT OF PROHIBITION GRANTED

Bart Jay Robey and Eric A. Moen, Chubbuck, Duncan & Robey, P.C., Oklahoma City, Oklahoma, for Petitioner.

James G. Wilcoxen, Wilcoxen & Wilcoxen, and Jeff Potts, Jeff Potts Law Office, Muskogee, Oklahoma, for Real Party in Interest, Harold G. Hayward, Jr.

Wyrick, J.:

¶1 The district court in this case sanctioned Honda Motor Company for "destroying evidence." The evidence – a computer program that Honda uses when designing new models of its vehicles[1] – had been deleted pursuant to a routine document-retention policy some 12 years prior to the accident that sparked this litigation.[2] The Plaintiff in the case wants the computer program so that his expert can use it to attempt to demonstrate that Honda could have designed a safer car. The computer program is expensive – between two and three million dollars according to Plaintiff – so he understandably wanted to get it from Honda rather than pay to recreate it. As punishment for Honda's inability to produce the program, the district court issued an order directing that an "adverse inference" jury instruction be given at trial, i.e., an instruction telling the jury that it can infer that the computer program would be adverse to Honda's defense. This was a clear abuse of the trial court's discretion to issue such sanctions.[3] We accordingly assume original jurisdiction and issue a writ of prohibition preventing the Respondent, Hon. Norman Thygesen, or any other assigned judge, from enforcing the August 9, 2017, sanctions order.

¶2 The sanctions order was a clear abuse of discretion because it failed to account for 12 O.S.2011 § 3237(G), which prohibits sanctions in circumstances like these unless there is a finding of "exceptional circumstances":

> ELECTRONICALLY STORED INFORMATION. Absent exceptional circumstances, a court may not impose sanctions on a party for failure to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Section 3237(G) applies because there is nothing in the record to indicate that the deletion of the program was the result of something other than the routine operation of Honda's information-retention system. Nor is there anything in the record to demonstrate Honda was operating its retention policy in bad faith when it deleted the program some 12 years prior to the commencement of litigation.

¶3 To be sure, this "safe harbor" provision doesn't protect a party who fails to "implement[] a sufficient litigation hold once a lawsuit is filed or becomes likely"[4] – that's the very sort of bad-faith operation for which a sanction would be permitted. But there is nothing on this record to suggest that Honda was required to halt the normal course of its retention policy in 2003 in anticipation of litigation that didn't commence until 2015 – no decision from this Court has ever recognized a duty to preserve data in anticipation of litigation that might happen 12 years in the future. And to recognize such a duty would essentially require Honda to retain all electronically stored information relating to the design of the 2006 Accord *for as long as one of those cars might still be on the roads.* Such a broad and long-running duty would be antithetical to the design of section 3237(G), which plainly recognizes the need of individuals and entities not to be burdened by legal obligations to retain their electronically stored information in perpetuity.

¶4 Thus, because Honda was under no legal obligation to retain the computer program at the time it was deleted, and its deletion was pursuant to the routine, good-faith operation of Honda's document-retention system, Honda falls within section 3237(G)'s safe harbor. Only some "exceptional circumstances" would therefore permit sanctions, none of which was found by the district court. Accordingly, the district court's sanctions order was not authorized by law.

¶5 For these reasons, we assume original jurisdiction, and issue a writ of prohibition preventing the Respondent, Hon. Norman Thygesen, or any other assigned judge, from enforcing the August 9, 2017, sanctions order.

Combs, C.J., Gurich, V.C.J., and Kauger, Winchester, Edmondson, Reif, and Wyrick, JJ., concur.

Colbert, J., dissents

Wyrick, J.:

1. The particular data Plaintiff desires is called Finite Element Modeling (FEM), which is the result of a process by which engineers convert the physical details of a car into mathematical equations for purposes of testing. The design details of the car are broken down into "elements," and each element is then reduced to a series of equations. It can take an entire day to model just one element of a car's design, and there can be as many as a million elements to a single car. Once an element is modeled, analysts can then isolate or group the element with others to test for things like how the element will react to a particular impact. This process allows manufacturers to test crashworthiness without having to physically build and crash a car.

2. The accident in this case took place in August of 2015. The vehicle at issue was a seventh-generation Honda Accord, the U.S. production of which lasted from 2003 to 2007. The FEM data Plaintiff seeks was created during the design phase of the vehicle between 2000 and 2002. According to Honda, this data was discarded by 2003 pursuant to its document-retention policy. Indeed, Plaintiffs conceded at the hearing before the district court that the relevant data was destroyed before the vehicle was released for public consumption, Tr. of Hr'g on Pl.'s Mot. to Compel, App'x at 284, which demonstrates that the loss occurred not only well before this litigation was imminent, but also before any such litigation could have been pending.

3. *See Exxon Co., U.S.A. v. Dist. Ct. of Kingfisher Cty., Fourth Judicial Dist.*, 1977 OK 231, ¶ 6, 571 P.2d 1228, 1230; *Warren v. Myers*, 1976 OK 118, ¶¶ 20, 22, 554 P.2d 1171, 1174 ("[T]he extraordinary writs of mandamus and prohibition may be resorted to only in cases where the trial court lacks jurisdiction or has clearly abused judicial discretion in its orders controlling pre-trial discovery. . . . [M]andamus or prohibition to require or prohibit the trial court from enforcement of an order regarding the answering of interrogatories will only be entertained by this Court if the trial court is either without jurisdiction or has clearly exceeded the bounds of judicial discretion").

4. Steven S. Gensler, *Oklahoma's New E-Discovery Rules*, 81 Okla. B.J., no. 29, at 2427, 2433 (Nov. 6, 2010), *available at* http://www.okbar.org/members/BarJournal/archive2010/NovArchive10/obj8129Gensler.aspx.

NOTICE OF INVITATION TO SUBMIT OFFERS TO CONTRACT

THE *OKLAHOMA INDIGENT DEFENSE SYSTEM* BOARD OF DIRECTORS gives notice that it will entertain sealed Offers to Contract ("Offers") to provide non-capital trial level defense representation during Fiscal Year 2019 pursuant to 22 O.S. 2001, '1355.8. The Board invites Offers from attorneys interested in providing such legal services to indigent persons during Fiscal Year 2019 (July 1, 2018 through June 30, 2019) in the following counties: **100% of the Oklahoma Indigent Defense System caseloads in THE FOLLOWING COUNTIES:**

ALFALFA, COMANCHE, COTTON, HUGHES, JEFFERSON, LEFLORE, MAJOR, MAYES, SEMINOLE, STEPHENS, WOODS

Offer-to-Contract packets will contain the forms and instructions for submitting Offers for the Board's consideration. Contracts awarded will cover the defense representation in the OIDS non-capital felony, juvenile, misdemeanor, traffic, youthful offender and wildlife cases in the above counties during FY-2019 (July 1, 2018 through June 30, 2019). Offers may be submitted for complete coverage (100%) of the open caseload in any one or more of the above counties. Sealed Offers will be accepted at the OIDS offices Monday through Friday, between 8:00 a.m. and 5:00 p.m.

The deadline for submitting sealed Offers is 5:00 PM, Thursday, March 8, 2018.

Each Offer must be submitted separately in a sealed envelope or box containing one (1) complete original Offer and two (2) complete copies. The sealed envelope or box must be clearly marked as follows:

FY-2019 OFFER TO CONTRACT **TIME RECEIVED:**
_____ COUNTY / COUNTIES **DATE RECEIVED:**

The Offeror shall clearly indicate the county or counties covered by the sealed Offer; however, the Offeror shall leave the areas for noting the time and date received blank. Sealed Offers may be delivered by hand, by mail or by courier. Offers sent via facsimile or in unmarked or unsealed envelopes will be rejected. Sealed Offers may be placed in a protective cover envelope (or box) and, if mailed, addressed to OIDS, FY-2019 OFFER TO CONTRACT, P.O. Box 926, Norman, OK 73070-0926. Sealed Offers delivered by hand or courier may likewise be placed in a protective cover envelope (or box) and delivered during the above-stated hours to OIDS, at 111 North Peters, Suite 500, Norman, OK 73069. **Please note that the Peters Avenue address is NOT a mailing address; it is a parcel delivery address only.** Protective cover envelopes (or boxes) are recommended for sealed Offers that are mailed to avoid damage to the sealed Offer envelope. **ALL OFFERS, INCLUDING THOSE SENT BY MAIL, MUST BE PHYSICALLY RECEIVED BY OIDS NO LATER THAN 5:00 PM, THURSDAY, March 8, 2018 TO BE CONSIDERED TIMELY SUBMITTED.**

Sealed Offers will be opened at the OIDS Norman Offices on Friday, March 9, 2018, beginning at 9:30 AM, and reviewed by the Executive Director or his designee for conformity with the instructions and statutory qualifications set forth in this notice. Non-conforming Offers will be rejected on Friday, March 9, 2018, with notification forwarded to the Offeror. Each rejected Offer shall be maintained by OIDS with a copy of the rejection statement.

NOTICE OF INVITATION TO SUBMIT OFFERS TO CONTRACT

Copies of qualified Offers will be presented for the Board's consideration at its meeting on **Friday, March 16th, 2018**, at ***a place to be announced***.

With each Offer, the attorney must include a résumé and affirm under oath his or her compliance with the following statutory qualifications: presently a member in good standing of the Oklahoma Bar Association; the existence of, or eligibility for, professional liability insurance during the term of the contract; and affirmation of the accuracy of the information provided regarding other factors to be considered by the Board. These factors, as addressed in the provided forms, will include an agreement to maintain or obtain professional liability insurance coverage; level of prior representation experience, including experience in criminal and juvenile delinquency proceedings; location of offices; staff size; number of independent and affiliated attorneys involved in the Offer; professional affiliations; familiarity with substantive and procedural law; willingness to pursue continuing legal education focused on criminal defense representation, including any training required by OIDS or state statute; willingness to place such restrictions on one's law practice outside the contract as are reasonable and necessary to perform the required contract services, and other relevant information provided by attorney in the Offer.

The Board may accept or reject any or all Offers submitted, make counter-offers, and/or provide for representation in any manner permitted by the Indigent Defense Act to meet the State's obligation to indigent criminal defendants entitled to the appointment of competent counsel.

FY-2019 Offer-to-Contract packets may be requested by facsimile, by mail, or in person, using the form below. Offer-to-Contract packets will include a copy of this Notice, required forms, a checklist, sample contract, and OIDS appointment statistics for FY-2014, FY-2015, FY-2016, FY-2017 and FY-2018 together with a 5-year contract history for each county listed above. The request form below may be mailed to **OIDS OFFER-TO-CONTRACT PACKET REQUEST, P.O. Box 926, Norman, OK 73070-0926, or hand delivered to OIDS at 111 North Peters, Suite 500, Norman, OK 73069 or submitted by facsimile to OIDS at (405) 801-2661.**

* * * * * * * * * * * *

REQUEST FOR OIDS FY-2019 OFFER-TO-CONTRACT PACKET

Name: _____ OBA #:_____

Street Address: _____ Phone: _____

City, State, Zip: _____ Fax: _____

County / Counties of Interest _____

_____

_____

Court of Criminal Appeals Opinions

2018 OK CR 2

STATE OF OKLAHOMA, Appellant, v. KELLY STRAWN, Appellee.

Case No. S-2016-963. February 8, 2018

OPINION

HUDSON, JUDGE:

¶1 On February 25, 2016, Appellee Kelly Strawn, was charged with Count 1: Unlawful Possession of Controlled Drug With Intent to Distribute, in violation of 63 O.S.Supp.2012, § 2-401(B)(2); and Count 2: Driving with a Cancelled, Suspended or Revoked License, in violation of 47 O.S.2011, § 6-303(B), in the District Court of Okmulgee County, Case No. CF-2016-75. Strawn was bound over at preliminary hearing on the felony charge. Strawn thereafter filed a motion to suppress all narcotics evidence arising from the traffic stop of his vehicle. District court arraignment was held August 5, 2016. Strawn then filed supplemental authority with the district court in support of his motion to suppress. On October 7, 2016, a hearing was held on Strawn's motion to suppress. At the conclusion of this hearing, the Honorable Kenneth E. Adair, District Judge, granted the motion to suppress and, upon the State's oral notice of its intent to appeal, stayed further proceedings in the case.

¶2 Appellant, the State of Oklahoma, now appeals. We exercise jurisdiction pursuant to 22 O.S.2011, § 1053(5). For the reasons discussed below, we reverse the district court's ruling and remand for further proceedings.

BACKGROUND

¶3 Both the district court and the parties relied largely upon the transcript of the preliminary hearing testimony in litigating the motion to suppress below. What follows is a summary of testimony from Oklahoma Highway Patrol (OHP) Trooper Daren Koch, the sole witness presented at that hearing. Trooper Koch, a seventeen (17) year OHP veteran, de-scribed for the court his training and education in relation to narcotics interdiction and certified drug K-9 handling. Trooper Koch also discussed his drug dog and the certifications they hold as a team for drug detection. Trooper Koch then turned to the events in the present case.

¶4 On February 16, 2016, Trooper Koch initiated a stop of a truck driven by the defendant, Kelly Strawn, on Interstate 40 near Mile Marker 242 in Okmulgee County. Strawn was stopped for speeding, specifically, driving 73 miles per hour in a 70 mile-per-hour zone. Trooper Koch made contact with Strawn at the truck's driver-side window, informed him of the violation and asked for a driver's license. Trooper Koch then instructed Strawn to come back to the patrol unit so Trooper Koch could write him a warning. Trooper Koch noticed that Strawn's hand was shaking and that he had two large dogs inside his truck. Strawn complied. Once both men were seated in the front of the patrol unit, Trooper Koch started running Strawn's license and vehicle registration and began writing out the warning.

¶5 During his brief conversation with Strawn while sitting in the patrol unit, Strawn said he was from Northern California and was driving to Memphis to see a girl. Trooper Koch, based upon his training and experience as a narcotics interdiction officer, recognized Northern California as "a hotspot" for the origin of narcotics, particularly high-grade marijuana. When Trooper Koch inquired about Strawn's destination, Strawn paused before saying he was going to Memphis to see a girl. Trooper Koch "thought possibly this pause that he had in his speech was a sign of deception."

¶6 Strawn also repeatedly engaged in what Trooper Koch described as a "fake yawning[.]" Trooper Koch estimated that Strawn "fake yawn[ed]" at least six or seven times during the course of his contact with Strawn in the front of the patrol unit. Based on his training, Trooper Koch testified that he recognized Strawn's "fake yawning" as an indicator of nervousness. Trooper Koch is trained to pay attention to body language and, based upon his training and experience, he determined the fake yawns were "nervousness that was leaking from [Strawn's] body."

¶7 When Trooper Koch ran Strawn's driver's license, he discovered it was suspended in California and was not valid. Continuing the conversation, Trooper Koch asked Strawn what

he did for a living. Strawn paused, then responded that he cut wood. Trooper Koch believed this was possibly another deceptive answer. In addition, Trooper Koch observed other signs of nervousness by Strawn. For example, Strawn's carotid artery was visible in his neck and Trooper Koch observed that it was "beating heavily, rapidly." Trooper Koch noticed too that Strawn, in addition to the yawning, was "making weird movements with his mouth." Trooper Koch testified that he also could see Strawn's heart beating through both his chest and shirt.

¶8 At this point, Trooper Koch thought Strawn "maybe . . . was tweaking. It looked like he was on meth." Trooper Koch recognized Strawn as being "extremely nervous." Strawn's behavior was well outside the norm of what he had observed in similar situations where he had written warnings to motorists whose only offense was speeding. At this point, Trooper Koch believed that he had reasonable suspicion that criminal activity was afoot. Trooper Koch asked Strawn about his license being suspended. Strawn admitted knowing his driver's license was suspended; Strawn said it was suspended for not having insurance.

¶9 Trooper Koch printed out the written warning for the speeding violation and gave it to Strawn along with his license and other documents. Trooper Koch then explained the warning and told Strawn he could not drive away due to the suspended license. Trooper Koch testified that, at this point, "most people are gonna say thank you. They'll get out" but Strawn did not exit the patrol unit. Instead, Strawn remain seated in the vehicle.

¶10 Trooper Koch testified that he "entered into a consentual [sic] encounter" with Strawn at that moment. Trooper Koch asked whether Strawn was transporting anything illegal such as an open container of alcohol, weapons or drugs of any kind. In response, Strawn "basically just sat there and looked at his truck" and did not answer. Strawn was "[j]ust . . . locked up. He would look at me, then look at his truck, look at me, look at his truck." Strawn looked at Trooper Koch and "didn't know what to say." Trooper Koch recognized this as more nervousness on Strawn's part and told him: "you can say yes or no." Strawn abruptly responded "no."

¶11 Trooper Koch then told Strawn he was going to run his K-9 unit around the truck. Trooper Koch explained the four odors to which his drug dog alerted and asked Strawn whether there was any reason his dog would alert on his truck. Strawn responded that there were "crumbles of pot" all over his truck. Strawn then confirmed that by "pot" he meant marijuana. Trooper Koch told Strawn that, based on that information, he now had probable cause to search the truck and intended to search the vehicle. Trooper Koch asked Strawn whether he had anything else in the truck, and, specifically, whether he "had any pounds." Strawn did not answer but instead merely looked at his truck.

¶12 Trooper Koch next placed Strawn in handcuffs and asked again whether he, Strawn, had "any pounds" in the truck. Strawn replied "a couple" behind the backseat. Trooper Koch had Strawn (while handcuffed) leash and remove the two large dogs from his truck. Trooper Koch then searched the truck and found five (5) large vacuum-sealed bags of high grade marijuana weighing 1.06 pounds each.

¶13 On cross-examination, Trooper Koch acknowledged that when he handed the written warning to Strawn, he did not tell Strawn he was free to go. Instead, Trooper Koch told Strawn he could not drive away. When defense counsel suggested that Strawn sat in the patrol unit because he had no other place to go, Trooper Koch responded "[h]e could step out and hang out on the shoulder." Trooper Koch further acknowledged that he started talking to Strawn about the other things a few seconds after telling Strawn he could not drive away.

¶14 Strawn's written motion to suppress alleged that Trooper Koch unlawfully prolonged the traffic stop without reasonable suspicion beyond the time needed to address the traffic violation that warranted the stop (speeding) and the traffic violation which subsequently arose during the stop (the cancelled or suspended driver's license). Strawn argued there was no consensual encounter leading to the search. Strawn too complained that the trooper's stated reliance upon his nervousness was insufficient to establish reasonable suspicion of criminal activity. Strawn argued that nervousness alone is insufficient to warrant prolonging a traffic stop to investigate perceived criminal activity. Further, Strawn reasoned, the video of the traffic stop did not show "extreme nervousness" as Trooper Koch claimed. Finally, none of the other factors cited by the trooper — Strawn being from Northern

California, his work cutting wood or his stated destination of Memphis and his reason for going — supplied reasonable suspicion under the totality of circumstances to prolong the traffic stop for further investigation after writing the warning.

¶15 The State did not file a written response to Strawn's motion to suppress. At the hearing on the motion to suppress, defense counsel offered as an exhibit the video of the traffic stop recorded from Trooper Koch's patrol unit. Judge Adair admitted the video as an exhibit but did not view it at the hearing because he did not have a device on which to play the CD-ROM video. The video of the stop is part of the record before this Court on appeal.

¶16 Defense counsel then called Strawn as a witness to explain the "fake yawning" described by Trooper Koch in his preliminary hearing testimony. Strawn testified that he opened his mouth several times, as shown on the video of the traffic stop, due to "pressure in [his] ears." Strawn testified that the pressure in his ears is an ongoing problem for him and that he opened his mouth several times while sitting in Trooper Koch's patrol unit "[t]o try to clear the pressure out of [his] ears." Strawn testified that the trooper's "diagnosis" of "fake yawning" was thus an inaccurate "medical diagnosis." The prosecutor did not cross-examine Strawn.

¶17 Defense counsel stood on the argument contained in his written motion. After questioning both defense counsel and the State, Judge Adair granted the motion to quash. This appeal ensued.

ANALYSIS

¶18 The State brings this appeal under 22 O.S.2011, § 1053(5) and challenges the district court's order granting the defense motion to suppress. Section 1053(5) provides that the State may appeal "[u]pon a pretrial order, decision, or judgment suppressing or excluding evidence where appellate review of the issue would be in the best interests of justice[.]" We find that the best interests of justice warrant review of the State's appeal because the suppressed evidence forms a substantial part of the State's evidence. Thus, the State's ability to prosecute Strawn on the Count 1 felony drug charge is substantially impaired absent the suppressed evidence and our review here is appropriate. *Feeken v. State*, 2016 OK CR 6, ¶ 1 n.1, 371 P.3d 1124, 1125 n.1; *State v. Iven*, 2014 OK CR 8, ¶ 6, 335 P.3d 264, 267.

¶19 "When reviewing a trial court's ruling on a motion to suppress evidence based on a complaint of an illegal search and seizure, this Court defers to the trial court's findings of fact unless they are not supported by competent evidence and are therefore clearly erroneous. We review the trial court's legal conclusions based on those facts *de novo." State v. Alba*, 2015 OK CR 2, ¶ 4, 341 P.3d 91, 92 (internal citations omitted).

¶20 The State argues on appeal, as it did below, that Trooper Koch had reasonable suspicion based upon the totality of circumstances to continue questioning Strawn after he handed Strawn the printed warning and told him he could not drive away because of the suspended driver's license. The State argues too that Trooper Koch engaged in a consensual encounter with Strawn from this point on and, alternatively, that the inevitable discovery doctrine applies to save the drug evidence in this case.

¶21 Appellee had a right under both the United States and Oklahoma constitutions to be free from unreasonable searches and seizures. *Alba*, 2015 OK CR 2, ¶ 5, 341 P.3d at 92 (citing U.S. Const. amend. IV; Okla. Const. art. 2, § 30). As we have held:

> A traffic stop is a seizure under the Fourth Amendment. *McGaughey v. State*, 2001 OK CR 33, ¶ 24, 37 P.3d 130, 136. The scope and duration of such a seizure must be related to the stop and must last no longer than is necessary to effectuate the stop's purpose. *Florida v. Royer,* 460 U.S. 491, 500, 103 S. Ct. 1319, 1325, 75 L. Ed. 2d 229 (1983); *Terry v. Ohio*, 392 U.S. 1, 20, 88 S. Ct. 1868, 1879, 20 L. Ed. 2d 889 (1968); *McGaughey,* 2001 OK CR 33, ¶¶ 24 and 27, 37 P.3d at 136-37. If the length of the investigative detention goes beyond the time necessary to reasonably effectuate the reason for the stop, the Fourth Amendment requires reasonable suspicion that the person stopped has committed, is committing or is about to commit a crime.

Seabolt v. State, 2006 OK CR 50, ¶ 6, 152 P.3d 235, 237-38.

¶22 Here, the record shows Trooper Koch witnessed a traffic violation by Strawn, specifically, driving three miles per hour over the posted speed limit on an interstate highway, a

violation of 47 O.S.Supp.2015, § 11-801. Strawn's counsel stipulated at the hearing on the motion to suppress that this was a lawful stop. Because he had probable cause to believe that a traffic violation had occurred, Trooper Koch's decision to stop the vehicle driven by Strawn was wholly reasonable. *Whren v. United States*, 517 U.S. 806, 809-10, 116 S. Ct. 1769, 1772, 135 L. Ed. 2d 89 (1996); *Dufries v. State*, 2006 OK CR 13, ¶ 8, 133 P.3d 887, 889. This is so regardless of the officer's subjective motivation for the stop. *Id.*, 2006 OK CR 13, ¶ 9, 133 P.3d at 889 ("Subjective intentions play no role in the ordinary probable-cause Fourth Amendment analysis.").

¶23 Although Trooper Koch's stop of Strawn for speeding was lawful, that does not mean that the *duration* of the stop was lawful. "[A] police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." *Rodriguez v. United States,* 575 U.S.__, 135 S. Ct. 1609, 1612, 191 L. Ed. 2d 492 (2015). In this sense, "the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission' — to address the traffic violation that warranted the stop and attend to related safety concerns." *Id.*, 135 S. Ct. at 1614 (internal citations omitted). "Authority for the seizure thus ends when tasks tied to the traffic infraction are — or reasonably should have been — completed." *Id.*

¶24 The United States Supreme Court has recognized that, in addition to issuing a traffic citation, "an officer's mission includes 'ordinary inquiries incident to [the traffic] stop'" like "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.*, 135 S. Ct. at 1615 (quoting *Illinois v. Caballes*, 543 U.S. 405, 408, 125 S. Ct. 834, 837, 160 L. Ed. 2d 842 (2005)). Unlike a dog sniff, which is a measure aimed at detecting criminal wrongdoing, the ordinary inquiries incident to a traffic stop are aimed at ensuring that vehicles on the road are operated in a safe and responsible manner. *Id.* Investigations and actions unrelated to the traffic stop — like questioning and a dog sniff — which do not lengthen the roadside detention are permissible under the Fourth Amendment. *Id.*, 135 S. Ct. at 1614. In this sense, an officer "may conduct certain unrelated checks during an otherwise lawful traffic stop. But . . . he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Id.*, 135 S. Ct. at 1615.

¶25 In the present case, the record shows Trooper Koch completed his enforcement action by returning Strawn's documents and license and issuing him a written warning. Trooper Koch explained the warning and also told Strawn that he could not drive away in his truck due to the suspended driver's license. At this point, all tasks associated with the mission of the traffic stop were completed. However, the record confirms Strawn simply sat in Trooper Koch's patrol unit and did not get out. Trooper Koch described the questioning that occurred next — along with Strawn's answers leading to his admission that there was marijuana in his truck — as a consensual encounter with Strawn. If this was a consensual encounter, Trooper Koch's subsequent questioning of Strawn did not violate the Fourth Amendment and Strawn's statement that there was marijuana in his truck provided probable cause to search the vehicle.

¶26 The district court did not specifically address this issue, instead focusing on whether Trooper Koch had reasonable articulable suspicion of other crimes to justify prolonging the traffic stop for further investigation. Essentially, we have a ruling from the trial court, without any independent factual findings, that Trooper Koch's questioning after handing the warning and other paperwork back to Strawn was an illegal seizure. The district court with this ruling nonetheless implicitly rejected Trooper Koch's testimony that a consensual encounter arose after he handed Strawn the warning and related paperwork. Because the district court did not expressly address this issue, we turn to the evidence presented at the preliminary hearing "and consider whether it fairly supports the ruling under relevant legal principles." *Feeken*, 2016 OK CR 6, ¶ 3, 371 P.3d at 1125.

¶27 Consensual encounters are not Fourth Amendment seizures since they involve the mere voluntary cooperation with an officer's non-coercive questioning. In the context of traffic stops, we have held:

> The police may detain a driver longer than necessary for the initial stop with consent. *See State v. Goins*, 2004 OK CR 5, ¶ 17, 84 P.3d 767, 770. A driver must be permitted to proceed after a routine traffic stop if a license and registration check reveals no reason to

> detain the driver unless the officer has reasonable articulable suspicion of other crimes or the driver voluntarily consents. *See id.* at ¶ 13, 84 P.3d at 770. To determine whether an encounter was consensual, courts consider if a reasonable person would have felt free to leave considering the totality of the circumstances. *Id.* at ¶ 18, 84 P.3d at 770. A "consensual encounter is the voluntary cooperation of a private citizen in response to non-coercive questioning by a law enforcement officer." *Id.* at ¶ 20, 84 P.3d at 771 quoting *United States v. West*, 219 F.3d 1171, 1176 (10th Cir. 2000). Applying this test, a "traffic stop may be-come a consensual encounter, requiring no reasonable suspicion, if the officer returns the license and registration and asks questions without further constraining the driver by an overbearing show of authority." *Id.*

Coffia v. State, 2008 OK CR 24, ¶ 14, 191 P.3d 594, 598.

¶28 In the present case, the mere fact that Strawn was sitting in Trooper Koch's patrol unit after being handed back his license and paperwork, without more, does not make his subsequent questioning involuntary. *United States v. Bradford*, 423 F.3d 1149, 1158 (10th Cir. 2005). The same is true of the fact that Strawn was not informed at that moment that he was free to leave. *Goins,* 2004 OK CR 5, ¶ 20, 84 P.3d at 770 ("An officer is not required to inform a suspect that he did not have to respond to his questioning or that he was free to leave. Therefore, an unlawful detention occurs only when the driver has an 'objective reason to believe he or she is not free to end the conversation with the officer and proceed on his or her own way.'") (quoting *West*, 219 F.3d at 1176-77).

¶29 Our review of the testimony, along with the video of the traffic stop, convinces us that a consensual encounter occurred when Trooper Koch handed the driver's license and paperwork back to Strawn, told him that he could not legally drive away and then asked whether there was anything illegal in the truck. Indeed, the video from inside Trooper Koch's patrol unit leaves no doubt that a consensual encounter occurred. Initially, we note that the entire conversation between Trooper Koch and Strawn inside the patrol unit, as shown on the video, is fairly described as conversational and relaxed. Even when Strawn is asked about not having a license, Trooper Koch is not confrontational but instead merely inquisitive as to why and informative concerning the need for Strawn to drive with a license.

¶30 The placid nature of the encounter between Trooper Koch and Strawn is evident throughout the entire stop. Trooper Koch at one point can be heard asking Strawn about the type of dogs he has in the car and whether he had considered moving somewhere in the area to be closer to his girlfriend in Memphis. The conversation too occurs intermittently while Trooper Koch is working on the warning. We note that Trooper Koch moves quickly in writing the warning and running Strawn's information through the on-board computer. The total encounter from the moment Strawn sits down in Trooper Koch's patrol unit to the time Trooper Koch hands back Strawn's license and begins discussing the warning amounts to roughly five (5) minutes.

¶31 At the conclusion of the enforcement action, the video shows that Trooper Koch told Strawn that he did not cite him for driving without a license. However, Trooper Koch told Strawn that he needs to "get that squared away." The video shows that Trooper Koch also informed Strawn that "legally you can't drive, so I can't let you drive off from here, okay, so you need to figure out something to get where you're going. Okie-doke." Strawn repeatedly nods, responds "okay" to the trooper and can be seen looking down at the paperwork he was just handed.

¶32 At this point, a reasonable person would have felt free to leave Trooper Koch's patrol unit. Trooper Koch's actions and words conveyed to Strawn that the enforcement action was completed. Trooper Koch returned Strawn's documents along with the written warning and explained that he did not write a ticket for Strawn driving without a license. Although Trooper Koch explained that Strawn could not drive away because of his failure to have a valid driver's license, and that Strawn needed to figure out some way "to figure out something to get where you're going[,]" there was no impediment to Strawn exiting the vehicle. Indeed, Trooper Koch concluded his enforcement action for the traffic violation with the parting phrase "Okie-doke" further indicating the conclusion of the encounter. Trooper Koch's subsequent questions to Strawn whether he had anything illegal in his truck, whether he would give permission to search the truck and whether his drug dog would alert on anything inside the truck, was

stated matter-of-factly and, again, not in an accusatory or overbearing manner.

¶33 These facts, combined with the overall speed and non-confrontational nature of the encounter between Trooper Koch and Strawn inside the patrol unit convince us that the subsequent questioning of Strawn amounted to a consensual encounter. There was no restraining of Strawn by an overbearing show of authority. Nor was there evidence that Trooper Koch used a commanding or threatening manner or tone of voice, displayed a weapon or otherwise touched Strawn. Also, nothing in Trooper Koch's manner or words were accusatory, persistent or intrusive. Nor did they suggest that compliance was necessary. *See Goins*, 2004 OK CR 5, ¶¶ 17-18, 84 P.3d at 770-71 (discussing factors utilized in determining whether a police encounter is consensual). Under the total circumstances, a reasonable person would feel free to leave the patrol unit and proceed on his or her own way.

¶34 The district court's recurring concerns that Trooper Koch's actions in connection with this stop were a mere pretext to conducting a search of Strawn's truck does not undermine Trooper Koch's testimony that a consensual encounter arose. Again, Trooper Koch had probable cause to believe that a traffic violation had occurred. Thus, his decision to stop Strawn's vehicle was wholly reasonable regardless of his subjective motivation for the stop. *Whren*, 517 U.S. at 809-10, 116 S. Ct. at 1772; *Dufries*, 2006 OK CR 13, ¶ 8, 133 P.3d at 889. The same is true of the trooper's decision to continue questioning Strawn in connection with what the record — in particular the video of the stop itself — shows objectively was a consensual encounter. "This Court has never held that an officer must have a reasonable and articulable suspicion before he may ask for consent after he has already engaged in a valid traffic stop. We have only held that consent must be voluntary." *Goins*, 2004 OK CR 5, ¶ 20, 84 P.3d at 771.

¶35 We therefore reverse the district court's order granting Strawn's motion to suppress and remand this case for further proceedings. We do not address in this opinion the district court's apparent conclusion that Trooper Koch did not have reasonable suspicion of ongoing criminal activity to prolong the stop with additional questioning in light of the above findings. Our finding of a consensual encounter resolves Strawn's Fourth Amendment challenge to the narcotics evidence in this case. Simply, the Fourth Amendment presents no impediment whatsoever to the admission of this evidence at Strawn's trial.

DECISION

¶36 The District Court's order sustaining Appellee's motion to suppress is **REVERSED** and this case is **REMANDED** for further proceedings not inconsistent with this Opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT
OF OKMULGEE COUNTY
THE HONORABLE KENNETH E. ADAIR,
DISTRICT JUDGE

APPEARANCES AT HEARING

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

2018 OK CR 3

FABION DEMARGIO BROWN, Appellant,
v. THE STATE OF OKLAHOMA, Appellee.

Case No. D-2014-705. February 15, 2018

OPINION

LEWIS, Vice Presiding Judge:

¶1 Appellant, Fabion Demargio Brown,[1] was charged conjointly with Brodric Lontae Glover and Emily Ann Matheson with two counts of first degree murder in violation of 21 O.S.2011, § 701.7, and one count of conspiracy to commit murder in violation of 21 O.S.2011, § 421, in the District Court of Oklahoma County, Case No. CF-2012-938.[2] The State filed a Bill of Particulars alleging two aggravating circumstances:

(1) the defendant knowingly created a great risk of death to more than one person; and (2) the defendant committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration. 21 O.S.2011, § 701.12 (2) and (3).

¶2 Fabion's case was severed from his codefendants, and his trial commenced on June 16, 2014, before the Honorable Ray C. Elliott, District Judge. The jury found Fabion guilty on all counts and assessed punishment at death on the two first degree murder convictions, after finding the existence of both of the aggravating circumstances. The jury assessed ten (10) years imprisonment and a $5,000 fine on the conspiracy count. Judge Elliott formally sentenced Fabion in accordance with the jury verdict on August 11, 2014. Thereafter, Fabion perfected his appeal to this Court.[3]

I. FACTS

¶3 Fabion was the estranged husband of the victim, Jessica Brown. They were in the process of divorcing, and Fabion owed child support for their two children. The Browns' marital problems began sometime in 2009, and Jessica Brown told family and friends that she was afraid of her husband. Ms. Brown filed for divorce in April 2011, and she received temporary custody of the children. Fabion's child visitation was limited by court order but he wanted custody of their two children or, at least, expanded visitation.

¶4 During the summer of 2011, Ms. Brown became pregnant with a third child. She expressed plans to move back, with her children, to her home State of Washington to be near her family. Fabion told friends and acquaintances that he did not want Jessica to take the children away to Washington. Emily Matheson testified that Fabion discussed his options, including the killing of his wife, to get her out of the picture.

¶5 On the morning of January 11, 2012, officers of the Midwest City Police Department responded to a call reporting that two children, ages six and three, were in the street in front of Jessica Brown's home. Officers arrived and noticed that the front door of the home was open. Upon checking the home, officers found Jessica Brown lying lifeless at the foot of her bed. She had been shot in the head.

¶6 On that same day, Fabion appeared at the Oklahoma County courthouse for a hearing on his child support. He had told Matheson that he thought he would go to jail for not paying support. While he was at the courthouse, he was told that Jessica was found dead at her house.

¶7 Matheson testified against Fabion. She met Fabion in October 2011. They moved into an apartment together shortly thereafter. After they moved in together, Fabion began discussing the prospect of murdering Jessica. Fabion was employed at Club ATL as a disc jockey. Matheson spent quite a bit of time at the club. They met Brodric Glover at the club. Glover was employed to clean the club after it closed. Glover was included in the discussions about killing Jessica.

¶8 A plan was conceived whereby Glover would be paid $250 dollars for killing Jessica. Fabion wanted Glover to kill Jessica during the night while she was at home. Fabion told Glover how to get into the house and told him he could not use a .40 caliber weapon, as Fabion had once owned a .40 caliber weapon.

¶9 Matheson testified that the three of them drove by Jessica's house during the first week of January 2012. Fabion said that he wanted Jessica killed before his January 11 child support hearing.

¶10 On January 9, 2012, Fabion leased a Kia Soul, for one day, from a rental company located at the Sears store in Quail Springs Mall. Fabion took out a payday loan that day, met Glover, gave him $125, and gave him the Kia Soul. Fabion and Matheson went to a casino that night and rented a room. About midnight, Glover called and said the killing would not take place that night.

¶11 The next day, January 10, Fabion extended the lease of the Kia for an additional day. That evening, Fabion asked Jessica Eckiwaudah to spend the night and hang out. She agreed. Fabion, Matheson and Eckiwaudah played video games until about midnight. The three then turned in for the night. Eckiwaudah went to sleep on the couch.

¶12 At about 3:00 a.m. that night, Glover called Matheson and told her that the killing was done. She relayed the information to Fabion. Fabion gave her $125, and she drove Fabion's pickup to the Belle Isle Wal-Mart to

meet Glover and pay him the $125. Eckiwaudah saw Matheson leave the apartment.

¶13 Glover was at the Wal-Mart in the Kia Soul with two other individuals. After meeting with Glover, Matheson returned to the apartment.

¶14 The investigation revealed that Jessica Brown died from two nine millimeter caliber gunshot wounds to the head. Jessica Brown's unborn child was viable at the time of her death, as her pregnancy was 24 weeks and two days along. The authorities utilized video surveillance tapes, wire-taps, cell phone usage data, and interviews before arresting Matheson, Fabion and Glover. Matheson was the first to be arrested. During her first contact with police, she denied any involvement, but later confessed to the murder plot. Glover did not testify.

II.ISSUES RELATED TO WAIVER OF COUNSEL AND *PRO SE* REPRESENTATION

¶15 In proposition one Fabion claims that the waiver of his right to counsel was not voluntary, knowing or intelligent. A defendant's right to waive representation by counsel and proceed *pro se* is found in the Sixth Amendment to the United States Constitution.[4] *Faretta v. California,* 422 U.S. 806, 818-21, 95 S.Ct. 2525, 2532-34, 45 L.Ed.2d 562 (1975). A waiver of the right to counsel is voluntary, knowing and intelligent when a defendant is informed of the dangers, disadvantages, and pitfalls of self-representation. *Faretta*, 422 U.S. at 835, 95 S.Ct. at 2541; *Mathis v. State*, 2012 OK CR 1, ¶ 7, 271 P.3d 67, 71-72.[5] These dangers "must be 'rigorous[ly]' conveyed." *Iowa v. Tovar,* 541 U.S. 77, 89, 124 S.Ct. 1379, 1388, 158 L.Ed.2d 209 (2004).

¶16 In determining whether a defendant has intelligently elected to proceed *pro se*, the question is not the wisdom of the decision or its effect upon the expeditious administration of justice.

> [A]n "intelligent" decision to waive counsel and proceed *pro se* is not the same as a "smart" or well-thought decision. The issue is whether the defendant was adequately informed and aware of the significance of what he was giving up, by waiving the right to be represented by counsel.

Mathis v. State, 2012 OK CR 1, ¶ 8, 271 P.3d 67, 72. Even when a defendant exhibits an unrealistic or foolish view of his case and possible defenses, he may still be granted the right to choose self-representation. *Maynard v. Boone,* 468 F.3d 665, 678 (10th Cir. 2006). It is only necessary that a defendant be made aware of the problems of self-representation so the record establishes that he understands that his actions in proceeding without counsel may be to his ultimate detriment. *Id.* at 678-79.

¶17 Fabion claims that he was forced to choose between either unprepared, ineffective counsel, or waive counsel and represent himself. Undoubtedly, a defendant who faces a choice between incompetent or unprepared counsel and appearing *pro se* faces a constitutional dilemma. *United States v. Padilla*, 819 F.2d 952, 955 (10th Cir.1987).

¶18 Fabion cites several instances where he complained about counsel before he decided to ask the trial court to allow him to represent himself. His complaints centered on a lack of communication and the inability to assert a speedy trial right. He voiced complaints about access to discovery materials, claimed counsel was misinforming him about significant legal issues, and improperly coercing him into taking a plea deal. Fabion continuously sent letters to the trial court complaining about his appointed counsel. Finally, in a letter dated March 10, 2014, Fabion requested that he be allowed to represent himself.

¶19 On March 13, 2014, the trial court conducted a hearing on Fabion's request pursuant to *Faretta.* As part of that hearing, the trial court specifically inquired whether or not Fabion was requesting to represent himself because counsel was constitutionally ineffective. A defendant's complaints about counsel must rise to the level of ineffectiveness that would allow a defendant to assert a right to new counsel. *Padilla,* 819 F.2d at 955.

¶20 This Court has recognized valid reasons for discharge of an appointed counsel and appointment of new counsel; they include demonstrable prejudice against the defendant, incompetence, and conflict of interest. *Johnson v. State*, 1976 OK CR 292, ¶ 33, 556 P.2d 1285, 1294. Neither a personality conflict nor disagreements over the conduct of the defense constitute valid reasons. *Id.*

¶21 Fabion's complaints were revealed during the *Faretta* hearing. The trial court was very careful in its inquiry about Fabion's dissatisfaction with appointed counsel. *See United States*

v. Silkwood, 893 F.2d 245, 248 (10th Cir. 1989). Indeed, *Silkwood* held that a trial court must, in order for a waiver of counsel to be deemed voluntary, delve into reasons why a defendant is dissatisfied with counsel and wants to proceed with self-representation. *Id.* This requirement ensures that a defendant is not exercising "a choice between incompetent or unprepared counsel and appearing *pro se*." *Id.*

¶22 Fabian's complaints, however, did not rise to the level that would have allowed him the appointment of a new attorney. His complaints were mere personality conflicts and disagreements. Fabion again complained that his attorney tried to convince him to enter a plea instead of risking the death penalty. He argued that counsel, in his words, "insinuated" that he could not get a fair trial because of his biracial marriage.

¶23 Counsel responded and told the court that she as well as other attorneys involved in the case explained to him about the expected racial makeup of the jury. Counsel indicated that there was some evidence (in the form of text messages) that Fabion knew, well in advance of meeting with his attorneys, that trial would be difficult because of the difference in race between him and his wife. These conversations, in the worst case scenario, are things that experienced trial counsel would point out to a client, so a client could make informed decisions.

¶24 Fabion was allowed to further specify his dissatisfaction. He stated that he believed his attorney wasn't totally honest, as he had asked his attorney certain questions and she would give an answer, but he would research and find cases supporting a contradictory answer. He claimed he even found a case where his attorney was involved and when he asked his attorney about it, he got no response. Fabion then generally complained that there was a lack of communication, because he didn't always get responses to his letters, and sometimes he did not "get a clear answer." He complained he didn't get explanations about the contradictory research. He stated that he was "having issues getting those why's …." He summed up his complaint by saying that he didn't trust that he was getting "her best and I think I can do it better myself."

¶25 Fabion expressed no dissatisfaction with co-counsel who was new to the case. Fabion's explanation was that he believed it would be a lot better for him if he went ahead and did it himself. Judge Elliott made the finding that Fabion was "not dissatisfied with [counsel] … because of their incompetence or their unpreparedness."

¶26 The record supports the trial court's decision and indicates that Fabion was not forced between the choice of accepting ineffective, incompetent counsel and the choice of representing himself; thus, his choice was not improperly coerced. On appeal, Fabion has not set forth any basis for the belief that his appointed attorneys were not providing adequate legal assistance.

¶27 Once the trial court determined that Fabion's decision of self-representation was not based on a valid belief that his appointed attorneys were constitutionally ineffective, the trial court proceeded to warn Fabion about the dangers of self-representation. The trial court pointed out to Fabion that, in his request to act as his own attorney, he admitted he didn't know what he was doing. Fabion explained that he meant that he was not familiar with the court rules and procedures. He claimed he could present the facts "easily," because he knew "the facts better than anyone else that would be present. And therefore, I would have an advantage in that area."

¶28 Judge Elliott acknowledged that he might know more about the facts, but he would also be required to know the law and the rules and procedures of the district court. Judge Elliott explained that his own bench book had taken him twenty-five years to compile, and Fabion would be expected to know the applicable rules, procedures and laws, whether based on cases, statutes or rules.

¶29 Judge Elliott told Fabion that he would be expected to know as much as his appointed attorneys who were among the "most experienced death penalty litigators in this State." He noted that part of their job is to "save your life" in a death penalty case. He explained that it is the attorney's job to examine the evidence and the law and make recommendations to their clients based on the law, the evidence, and their combined experience. Judge Elliott warned Fabion against listening to legal advice from others sitting in the jail or others out on the street. He also explained that if he was "not guilty" his attorneys would want a result that reflects that truth, even though their primary objective is to "save your life." Judge Elliott then explained

the real possibility of the death penalty being carried out in Oklahoma.

¶30 During the hearing, Judge Elliott warned Fabion several times that the trial court was limited on giving Fabion advice on rules and regulations such as issuing subpoenas, admitting evidence, and conducting *voir dire*. He explained that the decision for Fabion to represent himself was Fabion's alone, and his decision to accept a plea deal was also his decision and no one could make him "sign for anything."

¶31 Judge Elliott warned Fabion that his chances of getting a fair trial were less likely if he represented himself, because he would not "understand the nuances of trying a death penalty case." He opined that the "stakes are too high" for self-representation in a death penalty case. Judge Elliott emphasized the fact that this could be a life or death decision.

¶32 Judge Elliott next informed Fabion, as required by *Patterson v. Illinois*, 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988), of the pitfalls of representing himself, some of which he had already covered. Judge Elliott again explained that he would be bound by the same rules as his attorneys; he would have to voice objections in the same form as attorneys do, and have a legal basis for the objection. Fabion would have to follow courtroom procedures and local court rules, and he would have to conduct himself in the same manner required of attorneys. Judge Elliott explained that Fabion would get no preferential treatment due to his lack of experience and training. Judge Elliott also explained, that in his experience, a jury would not "cut [Fabion] … any slack" because he was representing himself. Judge Elliott again reminded Fabion that he, as the Judge, could not tell him or advise him on the proper way to conduct a trial.

¶33 Judge Elliott noted that Fabion seemed very confident, but warned that his reasonableness could be blinded by his confidence. Judge Elliott also noted that, unlike many defendants, Fabion seemed very articulate, but being articulate does not mean that he would be well versed in the law or in the procedures that he would be bound by. The record indicates that Fabion was twenty-four years old when he was charged. Fabion had already revealed that he was able to research legal matters by filing many *pro se* documents. The trial court finally advised that Fabion would be responsible for unfavorable rulings when Fabion did not follow the proper procedures.

¶34 One of Fabion's attorneys spoke up and reminded Fabion, and the trial court, that, to preserve the record on appeal, a remedy must be suggested. He was concerned that Fabion would not properly preserve a record for appeal. Judge Elliott added that Fabion risked the chance of error being waived on appeal because he did not preserve issues during trial. Judge Elliott explained that even the best trained lawyers make mistakes, so just imagine the mistakes he might make as someone untrained in the law. Even after these weighty warnings, Fabion acknowledged that he understood the pitfalls and still wanted to represent himself.

¶35 Judge Elliott continued to question Fabion to determine whether he was making a knowing decision. He asked Fabion if anyone was encouraging him to represent himself, and Fabion indicated that no one was encouraging him to represent himself. To the contrary, Fabion indicated that his appointed attorneys warned him to be certain before he "step[ped] off the dock." Fabion assured the trial court that he was making this decision of his own free will, that he had not been forced or threatened to make this decision, and no one had made him any promises in exchange for his decision.

¶36 Finally, Judge Elliott warned Fabion that if he engaged in misconduct, obstructionism, or disruption of the proceedings, he was authorized to terminate Fabion's self-representation, and Fabion indicated that he understood.

¶37 Throughout the proceeding, Judge Elliott emphasized the serious nature of the death penalty. He informed Fabion, that if found guilty of the crimes, the lowest sentence he could get would be eighty-five percent on a life sentence, "38-plus years."

¶38 Judge Elliott found that Fabion was articulate, confident and no doubt competent enough to undertake the decision to represent himself. Judge Elliott expressed no doubt that Fabion understood everything he had explained to him. Judge Elliott, therefore, granted Fabion's motion to represent himself.

¶39 The record is abundantly clear that the trial court advised Fabion of the dangers (that he was not well versed in the law and procedure) and the pitfalls of self-representation as required by *Faretta. See Braun v. State*, 1995 OK CR 42, ¶¶

13-14, 909 P.2d 783, 788-89. Whether a valid waiver of counsel exists is determined from a totality of the circumstances including the individual facts of the case and the experience and conduct of the defendant. *Id.* ¶ 12, at 788.

¶40 The third part of this claim (subpart C) is the argument that the record does not support the finding that Fabion's choice to choose self-representation was intelligently made. He argues that the trial court, first, did not fully explain the order of trial, specifically the nature of a penalty phase in a death-penalty trial; second, did not explain and clarify the role of standby counsel and inconsistently made pronouncements regarding standby counsel's duties; third, misinformed Fabion about his ability to subpoena witnesses; and fourth, failed to inform Fabion that his ability to conduct legal research and view discovery would be diminished if he waived his right to an attorney. These complaints are not borne out in the record.

¶41 It seems that Fabion's argument under the first part of the proposition is that his waiver could not be knowing and intelligent because he did not possess the intelligence of an attorney who is familiar with the trial procedure and rules. His general argument is the failure to explain the order of trial, especially the second stage.

¶42 Whether or not Fabion received training from the trial court is a non-issue, as a trial court is under no obligation to train a *pro se* defendant on trial procedure. Fabion has no "constitutional right to receive personal instruction from the trial judge on courtroom procedure." *McKaskle v. Wiggins*, 465 U.S. 168, 183, 104 S.Ct. 944, 954, 79 L.Ed.2d 122 (1984). The 10th Circuit Court of Appeals has held that a developed and complete understanding of courtroom procedure is unnecessary, if the record shows that the defendant was aware "of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." *Silkwood,* 893 F.2d at 248, quoting *Padilla,* 819 F.2d at 956-57. A defendant's technical legal knowledge is totally irrelevant in the assessment of his knowing exercise of the right to represent himself. *Faretta,* 422 U.S. at 836, 95 S.Ct. at 2541; *Johnson*, 1976 OK CR 292, ¶ 34, 556 P.2d at 1294.

¶43 Judge Elliott's explanations and warnings were obviously sufficient for the first stage of trial where the jury would only be expected to determine Fabion's guilt or innocence. The warnings, however, were woefully insufficient to give Fabion the information to make a knowing and intelligent waiver of counsel for the punishment stage of a capital trial. The trial court's explanations were insufficient to explain the circumstances in mitigation of punishment. Clearly, the punishment stage of a capital trial involves the presentation of mitigating evidence or the knowing and voluntary waiver of the presentation of that evidence.

¶44 While a trial court is not required to explain, in detail, the second stage procedure, this Court's jurisprudence requires that a defendant have some understanding of mitigating evidence before he waives the presentation of that evidence. *See Wallace v. State,* 1995 OK CR 19, ¶ 21, 893 P.2d 504, 512-13. The second stage of a death penalty case is unique among trials in Oklahoma. The second stage is the means by which the State is obligated to present evidence to support the alleged aggravating circumstances beyond a reasonable doubt, and a defendant is allowed to present mitigating evidence which might persuade a jury to recommend a sentence less than death.

¶45 A defendant is not required to present mitigating evidence. *Wallace*, ¶ 18, at 511. A defendant must, however, be given the opportunity to present mitigating evidence. *Id.* "[M]itigating evidence is critical to the sentencer in a capital case." *Wallace,* ¶ 12, at 510.

¶46 To support his overarching complaint under this area of his brief regarding trial procedure and his complaint about the lack of instruction about the second stage, Fabion cites *Lay v. State*, 2008 OK CR 7, ¶ 11, fn 9, 179 P.3d 615, 620, fn 9, arguing that the trial court did not explain in detail "how the penalty phase of a trial works." In *Lay,* the footnote states that,

> Here we find Lay's waiver of counsel was adequate. In a death penalty case the trial court must explain in detail to any defendant desiring *pro se* representation how the penalty phase of a capital trial works.

¶47 The language in this footnote was not necessary to the holding in the *Lay* case, thus it is *dicta. See Wainwright v. Witt*, 469 U.S. 412, 422, 105 S.Ct. 844, 851, 83 L.Ed.2d 841 (1985) (holding statements in a footnote were *dicta* because they were unnecessary to decide a case). *Wain-*

wright does not hold that all statements in footnotes are *dicta* as the State argues; however, here the footnote is clearly *dicta. Dicta*, or more precisely *obiter dictum*, are words of an opinion which are entirely unnecessary for the decision of the case, and, therefore, not precedential. Black's Law Dictionary (10th ed. 2014). In other words *dicta* "is an expression in a court's opinion which goes beyond the facts before the court and therefore is an individual view of the author and is not binding in subsequent cases." *See Cohee v. State*, 1997 OK CR 30, ¶ 4, 942 P.2d 211, 219 (Lane, J. concurring in results) (citing Black's Law Dictionary, 5th ed. 408, 409).

¶48 Even though the footnote in *Lay* was *dicta,* our decision in *Wallace* [supra] holds that a defendant should know and understand the rights he is abandoning during a sentencing stage of a capital case. *Wallace* sets forth a framework that can be utilized when a defendant chooses self-representation in a capital case. *Wallace*, ¶ 21, at 512-13. As that framework applies in these types of cases, the trial court must ensure that a defendant choosing self-representation understands his rights, not only in the guilt/innocence process, but also in the sentencing process. In doing so,

1) the trial court must inform the defendant of the right to present mitigating evidence and what mitigating evidence is;

2) the trial court must inquire of the defendant whether he or she understands the sentencing rights;

3) the trial court must inquire of the defendant and make a determination on the record whether the defendant understands the importance of mitigating evidence in a capital sentencing scheme, understands such evidence could be used to offset the aggravating circumstances proven by the prosecution in support of the death penalty, and the effect of failing to present that evidence;

4) after being assured the defendant understands these concepts, the court must inquire whether the defendant desires to waive the right to counsel; and

5) the court shall make findings of the defendant's understanding and waiver of rights.

¶49 This list provides guidelines to assist trial judges in determining whether a defendant has the knowledge and understanding to waive an attorney for the penalty phase of a capital case, or any case in which the State may present aggravating circumstances and a defendant may present mitigating evidence.

¶50 Obviously, a competent attorney must understand the role of mitigating evidence, conduct a thorough investigation of possible mitigating evidence, and then make strategic choices, with the consultation of the client, regarding the presentation of the mitigating evidence. *Wiggins v. Smith*, 539 U.S. 510, 522-23, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003). A *pro se* defendant must understand that without an attorney, his or her ability to do these things will be limited by a lack of experience and training in capital cases. Here, Fabion's waiver of an attorney was done without this specific understanding.

¶51 In three other subparts Fabion complains about the failure of the trial court to explain the role of standby counsel, the procedure to subpoena witnesses, and the ability to conduct legal research and view discovery from the county jail.

¶52 The role of standby counsel is necessarily a nebulous concept because every trial and case is unique. Clarification can almost seem impossible. In explaining what Fabion was giving up by choosing self-representation, the trial court expressed a very narrow view of the role of standby counsel. Initially, at the *Faretta* hearing, the trial court informed Fabion that he was on his own and he could not rely on standby counsel to assist him in any manner. He informed Fabion that standby counsel was nothing more than attorneys standing by. The lecture was obviously meant to give Fabion an understanding of the rights he was abandoning if he decided to represent himself.

¶53 The trial court, initially and appropriately, advised Fabion and standby counsel about standby counsel's limitations, so that Fabion would understand the import of self-representation. The trial court properly informed Fabion that there was only a potential chance that standby counsel would be ordered to take over, if the trial court felt it was necessary. This declaration is clearly in line with our holding in *Stiner v. State,* 1975 OK CR 156, ¶ 15, 539 P.2d 750, 753, quoting *Faretta*, 422 U.S. 806, 834, fn 46, 95 S.Ct. at 2541, fn 46.

¶54 The trial court also told Fabion, "That if you falter and change your mind and go, whoa, I'm in way over my head, now I need a

lawyer, then potentially – potentially, at that point then they would take over." Fabion was advised that he could ask standby counsel questions, but he could not turn to standby counsel and ask them everything to do. Fabion was under no disillusionment about the role of standby counsel when he made his waiver of counsel. The dialogue during later hearings after the trial court found that Fabion had made a knowing and voluntary waiver bears no weight on this finding.

¶55 After the trial court had conducted the *Faretta* hearing and found Fabion made a knowing and voluntary waiver of counsel, Judge Elliott appointed two standby counsel, Assistant Public Defenders James Rowan and Catherine Hammarsten; Rowan for the first stage and Hammarsten for the second stage. Up until that point, they had been his appointed attorneys. This Court requires that standby counsel be appointed in all capital cases where an indigent defendant elects to go *pro se*. *Lay*, 2008 OK CR 7, ¶ 9, 179 P.3d at 620. This Court also required such standby counsel to "be present at all proceedings to assist the defendant in self-representation but allow the defendant to maintain control of the case." *Id.*

¶56 Standby counsel's role, however, includes basic necessities in every case. We have determined that standby counsel should ensure that a *pro se* defendant have adequate access to a law library or suitable research equivalent which satisfies constitutional requirements. *See Cardenas v. State*, 1985 OK CR 21, ¶ 4, 695 P.2d 876, 877-78. Standby counsel may also assist in that research when requested.

¶57 Standby counsel, as stated above, should ensure that a defendant has adequate access to a law library or share legal research and knowledge when requested. Access to a law library would include access to case law, statutory law and local court rules and procedures. This would include the method of issuing subpoenas, obtaining expert witnesses, and whether witnesses subpoenaed by the State must also be subpoenaed by a defendant. In a death penalty case this would also include information regarding the sentencing stage where the State presents evidence to support its aggravating circumstances and a defendant presents evidence in mitigation.

¶58 Standby counsel should be present at all court proceedings; standby counsel should be there to give solicited advice, but standby counsel cannot act for a *pro se* defendant, and has limitations so that he may neither give unsolicited advice, nor give the jury an appearance of representing defendant. *McKaskle*, 465 U.S. at 177, 104 S.Ct. at 950. Standby counsel can participate in the case as long as that participation does not destroy a jury's perception that a defendant has chosen self-representation and does not interfere with a defendant's ac-tual control of the case. *McKaskle*, 465 U.S. at 178-79, 104 S.Ct. at 951.

¶59 The trial court, however, expected standby counsel to do nothing more than their "defined role." The trial court told counsel that they were under no obligation to visit with Fabion at all. He instructed the two attorneys to give Fabion the discovery, and told them that it was Fabion's responsibility to determine how to view the electronically recorded material. The trial court ultimately informed Fabion that issues with research and discovery could be resolved with motions, if necessary.

¶60 The trial court, contradictorily, informed Fabion that he could not seek legal advice from standby counsel because they no longer represented him. The trial court, however, told standby counsel there would be some leeway about handing notes to Fabion, if standby counsel perceived the "ship about to hit rocks." In this case, however, there is no showing that Fabion was denied or barred from using standby counsel as he deemed necessary.

¶61 Judge Elliott's contradictory and confusing pronouncements were just that; they had no bearing on Fabion's decision to waive counsel and choose self-representation. The pronouncements, however, may have confused standby counsel and Fabion. *McKaskle* holds that the role of standby counsel is limited on the extent of unsolicited participation. *McKaskle*, 465 U.S. at 177-78, 104 S.Ct. at 950-51; *Parker v. State*, 1976 OK CR 293, ¶ 10, 556 P.2d 1298, 1302. The *pro se* defendant is entitled to have control over the case he presents to the jury. *McKaskle*, 465 U.S. at 178, 104 S.Ct. at 951. *McKaskle* also holds that standby counsel may participate as long as the participation does not destroy a jury's perception that a defendant has chosen self-representation. *McKaskle*, 465 U.S. at 178-79, 104 S.Ct. at 950-51. Standby counsel, therefore, is free to participate as long as the participation does not undermine a defendant's control of the case and does not confuse a jury. If standby counsel is allowed to

speak on any matter of importance, the *Faretta* right is eroded. *Id.*

¶62 While *McKaskle* is a case where the appellant complained about standby counsel's improper participation, no error was found where the participation was clearly invited and in no way undermined the right of self-representation. In this case we have no violation of the right to self-representation by "unsolicited and excessively intrusive participation by standby counsel." *McKaskle,* 465 U.S. at 177, 104 S.Ct. at 950.

¶63 Fabion clearly benefited from the trial court's request to have standby counsel assist him, when necessary. In this respect, Fabion basically acquiesced to standby counsel's participation, thus he cannot object. *Id.*, 465 U.S. at 182, 104 S.Ct. at 953. *Faretta* does not require "hybrid" representation, but a defendant cannot complain if he elects, or acquiesces, to counsel's appearing before the court or jury. *McKaskle,* 465 U.S. at 183, 104 S.Ct. at 953. The Court in *McKaskle* explained that *Faretta* rights are not infringed when standby counsel assists a *pro se* defendant in understanding procedure, protocol and etiquette. *Id.*, 465 U.S. at 183-84, 104 S.Ct. at 954. A defendant either accepts counsel or he elects to proceed *pro se*; one or the other must be in charge in order to maintain orderly procedure. *See Bowen v. State*, 1980 OK CR 2, ¶ 20, 606 P.2d 589, 594, quoting *Smith v. State,* 1974 OK CR 60, ¶ 20, 521 P.2d 832, 836, *see also Thomas v. State*, 1984 OK CR 19, ¶ 25, 675 P.2d 1016, 1022 (holding a defendant may have representation by an attorney, or he may proceed *pro se*, but he may not have both concurrently). Here, however, there is no record that standby counsel either overstepped their bounds of standby counsel or limited their assistance to Fabion in any way.

¶64 Fabion complains about the trial court's pronouncement to standby counsel that, if Fabion changed his mind, standby counsel would step in, so they should be prepared to do so. During a hearing on March 20, the trial court stated, "you guys … are appointed as standby counsel to step up and take over the case when or if he indicates to me that he wants a lawyer." Rowan, attempting to clarify the role of standby counsel, asked the trial court whether Fabion could ask the grounds for a proper objection and the trial court said, "Absolutely not."

¶65 The trial court limited standby counsel to preparations for a substitute role by stating, "If he decides at some point and conveys that to me that he no longer wishes to represent himself, at that point then you step up to the table and you assume responsibility of the case…. [Y]ou're standby counsel, which in a lot of ways, perhaps not totally, you're an observer at this point."

¶66 Rowan asked for more clarification asking, "Are you telling me that I should actively be preparing for trial …." The trial court stated,

> Absolutely. Because if he decides on day four he wants a lawyer, you step right in right then. If it's first stage you step in. If it's second stage, it's Ms. Hammarsten. Absolutely. Absolutely…. He doesn't get to let jeopardy attach and then, who, Kings X, I want another lawyer and then the lawyer would be able to step and say, oh, I'm not prepared. Huh-huh. That's not the way the system works. Not the way I'm going to allow it to work…. He's made his decision, … which he can certainly change at any point. But when he does, then you step up to the table and you take over the process, if it's first stage, and Ms. Hammersten in the second stage, if there is a second stage. (March 13, 2014, Tr. at 10-11)

¶67 Rowan expressed concern stating that the Oklahoma County public defender "shut the second stage down as far as expert witnesses and all of the preparation that goes into preparing a second stage." The trial court again stated that,

> A defendant doesn't get to go *pro se* and then in the middle of the proceeding after jeopardy is attached to say, I want another lawyer and then that lawyer who is standby doesn't get to say, whoa, I'm not prepared…. Yes, you and Ms. Hammarsten will be expected to be prepared … (March 13, 2014, Tr. at 12)

¶68 Standby counsel steps in and takes over, but is limited to the strategy prepared by the defendant. *See, e.g., State v. Richards*, 552 N.W.2d 197, 207 (Minn.1996) (holding that standby counsel is at the mercy of the defendant's plans). There is no right to hybrid representation. *See McKaskle*, 465 U.S. at 183, 104 S.Ct. at 953 (holding *Faretta* does not require hybrid representation), *Parker,* 1976 OK CR 293, ¶ 10, 556 P.2d at 1302, *Stiner,* 1975 OK CR 156, ¶ 14, 539 P.2d at 753. Standby counsel does not get to

start over with a new strategy and proceeding. Standby counsel and Fabion surely understood this because the trial court told standby counsel that they were limited to Fabion's *pro se* witness lists for first and second stage, should it become necessary for them to take over. Then, again, the trial court told the attorneys that they would, absolutely, be expected to be prepared.

¶69 Effective representation at the point that a *pro se* defendant is required to accept representation does not mean that standby counsel may hit reset and start a different trial strategy. When a *pro se* defendant has made strategic choices, standby counsel should be prepared to accept the strategic choices and take over. None of the trial court's orders regarding standby counsel's role, both active and passive would have created an issue had Fabion never indicated to standby counsel that he was "in over his head." The idea that standby counsel is limited to a defendant's strategy if it becomes necessary for standby counsel to take over inoculates counsel from ineffective claims, especially in cases where a defendant causes a situation where standby counsel must step in and take over the case.

¶70 Understandably, courts face a fine line between limiting standby counsel's participation and forbidding standby counsel from assisting at all. As long as standby counsel's participation does not create the perception before the jury that the defendant has not chosen self-representation, the participation is not harmful.

¶71 Here, the concept of standby counsel's role was not explained to this extent, so in proposition three, Fabion argues, citing *Johnson*, 1976 OK CR 292, ¶ 42, 556 P.2d at 1297, that the most important role of standby counsel is to take over the case if requested by the *pro se* defendant. This Court in *Johnson* actually held that the defendant had knowingly, voluntarily, and intelligently waived his right to counsel pursuant to the *Faretta* decision. This Court strongly encouraged trial courts to appoint standby counsel if a defendant waives his right to counsel. The opinion reasons that standby counsel is encouraged:

> If termination becomes necessary or if the defendant changes his mind and decides during the trial that he wants to be represented by counsel, a standby counsel would be able to step in and the trial could continue regardless of whether the defendant forfeits or relinquishes his right of self-representation.

Id. Despite the fact that this language is *dicta,* as it was clearly not necessary to the decision in that case, the language is only an example of what may occur if a *pro se* defendant believes he can change his mind during trial and wishes to be represented by counsel.

¶72 The confusion in the record regarding the role of standby counsel alone does not rise to a level which would require reversal of this case, because Fabion has not shown that he was denied the assistance of standby counsel in any way. The confusion, however, does support a conclusion that Fabion was unaware of the rights he was giving up by waiving counsel in the punishment stage of this trial. The confusion regarding the role of standby counsel and our conclusion that Fabion was unaware of the punishment stage rights he was waiving lead this Court to reverse Fabion's death sentences and remand this case for a new sentencing proceeding.

¶73 At trial, Fabion's waiver of the right to have competent counsel assist in the presentation of mitigating evidence includes the waiver of competent presentation of that evidence. A defendant, therefore, should at least understand that mitigating evidence may be anything listed in Oklahoma Uniform Jury Instruction (OUJI) 4-79, as well as other evidence which might be considered as mitigating. So while a defendant must be informed of the possible defenses to the charges, he must also be informed about possible defenses to the aggravating circumstances and possible mitigating evidence which might be presented during the punishment stage of trial.

¶74 Here, there is absolutely nothing in the record to indicate that the trial court explained possible defenses to the aggravating circumstances or possible mitigating evidence. While neither the Eighth Amendment to the United States Constitution, nor corresponding provisions of the Oklahoma Constitution or statutes require that mitigating evidence be presented on behalf of a defendant, a defendant must be given the opportunity to present such evidence. Along with a waiver of that opportunity, there exists the necessity of a record indicating that a defendant was informed of the mitigating evidence he is forfeiting. *Wallace*, 1995 OK CR 19, ¶¶ 20-23, 893 P.2d at 512-13.

¶75 There is no record in this case to indicate that Fabion sufficiently understood mitigating evidence. Compounding the failure to inform Fabion regarding defenses to second stage aggravators and possible mitigating evidence, is the method by which the trial court determined whether or not Fabion actually wanted counsel to represent him during the second stage. At the beginning of second stage, standby counsel notified the trial court that Fabion told her that he did not want to continue to represent himself. Standby counsel was questioned regarding the possibility of representing Fabion, and she explained she could not be prepared to present a second stage case that met her personal and professional standards without a continuance; the State argued against a continuance; and, when asked, Fabion stated he was ready to proceed to the second stage.

¶76 At that crucial point of trial, the trial court abandoned the idea that Fabion was representing himself. This was a matter of importance where counsel was asked to speak instead of Fabion, which eroded Fabion's *Faretta* right.

¶77 The trial court allowed standby counsel to take over and act as if Fabion was represented by counsel. Counsel, however, made an argument which was contrary to the interests of Fabion. At that point, Fabion was required to choose between counsel who refused to present mitigating evidence unless given a continuance or continue with self-representation. Counsel's argument, however, presumed that ineffectiveness would be attributed to her and not to Fabion's poor choices.

¶78 The trial court did not initially address Fabion. It appeared, therefore, that Fabion was no longer representing himself. The trial court, at best, gave everyone the impression that standby counsel was no longer standby, but was now representing Fabion and arguing for a continuance of the punishment phase of the death case. Then, of course, the trial court allowed the State to argue against a continuance. By the time the trial court addressed Fabion, the writing was on the wall, even though the trial court had not ruled on counsel's request for a continuance. Fabion had three choices: announce ready and present his second stage case for which he informed counsel he was unprepared to do, face a ruling denying a continuance where he would be represented by counsel who could not, in good conscience, proceed with Fabion's ill-prepared second stage case, or give up his right to a speedy trial and accept a ruling granting a continuance. Neither Fabion, nor counsel understood that counsel could be required to continue with Fabion's strategy at no consequence to counsel.

¶79 Fabion was now facing a trial court that, at the March 20 hearing, had told counsel to be prepared but was now learning that counsel was unprepared to take over the punishment stage, even with the witness Fabion had prepared for this phase of trial. The trial court did not address Fabion, the *pro se* litigant, until after attorneys had made their argument. We find this constituted error and violated Fabion's initial waiver of his right to counsel. As a *pro se* litigant his desires regarding continuing self-representation should have been addressed initially.

¶80 At this point Fabion no longer had standby counsel assisting him with the punishment phase of trial. He had an attorney whose argument indicated that professional interests had created a relationship adverse to the defendant. Understandably, standby counsel does not have to agree with a *pro se* defendant's strategic decisions in a trial. These disagreements, however, should not prevent standby counsel in assisting a defendant who asks for reasonable assistance. Fabion arguably understood at this point that standby counsel's interests had become adverse to his own.

¶81 This Court cannot predict what Fabion might have told the trial court had the trial court allowed him to speak first without the statements of standby counsel indicating that she had a professional conflict of interest preventing her from stepping in and taking over the case utilizing Fabion's second stage strategy. The trial court foreclosed that possibility by questioning counsel first. This dialogue clearly violated Fabion's right of self-representation as addressed in *McKaskle*.

¶82 The record supports a finding that Fabion made a knowing and voluntary decision to waive counsel and represent himself during the first stage. *See Fitzgerald v. State*, 1998 OK CR 68, ¶¶ 6-8, 972 P.2d 1157, 1162-63 (approving a similar record). The record, however, does not support a finding that Fabion made a knowing and voluntary decision to waive counsel for the punishment stage of this proceeding. The death sentences in this case will, therefore, be reversed and the case will be remanded for resentencing. Upon remand the trial court will appoint counsel to represent

Fabion Brown unless Brown makes a knowing and voluntary waiver of counsel not inconsistent with this Opinion.

¶83 In a related argument, in proposition eight, Fabion argues that the heightened standard of reliability required by the Eighth Amendment in rendering a penalty of death supersedes a defendant's right to self-representation in a capital sentencing proceeding. Appellant asks this Court to overrule established precedent and force representation upon a capital defendant during the second stage of a capital case.

¶84 We recognize that the right of self-representation is not absolute and the waiver of the right to counsel must be knowing and intelligent. *Edwards v. Arizona,* 451 U.S. 477, 482, 101 S.Ct. 1880, 1884, 68 L.Ed.2d 378 (1981). As long as the dangers and pitfalls are understood by a defendant and the defendant does not deliberately engage in serious and obstructionist conduct, a lawyer will not be forced upon an unwilling defendant. *Indiana v. Edwards,* 554 U.S. 164, 170, 128 S.Ct. 2379, 2383, 171 L.Ed.2d 345 (2008).

¶85 In *Lay,* however, this Court held that the right of self-representation is not limited by the type of trial, and a competent individual may waive counsel for any stage of a capital trial. *Lay*, 2008 OK CR 7, ¶ 5, 179 P.3d at 619; *see Silagy v. Peters,* 905 F.2d 986, 1007 (7th Cir. 1990) (holding that *Faretta* grants a defendant the right to self-representation in a capital sentencing hearing and there exists no logical reason to deny a death-eligible defendant his Sixth Amendment right to self-representation).[6] Appellant has cited no new precedent which would cause this Court to overrule its holding in Lay. Furthermore, this Court's decision remanding the case for new sentencing renders this issue moot.

III. JURY SELECTION ISSUES

¶86 In proposition seven, Fabion claims that his constitutional rights to a fair trial were violated when the trial court abused its discretion in excusing two prospective jurors for cause. He also argues that he was not allowed to rehabilitate one of these jurors who gave equivocal answers regarding his ability to impose the death penalty.

¶87 We review the manner and extent of a trial court's *voir dire* under an abuse of discretion standard. *Littlejohn v. State*, 2004 OK CR 6, ¶ 49, 85 P.3d 287, 301. This Court will not reverse unless an abuse of discretion is shown. The manner and extent of *voir dire* rests within the discretion of the trial court. *Black v. State,* 2001 OK CR 5, ¶ 15, 21 P.3d 1047, 1057. This Court will not disturb the verdict based on *voir dire* methods unless an abuse of discretion is shown, or the method is not constitutionally adequate. *Id.*, 2001 OK CR 5, ¶ 23, 21 P.3d at 1059-60.

¶88 In reviewing cases where the answers of potential jurors are unclear or equivocal, "this Court traditionally defers to the impressions of the trial court who can better assess whether a potential juror would be unable to fulfill his or her oath." *Scott v. State,* 1995 OK CR 14, ¶ 10, 891 P.2d 1283, 1289. Moreover, it is not an abuse of discretion to deny counsel an opportunity to rehabilitate a potential juror if the trial court has sufficiently questioned the juror to make an informed decision. *Littlejohn*, 2004 OK CR 6, ¶ 49, 85 P.3d at 301. The trial court is not required to allow the parties to rehabilitate potential jurors. *Duvall v. State*, 1991 OK CR 64, ¶ 25, 825 P.2d 621, 631.

¶89 When the proper questions have been asked by the trial court to determine whether prospective jurors can sit in the case, it is not error to deny defense counsel an opportunity to rehabilitate the excused jurors. *Scott*, 1995 OK CR 14, ¶ 11, 891 P.2d at 1290. Furthermore, when a juror's views on capital punishment would "prevent or substantially impair the performance of his duties," removal for cause is proper. *Williams v. State*, 2001 OK CR 9, ¶ 10, 22 P.3d 702, 709.

¶90 Juror M.W., during individual *voir dire*, expressed a belief that imposing death would be tough due to religious beliefs. M.W. was able to say that meaningful consideration could be taken for all three punishment options. M.W., however, admitted that his religious teachings would place him in a camp of never imposing a penalty of death. From the record it appears that M.W. might consider all three punishment options, but would not actually sentence a defendant to death, regardless of the facts. The trial court did not abuse its discretion in determining that M.W. would not give meaningful consideration to all three punishment options, thus the removal for cause was not an abuse of discretion.

¶91 Juror D.M., also during individual *voir dire*, expressed reluctance in imposing the pen-

alty of death. Initially potential juror D.M. would not consider the death penalty regardless of the law and facts. The trial court utilized the uniform instructions and D.M. clearly indicated that the death penalty would not be considered. Again, there was no abuse of discretion here, and the trial court did not abuse its discretion in not allowing Fabion to attempt to rehabilitate the potential juror.

¶92 Both of these jurors gave unequivocal answers about their ability to consider the death penalty. The trial court sufficiently questioned both of the potential jurors to make an informed decision about their ability to truthfully consider all three punishment options. The method of *voir dire* and the decision to excuse these two potential jurors for cause did not amount to an abuse of discretion.

IV. FIRST STAGE TRIAL ISSUES

¶93 Fabion argues, in proposition two, that he was deprived of due process many times during trial because the trial court denied specific requests. Fabion raises three sub-propositions, A-C. The first sub-proposition is divided into three parts.

¶94 In sub-proposition A, Fabion claims that Judge Elliott restricted his ability to call witnesses. He first references arguments made in proposition one where he expressed that he needed to know how to get subpoenas out. He argues that the trial court would not offer suggestions on issuing subpoenas and prohibited standby counsel from doing so as well. This argument is somewhat disingenuous.

¶95 The trial court advised Fabion that he was forbidden from giving legal advice. When viewing the record as a whole, it becomes clear that the trial court prohibited standby counsel from giving unsolicited advice. The trial court, however, did tell Fabion that he could ask standby counsel questions.

¶96 Despite his ignorance about issuing subpoenas, Fabion stated he was ready to represent himself. Due to his *pro se* representation at trial, he cannot raise ineffective assistance on appeal, thus he cannot develop a record which indicates who he might have called as a witness. There is no indication in the record that Fabion failed to get subpoenas issued to witnesses he desired.

¶97 Next, Fabion claims that the trial court denied him the right to call witnesses who had been subpoenaed and called to testify by the State. Fabion attempted to call Detective Harkins during an "other crimes" motion hearing. The trial court had limited Fabion's cross examination due to a question outside the scope of direct, and irrelevant questions, then when Fabion wanted to call him as his own witness, the trial court told Fabion he could not recall him because he "had ample opportunity to ask him all of the questions you wanted to ask him." Fabion has completely failed to show that he was prejudiced by this limitation. Any possible or imagined error is clearly harmless. Nothing here affected Fabion's trial rights.

¶98 Fabion claims, next, that the trial court would not allow him to call a different witness during the same motion hearing, because of a "rule of sequestration," which had never been ordered. The rule of sequestration had been ordered February 6, 2014, and this *Burks* hearing was on March 20, 2014. Neither the motion nor the order was limited to trial witnesses. The referenced witness, Kelly Haley, was present at the hearing and was subject to the rule of sequestration ordered by the court. There was no abuse of discretion here.

¶99 Fabion further complains that the trial court limited the opportunity to raise complaints about his trial counsel. In fact, as part of the *Faretta* hearing and Fabion's *pro se* filings, his complaints were well documented. His complaints, as stated under a prior proposition, were nothing more than personality conflicts and did not rise to the level of ineffective assistance which would be grounds for the substitution of counsel.

¶100 Fabion claims that he was denied access to legal research. Fabion's complaints are not supported by the record. The record is clear that the trial court gave Fabion opportunities to address issues with access to legal research by the use of motions. The record is also clear that Fabion indicated that standby counsel had assisted with legal research. This complaint has no basis.

¶101 In proposition four Fabion claims that a *Brady*[7] violation occurred when the trial court refused to allow him to have a copy of Emily Matheson's mental health report. Fabion requested the report, the trial court read the report, and the trial court ruled that the information was not exculpatory nor was it relevant.

¶102 "Due process requires the State to disclose exculpatory and impeachment evidence

favorable to an accused. *See United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d [104] (1972), *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) *and Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)." *Wright v. State,* 2001 OK CR 19, ¶ 22, 30 P.3d 1148, 1152. To establish a *Brady* violation, a defendant must show that the prosecution failed to disclose evidence that was favorable to him or exculpatory, and that the evidence was material. *Jones v. State*, 2006 OK CR 5, ¶ 51, 128 P.3d 521, 540-41; *Paxton v. State*, 1993 OK CR 59, ¶ 15, 867 P.2d 1309, 1318.

¶103 Material evidence must create a reasonable probability (a probability sufficient to undermine confidence in the outcome) that the result of the proceeding would have been different had the evidence been disclosed. *Bagley,* 473 U.S. at 682, 105 S.Ct. at 3383. The mere possibility that an item of undisclosed information might have helped the defense or affected the outcome does not establish materiality. *Knighton v. State,* 1996 OK CR 2, ¶ 43, 912 P.2d 878, 890.

¶104 The burden is on Fabion to show that, without considering the intent of the prosecution, the evidence was: 1) suppressed by the prosecution, 2) favorable to the accused, and 3) material as to guilt or punishment. *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196-97. The duty to disclose evidence favorable to an accused includes impeachment as well as exculpatory evidence. *Bagley*, 473 U.S. at 676, 105 S.Ct. at 3380.

¶105 Here the report was not material to the case. "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Bagley,* 473 U.S. at 682, 105 S.Ct. at 3383. The question is not whether the verdict more likely than not would have been different, "but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley,* 514 U.S. 419, 434, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490 (1995).

¶106 The mere possibility that an item of undisclosed information might have helped the defense or affected the outcome does not establish materiality. *Knighton*, 1996 OK CR 2, ¶ 43, 912 P.2d at 890.

¶107 After thorough consideration, we find the report on Matheson was not material according to the standard in *Bagley,* 473 U.S. at 682, 105 S.Ct. at 3383. Fabion received a verdict worthy of confidence even in the absence of the Matheson examination report.

¶108 Dr. Poyner only reported that Matheson was depressed and had some interpersonal relationship disorders. Matheson was not suffering from a serious or pervasive mental illness. Matheson's personality disorders were not relevant to her credibility. There were no disorders which prevented Matheson from perceiving matters and testifying about them in a truthful manner.

¶109 Fabion's reliance on *Browning v. Trammell,* 717 F.3d 1092 (10th Cir.2013), is not persuasive. In *Browning,* a witness was diagnosed as having a severe mental illness which affected her ability to recount events accurately. The witness was prone to homicidal acts and motivations. The witness had memory deficits and blurred reality and fantasy. Her ability to observe and remember events was impaired. *Id.*, 717 F.3d at 1094-1101.

¶110 Here the report on Matheson does not make any conclusions that she was suffering a mental illness so severe that she could not recall events. There is no error here.

¶111 Fabion complains, in proposition five, the trial court erred in improperly allowing evidence showing that the victim, Jessica Brown, was afraid of him. Fabion admits that this type of evidence is admissible under a "state of mind" exception.

> "Such antecedent declarations by a decedent are admissible in a homicide case to show the decedent's state of mind toward the defendant or to supply the motive for killing." *Welch v. State*, 2000 OK CR 8, ¶ 28, 2 P.3d 318, 370.
>
> > Testimony showing ill feeling, threats, or similar conduct by one spouse toward another in a marital homicide case is relevant and statements by the deceased expressing fear of a spouse are admissible under the state of mind exception to the hearsay rule.

Washington v. State, 1999 OK CR 22, ¶ 36, 989 P.2d 960, 973.

¶112 Fabion, however, argues that the amount of evidence was cumulative and undu-

ly prejudicial. There were no objections to the admission of this evidence at trial, thus this Court is limited to a review for plain error only. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. To be entitled to relief for plain error, a defendant must show: (1) the existence of an actual error; (2) that the error is plain or obvious; and (3) that the error affected his substantial rights, meaning that the error affected the outcome of the proceeding. *Id.*

¶113 The evidence was not cumulative, as each witness who testified about Jessica Brown's fear, relayed information about different aspects or factual situations which showed Jessica's fear. Jessica's friends, her mother, and her divorce attorney all testified about information which showed Jessica was afraid of Fabion. Their testimony did not deprive Fabion of a fair trial which lacked due process. This proposition does not rise to the level of error which is clear or plain on the record. The alleged error, therefore, cannot meet the threshold criteria of plain error.

¶114 In proposition six, Fabion claims that the trial court's directions to the jury regarding ordering pizza coerced them into reaching a first stage verdict without proper deliberations. The trial court's directions, verbatim, were:

> For the record, it is 5:51.
>
> Now, in reference to the meal. [sic] If you decide, and it's your decision, if you decide as a jury you wish to have a pizza delivered, this is the process. You press the buzzer. The bailiff will come up and the foreperson will tell the bailiff, you would like to see the menus.
>
> She will then come downstairs, get the menus and bring an individual menu up for each of you. You are allowed to order up to and no more than four large pizzas. Okay? And then one soda or water per person [sic]. Okay?
>
> And you write it down on the yellow tablet, exactly, specifically what you want ordered. If it says pepperoni, you're going to get pepperoni. If you wanted ham, too bad [sic]. It said pepperoni. Write it down exactly the way you want it ordered that is available on the menu.
>
> If there is no Coke on the – Coca Cola on the menu, don't write Coca Cola because it says Pepsi. Okay?
>
> Because if you write something down that's not on the menu, it doesn't get ordered and not our problem. Okay? Write it down specifically off the menu. Okay? Once that is done, then you press the buzzer again. The bailiff will come up. And the foreperson, no one else, goes to the door and says nothing more than, here's our order.
>
> She will then come downstairs and order it. It takes about an hour to get it here after you give it to her. Okay? And that's depending on how busy they are.
>
> There is only one pizza place that delivers for us on credit. A place called Joey's Pizza that's over here on Film Row downtown. Because since we're a government agency, it has to be done on credit and they have been very kind to us and agreed to do that and they will deliver today and get paid in 30 days.
>
> So that's the only place that's available. If you don't like that, can't eat that, don't want that, then I explained those contingencies to you last evening. That's the way it is. Okay?
>
> But be mindful, that it takes approximately, depending on how busy they are, but it averages right at an hour to get to you after you give the order to the bailiff.
>
> Now, having said that, if you believe, and this is your choice, if you believe you are near getting a verdict and you will have a verdict in less than a [sic] hour, don't order the pizza. Okay?
>
> And I hope the reasons there are obvious. Okay? I try to be a steward of the taxpayer money. But if you order it, if you want it, we'll order it. But I've had two or three juries who order it and then five minutes later have a verdict and then they get to wait instead of going home to eat the pizza that they ordered.
>
> So again that is your choice. And if you decide you want it, it will be ordered.
>
> Okay. That's the process….
>
> With that for the record, it's 5:54.

(Vol. IX, Tr. 227-29) (Transcribed verbatim) Moments thereafter, the jury retired to deliberate and returned with a verdict at 6:41 p.m. Fabion claims that this "lecture about pizza" caused

them to return a verdict without due deliberations. Fabion, however, did not object to the instruction at trial. This Court, therefore, is limited to a review for plain error. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

¶115 Instructions given to the jury are a matter of judicial discretion. *Postelle v. State*, 2011 OK CR 30, ¶ 38, 267 P.3d 114, 132. There are no Uniform Jury Instructions on the ordering of dinner; therefore, the trial court is bound only by existing law and good judgment.

> If the court determines that jurors should be instructed on a matter not included within the Uniform Jury Instructions, the court should give an instruction that is "simple, brief, impartial and free from argument." 12 O.S.2001, § 577.2.

Id. ¶ 55, at 137, citing *Johnson v. State*, 2009 OK CR 26, ¶ 4, 218 P.3d 520, 522. A trial court's instructions should never influence jurors in their decision-making process. *Johnson*, 2009 OK CR 26, ¶ 4, 218 P.3d at 522. In this case, there is no indication that the instruction influenced the jurors to reach a verdict. No plain error occurred in this instruction, as the instruction did not affect the outcome of this case.

¶116 This Court, therefore, finds no error in the first stage of this trial requiring reversal of Fabion's convictions and his sentence in the conspiracy count.

IV. DEATH PENALTY PUNISHMENT ISSUES

¶117 Along with Fabion's arguments, in propositions three and eight, that due process and the demand for a reliable sentencing proceeding require that an attorney be forced upon an unwilling defendant in the punishment stage of a death penalty case, he also argues, in proposition nine, that the death penalty, in and of itself constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article II, §§ 7, 9 and 20 of the Oklahoma Constitution.

¶118 These propositions are rendered moot by this Court's decision to remand this case for resentencing. Nevertheless, Fabion's proposition is primarily supported by dissenting opinions of United States Supreme Court Justices Bryer and Ginsburg in *Glossip v. Gross*, 576 U.S. ___, 135 S.Ct. 2726, 192 L.Ed.2d 761 (2015). Fabion's argument includes assertions that the death penalty's administration is unreliable, arbitrarily imposed, excessively delayed, and declining in use.

¶119 Fabion has cited no controlling precedent which overrules the existing and overwhelming case law upholding the constitutionality of the death penalty. *See Miller v. State,* 2013 OK CR 11, ¶ 213, 313 P.3d 934, 998 (reaffirming this Court's long standing holding that the death penalty does not constitute cruel and unusual punishment).

V. CUMULATIVE ERROR AND MANDATORY SENTENCE REVIEW

¶120 In proposition ten, Fabion claims that the accumulation of error deprived him of due process of law and a reliable sentencing hearing. This proposition is moot due to our finding that error requires reversal of Fabion's death sentences and remand for resentencing. Furthermore, our statutorily mandated sentence review is no longer relevant based on reversal of the death sentences and remand for resentencing.

VI. DECISION

¶121 The Judgment of the district court on counts one and two (first degree murder) is **AFFIRMED**. The death sentences, however, are **REVERSED** and the case is **REMANDED** to the district court for resentencing. The Judgment and Sentence for count three (conspiracy) is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT
OF OKLAHOMA COUNTY
THE HONORABLE RAY C. ELLIOTT,
DISTRICT JUDGE

ATTORNEYS AT TRIAL

Fabion DeMargio Brown, *pro se*, James Rowan (standby counsel), Catherine Hammarsten (standby counsel), Assistant Public Defenders, 320 Robert S. Kerr, Oklahoma City, OK 73102, for Defendant

Scott Rowland, Daniel Gridley, Assistant District Attorneys, Oklahoma County, 320 Robert S. Kerr, Oklahoma City, OK 73102, Attorneys for State

ATTORNEYS ON APPEAL

Bobby Lewis, Jamie D. Pybas, Indigent Defense System, P.O. Box 926, Norman, OK 73070, Attorneys for Appellant

E. Scott Pruitt, Attorney General, Caroline E.J. Hunt, Assistant Attorney General, 313 N.E. 21st St., Oklahoma City, OK 73105, Attorneys for Appellee

OPINION BY: LEWIS, V.P.J.:
LUMPKIN P.J.: Specially Concur
HUDSON, J.: Specially Concur
WINCHESTER, J.: Concur
WALKLEY, J.:[8] Specially Concur

LUMPKIN, PRESIDING JUDGE: SPECIALLY CONCURRING

¶1 I concur in affirming the judgment of guilt and remanding the case for resentencing. I also want to compliment my colleague for a well reasoned opinion that gives guidance to the bench and the bar. I write separately to address Appellant's waiver of counsel and *pro se* representation.

¶2 Under the circumstances of this case, the trial judge should have made a more detailed inquiry of Appellant at the start of the second stage of trial and clarified what, if any, concerns he had regarding the assistance of counsel. As it stands, we are uncertain whether Appellant's valid waiver of counsel during the first stage of trial survived into the second stage of the proceedings.

¶3 As discussed in the opinion, the trial court's first stage warnings about self-representation were adequate to find a valid Sixth Amendment waiver of counsel. Also, as stated in the opinion, during the second stage, the trial court initially appropriately advised Appellant and standby counsel about standby counsel's limited role. The problem occurred when, after being notified by standby counsel, and not Appellant, that Appellant told counsel that he did not want to continue to represent himself, the trial court turned the discussion to counsel, and not Appellant. Once the trial court was informed Appellant no longer wanted to represent himself, the trial court had a duty to question Appellant, who was still proceeding *pro se* at that point, regarding his desire to proceed *pro se* or with standby counsel.

¶4 While neither the United States Supreme Court nor this Court have addressed a situation like the one before us and set forth specific warnings to be given a *pro se* defendant during the penalty phase of a capital case, this Court's opinion in *Wallace v. State*, 1995 OK CR 19, 893 P.2d 504 (involving a defendant's waiver of the right to present mitigating evidence in a capital trial) includes an admonishment which would serve the trial bench well when formulating the requisite second stage *Faretta* warning. The guidelines in *Wallace* require the trial court to ensure that the defendant has an understanding of his or her rights in the sentencing process.

> The court must inform the defendant of the right to present mitigating evidence, and what mitigating evidence is . . . The trial court must inquire of a defendant and make a determination on the record whether the defendant understands the importance of mitigating evidence in a capital sentencing scheme, understands such evidence could be used to offset the aggravating circumstances proven by the prosecution in support of the death penalty, and the effect of failing to present that evidence.

Id., 1995 OK CR 19, ¶ 21, 893 P.2d at 512–13. By determining that the defendant understands these concepts, the trial court will make a sufficient record for the purposes of *Faretta.* "Whether there has been a valid waiver of right to counsel is to be determined from the total circumstances of the individual case including background, experience and conduct of the accused." *Braun v. State,* 1995 OK CR 42, ¶ 12, 909 P.2d 783, 788.

¶5 On remand, the trial court should warn Appellant as it did in the first stage of trial regarding the dangers of self-representation but with further emphasis on the particularities of the sentencing phase of a capital trial. *See Mitchell v. State*, 2016 OK CR 21, ¶ 4, 387 P.3d 934, 937, citing *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975) ("[a] defendant must be warned of the dangers and disadvantages of self-representation, based on all the circumstances of the case."). The trial court should ensure that Appellant is made aware that self-representation results in the waiver of any claim of ineffective assistance on appeal and that the trial court will not effectively operate as counsel or co-counsel for the defendant. *Coleman v. State,* 1980 OK CR 75, ¶ 8, 617 P.2d 243, 246.

¶6 As the opinion states, on remand, if Appellant makes a knowing and voluntary waiver of counsel pursuant to the requirements of *Faretta*, standby counsel should be appointed. It is worth repeating that both

Appellant and attorneys appointed as standby counsel should be informed as to standby counsel's limited role, *McKaskle v. Wiggins*, 465 U.S. 168, 177, 104 S.Ct. 944, 950, 79 L.Ed.2d 122 (1984), and particularly as it pertains to the punishment phase of trial.

¶7 I find the analysis in *United States v. Taylor,* 933 F.2d 307, 312–13 (5th Cir. 1991) citing *McKaskle*, 465 U.S. at 177–78, 104 S.Ct. at 950–51, instructive as the Fifth Circuit Court of Appeals delineated the limited nature of standby counsel's role as:

> The defendant preserves actual control over the case he presents to the jury: standby counsel cannot substantially interfere with any significant tactical decisions, cannot control the questioning of witnesses, and cannot speak in place of the defendant on any matter of importance. Standby "counsel" is thus quite different from regular counsel. Standby counsel does not represent the defendant. The defendant represents himself, and may or may not seek or heed the advice of the attorney standing by. As such, the role of standby counsel is more akin to that of an observer, an attorney who attends the trial or other proceeding and who may offer advice, but who does not speak for the defendant or bear responsibility for his defense.

Taylor, 933 F.2d at 312–13.

¶8 "In determining whether a defendant's *Faretta* rights have been respected, the primary focus must be on whether the defendant had a fair chance to present his case in his own way." *McKaskle*, 465 U.S. at 177, 104 S.Ct. at 950. "The *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury" and he must be "allowed to address the court freely on his own behalf." *Id*., 465 U.S. at 179, 104 S.Ct. at 951. Since a *pro se* defendant's control of his own defense may be undermined or eroded by standby counsel's "unsolicited participation" the Supreme Court requires trial courts to limit standby counsel's role. *Id.*, 465 U.S. at 177, 104 S.Ct. at 950. Standby counsel does not appear before the court or the jury on the *pro se* defendant's behalf. *Id.*, 465 U.S. at 183, 104 S.Ct. at 953. Standby counsel is appointed for the purpose of relieving the judge of 'the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals." *Id*., 465 U.S. at 184, 104 S.Ct. at 954.

¶9 This law clearly indicates that standby counsel is to be prepared to try the case should Appellant desire, but standby counsel is to try the case as Appellant desires – even if that is different from the way standby counsel would have tried the case. This advisory role should include standby counsel assisting in discovery and the securing of defense witnesses. The trial court should so advise both Appellant and attorneys appointed to serve as standby counsel. As the opinion strongly points out, the trial judge in this case admonished counsel that standby counsel must be prepared to proceed immediately with the trial if Appellant decides he wants standby counsel to step in and take over the trial of the case.

¶10 Further, in light of the Supreme Court's decision in *McKaskle*, it appears that a preliminary instruction to the jury explaining the role of standby counsel when a defendant has elected to waive his or her right to counsel and to represent themselves at trial is warranted to protect a *pro se* defendant's right to control his or her own defense. I suggest the following instruction be forwarded and formatted by the Oklahoma Uniform Jury Instruction Committee-Criminal:

> Ladies and gentlemen of the jury, the 6th Amendment to the United States Constitution guarantees that a person charged with a crime has the right to the assistance of counsel. This Constitutional guarantee also provides that an individual charged with a crime has the right to waive representation by legal counsel and proceed to trial representing themselves and act as their own attorney. The defendant has elected to waive his/her right to counsel and represent his/herself in this matter. Mr./Mrs./Ms. _____ has been appointed as standby counsel to the defendant but not to act as his/her attorney in this case. The role of standby counsel is limited to answering the defendant's questions and providing other assistance but standby counsel will not be participating directly in the trial. In electing to represent himself/herself, the defendant has assumed the full responsibility of acting as his/her own attorney in this case and will be held to the same standards and requirements of an actual practicing attorney. Standby counsel will be available to answer the defendant's

questions during the course of the trial but the defendant will solely make all of decisions concerning his/her defense. You are not to let the fact that the defendant has elected to represent himself/herself influence your decision in this case. Instead, you must decide this case based upon the law in the court's instructions and the evidence received during the course of the trial.

HUDSON, J., SPECIALLY CONCURS

¶1 This case demonstrates the critical need for the trial judge to advise aspiring *pro se* capital defendants of the specific warnings contained in *Wallace v. State,* 1995 OK CR 19, ¶ 21, 893 P.2d 504, 512-513 concerning mitigating evidence and the capital sentencing process. This information, in my view, should be conveyed during the initial *Faretta* inquiry so the defendant will understand up front the nature of his or her rights and the importance and purposes of the capital sentencing process. In this way, the defendant will understand fully the high stakes and potential consequences of self-representation in a capital case.

¶2 Additionally, the trial court must also inquire of a pro se defendant if, at any point during the trial, it appears the defendant wants standby counsel to take over the case. This should include a full inquiry of the matter on the record and an unequivocal statement by the defendant should he decide he wants standby counsel to takeover. Because these things were not done in the present case, I concur in today's decision.

¶3 I agree with the majority that, when standby counsel takes over midtrial, he or she must simply takeover wherever the defendant has left off and work from there. The defense is not entitled to a mistrial or continuance such that a new strategy may be implemented. Trial courts must clearly explain to aspiring *pro se* defendants up front that they will not get a "redo" of their trial if standby counsel takes over the defense of the case midtrial at the defendant's request. In other words, the defendant who makes his proverbial bed by representing himself at trial must lay in the mess of his own creation even when standby counsel takes over midtrial. This should also be conveyed to a *pro se* defendant anytime he requests standby counsel to take over the case.

¶4 Moreover, once standby counsel takes over the case, the defendant is no longer "in charge." As explained by the majority, there is no hybrid representation. No longer does the defendant "control the organization and content of his own defense" or have the authority "to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial." *McKaskle v. Wiggins,* 465 U.S. 168, 174, 104 S. Ct. 944, 949, 79 L. Ed. 2d 122 (1984). This too must be clearly explained to the *pro se* defendant who expresses a desire for standby counsel to intervene and take over the case.

¶5 Finally, I agree that the jury instruction proposed in Judge Lumpkin's special writing is one possibility for use when faced with a defendant who represents himself at trial. However, I believe the matter should be referred to the OUJI committee for study and recommendation of a uniform jury instruction.

WALKLEY, JUDGE (By Special Appointment to the Court): SPECIALLY CONCURRING

¶1 I also concur in affirming the judgment of guilt and remanding the case for resentencing. However, due to the nature of the issues arising from the waiver of counsel and the role of standby counsel in this matter, further guidance for the trial court is necessary.

¶2 I take no issue with the Opinion nor with P.J. Lumpkin and J. Hudson's Specially Concurring Opinions and would adopt the recitation of facts, law and conclusions contained therein. In particular, as it relates to the resentencing in this matter, I agree that the trial court should re-address the *Faretta* factors as it relates to the sentencing phase of a capital trial, consistent with the Opinion in this matter. However, this case also demonstrates the need for the trial court to define the role of standby counsel in any case that a defendant chooses to waive his/her right to counsel, whether that matter is a capital case or non-capital matter where standby counsel is assigned.

¶3 While the role of standby counsel is a nebulous concept and hard line rules would not be prudent due to the variations within each individual case, clarification by the trial court is possible and should be required. The requirements of any individual case would be known by the trial court and the scope and limitations of standby counsel should be set at the time of appointment of standby counsel. As this often happens in conjunction with the *Faretta* hearing, it is appropriate for the trial

court to advise a defendant of the scope and limitation at that time. The first consideration should be to determine the scope of assistance a defendant is requesting. The ABA Standards, in conjunction with the holding in *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), define two scopes of representation for defense counsel in assisting a *pro se* litigant: (1) Active assistance while permitting "the accused to make the final decision on all matters, including strategic and tactical matters relating to the conduct of the case, or (2) Assistance only when requested by the accused. *ABA Defense Function Standard 4-3.9*. At a minimum, a defendant should be advised that standby counsel shall be required to attend all court proceedings and shall ensure that a defendant has adequate access to legal research as more fully set forth in the Opinion of this matter.

¶4 In addition, once the broad scope of assistance is established, a trial court should then determine, inter alia, whether standby counsel is required to perform any of the following tasks:

- Assist in any investigation of the case
- Identify or prioritize issues on which the defendant should focus attention
- Develop a full understanding of the prosecution's records, documents, reports and other investigations pertaining to the case
- Assist in specific areas or aspects of the case (e.g., discovery, subpoenas)
- Undertake research and render advice about specific areas of the law applicable to the case
- Interview, research or develop knowledge about witnesses
- Assist the defendant in locating witnesses helpful to the defense, including expert witnesses
- Bring to the attention of the defendant matters beneficial to the defendant.

¶5 *McKaskle* clearly defines the limitations on standby counsel. These limitations should be clearly stated to ensure that an accused is making an informed decision to proceed *pro se*. For example, the trial court should make it clear that the defendant alone is responsible for the preparation and presentation of that defendant's case. Furthermore, it should be made clear that standby counsel is not an advocate, and will play no advocacy role in hearings, pleadings, or at trial unless directed by the Court to assume the defense. If standby counsel is directed by the trial court to assume the defense, the defendant should be cautioned that standby counsel is bound by the tactical and strategic decisions made by the defendant and that standby counsel is not subject to an ineffective assistance of counsel claim when bound by those strategic/tactical decisions of the defendant. In addition, a defendant should be aware that, during trial, standby counsel may answer the defendant's questions of law and courtroom procedure, but may not interject himself/herself into the case without the consent of the defendant. Other case specific limitations should also be delineated at this time such as the fact that standby counsel will not serve as a defendant's lackey or legal assistant. However, as stated by Judge Hudson, a defendant should be advised that if standby counsel assumes control over a case, whether by court order or at defendant's request, that the defendant will no longer "control the organization and content of the defense" from that point forward. *See McKaskle*.

¶6 For these reasons, while I concur with the Opinion in this matter as well as with the Specially Concurring Opinions of P.J. Lumpkin and J. Hudson, I would urge that trial courts make specific records to avoid any misperception on behalf of the defendant or confusion in the record as to the scope and limitations of the role of standby counsel. Furthermore, to avoid any misperception on behalf of a jury, I also agree that a jury instruction would be appropriate.

LEWIS, VICE PRESIDING JUDGE

1. Appellant will be referred to as Fabion throughout in order to remain consistent and to avoid confusion between Appellant and the victim.

2. An additional defendant, Laquan Ashley, was added in an Amended Information.

3. The appeal of this conviction was submitted to this Court on June 18, 2016. Oral argument was held on June 27, 2017.

4. Fabion, however, in proposition eight, urges this Court to reconsider its holding that a defendant has a constitutional right to self-representation in the sentencing phase of a capital case. Fabion argues that the penalty of death is so severe and unique, that the right of self-representation in the punishment phase of a capital case does not eclipse the heightened standard of sentencing reliability required by the Eighth Amendment in death penalty cases.

5. Our recent decision in *Mitchell v. State,* 2016 OK CR 21, 387 P.3d 934, is also instructive on the right of self-representation; however, the opinion had not been issued prior to Brown's trial.

6. "The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to the willing defendant — not an organ of the State interposed between an unwilling defendant and his right to defend himself personally." *Faretta*, 422 U.S. at 820, 95 S.Ct. at 2533.

7. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed. 215 (1963) (holding suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment).

8. The Honorable James Winchester, Justice of the Oklahoma Supreme Court, and the Honorable Lori Walkley, Cleveland County District Judge, are sitting by special appointment.

2018 OK CR 4

MICHAEL LEE SMITH, Appellant, v. STATE OF OKLAHOMA, Appellee.

No. F-2016-184. February 15, 2018

SUMMARY OPINION

HUDSON, JUDGE:

¶1 Appellant, Michael Lee Smith, was tried by a jury in Wagoner County District Court, Case No. CF-2014-451, and convicted of Count II: Possession of Controlled Dangerous Substance in the Presence of a Minor, After Former Conviction of Two or More Felonies, in violation of 63 O.S.Supp.2012, § 2-402(C); and Count III: Unlawful Possession of Drug Paraphernalia, in violation of 63 O.S.2011, § 2-405.[1] At the conclusion of second stage proceedings, the jury recommended Smith be sentenced to twelve (12) years imprisonment and a $2,000.00 fine on Count II; and one (1) year in the county jail and a $1,000.00 fine on Count III. The Honorable Thomas H. Alford, District Judge, sentenced Smith in accordance with the jury's verdict and ordered the sentences to be served concurrently. Smith now appeals, raising two (2) propositions of error before this Court:

I. THE TRIAL COURT'S DENIAL OF THE MOTION TO SUPPRESS WAS ERRONEOUS BECAUSE THE AFFIDAVIT USED TO OBTAIN THE SEARCH WARRANT WAS BASED ON UNRELIABLE AND UNTRUE INFORMATION; and

II. THE TRIAL COURT ERRED WHEN IT BIFURCATED THE MISDEMEANOR COUNT OF UNLAWFUL POSSESSION OF DRUG PARAPHERNALIA.

¶2 After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we find that no relief is required under the law and evidence and Appellant's judgment and sentence should be **AFFIRMED**.

I.

¶3 Appellant contends the trial court's refusal to suppress the evidence seized from his home was error. We review the trial court's ruling for an abuse of discretion. *Johnson v. State*, 2012 OK CR 5, ¶ 11, 272 P.3d 720, 726. "An abuse of discretion is a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *Martinez v. State*, 2016 OK CR 3, ¶ 39, 371 P.3d 1100, 1112, *cert. denied, Martinez v. Oklahoma*, 137 S. Ct. 386, 196 L. Ed. 2d 304 (2016). "When reviewing a trial court's denial of a motion to suppress evidence, we accept its factual findings unless those findings are clearly erroneous and view the evidence in the light most favorable to the State." *Coffia v. State,* 2008 OK CR 24, ¶ 5, 191 P.3d 594, 596; *Seabolt v. State*, 2006 OK CR 50, ¶ 5, 152 P.3d 235, 237. "The ultimate conclusion drawn from those facts of whether a search or seizure is unreasonable is a question of law we review *de novo." Seabolt,* 2006 OK CR 50, ¶ 5, 152 P.3d at 237.

¶4 As was similarly argued below to the district court, Appellant specifically asserts the affidavit was not sufficient to conclude probable cause for a search existed. Appellant maintains the supporting affidavit was "full of conclusions instead of facts." In making this argument, Appellant dissects the affidavit paragraph by paragraph, individually challenging the information contained therein. Appellant further asserts the affidavit contained a false statement.

¶5 Appellant's method of evaluating the facts contained in the affidavit in isolation is contrary to this Court's totality of the circumstances approach for evaluating the sufficiency of a search warrant affidavit. *See Marshall v. State,* 2010 OK CR 8, ¶ 49, 232 P.3d 467, 479 ("In evaluating the sufficiency of an affidavit for a search warrant, this Court looks to the totality of the circumstances."); *Andrews v. State*, 2007 OK CR 30, ¶ 8, 166 P.3d 495, 497 (same). Under the totality of the circumstances approach, "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527 (1983). For there to be a valid finding of probable cause, the affidavit must set forth enough underlying facts and circumstances to enable the magistrate to independently judge the affiant's conclusion that evidence of the crime is located where the affiant says it is. *Marshall*, 2010 OK CR 8, ¶ 49, 232 P.3d at 479. Our duty as a reviewing court,

therefore, is "simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed." *Id.; Langham v. State,* 1990 OK CR 9, ¶ 7, 787 P.2d 1279, 1281. We accord a magistrate's finding of probable cause "great deference." *Gates*, 462 U.S. at 236, 103 S. Ct. at 2331; *Marshall*, 2010 OK CR 8, ¶ 49, 232 P.3d at 479.

¶6 In addition, a sworn affidavit in support of a search warrant is presumed valid. *Franks v. Delaware*, 438 U.S. 154, 171, 98 S. Ct. 2674, 2684, 57 L. Ed. 2d 667 (1978). While an affidavit may be attacked by allegations the affidavit contained intentional falsehoods or reckless disregard for the truth, "[a]llegations of negligence or innocent mistake are insufficient." *Id.; see also Jones v. State*, 2006 OK CR 5, ¶ 27, 128 P.3d 521, 536. Such allegations of perjury or reckless disregard for the truth in an affiant's statements must be established by preponderance of the evidence. *See Franks*, 438 U.S. at 156, 98 S. Ct. at 2676. Moreover, "[i]f the inaccuracies are removed from consideration and there remains in the affidavit sufficient allegations to support a finding of probable cause, the inaccuracies are irrelevant." *Jones,* 2006 OK CR 5, ¶ 27, 128 P.3d at 536 (citing *Franks,* 438 U.S. at 171, 98 S. Ct. at 2684). "To determine this issue, we ask whether the warrant would have been issued if the judge had been given accurate information." *Wackerly v. State*, 2000 OK CR 15, ¶ 13, 12 P.3d 1, 9 (quoting *Gregg v. State*, 1992 OK CR 82, ¶ 19, 844 P.2d 867, 875).

¶7 In the present case, Appellant fails to show by a preponderance of the evidence that Deputy Elliott deliberately made false statements or acted with reckless disregard for the truth when he put the challenged statements in the affidavit. *See Franks*, 438 U.S. at 156, 98 S. Ct. at 2676. Appellant shows at best that the affiant was negligent for failing to verify the challenged statement. Such negligence or innocent mistake is not sufficient to overcome the presumed validity of the sworn affidavit. *Franks*, 438 U.S. at 171, 98 S. Ct. at 2684. Moreover, contrary to Appellant's challenges to the sufficiency of the supporting affidavit, we find the magistrate had a substantial basis for his probable cause finding *even if* the challenged statement is removed from the search warrant. Gates, 462 U.S. at 238, 103 S. Ct. at 2332; *Marshall,* 2010 OK CR 8, ¶ 49, 232 P.3d at 479. Thus, Appellant fails to demonstrate the trial court's refusal to suppress the search warrant was an abuse of discretion. Relief is denied for this proposition of error.

II.

¶8 Appellant failed to object to the bifurcation. He has thus waived all but plain error review of this claim. *Cf. Wood v. State*, 2007 OK CR 17, ¶ 10, 158 P.3d 467, 473 (failure to request proceeding be trifurcated reviewed for plain error where no objection at trial). To be entitled to relief under the plain error doctrine, Appellant must show an actual error, which is plain or obvious, and which affects his substantial rights. *Baird v. State,* 2017 OK CR 16, ¶ 25, 400 P.3d 875, 883; *Ashton v. State*, 2017 OK CR 15, ¶ 34, 400 P.3d 887, 896; *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395; 20 O.S.2011, § 3001.1. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Baird*, 2017 OK CR 16, ¶ 25, 400 P.3d. at 883; *Ashton*, 2017 OK CR 15, ¶ 34, 400 P.3d. at 896-97; *Tollett v. State,* 2016 OK CR 15, ¶ 4, 387 P.3d 915, 917; *Hogan v. State,* 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

¶9 Assuming without deciding it was error to bifurcate the trial on Appellant's misdemeanor count, we find the error, if any, does not rise to the level of plain error in this case as Appellant fails to show the error affected his sentence. *See Tollett,* 2016 OK CR 15, ¶ 4, 387 P.3d at 916 (an appellant must prove plain error). While the jury imposed the maximum sentence (1 year and $1,000.00 fine) for his misdemeanor offense, Appellant provides no basis for this Court to conclude that the knowledge jurors gained of his prior felony convictions during the sentencing phase of his trial influenced their sentencing decision on the misdemeanor possession of drug paraphernalia count. That is so especially given Appellant was sentenced to considerably less than the maximum punishment of life permitted on his felony conviction for possession of a controlled dangerous substance in the presence of a minor. Thus, relief is not required and this proposition of error is denied.

DECISION

¶10 The judgments and sentences of the District Court are **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2018), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT
OF WAGONER COUNTY
THE HONORABLE THOMAS H. ALFORD,
DISTRICT JUDGE

APPEARANCES AT TRIAL

Joe Paul Robertson, 610 S. Hiawatha, Sapulpa, OK 74066; Eric Johnson, 318 E. Cherokee St., Wagoner, OK 74467, Counsel for Defendant

Josh King, Joy Mohorovicic, Assistant District Attorneys, Wagoner County Courthouse, 307 E. Cherokee St., Wagoner, OK 74467, Counsel for the State

APPEARANCES ON APPEAL

Mark P. Hoover, P.O. Box 926, Norman, OK 73070, Counsel for Appellant

Mike Hunter, Oklahoma Attorney General, Sheri M. Johnson, Assistant Attorney General, 313 N.E. 21st St., Oklahoma City, OK 73105, Counsel for Appellee

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

1. Defendant was found not guilty of Count I: Unlawful Possession of Controlled Drug with Intent to Distribute.

2018 OK CR 5

KENDALL RAY THOMPSON, Appellant,
v. THE STATE OF OKLAHOMA, Appellee.

No. F-2016-982. February 15, 2018

SUMMARY OPINION

KUEHN, JUDGE:

¶1 Kendall Ray Thompson was tried by jury and convicted of Counts I and II, Manslaughter in the First Degree in violation of 21 O.S.2011, § 711, and Count III, Failure to Stop at a Stop Sign (Misdemeanor) in violation of 47 O.S.2011, § 11-201, all after former conviction of two or more felonies, in the District Court of Haskell County, Case No. CF-2014-74. In accordance with the jury's recommendation the Honorable Brian C. Henderson sentenced Thompson to twenty (20) years imprisonment on each of Counts I and II, to be served concurrently, and a fine of $5.00 on Count III. Thompson must serve 85% of his sentences on Counts I and II before becoming eligible for parole consideration. Thompson appeals from these convictions and sentences.

¶2 Thompson raises three propositions of error in support of his appeal:

I. The trial court erred in denying Appellant's motion to quash and instructing the jury on the enhanced range of punishment for first degree murder [sic].

II. Under the facts and circumstances of this case, the concurrent twenty-year sentences are excessive and should be modified by at least partial suspension.

III. Appellant's convictions for both misdemeanor manslaughter and the underlying misdemeanor cannot stand.

¶3 After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we find that the law and evidence do not require relief in Counts I and II. Count III must be vacated and remanded with orders to dismiss.

¶4 We first find in Proposition I that the trial court did not err in denying Thompson's motion at trial to quash the Supplemental Information charging him with prior convictions. This is not a jurisdictional claim; Thompson waived this issue because he failed to timely assert that the evidence at preliminary hearing was insufficient before he entered a plea at arraignment. *Primeaux v. State*, 2004 OK CR 16, ¶ 18, 88 P.3d 893, 900; *Koonce v. State*, 1985 OK CR 26, ¶ 7, 696 P.2d 501, 504, overruled on other grounds, *Landtroop v. State*, 1988 OK CR 90, ¶ 6, 753 P.2d 1371, 1371.

¶5 As well, Appellant's argument that he was surprised by the second page allegations because the second page was not filed with each amended Information is unpersuasive. We have upheld a conviction where a second page was initially separately filed, and not included in the subsequently-filed amended Informations; the defendant had been bound over on the alleged prior convictions, and the record clearly showed he was not surprised by them. *Doyle v. State*, 1989 OK CR 85, ¶¶ 10, 11, 785 P.2d 317, 322. Like the defendant in *Doyle*, the record reflects that Thompson was not surprised by the allegations in the Supplemental Information and admitted he had the prior convictions. *Id.*

¶6 We warned prosecutors that "the better practice would be for the State to file the second page with the amended first page, even when the second page remains the same in

substance. . . ." *Id.*, 1989 OK CR 85, ¶ 11, 785 P.2d at 322. The State did not heed that warning in this case. We take this opportunity to again instruct prosecutors to follow the advice of the Court: with subsequent filings of an Information, best practice is for the State to attach or incorporate by reference the second page.

¶7 We further find that the trial court did not err in instructing jurors on the range of punishment. Thompson did not object to the instructions given at sentencing and has waived all but plain error. *Day v. State*, 2013 OK CR 8, ¶ 14, 303 P.3d 291, 298. Plain error is an actual error, that is plain or obvious, and that affects a defendant's substantial rights, affecting the outcome of the trial. *Barnard v. State*, 2012 OK CR 15, ¶ 13, 290 P.3d 759, 764. Thompson's claim of incorrect instruction relies wholly on the underlying claim that there was no evidence of the prior convictions presented at preliminary hearing. As Thompson waived that underlying claim of error by failing to raise it before he entered a plea at arraignment, there is no error this Court could use to find plain error in the instructions. This proposition is denied.

¶8 We find in Proposition II that, taking the facts and circumstances of the case into account, Thompson's sentences on Counts I and II are not excessive. *See Burgess v. State*, 2010 OK CR 25, ¶ 22, 243 P.3d 461, 465. As Thompson admits, the misdemeanor manslaughter charges may be brought, despite the availability of other charges, at the prosecutor's discretion. *State v. Haworth*, 2012 OK CR 12, ¶¶ 18-19, 283 P.3d 311, 317-18. The record does not support Thompson's claim that the exercise of discretion in this case, or any other factor at trial, led to an excessive sentence. This proposition is denied.

¶9 We find in Proposition III that Thompson's conviction in Count III violates the prohibition against multiple punishment found in 21 O.S.2011, § 11. The State concedes this error. The conviction and fine in Count III are vacated, and the case remanded with instructions to dismiss. This proposition is granted.

DECISION

¶10 The Judgments and Sentences of the District Court of Haskell County, on Counts I and II, are **AFFIRMED**. The Judgment and Sentence in Count III is **VACATED** and the case is **REMANDED** with instructions to **DISMISS** Count III. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF HASKELL COUNTY THE HONORABLE BRIAN C. HENDERSON, ASSOCIATE DISTRICT JUDGE

ATTORNEYS AT TRIAL

Gary Buckles, Evan Freeman, P.O. Box 771, Poteau, OK 74953, Counsel for Defendant

Farley Ward, District Attorney, Adam Scharn, Assistant District Attorney, Haskell County Courthouse, 202 E. Main St., Ste. 11, Stigler, OK 74462, Counsel for the State

ATTORNEYS ON APPEAL

James H. Lockard, Deputy Division Chief, Homicide Direct Appeals Div., Okla. Indigent Defense System, P.O. Box 926, Norman, OK 73070, Counsel for Appellant

Mike Hunter, Attorney General of Oklahoma, Matthew D. Haire, Assistant Attorney General, 313 N.E. 21st St., Oklahoma City, OK 73105, Counsel for Appellee

OPINION BY: KUEHN, J.
LUMPKIN, P.J.: CONCURRING IN RESULT
LEWIS, V.P.J.: CONCUR
HUDSON, J.: SPECIALLY CONCUR
ROWLAND, J.: SPECIALLY CONCUR

LUMPKIN, PRESIDING JUDGE: CONCURRING IN RESULT

¶1 I concur in the results reached but cannot agree with the analysis set forth in Proposition One. The Opinion omits part of the plain error standard of review. Appellant waived his right to preliminary hearing when he proceeded to trial.

¶2 As Appellant made no formal motion to quash prior to entering his plea at the formal arraignment, he waived appellate review of this issue for all but plain error. *Primeaux v. State,* 2004 OK CR 16, ¶ 18, 88 P.3d 893, 900. This Court reviews for plain error pursuant to the test set forth in *Simpson v. State,* 1994 OK CR 40, 876 P.2d 690, and determine whether Appellant has shown an actual error, which is plain or obvious, and which affects his substantial rights. *Jackson v. State*, 2016 OK CR 5, ¶

4, 371 P.3d 1120, 1121. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.; Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

¶3 Appellant has failed to show an actual error in the present case. This Court has long recognized that a defendant who proceeds to trial without challenging the absence of a preliminary hearing or, if one was held, any irregularities therein, waives his right to preliminary hearing. *Berry v. State*, 1992 OK CR 41, ¶ 9, 834 P.2d 1002, 1005 ("[A]ny error arising from the lack of a preliminary hearing on second and subsequent charges was waived by the defendant's entry of a plea to the information and his proceeding to trial without timely offering any objections to the information."); *Hambrick v. State*, 1975 OK CR 86, ¶ 11, 535 P.2d 703, 705 ("When a defendant, upon arraignment, pleads to the merits and enters on trial, he waives right to preliminary examination, or if one was held, any irregularities therein."); *Muldrow v. State*, 1919 OK CR 313, 185 P. 332, 334 ("[I]f the defendant upon arraignment pleads to the merits and enters on the trial, he waives the right to a preliminary examination.").

¶4 At the bare minimum, Appellant knew that the State intended to proceed on the Supplemental Information when he received the State's Witness List on August 4, 2016. Defense counsel admitted this fact in his argument to the trial court. Appellant's trial did not start until August 15, 2016. Despite the fact that Appellant had ten days to challenge the sufficiency of the preliminary hearing, he lay behind the log and did not raise the instant challenge until the day of trial and proceeded to trial without resolution of the issue. As Appellant failed to challenge the lack of a preliminary hearing and proceeded to trial, he waived his right to a preliminary hearing on the Supplemental Information. Therefore, no error, plain or otherwise, occurred.

HUDSON, J., SPECIALLY CONCURS

¶1 Appellant ran a stop sign at the intersection of two state highways while driving at a high rate of speed in a ten-wheeled lumber truck. This resulted in the deaths of two people when the Lexus in which they were traveling crashed broadside into the bed of Appellant's lumber truck, sheering off the top part of the Lexus as it passed underneath the truck bed. The prosecutor's decision to file two counts of First Degree Misdemeanor-Manslaughter under 21 O.S.2011, § 711(1) was appropriate on these facts. Under Oklahoma law, Failure to Stop at a Stop Sign is a misdemeanor offense for which Appellant was actually charged and convicted in Count 3 (although we dismiss this conviction on double punishment grounds). 47 O.S.2011, §§ 11-201, 17-101(A). We held in *State v. Haworth*, 2012 OK CR 12, 283 P.3d 311 that "so long as a causal relation can be established between the misdemeanor and the homicide, **any misdemeanor** could conceivably serve as a predicate for First Degree Manslaughter, consistent with the plain, unambiguous wording of that statute." *Id.*, 2012 OK CR 12, ¶ 19, 283 P.3d at 318 (emphasis added).

¶2 Appellant complains in Proposition II that we should modify his sentences because the legal theory upon which his misdemeanor-manslaughter convictions rest "stands on less than a perfectly solid legal foundation." Aplt. Br. at 6. There is nothing shaky about it. But for Appellant's failure to stop at the stop sign, the victims would not have been killed. The commission of the misdemeanor offense of running a stop sign was therefore the proximate cause of the victims' deaths. *State v. Ceasar,* 2010 OK CR 15, ¶ 11, 237 P.3d 792, 795-96 (focus of causal relation analysis is whether the defendant's conduct "was a substantial factor in bringing about the victim's death."). We observed in *Haworth* that the determination of which charge to bring in these circumstances – negligent homicide or misdemeanor-manslaughter – is left to the prosecutor's broad discretion. *Haworth*, 2012 OK CR 12, ¶ 18, 283 P.3d at 317. It's hard to argue with the prosecutor's charging decision here based on the record evidence. That is especially so considering the jury rejected convictions on the misdemeanor offense of Negligent Homicide for which it was also instructed on Counts 1 and 2 (O.R. 175-77, 186-87). I therefore specially concur in today's decision.

ROWLAND, JUDGE, SPECIALLY CONCURRING:

¶1 I concur that under the unique facts of this case, no relief is warranted and Thompson's convictions should be affirmed. Nothing in the Court's decision today, however, should be read as diminishing a defendant's entitlement to a preliminary hearing on prior convictions used to enhance his sentence. In this case, the Supplemental Information, commonly referred

to as a page two, had been on file approximately one year prior to the start of the preliminary hearing. Thompson was bound over with prior convictions even though no specific evidence of them was presented during the preliminary hearing. I agree this did not deprive the district court of jurisdiction over the Supplemental Information.

¶2 In *Thomas v. State*, the defendant was bound over at preliminary hearing with three prior felony convictions, after which two of the prior convictions were stricken from the page two and replaced by two more recent felony convictions. *Thomas,* 1984 OK CR 19, ¶ 11, 675 P.2d 1016, 1020. This Court rejected his claim that he was entitled to a second preliminary hearing on the specific prior felony convictions which would be used to enhance his potential punishment at trial, citing the fact that "the appellant was put on notice that he was to be charged as a second and subsequent offender, and subject to enhanced punishment pursuant to 21 O.S.1981, § 51(B), at his preliminary hearing by virtue of the three convictions then alleged." *Thomas*, 1984 OK CR 19 at ¶ 13, 675 P.2d at 1020.

¶3 In declining to quash Thompson's Supplemental Information or to remand his case for further preliminary hearing on the second page, the district court did not commit error. There is no dispute about the existence of his prior convictions. More than a year and a half passed between the time the Supplemental Information was filed and the time Thompson was bound over for trial, and thus more than ample time had passed to properly put him on notice that enhancement of his sentence was being sought. That being said, I join the Summary Opinion's urging of prosecutors to be diligent in ensuring that similar facts do not arise in the future. This can be done by filing a page two with the original Information, and with every Amended Information filed in a given case.

Applicants for February 2018 Oklahoma Bar Exam

The Oklahoma Rules of Professional Conduct impose on each member of the bar the duty to aid in guarding against the admission of candidates unfit or unqualified because of deficiency in either moral character or education. To aid in that duty, the following is a list of applicants for the bar examination to be given Feb. 27-28, 2018.

The Board of Bar Examiners requests that members examine this list and bring to the Board's attention in a signed letter any information which might influence the board in considering the moral character and fitness to practice of any applicant for admission. Send correspondence to Cheryl Beatty, Administrative Director, Oklahoma Board of Bar Examiners, P.O. Box 53036, Oklahoma City, OK 73152.

EDMOND

Volney Joseph Kambon Cothran
Sheila Ann Cunningham
Andy Nash Ferguson
Kristin Nicole Hutton
Carrie L. Kincade
Valerie Marie Salem
Victoria Le Tran
Rachel Nicole Voss

NORMAN

Shawn Ward Ceyler
Joshua Joe Conaway
Justin Blake Conway
Andrew Heath Garrett
Andrea Morgan Golden
Joshua William Harrison
Kelbie RaeAnn Kennedy
Zachary Paul Lewis
Jaron Tyler Moore
Jeremy Eugene Otis
John Phillip Sartin III
Matthew Ryan Selander

OKLAHOMA CITY

Blythe Rachel Bradley
Nana Abram Dankwa
Jonathan Michael Hall
Jared A. King
John Thomas-Hohn Knapp
Landon Scott Lester
Lisa Leigh Lopez
Donald Cyril Macarthy
Noelle Cherie Moorad
Bryan Ashton Don Muse
Hunter Christian Musser
Morgen DeAnna Potts
Kristen Annette Prater
Tyler Ray Pruitt
Audrey Camille Talley

TULSA

Erik Sven Anderson
Jerry Dace Arnold
Christopher Maxwell Deane
Elizabeth Mary Edwards
Sherry Lynn Erb
Amy Lynn Faltisko
Joseph Cain Geresi
Drew Wortham Gilbert
Marco Antonio Hernandez Jr.
Andrew John Hofland
Todd Alan Jamieson
Henry Herman Klaus
Tiffany Michelle Lemons
Lori Lee Lindsey
Dimitrios H. Panagopoulos
Kylie Danielle Ray
Andrea Claire Rogers
Paige Elizabeth Vitale

OTHER OKLAHOMA CITIES AND TOWNS

Alexander Joseph Albert, Elk City
Leah Nicole Asbury, Spavinaw
Matthew Ray Bray, Muldrow
Jacklyn Frances Capite, Jenks
Steven Chance Clinkenbeard, Fort Gibson
Tyler DeWayne Davis, Purcell
William Richard Frank, Moore
Tasha Renee Fridia, Moore
Stacy Nichole Fuller, Owasso
Alexander Scott Hall, Moore
Caleb Alexander Harlin, Muskogee
Mackenzie Dawn Jacobson, Claremore
Diamond Johnson, Lawton
Rebecca Lynn Kirk, Pawhuska
John Kavanagh Kristjansson, Owasso
Michael William Mathis, Guthrie
Donald Robert McConnell, Wynnewood

Walter James Morris II, Stratford
Misty Marie Neal, Lawton
Eric Scott Nickel, Broken Arrow
Juan Miguel Pedroza, Bixby
Nocona Louise Pewewardy, Lawton
Matthew Carson Porter, Bethany
Courtney Paige Rainbolt, Broken Arrow
Amity Eileen Ritze, Broken Arrow
Trent Allen Robinson, Owasso
Dalton Bryant Rudd, Davis
Dakota Lynn Semrad, Enid
Jordan Marie Soto, Blanchard
Shannon Lynn Stone, Mounds
Andrew Todd Swann, Moore
Brandon Jacob Williamson, Yukon
Clifford Allan Wright Jr., Vian

OUT OF STATE

Candace Lee Carter, Shady Shores, TX
Kenia Ines Castillo, Naples, FL
Peter C. Chemmalakuzhy, Roanoke, TX
Cody Glyn Cook, Terrell, TX
Wesley Edward Davis, Lewisville, TX
Vassiliki Economedies Farrior, Bethesda, MD
Charles Robert Haskell, Miami, FL
Patrick Sean Hawkins, Brazoria, TX
John Marshall Homra, Jackson, TN
Johnnie Jonathan James III, Gastonia, NC
Bryce Robert Lindgren, Goddard, KS
Janet Carol Love, St. Louis, MO
Joseph Peter Mandala, Sherman, TX
Riley Wade Pagett, Washington, D.C.
Elizabeth Gean Roberts, Fort Smith, AR
Jeffrey Bruce Roderick, Cambridge, MA

March

1 **OBA Lawyers Helping Lawyers Discussion Group;** 6 p.m.; Office of Tom Cummings, 701 NW 13th St., Oklahoma City, OK 73012; RSVP to Jeanie Jones 405-840-0231

2 **OBA Alternative Dispute Resolution Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Clifford R. Magee 918-747-1747

5 **OBA Appellate Practice Section meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Rob Ramana 405-524-9871

6 **OBA Legislative Monitoring Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Angela Ailles Bahm 405-475-9707

OBA Government and Administrative Law Section meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Melissa L. Blanton 405-521-6600

7 **OBA Law Day Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with BlueJeans; Contact Roy D. Tucker 918-684-6276 or Kara E. Pratt 918-599-7755

9 **OBA Law-Related Education Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Amber Peckio Garrett 918-895-7216

13 **OBA Women in Law Committee meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with BlueJeans; Contact Melanie Christians 405-705-3600 or Brittany Byers 405-682-5800

15 **OBA Diversity Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Telana McCullough 405-267-0672

20 **OBA Bench and Bar Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact David Swank 405-325-5254 or David B. Lewis 405-556-9611

21 **OBA Family Law Section meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Jeffrey H. Crites 580-242-4444

OBA Indian Law Section meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Valery Giebel 918-581-5500

22 **OBA Access to Justice Committee meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Rod Ring 405-325-3702

OBA Professionalism Committee meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Linda Scoggins 405-319-3510

28 **OBA Financial Institutions and Commercial Law Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Miles T. Pringle 405-848-4810

30 **OBA Professional Responsibility Commission meeting;** 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Gina Hendryx 405-416-7007

OBA Bar Center Facilities Committee meeting; 2 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Bryon J. Will 405-308-4272

April

3 **OBA Legislative Monitoring Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Angela Ailles Bahm 405-475-9707

OBA Government and Administrative Law Section meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Melissa L. Blanton 405-521-6600

Court of Civil Appeals Opinions

2018 OK CIV APP 8

CARRIE A. AUTRY, Plaintiff/Appellant, vs. ACOSTA, INC., Defendant/Appellee.

Case No. 115,196. November 14, 2017

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE PATRICIA G. PARRISH, TRIAL JUDGE

REVERSED

Mark Hammons, HAMMONS, GOWENS, HURST & ASSOCIATES, Oklahoma City, Oklahoma, for Plaintiff/Appellant

W. Joseph Miguez, McGUIRE WOODS LLP, Austin, Texas, for Defendant/Appellee

JANE P. WISEMAN, JUDGE:

¶1 Carrie A. Autry appeals a temporary injunction enjoining her from (1) recruiting or hiring the employees of her former employer, Acosta, Inc., (2) using Acosta's confidential or proprietary information, or (3) soliciting or selling to named clients she represented while employed by Acosta. Was granting the temporary injunction to enforce the non-solicitation provision in question an abuse of discretion? We conclude it was, and reverse the order of the trial court.

FACTS AND PROCEDURAL BACKGROUND

¶2 In her June 2016 petition, Autry sought declaratory and injunctive relief against Acosta, alleging she resigned her employment with Acosta and was seeking employment with "Cruise Marketing, Inc., which [she] agrees is doing the same general kind of work as Acosta." Autry said Acosta threatened her with a lawsuit for violating or threatening to violate a non-compete clause in her contract with Acosta and that "Acosta is affirmatively attempting to interfere with [her] employment with Cruise."

¶3 The Non-Solicitation Agreement, dated December 1, 2008, provides in relevant part:

> 3. Non-Compete Restrictions. Employee agrees that during the term of Employee's employment with Acosta, Employee shall not, on Employee's own behalf or on behalf of others, in any capacity whatsoever, including, without limitation, as an owner, salesperson, sales manager, consultant or otherwise, directly or indirectly, engage[] in any other business that provides, in whole or in part, the same or similar services and/or products offered by Acosta as part of its Business. In the event of any violation by the Employee of this covenant against competition, the term of this covenant shall automatically be extended for a period of one (1) year from and after the later of: (i) the date upon which the Employee permanently ceases such violation; or (ii) the date of the entry by a court of competent jurisdiction of an order or judgment enforcing such covenant, but in no event shall the term of this covenant against competition be extended for a period beyond two (2) years from the date of termination of Employee's employment with Acosta.

Section 4 of the Non-Solicitation Agreement is titled "Non-Solicitation" and subsection (a) is titled "Business and Accounts." This subsection covers termination, both with and without cause. The "Termination of Employee for Cause" clause states:

> Employee agrees that for a period of twelve (12) months following termination by Employee, for any reasons, including resignation, or by Acosta for Cause, Employee shall not, on Employee's own behalf or on behalf of others, in any capacity whatsoever, including, without limitation, as an owner, salesperson, sales manager, consultant, or otherwise, directly or indirectly, engage in the business of selling, soliciting, or promoting the sale of the Clients that Employee represented while employed by Acosta.

The Agreement also provides that Autry "shall not, directly or indirectly solicit or discuss with any employee of Acosta the employment of such Acosta employee by any other commercial enterprise other than Acosta" or attempt to recruit or hire, or recruit or hire an Acosta employee. The Agreement also covers confidential information.

¶4 In its answer, Acosta admitted some of Autry's allegations, denied others, and asserted as affirmative defenses unclean hands, estoppel, failure to state a claim, and the relief sought requires an improper advisory opinion. Acosta asserted counterclaims for breach of the Non-Solicitation Agreement by Autry's solicitation of Acosta's employees and established clients, breach of the Agreement's confidentiality provision, misappropriation of Acosta's proprietary business information, violation of Oklahoma's Uniform Trade Secrets Act, breach of fiduciary duty, tortious interference with prospective economic advantage, and conspiracy. Acosta asked for injunctive relief, a declaration that the Agreement is valid and enforceable, damages, and attorney fees and costs. Acosta also filed an application for a temporary restraining order and temporary injunction.

¶5 On June 23, 2016, the trial court announced it was entering a temporary restraining order directing Autry to refrain from (1) soliciting any Acosta employees, (2) sharing any electronic information or documents that she obtained from Acosta, and (3) directly soliciting any clients on a list titled "2016 Oklahoma bakery/deli clients."

¶6 The trial court held an evidentiary hearing on Acosta's request for a temporary injunction. Danny Ray Karst, senior vice-president and manager of Acosta, testified that MDS Foods, Reser's, and General Mills terminated their relationship with Acosta on May 23, 2016. Maple Hurst terminated its relationship with Acosta on May 31, 2016, and Eddy Packing did so on May 26, 2016. Autry resigned on May 20, 2016. Karst testified that other companies also terminated their relationships with Acosta.

¶7 Karst testified that Autry purchased an external hard drive in early April 2016 and "expensed it to the company and got reimbursed." When he asked why she purchased the hard drive, "She said she does a lot of work from home, and it is easier for her to do work from home with an external hard drive." He stated Autry had a company-issued laptop which she could use remotely for "full access to the Acosta share-point site."

¶8 During cross-examination, Karst testified that Acosta now has possession of the external hard drive. He admitted that, if Autry took the laptop home with her, she would have access to Acosta's information. He stated that although he had been told that Autry copied information to her home computer, he did not have personal knowledge that she did so or that she provided any of that information to Cruise Marketing. He stated that the two employees who reported directly to Autry left Acosta on the same day as Autry. Karst "agree[d] that Cruise Marketing is not subject to any contractual restraint on soliciting [Acosta's] employees." Karst testified he had personal knowledge that Autry conveyed Cruise Marketing's employment offers to the two former Acosta employees.

¶9 David Dunlevy, Autry's supervisor at Acosta, testified that Tina Genow and Samuel Shinn reported to Autry when they were employed by Acosta. Dunlevy stated that neither Genow nor Shinn individually submitted his or her resignation to him. Autry informed him on May 20, 2016, that she was leaving Acosta and Genow and Shinn were leaving too. Dunlevy testified that Autry sent an email on May 25, 2016, to Alfonso Castillo, who "is the person responsible for King's Hawaiian sales in Oklahoma" and asked him, "Have you made a decision on support?" Dunlevy said, "What this meant to me was that [Autry] was asking if King's Hawaiian was going to go to Cruise Marketing." Acosta offered exhibits containing offer letters from Cruise Marketing to Genow and Shinn. The offer letters were sent by Autry through her Acosta email address to Genow and Shinn on May 19th, before Autry resigned from Acosta.

¶10 Shinn testified that during the time he was employed by Acosta, Autry did not solicit him to leave Acosta for Cruise Marketing. He testified Jeff Lober solicited him to leave Acosta to work for Cruise Marketing. Autry did not negotiate his employment with Cruise Marketing, negotiate his terms of employment, or suggest or draft his employment contract terms. He stated he made his decision to go to work for Cruise Marketing before the written employment agreement was forwarded to him. He turned in his resignation to Autry because she was his boss. No one suggested that Shinn take information from Acosta.

¶11 He agreed that Autry sent him the job offer from Cruise Marketing on May 23, 2016. He submitted his resignation on May 20, 2016, before he received the offer letter. He stated he "knew what the offer was orally." He received his "first communication with Cruise Marketing about going to work for them" on April 26, 2016, and it was the third time the company

that Cruise Marketing acquired, Food Marketing Resources, asked him to work for it. He stated he "pretty much committed fully" to going to work for Cruise Marketing on April 26th at a dinner attended also by Autry and Genow. Jeff Lober invited him to the dinner.

¶12 Genow testified Autry did not solicit her to leave her employment with Acosta to work for Cruise Marketing. She stated that Lober and another person solicited her to leave Acosta for Cruise Marketing. She had also already turned in her resignation when she received a written contract.

¶13 Genow stated that she had "forwarded e-mails to [herself] . . . from [her] desktop, which [she] did every year in tornado season." She stated, "Everything has since been returned to Acosta at their request." She claimed she has not retained any business information relating to Acosta and did not give any Acosta information to anyone outside Acosta.

¶14 She made her decision to leave Acosta on April 26, 2016, and she sent emails to her personal address on April 27, 2016, with the subject of "Reser's Tyson contracts, 2016." Two spreadsheets attached to the email were "[a]ccrual worksheets for Tyson products for Reser's and Wilson's Deli," which Genow created while employed by Acosta. She said she emailed herself documents every tornado season. Genow hand delivered her resignation letter to Autry. She denied trying to take a stack of papers relating to Tyson's Foods when she left Acosta's offices, and she denied Dunlevy's claim that he told her to put papers on the desk and leave them there.

¶15 Autry testified she worked for Acosta from November or December 2008 through May 26, 2016. She did not recall signing a non-compete agreement. She explained that when she went through orientation when Acosta acquired her employer, she and other employees were asked to sign documents, but the documents were not explained to them and she did not receive a copy of them. She stated that Lober contacted her about employment with Cruise Marketing. She had previously expressed to Dunlevy that she was not happy at Acosta. Cruise Marketing offered her employment at the April 26th dinner, and they reached an agreement on employment at the dinner. She denied sharing any Acosta information with Cruise Marketing.

¶16 She did not encourage Genow or Shinn to leave Acosta and did not help them negotiate the terms of their employment. She copied the information from her laptop to an external hard drive. When her external hard drive stopped working, she bought a new one. She immediately handed over the hard drive to Dunlevy when she left Acosta. She stated she did not use any of Acosta's electronic or paper documents while working for Cruise Marketing. She said, "There [are] no trade secrets in this business. It is just basically who puts in the most effort and who does the job better. There is no special knowledge." She did not save or copy the information from the external hard drive other than some emails.

¶17 Autry testified: "The day I turned in my resignation, I paid a courtesy call to the vendors that I had a longstanding relationship with so they would hear it from me and not on the street that I was leaving." She did not suggest whether the clients she called should stay with Acosta or go to another company. She testified she has not had any contact with the vendors she handled while she was employed by Acosta.

¶18 On cross-examination, she testified that at the time she accepted Cruise Marketing's job offer, she did not remember that she had a non-solicitation agreement with Acosta. Cruise Marketing asked her if she had a non-solicitation agreement and she told them she did not. She said she was sure she signed the agreement after looking at the document, but she did not recall signing it.

¶19 Autry testified she had talked to Lober in January or February about going to work for Cruise Marketing but she did not accept a job offer until the April 26th dinner. She never discussed bringing her existing book of Acosta clients with her to Cruise Marketing. Cruise Marketing sent her a written offer of employment to her personal email at the same time it sent offers to Genow and Shinn. Autry did not intend for the offers to be sent to Genow and Shinn through her Acosta email account. She admitted she sent emails from her Acosta account to her personal email account after she submitted her resignation. She also copied a list of contact information for all of her Acosta clients and some of her customers to her personal email address after submitting her resignation. She claimed it was for a meeting with one of her customers on June 20, 2016. She sent

the list to Genow and sent a copy to her personal email address.

¶20 Lober testified that he and his partner recruited Genow and Shinn. He explained that Cruise Marketing had a 15-year relationship with Reser's in the Des Moines, Nebraska, Kansas City, and Springfield markets before Reser's left Acosta. He has not asked Autry to solicit any of Acosta's clients, and to his knowledge, she has not done so. He said, "We specifically asked her not to." He stated Autry has not provided any information from Acosta.

¶21 Lober testified that before Autry came to Cruise Marketing, there were "serious conversations" with some clients, like Reser's, that Cruise Marketing would start doing business with them in Oklahoma City. He stated that Maple Hurst was going to leave Acosta regardless of whether Autry worked for Cruise Marketing. He testified that if the court ordered Autry not to service her clients at Acosta, there would still be clients for her to work with at Cruise Marketing. However, he also stated that, although there are other clients, he "hired them to do a job." When asked if he hired Autry to service the other clients, he replied, "No, I didn't." He again acknowledged there would still be other lines to represent if Autry could not represent the clients she represented while employed by Acosta.

¶22 The trial court determined that good cause existed for issuing a temporary injunction. It enjoined Autry "from directly or indirectly soliciting, discussing, recruiting or hiring any employee of Acosta, Inc." It enjoined Autry "from utilizing any of Acosta, Inc.'s proprietary or confidential information." The court also enjoined Autry "from directly selling, soliciting, or promoting the sale of" the following clients she represented at Acosta:

> BelGioioso, Bensons, Cargill, Churny, Cyrus O'Leary, Dawn Foods, Eddy Packing, FlatOut Breads, Family Fresh Pack, General Mills, Gonnella Baking Co., Harlan Bakeries, Hill & Valley Premium Bakery, James Skinner Baking Company ("J. Skinner"), King's Hawaiian, MDS Foods, Maplehurst Bakeries, Maple Leaf Foods, Nestle (including without limitation its Stouffer's brand), Otis Spunkmeyer, Prairie City Bakery, Prater's, Reser's Fine Foods, Sabra Dipping Co., Southeastern Mills, Stacy's Pita Chip Company, Superior Cake Products, and Tyson Foods (including without limitation its Sara Lee Bakery, Sara Lee Deli, and Wilson brands).

The trial court stated: "Article 4(a)(i) of Autry's Non-Solicitation Agreement with Acosta violates the provisions of 15 O.S. § 219A by its use of the word 'indirectly,' and further finds that that provision of the Non-Solicitation Agreement can be easily corrected to comply with 15 O.S. § 219A by deleting the word 'indirectly.'"

¶23 Acosta appeals the trial court's order. She filed a motion to stay the trial court proceedings, but not the temporary injunction, in which she "propose[d] that she will abide by the Temporary Order." The trial court denied the motion to stay. Autry then filed an application with the Supreme Court to stay the trial court proceedings pending appeal. The Supreme Court granted Autry's request for the stay.

STANDARD OF REVIEW

¶24 As an equitable matter, "[i]njunction is an extraordinary remedy and relief by this means should not be granted lightly." *Dowell v. Pletcher,* 2013 OK 50, ¶ 6, 304 P.3d 457. We review the grant or denial of an injunction to determine whether the trial court abused its discretion in making its decision. *Murlin v. Pearman,* 2016 OK 47, ¶ 17, 371 P.3d 1094. "Under an abuse of discretion standard, the appellate court examines the evidence in the record and reverses only if the trial court's decision is clearly against the evidence or is contrary to a governing principle of law." *Id*.

ANALYSIS

¶25 On appeal, Autry first asserts this Court should reverse the trial court's decision granting the injunction against soliciting customers, stating that the Non-Solicitation Agreement is invalid pursuant to 15 O.S. § 219A.

¶26 The Oklahoma Legislature has specifically provided that restraint of trade is void unless otherwise provided by statute. Title 15 O.S.2011 § 217 states: "Every contract by which any one is restrained from exercising a lawful profession, trade or business of any kind, otherwise than as provided by Sections 218 and 219 of this title, or otherwise than as provided by Section 2 of this act, is to that extent void." (Footnote omitted.) Section 218 of Title 15, applicable to the sale of the goodwill of a business, and Section 219, addressing partnerships, are not applicable here. Section 219A, enacted in 2001, provides:

> A. A person who makes an agreement with an employer, whether in writing or verbally, not to compete with the employer after the employment relationship has been terminated, shall be permitted to engage in the same business as that conducted by the former employer or in a similar business as that conducted by the former employer as long as the former employee does not directly solicit the sale of goods, services or a combination of goods and services from the established customers of the former employer.
>
> B. Any provision in a contract between an employer and an employee in conflict with the provisions of this section shall be void and unenforceable.

15 O.S.2011 § 219A. Section 219B provides:

> A contract or contractual provision which prohibits an employee or independent contractor of a person or business from soliciting, directly or indirectly, actively or inactively, the employees or independent contractors of that person or business to become employees or independent contractors of another person or business shall not be construed as a restraint from exercising a lawful profession, trade or business of any kind. Sections 217, 218, 219 and 219A of Title 15 of the Oklahoma Statutes shall not apply to such contracts or contractual provisions.

15 O.S. Supp. 2013 § 219B. Section 219B was enacted effective November 1, 2013.

¶27 The Non-Solicitation Agreement involved here provides:

> Employee agrees that for a period of twelve (12) months following termination by Employee, for any reasons, including resignation, or by Acosta for Cause, Employee shall not, on Employee's own behalf or on behalf of others, in any capacity whatsoever, including, without limitation, *as an owner, salesperson, sales manager, consultant, or otherwise, directly or indirectly, engage in the business of selling, soliciting, or promoting the sale of the Clients that Employee represented while employed by Acosta.*

(Emphasis added.) The trial court found that the Non-Solicitation Agreement could be reformed to comply with § 219A simply by striking the term "indirectly." It also listed the clients Autry is enjoined from engaging in the business of "selling, soliciting, or promoting the sale of."

¶28 The Oklahoma Supreme Court has specifically instructed that "15 O.S. 2001 §219A is the Legislature's pronouncement on Oklahoma's public policy regarding covenants not to compete." *Howard v. Nitro-Lift Techs., L.L.C.*, 2011 OK 98, ¶20, 273 P.3d 20 (reversed on other grounds by Nitro-Lift Techs., L.L.C. v. Howard, 568 U.S. 17, 133 S. Ct. 500, 184 L. Ed. 2d 328 (2012) (footnote omitted). The United States Supreme Court reversed the decision of the Oklahoma Supreme Court in *Howard* finding that it was for "the arbitrator to decide in the first instance whether the covenants not to compete are valid as a matter of applicable state law." *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 22, 33 S. Ct. 500, 504, 184 L. Ed. 2d 328 (2012). Although reversed on grounds pertaining to who had the authority under an arbitration provision to decide the non-compete covenants' validity – grounds unrelated to the merits of the dispute – the Oklahoma Supreme Court's decision in *Howard* remains the best pronouncement of that Court's instruction on the proper analysis of such non-solicitation agreements like the one under review.

¶29 The *Howard* Court explained § 219A:

> Subsection A utilizes the mandatory term, "shall," in association with the employee's right to engage in the same or similar business as that of the employer while subsection B provides that "any" provision in a contract between the employer and employee conflicting with those terms "shall be void and unenforceable." The term "any" is all-embracing and means nothing less than "every" and "all." *The plain, clear, unmistakable, unambiguous, and unequivocal language of 15 O.S. 2001 §219A prohibits employers from binding employees to agreements which bar their ability to find gainful employment in the same business or industry as that of the employer. The only exception allowed by the statutory provision is that the employee may be barred from soliciting goods or services from the employer's* ***established customers.***

Howard, 2011 OK 98, ¶ 21 (emphasis added & footnotes omitted).

¶30 The Supreme Court detailed the covenants at issue in *Howard*:

> The covenants not to compete contain provisions, for the period of two years, prohib-

> iting the employees from accepting employment with any oil or gas entity located in the United States which generates five percent (5%) of its gross revenues from nitrogen generation. The same clause prevents the employees from: "owning, managing, operating, joining, controlling or participating" in a similar business; being a director, officer, representative, partner, or consultant in any business engaging in nitrogen generation; loaning money to a like enterprise; or selling or leasing equipment to any person or business which has any significant portion of its business as nitrogen generation, whether or not the equipment is related to that particular portion of the business. The covenant conceivably could be interpreted to prevent the employees from taking jobs in any capacity from a competing business, even one not directly related to the nitrogen generation process. *The agreement not only bars active solicitation of current customers or suppliers of Nitro-Lift, it also forbids the employees from approaching past customers and suppliers. Furthermore, it operates to inhibit the employees from employing or engaging any Nitro-Lift officer or employee even where those individuals might seek employment on their own initiative rather than from any intervention by the employees.*

Id. ¶ 22 (emphasis added). The Supreme Court concluded: "The non-competition contracts go well beyond the bounds of what is allowable under §219A and violate the legislatively expressed public policy. Therefore, we hold that, pursuant to 15 O.S. 2001 §219A, the covenants not to compete are void and unenforceable as against Oklahoma's public policy expressed through legislative mandate." *Id.* ¶ 23.

¶31 We conclude the Non-Solicitation Agreement in the present case violates § 219A because it prohibits more than the direct solicitation of established clients. The Non-Solicitation Agreement prohibits Autry from directly or indirectly "engag[ing] in the business of selling, soliciting, or promoting the sale of the Clients that [Autry] represented while employed by Acosta." Section § 219A specifically allows an agreement between an employer and employee that prohibits the direct solicitation from the employer's "established customers." The trial court recognized this conflict and stated, "[T]he Non-Solicitation Agreement can be easily corrected to comply with 15 O.S. § 219A by deleting the word 'indirectly.'" We find that the remedy for this Non-Solicitation Agreement's shortcomings is not quite that simple and it cannot be made to comply with § 219A by merely deleting the word "indirectly."

¶32 The Non-Solicitation Agreement exceeds the permissible limitations of § 219A. It prohibits Autry from soliciting "Clients" Autry represented while employed by Acosta. This includes past clients, for instance, companies with whom Acosta or Autry no longer had a business relationship when Autry left Acosta. Autry had worked for Acosta since 2008. The Non-Solicitation Agreement would prohibit Autry from directly "selling, soliciting, or promoting the sale of" clients of her current employer who were former clients of Acosta, even if they left Acosta years before Autry changed employers. In *Howard*, the Supreme Court said:

> Undoubtedly, the Legislature, in utilizing the term "established customer," had in mind those businesses and customers wherein a relationship was ongoing and anticipated to continue into the future.

Howard, 2011 OK 98, ¶ 26. This Non-Solicitation Agreement would extend to previous business customers Autry had represented even though Acosta had no current relationship with them when Autry left and were past clients with whom Acosta did not have an ongoing relationship and those it could not reasonably anticipate continuing a business relationship in the future.

¶33 In addition to striking the term "indirectly" in the Non-Solicitation Agreement, we would have to determine whether the phrase "Clients that Employee represented while employed by Acosta" conformed with the statutory term "established customer," and as in *Howard*,[1] "thereby suppl[ied] a material term of the contract." This conclusion is supported by the trial court's specific list of clients in its order which it enjoined Autry "from directly selling, soliciting or promoting," which in essence added material terms to the contract. Based on the holding of *Howard*, we decline to do so.

¶34 A party must prove the following to obtain an injunction: "1) the likelihood of success on the merits; 2) irreparable harm to the party seeking injunction relief if the injunction is denied; 3) his threatened injury outweighs the injury the opposing party will suffer under the injunction; and 4) the injunction is in the

public interest." *Dowell v. Pletcher,* 2013 OK 50, ¶ 7, 304 P.3d 457. The party seeking an injunction must establish the right to injunctive relief "by clear and convincing evidence and the nature of the injury must not be nominal, theoretical or speculative." *Id*.

¶35 Based on our conclusion that the non-solicitation provision exceeds the restrictions allowed by § 219A, Acosta has not shown that any threatened injury it may suffer outweighs the injury to Autry from the injunction's restrictions. Examined under the lens of § 219A, the Non-Solicitation Agreement is void and unenforceable as against Oklahoma's public policy expressed by the Legislature's enactment of that section. And, based on the clear public policy reasons underpinning § 219A, the circumstances will not allow us to conclude that upholding this injunction is in the public interest. Accordingly, the temporary injunction granted by the trial court must be set aside.

CONCLUSION

¶36 The non-solicitation provision in question exceeds the restrictions permitted by 15 O.S.2011§ 219A. The temporary injunction entered on the basis of this unenforceable provision must be reversed.

¶37 **REVERSED**.

THORNBRUGH, V.C.J., and BARNES, P.J., concur.

JANE P. WISEMAN, JUDGE:

1. In *Howard*, the Supreme Court stated: "To conform with the restrictions of 15 O.S. 2001 §219A, we would have to determine whether the phrase 'present customers' within the agreement conformed to the Legislature's term 'established customer,' thereby supplying a material term of the contract." *Howard v. Nitro-Lift Techs., L.L.C.*, 2011 OK 98, ¶ 27, 273 P.3d 20.

ORDER

Case No. 115,196. January 12, 2018

The Court has before it several motions filed on behalf of Appellant, Carrie Autry, which we will address in turn.

1. Appellant's Motion to Assess Costs has previously been addressed, and costs taxed, by the Supreme Court Clerk pursuant to Sup. Ct. Rule 1.14(A).
2. Appellant's Motion to Publish the Opinion issued on November 14, 2017, is granted, and pursuant to Sup. Ct. Rule 1.200(c), the Opinion is ordered released for official publication.
3. Appellant's Motion to File a Reply Brief on the issue of appellate attorney fees is granted.

Having considered Appellant's Motion to Assess Appellate Attorney Fees, Appellee Acosta, Inc.'s Response to that motion, and Appellant's Reply, we grant the Motion for Appellate Attorney Fees and remand the case to the trial court to determine the amount of those fees.

SO ORDERED this 10th day of January, 2018.
ALL JUDGES CONCUR.

/s/ DEBORAH B. BARNES
Presiding Judge, Division IV

2018 OK CIV APP 9

IN RE THE MARRIAGE OF MAHONEY: JOHN M. MAHONEY, Petitioner, and THE ESTATE OF JOHN M. MAHONEY, Real Party in Interest/Appellee, vs. CONNIE A. MAHONEY, Respondent/Appellant.

Case No. 114,926. September 8, 2017

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE RICHARD OGDEN, JUDGE

AFFIRMED

Kevyn Gray Mattax, Oklahoma City, Oklahoma, for Petitioner/Appellee,

Kelsey Dulin, DULIN LAW FIRM, Edmond, Oklahoma, for Respondent/Appellant.

Kenneth L. Buettner, Chief Judge:

¶1 Respondent/Appellant Connie A. Mahoney (Wife) appeals from the trial court's order denying her motion to vacate a consent decree of dissolution. Wife sought to vacate the decree because it was signed by Petitioner John Mahoney's (Husband) sister, acting as his attorney in fact under a durable power of attorney, under allegedly fraudulent means. Husband died between the date of the consent decree and Wife's motion to vacate and Petitioner/Appellee The Estate of John Mahoney was substituted as the real party in interest. The trial court's findings that Husband was competent at the time the decree was executed and that the decree was not executed by fraud are supported by the weight of the evidence. The broad power of attorney form in this case gave Husband's attorney in fact power to enter contracts affecting property rights; more importantly, Husband directed his attorney in

fact to sign the consent decree for him because his own signature was shaky. A consent decree of dissolution may be executed by an agent where such authority is not excluded by the terms of the power of attorney instrument. The trial court did not abuse its discretion in denying Wife's motion to vacate and we affirm.

¶2 The parties were married in 1960 and separated in January 2008. Husband filed his Petition for Dissolution of Marriage in November 2012. The parties entered a Journal Entry and Consent Decree of Dissolution of Marriage which was approved by the trial court and filed August 5, 2013. Wife filed her motion to vacate the consent decree September 3, 2013. Wife asserted that after it was filed, she discovered the decree had been signed by Kathleen Dunn as Husband's attorney in fact under a power of attorney and that Husband had died due to a brain tumor three weeks after the decree was filed. Wife argued the decree was obtained by fraud because Husband's counsel failed to disclose to Wife that Husband had a terminal illness affecting his brain and because Husband had failed to disclose one bank account during discovery. Wife also sought to vacate based on an irregularity in obtaining the judgment and unavoidable casualty or misfortune due to the decree being signed by Dunn rather than by Husband. Estate opposed the motion.

¶3 Hearing on Wife's motion to vacate was held in February 2016. The trial court issued its order denying the motion March 24, 2016. The trial court found that Estate met its burden of proving that Husband was competent at the time he expressly directed Dunn to execute the consent decree. In particular, the trial court found Husband first signed a signature page for the decree but due to physical shaking and not due to incapacity, Husband directed Dunn to also sign a signature page, which disclosed her status and which was attached to the filed decree. The trial court noted Husband's signature was shaky and Husband himself signed a beneficiary change on an annuity and his last will and testament after the decree was filed. The court found Husband had no duty to disclose his illness or that he had executed a power of attorney and therefore found no irregularity or fraud in the use of the power of attorney to execute the decree. Lastly, the trial court found that the fact that Dunn was designated as the beneficiary of Husband's estate was not a sufficient irregularity to set aside the decree because the evidence showed Husband desired that his sister, who was his primary caregiver during his last illness, receive his estate.[1]

¶4 We review a trial court's order on a motion to vacate for an abuse of discretion. *Jones, Givens, Gotcher & Bogan, P.C. v. Berger,* 2002 OK 31, ¶5, 46 P.3d 698. "Although a trial court is vested with wide discretion in denying a new trial, its order will be reversed if the trial court is deemed to have erred with respect to a pure, simple and unmixed question of law." *Id.*, citing *Bishop's Restaurants, Inc. of Tulsa v. Whomble,* 1960 OK 44, 355 P.2d 560, 563, and *Nash v. Hiller,* 1963 OK 63, 380 P.2d 77, 80. Wife's claims on appeal are that a divorce is personal and may not be entered by an attorney in fact, that Husband lacked capacity to direct Dunn to execute the decree, and that Husband, Dunn, and Husband's counsel fraudulently concealed Husband's illness from Wife in order to obtain the consent decree.

¶5 We have reviewed the record and find it supports the trial court's findings of fact. As noted above, the parties separated at the beginning of 2008 and Husband filed his petition in late 2012. In April 2013, Husband discovered he had a brain tumor and he named Dunn as his attorney in fact in a broad durable power of attorney form executed April 29, 2013. Husband lived with Dunn until he entered a nursing home July 13, 2013.[2] Through counsel, the parties exchanged discovery and the case was set for trial September 13, 2013. Also through counsel, the parties exchanged offers and counter-offers to settle during summer 2013 and reached an agreement in late July. Husband's counsel prepared the consent decree and sent it to Wife's counsel. Wife and her counsel signed it and returned it to Husband's counsel. Dunn testified she took the document to Husband at the nursing home where he read it and signed it. Due to concern about his signature being shaky, Husband asked Dunn to sign the instrument on a new signature page. On the line above Husband's name, Dunn signed "John M. Mahoney by Kathleen S. Dunn POA". Husband's counsel took the decree, with attached signatures of Dunn as attorney in fact for Husband, Husband's counsel, Wife, and Wife's counsel, to the assigned judge who approved it for filing. The decree was file stamped August 5, 2013.

¶6 Wife and her counsel received the file-stamped copy August 16. Wife's counsel then

sent an email to Husband's counsel, expressing surprise that Dunn had signed for Husband and asking for assurance that Husband would not try to use that fact to get out of the contract. In that email, Wife's counsel asserted Wife was not trying to get out of the decree. Husband died August 25, 2013. Only after learning of Husband's death did Wife seek to vacate the consent decree.

¶7 We first address Wife's claim that she was fraudulently induced to sign the consent decree. Wife cites testimony that Husband did not want Wife to know he was sick as proof of a conspiracy to trick her into settling. She contends she would not have agreed to settle if she had known Husband was dying and therefore contends Husband's illness was a material fact she had a right to know before agreeing to settle. Wife has not urged that she was induced to enter an inequitable settlement due to the failure to disclose Husband's illness. Wife has presented no authority that a party to a divorce proceeding has a duty to inform the other spouse of illness where the fact of illness is not relevant to the controversy. A spouse's health may be relevant for purposes of showing need for support alimony or determining the best interests for custody determinations, but neither of these questions was presented in this case. Wife has not suggested Husband's health was in controversy. Under the discovery code, to seek a medical examination of a party, the other party must show good cause and that the party's medical condition is "in controversy." 12 O.S.2011 §3235. Nor has Wife asserted she made a discovery request regarding Husband's health to which Husband answered falsely. Wife was represented by counsel and Wife agreed to settle the case rather than proceed to trial. Additionally, Wife has presented no authority that anyone had a duty to tell her, before she agreed to settle, that Husband had given Dunn a power of attorney or that Dunn would sign the consent decree under that power. There is no evidence of fraud in this case.

¶8 Wife also argues that Husband was not competent at the time the decree was executed and that it was fraud for Dunn to sign it as a result. Our review of the record shows the witnesses who actually observed Husband testified that he was competent at the time the parties settled. The trial court's finding that Husband was mentally competent at the time he directed Dunn to sign the decree is not against the weight of the evidence.

¶9 We next consider whether an attorney in fact, acting pursuant to a power of attorney, may execute a consent decree of dissolution.

> A consent judgment is the agreement of the parties entered upon the record with the sanction of the court. . . . A consent decree in a divorce is the result of negotiations between the parties and subsequent settlement of the issues involved, which settlement is then presented to the court as a proposed judgment. Although it is not a judicial determination of the rights of the parties, it acquires the status of a judgment through the approval of the judge of the pre-existing agreement of the parties. . . . The law and public policy favor settlements and compromises, entered into fairly and in good faith between competent persons, as a discouragement to litigation. . . . If the agreement between the parties regarding support and maintenance is intended as final and binding, leaving nothing for determination by the court on the question of the amount of the allowance, such decree is not subject to modification without the consent of both parties. . . . Such an agreement between the parties is enforceable and valid even though it does what a trial court cannot do, provided the agreement does not contravene public policy. . . .

Whitehead v. Whitehead, 1999 OK 91, ¶¶9-10, 995 P.2d 1098 (footnotes and citations omitted). A power of attorney is "an instrument authorizing another to act as one's agent or attorney in fact (as distinguished from an attorney at law)." *Matter of Rolater's Estate*, 1975 OK CIV APP 60, 542 P.2d 219. Oklahoma has adopted the Uniform Durable Power of Attorney Act, codified at 58 O.S.2011 §§1071-1077. The instrument Husband executed in this case complied with the statutory requirements for creating a durable power of attorney under 58 O.S.2011 §1072. In addition to the testimony that Husband directed Dunn to sign the decree and that Husband later ratified that act by executing a will in which he declared he was unmarried, the Durable Power of Attorney form that Husband executed gave Dunn broad powers to contract without his direction and after any loss of capacity.[3] Nevertheless, Wife contends that divorce is a purely personal matter which can never be accomplished by an attorney in fact. Oklahoma cases have indeed referred to divorce as a personal matter, but none have expressly reached the question whether a broad

power of attorney includes the power to sign a divorce settlement. See *Pellow v. Pellow*, 1985 OK 88, 714 P.2d 593 ("A cause of action for divorce is purely personal, and it has been held that such a cause of action terminates on the death of either spouse before the entry of a final decree.") and *Scoufos v. Fuller,* 1954 OK 363, 280 P.2d 720 ("The divorce decree severs the marital relation and requires a personal decision.") Wife also relies on the following language from a New York case addressing whether an attorney in fact has authority to amend an irrevocable trust:

> Generally, the scope of a power of attorney is limited only by the boundaries of the principal-agency relationship . . . There are a few exceptions to the powers which can be granted to an attorney-in-fact. These exceptions include, but are not limited to: the execution of a principal's will . . . ; the execution of a principal's affidavit upon personal knowledge . . . ; or the entrance into a principal's marriage or divorce.

Matter of Perosi v. LiGreci, 98 A.D.3d 230, 948 N.Y.S.2d 629 (2012) (citations omitted). However, the case cited in *Perosi* as holding there is an exception for marriage and divorce, *Mallory v. Mallory*, 113 Misc.2d 912, 450 N.Y.S.2d 272 (1982), indicates its statement that an agent may not obtain a divorce for her principal was based on the very unusual facts of that case. In *Borghol v. Borghol*, 2014 WL 10920357 (Super. Ct. PA, not reported in A.3d), the court held a wife could not collaterally attack a divorce settlement where she had given an attorney a power of attorney to appear for her in a foreign court.

¶10 In *Scoufos, supra*, the Oklahoma Supreme Court found that where a person filed a divorce petition and later suffered a head injury necessitating the appointment of a guardian, the guardian could proceed in the case and obtain a valid divorce for the ward, so long as the ward *was incompetent but not insane*. The court found that an incompetent person, though unable to manage his financial affairs, could still form the intent to divorce, while an insane person could not make the personal decision to divorce. Implicit in this holding is the recognition that while divorce is indeed a personal decision, the facts of a particular case may necessitate a guardian's or agent's participation. This reality is such that it may not even warrant analysis where it is not challenged. For example, in *French v. French*, 1947 OK 14, 198 Okla. 135, 176 P.2d 807, the Oklahoma Supreme Court mentioned in its statement of facts that the husband's mother instituted the divorce proceeding, acting "under power of attorney for that purpose executed and acknowledged by plaintiff before a Judge Advocate in the Southwest Pacific area" during World War II. The decision made no further mention of the power of attorney; clearly that fact was not relevant to the decision. Similarly, in an unpublished decision of the Texas Court of Appeals, the wife's son initiated divorce proceeding under power of attorney, the case proceeded to trial and appeal, but the issue of power of attorney was not raised. See *Gilbreath v. Gilbreath*, 2004 WL 2066243 (not reported in S.W.3d). In another Texas Court of Appeals case, with facts similar to this one, the appellate court expressed no concern that Husband's attorney in fact appeared at a mediation and negotiated a divorce settlement on behalf of his principal. *In re Marriage of Fannette*, 2013 WL 3533238 (not reported in S.W.3d). We also note cases from New York approving of one spouse giving a power of attorney to the other spouse for the specific purpose of obtaining a divorce in another jurisdiction. The issue in those cases was whether the power itself was fraudulently obtained, not whether a person holding a valid power of attorney could agree to a divorce for the principal. See *Kantrowitz v. Kantrowitz*, 21 A.D.2d 654, 249 N.Y.S.2d 723 (1964); *Kurman v. Kurman*, 11 Misc.2d 1035, 174 N.Y.S.2d 128 (1958).

¶11 We recognize that some states have reached the opposite conclusion. The New Jersey Superior Court has recently held that a competent person may not authorize a power of attorney to certify an answer to a divorce petition. *Marsico v. Marsico*, 436 N.J.Super. 483, 94 A.3d 947 (2013). In *Marsico,* the court found that a competent person must appear and testify, rather than relying on a power of attorney, despite advanced age. The court noted that in that state a guardian has authority to initiate a divorce proceeding for a ward, thus emphasizing the court's view that a finding of incompetency was necessary before a party other than the spouse could appear in a divorce case. The South Carolina Court of Appeals has signaled its approval of the view that an action for separate maintenance may be brought by an attorney in fact in contrast to an action for divorce, which is personal to the parties to the marriage. See *Brewington v. Brewington*, 280 S.C. 502, 313 S.E.2d 53 (1984). These cases are factually distinguishable from the circumstance here, where Husband filed the petition for

divorce before he became ill and executed the power of attorney and where Dunn's *only* participation was signing the negotiated consent decree at Husband's direction and after Husband himself had attempted to sign it.

¶12 In this case, the record showed Husband believed he was unable to legibly sign the consent decree and directed his agent to sign for him. We fail to see how this circumstance differs from a spouse who is unable to sign due to being physically located in another state. We find no irregularity or fraud in obtaining the consent decree here and we therefore find no abuse of discretion in the trial court's denial of Wife's motion to vacate the consent decree. AFFIRMED.

MITCHELL, P.J., and SWINTON, J., concur.

Kenneth L. Buettner, Chief Judge:

1 As to Wife's complaint that Husband failed to disclose a certain account, the trial court found both parties were represented by counsel and both parties had claimed there were outstanding discovery issues at the time they agreed to settle. Wife has not challenged this finding in her appellate brief.

2 Although Wife contends Dunn put Husband in the nursing home without notice to him, the testimony showed Husband's daughter took him to the nursing home while Dunn was at a hotel.

3 Among other powers, the Durable Power of Attorney authorized Dunn to appear for Husband in litigation and to sign contracts or instruments related to property. It is important to note that Husband did not claim, nor does his Estate claim, that Dunn was without authority to sign the decree as Husband's agent. Rather, the other party to the contract seeks to avoid her own agreement by challenging the authority of the other party's agent.

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, February 1, 2018

F-2016-842 — Appellant, Jurmail Hosay Samuel Huffman, was tried by jury and convicted of Robbery in the First Degree (21 O.S.2011, § 797), After Former Conviction of Two or More Felonies in District Court of Grady County Case Number CF-2015-14. The jury recommended as punishment imprisonment for thirty (30) years. The trial court sentenced accordingly, imposed a $100.00 Victims Compensation Assessment and court costs. The trial court further ordered that Appellant receive credit for time served. From this judgment and sentence Jurmail Hosay Samuel Huffman has perfected his appeal. The Judgment and Sentence is hereby AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

F-2016-0948 — Appellant, Willie Mae Coursey, entered a plea of guilty in Oklahoma County District Court Case No. CF-2011-6529 on February 8, 2013, to Obtaining a Controlled Dangerous Substance by Fraud, a felony. She was sentenced to eight years suspended, with rules and conditions of probation, with credit for time served, and fined $50.00. On October 9, 2014, Appellant was charged with Identity Theft in Oklahoma County District Court Case No. CF-2014-6876. On December 4, 2014, Appellant was charged in Oklahoma County District Court Case No. CF-2014-8184 with Count 1 – Attempting to Obtain a Controlled Dangerous Substance by Fraud, and Count 2 – Obstructing an Officer. On April 28, 2015, Appellant entered pleas of guilty in Case Nos. CF-2014-6876 and CF-2014-8184. Sentencing was delayed until such time as Appellant successfully completed the Mental Health Court Program or was revoked from the program and sentenced for the criminal offenses as provided in the Plea Agreement. On April 28, 2015, the State filed an application to revoke Appellant's suspended sentence in Case No. CF-2011-6529 alleging Appellant committed the new crimes as alleged in Oklahoma County District Court Case No. CF-2014-8184. Appellant pled into the Mental Health Court Program in this case on May 6, 2015. The State filed an application to revoke Appellant from the Mental Health Court Program on December 10, 2015. Following a hearing on the State's application on October 4, 2016, the Honorable Geary L. Walke, Special Judge, revoked Appellant's suspended sentence in full, eight years imprisonment, in Case No. CF-2011-6529. In Case Nos. CF-2014-6876 and CF-2014-8184, Judge Walke revoked Appellant's participation in the Mental Health Court Program. Appellant was sentenced to ten years imprisonment on Count 1, with credit for time served including all time served for sanctions, in Case No. CF-2014-6876, and ten years imprisonment on Count 1 and one year on Count 2, in Case No. CF-2014-8184, with credit for time served including all time served for sanctions. The sentences were all ordered to run concurrently. Appellant appeals from her termination from Mental Health Court. Appellant's termination from Mental Health Court is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

F-2016-878 — Steven Vanzant, Appellant, was tried by jury for the crime of First Degree Murder in Case No. CF-2013-226 in the District Court of McIntosh County. The jury returned a verdict of guilty and set punishment at life imprisonment without the possibility of parole. The trial court sentenced accordingly. From this judgment and sentence Steven Vanzant has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

C-2017-521 — Kendra Leigh Butler, Petitioner, entered a blind plea of no contest for the crimes of Child Abuse by Injury (Count 1) and Child Neglect (Count 2) in Case No. CF-2016-480 in the District Court of LeFlore County. The Honorable Marion Fry, Associate District Judge, accepted Butler's plea and set punishment at thirty years imprisonment and a $500.00 fine on each count to be served concurrently. Butler filed a timely application to withdraw plea which was denied following the prescribed hearing. Butler appeals the denial of her application. The Petition for Writ of Cer-

tiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

C-2017-230 — On November 14, 2016, Cesar Rios, Petitioner, entered blind pleas of guilty to Counts 1-3, shooting with intent to kill; Count 4, using a vehicle to facilitate the discharge of a weapon; Count 5, possession of a firearm while committing a felony; and Count 6, causing great bodily injury while eluding a police officer, in Case No. CF-2015-70 in the District Court of Nowata County. The Honorable Curtis L. DeLapp, District Judge, accepted the guilty pleas, and ordered a pre-sentence investigation. On January 20, 2017, Judge DeLapp sentenced Rios to life imprisonment on each of counts 1-4 with one year of post-imprisonment supervision, ten years imprisonment (suspended) on count 5, and five years imprisonment (suspended) on count 6. The court further ordered the sentences on counts 1-4 to be served concurrently with each other. The sentences on counts 5 and 6 were to be served concurrently with each other, but consecutively to the sentences on counts 1-4. The court also imposed various fines and costs. Petitioner filed a timely motion to withdraw his guilty pleas which was denied. It is from this denial that Petitioner appeals. The Petition for the Writ of Certiorari is DENIED. The Judgments and Sentences of the District Court are AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

Thursday, February 8, 2018

C-2017-441 — Ezekiel Gilbert Holbert, Petitioner, entered a negotiated plea of guilty in the District Court of Seminole County, Case No. CF-2009-227, to the crimes of First Degree Murder (Counts 1 & 2) Shooting with Intent to Kill (Counts 3-4), and Feloniously Pointing a Firearm (Count 6). Holbert also entered a plea of *nolo contendere* to one count of Shooting with Intent to Kill (Count 5). The Honorable George Butner accepted Holbert's plea and sentenced him, pursuant to the plea agreement, to life imprisonment without the possibility of parole on each of Counts 1 and 2, life imprisonment with the possibility of parole on each of Counts 3, 4 and 5, and ten years imprisonment on Count 6. Judge Butner ordered Holbert's sentences to be served consecutively. Holbert filed an untimely *pro se* motion to withdraw his plea. Nevertheless, the district court heard the motion and denied it. Holbert spent four years pursuing an appeal out of time. This Court ultimately granted an appeal out of time in 2017 and ordered the district court to appoint counsel. To trigger the appeal process, Holbert's counsel filed an amended Motion to Withdraw Plea that was heard and denied by the district court. Holbert appeals the denial of this motion. The Petition for Certiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

C-2017-151 — Brent Thomas Pesch, Petitioner, entered un-negotiated guilty pleas to the crimes of Count 1 - Rape by Instrumentation, Count 2 - Forcible Sodomy and Count 3 - Attempted Rape in Case No. CF-15-32 in the District Court of Tillman County before the Honorable Richard Darby, District Judge. On August 1, 2016, Petitioner filed a Motion to Withdraw Plea. Following a December 12, 2016 hearing, the Honorable Norman L. Russell, Associate District Judge, denied the plea. Judge Russell, on February 3, 2017, sentenced Petitioner to 20 years imprisonment, with all but the first twelve years suspended, on all counts and ordered the terms to be served concurrently. Brent Thomas Pesch has perfected his certiorari appeal. Petition for Certiorari DENIED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

Thursday, February 15, 2018

C-2017-512 — Spencer Allen Estes, Petitioner, pled guilty to the crimes of Counts I and II - Use of a Vehicle in Discharge of a Weapon, Count III - Intimidation of a Witness and Count IV - Possession of a Firearm After Former Conviction of a Felony, all after former conviction of a felony in Case No. CF-2016-4553 in the District Court of Tulsa County. The trial court sentenced Petitioner to 18 years imprisonment and fined him $500.00 on each of Counts I, II and III and to 10 years imprisonment and a $500.00 fine on Count IV, to run concurrently with credit for time served. Petitioner filed a Motion to Withdraw his pleas, and an appeal out of time was granted. The Motion was de-nied after a May 3, 2017 hearing. Spencer Allen Estes has perfected his Petition for Writ of Certiorari. CERTIORARI DENIED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

F-2016-476 — Robert Charles Bates, Appellant, was tried by jury for the crime of second degree manslaughter in Case No. CF-2015-1817 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at four years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Robert Charles Bates has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Appellant's motion for oral argument is DENIED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., recuses; Rowland, J., recuses.

COURT OF CIVIL APPEALS
(Division No. 1)
Friday, February 9, 2018

114,820 — State of Oklahoma ex rel. Charles W. Wright and Rachel Lawrence Mor, Individuals and Taxpayer Citizens of the State of Oklahoma, Plaintiffs/Appellants, vs. ConocoPhillips Company, an Oklahoma Corporation, Defendant/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Thomas E. Prince, Judge. In this *qui tam* action challenging a 2003 settlement between Defendant/Appellee ConocoPhillips Company (Phillips) and the Oklahoma Petroleum Storage Tank Indemnity Fund, Plaintiffs appeal from the trial court's judgment following a jury verdict in favor of Phillips. We hold: There was sufficient evidence to support the jury's verdict; the trial court did not err in granting partial summary judgment to Phillips regarding disclosure of insurance coverage; the State Auditor's report did not prohibit the trial court from submitting this cause to the jury; the inclusion of attorney fees and interest did not invalidate the settlement; Plaintiffs have failed to demonstrate the exclusion of certain evidence would have changed the jury's verdict; and the jury was not misled and would not have reached a different conclusion but for the questioned instructions. AFFIRMED. Opinion by Bell, P.J.; Joplin, J., and Buettner, J., concur.

115,388 — Bryan Mason, Stephen Clark, Red Oak L.L.C., vs. Illinois River Ranch Property Owners Association. Appeal from the District Court of Cherokee County, Oklahoma. Honorable Darrell Shepherd, Judge. Respondent/Appellant Illinois River Ranch Property Owners Association (IRRPOA) seeks review of the trial court's order restraining a vote on the proposed amendment of the IRRPOA's bylaws, directing the election of new members of the IRRPOA's governing board under the supervision of a court-appointed master, and holding the payment of IRRPOA dues was not a condition to voting. We hold the trial court did not err or abuse its discretion in holding the covenants did not condition voting on the current payment of dues. The evidence supported the appointment of a special master to oversee the election of new board members and officers. The trial court engaged in no prohibited ex parte communications with any party. AFFIRMED. Opinion by Joplin, J.; Bell, P.J., and Buettner, J., concur.

115,421 — Annelise Bright, Plaintiff/Appellant vs. The Corporation Company, (WalMart), Defendant/Appellee. Appeal from the District Court of Cleveland County, Oklahoma. Honorable Jequita H. Napoli, Judge. In this small claims action, Plaintiff/Appellant, Annelise Bright, appearing *pro se*, appeals from the trial court's judgment in favor of Defendant/Appellee, Wal-Mart Stores East, LP, (incorrectly identified by Plaintiff as The Corporation Company). Plaintiff filed a small claims affidavit against Wal-Mart claiming she was injured by the store's debit/credit card machine at the check-out counter. After conducting a trial, taking testimony of witnesses and reviewing video and photographic evidence, the court rendered judgment to Wal-Mart. We hold the trial court's judgment is supported by the evidence and affirm. Opinion by Bell, P.J.; Joplin, J., and Buettner, J., concur.

115,429 — Kendra Johnston, Petitioner/Appellee, vs. Mark Johnston, Respondent/Appellant. Appeal from the District Court of Garfield County, Oklahoma. Honorable Dennis W. Hladik, Judge. Respondent/Appellant Mark Johnston (Husband) appeals the property division, support alimony, and attorney fees provisions in the Decree of Dissolution ending Husband's marriage to Petitioner/Appellee Kendra Johnston (Wife). The trial court's decisions are not against the weight of the evidence and show no abuse of discretion. We AFFIRM. Opinion by Buettner, J., Bell, P.J., and Joplin, J., concur.

115,847 — Rebecca Culver, Petitioner/Appellee, vs. Daniel Culver, Respondent/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Tammy Bruce, Trial Judge. In his appeal of a judgment for indirect contempt of court, Daniel Culver, Respondent/Appellant proposes that, based on the evidence, the trial court erroneously concluded he failed to tender child support payments to Rebecca Culver, Petitioner/Appellee. He also

argues the order is invalid because the purge fee was calculated arbitrarily. We affirm because appellate courts do not review fact questions made in contempt proceedings and because the form of the order is proper. AFFIRMED. Opinion by Bell, P.J.; Joplin, J., and Buettner J., concur.

116,192 — Richard Lynn Dopp, Plaintiff/Appellant, vs. Justin Jones, Johnny Blevins, Randy Knight, David Orman, John Marlar, Debbie Morton, Terry Crenshaw, Dr. Paul Sockey, Kristy Wingo, Jim Rabon, Wayne Brakensiek, Wad Scott, David Miller, Richard Roberts, E. Scott Pruitt, and Robert Apala, Defendants/Appellees, and Kara Johnson, Randall Workman, Ron Anderson, Chad Brown, Ron Cantwell, and Bob Compton, Defendants. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Bryan C. Dixon, Judge. Plaintiff/Appellant Richard Lynn Dopp appeals from the trial court's order denying Dopp's motion to reconsider the trial court's orders dismissing without prejudice Dopp's Third Amended Petition. Dopp filed suit alleging Justin Jones, Johnny Blevins, Randy Knight, David Orman, John Marlar, Debbie Morton, Terry Crenshaw, Dr. Paul Sockey, Kristy Wingo, Jim Rabon, Wayne Brakensiek, Wade Scott, David Miller, Richard Roberts, E. Scott Pruitt, Robert Apala, Kara Johnson, Randall Workman, Ron Anderson, Chad Brown, Ron Cantwell, and Bob Compton violated his rights under the U.S. Constitution while he was in the custody of the Department of Corrections. Dopp has not presented a record showing he is entitled to relief. We AFFIRM. Opinion by Buettner, J.; Bell, P.J., and Joplin, J., concur.

(Division No. 2)
Wednesday, January 21, 2018

115,759 — Flex-N-Gate Oklahoma LLC, and Own Risk #19362, Petitioners, v. Erica Winchester and The Workers' Compensation Court of Existing Claims, Respondents. Proceeding to Review an Order of a Three-Judge Panel of The Workers' Compensation Court of Existing Claims, Hon. L. Brad Taylor, Trial Judge, affirming a trial court decision that it had subject matter jurisdiction to hear the claim based on its finding that Claimant's date of first awareness of her cumulative trauma injury preceded the February 1, 2014, effective date of the Administrative Workers' Compensation Act (AWCA). Based on our *de novo* review of the record, and applying the "date of awareness" test set forth in *Munsingwear v. Tullis*, 1976 OK 187, 557 P.2d 899, we agree with the workers' compensation court's finding of this jurisdictional fact. Claimant testified she first started noticing numbness, pressure, and tingling in her hands in December 2013. She complained to her supervisor at that time and obtained wrist braces from Employer's tool crib to wear as she worked. Her supervisor also would move Claimant to different machines requiring less grip pressure in order to accommodate her hand problems. The date-of-awareness test asks only when a claimant has exhibited or experienced manifestations, "ill effects," or symptoms that they do know, or should know, are caused by the conditions of their employment. The test does not require that a claimant who is subjected to cumulative trauma actually seek medical treatment, file a workers' compensation claim, or self-diagnose an injury that might qualify as "compensable" under the law. Applying that test here establishes that Claimant's "date of awareness" as defined by Oklahoma law occurred in December 2013. The workers' compensation court had subject matter jurisdiction to hear the claim. SUSTAINED. Opinion from Court of Civil Appeals, Division II, by Thornbrugh, C.J.; Wiseman, P.J., and Fischer, J., concur.

Thursday, February 1, 2018

115,200 — Terry W. Brandt, Petitioner/Appellee, v. Sherri B. Brandt, Respondent/ Appellant. Appeal from an order of the District Court of Tulsa County, Hon. Theresa Dreiling, Trial Judge. In this dissolution of marriage case, Wife seeks reversal of the trial court's property division in the decree. The central question is whether the trial court properly classified the couple's homestead as joint marital property, rather than Wife's separate property, and properly awarded the pension fund to Husband. We find the trial court properly awarded Husband his pension in its entirety to offset the value of the marital property, including the residence, awarded to Wife. We see no abuse of discretion by the trial court in finding the residence to be marital property or in its subsequent division of the parties' marital property and affirm the decree. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., and Fischer, J., concur.

Friday, February 2, 2018

116,039 — In the Matter of: A.A.W., an Alleged Deprived Child, Tammy Walls, Appellant, vs. State of Oklahoma, Appellee. Appeal

from an Order of the District Court of Garvin County, Hon. Trisha Misak, Trial Judge, entering judgment on a jury verdict that terminated the parental rights of Appellant Mother to A.A.W. (Child), on the grounds of failure to correct the conditions that led to the prior termination of Mother's rights to another child. The conditions that State claimed Mother failed to correct were not stated with specificity in State's petition, nor were they delineated in the jury instructions, the verdict form, or the journal entry of judgment entered by the trial court. This fundamental error necessitates that we vacate the judgment of termination *sua sponte* and remand to the trial court for further proceedings in conformity with the requirements of the Oklahoma Supreme Court set forth in *In re T.T.S.*, 2015 OK 36, 373 P.3d 1022, and with this opinion, to include a new trial if necessary. Child shall remain in DHS custody pending the outcome of such proceedings. VACATED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division II, by Thornbrugh, C.J.; Wiseman, P.J., and Fischer, J., concur.

Wednesday, February 7, 2018

115,736 (Companion with Case No. 115,062) — Caroline Smith, and on behalf of A.S. and T.S., minor children, Petitioner/Appellee, vs. Kendra Crystal Wheeler, Defendant/Appellant. Appeal from Order of the District Court of Tulsa County, Hon. Sarah Day Smith, Trial Judge. Appellant Kendra Wheeler appeals the district court's decision denying her motion to vacate or modify a protective order in favor of Appellee Caroline Smith and her children, A.S. and T.S. Pursuant to 22 O.S. Supp. 2016 § 60.4(G)(3), Kendra was entitled to a hearing on her motion. The district court's order denying Kendra's motion without a hearing is reversed, and this case is remanded for proceedings consistent with this Opinion. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division II by Fischer, J.; Wiseman, P.J., concurs, and Thornbrugh, C.J., dissents.

115,062 (Companion with Case No. 115,736) — Caroline Smith, and on behalf of A.S. and T.S., minor children, Petitioner/Appellee, vs. Kendra Crystal Wheeler, Defendant/Appellant. Appeal from the District Court of Tulsa County, Hon. Sarah Day Smith, Trial Judge. Appellant Kendra Wheeler appeals the district court's entry of a final protective order in favor of Appellee Caroline Smith and her children, A.S. and T.S. We find that Caroline presented sufficient evidence to satisfy the statutory definition of "stalking" pursuant to 22 O.S.2011 § 60.1. Consequently, the district court did not abuse its discretion in granting the protective order and we affirm. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Fischer, J.; Thornbrugh, C.J., and Wiseman, P.J., concur.

(Division No. 3)
Friday, February 2, 2018

115,464 — Summers Blue Lake Quarry, LLC, Plaintiff/Appellant, vs. Kay County Commissioners, Defendant/Appellee. Plaintiff/Appellant Summers Blue Lake Quarry, LLC appeals the trial court's entry of judgment in favor of Defendant/Appellant Kay County Commissioners following a bench trial in this declaratory judgment action. The trial court erred in its legal conclusion that a regulatory taking had not occurred because the Board did not act with malicious intent and because the real property retained some value. There is no requirement that, for a regulatory taking to occur, the government entity must act with some malicious intent. Similarly, the fact that the real property at issue retained some value is not solely determinative of whether a regulatory taking occurred. The decision of the trial court is REVERSED and REMANDED for further proceedings. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

115,607 — Shannon Otteson-Gosa, Plaintiff/Appellee, vs. Donovan S. Willis, Defendant/Appellant. Appeal from the District Court of Cherokee County, Oklahoma. Honorable Lawrence Langley, Judge. Plaintiff/Appellee Shannon Otteson-Gosa (Gosa) filed an action in small claims court against Defendant/Appellant Donovan S. Willis (Willis) seeking $7,025.00 in damages for lost wages and the cost of dental work. The trial court denied Willis' Motion to Transfer the action to the regular civil docket. Following a bench trial, the trial court awarded Gosa $3,825.00, plus court costs and fees, to cover the cost of the dental work needed to repair Gosa's broken teeth which she alleged were damaged by Willis during a procedure to remove her gallbladder. Willis appealed both the underlying judgment and the trial court's denial of his Motion to Reconsider. We find that the trial court did not err by refusing to transfer the matter to the regular civil docket and that the judgment in favor of Gosa was supported by competent evidence. The decision of the trial court is AFFIRMED. Opin-

ion by Mitchell, J. Swinton, P.J., concurs; Goree, V.C.J., dissents.

115,893 — Jean McGill Exemption Trust, Plaintiff/Appellant, vs. Noble Investments, Defendant/Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Daman H. Cantrell, Judge. Plaintiff/Appellant Jean McGill Exemption Trust (McGill) appeals from a dismissal of its claim against Defendant/Appellee Noble Investments (Noble) related to a request for inspection of Noble's corporate records and books. Upon denial of a demand to inspect Noble's records pursuant to 18 O.S. § 1065, McGill sought a writ of mandamus in the Tulsa County district court. Noble argued that the suit was subject to dismissal because McGill had previously sued Noble in a separate lawsuit for similar claims. We find that McGill's prior claims bar the present action, and affirm the trial court's order. AFFIRMED. Opinion by Swinton, P.J.; Goree, V.C.J., and Mitchell, J., concur.

115,956 — TMH West, LLC, an Oklahoma Limited Liability Company; and The Meat House OKC, LLC, Plaintiffs/Appellees, vs. PCPA, LLC; Prime Choice Brands, LLC; and Dave Bane, Defendants/Appellants. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Patricia Parrish, Judge. Defendants/Appellants PCPA, LLC, Prime Choice Franchising, LLC, Prime Choice Brands, LLC, and Dave Bane appeal from an order of the trial court denying their motion to compel arbitration in an action filed by Plaintiffs/Appellees TMH West, LLC and The Meat House OKC, LLC seeking declaratory relief and damages stemming from the parties' franchise relationship. After *de novo* review, we find the Franchise Agreement at issue did not prohibit the now-defunct franchiser from granting a security interest in the agreement. We further find the Uniform Commercial Code did not prevent the secured party from transferring its rights in the agreement when the franchiser defaulted on its loan. The trial court erred by refusing to compel arbitration pursuant to the Franchise Agreement. We reverse and remand to the trial court with instructions to order arbitration in accordance with the terms of the contract. REVERSED AND REMANDED WITH INSTRUCTIONS. Opinion by Mitchell, J. Goree, V.C.J., concurs; Swinton, P.J., dissents.

(Division No. 4)
Tuesday, January 30, 2018

114,975 — Paula Lynne Thompson, Plaintiff/Appellant, v. Herndon Chris Gideon, Defendant/Appellee. Appeal from the District Court of Oklahoma County, Hon. Thomas E. Prince, Trial Judge. In this negligence action arising out of an automobile collision in which the jury found in favor of Appellee, Appellant appeals from the trial court's denial of her motion for new trial. As she argued below, Appellant argues on appeal that the jury's verdict is not supported by the evidence, the trial court erred in submitting both a pink jury verdict form and a blue jury verdict form to the jury, and juror misconduct affected the verdict. Based on our review of the record, we conclude the jury was presented with evidence from which it could have reasonably determined that Appellant suffered no injury as a result of the accident or that her neck injury and surgery were as a result of a pre-existing condition and not the direct cause of the accident. We therefore also conclude the trial court did not err in submitting both a pink and blue verdict form to the jury. Consequently, we conclude the trial court did not err in denying Appellant's motion for new trial based on a lack of evidence, submission of an incorrect verdict form and instructions, or misleading of the jury because of erroneous instructions. We also conclude the trial court did not abuse its discretion in denying Appellant's motion based on juror misconduct. Accordingly, we affirm. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Goodman, J., and Rapp, J., concur.

Tuesday, February 6, 2018

115,248 — In Re the Marriage of Debbie Elaine Aaron, Petitioner/Appellee, v. Dale Max Aaron, Respondent/Appellant. Appeal from the District Court of Mayes County, Hon. Shawn S. Taylor, Trial Judge. In this dissolution of marriage action, Respondent/Appellant (Husband) appeals from that part of the trial court's decree of dissolution awarding Petitioner/Appellee (Wife) certain sums for expenses incurred by her for her care and for the upkeep and maintenance of the marital home during the pendency of the divorce and for support alimony to be paid from Husband's portion of the marital estate, and from that part of the decree awarding certain marital property to him and other marital property to Wife. Based on our review of the record, we conclude: the trial court did not abuse its discre-

tion in valuing and dividing the marital estate; in awarding Wife a judgment against Husband for the expenses she incurred for her care as a result of having been shot by Husband and rendered disabled and for one-half of the expenses for the upkeep and maintenance of the marital assets during the pendency of the divorce; and in awarding Wife support alimony in the total amount of $120,000. However, we modify the decree to reflect the expense incurred for Wife's care to be reduced to $31,023.11. We also modify the decree to reflect that the award the court made against Husband for one-half the cost of the upkeep and maintenance of the marital "home" was for, instead, the marital estate during the pendency of the divorce. Accordingly, we affirm the decree as modified. AFFIRMED AS MODIFIED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Goodman, J., and Rapp, J., concur.

Wednesday, February 7, 2018

115,097 — Constance Jo Naydan, Plaintiff/Appellee, v. Charles Hilton and Joycelyn Marquis, Defendants/Appellants. Appeal from the District Court of Cherokee County, Hon. Sandy Crosslin, Trial Judge. Defendants appeal from the trial court's Judgment memorializing a jury verdict in favor of Plaintiff. Plaintiff filed this action alleging Defendants performed certain roadwork which affected the natural course of water flow. Plaintiff alleged Defendants caused substantial amounts of rainwater to flow onto her property, causing serious damage. Evidence was introduced at trial that, among other things, Plaintiff's property is in a rural area and is bordered by a road constructed partway up a hill; about ten years after Plaintiff moved to the property, substantial amounts of rainwater began pouring down from the road and into her backyard; and the portion of the road where the water pours down is maintained by Defendants who, among other things, cleared and lowered the edge of the road closest to Plaintiff's property and filled in a ditch along the opposite side of the road which formerly carried away rainwater. Conflicting evidence was also presented at trial by Defendants. However, the jury found in favor of Plaintiff and awarded Plaintiff damages and found there should be an abatement of the nuisance. Finding, on appeal, neither an absence of competent evidence reasonably supporting the jury's verdict nor prejudicial error, we affirm the trial court's Judgment. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., and Goodman, J., concur.

Monday, February 12, 2018

115,922 (comp. w/ 115,513; 115,515; 115,522; 115,565; 115,581; and 115,819) — Tinker Federal Credit Union, Plaintiff, v. Bernard Henry and Tarshish C. Henry, Defendants/Third-Party Plaintiffs/Appellants, v. BRSI, LLC d/b/a Big Red Sports & Imports, Third-Party Defendant/Appellee. Appeal from the District Court of Oklahoma County, Hon. Bryan C. Dixon, Trial Judge. Defendants (the Henrys) appeal from the trial court's order sustaining the motion to compel arbitration of Third-Party Defendant (BRSI). For the same reasons set forth in this Court's recent Opinion – *Najera v. David Stanley Chevrolet, Inc.*, 2017 OK CIV APP 62, 406 P.3d 592 – we conclude the Henrys' following arguments are unpersuasive: (1) that the retail installment sales contract (RISC) signed by the parties supersedes the arbitration agreement and is the only controlling document between the Henrys and BRSI; and (2) that the trial court's findings in this case are inconsistent with *Walker v. BuildDirect.com Technologies, Inc.*, 2015 OK 30, 349 P.3d 549. The Henrys also assert the parties executed an addendum to the RISC, the terms of which allegedly indicate there was no agreement as to arbitration. However, this document is not contained in the record, and we conclude the Henrys have failed on appeal to overcome the presumption of correctness that attaches by force of law to a trial court's rulings. Finally, we conclude the trial court did not err in finding the arbitration agreement is not unconscionable. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Thornbrugh, V.C.J., concurs, and Wiseman, J., concurs in result.

ORDERS DENYING REHEARING
(Division No. 3)
Wednesday, January 31, 2018

114,830 — In Re the Marriage of Rinehart: Deborah G. Rinehart, Petitioner/Appellant/Counter-Appellee, vs. Stormy Dean Rinehart, Respondent/Appellee/Counter-Appellant. Appellant's Petition for Rehearing, filed December 27, 2017, is *DENIED*.

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