THE OKLAHOMA BAR
Journal
Volume 89 — No. 16 — 6/16/2018

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Oklahoma Bar Association

table of contents

June 16, 2018 • Vol. 89 • No. 16

page

Index to Opinions of Supreme Court

Index to Opinions of Court of Criminal Appeals

Supreme Court Opinions

Manner and Form of Opinions in the Appellate Courts;
See Rule 1.200, Rules — Okla. Sup. Ct. R., 12 O.S. Supp. 1996 (1997 T. 12 Special Supplement)

2018 OK 43

IN THE MATTER OF THE REINSTATEMENT OF LAURIE LYNN HASTINGS, TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION AND TO THE ROLL OF ATTORNEYS.

SCBD# 6533. May 29, 2018

ORDER

¶1 The Petitioner, Laurie Lynn Hastings, was stricken from the roll of attorneys on or about June 25, 2013, following her suspension for non-payment of dues and non-compliance with Mandatory Continuing Legal Education. On June 23, 2017, Ms. Hastings petitioned this Court for reinstatement as a member of the Oklahoma Bar Association. A hearing was held before the Professional Responsibility Tribunal, and the panel unanimously recommended that the attorney be reinstated. Upon consideration of the matter, we find:

1) The attorney has met all the procedural requirements necessary for reinstatement to the Oklahoma Bar Association as set out in Rule 11, Rules Governing Disciplinary Proceedings, 5 O.S. 2011, ch.1, app. 1-A;

2) The attorney has established by clear and convincing evidence that she has not engaged in the unauthorized practice of law in the State of Oklahoma;

3) The attorney has established by clear and convincing evidence that she possesses the competency and learning in the law required for reinstatement to the Oklahoma Bar Association;

4) The attorney has established by clear and convincing evidence that she possesses the good moral character which would entitle her to be reinstated into the Oklahoma Bar Association.

¶2 IT IS THEREFORE ORDERED that the Petition for Reinstatement of Laurie Lynn Hastings to the Oklahoma Bar Association be granted. The Court notes the Receipt of Costs filed by the Oklahoma Bar Association on April 17, 2018, reflecting receipt of payment of costs from Ms. Hastings in the amount of $149.36. Thus, the Application to Assess Costs filed by the Oklahoma Bar Association on March 13, 2018, is moot.

¶3 IT IS FURTHER ORDERED that Ms. Hastings shall pay her 2018 Bar Association dues within sixty (60) days from the date of this order. Reinstatement is conditioned upon the attorney's payment of these dues.

¶4 DONE BY ORDER OF THE SUPREME COURT THE 29th DAY OF May, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

¶5 ALL JUSTICES CONCUR.

2018 OK 44

IN THE MATTER OF THE SUSPENSION OF MEMBERS OF THE OKLAHOMA BAR ASSOCIATION FOR NONPAYMENT OF 2018 DUES

SCBD No. 6659. June 4, 2018

ORDER OF SUSPENSION FOR NONPAYMENT OF DUES

On May 22, 2018, the Board of Governors of the Oklahoma Bar Association filed an Application for the suspension of Oklahoma Bar Association members who failed to pay dues for the year 2018 as required by the Rules Creating and Controlling the Oklahoma Bar Association (Rules), 5 O.S. 2011, ch. 1, app. 1, art. VIII, §1. The Board of Governors recommended that the members whose names appear on the Exhibit A attached to the Application be suspended from membership in the Oklahoma Bar Association and from the practice of law in the State of Oklahoma, as provided by the Rules, 5 O.S. 2011, ch. 1, app. 1, art. VIII, §2.

This Court finds that on April 13, 2018, the Executive Director of the Oklahoma Bar Association notified by certified mail all members delinquent in the payment of dues and/or expense charges to the Oklahoma Bar Association for the year 2018. The Board of Governors have determined that the members set forth in

Exhibit A, attached hereto, have not paid their dues and/or expense charges for the year as provided in the Rules.

This Court, having considered the Application of the Board of Governors of the Oklahoma Bar Association, finds that each of the Oklahoma Bar Association members named on Exhibit A, attached hereto, should be suspended from the Oklahoma Bar Association membership and shall not practice law in the State of Oklahoma until reinstated.

IT IS THEREFORE ORDERED that the attorneys named on Exhibit A, attached hereto, are hereby suspended from membership in the Association and prohibited from the practice of law in the State of Oklahoma for failure to pay membership dues for the year 2018 as required by the Rules Creating and Controlling the Oklahoma Bar Association.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 4TH DAY OF JUNE, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR.

EXHIBIT A
(DUES - SUSPENSION)

Marc S. Albert, OBA NO. 32287
14 Brook Lane
Brookville, NY 11545

Daniel Allen Arnett, OBA NO. 30359
421 Nantucket Blvd.
Norman, OK 73071

Joseph Bradley Ayo, OBA NO. 31458
1841 Portsmouth St.
Houston, TX 77098

Ronald Eugene Berry, OBA NO. 759
P.O. Box 490
Catoosa, OK 74015

Marcus James Bivines, OBA NO. 21604
643 Providence Pl. S.W.
Atlanta, GA 30331

Justin Michael Blumer, OBA NO. 32157
P.O. Box 2006
Mannford, OK 74044

Ryan Kenneth Canady, OBA NO. 16913
417 Merkle Dr.
Norman, OK 73069

Charlotte Linn Claborn, OBA NO. 21139
P.O. Box 13
Stonewall, OK 74871-0013

Sarai Cook, OBA NO. 31374
413 W. Britton Rd., Apt. 316
Oklahoma City, OK 73114-3550

Spencer Marshall Coons, OBA NO. 31520
7975 N. Hayden Road, Suite D-280
Scottsdale, AZ 85258

Mark Robert Daniel, OBA NO. 11075
Merck & Co. Inc.
P.O. Box 2000, Ry 60-30
Rahway, NJ 07065

James M. Demopolos, OBA NO. 2291
10802 Quail Plaza Dr., #205
Oklahoma City, OK 73120-3119

Brian Lane Dickson, OBA NO. 2354
P.O. Box 31593
Edmond, OK 73003-0027

Tai Chan Du, OBA NO. 30784
3324 North Classen Boulevard
Oklahoma City, OK 73118

Shanita Danielle Gaines, OBA NO. 30796
200 W. 15th Street, Apt. 81
Edmond, OK 73013

Joyce Ann Good, OBA NO. 14722
1705 Smoking Tree Road
Moore, OK 73160-5725

John Thomas Green, OBA NO. 32944
1101 7th St.
Pawnee, OK 74058-4049

James Michael Grier, OBA NO. 20916
420 Nichols Rd., # 200
Kansas City, MO 64112-2005

David Levi Hanes, OBA NO. 22580
2853 Ridge Drive
Broomfield, CO 80020

Michael G. Harris, OBA NO. 3903
9401 Forest Hollow Crt.
Oklahoma City, OK 73151

Susan Margaret Hinck, OBA NO. 16761
5073 KingsWood Dr., N.E.
Roswell, GA 30075

Jacob Russell Lee Howell, OBA NO. 30874
P.O. Box 767
Van Buren, AR 72957-0767

Mark Kelly Hunt, OBA NO. 32019
1408 S. Denver Ave.
Tulsa, OK 74119

Deborah E. Keele, OBA NO. 16906
3006 W. Willowbrook Dr.
Enid, OK 73703-3846

Bryan Lynn Kingery, OBA NO. 15507
P.O. Box 398
Ada, OK 74821-0398

M. Carol Layman, OBA NO. 12130
17307 Oak Hollow Way
Spring, TX 77379

Neilson David Lea, OBA NO. 31621
305a Prospect St.
Cuba, MO 65453

Michelle Lee Lester, OBA NO. 18582
2317 South Jackson Ave., Rm. 326-S
Tulsa, OK 74107

Trisha M. Levine, OBA NO. 17403
350 W. Swan Circle, Apt. 3401
Oak Creek, WI 53154-8320

Edward Anderson Logan, OBA NO. 5495
908 N.W. 14th St.
Oklahoma City, OK 73106

John Ogelsby Long III, OBA NO. 11131
9730 S. Park Cir.
Fairfax Station, VA 22039-2939

Johnny W. Long, OBA NO. 5509
114 S. Irving Blvd.
Los Angeles, CA 90004-3841

Scott Ford McKinney, OBA NO. 16692
12216 Banyan Lane
Oklahoma City, OK 73162

James Lloyd Menzer, OBA NO. 12406
211 W. Blackwell Ave.
P.O. Box 818
Blackwell, OK 74631-0818

April Beeman Metwalli, OBA NO. 19351
3209 Rolling Rd.
Chevy Chase, MD 20815

Anthony George Mitchell, OBA NO. 14004
207 S. Park
Hobart, OK 73651

Jay Patrick Moisant, OBA NO. 19682
14453 S.E. 29th St., Suite B
Choctaw, OK 73020

Jason K. Moore, OBA NO. 30652
205 Ridge Lake Blvd.
Norman, OK 73071

Jessica C. Ridenour, OBA NO. 20758
401 S. Boston Ave., Suite 2150
Tulsa, OK 74103-4009

Jeff Michael Roberts, OBA NO. 22287
6700 W. Memorial Rd., Apt. 313
Oklahoma City, OK 73142

Timothy William Schneidau, OBA NO. 30246
2448 E. 81st St., Suite 5606
Tulsa, OK 74137

Conly J. Schulte, OBA NO. 31318
1900 Plaza Drive
Louisville, CO 80027

Donald Dale Stemple, OBA NO. 21832
112 S.W. 8th Ave., Ste. 700
Amarillo, TX 79101-2330

Amber Ann Sweet, OBA NO. 31725
10535 E. 156th St., N.
Collinsville, OK 74021

Sherry Abbott Todd, OBA NO. 13389
821 N. Mississippi
Ada, OK 74821

Wes Eugene Wadle, OBA NO. 20006
Conduent, Inc.
2828 North Haskell Ave., 9th Floor
Dallas, TX 75204

Joshua Allen Walker, OBA NO. 30936
16373 Scotland Way
Edmond, OK 73013

Kimberly S. Edwards Welty, OBA NO. 2643
11007 Caloden St.
Oakland, CA 94605-5548

Demetria Nicole Williams, OBA NO. 20942
P.O. Box 5894
Albany, GA 31706

Trey Adolph Wirz III, OBA NO. 18496
8207 Misty Landing Court
Humble, TX 77396

Robert D. Wittenauer, OBA NO. 9808
9329 Battle Street
Manassas, VA 20110

2018 OK 45

IN THE MATTER OF THE SUSPENSION OF MEMBERS OF THE OKLAHOMA BAR ASSOCIATION FOR NONCOMPLIANCE WITH MANDATORY CONTINUING LEGAL EDUCATION REQUIREMENTS FOR THE YEAR 2017

SCBD No. 6660. June 4, 2018

ORDER OF SUSPENSION FOR FAILURE TO COMPLY WITH THE RULES FOR MANDATORY CONTINUING LEGAL EDUCATION

On May 22, 2018, the Board of Governors of the Oklahoma Bar Association filed an Application for the suspension of members who failed to comply with mandatory legal education requirements for the year 2017 as required by Rules 3 and 5 of the Rules for Mandatory Continuing Legal Education (MCLE Rules), 5 O.S. 2011, ch. 1, app. 1-B. The Board of Governors recommended the members, whose names appear on Exhibit A attached to the Application, be suspended from membership in the Oklahoma Bar Association and prohibited from the practice of law in the State of Oklahoma, as provided by Rule 6 of the MCLE Rules.

This Court finds that on March 15, 2018, the Executive Director of the Oklahoma Bar Association mailed, by certified mail to all Oklahoma Bar Association members not in compliance with Rules 3 and 5 of the MCLE Rules, an Order to Show Cause within sixty days why the member's membership in the Oklahoma Bar Association should not be suspended. The Board of Governors determined that the Oklahoma Bar Association members named on Exhibit A of its Application have not shown good cause why the member's membership should not be suspended.

This Court, having considered the Application of the Board of Governors of the Oklahoma Bar Association, finds that each of the Oklahoma Bar Association members named on Exhibit A, attached hereto, should be suspended from Oklahoma Bar Association membership and shall not practice law in this state until reinstated.

IT IS THEREFORE ORDERED that the attorneys named on Exhibit A, attached hereto, are hereby suspended from membership in the Association and prohibited from the practice of law in the State of Oklahoma for failure to comply with the MCLE Rules for the year 2017.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 4TH DAY OF JUNE, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR.

EXHIBIT A
(MCLE - Suspension)

Brent Douglas Berry, OBA No. 18013
West Ylla Gosney Law Firm
8 S.W. 89th St., Suite 200
Oklahoma City, OK 73139

Justin Michael Blumer, OBA No. 32157
P.O. Box 2006
Mannford, OK 74044

Michael Burleson Bush, OBA No. 21123
2724 N.W. 158th St.
Edmond, OK 73013

Jade Caldwell, OBA No. 31820
12316A N. May Ave., Ste. 216
Oklahoma City, OK 73120

Charlotte Linn Claborn, OBA No. 21139
P.O. Box 13
Stonewall, OK 74871-0013

Tai Chan Du, OBA No. 30784
3324 North Classen Boulevard
Oklahoma City, OK 73118

John Thomas Green, OBA No. 32944
1101 7th St.
Pawnee, OK 74058-4049

David Levi Hanes, OBA No. 22580
2853 Ridge Drive
Broomfield, CO 80020

Michael G. Harris, OBA No. 3903
9401 Forest Hollow Crt.
Oklahoma City, OK 73151

Mark Kelly Hunt, OBA No. 32019
1408 S. Denver Ave.
Tulsa, OK 74119

Katherine Eileen Koljack, OBA No. 31123
1543 Southwest Blvd., Apt. 9J
Tulsa, OK 74107

Joel Lawrence Kruger, OBA No. 5128
P.O. Box 35889
Tulsa, OK 74153-0889

Carl O. LaMar, OBA No. 18203
P.O.Box 357
Duncan, OK 73534

Anthony C. Liolios, OBA No. 32050
1300 S.W. Park Avenue, Apt. 210
Portland, OR 97201

Nathan Andrew McCaffrey, OBA No. 20090
112 N.E. Fourth St.
P.O. Box 1739
Guymon, OK 73942

James Lloyd Menzer, OBA No. 12406
211 W. Blackwell Ave.
P.O. Box 818
Blackwell, OK 74631-0818

Steven Paul Minks, OBA No. 32077
404 Dewey Ave.
Poteau, OK 74953

Jason K. Moore, OBA No. 30652
205 Ridge Lake Blvd.
Norman, OK 73071

Ryan Steven Wiehl, OBA No. 32893
2202 E. 49th St., Ste. 400
Tulsa, OK 74105

2018 OK 46

STATE OF OKLAHOMA, ex rel., OKLAHOMA BAR ASSOCIATION, Complainant, v. JAMES LLOYD MENZER, Respondent.

SCBD No. 6626. June 4, 2018

ORDER APPROVING RESIGNATION FROM OKLAHOMA BAR ASSOCIATION PENDING DISCIPLINARY PROCEEDINGS

¶1 The State of Oklahoma, ex rel. Oklahoma Bar Association (Complainant) has presented this Court with an application to approve the resignation of James Lloyd Menzer (Respondent) from membership in the Oklahoma Bar Association. Respondent seeks to resign pending disciplinary proceedings and investigation into alleged misconduct, as provided in Rule 8.1, Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 1-A. Upon consideration of the Complainant's application and Respondent's affidavit in support of resignation, we find:

1. Respondent executed his resignation on February 9, 2018.
2. Respondent acted freely and voluntarily in tendering his resignation; he was not subject to coercion or duress, and was fully aware of the consequences of submitting his resignation.
3. Respondent acknowledged that the Office of the General Counsel of the Oklahoma Bar Association had received and was investigating the following grievances: DC 16-92 by Florence Kellam; DC 16-140 by Sherry Blazi; DC 16-193 by Jason Sullivan; DC 16-198 by Dawn Jackson; DC 16-249 by Truman Stiner; DC 17-26 by Arthur Oxford; DC 17-215 by Kimberly Haworth; and DC 17-222 by Teddy Tannehill. The gravamen of each of these grievances is that Respondent failed to fulfill arrangements he had made to perform legal services for the named aggrieved party. Respondent has waived the right to contest the allegations set forth in these grievances and in doing so relieves the Complainant from proving his failure to perform the agreed legal services.
4. Respondent is aware that the allegations concerning the conduct specified in paragraph three above, if proven, would constitute violations of Rules 1.1, 1.3, 1.4, 1.5, 1.15, 1.16(d), 5.3, and 8.4(a), (b) and (d) of the Oklahoma Rules of Professional Conduct, 5 O.S. 2011, Ch. 1, App. 3-A . Said conduct would also violate Rule 1.3, Oklahoma Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 1-A, and his oath as an attorney.
5. Respondent further acknowledges that as a result of his conduct the Client Security Fund may receive claims from his former clients. He agrees that should the Oklahoma Bar Association approve and pay such Client Security Fund claims, he will reimburse the fund the principal amount and the applicable statutory interest prior to filing any application for reinstatement.
6. Respondent recognizes and agrees he may not make application for reinstatement to membership in the Oklahoma Bar Association prior to the expiration of five years from the effective date of this Court's approval of his resignation; he acknowledges he may be reinstated to practice law only upon compliance with the conditions and procedures prescribed by Rule 11 of the Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 1-A.
7. Respondent has agreed to comply with Rule 9.1 of the Rules Governing Disciplinary Proceeding, 5 O.S. 2011, Ch. 1, App. 1-A.
8. Respondent's resignation pending disciplinary proceedings is in compliance with Rule 8.1 of the Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 1-A.

9. Respondent's name and address appears on the official roster maintained by the Oklahoma Bar Association as follows: James Lloyd Menzer, OBA #12406, 211 W. Blackwell Avenue, P.O. Box 818, Blackwell, Oklahoma 74631-0818.

10. Costs have been incurred by Complainant in this matter in the amount of $2687.71 and Respondent has agreed to reimburse said costs. Respondent shall reimburse said costs within 180 days of the approval of his resignation.

11. Respondent's resignation should be approved.

12. This Order accepting respondent's resignation is to be effective as of February 9, 2018, the date the application for approval of his resignation was filed in the Court.

¶2 It is therefore **ORDERED** that Complainant's application is approved and Respondent's resignation is accepted and approved effective February 9, 2018.

¶3 It is further **ORDERED** that Respondent's name be stricken from the Roll of Attorneys and that he make no application for reinstatement to membership in the Oklahoma Bar Association prior to five years from February 9, 2018.

¶4 It is further **ORDERED** that Respondent comply with Rule 9.1 of the Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 1-A and shall reimburse the Complainant $2,687.71, the costs of investigating of the grievances set forth herein.

¶5 **DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 4th DAY OF JUNE, 2018**.

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR

2018 OK 47

IN THE MATTER OF THE STRIKING OF NAMES OF MEMBERS OF THE OKLAHOMA BAR ASSOCIATION FOR NONPAYMENT OF 2017 DUES

SCBD No. 6510. June 11, 2018

ORDER STRIKING NAMES

The Board of Governors of the Oklahoma Bar Association filed an Application for Order Striking Names of attorneys from the Oklahoma Bar Association's membership rolls for failure to pay dues as members of the Oklahoma Bar Association for the year 2017.

Pursuant to the Rules Creating and Controlling the Oklahoma Bar Association (Rules), 5 O.S. 2011 ch. 1, app 1, art. VIII §2, the Oklahoma Bar Association's members named on Exhibit A, attached hereto, were suspended from membership in the Oklahoma Bar Association and prohibited from practicing law in the State of Oklahoma by this Court's Order of May 30, 2017, for failure to pay their 2017 dues in accordance with Article VIII, Section 2 of the Rules. Based upon the application, this Court finds that the Board of Governors determined at its May 18, 2018, meeting that none of the Oklahoma Bar Association members named on Exhibit A, attached hereto, have applied for reinstatement at the time of the filing of its application. The Board of Governors further declared that the members set out on Exhibit A, attached hereto, shall cease to be members of the Oklahoma Bar Association and that their names should therefore be stricken from its membership rolls and the Roll of Attorneys on May 30, 2018, pursuant to Article VIII, Section 5 of the Rules. This Court further finds that the actions of the Board of Governors of the Oklahoma Bar Association are in compliance with the Rules.

It is therefore ordered that the attorneys named on Exhibit A, attached hereto, are hereby stricken from the Roll of Attorneys for failure to pay their dues as members of the Association for the year 2017.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 11TH DAY OF JUNE, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR.

EXHIBIT A
(Dues - Strike)

Kenneth Robert Baily, OBA #12056
32496 Bergamo Crt.
Temecula, CA 92592

Colin Richard Barrett, OBA #31936
201 Robert S. Kerr, Ste. 700
Oklahoma City, OK 73102

Jack Douglas Been, OBA #31900
1405 N. Old North Place
Sand Springs, OK 74063-8987

Steven Alex Bellanti, OBA #31342
3166 E. Phillips Dr.
Centennial, CO 80122

Kristen Mark Boyd, OBA #19640
11300 N. Rodney Parham, Ste. 320
Little Rock, AR 72212

Stacy Loraine Burgan, OBA #14065
6204 N.W. 84th Pl.
Oklahoma City, OK 73132

Stephanie M. Burke, OBA #17585
1720 Westmister Pl.
Oklahoma City, OK 73112

John Raymond Cathey, OBA #10236
229 Alder Lane
Boulder, CO 80304

M. Frederick Conlin Jr., OBA #12247
1515 Frost Dr.
College Station, TX 77845

Jacqueline Cronkhite Dodd, OBA #30851
17 N. 6th St.
P.O. Box 1526
Fort Smith, AR 72902-1526

Jamie Dawn Dunkel, OBA #22407
4209 Horseshoe Bend
Matthews, NC 28104

Kristin Foster, OBA #30078
1080 Bergen Street, #188
Brooklyn, NY 11216

Nicole Suzette Weeks Fowler, OBA #18557
2718 N. Emerald
Fayetteville, AR 72703

Sara Ruth Garrett, OBA #31907
129 E. 46th St., Apt. 5
Kansas City, MO 64112

Ryan Patrick Goodwin, OBA #32403
1814 E. 72nd St., Apt. 1615
Tulsa, OK 74136

Todd Maxwell Henshaw, OBA #4114
1 Peachtree Drive
Springs #101
Savannah, GA 31419

Martha Lynne Hyde, OBA #31102
7854 South 69 East Ave.
Tulsa, OK 74133

Kenneth James Irwin, OBA #11877
15103 Rolling Oaks Dr.
Houston, TX 77070-1264

Val Ryan Jolley, OBA #17218
P.O. Box 2364
Farmington, NM 87499

Henry W. Kappel, OBA #4874
P.O. Box 6271
Pago Pago, AS 96799

Kendra Celeste Kuehn, OBA #32248
1007 S.E. 9th Street
Wagoner, OK 74467-7203

Ryan Andrew Kuzmic, OBA #32249
1722 S. Carson Ave., Apt. 2207
Tulsa, OK 74119

Michael McLennon, OBA #13382
3740 Deer Crossing
Edmond, OK 73025

Glenn Martin Mirando, OBA #14282
2125 E. 31st St.
Tulsa, OK 74105

Rhoda Jane Mull, OBA #17790
23 Sharpley Dr.
Chadds Ford, PA 19317

Donna Lane Nolan, OBA #5215
524 Jean Marie
Norman, OK 73069

Bridget Elizabeth Rains, OBA #31691
101 Darwin Rd.
Edmond, OK 73034

Nicholas J. Stockdale, OBA #31429
2433 N.W. 54th St.
Oklahoma City, OK 73112

Duncan Harold Strickland, OBA #32933
20333 State Hwy. 249, #200
Houston, TX 77070

Rebecca K. Tallent, OBA #8834
3816 N. Tacoma
Oklahoma City, OK 73112-6344

2018 OK 48

IN THE MATTER OF THE STRIKING OF NAMES OF MEMBERS OF THE OKLAHOMA BAR ASSOCIATION FOR NONCOMPLIANCE WITH MANDATORY CONTINUING LEGAL EDUCATION REQUIREMENTS FOR THE YEAR 2016

SCBD No. 6511. June 11, 2018

ORDER STRIKING NAMES

The Board of Governors of the Oklahoma Bar Association filed an application for an Order Striking Names of attorneys from the Oklahoma Bar Association's membership rolls and from the practice of law in the State of Oklahoma for failure to comply with the Rules for Mandatory Continuing Legal Education, 5 O.S. 2001, ch. 1, app. 1-B, for the year 2016.

Pursuant to Rule 6(d) of the Rules for Mandatory Continuing Legal Education, the Oklahoma Bar Association's members named on Exhibit A, attached hereto, were suspended from membership in the Association and the practice of law in the State of Oklahoma by Order of this Court on May 30, 2017, for noncompliance with Rules 3 and 5 of the Rules for Mandatory Continuing Legal Education for the year 2016. Based on its application, this Court finds that the Board of Governors determined at their May 18, 2018, meeting that none of the Oklahoma Bar Association's members named on Exhibit A, attached hereto, have applied for reinstatement within one year of the suspension order. Further, the Board of Governors declared that the members set out on Exhibit A, attached hereto, shall cease to be members of the Oklahoma Bar Association and their names should therefore be stricken from its membership rolls and the Roll of Attorneys on May 30, 2018. This Court finds that the actions of the Board of Governors of the Oklahoma Bar Association are in compliance with the Rules.

It is therefore ordered that the attorneys named on Exhibit A, attached hereto, are hereby stricken from the Roll of Attorneys on May 30, 2018, for failure to comply with the Rules for mandatory Continuing Legal Education for the year 2016.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 11TH DAY OF JUNE, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR.

EXHIBIT A
(MCLE - STRIKE)

Marc S. Albert, OBA No. 32287
14 Brook Lane
Brookville, NY 11545

Daniel Allen Arnett, OBA No. 30359
421 Nantucket Blvd.
Norman, OK 73071

Joseph Bradley Ayo, OBA No. 31458
1841 Portsmouth St.
Houston, TX 77098

Jacqueline Cronkhite Dodd, OBA No. 30851
17 N. 6th St.
PO Box 1526
Fort Smith, AR 72902-1526

Kristin Foster, OBA No. 30078
1080 Bergen Street, No. 188
Brooklyn, NY 11216

Sara Ruth Garrett, OBA No. 31907
129 E. 46th St., Apt. 5
Kansas City, MO 64112

Ryan Patrick Goodwin, OBA No. 32403
1814 E. 72nd St., Apt. 1615
Tulsa, OK 74136

Martha Lynne Hyde, OBA No. 31102
7854 South 69 East Ave.
Tulsa, OK 74133

Ryan Andrew Kuzmic, OBA No. 32249
1722 S. Carson Ave., Apt. 2207
Tulsa, OK 74119

Scott Ford McKinney, OBA No. 16692
12216 Banyan Lane
Oklahoma City, OK 73162

Jay Patrick Moisant, OBA No. 19682
14453 S.E. 29th Street, Suite B
Choctaw, OK 73020

Bridget Elizabeth Rains, OBA No. 31691
101 Darwin Rd.
Edmond, OK 73034

Nicholas J. Stockdale, OBA No. 31429
2433 N.W. 54th St.
Oklahoma City, OK 73112

2018 OK 49

In re: Amendments to Rule 7.4, Rules Governing Disciplinary Proceedings, 5 O.S.2011, ch. 1, app. 1-A

SCAD-2018-35. June 11, 2018

ORDER

Rule 7.4 of the Rules Governing Disciplinary Proceedings, 5 O.S.2011, ch. 1, app. 1-A, is hereby amended as shown with the 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 on June 11, 2018.

/s/Noma D. Gurich
VICE CHIEF JUSTICE

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

Combs, C.J., Colbert, Darby, JJ., dissent.

Exhibit "A"

Rules Governing Disciplinary Proceedings, Chapter 1, App. 1-A
Rule 7. Summary Disciplinary Proceedings Before Supreme Court.
§7.4 Conviction Becoming Final Without Appeal

If the conviction becomes final without appeal, the General Counsel of the Oklahoma Bar Association shall inform the Chief Justice and the Court ~~shall~~ may order the lawyer, within such time as the Court shall fix in the order, to show cause in writing why a final order of discipline should not be made. The written return of the lawyer shall be verified and expressly state whether a hearing is desired. The lawyer may in the interest of explaining his conduct or by way of mitigating the discipline to be imposed upon him, submit a brief and/or any evidence tending to mitigate the severity of discipline. The General Counsel may respond by submission of a brief and/or any evidence supporting ~~his~~ the recommendation of discipline.

Exhibit "B"

Rules Governing Disciplinary Proceedings, Chapter 1, App. 1-A
Rule 7. Summary Disciplinary Proceedings Before Supreme Court.
§7.4 Conviction Becoming Final Without Appeal

If the conviction becomes final without appeal, the General Counsel of the Oklahoma Bar Association shall inform the Chief Justice and the Court may order the lawyer, within such time as the Court shall fix in the order, to show cause in writing why a final order of discipline should not be made. The written return of the lawyer shall be verified and expressly state whether a hearing is desired. The lawyer may in the interest of explaining his conduct or by way of mitigating the discipline to be imposed upon him, submit a brief and/or any evidence tending to mitigate the severity of discipline. The General Counsel may respond by submission of a brief and/or any evidence supporting the recommendation of discipline.

2018 OK CR 12

J.T.A., Appellant, vs. STATE OF OKLAHOMA, Appellee,

No. J-2018-13. May 24, 2018

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

¶1 Appellant, J.T.A., is charged pursuant to the Youthful Offender Act with Count 1 – Robbery With a Dangerous Weapon, Count 2 - Robbery With a Dangerous Weapon, Count 3 – Conjoint Robbery, Count 4 – Conjoint Robbery, and Count 5 – Robbery First Degree, and/or in the alternative Conjoint Robbery in Tulsa County District Court Case No. YO-2017-30. On September 19, 2017, the State filed a motion to sentence Appellant as an adult. The motion was heard on December 19, 2017. The Honorable James Caputo, District Judge, granted the State's motion to sentence Appellant as an adult. From this Judgment, Appellant appeals, raising one proposition of error:

> The District Court abused its discretion by granting the State's motion to impose an adult sentence when the State did not prove by clear and convincing evidence that there was good cause to believe that Appellant would not reasonably complete a plan of rehabilitation and that the public would not be adequately protected if Appellant were to be sentenced as a Youthful Offender.

¶2 Pursuant to Rule 11.2(A)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018), this appeal was automatically assigned to this Court's Accelerated Docket. The propositions or issues were presented to this Court in oral argument April 5, 2018, pursuant to Rule 11.2(E). Rule 11.2(E), *Rules, supra*. At the conclusion of oral argument, the parties were advised of the decision of this Court.

¶3 The District Court's order granting the State's motion to sentence Appellant as an adult is **REVERSED** and this case is **REMANDED** to the District Court of Tulsa County with instructions Appellant be treated and sentenced as a Youthful Offender.

¶4 Appellant was allegedly involved in a series of convenience store robberies taking place between June 22, 2016, and June 18, 2017. No evidence regarding the specifics of these crimes was introduced at the December 19, 2017, hearing on the State's motion. The only evidence received by the trial court at this hearing was the unsworn statement of Appellant's Office of Juvenile Affairs (OJA) caseworker Sarah Havenstrite and the sworn testimony of Appellant. At the conclusion of this hearing Judge Caputo ruled in favor of the State. On December 28, 2017, by agreement of the parties, the hearing had to be reopened for the limited purposes of allowing the State to introduce the OJA Psychological Evaluation and OJA Youthful Offender Study into evidence.[1] The trial court filed its written order granting the State's motion on December 28, 2017.

¶5 The Psychological Evaluation does not discuss the details of Appellant's alleged crimes.[2] Appellant's Psychological Evaluation states the Youthful Offender system could rehabilitate Appellant but for his age. Due to the eighteen year and five month age cutoff the Psychological Evaluation concludes Appellant could not complete a treatment program. *See* 10A O.S. 2011, § 2-5-207. The Youthful Offender Study, prepared by Ms. Havenstrite, describes Appellant's amenability to treatment as "unknown."[3] However, at the motion hearing Ms. Havenstrite stated her belief Appellant could be rehabilitated within the approximately one year of remaining treatment eligibility. Neither trial counsel, nor the trial court, questioned Ms. Havenstrite regarding the inconsistencies between her Youthful Offender Study and her in-court statements made at the motion hearing.

¶6 The Psychological Evaluation, Youthful Offender Study, and Ms. Havenstrite's statements at the motion hearing contain no specifics as to an appropriate plan of treatment unique to Appellant. All three include comments regarding types of treatment that might benefit Appellant but none reduced these concepts to a treatment plan designed specifically to meet Appellant's needs. Appellate Youthful Offender proceedings require this Court to determine if the trial court has abused its discretion when ruling upon various Youthful

Offender issues. Judge Caputo was required to determine whether the State presented clear and convincing evidence that there was good cause to believe Appellant would not reasonably complete a plan of rehabilitation. *See* 10A O.S.2011, § 2-5-208(D), (E). There was no evidence presented to the trial court outlining a treatment plan for Appellant based on his specific needs or the current availability of such treatment within the Youthful Offender system.

¶7 In the overwhelming majority of Youthful Offender cases, the evidence presented at hearings fails to detail with specificity a treatment plan tailored to a particular appellant, and to advise the trial court of the availability of such treatment. This Court has repeatedly seen general statements regarding treatment options relied upon in Youthful Offender cases presented for appellate review. This practice makes it difficult for the parties to argue their respective positions and provides scant guidance to the trial court which is then required to make detailed decisions relying on minimal, generic information. 10A O.S.2011, § 2-5-208(D). This Court must then struggle to adequately review these decisions on appeal. *Id.* For the trial court, and in turn this Court, to be able to make a reasoned decision both need more than bald assertions regarding a Youthful Offender's ability to complete a generic treatment plan. In order to better review these cases, trial courts and this Court need more specific information regarding the actual treatment plan and if the Youthful Offender can reasonably complete the plan. These general recommendations make it difficult for trial courts to make detailed and thorough findings of fact and in turn for this Court to provide adequate appellate review. *Id.*

¶8 At the conclusion of the December 19, 2017, hearing Judge Caputo made the following oral findings:

> Well, as I look at the criteria and as I look at the reports, I just don't see it. I don't see this or anybody that has this kind of history can make that kind of progress in less than a year.
>
> I also look at the types of crimes and the frequency of those crimes, and I – I can't grant OJA status on this gentleman. I'm going to grant the motion to sentence the Youthful Offender as an adult. I just – all things considered, I don't see that I can do that in good conscience. And to protect the public and to hold this Defendant fully accountable for his actions.
>
> I don't know what the sentence might be at this point in time, but I just don't see that the Youthful Offender is going to be appropriate in this case. So I'm going to grant the motion at this time.

On December 28, 2017, Judge Caputo filed his written findings of fact and conclusions of law which stated in relevant part "[a]fter hearing arguments and examining the file herein, the Court finds that the State's motion shall be granted."

¶9 The requirements for Judge Caputo's findings in this case are established by 10A O.S.2011, § 2-5-208(D) which in part requires the following:

> …In its decision on the motion of the state for imposition of an adult sentence, the court ***shall detail*** findings of fact and conclusions of law to each of the considerations in subsection C of this section and shall state that the court has considered each of its guidelines in reaching its decision. (emphasis added)

10A O.S.2011, § 2-5-208(D). Even taken together, Judge Caputo's oral findings and written order are insufficient to advise this Court regarding what evidence Judge Caputo relied upon in making his decision. It is unclear how his conclusions and judgments relate to the minimal evidence presented in this case.

¶10 The standard of review before this Court is whether the trial court abused its discretion in granting the State's motion to sentence Appellant as an adult. *A.R.M. v. State*, 2011 OK CR 25, ¶ 7, 279 P.3d 797, 799; *W.C.P. v. State*, 1990 OK CR 24, ¶ 9, 791 P.2d 97, 100; *C.L.F. v. State*, 1999 OK CR 12, ¶ 5, 989 P.2d 945, 946. To wit:

> An "abuse of discretion" has been defined by this Court as a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented in support of and against the application. . . . . The trial court's decision must be determined by the evidence presented on the record, just as our review is limited to the record presented.

Id.

¶11 As this Court noted in *G.G. v. State*, 1999 OK CR 7, ¶ 12, 989 P.2d 936:

> The [Youthful Offender] Act creates a presumption that a youthful offender who is tried and found guilty, shall be sentenced as a Youthful Offender. However, Section 7306-2.8[2-5-208] creates an exception to the presumption by providing a vehicle for the State to have a Youthful Offender sentenced as an adult. For the State to succeed, the burden is upon the State to prove by "clear and convincing evidence" that either (1) there is good cause to believe that the accused person would not reasonably complete a plan of rehabilitation or (2) the public would not be adequately protected if the person were to be sentenced as a youthful offender.

We do not find the State provided evidence sufficient to meet its clear and convincing burden to show Appellant should be sentenced as an adult. The State did not present sufficient evidence to overcome the presumption Appellant should be sentenced as a Youthful Offender. *Id*; 10A O.S.2011, § 2-5-209(B)(1). Based on the insufficient evidence presented on the record at the hearing on the State's motion to sentence Appellant as an adult and the trial court's insufficient findings of fact and conclusions of law, we find the trial court's order is clearly against the logic and effect of the facts presented in support of and against this application.

DECISION

¶12 By a five to zero vote, the District Court's December 28, 2017, order, granting the State's motion to sentence Appellant as an adult, is **REVERSED**. This matter is **REMANDED** to the District Court of Tulsa County with instructions to treat and sentence Appellant as a Youthful Offender.

¶13 Pursuant to Rule 3.15, *Rules, supra*, the **MANDATE** is **ORDERED** issued upon the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY

THE HONORABLE JAMES CAPUTO, DISTRICT JUDGE

APPEARANCES AT TRIAL

Alex Bramblett, Assistant Public Defender, 423 S. Boulder Ave., Tulsa, OK 74103, Counsel for Defendant

James Pfeffer, Assistant District Attorney, 500 S. Boulder Ave., Tulsa, OK 74103, Counsel for the State

APPEARANCES ON APPEAL

Richard Couch, Assistant Public Defender, 423 S. Boulder Ave., Tulsa, OK 74103, Counsel for Appellant

Mark Morgan, Assistant District Attorney, 500 S. Boulder Ave., Tulsa, Oklahoma 74103, Counsel for the State

OPINION BY: LUMPKIN, P.J.
LEWIS, V.P.J.: Concur in Results
HUDSON, J.: Concur in Results
KUEHN, J.: Concur
ROWLAND, J.: Concur

LEWIS, VICE PRESIDING JUDGE, CONCURRING IN RESULTS:

¶1 This is a straight forward case. The State had the burden of proving by clear and convincing evidence either (1) there is good cause to believe that the accused person would not reasonably complete a plan of rehabilitation, or (2) the public would not be adequately protected if the person were to be sentenced as a youthful offender. The question in this case is whether there was an abuse of discretion by the lower court. The record in this matter shows (1) Appellant is amenable to treatment, and (2) he would not be a threat to the public in O.J.A. custody. This matter should be reversed and remanded.

HUDSON, J., CONCUR IN RESULTS:

¶1 I concur in the results of today's decision because the State simply did not meet its burden to show Appellant should be sentenced as an adult. Tragically, we are stuck with the record presented on appeal.

1. Exhibit 1 was the Office of Juvenile Affairs Youthful Offender Study and Exhibit 2 was the Office of Juvenile Affairs Psychological Evaluation.

2. There is no mention in the OJA Psychological Evaluation regarding whether it was prepared with the assumption Appellant committed the crimes charged in this case.

3. Ms. Havenstrite stated in the OJA Youthful Offender Study she had prepared the report operating on the assumption Appellant committed the crimes as charged.

2018 OK CR 14

GLENDELL DEWAYNE LEE, Appellant v. STATE OF OKLAHOMA, Appellee.

Case No. F-2016-968. May 31, 2018

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

¶1 Appellant Glendell Dewayne Lee was tried by jury and convicted of Shooting with

Intent to Kill (Counts I and II) (21 O.S.2011, § 652(A)); Robbery with a Firearm (Count III) (21 O.S.2011, § 801); and Possession of a Firearm After Former Conviction of a Felony (Count IV) (21 O.S.Supp.2014, § 1283) in the District Court of Tulsa County, Case No. CF-15-2282. The jury recommended as punishment imprisonment for one hundred (100) years in each of Counts I and II and for life in each of Counts III and IV. The trial court sentenced accordingly, ordering the sentences to run consecutively. It is from this judgment and sentence that Appellant appeals.

¶2 Appellant raises the following propositions of error in support of his appeal:

I. The trial court committed plain error by giving an incomplete jury instruction on the 85% Rule.

II. Prosecutorial misconduct deprived Appellant of a fair trial.

III. Appellant was deprived of the effective assistance of counsel.

IV. Cumulative error deprived Appellant of a fair trial.

¶3 After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that under the law and the evidence the judgment of guilt should be affirmed but the case should be remanded for sentencing on all counts.

¶4 In Proposition I, we review for plain error Instruction No. 36 setting forth the 85% Rule. *See Daniels v. State*, 2016 OK CR 2, ¶ 3, 369 P.3d 381, 383. Under the plain error test set forth in *Simpson v. State*, 1994 OK CR 40, ¶¶ 10, 26, 30, 876 P.2d 690, 694, 699, 701 this Court determines whether the appellant has shown an actual error, which is plain or obvious, and which affects his or her substantial rights. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id. See Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. *See also Jackson v. State*, 2016 OK CR 5, ¶ 4, 371 P.3d 1120, 1121; *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395.

¶5 In Counts I, II, and III the trial court gave the jury a modified version of the uniform instruction which incorrectly stated that the 85% Rule applied only to life sentences. The court's failure to give the full uniform instruction was error. *See Marquez-Burrola v. State*, 2007 OK CR 14, ¶ 26, 157 P.3d 749, 758. The error was obvious and affected Appellant's substantial rights because it was as if the court did not instruct at all on the 85% Rule in Counts I and II, despite the fact they were 85% crimes. Further, when combined with the prosecutor's misstatement that a life sentence was forty-five (45) years (see Proposition II), we find Appellant's substantial right to a fair sentencing was denied. We find this plain error seriously affected the fairness and integrity of the proceedings. Therefore, we find the appropriate remedy is to remand the case to the District Court for re-sentencing on all counts.

¶6 In Proposition II, we review Appellant's claims of prosecutorial misconduct for plain error under the standard set forth above. *See Malone v. State*, 2013 OK CR 1, ¶ 40, 293 P.3d at 211; *Simpson*, 1994 OK CR 40, ¶¶ 10, 26, 30, 876 P.2d at 694, 699, 701. We evaluate alleged prosecutorial misconduct within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel. *Mitchell v. State*, 2010 OK CR 14, ¶ 97, 235 P.3d 640, 661; *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 96, 241 P.3d 214, 243.

¶7 During his cross-examination of Appellant, the prosecutor briefly referred to hearsay statements made by one of the victims not present at trial regarding his description of the shooter and previously excluded by the trial court. Any error in this line of questioning does not constitute plain error as it did not affect Appellant's substantial rights. The trial court had already admonished the jury not to consider the hearsay statements and the trial court reminded the jury of this admonishment during closing argument. Given the weight of the evidence against Appellant the error did not deny him a fair trial.

¶8 Further, during closing argument, the prosecutor argued in part:

> The jury form tells you that if you put life in prison, that the law calls that 45 years. But you send a message to Mr. Lee that you never want him out of prison. So on those verdict forms for Counts 3 and 4, the robbery and the firearm, you put on there life. But for Count 1 and for Count 2, you put

one thousand years. And you make it clear that he will never get out of prison again. And you tell those boys that the law is here for them too. Thank you.

¶9 Defense counsel did not raise an objection to the comment. Therefore we review for plain error under the standard set forth in *Simpson*.

¶10 Telling the jury that a life sentence is forty-five (45) years in prison is a misstatement of the law. *See Anderson v. State*, 2006 OK CR 6, ¶ 24, 130 P.3d 273, 282-283 (a defendant *can be considered for parole* eligibility after serving 85% of 45 years).[1] This misstatement of the law does not always require relief. *See Florez v. State,* 2010 OK CR 21, ¶ 9, 239 P.3d 156, 159. However, when combined with the incorrect 85% instructions given in this case (addressed in Proposition I) and the prosecutor's request for a 1,000 year sentence in each of Counts I and II, the misstatement regarding the length of a life sentence likely could have contributed to the 100 year verdicts returned by the jury. Therefore, in light of the incorrect 85% instruction and the prosecutor's misstatements, the case should be remanded to the District Court for resentencing on all counts.

¶11 In Proposition III, we review Appellant's claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to show that counsel was ineffective, Appellant must show both deficient performance and prejudice. *Goode v. State,* 2010 OK CR 10, ¶ 81, 236 P.3d 671, 686 citing *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. *See also Marshall v. State,* 2010 OK CR 8, ¶ 61, 232 P.3d 467, 481. In *Strickland*, the Supreme Court said there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct, *i.e.*, an ap-pellant must overcome the presumption that, under the circumstances, counsel's conduct constituted sound trial strategy. Goode, 2010 OK CR 10, ¶ 81, 236 P.3d at 686. To establish prejudice, Appellant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at ¶ 82, 236 P.3d at 686.

¶12 Appellant first asserts trial counsel was ineffective in eliciting testimony regarding Appellant's prior criminal record. Having thoroughly reviewed Appellant's multiple complaints of ineffectiveness in regards to evidence of his criminal history, we find Appellant has failed to show counsel was either ineffective or that he was prejudiced.

¶13 The record shows that Appellant had an extensive criminal history and trial counsel chose to present that history to the jury through Appellant rather than waiting for the State to bring it out as impeachment. (The prosecutor had informed defense counsel that he would impeach the defendant with his criminal history). It is well established defense strategy to have the defendant testify to his own prior criminal history in an attempt to ease the blow of any future impeachment by the State.

¶14 Further, evidence of Appellant's criminal history was offered to explain why he did not call the police immediately after allegedly witnessing a shooting and during the eight months that followed. The decision to highlight Appellant's prior criminal history in an attempt to explain his distrust and hesitancy in calling the police despite witnessing a shooting was reasonable trial strategy under the facts of this case. This Court will not second-guess matters concerning trial strategy if there is a reasonable basis for counsel's actions. *Turrentine v. State,* 1998 OK CR 33, ¶ 41, 965 P.2d 955, 971. "So long as the choices are informed ones, counsel's decision to pursue one strategy over others is 'virtually unchallengeable.'" *Jones v. State*, 2006 OK CR 5, ¶ 78, 128 P.3d 521, 545 citing *Strickland,* 466 U.S. at 690-91, 104 S.Ct. at 2066. That the strategy ultimately proved unsuccessful is not grounds for branding counsel ineffective. *Turrentine,* 1998 OK CR 33, ¶ 41, 965 P.2d at 971.

¶15 Appellant also complains about the wording of some of trial counsel's questioning. The fact that appellate counsel would have worded questions to Appellant differently than trial counsel is not grounds for a finding of ineffectiveness absent some showing of prejudice. *See Shultz v. State*, 1991 OK CR 57, ¶ 9, 811 P.2d 1322, 1327 ("[t]he fact that another lawyer would have followed a different course during the trial is not grounds for branding the appointed attorney with the opprobrium of ineffectiveness, or infidelity, or incompetency. Absent a showing of incompetence, the Appellant is bound by the decisions of his counsel and mistakes in tactic and trial strategy do not provide grounds for subsequent attack" (internal citation omitted). "Counsel's decision not to ask different questions, or ask questions in a different way, will not be second guessed." *Un-*

derwood v. State, 2011 OK CR 12, ¶ 87, 252 P.3d 221, 253.

¶16 Counsel's questioning regarding Appellant's "charges" instead of "convictions" and juvenile record was limited. Appellant's contact with the criminal justice system as a juvenile was only briefly referenced and minimal facts were discussed. In light of the strong evidence of Appellant's guilt, he has failed to show how he was prejudiced by the brief discussion of his juvenile record.

¶17 "We have held repeatedly that representation will not be deemed inadequate because in hindsight, trial strategy could have been different." *Stover v. State*, 1984 OK CR 14, ¶ 10, 674 P.2d 566, 568. "While Appellant may wish trial counsel had done things differently, '[e]ven the best criminal defense attorneys would not defend a particular client in the same way.'" *Bland v. State*, 2000 OK CR 11, ¶ 122, 4 P.3d 702, 732 quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Appellant has not shown that but for counsel's introducing his prior criminal history, there is a reasonable probability that the results of the trial would have been different.

¶18 Appellant also argues that counsel was ineffective for failing to object to a question posed to him by the prosecutor regarding both victims having picked Appellant's photo out of a photo lineup. The record shows that only one of the two victims picked Appellant's photo out of a lineup. For the prosecutor to misstate the evidence and intimate that both victims picked Appellant out of a photo lineup was error and should have drawn an objection from defense counsel. However, given the weight of evidence against Appellant, he has failed to show a reasonable probability that but for counsel's failure to object, he would have been found not guilty on all counts.

¶19 Appellant further contends counsel was ineffective for failing to object to Instruction No. 36, misstating the 85% Rule, and for failing to object to the prosecutor's misstatement regarding the length of a life sentence. Appellant has failed to show he suffered any prejudice in the guilt/innocence portion of his trial by counsel's omissions as the errors identified in this opinion affected only sentencing. Our remand for resentencing on all counts sufficiently cures any sentencing stage prejudice.

¶20 In his final proposition of error, Appellant argues the accumulation of errors denied him a fair trial. This Court has repeatedly held that a cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by Appellant. *Martinez v. State*, 2016 OK CR 3, ¶ 84, 371 P.3d 1100, 1119; *Williams v. State*, 2001 OK CR 9, ¶ 127, 22 P.3d 702, 732. However, when there have been numerous irregularities during the course of a trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors is to deny the defendant a fair trial. *Martinez*, 2016 OK CR 3, ¶ 84, 371 P.3d at 1119.

¶21 The errors identified in Propositions I and II regarding the incorrect 85% Rule instruction and the prosecutor's misstatement of the length of a life sentence impacted only sentencing. The guilt/innocence portion of the trial was not impacted and remanding the case for resentencing is the only relief warranted.

DECISION

¶22 The **JUDGMENT is AFFIRMED**. The case is **REMANDED FOR RESENTENCING ON ALL COUNTS**. 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 TULSA COUNTY

THE HONORABLE WILLIAM D. LAFORTUNE, DISTRICT JUDGE

APPEARANCES AT TRIAL

Sofia Johnson, Glen Blake, Tulsa County Public Defender's Office, 423 S. Boulder, Ste. 300, Tulsa, OK 74103, Counsel for Defendant

Steve Kunzweiler, District Attorney, Isaac Shields, Mark Morgan, Assistant District Attorneys, Tulsa County Courthouse, 500 S. Denver, Tulsa, OK 74103, Counsel for the State

APPEARANCES ON APPEAL

Richard Couch, Tulsa County Public Defender's Office, 423 S. Boulder, Ste. 300, Tulsa, OK 74103, Counsel for Appellant

Mike Hunter, Attorney General of Oklahoma, Tessa L. Henry, Assistant Attorney General, 313 N.E. 21st St., Oklahoma City, OK 73105, Counsel for the State

OPINION BY: LUMPKIN, P.J.
LEWIS, V.P.J.: Concur in Part Dissent in Part
HUDSON, J.: Concur
KUEHN, J.: Concur
ROWLAND, J.: Concur

LEWIS, VICE PRESIDING JUDGE, CONCURRING IN PART AND DISSENTING IN PART:

¶1 I would affirm and not remand for resentencing. While there was a clear misstatement of the law, under the facts of this case, it was harmless error.

LUMPKIN, PRESIDING JUDGE:

1. Lawyers continue to confuse the punishment set out in our statutes with the administrative rules of the Pardon and Parole Board. Under our penal statutes, a life sentence means the natural life of the offender. The fact that the Pardon and Parole Board has arbitrarily set forty-five (45) years as the number the Board will use to comply with the "Forgotten Man Act", 57 O.S.Supp.2013 § 332.7, does not affect the actual sentence; that number affects only when the Board will consider the inmate for purposes of parole.

2018 OK CR 16

STATE OF OKLAHOMA, Appellant, v. LOUIS KILAKILA STARK, Appellee.

Case No. S-2017-66. May 24, 2018

OPINION

ROWLAND, JUDGE:

¶1 The State of Oklahoma charged Appellee Louis Kilakila Stark in the District Court of Comanche County, Case Number CF-2015-530, with Unlawful Possession of a Controlled Drug (Marijuana) With Intent to Distribute (Count 1) in violation of 63 O.S.Supp.2012, § 2-401, Unlawful Possession of a Controlled Dangerous Substance (Cocaine) (Count 2) in violation of 63 O.S.Supp.2012, 2-402, Unlawful Possession of Drug Paraphernalia (Count 3) in violation of 63 O.S.2011, 2-405, and Felon in Possession of a Firearm (Count 4) in violation of 21 O.S.Supp.2014, § 1283(A). The State filed a Supplemental Information alleging one prior felony conviction for sentence enhancement on Counts 1, 2, and 4. Stark filed a motion to quash the Information and Bind Over Order and to suppress the narcotics and firearms evidence, alleging the search yielding the contraband was illegal. The Honorable Gerald Neuwirth sustained on the record Stark's motion to quash and suppress on January 11, 2017, and again by written order dated January 18, 2017. The court found that the warrantless entry into the trailer house under the guise of a protective sweep was a subterfuge and amounted to an illegal search that tainted the later consent search and search conducted pursuant to a search warrant. The State of Oklahoma filed the instant appeal of the district court's order.

¶2 Once the cause was submitted for decision, this Court determined supplementation of the record was necessary to resolve the issues presented. We remanded the case to the district court for an evidentiary hearing to determine whether the police officers had permission from any lawful occupant to enter the trailer house before officers conducted a protective sweep and whether Stark's presence in the trailer house was with the permission of the home's lessee resident. The district court filed its Findings of Fact and Conclusions of Law after the evidentiary hearing, finding that Stark had permission to be in the trailer house from the lawful lessee resident and that no lawful occupant gave the officers permission to enter before they conducted the protective sweep of the trailer.

¶3 The State of Oklahoma raises four issues:

(1) The district court's order granting Appellee's Motion to Quash the Information, Quash the Arrest and to Suppress Evidence should be reversed because Appellee has not established that he has standing to challenge any search of the residence;

(2) The district court erred in its ruling that Officer Witten conducted an illegal search of the residence when it was in fact a protective sweep of the residence for the purpose of officer safety;

(3) The district court erred in its ruling that Officer Witten did not obtain proper consent from the homeowner before conducting any type of search of the residence; and

(4) The district court erred in its ruling that the actions of the officers rose to the level of misconduct requiring suppression of the evidence.

¶4 We reverse the district court's order and remand this matter to the district court for further proceedings for the reasons discussed below.

BACKGROUND

¶5 Siya Menefee called the Lawton Police Department, on October 5, 2015, requesting assistance in retrieving her belongings from inside a trailer house where she had been living. She reported to the dispatcher and to the patrol officers who responded to her call that the men inside, out-of-town visitors of her roommate, had marijuana, cocaine, and guns.

She further stated that the men would not let her inside her residence and that she feared for her safety while attempting to retrieve her belongings. Officers knocked on the door with guns drawn in a ready position, removed the men, including Stark, and then made entry for the stated purpose of a "protective sweep" based on Ms. Menefee's report of the presence of weapons in the home. The officers secured two firearms in plain view and cleared the home of occupants, with the exception of one man with mobility issues who was seated just inside the front door of the trailer house. The odor of raw marijuana was noticeable. The police informed the lessee resident, whom they had summoned home, of the presence of firearms and the odor of marijuana in her trailer. She consented to a search of her trailer house. Patrol officers found a large amount of marijuana in a backpack in the lessee resident's bedroom and notified special operations. The special operations detectives obtained a search warrant and seized the drugs and guns.

DISCUSSION

¶6 The State challenges the district court's order granting Stark's motion to quash and suppress. We exercise jurisdiction under 22 O.S. 2011, § 1053(5)[1] because the State's ability to prosecute Stark on the felony charges is substantially impaired absent the suppressed evidence, making review appropriate. *See State v. Strawn*, 2018 OK CR 2, ¶ 18, ___P.3d___.

¶7 The State's argument challenging Stark's standing to contest the search requires only brief consideration. The record before us amply supports the district court's finding that Stark was an overnight guest of the lawful lessee resident and therefore had standing to challenge the search in this case. *See Minnesota v. Olson*, 495 U.S. 91, 96-100, 110 S.Ct. 1684, 1688-90, 109 L.Ed.2d 85 (1990) (holding overnight guest has a legitimate expectation of privacy in host's home and standing to challenge a search thereof). Hence, we find the district court did not err by rejecting the State's standing challenge. *See Terry v. State*, 2014 OK CR 14, ¶ 7, 334 P.3d 953, 955 ("To establish standing to contest the constitutionality of a search, a defendant must show he had a 'legitimate expectation of privacy in the invaded place.'") (citation omitted). The State's standing claim is without merit.

¶8 Whether the search of the trailer and the seizure of items in it violated Stark's constitutional rights is an issue that must be analyzed under substantive Fourth Amendment law. *See State v. Marcum*, 2014 OK CR 1, ¶ 7, 319 P.3d 681, 683. In reviewing a district court's ruling on a motion to suppress evidence based upon an allegation the search or seizure was illegal, we credit the district court's findings of fact unless they are unsupported by the record and are clearly erroneous, and we review the legal conclusions based on those facts *de novo. Strawn*, 2018 OK CR 2, at ¶ 19. Review of this record leads us to conclude that the district court erred in sustaining Stark's motion to suppress evidence based on its flawed assessment of probable cause, exigent circumstances, and the independent source doctrine.

¶9 The Fourth Amendment, made applicable to the states through the Fourteenth Amendment, prohibits unreasonable searches and seizures. "It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" *Welsh v. Wisconsin*, 466 U.S. 740, 748, 104 S.Ct. 2091, 2097, 80 L.Ed.2d 732 (1984) (quoting *United States v. United States District Court for the Eastern District of Michigan, Southerndivision, et al*., 407 U.S. 297, 313, 92 S.Ct. 2125, 2134, 32 L.Ed.2d 752 (1972)). Warrantless searches and seizures inside a home are "presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980). This presumption can be overcome by a showing of one of the few "specifically established and well-delineated exceptions" to the warrant requirement, *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967), such as "'hot pursuit of a fleeing felon, or imminent destruction of evidence, ... or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling.'" *Olson,* 495 U.S. at 100, 110 S.Ct. at 1690 (citations omitted) . Even where officers make an unlawful entry to secure a residence, any resultant search warrant based upon information not gained by the illegal entry will be upheld.

> On this issue, we hold that the evidence discovered during the subsequent search of the apartment the following day pursuant to the valid search warrant issued wholly on information known to the officers before the entry into the apartment need not have been suppressed as "fruit" of the illegal entry because the warrant and the information on which it was based were unrelated to the entry and therefore

constituted an independent source for the evidence under *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920).

Segura v. United States, 468 U.S. 796, 799, 104 S.Ct. 3380, 3382, 82 L.Ed.2d 599 (1984).

¶10 The instant case is remarkably similar to the United States Supreme Court's decision in *Illinois v. McArthur*, 531 U.S. 326, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001). In *McArthur,* police officers were called out to a trailer house to stand by while a female retrieved her belongings from inside where she had been staying. *Id.*, 531 U.S. at 328-29, 121 S.Ct. at 948-49. As she exited the residence she told officers they should search the trailer because the man inside, her husband, had "dope" inside there. *Id.* Officers knocked on the door, asked the man for permission to search and upon being denied, kept him detained outside the trailer until a search warrant was obtained. *Id.* The Supreme Court found the officers' actions reasonable because they had probable cause to search based upon the eyewitness account of the wife, and an exigent circumstance requiring them to secure the residence while a warrant was obtained because their request to search had alerted the man that police knew of his unlawful activity. *Id.*, 531 U.S. at 337, 121 S.Ct. at 953.

¶11 These facts, legally speaking, are strikingly similar to the facts in the case before us now. At the point in time that the officers knocked on the door of this trailer, they had already obtained from Ms. Meneffee almost exactly the same information officers had in *McArthur*, and which the Supreme Court found sufficient to support the detention of the occupant outside the residence and the issuance of a search warrant. Specifically, officers had probable cause to believe that the trailer house contained evidence of a crime based on Ms. Menefee's statements. The police had the opportunity to speak with her and make at least a rough assessment of her reliability. The details she provided about the types of guns and drugs inside the trailer house indicated a first-hand knowledge of their presence. The officers had reason to believe that the occupants knew Ms. Menefee was aware of the guns and drugs inside the trailer house and that she was angry enough to call police about being denied admission to retrieve her belongings. The officers had reason to believe the trailer house occupants were aware of their presence, and fearing an imminent entry for Menefee's belongings or a search, would destroy evidence or otherwise pose a threat to the officers or other persons who might interfere with their criminal activity. Armed with this information, the officers took action to confirm the existence of criminal activity by knocking on the door and seizing Stark and the other occupants. The immediate detection of the odor of raw marijuana and observation of guns in plain sight from the doorway instantly confirmed Ms. Menefee's reported accusations. This was a rapidly evolving incident under circumstances giving rise to a reasonable concern about the nature of the danger involved. Understandably the officers conducted a protective sweep for their safety. In an effort to reconcile their law enforcement needs and the demands of personal privacy, the officers obtained consent from the trailer home lessee to search and later obtained a search warrant after finding a large amount of marijuana in a backpack. Based on the reasoning in *McArthur,* we find the seizure of Stark, the warrantless entry for the protective sweep, and the subsequent searches of the trailer were reasonable.

¶12 Even assuming, however, for argument's sake that the initial protective sweep was unauthorized and that no valid consent to search was given by the lessee, the search warrant ultimately obtained by officers was sufficiently supported by probable cause not derived from any illegal source to support the search. As noted above, Ms. Menefee's statements provided probable cause to believe criminal activity was afoot inside the trailer. "Evidence may be admissible where it was discovered through an independent source, or where intervening circumstances break the connection between the illegal government conduct and discovery of the evidence." *Jacobs v. State*, 2006 OK CR 4, ¶ 6, 128 P.3d 1085, 1087. Hence, the search warrant affidavit, extirpating any information gained after the officers contacted the occupants at the front door, still supported the issuance of the warrant and the resultant search. "The law is clear that the inclusion of illegally obtained evidence does not vitiate a search warrant otherwise lawfully issued upon probable cause." *Simon v. State,* 1973 OK CR 429, ¶ 15, 515 P.2d 1161, 1164.

¶13 Deciding the present case upon this narrow ground of extirpating the challenged information from the affidavit and then reviewing for probable cause serves two public policy

aims. First, showing preference to searches based upon warrants encourages officers to obtain them rather than relying upon warrantless search exceptions. "Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *United States v. Ventresca*, 380 U.S. 102, 109, 85 S.Ct. 741, 746, 13 L.Ed.2d 684 (1965).

¶14 Second, it avoids application of the exclusionary rule where its deterrent effects are minimal or non-existent. During the evidentiary hearing held by the district court, one of the responding officers testified that Ms. Menefee "wanted us to go with her to get her stuff. She said she did not want to go in without officers being there because she was in fear of her safety." The officer admitted that Ms. Menefee never explicitly stated he could enter, although the context led him to believe she was giving consent for him to enter.

¶15 The officer's evaluation of his conversation with Ms. Menefee was the only reasonable interpretation under the circumstances to be made of her words and actions. She called police, complaining that armed men with drugs in her house would not let her inside to retrieve her belongings and that she needed officer assistance. If she had no intent to allow the officers inside the trailer, it strains the imagination to determine how exactly she expected the officers to obtain her belongings. Furthermore, it is well-settled that although silence or failure to object cannot manifest one's consent to search, consent can be inferred from one's conduct. *See Lumpkin v. State*, 1984 OK CR 71, ¶¶ 5 & 10, 683 P.2d 985, 986, 987 (holding consent given voluntarily where officer asked to look in defendant's trunk and defendant responded by retrieving trunk key from ignition and handing it to officer); *United States v. Gordon*, 173 F.3d 761, 766 (10th Cir. 1999)(holding handing over key to DEA agent evidenced defendant's voluntary consent to search locked duffle bag).

¶16 The actions of these officers in acting upon what they thought was consent from Ms. Menefee, one of the residents of the property, and then removing the occupants from the trailer house for officer safety while the officers obtained consent to search from the lessee and later a search warrant, even if negligent, are simply not the types of egregious conduct which should beget the significant societal costs of suppression.

> Suppression of evidence, however, has always been our last resort, not our first impulse. The exclusionary rule generates "substantial social costs," which sometimes include setting the guilty free and the dangerous at large. We have therefore been "cautio[us] against expanding" it, and "have repeatedly emphasized that the rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application." We have rejected "[i]ndiscriminate application" of the rule, and have held it to be applicable only "where its remedial objectives are thought most efficaciously served," – that is, "where its deterrence benefits outweigh its 'substantial social costs.'"

Hudson v. Michigan, 547 U.S. 586, 591, 126 S.Ct. 2159, 2163, 165 L. Ed.2d 56 (2006) (internal citations and quotations omitted).

¶17 For these reasons, we find the initial entry by the officers was reasonable under the circumstances, but that even were this not so, the evidence was ultimately seized pursuant to a search warrant supported by probable cause obtained entirely independent of the contested entry. Accordingly, we hold the district court erred as a matter of law in suppressing the narcotics and firearms evidence against Stark in this case.

DECISION

¶18 The ruling of the district court sustaining Stark'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 delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY

THE HONORABLE GERALD F. NEUWIRTH, DISTRICT JUDGE

APPEARANCES IN DISTRICT COURT AND ON APPEAL

Fred C. Smith, District Attorney, Kyle A. Cabelka, Assistant District Attorney, 315 SW 5th St., Room 502, Lawton, OK 73501, Counsel for State/Appellant

Eddie D. Valdez, Attorney at Law, 513 SW "C" Ave., Lawton, OK 73501, Counsel for Defendant/Appellee

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

LEWIS, VICE PRESIDING JUDGE, DISSENTS:

¶1 The decision to suppress the evidence in this case was based wholly on the trial court's assessment of the facts. This Court reviews factual findings for an abuse of discretion and we will not disturb the factual findings of the trial court unless they have no support in the record. *State v. Zungali*, 2015 OK CR 8, ¶ 4, 348 P.3d 704, 705; *State v. Kudron*, 1991 OK CR 92, ¶ 19, 816 P.2d 567, 571. An abuse of discretion is a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts. Bosse v. State, 2015 OK CR 14, ¶ 23, 360 P.3d 1203, 1216. "[T]he credibility of witnesses and the weight given their testimony is within the exclusive province of the trier of fact, who may believe or disbelieve the witnesses as it desires." *Kudron*, 1991 OK CR 92, ¶ 19, 816 P.2d at 570-71. In this case, there are sufficient facts to support the trial court's suppression of the evidence. I, therefore, must dissent.

¶2 The majority's conclusion that the facts in *Illinois v. McArthur* are "remarkably similar" is faulty. In *McArthur*, the officers detained the occupants and obtained a search warrant before any search commenced, not so here. Further, in *McArthur* there was a clear indication that the person giving incriminating information to the police was reliable. Not so here. There was no supposedly "protective sweep" in *McArthur,* but the majority relies on a protective sweep to justify the initial entry.

¶3 To justify a protective sweep, the searching officer must possess "a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger" to the officers at the scene. *Maryland v. Buie*, 494 U.S. 325, 334, 110 S.Ct. 1093, 1098, 108 L.Ed.2d 276 (1990). In this instance there was no evidence of danger to police or civilians, as the officers had ordered everyone out of the trailer. In fact, officers did not even check all of the rooms in the trailer.

¶4 Here, facts supporting the trial court's findings were that officers entered the residence without a warrant before they viewed firearms and smelled marijuana and they did not indicate a clear reason to conduct a protective sweep. Officers testified that they relied on Menefee's consent to enter the trailer, but a person's valid consent must be unequivocal, specific, and voluntary. *Florida v. Royer*, 460 U.S. 491, 497, 103 S.Ct. 1319, 1324, 75 L.Ed.2d 229 (1983); *United States v. Soto*, 988 F.2d 1548, 1557-58 (10th Cir. 1993). Here, officers did not have clear consent from Menefee.

¶5 The presence or absence of consent is a question of fact and this Court will not reverse a trial court's finding absent an abuse of discretion. *See Sands v. State*, 1975 OK CR 192, ¶ 25, 542 P.2d 209, 214 (the legality of a search based on evidence of consent was a determination of fact for the trial court). *See also Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49, 93 S.Ct. 2041, 2059, 36 L.Ed.2d 854 (1973). Moreover, voluntariness of the consent is determined from all of the facts and circumstances. *See Van White v. State*, 1999 OK CR 10, ¶ 45, 990 P.2d 253, 267.

¶6 I would find that the trial court did not abuse its discretion in finding that the initial entry violated the Fourth Amendment because officers did not have a warrant, nor did they articulate any exception to the warrant requirement authorizing their entry into the trailer. Further, as the evidence was acquired after the illegal entry, and the later consent of the homeowner and subsequent warrant was the fruit of that illegal entry, I would find that the trial court did not abuse its discretion in suppressing the evidence in this case.

1. Under Section 1053(5), 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[.]"

2018 OK CR 17

THE STATE OF OKLAHOMA, Appellant, vs. B.C.E.T., Appellee.

No. JS-2017-1315. May 24, 2018

ACCELERATED DOCKET OPINION

KUEHN, JUDGE:

¶1 On August 16, 2017, in the District Court of Washita County, Case No. CF-2017-68, the State charged Appellee, B.C.E.T., by Information as an adult with Felony Murder in the First Degree in violation of 21 O.S.Supp.2012, § 701.7 (B), Shooting with Intent to Kill in violation of

21 O.S.2011, § 652(A); and Burglary in the First Degree in violation of 21 O.S.2011, § 1431. On July 20, 2017, the date these offenses were alleged to have occurred, Appellee was fourteen (14) years and four (4) months old. On August 31, 2017, Appellee filed an "Amended Motion for Certification as a Child" under the authority of 10A O.S.2011, § 2-5-205. Appellee's Motion asked that the District Court certify him as a child, or alternatively, as a youthful offender.

¶2 The Honorable Jill C. Weedon, Associate District Judge presided over Appellee's preliminary hearing and the hearing on Appellee's request for reverse certification. At the conclusion of those proceedings, the Magistrate took the matter under advisement and on December 19, 2017, filed a detailed written order denying certification as a juvenile but granting certification as a youthful offender. The order further bound Appellee over for trial on all counts. Appellant, the State of Oklahoma, now appeals that order.

¶3 The State's appeal was regularly assigned to this Court's Accelerated Docket under Section XI of the *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018), and oral argument was held on March 29, 2018. Appellant raises a single proposition of error:

> The District Court erred in sustaining the Motion to Certify as a Child because the Appellee failed to produce sufficient evidence to establish he is entitled to youthful offender status and sentencing.

After hearing oral argument and after a thorough consideration of Appellant's proposition of error and the entire record before us on appeal, the court affirms the trial court's order certifying Appellee as a youthful offender, as we FIND no abuse of discretion.

¶4 The evidence appropriately weighed by Judge Weedon included testimony from three psychological experts who personally examined Appellee. Each affirmed that Appellee was amenable to treatment and that his prospects for rehabilitation were good. These mental health professionals found Appellee had only a moderate risk of reoffending. Disturbingly, however, there was also testimony that this moderate risk assessment was derived without consideration of those acts Appellee was accused of committing in the charged offenses. We note that in the reverse certification context, a juvenile is presumed to have committed the offenses for which probable cause has been established. The Office of Juvenile Affairs (OJA) officials, treatment providers, or mental health professionals, when performing their evaluations, should not ignore the juvenile's prior behaviors as revealed by competent evidence at the preliminary hearing or as revealed in any other source materials on which competent professionals would reasonably rely in rendering an expert opinion.

¶5 Despite any apparent shortcoming in this one particular aspect of the expert testimony, we recognize Judge Weedon gave thorough consideration to Appellee's behaviors regarding the alleged offenses. In doing so, she heavily weighed those behaviors and fairly weighed the expert opinion testimony, all as required by the reverse-certification guidelines set out within 10A O.S.2011, § 2-5-205(E).

¶6 Certification motions are difficult. They call on courts to make predictions about future behaviors and require trial courts to hear from experts in order to have sufficient information. *See J.R.L. v. State*, 2000 OK CR 26, ¶¶ 8-9, 17 P.3d 1041, 1043 (recognizing that the statutory criteria for reverse-certification as a youthful offender "requires consideration of a 'psychological evaluation'" and therefore "it is evident from the language of the statute, that the trial court must have a psychological evaluation," as well as a certification study); *cf. In Interest of M.D.N.*, 493 N.W.2d 680, 687 (N.D. 1992) ("Determining whether a juvenile is amenable to treatment, especially in light of a limited time period within the juvenile system, requires the juvenile court judge to predict the future. It is essential, therefore, that the court hears expert testimony – not as a sole basis for the court's decision, but to assist in its determination."). In turn, it is imperative that the experts provide the trial court more than a general listing of OJA facilities and programs. The trial court must also consider expert testimony about the youth's mental and medical issues and specifically how the Youthful Offender Program will address and treat those delineated issues.

¶7 In this case, although the State criticizes portions of the experts' testimony and their conclusions and opinions as to certification, most of those criticisms involve the weight and credibility to be given to that testimony. Also, the State did not present any experts opposing or challenging Appellee's experts. We have long held that "[t]he credibility of witnesses and the weight and value to be given to their testimony

are within the exclusive province of the trier of facts." *Brown v. State*, 1972 OK CR 55, ¶ 6, 494 P.2d 344, 346, *accord Bland v. State*, 2000 OK CR 11, ¶ 29, 4 P.3d 702, 714.

> "The reverse certification question is addressed to the sound discretion of the magistrate. Our duty on appellate review of the magistrate's decision, therefore, is not to conduct our own weighing *de novo*, but rather to determine whether the decision of the magistrate is supported by the law and facts of the case. A decision which is so supported is, by definition, not an abuse of discretion."

W.D.C. v. State, 1990 OK CR 71, ¶ 8, 799 P.2d 142, 144-45. *See also Cargle v. State*, 1995 OK CR 77, ¶ 25, 909 P.2d 806, 816 ("We see no abuse of discretion here, as we find the court's ruling is reasonably supported by competent evidence."). Judge Weedon clearly established in her comprehensive Findings of Fact that she weighed all of the testimony and exhibits in deciding to certify Appellee as a Youthful Offender.

¶8 Having reviewed the appellate record in this case, we find that the Judge's decision was not an abuse of discretion and was supported by the facts and law.

DECISION

¶9 The order of the District Court of Washita County granting Appellee's motion for certification as a youthful offender in Case No. CF-2017-68 is **AFFIRMED**. Pursuant to Rule 3.15 of this Court's *Rules*, **MANDATE IS ORDERED ISSUED** on the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF WASHITA COUNTY BEFORE

THE HONORABLE JILL C. WEEDON, ASSOCIATE DISTRICT JUDGE

APPEARANCES AT TRIAL

Angela Marsee, District Attorney, S. Brooke Gatlin, Assistant District Attorney, 111 E. Main, Box 3, Cordell, OK 73632, Attorneys for the State

Rebecca N. Beason, Michael T. Beason, Beason Law Firm, 108 W. Broadway, P.O. Box 685, Altus, OK 73522, Attorneys for Defendant

APPEARANCES ON APPEAL

S. Brooke Gatlin, Assistant District Attorney, 111 E. Main, Box 3, Cordell, OK 73632, Attorneys for Appellant

Rebecca N. Beason, Michael T. Beason, Beason Law Firm, 108 W. Broadway, P.O. Box 685, Altus, OK 73522, Attorneys for Appellee

OPINION BY: KUEHN, J.
Lumpkin, P.J.: CONCUR
Lewis, V.P.J.: CONCUR IN RESULTS
Hudson, J.: DISSENT
Rowland, J.: CONCUR

LEWIS, VICE PRESIDING JUDGE, CONCURS IN RESULTS:

¶1 I write separately to clarify perceived inconsistencies in the Opinion's finding that the O.J.A. experts did not consider B.C.E.T.'s charged offenses when making their recommendation. In fact, the O.J.A. psychological clinician testified that one testing tool did not take the charged offenses into account, but she considered everything in making her recommendation. Had the experts not considered the instant offenses in making their recommendation, then their recommendation would be faulty. I do not believe the recommendation is faulty, as I believe they considered everything including the instant offenses.

¶2 I find that the experts based their findings with due consideration to the instant offenses in making their recommendation, and the trial court properly considered the recommendations of those experts, as well as the instant offenses. I, therefore, join the Opinion in finding that the trial court did not abuse its discretion in making its decision.

HUDSON, J., DISSENTING:

¶1 This is a shocking crime. Appellee is accused of breaking into the home of a schoolmate, C.T., in the middle of the night while C.T.'s family was sleeping then fatally shooting C.T.'s mother in the head and shooting C.T. in both arms. After being shot, C.T. fell to the floor where he was promptly kicked in the head. C.T. squinted his eyes and pretended to pass out but was still able to see his attacker towering overhead while pointing the gun at C.T. for a brief time. The evidence shows these offenses were premeditated, carried out in a manner to avoid detection and were prompted by little more than Appellee's brooding dislike of C.T. The State's evidence too reveals Appellee's troubling history of violence directed towards C.T. and other classmates prior to the onslaught he unleashed inside C.T.'s home.

¶2 The State presented evidence showing that Appellee had numerous school suspensions

for fighting in the 2016-2017 school year. One of those fights was witnessed by Paul Pankhurst, an assistant school principal. Pankhurst observed Appellee ambush K.G. in the school cafeteria and punch the boy in the face. On another occasion, Appellee slapped C.T. in the face after a school assembly. In a separate incident, Appellee was found in possession of a Taser at school. Appellee was eventually suspended for the rest of the school year after attacking another student. During this incident, Appellee waited outside the school cafeteria for the student then pushed past two others so he could hit the boy. When given the opportunity to lessen this last school suspension, Appellee's mother told Pankhurst "she did not believe that she could keep [Appellee] from fighting again. So it was . . . the rest of the year."

¶3 The Legislature must have envisioned a defendant like Appellee when it enacted the current statutory scheme for juvenile offenders charged with first degree murder. At age fourteen years and four months, Appellee was presumed to be an adult under Oklahoma law when the charged offenses were committed. *See* 10A O.S.2011, § 2-5-205(A) ("Any person thirteen (13) or fourteen (14) years of age who is charged with murder in the first degree shall be held accountable for the act as if the person were an adult; provided, the person may be certified as a youthful offender or a juvenile as provided by this section …."). The State charged Appellee as an adult in this case. Appellee subsequently filed a motion for certification as a juvenile or, in the alternative, as a Youthful Offender.

¶4 At a reverse certification hearing, it is Appellee's burden to overcome the presumption and prove that he should be certified as either a child or as a youthful offender. *C.L.F. v. State*, 1999 OK CR 12, ¶ 4, 989 P.2d 945, 946. Title 10A O.S.2011, § 2-5-205(E) directs that when ruling on a motion for certification as a youthful offender or juvenile, that the court shall consider the following seven guidelines with **greatest weight** to be given to the first three listed:

> 1. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;
>
> 2. Whether the offense was against persons, and, if personal injury resulted, the degree of personal injury;
>
> 3. The record and past history of the accused person, including previous contacts with law enforcement agencies and juvenile or criminal courts, prior periods of probation and commitments to juvenile institutions;
>
> 4. The sophistication and maturity of the accused person and the capability of distinguishing right from wrong as determined by consideration of the person's psychological evaluation, home, environmental situation, emotional attitude and pattern of living;
>
> 5. The prospects for adequate protection of the public if the accused person is processed through the youthful offender system or the juvenile system;
>
> 6. The reasonable likelihood of rehabilitation of the accused person if such person is found to have committed the alleged offense, by the use of procedures and facilities currently available to the juvenile court; and
>
> 7. Whether the offense occurred while the accused person was escaping or on escape status from an institution for youthful offenders or delinquent children.

Id.

¶5 In the present case, Judge Weedon granted Appellee's motion for certification as a Youthful Offender. "Absent an abuse of discretion, the . . . judge, as trier of fact, has the discretion and the prerogative to assess the credibility of the witnesses and to weigh and value their testimony and opinions." *R.J.D. v. State*, 1990 OK CR 68, ¶ 16, 799 P.2d 1122, 1125. We have defined an abuse of discretion as "a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *State v. Keefe*, 2017 OK CR 3, ¶ 7, 394 P.3d 1272, 1275 (quoting *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170).

¶6 Granting Appellee's motion for certification as a Youthful Offender in this case was an abuse of discretion. Sufficient evidence is not found in this record to support the lower court's ruling that priority was given to the first three guidelines set forth in § 2-5-205(E). The lower court's findings for each criteria in Section 2-5-205(E) does not support her conclusion that Appellee met his burden by a preponderance of the evidence. *See C.R.B. v. State*, 1999 OK CR 1, ¶ 20, 973 P.2d 339, 342 (defendant has the burden to prove by preponderance of the evidence that he should be treated as a youth-

ful offender). There is insufficient evidence in this record to support overriding the presumption that Appellee be treated as an adult.

¶7 The first three factors mandated for consideration by Section 2-5-205(E) do not support Appellee's quest for Youthful Offender status. The present charges were unquestionably committed in an aggressive, violent, premeditated and willful manner; were directed against C.T. and his mother; resulted in the death of C.T.'s mother and in C.T. being shot. Moreover, C.T. witnessed his mother being fatally shot while his brother hid in an adjacent bedroom. But for C.T. feigning death, this may have been a double homicide. The psychological toll on the surviving victims must be considered as well. Finally, Appellee's past history of violence towards his classmates likewise counsels against granting Appellee Youthful Offender status. That is particularly so considering the lower court's finding – fully supported by the evidence – that Appellee portrays all of his school fights "as either justified or paints himself as the victim." Order at 9; (Tr. 827). From the outset, the three factors receiving the greatest weight in this analysis cut against granting Youthful Offender status.

¶8 It is the fourth, fifth and sixth factors upon which the lower court excessively relied to overcome the presumption of adult charging in the present case. The lower court concluded that Appellee's above-average intelligence, along with his ability to distinguish right from wrong, counseled in his favor. The lower court acknowledged that Appellee "is immature for his age and lacks insight into his own behavior, is impulsive, violent, isolates himself, and has an unstable home." Order at 10. The court acknowledged too the many psychopathic characteristics and tendencies revealed by Appellee's psychological testing. This included moderate risks of grandiose sense of self-worth, pathological lying, manipulation for personal gain and high risks for impression management, lack of remorse, failure to accept responsibility and poor anger control.

¶9 According to Jacqueline Bontrager, the OJA psychological clinician who conducted the evaluation in this case, Appellee has a "moderate" risk level for committing future violent criminal acts. Bontrager admits that she did not consider the nature of the present charges in conducting Appellee's risk assessment. Bontrager was also unable to say whether consideration of the nature of the current charges would change her assessment of Appellee's risk of future violent acts. The lynchpin for Bontrager's conclusions that Appellee had a good chance at being rehabilitated in the Youthful Offender program while also protecting the public was based on treatment of Appellee's major depression. However, when asked how treating Appellee's major depression would reduce his risk of committing violent acts, Bontrager was unable to give a coherent explanation for this conclusion:

> Q. Let me ask you this. He's currently a moderate risk to reoffend?
>
> A. Uh-huh.
>
> Q. To perpetrate another violent crime; correct?
>
> A. (Witness nods head.)
>
> Q. Can you say with any degree of certainty that treatment for his major depressive disorder, trauma history, all the things we have talked about, if it is successful, can you say with any degree of certainty that that would decrease his risk level?
>
> A. Yes.
>
> Q. Tell me why.
>
> A. I think – okay. I think for someone who is reporting symptoms of depression, psychotic features, hearing things, not able to describe, visual hallucinations that he's experiencing, I think treatment for that would contribute to – would lessen the likelihood of – **I don't know**.

(Tr. 856) (emphasis added). Defense counsel did not follow-up with Bontrager on this point on cross-examination. Nor was this specific issue addressed in the testimony of Dr. Trentham or Dr. Hand who each endorsed Bontrager's work.

¶10 Further, Bontrager's conclusion that Appellee's amenability to treatment was "good" based on his "positive attitude" towards treatment and intellect is not supported by the record. Appellee told Bontrager during the evaluation that he didn't really need treatment. Bontrager acknowledged this fact in her testimony but claimed Appellee expressed that he wanted treatment at some point towards the end of the evaluation. Bontrager's account of this conversation in her written report, however, suggests little enthusiasm on Appellee's

part to undergo treatment for major depression:

> When asked if he believes he currently needs counseling, [B.C.E.T.] responded, "Not really. There's nothing for me to talk about. I don't even know why I experience the depression and everything else." When asked what he would work on if he were in counseling, he stated, "Something to get the voices to stop in my head . . . and make my body act like it's supposed to." When asked to clarify his last statement, [B.C.E.T.] stated, "Being able to relax and tense up."

(O.R. 68; Tr. 824, 883-84; Def's Ex. 6 at 5). Neither Dr. Trentham nor Dr. Hand in their testimony added to, or expanded upon, this account of Appellee's views on treatment.

¶11 As acknowledged by the lower court, Appellee's claim of hearing voices is inconsistent throughout his responses during the psychological evaluation. Appellee's parents were unaware of him having any history of depression (he claimed to have been previously diagnosed and treated for this already). Nor is there any prior medical documentation of either depression or auditory hallucinations in Appellee. The psychological evidence *does* show that Appellee misrepresents himself, is immature, overreacts to stress, has anger management issues, is attention seeking, lacks psychological insight into his problems and seeks concrete solutions to his problems like killing a classmate with whom he has a problem. The total record does not support the lower court's conclusion that there is a reasonable likelihood Appellee can be rehabilitated within the OJA Youthful Offender system.

¶12 When the first three factors of the analysis are given the appropriate weight as required by the statute, this is not a close case for showing abuse of the lower court's discretion in certifying Appellee as a Youthful Offender. The lower court focused excessively on the fourth, fifth and sixth factors in contradiction of the statutory command that the first three factors be given greater weight. Moreover, the record evidence does not support basic conclusions underpinning the lower court's findings with respect to the fourth, fifth and sixth factors. When considering the balance of these factors, it is clear that Appellee did not overcome the statutory presumption that he be charged as an adult in this case.

¶13 I see little difference between the present case and our recent decision in *State v. K.G.O.*, No. JS-2017-909, slip op. (Okl.Cr. Dec. 21, 2017) (unpublished), where we reversed the lower court's certification of the appellee as a Youthful Offender. Sufficient evidence was not found in the record to support the lower court's ruling that priority was given to the first three guidelines. Further, the lower court's findings for each criteria in Section 2-5-205(E) did not support the court's conclusion that K.G.O. met his burden by a preponderance of the evidence. We found that the record presented a lack of evidence to support overriding the presumption that K.G.O. be treated as an adult.

¶14 My analysis of the present case does not amount to a reweighing of the factors presented to the court below. Rather, my conclusion is based on whether the record evidence supports the lower court's ruling (it does not) and whether the lower court gave greater weight to the nature of the crime, the victims' personal injuries and Appellee's past history of violent acts (the court did not). Although we review the lower court's decision for an abuse of discretion, that does not amount to abject deference. Today's decision, in true form-over-substance fashion, fails to appropriately scrutinize the lower court's decision and is inconsistent with *K.G.O*. That is no doubt little comfort to C.T. and his family who can look forward to years of navigating a legal system that, upon conviction, will treat Appellee as a victim of a broken childhood instead of the aspiring junior psychopath that he appears to be.

¶15 I would grant the State's appeal and order that Appellee stand trial as an adult. I dissent from the majority's decision to affirm the order in this case certifying Appellee as a Youthful Offender.

2018 OK CR 18

VICKY PITTMAN McNEELY, Petitioner, v. THE STATE OF OKLAHOMA, Respondent.

No. MA-2017-770. May 24, 2018

SUMMARY OPINION

HUDSON, JUDGE:

¶1 On July 25, 2017, Vicky Pittman McNeely, Petitioner, by and through counsel Jason Edge and Melanie Lander, filed with the Clerk of this Court a Petition for Writ of Mandamus seeking relief from an order entered by the Honorable William D. LaFortune, District Judge, denying

McNeely's Motion For Determination of Immunity in Tulsa County District Court Case No. CF-2013-343. Petitioner's request for extraordinary relief is **DENIED**.

¶2 Petitioner is charged in Case No. CF-2013-343 with one count of Murder in the First Degree for the shooting death of her husband inside their home. Petitioner filed a motion to dismiss the charge based on her claim of immunity from prosecution under 21 O.S.2011, § 1289.25,[1] commonly referred to as the Stand Your Ground law (hereinafter "Section 1289.25" or "Stand Your Ground"). In denying the motion, Judge LaFortune determined that McNeely was not entitled to immunity because "it was not the Legislature's intent to include a person's residence, in the context of the use of deadly force as between lawful residents therein, within the meaning of 'any other place' as those words are used in § 1289.25(D)." McNeely seeks an order reversing the District Court's ruling and dismissal of the charge filed against her.

¶3 Petitioner seeks a writ of mandamus and thus indicates her acknowledgement that there is no statutory interlocutory appeal to this Court from the District Court order. Appeal is a creature of statute and exists only when expressly authorized. *White v. Coleman*, 1970 OK CR 133, ¶ 11, 475 P.2d 404, 406; *Weatherford v. State*, 2000 OK CR 22, ¶ 3; 13 P.3d 987, 988; *Burnham v. State*, 2002 OK CR 6, ¶ 6, 43 P.3d 387, 389; *City of Elk City v. State,* 2007 OK CR 15, ¶ 7, 157 P.3d 1152, 1154. "[U]nless we are vested with original jurisdiction, all exercise of power must be derived from our appellate jurisdiction, which is the power and the jurisdiction to review and correct those proceedings of inferior courts brought for determination in the manner provided by law." *In the matter of L.N.,* 1980 OK CR 72, ¶ 4, 617 P.2d 239, 240. This Court does not engage in interlocutory review of an issue unless the defendant offers some constitutional, statutory, or judicially-created authority for interlocutory review under the circumstance. *Smith v. State,* 2013 OK CR 14, ¶ 24, 306 P.3d 557, 567. Petitioner offers no such authority in this matter and we find none. The Oklahoma Legislature has not included in Section 1289.25 any statutory right to an interlocutory appeal to this Court on Stand Your Ground issues. 21 O.S.2011, § 1289.25. There is thus no interlocutory appeal to this Court from Judge LaFortune's order, or any other District Court ruling that denies a motion to dismiss charges based on a claim of Stand Your Ground immunity from prosecution under Section 1289.25.

¶4 This Court has previously allowed in a series of unpublished opinions the use of a writ of prohibition as the vehicle to allow a defendant to seek pre-trial review of a trial court's denial of Stand Your Ground immunity from prosecution. *See e.g. State v. Ramos*, Nos. S-2013-509 and S-2013-510 (Okl.Cr. June 9, 2015) (not for publication). Petitioner argues here that a petition for writ of mandamus is the proper method of challenging the District Court order denying her request for Stand Your Ground immunity from prosecution. Whether through a writ of prohibition or mandamus, we now expressly reject our previous approach to these cases. We hold today that an extraordinary writ proceeding is not cognizable to allow merits review of a District Court's pretrial ruling denying Stand Your Ground immunity. While we recognize a direct appeal is not a true substitute for the interlocutory appeal Petitioner seeks, there is simply no statutorily authorized means under existing law to address the issue pretrial as it is presented here.

¶5 The Rules of this Court specifically state the requirements that must be established before issuance of a writ of mandamus or a writ of prohibition. Before a writ of prohibition will issue, a "[p]etitioner has the burden of establishing (1) a court, officer or person has or is about to exercise judicial or quasi-judicial power; (2) the exercise of said power is unauthorized by law; and (3) the exercise of said power will result in injury for which there is no other adequate remedy." Rule 10.6(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018). The purpose of the writ of prohibition is thus to address whether the exercise of judicial power is unauthorized by law, and is not to address the merits of a decision rendered after the exercise of authorized judicial power. *Id.* When a judge of a district court addresses and decides a defendant's motion to dismiss charges based on a claim of Stand Your Ground immunity from prosecution under 21 O.S.2011, § 1289.25, that judge is exercising judicial power that is sanctioned by law. Judge LaFortune's exercise of judicial power in denying Petitioner's motion to dismiss charges based on a Stand Your Ground immunity claim is not unauthorized by law. Petitioner has thus not established that a writ of prohibition can or should issue in this matter. Rule 10.6(A), *Rules, supra.*

¶6 Before a writ of mandamus will issue, a "[p]etitioner has the burden of establishing (1) he has a clear legal right to the relief sought; (2) the respondent's refusal to perform a plain legal duty not involving the exercise of discretion; and (3) the adequacy of mandamus and the inadequacy of other relief." Rule 10.6(B), *Rules, supra*. Stand Your Ground immunity is necessarily a factual determination and thus can never be a clear legal right. Rule 10.6(B), *Rules, supra*. Petitioner may be able to establish a factual basis for a Stand Your Ground defense; but she cannot establish a clear legal right to the relief of Stand Your Ground immunity from prosecution. *Id.* Judge LaFortune did not refuse to perform a plain legal duty, and exercised discretion in denying Petitioner's claim of Stand Your Ground immunity from prosecution. Rule 10.6(B), *Rules, supra*. Reviewing the merits of Judge LaFortune's decision is not the proper function of the extraordinary writ of mandamus. Rule 10.6(B), *Rules, supra*. Thus, Petitioner has also not established that a writ of mandamus can or should issue in this matter. Rule 10.6(A), *Rules, supra*.

¶7 The use of the term "immun[ity]" in the Stand Your Ground law is somewhat a misnomer. Immunity is generally defined as an exemption from a duty or liability, as granted by law to a person or class of persons. *Black's Law Dictionary* 751 (6th ed. 1990); *Webster's Third New International Dictionary* 1130-31 (1986). Immunity as used in Oklahoma's Stand Your Ground law can be easily misconstrued to mean absolute immunity from prosecution regardless of the underlying facts and circumstances. Yet, the immunity created in section 1289.25 is a conditional immunity meaning that it applies only if certain factual elements are established. *See, e.g., People v. Guenther,* 740 P.2d 971, 977 (Colo. 1987) (finding Colorado's equivalent Stand Your Ground law provides "conditional immunity" that requires the adjudicatory role of the court to determine if a sufficient factual predicate exists for application of the statute). The applicability of Stand Your Ground is thus entirely dependent on the specific and unique facts and circumstances of the particular incident at issue. *See* 21 O.S.2011, § 1289.25. The pivotal determination of whether Stand Your Ground applies to any given scenario requires judicial application of the law to the specific facts at hand.

¶8 When criminal charges are filed, the only way courts can truly determine whether a defendant is immune from prosecution under the Stand Your Ground law is for the State to present evidence showing all of the facts and circumstances regarding the commission of the alleged crime; and then for the defendant to present evidence showing why, under all the facts and circumstances of the case, the defendant's use of force was reasonable and justified under the Stand Your Ground law. Such a procedure is the very essence of a criminal prosecution. In other words, a defendant must be prosecuted to some extent in order for Oklahoma courts to determine if he or she is legally not guilty of a crime.

¶9 District Attorneys of Oklahoma should continue to include Stand Your Ground considerations in the exercise of their general discretion and authority to decide what criminal charges should be filed. Okla. Const. Art II, § 17; 22 O.S.2011, § 303; 21 O.S.2011, § 1289.25; *see also Woodward v. Morrisey*, 1999 OK CR 43, 991 P.2d 1042. Trial courts should continue to use motion hearings and preliminary examination proceedings to address arguments and precepts concerning Stand Your Ground immunity from prosecution. *See* 22 O.S.2011, §§ 264, 1289.25. We are confident that all due process and statutory Stand Your Ground requirements will be fully satisfied by such efforts even though there are no available appellate challenges for interlocutory Stand Your Ground decisions.

DECISION

¶10 The petition for writ of mandamus asking this Court to overturn the order entered by Judge LaFortune in Tulsa County District Court Case No. CF-2013-343 is **DENIED**. The application for stay of proceedings is **DENIED**.

APPEARANCES

Melanie Lander, Jason Edge, Edge Law Firm, 201 W. 5th St., Ste. 550, Tulsa, OK 74103, Attorneys for Petitioner

No Response Required

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

LUMPKIN, PRESIDING JUDGE: SPECIALLY CONCURRING

¶1 I compliment my colleague for a clearly written direct application of the Rule of Law in

this matter. I amplify his finding that to abrogate the Rule of Law through the use of a writ of mandamus to affect an unauthorized interlocutory appeal would contravene not only our rules but our precedent.

¶2 I write further to explain why the use of the phrase "immune from criminal prosecution" is a misnomer as to the right and defense set forth in 21 O.S.2011, § 1289.25(F). The District Courts do not have the authority to unilaterally grant immunity. Only the executive branch of the government, *i.e.*, the prosecutor, can propose a grant of immunity. *See Mills v. State*, 1985 OK CR 58, ¶ 12, 733 P.2d 880, 882 ("[T]he immunity provision contained in Art. II, § 27 of the Oklahoma Constitution [] extends the privilege only to witnesses testifying for the State."); *United States v. Apperson*, 441 F.3d 1162, 1203-04 (10th Cir. 2006) (holding courts have no inherent authority to grant a witness use immunity in absence of prosecution's deliberate attempt to distort fact finding process); *United States v. LaHue*, 261 F.3d 993, 1014 (10th Cir. 2001) ("[T]he district court did not abuse its discretion in refusing to grant immunity to the twelve unnamed defense witnesses, because use immunity is the sole prerogative of the executive branch . . . ."). The court's role is only to confirm the immunity which the prosecution has granted. *See Harris v. State*, 1992 OK CR 74, ¶ 17, 841 P.2d 587, 601 (holding immunity attaches after hearing before court reporter, when court approves written immunity agreement with written order).

¶3 Reading Section 1289.25 as a whole I must conclude that § 1289.25(F) does not grant immunity. *State ex. rel. Mashburn v. Stice*, 2012 OK CR 14, ¶¶ 11-12, 288 P.3d 247, 250 (setting forth requirement of seeking to reconcile conflicting statutory provisions to give effect to each, if possible, and apply the intent of the Legislature, if it can be properly discerned). Section 1289.25(G) clearly provides for the prosecution of the use of physical or deadly force where there is probable cause to believe that the force was unlawful. Thus, the Legislature did not intend to grant immunity but merely placed a limitation on the prosecution's charging discretion. *Cf. State v. Haworth*, 2012 OK CR 12, ¶ 18, 283 P.3d 311, 317 (describing prosecutorial discretion in charging). In other words, instead of the use of the word "immune" the Legislature meant "is not subject to prosecution."

¶4 This Court does not engage in interlocutory review of an issue unless there is constitutional, statutory, or clear legal precedent establishing the circumstance. *Smith v. State*, 2013 OK CR 14, ¶ 24, 306 P.3d 557, 567. Absent a special right to interlocutory appeal, a criminal defendant must hold his complaint unless and until he has been convicted of, and sentenced for, the crime with which he is charged. *Id.*

¶5 The Legislature has not made any provision for interlocutory or pre-trial appellate review of the right set forth in § 1289.25(F). The right does not otherwise exist. *Heike v. United States*, 217 U.S. 423, 433, 30 S. Ct. 539, 543, 54 L. Ed. 821 (1910); *Scribner v. State*, 1913 OK CR 131, 9 Okla. Crim. 465, 132 P. 933, 949; Rule 10.6, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018). This Court must not afford interlocutory or pre-trial appellate review under these circumstances. To do otherwise would violate the Rule of Law and set us on a course of continually reaching out to address issues just because we might "feel" it was the best course of action rather than whether the law allowed it.

LEWIS, VICE PRESIDING JUDGE, DISSENTING:

¶1 I respectfully dissent to the Court's needless destruction of the interlocutory review procedure for Stand Your Ground immunity claims established almost three years ago in *State v. Ramos*. I come not to praise *Ramos*, but to bury *Ramos*.[1]

¶2 *Ramos* emerged from a divided Court, and guided the bench and bar without official publication. The Court in *Ramos* viewed its procedure for pre-trial adjudication and review of Stand Your Ground immunity claims as a logical and practical approach. In three intervening sessions, the Oklahoma Legislature declined to alter the *Ramos* procedure, and similar interlocutory review is the norm in other states with Stand Your Ground immunity.[2] Yet the logical and practical virtues of *Ramos* cannot forestall its destruction today. *Stare decisis* would not have saved it, either. The struggle, as they say, is real.

¶3 The *Ramos* Court reasoned that criminal prosecution and trial of a person entitled to immunity are judicial proceedings *unauthorized by law*, for which there is clearly *no adequate post-trial remedy*.[3] The Court pretty much concedes this reality today, and avoids its obvious implications only by misconstruing its *original* and *appellate* jurisdiction, as well as its existing authority to arrest unauthorized proceedings by

issuing the writ of prohibition.[4] As a result, while some defendants may well be immune from criminal prosecution and trial under the Stand Your Ground law, they must first be criminally prosecuted and tried to see if they are immune. The Court thus turns Stand Your Ground immunity into a present day Catch-22.[5]

¶4 Immunity statutes create narrow, but presumably important, legal protections. The Court's *ad hoc* ruling today in the controversial area of Stand Your Ground immunity diminishes the scope of immunity protections in other circumstances as well.[6] The Legislature now must enact the interlocutory appeal statute that today's new majority demands, or resign the enforcement of immunity statutes to local prosecutors and judges, just as the Court does today. The better-reasoned attempt in *Ramos* to provide prompt interlocutory review of Stand Your Ground claims has, at last, come to nothing. "Mischief, thou art afoot. Take thou what course thou wilt."[7]

KUEHN, J., DISSENTING:

¶1 Oklahoma's Stand Your Ground law clearly, if implicitly, includes a right to an interlocutory appeal following a judicial determination of immunity. Under 21 O.S.2011, § 1289. 25(f), an individual who uses certain kinds of defensive force against an intruder is "immune from criminal prosecution," which includes both charging and prosecuting. This determination by a district court judge is dispositive. If one is held to be immune from prosecution, then the case is over. If a district court judge finds that an individual is not immune from prosecution, then the criminal case continues.

¶2 The majority finds there is no right for a defendant to appeal because one is not explicitly provided for in the Stand Your Ground statute. This finding disregards the fact that other Oklahoma criminal statutes have been interpreted to include an appeal right where it is not explicitly written in the statute. One example is found in the Interstate Agreement on Detainers Act, 22 O.S.2011, §§ 1345–1349; *see Hopkins v. LaFortune,* 2016 OK CR 25, ¶ 1, 394 P.3d 1283, 1284. In 1999, this Court found that a defendant had the right to appeal a decision to revoke or terminate participation in Drug Court, although the statute provided no explicit right to appeal. *Hagar v. State*, 1999 OK CR 35, ¶ 12, 990 P.2d 894, 898. Of course, some criminal statutes explicitly allow or disallow an appeal. 10A O.S. 2011, § 2-5-101(G) (order certifying a person as a child or denying the request for certification as a child shall be a final order, appealable when entered); 10A O.S.2011, § 2-5-203 (decision to join multiple youthful offender offenses shall not be appealable as a final order). Because a district court order regarding Stand Your Ground immunity is dispositive, an intermediate appeal is appropriate.

¶3 I agree with Judge Lewis that McNeely's appeal falls under a writ of prohibition. A defendant seeking review from a pretrial decision denying a Stand Your Ground claim must establish that the court has exercised a judicial power unauthorized by law, and that exercise of power resulted in injury for which there is no other adequate remedy. Rule 10.6(A), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2018). Immunity from prosecution, a right which is necessarily lost if a prosecution continues, is exactly the kind of dispositive claim ripe for a writ of prohibition.

¶4 The majority and concurring opinions all refer to the ambiguity of the term "immunity" under the statute, but the intent of the Legislature is clear. If a district court judge finds you are immune under the statute, you are immune from prosecution – in fact, the statute goes even further and explicitly states you should not be charged with a crime. This language, explicitly granting immunity from criminal prosecution, was added by amendment in 2011, and was not included in any previous version. The amendment proves the Legislature intended "immunity" to mean what it says. We must construe this provision according to the plain and ordinary meaning of its language, as our "fundamental principle" is to give effect to the Legislature's intent. *Gerhart v. State*, 2015 OK CR 12, ¶ 14, 360 P.3d 1194, 1198.

¶5 The Oklahoma Legislature amended the Stand Your Ground statute to make clear that it includes a right to immunity, distinguishing it from a traditional self-defense claim. On its face, "immunity" means that there will be no further prosecution. According to the procedure we set forth in *State v. Ramos*, this determination is made by a district court judge. *State v. Ramos*, Nos. S-2013-509 & S-2013-510, slip op. at 9-10 (Okl.Cr. June 9, 2015) (not for publication). A special judge could only make such a ruling if she was fulfilling the role of a district court judge by agreement of the parties. Therefore, the only avenue of appeal is to this Court.

¶6 The trial court's decision on a Stand Your Ground claim is a final disposition of the issue of immunity from prosecution. While a defendant may raise the issue as a defense at trial, obviously if he is defending against charges during a trial, his right not to be prosecuted no longer exists. The majority as good as admits this when it says that a defendant must be prosecuted "to some extent" to determine whether he is immune. The defendant must establish he is factually entitled to immunity before the statute applies. The majority disregards the fact that this particular factfinding happens before trial begins. In a pretrial hearing the State and defendant present evidence, and the trial court makes factual and legal findings and rules on the Stand Your Ground issue. If the ruling is in the defendant's favor, he goes free. The majority suggests that the presentation of evidence and factfinding which take place in a pretrial hearing is "the essence of a criminal prosecution", comparable to a trial, and thus, it implies, immunity is preserved even if a trial occurs. It is not. The Legislature did not say that a person fitting the parameters of § 1289.25 could be prosecuted to the extent necessary to establish that his use of force was reasonable and justified; nor did it say that immunity is lost when evidence is presented in pretrial proceeding. The Legislature said instead that person "is immune from criminal prosecution and civil action", including "charging or prosecuting the defendant." 21 O.S § 1289.25(F). There is no equivocation in that language.

¶7 I am deeply disturbed by the majority's decision here, which removes all possibility of pretrial appeal from the defendant while preserving the State's right to a pretrial appeal. This Court's previous decisions granted both parties a right to interlocutory review. In fact, this Court has previously allowed the State to appeal a pretrial decision granting Stand Your Ground immunity in two different ways. In *Ramos* we determined that, because such a decision involves a legal bar to further prosecution, the State could only appeal it under 22 O.S.2011, § 1053(3) as a reserved question of law. *Ramos,* Nos. S-2013-509 & S-2013-510, slip op. at 8-9.[1] Under a reserved question of law, this Court will answer the question presented, but even if the answer is in the State's favor that particular prosecution remains barred. *See, e.g., City of Norman v. Taylor,* 2008 OK CR 22, ¶ 8, 189 P.3d 726, 729. However, we held in *State v. Cooper* that the State may appeal such a decision under 22 O.S.2011, § 1053(4) *where a defendant raises Stand Your Ground immunity in a motion to quash,* rather than moving to dismiss the charges directly under Stand Your Ground. *State v. Cooper,* No. S-2014-961, slip op. at 6-7 (Okl.Cr. July 5, 2015) (not for publication). Of course, if this Court grants a State appeal under § 1053(4), the prosecution may proceed. So the State will always have an avenue of appeal from an unfavorable decision below, and may have the opportunity to continue the prosecution, depending on how a defendant happens to raise the issue in the trial court.

¶8 After today's decision, by contrast, defendants cannot appeal at all, and must undergo prosecution (losing their immunity from prosecution) before this Court will even hear their claim. Such a result is fundamentally unfair. Because a trial court's pretrial Stand Your Ground decision is final on the question of immunity, both the State and the defendant should have an equal right to an interlocutory appeal of the decision before this Court. Only that way will both parties be protected and the Legislature's clear intent be preserved.

¶9 Allowing defendants an interlocutory appeal through writ of prohibition – and thus preserving both legislative intent and parity between the parties – is not, as my colleagues fear, an act of judicial legislation. Rather, it is "incidental to judicial administration." *State ex rel. Haskell v. Huston*, 1908 OK 157, ¶ 75, 97 P. 982, 995, 21 Okla.782. We are deciding a question of law, not policy. The Legislature intended that individuals who are immune under the statute should not be prosecuted or even charged. To give effect to this intent and preserve immunity, Stand Your Ground *must* in-clude an interlocutory appeal. That determination is incidental to the judicial administration of the law as the Legislature wrote it. *Id.* In its narrow focus on whether a right to appeal is explicitly written in the statute, the majority strips away the explicit language, which is written in the statute, granting immunity from prosecution. The majority thus fails to honor the Legislature's intent that a defendant im-mune under Stand Your Ground should be free from prosecution. I dissent.

ROWLAND, JUDGE, SPECIALLY CONCURRING:

¶1 Some may believe today's summary opinion to be about whether McNeely should have a right to appeal a pretrial immunity ruling

under 21 O.S.2011, § 1289.25. It is not. It is about whether we, as an appellate court, have the power to fashion such an appeal in the absence of legislative action. We do not.

¶2 In deciding this case we confront no less an oracle than the doctrine of the separation of governmental powers, implicit in the structure of the federal constitution and explicitly stated in the Oklahoma Constitution:

> The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; and except as provided in this Constitution, the Legislative, Executive, and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others.

Okla. Const. art. IV, § 1.

¶3 Were this Court to craft a right of appeal from a judge or magistrate's ruling on a claim of "Stand Your Ground" immunity, it would in my view constitute legislating in derogation of the separation of powers. The fact that adding such a provision might improve the statute or better effectuate its aims is of no moment, because "it is not our place to interpret a statute to address a matter the Legislature chose not to address, even if we think that interpretation might produce a reasonable result." *State v. Young*, 1999 OK CR 14, ¶ 27, 989 P.2d 949, 955. *See also Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951, 103 S.Ct. 2764, 2784, 77 L.Ed.2d 317 (1983) ("The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.").

¶4 The right to appeal an order or judgment is statutory and this Court has refused to expand existing statutory appellate rights by interpretation. *See, e.g., State v. Humphrey,* 1947 OK CR 129, 85 Okl.Cr. 153, 155-56, 186 P.2d 664, 665 ("The right of the state to take an appeal is governed by statute and it has been held that the statutory authority cannot be enlarged by construction." (citing *State v. Gray,* 1941 OK CR 42, 71 Okl.Cr. 309, 111 P.2d 514)). This rule applies with even more force when the question involves not just an expansion of an existing appellate right, but the creation of one which is entirely absent from the statute. "The wisdom of legislative acts is not a matter for the courts to determine. Legislative power not wisdom is the concern of the courts." *Ex parte Pappe*, 1948 OK CR 128, 88 Okl.Cr. 166, 173, 201 P.2d 260, 263. Appeal is a creature of statute and exists only when expressly authorized. *Weatherford v. State,* 2000 OK CR 22, ¶ 3, 13 P.3d 987, 988. *See also White v. Coleman*, 1970 OK CR 133, ¶ 11, 475 P.2d 404, 406.

¶5 Specifically, 22 O.S.2011, § 1051(a) establishes a criminal defendant's statutory right to appeal from a judgment against him or her and provides in relevant part:

> An appeal to the Court of Criminal Appeals may be taken by the defendant, as a matter of right from any judgment against him, which shall be taken as herein provided; and, upon the appeal, *any decision of the court or intermediate order made in the progress of the case may be reviewed ….*

(emphasis added). An adverse ruling denying immunity under Section 1289.25 is nothing more than an intermediate order made in the progress of the case that is reviewable on direct appeal following conviction, the adequacy of relief at that time notwithstanding. The defendant has been afforded the pretrial opportunity under Section 1289.25 to make his or her case for immunity and that is all the Legislature has provided.

¶6 In *State v. Ramos*, No. S-2013-509 (Okla.Cr. June 9, 2015) (unpublished), the majority found that review of an adverse immunity ruling falls under this Court's original jurisdiction to issue writs of prohibition and therefore legislative action was unnecessary. Okla. Const. art. VII, § 4. The underlying reasoning focused on what the majority viewed as the unfairness of a right without an adequate remedy because the right to immunity from prosecution "is effectively lost if the defendant is erroneously forced to stand trial." As Judge Hudson's summary opinion points out, the use of the term "immune from criminal prosecution" creates some confusion as it is impossible for one to have absolute immunity from *any* prosecution when determination of that immunity requires at least *some* initial prosecution. In any event, the statute gives the accused the right to have a judge rule on his claim of immunity but I find no evidence in the text of this statute that the Legislature intended anything further in the way of interlocutory appeal.

¶7 Assuming for argument one believes such a right does exist: Exactly what are the contours of that right? Does it require an immediate appeal to this Court, or would an appeal to

the trial judge or presiding District Judge suffice? Shall it be available to both parties, or only to one or the other? My point is that choices would have to be made in fashioning this right, and the selection of policy choices from among a variety of available options is the very essence of legislating. This Court has recognized:

> It is our duty to declare the law as we find it, whether or not we agree as to its policies or purposes. If the law does not meet the approval of the people, they alone, either through the Legislature or the initiative, have the power to change it, not the courts. Judicial legislation is not in accord with popular institutions. Everything in nature legislative, when not incidental to judicial administration, is by express organic provision denied to the judiciary.

State ex rel. Haskell v. Huston, 1908 OK 157, ¶ 75, 21 Okl. 782, 97 P. 982, 995.

¶8 Even were it possible for this Court to create an appellate remedy without doing violence to the doctrine of separation of powers, it could not be done by extraordinary writ without doing violence to our jurisprudence in those two areas. As pointed out in today's summary opinion, one seeking a writ of prohibition must show, among other things, the exercise of judicial authority not authorized by law, but the exercise of authority by a trial judge ruling on the question of immunity is explicitly authorized by law. One seeking a writ of mandamus must show, among other things, a clear legal right to the relief sought and that the trial court is refusing to perform a plain legal duty not involving the exercise of discretion. A trial court's ruling on this issue is the very epitome of an exercise of discretion, and no defendant can show a clear legal right to relief which doesn't exist until this Court makes it exist.

¶9 Had I drafted this statute, I would likely have included some vehicle for review of the initial ruling on the question of immunity. But that belief, however well founded and sincerely held, does not equate to judicial authority where none otherwise exists. Whether or not I think the Legislature has given an accused who claims this immunity enough protection doesn't change the amount of protection the Legislature has clearly given. Where routine policy matters are concerned, garnering the support of a majority of this Court will never be an adequate substitute for garnering the support of a majority of the members of the Legislature.

¶10 Because McNeely has no legal right to interlocutory appeal from Judge LaFortune's Order, she has not shown, nor can she show, that she has a clear legal right to the relief she seeks. I agree the request for Writ of Mandamus should be denied.

HUDSON, J.

1. This cited version was in effect on the date Petitioner's alleged crime was committed on January 11, 2013.

LEWIS, V.P.J.

1. William Shakespeare, *The Tragedy of Julius Caesar,* act 3, sc. 2, l. 74, *The Complete Pelican Shakespeare* 1295 (S. Orgel & A.R. Braunmuller, eds., Penguin 2002)

2. *Wood v. People*, 255 P.3d 1136, 1141-42 (Colo. 2011); *Bretherick v. State,* 170 So. 3d 766, 778 (Fla. 2015)(pre-trial original proceeding or petition for writ of prohibition are proper methods to challenge denial of Stand Your Ground immunity).

3. The U.S. and Oklahoma Supreme Courts have long recognized that immunity "is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411 (1985). Immunity is "an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law." *Id.* An erroneous denial of immunity is therefore "effectively unreviewable on appeal from a final judgment." *Id.*, 472 U.S. at 527, 105 S. Ct. at 2816, quoted in, *McLin v. Trimble*, 1990 OK 74, ¶¶ 8, 795 P.2d 1035, 1038.

4. Article 7, § 4 of the Oklahoma Constitution authorizes the Court of Criminal Appeals, "in criminal matters . . . to issue, hear and determine writs of . . . prohibition." This original jurisdiction to issue writs extends to proceedings in which the relationship of superior and inferior court exists between the Court of Criminal Appeals and the lower tribunal. As the Court of Criminal Appeals possesses exclusive *appellate* jurisdiction in criminal matters, it *also* possesses *original* jurisdiction concerning writs of prohibition, mandamus, and habeas corpus in such proceedings. *See Carder v. Court of Criminal Appeals*, 1978 OK 130, ¶ 12, 595 P.2d 416, 419. Title 22 O.S.2011, § 9 provides that "[t]he procedure, practice and pleadings . . . in criminal actions or in matters of criminal nature, not specifically provided for in this code, shall be in accordance with the procedure, practice and pleadings of the common law." Prohibition was the common law writ by which a superior court commanded a halt to unlawful proceedings in a lower court. III W. Blackstone, *Commentaries on the Laws of England* 112 (1769); *Pulliam v. Allen*, 466 U.S. 522, 532-33, 104 S. Ct. 1970, 1976, 80 L. Ed. 2d 565 (1984); *State ex rel. Wester v. Caldwell*, 84 Okl.Cr. 334, 339-41, 181 P.2d 843, 847 (1947).

5. Joseph Heller, *Catch-22* (The Modern Library 1961).

6. A partial list of immunities from criminal prosecution under Oklahoma Statutes includes 10A O.S.2011, § 1-2-104 (granting immunity "from any liability, civil or criminal," for person making good faith report of suspected child abuse or neglect); § 1-2-109(A) (prohibiting child abandonment or neglect prosecution for parent who relinquishes child (7) days old or younger to medical provider or rescuer); § 1-2-109(H)(granting medical provider or child rescuer immunity "from any criminal liability that might otherwise result" from good faith action of receiving a relinquished child); 21 O.S.2011, § 1290.24 (granting immunity from "liability" in connection with handgun licensing); § 1767.4 (granting immunity from "any civil or criminal action or liability" to telephone companies and employees tracing unauthorized calls); 22 O.S.2011 §§ 36, 36.2 (extending the same civil and criminal immunity as a law enforcement officer to citizens aiding peace officers and park rangers); 22 O.S.2011, § 59 (granting "immunity from any liability, civil or criminal," to health care workers reporting suspected domestic abuse); 22 O.S.2011, § 60.26 (granting agencies, law enforcement officers, prosecutors, and state officials immunity "from civil and criminal liability" for enforcing foreign protective orders); 22 O.S.2011, § 736 (granting witness immunity from civil or criminal process for any act prior to entry pursuant to out of state subpoena); 37A O.S.Supp.2017, § 6-126(C) (granting immunity "from

criminal prosecution" for intoxicated person who requests emergency medical assistance for an individual who reasonably appeared to be in need of medical assistance due to alcohol consumption, and cooperated with authorities at the scene); 59 O.S.2011, § 1256.2 (granting social worker immunity "from civil liability or criminal prosecution for submitting in good faith" on professional misconduct); 59 O.S. Supp.2016, § 1370.3 (granting immunity from "any civil or criminal liability" resulting from good faith reports that psychologist is practicing while mentally or physically impaired); 70 O.S.2011, § 5-146.1(B) (granting school employee "immunity from all civil or criminal liability" for good faith report of minor involved in gang activity).

7. *The Tragedy of Julius Caesar,* act 3, sc. 2, ll. 252-53.

KUEHN, J.

1. While it may be more common that only issues concerning the facts of the case will arise from a pretrial decision granting Stand Your Ground immunity – issues clearly not answerable under § 1053(3) – it is certainly possible that the State will present questions of law which fit squarely within the limits of a reserved question of law. For example, in *Ramos* the State presented three questions of law, which were answered by this Court. *Ramos*, Nos. S-2013-509 & S-2013-510, slip op. at 12.

2018 OK CR 19

RENESE BRAMLETT, Appellant, v. THE STATE OF OKLAHOMA, Appellee.

Case No. F-2016-1052. May 31, 2018

OPINION

ROWLAND, JUDGE:

¶1 Appellant Renese Bramlett was convicted by jury in the District Court of Tulsa County, Case No. CF-2015-4266, of First Degree Murder, in violation of 21 O.S.2011, § 701.7. The jury assessed punishment at life imprisonment without the possibility of parole. The Honorable William J. Musseman, District Judge, presided at trial and sentenced Bramlett accordingly. Bramlett appeals his Judgment and Sentence, raising the following issues:

(1) whether his statement should have been suppressed as fruit of the poisonous tree because his arrest violated Oklahoma law and was therefore illegal;

(2) whether the admission of his video recorded interview was error which violated his rights under the Fourteenth Amendment;

(3) whether he was denied his right to due process and a fair trial by the admission of evidence of prior bad acts;

(4) whether inadmissible hearsay was admitted in violation of his rights under the Confrontation Clause;

(5) whether a discovery violation deprived him of his right to a fair trial;

(6) whether the trial court erred in ruling that Corporal Shilling's testimony was lay testimony rather than expert testimony; and

(7) whether prosecutorial misconduct deprived him of a fair trial requiring modification of his sentence.

¶2 We affirm the judgment but vacate the sentence of the district court and remand the case for resentencing.

Background

¶3 On the night of March 19, 2015, Michelle Spence took her fourteen and eleven year-old sons to their grandparents' house to spend the night. Between 6:00 and 7:00 p.m. the following day, their grandfather took the boys home to Spence's house and dropped them off. Their mother wasn't home and when Spence had not come home by 10:00 p.m., the boys walked down the street to see if she was at Renese Bramlett's apartment.[1] When the two boys arrived at Bramlett's apartment complex, they saw their mother's vehicle, a blue Mercedes-Benz SUV, parked in the parking lot of the apartment complex across the street. They tried to call Bramlett but he did not answer. The boys walked around the apartments and when they did not find their mother, they went to her vehicle to charge their phone. Inside the SUV they found their mother dead in the backseat. She was naked and wrapped in a blanket. The boys went to an apartment for help and the occupants called the police. Michelle Spence's death was subsequently ruled a homicide caused by asphyxia due to strangulation.

¶4 The case against Bramlett was pieced together from information the police gathered from Spence's neighbors, video surveillance footage from a security guard at the apartment complex where Spence's SUV was found, video footage from a QuickTrip located between Spence's house and Bramlett's apartment, and cell phone records from Spence's phone and from Bramlett's phone. Cell phone records indicated that Spence called Bramlett from her home at 10:48 p.m. on March 19, 2015. At around 11:11 p.m. video surveillance from a QuickTrip located between Spence's house and Bramlett's apartment showed a Cadillac similar to Bramlett's traveling on 129th East Avenue in the direction of Spence's house. Cell phone records showed that Bramlett's phone was taken to Spence's house around this time and remained there until after 2:00 a.m. when it was taken back to his apartment. Spence's phone remained at her

house until 2:10 a.m. when it, too, was taken to Bramlett's apartment. Video Surveillance from the Quicktrip showed a vehicle that looked like Spence's SUV traveling on 129th East Avenue toward Bramlett's apartment around this same time at 2:14.

¶5 A security guard patrolling several apartment complexes in his vehicle noticed Spence's SUV in the Stonecrest apartment complex across the street from Bramlett's apartments during his patrol at 3:57. The SUV had not been there when he drove by earlier at 11:07.

¶6 At approximately 6:45 a.m. on March 20, 2015, when Spence's neighbor left his house to go to work, there was a dark Cadillac blocking his driveway. Another neighbor also noticed the Cadillac between 7:30 and 7:45 a.m. She had seen it at Spence's residence before. Video surveillance from the QuickTrip showed an African-American man with a body type similar to Bramlett's walking in the direction of Spence's house at about 7:30 a.m. Approximately 28 minutes later the QuickTrip video surveillance showed a green Cadillac traveling in the direction of Bramlett's apartment.

¶7 Cell phone records showed that a call was made from Bramlett's phone to the bus station and that Spence's phone was at the bus station at 1:47 p.m. on March 20, 2015. That was the location of the last activity on Spence's phone. Bramlett's Cadillac was discovered later parked near the bus station.

¶8 Bramlett was subsequently located in Chicago, Illinois. He was arrested on a material witness warrant and taken into custody in Chicago where he was interviewed by Tulsa detectives on July 22, 2015. During this interview, Bramlett denied seeing Spence on the night she was killed; he claimed to have last seen her several days earlier. When advised that the detectives had evidence to the contrary, Bramlett terminated the interview. He was arrested, charged with first degree murder, and returned to Oklahoma to stand trial.

¶9 Bramlett testified at his trial. He acknowledged that he and Spence had been friends since 2012 and although they had been boyfriend/girlfriend in the past, they were not romantically involved at the time of her death. They remained friends because they used drugs together multiple times a week; their drug of choice was PCP. Bramlett testified that on Thursday, March 19, 2015, Spence contacted him right before he got off work around 10:30. He went home, got some PCP, and went over to her house. They smoked the PCP and when they had used all that he brought over, she wanted more. They got in her car and she drove him to his apartment where she left him to go meet her dealer to get more PCP. Bramlett testified that he made her leave her phone with him so that she would be sure to come back to get him. He wanted her to take him back to her house to get his car so that he would not have to walk there to get it. Bramlett testified that he eventually went to sleep until morning. When he awoke and Spence had not come back or called he started walking to her house to get his car. Bramlett testified that when he returned to his apartment complex in his car he noticed Spence's SUV parked in that parking lot of the complex across the street. He thought she had a drug deal there and started panicking because he was worried that something went wrong. Bramlett testified that he started operating out of fear because he knew that he was one of the last people to see her. He called the bus station, bought a ticket to Chicago, and left that day. He testified that Spence's phone died so he threw it into the trash at the bus station. Bramlett acknowledged that the QuickTrip video introduced by the State of the car driving by and person walking could have been his car and him. He denied that he killed Spence.

1. Legality of Arrest and Admissibly of Statement

¶10 Bramlett argues that his statement to the police should not have been admitted at trial because it was made during an illegal arrest and detention and was therefore fruit of the poisonous tree. Bramlett raised the issue below and appeals the trial court's ruling overruling his objection to the admission of his statement. This Court reviews a trial court's ruling on a motion to suppress for an abuse of discretion. *State v. Pope*, 2009 OK CR 9, ¶ 4, 204 P.3d 1285, 1287. *See also Gomez v. State*, 2007 OK CR 33, ¶ 5, 168 P.3d 1139, 1141. In reviewing a trial court's decision, we defer to the trial court's findings of fact unless they are clearly erroneous. *Gomez*, 2007 OK CR 33, ¶ 5, 168 P.3d at 1141-42. We review the trial court's legal conclusions derived from those facts *de novo. Id.*

¶11 As a general rule, a statement obtained through custodial interrogation after an illegal arrest should be excluded unless the chain of causation between the illegal arrest and the statement is sufficiently attenuated so that the confession was "sufficiently an act of free will

to purge the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 486, 83 S.Ct. 407, 416-417, 9 L.Ed.2d 441, 454 (1963). *See also Matthews v. State*, 1998 OK CR 3, ¶ 12, 953 P.2d 336, 341-42 (post-arrest statements made by an accused subsequent to an illegal arrest are potentially fruit of the poisonous tree and should be suppressed unless the making of such statements was an act of free will sufficient to purge the primary taint of the unlawful invasion).

¶12 Bramlett asserts that when Oklahoma authorities suspected his involvement in Spence's murder but did not yet have enough information to charge him, they issued a material witness warrant. He was taken into custody in Chicago on the material witness warrant and Tulsa detectives traveled to Chicago to ask his consent for an interview which he granted. Bramlett asserted below and again on appeal that because his arrest and detention on the material witness warrant was illegal, his statement made during the illegal arrest and detention should have been suppressed.[2]

¶13 Bramlett's complaint concerns his extradition to Oklahoma from Illinois under the Uniform Criminal Extradition Act (Extradition Act) (22 O.S.2011, §§ 1141.1 – 1141.30) and his summons from Illinois to Oklahoma as a material witness under The Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings (Uniform Act) (22 O.S.2011, §§ 721-727). While failure to follow the procedural requirements of either of these Acts would be relevant to a determination of whether Bramlett was properly removed from Illinois to Oklahoma, the allegation that he was removed to Oklahoma in violation of the procedural requirements of these Acts is not relevant to deciding whether his statement to the Tulsa detectives made before his removal was tainted by an illegal arrest and detention.

¶14 The specific question before us on appeal is whether Bramlett was under legal arrest and detention on a material witness warrant at the time he was interviewed in Chicago by the Tulsa Detectives. That determination requires review of the arrest warrant and related documents. Neither the material witness warrant nor any documents associated with it are included in the record before this Court on appeal. "In Oklahoma a defendant bears the burden to provide a sufficient record upon which this Court may determine the issue raised." *Hill v. State*, 1995 OK CR 28, ¶ 10, 898 P.2d 155, 160. *See also Boyd v. State*, 1987 OK CR 211, ¶ 11, 743 P.2d 674, 676. Failure to provide an adequate record waives review of the error on appeal. *Hill*, 1995 OK CR 28, ¶ 10, 898 P.2d at 160. Absent inclusion in the record of the material witness warrant and supporting documentation, this Court cannot decide this issue.[3]

¶15 We cannot find on this record that the trial court abused its discretion in denying his motion to suppress the statement. Relief is not required.

2. Video Interview

¶16 Bramlett's videotaped interview with detectives at the police station in Illinois showed him in the interview room in an orange jumpsuit and handcuffs which appeared to be fastened to his body. Prior to its admission into evidence, defense counsel objected to this exhibit on the grounds that the videotape depicted him in custody and was unnecessarily prejudicial. Counsel asked that the audio of the conversation be played for the jury but the video be omitted so that the jury would not see Bramlett handcuffed and in the jail jumpsuit. This request and objection was overruled because the trial court found it important for the jury to see Bramlett's demeanor during the interview. Bramlett complains on appeal that this ruling was error. Decisions on the admissibility of evidence are left to the sound discretion of the trial court and this court will not disturb the trial court's ruling absent a clear showing of abuse and resulting prejudice. *Baird v. State*, 2017 OK CR 16, ¶ 37, 400 P.3d 875, 885, quoting *Jones v. State*, 2006 OK CR 5, ¶ 48, 128 P.3d 521, 540.

¶17 The United States Supreme Court has held that, "the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Deck v. Missouri*, 544 U.S. 622, 629, 125 S. Ct. 2007, 2012, 161 L.Ed.2d 953 (2005). *See also Ochoa v. State*, 2006 OK CR 21, ¶ 21, 136 P.3d 661, 667-68. In *Deck*, the Court reasoned that routine use of visible shackling during the guilt phase of trial undermines the presumption of innocence, interferes with the accused's ability to communicate with his lawyer and participate in his own defense, and is an affront to the dignity of judicial proceedings. *Deck*, 544 U.S. at 631-32, 125 S.Ct. at 2013. Additionally, 22 O.S. 2011, § 15 provides:

> No person can be compelled in a criminal action to be witness against himself; nor

> can a person charged with a public offense be subjected before conviction to any more restraint than is necessary for his detention to answer the charge, and in no event shall he be tried before a jury while in chains or shackles.

¶18 Bramlett argues that although not specifically barred by statute or case law, these same concerns should have prohibited the jury from viewing him in jail clothing and handcuffs in the videotaped interview. Bramlett's argument is unpersuasive. Clearly, his appearance in the video in handcuffs and jail clothing had no bearing on his ability to communicate with his lawyer nor was it an affront to the judicial proceedings. While it is easy to understand how viewing a defendant in handcuffs and jail clothing during trial might risk diluting the presumption of innocence, the same cannot be said about exposure to a video showing the defendant in jail clothing and handcuffs during an interview prior to trial. As the State argues, most jurors would not be surprised by the fact that a defendant was handcuffed and wearing jail clothing while in jail prior to trial. *See Gilbert v. State,* 1997 OK CR 71, ¶¶ 80-81, 951 P.2d 98, 119, (rejecting a similar claim where a defendant was not tried in handcuffs or shackles but was seen restrained by such in a newspaper photograph introduced at trial). The concerns which arise when a criminal defendant appears at trial in jail clothing or shackles were not implicated under the circumstances of this case. The same degree of potential prejudice was simply not present and we decline to extend the *Deck v. Missouri* ruling to such situations. The trial court's ruling, that it was important that the jurors see Bramlett's demeanor during the interview to determine whether his statement was voluntary or the product of coercion, was not an abuse of discretion. The video of the interview was relevant and its probative value was not outweighed by the danger of unfair prejudice. See 12 O.S.2011, §§ 2402, 2403. This proposition requires no relief.

3. Evidence of Prior "Bad Acts"

¶19 Prior to trial the State filed a notice of its intent to introduce evidence of other bad acts pursuant to 12 O.S.2011, § 2404(B) as is required by *Burks v. State*, 1979 OK CR 10, ¶ 12, 594 P.2d 771, 773, overruled in part on other grounds in *Jones v. State,* 1989 OK CR 7, ¶ 7, 772 P.2d 922, 925. Defense counsel objected and after a hearing on the matter the objection was overruled. Counsel renewed the objection prior to the introduction of this evidence at trial thus preserving the error for review on appeal. Bramlett asserts on appeal that the trial court's ruling on the admissibility of this evidence was error; we review the district court's ruling for an abuse of discretion. *Miller v. State*, 2013 OK CR 11, ¶ 88, 313 P.3d 934, 966. "An abuse of discretion is any unreasonable or arbitrary action made without proper consideration of the relevant facts and law, also described as a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts." *Mitchell v. State*, 2016 OK CR 21, ¶ 13, 387 P.3d 934, 940. As this claim was properly preserved, the State must demonstrate on appeal that admission of the challenged evidence "did not result in a miscarriage of justice or constitute a substantial violation of a constitutional or statutory right." *Welch v. State*, 2000 OK CR 8, ¶ 10, 2 P.3d 356, 366.

¶20 Any "criminal conviction obtained through a trial must be based upon evidence establishing that the defendant committed the charged crime(s), rather than evidence of other offenses." *Miller,* 2013 OK CR 11, ¶ 89, 313 P.3d at 966. While evidence of other crimes or bad acts is not admissible to prove the character of a person in order to show action in conformity therewith, Oklahoma law specifically provides that evidence that a defendant has committed "other crimes" or "bad acts" may be admissible at trial to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. 12 O.S.2011, § 2404(B). This Court has held that:

> [I]n order to be admissible, evidence that a defendant has committed another crime or "other crimes": (1) must be probative of a disputed issue in the case being tried; (2) that there must be a "visible connection" between the charged crime(s) and the evidence sought to be introduced; (3) that the evidence of the other crime(s) must be necessary to support the State's burden of proof in the case being tried; (4) that the evidence of the other crime(s) sought to be introduced must be clear and convincing; and (5) that the probative value of the other crime(s) evidence must outweigh any unfair prejudice to the defendant resulting from its introduction.

Miller, 2013 OK CR 11, ¶ 89, 313 P.3d at 966 (internal footnotes omitted). Additionally, the

trial court must issue contemporaneous and final limiting instructions. *Welch*, 2000 OK CR 8, ¶ 8, 2 P.3d at 365.

¶21 The evidence of other "bad acts" at issue in this case was evidence that approximately sixteen months before Spence was killed, around November 9, 2013, Bramlett beat and strangled Spence resulting in her having to go to the hospital. The emergency room physician who treated Spence when she arrived at the hospital testified that Spence told him that her boyfriend had assaulted her. Michelle Spence's sister, Stephanie Spence, testified that Bramlett was Michelle's boyfriend at the time of the assault. Bramlett argues that this evidence did not fall within any of the exceptions listed in Section 2404(B). We disagree. Evidence of previous altercations between spouses or those involved in a close or dating relationship is relevant to show motive and intent. *See Cuesta-Rodriguez v. State,* 2010 OK CR 23, ¶ 27, 241 P.3d 214, 226; *Eizember v. State*, 2007 OK CR 29, ¶ 87, 164 P.3d 208, 232; *Harris v. State,* 2004 OK CR 1, ¶ 35, 84 P.3d 731, 747; *Short v. State*, 1999 OK CR 15, ¶ 40, 980 P.2d 1081, 1097.

¶22 In the present case, the evidence that Bramlett had strangled Spence on a prior occasion was relevant to establish both identity and intent and there was a connection between the evidence of the prior bad act and the crime charged in the present case. Furthermore, the evidence of the prior assault was clear and convincing and supported the State's burden of proof. The probative value of the evidence of the prior bad act was not substantially outweighed by the danger of unfair prejudice; it was relevant evidence admissible under 12 O.S.2011, § 2404(B). The court gave a contemporaneous limiting instruction in connection with the introduction of this evidence instructing the jury that they could not consider the evidence of other bad acts as proof of guilt or innocence of the offense charged; it was to be considered solely on the issue of Bramlett's alleged motive, intent, common scheme or plan or absence of mistake and accident. A proper limiting instruction was also given to the jury at the end of trial. The trial court did not abuse its discretion in allowing introduction of this evidence. Relief is not required.

4. Hearsay and Confrontation

¶23 Bramlett argues that the trial court erred in allowing the State to prove his prior bad act with inadmissible hearsay. As Bramlett did not raise this challenge at trial, he has waived appellate review of this issue for all but plain error. *Hogan v. State,* 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. To be entitled to relief for plain error, an appellant must show: "(1) the existence of an actual error (i.e., deviation from a legal rule); (2) that the error is plain or obvious; and (3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding." *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. "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." *Stewart v. State*, 2016 OK CR 9, ¶ 25, 372 P.3d 508, 514.

¶24 Bramlett argues on appeal that Stephanie Spence's testimony that he was Michelle Spence's boyfriend when Michelle was strangled in November of 2013 was inadmissible because it was hearsay which fell under no exception to the hearsay rule. He claims that Stephanie Spence's knowledge about the status of his and Michelle Spence's relationship during that time could only have been based upon what Michelle Spence told her and that Stephanie Spence admitted as much at trial. This argument is not supported by the record. The record shows that defense counsel actually made this argument prior to trial during a hearing on the State's notice of intent to introduce evidence of other bad acts. The prosecutor responded that Stephanie Spence's testimony about Michelle Spence's and Bramlett's relationship would not be hearsay because her knowledge of the relationship was based on her personal observations; she socialized with Michelle and Bramlett during this time and she knew from her observations that Bramlett was Michelle Spence's boyfriend when she was assaulted. Defense counsel did not object to Stephanie Spence's testimony at trial, presumably because he anticipated her to further clarify how she knew that Bramlett was her sister's boyfriend at the time of the assault. The record does not support Bramlett's claim that Stephanie Spence's testimony was hearsay.[4] The admission of this testimony was not error, plain or otherwise.

¶25 Bramlett also argues in this proposition that the introduction of Stephanie Spence's testimony violated his right to confrontation because the Confrontation Clause forbids the admission of testimonial hearsay. *See Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 1365, 158 L.Ed.2d 177 (2004) (The United States

Supreme Court held that the Sixth Amendment's right to confrontation bars the admission of "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."). Again, the record does not support Bramlett's claim that the testimony at issue was hearsay. Stephanie Spence's testimony was based on her personal observations and she was available for cross examination at trial. Accordingly, his claim that the testimony violated his constitutional right to confrontation fails.

5. Discovery

¶26 Prior to trial defense counsel filed a motion to produce requesting that the State disclose all material in the State's possession which was favorable to the defendant or exculpatory in nature. In his motion the defendant requested that the trial court "conduct an *in camera* inspection of the District Attorney's file in order that a neutral and detached judicial officer may determine the existence or nonexistence of such material." Bramlett argues on appeal that the district court's failure to conduct the requested *in camera* inspection of the District Attorney's file violated the Oklahoma Discovery Code and his right to due process under the United States Constitution.

¶27 Bramlett's argument centers around the "decline sheet" presumably showing the reason(s) why the State declined to file charges against him for the assault against Michelle Spence reported in November of 2013. He speculates that this document could have been exculpatory if it showed that he was not charged because there was insufficient evidence to establish probable cause to believe that he committed that crime. It would, Bramlett speculated, refute the State's evidence that he was Michelle Spence's boyfriend at the time of the 2013 assault and the State's evidence of his alleged prior bad act. While defense counsel raised this issue at the pretrial hearing on the State's notice of intent to introduce evidence of other bad acts, he did not object to this alleged discovery violation at trial. Accordingly, our review on appeal is for plain error. *See Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

¶28 The Oklahoma Criminal Discovery Code provides that, "[t]he discovery order shall not include discovery of legal work product of either attorney which is deemed to include legal research or those portions of records, correspondence, reports, or memoranda which are only the opinions, theories, or conclusions of the attorney or the attorney's legal staff." 22 O.S.2011, § 2002(E)(3). The prosecutor's "decline sheet" would be considered work product and not subject to discovery under section 2002(E)(3). That a document is not discoverable under state law, however, does not foreclose the possibility that the State was nonetheless required to disclose it; due process requires the State to disclose exculpatory and impeachment evidence favorable to an accused. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). *See also Nauni v. State*, 1983 OK CR 136, ¶ 31, 670 P.2d 126, 133, citing *Castleberry v. Crisp*, 414 F.Supp. 945 (W.D. Okl. 1976)("While the work-product privilege may not be applied in derogation of a criminal defendant's constitutional rights to disclosure of evidence favorable to the defendant, . . . such evidence must be material to either guilt or to punishment before it is discoverable."). This Court has held that, "[t]o establish a *Brady* violation, a defendant must show that the prosecution suppressed 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, 541. "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." *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985). The question is whether, in the absence of the nondisclosed information, the defendant received a fair trial resulting in a verdict worthy of confidence. *See Jones*, 2006 OK CR 5, ¶ 51, 128 P.3d at 541. *See also Wright v. State*, 2001 OK CR 19, ¶ 38, 30 P.3d 1148, 1157. There is no indication from the record that there was a *Brady* violation in this case.

¶29 Bramlett complains that while it is clear that Spence was injured in the prior assault and that she told medical personnel that her boyfriend had injured her, he states, "we only have her sister's word that [he] was her only boyfriend at the time, or even that he was her boyfriend at all." Bramlett argues that because the "decline sheet" is not part of the record we cannot know whether or not it was truly exculpatory. He asserts that the mere fact that the State declined to charge him with the prior assault creates a sufficient question to either reverse and remand the case for a new trial or

to remand the case for an *in camera* hearing. The record belies his claim. When the State filed its notice of intent to introduce evidence of other wrongs, crimes or bad acts, the prosecutor attached a copy of the police report made by the officer who spoke with Spence at the hospital when he investigated the reported assault. The officer noted in this report that Spence named Bramlett as her assailant. Defense counsel mentioned this report at the hearing on the notice of intent to introduce evidence of other bad acts and acknowledged that it was "clear that [Spence] was not cooperative." We find no error, plain or otherwise, in the trial court's denial of Bramlett's request for an *in camera* inspection of the District Attorney's records to look for exculpatory evidence. This proposition is without merit and relief is not required.

6. Lay Testimony

¶30 Tulsa Police Department Corporal Nathan Schilling testified at trial about where Spence's and Bramlett's cell phones were physically located shortly before, during, and shortly after the crime was alleged to have happened. His testimony was based upon his review of cell phone data retrieved from both Spence's and Bramlett's cell phones as well as geographic location data from Google and Facebook. The trial court ruled prior to trial that Corporal Schilling could not give this testimony as an expert but could testify as a lay witness. Bramlett argues on appeal that Corporal Schilling's testimony was not lay testimony and the trial court abused its discretion in permitting Schilling to give expert testimony without first performing the 'gatekeeping' function of determining that Schilling was qualified as an expert and that his opinions were reliable. The district court's rulings on the admissibility of evidence are reviewed for an abuse of discretion. *See Ashton v. State,* 2017 OK CR 15, ¶ 26, 400 P.3d 887, 895. The record reveals, however, that in this case Bramlett waived appellate review of this issue for all but plain error by failing to object at trial. *See Williams v. State*, 2008 OK CR 19, ¶ 80, 188 P.3d 208, 225. Again, to be entitled to relief for plain error, Bramlett must show: "(1) the existence of an actual error (i.e., deviation from a legal rule); (2) that the error is plain or obvious; and (3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding." *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

¶31 Title 12 O.S.2013, § 2702 provides that under certain conditions, "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise…." A lay witness, on the other hand, may testify in the form of opinions or inferences provided the opinions or inferences are rationally based on the witness' perception, are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue and are not based on scientific, technical or other specialized knowledge. 12 O.S.2011, § 2701.

¶32 Prior to trial defense counsel filed a bench brief regarding the admissibility of cell phone tower records and geographic location data from cell phones in which the defense objected to the propriety of using lay witnesses as experts arguing, "[t]he defense would object to any testimony or evidence from any police lay witnesses explaining the scientific, technical or specialized knowledge involved in the cellular tower data or geo location data as this would exceed the appropriate limits established by 12 O.S. § 2702 and the case law construing it." The trial court treated the brief as a motion in limine and after an initial hearing the court determined it was necessary to hold a *Daubert*[5] hearing to assess Corporal Schilling's training and the extent of his knowledge about this information.

¶33 During the *Daubert* hearing Corporal Schilling testified that he collected records from Spence's and Bramlett's cell phone carriers and from Facebook and Google and from this information he was able to plot a general timeline of where the phones were located. Corporal Schilling agreed that he was not reaching a scientific conclusion but rather was drawing together facts to reach an inference. Defense counsel's cross examination of Corporal Schilling was primarily focused on discrediting him as an expert and at the conclusion of the hearing the prosecutor argued that although Corporal Schilling had some training, the better part of his testimony was more properly characterized as lay witness opinion testimony. Defense counsel agreed stating, "what [Corporal Schilling] wants to testify to is to his opinion, his lay opinion, based on some specialized knowledge that he has, which is outside of *Daubert*."

¶34 At the conclusion of the *Daubert* hearing, the trial court noted that they were not dealing with a new and novel science but rather the hearing was about what the parameters of the testimony should be. The district judge stated, "[Corporal Schilling]'s kind of a lay witness talking about what these data points mean to him after some specialized training. … [T]here's a line somewhere where it would cross into the expert arena, which would not be proper." The judge ruled that Corporal Schilling's testimony was that of a lay witness and he would be allowed to testify about Spence's and Bramlett's phones initiating or having contact with Facebook or Google maps but he could not testify about who was using the phones. Defense counsel, who had specifically objected to the court or the prosecutor calling Corporal Schilling an expert, stated that she did not object to this ruling. To the extent that defense counsel was in agreement with the district court's pretrial ruling and then did not object to Corporal Schilling's testimony at trial, the claim is waived as invited error. *See Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 73, 241 P.3d 214, 237. *See also Ellis v. State*, 1992 OK CR 45, ¶ 28, 867 P.2d 1289, 1299 (opinion on rehearing) (holding that error invited by defense counsel cannot serve as basis for reversal because defendant cannot invite error and then seek to profit from it); *Pierce v. State*, 1990 OK CR 7, ¶ 10, 786 P.2d 1255, 1259 ("[w]e have often recognized the well established principal that a defendant may not complain of error which he has invited, and that reversal cannot be predicated on such error").

¶35 Nevertheless, the claim also fails on the merits. We agree with the district court that Corporal Schilling's testimony did not express an expert opinion based upon novel technical, or specialized knowledge. Rather, he reviewed records of cell phone data retrieved from both Spence's and Bramlett's cell phones as well as geographic location data from Google and Facebook and gave proper lay opinion testimony about where the cell phones were located at different times based upon his training and experience as a police officer. The testimony was admissible under 12 O.S.2011, § 2701. The trial court's ruling was not error, plain or otherwise.

7. Prosecutorial Misconduct

¶36 In his final proposition of error Bramlett seeks relief based upon claims of prosecutorial misconduct occurring during closing argument.[6] One instance of alleged misconduct was met with contemporaneous objection at trial and the other was not. The alleged misconduct not objected to at trial is reviewed for plain error only. *Barnes v. State*, 2017 OK CR 26, ¶ 6, 408 P.3d 209, 213. Again, "[p]lain error is an actual error, that is plain or obvious, and that affects a defendant's substantial rights, affecting the outcome of the trial." *Mitchell v. State*, 2016 OK CR 21, ¶ 24, 387 P.3d 934, 943. Relief is only granted where the prosecutor's flagrant misconduct so infected the defendant's trial that it was rendered fundamentally unfair. *See Jones v. State*, 2011 OK CR 13, ¶ 3, 253 P.3d 997, 998. It is the rare instance when a prosecutor's misconduct during closing argument will be found to be so egregiously detrimental to a defendant's right to a fair trial that reversal is required. *Pryor v. State*, 2011 OK CR 18, ¶ 4, 254 P.3d 721, 722.

¶37 Bramlett argues that the prosecutors twice misstated the consequences of a sentence of life imprisonment with the possibility of parole when they told the jury that if Bramlett was sentenced to life with the possibility of parole he would be paroled after serving 85% of forty-five years. Bramlett is, as the State concedes, correct. This was a misstatement of the law because Bramlett would be required to serve 85% of a life sentence before he would be "eligible for consideration for parole." 21 O.S. Supp.2014, § 13.1. There was no guarantee that he would be paroled.

¶38 On at least two occasions this Court has condemned as improper the very argument advanced by the prosecution here. *See Florez v. State*, 2010 OK CR 21, 239 P.3d 156; *Taylor v. State*, 2011 OK CR 8, 248 P.3d 362. In *Florez* the prosecutor told the jury in closing argument:

> And you're also given an instruction that tells you he will only do 85 percent of what you give him. He's not going to do all of it. So you've got to take that into consideration. He's only going to do 85 percent of it.

Florez, 2010 OK CR 21, ¶ 5, 239 P.3d at 158. This Court found that the prosecutor's argument was, "a misleading misstatement of law which constitutes a substantial violation of Florez's constitutional and statutory right to have his jury correctly instructed regarding sentencing." *Id.*, 2010 OK CR 21, ¶ 6, 239 P.3d at 158. A year later, in *Taylor*, where the prosecutor made comments virtually identical to those condemned in *Florez*, we cautioned:

> Prosecutors must be careful that their statements about the 85% Rule do not mischaracterize the statute as some form of automatic release; the statute is a limitation on a prisoner's legal eligibility 'for consideration for parole' and does not guarantee or require any form of early release.

Taylor, 2011 OK CR 8, ¶ 52, 248 P.3d at 378 (emphasis in original).

¶39 Despite the error, this Court declined to grant relief in either *Florez* or *Taylor.* The Court found in Florez that the defendant failed to show prejudice; the range of punishment options was wide and the jury sentenced Florez far below the maximum allowed and even below the term of years encouraged by the prosecutor. *Florez,* 2010 OK CR 21, ¶ 9, 239 P.3d at 159. In *Taylor,* the Court noted that the prosecutor's improper argument mischaracterizing the 85% Rule was mitigated by other statements made by the prosecutor directing the jurors to the instructions telling them that the instructions set forth the ground rules explaining how the 85% Rule works. *Taylor,* 2011 OK CR 8, ¶ 53, 248 P.3d at 378. There were no such mitigating factors here.

¶40 During the first closing argument the prosecutor told the jury that if Bramlett was sentenced to life with the possibility of parole he would be required to serve 85% of forty-five years, "which means in 38 1/3rd years, should he make it to that age, he will be paroled." Defense counsel objected and the objection was overruled. Then again, in the State's final closing, the prosecutor stated, "If you give [Bramlett] life, he will only serve 85 percent of the crime. He will only serve those 38 years, while Michelle is gone forever." As in *Florez* and *Taylor,* the prosecutors' argument flatly misstated the law's intent and effect and encouraged jurors to misapply the law in considering an appropriate punishment. Unlike in *Florez,* however, the jury did not sentence Bramlett below the statutory maximum but rather sentenced him to the maximum punishment possible which was requested by the prosecutor, i.e., life imprisonment without the possibility of parole. Unlike in *Taylor,* the prosecutors here did nothing to mitigate the effects of the erroneous statements. While the prosecutor in *Taylor* directed the jury's attention to the written jury instructions and told them that the instructions properly informed them about the effect of the 85% Rule, the prosecutor in the present case mentioned the instructions and then misstated the law regarding the 85% Rule inferring, misleadingly, that the instructions mirrored his argument. While defense counsel admirably attempted to correct the misstatement and argued the appropriate application of the law, the potential impact of her argument was weakened both by the trial court's failure to sustain her objection to the prosecutor's initial misstatement of the law and by the prosecutor's second misstatement which, unfortunately, was the last argument the jurors heard before they were excused to deliberate.

¶41 As the United States Supreme Court has admonished, a prosecutor "is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). This Court noted in *Florez* that in another case, like misstatements of law would require reversal for resentencing or sentence modification. *Florez*, 2010 OK CR 21, ¶ 9, 239 P.3d at 159. This is that case.

¶42 The trial court abused its discretion in overruling defense counsel's objection to the prosecutor's first misstatement of the 85% Rule. The second misstatement of law, not met with objection, was plain error; it was actual error, plain or obvious, and affected Bramlett's substantial rights. Under the circumstances of this case, neither error was harmless. The prosecutor's flagrant misconduct so infected the sentencing stage of Bramlett's trial that it was rendered fundamentally unfair. Bramlett's sentence must be vacated and the case remanded to the trial court for resentencing.

DECISION

¶43 The Judgment of the District Court is **AFFIRMED**, but the Sentence is **VACATED** and the cause **REMANDED** to the District Court for **RESENTENCING**. 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 TULSA COUNTY

THE HONORABLE WILLIAM J. MUSSEMAN, DISTRICT JUDGE

APPEARANCES AT TRIAL

Marny Hill, Sophia Johnson, Assistant Public Defenders, 423 S. Boulder, Tulsa, OK 74103, Counsel for Defendant

Benjamin Fu, Kenneth Elmore, Assistant District Attorneys, 500 S. Denver, Tulsa, OK 74103, Counsel for State

APPEARANCES ON APPEAL

Stuart W. Southerland, Tulsa County Public Defender's Office, 423 S. Boulder, Tulsa, OK 74103, Counsel for Appellant

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

OPINION BY: ROWLAND, J.
LUMPKIN, P.J.: Concur
LEWIS, V.P.J.: Concur in Part and Dissent in Part
HUDSON, J.: Concur
KUEHN, J.: Concur

LEWIS, VICE PRESIDING JUDGE, CONCURRING IN PART AND DISSENTING IN PART:

¶1 While I agree with affirming Appellant's conviction in this matter, I dissent to remanding this matter for resentencing. The opinion concludes, "The prosecutor's flagrant misconduct so infected the sentencing stage of Bramlett's trial that it was rendered fundamentally unfair." Considering this fundamental violation of Appellant's rights, I would modify his sentence to a life sentence.

¶2 As pointed out by the Appellant's counsel in his brief, until this Court reverses or modifies a sentence, prosecutors will see little incentive to change their ways. If the intention of remanding the matter for resentencing is to condemn the prosecutor's misconduct, it is my humble opinion that the better course would be to modify his sentence to life.

1. The distance between Bramlett's and Spence's residences was approximately two miles. Bramlett was Spence's ex-boyfriend and although the two were not currently dating, they saw each other frequently.

2. Bramlett does not argue that his statement to the Tulsa detectives was not knowingly and voluntarily made. Such argument would not be supported by the record; prior to speaking with the detectives he was properly advised of his rights under *Miranda v. Arizona*, 384 U.S. 436, 469-70, 86 S.Ct. 1602, 1625-26, 16 L.Ed.2d 694 (1966) and he agreed to the interview voluntarily with full knowledge and understanding of his rights. The Fourteenth Amendment safeguards against badgered confessions is the requirement that all statements introduced against a criminal defendant, regardless of whether they are in custody or have secured counsel, be voluntarily made. *See Malloy v. Hogan*, 378 U.S. 1, 8, 84 S.Ct. 1489, 1493-94, 12 L.Ed.2d 653 (1964); *Young v. State*, 1983 OK CR 126, 10-11, 670 P.2d 591, 594. These requirements were satisfied here.

3. Notably, the record shows that Bramlett waived extradition from Illinois to Oklahoma. In this waiver of extradition he acknowledged that he had been advised of several rights including his right to contest the legality of his arrest and he "waived all rights to contest extradition … without extradition proceedings or the issuance and service of a Warrant of Extradition by the Governor of Illinois." Thus, Bramlett specifically waived his right to contest the legality of his arrest.

4. It is of no consequence that in response to the prosecutor's question, "Who would [Michelle] say was her boyfriend?" Stephanie Spence answered, "Renese Bramlett." While this question anticipated a response relying upon hearsay, Stephanie Spence's other testimony that Bramlett was her sister's boyfriend did not rely on hearsay.

5. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), govern admissibility of scientific and other technical or specialized evidence. *Day v. State*, 2013 OK CR 8, ¶ 4, 303 P.3d 291, 295. In Oklahoma criminal cases, *Daubert* inquiry is explicitly limited to novel scientific evidence; if the testimony does not concern novel technical, or specialized knowledge, the trial court need not hold a *Daubert* hearing. *Day*, 2013 OK CR 8, ¶ 5, 303 P.3d at 295. Schilling's testimony was not about novel scientific evidence, and although he received a *Daubert* hearing, none was necessary.

6. Because we find a portion of Bramlett's argument to merit relief, we address in this proposition only the claim upon which the grant of relief is based.

2018 OK CR 20

ISAIAH GLENNDELL TRYON, Appellant, v. STATE OF OKLAHOMA, Appellee.

Case No. D-2015-331. May 31, 2018

OPINION

HUDSON, JUDGE:

¶1 Appellant, Isaiah Glenndell Tryon, was tried by jury in the District Court of Oklahoma County, Case No. CF-2012-1692, and convicted of Murder in the First Degree in violation of 21 O.S.2011, § 701.7(A). In a separate capital sentencing phase, Appellant's jury found the existence of four statutory aggravating circumstances[1] and sentenced Appellant to death. The Honorable Cindy H. Truong, District Judge, presided over the trial and pronounced judgment and sentence accordingly. Appellant now appeals his conviction and death sentence. We affirm.

BACKGROUND

¶2 On March 16, 2012, around 10:30 a.m., Appellant fatally stabbed Tia Bloomer inside the Metro Transit bus station in downtown Oklahoma City. Tia recently broke off her relationship with Appellant due in part to his inability to support their infant child. Appellant was terminally unemployed and drew as income a meager $628.00 a month in Social Security disability benefits. The couple too had a stormy relationship. The day before her death – March 15, 2012 – Tia called Detective Jeffrey Padgett of the Oklahoma City Police Department (OCPD) Domestic Violence Unit to schedule a follow-up interview for an assault

case in which she was the named victim. Tia previously denied to authorities that Appellant had assaulted her. Instead, she claimed another man had assaulted her.

¶3 During her phone conversation with Detective Padgett, Tia repeated this claim but agreed nonetheless to meet the next day. Later that night, Tia sent Appellant a text message stating the following:

> It's okay bc im [sic] going to tell the truth tomorrow. I'm tired of holding lies for yhu [sic]. Isaiah Tryon is the guy who choked nd [sic] nearly killed me Saturday.

(State's Ex. 38).

¶4 The next day, Appellant accosted Tia inside the downtown bus station while she was talking on her cell phone. Surveillance video from inside the terminal showed Appellant speaking to Tia before stabbing her repeatedly with a knife. Immediately before this brutal attack, an eyewitness heard Tia yell for Appellant to leave her alone. Appellant then stabbed Tia in the neck with the knife, causing blood to gush out from her neck. The surveillance video shows Appellant grabbing the victim then stabbing her when she tried to leave the terminal building. Appellant stabbed the victim repeatedly after she fell to the floor. The victim said "help" as Appellant continued stabbing her repeatedly and blood gushed out of her wounds. During the attack, several bystanders unsuccessfully attempted to pull Appellant off the victim. At one point, a bystander can be seen on the surveillance video dragging Appellant across the floor while Appellant held on to Tia and continued stabbing her.

¶5 Appellant released his grip on the victim only after Kenneth Burke, a security guard, sprayed him in the face with pepper spray. The security guard then forced Appellant to the ground, handcuffed him and ordered the frantic crowd to move away both from Appellant and the bloody scene surrounding the victim's body. A bloody serrated knife with a bent blade was found resting a short distance away on the floor.

¶6 While waiting for police to arrive, Burke checked on the victim but found no signs of life. Paramedics soon arrived and decided to transport the victim to the hospital because they detected a faint pulse. Despite the efforts of emergency responders, Tia died from her injuries. The medical examiner autopsied the victim and found seven (7) stab wounds to her head, neck, back, torso and right hand. Several superficial cuts were also observed on the victim's face and the back of her neck. The medical examiner testified these cuts were consistent with having been made by a serrated blade. The cause of death was multiple stab wounds. In addition to these injuries, the medical examiner observed redness and heavy congestion in the victim's eyes. The medical examiner did not associate this congestion with the victim's stab wounds but testified it is sometimes found in cases of strangulation.

¶7 OCPD Lieutenant Brian Bennett was one of the first officers on the scene. He removed Appellant from the ground and escorted him out of the bus station. Because Appellant had a great deal of blood on his hands and clothing, Lt. Bennett asked whether Appellant needed medical treatment. Appellant replied that he did not. Appellant said he was not injured and all of the blood on him "was hers." Appellant was nonetheless transported to nearby St. Anthony's Hospital where he was treated for cuts to his hand. When asked by a doctor about these injuries, Appellant calmly responded that he had stabbed his girlfriend.

¶8 After being released from the hospital, Appellant was transported to police headquarters. There, he was read the *Miranda*[2] warning by OCPD Detective Robert Benavides and agreed to talk. During his interview, Appellant admitted stabbing Tia repeatedly while inside the bus terminal. Appellant said he stabbed the victim six times with a kitchen knife he brought from home. Appellant explained that he and Tia recently broke up and that they had been fighting over his support of their infant son. When Appellant saw Tia at the bus station, he walked up and tried to talk with her about their problems. Tia refused and told Appellant to get away from her. That is when Appellant said he pulled out his knife and began stabbing her.

¶9 Appellant claimed he did not know Tia would be at the bus station that morning or that he would even see her that day. Appellant did know, however, that Tia had some business to take care of that day. Appellant admitted bringing the knife with him because if he saw Tia, he planned to stab her. Appellant said Tia was facing him when he grabbed her and started stabbing her in the neck. Appellant described how he continued stabbing Tia after she fell to the ground and how he kept hold of her arm. Appellant said he was sad and de-

pressed when he stabbed Tia because he didn't want to be without her. Nor did he want anyone else to be with her. Appellant did not believe he could find someone else to be with. Appellant admitted that what he did to Tia "wasn't right." At one point during the interview, Appellant demanded protective custody because "people ain't gonna like that type of shit" and would try to kill him in the county jail.

¶10 During the interview, Appellant asked whether Tia was okay. Detective Benavides promised to let him know about Tia's condition as soon as he found out. When informed by Detective Benavides at the end of the interview that Tia did not survive her injuries and was dead, Appellant showed no emotion to this news.

JURY SELECTION

¶11 In Proposition I, Appellant complains that the trial court violated due process by limiting the questions defense counsel was allowed to ask of the prospective jurors. Appellant says the trial court improperly restricted the questions he was allowed to ask the venire panel concerning their views on both the death penalty and mitigating evidence. This, Appellant says, limited his ability to ask questions which would provide the information needed to intelligently exercise his peremptory challenges.

¶12 The Supreme Court has recognized that a critical part of the constitutional right to an impartial jury is "an adequate *voir dire* to identify unqualified jurors." *Morgan v. Illinois*, 504 U.S. 719, 729, 112 S. Ct. 2222, 2230, 119 L. Ed. 2d 492 (1992). "The purpose of *voir dire* examination is to discover whether there are grounds to challenge prospective jurors for cause and to permit the intelligent use of peremptory challenges." *Harmon v. State*, 2011 OK CR 6, ¶ 7, 248 P.3d 918, 927 (citation omitted). Rule 6 of the Rules of the District Courts, Title 12, O.S.2011, Ch.2, App., requires both the State and defense have a "reasonable opportunity to supplement" the trial court's examination of prospective jurors. *Mayes v. State*, 1994 OK CR 44, ¶ 15, 887 P.2d 1288, 1298.

¶13 Yet, this right is not unlimited. The manner and extent of examination of jurors is not "prescribed by any definite, unyielding rule, but instead rests in the sound discretion of the trial judge." *Id.* Towards that end, Rule 6 directs that "[c]ounsel shall scrupulously guard against injecting any argument in their *voir dire* examination and shall refrain from asking a juror how he would decide hypothetical questions involving law or facts." The trial court retains broad discretion in restricting questions "that are repetitive, irrelevant or regard legal issues upon which the trial court will instruct the jury." *Harmon*, 2011 OK CR 6, ¶ 7, 248 P.3d at 927. "There is no abuse of discretion as long as the *voir dire* examination affords the defendant a jury free of outside influence, bias or personal interest." *Id.* Where, as here, a defendant challenges the restrictions placed upon his *voir dire* examination, the question is whether the trial court's actions rendered his trial fundamentally unfair. *Morgan*, 504 U.S. at 730, 112 S. Ct. at 2230.[3]

¶14 Appellant challenges six separate instances in which the trial court restricted his examination of prospective jurors. In the first instance, defense counsel described for the prospective jurors a "hypothetical situation" in which a defendant is convicted of "intentional first degree murder of a person who committed malice aforethought murder, planned it, intended to do it, did it of an innocent person." Defense counsel then asked:

> I want to know what each of your individual feelings are about the death penalty under that situation for a person who's guilty of malice aforethought murder.

(Tr. I 248).

¶15 The prosecutor immediately objected and, at a bench conference, argued defense counsel was impermissibly posing a hypothetical scenario to the jury by "running his facts of this case by them, and wanting to know are they predisposed to consider any of these three punishments." Defense counsel responded that Appellant had a constitutional right under *Morgan v. Illinois, supra*, to ask the challenged question. Defense counsel urged that he could only ascertain whether the prospective jurors would automatically vote for the death penalty if they first knew "what first degree murder is. It doesn't involve heat of passion, doesn't involve some of the other things." The trial court stated it would provide definitions and sustained the objection.

¶16 The trial court did not abuse its discretion in limiting defense counsel's *voir dire* in this manner. In the challenged passage, defense counsel was attempting to ascertain what sentences the prospective jurors would give based on a "hypothetical" scenario drawn from the facts of the case. This is impermissible under

our decisions. *See Robinson v. State*, 2011 OK CR 15, ¶ 16, 255 P.3d 425, 432-33 ("An attorney should not use *voir dire* to test prospective jurors' willingness to accept a party's theory of the case, rather than the juror's impartiality[.]"); *Black v. State,* 2001 OK CR 5, ¶ 19, 21 P.3d 1047, 1058 ("When counsel attempted to ask questions dealing specifically with the facts of this case or to give hypotheticals based on the facts of this case, the trial court properly sustained the State's objections."); *Bernay v. State*, 1999 OK CR 37, ¶¶ 9-11, 989 P.2d 998, 1005-06 (no abuse of discretion where defense counsel was prohibited from attempting to rehabilitate six prospective jurors using "specific or hypothetical factual patterns under which the prospective juror might consider the death penalty appropriate."); *Jackson v. State,* 1998 OK CR 39, ¶ 12, 964 P.2d 875, 883 (no abuse of discretion where the trial court restricted *voir dire* questioning regarding legal issues upon which the trial court would instruct).

¶17 Appellant's citation to *Morgan v. Illinois* does not support his claim. *Morgan* held that due process of law mandates that a capital defendant must be allowed, upon request, to ask whether a prospective juror would automatically impose the death penalty upon conviction of the defendant no matter what the facts are. *Morgan*, 504 U.S. at 721, 735-36, 112 S. Ct. at 2233. The fact-intensive question posed by Appellant did not address this issue. There is a difference between 1) asking whether a prospective juror would automatically impose the death penalty, regardless of the facts of the case, upon the defendant's conviction for first degree murder; and 2) asking prospective jurors to prejudge the appropriate sentence in light of the supposed facts of the case. Defense counsel was engaged in the latter exercise which we have found impermissible. *Lovell v. State*, 1969 OK CR 177, ¶¶ 9-10, 455 P.2d 735, 738 (hypothetical questions designed "to have jurors indicate in advance what their decision will be under certain state of evidence or upon a certain state of facts" are improper) (citation omitted). *Morgan* does not require such questioning.[4]

¶18 The remaining defense questions disallowed by the trial court are of similar ilk. Asking prospective jurors what they would want to know about a person before sentencing them to death; whether jurors could realistically consider life with the possibility of parole where the murder victim was the defendant's girlfriend and mother of his baby; and whether jurors could imagine imposing life with the possibility of parole for a defendant who killed a loved one as opposed to a stranger are the types of questions we have previously ruled impermissible. *Frederick v. State*, 2017 OK CR 12, ¶¶ 22-28, 400 P.3d 786, 802-03 (no abuse of discretion where trial court disallowed defense questioning of prospective jurors about their ability to consider all three possible punishments in the event appellant was convicted of murdering his mother); *Harmon,* 2011 OK CR 6, ¶ 9 n.3, 248 P.3d at 927 n.3 (finding the trial court properly limited defense *voir dire* asking, *inter alia*, "which punishment [a juror] would favor if the State proved Harmon killed a convenience store clerk[,]" "the kinds of circumstances that would warrant the death penalty[,]" and "what the jurors thought were proper circumstances to consider in deciding punishment and what circumstances jurors thought deserved the death penalty."); *Lovell*, 1969 OK CR 177, ¶¶ 9-10, 455 P.2d at 738 (prosecutor's question whether any of the prospective jurors "would not send [the defendant] to the penitentiary if the evidence shows that he was guilty of driving while under the influence of liquor, after former conviction" was improper).

¶19 The limitations imposed upon the defense *voir dire* in this case were proper. Despite the restrictions, defense counsel was nonetheless allowed to question several jurors about whether they could consider a life sentence with the possibility of parole where the victim is a loved one and the mother of a child; whether they understood that first degree malice aforethought murder involves an intentional killing; their feelings on the death penalty for an intentional murder; and whether they could consider all three punishments for someone convicted of an intentional malice aforethought killing. Moreover, the record shows defense counsel was afforded an adequate *voir dire* which allowed Appellant to probe the jurors' attitudes toward the death penalty and potential mitigating circumstances in the case.

¶20 Under the total circumstances, the trial court did not abuse its discretion in limiting the defense *voir dire*. Appellant was provided an adequate *voir dire* to identify unqualified jurors and intelligently exercise his peremptory challenges. Appellant's trial was not rendered fundamentally unfair from the trial court's limitations on *voir dire*. Proposition I is denied.

¶21 In Proposition II, Appellant complains that Prospective Jurors K.T. and A.F. should

have been removed for cause. K.T. sat as a juror. A.F., however, was removed with the fifth defense peremptory. We have held that:

> In order to properly preserve for appellate review an objection to a denial of a challenge for cause, a defendant must demonstrate that he was forced over objection to keep an unacceptable juror. This requires a defendant to excuse the challenged juror with a peremptory challenge and make a record of which remaining jurors the defendant would have excused had he not used that peremptory challenge to cure the trial court's alleged erroneous denial of the for cause challenge.

Eizember v. State, 2007 OK CR 29, ¶ 36, 164 P.3d 208, 220 (internal citations omitted). Here, Appellant challenged the ability of both K.T. and A.F. to be impartial and renewed his challenges at the conclusion of *voir dire*. Appellant preserved his for-cause challenge to A.F. by using a peremptory challenge against him, requesting additional peremptory challenges and effectively identifying three other jurors he would have excused – R.G., P.S. or K.T. – with the peremptory challenge he used to remove A.F.

¶22 Appellant failed to preserve his for-cause challenge to K.T., however, by 1) failing to excuse her with an available peremptory challenge and 2) using peremptory challenges against other prospective jurors whom he failed to claim could not be impartial. Our review of the trial court's handling of Appellant's for-cause challenge to K.T. is thus waived for all but plain error. *Id.*, 2007 OK CR 29, ¶ 48, 164 P.3d at 223.

¶23 The trial court used the struck juror method of jury selection in which thirty (30) prospective jurors were seated and systematically questioned by the court and parties. Judge Truong initiated the questioning of the prospective jurors then allowed counsel for both parties to question the prospective jurors. When prospective jurors were excused, they were replaced so that thirty prospective jurors remained on the panel.

¶24 At the conclusion of the State's questioning, the prosecutor passed the panel for cause. At the conclusion of the defense questioning, defense counsel announced he had no further questions of the venire panel but refused to pass the panel for cause. Instead, defense counsel made a lengthy record complaining about the trial court's limitations on his *voir dire* examination. This argument was based largely on the same issues raised by Appellant in Proposition I above. At the conclusion of this argument, defense counsel read for the court the names of twelve prospective jurors he said should be removed for cause in light of the trial court's restrictions on defense counsel's *voir dire* of the prospective jurors. Defense counsel stated that prospective jurors W.T., N.M., M.V., La.H., B.M., J.F., Ly.H., A.F., K.T., D.W., R.G. and P.S. should be removed for cause. Notably, with the exception of A.F. and K.T., Appellant did not challenge any of these prospective jurors for cause earlier in the *voir dire*.

¶25 The trial court denied Appellant's motion to strike these particular jurors. Defense counsel then requested nine extra peremptory challenges "because you are requiring us to use peremptory challenges to kick people that should have been kicked because they were excusable for cause." The trial court too denied this request. Both parties then exercised nine peremptory challenges each, leaving twelve jurors to hear the case. Defense counsel used peremptory challenges to remove prospective jurors W.T., N.M., M.V., La.H., A.F., B.M., J.F., Ly.H., D.W. – nine of the twelve prospective jurors defense counsel identified just moments earlier as ones who should be removed for cause based on the trial court's limitations on the defense *voir dire*. Ultimately, K.T., P.S. and R.G. survived the exercise of peremptory challenges by both parties and sat on the jury.

¶26 Appellant made a conscious decision not to remove K.T. with any of the eight peremptory challenges he used against prospective jurors who were, in effect, not properly challenged for cause. In Proposition I, we rejected Appellant's challenge to the trial court's limitations on the defense *voir dire*. Moreover, Appellant never challenged these eight prospective jurors on any other grounds. By failing to excuse K.T., who *was* challenged for cause well before the end of the *voir dire* on grounds unrelated to the trial court's restrictions on *voir dire*, Appellant has waived all but plain error relating to K.T.'s placement on the jury. Appellant may have had a difficult choice in determining whether to strike K.T. from the jury panel. But, as the Supreme Court has observed in this context, "[a] hard choice is not the same as no choice." *United States v. Martinez-Salazar*, 528 U.S. 304, 315, 120 S. Ct. 774, 781, 145 L. Ed. 2d 792 (2000).

¶27 We now turn to the merits of Appellant's challenges to A.F. and K.T. Appellant says the trial court was required to remove prospective juror A.F. for cause. Appellant argues that A.F.'s answers during defense *voir dire* showed A.F. could not uphold the juror's oath due to his inability to consider all three sentencing options. Specifically, Appellant points to A.F.'s responses concerning his ability to consider the sentence of life imprisonment with the possibility of parole.

¶28 We have stated the following standard of review for resolving challenges of this type:

> The proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *[Waiwright v.] Witt*, 469 U.S. [412], at 424, 105 S. Ct. [844], at 852, [83 L. Ed. 2d 841 (1985)]. *See also Gray v. Mississippi*, 481 U.S. 648, 658, 107 S. Ct. 2045, 2051, 95 L. Ed. 2d 622 (1987). Inherent in this determination is that the potential juror has been fully informed of the law and his or her responsibilities under the law and oath of a juror. This standard does not require a juror's bias be proved with unmistakable clarity; neither must the juror express an intention to vote against the death penalty automatically. *Witt*, 469 U.S. at 425, 105 S. Ct. at 852. "Deference must be paid to the trial judge who sees and hears the jurors". *Id.*, 469 U.S. at 425, 105 S. Ct. at 853. *See also Uttecht v. Brown*, 551 U.S. 1, 127 S. Ct. 2218, 2224, 167 L. Ed. 2d 1014 (2007) ("deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors.").
>
> This Court has adhered to the principles set forth in *Witt. See Glossip v. State*, 2007 OK CR 12, ¶¶ 31-33, 157 P.3d 143, 150-51; *Williams v. State,* 2001 OK CR 9, ¶ 10, 22 P.3d 702, 709 (and cases cited therein). We have said the *Witt* standard only requires that each juror be willing to consider each of the three statutory punishments: the death penalty, life imprisonment without the possibility of parole, and life imprisonment (with the possibility of parole). *Glossip*, 2007 OK CR 12 at ¶ 31, 157 P.3d at 150. *See also Williams*, 2001 OK CR 9 at ¶ 10, 22 P.3d at 709-10. Further, all doubts regarding juror impartiality must be resolved in favor of the accused. *Williams*, 2001 OK CR 9 at ¶ 10, 22 P.3d at 709-10. This Court will look to the entirety of the juror's *voir dire* examination to determine if the trial court properly excused the juror for cause. *Id.* As the trial court personally observes the jurors and their responses, this Court will not disturb its decision absent an abuse of discretion. *Id.*

Eizember, 2007 OK CR 29, ¶¶ 41-42, 164 P.3d at 221-22.

¶29 We find prospective juror A.F.'s answers do not show that his views on the life with possibility of parole sentencing option would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. A.F. provided inconsistent responses concerning his ability to give meaningful consideration to the life imprisonment sentencing option where the victim was a loved one. When admonished by the trial court to set aside counsel's characterization of the victim's relationship with the defendant because the jury had not heard evidence relating to it, A.F. made clear that he could listen to all the evidence and give meaningful consideration to all three sentencing options. Even after the trial court's questioning, A.F.'s responses to defense counsel's questions revealed his ability to give fair and meaningful consideration to a life sentence – even though personally he did not see it as a desirable sentencing option for the murder of a loved one.

¶30 We give broad deference on appeal to the trial court's rulings on for-cause challenges precisely because of the situation presented here. "A trial court's 'finding may be upheld even in the absence of clear statements from the juror that he or she is impaired . . . .'" *White v. Wheeler*, __U.S.__, 136 S. Ct. 456, 460, 193 L. Ed. 2d 384 (2015) (quoting *Uttecht,* 551 U.S. at 7, 127 S. Ct. at 2223). That is because we are presented on appeal simply with the cold face of the record. The trial court, by contrast, was able to see and hear prospective juror A.F. Judge Truong was in a superior position to make the credibility determinations critical to determining A.F.'s qualifications to serve. The Supreme Court has made clear that "when there is ambiguity in the prospective juror's statements, 'the trial court, aided as it undoubtedly [is] by its

assessment of [the venireman's] demeanor, [is] entitled to resolve it in favor of the State." *Uttecht,* 551 U.S. at 7, 127 S. Ct. at 2223 (quoting *Witt*, 469 U.S. at 434, 105 S. Ct. at 857); *Accord White*, 136 S. Ct. at 461. We afford that type of broad deference in the present case in denying relief for Appellant's challenge to prospective juror A.F.

¶31 We will reverse the lower court's ruling on a for-cause challenge where there is no support for it in the record. *Uttecht*, 551 U.S. at 20, 127 S. Ct. at 2230 ("The need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment."). But where, as here, the record demonstrates a thorough vetting of the prospective juror's views and we are left simply with ambiguous responses, the trial court's ruling will be honored on appeal. We are not faced in the present case with a prospective juror who would automatically vote for, or against, any one of the three penalty options. Nor were A.F.'s responses such that he was substantially impaired in his ability to fairly consider and impose a life sentence – even if the victim was a loved one of the defendant.

¶32 Thus, we find the trial court did not abuse its discretion in denying Appellant's request to remove prospective juror A.F. from the venire panel. *See Myers v. State*, 2006 OK CR 12, ¶¶ 6-9, 133 P.3d 312, 320-21, *overruled on other grounds, Davis v. State*, 2018 OK CR 7, ¶ 26 n.3, __P.3d.__. The record does not show A.F.'s views on the life imprisonment sentencing option would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath. We deny relief for this aspect of Appellant's Proposition II claim.

¶33 We likewise find no plain error from the trial court's refusal to remove prospective juror K.T. Under the plain error test, an appellant must show an actual error, that is plain or obvious, affecting his substantial rights. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Jackson v. State,* 2016 OK CR 5, ¶ 4, 371 P.3d 1120, 1121.

¶34 Appellant argues K.T. should have been removed for cause for actual bias. *See* 22 O.S.2011, § 659 (defining "actual bias" as "the existence of a state of mind on the part of the juror, in reference to the case, or to either party, which satisfies the court, in the exercise of sound discretion, that he cannot try the issue impartially, without prejudice to the substantial rights of the party challenging . . . .").

¶35 The record shows K.T. initially provided inconsistent answers concerning her ability to set aside her previous experiences with domestic violence. As K.T. went further along in the questioning, however, it became evident that she could in fact set aside her personal experiences and render a fair and impartial verdict based solely on the evidence admitted in court. She made clear – particularly in her final responses to the court and defense counsel – that she could do this. The record shows too that, as the parties and court explained what the law required of her, K.T.'s initial concerns about her ability to be fair and impartial vanished. This is not atypical in capital *voir dire* and hardly a basis for removing a prospective juror for cause. *Davis v. State,* 2011 OK CR 29, ¶¶ 41-42, 268 P.3d 86, 105. "Any ambiguity or inconsistencies in her responses were subject to resolution by the trial court. Having benefit of observing [K.T.'s] demeanor throughout *voir dire*, the court found her responses credible and insufficient to excuse her for cause." *Id.*, 2011 OK CR 29, ¶ 42, 268 P.3d at 105. Our review of the totality of K.T.'s *voir dire* supports the trial court's decision. The trial court therefore did not abuse its discretion in denying Appellant's for-cause challenge to K.T. Because there was no error, there is no plain error warranting relief based on this claim. *Pullen v. State*, 2016 OK CR 18, ¶ 8, 387 P.3d 922, 926.

¶36 Finally, because the trial court did not abuse its discretion in failing to remove prospective jurors A.F. and K.T., we need not address whether Appellant was entitled to additional peremptory challenges. *Davis*, 2011 OK CR 29, ¶ 43, 268 P.3d. at 105. Proposition II is denied.

ALLEGED EVIDENTIARY ERROR

¶37 In Proposition III, Appellant challenges the admission of State's Exhibit 38, the text message sent from Tia Bloomer to Appellant the night before the killing, which stated:

> It's okay bc im [sic] going to tell the truth tomorrow. I'm tired of holding lies for yhu [sic]. Isaiah Tryon is the guy who choked nd [sic] nearly killed me Saturday.

(State's Ex. 38). Appellant argues this text message was testimonial and, thus, its admission violated his Sixth Amendment right to confrontation of witnesses. He also argues it was inadmissible hearsay under state evidence rules. The trial court admitted the text message, finding it was not offered to prove the truth of the matter asserted but, rather, was relevant simply because the text message was sent to Appellant and was probative on the issue of Appellant's motive to commit the murder the next morning.

¶38 We typically review a trial court's decision to admit evidence for an abuse of discretion. However, "the determination of whether admission of hearsay evidence violates the Confrontation Clause . . . is a question of law we review de novo." *Hanson v. State*, 2009 OK CR 13, ¶ 8, 206 P.3d 1020, 1025. We note too Appellant did not preserve his current Confrontation Clause challenge to the admission of State's Exhibit 38. Appellant raised numerous objections on state law grounds to this evidence at the pre-trial hearing. Appellant renewed these same objections at trial. At no point below did Appellant assert a claim that the admission of State's Exhibit 38 was a constitutional violation. Appellant has therefore waived review of his constitutional claim for all but plain error. *Miller v. State,* 2013 OK CR 11, ¶ 104, 313 P.3d 934, 971.

¶39 Appellant fails to show plain error. The Sixth Amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. The Sixth Amendment's Confrontation Clause has been extended to the States through the Fourteenth Amendment for over fifty years. *See Richardson v. Marsh,* 481 U.S. 200, 206, 107 S. Ct. 1702, 1706-07, 95 L. Ed. 2d 176 (1987) (citing *Pointer v. Texas*, 380 U.S. 400, 404, 406-07, 85 S. Ct. 1065, 1068, 1069-70, 13 L. Ed. 2d 923 (1965)). In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the Supreme Court held that under the Sixth Amendment, testimonial out-of-court statements may be admitted against the accused in a criminal trial only 1) when the declarant is unavailable and 2) the defendant has had a previous opportunity to cross-examine the declarant. *Id.*, 541 U.S. at 51, 68, 124 S. Ct. at 1364, 1374.

¶40 "Statements not offered to prove the truth of the matter asserted are generally admissible." *Primeaux v. State,* 2004 OK CR 16, ¶ 39, 88 P.3d 893, 902. Further, the Supreme Court has held that the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. *Crawford,* 541 U.S. at 59-60 n.9, 124 S. Ct. at 1369 n.9 (citing *Tennessee v. Street,* 471 U.S. 409, 414, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985)); *Andrew v. State,* 2007 OK CR 23, ¶ 31, 164 P.3d 176, 189.

¶41 In the present case, assuming *arguendo* the text message was offered to prove the truth of the matter asserted, Appellant's Sixth Amendment claim fails because the victim's text message to Appellant was nontestimonial. *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 2273, 165 L. Ed. 2d 224 (2006) (only testimonial statements "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause"); *See also Michigan v. Bryant*, 562 U.S. 344, 354, 131 S. Ct. 1143, 1153, 179 L. Ed. 2d 93 (2011) (noting that Crawford limited the Confrontation Clause's reach to testimonial statements); *Whorton v. Bockting*, 549 U.S. 406, 420, 127 S. Ct. 1173, 1183, 167 L. Ed. 2d 1 (2007) (the Confrontation Clause has no application to out-of-court nontestimonial statements under *Crawford*).

¶42 The victim's text message to Appellant was not made in the context of a police interview. Nor was it made in response to police questioning. *See Crawford*, 541 U.S. at 51, 68, 124 S. Ct. at 1364, 1374. It is an informal three-sentence message, riddled with spelling errors, which on its face appears to be a threat to Appellant. There is no evidence suggesting the message was written so that it could be used later as evidence in a formal court proceeding, let alone that the primary purpose of the message was to create an out-of-court substitute for trial testimony. *See Ohio v. Clark*, __U.S.__, 135 S. Ct. 2173, 2181, 192 L. Ed. 2d 306 (2015). Rather, the content and circumstances in which the text message was sent shows it was simply an informal message sent by the victim through her cell phone to Appellant's cell phone the night before her murder and was never disclosed to third parties. Under the total circumstances, State's Exhibit 38 was unquestionably nontestimonial and, thus, not subject to the Confrontation Clause. *See Clark*, 135 S. Ct. at 2180, 2182 (the informality of the situation in which the statement was made is a relevant factor in determining whether it was testimonial or nontestimonial); ("Statements made to someone who is not principally charged with

uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers."). The statements at issue resemble (if not typify) the casual remark to an acquaintance *Crawford* said was not testimonial, *Crawford,* 541 U.S. at 51, 124 S. Ct. at 1364, as well as the "[s]tatements to friends and neighbors about abuse and intimidation" the Court likewise held in *Giles v. California* 554 U.S. 353, 376, 128 S. Ct. 2678, 2692-93, 171 L. Ed. 2d 488 (2008) were not subject to the Confrontation Clause. Thus, there is no constitutional error arising from the admission of State's Exhibit 38 and, thus, no plain error. *Frederick,* 2017 OK CR 12, ¶ 14, 400 P.3d at 800 ("Finding no error, we find no plain error.").

¶43 There remains the matter of the specific basis for admissibility of the text message under state evidence rules again assuming *arguendo* it was hearsay. *Bryant,* 562 U.S. at 358-59, 131 S. Ct. at 1155 ("when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony … the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause."). This issue caused considerable confusion below. Appellant maintains on appeal that State's Exhibit 38 was inadmissible hearsay.

¶44 In making this determination, it is helpful to realize that the text message itself is actually composed of three separate sentences. The first two sentences ("It's okay bc im [sic] going to tell the truth tomorrow. I'm tired of holding lies for yhu [sic]."") were unquestionably admissible hearsay under the state of mind exception to indicate the declarant's intent toward future conduct and as a direct statement of her state of mind. 12 O.S.2011, § 2803(3) ("A statement of the declarant's then existing state of mind … such as intent, plan, motive, design, mental feeling …." is not excluded by the hearsay rule). *See Frederick v. State,* 2001 OK CR 34, ¶ 98, 37 P.3d 908, 935; *Davis v. State*, 1983 OK CR 57, ¶ 48, 665 P.2d 1186, 1198.

¶45 The third and final sentence of the text message ("Isaiah Tryon is the guy who choked nd [sic] nearly killed me Saturday") was also arguably admissible under the state of mind exception. 12 O.S.2011, § 2803(3). We have held in domestic homicide cases that "[a] victim's hearsay statements describing threats and beatings are admissible to show the victim's state of mind and indicate fear of a defendant … evidence of prior threats, assaults, and battery on a victim is proper to show the victim's state of mind[.]" *Hooper v. State,* 1997 OK CR 64, ¶ 28, 947 P.2d 1090, 1102. True, Section 2803(3) expressly disallows the admission of "a statement of memory or belief to prove the fact remembered or believed[.]" Consistent with this provision, our cases have expressly distinguished between admissible evidence of prior threats, assaults, and battery on a victim showing the victim's state of mind from "a specific description of a defendant's actions" such as grabbing a gun or pulling the phone out of the wall which we have deemed inadmissible. *Hooper*, 1997 OK CR 64, ¶ 28, 947 P.2d at 1102. *Cf. Andrew v. State,* 2007 OK CR 23, ¶ 30, 164 P.3d at 189 (victim's recorded antecedent declaration to Prudential Insurance representatives of his belief that his wife and her lover tried to kill him by cutting the brake lines to his car was admissible under the state of mind exception to show victim's fear and to provide motive); *Lamb v. State*, 1988 OK CR 296, ¶¶ 7-8, 767 P.2d 887, 890 (testimony by witnesses that murder victim told them that the defendant, her husband, had previously committed battery on her, had threatened her and that she was afraid of him admissible under state of mind exception).

¶46 We need not reach this issue however because assuming *arguendo* error, admission of the third sentence in the text message was nonetheless harmless. The properly-admitted portion of the text message, combined with the domestic violence evidence introduced by the State during the trial's first stage, constituted strong evidence identifying Appellant as the perpetrator of this previous attack and showing motive for the killing. Moreover, the videotape of the killing itself represented overwhelming evidence demonstrating Appellant's responsibility for the victim's death and that the murder was committed with malice aforethought. Under the total circumstances, any imaginable error from admission of the third sentence in the text message was harmless and did not contribute to the verdict or sentence given the strong evidence against Appellant. Proposition III is denied. 20 O.S.2011, § 3001.1.

¶47 In Proposition IV, Appellant complains that the trial court prevented him from presenting a defense by disallowing questions to defense witnesses Rico Wilson and Eric Wilson as to whether Appellant made any threats

towards the victim in the days leading up to the murder or had otherwise mentioned receiving the text message discussed in Proposition III. Rico Wilson is Appellant's brother. Rico testified that he saw Appellant standing in front of his mother's apartment around 9:30 or 10:00 p.m. the night before the murder and that Appellant appeared to be high on drugs at the time. Rico testified too that Appellant was "probably" drinking then because Appellant had been drinking earlier in the day. Rico saw Appellant several times previously during the week leading up to the murder. Rico saw Appellant snorting cocaine and using PCP earlier in the week.

¶48 Eric Wilson is Appellant's cousin. Eric testified he was with Appellant and Rico on March 13 – 14, 2012, and when they were not looking for employment, he and Appellant were drinking and getting high on drugs. Appellant stayed at Eric's apartment the evening of March 14 through the morning of March 15. Eric testified that he and Appellant began using drugs early in the morning on March 15 and Appellant continued drinking and using drugs throughout the afternoon and evening hours of March 15. According to Eric, Appellant left around 3:00 or 4:00 a.m. on March 16 – just hours before the murder.

¶49 Prior to this testimony, defense counsel stated her intent during an in camera hearing to ask Rico and Eric on direct whether Appellant expressed any desire to harm the victim or otherwise expressed concern about getting a text message from her. Defense counsel argued that, with this testimony, she wanted to elicit that Appellant did not make or express any threats towards the victim during the five day period Rico and Eric reported being with Appellant. This was to be part of defense counsel's strategy to counter the State's motive evidence relating to the text message. The prosecutor objected on grounds that any such testimony would be inadmissible self-serving hearsay. The trial court sustained the prosecutor's objection and ruled she would not allow this type of testimony. Rico and Eric testified the next day.

¶50 Now on appeal, Appellant claims the trial court violated his rights to a fundamentally fair trial and to present a defense with this ruling. Appellant argues the State "was allowed to take an isolated text message and build an entire case around it[ ]" whereas the defense was prohibited from challenging that evidence.

¶51 We review the district court's evidentiary rulings for abuse of discretion. *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 14, 241 P.3d 214, 224. Notably, Appellant did not raise the trial court's earlier ruling when either witness testified the next day at trial. Nor did Appellant make an offer of proof to the judge concerning what testimony he wanted to present. "After a motion in limine is sustained, the party seeking to introduce the evidence must make an offer of proof at trial. This affords the trial court an opportunity to make a final ruling on the evidence." *Id.*, 2010 OK CR 23, ¶ 86, 241 P.3d at 240 (internal citations omitted). Failure to follow this procedure on a motion in limine waives review on appeal of all but plain error. *Id.*

¶52 Appellant fails to show plain error. The rules of evidence may not be used to arbitrarily impinge on the defendant's right to present competent evidence in his defense. *Pavatt v. State*, 2007 OK CR 19, ¶ 42, 159 P.3d 272, 286 (citing *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049, 35 L. Ed. 2d 297 (1973)). However, "[w]hether Appellant was denied the right to present a defense ultimately turns on whether the evidence at his disposal was admissible." *Id.*, 2007 OK CR 19, ¶ 45, 159 P.3d at 287.

¶53 Assuming *arguendo* the trial court abused its discretion in disallowing this particular evidence, Appellant fails to show plain error. We have held:

> To establish a violation of . . . due process, a defendant must show a denial of fundamental fairness. . . . It is the materiality of the excluded evidence to the presentation of the defense that determines whether a petitioner has been deprived of a fundamentally fair trial. Evidence is material if its suppression might have affected the outcome. In other words, material evidence is that which is exculpatory – evidence that if admitted would create reasonable doubt that did not exist without the evidence.

Primeaux, 2004 OK CR 16, ¶ 49, 88 P.3d at 903-04 (quoting *Ellis v. Mullin*, 326 F.3d 1122, 1128 (10th Cir. 2002)). In the present case, Appellant's proposed evidence (we assume *arguendo* Eric and Rico would have testified that Appellant had no reaction to the text message or simply did not mention it and that he did not threaten the victim) would at best call into question the State's theory of the motive for the murder. However, it does not refute the over-

whelming evidence presented showing Appellant's guilt for Tia Bloomer's murder, including the surveillance tape showing him repeatedly stabbing the victim; eyewitness testimony describing this attack and the efforts needed to stop Appellant's attack; testimony concerning the victim's injuries; and Appellant's videotaped interview describing how he came to be in the bus station with a knife that morning along with his confession to repeatedly stabbing Tia and the reasons why – namely, his sad mental state upon their breakup as a couple. The defense was able to elicit considerable evidence from Eric and Rico regarding Appellant's extended drug binge over the five day time span leading up to the murder. Rico testified concerning Appellant's emotional condition over the loss of his relationship with the victim. Eric described Appellant's relationship with Tia the week before the murder as "off and on" and "they just always have been off and on."

¶54 We fail to see how the additional evidence championed on appeal might have affected the outcome of the first stage, let alone called into question the State's considerable evidence showing malice aforethought. 21 O.S.2011, § 701.7(A) ("Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof."). "Premeditation sufficient to constitute murder may be formed in an instant or it may be formed instantaneously as the killing is being committed." *Davis*, 2011 OK CR 29, ¶ 76, 268 P.3d at 111. The jury too may rely upon circumstantial evidence to ascertain a person's intent at the time of the homicidal act. *Id.* In this sense, it matters little for first stage purposes whether the motive behind Appellant's murder of the victim was his deep sadness over the end of the relationship or, instead, was an effort to stop Tia from identifying him to police as her attacker during the previous assault. The overwhelming evidence at trial shows the killing was committed with malice aforethought as alleged by the State even if the jury found the State's theory of motive unpersuasive. Thus, under the total circumstances, Appellant fails to show he was deprived of a fundamentally fair trial through the denial of critical defense evidence during the guilt stage of his trial. Appellant therefore fails to show a plain or obvious error affecting his substantial rights. Proposition IV is denied.

¶55 In Proposition V, Appellant challenges the admission of what he describes as "numerous gruesome photographs" during guilt stage. Specifically, Appellant challenges State's Exhibits 21-36, 41-49 and 51. Appellant argues these photographs were unnecessary because there was no dispute that he stabbed the victim to death. Appellant argues these photographs "serve[d] no legitimate purpose other than to inflame the passion of the jury." Appellant tells us the photographs were more prejudicial than probative, unduly gruesome and cumulative, and deprived him of a fair and reliable trial and sentencing proceeding.

¶56 We review the trial court's admission of photographic evidence for an abuse of discretion. Photographic exhibits are subject to the same relevancy and unfair prejudice analysis as any other piece of evidence. 12 O.S.2011, §§ 2401-2403. As we have held:

> Photographs may be probative of the nature and location of wounds; may corroborate the testimony of witnesses, including the medical examiner; and may show the nature of the crime scene. Gruesome crimes make for gruesome photographs, but the issue is whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or needless presentation of cumulative evidence.

Martinez v. State, 2016 OK CR 3, ¶ 46, 371 P.3d 1100, 1112-13, *cert. denied*, __U.S.__, 137 S. Ct. 386, 196 L. Ed. 2d 304 (2016) (internal citations omitted).

¶57 Appellant's challenge to State's Exhibits 21-26, which he describes as photographs of the victim's bloody clothes, is procedurally defective and does not comply with our Rules. Appellant fails to provide citations to the record showing where these particular photographs were admitted into evidence. These photographs are not referenced on any of the transcript pages cited by Appellant in this claim. Hence, this aspect of his Proposition V claim is waived from appellate review. Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018); *Logsdon v. State*, 2010 OK CR 7, ¶ 41, 231 P.3d 1156, 1169-70.

¶58 State's Exhibit 27 depicts the victim's face showing the redness and heavy congestion in the victim's eyes observed by the medical examiner during the autopsy. Appellant preserved his objection to this photograph by

making a contemporaneous objection which the trial court overruled.

¶59 State's Exhibits 28-36 depict close-up views of the various stab wounds to the victim's head, neck, back, torso and right hand. Appellant registered a contemporaneous objection to these photographs at trial but cited only his previously-stated objections. The trial court overruled this objection. From the record presented, we cannot ascertain whether Appellant even objected to these particular photographs during the in camera hearing, let alone what grounds may have been asserted.[5] Appellant has therefore waived all but plain error review of State's Exhibits 28-36. *Simpson v. State,* 1994 OK CR 40, ¶ 2, 876 P.2d 690, 693 (failure to object with specificity to errors alleged to have occurred at trial waives review on appeal of all but plain error).

¶60 Appellant challenges too State's Exhibits 41 – 46. Although neither party seems to notice, the record shows State's Exhibits 44 and 45 were not published to the jury and ultimately were withdrawn by the prosecutor at the conclusion of the medical examiner's testimony. State's Exhibits 41, 42, 43 and 46 depict an overview of the constellation of injuries observed by the medical examiner on the right side of the victim's head and neck, the right side of her throat and jaw, her upper back and neck as well as to the right side of her body. Appellant objected to these photographs, thus preserving these challenges for appeal.

¶61 State's Exhibits 47 and 48 are photographs depicting the directionality of the victim's stab wounds using wooden Q-tip applicators placed inside each wound. State's Exhibit 49 is a photograph of the victim's hand with a thin metal probe inserted to depict the directionality of the stab wound through the full thickness of the hand. Defense counsel objected to these photographs, thus preserving these challenges for our review.

¶62 State's Exhibit 51 depicts an extracted portion of the ribs from the victim's right side showing where the knife passed and cut through the ribs. Appellant also objected to this photograph, thus preserving this claim for appellate review.

¶63 We find no abuse of discretion from the trial court's admission of these photographs. The photographs depicted the victim's injuries, illustrated the testimony of the medical examiner, and demonstrated the directionality of the various stab wounds. The photographs were relevant to numerous trial issues in the case including, most notably, proving deliberate intent to kill and, during penalty phase, conscious physical suffering to show the murder was especially heinous, atrocious or cruel. *See* Proposition XIII. These photographs were not unfairly prejudicial considered both individually and collectively. Nor were they cumulative. "[T]he State was not required to downplay the violence involved or its repercussions." *Jones v. State*, 2009 OK CR 1, ¶ 57, 201 P.3d 869, 885.

¶64 Appellant fails to show error from the admission of any of these photographs (or, for that matter, plain error in those instances where Appellant did not preserve his claim below). Moreover, under the total circumstances, Appellant fails to show he was denied a fundamentally fair trial in violation of due process during either stage of his capital murder trial based on the admission of these photographs. Relief is thus denied for Proposition V.

JURY INSTRUCTIONS

¶65 In Proposition VI, Appellant complains that the trial court violated his due process rights by failing to instruct the jury on the lesser included offenses of second degree depraved mind murder and first degree heat of passion manslaughter. In Proposition VII, Appellant complains that the trial court erred in failing to give voluntary intoxication instructions.

¶66 Appellant requested lesser-included offense instructions on second degree murder and first degree manslaughter at trial, thus preserving these issues for appellate review. The trial court overruled these requests and provided no lesser included offense instructions. "This Court has held that it is the duty of the trial court to determine as a matter of law whether the evidence is sufficient to justify the submission of instructions on a lesser included offense. If there is a doubt, the court should submit the matter to the jury." *Rumbo v. State,* 1988 OK CR 27, ¶ 3, 750 P.2d 1132, 1132. In a first degree murder case, the trial court should instruct on any lesser form of homicide supported by the evidence. *Bland v. State*, 2000 OK CR 11, ¶ 54, 4 P.3d 702, 719. We require *prima facie* evidence of the lesser included offense to support giving a lesser included instruction. *Davis*, 2011 OK CR 29, ¶ 101, 268 P.3d at 116. "*Prima facie* evidence of a lesser included offense is that evidence which would allow a

jury rationally to find the accused guilty of the lesser offense and acquit him of the greater." *Id.*

¶67 In capital cases, the Supreme Court has held that a death sentence may not constitutionally be imposed unless the jury is permitted to consider a verdict of guilt as to a lesser-included non-capital offense which is supported by the evidence. *Beck v. Alabama*, 447 U.S. 625, 633-45, 100 S. Ct. 2382, 2387-94, 65 L. Ed. 2d 392 (1980). *See Davis*, 2011 OK CR 29, ¶ 117, 268 P.3d at 119. *Beck* does not, however, require the trial court to instruct on offenses that are not lesser included offenses of the charged offense under state law. *Hopkins v. Reeves,* 524 U.S. 88, 90-91, 118 S. Ct. 1895, 1898, 141 L. Ed. 2d 76 (1998). The Court's "fundamental concern" in *Beck* "was that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all." *Schad v. Arizona*, 501 U.S. 624, 646, 111 S. Ct. 2491, 2504, 115 L. Ed. 2d 555 (1991).

¶68 Homicide is murder in the second degree "[w]hen perpetrated by an act imminently dangerous to another person and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual[.]" 21 O.S.2011, § 701.8. The record fails to contain any evidence showing Appellant acted without any premeditated design to effect death. Appellant stabbed the victim seven (7) times in the head, neck, back, torso and hand. Numerous superficial cuts too were observed on the victim's head and neck and were consistent with having been made by a serrated blade.

¶69 In his videotaped interview, Appellant admitted grabbing the victim, holding on to her and stabbing her repeatedly. Appellant was separated from the victim only when a security guard sprayed him in the face with pepper spray. Appellant said that he brought the kitchen knife from home so that if he saw Tia, he could stab her. Appellant said too that he and Tia had been arguing about his support of their child and that the relationship between them recently ended. Appellant admitted being angry and depressed when he stabbed the victim. "Nothing in these facts suggests anything but a design to effect the death of one specific person." *Charm v. State*, 1996 OK CR 40, ¶ 10, 924 P.2d 754, 760. All things considered, there was insufficient evidence presented to allow a jury rationally to find the accused guilty of second degree depraved mind murder and acquit him of first degree malice aforethought murder. *See Boyd v. State,* 1992 OK CR 40, ¶¶ 5, 11, 839 P.2d 1363, 1366, 1367.

¶70 Appellant's claimed entitlement to instructions on first degree heat of passion manslaughter also lacks merit. Under Oklahoma law, homicide is manslaughter in the first degree "[w]hen perpetrated without a design to effect death, and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; unless it is committed under such circumstances as constitute excusable or justifiable homicide." 21 O.S.2011, § 711(2). "The elements of heat of passion are 1) adequate provocation; 2) a passion or emotion such as fear, terror, anger, rage or resentment; 3) homicide occurred while the passion still existed and before a reasonable opportunity for the passion to cool; and 4) a causal connection between the provocation, passion and homicide." *Cipriano v. State,* 2001 OK CR 25, ¶ 16, 32 P.3d 869, 874. "The question is whether, in addition to evidence of intent, there was evidence that Appellant killed the deceased with adequate provocation, in a heat of passion, without the design to effect death." *Id.*

¶71 The evidence presented at trial was insufficient to show adequate provocation. The evidence shows that when Appellant confronted the victim in the bus station, she told him simply to leave her alone. At that point, Appellant began stabbing the victim. This is insufficient evidence to show adequate provocation. *See Washington v. State,* 1999 OK CR 22, ¶ 13 n.4, 989 P.2d 960, 968 n.4 ("Mere words alone, or threats, menaces, or gestures alone, however offensive or insulting, do not constitute adequate provocation."); *Grindstaff v. State,* 1946 OK CR 12, 82 Okl. Cr. 31, 40, 165 P.2d 846, 850 ("mere words or threats, however opprobrious or violent, constitute in law no adequate provocation for passion such as will reduce a homicide from murder to manslaughter."). *See also Jones v. State*, 2006 OK CR 17, ¶ 7 n.4, 134 P.3d 150, 154 n.4 ("Adequate provocation requires personal violence by the deceased likely to cause pain, bloodshed or bodily harm."); OUJI-CR (2d) 4-98 (definition of adequate provocation).[6]

¶72 Additionally, as discussed earlier, there was insufficient record evidence showing Appellant killed the victim with no design to effect death. Rather, the evidence uniformly showed Appellant killed the victim with malice aforethought, i.e., the deliberate intention to

take away the life of a human being. 21 O.S. Supp.2012, § 701.7(A). Lesser-included instructions on first degree heat of passion manslaughter were thus unwarranted. *Black*, 2001 OK CR 5, ¶ 48, 21 P.3d at 1066 ("the Oklahoma definitions of malice and heat of passion show they cannot co-exist[.]"). All things considered, insufficient evidence was presented to support instructions on first degree heat of passion manslaughter. Proposition VI is denied.

¶73 In Proposition VII, Appellant complains that the trial court's failure to instruct on voluntary intoxication was reversible error. We review a trial court's refusal to instruct on the defense of voluntary intoxication for abuse of discretion. *Cuesta-Rodriguez*, 2010 OK CR 23, ¶ 11, 241 P.3d at 223. Appellant requested an instruction on voluntary intoxication and, after an extended discussion, the trial court denied this request. He has therefore preserved this claim for our review.

¶74 "Before a voluntary intoxication instruction is given, the evidence must be sufficient to establish a prima facie case that the defendant was intoxicated to the point he was unable to form deliberate intent to kill." *Id.*, 2010 OK CR 23, ¶ 11, 241 P.3d at 223. We have held that:

> Prima facie evidence is evidence that is "good and sufficient on its face," i.e., "sufficient to establish a given fact, or the group or chain of facts constituting the defendant's claim or defense, and which if not rebutted or contradicted, will remain sufficient to sustain a judgment in favor of the issue which it supports." *Black's Law Dictionary* 1190 (6th ed. 1990); *Ball v. State,* 2007 OK CR 42, ¶ 29 n.4, 173 P.3d 81, 90 n.4. Under our law, the requirements for establishing a voluntary intoxication defense are: (1) the defendant was intoxicated; and (2) he was "so utterly intoxicated, that his mental powers [were] overcome, rendering it *impossible* for [him] to form the specific criminal intent . . . element of the crime" (emphasis added). *Simpson v. State*, 2010 OK CR 6, ¶ 28, 230 P.3d 888, 899; *see also McElmurry v. State*, 2002 OK CR 40, ¶ 72, 60 P.3d 4, 23.

Cuesta-Rodriguez v. State, 2011 OK CR 4, ¶ 7, 247 P.3d 1192, 1195 (denying rehearing).

¶75 The closest evidence in this case of Appellant's purported intoxication at the time of the murder was from Eric Wilson. Eric testified that starting at 9:00 p.m. on March 15, he and Appellant were drinking gin at Eric's apartment. Eric testified Appellant drank "a lot" of gin that night. Eric testified that he and Appellant stayed up into the early morning hours of March 16 snorting powder cocaine and drinking beer. Eric testified that he did not see Appellant using PCP at any point. Eric last saw Appellant around 3:00 or 4:00 a.m. on March 16 when Appellant left.[7]

¶76 In his videotaped interview, Appellant did not indicate that he was under the influence of anything when he murdered the victim. Instead, Appellant calmly described his reason for stabbing the victim, i.e., that he was depressed and angry over the breakup. Detective Benavides, who commenced the interview within roughly two hours after Appellant's arrest, did not observe anything in his interactions with Appellant suggesting intoxication. Neither Detective Benavides nor any of the officers at the bus station who interacted with Appellant observed any of the tell-tale signs and behaviors they typically associated with PCP use based on their training and experience. Instead, Appellant was very calm and matter-of-fact. Appellant was able to communicate with the officers at the bus station and, a short time later, with a doctor at the emergency room concerning his injuries. As Detective Benavides reviewed the Miranda warning with Appellant at the beginning of the interview, Appellant followed along, responded to the detective's questions and appeared to understand.

¶77 During the videotaped interview, Appellant provided a full account of how he came to be at the bus station and why he stabbed the victim. Appellant is seen on the videotape responding appropriately to Detective Benavides's questions. Appellant gave a detailed description of taking a knife from home with him to the bus station, confronting the victim and then stabbing her repeatedly inside the terminal. Appellant never claimed during the interview that he was high or intoxicated or that drug or alcohol use was somehow responsible for his actions. Instead, Appellant calmly – and at times, tearfully – explained his actions as being fueled by the depression and anger he felt over Tia's termination of their relationship. Appellant asked if the detective would contact his mother, asked about the victim's condition and expressed his belief that he would be killed in jail for what he had done to Tia. Appellant too interacted with the detectives

during the interview to facilitate their taking of buccal swabs for later testing.

¶78 We have described the test for obtaining voluntary intoxication instructions as "a high standard whose threshold cannot be met simply by presenting conflicting evidence of a defendant's level of intoxication." *Cuesta-Rodriguez*, 2011 OK CR 4, ¶ 7, 247 P.3d at 1195. The evidence in this case falls well short of what is required for voluntary intoxication instructions under our law. In this regard, we have held that:

> In a case like the current one, where the defendant provides a detailed description of the circumstances and events leading up to and including his own act(s) of killing the victim, the very fact that the defendant was aware of his circumstances and able to recognize what was happening at the time suggests that he will not be able to make even a prima facie showing that he was so intoxicated that it was impossible for him to have formed a specific intent to kill his victim.

Id., 2011 OK CR 4, ¶ 10, 247 P.3d at 1196.

¶79 Here, the evidence shows at best Appellant used drugs and drank gin in the hours leading up to the killing. Nonetheless, Appellant provided a detailed, lucid account of what happened before, during and after the killing of his ex-girlfriend. And his behavior and interaction with the police after being arrested does not suggest intoxication of any kind. Under the total circumstances, an instruction on voluntary intoxication was unwarranted. *See Bland,* 2000 OK CR 11, ¶ 51, 4 P.3d at 718 (voluntary intoxication instructions unwarranted where, despite evidence showing appellant had ingested drugs the day of the murder, appellant provided a detailed account of the circumstances of the murder in his testimony); *Jackson*, 1998 OK CR 39, ¶¶ 69-70, 964 P.2d at 892 (voluntary intoxication instructions unwarranted where appellant testified he was aware of things going on around him just before and just after the murder). Proposition VII is denied.

JUROR MISCONDUCT

¶80 In Proposition VIII, Appellant complains that the trial court abused its discretion in failing to remove Juror R.G. for misconduct during the first stage of trial based on her purported discussion of the case with Juror C.E., who *was* removed. Appellant also complains that the trial court abused its discretion in replacing C.E. with Alternate Juror C.S. as the ninth juror on the panel. Appellant argues the trial court should have replaced C.E. with the other available alternate juror because C.S. too was implicated in the juror misconduct.

¶81 The crux of Appellant's Proposition VIII claim is that "[t]he record shows by clear and convincing evidence that [C.E.] and [R.G.] engaged in a conversation suggesting that they did not believe the defense witnesses who appeared in orange." The bedrock constitutional principle at issue here is Appellant's due process right to "a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 1642, 6 L. Ed. 2d 751 (1961). *See* U.S. Const. amends. VI and XIV; Okla. Const. art. 2, § 20. Towards that end, trial judges in Oklahoma are required to instruct jurors "that it is their duty not to converse with, or suffer themselves to be addressed by, any other person, on any subject of the trial, and that it is their duty not to form or express an opinion thereon, until the case is finally submitted to them." 12 O.S.2011, § 581.

¶82 In the present case, the trial court repeatedly admonished the jury not to discuss the case before releasing the jurors for mid-trial and evening recesses. The record shows Marva Banks, an assistant public defender not involved with Appellant's case, informed the trial court on the fifth day of trial that she heard three jurors (two African American males and a woman with blonde hair) the previous evening discussing witness testimony in the parking garage while they were all waiting for the elevator. Banks testified that two jurors were standing in front of her waiting on the elevator in the parking garage when a third juror approached and said "I've never seen so much orange." At that point, the other two jurors started laughing and one said "Yeah, there were so many family members that showed up in orange and it didn't help." Banks said the jurors' reference to "orange" was to jail orange. According to Banks, one of the jurors asked "where was his mother? That would have helped."

¶83 Notably, the last three witnesses before this purported incident were Eric Wilson, Roy Tryon, and Rico Wilson – Appellant's cousin, father and brother respectively. All three of these witnesses were in custody, and wearing orange jail garb, when they took the witness stand. Based on Banks's description of the

three jurors, the trial court and parties questioned Juror C.E., Juror R.G. and Alternate Juror C.S. When R.G. was brought in for questioning, Banks stated R.G. was not the female juror involved. R.G. was then returned to the jury room without being questioned. Juror C.E. was brought in next and admitted saying "I couldn't believe there was [sic] so many people in orange coming today." However, C.E. denied saying this on the way to the elevator or in the parking lot. Instead, he claimed to have made this comment upstairs in the courthouse the day before when the jurors were leaving as one of the witnesses in orange was also getting on an elevator to leave. C.E. testified that the man in orange had a "weird" stare.

¶84 When asked by Judge Truong whether, when C.E. left the day before, he rode with anyone in the elevator on the way to his car, C.E. responded that he rode with Juror R.G. C.E. explained that he was waiting at the elevator with R.G. and then rode the elevator up with her and some other people. C.E. denied discussing anything about the case. When asked whether anyone mentioned too many people in orange or said they wished the mother was there, C.E. replied "[n]o, not during there." C.E. then immediately corrected himself and recalled that he "did say I wish the mother would have got up here."

¶85 In follow-up questioning, the prosecutor asked whether C.E. had predetermined the outcome of the case; C.E. said no. When asked to explain what precipitated the comment about people being in orange, C.E. said it was because of the behavior of the person in orange. C.E. acknowledged too that the defense had no burden of proof and had no obligation to present any witnesses. When asked by the defense with whom he was discussing all the orange, C.E. responded "I had just said it out loud . . . I just said that was a lot of orange." When asked whether there was discussion to the effect that all the orange didn't help the client, C.E. denied having any such conversation or ever saying it. However, one of the other jurors – he believed Juror J.L. – in response to his comment about all the orange told him "shh." Additionally, C.E. said he made the comment about wishing they had heard from the mother to Juror R.G. When C.E. made the comment, he said R.G. "just didn't say nothing. She just kind of looked at me and just acknowledged that I said something and that was it." C.E. denied that any other male jurors were present.

¶86 Alternate Juror C.S. did not recall walking the night before with Jurors C.E. and R.G. to the parking garage. C.S. denied saying to the other jurors anything about having made up his mind on the case. Nor had he talked to the other jurors about the case. C.S. also did not remember hearing the other jurors talk about the case. C.S. testified that he had not made up his mind on the case because he had not yet heard all the evidence.

¶87 Banks never identified C.S. as one of the people involved in the conversation with C.E. At the conclusion of C.S.'s testimony, defense counsel stated that Banks thought the other male involved in the conversation may have been Juror Q.A. The prosecutor noted too that Banks gestured in a manner indicating she was not sure it was C.S. when he first entered the room. When Q.A. was questioned, he testified C.E. did walk ahead of him on the way to the parking garage the night before. Q.A. did not, however, hear C.E. talking. Nor had he heard any of the jurors discussing the case or indicating that they had reached a verdict. Q.A. denied doing the same. When asked by defense counsel whether Q.A. heard any of the jurors discussing what they saw yesterday as they were leaving, Q.A. responded that he only saw "some shaking of heads, but no discussion." Q.A. clarified that no one was shaking their heads to each other but only in "self-contemplation" just as some had done when they were sitting in the jury box listening to the testimony. Q.A. clarified no one was talking about the case or deliberating in any way when they were shaking their heads.

¶88 Juror R.G. was the last juror questioned. R.G. denied discussing the case with anyone on the jury. Nor had R.G. heard other jurors talking about the case in her presence. R.G. admitted using the elevators in the parking garage the previous evening but denied hearing anyone talking about orange. R.G. could not remember other jurors being around her as she walked to the parking garage. R.G. explained she "want[s] to leave here as soon as possible when I'm done at the end of the day. I don't look or talk to anybody. I just want to get the heck out of here." R.G. testified the trial had been "very intense" and she "just want[s] to leave" after court each day. Hence, R.G. could not recall who she was with yesterday as she left. Nor did she hear any conversations.

¶89 The parties agreed to remove Juror C.E. based on his violation of the court's admonish-

ment not to talk about the case. The trial court granted that request. C.E. was replaced by Alternate Juror C.S., the first alternate juror. Defense counsel objected because she said Banks thought C.S. looked closer to the man she saw than Juror Q.A. Defense counsel urged that the second alternate juror replace C.E. instead. Defense counsel also requested R.G. be removed from the panel. The trial court overruled Appellant's objection as to C.S. because he heard nothing and had not discussed the case with anyone. The trial court likewise denied Appellant's challenge to R.G., concluding that even if C.E. had been talking to R.G., her testimony makes clear she was not paying any attention. The trial court observed R.G.'s testimony that all she cared about was going home at the time and noted too that there was no evidence C.E. and R.G. had been discussing anything. Unsuccessful in his quest to remove C.S. and R.G., Appellant requested a mistrial which was also denied.

¶90 In *Jones v. State*, 2006 OK CR 5, 128 P.3d 521, we found no abuse of discretion from the trial court's refusal to remove a juror mid-trial who expressed in the presence of another juror an opinion as to the appropriate punishment. The trial court made inquiry when another juror reported hearing Juror Y say "that they should place him in a box in the ground for what he has done." *Id.*, 2006 OK CR 5, ¶ 19 n.3, 128 P.3d at 535 n.3. This indicated to the reporting juror that Juror Y had already made up his mind on the issue of punishment. *Id.*, 2006 OK CR 5, ¶ 19, 128 P.3d at 535. When questioned by the trial court, Juror Y denied making the statement but then later admitted he "could have said that, yes." *Id.* Juror Y also admitted having formed a partial opinion on what he thought should be the appropriate punishment but said he was waiting to hear the rest of the evidence. When the reporting juror was questioned again, she indicated hearing only part of the statement and admitted she did not know if it was related to the case. All of the other jurors denied hearing another juror express an opinion as to the appropriate penalty or punishment. The trial court denied defense counsel's request to further question Juror Y and to excuse him for cause. *Id.*

¶91 We find our previous holding in *Jones* applies here:

> A claim of juror misconduct before a criminal case is submitted to a jury must be established by clear and convincing evidence. *Glasgow v. State*, 1962 OK CR 41, ¶ 16, 370 P.3d 933, 936; *Pennington v. State,* 1995 OK CR 79, ¶ 18, 913 P.2d 1356, 1363. Jones must show actual prejudice from any jury misconduct and "defense counsel's mere speculation and surmise is insufficient upon which to cause reversal." *Woodruff v. State,* 1993 OK CR 7, ¶ 13, 846 P.2d 1124, 1132, quoting *Chatham v. State*, 1986 OK CR 2, ¶ 7, 712, P.2d 69, 71. The trial court personally observed the jurors and their responses. We will not disturb its refusal to allow additional questioning and/or excuse the allegedly offending juror for misconduct absent an abuse of discretion. *Teafatiller v. State*, 1987 OK CR 141, ¶ 18, 739 P.2d 1009, 1012. The trial court did not abuse its discretion. Jones has failed to show that any of his alleged misconduct was prejudicial; therefore, this proposition fails.

Id., 2006 OK CR 5, ¶ 20, 128 P.3d at 535.

¶92 In the present case, the trial court excused C.E. in light of his admission that he did not follow the court's admonishment against not talking about the case. However, the trial court did not abuse its discretion in denying Appellant's request to strike C.S. and R.G., or to seat the second alternate instead of C.S. Appellant does little more on appeal than speculate and surmise that these two jurors engaged in misconduct. The record, on the other hand, supports the trial court's findings. Appellant fails to show by clear and convincing evidence these two jurors discussed the case with anyone, let alone had predetermined the case. Considering the deference we must afford the trial court in this context, we defer to the trial court's ruling on these issues. *See Jackson v. State*, 2006 OK CR 45, ¶ 11, 146 P.3d 1149, 1156 ("Whether a prospective juror is biased depends heavily on the trial court's appraisal of the juror's credibility and demeanor and often the basis for these credibility findings cannot be readily discerned from an appellate record."). The trial court did not abuse its discretion either in refusing to remove C.S. and R.G. or in denying Appellant's related motion for mistrial. The removal of C.E. cured any possible prejudice arising from his admitted misconduct. *Knighton v. State*, 1996 OK CR 2, ¶¶ 64-65, 912 P.2d 878, 894 (a defense motion for mistrial is left to the court's discretion and is warranted only when an event at trial results in a miscarriage of justice or constitutes an irreparable and substantial violation of a defendant's

constitutional or statutory rights). Proposition VIII is denied.

SENTENCING ISSUES

¶93 In Proposition IX, Appellant complains that the trial court impermissibly restricted his presentation of mitigating circumstances. Appellant first challenges the limitations placed on Dr. David Musick's testimony during penalty phase. Dr. Musick, a sociology professor, was presented by the defense as an expert witness to discuss the risk factors and events from Appellant's life history which impacted his development. This was offered to explain Appellant's pattern of illegal behavior culminating in his murder of Tia Bloomer. During this testimony, the trial court sustained a hearsay objection to Dr. Musick's regurgitation on his direct examination of hearsay statements by Appellant's mother concerning Roy Tryon's violent conduct using a knife against one of Sheryl Wilson's boyfriends. This testimony was offered to show the facts relied upon by Dr. Musick in formulating Appellant's life story which, in turn, was used to support his conclusions and opinions. The trial court admonished defense counsel that the witness "cannot testify to what other people told him" in presenting his expert's opinion.

¶94 On appeal, Appellant complains that the trial court's ruling violated his Eighth Amendment right to present relevant mitigating evidence. He also claims that the strict application of state evidence rules to disallow this particular evidence deprived him of due process. Appellant did not raise this claim in connection with the trial court's ruling, thus waiving all but plain error review on appeal. *Brown v. State*, 2008 OK CR 3, ¶ 11, 177 P.3d 577, 580 (failure to object at trial on grounds raised on appeal waives review of all but plain error). Appellant fails to show plain error.

¶95 "It is beyond dispute that mitigating evidence is critical to the sentencer in a capital case." *Warner v. State*, 2001 OK CR 11, ¶ 15, 29 P.3d 569, 575. Mitigating evidence is a necessary component of the individualized sentencing required in capital cases. One of the cardinal principles of the Supreme Court's Eighth Amendment jurisprudence is that a capital murder defendant must be given the opportunity to present relevant mitigating evidence for consideration by the jury. *Tennard v. Dretke*, 542 U.S. 274, 284, 124 S. Ct. 2562, 2570, 159 L. Ed. 2d 384 (2004); *Eddings v. Oklahoma*, 455 U.S. 104, 113-14, 102 S. Ct. 869, 876-77, 71 L. Ed. 2d 1 (1982). The Eighth Amendment forbids imposition of a death sentence if the jury "is 'precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Smith v. Spisak*, 558 U.S. 139, 144, 130 S. Ct. 676, 681-82, 175 L. Ed. 2d 595 (2010) (quoting *Mills v. Maryland*, 486 U.S. 367, 374, 108 S. Ct. 1860, 1865, 100 L. Ed. 2d 384 (1988)).

¶96 The trial court's ruling was based on state law, specifically, Title 12 O.S.Supp.2013, § 2703 and 12 O.S.2011, § 2705. Section 2703 provides that an expert witness may base an opinion on inadmissible facts or data so long as such facts or data are of the type reasonably relied upon by experts in the witness's field of expertise.[8] "Under this rule, an expert may base an opinion solely on inadmissible hearsay." *Cuesta-Rodriguez*, 2010 OK CR 23, ¶ 39, 241 P.3d at 229. We have previously held that an expert witness may, consistent with 12 O.S. 2011, § 2705, generally disclose on direct examination the facts or data underlying his opinion. *Id.*[9] We found that "[t]he only limit placed on the disclosure of such information by this Court is that section 2705 cannot be used as 'a license to parade a mass of inadmissible evidence before the jury.'" *Lewis v. State*, 1998 OK CR 24, ¶ 19, 970 P.2d 1158, 1166-67 (quoting *Sellers v. State*, 1991 OK CR 41, ¶ 23, 809 P.2d 676, 685). However, since these decisions, the Legislature has amended Section 2703 to add that facts or data otherwise inadmissible "shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." 12 O.S.Supp.2013, § 2703. This amended version of Section 2703 was in force during Appellant's trial.

¶97 The trial court's limitation of Dr. Musick's testimony was driven by the compelling state interest of preventing a party from using an expert witness as a mere conduit to regurgitate large amounts of inadmissible and possibly unreliable hearsay. Appellant argues it was impossible for him to present a full social history to the jury in light of the trial court's limitation. The record, however, does not support this assertion. Appellant presented numerous first-hand accounts from several relatives and

family members – including Sheryl Wilson and Roy Tryon – concerning the physical abuse and violence Roy inflicted on Appellant, Sheryl and Appellant's siblings as well as the turbulent, drug-fueled nature of Roy and Sheryl's relationship. Indeed, Roy admitted in his testimony to stabbing in front of the children a man whom he believed was Sheryl's boyfriend. Appellant presented mitigation evidence from the family witnesses concerning virtually every aspect of his life. This included first-hand accounts concerning Appellant's drug abuse; learning disabilities; educational background; prior incarcerations; prior head injuries; suicide attempts; family background; mental health treatment and institutionalization; prior incarcerations of his mother, father and siblings; gang involvement; the crowded conditions at the family home; the fact the family constantly moved; the non-stop drug activity at the family home; the routine absence of Appellant's mother from the family home while on multi-day drug binges; Appellant's mother buying drugs from Appellant and his brother; Sheryl's physical abuse of her children; Appellant's drug dealing; Appellant's love for his son; the nature of Appellant's relationship with the victim; and the nature of Appellant's relationship with his mother.

¶98 Dr. Musick's expert testimony was based in large part on the same first-hand accounts relayed through Appellant's family witnesses during penalty phase testimony. To be sure, Dr. Musick's opinions and conclusions were subject to extensive cross-examination and impeachment by the prosecutor, but we fail to see how this fact undermined Appellant's Eighth Amendment right to present relevant mitigating evidence – particularly in light of the large amount of mitigating evidence Appellant presented about every aspect of his life. Under these circumstances, Appellant was not deprived of his Eighth Amendment right to present relevant mitigating evidence based on the trial court's hearsay ruling. At best, the effect of the trial court's ruling was to disallow cumulative accounts by the expert witness that would needlessly prolong the trial. This was well within the trial court's discretion under the governing law. *See Postelle v. State*, 2011 OK CR 30, ¶ 74, 267 P.3d 114, 142. This aspect of Proposition IX is denied as there is no plain or obvious error affecting Appellant's substantial rights based on the trial court's ruling.

¶99 Appellant's complaint that the trial court violated his Eighth Amendment rights by disallowing mitigation testimony from Pamela Wilson, Appellant's aunt, concerning domestic violence between Appellant's parents which occurred before Appellant was born also lacks merit. In the challenged passage, Pamela Wilson testified on direct examination to the controlling nature of the relationship between Sheryl Wilson and Roy Tryon. When defense counsel asked whether Roy had ever become physical with Sheryl, the prosecutor asked to approach and a bench conference ensued. The prosecutor objected to the form of the question, arguing the question would allow testimony about incidents of domestic abuse between the couple which occurred before Appellant was born. The prosecutor urged that the defense be required to limit its inquiry to those instances of domestic violence which Appellant personally observed because "this is a trial about [Appellant] not about Roy and Sheryl's relationship. So it's only relevant if somehow that behavior morphed or shaped who [Appellant] is." Defense counsel responded that she was eliciting testimony showing "the foundation of when the behavior began, which does impact him, and how long it had began and how long it has happened". The trial court sustained the prosecutor's objection and directed defense counsel to limit her inquiry to those incidents of domestic violence witnessed by both the witness and Appellant. Wilson went on in her testimony to describe incidents of domestic abuse which occurred in front of Appellant and his siblings, thus conforming to the ruling.

¶100 During Sheryl Wilson's direct examination, the trial court sustained a similar objection to testimony concerning certain instances of domestic abuse between Roy and Sheryl. In this instance, Wilson acknowledged that the domestic violence she was asked to describe was nothing Appellant "knew much about". The trial court later sustained a challenge to testimony from Wilson concerning her drug use before Appellant was born.

¶101 Appellant complains on appeal that the trial court violated his Eighth Amendment right to present relevant mitigation evidence with these rulings. Appellant did not make these arguments in connection with the trial court's ruling, thus waiving all but plain error. Moreover, the trial court did not abuse its discretion in limiting the mitigation testimony. As discussed earlier, Appellant has a constitu-

tional right to present *relevant* mitigation evidence during his capital sentencing hearing. Drawing on the general relevancy standard for the admission of evidence, the Supreme Court has held that "[r]elevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." *Tennard*, 542 U.S. at 284, 124 S. Ct. at 2570 (internal quotation omitted). Thus, the state cannot bar "the consideration of . . . evidence if the sentencer could reasonably find that it warrants a sentence less than death." *Id.*, 542 U.S. at 285, 124 S. Ct. at 2570 (internal quotation omitted).

¶102 The trial court did not bar the admission of evidence the sentencer could reasonably find warranted a sentence less than death. The disallowed testimony was not relevant because it described incidents of domestic violence Appellant did not witness and that did not affect his development. This testimony, along with the specifics of Sheryl Wilson's drug use prior to Appellant's birth, was not evidence of Appellant's character or record and any of the circumstances of the offense. Moreover, defense counsel elicited from the various family members extensive testimony concerning the domestic abuse Appellant witnessed as a child as well as the dynamics of his parents' relationship. Defense counsel too elicited a great deal of testimony concerning Sheryl Wilson's drug use, including evidence concerning the drugs she ingested while pregnant with Appellant. The trial court appropriately limited the witness's testimony with the challenged rulings. There was no plain or obvious error affecting Appellant's substantial rights from the trial court's ruling. Proposition IX is denied.

¶103 In Proposition X, Appellant complains that capital punishment for "brain damaged and chronically mentally ill defendants" like himself violates the Eighth Amendment. In urging a categorical exception from the death penalty for those whom he describes as "severely mentally ill," Appellant compares his situation to mentally retarded inmates who are ineligible for execution under *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). Appellant argues too that mental illness "is often misunderstood" by juries who "might believe, wrongly, that mental illness necessarily implies violence." This, in turn, means "a mentally ill defendant cannot adequately wage a mitigation case." And because evidence of mental illness is "often not well received by jurors" this fact calls into question the ability of a capital sentencer to adequately conduct the individualized sentencing determination required by the Eighth Amendment. For these reasons, Appellant tells us a categorical exception is needed.

¶104 We have previously rejected this claim and do so here. *Underwood v. State*, 2011 OK CR 12, ¶ 69, 252 P.3d 221, 248. In the present case, Appellant presented expert testimony that he was low functioning and suffered both from mental illness (most prominently depression) and brain damage. Appellant presented this testimony along with anecdotal evidence from family members concerning his cognitive and developmental limitations, his mental health treatment and his experience taking – then discontinuing – medications prescribed specifically for his mental issues.

¶105 Appellant did not assert an insanity defense at trial or otherwise show that he suffered diminished capacity to understand the nature of his conduct at the time of the crime. Appellant calmly described for police during the videotaped interview a few hours after the murder how, and why, he repeatedly stabbed the victim. Appellant's neuropsychological expert, Dr. John Fabian, testified Appellant was not mentally retarded. And there is no evidence suggesting mental illness prevents Appellant from comprehending the reasons for the death penalty in this case or its implications. *Ford v. Wainwright,* 477 U.S. 399, 417, 106 S. Ct. 2595, 2606, 91 L Ed. 2d 335 (1986). Defense counsel presented evidence of Appellant's mental issues as mitigating circumstances for the jury's consideration during penalty phase. Here, the jury rejected this evidence as a basis for imposing a non-capital punishment.

¶106 We decline Appellant's invitation to hold that mentally ill persons are categorically ineligible for the death penalty. Appellant provides no workable standard to implement such a rule and one is not readily apparent considering the various forms of mental illness and their varying effects on different individuals. We reject too Appellant's suggestion that he was somehow unable to mount an adequate penalty-phase defense because of the so-called "double-edged" nature of mental health evidence. In the present case, the jury was adequately instructed on the consideration of mitigating circumstances and was presented a plethora of mitigation evidence by the defense to consider in determining

the appropriate sentence for Appellant's crime. The value and worth of this evidence was ultimately for the jury to decide. "Despite evidence that Appellant suffers from . . . mental illness, we accept the jury's conclusion that he was morally culpable for his actions and deserving of the death penalty." *Underwood*, 2011 OK CR 12, ¶ 69, 252 P.3d at 248. Proposition X is denied.

¶107 In Proposition XI, Appellant complains that his prior felony conviction was improperly used to support three (3) separate aggravating circumstances. This, Appellant argues, violated the Eighth Amendment requirement that aggravators narrow the class of persons eligible for the death penalty. Appellant complains too that using the same evidence to support three separate aggravating circumstances skews the weighing process and creates the risk that the death penalty will be imposed arbitrarily.

¶108 Appellant did not raise this claim below, thus waiving all but plain error. Appellant fails to show error, plain or otherwise. In the present case the State introduced by stipulation State's Exhibits 60 and 61, a judgment and sentence and docket sheet for Appellant's convictions on four (4) counts of Assault with a Dangerous Weapon in 2011. According to the judgment and sentence, Appellant received a ten (10) year suspended sentence on each count. These convictions were for Appellant's act of shooting at several people in a hotel parking lot. Evidence of the facts surrounding these crimes was independently presented from the police officer who witnessed the shooting. Evidence of Appellant's prior felony convictions was introduced by the State to support the aggravating circumstances that the murder was committed by a person while serving a sentence of imprisonment on a conviction of a felony; and the defendant was previously convicted of a felony involving the use or threat of violence to the person. Appellant's prior felony convictions were also relevant to show future dangerousness and, thus, the aggravating circumstance of the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. *See Lockett v. State*, 2002 OK CR 30, ¶ 32, 53 P.3d 418, 428 (prior felony convictions indicating likelihood of future violence may be offered to show continuing threat aggravator).

¶109 This Court has reviewed claims of unconstitutionally duplicitous aggravating circumstances in the past. We have rejected the claim that use of a prior conviction to support both the prior violent felony and continuing threat aggravators constituted error. We reasoned that the same evidence, a prior felony conviction, may be used to support these two aggravators so long as the prior conviction covers different aspects of the defendant's conduct. *Hammon v. State*, 2000 OK CR 7, ¶¶ 85-86, 999 P.2d 1082, 1100; *Berget v. State*, 1991 OK CR 121, ¶¶ 47-52, 824 P.2d 364, 376-77. We found that each aggravator covered separate and distinct aspects of the defendant's conduct, i.e., his past violent felony convictions versus the probability of committing violent acts in the future from which society would need protection. *Hammon*, 2000 OK CR 7, ¶ 86, 999 P.2d at 1100.

¶110 In light of these decisions, we reject Appellant's challenge to the prior violent felony aggravator and the continuing threat aggravating circumstances on grounds they are impermissibly duplicitous. Both aggravators focus on different aspects of Appellant's conduct "and one can be found without necessarily finding the others[.]" *Cannon v. State*, 1998 OK CR 28, ¶ 57, 961 P.2d 838, 853. Appellant fails to show a plain or obvious error affecting his substantial rights. Thus, there is no error, plain or otherwise. To the extent Appellant bases his duplicity challenge on the serving a sentence of imprisonment aggravator, this aspect of his Proposition XI claim is moot. We strike this particular aggravating circumstance in the next proposition of error and conduct reweighing in connection with our mandatory sentence review. Proposition XI is therefore denied.

¶111 In Proposition XII, Appellant complains that application of the serving a sentence of imprisonment aggravator in his case renders the aggravator unconstitutionally overbroad because he was not physically incarcerated when he committed the murder. Rather, Appellant says, he had never been to prison and was merely serving a probated sentence while serving out the suspended sentence for his prior felony convictions.

¶112 The jury found that Appellant murdered Tia Bloomer while he was "serving a sentence of imprisonment on conviction of a felony." 21 O.S.2011, § 701.12(6). In Oklahoma, a suspended felony sentence represents a felony conviction in which execution of the defendant's sentence of imprisonment is suspended in whole or part, with or without probation. 22

O.S.2011, § 991a(A)(1). When the defendant is subject to probation in this context, the sentence of imprisonment is suspended based on the defendant's compliance with special terms and conditions of probation imposed by the judgment and sentence. *Marutzky v. State,* 1973 OK CR 398, ¶ 5, 514 P.2d 430, 431. Probation "is a procedure by which a defendant found guilty of a crime . . . is released by the court subject to conditions imposed by the court and subject to supervision by the Department of Corrections, a private supervision provider or other person designated by the Court." 22 O.S.Supp.2014, § 991a(E).[10] We have held that a suspended sentence is a matter of grace. *Demry v. State,* 1999 OK CR 31, ¶ 12, 986 P.2d 1145, 1147. "Until that suspended sentence has been fully served, a defendant remains under the jurisdiction of the trial court with the sentence subject to revocation." *Id.*

¶113 "[A] judgment and sentence where execution of all or a portion of the assessed sentence is suspended is a conviction." *Grimes v. State,* 2011 OK CR 16, ¶ 16, 251 P.3d 749, 754. When the State files an application to revoke, the issue is whether the suspended sentence previously imposed should be executed and the court makes a factual determination as to whether or not the terms of the suspension order have been violated. *Id.*, 2011 OK CR 16, ¶ 13, 251 P.3d at 754. *See also Friday v. State*, 2016 OK CR 16, ¶ 5, 387 P.3d 928, 930 ("An order revoking a suspended sentence is not a conviction or sentence, but is instead the revocation of a condition placed upon the execution of a sentence."). During the time span of the suspended sentence, the defendant "is obligated to abide by the terms and conditions of his probation or face revocation of the unexecuted portion of his sentence. The unexecuted portion of the sentence consists of any time during that . . . [time] span not spent in custody." *Grimes,* 2011 OK CR 16, ¶ 10, 251 P.3d at 753.

¶114 In the present case, the judgment and sentence document introduced to prove Appellant's prior felony conviction shows he was serving a ten year sentence of imprisonment under the custody and control of the Department of Corrections – all suspended and subject to special terms and conditions of probation. A supplemental order attached to the judgment and sentence shows Appellant was subject to supervised probation for the first two (2) years of his ten year suspended sentence through the Oklahoma County District Attorney's Office. The supplemental order too contained the rules and conditions of probation to which Appellant was subject along with a few special conditions like attending domestic abuse counseling and obtaining a drug/alcohol assessment.

¶115 We have consistently rejected claims that the serving a sentence of imprisonment aggravator is limited to cases where the murder occurs in a prison facility. *Humphreys v. State,* 1997 OK CR 59, ¶ 31, 947 P.2d 565, 575 (citing cases). We have upheld this aggravator for murders committed by parolees. We reasoned that parole is "a 'significant restraint' on the liberty of the parolee who is subject to control of the parole board 'under the cloud of an unexpired sentence.'" *Cleary v. State*, 1997 OK CR 35, ¶ 42, 942 P.2d 736, 747 (quoting *Plotner v. State*, 1986 OK CR 97, ¶ 3, 721 P.2d 810, 811-12). *See* 57 O.S.2011, § 512 (setting forth the conditions for release of inmates in state penal institutions who are granted parole). We observed too that "[a] sentence which is unexpired obviously is being served." *Cleary,* 1997 OK CR 35, ¶ 42, 942 P.2d at 747.

¶116 We have also approved of the application of this aggravator to situations "when the killing occurred within an Oklahoma prison facility, when the murder was committed by an inmate who had escaped and when the killing was committed by an inmate participating in the Pre-parole Conditional Supervision Program." *Humphreys,* 1997 OK CR 59, ¶ 31, 947 P.3d at 576. We have upheld this aggravator too when the killing was committed by inmates participating in the house arrest program. *Id.* We reasoned that inmates serving under house arrest, like those in the pre-parole supervision program, "remain within the custody of the Department of Corrections and continue to serve their sentences while participating in them[.]" *Id.*

¶117 We have found no prior cases in which this Court has upheld the application of the serving a sentence of imprisonment aggravator when the murder was committed by a defendant serving a suspended sentence on a felony. The difference between the present case and those previous situations where this aggravator has been approved is that Appellant's ten year sentence of imprisonment was not executed prior to Tia Bloomer's murder. That is because Appellant's sentence of imprisonment was *suspended*. Appellant thus was not serving a sentence of imprisonment when he stabbed Tia

Bloomer but, rather, was serving a *suspended* sentence of imprisonment while on probation. Appellant's situation is therefore far different from a parolee who "was serving a sentence, albeit on parole," *Harmon*, 2011 OK CR 6, ¶ 73, 248 P.3d at 942, an escapee who physically absented himself from DOC custody, or any of the other forms of supervised release in which we have approved the use of this aggravator. In those cases, the defendant committed capital murder while serving an unexpired sentence of imprisonment that had actually been executed.

¶118 The State argues Appellant was "under the custody and control of the Department of Corrections" when he stabbed the victim based on similar language contained within the judgment and sentence document. The judgment and sentence, however, makes clear that Appellant's ten year sentence of imprisonment was *suspended* on condition that Appellant follow the rules and conditions of probation contained within the supplemental order. Moreover, Appellant was not even being supervised by the Department of Corrections when he stabbed the victim. He was being supervised by the Oklahoma County District Attorney's Office and, at that, for a mere fraction (two years) of the ten year suspended sentence imposed. We therefore think the State's comparison of Appellant's supervised two-year probation to that of an inmate serving out the balance of his or her unexpired sentence of imprisonment through parole or some other form of early release to be misguided. The record makes clear Appellant's sentence of imprisonment was never executed and that he was never in DOC custody on the suspended sentence.

¶119 The difference between a suspended sentence of imprisonment and an actual sentence of imprisonment is stark when one considers the significance of an order revoking a suspended sentence. If the trial court finds a defendant violated the rules and conditions of his probation, the court may execute the entire unexecuted portion of the defendant's sentence until the expiration of the original term of sentence. 22 O.S.2011, § 991b; *Grimes,* 2011 OK CR 16, ¶ 10, 251 P.3d at 753; *Hemphill v. State,* 1998 OK CR 7, ¶ 9, 954 P.2d 148, 151. That means had Appellant's sentencing judge found a violation by Appellant of his rules and conditions of probation, the court would have been authorized to revoke Appellant's ten year sentence in whole, thus resulting in Appellant's subsequent service of ten full years in confinement. The reason why is clear: Appellant was serving a *suspended*, probated sentence of imprisonment that had not yet been executed – not an unexpired sentence of imprisonment where he was actually committed to DOC custody. A parolee, by contrast, would only be forced to serve the remainder of his unexpired sentence of imprisonment in the case of parole revocation. *State ex rel. Corgan v. King*, 1994 OK CR 7, ¶ 9, 868 P.2d 743, 745.

¶120 "Parole is a discretionary act of the Governor which releases a person from jail, prison or other confinement, after actually serving a part of the sentence. Probation, on the other hand, relates to judicial action taken before the prison door is closed, and is part of the sentence imposed." *Swart v. State*, 1986 OK CR 92, ¶ 16 n.9, 720 P.2d 1265, 1270 n.9. This distinction is critical in light of the plain language of the statute defining this statutory aggravating circumstance, i.e., "[t]he murder was committed by a person while serving a sentence of imprisonment on conviction of a felony." 21 O.S.2011, § 701.12(6). Had the Legislature intended for the serving a sentence of imprisonment aggravator to apply to unexecuted, suspended sentences like the one at issue here, it could easily have said so. Because it did not, however, we must follow the plain language of the statute and strike the jury's finding of this aggravator here. *Newlun v. State*, 2015 OK CR 7, ¶ 8, 348 P.3d 209, 211 ("We must hold a statute to mean what it plainly expresses and cannot resort to interpretive devices to create a different meaning."). We will discuss below, in connection with our mandatory sentence review, the effect of this error on Appellant's death sentence.

¶121 In Proposition XIII, Appellant argues that insufficient evidence was presented to support the jury's finding that "[t]he murder was especially heinous, atrocious, or cruel." *See* 21 O.S.2011, § 701.12(4). In reviewing an evidentiary sufficiency challenge to an aggravating circumstance, we take the record evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the aggravator beyond a reasonable doubt. *Coddington v. State,* 2011 OK CR 17, ¶ 62, 254 P.3d 684, 710; *DeRosa v. State,* 2004 OK CR 19, ¶ 85, 89 P.3d 1124, 1153.

¶122 A particular murder is especially heinous, atrocious or cruel where the evidence shows: (1) that the murder was preceded by

either torture of the victim or serious physical abuse; and (2) that the facts and circumstances of the case establish that the murder was heinous, atrocious or cruel. *Postelle,* 2011 OK CR 30, ¶ 79, 267 P.3d at 143. The "term 'torture' means the infliction of either great physical anguish or extreme mental cruelty." *Id.* A finding of "serious physical abuse" or "great physical anguish" requires that the victim have experienced conscious physical suffering prior to death. *Id.* "[T]he term 'heinous' means extremely wicked or shockingly evil; the term 'atrocious' means outrageously wicked and vile; and the term 'cruel' means pitiless, designed to inflict a high degree of pain, or utter indifference to or enjoyment of the suffering of others." *Id.*

¶123 Taken in the light most favorable to the State, the evidence shows the victim was not only aware of Appellant's attack but that she cried for help and actively resisted the stabbing for a significant period of time. Appellant inflicted numerous and repeated severe injuries to vital areas of the victim's body with the flimsy serrated steak knife. Many of these stab wounds cut through bone and vital organs. The surveillance video shows the victim was alive, conscious and moving during the attack. A defensive wound was evident on her hand along with a broken finger and fractured thumb, all suggesting active resistance. The presence of numerous superficial cuts confirms what the surveillance video shows, namely, that Appellant stabbed at the victim many more times than what was required to inflict the seven stab wounds.

¶124 True, Appellant launched a rapid attack in which he repeatedly stabbed the victim over a short period of time. But there is no question the stab wounds and superficial cuts he inflicted would have been painful. And the surveillance video shows the victim's death was not instantaneous. Rather, she actively resisted for a portion of Appellant's attack. "Evidence that the victim was conscious and aware of the attack supports a finding of torture and serious physical abuse." *Frederick*, 2017 OK CR 12, ¶ 109, 400 P.3d at 817. The victim's inability to more actively (and visibly) resist may be explained by Appellant sitting on the victim while stabbing her as well as the injuries he inflicted to her throat which likely prevented her from speaking.

¶125 In *Cole v. State,* 2007 OK CR 27, 164 P.3d 1089, we found sufficient evidence supported the especially heinous, atrocious or cruel aggravating circumstance where the infant victim suffered a fairly quick death but the evidence showed defendant forcefully folded his daughter over backwards until her spine snapped and her aorta tore. The medical examiner testified these injuries would be painful and unconsciousness was not immediate. However, the victim was likely not conscious for more than 30 seconds after her spine snapped and she probably died within two or three minutes. Because of the great amount of protracted deliberate force inflicted, however, we found this aggravator was supported by the evidence. Although fairly quick, the victim's death "was far from painless [and] the pain was likely excruciatingly horrible." We found this evidence of conscious physical suffering was "unlike 'virtually all murders,' thereby placing this crime within the narrowed class of individuals for which capital punishment is a valid option." *Id.*, 2007 OK CR 27, ¶¶ 41-47, 164 P.3d at 1098-99. *See also Cole v. Trammell,* 755 F.3d 1142, 1166-71 (10th Cir. 2014) (upholding on habeas review the finding of the heinous, atrocious or cruel aggravator on these facts).

¶126 In the present case, Appellant inflicted numerous severe stab wounds and superficial cuts to the victim. Although her injuries were delivered rapidly and her death was relatively quick, there is no question the victim suffered excruciating pain from the stab wounds and cuts at the hands of her estranged boyfriend as she and several bystanders resisted his attack. The surveillance video of the killing reveals a ferocious attack launched by Appellant against the victim in a public place after following and cornering her near the glass doors. Considering the nature of the injuries, many of the victim's stab wounds would require tremendous force to inflict using the flimsy white-handled steak knife found near the body.

¶127 Although brief, the conscious physical suffering endured by the victim was extreme and qualitatively separates this case from the many murders where the death penalty was not imposed. The sheer brutality of the injuries, combined with the victim's active and on-going resistance together with the mental anguish of being stabbed repeatedly, further separates this case from virtually all other murders. The total evidence shows the requisite conscious physical suffering to demonstrate that the victim endured serious physical abuse prior to death. As in *Cole*, we find the intensity of suffering caused

by the rapidly inflicted injuries here warrants a finding that this evidence of conscious physical suffering and mental anguish was unlike virtually all murders, thereby placing this crime within the narrowed class of individuals for which capital punishment is a valid option. *See Maynard v. Cartwright*, 486 U.S. 356, 362-65, 108 S. Ct. 1853, 1858-59, 100 L. Ed. 2d 372 (1988).

¶128 In addition, the evidence shows Appellant intended to inflict a high degree of pain and suffering on his estranged girlfriend and that he did so with utter indifference to the victim's conscious physical suffering. Appellant's attack on Tia Bloomer in the downtown bus station was pitiless and showed no feeling or mercy towards the victim as he thwarted the efforts of both bystanders and the victim to resist his onslaught. Given the couple's tumultuous history, the victim too surely experienced increased anxiety and mental anguish when Appellant appeared, attempted to speak with her and followed her around inside the bus terminal. Appellant attacked the victim only after she rejected his advances to talk inside the bus terminal and walked away, further increasing the already tense relations between the two and sparking Appellant's unrestrained violence and fury towards her. The jury could infer that Appellant sought to (and in fact did) severely punish the victim when delivering the deadly knife attack. Under these circumstances, the victim's murder was, at the least, "cruel" in light of our definitional interpretation of the statutory language for the especially heinous, atrocious or cruel aggravator. These facts further place the crime within the narrowed class of individuals for which capital punishment is a valid option.

¶129 Taken in the light most favorable to the State, any rational trier of fact could have found the victim was conscious for a significant portion of the stabbing and that she suffered the requisite torture or serious physical abuse. Sufficient evidence was therefore presented to show the existence beyond a reasonable doubt that this brutal murder was especially heinous, atrocious or cruel. Proposition XIII is denied.

¶130 In Proposition XIV, Appellant complains that the especially heinous, atrocious, or cruel aggravating circumstance is unconstitutionally vague and applied in an overbroad manner. We have repeatedly rejected this claim in light of the limiting construction we have applied to this aggravator as discussed above in Proposition XIII. *See, e.g., Martinez*, 2016 OK CR 3, ¶ 67, 371 P.3d at 1116. Notably, that limiting construction was provided to the jury in the written instructions provided for this aggravating circumstance. Proposition XIV is denied.

¶131 In Proposition XV, Appellant complains that reversible error arose from his outburst before the jury during his mother's penalty phase testimony. Appellant's outburst occurred when the prosecutor objected to Sheryl Wilson's testimony concerning domestic violence by Roy Tryon. The prosecutor objected on grounds of relevance because there was no evidence that Appellant had witnessed the specific instance of domestic violence being described by Wilson. When the prosecutor asked to approach the bench, the following exchange occurred:

> MS. LAVENUE: Your Honor, I'd ask to approach again.
>
> THE COURT: Okay. Come on up.
>
> [DEFENDANT]: Mama, tell it how it is, man, fuck, Blood.
>
> THE COURT: Hey, hey, stop, stop.
>
> [DEFENDANT]: It can't be fucking hurt no more than I already in some shit.
>
> THE COURT: Stop, stop.
>
> [DEFENDANT]: I'm just saying quit holding things back. You need to tell them how the fuck it is.
>
> THE COURT: If you guys would please step out for me, please.
>
> (Jurors exited the proceedings.)
>
> [DEFENDANT]: I'm already facing the DP. Fuck these people, I'm saying. (Unintelligible).
>
> I don't give a fuck. I'm tired of this trial anyway. I need the death penalty. I don't give a fuck about this shit, man.
>
> MS. FREEMAN-JOHNSON: All right.
>
> THE COURT: Do you want to stay down here or do you want to go upstairs?
>
> [THE DEFENDANT]: Yeah, just take me back to the jail. I mean, fuck, I don't need to be in here. Give me the DP. That's the fuck I've been asking for since day one. Give me

the fucking DP, straight up, man. Quit bringing me the fuck over here, man.

(Tr. VII 1555-56).

¶132 The trial court ordered Appellant taken back upstairs and defense counsel stated they were going to talk to Appellant. The witness left the stand after proclaiming "I'm done too." Before he was led out of court, Appellant stated, apparently to the prosecutor, "You keep jumping up and objecting to shit, like mother fuck is lying." After a brief recess, a record was made during which defense counsel requested a mistrial based on Appellant's outburst. The trial court also issued a bench warrant to authorize the arrest of Sheryl Wilson who, by this point, had left the courthouse. The trial court denied the defense request for a mistrial and to question the jurors individually concerning what each one heard and whether it would affect their ability to sit on the case. The trial court then admonished Appellant that further outbursts would result in his permanent banishment from the courtroom. The jury was brought in and, after explaining that a new witness was going to be called out of order, the trial court admonished the jury to "don't let that be part of your deliberation or cause you any concerns. And also please disregard the defendant's outburst earlier and please do not let that be a part of your deliberation or cause of concern." The trial then resumed.

¶133 The trial court did not abuse its discretion in denying Appellant's request for mistrial. *Knighton*, 1996 OK CR 2, ¶ 64, 912 P.2d at 894 (whether to grant a mistrial at defense request is left to the trial court's sound discretion). "A mistrial is an appropriate remedy when an event at trial results in a miscarriage of justice or constitutes an irreparable and substantial violation of an accused's constitutional or statutory right." *Id.*, 1996 OK CR 2, ¶ 65, 912 P.2d at 894. Here, the trial court intervened decisively by removing the jury in response to Appellant's outburst. The trial court then admonished the jury to disregard Appellant's outburst. Jurors are presumed to follow their instructions. *Blueford v. Arkansas*, 566 U.S. 599, 606, 132 S. Ct. 2044, 2051, 182 L. Ed. 2d 937 (2012). We have held too in a slightly different context that the court's admonishment of the jury to disregard a witness's vile language towards defense counsel prompted by defense counsel's conduct, along with a prejudicial outburst by a spectator, cured any error. *Johnson v. State,* 1979 OK CR 65, ¶¶ 3-4, 597 P.2d 340, 341-42; *Cooper v. State,* 1974 OK CR 131, ¶¶ 24-25, 524 P.2d 793, 798; *McDaniel v. State*, 1973 OK CR 222, ¶ 12, 509 P.2d 675, 679-80.

¶134 The incident in the present case was of short duration and the trial court took appropriate measures to reduce the risk of unfair prejudice. *See Williams v. State,* 2001 OK CR 9, ¶¶ 56-57, 22 P.3d 702, 717-18. Moreover, Appellant is solely responsible for any prejudice arising from this outburst. An appellant will not be permitted to profit on appeal from alleged error he or his counsel invited. *See Slaughter v. State*, 1997 OK CR 78, ¶ 101 n.18; 950 P.2d 839, 865 n.18 (citing cases). All things considered, the trial court did not abuse its discretion in denying Appellant's motion for mistrial or in declining his motion to question the jurors about what they had heard. Proposition XV is denied.

¶135 In Proposition XVII, Appellant challenges the constitutionality of capital punishment. He cites Justice Breyer's dissent in *Glossip v. Gross*, __U.S.__, 135 S. Ct. 2726, 192 L. Ed. 2d 761 (2015) to support this claim. We reject Appellant's invitation to revisit this issue. We have repeatedly held that capital punishment does not violate the Eighth Amendment's prohibition against cruel and unusual punishment. *See, e.g., Miller,* 2013 OK CR 11, ¶ 213, 313 P.3d at 998; *Johnson v. State*, 2012 OK CR 5, ¶¶ 33-34, 272 P.3d 720, 731-32. Appellant's claim is notable for its failure to cite controlling authority overruling our prior decisions in this area. Appellant's scant arguments here invoke the alleged unreliability of capital punishment, its supposed arbitrariness in application, the delay associated with its use and the decision by other States not to use it. These non-case-specific complaints amount to basic policy disagreements with the sentence itself which are more appropriately made to the Legislature. Proposition XVII is denied.

¶136 In Proposition XVIII, Appellant asserts previously rejected claims challenging several uniform Oklahoma capital sentencing instructions given in this case. Appellant asks this Court to reconsider our prior rulings on these issues so he may preserve them for later federal review. First, Appellant did not object to the penalty phase instructions, thus waiving all but plain error review on appeal. *Jackson*, 2016 OK CR 5, ¶ 4, 371 P.3d at 1121. Second, there is no error, let alone plain error, in light of our previous rejection of these claims and our review of the total instructions given here. *Mitchell v. State*, 2016 OK CR 21, ¶ 27, 387 P.3d

934, 944 ("As there is no error, there is no plain error."). **Claim A:** *Harmon*, 2011 OK CR 6, ¶ 85, 248 P.3d at 944-45 (rejecting claim that OUJI-CR 4-78 improperly allowed the jury to disregard the mitigating evidence presented). **Claim B:** *Mitchell v. State*, 2010 OK CR 14, ¶ 122, 235 P.3d 640, 664 (rejecting claim that OUJI-CR 4-76 erroneously implied that a non-capital sentence is appropriate only if the jury failed to find existence of an aggravating circumstance). **Claim C:** *Cuesta-Rodriguez*, 2010 OK CR 23, ¶¶ 72-74, 241 P.3d at 237 (rejecting claim that the phrase "unique loss to society and the family" in OUJI-CR 9-45 improperly allowed jurors to consider the impact of the loss of the victim on society rather than simply the impact on the immediate family in light of victim impact statute). **Claim D:** *Johnson*, 2012 OK CR 5, ¶ 22, 272 P.3d at 728-29 (State is not required to prove beyond a reasonable doubt that the alleged aggravating circumstances outweigh mitigating circumstances nor is such an instruction required); *Mitchell,* 2010 OK CR 14, ¶ 123, 235 P.3d at 664 (rejecting challenge that OUJI-CR 4-80 weighing instruction procedures contravene the heightened need for reliability in death penalty cases). Proposition XVIII is denied.

PROSECUTORIAL MISCONDUCT

¶137 In Proposition XVI, Appellant alleges various instances of prosecutorial misconduct at trial. We will not grant relief for improper argument unless, viewed in the context of the whole trial, the statements rendered the trial fundamentally unfair, so that the jury's verdict is unreliable. *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471, 91 L. Ed. 2d 144 (1986); *Pullen,* 2016 OK CR 18, ¶ 13, 387 P.3d at 927.

¶138 First, Appellant complains the prosecutor improperly defined "justice" for the jury. During *voir dire*, the prosecutor told prospective juror J.H. that "[t]he dictionary defines justice as rendering unto each man or woman that which he or she is due." With that definition in mind, the prosecutor asked J.H. whether she could "sit in this case and see that justice is done?" When J.H. replied "yes", the prosecutor followed up and asked whether she realized that could mean finding the defendant guilty or it could mean acquitting the defendant. The prosecutor then asked the other prospective jurors whether they could do the same thing. The prospective jurors agreed that they could do justice in the case based on the evidence. During this discussion, the prosecutor told the panel that what the attorneys said is not evidence and that the trial judge would give the jury instructions at the end of the case to "lay out exactly what it is that you have to do or, I mean, what the rules are."

¶139 At the end of the State's second closing argument, the prosecutor revisited the earlier discussion she had with the jurors about doing justice in the case:

> Ladies and gentlemen of the jury, I ask each of you, when you were chosen, if you could sit in this case and see that justice is done. And justice was defined to you as rendering unto each man or woman that which he or she is due. I would submit to you that the State of Oklahoma has proved beyond all doubt that on March the 16th of 2012 [Appellant] murdered Tia Bloomer; that he had malice aforethought.

(Tr. V 1172). The prosecutor then briefly urged that stabbing someone in the vital areas of the body, as Appellant had done to the victim, showed malice aforethought. Thus, the prosecutor argued, Appellant killed the victim with malice aforethought and a verdict of guilty on first degree murder was warranted.

¶140 Later, during final penalty phase closing, the prosecutor once again briefly revisited the earlier discussion about justice she had with the jurors during *voir dire*. The prosecutor then continued with her argument by discussing the evidence supporting Appellant's mitigating circumstances. During this argument, the prosecutor urged that the "fair" and "just" punishment for Tia Bloomer's murder was the death penalty; "that, when we talk about justice and rendering unto each man what he is due, that is what he is due."

¶141 Appellant did not object to any of these arguments below. He has therefore waived on appeal all but plain error. *Sanchez v. State*, 2009 OK CR 31, ¶ 72, 223 P.3d 980, 1004. Appellant fails to show error, let alone plain error, from these comments. In *Grant v. State,* 2009 OK CR 11, ¶ 64, 205 P.3d 1, 25, we rejected virtually this same argument, finding that "[w]hatever the source of the definition, it was within the bounds of proper argument." Appellant fails to show plain or obvious error affecting his substantial rights, particularly considering the prosecutor's focus on the evidence during her closing argument in urging the jury both to convict and, then later, sentence Appellant to death. Relief is denied for this particular claim.

¶142 Finally, Appellant cries foul over several of the prosecutor's questions on cross-examination of Dr. Fabian during penalty stage. Appellant also challenges in one instance the prosecutor's questioning of Dr. Musick. Some of the questions now challenged by the prosecutor drew proper objections at trial whereas others did not. Regardless, we have reviewed the prosecutor's various questions challenged here and find no error. "Cross-examination is permissible into 'matters affecting the credibility of the witness.'" *Harris v. State*, 1989 OK CR 34, ¶ 9, 777 P.2d 1359, 1362 (quoting 12 O.S.1981, § 2611). The prosecutor did nothing more in the challenged passages than impeach, or attempt to impeach, each expert's credibility based on issues raised by their testimony on direct examination. This was wholly permissible, *see McElmurry v. State*, 2002 OK CR 40, ¶ 120, 60 P.3d 4, 29-30, and Appellant fails to show that he was denied a fundamentally fair sentencing proceeding based on the prosecutor's cross examination. Proposition XVI is denied.

CUMULATIVE ERROR

¶143 In Proposition XIX, Appellant claims that relief is warranted based on cumulative error. In this case, we assumed first stage error based on the trial court's admission of the third sentence of the text message evidence in which the victim expressly identified Appellant as her attacker. We nonetheless found any error harmless in light of the overwhelming evidence of Appellant's guilt along with the properly admitted evidence establishing Appellant's responsibility for previously choking the victim (Proposition III). We also assumed first stage error from the trial court's disallowance of testimony from Appellant's brother and cousin concerning whether Appellant expressed any desire to harm the victim or otherwise expressed concern about getting the text message from her. However, we found no plain error based on the overwhelming evidence of guilt which the omitted evidence would not overcome (Proposition IV). Also, we invalidated the serving a sentence of imprisonment aggravator, finding that it did not apply to defendants who kill while serving a suspended sentence (Proposition XII). We address the impact of this invalid aggravator more fully in our mandatory sentence review.

¶144 We find that the cumulative effect of these errors does not warrant relief. This simply is not a case where numerous irregularities during Appellant's trial tended to prejudice his rights or otherwise deny Appellant a fair trial. *See Martinez*, 2016 OK CR 3, ¶ 85, 371 P.3d at 1119 (reciting cumulative error standard). Proposition XIX is denied.

MANDATORY SENTENCE REVIEW

¶145 This Court must determine in every capital case: (1) whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and (2) whether the evidence supports the jury's finding of the statutory aggravating circumstances. 21 O.S.2011, § 701.13(C). As discussed earlier, we invalidated the serving a sentence of imprisonment aggravator. *See* Proposition XII. We also found sufficient evidence supported the especially heinous, atrocious or cruel aggravating circumstance. *See* Proposition XIII. Sufficient evidence was also presented to support the prior violent felony aggravator based upon the admission of State's Exhibits 60-61, the judgment and sentence documents evidencing Appellant's four prior convictions for Assault with a Dangerous Weapon.

¶146 Additionally, the State presented sufficient evidence in support of the continuing threat aggravator. "To support the aggravator of continuing threat, the State must present evidence showing the defendant's behavior demonstrated a threat to society and a probability that threat would continue to exist in the future." *Lockett*, 2002 OK CR 30, ¶ 32, 53 P.3d at 428 (quoting *Hain v. State*, 1996 OK CR 26, ¶ 67, 919 P.2d 1130, 1147).

¶147 Here, the State presented evidence during penalty phase showing Appellant: 1) attempted to pull a loaded 9mm on a uniformed Oklahoma City police officer during a foot chase and subsequent take down; 2) opened fire into a crowd of bystanders he was chasing in a hotel parking lot then ran inside the hotel, ditched the gun and altered his appearance in an effort to avoid arrest for the shooting; 3) was shocked with a Taser and forcibly removed from his mother's residence after physically fighting with police officers responding to a call for help from Appellant's mother; 4) claimed gang affiliation, had gang tattoos and had been shot at during a gang shooting; 5) engaged in fights with other inmates in the county jail, one of which was captured on surveillance video and shows Appellant beating up inmate Dartangan Cotton; 6) punched a female cousin in the face at the family home during a Christmas Eve fight with his brother

Rico resulting in Appellant's arrest; and 7) was on supervised probation, serving a suspended sentence for his prior convictions of Assault with a Dangerous Weapon, when he murdered the victim. *See Romano v. State*, 1993 OK CR 8, ¶ 92, 847 P.2d 368, 389, *aff'd, Romano v. Oklahoma,* 512 U.S. 1, 114 S. Ct. 2004, 129 L. Ed. 2d 1 (1994) (evidence of a defendant's criminal record, or prior unadjudicated acts of violent conduct, is relevant to show future dangerousness and, thus, the continuing threat aggravator). In addition, the State elicited on cross-examination testimony from Sheryl Wilson that she had witnessed Appellant head butt and beat Tia Bloomer. Dr. Fabian too testified that Appellant meets the criteria for antisocial personality disorder.

¶148 We now assess the impact of the invalidated aggravator on Appellant's death sentence. In this analysis, "we must determine both that the remaining aggravating circumstances outweigh the mitigating circumstances and the weight of the improper aggravator is harmless." *Malone v. State*, 2013 OK CR 1, ¶ 87, 293 P.3d 198, 221. The prior violent felony aggravator and continuing threat aggravator enabled the jury to give aggravating weight to the same facts and circumstances used to support the invalid aggravator, i.e., the judgment and sentence documents reflecting Appellant, at the time of the murder, was serving a suspended sentence for his prior felony convictions for Assault with a Dangerous Weapon. Thus, the invalid aggravator could not have skewed the sentence imposed, and no constitutional violation occurred. *See Brown v. Sanders,* 546 U.S. 212, 220, 126 S. Ct. 884, 892, 163 L. Ed. 2d 723 (2006); *Myers,* 2006 OK CR 12, ¶ 105, 133 P.3d at 337.

¶149 With this finding, we conduct an independent reweighing of the aggravating and mitigating evidence to determine the validity of Appellant's death sentence. *Malone,* 2013 OK CR 1, ¶ 87, 293 P.3d at 221-22; *Myers,* 2006 OK CR 12, ¶ 106, 133 P.3d at 337. In this regard we have held:

> when this Court invalidates an aggravator and at least one valid aggravating circumstance remains which enables the jury . . . to give aggravating weight to the same facts and circumstances which supported the invalid aggravator, it will continue to reweigh the evidence and uphold the death sentence if the remaining aggravating circumstances outweigh the mitigating circumstances and the weight of the improper aggravator is harmless. *Clemons v. Mississippi*, 494 U.S. 738, 741, 110 S. Ct. 1441, 1444, 108 L. Ed. 2d 725 (1990); *Valdez v. State*, 1995 OK CR 18, ¶ 73, 900 P.2d 363, 384. We may find an improper aggravator to be harmless error if, looking at the record, the Court finds that the elimination of the improper aggravator cannot affect the balance beyond a reasonable doubt. *McGregor v. State*, 1994 OK CR 71, ¶ 48, 885 P.2d 1366, 1385-86. This "independent reweighing of aggravating and mitigating circumstances where one of several aggravating circumstances has been invalidated is implicit to our statutory duty to determine the factual substantiation of a verdict and validity of a death sentence." *McGregor, id.*

Myers, 2006 OK CR 12, ¶ 106, 133 P.3d at 337.

¶150 In the present case, three aggravating circumstances remain: the prior violent felony aggravator; the continuing threat aggravator; and the especially heinous, atrocious or cruel aggravator. 21 O.S.2011, § 701.12(1), (4), (7). The evidence supporting all three aggravating circumstances was strong. The evidence detailed earlier showed not only Appellant's prior felony convictions for four counts of Assault with a Dangerous Weapon but also numerous instances of prior violent acts towards police officers, family members, the victim, other inmates and the public supporting the continuing threat aggravator. Appellant's murder of Tia Bloomer in a crowded public place while serving a sentence of supervised probation likewise supports this aggravator as does the callous and brutal nature of the killing itself. *See Hooks*, 1993 OK CR 41, ¶ 33, 862 P.2d at 1282-83. Moreover, as discussed in Proposition XIII, the evidence showed the victim endured conscious physical suffering as Appellant stabbed her repeatedly in the bus station, thus supporting the especially heinous, atrocious, or cruel aggravator.

¶151 Appellant presented abundant mitigation evidence from his family members covering virtually every aspect of his life. This included first-hand accounts concerning Appellant's drug abuse; learning disabilities; educational background; prior incarcerations; prior head injuries; suicide attempts; family background; mental health treatment and institutionalization; prior incarcerations of his mother, father and siblings; gang involvement; the crowded conditions at the family home; the fact the family

constantly moved; the non-stop drug activity at the family home; the routine absence of Appellant's mother from the family home while on multi-day drug binges; Appellant's mother buying drugs from Appellant and his brother; Sheryl's physical abuse of her children; Appellant's drug dealing; Appellant's love for his son; the nature of Appellant's relationship with the victim; and the nature of Appellant's relationship with his mother.

¶152 The defense also presented expert testimony from Dr. Fabian, a neuropsychologist, that Appellant was low functioning (but not mentally retarded) and suffered both from mental illness and brain damage. Appellant presented this testimony along with anecdotal evidence from family members concerning his cognitive and developmental limitations, his mental health treatment and his experience taking – then discontinuing – medications prescribed specifically for his mental issues. Dr. Musick, a sociology professor, was presented by the defense as an expert witness to discuss the risk factors and events from Appellant's life history which impacted his development. This was offered to explain Appellant's pattern of illegal behavior culminating in his murder of Tia Bloomer.

¶153 Upon reweighing the remaining valid aggravating circumstances against the mitigation evidence, we find the aggravating circumstances outweighed the mitigating evidence and supported the death sentence. Had the jury considered only these valid aggravating circumstances, we find beyond a reasonable doubt the jury would have imposed the same sentence of death. Upon review of the record, we are also satisfied that neither passion, prejudice nor any other arbitrary factor contributed to the jury's sentencing determination. After carefully reviewing the evidence presented, we find too that it supported the jury's finding of the three valid aggravating circumstances.

DECISION

¶154 The Judgment and Sentence of the district court 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 delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY

THE HONORABLE CINDY H. TRUONG, DISTRICT JUDGE

APPEARANCES AT TRIAL

Melanie Freeman-Johnson, James T. Rowan, Laura Sams, Assistant Public Defenders, 320 Robert S. Kerr, Suite 611, Oklahoma City, OK 73102, Counsel for Defendant

Suzanne Lavenue, Merydith Easter, Assistant District Attorneys, 320 Robert S. Kerr, Suite 505, Oklahoma City, OK 73102, Counsel for State

APPEARANCES ON APPEAL

Andrea Digilio Miller, Assistant Public Defender, 320 Robert S. Kerr, Suite 611, Oklahoma City, OK 73102, Counsel for Appellant

E. Scott Pruitt, Oklahoma Attorney General, Jennifer J. Dickson, Assistant Attorney General, 313 N.E. 21st St., Oklahoma City, OK 73105, Counsel for Appellee

OPINION BY: HUDSON, J.
LUMPKIN, P.J.: CONCUR IN PART/ DISSENT IN PART
LEWIS, V.P.J.: CONCUR
KUEHN, J.: CONCUR IN PART/DISSENT IN PART
MUSSEMAN, D.J.[11] : CONCUR

LUMPKIN, PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

¶1 I concur in affirming the Judgment and Sentence in this case but write separately to address Proposition XII and the striking of the aggravator of "serving a sentence of imprisonment on conviction of a felony". 21 O.S.2011, § 701.12(6). I disagree with the interpretation expressed in the opinion of a suspended sentence not coming within the parameters of the aggravator. I believe the opinion "strains a gnat's hair" to get to the result reached and I see no difference between the parolee committing murder and a person on a suspended sentence committing murder. The analysis used in the opinion applies form over substance as to the condition of the defendant when a murder is committed. I would uphold the aggravator finding it supported by sufficient evidence.

KUEHN, JUDGE, CONCURRING IN PART, DISSENTING IN PART:

¶1 In Proposition III, the Majority discusses the admissibility of a three-sentence text message that the victim sent to Appellant the night

before he killed her: "It's okay bc im [sic] going to tell the truth tomorrow. I'm tired of lies for yhu [sic]. Isaiah Tryon is the guy who choked nd [sic] nearly killed me Saturday." The Majority finds that admission of this statement did not violate Appellant's Sixth Amendment right to confront his accusers, because it was not testimonial in nature. I agree with that conclusion. Turning next to the statement's admissibility under the Evidence Code, the Majority finds that the first two sentences of the text are hearsay, but admissible under the "state of mind" exception to the general ban on hearsay evidence. 12 O.S.2011, § 2803(3). I agree with that analysis as well.

¶2 The Majority finds the third sentence – which directly accuses Appellant of domestic abuse – admissible under the same state-of-mind exception. I disagree with that analysis. After conceding that the state-of-mind exception expressly disallows statements "of memory or belief to prove the fact remembered or believed," *id.*, the Majority nevertheless tries to defend the victim's reference to past abuse under this exception by distinguishing statements merely *about* prior acts from those that actually describe the events in question. Statements about past events, offered to prove the past event, simply are not contemplated by the state-of-mind exception. No matter how hard you hit a square peg, it won't fit into a round hole.[1]

¶3 To determine admissibility of an unsworn statement, the questions to be asked are: (1) Is it hearsay? (2) If so, does it meet an exception to the general rule barring hearsay? (3) If so, is it relevant? and (4) Even if it is relevant, is its probative value substantially outweighed by unfair prejudice? I believe the accusation of prior abuse – indeed, the entire text message – is admissible under the "forfeiture by wrongdoing" doctrine. 12 O.S.Supp.2014, § 2804(B)(5). And I believe the entire message, admissible under *this* exception, was relevant to show Appellant's intent and motive for killing the victim and had considerable probative value. Because trial courts and counsel look to this Court for guidance on evidentiary issues, I believe the doctrine of forfeiture by wrongdoing merits additional discussion.

¶4 Because the text message referred to another crime, the State gave pretrial notice of its intent to offer the evidence. 12 O.S.2011, § 2404(B); *Burks v. State*, 1979 OK CR 10, 594 P.2d 771. At a hearing, the prosecutor argued that the victim's text message was admissible on equitable grounds, because it was reasonable to infer that Appellant killed the victim to prevent her from making good on her threat to report his prior abuse to the police. Well-established at common law, the doctrine of forfeiture by wrongdoing holds that the State is absolved of its duty to bring the accuser to court if the defendant has taken part in a scheme to keep her away. *Giles v. California*, 554 U.S. 353, 366-68, 128 S.Ct. 2678, 2687-88, 171 L.Ed.2d 488 (2008); *Davis v. Washington*, 547 U.S. 813, 833, 126 S.Ct. 2266, 2280, 165 L.Ed.2d 224 (2006); *Hunt v. State*, 2009 OK CR 21, ¶ 8, 218 P.3d 516, 518. The doctrine is an equitable remedy. It is concerned only with fairness, *i.e.*, it is not based on any conclusions about the inherent reliability of the statements themselves. *Crawford v. Washington*, 541 U.S. 36, 62, 124 S.Ct. 1354, 1370, 158 L.Ed.2d 177 (2004); *Reynolds v. United States*, 98 U.S. 145, 158–159, 25 L.Ed. 244 (1879).[2]

¶5 To support a finding of forfeiture by wrongdoing, the State must prove in a pretrial hearing, by a preponderance of evidence, that the defendant wrongfully caused the declarant's unavailability as a witness, and did so intending that result. 12 O.S.Supp.2014, § 2804(B)(5). The exception applies "only if the defendant has in mind the particular purpose of making the witness unavailable." *Giles*, 554 U.S. at 367, 128 S.Ct. at 2687. The court can consider the totality of the circumstances, including both pre-arrest and post-arrest conduct, which may include the charged crime if it was committed to prevent a witness from testifying. However, the context of the conduct is important to establish the defendant's intent, and to show what, specifically, the defendant did that made the witness choose not to testify. As well, hearsay evidence (not limited to the statements themselves) may be considered at that hearing. *Davis*, 547 U.S. at 833-34, 126 S.Ct. at 2280; 12 O.S.2011, § 2103(B)(1). Such a hearing should also address any other issues relevant to the statements, *e.g.*, other-crimes evidence under § 2404(B) of the Evidence Code.[3] If the court finds, by a preponderance of evidence, that the defendant willfully procured the declarant's absence for the purpose of preventing her from giving evidence, then the doctrine will permit her unsworn, unconfronted statements to be offered into evidence. *Davis*, 547 U.S. at 833, 126 S.Ct. at 2280; *Giles*, 554 U.S. at 367, 128 S.Ct. at 2687. Evidence admissible under this theory is immune to both Confrontation-Clause and hear-

say challenges. *Giles*, 554 U.S. at 365, 128 S.Ct. at 2686; *United States v. Dhinsa*, 243 F.3d 635, 652 (2nd Cir. 2001).

¶6 As the Supreme Court stressed in *Giles*, the State must show not only that the defendant procured the declarant's absence, but that he did so for the purpose of preventing her from testifying. But that conclusion, like any other, may legitimately rest on reasonable inferences from circumstantial evidence. From (1) the substance of the text message, (2) the fact that it was sent directly to Appellant, (3) Appellant's admission that, just hours later, he armed himself with a knife, purposefully sought the victim out, and fatally stabbed her, the trial court could reasonably infer that Appellant wrongfully procured the victim's absence to prevent her from publicly accusing him of domestic abuse.[4]

¶7 Admissibility and relevance are independent concepts. The text message, admissible via the forfeiture by wrongdoing doctrine, was relevant to show Appellant's intent and motive for the killing. Evidence of other crimes may be admitted for purposes of establishing intent or motive for the instant offense. 12 O.S.2011, § 2404(B). Other-crimes evidence should only be admitted if (among other things) it is "probative of a disputed issue of the crime charged." *Eizember v. State*, 2007 OK CR 29, ¶ 76, 164 P.3d 208, 230. Intent is an essential element of First Degree Malice Murder. Motive is not an element of murder, but it can be an extremely relevant basis for circumstantial inferences about the intent of the perpetrator. *See e.g. Allen v. State*, 1993 OK CR 49, ¶¶ 16-17, 862 P.2d 487, 491.

¶8 The fact that Appellant killed the victim was never in dispute, but his motive and intent certainly were. Appellant claimed he killed the victim out of jealousy, because he did not want anyone else to have her. Once it discovered the text messages, the State disputed that explanation and alleged that Appellant sought to kill the victim to prevent her from reporting his domestic abuse. The victim's text message was admissible in its entirety. There was no error here.

¶9 As to Proposition VI, the Majority finds that instructions on lesser forms of homicide were properly rejected. I agree, but wish to clarify that our focus must be not on whether the evidence supports the greater charge, but on whether any rational juror could have found the lesser charge. *McHam v. State*, 2005 OK CR 28, ¶ 21, 126 P.3d 662, 670. In my view, the manner in which the victim was killed is not as convincing on this point as the circumstances surrounding the killing: the domestic quarrels, the fight over child support, the victim's threat to report Appellant's domestic abuse, and, of course, the fact that Appellant admitted arming himself with a knife with the express intent to stab the victim if he saw her that day.

¶10 Finally, Appellant raises several constitutional issues which were not preserved at trial. It is unclear from the Opinion whether the Majority has considered these claims using the appropriate standard of review. In concluding that these issues do not require relief, I considered whether the alleged errors were harmless beyond a reasonable doubt, and determined that they were. *Miller v. State*, 2013 OK CR 11, ¶ 106, 313 P.3d 934, 972-73; *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

HUDSON, JUDGE

1. The jury found: 1) the defendant was previously convicted of a felony involving the use or threat of violence to the person; 2) the murder was committed by a person while serving a sentence of imprisonment on conviction of a felony; 3) at the present time there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society; and 4) the murder was especially heinous, atrocious, or cruel. 21 O.S.2011, § 701.12.

2. *See Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

3. Appellant complains that the abuse of discretion standard we use to evaluate the district court's limitations on *voir dire* does not apply when a constitutional error is alleged. Notably, Appellant cites no authority for this proposition. There is nothing inconsistent with our use of the abuse of discretion standard in this context. Simply, we apply *Morgan's* pronouncement that the trial court's broad discretion in conducting *voir dire* is subject to the essential demands of fundamental fairness. If Appellant's trial was not rendered fundamentally unfair from the trial court's exercise of discretion in limiting *voir dire* then there is no abuse of discretion and, thus, no basis for relief.

4. We note that the trial court as part of its questioning asked the prospective jurors, consistent with *Morgan*, whether they would automatically impose the death penalty if they found Appellant guilty of first degree murder.

5. Appellant's trial objection to these photographs appears to reference the objections he made to various autopsy photographs at an in camera hearing the day before. The problem, however, is that none of the photographs discussed at the in camera hearing were marked as exhibits. We can identify several discrete objections made by defense counsel to certain categories of photographs—for example, defense counsel objected to the autopsy photographs depicting the wooden Q-tip swabs in the wounds to illustrate directionality of the wound; to the photograph of the victim's face; and to the photograph depicting the thin metal probe through the victim's hand. But we cannot discern from the record of the pre-trial hearing any objections to the photographs which were later admitted as State's Exhibits 28-36.

6. Notably, defense counsel was unable to identify any act of provocation during the instructions conference but explained that he was requesting the instruction anyway because "I'm not a juror. So a juror might have seen something."

7. Rico Wilson testified that he last saw Appellant sitting by himself on the steps of his mother's apartment around 9:30 or 10:00 p.m. on March 15th. Rico testified he was "pretty sure" Appellant was high at the time. However, Rico denied knowing anything about what happened at the bus station the next day.

8. Title 12, O.S.Supp.2013, § 2703 states:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

9. Title 12, O.S.2011, § 2705 states:

An expert may testify in terms of opinion or inference and give reasons therefor without previous disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

10. In 2011, when Appellant received his ten year suspended sentence, the statutory language authorizing court-ordered supervision by the District Attorney's Office was set forth at 22 O.S.2011, § 991a(A)(1)(s). The District Attorney's Office falls, for purposes of this statutory language, under the provisions of "other person designated by the Court." *State ex rel. Mashburn v. Stice*, 2012 OK CR 14, ¶ 14, 288 P.3d 247, 251.

11. The Honorable William J. Musseman, Tulsa County District Judge, sitting by assignment.

KUEHN, JUDGE

1. Furthermore, it's not clear how this accusation shows the victim's "state of mind," or why her state of mind would be relevant. It is certainly not an expression of fear; the victim is standing up for herself, heroically telling her abuser that she will not lie to the police about his actions.

2. The reason behind the rule is summarized by Professor Wigmore:

[A defendant who procures the absence of a witness] ought of itself to justify the use of [the witness's] testimony – whether the offering party has or has not searched for him, whether he is within or outside of the jurisdiction, whether his place of abode is secret or open; *for any tampering with a witness should once [and] for all estop the tamperer from making any objections based on the results of his own chicanery.*

5 Wigmore, *Evidence* §1405 (Chadbourn rev. 1974) (emphasis added).

3. This will not always be the case. Assume that a defendant is on trial for conjoint robbery. His text messages threatening to harm his accomplice, if the accomplice testifies for the State, might be relevant in a pretrial hearing to show why the accomplice is unavailable and why his hearsay statements should be admitted; but those messages might not be relevant in the trial itself.

4. The fact Appellant was on trial for the same "wrongdoing" that permitted introduction of the out-of-court statements in the first place is no impediment to admission. The same situation was present in *Giles*: the State charged the defendant with murdering his ex-girlfriend, and sought to introduce statements she had made before the killing, accusing *Giles* of domestic abuse and of threatening to kill her. The difference between *Giles* and this case is that in *Giles*, the statements were made to a police officer weeks before the killing. *Giles*, 554 U.S. at 356-57, 128 S.Ct. at 2681-82.

June

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

19 **OBA Bench and Bar Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Rod Ring 405-325-3702

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

20 **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

21-23 **OBA Solo & Small Firm Conference;** River Spirit Casino Resort, Tulsa; Contact Jim Calloway 405-416-7000

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

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

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

27 **OBA Immigration Law Section meeting;** 11 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Melissa R. Lujan 405-600-7272

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

OBA Technology Committee meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Aaron M. Arnall 405-733-1683

July

4 **OBA Closed** – Independence Day

5 **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

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

10 **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

11 **OBA Communications Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with BlueJeans; Contact Mike Mayberry 405-521-3927

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

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

Court of Civil Appeals Opinions

2018 OK CIV APP 41

STATE OF OKLAHOMA ex rel.; JAYCEE CALAN; LUCILLE CALAN; KACE CALAN; JOHN E. KENDALL, JR.; JACQUELYNE KENDALL; DAVID F. HIEBERT, JR.; EDWINA C. HIEBERT; KATHRYN WEATHERBY; JAIME MILLS; and TRAVIS MILLS, Plaintiffs/Appellees, vs. KEMP STONE, INC., Defendant/Appellant, and CITY OF MIAMI; RUDOLPH SCHULTZ; SCOTT TRUSSLER; TERRY ATKINSON; JOHN DALGARN; BRENT BRASSFIELD; DENNY CRETE, LLC; SCURLOCK INDUSTRIES OF MIAMI, INC.; TRI-STATE ASPHALT, INC.; NEECE CONCRETE CONSTRUCTION; TEETER'S PAVING, LLC; BELL CONTRACTING, INC.; APAC-CENTRAL, INC.; ANDERSON ENGINEERING, INC.; SERVICE SOLUTIONS, INC.; COLLINS CONSTRUCTION CO. OF MIAMI, INC.; BLEVINS ASPHALT CONSTRUCTION CO., INC.; T-G EXCAVATING, INC.; VANCE BROTHERS, INC.; JOHN DOES 1-20, other persons and/or entities who were awarded bids pursuant to the street project in excess of $50,000.00, Defendants.

Case No. 115,380. November 1, 2017

APPEAL FROM THE DISTRICT COURT OF OTTAWA COUNTY, OKLAHOMA

HONORABLE CARL GIBSON, TRIAL JUDGE

AFFIRMED

Zachary T. Barron, Bradford D. Barron, THE BARRON LAW FIRM, PLLC, Claremore, Oklahoma and

Kevin Dodson, DODSON LAW OFFICE, Pryor, Oklahoma, for Plaintiffs/Appellees

Bryan A. Rock, K. ELLIS RITCHIE, P.C., Pryor, Oklahoma, for Defendant/Appellant

KEITH RAPP, JUDGE:

¶1 The defendant, Kemp Stone, Inc. ("Kemp Stone") appeals an Order denying its request that attorney fees and costs be assessed against the plaintiffs, The State of Oklahoma ex rel. Jaycee Calan, Lucille Calan, Kace Calan, John E. Kendall, Jr., Jacquelyne Kendall, David F. Hiebert, Jr., Edwina C. Hiebert, Kathryn Weatherby, Jaime Mills, and Travis Mills (collectively "Taxpayers").

BACKGROUND

¶2 This appeal arises from a *qui tam* action brought by Taxpayers and their inclusion of Kemp Stone in their lawsuit.[1] Kemp Stone claimed that the lawsuit was frivolous as to Kemp Stone, thereby entitling it to attorney fees and costs.[2]

¶3 On September 26, 2011, the City of Miami, Oklahoma ("City") received a *qui tam* notice signed by ten persons (a sufficient number then) including Taxpayers. The notice complained that a City street project ("Project") funded by a sales tax was being unlawfully carried out. The basis of the claim was that the City took bids, used the bids as contracts, and paid out more than $50,000.00 to contractors. All of this was claimed to be in violation of the law concerning municipal contracts and competitive bidding statutes.

¶4 On November 23, 2011, the City filed a declaratory judgment action. Taxpayers intervened and added the *qui tam* action against City and named entities including Kemp Stone. The intervention petition contained detailed allegations regarding City's actions pertaining to the Project and the claimed unlawful acts by City's officials. The intervention petition alleged that the named entities received unspecified amounts of money from City for the Project and that such money should be repaid to City. The entities were not immediately served because City and Taxpayers engaged in mediation. The mediation was unsuccessful and City dismissed its declaratory judgment action before intervention was granted. Subsequent proceedings not relevant here culminated with Taxpayers filing this *qui tam* action.[3]

¶5 The *qui tam* petition recited the history of the intervention petition and alleged City's violations regarding the Project.[4] The petition named the entities, including Kemp Stone, and alleged:

> In furtherance of the Street Project it [Kemp Stone] submitted and was awarded a construction bid in excess of $50,000. However, it failed to enter into [a] public

> construction contract with the City prior to performing working and/or providing materials. Despite this Kemp Stone, Inc. received at least $50,000 for performing work and/or providing materials

City filed its Answer.[5] The Answer admitted that Kemp Stone submitted a bid and performed work. City's Answer denied the remainder of the allegations about Kemp Stone.

¶6 Kemp Stone's Amended Answer[6] denied all allegations against it. Kemp Stone alleged that it did have a contract for all of its work and materials. However, Kemp Stone denied submitting a bid or being paid any money on the Project.

¶7 Kemp Stone submitted request for admission to City. In response, City admitted that Kemp Stone neither submitted a bid nor had a bid approved regarding the Project and that Kemp Stone did not have a contract pertaining to the Project.[7] Counsel for Kemp Stone wrote to counsel for Taxpayers a letter dated May 8, 2015, in which he advised of the receipt of City's discovery request submitted by Kemp Stone and enclosed a copy.[8] Counsel described the discovery response as establishing that Kemp Stone had nothing to do with the Project. He also advised that City's attorney stated that City would amend its Answer to conform to its discovery response about Kemp Stone. City did not file the amendment.

¶8 Kemp Stone filed a motion for summary judgment based upon its position that it was not a bidder/contractor on the Project.

¶9 Prior to the hearing on Kemp Stone's summary judgment motion, Taxpayers dismissed the action as to Kemp Stone. Kemp Stone then sought attorney fees and costs on the ground that Taxpayers brought a frivolous lawsuit against Kemp Stone because Kemp Stone never had anything to do with the Project that could be considered actionable.

¶10 Taxpayers defended on the basis that a reasonable investigation preceded the filing and that the investigation revealed the existence of a claim against Kemp Stone. The investigation included an interview with City's chief financial officer ("CFO"). Taxpayers' claims about City's acts were confirmed in an audit performed by the State of Oklahoma State Auditor and Inspector. Taxpayers further argued that events following the filing served to confirm the existence of a claim, citing such as the City's Answer and its failure to amend the Answer.

¶11 In summary, the trial court had the following sequence of events to consider when making its ruling regarding whether the action against Kemp Stone was frivolous.

> Taxpayers' Demand, Record p. 1123. Dated September 26, 2011. Set out specific unlawful acts and demands recovery of funds expended by City, but does not name parties receiving funds.
>
> Issues referred to State Auditor and Inspector who issued an audit report dated June 19, 2013, Record p. 1139. Auditor's findings were addressed to Taxpayers and to City. The Auditor found several improper actions relating to the Project consistent with Taxpayers' demands served on City, including "multiple examples of noncompliance with the Public Competitive Bid Act."[9]
>
> Prior to filing the petition, counsel for Taxpayers interviewed CFO. Affidavit, Record, p. 1186.[10] According to counsel, CFO informed him that Kemp Stone was one of the Project contractors and was paid in excess of $50,000.00.
>
> Taxpayers filed their petition on November 1, 2013, naming Kemp Stone as one contractor for the Project.
>
> On January 6, 2016, Kemp Stone filed its answer generally alleging that it had nothing to do with Project or Taxpayers' claims.
>
> On March 3, 2016, City filed its Answer where it admits that Kemp Store submitted a bid and performed work or provided materials for the Project.
>
> On March 6, 2015, counsel for Kemp Stone transmitted a letter to counsel for Taxpayers that included recently received discovery responses from City where City admitted that Kemp Stone did not bid and was not an approved bidder on the Project.
>
> City never amended its formal Answer, notwithstanding the statement from Kemp Stone's counsel that City would amend its Answer.
>
> Taxpayers dismissed Kemp Stone on April 26, 2016.

¶12 The trial court ruled that taxpayers did not file a frivolous action and denied the attorney fees and costs request. Kemp Stone appeals.

STANDARD OF REVIEW

¶13 A trial court's denial of attorney fees that are requested based upon the opponent bringing a frivolous action is reviewed for abuse of discretion. *Broadwater v. Courtney*, 1991 OK 39, ¶ 6, 809 P.2d 1310, 1312. "A judgment will not be reversed based on a trial judge's ruling to admit or exclude evidence absent a clear abuse of discretion." *Myers v. Missouri Pacific R.R. Co.*, 2002 OK 60, ¶36, 52 P.3d 1014, 1033. "A finding of abuse requires that the trial court made a clearly erroneous conclusion and judgment, against reason and evidence." *Meadows v. Wal-Mart Stores, Inc.*, 2001 OK 25, ¶ 5, 21 P.3d 48, 50-51 (citations omitted).

¶14 The appellate court has the plenary, independent, and nondeferential authority to reexamine a trial court's legal rulings. *Neil Acquisition, L.L.C. v. Wingrod Inv. Corp.*, 1996 OK 125, n.1, 932 P.2d 1100 n.1.

ANALYSIS AND REVIEW

¶15 Kemp Stone asserted several statutory grounds for its fee claim, but withdrew all but the claim that Taxpayers filed a frivolous lawsuit. In this case, two statutes provide for fees in case of a frivolous claim. The general statute is 12 O.S.2011, § 2011, and the specific statute is part of the *qui tam* statute, 62 O.S.2011, § 373. The latter, being the specific statute controls.[11] *Jones v. State ex rel. Office of Juvenile Affairs*, 2011 OK 105, 268 P.3d 72.

¶16 Section 373 is a statutory exception to the American Rule regarding attorney fees. Therefore, as an exception, the Court strictly construes its provision for attorney fees. In *Beard v. Richards*, 1991 OK 117, 820 P.2d 812, the Court defined the fees for a bad faith injury claim or defense statute, 23 O.S.2011, § 103, to be an exception to the American Rule and, therefore, strictly construed. *Eagle Bluff, L.L.C. v. Taylor,* 2010 OK 47, ¶ 16, 237 P.3d 173, 179, is an example of strict construction. There, the Court distinguished discretionary transfers from Small Claims Court from mandatory transfers from Small Claims court. Under the statutes only the former had provision for attorney fees. Therefore, attorney fees were not allowed for a mandatory transfer. Another example is *Borst v. Bright Mortgage Co.*, 1991 OK 121, n.5, 824 P.2d 1102 n.5. There, the Court distinguished recovery on a promissory note from cancellation of a promissory note. Only the former action included attorney fees.

¶17 Thus, Kemp Stone must show here that "*all claims* stated by the resident taxpayers in the written demand are determined in a court of competent jurisdiction to be frivolous." Kemp Stone has not shown that "all claims" are frivolous. In fact, the primary basis for the action and Taxpayers' demand appears well grounded in fact and law. When strictly construed, Section 373 does not contemplate separating claims against individual entities for a frivolous determination. Therefore, just as in *Eagle Bluff, L.L.C.* and *Borst,* Kemp Stone is not entitled to attorney fees.

¶18 Although the foregoing strict construction of Section 373 resolves the appeal, Kemp Stone maintains that the Taxpayers' lawsuit was frivolous *as to Kemp Stone* when brought and that inquiry would have revealed that it had nothing to do with their claims about the Project.[12] A plaintiff's attorney has a duty to investigate prior to filing the action. *Navarro v. City of Riviera Beach*, 192 F. Supp.3d 1353 (D.C. S.D. Fla. 2016.) The requirement is to conduct a reasonable inquiry. *State ex rel. Tal v. City of Oklahoma City,* 2002 OK 97, ¶ 17, 61 P.3d 234, 244. Here, counsel did investigate before the lawsuit was filed and had supporting information from City's CFO and from the State Auditor and Inspector.[13]

> When faced with deciding if sanctions should be imposed under § 2011, a court must view the matter through the eyes of a competent attorney who is advocating the claim of his/her client(s). An objective test is used to decide if a competent lawyer could make a reasonable argument supporting the legal theory advanced but the test is not whether the argument, claim or defense being presented is ultimately successful.

State ex. rel. Tal, 2002 OK 97 ¶ 18, 61 P.3d at 244-45 (citing *Hammonds v. Osteopathic Hosp. Founders Ass'n*, 1996 OK 100, 934 P.2d 319, 322-23).

¶19 However, the question is not whether Taxpayers would have prevailed in their action against Kemp Stone.[14] *Broadwater*, 1991 OK 39 ¶ 7, 809 P.2d at 1312 (citations omitted) ("Sustaining a demurrer to the evidence does not mean that the trial court found the lawsuit not well grounded in fact; only that the evidence presented does not create a *prima facie* case of the theory of law upon which the claim is based.") Merely because a case might have a small chance of success does not make it frivolous. *Finch v. Hughes Aircraft Co.*, 926 F.2d 1574, 1578

(Fed. Cir. 1991). The *Finch* Court observed that an appeal, when filed, might not be frivolous but it can become so as argued. The analogy is that a lawsuit, *when filed*, might not be frivolous, but could become so in light of subsequent proceedings. In *Hammonds*, the Court emphasized that the focus must be on the existing circumstances, not on what might transpire later.

> The appropriateness of sanctions depends on the *pre-filing* conduct by counsel who signed the critical document. That conduct must be tested by a *standard of objective reasonableness* under the then-existing circumstances.

Hammonds, 1996 OK 100 ¶ 8, 934 P.2d at 323.

¶20 Kemp Stone has not established that the action was frivolous when filed. The trial court did not err by denying Kemp Stone's request for attorney fees.

CONCLUSION

¶21 The *qui tam* statute, 62 O.S.2011, § 373, authorizes attorney fees when "all claims" are determined to be frivolous. As an exception to the American Rule, this statutory authorization is strictly construed. Here, Kemp Stone claims that the action against it was frivolous. However, Kemp Stone did not demonstrate that "all claims" of Taxpayers were frivolous and, in fact, the rest of Taxpayers' claims were not frivolous. The failure to demonstrate that "all claims" were frivolous is fatal to Kemp Stone's application for attorney fees.

¶22 Moreover, when viewed objectively at the time the lawsuit was filed, the inclusion of Kemp Stone was not frivolous. Taxpayers' counsel's investigation revealed information showing that Kemp Stone was a bidder and was paid for work or materials on the Project. The fact that discovery in the litigation produced evidence showing that Taxpayers would not prevail as to Kemp Stone is not a basis to decide that the case was frivolous when filed.

¶23 The trial court did not err by denying Kemp Stone's request for attorney fee. The judgment is affirmed.

¶24 **AFFIRMED**.

FISCHER, P.J., and GOODMAN, J., concur.

KEITH RAPP, JUDGE:

1. A *qui tam* action is a statutory action which places taxpayers in the position of a representative of the public to recover based upon the commission or omission of action by a public authority. 62 O.S.2011, §§ 372, 373; *State ex rel. Fent v. State ex rel. Oklahoma Water Resources Board*, 2003 OK 29, n.1, 66 P.3d 432, n.1.

2. At the hearing, Kemp Stone limited the legal basis for its claim to whether the action was frivolous when filed. 62 O.S.2011, § 373 provides, in part:

> If all claims stated by the resident taxpayers in the written demand are determined in a court of competent jurisdiction to be frivolous, the resident taxpayers who signed such demand and who are parties to the lawsuit in which such claims are determined to be frivolous shall be jointly and severally liable for all reasonable attorney fees and court costs incurred by any public officer or officers or any other person alleged in such demand to have paid out, transferred, or received any money or property belonging to the state, or such county, city, town or school district in pursuance of any alleged unauthorized, unlawful, fraudulent, or void claim paid or contract or conveyance made, or attempted to be made, by such officer or officers.

Kemp Stone also cited 12 O.S. Supp. 2016, § 2011 and 12 O.S.2011, § 941. These two statutes provide for attorney fees under the circumstances covered by each statute.

3. The proceedings included an appeal of a certified question. Kemp Stone joined the appeal.

4. Record, p. 1.

5. Record, p. 595, at 598.

6. Record, p. 578.

7. Record, p. 800.

8. Record, p. 1063.

9. Record, p. 1155.

10. Kemp Stone maintains that the affidavit is hearsay and should not be considered.

11. The case of *State ex rel. Tal v. City of Oklahoma City*, 2002 OK 97, 61 P.3d 234, involved a *qui tam* action and a frivolous claim pursuant to 12 O.S.2001, § 2011. At that time the *qui tam* statute, 62 O.S.2001, § 373, did not have a frivolous provision.

12. It appears to be undisputed that Kemp Stone was not a bidder or contractor under the Project nor was it paid more than $50,000.00 for work or materials for the Project.

13. Kemp Stone argues that Taxpayers' counsel's affidavit should not be considered because it is hearsay. Taxpayers' counsel's affidavit is not hearsay. Its function was to show what the affiant counsel did. The affidavit was not used for the purpose of proving the truth of any statements made to him.

14. Here, Taxpayers dismissed Kemp Stone after City responded to discovery and admitted that Kemp Stone was not a bidder or awarded a bid on the Project (but City did not amend its formal Answer to the contrary).

2018 OK CIV APP 42

DENTON JAMES POLSON, Petitioner/Appellee, vs. MADISON CAROLYN BOYD, Respondent/Appellant.

Case No. 115,793. April 27, 2018

APPEAL FROM THE DISTRICT COURT OF OSAGE COUNTY, OKLAHOMA

HONORABLE JOHN M. KANE, JUDGE

AFFIRMED

Ramona A. Jones, Tulsa, Oklahoma, for Petitioner/Appellee,

Todd Alexander, THE ALEXANDER LAW FIRM, PLLC, Tulsa, Oklahoma, for Respondent/Appellant.

ROBERT D. BELL, PRESIDING JUDGE:

¶1 In this post-paternity proceeding, Respondent/Appellant, Madison Carolyn Boyd (Mother), appeals from the trial court's order modifying the parties' joint custody arrange-

ment and implementing a "split custody" arrangement. The parties were never married to each other. Mother currently lives in Georgia and Father lives in Osage County, Oklahoma. The trial court found both parties are fit parents, but due to numerous incidents on important issues, the parties have shown an inability to fully cooperate in raising the child. The trial court awarded Petitioner/Appellee, Denton James Polson (Father), physical and legal custody of the parties' minor child during the school year, and awarded Mother physical and legal custody of the child during summers, fall break, spring break, and Thanksgiving break. The parties were ordered to alternate Christmas. After reviewing the record and extant law, we cannot find the trial court's "split custody" order was contrary to the evidence or the child's best interests. We therefore hold the trial court did not abuse its discretion in entering the "split custody" custody order and affirm.

¶2 The parties' child, E.M.E.P., was born December 1, 2010. The parties filed an agreed decree of paternity, joint custody plan and child support computation on March 2, 2012. The decree found both Mother and Father were fit and proper persons to be awarded the care, custody and control of the child. In January 2015, Father filed a motion to modify the joint custody arrangement. Father asked the court to award him sole custody because Mother relocated to Georgia, Mother subjected the child to three residential moves in two years, the transportation costs for custodial exchanges have increased due to Mother's relocation, and the child would soon be attending kindergarten. Father also stated he should have sole custody because it was important for the child to obtain instruction as to her Osage Indian heritage which was offered at the Osage Headstart program in Skiatook, Oklahoma. Mother counterclaimed for sole custody as well.

¶3 At trial, the parties described that they shared custody with one month in Oklahoma and one month in Georgia. However, because the child is beginning kindergarten, both parties agreed it is not reasonable to continue this arrangement because of the geographic distance. Mother testified she is married, that she and her spouse have an 8-month old child, and that they live in Savannah, Georgia. She stated she is very stable, unemployed and can stay home to care for her children. Mother pointed out Father's 24-hour shifts as a paramedic firefighter made him unavailable to parent the child on a daily basis. She asserted Father's wife is the primary care-giver when Father is working. Mother stated she has no issues with Father's wife, but she asserted the child should be raised by Mother. Mother also testified all her family, parents, brothers and sisters and their spouses live in Savannah, Georgia.

¶4 Father testified he works a 24-hour shift as a paramedic firefighter. He then has 48 hours off to care for his child. Father admitted during his 24-hour shift, he cannot care for the child, but stated he is accessible to the child at any time other than when he is performing his job. During his 24-hour shift, Father delegated his custodial responsibilities to his wife. Father testified his wife and the child are very close and she has been in the child's life since the day the child was born. Father asserted he is very stable, he has maintained consistent residences, and he has never met Mother's husband.

¶5 After the trial, the trial court found both parents are fit and proper persons to have custody of the child. The court announced: "the Court would be entitled under the facts here to continue with joint custody and perhaps simply modify the joint custody plan, but I'm going to do something that I have rarely done, if ever; and that is, I am going to order split custody in this case." The court explained this "means that whichever parent has the child during their time of custody is the custodial parent." The trial court stated the parties' testimony gave the court concern about their ability to cooperate in the raising of this child. Based on these findings, the trial court granted Mother custody of the child during the summer, fall break, spring break, and Thanksgiving break. The court granted Father custody during the school year. The parties were ordered to alternate Christmas. Mother now appeals arguing the court's order was contrary to law, not in the best interests of the child and an abuse of discretion.

¶6 Custody proceedings are equitable matters; thus, the trial court's ruling will not be disturbed unless it is against the clear weight of the evidence respecting the best interests of the child. *Manhart v. Manhart*, 1986 OK 12, ¶14, 725 P.2d 1234. In custody modification matters, this Court gives great deference to the trial court's judgment because the trial judge is better able to determine controversial evidence by observing the witnesses and their demeanor. *Id*. at ¶15.

¶7 In the instant case, both parties sought to modify the joint custody arrangement and to be awarded sole custody of the child. Joint custody may be terminated upon the request of one or both parents, or whenever the trial court determines joint custody is not in the best interests of the child. Title 43 O.S. Supp. 2009 §109(G)(1). "When it becomes apparent to the court that joint custody is not working and it is not serving the child's best interests, then a material and substantial change of circumstance has occurred and the joint custody arrangement must be vacated." *Daniel v. Daniel*, 2001 OK 117, ¶20, 42 P.3d 863. "When joint custody is terminated, the trial court must proceed as if it is making an initial custody determination and award custody in accordance with the best interest of the child, as if no such joint custody decree had been made." *Id*. at ¶21.

¶8 On appeal, Mother does not contest the termination of the joint custody arrangement. She objects to the change in child's primary domicile during the school year. Mother posits the trial court should have left the child in her care for the in-school/nine-month period and placed the child with Father for the summer period. Mother claims the trial court improperly considered her relocations as instability and a basis to award Father in-school custody. She also argues Father's work schedule prevents him from personally caring for the child. Mother argues there is no rational basis for an absent Father to be awarded primary custody of the child. Also, Mother argues there is no statutory authority for a "split custody" order in Oklahoma.

¶9 Father counters the trial court properly placed the child with him for the school year. He explains his work schedule allows him to spend blocks of time with the child. He also maintains he personally performs the parenting duties and responsibilities when he is home. He submits it is in the child's best interest to attend school in Oklahoma so she may learn about her Indian heritage and remain close to Father's family.

¶10 Having reviewed the record, we recognize this was a difficult decision for the trial court. Both parties are fit and loving parents and both are excellent choices as custodial parents. Joint custody is commonly used to permit a child to be placed under the care and control of one parent during the school year and with the other parent during summer vacation. However, this arrangement was not feasible due to the geographic distance between the parties' homes in Georgia and Oklahoma and the evidence that the parties were unable to cooperate on some issues concerning the child. As a result, the trial court ordered a hybrid arrangement involving split physical and legal custody. We cannot find the trial court's decision was against the clear weight of the evidence or an abuse of discretion.

¶11 Mother claims the trial court cannot award "split custody," because there is no provision for such custody in the statutes. The "split custody" arrangement ordered by the trial court is not specifically delineated in Title 43.[1] Notwithstanding, *Spencer v. Spencer,* 1977 OK CIV APP 23, 567 P.2d 112, long ago recognized the "split custody" school-year/summer custody arrangement that is particularly applicable when the child's parents live in different states. *See also Stover v. Stover,* 1984 OK CIV APP 43, 689 P.2d 952 (held trial court did not abuse its discretion splitting custody and granting father custody during school year and mother during summer). We therefore reject Mother's contention that the trial court's "split custody" arrangement is contrary to law.

¶12 It is evident both Mother and Father care deeply for the child. And, whether she is in Georgia or Oklahoma, the child has familial relationships and a loving parent to care for and nurture her. We therefore cannot find the trial court's custody decision is contrary to law, an abuse of discretion or contrary to the child's best interests. The trial court's order is affirmed.

¶13 AFFIRMED.

JOPLIN, J., and BUETTNER, J., concur.

ROBERT D. BELL, PRESIDING JUDGE:

1. Title 43 O.S. Supp. 2009 §118D(D)(1) and 43 O.S. Supp. 2015 §118E(B) recognize "split physical custody" arrangements (where each parent is awarded physical custody of at least one of the children) for child support computation purposes and parenting time adjustments.

2018 OK CIV APP 43

ROLLED ALLOYS, INC., and TRAVELERS PROPERTY CASUALTY CO. OF AMERICA, Petitioners, vs. DONALD WILSON and THE WORKERS' COMPENSATION COMMISSION, Respondents.

Case No. 115,930. December 22, 2017

PROCEEDING TO REVIEW AN ORDER OF THE WORKERS' COMPENSATION COMMISSION EN BANC

HONORABLE TARA A. INHOFE,
ADMINISTRATIVE LAW JUDGE

SUSTAINED

Mia C. Rops, DAVID KLOSTERBOER & ASSOCIATES, Oklahoma City, Oklahoma, for Petitioner

Esther M. Sanders, SANDERS AND ASSOCIATES, P.C., Tulsa, Oklahoma and

Bob Burke, Oklahoma City, Oklahoma, for Respondent

JANE P. WISEMAN, JUDGE:

¶1 Rolled Alloys, Inc., and Travelers Property Casualty Company of America seek review of an order of the Workers' Compensation Commission affirming the decision of an administrative law judge finding compensability and authorizing medical treatment for Claimant Donald Wilson. After review, we sustain the Commission's decision.

FACTS AND PROCEDURAL BACKGROUND

¶2 Claimant filed a CC Form 3 on November 24, 2015, alleging injury to his hands due to "repetitive twisting, gripping controls on plasma machine." In the box titled, "Date of Accident/Injury," Claimant listed "1+yr. ago." Claimant indicated his injury resulted from cumulative trauma while working for Rolled Alloys, Inc. (Employer). An amended CC Form 3, filed on December 8, 2015, lists the "Date of Accident/Injury," as December 2014, and indicates the injury resulted from a single incident and cumulative trauma. Another amended CC Form 3 was filed on March, 28, 2016, which listed under the "Date of Accident/Injury" title the following: "Awareness April 2014." The amended form also added the left arm and alleged a consequential injury to the left shoulder. Employer denied Claimant suffered an injury arising out of and in the course of his employment and also denied Claimant filed his claim within the statutory period of time or timely notified Employer of his injury. On April 8, 2016, Claimant filed another amended CC Form 3, in which he removed the consequential injury to the left shoulder.

¶3 At trial, Employer states it was asserting the statutory defenses found in 85A O.S. §§ 67 and 69(A)(1).[1] Employer also asked the trial court to consider the rebuttable presumption that arises from a lack of notice found in 85A O.S. Supp. 2016 §§ 68.[2]

¶4 Claimant testified he first began having symptoms in his hands and arms shortly before he saw Dr. Ryan Choplin in May 2014. He then saw Dr. Chalkin, who gave him splints to wear at night. In September 2014, Claimant saw a nurse practitioner at the Warren Clinic. After Claimant's symptoms worsened, Employer sent him to Concentra in November 2015 for problems with his hands and his shoulder. He reported the injury to John Sappington, Employer's president. Claimant has filed a separate claim for his shoulder.

¶5 Claimant "used [his] health insurance to get . . . surgery to [his] right hand," but he now needs surgery on his left hand. Before he went to Concentra, his pain became more intense after he took "the retaining cap off of a torch." He worked until April 2016, when he had surgery on his shoulder, and then he was off work for a period of time, during which he received workers' compensation benefits. Employer put him on light duty when he returned to work. His last day of work was August 25, 2016.

¶6 The administrative law judge (ALJ) asked Claimant why he waited until November 2015 to report to Employer that he was having problems with his hands. Claimant stated:

> Well, I was still able to work and I had a lot of responsibilities at home. I was taking care of my stepson and his wife and children, and I was still able to work. I don't know, it was just – I don't know, I guess a lot of it was the responsibilities at home kind of kept me from it and it was just steadily getting worse, too.

The ALJ found:

> It is undisputed that claimant did not provide notice of any work-related injury to respondent until November of 2015. The incident report … reports injury to the bilateral hands and left forearm on approximately November 4, 2014, that was to have happened while claimant was "taking torch retaining cap apart." The incident report is signed by claimant and Kevin Romanewicz.
>
> Upon report of injury, respondent sent claimant to Concentra, where he was seen on November 4, 2015, complaining of bilateral hand issues, after "taking the retaining cap off torch." Seemingly contradictorily,

> the record also states that claimant has been having the problems for about one year's time, but only had the retaining cap incident a few days previous.

The ALJ noted Claimant sought care on his own and had surgery on his right hand on August 25, 2016. The ALJ found that Claimant's claim was not time-barred. The ALJ concluded Claimant sustained a compensable cumulative trauma injury to his right hand, left hand, and left arm, with a date of awareness of April 2014 and date of last exposure of April 2016 and awarded him medical treatment.

¶7 Employer filed a request for review. After oral argument, the Commission affirmed the ALJ's decision. The Commission noted that since 1985, in cumulative trauma cases, "the law in effect on the date of awareness determined substantive rights, while the date of last exposure/employment triggered the limitations period." In support of this statement of law, the Commission cited *American Airlines, Inc. v. Crabb*, 2009 OK 68, ¶ 10, 221 P.3d 1289. Pursuant to the Administrative Workers' Compensation Act (AWCA), specifically 85A O.S. Supp. 2016 § 45(G), "Benefits for a cumulative trauma injury or occupational disease or illness shall be determined by the law in effect at the time the employee knew or reasonably should have known that the injury, occupational disease or illness was related to work activity." The Commission noted that AWCA "amended the statute of limitations for cumulative trauma injuries by changing the triggering event from the 'date of last employment' to the 'date of the injury' to commence the limitation period in Section 69(A)(1)," which provides:

> A claim for benefits under this act, other than an occupational disease, shall be barred unless it is filed with the Commission within one (1) year from the date of the injury. If during the one-year period following the filing of the claim the employee receives no weekly benefit compensation and receives no medical treatment resulting from the alleged injury, the claim shall be barred thereafter. For purposes of this section, the date of the injury shall be defined as the date an injury is caused by an accident as set forth in paragraph 9 of Section 2 of this act.

85A O.S. Supp. 2016 § 69(A)(1). Title 85A O.S. Supp. 2016 § 2(9)(a) provides:

> "Compensable injury" means damage or harm to the physical structure of the body, or prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, caused solely as the result of either an accident, cumulative trauma or occupational disease arising out of the course and scope of employment. *An "accident" means an event involving factors external to the employee that:*
>
> (1) was unintended, unanticipated, unforeseen, unplanned and unexpected,
>
> (2) *occurred at a specifically identifiable time and place,*
>
> (3) occurred by chance or from unknown causes, and
>
> (4) was independent of sickness, mental incapacity, bodily infirmity or any other cause.

(Emphasis added.) The Commission found that the definition of "accident" found in § 2(9)(a) conflicts with the definition of cumulative trauma found in 85A O.S. Supp. 2016 § 2(14):

> "Cumulative trauma" means an injury to an employee that is caused by the combined effect of repetitive physical activities extending over a period of time in the course and scope of employment. Cumulative trauma shall not mean fatigue, soreness or general aches and pain that may have been caused, aggravated, exacerbated or accelerated by the employee's course and scope of employment. Cumulative trauma shall have resulted directly and independently of all other causes and the employee shall have completed at least one hundred eighty (180) days of continuous active employment with the employer ….

The Commission concluded that the apparent conflict between these definitions "creates ambiguity as to the meaning of the term 'accident' for the purpose of determining the date of injury that triggers the limitation period under §69(A)(1)." The Commission agreed with the ALJ "that the limitations period in cumulative trauma injuries begins to run on the last date of exposure." It found

> [T]he apparent conflict between the definitions of "accident" and "cumulative trau-ma" is resolved by construing these provisions to mean that an "accident" occurs each time an employee is exposed to injurious repetitive activity. This con-

> struction harmonizes the definition of an accident, which occurs "at a specifically identifiable time and place," with the ongoing nature of cumulative trauma, which occurs "over a period of time." Thus, each day an employee performs repetitive physical activities that cause physical harm is considered a "date of injury" for the purposes of §69(A)(1). We find this construction to be consistent with the statutory scheme and purpose of the AWCA to provide no-fault compensation for disability resulting from repetitive work activities.

¶8 The Commission reasoned that if the Employer's interpretation of the statutes was adopted there would be:

> consequences the Legislature could not have intended. If the date of awareness triggered the statute of limitations, employees who develop symptoms, but are not disabled or in need [of] treatment, would be forced to file a claim to avoid the one-year statutory time-bar. As such, the awareness rule would increase the number of claims for **potential** cumulative trauma injuries. This would result in increased administrative costs and unnecessary litigation. Further, these claims would likely be dismissed and barred for "want of prosecution" under §69(A)(1), which requires the dismissal of claims in which no compensation or medical treatment is received within a year of the claim's filing date.

The Commission also opined:

> Contrary to the general purpose of limitation statutes, the awareness rule would indefinitely extend an employee's time to file a cumulative trauma claim. Unlike the last exposure rule, which defines the limitation period by objective criteria, [Employer's] approach would expose employers to liability based on an employee's awareness of injury. Under the awareness rule, the limitations period could begin to run years after employment ends. Such a result is also inconsistent with §69(G), which prohibits the tolling of the limitation period for "latent injuries."

The Commission concluded, "Although the Legislature did not expressly define the date of accident for cumulative trauma injuries, we find that the last exposure rule harmonizes related statutes to give effect [to] the overarching purpose of the AWCA." Employer now seeks review of the Commission's decision.

STANDARD OF REVIEW

¶9 "The Supreme Court may modify, reverse, remand for rehearing, or set aside the judgment or award" of the Workers' Compensation Commission upon a finding that the judgment or award was:

> 1. In violation of constitutional provisions;
>
> 2. In excess of the statutory authority or jurisdiction of the Commission;
>
> 3. Made on unlawful procedure;
>
> 4. Affected by other error of law;
>
> 5. Clearly erroneous in view of the reliable, material, probative and substantial competent evidence;
>
> 6. Arbitrary or capricious;
>
> 7. Procured by fraud; or
>
> 8. Missing findings of fact on issues essential to the decision.

85A O.S. Supp. 2016 § 78.

¶10 To the extent this matter presents a question of law regarding statutory construction of a statute of limitations, our review is de novo. See *Rural Waste Management & Indem. Ins. Co. of North America v. Mock*, 2012 OK 101, ¶ 6, 292 P.3d 24.

ANALYSIS

¶11 The primary question for this Court is when does the statute of limitations begin to run for a cumulative trauma injury pursuant to the AWCA. After review, we agree with the Commission that the statute of limitations begins to run on the date of last exposure.

¶12 Before its repeal in 2011, 85 O.S.2011 § 318(B) provided, "With respect to disease or injury caused by cumulative trauma causally connected with employment, a claim must be filed within two (2) years of the date on which the employee was last employed by the employer." After the passage of the AWCA, the statute of limitations is now found at 85A O.S. Supp. 2016 § 69(A)(1), which provides: "A claim for benefits under this act, other than an occupational disease, shall be barred unless it is filed with the Commission within one (1) year from the date of the injury." It further provides, "For purposes of this section, the date of the

injury shall be defined as the date an injury is caused by an accident as set forth in paragraph 9 of Section 2 of this act." As noted above, 85A O.S. Supp. 2016 § 2(9) provides that an accident is "an event involving factors external to the employee that: (1) was unintended, unanticipated, unforeseen, unplanned and unexpected, (2) *occurred at a specifically identifiable time and place*, (3) occurred by chance or from unknown causes, and (4) was independent of sickness, mental incapacity, bodily infirmity or any other cause." (Emphasis added.) Although this subsection specifically states that an accident must have "occurred at a specifically identifiable time and place," as the Commission pointed out "cumulative trauma is not an event that occurs at a specifically identifiable time and place."

¶13 Section 2 also provides a definition of cumulative trauma. Cumulative trauma is defined as "an injury to an employee that is caused by the combined effect of repetitive physical activities extending over a period of time in the course and scope of employment." 85A O.S. Supp. 2016 § 2(14). We agree with the Commission that the "definition of 'accident' appears to conflict with the definition of 'cumulative trauma'" in that "[u]nlike an accident, cumulative trauma is not an event that occurs at a specifically identifiable time and place."

¶14 The AWCA, at 85A O.S. Supp. 2016 § 69(A)(2)(a), provides, "A claim for compensation for disability on account of injury which is either an occupational disease or occupational infection shall be barred unless filed with the Commission within two (2) years from the date of the last injurious exposure to the hazards of the disease or infection." Therefore, the Legislature specifically adopted the "last injurious exposure" rule in regard to occupational disease, which is another condition that can arise from repeated exposure.

¶15 "The goal of any inquiry into the meaning of a legislative enactment is to ascertain and follow legislative intent." *Arrow Tool & Gauge v. Mead*, 2000 OK 86, ¶ 15, 16 P.3d 1120. "Only when the circumstances clearly indicate that in enacting the statute the legislature has overlooked something will this court apply rules of statutory construction in an effort to clarify and make sensible an act's purview." *Id.*

¶16 The Commission in its decision identified a conflict in the provisions of the AWCA regarding the statute of limitations for cumulative trauma cases and interpreted the statutes to harmonize them. We agree with the Commission's reasoning that the conflict in the AWCA between the definitions of "cumulative trauma" and "accident" can be "resolved by construing these provisions to mean that an 'accident' occurs each time an employee is exposed to injurious repetitive activity." We further agree that the Commission's "construction harmonizes the definition of an accident, which occurs 'at a specifically identifiable time and place,' with the ongoing nature of cumulative trauma, which occurs 'over a period of time.'" The Commission concluded, "Thus, each day an employee performs repetitive physical activities that cause physical harm is considered a 'date of injury' for the purpose of §69(A)(1)." We conclude that the Commission properly determined "this construction to be consistent with the statutory scheme and purpose of the AWCA to provide no-fault compensation for disability resulting from repetitive work activities."

¶17 The basic facts of this case were undisputed. The only issue was whether the Commission properly applied the law. We conclude it has, and we sustain its decision.

CONCLUSION

¶18 Finding no error, we sustain the Commission's order affirming the ALJ's order finding Claimant's claim is compensable and authorizing medical treatment.

¶19 **SUSTAINED**.

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

JANE P. WISEMAN, JUDGE:

1. Title 85A O.S. Supp. 2016 § 67(A)(2) provides written notice of cumulative trauma must be given to an employer "within six (6) months after the first distinct manifestation of the disease or cumulative trauma or within six (6) months after death."

Title 85A O.S. Supp. 2016 § 69(A)(1) provides for a one-year statute of limitation "from the date of injury," which is "defined as the date an injury is caused by an accident as set forth in paragraph 9 of Section 2 of this act."

2. Title 85A O.S. Supp. 2016 § 68(A) provides that unless an employee gives written notice within 30 days from the date of injury, "the rebuttable presumption shall be that the injury was not work-related." And, "[s]uch presumption must be overcome by a preponderance of the evidence."

2018 OK CIV APP 44

AMERICAN ENERGY – PERMIAN BASIN, LLC, Plaintiff/Appellee, vs. ETS OILFIELD SERVICES, LP, Defendant/Appellant.

Case No. 116,307. April 23, 2018

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE ROGER H. STUART, TRIAL JUDGE

REVERSED AND REMANDED WITH INSTRUCTIONS

E. Edd Pritchett, Jr., David L. Kearney, DURBIN, LARIMORE & BIALICK, Oklahoma City, Oklahoma, for Plaintiff/Appellee

Drew A. Lagow, Nathaniel T. Smith, HOLDEN & MONTEJANO, Tulsa, Oklahoma, for Defendant/Appellant

DEBORAH B. BARNES, PRESIDING JUDGE:

¶1 This case stems from an accident that occurred at an oil well in Texas. ETS Oilfield Services, LP (ETS) appeals from the trial court's order granting summary judgment in favor of American Energy – Permian Basin, LLC (AEP). ETS is a contractor for AEP. The dispositive issue on appeal is whether the parties intended in their written agreement for ETS to indemnify AEP from AEP's separately contracted duty to indemnify a third-party contractor sued by an ETS employee. We conclude that although the agreement between AEP and ETS contains general language susceptible to a broad interpretation, it lacks the unequivocally clear language necessary under Oklahoma law to make ETS responsible for indemnifying AEP from AEP's contractual duty to indemnify the third-party contractor. Consequently, we reverse and remand this case to the trial court with instructions to enter summary judgment in favor of ETS.

BACKGROUND

¶2 The present action stems from the filing of a lawsuit in the District Court of Regan County, Texas, by Joshua McBride – an employee of Eagle Testing Services LP (Eagle) – against C&J Well Services, Inc. (C&J).[1] McBride alleges in his petition in the underlying case that while working as "an employee for Eagle" he was "called to a location to do repair work on a work over rig" in Texas.[2] McBride alleges he

> was sitting on the edge of the cellar, holding a rope to stabilize some equipment …. Suddenly, and without warning, a member of the [C&J] crew, who was working on the floor above, dropped a heavy pipe wrench, which fell, striking [McBride] on the top of his hardhat, jolting his spine[.]

¶3 Pursuant to indemnification provisions contained in an agreement between AEP and C&J, C&J tendered defense of the Texas lawsuit to AEP. It is undisputed AEP "accepted tender of the defense of [C&J] in the underlying suit" pursuant to the "separate [agreement] between AEP and [C&J] that provides the basis for AEP's duty to indemnify and defend [C&J] in the underlying [Texas] lawsuit."

¶4 A separate agreement also exists between AEP and ETS which also contains indemnification provisions. The evidentiary materials in the record on appeal indicate that ETS and C&J are both contractors for AEP. AEP's written agreements with ETS and C&J, both of which are found in the record on appeal, each contain (in addition to indemnification provisions and various other provisions) a provision stating that ETS and C&J "shall be deemed to be an independent Contractor[.]"

¶5 After accepting tender of the defense of C&J in the underlying suit, AEP, in a May 2016 letter to ETS, made "demand . . . upon [ETS] for defense and indemnification in connection with the claims and allegations made against [C&J]" in the Texas lawsuit. Upon ETS refusing to accept this demand, AEP filed the present action in the District Court of Oklahoma County seeking a declaratory judgment on its demand for indemnification – which ETS describes as a demand for "pass-through" indemnity. The parties have filed competing motions for summary judgment.

¶6 In its order, the trial court granted summary judgment in favor of AEP. The order states that the trial court "finds that the language of the indemnity agreement between the parties is clear and explicit and requires [ETS] to indemnify [AEP] from and against any expenses, costs or liabilities it has incurred and will incur, of every kind and character without limit arising out of the lawsuit" filed by McBride against C&J.

¶7 From this order, ETS appeals.

STANDARD OF REVIEW

¶8 Summary judgment is proper only if it appears to the court that there is no substantial controversy as to the material facts and that one of the parties is entitled to judgment as a matter of law. Only when the evidentiary materials eliminate all *factual* disputes relative to a question of law is summary judgment appropriate on that

> issue. The trial court's ruling on the legal issue is reviewed de novo as a question of law. However, an appellate court will reverse the grant of summary judgment if the materials submitted to the trial court indicate a substantial controversy exists as to any material fact.

Plano Petroleum, LLC v. GHK Exploration, L.P., 2011 OK 18, ¶ 6, 250 P.3d 328 (citations omitted) (internal quotation marks omitted). "When this Court reviews the trial court's grant of summary judgment, all inferences and conclusions drawn from the evidence must be viewed in the light most favorable to the party opposing the motion." *Geyer Bros. Equip. Co. v. Standard Res., L.L.C.*, 2006 OK CIV APP 92, ¶ 7, 140 P.3d 563 (citation omitted).

ANALYSIS

¶9 Prior to turning to the issue of "pass-through" indemnity, we first address the issue of whether the parties' agreement applies to this case at all given McBride's allegation in the underlying case that he was an employee of Eagle, not ETS, at the time of the accident. In the parties' agreement, AEP is defined as the "Company" and ETS is defined as the "Contractor." Two additional terms – "Company Group" and "Contractor Group" – are also defined. Unlike "Company," "Company Group" is defined very broadly in the agreement, as follows:

> (a) [AEP], (b) [AEP's] successors and assigns; (c) general and limited partners of (a) and (b); (d) parents, subsidiaries and affiliates of (a), (b) and (c); (e) the working interest owners, co-lessees, co-owners, lessors, partners, and joint venturers of (a), (b), (c) and (d) and any entities for whom it is performing services or with whom it has entered into sharing agreements; (f) consultants of (a), (b), (c), (d) and (e); and (g) the agents, directors, officers and employees of (a), (b), (c), (d), (e) and (f). A partial list of those entities comprising the Company Group is set forth on Exhibit "B" attached hereto.[3]

¶10 "Contractor Group" is also defined broadly in the agreement, as follows:

> (a) [ETS]; (b) any parent company of [ETS]; (c) [ETS's] heirs (if applicable), successors and assigns; (d) subsidiaries and affiliates of (a), (b) and (c); (e) all contractors and subcontractors (of every tier) of (a), (b), (c) and (d); and (f) the agents, directors, officers and employees of (a), (b), (c), (d), and (e).

Thus, there is an obvious difference in the agreement between the terms "Company" and "Company Group," and "Contractor" and "Contractor Group," and these terms are not meant to be used interchangeably in the parties' agreement.

¶11 In the indemnity provisions in the parties' agreement, "Contractor" has agreed to indemnify and hold harmless "Company Group" from and against all claims and demands "arising in connection herewith in favor of *Contractor's employees*, Contractor's subcontractors or their employees, or Contractor's invitees on account of bodily injury, death or damage to property." (Emphasis added.) In addition, "Company" has agreed to reciprocal terms – i.e., "Company" has agreed to indemnify and hold harmless "Contractor Group" in a similar manner.

¶12 Thus, the indemnity provisions protecting "Company Group" require ETS to indemnify AEP against any and all claims made by ETS's employees (as well as ETS's subcontractors and invitees) but, importantly, not against claims made by all of the various individuals and entities within the larger class of the "Contractor Group."[4] The term "Contractor Group" is used only to specify AEP's duty to indemnify.

¶13 As stated, "Contractor" is defined in the agreement as "ETS Oilfield Services, L.P.," i.e., ETS, and not as the entity identified as the employer of McBride – "Eagle Testing Services LP" – in McBride's petition filed in the Texas lawsuit. AEP alleges in its amended petition that Eagle is not merely another name for ETS but is "a subsidiary of ETS." Elsewhere, however, AEP asserts McBride was an employee of ETS at the time of the underlying accident. Neither party has presented evidentiary materials in this regard, nor have they presented any argument or authority in support of the proposition that an employee of a subsidiary (assuming Eagle is a subsidiary of ETS) *is* an employee of the controlling entity.

¶14 Nevertheless, even assuming for purposes of summary judgment that McBride was an employee of ETS, McBride's claims in the Texas lawsuit are asserted only against C&J, a third-party independent contractor not within the "Company Group."[5] As quoted above, the definition of Company Group, although broad, does not expressly include indemnitees or even contractors of AEP. Although AEP accepted

tender of the defense of C&J pursuant to an indemnification provision contained in a contract between AEP and C&J, ETS has only contracted in its agreement with AEP to indemnify the members of the "Company Group."

¶15 AEP is essentially demanding "pass-through" indemnity. "Indemnifying third parties to the contract is called 'pass-through' indemnity."[6] B. Lee Wertz, Jr. & Stephan D. Selinidis, *Risk Shifting in the Oil Patch: A Guide to Extraordinary Risk Shifting*, 33 Corp. Couns. Rev. 147, 152 (2014). *But see* 15 O.S. 2011 § 421 ("Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person."). AEP asserts "[i]t does not . . . matter whether there is no specific language to 'pass through' indemnity" because "Oklahoma does not require any specific, magic language." According to ETS, the law on "pass-through" indemnity is not well developed in Oklahoma. It is established in Oklahoma, however, that "the terms of the parties' contract, if unambiguous, clear, and consistent, are accepted in their plain and ordinary sense and the contract will be enforced to carry out the intention of the parties as it existed at the time the contract was negotiated." *Osprey L.L.C. v. Kelly-Moore Paint Co. Inc.*, 1999 OK 50, ¶ 13, 984 P.2d 194.

> As with other contracts, the cardinal rule in the interpretation of an indemnity contract is to "ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles." *McAtee v. Wes-Lee Corp.*, 1977 OK 130, ¶ 6, 566 P.2d 442, 444 (quoting *Clifford v. United States Fid. & Guar. Co.*, 1926 OK 564, ¶ 0, 249 P. 938, 938 (syllabus by the Court)). The intention of the parties should be derived from the whole contract, with particular clauses of a contract being subordinate to the general intent; and every part of a contract should be given effect, "each clause helping to interpret the others." 15 O.S. 2001 [now 2011] §§ 157, 166; *Wallace v. Sherwood Const. Co.*, 1994 OK CIV APP 82, 877 P.2d 632. Although the terms of a contract may be broad, "it extends only to those things concerning which it appears that the parties intended to contract." 15 O.S. 2001 [now 2011] § 164. "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." 15 O.S. 2001 [now 2011] § 163.

Estate of King v. Wagoner Cty. Bd. of Cty. Comm'rs, 2006 OK CIV APP 118, ¶ 14, 146 P.3d 833.

¶16 The parties' agreement does not contain any language expressly stating that ETS agrees its indemnity obligation extends to third-party contractors (or any other third-party outside the Company Group) to whom Company Group (including AEP) owes an indemnification duty, nor does the definition of "Company Group" include AEP's contractors and/or subcontractors. Less clear, however, is whether, given the seemingly all-encompassing nature of the language found in portions of the indemnification provisions in the agreement, ETS has nevertheless agreed to indemnify the Company Group from contractual liability to third parties arising from claims made by ETS's em-ployees, subcontractors and invitees.[7] The agreement states that

> Contractor agrees to protect, defend, indemnify and hold harmless Company Group, *from and against all claims, demands, and causes of action of every kind and character without limit and without regard to the cause or causes thereof or the negligence or fault (active or passive) of any party or parties* including the sole, joint or concurrent negligence of Company Group, any theory of strict liability and defect of premises . . . , arising in connection herewith in favor of Contractor's employees, Contractor's subcontractors or their employees, or Contractor's invitees on account of bodily injury, death or damage to property.

(Emphasis added.)

¶17 While we agree that this language is very broad, we disagree with the trial court that this language "is clear and explicit" with regard to requiring ETS to indemnify AEP from AEP's separately contracted duty to indemnify third-party contractors sued by ETS employees. Indeed, the next provision in the agreement provides, in part, that AEP agrees to indemnify Contractor Group from all claims made by "Company's contractors," and the agreement executed by C&J and AEP contains the same language – i.e., that AEP agrees to indemnify C&J against all claims made by AEP's contractors. The trial court's reading would render nugatory AEP's promises to indemnify its contractors against claims made by other contractors, and would place the indemnification duty on the contractor whose employee was injured; in effect, such a reading would require the injured employee's employer (here, ETS) to

indemnify the negligent employee and its employer (here, C&J), without any clear terms in the agreement to this effect.

¶18 In Oklahoma, it is further established:

> Agreements to indemnify a party against its own negligence or liability are strictly construed. *See Transpower Constructors v. Grand River Dam Auth.*, 905 F.2d 1413, 1420 (10th Cir. 1990) (applying Oklahoma law). "To be enforceable, the agreement must meet the following three conditions: (1) the parties must express their intent to exculpate in unequivocally clear language; (2) the agreement must result from an arm's-length transaction between parties of equal bargaining power; and (3) the exculpation must not violate public policy." *Id.* (citing *Fretwell v. Protection Alarm Co.*, 1988 OK 84, ¶ 12, 764 P.2d 149, 152).

Noble Steel, Inc. v. Williams Bros. Concrete Const. Co., 2002 OK CIV APP 66, ¶ 10, 49 P.3d 766.

> An agreement which would have the effect of indemnifying one against its own negligence is strictly construed. *Fretwell*[,] ¶ 12. To be enforceable, such an agreement must be "*unequivocally clear* from an examination of the contract." *Id.* ¶ 12, 764 P.2d at 153 (emphasis added).

Estate of King, 2006 OK CIV APP 118, ¶ 50. Thus, we conclude Oklahoma law on this point is consistent with the following principles:

> [U]nless expressly stated, pass through indemnification clauses violate the long standing policy underlying the rule narrowly construing indemnification provisions. When the provision sought to be "passed through" involves indemnification for acts of another party's negligence, the theory will not be applied, unless the contract language is clear and specific. Sound public policy requires an unequivocally stated intention to be included in the subcontract for this particular type of provision to pass through[.]

Bernotas v. Super Fresh Food Markets, Inc., 863 A.2d 478, 484 (Penn. 2004).[8]

¶19 Although the parties' agreement contains general language susceptible to a broad interpretation, it lacks the "unequivocally clear" language necessary to make ETS responsible for indemnifying AEP from AEP's contractual duty to indemnify C&J. AEP's proposed interpretation of the parties' agreement is perhaps all the more unreasonable in the present case, where AEP entered into its indemnity agreement with C&J (dated September 30, 2014) only after ETS and AEP executed their agreement (dated August 14, 2014). But, regardless, unequivocally clear language which might support AEP's pass-through indemnity theory is lacking in the parties' agreement. Therefore, we conclude the trial court erred in granting summary judgment in favor of AEP. *Cf. Noble Steel*, ¶ 10 ("It is unnecessary to address the second and third requirements, because [the plaintiff] cannot meet the first requirement."). Summary judgment should, instead, be entered in favor of ETS.

CONCLUSION

¶20 We conclude the trial court erred in granting summary judgment in favor of AEP. Summary judgment should, instead, be entered in favor of ETS. We remand this case to the trial court with instructions to enter summary judgment in favor of ETS.

¶21 **REVERSED AND REMANDED WITH INSTRUCTIONS**.

RAPP, J., and GOODMAN, J., concur.

DEBORAH B. BARNES, PRESIDING JUDGE:

1. It appears C&J filed for "Chapter 11" bankruptcy relief in July 2016.

2. McBride further alleges that the rig was "owned and operated by [C&J.]" Elsewhere in the evidentiary materials it is stated that the alleged injuries occurred "at a well-site owned and operated by [AEP]."

3. The "partial list of those entities which are part of the Company Group" is set forth as follows:

1. [AEP]
2. AEPB Services, LLC
3. American Energy Permian Holdings, LLC
4. American Energy Management Services, LLC
5. American Energy Partners, LP[.]

4. This reading is bolstered by other provisions of the parties' agreement. For example, one provision states, in full, as follows: "The indemnity provisions of this Agreement shall apply to any and all work performed, services rendered or material supplied *by Contractor on behalf of Company* whether Company is acting in the capacity of an operator, non-operator or working interest owner." (Emphasis added.)

5. As stated above, the agreement between C&J and AEP states, like the agreement between ETS and AEP, that C&J "shall be deemed to be an independent Contractor[.]" AEP has made no indemnification claim based, for example, on an assertion of an employer/employee or agency relationship with C&J, an assertion which could potentially be proven despite contract language stating otherwise. *See, e.g., Duncan v. Powers Imports*, 1994 OK 126, ¶ 8, 884 P.2d 854 ("eleven factors . . . in deciding whether a person is an independent contractor"). We decline to make such an argument for AEP. *See, e.g., Enter. Mgmt. Consultants, Inc. v. State ex rel. Okla. Tax Comm'n*, 1988 OK 91, ¶ 5, 768 P.2d 359 (An agency relationship will not be presumed, and "[t]he burden of proving the existence, nature and extent of the agency relationship rests ordinarily upon the party who asserts it." (footnote omitted)). Although, when "determining the propriety of granting a summary judgment, the trial court is not only authorized but required to rule out all theories of liability fairly encompassed within the evidentiary material presented," *Parris v. Limes*, 2012 OK 18, ¶ 3, 277 P.3d 1259 (citation omitted), the only evidentiary material presented in this regard is the

contract language stating that C&J is to be deemed an independent contractor.

6. The terms "flow-down" or "flow-through" indemnity are also sometimes used.

7. *See* 33 Corp. Couns. Rev. at 152 ("There are different ways to accomplish pass-through protection. One method is for the indemnitor to agree to indemnify the indemnitee from any contractual liability to third parties," "[a] second method would be to specify that the indemnity obligation is owed to the indemnitee and anyone to whom the indemnitee owes contractual indemnity," and "[a] third method would be to expand the categories of persons or companies entitled to indemnity protection to include the indemnitee and its contractors and subcontractors." (footnotes omitted)).

8. *See Nat'l Union Fire Ins. Co. v. A.A.R.W. Skyways, Inc.*, 1989 OK 157, ¶ 11, 784 P.2d 52 (Although *Nat'l Union Fire* was issued prior to *Bernotas* and involved a different legal issue, the Oklahoma Supreme Court stated: "[W]e cite with approval a sister state opinion [of the Supreme Court of Pennsylvania] that expressly states the law of indemnity as we perceive it.").

2018 OK CIV APP 45

STEVEN RUTHER, Plaintiff/Appellant, vs. OKLAHOMA FIREFIGHTERS PENSION AND RETIREMENT SYSTEM, Defendant/Appellee.

Case No. 116,401. April 23, 2018

APPEAL FROM THE DISTRICT COURT OF GARFIELD COUNTY, OKLAHOMA

HONORABLE PAUL K. WOODWARD, TRIAL JUDGE

VACATED

David C. Henneke, DAVID C. HENNEKE, ATTORNEY AT LAW, Enid, Oklahoma, for Plaintiff/Appellant

Marc Edwards, Catherine L. Campbell, PHILLIPS MURRAH P.C., Oklahoma City, Oklahoma, for Defendant/Appellee

P. THOMAS THORNBRUGH, CHIEF JUDGE:

¶1 Steven Ruther appeals a decision of the district court dismissing his petition against the Oklahoma Firefighters Pension and Retirement System for failure to state a claim. On review, we vacate the finding of the district court because it was without jurisdiction in this matter.

BACKGROUND

¶2 Ruther is a retired Garfield County firefighter. Early in 2016, Ruther began a correspondence with the Executive Director of the Firefighters Pension and Retirement System regarding the possibility of a "lump sum" distribution of Ruther's accrued pension benefits. The executive director (or an assistant acting on his behalf) informed Ruther that he was not entitled to such a distribution. The system's attorneys later sent Ruther a letter confirming the Executive Director's position. In May 2017, Ruther sued the pension system in Garfield County. The pension system filed a motion to dismiss raising jurisdictional and venue questions, as well as arguing its legal position that a lump sum distribution was not allowed. The district court ruled that, as a matter of law, Ruther was not entitled to a lump sum distribution, without ruling on the jurisdictional and venue questions. Ruther now appeals this decision.

STANDARD OF REVIEW

¶3 The standard of review for a district court's decision granting a motion to dismiss is *de novo*. The purpose of such a review is to test the law that governs the claim, not the underlying facts. As such, we take all factual allegations in the petition as true and draw all reasonable inferences therefrom. We do not require the plaintiff to specify a theory of recovery, nor a particular remedy. If relief is possible under any set of facts that can be gleaned from the petition, the motion to dismiss should be denied. *Cates v. Integris Health, Inc.*, 2018 OK 9, ¶ 7, __ P.3d ___ (footnotes omitted).

ANALYSIS

¶4 An immediate problem that presents itself in this case is that 11 O.S.2011 § 49-128, part of Article XLIX – "Firefighters Pension and Retirement System," requires that:

> Any person possessing the qualifications required and provided for under this article, who **deems himself aggrieved by a decision** of the State Board on his or her claim for pension, either in r**ejecting his or her claim** or in the amount allowed by the Board, or participating municipality, **may appeal from such decision by filing a petition in the Oklahoma County District Court** within thirty (30) days from the date of such decision. (Emphasis added)

¶5 Two factual scenarios are possible under this statute, and neither grants venue to the district court of Garfield County. The first is that Ruther has not yet obtained a decision of the State Board on his claim for benefits. If so, it is clear that he does not have an appealable decision at this time. The second is that Ruther has obtained a decision of the State Board. If so, venue is clearly not proper in Garfield County.

¶6 Title 11 § 49-100.7 (G) requires that

> The State Board shall take all necessary action upon applications for pensions, dis-

> ability benefits, refund of accumulated contributions and shall take action on all other matters deemed necessary by the State Board, including bringing actions for declaratory relief in the district courts in the state to enforce the provisions of applicable state law.

It is clear that the State Board is the entity with the statutory responsibility to make a decision regarding Ruther's request for a pension distribution. The first question is, therefore, *whether the State Board has made a final decision.*

¶7 Prior to December 31, 2016, 11 O.S. § 49-103 required the City of Enid to have a local Firefighters Pension and Retirement Board:

> A. The mayor, the clerk and the treasurer of every incorporated municipality are, in addition to the duties now required of them, hereby created and constituted, together with three members from the fire department of such municipality, a local firefighters pension and retirement board of each such municipality, which board shall be known as the Local Firefighters Pension and Retirement Board.

¶8 This board was responsible for making an initial determination of Ruther's request pursuant to 11 O.S. § 49-105.1:

> Responsibility of Local Board to Review Certain Applications
>
> It shall be the responsibility of the local board to review applications for retirement benefits and disability benefits. Each local board shall recommend approval, disapproval or modification of each application and the secretary shall forward such recommendations to the State Board within ten (10) days following the local board's decision. Consideration by the local board shall be pursuant to this article and the rules and regulations of the State Board. The State Board shall furnish all required forms.

Title 11 O.S. § 49-103(B) also states, however, that:

> Local firefighter pension and retirement boards of participating employers of the System shall be terminated on **December 31, 2016,** and all powers, duties and functions shall be assumed by the Executive Director. (Emphasis added).

¶9 The record indicates that some amount of "jumping the gun" took place in this case. The record shows that, in *April 2016*, Ruther sent a letter to the Executive Director of the Firefighters Pension and Retirement System, requesting a "lump sum distribution calculation." According to a June 20 letter written by Ruther's counsel, he then received "information" from someone identified as Deputy Director Duane Michael. The letter implies that Michael has sent some information indicating that Ruther was not entitled to a lump sum distribution under Oklahoma law.[1] In August 2016, a law firm identifying itself as counsel for the Firefighters Pension and Retirement Board wrote to Ruther's counsel reiterating that he was not entitled to the distribution he requested. All of this took place while the local Firefighters Pension and Retirement Board was *still statutorily constituted* and required to "review applications for retirement benefits and disability benefits" and "recommend approval, disapproval or modification of each application . . . to the State Board within ten (10) days following the local board's decision." 11 O.S. § 49-105.1. The Executive Director had no statutory authority to hear or decide Ruther's benefit application at the time this alleged decision was made.

¶10 Were the local Firefighters Pension and Retirement Board still in operation, we would have no choice but to hold that no proper application for benefits was made, and no decision rendered. However, after December 31, 2016, the Executive Director *does* appear to be the proper party to assess Ruther's initial application, and returning the case for a new assessment would be futile at this time. We will therefore treat the Executive Director's decisions as the equivalent of a *recommendation by the local board* that Ruther's application be denied.

¶11 The next requirement in the statutory process is that the local Board "forward such recommendations to the State Board." We find no record that any recommendation has been made to the State Board,[2] or any formal decision issued by the State Board. All we appear to have at this time is an exchange of legal opinions between Ruther's counsel and counsel for the pension system.

¶12 Even if we were to assume (without agreeing) that this exchange of legal positions between counsel constituted a State Board decision that becomes appealable pursuant to 11 O.S. § 49-128, that statute is quite clear that statutory venue for an appeal of the decision lies

only in Oklahoma County ("may appeal from such decision by filing a petition in the Oklahoma County District Court …"). Garfield County was an improper venue to hear the matter.

CONCLUSION

¶13 The statutes governing the resolution of claims for pension benefits against the Firefighters Pension and Retirement System are clear. The request must first be made to a local board, or, if a local board does not exist, to the Executive Director. A recommendation is then made to the State Board, and the State Board's final decision must be appealed in Oklahoma County. We find no record of any appealable State Board decision in this case, and no indication that this statutory process is discretionary.

¶14 As a result, there was no justiciable issue before the district court. We vacate its decision. If Mr. Ruther wishes to proceed, he must obtain a final Board decision, and appeal it in Oklahoma County if he is dissatisfied.

¶15 **VACATED**.

WISEMAN, P.J., and FISCHER, J., concur.

P. THOMAS THORNBRUGH, CHIEF JUDGE:

1. This must be surmised from Ruther's July 20 letter because neither party chose to make any actual communication between Michael and Ruther part of the record.

2. There is no equivalent "sunset" language in the statute creating the State Board.

2018 OK CIV APP 46

DANNY BOB MYERS, an individual, and WALTER KENT MYERS, an individual, Plaintiffs/Appellees, vs. LARRY STEVE MYERS, individually and as CO-TRUSTEE of the PATTERSON REVOCABLE LIVING TRUST dated August 29, 2007; and GUY W. JACKSON individually and as TRUSTEE of the PATTERSON REVOCABLE LIVING TRUST dated August 29, 2007, Defendants/Appellants; CURTIS MARK MYERS, an individual, Plaintiff/Appellee, vs. LARRY STEVE MYERS, as CO-TRUSTEE of the PATTERSON REVOCABLE LIVING TRUST; and GUY W. JACKSON, TRUSTEE EXECUTOR of the PATTERSON REVOCABLE LIVING TRUST, Defendants/Appellants.

Case No. 114,846. April 24, 2017

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE BARBARA J. SWINTON, TRIAL JUDGE

AFFIRMED IN PART AND APPEAL DISMISSED IN PART AS MOOT

Debra W. McCormick, MCCORMICK & BRYAN, PLLC, Edmond, Oklahoma, for Plaintiffs/Appellees Danny Bob Myers, Curtis Mark Myers and Walter Kent Myers

J. John Hager, Jr., ELIAS, BOOKS, BROWN & NELSON, P.C., Oklahoma City, Oklahoma, for Defendant/Appellant Larry Steve Myers

Ken Felker, Edmond, Oklahoma, for Defendant/Appellant Guy Jackson

R. Stephen Haynes, LAW OFFICES OF R. STEPHEN HAYNES, Oklahoma City, Oklahoma, for Defendant Appellant Richard Franklin Myers

KEITH RAPP, JUDGE:

¶1 This is an appeal from an Order of the trial court denying a defendants' Motion to Reconsider the Order of the trial court that denied defendants' Motion to Disqualify the plaintiffs' attorney for conflict of interest. The plaintiffs' attorney has moved to dismiss the appeal as moot. The Supreme Court of Oklahoma deferred the decision on dismissal to this Court.

BACKGROUND

¶2 This matter began as two cases. The trial court subsequently consolidated the cases at the defendants' request. The plaintiffs in both cases are represented by the same law firm.

¶3 The cases involve charges by one brother in the first case and by two other brothers in the second case against a fourth brother, Larry Steve Myers (Steve), as co-trustee, and the other co-trustee, Guy W. Jackson (Jackson), of a revocable trust. The trust was created, and thereafter restated by the brothers' Mother, Joanie Patterson (Mother).[1]

¶4 Curtis Mark Myers (Mark) filed the first case.[2] He charged Steve and Jackson with fraudulent transfer of trust property and exercise of undue influence.[3] He sought damages, an accounting and imposition of a constructive trust over Mother's trust's assets.

¶5 Danny Bob Myers (Bob) and Walter Kent Myers (Kent) filed the second case and twice amended their petition.[4] They charged Steve and Jackson with breach of fiduciary duty, neg-

ligence and conversion. They requested an accounting, surcharge and removal of Jackson as co-trustee. In their Second Amended Petition they named the fifth brother, Richard Franklin Myers (Richard), because he is a named beneficiary of Mother's Trust and thus a necessary party.

¶6 All defendants have answered and Jackson filed a counterclaim against Kent in the second case. Jackson alleged that Kent occupied a trust property without paying rent and has been unjustly enriched.

¶7 After the trial court consolidated the cases, the defendants moved to disqualify plaintiffs' counsel. The premises for the motion are:[5]

- Mark, in his lawsuit, and Bob and Kent in their lawsuit, are seeking inconsistent reliefs which are adverse to each other. According to the disqualification motion, Mark seeks to declare the restated Trust null and void whereas Bob and Kent seek to enforce the Trust.
- Plaintiffs' counsel is defending the counterclaim against Kent. This counterclaim seeks to recover for the benefit of the Trust, and thus its beneficiaries. Therefore, representation of Kent is adverse to the interests of the other brother beneficiary.

¶8 In response, plaintiffs denied any conflict and produced two signed and one unsigned email by each plaintiff stating that they were informed by counsel of "a possible conflict of interest" and wished to retain counsel notwithstanding any conflict.[6] Plaintiffs further argued that if a conflict existed, it was created by defendants when they succeeded in having the two cases consolidated.

¶9 The trial court denied the disqualification motion without a hearing. Defendants moved to reconsider. The trial court held a hearing where the parties submitted the waivers, legal authority and arguments. The trial court reaffirmed its denial of the Motion to Disqualify and this appeal followed.

¶10 Plaintiffs' counsel has moved to dismiss the appeal as moot. The basis for this motion is that the first lawsuit, the case filed by Mark, has been dismissed due to Mark's ill health.

¶11 Jackson and Steve (now appellants) then argue that an attorney cannot defeat disqualification for conflict of interest by dropping one client. They cited *Flatt v. Superior Court,* 885 P.2d 950, 957-58 (Cal. 1994), and other cases, for the "hot potato" rule that bars an attorney from correcting a ground for disqualification by severing the relationship with another client.

¶12 Jackson and Steve further argue that counsel also has a conflict because of the representation of Kent on the Jackson counterclaim. According to the argument, defending the Jackson counterclaim against Kent is adverse to the interest of Bob because Bob, as a beneficiary, has an interest in recovering from Kent. Jackson and Steve maintain that the appeal should proceed and address the issues of the adequacy of the waivers, the need for an evidentiary hearing, and whether there is a requirement for the trial court to enter findings of fact and conclusion of law on the disqualification issue.

STANDARD OF REVIEW

¶13 The appellate court determines whether an appeal is moot. *In re Guardianship of Doornbos*, 2006 OK 94, ¶ 2, 151 P.3d 126.

¶14 This appeal arises from an Order denying a motion to reconsider the trial court's Order denying a motion to disqualify. When reviewing a motion to reconsider, which is equivalent to a motion for new trial, this Court will not disturb the trial court's determination in the absence of abuse of discretion. *Nu-Pro, Inc. v. G. L. Bartlett & Co., Inc.*, 1977 OK 226, ¶ 5, 575 P.2d 620, 622; *Harlow Corp. v. Bryant Exploration and Production Co., Inc.*, 1991 OK CIV APP 80, ¶ 9, 816 P.2d 1154, 1155. To reverse a trial court on the ground of an abuse of discretion, it must be found that the trial court made a clearly erroneous conclusion and judgment, against reason and evidence. Here, this determination requires examination of the underlying ruling on the motion to disqualify.

¶15 The Oklahoma Rules of Professional Conduct provide:

> a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client;
>
> or
>
> (2) there is a significant risk that the representation of one or more clients will be

materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.7, 5 O.S.2011, Ch. 1 App. 3-A.

¶16 With regard to an Order on a motion to disqualify an attorney, the standard of review is:

> "When reviewing the order, we review the trial court's findings of fact for clear error and carefully examine *de novo* the trial court's application of ethical standards.

Arkansas Valley State Bank v. Phillips, 2007 OK 78, ¶ 8, 171 P.3d 899, 903 (footnote citations omitted).

ANALYSIS AND REVIEW

A. Mootness

¶17 This Court holds that the question of whether there is a conflict of interest associated with representation of Mark is now moot. The circumstances here are distinguishable from the case where an attorney "drops" one client and keeps another and all continue in the litigation. Moreover, there is no allegation that plaintiffs' counsel's representation involves prior representation of an adverse party. Mark is no longer a litigant because of the independent reason of ill health. Therefore, this Court will not consider the question of whether a conflict existed arising from representation of Mark.

B. Separate Ground Argument

¶18 Next, Jackson and Steve maintain that their separate ground for disqualification requires consideration of the appeal and the issues regarding evidentiary hearing and fact findings by the trial court, including the sufficiency and validity of the consents. The appeal is not moot regarding this claim for disqualification.

1. Evidentiary Hearing

¶19 "Historically under Oklahoma law, before the trial court can determine that an attorney should be disqualified based on conflict of interest or improper possession of confidential information, it must hold an evidentiary hearing and make a specific factual finding in its order of disqualification that the attorney had knowledge of material and confidential information." *Miami Business Services, LLC v. Davis*, 2013 OK 20, ¶ 10, 299 P.3d 477, 483. Clearly, the failure to conduct an evidentiary hearing when one is required is reversible error. *Miami Business Services, LLC*, 2013 OK 20 ¶ 10, 299 P.3d at 483; *Sperdute v. Household Realty Corp.*, 585 So. 2d 1168, 1169 (Fla. Dist. Ct. App. 1991).

¶20 The *Miami Business Services, LLC* Court continued:

> While disqualification of counsel is a drastic measure, it is used when necessary to preserve the integrity of the judicial process. The standard for disqualifying counsel is whether real harm to the integrity of the judicial process is likely to result if counsel is not disqualified. This is a high standard to meet and the burden rests with the moving party to establish the likelihood of such harm by a preponderance of the evidence. *If disqualification is to be based on an alleged conflict of interest or improper possession of confidential information, then we have required the trial court to hold an evidentiary hearing and make specific findings that the attorney whose disqualification is sought had knowledge of material and confidential information.*

Miami Business Services, LLC, 2013 OK 20 ¶ 12, 299 P.3d at 484 (emphasis added) (footnote citations omitted).

¶21 At the outset, this Court observes that the cases such as *Miami Business Services, LLC* involve claims of conflict because the attorney allegedly had knowledge of material and confidential information derived from a former representation.[7] Second, the requirement for findings and conclusions is associated with a

disqualification order based upon such knowledge and possession.

¶22 Neither situation is present here. Plaintiffs' counsel is alleged to have a conflict because of conflicting economic interests and the trial court did not disqualify counsel. The alleged conflict is based upon representation of Kent in opposition to the Jackson counterclaim. Of course, there is no disqualification order.

¶23 Jackson and Steve have not drawn any distinction between types of disqualification grounds. They simply assert that an evidentiary hearing followed by findings and conclusions is required. The precise rulings of the Oklahoma Supreme Court do not support their argument.

¶24 An evidentiary hearing is an adjudicative process leading to the establishment of the existence or non-existence of a fact or facts. Sperdute, 585 So. 2d at 1169 ("[P]urpose of an evidentiary hearing is to allow a party to 'have a fair opportunity to contest' the factual issues.") The process involves evidence, documentary and witnesses, and legal arguments. The evidentiary hearing is not a trial on the merits to resolve the parties' dispute, but is an adjunct to the trial proceedings. For example, like here, it might pertain to a preliminary, separate matter, or it might pertain to post-trial matters, such as in criminal proceedings.

¶25 Here, the trial court did not hold a hearing *before* making its initial decision.[8] However, the trial court held a hearing on the Motion to Reconsider and reopened consideration of the Motion to Disqualify. The trial court began the hearing by stating:

> The Court: All right. So we're back again on the Motion to Disqualify Ms. McCormick.[9]

Jackson and Steve characterized that hearing as an evidentiary hearing.[10] Examination of the transcript of that hearing confirms that characterization.

¶26 Jackson and Steve are the moving parties with the burden of proof. Here, they have not defined "evidentiary hearing" nor have they shown what more could have been considered in the hearing on the Motion to Reconsider. The trial court received the consent documents, heard arguments, and examined the parties' written submittals and the pleadings. Jackson and Steve did not subpoena witnesses or take depositions on the issue or tender an offer of proof.

¶27 Their presentation at the hearing was essentially a legal argument premised upon the evidentiary facts before the trial court. There was no dispute about the Kent representation, or that a counterclaim was pending against him. Jackson and Steve maintained that the consent forms from Bob and Kent were insufficient as a matter of law, so delving further into their authenticity would not be necessary to their argument.[11] They also asserted that the language of the consents did not clearly encompass the Kent representation, but they did not offer evidence from the consenting brothers. The trial court clearly interpreted the consents as broad based, written consents covering the Kent representation.

¶28 Therefore, this Court concludes that the hearing on the Motion to Reconsider functioned as an evidentiary hearing on the Motion to Disqualify.

2. Findings and Conclusions

¶29 The trial court did not enter written findings or conclusions. The precise holdings of the Supreme Court in the *Miami Business Services, LLC* line of cases do not require them in this instance because those cases involved disqualification based on conflicts of interest resulting in the alleged possession of confidential information; an issue not present in this appeal.[12] Nevertheless, Jackson and Steve maintain that the trial court erred by failing to conduct an evidentiary hearing and enter fact findings and conclusions of law.

¶30 Although the trial court did not enter formal findings and conclusions, the trial court did announce on the Record the reason for the decision. The trial court referenced the Professional Rules of Conduct and, without specific citation, Rule 1.7, 5 O.S.2011, Ch. 1 App. 3-A(b)(4).[13]

¶31 The required findings and conclusions provide a Record for a meaningful appellate review. Thus, the facts relied upon by the trial court must appear in a Record.

¶32 Here, the facts relied upon by the trial court and the trial court's ruling applying the facts do appear of Record. The Oklahoma Supreme Court's view of statutory requirement for findings and conclusions to be in writing provides an analogy. There is substantial com-

pliance with the statute when the trial court "dictates into the record, in such intelligible manner or form as to render them distinguishable, the material facts, as he views them, and what his conclusions of law are." *Etchen v. Texas Co.*, 1921 OK 187, ¶ 10, 199 P. 212, 215-16; *see Kilgore v. Stephens*, 1932 OK 637, 14 P.2d 690.[14]

¶33 Therefore, in this instance, and assuming arguendo that findings and conclusions are required, this Court concludes that the Record statement by the trial court is substantially in compliance with a requirement for findings and conclusions in this attorney disqualification proceeding. The Record here suffices for a meaningful review. However, this conclusion applies only to the facts here.

3. The Merits of the Ruling

¶34 Jackson and Steve must satisfy the standard of whether real harm to the integrity of the judicial process is likely to result if counsel is not disqualified. Moreover, as stated in *Arkansas Valley State Bank v. Phillips*, 2007 OK 78, ¶ 12, 171 P.3d 899, 904-05 (footnote citations omitted):

> The right to select counsel without state interference is implied from the nature of the attorney-client relationship in our adversarial system of justice, where an attorney acts as the personal agent of the client and not the state. It is also grounded in the due process right of an individual to make decisions affecting litigation placing his or her property at risk. An individual's decision to employ a particular attorney can have profound effects on the ultimate outcome of litigation. Legal practitioners are not interchangeable commodities. Personal qualities and professional abilities differ from one attorney to another, making the choice of a legal practitioner critical both in terms of the quality of the attorney-client relationship and the type and skillfulness of the professional services to be rendered.

¶35 The assertion of a conflict necessarily assumes that Bob agrees with the premise of the counterclaim, i.e. his co-plaintiff, brother Kent's liability to the Trust. Clearly, if Bob does not believe, or agree, that his brother is liable to the Trust, then his interest is not with the prosecution of the counterclaim. Jackson and Steve have not shown that Kent agrees with their claim of his brother's liability. Absent such showing, their claim of conflict does not override the rights of Bob and Kent to select their own attorney.

¶36 Therefore, the denial of the Motion to Disqualify and the subsequent Motion to Reconsider are affirmed in part and the appeal is dismissed, in part, as moot.

CONCLUSION AND SUMMARY

¶37 This Court holds that the question of whether there is a conflict of interest associated with representation of Mark is now moot. Mark is no longer a litigant because of the independent reason of ill health. Therefore, this Court will not consider the question of whether a conflict existed arising from representation of Mark.

¶38 The second claim of conflict of interest is based upon a claim that counsel's other plaintiffs have competing economic interests. Cases requiring findings of fact, conclusions of law and evidentiary hearings all involve conflicts where the claim is that counsel is in improper possession of confidential information and the attorney is disqualified. This is not the case here.

¶39 Nevertheless, the trial court did reopen the Motion to Disqualify at the Motion to Reconsider hearing. Movants characterized this hearing as an evidentiary hearing. Examination of the Record of the hearing confirms that characterization. At the close of the hearing, the trial court announced its conclusion of law based upon the stated fact of written consents. Under the circumstances here, the Record is reviewable and presents substantial compliance with any requirement for findings and conclusions.

¶40 Therefore, the judgment of the trial court is affirmed in part and this appeal is dismissed in part as moot.

¶41 **AFFIRMED IN PART AND APPEAL DISMISSED IN PART AS MOOT.**

FISCHER, P.J., and GOODMAN, J., concur.

KEITH RAPP, JUDGE:

1. A fifth brother, Richard Franklin Myers, does not appear to be involved in the litigation filed by Mark.
2. Case Number CJ 2015-120.
3. In her restated trust, Mother disinherited Mark. Mark alleged that Steve and Jackson exercised undue influence to accomplish the disinheritance.
4. Case Number CJ 2015-189.
5. The motion is not in the appellate Record. The bases for the motion is derived from the responses to the motion, appellate briefs, and the Record on the Motion to Reconsider.
6. Record, pp. 80-82.

7. For example, *see Piette v. Bradley & Leseberg*, 1996 OK 124, ¶ 2, 930 P.2d 183, 184.

8. This Court notes that the Motion to Disqualify did not ask for an evidentiary hearing. Record, p. 370. The trial court overruled the motion by minute order and stated in the order that "there was no need to conduct the (scheduled) hearing."

9. Tr., p. 3. Also, the trial court's ruling was to deny the Motion to Disqualify. Tr., p. 8.

10. Motion to Disqualify Hearing, Tr., p. 7. *See also*, Appellants' Brief, p. 2:

> On Appellants' Joint Motion for Reconsideration, Trial Court set the matter for hearing, considered arguments of counsel and the parties' written submissions, including purported client consents to McCormick's multiple representation, and refused disqualification, again, without making any findings of fact or conclusions of law.

11. The consents are found in Volume I of the Record at pages 146-48.

12. Jackson and Steve did not pursue the statutory request for findings and conclusions. 12 O.S.2011, § 611.

13. Tr., p. 8. The trial court ruled:

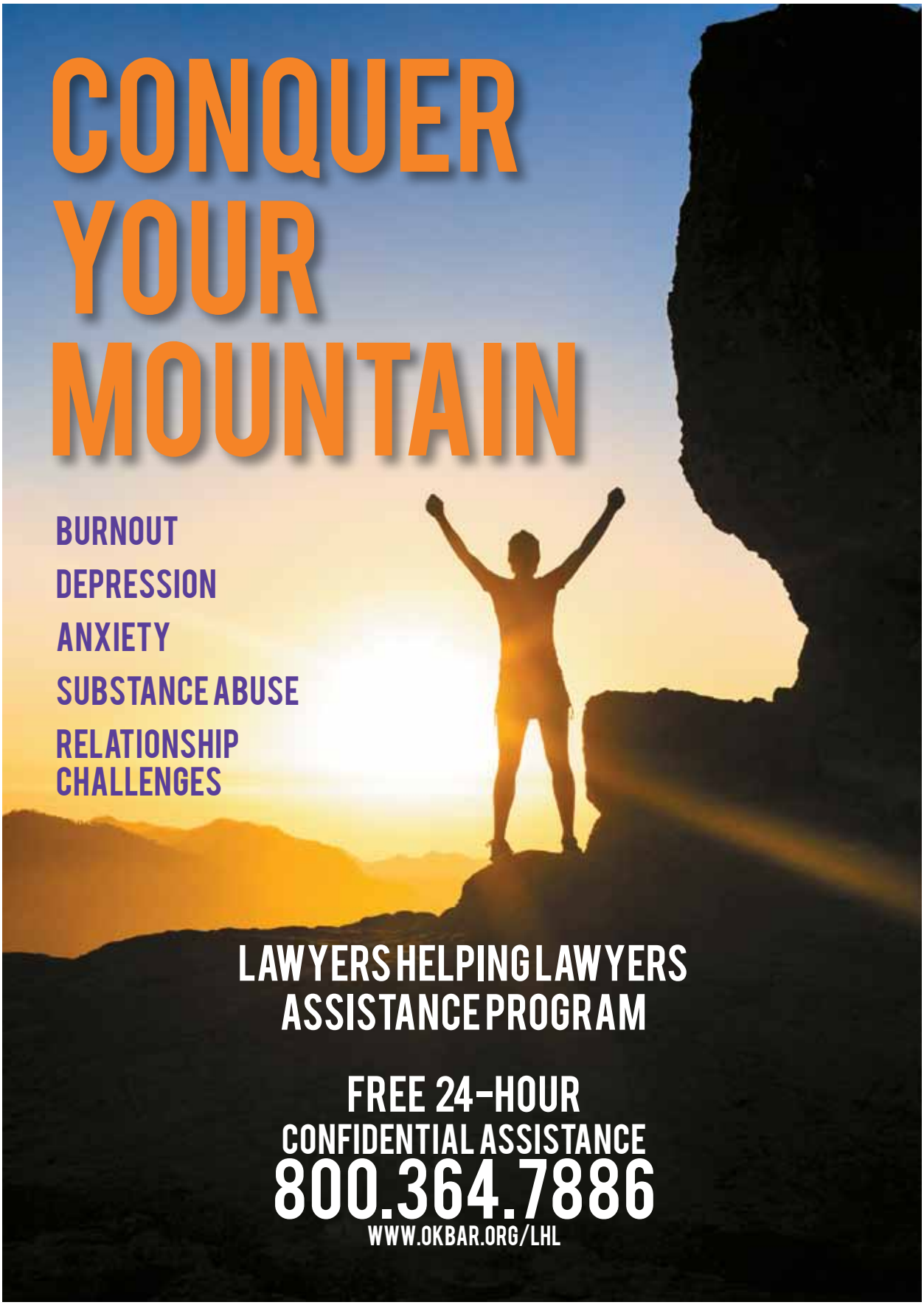
> The Court: Okay. Well, the last one says that if it's in writing it's allowable. So I'll overrule the Motion to Disqualify.

The Rule provides, in part:

> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (4) each affected client gives informed consent, confirmed in writing.

Part (b)(1)-(3) are not in question here.

14. "12 O.S.1941 § 611, requires only that the material and controlling facts and conclusions as found by the trial court shall be so separated as to render them distinguishable, thereby enabling a party to except to any particular finding or conclusion which in his opinion may prejudice his rights, and to point out and assign same as error in case of appeal." *Renegar v. Fleming*, 1949 OK 209, Syl, 4, 211 P.2d 272, Syl. 4.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Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, May 17, 2018

C-2017-975 — Robert Coleman, Sr., Petitioner, pled guilty to two Assault with intent to commit a felony Case No. CF-2017-3912 in the District Court of Tulsa County. The Honorable James W. Keeley, Special Judge, accepted the guilty plea and sentenced him to three years imprisonment, suspended, with rules and conditions of probation. Petitioner filed a timely motion to withdraw plea that was denied after evidentiary hearing. Petitioner now seeks a writ of certiorari. The Petition for Writ of Certiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

C-2017-507 — A.W., Petitioner, entered a negotiated plea of nolo contendere, to Rape by Instrumentation, in Pontotoc County District Court, Case No. YO-2014-1, before the Honorable C. Steven Kessinger, District Judge. Judge Kessinger accepted this plea and sentenced Petitioner as a Youthful Offender for placement in a secure Office of Juvenile Affairs (OJA) facility until Petitioner reached age 18 years, 5 months. While in OJA custody, Petitioner agreed to complete a treatment plan to be placed in effect in 30-45 days from entry of the plea. After release from OJA custody, the parties agreed that Petitioner would receive a fifteen year suspended sentence to be supervised by the Oklahoma Department of Corrections (ODOC). Judge Kessinger subsequently granted the State's motion to transfer custody of Petitioner to ODOC and sentenced Petitioner as an adult to fifteen years imprisonment. Later, Petitioner presented a handwritten note to the district court stating "I [A.W.] would like to pull my plea back." After a hearing on Petitioner's motion to withdraw, Judge Kessinger denied the motion. Petitioner now seeks a writ of certiorari. The Petition for Writ of Certiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. The opinion by: Hudson, J.; Lumpkin, P.J., Concur; Lewis, V.P.J., Concurs in Results; Kuehn, J., Concurs; Rowland, J., Concurs.

F-2016-1168 — Chloe Marie Thomas, Appellant, was tried by jury for the crime of second degree felony murder in Case No. CF-2015-1167 in the District Court of Oklahoma County. The jury returned a verdict of guilty and assessed punishment at life imprisonment. The trial court sentenced accordingly. From this judgment and sentence Chloe Marie Thomas has perfected her appeal. The Judgment and Sentence of the District Court is AFFIRMED. The Application for Evidentiary Hearing on Sixth Amendment Claim is DENIED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., recuses.

J-2018-115 — In the District Court of Tulsa County, Case No. YO-2017-45, Appellant, C.T.E., was charged as a youthful offender with two counts of Robbery with a Dangerous Weapon and one count of Assault with a Dangerous Weapon. On January 18, 2018, the Honorable Deborrah Ludi Leitch, Special Judge, sustained a motion by the State to certify Ap-pellant eligible for adult sentencing if convicted. Appellant appeals that final certification order. AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

F-2016-629 — Ethan Johnson Spruill, Appellant, was tried by jury for the crime of First Degree Manslaughter, in Case No. CF-2014-322, in the District Court of Cleveland County. The jury returned a verdict of guilty and recommended as punishment twenty three years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Ethan Johnson Spruill has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concur; Lewis, V.P.J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

J-2018-0045 — Appellant, M.D.W., born February 3, 2001, was charged as a Youthful Offender in Oklahoma County Case No. CF-2017-3472 with Count 1 – Burglary in the First De-gree, Count 2 – Aggravated Assault and Battery, Count 3 – Use of a Computer for the Purpose of Violating Oklahoma Statutes, Count 4- Conspiracy to Commit a Felony, Count 5 –

Robbery in the First Degree, Count 6 – Conspiracy to Commit a Felony, Count 7 – Larceny of an Automobile, Count 8 – Burglary in the Second Degree, and Count 9 – Larceny of an Automobile. On July 7, 2017, the State filed a motion to impose an adult sentence should Appellant be convicted. The Honorable Gregory J. Ryan, Special Judge, sustained the State's motion for imposition of an adult sentence on January 2, 2018. Appellant appeals from the order sustaining the State's motion to sentence him as an adult should he be convicted. The District Court's order is AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J.: not participating; Hudson, J.: concur; Kuehn, J.: concur; Rowland, J.: recused

C-2017-626 — Donna Kinsey Lee, Petitioner, pled no contest to the crime of Domestic Assault and Battery by Strangulation in Case No. CF-2017-102 in the District Court of Atoka County. In accordance with a negotiated plea the Honorable Paula Inge sentenced Lee to three years imprisonment, suspended. Lee timely filed this Petition for Writ of Certiorari. Petition for Writ of Certiorari DENIED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

F-2017-465 — Alex Eugene Bickford, Appellant, was tried by jury for the crime of Felon in Possession of a Firearm, After Two or More Felony Convictions (Count 3) and Blackmail, After Former Conviction of Two or More Felony Convictions (Count 4) in Case No. CF-2016-231 in the District Court of Osage County. The jury returned verdicts of guilty and set punishment at forty-five years imprisonment on Count 3 and thirty-five years imprisonment on Count 4. The trial court sentenced accordingly and ordered the sentences to be served concurrently. From this judgment and sentence Alex Eugene Bickford has perfected his appeal. Affirmed. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs in results; Hudson, J., concurs; Kuehn, J., concurs.

C-2017-713 — Timothy Lewis McGaughy, Petitioner, entered a blind plea of guilty to two counts of possession of child pornography in Case No. CF-2016-263 in the District Court of Carter County. The Honorable Dennis R. Morris, District Judge, accepted the guilty plea and sentenced him to twenty years imprisonment on each count with all but the first fifteen years suspended, to run concurrently with each other and with credit for time served. Petitioner filed a timely motion to withdraw plea that was denied after evidentiary hearing. Petitioner now seeks a writ of certiorari. The Petition for Writ of Certiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

F-2016-1026 — Brandon Jesse Cords, Appellant, was tried by jury for the crimes of Count 1, conspiracy; Count 2, robbery with a dangerous weapon; Count 3, feloniously pointing a firearm; and Count 4, first degree burglary in Case No. CF-2014-654 in the District Court of Kay County. The jury returned a verdict of guilty and assessed punishment at two years imprisonment in Count 1, five years imprisonment in Count 2, one year imprisonment in Count 3, and seven years imprisonment in Count 4. The trial court sentenced accordingly and ordered the sentences to be served concurrently. From this judgment and sentence Brandon Jesse Cords has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs in results; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

F-2017-537 — Chance Allen Derryberry, Appellant, was tried by jury for the crime of Child Neglect (Counts 1 and 2), Child Endangerment While Being in Actual Physical Control of a Vehicle Under the Influence (Counts 3 and 4), Actual Physical Control of a Vehicle While Under the Influence, Second and Subsequent Offense (Count 5) and Possession of a Controlled Substance in the Presence of a Minor (Count 6) in Case No. CF-2016-106 in the District Court of Stephens County. The jury returned verdicts of guilty and set punishment at two years imprisonment on each Counts 1 and 2, one year imprisonment on each Counts 3 and 4, treatment at Derryberry's expense for Count 5, and a fine of $10,000.00 for Count 6. The trial court sentenced accordingly and ordered the sentences to be served consecutively. From this judgment and sentence Chance Allen Derryberry has perfected his appeal. Affirmed. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs in results; Hudson, J., concurs; Kuehn, J., concurs.

F-2017-426 — Robert Dennis Martin, Appellant, was tried by jury for the crime of Aggravated Trafficking in Methamphetamine, After Conviction of a Felony in Case No. CF-2016-27 in the District Court of Caddo County. The jury

returned a verdict of guilty and recommended as punishment life imprisonment and a $500,000 fine. The trial court sentenced accordingly. From this judgment and sentence Robert Dennis Martin has perfected his appeal. AFFIRMED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

F-2016-1089 — Fue Xiong, Appellant, was tried by jury for the crime of Murder in the First Degree in Case No. CF-2014-2159 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at life imprisonment. The trial court sentenced accordingly. From this judgment and sentence Fue Xiong has perfected his appeal. Affirmed. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

J-2018-121 — Appellant, L.W., was charged as a Youthful Offender in Okmulgee County District Court Case No. YO-2017-2 on September 7, 2017, with Shooting With Intent to Kill. On October 12, 2017, Appellant filed a motion for certification as a juvenile pursuant to 10A O.S.2011, § 2-5-206. Following a certification hearing, the Honorable Pandee Ramirez, Special Judge, denied Appellant's motion for certification as a juvenile and bound Appellant over for arraignment on the Information as a Youthful Offender. Appellant appeals from the denial of his motion for certification as a juvenile. The District Court's order denying Appellant certification as a juvenile is AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs in results; Hudson, J., concurs; Kuehn, J., concurs.

Thursday, May 24, 2018

F-2016-1124 — Tristen Leanne Taylor, Appellant, was tried by jury for the crime of Second Degree Manslaughter in Case No. CF-2015-41 in the District Court of Payne County. The jury returned a verdict of guilty and recommended as punishment eight months imprisonment in the Payne County jail. The trial court sentenced accordingly. From this judgment and sentence Tristen Leanne Taylor has perfected her appeal. AFFIRMED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur in results; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

F-2017-355 — Richard Cortez Lewis Jr., Appellant, was tried by jury for the crimes of Count I - Child Sexual Abuse and Count II - Manufacturing Child Pornography in Case No. CF-2016-2367 in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment life imprisonment on Count I and 10 years on Count II. The trial court sentenced accordingly and ordered the sentences to run concurrently. From this judgment and sentence Richard Cortez Lewis Jr. has perfected his appeal. AFFIRMED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur; Lewis, V.P.J., concur in results; Hudson, J., concur in results; Rowland, J., concur.

F-2016-1077 — Appellant, Robert Jeffery Wells was tried by jury and convicted of Assault and Battery with a Deadly Weapon (Count 1) in District Court of Garvin County Case Number CF-2014-288. The jury recommended as punishment imprisonment for ten (10) years. The trial court sentenced accordingly, granted Appellant credit for time served, and imposed nine (9) months of post-imprisonment supervision. It is from this judgment and sentence that Appellant appeals. The Judgment and Sentence is hereby AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concurs in Results; Hudson, J., Concur; Kuehn, J., Concurs in Part Dissents in Part; Rowland, J., Concur.

F-2016-502 — Appellant Cody Reid Lunsford was tried by jury and convicted of Child Abuse by Injury, in the District Court of Pottawatomie County, Case No. CF-2015-339. The jury recommended as punishment thirty-six (36) years in prison and the trial court sentenced accordingly. It is from this judgment and sentence that Appellant appeals. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur in Results; Rowland, J., Concur.

F-2017-189 — William Todd Lewallen, Appellant, was tried by jury for the crime of Child Neglect, After Former Conviction of Two or More Felonies in Case No. CF-2012-5174 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at twenty-three years. The trial court sentenced accordingly. From this judgment and sentence William Todd Lewallen has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs in results; Hudson, J., concurs; Kuehn, J., concurs.

F-2016-482 — Daniel Esparza Saldivar, Appellant, was tried by jury and convicted in Case No. CF-2014-5368, in the District Court of Tulsa County, of Counts 1, 2 and 4: Child Sexual Abuse; and Counts 3 and 5: Child Sexual

Abuse with a Child Under the Age of 12. The jury recommended the following sentences: Counts 1 and 4 – fifty (50) years imprisonment on each count; and Counts 2, 3 and 5 – twenty-five (25) years imprisonment on each count. The Honorable Kelly Greenough, District Judge, sentenced Saldivar in accordance with the jury's verdicts and ordered Counts 1 through 4 to run consecutively each to the other and Count 5 to run concurrently with Count 3. From this judgment and sentence Daniel Esparza Saldivar has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs in Results; Kuehn, J., Concurs in Results; Rowland, J., Concurs.

C-2017-33 — Christopher Dewayne Banks, Petitioner, entered a negotiated guilty plea in Carter County District Court, Case No. CF-2015-746A, before the Honorable Dennis R. Morris, District Judge, to First Degree Manslaughter, After Former Conviction of a Felony. In accordance with the plea agreement, Banks was sentenced to twenty-three (23) years imprisonment. Banks filed a motion to withdraw his plea. Three separate hearings were held before Judge Morris on Banks' motion. At the conclusion of the third and final hearing, Judge Morris denied Banks' motion. Banks now seeks a writ of certiorari, also submits for consideration his Application for Evidentiary Hearing on Sixth Amendment Claim and Brief in Support. The Petition for Writ of Certiorari is GRANTED. The Judgment and Sentence of the District Court is AFFIRMED as MODIFIED to run concurrent with Banks' sentence in Carter County Case No. CF-2014-128. Banks' Application for Evidentiary Hearing on Sixth Amendment Claim is DENIED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs in Part/Dissents in Part; Lewis, V.P.J., Concurs in Results; Kuehn, J., Concurs; Rowland, J., Concurs.

F-2016-915 — Shelia Faye Bills, Appellant, was tried by jury and convicted in Case No. CF-2015-139, in the District Court of Choctaw County, on Count 1: Trafficking in Illegal Drugs (Methamphetamine), and Count 2: Possession of a Controlled Dangerous Substance (Cocaine). The jury recommended the following sentences – Count 1: four (4) years imprisonment and a $25,000.00 fine; and Count 2: two (2) years imprisonment and a $500.00 fine. The Honorable Bill J. Baze, Associate District Judge, sentenced Bills in accordance with the jury's verdicts and ordered the terms of confinement on both counts to run concurrently. From this judgment and sentence Shelia Faye Bills has perfected her appeal. AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

F-2017-243 — Donald Lee Colbert, Appellant, was tried and convicted by jury for the crime of Possession of a Firearm, After Former Conviction of a Felony, in Case No. CF-2016-1478, in the District Court of Tulsa County. During a bifurcated sentencing proceeding, the jury found the existence of one prior felony conviction for purposes of sentence enhancement and recommended a sentence of ten years imprisonment. The Honorable James M. Caputo, District Judge, sentenced Colbert in accordance with the jury's verdict and imposed various costs and fees. From this judgment and sentence Donald Lee Colbert has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

Thursday, May 31, 2018

F-2016-1141 — Appellant, Laron Tucker, was tried by jury and convicted of Murder in the First Degree in District Court of Tulsa County Case Number CF-2013-5749. The jury recommended as punishment imprisonment for life and a $10,000.00 fine. The trial court sentenced Appellant accordingly. It is from this judgment and sentence that Appellant appeals. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur in Results; Hudson, J., Concur; Kuehn, J., Concur in Part Dissent in Part; Rowland, J., Concur.

C-2017-684 — Petitioner, Bryan Lee Guy, was charged by Amended Information in District Court of Payne County Case No. CF-2016-629 with Possession of Stolen Vehicle (Count 1) After Two or More Prior Felony Convictions; Driving While License Under Suspension (Count 2); and Affixing Unauthorized License Plate (Count 3). On May 18, 2017, Petitioner entered a negotiated plea of guilty to each of these counts. The Honorable Phillip C. Corley, District Judge, accepted Petitioner's plea and sentenced him to imprisonment for eight (8) years in Count 1, incarceration in the county jail for one (1) year in Count 2, and incarceration in the county jail for six (6) months in Count 3. The District Court also imposed a term of nine (9) months post imprisonment

supervision in Count 1, granted Petitioner credit for time served and ordered all of the sentences to run concurrently. The District Court further ordered Petitioner to pay any costs of incarceration and the court costs in each count. On May 23, 2017, the Petitioner filed his handwritten Motion to Withdraw Guilty Plea. On June 9, 2017, the District Court held a hearing on Petitioner's motion. Petitioner appeared with conflict free counsel at the hearing. The District Court denied Petitioner's motion. The Petition for a Writ of Certiorari is DENIED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

C-2017-1256 — Billy Joe Davis, Petitioner, entered an un-negotiated guilty plea to the crime of Child Sexual Abuse in Case No. CF-2014-323 in the District Court of Lincoln County. The court sentenced Petitioner to 30 years imprisonment. Petitioner timely filed an application to withdraw plea. At a hearing held March 15, 2016, the court denied that request. From this denial of his motion to withdraw plea, Billy Joe Davis has perfected his certiorari appeal. Trial court's denial of motion to withdraw plea affirmed. PETITION FOR CERTIORARI DENIED. Opinion by: Kuehn, J.; Lumpkin, P.J., Concur; Lewis, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F-2016-967 — Eleno Maldonado, Jr., Appellant, was tried by jury for two counts of first degree murder in Case No. CF-2015-494 in the District Court of Muskogee County. The jury returned a verdict of guilty and assessed punishment at life imprisonment on each count. The trial court sentenced accordingly and ordered the sentences to be served consecutively. From this judgment and sentence Eleno Maldonado, Jr. has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs in results; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

M-2017-739 — Jeremy L. Garza, Appellant, appearing *pro se*, stipulated to allegations in an Application to Accelerate Deferred Judgment that the State filed in Logan County District Court, Case No. CM-2016-18. On July 7, 2017, the Honorable Susan C. Worthington, Special Judge, sustained that Application, found Appellant guilty of the misdemeanor of Driving under the Influence of Intoxicating Substances, and sentenced him to a fine of $600.00 and one (1) year in the county jail. Appellant appeals the final order accelerating sentencing. REVERSED AND REMANDED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J.; concur.

F-2016-1009 — Charles Ray Glaze, Appellant, was tried by jury and convicted in Case No. CF-2015-7788, in the District Court of Oklahoma County, of Count 1: Burglary in the Second Degree, After Former Conviction of Twenty-Two (22) Felonies; and Count 2: Knowingly Concealing Stolen Property, After Former Conviction of Twenty-Two (22) Felonies. The jury recommended as punishment twelve (12) years imprisonment on Count 1 and four (4) years imprisonment on Count 2. The Honorable Glenn M. Jones, District Judge, sentenced Glaze in accordance with the jury's verdicts, ordered Counts 1 and 2 to run concurrently each to the other, but consecutively with the sentence imposed in Oklahoma County Case No. CF-2010-25. Judge Jones also ordered credit for time served. From this judgment and sentence Charles Ray Glaze has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Recuses.

S-2017-986 — Appellee Jamar Mordecai Simms was charged in the District Court of Oklahoma County, Case No. CF-2016-7415, with two counts of First Degree Murder. Simms filed a Motion in Limine re: Gruesome Photographs, requesting certain exhibits be excluded from his trial. At a September 25, 2017 hearing which was limited to the admissibility of video from a police officer's body camera, the Honorable Ray C. Elliott excluded the video exhibit from evidence to be presented at trial. Appellant, the State of Oklahoma has perfected its appeal. AFFIRMED. Opinion by: Kuehn, J.; Lumpkin, P.J., Concur; Lewis, V.P.J., Concur in results; Hudson, J., Concur; Rowland, J., Recused.

COURT OF CIVIL APPEALS
Friday, May 18, 2018
(Division No. 1)

115,806 — In Re The Estate of Bobby J. Moon: Earl Moon, Petitioner/Appellant, vs. Bill Elliott, Respondent/Appellee, and Kathryn Moon, Petitioner/Appellant, vs. Bill Elliott, Respondent, Appellee. Appeal form the District Court of Cherokee County, Oklahoma. Honorable Sandy Crosslin, Judge. Petitioners/Appellants Earl Moon and Kathryn Moon (collectively, Appellants) appeal the trial court's order in consolidated probate cases finding that Respon-

dent Bill Elliott fulfilled the wishes of the decedent and generally finding the issues had been resolved in an earlier order and finding in favor of Elliott. The trial court previously directed that certain issues were reserved but in the order on appeal it found those issues had been resolved by the order reserving them; accordingly, the trial court erred in failing to address the issues it reserved. The trial court also erred in denying Kathryn Moon's challenge to Elliott's denial of her claim for funeral expenses. Appellants' brief is reasonably supportive of their claims of error and we REVERSE AND REMAND. Opinion by Buettner, J.; Bell, P.J., and Joplin, J., concur.

116,227 — Ronald R. Wallis, individually; Janice M. Wallis, individually; Ronald Wallis and Janice M. Wallis, as husband and wife, Plaintiffs/Appellees, vs. Deutsche Bank National Trust Company, successor to Bankers Trust Company of California, as custodian or Trustee; and JP Morgan Chase Bank, N.A., successor to Chase Home Finance, LLC and Chase Manhattan Mortgage Corporation, Defendant, and Todd Markum, and individual; and Kivell, Rayment and Francis, an Oklahoma Professional Corporation, Defendants/Appellees. Appeal from the District Court of Rogers County, Oklahoma. Honorable Sheila A. Condren, Judge. Defendant/Appellant Deutsche Bank National Trust Company, formerly known as Bankers Trust Company of California, N.A., as former trustee for the terminated trust, Advanta Mortgage Loan Trust 1997-4 (Deutsche Bank), appeals from the trial court's order vacating summary judgment in this malicious prosecution action arising from a 2005 foreclosure action against Plaintiffs/Appellees Ronald R. Wallis and Janice M. Wallis. After *de novo* review, we hold that, because the underlying foreclosure action cannot be reinstated, the dismissal of the 2005 foreclosure action based on lack of standing was a successful termination of the case in the Wallises' favor. Therefore, the trial court did not abuse its discretion by vacating summary judgment for Deutsche Bank. AFFIRMED. Opinion by Buettner, J.; Bell, P.J., concurs and Joplin, J., dissents.

116,542 — Michael Whitmore, Plaintiff/Appellant, vs. Jason Hicks, District Attorney within and for the Sixth Judicial District and Oklahoma Department of Corrections, Defendants/Appellees. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Aletia Haynes Timmons, Judge. Plaintiff/Appellant, Michael Whitmore, appeals from the trial court's order dismissing his petition for extraordinary relief against Defendants/Appellees, Oklahoma Department of Corrections (DOC) and Jason Hicks, the district attorney for the Sixth Judicial District. For the reasons set forth below, we REMAND WITH INSTRUCTIONS. Opinion by Bell, P.J.; Joplin, J., and Buettner, J., concur.

116,642 — R & M Resources, Inc., Plaintiff/Counter-Defendant/Appellee, vs. Darla S. Mullett, Defendant/Counter-Claimant/Appellant, and Michael B. Mullett and Dores A. Mullett, Defendants. Appeal from the District Court of Canadian County, Oklahoma, Honorable Paul Hesse, Judge. Defendant/Counter-Claimant/Appellant Darla S. Mullett (Darla) appeals the trial court's denial of her motion for new trial following summary judgment reforming a deed and quieting title to three tracts of land in Canadian County in Plaintiff/Counter-Defendant/Appellee R&M Resources, Inc. R&M sued Defendant Michael Mullett, Defendant Dores A. Mullett, and Darla seeking to reform two deeds and quiet title to certain property in R&M. The trial court did not reach Darla's counterclaim for piercing the corporate veil but the trial court certified the judgment as a final, appealable order. The claim for deed reformation was barred by the five year limitations period and we reverse the trial court's judgment granting relief on that claim. Questions of fact remain as to the intent of the deed at issue and we therefore REVERSE AND REMAND FOR TRIAL of R&M's quiet title claim. Opinion by Buettner, J.; Bell, P.J., and Joplin, J., concur.

Thursday, May 31, 2018

116,015 — In Re The Marriage of Carpenter: Stella M. Carpenter, Petitioner/Appellee, vs. William E. Carpenter, Respondent/Appellant. Appeal from the District Court of Canadian County, Oklahoma. Honorable Gary D. McCurdy, Judge. Respondent/Appellant William E. Carpenter appeals the support alimony award in the Decree of Dissolution of Marriage. We hold the trial court's award of support alimony to Petitioner/Appellee Stella M. Carpenter in the amount of $120,000.00 payable at the rate of $2,000.00 per month for 60 months is not an abuse of discretion nor is it clearly contrary to the weight of the evidence. AFFIRMED. Opinion by Buettner, J.; Bell, P.J., and Joplin, J., concur.

116,493 — In The Matter of: R.H., R.H. CH., Jr., C.H., M.H. M.H., J.H. M.H., I.H., M.H., W.H., and K.H., Deprived Children, Tequila Howard, Natural Mother/Appellant, vs. State of Oklahoma, Appellee. Appeal From the District Court of Tulsa County, Oklahoma Honorable Rodney Sparkman, Judge. Appellant, Tequila Howard (Mother), is the natural mother of the following deprived children: R.H. born 11/20/2014; R.H. born 09/11/2013; C.H., Jr. born 09/25/2012; C.H. born 10/01/2008; M.H. born 09/30/2007; M.H. born 10/01/2006; J.H. born 08/05/2005; M.H. born 02/01/2003; I.H. born 12/14/2003; M.H. born 06/18/2001; W.H. born 06/08/2000; and K.H., born 11/11/2015. Mother appeals from the trial court's order terminating her parental rights to the children. Mother's parental rights were terminated pursuant to 10A O.S. Supp. 2014 §1-4-904(B)(13) due to a diagnosed cognitive disorder which renders her incapable of exercising her parental rights without harming the children. Mother's parental rights were also terminated under 10A O.S. 2011 §1-4-904(B)(15) as to all the children, except K.N. and K.N.N., for "a substantial erosion of the relationship" between Mother and these children caused by Mother's neglect and abuse of the children. Mother's rights were also terminated as R.H., R.H., C.H. and K.H. pursuant to 10A O.S. 2011 §1-4-904(B)(17) because these children were younger than four (4) years of age at the time of placement in foster care for at least six (6) of the twelve (12) months preceding the filing of the petition for termination of parental rights. The court found termination of Mother's parental rights was in the children's best interests. After reviewing the rec-ord, we hold the trial court's order terminating Mother's parental rights is supported by clear and convincing evidence and AFFIRM. Opinion by Bell, P.J.; Joplin, J., and Buettner, J., concur.

116,495 — In The Matter of: K.H.H., Deprived Child, Tequila Howard, Natural Mother/Appellant, vs. State of Oklahoma, Appellee. Appeal From the District Court of Tulsa County, Oklahoma. Honorable Rodney Sparkman, Judge. Appellant, Tequila Howard (Mother), is the natural mother of K.H.H., born November 25, 2016. Mother appeals from the trial court's order terminating her parental rights to the child. Mother's parental rights were terminated pursuant to 10A O.S. Supp. 2014 §1-4-904(B)(13) due to a diagnosed cognitive disorder which renders her incapable of exercising her parental rights without harming the child. The court found termination of Mother's parental rights was in the child's best interests. After reviewing the record, and in accordance with our decision in the companion case *In the Matter of R.H.*, Case No. 116,493, we hold the trial court's order terminating Mother's parental rights to K.H.H. is supported by clear and convincing evidence and AFFIRM. Opinion by Bell, P.J.; Joplin, J., and Buettner, J., concur.

(Division No. 2)
Wednesday, May 16, 2018

116,382 — The T. Le, Plaintiff/Appellant, vs. Total Quality Logistics, LLC, d/b/a TQL, Defendant/Appellee, and Arora Enterprise, Inc. and Gurinder Pal Singh, Defendants. Proceeding to review a judgment of the District Court of Canadian County, Hon. Paul Hesse, Trial Judge. Plaintiff, The T. Le, appeals a decision of the district court granting summary judgment to transportation broker Total Quality Logistics, LLC (TQL), on the grounds that TQL was not vicariously liable for the acts of motor carrier Arora or its driver Gurinder Singh. In this case, TQL satisfied its initial burden on summary judgment by showing that, absent special facts, it was not Gurinder Singh's employer, and that Arora was nominally an independent contractor. Le's arguments that case law arising from the Carmack Amendment (a federal law dealing with lost or damaged freight), or federal statutory employee doctrines, made TQL a "motor carrier" fail as a matter of law. We find the evidence of control in this case insufficient as a matter of law to create a principal/agent relationship between TQL and Arora. Le's joint venture claim fails because there is no evidence of the element of a joint, rather than several profit that is required by Oklahoma law. We reject Le's contention that the federal trial court opinion in *Schramm v. Foster,* 341 F. Supp. 2d 536, 551 (D. Md. 2004), defines the duties of a broker to investigate carriers pursuant to Oklahoma law. We find no "red flags" that would give rise to an enhanced duty of inquiry. We therefore affirm the decision of the trial court that no jury question as to Le's claims that TQL "negligently hired" Arora. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Thornbrugh, C.J.; Wiseman, P.J., and Fischer J., concur

Friday, May 18, 2018

115,950 — In re the marriage of: Sammy Dwain Dudgeon, Petitioner/Appellant, vs. Elizabeth Arielle Dudgeon (now Beard), Respondent/Appellee. Appeal from Order of the

District Court of Washita County, Hon. Christopher S. Kelly, Trial Judge. Appellant Sammy Dudgeon appeals the district court's order granting Appellee Elizabeth Beard's motion to change venue in this child custody and visitation case. The district court held a hearing and made the decision based on an analysis of factors pursuant to 43 O.S.2011 § 103(D) and 43 O.S.2011 § 551-207. The district court's findings are supported by the record and we find no abuse of discretion. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Fischer, J.; Thornbrugh, C.J., and Wiseman, P.J., concur.

Monday, May 21, 2018

115,971 — William E. Long, III, an individual, William E. Long, II, an individual, and Janet E. Long, an individual, Plaintiffs/Appellants v. Oklahoma Kappa Chapter of Sigma Alpha Epsilon, Inc., an Oklahoma non-profit corporation, Sigma Alpha Epsilon Fraternity, Inc., an Illinois non-profit corporation, Michael McCrea, an individual, Deran Abernathy, an individual, and Jared T. Davis, an individual, Defendants/Appellees. Appeal from an Order of the District Court of Cleveland County, Hon. Tracy Schumacher, Trial Judge. Plaintiffs appeal from the trial court's order granting Defendants' motion for summary judgment. William E. Long, Jr. and Janet Long are the parents of William E. Long, III (Long III). Long III was a student at the University of Oklahoma (OU). Jared Davis, an OU student and also a member of the Sigma Alpha Epsilon (SAE) fraternity at OU, allegedly attacked Long III. Plaintiffs filed a Petition against SAE Defendants and later, an Amended Petition, alleging assault and battery and negligence. Defendants subsequently filed a Motion for Summary Judgment arguing Plaintiffs cannot establish a prima facie case of negligence because SAE Defendants did not owe a duty to Plaintiffs and, if they owed a duty as argued by Plaintiffs, SAE Defendants did not breach the alleged duty. In response, Plaintiffs argued SAE Defendants were not entitled to summary judgment. The trial court granted the Motion for Summary Judgment of SAE Defendants and Plaintiffs appeal. Plaintiffs ask this Court to impose a duty on the SAE Defendants to police activities not sanctioned by, or done with knowledge of, the fraternity. Here, the facts indicate the actions that precipitated the alleged injuries were not reasonably foreseeable to Defendants so as to create a duty. Thus, the requisite foreseeability to establish duty is not present, and there is no viable claim of negligence. Based on the foregoing, this Court finds the trial court correctly granted SAE Defendants' motion for summary judgment and the judgment is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Goodman, J., concurs, and Fischer, P.J., concurs in part and concurs in result.

Thursday, May 24, 2018

116,185 — In the Matter of the Estate of Frank Nash, Deceased, Hewlett Nash, Appellant, vs. Glendell L. Gaskins, Appellee. Appeal from an order of the District Court of Tulsa County, Hon. Kurt Glassco, Trial Judge, denying admission to probate of the "Last Will and Testament of Frank Nash" and appointing Jim McGough as administrator of the Estate. We first determine whether a previous trial court's final order in a quiet title case, which was affirmed on appeal by this Court (Case No. 112,372), precludes further consideration of whether the offered will should be admitted to probate in the present case. We conclude that the issues of whether to probate the proffered will of Frank Nash and the determination of heirs were decided in the quiet title action, precluding further litigation on these questions after mandate in that case. Even if this were not the case, Nash has not shown the trial court erred in denying the will's admission to probate. We also see no error in the trial court's decision to appoint an independent administrator for the Estate. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., and Fischer, J., concur.

(Division No. 3)
Thursday, May 17, 2018

114,945 — In the Matter of the Estate of Ethel Boydstun Haigh, Deceased: Jack Albert Haigh, Sr., Jack Albert Haigh, Jr., and Joann Haigh Courey, Appellants, vs. Martha Sue Haigh, Special Administrator of the Estate of Ethel Boydstun Haigh, Appellee. Appeal from the District Court of Bryan County, Oklahoma. Honorable Rocky L. Powers, Trial Judge. Appellants Jack Albert Haigh, Sr., Jack Albert Haigh, Jr., and Joann Haigh Courey appeal from an order of a surcharge and interest against Jack Haigh, Sr. (Haigh, Sr. or Executor) as executor of the estate of Ethel Boydstun Haigh (the Estate) in the principal amount of $1,967,234.20 and interest of $5,099,797.15. The order followed a remand from a different divi-

sion of this court, reversing the original trial court order which denied a surcharge against the Executor. We affirm the entry of a surcharge against Executor, but because the amount of surcharge is not supported by the evidence and is an abuse of discretion, we reverse that portion of the order and remand for further proceedings. Opinion by Swinton P.J.; Goree, V.C.J., and Mitchell, J., concur.

115,844 — Randall Aaron Martin, Plaintiff/Appellee, vs. Lori Gene Heaton, Defendant/Appellant. Appeal from the District Court of LeFlore County, Oklahoma. Honorable Mike Hogan, Trial Judge. At issue in this case is the role actual knowledge plays in the Residential Property Condition Disclosure Act. Plaintiff/Appellee, Randall Aaron Martin, was awarded $6,200 to repair a faulty heater in a home purchased from Defendant/Appellant, Lori Gene Heaton, who had indicated that the heater was working on the Residential Property Disclosure Statement. In dispute is whether a box checked on the Disclosure Statement is sufficient to prove actual knowledge of the heater's condition. Plaintiff failed to introduce any evidence at trial demonstrating Defendant had actual knowledge, and the trial court expressly held that she did not. Accordingly, the trial court's determination in this case was not supported by any competent evidence and must be reversed. REVERSED AND REMANDED. Opinion by Goree, V.C.J.; Swinton, P.J., and Mitchell, J., concur.

116,297 — In the Matter of M.W., Jr.; M.W., children under 18 years of age: Mark Washington, Sr., Natural Father, Appellant, vs. State of Oklahoma, Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Doris Fransein, Trial Judge. Appellant Mark Washington Sr. (Father) appeals an order terminating his parental rights to his minor children, M.W., Jr. and M.W. (collectively, Children), after a bench trial in their deprived child case. The parental rights of Children's biological mother (Mother) were terminated based on her voluntary consent to relinquish her parental rights, and she is not a party to this appeal. We find the requisite evidence supports termination of Father's parental rights. However, due to the absence of necessary findings, WE REVERSE THE ORDER AND REMAND WITH INSTRUCTIONS to enter a correction order. Opinion by Swinton, P.J.; Mitchell, J., and Goree, V.C.J., concur.

116,366 — Jason Talbot, Petitioner, vs. Cudd Pressure Control, Inc., Ace American Insurance Co., and The Workers' Compensation Commission, Respondents. Proceeding to Review an Order of the Workers' Compensation Commission. Petitioner Jason Thomas Talbot (Claimant) and Respondents Cudd Pressure Control, Inc. and Ace American Insurance Co. (Respondents) both appeal from an Order of the Workers' Compensation Commission (the Commission), which affirmed in part and modified in part the decision of an Administrative Law Judge (ALJ). The ALJ denied Claimant's constitutional challenges to the Administrative Workers' Compensation Act's (AWCA) 104-week temporary total disability (TTD) limit and maximum TTD wage rate. The ALJ also granted Respondents' request to suspend payment of workers' compensation benefits until Claimant's workers' compensation claim totaled more than the amount Claimant recovered against a third-party tortfeasor. The ALJ further found Respondents were not prohibited from a suspension of benefits, despite a Montana Supreme Court decision denying Respondents' request for subrogation. The Commission affirmed the ALJ's constitutional findings and agreed Respondents were entitled to suspend payment of workers' compensation benefits. The Commission found, however, that Respondents were only entitled to suspend benefits until Claimant's claim exceeded two-thirds of his third-party recovery, rather than the full amount. On appeal, Claimant challenges the Commission's constitutional findings and its legal ruling concerning Respondents' suspension of workers' compensation payments. Respondents challenge the Commission's finding that payments should only be suspended until Claimant's workers' compensation claim exceeds two-thirds of his third-party recovery. After *de novo* review, we sustain the Commission. SUSTAINED. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

116,416 — In the Matter of C.K. and K.S., Deprived Children: State of Oklahoma, Petitioner/Appellee, v. Mylissa Smith, Respondent/Appellant. Appeal from the District Court of Garfield County, Oklahoma. Honorable Tom L. Newby, Judge. Respondent/Appellant Mylissa Smith (Mother) appeals from an order terminating her parental rights to her children, C.K. and K.S. On appeal, Mother only challenges one of the three statutory grounds upon which the court based termination of her parental rights – the failure to correct conditions. She

does not dispute that the two other statutory grounds were established by clear and convincing evidence. Further, we find the evidence supports the court's determination that termination was in the best interest of the children. AFFIRMED. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

116,444 — Jasiel Randolph, an individual, Plaintiff/Appellant, vs. Randy Anderson, individually, Riverside Autoplex of Holdenville, LLC, an Oklahoma limited liability company, d/b/a Randolph Chevrolet-Buick-GMC, Defendants/Appellees. Appeal from the District Court of Muskogee County, Oklahoma. Honorable Thomas H. Alford, Judge. Plaintiff/Appellant Jasiel Randolph (Buyer) appeals from an order of the trial court ordering arbitration of Buyer's claims against Defendants/Appellees Ryan Anderson (Seller) and Riverside Autoplex of Holdenville, LLC, d/b/a Randolph Chevrolet-Buick-GMC (Riverside Autoplex, LLC) for fraudulent inducement, misrepresentation, and breach of contract related to the parties' Membership Interest Purchase Agreement (the Purchase Agreement). After *de novo* review, we find the court erred when it determined the Purchase Agreement incorporated the Riverside Autoplex, LLC Operating Agreement (the Operating Agreement). The Purchase Agreement provided that Buyer would be bound by the Operating Agreement *after* the parties closed their transaction under the Purchase Agreement. Buyer alleges Seller never performed his obligation under the Purchase Agreement to assign his membership interest to Buyer. WE REVERSE AND REMAND WITH INSTRUCTIONS to determine whether the transaction closed such that Buyer was bound by the Operating Agreement. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

Friday, May 18, 2018

115,668 — Jesse McPeak, Petitioner, vs. Express Services, Inc., New Hampshire Ins. Co., and The Workers' Compensation Commission, Respondents. Proceeding to Review an Order of the Workers' Compensation Commission. Petitioner Jesse McPeak (Claimant) appeals an order by the Workers' Compensation Commission (Commission) that affirms an order of the administrative law judge (ALJ) denying compensability for Claimant's alleged injury to his right shoulder and right arm. The ALJ also found 85A O.S. Supp. 2013 § 2(9)(b)(6) is not unconstitutional. We conclude the findings of fact and conclusions of law in the ALJ's August 5, 2016 Order adequately explain the decision, and the Commission's order filed December 20, 2016 is supported by substantial competent evidence. We sustain the Commission's Orders and affirm the same under Rule 1.202(b) and (d). AFFIRMED UNDER RULE 1.202(b) and (d). Opinion by Swinton, P.J.; Mitchell, J., and Goree, V.C.J., concur.

115,912 — Vera Pete, Claimant, vs. Tulsa Public Schools, Respondent, Independent School District #1 - Tulsa Schools (Own Risk #1260), Insurance Carrier. Proceeding to Review an Order of a Three-Judge Panel of the Workers' Compensation Court of Existing Claims. Petitioner Vera Pete appeals from a February 24, 2017 order of the Workers' Compensation Court en banc affirming the decision of the trial court denying Permanent Total Disability benefits and denying medical maintenance on December 5, 2016. We find that the order is supported by competent evidence and therefore SUSTAIN. Opinion by Swinton, P.J.; Mitchell, J., and Goree, V.C.J., concur.

Friday, June 1, 2018

115,874 — Bill B. Sanders, C.O.T.A./L., P.C., Plaintiff, and Innova, LLC, Plaintiff/Appellant, vs. John P. Jiles, Valir Health, LLC, N-Vest Skilled Nursing of Oklahoma, LLC d/b/a Parcway, Portland Realty, LLC, N-Vest, LLC, Abbe Rehab and Medical Services, LLC, and Senior Comfort Corp., Defendants, and Christopher J. "Kitt" Wakeley and Kittco, LLC, Defendants/Appellees. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Bryan C. Dixon, Judge. Plaintiff/Appellant Innova, LLC (Innova) challenges the trial court's ruling sustaining a motion for summary judgment in favor of Defendants/Appellees Christopher J. "Kitt" Wakeley and his limited liability company Kittco, LLC (collectively, Appellees), as well the trial court's denial of Innova's motion for new trial. On appeal, Innova claims the trial court erred by applying collateral estoppel to its claim against Appellees for tortious interference. Plaintiffs Bill B. Sanders (Sanders) and his limited liability company C.O.T.A./L., P.C. (COTA) arbitrated their claims against Appellees and the other named Defendants; the arbitrator found that none of the Defendants had committed a tort or owed a duty to refer patients to Innova. Because Sanders and COTA are the majority owners of Innova, we find the trial court did not abuse its discretion or err as a matter of law when it found that Innova's claim against Appellees was barred by the

doctrine of collateral estoppel. AFFIRMED. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

116,082 — Dawn Griffith, Plaintiff/Appellant, vs. Schindler Elevator Corporation, a foreign business, Defendant/Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Linda Morrissey, Trial Judge. Dawn Griffith sued Schindler Elevator Corporation for injuries she sustained after the elevator she was riding came to an abrupt stop. The single issue on appeal is whether the trial court committed error when it denied Griffith's request to instruct the jury on the law of res ipsa loquitur. We hold *Qualls v. U.S. Elevator Corp.*, 1993 OK 135, 863 P.2d 457, applies in this case. Reasonable jurors could reach different conclusions about whether the instrumentality was in Schindler's exclusive control and whether the event was of a kind that ordinarily does not occur in the absence of negligence. The trial court erroneously decided these elements as a matter of law instead of submitting them as fact questions for jury deliberation. This error misled the jury because it was not permitted to consider that negligence could be inferred if the res ipsa criteria were met. Giving due consideration to 20 O.S. §3001.1, we acknowledge the high probability that a miscarriage of justice has occurred in this case, and therefore reverse the judgment on the jury's verdict. REVERSED AND REMANDED. Opinion by Goree, V.C.J.; Swinton, P.J., and Mitchell, J., concur.

116,291 — In the Matter of B.S. and C.S., Alleged Deprived Children: State of Oklahoma, Petitioner/Appellee, vs. Heather Davis, Respondent/ Appellant. Appeal from the District Court of Muskogee County, Oklahoma. Honorable Weldon Stout, Judge. Respondent/Appellant Heather Davis (Mother) appeals from an order terminating her parental rights to her children, B.S. and C.S. On appeal, Mother claims termination should be reversed because active efforts were not made to provide her with remedial services designed to prevent the breakup of the Indian family. B.S. and C.S. have been the subjects of three prior deprived adjudications. We find it was not erroneous for the court to rely on the active efforts made in previous deprived proceedings. Accordingly, we AFFIRM. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

116,353 — In Re the Marriage of Gordon: Shannon L. Gordon, Petitioner/Appellee, vs. Katharine Paige Gordon, Respondent/Appellant. Appeal from the District Court of Comanche County, Oklahoma. Honorable Gerald F. Neuwirth, Trial Judge. Katherine P. Gordon, Appellant, appeals the trial court's child support order, claiming an unjustified reduction in the amount owed by Shannon L. Gordon, Appellee. At issue is whether a trial court abuses its discretion under the Oklahoma Child Support Guidelines by subtracting the financial obligation of the spouse with the lesser burden from the amount owed by the spouse with the greater burden. We hold this is neither an abuse of discretion nor a deviation from the Guidelines because such an offset is provided for under 43 O.S. §118D(D)(2). The judgment is AFFIRMED. Opinion by Goree, V.C.J.; Swinton, P.J., and Mitchell, J., concur.

116,517 — In the Matter of the Adoption of T.R.C., a minor child: Jake Simpson, Appellant, vs. Amy Leann Hanks and Cody Thomas Hanks, Appellees. Appeal from the District Court of Beckham County, Oklahoma. Honorable Michelle Kirby Roper, Trial Judge. Biological Father appeals the trial court order granting the Mother's and Stepfather's petition to adopt Child without his consent. We find that Mother and Stepfather presented clear and convincing evidence that he willfully failed to contribute to Child's support for twelve consecutive months out of the last fourteen months immediately preceding the filing of the petition for adoption. AFFIRMED. Opinion by Goree, V.C.J.; Swinton, P.J., and Mitchell, J., concur.

116,694 — Dr. Robert McIntyre, M.D., Plaintiff/Appellant, vs. State of Oklahoma, *ex rel.*, Oklahoma Department of Mental Health and Substance Abuse Services, Defendant/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Thomas E. Prince, Trial Judge. Appellant, Dr. Robert McIntyre, M.D., appeals an order dismissing three claims he filed in his original petition against Appellee, State of Oklahoma, *ex rel.*, Oklahoma Department of Mental Health and Substance Abuse Services. Appellee filed a counterclaim for breach of contract. The trial court granted the motion to dismiss and permitted amendment of the claims. Appellant filed an amended petition and then appealed the dismissal order. That order did not determine Appellee's counterclaim and the trial court did not expressly state there is no just cause for delay in entering a final judgment. 12 O.S. §994. Furthermore, the amended petition remains pend-

ing. The order is not a judgment because it does not dispose of all claims and all parties. It is neither an interlocutory order appealable by right pursuant to 12 O.S. §952(B)(2) nor a certified interlocutory order pursuant to 12 O.S. §952(B)(3). After due consideration of Appellant's response to this court's show cause order, the appeal is DISMISSED for lack of an appealable order. Opinion by Goree, V.C.J.; Swinton, P.J., and Mitchell, J., concur.

(Division No. 4)
Wednesday, May 16, 2018

115,995 — Hub Partners XXVI, Ltd., Plaintiff/Appellant, vs. Thomas Burnell Barnett, Defendant/Appellee, and Willie Rogers, Mary Roe (real name unknown), Spouse, if any of Willie Rogers, Margaret Roe (real name unknown), Spouse, if any of Thomas Burnell Barnett, Feist Publications, Inc. d/b/a Feist Yellow Book, John Doe (real name unknown) and Jane Doe (real name unknown), Defendants. Appeal from the District Court of Oklahoma County, Hon. Aletia Haynes Timmons, Trial Judge. The trial court plaintiff, Hub Partners XXVI, Ltd, ("Hub"), appeals an Order which granted the defendant's, Thomas Burnell Barnett ("Barnett"), Motion to Release Dormant Judgment of Plaintiff's and Motion to Vacate Execution and Sale and Order on Thomas Burnell Barnett's Objection to Plaintiff's Motion to Confirm Sale. Hub obtained a money and foreclosure of mortgage judgment against Barnett. Hub filed the judgment on February 24, 2011. On March 4, 2011, Barnett filed for bankruptcy under Chapter 13. Barnett failed to complete the bankruptcy plan and the bankruptcy was dismissed on July 13, 2016. Hub accepted the payments made under the plan and did not take any action regarding its judgment. Thus, Hub did not seek to lift the bankruptcy stay and did not file a Notice of Renewal of Judgment in state court. On July 15, 2016, the bankruptcy court electronically notified Hub of the dismissal of Barnett's bankruptcy. On August 19, 2016, Hub issued execution. Prior to that, and subsequent to the bankruptcy dismissal, Hub had not filed an execution or a Notice of Renewal of Judgment. Barnett then moved to declare the judgment dormant and released and to vacate the execution and sale under execution. Barnett argued that Hub failed to take action on its judgment within the thirty day window as provided by 11 U.S.C. § 108(c)(2). The fact is that Hub waited thirty-seven days after dismissal of the bankruptcy to take any action listed under 12 O.S.2011, § 735. The judgment became dormant because it was over five years old without action taken under Section 735 to preclude dormancy. However, only Section 108 of the Bankruptcy Code provided any relief from the dormancy of the judgment. This relief lasted for thirty days. The trial court's judgment is correct and is affirmed. AFFIRMED. Opinion from Court of Appeals, Division IV by Rapp, J.; Barnes, P.J., and Goodman, J., concur.

Thursday, May 17, 2018

115,788 — Gary David, Plaintiff/Appellant, v. Merit Protection Commission and Oklahoma Tourism & Recreation Department, Defendants/Appellees. Appeal from the District Court of Oklahoma County, Hon. Roger H. Stuart, Trial Judge. Appellant appeals from an order of the district court affirming the final order of the Oklahoma Merit Protection Commission (MPC) which upheld the termination of Appellant's employment as a park ranger with the Oklahoma Tourism and Recreation Department. Our review of the record leads us to conclude, as did the district court, that the evidence more than sufficiently supports the MPC's final order upholding Appellant's termination. The factual determination to uphold Appellant's termination was neither clearly erroneous in view of the reliable, material, probative and substantially competent evidence, nor was it arbitrary and capricious. Further, even if conduct that occurred more than four years prior to the events leading to the present disciplinary matter should not have been considered, Appellant's substantial rights have not been prejudiced, 75 O.S. 2011 § 322, because termination was otherwise the appropriate and just disciplinary action in this case and is fully supported by the factual record presented herein. Accordingly, we affirm. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., and Goodman, J., concur.

Friday, May 18, 2018

116,304 — James Orville McBride, and Sherri Ann McBride, Plaintiffs/Appellants, v. William C. Ihle and Suzanna L. Ihle. Appeal from an Order of the District Court of Creek County (Sapulpa Division), Oklahoma, Hon. Douglas W. Golden, Trial Judge. The plaintiffs, James Orville McBride and Sherri Ann McBride (collectively "McBride") appeal a judgment in favor of the defendants, William C. Ihle and Suzanna Ihle (collectively "Ihle"). The judgment denied McBride's petition to quiet title to

a disputed strip of real estate on the boundary of the parties' properties. The evidence shows that a long-standing fence between Tract 25 and Tract 26 established an artificial boundary between the Tracts instead of the official Section Line boundary. Chisum became the owner of all of both Tracts subsequent to the time when the fence might be considered as the artificial boundary. However, Chisum (or his predecessors) took no action to formally establish the fence as the boundary between Tract 25 and Tract 26. There was no apparent reason for Chisum to take any action as he owned both Tracts. Thus, the artificial fence boundary became irrelevant when both Tracts came under the single ownership of Chisum. After several years as the owner of both Tracts, Chisum conveyed each Tract to separate parties. These conveyances (and all subsequent conveyances) described the land conveyed by U.S. Government survey without reference to any fence or without any limit or qualification on the described property. He might have, but did not, dispose of his property by descriptions that took into account the fence. His deeds are clear and unambiguous. He conveyed specific tracts of land by reference only to the U.S. Government survey without limitation, exception, or artificial boundary reference. The result is that the current owners, McBride and Ihle, own tracts of land bordered by the official U.S. Government Section Line rather than the artificial boundary fixed by the fence. The trial court erred by entering judgment for the defendants. Therefore, the judgment is reversed and the cause is remanded with instructions to enter judgment for the plaintiffs. REVERSED AND REMANDED WITH INSTRUCTIONS. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., concurs, and Goodman, J., specially concurs.

Wednesday, May 23, 2018

115,688 — In re the Marriage of: Nancy Blomquist, Petitioner/Appellant, v. Herbert Blomquist, Respondent/Appellee. Appeal from the District Court of Oklahoma County, Hon. Howard R. Haralson, Trial Judge. In this dissolution of marriage case, Petitioner (Wife) seeks review of that portion of the decree awarding her support alimony in the amount of $84,000 to be paid over a period of seven years by Respondent (Husband). We conclude the trial court's support alimony award along with the other awards and orders made in the decree pertinent to the support alimony award in this case were not an abuse of discretion, except we conclude the trial court should have extended the period of the support alimony award to the time Wife's full Social Security benefits accrue. Therefore, in the exercise of our equitable powers, we enlarge the support alimony award to $1,000 per month for a period of 108 months, for a total of $108,000. Accordingly, we affirm the support order as modified. AFFIRMED AS MODIFIED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., and Goodman, J., concur.

Thursday, May 24, 2018

114,107 — In re the Marriage of: Aaron David Compton, Petitioner/Appellee, v. Amy J. Compton, Respondent/Appellant. Appeal from an Order of the District Court of Oklahoma County, Hon. Howard R. Haralson, Trial Judge. Amy G. Compton (Wife) appeals the Decree of Dissolution of Marriage and an order awarding her an attorney's fee. Wife contends the trial court erroneously relabeled and excluded as "business debts" certain loans that were, in fact, marital debts and should have been included in the division of the marital estate. We disagree with the trial court's findings as provided in the opinion. We conclude these are marital debts subject to division among the parties. The Decree is therefore reversed and the matter remanded to the trial court. Upon remand, the trial court shall equitably divide these debts and recalculate the equitable division of the marital estate, as well as any alimony in lieu of property division, consistent with the opinion. The remainder of the trial court's orders contained in the decree, as well as the order awarding Wife her attorney's fee and costs, are affirmed. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

Thursday, May 31, 2018

116,116 — In the Matter of the Estate of Anita Telenius Wright, a deceased person, Patricia Chamberlain, Appellant, v. Thomas L. Wright, Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Richard Kirby, Trial Judge. The trial court movant, Patricia Chamberlain (Patricia), appeals an Order denying her motion to vacate an Order and Final Decree of Distribution entered in the probate matter of In re Anita Telenius Wright (Anita). Thomas L. Wright (Thomas) is the per-

sonal representative in that probate. Thomas Wright filed an ancillary probate for his mother's, Anita, estate. He alleged that his mother, a Texas resident, owned a Tract of land in Oklahoma. The estate was probated and the tract distributed in accord with Anita's Will to the Anita Wright Trust. The Tract was acquired in the name of Anita's husband, Clayton, during their marriage. Clayton remarried the appellant, Patricia. Clayton died. Patricia now claims an interest in the Tract by conveyance from Clayton and by inheritance from Clayton. Precisely what percentage of interest she claims cannot be ascertained from the Appellate Record. Patricia moved to vacate the Anita Oklahoma probate decree. The trial court denied the motion for lack of standing and noted Patricia's contrary position in Clayton's Texas probate. After review, this Court finds that it is not possible under the Appellate Record to determine whether the Anita Trust and Patricia are claiming separate undivided interests or whether their claims are overlapping as to interest, in whole or in part. However, the Appellate Record does show a basis for a claim of ownership interest in the Tract by Patricia and that her claimed interest in the Tract is affected by the Anita Oklahoma probate due to the diverse legal descriptions of percentage ownerships contained in all of the documents in the Appellate Record. Therefore, this Court holds that the trial court erred by denying the motion to vacate on the ground that Patricia lacked standing or interest in the Anita Oklahoma probate. This Opinion does not express any view regarding what percentage interests, if any, are owned by the competing parties, as that is a threshold, first instance task for the trial court to decide. Thus, the denial of the motion to vacate is reversed without prejudice to renewal if the trial court determines that the competing parties do not claim the same, or overlapping, interest in the Tract. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., concurs, and Goodman, J., dissents.

Friday, June 1, 2018

116,628 — Casey Thompson, Petitioner, v. Multiple Injury Trust Fund 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. Margaret A. Bomhoff, Trial Judge. Casey Thompson (Claimant) seeks review of the panel's order affirming the order of the trial court denying permanent total disability (PTD) benefits from the Multiple Injury Trust Fund (the Fund). Claimant sought PTD benefits from the Fund due to a combination of adjudicated, work-related injuries, and the parties agree Claimant constitutes a "physically impaired person"; thus, jurisdiction over the Fund is established in this case. However, the Fund denied Claimant was PTD as a result of his combined injuries, and the trial court agreed. The applicable standard of review on appeal in this case is the any-competent-evidence standard, and competent evidence supports the trial court's determination (affirmed by the panel) that Claimant is not PTD. Consequently, we sustain the order of the three-judge panel affirming the order of the trial court denying PTD benefits from the Fund. SUSTAINED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., and Goodman, J., concur.

ORDERS DENYING REHEARING

(Division No. 2)
Wednesday, May 16, 2018

116,001 — Mid-Continent Casualty Company, a foreign corporation, Plaintiff/Appellee, vs. Scott Gordon, an individual, Defendant/Appellant, vs. Michael G. McConnell, Third-Party Defendant. Appellee's Petition for Rehearing is hereby *DENIED*.

(Division No. 4)
Wednesday, May 16, 2018

116,024 — Frances Cox, Plaintiff/Appellant, vs. Choctaw Casino of Pocola and The Choctaw Nation of Oklahoma, Defendants/Appellees, and Gaming Capital Group, LLC, Defendant/Real Party in Interest. Appellant's Petition for rehearing is hereby *DENIED*.

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CONTRACT LEGAL SERVICES – Lawyer with highest rating and with 30+ years' experience on both sides of the table is available for strategic planning, legal research and writing in all state and federal trial and appellate courts and administrative agencies. Admitted and practiced before the United States Supreme Court. Janice M. Dansby, 405-833-2813, jdansby@concentric.net.

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OFFICE SPACE

LAW OFFICE SPACE – four offices plus reception area for rent in Tulsa. Rent negotiable. Located at 5508 South Lewis Avenue, Tulsa, Oklahoma. Please contact Jennifer or Sherri at 918-742-0282.

OFFICE SPACE

OFFICE SPACE FOR LEASE IN ESTABLISHED FIRM. Space located in Boulder Towers at 1437 S. Boulder Ave., Suite 1080, Tulsa, OK. Space includes two conference rooms, kitchen, reception area, security and free parking. $750 per month. Contact Christine Fugate at 918-749-5566 or cfugate@trsvlaw.com.

OFFICE SPACE – MIDTOWN LAW CENTER

One space available – easy walk to multiple Midtown restaurants. Turn-key arrangement includes phone, fax, LD, internet, gated parking, kitchen, storage, 2 conference rooms and receptionist. Share space with 7 attorneys, some referrals.

405-229-1476 or 405-204-0404

LAW OFFICE SPACE FOR LEASE. One executive law office available in established practice. $750 per month. Furnished or unfurnished. Includes Wi-Fi and access to conference room etc. Downtown location with parking. Call Jarman Law Offices 405-606-8400 for details or email JarmanLaw@gmail.com.

EXECUTIVE OFFICE WITH SECRETARIAL SPACE, use of conference rooms, receptionist, high-speed internet, fax, copy machine and kitchen. Convenient to all courthouses. Located on Automobile Alley. $1,000-$1,250/month. Contact David Proctor at 405-524-2400.

OFFICE SUITE AVAILABLE AT 101 PARK IN OKC. Conference room, reception and kitchen access. Contact 405-235-8488 for more information.

OFFICE SHARE

ESTABLISHED NINE PERSON OKLAHOMA CITY LAW FIRM SEEKING OFFICE SHARING or of counsel arrangement. Turn key new office space on Hefner Parkway with receptionist, all office equipment and network available. Joining law firm may have up to seven attorneys plus staff. If interested, please contact us at "Box R," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

POSITIONS AVAILABLE

NORMAN BASED FIRM IS SEEKING SHARP, MOTIVATED ATTORNEYS for fast-paced transactional work. Members of our growing firm enjoy a team atmosphere and an energetic environment. Attorneys will be part of a creative process in solving tax cases, handle an assigned caseload and will be assisted by an experienced support staff. Our firm offers health insurance benefits, paid vacation, paid personal days and a 401K matching program. No tax experience necessary. Position location can be for any of our Norman, OKC or Tulsa offices. Submit resumes to justin@polstontax.com.

POSITIONS AVAILABLE

LANDOWNERFIRM.COM IS LOOKING TO FILL TWO POSITIONS in the Tulsa office: 1) a paralegal or legal assistant with strong computer skills, communication skills and attention to detail and 2) an attorney position – the ideal candidate will have excellent attention to detail with an interest in writing, drafting pleadings, written discovery and legal research. Compensation DOE. Please send resumes and any other applicable info to tg@LandownerFirm.com. Applications kept in strict confidence.

METRO AREA LAW FIRM SEEKING OIL AND GAS TITLE ATTORNEYS for its OKC and Norman offices. Great salary and bonus structure, plus health insurance and 401K benefits immediately available. Please send resume, references and writing sample to office@ballmorselowe.com.

THE OKLAHOMA BAR ASSOCIATION HEROES program is looking for several volunteer attorneys. The need for FAMILY LAW ATTORNEYS is critical, but attorneys from all practice areas are needed. All ages, all counties. Gain invaluable experience, or mentor a young attorney, while helping someone in need. For more information or to sign up, contact Margaret Travis, 405-416-7086 or heroes@okbar.org.

PROGRESSIVE, OUTSIDE-THE-BOX THINKING BOUTIQUE DEFENSE LITIGATION FIRM seeks a nurse/paralegal with experience in medical malpractice and nursing home litigation support. Nursing degree and practical nursing care experience a must. Please send resume and salary requirements to edmison@berryfirm.com.

ESTABLISHED OKLAHOMA CITY LAW FIRM SEEKS ASSOCIATE for Personal Injury Department. Minimum 3 years of personal injury experience. Competitive salary, full health and dental, PTO and 401K match. Submit cover letter and resume to "Box Z," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

ASSISTANT DISTRICT ATTORNEY NEEDED FOR LOGAN COUNTY, GUTHRIE. Prefer prosecutor with two years major crimes or significant misdemeanor jury trial experience. Strong research and writing skills required. Must have strong work ethic, be self-motivated and have the ability to work professionally with law enforcement and other organizations. Submit resume with references, cover letter and writing samples to Laura Austin Thomas, District Attorney at scott.staley@dac.state.ok.us.

THE LAW FIRM OF CHUBBUCK DUNCAN & ROBEY PC is seeking an experienced associate attorney with 1-3 years of experience. We are seeking a motivated attorney to augment its fast-growing trial practice. Excellent benefits. Salary commensurate with experience. Please send resume and writing sample to Chubbuck Duncan & Robey PC, located at 100 North Broadway Avenue, Suite 2300, Oklahoma City, OK 73102.

POSITIONS AVAILABLE

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The **Tulsa City Attorney's Office**, a 22-attorney in-house Legal Department, has a rare opportunity for a versatile **Senior Attorney** in its Real Property Division. You will play a critical role in unique municipal issues such as infrastructure developments, public utilities, trade codes (Fire, Building, Plumbing, Electrical & Mechanical), and Code Enforcement actions, and advise elected officials and City boards. You must have:

- Minimum 4 years legal experience, including 2 years litigation,
- Broad base of legal experience in several areas,
- Proven record of high quality work & reliability,
- Strong academic record,
- Excellent analytical and communication skills, and
- Okla bar license (or obtain within reasonable period)

See full job requirements at cityoftulsa.org and complete required online application. Also send resume, cover letter, transcript, 2 writing samples, and references to: Legal@cityoftulsa.org.

TULSA LAW FIRM SEEKS AN ATTORNEY WHO CAN HANDLE SOCIAL SECURITY DISABILITY CASES and provide support in other cases involving personal injury. The location of this position is in Tulsa. Experience in handling social security disability cases is required. Competitive salary and health insurance is provided. Please apply at https://www.carrcarr.com/employment/.

ECHO ENERGY, LLC IS SEEKING AN INSIDE COUNSEL. Must be admitted to practice in Oklahoma, have a balance of litigation and transaction experience, two to 10 years of experience, ability to communicate effectively within the Legal Department and various levels of management and ability to work independently, but within a team-focused environment. Please submit resume to Hayley Burroughs at Hburroughs@echoenergy.com.

POSITIONS AVAILABLE

AV RATED DOWNTOWN OKC insurance defense firm is accepting resumes for an associate attorney with 2 to 6 years civil litigation experience. Candidate should be self-motivated, detail oriented and have strong research and writing skills. Competitive salary and benefits. Send replies to lawfirmresumes@outlook.com.

THE HASKELL COMPANY IS SEEKING AN EXPERIENCED CONTRACTS REPRESENTATIVE to work in our Oklahoma City office. The candidate will support a high-energy, exciting organization, focusing on professional services contracting with domestic and international commercial entities and state and local governments. Candidates must have a J.D. with five years of experience. Experience in commercial and government contracts and/or construction-related from agreements (AIA, DBIA, etc.) is preferred. Haskell is an Equal Opportunity Employer (Females/Minorities/Protected Veterans/Individuals with Disabilities) and drug-free workplace. Please send resumes to Kaylin.Goswami@haskell.com and apply online www.haskell.com/why-haskell/careers.

SAY BYE TO BILLABLE HOURS AND HELLO TO A MEANINGFUL AND REWARDING LAW PRACTICE IN VIBRANT DOWNTOWN OKLAHOMA CITY. An Oklahoma state agency located in the heart of OKC's downtown business district seeks an experienced civil litigator. Candidates should possess 5+ years of litigation experience preferably in both state and federal courts. The ideal candidate will be experienced in all phases of defending lawsuits involving employment law, personal injury and/or §1983 actions. Excellent communication and legal research and writing skills are required. Salary will be based upon the successful candidate's experience and qualifications within a range of $60,000 to $90,000 for the exceptionally well qualified candidate. Fringe benefits include a generous health insurance allowance for you and your family, retirement benefits and optional participation in a deferred compensation plan similar to a 401(k). Please send your cover letter, résumé and writing sample to "Box LL," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

THE HASKELL COMPANY IS SEEKING AN ENTRY-LEVEL CONTRACTS REPRESENTATIVE to work in our Oklahoma City office. The candidate will support a high-energy, exciting organization, focusing on professional services contracting with domestic and international commercial entities and state and local governments. Candidates must have a J.D. with 0-1 years of experience. Knowledge of construction law and construction procedures is preferred. Haskell is an Equal Opportunity Employer (Females/Minorities/Protected Veterans/Individuals with Disabilities) and drug-free workplace. Please send resumes to Kaylin.Goswami@haskell.com and apply online www.haskell.com/why-haskell/careers.

POSITIONS AVAILABLE

APPLICATIONS MUST BE RECEIVED AT DHS BY 11:59 P.M. OF THE CLOSING DATE of this job announcement. Basic purpose of the position - The DHS Child Support Services – Oklahoma Count CSS- North Oklahoma City Office has an opening for a full-time attorney (CSS attorney IV, $4,961.58 monthly) with experience in child support enforcement. This position will be located at 2409 N. Kelley Ave, Room 103, Oklahoma City, OK 73111. Typical functions - The position involves preparation and filing of pleadings and trial of cases in child support related hearings in district and administrative courts. Duties will also include consultation and negotiation with other attorneys and customers of Oklahoma Child Support Services, and interpretation of laws, regulations, opinions of the court and policy. Position will train and assist staff with preparation of legal documents and ensure their compliance with ethical considerations. Knowledge, skills and abilities (KSA's) - Knowledge of legal principles and their applications; of legal research methods; of the scope of Oklahoma statutory law and the provisions of the Oklahoma Constitution; of the principles of administrative and constitutional law; of trial and administrative hearing procedures; and of the rules of evidence; and skill in performing research, analyzing, appraising and applying legal principles, facts and precedents to legal problems; presenting explanation of legal matters, statements of facts, law and argument clearly and logically in written and oral form; and in drafting legal instruments and documents. Minimum qualifications - Preference may be given to candidates with experience in child support and/or family law. This position may be filled at an alternate hiring level as a Child Support Services attorney III (beginning salary $4,321.67 monthly), Child Support Services attorney II (beginning salary $3,942.92 monthly), or as a Child Support Services attorney I (beginning salary $3,564.25 monthly), dependent on child support or family law experience and minimum qualifications as per state policy. Notes - A conditional offer of employment to final candidate will be contingent upon a favorable background check and a substance abuse screening. Veteran's preference points do not apply to this position. If you need assistance in applying for this position contact Oklahoma Department of Human Services, Talent Acquisitions at 405-521-3613 or email STO.HRMD.ESU@okdhs.org. Benefits - This is a full-time unclassified state position with full state retirement and insurance benefits, including paid health, dental, life and disability insurance. Annual leave of 10 hours per month and sick leave of 10 hours per month begin accruing immediately.

CITY ATTORNEY – Provides legal assistance on matters pertaining to city functions and activities and acts as the city's legal representative. Must be licensed by the Oklahoma State Bar Association with previous experience in municipal law and preferably, previous experience working in a city attorney's office. Must possess valid Oklahoma driver license and be insurable. Starting salary range: $80,947 - $117,382. Apply City of Midwest City, HR Dept., 100 N. Midwest Blvd., or www.midwestcityok.org. Apps accepted until filled. EOE.

POSITIONS AVAILABLE

THE OKLAHOMA TAX COMMISSION, LEGAL DIVISION is seeking attorney applicants for openings in its Tulsa and Oklahoma City offices. Applicants must be licensed to practice law in Oklahoma. Preference will be given to candidates with administrative hearing, collection and/or litigation experience but all applicants will be considered. Deadline is June 30, 2018, to submit cover letter, resume and writing sample to Melody Suess, Deputy General Counsel, 440 S. Houston, Suite 501B, Tulsa, OK 74127 or msuess@tax.ok.gov. Please identify your preferred office location in your cover letter. The OTC is an equal opportunity employer.

ADVOCATE GENERAL FOR THE OKDHS, OFFICE OF CLIENT ADVOCACY. The position involves preparation and filing of pleadings and trial of cases in child support related hearings in district and administrative courts. Duties will also include consultation and negotiation with other attorneys and customers of Oklahoma Child Support Services, and interpretation of laws, regulations, opinions of the court and policy. Position will train and assist staff with preparation of legal documents and ensure their compliance with ethical considerations. Knowledge of legal principles and their applications; of legal research methods; of the scope of Oklahoma statutory law and the provisions of the Oklahoma Constitution; of the principles of administrative and constitutional law; of trial and administrative hearing procedures; and of the rules of evidence; and skill in performing research, analyzing, appraising and applying legal principles, facts and precedents to legal problems; presenting explanation of legal matters, statements of facts, law and argument clearly and logically in written and oral form; and in drafting legal instruments and documents. Requires active membership in the Oklahoma Bar Association and 3 years of experience engaged in the practice of law. Salary will be commensurate with education and experience. Excellent benefits package. To apply go to www.jobapscloud.com/OK and find Unclassified Positions, then submit via JobAps using the link for this position. Contact Talent Acquisitions at 405-521-6219 for more information. Submission deadline is July 10, 2018, at 11:59 p.m. EOE.

POSITIONS AVAILABLE

THE LEFLORE COUNTY DISTRICT ATTORNEY'S OFFICE IS SEEKING AN ASSISTANT DISTRICT ATTORNEY for its Poteau office. Primary responsibilities include the criminal prosecution of all domestic violence offences and juvenile delinquent and deprived dockets. Salary $53K plus, DOE. Applicant must have a J.D. from an accredited law school; prior jury trial experience and experience in criminal law preferred. Must be member of good standing with the Oklahoma State Bar. Applicants may submit a resume and writing sample, postmarked no later than July 6, 2018, to the following address: District Attorney's Office, 100 S. Broadway, Room 300, Poteau, OK 74953, or Fax 918-647-3209.

MULLICAN & HART PC IS SEEKING A LITIGATION ATTORNEY with 2 to 7 years of experience for its growing downtown Tulsa practice. The ideal candidate will have excellent writing skills, solid communication skills and be able to flourish in a fast-paced environment. Experience in transportation law or insurance defense is a plus, but is not required. The compensation package is commensurate with experience and qualifications. The firm provides an outstanding benefit package including health insurance, life insurance and a 401K with profit sharing opportunities. Please submit a confidential cover letter and resume to office@mullicanhart.com.

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UPCOMING LUNCH-HOUR WEBCASTS

ALL of your required 12 hours of MCLE credit can be received by viewing Live Webcasts. These programs are being "live-streamed" at certain dates and times and MUST be viewed on these scheduled dates and times:

Tuesday, June 19
Deal or No Deal: Legal Ethics Edition
Presented by MESA CLE with Joel Oster, Comedian at Law

Tuesday, June 19
The Ethics of Delegation
Presented by CLESeminars.com with Cynthia Sharp, Esq.

Wednesday, June 20
Bad Review? Bad Response? Bad Idea! Ethically Managing Your Online Reputation
Presented by CLESeminars.com with Jennifer Ellis, Esq. and Daniel J. Siegel, Esq.

Thursday, June 21
Networking Professionally and Ethically
Presented by CLESeminars.com with Roy Ginsburg, Esq.

Friday, June 22
How to Avoid Potential Malpractice Pitfalls in the Cloud
Presented by CLESeminars.com with Debbie Foster

Saturday, June 23 @ 8 a.m.
The 2018 Ethy Awards
Presented by MESA CLE with Sean Carter, Humorist at Law

Monday, June 25
Clear and Effective Communications With Clients, Colleagues and Staff
Presented by CLESeminars.com with Irwin Karp, Esq.

Tuesday, June 26
Ethical Issues and Implications on Lawyers' Use of LinkedIn
Presented by CLESeminars.com with Allison Shields, Esq.

Thursday, June 28
The 2018 Ethy Awards
Presented by MESA CLE with Sean Carter, Humorist at Law

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