THE OKLAHOMA BAR
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2018 OK CR 23

IN RE: ADOPTION OF THE 2018 REVISIONS TO THE OKLAHOMA UNIFORM JURY INSTRUCTIONS CRIMINAL (SECOND EDITION)

CASE NO. CCAD-2018-2. July 27, 2018

ORDER ADOPTING AMENDMENTS TO OKLAHOMA UNIFORM JURY INSTRUCTIONS-CRIMINAL (SECOND EDITION)

¶1 On April 28, 2018, The Oklahoma Court of Criminal Appeals Committee for Preparation of Uniform Jury Instructions submitted its report and recommendations to the Court for adoption of amendments to Oklahoma Uniform Jury Instructions-Criminal (Second Edition). The Court has reviewed the report by the Committee and recommendations for the adoption of the 2018 proposed revisions to the Uniform Jury Instructions. Pursuant to 12 O.S.2011, § 577.2, the Court accepts that report and finds the revisions should be ordered adopted.

¶2 **IT IS THEREFORE ORDERED ADJUDGED AND DECREED** that the report of The Oklahoma Court of Criminal Appeals Committee for Preparation of Uniform Jury Instructions shall be accepted, the revisions shall be available for access via the internet from this Court's web site at www.okcca.net on the date of this order and provided to West Publishing Company for publication. The Administrative Office of the Courts is requested to duplicate and provide copies of the revisions to the judges of the District Courts and the District Courts of the State of Oklahoma are directed to implement the utilization of these revisions effective on the date of this order.

¶3 **IT IS FURTHER ORDERED ADJUDGED AND DECREED** the amendments to existing OUJI-CR 2d instructions, and the adoption of new instructions, as set out in the following designated instructions and attached to this order, are adopted, to wit:

2-23; 2-24; 2-25; 4-26; 4-56A; 4-56B; 4-57; 4-57A; 4-57B; 4-58; 4-58A; 4-58A-1; 4-64; 4-65; 4-87B; 4-96A; 4-138; 4-138A; 8-31; 8-31A; 8-32; 8-33; 8-33A; 8-33B; 8-33C; 8-34; 10-13.

¶4 The Court also accepts and authorizes the updated committee comments to be published, together with the above styled revisions and each amended page in the revisions to be noted at the bottom as follows "(2018 Supp.)".

¶5 **IT IS THE FURTHER ORDER OF THIS COURT** that the members of the Oklahoma Court of Criminal Appeals Committee for Preparation of Uniform Criminal Jury Instructions be commended for their ongoing efforts to provide up-to-date Uniform Jury Instructions to the bench and the bar of the State of Oklahoma.

¶6 **IT IS SO ORDERED**.

¶7 **WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this 27th day of July, 2018.

/s/ GARY L. LUMPKIN, Presiding Judge

/s/ DAVID B. LEWIS, Vice Presiding Judge

/s/ ROBERT L. HUDSON, Judge

/s/ DANA KUEHN, Judge

/s/ SCOTT ROWLAND, Judge

ATTEST:
John D. Hadden
Clerk

2018 SUPPLEMENT

F. ATTEMPT OR THREATEN VIOLENCE

OUJI-CR 2-23

ATTEMPT ACT OF VIOLENCE – ELEMENTS

No person may be convicted of attempting to perform an act of violence unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully;

Second, **attempting/conspiring/endeavoring;**

Third, to perform an act of violence;

Fourth, **involving/(intended to involve) (serious bodily harm to)/(the death of)** another person.

Statutory Authority: 21 O.S. 2011, § 1378(A).

Notes on Use

For an Instruction on attempt, *see* OUJI-CR 2-11, *supra*. For an Instruction on conspiracy, see OUJI-CR 2-17, *supra*. For a definition of endeavoring, *see* OUJI-CR 6-16, *infra*.

OUJI-CR 2-24

THREATEN ACT OF VIOLENCE – ELEMENTS

No person may be convicted of threatening to perform an act of violence unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully;

Second, threatening;

Third, to perform an act of violence;

Fourth, **involving/(intended to involve) (serious bodily harm to)/(the death of)** another person.

Statutory Authority: 21 O.S. 2011, § 1378(B).

OUJI-CR 2-25

PLAN TO CAUSE (SERIOUS BODILY INJURY)/DEATH – ELEMENTS

No person may be convicted of planning to cause **(serious bodily harm to)/(the death of)** another person unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willfully;

Second, devising a **plan/scheme/program** of action;

Third, **involving/(intended to involve) (serious bodily harm to)/(the death of)** another person;

Fourth, with the intent to perform a malicious act of violence.

Statutory Authority: 21 O.S. 2011, § 1378(C).

OUJI-CR 4-26

ASSAULT AND BATTERY – ELEMENTS

No person may be convicted of assault and battery unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, willful;

Second, unlawful;

Third, use of force or violence;

Fourth, upon another person.

Statutory Authority: 21 O.S. ~~1991~~ 2011, §§ 641, 642.

Committee Comments

Simple assault, simple battery, and simple assault and battery are misdemeanor crimes in Oklahoma. Oklahoma defines an assault in accordance with both of the common law definitions: an attempt to commit a battery, or the intentional placing of another in apprehension of receiving an immediate battery. *Minnix v. State*, 1955 OK CR 37, 282 P.2d 772 ~~(Okl. Cr. 1955)~~; *Dunbar v. State*, 1942 OK CR 150, ~~75 Okl. Cr. 275,~~ 131 P.2d 116, 75 Okl. Cr. 275 (1942), *overruled on other grounds, Parker v. State,* 1996 OK CR 19, ¶ 23, n.4, 917 P.2d 980, 986 n.4 ~~(Okl.Cr. 1996)~~; *Tyner v. United States*, 1909 OK CR 108 ~~2 Okl. Cr. 689~~, 103 P. 1057, 2 Okl. Cr. 689 ~~(1909)~~. *See generally R. Perkins, Criminal Law* 114-27 (2d ed. 1969).

Simple battery is also defined in Oklahoma in accordance with the common law concept. It is an unlawful beating, or use of wrongful physical violence or constraint upon the person of another, without that person's consent. *Minnix v. State, supra*. *See generally R. Perkins, Criminal Law* 107-13 (2d ed. 1969).

Every battery, by definition, includes an assault, although an assault can be perpetrated without a battery. The Court of Criminal Appeals has held that, when an assault culminates in a battery, the offense is assault and battery, and prosecution should be commenced for that grade of assault and battery which is reasonably

supported by the State's proof of the facts. *Hall v. State*, 1957 OK CR 34, 309 P.2d 1096.

Specific intent is not an element of simple assault, simple battery, or simple assault and battery. *Hainta v. State,* 1979 OK CR 61, 596 P.2d 906; *Morris v. State*, 1973 OK CR 421, 515 P.2d 266.

In *Steele v. State*, 1989 OK CR 48, ¶12, 778 P.2d 929, 931, the Court of Criminal Appeals held that only the slightest force or touching is necessary to constitute the force required for battery. This degree of force is reflected by the definition of force in OUJI-CR 4-28. ~~The "force or violence" constituting a battery will generally be direct and of such a nature as to produce physical injury. However, although there is a dearth of Oklahoma cases defining the nature and degree of "force or violence" required to establish a battery, it is settled in the vast majority of jurisdictions that any unconsented, offensive touching suffices as proof of "force." *See, e.g., State v. Brewer*, 31 Del. 363, 114 A. 604 (1921); *Smith v. State*, 85 Ga. App. 215, 68 S.E.2d 719 (1952); *Commonwealth v. McCan*, 277 Mass. 199, 178 N.E. 633 (1931); *State v. Cruikshank*, 13 N.D. 337, 100 N.W. 697 (1904); *Weaver v. State*, 66 Tex. Crim. R. 366, 146 S.W. 927 (1912); *Wood v. Commonwealth*, 149 Va. 401, 140 S.E. 114 (1927); *Lynch v. Commonwealth*, 131 Va. 762, 109 S.E. 427 (1921).~~

OUJI-CR 4-56A

LOITERING BY A PERSON REQUIRED TO REGISTER AS A SEX OFFENDER – ELEMENTS

No person may be convicted of loitering by a person required to register as a sex offender unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **[Name of Defendant]** was convicted of a crime that required **him/her** to register as a sex offender; and

Second, while required to register as a sex offender **he/she** knowingly;

Third, was loitering within 500 feet of **a/an [elementary/(junior high)/high school]/ [licensed child care facility]/park/playground.**

Loitering means to stand around or move slowly about; to spend time idly; to saunter; to delay; to linger; to lag behind.

[Loitering does not include:

(A (custodial parent)/(legal guardian) of a student enrolled at the school/(child care facility) who is enrolling/delivering/retrieving the student at the school/(child care facility) [during regular school/facility hours]/(for (school-sanctioned)/(child-care-facility-sanctioned) extracurricular activities].

OR

(A person receiving medical treatment at a hospital/(a facility certified/ licensed by the State of Oklahoma to provide medical services), unless it is any form of psychological, social or rehabilitative counseling services or treatment programs for sex offenders).

OR

(A person attending a recognized church/ (religious denomination) for worship if he/she has notified the religious leader of his/her status as a registered sex offender and he/she was granted written permission by the religious leader).]

Statutory Authority: 21 O.S. Supp. 2017, § 1125.

Notes on Use

The trial judge should use the bracketed exceptions at the end of the instructions only if they are supported by the evidence. This Instruction should be modified as appropriate, if the defendant was convicted in another jurisdiction of an offense which would require registration if the defendant had been convicted in Oklahoma of that offense. *See* 21 O.S. Supp 2017, § 1125(A)(1).

Committee Comments

The Oklahoma Court of Criminal Appeals held that 21 O.S. Supp. 2010, § 1125 was not unconstitutionally vague in *Weeks v. State,* 2015 OK CR 16, ¶¶ 20-26, 362 P.3d 650, 656-57, and *Engles v. State*, 2015 OK CR 17, ¶ 6, 366 P.3d 311, 314. In *Weeks,* the Court of Criminal Appeals distinguished two of its previous decisions in which anti-loitering ordinances in Oklahoma City and Tulsa

had been struck down on the ground that they were unconstitutionally vague. The Court explained that in contrast to the anti-loitering ordinances in its previous decisions, § 1125 includes exemptions that provide guidance as to what is and what is not prohibited and "the statute clearly defines the prohibited conduct through reference to the only conduct that is permitted." *Weeks v. State*, 2015 OK CR 16, ¶ 26, 362 P.3d 657. Similarly, in *Engles*, the Court decided that the exemptions in § 1125 avoided unconstitutional vagueness. The Court held: "By operation of these specific statutory exemptions, any sex offender convicted of a registerable offense involving a victim under thirteen, who is present in the zone of safety *without* a statutory exemption *and* the required prior notice to administrators is, by definition, loitering in violation of the law." 2015 OK CR 17, ¶ 6, 366 P.3d 311, 314 (emphasis in original).

OUJI-CR 4-56B

AGGRAVATED/HABITUAL SEX OFFENDER IN A PARK – ELEMENTS

No person may be convicted of entering a park by **a/an aggravated/ habitual** sex offender unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **[Name of Defendant]** had been designated as **a/an aggravated/habitual** sex offender ; and

Second, **he/she** knowingly;

Third, entered a park.

OR

First, **[Name of Defendant]** was convicted of an offense in another **state/ country** that if committed in Oklahoma would designate **[Name of Defendant]** as a/an aggravated/habitual sex offender ; and

Second, **he/she** knowingly;

Third, entered a park.

A park is any outdoor public area specifically designated as being used for recreational purposes that is operated/supported in whole or in part by a **(homeowners' association)/city/town/county/state/(federal/tribal governmental authority).**

Statutory Authority: 21 O.S. Supp. 2017, § 1125(A)(2).

OUJI-CR 4-57

CRIMES AGAINST UNBORN CHILDREN – DEFINITION AND LIMITATIONS

A "**person/(human being)**" shall include an unborn child. An "unborn child" means an unborn offspring of human beings from the moment of conception, through pregnancy, and until live birth.

Statutory Authority: 21 O.S. ~~Supp. 2007~~ 2011, §§ 652, 691(B)~~, 713~~; 61 O.S. 2011, § 1-730(4).

Notes on Use

This instruction should be given along with OUJI-CR 4-4, 4-5, 4-6, 4-7, 4-8, 4-61, 4-64, 4-91, 4-92, 4-94, 4-95, ~~4-96A,~~ or 4-105, *supra*, in cases where the victim was an unborn child. OUJI-CR 4-57A or 4-57B, *infra*, or both, should also be given, if appropriate.

~~Committee Comments~~

~~Prior to its 2005 amendment, 21 O.S. § 713 required an unborn child to be "quick" before criminal liability for manslaughter in the first degree could be imposed. *See* 21 O.S. 2001, § 713 (amended 2005). "Although 'quick child' is not defined by statute, the term is generally defined as a fetus that has so developed as to move within the mother's womb." *McCarty v. State*, 2002 OK CR 4, n.2, 41 P. 3d 981.~~

OUJI-CR 4-57A

LIMITATIONS ON (INJURIES TO)/(DEATH OF) UNBORN CHILD

No person shall be guilty of:

(murder in the first degree of)

(murder in the second degree of)

(manslaughter in the first degree of)

(manslaughter in the second degree of)

(shooting with intent to kill)

(use of a vehicle to facilitate the discharge of a **firearm/crossbow/weapon** in the conscious disregard for the safety of)

(assault and battery with a deadly weapon upon)

(willfully killing)

an unborn child if:

[The acts that caused the death of the unborn child were committed during a legal abortion to which the pregnant woman consented ; .]

OR

[The acts were committed pursuant to the usual and customary standards of medical practice during diagnostic testing or therapeutic treatment.]

Statutory Authority: 21 O.S. ~~Supp. 2006~~ 2011, §§ 652(D), 691(C)~~, 713(B)~~.

Notes on Use

The court should give the paragraphs in brackets if the issues are asserted as affirmative defenses and there is evidence to support them offered at the trial.

OUJI-CR 4-57B

NO PROSECUTION OF MOTHER FOR CAUSING DEATH OF UNBORN CHILD

Under no circumstances shall the mother of the unborn child be convicted for causing the death of the unborn child unless the mother has committed a crime that caused the death of the unborn child.

Statutory Authority: 21 O.S. ~~Supp. 2006~~ 2011, §§ 652(E), 691(D)~~, 713(C)~~.

OUJI-CR 4-58

(This Instruction is Intentionally Blank)

OUJI-CR 4-58A

TRAFFICKING IN CHILDREN – ELEMENTS

No person may be convicted of trafficking in children unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, **[Name of Defendant]** knowingly **accepted/solicited/offered/paid/transferred** any compensation in **money/property/(any thing of value);**

Second, in connection with the **(acquisition/transfer** of the **legal/physical custody)/adoption** of a minor child.

Statutory Authority: 21 O.S. 2011, § 866(A)(1)(a); 10 O.S. Supp. 2017, § 7505-3.2.

Notes on Use

This Instruction covers the crime of trafficking in children as set forth in 21 O.S. 2011, § 866(A)(1)(a).

The statute provides exceptions for certain costs and expenses, and OUJI-CR 4-58A-1 covers these costs and expenses as an affirmative defense to the crime.

Committee Comments

Although the publisher of the Oklahoma Statutes added the heading for 21 O.S. 2011, § 866 "Elements of offense", the Oklahoma Session Laws do not include this heading, and it is not part of Oklahoma law. *See Fairchild v. State*, 1999 OK CR 49, ¶ 60, 998 P.2d 611, 624 (publisher's heading has no legal significance because it is not part of the statute); *Hall v. State*, 1957 OK CR 56, ¶ 5, 312 P.2d 981, 983-84 (titles or headings added by publisher after enactment for index purposes or identification are not in the law itself).

OUJI-CR 4-58A-1

TRAFFICKING IN CHILDREN– AFFIRMATIVE DEFENSE FOR COURT APPROVED COSTS AND EXPENSES

[Name of Defendant] has asserted as a defense to the charge of trafficking in children that the following expenses have been approved by the Court **and/or** authorized by law: **[Specify the applicable costs and expenses ordered by the Court or provided in 10 O.S. Supp. 2017, § 7505-3.2]**. The State has the burden of proving beyond a reasonable doubt that the expenses were not approved by the Court **and/or** were not authorized by law.

OUJI-CR 4-64

MURDER IN THE FIRST DEGREE BY FELONY MURDER – ELEMENTS

No person may be convicted of murder in the first degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the death of a human;

Second, the death occurred as a result of an act or event which happened in the defen-

dant's **commission/(attempted commission) of a/an**

[forcible rape]

[robbery with a dangerous weapon]

[kidnapping]

[escape from lawful custody]

[eluding an officer]

[first-degree burglary/arson]

[murder of a person other than the deceased]

[shooting/discharge of a firearm/crossbow with intent to kill a person other than the deceased]

[intentional discharge of a firearm/[specify other deadly weapon] into a dwelling/(building used for business/public purposes)]

[unlawful distributing or dispensing of (controlled dangerous substances/(synthetic controlled substances)]

[trafficking in illegal drugs]

[(manufacturing)/(attempting to manufacture) a controlled dangerous substance)];

Third, the elements of the crime of

[forcible rape]

[robbery with a dangerous weapon]

[kidnapping]

[escape from lawful custody]

[eluding an officer]

[first-degree burglary/arson]

[murder of a person other than the deceased]

[shooting/discharge of a firearm/crossbow with intent to kill a person other than the deceased]

[intentional discharge of a firearm/[specify other deadly weapon] into a dwelling/(building used for business/public purposes)]

[unlawful distributing or dispensing of (controlled dangerous substances/(synthetic controlled substances)]

[trafficking in illegal drugs]

[(manufacturing)/(attempting to manufacture) a controlled dangerous substance)]

that the defendant is alleged to have been in the commission of are as follows:

[Give Elements of Underlying Felony]

Notes on Use

The trial judge should give accomplice and/or coconspirator instructions where appropriate.

Committee Comments

As a result of a 1996 amendment, the ~~The~~ felony-murder statute, 21 O.S.2011, §701.7 (B) covers not only deaths that were actually committed by the person charged with the underlying felony but also deaths that were committed by that person's intended victims, police officers and innocent bystanders. *Kinchion v. State*, 2003 OK CR 28, ¶ 6, 81 P.3d 681, 683.

1. It must be emphasized that the Oklahoma statutes do not include as a specific crime "An Escape from Lawful Custody." This instruction is appropriate only when the defendant has escaped from a peace officer after being lawfully arrested or detained by such officer, 21 O.S. ~~2001~~ 2011, § 444, or where the escape is from a penal institution, 21 O.S. ~~2001~~ 2011, § 443. (See OUJI-CR 6-52 through 6-54.)

OUJI-CR 4-65

MURDER IN THE FIRST DEGREE BY FELONY MURDER - IN THE COMMISSION OF DEFINED

A person is in the commission of

[forcible rape]

[robbery with a dangerous weapon]

[kidnapping]

[escape from lawful custody]

[eluding an officer]

[first-degree burglary/arson]

[murder of a person other than the deceased]

[shooting/discharge of a firearm/crossbow with intent to kill a person other than the deceased]

[intentional discharge of a firearm/[specify other deadly weapon] into a dwelling/(building used for business/public purposes)]

[unlawful distributing or dispensing of (controlled dangerous substances/(synthetic controlled substances)]

[trafficking in illegal drugs]

[(manufacturing)/(attempting to manufacture) a controlled dangerous substance)]

when **he/she** is **(performing an act which is an inseparable part of)/(performing an act which is necessary in order to complete the course of conduct constituting)/(fleeing from the immediate scene of) a/an**

[forcible rape]

[robbery with a dangerous weapon]

[kidnapping]

[escape from lawful custody]

[eluding an officer]

[first-degree burglary/arson]

[murder of a person other than the deceased]

[shooting/discharge of a firearm/crossbow with intent to kill a person other than the deceased]

[intentional discharge of a firearm/[specify other deadly weapon] into a dwelling/(building used for business/public purposes)]

[unlawful distributing or dispensing of (controlled dangerous substances/(synthetic controlled substances)]

[trafficking in illegal drugs]

[(manufacturing)/(attempting to manufacture) a controlled dangerous substance)].

Statutory Authority: 21 O.S. ~~Supp. 1999~~ 2011, § 701.7(B).

Notes on Use

This instruction must be given in every prosecution for murder in the first degree by felony murder.

If the predicate felony is an attempted crime, the trial judge should give the appropriate instructions for attempts (OUJI-CR 2-10 to 2-15).

Committee Comments

The first-degree felony-murder statute explicitly negates the requirement of mental state, and is analogous in this respect to the pre-1973 felony-murder statute. An analysis of the elements of first-degree felony murder follows.

~~The Death of a Human. An unborn fetus that is viable at the time of injury is a "human being" and therefore may be the subject of a homicide. *Hughes v. State*, 1994 OK CR 3, ¶ 4, 868 P.2d 730, 731.~~

Since intent to effect death is not an element of the crime of felony murder, an accused may be found guilty of murder in the first degree where he/she engages in one of the specified felonies, and his/her personal conduct causes death. The instruction encompasses this straightforward situation.

The felony-murder statute states that a person commits murder when that person or another person takes the life of a human during, or if the death of a human being results from, the commission of an underlying felony. The statute was amended in 1996 to cover deaths that occur at the hands of the intended victim of the underlying felony, police officers, or innocent bystanders. *Dickens v. State*, 2005 OK CR 4, ¶ 8, 106 P.3d 599, 601 ("That a police officer killed a codefendant does not relieve Appellant of responsibility for the death."); *Kinchion v. State*, 2003 OK CR 28, ¶ 6, 81 P.3d 681, 683.

~~The instruction also addresses the situation where a cofelon, rather than the accused, has performed the conduct causing the death in the commission of a felony. The most significant and troublesome question raised by the adoption of section 701.7 concerns the circumstances under which the defendant will be deemed responsible for felony murder when he/she has participated in the commission of the underlying felony but does not actually participate in the killing, as a factual matter, or as an aider or abettor. *See, e.g., Oxendine v. State*, 1960 OK CR 26, 350 P.2d 606 (defendant guilty of murder as a principal under 21 O.S. 1991, § 172, where defendant agreed with coparticipant, who fired fatal shot, to murder robbery victims in order to prevent detection and identification).~~

The pre-1973 felony-murder statute, section 701(3), defined the offense as one "perpetrated without any design to effect death by a person engaged in the commission of any felony." A prodigious number of Oklahoma cases exist which interpret this language as allowing conviction for felony murder

> of all felons participating in a felony which results in death to the victim, regardless of which cofelon actually does the killing. As the court explained in *Carle v. State*, 1926 OK CR 137, 34 Okl. Cr. 24, 32, 244 P. 833, 836, 34 Okl. Cr 24, 32 (1926):
>
> It is well-settled that, where two or more persons enter into a conspiracy to commit a felony under such circumstances as will, when tested by human experience, probably result in the taking of human life, it is presumed that all understand the consequences, and, if death happens in the prosecution of such enterprise, all are alike guilty of a homicide.

See also Lewis v. State, 1967 OK CR 92, 451 P.2d 399; *Osborn v. State*, 1948 OK CR 24, 86 Okl. Cr. 259, 194 P.2d 176 ,86 Okl. Cr. 259 (1948); *Morris v. State*, 1939 OK CR 150, 68 Okl. Cr. 147, 96 P.2d 88 ,68 Okl. Cr. 147 (1939); *Sands v. State*, 1937 OK CR 66, 61 Okl. Cr. 206, 67 P.2d 62, 61 Okl. Cr. 206 (1937); *Valdez v. State*, 18 Okl. Cr. 204, 194 P. 451 (1921).

In *Johnson v. State*, 1963 OK CR 91, 386 P.2d 336, criminal responsibility for murder was extended even further. In this case, the defendant's conviction for murder of a police officer was upheld, although it could not be proved that the fatal bullet came from the gun the defendant was firing, rather than from the gun being fired by another officer. The court determined that, where "an accused commits an assault designed to produce injury or death upon officers of the law, and injury or death does result without any intervening cause, but from an instinctive retaliatory force, the accused is criminally responsible." *Id.* at 340. The court cautioned, however, that its holding "should not be construed as extending beyond the facts of the instant case and an instruction ... should only be given where similar facts exist." Therefore, it remains unclear whether prior to the enactment of section 701.7 the felony-murder rule extended to deaths during the commission of a felony which were traceable to the conduct of police officers, innocent bystanders, or victims.

Despite this precedent, attention must be focused upon the language alteration embodied in the first-degree murder definition of felony murder, which explicitly holds a person responsible for murder only "when he takes the life of a human being" (emphasis added). There appears to be no clearer way to express a legislative mandate that the defendant may be convicted for first-degree murder accomplished without statutory malice during the commission of a felony, with its concomitant potential punishment of death, only where the defendant himself has performed the homicidal act. This language should be contrasted to that embodied in section 701.8, which merely echoes the old section 701(3); this indicates a deliberate legislative change in the wording of section 701.7.

The counterargument is that, regardless of the clear import of the present statute, the Legislature could not have intended a result which not only would overturn existing precedent, but also would allow the defendant participating in one of the felonies enumerated in section 701.7 who does not commit the fatal act wholly to escape punishment for murder. This result follows from the exclusion of the specified felonies of section 701.7 from the definition of felony murder in the second degree. See § 701.8.

The Commission has concluded that the adoption of the language "when he takes the life of a human being" was intended as a clarification, rather than a refutation, of existing Oklahoma precedent. It is the viewpoint of the Commission that "he" in the above quoted statutory language must be construed to encompass any felon engaged in the commission of an enumerated felony crime. This construction preserves the concepts underlying the felony-murder rule articulated both at common law and throughout Oklahoma cases, that persons who agree to engage in conduct that is inherently dangerous or holds a great potential for peril to others, is responsible, regardless of malice, when death occurs at the hands of one of his/her cofelons.

Even though a person may be convicted under the felony-murder rule for the acts of an accomplice, he may not be subject to the death penalty unless he was individually culpable for the killing. *See Tison v. Arizona,* 481 U.S. 137, 158 (1987) (requiring "major participation in the felony committed, combined with reckless indifference to human life" for defendant to be subject to the death penalty under the felony-murder rule); *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (reversing death penalty where the defendant neither killed, attempted to kill, or intended the killing to take place or the use of lethal force).

~~The use of the term "he" cannot be construed as including deaths at the hands of police officers, victims of the felony, or innocent bystanders without doing violence to the statutory language. *State v. Jones*, 1993 OK CR 36, ¶ 7, 859 P.2d 514, 515. Many jurisdictions extend the felony-murder rule to killings perpetrated by someone other than a cofelon during the commission or the aftermath of the felony, on the theory that felons voluntarily accept all consequences of their dangerous conduct by engaging in the felony. *See generally* W. LaFave & A. Scott, *Criminal Law* § 71, at 545-61 (1972). However, the clear legislative reference of "he" to the perpetrator of the homicidal act can only be construed as a limitation on the felony-murder rule. This restriction limits *Johnson, supra*, to its facts, and requires that the homicidal act be performed by one of the cofelons.~~

The Death Occurred as a Result of an Act or Event Which Happened in the Commission of a Specified Felony. The statute defines murder in the first degree to include killings perpetrated during the course of a number of specified felonies~~, including forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first-degree arson, first-degree burglary, unlawful distribution of controlled dangerous substances, and trafficking in illegal drugs~~.

The trial court must instruct the jury regarding the elements of the underlying felony with which the defendant is charged.

The trial judge must also instruct the jurors regarding the breadth of the "in the commission of" language, so there is no confusion regarding whether a homicide has been committed "in" the course of committing a felony. Therefore, a separate instruction defining "in the commission of" is included.

It must be noted that the guidance afforded by Oklahoma case law regarding the scope of criminal conduct included within the purview of "in the commission of" indicates a broad reading of this language. In *Clark v. State*, 1977 OK CR 4, 558 P.2d 674, in construing the predecessor first-degree felony-murder rule, the court declared:

> [I]f the homicide is committed during the one, continuous transaction, the acts are so closely connected as to be inseparable in terms of time, place, and causal relation, and the actions tend to be explanatory and incidental to each other, the homicide has been committed during the felony in our statutory sense.

Id. ¶ 16, 558 P.2d at 678. The felony-murder rule was held applicable in that case to the killing of a hostage taken during a bank robbery by the defendants after they had left the bank and placed the deceased and another hostage in a different location. *See also Johnson v. State*, 1963 OK CR 91, 386 P.2d 336, (homicide committed during resistance by defendant after burglary attempt was thwarted by pursuing officers constitutes murder); *Oxendine v. State,* 1960 OK CR 26, 350 P.2d 606 (homicide committed to avoid detection and identification of perpetrators of felony constitutes murder).

A defendant may be convicted of murder under the felony-murder rule even though the defendant does not complete the underlying felony crime. For example, the Oklahoma Court of Criminal Appeals affirmed a murder conviction in *James v. State*, 1981 OK CR 145, 637 P.2d 862, where the fatal injury occurred during the course of an attempted robbery with a dangerous weapon. The court stated: "[T]his Court has concluded that the Legislature intended to include attempted armed robbery in the felony murder statute, just as they intended to include attempted armed robbery in the statute defining armed robbery." *Id.* ¶ 13, 637 P.2d at 865. *See also McDonald v. State*, 1984 OK CR 2, ¶ 8, 674 P.2d 51, 53 (following *James*).

Causation. In a line of cases, the Court of Criminal Appeals has recognized a nexus requirement between the underlying felony and the victim's death in order for the felony murder doctrine to be applicable. *Malaske v. State*, 2004 OK CR 18, ¶ 5, 89 P.3d 1116, 1118; *Wade v. State*, 1978 OK CR 77, ¶ 4, 581 P.2d 914, 916; *Lampkin v. State*, 1991 OK CR 33, ¶4, 808 P.2d 694, 695; *Diaz v. State*, 1986 OK CR 187, ¶ 9, 728 P.2d 503, 509; *Irvin v. State*, 1980 OK CR 70, ¶ 34, 617 P.2d 588, 597. This requirement is satisfied if the defendant's conduct was a "substantial factor in bringing about the death and the conduct is dangerous and threatens or destroys life." *See* OUJI-CR 4-60, *supra*, ~~As in all homicide cases, there must be a causal link between the conduct of the defendant, or of one of the cofelons, and the death, so the jury must be instructed regarding causation. The Commission chose the phrase "cause," and omitted use of the terms "legal" or "proximate," in order to obviate confusion.~~

~~However, it is not necessary that causal connection between the felony itself and the death be established. The argument that the particular felony which the defendant was engaged in committing was not proximately related to the victim's death was explicitly rejected in *Wade v. State*, 1978 OK CR 77, 581 P.2d 914. The defendant in *Wade* argued that his felony, possession of a loaded firearm in an establishment selling beer and alcoholic beverages, in violation of 21 O.S. Supp. 1976, § 1272.2, was not the legal cause of the homicide by his shooting the victim. The court declared that the State is not constrained to establish that "the felony perpetrated by the defendant is the proximate cause of the victim's death in order to establish the crime of Murder." *Id.* ¶ 3, 581 P.2d at 916. Rather, the State was required to establish that the felony committed was one "inherently or potentially dangerous to human life," *id.* ¶ 4, 581 P.2d at 916, an issue which does not arise under section 701.7, but is further discussed in the Commission Comment accompanying second-degree felony murder section 701.8.~~

OUJI-CR 4-87B

LIFE WITHOUT PAROLE PROCEEDINGS – JUVENILES

By your verdict in the first part of this trial you have already found the defendant guilty of the crime of murder in the first degree. You must now determine the proper punishment.

Under the law of the State of Oklahoma, every person found guilty of murder in the first degree shall be punished by imprisonment for life without the possibility of parole, or imprisonment for life with the possibility of parole.

You are further instructed that **[Defendant]** was a juvenile when this crime was committed. The law regards juvenile offenders generally as having lesser moral culpability and greater capacity for change than adult offenders. An offender's youth matters in determining the appropriateness of the sentence in this case.

You are therefore instructed to consider, in determining the proper sentence, whether the defendant's youth and youth-related characteristics, as well as any other aggravating and mitigating circumstances, and the nature of the crime, reflect the defendant's transient immaturity as a juvenile; or, on the other hand, irreparable corruption and permanent incorrigibility.

No person who committed a crime as a juvenile may be sentenced to life without the possibility of parole unless you find beyond a reasonable doubt that the defendant is irreparably corrupt and permanently incorrigible.

Notes on Use

In *Luna v. State*, 2016 OK CR 27, ¶ 21, 387 P.3d 956, 962, the Oklahoma Court of Criminal Appeals stated that a "meaningful procedure" was required for imposition of a sentence of life without parole for a juvenile offender. Bifurcation would be an appropriate procedure, and this instruction should be used in the sentencing stage of a trial for first degree murder if the defendant was under the age of eighteen at the time of the murder.

Committee Comments

The United States Supreme Court held in *Miller v. Alabama*, 567 U.S. 460 (2012), that a sentence of "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amend-

ment's prohibition on 'cruel and unusual punishments.' *Id.* at 460. The Oklahoma Court of Criminal Appeals decided in *Luna v. State*, 2016 OK CR 27, ¶ 21, 387 P.3d 956, 963, that *Miller* required a jury to be "fully aware of the constitutional 'line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption.'" This Instruction is based on the instruction that the *Luna* court promulgated. *Id.* n. 11, 387 P.3d at 963.

~~**OUJI-CR 4-96A**~~

~~**MANSLAUGHTER**~~
~~**KILLING AN UNBORN CHILD - ELEMENTS**~~

~~No person may be convicted of killing an unborn child unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:~~

~~First, unlawfully;~~

~~Second, willfully;~~

~~Third, killing an unborn child;~~

~~Statutory Authority: 21 O.S. Supp. 2005, § 713.~~

~~Notes on Use~~

~~The court should also give OUJI-CR 4-57, *infra*, and, if appropriate, OUJI-CR 4-57A or 4-57B, or both.~~

~~Committee Comments~~

~~Prior to its 2005 amendment, 21 O.S. § 713 required an unborn child to be "quick" before criminal liability for manslaughter in the first degree could be imposed. *See* 21 O.S. 2001, § 713 (amended 2005). "Although 'quick child' is not defined by statute, the term is generally defined as a fetus that has so developed as to move within the mother's womb." *McCarty v. State*, 2002 OK CR 4, n.2, 41 P. 3d 981.~~

OUJI-CR 4-138

RAPE AND SEX CRIMES – CONSENT ~~OF MINOR~~

~~You are instructed that as a matter of law a minor under the age of **fourteen/sixteen** is incapable of giving **consent/agreement** to engaging in sexual conduct which is otherwise prohibited by law and the **agreement/consent** of such minor to such activity should be disregarded by you in determining the question of the defendant's guilt.~~

It is the burden of the State to prove beyond a reasonable doubt the absence of consent to the **(sexual intercourse)/[specify other sexual conduct].**

Persons need not expressly announce their consent to engage in sexual activity for there to be consent. Consent can be given either through words or through actions that, when viewed in the light of all the surrounding circumstances, would demonstrate to a reasonable person that consent for the specific sexual activity had been given.

Consent is present when the evidence, in whatever form, is sufficient to demonstrate that a reasonable person would have believed that the alleged victim had affirmatively and freely given authorization to the act.

"Consent" means the affirmative, unambiguous and voluntary agreement to engage in a specific sexual activity during a sexual encounter. Consent can be revoked at any time.

Consent cannot be:

1. Given by an individual who:

a. is asleep or is mentally or physically incapacitated either through the effect of drugs or alcohol or for any other reason, or

b. is under duress, threat, coercion or force; or

2. Inferred under circumstances in which consent is not clear including, but not limited to:

a. the absence of an individual saying "no" or "stop", or

b. the existence of a prior or current relationship or sexual activity.

If there is evidence to suggest that the defendant reasonably believed that consent had been given, the State must demonstrate that such a belief was unreasonable under all of the circumstances. If you find that the State has failed to sustain its burden of proof beyond a reasonable doubt, then the defendant must be found not guilty.

Statutory Authority: 21 O.S. Supp. 2017, § 113.

Notes on Use

~~This instruction is appropriate for rape and other sex crimes when the victim is a child below a particular age. This age is fourteen for prosecutions for rape in the first degree and sixteen for prosecutions for rape in the second degree and other sex crimes. *See* 21 O.S. 1991 & Supp. 2000, §§ 1111-1114.~~ This Instruction should be given where consent is an issue in the case, including where "force" is an element of a crime involving sexual assault. *See* 21 O.S. Supp. 2017, § 111(A) (defining "force") and § 112 (defining "sexual assault").

Committee Comments

~~The Oklahoma Court of Criminal Appeals held in *Kimbro v. State*, 1990 OK CR 4, ¶¶ 3-4, 857 P.2d 798, 799, that as a matter of law a child under the age of sixteen cannot consent to oral or anal sodomy. In doing so, it overruled *Slaughterback v. State*, 1979 OK CR 28, 594 P.2d 780.~~

OUJI-CR 4-138A

RAPE AND SEX CRIMES – CONSENT OF MINOR

You are instructed that as a matter of law a minor under the age of **fourteen/sixteen** is incapable of giving **consent/agreement** to engaging in sexual conduct which is otherwise prohibited by law and the **agreement/consent** of such minor to such activity should be disregarded by you in determining the question of the defendant's guilt.

Notes on Use

This instruction is appropriate for rape and other sex crimes when the victim is a child below a particular age. This age is fourteen for prosecutions for rape in the first degree and sixteen for prosecutions for rape in the second degree and other sex crimes. *See* 21 O.S. ~~1991 & Supp. 2000~~ 2011 & Supp. 2017, §§ 1111-1114.

Committee Comments

The Oklahoma Court of Criminal Appeals held in *Kimbro v. State*, 1990 OK CR 4, ¶¶ 3-4, 857 P.2d 798, 799, that as a matter of law a child under the age of sixteen cannot consent to oral or anal sodomy. In doing so, it overruled *Slaughterback v. State*, 1979 OK CR 28, 594 P.2d 780.

F. DEFENSE OF ~~INSANITY~~ MENTAL ILLNESS

OUJI-CR 8-31

DEFENSE OF ~~INSANITY~~ MENTAL ILLNESS – INTRODUCTION

~~Evidence has been introduced of insanity as a defense to the charge that the defendant has committed the crime of~~ Defendant has raised the Defense of Mental Illness and asserts he/she should be found not guilty by reason of mental illness for **[Crime Charged in Information/ Indictment]**. Under ~~the laws of the State~~ Oklahoma law, no person can be convicted of a crime if that person was:

1) mentally ill ~~insane~~ at the time of the commission of the acts or omissions that constitute the crime~~.~~, and

2) was either unable to understand the nature and consequences of his or her actions or was unable to differentiate right from wrong, and

3) **has not been** diagnosed with antisocial personality disorder which substantially contributed to the act for which the person has been charged.

Notes on Use

The introductory instruction is simply meant to inform the jury that the defendant is claiming the defense of ~~insanity~~ mental illness and that the laws of the State do not permit conviction of a defendant who was ~~insane~~ mentally ill at the time of the commission of the acts with which he is charged, was either unable to understand the nature and consequences of his/her actions or was unable to differentiate right from wrong, and has not been diagnosed with antisocial personality disorder which substantially contributed to the act for which the person has been charged. ~~21 O.S. 1991, § 152(4);~~ 22 O.S. ~~1991~~ Supp. 2017, § 1161. The defense of mental illness replaces what was formerly known as the defense of insanity.

OUJI-CR 8-31A

DEFENSE OF MENTAL ILLNESS – GUILTY WITH MENTAL DEFECT

I am also required by law to instruct you concerning the verdict of guilty with a mental defect. A person is guilty with mental defect if that person committed the act for which the

person was charged and was either unable to understand the nature and consequences of **his/her** actions or was unable to differentiate right from wrong, **and has been** diagnosed with antisocial personality disorder which substantially contributed to the act for which the person has been charged. At the end of these instructions you will be asked to determine whether the Defendant is guilty, guilty with a mental defect, not guilty, or not guilty by reason of mental illness.

Statutory Authority: 22 O.S.Supp.2017, § 1161 (H)(4).

OUJI-CR 8-32

DEFENSE OF ~~INSANITY~~ MENTAL ILLNESS – ~~REQUIREMENTS~~ DEFINITIONS

~~A person is insane when that person is suffering from such a disability of reason or disease of the mind that **he/she** does not know that **his/her** acts or omissions are wrong and is unable to distinguish right from wrong with respect to **his/her** acts or omissions. A person is also insane when that person is suffering from such a disability of reason or disease of the mind that **he/she** does not understand the nature and consequences of **his/her** acts or omissions.~~

Mental Illness: A person is mentally ill if that person has a substantial disorder of thought, mood, perception, psychological orientation or memory that significantly impaired judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life.

Mental Defect: A person has a mental defect if that person has been diagnosed with antisocial personality disorder which substantially contributed to the act for which the person has been charged.

Antisocial Personality Disorder: An antisocial personality disorder is a pervasive pattern of disregard for and violation of the rights of others, occurring since the age of fifteen (15). It is indicated by three or more of the following:

1. Failure to conform to social norms with respect to lawful behaviors, as indicated by repeatedly performing acts that are grounds for arrest.

2. Deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure.

3. Impulsivity or failure to plan ahead.

4. Irritability and aggressiveness, as indicated by repeated physical fights or assaults.

5. Reckless disregard for safety of self or others.

6. Consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations.

7. Lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.

In addition, 1) the individual is at least eighteen (18) years of age, 2) there is evidence of conduct disorder with onset before fifteen (15) years of age, and 3) the occurrence of antisocial behavior is not exclusively during the course of schizophrenia or bipolar disorder.

Statutory Authority: ~~21 O.S. 1991, § 152(4);~~ 22 O.S. ~~1991~~ Supp. 2017, ~~§§ 914~~, 1161 (H).

~~Committee Comments~~ Notes on Use

This Instruction should be modified if the definition is modified by a subsequent edition of the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5).

~~OUJI-CR 8-32, the instruction on requirements of insanity, defines insanity for the jury. The definition of insanity stated in this instruction is the M'Naghten Test for insanity, which has long been the test for insanity in Oklahoma. *Pugh v. State*, 1989 OK CR 70, ¶ 5, 781 P.2d 843, 844; *Richardson v. State*, 1977 OK CR 298, ¶ 8, 569 P.2d 1018; *French v. State*, 1966 OK CR 84, ¶ 14, 416 P.2d 171; *Dare v. State*, 1963 OK CR 6, ¶ 34, 378 P.2d 339. The M'Naghten Test is the judicial formulation of the statutory definition of insanity found at 21 O.S. 2011, § 152(4). Under this definition, a person is insane if he or she is either unable to differentiate right from wrong or understand the nature and consequences of his or her acts. *Johnson v. State*, 1992 OK CR 71, ¶ 8, 841 P.2d 595, 596 (ordering new trial because jury instruction used conjunctive word "and" rather than disjunctive word "or").~~

~~The instructions on insanity do not include any comment or statement on other possible tests of insanity for several rea-~~

sons. First, the law is clearly settled in Oklahoma that the M'Naghten Test is the correct test for insanity. Any reference to other possible tests of insanity would either incorrectly state the law or possibly confuse the jury.

Second, the product test of *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), has been specifically rejected by the Court of Criminal Appeals in *Dare v. State*, *supra*. Moreover, the irresistible impulse test has long been rejected by the Court of Criminal Appeals. *Snodgrass v. State*, 1918 OK CR 139, 175 P. 129, 15 Okl. Cr. 117. *See also* 21 O.S. 2011, § 154.

Insanity may be induced by long periods of excessive alcohol or drug consumption, which may cause a continuing mental disease that deprives a person of the capacity to distinguish right from wrong. Voluntary intoxication that results in temporary mania does not constitute a mental defect that is necessary for a valid defense of insanity, however. *Jones v. State*, 1982 OK CR 112, ¶ 8, 648 P.2d 1251, 1254.

It should be noted that the defense "that the person committed the act charged without being conscious thereof," i.e., automatism, is set out in 21 O.S. 2011, § 152(6). *See Sellers v. State*, 1991 OK CR 41, ¶ 32, 809 P.2d 676, 687. In *Jones v. State*, 1982 OK CR 112, 648 P.2d 1251, the Oklahoma Court of Criminal Appeals described this defense as follows:

> The defense of unconsciousness applies to situations where the defendant's otherwise criminal conduct results from an involuntary act totally beyond the control and knowledge of the defendant. The defense is not the same as insanity. [Citation omitted.]. To invoke an unconsciousness defense the defendant is not required to present evidence of a mental disease or defect.

1982 OK CR 112, ¶ 31, 648 P.2d at 1258.

OUJI-CR 8-33, the instruction on burden of proof, contains the substance of the jury instructions on the burden of proof for the defense of insanity that the Oklahoma Court of Criminal Appeals approved in *Thomas v. State*, 1990 OK CR 36, ¶ 4, 792 P.2d 1195, 1196, and *Morris v. State*, 1988 OK CR 298, ¶ 7, 766 P.2d 1388, 1390. Since insanity is a defense, the defendant has the burden to come forward with evidence of insanity, unless the evidence of the State raises the issue. *Wooldridge v. State*, 1990 OK CR 77, ¶16, 801 P.2d 729, 733. If the defendant does not come forward with evidence of insanity, insanity as an issue simply never enters the trial and never enters the consideration of the jury. If the defendant brings forward evidence of insanity, the question of whether sufficient evidence has been presented to require the trial judge to instruct the jury on the defense of insanity is a mixed question of law for the trial judge and a question of fact for the jury. *Brewer v. State*, 1986 OK CR 55, ¶ 17, 718 P.2d 354, 361. Accord *Ake v. State*, 1989 OK CR 30, ¶ 43, 778 P.2d 460, 470 (reaffirming *Brewer*). Once the jury determines that the defendant has presented sufficient evidence to raise the defense of insanity, the State's burden of overcoming that defense is a burden of proof beyond a reasonable doubt. *Taylor v. State*, 1994 OK CR 61, ¶ 10, 881 P.2d 755, 758; *Adair v. State*, 1911 OK CR 296, 118 P. 416, 6 Okl. Cr. 284.

The Commission has decided not to draft instructions concerning temporary versus permanent insanity. Such instructions would only confuse the jury, in the opinion of the Commission, because the issue the jury should focus upon is whether the defendant was sane at the time of the commission of the acts with which he is charged. The jury should not be confused with distinctions concerning the diagnosis or prognosis of the defendant's mental disease, which are irrelevant to the question which the jury must resolve. Of course, evidence on the defendant's mental health before and after the commission of the acts with which the defendant is charged is relevant to the jury's determination. But evidence on the defendant's mental health should be treated as all other evidence, and an evidentiary instruction informing the jury that it is to determine the weight to be given the evidence should be sufficient. *See Adams v. State*, 1930 OK CR 419, 292 P. 385, 49 Okl. Cr. 94.

Nor did the Commission draft instructions on lay versus expert testimony solely for the defense of insanity. The Commission was of the opinion that the usual evidentiary instructions on how the jury

~~should handle lay testimony and expert testimony are sufficient, and that no special evidentiary instructions for the defense of insanity are needed.~~

OUJI-CR 8-33

DEFENSE OF MENTAL ILLNESS – REQUIREMENTS

The existence of mental illness standing alone is not sufficient to establish the Defense of Mental Illness. Instead, a person is not guilty by reason of mental illness when that person committed the act for which the person has been charged while mentally ill and was either unable to understand the nature and consequences of **his/her** actions or was unable to differentiate right from wrong, and has not been diagnosed with antisocial personality disorder which substantially contributed to the act for which the person has been charged.

Statutory Authority: 21 O.S. 2011, § 152(4); 22 O.S.2011 & Supp.2017, §§ 914, 1161.

Notes on Use

The major difference between not guilty by reason of mental illness and guilty with a mental defect is whether the defendant has been diagnosed with antisocial personality disorder that substantially contributed to the act for which the defendant has been charged. The governing statute, 22 O.S. Supp. 2017, § 1161, defines antisocial personality disorder by reference to the definition in the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-5), or its subsequent editions. This condition is commonly called sociopathy, and it is characterized by a pervasive pattern of disregard for, or violation of, the rights of others and an impoverished moral sense or conscience.

OUJI-CR 8-33A

DEFENSE OF MENTAL ILLNESS – CONSIDERATION

In considering the Defense of Mental Illness, you shall first determine whether, at the time of the commission of the acts or omissions that constitute the crime, the defendant was either unable to understand the nature and consequences of **his/her** actions or was unable to differentiate right from wrong. If you find that the defendant was able to understand the nature and consequences of **his/her** actions and was able to differentiate right from wrong, then the Defense of Mental Illness does not apply.

If you find either that the defendant was unable to understand the nature and consequences of his or her actions or was unable to differentiate right from wrong, then you must determine whether the defendant has been diagnosed with antisocial personality disorder which substantially contributed to the act for which the person has been charged. If you find that the defendant has been so diagnosed and that **his/her** antisocial personality disorder substantially contributed to **his/her** criminal act, you shall find the defendant guilty with mental defect if the State has proved all elements of the charged offense beyond a reasonable doubt.

If you find that the defendant has not been diagnosed with antisocial personality disorder or that the disorder did not substantially contribute to **his/her** criminal act, you must determine whether the defendant is mentally ill. If you find that at the time of the commission of the acts or omissions that constitute the crime the defendant was mentally ill, and that the defendant was either unable to understand the nature and consequences of **his/her** actions or was unable to differentiate right from wrong, then the defendant is not guilty by reason of mental illness. If you find that the defendant was not mentally ill, then the Defense of Mental Illness does not apply.

OUJI-CR 8-33B

DEFENSE OF ~~INSANITY~~ MENTAL ILLNESS – BURDEN OF PROOF

Every person is presumed to be ~~sane~~of sound mind, and unless ~~there is proof of insanity, the State may rely on the presumption of sanity and not offer any proof that the defendant was sane~~ evidence is produced that the defendant is not guilty by reason of mental illness, the defense of mental illness does not apply. Therefore, unless you determine that sufficient evidence has been presented to raise a reasonable doubt ~~as to the defendant's sanity at the time of the commission of the acts or omissions that constitute the crime, you are to presume that **he/she** was sane~~ that the defendant is not guilty by reason of mental illness, the State may rely on this presumption and not offer any proof that the defense of mental illness does not apply. However, if sufficient evidence has been presented to raise a reasonable doubt ~~as to **his/her** sanity~~ that the defendant is not

guilty by reason of mental illness, the State has the burden to prove beyond a reasonable doubt that the defendant was ~~sane at the time of the commission of the acts or omissions that constitute the crime~~ not acting under circumstances sufficient to constitute the defense of mental illness. If you find that the State has failed to sustain that burden, then the defendant must be found not guilty by reason of ~~insanity~~ mental illness.

Statutory Authority: 21 O.S. 2011, § 152(4); 22 O.S. Supp. 2017, §§ 914, 1161.

Notes on Use

The explicit language of 22 O.S. Supp.2017, § 1161(A)(4) requires the defendant to raise the Defense of Mental Illness. Every person is presumed to be of sound mind and capable of committing crimes, thus, it is the defendant's burden to produce evidence establishing the defense of not guilty by reason of mental illness. *See* 21 O.S. 2011, § 152(4).

OUJI-CR 8-33~~A~~C

DEFENSE OF ~~INSANITY~~ MENTAL ILLNESS – EXPLANATION OF CONSEQUENCES OF VERDICT OF NOT GUILTY BY REASON OF ~~INSANITY~~ MENTAL ILLNESS AND GUILTY WITH MENTAL DEFECT

If you decide that the defendant ~~was insane~~ is not guilty by reason of mental illness at the time of the commission of the crime charged, the defendant shall not be released from confinement in a mental hospital until the court determines that the defendant is not at that time dangerous to the public peace and safety by being a risk of harm to **himself/herself** or others on account of a mental illness.

If you decide that the defendant is guilty with mental defect, you shall then determine the proper punishment as prescribed in these Instructions. A defendant found to be guilty with mental defect shall not be placed in the community without undergoing a mental examination and adoption of a treatment plan.

Statutory Authority: 22 O.S. Supp. 2017 ~~2007~~, § 1161(A)(2), (A)(5).

Notes on Use

This Instruction should be given when a defense of ~~insanity~~ not guilty by reason of mental illness has been raised. The Court of Criminal Appeals held in *Ullery v. State*, 1999 OK CR 36, ¶ 28, 988 P.2d 332, 346, that a jury instruction on the consequences of a verdict of not guilty by reason of insanity was not required. However, in an unpublished decision, *Fears v. State*, No. F-2004-1279 (July 7, 2006), the Court of Criminal Appeals has suggested that trial courts should use an instruction explaining the consequences of a verdict of not guilty by reason of insanity. There is a risk that jurors might confuse a verdict of not guilty by reason of ~~insanity~~ mental illness with other not guilty verdicts and think that the defendant would go free if they returned a verdict of not guilty by reason of ~~insanity~~ mental illness. *See Lyles v. United States*, 254 F.2d 725, 728 (D.C. Cir. 1957), *overruled in part in Brawner v. United States*, 471 F.2d 969 (D.C. Cir. 1972). This Instruction ought to avoid both juror confusion and also unnecessary speculation by jurors during their deliberations.

OUJI-CR 8-34

DEFENSE OF ~~INSANITY~~ MENTAL ILLNESS – FORM OF VERDICT

IN THE DISTRICT COURT OF THE ____ JUDICIAL DISTRICT OF THE STATE OF OKLAHOMA SITTING IN AND FOR _____ COUNTY

THE STATE OF OKLAHOMA,

Plaintiff,)

vs) Case No. _____

JOHN DOE,)

Defendant.)

VERDICT

COUNT 1 – **[CRIME CHARGED]**

We, the jury, empaneled and sworn in the above-entitled cause, do, upon our oaths, find as follows:

Defendant is:

_____ Guilty and fix punishment at _____.

_____ Guilty with mental defect and fix punishment at _____.

_____ Not guilty.

_____ Not guilty by reason of ~~insanity~~ mental illness.

_____

FOREPERSON

_____

Statutory Authority: 21 O.S. 2011, § 152(4); 22 O.S. 2011 & Supp. 2017, §§ 914, 1161.

OUJI-CR 10-13

RETURN OF VERDICT – BASIC INSTRUCTION

If you find beyond a reasonable doubt that the defendant committed the crime of **[Crime Charged]**, you shall return a verdict of guilty by marking the Verdict Form [**for the crime of (Crime Charged)**] appropriately.

If you have a reasonable doubt of the defendant's guilt of the charge of **[Crime Charged]**, or you find that the State has failed to prove each element of **[Crime Charged]** beyond a reasonable doubt, you shall return a verdict of not guilty by marking the Verdict Form [**for the crime of (Crime Charged)**] appropriately.

If you find the defendant guilty, you shall then determine the proper punishment. The crime of [**Crime Charged**] is punishable by **[State Range of Punishment (including any mandatory fine)]. [You may also impose a fine of not exceeding one/ten thousand dollars ($1,000/10,000).]** When you have decided on the proper punishment, you shall fill in the appropriate space on the Verdict Form [**for the crime of (Crime Charged)**] and return the verdict to the Court.

Notes on Use

This instruction should be used in cases where there are no lesser included offenses charged, and there is no sentence enhancement for prior convictions. For instructions in cases involving lesser included offenses, *see* OUJI-CR 10-23 through 10-27. For instructions in cases involving sentence enhancement for prior convictions, *see* OUJI-CR 10-15 through 10-22. OUJI-CR 10-13A or 10-13B should be used for crimes listed in 21 O.S. Supp. ~~2015~~ 2017, § 13.1, and OUJI-CR 10-13C should be used for crimes requiring post-imprisonment community supervision.

For any offense for which no fine is otherwise provided by law, the punishment may include a fine imposed under 21 O.S. 2011, § 64. *Daniels v. State*, 2016 OK CR 2, ¶ 5, 369 P.3d 381, 384; *Fite v. State*, 1993 OK CR 58, ¶¶ 8-11, 873 P.2d 293, 295. The Oklahoma Court of Criminal Appeals has provided an example of a proper instruction in *Daniels v. State*, as follows: "The crime of SHOOTING WITH INTENT TO KILL is punishable by imprisonment in the state penitentiary not exceeding life. In addition, you may also impose a fine not exceeding ten thousand ($10,000.00) dollars." 2016 OK CR 2, ¶ 5, 369 P.3d 381, 384.

If there are multiple counts, this instruction should be repeated for each count, and the instruction should conclude with the statement: "You may find the defendant guilty of [one or both] [some or all] counts or not guilty of [one or both] [some or all] counts."

The Committee recommends individual Verdict Forms on separate sheets of paper for each Count. A Verdict Form to go with this instruction is provided in OUJI-CR 10-14, *infra*.

2018 OK CR 28

STATE OF OKLAHOMA, Appellant, -vs- BROOKE HALIBURTON, Appellee. and STATE OF OKLAHOMA, Appellant, -vs- CLINT GOURLEY, Appellee and STATE OF OKLAHOMA, Appellant, -vs- JONATHAN KNIPE, Appellee

No. S-2017-919. No. S-2017-920. No. S-2017-921. August 2, 2018

OPINION

LEWIS, VICE PRESIDING JUDGE:

¶1 The State of Oklahoma appeals to this Court, pursuant to this Court's Rule 6.1, from the order of a reviewing judge affirming an adverse ruling of the preliminary hearing magistrate in Case Nos. CF-2016-844, CF-2016-845 and CF-2016-846 in the District Court of Rogers County. *See* 22 O.S.2011, §§ 1089.1 – 1089.7; Rule 6.1, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018). The three cases are consolidated for the purpose of consideration on appeal.

¶2 On September 14, 2016, through September 16, 2016, the Rogers County Sheriff's Department conducted surveillance of the residence shared by Brooke Haliburton and Jonathan Knipe. The Honorable Stephen Pazzo,

Associate District Judge, approved a search warrant for this residence on September 19, 2016. The Sheriff's Department executed the search warrant on September 19, 2016.

¶3 On October 4, 2016, Haliburton and Knipe were both charged with Count 1 – Child Neglect, Count 2 – Child Neglect, Count 3 – Possession of CDS With Intent to Distribute Within 2000 Feet of a Park, Count 4 – Maintaining a Place for Keeping/Selling a Controlled Substance, Count 5 – Unlawful Use of a Communication Facility, Count 6 – Possession of a Controlled Dangerous Substance and Count 7 – Unlawful Possession of Drug Paraphernalia in Rogers County District Court Case Nos. CF-2016-844 and CF-2016-846, respectively. On the same day Clint Gourley was charged with Count 1 – Possession of Controlled Dangerous Substance Within 1000 Feet of a School or Park and Count 2 – Unlawful Possession of Drug Paraphernalia in Rogers County District Court Case No. CF-2016-845.

¶4 Prior to the preliminary hearing Haliburton and Knipe each filed a motion to suppress challenging the search warrant.[1] Gourley entered an oral Motion to Suppress during the preliminary hearing on August 2, 2017, also challenging the sufficiency of the search warrant. The preliminary hearing was conducted over a three-day period before the Honorable Terrell Crosson, Special Judge.[2] At the conclusion of this hearing Judge Crosson sustained the motions to suppress and dismissed the charges against Appellees. The State announced its intent to appeal pursuant to 22 O.S.2011, §§ 1089.1 – 1089.7 and Rule 6.1, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018).

¶5 The State's appeal was assigned by the Honorable Terry McBride, District Judge, to a reviewing judge, the Honorable Robert E. Reavis, II, Associate District Judge.[3] *Id.* Judge Reavis reviewed the relevant portions of the record and following an August 24, 2017, hearing, affirmed Judge Crosson's order sustaining Appellees' motions to suppress and dismissing the charges against Appellees. The State brings this appeal from the rulings of the District Court judges.

¶6 The State asserts the following propositions of error:

> 1. The Magistrate erred in sustaining the Defendant's Motion to Suppress the Search Warrant alleging that there was insufficient probable cause to support the search warrant and terminating proceedings of the case, resulting in a *de facto* Demurrer.[4]
>
> 2. The District Court erred in terminating the proceedings; even if the search warrant was deficient, the evidence should still not be suppressed due to good faith.[5]

¶7 This appeal was automatically assigned to the Accelerated Docket of this Court pursuant to Rule 11.2(A)(4), *Rules, supra*. The propositions or issues were presented to this Court in oral argument on April 19, 2018, pursuant to Rule 11.2(E), *Rules, supra*. At the conclusion of oral argument, this Court **REVERSED** the rulings of the District Court judges and **REMANDED** this case to the District Court for further proceedings consistent with this opinion.

FACTS

¶8 The Rogers County Sheriff's Office received several tips from unproven confidential sources stating that Knipe and Haliburton, with the help of Joshua James and Sheldon Coen, were selling methamphetamine from their home where they lived with their two small children. These individuals were known to the deputies due to the deputies' past experiences with the individuals involving illegal narcotics. The officers conducted surveillance of this home on September 14, 2016, and September 15, 2016, keeping the home under observation from approximately 10 p.m. to 2 a.m.[6] Knipe, Haliburton, James and Coen were all observed at the home along with two small children. Knipe's behavior was erratic and, according to officers, he appeared to be displaying both physical and behavioral symptoms consistent with methamphetamine use. The deputies observed high volumes of automobile traffic at the residence on both nights, with the vehicles only remaining at the location for short periods. The deputies observed Coen approach one of the vehicles and conduct what appeared to be a drug transaction. Deputy Quint Tucker prepared the Affidavit for Search Warrant in this case and on September 19, 2016, presented it to Judge Pazzo who signed the affidavit, resulting in the issuance of a facially valid search warrant. Deputies served the warrant on September 19, 2016, and found approximately nine grams of methamphetamine, marijuana, small baggies, several smoking devices, digital scales and syringes.

¶9 During the search, Gourley drove up to the home, parked in front, and walked toward

the home. A plain-clothes officer contacted him in the front yard and Gourley stated he had a marijuana pipe in his truck. Later Gourley admitted he came to the home to purchase methamphetamine. A search of Gourley's truck produced a marijuana pipe, a methamphetamine pipe and a small baggie of methamphetamine.

ANALYSIS

¶10 The issues in this case involve the search warrant issued by Judge Pazzo on September 19, 2016. Judge Pazzo signed the search warrant based on an affidavit prepared by Deputy Tucker, resulting in the warrant being served and charges being filed. At the preliminary hearing Judge Crosson determined Judge Pazzo's decision was an error and that the deputies' subsequent reliance on this warrant was misplaced. Judge Crosson granted Appellees' motions to suppress and dismissed the criminal cases. Judge Reavis affirmed Judge Crosson's order pursuant to a Rule 6.1 appeal and this Court must now determine if Judge Reavis's decision constitutes an abuse of discretion. *See* 22 O.S.2011, §§ 1098.1 – 1089.7; Rule 6.1, *Rules, supra.*

¶11 The central issues in this case are whether the warrant was based on probable cause and whether the "good faith" exception applies. Appellees argue that the affidavit in this case lacked sufficient probable cause and that the affidavit was so obviously lacking that the "good faith" exception to the exclusionary rule should not protect the deputies' actions in this case.

¶12 In State appeals, this Court reviews the trial court's decision for abuse of discretion. *See State v. Salathiel*, 2013 OK CR 16, ¶ 7, 313 P.3d 263, 266. An abuse of discretion has been defined as "any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue." *State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194. An abuse of discretion has also been described as "a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *Id.*

¶13 We assume for purposes of this discussion the trial court did not abuse its discretion in finding the affidavit lacked sufficient probable cause. We now turn to the second issue of whether the "good faith" exception applies. The United States Supreme Court addressed this search warrant issue in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). This Court adopted the *Leon* doctrine in *State v. Sittingdown*, 2010 OK CR 22, ¶ 17, 240 P.3d 714. *See State v. Thomas*, 2014 OK CR 12, ¶ 11, 334 P.3d 941, 945.

¶14 In *Leon*, law enforcement officers with the Burbank Police Department received information from unproven confidential sources alleging that drugs were being sold by two individuals. The investigation led the officers to Alberto Leon and Ricardo Del Castillo, who officers determined had prior criminal history involving illegal narcotics. The officers conducted surveillance of a home and observed several cars stop at the house. The drivers would enter the home and then return to their vehicles carrying small packages and leave. One of the individuals observed coming and going from the home was determined to have prior involvement with illegal narcotics. Officers prepared an affidavit for a search warrant and a facially valid search warrant was subsequently issued.

¶15 The lower courts in *Leon* found the search warrant affidavit lacked sufficient probable cause and this determination was not challenged. The issue before the Supreme Court was "[w]hether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective." *Leon*, 468 U.S. at 905.

¶16 The Supreme Court held that the exclusionary rule should not act to bar law enforcement activities that are objectively reasonable. *Leon*, 468 U.S. at 918-923. When a reviewing judge determines that a search warrant affidavit does not contain probable cause but that the subsequently issued warrant is facially valid, it will be an unusual case where the good faith of the officers executing the warrant does not allow the admission of the evidence seized. *Id.*

¶17 Trial courts reviewing such situations must first determine whether the search warrant was supported by an affidavit containing sufficient probable cause. If probable cause is present then the officer's good faith is not an issue. In situations where a reviewing court determines that probable cause is lacking, it must then determine if the supporting affidavit was more than a "bare bones" affidavit. If "no reasonably well trained police officer could have believed that there existed probable cause to search" then it is a "bare bones" affidavit

and the exclusionary rule should bar the evidence seized. *Id.* at 926. In cases such as *Leon*, where a subsequently issued search warrant is later challenged and the supporting affidavit is something more than a "bare bones" affidavit but is, or might be, less than probable cause, trial courts must turn to the holding in *Leon* to consider the officers' good faith.

¶18 In these situations, it is the rare and unusual case where the "good faith" exception to the exclusionary rule will not allow the evidence to be admitted. *Id.* at 918, 926. The test to be used in "good faith" exception determinations was explained in *Leon* as follows:

> Suppression therefore remains an appropriate remedy if **1)** ***the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth.*** *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). The exception we recognize today will also not apply in cases where **2)** ***the issuing magistrate wholly abandoned his judicial role*** in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979); in such circumstances, no reasonably well trained officer should rely on the warrant. Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Brown v. Illinois*, 422 U.S., at 610-611, 95 S.Ct., at 2265–2266 (POWELL, J., concurring in part); *see Illinois v. Gates, supra*, 462 U.S., at 263–264, 103 S.Ct., at 2345–2346 (WHITE, J., concurring in the judgment). **3)** ***Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid.*** Cf. *Massachusetts v. Sheppard*, 468 U.S., at 988–991, 104 S.Ct., at 3428-3430.

Leon, 468 U.S. at 923 (emphasis and numbering added). If none of these three questions are answered yes, the "good faith" exception to the exclusionary rule should prevent suppression of the evidence. *Id.* at 925-926.

¶19 The facts in this case are similar to those in *Leon*. Both search warrant affidavits were based on surveillance of suspected drug dealers pursuant to information provided by unverified informants. In both cases officers observed various activities they believed to be consistent with illegal narcotics transactions. The affidavit in this case also included statements that deputies observed Coen conduct a drug transaction and that Knipe displayed mannerisms and behavior indicative of Methamphetamine use. While there has been some argument regarding whether the affidavit in this case contained sufficient probable cause, Appellees were not able to establish that this affidavit was a "bare bones" affidavit. This necessitates determining pursuant to *Leon* whether the officers' "good faith" in this case should prevent the suppression of the evidence in this case.

¶20 Neither Judge Crosson nor Judge Reavis properly applied the *Leon* holding to the facts in this case. Judge Crosson flatly stated that the "good faith" exception did not apply in this case. We find that had Judge Crosson or Judge Reavis properly applied the *Leon* holding he should have found that the deputies acted in an objectively reasonably manner and that based on the "good faith" exception the evidence should not have been suppressed. First, nothing in the record, the pleadings or in the oral arguments made to this Court established Judge Pazzo was misled by information in this affidavit, i.e., that Deputy Tucker knew the information was false or would have known it was false except for his reckless disregard of the truth. *Id.* at 923. Next, there is nothing in this record indicating Judge Pazzo wholly abandoned his judicial role. *Id.* No claim was made by the parties that Judge Pazzo failed to perform his function in a neutral and detached manner. *Id.* at 914. Finally, Appellees failed to establish that this warrant was so facially deficient that the deputies could not reasonably presume it to be valid. The warrant in this case was more than adequate in particularizing the place to be searched and the things to be seized. *Id.* at 923.

¶21 The State has established that Judge Reavis abused his discretion when he affirmed Judge Crosson's order dismissing these cases without properly applying *Leon*. Because neither judge addressed the facts in this case pursuant to the applicable legal standard established in *Leon*, Judge Reavis's order affirming Judge Cros-

son's suppression of the evidence based on an insufficient affidavit for a search warrant in this case was an "unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue" and was "a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d at 1194.

DECISION

¶22 The order of the District Court of Rogers County affirming the suppression of evidence and dismissal of Rogers County District Court Case Nos. CF-2016-844, CF-2016-845 and CF-2016-846 is **REVERSED**. These cases are **REMANDED** to the District Court of Rogers County for further proceedings consistent with this opinion. 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 ROGERS COUNTY
THE HONORABLE ROBERT E. REAVIS, II,
ASSOCIATE DISTRICT JUDGE

APPEARANCES IN TRIAL

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OPINION BY: LEWIS, V.P.J.

LUMPKIN, P.J.: Concur
HUDSON, J.: Specially Concur
KUEHN, J.: Concur
ROWLAND, J.: Concur

HUDSON, J., SPECIALLY CONCURS:

¶1 I agree that the "good faith" exception to the exclusionary rule applies in this case and that Judge Reavis's order affirming Judge Crosson's suppression of the evidence was an abuse of discretion. I write separately to observe too that Gourley had no apparent standing to challenge the search of the home in this case. Gourley was intercepted in the front yard and later told authorities he had come to the trailer to purchase methamphetamine from Knipe. This admission, in turn, led to the discovery of methamphetamine and other contraband in Gourley's truck. Gourley failed to show that he had a legitimate expectation of privacy in the home where Knipe and Haliburton lived. *See State v. Stark*, 2018 OK CR 16, ¶ 7, __P.3d__ ("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.'") (quoting *Terry v. State*, 2014 OK CR 14, ¶ 7, 334 P.3d 953, 955). For this reason alone, the motion to suppress should have been denied with respect to Gourley. *See Minnesota v. Carter,* 525 U.S. 83, 90-91, 119 S. Ct. 469, 473-74, 142 L. Ed. 2d 373 (1998).

¶2 I agree too that this case does not involve a "bare bones" affidavit which would require application of the exclusionary rule. Indeed, in my view, the totality of circumstances provided the magistrate a substantial basis for concluding that probable cause existed, based upon the information contained in the search warrant affidavit, that contraband would be found in Haliburton's and Knipe's residence. *See Marshall v. State*, 2010 OK CR 8, ¶ 49, 232 P.3d 467, 479 (discussing standard of review for determining validity of search warrant). The search warrant affidavit stated that deputies observed a high volume of car traffic during the overnight hours on two separate nights by multiple vehicles to the residence, which was consistent with the conduct of drug transactions; Knipe's erratic behavior outside the trailer during that period was consistent with methamphetamine use; and Sheldon Coen – one of the individuals named by the informant as selling methamphetamine with Knipe – conducted an apparent (though unconfirmed) drug transaction with a car that pulled up to the residence then left during this same period.

Based on these facts, the magistrate could conclude there was probable cause to believe that contraband would be found in Haliburton's and Knipe's residence. I therefore concur in today's decision.

1. The three cases were combined for the purposes of the preliminary hearing and motions to suppress.

2. The preliminary hearing took place June 21, 2017, July 19, 2017, and August 2, 2017.

3. Judge McBride is the Presiding Judge for the Northeast Judicial Administrative District. Judge Reavis sits in Ottawa County which is located in the Northeast Judicial Administrative District.

4. The State's Proposition 1 was identical in its appeals in Knipe's and Haliburton's cases, and was stated as listed above. The State's Proposition 1 in its appeal in Gourley's case was "The Magistrate erred in sustaining the Defendant's Demurrer to the evidence presented at the preliminary hearing and his Oral Motion to Suppress the evidence as being 'fruit of the poisonous tree.'"

5. The only difference in the wording of the State's Proposition 2 in these three appeals is that in its brief in Knipe's case the State used the word "suppressed" instead of the word "excluded."

6. The surveillance continued into the early morning hours of September 16, 2016.

HUDSON, J. SPECIALLY CONCURRING

1. Probable cause means "more than bare suspicion" but less than evidence which would justify a conviction. *Brinegar v. United States*, 338 U.S. 160, 175, 69 S. Ct. 1302, 1310, 93 L. Ed. 1879 (1949). Probable cause is a "'practical, nontechnical conception[,]'" which deals with probabilities based on "'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Illinois v. Gates*, 462 U.S. 213, 231, 103 S. Ct. 2317, 2328, 76 L. Ed. 2d 527 (1983) (quoting *Brinegar*, 338 U.S. at 175, 176, 69 S. Ct. at 1310, 1311). The Supreme Court has emphasized that "'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.'" *Gates*, 462 U.S. at 235, 103 S. Ct. at 2330 (quoting *Spinelli v. United States*, 393 U.S. 410, 419, 89 S. Ct. 584, 590, 21 L. Ed 2d 637 (1969)).

2018 OK CR 29

J.M.F., Appellant, v. THE STATE OF OKLAHOMA, Appellee

No. J-2018-0278. August 2, 2018

SUMMARY OPINION

KUEHN, JUDGE:

¶1 A Delinquency Petition was filed on January 23, 2017, charging Appellant, J.M.F., age thirteen, with two counts of Indecent or Lewd Acts with a Child Under Sixteen, pursuant to 21 O.S.Supp. 2015, § 1123(A)(2), in Oklahoma County District Court Case No. JDL-2017-1. Following a December 2017 trial, the jury found Appellant delinquent on the first count and not delinquent on the second count. The Honorable Cassandra Williams, Special Judge, adjudicated Appellant delinquent pursuant to 10A O.S.Supp. 2014, § 2-2-402. Appellant appeals from the order adjudicating him a delinquent child. 10A O.S.2011, § 2-2-601.

¶2 Pursuant to Rule 11.2(A)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018), this appeal was automatically assigned to the Accelerated Docket of this Court. Oral argument was held June 21, 2018. Rule 11.2(E). As we find merit in Appellant's first proposition of error, the adjudication is reversed and remanded for a new trial on Count 1.

¶3 Appellant's first proposition of error argues he was denied due process of law when the trial judge broke sequestration over defense counsel's objection in violation of 22 O.S.2011, § 857. Section 857 directs:

> After hearing the charge, the jury may either decide in court, or may retire for deliberation. If they do not agree without retiring, one or more officers must be sworn to keep them together in some private and convenient place, and not to permit any person to speak to or communicate with them, nor do so themselves, unless it be by order of the court, or to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed, or when ordered by the court.

In this case, at 10:43 p.m. on December 6, 2017, when the jury was unable to reach a unanimous verdict on one of the counts, Judge Williams released the jurors to go home for the evening. Counsel for Appellant objected. The judge, in overruling the objection, held that since this is not a purely criminal case and because of the Legislature's intent under the Juvenile Code, she did not believe the Rule of Sequestration applied. She also relied upon 10A O.S.Supp. 2014, § 2-2-402(A), which directs that all adjudicative hearings shall be conducted according to rules of evidence and "may be adjourned from time to time." Judge Williams recessed deliberations until 9:00 a.m. the following day with an admonition.

¶4 A child has a right to demand a trial by jury in adjudicatory hearings to determine if the child is delinquent. 10A O.S.2011, § 2-2-401. Section 2-2-402(A) requires adjudicative hearings be conducted according to the rules of evidence. We agree that Section 2-2-402(A) allows adjudicative hearings to be adjourned from time to time, but once the jury has been charged, Section 857 controls.

¶5 The plain purpose and intent of the law regarding sequestration "is to surround a trial by such safeguards as will exclude all external and improper influence from the jury, and thus protect the right of a defendant to a fair and

impartial trial." *Evans v. State*, 1924 OK CR 4, 18, 221 P. 794, 797, *overruled in part on other grounds by Neill v. State*, 1994 OK CR 69, ¶ 33, 896 P.2d 537, 550. As set forth in *Johnson v. State:*

> This statute [Section 857], or a comparable version of it, has been on the books in Oklahoma since 1890. It is a well established part of this State's jurisprudence and even the earliest cases found it to mandate that a jury be kept together between the time the cause is submitted and the verdict returned. For almost a century, this Court's treatment of this statute has remained consistent, perhaps because neither its language nor its intent is ambiguous. Under the plain language of Section 857, after the jury has heard the charge, they are to remain together for deliberation until a verdict is returned. If they do not decide in court they must immediately retire for deliberations after having been put in the charge of an officer sworn to keep them together and away from outside communications.

Johnson v. State, 2004 OK CR 23, ¶¶ 17-18, 93 P.3d 41, 46. When a violation of Section 857 occurs over defense objection, as occurred in this case, prejudice is presumed and the burden falls to the State to prove there was no harm done. *Johnson*, 2004 OK CR 23, ¶¶ 20 & 24, 93 P.3d at 47-48.

¶6 The State argues that there was no prejudice by allowing the jury to break sequestration overnight as the proceedings were confidential and the jury was instructed not to discuss the case with anyone outside of themselves. The State's argument is unpersuasive.

¶7 The record is void of any evidence presented by the State to overcome the presumption of prejudice. Absent inquiries made of the jurors upon their return the next morning, there can be no showing the error was harmless.

¶8 Finding merit to Appellant's first proposition of error, we do not find it necessary to address the remaining propositions of error.

DECISION

¶9 The order of the District Court of Oklahoma County adjudicating Appellant as a Delinquent Child in Case No. JDL-2017-1 is **REVERSED and REMANDED for further proceedings consistent with this Opinion**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, THE HONORABLE CASSANDRA WILLIAMS, SPECIAL JUDGE

APPEARANCES AT TRIAL

Jarrod Stevenson, Thomas Griesedieck, Attorneys at Law, 903 N.W. 13th St., Oklahoma City, OK 73106, Counsel for Defendant

Janet Brown, Colleen Galaviz, Assistant District Attorneys, District No. 7, 5905 N. Classen Ct., Ste. 301, Oklahoma City, OK 73118, Counsel for the State

APPEARANCES ON APPEAL

Danny Joseph, Sarah MacNiven, Appellate Defense Counsel, Oklahoma Indigent Defense System, P.O. Box 926, Norman, OK 73070, Counsel for Appellant

Janet Brown, Assistant District Attorney, District No. 7, 5905 N. Classen Ct., Ste. 301, Oklahoma City, OK 73118, Counsel for the State

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

2019 OBA Board of Governors Vacancies

Nominating Petition Deadline: 5 p.m. Friday, Sept. 7, 2018

OFFICERS

President-Elect
Current: Charles W. Chesnut, Miami
Mr. Chesnut automatically becomes OBA president Jan. 1, 2019
(One-year term: 2019)
Nominee: **Vacant**

Vice President
Current: Richard Stevens, Norman
(One-year term: 2019)
Nominee: **Lane R. Neal, Oklahoma City**

BOARD OF GOVERNORS

Supreme Court Judicial District Three
Current: John W. Coyle III, Oklahoma City
Oklahoma County
(Three-year term: 2019-2021)
Nominee: **Vacant**

Supreme Court Judicial District Four
Current: Kaleb K. Hennigh, Enid
Alfalfa, Beaver, Beckham, Blaine, Cimarron, Custer, Dewey, Ellis, Garfield, Harper, Kingfisher, Major, Roger Mills, Texas, Washita, Woods and Woodward counties
(Three-year term: 2019-2021)
Nominee: **Vacant**

Supreme Court Judicial District Five
Current: James L. Kee, Duncan
Carter, Cleveland, Garvin, Grady, Jefferson, Love, McClain, Murray and Stephens counties
(Three-year term: 2019-2021)
Nominee: **Vacant**

Member At Large
Current: Alissa Hutter, Norman
Statewide
(Three-year term: 2019-2021)
Nominee: **Vacant**

SUMMARY OF NOMINATIONS RULES

Not less than 60 days prior to the annual meeting, 25 or more voting members of the OBA within the Supreme Court Judicial District from which the member of the Board of Governors is to be elected that year, shall file with the executive director, a signed petition (which may be in parts) nominating a candidate for the office of member of the Board of Governors for and from such judicial district, or one or more county bar associations within the judicial district may file a nominating resolution nominating such a candidate.

Not less than 60 days prior to the annual meeting, 50 or more voting members of the OBA from any or all judicial districts shall file with the executive director a signed petition nominating a candidate to the office of member at large on the Board of Governors, or three or more county bars may file appropriate resolutions nominating a candidate for this office.

Not less than 60 days before the opening of the annual meeting, 50 or more voting members of the association may file with the executive director a signed petition nominating a candidate for the office of president elect or vice president, or three or more county bar associations may file appropriate resolutions nominating a candidate for the office.

If no one has filed for one of the vacancies, nominations to any of the above offices shall be received from the House of Delegates on a petition signed by not less than 30 delegates certified to and in attendance at the session at which the election is held.

See Article II and Article III of OBA Bylaws for complete information regarding offices, positions, nominations and election procedure.

Elections for contested positions will be held at the House of Delegates meeting Nov. 9, during the Nov. 7-9 OBA Annual Meeting.

Terms of the present OBA officers and governors will terminate Dec. 31, 2018.

Nomination and resolution forms can be found at www.okbar.org/members/BOG/BOGvacancies.

Oklahoma Bar Association Nominating Petitions

(See Article II and Article III of the OBA Bylaws)

OFFICERS
Vice President

Lane R. Neal, Oklahoma City

Nominating Petitions have been filed nominating Lane R. Neal for Vice President of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2019. Fifty of the names thereon are set forth below:

Gerald Durbin, Mark Bialick, David Donchin, Michael C. Mayhall, Jim Stuart, Jack Brown, Steven Barghols, George Corbyn, Molly Aspan, Joe Vorndran, David Nichols, Brandi Nowakowski, Jordan Haygood, Adam Kallsnick, Blake Lynch, Brad Brown, Dylan Erwin, Brittany J. Byers, Melanie Christians, Grant Kincannon, Scott Cordell, Garrett B. Jackson, Caroline M. Shaffer, Gary Davis, II, Aaron Pembleton, Matt Sheets, John C. Mackey, Edward W. Dzialo Jr., Joe B. Dutcher Jr., Darrell Latham, Phillip L. Nelson, Michael K. Duffy, Michael Clover, Tony Morales, Laura Neal, Chris Hammons, Eric Epplin, Katherine Taylor Loy, Glen Mullins, Hilary Allen, Jennifer Christian, Kaci Trojan, Thomas Kendrick, Bryan C. Dixon Jr., Andrew Gunn, David Kearney, Alexandra Butts Brady, Stephen Sherman, Sterling Pratt and C. William Threlkeld

A total of 108 signatures appear on the petitions.

2018 OK CIV APP 53

IN RE THE MARRIAGE OF: JANA DRUMMOND EVANS, Petitioner/ Appellant, vs. GEORGE EDWARD EVANS, Respondent, and KIRK & CHANEY, PLLC, Appellee.

Case Number: 115,034; Comp to 114,270; 115,600. May 8, 2018

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE RICHARD C. OGDEN, TRIAL JUDGE

AFFIRMED

Christopher A. Wood, CHRISTOPHER A. WOOD & ASSOCIATES, P.C., Oklahoma City, Oklahoma, for Appellant

Thomas J. Daniel, IV, Allen Campbell, KIRK & CHANEY, Oklahoma City, Oklahoma, for Appellee

JERRY L. GOODMAN, JUDGE:

¶1 Jana Drummond Evans (Client) appeals an April 29, 2016, order granting Kirk & Chaney's (Law Firm) motion to enforce attorney's lien. Based upon our review of the record and applicable law, we affirm.

BACKGROUND

¶2 This is one of three companion appeals assigned to this Court arising from a divorce action. In Appeal No. 114,270, Client seeks review of the trial court's August 10, 2015, order denying her motion to correct, open, modify, or vacate the Decree of Dissolution of Marriage. In Appeal No. 115,600, Client seeks review of the trial court's November 9, 2016, order granting Law Firm's application for an attorney's fee, which sought fees incurred in enforcing the attorney's lien. In the present case, Appeal No. 115,034, Client seeks review of the trial court's April 29, 2016, order granting Law Firm's motion to enforce attorney's lien.

¶3 Briefly, Law Firm represented Client in a divorce action which culminated in a divorce decree entered on May 11, 2015. On April 7, 2015, Law Firm filed a notice of attorney's lien pursuant to 5 O.S.2011 and Supp. 2014, § 6. On September 1, 2015, Law Firm filed a motion to enforce attorney's lien, asserting Client owed Law Firm $47,891.82. Client filed multiple objections, asserting Law Firm's fee was excessive and unreasonable because Law Firm made legal and mathematical errors during the legal representation resulting in a reduced division of the marital estate.

¶4 On December 4, 2015, Client filed a counterclaim for negligence. Client sought reimbursement of excessive fees paid and damages. In addition, on December 9, 2015, Client filed an objection to jurisdiction of special judge and motion to transfer to district court. Client asserted the special judge's jurisdiction was limited to $10,000.00 pursuant to 20 O.S.2011, § 123(A)(1). Law Firm responded, asserting the attorney-lien enforcement was an equitable proceeding ancillary to the original divorce proceeding. Thus, the special judge may decide this proceeding pursuant to 20 O.S.2011, § 123(A)(9). Finally, Law Firm asserted Client should file a separate action for alleged malpractice. By order filed on January 15, 2016, trial court denied Client's objection to jurisdiction and motion to transfer to district court. The court further dismissed Client's counterclaim as not properly filed with the court.

¶5 An evidentiary hearing was subsequently held on December 11, 2015, January 15, March 11, March 30, and April 4, 2016. By order entered on April 29, 2016, the trial court granted Law Firm's motion to enforce attorney's lien in the amount of $47,891.82. Client appeals.

STANDARD OF REVIEW

¶6 When the appeal raises an issue of the reasonableness of an attorney's fee awarded by the trial court, then the standard of review is whether there has been an abuse of discretion by the trial judge. *Green Bay Packaging, Inc. v. Preferred Packaging, Inc.*, 1996 OK 121, ¶ 32, 932 P.2d 1091, 1097; *State ex rel. Burk v. Oklahoma City*, 1979 OK 115, ¶ 22, 598 P.2d 659, 663. To establish an abuse of discretion, the appellant must show the trial court made a clearly erroneous conclusion, which resulted in a judgment against reason and evidence, before such an award may be reversed. *Green Bay Packaging, Inc.*, at ¶ 32, at 1097; *Broadwater v. Courtney*, 1991 OK 39, ¶ 7, 809 P.2d 1310, 1312; *Abel v. Tisdale,* 1980 OK 161, ¶ 20, 619 P.2d 608, 612.

ANALYSIS

¶7 Oklahoma law recognizes two types of liens by which an attorney may secure payment for his or her services: (1) a special or charging lien; and (2) a common-law possessory or retaining lien. *Mehdipour v. Holland*, 2007 OK 69, ¶ 20, 177 P.3d 544, 548. In the present case, Law Firm sought to enforce a special or charging lien. An action to enforce a charging lien is an equitable proceeding that may be brought in a proceeding ancillary to the main litigation or in an independent action. *Id.* at ¶ 25, at 549.

¶8 Client challenged Law Firm's fee as excessive and unreasonable because of purported legal and mathematical errors made during their legal representation resulting in a reduced division of the marital estate. Because a court exercises its equitable powers in enforcing an attorney's charging lien, it may inquire into the reasonableness of the asserted fee for purposes of enforcing the lien.

¶9 Rule 1.5 of the Oklahoma Rules of Professional Conduct, 5 O.S.2011, ch.1, app.3-A, provides attorneys have a professional responsibility not to make an agreement for, charge, or collect unreasonable fees or expenses. *In re Adoption of Baby Boy A*, 2010 OK 39, ¶ 25, 236 P.3d 116, 124. Rule 1.5 lists eight factors to be considered in determining the reasonableness of the contract, charge, or fee. *Id.* In addition, *State ex rel. Burk v. City of Oklahoma City,* 1979 OK 115, 598 P.2d 659, established a two-part reasonableness test for an attorney's fee: 1) a base fee calculated by multiplying hours worked by an hourly rate, and 2) a bonus or incentive fee calculated under eight factors.[1] *In re Adoption of Baby Boy A*, 2010 OK 39, ¶ 26, 236 P.3d 116, 124. Generally referred to as the Burk criteria, the same eight factors are listed for determining the amount of an attorney's fee: 1) time and labor required, novelty and difficulty of the questions involved, and skill requisite to properly perform the legal services; 2) the likelihood the representation will preclude other employment by the attorney; 3) customary charge in the community for similar legal services; 4) amount involved and results obtained; 5) time limitations imposed by the client or the circumstances; 6) nature and length of the professional relationship with the client; 7) the experience, reputation, and ability of the attorney performing the legal service; and 8) whether the fee is fixed or contingent. *Id.* at ¶ 25 fn. 9, 129 fn. 9. The *Burk* criteria are the standard by which courts test the reasonableness of attorney fee contracts as well as fee awards. *Id.* at ¶ 27, at 124.

¶10 Parties are free to contract for a reasonable attorney's fee. However, if the fee is challenged as excessive or unreasonable, the trial court should take evidence as to the reasonableness of the fee and has the power to fix an attorney's fee that is reasonable and commensurate with the work performed by the attorney. *In re Adoption of Baby Boy A*, 2010 OK 39, at ¶ 33, 236 P.3d at 126. The Supreme Court has long held the party moving for an attorney's fee has the duty of demonstrating the reasonableness of the fee to the trial court. *Id. See also Oliver's Sports Center, Inc. v. National Std. Ins. Co.*, 1980 OK 120, ¶ 8, 615 P.2d 291 (an attorney seeking an attorney's fee has the burden to present to the court detailed time records of the work performed and evidence of the reasonable value for the services performed for different types of legal work.). The reasonableness of an attorney's fee is a question for the trier of fact, *Arkoma Gas Co. v. Otis Engineering Corp.*, 1993 OK 27, ¶ 8, 849 P.2d 392, 394, and the fee must be supported by evidence and reason. *Finnell v. Seismic,* 2003 OK 35, ¶ 18, 67 P.3d 339, 346-47.

¶11 Because "the determination of the reasonableness of an attorney's fee is particularly within the province of a trial court," *Marvel v. Milken*, 1994 OK CIV APP 150, ¶ 6, 889 P.2d 903, 905, we will affirm a trial court's award of an attorney's fee absent an abuse of discretion. *Abel v. Tisdale*, 1980 OK 161, ¶ 20, 619 P.2d 608, 612. An abuse of discretion will only be found where the trial court made a "clearly erroneous conclusion and judgment against reason and evidence." *Id. See also Oklahoma Turnpike Auth. v. Asher*, 1993 OK 136, ¶ 7, 863 P.2d 1205, 1207. Furthermore, a trial judge's decision comes to a court of review clothed with a presumption of correctness. *Willis v. Sequoyah House, Inc.,* 2008 OK 87, ¶ 15, 194 P.3d 1285, 1290.

¶12 In the present case, Law Firm addressed the *Burk* factors at the hearing before the trial court. Law Firm introduced detailed time records of the work it performed for Client, affirmatively testifying that its time records accurately reflected the time and labor required in the case. In addition, counsel for Law Firm testified he has considerable experience in divorce matters, having practiced primarily domestic law for over twenty-nine years, has an AV rating in Martindale-Hubbell, and is listed in the area of family law as one of the

"Best Lawyers in America." Counsel noted they represented Client for approximately twenty-one months against very capable opposing counsel in a hard-fought divorce case that consisted of a marital estate valued at almost $4.5 million dollars. Issues included separate property, significant stock and stock options, support alimony, child support, contempt, and child custody. Law Firm asserted that due to its efforts, Client was awarded separate assets worth over $1.2 million, plus stock and stock options, as well as $790,000.00 in property division alimony, $4,000.00 per month in support alimony for three years, and $3,500.00 per month for child support. With respect to separate property issues, Law Firm noted Husband claimed over $2 million of Client's property was marital property. The trial court ultimately found only $91,322.00 was marital property and the rest was Client's separate property.

¶13 Law Firm also introduced a copy of its attorney fee contract with Client that established the agreed hourly rate. Client did not object to the agreed hourly rate as unreasonable.[2] In addition, Client did not specifically object to the number of hours Law Firm incurred in its representation of Client. Rather, in essence, Client asserted she did not receive a reasonable value for the services she paid for due to alleged legal and mathematical errors by Law Firm during trial.[3, 4] Thus, she asserts the fee is unreasonable.

¶14 The trial court conducted a thorough hearing addressing the reasonableness of the fee charged for the services performed, specifically reviewing each alleged error in representation. The trial court found Law Firm did submit the arguments to the trial court on Client's behalf and "did fervently fight for the calculations and computations that were ultimately not determined by the Court." In short, the trial court found Law Firm met their burden of proving reasonableness of their requested attorney's fee and that the charging lien should be enforced. Notably, Client's own expert witness testified Law Firm's fee was reasonable given the issues involved in the case.[5] Based on our review of the record on appeal, we find no abuse of discretion and affirm the trial court's order granting Law Firm's motion to enforce attorney's lien. This assertion of error is therefore denied.

¶15 Client further contends the trial court erred by dismissing her negligence counterclaim. Client contends it is a compulsory counterclaim pursuant to 12 O.S.2011, § 2013(A).

¶16 Compulsory counterclaims are creatures of 12 O.S.2011, § 2013(A). *Robinson v. Texhoma Limestone, Inc.*, 2004 OK 50, ¶ 8, 100 P.3d 673, 675. Subsection 2013(A) requires a pleader to assert as a counterclaim any claim that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim which the pleader has against the opposing party at the time of serving the pleading. The failure to assert a compulsory counterclaim bars a later action on that demand. *Id.* (citing *McDaneld v. Lynn Hickey Dodge, Inc.*, 1999 OK 30, ¶ 7, 979 P.2d 252, 255-56). The purpose of the compulsory counterclaim bar is to prevent multiplicity of litigation over related claims. *Robinson*, at ¶ 8, at 675 (citing *Oklahoma Gas & Elect. Co. v. District Ct., Fifteenth Judicial Dist.*, 1989 OK 158, ¶ 11, 784 P.2d 61, 64).

¶17 Oklahoma has not addressed whether a negligence, or malpractice, claim is a compulsory counterclaim required to be pled in response to a motion to enforce a attorney's charging lien.

¶18 In *Computer One, Inc. v. Grisham & Lawless P.A.*, 188 P.3d 1175 (N.M. 2008), the New Mexico Supreme Court addressed this precise issue. A law firm represented Computer One through a settlement agreement. The law firm ultimately withdrew as counsel after Computer One asserted the settlement was unauthorized. The law firm filed a notice of a charging lien against the settlement proceeds in the original proceeding, which the trial court enforced. Subsequently, Computer One filed a legal malpractice claim against the law firm. The law firm moved for summary judgment, asserting the claim was barred as a compulsory counterclaim to its motion for a charging lien. The trial court agreed and granted summary judgment.

¶19 The New Mexico Supreme Court reversed, finding the malpractice claim was not a compulsory counterclaim because there was no adversarial relationship between Computer One and the law firm. The Court held its compulsory counterclaim rule, which is identical to Oklahoma's rule, is triggered by its "opposing party" provision. "An 'opposing party' must be one who asserts a claim against the prospective counterclaimant in the first instance. In other words, it is the adversarial nature of the relationship between the parties from the

beginning that . . . trigger[s] the compulsory counterclaim rule and its attendant res judicata effect." *Id.* "[O]ne must first be a 'party' before one can be an 'opposing party[,]'" and "an attorney does not transform his former client into either, merely by taking steps to secure attorney fees in the same underlying proceeding." *Id.* at 1182. Conversely, if the law firm had filed a separate suit for breach of contract against Computer One for its attorney's fee, then Computer One would have had to press its legal malpractice claim as a compulsory counterclaim. *Id.* at 1182.

¶20 Similarly, in *Tilzer v. Davis, Bethune & Jones, L.L.C.*, 204 P.3d 617, 624 (Kan. 2009), the Kansas Supreme Court reversed the trial court which had held that Missouri's compulsory counterclaim rule, again similar to Oklahoma's rule, required the clients to assert their legal malpractice claims as a response to the attorney's motion to enforce an attorney's fee lien in the underlying Missouri lawsuit, stating:

> By moving to enforce an attorney's fee lien in the underlying action, [the attorney] was proceeding against the judgment itself, not against the former client. Such an action does not transform the former client into an "opposing party" for purposes of the compulsory counterclaim rule. To invoke that rule, [the attorney] had to file an independent action against [the client], i.e., had to become a "party" in the first instance.

Id. at 624 (emphasis added).

¶21 We find these authorities persuasive. As previously stated, an action to enforce a charging lien is an equitable proceeding that may be brought in a proceeding ancillary to the main litigation or in an independent action. *Mediphour,* at ¶ 25, at 549. In the present case, Law Firm filed its motion to enforce attorney's charging lien in a proceeding ancillary to the underlying divorce action. By seeking to enforce its attorney's fee lien in the underlying action, Law Firm was proceeding against the judgment itself and not against Client. Client did not become an opposing party for purposes of the compulsory counterclaim rule merely by Law Firm seeking to enforce its charging lien in the underlying action. Accordingly, the trial court properly dismissed Client's negligence/malpractice counterclaim as it was not a compulsory counterclaim. This assertion of error is therefore denied.

¶22 For her final assertion of error, Client contends the trial court erred by retaining jurisdiction in a matter that exceeded the jurisdiction of special judges.

¶23 Pursuant to 20 O.S.2011, § 123(A)(1), the jurisdictional limit of special judges is $10,000.00 for a claim and $10,000.00 for a counterclaim or setoff. However, § 123(A)(9) provides, "[a]ny matter, regardless of value, at any stage, whether intermediate or final, and whether or not title to property, real, personal, tangible, intangible, or any combination thereof, is to be determined, in a probate, divorce, domestic relations, ..."

¶24 Again, an action to enforce a charging lien is an equitable proceeding that may be brought in a proceeding ancillary to the main litigation or in an independent action. *Mediphour,* at ¶ 25, at 549. Law Firm filed its motion to enforce attorney's lien as an ancillary proceeding to the original divorce proceeding. Thus, we reject Client's assertion that the trial judge lacked jurisdiction or authority to hear and determine the motion to enforce attorney's lien.

¶25 The trial court's April 29, 2016, order granting Law Firm's motion to enforce attorney's lien is therefore affirmed.

¶26 **AFFIRMED**.

BARNES, P.J., and RAPP, J., concur.

JERRY L. GOODMAN, JUDGE:

1. The Court has used the *Burk* criteria in cases where there is no incentive or bonus fee. *In re Adoption of Baby Boy A*, 2010 OK 39, at ¶ 26, 236 P.3d at 124.

2. Client did object to a rate increase from $300.00 per hour to $325.00 per hour during Law Firm's representation of Client. The trial court found the attorney fee contract provided for the increase and that the increase was within the normal course of practice and therefore reasonable. We find no abuse of discretion.

3. Client has filed a separate lawsuit for legal malpractice against Law Firm.

4. Client contends, inter alia, that Law Firm did not hire an expert despite her request, that Law Firm failed to raise certain math errors in ex-husband's exhibits in its closing argument, Proposed Findings of Fact and Conclusions of Law, or the Response to Motion to Settle Journal Entry and Counter-Motion to Settle, and that Law Firm submitted a Proposed Decree of Dissolution of Marriage to the trial court that contained an error. Law Firm disputes Client's assertions, asserting it did not make any errors. Law Firm contends it presented all arguments to the trial court, noting Client has acknowledged that Law Firm did raise or address the purported errors with the trial court at trial, or in some instances, in the Motion to Settle Journal Entry or Counter-Motion. Law Firm further disputed that a Motion to Settle Journal Entry is the proper avenue to raise such errors with the trial court.

5. Trial, April 4, 2016, p. 26, ll. 4-8.

Calendar of Events

August

14 **OBA Rules of Professional Conduct Committee meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Paul B. Middleton 405-235-7600

15 **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

16 **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

17 **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

18 **OBA Young Lawyers Division meeting**; 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Nathan Richter 405-376-2212

21 **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

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

24 **OBA Board of Governors meeting;** 10 a.m.; Duncan; Contact John Morris Williams 405-416-7000

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

30 **OBA Awards Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Jennifer Castillo 405-553-3103

September

3 **OBA Closed** – Labor Day

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

6 **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

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

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

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

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, July 19, 2018

RE-2017-482 — On November 7, 2005, Appellant Raymond R. Hopkins a/k/a Herbert L. Robinson, represented by counsel, entered a guilty plea to Count 1, Grand Larceny after former conviction of two or more felonies, and Count 2, Obstructing an Officer in Oklahoma County Case No. CF-2004-6925. Robinson was sentenced to ten (10) years, all suspended for Count 1 and one (1) year, suspended, for Count 2, both sentences subject to rules and conditions of probation. On September 16, 2015, the State filed its Second Amended Application to Revoke Robinson's suspended sentence, alleging numerous probation violations. On May 2, 2017, the District Court of Oklahoma County, the Honorable Cindy H. Truong, District Judge, revoked five (5) years of Robinson's suspended sentence, after Robinson entered a guilty plea to the State's revocation application. From this Judgment and Sentence, Robinson appeals. The partial revocation of Hopkins's suspended sentence is AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

F-2017-353 — Appellant Arthur Tequon Hill, Jr., was tried by jury and convicted of Robbery with a Firearm, in the District Court of Oklahoma County, Case Nos. CF-2014-1708 and CF-2014-1718. The jury recommended as punishment imprisonment for fifteen (15) years in each case and the trial court sentenced accordingly. The trial court sentenced accordingly. From this judgment and sentence Arthur Tequon Hill, Jr. has perfected his appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Recuse.

C-2017-966 — Petitioner, Thomas Lloyd Ellison, was charged by Amended Information in the District Court of Blaine County Case No. CF-2015-128 with Rape in the Second Degree (Counts 1 and 2), and Possession of Child Pornography (Count 3). On June 26, 2017, Petitioner entered a negotiated blind plea to the charges with the assistance and advice of retained counsel. In exchange for Petitioner's plea of no contest to Count 3 of the Amended Information the State dismissed Counts 1 and 2. The Honorable Paul K. Woodward, District Judge, accepted Petitioner's plea and set the matter for sentencing pending receipt of the pre-sentence investigation report. On August 17, 2017, the District Court sentenced Petitioner to imprisonment for twenty (20) years, a $1,000.00 fine, $500.00 Victim's Compensation Assessment, $150.00 DNA Assessment, and Costs. On August 24, 2017, Petitioner, with the assistance of newly retained counsel, filed his Application to Withdraw Plea of No Contest. On September 8, 2017, the District Court held an evidentiary hearing on Petitioner's request and denied the motion. Petitioner timely filed his Notice of Intent to Appeal seeking to appeal the denial of his application to withdraw plea. The trial court's order denying Petitioner's Application to Withdraw Plea of No Contest is AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

RE-2017-0483 — Appellant, Christopher Whibbey, pled guilty on March 18, 2016, in Oklahoma County District Court Case No. CF-2013-8418, to Count 1 – Indecent or Lewd Acts with a Child Under Sixteen and Count 2 – Manufacturing Child Pornography. He was sentenced on each count to twenty years suspended except for the first two years, with rules and conditions of probation. The sentences were ordered to run concurrently, with credit for time served. Appellant was also fined $50.00. The State filed an application to revoke Appellant's suspended sentences on November 8, 2016. Following a revocation hearing on May 1, 2017, before the Honorable Michele McElwee, District Judge, Appellant's suspended sentences were revoked in full, with credit for time served. The sentences were ordered to run concurrently. Appellant appeals the revocation of his suspended sentences. The revocation of Appellant's suspended sentences is AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J.: Concur; Hudson, J.: Concur; Kuehn, J.: Concur; Rowland, J.: Concur.

C-2017-1070 — Daltyn Ryan Stout, Petitioner, entered an *Alford* plea to first degree man-

slaughter (Count 1) and conspiracy to commit a felony (Count 2) in Case No. CF-2015-887 in the District Court of Kay County. The Honorable Philip A. Ross, District Judge, found Stout guilty and sentenced him to twenty years imprisonment with all but ten years suspended and a $500.00 fine in Count 1, ten years imprisonment and a $100.00 fine in Count 2, and ordered the sentences to be served concurrently. Stout filed a timely motion to withdraw his guilty plea which the court denied after evidentiary hearing. From this denial, Daltyn Ryan Stout has perfected his appeal. 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-2016-626 — Christopher Shane Lee Fuentez, Appellant, was tried by jury for the crimes of Count 1: Conjoint Robbery and Count 2: Possession of a Firearm, both After Former Conviction of a Felony, in Case No. CF-2014-178, in the District Court of Muskogee County. The jury returned a verdict of guilty and recommended as punishment on Count 1: twenty years imprisonment and Count 2: three years imprisonment. The trial court sentenced accordingly and ordered the sentences to run concurrently and further imposed a one year term of post-imprisonment supervision. From this judgment and sentence Christopher Shane Lee Fuentez has perfected his appeal. The Judgments and Sentences of the District Court are REVERSED and the matter REMANDED with instructions to DISMISS. Opinion by: Hudson, J.; Lumpkin, P.J., Dissent; Lewis, V.P.J., Dissent; Kuehn, J., Concur; Rowland, J., Concur.

Thursday, July 26, 2018

F-2017-0880 — Appellant, Sarah Ashley Wilkerson, was charged on September 28, 2015, in Case No. CF-2015-0308, in the District Court of Osage County, with Count 1 – Possession of Controlled Dangerous Substance, a felony, Count 2 – Domestic Abuse – Assault and Battery, a misdemeanor, and Count 3 – Obstructing an Officer, a misdemeanor. Appellant entered a plea of guilty on December 30, 2015, and was admitted into the Osage County Drug Court Program. The State filed an application to terminate Appellant from the Drug Court Program on November 16, 2016. Appellant stipulated to the State's allegations at a hearing held on February 1, 2017. The Honorable Stuart L. Tate, Special Judge, accepted Appellant's stipulation, took the matter under advisement, and continued the hearing. Following a hearing on August 16, 2017, Appellant was terminated from Drug Court. Appellant was sentenced on Count 1 to eight years, all suspended but for the first six years to serve. She was sentenced to one year in the Osage County Jail on Counts 2 and 3. The sentences were ordered to run concurrently, with credit for time served. Appellant was also fined $300.00 on Count 1, $200.00 on Count 2 and $100.00 on Count 3. Appellant appeals from her termination from Drug Court. Appellant's termination from the Osage County Drug Court Program is AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

F-2017-544 — Christopher Breondi Thompson, Appellant, was charged in Case No. CF-2014-7069, in the District Court of Oklahoma County, with Count 1: Burglary in the First Degree, After Former Conviction of Two Felonies; Count 2: Concealing Stolen Property, After Former Conviction of Two Felonies; and Count 3: Aggravated Attempting to Elude, After Former Conviction of Two Felonies. After a nonjury trial, Thompson was convicted of the charged offenses. The Honorable Cindy H. Truong, District Judge, sentenced Thompson to twenty years imprisonment on each count and ordered that the sentences for all three counts run concurrently each to the other. Judge Truong also ordered credit for time served. Thompson now appeals. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Recuses.

RE-2017-380 — On September 15, 2015, Appellant Daniel Wayne Lail, represented by counsel, entered a plea of *nolo contendere* to Larceny of an Automobile in LeFlore County Case No. CF-2015-305. Lail was sentenced to twelve (12) years, all suspended, subject to rules and conditions of probation. On July 6, 2016, the State filed an Application to Revoke Lail's suspended sentence alleging Lail violated his terms and conditions of probation by committing the new crime of First Degree Burglary as alleged in LeFlore County Case No. CF-2016-315. On April 11, 2017, the District Court of LeFlore County, the Honorable Marion Fry, Associate District Judge, revoked the remainder of Lail's suspended sentence in full. The revocation of Lail's suspended sentence is AFFIRMED. Opinion by: Kuehn, J.; Lumpkin,

P.J., Concur; Lewis, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F-2017-897 — On December 9, 2010, Appellant Dustin Shane Graves entered a plea of *nolo contendere* in Pontotoc County District Court Case No. CF-2010-184. Appellant was admitted to the Pontotoc County Drug Court Program pursuant to a Drug Court Plea Agreement and his sentencing was de-layed. On June 21, 2017, the State filed an application to terminate Appellant's participation in Drug Court. Following a hearing on the application, the Honorable C. Steven Kessinger, District Judge, sustained the State's application and sentenced Appellant pursuant to his Drug Court Plea Agreement. Appellant appeals. The termination of Appellant's participation in Drug Court is AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J.: Concur; Hudson, J.: Concur; Kuehn, J.: Concur; Rowland, J.: Concur.

F-2017-881 — Michael Lee Cowan, Appellant, was tried by jury for the crime of Lewd Proposals to a Child Under Sixteen in Case No. CF-2014-317 in the District Court of Cherokee County. The jury returned a verdict of guilty and recommended as punishment three years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Michael Lee Cowan has perfected his appeal. AFFIRMED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur in result; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

F-2017-724 — Daniel Terrell Smith, Appellant, was tried by jury for the crimes of Count I – Assault and Battery With a Dangerous Weapon; Count II – Burglary in the First Degree; Count III – Domestic Abuse Assault and Battery; Count IV – Violation of a Protective Order; and Count V – Maiming in Case No. CF-2014-7327 in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment 10 years imprisonment on each of Counts I and II, a $5000.00 fine in Count III; a $1000.00 fine in Count IV; and 20 years on Count V. The trial court sentenced accordingly and ordered the sentences to be served consecutively. From this judgment and sentence Daniel Terrell Smith has perfected his appeal. The Judgment and Sentence in Counts II, III, IV and V are AFFIRMED; the Count I Judgment and Sentence is DISMISSED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur.; Lewis, V.P.J., concur.; Hudson, J., concur.; Rowland, J., concur.

Thursday, August 2, 2018

F-2017-513 — William Campbell, Appellant, was tried by jury for the crimes of Count 1 - First Degree Murder and Count 2 - Feloniously Pointing a Firearm in Case No. CF-2015-3492 in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment life imprisonment and a $1000 fine on Count 1 and five years and a $1000 fine on Count 2. The trial court sentenced accordingly. From this judgment and sentence William Campbell has perfected his appeal. AFFIRMED. Opinion by: Kuehn, J.; Lumpkin, P.J., Concur; Lewis, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

C-2017-976 — Anna Marie Hyden, Petitioner, entered a blind plea of guilty in Case No. CF-2016-380, in the District Court of Tulsa County, before the Honorable William D. LaFortune, to Child Neglect, After Former Conviction of a Felony. Judge LaFortune accepted Petitioner's plea and after a hearing, sentenced Petitioner to twenty-five years imprisonment with the last five years suspended and further imposed various fines, costs and fees. Petitioner then filed an application to withdraw her guilty plea and after that hearing the motion was denied. 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: Hudson, J.; Lumpkin, P.J., Concurs in Results; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

COURT OF CIVIL APPEALS
(Division No. 1)
Thursday, July 19, 2018

115,057 — Richard Ford, Joe Bob Lovett, Dona Lovett and Colton Lovett; Jeremy Smith, individually and as Parent and Next Friend of J.S. and A.S., Minors, Plaintiffs/Appellants/Counter-Appellees, vs. Mark A. Qualls and Colton Lee Lovett, Defendants/Appellees/Counter-Appellants. Appeal from the District Court of Wagoner County, Oklahoma. Honorable Darrell G. Shepherd, Judge. Plaintiffs/Appellants/Counter-Appellees Richard Ford, Joe Bob Lovett, Dona Lovett, Colton Lovett, and Jeremy Smith, individually and as Parent and Next Friend of J.S. and A.S., Minors, seek review of the trial court's order denying their motion for new trial after a jury returned a verdict for Defendants/Appellees/Counter-Appellants Mark A. Qualls and Colton Lee Lovett on Plaintiffs' claims to recover damages for personal injuries sustained in an automobile

collision. In the counter appeal, Defendants/Appellees/Counter-Appellants Mark A. Qualls and Colton Lee Lovett seek review of the trial court's order denying their post-judgment motion to assess prevailing party attorney's fees and costs. Whether the Plaintiffs were required to wear their seat belts by law or not, the Defendants were not barred from commenting on Plaintiffs' admission they did not in closing argument and, based on this evidence, the jury would have been justified in concluding that Plaintiffs contributed to their own injuries by failing to wear their seat belts. The trial court discerned no misconduct by Defendants' counsel in closing argument, nor do we. The trial court held Defendants did not adequately support their request for attorney's fees with evidence of the reasonableness of the time spent or the value of the time spent. Given the nominal time involved in the defense of the property damage claim, we cannot say the trial court abused its discretion in refusing to award attorney's fees and costs to Defendants. AFFIRMED. Opinion by Joplin, J.; Bell, P.J. and Buettner, J., concur.

115,437 — Catherine E. Waide, Plaintiff/Appellant, vs. Oklahoma Employment Security Commission, Board of Review of the Oklahoma Employment Security Commission, The City of Oklahoma City, Defendants/Appellees. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Bryan Dixon, Judge. Appellant, Catherine Waide, seeks review of the Oklahoma County District Court's order affirming the decision of the Board of Review of the Oklahoma Employment Security Commission, which denied Appellant unemployment benefits after she was involuntarily terminated from her employment with the City of Oklahoma City. Appellant was terminated from employment on June 22, 2015, after having worked for the City of Oklahoma City since February 3, 1993. At the time her employment ended, Appellant worked for the Parks, Recreation and Cultural Division for the City as the Parks and Grounds Superintendent. On June 5, 2015, Appellant was presented with a pre-determination hearing and report, she was told she could respond to the allegations listed in the report: a) fostering a culture of intimidation, b) poor decision making/management of human resources, and c) unprofessionalism. She was accused of intimidating a job candidate to whom she was to offer a promotion and worked against him and attempted to get him fired after he accepted the promotion. She did not immediately terminate an employee who threatened other employees with a machete, instead she initially transferred the employee, although she fired the employee when instructed to do so by a superior. She was accused of dancing and singing in celebration, in front of other employees, when her supervisor resigned. And she used a derogatory word for disabled individuals during a meeting about hiring and a job fair. Appellant provided a written response to the report, in which she explained the context of these decisions or denied the allegation in the report. Appellant first appealed the denial of unemployment benefits to the Board of Review, which found it was "more likely than not" that Appellant behaved as her employer alleged and found the cumulative effect of Appellant's misconduct and violations of policy demonstrated that she acted inappropriately and not in the interests of her employer. The Board found her behavior was "a deliberate act constituting a material and substantial breach of her job duties pursuant to her contract of employment and her obligations to her employer. Claimant engaged in misconduct connected to the work. Accordingly, benefits are disallowed." The Oklahoma County District Court affirmed the Board's decision. Appellant then brought this appeal. Appellant's alleged errors in this appeal fall into essentially two categories, a) attacking the sufficiency of the evidence that was presented in support of her termination and denial of unemployment benefits, and b) a legal argument that asserts the evidence of Appellant's conduct, even if believed, does not constitute misconduct so as to deprive Appellant of her entitlement to unemployment benefits. "The findings of the Board of Review as to facts are conclusive, if supported by the evidence, and the jurisdiction of the district court is confined to questions of law. *See* 40 O.S. § 2-610." *Nordam v. Bd. of Review of Oklahoma Employment Sec. Comm'n*, 1996 OK 110, 925 P.2d 556, 559. The record supported the factual finding of the Board and the District Court's affirmation of those findings. The next component of this court's inquiry is whether Appellant's conduct rose to the level of misconduct under the terms of 40 O.S. Supp.2014 § 2-406 so as to deprive Appellant of the right to receive unemployment benefits. The hearing officer's decision rests on the officer's finding that Appellant's "behavior shows a deliberate act constituting a material and substantial breach of her job duties pursuant to her contract of employment

and her obligations to her employer," in keeping with the statute's provisions, 40 O.S. § 2-406(B)(1). In reviewing Appellant's actions, there is evidence upon which the hearing officer and later the Oklahoma County District Court could have determined Appellant acted deliberately or carelessly in her management position, acting counter to her employer's directives and interests. We find no relief is warranted on Appellant's propositions of error. The order of the Oklahoma County District Court, affirming the decision of the Board of Review, is AFFIRMED. Opinion by Joplin, J.; Bell, P.J., and Buettner, J., concur.

115,540 — In the Matter of the Estate of Gladys Clark Stephens: Robert L. Myers and Barry D. Myers, Co-Administrators of the Estate of Gladys Clark Stephens, Appellants, vs. Diane Robinson, Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Allen J. Welch, Judge. This matter stems from a 2016 appeal which affirmed an Oklahoma County District Court order quieting title to oil, gas, and mineral rights that once belonged to Gladys Clark Stephens (Case No. 114,386). After the trial court order was appealed, this court issued an opinion quieting title to the subject property in the Appellee, Diane Robinson, who claimed the property by virtue of her predecessor in interest, Hoy Clark, Mrs. Stephens brother. Hoy Clark asserted Mrs. Stevens' oil, gas and mineral interests were conveyed to him by his sister in 1972. After receiving the favorable quiet title ruling at trial and on appeal, Appellee Robinson sought an accounting from Mrs. Stephens' Estate. Upon the Estate's accounting, the Estate noted it received funds attributable to the subject properties in the amount of $82,288.43. Appellee requested the Estate deliver payment of the $82,288.43, plus prejudgment interest through September 29, 2015 (the date the trial court determined title ownership prior to appeal) and post-judgment interest from September 29, 2015 thereafter, in accordance with 52 O.S. Supp.2010 §570.10(D)(1)-(2), the Production Revenue Standards Act. The trial court awarded the property owners in whom title was quieted the $82,288.43, as well as the interest "to be quantified per 52 O.S. 570.10(D)(1) and (2)." From this order the Estate appeals. The issue of entitlement to an attorney's fee, costs, and interest presents purely a legal question which we review *de novo* without deference to the trial court's determination. *Finnell v. Jebco Seismic*, 2003 OK 35, ¶ 7, 67 P.3d 339, 342. Appellant asserts that requesting post-judgment interest after a protracted quiet title proceeding violates the Estate's due process, as Appellee pursued her quiet title claim without requesting damages in the earlier pleadings; her requested relief and the corresponding judgment entered addressed only the issue of quieting title. The Estate argues that Appellee might have sought a judgment for damages in the quiet title proceeding and may have prevailed if the evidence had warranted it; however, Appellee did not seek damages and at this point is foreclosed from doing so. The first question in this case is whether or not Appellee could have sought damages relating to her quiet title action upon which post-judgment interest might have attached. We find in the affirmative, Appellee could have sought such damages and did not do so. *Pruitt v. Hammers,* 1955 OK 348, 292 P.2d 157, 159. Appellee is precluded at this juncture to seek damages claims which she should have pursued at the time she sought her equitable relief. In addition, while we agree the court may conduct a post-judgment accounting, the trial court's interest award is not appropriate in this case. *Trapp Associated v. Tankersley,* 206 Okl. 118, 240 P.2d 1091; *Allison v. Allen,* 1958 OK 125, 326 P.2d 1059, 1063. With respect to the award of prejudgment interest, 12 O.S. § 696.3(A)(2) does not offer Appellee a mechanism whereby she could omit a statement regarding prejudgment interest from the appealable order quieting title and then seek prejudgment interest during the accounting phase after the quiet title action was concluded and affirmed on appeal. *In re Estate of Bleeker,* 2013 OK CIV APP 106, ¶ 13, 316 P.3d 932, 935-36. Regarding the Production Revenue Standards Act, Appellee cannot now use the Act to claim an entitlement to prejudgment interest or to any other award the Act might offer, as she has not previously made claims based on the Act. The order of the trial court is REVERSED and this cause is REMANDED. Opinion by Joplin, J.; Bell, P.J., and Buettner, J., concur.

115,749 — In the Matter of the Adoption of J.D.F. and A.N.F., minor children. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Kurt Glassco, Judge. Appellant Step-Father of the Minor Children, J.D.F. and A.N.F., seeks review of the trial court's order awarding visitation expenses and attorney's fees to Appellee Natural Father of the Minor Children on a finding of the bad faith prosecution of adoption proceedings by Step-Father.

No doubt this litigation placed a substantial emotional and financial strain on both Natural Father and Natural Mother. However, from our review of the record, we cannot say the conduct of Natural Mother and Step-Father rose to the level of bad faith or vexatious conduct as to warrant an award of attorney's fees, and we hold the trial court erred in so holding. We likewise hold the trial court abused its discretion in awarding Natural Father his supervised visitation expenses, as we believe the propriety of those expenses should be left to the divorce court where the order for supervised visitation originated. Having so held, we nevertheless approve the award of costs to Natural Father as authorized by 12 O.S. §930, and the order of the trial court awarding costs is AFFIRMED. The orders of the trial court awarding attorney's fees and supervised visitation expenses are REVERSED. Opinion by Joplin, J.; Bell, P.J., and Buettner, J., concurs in part, dissents in part with opinion.

116,119 — Richard "Jay" Joyner, Plaintiff/Appellant, vs. Blackmon Mooring of Oklahoma City, Inc., an Oklahoma corporation, Defendant/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable James B. Croy, Judge. Plaintiff/Appellant Richard "Jay" Joyner appeals from judgment in favor of Defendant/Appellee Blackmon Mooring of Oklahoma City, Inc. on his breach of contract claim. After *de novo* review, we hold the trial court did not err in applying the burden of proof and, if there was any error, it was harmless. The trial court found there was uncontroverted evidence that Joyner failed to perform under the terms of the contract. Without a record on appeal, we must assume the facts underlying the trial court's judgment were proven. AFFIRMED. Opinion by Buettner, J.; Bell P.J., and Joplin, J., concur.

116,618 — In Re the Matter of the Adoption of A.W.L.W., a minor child: DeAndre'a Tatum and Chellse Lawrence, Petitioners/Appellants, vs. Kennon White, Respondent/Appellee. Appeal from the District Court of Canadian County, Oklahoma. Honorable Bob W. Hughey, Judge. Petitioners/Appellants DeAndre'a Tatum (Step-Father) and Chellse White (Mother) (collectively, Appellants) appeal an order denying their application to adjudicate Mother's minor child, A.W.L.W., eligible for adoption without the consent of Respondent/Appellee Kennon White (Natural Father). Appellants sought adoption without consent based on Natural Father's failure to support the child and failure to maintain a relationship with the child. Natural Father argued Mother had prevented him from maintaining a relationship. The trial court found Appellants had failed to meet their burden of proving by clear and convincing evidence that Natural Father's consent was unnecessary, based in part on the trial court's finding that any judicial action by Natural Father would have been futile. The trial court's finding that Mother prevented Natural Father from maintaining a relationship with the child is not against the clear weight of the evidence and we AFFIRM. Opinion by Buettner, J.; Bell, P.J., and Joplin, J., concur.

116,632 — All Steel Carports, Plaintiff/Appellant, vs. Larry Perry, Defendant/Appellee. Appeal from the District Court of McClain County, Oklahoma. Honorable Leah Edwards, Judge. In this action for defamation and tortious interference with business relations, Plaintiff/Appellant, All Steel Carports, sought an injunction and punitive damages against Defendant/Appellee, Larry Perry, for erecting a billboard sized, publicly-visible sign on his property which stated the carport installed by Plaintiff leaked when it rained and it might make a good chicken coop. The trial court applied the Oklahoma Citizens Participation Act, 12 O.S. Supp. 2014 §1430 *et seq.* (Act), and dismissed Plaintiff's case. The Act's purpose is to encourage and safeguard the constitutional rights of persons to "petition, speak freely, associate freely and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file a meritorious lawsuit for a demonstrable injury." *Anagnost v. Tomecek,* 2017 OK 7, ¶8, 390 P.3d 707, quoting §1430(B) of the Act. The Act "accomplishes this goal by allowing parties to file motions to dismiss legal actions if the legal action relates or is in response to free speech." *Anagnost*, 2017 OK 7 at ¶8. After *de novo* review, we find Plaintiff did not establish by clear and specific evidence a *prima facie* case for each essential element of its claims as required by §1434(C) of the Act and affirm the trial court's dismissal order. AFFIRMED. Opinion by Bell, P.J.; Joplin, J., and Buettner, J., concur.

116,904 — Gloria Currens and John Currens, Wife and Husband, Plaintiffs/Appellants, vs. Panama Public School District, Defendant/Appellee. Appeal from the District Court of LeFlore County, Oklahoma. Honorable Jonathan K. Sullivan, Judge. Plaintiffs/Appellants, Gloria and John Currens, appeal from the trial

court's grant of summary judgment in favor of Defendant/Appellee, Panama Public School District, in this action involving a slip and fall on school grounds. In 2015, Plaintiff Gloria Currens slipped and fell on a ramp located on Defendant's property while attending an alumni event with her husband on a Saturday night. Plaintiff John Currens claims loss of consortium as a result of his wife's injuries. At trial they alleged Defendant was negligent in maintaining its property. The trial court held 51 O.S. Supp. 2013 §155(21) precluded liability because the event was approved by the local school board, on school grounds, and after regular hours. Upon *de novo* review, we hold there exists no disputed issue of material fact and affirm. AFFIRMED. Opinion by Bell, P.J.; Joplin, J., and Buettner, J., concur.

Thursday, July 19, 2018

115,625 — In Re The Marriage of Luther: James Luther, Petitioner/Appellant, vs. Christie Luther, Respondent/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Richard Odgen, Judge. Father seeks review of the trial court's order modifying custody of the parties' minor child from Father's sole custody to the joint custody of Father and Mother, and awarding attorney's fees to Mother. Father asserts Mother failed to prove the requisite substantial change of condition necessary to modify custody, and erred as a matter of fact and law in awarding attorney's fees to Mother. Since her release from incarceration, Mother has established a non-profit organization for the vocational training of inmates, she has been granted increased visitation with the child as, at least implicitly, in the child's best interest, and Father has interfered with Mother's visitation on many occasions. We hold this evidence demonstrates the existence of a permanent, substantial and material change of circumstances since entry of the order for sole custody by Father, and supports the trial court's order modifying the order for sole custody by Father to joint custody by Mother and Father. In the present case, the trial court noted a "modest income disparity between the parties." On this basis, the trial court was justified in awarding Mother attorney's fees and costs, and given the difference in income, we cannot say the trial court abused its discretion in awarding Mother some attorney's fees and costs. AFFIRMED. Opinion by Joplin, J.; Bell, P.J., and Buettner, J., concur.

116,474 — Southcrest Hospital and Zurich American Insurance Company, Petitioners, vs. Linda Molinard 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. Petitioners Southcrest Hospital (Employer) and Zurich American Insurance Company (Insurer) seek review of an order of a three-judge panel of the Workers' Compensation Court of Existing Claims which affirmed an order of the trial court apportioning settlement proceeds that Respondent Linda Molinard received from a third-party tortfeasor. The applicable statute directs that the parties may agree to divide the settlement or the District Court may do so; nothing in the statute provides for the Workers' Compensation Court of Existing Claims (WCCEC) to apportion the settlement. The panel found the parties had agreed for the WCCEC to divide the settlement, but the record does not support that finding. In order to accomplish the statutory purpose of avoiding a double recovery, Employer and Insurer were entitled to suspend workers' compensation benefits payments to Molinard to recoup the amount she received from the third-party tortfeasor. The panel's order is contrary to law and we REVERSE AND REMAND FOR FURTHER PROCEEDINGS consistent with this opinion. Opinion by Buettner, J.; Bell, P.J.; concur in result, Joplin, J., concurs.

116,575 — Donald J. Webb, Petitioner, vs. T-G Excavating Inc. of Oklahoma, Gray Insurance Co., 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. Petitioner, Donald J. Webb (Claimant), appeals from an order of a three-judge panel of the Workers' Compensation Court of Existing Claims (Panel). The Panel affirmed the trial court's finding that Claimant is Permanently Partially Disabled (PPD) and is entitled to continuing medical treatment. The Panel vacated the trial court's finding that Claimant is permanently disfigured and held Respondent T-G Excavating, Inc. of Oklahoma (T-G) is not responsible for any continuing medical treatment. An unappealed trial court ruling involving Claimant's other employer (BECCO) held the cost of continuing medical maintenance was to be split 50/50 between T-G and BECCO. We hold the Panel's order is not supported by competent evidence. The undisputed expert

medical evidence indicates Claimant's continuing medical maintenance should be bourne equally by T-G and BECCO. By extension, the award for Claimant's disfigurement occasioned by his treatment should also be evenly apportioned. SUSTAINED IN PART, VACATED IN PART AND REMANDED WITH INSTRUCTIONS. Opinion by Bell, P.J.; Joplin, J., and Buettner, J., concurs.

116,607 — Angela Byrd, Successor Trustee of the Gaylord and Judy Elam Family Trust dated March 3, 2010, Plaintiff/Appellee, vs. Champion Mortgage Company, a Division of Nationstar Mortgage, LLC; and Metlife Home Loans, LLC., a Division of Metlife Bank, Defendant/Appellant, vs. Gaylord Elam, Third-Party Defendant. Appeal from the District Court of Canadian County, Oklahoma. Honorable Paul Hesse, Judge. In this action to quiet title and for declaratory relief, Defendant/Appellant, Champion Mortgage Company, a Division of Nationstar Mortgage, LLC (Champion), appeals from the trial court's summary judgment in favor of Plaintiff/Appellee, Angela Byrd, (Trustee), Successor Trustee of the Gaylord and Judy Elam Family Trust dated March 3, 2010 (Trust). The trial court found Gaylord Elam was not the trustee of the Trust when he quit claimed trust property located at 10408 Fairfax Lane, Yukon, Oklahoma, Canadian County (subject property), to himself; and therefore, that quit claim deed was void. The court also found the mortgage lien on the subject property granted by Gaylord Elam, individually, to Champion's successor was void. Based on these findings, the court concluded Trustee is the owner of the property free and clear of any encumbrances. Finding no controversy as to any material facts, we affirm the trial court's summary judgment in favor of Trustee. AFFIRMED. Opinion by Bell, P.J.; Joplin, J., and Buettner, J., concurs.

(Division No. 2)
Tuesday, July 24, 2018

116,146 — Everett Robins, Plaintiff/Appellant, vs. Frisco Ridge Homeowners' Association, Inc., Defendant/Appellee, and Anthony Grylls, Jeanne Grylls and Garet Earles, Defendants. Appeal from Order of the District Court of Canadian County, Hon. Bob W. Hughey, Trial Judge. Plaintiff Everett Robins, neighborhood resident and Vice-President of the Board of Defendant Frisco Ridge Homeowners' Association (HOA), appeals the district court's order granting summary judgment in favor of the HOA in his action seeking to recover damages for injuries he sustained following an altercation with a neighborhood resident and that resident's visiting stepson. The appeal has been assigned to the accelerated docket pursuant to Oklahoma Supreme Court Rule 1.36(b), 12 O.S. Supp. 2013, ch. 15, app. 1, and the matter stands submitted without appellate briefing. There are no disputed issues of fact concerning the existence of a special relationship between Plaintiff and the HOA that would impose a duty on the HOA to warn Plaintiff or protect him from an intentional physical assault by third parties. Absent that duty, Plaintiff cannot maintain his negligence claim against the HOA. *Brewer v. Murray*, 2012 OK CIV APP 109, 292 P.3d 41 (Approved for publication by the Oklahoma Supreme Court). AFFIRMED. Opinion from Court of Civil Appeals, Division II by Fischer, J.; Thornbrugh, C.J., and Wiseman, P.J., concur.

Wednesday, July 25, 2018

115,916 — In re: ODS, ELS, WRS, MMS, and NLS, adjudicated deprived children. Misti Smith, Appellant, vs. State of Oklahoma, Appellee. Appeal from Order of the District Court of Kingfisher County, Hon. Robert E. Davis, Trial Judge. Appellant Misti Smith appeals from the district court's judgment entered on a jury verdict terminating her parental rights to her minor children. Misti claims that the district court erred in admitting evidence of the children's lives with their foster parents. However, she failed to establish that the foster parents' testimony was comparative in nature or that the jury was prejudiced by the testimony. Misti also claims that the district court improperly limited the jury's discretion when it declined to give her proposed jury instruction. We find that the jury instructions were sufficient to inform the jury of its obligation to render a fair judgment, and that Misti did not suffer a violation of her constitutional rights. Consequently, the district court's judgment is affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Fischer, J.; Thornbrugh, C.J., and Wiseman, P.J., concur.

Thursday, July 27, 2018

116,513 — U.S. Bank National Association, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2006-WMC2, Asset Backed Pass-Through Certificates, Series 2006-WMC2 a/k/a U.S. Bank N.A., as Trustee, on behalf of the Holders of the J.P. Morgan Mortgage Acquisition Trust 2006-WMC2 Asset Backed Pass-Through Certificates, Series 2006-WMC2, Plaintiff/Appel-

lee, Lennard L. Finley, Defendant/Appellant, and Spouse of Lennard L. Finley, if married; Occupants of The Premises; Jewel L. Finley; Spouse of Jewel L. Finley, if married, Defendants. Proceeding to review a judgment of the District Court of Oklahoma County, Hon. Patricia G. Parrish, Trial Judge. Lennard L. Finley appeals the decision of the district court allowing foreclosure on a mortgage. We find that Finley misinterprets 12 U.S.C. § 24 as forbidding the Bank from suing in Oklahoma. We find that Finley's failure to either attend the hearing on foreclosure or seek a continuance was not due to "excusable neglect." We find no merit in Finley's allegations that the trial court relied on inadmissible hearsay; that Bank was an "improper party" or that Bank and its counsel committed some type of "jurisdictional fraud." We further reject Finley's assertions that the note and mortgage are invalid because of a MERS assignment; that he was defrauded because he was not told at the time of execution that the original note and mortgage could be "unilaterally changed from a loan with a regulated mortgage lender to an 'investment' contract with a private equity investor;" and that Bank has engaged in presenting "counterfeit securities" to the court in the form of the note. There are two crucial facts in this matter that appear undisputed. Finley made the note and mortgage, and ceased making payments on the note over 10 years ago. A copy of a facially properly endorsed note was presented. An affidavit swore as to the amount owed, and the authenticity of the note and mortgage. The foreclosure process in this case was routine and correct, and we find no error in the district court's decision. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Thornbrugh, C.J.; Wiseman, P.J., and Fischer, J., concur.

Tuesday, July 31, 2018

115,690 — Sara Chrisman, Petitioner/Appellee, vs. Earl Chrisman, Respondent/Appellant. Proceeding to review a judgment of the District Court of Tulsa County, Hon. Theresa Dreiling, Trial Judge. Earl Chrisman (Husband) appeals various aspects of the decree of the district court in a divorce case between Sara Chrisman (Wife) and him. The district court found that Wife's share of a property known as the Johnson Farm was inherited and remained Wife's separate property. Husband argues that Wife did not sufficiently show that the Farm was inherited, and hence it is presumed to be marital property. We disagree. Husband further argues that the Farm was "commingled" so as to become marital. "Commingling" is not a term that Oklahoma case law normally applies to the use of real property. The term is generally used in cases involving the conversion of separate funds to joint funds. We find no evidence that Husband acquired a marital share in the Farm, either by "co-mingling" or by contributing to an increase in its value during marriage. Husband further argues that the court failed to surcharge Wife for several items of "missing" property. We find no error in the court's decision. The court further found that a $15,750 "service charge" claimed by Husband for caring for cattle on the Farm after separation was neither agreed, nor supported by evidence, nor equitable. We find no error in this decision. We also reject Husband's argument that he was entitled to compensation for "post-separation use of marital property" during the separation. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Thornbrugh, C.J.; Wiseman, P.J., and Fischer J., concur.

116,408 — Multiple Injury Trust Fund, Petitioner, vs. Patti Y. Gonzolez and The Workers' Compensation Court of Existing Claims, Respondents. Proceeding to Review an Order of a Three-Judge Panel of the Workers' Compensation Court of Existing Claims, Hon. L. Brad Taylor, Trial Judge. The Multiple Injury Trust Fund seeks review of a panel's order that affirmed, as modified, a workers' compensation trial court's award of permanent total disability (PTD) benefits to Claimant. At the time of her January 2009 injury, Claimant had no prior adjudicated injuries; however, she did have a pre-existing injury to her right arm that was obvious and apparent to an ordinary layman. When the court adjudicated the January 2009 injury, it made a *Crumby* finding of pre-existing injury as to Claimant's arm; and when the court adjudicated Claimant's MITF claim, it found that the same injury not only was pre-existing but also was obvious and apparent, and that, as such, Claimant qualified as a previously physically impaired person under 85 O.S. Supp. 2005 § 171. We reject MITF's contention that Claimant should not be able to "use" an injury that is obvious and apparent, but previously was adjudicated as a *Crumby* finding, to qualify for benefits from the Fund. This situation is not controlled by the rationale of *Ball v. Multiple Injury Trust Fund*, 2015 OK 64, 360 P.3d 499, which excluded *Crumby* findings from the category of previous adjudications of disability, but did not address previously existing obvious and apparent injuries. We find the

panel's decision was correct, and that it is supported by competent evidence. SUSTAINED. Opinion from Court of Civil Appeals, Division II, by Thornbrugh, C.J.; Wiseman, P.J., and Fischer, J., concur.

(Division No. 3)
Friday, July 20, 2018

116,044 — The State of Oklahoma, ex rel., Department of Transportation, Plaintiff/Appellee, vs. Tulsa Kampground, Inc., an Oklahoma Corporation, Defendant/Appellant, and Rogers County Treasurer, Defendant. Appeal from the District Court of Rogers County, Oklahoma. Honorable Sheila A. Condren, Judge. Defendant/Appellant Tulsa Kampground, Inc. (Defendant) seeks review of the trial court's order granting judgment on a jury's verdict, which determined the value of Defendant's property taken by eminent domain for highway widening and improvements by Plaintiff/Appellee the State of Oklahoma, *ex rel*. Department of Transportation (the State). We find the court did not abuse its discretion by allowing the State to admit evidence concerning Defendant's sale of a billboard sign relocated on Defendant's remainder land. We also find it was not an abuse of discretion for the court to allow testimony from the State's expert witness regarding the "larger parcel" land valuation method. AFFIRMED. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

116,200 — In the Matter of the Estate of Cecil Wayne Mackey: Vincent Mesis, III and Sean Mesis, Respondents/Appellants, vs. Joe Mackey, individually and as Personal Representative of the Estate of Cecil Mackey and as Trustee of the Cecil Mackey Revocable Trust, Petitioner/Appellee. Appeal from the District Court of Kingfisher County, Oklahoma. Honorable Paul K. Woodward, Judge. Respondents/Appellants Vincent Mesis, III and Sean Mesis (Grandsons) appeal from the trial court's Order Allowing Final Account of Personal Representative, Determining Heirs, and Decree of Distribution and Discharge in the probate of the estate of Cecil Wayne Mackey (Cecil). Grandsons objected to the account alleging that Cecil did not have the capacity to execute his will and trust. Grandsons additionally argued the will and trust were the result of undue influence inflicted by Cecil's son, Petitioner/Appellee Joe Mackey. We find the court did not abuse its discretion when it found that Cecil had testamentary capacity and that Cecil's estate-planning documents were not the product of undue influence. AFFIRMED. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

116,689 — Shari Shirley, Plaintiff/Appellee, vs. Sam Adamson, Defendant/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Richard Ogden, Judge. Defendant/Appellant Sam Adamson (Adamson) appeals from an order granting summary judgment to Plaintiff/Appellee Shari Shirley (Shirley) in Shirley's action for breach of contract and unjust enrichment stemming from Adamson's failure to repay a loan made by Shirley. After *de novo* review, we find Adamson's affidavit did not comply with the statutory requirements for affidavits. Because he attached no other evidentiary material to his response, the material facts alleged by Shirley are deemed admitted. Further, we find the facts established by Shirley entitle her to judgment as a matter of law. We AFFIRM. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., all concur.

Wednesday, July 25, 2018

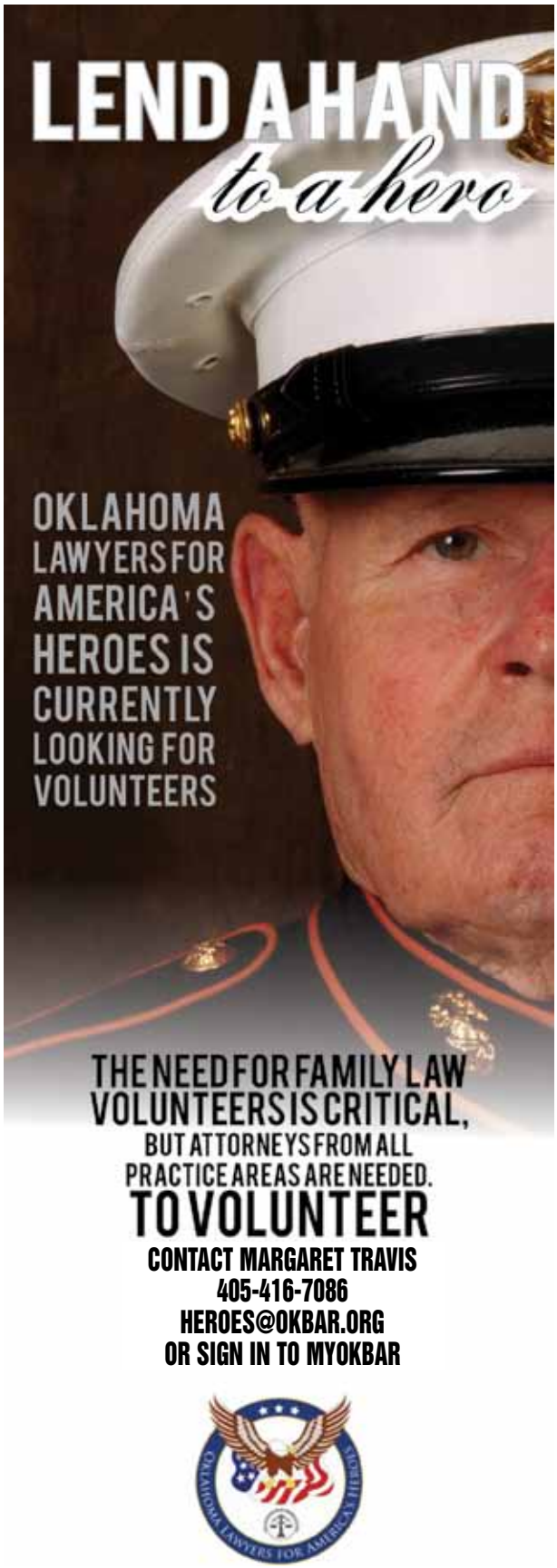
115,928 — Jennifer Fleming, Plaintiff/Appellant, vs. Rachael Whitney Hyde, Defendant/Appellee. Appeal from the District Court of Logan County, Oklahoma. Honorable Louis Duel, Trial Judge. This is the second appeal in this parentage/child custody action filed by Jennifer Fleming (Fleming) against Whitney Hyde (Hyde), the biological mother of a child who was born during the parties' same sex, 10-year relationship. The couple raised the child together for 1½ years until their relationship ended. In the first appeal, the Supreme Court held Fleming "had standing to pursue a best interest of the child hearing," vacated the trial court's order granting Hyde's motion to dismiss Fleming's petition, and "remanded the case for further proceedings." *See Fleming v. Hyde*, 2016 OK 23, ¶¶ 6-7, 368 P.3d 435. VACATED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion by Swinton, P.J. Mitchell, J., concurs; Goree, V.C.J., concurs specially.

115,975 — Associated Engineering Consultants, LTD, Plaintiff/Appellee, vs. Cross Texas Land Services, Inc., Defendant, and Ed Meyers, Defendant/Appellant. Appeal from the District Court of Payne County, Oklahoma. Honorable Stephen R. Kistler, Judge. Defendant/Appellant Ed Meyers appeals from judgment entered against him and in favor of Plaintiff/Appellee Associated Engineering Consultants, Ltd (AEC) d/b/a Gose & Associates. The trial

court found Meyers personally guaranteed the indebtedness of his employer Defendant Cross Texas Land Services, Inc. (CTLS). After *de novo* review, we find the guaranty agreement is not ambiguous. Meyers was acting as an agent of CTLS and did not personally guarantee the debt. We REVERSE. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

(Division No. 4)
Tuesday, July 24, 2018

115,767 — Michelle Renee Coble, Petitioner/Appellee, v. Camden Lee Coble, Defendant/Appellant. Appeal from the District Court of Grady County, Hon. John E. Herndon, Trial Judge. Defendant appeals from a protective order entered on the grounds of "DOMESTIC ABUSE AND/OR STALKING." With regard to domestic abuse, we conclude that the trial court's decision regarding a threat of imminent physical harm – i.e., that "the threat is real, nor merely perceived," *Curry v. Streater*, 2009 OK 5, ¶ 15, 213 P.3d 550 – is not clearly against the evidence. We also conclude the trial court did not abuse its discretion with regard to stalking – i.e., that the trial court's decision is not clearly against the evidence that Defendant's actions rose to the level of "willful, malicious, and repeated following or harassment . . . in a manner that would cause a reasonable person to feel frightened, intimidated, threatened, harassed, or molested and actually causes the person being followed or harassed to feel terrorized, frightened, intimidated, threatened, harassed or molested." 22 O.S. § 60.1(2). Consequently, we conclude the trial court did not abuse its discretion in granting Petitioner a protective order on these grounds. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., and Goodman, J., concur.



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