THE OKLAHOMA BAR
Journal
Volume 89 — No. 27 — 10/13/2018

Court Issue

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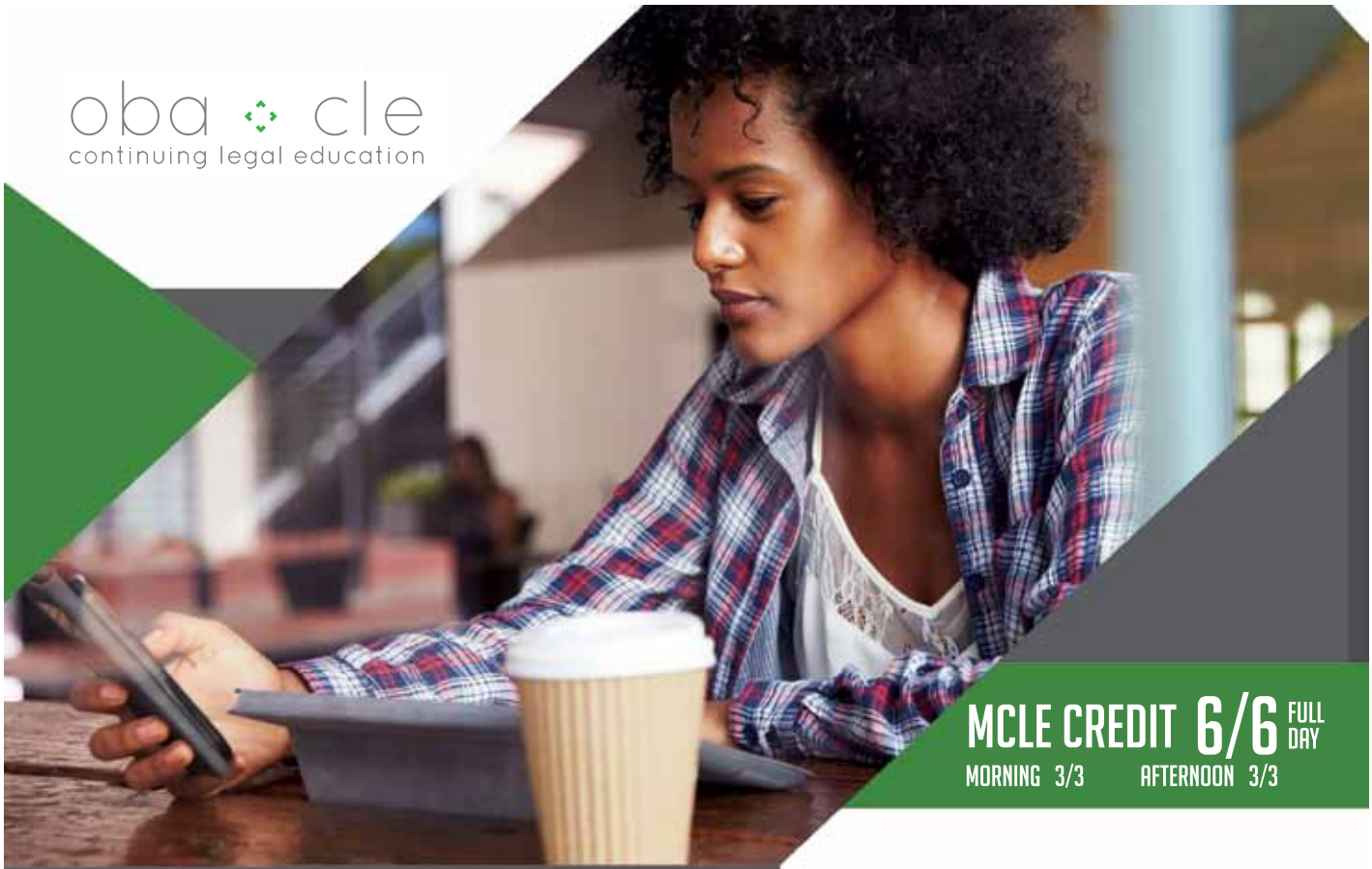

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THE OKLAHOMA BAR
Journal

Volume 89 – No. 27 – 10/13/2018

The Oklahoma Bar Journal (ISSN 0030-1655) is published three times a month in January, February, March, April, May, August, September, October November and December and bimonthly in June and July by the Oklahoma Bar Association, 1901 N. Lincoln Boulevard, Oklahoma City, Oklahoma 73105. Periodicals postage paid at St. Joseph, Michigan.

Subscriptions $60 per year except for law students registered with the OBA and senior members who may subscribe for $30; all active members included in dues. Single copies: $3

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Year in Review: 2018 Federal & State Case Law Review

Oklahoma Bar Association

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2018 OK 75

DONNA FOX, as Personal Representative of Ronald J. Fox, Deceased, Plaintiff/Respondent, v. JAMES R. MIZE and VAN EATON READY MIX, INC., Defendants/Petitioners, and FEDERATED MUTUAL INSURANCE COMPANY, Defendant.

No. 116,489. October 2, 2018

CORRECTION ORDER

The Court's opinion, filed herein on September 18, 2018, is **revised** to correct citation appearing in paragraph 11 as follows:

> 1997 OK 9, 935 P. 2d 289 shall be deleted and replaced with 2008 OK 29, ¶ 19, 198 P. 3d 877, 884

In all other respects the September 18, 2018 opinion shall remain unchanged.

DONE BY ORDER OF THE SUPREME COURT THIS 2nd DAY OF OCTOBER, 2018.

/s/ Noma D. Gurich
VICE CHIEF JUSTICE

2018 OK 77

In the Matter of: J.L.O., IV, a Child Under 18 Years of Age, Carolyn Dougherty, Appellant, v. STATE OF OKLAHOMA, Appellee.

No. 116,465. September 25, 2018

ON APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, STATE OF OKLAHOMA

HONORABLE RODNEY SPARKMAN, SPECIAL JUDGE

¶0 Carolyn Dougherty (Mother), appeals the judgment of the Tulsa County District Court terminating her parental rights to J.L.O., IV (Child). We find the district court did not err in judgment.

ORDER OF THE DISTRICT COURT IS AFFIRMED.

Isaiah Parsons, Charles Graham, and Matthew D. Day, PARSONS, GRAHAM & DAY, LLC, Tulsa, OK, for Appellant.

Kyle Felty, Assistant District Attorney, Tulsa County District Attorney's Office, Tulsa, OK, for Appellee.

Sal R. Munoz, Assistant Public Defender, Tulsa, OK, for Minor Child.

OPINION

DARBY, J.:

¶1 The questions presented to this Court are whether 1) the district court abused its discretion by denying Mother's motion to continue and allowing her waiver of jury trial; 2) a witness testifying telephonically violated Mother's right to procedural due process; 3) the State presented clear and convincing evidence to support the termination of parental rights; and 4) Mother's trial counsel provided effective assistance. We answer the first two questions in the negative and the last two in the affirmative.

I. BACKGROUND AND PROCEDURAL HISTORY

¶2 Mother gave birth to Child on June 6, 2016. On June 17, 2016, when Child was less than two (2) weeks old, the Oklahoma Department of Human Services (DHS) removed Child from Mother's custody. On June 28, 2016, the State filed a petition in Tulsa County District Court requesting that the court adjudicate Child deprived because of the following facts: On June 13, 2016, Tulsa Police pulled over Child's natural parents for expired tags. During the impound inventory, Tulsa Police found multiple items containing brown residue which the searching officer confirmed as heroin, via field test. Mother admitted to using heroin previously, but claimed that she had quit after learning she was pregnant. While Child was in the NICU for weight loss, hospital staff observed Mother with symptoms of continued heroin use including: passing out on a toilet, falling asleep with Child on her chest, and dozing off while standing up. The State alleged that Mother's actions in the above-described conditions constituted **"neglect, failure to provide a safe and stable home, threat of harm, and substance abuse by [the] caretaker."**

¶3 On September 8, 2016, Mother failed to appear for the hearing and the Tulsa County District Court adjudicated Child deprived by consent due to 1) lack of proper parental care or guardianship; 2) abuse, neglect, or dependence; and 3) drug endangerment. The court also imposed an individualized service plan (ISP) by consent, requiring Mother to correct conditions of neglect, failure to provide safe and stable home, threat of harm, and substance abuse. On March 2, 2017, the State filed a Motion to Terminate Mother's parental rights to Child under Title 10A, Sections 1-4-904(B)(5), (7), and (17), alleging Mother had failed to correct the conditions that led to Child being adjudicated deprived. After Mother appeared three (3) hours late to the previously scheduled June 2017 permanency hearing, the district court scheduled a jury trial for August 28, 2017, on the motion to terminate parental rights.

A. Request for Continuance

¶4 Mother appeared for jury trial on August 28, 2017, and orally requested that the district court grant her a continuance. She stated that she had begun to make progress on correcting the conditions that led to Child being adjudicated deprived and she wanted more time to achieve success. Mother explained that she had suffered from unaddressed depression that had set her back on her ISP. Mother offered that she would be willing to waive her right to a jury trial in order to be scheduled for a non-jury trial at a later date. Because Child's biological father is a member of the Choctaw tribe, Mother also requested that the court find out whether the State had secured tribal testimony for her originally scheduled jury trial.

¶5 The State objected to a continuance, stating that they were prepared to proceed. Child agreed with the State's objection and argued that without compelling reasons, due to Child's young age and the length of time he had been kept in protective custody, the court should deny a continuance. Based on Mother's request, the district court recessed briefly to inquire whether tribal testimony would be available, if the court continued the trial. Before receiving an answer from the tribe, however, the court denied Mother's motion for a continuance due to the length of time the case had been pending.

B. Waiver of Jury Trial

¶6 After unequivocally denying the motion for continuance, the district court clarified that Mother was still scheduled for a jury trial that day. The court then asked Mother, "is it your desire to waive your right to have a jury trial on the request for termination issue?" Mother replied affirmatively. The court then reviewed the form waiver of jury trial with Mother:

> THE COURT: It says here that you do wish to waive your right to have a jury trial. Is that your request at this time, ma'am?
>
> [MOTHER]: Yes, Your Honor.
>
> THE COURT: Did you make that decision voluntarily? Is it — did anyone force you, coerce you or promise —
>
> [MOTHER]: No, Your Honor.
>
> THE COURT: — you anything of value to waive your right to have a hearing by jury?
>
> [MOTHER]: No, Your Honor.
>
> THE COURT: Ma'am, you realize by doing this the issue of whether or not to terminate your parental rights will be coming to me. I'll hear all the evidence on both sides of the case and decide whether or not the State has met their burden. Is that your understanding of how you want to proceed?
>
> [MOTHER]: Yes, Your Honor.
>
> THE COURT: Ma'am, are you currently under the influence of any substance that could affect your ability to understand what we're doing today?
>
> [MOTHER]: No
>
> THE COURT: Okay. Are you currently taking or prescribed any type of medication?
>
> [MOTHER]: I am prescribed methadone.
>
> THE COURT: Methadone?
>
> [MOTHER]: Uh-huh.
>
> THE COURT: Okay. And are you taking it as prescribed by a physician and following all of those regulations --
>
> [MOTHER]: Yes, Your Honor.
>
> THE COURT: Okay. And, ma'am, on this back page this form is filled out and there's a signature. Is that your signature up at the top line?
>
> [MOTHER]: Yes, Your Honor.
>
> THE COURT: Okay. At this time I will make the following findings that the mother was — actually, ma'am, I need to swear

you in. I'm sorry. Please raise your right hand. Ma'am, do you swear or affirm to tell the truth, the whole truth and nothing but the truth, so help you God?

[MOTHER]: I do.

THE COURT: Okay. Ma'am, the answers to my questions I just asked you on the record, are those answers true and correct?

[MOTHER]: Yes, they are.

THE COURT: Okay. Thank you, ma'am.

So I'll find that the mother was sworn and responded to the questions under oath, that she understands the nature, purpose and consequence of this proceeding, that her waiver of jury trial was knowingly and voluntarily entered and the Court will accept that at this time and at this time the Court finds that she is competent for the purposes of making that decision. So at this point the Court will show the mother has waived her right to have a jury trial. At this point since we have not heard from the Choctaw Nation, any objection to my taking the issue of the father's consent and the mother's non[-]jury trial to tomorrow morning at 9:00?

Trial Tr. 15:13-17:20, *In re J.L.O.*, JD-16-303, Aug. 28, 2017. With no objections, the district court continued the non-jury trial until the next morning.

C. Non-Jury Trial

¶7 On August 29, 2017, the Tulsa County District Court held the non-jury trial on termination of Mother's parental rights to Child. At trial, Mother testified that she did not finish the assigned parenting classes because of transportation issues and emotional distress over Child's father being arrested. Although assigned to attend substance abuse counseling once a week, Mother admitted she attended only five (5) to fifteen (15) sessions over the course of ten (10) months and was eventually dismissed for her continued lack of attendance. Mother took no action to resume counseling.

¶8 Furthermore, the evidence showed that Mother failed to submit to approximately fifty (50) required drug screenings, providing only three (3) urine samples over the course of ten (10) months. Nonetheless at trial, Mother denied having a drug problem numerous times and stated that she did not understand that a missed urine screen was considered a positive result. Mother self-reported heroin use to her probation officer in January 2017. She also tested positive for various illegal substances in February, March, June, and finally on August 25, 2017. Mother claimed that a prescription medication (she was using to treat a urinary tract infection) was the cause of the positive result four (4) days before trial, as well as the positive in February 2017. Mother, however, had not been prescribed the blamed medication and failed to produce any evidence to show that the drug has the potential to show up on a toxicology report, as claimed.[1]

¶9 When asked if she felt she had corrected the conditions in the case, Mother stated "[n]ot all of them but most of them." Mother expounded that while she had not finished the parenting classes, rented or purchased a place of her own to live, or maintained employment; she had established a stable living environment, was seeking a job, and was sober. Mother agreed that in the past she had not demonstrated sobriety, defining "the past" as any time prior to walking into the courtroom that day.

¶10 Mother claimed to be sober while testifying, but stated that she had taken a prescribed dose of methadone earlier that morning. The State asked Mother if she felt she had exhibited any unusual behavior that day in court, such as having difficulty keeping her eyes open, speaking slowly, or acting lethargically, and she answered no. When asked if she believed it would be best for Child to return to her care that day, Mother said yes, that she was ready, willing, and able to provide appropriate and safe care to Child and that there was nothing further she needed to do to provide safety for him. Trial Tr. 73:6-14, In re J.L.O., JD-16-303, Aug. 29, 2017.

¶11 After Mother's testimony, the State called an Indian Child Welfare Social Worker, from the Choctaw Nation, who was sworn in and testified via telephone. The Choctaw social worker testified that, due to the length of time the case had been ongoing and the numerous unsuccessful attempts by DHS to reunite Mother with Child, she believed Child deserved permanency and was against allowing Mother additional time to correct the conditions that led to termination. She finally stated that she felt it was in the best interest of Child to terminate Mother's parental rights.

¶12 The State last called a DHS child welfare specialist, who testified that it was in Child's best interest to terminate Mother's rights because Mother had not corrected any of the conditions that led to Child being adjudicated deprived. The child welfare specialist noted that Mother had failed to show her ability to provide a safe and stable home, that substance abuse and neglect were both still issues, and that DHS believed that Mother presented a threat of harm to Child if he was returned to her care — pointing to the positive urine screen results from Mother the week before. The child welfare specialist stated that Mother's efforts seemed last-minute and did not warrant additional time under the circumstances — pointing out the importance of permanency for Child.

¶13 In lieu of closing, the State simply withdrew the request for termination under Title 10A, Section 1-4-904(B)(7), leaving the request for termination under the grounds of Sections 1-4-904(B)(5) and (17). Mother made the following closing statement:

> Judge, . . . you've heard the facts and evidence today. Our request on behalf of natural mother, the legal argument that we're making at this time is not that you return the child today to natural mother. I think it's clear from the facts and evidence that we still have some work to do, but we are asking that with the age of this child and with the — the progress that mom has made lately the Court consider allowing natural mother some more time, at least an additional 90 days to get further completion on her service plan. So at this time, Judge, we would ask that you deny the State's motion to terminate based upon the fact that natural mother has started engaging in services and even some services that weren't on her treatment plan that might be more in the nature of helping with the main issue which is the substance abuse issue, and we would ask that you deny the State's motion at this time and allow her some more time to complete her service plan . . . and to correct the conditions.

Trial Tr. 160:25-161:19, *In re J.L.O.*, JD-16-303, Aug. 29, 2017.

¶14 The district court found that Child was placed in DHS care on June 17, 2016, and that, after proper notice, Child was adjudicated deprived by consent on September 8, 2016, with an ISP imposed by consent on Mother that same day. The district court noted that Mother had been provided at least three months to work on the treatment plan and to correct the conditions that led to Child's placement in DHS custody. The district court found that Mother had failed to correct conditions of neglect, threat of harm, failure to provide a safe and stable home, and substance abuse by a caretaker, under which Child was placed in the State's custody.

¶15 The district court determined that additional time would not make a difference to Mother completing the conditions; the court noted the minimal efforts made by Mother throughout the case, including her continued drug use even after the State filed the motion to terminate her parental rights. The court also stated that "it's hard for this Court to believe that [Mother] would fully engage[] in substance abuse treatment if [Mother] does not believe even on this date that she does not have a drug problem." Trial Tr. 166:11-14, *In re J.L.O.*, JD-16-303, Aug. 29, 2017. Therefore, the district court found that termination of Mother's parental rights was in the best interest of Child.

¶16 The district court also determined that DHS had provided Mother with active efforts to reunify with Child and that reunification had failed. Pursuant to the Indian Child Welfare Act, the court found beyond a reasonable doubt that returning Child to Mother's custody would result in serious physical and/or emotional harm to Child.[2] The district court also found that Child was under the age of four and had been in foster care for six (6) of the most recent twelve (12) months prior to the State filing the Motion to Terminate. Finding that the State met its burden of proof by presenting clear and convincing evidence that Mother's parental rights to Child should be terminated pursuant to Title 10A, Sections 1-4-904(B)(5) and (B)(17), the district court therefore granted the State's Motion to Terminate in an order filed September 11, 2017.

¶17 Mother appealed with five propositions of error: 1) the district court committed reversible error in sustaining the State's motion to terminate as the ruling was not supported by clear and convincing evidence; 2) the district court wrongfully denied Mother's motion to continue her trial; 3) Mother did not knowingly and voluntarily waive her right to a jury trial; 4) ineffective assistance of counsel; and 5) Mother was denied her constitutional right to confront all witnesses called against her when

a witness testified via telephone. We address the issues in the order of occurrence.

II. ANALYSIS

A. Motion to Continue Trial

¶18 Mother asserts that the district court erred when it denied her oral motion for a continuance the day the jury trial was scheduled. A district court "may, for good cause shown, continue an action at any stage of the proceedings upon terms as may be just." 12 O.S.2011, § 667. We review a grant or refusal of a motion to continue for abuse of discretion. *Anderson v. Chapman*, 1960 OK 235, ¶ 6, 356 P.2d 1072, 1073; *Mott v. Carlson*, 1990 OK 10, ¶ 6, 786 P.2d 1247, 1249.

¶19 Mother states that the district court abused its discretion when it considered the availability of the State's witnesses prior to ruling on the motion, arguing that "availability of the State's witnesses is not sufficient for granting a continuance in the State's favor any more than a need to maintain a docket or effect permanency for the Minor Child." Mother also claims that the court should have taken into consideration other facts such as Mother's jury trial waiver and methadone use.

¶20 This Court has stated that there may be an abuse of discretion in denying a motion to continue "when a trial is forced with such dispatch as to result in depriving an interested party of reasonable opportunity to prepare for trial, and secure witnesses." *Bookout v. Great Plains Reg'l Med. Ctr.,* 1997 OK 38, ¶ 11, 939 P.2d 1131, 1135 (quoting *State v. Duerkson*, 1943 OK 6, ¶ 7, 132 P.2d 649, 650). We have also held that the applicable chief test is "whether the grant or denial of the motion operates in the furtherance of justice." *Duerkson*, 1943 OK 6, ¶ 7, 132 P.2d at 650; *see also In re N.L.*, 1988 OK 39, ¶¶ 29-32, 754 P.2d 863, 869 (denial of motion to continue was not an abuse of discretion when Mother requested a continuance to controvert a report, but Mother did not explain the nature or materiality of evidence she expected to obtain, did not file a written motion for continuance, did not show due diligence in obtaining evidence to controvert the report, and made no argument why a continuance would be required to give her a fair opportunity to controvert the report).

¶21 Mother's oral motion for a continuance occurred on the morning the jury trial was scheduled to occur. Mother requested the continuance for additional time to work on her treatment plan, not for the purpose of gathering additional evidence or witnesses or for attorney preparation. While Mother offered to waive her right to a jury trial in exchange for a continuance, the court clearly denied the motion to continue before Mother waived her right to a jury trial. Mother also argues that the court improperly considered the availability of the State's witness; however, Mother specifically requested the court to do so as part of her motion to continue. Further, consideration of availability of key witnesses in granting or denying a motion to continue is not an abuse of discretion. *Bookout*, 1997 OK 38, ¶¶ 14-16, 939 P.2d at 1135 (denial of a two-day continuance for a newly retained attorney to prepare expert witnesses was an abuse of discretion). Denial of the motion operated in furtherance of justice and did not deprive Mother of reasonable opportunity to prepare. We find the district court did not abuse its discretion in denying the motion to continue.

B. Waiver of Jury Trial

¶22 Mother charges that, because of her methadone use, she did not knowingly and voluntarily waive her right to a jury trial. The right to a jury trial in a child deprivation hearing can be surrendered by voluntary consent or waiver. 12 O.S. §591; *In re D.D.F. & S.D.F.*, 1990 OK 89, ¶ 5, 801 P.2d 703, 705. Waiver must be competently, knowingly, and intelligently given. *Colbert v. State,* 1982 OK CR 174, ¶ 13, 654 P.2d 624, 627; *In re D.D.F. & S.D.F.*, 1990 OK 89, ¶ 8, 801 P.2d at 705. We review allowance or denial of waiver of the right to a jury trial for abuse of discretion. *See Colbert*, 1982 OK CR 174, ¶ 13, 654 P.2d at 628.

¶23 Mother argues that the district court improperly failed to ask her if the methadone she had taken affected her ability to think clearly. The district court did, however, ask Mother specifically if she was currently under the influence of any substance that could affect her ability to understand what was happening. Mother answered no. The examining court is in the best position to observe an individual who waives a substantial and significant right. *In re Adoption of A.W.H.*, 1998 OK 61, ¶ 4, 967 P.2d 1178, 1179. The district court is able to observe the person's actions and appearances, looking for any indication of a lack of mental clarity. *Seabolt v. Ogilvie*, 1969 OK 3, ¶ 19, 448 P.2d 1009, 1012.

¶24 Mother also argues that due to questions from the State the next day, the district court should have been on notice that Mother was under the influence of drugs, such that her waiver was not knowingly given. Mother argues that the State's questions, regarding whether she was under the influence on August 29, 2017, should have affected the district court's ruling the day before finding that Mother was competent to waive her jury trial. While the record implies that Mother may have appeared to be under the influence on August 29, there is no evidence in the record that Mother was exhibiting similar behavior on August 28 when the court accepted Mother's waiver of jury trial. The district court did not abuse its discretion in allowing Mother to waive her right to a trial by jury on August 28, 2017.

C. Right to Confront Witnesses

¶25 Mother claims that the district court erred when it allowed the State to present telephonic testimony from the Choctaw Nation without objection. A party who fails to preserve an issue for appeal, by timely objecting to the issue at the district court, waives review of that issue in this Court. *Bane v. Anderson, Bryant & Co*., 1989 OK 140, ¶ 24, 786 P.2d 1230, 1236. A timely objection, however, is not necessary if a showing of prejudice or fundamental error is made. *McMillian v. Lane Wood & Co*., 1961 OK 95, ¶ 14, 361 P.2d 487, 492. Mother has failed to show any prejudice to her resulting from the telephonic testimony.

¶26 Mother further claims that she was denied her Sixth Amendment guarantee that "the accused shall enjoy the right . . . to be confronted with witnesses against him," U.S. Const. amend VI; Okla. Const. art. II, § 20. Mother believes the Sixth Amendment is applicable due to this Court's statement that the "full panoply of procedural safeguards must be applied" in child deprivation cases. *In re Chad S*., 1978 OK 94, ¶ 12, 580 P.2d 983, 985. This Court has stated repeatedly, however, that the Sixth Amendment to the United States Constitution is not implicated in parental rights termination proceedings as the confrontation clause only applies to criminal cases. *In re A.M.* & R.W., 2000 OK 82, ¶ 9 n.7, 13 P.3d 484, 487 n.7; *In re Rich*, 1979 OK 173, ¶ 13 n.21, 604 P.2d 1248, 1253 n.21. Instead, we have determined that the requirement that the full panoply of procedural safeguards be applied to child deprivation hearings is based on due process. *In re A.M. & R.W.*, 2000 OK 82, ¶¶ 7- 8, 13 P.3d at 487; U.S. Const. amend. XIV, § 1; Okla. Const. art. II, § 7. We review a claim of denial of procedural due process *de novo. In re A.M. & R.W.*, 2000 OK 82, ¶ 6, 13 P.3d at 487.

¶27 In parental termination proceedings, procedural due process requires a meaningful and fair opportunity to defend which includes a reasonable opportunity to confront and cross-examine witnesses. *Id.* ¶ 9, 13 P.3d at 487. Here, the State called a witness to testify via telephone. The witness was sworn in and questioned by all parties via telephone. Mother was not excluded from the courtroom during any of this testimony, or barred from participation in cross-examination; rather, like everyone else present, she simply was not able to physically observe the witness. Mother conducted an extensive cross-examination of this witness.

¶28 Mother was allowed reasonable opportunity to confront and cross-examine the witness; there was no due process violation of Mother's rights. Further, Title 10A, Section 1-4-503(A)(4) specifically allows the district court to conduct any proceeding held pursuant to the Oklahoma Children's Code via teleconference communication. 10A O.S.2011, § 1-4-503(A)(4).[3]

D. Clear and Convincing Evidence

¶29 In parental termination cases, the State bears the burden to show by clear and convincing evidence that the child's best interest is served by the termination of parental rights. *In re C.D.P.F.*, 2010 OK 81, ¶ 5, 243 P.3d 21, 23; *In re C.G.*, 1981 OK 131, ¶ 17, 637 P.2d 66, 71-72. Clear and convincing evidence is the degree of proof which produces a firm belief or conviction as to the truth of the allegation in the mind of the trier of fact. *In re C.D.P.F.*, 2010 OK 81, ¶ 5, 243 P.3d at 23. Appellate review of a termination of parental rights must show that the record contains clear and convincing evidence to support the district court's decision. *In re S.B.C.,* 2002 OK 83, ¶ 7, 64 P.3d 1080, 1083.

¶30 Mother alleges that the State failed to prove by clear and convincing evidence that termination of her parental right was in the best interest of Child. The district court terminated Mother's parental rights under Title 10A, Sections 1-4-904(B)(5) and (17). Those sections provide:

> (B) The court may terminate the rights of a parent to a child based upon the following legal grounds:

. . . .

5. A finding that:

a. the parent has failed to correct the condition which led to the deprived adjudication of the child, and

b. the parent has been given at least three (3) months to correct the condition;

. . . .

17. A finding that a child younger than four (4) years of age at the time of placement has been placed in foster care by the Department of Human Services for at least six (6) of the twelve (12) months preceding the filing of the petition or motion for termination of parental rights and the child cannot be safely returned to the home of the parent.

a. For purposes of this paragraph, a child shall be considered to have entered foster care on the earlier of:

(1) the adjudication date, or

(2) the date that is sixty (60) days after the date on which the child is removed from the home.

10A O.S.Supp.2015, §§ 1-4-904(B)(5),(17).

1. Section 1-4-904(B)(5)

¶31 At the time of trial, Mother had been given eleven and a half months to correct the conditions that led to Child being adjudicated deprived: neglect, failure to provide a safe and stable home, and threat of harm and substance abuse by caretaker. While Mother did show some effort toward correcting these conditions, she continued to fail drug tests even after the State filed for termination of her parental rights and failed to even admit that she had a drug problem.

¶32 The State presented evidence that Mother also failed to complete substance abuse counseling or take steps to be re-admitted to the program after being dismissed for lack of attendance. Workers from both DHS and the Choctaw Nation testified that termination of Mother's parental rights was in Child's best interest. The State offered evidence that Mother admitted to drug use, refused countless drug tests, and failed at least four drug tests — the most recent less than one week before trial.

2. Section 1-4-904(B)(17)

¶33 Child was removed from the home on June 17, 2016, and was adjudicated deprived on September 8, 2016. Therefore, Child "entered foster care" sixty (60) days after removal from the home, on August 16, 2016. At that time, Child was two (2) months old. Child had been in foster care for six and a half (6 1/2) of the past twelve (12) months when the petition for termination of parental rights was filed. Due to Mother's continued drug use, Child could not be safely returned to the home.

¶34 It is clear that Mother failed to correct the conditions that led to Child being adjudicated deprived and that Child could not safely return to the home of Mother at the time of trial. The State presented clear and convincing evidence to prove the grounds for termination. We find the district court did not err by terminating Mother's parental rights to Child.

E. Effective Assistance of Counsel

¶35 Lastly, Mother asserts ineffective assistance of trial counsel. We perform a de novo review on procedural due process claims from a termination of parental rights. *In re A.M. & R.W.*, 2000 OK 82, ¶ 6, 13 P.3d at 487. This Court has said numerous times that parents and children have the right to effective assistance of counsel in proceedings terminating parental rights. 10A O.S.2011, § 1-4-306(A); *In re T.M.H.*, 1980 OK 92, ¶ 7, 613 P.2d 468, 471; *In re D.D.F. & S.D.F.*, 1990 OK 89, ¶ 15, 801 P.2d at 707. We review claims for ineffective assistance of counsel in termination proceedings under the same standard used in criminal trials. *In re R.S.*, 2002 OK CIV APP 90, ¶ 16, 56 P.3d 381, 384; *In re N.L.*, 2015 OK CIV APP 24, ¶ 18, 347 P.3d 301, 304.

¶36 To require reversal, the claimant must show that 1) the attorney's performance was deficient, and 2) the deficient performance prejudiced the defense such that but for the deficient performance, the result would have been different. *Strickland v Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). The proper measure of attorney performance is reasonableness under prevailing professional norms. *Id*. at 688; *In re D.D.F. & S.D.F.*, 1990 OK 89, ¶ 15, 801 P.2d at 707 (citing *In re Orcutt*, 173 N.W.2d 66, 69 (Iowa 1969)). Judicial scrutiny of trial counsel's performance is highly deferential; every effort must be made to avoid hindsight, and the Court must indulge a strong presumption that counsel's conduct falls within the range of reasonable assistance. *Strickland*, 466 U.S. at

689. The claimant "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.*

¶37 Mother claims she received deficient assistance; citing a lack of overall objections, opening statement, witnesses called on her behalf, and objection to a witness testifying telephonically or further verification of that witness's identity. The choice not to give an opening statement, call witnesses, object excessively, and even not to object to testimony of a witness via telephone, however, all "might be considered sound trial strategy." Mother fails to show the actions of trial counsel were not reasonable or that they in any way prejudiced her such that but for the errors, the result would have been different. *Strickland*, 466 U.S. at 694.

¶38 In fact, Mother fails to show any prejudice resulting from trial counsel's strategy. None of the counsel in this proceeding made opening statements. After both the State and Child waived closing, Mother's counsel made a closing statement. Counsel's strategic choices were within the range of professionally reasonable judgment. Mother's failure to show deficient performance or sufficient prejudice de-feats her ineffectiveness claim.

III. CONCLUSION

¶39 The district court did not abuse its discretion when it denied Mother's motion for a continuance. Mother knowingly and voluntarily waived her right to a jury trial on the termination of her parental rights; the court did not abuse its discretion in allowing her waiver. The district court did not violate Mother's right to procedural due process when it allowed one of the State's witnesses to testify telephonically. Further, the evidence was clear and convincing that it was in Child's best interest to terminate Mother's parental rights. Finally, trial counsel for Mother was effective.

¶40 We find the district court did not err in its judgment granting the State's Motion to Terminate Parental Rights and hereby affirm. We remand to the district court for permanency proceedings.

ORDER OF THE DISTRICT COURT IS AFFIRMED.

Combs, C.J., Gurich, V.C.J., Winchester, Edmondson, Colbert, Reif, Darby, JJ., concur;

Kauger, J., concurs in result;

Wyrick, J., concurs in judgment.

DARBY, J.:

1. Direct Examination of Mother by State:
[State: Y]ou gave your third UA to DATL on your fourth visit there on Friday of last week; is that right?
[Mother:] Yes.
[State:] Okay. And you tested positive in that UA for benzos; correct?
[Mother:] Yes.
[State:]: Okay. Do you consider that to be a problem?
[Mother:] No.
[State:] Why not?
[Mother:] Because that was given to me for a UTI and that was given to me by someone because I don't have medical insurance.
[State:] So the benzo you were given was not a prescription for you?
[Mother:] No.
[State:] Okay. And is that the same benzo you were taking back in January —
[Mother:] Yes.
[State:] — when you said it was for a UTI?
[Mother:] Yes. It's called sulfameth and it's for like UTIs and —
[State:] Do you have the same UTI from January?
[Mother:] Not that same one . . . . But, yeah, sulfameth shows up as a benzo.
[State:] Shows up as a benzo or is it a benzo?
[Mother:] It shows up as a benzo, but it's not classified as a benzo. It's actually classified as an antibiotic.
[State]:] Did you provide any — well, I guess you couldn't have provided any prescription because you haven't been given a prescription; right?
[Mother:] Right.
[State:] Okay. Do you find it problematic for someone with your history taking medication that hasn't been prescribed to you?
[Mother:] It could be problematic.
Trial Tr. 60:1- 61:12, In re J.L.O., JD-16-303, Aug. 29, 2017.

2. In cases that fall under the State or Federal Indian Child Welfare Acts, the State must prove beyond a reasonable doubt that continued custody by the parent is likely to result in serious emotional or physical damage to the child. *In re H.M.W. & K.D.W.*, 2013 OK 44, ¶ 6, 304 P.3d 738, 740.

3. A. All cases initiated by the filing of a petition alleging that a child is deprived shall be heard separately from the trial of other cases against adults. The adjudicative hearings and hearings for termination of parental rights shall be conducted according to the rules of evidence. All other hearings and proceedings conducted pursuant to the Oklahoma Children's Code shall be informal and the rules of evidence shall not apply.
. . . .
4. If authorized by the court, **any proceeding held pursuant to the Oklahoma Children's Code may be conducted via teleconference communication**; provided, that when a parent or child appears for a proceeding via teleconference communication, the attorney representing that parent or child shall personally appear at the hearing. For purposes of this paragraph, **"teleconference communication" means participation in the hearing by interactive telecommunication, including telephonic communication by the absent party, those parties present in court, the attorneys and others deemed to be necessary participants to the proceeding** including, but not limited to, foster parents and facility staff where a child may be receiving care or treatment.
10A O.S.2011, § 1-4-503(A)(4) (emphasis added).

2018 OK 78

IN THE MATTER OF THE REINSTATEMENT OF: MICHAEL C. TAYLOR TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION AND TO THE ROLL OF ATTORNEYS.

SCBD No. 6551. September 25, 2018

ORIGINAL PROCEEDING FOR ATTORNEY REINSTATEMENT

¶0 Michael C. Taylor (Petitioner) resigned his Bar membership in the State of Oklahoma in 2011 pending disciplinary proceedings and applied for reinstatement in August 2017. Following its evidentiary hearing, the Professional Responsibility Tribunal Trial Panel recommended we deny reinstatement. Upon *de novo* review, we agree.

REINSTATEMENT DENIED; COSTS ASSESSED.

Sheila J. Naifeh, Tulsa, Oklahoma, for Petitioner.

Stephen L. Sullins, Assistant General Counsel, Oklahoma Bar Association, Oklahoma City, Oklahoma, for Respondent.

Darby, J.

¶1 The Supreme Court of Oklahoma possesses original, exclusive, and nondelegable jurisdiction to control and regulate the practice of law, licensing, ethics, and discipline of attorneys. *In re Reinstatement of Kamins,* 1988 OK 32, ¶ 18, 752 P.2d 1125, 1129. The Court finds the underlying record is sufficient for review and resolution of the Petition for Reinstatement pursuant to Rule 6.13 of the Rules Governing Disciplinary Proceedings (RGDP). 5 O.S.2011, ch. 1, app. 1-A; *State ex rel. Okla. Bar Ass'n v. Braswell*, 1998 OK 49, ¶ 7, 975 P.2d 401, 404. To assist the Court in its ultimate determination, the Professional Responsibility Tribunal Trial Panel (Trial Panel) conducts an evidentiary hearing and files a report with the Supreme Court. In its report, the Trial Panel sets forth findings regarding whether the applicant (1) possesses the good moral character to be admitted to the Bar, (2) has engaged in any unauthorized practice of law during the period of resignation, and (3) possesses the competency and learning in the law required for admission to practice law in the State of Oklahoma. RGDP 11.2, 11.5.

¶2 The applicant bears the heavy burden of proving by clear and convincing evidence that reinstatement is warranted on these grounds and must present stronger proof of his qualifications than a person seeking admission for the first time. RGDP 11.4, 11.5; *In re Reinstatement of Mumina*, 2009 OK 76, ¶ 8, 225 P.3d 804, 809. An applicant who has been resigned for more than five (5) years must also show that he has "continued to study and thus has kept himself informed as to current developments in the law sufficient to maintain his competency." RGDP 8.2, 11.5. In addition, the Court may also consider: (1) the applicant's present moral fitness; (2) the demonstrated consciousness of the conduct's wrongfulness and disrepute it has brought upon the legal profession; (3) the extent of rehabilitation; (4) the seriousness of the original misconduct; (5) the applicant's conduct after resignation; (6) the time elapsed since the resignation; (7) the applicant's character, maturity, and experience when he resigned; and (8) the applicant's present legal competence. *In re Reinstatement of Pacenza,* 2009 OK 9, ¶ 9, 204 P.3d 58, 62.

¶3 In deciding appropriate action, the Court must safeguard the interests of the public, the courts, and the legal profession. *Kamins*, 1988 OK 32, ¶ 21, 752 P.2d at 1130. At the same time, the Court balances the interests of the applicant against the fact that an unprincipled attorney may inflict tremendous harm upon his clients and the public. *In re Reinstatement of Conrady*, 2017 OK 29, ¶ 5, 394 P.3d 219, 221-22.

STANDARD OF REVIEW

¶4 This Court reviews the Trial Panel's findings *de novo. State ex rel. Okla. Bar Ass'n v. Kinsey*, 2009 OK 31, ¶ 12, 212 P.3d 1186, 1192. While entitled to great weight, the Trial Panel's report and recommendations are merely advisory in nature. *State ex rel. Okla. Bar Ass'n v. Anderson,* 2005 OK 9, ¶ 15, 109 P.3d 326, 330; *Kamins,* 1988 OK 32, ¶ 18, 752 P.2d at 1129. The ultimate decision regarding reinstatement rests with this Court. *In re Reinstatement of Johnston,* 2007 OK 46, ¶ 4, 162 P.3d 922, 923.

THE FACTS

¶5 Petitioner was initially admitted to the Oklahoma Bar Association in 1982. This Court has twice before disciplined Petitioner for mishandling client trust funds. First, in 2000, we suspended Petitioner's license for thirty (30) days; *State ex rel. Okla. Bar Ass'n v. Taylor (Taylor I)*, 2000 OK 35, ¶ 36, 4 P.3d 1242, 1256; then three years later, we imposed a public reprimand for similar misconduct. *State ex rel. Okla. Bar Ass'n v. Taylor (Taylor II)*, 2003 OK 56, ¶¶ 15, 24, 71 P.3d 18, 26, 29.[1]

¶6 In 2011, the General Counsel for the Oklahoma Bar Association alleged that Petitioner misappropriated approximately $80,000 of client funds to gamble at casinos. The Bar stated that the money Petitioner stole from the account was from settlement funds awarded to a widowed client after her husband had been killed in a motorcycle accident. Petitioner allegedly

removed the settlement funds incrementally and gambled away the entire amount on slot machines. After spending all of the money, Petitioner told his client what he had done and then pressured her into signing an affidavit characterizing the improper taking as "a loan." Petitioner informed the client that if she did not sign the affidavit, or if she reported him to the Bar, he would be disbarred and thus unable to pay her back at all. Afterwards, Petitioner reimbursed the stolen funds to the trust account with money partially provided to him by his mother.

¶7 The Bar charged Petitioner with professional misconduct in SCBD 5716, citing misappropriation of funds and coercion of the client. On January 24, 2011, this Court issued an Order suspending Petitioner's license to practice law, effective immediately. *State ex rel. Okla. Bar Ass'n v. Taylor,* 2011 OK 5. In this Order, we specifically directed Petitioner to "notify all clients having legal business pending with him within twenty days" and "to comply with all other requirements of Rule 9.1" of the RGDP. *Id.* ¶ 2. Petitioner then resigned his Bar membership pending disciplinary proceedings and voluntarily waived his right to contest any of the Bar's allegations against him. We approved Petitioner's resignation on May 2, 2011, and removed his name from the roll of attorneys. *State ex rel. Okla. Bar Ass'n v. Taylor,* 2011 OK 39, 266 P.3d 43.

¶8 In August 2017, Petitioner applied for reinstatement following the requisite five-year waiting period. RGDP 8.1(c). After conducting its evidentiary hearing, the Trial Panel found that while Petitioner possessed sufficient competency, he had engaged in the unauthorized practice of law while resigned and had "utterly failed" to show the moral character warranting reinstatement. Trial Panel Rep., pp. 3-5, Mar. 26, 2018. The report concluded:

> Regrettably, the sum of evidence, including the serious personal and financial harm occasioned on his wife specifically, shows that his continued gambling is a priority which exceeds his desire to regain his license to practice law.

Id. at p. 5. Accordingly, the Trial Panel recommended we deny reinstatement.

DISCUSSION

¶9 In consideration of the entire record, we find that Petitioner (1) lacks sufficient competency to practice law, (2) engaged in the unauthorized practice of law while resigned, and (3) is not currently possessed of the moral character befitting membership to the Bar. We discuss each of these considerations below.

I. Competency to Practice Law

¶10 At the evidentiary hearing, Petitioner produced numerous credible witnesses to testify to his competency and learning in the law. Indeed, several attorneys in good standing affirmed Petitioner's seasoned legal experience, knowledge of the law, and skills in client representation. Testimony of these character witnesses demonstrates that Petitioner has remained informed on current developments in the law.

¶11 Competency to practice law, however, requires more. Specifically, Rule 9.1 of the RGDP requires that within twenty (20) days after being suspended or after resigning pending disciplinary proceedings, the lawyer must notify all clients of his inability to continue representation and withdraw from all pending cases in all courts. 5 O.S.2011, ch. 1, app. 1-A. Additionally, within these twenty (20) days, the lawyer must file:

> an affidavit with the Commission and with the Clerk of the Supreme Court stating that the lawyer has complied with the provisions of this Rule, together with a list of the clients so notified and a list of all other State and Federal courts and administrative agencies before which the lawyer is admitted to practice. **Proof of substantial compliance by the lawyer with this Rule 9.1 shall be a condition precedent to any petition for reinstatement.**

Id. (emphasis added).

¶12 Petitioner was suspended from the practice of law on January 24, 2011. Therefore, Petitioner's twenty-day deadline to withdraw and notify his clients and the courts was February 14, 2011, at the latest. Petitioner, however, failed to file any such record of his compliance until January 19, 2018, *nearly seven (7) years later.* The untimely affidavit also lacks compliance by neglecting to include a list of clients notified or courts or administrative agencies before which Petitioner was admitted to practice.

¶13 The Court has previously excused a nonconforming affidavit that, although untimely, was submitted within a reasonable period and

included all documentation necessary to meet the standards imposed by the rule. *See In re Reinstatement of Munson,* 2010 OK 27, ¶ 28, 236 P.3d 96, 106 (finding proof of substantial compliance in notice filed nine (9) days late and then supplemented ten (10) days later with a full list of clients, agencies, and courts). Contrastingly, Petitioner's seven-year-late, incomplete affidavit does not signal a reasonable time period nor a sufficient effort to substantially comply with the standards imposed by the rule. Accordingly, Petitioner has failed to show clearly and convincingly that he is possessed of the requisite competency to re-engage in the practice of law. *See id.* ¶¶ 24-31, 236 P.3d at 105-07, I*n re Reinstatement of Bodnar*, 2016 OK 12, ¶ 19, 367 P.3d 916, 920.

II. Unauthorized Practice of Law

¶14 Petitioner openly admits he engaged in the unauthorized practice of law while resigned, yet he conceals the full extent of his misconduct. The Oklahoma Rules of Professional Conduct (ORPC) provide that "[a] lawyer who is not admitted to practice in this jurisdiction shall not "hold out to the public or otherwise represent" that he is so permitted." ORPC 5.5(b)(2), 5 O.S.2011, ch. 1, app. 3-A. Likewise, "a lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction." ORPC 5.5(a).

¶15 Petitioner actively engaged in the unauthorized practice of law in a case he had pending in federal court. Unaware of Petitioner's suspension, opposing counsel in that case filed and attempted to discuss two pending motions with Petitioner. In these filings, opposing counsel stated that Petitioner agreed to discuss the first motion, but declined to discuss the second. On neither occasion, however, did Petitioner ever inform opposing counsel he was suspended.

¶16 Similarly, without notice of Petitioner's suspension, the federal court scheduled a hearing on the second motion for March 10, 2011. Just one (1) day before the hearing was set to occur, Petitioner filed an "Application to Extend or Reset Deadlines and Reopen Discovery." Only at this point, nearly a month past his February 14 notice deadline, did Petitioner inform the court he was suspended from the practice of law. Even more egregious, in doing so Petitioner fabricated a new deadline of March 11, presumably to make it appear as if he had given the court proper notice. Not only did Petitioner distort the timeline of events, but he perpetrated this fraud in the eleventh hour in a way that could have damaged his client's case. Therefore, Petitioner violated Rule 3.3(a) of the ORPC by knowingly making a false statement of fact to a tribunal and failing to thereafter correct that statement. 5 O.S.2011, ch. 1, app. 3-A.

¶17 Regarding Petitioner's unauthorized practice of law in this federal case, the Trial Panel stated that Petitioner "was between the Devil and The Deep, Blue Sea." Trial Panel Rep., p. 4, Mar. 26, 2018. We disagree. No outside force prevented Petitioner from filing a truthful, timely notice of his suspension. It was Petitioner's dishonesty and delay — no one else's — that landed him and his client in this predicament. Petitioner's behavior presents clear rule violations. This Court will not simply ignore Petitioner's lack of candor and noncompliance, particularly because he should have been extraordinarily careful to follow even the most minor of rules while resigned. *See In re Reinstatement of DeBacker*, 2008 OK 17, ¶ 23 n.23, 184 P.3d 506, 515, n.23.

III. Moral Character

¶18 Petitioner's moral character presents a central issue in this matter, primarily because Petitioner has produced little evidence to show how he has utilized the past six (6) years to rehabilitate himself. For many years, Petitioner played only live poker and was able to engage in this activity with moderate control. Eventually, however, Petitioner began playing slot machines and got hooked. He then started dipping into his client's trust account to fuel this addiction. Thereafter, in order to restore what he had improperly taken, Petitioner strapped himself and his family with oppressive debt. Instead of endeavoring to climb out of this hole, Petitioner dug himself and his family deeper still. Petitioner currently owes considerable sums of money to the Internal Revenue Service, the Oklahoma Tax Commission, and providers of student loans for the benefit of his children.

¶19 This Court has reinstated applicants who, like Petitioner, took client funds to pay for gambling, but only after the applicant established clearly and convincingly that a reoffense was not likely. For example, in *In re Reinstatement of Elias*, this Court noted, "It is significant that Elias has put great efforts into placing himself in a position to be considered for readmission by making restitution and

clearing his debts." 1988 OK 86, ¶ 10, 759 P.2d 1021, 1024. Likewise, we have reinstated other applicants who discontinued their injurious gambling behaviors and otherwise demonstrated consistent life changes illustrating the moral character warranting reinstatement. *In re Reinstatement of Clifton*, 1990 OK 15, ¶¶ 3-5, 787 P.2d 862, 862-63; *In re Reinstatement of Snodgrass*, 1933 OK 592, ¶¶ 11-13, 26 P.2d 756, 758. Conversely, Petitioner has neither cleared his debts nor gained control over his addictive behavior.

¶20 More importantly, Petitioner *continued* to gamble periodically throughout his resignation, including an instance just five (5) days prior to filing his Petition for Reinstatement. The Court's concern is that Petitioner will continue gambling and thereby place client funds at risk, further burden his family, and stain the Bar all the more. Petitioner must somehow convince us that the hook is out of his mouth before we readmit him to membership in the Bar.

¶21 The Court weighs heavily Petitioner's marginal efforts to regain control over his caustic behaviors. Petitioner claims that after resigning he participated in counseling to work through his addiction. His sporadic appearances throughout this time, however, were inconsistent at best and had discontinued completely by March 2016. Only *after* filing for reinstatement did Petitioner resume his efforts to seek treatment. Petitioner fails to show how this on-again, off-again approach to counseling has sufficiently helped him manage his gambling issues.

¶22 This Court also allowed reinstatement in *In re Reinstatement of Fraley* after the applicant resigned for misappropriation of funds to support wagering on horse races. 2007 OK 74, ¶ 8, 175 P.3d 355, 357. Regarding Fraley, we emphasized:

> He has accepted full responsibility for his actions and has taken steps to rehabilitate himself. He no longer gambles on horse races or imbibes heavily, and he sought professional counseling for four years.

Id. ¶ 5, 175 P.3d at 356. The Court has even reinstated an applicant who committed several criminal acts while intoxicated. *Conrady*, 2017 OK 29, ¶¶ 1-2, 394 P.3d at 220-21. There we highlighted:

> Conrady's conduct after imposition of discipline shows he obtained regular professional medical behavioral treatment with a professional witness stating Conrady's "complete success" with this treatment.

Id. ¶ 8, 394 P.3d at 222. In contrast, Petitioner has persisted in the gambling behaviors that led to his resignation and has not meaningfully sought recovery.

¶23 We must consider Petitioner's ongoing addiction to gambling, and how that addiction may impugn the interests of the public, the courts, and the legal profession. At times, Petitioner has declared that he is finished gambling, yet before the Trial Panel he testified otherwise:

> I'm not saying I won't ever, in twenty (20) years, go to Vegas. I can't tell you that. But my present plan today is not to gamble anywhere, not online, not for play money, not — because I've shut that all down. My wife watches me.

Trial Panel Hr'g Tr., p. 386, Jan. 10, 2018. Petitioner's verbal assurances that he will not gamble again are insufficient to meet his high burden of showing he is fit to practice law. Likewise, the Court will not place the responsibility on Petitioner's wife to "keep an eye on him" and manage his tendencies for the foreseeable future. The gambling behaviors are *Petitioner's* problem, and he must be the one to remedy them before the Court will favor reinstatement.

¶24 Equally troubling, Petitioner does not appear to fully appreciate the wrongfulness of his prior misconduct and the resulting disrepute upon the legal profession. The Trial Panel asked Petitioner if he believed he possessed the good moral character to warrant reinstatement, to which he plainly replied: "Yes, I think I *always* have." *Id.* at 341 (emphasis added). Unfortunately, we disagree. Petitioner dismisses the gravity of his dishonesty and in doing so minimizes the corrosive impact of his decisions on clients and family members left in his wake.

¶25 Contrary to accepting responsibility, at the reinstatement hearing Petitioner attempted to recant his prior waiver of rights to contest the Bar's allegations by denying certain portions of their findings. Specifically, Petitioner testified that he did *not* coerce or pressure his former client to sign the cover-up affidavit after he siphoned off her money. To now switch

his position on this critical aspect of the original complaint shows Petitioner possesses neither remorse nor a willingness to stand by his word and take responsibility for his wrongdoing.

¶26 Aside from this contention, Petitioner does not deny that he took the settlement money without the client's knowledge. Nor does he deny that he conjured up the bogus affidavit and placed it before his client in a desperate attempt to prevent a third disciplinary action. Petitioner, therefore, violated Rule 8.4 of the ORPC by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. 5 O.S.2011, ch. 1, app. 3-A. The fact remains that Petitioner perpetrated this fraud whether he compelled the client to sign the document containing the misrepresentation or not.

¶27 Lastly, the seriousness of Petitioner's breach of trust gives this Court pause in considering the Petition for Reinstatement. The Court has consistently regarded misappropriation of funds and subsequent efforts to conceal the defalcation to be among the most egregious of rule violations. *State ex rel. Okla. Bar Ass'n v. Lavelle*, 1995 OK 96, ¶ 28, 904 P.2d 78, 82-83; *State ex rel. Okla. Bar Ass'n v. Miskovsky*, 1992 OK 40, ¶ 15, 832 P.2d 814, 818; *State ex rel. Okla. Bar Ass'n v. Perkins*, 1988 OK 65, ¶ 34, 757 P.2d 825, 832; *State ex rel. Okla. Bar Ass'n v. Raskin*, 1982 OK 39, ¶ 22, 642 P.2d 262, 268. To be clear, the fact that Petitioner is addicted to gambling does not by itself lead us to believe he is morally unfit to practice law. The Court's dismay rests instead in the unethical conduct flowing from Petitioner's addiction alongside his lack of visible rehabilitation.

CONCLUSION

¶28 The combination of Petitioner's ongoing addiction, significant debt, and failure to accept responsibility indicate the potential for greater malfeasance, harm to clients, and disrespect upon all who practice law in Oklahoma. Upon thorough review, we find Petitioner has engaged in the unauthorized practice of law, lacks sufficient competency, and does not currently possess the moral character befitting membership to the Bar. Petitioner has failed to meet his burden by clear and convincing evidence. Therefore, his request for reinstatement is denied. Pursuant to Rule 11.1(c) of the RGDP, Petitioner is ordered to pay costs associated with this proceeding in the amount of $148.25. 5 O.S.2011, ch. 1, app. 1-A. Petitioner must wait at least one (1) year from this denial before applying again for reinstatement. RGDP 11.1(e).

REINSTATEMENT DENIED; COSTS ASSESSED.

All Justices concur.

Darby, J.

1. The acts of misconduct in *Taylor I* occurred from November 1998 through June 1999, and those in *Taylor II* began just a few months later in November 1999. *Taylor II*, 2003 OK 56, ¶ 15, 71 P.3d at 26. The second series of events, however, was not reported to the Bar until July 2000 — after our imposition of discipline in *Taylor I*. *Id*. Due to the overlap in discipline and reporting, which prevented the Court from considering the related conduct in *Taylor I*, the Bar stipulated *Taylor II* should not be treated more harshly as a distinct, repeat offense. *Id*.

2018 OK 79

In Re: Rules of the Supreme Court for Mandatory Continuing Legal Education [Rule1, Rule 6(e) and Rule 7 Regulation 4.1.9]

SCBD 3319. October 8, 2018

ORDER

This matter comes on before this Court upon an Application to Amend Rule 1, Rule 6(e) and Rule 7 Regulation 4.1.9 of the Rules of the Supreme Court for Mandatory Continuing Legal Education, 5 O.S. ch. 1, app. 1-B, as proposed and set out in Exhibit "A" attached hereto. This Court finds that it has jurisdiction over this matter and the Rules are hereby amended as set out in Exhibits A, B & C attached hereto effective January 1, 2019.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 8th day of OCTOBER, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR.

EXHIBIT A

Rules for Mandatory Continuing Legal Education

Chapter 1, App. 1-B

RULE 1. Mandatory Continuing Legal Education Commission

(a) There is hereby established a Mandatory Continuing Legal Education Commission (MCLEC) consisting of eleven (11) members who are ~~**resident**~~ members of the Bar of this State of which one voting member may be a non-resident

of the State of Oklahoma. The Executive Director of the Oklahoma Bar Association and the Director of Continuing Legal Education of the Oklahoma Bar Association shall be ex-officio members without vote. The remaining nine (9) members shall be appointed by the President of the Oklahoma Bar Association with the consent of the Board of Governors of the Oklahoma Bar Association

(b) The MCLEC shall have the following duties:

(1) To exercise general supervisory authority over the administration of these rules.

(2) To adopt regulations consistent with these rules with approval of the Board of Governors.

(3) Report annually on the activities and operations of the Mandatory Continuing Legal Education Commission to the Board of Governors of the Oklahoma Bar Association and the Oklahoma Supreme Court.

(c) Five (5) Commissioners shall constitute a quorum of the MCLEC.

(d) A member of the MCLEC who misses three (3) consecutive regular meetings of the MCLEC, for whatever reason, shall automatically vacate the office.

EXHIBIT B

Rules for Mandatory Continuing Legal Education

Chapter 1, App. 1-B

Rule 6. Noncompliance and Sanctions.

(a) As soon as practicable after February 15th of each year, the Commission on Mandatory Continuing Legal Education shall furnish to the Executive Director of the Oklahoma Bar Association (1) a list of those attorneys who have not reported for the calendar year ending the preceding December 31st as required by Rule 5, Rules for Mandatory Continuing Legal Education, and (2) a list of attorneys who have reported on or before February 15th indicating that they have not complied with the requirements of Rule 3, Rules of Mandatory Continuing Legal Education.

(b) For a member who fails to comply with the Rule 3 continuing legal education requirement by December 31st of each year, there shall be added an expense charge of $100.00. For a member who fails to comply with the Rule 5 annual report requirement by February 15th of each year, there shall be added an expense charge of $100.00. The Commission is authorized to, and may waive the expense charge for a late filing of the Rule 5 annual report upon a finding by the Commission that the late filing was attributable to extreme hardship. Attorneys seeking a waiver shall do so by written application submitted to the Commission. The Commission is authorized to adopt, from time to time, policies and procedures as may be deemed appropriate for continuity in the exercise of the foregoing discretionary authority.

(c) The Executive Director of the Oklahoma Bar Association shall then serve by certified mail each attorney who has not complied with the Rules for Mandatory Continuing Legal Education, with an order to show cause, within sixty (60) days, why the attorney's license should not be suspended at the expiration of the sixty (60) days. Cause may be shown by furnishing the Board of Governors of the Oklahoma Bar Association with an affidavit by the attorney and a certificate from the MCLEC (a) indicating that the attorney has complied with the requirement prior to the expiration of the sixty (60) days or (b) setting forth a valid reason for failure to comply with the requirement because of illness or other good cause.

(d) At the expiration of sixty (60) days from the date of the order to show cause, if good cause is not shown, the Board of Governors shall file application with the Supreme Court recommending suspension of the delinquent's membership. Upon order of the Court, the attorney shall be so suspended and shall not thereafter practice law in this state until reinstated as provided herein. At any time within one (1) year after the order of suspension, an attorney may file with the Executive Director an affidavit by the attorney and a certificate

from the MCLEC indicating compliance with the Rules for Mandatory Continuing Legal Education, and payment of a reinstatement fee of $500.00 and if satisfactory to the Executive Director, the member will be restored to membership and the Executive Director will notify the Clerk and the Chief Justice of the Supreme Court and cause notice of reinstatement to be published in the Oklahoma Bar Journal.

(e) A suspended member who does not file an application for reinstatement within one (1) year from the date the member is suspended by the Supreme Court for noncompliance with the Rules for Mandatory Continuing Legal Education, shall cease automatically to be a member of the Association, and the Board of Governors shall file an application with the Supreme Court recommending the member be stricken from the membership rolls. Subsequent to the Order of the Court, if the attorney desires to become a member of the Association within two years, the attorney shall be required to file with the Professional Responsibility Commission an affidavit by the attorney and a certificate from the MCLEC indicating compliance with the Rules for Mandatory Continuing Legal Education for the year suspended for noncompliance with MCLE, including payment of all fees and charges, and the attorney must comply with Rule 11 of the Rules Governing Disciplinary Proceedings of the Oklahoma Bar Association, unless otherwise ordered by the Supreme Court of Oklahoma. If the attorney desires to become a member of the Association after two years and a day, the attorney shall be required to file with the Professional Responsibility Commission an affidavit by the attorney and a certificate from the MCLEC indicating completion of 24 CLE credits, including 2 legal ethics credits, including payment of all fees and charges, and the attorney must comply with Rule 11 of the Rules Governing Disciplinary Proceedings of the Oklahoma Bar Association, unless otherwise ordered by the Supreme Court of Oklahoma.

EXHIBIT C

Rules for Mandatory Continuing Legal Education

Chapter 1, App. 1-B

Rule 7. Regulations.

Regulation 4.

4.1.1. The following standards will govern the approval of continuing legal education programs by the Commission.

4.1.2. The program must have significant intellectual or practical content and its primary objective must be to increase the participant's professional competence as an attorney.

4.1.3. The program must deal primarily with matters related to the practice of law, professional responsibility or ethical obligations of attorneys. Programs that cross academic lines may be considered for approval.

4.1.4. The program must be offered by a sponsor having substantial, recent, experience in offering continuing legal education or demonstrated ability to organize and present effectively continuing legal education. Demonstrated ability arises partly from the extent to which individuals with legal training or educational experience are involved in the planning, instruction and supervision of the program.

4.1.5. The program itself must be conducted by an individual or group qualified by practical or academic experience. The program, including the named advertised participants, must be conducted substantially as planned, subject to emergency withdrawals and alterations.

4.1.6. Thorough, high quality, readable, and carefully prepared written materials must be made available to all participants at or before the time the course is presented, unless the absence of such materials is recognized as reasonable and approved by the MCLE Administrator. A mere outline without citations or explanatory notations will not be sufficient.

4.1.7. The program must be conducted in a comfortable physical setting, conducive to learning and equipped with suitable writing surfaces.

4.1.8. Approval may be given for programs where audiovisual recorded or reproduced material is used. Video programs shall qualify for CLE credit in the same manner as a live CLE program provided:

(a) the original CLE program was approved for CLE credit as provided in these regulations or the video program has been approved by the Commission under these rules, and

(b) each person attending the video program is provided written material as required in regulation 4.1.6 and

(c) each program is conducted in a location as required in regulation 4.1.7 and

(d) there are a minimum of five (5) persons enrolled and in attendance at the presentation of the video program unless viewed at the Oklahoma Bar Center or sponsored by a county bar association in Oklahoma.

4.1.9. Approval for credit may also be granted for the following types of electronic-based CLE programs:

a. Live interactive webcast seminars, webcast replay seminars live teleconferences, ~~and~~ teleconference replays, on-line, on-demand programs and downloadable podcasts. If approved, an attorney may earn credit for seminars provided by these various delivery methods without an annual limit.

~~b. Online, on-demand seminars and downloadable podcasts. If approved, an attorney may receive up to six approved credits per year for these types of electronic-based programs.~~

Such programs must also meet the criteria established in the Rules of the Oklahoma Supreme Court for Mandatory Continuing Legal Education, Rule7, Regulation 4, subject to standard course approval procedures and appropriate verification from the course sponsor.

1. The target audience must be attorneys.

2. The course shall provide high quality written instructional materials. These materials may be available to be downloaded or otherwise furnished so that the attorney will have the ability to refer to such materials during and subsequent to the seminars.

3. The provider must have procedures in place to independently verify an attorney's completion of a program. Verification procedures may vary by format and by provider. An attorney affidavit attesting to the completion of a program is not by itself sufficient.

4. If an online, on demand seminar is approved, it is approved only for twelve (12) months after the approval is granted. The sponsor may submit an application to have the course considered for approval in subsequent years.

2018 OK 80

RE: Rules and Procedures for the Dispute Resolution Act; Appendix C - Acknowledgment of Confidentiality and Rules of Conduct

No. SCAD-2018-53. October 8, 2018

ORDER

The form set forth in Appendix C of the Rules and Procedures for the Dispute Resolution Act, Title 12, Chap. 37, App., is hereby withdrawn and replaced in its entirety with the Acknowledgment Form* set forth on the attached Exhibit. All persons attending a proceeding in the Dispute Mediation Program must abide by the applicable Confidentiality Provisions (12 O.S. §1805) and Rules of Conduct for Outside Parties Attending Mediation Hearing (Rule 10, Rules and Procedures for the Dispute Resolution Act, Title 12, Chap. 37, App), and shall be required to execute this Acknowledgment Form before attending a mediation proceeding.

DONE BY ORDER OF THE OKLAHOMA SUPREME COURT IN CONFERENCE THIS 8TH DAY OF OCTOBER, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR

(see following 2 pages for Acknowledgment Form - pdf version available at OSCN.net)

Alternative Dispute Resolution System
Confidentiality of Proceedings and Rules of Conduct
For Parties Attending Mediation Hearing

ACKNOWLEDGEMENT FORM

As ordered by the Oklahoma Supreme Court, all persons attending a proceeding in the Dispute Mediation Program must abide by the following Confidentiality Provisions and Rules of Conduct, and must execute this Acknowledgement Form before attending a mediation proceeding.

Case No:_____ **Case Name:**_____

CONFIDENTIALITY OF PROCEEDINGS – 12 O.S. §1805

A. Any information received by a mediator or a person employed to assist a mediator, through files, reports, interviews, memoranda, case summaries, or notes and work products of the mediator, is privileged and confidential.

B. No part of the proceedings shall be considered a matter of public record.

C. No mediator, initiating party, or responding party in a mediation proceeding shall be subject to administrative or judicial process requiring disclosure of any matters discussed or shall disclose any information obtained during any part of the mediation proceeding.

D. Each mediation session shall be informal. No adjudication sanction or penalty may be made or imposed by the mediator or the program.

E. No mediator, employee, or agent of a mediator shall be held liable for civil damages for any statement or decision made in the process of mediating or settling a dispute unless the action of such person was a result of gross negligence with malicious purpose or in a manner exhibiting willful disregard of the rights, safety, or property or any party to the mediation.

F. If a party who has participated in mediation brings an action for damages against a mediator arising out of mediation, for purposes of that action the privilege provided for in subsection A of this section shall be deemed to be waived as to the party bringing the action.

RULE 10 - RULES OF CONDUCT FOR OUTSIDE PARTIES ATTENDING MEDIATION HEARING

A. All persons attending a mediation session shall respect and maintain the total confidentiality of the session.

B. When one party in a mediation session requests an assisting party, the following rules must be outlined and agreed to by the assisting party prior to initiating the mediation session:

1. An assisting party may advise only his/her client. The assisting party shall speak only with the mediator or his/her client and cannot interrogate the opposing party during the mediation session.

2. The party without an assisting person present must consent to allowing the other person's assisting party in the mediation session, or be given the opportunity to secure his/her own assisting party to be present during the mediation session.

3. If a party who is without an assisting party refuses to participate in mediation due to the presence of another's assisting party, no mediation session will be conducted.

C. If a party requests a non-assisting friend or relative to attend the session, attendance shall be allowed only if agreed upon in advance by the other party and is not in violation with program policy. The person may then be in the room but in no way may interrupt, or interfere with proceedings. Such a person shall not be heard nor allowed to display distracting behavior.

D. If the mediating parties agree, a neutral third party may serve as a resource person for the mediator and the parties. Such a person shall participate only on request and must remain impartial.

E. Mediation sessions shall not be filmed, taped, or otherwise recorded.

F. All notes or other writings produced by the mediator or any other person while a mediation is in session shall be collected by the mediator at the end of each session and held in a confidential file until the mediation process is completed. When the mediation process is completed, whether or not an agreement is reached, all notes and other writings produced while a mediation is in session, except the written agreement or memorandum of understanding, shall be destroyed.

ACKNOWLEDGEMENT: By signing below, I acknowledge that I have read and understand the above Confidentiality Provisions and Rules of Conduct for Outside Parties Attending Mediation Hearing, and agree to abide by these rules for this mediation proceeding.

Signed:______________________________ Dated:______________

Role:____

Signed:______________________________ Dated:______________

Role:____

Signed:______________________________ Dated:______________

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Supreme Court of Oklahoma, ADRS/Early Settlement Program *Page **2** of **2***
Acknowledgement Form - Confidentiality & Rule 10 *Revised July 2018*

NOTICE OF JUDICIAL VACANCY

The Judicial Nominating Commission seeks applicants to fill the following judicial office:

Associate District Judge
First Judicial District
Cimarron County, Oklahoma

This vacancy is due to the retirement of the Honorable Ronald Kincannon effective December 31, 2018.

To be appointed an Associate District Judge, an individual must be a registered voter of the applicable judicial district at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, the appointee must have had a minimum of two years experience as a licensed practicing attorney, or as a judge of a court of record, or combination thereof, within the State of Oklahoma.

Application forms can be obtained on line at www.oscn.net by following the link to the Oklahoma Judicial Nominating Commission or by contacting Tammy Reaves, Administrative Office of the Courts, 2100 North Lincoln, Suite 3, Oklahoma City, OK 73105, (405) 556-9300, and should be submitted to the Chairman of the Commission at the same address **no later than 5:00 p.m., Friday, November 16, 2018. If applications are mailed, they must be postmarked by midnight, November 16, 2018.**

Steve Turnbo, Chair
Oklahoma Judicial Nominating Commission

NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT OF DOUGLAS STEPHEN TRIPP, SCBD #6682 TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION

Notice is hereby given pursuant to Rule 11.3(b), Rules Governing Disciplinary Proceedings, 5 O.S., Ch. 1, App. 1-A, that a hearing will be held to determine if Douglas Stephen Tripp should be reinstated to active membership in the Oklahoma Bar Association.

Any person desiring to be heard in opposition to or in support of the petition may appear before the Professional Responsibility Tribunal at the Oklahoma Bar Center at 1901 North Lincoln Boulevard, Oklahoma City, Oklahoma, at 9:30 a.m. on **Wednesday, Dec. 5, 2018**. Any person wishing to appear should contact Gina Hendryx, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152, telephone (405) 416-7007.

PROFESSIONAL RESPONSIBILITY TRIBUNAL

2018 OK CR 31

MILES STERLING BENCH, Appellant, v. THE STATE OF OKLAHOMA, Appellee.

Case No. D-2015-462. October 4, 2018

OPINION

LUMPKIN, PRESIDING JUDGE:

¶1 Appellant, Miles Sterling Bench, was tried by jury and convicted of First Degree Murder (21 O.S.2011, § 701.7(A)) in the District Court of Stephens County, Case Number CF-2012-172. The jury found the presence of two aggravating circumstances: 1) the murder was especially heinous, atrocious, or cruel, and 2) the defendant posed a continuing threat to society, and set punishment as death. The trial court formally sentenced Appellant in accordance with the jury's verdict. Appellant now appeals his conviction and sentence.[1]

FACTS

¶2 Appellant began working at the Teepee Totem convenience store in the town of Velma, Stephens County in May of 2012. He was twenty-one years old. Appellant lived outside of town with his grandparents. His cousin, Clayton Jenson, regularly drove him to work.

¶3 After three weeks of training, Appellant began to close the store by himself. On June 6th, Jenson drove Appellant to work. They visited for 2 hours beforehand and discussed Appellant's plan to go to California so Appellant could be a mixed martial arts ("MMA") fighter. Jenson dropped Appellant off shortly before 2:00 p.m. Other than a sore throat, Appellant seemed absolutely normal to Jenson that day.

¶4 Sixteen-year-old Braylee Henry drove into Velma around 7:30 p.m. to get an item from the grocery store. After completing this task, Henry went into the Teepee Totem to get some candy and a soda fountain drink. Through Appellant's admissions to his psychological expert, we know that Appellant attacked Henry while she was filing a cup at the fountain. He struck Henry and took her to the ground. He strangled Henry with a choke hold and dragged her into the store's stockroom.

¶5 Henry played basketball for her school and was in good shape. Once inside the storeroom, she fought back. Appellant attacked Henry a second time. He repeatedly hit her. Appellant brutally beat Henry's head, face, neck, and chest. Appellant dragged Henry across the room causing her head to strike the floor. He stomped on her head, neck, arm, and upper back with his shoe. Appellant's prolonged savagery resulted in Henry's death. She asphyxiated on the blood in her lungs and died from the blunt force trauma to her head and neck.

¶6 Appellant then took steps to conceal what he had done and flee to California. He put a sack around Henry's head and placed her body inside a shopping cart. Appellant covered Henry's body with boxes, pushed the cart out to Henry's car, and placed her body inside the back seat. Appellant gathered up peanut butter, sunflower seeds, a toothbrush, rubbing alcohol, and razors from the store's shelves and placed them in the car. He drove Henry's car to a semi-secluded area on his grandparent's land and removed her body from the car. Appellant completely undressed Henry from the waist down and pulled her jacket, tank-top, and sports bra up until they fully exposed her breasts. He dragged Henry's body to a muddy spot in the field and partially covered it with dirt and vegetation.

¶7 Appellant went inside his grandparent's home, put a clean shirt over the top of the shirt he was wearing, and collected additional items for his trip, including boots, clothing, hydrogen peroxide, and his wallet. Recognizing that it was too early for Appellant to be home from work, his grandfather, Stanley Bench, asked Appellant if he had quit or been fired. Appellant simply responded, "Yes." Appellant informed Mr. Bench that he was leaving. He went outside and washed himself in the water spigot. When he was done, he stuck his head back inside the door and declared; "Pa, I love you." Mr. Bench responded; "I do you too. Be careful out there and don't get hurt." Appellant stated, "Okay," and left.

¶8 Tammy Wilkerson ventured into the Teepee Totem around 8:15 that evening. She was alarmed to discover that the clerk was missing

from the store. When she looked into the storeroom she discovered a pool of blood. Wilkerson called the Velma Police Department and contacted Melissa Lynn, one of the other store clerks who lived nearby.

¶9 When Henry failed to return on time, her mother went looking for her. She contacted law enforcement when she was unable to find Henry.

¶10 The Stephen's County Sheriff's Department investigated Appellant's absence from the store. Deputy Michael Moore documented the interior of the convenience store and obtained a DNA sample from the pool of blood in the storeroom. Deputy David Martin went to the home of Appellant's grandparents to check on Appellant's welfare. Using canine officers, Lieutenant Chad Powell discovered Henry's nude body in the nearby field. The officers put out a "BOLO" alert for Henry's car.

¶11 Deputy Quinton Short of the Custer County Sheriff's Department received the alert and observed Henry's vehicle headed west on Interstate 40. He stopped the car and approached it on foot. Short observed in plain sight a large amount of blood in the backseat. He discovered Appellant seated in the driver's seat and ordered him to exit the car. Once outside the sedan, Appellant spontaneously declared that he was not driving the vehicle. Slightly confounded by Appellant's assertion, Short responded; "Then whose vehicle is it?" Appellant then stated; "I think I f****d up, I may have killed somebody." Deputy Short observed that Appellant had blood on his clothing. He took Appellant into custody and transported him to the Custer County Jail.

¶12 Chief Investigator Robert Short of the Custer County Sheriff's Department observed that Appellant had dirt on his face as well as on the shoulder of his shirt. He further noticed that Appellant had blood on his shirt, shoes, and socks. There was a mixture of blood and dirt on the bottom of Appellant's shoes. Short further observed that Appellant's hands were red and swollen.

¶13 Detention Officer, Kendall Brown, booked Appellant into the Custer County Jail. While Brown was gathering Appellant's information, Appellant interjected several admissions. Appellant informed Brown; "I think I might have messed up. I think I may have killed somebody." Later, Appellant mentioned; "I might have blacked out." Appellant asked Brown if he would be able to make bond. After Brown advised Appellant that he did not know, Appellant spontaneously stated; "I think I murdered someone. The officer in the car mentioned manslaughter *** isn't manslaughter murder?" Still later, Appellant volunteered; "I think Stephens County is gonna come get me."

¶14 Appellant repeatedly engaged Brown in small talk. Some of his statements evinced prior knowledge concerning the mental health system. Appellant volunteered that he had undergone "psych evaluations" while in the military and added that the "dude in the straight-jacket" is usually the one screaming that he is "not crazy."

¶15 Appellant attempted to develop grounds for an insanity plea from his conversation with Brown; Appellant asked where he was at? After Brown indicated that he was in Arapaho in Custer County, Appellant stated; "If they believe that I don't know where I am at they might believe that I was crazy." Thereafter, Appellant queried: "Since I blacked out do you think that I should go for an insanity plea or what?" Brown informed Appellant that he could not give him any legal advice whatsoever.

¶16 Investigator Justin Scott of the Stephens County District Attorney's Office executed a search warrant on Appellant's person. Appellant also spontaneously volunteered a statement to Scott. Appellant asked if Oklahoma had the death penalty. When Scott answered that under certain circumstances they do, Appellant declared that he needed death or needed to be locked away in the big house. Scott noticed that Appellant had a bite mark on his elbow.

¶17 Forensic testing revealed that Henry's DNA profile matched the DNA profile of the blood discovered in the storeroom. Similarly, Henry's profile matched the DNA profile of the blood found on Appellant's shoes.

ISSUES RELATING TO JURY SELECTION AND COMPOSITION

¶18 In Proposition I Appellant contends that the trial court erred when it denied his pretrial request for a change of venue. He argues that this action denied him his right to an impartial jury and a fundamentally fair trial.

¶19 The Sixth Amendment right to a jury trial "'guarantees to the criminally accused a

fair trial by a panel of impartial, 'indifferent jurors'" and it is a basic requirement of due process that an accused receive a fair trial in a fair tribunal. *DeRosa v. State*, 2004 OK CR 19, ¶ 17, 89 P.3d 1124, 1133 (quoting *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961)). Likewise, Article II, Section 20 of the Oklahoma Constitution and 22 O.S.2011, § 561 guarantee a criminal defendant a fair trial by an impartial jury.

¶20 We note that Henry's murder occurred in the small, rural farming community known as Velma. The town is approximately 18 miles southeast of Duncan, the county seat of Stephens County and where the trial took place.

¶21 Appellant timely filed an application for change of venue prior to trial. He cited to the titles of approximately 125 news articles appearing in either print, television or online. However, he did not include the content of the actual articles. It appears that not all of the cited articles actually referenced the instant case.[2] We also note that many of the cited news sources were not from the local community in which the crime occurred but were from sources throughout the state and across the globe as a whole.[3] Several of the cited titles appear to be from news aggregator websites.[4] Other articles belonged to online groups requiring admission to the group prior to accessing the cited blog.[5] Thus, many of the cited articles would not necessarily have been readily available in the local community. After the trial court denied his application, Appellant filed a motion to reconsider and attached the contents of 9 of the cited articles. The district court denied Appellant's renewed request.

¶22 The trial court conducted individual *voir dire* of the venire concerning the death penalty, prior knowledge concerning the offense and pretrial publicity. Appellant did not renew his pretrial request for a change of venue at any point during *voir dire*. As such, we find that he has waived appellate review of this issue for all but plain error. *See Hain v. State*, 1996 OK CR 26, ¶¶ 6-7, 919 P.2d 1130, 1136. We review Appellant's claim pursuant to the test for plain error set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690. *Stewart v. State*, 2016 OK CR 9, ¶ 12, 372 P.3d 508, 511. Under this test, an appellant must show an actual error, which is plain or obvious, and which affects his substantial rights. *Id.* This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*

¶23 Reviewing Appellant's claim in the present case for plain error, we find that he is not entitled to relief. "Our analysis begins with the rebuttable presumption that the accused can receive a fair trial in the county in which the offense occurred..." *Hain*, 1996 OK CR 26, ¶ 7, 919 P.2d at 1135. It is Appellant's burden to show he has been "so prejudiced by pretrial publicity that he did not receive a fair trial." *Childress v. State*, 2000 OK CR 10, ¶ 34, 1 P.3d 1006, 1014.

¶24 This Court has adopted the two-part test which the United States Supreme Court set forth in *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975). *DeRosa*, 2004 OK CR 19, ¶ 20, 89 P.3d at 1135; *Braun v. State*, 1995 OK CR 42, ¶ 30, 909 P.2d 783, 792. First, there are rare instances in which prejudice is presumed. If the fact pattern reveals "the influence of the news media, either in the community at large or in the courtroom itself, pervaded the proceedings" prejudice is presumed regardless of the assurances of individual jurors that they can be fair and impartial. *Murphy,* 421 U.S. at 799, 95 S.Ct. at 2035. The Supreme Court in *Murphy* identified four cases as exemplifying the circumstances where prejudice is presumed.

> In *Irvin v. Dowd* the rural community in which the trial was held had been subjected to a barrage of inflammatory publicity immediately prior to trial, including information on the defendant's prior convictions, his confession to 24 burglaries and six murders including the one for which he was tried, and his unaccepted offer to plead guilty in order to avoid the death sentence. As a result, eight of the 12 jurors had formed an opinion that the defendant was guilty before the trial began; some went 'so far as to say that it would take evidence to overcome their belief' in his guilt.

Murphy, 421 U.S. at 798, 95 S.Ct. at 2035, (citing *Irvin v. Dowd*, 366 U.S. 717, 728, 81 S.Ct. 1639, 1645, 6 L.Ed.2d 751 (1961)). In *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963), a television station, in the community where the crime occurred and the trial took place, broadcast on three occasions a 20 minute film of the defendant's confession. *Murphy,* 421 U.S. at 799, 95 S.Ct. at 2035-36. The trial in *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d

543 (1965), was conducted in a circus atmosphere which included the press sitting within the bar of the court and overrunning the proceedings with television equipment. *Murphy,* 421 U.S. at 799, 95 S.Ct. at 2036. Similarly, the conviction in *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), "arose from a trial infected not only by a background of extremely inflammatory publicity but also by a courthouse given over to accommodate the public appetite for carnival." *Murphy*, 421 U.S. at 799, 95 S.Ct. at 2036. Prejudice was presumed in each of these cases because the proceedings "were entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob." *Id.*

¶25 However, juror exposure to information about a defendant's prior convictions or news accounts of the crime with which the defendant is charged, standing alone, does not create a presumption of prejudice. *Id.* "Media coverage extends to most homicides, particularly capital cases." *Braun,* 1995 OK CR 42, ¶ 32, 909 P.2d at 793 (quotations and citation omitted). The mere fact that pretrial publicity is adverse to a criminal defendant is not enough to presume prejudice. *Id.* Thus, this Court only presumes prejudice where a conviction has been obtained "in a trial atmosphere that has been utterly corrupted by press coverage" or entirely lacking in "'the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob.'" *Id.,* 1995 OK CR 42, ¶ 31, 909 P.2d at 792 (quoting *Murphy,* 421 U.S. at 799, 95 S.Ct. at 2036); *DeRosa*, 2004 OK CR 19, ¶ 19, 89 P.3d at 1135.

¶26 The second part of the *Murphy* test focuses on the situation where the facts are not sufficiently egregious to give rise to the presumption of prejudice. *DeRosa,* 2004 OK CR 19, ¶ 20, 89 P.3d at 1135. This is the much more common circumstance. *Id.* In this situation, a reviewing court must evaluate the "totality of the circumstances" in order to determine whether the defendant received a trial which was "fundamentally fair." *Id.,* citing *Murphy,* 421 U.S. at 799, 95 S.Ct. at 2035-36.

¶27 Turning to the present case, we find that the cited news coverage neither pervaded the trial court proceedings nor utterly corrupted the trial atmosphere. There was not a barrage of inflammatory publicity immediately before Appellant's trial as outlined in *Irwin, Rideau* or *Sheppard*. Although there was considerable media coverage of the case, the cited articles appeared over the course of the thirty-two months that passed between the date of the offense and Appellant's trial. *See Braun*, 1995 OK CR 42, ¶ 32, 909 P.2d at 793 (finding fact that publicity occurred over four-year period somewhat dispositive). The substance of the articles which Appellant actually included within his motion to reconsider was neither invidious nor inflammatory in nature. *See Beck v. Washington*, 369 U.S. 541, 556, 82 S.Ct. 955, 963, 8 L.Ed.2d 98 (1962). Appellant's characterization of the articles is not supported by the record. The articles did not demonize Appellant, demand swift justice, or stoke the emotional climate.[6] Similarly, the articles did not opine or assert that certain testimony or evidence suggested Appellant's guilt or support for imposition of death sentence. Instead, the articles simply recited only basic facts about the case and its progression through the court system.[7] Nothing in the record suggests that the individuals summoned to serve as jurors were predisposed to convict. Accordingly, we refuse to presume prejudice in the present case.

¶28 Instead, we review the totality of the circumstances of the present case in order to determine whether Appellant received a trial which was fundamentally fair. This includes review of the *voir dire* statements of individual jurors, *voir dire* statistics, and the atmosphere within the community, as reflected in the news media. *Braun*, 1995 OK CR 42, ¶ 31, 909 P.2d at 793, citing *Murphy*, 421 U.S. at 800-08, 95 S.Ct. at 2036-40. "[T]his Court focuses not on the jurors who might have been impaneled, but on the jurors who actually were impaneled." *DeRosa*, 2004 OK CR 19, ¶ 21, 89 P.3d at 1135.

¶29 Reviewing the totality of the circumstances in the present case we find that Appellant was not denied a fundamentally fair trial. The *voir dire* record reflects a fair and impartial jury venire which was not predisposed to convict Appellant. The trial court ultimately called 101 individuals to fill the venire. The transcript of the proceedings reveals that 53 of the venire members, a little over 50%, had received information about the case through the media, coworkers, friends or family. Many of them had received limited information about the case. Some had only heard about the offense when it had first happened. Others had only caught the passing words of an acquaintance. The trial court excused 9 individuals for cause because

they were unable to set aside what they knew about the offense and decide the case based upon the evidence presented in court.[8] Therefore, less than 10% of the venire members possessed a partiality which could not be laid aside.

¶30 Although the trial court took note that the case carried emotion in the close-knit town of Velma, where the offense occurred, this sentiment did not appear to carry over into the remainder of Stephens County. Many of the venire members who were ultimately excused due to partiality, lived, worked or had a similar connection to the town of Velma. However, the trial court was not required to go to great lengths to select jurors who appeared impartial from the other parts of Stephens County. *See Murphy,* 421 U.S. at 802–03, 95 S.Ct. at 2037 (finding length which trial court must go in order to select jurors who appear impartial is another factor relevant in evaluating atmosphere of community). The predominant reason that the trial court excused an individual from other parts of the county was due to their inability to consider all three punishment options. As discussed above, the news articles about the case were largely factual in nature. After individual questioning, defense counsel was not compelled to challenge the partiality of the venire. For these reasons, we conclude that the atmosphere within the community was not so inflammatory as to suggest that Appellant could not receive a fair trial.

¶31 Similarly, the *voir dire* statements of the individual jurors do not suggest a general partiality or an inflammatory atmosphere. Although they were individually questioned, none of the venire members excused for partiality either glorified Henry or expressed a strong sentiment against Appellant. Instead, the individuals simply expressed their inability to be impartial by stating or confirming that they could not set aside what they knew about the offense and decide the case based on the evidence presented at trial.

¶32 Focusing on the jurors who were actually impaneled, we find that Appellant received a fair trial by a panel of impartial, indifferent jurors. We note that "[q]ualified jurors need not ... be totally ignorant of the facts and issues involved." *Murphy*, 421 U.S at 799-800, 95 S.Ct. at 2036. "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin,* 366 U.S. at 723, 81 S.Ct. at 1643.

¶33 The record establishes that 4 of the impaneled jurors (A.R., C.C., M.H., and R.R.) had not received any information about the case. Although 8 of the impaneled jurors had received some information about the cases prior to being summoned, this exposure was minimal. Jurors D.B., R.G., and L.W. had not seen any media reports about the case but had heard about it from someone else. Jurors M.R. and S.G. had seen media reports about the case but were too preoccupied with other parts of their lives to pay much attention to it. Jurors G.W., R.M., and L.R. had simply heard about the offense when it first happened but did not know the details of the case.

¶34 Regardless of the level of pretrial exposure to the facts of the case, the record establishes that all of the impaneled jurors were both indifferent and impartial. The trial court asked and each and every member of the panel, including the three alternates, expressly affirmed that they could set aside any prior knowledge or opinions regarding the case and decide the case based upon the evidence presented at trial. All of the impaneled jurors indicated, in one form or another, that they could be impartial as to both guilt and punishment.

¶35 Appellant has not shown that any of the jurors who were actually impaneled were challengeable for cause. As no individual sat on the jury that could not set aside his or her impression or opinion and render a verdict based on the evidence presented in court, we find that Appellant was not denied a fundamentally fair trial. Proposition I is denied.

FIRST STAGE ISSUES

¶36 In Proposition II Appellant challenges the trial court's refusal to suppress his inculpatory statements to Custer County Detention Officer, Kendall Brown. He argues that the admission of the statements at trial violated his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution as well as corresponding provisions of the Oklahoma Constitution.

¶37 The record shows that Appellant made several inculpatory statements to Brown as he was being booked into the Custer County Jail. Appellant filed a pretrial motion seeking to suppress these statements. The trial court held a hearing pursuant to *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Appellant argued that his statements were involuntary because Brown had failed to advise him of

his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Finding that Appellant voluntarily made the statements without any interrogation, the trial court denied Appellant's motion. At trial, Brown testified to the admissions over Appellant's objection renewing his motion to suppress.

¶38 We review the trial court's denial of a motion to suppress for an abuse of discretion. *Sanders v. State*, 2015 OK CR 11, ¶ 17, 358 P.3d 280, 285. This is the same standard of review applied to the trial court's admission of evidence. *Davis v. State,* 2011 OK CR 29, ¶ 156, 268 P.3d 86, 125. An abuse of discretion has been defined as a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented or, stated otherwise, any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

¶39 The United States Supreme Court has recognized that the Due Process Clause of the Fourteenth Amendment is the cornerstone of the determination of the admissibility of an inculpatory statement. *Miller v. Fenton*, 474 U.S. 104, 109–10, 106 S.Ct. 445, 449, 88 L.Ed.2d 405 (1985). In *Culombe v. Connecticut*, 367 U.S. 568, 602, 81 S.Ct. 1860, 1879, 6 L.Ed.2d 1037 (1961), the Supreme Court set forth the test for the admissibility of an inculpatory statement under the Due Process Clause:

> The ultimate test remains that which has been the only clearly established test in Anglo–American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.

The voluntariness of a confession is evaluated on the basis of the totality of all the surrounding circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047, 36 L. Ed.2d 854 (1973).

¶40 This Court has generally refused to interpret the provision against self-incrimination within Article II, § 21 of the Oklahoma Constitution broader than the United States Supreme Court's interpretation of similar federal provisions. *Dennis v. State*, 1999 OK CR 23, ¶ 20, 990 P.2d 277, 286-86; *State v. Thomason*, 1975 OK CR 148, ¶ 14, 538 P.2d 1080, 1086. Instead, in addressing confessions or inculpatory statements, this Court has interpreted both § 7 and § 21 of the Oklahoma Constitution consistent with the Supreme Court's overriding standard. *Williams v. State*, 1982 OK CR 107, ¶¶ 14-17, 648 P.2d 843, 845; *Brown v. State,* 1963 OK CR 67, ¶¶ 14, 22-27, 384 P.2d 54, 59-61; *Marks v. State,* 1951 OK CR 145, 237 P.2d 459, 461. The ultimate test for the admission of either an inculpatory statement or a confession is the test of "voluntariness." *Johnson v. State,* 2012 OK CR 5, ¶ 14, 272 P.3d 720, 727; *Williams*, 1982 OK CR 107, ¶ 17, 648 P.2d at 845; *Brown*, 1963 OK CR 67, ¶¶ 26-27, 384 P.2d at 61. A statement is voluntary, and thus admissible in evidence, only when all the surrounding circumstances indicate that the statement is the product of an essentially free and unconstrained choice by its maker. *Id.* (quotation and citation omitted).

¶41 As he did below, Appellant argues that his inculpatory statements were not voluntary because they were given during custodial interrogation and Brown did not advise him of his *Miranda* rights. In *Miranda*, the United States Supreme Court held that the prosecution could not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of a defendant unless the suspect receives, prior to police questioning, certain warnings including the right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed. *Miranda*, 384 U.S. at 444, 86 S.Ct. at 1612. "The term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 1689, 64 L. Ed. 2d 297 (1980). The special procedural safeguards set forth in *Miranda* are not required where a subject is simply taken into custody, but rather where a suspect in custody is subjected to either express questioning or its functional equivalent. *Id*., 446 U.S. at 300-01, 100 S.Ct. at 1689.

¶42 "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding

today." *Miranda*, 384 U.S. at 478, 86 S.Ct. at 1630. In *Romano v. State*, 1995 OK CR 74, 909 P.2d 92, this Court recognized this circumstance stating that "[i]n post-arrest situations where *Miranda* warnings have not yet been given, a defendant's voluntary statements, not made in response to questioning, are admissible." *Id.*, 1995 OK CR 74, ¶ 19, 909 P.2d at 109.

¶43 In *Pennsylvania v. Muniz,* 496 U.S. 582, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990), a plurality of the Supreme Court recognized the "routine booking question" exception which exempts from *Miranda*'s coverage, questions to secure the biographical data necessary to complete booking or pretrial services. *Id.* 496 U.S. at 601–02, 110 S.Ct. at 2650. (plurality of four justices) (quotations and citation omitted). In *Clayton v. State*, 1992 OK CR 60, ¶ 29, 840 P.2d 18, 27, this Court determined that the inquiries necessary for proper booking procedures do not amount to "interrogation" for the purposes of *Miranda*. *See also Gilbert v. State,* 1997 OK CR 71, ¶¶ 46-47, 951 P.2d 98, 112 ("find[ing] no error in admitting Appellant's responses to background information as no *Miranda* warnings were required.").

¶44 "The underlying rationale for the exception is that routine booking questions do not constitute interrogation because they do not normally elicit incriminating responses." *United States v. Parra*, 2 F.3d 1058, 1068 (10th Cir. 1993). Therefore, the police may not ask questions during booking that are designed to elicit incriminatory admissions, without first obtaining a waiver of the suspect's *Miranda* rights. *Muniz*, 496 U.S. at 602 n. 14, 110 S.Ct. at 2650 n. 14; *Clayton*, 1992 OK CR 60, ¶ 29, 840 P.2d at 27 (finding booking questions did not require *Miranda* warning because "questions certainly were not the kind which the detective should know were reasonably likely to elicit incriminating statements").

¶45 Turning to the present case, we find that the trial court did not abuse its discretion when it denied Appellant's motion to suppress and admitted the challenged statements at trial. It is patently clear that Appellant was in custody. However, the trial court's determination that Appellant voluntarily made the statements without any interrogation is not clearly against the logic and effect of the facts presented.

¶46 Appellant's statements to Brown were preceded by his spontaneous declaration to Deputy Quinton Short; "I think I f****d up, I may have killed somebody." Short took Appellant into custody and transported him to the Custer County Jail.

Detention Officer Brown contacted Appellant as soon as the arresting officers brought him into the jail and sat him in the back of the room. Brown started gathering Appellant's biographical information to get a head start on the booking process. This exchange was captured on the jail's recording system and introduced into evidence at the pretrial hearing. Brown asked Appellant the necessary questions to book him into the jail, including his name, date of birth, height, weight, eye color, place of birth, current address, marital status, telephone, medical issues, and current medications. Brown simply asked Appellant for the requisite information and did not make any small talk. When Brown asked if he had any allergies to any medications, Appellant said; "[I've] been losing my voice lately." Brown followed up and asked; "Sick or something with a cold or flu?" Appellant stated; "I got a problem. I know I did something wrong. I just blacked out." Brown remarked; "Dude, I don't have nothing to do with anything like that." Appellant replied; "I know." Then he stated, "It's bad."

¶47 After Appellant's admission, Brown returned to asking Appellant the computer generated booking questions, including his social security number, emergency contact, whether Appellant was addicted to any drugs or alcohol which would cause him to have withdrawal symptoms during his stay in the jail, and whether Appellant had any identifying tattoos. Appellant disclosed that he had a tattoo of "PX SPEC" on his left upper arm. Brown sought to clarify the nature of the tattoo. When he correctly recognized it as military, Appellant became very talkative.

¶48 Brown was unable to complete the booking process. Instead, he was forced to wait until the arresting officers released Appellant from the back of the room so he could bring him up to the front and go over the information entered into the computer. During the interim, Brown answered Appellant's many questions and generally chatted with Appellant about the military and guns.

¶49 Brown related at trial that he did not interrogate Appellant but simply engaged in small talk like he did with most arrestees to make them easier to deal with and make the

booking process go smoother. After a time, both men fell silent. Without Brown making any statement or question, Appellant bluntly stated; "I think I may have killed somebody." Brown advised Appellant, "Dude, don't tell me," and fell silent again.

¶50 Since Appellant had made the previous admissions and Brown knew the jail's recording system did not always accurately capture entire conversations, Brown used his phone to record Appellant's statements. Appellant returned to asking Brown questions. He asked Brown if he was a jailer? He, then, asked if Brown had seen any interesting characters. Brown answered; "Interesting? No. Crazy? Yes." He related anecdotes about two colorful inmates that had been held in the jail. Appellant volunteered that the military required "psych evaluations" and added that the "dude in the straight-jacket" is usually the one screaming that he is "not crazy." He further stated; "we all have to be a little crazy to keep from going insane."

¶51 When the arresting officers returned, they checked on Brown's progress booking Appellant into the jail. They released Appellant from the back of the room so Brown could complete the process. After Brown moved him to the front of the room, Appellant freely chatted with Brown. When he asked; "Is there some detective or someone I can talk to?," Brown advised him; "I don't know." Appellant asked about the list of Bondsman on the wall and Brown explained how bonds worked. After Appellant asked if he could write down their numbers, Brown related that Appellant was only being temporarily held in his county.

¶52 Appellant queried where he was at and Brown informed him that he was in Arapaho in Custer County. Appellant then spontaneously declared; "If they believe that I don't know where I am at they might believe that I was crazy." Brown made no response to this statement. Appellant followed up by asking; "Do you think that I'll make bond at all?" Brown responded; "I have no idea, dude. I don't know if you have charges or are gonna have charges. I don't have a clue." Appellant then volunteered; "I think I murdered someone. The officer in the car mentioned manslaughter ... isn't manslaughter murder?" Brown advised Appellant that he was unable to tell him and explained that he was just a jailer, did not know anything about the law, and simply booked people into the jail.

¶53 Brown informed Appellant that "technically" he was not booking Appellant into the jail but was simply showing that he was there. When Appellant stated, "I think Stephens County is gonna come get me," Brown did not respond. Appellant then asked Brown; "Since I blacked out, do you think that I should go for an insanity plea or what?" Brown finally drove home his point by advising Appellant; "I can't give you any legal opinions whatsoever."

¶54 After a period of silence, Brown asked Appellant some additional medical questions and quickly confirmed the information that Appellant had previously given him. He had Appellant read over the jail rules and acknowledge his receipt of the same; execute a statement accounting for Appellant's property; and certify his answers to the medical questions. After completing the booking process, Brown gave Appellant a blanket and placed him in one of the cells in the jail.

¶55 Based upon the totality of the circumstances, we find that the trial court properly rejected Appellant's motion to suppress. The record plainly supports the trial court's determination that Appellant voluntarily made the statements without any interrogation. Brown's questions to Appellant fell squarely within the "routine booking question" exception. The questions which Brown asked Appellant were clearly not designed to elicit incriminatory admissions. Thus, Appellant was not subject to interrogation.

¶56 Instead, Appellant's statements were the product of an essentially free and unconstrained choice on his part. The record shows that Appellant was predisposed to confess and explain away his offense. Appellant's admissions were volunteered. The great majority of his statements were made when Brown paused his book-in questions or was simply silent. Appellant's inculpatory statements did not directly respond to any of Brown's questions.

¶57 Appellant argues that his statements should have been suppressed because Brown went outside the scope of the ordinary booking questions. We are not persuaded by this argument. Although Brown engaged in small talk with Appellant, his questions were certainly not the kind which an officer should know were reasonably likely to elicit incriminating statements. As such, we conclude that Appellant was not subjected to custodial interrogation or its functional equivalent.

¶58 The trial court's determination that Appellant volunteered the statements is not clearly against the weight and effect of the facts presented. Accordingly, we find that the trial court did not abuse its discretion when it admitted Appellant's admissions at trial. Proposition II is denied.

¶59 In Proposition III, Appellant challenges the trial court's admission of State's Exhibit Numbers 501 through 523. He argues that these photographs were gruesome, lacked probative value and were unfairly prejudicial. The admissibility of photographic evidence, as with all evidence, is reviewed under an abuse of discretion standard. *Glossip v. State*, 2007 OK CR 12, ¶ 80, 157 P.3d 143, 157. Unless a clear abuse of discretion is shown, reversal will not be warranted. *Horn v. State*, 2009 OK CR 7, ¶ 41, 204 P.3d 777, 787.

¶60 The trial court examined all of the State's proffered photographs during a pretrial hearing on Appellant's motion and, again, at trial. The trial court individually assessed each of the photographs and excluded any which were cumulative. After hearing the testimony of the State's witnesses, the trial court determined that the photos corroborated the medical examiner's testimony, showed the nature, extent, number and nature of Henry's injuries, were not unduly prejudicial and admitted the exhibits.

¶61 "The issue of gruesome photographs has been discussed by this Court in case after case, and the issues relating thereto are well known." *Cole v. State*, 2007 OK CR 27, ¶ 29, 164 P.3d 1089, 1096. "'Gruesome crimes result in gruesome pictures.'" *Id.*, quoting *Patton v. State*, 1998 OK CR 66, ¶ 60, 973 P.2d 270, 290. Photographs are admissible if their content is relevant and their probative value is not substantially outweighed by their prejudicial effect. *Davis,* 2011 OK CR 29, ¶ 86, 268 P.3d at 113; *Bernay v. State*, 1999 OK CR 37, ¶ 18, 989 P.2d 998, 1007. Relevant evidence is defined as evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. 12 O.S.2011, § 2401. "The probative value of photographs of murder victims can be manifested in numerous ways, including showing the nature, extent and location of wounds, establishing the *corpus delicti*, depicting the crime scene, and corroborating the medical examiner's testimony." Davis, 2011 OK CR 29, ¶ 86, 268 P.3d at 113.

¶62 "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise." 12 O.S.2011, § 2403. Where there is duplication in images, the appellant has the burden to show that the repetition in images was needless or inflammatory. *Mitchell v. State,* 2010 OK CR 14, ¶ 63, 235 P.3d 640, 656. "When measuring the relevancy of evidence against its prejudicial effect, the court should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." *Id.,* 2010 OK CR 14, ¶ 71, 235 P.3d at 657; *Mayes v. State*, 1994 OK CR 44, ¶ 77, 887 P.2d 1288, 1310.

¶63 Reviewing the record, we find that the trial court did not abuse its discretion when it admitted the challenged photographs. The photographs admitted as State's Exhibit Numbers 501 through 518 depicted Henry's injuries. State's Exhibit Humber 501 showed Henry's face, head, and shoulders. The remaining photographs were close up images of the abrasions, contusions and trauma which Henry suffered. The photographs do not depict the work of the medical examiner but solely display Henry's injuries.

¶64 The challenged exhibits held great probative value. The photographs accurately depicted the nature, extent and location of Henry's wounds, established the *corpus delicti,* and corroborated the medical examiner's testimony. They were neither extensive nor cumulative. Each photograph depicted a different aspect or injury on Henry's body. The medical examiner, Dr. Inas Yacoub, extensively relied upon the exhibits to illustrate to the jury the blunt force trauma to which Henry had been subjected and explain how that ultimately caused her death. As such, we find that the probative value of Exhibit Numbers 501 through 518 was not substantially outweighed by their prejudicial effect.

¶65 The photographs admitted as State's Exhibit Numbers 519 through 523 depicted the blood-soaked clothing which Henry had worn that night. Appellant's claim that this evidence was gruesome is not well taken. As with the other challenged exhibits, the photographs of Henry's clothing held great probative value. The exhibits were probative of the nature, extent and location of Henry's wounds and corroborated the testimony of the State's wit-

nesses. The blood-soaked nature of the clothing tended to establish the force and violence to which Henry was subjected and corroborated the medical examiner's determination that her death was caused by blunt force trauma. Thus, we find that the probative value of Exhibit Numbers 519 through 523 was not substantially outweighed by their prejudicial effect.

¶66 Appellant argues that the photos were not necessary to prove the State's case. He asserts that Dr. Yacoub's testimony and the diagrams in her report adequately covered Henry's wounds and the cause of death. This Court has repeatedly rejected the argument that photographs are not relevant if the cause of death is not contested. *Smallwood v. State,* 1995 OK CR 60, ¶ 33, 907 P.2d 217, 228; *Hooks v. State,* 1993 OK CR 41, ¶ 26, 862 P.2d 1273, 1281. The State is charged with establishing the elements of the offense and is entitled to corroborate and illustrate the testimony of its witnesses about what the crime scene looked like and the manner of death. *Davis,* 2011 OK CR 29, ¶ 89, 268 P.3d at 113. The State is not required to downplay the visual effects of a particular crime. *Id.* A medical examiner's diagrams and testimony concerning the location, nature, and extent of injuries are necessarily limited in their ability to convey to the jury the actual appearance of the victim's injuries. *DeRosa,* 2004 OK CR 19, ¶ 72, 89 P.3d at 1150.

¶67 Appellant also argues that the photographs obfuscated the evidence of his mental illness. We are not persuaded by this argument. Although the photographs show the results of the brutal crime, the photographs do not remotely approach those that this Court has previously determined as extremely grotesque. *See Cole,* 2007 OK CR 27, ¶ 30, 164 P.3d at 1096 (finding photographs depicting helpless child after grown man broke him in half "extremely grotesque, the sort of pictures that we would all like to avoid in our lives."). Because the photographs accurately depicted the nature, extent and location of Henry's wounds, established the *corpus delicti*, evidenced the force and violence to which Henry was subjected and corroborated the medical examiner's testimony, we find that their probative value was not substantially outweighed by their prejudicial effect. The photographic evidence was neither extensive nor cumulative. Therefore, we conclude that the trial court did not abuse its discretion in the admission of the challenged photographs. Proposition III is denied.

¶68 In Proposition V, Appellant contends the trial court erred in refusing to give his requested instructions on the lesser included offense of second degree depraved mind murder. He further asserts that by failing to instruct the jury on any lesser forms of homicide, the trial court violated his federal due process rights under *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). "The determination of which instructions shall be given to the jury is a matter within the discretion of the trial court." *Eizember v. State,* 2007 OK CR 29, ¶ 111, 164 P.3d 208, 236. "Absent an abuse of that discretion, this Court will not interfere with the trial court's judgment if the instructions as a whole, accurately state the applicable law." *Id.*

¶69 In denying Appellant's requested lesser offense instruction, the trial court determined that there was not any evidence to support an instruction upon second degree depraved mind murder. Reviewing the record we find that Appellant has not shown that the trial court's conclusion was clearly against the logic and effect of the facts presented. *Neloms*, 2012 OK CR 7, ¶ 35, 274 P.3d at 170.

¶70 In *Beck*, the United States Supreme Court held that a sentence of death may not constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict. *Beck*, 447 U.S. at 637, 100 S.Ct. at 2389. However, *Beck* does not require that the jury in a capital case be given a non-capital option where the evidence absolutely does not support that option. *Davis*, 2011 OK CR 29, ¶ 122, 268 P.3d at 120, citing *Spaziano v. Florida,* 468 U.S. 447, 455–56, 104 S.Ct. 3154, 3159–3160, 82 L.Ed.2d 340 (1984).

¶71 A *Beck* claim has two components. *Davis*, 2011 OK CR 29, ¶ 120, 268 P.3d at 120. First, the appellant must establish that the crime on which the trial court refused to instruct was actually a lesser-included offense of the capital crime of which he was convicted. *Id.* Second, the appellant must show that the evidence presented at trial would permit a rational jury to find him guilty of the lesser included offense and acquit him of first degree murder. *Id.*

¶72 We must turn to State law to resolve Appellant's Beck claim. This Court had traditionally looked to the statutory elements of the charged crime and any lesser degree of crime

to determine the existence of any lesser included offenses. *State v. Tubby,* 2016 OK CR 17, ¶¶ 5-6, 387 P.3d 918, 920. "However, in *Shrum v. State,* 1999 OK CR 41, 991 P.2d 1032, 1035, a majority of this Court determined the 'strict statutory elements approach' was too narrow and inflexible and broadened the rule to include situations 'where the lesser and greater offense are in the same class of offenses and are closely or inherently related, but the elements do not satisfy the strict statutory elements test.'" *Id.*, 2016 OK CR 17, ¶ 7, 387 P.3d at 921, quoting *Shrum*, 1999 OK CR 41, ¶¶ 7–9, 991 P.2d at 1036.

¶73 *Prima facie* evidence of the lesser offense must be presented at trial in order to warrant giving the lesser included instruction. *Davis,* 2011 OK CR 29, ¶ 101, 268 P.3d at 116. *Prima facie* evidence of a lesser included offense is that evidence which would allow a jury rationally to find the accused guilty of the lesser offense and acquit him of the greater. *Id.; see also Simpson v. State,* 2010 OK CR 6, ¶ 17, 230 P.3d 888, 897 (a lesser offense instruction should not be given unless the evidence would support a conviction for the lesser offense).

¶74 As Second Degree Murder has historically been recognized as a lesser included offense of First Degree Murder, we conclude that the requested lesser offense was, in fact, a necessarily included offense of the charged crime.[9] Therefore, Appellant was entitled to an instruction upon second degree depraved mind murder if *prima facie* evidence of the offense was presented at trial.

¶75 "Murder in the second degree occurs '[w]hen perpetrated by an act imminently dangerous to another person and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual.'" *Williams v. State*, 2001 OK CR 9, ¶ 23, 22 P.3d 702, 712, (quoting 21 O.S.1991, § 701.8(1)). The elements of second degree depraved mind murder are: First, the death of a human, Second, caused by conduct which was imminently dangerous to another person, Third, the conduct was that of the defendant's, Fourth, the conduct evinced a depraved mind in extreme disregard of human life, Fifth, the conduct is not done with the intention of taking the life of any particular individual. Inst. No. 4-91, OUJI-CR(2d) (Supp.2000). "[A] person evinces a 'depraved mind' when he engages in imminently dangerous conduct with contemptuous and reckless disregard of, and in total indifference to, the life and safety of another." *Id.*

¶76 Examples of this crime include: (1) shooting into a crowd, where one does not intend to kill any particular person, but where the likelihood of death is probable; (2) steering a speeding vehicle into the oncoming path of another speeding vehicle; (3) throwing a heavy stone into a crowded street; and (3) aiming a gun at the victim's ankles intending to simply injure the victim but, because of poor marksmanship, shooting the victim in the back and killing him. *Id.; Smallwood*, 1995 OK CR 60, ¶ 48, 907 P.2d at 231; *Smith v. State*, 1984 OK CR 15, ¶ 5 n. 1, 674 P.2d 569, 571 n.1, 365; *Dennis v. State,* 1977 OK CR 83, ¶ 24, 561 P.2d 88, 95; *Gibson v. State,* 1970 OK CR 171, ¶ 10, 476 P.2d 362, 365. An accidental killing will not support a finding that the killer had a depraved mind. *Harris v. State,* 2004 OK CR 1, ¶ 50, 84 P.3d 731, 750; *Crumley v. State,* 1991 OK CR 72, ¶ 13, 815 P.2d 676, 678–79.

¶77 Reviewing the record, we find that the evidence was insufficient to permit a rational jury to find Appellant guilty of second degree depraved mind murder. There was not any evidence to support an instruction upon second degree depraved mind murder. Neither the State nor Appellant presented evidence evincing that Appellant engaged in conduct akin to shooting into a crowd, i.e. imminently dangerous conduct done without the intention of taking the life of any particular individual. Thus, no reasonable view of the evidence gives rise to the inference that Appellant's conduct evinced a depraved mind in extreme disregard of human life.

¶78 Similarly, there was not any evidence showing that Appellant acted without the intention of taking the life of any particular individual. Appellant's sole defense at trial was that he was legally insane at the time of the offense. During opening argument, defense counsel admitted that Appellant had taken Henry's life and asserted that Appellant's actions did not make any sense because Appellant was insane. Appellant offered the testimony of forensic psychologist, Curtis Grundy, Ph.D., to support this defense. Grundy testified as to Appellant's mental health and sanity but did not render any opinion about Appellant's ability to form the intent to kill at the time of the offense.

¶79 During Dr. Grundy's evaluation, Appellant made several statements concerning

Henry's murder. Dr. Grundy related these statements to the jury. The trial court determined that Appellant's statements concerning the offense evinced that he had intentionally taken Henry's life. As the trial court's conclusion is not clearly against the weight and effect of the facts presented, we are bound to accept this interpretation of the evidence. Appellant admitted that he had intentionally taken Henry's life but sought to excuse that act under the notion that he acted under an insane delusion that he killed somebody who he believed had intended to kill him. In light of Appellant's and defense counsel's admissions, we find that no rational jury could conclude that Appellant acted without the intention of taking Henry's life.

¶80 In the absence of any evidence showing both that Appellant's conduct evinced a depraved mind in extreme disregard of human life and that he acted without the intention of taking the life of any particular individual, we must conclude that the evidence would not have permitted a rational jury to find Appellant guilty of second degree depraved mind murder. Therefore, we find that the trial court properly refused Appellant's request for an instruction upon this lesser included offense.

¶81 At the same time, we conclude that the evidence would not have permitted a rational jury to acquit Appellant of the charged offense of first degree murder. Deputy Quinton Short testified that Appellant informed him; "I think that I F****d up. I may have killed somebody." Detention Officer Kendall Brown testified that when he later encountered Appellant in the jail, Appellant advised him; "I got a problem. I know I did something wrong . . . I think I may have killed somebody." The medical examiner's testimony established that Appellant subjected Henry to a prolonged, brutal, and relentless attack. Dr. Inas Yacoub testified that Henry had extensive blunt force trauma to her head, face, scalp, neck and upper torso which resulted in internal bleeding. She also had bruises on her legs, arms, and hands. Sufficient pressure had been applied to Henry's neck to cause the fracture of the cricoid cartilage, petechiae in both eyes, and bleeding in the lining of her airways. Yacoub explained that the numerous injuries could not be explained by a single impact. Henry also had pattern injuries on her head, neck, arm, and upper back which were consistent with the bottom of Appellant's shoes. The photographs of Henry's injuries and the clothing that she wore on the night of her death thoroughly corroborated Dr. Yacoub's explanation. As no reasonable view of the evidence would permit a rational jury to acquit Appellant of first degree murder, we find that the trial court did not abuse its discretion when it refused Appellant's request for an instruction upon second degree depraved mind murder.

¶82 Since Appellant has not shown that the evidence presented at trial would permit a rational jury to find him guilty of second degree depraved mind murder and acquit him of first degree murder we find the trial court did not violate Appellant's federal due process rights under *Beck*. Proposition V is denied.

¶83 In Proposition VI, Appellant contends that Dr. Terese Hall rendered improper expert opinion testimony. He argues that Hall improperly vouched for the credibility of the State's witnesses while dismissing the credibility of key defense witnesses.

¶84 Appellant concedes that he waived appellate review of this issue when he failed to object to Hall's testimony at the time of trial. Therefore, we review Appellant's claim pursuant to the test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, and determine whether Appellant has shown an actual error, which is plain or obvious, and which affects his substantial rights. *Tollett v. State,* 2016 OK CR 15, ¶ 4, 387 P.3d 915, 916. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*

¶85 Applying this analysis to the present case, we find that Appellant has not shown the existence of an actual error that is plain or obvious. Appellant presented the testimony of forensic psychologist, Curtis Grundy, Ph.D., and the State presented the testimony of forensic psychologist, Terese Hall, Ph.D., in rebuttal. Both Dr. Grundy and Dr. Hall testified that in forming their respective opinions they relied upon information from people who had interacted with Appellant both before and after Henry's murder, including Appellant's immediate family members and members of law enforcement. Both also testified that they compared and contrasted the individuals' numerous statements in arriving at their final opinion.

¶86 Appellant lived with his grandparents at the time of the offense. Both Dr. Grundy and

Dr. Hall related that they had received two different sets of information from Appellant's grandparents. Their accounts had changed over time. Appellant's grandfather, Stanley Bench, testified at preliminary hearing approximately five months after the offense. Mr. Bench advised that there was nothing wrong with Appellant. When he met with Dr. Grundy approximately two years after the offense, Mr. Bench gave a different account. Mr. Bench indicated that a month prior to the offense, Appellant began mumbling to himself; he had trouble sleeping and stayed up all night; he banged on his bedroom wall and spoke in two different voices; and he stopped showering and grooming himself. Mr. Bench further indicated that Appellant advised that he had an implant in his brain like the Manchurian Candidate; a man and a woman from the Navy were after him; they had come into the store trying to kill him; and he was going to have to do something about them if they didn't stop.

¶87 Appellant's grandmother, Albertha Bench, initially indicated that Appellant lived in a world of make believe; he thought that he had seen spirits; was sometimes depressed and moody; did not like authority; was easily angered; and believed that he was smarter than everyone else. A few of Mrs. Bench's statements indicated that Appellant may have had some paranoia. She related that Appellant had advised her that he thought someone was after him and he came into her room one night because he thought something was in his room. At preliminary hearing, Mrs. Bench simply described Appellant as "a little mental." When Dr. Grundy evaluated Appellant two years after the offense, Mrs. Bench's relation of mental health concerns about Appellant had substantially grown. Despite the fact that she worked the graveyard shift and did not regularly see Appellant, Mrs. Bench related that Appellant was irrational; went without sleep for 4 or 5 days at a time; hit her bedroom wall at night; did not shower or groom himself; claimed that he was Jason Bourne or a spy; claimed that he had a chip in his head like the Manchurian Candidate; and repeatedly came into her room at night claiming that he was scared. Mrs. Bench indicated Appellant stated that he saw heads coming out of the closet after him, the apparition of a little girl in a white dress, and a man and a woman on these occasions. He further advised her that a man and a woman wanted to kill him, they had a hit out on him, and they had come into the convenience store, again.

¶88 Dr. Grundy testified that he heavily relied upon the statements of Mr. and Mrs. Bench in reaching the conclusion that Appellant had schizophrenia, suffered a psychotic break with delusions and was legally insane at the time of the offense. Testifying in rebuttal, Dr. Hall related that although Appellant had some psychological problems she did not see any signs of severe psychosis in him. She did not believe that he was sufficiently impaired at the time of the crime to render him unable to know right from wrong. Explaining why she reached a different conclusion than Dr. Grundy, she noted the inconsistencies in the grandparent's statements over time. Dr. Hall testified that she "discounted" the later statements because she felt that the statements both given under oath and closer in time to the offense were more reliable.

¶89 Appellant challenges Hall's statement about her discounting as improper vouching. The Oklahoma Evidence Code places few restrictions on the information an expert may rely upon to form her opinions. *Lewis v. State*, 1998 OK CR 24, ¶ 19, 970 P.2d 1158, 1166. The facts or data need only be of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. *Id.*; 12 O.S.Supp.2013, § 2703. Pursuant to 12 O.S.2011, § 2705, an expert may testify in terms of opinion or inference and give her reasons therefor with or without prior disclosure of the underlying facts or data. *Id.*[10]

¶90 However, this Court has determined that an expert witness cannot vouch for the truthfulness or credibility of a witness. *Warner v. State*, 2006 OK CR 40, ¶ 24, 144 P.3d 838, 860-61, *overruled on other grounds by Taylor v. State*, 2018 OK CR 6, 767 P.3d 265. "Vouching" occurs when an attorney or witness indicates a personal belief in a witness's credibility, either through explicit personal assurances of the witness's veracity or by implicitly indicating that information not presented to the jury supports the witness's testimony. *Nickell v. State*, 1994 OK CR 73, ¶ 7, 885 P.2d 670, 673. Thus, an expert is not permitted to testify as to whether a witness was either lying or telling the truth. *Lawrence v. State*, 1990 OK CR 56, ¶ 4, 796 P.2d 1176, 1177.

¶91 We find that Hall's explanation did not constitute improper opinion on the credibility

of a witness. Hall did not indicate a personal belief as to whether Mr. and Mrs. Bench were either lying or telling the truth. Instead, she simply explained why she relied upon certain facts more than other facts. We note that the challenged statement was part of Hall's explanation for why she reached a different opinion than Dr. Grundy. It is clear from the record that forensic psychologists reasonably rely upon such assessments in forming their opinions. Thus, Hall properly disclosed the discounting as part of the facts underlying her opinion that were different from Dr. Grundy's assessment.

¶92 Appellant also challenges Hall's statement that she took Mr. and Mrs. Bench's later statements with a grain of salt. Not satisfied with Hall's explanation that she had discounted the later statements, the prosecutor pushed Hall into testimony that nearly crossed the line of propriety. The prosecutor clarified that Hall had heard Dr. Grundy's discussion of individuals' "motivations [ ] to fabricate or elaborate or lie" and then obtained Hall's admission, "Yes" that she had taken the Benches' "later statements with a grain of salt" "because of that." This exchange very nearly placed Hall in the position of rendering an opinion as to whether the Benches were lying or telling the truth. As Hall did not testify as to what motivation she believed the Benches held, we find that Appellant has not shown an actual error that was plain or obvious.

¶93 Appellant further asserts that Hall vouched for the testimony of Clayton Jenson when she stated that he was worthy of belief because he was consistent in his statements to both law enforcement and to her. Appellant's claim is not supported by the record. Hall never remarked that Jenson was worthy of belief. When Hall initially disclosed that she had received two different sets of information from Appellant's family she mentioned that she would discuss Jenson separately because he "was the same throughout." Later, she related what Jenson had told her. Hall did not render any opinion as to whether Jenson was lying or telling the truth. She did not indicate a personal belief in Jenson's testimony at trial. As such, we conclude that Appellant has not shown the existence of an actual error in Hall's testimony about Jenson's statements.

¶94 Appellant also argues that Hall contended that jail administrator Dallas Cowen was trustworthy. Again, this assertion is not supported by the record. Hall did not testify that Cowen was trustworthy. The record shows that the prosecutor continued to explore why Hall's opinion differed from Dr. Grundy's opinion. Hall affirmed that she had information from Cowen as to how Appellant acted differently when a doctor or attorney visited him which Dr. Grundy did not have. She also affirmed that she thought it would have been important for Dr. Grundy to have had this information. Hall did not render any opinion as to whether Cowen lied or told the truth. She did not indicate a personal belief in Cowen's statement. As such, we conclude that Appellant has not shown the existence of an actual error.

¶95 Finally, Appellant claims that Hall impermissibly stated her belief that Appellant's family was not credible and implied that Dr. Grundy's reliance on the family was misplaced. We are not persuaded by this argument. Hall testified: "[I] think Dr. Grundy considered the family information that was offered later on to be highly credible and I did not. I think that is the main difference." Again, this was part of Hall's explanation as to why she reached a different conclusion than Grundy. Hall did not render any opinion as to whether the Benches were lying or telling the truth. She did not tell the jury who to believe. As such, we find that Appellant has not shown the existence of an actual error.

¶96 In the heading of this proposition of error, Appellant outlines that Hall's testimony rendered his trial fundamentally unfair in violation of the Fourteenth Amendment to the United States Constitution. As Appellant has not provided any argument or authority supporting this claim, we find that he has forfeited appellate review of the issue. Rule 3.5(C)(6), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017) ("Failure to present relevant authority in compliance with these requirements will result in the issue being forfeited on appeal."); *Malone v. State*, 2013 OK CR 1, ¶ 59, 293 P.3d 198, 215 (finding claim lacking argument or authority waived); *Harmon v. State*, 2011 OK CR 6, ¶ 90, 248 P.3d 918, 946 (finding claim waived where no argument or authority presented). Proposition VI is denied.

SECOND STAGE ISSUES

¶97 In Proposition IX, Appellant challenges the sufficiency of the evidence supporting the continuing threat aggravating circumstance. When the sufficiency of the evidence of an aggravating circumstance is challenged on

appeal, this Court reviews the evidence in the light most favorable to the State to determine if any rational trier of fact could have found the aggravating circumstance beyond a reasonable doubt. *Grissom v. State*, 2011 OK CR 3, ¶ 61, 253 P.3d 969, 990.

¶98 To prove the continuing threat aggravator, the State must present evidence showing the defendant's behavior has demonstrated a threat to society and a probability that this threat would continue to exist in the future. *Bush v. State,* 2012 OK CR 9, ¶ 42, 280 P.3d 337, 347. Evidence evincing that the murder was callous can be considered as supporting the existence of a continuing threat. *Grissom,* 2011 OK CR 3, ¶ 61, 253 P.3d at 990. Attempts to escape are among the other factors that, coupled with the calloused nature of the crime, may also support a finding that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. *Bush*, 2012 OK CR 9, ¶¶ 43-49, 280 P.3d at 347-48. A criminal history exhibiting a pattern of escalating violence is also viewed as supporting a determination that a defendant would constitute a continuing threat. Davis, 2011 OK CR 29, ¶ 139, 268 P.3d at 122; *Rojem v. State,* 2006 OK CR 7, ¶ 65, 130 P.3d 287, 300.

¶99 Appellant argues that none of the evidence which the State elicited in support of this aggravating circumstance indicates that he is likely to commit future acts of violence. He asserts that the incidents the State used to support this aggravating circumstance were non-violent. The State need not identify any particular violent act that the defendant committed prior to the crime. *Bush*, 2012 OK CR 9, ¶ 44, 280 P.3d at 347. "To prove this aggravating circumstance, this Court has held the State may present any relevant evidence, in conformance with the rules of evidence, including evidence from the crime itself, evidence of other crimes, admissions by the defendant of unadjudicated offenses or any other relevant evidence." *Bland v. State*, 2000 OK CR 11, ¶ 135, 4 P.3d 702, 735 (quotations and citation omitted). Evidence that the defendant has committed other crimes which were non-violent may satisfy the State's burden of proof if, coupled with the other evidence at trial, the prior offenses indicate a likelihood of future violence. *Jones v. State,* 2006 OK CR 10, ¶ 6, 132 P.3d 1, 2. A prior criminal history of non-violent offenses may support the existence of a continuing threat where the evidence shows that the slaying was callous and pitiless. *Bush*, 2012 OK CR 9, ¶ 43, 280 P.3d at 347; *Grissom*, 2011 OK CR 3, ¶ 62, 253 P.3d at 990.

¶100 Taking the evidence in the light most favorable to the State, we find that any rational juror could have found that Appellant's behavior had demonstrated a threat to society and a probability that this threat would continue to exist in the future. The facts of the crime itself demonstrated that Appellant would continue to present a threat to society after sentencing. *Scott v. State*, 1995 OK CR 14, ¶ 36, 891 P.2d 1283, 1296 (finding sheer callousness with which defendant commits a particular murder can support continuing threat aggravating circumstance); *Hooks,* 1993 OK CR 41, ¶ 33, 862 P.2d at 1282 (recognizing Court's holding that nature and circumstances of killing itself are sufficient to show propensity toward future acts of violence). Appellant's slaying of Henry was both brutal and callous. His treatment of her body after her death further evinced this fact.

¶101 In addition to the facts of the crime itself, the evidence showed that Appellant had violently attacked a family member. James Zolinski of the Will County Sheriff's Department in Illinois testified that on July 27, 2008, he responded to a domestic altercation involving a father and a son at Appellant's home. Deputy Zolinski found Appellant's stepfather, Farlan Huff, with facial injuries. Huff's eye was almost swollen shut. He also had a cut above it. Appellant was seventeen years old at that time. He did not have any injuries on his person. After interviewing all of the parties present at the home, Zolinski arrested Appellant for domestic abuse.

¶102 Farlan Huff testified and detailed what had occurred. Huff related that Appellant and he became embroiled in an argument after he reminded Appellant to complete his chore of taking the trash out. Appellant's mother, Dana Huff, heard the argument and came up to Appellant's room. She directed Appellant and Mr. Huff; "Just duke it out." Mistakenly, Mr. Huff took off his glasses and placed them on top of something. Before he turned completely back around, Appellant punched him in the eye. Appellant then placed Mr. Huff in a "sleeper hold" restricting the circulation in his neck. As Mr. Huff was starting to pass out, he called out; "Dana, if you let him —." Appellant did not stop until Mrs. Huff directed him to do so.

¶103 Appellant had training in hand-to-hand combat, in addition to his Naval training. Dana Huff and Albertha Bench testified that Appellant had received training in martial arts. Mrs. Bench indicated that Appellant practiced regularly while staying in her home. Clayton Jenson testified that Appellant desired to go to California and become a mixed martial arts fighter. Appellant's attack on Mr. Huff mirrored the choke-hold he later used to subdue Henry.

¶104 The evidence further showed that Appellant had a long history of sexually aggressive conduct towards females that escalated over time and culminated in him callously slaying Henry and pitilessly leaving her semi-nude body in a field. Karen Doyle testified that in July of 2005 she moved into the house behind Appellant's home. Appellant was fourteen years old at that time. On several occasions Doyle observed Appellant through a window as she swam in her backyard pool. Appellant appeared to be masturbating. During Labor Day Weekend, Appellant's sexual aggression toward Doyle intensified. Doyle heard Appellant shouting "F**k Me, F**k Me" as she came out of the water. When she glanced towards Appellant's home, she observed that Appellant was completely nude and leaning halfway out of his bedroom window with his hands in the air. Doyle was frightened and called the police. Although she continued to live behind Appellant's home, she remained fearful of him. Despite law enforcement's intervention, Doyle continued to notice someone peeking out of the blinds after this incident.

¶105 Appellant's criminal activity and level of violence continued to escalate after his discharge from the Navy. In what can only be perceived as an act of planning, Appellant began to approach those who appeared to be young and female in or near the convenience store. He made physical contact with their bodies and attempted to entice or lure them to be alone with him. The evidence showed that Appellant inappropriately touched sixteen-year-old Jesse Anderson only days before Henry's murder. Anderson testified that Appellant visited the sno-cone stand across the street from the Teepee Totem where she worked. Appellant spoke to Anderson but the conversation was nothing more than casual customer conversation. On June 2, 2012, Appellant chased Anderson as she was driving off in her car. He ran across the street and tapped on her car window until she stopped and rolled down the window. Appellant advised Anderson that he did not think it was right that she leave without them knowing each other's names. Anderson exchanged names with Appellant. When he stuck his hand out as if to shake her hand Anderson reciprocated the gesture. Instead of shaking hands, Appellant kissed Anderson's hand. He asked Anderson for her phone number, her address, where she was going, and if he could ever take her out on a date. Anderson was freaked out by Appellant's behavior. She did not feel that she knew Appellant well enough and did not consent to his kiss. She refused to provide Appellant the information he had requested and declined his request for a date. Anderson was sufficiently bothered by the incident that she reported it to her parents.

¶106 Thereafter, Appellant sexually assaulted Gina Mercer. 21 O.S.2011, § 112 (defining "sexual assault" to include "any type of sexual contact or behavior that occurs without explicit consent of the recipient including, but not limited to ... fondling"). Mercer testified that approximately four or five days before Henry's murder Appellant inappropriately touched her while she was shopping in the Teepee Totem. Mercer related that she entered the store with her daughter. Other than Appellant, no one else was in the store. Appellant came up behind Mercer while she was at the soda fountain. He put his arms around Mercer under her breasts. She exclaimed; "Don't touch me! I don't even know who you are," and slapped Appellant on the shoulder. In response, Appellant declared; "I'm sorry. I thought you were a high school girl." Mercer related that Appellant's actions were completely unwelcome, inappropriate and unacceptable. She reported this incident to the store owner. After Henry's death, Mercer realized the gravity of the situation and reported the incident to law enforcement.

¶107 The day before Henry's murder, Appellant had a lewd encounter with fifteen-year-old Breanna Stinchcomb while she was shopping at the Teepee Totem. 21 O.S.2011, § 1123 (lewdly touching, feeling or mauling the body of a child under 16 constitutes lewd molestation). Stinchcomb testified as to her eerie encounter with Appellant. She related that Appellant came up behind her while she was at the glass door to the refrigerated soda cans so she turned and walked to the candy section and picked up two packages of candy. Appellant

followed her to the soda fountain machine. Although the cups were perfectly straight, Appellant came up next to her, reached his right arm around her and acted as if he was straightening up the cups. As he did so, the side of his body came into contact with Stinchcomb. Appellant commented on Stinchcomb's attractiveness. He moved his hand and asked her if she wanted to go in the back and exchange life stories. Stinchcomb declined Appellant's offer stating that her mother was outside waiting on her. Appellant continued to make Stinchcomb feel uncomfortable as he rang up her purchase at the register. He advised her that he was only working at the store to make enough money to get back into the Navy. He asked Stinchcomb about her interests. When he found out that Stinchcomb liked music, he advised her that he played the guitar and suggested that they hang out and play the guitar together. Appellant's actions scared Stinchcomb and she immediately advised her mother about his behavior once she was safely outside.

¶108 Appellant suggests on appeal that these incidents showed nothing more than "harmless indiscretion," "overly-friendly attempts to converse with women," or "crass" behavior. However, viewing these incidents in the context of the remainder of the evidence, we find that the incidents clearly demonstrate that Appellant's behavior displayed a pattern of escalation tending to indicate a likelihood of future violence.

¶109 We note that the evidence concerning Appellant's attempts to escape also tended to show that Appellant would be a continuing threat to society. The evidence showed that Appellant had fled from his unlawful transgressions in the past and committed additional crimes along the way. Deputy David Matthew Welsh of the Will County Sheriff's Office in Wilmington, Illinois testified that Appellant admitted to stealing a car while he was AWOL from the Navy. He hid at the home of one of his friends.

¶110 The State's evidence further established that while awaiting trial, Appellant escaped from a restraint chair and attempted to escape from the jail. Detention Officer, Timothy Jackson, testified that Appellant was placed into a restraint chair because he had rammed his head into a wall. Appellant escaped from the chair and into a different part of the jail. He took off his orange jail uniform, put on a trustee's green uniform, and used this uniform to gain entry into other areas of the jail. Supervisor, Nathan Hicks, testified that Appellant used the trustee's clothing to make his way towards the exit to the jail. As the jail employees searched for him, Appellant ducked into a holding cell near the jail's exit. When Hicks found Appellant hiding in the cell, Hicks asked him what he was doing. Appellant admitted that he was trying to get out. Detention Officer, Kyle Henson, asked Appellant what had been his whole point, and Appellant indicated; "It was worth a try."

¶111 Viewed in its entirety, Appellant's behavior coupled with the callous and pitiless nature of the slaying demonstrated a threat to society and a probability that this threat would continue to exist in the future. Thus, taking the evidence in the light most favorable to the State, we find that any rational trier of fact could have found the continuing threat aggravating circumstance beyond a reasonable doubt. Proposition IX is denied.

¶112 In Proposition X, Appellant contends that the especially heinous, atrocious, or cruel aggravating circumstance is unconstitutionally vague and overbroad. Similar to many others before him, Appellant argues that this Court's attempts to limit and narrow this aggravating circumstance have been unsuccessful. We have repeatedly rejected this claim. *Martinez v. State,* 2016 OK CR 3, ¶ 67, 371 P.3d 1100, 1116, *cert. denied*, ___ U.S. ___, 137 S.Ct. 386, 196 L.Ed.2d 304 (2016); *Postelle v. State,* 2011 OK CR 30, ¶ 84, 267 P.3d 114, 144; *Cole v. State*, 2007 OK CR 27, ¶ 37, 164 P.3d 1089, 1098. The argument and authorities which Appellant presents raise nothing new. We continue to find that the current uniform instructions defining this aggravating circumstance sufficiently narrow its application to pass constitutional muster. *Id.; Postelle*, 2011 OK CR 30, ¶ 84, 267 P.3d at 144.

¶113 Appellant also challenges the sufficiency of the evidence to show that the murder was especially heinous, atrocious, or cruel. Again, we review a challenge to the sufficiency of the evidence of an aggravating circumstance by taking the evidence in the light most favorable to the State to determine if any rational trier of fact could have found the aggravating circumstance beyond a reasonable doubt. *Id.; DeRosa,* 2004 OK CR 19, ¶ 85, 89 P.3d at 1153.

¶114 To prove that a murder is especially heinous, atrocious or cruel, the State must show: (1) the victim's death was preceded by

torture or serious physical abuse; and (2) that the facts and circumstances of the case establish that the murder was heinous, atrocious, or cruel. *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 78, 241 P.3d 214, 238. Torture in the context of this aggravating circumstance may take any of several forms including the infliction of either great physical anguish or extreme mental cruelty. *Turrentine v. State*, 1998 OK CR 33, ¶ 70, 965 P.2d 955, 976. As to the circumstance of extreme mental cruelty, the torture must produce mental anguish in addition to that which of necessity accompanies the underlying killing. *Id.* Anticipation of death is sufficient to support the mental anguish requirement of the aggravator. *Postelle,* 2011 OK CR 30, ¶ 83, 267 P.3d at 144. The length of time which the victim suffers mental anguish is irrelevant. *Turrentine*, 1998 OK CR 33, ¶ 70, 965 P.2d at 976; *Neill v. State,* 1994 OK CR 69, ¶ 60, 896 P.2d 537, 555; *Berget v. State,* 1991 OK CR 121, ¶ 31, 824 P.2d 364, 373. Instead, the analysis focuses on the acts of the petitioner and the level of tension created. *Id.*

¶115 Serious physical abuse is proved by showing that the victim endured conscious physical suffering before dying. *Martinez*, 2016 OK CR 3, ¶ 68, 371 P.3d at 1116. This Court has found sufficient evidence of serious physical abuse where the victim suffered numerous defensive wounds indicating that the victim was conscious and attempted to fight off her attacker. *DeRosa,* 2004 OK CR 19, ¶ 99 n. 166, 89 P.3d at 1157 n. 166; *Cheney v. State*, 1995 OK CR 72, ¶ 18 n. 22, 909 P.2d 74, 81 n. 22; *Romano v. State,* 1993 OK CR 8, ¶¶ 77-80, 847 P.2d 368, 386–87. "[S]o long as the evidence supports a finding that death was preceded by torture or serious physical abuse, the jury is permitted to consider all the circumstances of the case, including the attitude of the killer and the pitiless nature of the crime." *Underwood v. State,* 2011 OK CR 12, ¶ 64, 252 P.3d 221, 247 (quotation and citation omitted).

¶116 Appellant argues that the State failed to establish that Henry's death involved conscious physical suffering. "The crucial aspect of this aggravator is the victim's awareness." *Id.* Both torture and serious physical abuse require evidence of consciousness. *Id.; Pavatt v. State,* 2007 OK CR 19, ¶ 75, 159 P.3d 272, 294.

¶117 Taking the evidence in the light most favorable to the prosecution in the present case, we find that any rational trier of fact could have found that Henry suffered torture and serious physical abuse prior to her death. Appellant admitted to Dr. Grundy that he attacked Henry at the soda fountain. He struck Henry and strangled her with a choke-hold. Appellant also admitted to attacking Henry a second time on the floor in the stockroom of the store.

¶118 The evidence at trial revealed that Henry suffered serious physical abuse. Appellant subjected the teenager to a prolonged, brutal, and relentless attack. Appellant beat Henry so severely with his hands that they were demonstrably swollen to the law enforcement officers who came into contact with him after his arrest. The medical examiner, Dr. Inas Yacoub, testified that Henry had extensive blunt force trauma to her head, face, scalp, neck, back and upper torso. The trauma was so significant that Henry had bruising behind her sternum and bleeding in the lining of her airways. She had suffered a traumatic brain injury from the trauma to her head. Yacoub indicated that the numerous injuries could not be explained by a single impact.

¶119 Yacoub testified that Henry also had bruises on her legs, arms, and hands. Sufficient pressure had been applied to Henry's neck to cause the fracture of the cricoid cartilage and petechiae in both eyes. Henry also had pattern injuries on her head, neck, arm, and upper back which were consistent with the bottom of Appellant's shoes.

¶120 Based on the extensive injuries from the beating, any rational juror would also have recognized that Henry would have been under extreme mental anguish and emotional fear as she realized she was being beaten to death, one of the most agonizing ways a person can die. In addition, Dr. Yacoub's testimony suggested that Henry fought back in an effort to save her own life. Yacoub testified that Appellant had a bruise on his elbow and a bite mark where Henry had fought back. Yacoub noted that the bruises on Henry's right forearm were defensive in nature. Henry had numerous abrasions and a broken toe nail.

¶121 Although Dr. Yacoub could not determine at what exact point Henry became unconscious, she did not see any evidence that Henry was immediately rendered unconscious. She explained that the pattern injury depicted in State's Exhibit Number 504 where Appellant had apparently stomped on Henry's throat occurred, as with the great majority of the

other injuries, while Henry was still alive. She detailed that Henry had injuries to both the inside and outside of her head consistent with her having been dragged across the floor while still alive and conscious. Yacoub related that the blood on Henry's face indicated that Henry was conscious after Appellant's attack on her torso and coughed out blood from her nose and mouth. She stated that Henry breathed in her own blood and had suffered the painful experience of air hunger as she tried to breathe but could not get air into her fluid filled lungs.

¶122 The photographs of Henry's injuries and the clothing that Appellant wore on the night of her death thoroughly corroborated Dr. Yacoub's account. Appellant did not present any evidence to contravene the State's evidence. Therefore, we conclude that, taking the evidence in the light most favorable to the prosecution in the present case, we find that any rational trier of fact could have found that Henry's murder was especially heinous, atrocious or cruel beyond a reasonable doubt. Proposition X is denied.

ISSUES CONCERNING BOTH STAGES

¶123 In Proposition VII, Appellant alleges that prosecutorial misconduct occurred during both stages of the trial. Our review for prosecutorial misconduct is well established. Relief will only be granted where the prosecutor committed misconduct that so infected the defendant's trial that it was rendered fundamentally unfair, such that the jury's verdicts should not be relied upon. *Sanders v. State,* 2015 OK CR 11, ¶ 21, 358 P.3d 280, 286, citing *Donnelly v. DeChristoforo,* 416 U.S. 637, 645, 94 S.Ct. 1868, 1872, 40 L.Ed.2d 431 (1974). We evaluate alleged prosecutorial misconduct within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel. *Id.* We have long allowed counsel a wide range of discussion and illustration in closing argument. *Id.* Counsel are permitted to fully discuss from their standpoint the evidence, the inferences and deductions arising from it. *Id.*

¶124 Appellant, first, claims that the prosecutors introduced false or misleading testimony from Melissa Lynn. "The knowing use of false or misleading evidence important to the prosecution's case in chief violates the Due Process Clause of the Fourteenth Amendment." *Omalza v. State*, 1995 OK CR 80, ¶ 77, 911 P.2d 286, 307 (quotations and citation omitted). To prove such a claim on appeal the appellant bears the burden to establish (1) certain testimony was misleading, (2) the prosecution knowingly used the testimony and (3) the testimony was material to guilt or innocence. *Id.*

¶125 In the present case, nothing in the record supports Appellant's claim. Instead, Appellant cites to materials attached to Appellant's Application for Evidentiary Hearing on Sixth Amendment Claim filed contemporaneously with his appellate brief. The materials filed in support of a request for an evidentiary hearing are not considered, by reason of their filing with this Court, part of the trial record. *Bland,* 2000 OK CR 11, ¶ 115, 4 P.3d at 731. If the items are not within the existing record, then only if they are properly introduced at the evidentiary hearing will they be a part of the trial court record on appeal. *Id.* As the materials in the present case are not properly before the Court at this time, and Appellant has failed to develop his arguments in his appellate brief, without citation to the non-record materials, we find that he has effectively waived review of those arguments. We have consistently held that we will not review allegations of error that are neither supported in the record or by legal authority. *Id.* We will only consider the materials when we address the Application for Evidentiary Hearing on Sixth Amendment Claim.

¶126 Second, Appellant claims that the prosecutors misstated and improperly shifted the burden of proof concerning Appellant's insanity defense. We note that Appellant waived appellate review of this claim when he failed to challenge the prosecutor's remarks at trial. *Malone*, 2013 OK CR 1, ¶ 40, 293 P.3d at 211. We review the claim for plain error under the test set forth in *Simpson* and determine whether he has shown an actual error that is plain or obvious as set out in Proposition VI, above. *Id.,* 2013 OK CR 1, ¶ 41, 293 P.3d at 211.

¶127 Appellant argues that the prosecutor told the jury not to consider his mental health evidence. We find that Appellant's argument is not supported by the record. The prosecutor did not inform the jury to not consider the mental health evidence. Instead, the prosecutor informed the jurors that they need not decide Appellant's exact mental health diagnosis to determine his sanity. As the prosecutor properly focused the jury on determining whether Appellant knew right from wrong or could

appreciate the nature and the consequences of his action, we find that the prosecutor's comments were proper. *Pugh v. State,* 1989 OK CR 70, ¶ 3, 781 P.2d 843, 843-44; Inst. No. 8-32, OUJI-CR(2d)(Supp.2014).

¶128 Appellant further argues that the prosecutors impermissibly shifted the burden of proof by arguing that it was Appellant's burden to prove insanity. He argues that the prosecutor compounded this error when he stated that Appellant had to prove insanity "beyond a reasonable doubt" in the rebuttal portion of closing argument. We note that there exists a presumption of sanity under Oklahoma law that continues until a criminal defendant presents sufficient evidence to raise a reasonable doubt as to his sanity at the time of the offense. *Jackson v. State,* 1998 OK CR 39, ¶ 64, 964 P.2d 875, 892. Only if a criminal defendant presents sufficient evidence to raise reasonable doubt as to his sanity, does the State bear the burden of proving beyond a reasonable doubt that the defendant was sane at the time of the commission of the offense. *Id.* In *Taylor v. State,* this Court found that a prosecutor's reference to the defendant's burden of raising a doubt as to sanity as "beyond a reasonable doubt" did not constitute fundamental error where the comment did not appear to be a blatant attempt to misstate the burden of proof and the jury was otherwise adequately instructed on the issue. *Id.*, 1994 OK CR 61, ¶ 14, 881 P.3d 755, 759.

¶129 The record in the present case reveals that the trial court properly instructed the jury concerning the burden of proof for the defense of sanity with the uniform jury instructions. Inst. Nos. 8-32, 8-33, OUJI-CR(2d) (Supp.2014). In the initial part of closing argument, the prosecutor directed the jury to the trial court's instruction and correctly paraphrased the uniform jury instruction concerning Appellant's burden of proof. She accurately stated that Appellant had the burden of raising a reasonable doubt as to his sanity but that if he raised such a doubt, the State had the overall burden of proving sanity beyond a reasonable doubt. Defense counsel then directed the jury to the trial court's instruction and argued that the State had to prove that Appellant was sane because Appellant had raised a reasonable doubt as to his sanity. In rebuttal the second prosecutor, again, directed the jury to the trial court's instruction and correctly stated that Appellant was presumed sane and had the burden to prove that he was not sane. However, he mistakenly stated that Appellant's burden was "beyond a reasonable doubt."[11] It is apparent from these facts that the prosecutor's comment was not a blatant attempt to misstate the burden of proof. As the prosecutor correctly stated the burdens in her initial argument, defense counsel correctly stated the State's burden, and the trial court adequately instructed the jury on the issue, we find that the error was not plain or obvious in this instance.

¶130 Third, Appellant claims that the prosecutor improperly bolstered the testimony of Dr. Hall with hearsay. He does not challenge Hall's reliance or relation of the hearsay at trial but, instead, argues that the prosecutor improperly used the evidence during closing argument to argue that Appellant was deceptive to his own attorneys. We note that Appellant waived appellate review of this claim when he failed to challenge the prosecutor's remarks at trial. *Malone*, 2013 OK CR 1, ¶ 40, 293 P.3d at 211. We review the claim for plain error under the test set forth in *Simpson* and determine whether he has shown an actual error that is plain or obvious. *Id.*, 2013 OK CR 1, ¶ 41, 293 P.3d at 211.

¶131 Appellant's claim is not supported by the record. The prosecutor's argument did not constitute improper bolstering. *Marquez v. State,* 1995 OK CR 17, ¶ 18, 890 P.2d 980, 985 (holding witness's prior consistent statement could not be admitted to bolster credibility of witness when witness had not been impeached). The prosecutor did not argue that Appellant had been deceptive to his own attorneys. Instead, the prosecutor properly summarized Hall's testimony concerning jailer Dallas Cowen's observation that Appellant's "behavior changed" "when the doctors and the lawyers showed up in the jail." The prosecutor's comment "still in that planning stage" suggesting that Appellant had planned his insanity defense from the very beginning of the offense was a reasonable inference based upon the evidence at trial. As the prosecutor's comments fell within the wide latitude afforded counsel during closing argument, we find that Appellant has not shown that error, plain or otherwise, occurred.

¶132 Fourth, Appellant argues that the prosecutor argued facts not in evidence when discussing the cash register receipt from the Teepee Totem. As Appellant failed to raise this challenge at trial, we find that he has waived appellate review of this issue for all but plain error,

and review the claim for plain error pursuant to the test set forth in *Simpson. Malone,* 2013 OK CR 1, ¶ 40, 293 P.3d at 211.

¶133 Appellant introduced the cash register receipts from the Teepee Totem for the shift which he worked on the night of Henry's murder. The receipts illustrated that Appellant had used unconventional mathematics, somewhat similar to common core math, to calculate sales that evening. In closing argument, defense counsel asserted that the receipts evinced Appellant's psychotic break and insanity at the time of the offense. The prosecutor countered in rebuttal stating; "How many of you have been a clerk? How many of you have been bored out of your minds and decided to do something while you were sitting there? I have ran a business in the past, and I have seen clerks do stuff like that."

¶134 The prosecutor's request that the jurors use their own experience in assessing whether the odd entries were indicative of boredom or a psychotic break was entirely proper. A prosecutor may properly urge the jury to use common sense in assessing the evidence. *See Harris v. State*, 2000 OK CR 20, ¶ 37, 13 P.3d 489, 499.

¶135 We reach a different conclusion as to the prosecutor's comment on his own experience as a business owner. As the prosecutor injected facts not in the trial record, we find that the comment was improper and constituted an actual error that was plain or obvious. *Dawkins v. State*, 2011 OK CR 1, ¶ 19, 252 P.3d 214, 220 (finding prosecutor argued facts not in evidence where he referenced evidence not in the trial record). However, we find that the prosecutor's comment did not constitute plain error, because the isolated comment did not affect his substantial rights and Appellant was not prejudiced by the extra-record remark. *Id.; Malone,* 2013 OK CR 1, ¶ 41, 293 P.3d at 211 ("[T]his Court will correct plain error only if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice.") (quotations and citation omitted). As discussed in Proposition VI, the evidence would not have permitted the jury to find that Appellant was insane at the time of the offense. Therefore, no relief is required.

¶136 Fifth, Appellant argues that the prosecutor misstated the evidence concerning the mopped floor in the store and Appellant's farewell statement to his grandfather. As Appellant failed to raise this challenge at trial, we find that he has waived appellate review of this issue for all but plain error, and review the claim for plain error pursuant to the test set forth in *Simpson. Malone*, 2013 OK CR 1, ¶ 40, 293 P.3d at 211.

¶137 The law is clear that prosecutors may not misstate the evidence. *Langley v. State,* 1991 OK CR 66, ¶ 24, 813 P.2d 526, 531. However, they are permitted to comment upon the evidence and draw logical inferences therefrom. *Grissom v. State*, 2011 OK CR 3, ¶ 67, 253 P.3d 969, 992. A minor misstatement of fact will not warrant a reversal unless, after a review of the totality of the evidence, it appears the same could have affected the outcome of the trial. *Langley,* 1991 OK CR 66, ¶ 24, 813 P.2d at 531.

¶138 The prosecutor's suggestion in the present case that "[t]he floor around the soda fountain was wet, like it had been mopped" was reasonably based upon the evidence at trial. Tammy Wilkerson was the first person to discover the pool of blood in the storeroom of the Teepee Totem. She testified that she observed that the floor was a little wet near the fountain drink dispenser. Wilkerson unmistakably hesitated when defense counsel on cross-examination attempted to secure her affirmation that this was to be expected around a soda fountain. Deputy Michael Moore testified that he observed droplets of blood leading from the storeroom, through the store and out to the front doors. He further observed a utility sink, mop, and a mop bucket in the storeroom. Both Wilkerson and Moore testified that they observed a cup of ice with a clear liquid in it on the counter next to the soda dispenser. Based upon this evidence, we find that the prosecutor did not misstate the evidence.

¶139 It appears that the prosecutor made a minor misstatement of fact when he recounted Stanley Bench's testimony in closing argument. Bench did not testify that Appellant stated; "Good-bye, Grandpa. I love you. Don't get hurt." Instead, Bench indicated that when Appellant declared, "Pa, I love you," Bench had replied, "I do you, too. Be careful out there and don't get hurt." Reviewing the totality of the evidence, we find that this minor misstatement did not constitute plain error. Appellant was not prejudiced by the misstatement, and thus it did not affect his substantial rights. We conclude that plain error did not occur.

¶140 Sixth, Appellant argues that the prosecutor improperly impeached his mother, Dana Huff, during the second stage of the trial. He, first, claims that the prosecutor used a "mix-up" about her violation of the rule of sequestration to portray Huff as a liar and then imputed this circumstance to the remainder of her testimony. Appellant failed to raise this specific challenge before the trial court, therefore, we find that he has waived appellate review of this issue for all but plain error, and review the claim for plain error pursuant to the test set forth in *Simpson. Malone*, 2013 OK CR 1, ¶ 40, 293 P.3d at 211; *Harmon v. State*, 2011 OK CR 6, ¶ 36, 248 P.3d 918, 934 ("[W]hen a specific objection is made at trial, this Court will not entertain a different objection on appeal.").

¶141 We are unpersuaded by Appellant's argument. We note that the trial court is permitted to fashion a proper remedy for the violation of the rule of sequestration. *See McKay v. City of Tulsa*, 1988 OK CR 238, ¶ 6, 763 P.2d 703, 704 (holding trial court properly allowed witness to take the stand despite violation of rule of sequestration); *Villanueva v. State*, 1985 OK CR 8, ¶ 2, 695 P.2d 858, 860 (disagreeing with appellant's contention that exclusion of witness is mandatory result of violation of the rule). We further note that generally, the State is permitted to cross-examine the defendant's witnesses at trial concerning any matter which is responsive to testimony given on direct examination or which is material or relevant thereto and which tends to elucidate, modify, explain, contradict or rebut testimony given in chief by the witness. *Malone*, 2013 OK CR 1, ¶ 45, 293 P.3d at 212.

¶142 Reviewing the record, we find that there was no "mix-up." Defense counsel invoked the rule of sequestration immediately prior to opening statements in the first stage of the trial. When defense counsel called Appellant's mother to testify, the State approached and alleged a violation of the rule. During the *in camera* hearing held on this issue, Huff admitted to violating the rule and speaking to her husband about his testimony after he had testified, as well as speaking to another listed witness about his expected testimony. Acknowledging this fact, defense counsel suggested that cross-examination as to credibility was the proper remedy instead of exclusion of Huff's testimony. Huff testified in Appellant's defense. On cross-examination, she very reluctantly admitted to violating the rule. As Huff clearly violated the rule of sequestration, we find that the prosecutor properly impeached her with this fact.

¶143 Second, Appellant argues that the State impermissibly implied that Mrs. Huff lied during her son's enlistment with the Navy. Dr. Grundy admitted during his testimony that contrary to their statements to him both Appellant and Mrs. Huff had certified that Appellant did not have any educational, medical, psychiatric, psychological, emotional or mental health problems on his enlistment forms with the Navy. They further certified that Appellant did not have trouble sleeping and had never attempted suicide. Huff testified and acknowledged Appellant's educational, medical, emotional, and mental health problems as he was growing up. She claimed that Appellant had always had trouble sleeping and focused on harming himself during the time that he was on medication to help his inability to focus. When the prosecutor confronted Huff with her lie to the Federal Government, Huff was evasive and refused to acknowledge her untruthfulness. She claimed that she did not remember the Navy asking her about Appellant's educational history and only admitted to lying about Appellant's bouts of sleeplessness if they had, in fact, asked that question. She explained her denial of Appellant's psychiatric history explaining that she did not feel that Appellant had any psychiatric issues before joining the Navy. Ultimately, she admitted to presenting a falsehood to the officer that investigated the domestic violence incident between Appellant and Farlan Huff. She further admitted that she had run interference for Appellant his whole life. As the prosecutor's questions to Huff tended to contradict or rebut her testimony given on direct, we find that Appellant has not shown that an error, plain or otherwise, occurred. The prosecutor's cross-examination was proper.

¶144 Finally, Appellant argues that the prosecutor improperly invoked sympathy for the victim during second stage closing argument. Appellant failed to raise this specific challenge before the trial court, therefore, we find that he has waived appellate review of this issue for all but plain error, and review the claim for plain error pursuant to the test set forth in *Simpson. Malone*, 2013 OK CR 1, ¶ 40, 293 P.3d at 211; *Harmon*, 2011 OK CR 6, ¶ 36, 248 P.3d at 934.

¶145 This Court has consistently held it is improper for the prosecution to attempt to

elicit sympathy for victims. *Garrison v. State*, 2004 OK CR 35, ¶ 117, 103 P.3d 590, 610–11. However, we have distinguished between the instance where a prosecutor "overtly sought sympathy for the victims" and the instance where the prosecutor's comments likely evoked an emotional reaction but were reasonable inferences based upon the evidence at trial. *Jackson v. State*, 2007 OK CR 24, ¶ 27, 163 P.3d 596, 604. Comments which are not a deliberate attempt to elicit sympathy but are reasonable inferences based upon the evidence generally fall within the wide range of permissible argument. *Id.; Bland,* 2000 OK CR 11, ¶ 97, 4 P.3d at 728.

¶146 Appellant claims that the prosecutor invoked sympathy by injecting her own thoughts and emotions during closing argument. The prosecutor's comment that she had been upset about missing her daughter's Ag show that day until she saw Henry's parents and realized that she had been selfish was borderline. Although the prosecutor's comment placed importance on focusing on the trial at hand, her personal observations were irrelevant and the comment had the potential to invoke sympathy. However, we do not find that the prosecutor's self-absorbed statement constituted plain error. Appellant claims that the prosecutor asked the jurors to imagine their daughters and nieces in Henry's circumstances. Although we have cautioned prosecutors against encouraging jurors to imagine themselves as the victim during the offense, we have concluded that these types of comments do not constitute plain error. *Browning v. State*, 2006 OK CR 8, ¶ 37, 134 P.3d 816, 839. Taking the prosecutor's comments in context, we find that Appellant's claim is not supported by the record. The prosecutor did not ask the jurors to imagine their daughters and nieces in Henry's circumstances. Instead, while comparing the diverse responses of the differently aged women to Appellant's aggressive sexual behavior, the prosecutor asked the jurors if Appellant's unwelcome physical contact with several of the young female witnesses would be a "big deal" if it had occurred to their daughter or niece. As the prosecutor did not ask the jurors in the present case to place either themselves or their relatives in the victim's circumstances, we find that plain error did not occur.

¶147 Appellant also claims that the prosecutor invoked sympathy for Henry when he asked the jurors to listen for a voice that was no longer there during the rebuttal portion of the State's closing argument. While the prosecutor should not encourage the jury to impose the death penalty out of sympathy for the victim, we find that the prosecutor's comment did not rise to the level of plain error. *Pickens v. State*, 2001 OK CR 3, ¶ 40, 19 P.3d 866, 880 (finding prosecutor's request for jurors to remember that last person the victim saw was the defendant and the last sound the victim heard was sound of thunder from gun did not rise to the level of plain error). We note that the victim's silence occurred as a result of Appellant's criminal act and thus the prosecutor's argument was reasonably based upon the evidence at trial.

¶148 Finally, Appellant claims that the prosecutor invoked sympathy when he compared the in-life photograph of Henry with one of the post-mortem photographs of her. We are not persuaded by this argument.

¶149 The record reveals that the State introduced as State's Exhibit Number 1 a recent school portrait of Henry to show her general appearance and condition before her death pursuant to 12 O.S.Supp.2003, § 2403. During second stage closing argument the prosecutor compared the in-life photo with a post-mortem photo depicting the injuries to Henry's head, face, neck, and shoulders. The prosecutor stated that one image reflected Henry before Appellant's attack and the other image reflected her appearance after Appellant was done with her. Appellant's suggestion that members of the public gasped during this display is not supported by the record. The affidavit which he references is not part of the record and we do not consider it. *Bland,* 2000 OK CR 11, ¶ 115, 4 P.3d at 731. The trial court instructed the jurors to not let sympathy, except for the defendant, enter into its deliberations.

¶150 The prosecutor's contrasting of the two images did not render Appellant's trial fundamentally unfair. *See Mitchell*, 2011 OK CR 26, ¶ 75, 270 P.3d at 179, *overruled on other grounds by Nicholson v. State,* 2018 OK CR 10, ¶¶ 11-12, 421 P.3d 890, 895 (finding prosecutor's display and contrasting of pre-death and post-mortem photographs in closing argument did not deny appellant a fair trial). In short, the prosecutor's actions did not unfairly evoke sympathy for the victim so much as it underscored the nature of Appellant's crime. As the prosecutor's display was reasonably based upon the evidence

at trial we conclude that Appellant has not shown that plain error occurred.

¶151 Reviewing the entire record, the cumulative effect of the prosecutor's comments and conduct did not deprive Appellant of a fundamentally fair trial or sentencing proceeding. The evidence strongly supported the jury's determination of both guilt and recommendation as to sentence. Proposition VII is denied.

¶152 In Proposition VIII, Appellant raises several challenges to the admission of State's Exhibit Number 1, the in-life photograph of Henry. The State introduced the photo pursuant to the language within 12 O.S.Supp.2003, § 2403 allowing the admission of a photograph of a criminal homicide victim while alive.

¶153 Appellant, first, asserts that this statutory provision is unconstitutional. He argues that in-life photographs are never relevant and inject passion and sympathy into the trial proceedings. This Court has repeatedly rejected these arguments. *Grant v. State*, 2009 OK CR 11, ¶ 52, 205 P.3d 1, 22; *Glossip*, 2007 OK CR 12, ¶¶ 77-80, 157 P.3d at 156-57; *Coddington v. State*, 2006 OK CR 34, ¶¶ 53–57, 142 P.3d at 452–53. The arguments and authorities which Appellant presents raise nothing new. *Marquez-Burrola v. State*, 2007 OK CR 14, ¶¶ 29-31, 157 P.3d 749, 760. We continue to find that this statutory provision is constitutional.

¶154 Appellant further argues that, under the circumstances of this case, the in-life photo was more prejudicial than probative. He asserts that the prosecutor's comparison of the in-life photograph of Henry with a post-mortem photograph of her during second stage closing argument rendered his trial fundamentally unfair.[12] We determined in Proposition VII that the prosecutor's act of displaying these images did not render Appellant's trial fundamentally unfair.

¶155 The photograph admitted in the present case was an appropriate snapshot of the decedent offered to show her general appearance and condition while alive. During second stage closing argument the prosecutor compared the in-life photo with a photo of Henry's body shortly after it was discovered. The post-mortem photo depicted the injuries to Henry's head, face, neck, and shoulders. Comparison of these two photos was the only means to grasp the true extent of Henry's injuries and the nature of Appellant's crime. As the contrasting images tended to establish both serious physical abuse and the calloused nature of Appellant, the photos held great probative value concerning the State's alleged aggravating circumstances. Giving the in-life photo its maximum reasonable probative force and its minimum reasonable prejudicial value, we find that the photo's probative value was not substantially outweighed by its prejudicial effect. *Mayes*, 1994 OK CR 44, ¶ 77, 887 P.2d at 1310. Proposition VIII is denied.

ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL

¶156 In Proposition IV, Appellant challenges the effectiveness of defense counsel in both stages of the trial. This Court reviews ineffective assistance of counsel claims under the two-part test mandated by the United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *Malone*, 2013 OK CR 1, ¶ 14, 293 P.3d at 206. The *Strickland* test requires an appellant to show: (1) that counsel's performance was constitutionally deficient; and (2) that counsel's deficient performance prejudiced the defense. *Id.*

¶157 The Court begins its analysis with the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Appellant must overcome this presumption and demonstrate that counsel's representation was unreasonable under prevailing professional norms and that the challenged action could not be considered sound trial strategy. *Id.*

¶158 When a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed. *Malone*, 2013 OK CR 1, ¶ 16, 293 P.3d at 207. To demonstrate prejudice an appellant must show that there is a reasonable probability that the outcome of the trial would have been different but for counsel's unprofessional errors. *Id.* "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter,* 562 U.S. 86, 112, 131 S.Ct. 770, 792, 178 L.Ed.2d 624 (2011). When a defendant challenges a death sentence, the question is whether there is a reasonable probability that, absent counsel's errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. *Strickland,* 466 U.S. at 695, 104 S.Ct. at 2069.

¶159 Appellant raises several claims of ineffective assistance predicated on circumstances within the record on appeal. He, first, claims that defense counsel was ineffective for failing to object to several of the instances he alleged constituted prosecutorial misconduct in Proposition VII. We determined in Proposition VII that the challenged comments and conduct did not deprive Appellant of a fundamentally fair trial and sentencing proceeding. As such, we find that Appellant has not shown a reasonable probability that the outcome of the trial would have been different but for counsel's alleged failures. *Glossip*, 2007 OK CR 12, ¶ 113, 157 P.3d at 161 (rejecting ineffective assistance of counsel claim where underlying claim did not rise to the level of plain error).

¶160 Second, Appellant claims that counsel was ineffective for failing to object to the expert testimony of Dr. Terese Hall which he argued was improper in Proposition VI. We determined in that Proposition that Appellant had not shown that Dr. Terese Hall's testimony constituted plain error. As such, we find that Appellant has not shown ineffective assistance of counsel under *Strickland*. *Id.*, 2007 OK CR 12, ¶ 112, 157 P.3d at 161.

¶161 Third, Appellant claims that counsel was ineffective for failing to impeach Dr. Hall's testimony. He argues that counsel should have impeached Hall with Clayton Jenson's trial testimony. Solely citing Jenson's testimony for the defense, Appellant asserts that defense counsel could have undercut Dr. Hall's testimony by questioning her concerning Jenson's statements. Taking Jenson's testimony in the full context of the trial, we find that Appellant has not shown that counsel's conduct fell outside the wide range of reasonable professional assistance.

¶162 Appellant's cousin, Clayton Jenson, testified for both the State and the defense at trial. Although Jenson extrapolated on his statements as the trial went on, his account remained consistent. Jenson testified in the State's case-in-chief that he regularly spoke with Appellant and spent approximately 2 hours with Appellant on the day of Henry's murder. He indicated that Appellant was able to engage him in meaningful conversation and they discussed their future plans together that day. Although Appellant had previously voiced concerns that other people might think he was different or crazy, Jenson did not see any sign of these things. Jenson testified that he did not see anything wrong with Appellant on the day of Henry's death.

¶163 Jenson expounded on Appellant's concerns while testifying in Appellant's defense. He recounted that Appellant had talked about things bothering him in his room, like a demon. Appellant had also stated that a man and a woman were hunting him, trying to find him and kill him, because he knew too much from what he had done in the military. He had claimed that he had a chip in his brain like a universal soldier science project and proclaimed that he was afraid of going to the doctor for fear that he would be committed. Jenson advised that Appellant has stated that he had gone days without sleeping.

¶164 On cross-examination, Jenson affirmed that he did not believe that there was anything wrong with Appellant during the two weeks preceding Henry's death. He explained that he did not believe Appellant's statements at that time. Jenson related that Appellant was clean and had good hygiene. He had meaningful conversations with Jenson. He was rational during these conversations and Jenson did not see anything to indicate that Appellant had any problem. Jenson testified that, consistent with his former testimony, he still did not believe that there was anything wrong with Appellant.

¶165 On redirect, defense counsel secured Jenson's affirmation that he did not want to believe Appellant's statements at the time. Jenson also affirmed that he had just blown Appellant off because he did not want to hear it.

¶166 Dr. Hall testified in rebuttal for the State. She indicated she relied upon information from Jenson in forming her opinion that Appellant was sane at the time of Henry's murder. Hall observed that Jenson's statements to her two years after Henry's death were consistent with his initial statements. Jenson reported that Appellant and he were about the same age and spent quite a bit of time together, including on the day of the offense. Jenson did not see anything wrong with Appellant and believed that he was normal.

¶167 When defense counsel cross-examined Hall, he did not seek to impeach Hall with Jenson's testimony for the defense. However, we find that counsel's omission did not constitute ineffective assistance of counsel. As outlined above, Jenson's testimony remained consistent. He wholly acknowledged Appellant's claims

but consistently maintained that he did not believe that Appellant had mental health problems based upon the fact that he did not see any signs to support Appellant's claims. Even after disclosing the nature and extent of Appellant's claims, Jenson explicitly testified that, consistent with his former testimony, he still did not believe that there was anything wrong with Appellant. Since Jenson's testimony in defense would not have undercut his statements to Hall or his testimony in the State's case-in-chief, we find that counsel's conduct fell within the wide range of reasonable professional assistance.

¶168 Appellant also argues that counsel was ineffective for failing to impeach Dr. Hall with her testimony in another case. He cites to this Court's unpublished opinion in *Fears v. State*, F-2004-1279 (Okla. Cr., July 7, 2006) as evidencing Dr. Hall's testimony. However, Appellant has not provided any authority establishing that defense counsel would have been able to use this Court's unpublished opinion to impeach Dr. Hall. Although the author of *Fears* described certain statements from Dr. Hall's testimony in that case, this Court's opinion in *Fears* does not constitute Dr. Hall's prior testimony. *See Roy v. State*, 2006 OK CR 47, ¶ 20, 152 P.3d 217, 224 n. 20 (finding transcript constitutes official record of the case); Rule 2.2(D), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017) ("The transcript prepared by the court reporter shall constitute the record of the proceedings from which it was transcribed."). Dr. Hall's testimony from *Fears* is not within the record on appeal and Appellant has not sought to supplement the record with the official court reporter's transcripts from that trial. As such, we must conclude that Appellant has not shown that counsel's performance was constitutionally deficient.

¶169 Even if we were to consider the statements which Appellant recounts from *Fears*, we would find that it did not undermine Dr. Hall's testimony in the present case. Hall's testimony did not materially differ. To the contrary, the facts in *Fears* actually reveal that Hall's testimony remained consistent. The officers who arrested the defendant in *Fears* observed signs of mental illness in him and the defendant, himself, verbalized a delusion to one of the officers. These were the very circumstances which Dr. Hall cited as missing from Appellant's conversations with Clayton Jenson, Stanley Bench, Deputy Quinton Short, and Detention Officer Brown and which led her to conclude that Appellant had not suffered a psychotic break. Therefore, we are forced to conclude that Appellant has not shown that there is a reasonable probability that the outcome of the trial would have been different but for counsel's failure to use Hall's testimony from the *Fears* case.

¶170 Appellant also argues that counsel should have impeached Dr. Hall with the conclusions of Scott Orth, Ph.D. and Peter Rausch, Ph.D. of the Oklahoma Forensic Center. We note that Dr. Orth's competency report and Dr. Rausch's testimony from Appellant's competency trial were both filed of record in the case and are among the items which Dr. Hall reviewed in formulating her opinion at trial.

¶171 Although this information was readily available to impeach Dr. Hall at trial, we are not convinced that the conclusions of Dr. Orth and Dr. Rausch were favorable to Appellant's defense because their observations and conclusions were more consistent with Dr. Hall's testimony than Appellant's own expert. Dr. Grundy testified that Appellant appeared psychotic when he visited him. Grundy did not find any evidence of malingering. He found that Appellant suffered active symptoms of mental illness, such as delusions and hallucinations, which caused him not to understand the legal wrongness of his behavior at the time of the offense.

¶172 Dr. Orth's report contrasted with Grundy's findings. Orth clearly found evidence of either fabrication or feigning when he evaluated Appellant in February of 2013. Dr. Orth did not see any overt evidence of Appellant's self-proclaimed hallucinations or delusions and noted that Appellant gave "vague and unusual responses regarding his experiences of psychiatric symptoms." Orth assessed Appellant with the MMPI-2 to determine whether Appellant was "feigning psychopathology." He wrote in his report that the testing indicated that Appellant "may have been responding to items in a manner to communicate that he is very psychologically disturbed when in fact that is not the case" or "he may have been responding to items in a manner to draw attention to negative characteristics, exaggerating his self-reported psychological symptoms as a plea for help." Orth did not conclusively determine whether Appellant was faking or exaggerating his symptoms. Instead, he wrote that it was his "conservative opinion" that it was more likely that Appellant had exaggerated his psychological symptoms

as a plea for help. Ultimately, Orth determined that Appellant was not a person requiring treatment.

¶173 Although Orth's "conservative opinion" did not exactly match Hall's conclusion that Appellant was malingering, overall Orth's report tended to corroborate Dr. Hall's testimony. Hall testified that Appellant's results on the two scales for assessing over-reporting or exaggeration on the MMPI-2 were extremely high. Appellant admits that the results of Dr. Orth's administration of the exam to Appellant were similar to the results which Dr. Hall obtained. Orth's report was consistent with Dr. Hall's explanation that she did not see any overt evidence of psychosis during her evaluation of Appellant. It also corroborated Hall's account that Appellant's report of delusions was very unusual.

¶174 As with Dr. Orth, we find that Dr. Rausch's testimony tended to corroborate Hall's observations and opinion. Dr. Rausch testified that he performed an outpatient evaluation with Appellant in March of 2014. The evaluation took place in an interview room over the course of approximately one hour. Rausch did not see any need to retest Appellant and simply relied upon his coworker, Dr. Orth's, prior testing of Appellant. Rausch indicated that he agreed with Orth's interpretation of Appellant's MMPI-2 testing. He indicated that the results revealed either that Appellant was "feigning psychological symptoms and pathology" or was endorsing a lot of symptoms and over-reporting as a cry for help. Rausch also testified that Appellant engaged in fairly unusual behavior during his evaluation. Dr. Rausch did not have any reason to dispute Orth's finding that Appellant did not have any substantial symptoms. Each of these findings was consistent with Dr. Hall's observations and tended to contradict Dr. Grundy's testimony. As such, we find that Appellant has not shown that counsel's performance fell outside the wide range of reasonable professional assistance.

¶175 Similarly, Appellant has not shown prejudice from counsel's omission. The evidence at trial strongly indicated that Appellant was sane at the time of the offense. When Appellant enlisted in the Navy in November of 2011, his mother verified that he did not have any mental health issues. The Navy had a doctor examine Appellant and he certified that Appellant did not have any psychiatric issues. After Appellant was discharged for going AWOL, his stepfather had him seen by a mental health professional on two separate occasions. Neither mental health professional determined that Appellant was a person requiring treatment.

¶176 Appellant's actions on the day of the murder evinced his sanity. Neither Stanley Bench nor Clayton Jenson observed Appellant acting out of the ordinary that night. Appellant did not report any delusions to them. Appellant's behavior immediately after killing Henry appeared to be rational, goal-oriented action. He quickly attempted to conceal the crime by secreting Henry out of the store and hiding her body in a semi-secluded area near his home. Appellant attempted to escape from the State in Henry's car after washing himself and covering up his blood soaked clothes.

¶177 Appellant acted coherent and rational when he later interacted with the law enforcement officials that night. He appeared lucid and normal to both Deputy Quinton Short and Detention Officer Kendall Brown. Dr. Grundy admitted that there was not any independent evidence to corroborate Appellant's claimed delusions.

¶178 The audio tape of Appellant's conversation with Brown was convincing. Appellant did not relate any delusions during the conversation. He was self-directed and voluntarily initiated a discussion with Brown concerning the viability of an insanity defense. Appellant's comments illustrated his prior knowledge concerning psychological evaluations and feigning mental illness.

¶179 The evidence also strongly suggested that Appellant was feigning mental illness. Although Appellant had passed Dr. Grundy's tests for malingering, Appellant's test results on the MMPI-2 tended to indicate that he was feigning or over-reporting symptoms. Appellant took two MMPI-2 tests. Both tests indicated that Appellant was feigning or over-reporting mental health symptoms. When Dr. Hall gave Appellant the MMPI-2 after Grundy's evaluation, the scores indicated that Appellant was exaggerating and over-reporting. Even Dr. Grundy had to admit that Appellant might not be the most truthful person in the world.

¶180 Dr. Hall did not see any evidence of severe psychosis in Appellant. At the time of trial, Appellant still maintained that he was not mentally ill. None of the seven separate

mental health professionals who had evaluated Appellant found that he was a person requiring treatment. Only Dr. Grundy had diagnosed Appellant as insane on the night of the offense. Despite Grundy's belief that Appellant had schizophrenia and was psychotic when he first evaluated him, Appellant was able to appear at trial and participate in his defense without taking any medication for the condition.

¶181 In light of the evidence of Appellant's sanity and feigning we conclude that the evidence would not have permitted the jury to find that Appellant was insane at the time of the offense. Accordingly, we find that Appellant has not shown a reasonable probability that the outcome of the trial would have been different had counsel attempted to impeach Dr. Hall with Dr. Orth's competency report and Dr. Rausch's testimony from the competency trial.

¶182 Fourth, Appellant asserts that counsel was ineffective because she wholly abandoned the theme that he was a severely mentally ill individual during the second stage of the trial. He alleges that this caused an unreasonable inconsistency between his first and second stage defenses. We find that Appellant's assertion is not supported by the record. Counsel emphasized Appellant's mental health issues during both stages of the trial.

¶183 Although counsel did not explicitly mention the term "schizophrenia" during the second stage, counsel presented testimony from several witnesses concerning Appellant's mental health. She introduced testimony from Naval Chief, Andre Southerland, who had overseen Appellant's training in boot camp. Chief Southerland had sent Appellant for a psychiatric evaluation during his extended time in boot camp. Counsel also called Appellant's best friend, Anthony Michael Popovich, to testify. Popovich interacted with Appellant while he was AWOL from the Navy and testified as to Appellant's mental state during this time. Popovich related that Appellant appeared disturbed, acted paranoid, and informed him that he was working "Special Ops" doing top secret work for the Navy. Defense counsel introduced Rebecca Becker's testimony that Appellant appeared both disoriented and scared at the arraignment following his arrest for stealing a vehicle while AWOL. She also presented Farlan Huff's testimony concerning Appellant's mental health and his attempts to have Appellant admitted for treatment after he came home from the Navy. Counsel called Sharon Clements of Ada's Program of Assertive Community Treatment to explain why they were unable to help Appellant.

¶184 Counsel's second stage closing argument emphasized that Appellant's mental health problems played a large role in his life and were mitigating. Thus, the record reflects that defense counsel presented a consistent defense across both stages of the trial centering upon a downturn in Appellant's mental health following his time in the Navy. As such, we find that Appellant has not shown that counsel's performance fell outside the wide range of reasonable professional assistance.

¶185 Appellant also raises several claims of ineffective assistance of counsel predicated on circumstances outside the record. Simultaneous with the filing of his Brief, Appellant filed his Application for Evidentiary Hearing on Sixth Amendment Claim. Appellant seeks to supplement the record on appeal pursuant to both Rule 3.11(A) and 3.11(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017) and requests an evidentiary hearing on his claims of ineffective assistance. We must address Appellant's application before we can determine his claims of ineffective assistance.

¶186 This Court analyzes requests to supplement the record which are based upon ineffective assistance of counsel claims pursuant to Rule 3.11(B). *Day v. State*, 2013 OK CR 8, ¶ 10, 303 P.3d 291, 297. Rule 3.11(A) solely allows this Court to supplement the record on appeal with items admitted during proceedings in the trial court but which were not designated or actually included in the record on appeal. *Id.; McElmurry v. State*, 2002 OK CR 40, ¶ 167, 60 P.3d 4, 36 (holding Rule 3.11(B) strictly limits supplementation under Rule 3.11(A) to matters which were presented to the trial court). Rule 3.11(A) is not intended to allow parties to bolster a trial record with extra-record documents or evidence. *Id.* In contrast, Rule 3.11(B)(3)(b) enables an appellant to qualify for an evidentiary hearing to support his or her claim of ineffective assistance of counsel by submitting affidavits and extra-record documents attached to his application for evidentiary hearing. *Hancock v. State*, 2007 OK CR 9, ¶ 112, 155 P.3d 796, 822, *overruled on other grounds by Williamson v. State,* 2018 OK CR 15, 422 P.3d 752.

¶187 As Appellant has not argued for supplementation with items admitted during proceedings in the trial court but which were not designated or actually included in the record on appeal, we find that his request for supplementation under Rule 3.11(A) must be denied. We review his request to supplement the record in support of his Sixth Amendment claim pursuant Rule 3.11(B)(3)(b).

¶188 This Court reviews an application under Rule 3.11(B)(3)(b) pursuant to the analysis set forth in *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905–906. We review and consider an appellant's application and affidavits along with other attached non-record evidence to determine whether the appellant has provided sufficient information to show this Court by clear and convincing evidence that there is a strong possibility trial counsel was ineffective for failing to utilize or identify the evidence at issue. *Id.* This standard is less demanding than the test imposed by *Strickland. Id.*

¶189 Reviewing Appellant's application under this standard, we find that he has not shown clear and convincing evidence that there is a strong possibility that counsel was ineffective for failing to identify or utilize the proffered evidence. Appellant asserts in his application that counsel was ineffective for failing to effectively cross-examine his co-worker at the Teepee Totem, Melissa Lynn. Arguing that Lynn's testimony at trial was in direct conflict with her statement to the police, Appellant refers us to Exhibit "1" to his application. This exhibit appears to be a copy of the DVD recording of Lynn's statement to Law Enforcement. Lynn's statements to the investigating officer in Exhibit "1" substantially conformed to her testimony at trial. The only exception was that Lynn informed the investigating officer that Appellant was slow and was not catching on. She explained that part of the reason that Appellant was slow was because he was young and liked to flirt with every girl that came into the store.

¶190 It appears that the State provided Exhibit "1" to the defense prior to trial. Comparing Lynn's testimony at trial with Exhibit "1" we find that Lynn's testimony was not false or misleading. Although defense counsel did not impeach Lynn with her prior statement that Appellant was slow and was not catching on, we find that Appellant has not shown that defense counsel's decision could not be considered sound trial strategy. Since Lynn partly attributed Appellant's slowness to the fact that he was young and liked to flirt with every girl that came into the store, we find that it was reasonable for counsel to omit this impeachment evidence. Delving into this topic with Lynn had the potential to undercut the defense's other evidence that Appellant was actually slow. Clearly, the defense wanted to avoid portraying Appellant as having approached other young females in the store.

¶191 We further find that Appellant has not shown that there is a reasonable probability that the outcome of the trial would have been different had defense counsel impeached Lynn. We note that defense counsel presented the testimony of several teachers and neighbors from Appellant's childhood. These individuals testified that Appellant had a learning disability and was in special education classes as he grew up. Counsel also presented Chief Southerland's testimony that Appellant required extra attention and did not do well in boot camp because he was slow and could not complete more than a 3 step process. Southerland sent Appellant to the Navy's special program which was akin to special education; however, it was apparent that Appellant was not going to complete boot camp even before he went AWOL. This testimony more than subsumed the evidence which Appellant contends defense counsel should have introduced. Accordingly, we find that Appellant has not shown clear and convincing evidence of a strong possibility that trial counsel was ineffective for failing to impeach Lynn with the proffered evidence. *Simpson*, 2010 OK CR 6, ¶ 53, 230 P.3d at 905–906.

¶192 Appellant further asserts in his application that counsel was ineffective for failing to impeach Lynn with the civil lawsuit which Henry's family filed against Appellant, the Teepee Totem, and its owners. He refers us to Exhibit "2" to his application. This exhibit appears to be a copy of a Petition alleging that Appellant, the Teepee Totem, and its owners we liable for the wrongful death of Henry. Lynn is not mentioned in the alleged petition.

¶193 Appellant has not provided any authority establishing that defense counsel would have been able to use this lawsuit to impeach Lynn. As Appellant has failed to establish that counsel's performance was constitutionally deficient, we, again, find that Appellant has not shown clear and convincing evidence of a

strong possibility that trial counsel was ineffective for failing to utilize or identify the proffered evidence. *Simpson*, 2010 OK CR 6, ¶ 53, 230 P.3d at 905–906.

¶194 Appellant further asserts in his application that counsel was ineffective for failing to challenge Dr. Hall's opinion that he was "malingering" or "faking" mental illness and her suggestion that it was easy to fool the Structured Interview of Reported Symptoms ("SIRS). Appellant argues that counsel should have called Dr. Grundy to testify in surrebuttal and impeach Dr. Hall's testimony on these points. He refers us to Exhibit "4" to his application. This exhibit is the affidavit of Dr. Curtis Grundy, Appellant's psychological expert from trial. The affidavit alleges that Dr. Grundy consulted with the defense team after Dr. Hall's testimony and informed them that he would not recommend his testifying in surrebuttal. Now, in hindsight, Grundy believes that if he had testified he could have challenged Dr. Hall's testimony suggesting that Appellant was "malingering" or "faking."

¶195 We refuse to review counsel's performance in the lens of hindsight. *Robinson v. State*, 1997 OK CR 24, ¶ 21, 937 P.2d 101, 108. Defense counsel's apparent reliance upon Dr. Grundy's expertise in determining whether to call him in surrebuttal was a strategic decision. That Grundy and appellate counsel have now imagined ways to impeach Dr. Hall is not persuasive. *See Hancock*, 2007 OK CR 9, ¶ 113, 155 P.3d at 822 ("Imaginative criticisms of trial counsel's performance issue all too readily from the gainful vantage of a zealous hindsight."

¶196 We further find that Appellant has not shown a reasonable probability that the outcome of the trial would have been different had counsel called Grundy in surrebuttal. Grundy's testimony at trial concerning "malingering" and "faking" was consistent with Dr. Hall's trial testimony. Dr. Grundy recounted that he gave Appellant two different tests to determine if he was malingering. One of the tests assessed "feigning or fabricating symptoms of mental illness" and the other test assessed "whether someone is trying to feign or fake memory impairment." Dr. Grundy agreed that equating malingering with "faking" was a lay-person's way of viewing it. On cross-examination, Grundy admitted that Appellant was not the most truthful person. Accordingly, we find that Appellant has not shown clear and convincing evidence of a strong possibility that trial counsel was ineffective for failing to call Dr. Grundy in surrebuttal. *Simpson*, 2010 OK CR 6, ¶ 53, 230 P.3d at 905–906.

¶197 Appellant further asserts in his application that counsel was ineffective for failing to present the testimony of a mitigation specialist in the second stage of the trial. He refers us to Exhibit "3" of his application. This exhibit is the affidavit of David Musick, Ph.D., a retired sociologist from the University of Northern Colorado, who claims to be a mitigation specialist. Dr. Musick alleges that he was retained to construct a social history in Appellant's case; reviewed all of the material which counsel sent him; interviewed Appellant, his mother, and half-brother; prepared a report; appeared at Appellant's trial to testify; but defense counsel did not call him to testify because he did not want the jury to hear 4 lines of information contained in his report. Attachment "B" to Musick's affidavit is his self-styled original report.[13] The ostensible language from Musick's report professes that Appellant had told his grandmother that young customers at the convenience store had called him cruel names.[14] It further denoted that the last thought of Appellant's mother was that Appellant might have reached his limit after taking years and years of abuse.

¶198 Despite Musick's acknowledgment of counsel's reason for not calling him as a witness at trial, Appellant asserts that Musick's testimony was necessary to explain and personalize the other mitigation evidence which counsel presented. This Court has explicitly rejected the notion that capital defense counsel must use the services of a "mitigation specialist." *Marquez-Burrola*, 2007 OK CR 14, ¶ 60, 157 P.3d at 767–68. "Defense counsel's decision not to present particular evidence in mitigation may be sound trial strategy." *Coddington*, 2011 OK CR 21, ¶ 19, 259 P.3d at 839. Similarly, the question of which witnesses to call on a criminal defendant's behalf is a matter of trial strategy. *Camron v. State*, 1992 OK CR 17, ¶ 32, 829 P.2d 47, 54. An appellant must show that capital defense counsel's strategic decision to not call a witness was objectively unreasonable. *Id.*; *Bobby v. Van Hook*, 558 U.S. 4, 9, 130 S.Ct. 13, 17, 175 L.Ed.2d 255 (2009).

¶199 Appellant has not made this showing in the present case. He has neither argued nor shown that counsel's strategic decision to not call Musick as a witness to avoid his being questioned about the 4 lines was objectively unreasonable. We note that these 4 lines were

inconsistent with Appellant's first stage defense. We cannot fault counsel for maintaining a consistent defense through both stages of the trial. *See Taylor v. State*, 2000 OK CR 6, ¶ 48, 998 P.2d 1225, 1237, *abrogated on other grounds by Taylor v. State*, 2007 OK CR 34, 168 P.3d 185 (refusing to second guess trial counsel's decision to maintain consistent defenses in first and second stage of trial).

¶200 Appellant has also failed to demonstrate prejudice from counsel's decision to not call Musick as a witness. Counsel presented the great majority of the information contained in Dr. Musick's affidavit and Report through the testimony of the numerous witnesses that counsel called during the second stage of the trial. Therefore, much of Musick's testimony would have been cumulative and not likely to have had an immense effect on the jury. At the same time, certain of Dr. Musick's conclusions could be considered detrimental to Appellant's case in mitigation. Musick's conclusion that Ap-pellant killed Henry as a reaction to years and years of bullying was not so compelling as to have shifted the jury's weighing of the evidence in aggravation and mitigation. Nothing in the record suggests that Henry bullied or spoke harshly to Appellant on the night of her death. That Appellant allegedly took out the accumulated pain of years of bullying on an innocent young female that ventured into the store where he was working tends to support the State's theory that Appellant posed a continuing threat to society.

¶201 We also note that Musick's concluding paragraph in his Report speculated that Appellant could continue to engage in impulsive behavior, lack empathy, and be aggressive in the future if his head injuries were left untreated. This information also would have likely tended to support the State's allegation that Appellant posed a continuing threat to society. As the great majority of Musick's information was actually presented to the jury and his ultimate conclusions might have actually supported the State's case, we find that Appellant has not shown a strong possibility that trial counsel was ineffective for failing to utilize or identify the proffered evidence. *Simpson*, 2010 OK CR 6, ¶ 53, 230 P.3d at 905–906.

¶202 Appellant further asserts in his application that counsel was ineffective for failing to present the testimony of a mental health expert in the second stage of the trial. He, again, refers us to Exhibit "4," the affidavit of Dr. Curtis Grundy. In his untested and unproven affidavit, Dr. Grundy alleges that he could have testified in the second stage of the trial that Appellant met the criteria for diagnosis of schizophrenia. He further alleges that schizophrenia is a severe mental illness that requires ongoing treatment and that he could have testified as to how this condition impaired Appellant's functioning.

¶203 Grundy's proffered statements are cumulative to the testimony he actually gave in the first stage of the trial. Grundy testified that he had diagnosed Appellant as suffering from schizophrenia. He explained that this accounted for his bizarre behavior after his discharge from the Navy, including his hallucinations, delusions, grandiose ideas, paranoia, odd statements to others, and boundary issues, i.e, failure to comply with notions of personal space. Although wholly unnecessary, defense counsel explicitly moved to introduce all of the defense's evidence from the first stage of the trial into evidence in the second stage of the trial. *See* 21 O.S.2011, § 701.10a (providing that "all exhibits and a transcript of all testimony and other evidence properly admitted in the prior trial and sentencing shall be admissible in [a] new sentencing proceeding."). Thus, the jury was free to consider Grundy's first stage testimony and there was no reason for defense counsel to call Grundy in the second stage of the trial. We, again, find that Appellant has not shown clear and convincing evidence of a strong possibility that counsel was ineffective for failing to utilize or identify the proffered evidence. *Simpson*, 2010 OK CR 6, ¶ 53, 230 P.3d at 905–906.

¶204 Appellant further asserts in his application that counsel was ineffective for failing to investigate and present neuro-imaging evidence in both stages of the trial. He cites to two different exhibits to his application in support of this claim.

¶205 Appellant refers us to Exhibit "5" to his application for evidentiary hearing. This exhibit is the affidavit of William Werner Orrison, M.D., the Chief of Neuroradiology at Simon Med Imaging Centers in Las Vegas, New Mexico. Dr. Orrison asserts that he received the MRI data from Appellant's evaluation at the University of Oklahoma Medical Center. He alleges that Appellant has anomalies in four different areas of his brain but does not relate those anomalies to Appellant's behavior in any way. Dr. Orrison does not directly correlate these alleged anomalies with any mental defect

disorder, disease, condition or illness. He has not set forth any diagnosis of Appellant. Instead, Dr. Orrison simply relates the problems which can result if a patient has an anatomical abnormality in the specified areas of the brain.

¶206 Appellant further refers us to Exhibit "6" to his application for evidentiary hearing. This exhibit is the affidavit of Jason Paulus Kerkmans, J.D., the Associate Director of MINDSET. Mr. Kerkmans asserts that MINDSET's protocol exam is sufficient to identify a wide range of structural brain abnormalities or deviations which may be of behavioral and clinical significance. He further asserts that additional imaging is necessary because Appellant's current MRI imaging data is not adequate to permit the full MINDSET protocol.

¶207 We find that Appellant has not established prejudice from counsel's omission to present neuro-imaging evidence at trial. The courts have not accepted diagnosis of psychological conditions through neuro-imaging as sufficiently reliable to be admissible under the *Daubert* standard.[15] *See* Jason P. Kerkmans, Lyn M. Gaudet, *Daubert on the Brain: How New Mexico's Daubert Standard Should Inform Its Handling of Neuroimaging Evidence*, 46 N.M.L. Rev. 383, 400-03 (2016) (arguing that novel field of neuro-imaging diagnosis can be recognized by the law despite the number of cases finding it does not meet the standard of admissibility). This is because neuro-imaging methods cannot readily determine whether a defendant knew right from wrong, maintained criminal intent or suffered from a psychological condition like schizophrenia at the time of the criminal act. *See Arizona v. Pandeli*, 394 P.3d 2, 11 (Ariz. 2017) (finding counsel not ineffective for failing to present brain imaging evidence because experts agreed there was not a good correlation between scans and cognitive ability); *United States v. Merriweather*, 921 F. Supp.2d 1265, 1284 n. 26, 1300 (N.D. Ala. 2013) (finding brain imaging questionable since medical experts agreed that brain imaging cannot be used to diagnose schizophrenia); *United States v. Montgomery*, 635 F.3d 1074, 1090 (8th Cir. 2011) (finding PET scan of brain could not be used to diagnosis Pseudocyesis); *Brant v. State,* 197 So. 3d 1051, 1071 (Fla. 2016) (finding neuro-imaging could not identify abnormalities as cause of criminal acts); *Foster v. State*, 132 So.3d 40, 58 (Fla. 2013) (distinguishing neuropsychological testing from brain imaging tests of MRI, fMRI and PET scan). Thus, the proffered neuro-imaging evidence would have been cumulative to the other evidence in Appellant's defense.

¶208 As more fully discussed, above, the evidence at trial strongly indicated that Appellant was feigning a severe mental illness. Appellant evinced knowledge of both mental illness and feigning during his impromptu discussion with Officer Brown in the jail. He did not appear to be hallucinating or suffering from delusions immediately after the offense. Multiple psychologists had come to the conclusion that Appellant was over-reporting or feigning mental illness. We are not persuaded that the neuro-imaging evidence would have been able to overcome the compelling evidence of Appellant's sanity.

¶209 We further find that Appellant has not shown prejudice from counsel's omission to present the proffered neuro-imaging evidence in the second stage of the trial. Reweighing the evidence in aggravation against both the mitigating evidence which was presented and the proffered neuro-imaging, we find that Appellant has not shown a reasonable probability that had counsel presented the neuro-imaging evidence the jury would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. *Williams v. Taylor,* 529 U.S. 362, 397–98, 120 S. Ct. 1495, 1515, 146 L. Ed. 2d 389 (2000); *Goode v. State,* 2010 OK CR 10, ¶ 93, 236 P.3d 671, 688.

¶210 The neuro-imaging evidence would not have contributed greatly to Appellant's case in mitigation. Counsel's omission to present the proffered evidence did not prevent the jury from considering any additional circumstance in mitigation because the neuro-imaging evidence was cumulative to Appellant's other mitigating evidence. The jury was instructed that they were able to consider Appellant's learning disability, the influence of his mental disturbance, his limitation in capacity to appreciate the criminality of his conduct, and his inability to conform his behavior to the requirements of the law among other potential mitigating circumstances. Since the proffered neuro-imaging evidence does not readily correlate to whether Appellant knew right from wrong, maintained criminal intent or suffered from schizophrenia we find that it did not corroborate Dr. Grundy's diagnosis of schizophrenia more adequately than the eyewitness accounts which defense counsel presented. Likewise, the proffered evidence would not have been sufficient

to overcome the strong evidence that Appellant had feigned a severe mental illness. The jurors were able to assess Appellant's mental functioning for themselves by listening to his recorded conversation with Detention Officer Kendall Brown.

¶211 The proffered neuro-imaging evidence would not have been sufficient to overcome the State's evidence. As discussed above, the evidence establishing the aggravating circumstances of the murder was compelling. The great weight of the evidence showed that Henry endured conscious physical suffering and severe emotional trauma before dying. Appellant's behavior displayed a pattern of escalating criminal activity and violence. Coupled with the calloused nature of the offense, there was a clear probability that Appellant would continue to constitute a threat to society. Therefore, we conclude that Appellant has not shown clear and convincing evidence of a strong possibility that counsel was ineffective for failing to present neuro-imaging evidence. *Simpson*, 2010 OK CR 6, ¶ 53, 230 P.3d at 905–906.

¶212 Appellant further asserts in his application that counsel was ineffective for failing to present testimony from his mother and grandmother documenting poignant stories and photographs from his life. He cites to two different exhibits to his application in support of this claim.

¶213 Appellant refers us to Exhibit "7" to his application. This exhibit is the affidavit of his mother, Dana Huff. In the affidavit, Mrs. Huff alleges that had counsel asked her, she would have testified that Appellant's life had value. She would have informed the jury that she loved Appellant and that he loved his siblings. She further alleges that she supplied Appellant's defense team with stories from Appellant's life as well as the 10 photographs attached to her affidavit. Mrs. Huff further alleges that she has sympathy for the victim's family and knows their grief because she had also lost a child.

¶214 Appellant further refers us to Exhibit "8" to his application. This exhibit is the affidavit of his grandmother, Albertha Bench. In the affidavit, Mrs. Bench alleges that had defense counsel called her testify in the second stage of the trial, she would have testified as to her love for Appellant and explained that he had never scared her. She further alleges that she gave defense counsel the photograph attached to her affidavit which depicted Appellant in his Navy uniform prior to trial. Mrs. Bench further alleges that she has sympathy for the victim's family and knows their grief because she had also lost a child.

¶215 Turning to the record, we find that the jury was not deprived of evidence showing that Appellant was a beloved and loving son, grandson and brother. Instead, it is quite clear from the record that Appellant's family loved him. His grandfather, Stanley Bench, testified in the first stage of the trial as to the exchange which occurred when Appellant declared that he was leaving his grandparents' home. Mr. Bench related that Mrs. Bench did not want Appellant to leave so he had advised Appellant; "You better get on out of here because when your grandma comes back, she is liable to have a heart attack." Appellant replied; "Yes, I know." Mr. Bench also testified as to their departing words. Appellant declared; "Pa, I love you. Mr. Bench responded; "I do you too. Be careful out there and don't get hurt."

¶216 Albertha Bench verified Mr. Bench's profession that she loved Appellant when she testified in the first stage of the trial. Mrs. Bench related how she had attempted to care for Appellant. She explained that she had tried to help him overcome strep throat and attempted to assuage his mental health issues while he was living with her.

¶217 Appellant's stepfather, Farlan Huff, testified in the second stage of the trial. Mr. Huff's testimony tended to show how Appellant's family loved him and he loved his family. Mr. Huff related that he had raised Appellant from the age of one-year as if he was his own son. Huff had potty-trained Appellant and taught him how to drive. Mr. Huff also explained that Appellant had sobbed after Mrs. Huff ordered him to stop his violent attack on Mr. Huff. He further related that he had refused to press charges against Appellant because he did not want to split the family up. Mr. Huff made it clear that he still considered himself as Appellant's father.

¶218 Similarly, Dana Huff's testimony in the second stage of the trial made it unmistakably clear that she loved Appellant and wanted him to go on living. She related how she had tried to care for Appellant his entire life. Mrs. Huff testified that she was always proud of her son. She testified concerning Appellant's brother and explained that Appellant had not taken it

well when his sister died. While admitting that she was "running interference" for Appellant, Mrs. Huff declared; "He is my child, and I would like to save him."

¶219 We further note that counsel presented other evidence that humanized Appellant. Mrs. Huff testified that Appellant had made friends with an elderly man in a nursing home when he was a teenager. Since his family had abandoned him in the home, Appellant became a companion to the man, went on walks, and shared many conversations with him. Counsel also presented the testimony of Jackie Plese, Appellant's third grade special education teacher. Ms. Plese informed the jury that she had continued to correspond with Appellant while he was in the jail. She regularly sent him Bible passages.

¶220 We further find that the proffered evidence would have undercut counsel's overall second stage strategy of emphasizing the upheaval and dysfunction in his childhood. It appears that counsel had identified and investigated the proffered testimony and photographs. Instead of introducing this evidence at trial, counsel presented evidence tending to show that Appellant was a quiet and sad child who was mistreated both at school and at home because of his learning disability and obsessive compulsive issues. Counsel portrayed Appellant's childhood home as dysfunctional and subject to numerous incidents of upheaval. Since testimony establishing that Appellant had a normal and happy childhood would have undercut the defense's claims of mistreatment and dysfunction, it is clear that counsel made a choice between these two avenues of evidence. As Appellant has neither argued nor shown why counsel's chosen avenue was unreasonable, we find that he has failed to overcome the presumption that counsel's omission of the evidence was an objectively reasonable strategic decision.

¶221 Appellant's allegation that defense counsel should have presented the declarations of Mrs. Huff and Mrs. Bench that each of them had sympathy for the victim's family and knew their grief because each had also lost a child is not well received. As these were the declarations of Appellant's family members, we fail to see how they would have humanized Appellant. Additionally, these declarations were not favorable to Appellant's defense. Every individual's grief over the loss of a loved one is unique and different. Certainly, the grief of Henry's family was different than the grief which Appellant's family members had suffered. Counsel's decision to omit such testimony was more than objectively reasonable. Accordingly, we find that Appellant has not shown clear and convincing evidence of a strong possibility that defense counsel was ineffective for failing to present the proffered photographs and testimony of his mother and grandmother. *Simpson*, 2010 OK CR 6, ¶ 53, 230 P.3d at 905–906.

¶222 Finally, Appellant asserts in his application that counsel was ineffective for failing to object to the audible gasps in the courtroom when the prosecutor displayed the in-life and post-mortem photographs of Henry during closing argument. Appellant refers us to Exhibit "9" to his application. This exhibit is the affidavit of Dale Anderson, who asserts that he heard audible gasps from the public seating area when these photos were displayed. As Appellant has not raised a claim of ineffective assistance of counsel in his brief predicated upon this assertion, we find that Appellant has waived appellate review of his request for supplementation of the record with this affidavit. Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017), (setting forth requirement of supporting request for evidentiary hearing with proposition of error alleging ineffective assistance of counsel raised in the brief-in-chief on allegation).

¶223 Appellant has not shown clear and convincing evidence of a strong possibility that counsel was ineffective in any of his claims. *Simpson,* 2010 OK CR 6, ¶ 53, 230 P.3d at 905–906. Therefore, we find that his Application for Evidentiary Hearing on Sixth Amendment Claim is **DENIED.**

¶224 Having determined that Appellant is not entitled an evidentiary hearing we turn to the remaining claims of ineffective assistance of counsel set forth in Appellant's Brief. We examine these claims under the test set forth in *Strickland* but do not consider the supplemental materials attached to Appellant's application. *See Bland,* 2000 OK CR 11, ¶ 115, 4 P.3d at 731 (holding Rule 3.11 affidavits are not considered part of record on appeal but reviewed only to determine if they contain clear and convincing evidence of counsel's ineffectiveness).

¶225 Appellant argues that counsel was ineffective for failing to impeach Melissa Lynn and Dr. Hall; failing to present the testimony of a

mitigation specialist and a mental health expert, failing to present neuro-imaging evidence; and failing to present the value of Appellant's life through the testimony of his mother and grandmother. Nothing in the record supports these claims, thus, we find that Appellant has not shown ineffective assistance of counsel under the more rigorous federal standard set forth in *Strickland. Simpson*, 2010 OK CR 6, ¶ 53, 230 P.3d at 906. Proposition IV is denied.

ACCUMULATION OF ERROR CLAIM

¶226 In Proposition XII, Appellant contends that, even if no individual error merits reversal, the cumulative effect of such errors warrants either reversal of his conviction or a modification of his death sentence. Reviewing the entire record in the present case, we find that Appellant was not denied a fair trial or sentencing proceeding by egregious or numerous errors. *Williams v. State*, 2001 OK CR 9, ¶ 127, 22 P.3d 702, 732; *Bechtel v. State,* 1987 OK CR 126, ¶ 12, 738 P.2d 559, 561. Therefore, no new trial or modification of sentence is warranted and this proposition of error is denied.

MANDATORY SENTENCE REVIEW

¶227 In Proposition XI, Appellant contends that arbitrary factors determined his death sentence. We consider this argument in conjunction with our mandatory sentence review pursuant to 21 O.S.2011, § 701.13.

¶228 The State alleged and the jury found the presence of two aggravating circumstances: 1) the murder was especially heinous, atrocious, or cruel; and 2) the defendant posed a continuing threat to society. In Propositions VIII and IX, we determined that the State presented sufficient evidence to support the jury's finding of these two aggravating circumstances.

¶229 Appellant alleged the following circumstances in mitigation of punishment: (1) he did not have any prior violent felony convictions; (2) his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired; (3) he was under the influence of mental disturbance at the time of the crime; (4) he acted under circumstances which tended to justify, excuse or reduce the crime; (5) he is likely to be rehabilitated; (6) he fully cooperated with the police when he was arrested; (7) he is only 23 years old today and was only 21 years old at the time of the offense; (8) he was diagnosed with a learning difficulty at an early age; (9) he was bullied, teased, and made fun of in school; (10) he had a negative emotional and family history; (11) he had suicidal thoughts when he was 13 years of age; (12) he was physically and verbally abused as a child; (13) he wanted to serve in the United States Navy, but was unable to complete requirements for such service; and (14) he was presented for mental health treatment and was denied.

¶230 Appellant presented the testimony of 18 witnesses in the sentencing stage of the trial, including his friends, neighbors, educators, family members, representatives of the Navy, and an administrator from a health care program. In addition to the evidence in mitigation detailed in Propositions IV and VI, the evidence showed that Appellant had a learning disability and had always struggled in the classroom. He participated in special education classes in school where it was determined that he had a normal intelligence quotient but experienced processing delays. By the eighth grade Appellant was very determined to get out of the special education classes. Due to his hard work he was able to transfer to a co-taught classroom in the Eighth grade. He was also able to accomplish his personal goal of making the school football team. Appellant's teachers found him to be respectful, quiet and polite.

¶231 The evidence further showed that Appellant's delays impacted his personal relationships. Appellant's family, neighbors, teachers and friends testified concerning his childhood. Some of Appellant's peers picked on him. He had a few friends but otherwise spent much of his time alone. Appellant was awkward around girls. Farlan Huff struggled to deal with Appellant's limitations, belittled him, and harshly disciplined him. This caused tension between them. Both Dana Huff and Farlan Huff had worked with Appellant to help him hide the fact that he was different. They encouraged Appellant to enter the military because they believed that this would fix him.

¶232 The evidence also showed that certain individuals cared for Appellant and maintained a positive relationship with him despite the passage of time. Anthony Popovich, Appellant's best friend from childhood, maintained a relationship with Appellant even after Appellant moved away. Jackie Plese, one of Appellant's instructors, continued to correspond with Appellant after his arrest and incarceration for Henry's murder. Appellant's maternal

grandparents, Stanley and Albertha Bench, also cared for Appellant.

¶233 Appellant supplemented the evidence from the first stage indicating that he had psychological issues with lay witness testimony. This evidence showed that he was diagnosed with attention deficit hyperactivity disorder as a child and had nightmares of a dark figure. As a teenager he engaged in obsessive handwashing and was diagnosed with compulsive personality disorder. He had to stop taking the medication prescribed to help him focus when he started to think about harming himself. Chief Southerland testified that he had sent Appellant to a psychiatrist for evaluation during his time in the Navy.[16] Appellant exhibited signs of paranoia after the Navy discharged him. Farlan Huff tried to get him help at several mental health clinics but they turned Appellant away. A representative from the program in Ada corroborated Farlan Huff's assertion that Appellant was turned away from that program.

¶234 Based upon the record before us, we find the sentence of death to be factually substantiated and appropriate. *Malone,* 2013 OK CR 1, ¶¶ 79-87, 293 P.3d at 218-21; *Eizember,* 2007 OK CR 29, ¶ 145, 164 P.3d at 242. Reviewing the record, we cannot say the trier of fact was influenced by passion, prejudice, or any other arbitrary factor contrary to 21 O.S.2011 § 701.13(C) in finding that the aggravating circumstances outweighed the mitigating evidence. *Id.* We affirm the sentence of death. 21 O.S.2011, § 701.13(E). Accordingly, finding no error warranting reversal or modification, this appeal is denied.

DECISION

¶235 The Judgment and Sentence is hereby **AFFIRMED**. The Application for Evidentiary Hearing on Sixth Amendment Claim is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT
OF STEPHENS COUNTY
THE HONORABLE G. BRENT RUSSELL
ASSOCIATE DISTRICT JUDGE

APPEARANCES AT TRIAL

Mitchell Solomon, Shea Smith, Capital Trial Division, Okla. Indigent Defense, P.O. Box 926, Norman, OK 73070, Counsel for Defendant

Jason Hicks, District Attorney, Leah Edwards, Asst. District Attorney, 101 S. 11th St., Duncan, OK 73533, Counsel for the State

APPEARANCES ON APPEAL

Traci J. Quick, Katrina Conrad-Legler, Homicide-Direct Appeals, Okla. Indigent Defense, P.O. Box 926, Norman, OK 73070, Counsel for Appellant

Mike Hunter, Atty General of Oklahoma, Caroline E.J. Hunt, Asst. Attorney General, 313 N.E. 21st St., Oklahoma City, OK 73105, Counsel for the State

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

HUDSON, J., CONCURRING IN RESULTS:

¶1 I concur with the decision to affirm Appellant's first degree murder conviction and death sentence. I write separately to clarify in Proposition Five that the evidence test adopted in *Shrum v. State*, 1999 OK CR 41, 991 P.2d 1032, is binding precedent in Oklahoma. Its holding is simple: "all lesser forms of homicide are necessarily included and instructions on lesser forms of homicide should be administered if they are supported by the evidence." *Id.*, 1999 OK CR 41, ¶ 10, 991 P.2d 1032, 1036. *Accord Tryon v. State*, 2018 OK CR 20, ¶ 66, 423 P.3d 617, 638 ("In a first degree murder case, the trial court should instruct on any lesser form of homicide supported by the evidence."). Thus, whether a lesser form of homicide is warranted is a fact-dependent issue, and hence, must be decided on a case by case basis. *State v. Tubby,* 2016 OK CR 17, ¶ 1, 387 P.3d 918, 922 (Hudson, J., Specially Concur). The pivotal question in the analysis is whether *prima facie* evidence was presented that "would allow a jury rationally to find the accused guilty of the lesser offense and acquit him of the greater." *Tryon*, 2018 OK CR 20, ¶ 66, 423 P.3d at 638.

¶2 The majority's statement that second degree murder has historically been considered a lesser included offense of first degree malice murder "is superfluous . . . the legal determination is already made, and the trial court need only look to the evidence to determine whether instructions on lesser forms of homicide are supported." *Davis v. State,* 2011 OK CR 29, ¶ 2, 268 P.3d 86, 141 (Lewis, V.P.J., concurring in results). The issue is whether

prima facie evidence of the lesser offense was presented at trial warranting instruction on the lesser included or lesser related offense. *See Tryon*, 2018 OK CR 20, ¶¶ 68-69, 423 P.3d at 638. The majority's approach is contrary to this Court's binding legal precedent and confuses the issue for the bench, bar and public. I agree, however, that insufficient evidence was presented in this case to support instruction on second degree murder under the governing test.

KUEHN, J., SPECIALLY CONCURRING:

¶1 I agree that Appellant's conviction and sentence should be affirmed, but write to discuss Propositions V and VI in more detail.

¶2 Regarding Proposition V, I agree the evidence did not warrant instructions on Second Degree Depraved Mind Murder, but I believe the Majority's analysis is overly complicated. I agree that even in capital cases, a trial court is not required to instruct the jury on any lesser (non-capital) option unless the evidence reasonably supports it. *Beck v. Alabama*, 447 U.S. 625, 637, 100 S.Ct. 2382, 2389, 65 L.Ed.2d 392 (1980); *Spaziano v. Florida*, 468 U.S. 447, 455-56, 104 S.Ct. 3154, 3159-60, 82 L.Ed.2d 340 (1984).[1] That determination is based on state law. *Hopkins v. Reeves*, 524 U.S. 88, 90-91, 118 S.Ct. 1895, 1898, 141 L.Ed.2d 76 (1998). We have rejected the strict "elements" approach to deciding whether it is appropriate to instruct on lesser offenses. *Shrum v. State*, 1999 OK CR 41, 991 P.2d 1032.[2] Instead, we consider (1) whether a reasonable view of the evidence meets all elements of the lesser option, and if so, (2) whether a rational juror could have acquitted Appellant of the greater option and convicted him of the lesser – in other words, whether a rational juror could have disregarded any evidence or element that distinguishes the greater from the lesser. *McHam v. State*, 2005 OK CR 28, ¶ 21, 126 P.3d 662, 670; *Shrum*, 1999 OK CR 41, ¶ 6 n. 2, 991 P.2d 1032, 1034 n. 2.

¶3 The question presented here is whether any rational juror could have viewed Appellant's conduct as imminently dangerous and evincing a depraved mind in extreme disregard of human life, *but not* done with the intention of taking the life of any particular person. *See* OUJI-CR (2nd) No. 4-91 (elements of Depraved Mind Murder).[3] The Majority makes reference to "shooting into a crowd" as a textbook example of conduct evincing a depraved mind, but the fact that Appellant committed violence against only one person does not categorically render him ineligible for an instruction on this lesser offense.[4] Nevertheless, I find that from the totality of the evidence, no rational juror could have concluded that Appellant acted with anything less than an intent to kill.

¶4 First, Appellant's own statements indicate that he intended to kill. At times he suggested that he had delusions about who the victim was, and at times he appeared to be feigning mental illness to escape liability. Regardless, the statements reasonably suggest that Appellant intended to cause the death of the victim. Second, the nature of the victim's injuries, and the sequence of these horrible events, leave no doubt in my mind that Appellant acted with decidedly more than "extreme disregard for human life." The Medical Examiner testified that the victim suffered repeated and extensive blunt force trauma to her head and torso, as well as bruising to her extremities. In short, it appeared that Appellant repeatedly stomped his victim until she died. What is more, he admitted to Dr. Grundy that after his first attack on the victim, he returned and attacked her a second time. The evidence suggested that the victim was conscious for some part of the attack, and fought back as best she could. The evidence also indicated that Appellant dragged her body across the floor while she was still conscious. The point here is not just that the attack was brutal and cruel; it clearly was. The point is that Appellant's extensive and protracted attack, and Henry's defensive attempts, convince me that no rational juror could have found any intent on Appellant's part but to kill her. The trial court properly rejected instructions on Depraved Mind Murder.

¶5 In Proposition VI, the Majority finds that the State's mental-health expert, Dr. Terese Hall, did not improperly comment on the veracity of other witnesses, but cautions that she came "dangerously close" to doing so at one point. I believe Dr. Hall's testimony was proper in all respects. Witnesses with specialized training and experience are often asked to explain why they find certain information noteworthy or credible.[5] Expert witnesses are permitted to base their conclusions on evidence that may not otherwise be admissible, such as hearsay. 12 O.S.2011, § 2703; *Studie v. State*, 1985 OK CR 124, ¶ 9, 706 P.2d 1390, 1391. They may be asked to disclose the underlying facts supporting their conclusions. 12 O.S.2011, § 2705; *Lewis v. State*, 1998 OK CR 24, ¶ 19, 970 P.2d 1158, 1166-67. Indeed, an expert's opinion

may be excluded if it is not supported by the facts. *Casady v. State*, 1986 OK CR 114, ¶ 16, 721 P.2d 1342, 1346.

¶6 Sanity is not determined by a litmus test; it relies on a compilation of information, much of it coming from lay people who have observed the subject's behavior over time. Thus, explaining the basis for an opinion on sanity necessarily includes a direct or indirect assessment of others' credibility, more than opinions based on "harder" science might. Here, both parties probed the bases for both experts' opinions, asking each what they considered, and what they considered probative. If the prosecutor had not asked Dr. Hall to explain her conclusion in the face of contradictory information, defense counsel was sure to do so in cross-examination.[6]

¶7 As the Majority notes, "vouching" is when a witness or attorney makes personal assurances to jurors about the credibility of a witness, *based on information not actually presented to them. See Simpson v. State*, 2010 OK CR 6, ¶¶ 35-36, 230 P.3d 888, 901. There was no vouching here. Not only was the basis for Dr. Hall's assessment (the consistency of family observations) easy to understand, but the key sources of that information (Appellant's grandmother and cousin) *themselves testified* before the jury, and were specifically asked whether their assessments of Appellant's mental health had changed over time.[7] Dr. Hall did not judge any witness's credibility using some secret formula or undisclosed fact. She simply told the jury how she reached her own conclusions. The credibility of all witnesses (including Dr. Hall) was left for the jury to determine. There was nothing improper in Dr. Hall's testimony.

LUMPKIN, PRESIDING JUDGE

1. Appellant filed his Petition in Error on October 22, 2015. He filed his Brief on February 28, 2017. The State filed its Brief on June 28, 2017. The case was submitted to the Court on July 18, 2017. Oral argument was held on March 7, 2018.

2. Two articles appear to reference Appellant's graduation from high school. In addition, two of the articles are simply publications of Henry's obituary.

3. Appellant's list of article titles includes articles from *NEWS9.COM, KOCO.COM, KFOR.COM* and *NEWSOK.COM* in Oklahoma City, Oklahoma; *TULSAWORLD.COM* and *KTUL.COM* in Tulsa, Oklahoma; *THE SHAWNEE NEWS-STAR* in Shawnee, Oklahoma; *THE DURANT DEMOCRAT* in Durant, Oklahoma; *THE REPUBLIC* in Columbus, Indiana; the *SFGATE* in San Francisco, California; the *NEWSTIMES* in Danbury, Connecticut; *THE CHRON* in Houston, Texas; *MAIL ONLINE* from the United Kingdom; and a non-english cinema website (*"onlinetamilcinema.com"*) in South India.

4. *See WN.COM; FREENEWSPAPERS.COM*; and *EXAMINER.COM.*

5. *See CAFEMOM.COM; WEBSLEUTHS.COM; CNCPUNISH MENT.COM; WITTYPROFILES.COM.*

6. The article "How we got the bum's rush," did not demonize Appellant, instead, it alleged that the District Court had violated the constitution when the article's author attempted to enter a closed pretrial hearing and was escorted from the courtroom.

7. One of the attached articles was a piece by a national author recounting how things had changed in Duncan, the county seat of Stephens county and location of Appellant's trial. The article cited to the murder of a foreign college athlete, the shooting of a local donkey, and the downturn in the stores on Main street. Two of the attached articles were from local individuals contesting the national author's portrayal of Duncan. We see little, if any, relevance between these articles and the subject at issue.

8. The District Court also excused 4 individuals who were either friends with Henry's family or had a family member who was a friend of Henry or her family.

9. *But see, contra Willingham v. State*, 1997 OK CR 62, ¶¶ 20–27, 947 P.2d 1074, 1080–1081 (second degree murder is not a lesser included offense of first degree murder), *overruled in part by Shrum*, 1999 OK CR 41, ¶ 10, 991 P.2d at 1036. I concurred in *Willingham* but previously acceded to this interpretation in an effort to give the trial bench and bar a bright line to apply in determining lesser included offenses as to first degree murder. *Grissom v. State*, 2011 OK CR 3, ¶ 4, 253 P.3d 969, 997 (Lumpkin J., Specially Concurring).

10. Since this Court decided *Lewis v. State*, 1998 OK CR 24, 970 P.2d 1158, the Legislature has amended Section 2703 to add that facts or data otherwise inadmissible "shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." 12 O.S.Supp.2013, § 2703.

11. It is not entirely certain that the court reporter precisely captured the prosecutor's argument. I note that there are numerous instances within the transcripts which give the reader a vague sense that a word was inexactly captured.

12. Appellant's suggestion that members of the public gasped when the prosecutor displayed the photo next to an image depicting Henry's facial injuries is not supported by the record. The affidavit which he references is not part of the record and we do not consider it. *Bland*, 2000 OK CR 11, ¶ 115, 4 P.3d at 731.

13. Attachment "A" is Dr. Musick's Curriculum Vita and Attachment "C" appears to be a diagram of the family dynamics in Appellant's family.

14. Evincing the unproven nature of the exhibit, Appellant and the State debate whether Dr. Musick's attribution of this statement to Appellant's grandmother was accurate.

15. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

16. The psychiatrist determined that Appellant was ready and fit for duty.

KUEHN, J., SPECIALLY CONCURRING

1. *Overruled on other grounds, Hurst v. Florida*, 577 U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016).

2. In fact, with regard to homicides, we rejected that notion more than a century ago. Our early cases treated all murders and manslaughters as degrees of "felonious homicide," even though their intent elements are dissimilar and, at times, mutually exclusive. *See Rhea v. Territory*, 1909 OK CR 153, 105 P. 314, 316 (affirming manslaughter conviction for defendant charged with premeditated murder); *Smith v. Territory*, 1904 OK 53, 77 P. 187, 188 (upholding conviction for second-degree manslaughter on a charge of murder).

3. The statutory text defines Depraved Mind Murder as a homicide "perpetrated by an act imminently dangerous to another person and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual." 21 O.S.2011, § 701.8(1).

4. *E.g. Palmer v. State*, 1994 OK CR 16, 871 P.2d 429 (evidence supported conviction for depraved-mind murder, where defendant gave the victim a dose of very potent cocaine, knowing that the victim had suffered a severe reaction to cocaine two weeks earlier).

5. *E.g. Simpson v. State*, 2010 OK CR 6, ¶¶ 35-36, 230 P.3d 888, 901 (detective did not vouch for witness credibility by commenting on inconsistencies among statements of the accused and his co-defendants, or by pointing out that another witness had given police previously-unknown information).

6. The prosecutor cross-examined Dr. Grundy about information he had discounted or failed to consider. In fact, the questions that the prosecutor asked Dr. Hall on direct were similar to those she had previously asked Grundy – what he thought about the changes in the grandparents' accounts, and why he discounted Clayton Jenson's observations. Defense counsel himself asked Dr. Grundy "what weight did you give" to certain information, and even asked him whether a particular observation related by Appellant's grandmother was "sig-

nificant in this case." The prosecutor's questions to Dr. Hall were not substantively different from defense counsel's own questions to Dr. Grundy (*e.g.*: "Tell me about what weight, if any, you gave to Mr. Bench's family members and their assertion of events"). In fact, as the Majority notes, Dr. Hall was quite transparent in her assessment: "I think Dr. Grundy considered [Appellant's] family information that was offered later to be highly credible and I did not. I think that is the main difference [in our opinions]." Dr. Hall even noted that Dr. Grundy used to be her supervisor, and that this was the rare case where their diagnoses diverged.

7. While the jury did not hear testimony from Dallas Cowen, the jail administrator, that brief description of Appellant's behavior was only related by Dr. Hall to corroborate her *own* first-hand observations. Dr. Hall testified that after a long psychological interview where Appellant claimed his jailers were trying to poison him, she overheard him casually ask his jailers for a double cheeseburger. Dr. Hall testified that Cowen had made similar observations (claiming Appellant acted normally until a lawyer or doctor came to visit him). I also note that while Appellant complains Dr. Hall said she took the grandparents' latter accounts with "a grain of salt," that phrase was actually suggested by the prosecutor.

NOTICE OF MEETINGS

CREDENTIALS COMMITTEE

The Oklahoma Bar Association Credentials Committee will meet Thursday, Nov. 8, 2018, from 9-9:30 a.m. in Room 1 of Director's Row on the second floor of the Hyatt Regency Hotel, 100 E. Second Street, Tulsa, Oklahoma, in conjunction with the 114th Annual Meeting. The committee members are: Chairperson Luke Gaither, Henryetta; Kimberly K. Moore, Tulsa; Jennifer Castillo, Oklahoma City; and Jeffery D. Trevillion, Oklahoma City.

RULES & BYLAWS COMMITTEE

The Rules & Bylaws Committee of the Oklahoma Bar Association will meet Thursday, Nov. 8, 2018, from 10-10:30 a.m. in Room 1 of Director's Row on the second floor of the Hyatt Regency Hotel, 100 E. Second Street, Tulsa, Oklahoma, in conjunction with the 114th Annual Meeting. The committee members are: Chairperson Judge Richard A. Woolery, Sapulpa; Roy D. Tucker, Muskogee; Billy Coyle IV, Oklahoma City; Nathan Richter, Mustang; and Ron Gore, Tulsa.

RESOLUTIONS COMMITTEE

The Oklahoma Bar Association Resolutions Committee will meet Thursday, Nov. 8, 2018, from 10:45 - 11:45 a.m. in Room 1 of Director's Row on the second floor of the Hyatt Regency Hotel, 100 E. Second Street, Tulsa, Oklahoma, in conjunction with the 114th Annual Meeting. The committee members are: Chairperson Molly A. Aspan, Tulsa; Kendall A. Sykes, Oklahoma City; Cory B. Hicks, Guymon; Clayton Baker, Vinita; Courtney Briggs, Oklahoma City; and Mark E. Fields, McAlester.

2018 Annual Meeting

President's Reception

Wednesday | Nov. 7

Open to all Annual Meeting registrants

www.okbar.org/annualmeeting

2019 OBA BOARD OF GOVERNORS VACANCIES

The nominating petition deadline was 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: **Susan B. Shields, Oklahoma City**

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: **David T. McKenzie, Oklahoma City**

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: **Timothy E. DeClerck, Enid**

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: **Andrew E. Hutter, Norman**

Member At Large
Current: Alissa Hutter, Norman
Statewide
(Three-year term: 2019-2021)
~~Nominee: **Josh D. Lee, Vinita**~~
[Nominating petition has been withdrawn]
Nominee: **Miles T. Pringle, Oklahoma City**

NOTICE
Pursuant to Rule 3 Section 3 of the OBA Bylaws, the nominees for uncontested positions have been deemed elected due to no other person filing for the position. The election for the contested position 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.

OKLAHOMA BAR ASSOCIATION
NOMINATING PETITIONS

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

OFFICERS
President-Elect

Susan B. Shields, Oklahoma City

Nominating Petitions have been filed nominating Susan B. Shields for President-Elect of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2019.

A total of 573 signatures appear on the petitions.

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.

A total of 126 signatures appear on the petitions.

BOARD OF GOVERNORS
Supreme Court Judicial District No. 3

David T. McKenzie, Oklahoma City

Nominating Petitions have been filed nominating David T. McKenzie for election of Supreme Court Judicial District No. 3 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2019.

A total of 57 signatures appear on the petitions.

Supreme Court Judicial District No. 4

Timothy E. DeClerck, Enid

Nominating Petitions have been filed nominating Timothy E. DeClerck for election of Supreme Court Judicial District No. 4 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2019.

A total of 46 signatures appear on the petitions.

A Nominating Resolution has been received from the following county: Garfield County

Supreme Court Judicial District No. 5

Andrew E. Hutter, Norman

Nominating Petitions have been filed nominating Andrew E. Hutter for election of Supreme Court Judicial District No. 5 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2019.

A total of 31 signatures appear on the petitions.

Member at Large

Miles T. Pringle, Oklahoma City

Nominating Petitions have been filed nominating Miles T. Pringle, Oklahoma City for election of Member at Large of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2019.

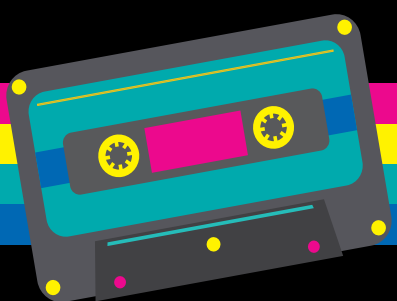
A total of 105 signatures appear on the petitions.

Kim & Alan's

HOUSE PARTY

Thursday, Nov. 8

Part of the 2018 Annual Meeting
Open to all - no registration required!



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Oklahoma Bar Association 2018 Annual Meeting
Nov. 7-9 | Tulsa Hyatt Regency

TITLE EXAMINATION STANDARDS

2018 Report of the Title Examination Standards Committee of the Real Property Law Section

Proposed Amendments to Title Standards for 2019, to be presented for approval by the House of Delegates, Oklahoma Bar Association at the Annual Meeting, November 9, 2018. Additions are underlined, deletions are indicated by ~~strikeout~~.

The Title Examination Standards Sub-Committee of the Real Property Law Section proposes the following revisions and additions to the Title Standards for action by the Real Property Law Section at its annual meeting in Tulsa on Thursday, November 8, 2018.

Proposals approved by the Section will be presented to the House of Delegates at the OBA Annual Meeting on Friday, November 9, 2018. Proposals adopted by the House of Delegates become effective immediately.

An explanatory note precedes each proposed Title Standard, indicating the nature and reason for the change proposed.

Proposal No. 1

The Committee proposes to add new to Standard 3.6, to make clear the purpose and effect of the filing of a Lis Pendens.

3.6 LIS PENDENS.

Oklahoma law recognizes the doctrine of lis pendens. The doctrine has its genesis in common law and equity jurisprudence and has been partially codified at 12 O.S. §2004.2.

The recorded lis pendens notice does not impress the affected property interest with a lien, encumbrance or defect but rather operates to bind third parties with notice that any interest in the real property affected by the pending litigation will be subject to the outcome of the litigation.

A recorded lis pendens notice is simply notice of pending litigation which may affect the described real property. The examiner should carefully review the underlying litigation and determine whether the litigation affects the interests under examination. No release of the lis pendens notice need be recorded.

Authority: 12 O.S. §2004.2, *White v. Wensauer*, 1985 OK 26, 702 P.2d 15 (Okla. 1985).

Proposal No. 2

The Committee recommends a caveat be added to Standard 35.3 B to make examiners aware of a provision in the new subdivision standards for the City and County of Tulsa regarding the divisions of land involving tracts of five acres or greater.

CAVEAT: A deed of land within the city limits of the City of Tulsa or within the unincorporated area of Tulsa County, which divides the land into two or more tracts, all of which are greater than five (5) acres, requires that an application be made to the head of the Land Development Services Division of the Indian Nations Council of Governments (INCOG) for exemption from lot split and subdivision requirements. Such exemption shall be endorsed on the face of the deed. This exemption is required regardless of whether the land being divided is unplatted or comprises less than a full platted lot. The failure to obtain the exemption will not affect the marketability of the title.

Authority: Section 10-130 Tulsa Metropolitan Area Subdivision and Development Regulations.

EASIEST CATCH

Don't Be Another Fish in the Dark 'Net

Speaker: Mark Lanterman, founder, Computer Forensic Services

Annual Luncheon

Thursday, Nov. 8

Sponsored by the Family Law Section

Part of the 2018 Annual Meeting | www.okbar.org/annualmeeting

Criminal Law Section
ANNUAL LUNCHEON
Wednesday, November 7, 2018 - 11:50-1:15
Hyatt Hotel (OBA Annual Meeting)
100 E. 2nd St., Tulsa, OK

FANTASTIC KEYNOTE SPEAKERS

U.S. MAGISTRATE JUDGE SUZANNE MITCHELL, OKLAHOMA COUNTY DISTRICT COURT JUDGE KEN STONER, AND SUPERVISORY U.S. PROBATION OFFICER JEFF YOWELL will discuss the latest in specialty state court programs for criminal defendants. In addition, they will discuss the CARE reentry program that provides support systems for defendants with drug, alcohol and (in possibly in the future) gambling issues. *Register soon as seating is limited and the speakers are fantastic.*

PROFESSIONAL ADVOCATE OF THE YEAR AWARDS

The Criminal Law Section will recognize the **Defense Attorney of the Year and the Prosecutor of the Year** who (*as recognized by their peers*) exhibit superior advocacy skills before the court and consistently show professionalism, courtesy, and respect to opposing counsel in the spirit of the adversarial system. Prosecutors nominate defense attorneys, and defense attorneys nominate prosecutors. Send nominations to wilds@nsuok.edu or Trent.Baggett@dac.state.ok.us.

HONORABLE DONALD L. DEASON AWARD

The Criminal Law Section will award the **Honorable Donald L. Deason Judicial Award** to in Oklahoma or Tenth Circuit Judge who is known for character, dedication, and professional excellence.

BBQ BUFFET: Chopped Iceberg Lettuce, Tomatoes, Shredded Carrots, Cucumbers, Ranch Dressing Roasted Dill Potatoes, Sweet Baked Beans, Golden Corn, Sliced Smoked Brisket, BBQ Chicken Drumsticks, Pickles, Sliced Red Onion, Cherry Peppers, and Fantastic Fudge Brownies.

DOOR PRIZES: Everyone will receive a Criminal Law adhesive cell phone credit (or business) card holder. In addition, we will draw names for our **Thunder Tickets,** some Criminal Law polo shirts, and our famous Criminal Law sharks! *You must be present during the drawings to win the door prizes*.

Criminal Law Section Annual Luncheon

November 7, 2018 • Tulsa Hyatt Hotel (during the OBA Annual Meeting)

Last Name (print) _____ First Name _____

Address _____

City_____ State_____ Zip_____

Email _____ Phone _____ OBA # _____

❑ $20 - Criminal Law Section Member ❑ $15 - Judge ❑ $30 - Non-member ❑ $30 after Oct. 30 or at the door

❑ Check ❑ Visa ❑ Mastercard ❑ Card # _____

Signature (required if paying by credit card) _____

REMIT TO: CRIMINAL LAW SECTION OF THE OBA, ATTN: ROBERTA YARBROUGH

E-Mail: robertay@okbar.org
Fax: (405) 416-7001 (Attn: Roberta Yarbrough)

Mail: OBA Administration Department
PO Box 53036, Oklahoma City, OK. 73152

Oklahoma Bar Association 2018 Annual Meeting
Nov. 7-9 | Tulsa Hyatt Regency

REGISTRATION

Join us for great speakers, great events and good times with great friends at this year's Annual Meeting. See what's included with your Annual Meeting registation below. Plus, choose from optional CLE courses with nationally recognized speakers and add-on luncheons.

What's included in your Annual Meeting registration:

- Conference gift
- Wednesday President's Reception and Thursday Kim & Alan's House Party social events
- OBA hospitality refreshments daily
- 20% discount on registrants' Annual Luncheon tickets

HOW TO REGISTER

Online
Register online at www.okbar.org/annualmeeting

Mail
OBA Annual Meeting
P.O. Box 53036
Okla. City, OK 73152

Phone
Call Mark at
405-416-7026 or
800-522-8065

Fax/Email
Fax form to
405-416-7092 or email
to marks@okbar.org

DETAILS

Location

Most activities will take place at the Hyatt Regency Tulsa, 100 E 2nd St., Tulsa, 74103, unless otherwise specified.

CLE Materials

You will receive electronic CLE materials in advance of the seminar.

Hotel

Fees do not include hotel accommodations. For reservations at the Hyatt Regency Tulsa, call 888-591-1234 and reference the Oklahoma Bar Association, or go to www.okbar.org/annualmeeting. A discount rate of $115 per night is available on reservations made on or before Oct. 14.

Cancellation

Full refunds will be given through Oct. 31. No refunds will be issued after that date.

Special Needs

Please notify the OBA at least one week in advance if you have a special need and require accommodation.

Name _____

Email _____

Badge Name (*if different from roster*) _____ Bar No. _____

Address _____

City _____ State _____ Zip _____ Phone _____

Name of Nonattorney guest _____

Please change my OBA roster information to the information above: ☐ Yes ☐ No

Check all that apply: ☐ Judiciary ☐ Delegate ☐ Alternate

Meeting Registration

✓Check your choice
**New members sworn in this year*
***Early rate applies to registrations made on or before Oct. 14.*

**Early Rate	Standard Rate	*New Member Early Rate	*New Member Standard Rate
☐ $75	☐ $100	☐ $0	☐ $25

SUBTOTAL $ _____

CLE

Early rate valid on or before Oct. 14. ✓Check the box next to your choice.

	Early Rate With Meeting Registration	Standard Rate With Meeting Registration	Early Rate Without Meeting Registration	Standard Rate Without Meeting Registration
Wednesday *Getting Out of the Weeds: What You Need to Know about the New World of Marijuana Regulation*	☐ $50	☐ $100	☐ $75	☐ $125
Thursday *The Internet of Things and Leveraging Digital Evidence, Mark Lanterman, and Cybersecurity Panel, Eide Bailly LLP, Anglin PR and GableGotwals*	☐ $50	☐ $100	☐ $75	☐ $125

SUBTOTAL $ _____

LUNCHEONS AND EVENTS

Annual Meeting registration not required

Law School Luncheon ☐ OCU ☐ OU ☐ TU _____ # of tickets at $40 $ _____
Annual Luncheon with meeting registration _____ # of tickets at $40 $ _____
Annual Luncheon without meeting registration _____ # of tickets at $50 $ _____
Delegate Breakfast for nondelegates and alternates _____ # of tickets at $30 $ _____
Delegate Breakfast for delegates (*no charge*) ☐ (check if attending as a delegate)

SUBTOTAL $ _____

PAYMENT

☐ Check enclosed: Payable to Oklahoma Bar Association **TOTAL COST $** _____

Credit card: ☐ VISA ☐ Mastercard ☐ American Express ☐ Discover

Card # _____ CVV# Exp. _____ Date _____

Authorized Signature _____

Calendar of Events

October

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

17 **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

18 **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

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

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

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

November

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

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

OBA Legal Internship Committee meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact H. Terrell Monks 405-733-8686

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

7-9 **OBA Annual Meeting;** Hyatt Regency Downtown, Tulsa

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

12 **OBA Closed** – Veterans Day

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

14 **OBA Clients' Security Fund Committee meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Micheal Salem 405-366-1234

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

2018 OK CIV APP 57

THE STATE OF OKLAHOMA, Plaintiff/Appellee, vs. BENITO CORRAL-OROZCO, Defendant, and LEXINGTON NATIONAL INSURANCE COMPANY, Appellant.

No. 115,923. August 20, 2018

APPEAL FROM THE DISTRICT COURT OF CADDO COUNTY, OKLAHOMA

HONORABLE DAVID A. STEPHENS, JUDGE

REVERSED AND REMANDED WITH INSTRUCTIONS

Jeff Eulberg, EULBERG LAW OFFICE, PLLC, Oklahoma City, Oklahoma, for Appellant,

Andrew Benedict, Assistant District Attorney, CADDO COUNTY DISTRICT ATTORNEY'S OFFICE, Anadarko, Oklahoma, for Plaintiff/Appellee.

Bay Mitchell, Judge:

¶1 Appellant Lexington National Insurance Company (Insurer) appeals from an order denying its motion to exonerate a $100,000 bail bond. We find the plain language of 59 O.S. Supp. 2015 §1332(B) provides that an order and judgment of forfeiture must be on forms prescribed by the Administrative Director of the Courts. Section 1332(A) also plainly states that, where the order and judgment of forfeiture are not filed within fifteen days from the date of forfeiture, the bond shall be exonerated by operation of law. Although the trial court's initial forfeiture order was filed within fifteen days, it was not on the Administrative Director of the Courts' form, nor did it substantially comply with the prescribed form. Accordingly, the bond was exonerated by operation of law. We reverse and remand with instructions to vacate the forfeiture judgment and exonerate the bond.

¶2 Defendant Benito Corral-Orozco was charged by felony information with trafficking in illegal drugs. Defendant posted a bond in the sum of $100,000, which was insured by Insurer. Defendant waived his preliminary hearing and was ordered to appear for formal arraignment on December 7, 2016. Defendant failed to appear.

¶3 The bond forfeiture statute applicable here is found at 59 O.S. Supp. 2015 §1332. Section 1332 provides, in relevant part, as follows:

> A. If there is a breach of an undertaking, the court before which the cause is pending shall issue, within ten (10) days, an arrest warrant for the defendant and declare the undertaking and any money, property, or securities that have been deposited as bail, forfeited on the day the defendant failed to appear. Within fifteen (15) days from the date of the forfeiture, the order and judgment of forfeiture shall be filed with the clerk of the trial court. Failure to timely issue the arrest warrant or file the order and judgment of forfeiture as provided in this subsection shall exonerate the bond by operation of law. In the event of the forfeiture of a bail bond the clerk of the trial court shall, within thirty (30) days after the order and judgment of forfeiture is filed in the court, by mail with return receipt requested, mail a true and correct copy of the order and judgment of forfeiture to the bondsman, and if applicable, the insurer … Failure of the clerk of the trial court to comply with the thirty-day notice provision in this subsection shall exonerate the bond by operation of law.
>
> B. The order and judgment of forfeiture shall be on forms prescribed by the Administrative Director of the Courts.

59 O.S. Supp. 2015 §1332 (emphasis added).

¶4 After Defendant failed to appear for his formal arraignment on December 7, the trial court, on the same day, issued an order entitled "Order Issuing Bench Warrant and Bond Forfeiture to [sic] Failure to Appear" (the Initial Order). The court did not utilize the form prescribed by the Administrative Director of the Courts in its Initial Order.[1] Rather, the court used its own template. The court's template did not include numerous components required by the Administrative Director of the Courts' form, e.g., the crime charged, the amount of bail, the name of the bondsman, the name of the insurer, whether the defendant had notice of the hearing, or whether the defendant's name was called in court three

times. The template also failed to include language ordering the bondsman or insurer to deposit the forfeited bond with the court clerk.

¶5 On January 5, 2017, the trial court filed a new Order and Judgment of Forfeiture using the form prescribed by the Administrative Director of the Courts. The certificate of mailing notes that the Order and Judgment of Forfeiture were mailed to Insurer on January 5. Insurer subsequently filed a Notice to Court Clerk on January 19. The notice stated that the bond had been exonerated by operation of law and requested that the clerk document this fact. Insurer also filed a Motion to Exonerate on January 26 asking the court to set aside the forfeiture and exonerate the bond.

¶6 After a hearing, the court denied Insurer's motion, struck Insurer's notice to the clerk, and denied Insurer's request for a stay of bond forfeiture. The court explained its reasoning in a detailed order dated March 27, 2017. The court found that, although the Initial Order was not on the form prescribed by the Administrative Director of the Courts, this error was not prejudicial to Insurer because the Initial Order included the necessary statutory language, i.e., the order stated, "[T]he Court orders that a bench warrant be issued for the defendant's arrest and that his/her bond be forfeited." The court also concluded that the language in §1332 providing, "Within fifteen (15) days from the date of the forfeiture, the order and judgment of forfeiture **shall** be filed with the clerk of the trial court" should be interpreted as a permissive "may." *See* 59 O.S. Supp. 2015 §1332(A) (emphasis added). Finally, the court reasoned that Insurer had received notice of the Order and Judgment of Forfeiture within thirty days, as required by §1332.

¶7 "A trial court's finding on the question of whether to vacate an order of forfeiture and exonerate a bond is reviewed for an abuse of discretion." *State v. Tyler,* 2009 OK 69, ¶13, 218 P.3d 510, 514. This case also presents issues of statutory construction, which are questions of law reviewed under a de novo standard. *Id.* Such review is plenary, independent, and nondeferential. *Id.* Our fundamental goal in statutory interpretation is to ascertain and give effect to legislative intent. *Humphries v. Lewis,* 2003 OK 12, ¶7, 67 P.3d 333, 335. "If the language is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and no further construction is required or permitted." *Sullins v. Am. Med. Response of Oklahoma, Inc.,* 2001 OK 20, ¶17, 23 P.3d 259, 263. Generally, "forfeiture statutes will be strictly construed and a forfeiture will not be decreed except when required to do so by clear statutory language." *State v. Nesbitt,* 1981 OK 113, ¶5, 634 P.2d 1306, 1308.

¶8 As noted above, the court here found the Initial Order was substantially compliant with §1332, despite the court's failure to utilize the required form, because it ordered the issuance of an arrest warrant and forfeiture of the bond. The court also determined that §1332's directive "Within fifteen (15) days from the date of the forfeiture, the order and judgment of forfeiture **shall** be filed with the clerk of the trial court" should be interpreted as a permissive "may." Although not entirely clear, it appears the trial court determined that use of the statutorily prescribed form within the first fifteen days is permissive and, as long as some order and judgment of forfeiture is filed within fifteen days, the directives of §1332 are met.

¶9 A strict reading of the statute does not allow for an order and judgment of forfeiture that is not on, or in conformance with, the forms prescribed by the Administrative Director of the Courts. The statute's plain language provides, "The order and judgment of forfeiture **shall** be on forms prescribed by the Administrative Director of the Courts." *See* 59 O.S. Supp. 2015 §1332(B) (emphasis added). "Generally, when the Legislature uses the term 'shall,' it signifies a mandatory directive or command." *See Keating v. Edmondson*, 2001 OK 110, ¶13, 37 P.3d 882, 888. In *Keating*, the Supreme Court acknowledged that "shall" can, at times, be used permissively in drafting. *Id.* Here, we need not determine whether the Legislature's use of "shall" requires strict compliance with the statutorily prescribed form or whether substantial compliance is sufficient: as noted above, the Initial Order failed to include numerous details required by the Administrative Director of the Court's form. Accordingly, even if §1332 permits substantial compliance, we find the Initial Order did not substantially comply.

¶10 In light of the Legislature's clear and unmistakable language and the strict construction required for forfeiture statutes, we find that §1332 mandates filing of the order and judgment of forfeiture, which must be on, or at least in conformance with, the forms prescribed by the Administrative Director of the Courts, within fifteen days of the date of forfei-

ture. When these requirements are not satisfied, the bond is exonerated by operation of law. We disagree with the trial court's reasoning that any errors in the Initial Order were harmless because Insurer was given notice of the second, statutorily compliant Order and Judgment of Forfeiture within thirty days. *See* §1332(A) (requiring mailing of the order and judgment of forfeiture to bondsman and insurer within thirty days of the order's filing). Meeting one of the statutory requirements does not relieve the duty to comply with §1332's other directives. Because the Initial Order in this case did not comply with the required form and the statutorily compliant form was not filed within fifteen days, the bond was exonerated by operation of law. We reverse and remand with instructions to vacate the forfeiture and exonerate the bond.

¶11 REVERSED AND REMANDED WITH INSTRUCTIONS.

SWINTON, P.J., and GOREE, J., concur.

Bay Mitchell, Judge:

1. The form is provided on www.oscn.net in Word, WordPerfect, and PDF formats (available at http://www.oscn.net/static/forms/aoc_forms/bail.asp).

2018 OK CIV APP 58

STATE OF OKLAHOMA, Plaintiff/Appellee, vs. STEVEN JEROME ARRINGTON, Defendant/Appellant.

Case No. 115,392. August 30, 2018

APPEAL FROM THE DISTRICT COURT OF STEPHENS COUNTY, OKLAHOMA

HONORABLE KEN GRAHAM, JUDGE

REVERSED

Heather J. Russell Cooper, Office of District Attorney, Ardmore, Oklahoma, for Appellee,

David W. Hammond, Jeffrey K. Archer, Hammond, Archer & Kee, P.L.L.C., Duncan, Oklahoma, for Appellant.

Larry Joplin, Judge:

¶1 Defendant/Appellant Steven Jerome Arrington (Defendant) seeks review of the trial court's order revoking his license as a private process server. In this appeal, Defendant complains the trial court revoked his license absent the filing of a petition to revoke filed by the district attorney or attorney general as required by 12 O.S. §158.1(H). This appeal stands submitted on the brief of Defendant/Appellant only.

¶2 Defendant entered a plea of no contest to the charge of sexual battery. Defendant received a five-year deferred sentence and was ordered to perform community service and pay a fine and costs.

¶3 On its own motion, the trial court then entered an "administrative" order revoking Defendant's license as a private process server. The trial court's order provided that any party aggrieved could seek a "show cause" hearing. Defendant requested a hearing.

¶4 At the hearing, Defendant presented the testimony of his probation officer, who testified Defendant had complied with all terms of his continuing probation. Defendant presented two letters from former clients establishing his satisfactory service of process for them. Defendant argued that his license could be revoked only on a petition filed by the district attorney or attorney general as required by 12 O.S. §158.1(H).

¶5 The trial court held that §158.1(E) authorized the presiding judge, associate district judge or district judge of the county to deny an application for process server license, and reasoned this authority extended to permit the *sua sponte* revocation of Defendant's license. The trial court consequently confirmed its earlier order to revoke Defendant's private process server license.

¶6 As we have previously noted, this appeal stands submitted on Defendant/Appellant's brief only. Generally, where no answer brief is filed, and the omission is unexcused, the appellate courts are under no duty to search the record for some theory to sustain the trial court's judgment, and on appeal, will ordinarily, where the brief in chief is reasonably supportive of the allegations of error, reverse the judgment and remand for further proceedings. *See, e.g., Sneed v. Sneed*, 1978 OK 138, 585 P.2d 1363; *Harvey v. Hall*, 1970 OK 92, 471 P.2d 911. However, it is equally well-settled that reversal is not automatic for failure to file an answer brief. *See, e.g., Hamid v. Sew Original*, 1982 OK 46, 645 P.2d 496.

¶7 This case presents an issue of statutory construction. Issues of statutory construction present a "question of law that we review *de novo* and over which we exercise plenary, independent and non-deferential authority." *Stump v. Cheek*, 2007 OK 97, ¶9, 179 P.3d 606, 609.

(Emphasis original.) (Footnotes omitted.) "The primary goal of statutory construction is to ascertain and follow the intent of the legislature," and "[t]he words of a statute will be given their plain and ordinary meaning unless it is contrary to the purpose and intent of the statute when considered as a whole." *Id.*

¶8 Concerning the issuance and revocation of a private process server's license, §158.1 provides:

> B. Any person who is:
>
> 1. Eighteen (18) years of age or older;
>
> 2. Of good moral character;
>
> 3. Found ethically and mentally fit;
>
> 4. A resident of the State of Oklahoma for a period of not less than six (6) months; and
>
> 5. A resident of the county or judicial administrative district in which the application is submitted for a period of not less than thirty (30) days, may obtain a license by filing an application with the court clerk on a verified form to be prescribed by the Administrative Office of the Courts.
>
> . . .
>
> E. If, at the time of consideration of the application or renewal, there are no protests and the applicant appears qualified, the application for the license shall be granted by the presiding judge or such associate district judge or district judge as is designated by the presiding judge . . . . If, at the time of consideration of the application for the license, the presiding judge, associate district judge or district judge as is designated by the presiding judge determines that the applicant does not meet all of the qualifications necessary for a license, the applicant shall be prohibited from reapplying for a license to serve process for a period of not less than one (1) year from the date of denial.
>
> F. If any citizen of this state files a written protest setting forth objections to the licensing of the applicant, the district court clerk shall so advise the presiding judge or such associate district judge or district judge as is designated by the presiding judge, who shall set a later date for hearing of application and protest. The hearing shall be held within sixty (60) days and after notice to all persons known to be interested.
>
> . . .
>
> H. The district attorney of the county wherein a license authorized under this act has been issued or the Attorney General may file a petition in the district court to revoke the license issued to any licensee, as authorized pursuant to the provisions of this section, alleging the violation by the licensee of any of the provisions of the law. After at least thirty (30) days' notice by certified mail to the licensee, the chief or presiding judge, sitting without jury, shall hear the petition and enter an order thereon. If the license is revoked, the licensee shall not be permitted to reapply for a license for a period of five (5) years from the date of revocation. Notwithstanding any other provision of this section, any licensee whose license has been revoked one time shall pay the sum of One Thousand Dollars ($1,000.00) as a renewal fee.

¶9 From our reading of §158.1, control over the issuance and renewal of the license of a private process server is bestowed on the district court, whether the presiding judge, associate district judge or district judge as the case may be. 12 O.S. §158.1(E). That is to say, if, at the time of the initial application for a license, or at the time of an application to renew a license, the district court determines the applicant does not possess the "qualifications necessary" for a private process server, the district court may deny the application or renewal. *Id.*

¶10 Against this section, §158.1(H) specifies that an action to revoke the license of a private process server be commenced by the filing of a petition to revoke by either the district attorney or the attorney general. Construing §158.1(E) and (H) together, it appears plain to us that while the district court controls the issuance or renewal of a private process server's license, the district court also controls the revocation of a private process server's license.

¶11 However, by the terms of §158.1(H), the Legislature plainly anticipated that, after the initial issuance of a private process server's license, the subsequent renewal of a private process server's license or the denial of a private process server's license, an action to revoke the license of a private process server would be commenced on a petition filed by the district attorney or attorney general. To afford the licensee his right to due process notice of the potential loss of his license, §158.1(H) re-

quires that notice of the commencement of the action be given to the licensee, and that, within thirty days of the date of filing of the petition to revoke, the trial court hold a hearing on the merits of the petition to revoke. Section 158.1(H) embodies the due process guarantee that the affected person receive notice of the action pending against him or her, and advance notice of the time and place of hearing where he or she might advance a defense. *See, e.g., Booth v. McKnight*, 2003 OK 49, ¶¶18, 20-21, 70 P.3d 855, 862.

¶12 This appeal is submitted on Defendant/Appellant's brief only, and we find his brief reasonably supportive of his allegation of error. In the present case, Defendant was afforded no notice of the potential loss of his license by the filing of a petition to revoke by either the district attorney or the attorney general. Absent such notice of the commencement of an action to revoke his license, the trial court erred in revoking Defendant's private process server's license.

¶13 The order of the trial court is REVERSED.

BELL, P.J., and BUETTNER, J., concur.

2018 OK CIV APP 59

KACI SUSANNE GOODSON, an individual, Plaintiff/Appellee, vs. SHERRY DORIS MCCRORY, an individual, Defendant/Appellant, and JOEY PEPPER and BILL PEPPER, individuals, Defendants.

Case No. 116,669. August 29, 2018

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE REBECCA BRETT NIGHTINGALE, TRIAL JUDGE

REVERSED AND REMANDED WITH INSTRUCTIONS

Kendall W. Johnson, Molly A. Sullivan, SAVAGE, O'DONNELL, AFFELDT, WEINTRAUB & JOHNSON, Tulsa, Oklahoma, for Plaintiff/Appellee

Robert V. Seacat, THE SEACAT LAW FIRM, Tulsa, Oklahoma, for Defendant/Appellant

DEBORAH B. BARNES, PRESIDING JUDGE:

¶1 In a deed signed and filed in 2001 (the 2001 Deed), Plaintiff Kaci Susanne Goodson, along with three other individuals — Patricia Lynn Farquhar, Mary Beth Guzman, and Defendant Sherry Doris McCrory — were granted property located in Tulsa County (the Property) "in equal shares in their individual capacities, as joint tenants, and not as tenants in common, on the death of" the grantor. The grantor — who was the mother of Farquhar, Guzman, and McCrory, and the grandmother of Goodson — passed away in 2011.

¶2 Goodson filed the petition in this case in February 2017 for quiet title, declaratory relief, and/or a determination of rights relating to her interest in the Property. Goodson contests the validity of the purported conveyance of her interest in the Property to McCrory set forth in a deed signed and filed in 2002 (the 2002 Deed). The 2002 Deed states that Goodson, along with Farquhar and Guzman, "in consideration of the sum of [$10.00] and other good and valuable consideration . . . , grant, bargain, sell and convey" their interests in the Property to McCrory. Although Goodson contests the validity of the conveyance of her interest, she asserts in her petition that she "does not contest the validity of the conveyance [in the 2002 Deed] by the other joint tenants[.]"

¶3 Goodson subsequently filed a motion for summary judgment in which she asserts she did not sign the 2002 Deed. Attached to Goodson's motion is a copy of the 2002 Deed, and Goodson points out in her motion that both her typed name and written signature on the 2002 Deed are misspelled as Kaci Susanne "Goodman," not Kaci Susanne "Goodson." Also attached to Goodson's motion is a partial transcript of the deposition of McCrory in which McCrory agrees that "this is not [Goodson's] signature on [the 2002] [D]eed[.]" However, Goodson asserts in her motion, as she similarly does in her petition, that it is undisputed that "[n]o person questions that the rights of the remaining Joint tenants, [Farquhar] and [Guzman], have been terminated by the signing of the [2002 Deed]." Goodson requests that, as a result of these undisputed facts, an order be entered determining that McCrory and Goodson own the property as joint tenants.

¶4 No response was filed to Goodson's motion for summary judgment. In a judgment filed in October 2017, the trial court stated, "Defendants are deemed not opposed to [Goodson's] Motion . . . . Therefore, all material facts set forth in the Motion are deemed admitted for the purpose of summary judgment." In particular, the trial court set forth the undisputed facts that the 2002 Deed is effective as to

Farquhar and Guzman as "joint tenants relinquishing their interest to the real property . . . , but is ineffective as to [Goodson]."[1] Based on these undisputed facts, the court concluded the Property "vest[s] in Joint Tenancy, with Right of Survivorship, to [Goodson] and [McCrory][.]"

¶5 McCrory then filed a "Motion for New Trial" within ten days[2] in which she admits the 2002 Deed is ineffective as to Goodson but nevertheless contests the trial court's legal conclusion. That is, McCrory asserts the trial court erred as a matter of law in concluding, based on the undisputed facts, that Goodson and McCrory own the Property as joint tenants. McCrory asserts, instead, that the joint tenancy was "severed" upon Farquhar and Guzman conveying their interests in the 2002 Deed to McCrory, and that "the correct state of the title is [Goodson] owning [25%] of the property and McCrory owning [75%]" as tenants in common.

¶6 The trial court denied McCrory's motion for new trial in its order filed in December 2017, and McCrory appeals.

STANDARD OF REVIEW

¶7 "A trial court's denial of a motion for new trial is reviewed for abuse of discretion," but "[w]here, as here, our assessment of the trial court's exercise of discretion in denying defendants a new trial rests on the propriety of the underlying grant of summary judgment, the abuse-of-discretion question is settled by our *de novo* review of the summary adjudication's correctness." *Reeds v. Walker,* 2006 OK 43, ¶ 9, 157 P.3d 100 (footnotes omitted). "The standard for appellate review of a summary judgment is *de novo* and an appellate court makes an independent and nondeferential review[.]" *Nelson v. Enid Med. Assocs., Inc*., 2016 OK 69, ¶ 7, 376 P.3d 212.

¶8 Regarding McCrory's failure to file a response to the motion for summary judgment, a separate division of this Court has explained as follows:

> Ordinarily, the failure to file a response to a motion for summary judgment "results . . . in the admission for purpose of summary judgment [of] '[a]ll material facts set forth in the statement of the movant which are supported by admissible evidence.'" *Spirgis v. Circle K Stores, Inc*., 1987 OK CIV APP 45, ¶ 9, 743 P.2d 682, 684 (Approved for Publication by Supreme Court). However, "[e]ven when no counterstatement has been filed, it is still incumbent upon the trial court to insure that the motion is meritorious." *Spirgis*, 1987 OK CIV APP 45, ¶ 10, 743 P.2d at 685.

First Pryority Bank v. Moon, 2014 OK CIV APP 21, ¶ 35, 326 P.3d 528.

ANALYSIS

¶9 The Oklahoma Supreme Court has explained:

> A joint tenancy is created only when unities of time, title, interest, and possession are present; unity of time requires interests of joint tenants to vest at the same time; unity of title requires parties to take their interests by the same instrument; unity of interest requires estates of same type and duration; and unity of possession requires joint tenants to have undivided interests in the whole, not undivided interests in the several parts. Alteration of any required unity will destroy the joint tenancy.

Am. Nat. Bank & Tr. Co. of Shawnee v. McGinnis, 1977 OK 47, ¶ 3, 571 P.2d 1198 (citations omitted). Thus, not unreasonably, McCrory argues that the effective conveyance by Farquhar and Guzman of their interests in the Property destroyed the joint tenancy. Indeed, this argument is consistent with the McGinnis Court's explanation that, "[f]or example, if A and B hold as joint tenants and B, with or without the permission of A, conveys to C, the joint tenancy is destroyed because unity of interest is eliminated; the result is A and C hold as tenants in common, each having an estate of a whole undivided half interest." *Id.* Complete termination of joint tenancy also occurs where there are several joint tenants and all but one of them convey their interests. *See, e.g.*, 20 Am. Jur. 2d Cotenancy and Joint Ownership § 22 ("Termination of a joint tenancy also results of necessity where all but one of several joint tenants convey their interests[.]").

¶10 However, the scenario presented by the undisputed facts of the present case is distinguishable from these scenarios because, although two joint tenants (Farquhar and Guzman) conveyed their interests in the 2002 Deed, the other two joint tenants (McCrory and Goodson) did not. The Oklahoma Supreme Court explained in *McGinnis* that under circumstances in which at least two joint tenants do not convey their interests, a conveyance by other joint tenants does not destroy the con-

tinuance of the joint tenancy among the remaining joint tenants, though it does destroy the joint tenancy as to the conveyed interests. The *McGinnis* Court explained as follows: "[I]f A, B and C are joint tenants and C conveys to D, A and B continue as joint tenants in an undivided two-thirds of the whole estate and D has the whole of an undivided one-third as a tenant in common with A and B. *See* Cribbett, *Principles of the Law of Property* 94-7 (1962)." McGinnis, ¶ 3 (emphasis added).

¶11 The explanation of the Oklahoma Supreme Court in *McGinnis* is consistent with the common law. *See, e.g.*, 64 A.L.R.2d 918 (Originally published in 1959) ("Where there are three or more joint tenants, a conveyance by one of them only will sever the tenancy only as to the share conveyed," and "where one of three or more joint tenants conveys his interest to one of the others, the conveyee becomes a tenant in common as to the interest conveyed, but remains a joint tenant as to his original interest." (emphasis added)); *Jackson v. O'Connell*, 177 N.E.2d 194, 195 (Ill. 1961) ("well settled at common law that where there were three joint tenants, and one conveyed his interest to a third party, the joint tenancy was only severed as to the part conveyed; the third party grantee became a tenant in common with the other two joint tenants, but the latter still held the remaining two thirds as joint tenants with right of survivorship therein" (emphasis added) (citations omitted)); 20 Am. Jur. 2d Cotenancy and Joint Ownership § 22 ("Termination of a joint tenancy . . . results of necessity where all but one of several joint tenants convey their interests," but where two or more joint tenants do not participate in the conveyance, the conveyance "severs the joint tenancy only as to the share conveyed, which is then held by the grantee as a tenancy in common, while the other joint tenants continue to hold their interests in joint tenancy.").

¶12 In the absence of unambiguous statutory intent to the contrary, we will apply common law rules pertaining to joint tenancy. *See, e.g., Toma v. Toma*, 2007 OK 52, ¶ 22, 163 P.3d 540 ("[W]e find no language in [the statute pertaining to judgment liens] suggesting legislative intent to abandon the common law rule pertaining to judgment liens on joint tenancy interests" and, thus, the common law rule controls.); *Ladd v. State ex rel. Okla. Tax Comm'n*, 1984 OK 60, 688 P.2d 59 (the common law rules applicable to issues related to joint tenancy apply in Oklahoma unless unambiguous legislative intent exists in derogation of the common law); *Hill v. Hill*, 1983 OK 81, ¶ 6, 672 P.2d 1149 ("statutory affirmation of the common law in Oklahoma" with regard to joint tenancy); *Raney v. Diehl*, 1971 OK 28, ¶ 15, 482 P.2d 585 (The term joint tenancy is defined in Oklahoma "in the technical common law sense." (citation omitted)). Neither party suggests, nor do we find, there exists statutory language applicable to the circumstances presented that stands in derogation of the common law.

¶13 Here, it is undisputed the 2002 Deed is ineffective as to Goodson, but effective as to the conveyance of the interests of Farquhar and Guzman to McCrory. Thus, the conveyance of the shares of Farquhar and Guzman severed the joint tenancy as to their shares. Accordingly, McCrory became a tenant in common as to the combined one-half interest conveyed to her. In other words, McCrory has the whole of an undivided one-half interest as a tenant in common. However, Goodson and McCrory continue as joint tenants in an undivided one-half of the property. Thus, as to the one-half of the property held in tenancy in common, McCrory "has a separate and distinct title which is held independently of" Goodson. *Matthews v. Matthews*, 1998 OK 66, ¶ 11, 961 P.2d 831 (defining tenancy in common). However, Goodson and McCrory continue as joint tenants with right of survivorship as to their original interests.

CONCLUSION

¶14 In the underlying order granting summary judgment, the trial court determined that, based on the undisputed facts, the Property "vest[s] in Joint Tenancy, with Right of Survivorship, to [Goodson] and [McCrory][.]" We conclude, however, that Goodson and McCrory continue as joint tenants only as to their original interests, and that McCrory became a tenant in common as to the one-half interest conveyed to her in the 2002 Deed. Consequently, the trial court erred in failing to grant McCrory's motion for new trial. We reverse and remand this case with instructions to the trial court to enter a new order granting summary judgment to Goodson in a manner consistent with this Opinion.

¶15 **REVERSED AND REMANDED WITH INSTRUCTIONS.**

RAPP, J., and GOODMAN, J., concur.

DEBORAH B. BARNES, PRESIDING JUDGE:

1. (Emphasis omitted.)
2. *See* Okla. Dist. Ct. R. 17, 12 O.S. 2011, ch. 2, app. *See also* Okla. Sup. Ct. R. 1.22, 12 O.S. Supp. 2013, ch. 15, app. 1.

2018 OK CIV APP 60

JASON McDANIEL, Petitioner, vs. WOODS PUMPING SERVICES, INC., COMPSOURCE MUTUAL INSURANCE COMPANY, and THE WORKERS' COMPENSATION COMMISSION, Respondents.

Case No. 116,420. August 31, 2018

PROCEEDING TO REVIEW AN ORDER OF THE WORKERS' COMPENSATION COMMISSION

REVERSED AND REMANDED

Joe Farnan, Purcell, Oklahoma, for Petitioner,

Gary Farabough, Warren E. Mouledoux, III, PASLEY, FARABOUGH AND MOULEDOUX, Ardmore, Oklahoma, for Respondents Woods Pumping Services, Inc. and Compsource Mutual Insurance Company.

Bay Mitchell, Judge:

¶1 Petitioner Jason McDaniel (Claimant) appeals from the order of the Workers' Compensation Commission affirming the Administrative Law Judge's order finding Claimant sustained a left orbital wall fracture but denying compensability based on Respondent Woods Pumping Services, Inc. and CompSource Mutual Insurance Company's (Employer) intoxication defense. The Commission's finding that, within 24 hours of the injury, Claimant refused to undergo drug and alcohol testing is supported by substantial evidence. Pursuant to 85A O.S. Supp. 2013 §2(9)(b)(4), Claimant's refusal created a rebuttable presumption that the injury was caused by drugs or alcohol. However, there is uncontroverted evidence Claimant was not intoxicated when the injury occurred. Therefore, we hold the Commission's finding that Claimant failed to overcome the presumption of intoxication is not supported by substantial evidence. The Commission's order denying compensability based on the intoxication defense is REVERSED and REMANDED for further proceedings.

¶2 Claimant asserts that while working December 22, 2016, he was injured when he was disconnecting a rubber hose and the hose hit him in the face. Claimant filed a Form-3 January 18, 2017 claiming injuries to his left eye, head, neck, and right hand. Employer denied compensability based on an intoxication defense. *See* 85A O.S. §2(9)(b)(4). The ALJ found Claimant sustained a left orbital wall fracture while employed by Employer;[1] Claimant did not undergo alcohol and drug testing and Claimant did not overcome the intoxication presumption. The ALJ entered an Order Denying Compensability. Claimant appealed to the Workers' Compensation Commission. The Commission found the ALJ's order was supported by a preponderance of the credible evidence and correctly applied the law and, therefore, was not against the clear weight of the evidence nor contrary to law. The Commission entered an Order Affirming Decision of Administrative Law Judge. Claimant seeks review.

¶3 The Administrative Workers' Compensation Act provides that we may modify, reverse, remand for rehearing or set aside a judgment or award only if it was:

> 1. In violation of constitutional provisions;
>
> 2. In excess of the statutory authority or jurisdiction of the Commission;
>
> 3. Made on unlawful procedure;
>
> 4. Affected by other error of law;
>
> 5. Clearly erroneous in view of the reliable, material, probative and substantial competent evidence;
>
> 6. Arbitrary or capricious;
>
> 7. Procured by fraud; or
>
> 8. Missing findings of fact on issues essential to the decision.

85A O.S. Supp. 2013 §78(C). Interpreting §78(C)(5), our Supreme Court has said "[O]n issues of fact, the Commission's order will be affirmed if the record contains substantial evidence in support of the facts upon which it is based and the order is otherwise free of error." *Brown v. Claims Mgmt. Res., Inc.*, 2017 OK 13, ¶11, 391 P.3d 111.

¶4 The intoxication defense is found at 85A O.S. Supp. 2013 §2(9)(b)(4) and it provides:

> b. "Compensable injury" does not include:
>
> . . . .
>
> (4) injury where the accident was caused by the use of alcohol, illegal drugs, or prescription drugs used in contravention

> of physician's orders. If, within twenty-four (24) hours of being injured or reporting an injury, an employee tests positive for intoxication, an illegal controlled substance, or a legal controlled substance used in contravention to a treating physician's orders, or refuses to undergo the drug and alcohol testing, there shall be a rebuttable presumption that the injury was caused by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders. This presumption may only be overcome if the employee proves by clear and convincing evidence that his or her state of intoxication had no causal relationship to the injury[.]

Claimant argues first that Employer failed to establish he refused to undergo drug and alcohol testing. And second, that even if Employer established he refused to undergo drug and alcohol testing, he proved by clear and convincing evidence that he was not intoxicated and overcame the intoxication presumption.

¶5 Claimant and his supervisor were the only witnesses to testify at trial. The evidence as to whether Claimant refused to undergo drug and alcohol testing was conflicting. Claimant testified he did not remember Randall asking him to go to the hospital or take a drug and alcohol test the day of the accident. Claimant asserted it was not until two days after the accident that Employer's owner contacted him about taking a drug test. Shane Randall, Claimant's supervisor, testified when he checked on Claimant immediately after the accident, Claimant said he was fine and just needed to rest. Randall then told him he probably needed to go to the hospital and get a drug test. Randall testified Claimant responded that he did not need to go to the hospital or get a drug test and, again, he just needed to rest. The incident report completed by Randall the day of the accident was also admitted as evidence. In the report, Randall stated: "I told him we're going for a drug screen and hospital. He refused to go to either place. Then 10 minutes later he drove off location without permission. . . . He drove off refusing medical attention and drug screen." This is substantial evidence supporting the finding that, within 24 hours of being injured, Employer asked Claimant to undergo drug and alcohol testing and Claimant refused. Thus, the rebuttable presumption that the injury was caused by the use of drugs or alcohol was triggered.

¶6 But was the presumption rebutted? Claimant contends that even if he was intoxicated, his state of intoxication had no causal relationship to the injury. The evidence Claimant was *not* in a state of intoxication is uncontroverted. Claimant testified he was not intoxicated and had not used drugs or alcohol the day of the injury. Claimant had been working 9-10 hours prior to the accident. Even Randall testified, "I don't think he was intoxicated." When asked why he told Claimant to go to the hospital and have a drug and alcohol test, Randall explained it is company policy any time there is an accident, not because he suspected Claimant was intoxicated. The evidence that Claimant was not in a state of intoxication satisfies the clear and convincing evidence requirement that his state of intoxication had no causal relationship to the injury. We hold the denial of compensability based on Claimant's failure to overcome the presumption of intoxication is clearly erroneous in view of the reliable, material, probative and substantial competent evidence.

¶7 The ALJ's Order found:

> The Claimant reported the injury and his supervisor took a picture of him which shows an injury under his eye. Despite this the Claimant resisted drug testing at any point and delayed medical treatment for four days. There must be a logical reason why he would not seek treatment. One reason that comes to mind is that he is fearful that he will not pass a drug test, and possibly lose his job. He is unable to overcome the burden imposed by the intoxication [sic]. Although he stated that he didn't drink much, he could have been under the influence of other intoxicants.
>
> . . . .
>
> His refusal to first accept medical treatment by [Employer] and then not seek treatment when he returned home shows signs of impaired judgment.

The ALJ's findings are speculative and not based on the evidence presented at trial. The only evidence creating an inference Claimant was intoxicated was his refusal to submit to drug and alcohol testing after the accident. His refusal merely created a rebuttable presumption. The uncontroverted (and not speculative) evidence that Claimant was not intoxicated rebuts the presumption drugs or alcohol caused the injury.

¶8 Because we reverse the Commission's order pursuant to 85A O.S. §78(C)(5), we need not address Claimant's arguments the Commission's order is arbitrary and capricious and in violation of constitutional provisions.

¶9 The Commission found Claimant sustained a left orbital wall fracture. The part of the order finding the injury did not arise in the course and scope of employment, pursuant to 85A O.S. §2(9)(b)(4), and denying Claimant's request for benefits is reversed. The case is remanded for further proceedings.

¶10 REVERSED AND REMANDED.

SWINTON, P.J., and GOREE, V.C.J., concur.

Bay Mitchell, Judge:

1. The ALJ found Claimant did not sustain physical injury to the left eye, head, neck, right hand or back while employed by Employer. Claimant has not appealed that part of the order.

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, September 13, 2018

F-2017-195 — Appellant, Brian Wade Cochran, was tried by jury and convicted of Lewd Molestation after Two or More Felony Convictions in District Court of Pushmataha County Case Number CF-2016-5. The jury recommended as punishment imprisonment for life. The trial court sentenced Appellant in accordance with the jury's recommendation. It is from this judgment and sentence that Appellant appeals. The Judgement and Sentence of the District Court is hereby AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

F-2017-460 — On April 28, 2010, Appellant Kerry Eugene Mills, represented by counsel, entered a guilty plea to Count 1, Possession of a Controlled Dangerous Substance within 1000 feet of a school in Greer County Case No. CF-2009-40. That same date, Mills entered a guilty plea to Count 1, Driving Under the Influence and Count 2, Resisting an Officer (misdemeanor) in Greer County Case No. CF-2009-51. Sentencing in both cases was deferred pending Mills's completion of the Greer County Drug Court program. On March 18, 2013, the State filed its second Application to Terminate Mills from Drug Court. On August 28, 2013, the Honorable Richard Darby, District Judge, terminated Mills's Drug Court participation and sentenced him as specified in his plea agreement. From this judgment and sentence Mills appeals. Mills's termination from Drug Court is AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

F-2017-364 — Appellant Judith Gayle Nix was tried by jury and convicted of First Degree Murder in the District Court of Tulsa County, Case No. CF-2016-1662. The jury recommended as punishment life in prison and the trial court sentenced accordingly. From this judgment and sentence Judith Gayle Nix has perfected her appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur in Results; Hudson, J., Concur; Kuehn, J., Concur in Results; Rowland, J., Concur.

M-2016-1003 — Following a jury trial before the Honorable Deborrah Ludi Leitch, Special Judge, in the District Court of Tulsa County, Case No. CM-2013-5993, Charley Hart Wilson, Appellant, was found guilty of the misdemeanor offenses of Domestic Assault and Battery in the Presence of a Minor Child (Count 1) and Obstructing an Officer (Count 2). In accordance with the jury's verdicts, Judge Leitch, on February 25, 2015, imposed a term of one (1) year in the county jail on Count 1 and nine (9) months in jail on Count 2, with those terms to be served consecutively. Appellant appeals these convictions. AFFIRMED. Opinion by: Hudson, J; Lumpkin, P.J.; Concurs in Results; Lewis, V.P.J.; Concurs; Kuehn, J., Specially Concurs; Rowland, J., Concurs.

F-2016-840 — Devante Milton Norton, Appellant, was tried by jury for the crimes of Count 1: Robbery with a Dangerous Weapon, After One Previous Felony Conviction; and Count 2: First Degree Burglary, After One Previous Felony Conviction, in Case No. CF-2014-6257, in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment ten years imprisonment on each count. The Honorable Doug Drummond, District Judge, sentenced accordingly and ordered sentences to run consecutively to each other, but concurrently with Appellant's revoked sentence in Tulsa County Case No. CF-2010-674. Judge Drummond also ordered credit for time served. From this judgment and sentence Devante Milton Norton has perfected his appeal. AFFIRMED. Appellant's *Application to Supplement Appeal Record or In the Alternative Remand for Evidentiary Hearing on Sixth Amendment Claims* is DENIED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs in Results; Rowland, J., Concurs.

C-2017-1048 — Thomas Carl Dodds, Jr., Petitioner, entered a blind plea of nolo contendere in the District Court of Muskogee County, Case

No. CF-2015-897 to Second Degree Rape (Count 1); Lewd Molestation (Count 2); Soliciting Sexual Conduct or Communication with Minor by Use of Technology (Count 3), each After Former Conviction of Two or More Felonies, and to Contributing to the Delinquency of Minors (Count 4). In the District Court of Muskogee County, Case No. CF-2016-620, Dodds entered a blind plea of nolo contendere to Pornography – Procure/Produce/Distribute/Possess Juvenile Pornography, after Former Conviction of Two or More Felonies. The Honorable Darrell G. Shepherd, District Judge, accepted Dodds' nolo contendere pleas and assessed punishment at twenty years imprisonment on each of Counts 1-3 and one year on Count 4 in Case No. CF-2015-897. Punishment was assessed at twenty years imprisonment with all but the first ten years suspended in Case No. CF-2016-620. The judge ordered that the sentences in Case No. CF-2015-897 be served concurrently with each other and consecutively to that imposed in Case No. CF-2016-620. Dodds filed a timely application to withdraw his pleas that the district court denied after holding the prescribed hearing. Dodds appeals the denial of his motions to withdraw his pleas. The Petitions for Writ of Certiorari are DENIED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

S-2017-1209 — Appellee Lesley Nchanji was charged with the crimes of Count I - Rape First Degree, Counts II and III - Forcible Sodomy and Count IV - Sexual Battery in Case No. CF-2017-3521 in the District Court of Tulsa County. After a hearing, the Honorable William D. LaFortune, District Judge, granted Nchanji's Motion to Quash for Insufficient Evidence as to Count IV. The State timely appealed. From this ruling, the State of Oklahoma has perfected its appeal. The Order of the District Court sustaining Nchanji's Motion to Quash is REVERSED, and case REMANDED for further proceedings. Opinion by: Kuehn, J.; Lumpkin, P.J., concur; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

Thursday, September 20, 2018

F-2016-1149 — Ann Marie Turner, Appellant, was tried in a non-jury trial in the District Court of Washington County, Case No. CF-2014-410, for the crime of Financial Exploitation by Caretaker. The Honorable John Kane found sufficient evidence to convict Turner. Judge Kane entered a Deferred Judgment with a three year term of deferment, assessed a $500.00 fine plus other costs and fees and ordered restitution in the amount of $1,258.00. From this deferred judgment Ann Marie Turner has perfected her appeal. AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs in part and dissents in part; Lewis, V.P.J., concurs in results; Hudson, J., concurs; Kuehn, J., dissents.

F-2016-1100 — In the District Court of Oklahoma County, Case No. CF-2009-5977, Tyrees Michael Dotson, Appellant, entered a plea of guilty to Possession of a Controlled Dangerous Substance (Cocaine Base) with Intent to Distribute, and on February 3, 2012, the Honorable Glenn M. Jones, District Judge, deferred Petitioner's sentencing for seven (7) years conditioned on written rules of probation. On November 22, 2016, Judge Jones, found Appellant violated his probation. Judge Jones thereupon accelerated sentencing, pronounced a judgment of guilt, and imposed a sentence of fifteen (15) years imprisonment. Appellant appeals the final order of acceleration. AFFIRMED. Opinion by: Lumpkin; P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

F-2016-1122 — Joseph Richard Cyr, Appellant, was tried by jury for the crimes of Counts I and II - Murder in the First Degree in Case No. CF-2013-2102 in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment life without the possibility of parole on each count. The trial court sentenced accordingly and ordered the counts to run consecutively. From this judgment and sentence Joseph Richard Cyr has perfected his appeal. AFFIRMED. Opinion by: Kuehn, J.; Lumpkin, P.J., specially concur; Lewis, V.P.J., concur in result; Hudson, J., concur; Rowland, J., recuse.

F-2017-497 — Appellant, Daryoush Ali Monfared, was tried by jury and convicted of Burglary in the First Degree After Two or More Felony Convictions in District Court of Tulsa County Case Number CF-2016-5122. The jury recommended as punishment imprisonment for twenty-five (25) years. The trial court sentenced Appellant accordingly. From this judgment and sentence Daryoush Ali Monfared 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., Concur.

F-2017-239 — Tommy James Whitt, Appellant, was tried by jury for the crimes of lewd

molestation (Count 1), first degree rape (Count 2), forcible sodomy (Count 3), and child sexual abuse (Count 4) in Case No. CF-2016-112 in the District Court of Seminole County. The jury returned a verdict of guilty and set punishment at life imprisonment on each count. The trial court sentenced accordingly and ordered the sentences to be served consecutively. From this judgment and sentence Tommy James Whitt has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Count 1 is REMANDED for correction *nunc pro tunc* to reflect a conviction for lewd molestation and otherwise AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs in result; Rowland, J., concurs n part and dissents in part.

RE-2017-7 — In the District Court of Tulsa County, Case No. CF-2009-1455, Appellant, Clarence Frank Kamp III, while represented by counsel, entered a plea of nolo contendere to Possession of Child Pornography, After Former Conviction of a Felony. On August 28, 2009, in accordance with a plea agreement, the Honorable William C. Kellough, District Judge, sentenced Appellant to a term of ten (10) years imprisonment, with all but the first three (3) years suspended under written rules of probation. On December 21, 2016, the Honorable James M. Caputo, District Judge, found Appellant violated his probation and revoked the suspension order in full. Appellant appeals the final order of revocation. AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

C-2018-226 — Petitioner, Makayla Breann Horse, entered a negotiated guilty plea in Pottawatomie County District Court, Case No. CF-2017-380C, before the Honorable John Canavan, Jr., District Judge, to Count 1: Trafficking in Illegal Drugs—Methamphetamine; Count 2: Distribution of Controlled Dangerous Substance–Methamphetamine; and Count 3: Conspiracy to Distribute Controlled Dangerous Substance–Methamphetamine. In accordance with the plea agreement, Judge Canavan sentenced Horse to seven years imprisonment on each count with all three sentences to run concurrently to each other. The trial court also imposed fines of $25,000.00 on Count 1, $250.00 on Count 2, and $250.00 on Count 3. On January 11, 2018, Petitioner filed a *pro se* motion to withdraw her guilty plea. After a hearing on Petitioner's motion, Judge Canavan denied Petitioner's motion to withdraw her plea. 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; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

F-2017-177 — Miguel Angel Murillo, Appellant, was tried by jury for the crimes of rape in the first degree (Count 1), lewd or indecent acts with a child under sixteen (Count 3), and lewd or indecent proposal to a child under sixteen (Count 4) in Case No. CF-2015-166 in the District Court of Oklahoma County. The jury returned a verdict of guilty and set punishment at life imprisonment on each of Counts 1 and 3, and twenty-five years imprisonment on Count 4. The trial court sentenced accordingly and ordered the sentences to be served consecutively with credit for time served. From this judgment and sentence Miguel Angel Murillo has perfected his appeal. 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 in result.

C-2018-109 — Shaun Anthony Schafer, Petitioner, entered blind pleas of *nolo contendere* to Count 1, assault and battery on a police officer, and Count 2, driving under the influence, a misdemeanor, in the District Court of Custer County, Case No. CF-2017-66. The Honorable Jill C. Weedon, Associate District Judge, accepted the pleas, found Petitioner guilty, and ordered a pre-sentence investigation. The trial court later sentenced Petitioner to consecutive terms of three years imprisonment, with all but the first thirty days suspended, in Count 1; and one year in jail, with all but the first thirty days suspended in Count 2. Petitioner filed a timely motion to withdraw the plea, which the district court denied after evidentiary hearing. Petitioner now seeks the writ of certiorari. The petition for writ of certiorari is DENIED. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

C-2018-210 — Richard Alan Smith, Petitioner, entered guilty pleas for the crimes of Count 1 - Possession of Marijuana, Count 2 - Possession of a Firearm After Felony Conviction, Count 3 - Attempting to Elude a Police Officer, Count 4 - Resisting Arrest, Count 5 - Possession of Drug Paraphernalia and Count 6 - Driving with Defective Equipment in Case No. CF-2016-

514 in the District Court of Mayes County. The Honorable Terry H. McBride, District Judge, sentenced Petition to 15 years imprisonment on each of Counts 1 through 3, one year in the county jail on Count 4, a $100 fine on count 5 and a $10 fine on Count 6. All terms were ordered to be served consecutive to each other. On January 28, 2018, Petitioner filed a motion to withdraw his pleas. At a February 1, 2018 hearing, the trial court granted the motion to withdraw as to Count 2, but denied it in all other respects. Petitioner has perfected his certiorari appeal from the District Court's denial of his motion to withdraw plea. CERTIORARI DENIED; JUDGMENT AND SENTENCE OF DISTRICT COURT AFFIRMED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur in result; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

F-2017-609 — David Eugene Reeves, Appellant, was tried by jury for the crime of trafficking in illegal drugs in Case No. CF-2015-2282 in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment fifteen years imprisonment and a $25,000.00 fine. The trial court sentenced accordingly. From this judgment and sentence David Eugene Reeves has perfected his appeal. 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., recuses.

F-2017-0586 — Appellant, Danny Joe Rolens, was charged on January 12, 2016, in Washita County District Court Case No. CF-2016-16 with Count 1 – Larceny of Gasoline, a felony, Count 2 – Conspiracy, a felony, Count 3 – Possession of Controlled Dangerous Substance, a felony, Count 4 – Unlawful Possession of Drug Paraphernalia, a misdemeanor; and Count 5 – Driving with License Cancelled/Suspended/Revoked, a misdemeanor. In Washita County District Court Case No. CF-2016-38 Appellant was charged on February 11, 2016, with Count 1 – Knowingly Concealing Stolen Property, a felony. On June 1, 2016, Appellant was diverted to the Washita/Custer County Drug Court. Pursuant to the plea agreement, upon successful completion, all counts in both cases would be dismissed with court costs. Upon failure to successfully complete Drug Court, Appellant would be sentenced in Case No. CF-2016-16 to ten years on Counts 1 and 3, five years on Count 2, and one year in the County Jail on Counts 4 and 5, and to five years on Count 1 in Case No. CF-2016-38. All counts and cases would be run concurrently. The State filed a Petition to Terminate Drug Court Participation and Sentence Defendant on May 1, 2017. Following a hearing on the State's Petition on June 1, 2017, the Honorable Doug Haught, District Judge, sustained the petition for termination and sentenced Appellant as stated in the plea agreement. Appellant appeals from his termination from Drug Court. The order terminating Appellant from Drug Court is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J.: Concur; Hudson, J.: Concur; Kuehn, J.: Dissent; Rowland, J.: Concur.

F-2017-1117 — Ruth Godinez-Perez, Appellant, was tried by jury for the crime of Child Neglect in Case No. CF-2016-3023 in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment 17 years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Ruth Godinez-Perez has perfected her appeal. AFFIRMED. Opinion by: Kuehn, J.; Lumpkin, P.J., Concur; Lewis, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F-2017-310 — Christian Xavier Harris, Appellant, was tried by jury for the crimes of Count I - First Degree Felony Murder and Count III - Conspiracy to Commit a Felony, Robbery, in Case No. CF-2016-2650 in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment life imprisonment on Count I and a $5,000.00 fine on Count III. The trial court sentenced accordingly. From this judgment and sentence Christian Xavier Harris has perfected his appeal. AFFIRMED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur in result; Lewis, V.P.J., specially concur; Hudson, J., concurR; Rowland, J., recuse.

RE-2017-166 — In the District Court of Pontotoc County, Case No. CF-2010-166, Appellant, Aron M. Choate, pro se, entered a plea of guilty to Possession of Marijuana with Intent to Distribute. On May 27, 2010, in accordance with a plea agreement, the Honorable C. Steven Kessinger, District Judge, sentenced Appellant to a term of ten years imprisonment, all suspended under written rules of probation. On January 30, 2017, Judge Kessinger found Appellant violated his probation and revoked the suspension order in full. Appellant appeals the final order of revocation. AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

F-2017-638 — Appellant, Jesse William Holland, was tried by jury and convicted of Trafficking in Illegal Drugs (Methamphetamine) (Count 1), Acquire Proceeds from Drug Activity (Count 2), Possession of Controlled Drugs Without Tax Stamp (Count 3), Falsely Personating another to Create Liability (Count 4), After Two or More Felony Convictions and Obstructing An Officer (misdemeanor) (Count 5) in District Court of Tulsa County Case Number CF-2016-5318. The jury recommended as punishment imprisonment for fifty-one (51) years and a $25,000.00 fine in Count 1; twelve (12) years in Count 2; four (4) years and a $1,000.00 fine in Count 3; ten (10) years and a $1,000.00 fine in Count 4; and one (1) year in the county jail in Count 5. The trial court sentenced Appellant accordingly, ordered the sentences in Counts 1 through 4 to run consecutively, and ordered the sentence in Count 5 to run concurrently with Count 4. From this judgment and sentence Jesse William Holland has perfected his appeal. The Judgment and Sentence is hereby AFFIRMED. This matter is REMANDED to the District Court with instructions to enter an order nunc pro tunc correcting the Judgment and Sentence documents in conformity with his opinion. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Specially Concur; Hudson, J., Concur; Kuehn, J., Concurring in Result; Rowland, J., Concur.

S-2017-1211 — Appellee, Richard Erving Tyner, Jr., was charged by information with Count 1, possession of a sawed-off shotgun, in Tulsa County District Court, Case No. CF-2016-5910. After preliminary examination, Appellee was bound over for arraignment in the trial court. Appellee later moved for an order suppressing evidence of the shotgun. After hearing, the trial court sustained Appellee's motion to suppress. The State appeals pursuant to 22 O.S.2011, § 1053(5). The order and judgment of the District Court of Tulsa County sustaining the motion to suppress evidence is REVERSED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

J-2018-116 — A.D., Appellant, was charged as a Youthful Offender with eight counts of Lewd Molestation in YO-2017-22 in the District Court of Tulsa County. The State filed a Motion to Sentence Youthful Offender as an Adult. The trial court granted the motion, ruling that Appellant should be sentenced as an adult. From this finding, Appellant has perfected his appeal. AFFIRMED. Opinion by: Kuehn, J.; Lumpkin, P.J., Concur; Lewis, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F-2017-774 — On February 9, 2017, Appellant Henry Jerome Quinn pled guilty to Count 1 – Domestic Assault with a Dangerous Weapon and Count 2 – Interference with an Emergency Telephone Call in Oklahoma County District Court Case No. CF-2016-5684. The parties entered into a plea agreement which delayed sentencing pending successful completion of the Oklahoma County Mental Health Court Program. The parties agreed that if Appellant completed the program successfully, Case No. CF-2016-5684 would be dismissed or, if terminated from the program, Appellant would be convicted and sentenced to ten years imprisonment each on Counts 1 and 2. On June 30, 2017, the State filed an application to terminate Appellant's participation in the program and to sentence Appellant pursuant to his plea agreement. Following a hearing on the application, the Honorable Geary L. Walke, Special Judge, terminated Appellant's participation and sentenced Appellant in accordance with his plea agreement. Appellant appeals. The termination of Appellant's participation in the Oklahoma County Mental Health Court Program is AFFIRMED. Opinion by: Kuehn, J. Lumpkin, P.J.: concur; Lewis, V.P.J.: concur; Hudson, J.: concur; Rowland, J.: concur.

F-2017-495 — Donald Ray Varner, Appellant, was tried by jury in Case No. CF-2016-4004, in the District Court of Tulsa County, for the crimes of Count 1: Trafficking in Illegal Drugs - Methamphetamine, After Former Conviction of Two or More Felonies; and Count 2: Unlawful Possession of Drug Paraphernalia – Scales. Appellant was convicted in a two stage proceeding before the Honorable Clifford Smith, Special Judge. Prior to the second stage, the parties agreed to waive jury sentencing for Appellant's Count 2 misdemeanor conviction. At the conclusion of the second stage, the jury recommended Appellant be sentenced to life imprisonment. Judge Smith sentenced Varner in accordance with the jury's Count 1 verdict. As to Count 2, the trial court sentenced Varner to one year in the Tulsa County Jail and ordered the sentence to run concurrent to Count 1. From this judgment and sentence Donald Ray Varner has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concur; Lewis, V.P.J., Concurs; Kuehn, J., Concurs in Results; Rowland, J., Concurs.

F-2016-1044 — Michael Lee Smith, Appellant, was tried and convicted by a jury in Case No. CF-2014-465, in the District Court of Wagoner County, for the crimes of Count 1: First Degree Arson, After Two or More Previous Felony Convictions; and Counts 2, 3 and 4: Cruelty to Animals, After Two or More Previous Felony Convictions. The jury recommended twenty years imprisonment for Count 1 and four years imprisonment each on Counts 2, 3 and 4. The Honorable Thomas H. Alford, District Judge, sentenced Appellant in accordance with the jury's verdicts. Judge Alford ordered these sentences to run concurrently, imposed various costs and ordered credit for time served. From this judgment and sentence Michael Lee Smith has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concur; Lewis, V.P.J., Concurs in Results; Kuehn, J., Concurs; Rowland, J., Concurs.

RE-2016-1070 — In the District Court of Oklahoma County, Case No. CF-2007-585, Appellant, James Derrell Thompson, while represented by counsel, entered pleas of no contest to two counts of Indecent or Lewd Acts with a Child under Sixteen (Counts 1 and 2) and two counts of Forcible Oral Sodomy (Counts 3 and 4). On March 6, 2008, in accordance with a plea agreement, the Honorable Jerry D. Bass, District Judge, sentenced Appellant to a concurrent term of fifteen (15) years imprisonment for each count, with all but the first five (5) years conditionally suspended under written rules of probation. On May 28, 2013, the District Court revoked a two-year portion of that suspension order. On November 8, 2016, the Honorable Cindy H. Truong, District Judge, found Appellant violated his probation and revoked the remainder of the suspension order in full. Appellant appeals that final order of revocation. AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs in results; Hudson, J., concurs; Kuehn, J., concurs in results; Rowland, J., concurs.

F-2016-619 — Elvis Aaron Thacker, Appellant, was tried by jury and convicted of Count 1, first degree murder, and Count 2, forcible sodomy in Case No. CF-2010-312 in the District Court of LeFlore County. The jury set punishment at life imprisonment without the possibility of parole on Count 1 and twenty years imprisonment on Count 2. The trial court sentenced accordingly and ordered the sentences served consecutively. From this judgment and sentence Elvis Aaron Thacker has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs in results; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs in results.

F-2017-505 — Demario Veshawn Bethany, Appellant, was tried by jury in Case No. CF-2015-388 in the District Court of Tulsa County for the following crimes: Count 1 - Felony Murder in the Commission of Attempted Robbery with a Dangerous Weapon, Count 2 - Attempted Robbery with a Dangerous Weapon, Count 3 - Feloniously Pointing a Firearm and Count 4 – Possession of a Firearm After Felony Conviction. The jury acquitted Appellant on Count 3, but convicted him on Counts 1, 2 and 4 and recommended life sentences on all three counts. The trial court vacated the conviction on Count 2, as it was the predicate felony for Felony Murder (Count 1). The trial court sentenced Appellant to life imprisonment terms on each of Counts 1 and 4 and ordered them to be served consecutively. From this judgment and sentence Demario Veshawn Bethany has perfected his appeal. AFFIRMED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

COURT OF CIVIL APPEALS
(Division No. 1)
Friday, September 14, 2018

114,418 — Home Rescuers 5209 LLC, Plaintiff/Counter-Defendant, v. David Ambrose, an individual; Wylda Ambrose, an individual; David Ambrose and Wylda Ambrose, as Trustees of the Ambrose Family Revocable Trust; and Kassie Box, an individual, Defendants/Third-Party Plaintiffs/Appellees, v. Craig A. Hodgens, an individual, Third-Party Defendant/Appellant, and Home Rescuers, LLC, a domestic limited liability company; Home Rescuers 9601, LLC, a domestic limited liability company; Credit Solution, LLC, a domestic limited liability company; and GMW Investments, LLC, a domestic Limited liability company, Third-Party Defendants/Appellants, and Richard K. Holmes, Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Linda Morrissey, Judge. In this post-receivership proceeding, Third-Party Defendant/Appellant, Craig A. Hodgens, individually, and purportedly on behalf of the limited liability companies (LLCs) listed above as Third Party Defendants/Appellants, appeals from the trial court's October 8, 2015, journal entry granting the motion to dismiss filed by Appellee, Richard K. Holmes (Receiver). Re-

ceiver was appointed in 2008 to manage and liquidate all the business interests of Hodgens and the LLCs. Receiver's Final Report was approved by an Order entered December 2014. The Order approving the Final Report and discharging Receiver was not appealed by any party. In 2015, L. Win Holbrook, Bankruptcy Trustee of the Chapter 7 bankruptcy case for Craig A. Hodgens, Case No. 13-14087 in the United States Bankruptcy Court for the Western District of Oklahoma, adopted an earlier motion filed by Hodgens against Receiver to require a thorough accounting. The bankruptcy trustee was substituted as the party in lieu of Appellant, Craig A. Hodgens, on October 14, 2014, and holds any interest Hodgens may have in the instant proceeding. Receiver moved to dismiss the bankruptcy trustee's motion arguing there are no parties with a cause of action in this case; Plaintiff, Home Rescuers 5209 LLC (HR 5209), ceased to exist as an LLC; the attorney for Plaintiff dismissed all claims; the Ambrose Defendants dismissed all their claims when Hodgens filed bankruptcy, and Receiver has been discharged. The trial court granted Receiver's motion to dismiss because "no one appeared to object" to the dismissal motion. The trial court further found the bankruptcy trustee's motion was abandoned because the bankruptcy trustee failed to appear for the hearing on the motion. We find Hodgens is not the real party in interest to bring this appeal. Accordingly, this appeal is dismissed. Opinion by Bell, P.J.; Joplin, J., and Buettner, J., concur.

115,611 — In Re the Marriage of Elhalm Abedini, Petitioner/Appellee, v. Omid Mogaghegh Motlagh, Respondent/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Lynn McGuire, Judge. Husband, Omid Motlagh, appeals the November 30, 2016 Decree of Divorce and Dissolution of Marriage granting the divorce between Motlagh and his Wife, Elham Abedini. The couple married on January 21, 2015 and separated in November 2015. Wife's petition for divorce was filed in Oklahoma County District Court on March 22, 2016. The couple have no children together. Husband testified he gave Wife approximately $25,000 prior to the marriage in January 2015. Wife testified Husband contributed approximately $3,400 to the marriage, but she paid far more than this amount to Husband's immigration attorney and in supporting Husband during the marriage. Wife added Husband's name to her bank account, Husband's name was removed from the account shortly thereafter, as bank policy required Husband not be a joint account holder while his immigration status was ongoing and he was not a citizen of the U.S. Husband's name was also added to the title of the couple's 2015 vehicle. This vehicle was paid for from the bank account that had at one time been listed in both Husband and Wife's names. Wife testified Husband's name was placed on the car title to encourage Husband to pass his driving test, which Husband was not able to do during the marriage, and also to demonstrate to immigration services that Husband had support while in the U.S. Prior to the divorce, Wife removed Husband's name from the 2015 car title. Wife owned an older 2007 vehicle which was intended to be Husband's when he received his license; Husband's name was never placed on the title to the older car. Wife sold the 2007 vehicle prior to the divorce and retained those funds in the bank account that had at one time been the joint account. "[A] trial court has wide discretion in the division of marital property and the decision dividing such property will not be disturbed on appeal unless contrary to law, against the clear weight of the evidence, or an abuse of discretion is shown." *Jackson v. Jackson*, 2002 OK 25, ¶3, 45 P.3d 418, 422. Husband's first five propositions of error essentially argue Husband was entitled have the bank account and the 2015 auto to be awarded as marital property, and to have the older vehicle awarded to him as it was intended as a gift. The Oklahoma Supreme Court has found that in order to rebut the presumption of a gift, the party attempting to rebut the presumption must "present clear and convincing evidence of a purpose for placing the property in joint tenancy which is collateral to intending a gift. *Larman v. Larman*, 1999 OK 83, ¶ 9, 991 P.2d 536." Wife offered a collateral basis to explain the bank account and 2015 car title, saying these were efforts to motivate Husband to get his license and to assist in his immigration process, demonstrating he had support while in the country. Wife argued the older car was never held in Husband's name and no donative intent was ever presumed. Husband's sixth proposition on appeal asserts the trial court failed to maintain impartiality and objectivity, as evidenced by awarding fees to Wife for her attorney's preparation of a responsive filing to Husband's request for findings of fact and conclusions of law. 12 O.S. 2001 §611. The trial court was very critical of Husband's filing the

request for findings of fact and conclusions of law on the first day of trial and for failing to provide the court or opposing counsel a timely copy of the request. Based on the concerns highlighted by the trial court below, we do not find the trial court's balancing of the equities to permit an attorney fee award for Wife's attorney fee incurred in preparation of the responsive pleading to be unwarranted in this case. *Thielenhaus v. Thielenhaus*, 1995 OK 5, 890 P.2d 925, 935. Husband's final proposition of error asserts the trial court improperly refused Husband monetary support for his divorce representation or provide temporary support during the time Husband came back to the U.S. to address the divorce petition. Based on the factors considered in *McLaughlin v. McLaughlin*, 1999 OK 34, ¶13, 979 P.2d 257, 260-61 and *Husband v. Husband*, 2010 OK CIV APP 42, ¶35, 233 P.3d 383, 389-90, we do not find error in the trial court's decision to refrain from awarding Husband support alimony or support for his legal expenses during the pendency of the divorce. The trial court's Decree of Divorce and Dissolution of Marriage entered below on November 30, 2016 is AFFIRMED. Opinion by Joplin, J.; Bell, P.J., and Buettner, J., concur.

116,343 — Mark Kuhn, Petitioner, v. Multiple Injury Trust Fund and The Workers' Compensation Court, Respondents. Proceeding to review an Order of a Three-Judge Panel of the Workers' Compensation Court of Existing Claims. Petitioner, Mark Kuhn (Claimant), sought permanent total disability benefits from Respondent, the Multiple Injury Trust Fund (Fund). The Workers' Compensation Court of Existing Claims (WCC) relied on Claimant's testimony and medical evidence and held Claimant's combined injures constituted permanent total disability and allowed benefits against the Fund. A Three-Judge Panel (Panel) reversed holding Claimant's combined injuries do not constitute permanent total disability and Claimant is not permanently and totally disabled. We hold the weight of the evidence supports the trial court's finding that Claimant is permanently totally disabled due to his multiple injuries and is entitled to an award against the Fund. Accordingly, the Panel's order is vacated and the trial court's award is reinstated. Opinion by Bell, P.J.; Joplin, J., concurs and Buettner, J., dissents.

116,606 — Charles Lee Moore, III, Plaintiff/Appellant, v. Unit Manager Duncan, LT. McMillan, Chief of Security Jones of Lexington Correctional Center, Defendants/Appellees. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Patricia G. Parrish, Judge. Plaintiff/Appellant Charles Lee Moore, III, appeals from the trial court's order dismissing without prejudice his claims against Defendants/Appellees Unit Manager Duncan, Lieutenant McMillan, and Chief of Security Jones (collectively, Appellees). Moore failed to respond to Appellees' motion to dismiss his amended petition and the trial court therefore deemed the motion confessed. The trial court additionally found Moore failed to serve summons on Appellees and failed to allege exhaustion of remedies or compliance with the Governmental Tort Claims Act. We affirm the trial court's dismissal without prejudice on each of these grounds. AFFIRMED. Opinion by Buettner, J.; Bell, P.J., and Joplin, J., concur.

116,935 — Great Bend Regional Hospital, Plaintiff/Appellant, v. Nicholas E. Sanders, Defendant/Appellee. Appeal from the District Court of Lincoln County, Oklahoma. Honorable Cynthia Ferrell Ashwood, Trial Judge. Plaintiff/Appellant Great Bend Regional Hospital (Hospital) appeals from the trial court's order reversing its prior order vacating dismissal and thereafter dismissing the action with prejudice. The action was originally dismissed for Hospital's failure to appear at a pretrial conference, allegedly due to the court clerk's error in sending the scheduling order to the incorrect email address for counsel for Hospital. We hold that the trial court abused its discretion by reversing its prior order to vacate dismissal and dismissing the action with prejudice. REVERSED AND REMANDED. Opinion by Buettner; Bell, P.J., and Joplin, J., concur.

Monday, September 17, 2018

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, v. 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 assert-

ed 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. 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 prejudgement 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 AFFIRMED IN PART to affirm the accounting itself, finding Appellee had the right to request an accounting after title was quieted to pray for the return of income or property erroneously given to the Estate which should have been placed with the title holder. This cause is REVERSED IN PART, as the prejudgment and post-judgment interest awards given below were not appropriate in this case and this cause is REMANDED for further proceedings to determine the amount to be awarded Appellee upon a complete accounting. AFFIRMED IN PART, REVERSED IN PART AND REMANDED. Opinion by Joplin, J.; Bell, P.J., and Buettner, J., concur.

Tuesday, September 18, 2018

115,572 — Nichole Michelle Rushing, Plaintiff/Appellee, v. Josh Nemeck, Defendant/Appellant. Appeal from the District Court of Canadian County, Oklahoma. Honorable Gary D. McCurdy, Judge. Father seeks review of the trial court's order closing the case on the objection to jurisdiction for forum inconveniens of Mother. Father complains the trial court's order, recognizing Florida as the home state of the children and the appropriate forum for resolution of the parties' visitation dispute, effectively denies him a forum to resolve the issues surrounding the care and custody of his children. The trial court's Memorandum Opinion filed June 22, 2016 constitutes the final appealable order on the issue of inconvenient forum in this case. Father did not file his petition in error to commence the instant appeal challenging the inconvenient forum determination until November 30, 2016, more than thirty (30) days after filing of the challenged decision. Father's petition in error, filed more than thirty days after filing of the final appealable order determining the issue of inconvenient forum, is untimely to preserve for review any issue determined by the trial court in its Memorandum Opinion. Even if that were not so, the trial court did not err in considering and

granting Mother's inconvenient forum plea. AFFIRMED. Opinion by Joplin, J.; Bell, P.J., and Buettner, J., concur.

115,658 — Joey Penwell, Plaintiff/Appellee, v. OKC Dental Health Associates, P.C., d/b/a My Dentist, Trade Name Name for Advanced Dental Implant and Denture Center, Inc., Defendant/Appellant, and Wendy Holder, D.D.S. and Alan Fortenberry D.D.S., Defendants. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Aletia Haynes Timmons, Judge. Defendant/Appellant OKC Dental Health Associates, P.C., ("My Dentist") appeals from a judgment entered on jury verdict in favor of Plaintiff/Appellee Joey Penwell in a dental negligence suit. Penwell alleged he was injured by the negligence of My Dentist's employees, Defendants Alan Fortenberry, DDS, and Wendy Holder, DDS. Competent evidence supports the verdict and we find no reversible errors in My Dentist's claims on appeal. We therefore AFFIRM. Opinion by Buettner, J.; Bell, P.J., and Joplin, J., concur.

116,120 — Deutsche Bank National Trust Company, as Trustee for BCAPB L.L.C. Trust 2007-ABI Mortgage Passthrough Certificates, Series 2007-ABI, Plaintiff/Appellee, v. Martin L. Suarez-Martinez and Stephanie Suarez-Oliver, Defendants/Appellants, John Doe, Occupant; The Cornerstone Financial Group, Inc., and U.S. Bank National Association, as Indenture Trustee for the Firstplus Asset-Backed Certificates, Series 1997-4 Defendants. Appeal from the District Court of Comanche County, Oklahoma. Honorable Irma Newburn, Judge. Debtors seek review of the trial court's order denying their motion to reconsider after the trial court granted the motion for summary judgment of Bank in Bank's action to recover on a promissory note in default and to foreclose the mortgage securing the note. The bank officer employed by Bank's loan servicer attested to his review and, hence, his personal knowledge of the underlying loan documents, and Debtors' default in payments as alleged. The promissory note executed by Debtors bears an endorsement in blank by the loan originator and servicer. The affidavit of the bank officer employed by Bank's loan servicer is competent and establishes Bank's status as holder and owner of the note and mortgage, and Bank's damages. Beyond a copy of the loan's amortization table, and in the face of Bank's evidence of default, Debtors offered no admissible evidence demonstrating their current installment payments. The trial court did not err in granting the Bank's motion for summary judgment, and did not abuse its discretion in denying Debtors' motion to reconsider. AFFIRMED. Opinion by Joplin, J.; Bell, P.J., and Buettner, J., concur.

116,344 — In Re: The Marriage of Cindy Buckland, Petitioner/Appellant, v. Lance Buckland, Respondent/Appellee. Appeal from the District Court of McIntosh County, Oklahoma. Honorable Jim Pratt, Judge. In this dissolution of marriage proceeding, Petitioner/Appellant, Cindy Buckland (Wife), appeals from the trial court's division of marital property and debts. On the first day of the merits trial, Wife attempted to introduce previously un-produced documents and her testimony regarding the division of certain marital property and debts. The trial court disallowed Wife's testimony, exhibits, and proposed division of assets and debts because Wife failed to comply with the trial court's order compelling production of discovery. After the trial, the trial court adopted Husband's proposed decree of divorce. Wife claims the property division in the decree is inequitable because the court made the division without taking testimony or admitting evidence at trial. Finding no abuse of discretion, we affirm the trial court's decree. AFFIRMED. Opinion by Bell, P.J.; Joplin, J., and Buettner, J., concur.

Friday, September 28, 2018

115,709 — In the Matter of the Adoption of H.R.J.: Joanie Jones, Appellant, Ryan Howard and Stacey Howard, Appellees. Appeal from the District Court of Woodward County, Oklahoma. Honorable Don A. Work, Judge. Opinion by: Larry Joplin, Judge. Mother, Joanie Jones, seeks review of the trial court's decree of adoption entered on December 19, 2016, permitting Appellees, Ryan and Stacey Howard, to adopt H.R.J., born February 10, 2015. Ryan and Stacey Howard filed a petition to adopt H.R.J. on October 7, 2016, after having been previously appointed guardians. Mother left H.R.J. in her cousin's, Stacey Howard, care in September 2015 in anticipation of Jones being placed in Department of Corrections custody; H.R.J. has been in Ryan and Stacey Howard's care since that time. The Howards seek adoption without the Mother's consent due to her alleged a) willful failure to provide support for the child and b) for failing to maintain a significant and positive relationship with the child, having failed to visit the child, see her or communicate with her "for a period of twelve (12) consecutive months out of the last fourteen

(14) months immediately preceding the filing of a petition for adoption of the child." 10 O.S. Supp.2007 §7505-4.2(B)&(H). H.R.J. is an Indian Child, as defined under the terms of the Oklahoma Indian Child Welfare Act and the federal Indian Child Welfare Act. 10 O.S. Supp. 2008 §40.1 et seq.; 25 U.S.C.A. §1901 et seq. (1978). The record does not provide evidence to demonstrate the Howards served Mother notice of the hearing in a timely manner. According to the Mabel Bassett records provided with Mother's petition in error, the adoption petition was delivered to Mother on the morning of December 20, 2016, which was the day after the hearing. "The law presumes that consent of a child's natural parents is necessary before an adoption may be effected." *In the Matter of the Adoption of C.D.M.*, 2001 OK 103, ¶13, 39 P.3d 802, 807; *In re Adoption of M.A.R.*, 2009 OK CIV APP 103, ¶9, 229 P.3d 545, 548. Adoption statutes must be strictly construed. *Matter of Adoption of V.A.J.*, 1983 OK 23, 660 P.2d 139, 141; *Adoption of M.A.R.*, 229 P.3d at 548, 2009 OK CIV APP 103, ¶9. Mother's first proposition of error asserts the notice she received was insufficient to satisfy due process. "Whether an individual's procedural due process rights have been violated is a question of constitutional fact which this Court reviews *de novo. ... De novo* review requires an independent, non-deferential re-examination of another tribunal's legal rulings." *In re Adoption of K.P.M.A.*, 2014 OK 85, ¶12, 341 P.3d 38, 42-43 (citations omitted). In this case, the adoptive parents did not request Mother be provided notice by publication, the request to publish notice was directed at the putative father. At the same time, the record lacks evidence that Mother was timely served at her correctional facility, as the notice does not demonstrate how or when the adoption petition was delivered. The adoptive parents were required to notify Mother of these hearings "not less than fifteen (15) days prior to the hearing[s]." 10 O.S. Supp.1998 §7505-4.1 (C). The record demonstrates the notice Mother received did not comply with the statute. As a result, she was unable to defend herself against the adoptive parents' allegations of her visitation failures and her failure to support H.R.J. and was unable to appear before the court in the final adoption phase. As a member of the Choctaw Nation, Mother was entitled to notice under the provisions of both the federal and state Indian Child Welfare Acts (ICWA), 25 U.S.C.A §1912 (1978) and 10 O.S. Supp.2006 §40.4. The notice as it was written did not comply with the Oklahoma ICWA, even if the notice had been timely given. In effect, the failure to provide notice and failure to provide notice which complied with the ICWA effectively resulted in Mother being purged from the proceedings below. "Error does not require reversal unless examination of the entire record discloses that miscarriage of justice probably has resulted, or that there was a violation of statutory or constitutional rights. *Falletti v. Brown*, 1971 OK 18, ¶ 8, 481 P.2d 744, 746." *Malloy v. Caldwell*, 2011 OK CIV APP 26, ¶18, 251 P.3d 183, 186; *In re Adoption of B.T.S.*, 2016 OK CIV APP 21, ¶23, 371 P.3d 1145, 1153. This record demonstrates a "miscarriage of justice probably has resulted[,]" due to Mother's lack of notice and opportunity to be heard, and Mother's statutory and constitutional rights were violated. For these reasons, the order permitting adoption without the natural Mother's consent and corresponding order of adoption are reversed and this cause is remanded to proceed in full compliance with Mother's statutory and constitutional rights. Mother's remaining propositions of error stem from the issue of the notice which was not provided and her inability to participate in the proceedings because of the due process failures. The orders below permitting the adoption of H.R.J. without Mother's consent and the final decree of adoption are REVERSED and this cause is REMANDED for further proceedings. Opinion by Joplin, J.; Bell, P.J., and Buettner, J., concur.

115,728 — Timmy Elliott, an individual, Elliott Cattle Company, L.L.C., an Oklahoma limited liability company, Plaintiffs/Appellees, v. Jon Brown, an individual, and James Schlect, an individual, Defendants/Appellants, Timmy Elliott, Equine Sports Medicine & Surgery Weatherford Division, P.L.L.C., Absolute Waste Systems, Inc., Michael Fox, D.V.M., Michael McDaniel, Walter Johnson, Jess Harris III, Oscar Glover, Standley Systems, L.L.C., an Oklahoma limited liability company, Third-Party Defendants. Appeal from the District Court of Grady County, Oklahoma. Honorable Michael C. Flanagan, Judge. Defendants/Appellants Jon Brown, an individual, and James Schlect, an individual (collectively, Brown), seek review of the trial court's order granting the motion for partial summary judgment of Plaintiffs/Appellees Timmy Elliott, an individual, and Elliott Cattle Company, L.L.C., an Oklahoma limited liability company (collectively, Elliott), on Elliott's claim to quiet title in certain real property located in Grady County, Oklahoma. In

this appeal, Brown asserts there remain material facts in controversy on his claims for adverse possession, joint venture and accounting, which preclude summary judgment. Brown conceded the purported agreement for the reconveyance of the Bridwell Place by Elliott to Brown was entirely oral. Brown also conceded the parties agreed neither would profit from the transaction, and absent an agreement for the sharing of profits and losses, there was no joint venture. Moreover, Brown did not change his position or suffer any detriment as a result of the alleged oral agreement. Brown conveyed all of his interest in the Bridwell Place to Jath Oil Co. by warranty deed without reservation of any interest. Jath Oil Co. conveyed all of its interest to Elliott by warranty deed without reservation of any interest. The express and unambiguous terms of the deeds are controlling and may not be modified by parole. AFFIRMED. Opinion by Joplin, J.; Bell, P.J., and Buettner, J., concur.

116,386 — Oklahoma Department of Human Services, *ex rel.* Alma D. Cooke, Petitioner/Appellee, v. Shannon W. Daniels, Respondent/Appellant, Respondent/Appellant. Appeal from the District Court of Pittsburg County, Oklahoma. Respondent/Appellant Shannon W. Daniels appeals from a paternity and child support judgment entered after a fifteen year gap in the proceedings. The trial court found Daniels had kept his whereabouts unknown so that Petitioner DHS and Petitioner/Appellee Alma D. Cooke were unable to serve process. The trial court additionally found that Daniels was willfully unemployed and imputed income to him based on his past earning capacity. The decision is not against the clear weight of the evidence or an abuse of discretion and we AFFIRM. Opinion by Buettner, J.; Bell, P.J.; and Joplin, J., concur.

116,933 — David Shawn Fritz, Plaintiff/Appellant, v. The Estate of the Talliaferros; Andrea Locke, Executrix for the Estate; and Kenneth L. Delashaw, Defendants/Appellees. Appeal from the District Court of Love County, Oklahoma. Honorable Wallace Coppedge, Judge. Plaintiff/Appellant David Shawn Fritz (Fritz) seeks review of the trial court's order granting dismissal in favor of Defendants/Appellants Estate of the Taliaferros, Executrix Andrea Locke, and Kenneth L. Delashaw. We agree with the trial court's determination that Fritz's claims are barred by the applicable statutes of limitation and hereby affirm the order of the trial court. AFFIRMED. Opinion by Buettner, J.; Bell, P.J., and Joplin, J., concur.

(Division No. 2)
Wednesday, September 12, 2018

115,925 — In re the Marriage of: Lindsey Diane Hobbs, Petitioner/Appellee, vs. Brian Hobbs, Respondent/Appellant. Appeal from an order of the District Court of Kay County, Hon. Jennifer Brock, Trial Judge, in which Brian Hobbs (Father) appeals a dissolution of marriage decree asserting the trial court erred (1) in determining the value of the marital home, property division and debt allocation, (2) by not conducting a protective order hearing in a timely fashion and in assessing Father the costs, (3) in awarding sole custody to Mother Lindsey Hobbs, and (4) in refusing to allow the minor children to express a preference on visitation and/or custody. We conclude the trial court did not abuse its discretion in valuing the marital home, in its property division or debt allocation, in awarding sole custody to Mother, in refusing to allow the children to express a preference on visitation and/or custody, or, in the interest of judicial economy, in continuing the decision on the final or permanent protective order until the divorce trial. Because a final protective order was never granted against Father, the trial court had no statutory authority to assess costs against him, and this decision is reversed with directions on remand to revise the Amended Decree of Dissolution of Marriage accordingly. All other decisions of the trial court in this divorce action are affirmed. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., and Fischer, J., concur.

Friday, September 14, 2018

115,790 — Kurt Ochsner, Plaintiff/Appellant, v. BNSF Railway Company, a foreign corporation, Defendant/Appellee. Appeal from orders of the District Court of Pawnee County, Hon. Patrick Pickerill, Trial Judge, denying Plaintiff's motion for new trial and motion to vacate the judgment entered on a jury verdict in favor of Defendant. Plaintiff asserts the trial court erred in denying a new trial because the jury foreperson failed to disclose her involvement in prior litigation after the trial court asked during voir dire if she had been involved in a previous lawsuit. The facts and circumstances of this case do not allow us to conclude that Plaintiff was denied a fair trial because the juror

failed to reveal the prior collections case which was in essence a proceeding arising from and related to her divorce. We are not persuaded that the juror misconduct as alleged required a new trial or that the trial court improperly denied Plaintiff's motion for new trial on this issue. Plaintiff also asserts the trial court should have granted a new trial because of error in either giving or refusing certain jury instructions. Plaintiff has not shown in the record that the jury was misled or confused by the giving of certain instructions or the refusal to give a proposed instruction or that the jury would have rendered a different verdict except for the trial court's error. Plaintiff next argues the trial court erred in allowing the admission of evidence of seat belt usage. We conclude that Plaintiff invited error on this issue by introducing seat belt references during the trial. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., and Fischer, J., concur.

116,028 — Coca Cola Enterprises, Inc. and Indemnity Insurance Co. of North America, Petitioners v. Mark Brice Jenkins 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. Michael W. McGivern, Trial Judge. Employer seeks review of an order of a three-judge panel of the Workers' Compensation Court of Existing Claims. The panel, after modification to correct typographical errors, affirmed the trial court's order denying Employer's timeliness and jurisdictional defenses and awarding Claimant medical treatment for his neck. Employer claims: (1) "Claimant failed to timely prosecute his claim;" and (2) "Claimant adjudicated his claim in the State of Texas." On de novo review, we find that Claimant's action was not barred by the limitations provision of 85 O.S. Supp. 2005 § 43(B). The Texas proceedings did not result in a final adjudication of Claimant's rights and, therefore, Employer could not invoke 85 O.S. 2001 § 4 to prevent Claimant from pursuing his Oklahoma claim. SUSTAINED. Opinion from Court of Civil Appeals, Division II, by Fischer, J.; Thornbrugh, C.J., and Wiseman, P.J., concur.

Wednesday, September 19, 2018

116,045 — In re the Marriage of: Patricia Willyard, Petitioner/Appellant, vs. John Willyard, Respondent/Appellee. Appeal from an order of the District Court of Mayes County, Hon. Shawn S. Taylor, Trial Judge, granting John Willyard's petition to vacate the Decree of Dissolution of Marriage pursuant to 12 O.S.2011 § 1031(4), "[f]or fraud, practiced by the successful party, in obtaining a judgment or order." We agree with the trial court that John was a person of unsound mind within the meaning of 12 O.S.2011 § 1038. The trial court concluded John's petition was not time-barred because he was of unsound mind from the time of his stroke in September 2014 until at least April 2015. The Decree was filed on December 11, 2013, and the amended motion or petition to vacate was filed on January 24, 2017. The court found that the applicable date two years prior to John filing the amended motion/petition to vacate was January 24, 2015, which was within two years of the removal of the disability in April 2015. Title 12 O.S.2011 § 1038 gives a party two years after the decree, judgment, or order is filed to vacate or modify the decree, judgment, or order "unless the party entitled thereto be an infant, or a person of unsound mind and then within two (2) years after removal of such disability." Patricia further asserts the trial court erred in its finding of fraud. The Decree presented to the trial court clearly stated that the parties "freely and fairly entered into" an agreement and that the agreement "fully settles, compromises and resolves all issues between" the parties. The court found, "A default judgment is not an agreement nor should it have been presented to the Court as such." Because of the misrepresentation of an agreement and the vast disparity in the property division, especially in light of the value of the marital estate, the trial court's finding of fraud and vacation of the Decree pursuant to 12 O.S.2011 § 1031(4) is warranted. We do, however, conclude it was unnecessary to vacate the entire divorce decree rather than just the property division and "property division alimony." Vacating the entire Decree was not necessary to grant John the relief he was entitled to. We therefore reverse the decision to vacate the granting of a divorce to the parties and restoring Patricia to her former name but affirm the decision to vacate the remainder of the Decree pertaining to property division and the award of "property division alimony." The case is remanded to the trial court for further consideration of the property division between the parties. AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., and Fischer, J., concur.

Thursday, September 27, 2018

116,780 — In the Matter of J.F.: Angela Reyes, Appellant, vs. State of Oklahoma, Appellee. Appeal from an Order of the District Court of Custer County, Hon. Donna L. Dirickson, Trial Judge. Mother appeals from judgment on a jury verdict terminating her parental rights to her biological child. We reject Mother's contention that State did not follow proper procedures in taking Child into protective custody and therefore did not gain jurisdiction over Child or over this proceeding. We also reject her claim that she received ineffective assistance of counsel. On review of the entire record, we find the verdict terminating Mother's parental rights to Child is supported by clear and convincing evidence, and that the judgment on the verdict is in accord with the law. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Thornbrugh, C.J.; Wiseman, P.J., and Fischer, J., concur.

Friday, September 28, 2018

115,443 — Theresa Sanusi, Plaintiff/Appellee, vs. Otis Elevator Company, Defendant/Appellant. Appeal from an order of the District Court of Cleveland County, Hon. Michael D. Tupper, Trial Judge, in which Otis Elevator Company appeals both from a trial court judgment entered on a jury verdict and from an order denying Otis's post-trial motions. Sanusi sought and was awarded $3,000,000 in damages from Otis for injuries she alleged she sustained as a result of Otis's negligence in maintaining an elevator at Norman Regional Hospital. The principal issues on appeal are whether (1) there was sufficient evidence to sustain the jury's finding of negligence, (2) there was reversible error in admitting evidence of Otis's size, financial condition, and post-incident and post-litigation conduct, (3) there was reversible error by Sanusi's counsel in improper bolstering, (4) Sanusi's counsel's closing argument created reversible error, (5) the trial court abused its discretion in denying the motion for new trial, and (6) the trial court erred in denying the motion for judgment notwithstanding the verdict (JNOV). We find there was sufficient competent evidence to support the jury's verdict on the issue of negligence. We conclude Otis's failure to object to evidence and argument at trial precludes this Court from reversing the jury's verdict. We further conclude Otis has failed to show the trial court abused its discretion in denying its motion for new trial, and we find no error in the trial court's denial of Otis's motion for JNOV because it failed to show there was an entire absence of proof on a material issue. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., and Fischer, J., concur.

115,493 — 21st Mortgage Corporation, Plaintiff/Appellee, vs. Vincent Adams and Leslie Adams, Defendants/Appellants. Appeal from Order of the District Court of Tulsa County, Hon. Mary Fitzgerald, Trial Judge. Appellants Vincent and Leslie Adams appeal the district court's order denying their motion to vacate a default judgment in this mortgage foreclosure litigation. Our review of the record on appeal reveals that Appellee did not file a motion for default judgment prior to the court's judgment. Consequently, the judgment failed to comply with District Court Rule 10, 12 O.S. Supp. 2013, ch. 2, app. (Notice of Taking Default Judgment). The June 17, 2016 journal entry of judgment and the district court's September 28, 2016 order denying Appellants' motion to vacate are vacated and the case is remanded for further proceedings. VACATED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division II, by Fischer, J.; Wiseman, P.J., concurs, and Thornbrugh, C.J., concurs in result.

(Division No. 3)
Friday, September 14, 2018

116,804 — Oklahome Real Estate Services, LLC, an Oklahoma Limited Liability Company, Plaintiff/Appellant, vs. James H. Bryan, Defendant/ Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable James B. Croy, Judge. Plaintiff/Appellant Oklahome Real Estate Services, LLC appeals from the denial of its Motion for New Trial after the trial court granted summary judgment in favor of Defendant/Appellee James H. Bryan in this breach of contract action. We hold the trial court erred by denying Oklahome's Motion for New Trial. Material facts, including whether a contract was formed between Oklahome and Bryan, are in dispute. Therefore, Bryan is not entitled to judgment as a matter of law. We REVERSE and REMAND the cause for further proceedings. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

Friday, September 28, 2018

116,804 — Heather Diane Bailey, an individual, Plaintiff/Appellant, vs. The City of Shawnee, Defendant/Appellee. Appeal from the District Court of Pottowatomie County. Honorable Cyn-

thia Ferrell Ashwood, Judge. Plaintiff, Heather Bailey, sued the City of Shawnee City Commissioners and the City of Shawnee (City or Defendants) for false arrest. Defendants filed a motion for summary judgment arguing Bailey could not satisfy a prima facie case for false arrest. One element of the common law tort of false arrest is that a person was arrested without probable cause. The trial court determined the arrest warrant was supported by probable cause and issued its order granting summary judgment in favor of the City. Because there is no material fact or inference in dispute and the City is entitled to summary judgment as a matter of law, the trial court's order is AFFIRMED. Opinion by Goree, V.C.J.; Swinton, P.J., and Mitchell, J., concur.

116,866 — Wilmington National Association, as Successor Trustee, Plaintiff/Appellee, vs. Alvin Harrison Marshall and Lutretia Marshall, Defendants/Appellants, and Cavalry Portfolio Services, LLC; Jefferson Capital Systems, LLC; Occupants, Defendants. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Caroline E. Wall, Judge. Defendants/Appellants Alvin Harrison Marshall and Lutretia Marshall (collectively, Borrowers) appeal from summary judgment granted in favor of Plaintiff/Appellee Wilmington National Association (Mortgagee) in Mortgagee's action to foreclose its mortgage on certain real property owned by Borrowers. There are questions of fact as to whether Lutretia joined her husband Alvin in the execution of the mortgage on their homestead. However, even if Lutretia did not join in the execution of the refinanced mortgage, the purchase money mortgage interest exception to homestead protection applies. Therefore, Mortgagee is entitled to judgment as a matter of law. We also hold there is no genuine issue of material fact as to whether Mortgagee is entitled to enforce the note. We AFFIRM. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

(Division No. 4)
Wednesday, September 12, 2018

115,195 — Metropolitan Property and Casualty Insurance Company and Steve E. Calico, Plaintiffs, v. NIBCO, Inc., Defendant/Appellant, v. Steve Brown Construction, L.L.C., and Preferred Total Mechanical and Plumbing, Inc., Third-Party Defendants/Appellees. Appeal from an Order of the District Court of Tulsa County, Hon. Mary E. Fitzgerald, Trial Judge. In Cause 115,195, the trial court defendant/third-party plaintiff, NIBCO, Inc. (NIBCO) appeals an Order Granting Attorney Fees and Costs Pursuant to 12 O.S. § 940 (Order). This Order awarded attorney fees against NIBCO and in favor of the third-party defendants, Steve Brown Construction, LLC (Brown) and Preferred Total Mechanical and Plumbing, Inc. (Preferred). Brown and Preferred filed counterappeals of the same Order. The plaintiffs, Metropolitan Property and Casualty Insurance Company Metropolitan) and Steve E. Calico (Calico) are not participants in this appeal. The trial court awarded attorney fees and costs to Brown and Preferred. These parties were made third-party defendants by NIBCO. NIBCO is a manufacturer and the defendant in plaintiffs' product liability action. The American Rule regarding attorney fees is strictly applied. The trial court is without authority to award attorney fees absent a contractual basis or a specific statute permitting such award. This Court holds that neither 12 O.S.2011, § 832.1 nor 12 O.S.2011, § 940 constitute a statute specifically authorizing an award of attorney fees here. Therefore, the trial court erred in awarding attorney fees. The trial court's award of costs may be sustained under 12 O.S.2011, § 929. There is no challenge to the components of the costs award. Therefore, the judgments for costs are affirmed. All other arguments for error are moot. All requests for appeal related attorney fees are denied in light of the absence of specific statutory authority in the first instance. The request of Brown is denied also for lack of compliance with Okla.Sup.Ct.R. 1.14, 12 O.S. Supp. 2017, Ch. 15, App. 1. *People's Nat'l Bank v. Attison*, 2016 OK CIV APP 51, ¶ 12, 379 P.3d 1285, 1289. AFFIRMED IN PART, REVERSED IN PART. Opinion On Remand from Court of Civil Appeals, Division IV, BY Rapp, J.; Barnes, P.J., and Goodman, J., concur.

116,245 — Samuel Stevenson, Jr., Petitioner/Appellant, v. Wanda J. Stevenson, Respondent/Appellee. Appeal from an Order of the District Court of Logan County, Hon. Susan C. Worthington, Trial Judge. The petitioner, Samuel Stevenson, Jr. (Husband), appeals the trial court's property division and ground for dissolution of the marriage with the respondent, Wanda J. Stevenson, now Henderson (Wife). Wife did not appeal any aspect of the Decree. In this appeal, Husband maintains that Wife abandoned him. The purpose of this argument appears to be that if true, all property acquired by him after abandonment would not be jointly acquired property. The trial court's denial of

his clam is not against the clear weight of the evidence. Husband argues that the trial court erred regarding classifications of property and certain distributions and marital assets. Husband claims that real estate in Oklahoma and accounts with Tinker Federal Credit Union are his separate property. Husband placed these assets in joint tenancy with Wife, many years before the divorce and the properties remained in that status. Husband has not demonstrated an independent purpose for making these properties jointly owned. In addition, his claim that he did not make the Accounts joint tenant account lacked credibility. Husband did not overcome the rebuttable presumption of joint ownership as a marital asset. Husband claims that property inherited by Wife in North Carolina is joint property. There is no evidence that Wife ever changed the character of that property from separate property to jointly owned property. Husband argues for compensation as a contributor to enhanced value. He failed to demonstrate enhanced value or that he made direct, substantial contribution to any enhanced value. In all respects, the judgment of the trial court is not against the clear weight of the evidence or contrary to law. Therefore the judgment is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Goodman, J., concur.

Friday, September 14, 2018

115,960 — Janet Alice Solinski, Plaintiff/Appellee, v. Thomas Solinski, Defendant/Appellant. Appeal from the District Court of Oklahoma County, Hon. Howard R. Haralson, Trial Judge. In this post-decree proceeding, Thomas Solinski appeals from an order of the trial court denying his motion to correct a post-decree order pertaining to an award of a percentage of Husband's retirement pension to Janet Alice Solinski. Based on our review of the record and applicable law, we conclude the issue raised by Appellant is now moot and, therefore, dismiss the appeal pursuant to Oklahoma Supreme Court Rule 1.6(c)(1), 12 O.S. 2011 & Supp. 2013, ch. 15, app. 1; *House of Realty, Inc. v. City of Midwest City*, 2004 OK 97, ¶ 6, 109 P.3d 314. DISMISSED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., and Goodman, J., concur.

Tuesday, September 18, 2018

115,578 — Norma Jean Schritter, individually and as Trustee of the Norma Jean Schritter Living Trust, Plaintiff/Appellee, v. Ernie Schritter, individually and as Trustee of the Ernie Schritter Living Trust, Defendant/Appellant. Appeal from the District Court of Canadian County, Hon. Paul Hesse, Trial Judge. In the proceedings below, the trial court rescinded a deed in favor of Appellee. On appeal, Appellant argues the rescission of the deed was inappropriate because the conveyance of the property constituted an inter vivos gift. However, we reject Appellant's argument because the deed in this case expressly states the title is transferred for valuable consideration, thus indicating, on the face of the deed, that the transfer was not intended as a gift. Moreover, an inter vivos gift requires donative intent by the donor to make a gift of the property. Here, however, ample evidence was introduced at trial that the deed was executed only so that, in return, Appellant would sell the property and use the proceeds of the sale to purchase new property for the parties to live on. Thus, the trial court's implicit finding that the transfer was not gratuitous is not clearly against the weight of the evidence. Finally, to the extent the transfer is susceptible to being categorized as a gift, it is undisputed that the transfer was conditioned upon an expected state of facts which failed. Consequently, the transfer, even if viewed as a gift, failed as well. For these reasons, we find Appellant's argument challenging the rescission of the deed to be unpersuasive. Further, we conclude the trial court properly denied Appellant's request for a continuance. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., and Goodman, J., concur.

116,971 — Jim Bates, Plaintiff/Appellee, vs. Kim Vass, individually, LPI, Inc., a Tennessee Corporation, and Recdirect, Inc., a Tennessee Corporation, Defendants/ Appellants. Appeal from an Order of the District Court of McClain County, Hon. Leland Shilling, Trial Judge, granting summary judgment to Jim Bates (Bates) on his breach of contract, quantum meruit, and unjust enrichment claims against Kim Vass (Vass), LPI, Inc. (LPI), and Recdirect, Inc. (Recdirect), (collectively, Companies). Bates alleged that Companies breached an agreement to pay for his services storing hot tubs as inventory in a building on his property and to subsequently deliver those hot tubs to Companies' customers. It also alleged that Bates provided valuable services to Companies, that Companies knowingly accepted these benefits, and that they were therefore unjustly enriched. Having thoroughly reviewed the record, we conclude Vass, who acted in the capacity of an apparent agent of LPI and Rec-

direct, entered into an agreement with Bates for delivery services, testified that Bates notified him that Bates had performed services for him "and the shop," that those services were valuable to him, that Bates' service was valuable to Companies, that Bates expected to be compensated for those valuable services, that Vass did not expect Bates to work for free, and therefore it would be unfair for Bates not to be paid. These are the essential elements of a quantum meruit claim. The trial court's grant of summary judgment on Bates' quantum meruit claim was proper, and the order is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

Wednesday, September 19, 2018

116,000 — In the Matter of the Adoption of C.D.B. and H.G.B., minor children, Arlene Broadie, Appellant, v. Laren Shelton (formerly known as Broadie), Appellee. Appeal from an Order of the District Court of Beaver County, Hon. Ryan Reddick, Trial Judge, denying Arlene Broadie's (Grandmother) motion to proceed with the adoption of CDB and HGB without the consent of natural mother, Lauren Shelton (Mother). Grandmother contends the trial court erred in failing to find Mother's consent was unnecessary pursuant to 10 O.S.2011, § 7505-4.2(I). From our review of the record, we find Grandmother presented clear and convincing evidence that CDB was physically and sexually abused by Mother and that she suffered severe harm as a result of it. Therefore, the trial court erred in failing to find Mother's consent to the adoption was unnecessary. In addition to the statutory requirements contained in Title 10, the Oklahoma Supreme Court has also required that the adoption without consent and termination of parental rights be in the best interests of the minor children. Therefore, the order is reversed and the matter remanded to the trial court for a determination of whether the adoption without consent of the natural parent would be in the minor children's best interest. REVERSED AND REMANDED WITH DIRECTIONS. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

Friday, September 21, 2018

116,691 — In the Matter of A.B. and A.B., Deprived Children, Randall Bivins, Appellant, vs. State of Oklahoma, Appellee. Appeal from an order of the District Court of Tulsa County, Hon. Rodney Sparkman, Trial Judge, terminating Randall Bivins' (Father) parental rights upon a jury verdict in his minor children, AB and AB. Father contends the termination of his parental rights was not supported by clear and convincing evidence or in the best interest of the minor children. This Court, after record review, finds that the quality of the evidence presented by State meets the clear and convincing standard. It is for the jury to decide whether it is persuaded by the evidence. Therefore, we find that State presented clear and convincing evidence to show that termination was proper under § 1-4-904(B)(14), and clear and convincing evidence that such termination is in the minor children's best interest. Father further contends State failed to prove beyond a reasonable doubt that the minor children were likely to suffer serious emotional or physical damage if returned to Father's care, as required by 25 U.S.C.A. § 1912(f). From our review of the record, we conclude State met its burden. We also reject Father's assertion he was denied effective assistance of counsel at trial. Therefore, the trial court's order terminating Father's parental rights upon a jury verdict is affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

Tuesday, September 25, 2018

116,695 — In the Matter of the Estate of Gordon Henry Skinner, Deceased. Michael Skinner, Appellant v. Katherine Elizabeth Roth-Skinner, Appellee. This is an appeal from an Order denying admission to probate of the proposed Last Will of Gordon Henry Skinner, deceased (Decedent). The issue in this case is whether Decedent's 1986 Will is irreconcilably ambiguous based upon examination of the entire document. The 1986 Will is irreconcilably ambiguous. Therefore, the probate court did not err by denying admission to probate of the1986 Will. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Fischer, J (sitting by designation), concur.

Tuesday, September 25, 2018

117,029 — Donett Hendryx Holmes, Personal Representative for the Estate of Charles Holmes, Plaintiff/Appellant, v. Theodocia L. Pollard, Defendant, and Metropolitan Property and Casualty Insurance Company, Intervenor/Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Aletia H. Timmons, Trial Judge. The plaintiff, Donett Hendryx Holmes (PR), Personal Representative for the Estate of Charles Holmes (Holmes), appeals

an Order granting partial summary judgment to the intervenor, Metropolitan Property and Casualty Insurance Company (Metropolitan). In accelerated appeals, the petition-in-error must follow Form 5 of the Supreme Court Rules. The Appellate Rules prescribe the content of the petition-in-error in Form 5. Although Form 5 provides wide leeway to the drafter, Rule 1.36 does not. The petition-in-error must be consistent with Rule 1.36. Rule 1.36 does not authorize briefs absent permission. Review of PR's Exhibit C to the amended petition-in-error discloses that paragraph numbers 1-11, inclusive, include arguments and authorities which effectively brief the issues. Therefore, the motion to strike that part of Exhibit C is granted and the offending parts of Exhibit C are stricken. An insurer's bad faith may result from a variety of courses of conduct or a single course of conduct. Thus, bad faith has been in cases involving claim evaluation, claim payment offers, claim underpayment, and intervention in the insured's litigation. Metropolitan's duty to its insured, Holmes, extended to its responsibility to reasonably evaluate the claim. The Record in this case raises factual questions regarding whether Metropolitan breached this duty whether intentionally to evade the UM claim or simply by unreasonably disregarding applicable and available information pertinent to the evaluation of Holmes' claim. Therefore, the trial court's judgment granting summary judgment as to the claim of bad faith is reversed. The summary judgment as to the claim for punitive damages is affirmed. This reversal is without prejudice to any defenses on the merits, including the Statute of Limitations. REVERSED, IN PART, AFFIRMED, IN PART, AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Goodman, J., concurs, and Barnes, P.J., concurs in part and dissents in part.

Wednesday, September 26, 2018

115,613 — Billie Gail Byrd, now Seymour, Plaintiff/Appellee, v. James P. Byrd, Defendant/Appellant. Appeal from an Order of the District Court of Kay County, Hon. David R. Bandy, Trial Judge. James P. Byrd, (Byrd) appeals the trial court's Journal Entry of Judgment and Order Granting Attorney Fees and Judgments entered on remand in this post-divorce action. After a review of the appellate record, this Court finds it is unable to ascertain how the trial court arrived at the judgment amount for past-due child support. Thus, the trial court's judgment on remand for past-due child support is remanded to the trial court for clarification of the amount of child support owed and calculated based on *Roca v. Roca,* 2014 OK 55, 337 P.3d 97. On remand, the trial court is instructed to clarify its judgment for past due child support by providing a detailed explanation of how it arrived at the amount of past-due child support sufficient to allow meaningful appellate review. In all other respects, the trial court's Journal Entry of Judgment and Order Granting Attorney Fees and Judgments filed on November 8, 2016, is affirmed. AFFIRMED IN PART AND REMANDED IN PART WITH INSTRUCTIONS. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Goodman, J., concur.

ORDERS DENYING REHEARING
(Division No. 1)
Tuesday, September 18, 2018

116,179 — Thomas A. Quinn, Plaintiff/Appellant, vs. Estate of Aubrey K. McClendon, Defendant/Appellee. Appellant's Petition for Rehearing field September 5th, 2018, is *DENIED*.

Thursday, September 13, 2018

115,629 — Waveland Drilling Partners III-B, LP, Waveland Resource Partners II, LP, Waveland Drilling Partners 2011-B, LP, and Waveland Drilling Partners III-A, LP, Plaintiffs/Appellees, vs. New Dominion, LLC, Defendant/Appellant. Appellant's Petition for Rehearing and Brief in Support, filed August 9, 2018, is *DENIED*.

(Division No. 4)
Monday, October 1, 2018

116,088 — In the Matter of the Estate of Michael S. Phillips, Deceased, Problem Solved Plumbing, LLC and Guarantee Insurance, Appellants, vs. Denise Martinez, Appellee. Appellant's Petition for Rehearing is hereby *DENIED*.

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