THE OKLAHOMA BAR
Journal
Volume 90 — No. 16 — 8/17/2019

# Court Issue

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### PRESENTERS:

- **Sean Dooley,** *Senior U.S. Probation Officer Sentencing Guidelines Specialist*
- **Marianne Blair,** *Professor Emeritus, Tulsa University College of Law*
- **Melissa Lujan,** *Melissa Lujan Law*
- **Lambert Dunn,** *Lambert Dunn and Associates*

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THE OKLAHOMA BAR
# Journal

Volume 90 – No. 16 – 8/17//2019



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# Notice of Judicial Vacancy

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

**District Judge**
**Seventh Judicial District, Office 12 • Oklahoma County**

This vacancy is due to the untimely passing of the Honorable Lisa Davis on April 14, 2019.

**To be appointed to the office of District Judge, Office 12, Seventh Judicial District, one must be a registered voter of Oklahoma County Electoral Division Four at the time (s) he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, such appointee shall have had a minimum of four years experience as a licensed practicing attorney, or as a judge of a court of record, or both, within the State of Oklahoma.**

Application forms can be obtained on line at www.oscn.net, click on Programs, then Judicial Nominating Commission or by contacting Tammy Reaves at (405) 556-9300. Applications must be submitted to the Chairman of the Commission at the address below **no later than 5:00 p.m., Friday, September 20, 2019. If applications are mailed, they must be postmarked by midnight, September 20, 2019.**

Mike Mordy, Chairman
Oklahoma Judicial Nominating Commission
Administrative Office of the Courts
2100 N. Lincoln Blvd., Suite 3
Oklahoma City, Oklahoma 73105

OKLAHOMA BAR ASSOCIATION

# table of contents

Aug. 17, 2019 • Vol. 90 • No. 16

page

## Index to Opinions of Court of Criminal Appeals



## Index to Opinions of Court of Civil Appeals



# Notice of Judicial Vacancy

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

**Judge for Oklahoma Court of Civil Appeals**
**District One, Office One**

This vacancy is created by the retirement of the Honorable Jerry L. Goodman effective July 31, 2019.

**To be appointed to the office of Judge of the Court of Civil Appeals, one must be a legal resident of the respective district at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, such appointees shall have had a minimum of four years experience as a licensed practicing attorney, or as a judge of a court of record, or both within the State of Oklahoma.**

Application forms can be obtained on line at www.oscn.net, click on Programs, then Judicial Nominating Commission or by contacting Tammy Reaves at (405) 556-9300. Applications must be submitted to the Chairman of the Commission at the address below **no later than 5:00 p.m., Friday, September 20, 2019. If applications are mailed, they must be postmarked by midnight, September 20, 2019**.

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**2019 OK CR 17**

**DANIEL K. HOLTZCLAW, Appellant, vs. THE STATE OF OKLAHOMA, Appellee.**

**No. F-2016-62. August 1, 2019**

**OPINION**

**KUEHN, VICE PRESIDING JUDGE:**

¶1 Daniel K. Holtzclaw was tried by jury and convicted of Sexual Battery in violation of 21 O.S.Supp.2013, § 1123(B) (Counts 1, 13, 14, 30, 33 and 34); Procuring Lewd Exhibition in violation of 21 O.S.2011, § 1021 (Counts 4, 5, and 15); Forcible Oral Sodomy in violation of 21 O.S. 2011, § 888 (Counts 8, 10, 16, and 27); Rape in the First Degree in violation of 21 O.S.2011, §§ 1111, 1114 (Counts 11, 28, 29 and 32); and Rape in the Second Degree in violation of 21 O.S.2011, §§ 1111, 1114 (Count 31), in the District Court of Oklahoma County, Case No. CF-2014-5869.[1] In accordance with the jury's recommendation the Honorable Timothy R. Henderson sentenced Appellant to eight (8) years imprisonment on each of Counts 1, 13, 14, 30, 33 and 34; five (5) years imprisonment on each of Counts 4, 5, and 15; twenty (20) years imprisonment (Count 8); sixteen (16) years imprisonment on each of Counts 10, 16, and 27; thirty (30) years imprisonment on each of Counts 11, 28, 29, and 32; and twelve (12) years imprisonment (Count 31), all to run consecutively. Appellant must serve 85% of his sentences on Counts 8, 10, 11, 16, 27, 28, 29, and 32 before becoming eligible for parole consideration. 21 O.S.Supp.2015, § 13.1. Appellant appeals from these convictions and sentences, and raises seven propositions of error in support of his appeal.

**Facts**

¶2 From at least February 2014 to June 2014 Holtzclaw, an Oklahoma City police officer, sexually assaulted women in northeast Oklahoma City. An investigation into Appellant's activities began in earnest in late June of 2014. T.M. had reported in late May that a police officer sexually assaulted her on May 8, 2014. While that claim was being investigated, J.L. reported on June 18, 2014 that Appellant sexually assaulted her during a traffic stop early that morning. This led to a larger investigation. Officers used police department records, including warrants check logs, computer reports, computer dispatch records, and the automatic vehicle locator in Appellant's patrol car to identify women with whom Appellant had contact, and to confirm the time frame and locations of the crimes. They also used surveillance video from local businesses.

¶3 Eventually Appellant was charged with assaulting thirteen women. Jurors acquitted him of all charges involving five women: C.R., F.M., T.M., K.L., and S.H. He was acquitted of some charges and convicted of others for each of two women: T.B. (convicted of three, acquitted of two) and R.G. (convicted of one, acquitted of one). He was convicted of all charges concerning six women: S.E. (four counts), C.J. (two counts), J.L. (two counts), S.B. (two counts), R.C. (one count), and A.G. (three counts).

¶4 Taken together, the women's stories form a pattern wherein Appellant would conduct a traffic stop, or stop the victims while they were walking. While discussing the reason for the stop, he would ask whether the women had any drugs or "anything on them". He would then demand that they show him their breasts or vaginas, often asking how he could be sure the women weren't hiding something in their bra or pants or otherwise referring to the demand as a search. With several victims he touched their breasts or vaginas; he also demanded fellatio from some victims. In addition, he was convicted of five counts of first or second degree rape, and acquitted of three other rape claims. Appellant's threats included taking each of his victims to jail or detox, arresting her, charging her with a crime or promising that if she did as he demanded, he could make warrants or criminal charges go away, or otherwise help her situation. Most of the victims had previous recent contacts with law enforcement; some had outstanding warrants, some had drug paraphernalia on them, some were under the influence of drugs or alcohol when stopped. Sometimes he offered the victims a ride. Most of the crimes occurred late at night or in the early morning hours. The

women ranged in age from seventeen to in their fifties.

¶5 In his defense, Appellant basically asked jurors to accept as true all the information that victims gave about the stops that was amply supported by police records and documents, but to determine that the same victims were lying about the details of the sexual assaults.

**Proposition I**

¶6 In Proposition I Appellant claims there was insufficient evidence to convict him of procuring lewd exhibition, rape, oral sodomy, or sexual battery. He argues there was no evidence that the alleged "procuring lewd exhibition" occurred in public view; nor was there any evidence that the alleged rape and oral sodomy counts were accomplished by means of the use or threat of force or violence; and the evidence supporting the sexual battery counts was insufficient. We take each of these claims in turn.

¶7 Appellant was convicted on three counts of procuring lewd exhibition.[2] For each count, the State had to show that Appellant willfully procured the victim to expose herself *to public view or to the view of any number of persons,* for the sexual stimulation of the viewer. 21 O.S. 2011, § 1021(A)(2) (emphasis added). Jurors were correctly instructed on the elements of the crime. The victims in these counts each testified that Appellant demanded they expose their breasts and vagina to him. Moreover, J.L. testified that, after that exposure, Appellant took his penis from his pants, clearly aroused. Taken as a whole, sufficient evidence supports these charges.

¶8 Appellant's primary argument is concerned with the italicized language above. He argues that the State did not show Appellant compelled the victims to expose themselves to public view. Appellant admits that the plain language of the statute also includes exposure *to the view of any number of persons*. 21 O.S.2011, § 1021(A)(2). On its face, this language would appear to include exposure to one person – in this case, the Appellant. He argues that the statute should not be so interpreted. He says that "common sense" requires that the person viewing the exposure must be different from the person procuring it. That is, he argues that the crime necessarily requires three people: one to procure the exposure, one to expose herself, and one to see it. He offers no law to support this interpretation. Nor does he convincingly explain why common sense would suggest the Legislature intended to introduce a third person to the equation; his best, unstated, argument is that, under this interpretation, since there were no third persons present Appellant would win.

¶9 "In interpreting a statute, we look to its purpose, the evil to be remedied, and the consequences of any particular interpretation." *Rousch v. State*, 2017 OK CR 7, ¶ 5, 394 P.3d 1281, 1283. In Section 1021, the Legislature prohibits lewd exhibition, by both the person exhibiting and anyone who encourages or assists them to do so. Appellant suggests that the necessity of a third person is implicit in the language, because, since any person participating in a lewd exhibition would necessarily observe it, without a third person there would be no reason to refer to any type of "view" at all. On the contrary; this is not how statutory interpretation works. In order for the Legislature to protect the public from lewd exposure – the apparent purpose of this statute – the language must refer specifically to some type of public or personal view. Even assuming Appellant were correct in stating that one who procured or participated in a lewd exhibition must see it (an assumption we do not make), without specific language including public or personal view as an element, the fact that they or anyone else could see the exhibition would simply not be a crime. That interpretation cannot be what the Legislature intended.

¶10 As the State notes, other courts have interpreted similar language. The New Mexico Court of Appeals found that "public view" meant the crime happened in a place "accessible or visible to the general public," *State v. Artrip*, 112 N.M. 87, ¶ 4, 811 P.2d 585, 586 (N.M.Ct.App. 1991). The U.S. Court of Appeals for the Armed Forces found that, for indecent exposure, the phrase "public view" focuses on the person who views the indecent exposure, not the nature of the place as accessible to the public; where the crime is willful and a member of the public views the crime, the requirement is satisfied. *U.S. v Graham*, 56 M.J. 266, 269-70 (C.A.A.F. 2002). Even though these are indecent exposure statutes, the breadth of the interpretation is instructive. In addition, Appellant mistakenly compares the case to this Court's finding in an older case interpreting the old statute of outraging public decency, charged as a sexual assault on a public street. *Hulsey v. State*, 86 Okla.Crim. 273, 192 P.2d 301

(Ok.Cr.1948). There, because the crime required an act which was committed openly and affected the public, the jury should have been instructed to find whether the offense was committed "open to the view of the public in such a manner that it offended public decency." *Id.*, 192 P.2d at 306. This holding has no bearing on the Appellant's claim. The statute at issue in Hulsey did not refer to "public view" (or public place, for that matter), and it specifically required a finding that members of the public should be able to see and be outraged by the crime. That is not one of the elements of the crime of lewd exhibition, and the discussion in *Hulsey* is unhelpful.

¶11 Appellant initially notes that the Information states that, in committing the crimes, he acted under his authority as a police officer. Appellant correctly points out that this is not an element of the crime. However, he fails to show how the addition of this language to the Information has any effect on the sufficiency of the evidence. Appellant later returns to this language, arguing that he cannot be convicted of this crime precisely because it was alleged that he acted under authority of his badge. In § 1021.1, the Legislature provides that § 1021 does not apply where the proscribed conduct "occurs in the course of law enforcement activities." 21 O.S.2011, § 1021.1. Appellant admits that he was on duty or in uniform, in a patrol car, and "engaged in a *Terry* stop" when the crimes occurred. He argues that the statute might be designed to protect officers like him, who are merely searching detainees. He is mistaken. The statute protects persons connected with law enforcement who engage in prohibited sexual activity specifically connected with a law enforcement activity, such as a sting or undercover operation. The whole point in including the "on duty" language in the Information is that Appellant used his position to abuse the public trust afforded police officers – that is, that this made his actions worse. To construe the statute as Appellant suggests would produce the absurd result of shielding from prosecution any law enforcement officer who commits sex crimes prohibited under this statute while on duty. We will not presume the Legislature intended absurd consequences. *Head v. State*, 2006 OK CR 44 ¶ 13, 146 P.3d 1141, 1145. Taking the evidence in the light most favorable to the State, any rational juror could find beyond a reasonable doubt that Appellant committed the crimes of procuring lewd exhibition. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559.

¶12 Turning to the second set of charges, Appellant was convicted on four counts of first degree rape.[3] For each count, the State had to show that Appellant had sexual intercourse with a person not his spouse, using or threatening force or violence, where the defendant had the apparent power to carry out the threat. 21 O.S.2011, §§ 1111(A)(3), 1114(A)(5). Jurors were correctly instructed on the elements of the crime. Appellant claims the State failed to show any evidence that he either used or threatened force or violence. Appellant's position as a police officer put him in a position to make a type of threat not usually open to sexual perpetrators: the threat of incarceration. The victims in these counts each testified that they had warrants or were under the influence when they were stopped, and that Appellant presented them explicitly or implicitly with the choice of sex with him, or going either to detox or jail.

¶13 Appellant claims this is not enough, because the use or threat of force refers exclusively to physical force. On the contrary, the Legislature has specifically defined force:

> In all instances of sexual assault including, but not limited to, rape, rape by instrumentation and forcible sodomy where force is alleged, the term "force" shall mean any force, no matter how slight, necessary to accomplish the act without the consent of the victim. The force necessary to constitute an element need not be actual physical force since fear, fright or coercion may take the place of actual physical force.

21 O.S.Supp.2016, § 111. While this definition was adopted by statute in 2016, it mirrors the definition first approved by this Court in 1987, and consistently used since then. *Lawson v. State*, 1987 OK CR 140, ¶¶ 11-12, 739 P.2d 1006, 1008. The testimony overwhelmingly showed the victims were frightened, coerced by threats of incarceration or detention, and did not consent to sexual intercourse with Appellant. Taking the evidence in the light most favorable to the State, any rational trier of fact could find beyond a reasonable doubt that Appellant committed first degree rape. *Easlick*, 2004 OK CR 21, ¶ 15, 90 P.3d at 559.

¶14 Appellant was convicted of four counts of forcible oral sodomy.[4] The State had to show that Appellant penetrated the victims' mouths with his penis, using or threatening force or violence with the apparent power of its execu-

tion, or that he committed the acts while he was an Oklahoma municipal employee, and upon a person under the legal custody, supervision or authority of an Oklahoma municipality. 21 O.S.2011, § 888(B)(3), (4).

¶15 Appellant first complains that the evidence failed to show he used force or violence in the commission of the acts. As we discuss above, in connection with the rape charges, the definition of "force" includes fear, fright or coercion. 21 O.S.Supp.2016, § 111; *Lawson*, 1987 OK CR 140, ¶¶ 11-12, 739 P.2d at 1008. Each victim testified that Appellant stopped her and required her to commit fellatio, against her will and without her consent, in lieu of arrest or detention at a detox center. Appellant earlier argued that he could not be guilty of procuring lewd exhibition since each of those acts occurred while, acting as an Oklahoma City police officer, he was attempting to search each victim. Here, where one element of the crime is that the victim is under the legal custody, supervision or authority of an Oklahoma City police officer, he argues that none of the victims were in his custody. He can hardly argue that they were not detained – since he relies on that for his previous argument – so instead he claims that the statute does not include routine detention. He offers no law to support this argument, merely claiming "it is not reasonably likely" that is what the Legislature meant. A person is seized by authorities when, under the totality of the circumstances, a reasonable person in that situation would not believe she was free to leave. *Skelly v. State,* 1994 OK CR 55, ¶ 12, 880 P.2d 401, 405. The victims in these counts each testified that Appellant detained them, and demanded oral gratification during the course of that detention. No reasonable person under the circumstances would have felt free to leave. There is no question but that the victims were under Appellant's supervision and authority when he committed these acts. Taking the evidence in the light most favorable to the State, any rational trier of fact could find beyond a reasonable doubt that Appellant committed forcible oral sodomy. *Easlick*, 2004 OK CR 21, ¶ 15, 90 P.3d at 559.

¶16 Appellant also claims that the evidence did not support his forcible oral sodomy conviction for Count 8, against R.G. R.G. testified that Appellant stopped her, drove her home, followed her into her bedroom, told her "[T]his is better than county jail," and put his penis in her mouth. This evidence is sufficient to support the jury's determination of guilt. *Easlick,* 2004 OK CR 21, ¶ 15, 90 P.3d at 559. Appellant argues, essentially, that the jury couldn't have meant it because jurors acquitted him of first degree rape charges against R.G. He implies that the verdicts were inconsistent. Each verdict stands on its own, and we will not disturb a verdict supported by substantial evidence. *Smith v. State,* 2013 OK CR 14, ¶ 64, 306 P.3d 557, 578; *Gray v. State,* 1982 OK CR 137, ¶ 20, 650 P.2d 880, 884; *U.S. v. Powell*, 469 U.S. 57, 67-68, 105 S.Ct 471, 478, 83 L.Ed.2d 461 (1984); *Dunn v. U.S.*, 284 U.S. 390, 393, 52 S.Ct. 189, 190, 76 L.Ed. 356 (1932).

¶17 Appellant was convicted of six counts of sexual battery.[5] The State had to show that Appellant intentionally touched, felt or mauled the body of a person over the age of sixteen, in a lewd and lascivious manner, either without her consent or that he committed those acts while employed by an Oklahoma municipality and the victim was under the legal custody, supervision or authority of an Oklahoma municipality. 21 O.S.Supp.2013, § 1123(B)(1), (2). Specifically, Appellant, while acting as a police officer, stopped each woman and demanded to touch her breasts, vagina or both during the course of each stop. The circumstances of each encounter, as related by the victims, supports a conclusion that each individual touching was in a lewd and lascivious manner. Appellant, returning to his earlier argument, claims he was merely engaged in searching each woman pursuant to detention, which he argues was according to department policy. Evidence showed that while OKCPD policy allows male officers to search female detainees, justification for such searches is strictly limited and standard policy is for a female officer to be called to do any search. Evidence also showed the victims and Appellant were aware of this policy, and Appellant had followed it on at least one other occasion. While Appellant was certainly acting as a municipal employee, and the victims were under his supervision and authority, the record does not support his claim that he was merely carrying out official duties. Taking the evidence in the light most favorable to the State, any rational trier of fact could find beyond a reasonable doubt that Appellant committed sexual battery. *Easlick*, 2004 OK CR 21, ¶ 15, 90 P.3d at 559.

¶18 In summary, sufficient evidence supported Appellant's convictions. Proposition I is denied.

**Proposition II**

¶19 In Proposition II Appellant claims his cases – comprising thirty-six allegations involving thirteen victims – should not have been joined into a single trial. Appellant admits that, when a defendant commits multiple, similar crimes, they may be joined and charged in one Information. 22 O.S.2011, § 436; *Glass v. State,* 1985 OK CR 65, ¶ 8, 701 P.2d 765, 768. The transactions must refer to similar offenses, occurring over a relatively short period of time in approximately the same place, with overlapping proof showing a common scheme or plan. *Collins v. State*, 2009 OK CR 32, ¶ 14, 223 P.3d 1014, 1017; *Glass,* 1985 OK CR 65, ¶ 9, 701 P.2d at 768. "'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." *Gilson v. State*, 2000 OK CR 14, ¶ 46, 8 P.3d 883, 904 (citations omitted). The transactions must overlap because joinder is essentially designed to promote judicial economy by trying similar crimes together, conserving judicial resources. *Smith v. State,* 2007 OK CR 16, ¶ 28, 157 P.3d 1155, 1166. Appellant failed to object to joinder of the offenses below and we review for plain error. *Collins,* 2009 OK CR 32, ¶ 12, 223 P.3d at 1017. "Plain error is an actual error, that is plain or obvious, and that affects a defendant's substantial rights, affecting the outcome of the trial." *Thompson v. State*, 2018 OK CR 5, ¶ 7, 419 P.3d 261, 263.

¶20 We find no error. Appellant was charged with similar crimes, all occurring in a particular section of northeast Oklahoma City, over a span of just over six months. Appellant admits we have held that a "relatively short period of time" includes crimes committed within four to eight months of one another. *Gilson,* 2000 OK CR 14, ¶¶ 47-48, 8 P.3d at 904-05; *Collins,* 2009 OK CR 32, ¶ 15, 223 P.3d at 1017. He also admits we have held proximity in location may include crimes committed as much as five miles apart, *Pack v. State*, 1991 OK CR 109, ¶ 8, 819 P.2d 280, 283, or within the same county, *Middaugh v. State,* 1988 OK CR 295, ¶¶ 9-10, 767 P.2d 432, 435. Here, all the crimes occurred within the city limits in northeast Oklahoma City, and are thus in the same approximate location. *Smith*, 2007 OK CR 16, ¶ 25, 157 P.3d at 1165. Essentially, he argues that, despite this, the crimes are too far apart in time and location to be joined.

¶21 Appellant argues that joining multiple counts involving thirteen victims prejudiced him by allowing the State to "artificially strengthen its case". He argues that, under the definition of "common scheme or plan" used in other crimes cases, the proof of the crimes here does not overlap to show a common scheme or plan. However, Appellant admits we have rejected use of the other crimes definition in deciding joinder issues. *Smith*, 2007 OK CR 16, ¶¶ 28-29, 157 P.3d at 1166. Offenses may be joined for trial even though they could not be admissible as evidence of other crimes, if they otherwise meet the requirements for joinder. *Id.*, ¶ 29 n.5, 157 P.3d at 1166 n.5. The evidence against Appellant shows a pattern of sexual offenses committed in the same way, against similar victims, under similar circumstances. Thus the proof related to each offense overlaps. *Id.*, ¶ 31, 157 P.3d at 1167. The relationship or connection among the crimes in question was such that proof of one crime was relevant to prove the other charges. *Collins,* 2009 OK CR 32, ¶ 19, 223 P.3d at 1018.

¶22 Appellant notes that, if either the State or a defendant is prejudiced by joinder of offenses, the counts should be tried separately. 22 O.S.2011, § 439. However, a defendant must show that the joinder denied him a fair trial. *Mitchell v. State*, 2011 OK CR 26, ¶ 24, 270 P.3d 160, 171, overruled on other grounds by *Nicholson v. State,* 2018 OK CR 10, 421 P.3d 890. The record does not support Appellant's claim that he was prejudiced by joinder of the separate cases against him. He claims that the victims' testimony was largely unsupported by other evidence, arguing simply that they should not have been believed. We found in Proposition I that sufficient evidence supports Appellant's convictions; in addition, the testimony was in fact supported by police department records of Appellant's movements during the times in question. Although, as Appellant argues, the prosecutors repeatedly referred to the victims' testimony as a whole, jurors did not find Appellant guilty of offenses against every victim. In fact, jurors acquitted him entirely of charges against five victims, and in part of charges against two other victims. It is clear that jurors carefully and separately considered the evidence in each count, and pertaining to each victim. There was no plain error in the joinder of offenses, and Proposition II is denied.

**Proposition III**

¶23 In Proposition III Appellant claims that a "circus atmosphere" throughout the trial deprived him of a fundamentally fair trial. Appellant had the right to be tried by a jury free from outside influences which could affect the proceeding's fairness. *Harris v. State,* 2004 OK CR 1, ¶ 9, 84 P.3d 731, 740; *Sheppard v. Maxwell*, 384 U.S. 333, 363, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600 (1966). Appellant did not request either a change of venue or a change of courtroom. After an incident on the tenth day of trial, Appellant asked that the jury be sequestered throughout the remainder of the trial. The trial court denied that motion, and Appellant makes no argument contesting that decision on appeal. Later, jurors were sequestered from the time the case was submitted to them until a verdict was reached. Sixty-six times throughout the trial, the trial court admonished jurors not to talk about the case or let anyone talk to them about it; to tell the bailiff if anybody approached them about the case; not to watch or read any news reports; and generally that all jurors' information about the case should come from the courtroom.

¶24 Appellant does not complain about pretrial publicity, admitting it was "not particularly substantial." He argues instead that publicity during the trial increased dramatically.[6] Appellant lists several incidents which occurred outside the courtroom during the trial, and which he says created a circus atmosphere. In the first, a bystander approached a juror in a different case, on a different floor of the courthouse, to comment about Appellant's case. There is nothing in the record to suggest in any way that Appellant was prejudiced by this incident, nor does Appellant make any argument suggesting how it might have affected his trial. He includes it as part of his claim that, in the aggregate, the circumstances in the courthouse denied him a fair trial. However, since there is no evidence that Appellant's jury had any idea this happened, it cannot usefully be part of an aggregate argument. This incident cannot have impermissibly affected jurors.

¶25 On the third day of trial, a spectator tried to take pictures in the courtroom. The trial court held an *in camera* hearing, questioned the man, and admonished him to leave his phone off while in the courtroom. Nothing in the record suggests jurors were affected in any way by this incident.

¶26 Before the jury was brought in on the fifth day of trial, defense counsel raised his concern about a news story which had aired the previous night, discussing the racial makeup of the jury. The story included interviews with persons not connected with the trial, some of which were conducted at the courthouse in front of the courtroom. Counsel stated he believed this was an underhanded threat to the jury, that it was jeopardizing the trial, and that it was out of the trial court's control. Counsel noted the extra-court behavior seemed to escalate as the trial continued. Counsel specifically stated he was not asking that jurors be sequestered; he said that he did not have any reason to believe Appellant's trial was anything other than fair and impartial, but he worried that there was "a storm brewing" and wanted to prevent any incidents. Instead, he asked to *voir dire* jurors as to potential media contacts and exposure, and for an admonishment over the long weekend for jurors to avoid social media. The court stated it would specifically emphasize social media issues in its standard admonition to jurors. The trial court arranged to station a deputy in the hallway during every break, to shield jurors from any unauthorized contact. At the time of the discussion, both parties and the trial court agreed that, as of that time, there was no indication that jurors had been affected by the media presence or interviews conducted outside the courtroom. Nothing in the subsequent record suggests that jurors were adversely affected by either media presence or publicity.

¶27 At the close of the sixth day of trial, defense counsel noted for the record that "it's getting really crazy out there in the hallway," especially early in the morning. He stated he did not know what remedy there might be and did not ask the trial court to take any action. With both parties' agreement, the trial court ordered a deputy to cordon off the media, in an area away from the juror stairwell and elevators, to protect jurors from being seen by cameras on their breaks.

¶28 As the seventh day of trial began, defense counsel mentioned a comment to a television news story on the station's Facebook page, in which a person identified by name said he knew a juror and that the juror had an opinion and would likely vote guilty. At Appellant's request, and with the State's full agreement, jurors were questioned individually and each denied knowing anyone with the commenter's

name. With this established, the trial continued without objection. There is no indication the incident had any other effect.

¶29 On the eighth day of trial, a Friday, victim T.B. appeared in court for her second day of testimony possibly under the influence of benzodiazepine and PCP, as well as Seroquel. The parties delayed her testimony until after lunch, and discussed whether T.B. could testify that afternoon; she was detained during the lunch break after she created a disturbance in the hallway. The State suggested that she could be detained over the weekend and resume her testimony the following Monday. The trial court preferred to detain T.B. over the weekend, make sure she was sober, and have her testify the following Monday. Defense counsel opted to have her testify that afternoon, noting it might go to her credibility. Defense counsel stated, "I would just as soon put her on the stand now and have her finish her testimony." First, T.B.'s testimony does not constitute an outside influence that might improperly affect jurors. Second, Appellant fails to show either how he was prejudiced if she testified under the influence, or how that contributed to an unfair trial. He argues that his agreement to her testimony was a Hobson's choice. The record reflects that it was a strategic decision. After T.B.'s testimony, the trial court made a record that although she was sarcastic, she was coherent, seemed to comprehend the questions, and was able to remember what she wanted to remember and answer what she wanted to answer. The trial court found that T.B. was not inebriated on the stand and was a competent witness. Jurors acquitted Appellant of two of the charged crimes against T.B. Nothing in the record shows how her testimony, or her condition, improperly influenced jurors.

¶30 The record shows that throughout the morning of the tenth day of trial people in the courtroom could clearly hear protesters outside the courthouse chanting, "Give him life" and other things. Defense counsel asked that the protesters be removed, but the trial court noted the protesters had a permit. Appellant admits the trial court admonished jurors to disregard the chanting as irrelevant to the courtroom proceedings. He argues on appeal that the admonishment was "likely ineffective". This is just speculation, and the record does not support it.

¶31 That same morning, during the break, a protester in the hallway yelled "racist cop" and "racist jury" in front of two jurors. Concerned by the hostile environment, defense counsel asked whether the audience could be excused and the floor cleared before jurors left the courtroom. The trial court agreed, subsequently allowed jurors to leave the courtroom first at breaks and recesses, ordered a deputy to clear the floor each time jurors left, and said he would allow jurors to wait in the cleared courtroom until recesses ended. Appellant's request that jurors be sequestered for the remainder of the trial was denied. As the State noted, the bulk of the incidents had occurred in and around the courthouse during the trial proceedings; sequestration would neither prevent nor address those problems. Nothing in the record suggests that the trial court's measures were insufficient to protect the jury. The record does not show that any jurors complained that they had been approached or contacted, and nothing suggests jurors were inappropriately influenced by any incidents they may have seen or heard.

¶32 Appellant lists these incidents, but neither explains what this Court should do about them nor asks this Court for any specific relief. In his brief, Appellant says "it is understandable to some extent why the trial court did not want to take the extreme measures that were obviously necessary, such as moving the trial to another courtroom higher in the courthouse, if not another courthouse entirely, or to sequester the jury." However, Appellant never actually claims that the trial court should have done either of those things. He offers neither argument nor citation to authority to support such arguments. Instead, he repeats his observation that circumstances surrounding a trial may render a fair trial impossible. He cites in support a case from the Montana Supreme Court, featuring an angry mob attacking a judge over a bail decision, public meetings, vandalism, hostile publicity, and public statements about the case by the district attorney. *State ex rel. Coburn v. Bennett,* 655 P.2d 502, 507 (Mont. 1982). Appellant then claims that the individual incidents above might appear harmless, or have been cured by the trial court, but taken together they show "it was not possible for Appellant or anyone to get a fair trial." Beyond describing the incidents, he makes no effort to show how his trial was rendered unfair by these incidents. He also fails to ask this Court to reverse his convictions, or for a new trial, based on his claim that his trial was unfair.

¶33 The record does not support a conclusion that jurors were so affected by the incidents that they abandoned impartiality. In fact, as we note in Proposition II, the record shows that jurors carefully considered all the evidence against Appellant, accepting some and rejecting some. The fact that jurors acquitted Appellant of half the charges against him supports our conclusion that they were not improperly affected by events outside the courtroom. Proposition III is denied.

**Proposition IV**

¶34 In Proposition IV Appellant claims that the prosecutors' overzealous argument denied him due process and deprived him of a fair trial. Both parties have wide latitude to argue the evidence and its inferences, and we will not grant relief unless improper argument affects the fairness of the trial. *Barnes v. State*, 2017 OK CR 26, ¶ 6, 408 P.3d 209, 213. We will not grant relief unless errors in argument render a trial so fundamentally unfair that we cannot rely on the jury's verdict. *Webster v. State*, 2011 OK CR 14, ¶ 81, 252 P.3d 259, 281. Appellant objected to one comment, preserving that claim for appeal. He failed to object to the remainder of the comments, and we review for plain error. *Mathis v. State*, 2012 OK CR 1, ¶ 24, 271 P.3d 67, 76.

¶35 He first argues the prosecutor shifted the burden of proof in the first closing argument. Appellant admits the prosecutor first correctly stated the burden of proof, but argues she then negated it. The prosecutor's comment referred to a detailed discussion of the elements of each charged crime, with a description of the State's burden and the evidence supporting each element. In context, this was a comment on the evidence. Where the defense has not offered evidence, prosecutors may argue that evidence is uncontroverted. *Bosse v. State*, 2017 OK CR 10, ¶ 85, 400 P.3d 834, 863. After a similar comment in closing argument, Appellant's objections that the comment shifted the burden of proof and referred to Appellant's right to silence were sustained at the bench. Appellant did not ask that the jury be admonished. The jury was repeatedly told the correct burden of proof, in both argument and instruction. Appellant fails to show he was prejudiced, and the comment does not constitute plain error. *Barnes*, 2017 OK CR 26, ¶ 6, 408 P.3d at 213.

¶36 Appellant claims the prosecutor argued facts not in evidence. Appellant argues that neither the evidence nor science supports the prosecutor's argument in final closing that the DNA came from A.G.'s vaginal walls and was transferred where A.G. said it would be on his pants. Appellant claims that since the pockets, cuffs and seat of Appellant's uniform were never tested for DNA, one cannot argue there was no DNA at those locations. Regarding the latter claim, the prosecutor was reminding jurors where the evidence showed the DNA was – near his zipper. This is not a misstatement of the evidence. The DNA expert witness referred to the source of DNA as "biological material" which could have been transferred in a liquid. A.G. herself testified that Appellant put his penis in her vagina. Suggesting that the DNA came from A.G.'s vagina, transferred by the vaginal fluids, was a reasonable inference from the evidence. *Mathis*, 2012 OK CR 1, ¶ 26, 271 P.3d at 77. There is no error.

¶37 Appellant claims that the prosecutor misstated facts regarding Appellant's statements to police. Detective Davis specifically testified that Appellant told her, in the interview, that he could not remember whether he had an erection during J.L.'s traffic stop. This argument was supported by Davis's testimony and is not a misstatement of fact.

¶38 Appellant also claims the prosecutor misstated facts when discussing the testimony of Kerri Hunt, Appellant's ex-girlfriend. Hunt and Appellant dated from March 2014 to March 2015. She testified about details of their life together, including daily Scripture reading and sleep habits. During his interview with detectives, Appellant said he had intercourse with Hunt the night of June 17, 2014. Hunt testified that she took a sleeping pill that evening; that the two didn't have intercourse that night; and that she told detectives as much on June 18. On cross-examination, Hunt said that Appellant could have been truthful with detectives, given the effect on her of the sleeping pill. In closing, the prosecutor condensed this, admitting he was being sarcastic but saying Appellant "had six days of medicated, unconscious intercourse with Kerri Hunt because it happens regularly before they read their Bible verses which would make her preacher daddy really proud I'm sure. That was catty, but it's the evidence." It was not, in fact, the evidence, and was wholly irrelevant to Hunt's testimony. This comment was improper and unprofessional. However, reviewing for plain error, Appellant has not shown how he was prejudiced by this comment. *Mathis*, 2012 OK CR 1, ¶ 24, 271 P.3d at 77.

¶39 Appellant alleges that, in final closing, the prosecutor repeatedly disparaged defense counsel. The prosecution should not cast aspersions on defense counsel. However, prosecutors may respond to points raised in defense closing argument. *Warner v. State*, 2006 OK CR 40, ¶ 182, 144 P.3d 838, 889, overruled on other grounds by *Taylor v. State*, 2018 OK CR 6, 419 P.3d 265. The prosecutor began this argument by praising defense counsel's professionalism. He subsequently noted that any evidence offered must be relevant, remarked on defense counsel's attempts to shift the jurors' focus, and on the difference between "good lawyering" and common sense or the real-world experiences of the victims. These were all reasonable responses to defense counsel's closing argument, which vigorously attacked the victims, the police investigation, and the State's presentation of its case. The prosecutor twice said that defense counsel was making the arguments you have to make when your client is guilty. The first time, he continued, "they attack the victims, they attack the investigation and they attack the prosecutors." This was a poorly phrased response to counsel's argument. However, again responding to argument, the prosecutor said defense counsel was a fine attorney, "But when your client's guilty you have to do things that take the attention off of your client." This assertion of Appellant's guilt was improper. However, Appellant does not show prejudice from this comment, and it does not rise to the level of plain error. *Mathis*, 2012 OK CR 1, ¶ 24, 271 P.3d at 77.

¶40 In defense closing, defense counsel said of testimony that Appellant saw one victim naked in the hospital, "I don't care and you shouldn't care." Throughout both cross-examinations and his closing argument, defense counsel attacked the victims, their families and lifestyles. Defense counsel also vigorously argued that the victims had drug and legal problems and/or felony convictions that showed they were deceitful and dishonest and that should affect their credibility. He said, "The witnesses that you saw in this courtroom don't care about the truth." The prosecutor responded in final closing that defense counsel didn't think jurors should care about the victims because they were lying felons with bad lifestyles, and this was Appellant's attitude; that Appellant believed he could do what he wanted to the victims because, given their past actions and lifestyles, he didn't care about them and nobody else should. Appellant claims this both maligned defense counsel and misrepresented his argument. On the contrary, it precisely quoted defense counsel's remark about one victim, and neatly encapsulated the majority of Appellant's defense, as presented by counsel's argument.

¶41 No comments constituted plain error. While occasionally the argument may have overreached, the record shows that jurors carefully considered all the evidence against Appellant, acquitting him of half the charges against him. Appellant cannot show he was prejudiced by any of the comments, taken as a whole or individually. Proposition IV is denied.

**Proposition V**

¶42 In Proposition V Appellant claims trial counsel was ineffective. He must show that counsel's performance was deficient, and that the deficient performance was prejudicial. *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984);*Tucker v. State*, 2016 OK CR 29, ¶ 12, 395 P.3d 1, 5. Counsel's deficient performance must constitute objectively unreasonable decisions which undermine confidence in the trial's outcome. *White v. State*, 2019 OK CR 2, ¶ 23, 437 P.3d 1061, 1070. Appellant must show he was actually prejudiced by counsel's acts or omissions. *Williams v. Taylor,* 529 U.S. 362, 394, 120 S.Ct. 1495, 1513-14, 146 L.Ed.2d 389 (2000); *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067; *Marshall v. State,* 2010 OK CR 8, ¶ 61, 232 P.3d 467, 481.

¶43 Appellant claims that trial counsel failed to present available evidence to impeach victim T.B. After T.B. testified, defense counsel was informed that a teenage witness said T.B. had been handcuffed before the witness went into the house. Appellant argues that this story contradicted T.B.'s testimony. The record shows that any failure to call this witness was a strategic decision. The witness did not see anything that happened after she went into T.B.'s house, before the crimes against T.B. occurred. Appellant fails to show any prejudice from trial counsel's failure to use this information.

¶44 Appellant argues that trial counsel should have objected to the joinder of offenses into a single case. We found in Proposition II that Appellant's separate cases were properly joined for a single trial. As there was no error, counsel was not ineffective for failing to object to the joinder. Appellant argues that trial counsel should have objected to prosecutorial mis-

conduct in argument. We found in Proposition IV that isolated errors in argument did not rise to the level of plain error. As the outcome of the trial was not affected, trial counsel was not ineffective for failing to object.

¶45 Appellant claims that trial counsel completely failed to challenge the DNA evidence. This evidence went only to the three charges involving A.G., Counts 30, 31, and 32. Appellant, unwilling to admit that the utility of this evidence was limited, argues that the admission of this DNA evidence affected every count and every conviction, claiming that it was the "only independent evidence" substantiating any of the claims. He argues that without this DNA evidence, pertaining to a single victim and three counts, jurors would have acquitted him of all the crimes. Before discussing the merits of the claim, we note that the record simply does not support this allegation of prejudice. Appellant admits jurors acquitted him of half the charges against him; his attempt to use this as proof that, without this evidence, they would have acquitted him of everything is not substantiated. On the contrary, jurors were instructed to give separate consideration to each offense. The record shows jurors followed that instruction, and we cannot conclude this evidence affected every verdict. *Smith v. State*, 2007 OK CR 16, ¶ 38, 157 P.3d 1155, 1168. The State provided extensive corroborating evidence, in the form of records of Appellant's movements and locations while on duty on the days the crimes occurred; witnesses also corroborated each victim whose testimony supported a conviction, regarding their words and actions subsequent to the crimes. As to all but Counts 30, 31 and 32, the record does not show this evidence had any effect on the verdicts. Appellant fails to show any prejudice regarding his other fifteen convictions.

¶46 Consequently, we review this claim only for its effect on the convictions on Counts 30, 31, and 32. The police chemist, Taylor, found A.G.'s DNA along the zipper line on the inside and outside of Appellant's pants. Appellant does not contest the conclusion that the DNA was A.G.'s. Taylor could not say whether the DNA came from urine, saliva, or vaginal fluid, and called it "biological material". She said that it was more likely that epithelial cells contained in a fluid could be absorbed by fabric. Taylor testified that, because Appellant was not a contributor to the DNA sample, there was a good possibility that the cells had been in a liquid such as vaginal fluid and transferred to Appellant's pants. She testified she could say only that the DNA was in A.G.'s biological material, and where on Appellant's pants it was found, not how it got there. On cross-examination Taylor admitted the DNA could have been the result of a secondary transfer from something as innocuous as Appellant's previous search of A.G.'s purse. She confirmed that she had found biological material, and attempted to match it to a person, but could not tell how long the material had been there; she agreed that it could have been a secondary transfer.[7] Defense counsel also confirmed that Taylor had only tested the zipper area, without testing the pockets, legs or waist, for either Appellant's own DNA or any indication of other transfer DNA on those areas.

¶47 Appellant now argues that trial counsel should have challenged this evidence more comprehensively. He argues that neither the evidence at trial nor the current science supports a claim that A.G.'s DNA came from her vaginal walls – a claim Taylor never made. In fact, trial counsel did challenge this evidence. Appellant admits that on cross-examination Taylor agreed the DNA could have been from a secondary transfer. In closing, defense counsel used this to argue that the skin cells could have been the direct result of secondary transfer DNA from Appellant's legitimate search of A.G.'s purse.

¶48 Appellant claims this cross-examination and argument were not enough. Generally, if there is no showing of incompetence, the "fact that another lawyer would have followed a different course" is not reason enough to find trial counsel ineffective. *Lee v. State*, 2018 OK CR 14, ¶ 15, 422 P.3d 782, 786-7 (quoting *Shultz v. State*, 1991 OK CR 57, ¶ 9, 811 P.2d 1322, 1327). Appellant argues that trial counsel should have presented his own expert to refute Taylor's "conclusions and characterizations of the evidence."[8] Appellant argues that Taylor's testimony that he was not a contributor to the DNA is not supported by Taylor's own results. Appellant also argues that Taylor should have been asked about the actual quantities of DNA found on the garment, which he claims were modest at best. Appellant supports this claim in part with extra-record affidavits filed with his Rule 3.11 motion. As that information is not in the record, we do not consider it in determining the claim's merits. No record evidence supports his claim that Taylor's testimony

about Appellant's contribution to the DNA was inaccurate, or that the quantity of DNA was modest and thus more likely to be the product of secondary transfer. Any decision not to challenge Taylor's claim that Appellant was not a contributor was a reasonable strategic decision. The absence of his DNA lent credibility to Appellant's defense that the material was the result of secondary transfer. Trial counsel elicited or used admissions that (a) Taylor could not state the source of A.G.'s DNA beyond calling it "biological material", (b) she did not know how it got onto Appellant's pants, and (c) the DNA could have been the result of secondary transfer. We cannot say from the trial record that Appellant was prejudiced by trial counsel's failure to present an expert to specifically rebut Taylor's testimony. On this record, trial counsel was not ineffective for failing to present a defense DNA expert.

¶49 Trial counsel was not ineffective, and Proposition V is denied.

**Rule 3.11(B) Application**

¶50 In connection with his claim of ineffective assistance of counsel Appellant filed a Rule 3.11(B) application for an evidentiary hearing. Rule 3.11(B), Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App. (2019). There is a strong presumption of regularity in trial proceedings and counsel's conduct, and the application and affidavits must contain sufficient information to show by clear and convincing evidence the strong possibility that trial counsel was ineffective for failing to identify or use the evidence at issue. Rule 3.11(B)(3)(b)(i), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019). We "thoroughly review and consider Appellant's application and affidavits along with other attached non-record evidence[.]" *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905. The Rule 3.11 standard set out above is easier for a defendant to meet than the *Strickland* standard, as a defendant must only provide clear and convincing evidence that there is a strong possibility counsel was ineffective. *Id.* A Rule 3.11(B) motion must be accompanied by affidavits supporting the allegation of ineffective assistance of counsel. *Id.*

¶51 In stating his claim in his Rule 3.11 Application, Appellant refers to Proposition V of his brief for the factual basis and substantive argument. Appellant then claims that the DNA evidence was not challenged "in any meaningful way." However, the record shows defense counsel vigorously cross-examined Taylor regarding secondary transfer, her failure to run certain tests on the biological material, her failure to examine the pants themselves with a specialized lighting instrument, and the factual limitations of her testimony regarding length of time present, sources, methods of transfer, and mediums of transfer for DNA samples. Defense counsel also established that Taylor tested only a single area of the pants, without testing any other areas where one might expect to find DNA.

¶52 Appellant reiterates his claim that trial counsel should have called a defense DNA expert to rebut Taylor's testimony and bolster his own defense. He argues that the defense expert testimony would have been based on extant, relevant evidence available to trial counsel. In support, Appellant provides the affidavit of Dr. Spence, a forensic biologist and DNA expert. Spence reviewed the Oklahoma City Police Department forensic examination reports including worksheets, analyst bench notes, electropherograms, population statistical calculations, DNA extraction and quantification, law enforcement investigative reports, trial testimony transcripts and evidence – all sources available to trial counsel.

¶53 Spence avers that Taylor's testimony was not consistent with her DNA data. Taylor testified that Appellant was excluded as a contributor from all four swabs. Spence first says that the DNA data sheet actually states that a number of nanograms of male DNA were recovered from two of the swabs (17Q3 and 17Q4); thus, he says, Taylor's testimony that the DNA was only female was inaccurate. In addition to the male DNA found on two swabs, Spence says Taylor's examination report stated that the DNA profile on a third swab (17Q2A) was a mixture, with too little of the minor component to compare to known sources. He states that Taylor's report on that swab was thus inconclusive, rather than (as she testified) excluding Appellant. Spence thus determines that Taylor's testimony was inconsistent with her own findings. Spence concludes that these results are also inconsistent with Taylor's testimony that, as Appellant's DNA was not on his pants, there was a very good possibility that the DNA found there was transferred in a liquid such as vaginal fluid.

¶54 Spence also avers that Taylor's testimony regarding vaginal fluid was inconsistent

with the state of science and her own findings. Taylor testified she inspected the pants with an ambient light source, not a specialized instrument usually used for those purposes. Spence refers to Taylor's conclusion that A.G. would likely have had "quite a bit of lubrication," which could transfer cells, as speculative. Spence states this speculation, and the prosecutor's subsequent argument based on it, could have been rebutted with expert testimony.

¶55 Spence notes that the DNA mixture found on two swabs (17Q1 and 17Q2) included alleles that could not have originated from either A.G. or Appellant. He speculates on various ways these alleles could have appeared in the mixture. He asserts that trial counsel should have asked Taylor where the stray alleles came from. Spence states that exploration of the extra alleles in the mixture (either with a defense expert or through cross-examination) would have supported Appellant's claim that the DNA was a secondary transfer, and rebutted the prosecution's argument that such transfer was unlikely. He further notes that alleles from two swabs (17Q3 and 17Q4) included a male contribution, which was or could have been consistent with Appellant's DNA profile, and thus Taylor's findings were inconsistent with her conclusion that Appellant was excluded as a contributor.

¶56 Spence avers that Taylor's findings show only "modest quantities" of A.G.'s DNA were present on all four swabs. He states that Taylor's findings did not report high DNA yields on any swab. He notes that the DNA yield from a car door, also tested in the case, was equal to the yield on one swab and higher than the other three. Spence states that the issue of the quantity of DNA – the DNA yield – should have been raised because it was relevant to the issue of whether vaginal fluid was present.

¶57 Spence avers that officers mishandled the pants. He states a video of the interrogation shows an officer open a bag with his hand before placing Appellant's personal items, belt, and pants in the bag. He states that Taylor's report shows she did not take any control samples from the pants or belt; he suggests that control samples could have provided evidence supporting the probability of an inadvertent transfer.

¶58 Spence also avers that defense counsel could and should have used scientific principles concerning DNA transfer and testing in Appellant's defense. He particularly refers to principles of DNA transfer, scientific literature supporting DNA transfer events, and the sensitivity of DNA testing. He suggests that a DNA expert could have assisted trial counsel in interpreting Taylor's results and challenging her conclusions, and in explaining to jurors the principles surrounding DNA transfer and the likelihood of secondary transfer occurring here.

¶59 While Appellant argues in his 3.11 Application that he must show trial counsel's performance fell below an objective standard of reasonableness under *Strickland*, that is not our first query. Under Rule 3.11(B), we first determine whether the affidavit in support of the Application shows, by clear and convincing evidence, the strong possibility that trial counsel was ineffective for failing to identify or use the evidence at issue. Rule 3.11(B)(3)(b)(i). Appellant argues that Spence's affidavit supports the conclusion that Taylor's testimony was inconsistent with her findings (a) because several swabs included a DNA mixture, two had a male DNA component, and some alleles were from unidentified contributors, and (b) the quantities of DNA present did not have sufficient yield to support Taylor's testimony that the DNA came from vaginal fluid. He also argues that Spence's affidavit supports his claim that science and Taylor's findings support the possibility that the DNA was the result of secondary transfer, and that possibility was not sufficiently raised.

¶60 Many of Appellant's claims turn on the way in which A.G.'s DNA was deposited on Appellant's pants. There is no real disagreement that this occurred through a transfer of some sort. The State did not specifically describe the method of transfer, but argued that A.G.'s DNA was transferred to "the exact location she says his penis came in contact." Appellant consistently argued the material appeared through a secondary transfer after Appellant searched A.G.'s purse. Appellant claims, based on Spence's affidavit, that through properly challenging the DNA evidence, defense counsel could have supported his claim of secondary transfer. This is the focus of our analysis of these claims.

¶61 For purposes of this analysis, taking the assertions in Spence's affidavit as true, it appears that Taylor may have either misinterpreted or misstated her own findings regarding the possible presence of male DNA as a contributor to the DNA found on the different pants swabs. However, Appellant must still

show that this possibly mistaken testimony meets the standard above. At trial and on appeal – and in this application for evidentiary hearing – Appellant does not contest that the DNA was primarily A.G.'s. Spence's affidavit raises the possibility that some of the DNA might have belonged to Appellant, though, as Spence did not independently test the samples, this appears to be speculation. Again, taking this assertion as true, Appellant fails to meet the standard. Both parties questioned Taylor repeatedly about her claim that she did not find Appellant's DNA on his pants, even though everyone agreed they were his, he had worn them, and evidence showed they were not washed before the DNA testing.

¶62 Appellant now claims that information that Appellant might have contributed to the DNA would have supported his claim that A.G.'s DNA was the result of a secondary transfer. He fails to show how. The record clearly shows that everyone expected Appellant's DNA to be on his own pants. Everyone agreed that A.G.'s DNA was transferred to the pants. If Appellant's DNA were, in fact, present in the samples from the zipper area, this would show only that Appellant's DNA was on his pants near his zipper and might have mingled with the transferred DNA. Appellant does not show, and Spence's affidavit does not explain, how such evidence could possibly lend particular support to either a "vaginal fluid" transfer or secondary transfer theory; it could support either one. He similarly fails to show how, specifically, his theory of secondary transfer would have been supported by information that alleles from other individuals may have been present in the DNA samples. Appellant's argument regarding the quantity of DNA recovered suffers from the same defect.

¶63 Next, as we discuss above, Taylor never testified the DNA was transmitted in vaginal fluid; on the contrary, more than once Taylor testified she could not describe the medium as anything other than biological material, and could not say where it came from or how it got to Appellant's pants. Over the course of questioning, the prosecutor asked whether, given the location of the material and the context of the allegations – A.G.'s testimony that Appellant's penis entered her vagina – it was likely that the medium was fluid and was, specifically, vaginal fluid. Taylor responded that, given that context, it was a likely possibility. Her comment regarding lubrication was made in that context. Appellant argues that the low quantity of DNA recovered from the samples did not support any conclusion that the DNA medium was vaginal fluid. Spence appears to suggest that, logically, if the DNA sample yield was low, it is more likely that it originated from handling or contact with an object rather than transfer through vaginal fluid. While, if true, this may have supported an argument by defense counsel, it could not have countered testimony that Taylor never gave. The allegation in this Application is that defense counsel failed to counter Taylor's testimony regarding the DNA evidence, and the affidavit does not support that claim.

¶64 Spence's remaining concerns likewise do not raise a strong possibility that trial counsel was ineffective. Spence's opinion that the uniform pants were improperly handled (a) appears to be speculation, and (b) does not support Appellant's claim. Spence complains that Appellant himself handled all his personal items, before they were placed in the same evidence bag. He argues that Taylor should have taken control samples from places on the pants where there was little likelihood of finding incriminating biological materials. At best, Spence's first observation suggests that Appellant's own hands, or some personal possession other than Appellant's pants, might have contained A.G.'s DNA and transferred it to the outer and inner zipper area. His second observation leaves open the possibility that Taylor could have found no more DNA, or more of Appellant's own DNA, or A.G.'s DNA on less likely portions of Appellant's pants. Appellant fails to show how any of these possibilities make a secondary transfer more likely, or would have shown that such a transfer was, as Spence put it, "inadvertent". In fact, as Spence and Appellant both point out, and as Taylor testified, an expert cannot testify whether a transfer is inadvertent or deliberate. Spence also lists what he describes as scientific principles, and findings in scientific literature, regarding both the mechanics of DNA testing and secondary transfers. Appellant fails to show that this material, presented either through cross-examination or by an expert, would have more significantly aided jurors than the evidence elicited by defense counsel.

¶65 Appellant has failed to show by clear and convincing evidence the strong possibility that trial counsel was ineffective for failing to identify the alleged shortcomings in Taylor's

testimony, or to use the information contained in the affidavit, either through cross-examination or by presenting his own expert on DNA evidence. Rule 3.11(B)(3)(b)(i), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2019). Appellant's Application for Evidentiary Hearing is denied.

**Proposition VI**

¶66 In Proposition VI Appellant argues that his total sentence of 263 years is excessive. Appellant admits that each of his eighteen sentences is within the range of punishment. He complains that, taken together, the sentences are excessive, and argues that the trial court should not have run his sentences consecutively. At sentencing, defense counsel asked for mercy and for the judge to do the right thing but did not specifically ask for concurrent sentences. The decision to run sentences consecutively or concurrently is within the trial court's discretion. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. An abuse of discretion is any unreasonable or arbitrary action made without proper consideration of the relevant facts and law, also described as a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts. *State v. Hovet*, 2016 OK CR 26, ¶ 4, 387 P.3d 951, 953.

¶67 Appellant argues that he is a young, productive man who was dedicated to serving the people and law-abiding up until his arrest. He states that his life has been forever ruined. We have already rejected Appellant's claims that there was insufficient evidence to support the convictions, or that it was unfair for him to answer for all the crimes in a single case. He admits that jurors acquitted him of half the charges, but appears to claim that this somehow shows the remaining charges against him were unsupported. He finally claims that the joinder of the cases allowed his sentences to be stacked unfairly. He fails to show how exactly this "stacking" is unfair. Each sentence in this case represents a consequence of a separate crime, involving separate victims. The record does not support a conclusion that the trial court abused its discretion in ordering the sentences to run consecutively. Proposition VI is denied.

**Proposition VII**

¶68 In Proposition VII Appellant claims accumulated error requires relief. We found no error in the preceding propositions. Where there is no error, there will be no cumulative error. *Engles v. State,* 2015 OK CR 17, ¶ 13, 366 P.3d 311, 315. Proposition VII is denied.

**DECISION**

¶69 The Judgments and Sentences of the District Court of Oklahoma County are **AFFIRMED.** The Application for Evidentiary Hearing on Sixth Amendment Claims is **DENIED**. Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT
OF OKLAHOMA COUNTY
THE HONORABLE TIMOTHY R.
HENDERSON, DISTRICT JUDGE

**ATTORNEYS AT TRIAL**

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**OPINION BY KUEHN, V.P.J.**
LEWIS, P.J.: SPECIALLY CONCUR
LUMPKIN, J.: CONCUR
HUDSON, J.: CONCUR
MUSSEMAN, S.J.*: CONCUR

*The Hon. William J. Musseman, District Judge of Tulsa County, sitting by assignment.

**LEWIS, PRESIDING JUDGE, SPECIALLY CONCURRRING:**

¶1 I commend my colleague on a well written decision. I write separately to address Appellant's propositions one, two, and six. I will initially address the excessive sentence claim raised in proposition six.

¶2 This case involves a sexual predator who happened to be employed, most unfortunately, as an Oklahoma City police officer. He used his position of authority to intimidate and prey on

vulnerable victims. The facts and circumstances of this case, including his position of authority, the number of victims, and the callous nature of the offenses, dictate that consecutive sentences in this case are entirely appropriate. His arguments attacking the convictions are likewise unavailing.

¶3 Appellant attacks these convictions in proposition one. He first claims his convictions for procuring lewd exhibition, 21 O.S.2011, § 1021(A)(2), were unsupported because he did not procure or compel the obscene exhibition of the victims for the sexual pleasure of others. Nothing in the statute prohibits the person procuring or compelling the exhibition be different from the viewer. We correctly hold today that the procurer and the viewer can be the same person. He procured the exhibition for his own view and for his own sexual stimulation. I, therefore, agree that this crime was established by the evidence. The language in the Information stating that he did these acts under his authority as a police officer is surplusage. The procuring of the obscene exposure does not have to be by any type of force, which the command by a police officer might infer.

¶4 This brings us to the sufficiency of the force element of the rape and sodomy charges. Appellant's unique position gave him the power to demand sexual acts of victims facing the unfavorable alternative choices of jail or detox. This constitutes force and the evidence was sufficient to prove the force element. He also committed sexually battery by touching the victims in a lewd and lascivious manner. He did not commit the touching as part of a search or pat down pursuant to detention. I, therefore, concur that the evidence was sufficient to show that the touchings were committed lewdly and lasciviously.

¶5 Proposition two involves the joinder of all of these offenses committed against thirteen separate victims in one trial. Appellant absolutely made no request for separate trials in this case. Joinder was proper and he was not prejudiced by the joinder or the failure to request severance of the charges.

¶6 These offenses show a pattern of sexual predation committed in similar ways, with similar intents, under similar circumstances. Joinder of these offenses was proper because the counts arose from the same type of offense occurring within a few months, in approximately the same area of the city, and the proof of each transaction overlapped so as to show a common scheme or plan. *Cummings v. State*, 1998 OK CR 45, ¶ 15, 968 P.2d 821, 829; *Glass v. State*, 1985 OK CR 65, ¶ 9, 701 P.2d 765, 768; *see also Lott v. State*, 2004 OK CR 27, ¶ 34, 98 P.3d 318, 333. Common scheme or plan transactions refer to a series of occurrences "depending not so much upon the immediateness of their connection as upon their logical relationship." *Plunkett v. State*, 1986 OK CR 77, ¶ 7, 719 P.2d 834, 838. These offenses were logically connected and they met the other criteria for joinder. Their joinder, therefore, in one Information and trial was appropriate.

¶7 Appellant, furthermore, was not unfairly prejudiced by the joinder. Likely, had the cases been tried separately, evidence of other non-charged offenses would have been admissible under 12 O.S.2011, § 2404(B). This would not have spared Appellant in any manner. Moreover, Appellant was acquitted on half of the charges, showing that the jury was not influenced unfairly by the trial of multiple counts. He has shown neither error nor injury from the joint trial of these offenses.

¶8 Again, I commend my colleague and concur in the well written opinion.

1. Appellant was acquitted of crimes charged in Counts 2, 3, 6, 7, 9, 12, 17-26, 35, and 36, including sexual battery, procuring lewd exhibition, first degree burglary, stalking, forcible oral sodomy, first and second degree rape, and indecent exposure.

2. Counts 4, 5, and 15.

3. Counts 11, 28, 29 and 32.

4. Counts 8, 10, 16, and 27.

5. Counts 1, 13, 14, 30, 33 and 34.

6. Appellant also claims that *voir dire* improperly included questions regarding negative media reports about police officers. The prosecutor specifically referred to stories about situations stemming from police actions in Baltimore and a case involving a school resource police officer, as well as indirectly referring to protests and riots in Ferguson, Missouri. However, in context, the prosecutor was trying to explore with potential jurors reasons the victims might not have reported Appellant's crimes to police.

7. After Appellant's trial had concluded and while this appeal was pending before this Court, we remanded this case for hearings tangentially connected with the DNA claims raised in this proposition. Neither those hearings, the issues they discussed, nor the contemporaneous and subsequent documents filed with this Court concerning them are relevant to the issues raised in either this appeal or Appellant's Rule 3.11(B) Application. We neither discuss nor consider them in determining the appeal or the Application.

8. The State argues that trial counsel had retained a DNA expert who was present in the courtroom for Taylor's testimony, and the failure to call that expert was a strategic choice. However, nothing in the record supports this assertion, and we do not consider it as part of the analysis of Proposition V.

**2019 OK CR 18**

**A.O., Appellant, v. THE STATE OF OKLAHOMA, Appellee**

**No. J-2018-1066. August 8, 2019**

**OPINION**

**LEWIS, PRESIDING JUDGE:**

¶1 On December 7, 2017, Appellant, A.O., was charged as a juvenile with Sexual Battery, in violation of 21 O.S.Supp.2017, § 1123(B), in McIntosh County District Court Case No. JDL-2017-29.[1] On February 26, 2018, an Amended Delinquent Petition was filed charging A.O. as a juvenile with Child Sexual Abuse, in violation of 21 O.S.Supp.2014, § 843.5(E). A non-jury trial was completed on September 25, 2018, and the Honorable David Martin, Special Judge, entered an order adjudicating A.O. a delinquent child pursuant to 10A O.S.Supp.2014, § 2-2-402. A.O. appeals from this order pursuant to 10A O.S.2011, § 2-2-601. On appeal, A.O. raises the following issues:

1. A.O. WAS NEVER INFORMED OF HIS STATUTORY RIGHT TO A JURY TRIAL. THEREFORE, HIS DUE PROCESS RIGHTS WERE VIOLATED WHEN HE WAS ADJUDICATED AT A BENCH TRIAL.
2. THE TEXT, STRUCTURE, AND PURPOSE OF 21 O.S.SUPP.2014, § 843.5(E) INDICATES THAT ONE CHILD TOUCHING ANOTHER CHILD'S BUTTOCKS OVER HER JEANS IS NOT THE TYPE OF CONDUCT THAT THE LEGISLATURE INTENDED TO CRIMINALIZE AS "CHILD SEXUAL ABUSE."
3. A PROSECUTOR CANNOT GIVE HIS OPINION AS TO THE GUILT OF THE ACCUSED. THEREFORE, A.O.'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE PROSECUTOR EXPRESSED HIS OPINION AS TO ONE OF THE ELEMENTS OF THE OFFENSE.

¶2 Pursuant to Rule 11.2(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), this appeal was automatically assigned to the Accelerated Docket of this Court. Oral argument was held January 17, 2019, pursuant to Rule 11.2(E). At the conclusion of oral argument, the Court took its decision under advisement. After a review of the record before this Court and hearing oral argument, we find the record does not support A.O.'s Propositions I and III but pursuant to Proposition II, A.O. is entitled to relief.

¶3 The District Court order adjudicating A.O. delinquent for Child Sexual Abuse, in violation of 21 O.S.Supp.2014, § 843.5(E), is **REVERSED.** This matter is **REMANDED** to the District Court of McIntosh County for entry of an order **MODIFYING** A.O.'s adjudication order to reflect that A.O. is adjudicated delinquent for one count of Assault and Battery, in violation of 21 O.S.Supp.2014, § 644, and as so modified, the adjudication is **AFFIRMED**.

¶4 In his first proposition, A.O. argues reversal of his adjudication is required because the record is silent regarding whether he was informed of, or waived, his right to a jury trial. *See* 10A O.S.2011, § 2-2-401. This Court recently addressed this issue in *G.W. v. State* and eliminated the requirement that a waiver of the right to a jury trial be made affirmatively in the record. 2018 OK CR 36, ¶ 9, 433 P.3d 1283, 1286. Regardless, the record in this case is clear that A.O. and his guardian were both informed of his right to a jury trial and the right was waived.[2] Proposition I is without merit.

¶5 A.O. maintains in Proposition III that he is entitled to relief because the prosecutor allegedly stated his opinion during the non-jury trial that A.O. was guilty. The prosecutor's comment A.O. complains of in this proposition occurred during the State's argument in response to A.O.'s demur to the evidence.[3] A.O. complains of the State's following statement: "And, I mean, again I'm from the Country, *but to me that's expressing lust or lewdness.*" (emphasis added).

¶6 A.O. relies on *Evans v. State* and *United States v. Young* to support his argument that a prosecutor expressing his opinion that the evidence presented established an element of the crime in this case is plain error and requires reversal. *See United States v. Young*, 470 U.S. 1, 18–19, 105 S. Ct 1038, 1048, 84 L. Ed. 2d 1, 14 (1985); *Evans v. State*, 1976 OK CR 38, ¶ 3, 546 P.2d 284, 285. The objectionable comments made in both *Evans* and *Young* were made by prosecutors to a jury during closing remarks. In this case the comments were made by the State in a non-jury trial during its response to A.O.'s demur. Both *Evans* and *Young* indicate that the effect of a prosecutor's allegedly prejudicial comment may be outweighed by the sufficiency of the evidence. *Young*, 470 U.S. at 18-19; *Evans*, 1976 OK CR 38, ¶ 3. The evidence

in this case was more than sufficient to overcome any concern that Judge Martin's ruling was prejudiced by this remark. It is also important, according to both cases, that the State's comment "*but to me that's expressing lust or lewdness*" is clearly relying and commenting on the evidence (victim's testimony) presented at this non-jury trial. This comment did not deprive A.O. of a fair trial. *See Patton v. State*, 1998 OK CR 66, ¶ 126, 973 P.2d 270, 302. A.O.'s third proposition is without merit.

¶7 In Proposition II, A.O. objects to the trial court's failure to require the State to prove the elements of the underlying acts constituting Child Sexual Abuse. Appellant argues the State was not required to prove the correct elements.[4] A.O. was tried for one count of Child Sexual Abuse, in violation of 21 O.S.Supp.2014, § 843.5(E). Section 843.5(E) defines "Child Sexual Abuse" as "willful or malicious sexual abuse, which includes but is not limited to rape, incest, and lewd or indecent acts or proposals, of a child under eighteen (18) years of age by another." Appellee acknowledges that A.O.'s crimes in this case are lewd acts that would normally be prosecuted pursuant to 21 O.S.Supp.2017, § 1123, but for the age limitations found in Section 1123. Section 1123(A) requires an accused to be three years older than the victim of the lewd acts and Section 1123(B) only applies to victims of sexual battery that are sixteen years or older. 21 O.S.Supp.2017, § 1123(A), (B). According to A.O., the Oklahoma Legislature did not intend Section 843.5(E) to allow prosecutors to circumvent the age restrictions found in Section 1123. We agree.

¶8 Judge Martin erred when he did not require the State to prove each element of the underlying crime, including the age requirements, in addition to the elements of 21 O.S.Supp.2014, § 843.5(E). As a result, the trial court was able to find A.O. guilty of Child Sexual Abuse without properly considering the elements of the underlying lewd acts. A.O. was originally charged with Sexual Battery pursuant to Section 1123(B). By its own admission, the State only pursued adjudication pursuant to Section 843.5(E) after determining it was unable to prove the necessary elements of Subsections A or B of Section 1123 due to A.O.'s and the victim's ages.

¶9 We find that in order to convict an individual pursuant to 21 O.S.Supp.2014, § 843.5(E) the State must prove the elements of the underlying crime beyond a reasonable doubt. To find otherwise would chance rendering Section 843.5(E) unconstitutional for over-breadth and vagueness. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S. Ct. 839, 843, 31 L. Ed. 2d 110 (1972) (a person of ordinary intelligence must have fair notice what conduct is forbidden by a statute); *Switzer v. City of Tulsa*, 1979 OK CR 73, ¶ 4, 598 P.2d 247, 248.

¶10 In *Huskey v. State*, 1999 OK CR 3, 989 P.2d 1, this Court considered whether the trial court erred by failing to instruct on all of the elements of the underlying sexual abuse crime of Lewd Molestation.[5] The trial court created its own jury instruction in *Huskey*. It gave an instruction that included the standard OUJI instruction elements for Child Sexual Abuse and for Lewd Molestation, except that the elements of Lewd Molestation were modified by removing one element.[6] On appeal Huskey argued that the trial court erred when it did not instruct on each element of the underlying crime of Lewd Molestation pursuant to 21 O.S.1991, § 1123(A). This Court denied Huskey's claim determining it was not necessary in a Child Sexual Abuse case to give an instruction including, nor to prove, every element of the underlying crime of Lewd Molestation. *Huskey*, 1999 OK CR 3, ¶¶ 8–10. To the extent it is inconsistent with this opinion, *Huskey* is overruled.

¶11 The evidence in this case is uncontroverted that A.O. touched the victim without permission. "A battery is any willful and unlawful use of force or violence upon the person of another." 21 O.S.2011, § 642. While the evidence is insufficient to support an adjudication for Child Sexual Abuse, the evidence is more than sufficient to support an adjudication for simple battery. *Id.*

## DECISION

¶12 It is therefore the order of this Court that the McIntosh County District Court order adjudicating A.O. delinquent for Child Sexual Abuse, in violation of 21 O.S.Supp.2014, § 843.5 (E), is **REVERSED**. This matter is **RE-MANDED** to the District Court of McIntosh County for entry of an order modifying A.O.'s adjudication order. The adjudication order shall be **MODIFIED** to reflect that A.O. is adjudicated delinquent for one count of Assault and Battery, in violation of 21 O.S.2011, § 644. As so modified, the adjudication is **AFFIRMED**. The child is **REMANDED** to the jurisdiction of the District Court of McIntosh County for the entry of a disposition order. 10A O.S.Supp.2018,

§ 2-2-501; 10A O.S.2011, § 2-2-601. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF MCINTOSH COUNTY, THE HONORABLE DAVID MARTIN, SPECIAL JUDGE**

**APPEARANCES AT TRIAL**

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

**KUEHN, V.P.J., DISSENTING:**

¶1 In Proposition II, the Majority is unwilling to face the consequences of the elements of child sexual abuse as prohibited by 21 O.S. § 843.5(E), its relation to other sex offenses, and the instructions which must be used. I would construe § 843.5(E) as written, find it unconstitutional, and reverse.

¶2 Appellant was charged with and convicted of child sexual abuse in violation of 21 O.S. Supp.2014, § 843.5(E). As I have repeatedly said, that crime is separate and distinct from any other sex offense, and has only three elements: any person who (1) willfully or maliciously engages (2) in sexual abuse (3) of a child under eighteen is guilty of child sexual abuse. 21 O.S.Supp.2014, § 843.5(E); OUJI-CR 2d 4-39. The statutory language creating this crime is clear and unambiguous, and this Court has recognized it as a separate crime, with separate elements, since 1999. *Huskey v. State*, 1999 OK CR 3, ¶ 9, 989 P.2d 1, 6.

¶3 Of course, the Legislature has both the right and the authority to make having sex with children a crime. It not only should, it has done so, in both § 843.5(E) and in other sex offense statutes. Section 843.5(E) provides: "'child sexual abuse' means the willful or malicious sexual abuse, which includes but is not limited to rape, incest, and lewd or indecent acts or proposals, of a child under eighteen (18) years of age by another." 21 O.S.Supp.2014, § 843.5(E). That is, the language encompasses, *but does not incorporate*, various acts which may also be criminalized elsewhere in the Penal Code.

¶4 This statute originally was limited to persons responsible for the child victim's welfare. However, when the statutes were renumbered in 2009 the Legislature amended § 843.5(E) to remove that limiting language. With that amendment, the statute applied to every potential defendant, broadening its scope. "When construing a statute that has been amended, we may reasonably infer that the alteration was intended either to effect a change in the existing law, or to clarify an interpretation that may have been in question." *Lewis v. City of Oklahoma City*, 2016 OK CR 12, ¶ 7, 387 P.3d 899, 902. This amendment, along with the statute's plain language quoted above, suggests that the Legislature intended to expand the crime of child sexual abuse and create a comprehensive crime encompassing all defendants, all possible sexual acts, and all victims aged up to 18. I agree with the Majority that the language in § 843.5(E) is very broad. As written, it includes, without exception, basically any sexual act directed towards or committed upon a child under the age of eighteen – including the act committed by Appellant here.

¶5 I agree with the Majority that the statutory elements of § 843.5 directly conflict with the age restrictions found in the elements of 21 O.S.Supp.2017, § 1123. I further agree that it is impossible to construe the two statutes together without failing to give intelligent effect to at least part of one statute. However, the Majority's solution – to require a trial court to instruct on the elements of the underlying crime – renders the entirety of § 843.5(E) null and void. If this Court changes the elements of § 843.5(E) to add elements of other crimes, then we irrevocably alter the elements of § 843.5(E). Where

statutes conflict, this Court's duty is to reconcile them, if possible, to give effect to each provision. *Moss v. OK Dept. of Corr.*, 2016 OK CR 23, ¶ 18, 403 P.3d 379, 383; *Leftwich v. State*, 2015 OK CR 5, ¶ 15, 350 P.3d 149, 155. This is exactly what the Majority fails to do: including elements of every underlying offense, either included in the Information or supported by the evidence, strips § 843.5(E) of all meaning.[1]

¶6 We have previously said that we will not, in order to justify a prosecution, enlarge a statute beyond either its fair meaning or a meaning justified by its terms. *Leftwich*, 2015 OK CR 5, ¶ 15, 350 P.3d at 155; *see also McNeely v. State*, 2018 OK CR 18, ¶ 3, 422 P.3d 1272, 1274 (Court will not create authority not explicitly granted in statutory language). By the same token, we should not enlarge a statute's language in order to avoid a prosecution. "As there are no common law crimes in this State, this Court is bound by the language the Legislature has placed in our statutes defining crimes." *Arganbright v. State*, 2014 OK CR 5, ¶ 15, 328 P.3d 1212, 1216. The Majority's decision, requiring instruction on and proof of different elements of other sex crimes in prosecutions under § 843.5(E), is not (as the specially concurring opinion suggests) interpreting the statutes liberally to affect their objects; nor is it choosing from two possible interpretations of existing language. The Majority is rewriting the statute to fit its own conception of the crime, plain and simple, and that is not statutory interpretation.

¶7 As I note above, *Huskey* recognized the statute now codified as § 843.5(E) (then, 10 O.S.Supp.1995, § 7115) as a separate crime. In doing so, *Huskey* confronted the very question the Majority raises: must a trial court instruct on elements of an underlying sex offense when a defendant is charged with child sexual abuse, and the evidence suggests that sexual abuse falls within the parameters of a separate criminal statute? In *Huskey*, the Court found such instruction inappropriate. We noted, "[I]f the State must allege and prove the elements of lewd and indecent conduct in order to convict a parent of child abuse under § 7115, why not simply require it to charge the crime under § 1123? The Legislature evidently intended § 7115, child abuse, to be a separate crime encompassing activity already prohibited by other statutes." *Huskey*, 1999 OK CR 3, ¶ 9, 989 P.2d at 6. Put another way, we recognized that to require instruction on any underlying sex offense made the crime of child sexual abuse "pointless". *Id.*[2]

¶8 The Majority's solution to this dilemma is to overrule *Huskey*. While this certainly resolves the problem of conflicting case law, it does nothing to resolve the underlying statutory conflict. In the recent past this Court has seen a significant increase in the number of cases presenting issues directly caused by this conflict. Trial courts do not know how to instruct in these cases, and our case-by-case resolutions do not offer guidance. Neither does the Majority's solution here. The plain language of the statute does not require prosecutors to specify an underlying offense in the charging language, and the majority does not suggest that they must. Either § 843.5(E) is a separate crime with its own distinct elements, or it is not. By requiring additional instruction on separate elements of different crimes, the Majority concludes it is not. Yet, the evidence in many child sexual abuse cases includes aspects of more than one underlying sex offense – for example, one single charge may be proved by evidence of acts including lewd molestation, sexual battery, and forcible oral sodomy. Must the trial court instruct on each element of each of those offenses, even though none were included in the Information charging child sexual abuse under § 834.5(E)? Must jurors find each element of each crime unanimously? What if the evidence shows, overall, that child sexual abuse was clearly committed even though evidence did not show every element of any underlying offense? The Majority's resolution creates more questions than it answers, and perpetuates a problem that can be cleanly and clearly resolved by, for a start, accepting the statute on its face and taking the Legislature at its word.

¶9 My colleagues explicitly justify this decision – to add elements to § 843.5(E) and overrule *Huskey* – because they are concerned that, as it stands and taken on its face, § 843.5(E) is so broad as to be unconstitutional. I share that concern. A statute must be so definite that a person of ordinary intelligence can understand what conduct is prohibited, and that it does not encourage arbitrary and discriminatory enforcement. *Weeks v. State*, 2015 OK CR 16, ¶ 18, 362 P.3d 650, 655. If persons must either guess at a statute's meaning, or differ as to its application, it is void for vagueness. *Id.* As Justice Gorsuch recently said, "In our constitutional order, a vague law is no law at all. . . . When

Congress passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again." *United States v. Davis*, 588 U.S. __, 139 S.Ct. 2319, 2323 (2019).

¶10 As can be seen in this case, § 843.5(E) is so broad that it prohibits as criminal some actions that are not crimes under statutes specifically prohibiting similar behavior. In fact, as both the State and the Majority admit, this prosecution was brought specifically because, given the ages of the parties involved, the offenses of sexual battery and lewd molestation were not crimes as to Appellant. The record shows the prosecutor believed Appellant's acts were sexual in intent and nature. Rather than prosecute Appellant for simple battery, the prosecutor correctly turned to the only available sex offense, child sexual abuse.[3]

¶11 The statute conflicts with other statutes as well; most of the sex offense statutes, including lewd molestation, varieties of rape, incest, and forcible oral sodomy, have specific age elements restricting application to victims under the age of sixteen, or fourteen; some include victims under eighteen but require the defendant to be in a particular position of authority or responsibility towards the victim. Some, such as incest, carry significantly less potential prison time. The statute makes no exception for marriages, although minors of sixteen years may marry with parental consent. The very breadth and scope of the statute encourages arbitrary enforcement. District attorneys can choose to prosecute as child sexual abuse actions that simply are not otherwise crimes, or not, depending on the circumstances; district attorneys can also choose to prosecute as child sexual abuse actions that are elsewhere criminalized but at a lesser range of punishment. Depending on the county, or even the whim of individual prosecutors, a person may be punished for the same act with as little as ten years or as much as life in prison. This creates significant uncertainty. Again, quoting Justice Gorsuch, "Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." *Davis,* 139 S.Ct. at 2325.

¶12 I understand my colleagues' preference to adopt "any fairly possible" reading of § 843.5(E) to avoid having to declare it unconstitutional. *Id.* at 2332 & n.6 (quotation omitted). However, this Court neither can nor should step outside our role as judges in order to add elements or change elements to § 843.5(E) that were not included or written by the Legislature. *Id.* at 2324. It is this Court's duty to determine whether § 843.5(E) is too vague under the Constitution – indeed, where the question is before us, we must do so. The United States Supreme Court has made this clear. For example, Justice Marshall observed,

> First, 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so fair as possible the line should be clear.' *McBoyle v. United States*, 283 U.S. 25, 27, 51 S.Ct. 340, 341, 75 L.Ed. 816 (1931) (Holmes, J.). *See also United States v. Cardiff*, 344 U.S. 174, 73 S.Ct. 189, 97 L.Ed. 200 (1952). Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies 'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.' H. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks 196, 209 (1967). Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.

*U.S. v. Bass*, 404 U.S. 336, 348, 92 S.Ct. 515, 522-23, 30 L.Ed.2d 488 (1971)(footnote omitted). In a different case Justice Scalia, apparently goaded beyond endurance by the majority's reluctance to declare a problematic statute unconstitutional, said:

> We face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws. And no surprise that our indulgence of imprecisions that violate the Constitution encourages imprecisions that violate the Constitution. Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nitty-gritty. In the field of criminal law, at least, it is time to call a halt.

> I do not think it would be a radical step – indeed, I think it would be highly responsible – to limit ACCA to the named violent crimes. Congress can quickly add what it wishes. Because the majority prefers to let vagueness reign, I respectfully dissent.

*Sykes v. U.S.*, 564 U.S. 1, 35, 131 S.Ct. 2267, 2288, 180 L.Ed.2d 60 (2011) (Scalia, J., Dissenting), *overruled by Johnson v. United States*, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015). Just a few years after *Sykes*, the Court recognized the truth of Scalia's position and declared the statute at issue unconstitutional.

¶13 We always defer to the Legislature and begin by presuming that any given statute is constitutional. *Weeks*, 2015 OK CR 16, ¶ 17, 362 P.3d at 654. The Majority appears to start and stop with this presumption, preferring to add language to the statute creating new elements rather than face the constitutional question. However, where a statute fails to tell a citizen that his conduct may be forbidden, or where it encourages arbitrary and erratic enforcement, it is this Court's duty to find it is void for vagueness. *Davis,* slip op at 1; *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 O.Ed.2d 110 (1972). I would do so here. Because Appellant was convicted under an unconstitutional statute, I would reverse the conviction.

**HUDSON, J., SPECIALLY CONCUR:**

¶1 I concur in today's Opinion. I write separately to expand on the Court's holding that to convict an individual of child sexual abuse pursuant to § 843.5(E), the State must prove the elements of the underlying crime beyond a reasonable doubt. *See* Notes on Use, Inst. No. 4-39, OUJI-CR(2d) ("The trial court should give a separate instruction on the elements of the particular sexual abuse or sexual exploitation that has been alleged."). *See also Day v. State*, 2013 OK CR 8, ¶ 14, 303 P.3d 291, 298 ("Trial courts should use the uniform jury instructions if they state the applicable law."); *Lewis v. State*, F-2017-355, slip op. at 8 (Okl.Cr. May 24, 2018) (Hudson, J., Concurring in Results) (not for publication) (deviation from prescribed language of the uniform instructions for Child Sexual Abuse resulted in an omission in the statutorily mandated elements). In reaching this determination, we are mindful that the manner in which we interpret § 843.5(E) can have a ripple effect that may alter or impact the legislatively intended application of other statutory sex crimes. We determine the Legislature's intentions by looking "to each part of the statute, *to other statutes upon the same or relative subjects,* to the evils and mischiefs to be remedied, and to the natural or absurd consequences of any particular interpretation." *State v. Stice*, 2012 OK CR 14, ¶ 11, 288 P.3d 247, 250 (quoting *Lozoya v. State*, 1996 OK CR 55, ¶ 20, 932 P.2d 22, 28) (emphasis added). *See also State v. Cooper*, 2018 OK CR 40, ¶ 11, 434 P.3d 951, 954.

¶2 In the present case, we are called upon to reconcile § 843.5(E) with 21 O.S.Supp.2017, § 1123, specifically the age restrictions imposed by the Legislature on the crimes of lewd molestation and sexual battery. As acknowledged by the State, the crime of lewd molestation requires the accused be "at least three (3) years older than the victim, except when accomplished by the use of force or fear." 21 O.S.Supp.2017, § 1123(A). Sexual battery mandates that the victim be "sixteen (16) years of age or older[.]" 21 O.S.Supp.2017, § 1123(B). We must presume the Legislature did not embed these age restrictions in vain. *State v. Dist. Court of Oklahoma Cty.*, 2007 OK CR 3, ¶ 17, 154 P.3d 84, 87 ("This Court will not presume the Legislature to have done a vain thing."). Thus, construing the crime of child sexual abuse as a separate and distinct crime from any other sex offense fails to give intelligent effect to each § 843.5(E) and § 1123(A) and (B). *Moss v. Okla. Dept. of Corr.*, 2016 OK CR 23, ¶ 18, 403 P.3d 379, 383 ("Statutes are to be construed to determine the intent of the Legislature, reconciling provisions, rendering them consistent and *giving intelligent effect to each.")* (emphasis added). Such an interpretation would effectively morph 21 O.S. 843.5(E) into a super-crime, permitting the State to circumvent the Legislature's clear intent and thus risk rendering the statute constitutionally over-broad and void for vagueness. *See Saldivar v. State*, F-2016-482, slip op. at 7 n.3 (Okl.Cr. May 24, 2018) (not for publication).

¶3 While the dissent recognizes this Court's obligation to defer to the Legislature and begin with the presumption that statutes are constitutional, the dissent neglects our "duty to construe statutes in a manner which does not run afoul of the constitution[,]" and our "duty to liberally construe statutes 'with a view to effect their objects and to promote justice.'" *Gonseth v. State,* 1994 OK CR 9, ¶ 8, 871 P.2d 51, 54. Moreover –

> If two possible interpretations of a statute are possible, only one of which would render it unconstitutional, a court is bound to give the statute an interpretation that will render it constitutional, unless constitutional infirmity is shown beyond a reasonable doubt. A court is bound to accept an interpretation that avoids constitutional doubt as to the legality of a legislative enactment.

*Braitsch v. City of Tulsa*, 2018 OK 100, ¶ 2, 436 P.3d 14, 17 (internal citations omitted).

¶4 The majority's reconciliation of § 843.5(E) with other statutory sex crimes does not, as the dissent contends, impermissibly "add language to the statute creating new elements." Notably, specific statutory reference to preexisting delineated sex crimes is embedded within § 843.5(E), "which includes but is not limited to rape, incest, and lewd or indecent acts or proposals[.]" 21 O.S.Supp.2014, § 843.5(E). The majority's interpretation of § 843.5(E) rather gives proper credence to the Legislature's intentions by looking to each part of the statute, as well as other statutory sex crimes, and as mandated ultimately gives the statute an interpretation that renders it constitutional.

¶5 The OUJI Committee is to be commended for having the foresight to recognize the potential legal minefield presented in § 843.5(E) and adeptly drafting the needed instructions to ensure the constitutional application of this provision.

¶6 I am authorized to state that Judge Lumpkin joins in this special writing.

**LEWIS, PRESIDING JUDGE**

1. A.O. was born December 26, 2002. He was 14 years, 10 months, and 9 days old at the time of this incident. The victim was 13 years, 11 months, and 3 days old on the date of this incident.

2. A.O. and his guardian were informed of his right to a jury trial and waived this right in a hearing held on February 27, 2018. The February 27, 2018, hearing was unable to be transcribed and the State requested a hearing to memorialize the parties' recollections of what occurred. A hearing was held on December 18, 2018, and A.O.'s trial counsel testified A.O. was informed of his right to a jury trial, in the presence of his guardian, and that A.O. was adamant he did not want a jury trial. According to A.O.'s trial counsel A.O. specifically directed trial counsel to set this case for non-jury trial. The transcript of the December 18, 2018, hearing is more than sufficient pursuant to *G.W. v. State.* 2018 OK CR 36, ¶ 7.

3. The comment appears at page 46 of the June 19, 2018, non-jury trial transcript.

4. Trial courts are required to use the uniform jury instructions unless the trial court determines that they do not accurately state the law based on statutory changes or intervening case law. *See Order Adopting Amendments to Uniform Jury Instructions – Criminal*, No. CCAD-96-2 (Okl.Cr. April 4, 1996); *Bosse v. State,* 2017 OK CR 10, ¶ 61, 400 P.3d 834, 856; 12 O.S.2011, § 577.2. Child Sexual Abuse is prohibited by 21 O.S.Supp.2014, § 843.5(E). The Oklahoma Uniform Jury Instruction (OUJI) for Child Sexual Abuse is OUJI-CR 4-39 and in this case would read as follows:

> No person may be convicted of the sexual abuse of a child unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:
> First, a person willfully or maliciously engaged in;
> Second, lewd or indecent acts;
> Third, with a child under the age of eighteen.

The alleged sexual abuse in this case was lewd or indecent acts which are prohibited by Section 1123(A). The OUJI for lewd acts is OUJI-CR 4-129 and in this case would read as follows:

> No person may be convicted of lewd acts with a child under sixteen unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:
> First, the defendant knowingly and intentionally;
> Second, touched or felt;
> Third, the body;
> Fourth, of a child under sixteen years of age;
> Fifth, in any lewd or lascivious manner; and
> Sixth, the defendant was at least three years older than the child.

5. The defendant in *Huskey* was convicted of Child Sexual Abuse pursuant to 10 O.S.Supp.1995, § 7115. In 2009, HB 2028 recodified the statute prohibiting Child Sexual Abuse as 21 O.S.Supp.2009, § 843.5.

6. At the time the OUJI for Lewd Molestation included a third element, force, which the trial court chose not to include in the modified instruction it gave the jury.

**LEWIS, PRESIDING JUDGE**

1. The Majority's solution is even less persuasive in Appellant's case, because Appellant was charged with child sexual abuse, *not any underlying crime*. The instruction at issue arises from the evidence used to prove the charge, not from anything inherent in the charge itself. Thus, the Majority would require the trial court to instruct on elements of a crime that was not charged in the Information.

2. Specially concurring, my colleague commends the OUJI Committee for attempting to limit § 843.5(E) by stating, in the Notes on Use accompanying OUJI-CR 2d 4-39, that trial courts "should" instruct separately on the elements of the underlying sexual offense. I note we do not look to either jury instructions or committee notes as legal precedent.

3. However, the Majority decides the best result in this case is to modify Appellant's conviction to simple assault and battery. I cannot agree with this resolution. The prosecutor knew he could have charged Appellant with assault and battery, but deliberately and correctly chose to charge child sexual abuse because he thought a sex offense was committed. I conclude that the Majority reaches this result because, given its analysis of § 843.5(E), it cannot affirm Appellant's adjudication under that statute, no other sex offense is available, and apparently the Majority is unwilling to reverse.

# 2020 OBA Board of Governors Vacancies

## Nominating Petition deadline: 5 p.m. Friday, Sept. 6, 2019

**OFFICERS**

**President-Elect**
Current: Susan B. Shields, Oklahoma City
Ms. Shields automatically becomes OBA president Jan. 1, 2020
(One-year term: 2020)
Nominee: **Michael C. Mordy, Ardmore**

**Vice President**
Current: Lane R. Neal, Oklahoma City
(One-year term: 2020)
Nominee: **Vacant**

**BOARD OF GOVERNORS**

**Supreme Court Judicial District Two**
Current: Mark E. Fields, McAlester
Atoka, Bryan, Choctaw, Haskell, Johnston, Latimer, LeFlore, McCurtain, McIntosh, Marshall, Pittsburg, Pushmataha and Sequoyah counties
(Three-year term: 2020-2022)
Nominee: **Vacant**

**Supreme Court Judicial District Eight**
Current: Jimmy D. Oliver, Stillwater, Coal, Hughes, Lincoln, Logan, Noble, Okfuskee, Payne, Pontotoc, Pottawatomie and Seminole counties
(Three-year term: 2020-2022)
Nominee: **Vacant**

**Supreme Court Judicial District Nine**
Current: Bryon J. Will, Yukon
Caddo, Canadian, Comanche, Cotton, Greer, Harmon, Jackson, Kiowa and Tillman counties
(Three-year term: 2020-2022)
Nominee: **Robin L. Rochelle, Lawton**

**Member At Large**
Current: James R. Hicks, Tulsa
Statewide
(Three-year term: 2020-2022)
Nominee: **Amber Peckio Garrett, Tulsa**

**SUMMARY OF NOMINATIONS RULES**

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

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

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

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

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

Elections for contested positions will be held at the House of Delegates meeting Nov. 8, during the Nov. 6-8 OBA Annual Meeting.

Terms of the present OBA officers and governors will terminate Dec. 31, 2019.

Nomination and resolution forms can be found at www.okbar.org/governance/bog/vacancies.

# Oklahoma Bar Association Nominating Petitions

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

**OFFICERS**
**President Elect**
**Michael C. Mordy, Ardmore**

Nominating Petitions have been filed nominating Michael C. Mordy, Ardmore for President Elect of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2020. Fifty of the names thereon are set forth below:

Donald J. Chaffin, Carrie Pfrehm, Bradley Wilson, David G. Mordy, D. Michael Hisey, Justin R. Landgraf, Michael A. Cawley, Samuel J. Veazey, John S. Veazey, Lorenzo Collins, Brett Morton, Charles Milor, Bebe Bridges, Aaron Taber, Polly Murphy, Dan Little, David Youngblood, Payton Phelps, Ted Haxel, Charles W. Chesnut, Charles E. Geister, Robert N. Naifeh Jr., John Hermes, John W. Coyle III, William K. Elias, Steven L. Barghols, Tom E. Mullen, Cathy Christensen, Mark R. Smith, Stephen K. Newcombe, Kenneth L. Delashaw, David K. Petty, D. Faith Orlowski, William R. Grimm, Allen M. Smallwood, Kimberly Hays, Mark Craig, William H. Huffman, Charles Greenough, Jim Loftis, Richard E. Butner, Mark Wesner, Sam T. Allen IV, Gary C. Clark, Garvin A. Isaacs, M. Joe Crosthwait Jr., James T. Stuart, E. J. Buckholts II, Stephen Beam and David A. Poarch.

**A total of 389 signatures appear on the petitions.**

**BOARD OF GOVERNORS**
**Supreme Court Judicial District No. 9**
**Robin L. Rochelle, Lawton**

Nominating Petitions have been filed nominating Robin L. Rochelle for election of Supreme Court Judicial District No. 9 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2020.

**A total of 27 signatures appear on the petitions.**

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

**Member at Large**
**Amber Peckio Garrett, Tulsa**

Nominating Petitions have been filed nominating Amber Peckio Garrett, Tulsa for election of Member at Large of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2020. Fifty of the names thereon are set forth below:

Anthony Allen, Lynn Anderson, Trisha Archer, Jacob Aycock, Clifton Baker, Travis Barnett, Matthew C. Beese, Rodney Brook, Christy Caves, Tamera Childers, Sheri Eastham, Joseph R. Farris, Matthew P. Gomez, M. Shane Henry, N. Scott Johnson, A. Laurie Koller, Greg Lafevers, Anthony M. Laizure, Katherine Lewis, Edward J. Lutz, Blake Lynch, Alexandra Masters, Alexandria Mayfield, Daniel Medlock, J. Patrick Mensching, Jody Nathan, Lane Neal, Emily D. Pearson, Garrett, Kathleen Pence, Morgan Powell, Paula J. Quillin, Caleb Raynolds, Sara M. Schmook, Natalie Sears, Caroline Shaffer, Andrew A. Shank, Hunter M. Siex, Tim Spencer, Justin Stout, Michael Taubman, Roy D. Tucker, Charles C. Vaught, Jessica N. Vaught, Kara Vincent, Jill Walker-Abdoveis, Jeremy Ward, Mark Warman, Stephen C. Wilkerson, Phillip B. Wilson and Zachary Young

**A total of 51 signatures appear on the petitions.**

# Opinions of Court of Civil Appeals

**2019 OK CIV APP 43**

**IN THE MATTER OF THE ESTATE OF MARGARET J. STOLBA: DANIEL W. LOWTHER, Personal Representative of the Estate of Margaret J. Stolba, Deceased, Appellant, vs. MARK S. STOLBA, Appellee.**

**Case No. 116,512. July 8, 2019**

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE KURT G. GLASSCO, TRIAL JUDGE

**AFFIRMED**

Trey Abraham, Louis Abraham III P.C., Tulsa, Oklahoma, for Appellant

James H. Ferris, Blake M. Feamster, MOYERS MARTIN, LLP, Tulsa, Oklahoma, for Appellee

P. THOMAS THORNBRUGH, JUDGE:

¶1 Daniel W. Lowther, as personal representative of the estate of Margaret J. Stolba, deceased (Decedent), appeals a decision by the district court finding that a restriction on the alienation of property in the Decedent's will was invalid, and distributing the subject property to decedent's heirs.

**BACKGROUND**

¶2 Decedent's will was admitted for probate in December 2012. It was evidently composed by Decedent without legal assistance. Among its provisions was this:

> The home stead will remain in trust, Not to be sold or split. All four of you have got to get along. Work it out, you should be able to have fun doing things there. Everyone should behave themselves. (sic)

In January 2017, probate was still open, and one of Decedent's sons, Mark S. Stolba, filed an application to distribute the remaining property in the form of the homestead[1] because either 1) the "trust" failed for lack of required elements, or 2) the homestead provision created an unenforceable perpetuity or restriction on alienation.

¶3 In October 2017, the district court entered a decree of distribution, distributing the homestead to Decedent's four children, per the rules of intestate succession. Representative Daniel Lowther filed a motion for new trial, which was denied. He now appeals.

**STANDARD OF REVIEW**

¶4 Probate proceedings are of equitable cognizance. *In re Estate of Holcomb*, 2002 OK 90, ¶ 8, 63 P.3d 9. We will not disturb the trial court's decision unless it is "found to be clearly contrary to the weight of the evidence or to some governing principle of law." *In re Estate of Maheras,* 1995 OK 40, ¶ 7, 897 P.2d 268. This matter involves questions of statutory interpretation. We are required to review questions of law, such as the construction of statutes, under a *de novo* standard of review. *In re Estate of Jackson*, 2008 OK 83, ¶ 9, 194 P.3d 1269.

**ANALYSIS**

¶5 Appellant states the following questions on appeal, which we reproduce below.

> 1. Whether the trial court erred in granting Appellee's application for distribution in that Appellee did not contest the validity of the admitted will within 90 days and by the operation of 58 O.S. § 67, the probate is conclusive and the trial court did not have jurisdiction to hear and decide the application for distribution.
>
> 2. Whether the trial court erred in granting Appellee's application for distribution in that he did not contest the validity of the admitted will within 90 days and by the operation of 58 O.S. § 67, the application for distribution was time barred.
>
> 3. Whether the trial court erred in granting Appellee's application for distribution in that the application was not a sworn petition as required by 58 O.S. § 61.4.
>
> 4. Whether the trial court erred in granting Appellee's application for distribution in that no citations were served on the executors, legatees, devisees and heirs within the state as required by 58 O.S. § 62.
>
> 5. Whether the trial court erred in granting Appellee's application for distribution in that the order admitting the will to probate establishes the will as valid and was never revoked.

6. Whether the trial court erred in granting Appellee's application for distribution in that the testamentary trust in the admitted will contained a power to sell, exchange or otherwise convey the real or personal property vested in Appellant, and by the operation of 60 O.S. § 175.47 the Rule Against Perpetuities is not violated and the testamentary trust may exist in perpetuity.

7. Whether the trial court erred in granting Appellee's application for distribution in that the testamentary trust in the admitted will must be construed and or reformed to avoid invalidity based on the Rule Against Perpetuities by the operation of 60 O.S. § 75.

8. Whether the trial court erred in granting Appellee's application for distribution in that the testamentary trust in the admitted will must be construed and/or reformed to avoid invalidity based on the Rule against Perpetuities by the operation of 60 O.S. § 77.

¶6 The core question before us is whether the "trust" provision of the will represents an unenforceable perpetual ban on the alienation of real property. We will first address Appellant's jurisdictional arguments, however. These arguments appear to arise from a fundamental misunderstanding of the legal nature of the proceedings. Appellant argues that Appellee attempted to *contest the validity of the will,* thereby rendering it entirely ineffective, and forcing an intestate probate, and that the district court rejected the will and proceeded with an intestate distribution. This is incorrect. Appellee's "application for distribution" specifically requested that the court find the will valid, and requested the court to interpret whether a specific clause of the will was legally enforceable.

## I. The Operation of 58 O.S. § 67

¶7 Appellant argues that, by the operation of 58 O.S. § 67, the probate was "conclusive" three months after the will was admitted, and the trial court did not have jurisdiction to hear and decide the application for distribution. This argument arises from a misreading of § 67. Section 67 must be read in conjunction with 58 O.S. § 61, which states:

> When a will has been admitted to probate, any person interested therein may at any time within three (3) months from the date the will was admitted to probate contest the same or the validity of the will. For that purpose he must file in the court in which the will was proved a sworn petition in writing containing his allegations, that evidence discovered since the probate of the will, the material facts of which must be set forth, shows:
>
> 1. That a will of a later date than the one proved by the decedent, revoking or changing the will, has been discovered, and is offered; or
>
> 2. That some jurisdictional fact was wanting in the probate; or
>
> 3. That the testator was not competent, free from duress, menace, fraud, or undue influence when the will allowed was made; or
>
> 4. That the will was not duly executed and attested.

¶8 Section 61 makes it clear that challenges to the *validity of the will in toto, or to probate jurisdiction* must be made within three months of a will's admission to probate. This does not include any request to interpret a specific clause, including the argument here that the alienation clause of the will is legally unenforceable. A party requesting that the court interpret a provision of a will inherently relies on the premise that a valid will exists.

## II. The Sworn Petition As Required by 58 O.S. § 61(4)

¶9 Appellant's next argument springs from the same misapprehension. Section 61 regulates challenges to the validity of a will *in toto*, but not requests to interpret a particular provision. No "sworn petition" is required in these circumstances.

## III. "The Service of Citations on the Executors, Legatees, Devisees and Heirs Within the State As Required by 58 O.S. § 62."

¶10 The same argument applies here. The provisions of 58 O.S. §§ 61 through 67 govern attempts to have the document presented as the testator's will declared invalid, but not requests for distribution or to interpret the will's provisions.

## IV. Whether the Trial Court Erred In Granting Appellee's Application for Distribution In That the Order Admitting the Will to Probate Establishes the Will As Valid and Was Never Revoked

¶11 This argument also springs from the misapprehension that Appellee was attempting to "revoke" the admission of the will to probate. It is not valid in this context.

V. The Question of the "Trust" Provision

¶12 We now return to the core question. The will contained two significant provisions. The first was the "homestead" provision, which stated (sic):

> The home stead will remain in trust, Not to be sold or split. All four of you have got to get along. Work it out, you should be able to have fun doing things there. Everyone should behave themselves.

The second is the "powers" provision, which states:

> I name and appoint Daniel W. Lowther and Teresa Michele Lauscher as Co-Personal Representatives and request that they accept appointment. . . . Without limiting any powers conferred by law, I declare that they shall have the power to sell, lease, mortgage, and dispose of all or any part of my estate without the necessity of obtaining court approval . . . and to do all other acts related to administration and disposition of my estate that are required of them as Personal Representatives.

¶13 The first provision, as written, apparently violates the first part of 60 O.S. § 175.47 - *Suspension of absolute power of alienation – Period of suspension.*

> A. Except as otherwise provided in subsection B of this section, the absolute power of alienation of real and personal property, or either of them, shall not be suspended by any limitations or conditions whatever for a longer period than during the continuance of a life or lives of the beneficiaries in being at the creation of the estate and twenty-one (21) years thereafter.

¶14 The mandate that the homestead is "not to be sold or split" without a time limitation facially violates § 175.47. Appellant argues, however, that this directive is saved by the second part of § 175.47 which states:

> The absolute power of alienation is not suspended if there is any person in being who, alone or in combination with one or more others, has the power to sell, exchange, or otherwise convey the real or personal property.

¶15 Appellants argue that, pursuant to the second part of § 175.47, there is a person in being who has the power to sell the real property because of the clause stating that the Co-Personal Representatives "have the power to sell, lease, mortgage, and dispose of all or any part of my estate."

¶16 The will is specific that the property is "not to be sold." If the Co-Personal Representatives had attempted to sell a *validly restrained* property pursuant to their *general powers of sale*, we are certain that this specific restraint would control over the general power. We find that the provisions of the will permanently suspending the power of alienation as to the homestead are not saved by the grant of a general power of sale to the Co-Personal Representatives.

VI. "Reformation"

¶17 Appellant next argues that the combination of 60 O.S. § 75, "Reformation of interests violating rule against perpetuities," and 60 O.S. § 77, "Reformation of offending instruments," required the trial court to essentially re-write the "homestead" clause of the will to make it compliant with the alienation prohibition of § 175.47. These statutes state:

> 60 O.S. § 75 - Reformation of interests violating rule against perpetuities – Intent
>
> Any interest in real or personal property that would violate the rule against perpetuities shall be reformed, or construed within the limits of the rule, to give effect to the general intent of the creator of that interest whenever that general intent can be ascertained. This provision shall be liberally construed and applied to validate such interest to the fullest extent consistent with such ascertained intent.
>
> 60 O.S. § 77 - Reformation of offending instruments
>
> If an instrument violates the rule against perpetuities, but can be reformed or construed in accordance with the provisions of this act, it shall not be declared totally invalid. Rather, the provisions thereof that do not offend the rule shall be enforced, and only the provisions thereof that do violate, or might violate, the rule shall be subject to reformation or construction un-

der the doctrine of cy pres within the terms of this act.

¶18 The immediate problem, however, is that this case does not truly involve a *perpetuity,* but involves a *restraint on alienation.*

¶19 The rule against perpetuities is one of property law which precludes the *postponement* of vesting of *contingent* interests for a period of time considered to be too long. *Denney v. Teel,* 1984 OK 63, 688 P.2d 803. A restraint on alienation does not have any contingent interest or future vesting of rights. "Restraints upon alienation where there are no provisions for forfeiture or reversion are 'disabling re-straints' and void." *Shields v. Moffitt*, 1984 OK 42, ¶26, 683 P.2d 530. Commenting on Kentucky law, *Denney* noted the same distinction: The common-law rule against restraint on alienation is designed to prevent owners from losing their power to alienate property while the rule against perpetuities is designed to prevent interests from being created too far in the future. *Id.*, n. 18. *See also Producers Oil Co. v. Gore,* 1980 OK 62, 610 P.2d 772 (in contrast to rules against restraints on alienation, the rule against perpetuities, although aimed at preventing restrictions on alienation, is directed toward duration of the rights rather than toward absolute restraints); 70 C.J.S. Perpetuities § 12 ("the rule against perpetuities limits the power of an owner to create future interests, whereas the rule against restraints on alienation prohibits the owner from creating provisions blocking his or her grantee from disposing of the property").

¶20 In this case, the will as written clearly creates a restraint on alienation rather than an impermissibly remote future interest – the homestead is "not to be sold or split." Title 60 O.S. §§ 75 and 77 do not apply at all to void restraints on alienation. In reforming a perpetuity that vests too late, a court can simply shorten the vesting period and maintain the grantor's wishes in all other ways. It is not possible to reform an absolute restriction on alienation and maintain the grantor's intent.

¶21 Further, although these statutory sections were enacted almost 50 years ago, there are only three Oklahoma cases interpreting them. *Producers Oil Co. v. Gore* held that that the rule against perpetuities did not apply to interests created by preemptive option provisions of oil and gas lease operating agreements. *Am. Nat. Res., LLC v. Eagle Rock Energy Partners, L.P.*, 2016 OK 67, 374 P.3d 766, discussed the preservation of the issue of reformation for appeal, and found it had not been preserved. *Matter of Estate of Crowl*, 1987 OK 13, 737 P.2d 911, noted that, where an instrument is fairly susceptible to two or more constructions, the court should choose the one which does not violate the rule against perpetuities.

¶22 None of these cases give any indication of how far a court may go in "reforming" an instrument that violates the rule. As noted in *In re Prather's Estate*, 1974 OK CIV APP 24, n. 4, 527 P.2d 211, however:

> The rule of construction that the intent of the testator must be carried out if possible does not authorize courts to make a new will to conform to what they may think the testator intended. The intent of the testator must be ascertained from the will as it stands.

¶23 Even if we could ascertain that the testator intended the restriction on alienation to last only for the life of her children,[2] we are left with no clue as to the disposition of her property after that period. Simply assuming the property would fall into the estate residual does not solve the problem because the will has no residuary beneficiary. We find that, even if the void restraint on alienation could legally be reformed pursuant to §§ 75 & 77, the will is so defective in this area that a court could not reform it without re-writing the will to include a final disposition that is no more than a guess of the testator's intent.

¶24 As such, when faced with a trust provision that appears to lack any duties for the trustee, and contains an absolute prohibition on alienation, coupled with a will that gives no clue as to what the final disposition of the property should be, we find the trial court did not err in holding the homestead provisions of the will invalid, and distributing the property as a partial intestacy.

## CONCLUSION

¶25 We find no error in the district court's decision.

¶26 **AFFIRMED**.

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

P. THOMAS THORNBRUGH, JUDGE:

1. In the opinion, the word "homestead" is used in its generic meaning, and not in its legal sense.

2. Even this is less than certain, as the will appears to mention non-beneficiaries using the property, including school-age children.

**2019 OK CIV APP 44**

**IN RE: THE MEDEIROS REVOCABLE TRUST, Petitioner/Appellee, vs. MORGAN STANLEY SMITH BARNEY LLC, Respondent/Appellant.**

**Case No. 116,915. July 1, 2019**

APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY, OKLAHOMA

HONORABLE LISA E. SHAW, TRIAL JUDGE

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Phillip G. Whaley, Grant M. Lucky, RYAN WHALEY COLDIRON JANTZEN PETERS & WEBBER PLLC, Oklahoma City, Oklahoma, for Respondent/Appellant,

Arthur R. South, Vickie Leyja, Lawton, Oklahoma, for Petitioner/Appellee.

BRIAN JACK GOREE, CHIEF JUDGE:

¶1 Morgan Stanley Smith Barney, LLC (Morgan Stanley) filed a motion to compel arbitration and the trial court denied it. We have jurisdiction to review the decision *de novo* as an interlocutory order appealable by right. Okla. Sup. Ct. R. 1.60(i); 12 O.S. §1879(a)(1); *Johnson v. Convalescent Center of Grady County, LLC,* 2014 OK 102, ¶5, 341 P.3d 71, 73. The primary issue is whether a receiver, who did not sign the agreement containing the arbitration clause, is nevertheless bound by it. We answer yes and reverse.

I.
Background

¶2 Milton and Pearl Medeiros formed the Medeiros Revocable Trust, naming themselves as trustees. They signed a client agreement and made deposits to an account in California with Citigroup Smith Barney (Smith Barney). The client agreement contained an arbitration clause, the terms of which are undisputed.[1] It is also undisputed that Morgan Stanley is the successor to Smith Barney. Milton and Pearl agreed that their contract would be binding on their assignees or successors in interest as well as successors to Smith Barney.[2]

¶3 Pearl Medeiros died in 2015 and was survived by her husband, Milton, her son, Jon Katvala, and her daughter, Karen Stewart. Jon and Karen (Petitioners) filed this suit in Comanche County, Oklahoma, to construe the trust. A few weeks later, Milton, together with his daughter, Kimberly Sue Lafinier, and his step-daughter, Carol A. Phillips, commenced an action in Washoe County, Nevada, asserting a different construction of the trust and its assets. The ownership and control of the funds on deposit with Morgan Stanley is highly contested.

¶4 The district court in Comanche County appointed Allen McCall (Receiver) to receive and collect the outstanding assets including the Morgan Stanley accounts. Four months later, the court entered judgment in favor of Petitioners in the amount of $500,000, against Carol Philips, Kimberly Medeiros Lafinier, and Milton H. Medeiros, jointly and severally. In the same judgment, the court ordered Petitioners to participate with Receiver "to pursue all legal remedies to return the sum of $500,000.00 and all other assets to this Trust to be distributed only by further orders of this Court."

¶5 Receiver filed a petition asking for judgment against Morgan Stanley for reimbursement to the trust in the amount of $440,537.05.[3] Morgan Stanley filed a motion to compel arbitration based upon the agreement between Milton and Pearl Medeiros and Morgan Stanley's predecessor-in-interest, Smith Barney. This is an interlocutory appeal from the court's March 9, 2018, order denying Morgan Stanley's motion to compel arbitration.

II.
Personal Jurisdiction

¶6 Morgan Stanley proposes the Oklahoma district court does not have personal jurisdiction over it. In *Montgomery v. Airbus Helicopters, Inc.*, 2018 OK 17, 414 P.3d 824, the court stated: "[I]f a defendant has purposefully directed activities at the residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities, specific jurisdiction over a nonresident defendant may exist unless jurisdiction would be unreasonable or would offend the traditional notions of substantial justice and fair play." *Montgomery,* ¶16. Morgan Stanley concedes that it mailed client account records to the Oklahoma residence of Milton and Pearl Medeiros in 2014 or 2015. It is plain that Morgan Stanley held assets owned by the Medeiros Revocable Trust and it directed communications regarding those assets to the trustees who were residents of Oklahoma. The Receiver's claim arises from the account agreement between Morgan Stanley and Milton and Pearl Medeiros. It does not offend traditional notions of fair play and substantial

justice to require Morgan Stanley to defend itself in Oklahoma. We conclude the district court had personal jurisdiction over Morgan Stanley and the trial court did not err when it denied Morgan Stanley's motion to dismiss on that basis.

## III.
## Arbitration

¶7 When a court is asked to compel arbitration it must first determine whether the parties agreed to arbitrate that dispute. *Johnson v. Convalescent Center of Grady County, LLC,* 2014 OK 102, ¶6, 341 P.3d 71, 73. We review an order granting or denying a motion to compel arbitration *de novo. Thompson v. Bar-S Foods Co.,* 2007 OK 75, ¶9, 174 P.3d 567, 572.

¶8 Receiver did not sign the arbitration agreement with Morgan Stanley and therefore urges he cannot be compelled to arbitrate. Receiver contends he is an arm of the court whereas Morgan Stanley argues Receiver stepped into the shoes of the trustees. Both are correct.

¶9 Receivers are appointed by the court and serve under its authority when they bring actions to collect debts. 12 O.S. §§1551, 1554. A receiver is an officer of the court who holds property and funds coming into his hands by the same right and title as the person for whose title he is the receiver. *Norman v. Trison Development Corporation,* 1992 OK 67, ¶7, 832 P.2d 6, 8. The receiver is the representative of the court regarding the right of possession of property, but the right to receive it derives from the entity that has been placed in receivership. *Farrimond v. State ex rel. Carroll Fisher, Insurance Commissioner,* 2000 OK 52, ¶15, 8 P.3d 872, 875. A receiver's claims are subject to the claims and defenses possessed by all interested parties. *Oklahoma Dept. of Securities ex rel. Faught v. Blair*, 2010 OK 16, ¶36, 231 P.3d 645, 664. For example, a receiver of an insolvent corporation takes the property for the creditors subject to such equities, liens, or encumbrances which existed against the property at the time of his appointment. *Id.* at ¶36, referencing *Harn v. Smith*, 1921 OK 328, ¶9, 204 P. 642, 647.

¶10 However, none of the aforementioned cases hold that a receiver who did not agree to arbitrate can nevertheless be compelled to do so. Receiver relies on *Carter v. Schuster,* 2009 OK 94, 227 P.3d 149, to support his argument that he is not required to arbitrate with Morgan Stanley. *Carter* cited an opinion of the 2nd Circuit that identified five theories for binding non-signatories to arbitration agreements, and an entity's status as a receiver for a signatory was not one of them.[4] The holding in *Carter* is that an agent who signs a contract containing an arbitration provision, in his capacity as a corporate representative, cannot be compelled to arbitrate claims made against him as an individual in absence of fraud or some wrongful act. *Carter, supra* at ¶26. We disagree with Receiver that Oklahoma recognizes only these five exceptions to the general rule that non-signatories cannot be bound by arbitration agreements.

¶11 Morgan Stanley directs our attention to *Javitch v. First Union Securities, Inc.*, 315 F.3d 619 (6th Cir. 2003). In *Javitch,* the court found that a receiver was bound to an arbitration agreement to the same extent that the receivership entities would have been absent the appointment of the receiver. *Javitch,* p. 627. In reaching its decision, the court assessed the nature of the claims being asserted by the receiver and the authority granted to him in the appointing order.

¶12 In the case now before us, Receiver claims that Morgan Stanley was aware of the conflicting claims to the ownership of the trust funds, but nevertheless transferred the funds to another brokerage firm without disclosure to Petitioners. If the original trustees had commenced such an action against Morgan Stanley it would have been subject to arbitration. It is equally clear that the Receiver's appointing order authorized him to collect trust assets against Morgan Stanley.

¶13 When Receiver initiated a claim for the benefit of the trust that contracted with Morgan Stanley, his interest was subject to the agreements in that contract. Because the original trustees agreed to arbitration, Receiver's derivative claim is likewise subject to arbitration. The trial court's denial of Morgan Stanley's motion to compel arbitration was error.

## IV.
## Bond and Stay of Proceedings

¶14 After filing its petition-in-error, Morgan Stanley filed a motion in the district court requesting that the trial court proceedings be stayed during the pendency of the appeal. Receiver responded that 12 O.S. §990.4(D) required Morgan Stanley to post a bond. The trial court entered an order granting the stay contingent upon Morgan Stanley posting a

bond for $440,537.05.[5] Morgan Stanley asks that we review the trial court's order.

¶15 After a petition-in-error is filed, the trial court retains jurisdiction to, among other things, decide motions to stay the enforcement of interlocutory orders appealable by right. Rule 1.37(a)(4). A party aggrieved by such an order may seek review in the appellate court by motion without amending the petition in error. Rule 1.37(b).[6] Morgan Stanley has filed a timely motion seeking review of the trial court's order requiring a bond.

¶16 The appeal in this case is not from a judgment or a final order but from an interlocutory order denying a motion to compel arbitration.[7] Therefore, a stay of proceedings is governed by 12 O.S. §990.4(D) and Rule 1.15(b).[8] Accordingly, the trial court had discretion to stay the proceedings on terms which would protect the rights of the parties. Morgan Stanley's position is that requiring a bond equal to the amount in controversy was an abuse of discretion. We agree.

¶17 The appealed order denied arbitration and retained in the district court jurisdiction over Receiver's claim against Morgan Stanley. No judgment was ever entered against Morgan Stanley. Morgan Stanley requested a stay of the proceedings, not a stay of execution or enforcement of a judgment. A bond was not required to secure Receiver's or Petitioners' rights which remain contingent and unliquidated.

## V.
## Conclusion

¶18 The order filed March 9, 2018, is reversed because the trial court erroneously denied Morgan Stanley's motion to compel arbitration. Morgan Stanley's motion to review the stay order is granted pursuant to Okla. Sup. Ct. R. 1.37(b). The order filed November 30, 2018 is affirmed insofar as it stays the proceedings in the district court during the pendency of this appeal. The order is reversed as to the requirement that Morgan Stanley post a bond in the amount of $440,537.05.

¶19 The case is remanded for further proceedings consistent with this opinion. AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

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

BRIAN JACK GOREE, CHIEF JUDGE:

1. Paragraph 6 of the Agreement provided: "I agree that all claims or controversies, whether such claims or controversies arose prior, on or subsequent to the date hereof, between me and SB and/or any of its present or former officers, directors, or employees concerning or arising from (i) any account maintained by me with SB individually or jointly with others in any capacity: (ii) any transaction involving SB or any predecessor firms by merger, acquisition or other business combination and me, whether or not such transaction occurred in such account or accounts; or (iii) the construction, performance or breach of this or any other agreement between us, any duty arising from the business of SB or otherwise, shall be determined by arbitration before, and only before, any self-regulatory organization or exchange of which SB is a member."

2. Paragraph 7 of the Agreement provided: "The provisions of this Agreement shall be continuous, shall cover individually and collectively all accounts which I may open or reopen with SB, and shall insure to the benefit of SB's present organization, and any successor organization or assigns; and shall be binding upon my heirs, executors, administrators, assigns or successors in interest." Any question of who are the successor trustees to The Medeiros Revocable Trust is neither presented nor decided in this appeal.

3. Receiver's petition was not commenced as a separate action. It was filed in the same case as Petitioners' suit filed in Comanche County.

4. "The United States Court of Appeals for the Second Circuit has identified five theories for binding nonsignatories to arbitration agreements: 1) incorporation by reference, when a party has entered into a separate contractual relationship with the nonsignatory incorporating the existing arbitration clause; 2) assumption, when subsequent conduct indicates nonsignatory has assumed the obligation to arbitrate; 3) agency, when traditional principles of agency law may bind a nonsignatory to an arbitration agreement; 4) veil-piercing/alter ego, when the corporate relationship between a parent and its subsidiary are sufficiently close to justify piercing the corporate veil and holding one corporation legally accountable for the actions of the other, such as, to prevent fraud or other wrong or when a parent dominates and controls a subsidiary; and 5) estoppel, when the claims are integrally related to the contract containing the arbitration clause." *Carter v. Schuster*, 2009 OK 94, ¶14, 227 P.3d 149, 153, quoting *Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 776--779 (2d Cir.1995).

5. This is the sum Receiver claims Morgan Stanley must distribute to the Medeiros Revocable Trust.

6. Okla. Sup. Ct. R. 1.37(b) provides: "Except as provided in Subdivision (a)(3) & (10), review of the trial court's ruling upon any of the matters set forth in part (a) of this Rule shall be by motion filed in the Supreme Court which shall be entertained in the principal appeal. However, a petition in error or amended petition in error shall be filed in the Supreme Court to seek review of the trial court's ruling when statute or the Rules of the Supreme Court require review of the trial court's ruling by a petition or amended petition in error. *See, e.g.*, Rule 1.36(k). When review of a trial court's ruling is sought by motion, it must be filed in the Supreme Court within thirty (30) days of the date the trial court's ruling is filed in the trial court."

7. A stay of enforcement of a judgment, decree or final order is obtained by filing with the court clerk a written undertaking and the posting of a supersedeas bond or other security. 12 O.S. §990.4(A). Section §990.4(D) provides: "In any action not provided for in subsection A, B or C of this section, the court may stay the enforcement of any judgment, decree or final order during the pendency of the appeal or while any post trial motion is pending upon such terms as to bond or otherwise as it considers proper for the security of the rights of the parties."

8. Okla. Sup. Ct. R. 1.15(b) provides: "Stay of enforcement of the decision of a lower tribunal in any proceeding other than an appeal from a final decision of a district court shall be governed by any applicable statutory law or rules governing that tribunal. Except where an applicable statute or rule provides otherwise, the lower tribunal may in its sound discretion stay enforcement of the decision which is the subject of the proceedings in this Court on terms which will protect the rights of the parties. No motion shall be filed in this Court to stay the decision of the lower tribunal where such relief may be sought from the lower tribunal until application has first been presented to and ruled upon by the lower tribunal."

**2019 OK CIV APP 45**

**DAVID S. ELDRIDGE, Plaintiff/Appellant, vs. KAVON, LLC, Defendant/Appellee.**

**Case No. 117,911. July 9, 2019**

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE THOMAS E. PRINCE, JUDGE

AFFIRMED

David S. Eldridge, Oklahoma City, Oklahoma, *Pro Se*,

C. Todd Ward, Brion B. Hitt, FENTON, FENTON, SMITH, RENEAU & MOON, Oklahoma City, Oklahoma, for Defendant/Appellee.

Kenneth L. Buettner, Judge:

¶1 Plaintiff David Eldridge (Eldridge) appeals from the trial court's grant of summary judgment in favor of Defendant Kavon LLC (Kavon). Eldridge brought claims of breach of contract and violation of the Oklahoma Consumer Protection Act for Kavon's refusal to serve Eldridge at a Chick-Fil-A restaurant at which Eldridge had purchased a "Cow Calendar" containing coupons for the purchase of food. Kavon moved for summary judgment, alleging Eldridge had prevented performance of the contract and had not demonstrated damages as a result of the breach. The trial court granted Kavon's motion. Eldridge appeals. We affirm.

¶2 Eldridge purchased an $8 Cow Calendar at a Chick-fil-A restaurant in Oklahoma City operated and franchised by Kavon. The Cow Calendar included an offer for the registration of a "Cow Calendar Card," which gives users access to special offers each month, the total benefit of which is $96 for the calendar year. The Card may be used at any participating Chick-fil-A restaurant across the country. There are approximately thirteen Chick-fil-A restaurants in the Oklahoma City metro area.

¶3 Eldridge often frequented the Chick-fil-A location operated by Kavon, allegedly for hours at a time. Kavon alleges that Eldridge became inappropriate in his interactions with guests and restaurant staff, resulting in Kavon requesting that Eldridge not return to that particular Chick-fil-A location. When Eldridge did return, Kavon again requested that he leave. Eldridge filed suit against Kavon, alleging breach of contract and violation of consumer protection laws.

¶4 At trial, Kavon moved for summary judgment, arguing it was entitled to judgment as a matter of law because (1) Eldridge prevented Kavon's performance of the contract by behaving in an inappropriate manner; and (2) Eldridge could not demonstrate damages because he was not restricted from using his Cow Calendar Card at other Chick-fil-A locations. The trial court granted Kavon's motion. Eldridge appeals.

¶5 On appeal, Eldridge asserts that the trial court erred by granting summary judgment on his breach of contract and consumer protection claims.[1] A trial court should grant summary judgment where there is no dispute as to a material fact and the moving party is entitled to judgment as a matter of law. *Wood v. Mercedes-Benz of Okla. City*, 2014 OK 68, ¶ 4, 336 P.3d 457. The trial court should view all facts and inferences in the light most favorable to the non-moving party. Id. Summary judgment is not appropriate where reasonable persons might reach different conclusions based upon the undisputed evidence. Id. "In attempting to show the existence of a question that must be tried, the party may not rely on bald contentions that facts exist to defeat the motion." *Okla. Dep't of Sec. ex rel. Faught v. Wilcox,* 2011 OK 82, ¶ 19, 267 P.3d 106 (citing *Roberson v. Waltner,* 2005 OK CIV APP 15¶ 8, 108 P.3d 567). The standard of review for a grant of summary judgment is *de novo. Carmichael v. Beller*, 1996 OK 48, ¶ 2, 914 P.2d 1051. "Under the *de novo* standard, this Court is afforded 'plenary, independent, and non-deferential authority to examine the issues presented.'" *Wood*, 2014 OK 68, ¶ 4, 336 P.3d 457 (citing *Harmon v. Cradduck,* 2012 OK 80, ¶ 10, 286 P.3d 643).

¶6 In this case, the parties do not dispute the existence of a contract based upon Kavon's sale of a Cow Calendar to Eldridge and his subsequent registration for a Cow Calendar Card, nor do they dispute that Kavon refused service to Eldridge. Instead, the important legal determinations to be made are whether Kavon was excused from performance and whether Eldridge suffered damages. In order to maintain a breach of contract action, a party must demonstrate (1) the existence of a contract, (2) failure of a party to perform its contractual duty, and (3) damages suffered as a result of the breach. *Dig. Design Grp., Inc. v. Info. Builders, Inc.*, 2001 OK 21, ¶ 33, 24 P.3d 834. Performance of a contract may be excused where one party prevents the other party's performance. *Allen v. State ex rel. Bd. of*

*Trs. of Okla. Unif. Ret. Syst. For Justices & Judges*, 1988 OK 99, ¶ 14, 769 P.2d 1302.

¶7 Kavon alleges it was prevented from performing its duty of offering Eldridge the Cow Calendar Card special offers because Eldridge behaved in an inappropriate manner at the restaurant, resulting in his exclusion from that particular Chick-fil-A location. In so arguing, Kavon cites to *Chilton v. Oklahoma Tire & Supply Co.*, 1937 OK 168, 67 P.2d 27, in which the defendant, a refrigerator servicer, was prevented from performing his contractual duties as a result of the plaintiff, a refrigerator salesman, complaining to the state refrigerator distributor and causing the plaintiff to no longer be a designated servicer. There, the Supreme Court excused defendant's nonperformance because he had been prevented from performing his contractual duties by plaintiff's own actions. *Id*.

¶8 It is generally true that the owner of real property has "the right to exclude other members of society from any present occupation of the land." 3 C.J.S. Property § 45. Except as prohibited by anti-discrimination laws, business owners in most states have the common law right to refuse business for any reason or no reason. *See, e.g., Feldt v. Marriott Corp.*, 322 A.2d 913, 915 (D.C. 1974) ("[A] restaurant owner had the right to arbitrarily refuse service to any guest."). Logically, one reason a business owner might refuse service to a customer would be that customer's disruption of the business environment. Here, Kavon alleges that Eldridge behaved in a manner that was offensive to restaurant employees and patrons. Thus, Eldridge's exclusion from the restaurant was self-inflicted as a result of his continued inappropriate behavior. Where it would be unreasonable to require Kavon to allow Eldridge to remain on restaurant premises while Eldridge persisted in his disruptive behavior, we conclude that Kavon was rendered unable to honor Eldridge's requests to benefit from the Cow Calendar Card coupons because of Eldridge's own behavior. A breach of contract is excused where the breaching party was prevented from performing as a result of the other party's conduct. Therefore, Kavon's breach by failing to continue to honor Eldridge's requests to benefit from the Cow Calendar discounts is excused.

¶9 As an alternate defense theory, Kavon also argued that Eldridge could not demonstrate damages resulting from the breach of contract because Eldridge was free to use his Cow Calendar Card at any of the other thirteen Chick-fil-A restaurants in the Oklahoma City metro area. In response, Eldridge alleged he was unable to visit the other locations because he did not own a vehicle. We agree with Kavon and note that the availability of public transportation in Oklahoma City – including buses, taxis, and ride sharing programs – renders Eldridge's argument regarding lack of transportation ineffective.[2] Eldridge otherwise fails to demonstrate what damages he incurred as a result of Kavon's refusal of service and we hold that, in the alternative to the rationale of excused performance above, Eldridge has failed to demonstrate damages and his breach of contract claim must fail as a matter of law.

¶10 Because Kavon was prevented from honoring Eldridge's requests to use his Cow Calendar Card discounts as a result of Eldridge's own behavior, and because Eldridge has failed to demonstrate what damages he incurred as a result of such breach, we hold that there is no dispute as to a material fact and that Kavon was entitled to judgment as a matter of law.

¶11 AFFIRMED.

GOREE, C.J., and JOPLIN, P.J., concur.

Kenneth L. Buettner, Judge:

1. Eldridge's claims under the Oklahoma Consumer Protection Act (OCPA) are not supported by any evidence other than his own conclusory affidavit. Because self-serving affidavits do not meet the evidentiary burden necessary to withstand summary judgment, we affirm the trial court's judgment with regard to the OCPA claims and do not further address them herein.

2. We also suppose that Eldridge could make use of his Cow Calendar Card at the drive-through window by walking up, placing and receiving his order.

# Calendar of Events

## August

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

21 **OBA Family Law Section meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Amy E. Page 918-208-0129

**OBA Indian Law Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Wilda Wahpepah 405-321-2027

22 **OBA Legislative Debrief;** 2 p.m.; Oklahoma Bar Center, Oklahoma City; RSVP to Debbie Brink 405-416-7000

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

23 **OBA Board of Governors meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact John Morris Williams 405-416-7014

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

28 **OBA Immigration Law Section meeting;** 11 a.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Lorena Rivas 918-585-1107

## September

2 **OBA Closed** – Labor Day

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

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

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

**OBA Estate Planning, Probate and Trust Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact A. Daniel Woska 405-657-2271

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

18 **OBA Family Law Section meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Amy E. Page 918-208-0129

**OBA Indian Law Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Wilda Wahpepah 405-321-2027

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

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

# Disposition of Cases Other Than by Published Opinion

**COURT OF CRIMINAL APPEALS**
**Thursday, July 25, 2019**

**F-2018-211** — Lewis Long, III, Appellant, was tried by jury for the crime of Trafficking in Illegal Drugs (Methamphetamine), after former conviction of two or more felonies in Case No. CF-2017-66 in the District Court of Beckham County. The jury returned a verdict of guilty and recommended as punishment twenty years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Lewis Long, III has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Rowland, J., concurs.

**C-2018-679** — Jerry Ray Hawkins, Petitioner, entered a blind plea of guilty to Exhibiting Obscene Material to a Minor (Counts 1-3), Procuring Child Pornography (Count 4), and Lewd Acts (Count 5-6), in Case No. CF-2011-1610 in the District Court of Tulsa County. The Honorable James Caputo, District Judge, accepted Petitioner's pleas and ordered a presentence investigation report. Judge Caputo later sentenced Petitioner to twenty years imprisonment on each of Counts 1-3 and 5-6, and ten years imprisonment on Count 4, with the sentences for Counts 1-3 and 5-6 to run concurrently with each other, but consecutively to the sentence in Count 4. From this judgment and sentence Jerry Ray Hawkins has perfected his appeal. The Petition for Writ of Certiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Rowland, J., concurs.

**Thursday, August 1, 2019**

**F-2018-482** — Appellant, Sumeika D. Byrd, was tried by jury and convicted of First Degree Murder in the District Court of Oklahoma County Case Number CF-2016-5000. The jury recommended as punishment imprisonment for life. The trial court sentenced Appellant accordingly. It is from this judgment and sentence that Appellant appeals. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Recuse.

**Thursday, August 8, 2019**

**F-2017-1284** — Jesse Earl Maupin, Appellant, was tried by jury for the crime of Lewd or Indecent Acts to a Child Under 16 in Case No. CF-2017-10 in the District Court of Washita County. The jury returned a verdict of guilty and recommended as punishment life imprisonment. The trial court sentenced accordingly. From this judgment and sentence, Jesse Earl Maupin has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

**F-2018-945** — Appellant Carey James Buxton entered negotiated pleas of no contest on April 30, 2018, in Kay County District Court Case Nos. CM-2014-358, CF-2014-578 and CF-2017-5. In CM-2014-358, Appellant pled to Possession of Drug Paraphernalia. In CF-2014-578, Appellant pled to Possession of a Controlled Substance with the Intent to Distribute and Possession of Drug Paraphernalia. In CF-2017-5 Appellant pled to Second Degree Burglary and Knowingly Concealing Stolen Property. Appellant was sentenced to the Drug Court program. On August 2, 2018, the State filed an application to terminate Appellant from the Drug Court program. Following a hearing on August 31, 2018, the Honorable David Bandy terminated Appellant's participation in Drug Court and sentenced him in conformance with the plea agreement. Buxton appeals his termination from Drug Court. The orders are AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J.: Concur; Kuehn, V.P.J.: Concur; Hudson, J.: Concur; Rowland, J.: Concur.

**M-2018-267** — Following a jury trial, Appellant Robert Aaron Rodgers was found guilty of Domestic Abuse – Assault and Battery in Grady County District Court Case No. CM-2017-36. Appellant was convicted and sentenced to a $1,000 fine. Appellant appeals. The Judgment and Sentence of the trial court is AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

## COURT OF CIVIL APPEALS
## (Division No. 1)
## Wednesday, August 7, 2019

**116,345** — Tony Mullins, Plaintiff/Appellee, v. David Stanley Auto Group d/b/a David Stanley Chevrolet, Inc., Defendant/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Bryan C. Dixon, Judge. Defendant seeks review of the trial court's order denying its motion to compel arbitration of the claim of Plaintiff. In this appeal, Defendant complains the trial court erred in finding fraud in the inducement sufficient to avoid the binding arbitration clause of the parties' contract. Plaintiff's testimony arguably establishes that Defendant's finance manager misrepresented that the Dispute Resolution Clause contained in the Purchase Agreement did not apply to the transaction for Plaintiff's trade-in and purchase of a new car, and that the misrepresentation of Defendant's finance manager induced him to sign the Purchase Agreement. This testimony establishes Defendant's fraud in the inducement and precluded formation of a valid agreement for arbitration of the present dispute. AFFIRMED. Opinion by Joplin, P.J.; Goree, C.J., and Buettner, J., concur.

## Thursday, August 8, 2019

**117,496** — Greenwood Centre, LTD., Plaintiff/Appellee, v. Wanda Armstrong, d/b/a Wanda J's Next Generation, Defendant/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Deborah Ludi-Leitch, Judge. Defendant/Appellant Wanda Armstrong, d/b/a Wanda J's Next Generation appeals the trial court's denial of her motion to vacate an agreed judgment entered in Plaintiff/Appellee Greenwood Centre, Ltd.'s forcible entry and detainer action. We find no abuse of discretion and AFFIRM. Opinion by Buettner, J.; Goree, C.J., and Joplin, P.J., concur.

**117,671** — In Re Estate of Judith K. Pratt: Robinson Kenneth Rogers, Plaintiff/Appellant, v. Estate of Judith K. Pratt, Defendant/Appellee. Appeal from the District Court of Pittsburg County, Oklahoma. Honorable Timothy E. Mills, Judge. Plaintiff/Appellant Robinson Kenneth Rogers (Rogers) appeals from the admission of a will (the Will) to probate in the matter of the estate of Judith K. Pratt (Decedent). Rogers, the biological son of Decedent whom the Decedent gave up for adoption at birth, objected to the probate of the Will, alleging that Decedent did not have the requisite capacity to execute the Will and was under undue influence at the time of execution. Rogers also alleged he was entitled a share of the estate as a pretermitted heir of Decedent. The trial court held that Decedent had capacity and was not under undue influence when executing the Will. The trial court also held that Decedent had expressed in the Will that she wished to disinherit the class of heirs including Rogers and that Rogers was not entitled to take from Decedent's estate under the omitted child statute. Rogers appeals. We AFFIRM the trial court. Opinion by Buettner, J.; Goree, C.J., and Joplin, P.J., concur.

## (Division No. 2)
## Friday, July 26, 2019

**117,332** — In the Matter of K.J.S., J.N.S., and B.D.S., Alleged Deprived Children: Heather Jean Sharp, Appellant, vs. State of Oklahoma, Appellee. Appeal from an Order of the District Court of Alfalfa County, Hon. Loren E. Angle, Trial Judge, terminating biological Mother's parental rights to K.J.S., J.N.S., and B.D.S. (Children). Based on de novo review of the record, we find the trial court's judgment on the jury's verdict terminating Mother's rights is supported by clear and convincing evidence, and affirm that part of the decision. However, the court's order is fundamentally flawed because it fails to incorporate mandatory findings that were made in the course of the proceedings, and are evident within the record, but were not recited in the judgment itself. We therefore vacate the judgment to the extent it fails to record these mandatory findings, and remand for entry of a new, corrected order consistent with the record and with this opinion. AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH INSTRUCTIONS. Opinion from the Court of Civil Appeals, Division II by Thornbrugh, J.; Fischer, P.J., and Goodman, J., concur.

## Thursday, August 1, 2019

**116,862** — City of Edmond, Own Risk, Petitioner, vs. Travis Mark Little 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. Carla Snipes, Trial Judge. Employer City of Edmond seeks review of an order of a three-judge panel which affirmed the trial court's finding that Claimant Travis Mark Little sustained a consequential injury to his left knee and ordered

Employer to provide Claimant with reasonable and necessary medical treatment for that injury. In its sole proposition of error, Employer argues that the finding of a consequential injury to Claimant's left knee is against the clear weight of the evidence and contrary to law. The evidence of record supports a finding that Claimant's falls, resulting left knee injuries and current need for surgery were a direct result of the medical treatment required for his on-the-job lower back injury. Claimant satisfied his evidentiary burden to establish a consequential injury. SUSTAINED. Opinion from Court of Civil Appeals, Division II by Fischer, P.J.; Goodman, J., and Thornbrugh, J., concur.

**Friday, August 2, 2019**

**116,771** — In the Matter of the Estate of Terry Babcock, Deceased: Vicki Lynn Babcock, Appellant, vs. Ronda L. Vuillemont-Smith, Appellee. Proceeding to review a judgment of the District Court of Tulsa County, Hon. Kurt G. Glassco, Trial Judge. Vicki Lynn Babcock appeals the decision of the district court finding that she was intentionally omitted from the will of her father, Terry Babcock. The Will stated that "I have purposefully made no provision for any other person or relative, whether claiming to be an heir or not. If any beneficiary under this Will shall contest this Will or object to any of the provisions thereof, I give to such beneficiary the sum of $1.00 in lieu of the provisions I have made or which I might have made herein." We find that this exclusionary clause disinherits a narrow and specific class of potential beneficiaries, and is sufficient pursuant to *Matter of Estate of Woodward*, 1991 OK 25, 807 P.2d 262, to show intent to disinherit an heir on the face of the will in strong and convincing language. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Thornbrugh, J.; Fischer, P.J., and Goodman, J., concur.

**117,198** — Allegiance Credit Union, Plaintiff/Appellee, vs. Community Public Radio, Inc., Defendant/Appellant, and Hundred Oaks Office Park, LLC, Dale F. Jackson a/k/a Dale Jackson, Lowell M. Jackson and Somerton Group, LLC, Defendants. Proceeding to review a judgment of the District Court of Oklahoma County, Hon. Thomas Prince, Trial Judge. Community Public Radio (CPR) appeals the district court's grant of summary judgment in favor of Allegiance Credit Union (Allegiance) in a mortgage foreclosure action. CPR was the junior lienholder on 40 acres of undeveloped property in Edmond, Oklahoma. Allegiance was the senior lienholder with a note for $2,730,000. The note was originally for a short term and was renewed for numerous terms. Allegiance eventually refused to extend beyond August 22, 2016. In March 2016, CPR sued Hundred Oaks seeking a judgment for over $6,000,000 now owed. CPR obtained a judgment against Hundred Oaks in September 2016. Hundred Oaks did not pay the Allegiance note on its maturity date, or obtain new financing, and, in December 2016, Allegiance sued for foreclosure. The property sold at sheriff's sale for its appraised price of $2,800.000, a price substantially identical to the amount borrowed from Allegiance eleven years earlier. This amount was applied to the Allegiance debt and CPR was left with nothing from the sale proceeds to satisfy its loan of approximately six million dollars. CPR appeals, arguing several variations of a theory that Allegiance has some duty or obligation to continue to extend the primary loan until CPR, or others, could develop the property to help recoup CPR's loss. We find none of these equitable theories applicable in this case. The judgment of the district court is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Thornbrugh, J.; Fischer, P.J., and Goodman, J., concur.

**116,692** — In the Matter of: J.L., Deprived Child. Karina Hernandez Leal, Appellant, vs. State of Oklahoma, Appellee. Appeal from Order of the District Court of Tulsa County, Hon. Rodney Sparkman, Trial Judge. Appellant Karina Leal appeals the district court's order terminating her parental rights to minor child JL on the grounds that she failed to protect a sibling of the child from neglect that was heinous and shocking. We find that the State presented clear and convincing evidence to support the jury's verdict terminating Leal's parental rights. Furthermore, we find that she had effective assistance of counsel and failed to preserve the issue of prosecutorial misconduct for appellate review. Consequently, we affirm the district court's order. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Fischer, P.J.; Goodman, J., and Thornbrugh, J., concur.

**(Division No. 3)**
**Friday, August 2, 2019**

**117,191** — In Re the Matter of D.H.P.A., Alleged Deprived Child: Andrew Atkeson, Appellant, vs. The State of Oklahoma, Appellee. Appeal from the District Court of Adair County, Oklahoma. Honorable L. Elizabeth Brown, Judge. Appellant Andrew Atkeson (Father)

appeals an order terminating his parental rights to the minor child, D.H.P.A., after a bench trial on the petition to terminate filed by Appellee, the State of Oklahoma (State) against Father and D.H.P.A.'s mother. The order is based on 10A O.S. 2011 § 1-4-904(B)(5), *i.e.*, Father failed to correct the condition of substance abuse, which condition led to the adjudication of the child as deprived, he was given at least three months to correct that condition, and termination of parental rights is in the child's best interest. The trial court's judgment terminating Father's parental rights to D.H.P.A. is supported by clear and convincing evidence. However, the same judgment fails to make the required finding of the "condition" Father failed to correct and the statutory authority and failed to order child support. Because of these deficiencies, the judgment must be remanded to the trial court, not for a new trial, but with instructions to enter a final termination order correcting the errors. AFFIRMED AND REMANDED WITH INSTRUCTIONS. Opinion by Swinton, J.; Mitchell, P.J., and Bell, J., concur.

**Monday, August 5, 2019**

**116,580** — Wells Fargo Bank, N.A., as Trustee for Banc of America Alternative Loan Trust 2006-2 Mortgage Pass-Through Certificates, Series 2006-2, Plaintiff/Appellant/Counter-Appellee, vs. Lana J. Shryock, a/k/a Lana J. Carter, Defendant/ Appellee/Counter-Appellant, and Spouse, if any, of Lana J. Shryock and John Doe Occupant, Defendants. Appeal from the District Court of Canadian County, Oklahoma. Honorable Paul Hesse, Trial Judge. Plaintiff/Appellant/Counter-Appellee Wells Fargo Bank, N.A. (Wells Fargo) appeals from a denial of a motion for new trial concerning an order granting summary judgment in favor of Defendant/Appellee/Counter-Appellant Lana J. Shryock a/k/a Lana J. Carter and spouse (the Carters) in a foreclosure action. Wells Fargo and the Carters also appeal an order granting attorney fees in favor of the Carters. Wells Fargo challenges the court's finding that the action was barred due to the statute of limitations, and asserts that there were disputed facts regarding the acknowledgment of debt by the Carters. Wells Fargo also challenges the court's award of attorney fees to the Carters as being unreasonable. The Carters appealed the trial court's award of attorney fees as being too low based on the evidence presented. Because the petition was refiled within one year of the finality of the prior appeal, we find that it was timely filed, and therefore reverse the order granting summary judgment on the basis of the statute of limitations and remand for further proceedings. We also reverse the order awarding attorney fees. REVERSED AND REMANDED. Opinion by Swinton, J.; Mitchell, P.J., and Bell, J., concur.

**117,204** — Jacob Johnson, a member of Garrett & Garrett Cooling Tower & Services, LLC, on behalf of Garrett & Garrett Cooling Tower & Services, LLC, Plaintiff/Appellant, vs. Midwest Machinery OK, Inc., d/b/a Process Equipment Co., a Missouri Corporation, Defendant/ Appellee, and Wesley Chad Garrett, an individual, Defendant. Appeal from the District Court of Canadian County, Oklahoma. Honorable Paul Hesse, Judge. Plaintiff/Appellant, Jacob Johnson on behalf of Garrett & Garrett Cooling Tower & Services, LLC, appeals from the trial court's grant of summary judgment in favor of Defendant/Appellee, Midwest Machinery OK, Inc., d/b/a Process Equipment, Co., in this tort and civil conspiracy action. In March 2014, Midwest Machinery OK, Inc. (Midwest) purchased the assets and name of Process Equipment, Co. (Process). Process is the sole authorized Oklahoma sales dealer for Marley Cooling Towers. Prior to 2014, Plaintiff installed and repaired Marley products for customers. When Process sold Marley parts to customers, Process contacted Plaintiff to perform installation and/or labor, Plaintiff billed the customers directly and paid Process a commission for the referral. After Midwest purchased Process, Midwest started using Plaintiff as a sub-contractor to perform installation and labor on Marley equipment. Midwest included labor costs in its invoices to customers and paid Plaintiff directly for work it performed. Ultimately, one of Plaintiff's partners, Chad Garrett, became a Midwest employee and Midwest stopped using Plaintiff as a sub-contractor. Plaintiff sued Midwest for tortious interference with prospective economic advantage and civil conspiracy, asserting Midwest intentionally interfered with Plaintiff's relationship with Marley customers. The trial court granted Midwest's motion for summary judgment and Plaintiff appeals. Plaintiff's claims against Chad Garrett remain pending and he is not a party to this appeal. Plaintiff admitted its contacts with Marley customers originated solely from Process' referrals and Midwest did nothing to prevent or discourage Plaintiff from continuing its relationships with any Marley

customers. Indeed, Plaintiff is free to seek out business with any Marley customer, but has simply elected not to do so since Midwest stopped facilitating such relationships. Although Plaintiff frames its argument as one of a business expectancy with Marley customers, the undisputed facts demonstrate Plaintiff merely expected to continue receiving referrals from Midwest as it had in the past. Plaintiff has failed to show Midwest intentionally interfered with any relationship Plaintiff had with a Marley customer. Plaintiff has also failed to make out a *prima facie* case of conspiracy. Plaintiff's allegation that Midwest conspired against it lacks clear and convincing evidentiary support. Upon *de novo* review, the judgment of the trial court is AFFIRMED. Opinion by Bell, J. Swinton, J., concurs; Mitchell, P.J., dissents.

**117,609** — In Re the Matter of M.M.F., Deprived Child: Marquise Fonville, Natural Father, Appellant, vs. State of Oklahoma, Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Rodney Sparkman, Judge. Appellant, Marquise Fonville (Father), appeals from the trial court's order terminating his parental rights to his minor child, M.M.F. Appellee, the State of Oklahoma (State), filed a petition to terminate Father's parental rights under 10A O.S. Supp. 2015 §1-4-904(B)(15) on the basis that there exists a substantial erosion of the relationship between the parent and child caused at least in part by the parent's serious or aggravated neglect of the child, physical or sexual abuse or exploitation of the child, a prolonged and unreasonable absence of the parent from the child or an unreasonable failure by the parent to visit or communicate in a meaningful way with the child. State also alleged Father's parental rights should be terminated under §1-4-904(B)(17) because the child, who is younger than four (4) years of age at the time of placement, has been placed in foster care by the Department of Human Services (DHS) 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. State also alleged termination of Father's parental rights would be in the child's best interests. After reviewing the record, we find clear and convincing evidence supports the grounds for termination of Father's parental rights pursuant to §1-4-904(B)(17) and that the termination of Father's parental rights is in the child's best interest. The trial court's order terminating Father's parental rights is affirmed and remanded to the trial court to state that termination of Father's parental rights is in the child's best interest. AFFIRMED AND REMANDED FOR CORRECTION. Opinion by Bell, J.; Mitchell, P.J., and Swinton, J., concur.

**(Division No. 4)**
**Wednesday, July 24, 2019**

**117,114** — Mehlburger Brawley, Inc., an Oklahoma corporation, Plaintiff/Appellee, v. Derryberry Naifeh, L.L.P., an Oklahoma limited liability partnership; Douglas A. Rice, individually; and Pete G. Serrata, III, individually, Defendants/Appellees, and Craig Shew, Receiver for Mehlburger Brawley, Inc., Intervenor/Appellant. Appeal from the District Court of Tulsa County, Hon. Mary F. Fitzgerald, Trial Judge. In this legal malpractice action, Craig Shew (Receiver) appeals from an order of the trial court granting summary judgment in favor of Defendants. Subsequent to the filing of this appeal, Defendants filed a motion to dismiss asserting, among other reasons, the failure of Mehlburger Brawley, Inc. (MBI) to appeal from the order granting summary judgment to Defendants. This appeal is the second appeal in this case. In our prior opinion, we concluded the Receiver was not the "functional equivalent" of a bankruptcy trustee and did not stand in MBI's shoes although we allowed the Receiver the opportunity to seek intervention in the underlying suit. We determined, however, the Receiver cannot displace MBI as a party plaintiff in the underlying malpractice action and agreed with the trial court's determination that the Receiver should not be substituted as the party plaintiff for MBI. That decision is the settled law of the case. In the present appeal, MBI has not appealed from the grant of summary judgment for Defendants. The Receiver has no independent basis to pursue MBI's malpractice claim. Consequently, the appeal must be dismissed. APPEAL DISMISSED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Wiseman, V.C.J., and Rapp, J., concur.

**Wednesday, July 31, 2019**

**117,952** — Jessica Cheek and Charles Cheek, Plaintiffs/Appellants, v. The Oklahoma City Zoological Trust doing business as The Oklahoma City Zoo, Defendant/Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Cindy H. Truong, Trial Judge. The plaintiffs, Jessica Cheek (Cheek) and Charles Cheek (Husband), appeal an Order dismissing Cheek's case for lack of jurisdiction. Cheek sus-

tained an injury after clocking out from work. She filed a tort action in District Court. Zoo filed for summary judgment for lack of jurisdiction and asserted that the Administrative Workers' Compensation Commission had exclusive jurisdiction. The trial court agreed and Cheek appealed. The record presented by Zoo shows that the injury occurred on Zoo's premises and in a Zoo train being used to transport Cheek and other employees to a designated parking lot. Cheek has not presented evidentiary material in the record to show a question of fact regarding whether the injury occurred on Zoo premises. The fact that the injury occurred on Zoo's premises results here in the matter falling under the exclusive jurisdiction of the Administrative Workers' Compensation Commission. Therefore, the trial court correctly ruled that the District Court did not have jurisdiction and dismissed the case. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

**ORDERS DENYING REHEARING**
**(Division No. 1)**
**Thursday, August 8, 2019**

**116,960** — The Mattingly Law Firm, P.C., Plaintiff/Appellee, vs. Melvin Henson, Jr., a/k/a Dee Henson, Defendant/Appellant. Appellant's Petition for Rehearing and Brief in Support, filed May 28th, 2019, is *DENIED*.

**(Division No. 2)**
**Thursday, August 1, 2019**

**117,066** — Deborah Lewis, Plaintiff/Appellant, vs. Kersi J. Bharucha, M.D., State of Oklahoma ex rel. Board of Regents of the University of Oklahoma and John Does 1-5, Defendants/Appellees. Appellant's Petition for Rehearing is hereby *DENIED*.

**(Division No. 3)**
**Tuesday, August 6, 2019**

**116,708** — Scott R. McCoy, Plaintiff/Appellee, vs. Jessica A. Tharpe, Defendant/Appellant. Defendant/Appellant's Petition for Rehearing with Brief in Support, filed July 3, 2019, is *DENIED*.

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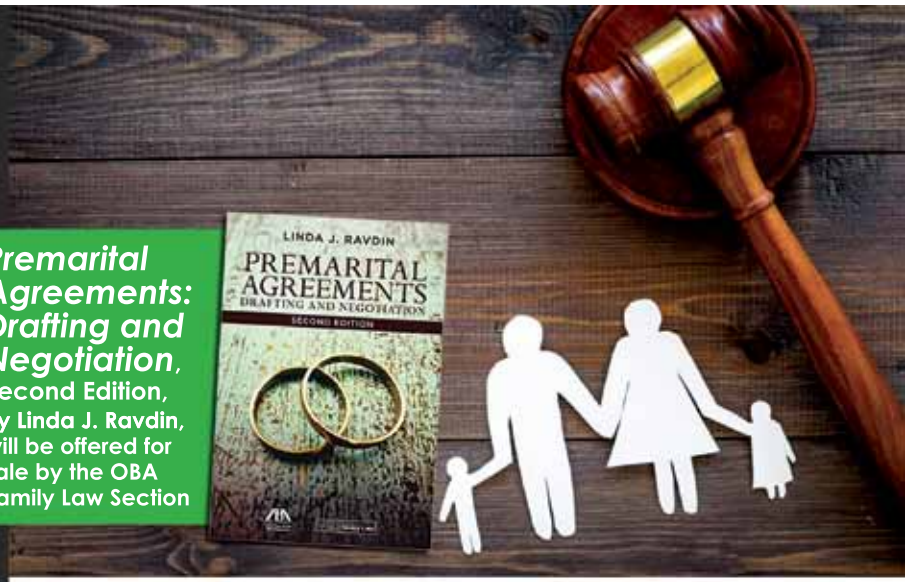


***Premarital Agreements: Drafting and Negotiation*, Second Edition, By Linda J. Ravdin, will be offered for sale by the OBA Family Law Section**

# PLAN FOR THE WORST, HOPE FOR THE BEST:

## Premarital Agreements, Tax Law, and Estate Planning Tools

**Cosponsored by the OBA Family Law Section**

**FRIDAY, SEPTEMBER 27, 2019**
**9 A.M. - 2:50 P.M.**

**Oklahoma Bar Center**
**1901 N. Lincoln Blvd.**
**Oklahoma City, OK**

**MCLE 6/1**

### FEATURING:

**Linda Ravdin,**
*Pasternak and Fiddis, Bethesda, MD*

### PROGRAM PLANNER/ MODERATOR:

**Brita Cantrell,** *McAfee & Taft*

### TOPICS INCLUDE:

- **First Consultation Tools for a Premarital Agreement**
- **Drafting a Premarital Agreement Relative to a Possible Divorce**
- **Tax and Estate Planning**
- **Strategies for Negotiating the Agreement (Panel)**
- **Premarital Agreement Role Play and Issue Identification: Featuring Laurey, Curley, and The Winds That Go Sweeping Down the Plains**
- **Attacking and Defending Tools: The Premarital Agreement in Discovery and Divorce**
- **Ethics Considerations**

LIVE WEBCAST AVAILABLE

**TUITION:** Early-bird registration by September 22, 2019 is $150. Registrations received after September 22, 2019 date is $175 and walk-ins are $200. Registration includes continental breakfast and lunch. For a $10 discount, enter coupon code FALL2019 at checkout when registering online for the in-person program. Registration for the live webcast is $200. Members license 2 years or less may register for $75 for the in-person program (late fees apply) and $100 for the webcast. All programs may be audited (no materials or CLE credit) for $50 by emailing ReneeM@okbar.org to register.

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**TO REGISTER GO TO WWW.OKBAR.ORG/CLE**

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# FRIDAY, OCTOBER 25, 2019

## 9 A.M. - 3:30 P.M.

**Renaissance Waterford Hotel**
**6300 Waterford Boulevard**
**Oklahoma City, OK 73118**

# MCLE 6/1

## PROGRAM PLANNERS:

**Melanie Dittrich,**
*OBA Women in Law Co-chair*

**Brittany Byers,**
*OBA Women in Law Co-chair*

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# 2019 WOMEN IN LAW CONFERENCE

## TOPICS INCLUDE:

- **Reflections from the Bench**
  ***Moderator:*** *The Honorable Justice Noma Gurich, Chief, Oklahoma Supreme Court*
  ***Panelists:*** *The Honorable Lori Walkley, Cleveland County District Court*
  *The Honorable Natalie Mai, Oklahoma County District Court*
  *The Honorable Irma J. Newburn, Comanche County District 5 Court*
  *The Honorable Jane Wiseman, Oklahoma Court of Civil Appeals, Tulsa*
- **An Impending Crossroad: LGBT Rights Under Title VII of the Civil Rights Act of 1964**
  *Alyssa Bryant, Staff Attorney dedicated to Palomar, Oklahoma City's Family Justice Center, Legal Aid Services of Oklahoma, Inc.*
- **Nonprofit Board Service: Have Fun, Make a Difference and Be More Than Free Legal Advice**
  *Ginny Bass Carl, Esq., Founder and CEO of Giving Well LLC*
- **Spotlight Awards Luncheon "The Supreme Court, an Institution at Risk"**
  *Featuring Marcia Coyle, Chief Washington Correspondent, The National Law Journal*
- **Practical Tips for Appeals**
  *The Honorable Brian Goree, Chief, Oklahoma Court of Civil Appeals*
- **Cyber-Ethics for Lawyers**
  *Gina Hendryx, General Counsel, Oklahoma Bar Association*
- ***Bracken case*: Jurisdictional Ramifications**
  *Kace Rodwell, Oklahoma Indian Legal Services*
  *Jacintha Webster, Oklahoma Indian Legal Services*

**TUITION:** Early registration for the CLE program and Awards Luncheon is $150 and must be received by Friday, October 20th. Students may register by October 18th for the program and luncheon for $50 by emailing ReneeM@okbar.org or call 405-416-7029. Government lawyers may register by October 20th for the program and luncheon for $100 and must also contact Renee. Luncheon only registrations are $45. Student luncheon only $40. All registrations received October 19th – 24th increase $25 and walk-ins increase $50.