THE OKLAHOMA BAR
Journal
Volume 90 — No. 19 — 10/12/2019

Court Issue

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continuing legal education

OKLAHOMA CITY THUNDER VS. ORLANDO MAGIC

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LIMITED TO THE FIRST 36 PEOPLE

NOVEMBER 5, 2019
4 - 7 P.M.

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MCLE 2/2

FEATURED PRESENTER:
Philip Bogdanoff,
Attorney & Instructor, Akron, Ohio

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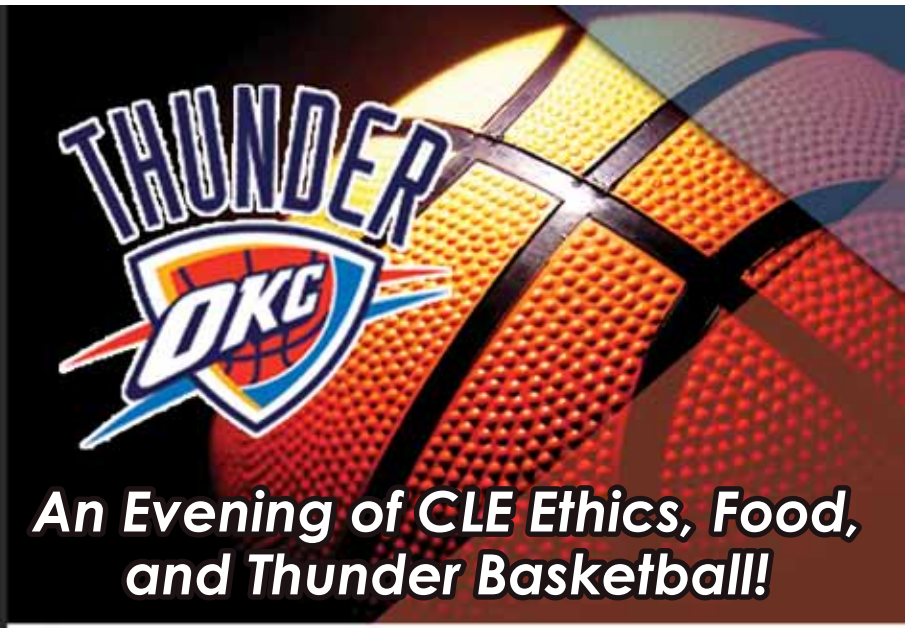

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THE OKLAHOMA BAR
Journal

Volume 90 – No. 19 – 10/12/2019

The Oklahoma Bar Journal Court Issue is published twice monthly and delivered electronically by the Oklahoma Bar Association, 1901 N. Lincoln Boulevard, Oklahoma City, Oklahoma 73105.

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Oklahoma Bar Association

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See Rule 1.200, Rules — Okla. Sup. Ct. R., 12 O.S. Supp. 1996 (1997 T. 12 Special Supplement)

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No. 115,069. September 30, 2019

¶0 CORRECTION ORDER

¶1 The Court's Opinion filed herein on September 24, 2019, shall be corrected in the following three instances.

(1) In footnote number 64 the word "indepedent" shall be corrected to state "independent";

(2) In footnote number 75 the word "statecrated" shall be corrected to read "statecreated";

(3) In footnote number 93 the name "Bivens" shall be corrected to read "Bivins".

¶2 The Opinion of the Court shall otherwise remain as filed September 24, 2019.

¶3 DONE BY ORDER OF THE SUPREME COURT THIS 30th DAY OF SEPTEMBER, 2019.

/s/ Noma D. Gurich
Chief Justice

2019 OK 60

STATE OF OKLAHOMA, ex rel. OKLAHOMA BAR ASSOCIATION Complainant v. RICHARD E. STOUT, Respondent.

SCBD No. 6732
As Corrected October 1, 2019

ORIGINAL PROCEEDING FOR ATTORNEY DISCIPLINE PURSUANT TO RULE 6, RULES GOVERNING DISCIPLINARY PROCEEDINGS

¶0 The complainant, Oklahoma Bar Association, commenced disciplinary proceedings against the respondent, Richard E. Stout. Based on evidence presented during a hearing, the Trial Panel concluded that his sexual involvement with one female client, and unwanted sexual advances and communications toward two other female clients, violated Rules 1.7, 1.8 (j) and 8.4 (a) of the Oklahoma Rules of Professional Conduct, (ORPC), 5 O.S. 2011, ch. 1, app. 3-A and Rule 1.3 of the Rules Governing Disciplinary Proceedings, (RGDP), 5 O.S. 2011, ch. 1, app 1-A. The Trial Panel of the Professional Responsibility Tribunal, (PRT) issued a report recommending Respondent's license be suspended for a period of three months.

RESPONDENT IS SUSPENDED FROM THE PRACTICE OF LAW FOR THREE MONTHS; ORDERED TO PAY COSTS.

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

Bob Burke, Oklahoma City, Oklahoma, for Respondent.

OPINION

EDMONDSON, J.:

¶1 The complainant, Oklahoma Bar Association, (OBA), filed its complaint against the respondent, Richard E. Stout, pursuant to Rule 6, RGDP.[1] The Trial Panel heard this disciplinary matter, found the respondent had violated the ORPC and RGDP, warranting discipline. The Panel recommended that the respondent be suspended from the practice of law for a period of three months, receive public censure and be required to pay the costs of the proceeding.

I. FACTS

Count 1

¶2 Mr. Stout received his license to practice law in Oklahoma in 1983. In February 2017, C.B. hired Mr. Stout to represent her in a juvenile deprived action. C.B. was the aunt of the deprived juvenile and was seeking full guardianship of her nephew and ultimately desired to adopt her nephew. During the course of the representation, Mr. Stout made unwanted sexual advances towards C.B. and sent her sexually suggestive emails. He also requested his client

send him sexually suggestive photographs. Mr. Stout tried to hide his sexually suggestive communications requesting that their "private" communications be conducted through Facebook Messenger and that business communications be conducted through text. On more than one occasion, Mr. Stout requested that C.B. delete the messages he sent, because his wife did not know about these conversations.

¶3 Mr. Stout appeared in court on behalf of C.B. three or four times. She testified before the Trial Panel that she believed Mr. Stout had provided competent representation in court and she had no problem with the quality of his representation. However, C.B. did not reciprocate the feelings for Mr. Stout and she testified that she felt uncomfortable with his continued representation. C.B. terminated the attorney-client relationship with Mr. Stout and then retained a different attorney who provided legal services pro bono to complete the outstanding legal matters. C.B. testified that this incident has not caused her to mistrust lawyers.

¶4 Mr. Stout admitted to the Trial Panel that he sent sexually suggestive comments to C.B. by text message and social media. He admitted these actions toward his client were improper and created harm to his client.

¶5 Mr. Stout voluntarily contacted Lawyers Helping Lawyers (LHL) within days after receiving the OBA letter notifying him of the formal complaint filed against him regarding his actions toward C.B. and C.R. A person connected with LHL suggested Mr. Stout consider obtaining treatment from a sexual addiction in-patient treatment center in Tennessee. Mr. Stout immediately followed up on this recommendation and within three days he was admitted for in-patient treatment. He completed the program and remains faithful to his follow-up care. He has admitted to his improper behavior and expressed deep remorse over the effect of his actions on C.B.

Count 2

¶6 In 2016, C.R. retained Mr. Stout to represent her in a divorce case. In the course of this representation, Mr. Stout sent sexually suggestive text messages to C.R. with instructions to delete the messages after reading them. Mr. Stout explained to C.R. that neither his wife or C.R.'s boyfriend need to see what he was sending via text. Mr. Stout also engaged in text communication with C.R. that included crude sexual remarks about C.B., who was also a friend of C.R.

¶7 Because of the sexual overtones in the communications, C.R. did not feel like Mr. Stout was 100% focused on representing her in her divorce matter. Although she was uncomfortable with his actions, she wanted her divorce completed as quickly as possible so she did not terminate the attorney relationship. Toward the end of the representation, she personally handled modifying some of the child support documents in order to avoid having additional communications or interactions with Mr. Stout.

¶8 Mr. Stout admitted to his improper behavior and that his client had no intention of seeking any sexual relationship from him. He took full responsibility for his actions and said that at the time he engaged in this behavior his thinking was distorted from his sexual addiction.

Count 3

¶9 In 2016, L.B. retained Mr. Stout to represent her in a criminal matter. A mutual friend indicated that Mr. Stout would work with her with respect to payment of legal fees. L.B. understood this to mean a payment plan would be worked out. L.B. then contacted Mr. Stout who agreed to accept representation for the fee of $7500. L.B. did not have a drivers license or ability to come to his office so Mr. Stout offered to meet L.B. in her home. L.B. did not have money at the time to pay, and she wound up having sex with Mr. Stout that evening "because [she] was in a desperate situation." This was the only sexual encounter they had. L.B. testified she paid the entire amount of the requested fee in payments over time by cash and by check. Although no contract was signed, Mr. Stout believes that he may have given her a reduced fee following the sexual encounter. Neither L.B. or Mr. Stout has exact records as to the amount paid in fees. Both parties agree that L.B. did pay money for the legal services.

¶10 Mr. Stout admitted to the sexual encounter at the PRT hearing, and he also assumed full responsibility for his actions and made clear that L.B. did not encourage this behavior. Mr. Stout expressed remorse and further admitted to the PRT that L.B. "didn't make any suggestion. It was all – it all started because of me, not because of her."[2]

¶11 At the time of the OBA investigative interview, the OBA only had knowledge of Mr. Stout's alleged improper conduct toward C.B. and C.R. However, when the OBA investigator asked Mr. Stout if he had been inappropriate

with any other clients, he voluntarily told the investigator about L.B. Prior to this interview, the OBA had no knowledge that Mr. Stout had a sexual encounter with a client. Although Mr. Stout thought it was extremely unlikely L.B. would ever come forward to the OBA, Mr. Stout wanted to be honest and forthright, because he believed it was important to "tell them the truth."[3] Without Mr. Stout's honesty, the OBA may not have ever known about this encounter.

II. STANDARD OF REVIEW

¶12 This Court has exclusive original jurisdiction in bar disciplinary matters to exercise its constitutional, non-delegable power to regulate the practice of law and ethics. *State ex rel. Okla. Bar Ass'n v. Passmore*, 2011 OK 90, 264 P.3d 1238, *State ex rel. Okla. Bar Ass'n v. Whitebook,* 2010 OK 72, 242 P.3d 517. Protection of the public and purification of the Bar are the primary purposes of disciplinary proceedings rather than to punish the accused lawyer. *State ex rel. Okla. Bar Ass'n v. Givens*, 2014 OK 103, 343 P.3d 214. This Court will conduct a *de novo* review of the record and decide whether misconduct has occurred and the appropriate discipline. *Passmore*, 2011 OK 90, ¶15, 264 P.3d at 1243. We are not bound by the PRT's findings of fact, analysis of the evidence, view of the credibility of witnesses, or its recommendation of discipline. *Id.*

III. ANALYSIS

¶13 An attorney is prohibited from representing a client where there is a concurrent conflict of interest.[4] Subsection (a)(2) provides that a concurrent conflict of interest exists if there is a substantial risk that the representation of a client will be materially limited by a personal interest of the lawyer.[5] Mr. Stout's actions in engaging in communication of a sexual nature with C.B., C.S. and L.B. reflect a "personal interest of the lawyer" and created a conflict of interest under Rule 1.7 of the ORPC.[6] The comments to Rule 1.7, ORPC support the conclusion that the sexual communication by Mr. Stout was for the purpose of "gratifying the sexual desire of either party."[7] Mr. Stout admitted his actions were improper and not encouraged by any of the clients. He violated both Rule 1.7 of the ORPC and his professional duty as an attorney to protect his client's interests. *State ex rel. Oklahoma Bar Ass'n v. Hixson,* 2017 OK 56, 397 P.3d 483. *State ex rel. Oklahoma Bar Ass'n v. Gassaway*, 2008 OK 60, ¶36, 196 P.3d 495, 504.

¶14 Rule 1.8 (j) of the ORPC provides that "A lawyer shall not have sexual relations with a client unless: (1) a consensual sexual relationship existed between them when the client-lawyer relationship commenced and (2) the relationship does not result in a violation of Rule 1.7 (a)(2)." Mr. Stout admitted that he had sex with L.B. He also testified that this only occurred one time. Mr. Stout owned full responsibility that "it all started because of me, not because of her."[8]

¶15 Rule 8.4 (a) of the ORPC provides that "It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Sexual advances within the professional attorney-client relationship are contrary to prescribed standards of conduct. *Hixson,* 2017 OK 56, ¶ 19, 397 P.3d at 489, citing, *State ex rel. Oklahoma Bar Ass'n. v. Gassaway,* 2008 OK 60, 196 P.3d 495. Mr. Stout's actions violated this subsection of this Rule.

¶16 Rule 1.3 RGDP[9] subjects an attorney to discipline for any acts by that attorney that are contrary to prescribed standards of conduct, and "which would reasonably be found to bring discredit upon the legal profession." *State ex rel. Oklahoma Bar Ass'n v. Smalley,* 2018 OK 97, ¶ 19, 432 P.3d 1048, 1053. We agree with the Trial Panel's findings that Mr. Stout's conduct violated this provision.

¶17 The Trial Panel found that the OBA had proven by clear and convincing evidence that Mr. Stout had violated both the Rules of Professional Conduct and the Rules of Disciplinary Procedure. At the hearing, Mr. Stout offered that he would agree to additional following conditions: (1) Mr. Stout will not accept women clients and will not meet alone with women at any time associated with his practice of law; (2) Mr. Stout will maintain site blocking protection on his electronic devices; and (3) Mr. Stout will remain in treatment as recommended by his counselor and stay in contact with Lawyers Helping Lawyers. The Trial Panel next concluded that his conduct warranted professional discipline. We agree.

¶18 The OBA recommended that Mr. Stout be suspended from the practice of law for a period of three months. The OBA expressed that it "believes that Respondent is truly sincere regarding his actions toward his clients."[10] The OBA also noted Mr. Stout's commitment to

treatment and he has taken affirmative steps through treatment and follow-up care. Further, Mr. Stout "should be given the utmost credit for these actions."[11] However, the OBA also notes that the harm done to his clients must also be considered and discredit to the legal profession.

¶19 Mr. Stout urged the Trial Panel and this Court to impose a public censure with costs and the additional recommendations regarding restrictions in his practice relating to females.

¶20 The Trial Panel concluded by unanimous vote, "that Respondent, Richard E. Stout, be suspended from the practice of law for three (3) months by the Supreme Court of the State of Oklahoma under the conditions offered by the Respondent during his testimony. Respondent will not accept women clients and will not meet alone with women at any time associated with his practice of law, will maintain site blocking protection on his electronic devices, will remain in treatment as recommended by his counselor and will stay in contact with Lawyers Helping Lawyers."[12]

¶21 Next we will address the appropriate discipline considering that the principal objectives of a disciplinary proceeding are to protect the public and purify the Bar, not to punish the lawyer. *Givens*, 2014 OK 103, 343 P.3d 214.

¶22 In *State ex rel. Oklahoma Bar Ass'n. v. Smalley*, 2018 OK 97, 432 P.3d 1048, Mr. Smalley was disciplined for his conduct involving two different female clients. Mr. Smalley admitted to having three sexual encounters with his client, Ms. A., although he insisted she was the aggressor on each occasion. Ms. A. disputed this fact. We noted that even if she were the aggressor, he should have never met with her again, and certainly not after hours, concluding that two of the sexual encounters were preventable and inexcusable. The other client, M.P. was a single mother of four children at the time she filed for divorce. Mr. Smalley was appointed as Guardian Ad Litem in the case. He demonstrated improper boundaries with Ms. A. and engaged in sexually suggestive dialogue with his client. The Trial Panel found that although there was evidence of remorse, there were inconsistencies. We determined that a six month suspension was warranted for Mr. Smalley.

¶23 In *State ex rel. Oklahoma Bar Ass'n v. Hixson*, 2017 OK 56, 397 P.3d 483, Mr. Hixson entered a plea to two separate criminal misdemeanor counts of solicitation of prostitution made to his 25 year old client with a newborn baby. In addition to his crimes, Mr. Hixson also repeatedly sent an overwhelming number of text messages requesting sexual contact with S.R., in fact there were 83 pages of text messages, instigated by Mr. Hixson. At the hearing, Mr. Hixson expressed deep remorse to his family, and various community organizations with whom he had been involved, but absent from his remorse was any empathy for his client. We imposed a six month suspension on Mr. Hixson.

IV. MITIGATION

¶24 We may consider mitigating circumstances when determining appropriate discipline. Upon receipt of the disciplinary letter from the OBA, Mr. Stout immediately sought help from Lawyers Helping Lawyers, admitted his behavior and expressed sincere and deep remorse toward his clients. Mr. Stout voluntarily consented to an inpatient treatment facility for sexual addiction. Following this treatment, he remains in therapy with a local counselor and regularly attends meetings. Mr. Stout also offered to not accept employment from any female clients in the future and in addition, he will never meet alone with any female relating to his practice of law. The Trial Panel found there was evidence of Mr. Stout's efforts to change his behavior through counseling and to guard against any future violations of the rules and the trust of his clients.

V. CONCLUSION

¶25 The OBA has established by clear and convincing evidence that the respondent, Richard E. Stout, violated Rules 1.7, 1.8 (j) and 8.4 of the ORPC and Rule 1.3 of the RGDP. Mr. Stout is suspended from the practice of law for three months, ordered to pay costs in the amount of $1,579.51, in addition to the following conditions: (1) Mr. Stout shall not accept female clients and will not meet alone with a female at any time associated with his practice of law; (2) he will remain in treatment as recommended by his counselor; (3) he will remain in contact with Lawyers Helping Lawyers; and (4) he will maintain site blocking protection on his electronic devices.

RESPONDENT IS SUSPENDED FROM THE PRACTICE OF LAW FOR THREE MONTHS; SUBJECT TO CONDITIONS; AND ORDERED TO PAY COSTS.

CONCUR: DARBY, V.C.J., KAUGER, WINCHESTER, EDMONDSON, and COLBERT, J.J.

CONCUR IN PART AND DISSENT IN PART: GURICH, C.J., COMBS, and KANE, J.J.

EDMONDSON, J.:

1. Rule 6, Formal Proceedings Before Supreme Court and Professional Responsibility Tribunal, 5 O.S. 2011, ch. 1, app. 1-A, Rules Governing Disciplinary Proceedings.

2. Transcript, Hearing on April 23, 2019 before the PRT, testimony of Mr. Stout.

3. *Id.*

4. Rule 1.7 (a), 5 O.S. 2011, ch. 1, app. 3-A provides:

> Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

5. *Id.*

6. Rule 1.8 (j), 5 O.S. 2011, ch. 1, app. 3-A provides:

> (j) A lawyer shall not have sexual relations with a client unless: (1) a consensual sexual relationship existed between them when the client-lawyer relationship commenced and (2) the relationship does not result in a violation of Rule 1.7 (a)(2).

7. Comment 12 to Rule 1.7, 5 O.S. 2011, ch. 1, app. 3-A provides:

> .... "Sexual relations" includes, *but is not necessarily limited to,* sexual intercourse or any touching of the sexual or other intimate parts of a client or causing such client to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party or to humiliate, harass, degrade or exploit."Sexual relationship" means an established course of sexual relations.

8. Transcript of Hearing before the Professional Responsibility Tribunal, April 23, 2019, SCBD #6732.

9. Rule 1.3 RGDP, provides: "The commission by any lawyer of any act contrary to prescribed standards of conduct, whether in the course of his professional capacity, or otherwise, which act would reasonably by found to bring discredit upon the legal profession, shall be grounds for disciplinary action, whether or not the act is a felony or misdemeanor, or a crime at all. Conviction in a criminal proceeding is not condition precedent to the imposition of discipline."

10. Complainant's Brief-In-Chief, June 12, 2019, *State of Oklahoma ex rel. Oklahoma Bar Ass'n, v. Richard E. Stout*, SCBD #6732.

11. *Id.*

12. Report of Trial Panel, May 21, 2019, SCBD #6732.

2019 OK 61

DANIEL WILLIAMS and BARBARA WILLIAMS, Plaintiffs/Appellants, v. TAMKO BUILDING PRODUCTS, INC., Defendant/Appellee.

No. 117,190. October 1, 2019

APPEAL FROM THE DISTRICT COURT OF LEFLORE COUNTY, THE HONORABLE JONATHAN SULLIVAN, PRESIDING

¶0 Defendant/Appellee is a roof shingle manufacturer incorporated in Missouri. Plaintiffs/Appellants are homeowners whose contractors installed the Defendant's shingles on homeowner's roof. Plaintiffs filed suit alleging they are entitled to compensation for damage to their home caused by Defendant's faulty shingles and the expense of installing a new roof. Defendants moved to stay proceedings and compel arbitration pursuant to an arbitration agreement on the shingle's packaging. The trial court granted the Defendant's Motion to Stay Proceedings and Compel Arbitration concluding the Plaintiffs are charged with the knowledge of the contract even if they did not read it, that TAMKO has not waived its right to compel arbitration, and that the contract is not unconscionable. The Plaintiffs appealed. This Court retained this matter on its own motion.

ORDER COMPELLING ARBITRATION REVERSED AND CASE REMANDED.

Jeremy K. Ward, Franden, Farris, Quillin, Goodnight + Roberts, Tulsa, Oklahoma, for Plaintiffs/Appellants.

Stephanie L. Theban, Riggs, Abney, Neal, Turpen, Orbison, & Lewis, Tulsa, Oklahoma; Shawn E. Arnold, Lytle Soulé & Curlee, P.C. Oklahoma City, Oklahoma, and Jeffrey J. Simon, Husch Blackwell LLP, Kansas City, Missouri for Defendant/Appellee.

COMBS, J.:

¶1 The issue presented is whether an arbitration agreement printed on shingle wrapping viewed only by contractors and then discarded creates a binding arbitration agreement between the homeowner and the shingle manufacturer. We hold it does not.

FACTS AND PROCEDURAL HISTORY

¶2 A third party contractor installed TAMKO Building Products, Inc.'s (TAMKO) shingles on Daniel and Barbara Williams' (Homeowners) roof in June of 2007. In April of 2016, the Homeowners noticed that the shingles were "cracking and de-granulating." The damage to the shingles caused "structural problems to their home." The Homeowners contacted TAMKO, and TAMKO requested the Homeowners submit a warranty claim. The Homeowners complied. Three months later, TAMKO sent the Homeowners a letter offering one square of replacement shingles and a certificate for $100 to cover installation costs.

¶3 The Homeowners filed suit against TAMKO on claims of product liability, negligent design and manufacture of the shingles, and failure to warn of shingle defects. TAMKO filed a Motion to Stay Proceedings and Compel Arbitration. TAMKO based its motion on the arbitration agreement printed with the limited warranty on the wrapping of each bundle of shingles. The following is the TAMKO arbitration clause:

> MANDATORY BINDING ARBITRATION: EVERY CLAIM, CONTROVERSY, OR DISPUTE OF ANY KIND WHATSOEVER INCLUDING WHETHER ANY PARTICULAR MATTER IS SUBJECT TO ARBITRATION (EACH AN "ACTION") BETWEEN YOU AND TAMKO (INCLUDING ANY OF TAMKO'S EMPLOYEES AND AGENTS) RELATING TO OR ARISING OUT OF THE SHINGLES OR THIS LIMITED WARRANTY SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION REGARDLESS OF WHETHER THE ACTION SOUNDS IN WARRANTY, CONTRACT, STATUTE OR ANY OTHER LEGAL OR EQUITABLE THEORY. TO ARBITRATE AN ACTION AGAINST TAMKO, YOU MUST INITIATE THE ARBITRATION IN ACCORDANCE WITH THE APPLICABLE RULES OF ARBITRATION OF THE AMERICAN ARBITRATION ASSOCIATION...

R. at 1-2. TAMKO argued that by purchasing and installing the shingles, the Homeowners agreed to the limited warranty and its arbitration clause. TAMKO argued that the Homeowners had the opportunity to read the warranty, or in the alternative, that the contractors who opened the product packaging were agents of the Homeowners and the agent's knowledge is imputed to the principal. TAMKO further argued that submitting a warranty claim bound the Homeowners to the arbitration clause. The Homeowners argued that they never knew of nor agreed to the arbitration clause, the clause is unconscionable, and TAMKO waived its right to demand arbitration. The trial court granted the Defendant's Motion to Stay Proceedings and Compel Arbitration concluding the Homeowners are charged with the knowledge of the contract, that TAMKO has not waived its right to compel arbitration, and that the contract is not unconscionable.

¶4 The Homeowners filed a Petition in Error as an Interlocutory Order Appealable by Right with this Court on July 10, 2018. This Court's order dated August 17, 2018 re-characterized this appeal as one from a final order. We retained the matter on July 13, 2018, and it was assigned to this office on August 19, 2019.

JURISDICTION

¶5 The Federal Arbitration Act (FAA) governs interstate commerce contracts. *Rogers v. Dell Computer Corp.*, 2005 OK 51, ¶11, 138 P.3d 826, 829. The FAA controls substantive rights, but the Oklahoma Uniform Arbitration Act (OUAA) controls the procedure for enforcing the FAA. *Rogers*, 2005 OK 51, ¶15, 138 P.3d at 839. "There is no federal policy favoring arbitration under a certain set of procedural rules." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989). Both the FAA and the OUAA allow appeals from arbitration orders that are a final decision. 9 U.S. § 16(b)(1); 12 O.S. §1879; *Green Tree Fin. Corp. – Alabama v. Randolph*, 531 U.S. 79 (2000) (holding an order compelling arbitration and dismissing the case was a final decision); *Oklahoma Oncology & Hematology P.C. v. US Oncology, Inc.* 2007 OK 12, 160 P.3d 936 (holding an order compelling arbitration and staying the case was a final decision). Unlike the FAA, the OUAA does not bar appeals from orders "granting a stay of any action." *Compare* 9 U.S.C. § 16(b)(1) (1990) ("Except as otherwise provided...an appeal may not be taken from an interlocutory order – granting a stay of any action...") *with* 12 O.S. §1879 (2005) (containing no provisions for denying an appeal from an order regarding arbitration). Oklahoma precedent establishes that an order compelling arbitration and staying court proceedings is an appealable final decision under the OUAA. *Oklahoma Oncology & Hematology P.C.*, 2007 OK 12, 160 P.3d 936.

¶6 The FAA does not preempt the OUAA's procedural rules for appeals. "The FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Scis., Inc.*, 489 U.S. at 477. However, state law may be pre-empted if it is "an obstacle to the accomplishment and execution of" Congress' "full purposes and objectives." *Id.* In *Volt*, the Court permitted a stay of arbitration on state statutory procedural grounds where the FAA did not provide for the stay. *Id.* Further, the FAA's purpose is not to force all claims to arbitration nor to expedite claim resolution. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985). "The legislative history... establishes that the purpose behind [the FAA's] passage was to

ensure judicial enforcement of privately made agreements to arbitrate." *Id.* The OUAA procedural provisions ensure that contracts with arbitration agreements are honored; and the provisions ensure that contracts without an arbitration agreement are honored. The OUAA procedural provisions further the FAA's purposes and are not preempted.

STANDARD OF REVIEW

¶7 This Court's review of whether a valid arbitration agreement exists is a question of law reviewed *de novo. Oklahoma Oncology & Hematology P.C*, 2007 OK 12, ¶19, 160 P.3d at 944; *Rogers,* 2005 OK 51, ¶18, 138 P.3d 826, 831.

ANALYSIS

¶8 An arbitration agreement's existence is governed by state law principles. *Wilkinson v. Dean Witter Reynolds, Inc.*, 1997 OK 20, ¶9, 933 P.2d 878, 880. The FAA does not preempt the traditional principles of state agency and contract law. *See Arthur Andersen LLP v. Carlisle,* 556 U.S. 624, 630-31 (2009). The FAA's purpose is "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, fn. 12 (1967). A valid contract requires the parties' mutual consent to the terms. *Beck v. Reynolds*, 1995 OK 83, ¶11 , 903 P.2d 317, 319.

I. Actual Knowledge

¶9 The Homeowners could not have had actual knowledge of the arbitration agreement and therefore could not consent. Courts presume that a buyer who had the opportunity to read a contract but did not is bound by the unread terms. *Borden v. Day*, 1946 OK 121, ¶4, 197 Okla. 110, 111, 168 P.2d 646, 657. Here, the buyers did not have an opportunity to read the contract. There is no evidence that the homeowners received any notice of the arbitration agreement – not a wrapper, not a leaflet, not a brochure. The Homeowners assert they did not personally purchase the shingles, nor were they given a copy of materials containing the arbitration terms. Appellants Br. 3. The exhibits of correspondence between TAMKO and the Homeowners for the warranty claims do not contain any reference to an arbitration agreement. R. at 17, 33-40. The Homeowners never had the opportunity to read and obtain actual knowledge of the arbitration provision.

¶10 This distinguishes the present case from three of the four cases TAMKO cites in support of its proposition that "numerous courts around the nation have found TAMKO's Arbitration Clause valid and enforceable." R. at 11. In three of the cases, although the courts discuss agency law, the plaintiffs had or should have had actual knowledge of the arbitration agreement. *See Am. Family Mut. Ins. Co. v. Tamko Bldg. Prods., Inc.*, 178 F. SupP.3d 1121, 1124-5 (D. Colo. 2016) (noting that the building owners personally selected and purchased the shingles); *Hoekman v. Tamko Bldg. Prods.*, Inc., No. 2:14-cv-01581-TLN-KJN, 2015 WL 9591471 at *3-4 (E.D. Cal. Aug. 26, 2015) (noting that the plaintiffs personally shopped for and purchased the shingles); *Krusch v. TAMKO Bldg. Prods., Inc.*, 34 F. SupP.3d 584, 589 (M.D.N.C. 2014) (noting that the agent received a sample shingle and brochure explaining the incorporation of a limited warranty – material much more likely to be passed on to the principal than throw-away packaging). Here, the Homeowners did not select the shingles nor do the facts show that they or their contractor received brochures mentioning a warranty.

II. Agency

¶11 The contractors were agents of the Homeowners for the purpose of selecting and installing shingles. In the absence of an explicit agreement, the words or conduct of the parties considered in light of the surrounding circumstances can establish an implied agency. *Campbell v. John Deere Plow Co.*, 1946 OK 189, ¶6, 403 172 P.2d 319, 320. The Homeowners authorized the contractors to select and install shingles on the Homeowner's roof. *See* R. at 18. The contractors purchased shingles and installed them. *Id.* The facts reflect that there was an agency agreement between the Homeowners and contractors.

¶12 But the scope of the contractor's authority did not include contracting away the Homeowners' constitutional right to a jury trial.

> An authorization is interpreted in light of all accompanying circumstances...
>
> (a) the situation of the parties, their relations to one another, and the business in which they are engaged;
>
> (b) the...usages of trades or employments of the kind to which the authorization relates...;
>
> (c) facts of which the agent has notice respecting the objects which the principal desires to accomplish;

(d) the nature of the subject matter, the circumstances under which the act is to be performed...; and

(e) the formality or informality, and the care...with which an instrument evidencing the authority is drawn.

Restatement (Second) of Agency §34. The Homeowners gave the contractor the right to buy and install shingles. TAMKO argues this gave the contractors the right to bind the principals to the arbitration agreement. R. at 11. The Oklahoma Constitution preserves the right to trial by jury. Okla. Const. art. 2, §19. A one-time selection and installation of shingles by a contractor without a formal agency agreement does not indicate an authorization to waive a constitutional right. Especially when the waiver is on material that per industry custom is opened by someone other than the consumer and then discarded. Appellants' Br. 16. The power to waive a principal's constitutional right is usually found in a power of attorney agreement. Under a power of attorney agreement, the agent is the principal's attorney in fact. Tellingly, an attorney in law representing a client does not have the power to waive a trial and settle a case without the principal's consent. 5 O.S. App. 3-A, Rule 1.2 (2007). How then could builders contracted to select and install shingles impliedly gain authority to abandon one's constitutional right to a jury trial? The opening of the shingles' wrapping did not expand the authority of the contractors.

¶13 Because the contractors lacked authority to enter an arbitration agreement, the principals' ratification of the contract is the only method of validating the contract. Ratification requires that the principal accept the benefits of the contract with full knowledge of the facts. *Kincaid v. Black Angus Motel, Inc.*, 1999 OK 54, ¶11, 983 P.2d 1016, 1020. Here, the principals could not ratify because they did not know the material facts. The Homeowners stated they were unaware of the arbitration agreement until after they submitted a warranty claim. R. at 6. The exhibits provided by both Plaintiffs and Defendant regarding their communications do not indicate there is an arbitration agreement. R. at 17, 33-40. Further, the wrapping containing the arbitration agreement has a panel requesting the owner "retain this warranty with contractors receipt for future reference." *Id.* at 15. That panel does not disclose the arbitration agreement. *Id.* The panel specifies only the years of warranty, the shingles' color and type, and installment details. *Id.* Conspicuously missing is any mention of the arbitration agreement. There are no facts suggesting that the Homeowners knew of the arbitration clause, so the Homeowners could not ratify the arbitration provision.

¶14 TAMKO argues that the Homeowners had imputed knowledge of the arbitration clause because the contractors acting as Homeowners' agent could observe the information. Imputed knowledge cannot mean that an agent who enters a contract with both authorized and unauthorized provisions suddenly binds his principal to the unauthorized portions of the contract. If that were true, then the system of ratification requiring a principal be apprised of all material facts would be incongruous. A third party could circumvent ratification requirements by entering a contract with an agent that included unauthorized provisions and then hold the principal liable for those illegitimate provisions even if the principal was never given an opportunity to learn of them.

III. Third-Party Beneficiary

¶15 TAMKO argues that the limited warranty provision contained the arbitration agreement, and because the Homeowners filed a warranty claim with TAMKO they have sought to enforce their rights in that contract and cannot now disclaim the arbitration agreement provision of that contract. Appellee's Br. 22. However, the Homeowners are not seeking to enforce their rights under the limited warranty contract. Their claims arise in tort law not contract law. R. at 1-4. Nor do their tort law cases stem from a breach of contract. All of TAMKO's string-cited cases subjecting third-party beneficiaries to arbitration agreements involve claims deriving from the contract containing the arbitration agreement. *Trans-Bay Eng'rs & Builders, Inc. v. Hills*, 551 F.2d 370, 373-74 (D. C. Cir. 1976) (asserting breach of contract); *Borsack v. Chalk & Vermilion Fine Arts, Ltd.*, 974 F. Supp. 293, 295 (S.D.N.Y. 1997) (asserting breach of contract); *Boyd v. Homes of Legend, Inc.*, 981 F. Supp. 1423, 1426 (M.D. Ala. 1997) (asserting claims for breach of implied and express warranties); *Ripmaster v. Toyoda Gosei, Co., Ltd.*, 824 F. Supp. 116, 118 (E.D. Mich. 1993) (asserting "plaintiff claims he has suffered because of defendants' alleged breach with plaintiff's employer"); *Wehe v. Montgomery*, 711 F. Supp. 1035, 1036 (D. Or. 1989) (asserting breach of fiduciary duty which arose from contractual agreement); *Interpool Ltd. v. Through Trans. Mut.*

Ins. Ass'n Ltd., 635 F. Supp. 1503, 1505 (S.D. Fla. 1985) (asserting claim to enforce insurance contract); *Lee v. Grandcor Med. Sys., Inc.*, 702 F. Supp. 252, 253 (D. Colo. 1988) (asserting breach of contract); *Infiniti of Mobile, Inc. v. Office*, 727 So.2d 42, 43 (Ala. 1999) (asserting claim of breach of warranty); *Parker v. Ctr. For Creative Leadership,* 15 P.3d 297,298 (Colo. App. 2000) (asserting a claim of breach of contract); *Liberty Comm., Inc. v. MCI Telecomm., Corp.*, 733 So.2d 571, 573 (Fla. Dist. Ct. App. 1999) (asserting claims for fraudulent inducement to enter contract and breach of contract).

¶16 Additionally, this fact distinguishes the present case from the last of the four cases TAMKO cites to support its proposition that "numerous courts around the nation have found TAMKO's Arbitration Clause valid and enforceable."[1] *Id.* at 11. The plaintiffs in that case included a claim for breach of express warranty. *Overlook Terraces, LTD. v. Tamko Bldg. Prods.,* 2015 WL 9906298 at *4 (W.D. Ky. May 21, 2015).

IV. Estoppel

¶17 The Homeowners are not estopped from challenging the arbitration agreement. Estoppel prevents one party from taking a position that is inconsistent with an earlier action that places the other party at a disadvantage. *Rouse v. Oklahoma Merit Prot. Comm'n,* 2015 OK 7, ¶24, 345 P.3d 366, 375. Estoppel requires:

> 1) a false representation or concealment of facts; 2) made with actual or constructive knowledge of facts; 3) to a person without knowledge of, or the means of knowing, those facts; 4) with the intent that it be acted upon; and 5) the person to whom it was made acted in reliance upon it to his detriment.

Sullivan v. Buckhorn Ranch P'ship, 2005 OK 41, ¶31, 119 P.3d 192, 202. The Homeowners did not know of the arbitration agreement until after they filed a warranty claim at the bequest of TAMKO. R. at 8. And, the Homeowners did not make a false representation to or conceal facts from TAMKO. An argument could be made that TAMKO should be estopped from enforcing its arbitration clause through linking it to the warranty. TAMKO concealed facts regarding its arbitration clause when discussing the warranty claim with Homeowners. The Homeowners did not know of the arbitration agreement. TAMKO intended the Homeowners to file the warranty claim and potentially bind themselves to the arbitration agreement – deduced from its use of this exact argument in this case. The Homeowners relied on TAMKO's statements and concealment of fact in submitting a warranty claim to the detriment of the Homeowners.

V. Unconscionability

¶18 TAMKO's adhesion contract printed on material to be discarded is unconscionable. "The basic test of unconscionability ... is whether under the circumstances existing at the time of making of the contract, and in light of the general commercial background and commercial need of a particular case, clauses are so one-sided as to oppress or unfairly surprise one of the parties." *Barnes v. Helfenbein*, 1976 OK 33, ¶23, 548 P.2d 1014, 1020. The arbitration clause at issue here is one-sided and was made to both oppress and unfairly surprise the Homeowners. TAMKO's definition of "owner" under the terms of the arbitration clause "means the owner of the building at the time the shingles are installed on that building. If you purchase a new residence and are the first person to occupy the residence, TAMKO will consider you Owner even though the Shingles were already installed."[2] R. at 15. "An adhesion contract is a standardized contract prepared entirely by one party to the transaction for the acceptance of the other. These contracts, because of the disparity in bargaining power..., must be accepted or rejected on a "take it or leave it" basis without opportunity for bargaining." *Max True Plastering Co. v. U.S. Fid. & Guar. Co.,* 1996 OK 28, ¶7, 912 P.2d 861, 864. This arbitration clause is an adhesion contract, and it requires the Homeowners to surrender their constitutional right to a jury trial. Further, this adhesion contract is intentionally printed on material that will be opened and discarded by the contractor who is likely not the owner. The portion of the packaging that is "to be completed by Owner and Contractor" and retained recounts only the years of warranty, a description of the shingles, and installment details – not the arbitration agreement.

CONCLUSION

¶19 The Homeowners are not bound to the arbitration agreement. The Oklahoma Constitution protects the right to a jury trial. An implied agent whose sole authority is to select and install shingles does not have the authority to waive the principal's constitutional rights. Further, the intentional printing of an agreement to waive a constitutional right on mate-

rial that is destined for garbage and not the consumer's eyes is unconscionable. The Homeowners never had an opportunity to make a knowing waiver of access to the courts. The order of the trial court compelling arbitration is reversed and the case is remanded.

ORDER COMPELLING ARBITRATION REVERSED AND CASE REMANDED.

¶20 Gurich, C.J., Darby, V.C.J., Kauger, Winchester, Edmondson, Colbert, Combs, and Kane J.J., concur.

COMBS, J.:

1. *See supra* ¶ 10.

2. Hypothetically, this arbitration agreement binds a purchaser of a new home completed by a builder a year earlier. The builder binds the homeowner even though at the time the builder entered the contract with TAMKO the builder was not the Homeowner's agent. Nor would the homeowner have any knowledge of the agreement or opportunity to negotiate.

2019 OK 62

State of Oklahoma ex rel. Oklahoma Bar Association, Complainant, v. SHELLEY LYNNE LEVISAY, Respondent.

SCBD No. 6827. October 7, 2019

ORDER OF IMMEDIATE INTERIM SUSPENSION

¶1 The Oklahoma Bar Association (OBA), in compliance with Rules 7.1 and 7.2 of the Rules Governing Disciplinary Proceedings (RGDP), has forwarded to this Court certified copies of the Information, Plea, and Disposition Order on a plea of no contest. On September 11, 2019, Shelley Lynne Levisay entered the plea of no contest to a felony charge of Harboring a Fugitive From Justice in violation of 21 O.S. 2011 §440, which occurred from December 29, 2017 through January 24, 2018. Levisay was convicted of felony Harboring a Fugitive and sentenced to a two year suspended sentence, 100 hours of community service and a fine of $5,000.

¶2 Rule 7.3 of the RGDP provides: "Upon receipt of the certified copies of Judgment and Sentence on a plea of guilty, order deferring judgment and sentence, indictment or information and the judgment and sentence, the Supreme Court shall by order immediately suspend the lawyer from the practice of law until further order of the Court." Having received certified copies of these papers and orders, this Court orders that Shelley Lynne Levisay is immediately suspended from the practice of law. Shelley Lynne Levisay is directed to show cause, if any, no later than **October 21, 2019**, why this order of interim suspension should be set aside. See RGDP Rule 7.3. The OBA has until **November 4, 2019**, to respond.

¶3 Rule 7.2 of the RGDP provides that a certified copy of a plea of guilty, an order deferring judgment and sentence, or information and judgment and sentence of conviction "shall constitute the charge and be conclusive evidence of the commission of the crime upon which the judgment and sentence is based and shall suffice as the basis for discipline in accordance with these rules." Pursuant to Rule 7.4 of the RGDP, Shelley Lynne Levisay has until **November 19, 2019**, to show cause in writing why a final order of discipline should not be imposed, to request a hearing, or to file a brief and any evidence tending to mitigate the severity of discipline. The OBA has until **December 4, 2019**, to respond.

¶4 DONE BY ORDER OF THE SUPREME COURT on October 7, 2019.

/s/ Noma D. Gurich

CHIEF JUSTICE

Gurich, C.J., Darby, V.C.J., Kauger, Winchester, Edmondson, Colbert, Kane, JJ., concur;

Combs, J., recused.

2019 OK 63

STATE OF OKLAHOMA ex rel.OKLAHOMA BAR ASSOCIATION Complainant, v. EMMA BARLIE ARNETT Respondent.

SCBD #6676. October 7, 2019

ORDER OF DISCIPLINE

¶1 On July 31, 2018, the Oklahoma Bar Association (Bar Association), filed Notice of Judgment and Sentence regarding the respondent, Emma Barlie Arnett, notifying the Court of her criminal conviction of manslaugher. Subsequently, on September 10, 2018, we issued an Order of Immediate Suspension. The Professional Responsibility Tribunal (PRT) held a disciplinary proceeding on April 22, 2019, to consider a recommendation of final discipline and gather mitigating evidence.

¶2 The respondent has no complaints, disciplinary actions, or previous suspensions from the Oklahoma Bar Association nor any previous criminal charges. The PRT recommended that the interim suspension remain effective for two years and one month or until incarceration has ended — whichever is longer.

¶3 THE COURT FINDS:

1. The respondent's suspension from the Oklahoma Bar Association shall remain effective for two years and one day or until incarceration has ended — whichever is longer.
2. Upon the expiration of the suspension, the respondent may follow the strictures of Rule 11, of The Rules Governing Disciplinary Proceedings, 5 O.S. 2011 Ch. 1, App. 1-A.
3. The resuming the practice of law is conditioned on the respondent paying the assessed costs of $4,077.65.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED the respondent's suspension from the Oklahoma Bar Association shall remain effective for two years and one day or until her incarceration has ended — whichever is longer. The Bar Association is awarded costs of $4,077.65 in this proceeding.

DONE BY ORDER OF THE SUPREME COURT THIS 7th DAY OF OCTOBER, 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

GURICH, C.J., KAUGER, WINCHESTER, EDMONDSON, KANE, JJ., concur.

DARBY, V.C.J., COLBERT, COMBS, JJ., dissent:

DARBY, V.C.J., with whom COMBS, J., joins, dissenting:

I dissentI would disbar respondent. *State ex rel. OBA v. Wyatt,* 2001 OK 70, 2 P.3d 858.

2019 OK 64

IN RE: AMENDMENT TO THE OKLAHOMA SUPREME COURT RULE 1.60, 12 O.S. ch. 15, app.1.

S.C.A.D. No. 2019-86. October 8, 2019

ORDER

On October 7, 2019, the Oklahoma Supreme Court in Conference approved the attached amendment to Oklahoma Supreme Court Rule 1.60, Okla. Stat. tit. 12, ch. 15, app. 1. The amendment shall be immediately effective upon the filing of this order, and shall apply to all pending cases before this Court and the Court of Civil Appeals.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THE 7th DAY OF OCTOBER, 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

Gurich, C.J., Darby, V.C.J., Kauger, Combs and Kane, JJ., concur;

Winchester, Edmondson and Colbert, JJ., dissent.

Exhibit "A"

RULE 1.60 - DEFINITION OF INTERLOCUTORY ORDERS APPEALABLE BY RIGHT

Orders of the district court that are interlocutory and may be appealed by right in compliance with the rules in this part are those that:

(a) Grant a new trial or vacate a judgment on any ground, including that of newly discovered evidence or the impossibility of making a record (12 O.S. § 655, 12 O.S. § 952(b)(2));

(b) Discharge, vacate or modify or refuse to discharge, vacate or modify an attachment (12 O.S. § 993(A)(1));

(c) Deny a temporary injunction, grant a temporary injunction except where granted at an ex parte hearing, or discharge, vacate or modify or refuse to discharge, vacate or modify a temporary injunction (12 O.S. § 952(b)(2) and 12 O.S. § 993(A)(2));

(d) Discharge, vacate or modify or refuse to discharge, vacate or modify a provisional remedy which affects the substantial rights of a party (12 O.S. § 952(b)(2) and 12 O.S. § 993(A)(3));

(e) Appoint a receiver except where the receiver was appointed at an ex parte hearing, refuse to appoint a receiver or vacate or refuse to vacate the appointment of a receiver (12 O.S. § 993(A)(4));

(f) Direct the payment of money pendente lite except where granted at an ex parte hearing, refuse to direct the payment of money pendente lite, or vacate or refuse to vacate an order directing the payment of money pendente lite (12 O.S. § 993(A)(5));

(g) Certify or refuse to certify an action to be maintained as a class action (12 O.S. § 993(A)(6));

(h) Are enumerated in 58 O.S. § 721 (interlocutory probate orders but not orders allowing a final account and granting a decree of distribution); or

(i) Are made under the provisions of 12 O.S. § 1879.; or

(j) Temporary orders of protection made in proceedings pursuant to the Protection From Domestic Abuse Act, 22 O.S. §§ 60 et seq.


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2019 OK CR 4

JOSEPH TRUSKOLASKI, Petitioner, v. STATE OF OKLAHOMA, Respondent.

No. PC-2018-864. Wednesday, March 27, 2019

ORDER GRANTING REQUEST FOR POST-CONVICTION RELIEF AND REMANDING MATTER TO THE

HONORABLE KELLY GREENOUGH, DISTRICT JUDGE, DISTRICT COURT OF TULSA COUNTY, TO ADDRESS PETITIONER'S APPLICATION FOR POST-CONVICTION RELIEF

¶1 On August 21, 2018, Petitioner Truskolaski, pro se, appealed to this Court from an order of the District Court of Tulsa County denying his application for post-conviction relief in Tulsa County District Court Case No. CF-2009-3155. He was convicted in that case of one count of manslaughter, and that conviction was affirmed on direct appeal by this Court in *Truskolaski v. State*, F-2011-0820 (Okla.Cr. August 13, 2013)(unpublished). What makes this case unusual is that Petitioner then filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Oklahoma, without first seeking relief under the Oklahoma Post Conviction Procedure Act. His attempts in federal court were unsuccessful.

¶2 On May 17, 2018, Petitioner then filed an application for post-conviction relief in the District Court of Tulsa County claiming ineffective assistance of appellate counsel. In an order entered July 23, 2018, filed July 25, 2018, the District Court of Tulsa County, the Honorable Kelly Greenough, District Judge, denied Truskolaski's application for post-conviction relief. Judge Greenough found that Truskolaski's claims were procedurally barred because, prior to filing his application for post-conviction relief, he sought and was denied federal habeas relief on two separate occasions. Judge Green-ough determined that Truskolaski's claims were not properly presented for review via post-conviction because he failed to establish that the claims could not have been raised on direct appeal or in his federal petition for writ of habeas corpus. Acknowledging that a claim of ineffective assistance of appellate counsel could be raised for the first time in a post-conviction application, the court nonetheless de-termined that by choosing to pursue federal habeas relief prior to seeking post-conviction relief in the district court, Truskolaski's ineffective assistance of appellate counsel claim was waived.

¶3 Title 22 O.S. 2011, § 1086 reads as follows:

> All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application.

Judge Greenough cites to this statute in support of her finding that Truskolaski's federal habeas petition constitutes "any other proceeding the applicant has taken to secure relief" as specified in the Post-Conviction Procedure Act. Truskolaski's application for relief filed with this Court alleges that Judge Greenough erroneously failed to rule on his post-conviction claims. He argues that his State post-conviction claims are not barred by his previous federal habeas requests for relief, and that had he raised an ineffective assistance of appellate counsel claim in his federal habeas petition, the federal court would have rejected that claim for failure to exhaust his state remedies.

¶4 Whether federal habeas proceedings constitute "any other proceeding the applicant has taken to secure relief" sufficient to bar a state request for post-conviction relief is an issue of first impression before this Court. "Because this claim raises an issue of statutory interpretation, it presents a question of law that this Court reviews *de novo." Newlun v. State*, 2015 OK CR 7, ¶ 5, 348 P.3d 209, 210–11. One seeking federal habeas relief must generally first exhaust available state remedies. *See* 28 U.S.C. § 2254. "Under Oklahoma's post-conviction statutes, the only issues that can be raised in post-conviction are those which: "(1) [w]ere not and

could not have been raised in a direct appeal; and (2) [s]upport a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent." *Bryan v. State*, 1997 OK CR 69, ¶ 2, 948 P.2d 1230, 1232. We hold that this phrase from the Post Conviction Procedure Act contemplates remedies under state law and that attempts to secure federal remedies, in this case federal habeas relief, do not constitute "any other proceeding the applicant has taken to secure relief."

¶5 A review of this Court's docket reveals this is Truskolaski's first application for post-conviction relief filed with this Court in this matter. There is nothing in this record indicating that Truskolaski has previously filed any proceeding in state court which would act as a bar to raising the claims he now alleges entitle him to relief.

¶6 Truskolaski's application for post-conviction relief is **GRANTED**. This matter is **REMANDED** to the District Court of Tulsa County, the Honorable Kelly Greenough, District Judge, for entry of an order setting forth findings of fact and conclusions of law addressing Petitioner's application for post-conviction relief as required by statute and this Court's Rules. The District Court shall act on the application within thirty days from the date of this order with a certified copy of the order forwarded to this Court and the Petitioner.

¶7 The Clerk of this Court is directed to transmit a copy of this order to the Honorable Kelly Greenough, District Judge, Tulsa County; the Court Clerk of Tulsa County; counsel of record; and Petitioner.

¶8 **IT IS SO ORDERED**.

¶9 **WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this 27th day of March , 2019.

/s/ DAVID B. LEWIS,
Presiding Judge

/s/ DANA KUEHN,
Vice Presiding Judge

/s/ GARY L. LUMPKIN, Judge

/s/ ROBERT L. HUDSON, Judge

/s/ SCOTT ROWLAND, Judge

ATTEST:
John D. Hadden
Clerk

2019 OK CR 22

DONNIE L. HARRIS, JR., Appellant v. THE STATE OF OKLAHOMA, Appellee.

No. D-2014-153. September 26, 2019

OPINION

KUEHN, VICE PRESIDING JUDGE:

¶1 Appellant, Donnie Lee Harris, was charged in the District Court of LeFlore County, Case No. CF-2012-113, with Felony Murder in the First Degree (21 O.S.2011, § 701.7(B)). The State sought the death penalty, and alleged two statutory aggravating circumstances in support thereof: (1) that the murder was especially heinous, atrocious, or cruel; and (2) that Appellant knowingly created a great risk of death to more than one person. 21 O.S.2011, § 701.12(2), (4). Jury trial was held December 9 through 18, 2013 before the Honorable Jonathan K. Sullivan, District Judge. The jury rejected several lesser forms of homicide as alternatives to the charge, found Appellant guilty of First Degree Murder, found both aggravating circumstances, and imposed a sentence of death. Formal sentencing was held February 12, 2014.

SUMMARY OF THE TRIAL PROCEEDINGS

¶2 Appellant was convicted of killing his girlfriend, Kristi Ferguson, by intentionally dousing her with gasoline and setting her on fire. The couple had been in a tumultuous relationship for several years. Late on the evening of February 18, 2012, Appellant and Ferguson showed up at the home of Martha Johnson in Talihina. Appellant lived with his father, brother, and others in a home near Johnson's. Johnson and her son testified that Ferguson, nearly naked, was screaming for help on their front porch. Part of her bra was melted to her chest. The Johnsons smelled gasoline and burned flesh. As they waited for an ambulance to arrive, Appellant repeatedly tried to keep Ferguson from talking, saying things like, "Shut the fuck up. Shut your fucking mouth. Just shut your fucking mouth. You're going to get me in fucking trouble. Don't say another fucking word." Ferguson was heard to say, "Donnie, look at me. Look what you did to me," to which Appellant replied, "I know."

¶3 Emergency personnel also testified that Appellant tried to keep Ferguson from telling them what happened. The paramedics repeatedly asked Appellant to get out of their way as

they attended to Ferguson. As Ferguson was carried to the ambulance, Appellant ran alongside, repeatedly exclaiming that he was sorry, that he loved her, and "We took it too far." Once Ferguson was secured inside the ambulance and away from Appellant, she said, "I don't want him in here. Keep him away from me. Keep him away from me. Don't let him near me. He did this to me. ... He threw kerosene on me and set me on fire."

¶4 After the ambulance left, Appellant walked to the home of his friend, Melvin Bannister. (At trial, Bannister testified that Appellant said he had gotten into a fight with Ferguson, and that some candles caught their house on fire.) When police made telephone contact with Appellant, he initially refused to reveal his location, but eventually agreed to be transported to the police station for an interview. Several witnesses said that Appellant reeked of gasoline; he had a serious burn to his left hand. A lighter was found in his pocket, although he later told a detective that he did not smoke.

¶5 Appellant gave authorities vague and inconsistent accounts of what happened.[1] On February 19, 2012, after a brief discussion with Talihina Police Officer Justin Klitzke, Appellant had a more extensive interview with State Fire Marshal Agent Tony Rust, who had been dispatched to investigate the fire. Appellant told Klitzke that he kept a Crown Royal bottle of gasoline on a table in his bedroom, but said he had no idea how the fire started. Appellant wrote a four-page account of what happened for Agent Rust where he claimed that while he and Ferguson were in his bedroom, a fire of unknown origin broke out "in an instant," and quickly "jumped to a blaze" on Ferguson's clothes. When Rust told Appellant he did not believe that account, Appellant exclaimed, "I didn't splash gasoline on her and set her on fire."

¶6 On February 24, 2012, Appellant was interviewed by LeFlore County Investigator Travis Saulsberry. That interview was recorded and played for the jury at trial. He volunteered to Saulsberry (as he had to Officer Klitzke) that he kept a Crown Royal bottle full of gasoline on a table in his bedroom. Appellant maintained that he did not know how the fire started. However, from the beginning, he conceded that the gasoline-filled bottle played a part. Initially he theorized that Ferguson may have kicked the bottle off of the table. When directly confronted about how the fire started, Appellant offered various possible scenarios. Almost in the same breath, he claimed that it might have been caused by candles or a faulty space heater, but he later said there were no lit candles in his bedroom at the time. When confronted with Melvin Bannister's claim that he had blamed the fire on candles, Appellant denied making such a claim. When confronted with a recording of Bannister's statement to that effect, Appellant replied that he "didn't know what else to say." At one point he told Saulsberry, "I don't know how it happened." Still later, Appellant claimed that Ferguson actually grabbed the Crown Royal bottle full of gasoline and "threw it down," causing the bed to catch fire. Appellant accused every other witness of being untruthful or mistaken.[2]

¶7 Because firefighters had to return to the scene several times to put out "hotspots," Agent Rust was unable to safely inspect it until a few days after the fire. He collected pieces of a Crown Royal bottle found in the debris and sent this evidence, along with clothing Appellant was wearing at the time of his arrest, to the Oklahoma State Bureau of Investigation for analysis. According to OSBI Criminalist Brad Rogers, the pieces of the bottle contained traces of an ignitable fluid such as gasoline.

¶8 Ferguson was eventually flown to Oklahoma City for treatment of second- and third-degree burns over fifty percent of her body. She also suffered other fire-related trauma such as lung damage. She succumbed to her injures a few weeks later. The burn patterns on her skin were consistent with those made by a liquid accelerant such as gasoline. Doctors testified that the pain associated with Ferguson's injuries would have been unimaginable.

¶9 The State presented evidence that the relationship between Appellant and Ferguson was tumultuous, that Appellant had made a number of menacing and threatening statements to and about Ferguson, and that Ferguson had sought a protective order against Appellant. A few weeks before the fire, Ferguson moved out of Appellant's home to live with a friend, Jenny Turner. Turner testified that Appellant threatened to kill Ferguson several times, saying things like, "I will kill you before I see you happy in Talihina." On one occasion, Appellant drove by Turner's home, waved a handgun and said, "I wanted y'all to see my new friend." Turner also recalled that a week before the fire, Appellant tried to run over Ferguson in his car.

¶10 The defense presented testimony from several of Appellant's family, who described the relationship between Appellant and Ferguson and their observations during the fire. None of them had personal knowledge about how the fire started.

¶11 In the first stage of the trial, the jury found Appellant guilty of First Degree Felony Murder in the Commission of First Degree Arson, rejecting the lesser alternative crimes of Second Degree Murder (Depraved Mind), First Degree Manslaughter (Heat of Passion), and Second Degree Manslaughter (Culpable Negligence). The jury's guilty verdict on a capital offense led to a second, capital sentencing phase of the trial. The State adopted the first-stage evidence to support its two aggravating circumstances. It presented victim impact testimony from Ferguson's father, mother, stepmother, and sister. It also presented brief expert testimony about the pain Ferguson likely suffered as a direct result of her burns. The defense presented many friends and family who testified to Appellant's upbringing, work habits, religious conviction, and general character as a good person whose life should be spared. The defense also presented a psychologist who examined Appellant and a mitigation specialist who provided a summary of Appellant's life story. After being instructed on how to consider the evidence relevant to sentencing, the jury recommended punishment of death.

ANALYSIS

¶12 In Proposition I, Appellant claims his inability to review certain materials has denied him his right to a meaningful appeal. Both trial counsel and appellate counsel designated, for the record on appeal, a "complete transcript" of each proceeding, and all exhibits "offered by any party, whether admitted or not." During the pendency of the appeal, appellate counsel filed several objections claiming the appeal record was not complete. Several times, we remanded the case to the district court to determine whether items were in fact missing, and if so, whether they could be recovered.[3] The materials at issue here fall into two groups: (1) omissions from the transcript of proceedings below, and (2) physical evidence presumably lost or destroyed before the appeal was perfected.

¶13 Appellant complains that no record exists of a motion hearing held December 4, 2013, a few days before trial began. The fact that a hearing was held on that date is not in dispute; in fact, counsel for both parties were in substantial agreement about much of what was discussed, including Appellant's complaints about his attorneys' communication with him. Importantly, both counsel also recalled stipulating that the State would substitute photographs and laboratory reports for much of its physical evidence. However, the district court concluded that no transcript or reporter's notes from the hearing could be found. Over Appellant's objection, we accepted the trial court's findings and conclusions, and deemed the appeal record complete.

¶14 Appellant has also catalogued several points in the trial proceedings where a participant's response is not recorded. These complaints fall into two categories: (1) where prospective jurors were asked to raise their hands in response to certain questions, but no record is made of how each individual panelist responded; and (2) where the response of a prospective juror or witness is described as "inaudible" by the court reporter. Finally, during the preparation of the appeal, appellate defense counsel attempted to locate physical evidence collected at the scene of the fire. This Court remanded the case to the district court to determine if this evidence still existed, but apparently it does not. Again, we note that the parties agreed to introduce photographs in lieu of most of the physical evidence related to this case.

¶15 As to the transcript of proceedings, Appellant acknowledges that it is his burden to show prejudice from any perceived omissions. *Parker v. State*, 1994 OK CR 56, ¶¶ 25-27, 887 P.2d 290, 294-95. Failure to provide a complete record of every word spoken, or every action taken, in the proceedings below is not *per se* reversible error. *Harris v. State*, 2007 OK CR 28, ¶ 7, 164 P.3d 1103, 1108-09. If the record is so incomplete that this Court cannot conduct a meaningful review, then relief may be warranted, particularly in capital cases where we are statutorily obligated to review the appropriateness of the death sentence. *See Black v. State*, 2001 OK CR 5, ¶¶ 83-88, 21 P.3d 1047, 1075-76.[4] Yet Appellant makes no attempt to show prejudice in this proposition. Instead, he claims prejudice will be shown as the omissions relate to other propositions of error, specifically Propositions III, VIII, XV, and XVII.[5] We will revisit the purportedly missing evidence and testimony as necessary in those claims. Proposition I is denied.

¶16 Propositions II, III, and IV share some factual background. The State's primary evidence against Appellant in the guilt phase consisted of Ferguson's statements immediately after the fire, Appellant's own incriminating statements and conduct after the fire, and his inconsistent and sometimes fanciful explanations in interviews with authorities. Appellant's defense team retained the services of an expert to assist in reviewing the State's handling of the investigation. In Proposition II, Appellant claims he was denied a fair trial because he was unable to present expert testimony to the jury. In Proposition III, he claims he was denied a fair trial because the State failed to preserve physical evidence from the fire scene. In Proposition IV, he accuses the State of failing to disclose evidence affecting the credibility of the investigator who collected evidence from the scene.

¶17 The fire occurred on the evening of February 18, 2012. The State Fire Marshal's Investigator, Tony Rust, spoke with Appellant and collected his clothing shortly after Appellant was taken into custody in the early morning hours of February 19, but Rust was unable to safely inspect the scene of the fire or collect evidence from it until a few days later. Rust submitted the physical evidence he collected to the OSBI in late February 2012. It was examined and analyzed in May 2012. Appellant's defense team hired its expert, David Smith, in late October 2012. Almost a year later, in September 2013, Smith submitted a brief report outlining his own conclusions about Agent Rust's investigation. Smith lives in Arizona. His report was based on documents, photos, and other material provided by defense counsel. There is no indication that Smith visited the scene of the fire; he did not personally inspect or test any physical evidence, and never asked to do so. A copy of Smith's report is included in the trial record as Court's Exhibit 2.

¶18 Smith was listed as a potential witness for the defense. Sometime during the first day of jury selection (December 9, 2013), defense counsel received word that Smith had suddenly developed a serious medical condition which prevented him from traveling. Counsel notified the trial court of the situation on the second day of jury selection (December 10), and provided an update after the third and final day of jury selection (December 11), telling the court that Smith would be sending paperwork about his condition. The State began presenting its evidence on the morning of December 12. That same day, defense counsel filed a verified motion for mistrial based on Smith's unavailability. The court heard argument on the motion on December 13. The State rested its guilt-stage case on the morning of December 14. Although defense counsel renewed his request for mistrial several times during the trial, documents substantiating Smith's condition were not received by the court until after the State had rested.

¶19 In Proposition II, Appellant claims the trial court's refusal to grant a mistrial, or at least a continuance, until Smith (or a replacement) could be brought in, infringed on his Sixth Amendment right to compulsory process, and ultimately violated his Fifth Amendment right to present a complete defense. We review a trial court's refusal to grant a mistrial or a continuance for an abuse of discretion. *Jackson v. State,* 2006 OK CR 45, ¶ 11, 146 P.3d 1149, 1156 (mistrial); *Marshall v. State*, 2010 OK CR 8, ¶ 44, 232 P.3d 467, 478 (continuance).

¶20 As noted, after jury selection had begun, the defense team learned that Smith, its fire expert, had developed a serious medical condition, and had been advised by his physician not to travel. Counsel appears to have communicated this development promptly to the prosecutor and the court. At the end of December 10, the second day of jury selection, lead defense counsel made reference to prior off-the-record discussions about how to proceed, mentioned a "potential, maybe, solution" that the prosecutor had suggested, and said he would probably be filing a motion for mistrial if Smith was indeed unable to travel. On December 11, the final day of jury selection, defense counsel told the court that Smith was sending paperwork about his condition. The State began presenting its evidence on the morning of December 12. That same day, defense counsel filed a verified motion for mistrial based on Smith's unavailability, with a brief "no travel" directive, presumably from Smith's physician and scribbled on a prescription pad, attached to the motion. The court heard argument on the motion on December 13, but declined to take any action without additional information. The State rested its guilt-stage case on the morning of December 14. Although defense counsel renewed his request for mistrial several times during the trial, documents substantiating Smith's condition were not received by the court until after

the State had rested on December 14. The court commented that a brief continuance might have been possible, but defense counsel could never say how much additional time was needed before Smith could appear or a replacement expert could be obtained.

¶21 From this record we conclude the following: (1) a continuance was at least considered, initially, as a possible remedy to the situation, and the prosecutor suggested some other alternative, possibly testifying by video; (2) defense counsel never formally requested a continuance; and (3) instead of formally requesting a continuance, or seeking alternative means of securing Smith's testimony without interrupting or delaying the trial, defense counsel took a different tack and moved for a mistrial, on the theory that Appellant had a constitutional right to demand the physical presence of his witnesses.

¶22 The Compulsory Process Clause of the Sixth Amendment, in conjunction with the Due Process Clause of the Fifth Amendment, have been interpreted to guarantee the accused a fair opportunity to secure and present relevant evidence. States may not enact laws or enforce rules that arbitrarily and unfairly prevent the accused from presenting relevant evidence. *See generally Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) (invalidating state evidence rule declaring accomplices to be "incompetent" as witnesses unless they were testifying for the prosecution or had been acquitted); *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986) (invalidating state rule barring defendant from presenting evidence to jury relevant to the voluntariness of his confession).

¶23 States may, however, enforce reasonable rules of procedure that apply to both parties. For example, in *Taylor v. Illinois*, 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988), the trial court barred the defendant from presenting a material witness as a sanction for failing to disclose that witness to the prosecution during pretrial discovery. The Court began by noting that, unlike other Sixth Amendment rights (such as the right to confront one's accusers), the Compulsory Process Clause "is dependent entirely upon the defendant's initiative"; the decision whether to invoke that right "rests solely with the defendant." 484 U.S. at 410, 108 S.Ct. at 653. The Court then observed that our adversary system could not function without rules of procedure that "govern the orderly presentation of facts and arguments to provide each party with a fair opportunity to assemble and submit evidence to contradict or explain the opponent's case." *Id.* at 411, 108 S.Ct. at 654. Ultimately, the Court concluded that barring Taylor's defense witness was an acceptable sanction under the circumstances, because the Sixth Amendment "does not confer the right to present testimony free from the legitimate demands of the adversarial system." *Id.* at 412-13, 108 S.Ct. at 655 (quoting *United States v. Nobles*, 422 U.S. 225, 241, 95 S.Ct. 2160, 2171, 45 L.Ed.2d 141 (1975)).

¶24 As Appellant claims the trial court's refusal to accommodate his situation to his satisfaction was tantamount to denying him the right to present a defense, he must show (1) that the court prevented him from obtaining or presenting evidence; (2) that the court's action was arbitrary or disproportionate to any legitimate evidentiary or procedural purpose; and (3) that the excluded evidence "would have been relevant and material, and ... vital to the defense." *Washington*, 388 U.S. at 16, 87 S.Ct. at 1922. The requirement of materiality is in keeping with other situations where a defendant has been denied access to evidence, whether by loss, destruction, or concealment by the prosecution. *See United States v. Valenzuela-Bernal*, 458 U.S. 858, 867-69, 102 S.Ct. 3440, 3446-47, 73 L.Ed.2d 1193 (1982).

¶25 As to the first two *Washington* criteria, Appellant was not barred from presenting Smith's testimony as punishment for failing to follow procedure, or as a result of some arbitrary rule. A defendant's right to present a defense is not unlimited; it is subject to reasonable restrictions. *United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 1264, 140 L.Ed.2d 413 (1998). Defense counsel did not formally request a continuance, but if he had, it would properly have been denied on the information provided to the court at the time. If a continuance is requested due to an absent witness, the proponent must inform the court of "the probability of procuring [the absent witness's] testimony within a reasonable time, and what facts [counsel] believes the witness will prove, and that he believes them to be true." 12 O.S.2011, § 668. Defense counsel did none of these things.

¶26 Nor did defense counsel make a record of any alternative remedies that were considered, such as having Smith testify remotely, and why no alternative to Smith's physical presence was feasible. *See e.g. Harris v. State*,

2004 OK CR 1, ¶ 10 n.3, 84 P.3d 731, 740 n.3 (live video testimony employed in capital murder trial where, ten days into the trial, terrorist attacks shut down air travel nationwide). The record shows that defense counsel had considered the possibility of having Smith testify by video, but instead took the position that the right to compulsory process included the absolute right to insist upon in-person testimony from any witness considered important to the defense. There simply is no authority for such a position.[6]

¶27 In our view, this is a case of unfortunate timing, with defense counsel ultimately unwilling to try to mitigate his predicament. By the time the trial court received the barest details of Smith's situation, the State's case-in-chief was well under way. Defense counsel could not offer even a ball-park estimate of when the defense could be ready. In its extended colloquy with defense counsel on December 13, the trial court discussed relevant case law, and expressed considerable understanding of the medical condition that Smith had apparently experienced. As for Smith's situation, all the court had before it was a doctor's note, scribbled on a prescription pad, advising Smith not to travel. The court took no action at that time, but invited counsel to bring more information as he received it. By the end of that same day, the State's guilt-stage case was almost complete. By the time the court received detailed information about Smith's status on December 14, the State had already rested its case.

¶28 Even if Appellant could show that the trial court's refusal to abort or pause the trial was unreasonable and disproportionate, he must still show that he was denied the right to present information material to his defense, and a reasonable likelihood that such information, if presented, would have affected the jury's verdict. *Washington,* 388 U.S. at 16, 87 S. Ct. at 1922; *Valenzuela-Bernal,* 458 U.S. at 873-74, 102 S.Ct. at 3450. Appellant was not denied a fair opportunity to use Smith's contribution to this case. Smith's written report summarizes the work he had done and the conclusions he had drawn. As we have noted, Smith never visited the scene or sought to inspect any physical evidence. He had no palpable alternative explanation for how the fire started. His only task was to critique the methods used and opinions reached by the State's investigator, Agent Rust. After reviewing the materials provided to him, Smith's conclusions were that Rust (1) failed to follow "recognized practices and methodologies," resulting in opinions that were "scientifically flawed"; (2) failed to establish a "competent ignition source" or "ignition scenario"; and (3) failed to formulate or test alternative hypotheses for how the fire started.

¶29 The gist of Smith's two-page report is that Rust was unable to independently establish, through physical evidence (*i.e.*, ignoring what eyewitnesses told him), a probable scenario for how and where the fire began. *Where* the fire began was never in dispute; according to Appellant and others in the house at the time, it began in his bedroom. *How* the fire began – and more precisely, how Ferguson came to be covered in gasoline – was disputed, but the various possibilities Appellant suggested to police were just that: possibilities. They were inconsistent with what Ferguson said, they were inconsistent with what Appellant had told Melvin Bannister, and they were inconsistent with one another. Appellant finally told Detective Saulsberry he had "no idea" how the fire started. As for the gasoline, Appellant initially told Saulsberry that Ferguson must have accidentally knocked the bottle off the table; later, he claimed that Ferguson (inexplicably) smashed the bottle into the flames on purpose.

¶30 While it may generally be the task of the Fire Marshal to investigate the cause of a fire with unknown or suspicious origin, Smith's expert opinion seems to fault Rust for paying attention to important primary evidence: the statements of Appellant and Ferguson, the only eyewitnesses to the fire's beginnings. Agent Rust focused on collecting the remains of the Crown Royal bottle because Appellant told Rust (and others) that he kept that bottle, full of gasoline, in his room, and because Appellant himself said the gasoline played a part in the fire. Appellant's strategy was to claim that the fire might have been an accident – that it might have been caused by, say, a spark from an overloaded electrical outlet – and that Agent Rust failed to eliminate those kinds of possibilities. Defense counsel took Rust to task for his methods and opinions. Appellant himself notes that trial counsel's cross-examination of Rust was "extensive." Counsel flatly told Rust, "I'm trying to show this jury that you did a poor investigation."

¶31 Appellant has not shown this Court that Smith himself could have been any more effective in disputing Rust's theory. Rust never

denied that an electrical spark can cause a fire; he simply had no evidence on which to rest such a theory in this case. If Smith had attended the trial, defense counsel still would have cross-examined Rust, in presumably the same manner, in the State's case-in-chief. Smith's testimony would have been somewhat cumulative, since he had conducted no tests or examinations, and had no specific, evidence-based alternative theories of his own. The State obligated itself to proving that Appellant intentionally set fire to Ferguson. The foundation of its theory consisted of the things Appellant and Ferguson said immediately after the fire. The State was only required to dispel any reasonable doubt about its theory; it was not required to disprove all other conceivable ones.[7]

¶32 Appellant claims the record is "replete" with instances where Smith's expert testimony would have been material and favorable, but he does not give any examples. We find Smith's role to be somewhat attenuated. He was not an eyewitness to the events giving rise to the charge, nor was he offered as a crucial witness in mitigation of sentence. He could not provide expert guidance as to Appellant's capacity to understand the nature and consequences of his acts. *Cf. Frederick v. State*, 1995 OK CR 44, ¶¶ 16, 25-26, 902 P.2d 1092, 1095-96, 1098 (capital defendant, whose sanity was in question, was denied a fair trial when court refused to grant a continuance to allow a psychiatrist to examine him); *Coddington v. State,* 2006 OK CR 34, ¶¶ 81-82, 90, 142 P.3d 437, 458, 460 (capital defendant was denied a fair trial by exclusion of his mother's video-taped testimony from the sentencing phase of trial).[8] Rather, Smith's opinions only tangentially relate to Appellant's guilt or innocence, because they merely call into question the thoroughness of investigator Rust whose greatest error was failing to look through the charred remains of the fire scene for ways to bolster theories that not even Appellant could credibly offer. We conclude that the material aspects of Smith's proffered expert opinion were sufficiently presented through the cross-examination of Agent Rust.

¶33 An abuse of discretion is an unreasonable, unconscionable and arbitrary action taken without proper consideration of the facts and law pertaining to the matter submitted. *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 19, 241 P.3d 214, 225. A defendant's right to present evidence is one of the core guarantees of due process. But given Appellant's apparent refusal to seriously consider viable alternatives (such as remote testimony), and his inability to estimate how much additional time was needed, we cannot say the trial court abused its discretion in refusing to abort or indefinitely pause a trial that was already well under way.[9] The record shows the trial court fairly and thoughtfully considered the situation as it developed. Furthermore, we do not believe Smith's absence prevented defense counsel from using his report to its fullest practical value. Appellant was not denied the right to present a defense to the crime; rather, through unfortunate circumstances and his own tactical decisions, he was unable to use impeachment evidence in a way that he now considers optimal. Considering the limited utility of Smith's critique, and the strong evidence of Appellant's guilt, we find no reasonable probability that Smith's presence would have affected the outcome of the trial. *Valenzuela-Bernal*, 458 U.S. at 873-74, 102 S.Ct. at 3450. Proposition II is denied.

¶34 In Proposition III, Appellant claims he was denied due process because the State failed to preserve certain physical evidence. The Due Process Clause of the Fourteenth Amendment obligates the State to preserve evidence that might be expected to play a significant role in a suspect's defense. *California v. Trombetta*, 467 U.S. 479, 488-89, 104 S.Ct. 2528, 2534, 81 L.Ed.2d 413 (1984). This obligation is not triggered unless the exculpatory value of the evidence is apparent before its destruction, and the evidence is such that the defendant would be unable to obtain comparable evidence by other reasonably available means. *Id.* When the exculpatory value of the evidence is not apparent, a less stringent test applies. If the State failed to preserve evidence that can only be called *potentially* useful to the defense, then no relief is warranted unless the defendant can show bad faith on the State's part. *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988); *Cuesta-Rodriguez,* 2010 OK CR 23, ¶ 20, 241 P.3d at 225.

¶35 As noted, Agent Rust collected physical evidence from the scene, as well as the clothing Appellant was wearing and the lighter he was carrying when he was arrested. Rust sent those items (except the lighter) to the Oklahoma State Bureau of Investigation for examination, which found traces of gasoline, or components of gasoline, on them. The OSBI analysis took place in May 2012. The evidence was then returned to LeFlore County authorities. How-

ever, at some point after testing, the evidence was lost.[10]

¶36 We first consider whether this evidence had any apparent exculpatory value. The simple answer is that, if the evidence had had *any* tendency to substantiate any part of the defense theory, or contradict the State's theory, then defense counsel would have at least asked to inspect it. Instead, counsel stipulated that photographs of the evidence were sufficient for the jury's purpose. Similarly, if the prosecutor had felt this evidence materially advanced the State's theory, she presumably would have introduced it. In reality, there was nothing particularly probative about the physical evidence for either party, as it only tended to corroborate what was never in dispute: that Appellant owned a cigarette lighter, that he had a Crown Royal bottle full of gasoline in his bedroom, and that the gasoline played some part in the fire that killed Ferguson. The OSBI's findings were entirely consistent with these facts and, in the end, no surprise to anyone. Indeed, Appellant does not take issue with those findings. We fail to see any exculpatory value in this evidence which would have been readily apparent before it went missing. Appellant offers no theory of how any of this evidence might have been parlayed to his advantage with additional examination or testing. Nor does he allege any bad faith on the part of the State in allowing this evidence to be lost or destroyed, which is fatal to any claim that the evidence was at least potentially useful to the defense.[11]

¶37 Once again, we stress that neither Appellant's defense lawyers nor his expert ever asked to inspect any of this evidence before trial.[12] Given the totality of the evidence presented, we can understand why: there was nothing to be gained from it. Due process does not impose "an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." *Youngblood*, 488 U.S. at 58, 109 S.Ct. at 337. Appellant has failed to show either (1) that the State permitted the loss or destruction of physical evidence whose exculpatory value was apparent at the time, or (2) that the State acted in bad faith in permitting the loss or destruction of physical evidence with even potential value to the defense. Proposition III is denied.

¶38 In Proposition IV, Appellant claims he was denied a fair trial by the State's failure to disclose evidence which could have impeached the credibility of Agent Rust, the State fire investigator who collected evidence and transmitted it to the OSBI. Due process requires the State to disclose evidence favorable to an accused, including evidence that would impeach the credibility of the State's witnesses or the probative force of its physical evidence. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963); *United States v. Bagley*, 473 U.S. 667, 677, 105 S.Ct. 3375, 3381, 87 L.Ed.2d 481 (1985); *Bramlett v. State*, 2018 OK CR 19, ¶ 28, 422 P.3d 788, 797. To establish a *Brady* violation, a defendant need not show that the State intentionally withheld such information. He must, however, show that the evidence had exculpatory or impeachment value, and that it was material, such that there is a reasonable probability that its omission affected the outcome of the proceeding. *Id.* The question is whether, absent the non-disclosed information, the defendant received a fair trial resulting in a verdict worthy of confidence. *Id.*

¶39 Because *Brady* claims, by definition, involve information that was not timely disclosed to the defense, they typically do not arise until sometime after trial. We remanded this case during the pendency of the appeal to resolve issues concerning the completeness of the record and the availability of physical evidence (see Proposition III). Information related to the present claim was presented at some of those hearings. Thus, the record before us already contains some of the factual basis for Appellant's *Brady* claim. Additional affidavits are included in a supplementary filing pursuant to Rule 3.11(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), which provides:

> After the Petition in Error has been timely filed in this Court, and upon notice from either party or upon this Court's own motion, the majority of the Court may, within its discretion, direct a supplementation of the record, when necessary, for a determination of any issue; or, when necessary, may direct the trial court to conduct an evidentiary hearing on the issue.

¶40 While seldom used, this provision seems well-tailored to the situation before us, where the supplementary materials inform and offer a more complete understanding of matters that were developed during the pendency of the appeal, and which themselves are part of the appeal record. Pursuant to Rule 3.11(A), we **GRANT** Appellant's request to consider inves-

tigators' affidavits and materials attached to them in conjunction with the *Brady* claim that arose during the post-trial remand hearings. *Coddington v. State*, 2011 OK CR 17, ¶ 21, 254 P.3d 684, 698.

¶41 The information at issue here falls into three categories: (1) an investigation into Rust's job performance, conducted by the Oklahoma State Fire Marshal's Office, several years before this case and unrelated to it; (2) the prosecutor's own interactions with Rust in the past; and (3) other allegations of job-related misconduct which did not come to light until after the trial.

¶42 We may easily dispense with the last allegation, because its factual basis simply did not exist at the time of trial. Appellant could not have impeached Rust's credibility with events that had not yet happened. Appellant concedes that the "bulk" of his concerns with Agent Rust's credibility relate to his investigation of *this* case, and he does not claim that the prosecutor has withheld any information on that subject. Since those allegations arose, the prosecutor has been completely cooperative and forthcoming in transmitting information to Appellant's defense team.[13]

¶43 As for the remaining matters, we question whether *Brady* extends to a prosecutor's personal opinion about a particular officer's work habits, punctuality, or similar issues. We also question whether *Brady* requires prosecutors to trawl for impeachment ammunition (including confidential personnel information) about every agent, from any arm of law enforcement, who had any involvement in a particular investigation. Given the posture of the case, we need not explore those questions here. The scope of the prosecutor's obligations are moot, because Appellant is not seeking potential *Brady* material; he already *has* the material. Regardless of the prosecutor's obligations or good faith, no *Brady* claim can succeed unless there is a reasonable probability that the evidence in question would have affected the outcome of the proceeding.

¶44 The remaining allegations concern Rust's training and other alleged personnel issues which occurred before this prosecution. We stress that these allegations *do not* involve claims that Rust ever destroyed, hid, or tampered with any evidence, in this investigation or in any other. In essence, the evidence that developed after trial suggested that Rust had not always followed office policy in his investigations, and that the prosecutor herself had unspecified "issues" with Rust while she briefly supervised him years before.[14] We believe any impeachment value in Agent Rust's general work habits bears little relevance to this case. Appellant claims Rust's credibility was essential – that the State could not have made its case without him. We disagree. The State's case was built upon the statements of the victim immediately after the fire, and Appellant's own suspicious conduct and statements. Rust's credibility *per se* was not central to the State's case, because Rust's participation was limited to collecting evidence from Appellant and the fire scene, and – as we observed in Proposition III – the probative value of *that* evidence was marginal as well. Furthermore, Rust's perceived lapses in this case were made apparent to the jury. Defense counsel chastised Rust on cross-examination for not considering alternative theories of how the fire started. The OSBI criminalist who tested the materials Rust submitted to him testified that Rust's preservation of Appellant's clothing was "probably one of the worst" evidence-collection jobs he had seen.[15]

¶45 Appellant does not claim any of the evidence Rust collected was tampered with or planted. He does not claim that his statements to Rust were coerced or fabricated. As we have noted, the fact that Appellant kept a liquor bottle full of gasoline in his bedroom, and that gasoline played a part in the fire that killed Ferguson, was never in dispute. Contrary to Appellant's claim, Rust did not "rush to judgment" by focusing on and retrieving pieces of the liquor bottle from the scene; his focus was guided by Appellant's own account of what happened. The only question at trial was whether Appellant intentionally set Ferguson ablaze. Rust never claimed any ability to "prove" that contention.

¶46 In a *Brady* analysis, evidence is material only if there is a reasonable probability that, had the evidence been timely disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is one "sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682, 105 S.Ct. at 3383. Put another way, evidence is material only if it could "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Cone v. Bell*, 556 U.S. 449, 470, 129 S.Ct. 1769, 1783, 173 L. Ed.2d 701 (2009) (quoting *Kyles v. Whitley*, 514

U.S. 419, 435, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490 (1995). Evidence with only marginal, incremental, or cumulative impeachment value will rarely meet this standard. *Douglas v. Workman*, 560 F.3d 1156, 1173 (10th Cir. 2009); *United States v. Derr,* 990 F.2d 1330, 1336 (D.C.Cir. 1993). The State's case did not rest on Agent Rust's credibility. It did not even rest, to any material degree, on the evidence he collected. Appellant has not demonstrated a reasonable probability that any of the proffered information concerning Agent Rust would have affected the outcome of the trial. Proposition IV is denied.

CLAIMS OF TRIAL ERROR

A. Other crimes evidence

¶47 In Proposition V, Appellant complains that three witnesses were allowed to relate evidence of other threats and intimidating acts he committed against Ferguson preceding her death. The evidence at issue consisted of the following: (1) testimony that Ferguson once sought a protective order to keep Appellant away from her; (2) testimony that shortly before the homicide, Appellant told a neighbor to "stop helping" Ferguson; and (3) testimony from Ferguson's friend, Jenny Turner, that when Ferguson lived with her in early 2012, Appellant drove by their home, waved a gun out of the car window and said, "I wanted ya'll to see my new friend." According to Turner, Appellant also tried to run over Ferguson and once warned her, "I will kill you before I see you happy in Talihina." Turner said that Ferguson was so afraid of Appellant that she would sleep with a knife under her pillow. The trial court held a hearing on the admission of this evidence, and we review its ruling for an abuse of discretion. *Cuesta-Rodriguez,* 2010 OK CR 23, ¶ 25, 241 P.3d at 226.

¶48 Oklahoma's Evidence Code bars evidence of "other crimes, wrongs, or acts" offered only to show the defendant acted in conformity therewith. 12 O.S.2011, § 2404(B). Appellant points out that applying for a protective order is not, itself, evidence of any crime that might have been committed by the target of the order, and that asking his neighbor to "stop helping" Ferguson does not amount to a crime or bad act as contemplated by § 2404(B).[16] We agree, but those arguments only undermine his claim that this evidence falls under § 2404(B). We take his complaints to be, in reality, about relevance, and we find this evidence was relevant to show the nature of relationship between the parties.

¶49 Where a defendant's domestic partner is the victim (or intended victim) of the charged crime, evidence of prior difficulties between the two can be relevant to show motive, intent, and the absence of mistake or accident. *Cuesta-Rodriguez*, 2010 OK CR 23, ¶¶ 26-27, 241 P.3d at 226 (spouse); *Short v. State*, 1999 OK CR 15, ¶ 40, 980 P.2d 1081, 1097 (girlfriend). The State believed Appellant's controlling personality (demonstrated by his words and deeds, and their effect, as shown by Ferguson's fear of him) made it more likely that setting her on fire was no accident. Appellant freely admitted to police that his relationship with Ferguson was a tumultuous one. Appellant's gun-waving and intimidating comments, related by Ms. Turner, were relevant for the same reasons. The trial court gave a cautionary instruction on the limited use of bad-acts evidence, not only in the final first-stage instructions, but each time such evidence was presented. The trial court did not abuse its discretion in admitting this evidence.

B. Hearsay

¶50 In Proposition VI, Appellant complains that some of the statements relating to his alleged prior threats toward Ferguson were inadmissible hearsay. Appellant did not object to the statements on hearsay grounds at the time, so our review is only for plain error. Appellant must show that a plain or obvious error affected the outcome of the proceeding. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. This Court will correct plain error only where it seriously affects the fairness, integrity, or public reputation of the proceedings. *Id.*

¶51 "Hearsay" is a statement, other than one made by a person testifying, offered to prove the truth of the matter asserted. 12 O.S.2011, § 2801(A)(3). As noted, Ferguson moved out of Appellant's home at one point and lived with her friend, Jenny Turner. Turner testified that when Ferguson told Appellant to stop coming around, he became angry and threatened to kill her. The "truth" of Ferguson's request, such as it can be discerned (presumably, whether she truly wanted Appellant to stop visiting), is not material. Turner was asked to relate the exchange between Ferguson and Appellant that she witnessed. As with the gun-waving incident discussed in Proposition V, the pur-

pose of eliciting this event was to show Appellant's statements, not the truth or falsity of anything Ferguson said. Appellant's own extrajudicial statements, offered against him, are not hearsay. 12 O.S.2011, § 2801 (B)(2)(a). The statements at issue here were not inadmissible hearsay.[17] Proposition VI is denied.

C. Prosecutor misconduct

¶52 In Proposition VII, Appellant identifies several statements made by the prosecutor during the trial that he believes were unfairly prejudicial to him. We generally review claims of prosecutor misconduct cumulatively, to determine if the combined effect denied the defendant a fair trial. *Warner v. State,* 2006 OK CR 40, ¶ 197, 144 P.3d 838, 891.

1. Misstatement of fact in closing argument

¶53 In guilt-stage closing argument, the prosecutor told the jury that according to two physician witnesses, the burn patterns on Ferguson's body were consistent with having been doused with a flammable liquid and set on fire, when only one of those experts, Dr. Pfeifer (the Medical Examiner who conducted the autopsy), actually rendered that opinion. Both parties have the right to discuss the evidence from their respective standpoints. *Bland v. State,* 2000 OK CR 11, ¶ 97, 4 P.3d 702, 728. Appellant implies that the prosecutor was obligated to, in essence, argue against her own case. The issue in dispute here was a very narrow one. It was not whether Ferguson's burns were the product of a liquid accelerant, such as gasoline; even defense counsel did not dispute that conclusion. It was whether – as defense counsel put it to Dr. Pfeifer – there are "lots of other circumstances that a person could find themselves with accelerant on them" besides being intentionally doused by another person. (Dr. Pfeifer agreed that there were.) The prosecutor did misstate the number of witnesses who gave a certain opinion, but this minor error did not contribute to the verdict. *Id.*, 2000 OK CR 11, ¶ 102, 4 P.3d at 728.

2. Alleged attack on defense counsel

¶54 Appellant claims the prosecutor impugned defense counsel's integrity. In the punishment stage, the defense presented Krystal Green, the mother of Appellant's eight-year-old child, to testify in mitigation of sentence. Green testified about taking the child to see Appellant in jail. The prosecutor objected, complaining that "subjecting this child to what we're fixing to talk about [is] borderline abuse." Defense counsel took umbrage at this characterization and asked for a mistrial. The trial court rejected both parties' complaints, and the questions resumed. Appellant reads this as a direct attack on defense counsel, but we do not. The prosecutor was not complaining about the questions being put to the witness, but the fact that the eight-year-old subject of the questioning remained in the courtroom. The prosecutor was rightfully concerned about emotional outbursts in front of the jury – the same kinds of outbursts that Appellant himself complains about in Proposition IX. Trials can be emotional events, and a capital sentencing proceeding is hardly an exception. Sometimes, in the heat of argument, counsel may use hyperbole or otherwise say things that are not entirely justified. *See Dodd v. State,* 2004 OK CR 31, ¶ 78, 100 P.3d 1017, 1041; *Gilbert v. State,* 1997 OK CR 71, ¶ 97, 951 P.2d 98, 121. But we find no outcome-influencing error here.

3. Comments on the possibility of parole

¶55 A defendant convicted of specified crimes, including First Degree Murder, may not be considered for parole until he has served at least 85% of the original sentence. 21 O.S.2011, § 13.1. Appellant's jury was correctly instructed that "If a person is sentenced to life imprisonment, the calculation of *eligibility* for parole is based upon a term of forty-five (45) years... ." OUJI-CR 10-13B (emphasis added). The prosecutor referred to this instruction in both stages of trial.[18] Appellant did not object to either comment, so we review only for plain error. *Barnes v. State,* 2017 OK CR 26, ¶ 6, 408 P.3d 209, 213. Appellant claims the prosecutor erroneously suggested that he was *guaranteed* to be released after 45 years, if not earlier. We disagree. Each time, the prosecutor was specifically talking about application of the 85% Rule to a life sentence – not about the "meaning" of a life sentence in general. No defendant is entitled to parole, even under the 85% Rule, and the prosecutor never made such an insinuation.[19] Nor has Appellant demonstrated a reasonable probability of prejudice. Any concerns about the first comment are mooted by the fact that it was made in reference to the lesser-related offense options, which the jury rejected. If, in the capital-sentencing stage, the jury had any confusion or misgivings about the possibility of Appellant's future release if given a straight life sentence, but did not believe a sentence of death was appropriate, it could

have settled on a sentence of life without parole. But it did not. Proposition VII is denied.

D. Chain of custody regarding Appellant's cigarette lighter

¶56 In Proposition VIII, Appellant claims the trial court erred in admitting State's Exhibit 9, a cigarette lighter he had with him when he was arrested, because the State failed to establish a sufficient "chain of custody." Because defense counsel objected to the chain of custody at the time, we review the trial court's ruling for an abuse of discretion. *Jones v. State,* 1995 OK CR 34, ¶ 79, 899 P.2d 635, 653. Identification and authentication of physical evidence can generally be satisfied by testimony that the evidence is what a proponent claims. 12 O.S.2011, § 2901(B)(1). The "chain of custody" concept guards against substitution of, or tampering with, physical evidence between the time it is found and the time it is analyzed. *Mitchell v. State,* 2010 OK CR 14, ¶ 74, 235 P.3d 640, 657. It is not necessary that all possibility of tampering be negated. *Alverson v. State,* 1999 OK CR 21, ¶ 22, 983 P.2d 498, 509. The lighter was never analyzed by either party. Appellant never denied possessing it, and the State never sought to prove any particular attributes of it. Thus, actual presentation of the lighter to the jury was superfluous. Appellant does not explain how the "integrity" of the lighter might have affected the State's case or his theory of defense. Three witnesses testified as to how the lighter was confiscated and secured as evidence, and that testimony was sufficient to admit the lighter. Proposition VIII is denied.

E. Display of emotion during guilt stage

¶57 During the testimony of Martha Johnson, as she related things Ferguson said to her before being transported from the scene, defense counsel approached the bench and moved for a mistrial because members of Ferguson's family were "creating a disturbance." Alternatively, counsel asked the court to admonish the jurors to disregard the disturbance, but counsel then agreed with the court that an admonition might just bring more attention to the event. The trial court did not grant a mistrial, and in Proposition IX, Appellant assigns error to that ruling. We review the ruling for an abuse of discretion. *Jackson v. State*, 2006 OK CR 45, ¶ 11, 146 P.3d 1149, 1156. The court assured defense counsel that it would speak with the victim's family and remind them that emotional outbursts could not be tolerated. In fact, that remedy appears to have satisfied counsel's concerns.[20] The "disturbance" is not described in any detail in the record. It appears, however, to have been brief in duration; the victim's mother promptly left the courtroom to regain her composure. No other distracting displays of emotion are mentioned.[21] Under these circumstances, we believe the trial court took appropriate measures to prevent unfair prejudice to Appellant. *Ellis v. State*, 1992 OK CR 45, ¶ 13, 867 P.2d 1289, 1297. The trial court did not abuse its discretion in refusing to grant a mistrial, and Proposition IX is denied.

PUNISHMENT STAGE ISSUES

A. Sufficiency of instructions on mitigating evidence

¶58 In Proposition X, Appellant complains that the packet of instructions provided to the jurors in the sentencing phase, as reproduced in the appeal record, does not include OUJI-CR 4-78. This Uniform Jury Instruction informs the jurors that they need not be unanimous in their consideration of mitigating evidence, *i.e.* factors that might support a sentence other than death. The instructions included in the appeal record skip from Instruction No. 58 (OUJI-CR 4-77) to Instruction No. 60 (OUJI-CR 4-79). Appellant claims the omission of OUJI-CR 4-78 impaired the jury's proper consideration of an appropriate sentence. He assumes that because a written copy of the instruction is not included in the appeal record, it was not in the jury deliberation room, either. We simply have no information on this point. But even assuming that to be the case, we do not find grounds for relief.

¶59 A defendant cannot be eligible to receive the death penalty unless the jurors unanimously find the existence of at least one aggravating circumstance beyond a reasonable doubt. 21 O.S.2011, § 701.11; *see Postelle v. State*, 2011 OK CR 30, ¶ 60, 267 P.3d 114, 138. Appellant's jurors were properly instructed that they were "authorized to consider" a death sentence in that event. OUJI-CR 4-76. Even after finding an aggravating circumstance, jurors cannot impose a death sentence unless they unanimously conclude that the aggravating circumstances outweigh any evidence that mitigates the crime; jurors are in any event *never required* to impose a death sentence under any set of circumstances. *Postelle*, 2011 OK CR 30, ¶ 60, 267 P.3d at 138. Appellant's jurors were instructed on these points as well. OUJI-CR 4-80. The

jurors were provided a list of mitigating circumstances advanced by the defense, but were also told they could consider any other factor they might find mitigating. OUJI-CR 4-79. The instruction omitted from the appeal record, OUJI-CR 4-78, elaborates on what "mitigating" means, reiterates that jurors need not be unanimous in deciding what factors they consider mitigating, and explains that mitigating circumstances need not be proven beyond a reasonable doubt.[22]

¶60 We addressed a similar situation in *Cleary v. State,* 1997 OK CR 35, 942 P.2d 736. In *Cleary,* Appellant claimed, and the State agreed, that one of the Uniform Jury Instructions was inadvertently omitted from the packet of written instructions given to the jury in the capital sentencing stage of the trial. The instruction at issue in *Cleary* told jurors they could not impose a death sentence unless they unanimously concluded that any aggravating circumstances outweighed any mitigating circumstances.[23] *Id.* at ¶¶ 57-58, 942 P.2d at 749. We noted at the outset:

> [T]he question is *not* whether the jury was instructed accurately and completely. It was. The only question before us is whether the omission of a *written copy* of the instruction is fatal to the second-stage proceeding.

Id. at ¶ 59, 942 P.2d at 749 (emphasis in original).

¶61 While Oklahoma law may not unequivocally require jurors to have written copies of their instructions while deliberating,[24] we held in *Cleary* that, given the "severity and finality" of the death penalty, the omission of a written instruction from the packet given to Cleary's jury was error. *Id.* at ¶¶ 60-62, 942 P.2d at 749-750. Nevertheless, we found the error harmless beyond a reasonable doubt, because (1) the instruction was read to the jury, (2) it was neither complex nor confusing on its face, and (3) other written instructions adequately communicated these essential points: (1) that no death sentence could ever be imposed unless one or more aggravating circumstances was found, unanimously and beyond a reasonable doubt, and (2) the importance of considering mitigating circumstances in arriving at the ultimate sentence recommendation. *Id.* at ¶¶ 63-65, 942 P.2d at 750.

¶62 Appellant cites *Cleary* as factually analogous to his case, because it, too, deals with a capital-sentencing jury instruction omitted from the written record. He claims the omission of OUJI-CR 4-78 here is "plain error," and he contends the circumstances in this case prevent any conclusion that the error was harmless, as we found in *Cleary.* He ultimately claims the omission of the instruction denied him a constitutionally fair and reliable capital sentencing proceeding. We must therefore determine if there is a reasonable likelihood that Appellant's jury applied its instructions in a way that prevented its consideration of relevant mitigating evidence. *Boyde v. California,* 494 U.S. 370, 380, 110 S.Ct. 1190, 1198, 108 L.Ed.2d 316 (1990); *Romano v. State,* 1995 OK CR 74, ¶ 94, 909 P.2d 92, 123.

¶63 Whether there was an "error" at all here is uncertain. In *Cleary*, the State conceded that the omitted instruction did not go to the deliberation room. *Cleary,* 1997 OK CR 35, ¶ 57, 942 P.2d at 749. But here, we simply do not know if the instruction at issue was misplaced before or after deliberations. In any event, *Cleary* is instructive for a reason that Appellant does not mention. The "missing instruction" in *Cleary* addressed a different point of law than the one at issue here; but the trial court actually *rejected* Cleary's request for an instruction similar to the one Appellant complains about here. We found no error because we had held, many times before, that no such instruction was necessary. *Id.* at ¶ 49, 942 P.2d at 748; *see also Pickens v. State*, 1993 OK CR 15, ¶ 47, 850 P.2d 328, 339-340.

¶64 While the Eighth Amendment requires that capital sentencing jurors be allowed to consider all relevant mitigating evidence, it does not demand that States structure that consideration in any particular way. *Kansas v. Carr,* – U.S. –, 136 S.Ct. 633, 642, 193 L.Ed.2d 535 (2016); *Weeks v. Angelone,* 528 U.S. 225, 233, 120 S.Ct. 727, 732, 145 L.Ed.2d 727 (2000); *Buchanan v. Angelone*, 522 U.S. 269, 276, 118 S.Ct. 757, 761, 139 L.Ed.2d 702 (1998); *Warner v. State,* 2006 OK CR 40, ¶ 140, 144 P.3d 838, 882, *overruled on other grounds by Taylor v. State,* 2018 OK CR 6, 419 P.3d 265. States need not expressly instruct capital juries on the concept of "non-unanimity" regarding mitigating evidence. *Duvall v. Reynolds,* 139 F.3d 768, 790-92 (10th Cir. 1998) (citing *Buchanan*). We thus find no constitutional significance to the "non-unanimity" language of OUJI-CR 4-78.[25]

¶65 Thus, even assuming Appellant's jury did not receive a written copy of OUJI-CR 4-78 (which, again, is not clear from the record), we

find no reasonable probability that the jurors were prevented from fully considering mitigating evidence here. To this end, we may consider all of the instructions, oral and written, given to the jury, any relevant communications between judge and jury, as well as other statements by the court and arguments by counsel. *Weeks,* 528 U.S. at 234-36, 120 S.Ct. at 733-34; *Buchanan*, 522 U.S. at 278-79, 118 S.Ct. at 762-63. There is no dispute that the trial court read OUJI-CR 4-78 to the jury in its closing instructions. Also, the concept of non-unanimity with regard to mitigating evidence was discussed repeatedly in *voir dire.* What is more, in closing argument, defense counsel repeatedly emphasized that what counted as "mitigating evidence" was personal to each individual juror.[26]

¶66 As evidence that the jurors misunderstood the mechanics of considering mitigating circumstances, Appellant points to handwritten notations on Instruction No. 60. This instruction (from OUJI-CR 4-79) listed mitigating factors specifically advanced by the defense. It also reminded the jurors that they could consider, as mitigating evidence, any other fact they might choose. Beside each enumerated mitigator appears a handwritten word, either "No" or "Yes." After the last sentence of this instruction, which encourages jurors to consider any other mitigating factors not already listed, the following handwriting appears: "We feel very sorry for Donnie's family and his little girl." Appellant assumes the jurors treated this list as a verdict form, and that the notations show the jurors were unanimous as to each factor; he infers that the jurors must have believed they *had to be* unanimous. Appellant does not point to any instruction by the court, or argument by counsel, which might have led jurors to conclude that they had to be unanimous on mitigating circumstances. As we view it, the handwriting on Instruction No. 60 simply confirms that Appellant's jurors did exactly what they are constitutionally required to do: They gave due consideration to each mitigating circumstance advanced and, searching their own hearts, found at least one more. That is all that the law requires.

¶67 The instructions and verdict forms in this case did not require, nor did they imply, that unanimity regarding mitigating circumstances was a prerequisite to consideration of those circumstances. We find no reasonable possibility that Appellant's jury was precluded from considering all mitigating evidence in a manner consistent with the Eighth Amendment. *Stiles v. State*, 1992 OK CR 23, ¶ 58, 829 P.2d 984, 997. Proposition X is denied.

B. Victim impact testimony

¶68 In Proposition XI, Appellant lodges several complaints about the victim impact evidence presented in the sentencing phase of the trial. We review a trial court's decision to admit victim impact evidence for an abuse of discretion. *Malone v. State,* 2007 OK CR 34, ¶ 62, 168 P.3d 185, 211. The State presented four victim impact witnesses: Kristi Ferguson's father, stepmother, mother, and brother. Each read a very brief statement about the effect of Ferguson's death on them personally, and on Ferguson's young son. These statements had been reviewed in great detail at a pretrial hearing; defense objections were entertained, and revisions were made. When they were presented to the jury, defense counsel made only a general objection as to content.

¶69 Appellant first claims it was error to allow Ferguson's stepmother, Rhonda Ferguson, to read a victim impact statement to the jury. He did not object on these grounds below, so our review is only for plain error. *Malone,* 2007 OK CR 34, ¶ 49, 168 P.3d at 206. This claim is governed by the language of the Oklahoma Victim's Rights Act, 21 O.S.2011, § 142A *et seq.* A "victim impact statement" is defined in the Act as information about certain effects of a violent crime on each "victim" and members of the victim's "immediate family." 21 O.S.2011, § 142A-1(8). Appellant's argument is based on the fact that at the time of his trial, the list of "immediate family" did not specifically include stepparents. 21 O.S.2011, § 142A-1(4).[27] What Appellant overlooks, however, is that stepparents are, and always have been, considered in the Act to be "victims" themselves when the crime is homicide. *See* 21 O.S.2011, § 142A-1(1) (a "victim" in a homicide case includes "a surviving family member including a ... stepparent"). Kristi Ferguson's stepmother, Rhonda Ferguson, was herself a "victim" under the Act, and could deliver a victim impact statement. *Bosse v. State,* 2017 OK CR 10, ¶ 64, 400 P.3d 834, 857. A few months before Appellant's trial, in *Miller v. State,* 2013 OK CR 11, ¶ 186, 313 P.3d 934, 990-91, we held that it was error to allow a murder victim's stepparent to deliver a victim impact statement in the sentencing phase of a capital trial. We no longer believe *Miller* was correctly decided on that point, and it is overruled to that extent. What is more, Oklahoma law has long provided

that in the sentencing phase of a capital trial, "the state may introduce evidence about the victim and about the impact of the murder on the family of the victim." 21 O.S.2011, § 701.10(C). The term "family" is not defined.[28] There was no error, and no prejudice, here.[29]

¶70 Appellant next claims the victim impact evidence as a whole was repetitive and unfairly prejudicial to him. Four family members gave statements; not surprisingly, sadness and loss were common themes. Appellant specifically takes issue with the fact that all four statements mentioned how Ferguson's death had affected her six-year-old son. Yet the statements were all very brief; none was longer than two pages of transcript. We believe their substance, as a whole, was in keeping with what is allowed under the Eighth Amendment. *See Payne v. Tennessee,* 501 U.S. 808, 831-32, 111 S.Ct. 2597, 2612, 115 L.Ed.2d 720 (1991) (O'Connor, J., concurring).[30]

¶71 Finally, Appellant complains that Kristi Ferguson's grandmother was allowed to recommend death as the appropriate sentence. To be precise, her comment – "Donnie Harris needs to pay for his deed with his life" – was part of a written statement read into the record by the prosecutor. Appellant made no objection to it at the time. But what Appellant overlooks is that the statement was only given to the trial judge at formal sentencing, after the jury had delivered its verdicts. The State never attempted to elicit such a recommendation in front of the jury.[31] The Eighth Amendment prohibits a capital sentencing jury from considering victim impact evidence that is unrelated to the circumstances of the crime. *Booth v. Maryland*, 482 U.S. 496, 501-02, 107 S.Ct. 2529, 2532-33, 96 L.Ed.2d 440 (1987), *overruled on other grounds by Payne*, 501 U.S. 808, 111 S.Ct. 2597 (1991); *Selsor v. Workman*, 644 F.3d 984, 1026-27 (10th Cir. 2011). Appellant cites no authority extending this rule to statements given at formal sentencing. In conclusion, we find no error in the victim impact testimony. Proposition XI is therefore denied.

C. Sufficiency of evidence supporting "great risk of death" aggravator

¶72 Appellant's jury found the existence of both aggravating circumstances alleged by the State. Appellant does not challenge sufficiency of the evidence to support the jury's finding that the murder was especially heinous, atrocious, or cruel. 21 O.S.2011, § 701.12(4). However, in Proposition XII, he challenges the sufficiency of the evidence to support the jury's finding that he knowingly created a great risk of death to more than one person. 21 O.S.2011, § 701.12(2). This argument is meritless. Appellant cannot deny that the fire began in a living area of the home, that several other people were in the home when it started, and that he knew they were there. The fire quickly engulfed the home and destroyed it. The fact that no one but Ferguson was seriously injured is fortuitous, but it does not prevent application of this aggravating circumstance. *See Davis v. State,* 2011 OK CR 29, ¶ 129, 268 P.3d 86, 121. Having already concluded in the guilt phase of the trial, beyond a reasonable doubt, that Appellant intentionally started the fire, a rational juror could further conclude from the totality of circumstances that the nature and location of the fire created a great risk of death to others. *Martinez v. State,* 1999 OK CR 33, ¶¶ 2-3, 80, 984 P.2d 813, 818, 832 (upholding "great risk of death" aggravator under similar facts). Proposition XII is denied.

EFFECTIVENESS OF TRIAL COUNSEL

¶73 In Proposition XIV, Appellant faults his trial counsel's performance on several grounds, and claims he was denied his Sixth Amendment right to reasonably effective counsel.[32] *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under *Strickland*, Appellant must demonstrate: (1) that counsel's performance was constitutionally deficient, and (2) a reasonable probability that counsel's performance caused prejudice – such that it undermines confidence in the outcome of the trial. *Bland v. State*, 2000 OK CR 11, ¶ 112, 4 P.3d 702, 730. We begin with the presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065. Appellant must demonstrate that counsel's choices were unreasonable under prevailing professional norms and cannot be considered sound trial strategy. *Id.* When a *Strickland* claim can be disposed of on the ground of lack of prejudice, that course should be followed. 466 U.S. at 697, 104 S.Ct. at 2069.

¶74 Appellant makes seven separate complaints about his trial counsel. Three are based on the record alone, and four rely on supplemental materials which he has submitted pursuant to Rule 3.11(B)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019).[33] We address the record-based claims first. Appellant faults trial counsel for (1) failing to correct the prosecutor's recollection of

expert testimony, and her comments on the 85% Rule; (2) failing to object to victim impact testimony and a sentence recommendation from the victim's grandmother; and (3) failing to "confirm" that the jury received complete instructions.[34] *Strickland* requires proof of both deficient performance and resulting prejudice; failure to demonstrate either is fatal to the claim. *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. We have already examined the substantive basis for each of these claims and either found no error, or no reasonable probability of prejudice from error. See our discussion of Propositions VII, X, and XI.[35] Absent error, counsel was not deficient for failing to take other action; absent prejudice, counsel's performance does not undermine confidence in the verdict. These claims are denied.

¶75 Because Appellant's remaining four ineffective-counsel claims rely on evidence outside the record, we do not reach the merits of these complaints, but only determine whether additional fact-finding regarding them is necessary. Rule 3.11(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019). Appellant has filed an application for evidentiary hearing pursuant to this Rule. As this Rule explains, there is a strong presumption of regularity in trial proceedings and counsel's conduct. The application must contain sufficient information to show, by clear and convincing evidence, a strong possibility that trial counsel was ineffective for failing to identify or use the evidence at issue. *Id.*, Rule 3.11(B)(3)(b)(i). We thoroughly review the application and accompanying materials. *Simpson v. State,* 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905. The standard set out above is easier for a defendant to meet than the *Strickland* standard, as he need only show a strong possibility that counsel was ineffective. *Id.* at ¶ 53, 230 P.3d at 905-06.

A. Failure to present expert testimony by alternative means

¶76 Appellant faults trial counsel for not finding some way to present expert testimony on fire investigation when it became clear that his original expert, Smith, would be unable to travel to Oklahoma in time for trial. Appellant claims trial counsel should have had Smith testify remotely, or sought to hire a substitute expert. He presents an affidavit from one of his trial attorneys who says they never gave "serious consideration" to these options. The factual background for this claim is discussed in Proposition II, where Appellant faulted the trial court for not granting him a mistrial. We found no reasonable probability of prejudice from Smith's absence, because his proposed opinions reflected in his pretrial report would not have materially added to defense counsel's cross-examination of Agent Rust's methods and conclusions. Absent prejudice, we need not consider whether trial court's choices were professionally reasonable.[36] *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069. Nevertheless, as we observed in Proposition II, such alternatives were considered and rejected by the defense team.[37] Counsel's decision appears to have been a tactical choice made after due consideration and research. As such, it is "virtually unchallengable" on appeal.[38] *Strickland*, 466 U.S. at 690-91, 104 S.Ct. at 2066. Trial counsel's *post hoc* affidavit does not change our assessment. Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019); Simpson, 2010 OK CR 6, ¶ 53, 230 P.3d at 905-06.

B. Failure to "confirm" that physical evidence was available

¶77 As noted in Proposition III, the parties stipulated before trial to introducing photographs of physical evidence collected at the scene and on Appellant's arrest. That evidence was eventually lost or destroyed. Appellant claims his trial counsel was ineffective for "failing to confirm" that this physical evidence existed before entering into the stipulation. We fail to see the logic in this argument. Appellant does not fault trial counsel for stipulating *per se*. By virtue of the stipulation, the evidence itself was not made part of the record.

¶78 Trial counsel's job is to make decisions based on reasonable investigation of the evidence and legal issues. Courts must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066. There may be countless ways to provide effective assistance in any given case. 466 U.S. at 689, 104 S.Ct. at 2065. There comes a point where counsel may reasonably decide that one strategy is in order, thereby making additional efforts toward some other strategy unnecessary. *Id.* at 691, 104 S.Ct. at 2066. It is not counsel's duty to somehow preserve every conceivable tactic or argument that was ultimately discarded.

¶79 As discussed in Proposition III, neither defense counsel nor their expert felt the need to

even inspect the physical evidence, much less have it tested in any way. Trial counsel had no responsibility – or control – over the preservation of evidence he did not reasonably feel was relevant to the jury's task. Even if counsel had asked to examine the evidence before trial, only to learn that it could not be located, we have already considered and rejected the merits of Appellant's claim that the loss of this evidence rendered his trial fundamentally unfair. See Proposition III. The extra-record material related to this claim does not alter our conclusion. Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2019); *Simpson,* 2010 OK CR 6, ¶ 53, 230 P.3d at 905-06.

C. Failure to demand access to Agent Rust's personnel file

¶80 Trial counsel filed an omnibus discovery motion seeking, among other things, "all evidence tending to impeach the credibility of each potential witness." Appellant maintains it was the prosecutor's duty to find impeaching evidence in Agent Rust's personnel file and supply it to the defense, see Proposition IV, but here he alternatively faults trial counsel for not making sure that the prosecutor fulfilled her duty. How trial counsel was supposed to demand the production of information he did not know existed is not clear. The Fifth Amendment does not guarantee defense counsel the right to unfettered inspection of the State's files. *Weatherford v. Bursey,* 429 U.S. 545, 559, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977). On the other hand, *Brady* obligates the State to disclose material, exculpatory evidence regardless of whether a defendant asks for it. *United States v. Bagley*, 473 U.S. at 682, 105 S.Ct. at 3383; *Douglas v. Workman,* 560 F.3d at 1172. Any fault here would properly lie with the prosecutor, not defense counsel, and we have already addressed that issue in Proposition IV. The materials submitted in support of this claim do not raise a strong possibility that counsel was ineffective. Rule 3.11(B)(3)(b); *Simpson,* 2010 OK CR 6, ¶ 53, 230 P.3d at 905-06.

D. Failure to present a neuropsychological expert

¶81 In the capital sentencing stage of the trial, the defense presented testimony from Dr. Jeanne Russell and Dr. Janice Garner. Dr. Russell, a psychologist, interviewed and conducted various tests on Appellant. Dr. Garner, who specializes in compiling mitigation evidence in capital cases, provided the jury with a summary of Appellant's upbringing and family life, based on interviews with family and other information. Appellant now claims trial counsel were deficient in failing to adequately investigate Fetal Alcohol Syndrome as a part of the mitigation case. He submits affidavits from an investigator who worked with trial counsel, Dr. Russell, and another expert consulted by the trial defense team, stating that they believe this subject should have been explored in greater detail. Appellant also submits a report from Dr. John Fabian, a neuropsychologist who examined Appellant in August 2015. In Dr. Fabian's opinion, Appellant may suffer from a "neurodevelopmental disorder" because his mother allegedly drank alcohol while pregnant with him. Finally, Appellant submits affidavits from friends and family (many of whom testified at trial), which Fabian appears to have relied upon when compiling his report. Appellant faults trial counsel for not presenting this or similar evidence to his jury.

¶82 The record shows that the possibility of Fetal Alcohol Syndrome was, in fact, explored by the experts defense counsel consulted. Both Drs. Russell and Garner investigated Appellant's mental health and cognitive ability as mitigating factors. Both specifically addressed Fetal Alcohol Syndrome in their testimony. Both said they had received information (presumably, from the same friends and family who provided affidavits to Dr. Fabian) that Appellant's mother, who died in 2011, drank alcohol to some extent while pregnant with Appellant. Both had access to Appellant and to others who could describe his apparent intellectual abilities. Yet, neither Dr. Russell nor Dr. Garner found evidence that Appellant suffered any developmental deficiencies that might convincingly be attributed to Fetal Alcohol Syndrome. (There was also no evidence that Appellant suffered from any mental illness.) Dr. Russell administered a universally accepted intelligence test (WAIS-IV) which, she explained, samples a number of different cognitive skills. Russell confirmed family members' opinions that Appellant had difficulty understanding complicated concepts. Nevertheless, she found Appellant's intellectual ability to be generally in the low-average range. She found no evidence of developmental disability.

¶83 Dr. Fabian conducted a battery of tests to gauge Appellant's functioning at a variety of

tasks. While these tests often placed Appellant in categories such as "low average," "mild impairment," or "mild to moderate impairment" when compared to the general population, these results were not inconsistent with Dr. Russell's own test-based opinion; Dr. Fabian simply confirmed Appellant's mild impairment in more discrete and subtle ways. As for whether and how often Appellant's mother drank alcohol during pregnancy, Dr. Fabian appears to have been limited to the same anecdotal source information available to Drs. Russell and Garner. In the end, Dr. Fabian could not conclusively point to prenatal alcohol exposure as the cause of Appellant's mild cognitive impairment. Rather, he appears to have concluded merely that prenatal exposure to alcohol *might have* contributed to that impairment. He conceded that Appellant might simply be suffering from "Fetal Alcohol Effect," considered to be a milder form of Fetal Alcohol Syndrome. Dr. Fabian also conceded that Appellant's mental problems were likely exacerbated by drug and alcohol abuse, which he also documented. In any event, the fact that Appellant suffers from mild intellectual deficits, whatever the cause, was never disputed.

¶84 Of course, whether Appellant was exposed to alcohol before birth is not, by itself, a mitigating factor. Rather, the search is for some fact which might explain or at least contribute to a particular manifestation or condition, such as cognitive impairment – a condition that might resonate with jurors and cause them to hold the defendant less culpable or more deserving of mercy. We simply do not believe Dr. Fabian's report materially assists in that regard. Dr. Fabian could suggest, but not confirm, that prenatal exposure to alcohol contributed to Appellant's cognitive difficulties. But the difficulties themselves were apparently not so great as to cause concern to the experts whom trial counsel consulted.

¶85 To obtain relief under Rule 3.11(B), a defendant need only show a "strong possibility" that trial counsel was ineffective. But *Strickland* contains the benchmarks for deciding what "ineffective" means. As we have noted, *Strickland* starts with the presumption that counsel acted reasonably and professionally, and grants considerable deference to strategic choices made after reasonable investigation. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Rule 3.11(B) echoes that presumption. Appellant must show a strong possibility that counsel's choices were unreasonable under prevailing professional norms, and cannot be considered sound trial strategy. *Id.* If counsel's strategic decisions are based on reasonably adequate investigation, then those decisions are "virtually unchallengeable" on appeal. 466 U.S. at 690-91, 104 S.Ct. at 2066. We must defer to reasonable trial strategies, and not second-guess them with the benefit of hindsight. *Id.* at 689, 104 S.Ct. at 2065. Counsel has a duty to make reasonable investigations, or to "make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691, 104 S.Ct. at 2066. Counsel cannot be expected to undertake an investigation that he reasonably believes would be fruitless. *Id.*

¶86 This is not a case involving lack of capital trial experience on the part of counsel, lack of funds or professional resources, or lack of focus. Appellant had two experienced capital trial attorneys defending him. They, in turn, had the resources of the Oklahoma Indigent Defense System to help them marshal their defense. Counsel consulted with and presented considerable testimony (exceeding sixty pages of transcript) from two professionals, both of whom considered Fetal Alcohol Syndrome within the context of their respective fields. We believe trial counsel conducted reasonable investigation into this subject. The fact that counsel might have been able to locate some other expert with an arguably different opinion does not render their efforts deficient. Ultimately, neither Dr. Russell nor Dr. Garner found evidence of mental impairment substantial enough to warrant further inquiry. Trial counsel made a reasonable strategic choice not to continue shopping for other opinions.[39]

¶87 *Strickland* also instructs that even professionally unreasonable decisions by counsel do not necessarily result in prejudice. We recognize the extremely broad scope of capital mitigation evidence. *Buchanan*, 522 U.S. at 276, 118 S.Ct. at 761. Few restrictions are placed on the defendant when his own life is at stake, and rightly so. Almost anything *might* be offered as mitigation evidence; but that does not mean that everything possible can or should be offered as mitigation evidence. It also does not mean that anything not presented was outcome-determinative. While Dr. Fabian concluded that a particular cause contributed to Appellant's cognitive state, we do not find that cognitive state was markedly unusual or debilitating; if it had been, it seems likely that Dr. Garner would have noticed it.[40]

¶88 Also, with regard to the probable effect of such evidence, there are portions of Dr. Fabian's investigation and report that might have done more harm than good at trial. Most notably, Appellant had a considerable history of drug use. In particular, he and Ferguson routinely used methamphetamine; Appellant even said he had manufactured and sold the drug. As for the long-term effects of alcohol, some of Appellant's impairment may have been self-inflicted: he reported that he drank beer daily as an adult. Dr. Fabian noted that Appellant's self-reporting of substance abuse was inconsistent, suggesting an attempt to minimize its frequency. Also, Appellant's former girlfriend reported that he went through a period of "huffing" gasoline fumes as a teenager. Dr. Fabian also concluded that Appellant "did not display impairment" on a test for impulsive decision-making. Given that the facts in this case suggest an impulsive act of rage, that finding might have been of particular interest to the jury.[41]

¶89 Here, counsel made a sound strategic choice, presumably based on what Drs. Garner and Russell concluded, not to expend any more time trying to identify a possible neurological cause for an effect (mild cognitive impairment) that was never seriously disputed – and which, given the balance of the evidence, cannot reasonably be said to have had a discernible impact on Appellant's ability to manage his affairs, control his emotions, or appreciate the consequences of his acts. *See e.g. Murphy v. State*, 2002 OK CR 32, ¶ 19 n.8, 54 P.3d 556, 564-65 n.8 (where evidence of Fetal Alcohol Syndrome was ambiguous, particularly before trial, when defense counsel was initially investigating the issue).[42] Having considered Dr. Fabian's report, we do not find a strong possibility that such evidence would have cast Appellant's culpability in a materially different light. *Malone*, 2007 OK CR 34, ¶ 114, 168 P.3d at 229-230. Hence, we find no strong possibility that counsel was ineffective. Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019); *Simpson*, 2010 OK CR 6, ¶ 53, 230 P.3d at 905-06.

¶90 In summary, the supplementary materials Appellant has presented to this Court do not show a strong possibility that trial counsel was ineffective, to the extent that additional fact-finding on the issue would be warranted. Proposition XIV is denied, and Appellant's request for an evidentiary hearing is also denied. Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019); Simpson, 2010 OK CR 6, ¶ 53, 230 P.3d at 905-06.

CONSTITUTIONAL CHALLENGES TO THE DEATH PENALTY

¶91 In Proposition XIII, Appellant claims that Oklahoma law defining the "especially heinous, atrocious, or cruel" (HAC) aggravating circumstance is so vague that it cannot be applied in a constitutionally fair manner. He also complains that the aggravating circumstance is defective because it has no intent requirement. We have rejected similar challenges to this aggravator before. The current Uniform Jury Instructions defining the HAC aggravator are sufficient to meaningfully narrow the sentencing jury's discretion. *Cuesta-Rodriguez*, 2010 OK CR 23, ¶ 80, 241 P.3d at 238-39. To support the HAC aggravator, the State must prove beyond a reasonable doubt that the defendant inflicted either torture (great physical anguish or extreme mental cruelty), or serious physical abuse, and in cases of great physical anguish or serious physical abuse, that the victim experienced conscious physical suffering before death. *Cuesta-Rodriguez,* 2010 OK CR 23, ¶ 78, 241 P.3d at 238; *see also Medlock v. Ward,* 200 F.3d 1314, 1321 (10th Cir. 2000) (holding that the HAC aggravator, defined in this manner, can provide a "principled narrowing" of the class of persons eligible for a death sentence).

¶92 Appellant claims the HAC aggravator cannot apply unless he harbored a specific intent to cause such anguish, but he is mistaken. In fact, Ferguson's murder can be deemed "especially heinous, atrocious, or cruel" even though Appellant was charged under a felony-murder theory – *i.e.*, without any allegation or proof that he harbored a specific intent to kill (much less cause anguish to) his victim. *E.g. Harmon v. State*, 2011 OK CR 6, ¶ 1, 248 P.3d 918, 926; *Wood v. State*, 2007 OK CR 17, ¶ 1, 158 P.3d 467, 470-71; *DeRosa v. State*, 2004 OK CR 19, ¶ 1, 89 P.3d 1124, 1129; *Romano,* 1995 OK CR 74, ¶ 90, 909 P.2d 92, 122. There was no dispute that Ferguson was in extreme pain when she ran to a neighbor's house, with clothing melted to her skin and flesh falling from her body. She languished for days before succumbing to her injuries. The evidence amply supports a conclusion that Ferguson experienced great physical anguish for an extended period of time before she died. *Duvall v. State,* 1991 OK CR 64,

¶¶ 38-39, 825 P.2d 621, 634. Proposition XIII is denied.

¶93 In Proposition XVI, Appellant claims that the death penalty in general is cruel and unusual punishment, violating the Eighth Amendment to the United States Constitution and corresponding provisions of the Oklahoma Constitution. Specifically, he identifies four concerns: (1) the death penalty is unreliable because it may be imposed on those who are factually innocent; (2) the death penalty is arbitrarily imposed, at times on those undeserving of it; (3) the death penalty is "cruel" because execution is preceded by long delays, and while such delays enhance the reliability of its application, any deterrent effect the penalty might have is necessarily undermined; and (4) the death penalty is "unusual," as evidenced by a decline in its use nationwide. As authority for these claims, Appellant relies exclusively on concerns raised by Justice Breyer in his dissenting opinion in *Glossip v. Gross*, – U.S. –, 135 S.Ct. 2726, 2755, 192 L.Ed.2d 761 (2015). We have rejected similar attacks on the death penalty before. *See e.g. Postelle v. State,* 2011 OK CR 30, ¶ 88, 267 P.3d 114, 145; *Harmon v. State,* 2011 OK CR 6, ¶ 87, 248 P.3d 918, 945; *Stouffer v. State,* 2006 OK CR 46, ¶ 208, 147 P.3d 245, 281. Because Appellant's argument is more about public policy than controlling law, it is better directed to our state legislature. *Williams v. State*, 2001 OK CR 24, ¶ 20, 31 P.3d 1046, 1051-52. Proposition XVI is denied.

MOTION FOR NEW TRIAL

¶94 Simultaneously with his Brief and his Application for Evidentiary Hearing, Appellant filed a Motion for New Trial based on what he claims is newly discovered evidence: (1) personnel information concerning Agent Rust, and (2) more pieces of a glass liquor bottle which have since been discovered at the fire scene. A defendant may seek a new trial in limited situations where his "substantial rights have been prejudiced," including when "new evidence is discovered, material to the defendant, and which he could not with reasonable diligence have discovered before the trial." 22 O.S.2011, § 952(7). The motion may be made within three months after the evidence is discovered, but must be filed within one year after judgment is rendered.[43] 22 O.S.2011, § 953.

¶95 With regard to the materials concerning Agent Rust, the timeliness of Appellant's motion is moot. We have already considered these materials under Rule 3.11(A) in conjunction with Appellant's *Brady* claim. See Proposition IV. However, with regard to the physical evidence Appellant offers as "newly discovered," his motion is untimely. According to an affidavit supplied by Appellant's investigator, the evidence was discovered in August 2015. Even if Appellant had immediately filed his motion, well over a year had already passed since his formal sentencing in February 2014. The motion is also untimely because it was filed in March 2017 – considerably longer than three months after the evidence was discovered. This Court is without jurisdiction to consider this evidence in its present posture.[44] *Owens v. State*, 1985 OK CR 114, ¶ 7, 706 P.2d 912, 913. Appellant's Motion for New Trial is **DISMISSED** for lack of jurisdiction.[45]

CUMULATIVE ERROR AND MANDATORY SENTENCE REVIEW

¶96 In Propositions XV and XVII, Appellant claims that the cumulative effect of all errors identified above resulted in the arbitrary, emotion-driven, and unconstitutional imposition of the death penalty. Our mandatory sentence review in capital cases, see 21 O.S.2011, § 701. 13, requires us to determine whether Appellant's death sentence was improperly influenced by "passion, prejudice or any other arbitrary factor," and whether the evidence supports the jury's findings as to aggravating circumstances. Having reviewed the record in this case, we find no reasonable probability that the jury's verdict was influenced by evidentiary error, prosecutor misconduct, or any other improper factor. The jury's findings as to both aggravating circumstances are supported by the evidence, and a rational juror could conclude, beyond a reasonable doubt, that the death sentence was appropriate here, even in light of the mitigating evidence presented. *Cuesta-Rodriguez*, 2010 OK CR 23, ¶¶ 110-113, 241 P.3d at 246-47. Propositions XV and XVII are denied.

DECISION

¶97 Appellant's Notice of Extra-Record Evidence/Application for Evidentiary Hearing is **DENIED**. His Motion for New Trial is **DISMISSED** for lack of jurisdiction. His Notice to Court Regarding Missing Evidence and Request to Remand, filed September 26, 2018 is **DENIED.** The Judgment and Sentence of the District Court of LeFlore County is **AFFIRMED.** 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 LEFLORE COUNTY THE HONORABLE JONATHAN K. SULLIVAN, DISTRICT JUDGE

ATTORNEYS AT TRIAL

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

LUMPKIN, JUDGE: CONCURRING IN RESULT

¶1 I concur in the results reached but write separately to further explain aspects of the analyses set forth in the opinion.

¶2 As to Proposition II, I note that the references to David Smith's report are taken from a Court Exhibit, *i.e.*, a copy of Smith's report to defense counsel. The Exhibit was not a part of the evidence presented to the jury. This Court only uses the report for the purpose of determining if the trial judge abused his discretion.

¶3 Defense counsel's use of Smith's report to cross-examine the State Fire Marshal's Investigator, Tony Rust, was most likely more effective than having Smith testify in person at the trial. Smith could have been readily impeached at trial for not having visited the site of the fire, not examining the physical evidence, and failing to speak with witnesses regarding the fire. Therefore, I agree that the trial court did not abuse its discretion when it refused to grant a mistrial.

¶4 Appellant's claim under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) in Proposition IV should have been raised in a timely motion for new trial and handled under that statute. Rule 3.11(A), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2019) solely allows this Court to supplement the record on appeal with items admitted during proceedings in the trial court but which were not designated or actually included in the record on appeal. *Bench v. State,* 2018 OK CR 31, ¶¶ 186-87, 431 P.3d 929, 974; *McElmurry v. State,* 2002 OK CR 40, ¶ 167, 60 P.3d 4, 36 (holding Rule 3.11(B) strictly limits supplementation under Rule 3.11(A) to matters which were presented to the trial court). The Court should not consider the extra-record evidence attached to Appellant's Rule 3.11 application in determining his *Brady* claim. These *ex parte* attachments have neither been properly identified nor subjected to cross examination. As such the Court cannot use the attachments as substantive evidence regarding the issues raised. *Warner v. State*, 2006 OK CR 40, ¶ 14, 144 P.3d 838, 858 *overruled on other grounds Taylor v. State,* 2018 OK CR 6, 419 P.3d 265. Instead, the attachments only go to the determination whether an evidentiary hearing is required. *Id.*, 2006 OK CR 40, ¶ 14 n.3, 144 P.3d at 858 n. 3.

¶5 The attachments to Appellant's motion should have been raised in a motion for new trial or as part of his ineffective assistance of counsel argument. *See* 22 O.S.2011, §§ 952-953. By attempting to raise the issue in the present manner, Appellant attempts to skirt the rules for deciding a motion for new trial. *See* Rule 2.1(A), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2019). Since Appellant has not argued for supplementation with items admitted during proceedings in the trial court but which were not designated or actually included in the record on appeal, his request for supplementation under Rule 3.11 (A) must be denied.

¶6 Those actions which occurred post-trial cannot support a *Brady* claim since the prosecutor could not have known or discovered them prior to the trial. Because nothing within the record establishes that the prosecution suppressed evidence that was exculpatory or favorable to Appellant, Proposition IV is properly denied. *United States v. Bagley*, 473 U.S.

667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196.

¶7 As to Appellant's request to supplement the record under Rule 3.11(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019), I note that this rule is neither a ground for relief nor part of the analysis under *Strickland v. Washington*, 6 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Instead, Rule 3.11(B) is only used to determine whether an evidentiary hearing is required and should not be considered in any manner regarding the substantive issue raised. *Bench*, 2018 OK CR 31, ¶¶ 223-24, 4131 P.3d at 981; *Bland v. State*, 2000 OK CR 11, ¶ 115, 4 P.3d 702, 731. The 3.11 proffered evidence should not be intermixed with the substantive evidence in the record as it is only for the purpose of deciding if an evidentiary hearing is required. *Id.* Appellant has not shown this Court by clear and convincing evidence that there is a strong possibility trial counsel was ineffective, thus, his request for an evidentiary hearing is properly denied. *Bench*, 2018 OK CR 31, ¶ 188, 431 P.3d at 974.

¶8 In addressing Proposition XIII, the opinion utilizes the acronym "HAC" to discuss the "especially heinous, atrocious, or cruel" aggravating circumstance. 21 O.S.2011, § 701.12(4). "I continue in the belief that it is inappropriate to utilize an acronym to deal with the serious nature of an aggravating circumstance." *Berget v. State*, 1991 OK CR 121, ¶ 1, 824 P.2d 364, 378 (Lumpkin, V.P.J., concurring in results). This Court should refrain from colloquialisms which denigrate the gravity of the issue presented for our decision.

¶9 Finally, the Opinion recounts that we cannot consider Appellant's Motion for New Trial because it was filed out of time. However, the Opinion did consider these circumstances in Proposition IV on the merits by wrongly admitting the ex parte affidavits. Those affidavits should not have been considered on the merits. Instead, the affidavits should have only been considered as part of the motion for new trial and for the limited purpose of determining if an evidentiary hearing was required. *Bland*, 2000 OK CR 11, ¶ 115, 4 P.3d at 731 ("If the items are not within the existing record, then only if they are properly introduced at the evidentiary hearing will they be a part of the trial court record on appeal.").

KUEHN, VICE PRESIDING JUDGE:

1. Appellant does not challenge the voluntariness of any of his statements to authorities.

2. When Saulsberry asked Appellant why he was telling Ferguson to "shut the fuck up" when she was asking the neighbors for help, Appellant claimed he was talking to the neighbors, not Ferguson, because (he claimed) they were demanding that Ferguson leave their property.

3. Hearings were held December 10, 2014; December 23, 2015; and May 13, 2016.

4. In *Black*, a capital defendant claimed prejudicial error from the fact that a number of events were not transcribed for the record, including bench conferences, rulings, the exercise of peremptory challenges, and the selection of alternate jurors. We rejected Black's claim that the omissions were so great as to impede either his right to appeal or this Court's duty to review. We observed that Black had failed to identify any evidentiary or other ruling which depended on some unrecorded portion of the proceedings. *Id.* at ¶¶ 85, 87, 88, 21 P.3d at 1075-76. We reached the same conclusion in *Parker*, cited above. *Parker*, 1994 OK CR 56, ¶¶ 23-27, 887 P.2d at 294-95.

5. The purpose of pretrial motion hearings is usually to resolve (at least preliminarily) issues about what evidence will be admissible at trial. But such rulings are always subject to change. *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 86, 241 P.3d 214, 240. Whatever rulings may have come out of the December 4, 2013 hearing, the bottom line is whether or not Appellant received a fair trial. Appellant fails to connect anything that might have transpired at the hearing with any ruling or decision that affected the trial itself. Similarly, with regard to perceived "omissions" in *voir dire*, the purpose of *voir dire* is to discover any grounds to challenge prospective jurors for cause, and to permit the intelligent use of peremptory challenges. *Harmon v. State*, 2011 OK CR 6, ¶ 7, 248 P.3d 918, 927. Yet Appellant raises no complaints whatsoever about the selection of his jury.

6. As early as December 11, defense counsel took the position that agreeing to anything less than Smith's physical presence on the witness stand would be *strategically* unwise. And the motion for mistrial stated, in relevant part:

> The defendant is not in the position to waive the right to compulsory process with regard to the critical fire causation expert. ... Defendant's right to have a favorable expert witness testify *in-court* would be waived if he acquiesced... . Under the case law counsel has been able to find, if a [sic] telecommunications testimony was agreed to, it would require the defendant to waive his right to compulsory process which again he is not in a position to do. (Emphasis in original) ...
>
> We become ineffective if required to make the decision not to call the expert at all, *or we are ineffective for waiving defendant's right to compulsory process which is [the] result of agreeing to tele-testimony* as opposed to the importance and necessity of the physical presence of the expert witness. (Emphasis added)

At the December 13 conference, counsel referred to *Harris v. State* (cited above). Counsel read *Harris* as holding that he would be acting deficiently if he agreed to have Smith testify remotely. But that is not what *Harris* holds. In *Harris*, the defendant claimed he was denied his right to an impartial jury, and one undistracted from national events, when the trial court refused to declare a mistrial (or at least adjourn for a few days) after the September 11 terrorist attacks interrupted the proceedings. We rejected that claim. In passing, Harris claimed he was "forced" to accept remote testimony of two defense witnesses – but he never claimed he was denied his constitutional right to confront witnesses or present a defense. *Harris* does not hold that a defendant has an unqualified right to personal attendance of witnesses unless he agrees to relinquish it. The fact that Harris agreed to remote testimony does not mean that his case would have been reversed if he had objected.

7. The possibility of an accidental ignition source is one thing; but how Ferguson ended up with gasoline all over her body is a different matter entirely. One can speculate about electrical sparks or upended candles, but one must still account for the shattered bottle of gasoline and the kinds of burns Ferguson exhibited and the statements she made. The State believed Appellant intentionally caused both events. Smith's report acknowledges the indisputable – the "probable presence of an ignitable liquid" – and agrees that how the liquid got on Ferguson is an important question. But even Smith is unable to offer a cogent alternative theory in this regard. He declares that "cognitive testing to identify alternate sources of ignition energy and to scientifically eliminate those other potential sources has not been accomplished." But as far as we can tell from Smith's introductory methodology, "cognitive" testing (as opposed to "experimental" testing) simply means thinking about the possibilities. Smith's report concludes that "the origin of a fire must be established before a cause can be opined." He faults Agent Rust for not more thoroughly investigating possible

ignition sources besides Appellant's cigarette lighter. But again, Smith's conclusion is simply that Rust didn't consider alternative scenarios; Smith never offered any of his own, including how Ferguson came to be covered in gasoline.

8. Appellant's citation to *United States v. West*, 828 F.2d 1468 (10th Cir. 1987) is instructive; the facts in that case differ markedly from those here. West was charged with murdering another man during a motorcycle-gang brawl. Testimony varied on who was involved in the fracas, and who threw the fatal blow to the victim's skull. *Id.* at 1468-69. On the second day of trial, West asked for a one-day continuance to obtain the attendance of another eyewitness who was expected to testify that West did not hit the victim. *Id.* at 1469. The witness had been orally advised to appear January 14 (the day that the continuance was requested), but his subpoena stated January 15. *Id.* The appellate court concluded that the trial court abused its discretion in refusing to grant a one-day continuance under the circumstances; the confusion was understandable, the requested delay was very brief, and the eyewitness testimony at issue was critical to the defense. *Id.* at 1470-71.

Appellant also refers us to *Baker v. State*, 1977 OK CR 304, 572 P.2d 233. But again, the fundamental unfairness in refusing to grant a continuance in that case is apparent. First, the State was granted a continuance to secure its own witnesses. Defense counsel released his witnesses until the next trial setting. The judge's continuance was countermanded by his superior, and the trial date was moved up several weeks. Defense counsel could not contact his witnesses in time for the court's advanced trial date, and thus was unable to present them at trial. This Court found an abuse of discretion because the missing witnesses would have provided key testimony establishing a complete defense to the charge. 1977 OK CR 304, ¶¶ 5-9, 572 P.2d at 234-35.

9. Appellant also claims two collateral results of the alleged Due Process violation: first, that defense counsel was prevented from providing effective assistance, and second, that the court's ruling had a "chilling effect" on Appellant's decision about whether to testify. Appellant does not elaborate on these claims or cite any authority to support them. Because we find the court's ruling was within its discretion, we need not consider these arguments further. We do, however, consider the reasonableness of defense counsel's strategy in Proposition XIV.

10. We remanded the case to determine if this evidence could be found, but it could not.

11. Appellant relies heavily on *post-hoc* speculation to argue that this evidence has exculpatory value. He claims that a defense investigator found additional pieces of a Crown Royal bottle, at what remains of the fire-gutted home, in August 2015 – over three years after the fire. We address this new evidence below, in our discussion of Appellant's Motion for New Trial. Appellant may claim that new evidence is somehow "exculpatory," but our concern here is whether the evidence that was in the State's possession had exculpatory value which was apparent at the time the evidence was lost. If it did not, then Appellant must demonstrate bad faith in its loss.

12. The only piece of physical evidence that appears to have been admitted as an exhibit at trial is Appellant's lighter (State's Exhibit 9), although only a photograph of the lighter is included in the appeal record. Ironically, defense counsel (who conceded having had an opportunity to inspect the lighter before trial) actually *objected* to admission of the lighter, arguing that it may have been tampered with or contaminated since its confiscation. *See* Proposition VIII.

13. In a nutshell, Appellant alleges that at some point after this trial, Agent Rust amended his own records concerning whether, and when, he received the physical evidence from the OSBI after testing, evidence which was returned sometime in May 2012. Appellant does not challenge the integrity of the testing itself; he only complains that physical evidence relevant to this case was subsequently lost or destroyed by LeFlore County authorities.

14. According to testimony at the December 2015 evidentiary hearing, Agent Rust had been reprimanded by his employer in 2009 for lax investigation in another case. But this testimony also showed Rust had investigated around 900 other fires without any complaints about his performance. In any event, Rust was required to undergo additional training. This was some three years before his participation in this case. In addition, Appellant points to the prosecutor's own testimony at the same hearing, where she described having "issues" with Rust when she briefly supervised him some time before 2009. Exactly what those issues were is not fully developed.

15. *See United States v. Lawson*, 810 F.3d 1032 (7th Cir. 2016). Lawson was convicted of robbing a post office. He left his cell phone and fingerprints at the scene. On appeal, Lawson claimed the government withheld evidence that the detective who lifted the fingerprints had a record of disciplinary actions in his personnel file, and that this information affected the detective's credibility. The Seventh Circuit concluded that the information was not material under *Brady*. It noted that the detective's role in the case was simply to gather evidence, and that the identification of the fingerprints as belonging to the defendant was made by someone else. *Id.* at 1043-44. Appellant's reliance on *Vaughn v. United States*, 93 A.3d 1237 (D.C. 2014), is misplaced for similar reasons. In *Vaughn*, a prosecution stemming from a prison assault, the court found that undisclosed information affecting a prison guard's credibility was not material as to one defendant, because the only relevant information that the guard provided (identification of the defendant as being present during the assault) was admitted by Vaughn in a post-trial affidavit. *Vaughn*, 93 A.3d at 1266. Here, Appellant stipulated that the physical evidence collected by Agent Rust need not be introduced at trial, and he had no challenge to the OSBI's test results. Appellant also cites *Milke v. Ryan*, 711 F.3d 998 (9th Cir. 2013), but that case is readily distinguishable. Milke was convicted and sentenced to death for taking part in the murder of her young son. No witnesses or physical evidence directly linked her to the crime; rather, the case was (in the Ninth Circuit's words) a "swearing contest" between Milke and a police detective, who claimed Milke confessed the crime to him. The detective's credibility was clearly key to the state's case – yet neither the defense nor the jury knew about the detective's "long history of lying under oath and other misconduct." *Id.* at 1000-01. Under those circumstances, the Ninth Circuit understandably found the state's failure to disclose the detective's track record to be material to the outcome of the trial. *Id.* at 1018-19.

16. No details of the grounds for the application were offered into evidence.

17. Appellant's real complaint here seems to be lack of foundation, not hearsay. He claims that Turner never affirmatively swore to personal knowledge of these events. Personal knowledge is generally a prerequisite to the admissibility of a witness's testimony. 12 O.S.2011, § 2602. But reading Turner's testimony in full, we find no reason to believe she was not describing events that she witnessed.

18. The trial was structured so that if the jury found Appellant guilty of a lesser, non-capital offense, it would assess punishment at that time.

19. In the first-stage closing argument, the prosecutor said (with emphasis added):

> As long as we're talking about lesser includeds then we have to talk about the punishment about [sic] the lesser includeds. ... *For purposes of calculating under the 85% Rule, we give you a definition of life,* okay. If you convict somebody of a crime that is under the 85% Rule, which two of these are, then you've got to know what DOC is going to do, and DOC is going to say I can't mathematically formulate .85 times l-i-f-e – doesn't work. What number do I use? So they have arbitrarily come up with the number 45. So if you write down the word l-i-f-e, that is what DOC will substitute *to determine when he's eligible* for parole or good time credits or any of those things. ...

In second-stage closing, the prosecutor said:

> I have to talk about this 85% instruction one more time. I'll talk briefly because I already told you yesterday. 85% instruction only applies if you give him life with parole, you are [inaudible] here; if you write down with life [sic], they're going to say, well, that means 45 and that's the number they're going to give him. You are not committed to 45; instead of life you can write down 50, 60 or 6000 or whatever number you have. So that's when the 85% – but it doesn't apply to the other two.

Appellant's reliance on *Florez v. State*, 2010 OK CR 21, 239 P.3d 156, is misplaced. In *Florez*, the prosecutor told the jury that the defendant "will only do 85 percent of what you give him" – erroneously suggesting that parole was guaranteed. 2010 OK CR 21, ¶ 5, 239 P.3d at 158. We found the error harmless since the jury's sentence recommendation was half of what the prosecutor had requested, and considerably lower than the maximum term available. 2010 OK CR 21, ¶ 9, 239 P.3d at 159.

20. The trial court said, "And I'll speak with the family; if they're not going to be able to be composed, then they're not going to be able to be in here. It's disruptive." Defense counsel replied, "I understand."

21. Appellant mistakenly claims there were two outbursts. Ferguson's mother appears to have left the courtroom and returned moments later as the prosecutor was still questioning Johnson. While defense counsel approached the bench and expressed concern that Ferguson's mother might get "riled up and crying before this jury again," there is no indication that this occurred. In fact, the trial court responded, "If she disrupts again, she's going to be removed for the remainder of the trial."

22. OUJI-CR 4-78 reads:

> Mitigating circumstances are 1) circumstances that may extenuate or reduce the degree of moral culpability or blame, or 2) circumstances which in fairness, sympathy or mercy may lead you as jurors individually or collectively to decide against imposing the death penalty. The determination of what circumstances are

mitigating is for you to resolve under the facts and circumstances of this case.

While all twelve jurors must unanimously agree that the State has established beyond a reasonable doubt the existence of at least one aggravating circumstance prior to consideration of the death penalty, unanimous agreement of jurors concerning mitigating circumstances is not required. In addition, mitigating circumstances do not have to be proved beyond a reasonable doubt in order for you to consider them.

23. This instruction has since been reworded and clarified. OUJI-CR 4-80.

24. We noted in *Cleary* that while Oklahoma law provides that jury instructions "shall be in writing," *see* 22 O.S.2011, § 831(6), the jury was permitted, but not required, to take written copies of the instructions to the deliberation room. *See* 22 O.S.2011, § 893.

25. In 1996, the drafters of the Second Edition of the Oklahoma Uniform Jury Instructions concluded that language on non-unanimity as to mitigating circumstances would be helpful to a capital jury – while at the same time conceding that this Court had repeatedly held no such instruction was necessary. *See* OUJI-CR 4-78, Notes on Use; *Hooper v. State*, 1997 OK CR 64, ¶ 51 n.65, 947 P.2d 1090, 1109 n.65.

26. *E.g.*,

> [Y]ou never have to impose the death penalty. ... And essentially, what that's allowing you to do is, all right, we found the aggravators, and before I get to my own personal moral belief, which we talked a lot about up in voir dire, what you twelve individually feel is right and just, which you can find collectively or not so... . [I]n your own reasonable moral judgment, in your own personal moral judgment, you can consider the mitigators, and that is what would lessen the culpability.

27. In 2014, our Legislature specifically added stepparents and some other relatives to this list. Laws 2014, SB 1824, c. 258, § 1 (eff. November 1, 2014).

28. The applicability of this statute was not affected by the Victim's Rights Act. In 2013, the Legislature added language to § 701.10 to underscore its application in cases where the death penalty was sought. Laws 2013, SB 1036, c. 6, § 1 (eff. November 1, 2013).

29. Defense counsel's lack of objection suggests he correctly understood that Rhonda Ferguson was a "victim" in this case. ("I'm not disputing that a stepmother and brother and grandmother cannot [sic] make statements. ... I know the statute talks about that those members can make a statement.") Rhonda Ferguson read a brief prepared statement, comprising about one page of transcript, about how Kristi's death affected her, then turned to how Kristi's son dealt with the loss of his mother, which itself is a completely appropriate topic for victim impact testimony. 21 O.S.2011, § 142A-1(8), § 701.10(C).

30. In her concurring opinion in *Payne,* Justice O'Connor wrote:

> We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, "the Eighth Amendment erects no *per se* bar." ... If, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment.
>
> That line was not crossed in this case. The State called as a witness Mary Zvolanek, Nicholas' grandmother. Her testimony was brief. She explained that Nicholas cried for his mother and baby sister and could not understand why they did not come home. I do not doubt that the jurors were moved by this testimony – who would not have been? But surely this brief statement did not inflame their passions more than did the facts of the crime... .

Payne, 501 U.S. at 831-32, 111 S.Ct. at 2612.

31. At the beginning of the hearing on victim impact statements, the prosecutor agreed to remove any such recommendations from statements to be read to the jury, citing *Lockett v. Trammell,* 711 F.3d 1218 (10th Cir. 2013).

32. Appellant had two experienced capital trial lawyers from the Oklahoma Indigent Defense System appointed to his case. We generally refer to them collectively as "counsel."

33. The Rule 3.11 application contains not only supplementary materials, but also more than twenty pages of additional argument. We have long looked with disfavor on attempts to evade page-limitation requirements for briefs (already permitted to be 100 pages in capital cases) by incorporating arguments made in this manner. *See Garrison v. State*, 2004 OK CR 35, ¶ 131 n.36, 103 P.3d 590, 612 n.36.

34. Parts E, F, and G, respectively, of Proposition XIV of Appellant's Brief.

35. Appellant faults trial counsel for failing to "confirm" that the jury's instruction packet was complete. This is not exactly a record-based claim, since we simply do not know what counsel did, or whether the packet included the instruction discussed in Proposition XI. In any event, such an instruction was not required in the first place. *See* discussion of Proposition XI.

36. Appellant also faults trial counsel for not filing a proper motion for continuance. As discussed in Proposition II, the trial court considered a continuance as a possible option, so we find no prejudice in failing to file a separate request.

37. To support his attacks on trial counsel's performance, Appellant also submits a revised report compiled by his fire expert, Smith, who was retained again on appeal to review information which simply was not available to him before trial. Because Smith's revised report includes opinions based on this post-trial information, we cannot consider it here, as it has no logical bearing on what trial counsel knew or did at the time of trial. We will revisit Smith's revised report in our discussion of Appellant's Motion for New Trial.

38. Appellant relies on *Garrison*, 2004 OK CR 35, ¶¶ 150-169, 103 P.3d at 616-620 for the importance of securing alternative means of presenting testimony when the original witness selected for the task cannot attend. *Garrison* was a capital murder case, but the similarities with this case end there. *Garrison* involved a "unique and utterly bizarre" set of circumstances (*id.* at ¶ 166, 103 P.3d at 619) regarding appellate counsel's efforts (or lack thereof) at an evidentiary hearing to determine whether trial counsel effectively handled the case for mitigation of punishment. While Garrison's crime and criminal past were despicable, the circumstances of his upbringing were equally "horrendous," *id.* at ¶ 167, 103 P.3d at 619, and may have explained his sociopathic conduct and persuaded the jury not to sentence him to death. Appellate counsel had retained an expert to show what kind of mitigation evidence trial counsel should have presented to the jury. The expert was unable to attend the evidentiary hearing due to health reasons. Appellate counsel declined the trial court's offer to continue the hearing, declined to present any of the fifteen or so other in-state witnesses who could corroborate the expert's investigation (claiming their testimony would make no sense without the expert's) – and even declined to cross-examine defendant's trial counsel about his own efforts to prepare a mitigation case. *Id.* at ¶¶ 160-65, 103 P.3d at 618-19. Thus, the trial court (the fact-finder in that situation) had no evidence on which to fairly evaluate the claim that trial counsel was ineffective – which was the purpose for remanding the case in the first place. We found appellate counsel's intransigence "completely unacceptable" (*id.* at ¶ 164, 103 P.3d at 619), and ultimately vacated Garrison's death sentence, because we lacked confidence that the death sentence was arrived at fairly. *Garrison* is markedly distinguishable from the instant case. Appellate counsel in *Garrison* utterly failed to support his claim that trial counsel's mitigation case was lacking, despite available evidence. Here, the defense expert merely critiqued the conduct of the State's fire investigator; his report provided talking points for defense counsel's cross-examination of the State's investigator, and counsel apparently made good use of it. *See* Proposition II.

39. Appellate defense counsel dismisses Dr. Garner's conclusions about the lack of Fetal Alcohol Syndrome evidence in this case because Garner was "not even" a psychologist. We find this assertion somewhat disingenuous. First, appellate counsel counters those opinions with an affidavit from a trial-team defense investigator (also not a psychologist). More important, however, is that Dr. Russell (who *was* a psychologist) reached the same conclusion as Dr. Garner. Dr. Garner had considerable experience in social work and was a capital mitigation specialist. The information that mitigation specialists compile and relate to juries should not be underestimated. *See e.g. Marquez-Burrola v. State*, 2007 OK CR 14, ¶ 60, 157 P.3d 749, 767-68. Garner worked for several years in a psychiatric setting and was qualified to diagnose mental illness. She was not a neurologist, but she had extensive experience in observing human behavior and detecting possible cognitive problems.

40. Among the affidavits Appellant presents is one from Dr. Russell, who states that she now believes "neuropsychological testing was warranted" in this case to "fully assess and explain [Appellant's] true level of functioning." It is not clear if Dr. Russell felt that way at the time of trial, or felt that any findings in that regard would "move the ball" as far as Appellant's moral blame, but her testimony at least suggests she did not.

41. We must also keep in mind that the jurors (assuming none were neuropsychologists) were able to consider Appellant's cognitive abilities, from a layperson's point of view, through his extensive video interview with Detective Saulsberry and by observing his demeanor and interactions with counsel throughout the trial.

42. *Overruled on other grounds, Blonner v. State*, 2006 OK CR 1, 127 P.3d 1135.

43. Timely motions for new trial based on new evidence are filed with this Court, not the trial court, if a direct appeal is pending. Rule

2.1(A)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019).

44. Appellant asks this Court to excuse the untimely filing by pointing out that it took some time to compile the appeal record. The post-trial evidentiary hearings did give rise to a potential *Brady* claim, which we have already addressed under Rule 3.11(A) of our Rules. But as for the additional physical evidence found at the scene, the affidavit from Appellant's investigator indicates that it was found quite inadvertently, while the investigator was searching the rubble of Appellant's home for a family photo album as part of her mitigation investigation. Any delays in perfecting this appeal simply had no bearing on Appellant's ability to locate this evidence.

45. On September 26, 2018, Appellant filed a request to remand this case, once again, to the district court. Appellate counsel claims that a court reporter recently found State's Exhibit 9, Appellant's cigarette lighter, in her work materials. This exhibit was offered at trial; a photograph was substituted for inclusion in the appeal record, and the lighter apparently went missing thereafter. *See* Proposition III. We also note that defense counsel objected to the introduction of the lighter at trial. *See* Proposition VIII. We are unsure what Appellant now believes the relevance of this evidence to be, but treat it as "newly discovered evidence" for present purposes, and likewise **DENY** the request to remand for the reasons discussed above regarding Appellant's Motion for New Trial.

2019 OK CR 23

ROBERT EUGENE BREWER, Appellant, v. STATE OF OKLAHOMA, Appellee.

Case No. F-2018-36. September 26, 2019

SUMMARY OPINION

HUDSON, JUDGE:

¶1 Appellant, Robert Eugene Brewer, was tried and convicted by jury in Tulsa County District Court, Case No. CF-2016-6383, of Sexual Abuse of a Child Under 12 (Count 1),[1] in violation of 10 O.S.Supp.2002, § 7115.[2] The jury recommended a sentence of seven years imprisonment.[3] The Honorable William J. Musseman, Jr., District Judge, presided at trial and sentenced Appellant in accordance with the jury's verdict. The court further ordered Brewer to serve a term of three years post-imprisonment supervision. Brewer now appeals, raising the following issue:

> THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF OTHER CRIMES WHICH HAD NOT BEEN SUBSTANTIATED.

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

¶3 **Proposition I**: Brewer asserts the trial court erred in admitting the propensity testimony of A.K., J.H., L.R.N., and P.E.S. Brewer specifically contends the trial court abused its discretion when it failed to hold a proper pretrial hearing. Brewer asserts the court should have required the State to present live testimony from the propensity witnesses. Without such testimony, Brewer argues the court was unable to properly examine the proposed witnesses' credibility, which rendered impossible the court's task of determining whether clear and convincing evidence of the challenged propensity evidence existed.

¶4 Brewer failed to specifically object to the challenged propensity evidence when it was presented at trial.[4] He has thus waived all but plain error review of this claim. *See Lowery v. State*, 2008 OK CR 26, ¶ 9, 192 P.3d 1264, 1268 (reviewing for plain error where defense counsel challenged the evidence during a hearing, but failed to renew his objection at the time it was actually offered at trial). To be entitled to relief under the plain error doctrine, Brewer must show an actual error, which is plain or obvious, and which affects his substantial rights. *Baird v. State*, 2017 OK CR 16, ¶ 25, 400 P.3d 875, 883; *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395; 20 O.S.2011, § 3001.1. "This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice." *Baird*, 2017 OK CR 16, ¶ 25, 400 P.3d at 883; *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

¶5 Two separate provisions of the Oklahoma Evidence Code provide for admission of sexual propensity evidence—12 O.S.2011, §§ 2413 and 2414. *James v. State*, 2009 OK CR 8, ¶ 4, 204 P.3d 793, 794-95; *Horn v. State*, 2009 OK CR 7, ¶¶ 25, 27, 37, 41, 204 P.3d 777, 784, 786. To be admissible, challenged propensity evidence "must be established by clear and convincing evidence." *Horn*, 2009 OK CR 7, ¶ 40, 204 P.3d at 786. "If the defense raises an objection to the admission of the propensity evidence, the trial court should hold a hearing, preferably pre-trial, and make a record of its findings . . . ." *Id.*

¶6 In determining the relevance of propensity evidence, trial courts should consider the following factors: "1) how clearly the prior act has been proved; 2) how probative the evidence is of the material fact it is admitted to prove; 3) how seriously disputed the material fact is; and 4) whether the government can avail itself of any less prejudicial evidence." *Horn*, 2009 OK CR 7, ¶ 40, 204 P.3d at 786. In addition, when analyzing the dangers of admitting propensity evidence trial courts should consider: "1) how likely is it such evidence will

contribute to an improperly based jury verdict; and 2) the extent to which such evidence will distract the jury from the central issues of the trial." *Id.* Trial courts may consider other relevant matters, including the credibility of the accuser in the other act, and must ensure that the other acts are shown by clear and convincing evidence. *Id.*

¶7 Reviewing the record evidence in the present case, we find the trial court properly admitted the challenged evidence as sexual propensity evidence. While proof of propensity evidence certainly may be established through the victim's testimony, proof may also be found in the pleadings and discovery. The rules of evidence, except those relating to privilege, do not apply where the judge is called upon to determine questions of fact preliminary to admissibility of evidence. 12 O.S. 2011, § 2103(B)(1); *Lee v. State*, 1983 OK CR 41, ¶ 6, 661 P.2d 1345, 1349.

¶8 Despite the absence of live testimony from the propensity witnesses at the pre-trial hearings, the hearings[5] in sum were more than sufficient. *Lee*, 1983 OK CR 41, ¶ 6, 661 P.2d at 1349. Although the better and preferred practice is to take live testimony, in this case the trial court's reliance on the written statements of the victims was not an error. Judge Musseman granted the State permission to present the evidence only after holding multiple hearings concerning the proposed testimony and requiring the State to greatly limit its proposed testimony to what was absolutely necessary. The record shows Judge Musseman carefully weighed the probative value of the challenged evidence against its prejudicial value. There could not have been a stricter adherence to the factors this Court set out in *Horn*, or a more careful and thoughtful exercise of discretion, than the procedure employed by Judge Musseman in this case.[6]

¶9 Moreover, giving the challenged evidence its maximum probative force and minimum reasonable prejudicial value, the probative value of the propensity testimony was not substantially outweighed by the danger of unfair prejudice. *See Welch v. State*, 2000 OK CR 8, ¶ 14, 2 P.3d 356, 367. Similarities between this case and Brewer's prior sexual abuse of the propensity witnesses reveal a method of operation common with all of the victims. *Cf. Driver v. State*, 1981 OK CR 117, ¶ 5, 634 P.2d 760, 762-63. The trial court committed no error, plain or otherwise, in finding the propensity evidence admissible based on the clear and convincing evidence set forth by the State. Brewer's sole proposition error is denied.

DECISION

¶10 The Judgment and Sentence of the District Court is **AFFIRMED**. However, the matter is **REMANDED** to the District Court with instructions to enter an order *nunc pro tunc* correcting the Judgment and Sentence document in conformity with this opinion. 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 TULSA COUNTY
THE HONORABLE WILLIAM J.
MUSSEMAN, JR., DISTRICT JUDGE

APPEARANCES AT TRIAL

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Katie Koljack, Asst. District Attorney, 500 S. Denver, Tulsa, OK 74103, Counsel for the State

APPEARANCES ON APPEAL

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

KUEHN, V.P.J., SPECIALLY CONCURRING:

¶1 I agree with the Majority that Judge Musseman "carefully weighed" the propensity evidence and "strictly adhered to the factors required" to make a decision on admissibility of that evidence. I have concern, however, with the Majority's statement that "the better and preferred practice is to take live testimony" in a pre-trial hearing on propensity evidence. Not only is live testimony not required by law, it would require sexual abuse victims to testify unnecessarily. Unlike a hearing on the admissibility of statements under 12 O.S. § 2803.1 or for consideration of a claim of forfeiture by

wrongdoing where live testimony is required by law, propensity evidence, like other crimes evidence, does not require live testimony.

¶2 I am authorized to state Presiding Judge Lewis joins in this separate writing.

1. Brewer was found not guilty of Count 2: Sexual Abuse of a Child Under 12.

2. Both the Amended Information and Judgment and Sentence incorrectly list 21 O.S.Supp.2009 § 843.5(F) as the statute violated by Brewer. However, Brewer's crime occurred between 2004 and 2007. During this time period, the crime of child sexual abuse was set forth in 10 O.S.Supp.2002, § 7115. Section 7115 was not renumbered as 21 O.S. § 843.5(F) until May 21, 2009. The matter is therefore **REMANDED** to the district court with instructions to enter an order *nunc pro tunc* correcting the Judgment and Sentence document to reflect the correct statute violated.

3. Pursuant to the governing statute, the punishment range for Brewer's crime was up to one year in the county jail or up to life imprisonment in the penitentiary. *See* 10 O.S.Supp.2002, § 7115(E).

4. Citing Volume II, transcript pages 102 and 113, Brewer claims that defense counsel objected to the other crimes evidence at a bench conference, following the exercise of peremptory challenges but before opening statements. However, the issue dealt with during this bench conference was whether the State would be permitted to present evidence that Brewer continued to sexually abuse the victim, C.B., when they moved outside of Tulsa County to Beggs. Defense counsel's objections during this lengthy discussion went to this particular evidence and its admissibility, and did nothing to preserve Brewer's present claim regarding the admissibility of the propensity evidence.

5. The trial court conducted three separate pre-trial hearings on the State's proposed propensity evidence.

6. Notably, even at trial, Judge Musseman continued to limit the propensity evidence proposed in order to limit the prejudicial weight against Brewer by denying the State's request to introduce testimony of C.B.'s abuse by Brewer that occurred outside of Tulsa County.

2019 OK CR 24

BRYON LYND GORDON, Appellant, v. THE STATE OF OKLAHOMA, Appellee

Case No. F-2018-624. October 3, 2019

SUMMARY OPINION

LUMPKIN, JUDGE:

¶1 Appellant, Bryon Lynd Gordon, was tried by jury and convicted of Count 1, Forcible Oral Sodomy, in violation of 21 O.S.Supp.2016, § 888,[1] in the District Court of Bryan County Case Number CF-2017-64. The jury recommended as punishment ten years imprisonment. The trial court sentenced Appellant accordingly. It is from this judgment and sentence that Appellant appeals.

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

I. The trial court abused its discretion by ruling, without inquiry, that the alleged victim was competent to testify at jury trial violating the Sixth Amendment of the United States Constitution, Article 2, § 20 of the Oklahoma Constitution, and 12 O.S.2011, §§ 2601-2603.

II. The Magistrate abused its [sic] discretion by considering testimony from an alleged victim who was incompetent during preliminary hearing, in violation of the Sixth Amendment of the United States Constitution, Article 2, § 20 of the Oklahoma Constitution, and 12 O.S. 2011, §§ 2601-2603.

III. The trial court abused its discretion when it allowed the admission of unreliable hearsay without exception and introduced without inquiring into the reliability of the hearsay statements, in violation of 21 O.S.Supp. 2013, § 2803.1.

IV. Because the testimony and statements of the alleged victim were inconsistent, incredible, and unbelievable, corroboration was required. The testimony was not adequately corroborated and therefor [sic] the evidence was insufficient to support the conviction.

V. Error occurred when the trial court failed to properly instruct the jury, in violation of Mr. Gordon's due process rights under the 14th Amendment to the United States Constitution and Art. II, § 7, of the Oklahoma Constitution.

VI. Mr. Gordon was prejudiced by Vicki Palmore's testimony vouching for the credibility of R.S.

VII. Mr. Gordon was denied his right to the effective assistance of counsel, in violation of the 6th and 14th Amendments to the United States Constitution and Art. II, §§ 7, 9, and 20, of the Oklahoma Constitution.

VIII. Cumulative errors deprived Mr. Gordon of a fair proceeding and a reliable outcome.

¶3 After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that under the law and the evidence no relief is warranted.

¶4 In Proposition One, Appellant contends the trial court committed an abuse of discretion by not making an inquiry regarding the victim's, R.S.'s, competency to testify.[2] Prior to trial, Appellant requested the trial court to hold an *in camera* hearing to determine if R.S. was able to differentiate between truth and fiction.

The trial court denied the motion, finding the preliminary hearing court determined that R.S. was a competent witness, either expressly or by virtue of the fact that the magistrate allowed R.S. to testify.

¶5 "Determination of a witness' competency to testify is a matter of discretion for the trial judge and that determination will not be disturbed unless the party asserting error shows a clear abuse of discretion." *Gilson v. State*, 2000 OK CR 14, ¶ 59, 8 P.3d 883, 906. An abuse of discretion has been defined as a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented or, stated otherwise, any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161,170 (internal citation and quotation marks omitted).

¶6 Reviewing the record, we find the trial court did not abuse its discretion in finding R.S. to be a competent witness. The Oklahoma Statutes provide, "[e]very person is competent to be a witness except as otherwise provided in this Code." 12 O.S.2011, § 2601. A witness must have "personal knowledge of the matter" about which he is testifying. 12 O.S.2011, § 2602. "Every witness shall be required to declare before testifying that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so." 12 O.S.2011, § 2603.

¶7 Although our cases have not addressed the competency of a witness with Down Syndrome, we have many that address the competency of child witnesses.[3] "A child is a competent witness under 12 O.S.1991, § 2603, if he or she can distinguish truth from fiction, has taken an oath, and demonstrated that he or she has personal knowledge of the crime." *Gilson,* 2000 OK CR 14, ¶ 59, 8 P.3d at 906. *See also Hawkins v. State*, 1994 OK CR 83, ¶ 27, 891 P.2d 586, 594-95 (where five year old child indicated she knew right from wrong and promised she would only tell what was right and her personal knowledge of the crime was shown, trial court properly found her to be a competent witness); *Dunham v. State,* 1988 OK CR 211, ¶ 8, 762 P.2d 969, 972 (where four year old child acknowledged he would be punished for making up stories and his personal knowledge of the crime was shown, trial court properly found him competent as a witness despite some confusion on his part during trial).

¶8 The record shows that R.S. was competent to testify. The preliminary hearing magistrate administered the oath to R.S. and he swore to tell nothing but the truth. R.S. told the prosecutor he did not lie but only told the truth. He further told the prosecutor that when people tell lies, they go to Hell. R.S. demonstrated his personal knowledge of the crime when he testified how Appellant put his penis into R.S.'s mouth.

¶9 That R.S.'s testimony may have been inconsistent in some respects does not affect his competency as a witness but only goes to the weight and credibility of his testimony, which may properly be addressed on cross-examination. *Gilson,* 2000 OK CR 14, ¶ 60, 8 P.3d at 907. Defense counsel thoroughly cross-examined R.S.

¶10 R.S. similarly demonstrated his competence as a witness at trial. R.S. received the oath and swore to tell the truth. He demonstrated that he knew the difference between the truth and a lie. When asked by the prosecutor whether it would be okay if she told a lie that R.S. did something wrong, R.S. answered in the negative. R.S. established his personal knowledge of the crime when he testified that Appellant touched R.S.'s mouth with his penis and had his penis in R.S.'s mouth.

¶11 While there may have been inconsistencies in R.S.'s trial testimony, they were squarely before the jury and it was for the jury to decide R.S.'s credibility and the weight to give his testimony. *Cf. Gray v. State,* 1982 OK CR 137, ¶ 23, 650 P.2d 880, 885 (once a child has taken an oath and has personal knowledge of the matters at issue, "[i]t is then for the jury to decide the amount of credence to be afforded such testimony").

¶12 Although it was error for the trial court to deny the defense motion for a hearing on R.S.'s competence as a witness, we find the error was harmless. The above record demonstrates R.S. was a competent witness and further discussion in Proposition Three also supports our finding of harmlessness due to the trial court's failure to hold a hearing as requested by the defense. Proposition One is denied.

¶13 In Proposition Two, Appellant claims the preliminary hearing magistrate abused his discretion by considering testimony from an incompetent witness in making his bind over decision. Appellant did not file a motion to quash challenging the sufficiency of the evi-

dence at preliminary hearing prior to entering his plea at formal arraignment. This Court has previously reviewed claims concerning irregularities at preliminary hearing where there was no motion to quash and a plea entered at formal arraignment for plain error, *i.e., Burgess v. State*, 2010 OK CR 25, ¶ 16, 243 P.3d 461, 464 and *Primeaux v. State*, 2004 OK CR 16, ¶ 18, 88 P.3d 893, 900. However, our jurisprudence on this matter leads us to conclude that these claims are waived and not subject to plain error review. *See Berry v. State,* 1992 OK CR 41, ¶ 9, 834 P.2d 1002, 1005 (where the appellant entered a plea at formal arraignment, he waived any irregularities which may have occurred at preliminary hearing); *Money v. State,* 1985 OK CR 46, ¶ 5, 700 P.2d 204, 206 (same); *Crawford v. State*, 1984 OK CR 89, ¶ 14, 688 P.2d 347, 350 (irregularities in bind over order waived where the appellant entered a plea at formal arraignment); and *Hambrick v. State*, 1975 OK CR 86, ¶ 11, 535 P.2d 703, 705 ("When a defendant, upon arraignment, pleads to the merits and enters on trial, he waives . . . any irregularities [in the preliminary examination]."). *Cf. Thompson v. State,* 2018 OK CR 5, ¶ 4, 419 P.3d 261, 262 (review of the trial court's denial of the appellant's motion to quash Supplemental Information waived where the appellant failed to timely assert that the evidence at preliminary hearing was insufficient before he entered his plea at formal arraignment); *Brennan v. State,* 1988 OK CR 297, ¶ 7, 766 P.2d 1385, 1387 (a plea on the merits operates as a waiver of preliminary hearing).

¶14 We now hold that where there is no motion to quash filed after preliminary hearing and the appellant enters a plea at formal arraignment, unless additional time in which to enter a plea or file motions is reserved by the defense or set by the magistrate to allow for the filing of additional motions, any irregularities in the preliminary hearing process are waived from appellate review. This procedure follows our historical precedent and ensures any challenges to the preliminary hearing are presented to the trial judge so the court can resolve all appropriate matters prior to trial. Therefore, Appellant's claim within this proposition is waived. To the extent that they are inconsistent with this rule, this Court's decisions in *Burgess* and *Primeaux* are overruled.

¶15 In Proposition Three, Appellant argues that hearsay was improperly admitted in the form of his mother Vicki Palmore's testimony about what R.S. told her initially regarding Appellant's abuse of him and of the video of R.S.'s forensic interview (State's Exhibit 2). He maintains this evidence was inadmissible since the State failed to provide the notice required by 12 O.S.Supp.2013, § 2803.1 and the trial court failed to hold the hearing required by that section.

¶16 Defense counsel objected to Palmore's testimony on the basis of hearsay. He objected to the video of the interview on the basis of violation of the statutory requirements of Section 2803.1. In this appeal, however, Appellant challenges Palmore's testimony on the basis of a violation of the statutory requirements of Section 2803.1. Thus, we review the claim regarding Palmore's testimony for plain error only. *Hill v. State,* 1995 OK CR 28, ¶ 26, 898 P.2d 155, 164. We use the plain error test found in *Simpson v. State*, 1994 OK CR 40, ¶¶ 2, 11, 23 30, 876 P.2d 690, 693-95, 698, 700-01. Under that test, we determine whether Appellant has shown an actual error, which is plain or obvious, and which affects his or her substantial rights. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Simpson,* 1994 OK CR 40, ¶ 30, 876 P.2d at 701. *See also Jackson v. State,* 2016 OK CR 5, ¶ 4, 371 P.3d 1120, 1121; *Levering v. State,* 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395; *Hogan v. State,* 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

¶17 Appellate review of the claim regarding the video of R.S.'s forensic interview is for an abuse of discretion. *Pullen v. State*, 2016 OK CR 18, ¶ 10, 387 P.3d 922, 927. We utilize the definition of abuse of discretion found in *Neloms,* 2012 OK CR 7, ¶ 35, 274 P.3d at 170, and set forth in Proposition I.

¶18 Section 2803.1(A) allows the admission at trial of statements made by an incapacitated person regarding "any act of sexual contact performed with or on the . . . incapacitated person." It requires a hearing, outside the presence of the jury, for the trial court to determine if "the time, content and totality of circumstances surrounding the taking of the statement provide sufficient indicia of reliability so as to render it inherently trustworthy." *Id.* Section 2803.1(A)(1) provides that the trial court, in determining the trustworthiness of the statement, may consider, among other things, the spontaneity and consistent repetition of the statement, the declarant's mental state at the time of the statement, whether the terminology

used is unexpected of an incapacitated person and whether lack of a motive to fabricate exists. Section 2803.1(B) requires that notice be given of the intention to use the statement at least ten days prior to trial in order for the adverse party to prepare to answer the statement.

¶19 This Court has determined that the list of permissive "factors" set forth in § 2803.1 is not exclusive. *State v. Juarez*, 2013 OK CR 6, ¶ 9, 299 P.3d 870, 873. Instead, the trial court is to determine whether the time, content and totality of circumstances surrounding the taking of the statement provide sufficient indicia of reliability so as to render it inherently trustworthy. *Folks v. State,* 2008 OK CR 29, ¶ 10, 207 P.3d 379, 382.

¶20 Error occurred in this case not only because the State failed to provide notice as required by Section 2803.1, but also because the trial court failed to hold the statutorily required hearing. Proponents of these statements must ensure that they give the statutorily mandated notice and trial courts must ensure that they hold the requisite hearing regarding these statements. The State concedes that omission of the notice and hearing constituted error but argues that these errors were harmless since the defense had constructive notice of the statements and since the statements bore sufficient indicia of reliability so as to render them inherently trustworthy and thus, the statements were properly admissible. While we agree these errors are harmless in the present case, practitioners and trial courts must follow the statutorily mandated requirements found in Section 2803.1.

¶21 This Court has held that the State's failure to provide actual notice as required by Section 2803.1 constitutes plain reversible error where the defendant did not have constructive notice of the hearsay statements. *Spears v. State,* 1991 OK CR 13, ¶¶ 5-7, 805 P.2d 681, 683, overruled by *Simpson,* 1994 OK CR 40, ¶ 9, 876 P.2d at 694 ("*Spears* is incorrect insofar as it precludes the possibility of harmless error under any circumstances."). We have similarly concluded that failure to comply with the hearing requirements set forth in § 2803.1 constitutes plain error. *Simpson*, 1994 OK CR 40, ¶ 2, 876 P.2d at 693; *Kennedy v. State*, 1992 OK CR 67, ¶ 17, 839 P.2d 667, 671. However, these types of errors are subject to harmless error analysis. *Simpson*, 1994 OK CR 40, ¶ 9, 876 P.2d at 694; *Kennedy*, 1992 OK CR 67, ¶ 17, 839 P.2d at 671.

¶22 In *Simpson*, we found that the trial court's error in omitting to hold the Section 2803.1 hearing was harmless "because we have no 'grave doubts' this failure had a 'substantial influence' on the outcome of the trial." *Id.*, 1994 OK CR 40, ¶ 37, 876 P.2d at 702. In *J.J.J. v. State,* 1989 OK CR 77, ¶ 5, 782 P.2d 944, 945-946, this Court found that the trial court's failure to hold the Section 2803.1 hearing was harmless as follows: "Had the judge heard the same evidence *in camera*, there is no doubt that he would have made the same ruling."

¶23 Reviewing the record in the present case, we find that the omissions did not have a substantial influence on the outcome of the trial and thus conclude that the errors were harmless. The record affirmatively establishes that Appellant had constructive notice of the State's intention to introduce the challenged statements at trial and that the statements were inherently trustworthy.

¶24 Palmore testified at preliminary hearing that R.S. told her he and Appellant were having sex. Additionally, Palmore's name was included in the State's discovery response filed two weeks prior to trial. The response included the statement that Palmore would testify in accordance with the reports and interviews attached to the response. One report attached was that of Lieutenant Tony Krebbs who interviewed Palmore. His report stated that Palmore told him that R.S. told her he and Appellant had sex and Appellant put his penis in R.S.'s mouth. Thus, the defense had adequate, constructive notice of Palmore's complained of testimony.

¶25 The record further affords this Court the ability to determine the reliability of the hearsay statement. We conclude that had the trial court judge heard the same evidence at the statutory hearing, there is no doubt that the judge would have found the subject hearsay statement was admissible. When the statement is analyzed pursuant to the factors set forth in Section 2803.1, R.S.'s statement to Palmore was spontaneous, repeated and there was no evidence of any motive for R.S. to fabricate. Palmore merely asked R.S. what had happened and R.S. said that he and Appellant were having sex. The fact that R.S.'s statement was made in response to questioning does not preclude a finding of spontaneity in the statement. *Cf. Folks*, 2008 OK CR 29, ¶12, 207 P.3d at 382 (mere fact that a child victim's statements are made in response to questioning does not pre-

clude a finding of spontaneity in the statements). R.S. repeated the statement during his forensic interview. He told the interviewer that he told his mother about what Appellant did to him. At preliminary hearing, R.S. acknowledged that he and Appellant had a relationship that involved sex and that he told Palmore about it. R.S. testified that Appellant had sex with him and put his penis in R.S.'s mouth. Concerning a motive to fabricate, the record belies any such motive. R.S. testified he liked living with his sister and her family and he liked going to the casino with Appellant. Given this evidence, had the trial court held the statutory hearing, the statement would have been found to be admissible.

¶26 We similarly find the failure to give notice and hold the hearing mandated by Section 2803.1 with regard to the video of R.S.'s forensic interview to be harmless. In the discovery responses previously addressed, Reanae Childers was listed as a witness who would testify that she forensically interviewed R.S. and would testify in conformance with the attached video of the interview. Childers testified at preliminary hearing and the video was admitted into evidence at the hearing. Defense counsel stipulated that the video was a true and accurate recording of the interview. Thus, the defense had adequate constructive notice of this evidence.

¶27 We also conclude that had the trial court viewed State's Exhibit 2 at a statutory hearing, there is no doubt that the trial court would have found the subject hearsay statements were admissible. Review of State's Exhibit 2 shows that R.S., while difficult to understand, had no trouble verbalizing what Appellant did to him. R.S. told Childers the Appellant made R.S. "suck Appellant's dick." He told Childers this happened at Choctaw Casino. R.S. stated he told his mom about what happened. Childers's questions to R.S. were open-ended and not leading.

¶28 As previously shown, at preliminary hearing R.S. acknowledged that he and Appellant had a relationship that involved sex and that he told Palmore about it. R.S.'s testimony was virtually identical to his statements on the video. R.S. testified Appellant had sex with R.S. When asked if Appellant put his penis inside R.S., he responded that Appellant put his penis in R.S.'s mouth. Later, R.S. responded affirmatively when asked if Appellant had his penis in R.S.'s mouth. R.S. testified he told Palmore about what Appellant did to him. He confirmed that he and Appellant were at Choctaw Casino when these things happened.

¶29 The record is devoid of evidence that R.S. had a motivation to lie. R.S. testified he liked living with his sister and her family and he liked going to the casino with Appellant. Childers testified she saw no evidence of coaching. While the record shows that R.S. had a limited vocabulary and struggled to understand some of the questions asked, R.S.'s testimony that Appellant placed his penis in R.S.'s mouth was crystal clear.

¶30 Considering the totality of the circumstances surrounding R.S.'s hearsay statements, we find that the statements had sufficient indicia of reliability so as to be considered inherently trustworthy and were properly admissible. Therefore, we conclude that the errors associated with omission of the statutory notice and hearing in the present case did not have a substantial influence on the outcome of the trial and were harmless. While the record in this case makes the errors harmless, trial courts need to follow strictly the requirements of the statute as to notice and hearing to ensure no error takes place. Proposition Three is denied.

¶31 In Proposition Four, Appellant challenges the sufficiency of the evidence supporting his conviction. He does not take issue with proof of the elements of the crime. He argues only that R.S.'s testimony was not corroborated and his testimony about the crime was contradictory and inconsistent.

¶32 This Court follows the standard for the determination of the sufficiency of the evidence which the United States Supreme Court set forth in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). *Easlick v. State,* 2004 OK CR 21, ¶ 5, 90 P.3d 556, 559; *Spuehler v. State,* 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04. Under this test, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789 (emphasis in original). A reviewing court must accept all reasons, inferences, and credibility choices that tend to support the verdict. *Taylor v. State*, 2011 OK CR 8, ¶ 13, 248 P.3d 362, 368.

¶33 The testimony of a non-consenting participant in sex crimes does not require corrobo-

ration. *Martin v. State*, 1987 OK CR 265, ¶ 6, 747 P.2d 316, 318. "A conviction may be sustained upon the uncorroborated testimony of the victim unless such testimony appears incredible or so unsubstantial as to make it unworthy of belief." *Jones v. State*, 1988 OK CR 281, ¶ 10, 765 P.2d 800, 802. Additionally, although R.S. was not a child based upon his chronological age, his cognition and ability to communicate were childlike as shown on State's Exhibit 2.

¶34 "A child victim's testimony does not require corroboration when it is lucid, clear, and unambiguous." *Applegate v. State*, 1995 OK CR 49, ¶ 16, 904 P.2d 130, 136. Although a child may give a slightly different story before trial, corroboration is not required when her testimony at trial is consistent. *Id.* Alleged inconsistencies must relate to the actual criminal act rather than related events. *Ray v. State,* 1988 OK CR 199, ¶ 8, 762 P.2d 274, 277. Ultimately, "even sharply conflicting testimony" does not trigger the need for corroboration. *Gilmore v. State,* 1993 OK CR 27, ¶ 12, 855 P.2d 143, 145.

¶35 Reviewing the record in the present case, we find that R.S.'s testimony did not require corroboration. His account was lucid, clear, and unambiguous. Although R.S.'s testimony was not perfect, his overarching description of the sexual act perpetrated by Appellant upon him remained consistent throughout his many statements. Since R.S.'s testimony was properly admitted, the jury was free to consider it in determining Appellant's guilt. Reviewing the evidence in the present case in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Proposition Four is denied.

¶36 In Proposition Five, Appellant claims the trial court should have instructed the jury with Instruction No. 9-20, OUJI-CR (2d) regarding the use of R.S.'s prior inconsistent statements as impeachment evidence. He mentions several statements which he characterizes as inconsistent, but fails to cite to the record where these statements can be found. Appellant claims R.S. denied at preliminary hearing that Appellant's penis was in R.S.'s mouth, so the jury should have been instructed that it could consider his denials as substantive evidence of Appellant's guilt or innocence. This denial is not identified by reference to the record.

¶37 Appellant's failure to cite to the record with regard to the above complained of inconsistencies, results in waiver of those issues from appellate review. Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018). *See also Tryon v. State,* 2018 OK CR 20, ¶ 57, 423 P.3d 617, 636 (appellant failed to cite to the record where the complained of photographs were admitted; thus the claim regarding the photographs was waived pursuant to Rule 3.5(A)(5)). We address the single inconsistency cited in the record, R.S.'s own admission that he previously stated the allegations against Appellant were not true.

¶38 Appellant lodged no objection to the jury instructions, nor did he request additional instructions. Thus, review of this claim is limited to plain error. *Witherow v. State,* 2017 OK CR 17, ¶ 3, 400 P.3d 902, 904. We utilize the definition of plain error review set forth in *Simpson*, 1994 OK CR 40, ¶¶ 2, 11, 23 30, 876 P.2d at 693-95, 698, 700-01. Jury "[i]nstructions are sufficient where they accurately state the applicable law." *Runnels v. State,* 2018 OK CR 27, ¶ 19, 426 P.3d 614, 619.

¶39 In the only cited portion of R.S.'s testimony, on cross-examination R.S. admitted he previously stated the allegations against Appellant did not occur. Consequently, the jury should have been instructed regarding the use of R.S.'s prior inconsistent statement. However, we find no plain error in the trial court's failure to instruct the jury as it did not affect Appellant's substantial rights.

¶40 The record demonstrates the jury was instructed that evidence included witness testimony, that the jury had all of the evidence proper for its determination and that the jury should rely on the evidence to reach its verdict. Thus, the jury was not precluded in any way from considering all of R.S.'s testimony or all the other testimony presented. *Cf. Mitchell v. State*, 2011 OK CR 26, ¶ 104, 270 P.3d 160, 184, *overruled on other grounds by Nicholson v. State*, 2018 OK CR 10, 421 P.3d 890 (no plain error due to trial court's failure to instruct the jury on impeachment of a witness by prior inconsistent statement where other instructions allowed the jury to fully consider all the evidence presented). Moreover, given the relatively light ten year sentence Appellant received, it is clear Appellant was not prejudiced by the omission of the subject jury instruction. Proposition Five is denied.

¶41 In Proposition Six, Appellant contends Palmore vouched for R.S.'s credibility. He ar-

gues Palmore affirmatively stated she believed R.S. was telling the truth about the allegations against Appellant. Appellant did not object to the testimony at issue; therefore, we review this claim for plain error. *Taylor,* 2011 OK CR 8, ¶ 57, 248 P.3d at 379. We utilize the definition of plain error review set forth in *Simpson*, 1994 OK CR 40, ¶¶ 2, 11, 23 30, 876 P.2d at 693-95, 698, 700-01.

¶42 "Evidence is impermissible vouching only if the jury could reasonably believe that a witness is indicating a personal belief in another witness's credibility, either through explicit personal assurances of the witness's veracity or by implicitly indicating that information not presented to the jury supports the witness's testimony." *Simpson v. State*, 2010 OK CR 6, ¶ 36, 230 P.3d 888, 901 (internal quotation omitted). Because Palmore explicitly testified she believed R.S. was telling the truth, this was error. However, we find no plain error in this isolated statement because it did not affect Appellant's substantial rights. *Cf. Bench v. State,* 2018 OK CR 31, ¶ 135, 431 P.3d 929, 966 (prosecutor's isolated reference to extra-record facts did not constitute plain error because the reference did not affect the appellant's substantial rights or prejudice him). *See also Mitchell v. State,* 2016 OK CR 21, ¶ 30, 387 P.3d 934, 945 (no plain error where the appellant failed to show any prejudice).

¶43 R.S.'s own admission, addressed in Proposition Five, showed that R.S. previously told others that the allegations against Appellant were untrue. Erik Smith, R.S.'s nephew, testified that R.S. told him the allegations against Appellant were not true. The jury observed R.S.'s demeanor and those of the other witnesses as they testified and was instructed that it determined the credibility of the witnesses. Additionally, the jury was instructed that it could consider a witness's bias in judging the witness's credibility. Clearly, Palmore's status as R.S.'s mother was a factor that the jury would consider in making its credibility determination. The record shows Appellant suffered no prejudice resulting from Palmore's testimony. Therefore, no plain error occurred. Proposition Six is denied.

¶44 In Proposition Seven, Appellant maintains that his counsel was ineffective. He argues counsel failed to do the following: to request Instruction No. 9-20, OUJI-CR (2d), to object to Palmore's testimony that R.S. was telling the truth about the allegations against Appellant, and to question R.S. regarding prior accusations of sexual assault against anyone besides Appellant.

¶45 This Court reviews ineffective assistance of counsel claims under the two-part test mandated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. "The *Strickland* test requires an appellant to show: (1) that counsel's performance was constitutionally deficient; and (2) that counsel's deficient performance prejudiced the defense." *Id.* To establish prejudice under *Strickland*, a defendant "must show there is a reasonable probability that the outcome of the trial would have been different but for counsel's unprofessional errors." *Barnes v. State,* 2017 OK CR 26, ¶ 17, 408 P.3d 209, 216. We found in Propositions V and VI that Appellant failed to show that plain and reversible error occurred. As a result, Appellant has not shown a reasonable probability that the outcome of the trial would have been different but for counsel's failures. *Runnels*, 2018 OK CR 27, ¶ 38, 426 P.3d at 623-24 (where no plain and reversible error occurred, no reasonable probability that the outcome of the trial would have been different but for counsel's failures was shown).

¶46 Appellant contends R.S. testified at preliminary hearing that he told others that someone besides Appellant did unwanted sexual things to him. However, the record shows Appellant's contention is not entirely borne out by the record. After R.S. gave Smith's name in response to defense counsel's question about whether someone besides Appellant did unwanted sexual things to him, R.S. explained that Smith yelled at Palmore and denied Smith did anything to him. R.S. denied three more times that anyone besides Appellant did unwanted sexual acts with him. Had defense counsel impeached R.S. with his statement about Smith, the State would have clarified the defense interpretation of R.S.'s statement since R.S. denied Smith did anything to him and explained that Smith yelled at R.S.'s mother. Given the lack of clarity in the preliminary hearing record regarding other allegations, counsel made the reasonable strategic decision not to pursue this line of questioning with R.S. *See Lee v. State*, 2018 OK CR 14, ¶ 14, 422 P.3d 782, 786 (where there is a reasonable basis for counsel's actions, trial strategy will not be sec-

ond-guessed on appeal). We find counsel was not ineffective. Proposition Seven is denied.

¶47 In his last proposition, Appellant argues the cumulative effect of the errors in this case deprived him of a fair trial. Although we found four errors, the errors were harmless and did not affect Appellant's substantial rights. "Cumulative error does not require relief where the errors, considered together, do not affect the outcome of the proceedings." *Bosse v. State*, 2017 OK CR 19, ¶ 2, 406 P.3d 26, *cert. denied*, __ U.S. __, 138 S. Ct. 1264 (2018). Any errors found in this case did not require relief, and when considered cumulatively, do not require reversal or modification of the sentence. Proposition Eight is denied.

DECISION

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

AN APPEAL FROM THE DISTRICT COURT
OF BRYAN COUNTY
THE HONORABLE MARK R. CAMPBELL,
DISTRICT JUDGE

APPEARANCES AT TRIAL

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

LEWIS, PRESIDING JUDGE, CONCURS IN PART AND DISSENTS IN PART:

¶1 Concerning the Court's discussion in Proposition Two, I agree that Appellant waived his objection to the complainant's testimony at preliminary examination by failing to file a motion to quash before trial. The trial court later took Appellant's written objection to the complainant's competency under advisement, subject to a further objection when the complainant testified. Appellant never renewed his objection, waiving any error. The record clearly indicates the witness was competent, and any error was harmless. I respectfully dissent from the rest of the discussion, as the Court should either consistently follow the plain error doctrine of *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, or abandon it altogether.

¶2 In *Simpson*, the Court expansively defined an "error" as "a deviation from a legal rule." *Id.*, 1994 OK CR 40, ¶ 10, 876 P.2d at 694. Serious errors or irregularities in preliminary criminal proceedings (involving the initial arrest, complaint, and preliminary examination) could conceivably deprive a defendant of substantial rights, see Okla. Const. art. 2, § 17, or even deprive the trial court of jurisdiction. *Nicodemus v. District Court*, 1970 OK CR 83, ¶ 5, 473 P.2d 312, 314 (lawful preliminary examination, or waiver, is necessary to trial court's jurisdiction). Deviations from the rules governing preliminary proceedings can be waived by a failure to timely object or file a motion to quash before the trial court. But such errors have theoretically remained subject to appellate correction when they seriously affect the fairness, integrity, or public reputation of criminal proceedings, or otherwise result in a miscarriage of justice. *Simpson*, 1994 OK CR 40, ¶ 30, 876 P.2d at 700-701.

¶3 Today the Court needlessly resurrects "the old, draconian rule barring an appellant from any possible relief because his attorney failed to preserve an error" by failing to file a motion to quash at arraignment. *Simpson*, 1994 OK CR 40, ¶ 30, 876 P. 2d at 700. The modern workaround for such waivers is already well known: Appellate counsel can avoid such waivers on appeal simply by claiming that trial counsel's failure to preserve these now-unreviewable preliminary errors violated the defendant's Sixth Amendment right to effective assistance of counsel.

¶4 The Court is then *constitutionally* obliged to assess the underlying, unpreserved claims of error under at least one prong of the two-pronged test of *Strickland v. Washington*, 466

U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), a task which is conceptually intertwined with, and often indistinguishable from, plain error review. *See, e.g., Vanderpool v. State*, 2018 OK CR 39, ¶ 52, 434 P.3d 318, 329 (noting that counsel's failure to object was not prejudicial under *Strickland* because, in part, underlying allegations did not rise to level of "plain error").

¶5 I agree that defense counsel should be strongly encouraged to lodge all viable complaints about the preliminary proceedings with the trial court in the form of timely pre-trial demurrers, motions to quash, and motions to set aside. But the pursuit of this policy through maximalist rules of waiver; and the somewhat more laudable attempts to mitigate harsh waivers through the plain error doctrine, are largely superfluous. Our constitutional system guarantees reasonably effective assistance of counsel at every critical stage of a criminal prosecution, and this Court must enforce that guarantee whenever an attorney's omission results in procedural default of a serious legal error.

¶6 The Court could simplify direct appeals considerably by affording ordinary review on the legal merits of alleged errors preserved by timely objections, and reviewing any unpreserved allegations of error raised by appellate counsel under the Sixth Amendment rubric of ineffective assistance of trial counsel. Plain error review could then be relegated to a judicial fail-safe for the correction of substantial errors noticed in the first instance by the Court.

KUEHN, V.P.J., CONCUR IN PART AND DISSENT IN PART:

¶1 In Proposition II, the Majority overrules case law that applied plain-error review to certain types of unpreserved claims. I join Presiding Judge Lewis in concluding that plain-error review fairly balances the need for timely challenges against the possibility of manifest injustice. That review should not be lightly abandoned.

¶2 *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, provides a simple framework for appellate review of all unpreserved claims. Today the Majority creates a special sub-class of claims that are beyond *Simpson's* reach, but offers no rationale for the classification. Some unpreserved claims are, it seems, better than others. Which unpreserved claims will receive *Simpson's* plain-error review, which will simply be passed over, and what is the rational distinction for such different treatment?

¶3 The Majority finds "historical precedent" for a rule that claims of error confined to preliminary proceedings are beyond this Court's power to correct. This conclusion is the result of some very selective reading. Cases declaring "waiver" of such unpreserved claims, but still considering whether there is plain evidence of prejudice, are legion.[1] Even cases the Majority cites in support of its rule employ this analysis.[2] As Presiding Judge Lewis observes in his separate writing, antiquated and "draconian" rules of waiver – like the one the Majority adopts here – are exactly what *Simpson* sought to abrogate. *Id.*, 1994 OK CR 40 ¶ 30, 876 P.2d at 700. The Court should not be inventing solutions to problems that don't exist.

¶4 In Proposition III, I agree with the Majority that failure to file a notice pleading and hold a reliability hearing as required by statute in this case was error, but I disagree with how the Court resolves the claim. Two witnesses testified about what the victim said to them in this case: the victim's mother and the forensic interviewer. As to the statement made to the mother, no reliability hearing was necessary. The victim said he "had sex with" Appellant, but his mother did not believe him. This brief statement, lacking any detail, was offered only to show why the victim's mother asked Appellant about the matter. It was not offered for the truth of the matter asserted, and was not hearsay. 12 O.S.2011, § 2801(A)(3). Therefore, there was no error in failing to hold a reliability hearing on the statement, nor was there harm in admitting it.

¶5 The detailed descriptions of sexual abuse made by the victim to the forensic interviewer, however, are a different story. Admission of this evidence absent a pretrial reliability hearing, as required by 21 O.S.Supp.2013, § 2803.1, should be reviewed for an abuse of discretion, as Appellant timely objected below on these grounds.[3] *See Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. This Court typically has scoured the record to determine whether the trial court would have found the hearsay admissible, if a proper hearing had been held. I think this practice of substituted judgment should stop, as it only encourages trial courts and prosecutors to continue to neglect the requirements of § 2803.1. The trial court is naturally in a better position to be the fact-finder, and § 2803.1 makes it the trial court's job, not

this Court's. As I have stated before, "[b]ecause hearsay statements from a child victim can have a powerful effect on a jury, the Legislature directs trial courts to review that evidence in advance of its admission, giving both parties a chance to test it and argue for or against its reliability." *Loya v. State*, F-2017-65 (unpub. Aug. 23, 2018) (Kuehn, J., specially concurring). We should honor the intent of that statute, and halt our own review of the record to determine reliability.

¶6 Here, it was an abuse of discretion not to hold the mandatory hearing, and the evidence was inadmissible. However, relief is not warranted as there was ample evidence for the jury to convict Appellant and the error did not result in a miscarriage of justice. 20 O.S.2011, § 3001.1.[4]

LUMPKIN, JUDGE:

1. Appellant must serve 85% of his sentence in Count 1 before becoming eligible for consideration for parole. 21 O.S.Supp.2015, § 13.1. The trial court granted Appellant's demurrer to Count 2, Second Degree Rape, at the conclusion of the State's case.

2. R.S. has Down Syndrome.

3. Vicki Palmore testified at preliminary hearing that her son R.S. had the mental age of a five or six year old child.

KUEHN, V.P.J., CONCUR IN PART AND DISSENT IN PART:

1. *E.g., Jennings v. State*, 92 Okl.Cr. 347, 351, 223 P.2d 562, 565 (1950) ("This court cannot consider questions that were not raised in the trial court as authorized by statute, unless fundamental error prejudicial to the substantial rights of appellant is apparent") (citations omitted); *Franklin v. State*, 17 Okl.Cr. 348, 188 P. 686, 687 (1920) ("Where the defendant fails to question the sufficiency of an information as authorized by the provisions of the code of criminal procedure, he in effect waives any and all defects, except such as are fundamental").

2. *E.g., Money v. State*, 1985 OK CR 46, ¶ 5, 700 P.2d 204, 206 (briefly mentioning waiver, after concluding that "it is not conceivable that the appellant was surprised or prejudiced" by the alleged error); *Hambrick v. State*, 1975 OK CR 86, ¶ 11, 535 P.2d 703, 705 (claim was denied for several reasons; one was "waiver," another was that the defendant "failed to show that he was prejudiced in any of his substantial rights").

3. The Majority outlines this procedure, but then seems to review the claim for harmlessness.

4. "No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or for error in any matter of pleading or procedure, unless it is the opinion of the reviewing court that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." 20 O.S.2011, § 3001.1.

2019 OK CR 25

DANIEL BRYAN KELLEY, Appellant, v. THE STATE OF OKLAHOMA, Appellee

Case No. F-2018-12. October 3, 2019

OPINION

ROWLAND, JUDGE:

¶1 Before the Court is Appellant Daniel Bryan Kelley's direct appeal following his resentencing trial in the District Court of Tulsa County, Case No. CF-2015-694. Kelley was convicted in his original jury trial of First Degree Rape by Instrumentation, After Former Conviction of Two Felonies, in violation of 21 O.S.2011, §§ 1111.1 and 1114(A) (Count 1) and misdemeanor Assault and Battery, in violation of 21 O.S.Supp.2014, § 644 (Count 3). The district court imposed the jury's verdict and sentenced Kelley to twenty years imprisonment and a $5,000.00 fine on Count 1 and ninety days in the county jail on Count 3, with the sentences running concurrently. Kelley appealed. This Court affirmed Kelley's convictions on both counts and his sentence on Count 3, but remanded the case for resentencing on Count 1 because of the erroneous admission of a prior out-of-state conviction for sentence enhancement. *Kelley v. State*, Case No. F-2015-963 (unpublished) (Okl. Cr. July 13, 2017). The prosecution thereafter filed a motion for jury sentencing. The Honorable Sharon K. Holmes, District Judge, presided over Kelley's resentencing trial and sentenced him, in accordance with the resentencing jury's verdict, to life imprisonment.[1] This appeal followed and Kelley raises four issues:

(1) whether he received effective assistance of appellate counsel on direct appeal in Case No. F-2015-963;

(2) whether the district court erred in instructing the jury on the range of punishment;

(3) whether the district court erred in following the mandate of this Court and not allowing him to reject the relief granted by this Court; and

(4) whether his sentence is excessive.

¶2 We find relief is not required and affirm the Judgment and Sentence of the district court.[2]

1. Ineffective Assistance of Counsel

¶3 Kelley contends he is entitled to relief because of ineffective assistance of appellate counsel. Kelley faults appellate counsel in his original direct appeal for failing to advise him of the potential adverse consequences of successfully appealing his conviction and sentence, namely the risk of a longer sentence. According to Kelley, appellate counsel failed to adequately advise him that he could receive a life sentence if he successfully appealed his twenty-year sentence, otherwise he would not

have pursued his sentencing error claim that resulted in resentencing. Kelley maintains that he was under the impression that this Court would honor appellate counsel's request for sentence modification if the Court found merit in his claim. He claims he was prejudiced because he received the maximum punishment at his resentencing trial. This Court granted Kelley's Application for Evidentiary Hearing and Supplementation of Record to investigate his claim. Rule 3.11(B)(3)(b)(ii), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019). The district court found that Kelley failed to prove appellate counsel was ineffective.

¶4 This Court reviews claims of ineffective assistance of appellate counsel to determine: (1) whether counsel's performance was objectively unreasonable; and (2) whether counsel's performance resulted in prejudice and deprived the appellant of a fair proceeding with reliable results. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Logan v. State*, 2013 OK CR 2, ¶ 5, 293 P.3d 969, 973. We indulge a strong presumption that counsel's representation was within the wide range of reasonable professional assistance. *Logan,* 2013 OK CR 2, ¶ 5, 293 P.2d at 973. The burden is on Kelley to affirmatively prove prejudice resulting from his appellate attorney's actions. *Strickland,* 466 U.S. at 693, 104 S. Ct. at 2067. He must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of his appeal would have been different. *Id.* at 694, 104 S.Ct. at 2068. This Court need not determine whether counsel's performance was deficient if there is no showing of harm. *See Logan*, 2013 OK CR 2, ¶ 7, 293 P.3d at 974. Where an evidentiary hearing has been held, this Court gives strong deference to the findings of fact and conclusions of law of the district court, but we decide the ultimate issue concerning whether counsel was ineffective. Rule 3.11(B)(3)(b)(iv), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2019).

¶5 The district court found appellate counsel's failure to advise Kelley either that the Court could elect a different remedy than that requested in the appellate brief, or that resentencing could result in a sentence greater than that originally imposed, did not fall below the objective standard of reasonableness imposed by the Sixth Amendment. The district court further found that Kelley failed to show the necessary prejudice because its review of the evidence showed Kelley would have accepted the risk of a longer sentence and would have elected to submit his sentencing error claim on appeal even had he been warned of the possibility of receiving a longer sentence.

¶6 The record reveals the district court advised Kelley of his right to appeal at formal sentencing of his original trial and Kelley elected to exercise his right. Appellate counsel raised seven propositions of error. Six of the claims, if meritorious, would have resulted in a complete retrial, exposing Kelley, barring acquittal, to a life sentence and the risk a second jury would not be as lenient as his first. The remaining claim alleged an error related to sentencing only. Had appellate counsel not also included the meritorious sentencing issue, a successful appeal would have left Kelley facing a minimum sentence on retrial of twenty years imprisonment instead of ten years imprisonment. Raising the sentencing error was therefore Kelley's only chance of facing a lesser range of punishment if his case was reversed and remanded based on one of the other errors alleged. On appeal, this Court found merit in the sentencing error claim only and opted to remand Kelley's case for resentencing, his request for sentence modification notwithstanding. Faulting appellate counsel for raising a meritorious issue is certainly unusual.[3] The record of the evidentiary hearing, however, uncovered that Kelley was neither advised of the claims raised on his behalf nor of the possible consequences of victory on any claim. Appellate counsel, by his own admission, thought the sentencing error claim was a winner and he considered the possibility of prevailing on the sentencing error claim only, structuring his prayer for relief accordingly to minimize Kelley's exposure. He understood that resentencing was not in Kelley's best interest.[4] Appellate counsel was aware that this Court was not bound by his request for relief and that it could remand Kelley's case for resentencing. He was also aware that the Court had recently rejected an appellant's request for sentence modification in an unrelated case and instead ordered resentencing.

¶7 We need not dwell on whether appellate counsel's representation was deficient in this case because Kelley cannot show the necessary prejudice to prevail.[5] Kelley must show the outcome of his appeal would have been different had appellate counsel advised him of the possible adverse consequences of appealing his original conviction and sentence. In other

words, Kelley must show either that he would not have raised his sentencing error claim or appealed at all. Kelley was unable to convince the district court that he would have forgone his sentencing error claim on direct appeal.

¶8 Appellate counsel wrote Kelley a letter the day after he received the Court's opinion, remanding Kelley's case for resentencing. (State's Exhibit 1) Appellate counsel informed Kelley, via the letter, that he had been granted partial relief because of the improper use of one of his prior convictions for sentence enhancement. Appellate counsel further informed Kelley that "either the judge or the jury will be able to sentence you within a range of ten to life." He pointed out the risk of resentencing, noting specifically "[a]s unfair as it sounds, you could get more than the twenty years that you already have been sentenced to." Shortly thereafter, Kelley spoke with appellate counsel by telephone. During this phone call, appellate counsel followed up on his letter and discussed the present posture of the case. He understood Kelley to approve, after the fact, of his decision to raise the sentencing error claim and to decline his offer to try to dismiss the appeal. Although appellate counsel proposed dismissing Kelley's successful appeal because of the risk of a longer sentence, Kelley said he wanted to proceed. The district court rejected Kelley's testimony disputing appellate counsel's recollection of his willingness to risk resentencing and dismissed appellate counsel's belief that he misunderstood Kelley's intentions about moving forward. The district court found the fact that Kelley wanted to move forward with resentencing, despite his exposure to a longer sentence, was proof he would have raised the sentencing error claim in his direct appeal even if appellate counsel had informed him of the risks of appeal.

¶9 The district court evaluated the credibility of the witnesses and the evidence supports its finding that Kelley would have accepted the risk of resentencing had he been advised of the possible adverse consequences of appealing. Based on the record before us, Kelley has not shown the required prejudice to prevail. For that reason, we deny Kelley's ineffective assistance of appellate counsel claim.

2. Jury Instruction

¶10 Kelley contends the district court abused its discretion by refusing his requested range of punishment jury instruction. Kelley asked the district court to instruct his resentencing jury that the range of punishment for first degree rape by instrumentation, after one former felony conviction was ten to twenty years imprisonment, ten years being the minimum sentence under the applicable habitual offender statute[6] and twenty years being the sentence Kelley received at his original trial.[7] The district court rejected Kelley's argument that due process and fundamental fairness compelled that his original jury's sentence act as the punishment cap for resentencing. We review the district court's ruling for an abuse of discretion. *Barnes v. State*, 2017 OK CR 26, ¶ 22, 408 P.3d 209, 217. An abuse of discretion is any unreasonable or arbitrary ruling made without proper consideration of the facts and law pertaining to the issue. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

¶11 Kelley puts a novel twist on the "clean slate" doctrine to support his claim. The well-established "clean slate" doctrine rests on the premise that once the defendant's original conviction has been wholly nullified at his behest, the slate is wiped clean, retrial is not barred by double jeopardy, and the defendant is subject to the full range of punishment. According to Kelley, when this Court remands a case solely for resentencing, the second jury, out of fairness, should not be allowed to resentence the defendant in excess of the original jury's verdict. He maintains the "clean slate" doctrine should not apply to him and those similarly situated because the underlying conviction has been affirmed and the original jury's sentencing decision deserves deference because that jury decided the level of the defendant's culpability. Because his original jury imposed the minimum sentence of twenty years under its instructions, Kelley argues that its verdict made clear that he was undeserving of the maximum sentence and its decision should enjoy some binding effect. In other words, his second jury should have been constrained by his original jury's intentions since that jury decided the facts of the underlying offense. The only justification for not capping the maximum sentence, he contends, is to punish a defendant for appealing. He asks this Court to remedy this alleged due process violation by remanding his case for a new sentencing proceeding with the range of punishment capped at twenty years imprisonment.[8]

¶12 In *North Carolina v. Pearce*, 395 U.S. 711, 725, 89 S.Ct. 2072, 2080, 23 L.Ed.2d 656 (1969), the Supreme Court held that vindictiveness

against the accused for having successfully overturned his conviction must play no part in the sentence he or she receives after a new trial. In order to assure the absence of vindictive motivation, the Court concluded that whenever a *judge* imposes a more severe sentence upon a defendant after a new trial, the reasons underlying the judge's sentencing decision must affirmatively appear. *Id.* at 726, 89 S.Ct. at 2081 (emphasis added). Otherwise, the presumption arises that a greater sentence has been imposed for a vindictive purpose – a presumption that must be rebutted by '"objective information ... justifying the increased sentence."' *Texas v. McCullough*, 475 U.S. 134, 142, 106 S.Ct. 976, 981, 89 L.Ed.2d 104 (1986) (quoting *United States v. Goodwin*, 457 U.S. 368, 374, 102 S.Ct. 2485, 2489, 73 L.Ed.2d 74 (1982)). The Supreme Court has since made clear that the Pearce presumption of vindictiveness does not apply in every case in which a defendant receives a higher sentence on retrial. *E.g. Alabama v. Smith,* 490 U.S. 794, 802-03, 109 S.Ct. 2201, 2206-07, 104 L.Ed.2d 865 (1989) (holding no presumption of vindictiveness arose where sentence imposed after trial was greater than sentence imposed after guilty plea that defendant succeeded in vacating); *Chaffin v. Stynchcombe,* 412 U.S. 17, 26-28, 93 S.Ct. 1977, 1982-83, 36 L.Ed.2d 714 (1973) (holding no presumption of vindictiveness arose when second jury on retrial following successful appeal imposed a higher sentence than a prior jury). The evil that *Pearce* sought to rectify was eliminating vindictiveness in the retrial process rather than preventing the imposition of an increased sentence on retrial, since valid reasons associated with the need for discretion in the sentencing process exist. *Smith*, 490 U.S. at 799, 109 S.Ct. at 2204-05. Where there is no reasonable likelihood the increase in punishment was the result of vindictiveness, the burden remains with the defendant to prove actual vindictiveness. *Id.* at 799-800, 109 S.Ct. at 2205.

¶13 Kelley cites no authority holding the "clean slate" doctrine operates differently at a resentencing trial versus a complete retrial. Nor does he offer any authority holding that a defendant should not, or is not, subject to the full range of punishment provided by law at a resentencing proceeding. *See Chaffin,* 412 U.S. at 25, 93 S.Ct. at 1982 (recognizing the possibility of a higher sentence has been accepted as a legitimate concomitant of the retrial process). Even though *Chaffin* is a complete retrial case, it is particularly instructive. Chaffin successfully appealed his original conviction and jury sentence of fifteen years. *Id.* at 18-19, 93 S.Ct. at 1978-79. At his retrial, the jury again returned a guilty verdict and fixed punishment at life imprisonment. *Id.* at 19-20, 93 S.Ct. at 1979. Chaffin argued on appeal that it was improper and unfair for the State to allow the second jury to render a harsher sentence on retrial. The Supreme Court rejected his arguments and held:

> Guided by the precedents of this Court, these are the conclusions we reach. The rendition of a higher sentence by a jury upon retrial does not violate the Double Jeopardy Clause. Nor does such a sentence offend the Due Process Clause so long as the jury is not informed of the prior sentence and the second sentence is not otherwise shown to be a product of vindictiveness. The choice occasioned by the possibility of a harsher sentence, even in the case in which the choice may in fact be 'difficult,' does not place an impermissible burden on the right of a criminal defendant to appeal or attack collaterally his conviction.

Id. at 35, 93 S.Ct. at 1987.

¶14 The record shows Kelley's jury at his resentencing trial was unaware of the original sentence meted out by his former jury. Kelley's resentencing jury was also not informed that he had successfully appealed and won a new sentencing trial. The district court instructed the jury on the applicable range of punishment under Section 51.1, and the jury fixed punishment within the range provided without any evidence of vindictiveness appearing in the record. Based on the reasoning in *Chaffin*, Kelley has neither established a violation of due process, nor has he shown the district court abused its discretion in refusing his range of punishment instruction. Accordingly, we find the district court did not err in refusing to cap Kelley's punishment range at twenty years imprisonment. This claim is denied.

3. Resentencing Relief

¶15 Kelley argues the district court abused its discretion by not permitting him to reject the resentencing relief ordered by this Court on direct appeal in *Kelley v. State*, Case No. F-2015-963 (unpublished) (Okl. Cr. July 13, 2017). Kelley unsuccessfully sought reconsideration of his request for sentence modification via a Petition for Rehearing after the Court handed down its decision ordering resentencing. 22 O.S.2011, § 1066. He also objected to resentenc-

ing below prior to jury selection at his resentencing trial.

¶16 The parties agree there is no mechanism to dismiss an appeal once it has been decided by this Court. Kelley exercised his right to appellate review of his conviction. When this Court decided his appeal in a way that exposed him to a greater sentence than originally imposed, Kelley understandably wanted the option to reject the ordered relief and essentially rescind his decision to appeal. If a criminal defendant avails himself of the appellate process, this Court's decision is binding once decided and will not be recalled absent a finding by the Court that the appeal was improvidently decided. This Court denied rehearing in Kelley's original direct appeal because the issued opinion disposed of all issues raised based on appropriate authority.

¶17 The opinion ordering resentencing was binding on the parties and Kelley provides no authority allowing a district court to ignore a directive from an appellate court. We therefore find that Kelley has not shown that the district court abused its discretion by conducting the ordered resentencing trial and disallowing his request, for all intents and purposes, to dismiss his decided appeal. This claim is denied.

4. Excessive Sentence

¶18 Kelley contends his sentence of life imprisonment is excessive because his original jury sentenced him to only twenty years and the facts of his case do not warrant a life sentence. "This Court will not disturb a sentence within statutory limits unless, under the facts and circumstances of the case, it shocks the conscience of the Court." *Thompson v. State,* 2018 OK CR 32, ¶ 16, 429 P.3d 690, 694.

¶19 Kelley's sentence is within the range of punishment provided by law for first degree rape by instrumentation after a former felony conviction. The evidence showed he attacked and violated a vulnerable woman resulting in physical injury. His prior conviction was for assault with a dangerous weapon committed two years prior to the instant crime. Kelley is unable to show his harsher sentence was the product of vindictiveness for having successfully attacked his first sentence. His resentencing jury heard the evidence of the crime along with his record and fixed punishment at the maximum. The sentence, though harsh, was not patently undeserved based on the evidence. For these reasons, we find that Kelley's life sentence does not meet our "shock the conscience" test and that his claim of excessive sentence is without merit.

DECISION

¶20 The Judgment and Sentence of the district court is **AFFIRMED**. Kelley's request for oral argument 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 delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY THE HONORABLE SHARON K. HOLMES, DISTRICT JUDGE

APPEARANCES AT TRIAL

Rebecca Newman, Stuart Southerland, Assistant Public Defenders, 423 S. Boulder Ave., Ste. 300, Tulsa, OK 74103-3805, Counsel for Defendant

Kenneth Elmore, Kevin Keller, Asst. District Attorneys, 500 S. Denver, Tulsa, OK 74103, Counsel for State

APPEARANCES ON APPEAL

Nicole Dawn Herron, Tulsa County Public Defender's Office, 423 S. Boulder Ave., Ste. 300, Tulsa, OK 74103-3805, Counsel for Appellant

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

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

LEWIS, PRESIDING JUDGE, SPECIALLY CONCURRING:

¶1 This case serves as a cautionary reminder of the considerable risks of pursuing a criminal appeal that often receive too little attention or discussion between appellate defense attorneys and their clients. Whenever practically possible, appellate defense counsel should "explain to the client the advantages and disadvantages of an appeal including . . . the possibility that if the client prevails on appeal, a remand could result in a less favorable disposition." *ABA Standards for Criminal Justice, Defense Function* 4-9.1(a).

¶2 I would specifically find that counsel's proven omission to timely convey such advice as part of appellate representation is unreasonably deficient performance within the meaning of *Strickland*. Indeed, the record in this case surely supports such a finding. Where such a breach of prevailing professional standards has materially disadvantaged the defendant, the government, rather than the defendant, must generally bear the burden of counsel's error.

¶3 Appellant has not shown here that he suffered a legally cognizable harm as a result of counsel's error. He can hardly deny that his original sentencing trial was affected by substantial error, or that this Court's reversal effectively vindicated his right to sentencing by a properly instructed jury. While proper advice from counsel about the risks of advancing this claim on appeal might have dissuaded some appellants, I cannot say that the trial court's factual conclusion on that question is utterly contrary to the logic and effect of the facts presented. Applying proper deference, the trial court's findings must be affirmed.

¶4 Counsel's adherence to prevailing professional standards concerning the duty to provide accurate and timely advice about the significant risks of a criminal appeal would likely prevent such troubling questions in the future.

ROWLAND, JUDGE:

1. Under 21 O.S.Supp.2015, § 13.1, Kelley must serve 85% of his sentence of imprisonment before he is eligible for parole consideration.

2. Kelley requested oral argument, claiming the issues involved in this case are novel. We find oral argument would not be beneficial and is not necessary for a determination of the issues raised. Rule 3.8, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019).

3. The typical ineffective assistance of appellate counsel claim involves the omission of an issue on appeal and the Court is required to examine the merits of the omitted claim to determine if raising the claim would have changed the outcome of the appeal.

4. Andrea Miller, head of the Appellate Division of the Oklahoma County Public Defender's Office, testified that her practice, as well as office policy, is to advise clients of appellate consequences especially when victory could expose the defendant to a lengthier sentence.

5. Best practices dictate that appellate counsel somehow advise a client of the appellate process, the likelihood of success on appeal, and the attendant risks associated with pressing any particular claim so the client can make an informed and intelligent decision whether or not to raise an issue or appeal at all. *ABA Standards for Criminal Justice, Defense Function* 4-9.1(a), 4-9.2(c), 4-9.3(a)(2015).

6. 21 O.S.2011, § 51.1(A)(1).

7. The range of punishment under Section 51.1(A)(1) is ten years to life imprisonment.

8. This remedy Kelley contends would 1) satisfy the court's preference for resentencing; 2) prevent a prosecutor from capitalizing on his or her mistakes; and 3) ensure the fact finder's culpability decision is preserved.

9. Section 1066 provides in relevant part:

> The appellate court may reverse, affirm or modify the judgment or sentence appealed from, and may, if necessary or proper, order a new trial or resentencing. In either case, the cause must be remanded to the court below, with proper instructions, and the opinion of the court, within the time, and in the manner, to be prescribed by rule of the court.

NOTICE

Oklahoma Bar Association 2020 Proposed Budget

Pursuant to Article VII, Section 1 of the Rules Creating and Controlling The Oklahoma Bar Association, Susan B. Shields, President-Elect and Budget Committee Chairperson, has set a Public Hearing on the 2020 Oklahoma Bar Association budget for Thursday, October 17, 2019, at 10 a.m. at the Oklahoma Bar Center, 1901 N. Lincoln Boulevard, Oklahoma City, Oklahoma.

The purpose of the OBA is to engage in those activities enumerated in the Rules Creating and Controlling the Oklahoma Bar Association ("the Rules") and the OBA Bylaws ("the Bylaws"). The expenditure of funds by the OBA is limited both as set forth in the Rules and Bylaws and in *Keller v. State Bar of California*, 496 U.S. 1 (1990). If any member feels that any actual or proposed expenditure is not within such purposes of, or limitations on the OBA, then such member may object thereto and seek a refund of a pro rata portion of his or her dues expended, plus interest, by filing a written objection with the Executive Director. Each objection must be made in writing on an OBA Dues Claim Form, addressed to the Executive Director of the OBA, P.O. Box 53036, Oklahoma City, OK 73152, and postmarked not later than Sixty (60) days after the approval of the Annual Budget by the Oklahoma Supreme Court or January 31st of each year, whichever shall first occur. Objection procedure and form are available at tinyurl.com/duesclaimformandpolicy.

Upon receipt of a member's written objection, the Executive Director shall promptly review such objection together with the allocation of dues monies spent on the challenged activity and, in consultation with the President, shall have the discretion to resolve the objection, including refunding a pro rata portion of the member's dues, plus interest or schedule a hearing before the Budget Review Panel. Refund of a pro rata share of the member's dues shall be for the convenience of the OBA, and shall not be construed as an admission that the challenged activity was or would not have been within the purposes of or limitations on the OBA.

The proposed budget begins on the next page.

OKLAHOMA BAR ASSOCIATION
2020 PROPOSED BUDGET

For expanded detail, go to tinyurl.com/2020expandedbudget

REVENUES	2020 PROPOSED BUDGET		2019 BUDGET	
ADMINISTRATIVE:				
Dues and Penalties	$ 4,206,750		$ 4,173,000	
Investment Income	100,000		85,000	
Annual Meeting	45,000		50,000	
Commissions and Royalties	30,000		28,000	
Mailing Lists and Labels	5,000		5,000	
Council on Judicial Complaints - Rent and Services	10,000		10,000	
Board of Bar Examiners - Rent and Services	15,000		15,000	
Legal Intern Fees	6,000		6,000	
Other	11,000	$ 4,428,750	10,500	$ 4,382,500
OKLAHOMA BAR JOURNAL AND COMMUNICATIONS:				
Oklahoma Bar Journal:				
Advertising Sales	150,000		175,000	
Subscription Sales	27,000		23,000	
Other Miscellaneous	-	177,000	-	198,000
LAW RELATED EDUCATION:				
Grants	0	0	-	0
CONTINUING LEGAL EDUCATION:				
Seminars and Materials	1,014,200	1,014,200	996,500	996,500
GENERAL COUNSEL:				
Disciplinary Reinstatements	10,000		14,000	
Cerficates of Good Standing	22,000		22,000	
Out of State Attorney Registration	349,200	381,200	349,200	385,200
MANDATORY CONTINUING LEGAL EDUCATION:				
Filing Penalties	112,000		113,000	
Provider fees	94,100	206,100	88,600	201,600
PRACTICE ASSISTANCE				
Consulting Fees and Material Sales	1,000		1,000	
Online Formbook	-		1,500	
Diversion Program	12,500	13,500	12,500	15,000
COMMITTEES AND SPECIAL PROJECTS:				
Mock Trial Program	52,500		52,220	
Lawyers Helping Lawyers	26,750		26,744	
Insurance Committee	27,000		23,000	
Women-in -Law Conference	30,000		30,000	
Solo-Small Firm Conference	80,000		80,000	
Diversity Committee Conference	10,000		10,000	
Oklahoma Lawyers for America's Heroes Program	5,000		4,000	
YLD Kick It Forward Program	2,300		2,000	
Leadership Academy	800		-	
Young Lawyers Division	3,000	237,350	3,000	230,964
TOTAL REVENUES		$ 6,458,100		$ 6,409,764

OKLAHOMA BAR ASSOCIATION
2020 PROPOSED BUDGET

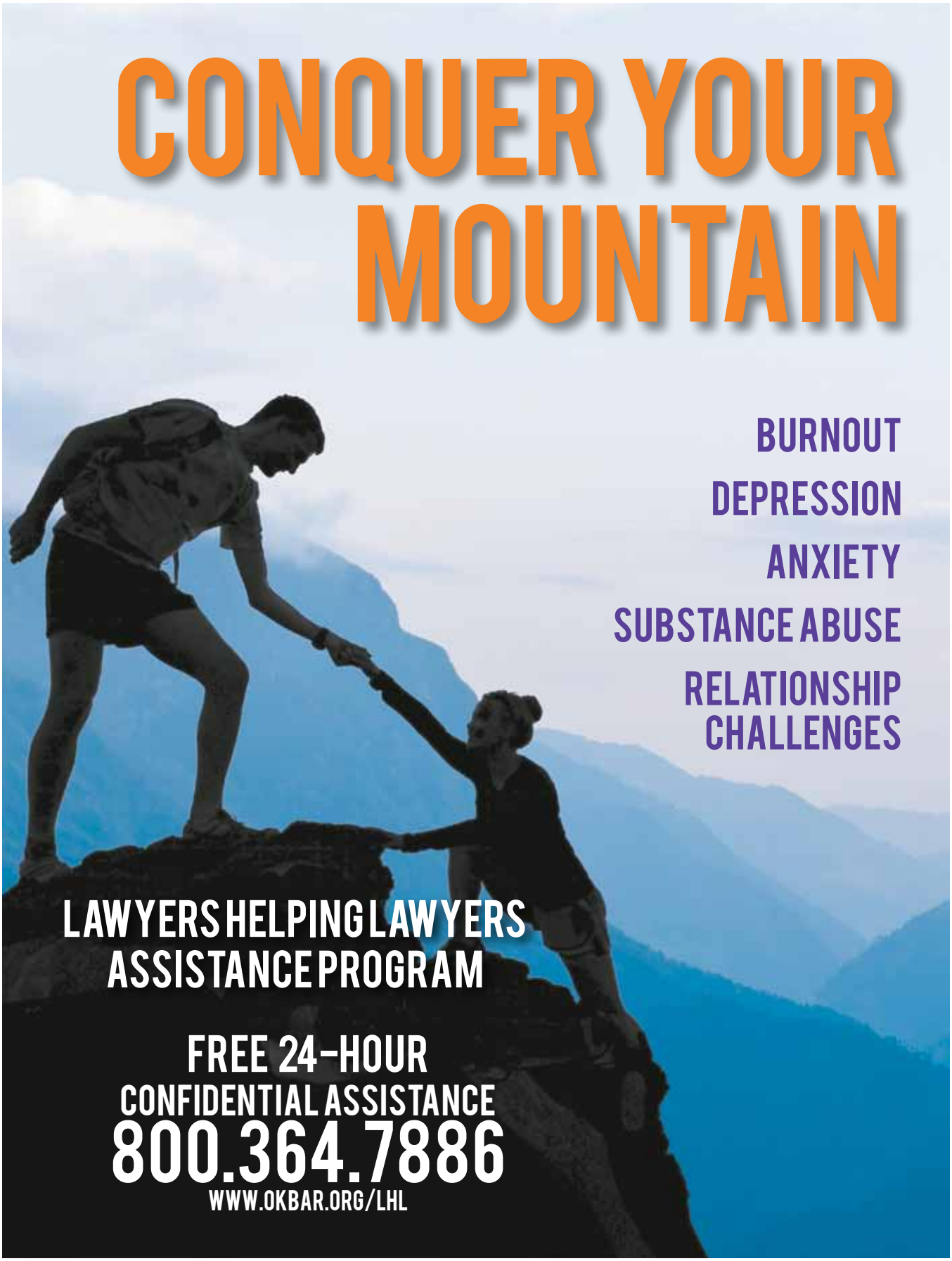
For expanded detail, go to tinyurl.com/2020expandedbudget

EXPENDITURES	2020 PROPOSED BUDGET		2019 BUDGET	
ADMINISTRATIVE:				
Salaries and Benefits	$ 1,041,302		$ 1,015,119	
Annual Meeting	105,000		105,000	
Board of Governors and Officers	115,000		111,000	
Conferences and Organizational Development	16,200		18,200	
Legislative Monitoring	46,000		46,000	
General and Administrative:				
Utilities	120,000		121,000	
Insurance	50,000		46,000	
Data Processing	242,124		242,124	
Bank and Credit Card Processing Fees	100,000		85,000	
Building and Equipment Maintenance	114,000		89,000	
Postage	35,000		42,000	
Copier	38,000		42,000	
Supplies	21,700		27,060	
Grounds Maintenance	10,000		8,000	
Audit	20,500		20,000	
Legal	50,000		0	
Miscellaneous	18,500		27,000	
Overhead Allocated to Departments	(480,358)	$ 1,662,967	(476,848)	$ 1,567,655
COMMUNICATIONS				
Salaries and Benefits	307,815		314,191	
Oklahoma Bar Journal:				
Weekly Issue Printing	45,000		45,000	
Special Issue Printing	160,000		165,000	
Other	4,000		4,000	
Public Information Projects	5,000		5,000	
Newsclip Service	3,700		3,700	
Pamphlets	5,000		5,000	
Photography	200		200	
Supplies	250		500	
Miscellaneous	9,700		10,700	
Allocated Overhead	100,177	640,842	100,688	653,979
LAW RELATED EDUCATION:				
Salaries and Benefits	0		0	
Other Grant Projects	0		0	
Training, Development and Travel	6,000		8,000	
Newsletter	0		0	
Miscellaneous	0	6,000	0	8,000
CONTINUING LEGAL EDUCATION:				
Salaries and Benefits	399,926		389,816	
Meeting Rooms and Food Service	60,000		60,000	
Seminar Materials	5,000		5,000	
Brochures and Bulk Mail	27,500		37,500	
Speakers	80,000		80,000	
Audio/Visual	3,000		3,000	
Online Provider Service Fees	181,200		168,200	
Credit Card Processing Fees	29,000		28,000	
Department Travel	1,500		5,000	
Supplies	1,200		2,000	
Miscellaneous	14,000		15,000	
Allocated Overhead	134,601	936,927	136,620	930,136

OKLAHOMA BAR ASSOCIATION
2020 PROPOSED BUDGET

For expanded detail, go to tinyurl.com/2020expandedbudget

EXPENDITURES	2020 PROPOSED BUDGET		2019 BUDGET	
GENERAL COUNSEL:				
Salaries and Benefits	$ 1,352,907		$ 1,321,188	
Investigation and Prosecution	66,000		63,000	
PRC Travel and Meetings	3,500		3,500	
PRT Travel and Meetings	10,000		10,000	
Department Travel	9,500		9,250	
Library	4,500		6,000	
Supplies	12,000		10,000	
Miscellaneous	11,300		8,300	
Allocated Overhead	129,866	$ 1,599,573	127,612	$ 1,558,850
MANDATORY CONTINUING LEGAL EDUCATION:				
Salaries and Benefits	246,137		241,100	
Printing & Compliance Reporting	1,500		3,000	
Supplies	150		200	
Commission Travel	1,000		1,000	
Miscellaneous	10,250		10,500	
Allocated Overhead	57,857	316,894	55,964	311,764
PRACTICE ASSISTANCE				
Salaries and Benefits	387,384		398,047	
OBA-NET Expense	0		0	
Dues & Subscriptions	1,900		1,900	
Library	1,000		1,300	
Computer Software	2,750		1,850	
Supplies	750		1,000	
Diversion Programs	1,700		2,000	
Travel and Conferences	19,800		20,000	
Miscellaneous	5,700		7,900	
Allocated Overhead	57,857	478,841	55,964	489,961
COMMITTEES AND SPECIAL PROJECTS:				
Law Day	50,000		60,000	
Women-in -Law Conference	30,000		30,000	
Solo-Small Firm Conference	80,000		80,000	
Mock Trial Program	54,620		54,620	
FastCase Legal Research	91,000		91,000	
Leadership Institute	10,000		9,000	
General Committees	34,500		49,688	
Lawyers Helping Lawyers Program	120,000		61,800	
Oklahoma Lawyers for America's Heroes Program	25,000		22,000	
Public Education Initiative	2,000		2,000	
President's Service Program	5,000		5,000	
YLD Kick It Forward Program	3,300		2,750	
Young Lawyers Division	76,700	582,120	75,700	543,558
OTHER EXPENDITURES				
Client Security Fund Contribution	175,000		175,000	
Bar Center Renovations	0		50,000	
Furniture and Equipment	12,200		32,000	
Computer Hardware and Software	235,976	423,176	99,585	356,585
TOTAL EXPENDITURES		6,647,341		6,420,488
TOTAL REVENUES OVER (UNDER) EXPENDITURES		(189,241)		(10,724)
TRANSFER FROM RESERVE FUNDS:				
Technology Fund		235,976		84,985
AG Grant Fund		3,000		3,000
Bar Center Improvements Fund		-		50,000
NET SURPLUS (DEFICIT)		$ 49,735		$ 127,261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TITLE EXAMINATION STANDARDS

2019 Report of the Title Examination Standards Committee of the Real Property Law Section

Proposed Amendments to Title Standards for 2020, to be presented for approval by the House of Delegates, Oklahoma Bar Association at the Annual Meeting, November 8, 2019. Additions are underlined, deletions are indicated by ~~strikeout~~.

The Title Examination Standards Sub-Committee of the Real Property Law Section proposes the following revisions and additions to the Title Standards for action by the Real Property Law Section at its annual meeting in Oklahoma City on Thursday, November 7, 2019.

Proposals approved by the Section will be presented to the House of Delegates at the OBA Annual Meeting on Friday, November 8, 2019. Proposals adopted by the House of Delegates become effective immediately.

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

PROPOSAL NO. 1

The Committee proposes to add new to Standard 23.11, in order to reflect results in the holdings of Taracorp V. Dailey, 2018 OK 32, and Automotive Finance Corporation v. Rogers, 2019 OK CIV APP 16 as to foreign money judgments.

23.11 FOREIGN MONEY JUDGMENTS AND LIENS.

A. Foreign Money Judgments. An authenticated copy of a money judgment rendered by a court of the United States, or by any other court entitled to full faith and credit in Oklahoma, may be filed in the district court clerk's office in any county in Oklahoma. Such money judgment shall have the same effect as a money judgment of a district court in Oklahoma, subject to the provisions regarding notice and possible stay outlined in the Uniform Enforcement of Foreign Judgments Act, Title 12 O.S. §719, et seq.

B. Lien Created Pursuant to a Foreign Money Judgment. A judgment lien, pursuant to a properly-filed foreign money judgment, can be created by compliance with the provisions of Title 12 O.S. §706.

Comment: It should be noted that a foreign money judgment can be filed in Oklahoma, as outlined above, at any time during the period in which the original judgment or any renewal of the original judgment is enforceable pursuant to the laws of the state of origin for such judgment.

Authority:

Taracorp v. Dailey, 2018 OK 32

Automotive Finance Corporation v. Rogers, 2019 OK CIV APP 16

Note: See Title Examination Standard 35.4 regarding the lack of authority of a foreign state court to establish or convey title to Oklahoma real property.

PROPOSAL NO. 2

The Committee recommends Comment 3 to Standard 17.4 be amended as follows to clarify the intent of the comment and the Title Examination Standards Sub-Committee and to add Comment 10 to clarify no additional instruments are required after a transfer on death deed has been revoked.

17.4 TRANSFER-ON-DEATH DEEDS

Comment 3: The examiner should be aware that the grantor's interest is subject to the homestead rights of a surviving spouse pursuant to Article 12 Section 2 of the Oklahoma Constitution. The examiner should be provided with satisfactory evidence which must be recorded, such as an affidavit as to marital status or death certificate of the grantor showing no surviving spouse. If the evidence provided to the examiner reveals that the grantor had a spouse at the time of death, and the surviving spouse did not execute the Transfer on Death Deed under examination, the examiner shall require a quit claim deed from the surviving spouse, showing marital status and joined by spouse, if any.

Comment 10: If the Grantor of a TOD deed revokes the TOD deed, no further instrument is required to terminate the potential interest of the Grantee of the revoked TOD deed. A TOD deed can be revoked by recording in the land records of the County where the TOD deed is recorded any one of the following executed by the Grantor of the TOD deed:

(i) an instrument specifically revoking the TOD deed,

(ii) a subsequently executed TOD deed covering the real property described in the original TOD deed, or

(iii) a subsequent deed which immediately vests in the grantee of the deed the title to the real property described in the TOD deed.

Authority: 58 O.S. §§ 1252A, 1254 A and B and 1257.

PROPOSAL NO. 3

The Committee recommends Standard 14.10 be amended as follows to add a new sub-paragraph "A" and a new "Comment 1", and to renumber the previous sub-paragraphs and Comments, to clarify the ownership in a Series LLC during various time periods.

14.10 LIMITED LIABILITY COMPANY WITH SERIES

A. PRIOR TO NOVEMBER 1, 2004: A properly created or domesticated LLC could not establish Series.

~~A~~B. ~~Prior to November 1, 2017,~~ BEGINNING NOVEMBER 1, 2004 THORUGH OCTOBER 31, 2017: Title ~~title~~ to real property which is to be held under a properly created LLC ~~limited liability company~~ with established Series ~~series~~, domestic or foreign, must be acquired, held and conveyed in the name of the ~~limited liability company~~LLC, with appropriate indication that such title is held for the benefit of the specific series.

~~B~~C. ~~Beginning November 1, 2017, unless~~ BEGINNING NOVEMBER 1, 2017: Unless otherwise provided in the operating agreement, a Series ~~series~~ established in accordance with subsection B of 18 O.S. §2054.4 (with the exception of the business of a domestic insurer) shall have the power and capacity to, in its own name, hold title to assets including real property.

Comment 1: Prior to November 1, 2017, if a conveyance has been made to a Series; the examiner should require a corrective conveyance from the original grantor.

Comment ~~1~~ 2: ~~Prior to November 1, 2017,~~ Beginning November 1, 2004 through October 31, 2017, because a series is merely an attribute of the LLC, the series ~~may~~ could not hold ~~title~~ real property in its own name independent of the LLC. Examples of acceptable designations of the grantor or grantee in ~~an instrument conveying title to real property to or from a particular series~~ a conveyance to or from an LLC for a Series would be one of the following:

A) Master, LLC, an Oklahoma limited liability company, as Nominee for its Series ABC;

B) XYZ, LLC, a Texas limited liability company, on behalf of its Series ABC;

C) DEF, LLC, a Delaware limited liability company, for the benefit of its Series 2016-A.

~~In the event an LLC, which has merely provided for the establishment of series, acquires property prior to the actual establishment of such series or otherwise acquires property in the name of the LLC, the LLC shall evidence such transfer of interest from the LLC itself to the LLC for the benefit of the series, by appropriate conveyance.~~

Comment 3: Beginning November 1, 2004, if an LLC, prior to the establishment of a Series acquired property, the LLC shall convey to:

A) The LLC for the benefit of the Series; or

B) The Series (on or after November 1, 2017).

Comment ~~2~~ 4: Beginning November 1, 2017, to ensure the Series ~~has not been~~ is not prohibited from holding title to real property in its own name, ~~title~~ the examiner may rely upon ~~an~~ a properly recorded affidavit of the LLC Manager ~~properly recorded in the land records of the county where the real property is located~~, stating the Series at the time it acquired title to the real property, had the power and capacity to hold ~~title to real estate~~ real property.

Comment 5: This Standard does not address the situation of real property held by a wholly owned subsidiary LLC, which is an entity capable of acquiring, holding and conveying real property in its own name.

PROPOSAL NO. 4

The Committee recommends Standard 7.2 be amended as follows to add a new sub-paragraph "D" and to revise the Comments to reflect the amendment of 16 O.S. §13.

C. The grantee is the spouse of the individual grantor and that fact is recited by the grantor in the body of the instrument~~.~~; or

D. In the event a recorded conveyance of nonhomestead property has been executed by a married grantor without being joined by his or her spouse, said conveyance shall be marketable if one of the following instruments is placed of record:

1. An affidavit executed by the nonjoining spouse stating that the property conveyed was nonhomestead property; or

2. A conveyance executed by the nonjoining spouse, with or without others, relinquishing any claim to an interest in the property to the same grantee, or to a successor or successors in interest, with a recitation that the property was nonhomestead property.

Comment 1: There is no question that an instrument relating to the homestead is void unless both spouses subscribe it. *Grenard v. McMahan, 1968 OK 75, 441 P.2d 950, Atkinson v. Barr, 1967 OK 103, 428 P.2d 316*, but also see *Hill v. Discover Bank, 2008 OK CIV APP 111, 213 P.3d 835*. It is also settled that both spouses must execute the same instrument, as separately executed instruments will be void. *Thomas v. James, 1921 OK 414, 202 P. 499*. It is essential to make the distinction between a valid conveyance and a conveyance vesting marketable title when consulting this standard. This distinction is important because the impossibility of determining from the record whether or not the land is homestead, requires the examiner, for marketable title purposes, to (1) assume that all real property is homestead, and (2) consequently, always require joinder of both spouses on all conveyances. ~~Although a~~A deed of non-homestead real property, signed by a title-holding married person without the joinder of their spouse, will be valid as between the parties to the deed~~, it cannot confer marketable record title.~~ and can confer marketable title upon the satisfaction of Sub-Part (D) above.

Comment 2: While 16 O.S. § 13 states that "The husband or wife may convey, mortgage or make any contract relating to any real estate, other than the homestead, belonging to him or her, as the case may be, without being joined by the other in such conveyance, mortgage or contract," joinder by both spouses must be required in all cases due to the impossibility of ascertaining from the record whether the property was or was not homestead or whether the transaction is one of those specifically permitted by statute. See 16 O.S. §§ 4 and 6 and Okla. Const. Art. XII, §2. A well-settled point, prior to amendment of 16 O.S. § 13, effective November 1, 2019, was ~~is~~ that one may not rely upon recitations, either in the instrument or in a separate affidavit, to the effect that property was not the homestead. Such recitation by the grantor may be strong evidence when the issue is litigated, but it cannot be relied upon for the purpose of establishing marketability. *Hensley v. Fletcher, 172 Okla. 19, 44 P.2d 63 (1935)*. However, the 2019 amendment authorized the use of affidavits and conveyances, executed by the nonjoining spouse and placed of record within ten (10) years of the filing of a conveyance described in 16 O.S. § 13(B), to evidence the property was not homestead and establish marketability.

PROPOSAL NO. 5

The Committee recommends Standard 34.2 be amended as follows to correct references and time limits.

A. Exempt Assets

…

E. Judgment Liens in Bankruptcy

…

5. For the title to real property passing through bankruptcy proceedings to be free and clear of a pre-petition judgment lien, the abstract being examined should contain, or the examiner should review certified copies of, the motion requesting that the lien be avoided pursuant to 11 U.S.C. § 522(f) and Fed. R. Bankr. P. 4003(d) and the order granting said motion. *Id.* and *Coats v. Ogg* (*In re: Ogg*), ~~— F.3d —~~, 1999 WL 218774, BAP No. EO-98-028 (10th Cir. 1999).

Comment: BKR 4003(d) provides that a proceeding to avoid a lien under 11 U.S.C. § 522(f) is by motion pursuant to Rule 9014 Fed. R. Bankr. P., which provides at (b) that service shall be as in service of summons pursuant to Rule ~~704 Fed. R. Bankr. P. Rule~~ 7004(h)~~;~~ Fed. R. Bankr. P.~~,~~ which provides for service on an Insured Depository Institution.

B. Abandonment

…

B. The Schedule of Real Property (Schedule "B-1" for cases filed prior to August 1, 1991, or Schedule "A" for cases filed on or after August 1, 1991) showing that the debtor(s)' interest in the property was disclosed. 11 U.S.C. § 521(a)(1) and Fed.R.Bankr.P. 1007(b) & 4002(a)(3).

C. If a trustee has been appointed in the case, evidence of the qualification of the case trustee to serve in that capacity. Such evidence shall consist of either:

1. Evidence that the trustee has filed with the bankruptcy court a bond in favor of the United States conditioned on the faithful performance of the trustee's official duties and transmitted notice of the acceptance of the office to the court and to the United States trustee within ~~five (5)~~ seven (7) days of receipt of the notice of selection. 11 U.S.C. § 322(a) and Fed.R.Bankr.P. 2008; or

2. If the trustee has filed a blanket bond pursuant to Fed.R.Bankr.P. 2010, evidence that the trustee did not reject the appointment within ~~five~~ seven (7) days of receipt of notice of the appointment. 11 U.S.C. § 322(a) and Fed.R.Bankr.P. 2008; or

…

E. If the property was affirmatively abandoned by either the case trustee or a debtor-in-possession:

…

2. Evidence that there was no objection to the notice of abandonment filed within ~~eighteen (18)~~ fourteen (14) days of the date of mailing of the notice. Fed.R.Bankr.P. 6007(a) and 9006(f); or

…

C. Sales

…

B. The Schedule of Real Property (Schedule "B-l" for cases filed prior to August 1, 1991, or Schedule "A" for cases filed on or after August 1, 1991) showing that the debtor(s)' interest in the property was disclosed. 11 U.S.C. § 521(a)(1) and Fed.R.Bankr.P. 1007(b) & 4002(a)(3).

C. If a trustee has been appointed in the case, evidence of the qualification of the case trustee to serve in that capacity. Such evidence shall consist of either:

1. Evidence that the trustee has filed with the bankruptcy court a bond in favor of the United States conditioned on the faithful performance of the trustee's official duties and transmitted notice of the acceptance of the office to the court and to the United States trustee within ~~five (5)~~ seven (7) days of receipt of the notice of selection. 11 U.S.C. § 322(a) and Fed.R.Bankr.P. 2008; or

…

E. Evidence that the debtor, the trustee, all creditors and indenture trustees, any committees formed pursuant to Sections 705 or 1102 and the United States trustee received at least ~~twenty (20)~~ twenty-one (21) days notice of the proposed sale. Fed.R.Bankr.P. 2002(a)(2), (i) and (k).

…

D. Sales Free and Clear of Liens

Section 363(f) of the Bankruptcy Code allows a movant to conduct a sale of estate property free and clear of certain specified interests that may encumber the interest being sold. In a Chapter 12 case, that authority is supplemented by Section ~~1208~~ 1206. If a sale free and clear of interests is encountered, in addition to the materials indicated in the immediately preceding section, the abstract being examined should contain, or the examiner should review certified copies of, the following:

A. The notice of sale discussed in TES 34.2.~~III.~~C. Sales E. and F. should also contain the date of the hearing on the motion and the time within which objections may be filed and served on the debtor-in-possession or trustee. Fed.R.Bankr.P. 6004(c).

…

E. Transfers Pursuant to a Confirmed Chapter 11 Plan

…

A. The Plan and the court approved Disclosure Statement

1. The Plan and Disclosure Statement are filed concurrently. Fed.R.Bankr.P. 3016~~(c)~~(b).

B. Approval of the Disclosure Statement

1. When the Plan and Disclosure Statement are filed, in accordance with Fed.R.Bankr.P. 2002(b) a hearing for approval of the Disclosure Statement should be set on not less than ~~twenty-five (25)~~ twenty-eight (28) days notice. Fed.R.Bankr.P. 3017(a).

2. Notice of the hearing must be served on:

…

f. all other parties in interest, including:

…

vi. the Secretary of the Treasury. ~~*Id.*~~ [Fed.R.Bankr.P. ~~3017(a)~~2002(j)(5)].

2019 RESOLUTION

RESOLUTION NO. ONE: Proposed amendment to Rules of the Supreme Court of Oklahoma for Mandatory Continuing Legal Education.

Whereas the Continuing Legal Education Task Force of the Oklahoma Bar Association (OBA) was charged with studying and evaluating the quality and delivery of education programs to OBA members;

Whereas the Continuing Legal Education Task Force and the OBA Mandatory Continuing Legal Education Commission met in joint session on June 20, 2019, to discuss the potential amendment of Mandatory Continuing Legal Education Rules relating to the number of ethics credits that should be required;

Whereas the enhancement of Continuing Legal Education programs for OBA members on issues related to the fitness to practice law and recognizing and assisting clients and others in the profession with substance use disorders and mental health challenges is significant to providing quality legal services to the public;

Whereas OBA members currently are required to obtain one (1) legal ethics credit each year.

Whereas expanding the definition of legal ethics under the existing Mandatory Continuing Legal Education Rules and requiring an additional legal ethics credit each year will give OBA members greater opportunity for educational programs that address serious issues that impact the legal profession and the public.

Whereas the suggested change to the Mandatory Continuing Legal Education Rules **will not increase the total number of credits** from the currently required twelve (12) total credits per year but will only require that an additional legal ethics credit be obtained each year by OBA members who are required to annually report their Mandatory Continuing Legal Education hours.

BE IT RESOLVED by the House of Delegates of the Oklahoma Bar Association that the Association amend Rule 7, Regulations 3.6 and 4.1.3 of the Rules of the Supreme Court of Oklahoma for Mandatory Continuing Legal Education, as published in The Oklahoma Bar Journal and posted on the OBA website at **www.okbar.org**. *(Requires sixty percent (60%) affirmative vote for passage. OBA Bylaws Art. VIII Sec. 5.) (Submitted by OBA Continuing Legal Education Task Force and Mandatory Continuing Legal Education Commission.)* **Adoption recommended by the OBA Board of Governors.**

PROPOSED CHANGES TO THE RULES OF THE SUPREME COURT OF OKLAHOMA FOR MANDATORY CONTINUING LEGAL EDUCATION

RULE 7. REGULATIONS

The following Regulations for Mandatory Continuing Legal Education are hereby adopted and shall remain in effect until revised or amended by the Mandatory Continuing Legal Education Commission with approval of the Board of Governors and the Oklahoma Supreme Court.

~~3.6 The number of hours required means that the attorney must actually attend twelve (12) instructional hours of CLE per year with no credit given for introductory remarks, meal breaks, or business meetings. Of the twelve (12) CLE hours required the attorney must attend and receive one (1) instructional hour of CLE per year covering the area of professional responsibility or legal ethics or legal malpractice prevention. An instructional hour will in all events contain at least fifty (50) minutes.~~

3.6 Instructional Hour. Each attorney must complete 12 instructional hours of CLE per year, with no credit for meal breaks or business meetings. An instructional hour must contain at least 50 minutes of instruction.

Legal Ethics and Professionalism CLE. Effective January 1, 2021, of the 12 required instructional hours of CLE each year, at least two hours must be for programming on Legal Ethics and Professionalism, legal malpractice prevention and/or mental health and substance use disorders.

PROGRAM GUIDELINES FOR LEGAL ETHICS AND PROFESSIONALISM CLE

Legal Ethics and Professionalism CLE programs will address the Code of Professional Conduct and tenets of the legal profession by which a lawyer demonstrates civility, honesty, integrity, fairness, competence, ethical conduct, public service, and respect for the Rule of Law, the courts, clients, other lawyers, witnesses and unrepresented parties. Legal Ethics and Professionalism CLE may also address legal malpractice prevention and mental health and substance use disorders.

Legal Malpractice Prevention programs provide training and education designed to prevent attorney malpractice. These programs focus on developing systems, processes and habits that reduce or eliminate attorney errors. The programs may cover issues like ensuring timely filings within statutory limits, meeting court deadlines, properly protecting digital client information, appropriate client communications, avoiding and resolving conflicts of interest, proper handling of client trust accounts and proper ways to terminate or withdraw from client representation.

Mental Health and Substance Use Disorders programs will address issues such as attorney wellness and the prevention, detection and/or treatment of mental health disorders and/or substance use disorders which can affect a lawyer's ability to provide competent and ethical legal services.

Programs addressing the ethical tenets of other disciplines and not specifically pertaining to legal ethics are not eligible for Legal Ethics and Professionalism CLE credit but may meet the requirements for general CLE credit.

Regulation 4.1.3

The program must deal primarily with matters related to the practice of law, professional responsibility, ~~or ethical obligations of attorneys~~ legal ethics, professionalism, mental health or substance use disorders related to attorneys. Programs that address law practice management and technology, as well as programs that cross academic lines may be considered for approval.

2020 OBA BOARD OF GOVERNORS VACANCIES

Nominating Petition deadline was 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: **Brandi N. Nowakowski, Shawnee**

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: **Michael J. Davis, Durant**

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: **Joshua A. Edwards, Ada**

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**

NOTICE

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

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

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 for President-Elect of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2020.

A total of 389 signatures appear on the petitions.

Vice President
Brandi N. Nowakowski, Shawnee

Nominating Petitions have been filed nominating Brandi N. Nowakowski for Vice President of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2020.

A total of 59 signatures appear on the petitions.

BOARD OF GOVERNORS
Supreme Court Judicial District No. 2
Michael J. Davis, Durant

A Nominating Resolution from Bryan County has been filed nominating Michael J. Davis for election of Supreme Court Judicial District No. 2 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2020.

Supreme Court Judicial District No. 8
Joshua A. Edwards, Ada

Nominating Petitions have been filed nominating Joshua A. Edwards for election of Supreme Court Judicial District No. 8 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2020.

A total of 36 signatures appear on the petitions.

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 for election of Member at Large of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2020.

A total of 53 signatures appear on the petitions.

Calendar of Events

October

16 **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

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

21 **OBA Communications Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Dick Pryor 405-740-2944

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

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

OBA Estate Planning, Probate and Trust Section meeting; 11:45 a.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact A. Daniel Woska 405-657-2271

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

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

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

November

1 **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

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

6-8 **OBA Annual Meeting;** Renaissance Oklahoma City Convention Center Hotel, Oklahoma City

7 **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

11 **OBA Closed** – Veterans Day

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

15 **OBA Lawyers Helping Lawyers Assistance Program Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Hugh E. Hood 918-747-4357 or Jeanne Snider 405-366-5466

OBA Juvenile Law Section meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Tsinena Thompson 405-232-4453

19 **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

Opinions of Court of Civil Appeals

2019 OK CIV APP 49

LEONARD DEAN LUNSFORD JR., Plaintiff, and VAUNITA TACKETT, Personal Representative of the Estate of Leonard Dean Lunsford Sr., Deceased, Plaintiff/Appellant, vs. HENRY KEITH LUNSFORD, Defendant/Appellee, and DAHNA LUNSFORD, GERALD C. BRUNSON, and KAREN E. BRUNSON, Defendants.

Case No. 117,013. September 5, 2019

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE CAROLINE WALL, TRIAL JUDGE

REVERSED

Paul Gee, GEE LAW FIRM, PLLC, Tulsa, Oklahoma, for Plaintiff/Appellant

David L. Weatherford, BIRMINGHAM, MORLEY, WEATHERFORD & PRIORE, P.A., Tulsa, Oklahoma, for Defendant/Appellee

DEBORAH B. BARNES, PRESIDING JUDGE:

¶1 This is the second appeal in this action, an action which arises from disputes concerning the real property where Leonard Dean Lunsford Sr. resided prior to his death in October 2014. Plaintiff/Appellant Vaunita Tackett, Personal Representative of the Estate of Leonard Dean Lunsford Sr., appeals from the trial court's order filed in April 2018 finding, at Defendant Henry Keith Lunsford's request, that he is entitled to recover postjudgment interest from Plaintiffs[1] under Oklahoma's postjudgment interest statute, 12 O.S. Supp. 2013 § 727.1(A). As set forth in the April 2018 Order, the trial court determined postjudgment interest "accrued . . . in the amount of $5,398.25 between the time of entry of the Order Enforcing Settlement Agreement . . . on February 10, 2014, and payment of the Judgment on May 4, 2017."

¶2 In the previous appeal, Case No. 112,690, we explained that the parties' settlement agreement, which was executed in 2013,

> end[ed] a breach of contract action involving the home in which [Leonard Dean] Lunsford Sr. resided . . . from 2003 until his death. It is undisputed that . . . the settlement agreement requir[ed] an appraisal of the property in question. The parties agreed to accept the appraisal value and agreed that the payment price would be based on the appraised value.

The settlement agreement, which is handwritten, provides:

> 1. Parties to agree to an appraisal . . . .
>
> 2. Parties to accept [the appraiser's] appraised value.
>
> 3. Based on appraised value, [Henry] Keith Lunsford to be paid 1/3 of value[.]
>
> 4. [Henry Keith Lunsford] to remain responsible for 1/3 of mortgage balance.
>
> 5. Mutual releases [and] each party responsible for their own fees [and] costs[.]
>
> 6. Deed to [Leonard] Dean Lunsford Sr.

¶3 Pursuant to the settlement agreement, the trial court found in its February 2014 Order that Henry Keith Lunsford is to be paid a certain amount "upon execution of the General Warranty Deed to Plaintiff Leonard Dean Lunsford Sr.," who was still living at that time. The February 2014 Order states that "Plaintiffs shall pay $28,365.40 to Defendants at the time of conveyance of the property to Plaintiff Leonard Dean Lunsford Sr."[2]

¶4 In this appeal, Henry Keith Lunsford asserts the trial court properly awarded him postjudgment interest because he

> obtained judgment for the amount of $28,365.40 [in the February 2014 Order]. Thereafter, there was an appeal of the judgment [i.e., the first appeal in this action, in which Henry Keith Lunsford challenged, unsuccessfully, certain aspects of the February 2014 Order] and a continuing dispute over a number of issues; however, from the time of judgment until payment (May 4, 2017), the amount was owed, [and Plaintiffs] had the full benefit of the use of the property in dispute even though a deed had not been executed . . . .

¶5 The issue presented on appeal is governed by the above-mentioned postjudgment interest statute, which states, in pertinent part,

that "all judgments of courts of record . . . shall bear interest . . . ." 12 O.S. Supp. 2013 § 727.1(A)(1). The statute further provides: "[P]ostjudgment interest . . . shall accrue from the earlier of the date the judgment is rendered as expressly stated in the judgment, or the date the judgment is filed with the court clerk . . . ." 12 O.S. § 727.1(C).

¶6 Questions of statutory interpretation are reviewed *de novo. Welch v. Crow*, 2009 OK 20, ¶ 10, 206 P.3d 599 (Questions of statutory construction "are questions of law that we review *de novo* and over which we exercise plenary, independent, and non-deferential authority." (footnote omitted)).

> The primary goal of statutory interpretation is to ascertain and . . . give effect to the intention and purpose of the Legislature as expressed by the statutory language. Intent is ascertained from the whole act in light of its general purpose and objective considering relevant provisions together to give full force and effect to each. The Court presumes that the Legislature expressed its intent and that it intended what it expressed. Statutes are interpreted to attain that purpose and end[,] championing the broad public policy purposes underlying them.

Cattlemen's Steakhouse, Inc. v. Waldenville, 2013 OK 95, ¶ 14, 318 P.3d 1105 (footnotes omitted). *See also Estes v. ConocoPhillips Co.*, 2008 OK 21, ¶ 16, 184 P.3d 518 ("It is important in construing the Legislative intent behind a word to consider the whole act in light of its general purpose and objective," and "[w]e presume that the Legislature expressed its intent and intended what it expressed, and statutes are interpreted to attain that purpose and end, championing the broad public policy purposes underlying them." (footnotes omitted)).[3]

¶7 Plaintiff/Appellant argues on appeal that the purpose of the postjudgment interest statute is to provide postjudgment interest on "ordinary money judgment[s] where one party is legally obligated to pay the other party with nothing else." She asserts that "[t]he goal of the postjudgment [interest] statute" is to provide "a statutory award for delay in payment of money due," and she contrasts such money judgments with the trial court's February 2014 Order upon which the award of postjudgment interest in the present case is based. According to Plaintiff/Appellant, the February 2014 Order constitutes a judicial enforcement of the terms of the parties' settlement agreement, an agreement which essentially requires, as she states, "that one party deliver a proper deed in return for payment of a sum certain." She asserts that no delay occurred in the "payment of money due" in this case because "the [February 2014] Order doesn't contemplate payment of money due until the occurrence of another event," i.e., the execution of a deed and conveyance of legal title.

¶8 Plaintiff/Appellant's interpretation of the February 2014 Order is accurate. The February 2014 Order states that, "[p]ursuant to the Settlement Agreement and appraisal submitted, the value of the residence shall be established as the appraised value of $64,000.00" (an appraisal value which Henry Keith Lunsford contested, unsuccessfully, in the first appeal), "with Defendant Henry Keith Lunsford paid 1/3 of that value upon execution of a General Warranty Deed" to Plaintiffs. Although the February 2014 Order states that "Plaintiffs shall pay $28,365.40 to Defendants," it states, as quoted above, that this payment is to be made "at the time of conveyance of the property" to Plaintiffs.

¶9 Various legal authorities support Plaintiff/Appellant's assertions. For example, according to the Corpus Juris Secundum, "[t]he purpose of a statute providing for interest on a money judgment in a civil action is to compensate the prevailing party for any delay in the payment of money damages." 47 C.J.S. Interest & Usury § 65 (footnote omitted).[4] Other authorities have explained that "[a] statute providing that all judgments must bear interest is directed to judgments *in personam* and not to judgments *in rem*." 44B Am. Jur. 2d Interest and Usury § 28. As noted by one court, "an action *in personam* is done, or directed against, a specific person such that a judgment *in personam* seeks recovery from one's personal liability." *Ohio v. Penrod*, 611 N.E.2d 996, 999 n.5 (Ohio Ct. App. 1992) (citation omitted).

¶10 Regardless, in order to effectuate the Oklahoma Legislature's intent that "all judgments" bear postjudgment interest from the date of judgment, the term "judgments" in this context must, of course, be construed in a manner that includes only judgments capable of forming the basis of such an award.[5] Where no money judgment is awarded by the court, or where the trial court has expressly made a payment contingent and not presently due, no

award of postjudgment interest can be made consistent with the plain terms of § 727.1. *See also City of Barnsdall v. Curnutt*, 1949 OK 105, ¶ 8, 207 P.2d 320 ("The judgment was not of the effect of a money judgment against the defendant, and such as that contemplated by the statute which provides that judgments shall bear interest from the day on which they are rendered."); 47 C.J.S. Interest & Usury § 65 ("[I] f a judgment is not a 'money judgment' within the provisions of the statute, interest is not allowed," and "[a] 'money judgment' within the meaning of [a] statute allowing interest on a money judgment recovered in a civil action is one that orders the payment of a sum of money as distinguished from an order directing an act to be done or property to be restored or transferred." (footnotes omitted)).

¶11 The February 2014 Order does not set forth a money judgment against a party as contemplated by § 727.1. Although this action was originally brought as a breach of contract action, the parties, after attending mediation, executed the above-mentioned settlement agreement, and the February 2014 Order that forms the basis of the trial court's award of postjudgment interest, while it interprets and enforces the terms of that agreement, does not contain a money judgment for damages and does not set forth a finding of personal liability against a party based on a finding of, for example, breach of contract. *Cf. City of Barnsdall*, ¶ 8 (award of interest inappropriate because, among other things, "[a]lthough the claim of the plaintiff was based on the performance of an agreement . . . , the proceeding was . . . not an action on contract for money judgment against the defendant").

¶12 In addition, the February 2014 Order expressly makes the payment of money set forth therein contingent and not presently due at the time the judgment was entered. As stated above, although the February 2014 Order sets forth an amount to be paid, it explicitly states that this payment is to be made "at the time of conveyance of the property": "Plaintiffs shall pay $28,365.40 to Defendants at the time of conveyance of the property[.]" Accordingly, Henry Keith Lunsford was not entitled to collect the amount set forth in the February 2014 Order because he did not immediately make the conveyance set forth in the February 2014 Order; instead, he challenged certain portions of the February 2014 Order and initiated the first appeal. In the prior appeal, we rejected his arguments and we affirmed the February 2014 Order. Mandate issued in August 2015.

¶13 In September 2015, Henry Keith Lunsford filed a "Motion to Enforce Court of Appeals Decision," but asserted in that motion that he had, by that time, only "proposed execution of the necessary deed for completion of the settlement, as requested by the Plaintiffs." Plaintiffs filed a response asserting they "have always been ready, willing and able to consummate the settlement agreement," but further asserted, among other things, that "Defendants, after exhausting all legal avenues to delay this matter now wish to settle on terms that were not ever within the spirit of the settlement agreement." Plaintiffs asserted in their response that they "stand ready to pay the amount agreed upon for 100% of the Property free and clear of liens, which is according to the settlement agreement entered into by the parties."

¶14 In an order filed in May 2017, the trial court found that "[t]he Oklahoma Supreme Court Mandate requires that Defendants, Henry Keith Lunsford, Dahna Lunsford, Gerald C. Brunson and Karen E. Brunson, properly execute General Warranty Deeds in favor of Plaintiff . . . in return for payment in the amount of $28,365.40[.]" The court ordered the parties to personally appear before the court on May 4, 2017, "to execute and deliver the deeds and payment of $28,365.40[.]" The parties agree, and the appellate record reflects, that on May 4, 2017, Defendants delivered General Warranty Deeds to Plaintiff/Appellant, at which time Plaintiff/Appellant tendered a cashier's check as payment.

¶15 Under the particular circumstances of this case, we conclude the award of postjudgment interest to Henry Keith Lunsford is inconsistent with the terms of § 727.1. Therefore, the trial court erred in awarding postjudgment interest, and we reverse the April 2018 Order.

¶16 **REVERSED**.

WISEMAN, V.C.J., and RAPP, J., concur.

DEBORAH B. BARNES, PRESIDING JUDGE:

1. Although the trial court's order states Defendant Henry Keith Lunsford "is granted Judgment for post judgment interest in the amount of $5,398.25 against the Plaintiffs," Ms. Tackett is the only Plaintiff who has appealed the order.

2. The $28,365.40 payment is based on a $64,000 valuation of the property by an appraiser. One-third of $64,000 is $21,333.33. The trial court also found, "[p]ursuant to the Settlement Agreement," that "Defendants shall be reimbursed" for certain mortgage payments, a tax payment, and a property insurance payment.

3. We note that we agree with Henry Keith Lunsford that our analysis is controlled by legislative intent and not, for example, equitable principles. In the context of Oklahoma's postjudgment interest statute, the Oklahoma Supreme Court, in a case cited by Henry Keith Lunsford, has explained that,

> [a]s a general rule[,] equity follows the law and where a party's rights are defined by statute, equity is without authority to modify or unsettle those rights. As stated early on, in this jurisdiction, no court is ever justified in invoking the maxim of equity for the purpose of destroying legal rights.

Fleming v. Baptist Gen. Convention of Okla., 1987 OK 54, ¶ 34, 742 P.2d 1087 (citations omitted).

4. We note that in the context of Oklahoma's postjudgment interest statute, the Oklahoma Supreme Court quoted and relied upon an opinion of the United States Court of Appeals for the Tenth Circuit citing portions of 47 C.J.S. Interest & Usury. *See Walker v. St. Louis-San Francisco Ry. Co.,* 1983 OK 86, ¶ 8, 671 P.2d 672. We further note the federal postjudgment interest statute is comparable to 12 O.S. § 727.1 in that it provides: "Interest shall be allowed on any money judgment in a civil case recovered in a district court." 28 U.S.C.A. § 1961(a) (2000). The United States Court of Appeals for the Second Circuit has explained that "[p]ostjudgment interest is designed to compensate the plaintiff for the delay it suffers from the time damages are reduced to an enforceable judgment to the time the defendant pays the judgment." *Andrulonis v. U.S.*, 26 F.3d 1224, 1230 (2d Cir. 1994). Similar to § 727.1, § 1961(a) provides that in cases in which there is a money judgment, postjudgment interest is to be calculated "from the date of the entry of judgment[.]" As explained by the Ninth Circuit, "the purpose of section 1961 is to ensure that the plaintiff is further compensated for being deprived of the monetary value of the loss from the date of ascertainment of damages until payment by defendant." *Am. Tel. & Tel. Co. v. United Computer Sys., Inc.*, 98 F.3d 1206, 1209 (9th Cir. 1996) (internal quotation marks omitted) (citation omitted).

5. "A judgment is the final determination of the rights of the parties in an action," 12 O.S. 2011 § 681, and a judgment may include a remedy (or a denial of any relief) which is distinct from a judgment capable of forming the basis of an award of postjudgment interest. *See also* Black's Law Dictionary (11th ed. 2019) (A judgment is "[a] court's final determination of the rights and obligations of the parties in a case," and "[t]he term *judgment* includes an equitable decree and any order from which an appeal lies."); 12 O.S. 2011 § 990.3(B) (addressing "the enforcement of the judgment, decree or final order," "[w]here relief other than the payment of money is awarded or where relief in addition to the payment of money is awarded"); 12 O.S. 2011 § 990.4(B) (addressing stays of enforcement of judgments that, inter alia, "direct[] execution of a conveyance or other instrument," "direct[] the delivery of possession of real or personal property," and "direct[] the assignment or delivery of documents," in addition to judgments "for payment of money").

2019 OK CIV APP 50

LPP MORTGAGE LTD., Plaintiff/Appellee, v. CARL D. SHELTON, Defendant/ Appellant.

Case No. 117,400. July 24, 2019

APPEAL FROM THE DISTRICT COURT OF MCCLAIN COUNTY, OKLAHOMA

HONORABLE LEAH EDWARDS, TRIAL JUDGE

AFFIRMED

Melvin R. McVay, Jr., Clayton D. Ketter, PHILLIPS MURRAH P.C., Oklahoma City, Oklahoma, for Plaintiff/Appellee

Sherry Doyle, SHERRY DOYLE, PLLC, Edmond, Oklahoma, for Defendant/Appellant

JANE P. WISEMAN, VICE-CHIEF JUDGE:

¶1 Carl D. Shelton appeals a trial court order denying his petition to vacate a summary judgment that was reinstated in favor of LPP Mortgage Ltd. on remand, in accordance with directions this Court issued in Case No. 114,938. The primary issue on appeal is whether the trial court abused its discretion in denying the petition to vacate. We conclude that the settled-law-of-the-case doctrine precludes Shelton from challenging the entry of summary judgment and therefore the trial court did not abuse its discretion in denying the petition to vacate.[1] We affirm the trial court's order.

FACTS AND PROCEDURAL BACKGROUND

¶2 The background facts were fully set out in our Opinion in Case No. 114,938. There we noted that New South Federal Savings Bank filed a petition for foreclosure of a mortgage on January 28, 2010, alleging Shelton (1) executed a promissory note on or about September 30, 2008, in which he agreed to pay Global Lending Group the sum of $192,448, plus interest, in monthly installments of $1,604.18, and (2) executed a real estate mortgage on property located at 3614 Stonebrook Drive, Norman, Oklahoma. New South claimed (1) the note was assigned by Global to New South which presently holds the note, (2) payments were due and have not been made on the account, and (3) the principal sum of $191,486.49 plus interest is now due.

¶3 We also noted that LPP asked the trial court in February 2010 to allow it to be substituted as plaintiff because it "is now the owner of the Mortgage at issue." In March 2010, the trial court granted LPP's application. In June 2014, LPP filed a motion to amend the petition (1) to allege that after the petition was filed, "LPP has determined that it cannot reasonably obtain possession of the original Note because its whereabouts are unknown," and (2) to attach a lost note affidavit. After the trial court granted LPP's motion, it filed an amended petition in September 2014 adding the allegation that the note had been lost but LPP is entitled to enforce the note pursuant to 12A O.S. § 3-301. LPP filed with its amended petition an affidavit of lost note from Kent Twitchell, who detailed the transfers of the note and the facts surrounding the note's loss. In his affidavit, he referred to and attached a copy of the original note with allonges from Global Lending to New South, from the FDIC as receiver for New South to Beal Bank, from Beal Bank to Property Accep-

tance Corp., and from Property Acceptance Corp. to LPP Mortgage Ltd.

¶4 LPP sought summary judgment on its claims against Shelton and in its favor on Shelton's counterclaims. A hearing on the motion was set for December 2, 2015, but Shelton failed to respond to the motion, request additional time, or appear at the hearing. The trial court granted judgment in favor of LPP on the promissory note, ordered the mortgage foreclosed, and granted LPP judgment on Shelton's counterclaims.

¶5 On January 4, 2016, Shelton filed a motion to vacate contending questions of material fact remained that precluded summary judgment and asserting the trial court should dismiss the case because LPP lacked standing and the court lacked jurisdiction. After the trial court granted Shelton's motion to vacate and overruled LPP's motion for summary judgment finding that "genuine issues of material fact exist," LPP appealed.

¶6 On October 24, 2017, in Case No. 114,938, we held LPP established its standing to enforce the note when it filed its amended petition. We concluded that LPP presented evidence in its motion for summary judgment that it was entitled to judgment as a matter of law on its claims, including evidence that as the holder of the note in question, it was entitled to enforce the note when it filed its petition. We noted Shelton failed to present any evidence to counter the claim of default and concluded Shelton failed to show sufficient cause to grant his motion to vacate. We held that LPP's summary judgment motion and supporting materials, undisputed by Shelton, established it was entitled as a matter of law to judgment on the note and to foreclosure of the securing mortgage. Shelton failed to counter that showing or to give sufficient cause for vacating the judgment. Although he argued there were questions of fact about whether LPP had standing, we determined that the record established LPP had standing.

¶7 We noted in that Opinion that there was no error in the trial court's entry of summary judgment, including granting judgment on the note and foreclosing the mortgage, where LPP established it was entitled to judgment as a matter of law. We concluded, "Vacating the judgment was an abuse of discretion when the original summary judgment was correct as a matter of law and Shelton failed to show sufficient cause to vacate that judgment." We reversed the trial court's decision and directed it to reinstate the summary judgment in favor of LPP.

¶8 On March 5, 2018, LPP filed an application with the trial court to reinstate the summary judgment in its favor. In its application, LPP maintained that after this Court issued its Opinion instructing the trial court to reinstate the summary judgment in LPP's favor, Shelton filed a petition for writ of certiorari, which the Supreme Court denied. The docket sheet indicates the Supreme Court denied the petition for certiorari on February 12, 2018.

¶9 On March 29, 2018, Shelton filed an "Opposition to [LPP's] motion to reinstate summary judgment" claiming that he met with his counsel on March 2, 2018, to review options regarding his home in light of the Supreme Court's denial of his petition for certiorari. Shelton alleged:

> Mr. Shelton and Counsel called the mortgage servicer, MGC Mortgage to request a Request for Mortgage Assistance ("RMA") package. Mr. Shelton provided his name, social security number, address, and loan number to [] Courtney, the MGC customer representative. MGC was unable to locate any records related to that property. It then looked for the information in its "old loans" files, and again, found no record.

Shelton claimed that his counsel called the number for LPP listed on LPP's website and the phone was answered by MGC Mortgage. A second call was made that verified the phone was answered by MGC. Shelton asserted he sent a Request for Information (RFI) to LPP and to MGC and that LPP received the RFI sent by facsimile to LPP on March 2, 2018, and by certified mail on March 7, 2018, but LPP failed to respond. Shelton stated, "However, given that MGC represented that it is the master servicer for LPP Mortgage, it is logical to infer that the request sent to LPP was forwarded to MGC." Shelton alleged MGC, who received its RFI on March 9, 2018, responded on March 12, 2018, that it was "'unable to identify the loan in question.'" Shelton stated he opposed the reinstatement of the judgment in favor of LPP because it appears LPP in not entitled to judgment because it does not have records for the loan or note.

¶10 In response, LPP asserted the trial court is required to comply with this Court's man-

date. It additionally asserted that this Court conclusively decided that LPP was the proper party in interest. It argued that 12 C.F.R. § 1024.36 applies to MGC as the servicer and not to LPP and that the response letter to Shelton's RFI, which indicated it was unable to identify the loan in question, was from Dovenmuehle Mortgage, not MGC. LPP claimed that Dovenmuehle Mortgage is a separate servicer not affiliated with MGC.

¶11 At the June 6, 2018, hearing on LPP's application to reinstate the summary judgment, the trial court granted the application and reinstated the journal entry of judgment filed on December 2, 2015.

¶12 Shelton filed a petition to vacate the June 6, 2018 judgment, arguing LPP "obtained a void judgment through fraud and fraud on the court." Shelton claimed there was newly discovered evidence that "Dovenmuehle is not an unaffiliated entity" but instead "maintains the mortgage accounts on behalf of MGC Mortgage" and was described by MGC as "'a trusted partner.'" Shelton asserted the judgment obtained by LPP is void.

¶13 In response, LPP asserted Shelton's request to vacate is barred pursuant to the settled-law-of-the-case doctrine. It also asserted no fraud occurred and claimed that Dovenmuehle is a completely separate company from MGC as MGC is a wholly-owned subsidiary of Beal Bank, and Dovenmuehle is not owned by Beal Bank. Even if MGC and Dovenmuehle are under common ownership, LPP claimed that has no effect on its standing to pursue this lawsuit or any of the issues previously resolved in Case No. 114,938

¶14 The trial court denied Shelton's petition to vacate based on the parties' briefs and the argument it heard from counsel. Shelton appeals the trial court's order.

STANDARD OF REVIEW

¶15 "The standard of review for a trial court's ruling either vacating or refusing to vacate a judgment is abuse of discretion." *Wells Fargo Bank, N.A. v. Heath*, 2012 OK 54, ¶ 7, 280 P.3d 328. "An abuse of discretion occurs when a court bases its decision on an erroneous conclusion of law, or where there is no rational basis in evidence for the ruling." *Id*.

ANALYSIS

¶16 Shelton asserts seven propositions of error. These propositions do not supplant the fact that we have already held that LPP had standing and instructed the trial court to reinstate the summary judgment in favor of LPP. Any further review of this decision ended with the Supreme Court's denial of certiorari. We conclude the settled-law-of-the-case doctrine governs this appeal, and we will therefore not address Shelton's propositions of error.

¶17 In *Gay v. Hartford Underwriters Insurance Co.*, 1995 OK 97, ¶ 18, 904 P.2d 83, the Supreme Court instructed:

> When an appellate court rules upon an issue, that ruling becomes the law-of-the-case and controls all subsequent proceedings in the action which will not be reversed on appeal. Only when the prior decision is found to be erroneous, and the Court is satisfied that failure to reverse will result in a gross or manifest injustice will the cause be overturned.

(Footnotes omitted.) We have clearly ruled that LPP had standing, that the trial court was correct in its decision to grant summary judgment, and that it erred in granting Shelton's motion to vacate the summary judgment. Nothing remained for the trial court to do on remand except enter summary judgment as we directed. The trial court was not required to take evidence, hold a hearing, or take any other action. After review, we conclude the trial court's decision was not erroneous nor an abuse of discretion.

¶18 Shelton acknowledges that the "settled-law-of-the-case" doctrine "bars relitigation of only those issues that have been settled by an appellate opinion." *State ex rel. Pruitt v. Native Wholesale Supply*, 2014 OK 49, ¶ 18, 338 P.3d 613. He bases his argument here on the only exception to this doctrine – it "does not apply where the prior decision was palpably erroneous and will result in gross injustice." *Id*. ¶ 19. We can see no basis for finding the prior decision to be "palpably erroneous" – we have reviewed it and agree with the Supreme Court that no grounds exist to depart from its holding. Nor do we see any "gross injustice" in adhering to its holding, despite Shelton's long-standing complaints about this case.

¶19 Shelton claims in this appeal, "There is no dispute LPP does not hold the note" and

that the judgment against him "is clearly erroneous and will result in irreparable harm should it stand and a windfall for [LPP]." We disagree. This foreclosure action was originally filed on January 28, 2010. LPP alleged Shelton's default began in September 2009 and he has been living on the mortgaged property for nearly a decade while eschewing his obligation to make payments on the note. It is difficult to find any windfall to LPP in not vacating the judgment in light of Shelton's total circumvention of his payment obligations since 2009.

¶20 After the Supreme Court denied Shelton's petition for certiorari on February 12, 2018, Shelton claims he sought to avail himself of loss mitigation provisions provided by the federal Real Estate Procedures Act. He now says that the servicer, MGC, has no record of him, and therefore he "is barred from exercising his statutory right to seek a loan modification and turn the loan into a performing loan no longer in default." He claims that LPP has no right, title, or interest in the loan.

¶21 However, this Court had already determined that LPP was entitled to foreclosure. Any issue Shelton is having in seeking loss mitigation or in contacting the servicer does not change the fact that the previous appeal established as a matter of law based on undisputed material facts that LPP had standing and was entitled to judgment on the note and foreclosure of the mortgage. Shelton failed to establish how his attempt to avail himself of loss mitigation under federal law somehow displaces LPP's right to foreclose, when this Court has already determined LPP's right to do so. Shelton's claims are fixed on the servicer and his attempts to avail himself of programs under federal law, but these claims do not affect LPP's right to foreclose.

¶22 Although Shelton is now claiming that according to Dovenmuehle and MGC, there is no loan to modify, there is clearly a loan and Shelton does not deny he received the benefits of that loan. Title 16 O.S.2011 § 11 provides:

> Any person or corporation, having knowingly received and accepted the benefits or any part thereof, of any conveyance, mortgage or contract relating to real estate shall be concluded thereby and estopped to deny the validity of such conveyance, mortgage or contract, or the power or authority to make and execute the same, except on the ground of fraud; but this section shall not apply to minors or persons of unsound mind who pay or tender back the amount of such benefit received by themselves.

Based on § 11, Shelton cannot deny the validity of the note or mortgage when he accepted, and continues to accept, the benefits of both.

¶23 Although Shelton claims LPP made misrepresentations about the relationship between MGC and Dovenmuehle, he makes no claim of fraud regarding the existence of the note or mortgage – he instead complains only about the servicer's records.

¶24 And, although Shelton claims MGC repeatedly stated they had no record of Shelton or the mortgage, in response to Shelton's motion to vacate, LPP attached an April 27, 2018, letter from MGC to Shelton which stated that MGC received Shelton's March 2, 2018, RFI after it was forwarded to its offices. MGC noted Shelton's correspondence was not sent to the correct address. MGC states in the letter that it was enclosing a loan history, copies of the note and mortgages, including allonges and assignments, and a payoff statement and reinstatement quote. So evidence was presented on which the trial court could conclude that if any misrepresentation about the relationship between MGC and Dovenmuehle occurred, it had no effect when MGC ultimately provided Shelton with the information he sought about the note and mortgage.

¶25 Based on our review of the record, we conclude the trial court did exactly as we directed in Case No. 114,938 and did not abuse its discretion in denying Shelton's petition to vacate the summary judgment.

CONCLUSION

¶26 Finding no abuse of discretion by the trial court in refusing to vacate the judgment this Court unambiguously directed it to enter, we affirm the decision of the trial court.

¶27 **AFFIRMED**.

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

JANE P. WISEMAN, VICE-CHIEF JUDGE:

1. LPP's motion to dismiss this appeal is denied. We also deny its motion for sanctions but note that this does not preclude LPP from requesting appellate attorney fees pursuant to Oklahoma Supreme Court Rule 1.14, 12 O.S. Supp. 2018, ch. 15, app. 1.

2019 OK CIV APP 51

KYNDRA D. ALLEN, Petitioner/Appellee, vs. JOSE CASTILLEJO, Defendant/ Appellant.

Case No. 117,533. September 5, 2019

APPEAL FROM THE DISTRICT COURT OF HARPER COUNTY, OKLAHOMA

HONORABLE ARIC ALLEY, TRIAL JUDGE

REVERSED AND REMANDED WITH INSTRUCTIONS

Jamelle R. King, TIGER LAW FIRM, PLLC, Tulsa, Oklahoma, for Defendant/Appellant

JANE P. WISEMAN, VICE-CHIEF JUDGE:

¶1 Jose Castillejo (Student) appeals a five-year protective order against him, asserting the trial court erred by finding that threats made to other students were also threats made to Kyndra Allen (Principal) in her role as a fiduciary to those students, creating a series of acts evidencing a continuity of purpose or unconsented contact with a person sufficient to satisfy the statutory definition of stalking under 22 O.S.2011 § 60.1(2). After review of the record and relevant law, we reverse the order of the trial court and remand this case with instructions to vacate the protective order against Student.[1]

FACTS AND PROCEDURAL BACKGROUND

¶2 Principal filed a petition for a protective order against Student on August 10, 2018. The petition was in response to the events of May 10, 2018, when Student allegedly brought a gun to Laverne High School, the high school he attended, and where Principal worked. During that day, Student allegedly threatened the lives of other students and Principal. When other school administrators learned of the threats Student made and that he had brought a gun to school, they called the police.

¶3 Principal did not witness the threats made to the other students but learned of them later. The only contact that day between the parties before the threat to her was when Principal checked Student through the lunch line as a part of her normal duties, and this interaction was peaceful. The police arrived shortly thereafter and escorted Student out of the cafeteria to Principal's office for questioning. According to Principal, it was during the questioning that Student threatened Principal. Principal testified that the threat was, "I'm going to kill you. You're going to die. You fucked up. You'll burn in hell." She then left her office.

¶4 There has been no contact between the parties of any kind since that day. Student now lives in a different community and is not enrolled at Laverne. According to his counsel, in an "unrelated matter he's under pre-adjudication rules and conditions of probation, which limit his contact with Laverne school and Laverne students while they're on that property."

¶5 Principal filed the petition for protective order on August 10, 2018. The petition included a request for an Emergency Order of Protection which was granted. A hearing on the protective order was set for August 22, 2018, but later continued to October 24, 2018. At the conclusion of the October hearing, the trial court found there was evidence of stalking under the second definition in 22 O.S.2011 § 60.1(2):

> Stalking also means a course of conduct composed of a series of two or more separate acts over a period of time, however short, evidencing a continuity of purpose or unconsented contact with a person that is initiated or continued without the consent of the individual or in disregard of the expressed desire of the individual that the contact be avoided or discontinued.

The trial court held that the threats made to the students were also threats to Principal because of her "fiduciary responsibility" to the students to keep them safe. The court found that these threats, combined with the threat made in her office, amounted to a course of conduct that satisfies the definition of stalking.

STANDARD OF REVIEW

¶6 We review proceedings under the Protection from Domestic Abuse Act, 22 O.S.2011 & Supp. 2018 §§ 60-60.20, for an abuse of discretion. *Curry v. Streater,* 2009 OK 5, ¶ 8, 213 P.3d 550. "Under the abuse of discretion standard, the appellate court examines the evidence in the record and reverses only if the trial court's decision is clearly against the evidence or is contrary to a governing principle of law." *Id.* Also, "[s]tatutory construction presents a question of law which we review *de novo." Id*.

ANALYSIS

¶7 An order of protection may be issued under 22 O.S. Supp. 2018 § 60.2(A), which provides, in part, "A victim of domestic abuse, a victim of stalking, a victim of harassment . . . may seek relief under the provisions of the Protection from Domestic Abuse Act." The protective order under review was issued on the ground of stalking. Stalking is defined in the Act as:

> the willful, malicious, and repeated following or harassment of a person by an adult, emancipated minor, or minor thirteen (13) years of age or older, in a manner that would cause a reasonable person to feel frightened, intimidated, threatened, harassed, or molested and actually causes the person being followed or harassed to feel terrorized, frightened, intimidated, threatened, harassed or molested. Stalking also means a course of conduct composed of a series of two or more separate acts over a period of time, however short, evidencing a continuity of purpose or unconsented contact with a person that is initiated or continued without the consent of the individual or in disregard of the expressed desire of the individual that the contact be avoided or discontinued.

22 O.S.2011 § 60.1(2). Student raises the question of whether the trial court abused its discretion in issuing the protective order. Specifically, he questions whether it was permissible to view threats made to other students as also being directed to Principal, based on her "fiduciary duty" to the students, in order to meet the definition of stalking.

¶8 This order relies on the second definition of stalking under 22 O.S.2011 § 60.1(2), which requires two or more acts that evidence a continuity of purpose. The trial court found one act in the threat made to Principal in her office on May 10, 2018. There are no other interactions between the parties that could be considered threatening. The trial court considered the threats Student made to other students as being made to Principal because she was the principal. The trial court found that the "fiduciary relationship" transferred the threats to Principal and counted as a second act under 22 O.S.2011 § 60.1(2). In the trial court's own words:

> I am of the opinion that given Ms. Allen's position as the principal that there is a fiduciary duty and responsibility that she has for the safety of the students, and so in that regard, I think either threats made to her directly, which I think there was testimony today that there was a specific incident, I'm also under the belief that threats made to other individuals in the school, threats made to them are also threats to Ms. Allen because she has a responsibility to care and watch over those students while they're on the school grounds in her capacity of fiduciary duty. And by that reasoning I do find that I would find that that definition's been met to the Court's satisfaction by a standard that would be used in this case.

This new application of the statute merits discussion.

¶9 The statute is designed to protect persons from domestic abuse, stalking, harassment, and rape. The statute also contemplates seeking protective orders on behalf of others who are family or household members and minors. 22 O.S. Supp. 2018 § 60.2(A). The statutory language does not include fiduciaries of any kind. "[O]ur goal is to determine the legislative intent . . . . [i]f a statute is unambiguous, this Court will apply the statute as it is plainly written." *Curry*, 2009 OK 5, ¶ 14. In this case, Principal did not seek a protective order on behalf of any of those threatened students, but only on her own behalf. Nor would she have been able to, as those students were neither family nor household members. Including threats made to others in determining whether the statute's requirements have been met to issue an order protecting an individual is beyond the scope of the statute and the purpose of the protective order itself.

¶10 A protective order can be supported by threats made to persons other than the party seeking a protective order, but by statute, those persons must be family or household members. The idea that a "fiduciary relationship" can transfer a threat from a student to his principal, in the same way that a threat to one's spouse transfers to her, is unfounded. A fiduciary relationship differs from a familial or spousal relationship, and we are not free to disregard those differences, even in the name of safety and caution. Without such disregard, we see no basis in law or fact to allow threats to other parties to be transferred to Principal as the students' "fiduciary." In *Spielman v. Hayes ex rel. Hayes*, 2000 OK CIV APP 44, ¶ 13, 3 P.3d 711, a student made death threats to his teach-

er's husband and reasonably caused her fear. The threat was "left on Teacher's voice mail system at the school." *Id*. ¶ 2. The teacher was able to identify the student based on the voicemail recording. *Id*. ¶ 3. We note that the *Spielman* case was focused on the then-statutory definition of harassment, not stalking. *Id*. ¶ 12.

¶11 It is important to distinguish *Spielman* from this case where the threats to the students were made outside Principal's presence and knowledge. And, there was no evidence that those threats were directed at Principal in any way, only that the threats were made at the school where she worked. These threats do not appear to be a part of an effort by Student to intimidate or harass Principal but were isolated. *Spielman* is clearly distinguishable. Because there is one threatening incident against Principal by Student, and no other act to support a finding of stalking, the trial court's interpretation of the statute was incorrect, and the trial court erred in granting the protective order.

CONCLUSION

¶12 After review and consideration of the record on appeal and applicable law, we conclude the trial court erred in the entry of this protective order. We thus reverse the trial court's order and remand to the trial court with instructions to vacate the protective order against Student.

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

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

JANE P. WISEMAN, VICE-CHIEF JUDGE:

1. Principal represented herself at the hearing and has not entered an appearance in this appeal, responded to the petition in error or filed an answer brief. As stated by the Supreme Court in its show cause order issued to Principal on April 9, 2019, this case is considered on the filings to date, if no answer brief is filed within the time specified. Oklahoma Supreme Court Rule 1.10(a), 12 O.S. Supp. 2018, ch. 15, app. 1. Failure to respond does not result in automatic reversal. Student, as the appellant, has the burden to produce a sufficient record and appropriate, applicable law to demonstrate error requiring reversal. *Been v. Been*, 2007 OK CIV APP 31, ¶ 11, 158 P.3d 491, (citing *Pracht v. Oklahoma State Bank*, 1979 OK 43, ¶ 5, 592 P.2d 976).

NOTICE OF MEETINGS

CREDENTIALS COMMITTEE

The Credentials Committee of the Oklahoma Bar Association will meet Thursday, Nov. 7, 2019, from 9 - 9:30 a.m. in Room 6 (street level) of the Cox Convention Center, 1 Myriad Gardens, Oklahoma City, Oklahoma, in conjunction with the 115th Annual Meeting. The Committee members are: Chairperson Luke Gaither, Henryetta; Kimberly K. Moore, Tulsa; Emma Payne, Tulsa; and Jeffery D. Trevillion, Oklahoma City.

RULES & BYLAWS COMMITTEE

The Rules & Bylaws Committee of the Oklahoma Bar Association will meet Thursday, Nov. 7, 2019, from 10 - 10:30 a.m. in Room 6 (street level) of the Cox Convention Center, 1 Myriad Gardens, Oklahoma City, Oklahoma, in conjunction with the 115th Annual Meeting. The Committee members are: Chairperson Judge Richard A. Woolery, Sapulpa; Roy D. Tucker, Muskogee; Billy Coyle IV, Oklahoma City; Nathan Richter, Mustang; and Ron Gore, Tulsa.

RESOLUTIONS COMMITTEE

The Resolutions Committee of the Oklahoma Bar Association will meet Thursday, Nov. 7, 2019, from 10:45 - 11:45 a.m. in Room 6 (street level) of the Cox Convention Center, 1 Myriad Gardens, Oklahoma City, Oklahoma, in conjunction with the 115th Annual Meeting. The Committee members are: Chairperson Molly A. Aspan, Tulsa; Kendall A. Sykes, Oklahoma City; Peggy Stockwell, Norman; Clayton Baker, Jay; M. Courtney Briggs, Oklahoma City; and Mark E. Fields, McAlester.

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, September 19, 2019

F-2018-401 — Martino L. Collins, Appellant, was tried by jury for the crime of Felon in Possession of a Firearm, After Former Conviction of Two or More Felonies, in Case No. CF-2016-6478, in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment fourteen years imprisonment. The Honorable Timothy R. Henderson, District Judge, sentenced accordingly ordering credit for the eighteen days served in the county jail and imposed various costs and fees. From this judgment and sentence, Martino L. Collins has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs in Results; Lumpkin, J., Concurs in Results; Rowland, J., Concurs.

F-2018-622 — Appellant Jasmine Michelle Irvin was convicted in a non-jury trial of First Degree Murder, Case No. CF-2016-255 in the District Court of Lincoln County. The trial court sentenced Appellant to life in prison without the possibility of parole. 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 in Results; Hudson, J., Concur; Rowland, J., Concur.

RE-2018-426 — Calvin Taylor Herrien, Appellant, appeals from the revocation of four years of his twenty-five year suspended sentences in Case No. CF-2011-4693 in the District Court of Oklahoma County, by the Honorable Cindy H. Truong, District Judge. AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs in result; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

F-2018-867 — Billie Wayne Byrd, Appellant, was tried by jury for Child Sexual Abuse – Under 12 in Case No. CF-2017-621 in the District Court of Muskogee County. The jury returned a verdict of guilty and recommended as punishment 25 years imprisonment. The trial court sentenced accordingly and imposed a 3-year term of post-imprisonment supervision. From this judgment and sentence Billie Wayne Byrd has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

F-2018-749 — Ralph William Sisco, Jr., Appellant, was tried by jury for the crime of Lewd Molestation (Counts 1 and 2) in Case No. CF-2017-123 in the District Court of Nowata County. The jury returned verdicts of guilty and set punishment at twenty-five years imprisonment on each count. The trial court sentenced accordingly and further ordered the sentences to be served consecutively. The trial court also ordered Sisco to serve a term of three years post-imprisonment supervision. From this judgment and sentence Ralph William Sisco, Jr. has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., specially concurs; Lumpkin, J., concurs in results; Hudson, J., concurs.

F-2018-940 — Appellant LeJeanna Sue Chronister was found guilty in a non-jury trial before the Honorable Danita G. Williams, District Judge, of Aggravated Manufacture of Controlled Substance – Methamphetamine in the District Court of LeFlore County, Case No. CF-2002-472. The trial court sentenced Appellant to twenty (20) years in prison. 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 in Result; Hudson, J., Concur; Rowland, J., Concur.

F-2018-552 — Appellant Berry entered guilty pleas to one count of Possession of Controlled Dangerous Substance (CDS) each in Carter County Case Nos. CF-2014-332 and CF-2014-646A. In Carter County Case No. CF-2015-71 he entered a guilty plea to one count of Possession of CDS with Intent to Distribute. The offenses were all charged after former conviction of two or more felonies. Sentencing was deferred pending completion of Drug Court. The State filed a Motion to Terminate Berry from Drug Court, alleging that he committed the new offenses of Distribution of a CDS with intent to distribute (2 counts) as charged in Carter County Case No. CF-2016-447, and that

he failed to comply with the terms and conditions of the Drug Court Contract. On December 1, 2016, at the conclusion of the hearing on the State's application, the Honorable Thomas K. Baldwin, Associate District Judge, terminated Berry's Drug Court participation and sentenced him as specified in his plea agreement. From this judgment and sentence Berry appeals. Berry's termination from Drug Court is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F-2018-241 — Appellant Mario Darrington appeals his Judgment and Sentence from the District Court of Tulsa County, Case No. CF-2010-939, for Trafficking in Illegal Drugs (Marijuana and Methamphetamine), After Former Conviction of Two or More Felonies (Counts 1 and 2), Possession of Controlled Drugs Without Tax Stamp Affixed, After Former Conviction of Two or More Felonies (Counts 3 and 4), and Unlawful Possession of Drug Paraphernalia, a misdemeanor (Count 6). The Honorable Tom C. Gillert, District Judge, presided over Darrington's jury trial and sentenced him, in accordance with the jury's verdicts, to life imprisonment without parole and a $50,000.00 fine on Count 1, life imprisonment without the possibility of parole and a $100,000.00 fine on Count 2, life imprisonment on Counts 3 and 4, and one year imprisonment and a $1,000.00 fine on Count 6. Judge Gillert ordered the sentences to be served concurrently with each other. From this judgment and sentence, Darrington has perfected his appeal. AFFIRMED. Darrington's tendered supplemental brief is REJECTED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

F-2018-446 — Appellant Bryan Craig Herd was tried by jury and found guilty of First Degree Burglary, After Former Conviction of Two or More Felonies (21 O.S.2011, § 1431), in the District Court of Tulsa County, Case No. CF-2017-1112. The jury recommended as punishment life in prison and the trial court sentenced accordingly. It is from this judgment and sentence that Appellant appeals. The Judgment and Sentence are AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., concur; Kuehn, V.P.J., concur; HJudson, J., concur; Rowland, J., concur.

F-2018-664 — Keyuna Crystal Mosley, Appellant, was tried by jury for Robbery with a Dangerous Weapon, after two or more previous felony convictions in Case No. CF-2017-1853 in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment 20 years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Keyuna Crystal Mosley has perfected her appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

Thursday, September 26, 2019

F-2018-341 — Anthony Kejuan Day, Appellant, was tried by jury for the crimes of Assault and Battery on a Police Officer (Count 1); Plan, Attempt, Endeavor or Conspire to Perform an Act of Violence (Count 2); Possession of a Firearm after former conviction of a felony (Count 3); Obstructing an Officer, a misdemeanor (Count 4); and Resisting an Officer, a misdemeanor (Count 5), in Case No. CF-2017-3342 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at 25 years imprisonment on Count 1, 20 years imprisonment on Count 2, 30 years imprisonment on Count 3, and one year each on Counts 4 and 5. The trial court sentenced accordingly and ordered the sentences on Counts 1 through 3 served consecutively to one another, and the sentences on Counts 4 and 5 to run concurrently to one another and concurrently to Count 3. From this judgment and sentence Anthony Kejuan Day has perfected his appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in result; Hudson, J., concurs; Rowland, J., concurs.

RE-2018-855 — Appellant Dakota Michael Shane Bell entered a plea of guilty on April 5, 2017, in Payne County District Court to Possession of a Firearm After Conviction of a Felony Case No. CF-2016-375 and Unlawful Use of a Vehicle in Case No. CF- 2016-952. He was convicted and sentenced to five years imprisonment in each case, with all but the first sixty days suspended. The sentences were ordered to be served concurrently. The State filed a Motion to Revoke Suspended Sentence in Case No. CF-2016-375 and First Amended Motion to Revoke Suspended Sentence in Case No. CF-2016-952. Following a July 24, 2018, revocation hearing, the trial court revoked Appellant's remaining suspended sentences. The revocation is AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J.: concur; Kuehn, V.P.J.: concur; Lumpkin, J.: concur; Rowland, J.: concur.

S-2018-1227 — Defendant David Flores Villanueva was charged with one count of Burglary in the First Degree and one count of Conspiracy to Commit Burglary in Comanche County Case No. CF-2018-135. At the conclusion of the preliminary hearing, the District Court of Comanche County, the Honorable Ken Harris, Special Judge, granted Villanueva's demurrer as to the conspiracy charge. The State appeals. The district court's order granting Villanueva's demurrer to the Conspiracy to Commit Burglary charge is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., dissents; Rowland, J., dissents.

RE-2018-348 — Appellant Darrin Wayne Culley entered a *nolo contendere* plea to one count of Child Abuse in Pontotoc County Case No. CF-2010-425. He was sentenced to fifteen (15) years imprisonment, suspended in full. On September 28, 2016, the State filed a Motion to Revoke Suspended Sentence, alleging Culley committed the new offense of Domestic Abuse – Assault and Battery – Second or subsequent offense as charged in Pontotoc County Case No. CF-2016-602. At the conclusion of the revocation hearing conducted December 20, 2017, the Honorable Greg Pollard, Special Judge, revoked ten (10) years of Culley's suspended sentence. Culley appeals. The partial revocation of ten (10) years of Culley's suspended sentence in Pontotoc County Case No. CF-2010-425 is AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

F-2018-147 — Appellant, Marcus Dewayne Boyd, was tried by jury and convicted of Count A, First Degree Murder, Counts B-E, Shooting with Intent to Kill, and Count F, Possession of a Firearm After Former Conviction of a Felony, in the District Court of Tulsa County Case Number CF-2016-3995. The jury recommended as punishment imprisonment for life in Count A, twenty years in Counts B-E and two years in Count F. The trial court sentenced Appellant accordingly and ordered the sentences run consecutively. It is from these judgments and sentences that Appellant appeals. The Judgment and Sentence is here by AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur in Result; Hudson, J., Concur; Rowland, J., Concur.

F-2018-542 — Charles Henry Tarver, Jr., Appellant, was tried by jury in the District Court of Pottawatomie County, Case No. CF-2016-446 for the crime of Possession of Controlled Dangerous Substance with Intent to Distribute, After Former Conviction of Two or More Felonies (Count 1) and Unlawful Possession of Drug Paraphernalia (Count 2). The jury returned verdicts of guilty and set as punishment forty years imprisonment on Count 1 and a $1,000.00 fine on Count 2. The trial court sentenced accordingly. From this judgment and sentence Charles Henry Tarver, Jr. has perfected his appeal. REVERSED WITH INSTRUCTIONS TO DISMISS. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in part and dissents in part; Hudson, J., concurs.

F-2018-893 — On January 23, 2013, Appellant D'Angelo Landon Burgess entered a plea of guilty to Grand Larceny and was placed on a five (5) year deferred sentence. On July 17, 2017, the State filed an application to accelerate the deferred sentence. The Honorable Ray C. Elliott ordered the sentence accelerated following a hearing held August 21, 2018. The district court's order accelerating the sentence is AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J.: Concur in Results; Kuehn, V.P.J.: Concur; Lumpkin, J.: Concur; Rowland, J.; Concur.

F-2018-964 — Robert Paul Lockner, Sr., Appellant, was tried by jury for the crime of two counts of Assault and Battery of a Police Officer After Former Conviction of Two Felonies in Case No. CF-2017-450 in the District Court of Pottawatomie County. The jury returned verdicts of guilty and set as punishment four years imprisonment on each count. The trial court sentenced accordingly and ordered the sentences to be served consecutively. From this judgment and sentence Robert Paul Lockner, Sr. has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs in results; Kuehn, V.P.J., concurs in results; Lumpkin, J., concurs; Hudson, J., concurs.

F-2018-477 — Gerald L. Taylor, Appellant, was tried by jury in Case No. CF-2016-6502 in the District Court of Oklahoma County for the crime of Robbery with a Firearm, After Former Conviction of Two or More Felonies (Count 1) and Unlawful Possession of a Firearm by Convicted Felon, After Former Conviction of Two or More Felonies (Count 2). The jury returned verdicts of guilty and set punishment at twenty-five years imprisonment on Count 1 and ten years imprisonment on Count 2. The trial court sentenced accordingly, ordered the sentences to be served consecutively and award-

ed Taylor credit for time served. From this judgment and sentence Gerald L. Taylor has perfected his ap-peal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs.

F-2018-374 — Michael Thomas Bride, Appellant, was tried by jury in Case No. CF-2016-55 in the District Court of Garfield County for the crime of Driving a Motor Vehicle While Under the Influence of Alcohol – Third or Subsequent Offense (Count 1), Driving With License Suspended – Third or Subsequent Offense (Count 2), and Transporting Open Container – Alcohol (Count 3). The jury returned a verdicts of guilty and set punishment at twenty years imprisonment and a $1,000.00 fine on Count 1, one year and a $1,000.00 fine on Court 2, and six months and a $500.00 fine on Count 3. The trial court sentenced accordingly and further ordered the sentences to run concurrently. From this judgment and sentence Michael Thomas Bride has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs in results; Kuehn, V.P.J., dissents; Lumpkin, J., specially concurs; Hudson, J., dissents.

RE-2018-1071 — Appellant Jose Angel Lopez pled guilty to Count 1 – Using a Vehicle to Facilitate the Intentional Discharge of a Firearm, and Count 2 – Possession of a Controlled Dangerous Substance in Oklahoma County Case No. CF-2010-3550. He was sentenced to ten years imprisonment for Count 1 and one year imprisonment for Count 2. The sentences were ordered to run concurrent and be suspended for all but the first five years. Following a one year Judicial Review Proceeding, Appellant's sentence was modified to three years to serve and seven years suspended. On November 17, 2017, the State filed an Amended Application to Revoke Suspended Sentence. Following a hearing on the State's motion, the District Court of Oklahoma County, the Honorable Glenn M. Jones, revoked the remaining seven years of Appellant's suspended sentence in full. Appellant appeals the revocation of his suspended sentence. AFFIRMED. Opinion by: Kuehn, V.P.J. Lewis, P.J.: concur; Lumpkin, J.: concur Hudson, J.: concur; Rowland, J.: recuse.

F-2018-629 — Brian Keith Fullerton, Appellant, was tried by jury for four counts of Lewd Acts with a Child Under Sixteen in Case No. CF-2016-4430 in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment life imprisonment on each count. The trial court sentenced accordingly, divided the four counts into two pairs and ordered each pair of life terms to be served concurrently, but one pair to be served consecutively to the other. From this judgment and sentence Brian Keith Fullerton has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur in results; Hudson, J., concur; Rowland, J., concur.

F-2018-616 — Heather Suzanne Barbee, Appellant, was tried by jury for Sexual Exploitation of a Child in Case No. F-2017-190 in the District Court of Muskogee County. The jury returned a verdict of guilty and recommended as punishment 33 years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Heather Suzanne Barbee has perfected her appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

F-2017-1125 — Jon Randall Ishmael, Appellant, was tried by jury for the crime of Sexual Abuse of a Child Under 12 in Case No. CF-2016-3644 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at life imprisonment and a $5,000.00 fine. The trial court sentenced accordingly. From this judgment and sentence Jon Randall Ishmael has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs in results; Kuehn, V.P.J., concurs in part and dissents in part; Lumpkin, J., concurs in results; Hudson, J., concurs.

Thursday, October 3, 2019

F-2018-269 — David Anthony Tofflemire, Appellant, was convicted at a non-jury trial of Possession of Child Pornography, in Case No. CF-2017-169, in the District Court of McCurtain County. The Honorable Gary Brock, Special Judge, sentenced Appellant to sixteen years imprisonment with the last eight years suspended. Judge Brock also ordered credit for time serviced. From this judgment and sentence, David Anthony Tofflemire, has perfected his appeal. The Judgment and Sentence of the district court is AFFIRMED. This matter is REMANDED to the district court with instructions to enter an order nunc pro tunc correcting the Judgment and Sentence document in conformity with this opinion if the matter has not already been addressed. Opinion by: Hudson,

J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

F-2018-814 — Appellant, Melinda Gayle Henry, was tried by jury and convicted of Embezzlement, in violation of 21 O.S.Supp.2012, § 1451, in the District Court of Nowata County Case Number CF-2016-71. The jury recommended punishment of five years imprisonment and payment of a $10,000.00 fine. The trial court sentenced Appellant accordingly. It is from this judgment and sentence that Appellant appeals. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur in Results; Kuehn, V.P.J., Concur in Results; Hudson, J., Concur; Rowland, J., Concur.

F-2018-915 — Trever Wayne Ford, Appellant, was tried by judge and convicted of Assault and Battery by Means and Force Likely to Produce Death. He was sentenced to 25 years imprisonment. From this judgment and sentence Trever Wayne Ford has perfected his appeal. AFFIRMED; Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

F-2018-973 — Appellant Brian Scott Willess entered a no contest plea to Stalking in Violation of Court Order in Cleveland County Case No. CF-2015-700. Sentencing was deferred for five (5) years pursuant to terms and conditions of probation. The State filed an Application to Accelerate, alleging that Willess violated the terms and conditions of probation. At the conclusion of the hearing, the District Court of Cleveland County, the Honorable Thad Balkman, District Judge, accelerated Willess' deferred sentence and sentenced him to five (5) years imprisonment. Willess appeals. The acceleration of Willess' deferred sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

M-2018-1055 — Sade Deann McKnight, Appellant, was tried by jury for the crime of Obstructing an Officer (Count 1) and Resisting an Officer (Count 2) in Case No. CM-2016-1491 in the District Court of Payne County. The jury returned verdicts of guilty and set as punishment a $500.00 fine for Count 1 and six weeks confinement in the county jail and a $500.00 for Count 2. The trial court sentenced accordingly. From this judgment and sentence Sade Deann McKnight has perfected her appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs.

COURT OF CIVIL APPEALS
(Division No. 1)
Friday, September 20, 2019

117,505 — State of Oklahoma, ex rel. Board of Regents for Tulsa Community College, Plaintiff, v. Elbert Kirby, Defendant/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. State of Oklahoma, ex rel. Board of Regents for Tulsa Community College sued Elbert Kirby for $1,365.57 for indebtedness. College filed a motion for summary judgment and attached documentation from its enrollment website that identified "Elbert Kirby" as an individual who registered for three courses. Defendant submitted his affidavit stating he has never enrolled in any courses at College. The mere denial in a pleading, repeated in an affidavit unsupported by proof is not sufficient to overcome summary judgment. *Weeks v. Wedgewood*, 1976 OK 72, ¶12, 554 P.2d 780, 784. Defendant's affidavit is more than a conclusory denial of indebtedness. The record presents a genuine issue concerning identity. It is a fact question that precludes summary judgment. The order is REVERSED. Opinion by: Goree, C.J.; Joplin, P.J., and Buettner, J., concur.

Friday, September 27, 2019

116,560 — Gary Anderson, Plaintiff/Appellant, v. City of Miami, Oklahoma, a municipal corporation and The Board of Review of the City of Miami, Oklahoma, a purported entity, Defendants/Appellees. Appeal from the District Court of Ottawa County, Oklahoma. Honorable J. Dwayne Steidley, Trial Judge. Plaintiff, Gary Anderson, appeals the trial court's Court Order denying his Renewed and Additional Petition for Review of the Findings of Fact and Conclusions of Law of City of Miami Board of Review [Board] regarding whether Plaintiff, a member of the Miami, Oklahoma, Police Department, was terminated for cause. We affirm. Opinion by Goree, C.J.; Joplin, P.J., and Swinton, J. (sitting by designation), concur.

116,655 — Kody Rogers, Plaintiff/Appellee, v. City of Norman, Oklahoma, Defendant/Appellant, Michael Joseph Hamoush and Mary K. O'Brien-Hamoush, Plaintiffs, v. Richard Hardin, Kody Rogers and City of Norman, Defendants. Appeal from the District Court of Cleveland County, Oklahoma. Honorable Michael Tupper, Trial Judge. The City of Norman, Appellant, appeals judgment rendered in favor of

Kody Rogers, Appellee, due to alleged errors concerning an evidentiary ruling and a jury instruction. Because the trial court's decision to exclude Facebook posts was not an abuse of discretion, and because the judge's refusal of additional language in a jury instruction did not constitute a miscarriage of justice or substantial violation of a constitutional or statutory right, the judgment must be affirmed. AFFIRMED. Opinion by Goree, C.J.; Joplin, P.J., and Buettner, J., concur.

116,749 — In the Matter of the Adoption: J.J.G. and J.D.G., Minor Children, Wava Diann Roberts, Maternal Grandmother, Appellant, v. Mike Priest and Gail Priest, Appellees. Appeal from the District Court of Pontotoc County, Oklahoma. Honorable Lori Jackson, Judge. Appellant, Wava Roberts, maternal grandmother of J.J.G. (born May 4, 2006) and J.D.G. (born June 25, 2007), seeks review of the trial court's January 10, 2018 order denying Appellant's Motion to Vacate the Final Decree of Adoption, issued on April 21, 2017. The children were taken into Department of Human Services (DHS) custody in 2015 and placed with Mike and Gail Priest, the adoptive parents, shortly thereafter in September 2015. Appellees, the Priests, filed a Petition for Adoption without the consent of the biological father on September 29, 2016; the biological Mother passed away in 2012. Appellant, the maternal grandmother, filed a Motion to Intervene in the adoption and a Cross-Petition for Adoption without the consent of the biological father on February 10, 2017. By order on March 20, 2017, the trial court dismissed Appellant/Grandmother's Cross-Petition for Adoption and advised Appellant to file an independent Petition for Adoption instead. Appellant did not file an independent Petition for Adoption, nor did she appeal the dismissal of the Cross-Petition or the trial court's adverse treatment of her Motion to Intervene. Appellant/Grandmother raises two issues in her appeal. First, she asserts the trial court denied her due process when the court granted the final adoption order, as Grandmother asserts she had standing to claim custody of her deceased daughter's children and she should have been given notice and an opportunity to be heard. Grandmother's second proposition of error on appeal asserts the trial court did not follow the mandatory placement preferences provided for in the Indian Child Welfare Act. Grandmother claimed a right to notice and an opportunity to be heard by virtue of this court's holding in *In the Matter of the Adoption of G.F.E.G.*, 2011 OK CIV APP 3, ¶9. 246 P.3d 1115, 1117. However, based on the reasoning of the Oklahoma Supreme Court in *Birtciel v. Jones*, 2016 OK 103, ¶12, 382 P.3d 1041, 1044, Grandmother was not entitled to notice of the adoption, because the children's Father was present and provided his consent, and Grandmother was no longer a party to the adoption as she failed to pursue the adoption process. Grandmother's second proposition of error similarly provides no relief, due to Grandmother's failure to pursue the adoption after her Cross-Petition was dismissed and she failed to file an independent adoption petition. The trial court's final adoption order is AFFIRMED. Opinion by Joplin, P.J.; Goree, C.J., and Buettner, J., concur.

117,821 — Matthew Penderson, Petitioner, vs. City of Tulsa, Own Risk No. 10435, and The Workers' Compensation Commission, Respondents. Proceeding to Review an Order of a Three-Judge Panel of the Workers' Compensation Commission. Claimant/Petitioner Matthew Penderson (Penderson) appeals from the decision of a three-judge panel of the Workers' Compensation Commission (the Commission). The appealed order affirmed the ruling of an Administrative Law Judge (the ALJ) granting Respondent City of Tulsa (the City) reimbursement for wages the City paid to Penderson while he was temporarily disabled. The Commission held the City's payment of Penderson's full wages during leave for a temporary injury – as required by statute – was capped by the statutorily designated maximum amount of temporary total disability (TTD) in the event of an award of permanent partial disability (PPD). The Commission affirmed the ALJ's order crediting the City for the excess wages paid. Penderson appeals. We SUSTAIN. Opinion by Buettner, J.; Joplin, P.J., and Goree, C.J., concur.

(Division No. 2)
Thursday, September 19, 2019

116,087 — In re the marriage of: Virginia Lynn Allen, Petitioner/Appellant, vs. Franklin Louis Allen, Respondent/Appellee. Appeal from Order of the District Court of Muskogee County, Hon. Norman D. Thygesen, Trial Judge. Appellant Virginia Lynn Allen appeals the district court's order denying her motion for new trial. We find that the appellate opinion in *Allen I* affirmed the property division award in the divorce decree and such award is now the settled law-of-the-case. Consequently,

the district court lacks authority to modify the property division award. The order denying Virginia's motion for new trial is vacated and the issue is remanded to the district court for a determination of award. VACATED AND REMANDED WITH INSTRUCTIONS. Opinion from the Court of Civil Appeals, Division II, by Fischer, P.J.; Reif, S.J. (sitting by designation), and Thornbrugh, J., concur.

117,030 — In the Matter of the Estate of Thomas Lee Burgess, Deceased. The Estate of Thomas Lee Burgess, Appellant, vs. St. John Health Systems, Inc., Appellee. Appeal from Order of the District Court of Tulsa County, Hon. Kurt Glassco, Trial Judge. Angela Williams, Personal Representative of the Estate of Thomas Lee Burgess, appeals the district court's Order which denied her motion for new trial. The district court sustained the objection to her petition seeking approval of final account and decree of final distribution and approved creditors' claims against the Estate submitted by Utica Park Clinic and St. John Health Systems, Inc. On this record, we conclude that the district court did not err either in sustaining creditors' objection to PR's petition seeking approval of final account or in approving creditors' claims against the Estate. Accordingly, we affirm the district court's order denying PR's motion for new trial. AFFIRMED. Opinion from Court of Civil Appeals, Division II by Fischer, P.J.; Reif, S.J. (sitting by designation), and Thornbrugh, J., concur.

Wednesday, September 25, 2019

117,135 — Child Care, Inc., Plaintiff/Appellant, v. State of Oklahoma, ex rel. The Oklahoma Department of Human Services, Defendant/Appellee. Appeal from Order of the District Court of Oklahoma County, Hon. Aletia Haynes, Trial Judge. Plaintiff Child Care, Inc., appeals from the district court's order granting the motion to dismiss filed by the Department of Human Services (DHS). Plaintiff complains the district court erred in determining Plaintiff lacked standing to bring suit and in dismissing the case due to lack of subject matter jurisdiction. Plaintiff's child care provider facility became the subject of an audit, which resulted in a DHS determination that Plaintiff had failed to accurately maintain records and had been overpaid. DHS then began to retain amounts from its payments due Plaintiff to recover the asserted overpayment. Plaintiff filed this action against DHS alleging that certain weekly payments owed to Plaintiff were "short" due to an unauthorized, unjustified and illegal "setoff" by DHS. DHS asserted that it complied with the terms of the Provider Contract, and that the Provider Contract and the applicable administrative rules pursuant to which it had audit authority also gave it authority to determine overpayment amounts and the sole discretion to determine the method by which it would pursue overpayment from Plaintiff. DHS argued, based on its interpretation of OAC 340: 40-15-1 (Overpayments), that only child care "clients" have the right to appeal DHS overpayment determinations and, therefore, Plaintiff did not have standing to appeal the overpayment determination or recoupment actions and could not, under the guise of a breach of contract claim, seek judicial review of those actions in district court. DHS's interpretation of the overpayment rule requires reading subsection 340: 40-15-1(c) in isolation, excluding consideration of other pertinent subsections of the rule. It leaves Plaintiff without any means to challenge an overpayment determination, without a remedy to correct an erroneous or unlawful withholding of payments, treats "providers" differently from "clients" subject to overpayment claims and leaves Plaintiff without access to judicial process. The district court's order determining Plaintiff lacked standing and dismissing the case based on lack of subject matter jurisdiction is reversed. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division II by Fischer, P.J.; Reif, S.J. (sitting by designation), and Thornbrugh, J., concur.

Monday, September 30, 2019

117,877 — In the Matter of the Adoption of K.J.B.: Victor Ashton Bustos, Appellant, vs. Jeffrey Freeman and Kelly Freeman, Appellees. Appeal from an Order of the District Court of Oklahoma County, Hon. Allen J. Welch, Trial Judge. Appellant, the biological Father of Child, appeals from a trial court order finding Child eligible for adoption without Father's consent by Child's maternal grandparents. As grounds, the grandparents alleged 10 O.S.2011 § 7505-4.2(B)(1), that Father failed to pay child support for more than a year preceding the filing of the adoption petition as ordered four years earlier by an Oklahoma DHS Office of Administrative Hearings. We reject Father's contention that the DHS order was invalidated after the agency closed its collection case on Father in mid-2015, but find, as did the trial court,

even if that action did "zero out" Father's support obligation (as he claims), the district court orders subsequently entered in Child's guardianship case were in full force and effect during the relevant time period. The grandparents had the burden of establishing by clear and convincing evidence that Father willfully refused, failed, or neglected to provide support for Child pursuant to a valid court order for the statutory period of time. The trial court found that they met that burden, and that Father's consent to Child's adoption therefore was not necessary. With the exception of minor scriveners' errors corrected herein, we find the trial court's decision is not against the clear weight of the clear and convincing evidence. AFFIRMED AS CORRECTED. Opinion from the Court of Civil Appeals, Division II, by Thornbrugh, J.; Reif, S.J. (sitting by designation), and Fischer, P.J., concur.

Tuesday, October 1, 2019

117,092 — Jonathan Sedlacek &/or Midwest Radiator, LLC, Petitioner, vs. Compsource Mutual and the Workers' Compensation Commission, Respondents. Proceeding to Review an Order of the Workers' Compensation Commission En Banc. Jonathan Sedlacek and Midwest Radiator, LLC, (collectively Employer) seek review of an order of the Workers' Compensation Commission En Banc, which affirmed the administrative law judge's order finding that Compsource Mutual Insurance Company (Compsource) was not a proper party. The administrative law judge denied Employer's motion to add Compsource to the case because Employer had no workers' compensation insurance coverage in effect with Compsource on the date of the claimant's injury. The record shows no reversible error, and the order is affirmed. Opinion from Court of Civil Appeals, Division II by Fischer, P.J.; Reif, S.J. (sitting by designation), and Thornbrugh, J., concur.

(Division No. 3)
Monday, September 23, 2019

117,469 — Faramarz Mehdipour, Plaintiff/Appellant, vs. Honorable Judge Richard Ogden, Defendant/Appellee. Appeal from Oklahoma County, Oklahoma. Honorable Tipping Davis, Judge. Plaintiff/Appellant Faramarz Mehdipour (Mehdipour) appeals from an order of the trial court dismissing his case. Mehdipour sought declaratory and injunctive relief against Defendant/Appellee Judge Richard Ogden (Odgen) related to rulings Ogden made in a quiet title proceeding in which Mehdipour is a party. Specifically, Ogden denied Mehdipour's request for additional time to conduct discovery. We find Mehdipour cannot show he is entitled to a writ of mandamus and, thus, has failed to state a claim for which relief may be granted. Mehdipour cannot show that he has no other "plain and adequate" remedy; that he has a "clear legal right" to an order allowing him to conduct further discovery; or that Odgen had a "plain legal duty . . . not involv[ing] the exercise of discretion" to grant Mehdipour's request. *See Maree v. Neuwirth,* 2016 OK 62, ¶6, 374 P.3d 750, 752-53. We AFFIRM. Opinion by Mitchell, P.J.; Goree, C.J. (Sitting by designation), and Bell, J. concur.

Wednesday, September 25, 2019

117,230 — In Re the Marriage of Arndt: Kristen Arndt, Petitioner/Appellee, vs. David Arndt, Respondent/Appellant. Appeal from the District Court of Canadian County, Oklahoma. Honorable Barbara Hatfield, Judge. Respondent/ Appellant David Arndt (Father) challenges the trial court's Decree of Dissolution entered in a divorce proceeding between Father and Petitioner/Appellee Kristen Arndt. Father contends the trial court was biased and prejudiced against him; that the court erred by allowing his Legal Aid attorney to withdraw; that his due process rights were violated because he was not allowed to present evidence regarding the marital assets and debts and was not allowed to attend or participate in certain proceedings; that the court inequitably divided the marital property; and that it was improper for the court to grant custody when there was an open Department of Human Services (DHS) proceeding involving the parties and their children and where no joint custody plan was submitted. We find the trial court did not abuse its discretion or violate Father's due process rights. Accordingly, the trial court's Decree of Dissolution is AFFIRMED. Opinion by Mitchell, P.J.; Bell, J., and Swinton, J., concur.

Friday, September 27, 2019

116,645 — Re the Marriage of: Katie Newton-Aguilar, Petitioner/Appellee, vs. Albert Aguilar, Respondent/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Barry L. Hafar, Judge. In this child custody modification proceeding, Respondent/Appellant, Albert Aguilar (Father), appeals from the trial court's order modifying the parties' joint custody plan and designating Petitioner/Appellee, Katie Newton-Aguilar (Mo-

ther), as primary physical custodian. Father also appeals from the trial court's order permitting Mother, as the parent with primary physical custody of the child, to relocate the minor child to Texas. This Court recognizes that 43 O.S. 2011 §112.3 grants the primary physical custodial parent a "presumptive right" to relocate the child notwithstanding the other parent's personal objections. *See Scocos v. Scocos*, 2016 OK 36, ¶6, 369 P.3d 1068. However, in equal time, joint custody arrangements, such as here, this Court finds §112.3 harms the non-primary physical custodial parent's ability to maintain a daily/weekly relationship with the child. Even so, based on the Supreme Court's holding in *Boatman v. Boatman*, 2017 OK 27, 404 P.3d 822, and §112.3's mandates, this Court is obliged to affirm the trial court's order. AFFIRMED. Opinion by Bell, J.; Mitchell, P.J., and Swinton, J., concur.

116,656 — JR Donelson, Inc., Petitioner/Appellee, vs. State of Oklahoma ex rel. The Oklahoma State Board of Licensure for Professional Engineers and Land Surveyors; and George Gibson, P.E., in his Capacity as Chairman of the Oklahoma State Board of Licensure for Professional Engineers and Land Surveyors, Respondent/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Daman H. Cantrell, Trial Judge. Respondent/Appellant State of Oklahoma ex rel. Oklahoma State Board of Licensure for Professional Engineers and Land Surveyors (the Board) appeals from a district court order reversing and vacating the Board's Final Order finding Petitioner/Appellee JR Donelson, Inc. (Donelson) guilty of noncompliance with certain regulations of the Board. Donelson had filed an administrative appeal in the district court of Tulsa County pursuant to the Oklahoma Administrative Procedures Act (APA). On appeal, the Board argues that its order was supported by the evidence, and therefore that the district court's order was improper. The Board also argues that the district court applied the wrong standard of review. We affirm the trial court's order. Opinion by Swinton, J. Mitchell, P.J., concurs, Bell, J., concurs in part and dissents in part.

117,307 — (Consolidated w/117,373) J. Asuncion Soto, Petitioner/Appellant, vs. Exterran Holdings Inc., American Zurich Insurance Co., New Hampshire Insurance Company and The Workers' Compensation Court of Existing Claims, Respondents/Appellees. Proceeding to Review an Order of The Workers' Compensation Court of Existing Claims. Honorable Michael W. McGivern, Judge. Petitioner/Appellant, J. Asuncion Soto (Claimant), appeals from two orders of the Workers' Compensation Court of Existing Claims dismissing his claims against Respondent/Appellee, Exterran Holdings Inc. (Employer), for cumulative trauma injury to his lungs (Appellate Case No. 117,307) and for lung injury from an occupational disease (Appellate Case No. 117,373). In both cases, Claimant alleged he developed silicosis while working for Employer. The trial court found that, prior to September 2015, Claimant was neither aware of any lung problems due to cumulative trauma nor should he have reasonably known that his occupational disease or injury was related to work activity. As such, the court held the proper forum for Claimant's claims lies with the Workers' Compensation Commission, not the Court of Existing Claims. The two cases were consolidated for appellate review. Claimant's claims before the Commission have been stayed pending resolution of this appeal. Claimant concedes he does not necessarily disagree with either order of dismissal, but asserts this is a preemptive appeal to ensure Employer does not argue before the Commission that Claimant should have been aware his condition was work-related prior to 2015. Claimant worked for Employer as a sandblaster and painter from 2007 until September 2015. He last used silica-based sand on his job in 2009. Claimant testified he never had lung or respiratory problems on the job prior to September 2015. At that time, however, Claimant began having difficulty breathing when he walked. He was subsequently diagnosed with silicosis, a lung disease caused by inhalation of silica dust. Both of Claimant's doctors opined the disease was work related. Pursuant to 85 O.S. 2011 §315, "Benefits for a cumulative trauma injury or occupational disease or illness shall be determined by the law in effect at the time the employee knew or reasonably should have known that the injury, occupational disease or illness was related to work activity." Because the law in effect in September 2015, was found within the statutes regulating the Workers' Compensation Commission, jurisdiction to adjudicate Claimant's claims belongs to the Commission. Claimant's claims before the Commission will rise or fall on their own merits and the facts presented therein. SUSTAINED. Opinion by Bell, J.; Mitchell, P.J., and Swinton, J., concur.

117,633 — Lamees Shawareb and Farouk Shawareb, Plaintiffs/Appellants, vs. SSM Health

Care of Oklahoma, Inc., d/b/a Bone & Joint Hospital at Saint Anthony, and Savannah Petty, Defendants/Appellees, and JM Smucker, Inc., Defendant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Trevor Pemberton, Judge. Plaintiffs/Appellants Lamees Shawareb and Farouk Shawareb appeal from the trial court's order granting summary judgment to Defendants/Appellees SSM Health Care of Oklahoma, Inc., d/b/a Bone & Joint Hospital at Saint Anthony (the Hospital), and Savannah Petty. We find Plaintiffs have failed to present evidence that creates a dispute of material fact as to nursing negligence or ordinary negligence. Therefore, Petty and the Hospital are entitled to judgment as a matter of law. We AFFIRM. Opinion by Mitchell, P.J.; Bell, J., and Swinton, J., concur.

(Division No. 4)
Thursday, September 19, 2019

118,041 — Daree Ione New, Plaintiff/Appellant, vs. The Board of Regents of The University of Oklahoma, Defendant/Appellee. Appeal from an Order of the District Court of Cleveland County, Hon. Lori Walkley, Trial Judge. The plaintiff, Daree Ione New (New), appeals an order dismissing her amended petition filed against the defendant, State of Oklahoma ex rel. Board of Regents of the University of Oklahoma. New alleged that she and University had a written agreement whereby University agreed to provide a master's degree program and New agreed to pay for the program. New claims that University breached the contract by wrongfully dismissing her from the Masters of Social Work Program. New alleged that this contract is in writing and is represented by handbooks and related material and a document styled SWK 5820: Field Practicum Contract & Student Evaluation For Direct Practice Concentration. The handbooks and related materials are not provided in the Record, and so will not be considered. The subject of the FPC is an internship with the Veterans Administration as a part of the degree curriculum and is not a contract with a subject as alleged by New. Thus, the FPC does not establish a duty on the part of University regarding provision of the Masters of Social Work Program. The order of dismissal is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

Friday, September 20, 2019

116,436 — Michael Joyner, Petitioner/Appellant, v. Lisa Smith, Respondent/Appellee. Appeal from an Order of the District Court of Garvin County, Hon. Steven C. Kendall, Trial Judge. The petitioner, Michael Chad Joyner (Father), appeals an Order Modifying Journal Entry in favor of the respondent, Lisa Smith. The parties have a child and, in a paternity proceeding, Mother was awarded custody and Father received visitation. The visitation schedule of week-on/week-off resulted in Father having a shared parenting credit. Here, Father moved to modify, primarily based upon Mother's health, and Mother countered with her own motion. The evidence did show changes of circumstances. However, Mother's health did not merit change of custody. The Record shows that there had not been a joint custody plan or a shared parenting order in place, although Father received a shared parenting credit based upon the time the child spent with him. After hearing the evidence, the trial court denied Father's motion. The trial court modified the visitation schedule to remove the week-on/week-off portion and substitute the standard schedule. The holiday provisions appear to be unchanged. The principal reason for the change was that the child is now in school and the child's best interest was not served by the existing schedule. The evidence also demonstrated that Mother was not keeping a telephone. This interferes with Father's telephone contact and is a safety factor for the child. Thus, this Court directs that the judgment be modified, as set out herein, to require Mother to maintain a working telephone and provide Father with the telephone number. In all other respects, the judgment is affirmed. AFFIRMED AS MODIFIED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., concurs, and Wiseman, V.C.J., dissents.

117,401 (Companion with Case No. 116,735) — In Re The Marriage of: Sheharyar Ali, Petitioner/Appellant, vs. Shaista Sheharyar, Respondent/Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Martha Oakes, Trial Judge. The trial court petitioner, Sheharyar Ali (Father), appeals an Order allowing the respondent, Shasta Sheharyar (Mother) to relocate out of state with the parties' children. In this relocation action, the best interests of the children are paramount. Although Mother, as legal custodian, has the right to relocate, this right is a qualified right.

As the relocating party, Mother has the burden to show that she is acting in good faith. She has done so by showing her repeated, unsuccessful efforts to obtain employment in her profession in Oklahoma. She obtained a well-paid position out of state and the living, cultural, and religious opportunities there are not detrimental to the children. Mother's financial life, and by extension the children's, will be enhanced by relocating. Mother denied any intention to cause harm to Father or adversely affect his relationship with the children. The statute on relocation provides factors to consider when deciding the best interests of the children. The evidence from Mother's expert and the GAL supported relocation based upon application of the statutory factors. Father's expert focused on the risk of harm to Father's relationship with the children from geographic separation. The trial court recognized Father's concern and mitigated that concern with a visitation schedule. The decision of the trial court that Mother's application is in good faith and that relocation is in the best interests of the children and, therefore, to approve relocation, is not against the clear weight of the evidence or contrary to law. Therefore the judgment is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

Tuesday, September 24, 2019

117,163 — In re the Marriage of: Melissa Kay Edwards, Petitioner/Appellee, v. Jeffrey Scott Edwards, Respondent/Appellant. Appeal from the District Court of Grady County, Hon. John E. Herndon, Trial Judge. In this dissolution of marriage case, Respondent/Appellant appeals from the trial court's order determining the marital estate and awarding and valuing marital assets and from the court's order awarding attorney fees to Petitioner/Appellee. From our review of the record and the applicable law, we conclude the trial court did not abuse its discretion in its determination of the assets of the marital estate, in its equitable division of those assets and the marital debts, and in its award of attorney fees and costs to Petitioner/Appellee. Accordingly, we affirm. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Wiseman, V.C.J., and Rapp, J., concur.

REINSTATEMENT

An error was made in the October 2019 *Oklahoma Bar Journal*. Dochele Burnett has complied with the requirements for reinstatement, and notice is hereby given of such reinstatement:

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Cosponsored by the OBA Financial Institutions & Commercial Law Section

FRIDAY, NOVEMBER 1, 2019
9 A.M. - 2:50 P.M.

Oklahoma Bar Center
1901 N. Lincoln Blvd.
Oklahoma City, OK 73106

MCLE 6/1

PROGRAM PLANNER:
Eric L. Johnson,
Hudson Cook, LLP

TOPICS INCLUDE:
- **UCC Article 9**
- **Payment Issues Updates**
- **Legal Issues in Financial Technology (Fintech) Lending**
- **Medical Marijuana, Banking and Ethical Issues**
- **Banking, Fraud, Ransomware and Social Engineering**
- **CFPB Updates for the Banking/Commercial Practitioner**

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2019 WORKERS' COMPENSATION UPDATE

- **Original Program Date:** September 20, 2019
- **MCLE:** 6/0
- **Program Description:** A comprehensive review of legislative changes and appellate court decisions in regard to the Administrative Workers' Compensation Act.

DIG INTO OIL AND GAS HOT TOPICS: LAND TITLES, DEEDS, HEIRSHIP, HORIZONTAL DRILLING, AND MORE!

- **Original Program Date:** September 26, 2019
- **MCLE:** 6/0
- **Program Description:** The oil and gas industry continues to thrive in Oklahoma, creating job opportunities for both landmen and attorneys alike. Recognizing the many careers and legal practices linked to the industry, this seminar covers selected topics in oil and gas land titles.

PLAN FOR THE WORST, HOPE FOR THE BEST: PREMARITAL AGREEMENTS, TAX LAW, AND ESTATE PLANNING TOOLS

- **Original Program Date:** September 27, 2019
- **MCLE:** 7/1
- **Program Description:** This Family-law section cosponsored program features Linda Ravdin, Phil Tucker and Barbara Klepper with practical take-aways.

PROFESSIONALISM: THE TIMELESS APPROACH TO THE PRACTICE OF LAW

- **Original Program Date:** October 3, 2019
- **MCLE:** 3/3
- **Program Description:** Learning to better advocate while remaining professional and to build a case without tearing down opposing counsel.

2019 LABOR AND EMPLOYMENT LAW UPDATE

- **Original Program Date:** October 4, 2019
- **MCLE:** 6/1
- **Program Description:** The 2019 OBA Labor and Employment Law Section's annual CLE features esteemed speakers who are specialists in their fields covering important and relevant legal updates.