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Court Issue

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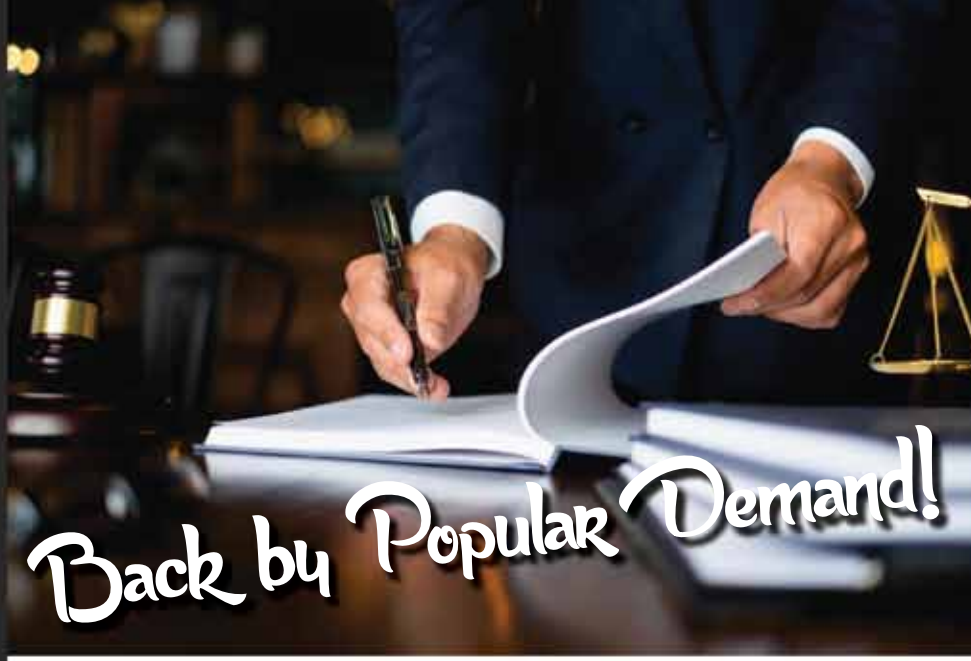

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Roy Ginsburg, a practicing lawyer for more than 35 years, is an attorney coach and law firm consultant. He works with individual lawyers and law firms nationwide in the areas of business development, practice management, career development, and strategic and succession planning. For more than a decade, he has successfully helped lawyers and law firms with their exit strategies. www.sellyourlawpractice.com.

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2020 OK 32

IN THE MATTER OF K.H., C.H., E.H., C.H. DEPRIVED CHILD(REN) TAYLOR HUDSON, Appellant, v. STATE OF OKLAHOMA, Appellee and CODY HUDSON, Appellant, v. STATE OF OKLAHOMA, Appellee.

No. 118,035; Comp. w/118,078
August 19, 2020

CORRECTION ORDER

Honorable Cassandra M. Williams, Trial Judge

The dissenting opinion, filed herein on May 12, 2020, is **revised** to reflect correctly, by the text appearing above, both case #118,078 as well as companion case # 118,035 in the style. The dissent shall be entered on the docket of both cases.

In all other respects the dissent remains unchanged.

Dated this 19th day of August, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

The Oklahoma District Attorneys Council (DAC) is pleased to announce that DAC has been designated by the U.S. Department of Justice to award and disburse loan repayment assistance through the John R. Justice (JRJ) Loan Repayment Program. The State of Oklahoma has received a total of $34,312.00 to be divided equally among eligible full-time **public defenders and prosecutors (including tribal government)** who have outstanding qualifying federal student loans.

Applications for new and renewal applicants are currently available online. For more information about the JRJ Student Loan Repayment Program and how to apply, please go to http://www.ok.gov/dac. Under "About the DAC", click on the "John R. Justice Student Loan Repayment Program" link. Application packets must be submitted to the DAC or postmarked no later than October 30, 2020 for consideration.

2020 OK CR 16

JAMES EDWARD KNAPPER, Appellant, v. STATE OF OKLAHOMA, Appellee.

Case No. F-2017-223. August 20, 2020

OPINION

HUDSON, JUDGE:

¶1 Appellant, James Edward Knapper, was tried and convicted at a jury trial in Tulsa County District Court, Case No. CF-2015-3957, of Count 1: Murder in the First Degree, in violation of 21 O.S.Supp.2012, § 701.7(A); Count 2: Assault and Battery With a Deadly Weapon, in violation of 21 O.S.2011, § 652; and Count 3: Gang-Related Offense, in violation of 21 O.S. 2011, § 856.3. The jury recommended sentences of life imprisonment with the possibility of parole on Count 1; fifty-five years imprisonment on Count 2; and five years imprisonment on Count 3. The Honorable William D. LaFortune, District Judge, presided at trial and sentenced Appellant in accordance with the jury's verdicts. Judge LaFortune gave credit for time served and ordered all three sentences to run consecutively.[1] Appellant now appeals.

FACTS

¶2 In 2015, Jerome Bledsoe was a member of a street gang called the Squeeze Team and a former member of the rival Hoover Crips. The Hoover Crips had marked him for death for leaving their gang. On June 23, 2015, a group of Crips unsuccessfully attempted to assassinate Bledsoe while he was getting gas at a north Tulsa QuikTrip. The shooters unintentionally shot another person during this attack.

¶3 On July 17, 2015, Bledsoe and his girlfriend, Deouijanea Terry, were driving around north Tulsa. Around 3:45 p.m., Bledsoe stopped at an intersection and a gray Chevy Astro van drove up next to them. The van's sliding passenger door opened[2] and the occupants on the passenger side of the van opened fire, wounding Bledsoe and killing Ms. Terry. Bledsoe later told police that Appellant, a then fourteen-year-old member of the Hoover Crips, was one of the shooters who opened fire. Bledsoe also identified Appellant at trial as a participant in the QuikTrip shooting the month before.

¶4 Appellant and his accomplices later bragged about the shootings to Roshawn Banks, telling Banks they had done some shooting and thought someone had been killed. Appellant also remarked that a ".40 barked harder than a nine." When Appellant learned he was wanted for questioning, he fled Tulsa for Wichita, Kansas, where he was later arrested.

¶5 After the shooting, police recovered a stolen van matching the description of the van used in the July 17th shooting. Latent fingerprints recovered from the window of the van's passenger side sliding door matched Appellant's known fingerprints. Police also recovered a .40 caliber shell casing and two 9mm shell casings from inside the van. The .40 caliber shell casing was recovered from the floor, near the edge of the van's sliding passenger door, behind the front passenger seat. A police ballistics examiner determined the .40 caliber shell casings recovered both from the roadway at the crime scene and from inside the van were fired from the same weapon.

¶6 The State also recovered numerous Snapchat videos of Appellant searching the OSCN online docket and saying that someone was talking to the police. Other Snapchat videos recovered by authorities showed Appellant praising incarcerated gang members and flashing gang signs. Some Snapchat videos too showed Appellant partying while on the run in Wichita.

¶7 Appellant took the witness stand and flatly denied his guilt of the charges, claiming he was not present and took no part in the shootings. Appellant claimed investigators were attempting to frame him by planting his fingerprints to connect him to the van used in the murder. Appellant also denied being a member of a gang.

¶8 Additional facts will be discussed below as necessary.

ANALYSIS

¶9 **Proposition I.** Appellant first complains that trial counsel was constitutionally ineffective for not attempting to have Appellant certified as a Youthful Offender. To prevail on an ineffective assistance of counsel claim, the defendant must show both that counsel's performance was deficient and that the deficient

performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). As summarized by the Supreme Court:

> To establish deficient performance, a person challenging a conviction must show that "counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 688. A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Id.*, at 689. The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*, at 687.
>
> With respect to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.*, at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*, at 687.

Harrington v. Richter, 562 U.S. 86, 104 (2011) (quoting Strickland, *supra*).

¶10 Appellant fails to show that trial counsel was ineffective. Oklahoma law provides that:

> Any person thirteen (13) or fourteen (14) years of age who is charged with murder in the first degree shall be held accountable for the act as if the person were an adult; provided, the person may be certified as a youthful offender . . . as provided by this section[.]

10A O.S.2011, § 2-5-205(A). Appellant was fourteen years old when he and his accomplices opened fire on Deouijanea Terry and Jerome Bledsoe. He was presumed to be an adult under Oklahoma law when the charged offenses were committed. Consistent with this understanding, the State charged Appellant as an adult in this case.

¶11 At a reverse certification hearing, it is the defendant's burden to overcome this presumption and prove he or she should be certified as a youthful offender. *C.L.F. v. State*, 1999 OK CR 12, ¶ 4, 989 P.2d 945, 946. In order to demonstrate youthful offender status, the district court must consider a statutorily-delineated list of seven factors with the greatest weight being given to the first three factors:

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

10A O.S.2011, § 2-5-205(E)(1-7).

¶12 Appellant offers no argument on appeal addressing these factors, let alone discussing how defense counsel could reasonably craft an argument utilizing these factors to overcome the presumption that he was an adult when he and his accomplices opened fire on Bledsoe and Terry in broad daylight at a busy north Tulsa intersection. The record shows, *inter alia*, that these were exceptionally violent and aggressive crimes; that the drive-by shooting resulting in the murder was gang-motivated;

that Appellant had participated in a previous drive-by shooting aimed at killing Bledsoe the month before at a QuikTrip; and that Appellant had prior contacts with law enforcement as a juvenile for weapons offenses including felony discharge of a firearm into a dwelling. Appellant's own mother acknowledged during her sentencing phase testimony that Appellant could not make it longer than two or three months at a time as a juvenile before getting back into trouble with authorities. The first three factors of the statutory analysis counsel strongly in favor of adult status in the present case for Appellant. Nothing in the record on appeal suggests the balance of factors prescribed in § 2-5-205(E) offset the first three factors to overcome the presumption that Appellant should have been charged as an adult.

¶13 Instead of addressing the factors relevant to this proposition, Appellant focuses largely on trial counsel's performance during closing argument at trial – an issue separately raised and addressed in Proposition IX, *infra*. This is wholly insufficient, however, to overcome the strong presumption that counsel's representation was within the wide range of reasonable professional assistance concerning his decision not to seek youthful offender status for Appellant. Nor does Appellant demonstrate *Strickland* prejudice with this claim. Appellant's claim that trial counsel was ineffective for failing to file a motion to certify Appellant as a youthful offender is, at best, speculative and conclusory. This is wholly inadequate to demonstrate ineffective assistance under the two-pronged *Strickland* standard. *See Fulgham v. State,* 2016 OK CR 30, ¶ 18, 400 P.3d 775, 780-81. Proposition I is denied.

¶14 **Proposition II.** Appellant complains his constitutional right to confrontation was violated from the reading at trial of preliminary hearing testimony for an unavailable witness. The record shows prosecution witness Roshawn Banks was declared unavailable by the trial court, at the State's request, on the second day of trial. The State read Banks's testimony to the jury pursuant to 12 O.S.Supp.2014, § 2804(B)(1). Appellant complains the trial court erred in allowing Banks's preliminary hearing testimony to be read into evidence at trial. Appellant says this violated his Sixth Amendment confrontation right. *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."). Appellant argues 1) the State failed to make an adequate showing that Banks was unavailable; and 2) the defense did not have an adequate opportunity at preliminary hearing to develop Banks's testimony on cross-examination. Appellant also complains the trial court failed to read for the jury the cross-examination of Banks conducted at the preliminary hearing by Appellant's codefendants.

¶15 **Background.** On February 10, 2017, the Friday before Appellant's trial was set to begin, the State filed a motion to declare Banks unavailable and to read his preliminary hearing testimony to Appellant's jury. In this motion, the State argued Appellant had an opportunity and similar motive to develop Banks's testimony on cross-examination through counsel at the preliminary hearing and that the State had been unable to procure Banks's appearance for trial. The State explained Banks had four separate pending felony matters set before Tulsa County District Judge Kelly Greenough and that Banks failed to appear for a status conference in those cases on February 8, 2017. The State wrote that Judge Greenough thereafter revoked Banks's personal recognizance bond and issued hold-without-bond arrest warrants for Banks. The State represented that, prior to issuance of these bench warrants, Banks "had been in steady contact with the State and was aware of the fact that he is a material witness [both] in this case" and for the jury trial set to begin on February 13, 2017. The State wrote too that Banks's location was unknown and Banks had expressed that he would no longer cooperate with the State.

¶16 During an in camera hearing held on the second day of trial, defense counsel contested only the State's assertion that Banks was unavailable. Defense counsel conceded he previously had an adequate opportunity at preliminary hearing to cross-examine Banks. The State presented testimony from Ivan Orndorff, Banks's attorney, to show Banks was unavailable. Orndorff confirmed that: he was Banks's retained counsel in the pending felony matters before Judge Greenough; Orndorff had kept in contact both with Banks and Banks's family during those cases; Banks had expressed concern for his personal safety if he appeared as a witness in Appellant's case; Banks was at risk of personal retaliation because of his prior gang affiliations and his status as a prosecution witness; Orndorff had met with Banks discreetly and covertly in the past because of the threat of

gang retaliation; and Banks had obtained a personal recognizance bond from Judge Greenough so he could bond out, get away from other gang members in the county jail who were threatening his life and be restricted to home confinement with his family in Tulsa.

¶17 Orndorff explained that Judge Greenough modified the conditions of Banks's personal recognizance bond after four individuals attempted to break into the Banks family home at 2 a.m. with weapons visible. Due to this event, Banks and his family were scared for their lives if they stayed in Tulsa. Under the modified bond conditions, Appellant was allowed to move to Texas with his family. According to Orndorff, Banks had generally complied with the requirements of his bond. Banks last appeared before Judge Greenough on January 13, 2017, and was recognized back for court on February 8th. When Banks appeared for the January 13th hearing, he had changed his appearance in an effort to preserve his safety. Banks also appeared on that date in the courtroom with one of his sisters. During the January 13th hearing, Banks was specifically instructed to return to court not only for the February 8th hearing but also for Appellant's trial.

¶18 Orndorff had contact with Banks prior to the February 8th hearing. By this point, the State had made known to Orndorff that it was going to move to revoke Banks's bond and return him to custody; the State had become aware Banks had been arrested for several crimes he had committed in the previous three months in Oklahoma.[3] When Orndorff informed Banks of the State's desire to revoke his bond, Banks "was upset and very scared for his safety." Orndorff had several conversations with Banks in an attempt to reassure him that if he was taken back into custody, Banks's safety "would be of the utmost importance and that we would do what we could to make sure that . . . he was safe." Orndorff communicated to Banks only that his bond may be revoked, not that it definitely would be.

¶19 Banks did not appear in Judge Greenough's courtroom on February 8th as previously ordered. This despite Banks's sister, Erica, appearing at the hearing and expressing to Orndorff her belief that Banks would appear. Erica attempted to make telephone contact with Banks when he did not appear. After this call, Erica suddenly and unexpectedly left the courthouse without saying goodbye to Orndorff. Orndorff attempted to make contact with Banks via text message after the February 8th hearing to see if he was coming to court. Orndorff received no reply from Banks. Orndorff also communicated with Banks's family who remained in Texas. Orndorff believed Banks was aware of the bench warrants issued for his arrest by Judge Greenough. It was Orndorff's understanding Banks did not intend to appear for court. When asked whether he would characterize Banks as refusing to testify, Orndorff responded "Yes, probably so." Orndorff offered too that he did not have a current address for Banks and did not know whether Banks was even in Tulsa. Banks's family too did not know where he was. Orndorff expressed his belief the State would not be able to procure Banks's testimony for Appellant's jury trial.

¶20 During the hearing, the parties and trial court discovered bench warrants had been authorized by Judge Greenough for Banks's arrest but had not yet been issued by the clerk. The prosecutor expressed his surprise that the bench warrants had not yet been issued. Orndorff too was unaware of this development and was informed subsequent to the February 8th hearing that several officers with the Tulsa Police Department stopped by the home of one of Banks's relatives looking for him. The prosecutor added that Tulsa Police had gone to the relatives' home the previous weekend because they believed, based upon information obtained from a confidential informant, that Banks was part of a group planning to commit a new crime. The State said the police and prosecutors were operating under the assumption Banks had four outstanding bench warrants. The prosecutor offered too that he "had no doubt in his mind whatsoever that the …warrants were unequivocal from Judge Greenough."

¶21 The prosecutor made an offer of proof that he had discussed with Banks at the January court date that it was imperative for Banks to come to court, not commit new crimes and that he, Banks, was expected to testify at Appellant's February trial. According to the prosecutor, Banks affirmatively stated that he understood. The prosecutor represented that he had personally contacted Banks's family members on February 8th and talked to them about the imperative nature of encouraging Banks to surrender to authorities.

¶22 Based on this testimony, Judge LaFortune found Banks was an unavailable witness for purposes of 12 O.S.Supp.2014, § 2804(A)(5) and accepted defense counsel's acknowledge-

ment that he had an adequate opportunity to cross-examine Banks at the preliminary hearing. Judge LaFortune requested, however, the State contact Judge Greenough and arrange for Banks's bench warrants to be issued to the sheriff so the warrant squad could attempt to find him. The record shows Judge Greenough's clerk issued the bench warrants for Banks later that same day. Judge LaFortune also signed a material witness warrant for Banks at that time.

¶23 Prior to reading Banks's testimony to the jury, the State presented to the trial court an agreed-upon redacted version of Banks's preliminary hearing testimony for use at the trial. The redacted version of Banks's testimony was made part of the record as Court's Exhibit 1. The redactions included the omission of the cross-examination conducted by Appellant's codefendants. When Banks's redacted testimony was read to the jury, defense counsel registered no contemporaneous objection.

¶24 **Standard of Review.** Appellant's failure to make a contemporaneous objection to the reading of Banks's testimony limits our review of this claim to plain error. *See Van White v. State*, 1999 OK CR 10, ¶ 51, 990 P.2d 253, 268. To show plain error, Appellant must show an actual error, which is plain or obvious, affected his substantial rights. "This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice." *Lamar v. State*, 2018 OK CR 8, ¶ 40, 419 P.3d 283, 294. *See also* 20 O.S.2011, § 3001.1.

¶25 **Analysis.** Appellant fails to show actual or obvious error with this claim. The accused in a criminal prosecution has a constitutional right to cross-examine the witnesses against him. *See Crawford v. Washington*, 541 U.S. 36, 61–62 (2004); U.S. Const. amend. VI; Okla. Const. art. 2, § 20. The Supreme Court held in *Crawford* that the Confrontation Clause prohibits the admission of testimonial hearsay unless 1) the witness is unavailable; and 2) the defendant had a prior opportunity to cross-examine the witness. *Crawford*, 541 U.S. at 68; *Willis v. State*, 2017 OK CR 23, ¶ 14, 406 P.3d 30, 34. Preliminary hearing testimony is testimonial hearsay subject to *Crawford's* mandate. *Willis*, 2017 OK CR 23, ¶ 14, 406 P.3d at 34; *Thompson v. State*, 2007 OK CR 38, ¶ 20, 169 P.3d 1198, 1205.

¶26 Appellant contends the State was not diligent in its efforts to secure Banks's appearance and, thus, Banks was not an unavailable witness. Under Oklahoma law, a witness is unavailable when he or she "[i]s absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance[.]" 12 O.S.Supp.2014, § 2804(A)(5). The proponent of the former testimony "must show that a diligent effort has been made to locate the missing witness and that the witness is actually unavailable." *Ybarra v. State*, 1987 OK CR 31, ¶ 11, 733 P.2d 1342, 1345. Stated another way, prior testimony is admissible under this rule if the witness is unavailable "despite good faith and due diligence of the party calling the witness[.]" *Clearly v. State*, 1997 OK CR 35, ¶ 16, 942 P.2d 736, 744. On appeal, "we look to all the relevant facts of the case, and issuance of a subpoena is not the *sine qua non* of good faith and due diligence." *Id.*, 1997 OK CR 35, ¶ 18, 942 P.2d at 744.

¶27 Our decisions on the unavailability of a witness are based on the Supreme Court's pronouncements for this issue. *See, e.g., Munson v. State*, 1988 OK CR 124, ¶ 29, 758 P.2d 324, 333. The Tenth Circuit recently summarized those decisions, which are instructive for present purposes:

> The clearly established Supreme Court law for unavailability claims like the one here is found in *Ohio v. Roberts*, 448 U.S. 56 (1980), and *Barber v. Page*, 390 U.S. 719 (1968). *See Hardy v. Cross*, 565 U.S. 65, 69-70 (2011) (per curiam) (citing *Roberts* and *Page* as the clearly established federal law in an AEDPA case about an unavailable witness). These decisions teach that "[a] witness is not 'unavailable' for purposes of the . . . exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain [her] presence at trial." *Roberts*, 448 U.S. at 74 (quoting *Barber*, 390 U.S. at 724-25). "The lengths to which the prosecution must go to produce a witness is a question of reasonableness." *Id.* (internal quotation marks omitted). "The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness." *Id.*
>
> "One, in hindsight, may always think of other things" the prosecution could have done. *Id.* at 75. But "[t]he law does not require the doing of a futile act." *Id.* at 74.

> "Thus, if no possibility of procuring the witness exists . . . , 'good faith' demands nothing of the prosecution." *Id.* If, however, "there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation." *Id.*

Acosta v. Raemisch, 877 F.3d 918, 927 (10th Cir. 2017) (emphasis in original).

¶28 The record in the present case shows the State conducted a reasonable, good-faith effort to obtain Banks's appearance at trial. The State maintained contact with Banks, Banks's attorney and Banks's family up through the January 13, 2017 hearing held in Banks's pending felony cases. It was at this hearing that Banks personally appeared and was informed by the prosecutor of the necessity for him to not commit additional crimes, to appear for court and to testify at Appellant's upcoming jury trial. Banks stated that he understood. The record shows Banks originally was a cooperative (albeit reluctant) witness in the State's prosecution of Appellant. Perhaps this was because of the prosecutor's efforts to secure the safety of Banks and his family. Banks acknowledged too in his preliminary hearing testimony that he was hoping for consideration from the State on his felony cases because of his testimony.

¶29 Regardless, Banks disappeared when notified by his own counsel that the State intended to seek revocation of his bond. Judge Greenough authorized bench warrants for Banks's arrest based upon his failure to appear at the February 8th hearing. By that point, neither Banks's attorney nor apparently his family knew of his whereabouts. The prosecutor contacted Banks's family members and told them it was imperative they encourage Banks to surrender to authorities. Even Banks's defense attorney was unable to make contact with his client by text message and Banks's own family was concerned for his safety. Finally, Tulsa Police searched for Banks the weekend before Appellant's trial began in an unsuccessful effort to arrest him.

¶30 Appellant complains the State was not diligent because it did not ensure the bench warrants for Banks's arrest had been issued by Judge Greenough's clerk. Appellant complains too that the State should have obtained a material witness warrant to secure Banks's appearance earlier in the process. Appellant ignores, however, that both the State and the police were unaware the bench warrants had not actually been issued by Judge Greenough's clerk and proceeded as though there were active warrants for Banks's arrest. Moreover, the bench warrants and material witness warrant were formally issued on the second day of Appellant's trial. It was reasonable for the State not to seek a material witness warrant for Banks earlier in the process because of his apparent cooperation. Further, the record does not suggest the State would have obtained Banks's appearance had it moved faster in securing a material witness warrant after Banks's arrest for the new crimes shortly before the February 8th hearing.

¶31 "The Sixth Amendment does not require the prosecution to exhaust every possible means of producing a witness at trial." *Acosta,* 877 F.3d at 930. Where, as here, the record shows there was no possibility of procuring the witness even had these additional efforts been taken, there was no actual or obvious error from the trial court's ruling that the State made a diligent, good-faith effort to produce this witness. *See Davis v. State,* 1988 OK CR 73, ¶ 11, 753 P.2d 388, 392 (State's failure to subpoena cooperating out-of-state witness who at the last minute deliberately made himself unavailable did not evidence lack of good faith and due diligence where prosecutor relied in good faith on the witness's repeated assurances that he would voluntarily appear); *Rogers v. State,* 1986 OK CR 104, ¶¶ 9-10, 721 P.2d 820, 823 (prosecutor's failure to utilize Uniform Act to secure the attendance of an out-of-state witness alone does not amount to lack of diligence; "the State must also fail to make a good faith effort to secure the witness"); *Rushing v. State,* 1984 OK CR 39, ¶ 50, 676 P.2d 842, 851 (holding the State adequately established witness's unavailability where prosecutor's subpoena at witness's last known address in Texas was returned unserved and the witness's Texas probation officer said she could not be found); *Poe v. Turner,* 490 F.2d 329, 331 (10th Cir. 1974) ("A good faith search does not mean that every lead, no matter how nebulous, must be tracked down to the ends of the earth[.]"). There was no error, and thus no plain error, from the trial court's ruling that Banks was an unavailable witness.

¶32 We find too that Appellant had an adequate opportunity and similar motive to develop Banks's prior testimony through cross-examination at the preliminary hearing.

Title 12 O.S.2011, § 2804(B)(1) provides in pertinent part:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness . . . Testimony given as a witness at another hearing of the same or another proceeding . . . if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination[.]

Defense counsel Brian Martin represented Appellant at both preliminary hearing and trial. The record shows defense counsel's cross-examination of Banks was full and substantial. This is not a case where defense counsel was shut down by the magistrate in any significant respect. The record shows "[d]efense counsel had ample opportunity to develop and challenge [Banks's] testimony about the central facts of what happened, as well as [his] credibility and potential bias in this regard." *Thompson,* 2007 OK CR 38, ¶ 22, 169 P.3d at 1206.

¶33 Defense counsel's cross-examination was not prejudiced by the limited nature of preliminary hearings under Oklahoma law – a common complaint of criminal defendants challenging the use of such testimony at trial and one used here by Appellant. First, this is not a case where the magistrate terminated the hearing and entered a bindover order. *See* 22 O.S.2011, § 258(6). Rather, defense counsel's cross-examination of Banks was full and substantive. Second, we have approved the use of an unavailable witness's preliminary hearing testimony under circumstances similar to those presented here. Such testimony is made under oath, in the truth-inducing atmosphere of a courtroom, where the defendant is represented by defense counsel who had "ample opportunity to cross examine" the witness. *Thompson,* 2007 OK CR 38, ¶ 23, 169 P.3d at 1206 (internal quotation omitted). These factors generally make preliminary hearing testimony an adequate substitute for the defendant's right to cross-examine the witnesses against him at trial when a witness becomes unavailable for trial. *Id.*, 2007 OK CR 38, ¶ 24, 169 P.3d at 1206.

¶34 Appellant's complaint that "[e]ffective cross-examination of the kind we expect in a jury trial setting cannot occur at preliminary hearing[,]" is half-baked at best. Appellant suggests the State's post-hearing discovery would have altered his cross-examination of Banks but fails to show how. Defense counsel may well have questioned Banks differently at trial. But it is likely so too would the State. Preliminary hearing testimony, however, need not be equivalent to trial testimony in every respect before it can be used as an adequate substitute for live testimony at trial. "[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer,* 474 U.S. 15, 20 (1985) (emphasis in original). The question for present purposes is simply whether Appellant had an adequate *opportunity* for cross-examination, not the line of questioning that would have occurred at trial with the benefit of hindsight. Prior testimony is admissible so long as the defendant was not "significantly limited" in his cross-examination. This despite the fact that a preliminary hearing "is ordinarily a less searching exploration into the merits of a case than a trial[.]" *California v. Green*, 399 U.S. 149, 165-66 (1970) (citing *Barber v. Page*, 390 U.S. 719, 725-26 (1968)). *See Thompson,* 2007 OK CR 38, ¶ 25, 169 P.3d at 1207 ("[A]n unfair or distorting constriction of defense counsel's cross examination of key State witnesses could result in a violation of the Sixth Amendment, whether that unjustified constriction occurs during a trial or during preliminary hearing that is later introduced into evidence at trial.").

¶35 Here, defense counsel was not "significantly limited in any way in the scope or nature of his cross-examination of the witness … at preliminary hearing." *Green,* 399 U.S. at 166. Appellant fails to show error, and thus there is no plain error, from the trial court's acceptance of defense counsel's acknowledgement below that Appellant had an adequate opportunity to cross-examine Banks at the preliminary hearing.

¶36 Appellant's complaint that reversible error occurred because of the redactions made to Banks's testimony before it was read to the jury also does not show actual or obvious error. The record shows the parties redacted from Banks's testimony defense objections made by Appellant's codefendants. Also, the parties did not read to the jury the cross-examination of Banks conducted by Appellant's codefendants and a small number of questions (and corresponding answers) made during the prosecutor's redirect examination that directly

correlated to cross-examination questions posed by Appellant's codefendants.

¶37 We find no error. Appellant could have demanded the omitted portions of Banks's testimony be read to the jury under the rule of completeness. *See* 12 O.S.2011, § 2107 ("When a record or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other record that should in fairness be considered contemporaneously with it."). He did not. This alone shows no error on the district court's part. *Davis v. State,* 1994 OK CR 72, ¶ 21, 885 P.2d 665, 670. Further, Appellant provides no authority to show his right to confrontation hinges on the questions and answers elicited during the cross-examination of this witness by his codefendants, let alone the objections made by those codefendants, most of which were overruled by the trial court. We have reviewed the omitted cross-examination by Appellant's codefendants and find its omission did not deprive Appellant of a fair trial in violation of due process or otherwise deprive Appellant of his right to confrontation. Because there was no error, there is no plain error. Proposition II is denied.

¶38 **Proposition III.** Appellant contends trial counsel was ineffective for failing to present "readily available" evidence in support of his objection to Banks's unavailability as a witness that he argues would have showed bad faith and a lack of diligence by the State. Notably, Appellant does not discuss this "readily available" evidence in his third proposition of error which spans roughly two pages. Instead, Appellant makes conclusory accusations against both the prosecutor and Judge Greenough in his brief in chief then incorporates by reference the first proposition of his application for evidentiary hearing filed pursuant to Rule 3.11(B), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2020). This portion of Appellant's Rule 3.11 application contains twelve pages of argument for this claim addressing both the *Strickland* standard and the corresponding non-record evidence which is attached. Notably, Appellant does not apply the less-onerous standard governing this claim, i.e., whether the application and affidavits contain sufficient evidence to show by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence. Rule 3.11(B)(3)(b)(i), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020); *Simpson v. State,* 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905-06.

¶39 Appellant's full argument in support of this ineffectiveness claim should have been raised in his brief in chief. *See* Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020) (requiring the brief of appellant to include "[a]n argument, containing the contentions of the appellant, which sets forth all assignments of error, supported by citations to the authorities, statutes and parts of the record"); Rule 3.11(B)(3)(b), *supra* ("The proposition of error relating to ineffective assistance of trial counsel can be predicated on either allegations arising from the record or outside the record or a combination thereof."). Instead, he makes a general claim in his brief in chief for this proposition, then goes into the specific argument and details for this issue in his application for evidentiary hearing. Appellant's approach violates our Rules. *Garrison v. State,* 2004 OK CR 35, ¶ 131 n.36, 103 P.3d 590, 612 n.36. *Accord Harris v. State,* 2019 OK CR 22, ¶ 74 n.33, 450 P.3d 933, 960 n.33 ("We have long looked with disfavor on attempts to evade page-limitation requirements for briefs . . . by incorporating arguments made in this manner.") (citing *Garrison, supra*). Appellant's third proposition is thus waived from appellate review.

¶40 Alternatively, we review this claim for purposes of determining whether an evidentiary hearing is warranted. *Simpson,* 2010 OK CR 6, ¶ 53, 230 P.3d at 905-06. Appellant fails to show by clear and convincing evidence a strong possibility that trial counsel was ineffective for failing to utilize the non-record evidence. Appellant has attached docket sheets and other purported records showing Banks's history of failing to appear in his pending felony cases and Judge Greenough's failure to issue bench warrants for Banks's arrest on these occasions. Appellant ignores, however, that the trial court reviewed during the in camera hearing the docket sheet for one of Banks's pending felony cases, CF-2016-599. Judge LaFortune also questioned Banks's defense attorney and the prosecutor concerning Banks's appearances and failure to appear, Banks's arrest on new charges and the history of continuances in that particular case. Further, the prosecutor and Banks's defense attorney both advised the trial court that Judge Greenough took protective measures concerning the public

docket entries in Banks's pending cases in an effort to conceal his movement in and out of the courthouse. As discussed in Proposition II, the trial court too was fully apprised of the reasons for Banks's personal recognizance bond.

¶41 Utilizing this and other information elicited at the in camera hearing, defense counsel argued the State was not diligent because the prosecutor was aware in advance of the issues surrounding Banks appearing as a witness at trial. This included Banks's arrest for new crimes while on a personal recognizance bond. Defense counsel too cited the prosecutor's failure to secure a material witness warrant for Banks and to ensure Judge Greenough's bench warrants actually issued as grounds for arguing the State was not diligent. Additional docket entries from Banks's other three pending felony cases offers little in the way of useful information beyond that already presented to the trial court. We therefore deny Appellant's request for an evidentiary hearing on this ineffectiveness claim. Appellant fails to show by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to use this information. Proposition III is denied.

¶42 **Proposition IV.** Appellant contends in his fourth proposition of error that trial counsel was ineffective for failing to utilize available evidence to demonstrate that counsel did not have an adequate opportunity to cross-examine Banks at preliminary hearing. None of this information is contained in the record. Instead, it is contained in Appellant's Rule 3.11 application. Appellant argues in his brief in chief that this information consisted of: 1) evidence concerning Banks's pending felony cases, the special treatment Banks received in exchange for his cooperation as a State's witness and his expectation of leniency from the State in return; and 2) statements made by Banks during his interview with police.

¶43 As in Proposition III, Appellant presents this claim only generally in his brief in chief and incorporates the extended argument set forth in his Rule 3.11 application to fill in the details and present his actual claim. This violates our Rules. Appellant's fully-developed argument in support of this ineffectiveness claim should have been raised in the brief in chief. Appellant's brief, however, already contains roughly fifty pages of argument. Appellant may not evade the page limitations for his brief through incorporation by reference of the extensive arguments set forth in the application for evidentiary hearing. *See* Rules 3.5(A)(5) and 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020); *Harris*, 2019 OK CR 22, ¶ 74 n.33, 450 P.3d at 960 n.33.

¶44 This claim is thus waived from appellate review. Alternatively, Appellant does not show by clear and convincing evidence a strong possibility that defense counsel was ineffective for failing to utilize the tendered non-record evidence concerning Banks's prior statements and pending felony cases. Appellant theorizes that the non-record evidence tends to impeach Banks's credibility by showing bias and motivation to lie. The jury, however, was read Banks's testimony on direct examination in which he acknowledged both having pending criminal matters in Tulsa County and being represented by an attorney. Banks testified too that while he had not received any promises from the State in exchange for his testimony, he nonetheless was hoping the prosecutor would give him consideration for his testimony. On cross, defense counsel elicited that Banks had prior felony convictions in Tulsa County for feloniously pointing a firearm and possession of a stolen vehicle. Banks also admitted on cross that he spoke with police about Appellant after committing the crimes for which he was in custody at the time of the preliminary hearing. Banks admitted speaking with the prosecutor before coming to court but denied having a conversation with the State about coming up with money for bond. The additional details concerning Banks's pending charges do not undermine the adequacy of counsel's cross-examination of Banks at preliminary hearing.

¶45 Appellant's complaint that trial counsel did not utilize portions of Banks's statement to police to challenge the adequacy of Banks's cross-examination also does not warrant an evidentiary hearing. Appellant simply offers his take on Banks's statement, but little in the way of evidence suggesting defense counsel did not have an adequate opportunity to cross-examine this witness. Notably, Appellant's jury heard more details at trial about Banks's background from the State's gang expert, Tulsa Police Sergeant Sean Larkin. Sgt. Larkin told the jury about Banks's gang affiliation and how Banks was "well known as being a thief" who also had been involved in numerous shootings both as a suspect and a victim. Sgt. Larkin

observed too that Banks had cooperated with authorities in past investigations and had testified against members of his own street gang, including the preliminary hearing in Appellant's case. The jury in this case was fully informed of the same credibility and bias issues surrounding Banks's testimony that Appellant attempts to extract from Banks's police interview. Appellant fails to show by clear and convincing evidence a strong possibility that counsel was ineffective in his challenge to the State's motion to use Banks's testimony at trial. An evidentiary hearing is unnecessary for this ineffectiveness claim. Proposition IV is denied.

¶46 **Proposition V.** Appellant claims the prosecutor presented false testimony from Jerome Bledsoe and Detective White that Bledsoe, during his police interview, identified Appellant as one of the QuikTrip shooters. Appellant argues trial counsel was ineffective for failing to refute this testimony using Bledsoe's videotaped interview. The recording of Bledsoe's interview is not part of the record on appeal so Appellant attaches it as an exhibit to his Rule 3.11 application. Rule 3.11 Appl., Exs. J & K. Appellant argues the video shows Bledsoe did not identify Appellant as one of the QuikTrip shooters and that trial counsel should have raised that fact to challenge the credibility of both Bledsoe and Det. White at trial.

¶47 We have thoroughly reviewed Bledsoe's videotaped police interview along with the two-page excerpt from Det. White's supplemental report which is also attached as an exhibit to Appellant's application for evidentiary hearing. Rule 3.11 Appl., Ex. L. We conclude Appellant has failed to show by clear and convincing evidence a strong possibility that trial counsel was ineffective for failing to utilize this evidence in the manner now envisioned.

¶48 The video shows Bledsoe contradicted himself during the interview concerning the identity of the perpetrators involved in both drive-by shootings. We observe too that defense counsel extensively referenced the interview video during Bledsoe's cross-examination and was clearly familiar with it. Appellant's counsel elicited on cross how Bledsoe repeatedly denied during the interview knowing who shot at him during the July 17th drive-by shooting that resulted in Ms. Terry's death. Defense counsel also inquired about threatening statements and actions by the detectives during the interview towards Bledsoe to suggest his identification of Appellant was coerced.[4] Defense counsel elicited that Bledsoe never told anybody Appellant was part of the group that shot at him at the QuikTrip until after he went in to interview with the detectives. And Bledsoe acknowledged on cross that the surveillance video of the QuikTrip shooting introduced by the State did not show the faces of his attackers.

¶49 Under the total circumstances, we find that defense counsel skillfully utilized Bledsoe's interview with police to attack this witness's credibility. The jury was made fully aware on cross that Bledsoe repeatedly denied during the interview knowing the identity of the perpetrators of the July 17th drive-by shooting. The jury was also aware Bledsoe declined to formally identify anyone in connection with the QuikTrip shooting prior to his police interview in connection with the July 17th drive-by shooting. Defense counsel used his cross-examination to suggest Bledsoe's identification of Appellant as being involved in both drive-by shootings was the product of police coercion and threats made by the detectives during the interview. Even if counsel could have done more to impeach this witness using the interview video, the State's physical evidence independently connected Appellant with the van used in the drive-by shooting of Bledsoe and Terry thus bolstering Bledsoe's overall identification testimony relating to the charged crimes. Under these circumstances, Appellant fails to show by clear and convincing evidence a strong possibility of ineffective assistance based on counsel's total performance. Proposition V is denied.

¶50 **Proposition VI.** Appellant contends the State intentionally misled the jury using the purported false testimony from Bledsoe and Det. White discussed in Proposition V and, thus, his conviction was obtained by the prosecutor with knowingly false evidence. *See Giglio v. United States*, 405 U.S. 150, 153 (1972); *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). The factual basis for this claim is non-record evidence. Because Appellant never raised this issue before the district court, it is not supported by the record and is not properly before this Court on appeal.[5] *Boone v. State*, 1982 OK CR 23, ¶ 8, 640 P.2d 1377, 1379. The exhibits filed in support of the request for an evidentiary hearing on Appellant's related Proposition V ineffectiveness claim are not, by reason of their filing,

considered part of the record. *Fuston v. State,* 2020 OK CR 4, ¶ 57, __P.3d__. Because we have denied an evidentiary hearing for Appellant's ineffective assistance of counsel claim based on this same evidence, the present claim is waived from appellate review. *Lamar,* 2018 OK CR 8, ¶ 42, 419 P.3d at 295 (supplementation of the record under Rule 3.11 "is not appropriate merely to cure a defendant's failure to preserve an issue below"). *See* Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020); *Day v. State*, 2013 OK CR 8, ¶ 10, 303 P.3d 291, 297. Proposition VI is denied.

¶51 **Proposition VII.** Appellant next challenges the admission of what he describes as improper other crimes or bad acts evidence. Appellant takes issue here with the following categories of evidence: 1) evidence of the June 23, 2015, QuikTrip shooting; and 2) the State's impeachment of Appellant on cross-examination using evidence of [a] his prior juvenile offenses, [b] the gang graffiti on the walls of his jail cell, [c] his fights with other inmates and [d] his use of a racial slur towards another inmate. Appellant admits defense counsel did not make contemporaneous objections to this evidence, thus waiving review on appeal for all but plain error. Appellant fails to show actual or obvious error with any of his claims.

¶52 The QuikTrip shooting evidence was properly admitted other crimes evidence under 12 O.S.2011, § 2404(B). This evidence was relevant to multiple issues in the case including to show the intent, motive, identity and plan underlying the charged crimes. The trial court instructed the jury with OUJI-CR (2d) 9-9 both orally during the trial, and in the written charge, concerning the limited use of this evidence. The State proved the existence of the other crimes evidence by clear and convincing evidence, going so far as to introduce surveillance video showing this drive-by shooting. Further, Bledsoe identified Appellant at trial as one of the gang members in the truck that opened fire while Bledsoe was pumping gas at the QuikTrip. The State too established a visible connection between both the QuikTrip shooting and the charged offense. The challenged evidence was relevant and its probative value was not outweighed by the danger of unfair prejudice, confusion of the issues or misdirection of the jury. 12 O.S.2011, §§ 2401-2403. The QuikTrip shooting evidence was critical to the jury's understanding of the course of events leading to the drive-by shooting resulting in Deouijanea Terry's murder. The evidence thus was necessary to support the State's burden of proof. There was no error, and thus no plain error, from the admission of this evidence for these limited purposes. *See Moore v. State,* 2019 OK CR 12, ¶ 15, 443 P.3d 579, 584 (discussing requirements for admission of other crimes or bad acts evidence). Relief is denied for this issue.

¶53 Appellant's challenge to the State's impeachment of him on cross-examination also does not show actual or obvious error. The record shows Appellant in his testimony opened the door to cross-examination about specific instances of past conduct that may not have resulted in a conviction. 12 O.S.2011, § 2608(B)(1); *Dodd v. State,* 2004 OK CR 31, ¶ 73, 100 P.3d 1017, 1039-40 ("A witness who offers one-sided versions of his own past conduct subjects himself to cross-examination aimed at showing the jury that he is not telling the whole truth about that conduct, and therefore, cannot be trusted to tell the truth about other matters either."). Here, the State appropriately questioned Appellant about his prior arrest for a gun crime after he repeatedly denied ever being caught with a gun.

¶54 Similarly, the State's cross-examination about Appellant having gang graffiti in his cell was relevant to refute his earlier testimony denying that he was a gang member. Evidence that Appellant instigated fights with other inmates in the county jail and called another inmate an inflammatory racial slur was relevant to impeach his testimony that he didn't want to get in trouble while incarcerated; that he was generally a non-violent person; and that he was not a member of a gang. The State's questions about Appellant having given a false name to authorities during the execution of a search warrant earlier in the summer of 2015 was relevant as a general matter to impeach Appellant's credibility. Appellant fails to show error, and thus there is no plain error, from these instances of impeachment with other crimes or bad acts. *Id.* Proposition VII is denied.

¶55 **Proposition VIII.** In his eighth proposition, Appellant challenges what he says was irrelevant and unfairly prejudicial evidence used by the State to connect him to illegal gang activity. This includes evidence of Appellant's association with other gang members and his documented presence at a gang house where ammunition was discovered. The vast majority of this challenged evidence did not draw

contemporaneous objections on these grounds at trial. Regardless, Appellant fails to show error, and thus there is no plain error, from any of the challenged evidence.

¶56 This evidence was relevant to all three counts in the Information which included a charge of gang-related offense while in association with any criminal street gang or gang member. 21 O.S.2011, § 856.3. The State's theory was that Deouijanea Terry was an innocent bystander who lost her life in a drive-by gang shooting intended for her boyfriend, Jerome Bledsoe. The challenged evidence was relevant on multiple fronts to the State's burden of proof for all three counts including to prove motive, intent and plan for the charged crimes and to impeach Appellant's testimony. The probative value of this evidence was not outweighed by the danger of unfair prejudice, confusion of the issues or misdirection of the jury. Appellant was not deprived of a fundamentally fair trial in violation of due process from this evidence. 12 O.S.2011, §§ 2401-2403; Stewart v. State, 2016 OK CR 9, ¶ 19, 372 P.3d 508, 512. Proposition VIII is denied.

¶57 **Proposition IX.** Appellant next contends that trial counsel Brian Martin was constitutionally ineffective for "conceding guilt without permission" during closing arguments of the first stage of trial. After the close of evidence, defense counsel made the following closing argument spanning roughly two pages of the trial transcript:

> MR. MARTIN: Thank you, Your Honor. Thank you for your time and attention today – or this week. It's awesome that you guys during *voir dire* didn't come up with some reason to try to get out of serving on this jury. Your job is important. Your service is welcomed by the Court, myself, the State.
>
> Everything [the prosecutor] just told you is complete crap. That's what I'd like to say. If I'm being honest with you, that's not what – I can't say that. If you noticed by the amount of cross-examination I did during the course of this trial, I didn't have a lot of questions for the witnesses.
>
> Punishment in this case is not before you at this point. Right now all you need to decide is whether or not you find him guilty or not guilty. Whether or not you believe there was a Quik Trip shooting, whether or not you believe there was a shooting at 46th and Martin Luther King. Whether or not you believe there were fingerprints in the van. And whether or not there were videos on Snapchat. Whether or not you believe there were .40 caliber shell casings in the van that were similar to the shell casings found at the murder scene.
>
> [Appellant] will not be happy with my argument here, his family will not be happy with my argument here, but if I'm being honest and I'm being sincere, I have no legitimate argument with the evidence. I'm not going to tell you he's guilty, but I can't argue that the evidence is wrong.
>
> I'd like to say what [the prosecutor] said was crap. I can't. I'm not going to be disingenuous with you. That's not how it goes.
>
> When it comes to sentencing, that will be a different issue for a different time. But right now for this period of time, I appreciate what you've done, the fact that you've sat here, the fact that you've listened.
>
> That's it. I thank you. You've done your job so far. You will go do your job here in a minute, and we'll get to talk again later. Thank you.

(Tr. 985-86).

¶58 Defense counsel's closing argument during the sentencing stage of trial included the following:

> This is not a fun case. This was not an enjoyable case to try. And I think my closing argument during the first part of this trial let you know that. I know James' family is not [*sic*] upset with my trial strategy in this particular case, but I'm not going to be disingenuous to the jury and come in here and argue evidence that doesn't exist, things that don't make sense. This entire trial from the very beginning has been a sentencing trial. It wasn't a trial about guilt or innocence.

(2/22/2017 Tr. 59).

¶59 The Supreme Court has held that "counsel may not admit [his] client's guilt of a charged crime over the client's intransigent objection to that admission." *McCoy v. Louisiana*, __U.S.__, 138 S. Ct. 1500, 1510 (2018). The Court held that such a concession amounts to structural error violating the defendant's Sixth Amendment right to autonomy in deciding the

objectives of his or her defense. *Id.*, 138 S. Ct. at 1508-09, 1511 ("When a client expressly asserts that the objective of '*his* defence' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt.") (quoting U.S. Const. amend. VI)) (emphasis in original).

¶60 In *Jackson v. State*, 2001 OK CR 37, 41 P.3d 395, defense counsel repeatedly told the jury during a capital murder trial that no one was going to contest the defendant's guilt. *Id.*, 2001 OK CR 37, ¶¶ 11-14, 41 P.3d at 398. This strategy was employed by defense counsel as a means to secure a noncapital sentence during the penalty phase. *Id.*, 2001 OK CR 37, ¶¶ 18-22, 41 P.3d at 399-400. We held that a concession of guilt "is a serious strategic decision that must only be made after consulting with the client and after receiving the client's consent or acquiescence." *Id.*, 2001 OK CR 37, ¶ 25, 41 P.3d at 400. Because the record did not show that the defendant consented or acquiesced to this trial strategy, we reversed and remanded for a new trial. *Id.*, 2001 OK CR 37, ¶¶ 22, 29, 41 P.3d at 399-401.

¶61 In light of this and other authority, and the record's silence concerning Appellant's consent to defense counsel's closing argument, we remanded Appellant's case for an evidentiary hearing before the District Court, pursuant to Rule 3.11(A), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2020), to address Appellant's claim that trial counsel conceded his guilt during closing without his permission.[6] We ordered the District Court to address four issues:

> 1. Whether trial counsel conceded Appellant's guilt to the charges in counsel's statements to the jury during first stage closing argument;
>
> 2. If counsel conceded guilt, whether trial counsel consulted with Appellant about this strategy before first stage closing argument;
>
> 3. Whether trial counsel sought Appellant's consent to this strategy before first stage closing argument; and
>
> 4. Whether Appellant gave his consent to, or acquiesced in, defense counsel's concession strategy before first stage closing argument to the jury.

¶62 The evidentiary hearing was held on January 30, 2019, during which the trial court heard testimony from two witnesses: Brian Martin and Appellant. We have thoroughly reviewed both the transcript of that hearing along with Judge LaFortune's written findings of fact and conclusions of law filed with this Court on April 15, 2019, and the record from Appellant's jury trial. In addition, we have reviewed supplemental post-hearing briefs filed by both parties with this Court addressing the testimony and the district court's findings.[7]

¶63 Appellant fails to show that trial counsel was ineffective for conceding guilt during closing argument. The trial record shows Martin conducted *voir dire*, objected to the prosecutor's use of certain evidence, waived opening statements and cross-examined several of the State's witnesses, including Jerome Bledsoe. At the evidentiary hearing, Martin testified that Appellant agreed well before trial to a defense strategy of conceding guilt and asking for a sentence of life imprisonment with the possibility of parole – the lesser available punishment option in this case for the first degree malice murder charge. *See* 21 O.S.2011, § 701.9 (A).[8] According to Martin, this trial strategy evolved after meeting with Appellant at the jail "on more than a dozen occasions." Martin proposed the concession strategy based on Appellant's age, the apparent strength of the State's evidence and Martin's desire to approach the jury "with a straight face" during the sentencing phase concerning the lesser of the two punishment options available for the murder. Martin obtained Appellant's consent to a concession of guilt at trial as part of a cohesive trial strategy designed to avoid a sentence of life without parole for the murder.

¶64 Martin testified the strategy changed when Appellant decided to take the stand *after* the State rested its case. The trial record shows that after the State rested its case in chief, Appellant informed the trial court during an ex parte hearing of his decision to testify in his own defense. Martin informed the trial court that Appellant's insistence to take the stand was against his advice. Defense counsel told Appellant on the record that taking the stand was "an absolutely horrible idea" and "would be . . . one of the worst decisions [Appellant has] ever made in his life."[9] Trial counsel then informed the trial court of his belief that ethical constraints limited his participation in Appellant's direct examination.[10]

¶65 In presenting Appellant's testimony in the defense case in chief, Martin asked opened-ended questions which allowed Appellant to testify in narrative form and give his version of events. This was out of ethical concerns, namely, to foreclose the possibility of defense counsel eliciting false testimony in his presentation of Appellant's direct examination. Defense counsel's reasons for doing this were fully explained to Appellant by Judge LaFortune during the ex parte hearing with Appellant and defense counsel immediately prior to Appellant taking the stand. Martin testified at the evidentiary hearing that Appellant's decision to testify was a "180-degree turn" from the original trial strategy. Martin decided at that point "to continue with the strategy that we started the trial with." Martin did not believe he could give a "straight-faced argument" to advance Appellant's narrative testimony that would not have offended the jury.

¶66 Martin denied that he implied to the jury during closing argument that they would be doing their job if they found Appellant guilty. Instead, Martin testified he said simply the jury was "going to go do their job." Martin denied too that he explicitly conceded Appellant's guilt during closing argument.

¶67 Appellant testified at the evidentiary hearing that he never gave defense counsel permission to concede guilt at the jury trial. Appellant also reiterated his innocence and testified he was surprised by defense counsel's closing argument. Appellant too claimed he never gave Martin permission to make the closing argument delivered to the jury and that he had wanted defense counsel to ask the jury to find him not guilty.

¶68 Judge LaFortune found defense counsel's closing argument "does not contain, at any point, any clear concession of guilt[,]" and that trial counsel "did not expressly or impliedly concede guilt in his first stage closing argument[.]" Judge LaFortune concluded too that Martin developed the concession strategy well before trial to maintain credibility with the jury so he could ask for the lesser of the two available punishments; that Appellant acquiesced to this strategy after several conversations with defense counsel as described in Martin's testimony; and that Appellant drastically changed this agreed strategy in the middle of the trial when he took the stand and proclaimed his innocence. Judge LaFortune found trial counsel "faced . . . both an ethical and strategic dilemma" when Appellant took the stand.

¶69 Despite Martin's testimony that he did not abandon the original strategy, Judge LaFortune concluded Martin "actually refrained from conceding guilt in his first stage closing argument to be as consistent as possible with the Appellant's drastic change in trial strategy, while maintaining some semblance of credibility." By so doing, Judge LaFortune concluded Martin "was able to walk the line of not losing all credibility with the jury, [while] still implicitly recognizing the Appellant's testimony by stating to the jury they had the job of determining whether the Appellant was guilty or not."

¶70 These findings are fully supported by the record. Defense counsel never expressly conceded guilt; never said that Appellant was the killer; and never said that Appellant committed the charged offenses. Nor did counsel ever tell the jury no one was contesting Appellant's guilt in the case or that the defense was not contesting the issues during the first stage of trial. Defense counsel also did not tell the jury that a finding of guilt was inevitable.

¶71 Instead, defense counsel acknowledged during his closing argument both the strength of the State's evidence and the corresponding limitations upon what he could say in response to this evidence. This was consistent with the defense strategy Appellant explicitly agreed to before trial but inexplicably abandoned when he decided to testify. Judge LaFortune correctly found that defense counsel faced "both an ethical and strategic dilemma" when Appellant "drastically altered the previously agreed upon trial strategy of conceding guilt" by taking the stand and proclaiming his innocence. Defense counsel did about as well as can be expected under these difficult circumstances to honor Appellant's decision to contradict the predetermined defense strategy with his testimony while maintaining some semblance of credibility before the jury.

¶72 Defense counsel acknowledged that he wanted to characterize the State's case as "complete crap" but said he was not going to be disingenuous in his closing argument by so doing. Defense counsel referenced different parts of the State's evidence and told the jury it was their job to determine whether or not they believed this evidence existed. This was reflective of Appellant's earlier testimony in which he proclaimed his innocence and attributed the

State's case to exaggeration and outright fabrication by the police and prosecutor. Defense counsel's statement to the jury that "I have no legitimate argument with the evidence. I'm not going to tell you he's guilty, but I can't argue that the evidence is wrong" was merely an attempt to separate counsel from some of the more outrageous parts of Appellant's testimony. It did not, however, amount to a concession of guilt. Indeed, as Judge LaFortune adeptly observed in his written order, defense counsel himself denied in his evidentiary hearing testimony that he conceded Appellant's guilt. The record bears this out.

¶73 Defense counsel sought to maintain credibility with the jury for the upcoming sentencing phase without conceding Appellant's guilt. There is nothing improper about this approach. Our decisions hold that "a *complete* concession of guilt" by defense counsel during the guilt-innocence portion of trial "must only be made with the client's consent or acquiescence." *Jackson*, 2001 OK CR 37, ¶ 29, 41 P.3d at 400 (emphasis added). *See also Johnson v. State*, 2012 OK CR 5, ¶ 37, 272 P.3d 720, 732; *Simpson v. State*, 2010 OK CR 6, ¶ 50, 230 P.3d 888, 905; *Lott v. State*, 2004 OK CR 27, ¶¶ 51, 54, 98 P.3d 318, 337, 338; *Lockett v. State*, 2002 OK CR 30, ¶ 16, 53 P.3d 418, 424. In the present case, defense counsel did not overtly or impliedly concede Appellant's guilt, let alone make a complete concession of guilt to the jury.

¶74 The present case stands in stark contrast to *McCoy v. Louisiana* where the defendant "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." *McCoy*, 138 S. Ct. at 1505. Yet, the trial judge in *McCoy* permitted defense counsel to tell the jury, during the guilt phase of a capital murder trial, that the defendant "committed three murders. . . .[H]e's guilty." *Id.* This was part of a calculated strategy by defense counsel to maintain credibility with the jury in order to save the defendant's life during the capital sentencing phase. Defense counsel repeatedly asserted the defendant's guilt throughout the trial and, at one point, admitted during closing arguments that he, defense counsel, had taken the burden off the prosecutor. The defendant expressed his disagreement with this strategy to the court and counsel at every opportunity. The defendant also "testified in his own defense, maintain[ed] his innocence and press[ed] an alibi difficult to fathom." *Id.* at 1506-07.

¶75 The lower court affirmed, finding that counsel had the authority to concede guilt in this manner, despite the defendant's stated opposition. *Id.* at 1507. The Supreme Court reversed, holding that "a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." *Id.* at 1505. The Court reasoned this was part of an accused's constitutionally-protected right to autonomy in deciding the objectives of the defense presented at trial. *Id.* at 1508.

¶76 In the present case, Appellant changed the trial strategy mid-trial when he decided to testify. The attorney is not responsible when a client abruptly changes his mind on strategy in the middle of a trial. *McCoy* does not apply in situations where the defendant agrees or acquiesces to a strategy of conceding guilt but changes his mind well into the trial – in this case, after the State's case in chief. *McCoy* set a firm rule in scenarios where defense counsel concedes guilt in derogation of the express wishes of a defendant made known to defense counsel from the outset.

¶77 *McCoy* is thus distinguishable from the present case in several ways. First, defense counsel in *McCoy* unequivocally and expressly conceded the defendant's guilt over his client's objection. Second, the record in *McCoy* shows that the defendant maintained his innocence from the beginning and throughout the trial, that his attorney knew this and both his attorney and the trial court knew the defendant did not agree with the strategy of conceding guilt. *Id.* at 1505-06. Third, the defendant in *McCoy* affirmatively sought to terminate his attorney's representation, but the trial court denied his request. *Id.* at 1506.

¶78 In the present case, the record shows defense counsel never expressly and unequivocally conceded Appellant's guilt as did counsel in *McCoy.* There is no comparison between Brian Martin's closing argument here and the attorney's statements in *McCoy*. Nothing in the record of the present case shows Appellant maintained his innocence and manifested his disagreement with the defense strategy from the beginning. Moreover, it was only at the evidentiary hearing that Appellant stated he never agreed with the defense concession strategy. Finally, Appellant never voiced, at any time prior to or during trial, any disagreement or concern regarding trial strategy or counsel's rep-

resentation of him. Even during the ex parte hearing prior to his testimony, Appellant said nothing about disagreement with his attorney's strategy or his desire to change that strategy.

¶79 Based on the total circumstances, Appellant's ineffective assistance of counsel claim must be analyzed under the familiar *Strickland* two-pronged test. *See Florida v. Nixon,* 543 U.S. 175, 189-192 (2004). *Cf. McCoy,* 138 S. Ct. at 1510-11 (where a criminal defendant's "autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence"). Unlike *McCoy* and *Jackson,* the present case does not involve a concession of guilt by counsel. The challenged argument represents the type of strategic decision making which is well within counsel's authority to make. "Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as 'what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.'" *McCoy,* 138 S. Ct. at 1508 (quoting *Gonzalez v. United States*, 553 U.S. 242, 248 (2008)). Defense counsel's closing argument here did not "block [ ] the defendant's right to make the fundamental choices about his own defense." *McCoy,* 138 S. Ct. at 1511. Rather, the defense closing argument was a reasonable strategic decision "about how best to *achieve* [Appellant's] objectives[.]" *Id.*, 138 S. Ct. at 1508 (emphasis in original). As there was no concession of guilt, defense counsel was not required to obtain Appellant's permission before proceeding with the challenged argument. Appellant fails to show either deficient performance or prejudice with this claim as required under the *Strickland* two-pronged test. Proposition IX is denied.

¶80 **Proposition X.** Appellant alleges the rule in *Bruton v. United States,* 391 U.S. 123 (1968) was violated in his case. *Bruton* held that a defendant's Sixth Amendment right to confront witnesses is violated by the government's use at trial of a non-testifying co-defendant's out-of-court statements inculpating the defendant in the charged offense. *Id.* at 126. Appellant challenges with the *Bruton* rule two categories of evidence admitted at trial. First, he challenges Roshawn Banks's testimony that Appellant's codefendants admitted their participation in the July 17, 2015, drive-by shooting that resulted in Deouijanea Terry's murder. The record shows these statements were made in Banks's house, in Appellant's presence, after the drive-by shooting and murder.

¶81 Appellant did not object to this testimony on these grounds at trial. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 327 (2009) ("The defendant *always* has the burden of raising his Confrontation Clause objection[.]") (emphasis in original)). Our review is therefore limited to plain error. T*ryon,* 2018 OK CR 20, ¶ 38, 423 P.3d at 632. Appellant fails to show actual or obvious error. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court drew a distinction between testimonial and nontestimonial hearsay statements, finding the Sixth Amendment's Confrontation Clause is limited to testimonial out-of-court statements like police interrogations and prior testimony. *Id.* at 53, 68. Further, "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68.

¶82 The challenged statements of Appellant's codefendants repeated in Banks's testimony were nontestimonial. These statements were not made at a hearing or trial, nor as a result of police interrogation. *Tryon,* 2018 OK CR 20, ¶ 42, 423 P.3d at 633. Nor is there any evidence these statements were made so they could be used later as an out-of-court substitute for trial testimony. *See Ohio v. Clark*, 576 U.S. 237, 244-45 (2015); *Tryon,* 2018 OK CR 20, ¶ 42, 423 P.3d at 633. Rather, they were informal statements, made amongst gangland acquaintances at a private residence, about a drive-by shooting they had perpetrated earlier. *See Crawford,* 541 U.S. at 51 ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."). The Confrontation Clause has no application to out-of-court nontestimonial statements like those present here. *See Michigan v. Bryant*, 562 U.S. 344, 354 (2011); *Whorton v. Bockting,* 549 U.S. 406, 420 (2007); *Davis v. Washington,* 547 U.S. 813, 821 (2006); *Tryon*, 2018 OK CR 20, ¶ 41, 423 P.3d at 633.

¶83 This is true even for nontestimonial statements seemingly implicated by the *Bruton* rule. The Tenth Circuit has held *Bruton* should be interpreted "consistent[ly] with the present state of Sixth Amendment law." *United States v. Clark,* 717 F.3d 790, 815 (10th Cir. 2013) (internal quotation omitted).[11] The Tenth Circuit explained that "*Crawford* made clear that the Confrontation

Clause applies only if a statement is 'testimonial' in nature, for '[o]nly statements of this sort cause the declarant to be a 'witness' within the meaning of the Confrontation Clause.'" *Id.* (quoting *Davis,* 547 U.S. at 821). Further, "*Crawford* indicates that the class of testimonial statements that fall within the protective ambit of the Confrontation Clause *in-cludes,* but is not limited to, statements covered also by *Bruton*." *Id.* (citing *Crawford*, 541 U.S. at 51-52) (emphasis in original). We find *Clark* persuasive and adopt its reasoning to conclude there is no error, and thus no plain error, from the admission of Banks's challenged testimony.[12] The challenged testimony here relayed nontestimonial statements and, therefore, was outside the protective ambit of the Confrontation Clause. Relief for this portion of Appellant's Confrontation Clause challenge is denied.

¶84 Appellant also challenges the admission of co-defendant Joshua Price's out-of-court statement, relayed in Det. White's testimony, that he, Price, stole during the early morning hours of July 17, 2015, the van used in the drive-by shooting and murder. Appellant objected to the admission of this statement on different grounds than now raised. Again, our review is limited to plain error. *See Tryon*, 2018 OK CR 20, ¶ 38, 423 P.3d at 632; *Al-Mosawi v. State,* 1996 OK CR 59, ¶ 22, 929 P.2d 270, 278. This particular confession was made by Price to authorities upon his arrest and in response to custodial interrogation. It was therefore testimonial and subject to the requirements of the Confrontation Clause. *Crawford,* 541 U.S. at 52 ("Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.").

¶85 Price's admission about stealing the van is not the type of statement typically prohibited by *Bruton.* This statement does not directly implicate Appellant in the July 17, 2015, drive-by shooting resulting in Ms. Terry's murder. Rather, it becomes incriminating only when combined with other evidence implicating Appellant in these crimes. These types of statements, which inculpate only inferentially, are not typically implicated by *Bruton's* rule. *Gray v. Maryland,* 523 U.S. 185, 195 (1998); *Richardson v. Marsh*, 481 U.S. 200, 208 (1987). *See Fowler v. State,* 1989 OK CR 52, ¶¶ 34-35, 779 P.2d 580, 586.

¶86 The real question here is whether the introduction of Price's statement violates the Sixth Amendment in light of *Crawford* because of its testimonial nature, even though it did not directly or explicitly inculpate Appellant. Applying *Crawford*, we find that Price's statement to Det. White was testimonial and, thus, inadmissible barring a showing both that Price was unavailable and that Appellant had a prior opportunity to cross-examine Price. Although the record shows Price was unavailable,[13] there was no prior opportunity for cross-examination. Appellant thus shows actual or obvious error affecting his substantial rights with this particular testimony. Nonetheless, relief is unwarranted because the error was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967); *Tafolla,* 2019 OK CR 15, ¶ 22, 446 P.3d at 1259. Det. White's testimony on this point was offered mainly to show the police investigation in this case and was eclipsed by the eyewitness testimony from Bledsoe identifying Appellant as one of the perpetrators involved in the drive-by shootings; the identification of this van by a bystander in traffic as the one used in the drive-by shooting; the fingerprints linking Appellant to the stolen van used in the murder; and Banks's testimony that Appellant and his accomplices bragged about the shootings. Because the violation of Appellant's Sixth Amendment right to confrontation was harmless beyond a reasonable doubt, Proposition X is denied.

¶87 **Proposition XI.** Appellant contends 1) the "Gang-Related Offense" alleged in Count 3 "is an unconstitutionally vague charge" that violates due process; 2) Instruction No. 42 defining this crime deviated from the uniform instruction and was "a nightmare"; and 3) the introduction of unduly prejudicial exhibits to prove this crime resulted in inflated sentences on the other counts. Appellant argues that both the offense and the instruction "are so vague that one could not read the statute and contemplate that the activity they charged [Appellant] with was the activity prohibited by that statute."

¶88 This proposition is waived from appellate review. First, Appellant has combined multiple issues – a constitutional vagueness challenge to 21 O.S.2011, § 856.3, an instructional error and an evidentiary challenge – into a single proposition of error. This violates Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020) ("Each proposition of error shall be set out separately in the brief. . . . Failure to list an issue pursuant to these requirements constitutes waiver of alleged error."). Appellant has presented related, but

clearly separate and distinct issues. All of these issues are thus waived. *See Baird v. State*, 2017 OK CR 16, ¶ 28, 400 P.3d 875, 883.

¶89 Second, each and every one of these claims is so inadequately developed in Appellant's brief in chief as to be waived from our review, even if they were presented in separate propositions of error. Appellant offers little more than conclusory statements for each claim with little in the way of actual argument and authority in support. *See* Rule 3.5(A)(5), *supra* (requiring argument in support of a proposition of error supported by citation of authorities, statutes and parts of the record). *See Davis v. State,* 2018 OK CR 7, ¶ 32, 419 P.3d 271, 282. Appellant has thus waived review on appeal of these three separate and discrete claims. Proposition XI is denied.

¶90 **Proposition XII.** Appellant contends his convictions for first degree murder and gang-related offense violate the state and federal constitutional prohibitions against double jeopardy. *See* U.S. Const., amends. V, XIV; Okla. Const. art. 2, § 21; *Kane v. State,* 1996 OK CR 14, ¶ 6 n.5, 915 P.2d 932, 934 n.5. Appellant's argument simply is this: "The Murder instructions (O.R. 436) do not require proof of an element not required by the 'Gang Related [offense].' (O.R. 448). *Blockburger v. United States*, 284 U.S. 299 (1932)." Appellant did not raise this claim below, thus waiving review of all but plain error. *Barnard,* 2012 OK CR 15, ¶ 25, 290 P.3d at 767.

¶91 Appellant fails to show actual or obvious error. The Supreme Court has held:

> The Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (footnotes omitted).

Brown v. Ohio, 432 U.S. 161, 165 (1977). Only the third aspect of the Double Jeopardy clause, protecting against cumulative punishments for the same offense imposed in a single proceeding, is at issue here. *See Jones v. Thomas,* 491 U.S. 376, 381 (1989). In this regard, the Supreme Court has held:

> Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.

Brown, 432 U.S. at 165 (internal citations omitted).

¶92 The elements of the Count 3 gang-related offense alleged here include all the elements of first degree murder.[14] The Legislature, however, has explicitly authorized cumulative punishment for the same act under these circumstances. Title 21 O.S.2011, § 856.3 states:

> Any person who attempts or commits a gang-related offense . . . while in association with any criminal street gang or gang member shall be guilty of a felony offense. Upon conviction, the violator shall be punished by incarceration in the custody of the Department of Corrections for a term of five (5) years, **which shall be in addition to any other penalty imposed**. For purposes of this section, "criminal street gang" is defined in subsection F of Section 856 of Title 21 of the Oklahoma Statutes and "gang-related offense" means those offenses enumerated in paragraphs 1 through 16 of subsection F of Section 856 of Title 21 of the Oklahoma Statutes.

(emphasis added). Title 21 O.S.2011, § 856(F)(5) includes the crime of first degree murder as a "gang-related offense."

¶93 Typically we apply the *Blockburger* test to determine "whether each provision requires proof of a fact which the other does not." *Blockburger,* 284 U.S. at 304. Appellant ignores, however, the *Blockburger* test is a rule of statutory construction that does not apply "[w]here, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger[.]" Missouri v. Hunter,* 459 U.S. 359, 368 (1983).

¶94 "Legislatures, not courts, prescribe the scope of punishments." *Id.* Here, the Legislature's intent authorizing multiple punishments for the gang murder committed by Appellant could not be more clear. Section 856.3 specifically provides the mandatory five-year penalty imposed for acting in association with any criminal street gang or gang member while committing a gang-related offense "shall be in addition to any other penalty imposed" – in this case, first degree murder. There is no violation of either the state or constitutional Double Jeopardy provisions from Appellant's

convictions for gang-related offense and first degree murder. There is no error and thus no plain error. Proposition XII is denied.

¶95 **Proposition XIII.** Appellant complains his convictions for gang-related offense and first degree murder are barred under Oklahoma's statutory prohibition against double punishment for the same act, contained in 21 O.S. Supp.2011, § 11(A) ("[I]n no case can a criminal act or omission be punished under more than one section of law[.]"). This claim too was not raised below and our review is again limited to plain error. *Lavorcheck v. State*, 2019 OK CR 13, ¶ 5, 443 P.3d 573, 576-77. Appellant fails to show actual or obvious error. "Double-punishment analysis focuses on the relationship between the crimes. If the offenses truly arise out of one act, [Section 11] prohibits prosecution for more than one crime, **absent express legislative intent**." *Lavorchek*, 2019 OK CR 13, ¶ 6, 443 P.3d at 577 (emphasis added). As discussed earlier in Proposition XII, the Legislature has expressly authorized multiple punishments for the gang-related murder in this case under both the first degree murder and gang-related crime statutes. There is no error, and thus no plain error, from Appellant's convictions for both crimes. Proposition XIII is denied.

¶96 **Proposition XIV.** Appellant claims the State improperly published to the jury that portion of his videotaped custodial interview showing his invocation of the right to counsel and his subsequent refusal when asked by the detectives to give a DNA sample. Defense counsel requested during an in camera hearing that Appellant's interview be stopped before his invocation of rights. The trial court instead ordered the video be stopped *after* Appellant's invocation of counsel, thus omitting Appellant's refusal to give a DNA sample.

¶97 At the conclusion of the State's publication of Appellant's interview, defense counsel objected on grounds that the prosecutor failed to stop the video in time and had unintentionally played for the jury the disallowed portion of the video. The trial court apparently did not hear this occur and asked whether the prosecutor heard that portion of the video being played. The prosecutor responded he "was getting to it" and "[a]s soon as [Appellant] invoked, I was reaching and trying to hit it." The prosecutor told the trial court "I don't even think [Appellant] answered the question." Defense counsel claimed the prosecutor "let it play through" to where the detective said "so you're not going to give us your DNA [sample]." Review of the video shows this would have occurred after Appellant told the detectives to talk to his counsel. Defense counsel emphasized he did not believe the prosecutor did anything intentionally wrong but nonetheless the failure to stop the tape as previously ordered was negligent. Defense counsel objected and the trial court overruled same.

¶98 The record shows Appellant was given the *Miranda*[15] warning at the beginning of the interview and he waived those rights when he agreed to speak with the detectives. The record, however, does not establish precisely what the jury heard because the parties waived the reporting of the publication of the interview. Assuming *arguendo* the jury heard Appellant invoke his right to counsel and heard the detective's statement that Appellant was not going to give a DNA sample, any violation of Appellant's Fifth Amendment rights was harmless beyond a reasonable doubt. *See Stemple v. State*, 2000 OK CR 4, ¶¶ 38-41, 994 P.2d 61, 70. The challenged portion came at the end of a short interview during which Appellant was generally nonresponsive to the questioning, obstinate towards the detectives and completely uncooperative. The jury would hardly be surprised Appellant ended the interview by telling the detectives to talk to his lawyer then refused to provide a DNA sample given his overall lack of cooperation as shown throughout the video. Appellant's trial testimony proclaiming his innocence, and accusing the State of fabricating its case against him, eclipsed the statements he made during this brief interview. Here, the State presented a strong case against Appellant including eyewitness testimony pinning him as one of the shooters, testimony showing Appellant bragged about the shooting afterwards with his accomplices and fingerprint evidence connecting Appellant to the van used in the drive-by shooting. Under the total circumstances, any error was harmless beyond a reasonable doubt. Proposition XIV is denied.

¶99 **Proposition XV.** Appellant complains that his sentencing stage was not conducted in accordance with *Luna v. State*, 2016 OK CR 27, 387 P.3d 956 because trial counsel presented an inadequate case in mitigation and his accumulated sentences amount to a life without parole sentence. Appellant thus requests his case be remanded for a new sentencing hearing.

¶100 Appellant did not raise this claim below, limiting our review to plain error. Appellant fails to show actual or obvious error. In accordance with *Luna*, the trial court bifurcated Appellant's trial and allowed defense counsel to present evidence of mitigating circumstances suggesting Appellant's crimes reflected his transient immaturity (as opposed to irreparable corruption and permanent incorrigibility) in an effort to convince the jury he should not be sentenced to life without parole. *Luna,* 2016 OK CR 27, ¶ 21, 387 P.3d at 963. Defense counsel presented mitigating evidence from Appellant's mother who testified concerning Appellant's background, character and development. The jury was also given the written sentencing instruction mandated by this Court in *Luna* to guide the jury's consideration of the sentencing-phase evidence. *Id.*, 2016 OK CR 27, ¶ 21 n.11, 387 P.3d at 963 n.11.

¶101 Trial counsel's efforts in this regard were successful: Appellant was sentenced to life imprisonment with the possibility of parole for the murder. Further, the aggregate of the sentences on Counts 1-3 in this case for the crimes Appellant committed does not violate the Eighth Amendment. The Eighth Amendment analysis in this context "focuses on the sentence imposed for each specific crime, not on the cumulative sentence for multiple crimes." *Detwiler v. State,* 2019 OK CR 20, ¶ 6, 449 P.3d 873, 875. The Supreme Court has held that a juvenile may not be sentenced to life without parole for non-homicide crimes. *Graham v. Florida*, 560 U.S. 48, 82 (2010); *Detwiler,* 2019 OK CR 20, ¶ 7, 449 P.3d at 875. As discussed above, Appellant was not sentenced to life without parole for any of his crimes. Thus, the Eighth Amendment was not violated by any of Appellant's sentences.

¶102 Appellant's real complaint is his dissatisfaction with the mitigation evidence presented by trial counsel. Appellant does not allege, however, that trial counsel was ineffective during the sentencing phase based upon his failure to present better or different mitigation evidence. Moreover, he does not show us what specific evidence trial counsel should have presented. Instead, Appellant talks in generalities. Under the total circumstances, Appellant fails to show error, and thus there is no plain error, based upon his challenge to the conduct of his sentencing proceeding. Proposition XV is denied.

¶103 **Proposition XVI.** In his final proposition of error, Appellant contends that the cumulative effect of the individual errors he identified on appeal warrants relief because they deprived him of a fair trial. We deny relief for Appellant's cumulative error claim. We rejected Appellant's individual claims of error outright after conducting harmless error review for the constitutional errors found in Propositions X and XIV. Review of the total record shows this is simply not a case where numerous irregularities during Appellant's trial tended to prejudice his rights or otherwise deny him a fair trial. Tryon, 2018 OK CR 20, ¶ 144, 423 P.3d at 655. Proposition XVI is denied.

DECISION

¶104 The Judgments and Sentences of the District Court are **AFFIRMED**. Appellant's *Application for Evidentiary Hearing on Sixth Amendment Claim and Brief in Support* is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY

THE HONORABLE WILLIAM D. LAFORTUNE, DISTRICT JUDGE

APPEARANCES AT TRIAL

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OPINION BY: HUDSON, J.
LEWIS, P.J.:DISSENT
KUEHN, V.P.J.: DISSENT

LUMPKIN, J.: CONCUR
ROWLAND, J.: CONCUR

LEWIS, PRESIDING JUDGE, DISSENTING:

¶1 I respectfully dissent. Defense counsel conceded guilt without the Appellant's consent in violation of his right to the assistance of counsel for *his* defense. The unauthorized concession of guilt, even if tactically sound, was a structural error requiring reversal of the convictions under *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018). I also conclude that Appellant's consecutive sentences of life plus sixty (60) years imprisonment deny him any meaningful opportunity for release on parole, without the findings of permanent incorrigibility or irreparable corruption required by *Miller v. Alabama,* 567 U.S. 460 (2012) and *Montgomery v. Louisiana,* 577 U.S. 460 (2016). *See Martinez v. State,* 2019 OK CR 7, ¶¶ 1-5, 442 P.3d 154, 157-58 (Lewis, P.J., joined by Kuehn, V.P.J., dissenting). I would reverse and remand this case for a new trial.

¶2 After hearing testimony at the remanded evidentiary hearing, Judge LaFortune found that: (1) Trial counsel developed a strategy in the months before trial "to concede guilt to be able to approach the jury with a straight face" in the punishment phase of trial; (2) Trial counsel had consulted with Appellant several times about this strategy, and Appellant had initially agreed to, or acquiesced in, that trial strategy; (3) Appellant had "drastically altered" that strategy at the close of the prosecution's case with his decision to take the stand and proclaim his innocence; (4) Trial counsel nevertheless decided "to not abandon" the concession strategy in closing argument; (5) Trial counsel had (a) "actually refrained from conceding guilt . . . to be as consistent as possible with the Appellant's drastic change in trial strategy;" and (b) managed to "walk the line of not losing all credibility" while "implicitly recognizing the Appellant's testimony" when he (c) told jurors "they had the job of determining whether Appellant was guilty or not."

¶3 Most of these findings are well supported. But Judge LaFortune's finding and conclusion that defense counsel avoided "a clear concession of guilt, or even an implied one" is clearly erroneous, and involves an unreasonable application of clearly established Sixth Amendment law to the facts of this case. The Court today unfortunately adopts the trial court's clearly erroneous finding and its unreasonable application of federal law in reaching its decision.

¶4 The Court acknowledges, as the trial court did on remand, that defense counsel crafted a strategy to concede Appellant's guilt long before the start of Appellant's trial. Appellant initially agreed to that strategy. Just as clearly, Appellant later changed his mind about the ultimate objectives for his defense when he decided to testify and maintain his innocence of all charges to the jury. Judge LaFortune was therefore undoubtedly correct in concluding that *after* Appellant made the decision to maintain his innocence, a concession of guilt "was no longer the Appellant's chosen trial strategy."[1]

¶5 The critical question then is whether defense counsel conceded guilt in closing argument. The Court's resolution of this question, not unlike the trial court's on remand, comes off strained and unconvincing. In the final analysis, both courts are simply unwilling to say what was probably obvious to the jury: Despite the defendant's assertions of innocence, counsel was acknowledging guilt to morally (and tactically) distance himself from the defendant. The Court's conclusion that counsel refrained from conceding guilt is not fundamentally reasonable.

¶6 *Black's Law Dictionary* 262 (5th Ed. 1979) briefly defines a concession as "a yielding to a claim or demand." *Webster's Ninth New Collegiate Dictionary* 271 (1986) says to "concede" is to "accept as true, valid, or accurate." The unabridged *Webster's Third New International Dictionary* 469 (1963) says to "concede" is to "acknowledge grudgingly or hesitantly;" or to "acknowledge as won by an opponent without formal determination of the result."

¶7 Counsel's first-stage closing argument must be viewed in context. The prosecutor, after all, had just given a closing argument too, directly asserting Appellant's guilt of all charges beyond a reasonable doubt. *Right before* defense counsel's argument, the jury heard the prosecutor say this:

> So ladies and gentlemen, you know that it's [Appellant]. The evidence at the scene, the evidence through that van, and the testimony in this case, it all points to him. [T]here is *absolutely no question that the State of Oklahoma has proven its case beyond a reasonable doubt* . . . He's a gangster, he's a shooter, and he's a murderer. And you need to find him guilty (emphasis added in all quotations).

¶8 In response to this, defense counsel launched his closing argument with, "Everything Mr. Morgan just told you is complete crap." He then just as dramatically reversed course with, "That's what I'd *like* to say. If I'm *being honest* with you, that's not what – I *can't* say that."

¶9 The remainder of counsel's speech built upon and amplified that striking rhetorical inversion. Counsel recalled for jurors the very limited defense he presented to the State's case: "If you noticed by the amount of cross examination I did during the course of this trial, I didn't have a lot of questions for the witnesses." Counsel moved on quickly to the issues that really concerned him. "Punishment in this case is not before you at this point. Right now all you need to decide is whether or not you find him guilty or not guilty."

¶10 He recalled the major points of the prosecution's case against the Appellant; the same points the prosecutor had just repeatedly mentioned.

> Whether or not you believe there was a Quik Trip shooting, whether or not you believe there was a shooting at 46th and Martin Luther King. Whether or not you believe there were [Appellant's] fingerprints in the van. And whether or not there were videos [of Appellant] on Snapchat. Whether or not you believe there were .40 caliber shell casings in the van that were similar to the shell casings found at the murder scene.

¶11 And in the heart of the argument, counsel powerfully dissociated himself from Appellant's testimonial claim of innocence:

> *James will not be happy with my argument here, his family will not be happy with my argument here, but if I'm being honest and I'm being sincere, I have no legitimate argument with the evidence. I'm not going to tell you he's guilty, but I can't argue that the evidence is wrong.*

¶12 Counsel then returned to his initial statement, and strongly reiterated his position: "I'd like to say what Mr. Morgan said was crap. *I can't. I'm not going to be disingenuous with you. That's not how it goes.*"

¶13 This Court today declares that the sum of these statements do not amount to a concession, which really makes me wonder which part of Appellant's guilt counsel managed *not* to concede in this brief argument. The argument's basic rhetorical structure, its expressed tactical purpose, and most importantly, its *probable impact on the jury*, compel me to conclude that counsel fully conceded Appellant's guilt. Counsel's remarks yielded entirely to the State's claim that Appellant was guilty. He repeatedly accepted the prosecution's evidence of guilt as true, valid, and accurate. Though sometimes affecting to do so grudgingly or hesitantly, he acknowledged that the proof of Appellant's guilt was wholly inarguable. As a matter of fact and law, counsel's closing argument objectively crossed the line and conceded guilt.

¶14 The trial court's finding that no "clear concession of guilt" occurred placed considerable weight on counsel's curiously crafted statement: "I'm not going to tell you he's guilty, but I can't argue that the evidence is wrong." I also find this statement particularly significant in reaching the opposite conclusion. Considering the fair import of this statement to jurors, and the specific context where it appears, the statement is best understood as an apophasic disclaimer that preceded a stylized, yet unequivocal, concession of guilt.

¶15 Apophasic statements typically "deny[] one's intention to speak of a subject that is at the same time mentioned or insinuated." *Webster's Unabridged Dictionary of the English Language,* RHR Press (2001). As famously epitomized in Marc Antony's funeral speech in Shakespeare's *Julius Caesar*,[2] and the ancient Roman defense speeches of Marcus Tullius Cicero,[3] apophasis allows the speaker to intimate their *real* position on a topic while maintaining some plausible deniability of having *actually* taken that position.[4]

¶16 Judge LaFortune characterized counsel's "I'm not going to tell you" statement as an instance of equivocation by which counsel managed to "walk the line" and avoid any "clear concession." On the contrary, despite its apophasic preamble ("I'm not going to tell you he's guilty"), the jury almost certainly understood counsel's next statement ("but I *can't* argue that the evidence is wrong") as a clear concession of guilt. Conscious of the tension between the strategy *he* had chosen and Appellant's *actual* defense, defense counsel apophasically denied conceding the very thing he was about to concede.

¶17 Having made this concession, counsel told the jury that "[w]hen it comes to sentencing, that will be a *different* issue for a different

time." There will be a real contest, real argument, a *real dispute* over the sentences.

> *But right now for this period of time*, I appreciate what you've done, the fact that you've sat here, the fact that you've listened. That's it. I thank you. You've done your job so far. You will go do your job here in a minute, and *we'll get to talk again later.* Thank you.

¶18 The fair import of counsel's closing argument was not lost on the prosecutor, who, without objection, reiterated counsel's concession of guilt in the State's final first-stage closing:

> [W]hat Mr. Martin is saying . . . is that you can have the world's greatest attorney, but the purpose behind this criminal justice system is to find the truth, and that has been elicited this week. *He [Appellant] did it*."

¶19 Again, we know exactly why defense counsel's closing argument proceeded in this way. Counsel testified at the evidentiary hearing that he was primarily seeking to maintain credibility for his arguments in the sentencing stage. He pursued this goal by displaying his professional *ethos*: acknowledging the evidence of guilt was incontestable; distancing himself from Appellant's far-fetched claims of innocence.

¶20 In the face of all this, I am not persuaded by the theory that counsel's salting of his concession with a few references to the jury's coming "job" to deliberate Appellant's guilt, or to the lines of evidence it would consider, somehow "implicitly" acknowledged Appellant's claim of innocence, or avoided a full concession of guilt. When counsel conceded that there was "no legitimate argument" with the State's evidence, and that he couldn't say the State's evidence was "wrong," he unmistakably implied that Appellant's testimony of innocence could assume no importance in the jury's coming deliberations.

¶21 By the Court's reasoning, a lawyer could most always technically avoid a legal concession of guilt simply by acknowledging that jurors would soon leave the courtroom and decide the matter for themselves. This is absurd. Every lawyer who addresses a jury implicitly acknowledges the ultimate decision is theirs. To say so in closing argument is only stating the obvious. A defense lawyer's concession of guilt does not end the criminal trial; it does not produce a guilty verdict *ipso facto.* But viewed as a whole, counsel's closing argument sought credibility with jurors by repeatedly acknowledging the *inevitable* result of their deliberations on the evidence: the conclusion of Appellant's guilt.

¶22 Appellant's decision to change the objectives of his defense after the State rested, though perhaps irksome to trial counsel and plainly repugnant to the Court, was a timely and valid exercise of constitutionally protected autonomy clearly established by the Supreme Court in *McCoy,* 138 S.Ct. at 1511-12, and earlier cases. *See also, Brooks v. Tennessee*, 406 U.S. 605, 613 (1972) (holding that due process protects defendant's freedom to remain silent, or elect to testify, *at any time* in the course of presenting his trial defense).

¶23 Appellant's decision effectively revoked the prior agreement to the original concession strategy, and constitutionally precluded counsel from making an *otherwise tactically reasonable* concession of guilt. Counsel here was "presented with express statements of the client's will to maintain innocence," yet unconstitutionally chose to "steer the ship the other way." *McCoy,* 138 S.Ct. at 1509.

> When a client expressly asserts that the objective of 'his defence' is to maintain innocence of the charged criminal acts, *his lawyer must abide by that objective and m*ay not override it by conceding guilt.

Id. (emphasis added). Counsel's unauthorized continuation of his concession strategy tactically vetoed Appellant's choice of ultimate defense objectives in violation of a clearly established right to the assistance of counsel for "*his* defense." *McCoy,* 138 S.Ct. at 1511-12 (emphasis added). The convictions should be reversed.

¶24 It seems practically important to mention what this does not mean: There was nothing professionally deficient about counsel's initial decision to pursue a concession strategy, and nothing inherently improper in the rhetoric of his closing argument. But the Sixth Amendment protected Appellant's decision to change his mind at the close of the prosecution's case, to take the stand, and to maintain his innocence, even in the teeth of his previous agreement with counsel.

¶25 Though the potential difficulty that a client's change of ultimate objectives might cause

for trial counsel is not hard to imagine, the actual difficulty in this case would have been relatively minimal. Counsel had not made a concession of guilt in *voir dire* or opening statement. He had conducted minimal cross-examination in the prosecution's case-in-chief. This was *not* a situation where counsel's prior statements to the jury had passed some tactical point of no return. *See e.g., Grissom v. State*, 2011 OK CR 3, ¶¶ 30-32, 253 P.3d 969, 980-81 (finding counsel effectively conceded defendant's guilt of murder by telling prospective jurors in *voir dire* that there was "no question" of defendant's guilt).

¶26 Appellant's change of objectives thus presented no real ethical or strategic dilemma for counsel in closing argument. The unenviable task of arguing against strong evidence without conceding guilt can be difficult, but it was not impossible here. Counsel could have maintained credibility with jurors in his closing argument by emphasizing uncontested principles of law and fairness: the presumption of innocence; the State's burden to prove guilt beyond a reasonable doubt; Appellant's right to have his trial testimony considered along with that of other witnesses; and the importance of a fair and impartial verdict. Even these possible lines of first-stage argument are only hypothetical. Given counsel's sentencing-stage strategy, he might well have tactically waived his first-stage closing and avoided the risk of constitutional error entirely.

¶27 Finally, this case pointedly illustrates the importance of counsel's compliance with the pre-concession procedure promulgated in *Jackson v. State*, 2001 OK CR 37, ¶ 25, 41 P.3d 395, 400. Counsel's failure to disclose his concession plan to the trial court before closing argument resulted in the failure to preserve a better record of having obtained the client's essential consent. Counsel's non-compliance with Jackson made a post-trial attack on the concession much more likely, and its ultimate resolution far more difficult.

¶28 I am authorized to state that Vice Presiding Judge Kuehn joins in this dissent.

HUDSON, JUDGE:

1. Appellant must serve 85% of the sentences imposed on Counts 1 and 2 before becoming eligible for parole. 21 O.S.Supp.2015, § 13.1(1), (5).

2. The van's front passenger side window was also open.

3. The record shows Banks was arrested by Tulsa Police on January 25, 2017, on unrelated charges and was released on bond the same day. The prosecutor mentioned during his offer of proof (discussed *infra*) that his decision to seek revocation of Banks's personal recognizance bond occurred when the State discovered Banks had been arrested outside Tulsa County for another crime. Orndorff testified he was aware of Banks being arrested on at least two and possibly three occasions for committing crimes in Oklahoma.

4. Defense counsel posed similar questions during his cross-examination of Det. White, at one point referencing the hour and minute shown on the video counter during the interview to identify a particular exchange.

5. Appellant does not allege the State withheld evidence from defense counsel. Appellant acknowledges defense counsel was supplied Bledsoe's videotaped interview in discovery. Had the State withheld this information, Appellant could have raised the issue in a timely motion for new trial. 22 O.S.2011, §§ 952-953; Rule 2.1(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020); *Reed v. State*, 1983 OK CR 12, ¶¶ 6-10, 657 P.2d 662, 664.

6. *See Order Remanding for Evidentiary Hearing*, No. F-2017-223 (Okl. Cr. Dec. 14, 2018) (unpublished).

7. Appellant filed his post-hearing supplemental brief with this Court on April 26, 2019. The State filed its supplemental brief on June 11, 2019.

8. Appellant faced a sentence on Count 1 of either life or life without parole. Because of his age at the time of the murder, Appellant was ineligible for the death penalty. *Roper v. Simmons*, 543 U.S. 551, 578 (2005); *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (plurality opinion).

9. Martin cited Appellant's lack of understanding of the law and his volatility when asked difficult questions by counsel.

10. *See* Rule 3.3(a)(3) – Candor Toward the Tribunal, *Oklahoma Rules of Professional Conduct*, 5 O.S.2011, Ch.1, App. 3-A (generally prohibiting a lawyer from offering "evidence that the lawyer knows to be false"); and Comment, ¶ 7 (noting some jurisdictions "have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false"). *See Nix v. Whiteside*, 475 U.S. 157, 174-76 (1986) (holding the right to counsel includes no right to the assistance of counsel in a plan to commit perjury; counsel's admonition to a client not to give false testimony was not ineffective assistance of counsel under *Strickland*).

11. The vast majority of federal circuit courts have reached the same conclusion. *Accord United States v. Vasquez*, 766 F.3d 373, 378-79 (5th Cir. 2014); *United States v. Dargan*, 738 F.3d 643, 651 (4th Cir. 2013); *United States v. Berrios*, 676 F.3d 118, 128 (3d Cir. 2012); *United States v. Figueroa-Cartagena*, 612 F.3d 69, 85 (1st Cir. 2010); *United States v. Johnson*, 581 F.3d 320, 326 (6th Cir 2009); *United States v. Spotted Elk*, 548 F.3d 641, 662 (8th Cir. 2008).

12. We recently took the same approach in *Clark v. State*, No. F-2017-1306, slip op. at 15-26 (Okl.Cr. Oct. 24, 2019) (unpublished).

13. During a bench conference, the parties and trial court noted Price had refused the State's previous offer to testify in exchange for immunity. *See* 12 O.S.Supp.2014, § 2804(A)(1); *Thompson*, 2007 OK CR 38, ¶ 18, 169 P.3d at 1204 ("[U]navailability also includes the situation where a witness has a valid Fifth Amendment privilege not to testify[.]").

14. The elements of gang-related offense as alleged in this case are 1) willfully; 2) attempts or commits; 3) murder and/or assault and battery with a deadly weapon; 4) while in association with any criminal street gang or gang member.

15. *See Miranda v. Arizona*, 384 U.S. 436 (1966).

LEWIS, PRESIDING JUDGE, DISSENTING:

1. Trial counsel had acknowledged as much when he made his first-stage closing, and again in the sentencing stage, where he acknowledged that "my trial strategy" had upset the defendant and his family. "But I'm not going to be disingenuous to the jury and argue evidence that doesn't exist, things that don't make sense. *This entire trial from the beginning has been a sentencing trial. It wasn't a trial about guilt or innocence.*" (emphasis added).

2. By saying, at the very beginning of the speech, for instance, "Friends, Romans, Countrymen, lend me your ears. I come to bury Caesar, *not to praise him*." Of course, Antony intended precisely the opposite, but could not openly admit the aims of his speech before Caesar's assassins. *The Tragedy of Julius Caesar,* III.2.75 (emphasis added); and later: "I have o'ershot myself to tell you of it [the bequests to Roman citizens in Caesar's will]; I fear I wrong the *honorable* men *whose daggers* have stabbed Caesar; I do fear it," III.2.150-52, and many other instances besides therein. *The Complete Pelican Shakespeare* 1321-22 (Penguin, 2002).

3. M.T. Cicero, "Pro Caelio," in *Cicero, Defense Speeches* 129-161, D.H. Berry, transl., (Oxford World's Classics, 2000).

4. *See* www.merriam-webster.com/dictionary/apophasis (visited July 1, 2019).

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2021 OBA Board of Governors Vacancies

Nominating Petition Deadline: 5 p.m. Friday, Sept. 4, 2020

OFFICERS
President-Elect
Current: Michael C. Mordy, Ardmore
(One-year term: 2021)
Mr. Mordy automatically becomes OBA president Jan. 1, 2021
Nominee: **James R. Hicks, Tulsa**

Vice President
Current: Brandi N. Nowakowski, Shawnee
(One-year term: 2021)
Nominee: **Charles E. Geister III, Oklahoma City**

BOARD OF GOVERNORS
Supreme Court
Judicial District One
Current: Brian T. Hermanson, Newkirk
Craig, Grant, Kay, Nowata, Osage, Ottawa, Pawnee, Rogers, Washington counties
(Three-year term: 2021-2023)
Nominee: **Vacant**

Supreme Court
Judicial District Six
Current: D. Kenyon Williams Jr., Tulsa
Tulsa County
(Three-year term: 2021-2023)
Nominee: **Richard D. White Jr., Tulsa**

Supreme Court
Judicial District Seven
Current: Matthew C. Beese, Muskogee
Adair, Cherokee, Creek, Delaware, Mayes, Muskogee, Okmulgee, Wagoner counties
(Three-year term: 2021-2023)
Nominee: **Benjamin R. Hilfiger, Muskogee**

Member At Large
Current: Brian K. Morton, Oklahoma City
Statewide
(Three-year term: 2021-2023)
Nominees: **Cody J. Cooper, Oklahoma City**
Elliott C. Crawford, Oklahoma City

NOTICE
This issue deadlined before the deadline, and the list of nominees is not complete. See www.okbar.org/governance/bog/vacanices for updates.

SUMMARY OF NOMINATIONS RULES

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

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

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

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

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

Terms of the present OBA officers and governors will terminate Dec. 31, 2020.

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

Oklahoma Bar Association Nominating Petitions

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

OFFICERS
President-Elect
James R. Hicks, Tulsa
Nominating Petitions have been filed nominating James R. Hicks, Tulsa for President-Elect of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2021.

A total of 175 signatures appear on the petitions.

Vice President
Charles E. Geister III, Oklahoma City
Nominating Petitions have been filed nominating Charles E. Geister III, Oklahoma City for Vice President of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2021.

A total of 231 signatures appear on the petitions.

BOARD OF GOVERNORS
Supreme Court
Judicial District No. 6
Richard D. White Jr., Tulsa
Nominating Petitions have been filed nominating Richard D. White Jr. for election of Supreme Court Judicial District No. 6 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2021. Twenty-five of the names thereon are set forth below:
J. Andrew Brown, Terry Weber, Stephen Layman, William D. Lunn Jr., Stanley D. Monroe, D. Kenyon Williams Jr., Bryan J. Nowlin, Stephen R. McNamara, James C. Milton, Steve Broussard, John O'Conner, Kyle Freeman, J. Kevin Hayes, Molly Aspan, Joe M. Fears, Maria Luckert, Taylor Burke, Stefan Mecke, William Todd Holman, Robert Bearer, Kara Pratt, Adrienne Cash, Stephanie R. Mitchell, Kurtis R. Eaton and Kenneth L. Hird.

A total of 32 signatures appear on the petitions.

Supreme Court
Judicial District No. 7
Benjamin R. Hilfiger, Muskogee
Nominating Petitions have been filed nominating Benjamin R. Hilfiger for election of Supreme Court Judicial District No. 7 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2021. Twenty of the names thereon are set forth below:
Roy Tucker, Orvil Loge, Sean Waters, Larry Edwards, Morgan Muzljakovich, Roger Hilfiger, R. Jay Cook, Roger Cliffton Johns, Justin Stout, Matthew Beese, Larry Vickers Jr., Donn Baker, James Richard "Jim" McClure, Brian Watts, Andy Hayes, Ryan B. Gassaway, Steve Money, Lowell G. Howe, Alex Wilson and Dan Medlock.

A total of 25 signatures appear on the petitions.

Member at Large
Cody J. Cooper, Oklahoma City
Nominating Petitions have been filed nominating Cody J. Cooper, Oklahoma City for election of Member at Large of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2021. Fifty of the names thereon are set forth below:
Justin G. Bates, Zachary K. Bradt, Elizabeth K. Brown, Susan E. Bryant, John M. Bunting, Michelle Campney, Michael D. Carter, Paul B. Cason, Hilary H. Clifton, Rodney L. Cook, Jessica N. Cory, Anderson J. Dark, C. Eric Davis, Bobby Dolatabadi, Dylan Charles Edwards, Joshua L. Edwards, Marc Edwards, Nikki J. Edwards, Melissa R. Gardner, Kayce L. Gisinger, Juston R. Givens, Erica K. Halley, Lauren B. Hanna, Sally A. Hasenfratz, Mark E. Hornbeek, Clayton Ketter, Fred A. Leibrock, Candace W. Lisle, Amber Martin, Melvin R. McVay Jr., Andrew S. Mildren, Jennifer L. Miller, Cindy H. Murray, Kendra Norman, Robert O. O'Bannon, Donald A. Pape, Miles T. Pringle, Dawn M. Rahme, Scott M. Rayburn, Mary H. Richard, James A. Roth, Calvin Sharpe, Ellen K. Spiropoulos, Kathryn D. Terry, Lauren S. Voth, Amy D. White, Lyndon W. Whitmire, Thomas G. Wolfe, Monica Ybarra and Raymond E. Zschiesche

A total of 52 signatures appear on the petitions.

Elliott C. Crawford, Oklahoma City
Nominating Petitions have been filed nominating Elliott C. Crawford, Oklahoma City for election of Member at Large of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2021. Fifty of the names thereon are set forth below:
Jarrod H. Stevenson, David T. McKenzie, Kaleb K. Hennigh, Carrie Hixon, Andre' Caldwell, Robert W. Gray, Scott Adams, Sierra Pfeiffer, Anthony J. Ferate, Tony Coleman, Frank Urbanic, Jeff Trevillion Jr., Malcolm M. Savage, Thomas A. Griesedieck, Taylor McLawhorn, Kimberly Miller, Jonathan Neal, Amber N. Leal, Christine N. Gronlund, Greta R. Rucker, Richard L. Hull, Melissa A. French, Emily J. Dunn, Kristen M. Messina, Johanna F. Roberts, Emily E. Grossnicklaus, Frances C. Ekwerekwu, Brigitte R. Biffle, William R. Foster Jr., Patrick A. Weigant, Kaitlin N. McCorstin, Bailey A. Daugherty, John Micah Sielert, Andrew S. Ewbank, Mara K. Funk, Kyla K. Willingham, Justin L. Lamunyon, Benjamin J. Barker, Roger L. Ediger, Karig P. Culver, Dustin E. Conner, Dalen D. McVay, Edna Mae Holden, Carl J. Buckholts, David W. Hammond, Lawrence M. Wheeler, Jamie L. Phipps, Scott W. Stone, Michael M. Reynolds and Jay B. Watkins.

A total of 53 signatures appear on the petitions.

2020 OK CIV APP 44

IN THE MATTER OF THE SALES TAX CLAIM FOR REFUND PROTEST OF: BRUCE A. MOATES and EDITH F. MOATES, Appellants, vs. OKLAHOMA TAX COMMISSION, Appellee.

Case No. 117,968. August 4, 2020

PROCEEDING TO REVIEW AN ORDER OF THE OKLAHOMA TAX COMMISSION

AFFIRMED

Edith F. Moates, MOATES & ASSOCIATES, Norman, Oklahoma, for Appellants

Joseph P. Gappa, GENERAL COUNSEL, Elizabeth Field, DEPUTY GENERAL COUNSEL, Tina S. Ikpa, ASSISTANT GENERAL COUNSEL, Sharon R. Sitzman, ASSISTANT GENERAL COUNSEL, OKLAHOMA TAX COMMISSION, Oklahoma City, Oklahoma, for Appellee

JOHN F. FISCHER, JUDGE:

¶1 Appellant Bruce A. Moates and his wife, Appellant Edith F. Moates, appeal from the order of the Oklahoma Tax Commission (OTC) denying their claim for a refund of sales tax in the amount of $927.14 paid on purchases of custom furniture. The Moates claimed the purchases were exempt from sales tax pursuant to the Disabled Veterans Sales Tax Exemption, 68 O.S. Supp. 2015 § 1357(34). Finding no error, we affirm.

BACKGROUND

¶2 The record reveals that the following facts are not in dispute. Bruce Moates applied to the Veterans Administration (VA) for a determination of his status as a 100% service-connected disabled veteran. While that status determination was pending before the VA, the Moates made two furniture purchases, on June 10 and June 14, 2016, from Haggard's Fine Furniture. The June 10 Haggard's Fine Furniture invoice, for a dining table and ten chairs, indicates a total purchase price of $10,159.81, including sales tax of $785.13. A down payment on the purchase was made by check in the amount of $5,159.81, and drawn on the account of "Moates and Associates."[1] The June 14 Haggard's invoice, for a game table, indicates a total purchase price of $1,837.66, including sales tax of $142.01. The $1,730.25 down payment on that purchase also was made by check drawn on the account of "Moates and Associates." Included terms in both invoices were that the remaining balance of the purchase price was due on delivery of the furniture. The $927.14 which is the subject of the Moates' claim for refund is the total of the sales tax charged on Haggard's June 10 and June 14 invoices.

¶3 Haggard's Fine Furniture operated an Oklahoma City showroom and was a local dealer for sales of the "Simply Amish" furniture the Moates purchased. Simply Amish produces collections of hand-crafted furniture in a variety of styles. Each furniture collection is available in a variety of hardwoods and stains. Simply Amish does not sell directly to the public and all furniture orders must be made through an official dealer. Although Haggard's Fine Furniture had Simply Amish furniture items on display, the Moates worked with Mr. Haggard, the owner, to decide on particular wood, designs and finishes. Mr. Haggard showed Edith Moates a catalog to assist her in making selections. The Haggard's invoices contain detailed information regarding the Moates' specific choices. On receipt of the or-der from Haggard's, Simply Amish began manufacture of the furniture specified in the order. For the June 10 custom furniture order, the balance due to Haggard's on delivery was $5,000. For the June 14 order, the balance due was $107.41.

¶4 The custom furniture was delivered to the Moates on September 16, 2016. However, due to alleged manufacturing defects, the Moates requested repair or replacement of certain pieces. On November 16, 2016, the Moates accepted delivery of the repaired/replaced furniture and paid the balance due for the purchase invoices.

¶5 In early May 2017, several months after all furniture was delivered, the VA notified Moates that he was awarded a 100% service-connected disability rating. The evaluation was permanent, with no future examinations scheduled. The ef-fective date of the VA disability determination was July 27, 2016.

¶6 After receiving notice of his VA disability rating, Bruce Moates applied for and was issued OTC Sales Tax Exemption cards for himself and his wife. The Moates received the cards on May 5, 2017, with the notation "**EXM-12149589-03 July 27, 2016**."[2] On May 10, 2017, the Moates submitted, along with copies of receipts, their Application for Credit or Refund of State and Local Sales or Use Tax, with a claim period covering July 27, 2016, through May 5, 2017. The Account Maintenance Division denied the claim in part.[3]

¶7 The Moates protested the partial denial of their refund claim, and the matter was heard by the administrative law judge (ALJ).[4] The ALJ denied the portion of the claim related to debit and credit card purchases, but determined that the Moates were entitled to a refund of sales tax for the furniture purchases because the sales occurred when Haggard's transferred possession and delivered the furniture to the Moates. The Account Maintenance Division of the OTC filed a motion for reconsideration, which the ALJ denied.

¶8 The Account Maintenance Division filed an Application for En Banc Hearing before the OTC. The OTC reviewed the refund claim, the briefs submitted by the parties and, following the hearing, vacated the findings, conclusions and recommendations made by the ALJ. The OTC concluded that the Moates' custom furniture purchases did not qualify for the sales tax exemption. The OTC's 26-page order, which includes a detailed and extensive recitation of the facts and applicable law, provides in part:

> The Commission finds that Claimants have not met their burden of establishing the validity of the claims for refund of sales tax paid on purchases made prior to applying for and obtaining a Disabled Veterans Card or exemption number. In addition, the Commission finds the subject sales of Simply Amish furniture occurred prior to the exemption date stamped on Claimant's Disabled Veterans Exemption Card and do not qualify for exemption from sales tax based on 68 O.S. [Supp. 2015] § 1357(34).

¶9 The Moates appeal. The issues they raise are limited to the denial of a refund of the sales tax paid for the custom furniture. The Moates claim that the OTC's order is clearly contrary to the applicable provisions of the Sales Tax Code. They also claim it is contrary to the general purpose of Oklahoma laws dealing with disabled veterans, which is to assist those veterans economically.

STANDARD OF REVIEW

¶10 The issues in this appeal involve the OTC's application and interpretation of statutes and rules concerning the Oklahoma Sales Tax Exemption for 100% Disabled Veterans. "When the OTC, an administrative agency, acts in its adjudicative capacity, its orders will be affirmed on appeal if 1) the record contains substantial evidence supporting the facts upon which the order is based and 2) the order is free of legal error." *American Airlines, Inc. v. State ex rel. Okla. Tax Comm'n*, 2014 OK 95, ¶ 25, 341 P.3d 56 (citing *Neer v. State ex rel. Okla. Tax Comm'n*, 1999 OK 41, ¶ 3, 982 P.2d 1071). "The OTC's legal rulings are subject to an appellate court's plenary, independent and nondeferential reexamination." *Id.* (footnote omitted).

ANALYSIS

¶11 The Moates' brief in chief contains two propositions of error. In Proposition I, they argue that it was error for the OTC to rely on or base any part of its decision on the May 5, 2017 date the Moates received the exemption cards rather the July 27, 2016 effective date of the VA disability determination noted on the face of the card. In Proposition II, they argue that the OTC erred by basing the decision to deny the refund of sales tax on the dates of the custom furniture orders, June 10 and June 14, 2016, rather than on the final date of delivery, which was not until November 2017.

I. Eligibility for Disabled Veterans Sales Tax Exemption

¶12 The OTC's authority to administer and collect sales taxes is statutory, and the OTC is authorized "to enforce the provisions of [the Uniform Tax Procedure Code] and to promulgate and enforce any reasonable rules with respect thereto." 68 O.S.2011 § 203.[5] Sales tax is imposed upon sales to consumers in Oklahoma of "tangible personal property" and services which are "not otherwise exempted." 68 O.S.2011 § 1351. *See also* 68 O.S. Supp. 2013 § 1354(A) ("There is hereby levied upon all sales, not otherwise exempted in the Oklahoma Sales Tax Code an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds of each sale of the following: 1. Tangible personal property . . . .").

¶13 Specific exemptions from Oklahoma sales tax are enumerated in 68 O.S. Supp. 2015 § 1357.

> There are hereby specifically exempted from the tax levied by the Oklahoma Sales Tax Code:
>
> . . . .
>
> 34. Sales of tangible personal property or services to persons who are residents of Oklahoma and have been honorably discharged from active service in any branch of the Armed Forces of the United States or Oklahoma National Guard and who have been certified by the United States Department of Veterans Affairs or its successor to be in receipt of disability compensation at the one-hundred-percent rate and the disability shall be permanent and have been sustained through military action or accident or resulting from disease contracted while in such active service or the surviving spouse of such person if the person is deceased and the spouse has not remarried; provided, sales for the benefit of the person to a spouse of the eligible person or to a member of the household in which the eligible person resides and who is authorized to make purchases on the person's behalf, when such eligible person is not present at the sale, shall also be exempt for purposes of this paragraph. The Oklahoma Tax Commission shall issue a separate exemption card to a spouse of an eligible person or to a member of the household in which the eligible person resides who is authorized to make purchases on the person's behalf, if requested by the eligible person. . . .

¶14 In order to claim the § 1357(34) exemption, the qualified veteran "to whom the sale is made shall be required to furnish the vendor proof of eligibility for the exemption as issued by the Oklahoma Tax Commission." 68 O.S.2011 § 1361.2. *See* Okla. Admin. Code (OAC) § 710:65-7-17.1. Proof of eligibility to claim the 68 O.S Supp. 2015 § 1357(34) sales tax exemption consists of either "a copy of the exemption card issued to the purchaser by the Tax Commission or the purchaser's name, address, and exemption number." OAC § 710:65-7-17. To receive an exemption card, the qualifying veteran must be an Oklahoma resident and submit to the OTC Taxpayer Assistance Division the following information: "(1) **Qualifying Veteran**. A letter from the United States Department of Veterans Affairs certifying that the veteran is receiving disability compensation at the 100% rate." OAC § 710:65-13-275(c)(1). The disabled veteran must follow the statutory procedure to obtain the exemption. *See Apache Corp. v. State*, 2004 OK 48, ¶ 10, 98 P.3d 1061 (noting that tax exemptions "are matters of legislative grace" and claimants must follow available statutory procedures to obtain them).

¶15 In the Moates' appellate brief, there is a considerable amount of discussion regarding what they characterize as the OTC's "totally absurd" position that, in order qualify for the sales tax exemption, they were required to "have the exemption card in hand" to present to Haggard's at the time of the custom furniture order. According to the Moates, the OTC's position overlooks the fact that, although they did not receive the sales tax exemption card until May of 2017, the effective date of Bruce Moates' 100% disability rating, correctly reflected on the Sales Tax Exemption Card, was **July 27, 2016**. And, when they filed their Application for Credit or Refund of State and Local Sales or Use Tax, Bruce Moates was a qualified veteran entitled to the sales tax exemption.

¶16 The OTC's lengthy order discusses the requirement of and timing for the purchaser to furnish the vendor proof of eligibility for the exemption, either by card, or by name, address and exemption number. The OTC's order notes that it must "strictly enforce exemption statutes." And, the order also notes that Bruce Moates did not have that proof until May 5, 2017, almost one year after the furniture purchases. However, the ultimate finding and conclusion in the OTC's order is that the Moates did not meet their burden of establishing the validity of their claim for refund of the sales tax paid on the furniture because "*the subject sales of Simply Amish furniture occurred prior to the exemption date stamped on [the Moates'] Disabled Veterans Exemption Card and do not qualify for exemption from sales tax based on 68 O.S. [Supp. 2015] §1357(34)*." (Emphasis added).

¶17 Based on our review of the record, this Court finds that the OTC did not err in concluding that the date of the "subject sales" was a determinative fact. However, the Moates argue that the OTC erred in using the dates of purchase reflected on the Haggard's invoices in denying their claim for a sales tax refund.

II. Date of the Furniture Sales

¶18 The Moates concede in their appellate brief that they ordered and made down payments on the furniture "before the decision by the Department of Veterans Affairs . . . that [Bruce Moates] was 100% service connected disabled." Nonetheless, they urge this Court to conclude that the "subject sales" of furniture did not predate Bruce Moates' eligibility to claim the Disabled Veterans Exemption. The Moates argue that the November 16, 2016 final delivery date, which is also the date on which they paid the balance owed on the purchase price, is the operative date for determining their entitlement to the claimed sales tax refund.

¶19 In support of their argument, the Moates maintain that the June 10 and June 14, 2016 invoice dates do not reflect actual sales of "tangible personal property" on those dates but simply orders for custom-made furniture "which was not in existence." They also point out that both invoices have an "ETA date box," and they rely on that fact in support of their contention that, for purposes of their requested sales tax refund, the taxable event occurred when the finished furniture was delivered. The Moates cite to the definition of the term "sale" found in the general definitions section of the Sales Tax Code: "'Sale' means the transfer of either title or possession of tangible personal property for a valuable consideration regardless of the manner, method, instrumentality, or device by which the transfer is accomplished in this state . . . ." 68 O.S.2011 § 1352(22). According to the Moates, there was no transfer of title, and certainly no transfer of possession of custom furniture on June 10 or June 14, 2016; the transfer did not occur until delivery. Therefore, the Moates argue that there were no transactions subject to sales tax on those June dates, and the OTC erred in concluding otherwise. We are not persuaded by their arguments.

¶20 There is some discussion within the analysis portion of the OTC's order regarding the May 5, 2017 date on which Bruce Moates received his sales tax exemption card and exemption number. However, as this Court has noted, the OTC ultimately concluded and ordered that the Moates did not meet their burden of establishing the validity of their claim for refund of the sales tax paid on the furniture because "the subject sales" of Simply Amish furniture occurred prior to the exemption date stamped on the Moates' Disabled Veterans Exemption Card.

¶21 In resolving the issue, the OTC noted that, during the hearing before the Commission en banc, the Moates agreed "they had a completed sales contract" upon completion of the June 2016 orders at Haggard's and the accompanying invoices reflecting the purchase of the Simply Amish furniture. OTC Order No. 2019-04-11-12 at p. 23 and n.25. The OTC also looked to one of its past precedential orders for guidance and observed that "a true object of the transaction test" is applied to determine whether a customer client "is primarily contracting for the services or for the article of tangible personal property produced by the service." OTC 90-04-03-06 PREC (April 3, 1990), 1990 WL 300932 at *5 (noting that transaction for commissioned original artwork was subject to sales tax because facts presented indicated the object of agreement between artist and his customers was artwork in its finished physical form).[6] The OTC noted that Haggard's Fine Furniture added sales tax due on the total purchase price at the time it wrote each invoice. The OTC did not find the contracted terms of purchase between Haggard's and the Moates regarding down payment, delivery and final payment to affect the dates of the "sales" for tax purposes.

¶22 Applying the de novo standard of review, we find no error in the OTC's determination that the invoice dates of June 10 and June 14, 2016, constitute the operative dates for purposes of determining the Moates' entitlement to the claimed sales tax refund. Their purchases of Simply Amish furniture on those dates in June 2016 do not qualify for the Disabled Veterans Sales Tax Exemption. The furniture sales on June 10 and June 14, 2016, occurred prior to the effective date of Bruce Moates' eligibility for the sales tax exemption. The effective date of the sales tax exemption was not until July 27, 2016, when the VA officially declared Bruce Moates to have a 100% service-connected disability. We also note:

> It is a well settled rule that the contemporaneous construction of a statute by those charged with its execution and application, especially when it has long prevailed, while not controlling, is entitled to great weight and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous.

Oral Roberts Univ. v. Okla. Tax Comm'n, 1985 OK 97, ¶ 10, 714 P.2d 1013 (citing *McCain v. State Election Bd.*, 1930 OK 323, 289 P. 759). We find no reason to overturn the OTC's more than thirty-year-old interpretation of section 1354(A)(1) of the Sales Tax Code.

CONCLUSION

¶23 The OTC did not err in concluding that the Moates' furniture purchases from Haggard's Fine Furniture on June 10 and June 14, 2016, did not qualify for the 100% Disabled Veteran Sales Tax Exemption found at 68 O.S. Supp. 2015 § 1357(34). Those furniture purchases occurred before July 27, 2016, the date on which the VA declared Bruce Moates to have a 100% service-connected disability. Prior to the determination by the VA, Bruce Moates did not qualify for the Oklahoma sales tax exemption and, therefore, the Moates were not entitled to the requested sales tax refund. The OTC's order is supported by substantial evidence and free of legal error. Accordingly, we affirm the Order of the Oklahoma Tax Commission.

¶24 AFFIRMED.

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

JOHN F. FISCHER, JUDGE:

1. As indicated by the Moates' appellate filings, "Moates and Associates" is the name under which Edith Moates, a licensed attorney, operates her law practice. The disabled veterans sales tax exemption applies to sales made to or on behalf of the qualified veteran and spouse. The OTC did not decide the issue of whether Bruce Moates had an interest in the funds of "Moates and Associates," because that issue "was not addressed during the administrative hearing process" and there were "insufficient facts in the record to enable the Commission to make that determination."

2. In its order, the OTC identified the above-quoted information on the card as one of the "facts" relevant to the issues before it. OTC Order No. 2019-04-11-12 at pgs. 3, 6 (fact No. 11) (emphasis in original).

3. The Moates' initial sales tax refund request totaling $2,958.60 covered numerous purchases on various dates from various vendors. The Credits and Refunds Section of the Account Maintenance Division of the OTC approved a refund amount of $979.69, but denied the remaining portion of the claim. Stated reasons for denial were that some purchases were made outside Oklahoma, some purchases were not documented by receipts, some purchases were returned with corresponding sales tax credited or refunded and, on other purchases, no sales tax was charged. The record contains copies of numerous receipts submitted by the Moates, some of which bear a hand-written notation apparently made by the Division: "Before Exemption date of 7/27/16."

4. *See* n.3. At the hearing before the ALJ, the Moates limited their protest to the Haggard's Fine Furniture receipts and certain other debit or credit card purchases for which they had no original sales receipts.

5. "The purpose of . . . the 'Uniform Tax Procedure Code', is to provide, so far as is possible, uniform procedures and remedies with respect to all state taxes. Unless otherwise expressly provided in any state tax law, heretofore or hereafter enacted, the provisions of this article shall control and shall be exclusive." 68 O.S.2011 § 201.

6. Precedential order OTC 90-04-03-06 addressed a sales tax protestant's challenge to the Commission's application of the 1981 version of 68 O.S. § 1354, to "persons who produce, through professional talent and skill, a tangible object for sale." OTC 90-04-03-06 PREC (April 3, 1990), 1990 WL 300932 at *5. The Commission did not specifically determine dates of sales in that order, but held: "If the client is primarily contracting for the tangible personal property produced by the service . . . the transaction is subject to sales tax." *Id.* The subsections of the current and applicable version of the statute, 68 O.S. Supp. § 1354(A)(1), have been renumbered but the language remains the same.

2020 OK CIV APP 45

LIONEL S. LEWIS, Plaintiff/Appellee, vs. ANTHONY CORRENTE, individually and d/b/a Prime Construction Services and d/b/a Prime Construction Group, LLC; and SHERRY CORRENTE, individually and d/b/a Prime Construction Services and d/b/a Prime Construction Group, LLC, Defendants/Appellants.

Case No. 118,470. May 18, 2020

APPEAL FROM THE DISTRICT COURT OF CANADIAN COUNTY, OKLAHOMA

HONORABLE JACK MCCURDY II, TRIAL JUDGE

AFFIRMED

Jacquelyn L. Dill, GRAFT & WALRAVEN, PLLC, Oklahoma City, Oklahoma, for Plaintiff/Appellee

Connie L. Calvert, LAW OFFICES OF CONNIE CALVERT, Oklahoma City, Oklahoma, for Defendants/Appellants

DEBORAH B. BARNES, PRESIDING JUDGE:

¶1 Lionel S. Lewis initiated this case by filing a petition asserting five theories of recovery against Anthony and Sherry Corrente, individually and d/b/a Prime Construction Services and d/b/a Prime Construction Group, LLC, (collectively, Defendants) who were hired by Mr. Lewis to undertake a residential kitchen and bath remodel on his property. Defendants responded by filing a motion to dismiss pursuant to the Oklahoma Citizens Participation Act (OCPA), 12 O.S. Supp. 2014 §§ 1430-1440. Defendants argue that four of the five theories asserted by Mr. Lewis should be dismissed under the OCPA.

¶2 The trial court denied Defendants' motion, and Defendants now appeal the trial court's order pursuant to 12 O.S. Supp. 2014 § 1437, which provides a specific right to appeal the denial of a motion to dismiss brought pursuant to the OCPA.[1]

¶3 Based on our review, we affirm the trial court's order denying Defendants' OCPA motion.

BACKGROUND

¶4 Mr. Lewis alleges in his petition that he hired Defendants in December 2018 to undertake a kitchen and bathroom remodel at his home in Yukon, Oklahoma. He alleges that the agreed-upon total price for the project was $34,505, "with one-half, $17,252.50, to be paid as a deposit and the balance to be paid upon comp letion." However, he asserts Defendants "failed to obtain any required permits from the City for the work performed," and Defendants "completed slightly less than one-half of the work on the project."

¶5 Mr. Lewis further asserts that because he worked irregular hours as a Federal Air Marshal, he called Defendants to discuss the project on one occasion "after normal hours." According to Mr. Lewis's petition, this phone call resulted in Defendant Sherry Corrente subsequently filing a police report against Mr. Lewis "claiming that he 'has not done anything illegal' but that he had called her on her cell phone after normal business hours."

¶6 Mr. Lewis, who asserts he merely called the number on Defendants' business card, asserts Ms. Corrente also filed a second police report that same evening "to allege that she was concerned that Mr. Lewis held the office of Air Marshal." Mr. Lewis also alleges that Ms. Corrente proceeded to "then contact[] the U.S. Marshals Service and report[] that she had filed a police report against Mr. Lewis." Mr. Lewis alleges that his "contract with the U.S. Marshals Service was then terminated . . . ."

¶7 Mr. Lewis also asserts that after these events, Defendants ceased work on the kitchen and bathroom remodel project and that Mr. Lewis was forced to hire another construction company to complete the project for $19,236. He asserts that Defendants nevertheless proceeded to demand full payment from Mr. Lewis for the total contract price, and that Defendants filed a mechanic's and materialmen's lien against his property in the amount of $17,252.50, "wrongfully clouding and slandering the title to [his] [p]roperty."

¶8 Mr. Lewis has set forth the following theories against Defendants in his petition: (1) breach of the construction contract; (2) cancellation of the mechanic's and materialmen's lien; (3) slander of title; (4) civil conspiracy to slander, encumber and cloud title; and (5) intentional interference with his contract with the U.S. Marshals Service.

¶9 As stated above, Defendants responded by filing a motion to dismiss pursuant to the OCPA. Defendants assert that all of Mr. Lewis's theories should be dismissed under the OCPA except the breach of contract theory.

¶10 The trial court ultimately denied Defendants' motion on the basis that, among other things, "the facts and circumstances of this case are [not] what the statute is intended for," "the legal action was [not] brought to deter or prevent the moving party from exercising constitutional rights," and Mr. Lewis "established by clear and convincing evidence a prima facie case for each essential element of his claims."

¶11 From the trial court's order denying their OCPA motion, Defendants appeal.

STANDARD OF REVIEW

¶12 Our review of the trial court's rulings under the OCPA requires analysis of issues of statutory interpretation; in addition, "disputed questions of material fact cannot be resolved in an OCPA dismissal proceeding." *Krimbill v. Talarico*, 2018 OK CIV APP 37, ¶ 21, 417 P.3d 1240. We, therefore, review a district court's determinations under the OCPA de novo, *id*. ¶ 4, pursuant to which we claim "plenary, independent, and non-deferential authority to reexamine [the] trial court's legal rulings," *Martin v. Gray,* 2016 OK 114, ¶ 5, 385 P.3d 64 (citation omitted).

ANALYSIS

¶13 As stated above, Defendants seek dismissal under the OCPA of the following theories of recovery asserted by Mr. Lewis: cancellation of the mechanic's and materialmen's lien; slander of title; civil conspiracy to slander, encumber and cloud title; and intentional interference with his contract with the U.S. Marshals Service.

I. With regard to the first three challenged theories, Defendants have failed to meet their initial burden of showing these theories are based on, relate to or are in response to Defendants exercising a constitutional right to petition.

¶14 Mr. Lewis's cancellation of lien theory is based on Defendants' "fil[ing] a Mechanic's and Materialmen's Lien against [his property] on July 3, 2019, in the amount of $17,252.50…."[2] Mr. Lewis asserts he "had fully paid [Defendants] in excess of the percentage of work completed under the [contract] and was under no obligation to make further payment under the

contract." Thus, he asserts "[t]he Lien was filed without any factual or legal merit" and that he "is entitled to have the Lien canceled." As Defendants acknowledge, Mr. Lewis's slander of title and civil conspiracy theories are also founded upon Defendants' filing of the above-described lien.

¶15 Under the OCPA, the initial burden is on the Defendants to show that Mr. Lewis's theories "relate[] to Defendants engaging in activity protected by the OCPA, i.e., the exercise of the right of free speech; the right to petition; or the right of association." *Krimbill,* 2018 OK CIV APP 37, ¶ 34. The Legislature has defined these protected activities in 12 O.S. Supp. 2014 § 1431 as follows:

> 2. "Exercise of the right of association" means a communication between individuals who join together to collectively express, promote, pursue or defend common interests;
>
> 3. "Exercise of the right of free speech" means a communication made in connection with a matter of public concern;
>
> 4. "Exercise of the right to petition" means any of the following: . . .

As noted by the *Krimbill* Court, "The definition of 'exercise of the right to petition' continues with numerous examples[.]" 2018 OK CIV APP 37, ¶ 34 n.12.

¶16 In the present case, Defendants argue that, with regard to the claim of cancellation of the mechanic's and materialmen's lien, the filing of the lien constituted the exercise of the right to petition as defined in the OCPA; in particular, Defendants cite to the examples listed under § 1431(4)(a)(2) and § 1431(4)(a)(5), which provide that the exercise of the right to petition means "a communication in or pertaining to . . . (2) an official proceeding, other than a judicial proceeding, to administer the law," and "a communication in or pertaining to . . . (5) a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity[.]"[3] With regard to the filing of the lien, Defendants assert that their "actions are protected by the OCPA as a lawful right to petition [exists] permitting Defendants' lawful, non-discretionary act of filing the lien to perfect it."

¶17 "The fundamental rule of statutory construction is to ascertain . . . the Legislature's intention and purpose as expressed in a statute." *Strong v. Laubach,* 2004 OK 21, ¶ 9, 89 P.3d 1066 (citation omitted).

> In the interpretation of statutes, we do not limit our consideration to a single word or phrase. Instead, we construe together the various provisions of relevant enactments, in light of their underlying general purpose and objective, to ascertain legislative intent. Words and phrases of a statute are to be understood and used not in an abstract sense, but with due regard for context and they must harmonize with other sections of the act to determine the purpose and intent of the legislature.

State ex rel. Okla. State Dep't of Health v. Robertson, 2006 OK 99, ¶ 7, 152 P.3d 875 (internal quotation marks omitted) (citations omitted).

¶18 The OCPA provides that its "purpose . . . is to encourage and safeguard the *constitutional rights* of persons to petition, speak freely, associate freely and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." § 1430(B) (emphasis added). As explained by the Krimbill Court, although the OCPA, in comparison to similar laws passed in other states, is "broad" and protects a "wide spectrum" of speech,[4] it is nevertheless limited to protecting what can be categorized as "First Amendment speech" or "the valid exercise of the constitutional rights of freedom of speech [or] petition for the redress of grievances," *Krimbill*, ¶¶ 7-8, rights protected either under the First Amendment of the United States Constitution or under the Oklahoma Constitution.[5]

¶19 Thus, pertinent to the present case, a defendant asserting that a plaintiff's theory is based on that defendant's exercise of the right to petition must make some showing that the communication in question is categorizable as an exercise of a constitutional right to petition.[6] We decline to view the statutory bases forwarded by Defendants – § 1431(4)(a)(2) and § 1431(4)(a)(5) – in complete isolation from the explicit purpose of the OCPA set forth in § 1430 such that *any* "communication in or pertaining to . . . (2) an official proceeding, other than a judicial proceeding, to administer the law," or *any* "communication in or pertaining to . . . (5) a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity," would find protection under the

OCPA and subject theories of recovery to accelerated dismissal that do not arise from a defendant exercising a relevant constitutional right. Our reading is bolstered by the final example articulated by the Legislature of an exercise of the right to petition: "[A]ny other communication that falls within the protection of the right to petition government under the Constitution of the United States or the Oklahoma Constitution[.]" 12 O.S. § 1431(4)(e).[7]

¶20 The United States Supreme Court has explained as follows:

> Both speech and petition are integral to the democratic process, although not necessarily in the same way. *The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives,* whereas the right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs. Beyond the political sphere, both speech and petition advance personal expression, although the right to petition is generally concerned with *expression directed to the government seeking redress of a grievance.*
>
> . . . A petition *conveys the special concerns of its author to the governmen*t and, in its usual form, requests action by the government to address those concerns.

Borough of Duryea, Pa. v. Guarnieri, 564 U.S. 379, 388-89 (2011) (emphasis added) (citation omitted).[8]

¶21 With regard to the right to petition protected under the Oklahoma Constitution, the Oklahoma Supreme Court has explained as follows:

> The right to petition the government for redress of grievances is safeguarded in Art. 2 § 3, Okl. Const.[9] This constitutional guarantee, which embodies the right of the people – collectively – to pursue political ends through group action, is a basic aspect of self government. Legitimate attempts to influence government action are absolutely protected from civil liability by this fundamental guarantee. The clear import of the right-to-petition clause is to protect from litigation those who attempt to induce the passage, repeal or the enforcement of law, or to solicit governmental action, even though the result of such activities may indirectly cause injury to others.

Gaylord Entm't Co. v. Thompson, 1998 OK 30, ¶ 24, 958 P.2d 128.

¶22 Here, Defendants make no effort to show that the filing of their lien was an exercise of the "constitutional right[] . . . to petition, speak freely, associate freely [or] otherwise participate in government." § 1430(B). They make no effort to show that the filing of their lien should be viewed as a valid exercise of the constitutional right to petition that would be protected under either the First Amendment right to petition or the Oklahoma Constitution's guarantee of "the right . . . to apply to those invested with the powers of government for redress of grievances by petition, address, or remonstrance." Okla. Const. art. 2, § 3. Indeed, Defendants merely assert that "[m]echanic's liens are a statutory right" or remedy, but do not assert their filing of a mechanic's lien constitutes the exercise of a constitutional right. Thus, we conclude Defendants have failed to meet the initial burden placed on them to show that Mr. Lewis's theories of cancellation of the mechanic's and materialmen's lien, slander of title, or civil conspiracy "relate[] to Defendants engaging in activity protected by the OCPA[.]" *Krimbill*, ¶ 34. Consequently, we conclude the trial court properly denied this portion of Defendants' OCPA motion.[10]

II. Material facts remain in dispute regarding the theory of interference with contract, thus rendering dismissal under the OCPA improper.

¶23 The elements of the tort of interference with contract are set forth in the Oklahoma Uniform Jury Instructions (OUJI) as follows:

> In order to win on the claim of intentional interference with a contract, [Plaintiff] must show by the weight of the evidence that:
>
> 1. [Plaintiff] had a contract with [Third Party];[11]
>
> 2. [Defendant] knew [or under the circumstances reasonably should have known] about the contract;
>
> 3. [Defendant] interfered with the contract [or induced the Third Party to breach the contract, or made it impossible for the contract to be performed];
>
> 4. [Defendant]'s conduct was intentional;

5. [Defendant] used improper or unfair means; and

6. [Plaintiff] suffered damages as a direct result of [Defendant]'s actions.

OUJI-Civ. 24.1.

¶24 Mr. Lewis alleges in his petition that he "had a Contract with the United States Marshals Service, Justice Prisoner & Alien Transportation System," that Ms. Corrente knew about Mr. Lewis's employment relationship with the United States Marshals Service and intentionally interfered with his contract "through improper and unfair means," and that his contract with the United States Marshals Service was terminated as a result of Ms. Corrente's actions. More particularly, as set forth above, Mr. Lewis alleges that because he merely called the number on Defendants' business card "after normal hours," Ms. Corrente filed two police report against him stating he "has not done anything illegal" but that he "called her on her cell phone after normal business hours" and that she was "concerned [he holds] the office of Air Marshal." Mr. Lewis alleges Ms. Corrente then proceeded to "contact[] the U.S. Marshals Service and report[] that she had filed a police report against Mr. Lewis." Mr. Lewis alleges that his "contract with the U.S. Marshals Service was then terminated . . . ."

¶25 Defendants assert, however, that the police reports and the phone call to Mr. Lewis's employer constitute the exercise of the right of free speech under the OCPA. As pointed out by Defendants, the OCPA provides, as quoted above, that the "'[e]xercise of the right of free speech' means a communication made in connection with a matter of public concern[.]" 12 O.S. Supp. 2014 § 1431(3). A matter of public concern is defined under the OCPA as "an issue related to: a. health or safety, b. environmental, economic or community well-being, c. the government, d. a public official or public figure, or e. a good, product or service in the marketplace[.]" 12 O.S. § 1431(7). Defendants assert, "[Mr. Lewis] was a U.S. Air Marshal and the police report involved matters of public concern."

¶26 Although Mr. Lewis disagrees with Defendants' argument, Mr. Lewis acknowledges that the communications underlying his interference with contract theory, at least when compared with the communications underlying his other theories, may possibly invoke the OCPA.[12] Thus, he argues, in effect, that regardless of whether Defendants have met the initial burden of showing that the interference with contract theory is based on, relates to or is in response to Defendants "exercis[ing] the right of free speech," questions of material fact remain in dispute regarding his interference with contract theory; thus, dismissal of the interference with contract theory cannot be awarded under the OCPA. We agree.

¶27 As quoted above, the OCPA provides that its "purpose . . . is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely and otherwise participate in government to the maximum extent permitted by law *and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury*." § 1430(B) (emphasis added). As explained persuasively and at length by the *Krimbill* Court, it follows "that disputed questions of material fact cannot be resolved in an OCPA dismissal proceeding." 2018 OK CIV APP 37, ¶ 21.

¶28 We conclude that not only has Mr. Lewis articulated allegations in his petition sufficient to support an interference with contract theory, he has also attached evidentiary materials in support of those allegations.[13] Therefore, we conclude the trial court also properly denied this portion of Defendants' OCPA motion.

CONCLUSION

¶29 With regard to the theories of cancellation of the mechanic's and materialmen's lien, slander of title, and civil conspiracy, we conclude Defendants have failed to meet the initial burden of showing these theories are based on, relate to or are in response to Defendants exercising a constitutional right to petition. With regard to the theory of interference with contract, we conclude material facts remain in dispute, thus rendering dismissal under the OCPA improper. Consequently, we affirm the trial court's order denying Defendants' OCPA motion.

¶30 **AFFIRMED**.

RAPP, J., and FISCHER, J., concur.

DEBORAH B. BARNES, PRESIDING JUDGE:

1. *See Steidley v. Cmty. Newspaper Holdings, Inc.*, 2016 OK CIV APP 63, ¶ 2 & n.3, 383 P.3d 780.

2. This language is found in Mr. Lewis's petition. "The OCPA is clear that a district court 'shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.' 12 O.S. Supp. 2014 § 1435. . . . [T]he Act clearly contemplates that the pleadings may be *considered." Krimbill*, 2018 OK CIV APP 37, ¶ 19 (footnote omitted) (emphasis in original).

3. With regard to the right to petition, § 1431 of the OCPA states in full as follows:

4. "Exercise of the right to petition" means any of the following:

a. a communication in or pertaining to:

(1) a judicial proceeding,

(2) an official proceeding, other than a judicial proceeding, to administer the law,

(3) an executive or other proceeding before a department or agency of the state or federal government or a political subdivision of the state or federal government,

(4) a legislative proceeding, including a proceeding of a legislative committee,

(5) a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity,

(6) a proceeding in or before a managing board of an educational or eleemosynary institution supported directly or indirectly from public revenue,

(7) a proceeding of the governing body of any political subdivision of this state,

(8) a report of or debate and statements made in a proceeding described by division (3), (4), (5), (6) or (7) of this subparagraph, or

(9) a public meeting dealing with a public purpose, including statements and discussions at the meeting or other matters of public concern occurring at the meeting,

b. a communication in connection with an issue under consideration or review by a legislative, executive, judicial or other governmental body or in another governmental or official proceeding,

c. a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial or other governmental body or in another governmental or official proceeding,

d. a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial or other governmental body or in another governmental or official proceeding, and

e. any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the Oklahoma Constitution[.]

4. That is,

Anti-SLAPP acts may be generally characterized as "narrow" or "broad." A narrow act protects only certain speech made in limited circumstances, often when the speech is discussing a political or municipal issue. The acts of Texas, Oklahoma and California are, by comparison, "broad" acts, directed at protecting a wide spectrum of First Amendment speech, with limited exceptions.

Krimbill, ¶ 8 (citation omitted) (footnote omitted).

5. *See* n.9, *infra. Cf. Jardin v. Marklund*, 431 S.W.3d 765, 769 (Tex. App. 2014) ("The constitutional rights enumerated in the [Texas Citizens' Participation Act (TCPA)]" – an act that is almost identical to the OCPA, *see* n.6, *infra* – "are found in the Texas and United States Constitutions.").

6. As observed by the *Krimbill* Court, "Texas . . . has an almost identical act," 2018 OK CIV APP 37, ¶ 4, and a review of recent case law in Texas reveals that at least some Texas jurists and courts have taken a similar view as to whether "the Legislature intended to incorporate this established understanding of this constitutional 'right to petition' when defining the 'exercise of the right to petition,' as opposed to creating some sort of *sui generis* innovation." *Serafine v. Blunt*, 466 S.W.3d 352, 380 (Tex. App. 2015) (Pemberton, J., concurring). The following authorities were noted:

> *Accord Jardin [v. Marklund]*, 431 S.W.3d [765,] 772 (relying on its understanding of First Amendment concept of "right to petition" to guide construction of TCPA's "exercise of the right to petition"); *see Cheniere Energy [Inc. v. Lotfi]*, 449 S.W.3d [210,] 216 (concluding, with respect to TCPA's "exercise of the right of association," that "the stated purpose of the statute indicates a requirement of some nexus between the communications used to invoke the TCPA and the generally recognized parameters of First Amendment protections"); *id.* at 217 (Jennings, J., concurring, joined by Sharp, J.) (further emphasizing their view that TCPA must be construed in light of its express purposes to protect only communications that are protected under established understandings of the constitutional freedoms of speech, assembly, and petition). *But cf. Neyland*, 2015 WL 1612155, at *12 & n. 2 (Field, J., concurring) (while agreeing with *Cheniere* (and, logically, with me) that TCPA's text must be construed in the context of its purposes, concluding, at least with regard to the "exercise of the right of association," that the Act's explicit text departs from the underlying constitutional concept in some respects).

Serafine, 466 S.W.3d at 382 (Tex. App. 2015) (Pemberton, J., concurring). We are not persuaded, however, by the reasoning of the Texas court in *Watson v. Hardman*, 497 S.W.3d 601 (Tex. App. 2016). There the court stated:

> The statute provides that a communication is an exercise of the right to petition if it is made in or pertains to "a judicial proceeding." The legislature could have qualified or limited the term "a judicial proceeding" as the [the plaintiffs] propose, but it did not. Because the statute is unambiguous, we give it its plain meaning, presuming that "words not included were purposefully omitted" by the legislature.

497 S.W.3d at 606. Were we to apply similar reasoning to the present case, we would read § 1431(4) in isolation while ignoring the explicit purpose of the OCPA set forth in § 1430(B). Such a reading would be entirely at odds with the method of statutory interpretation set forth above in *Robertson*. As stated persuasively by the *Jardin* Court, "While we must construe the TCPA liberally, we likewise cannot ignore the Legislature's express purpose for enacting it." 431 S.W.3d at 771. In addition, in *Bandin v. Free & Sovereign State of Veracruz de Ignacio de la Llave*, 590 S.W.3d 647 (Tex. App. 2019), the court cited *Jardin* with approval, stating, "[W]e cannot examine the words of [the TCPA] in isolation: the words must be informed by the context in which they are used"; thus, "[w]hile we must construe the TCPA liberally, at the same time, we cannot ignore the legislature's purpose for enacting it, particularly when it is expressly included in the statute." 590 S.W.3d at 652 (citations omitted).

7. The Legislature's use of the phrase "any other" to introduce this subsection implies that a communication that falls within any of the preceding examples under § 1431(4) must also "fall[] within the protection of the right to petition government under the Constitution of the United States or the Oklahoma Constitution," an implication that would not exist in the absence of this introductory phrase.

8. In *Jardin*, the court stated:

> The First Amendment guarantees "the right of the people . . . to petition the Government for a redress of grievances." *McDonald v. Smith*, 472 U.S. 479, 482 . . . (1985) (alteration in original). "The right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression." *Id.; see also Puckett v. State*, 801 S.W.2d 188, 192 (Tex. [App. 1990]), *cert. denied*, 502 U.S. 990 . . . (1991). James Madison made clear in the congressional debate on the proposed amendment that people "may communicate their will" through direct petitions to the legislature and government officials. *McDonald*, 472 U.S. at 482 . . . (citing 1 Annals of Cong. 738 (1789)).
>
> . . . The Petition Clause was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. *See United Mine Workers of Am., Dist. 12 v. Ill. Bar Ass'n*, 389 U.S. 217, 222 . . . (1967).

Jardin, 431 S.W.3d at 772-73 (Tex. App. 2014).

9. "The people have the right peaceably to assemble for their own good, and to apply to those invested with the powers of government for redress of grievances by petition, address, or remonstrance." Okla. Const. art. 2, § 3. The Thompson Court noted as follows:

> Oklahoma's right-to-petition clause is similar to, and was no doubt taken from, Amend. I (cl. 6) of the U.S. Constitution, which provides that "Congress *shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances*. " (Emphasis supplied.) Because there is a paucity of Oklahoma jurisprudence that construes the state petition-for-grievance clause, we look to analogous federal case law only for guidance. As the Court notes in *Thomas v. Collins*, 323 U.S. 516, 530 . . . (1945), this is a basic freedom in a participatory government, closely related to freedom of speech; together these are the "indispensable democratic freedoms" that cannot be abridged if a government is to continue to reflect the desires of the people.

Thompson, 1998 OK 30, ¶ 24 n.52. See also Okla. Const. art. 2, § 22 ("Every person may freely speak, write, or publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.").

10. Our review of the OCPA has also revealed the existence of an exemption potentially applicable to the present case. Section 1439 of the OCPA provides, in pertinent part, as follows:

> The [OCPA] shall not apply to:
>
> . . . ;
>
> 2. A legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct the action is based upon arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer[.]
>
> As explained by the Texas Supreme Court, however, this "exemption, of course, is wholly unnecessary unless the TCPA

applies. And the TCPA only applies when the claim is based on the defendant's exercise of the right of free speech, association, or to petition." *Castleman v. Internet Money Ltd.*, 546 S.W.3d 684, 688 (Tex. 2018). Thus, in the present case, we have turned first to the issue of whether Mr. Lewis's theories are based on Defendants' exercise of the right to petition and, because we conclude they (i.e., the three theories addressed in this portion of our analysis) are not, we need not reach a determination as to the applicability of the exemption, an issue that, moreover, is not addressed by the parties or by the trial court in its order.

11. An interference with contract theory requires interference with a contract between the plaintiff and a third party, as opposed to breach of a contract between the plaintiff and the defendant. *Voiles v. Santa Fe Minerals, Inc.*, 1996 OK 13, ¶ 18, 911 P.2d 1205.

12. For example, he asserts: "[T]he theories advanced [in the petition] do not invoke the [OCPA]," "[w]ith the possible exception of [the] claim for Intentional Interference with Contract[.]"

13. In Mr. Lewis's affidavit, for example, he asserts that as a result of his irregular hours he made the above-described phone call "in the evening to discuss the Project," that "Mr. Corrente called me back and was irate and demanded that I stop calling," that "[l]ater that evening, Mrs. Corrente filed a 'harassing phone call report'" as well as a second police report, and that she then contacted "the U.S. Marshals Service and reported that she had filed a police report against me," after which Mr. Lewis's employment was terminated. At least one dispute of material facts exists: whether improper or unfair means were used to interfere with Mr. Lewis's contract. Indeed, one inference from the allegations and evidence presented by Mr. Lewis is that the police reports were maliciously entered and baseless, rendering improper or unfair the call to Mr. Lewis's employer stating that Defendants had filed a police report against Mr. Lewis. Regardless of the conflicting factual assertions of Defendants at this stage of the proceedings, a dispute of material fact exists rendering dismissal under the OCPA improper. *Krimbill*, ¶ 21.

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, August 20, 2020

F-2018-2000 — Chester Earl-McKinnly Browning, Appellant, was tried by jury for the crime of three counts of Sexual Abuse of a Child Under Twelve, in Case No. CF-2016-5719, in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment life imprisonment for each count. The Honorable Sharon K. Holmes, District Judge, sentenced accordingly ordering the sentence to run consecutively. The court further granted Browning credit for time served and imposed various costs and fees. From this judgment and sentence Chester Earl-McKinnly Browning has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

F-2019-571 — William F. Kincannon, III, Appellant, entered a plea of nolo contendere for the crimes of Count 1, leaving the scene of an accident resulting in non-fatal injury; Count 2, driving under the influence of an intoxicating liquor; and Count 3, driving without a license in Case No. CF-2017-50 in the District Court of Cotton County. The Honorable Michael C. Flanagan accepted his plea and imposed a deferred Judgment and Sentence of five (5) years on each count with certain conditions, and restitution in the amount of $14,493.12. Appellant appeals the restitution portion of the conditions of his deferred sentence. The order granting restitution as a condition of probation is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs; Rowland, J., concurs.

J-2020-244 — On January 11, 2019, Appellant O.J.M., was charged as a youthful offender with Robbery with a Firearm in Tulsa County Case No. YO-2019-02. Sentencing was deferred pending completion of a rehabilitation plan. On March 16, 2020, at the conclusion of a dispositional hearing, the District Court of Tulsa County, the Honorable William J. Musseman, District Judge, denied O.J.M.'s request for dismissal and deferred sentencing for two (2) years. O.J.M. appeals. The District Court's dispositional order deferring O.J.M.'s sentencing for two (2) years is AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

RE-2019-229 — Sean Daniel Simmons, Appellant, was tried by jury for the crime of Count 1, Rape in the First Degree, Count 2, Domestic Abuse in Case No. CF-2011-3555 in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment For Count 1 a ten year term, with five to serve and five suspended; for Count 2 three years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Sean Daniel Simmons has perfected his appeal. AFFIRMED and the Mandate is Ordered. Opinion by: Lumpkin, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Hudson, J., concurs; Rowland, J., concurs.

C-2019-641 — Deonte James Green , Appellant, was tried by jury for the crime of Count 1 First Degree Murder, Counts 2 & 9 Attempted Robbery with a Dangerous Weapon, Counts 3 & 19 First Degree Burglary, Counts 4 & 21 Possession of a Firearm after Juvenile Adjudication, Counts 5,7,12,13, & 18 Robbery with a Dangerous Weapon, Count 8 rape, count 9 attempted cruelty to animals, count 10 kidnapping, count 14 feloniously pointing a firearm, count 15 sexual battery, count 17 second degree burglary, count 20 larceny of a motor vehicle, & count 22 reckless conduct with a firearm, in Case No. CF-2017-5295 in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment Count 1 life without parole, counts 2,3,7,11,13, & 19 twenty years, counts 4,10, & 14 ten years, Counts 6,12,5, & 18 twenty five years, count 9 one year, count 8 thirty years, counts 15,17, & 20 three years, & count 22 six months. counts 5,8,13, & 18 run consecutively, while counts 1-4, 6-7, 9-12, 14-15, 17, 19, 20 & 22 are to run concurrently. The trial court sentenced accordingly. From this judgment and sentence Deonte James Green has perfected his appeal. The Judgement and Sentence are AFFIRMED and the Petition for Writ of Certiorari is DENIED. Opinion by: Lumpkin, J.; Lewis, P.J., concurs in

part/dissents in part; Kuehn, V.P.J., concurs in part/dissents in part; Hudson, J., concurs; Rowland, J., concurs.

F-2019-256 — Jason Dean Cross, appellant, was tried by a jury for the crimes of lewd or indecent acts to a child under 16 and enabling child abuse in case no. CF-2017-15 in the district court of Lincoln County. The jury returned a verdict of guilty and recommended as punishment fifteen years in prison for count 1 and life imprisonment with the possibility of parole. The trial court sentenced accordingly. From this judgment and sentence Jason Dean Cross has perfected his appeal. The judgement and sentence is affirmed and mandate ordered. Opinion by: Lumpkin, J.; Lewis, P.J., concur in results; Kuehn, V.P.J., specially concurs; Hudson, J., concur; Rowland, J., concur.

S-2020-79 — Appellee, Steven Kirtus Stricker, was formally arraigned in the District Court before the Honorable Paul Woodward, District Judge, of Kingfisher County, case No. CF-2019-36. The Appellee filed a Motion to Quash and Dismiss. After hearing arguments the District Court sustained the Motion to Quash and Dismiss with regard to the alternative count of First Degree Felony Murder – Kidnapping. The ruling of the District Court granting the motion to quash and dismiss the alternative count of First Degree Felony Murder during the commission of or attempted commission of the crime of Kidnapping is AFFIRMED. Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App. (2020), the MANDATE is ORDERED issued upon delivery and filing of this decision. Opinion by: Lumpkin, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Hudson, J., Concurs; Rowland, J., Concurs.

Thursday, August 27, 2020

F-2019-823 — Appellant Bobby Joe Lane was tried in a non-jury trial and convicted of Soliciting Sexual Conduct or Communications with Minor by Use of Technology (felony), after former conviction of a felony, in McCurtain County District Court Case No. CF-2018-306. The trial court sentenced Appellant to 150 months (12.5 years) imprisonment, with credit for time served and two years of post-imprisonment supervision. From this judgment and sentence Bobby Joe Lane has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.: Lewis, P.J.: concur; Lumpkin, J.: concur; Hudson, J.: concur; Rowland, J.: concur.

C-2020-157 — Petitioner Freddie Lee Cobb, II, entered negotiated pleas to the following crimes in Oklahoma County District Court: CF-2018-4142 – two counts of Grand Larceny; CF-2018-5717 – Second Degree Burglary and Possession of Burglary Tools; CF-2019-3186 – Grand Larceny; and CF-2019-4529 – Assault and Battery with a Deadly Weapon and Robbery with a Firearm. Petitioner was sentenced to 35 years on each charge. The trial court ordered the charges to run concurrently and suspended the last 10 years. Petitioner filed a Motion to Withdraw Pleas and the trial court denied the motion. Freddie Lee Cobb, II, has perfected his certiorari appeal of the denial of his Motion to Withdraw Pleas. CERTIORARI DENIED. JUDGMENT and SENTENCE AFFIRMED. Opinion by: Kuehn, V.P.J.: Lewis, P.J.: concur; Lumpkin, J.: concur; Hudson, J.: concur; Rowland, J.: concur.

F-2019-82 — Spencer Thomas Cato, Appellant, was tried by jury in Case No. CF-2017-3445, in the District Court of Tulsa County, for the crimes of Count 1: Unlawful Possession of a Controlled Drug with Intent to Distribute, After Former Conviction of Two or More Felonies; Count 2: Possession of a Firearm After Former Conviction of a Felony, After Former Conviction of Two or More Felonies; Count 3: Possession of a Firearm While in the Commission of a Felony, After Former Conviction of Two or More Felonies; Count 4: Resisting an Officer, a misdemeanor; Count 5: Failure to Carry Insurance/Security Verification Form, a misdemeanor; and Count 6: Driving with a License Canceled, Suspended or Revoked, a misdemeanor. The jury returned a verdict of guilty and recommended as punishment Count 1: fifteen years imprisonment and a $10,000 fine; Count 2: six years imprisonment; Count 3: ten years imprisonment; Count 4: one year in the county jail and a $500 fine; Count 5: a $250 fine; and Count 6: one year in the county jail. The Honorable William D. LaFortune, District Judge, sentenced Cato in accordance with the jury's verdicts and imposed various costs and fees. Judge LaFortune ordered Counts 1 and 2 to run concurrently with each other, and Counts 3, 4 and 6 to run concurrently with each other but consecutively to Counts 1 and 2. Judge LaFortune further granted Cato credit for time served. From this judgment and sentence Spencer Thomas Cato, has perfected his appeal. Counts 1, 3, 4, 5 and 6 of the Judgment and Sentence are AFFIRMED. Count 2 of the Judgment and Sentence is REVERSED

AND REMANDED to the district court with instructions to DISMISS. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Specially Concurs.

F-2018-551 — Brent Allen Morris, Appellant, was tried by jury in Case No. CF-2016-6899, in the District Court of Tulsa County, for the crimes of Count 1: Assault and Battery With Means of Force Likely to Produce Death; Counts 4, 5, 6 and 10: Violation of Protective Order; Counts 7 and 9: Domestic Assault and Battery (Second Offense); Count 8: Malicious Injury to Property; and Count 11: Interference with Emergency Telephone Call. The jury returned a verdict of guilty and recommended as punishment, Count 1: twenty five years imprisonment and a $10,000 fine; Counts 4, 5, 6 and 10: one year in the county jail and a $1,000 fine on each count; Counts 7 and 9: four years imprisonment and a $5,000 fine on each count; Count 8: one year in the county jail and a $500 fine; Count 11: one year in the county jail and a $3,000 fine. The Honorable Doug Drummond, District Judge, sentenced Morris in accordance with the jury's verdicts. Judge Drummond ordered the sentences for Counts 1, 4, 7 and 9 to run consecutively each to the other. Judge Drummond further ordered the sentences for Counts 4, 5, 6, 8, 10 and 11 to run concurrently with each other. From this judgment and sentence Brent Allen Morris has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

ACCELERATED DOCKET
Thursday, August 27, 2020

S-2019-586 — The Appellant, the State of Oklahoma, appealed to this Court from an order entered by the reviewing judge, the Honorable Stephen R. Pazzo, District Judge, affirming a ruling of the magistrate, the Honorable Jacqueline C. Stout, Special Judge, which declined to bind the Appellee Glen Lee Calhourn over for trial on Count 1 of three counts of Child Sexual Abuse, in Case No. CF-2019-87 in the District Court of Mayes County. REVERSED and REMANDED for further proceedings. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs in results; Lumpkin, J., concurs; Hudson, J., concurs.

COURT OF CIVIL APPEALS
(Division No. 1)
Tuesday, August 11, 2020

118,347 — Franklin L. Allen, Plaintiff/Appellee/Counter-Appellant, and Virginia L. Allen, Plaintiff, v. Bela D. And Shirley A. Csendes, Defendants/Appellants/Counter-Appellees. Appeal from the District Court of Pittsburg County, Oklahoma. Honorable Tim Mills, Judge. Bela D. and Shirley A. Csendes, Defendants/Appellants/Counter-Appellees, appeal from a judgment, entered after a bench trial, in favor of Plaintiff/Appellee/Counter-Appellant, Franklin L. Allen, and his then-wife, Plaintiff Virginia L. Allen (now deceased). The Allens sued Defendants for breaching their promise to provide lake water in perpetuity for the irrigation system installed on the property Plaintiffs purchased from Defendants in 2009. The trial court ruled Defendants breached an oral contract to provide such water and awarded the Allens $12,000.00 in damages. The court denied the Allens' request for attorney fees and costs. Both sides appeal. We hold the alleged agreement is invalid pursuant to the Statute of Frauds because, by its terms, the agreement could not be performed within a year of its making; and it was a legal impossibility for Defendants to perform under the agreement because both 36 C.F.R. §327.30(g) and the terms of Defendants' waterline permit from the Army Corps of Engineers prohibited Defendants from authorizing another to use their lake water extraction system. The judgment in favor of Plaintiff is therefore reversed. In light of this holding, Plaintiff cannot be said to have been the prevailing party below. Accordingly, the trial court's denial of Plaintiff's motion for attorney fees and costs is affirmed. AFFIRMED IN PART AND REVERSED IN PART. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

118,486 — ENI Oil & Gas Drilling Program 1977B, LP, Plaintiff/Appellant, v. Newfield Exploration Mid-Continent, INC., Defendant/Appellee. Appeal from the District Court of Blaine County, Oklahoma. Honorable Paul K. Woodward, Judge. Plaintiff/Appellant ENI Oil & Gas Drilling Program 1977B, LP (ENI) appeals from summary judgment granted to Defendant/Appellee Newfield Exploration Mid-Continent, Inc. (Newfield). ENI filed suit seeking bonus payments under a pooling order. Newfield asserted ENI's lease had expired due to lack of production in paying quantities. On appeal, ENI asserts the record shows a dispute of fact on

whether its lease had expired before Newfield's pooling order. The undisputed evidence shows ENI's lease interest expired before the pooling order was entered. We AFFIRM summary judgment. Opinion by Buettner, J.; Bell, P.J., and Goree, J., concur.

Tuesday, August 18, 2020

117,164 — In Re the Marriage of Debra D. Murray, Petitioner/Appellant, vs. William R. Murray, Respondent/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Lynn McGuire, Trial Judge. In this dissolution of marriage action, the trial court granted a divorce to Petitioner, set aside separate property and debts to the parties, and ordered a division of marital assets including the parties' company and division of their debts. Wife appeals from the Decree of Dissolution of Marriage and Order on Petitioner's Motion to Reconsider. We AFFIRM IN PART, REVERSE IN PART AND REMAND WITH DIRECTIONS. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

117,754 — In Re the Marriage of Robin Gay Richert, Petitioner/Appellee, vs. Randal Gregory Park, Respondent/Appellant. Appeal from the District Court of Canadian County, Oklahoma. Honorable Jack McCurdy, Trial Judge. In a divorce proceeding, Randal Gregory Park (Husband), Respondent/Appellant, appeals the trial court's denial of his motion for new trial. Husband had been represented by various counsel during the proceedings, but on the day of trial, the trial court denied his request for continuance and allowed his then-attorney to withdraw given that Husband fired her. The trial proceeded as scheduled and Husband represented himself. The trial court entered a decree awarding Robin Gay Richert (Wife), Petitioner/Appellee, the jewelry in her possession. Husband appeals alleging reversible error in its disposition of the motion for continuance and motion for withdrawal of counsel of record, and that the decree in not supported by sufficient evidence. No abuse of discretion occurred. AFFIRMED. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

117,938 — Debra M. Cooper, Plaintiff/Appellant, vs. Northwest Rogers County Fire Protection District, a political subdivision; James Mathew Shockley, in his individual capacity; Mel W. Dainty, in his individual capacity; and Northwest Professional Firefighters Local No. 4057, an Oklahoma Organization, Defendants/Appellees. Appeal from the District Court of Rogers County, Oklahoma. Honorable Sheila Condren, Judge. Plaintiff/Appellant Debra M. Cooper appeals from summary judgment entered in favor of Defendant/Appellee James Mathew Shockley, Defendant/Appellee Mel W. Dainty, and Defendant/Appellee Northwest Professional Firefighters Local No. 4057 on Cooper's claims for malicious interference with contract, and from judgment entered in favor of Defendant/Appellee Northwest Rogers County Fire Protection District following a bench trial on Cooper's claim for violation of the Oklahoma Open Meetings Act. We AFFIRM. Opinion by Buettner, J.; Bell, P.J., and Goree, J., concur.

117,959 — Audrey Brown, Petitioner/Appellant, vs. Steven J. Brown, Respondent/Appellee. Appeal from the District Court of Cleveland County, Oklahoma. Honorable Jeff Virgin, Judge. Petitioner/ Appellant Audrey Brown (Wife) was granted a divorce from Respondent/ Appellee Steven J. Brown (Husband). For most of the 39-year marriage, Wife stayed at home to care for the couple's children while Husband was the sole breadwinner via his own business. In the divorce decree, the trial court awarded the marital home and the business to Husband. The court offset the property award to Husband with an alimony in lieu of property award of approximately $180,000 to Wife. The trial court denied Wife's request for support alimony. Wife appeals. We affirm most of the trial court's decree, including the valuation of the business. However, because the trial court improperly considered the alimony in lieu of property award in ruling upon Wife's request for support alimony, we reverse the denial of support alimony and remand to the trial court with instructions to enter a support award consistent with this opinion, and consider any party's application for attorneys' fees upon the final award. AFFIRMED IN PART AND REVERSED AND REMANDED IN PART. Opinion by Buettner, J.; Bell, P.J., and Goree, J., concur.

118,029 — Mark William Riggle, Petitioner/Appellant, vs. The State of Oklahoma, Defendant/Appellee. Appeal from the District Court of Lincoln County, Oklahoma. Honorable Cindy Ferrell Ashwood, Judge. Petitioner/Appellant, Mark William Riggle, appeals from the trial court's order rejecting his application for deregistration as a sex offender on the ground he does not qualify for such relief under 57 O.S. Supp. 2014 §583(E). In 2007, Petitioner

was convicted of sex crimes and given a ten (10) year suspended sentence. In 2008, Petitioner's sentence was reduced to five (5) years suspended. Pursuant to the then-applicable provisions of the Oklahoma Sex Offenders Registration Act (SO-RA), 57 O.S. §581 *et seq.*, Petitioner was required to register as a sex offender for ten (10) years from the date of completion of his sentence. Because Petitioner's sentence was set to be completed on January 9, 2012, this statute re-quired him to register as a sex offender through January 8, 2022. In 2007, SORA was amended to require the Oklahoma Department of Corrections (DOC) to assign a risk level to every sex offender. DOC then assigned Petitioner a Level 1 designation. However, *Starkey v. Oklahoma Dep't of Corrections*, 2013 OK 43, 305 P.3d 1004, held the 2007 SORA level assignments were to be applied prospectively only. On the basis of *Starkey* and its progeny, DOC should have removed Petitioner's assignment level and advised him that his registration end date had changed back to January 2022. In May 2018, Petitioner filed the instant application for relief pursuant to §583(E), which allows certain Level 1 sex offenders to petition the court for SORA deregistration. The trial court held Petitioner does not qualify for deregistration under §583(E) as a Level 1 offender because he is actually a Level 2 offender. We hold the trial court correctly ruled Petitioner is ineligible for deregistration, albeit for the wrong reason. Petitioner should never have been registered as a Level 1 offender under the amended SORA. No part of the 2007 SORA amendments apply to Petitioner, including the deregistration provisions. AFFIRMED. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

Thursday, August 20, 2020

116,942 — Kaylee Nicole Zelnicek, Petitioner/Appellee, v. Michael Demar, Defendant/Appellant. Appeal from the District Court of Logan County, Oklahoma. Honorable Louis A. Duel, Judge. Michael Demar, Respondent/Appellant, appeals the trial court's denial of his motion for new trial and award of attorney fees to Kaylee Zelnicek, Petitioner/Appellee. Appellant alleges the trial court erred in its child support award. Child support amounts were supported by evidence and the court's decision was not clearly contrary to the weight of evidence. Likewise, the attorney fees award was supported by the trial court's reasoning and authorized by statute. Denial of the motion for new trial was not an abuse of discretion. AFFIRMED. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

117,963 — Evin Richards, Appellee, v. Sherwin-Williams, Appellant. Appeal from the District Court of Cherokee County, Oklahoma. Honorable Gary Huggins, Judge. Plaintiff/Appellee, Evin Richards, was awarded judgment against Defendant/Appellant, Sherwin-Williams in small claims court for water loss after the paint store was burned by a vandal during a rain storm. We reverse because Sherwin-Williams owed no duty for the criminal acts of a third party or the remediation performed by an independent contractor. REVERSED AND REMANDED. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

Wednesday, August 26, 2020

117,949 — Beau Williams, Plaintiff/Appellee, v. Deborah Odez Hicks, Defendant/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Cindy H. Truong, Judge. Deborah Hicks, Defendant/Appellant, seeks review of the April 2, 2019 Oklahoma County District Court's journal entry of judgment memorializing the jury verdict in favor of Hicks' former attorney, Beau Williams, Plaintiff/Appellee, in which Williams was awarded $19,717.11 for payment of attorney fees and costs incurred while Williams' represented Hicks during Hicks' divorce. For the reasons provided, we AFFIRM the judgment of the district court. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

Friday, August 28, 2020

117,741 — Bill Foster and Francis Foster, Plaintiffs/Appellees, v. Claudia Flesner, Personal Representative of the Estate of Duffy Martin and The Claude Duffy Martin 1988 Revocable Trust, u/t/a dated July 18, 1988. Appeal from the District Court of Logan County, Oklahoma. Honorable Phillip C. Corley, Judge. Defendants/Appellees, predecessors in interest to Claude Duffy Martin (Martin), appeal the trial court's denial of a motion for judgment notwithstanding the verdict. Martin entered into a contract for the sale of an RV park to Bill Foster (Foster). Prior to closing, Martin represented to Foster that he had made necessary updates to the park's sewage lagoon system in order to bring the park into compliance with DEQ regulations. Foster took possession of the park, the DEQ notified Foster that further improvements to the sewage system were required to bring the park into full compliance. Foster made the

improvements, then sued Martin for breach of contract and fraudulent inducement. Martin passed away during the course of these proceedings. Following Martin's death, Foster joined as parties Martin's revocable inter vivos trust and his estate. A jury returned a verdict in favor of Foster. The Defendants moved for judgment notwithstanding the verdict, alleging they nor Foster were proper parties to the action. The trial court overruled the Defendants' motion. Defendants appeal. Because Foster had standing to bring suit and the Defendants were properly substituted and joined as parties, and because the trial court did not err in allowing the introduction of certain evidence, we AFFIRM the holding of the trial court. Opinion by Buettner, J., Bell, P.J., and Goree, J., concur.

118,049 — Kathy Switzer Miller, individually and as a co-trustee of the Kay McCollum Switzer Revocable Trust. Plaintiff/Appellee, v. Douglas K. Switzer, individually and co-trustee of the Kay McCollum Switzer Revocable Trust, and Gregory L. Switzer, individually and as co-trustee of the Kay McCollum Switzer Revocable Trust. Defendant/Third Party Plaintiffs/Appellants, v. Hunter Miller and Hunter Miller Family, LLC., Third Part Defendants/Appellees. Appeal from the District Court of Cleveland County, Oklahoma. Honorable Thad Balkman, Trial Judge. Kathy Switzer Miller, Plaintiff, brought suit against Douglas and Gregory Switzer, Defendants. Defendants counterclaimed and filed their third-party petition naming Hunter Miller and the Hunter Miller Family, LLC as Third-Party Defendants. This is an appeal from summary judgment for Plaintiff and Third-Party Defendants on the rationale that no self-dealing by the Plaintiff occurred and that Defendants consented to the acts. Summary judgment is only proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Inferences and conclusions drawn from the underlying facts are considered in the light most favorable to the party opposing summary judgment. Here, there are material fact questions about whether Plaintiff was self-dealing and whether Defendants consented. Summary judgment is not proper.Reversed and remanded. Opinion by Goree, J., Swinton, V.C.J., (sitting by designation) dissents and Mitchell, P.J., (sitting by designation) concurs.

(Division No. 2)
Wednesday, August 19, 2020

117,664 — Starr Zovak, Petitioner/Appellee, vs. David Kempf, Respondent/Appellant. Appeal from an Order of the District Court of Cleveland County, Hon. Lori Puckett, Trial Judge. The respondent, David Kempf, (Husband), appeals a Decree of Divorce and Dissolution of Marriage (Decree) entered in an action brought by Starr Zovak (Wife). Husband's first issue relates to the trial court dividing the marital equity in the residence which is conceded to be his separate property. Wife's contributions were as a housewife keeping and maintaining the residence. "Joint Industry" is the activity of each party to the marriage in his or her recognized sphere of marital activity. The marriage is an economic as well as a social unit. The trial court did not err by dividing the marital portion of the equity evenly between the parties. However, the calculated equity is modified and, as modified, affirmed. A conclusion that Husband gifted a 2002 motorcycle to Wife is not against the clear weight of the evidence. Husband admits he sold the motorcycle. The Decree contains typographical errors as corrected above. As modified and corrected, the award of $12,000.00 as compensation for the value of Wife's separate property motorcycle is affirmed. The trial court imputed in-come for both parties instead of calculating their income from income information. Under the evidence, the trial court's action meets the statutory requisite of being equitable. Wife's father pays her rent, but the evidence shows that the assistance was needed because Husband wholly defaulted in his ordered support payments. Moreover, inclusion of a gift is an item for calculation of income from income sources. It would not be equitable to benefit Husband by reducing his share of child support. The trial court' determination of the parties' income for child support purposes is affirmed. MODIFIED IN PART AND AFFIRMED AS MODIFIED. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Fischer, J., concurs, and Barnes, P.J., concurs in result.

Friday, August 21, 2020

118,334 — In the Matter of C.G., an Alleged Deprived Child, Candace Finley-Gamble, Appellant, vs. The State of Oklahoma, Appellee. Appeal from an Order of the District Court of Bryan County, Hon. Trace Sherrill, Trial Judge. Candace Finley-Gamble (Mother) appeals a judgment entered on a jury verdict terminating

her parental rights to C.G. The attorney appointed for C.G. has entered an appearance, waived filing a separate Brief, and joined with the State of Oklahoma in support of the judgment. The biological father, Kurtes Gamble (Father), is not a party to this appeal. C.G. has been in the legal custody of the Department of Human Services (DHS) since August 11, 2016, shortly after being born on July 27, 2016. The Mother of C.G. appeals the judgment entered on a jury verdict terminating her parental rights to C.G. Because Mother did not preserve the issue below, her claim here that she was denied counsel is reviewed for fundamental error. The facts show that she did have an appointed attorney after the adjudication petition was filed and for that hearing. The trial court discharged the attorney after the adjudication hearing, but reappointed the attorney one month later. The attorney represented Mother in all phases from that time forward. The one month period did not involve any proceedings or actions involving Mother. Mother experienced no prejudice whatsoever. This Court finds that the one month period without appointed counsel does not, under the facts, constitute fundamental error. The Record shows that the State's evidence demonstrated clearly and convincingly that Mother failed to correct any of the conditions leading to the deprived child adjudication. The Record, including Mother's admission that she is currently living with and supported by an individual with two felony convictions for child abuse and child neglect, demonstrates that C.G. would suffer harm if returned to Mother's home after being in custody of DHS for six of the twelve months preceding the filing of the termination petition. Therefore, the judgment terminating Mother's parental rights to C.G. is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

Monday, August 31, 2020

117,620 — Pollard Farm Land, LLC, an Oklahoma limited liability company, Plaintiff/Appellee, vs. Kristi Walden and Nathaniel Walden, as trustees of the Jimmy and Helen Summerour Living Trust, Defendants/Appellants. Appeal from Order of the District Court of Garfield County, Hon. Paul K. Woodward, Trial Judge. Kristi and Nathaniel Walden, as Trustees of the Jimmy and Helen Summerour Living Trust, appeal a judgment in favor of Pollard Farm Land, LLC quieting title to the minerals under certain real property sold by Helen Summerour and ultimately acquired by Pollard Farm Land, LLC. Our review of the record reveals ambiguous language in the granting clause from Helen Summerour to Pollard's predecessor-in-interest, E.C. and Ramona Paine. That ambiguity cannot be resolved by reference to other portions of the conveyance. Consequently, the facts and circumstances surrounding that transaction must be considered in attempting to resolve the ambiguity. The judgment of the district court in favor of Pollard is reversed and this case is remanded for further proceedings consistent with this Opinion. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division II, by Fischer J.; Barnes, P.J., and Rapp, J., concur.

(Division No. 3)
Thursday, August 13, 2020

117,038 — Federal National Mortgage Association (Fannie Mae), a Corporation Organized and Existing under the Laws of the United States of America, Plaintiff/Appellee, v. James A. Mallory, Defendant/Appellant. Appeal from the District Court of Canadian County, Oklahoma. Honorable Paul Hesse, Judge. In this mortgage foreclosure action, the defendant/appellant challenges the order confirming the sale of his property at a sheriff's sale, claiming that he never received notice of the sale, as required by 12 O.S. 2011 §764. The defendant presents no basis to disturb the trial court's finding that the plaintiff mailed the required notice to him before the sale. Accordingly, we affirm. Opinion by Mitchelll, P.J.; Swinton, V.C.J., and Goree, J., concur.

117,655 — In the Marriage of Howey: Deanna M. Howey, Petitioner/Appellee, v. Chris B. Howey, Respondent/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Owen T. Evans, Special Judge. In his third appeal before this Court, Respondent/Appellant Chris B. Howey (Father) challenges the court's order (1) modifying Father's child support payment based on the parties' income changes and ordering additional monthly child support based on the children's special needs; (2) awarding Petitioner/Appellee Deana M. Howey (Mother) a $15,147.21 judgment for Father's portion of expenses for their children's therapeutic needs; and (3) finding Father guilty of indirect contempt of court. We find the additional monthly child support ordered by the court was not clearly contrary to the

weight of the evidence. In addition, we find the court's division of past-due expenses based on the *pro rata* apportionment set forth in the divorce decree was not contrary to law. Finally, we find the court did not err by finding Father guilty of indirect contempt. AFFIRMED. Opinion by Mitchell, P.J.; Swinton, V.C.J., and Goree, J., (sitting by designation) concur.

117,945 — Home First, Inc., an Oklahoma corporation, Plaintiff/Appellee, v. Mid-Continent Casualty Company, an Oklahoma Corporation, Defendant/Appellant. Appeal from the District Court of Cleveland County, Oklahoma. Honorable Leah Edwards, Trial Judge. Defendant/Appellant Mid-Continent Casualty Company (MCC) appeals from an order granting attorney fees in favor of Plaintiff/Appellee Home First, Inc. (Home First) following a jury verdict for Home First on its claims for breach of contract and bad faith under a commercial general liability policy issued by MCC. REVERSED. Opinion by Swinton, V.C.J.; Mitchell, P.J., and Goree, J., (sitting by designation) concur.

Friday, August 14, 2020

117,836 — Janice Steidley, Plaintiff/Appellant, and David Iski, Plaintiff, v. William "Bill" Higgins, Erin O'Quin, Carl Williams, Sally Williams, and Edith Singer, Defendants/Appellees. Appeal from the District Court of Rogers County, Oklahoma. Honorable Rebecca Nightingale, Judge. Janice Steidley, Appellant, seeks review of the Rogers County District Court February 11, 2019 order granting the Defendants' Motions to Dismiss her suit for defamation and related claims filed in Tulsa County District Court on August 25, 2014 and transferred by agreement to Rogers County District Court on November 14, 2014. For the reasons provided, the order of the district court is AFFIRMED. Opinion by Mitchell, P.J.; Buettner, J., (sitting by designation) concur and Goree, J., (sitting by designation) concur in part dissent in part.

117,998 — Janice Steidley, Plaintiff/Appellant, and David Iski, Plaintiff, v. William "Bill" Higgins, Erin O'Quin, Carl Williams, Sally Williams, and Edith Singer, Defendants, and Randy Cowling, Bailey Dabney, Salesha Wilken, Newspaper Holdings d/b/a Claremore Daily Progress, Community Newspaper Holding, Defendants/Appellees. Appeal from the District Court of Rogers County, Oklahoma. Honorable Russell Vaclaw, Judge. Janice Steidley, Appellant, seeks review of the Rogers County District Court April 24, 2019 order denying Steidley's Motion to Reconsider the July 31, 2018 Journal Entry of Judgment granting Defendants' Motions to Dismiss for the applicable statute of limitations and for the filing of suit while there was another action pending between the same parties for the same claim(s), contra to the provisions of 12 O.S. 2011 §2012(B)(8). The same order also denied Steidley's Motion to Supplement the record based on Steidley's effort to demonstrate Defendants intentionally failed to secure a final order in Rogers County District Court case CJ-2014-482. For the reasons provided, the order of the district court is AFFIRMED. Opinion by Mitchell, P.J.; Buettner, J., (sitting by designation) concur and Goree, J., (sitting by designation) dissents.

118,461 — Ronnie Seal, Plaintiff/Appellant, v. Ada Coca-Cola Bottling Company, and its successor in interest. Ada Coca-Cola Bottling Company, and its successor in interest Ada Coca-Cola & Dr. Pepper Co., Appeal from the District Court of Pontotoc County, Oklahoma. Honorable C. Steven Kessinger, Judge. Plaintiff/Appellant Ronnie Seal (Seal) appeals from a summary judgment in favor of Defendants/Appellees Ada Coca-Cola Bottling Company, and its successor in interest, Ada Coca Cola Bottling Company, and its successor in interest, Ada Coca-Cola and Dr. Pepper Co. (Ada Coke). Seal, an independent contractor, was injured when he fell through a skylight on one of Ada Coke's buildings while checking for a roof leak. After *de novo* review, we find the court properly determined Ada Coke did not interfere with or direct the work of Seal and, therefore, owed no duty to Seal to warn him of the hazards incident to the job. Although Seal claims the court improperly weighed disputed evidence to determine Ada Coke did not interfere with or direct Seal's work, the record shows the material facts are undisputed. One conversation with an Ada Coke employee, in which the employee requested Seal and his coworker check for a leak and showed them the location of the leak, did not, as a matter of law, constitute interfering with or directing Seal's work. We AFFIRM. Opinion by Mitchell, P.J.; Swinton, V.C.J.; and Goree, J., (sitting by designation) concur.

(Division No. 4)
Thursday, August 13, 2020

118,039 — Lelah Lynn Watkins, Plaintiff/Appellant, vs. Randy Springs, Defendant/Appellee. Appeal from an Order of the District Court of Tulsa County, Hon. Tammy Bruce, Trial Judge. Randy Springs appeals from the trial court's final five-year Order of Protection granted to Lelah Lynn Watkins against him. The trial court's finding that Plaintiff was a victim of stalking by Defendant was not clearly against the evidence so as to amount to an abuse of discretion. We affirm the trial court's Order of Protection. AFFIRMED. Opinion from the Court of Civil Appeals, by Hixon, J.; Wiseman, C.J., and Thornbrugh, P.J., concur.

Tuesday, August 18, 2020

118,098 — In the Matter of the Estate of George Thomas Whitehouse, Deceased: Tawannah Burris, Plaintiff/Appellee, vs. Landstar Ranger, Inc. and Robert Jackson Swearingen, Defendant/Appellees, and Karen Brierton, Defendant/Appellant. Appeal from an order of the District Court of Pittsburg County, Hon. Tim Mills, Trial Judge. Karen Brierton appeals from denial of her Motion for Mandatory Intervention in a wrongful death action filed by Tawannah Burris, as personal representative of the Estate of George T. Whitehouse, against Landstar Ranger, Inc. and Robert Jackson Swearingen. The trial court did not err in denying Brierton's request to intervene in the underlying action, as of right or permissively. Brierton did not demonstrate that Burris' representation of beneficiaries, realized or contingent, is inadequate under the facts of this case. Further, the potential impairment of Brierton's interest through settlement, and which had not yet arisen at the time of her Motion, was resolved by the trial court's stay of approval of the settlement agreement pending resolution of Brierton's appeal. We affirm the trial court's Order denying Brierton's Motion for Mandatory Intervention. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C. J., and Thornbrugh, P.J., concur.

118,330 — In the Matter of K.D., K.H. and C.H., Alleged Deprived Children: Kenneth Hervey and Kerondra Douglas, Appellants, vs. State of Oklahoma, Appellee. Appeal from an Order of the District Court of Tulsa County, Hon. Rodney Sparkman, Trial Judge. Kerondra Douglas and Kenneth Hervey appeal from the trial court's orders upon jury verdict terminating their parental rights to their minor children, KD, KH, and CH. Based on our review of the record and applicable law, we affirm the trial court's orders terminating Father's parental rights to KD, KH, and CH. We conclude, however, that State violated Mother's due process rights and reverse the trial court's orders terminating her parental rights to KD, KH, and CH and remand for further proceedings. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C.J., and Thornbrugh, P.J., concur.

ORDERS DENYING REHEARING

(Division No. 1)
Thursday, August 13, 2020

117,719 — Roni Ann Curry, R.N., Appellant, vs. State of Oklahoma, ex rel Oklahoma Board of Nursing, Appellee. Appellant's Petition for Rehearing, filed June 30th, 2020, is *DENIED*.

(Division No. 2)
Thursday, August 13, 2020

117,711 — Pamela D. Copeland, Plaintiff/Appellant, vs. BNL Properties, Inc., an Oklahoma Corporation, Defendant/Appellee. Defendant/Appellee's Petition for Rehearing is *DENIED*.

Monday, August 24, 2020

117,185 — Dotie McBride, Plaintiff/Appellee, vs. Thomas McBride, Defendant/Appellant. Appellant's Petition for Rehearing is hereby *DENIED*.

(Division No. 3)
Tuesday, August 11, 2020

117,381 — Catherine Groves, Plaintiff/Appellant, vs. Nathan Cody and David Lindsey, Defendant/Appellee. Appellant's Petition for Rehearing and Brief in Support, filed June 5, 2020, is *DENIED*.

(Division No. 4)
Monday, August 10, 2020

117,243 — Ruby Aguirre, Plaintiff/Appellant, vs. M&N Dealerships, LLC, an Oklahoma Limited Liability Company dba Edmond Hyundai, Defendant/Appellee. Appellee's Petition for Rehearing is hereby *DENIED*.

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