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IN THE DISTRICT COURT OF THE FOURTEENTH JUDICIAL DISTRICT OF
THE STATE OF OKLAHOMA SITTING IN AND FOR TULSA COUNTY

2016 DEC 23 PM 3:06
STATE OF OKLAHOMA,

SALLY HONE SMITH
COURT CLERK

Case No. CF-2016-6899

Felony Information

Vs.

Brent Allen Morris

Defendant(s).

DISTRICT COURT
FILED

DEC 23 2016

INFORMATION

SALLY HONE SMITH, COURT CLERK
STATE OF OKLA, TULSA COUNTY

BE IT REMEMBERED:

That STEVE KUNZWEILER, the duly elected and qualified District Attorney for Tulsa County, Oklahoma, who prosecutes in the name and by the authority of The State of Oklahoma, comes now into the District Court of Tulsa County, State of Oklahoma, and gives the Court to understand and be informed that:

(COUNT 1)
21 O.S. 652(C)

BRENT ALLEN MORRIS, between 12/8/2016 and 12/10/2016, in Tulsa County, State of Oklahoma and within the jurisdiction of this Court, did commit the crime of ASSAULT AND BATTERY WITH INTENT TO KILL, a Felony, by unlawfully, feloniously, willfully and intentionally, without justifiable or excusable cause, commit an assault and battery upon one Charis Brianne Clopton with a weapon, to wit: a frying pan held in the hand of said defendant and with which he did then and there repeatedly strike the said Charis Brianne Clopton in the head causing life threatening injuries, to wit: subdural hematoma,

(COUNT 2)
21 O.S. 644(F)

BRENT ALLEN MORRIS, between 12/8/2016 and 12/10/2016, in Tulsa County, State of Oklahoma and within the jurisdiction of this Court, did commit the crime of DOMESTIC ASSAULT & BATTERY RESULTING IN GREAT BODILY HARM, a Felony, by unlawfully, feloniously, willfully and wrongfully, commit an assault and battery upon a person of one Charis Brianne Clopton, formerly in dating relationship with defendant, by then and there striking and/or stomping her about the left hand and/or face causing broken fingers and nasal fractures with force and violence and with the unlawful intent to do her great bodily harm,

ORIGINAL



IN THE DISTRICT COURT OF THE FOURTEENTH JUDICIAL DISTRICT OF
THE STATE OF OKLAHOMA SITTING IN AND FOR TULSA COUNTY

2017 MAY -1 AM 9:14
STATE OF OKLAHOMA,

DON NEWBERRY, Plaintiff,
COURT CLERK

Case No. CF-2016-6899
Amended Felony Information
BAPD Offense No. 2016-8860

Vs.

Brent Allen Morris

Defendant(s).

DISTRICT COURT
FILED

MAY 01 2017

INFORMATION

DON NEWBERRY, Court Clerk
STATE OF OKLA. TULSA COUNTY

BE IT REMEMBERED:

That STEVE KUNZWEILER, the duly elected and qualified District Attorney for Tulsa County, Oklahoma, who prosecutes in the name and by the authority of The State of Oklahoma, comes now into the District Court of Tulsa County, State of Oklahoma, and gives the Court to understand and be informed that:

(COUNT 1)
21 O.S. 652(C)

BRENT ALLEN MORRIS, between 12/8/2016 and 12/10/2016, in Tulsa County, State of Oklahoma and within the jurisdiction of this Court, did commit the crime of **ASSAULT AND BATTERY WITH INTENT TO KILL**, a Felony, by unlawfully, feloniously, willfully and intentionally, without justifiable or excusable cause, commit an assault and battery upon one Charis Brianne Clopton with a weapon, to-wit: a frying pan held in the hand of said defendant and with which he did then and there repeatedly strike the said Charis Brianne Clopton in the head causing life threatening injuries, to wit: subdural hematoma,

(COUNT 2)
21 O.S. 644(F)

BRENT ALLEN MORRIS, between 12/8/2016 and 12/10/2016, in Tulsa County, State of Oklahoma and within the jurisdiction of this Court, did commit the crime of **DOMESTIC ASSAULT & BATTERY RESULTING IN GREAT BODILY HARM**, a Felony, by unlawfully, feloniously, willfully and wrongfully, commit an assault and battery upon a person of one Charis Brianne Clopton, formerly in dating relationship with defendant, by then and there striking and/or stomping her about the left hand and/or face causing broken fingers and nasal fractures with force and violence and with the unlawful intent to do her great bodily harm,

ORIGINAL

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DISTRICT COURT

FILED

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

MAY 14 2018

STATE OF OKLAHOMA

Plaintiff,

DON NEWBERRY, Court Clerk
STATE OF OKLA. TULSA COUNTY

vs.

BRENT ALLEN MORRIS

Defendant.

Case No. CF-2016-6899
2nd Amended Felony Information
BAPD 2016-8860INFORMATION**BE IT REMEMBERED:**

That Steve Kunzweiler, the duly elected and qualified District Attorney for Tulsa County, Oklahoma, who prosecutes in the name and by the authority of The State of Oklahoma, comes now into the District Court of Tulsa County, State of Oklahoma, and gives the Court to understand and be informed that:

(COUNT 1)

21 O.S. 652(C)

BRENT ALLEN MORRIS, between 12/8/2016 and 12/10/2016, in Tulsa County, State of Oklahoma and within the jurisdiction of this Court, did commit the crime of **ASSAULT AND BATTERY WITH INTENT TO KILL**, a Felony, by unlawfully, feloniously, willfully and intentionally, without justifiable or excusable cause, commit an assault and battery upon one Charis Brianne Clopton with a weapon, to-wit: a frying pan held in the hand of said defendant and with which he did then and there repeatedly strike the said Charis Brianne Clopton in the head causing life threatening injuries, to wit: subdural hematoma,

(COUNT 2)

21 O.S. 644(F)

BRENT ALLEN MORRIS, between 12/8/2016 and 12/10/2016, in Tulsa County, State of Oklahoma and within the jurisdiction of this Court, did commit the crime of **DOMESTIC ASSAULT & BATTERY RESULTING IN GREAT BODILY HARM**, a Felony, by unlawfully, feloniously, willfully and wrongfully, commit an assault and battery upon a person of one Charis Brianne Clopton, formerly in dating relationship with defendant, by then and there striking and/or stomping her about the left hand and/or face causing broken fingers and nasal fractures with force and violence and with the unlawful intent to do her great bodily harm,

(COUNT 3)

21 O.S. 644(D)(1)

BRENT ALLEN MORRIS, between 12/8/2016 and 12/10/2016, in Tulsa County, State of Oklahoma and within the jurisdiction of this Court, did commit the crime of **DOMESTIC ASSAULT & BATTERY WITH A DANGEROUS WEAPON**, a Felony, by unlawfully, feloniously, willfully, wrongfully, and intentionally without justifiable or excusable cause commit an assault and battery on one Charis Brianne Clopton, formerly in dating relationship with defendant, of the defendant with a certain dangerous weapon, to-wit: flat screen TV and/or wooden chair, held in the hand of said defendant and with which he hit Charis Brianne Clopton with force and violence, and did thereby inflict wounds on and about the head and/or body of the said Charis Brianne Clopton with the unlawful and felonious intent then and there to do her bodily harm,

1 altercations, but just one big, long altercation, and there
2 is three different charges for that same altercation. I
3 would ask that the Court would look at two of the charges
4 are superfluous.

5 THE COURT: I'll preserve the issue of merger for
6 the District Court at the time of instruction on sentencing
7 and note that for the record. Does he rest?

8 MR. SAWYER: Yes, Your Honor.

9 THE COURT: Both sides resting, the Court is going
10 to find the State has demonstrated probable cause to believe
11 the crimes of Assault and Battery with Intent to Kill,
12 Domestic Assault and Battery Resulting in Great Bodily
13 Injury, and Domestic Assault and Battery with a Dangerous
14 Weapon occurred in Tulsa County, probable cause to believe
15 the named defendant, Mr. Brent Allen Morris, committed those
16 offenses after no prior felonies. He'll be bound over for
17 District Court.

18 State, can you tell me when that next bind-over is?

19 Let's go off the record.

20 (A brief off-the-record discussion was had.
21 Proceedings then continued on the record as follows:)

22 THE COURT: We're back on the record. The
23 defendant will be bound over for District Court for
24 arraignment, and that will be on March 20th at 2 p.m. Sir,
25 you'll be in front of District Judge Drummond from here

1 Court to understand and be informed that:
2 Count 1, Brent Allen Morris, between
3 December 8th, 2016, and December 10th, 2016 in Tulsa
4 County, State of Oklahoma, and within the
5 jurisdiction of this court, did commit the crime of
6 assault and battery with intent to kill, a felony,
7 by unlawfully, feloniously, willfully, and
8 intentionally, without justifiable or excusable
9 cause, commit an assault and battery upon one Charis
10 Brianne Clopton, with a weapon, to-wit, a frying
11 pan, held in the hand of said defendant in which he
12 did and there repeatedly strike said Charis Brianna
13 Clopton in the head, causing life-threatening
14 injuries, to-wit, a subdural hematoma.

15 Count 2, Brent Allen Morris, between
16 December 8th, 2016, and December 10th, 2016, in
17 Tulsa County, State of Oklahoma, and within the
18 jurisdiction of this court, did commit the crime of
19 domestic assault and battery resulting in great
20 bodily harm, a felony, by unlawfully, feloniously,
21 willfully, and wrongfully commit an assault and
22 battery upon a person of one Charis Brianne Clopton,
23 formerly in a dating relationship with the
24 defendant, by then and there striking and/or
25 stomping her about the left hand and/or face,

4104034635

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY, OKLAHOMA

State of Oklahoma, -vs- BRENT ALLEN MORRIS SS# XXX-XX-9467 DOB XX/XX/1983		DOCKET NO. 2016-6899 Case No. CF-2016-6899	DISTRICT COURT FILED
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MAY 29 2018

ORIGINAL

JUDGMENT AND SENTENCE
All Time In CustodyDON NEWBERRY, Court Clerk
STATE OF OKLA. TULSA COUNTY

Now, this 23 day of MAY, 2018 this matter comes on before the Court for sentencing and the defendant appears personally and by his or her Attorney of record, AMANDA SELF, and the State of Oklahoma is represented by HEATHER ANDERSON, and the Court Reporter, KIM WHITE is present.

The defendant has entered a plea of NOT GUILTY and is found GUILTY by a jury & by the Court of the crime(s) of:

Count 1: ASSAULT AND BATTERY WITH INTENT TO KILL, 21 O.S. 652 C; 12/10/2016.

Count 4: VIOLATION OF PROTECTIVE ORDER.

Count 5: VIOLATION OF PROTECTIVE ORDER.

Count 6: VIOLATION OF PROTECTIVE ORDER.

Count 7: DOMESTIC ASSAULT & BATTERY - 2ND OFFENSE, 21 O.S. 644 C; 07/17/2016.

Count 8: MALICIOUS INJURY TO PROPERTY.

Count 9: DOMESTIC ASSAULT & BATTERY - 2ND OFFENSE, 21 O.S. 644 C; 07/23/2016.

Count 10: VIOLATION OF PROTECTIVE ORDER.

Count 11: INTERFERENCE WITH EMERGENCY TELEPHONE CALL.

ORIGINAL



IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

BRENT ALLEN MORRIS,

NOT FOR PUBLICATION

Appellant,

Case No. F-2018-551

v.

STATE OF OKLAHOMA,

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

Appellee.

AUG 27 2020

JOHN D. HADDEN
CLERK

SUMMARY OPINION

HUDSON, JUDGE:

Appellant, Brent Allen Morris, was tried and convicted by a jury in the District Court of Tulsa County, Case No. CF-2016-6899, of Count 1: Assault and Battery With Means of Force Likely to Produce Death, in violation of 21 O.S.2011, § 652(C);¹ Counts 4, 5, 6 and 10: Violation of Protective Order, in violation of 22 O.S.2011, § 60.6(A)(1); Counts 7 and 9: Domestic Assault and Battery (Second Offense), in violation of 21 O.S.Supp.2014, § 644(C); Count 8: Malicious Injury to

¹ The jury also convicted Morris of Count 2: Domestic Assault and Battery Resulting in Great Bodily Harm and Count 3: Domestic Assault and Battery With a Dangerous Weapon. These counts were dismissed at formal sentencing, however, on grounds of merger because they were based on the same act as Count 1.

Property, in violation of 21 O.S.2011, § 1760; and Count 11: Interference with Emergency Telephone Call, in violation of 21 O.S.2011, § 1211.1. The jury recommended the following sentences: 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, presided at trial and 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.² Morris now appeals, raising seven propositions of error with this Court:

- I. APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED WHEN UNRELATED COUNTS WERE IMPROPERLY JOINED;
- II. THERE WAS NO EVIDENCE PRESENTED THAT APPELLANT INTERFERED WITH AN EMERGENCY

² Under 21 O.S.Supp.2015, § 13.1(5), Morris must serve a minimum of 85% of his sentence on Count 1 before becoming parole eligible.

TELEPHONE CALL, THEREFORE HE COULD NOT BE CONVICTED OF SUCH;

- III. THERE WAS MANIFEST NECESSITY TO GRANT A MISTRIAL AFTER A WITNESS MENTIONED A RAPE KIT. THEREFORE, IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT NOT TO GRANT THE MISTRIAL;
- IV. BECAUSE THE VICTIM COULD NOT—AS THE STATE ALLEGED—HAVE LAID FOR 30 HOURS WITHOUT HER BLOOD SUGAR FALLING, THERE WAS INSUFFICIENT EVIDENCE TO CONVICT APPELLANT ON COUNT 1;
- V. APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE STATE CHANGED THE ALLEGED CRIME FROM ASSAULT AND BATTERY WITH INTENT TO KILL TO ASSAULT AND BATTERY WITH MEANS OR FORCE LIKELY TO PRODUCE DEATH;
- VI. APPELLANT WAS DENIED CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL BASED ON TRIAL COUNSEL'S FAILURE TO OBJECT TO JOINDER AND TO DEMUR TO COUNT 11, AND FAILURE TO OBJECT TO THE SECTION 11 VIOLATION OF COUNT 1, 2, AND 3; AND
- VII. THE ACCUMULATION OF ERROR IN THIS CASE DEPRIVED APPELLANT OF DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, § 7 OF THE OKLAHOMA CONSTITUTION.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the

parties' briefs, we find that no relief is required under the law and evidence. Appellant's judgment and sentence is **AFFIRMED**.

Proposition I. Appellant concedes trial counsel did not object to the joinder of counts in this case, let alone request severance. Our review is therefore limited to plain error. *Collins v. State*, 2009 OK CR 32, ¶ 12, 223 P.3d 1014, 1017. 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 affected 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; 20 O.S.2011, § 3001.1.

Appellant fails to show actual or obvious error. Joinder is permitted if the separate offenses rise out of one criminal act or transaction, or are part of a series of criminal acts or transactions. 22 O.S.2011, § 438; *Mitchell v. State*, 2011 OK CR 26, ¶¶ 23-24, 270 P.3d 160, 170-71, *overruled on other grounds by Nicholson v. State*, 2018 OK CR 10, ¶ 12, 421 P.3d 890, 895. The charges in this case predominantly arose from three separate incidents of domestic violence occurring after Appellant was served with the protective

order obtained by the victim in early 2016. The charged crimes all occurred during the course of Appellant's romantic relationship with the victim and demonstrated the volatile on-again, off-again nature of Appellant's relationship. The State's proof showed the victim continued her relationship with Appellant despite the protective order and Appellant's recurring violence because she loved him. A logical relationship thus connected the repeated and ongoing instances of domestic abuse charged in this case that warranted joinder of these crimes for a single trial.

Where, as here, the joined counts "refer to the same type of offenses occurring over a relatively short period of time, in approximately the same location, and proof as to each transaction overlaps so as to evidence a common scheme or plan[,]" *Mitchell*, 2011 OK CR 26, ¶ 23, 270 P.3d at 170-71, joinder is proper. We have emphasized that the term "transaction" as used in this context has "flexible meaning" and offenses may be joined for trial even if they could not be admissible as evidence of other crimes. *Holtzclaw v. State*, 2019 OK CR 17, ¶¶ 19, 21, 448 P.3d 1134, 1144-1145. Here, the State's proof showed a pattern of offenses committed against the same victim under similar circumstances. *Id.*, 2019 OK CR 17, ¶ 21,

448 P.3d at 1144-1145. Appellant does not demonstrate that he was deprived of a fair trial from joinder of the counts in this case. 22 O.S.2011, § 439; *Holtzclaw*, 2019 OK CR 17, ¶ 22, 448 P.3d at 1145; *Mitchell*, 2011 OK CR 26, ¶ 24, 270 P.3d at 171. Under the total circumstances, Appellant fails to show actual or obvious error from the joinder of counts and thus there is no plain error. Proposition I is denied.

Proposition II. Taken in the light most favorable to the State, sufficient evidence was presented at trial to allow any rational trier of fact to find beyond a reasonable doubt the essential elements of the crime of Interference with Emergency Telephone Call. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Gordon v. State*, 2019 OK CR 24, ¶ 32, 451 P.3d 573, 583; 21 O.S.2011, § 1211.1. Taken in the light most favorable to the State, the jury could reasonably infer from this evidence the victim wanted to place a 911 call for assistance in getting Appellant to leave and that Appellant intentionally prevented or hindered the victim from so doing by keeping, then smashing, her cellphone after she hit the panic button on her alarm system. Sufficient evidence was presented to support Count 11. Proposition II is denied.

Proposition III. We review the trial court's denial of a mistrial for abuse of discretion. *Harris v. State*, 2019 OK CR 22, ¶ 19, 450 P.3d 933, 944. The trial court "abuses its discretion when its ruling is clearly outside the law or facts." *Knighton v. State*, 1996 OK CR 2, ¶ 64, 912 P.2d 878, 894. We have held that "[a] mistrial is an appropriate remedy when an event at trial results in a miscarriage of justice or constitutes an irreparable and substantial violation of an accused's constitutional or statutory right." *Id.*, 1996 OK CR 2, ¶ 65, 912 P.2d at 894.

The trial court did not abuse its discretion in denying Appellant's motion for mistrial based on the witness's reference to a rape kit being used at the hospital. The trial court's swift and decisive intervention sustaining the defense objection and admonishing the jury to disregard the witness's challenged testimony cured the error. Jurors are presumed to follow their instructions. *Blueford v. Arkansas*, 566 U.S. 599, 606 (2012). "The incident in the present case was of short duration and the trial court took appropriate measures to reduce the risk of unfair prejudice." *Tryon v. State*, 2018 OK CR 20, ¶ 134, 423 P.3d 617, 653. It is notable the witness's testimony made only passing mention of the rape kit being used at

the hospital and gave no further details. The prejudicial effect of this testimony too was blunted somewhat by its timing, occurring with the first witness in a twenty-seven witness trial. Under the total circumstances, there was no abuse of discretion from the trial court's handling of this matter. Proposition III is denied.

Proposition IV. Taken in the light most favorable to the State, sufficient evidence was presented at trial to allow any rational trier of fact to find beyond a reasonable doubt the essential elements of the crime of Assault and Battery With Means of Force Likely to Produce Death. *Jackson*, 443 U.S. at 319; *Gordon*, 2019 OK CR 24, ¶ 32, 451 P.3d at 583; 21 O.S.2011, § 652(C). The State presented evidence showing Appellant went to the victim's home around 12:45 a.m. on December 9, 2016, for a prearranged visit, then was seen leaving the victim's home the next day around 4:30 or 5:00 p.m. after a neighbor heard loud noises and yelling. Appellant was seen later that day with injuries to his face, including a gash to his forehead and a scratch on his cheek. The victim had no cell phone activity after her last call with Appellant at 12:45 a.m. on December 9th. The State presented DNA evidence connecting Appellant both to the victim's bite mark and the crime scene. Further, the State presented

evidence that Appellant admitted attacking the victim with a skillet during an argument. A dented skillet with a missing handle, covered in the victim's blood, was found in the kitchen near the victim's body. This evidence was more than sufficient to support Appellant's conviction on Count 1. Proposition IV is denied.

Proposition V. At the instruction conference, the trial court correctly observed the Count 1 charge was mislabeled in the amended Information as Assault and Battery With Intent to Kill. Title 21 O.S.2011, § 652(C), the subsection cited as authority for the charge, did not authorize prosecution for this crime. Despite the State's charging error, the trial court allowed the State to proceed on Count 1 with the crime of Assault and Battery With Means of Force Likely to Produce Death. The trial court very reasonably found the supporting facts pled in support of the Count 1 charge were generally consistent with this charge as was the explicit statutory reference for Count 1 found in the amended Information. Further, the supporting facts pled in Count 1 alleged neither an intent to kill nor an attempt. The trial court correctly viewed the problem with Count 1 as a simple labeling error that was not fatal to the charge "because it is clear from

the allegations of fact what crime is being charged." *Saulmon v. State*, 1980 OK CR 58, ¶ 6, 614 P.2d 83, 85.

Appellant contends on appeal the trial court did not have jurisdiction to try him for the crime of Assault and Battery With Means of Force Likely to Produce Death. The State aptly responds to this argument with our holding in *Parker v State*, 1996 OK CR 19, ¶ 21, 917 P.2d 980, 985, that "a trial court's jurisdiction is triggered by the filing of an Information alleging the commission of a public offense with appropriate venue" and defects in the Information raise due process concerns but do not undermine the trial court's jurisdiction. *Id.* There is no jurisdictional issue here.

Appellant's claim that his due process rights were violated because he did not have notice of the charge against him also lacks merit. "An accused is entitled to notice of the charge he must be prepared to defend against." *Patterson v. State*, 2002 OK CR 18, ¶ 23, 45 P.3d 925, 931. As discussed above, Appellant was charged, convicted and sentenced under Section 652(C) and he was fully apprised of the charge he faced based on the factual assertions pled in the charge. Defense counsel did not complain below about a lack of notice concerning the charge against which she had to defend. The

record also does not show defense counsel was hampered in any way from presenting Appellant's defense due to the State's charging error.

Because Appellant was adequately apprised of the charges against him based on the "four corners" of the amended Information together with the materials provided to him at preliminary hearing and through discovery, his due process challenge must be denied.

Parker, 1996 OK CR 19, ¶ 24, 917 P.2d at 986. Proposition V is denied.

Proposition VI. Appellant fails to show either deficient performance or prejudice based upon counsel's failure to raise these claims at trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). See also *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (discussing *Strickland* test for ineffectiveness). We rejected Appellant's challenge to the joinder of counts in Proposition I and his challenge to the sufficiency of the evidence supporting his Count 11 conviction for Interference with Emergency Telephone Call. Further, the trial court dismissed Appellant's convictions on Count 2: Domestic Assault and Battery Resulting in Great Bodily Harm and Count 3: Domestic Assault and Battery With a Dangerous Weapon at formal sentencing on grounds of merger with the Count 1 conviction. Defense counsel

thus was not ineffective for failing to raise these claims. *Logan v. State*, 2013 OK CR 2, ¶ 11, 293 P.3d 969, 975. Proposition VI is denied.

Proposition VII. We deny relief for purported cumulative error. Appellant has not proven the existence of two or more errors in this appeal that we can cumulate. *See Bosse v. State*, 2017 OK CR 10, ¶ 93, 400 P.3d 834, 866. Review of the 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 VII is denied.

DECISION

The Judgment and Sentence of the District Court 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 the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE DOUG DRUMMOND, DISTRICT JUDGE**

APPEARANCES AT TRIAL

AMANDA SELF
ATTORNEY AT LAW
616 S. BOSTON AVE., SUITE 200
TULSA, OK 74119
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STEPHANIE JACOBY
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JOSHUA R. FANELLI
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OKLAHOMA CITY, OK 73105
COUNSEL FOR APPELLEE

OPINION BY: HUDSON, J.

LEWIS, P.J.: CONCUR
KUEHN, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR
ROWLAND, J.: CONCUR

PROPOSITION V

MR. MORRIS'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE STATE CHANGED THE ALLEGED CRIME FROM ASSAULT AND BATTERY WITH INTENT TO KILL TO ASSAULT AND BATTERY WITH MEANS OR FORCE LIKELY TO PRODUCE DEATH.

Standard of Review

Whether the correct crime was charged on the Information is a jurisdictional issue. *Curtis v. State*, 1948 OK CR 40, 86 Okl.Cr. 332, 345, 193 P.2d 309, 316. Jurisdictional issues are reviewed "de novo" *Henry v. Office of Thrift Supervision*, 43 F.3d 507, 511 (10th Cir. 1994).

Argument

Count 1 was charged as "assault and battery with intent to kill" in violation of 652(c). The jury, however, was advised—over defense objection—that they did not have to find the element of intent. Instead, they had to find 1) assault and battery 2) upon another person; 3) with means or force likely to cause death.

The confusion stemmed from the language of 652 (C). This statute states that:

Any person who commits any assault and battery upon another... by means of any deadly weapon, or by such other means or force as is likely to produce death, or in any manner attempts to kill another... or in resisting the execution of any legal process, shall upon conviction by guilty of a felony punishable by imprisonment in the State Penitentiary not exceeding life.

21 O.S., 2011, § 652(C)

This statute lays out 4 different ways to violate the provision. 1) Assault and battery with a deadly weapon, 2) Assault and battery by such other means or force as is likely to produce death 3) Assault and battery while attempting to kill another, and 4) Assault and battery while resisting the execution of any legal process.

The only one of these four ways to violate that include an "intent" element is "assault and battery while attempting to kill another." The legislature made this clear when they included the word "attempt" *See Goree v. State*, 2007 OK CR 21, ¶ 2, 163 P.3d 583, 585 (Lumpkin, P.J., Concurring).

Therefore, because the Information charged Mr. Morris under the third prong of the statute, they must stand by that election, and cannot change their decision to another crime after both the state and defense rested.

This case is similar to the case of *Curtis v. State*, 1948 OK CR 40, 86 Okl. Cr. 332, 193 P.2d 309. Curtis was charged with grand larceny and the information stated that he stole 7 domestic animals that were valued at \$200. This information was broad enough to allege both the crime of grand larceny² and larceny of domestic animals. *Curtis v. State*, 1948 OK CR 40, 86 Okl. Cr. 332, 336, 193 P.2d 309, 312

The case was tried and the State did not prove the money amount element. The court then abandoned the charge of grand larceny and instructed the jury on

² At that time grand larceny was anything over \$20 dollars. *See Curtis v. State*, 1948 OK CR 40, 86 Okl. Cr. 332, 336, 193 P.2d 309, 312

the theory of larceny of domestic animals. *Curtis v. State*, 1948 OK CR 40, 86 Okl. Cr. 332, 338, 193 P.2d 309, 313.

This Court reversed. It held that the county attorney had discretion to charge either crime, but once he had elected to charge one, he could not change what crime was charged after the trial. This Court said that,

"[w]e believe that in cases such as the one at bar, where the charging part of the information may define either of two offenses, then resort should be had to the descriptive label to determine the prosecutor's election as to the charge intended. Where, as in the case at bar, the pleader has clearly made an election between two offenses charged in the same count of an information, the defendant must be tried on the basis of the election.

Curtis v. State, 86 Okl. Cr. 332, 343, 193 P.2d 309, 315.

In the case at bar, the Information was broad enough to cover both assault and battery with intent to kill and assault and battery by force likely to cause death or serious injury. When Morris was charged with assault and battery with intent to kill, he had the right to be tried for that.

As this Court stated in *Curtis*,

"Under such conditions the constitutional requirements, the statutes, and the cases construing the same, require us to hold the prosecutor bound by his election, and a conviction on any other charge than as that so laid in the information as clearly expressed in the descriptive label and confirmed in the charging part of the information, is void for want of jurisdiction."

Curtis v. State, 86 Okl. Cr. 332, 345, 193 P.2d 309, 316.

The harm to Morris is twofold. The first, as stated above, is that the prosecutor simply did not have jurisdiction to try Morris for a different crime than the one that he had charged. The Information confers this jurisdiction and not having it is fatal to the charge.

Secondly, Morris was harmed because he did not know what to defend against. Morris was put on notice that the State needed to prove an intent element. It violated Morris's due process rights to be prepared against one charge and then suddenly have to defend against another. As this Court went on to say,

"[a] defendant cannot be led to believe by the clearly expressed election he is to be tried for one offense and the jury instructed on another, at the whim or caprice of either the prosecutor or the court. Particularly, this should be the rule where the other offense is an entirely different crime, and carrying a greatly increased penalty with an additional charge of a second or subsequent offender involved. Such a situation invades the defendant's fundamental right to be apprised of the charge he must meet. He should never be subjected to the uncertainties of speculative procedure. He should never be compelled to say at any stage of the proceeding "maybe the charge is this or maybe it is that."

Curtis v. State, 1948 OK CR 40, 86 Okl. Cr. 332, 344, 193 P.2d 309, 315.

Although the sentencing range here for both of the crimes that could be charged in Morris's information is the same, the logic still stands. To effectively drop an element that the State has to prove after the defense has rested is fundamentally unfair. Appellant respectfully requests this Court reverse and remand this case to the trial court or, in the alternative, favorably modify his sentence.

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

BRENT ALLEN MORRIS,)
)
 Appellant,)
)
 v.) Case No. CP-2018-6899
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

STATEMENT OF THE CASE¹

Mr. Brent Allen Morris was charged by Information on December 23, 2016.

This Information both was amended and joined with previous cases until a final Amended Information was produced on May 14, 2018. This Information was filed in Tulsa County District Court Case Number CF-2016-6899 charging

- Count 1: Assault and battery with intent to kill, in violation of 21 O.S.2011, § 652(C);
- Count 2: Domestic assault and battery resulting in great bodily harm, in violation of 21 O.S.Supp.2014, § 644(F);
- Count 3: Domestic assault and battery with a dangerous weapon, in violation of 21 O.S.Supp.2014, § 644(D)(1);
- Count 4: Violation of protective order, in violation of 22 O.S.2011, § 60.6(A);
- Count 5: Violation of protective order, in violation of 22 O.S.2011, § 60.6(A);

¹ Reference to the record will include the original record of Tulsa County District Case Number CF-2016-6899 (OR), Jury Trial (J.Tr.), and formal sentencing (S.Tr.)

Count 6: Violation of protective order, in violation of 22 O.S.2011, § 60.6(A);

Count 7: Domestic Assault & Battery (2nd offense) in violation of 21 O.S.Supp.2014, § 644(C);

Count 8: Malicious injury to property, in violation of 21 O.S.2011, § 1760;

Count 9: Domestic assault and battery (2nd offense) in violation of 21 O.S.Supp.2014, § 644(C);

Count 10: Violation of protective order, in violation of 22 O.S.2011, § 60.6;

Count 11: Interference with emergency telephone call, in violation of 21 O.S.2011, § 1211.1.

(OR 72-74)

The Honorable Judge Doug Drummond presided over the jury trial. (J.Tr.

1) Morris was found guilty of all counts. (1108-1109) The jury sentenced Mr. Morris as follows:

Count 1: 25 years and \$10,000;
Count 2: 5 years and \$10,000;
Count 3: 5 years and \$10,000;
Count 4: 1 year and \$1,000;
Count 5: 1 year and \$1,000;
Count 6: 1 year and \$1,000;
Count 7: 4 years and \$5,000;
Count 8: 1 year and \$500;
Count 9: 4 years and \$5,000;
Count 10: 1 year and \$1,000;
Count 11: 1 year and \$3,000

(J.Tr. 1108-1109, 1117-1118)

Formal sentencing was held on May 23rd, 2018. The court dismissed Count 2 and 3, on the basis of the fact that they merged with Count 1. (S.Tr. 8) The judge ran Count 4, 5, 6, 10, 8 and 11 concurrently with each other and consecutively with count 1, 7, 9, and 4. These last four counts all ran consecutively to each other as well. (St.Tr. 9)

STATEMENT OF THE FACTS

The facts of this case span almost four months. At the time of trial, Mr. Morris and Charis Clopton knew each other for about 6 or 7 years (J.Tr. 433) In April of 2015, the two started dating and between April of 2015 and December of 2016, Clopton described the relationship as "very off and on." (J.Tr. 434) In February of 2016, Clopton obtained a protective order against Morris. (J.Tr. 435) After the protective order was granted, however, both parties continued to see each other (J.Tr. 438).

Count 7 and Count 8

On July 17, 2016, Clopton lost power to her house. In order to preserve Clopton's groceries, both she and Morris went to their friend's house, Connor McGee. (J.Tr. 439) Morris became angry with Clopton because she wanted to use the restroom that was inside McGee's bedroom. (J.Tr. 440) Clopton claimed that Morris threw her things and when she was trying to leave, he pulled the back of her pants, causing her to fall to the floor. She then said he pressed his head

against hers. (J.Tr. 441-442) She went to her car and then claimed that Morris punched out her passenger side window with his fist. (J.Tr. 443)

Count 9, 10, and 11

On July 23rd, 2016, Morris went to Potbelly's, a bar that Clopton was also at. (J.Tr. 454) He drove her home from the bar and they both went into her house. (J.Tr. 457-458)

She said he took her phone, used her thumb to unlock it, and then looked through it. She went outside and then came back in, asked him to leave. When he said no, she set off an alarm at her house. He asked her to turn it off, she did, and then she set the alarm off again. (J.Tr. 458-460) Clopton said Morris broke both the phone and the alarm and threw her to the floor and started kicking her. (J.Tr. 461) She claims that the beating only stopped when the police arrived. (J.Tr. 462)

Count 6

On September 29, 2016, Morris sent pictures of a ring that Clopton had lost and was hanging on her door in violation of the protective order. (J.Tr. 468-469)

Count 1-5

On December 8, 2016, Clopton and Morris were still engaged in a dating relationship. (J.Tr. 480). Clopton went to a bar to attend a surprise party for her friend. She saw Morris at the bar. (J.Tr. 490) She remembered going home, sitting on the couch, and then remembered waking up in the hospital (J.Tr. 492). She

had been viciously beaten at her house. Her injuries included broken fingers, much bleeding, and her insulin pump being pulled out. However, she did not know who had beaten her. (J.Tr. 492)

Her father found her because he was tipped off by her ex-husband (against who she also had a protective order) that something might be wrong. (J.Tr. 250, 255)

Additional facts will be discussed as they relate to each proposition of error.

1040410619

IN THE DISTRICT COURT OF THE FOURTEENTH JUDICIAL DISTRICT
OF THE STATE OF OKLAHOMA SITTING IN AND FOR TULSA COUNTY

THE STATE OF OKLAHOMA,)
Plaintiff,)
vs) Case No. CF-2016-6899
BRENTALLEN MORRIS,)
Defendant.)

VERDICT
COUNT 1

DISTRICT COURT
FILED

MAY 22 2018

DON NEWBERRY, Court Clerk
STATE OF OKLA. TULSA COUNTYASSAULT AND BATTERY WITH MEANS OF FORCE LIKELY TO
PRODUCE DEATH

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

Guilty and fix punishment at 25 years + \$10,000
 Not Guilty.
Mr. H. Wilson
FOREPERSON

COUNT 1 (LESSER INCLUDED)

ASSAULT AND BATTERY WITH A DANGEROUS WEAPON

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

Defendant is:

Guilty and fix punishment at _____
 Not Guilty.

INSTRUCTION NO. 12

No person may be convicted of ASSAULT AND BATTERY WITH MEANS OF FORCE LIKELY TO PRODUCE DEATH unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, an assault and battery;

Second, upon another person;

Third, with means of force likely to produce death.

OUJI-CR 4-7