

IN THE SUPREME COURT OF THE UNITED STATES

BRENT ALLEN MORRIS,
Petitioner,

vs.

THE STATE OF OKLAHOMA,
Respondent.

RESPONDENT'S APPENDIX TO BRIEF IN OPPOSITION

Respectfully submitted,

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Dated: April 17, 2023

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No. F-2018-551

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

BRENT ALLEN MORRIS,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JAN 29 2019

JOHN D. HADDEN

CLERK

Appeal from the District

Court of Tulsa County

Case No. CF-2016-6899

BRIEF OF APPELLANT

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IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

BRENT ALLEN MORRIS,)
v.)
THE STATE OF OKLAHOMA,)
Appellant,)
Appellee.)
Case No. F-2018-551

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.

PROPOSITION I

MR. MORRIS' DUE PROCESS RIGHTS WERE VIOLATED WHEN UNRELATED COUNTS WERE IMPROPERLY JOINED.

Standard of Review

Because trial counsel failed to object to the joinder in this case, or to request a severance, he has forfeited for Appellant review of all but plain error. *See Collins v. State*, 2009 OK CR 32, ¶ 12, 223 P.3d 1014, 1017. Plain error review requires the defendant to prove: (1) an actual error was committed; (2) the error was plain or obvious; and (3) that the error affected his substantial rights, meaning that the outcome of trial was affected by the error. *See Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

Argument

Mr. Morris was tried on an 11-count Information with crimes that were alleged to have taken place in predominately three different time frames. Count 1-5 were all alleged between 12/8/16 and 12/10/16. Count 6 was alleged on 9/29/16. And Count 7-11 were alleged between 7/17/16 and 7/23/16.

These crimes were unrelated and not part of the same series of criminal acts or transactions. This Court has laid out a test to see if joinder of separate offenses is proper. This Court held that,

“[J]oinder of separate offenses is permitted if the offenses are part of a series of criminal acts or transactions. Joinder of a series of criminal acts is proper where the joined counts refer to: (1) the same type of offenses; (2) occurring over a relatively short period of time; (3)

in approximately the same location; and (4) proof of each act or transaction overlaps so as to show a common scheme or plan.

Smith v. State, 2007 OK CR 16, ¶ 23, 157 P.3d 1155, 1165 (Citation omitted)

The offenses here are not part of the same series of criminal acts or transactions. Therefore it was error to join them.

There were two main groups of crimes, the ones that occurred between July 17-23, 2016 (July crimes) and the ones that occurred between December 8-10, 2016 (December crimes).

Count 6 was simply a picture message, part of their constant texting back and forth that violated the protective orders. It will not be considered for purposes of this analysis.

The two sets of crimes were not the same type of offense.

Although the December crimes and the July crimes both alleged domestic violence, the crimes in December were severe enough as not to be categorized with the July crimes. The most serious crime in July was Morris kicking Clopton, which was lumped in with him pulling her down by the back of her pants and violating a protective order.

However, as a result of the December crimes, Clopton almost died, her hand was fractured and she was left in a pool of her own blood. These two crimes were qualitatively different.

This is further reflected in the sentence that was given. Morris got 4 years for the most severe of the July crimes, and that was only because it was his

second offense. However, for the December crimes, he got 25 years, of which he has to serve 85% before he is eligible for parole.

The two crimes did not occur within a relatively short period of time.

The time period between the offenses does not constitute a relatively short period of time. The testimony showed that between the first offense and the last offense there was almost four months. This further goes to show how unrelated these crimes were.

The crimes did not occur at approximately the same location.

The July crimes and the December crimes did not occur at approximately the same location. Although the crime on July 23rd did happen at Clopton's house, (J.Tr. 458) the crime on July 17 happened at Connor McGee's house. (J.Tr. 440) All of the December crimes happened at Clopton's house. (J.Tr. 275)

Proof of each act or transaction does not overlap to show a common scheme or plan.

The proof in these cases hardly overlaps. Clopton, and perhaps Connor McGee, were the sole witness for the July incidents. However, Clopton testified that she did not see who attacked her in December. (J.Tr. 492) It was other witnesses—not present at the July incident—that led to Morris being linked to the crime. Additionally, the word “common” implies that although there may be various crimes, all said crimes must come under one plan or scheme whereby the facts of one crime tend to establish the other such as where the commission of one crime depends upon or facilitates the commission of the other crime, or where

each crime is merely a part of a greater overall plan. *See Atnip v. State*, 1977 OK CR 187, ¶ 11, 564 P.2d 660, 663. For a series of crimes to be a common plan or scheme, therefore, they must be something more than similar in kind or manner of execution. As this Court noted in *Owens v. State*, 2010 OK CR 1, ¶ 14, 229 P.3d 1261, 1266, the common scheme or plan exception requires “[A] relatedness between the crimes such that the other crime appears to have paved the way for the current offense or the second offense is dependent on the first,” whereas showing unique similarities between crimes amounting to a signature goes to the identity of the perpetrator, not commission of a common plan or scheme. The separate offenses must be interconnected or lead up to some greater overall criminal plan.

Prejudice

The crimes here are not part of the same series of criminal acts or transactions. Therefore it was error to join them. However, to show plain error, Morris needs to show not only that there was error, but that the error prejudiced him.

There was a great disparity in the amount of evidence for the July crimes and the December crimes. In July, there was testimony from the victim that she was injured, along with police reports and pictures of bruises. Not so with December. In December, Clopton could not identify who had injured her. Because

of that, the State had to rely entirely on the testimony of people who didn't see the abuse actually occur.

If the December case was tried alone, there would be genuine doubt as to who hurt Clopton. In fact, it would be far more likely that the ex-husband, who also has a protective order from Clopton against him, was engaged in a custody dispute, and tipped off the father into checking the house, would be the one who committed this act.

On top of that, Clopton could not have been attacked on the day that the State alleged she was attacked, because her blood sugar was normal even though her insulin pump had been disconnected. *See Proposition IV.* There were two witnesses who said they were with Morris the day that the attack must have happened.

This case illustrated the dangers inherent in joinder. The State piggybacked their weak December case with their strong July case and as a result got two convictions. This was their way of doing an end run around the rule that prevents propensity evidence. Not only that, but in doing so, they used the less serious crime to secure a conviction on the more serious one. This violated Mr. Morris's due process rights. Appellant respectfully requests that this case be reversed and remanded to the district court or, in the alternative, that his case be favorably modified.

PROPOSITION II

**THERE WAS NO EVIDENCE PRESENTED THAT MR. MORRIS
INTERFERED WITH AN EMERGENCY TELEPHONE CALL,
THEREFORE HE COULD NOT BE CONVICTED OF SUCH.**

Standard of Review

The State bears the burden of proving every element of the crime beyond a reasonable doubt. The test for sufficiency of the evidence on appeal is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979). On appeal, such claims are reviewed *de novo*. *United States v. Virgil*, 523 f.3d 1258, 1262 (10th Cir. 2008).

Argument

Mr. Morris was charged with interference of an emergency telephone call. The Information stated that he did such by “grabbing the phone when the victim, Charis Brianna Clopton, tried to call 911 for help.” (OR 193)

There was no testimony that this event ever happened. There was testimony that only July 23, 2016, the defendant took the victim’s phone—without her permission—to look through it. (J.Tr. 458) Clopton said that this was a request that came up “every now and then.” There was no testimony that Clopton was trying to call the police at that time. Her state of mind is illustrated well by her response to the prosecutor’s questions.

Q. (by the prosecutor) and then what happened?

A. I told him that if he didn't leave, I was going to set off the alarm.

Q. Why were you – why not just call the police?

A. (no response)

Q. where was your phone?

A. I just never did.

Q. where was your phone at this time?

A. He had it. He was on it.

Q. Okay. So when – so you testified that you told him that you set off the alarm? Is that a yes?

A. Yes. Sorry.

(J.Tr. 460)

Even though the prosecutor gave Clopton every opportunity to say that the reason that she set off the alarm was because she wanted to call the police but she couldn't because Morris was preventing her, she did not.

The State may argue that the breaking of the alarm was, in effect, interference with an emergency telephone call. If so, the State would be wrong. The plain meaning of the statute is that it can only be violated by interference with a telephone, not another device used to call the police. *See Lamie v. United States Tr.*, 540 U.S. 526, 536, 124 S. Ct. 1023, 1031, 157 L.Ed.2d 1024 (2004) (The plain meaning of a text should be followed, unless it leads to absurd results.)

Appellant submits that no reasonable fact finder could have found that Morris interfered with an emergency telephone call. Appellant respectfully requests that this Court reverse and remand this count to the district court with instructions to dismiss.

PROPOSITION 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 TO NOT GRANT THE MISTRIAL.

Standard of Review

This Court reviews a trial court's ruling on a motion for mistrial under the standard of "abuse of discretion." *See Jackson v. State*, 2006 OK CR 45, ¶ 11, 146 P.3d 1149, 1156 (citing *Harris v. State*, 2004 OK CR 1, ¶ 10, 84 P.3d 731, 740.)

Argument

It is a fundamental principle of criminal law that a "when one is put on trial, one is to be convicted -- if at all -- by evidence which shows one guilty of the offense charged; and proof that one is guilty of other offenses not connected with that for which one is on trial must be excluded." *Burks v. State*, 1979 OK CR 10, ¶ 2, 594 P.2d 771, 772. (Citation omitted) (Overruled on other grounds by *Jones v. State*, 1989 OK CR 7, 772 P.2d 992). It is not appropriate for the jury to consider prior bad acts unless they are for the limited purpose of "motive, intent, absence of mistake or accident, identity or a common scheme or plan which embraces the commission of two or more crimes so related to each other that proof of one tends to establish the other" *Id.* (Citation omitted). And even if that is the case, a *Burks* notice needs to be provided. *Burks*, 1979 OK CR 10, ¶ 12, 594 P.2d at 774.

In the present case, a prosecution witness spoke of the use of a rape kit at the scene of the crime. (J.Tr. 266).

Q. (by the prosecutor) Were you ever present with Charis—

A. Yes.

Q. —at Hillcrest at all?

A. Yes. While they—we got there about the time they were doing the rape kit and we couldn't go —

(J.Tr. 266)

The defense timely objected, asked for a mistrial, and was overruled (J.Tr. 267-268)

The trial judge showed that he understood the seriousness of what the jury had heard by his reprimanding of the prosecutor.

The Court: we had this discussion. What — did you not talk to your witnesses?

Ms. Jacoby: I advised my forensic nurse.

The Court: No. No. I'm talking about this witness because this witness just said something —

Ms. Jacoby: No, I did not advise him.

The Court: What is the purpose of me making ruling (sic) and informing you to — of them if you're not gonna talk to your witnesses about this?

Ms. Jacoby: He never mentioned the rape kit to me before. We've met — I just — she had said earlier that she was gonna object to this — some of the photos because they were at the hospital, so my goal —

The Court: that's not the point. Go over and tell him that he cannot talk about this again.

Ms. Jacoby: Yes, your honor.

The Court: And I'm going to overrule a mistrial at this point but you all are on thin ice about this. This was discussed — and I don't want excuses. I want you to make sure your witnesses — all of them — understand that they can't talk about that, or we're gonna be trying to (sic) this case again. Do we understand?

(J.Tr. 267-268)

This comment prejudiced Mr. Morris by allowing evidence of an uncharged crime to go to the jury. Further, an allegation of rape is likely to cause an emotional reaction in jurors, and the simple admonishment to disregard is unlikely to help. This information had no relevance and did nothing but prejudice Mr. Morris. Appellant respectfully asks that his sentences be vacated and the case be remanded for a new trial, or, in the alternative, that his sentences be favorably modified.

PROPOSITION IV

BECAUSE CHARIS CLOPTON COULD NOT—AS THE STATE ALLEGED— HAVE LAID FOR 30 HOURS WITHOUT HER BLOOD SUGAR FALLING, THERE WAS INSUFFICIENT EVIDENCE TO CONVICT DEFENDANT ON COUNT 1.

Standard of Review

The State bears the burden of proving every element of the crime beyond a reasonable doubt. The test for sufficiency of the evidence on appeal is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) de novo review. *See* Proposition II.

Argument

Count 1—Assault and Battery with the intent to Kill— could not have happened as the State alleged. The State’s theory of the case was that on the evening of December 8th, 2016 Clopton came home from a bar. Then at around 12:30 a.m. on December 9th, 2016 the State claimed that Morris brutally beat Clopton and pulled out her insulin pump. (J.Tr. 241) Then the State claimed that Charis laid on the ground for 30 hours and was found by her father on the morning of December 10th . (J.Tr.242)

However, when found her blood sugar was in the normal range, and the examiner had no reason to dispute the fact the the blood sugar was 117. (J.Tr.

325) If she had really laid without insulin for 30 hours, her blood sugar would have been outside the normal range. Therefore, she must have been assaulted later on the 9th, or in the early hours of the 10th.

A defense witness, James Gilbert, testified that he was with Morris on the evening of December 9th. He testified that he was with him sometime between 4:00p.m. and 6:00p.m. (J.Tr. 999) Further, he testified that during his meeting with Morris, he noticed that Morris had a scar on his forehead. (J.Tr. 1000)

Another witness, Susie Atzbach, testified that the night of December 9th, 2016, that Morris was at a bar and later went home with her.(J.Tr. 633, 638-639) She testified that they left that bar early on the morning of December 10th, between 12:00 and 12:30am. They left, went together to Atzbach's house and later Morris left. (J.Tr. 639)

This leaves only a period of a few hours until Gene Gregg found Clopton in the morning.

There is a lack of evidence in the case upon which a rational trier of fact could say that Mr. Morris attacked Clopton. She could not have been attacked on December 8th, and Mr. Morris had witnesses testifying to his whereabouts all of the evening of December 9, 2016. Appellant respectfully requests that this Court reverse and remand Count 1 to the district court with instructions to dismiss.

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.

PROPOSITION VI

MR. MORRIS 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.

Standard of Review

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the reasonably effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984). In order to prevail on a claim of ineffective assistance of counsel, an Appellant must show 1) that trial counsel's performance was deficient and 2) that he was prejudiced by the deficient performance. The United States Supreme Court went on to define prejudice as error, without which, there would be a reasonable probability that the result of the proceeding would have been different. *Id* at 698.³

Argument

Trial counsel's performance fell below what was constitutionally permissible. This is clear by applying the two prongs of *Strickland* to the counsel's actions.

A. Deficient Performance

This Court has held that to establish deficient performance, an applicant must show actions indicating that counsel breached some duty owed to him, or that counsel's judgment was unreasonable under the circumstances. *See Mitchell*

³ Such claims are reviewed de novo. *Davis v. State*, 2005 OK CR 21, ¶ 7, 123 P.3d 243, 246.

v. State, 1997 OK CR 9, ¶ 5, 934 P.2d 346, 350. Here, counsel failed object to joinder, demur to Count 11 (interference with an emergency telephone call), and failed to object to Count 1, 2, and 3 being tried in violation of Section 11.

When a basis for objecting exists, and counsel fails to object to error that goes to the heart of the case, not objecting cannot be considered trial strategy. *See Collis v. State*, 1984 OK CR 80, ¶ 9, 685 P.2d 975, 977. In *Collis*, defense counsel failed to object to hearsay testimony, testimony which was the only evidence that could be used to show the intent of the accused to kill the deceased. *Id* at ¶ 3. This Court found that this failure to object could not have been valid trial strategy. That, coupled with the fact that failing to object also failed to preserve error, led this Court to say that defense counsel's conduct was "beyond justification." *Id* at ¶ 3.

Joinder

Counsel failed to object to joinder in this case. The defense at the trial level was not that Clopton was not beaten up, but rather that Morris was not the one who beat her. However, in not objecting to this joinder, Morris was presented to the jury as someone who beats women. There was no reasonable trial strategy to join two cases where the less serious crime had stronger evidence and the more serious crime had weaker evidence.

Emergency Phone Call

Further, counsel failed to demur to the evidence that Morris did not interfere with an emergency phone call. There was no evidence to show such. There is no conceivable trial strategy in allowing a client to be convicted of a charge that there was no evidence for.

Section 11 Violation

Further, the charges were offered in clear violation of 21 O.S.2011, § 11. These convictions violate the prohibition against double punishment.

Oklahoma law provides:

...an act or omission which is made punishable in different ways by different provisions of this title may be punished under any of such provisions... but in no case can a criminal act or omission be punished under more than one section of the law; and an acquittal or conviction and sentence under one section of law, bars the prosecution for the same act or omission under any other section of the law.

21 O.S.2011, § 11(A).

This Court has held that Section 11 has a wider scope than the constitutional provision against double jeopardy. In *Shackelford v. State*, this Court stated:

It is significant that this statute speaks of an “act or omission” while the double jeopardy prohibition speaks of a conviction or acquittal of an “offense” as being a bar to another prosecution for the same “offense.” If an “act” violates two different laws, it may be two “offenses” under double jeopardy interpretation, but Section 11 prohibits a single act being punished more than once under different statutes.

Shackelford v. State, 1971 OK CR 49, ¶ 4, 481 P.2d 163, 165.

In deciding a Section 11 multiple punishment claim, this Court focuses on the relationship between the criminal acts to determine whether those acts may be punished separately. *See Barnard v. State*, 2012 OK CR 15, ¶ 27, 290 P.3d 759, 767 (“[i]f the crimes truly arise out of one act, Section 11 prohibits prosecution for more than one crime, absent express legislative intent.”). Here, the crimes of assault and battery with intent to kill, domestic assault and battery resulting in great bodily harm, and domestic assault and battery with a dangerous weapon all arose out of one transaction. It is apparent that counsel knew this because the trial judge stated that he thought the first three counts should merge and that he was “baffled” by how the case was filed” (J.Tr. 1019-1020) Yet even after that, counsel did not object to the Section 11 violation.

Conclusion

Any of these errors alone could show that counsel’s performance fell below what was reasonable under the circumstances; considering them in the aggregate makes it clear that Mr. Morris’s counsel did not perform at the standard of a constitutionally effective attorney. However, to prevail on a claim of ineffective assistance of counsel, Appellant needs to also show prejudice.

B. Prejudice.

The standard of prejudice under *Strickland* is whether there is a reasonable probability that, but for trial counsel’s acts or omissions, the results of the

proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* The facts of this case reveal a reasonable probability that the outcome of Mr. Medina’s trial would have been different but for trial counsel’s unprofessional errors.

Count 11—interference with an emergency telephone call—would have been dismissed if counsel had objected to the error. *See Proposition II*. This is clear prejudice because not objecting ended in a conviction.

Further, failing to object to joinder was prejudicial to Mr. Morris. Without the evidence of the prior abuse, which had much stronger evidence than the December 10, 2016 incident, the jury would not have found that Mr. Morris committed the December 10 crime. The prosecutor coupled an emotionally-charged crime with strong evidence with an emotionally-charged crime with weak evidence and submitted both to the jury. This harmed Mr. Morris. Without the case being joined, the jury would only have found Mr. Morris guilty on the less severe crime and he would have only gotten 4 years instead of 25 years. This was real prejudice.

Further, the fact that trial counsel did not object to the Section 11 claim harmed Morris as well. Part of the State’s strategy was to put as many crimes down as possible in order to buttress their weak case as to the most serious crime. As defense counsel argued, this was a case of “I’m gonna throw everything

on the wall and let's hope something sticks." (J.Tr. 1081) If trial counsel had objected to this joinder, then what would have happened is that there would be two less crimes to prejudice Mr. Morris. An 11-count Information has the potential to overwhelm the jurors. Any less charges that the jury was allowed to look at would have benefitted Mr. Morris.

Defense counsel's conduct fell far below what was reasonable under the circumstance and this conduct greatly prejudiced Mr. Morris. Accordingly, Mr. Morris asks that his sentence be vacated and his case be remanded for a new trial, or, in the alternative, that his sentence be favorably modified.

PROPOSITION 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.

Standard of Review

Even if none of the previously discussed errors, when viewed in isolation, necessitate reversal or modification of Appellant's conviction, the combined effect of these errors deprived Appellant of his right to a fair trial and necessitates that his conviction be reversed or modified.

This Court has stated "When a review of the entire record reveals numerous irregularities that tend to prejudice the rights of defendant, and where a cumulation of said irregularities denies defendant a fair trial, the case will be reversed, even though one of said errors standing alone would not be ample to justify reversal." *Chandler v. State*, 1977 OK CR 324, ¶ 13, 572 P.2d 285, 290.

Argument

None of these propositions of error occurred in isolation. Each of the errors worked with the others to deprive Mr. Morris of his right to a fair trial. The State created a case with 11 counts, and it overwhelmed the jury. They created this case by improperly joining two unrelated sets of crimes, *see* Proposition I. This was further exasperated by the State charging a crime for which they had no evidence—*see* Proposition II—and changing the primary charge in order to drop

an element, *see* Proposition V. All of this was against a backdrop that hinted at an uncharged rape during a trial that was conducted by constitutionally deficient counsel. *See* Proposition III and VI. Mr. Morris did not have a fair trial.

In light of these compounded various errors, Appellant respectfully requests that this Court reverse and remand this case for a new trial, or in the alternative, favorably modify the sentence.

CONCLUSION

The Supreme Court long ago recognized the dangers inherent in joinder:

"[T]he multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense, or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury or otherwise."

McElroy v. United States, 164 U.S. 76, 80, 17 S.Ct. 31, 32, 41 L.Ed. 355 (1896)

This case—because of its emotionally charged nature and opportunity for prejudice—illustrates the need for dissimilar cases to be tried separately. To not do so violated Mr. Morris's due process right to a fundamentally fair trial.

Because of this improper joinder, along with the other complained-of errors, Mr. Morris respectfully asks that this Court dismiss his convictions with prejudice, vacate and remand his conviction, or otherwise favorably modify his sentences.

Respectfully submitted,

BRENT ALLEN MORRIS



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CERTIFICATE OF SERVICE

This is to certify that on January 29, 2019, a true and correct copy of the foregoing Brief of Appellant was served upon the Attorney General by leaving a copy with the Clerk of the Court of Criminal Appeals for submission to the Attorney General, and a copy was caused to be mailed, via United States Postal Service, postage pre-paid, to Appellant at the address set out below, on the date of filing or the following business day.

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Helena OK 73741



Danny Joseph



* 1 0 4 3 2 7 7 3 4 1 *

ORIGINAL

No. F-2018-551

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BRENT ALLEN MORRIS,

Appellant,

-vs-

THE STATE OF OKLAHOMA,

Appellee.

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAY - 2 2019

JOHN D. HADDEN,
CLERK

BRIEF OF APPELLEE
FROM TULSA COUNTY DISTRICT COURT
CASE NO. CF-2016-6899

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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BRENT ALLEN MORRIS,)
)
 Appellant,) Case No. F-2018-551
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Brent Allen Morris, hereinafter referred to as the defendant, was tried by jury for the crimes of Assault and Battery by Means or Force Likely to Produce Death, in violation of 21 O.S.2011, § 652(C) (Count I), Domestic Assault and Battery Resulting in Great Bodily Harm, in violation of 21 O.S.Supp.2014, § 644(F) (Count II), Domestic Assault and Battery with a Dangerous Weapon, in violation of 21 O.S.Supp.2014, § 644(D)(1) (Count III), Violation of Protective Order, in violation of 22 O.S.2011, § 60.6 (Counts IV, V, and VI), Domestic Assault and Battery—Second Offense, in violation of 21 O.S.Supp.2014, § 644(C) (Count VII), Malicious Injury to Property, in violation of 21 O.S.2011, § 1760 (Count VIII), Domestic Assault and Battery—Second Offense, in violation of 21 O.S.Supp.2014, § 644(C) (Count IX), Violation of Protective Order, in violation of 22 O.S.2011, § 60.6 (Count X), and Interference with Emergency Telephone Call, in violation of 21 O.S.2011, § 1211.1 (Count XI), in Case No. CF-2016-6899, in the District Court of Tulsa County before the Honorable Douglas E. Drummond, District Judge (O.R. 305-06).¹ The

¹ Citations to the original record in CF-2016-6899 will be referred to as (O.R. __). Citations to the preliminary hearing in CF-2016-6899 will be referred to as (P.H. Tr. __). Citations to the transcript of the jury trial held on May 14-18, 2018, will be referenced according to volume as (Tr. I, __), (Tr. II, __), (Tr. III, __), (Tr. IV, __), and (Tr. V, __). Citations to exhibits presented by the State at trial will be referred to as (State's Ex. __). References to audio and video recordings in State's Exhibits will include the

defendant was represented by counsel. The jury found the defendant guilty on all counts and set punishment at twenty-five (25) years imprisonment and a \$10,000 fine on Count I, five (5) years imprisonment and a \$10,000 fine on Count II, five (5) years imprisonment and a \$10,000 fine on Count III, one (1) year imprisonment and a \$1,000 fine on Count IV, one (1) year imprisonment and a \$1,000 fine on Count V, one (1) year imprisonment and a \$1,000 fine on Count VI, four (4) years imprisonment and a \$5,000 fine on Count VII, one (1) year imprisonment and a \$500 fine on Count VIII, four (4) years imprisonment and a \$5,000 fine on Count IX, one (1) year imprisonment and a \$1,000 fine on Count X, and one (1) year imprisonment and a \$3,000 fine on Count XI (O.R. 210-22; Tr. V, 1108-09, 1117-18).² At sentencing, the trial court sentenced the defendant in accordance with the jury's verdicts but merged Counts II and III with Count I, and ordered that the defendant's sentences in Counts I, IV, VII, and IX run consecutively, Counts V, VI, VIII, X, and XI run concurrently to Count IV, with credit for time served, in addition to one (1) year of post-imprisonment supervision and the fines assessed by the jury (O.R. 305-08; Sent. 8-10). From this Judgment and Sentence, the defendant has perfected his appeal to this Court.

Citations to the sentencing proceeding held on May 23, 2018, will be referred to as (Sent. __). The defendant's crimes were originally filed in four separate Tulsa County cases, but were ultimately joined on the State's motion and tried together in one action (O.R. 63-70); *see infra* Proposition I (discussing proper joinder of the defendant's crimes).

² Because Counts VII and IX were charged as Domestic Assault and Battery—Second Offense, the defendant's trial was bifurcated. At the second stage and after a finding of guilt on all counts, the State incorporated the evidence from the first stage and introduced a certified copy of a Judgment and Sentence in Tulsa County Case No. CM-2011-0024, which reflected the defendant's prior conviction for one count of Domestic Assault and Battery (Misdemeanor) (Tr. V, 1112-13; State's Ex. 166). After this document was admitted and the State rested its case, the jury assessed punishment on Counts VII and IX (Tr. V, 1117-18).

STATEMENT OF THE FACTS

This case involves the ongoing domestic abuse of thirty-two (32) year old Charis Clopton, including multiple acts of violence inflicted by the defendant over the span of nearly five (5) months, culminating in December of 2016. Ms. Clopton began a dating relationship with the defendant in April of 2015, after the two had been friends for several years (Tr. III, 433-34). Though Ms. Clopton eventually became unhappy in the relationship, she continued her involvement with the defendant because she loved him and because “[i]t was easier staying” with him (Tr. III, 434-35, 453). Ms. Clopton described their relationship as “[v]ery off and on” (Tr. III, 434). Ms. Clopton lived alone in a home on East Detroit Street in Broken Arrow, Oklahoma (Tr. II, 253; Tr. III, 432). The defendant lived with his mother in a home nearby on South Redbud Avenue in Broken Arrow (Tr. IV, 746).

Eventually, in February of 2016, Ms. Clopton obtained a protective order against the defendant following a fight between the two, wherein the defendant “ripped out” Ms. Clopton’s insulin pump, a device used to stabilize Ms. Clopton’s Type I diabetes (Tr. III, 435-36). That protective order was issued in Tulsa County and was properly served personally on the defendant on February 22, 2016, by a deputy with the Tulsa County Sheriff’s Office (Tr. III, 436-38, 601-10; State’s Exs. 153, 154). Upon service of the protective order, the defendant was instructed to have no contact with Ms. Clopton, even if Ms. Clopton subsequently attempted to contact the defendant and re-initiate communication (Tr. III, 603-04). Despite the validity of this protective order, neither the defendant nor Ms. Clopton acted as if the order was in place; the two continued to see each other and remained in contact (Tr. III, 438). The defendant discussed the protective order with Ms. Clopton and tried to have Ms. Clopton dissolve that protective order, though she never did (Tr. III, 466-67). When asked why she maintained the protective order despite her

continued relationship with the defendant, Ms. Clopton testified: “I kept it because I always thought in my mind if he ever does finally kill me, I want something to be there that . . . I had tried standing up for myself once” (Tr. III, 477).

On July 17, 2016, after a wind storm caused a power outage in Broken Arrow, Ms. Clopton and the defendant stayed over with a friend, Conor McGee, at Mr. McGee’s house in Tulsa (Tr. III, 438-39). In the early hours of that morning, Ms. Clopton asked Mr. McGee for permission to use his master bathroom (Tr. III, 440). The defendant suddenly became angry and began yelling at Ms. Clopton, throwing and breaking all of Ms. Clopton’s belongings in her overnight bag (Tr. III, 441). The defendant’s anger escalated, and he cornered Ms. Clopton, pressing his head up against Ms. Clopton’s head as she began screaming. Ms. Clopton attempted to run out the back door, but the defendant grabbed Ms. Clopton by the back of her pants and pulled her down to the floor, causing her bruises (Tr. III, 442). Ms. Clopton eventually got into her car, a Toyota Venza, and attempted to leave. The defendant followed Ms. Clopton to her vehicle and punched out her passenger side window with his fist (Tr. III, 443). Using her cell phone, Ms. Clopton took an eighteen (18) minute audio recording of the altercation, though she stopped the recording before the defendant punched her car window (Tr. III, 444, 450). That recording was admitted and played for the jury at trial (Tr. III, 450-51; State’s Ex. 155). Ms. Clopton made a police report of this incident on July 20, 2016, and photographs were taken of both her injuries and the damage done to her vehicle (Tr. III, 445; State’s Exs. 73-77). The defendant’s charges in Counts VII and VIII arose from this incident (O.R. 192).

On July 23, 2016, Ms. Clopton was with some friends at Potbelly’s, a local bar in Broken Arrow (Tr. III, 454-56). Several hours after Ms. Clopton arrived at the bar, the defendant showed up uninvited and sat down at a table with Ms. Clopton and her friends (Tr. III, 454-56). The

defendant “just stared at [Ms. Clopton],” and though she was not happy to see him, she made no effort to leave (Tr. III, 455-56). At the end of the evening, the defendant insisted that Ms. Clopton let him drive her home (Tr. III, 457). Upon arrival at Ms. Clopton’s house, the defendant came inside and asked to see Ms. Clopton’s cell phone (Tr. III, 458). When Ms. Clopton refused, the defendant grabbed her wrist and used her thumb to unlock the phone, using the iPhone’s fingerprint unlock (Tr. III, 459). Ms. Clopton then went outside and worked up the courage to tell the defendant to leave. When she re-entered and asked the defendant to leave, he laughed at her and made no effort to go (Tr. III, 460). Ms. Clopton informed the defendant that she would set off her panic alarm if he did not leave (Tr. III, 460). When he again laughed at her, Ms. Clopton set off the panic alarm. The defendant begged Ms. Clopton to shut off the alarm, which she did, before the defendant went into Ms. Clopton’s bedroom and laid in her bed (Tr. III, 460-61). After Ms. Clopton set off the alarm a second time, the defendant came back into the living room, yelling, and shattered Ms. Clopton’s phone before also picking up and smashing the activated panic alarm (Tr. III, 461). The defendant then grabbed Ms. Clopton by the back of her hair, threw her to the floor, and began kicking her in the side (Tr. III, 461). The defendant broke Ms. Clopton’s computer and television, and flipped over her living room furniture (Tr. III, 462). When the police arrived shortly thereafter, the defendant was found hiding in Ms. Clopton’s garage attic (Tr. III, 677). The defendant’s charges in Counts IX, X, and XI arose from this incident (O.R. 193).

On September 29, 2016, Ms. Clopton received a text message from the defendant that read “I love you,” and included a picture of a ring that Ms. Clopton had lost at Mr. McGee’s house (Tr. III, 468; State’s Ex. 164). Subsequently, on that same morning, Ms. Clopton found that ring hanging on a nail on the door of her home (Tr. III, 469). Ms. Clopton filed a police report and

provided pictures of the ring and the text she received from the defendant (Tr. III, 469-70). The defendant's charge in Count VI arose from this incident (O.R. 192).

On December 8, 2016, Ms. Clopton attended a surprise birthday party for her friend, Shauna Hermann, at the Mercury Lounge in Tulsa (Tr. III, 480-81). Prior to the party, Ms. Clopton was at Mr. McGee's house with the defendant. Though she could not remember whether she told the defendant her plans for the evening, she took the defendant's credit card out with her that night (Tr. III, 486-87). Ms. Clopton arrived at the Mercury Lounge sometime before 8:45 P.M. and, over the course of the evening, had two beers and a mixed drink (Tr. II, 392-93; Tr. III, 487). Around 9 or 9:30 P.M., the defendant showed up to the party uninvited (Tr. II, 392, 402-03; Tr. III, 490). The defendant announced that he was at the party "to pay [Ms. Clopton's] bar tab" (Tr. II, 403). The defendant and Ms. Clopton made eye contact across the party, and Ms. Clopton soon left, driving alone back to her house in Broken Arrow (Tr. III, 490-91). After returning home safely, the next thing Ms. Clopton remembered was waking up in the hospital, days later, with both arms wrapped in casts, with a head bandage, and with pain throughout her entire body (Tr. III, 493). Ms. Clopton had no recollection of how she received her injuries, though when she woke up, she "knew it was probably Brent" who had inflicted her wounds (Tr. III, 493).

Although Ms. Clopton suffered memory loss as a result of her attack, other witnesses shared the details of Ms. Clopton's rescue and transport to the hospital. On the morning of December 10, 2016, two days after the party, Ms. Clopton's father, Gene Gregg, had gone over to Ms. Clopton's house to check on her (Tr. II, 255). Mr. Gregg found nothing unusual upon his arrival; Ms. Clopton's house was dark and the door locked, the blinds were drawn, and her car was gone (Tr. II, 258). Mr. Gregg noted that pillows had been placed against the blinds, so as to prevent Ms. Clopton's cat from disrupting the blinds (Tr. II, 259-60). There were no signs of forced entry

to the home (Tr. II, 343). Mr. Gregg unlocked the door and went inside, and found Ms. Clopton on the kitchen floor, lying on her back in a pool of dried and coagulated blood, in what Mr. Gregg described as a “gruesome, horrifying” scene (Tr. II, 258, 260). Ms. Clopton’s hands were “mangled beyond recognition,” and she had a jagged laceration on the top of her head (Tr. II, 265, 371). Ms. Clopton was shivering, barely breathing, incoherent, and was mumbling “[W]hy are you hurting me” and “[W]hy are you doing this to me,” as if she were reliving her attack (Tr. II, 262-63). Police and paramedics were immediately called to the scene, around 10:30 A.M., to administer emergency medical care (Tr. II, 264, 304). Mr. Gregg photographed Ms. Clopton lying on the floor, and she was soon covered with a blanket (Tr. II, 261-62; State’s Exs. 1, 3).

As a result of the dried and caked blood, Ms. Clopton’s hair was “glued” to the kitchen floor, and sounded like “Velcro” when the paramedics ripped her hair off the linoleum floor (Tr. II, 265-66, 276, 314-15, 346). The apparatus of Ms. Clopton’s insulin pump was disconnected from her arm and found lying nearby (Tr. II, 311). A bent and warped frying pan with multiple dents was found next to Ms. Clopton’s body (Tr. II, 263, 346). A flat screen television was on the floor next to Ms. Clopton, shattered and broken (Tr. II, 263, 345-46). Pieces of a broken chair were also found on the floor (Tr. II, 263, 345). Ms. Clopton had a bite mark on her right shoulder, as well as various contusions, abrasions, and lacerations on her body (Tr. II, 367, 374, 376). Ms. Clopton was “in and out of consciousness” as emergency personnel were treating her wounds, and exhibited an “altered mental status,” which one paramedic noted could be caused by low blood sugar, though Ms. Clopton’s blood sugar tested within normal range at the time of treatment (Tr. II, 308-09, 325). After administering an IV and dressing her wounds, the paramedics transported Ms. Clopton to Hillcrest Hospital under “emergency status” (Tr. II, 315-16, 328).

Upon arrival at Hillcrest, Ms. Clopton was treated for both hand and head injuries. Dr. Brian Chalkin, an orthopedic surgeon, washed and closed the wounds on Ms. Clopton's hands, and put pins in her left hand fingers to stabilize the fractures to her bones (Tr. II, 282, 284-85, 289-90). Ms. Clopton's left hand had suffered from high-energy trauma resulting in an open fracture to her index and middle fingers, meaning the bones were forcefully pushed through her skin (Tr. II, 287-88). Dr. Chalkin opined that the injury to her left hand was consistent with having her hand crushed or stomped (Tr. II, 297). Photographs were taken of Ms. Clopton's hand injuries and admitted at trial (Tr. II, 269; State's Exs. 4-6). Ms. Clopton underwent hand surgery on December 15, 2016 (Tr. II, 290).

Dr. Clinton Baird, a neurosurgeon with the Oklahoma Spine and Brain Institute, treated Ms. Clopton for brain injuries at Hillcrest on December 10, 2016 (Tr. III, 581-84). Dr. Baird reviewed Ms. Clopton's CT scan and diagnosed her with a subdural hematoma, which he explained was bleeding in the skull cavity pushing towards her brain (Tr. III, 584-86). That injury was consistent with the external head injuries Ms. Clopton presented with (Tr. III, 587). Though Dr. Baird's initial treatment plan was to continue monitoring her recovery progress, Ms. Clopton's condition deteriorated as a result of increased bleeding in her brain, and a burr hole and craniotomy surgery was subsequently performed on December 19, 2016, to relieve pressure in her brain (Tr. III, 590, 592-94). Had the surgery not been performed, Ms. Clopton would have sustained "relatively catastrophic neurological injury, potentially up to permanent vegetative state and/or death" (Tr. III, 596).

Karen Weikel, a crime scene investigator with the Broken Arrow Police Department, processed Ms. Clopton's kitchen for forensic evidence and photographed the scene (Tr. IV, 787, 793-94). Investigator Weikel collected the frying pan, pieces of the chair, Ms. Clopton's shoes,

and the broken television, before packaging and sealing these items (Tr. IV, 802-03, 808-10, 818-19, 822). The broken chair pieces had long strands of dark hair stuck to them, in addition to blood spatter (Tr. IV, 813, 823). Investigator Weikel swabbed the blood on the television, the blood stains on the frying pan, and a clear stain found on the kitchen floor, in addition to swabbing Ms. Clopton's hand at the hospital (Tr. IV, 826, 829, 831, 846, 850). A swab of Ms. Clopton's shoulder bite mark was received from a nurse at Hillcrest Hospital and was also processed (Tr. II, 367-68). Investigator Weikel booked into evidence the physical items from the crime scene, as well as the swabs taken, and later submitted an Oklahoma State Bureau of Investigation (OSBI) forensic request to test swabs taken from the frying pan, the clear stain, Ms. Clopton's hand, the bite mark on Ms. Clopton's shoulder, as well as buccal swabs taken from both Ms. Clopton and the defendant (Tr. IV, 814-16, 824-25, 842, 851). A criminalist with the OSBI subjected these items to serology and DNA testing (Tr. IV, 961, 971-73). The blood on the frying pan belonged to Ms. Clopton alone (Tr. IV, 982). A "YSTR" analysis of both the swab from the clear stain on the kitchen floor and the swab from Ms. Clopton's shoulder bite wound revealed a partial DNA profile consistent with the defendant (Tr. IV, 985, 991). Analysis of the clear stain from the kitchen floor also detected P30, a protein found in seminal fluid, though no sperm were observed (Tr. IV, 977).

Other circumstantial evidence linked the defendant to the crime scene. Extensive testimony and evidence was presented regarding Global Positioning System (GPS) coordinates associated with the defendant's cell phone during the times in question, in addition to call logs (Tr. IV, 865, 875-887). The last outgoing call from Ms. Clopton's phone was made to the defendant at 12:37 A.M., in the early morning hours of December 9, 2016 (Tr. IV, 919-20). After that phone call, all outgoing cell communication from Ms. Clopton's phone ceased entirely. (Tr. IV, 911, 956). Detective Ian Seorgel, a detective with the Broken Arrow Police Department and the lead agent

on this case, took a statement from the defendant's sister, Kari Morgan, following the defendant's arrest (Tr. IV, 898, 907, 932-34). Ms. Morgan, who had been in contact with the defendant before his arrest, knew that Ms. Clopton had been struck with a frying pan, though that detail was never publicly released during the investigation (Tr. IV, 772, 933-34). The type of weapon used in the assault, Detective Seorgel noted, was information that only the perpetrator would have reason to know (Tr. IV, 934). In fact, the defendant admitted to Ms. Morgan that he had gotten into an argument with Ms. Clopton and that he hit Ms. Clopton with a pan before he "blacked out" (Tr. IV, 772). Other than the defendant, no other suspects were ever developed in this case (Tr. IV, 930). The defendant's charges in Counts I-V arose from this incident (O.R. 191-92). Additional facts will be discussed as they become relevant.

PROPOSITION I

THE DEFENDANT'S CRIMES WERE PROPERLY JOINED IN THE SAME TRIAL.

In his first proposition of error, the defendant contends that his constitutional rights were violated when allegedly "unrelated" crimes were joined and tried together in one case. (Appellant's Brief at 6). Because the defendant's crimes were properly joined, his argument and proposition must be rejected.

The defendant raised no objection to the joinder of his crimes in the proceedings below, nor did he file a motion to sever, making review of this issue for plain error only. *Collins v. State*, 2009 OK CR 32, ¶ 12, 223 P.3d 1014, 1017. To warrant relief under plain error review, the defendant must show: "1) the existence of an actual error (i.e. deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding." *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923

(citing *Simpson v. State*, 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d 690, 695, 698). Further, this Court will not correct plain error unless it “seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice.” *Id.* (citation and internal quotation marks omitted).

Joinder of multiple separate offenses in a single trial may be permitted when those offenses “are part of a series of criminal acts or transactions.” *Smith v. State*, 2007 OK CR 16, ¶ 23, 157 P.3d 1155, 1165 (citing *Glass v. State*, 1985 OK CR 65, ¶ 8, 701 P.2d 765, 768); *see also* 22 O.S.2011, § 438 (authorizing joinder of offenses). Joinder is appropriate when the counts joined involve: “(1) the same type of offenses; (2) occurring over a relatively short period of time; (3) in approximately the same location; and (4) proof of each act or transaction overlaps so as to show a common scheme or plan.” *Id.* (citing *Glass*, 1985 OK CR 65, ¶ 9, 701 P.2d at 768). As a whole, judicial economy favors the joinder of similar offenses. *See McClellan v. State*, 1988 OK CR 118, ¶ 7, 757 P.2d 397, 398 (noting that “the interests of a speedy trial for an accused, conserving judicial economy, and public policy are best served by joinder of action in similar situations”).

Here, the State filed a Motion for Joinder of Offenses on April 21, 2017, seeking to join together Tulsa County Case Nos. CF-2016-4058, CF-2016-5614, CF-2016-6899, and CM-2016-5907 (O.R. 62-70).³ On April 25, 2017, the trial court granted the State’s motion for joinder, without any objection from the defense.⁴ The defendant now claims the joinder of his crimes violated his due process rights because the offenses were “unrelated” and were “not part of the

³ Counts I, II, III, IV, and V were originally filed in CF-2016-6899. Count VI was originally filed in CM-2016-5907. Counts VII and VIII were originally filed in CF-2016-5614. Counts IX, X, and XI were originally filed in CF-2016-4058. All counts were ultimately joined and tried together under case number CF-2016-6899 (O.R. 191-93).

⁴ *See* <http://www.oscn.net/dockets/GetCaseInformation.aspx?db=tulsa&number=CF-2016-4058&cmid=2970365>.

same series of criminal acts or transactions.” (Appellant’s Brief at 6-7). To the contrary, a logical relationship connected the defendant’s repeated and ongoing domestic abuse of Ms. Clopton, and consolidation of his crimes in a single trial was proper. The defendant’s challenge to the joinder of his offenses is entirely without merit.

Application of the *Glass* factors for joinder demonstrates the propriety of consolidating the defendant’s crimes in a single trial. First of all, the defendant’s crimes all involved the same type of domestic abuse against the same victim, Charis Clopton. The defendant committed multiple acts of anger-driven physical violence against Ms. Clopton, each time causing her various degrees of bodily harm, emotional distress, and property damage. On July 17, 2016, the defendant became angry with Ms. Clopton and, after yelling at her, began smashing Ms. Clopton’s belongings in her overnight bag (Tr. III, 440-41). When Ms. Clopton attempted to run out the door, the defendant grabbed her by the pants and pulled her down to the floor, causing her bruises (Tr. III, 442). Before Ms. Clopton was able to leave in her vehicle, the defendant punched out her passenger-side window with his fist (Tr. III, 443). On July 23, 2016, after insisting that he drive Ms. Clopton home from a local bar, the defendant grabbed Ms. Clopton’s wrist and forcefully used her thumb to unlock her iPhone (Tr. III, 457-59). Though Ms. Clopton urged the defendant to leave her home, the defendant merely laughed at her and laid down in her bed (Tr. III, 459-61). When Ms. Clopton set off her panic alarm, the defendant shattered her phone, and then smashed her panic alarm, before grabbing Ms. Clopton by the back of the hair, throwing her to the floor, and repeatedly kicking her in the side (Tr. III, 461). The defendant destroyed her television, computer, and living room furniture, and was eventually found by police hiding in Ms. Clopton’s garage attic (Tr. III, 462-64, 677). On the morning of December 10, 2016, Ms. Clopton was found lying in a pool of dried blood on her kitchen floor, beaten and battered, with severe injuries to her head, with her

hair “glued” to the kitchen linoleum, and with her hands “mangled” (Tr. II, 255, 258, 260, 265-66, 276, 314-15, 346). A warped frying pan was found next to Ms. Clopton’s body, as were a shattered television and broken pieces of a chair with long hair stuck to them (Tr. II, 263, 345-46; Tr. IV, 821-23). The apparatus of Ms. Clopton’s insulin pump was found disconnected, and Ms. Clopton suffered a variety of bruises, abrasions, and lacerations to her body (Tr. II, 311, 367, 374). Ms. Clopton had a bite mark on her shoulder; a forensic swab of that bite revealed a partial DNA profile match with the defendant (Tr. II, 367; Tr. IV, 991). In total, the defendant engaged in a pattern of escalating domestic abuse against Ms. Clopton, causing her continuous, repeated physical and emotional harm, in addition to extensive property damage. These crimes clearly involve the same type of offense. *See Smith*, 2007 OK CR 16, ¶ 23, 157 P.3d at 1165.

The defendant now separates his crimes into two categories: “the December crimes” and “the July crimes,” in an effort to diminish the similarities between his multiple acts of violence against Ms. Clopton. (Appellant’s Brief at 7). The defendant alleges that his “two sets of crimes” presented different types of offenses, because his crimes in December were much more severe than his crimes in July. (Appellant’s Brief at 7). The defendant offers no authority for his overly narrow interpretation of this joinder factor, nor does he otherwise support his suggestion that this Court should look to the severity of injuries caused to a victim in determining whether a defendant’s crimes were properly tried together. The varying severity of the defendant’s crimes should have no bearing on the joinder analysis. *See Gilson v. State*, 2000 OK CR 14, ¶¶ 47-48, 8 P.3d 883, 904-05 (upholding joinder of appellant’s crimes for injury to a minor child and first-degree murder of that child, where the abuse of the child escalated and ultimately culminated in appellant’s murder of the child). Rather, though Ms. Clopton sustained numerous injuries of various magnitudes, each injury was inflicted at the hands of the defendant in an escalating exhibition of anger and control,

all while the defendant and Ms. Clopton were engaged in an ongoing romantic relationship. Because these crimes involved the same type of offense—albeit by increasingly severe acts of violence—joinder was clearly proper. *See Smith*, 2007 OK CR 16, ¶ 23, 157 P.3d at 1165.

The defendant's crimes also occurred over a relatively short span of time and in roughly the same location. Though just over four (4) months separated the crimes in July, 2016, from the crimes in December, 2016, the defendant and Ms. Clopton were engaged in an “off and on” romantic relationship throughout this time (Tr. III, 434). Ms. Clopton sought and obtained a protective order against the defendant in February of 2016 (Tr. III, 435). Despite the defendant's violence, Ms. Clopton continued to see him because she “loved him,” and because “[i]t was easier staying” (Tr. III, 434-35, 453). The fact that the defendant's abuse of Ms. Clopton spanned several months should create no barrier to those crimes being joined, particularly in light of the defendant's domestic history and ongoing relationship with Ms. Clopton. *See Lott v. State*, 2004 OK CR 27, ¶ 35, 98 P.3d 318, 333-34 (upholding joinder of rape and murder of two women separated by four (4) months); *Pack v. State*, 1991 OK CR 109, ¶ 8, 819 P.2d 280, 283 (upholding joinder of burglaries that occurred eight (8) weeks apart). Indeed, in a joinder analysis, this Court has recognized that “transaction” has a “flexible meaning,” which “may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship.” *Gilson*, 2000 OK CR 14, ¶ 46, 8 P.3d at 904 (citation and internal quotation marks omitted). The defendant's repeated acts of abuse over several months and in similar ways, therefore, shared a logical connection such that joinder of his crimes was proper. *See id.*

Nor should the different locations of the defendant's crimes defeat their joinder. *See Smith*, 2007 OK CR 16, ¶ 25, 157 P.3d at 1165 (noting that the “proximity nexus for joinder” is not determined by an “arbitrary maximum distance”). The defendant attacked Ms. Clopton at her home

in Broken Arrow on July 23, 2016, and again in the early morning hours of December 9, 2016. The defendant's violence towards Ms. Clopton on July 17, 2016, occurred at the home of Conor McGee, a mutual friend, in Tulsa (Tr. III, 438-39, 442). All of the defendant's crimes were committed in sufficiently close proximity, because each act of violence occurred at a location known and familiar to both the defendant and Ms. Clopton (including Ms. Clopton's own home, and the home of Mr. McGee, a friend). The fact that some of the crimes took place across town should not defeat the proximity analysis. *See Smith*, 2007 OK CR 16, ¶ 25, 157 P.3d at 1165 (finding sufficient proximity for joinder of crimes fifteen (15) miles apart, "given Oklahoma City's sprawling geography and the fact that both murders occurred within the city limits in south Oklahoma City"); *Middaugh v. State*, 1988 OK CR 295, ¶¶ 9-10, 767 P.2d 432, 435 (upholding joinder of crimes when committed in two different towns within the same county).

Finally, the defendant's crimes exhibit a common scheme and effort to control Ms. Clopton through means of physical violence and domestic abuse. The defendant's crimes in both July and December involve elements of bodily harm, including various lacerations, abrasions, and contusions inflicted on Ms. Clopton's person. In each incident, the defendant also destroyed Ms. Clopton's belongings, exhibiting a reckless disregard for her personal property. On July 17, 2016, the defendant smashed the items in Ms. Clopton's overnight bag and subsequently punched out the window of her vehicle (Tr. III, 441, 443). On July 23, 2016, the defendant shattered Ms. Clopton's iPhone before smashing the panic alarm in her home and destroying the television and computer in her living room (Tr. III, 461-62, 673, 683). On December 9, 2016, the defendant again shattered Ms. Clopton's television, broke her chair into pieces, and bent her frying pan (Tr. II, 263, 345-46). Though the means of violence against Ms. Clopton took various forms, each act of abuse was driven by the defendant's rage, control, and physical domination of Ms. Clopton and her

personal belongings. *See Collins*, 2009 OK CR 32, ¶¶ 18-19, 223 P.3d at 1018 (considering a joinder challenge, finding a defendant's use of "force and fear" in various acts of coercion, threats, kidnapping, and sexual exploitation of similar female victims exhibited appellant's "unique predatory pattern and common plan of attack," such that a "pattern and common plan" made joinder necessary). Because the defendant's repeated and ongoing domestic abuse of Ms. Clopton illustrated a common scheme or pattern of offenses against her, his crimes were properly joined in one action. *See Smith*, 2007 OK CR 16, ¶ 23, 157 P.3d at 1165.

The defendant contends that, in total, prejudice resulted from the joinder of these crimes together, because there was "a great disparity in the amount of evidence for the July crimes and the December crimes." (Appellant's Brief at 9-10). The defendant's claim of prejudice is entirely devoid of any legal authority or support.⁵ The defendant baldly asserts that the December crimes were supported with weaker evidence because Ms. Clopton had no personal memory of the attack. On this point, the defendant claims the State "piggybacked their weak December case with their strong July case." (Appellant's Brief at 10). This argument is meritless, for multiple reasons.

First, though Ms. Clopton was unable to remember the details of her attack in December, strong circumstantial evidence supported the defendant's guilt of the crimes arising from that incident. Shortly after Ms. Clopton arrived at Ms. Hermann's birthday party on the evening of December 8, 2016, the defendant showed up uninvited (Tr. III, 480-81). The defendant made eye contact with Ms. Clopton from across the party, and Ms. Clopton left shortly thereafter, driving

⁵ To the extent that the defendant offers no authority for his claim of prejudice, review of his argument should be waived. *See Rule 3.5(A)(5), Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018) (requiring appellant's brief to consist of "[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 . . . Failure to list an issue pursuant to these requirements constitutes waiver of alleged error.") (emphasis added).

her own car home (Tr. III, 490-91). Ms. Clopton's last outgoing call was made to the defendant's phone at 12:39 A.M. on December 9, 2016 (Tr. IV, 919). Ms. Clopton was subsequently found on the morning of December 10, 2016, lying in a pool of dried and coagulated blood on her kitchen floor with a dented frying pan nearby (Tr. II, 260, 263, 306, 344, 346). There were no signs of forced entry to the home (Tr. II, 343). A partial DNA profile matching the defendant was found in forensic swabs taken from both a bite wound on Ms. Clopton's shoulder, as well as a clear stain found on the kitchen floor near Ms. Clopton's body (Tr. IV, 828-29, 851, 972-73, 985, 991). The defendant admitted to his sister, Kari Morgan, that he had gotten into an argument with Ms. Clopton, had hit her with a pan, and then "blacked out" (Tr. IV, 772). Tracy Howard, Ms. Clopton's next-door neighbor, observed the defendant standing on Ms. Clopton's porch on the afternoon of December 9, 2016 (Tr. III, 613-14, 622). Ms. Howard watched as the defendant came out of Ms. Clopton's house, left in his own vehicle, came walking back to Ms. Clopton's house, and left a second time in Ms. Clopton's vehicle (Tr. III, 615-621). Ms. Clopton's vehicle was later found abandoned on a nearby street (Tr. IV, 781-83, 916-17). The trial court defined circumstantial evidence for the jury, and properly instructed the jury that circumstantial evidence is given the same weight as direct evidence. *See* Instruction Nos. 9-3, 9-4, 9-5 OUJI-CR(2d); (O.R. 263-65). The defendant's December crimes were therefore supported by ample evidence to sustain those convictions.

Moreover, the defendant's allegation of prejudice is belied by the fact that, even had his counts been severed and tried separately, his repeated acts of violence against Ms. Clopton would have been admissible at each trial under 12 O.S.2011, § 2404(B). *See Lott*, 2004 OK CR 27, ¶ 37, 98 P.3d at 334 (holding no prejudice resulted from joinder of counts when "evidence of either offense would have been admissible in a trial of the other pursuant to 12 O.S.1991, § 2404(B) as

evidence of other crimes or wrongs to prove motive, intent, or common scheme or plan"); *Gilson*, 2000 OK CR 14, ¶ 50, 8 P.3d at 905 ("Evidence of the other offenses would have been permissible pursuant to 12 O.S.1991, § 2404(B) to prove identity, common scheme or plan, and absence of mistake or accident. Accordingly, we cannot find that the joinder of offenses severely prejudiced Appellant's right to a fair trial."). Therefore, the defendant's claim of prejudice resulting from the joinder of his crimes is meritless.

Finally, the jury was instructed that each crime be given separate consideration. That instruction read as follows:

You must give separate consideration for each offense. The defendant is entitled to have his case decided on the basis of the evidence and law which is applicable to each offense. *The fact that you return a verdict of guilty or not guilty on one offense should not, in any way affect your verdict regarding any one of the other offenses.*

See Instruction No. 9-6A, OUJI-CR(2d) (emphasis added); (O.R. 266). The jury was also presented with separate verdict forms for each crime (O.R. 210-22). This Court presumes that jurors follow the instructions given them. *See Jackson v. State*, 2007 OK CR 24, ¶ 16, 13 P.3d 596, 602. The defendant offers nothing in the record showing the jury did not follow this instruction. The defendant's baseless allegation of prejudice should accord no relief. *See Smith*, 2007 OK CR 16, ¶ 38, 157 P.3d at 1168-69 (rejecting appellant's claim of prejudice resulting from joinder when the jury was instructed to give separate consideration for each offense, holding that "[w]ith nothing but a bare allegation of prejudice, and in light of the fact that the jury was specifically instructed to give separate consideration to each offense, we cannot conclude that joinder [of the crimes] resulted in prejudice so great as to deny [appellant] a fair trial"). In total, because the defendant's crimes were properly joined, the defendant can show no error—much less plain error—in the consolidation of his offenses together in one trial. *See Sonnier v. State*, 2014 OK CR 13, ¶ 14, 334

P.3d 948, 953 (finding no plain error when there was no error to begin with). His claim for relief must be rejected accordingly.

PROPOSITION II

SUFFICIENT EVIDENCE WAS PRESENTED TO SUSTAIN THE DEFENDANT'S CONVICTION ON COUNT XI.

In his second proposition of error, the defendant argues that insufficient evidence supported his conviction on Count XI, Interference with Emergency Telephone Call. Because ample evidence was presented to show each element of this crime by virtue of the defendant shattering Ms. Clopton's cell phone and smashing her activated panic alarm, the defendant's argument must fail.

Evidence is sufficient to support a conviction when such evidence allows a rational trier of fact to find guilt beyond a reasonable doubt, taking all evidence and drawing all reasonable inferences in the light most favorable to the State. *Mitchell v. State*, 2018 OK CR 24, ¶ 11, 424 P.3d 677, 682; *Coddington v. State*, 2006 OK CR 34, ¶ 66, 142 P.3d 437, 455. When presented with an allegation of insufficient evidence, “[t]his Court does not reweigh conflicting evidence or second-guess [] fact-finding decisions,” but instead will “accept all reasonable inferences and credibility choices that tend to support the verdict.” *Mitchell*, 2018 OK CR 24, ¶ 11, 424 P.3d at 682.

In making a sufficiency determination, this Court evaluates “the direct and circumstantial evidence, crediting all inferences that could have been drawn in the State’s favor.” *Davis v. State*, 2004 OK CR 35, ¶ 22, 103 P.3d 70, 78; *see also Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04 (“[D]ue process requires a reviewing court to determine whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found

the essential elements of the crime beyond a reasonable doubt" (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d. 560 (1979) (internal quotation marks omitted))).

Here, the evidence presented was sufficient to support the defendant's conviction for Interference with Emergency Telephone Call, because the State demonstrated each essential element of the crime beyond a reasonable doubt. The elements of this crime are as follows:

First, any person;

Second, intentionally interrupts, disrupts, impedes, or prevents;

Third, an emergency phone call.

21 O.S.2011, § 1211.1; (O.R. 260). The defendant now attacks the sufficiency of the evidence on the third element, alleging that because Ms. Clopton never attempted to make an emergency phone call, the defendant could not have prevented the same. (Appellant's Brief at 12). This argument is entirely without merit.

Despite the defendant's claims, each element of the crime is supported by the facts. On July 23, 2016, the defendant and Ms. Clopton were alone at Ms. Clopton's house in Broken Arrow, after the defendant insisted on driving Ms. Clopton home from a local bar (Tr. III, 454, 457-58). After returning home, the defendant demanded to see Ms. Clopton's cell phone; she refused (Tr. III, 458). In response, the defendant forcibly grabbed Ms. Clopton's wrist and used her thumb to unlock her iPhone using the fingerprint passcode feature (Tr. III, 459). Ms. Clopton then went outside to build up her courage. When she returned inside, she asked the defendant to leave, informing him that if he did not leave, she would set off the home's panic alarm (Tr. III, 459-60). The defendant merely laughed at her request to leave (Tr. III, 460). When asked at trial why she did not call the police using her phone, Ms. Clopton admitted that she "just never did," explaining further that "[the defendant] had it. He was on it" (Tr. III, 460). Accordingly, Ms. Clopton set off

the panic alarm, and the defendant came into the living room, begging with Ms. Clopton to shut the alarm off (Tr. III, 460). Ms. Clopton turned the alarm off and the defendant returned to Ms. Clopton's bedroom, laying down in her bed (Tr. III, 460-61). Ms. Clopton then triggered the alarm a second time (Tr. III, 461). The defendant came back into the living room, yelling, and threw Ms. Clopton's phone at the wall, "shattering it" (Tr. III, 461). The defendant then picked up Ms. Clopton's panic alarm and smashed it, before grabbing Ms. Clopton by the back of the hair, throwing her to the floor, and kicking her in the side (Tr. III, 461). Around 4:42 A.M., the police arrived in response to the panic alarm and found the defendant hiding in Ms. Clopton's garage attic (Tr. III, 670, 677). Officers Jamie Dufriend and Jonathan Seagraves with the Broken Arrow Police Department responded to the panic alarm and made contact with Ms. Clopton. Officer Seagraves described Ms. Clopton as "very frightened. Afraid. Scared . . . you could tell she was visibly upset" (Tr. III, 682). As a whole, the testimony heard demonstrates that Ms. Clopton wanted to call 9-1-1 but was prevented from doing so, as a result of the defendant having taken her phone from her.

Based on the facts presented at trial, it is evident the defendant interfered with and prevented Ms. Clopton's efforts to make an emergency phone call. The defendant forcibly took Ms. Clopton's cell phone from her (and eventually shattered it), despite her desire to call 9-1-1 and seek the help of law enforcement (Tr. III, 458-61, 682). The defendant remained in Ms. Clopton's home, clearly against her will, as shown by the fact that her requests for the defendant to leave were met with nothing but laughter (Tr. III, 460). In fact, in a demonstration of control, the defendant got into Ms. Clopton's bed after she asked him to leave (Tr. III, 460-61). Even after police arrived, the defendant was still in Ms. Clopton's home; the defendant was found hiding in Ms. Clopton's attic (Tr. III, 677). Ms. Clopton twice triggered the panic alarm in her home—her

only means of alerting emergency personnel to her location—showing Ms. Clopton’s intent to make an emergency call (Tr. III, 460-61). Based on the defendant’s possession, control, and eventual destruction of Ms. Clopton’s cell phone, despite her intent and desire to route law enforcement to her location, sufficient evidence showed the defendant prevented an emergency phone call. The testimony at trial established each and every element of this crime. *See* 12 O.S.2011, § 1211.1. On balance, in light of the testimony heard regarding this incident, “taking all evidence and drawing all reasonable inferences in the light most favorable to the State,” *Coddington*, 2006 OK CR 34, ¶ 66, 142 P.3d at 455, the defendant’s conviction and sentence on Count XI must be upheld.

PROPOSITION III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN OVERRULING THE DEFENDANT’S MOTION FOR A MISTRIAL.

In his third proposition of error, the defendant alleges the trial court abused its discretion in overruling his request for a mistrial after one lay witness for the State, Gene Gregg, made a passing mention of a rape kit. For the reasons discussed below, the trial court did not abuse its discretion in refusing to declare a mistrial. The defendant’s argument should accord no relief.

A trial court’s ruling on a motion for mistrial is reviewed by this Court for an abuse of discretion. *Randolph v. State*, 2010 OK CR 2, ¶ 9, 231 P.3d 672, 676; *Jackson v. State*, 2006 OK CR 45, ¶ 11, 146 P.3d 1149, 1156. Trial courts have the authority to declare a mistrial when, “taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.” *Randolph*, 2010 OK CR 2, ¶ 9, 231 P.3d at 675 (citing *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580, 6 L. Ed. 165 (1824) (internal quotation marks omitted)). A mistrial is warranted only when “an event at trial results in a

miscarriage of justice or continues an *irreparable and substantial violation of an accused's constitutional or statutory rights.*" *Knighton v. State*, 1996 OK CR 2, ¶ 65, 912 P.2d 878, 894 (emphasis added). Ultimately, denial of a motion for mistrial is not an abuse of discretion unless the trial court's ruling "is clearly made outside the law or facts of the case." *Id.*, 1996 OK CR 2, ¶ 64, 912 P.2d at 894.

Here, the defendant challenges the trial court's decision to overrule his request for a mistrial after one witness for the State mentioned a rape kit in his testimony. In context, the State was questioning Mr. Gregg about how emergency personnel responded to the scene and subsequently transported Ms. Clopton to the hospital (Tr. II, 265-66). The State then asked Mr. Gregg whether he was present with Ms. Clopton at the hospital, and whether he observed her while she was there (Tr. II, 266). Mr. Gregg responded: "Yes. While they—we got there about the time they were doing the rape kit and we couldn't go—," at which point the defense promptly objected (Tr. II, 266-67). The trial court immediately sustained the objection and admonished the jury: "Ladies and gentlemen, you're to disregard that last statement" (Tr. II, 267). The parties then approached the bench, and outside the hearing of the jury, the following colloquy ensued:

Defense Counsel: Your Honor, at this time I'm moving for mistrial.

The Court: We had this discussion.⁶ What—did you not talk to your witnesses?

The State: I advised my forensic nurse.

⁶ On the first day of trial, after dismissing the jurors for the day, the trial court heard argument from the parties regarding the admissibility of sexual assault evidence (Tr. I, 150-56). The State argued that the violence against Ms. Clopton had sexual undertones, given the bite mark on her shoulder, the presence of a clear stain on the kitchen floor, and the fact that she was found with her pants partially pulled down (Tr. I, 150-51). The defense argued that any sexual assault evidence should be excluded as overly prejudicial, particularly since no charges were filed alleging acts of a sexual nature (Tr. I, 152-54). The trial court permitted the State to introduce evidence relating to the clear stain found on the floor, but restricted the State's Sexual Assault Nurse Examiner (SANE) from representing her field of expertise to the jury, and prohibited the State from leaving the impression that a sexual assault had occurred (Tr. I, 154-55).

The Court: No. No. I'm talking about this witness because this witness just said something—

The State: No, I did not advise him.

The Court: What is the purpose of me making [a] ruling and informing you to—of them if you're not gonna talk to your witnesses about this?

The State: He never mentioned the rape kit to me before. We've met—I just—she had said earlier that she was gonna object to this—some of the photos because they were at the hospital, so my goal—

The Court: That's not the point. Go over and tell him that he cannot talk about this again.

The State: Yes, Your Honor.

The Court: And I'm going to overrule a mistrial at this point but you all are on thin ice about this. I want you to make sure your witnesses—all of them—understand that they can't talk about that, or we're gonna be trying [] this case again. Do we understand?

(Tr. II, 267-68). The parties acknowledged the trial court's ruling, and the State continued questioning Mr. Gregg without further incident or mention of this issue.

The defendant now attacks the trial court's decision to overrule the defense's motion for a mistrial, claiming there was a "manifest necessity" to order a mistrial based solely on Mr. Gregg's isolated and undeveloped mention of a rape kit, despite the trial court's immediate admonishment to the jury to disregard Mr. Gregg's statement. (Appellant's Brief at 13). Principally, the defendant attempts to characterize Mr. Gregg's comment as improper bad act evidence under *Burks v. State*, 1979 OK CR 10, ¶ 2, 594 P.2d 771, 772, *overruled on other grounds by Jones v. State*, 1989 OK CR 7, ¶ 8, 772 P.2d 922, 925. The defendant alleges the mere mention of a rape kit caused him prejudice "by allowing evidence of an uncharged crime to go to the jury." (Appellant's Brief at 15). To the contrary, no evidence about the rape kit ever went to the jury other than Mr. Gregg's passing mention of the words "rape kit," without any additional details or elaboration. The

prosecutor did not elicit this comment from the witness; the context of the State's questioning shows the State was merely asking whether Mr. Gregg followed Ms. Clopton to the emergency room, and whether he observed Ms. Clopton's condition following her admission. At the bench, the prosecutor explained that she was previously unaware that Mr. Gregg even had knowledge of a rape kit, noting that “[h]e never mentioned the rape kit to me before” (Tr. II, 267). The State otherwise complied with the trial court's restriction on the admissibility of sexual assault evidence and no further mention of this issue was made.

Moreover, the defendant lodged a prompt objection to the testimony, and the trial court immediately admonished the jury to disregard Mr. Gregg's statement (Tr. II, 267). Though the defendant now argues that “the simple admonishment to disregard is unlikely to help,” his argument on this point is entirely undeveloped and unsupported. (Appellant's Brief at 15). To the contrary, this Court has previously held that an admonishment to the jury generally cures any error flowing from a question asked unless that error appears to have determined the verdict. *Parker v. State*, 2009 OK CR 23, ¶ 26, 216 P.3d 841, 849; *see also Welch v. State*, 2000 OK CR 8, ¶ 26, 2 P.3d 356, 369-70 (“[W]hen inadmissible evidence or an improper comment is presented to a jury, an admonishment to the jury by the court that the evidence or comment is not to be considered will cure any error.”); *Andrews v. State*, F-2017-726, slip op. at 29 (Okl. Cr. Feb. 7, 2019) (unpublished and attached as Exhibit A)⁷ (finding no abuse of discretion in trial court's refusal to grant a mistrial based on improper comments heard from a State's witness injecting testimony about an undisclosed bad act—thereby violating the trial court's discovery order—when no evidence

⁷ Each unpublished decision cited by the State is cited because no published case would serve as well the purpose for which counsel cites it, and all are attached as exhibits, pursuant to Rule 3.5(C)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018).

showed that testimony had an effect on the verdict, holding the trial court's admonition to the jury cured any error resulting from the improper testimony).

For example, in *Parker*, this Court considered appellant's motion for mistrial following the State's elicitation of testimony from a witness regarding a previously undisclosed alleged bad act. *Parker*, 2009 OK CR 23, ¶ 23, 216 P.3d at 848. There, appellant's counsel objected to the testimony, and after a bench conference, the trial court declared a recess to more fully consider the issue. *Id.*, 2009 OK CR 23, ¶ 24, 216 P.3d at 848. The trial court ultimately rejected appellant's request for a mistrial, reconvened the jury, and admonished the jury "to disregard what you heard" regarding the alleged bad act. *Id.*, 2009 OK CR 23, ¶ 25, 216 P.3d at 848-49. On appeal, in light of the overwhelming evidence sustaining appellant's conviction, this Court found the trial court's admonition sufficient to remedy any error caused by the witness's impermissible testimony. *Id.*, 2009 OK CR 23, ¶ 27, 216 P.3d at 849 ("This Court does not hesitate to conclude that the trial court's admonishment cured any error from the elicitation of the undisclosed testimony from [the witness].").

Likewise, in the instant case, the trial court admonished the jury to disregard the comment made by Mr. Gregg. Unlike in *Parker*, however, the admonishment here was given immediately following Mr. Gregg's statement (Tr. II, 267). If an admonishment given after a court's recess effectively cures error, as in *Parker*, an admonishment given contemporaneously with the witness's testimony should certainly remedy that error. *See Parker*, 2009 OK CR 23, ¶¶ 24-25, 27, 216 P.3d at 848-49. Moreover, the State presented overwhelming evidence of the defendant's crimes independent of this improper comment from Mr. Gregg. Victim testimony was heard from Ms. Clopton about the defendant's ongoing and repeated abuse over the span of many months, including multiple willful violations of her protective order and various incidents involving

property damage and bodily injury to Ms. Clopton's person (Tr. III, 441-43, 460-62, 469-70, 493). This abuse culminated in the defendant's attack on Ms. Clopton in the early morning hours of December 9, 2016, wherein Ms. Clopton suffered severe head and hand trauma (Tr. II, 260, 265, 287-88, 297, 367, 371-74; Tr. III, 584-86). Though Ms. Clopton had no memory of that particular incident, a chain of circumstantial evidence linked the defendant to the scene, including DNA evidence swabbed from a clear stain on the kitchen floor and swabbed from a bite wound on Ms. Clopton's shoulder, in addition to GPS location data and phone call logs (Tr. IV, 875-87, 977, 985, 991). The defendant later admitted to Kari Morgan that he had gotten into an argument with Ms. Clopton at her house and that he hit Ms. Clopton with a pan before blacking out (Tr. IV, 772). In total, because the evidence supported the defendant's convictions independent of Mr. Gregg's isolated mention of a rape kit, and because the trial court immediately admonished the jury to disregard that comment, this testimony did not result in an "irreparable and substantial violation of an accused's constitutional or statutory rights." *Knighton*, 1996 OK CR 2, ¶ 65, 912 P.2d at 894; *see also Parker*, 2009 OK CR 23, ¶¶ 26-27, 216 P.3d at 849. Because the trial court's refusal to grant a mistrial was not "clearly made outside the law or facts of the case," the trial court therefore did not abuse its discretion in rejecting the defendant's request. *Knighton*, 1996 OK CR 2, ¶ 64, 912 P.2d at 894.⁸

Lastly, the defendant contends that this comment by Mr. Gregg was "likely to cause an emotional reaction in jurors," and that the mention of a rape kit "did nothing but prejudice" the defendant. (Appellant's Brief at 15). The trial court, at the close of evidence, issued an instruction

⁸ The defendant contends "[t]he trial judge showed that he understood the seriousness of what the jury heard." (Appellant's Brief at 14). This only underscores the State's position that no abuse of discretion occurred—the trial court clearly considered the potential harm from the mention of the rape kit but decided, in its discretion, that no mistrial was warranted.

admonishing the jury not to consider sympathy or emotion in reaching a fair verdict (O.R. 235); *see also* Instruction No. 10-8, OUJI-CR(2d). To the extent that Mr. Gregg's comment triggered emotion or sympathy, this jury instruction was sufficient to remedy any resulting prejudice. *See Garrison v. State*, 2004 OK CR 35, ¶ 119, 103 P.3d 590, 611 (“The jury was instructed not to allow sympathy, sentiment or prejudice enter into their deliberations. We presume they followed that instruction.”). On balance and as a whole, because the trial court did not abuse its discretion in refusing to grant a mistrial, the defendant’s argument and proposition must be rejected. *See Randolph*, 2010 OK CR 2, ¶ 9, 231 P.3d at 676.

PROPOSITION IV

SUFFICIENT EVIDENCE WAS PRESENTED TO SUSTAIN THE DEFENDANT’S CONVICTION ON COUNT I.

In his fourth proposition, the defendant again raises a challenge to the sufficiency of the evidence at trial, now attacking his conviction on Count I, Assault and Battery by Means or Force Likely to Produce Death. Specifically, the defendant avers that Ms. Clopton’s blood sugar level at the time she was found shows that she could not have laid injured on her kitchen floor for thirty (30) hours, thereby altering the timeline of the attack and allegedly exculpating the defendant. Because the defendant’s argument is nothing more than an attempt to speculate and second-guess the jury’s findings, and because ample evidence was otherwise offered to support the defendant’s conviction on Count I, his argument must be rejected.

The standard for assessing the sufficiency of the evidence is discussed in Proposition II, *supra*. Rather than challenging the State’s evidence on any particular element for his crime of Assault and Battery by Means or Force Likely to Produce Death, the defendant instead contends generally that Ms. Clopton’s attack in the early hours of December 9, 2016, “could not have

happened as the State alleged.” (Appellant’s Brief at 16). Ms. Clopton used an insulin pump consistent with Type I diabetes; the apparatus of that pump was found disconnected from her arm at the time that paramedics arrived on scene (Tr. II, 310-11). The defendant points to paramedic Trevor Morgan’s testimony that Ms. Clopton’s blood sugar was within “normal range” at the time that she was found in her kitchen on the morning of December 10, 2016, arguing that Mr. Morgan’s opinion about Ms. Clopton’s blood sugar level shows the attack “must have” occurred closer to the time Ms. Clopton was found, and insisting that the defendant’s whereabouts were accounted for during that time. (Appellant’s Brief at 16-17). This reasoning is flawed for multiple reasons.

First of all, Ms. Clopton’s blood sugar level at the time she was found on December 10, 2016, should not be dispositive of how long she laid on her kitchen floor after she was attacked. Although Mr. Morgan testified that Ms. Clopton’s blood sugar was “within normal range” when she was loaded into the ambulance, he also noted that “everybody has a different normal,” and that “[i]t depends on the person, the patient I guess” (Tr. II, 325-26). No other evidence was presented regarding the extent of Ms. Clopton’s dependence on her insulin pump or the severity of her particular diabetic condition, nor was any medical testimony offered to show the relationship between insulin deprivation and blood sugar depletion. Indeed, the defendant cites no authority for his assertion that Ms. Clopton’s blood sugar level was incompatible with her lack of insulin, standing only on his unsupported conjecture that “[i]f she had really laid without insulin for 30 hours, her blood sugar would have been outside the normal range,” and concluding that “she must have been assaulted later on the 9th, or in the early hours of the 10th.”⁹ (Appellant’s Brief at 17).

⁹ The defendant’s failure to support his assertions with any authority whatsoever should effect a waiver of his claim. *See Rule 3.5(A)(5), Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018) (requiring appellant’s brief to consist of “[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

The defendant's logic relies on nothing more than a series of baseless inferences tenuously linked in an effort to second-guess the jury's fact-finding conclusions. Despite the defendant's reasoning, this Court has already noted that it will not "reweigh conflicting evidence or second-guess the fact-finding decisions of the jury," but will instead "accept all reasonable inferences and credibility choices that tend to support the verdict." *Mitchell*, 2018 OK CR 24, ¶ 11, 424 P.3d at 682. Because the jury reasonably concluded that Ms. Clopton was attacked by the defendant early on December 9, 2016, despite any alleged inconsistency in Ms. Clopton's blood sugar levels when she was eventually found, the defendant's meritless challenge to the sufficiency of the evidence should be rejected.

Moreover, the defendant's speculation is incompatible with the other evidence at trial, which showed the defendant's attack on Ms. Clopton occurred in the early morning hours of December 9, 2016, after Ms. Clopton returned home from the Mercury Lounge. First of all, the GPS cell data and call logs show Ms. Clopton's communication with the defendant during the time in question (Tr. IV, 919-20; State's Ex. 162). Ms. Clopton's last phone call was made to the defendant on December 9, 2016 at 12:37 A.M., and was terminated at 12:45 A.M. (Tr. IV, 919-20; State's Ex. 162). GPS coordinates showed the call was made while traveling away from the Mercury Lounge, and was ultimately terminated at the cell tower closest to Ms. Clopton's home (Tr. IV, 920). After her call to the defendant that morning, no other calls or cell communications from Ms. Clopton's phone were made; cell activity from Ms. Clopton's phone ceased entirely (Tr. IV, 911, 956; State's Ex. 162). According to Detective Seorgel, Ms. Clopton's cell phone was never recovered from the scene (Tr. IV, 931). Ms. Clopton's utter lack of outgoing cell phone

record . . . Failure to list an issue pursuant to these requirements constitutes waiver of alleged error." (emphasis added).

activity after calling the defendant in the early hours of December 9, 2016, leads to the reasonable inference that her attack occurred shortly thereafter. *Cf. Harjo v. State*, 1994 OK CR 47, ¶ 60, 882 P.2d 1067, 1078 (noting that juries are permitted to make reasonable inferences based on the evidence presented).

Additionally, the defendant suffered facial wounds consistent with the attack occurring early on December 9, 2016. On December 8, 2016, prior to Ms. Clopton's attack, Janet Gonzales saw the defendant at a party at Mr. McGee's house, and observed nothing unusual about the defendant's appearance, nor did she see any injuries on the defendant's person (Tr. IV, 734-35). The defendant returned to Mr. McGee's house later that evening, around 2 A.M. in the early hours of December 9, 2016, and was recorded on Mr. McGee's "Ring" doorbell camera (Tr. IV, 739-40; State's Ex. 149). In that doorbell video, the defendant can be seen wiping his forehead with his hand (State's Ex. 149; 0:49-0:53). Two witnesses subsequently observed the defendant with facial injuries. James Gilbert saw the defendant at a restaurant on the afternoon of December 9, 2016, and noted that the defendant had a scratch on his cheek (Tr. IV, 998-1000). Susie Atzbach saw the defendant at a local bar later in the evening of December 9, 2016, and also observed a scratch on the defendant's cheek, as well as a gash on the defendant's forehead (Tr. III, 633-34). Ms. Atzbach and the defendant took a picture together in the bar's bathroom; the defendant's facial wounds can be seen in that photograph (Tr. III, 637; State's Ex. 150). When Ms. Atzbach asked the defendant about his injuries, the defendant explained that he received the forehead gash when he fell getting out of a car "a couple of nights before," and that his cheek was recently burned by a cookie pan (Tr. III, 635). The timing of the defendant's injuries serves to corroborate the State's theory that the attack occurred in the early morning hours of December 9, 2016, and not later, as the defendant urges.

In total, the defendant's attack on the sufficiency of the evidence used to convict him on Count I is meritless and should afford him no relief. The State's timeline of when the attack occurred should not be undermined by the defendant's own second-guessing of the jury's findings of fact, particularly since the defendant's argument is devoid of any supporting authority and is merely his own appellate interpretation of the evidence presented. *See Mitchell*, 2018 OK CR 24, ¶ 11, 424 P.3d at 682. Moreover, adequate circumstantial evidence showed the defendant attacked Ms. Clopton in the early morning hours of December 9, 2016, and that she laid injured on her kitchen floor for approximately thirty (30) hours before receiving emergency medical care. Drawing all reasonable inferences and taking the evidence in the light most favorable to the State, it is clear that any rational trier of fact could have found the defendant's guilt on Count I beyond a reasonable doubt. *See id; Coddington*, 2006 OK CR 34, ¶ 66, 142 P.3d at 455. Because sufficient evidence sustained the defendant's conviction on Count I, the defendant's argument must fail accordingly.

PROPOSITION V

INSTRUCTING THE JURY ON THE ELEMENTS OF ASSAULT AND BATTERY BY MEANS OR FORCE LIKELY TO PRODUCE DEATH FOR THE DEFENDANT'S CHARGE IN COUNT I DID NOT VIOLATE THE DEFENDANT'S DUE PROCESS RIGHTS.

In his fifth proposition of error, the defendant contends that his constitutional rights were violated when he was charged by information with the crime of Assault and Battery with Intent to Kill, in violation of 21 O.S.2011, § 652(C), but the jury was ultimately instructed on the elements of Assault and Battery by Means or Force Likely to Produce Death, also in violation of 21 O.S.2011, § 652(C). Because the defendant received adequate notice of his charges before trial, based on the entirety of the pre-trial record, the defendant's due process rights were not violated

when the challenged instruction was given to the jury. The defendant's request for relief must be rejected.

As a general matter, this Court reviews for an abuse of discretion a trial court's decision regarding which instructions to give the jury. *Davis v. State*, 2018 OK CR 7, ¶ 7, 419 P.3d 271, 277; *Dill v. State*, 2005 OK CR 20, ¶ 11, 122 P.3d 866, 869 ("Jury instructions are a matter committed to the sound discretion of the trial court whose judgment will not be disturbed as long as the instructions, taken as a whole, fairly and accurately state the applicable law."). Although the defendant's argument is, on its surface, an attack on the propriety of the jury instruction given for Count I, the core of the defendant's due process claim challenges whether sufficient notice of the crime was given before trial. When confronted with an issue of allegedly insufficient notice in a charging instrument, "this Court will look to the entire record including discovery and preliminary hearing transcripts to ascertain whether the accused received satisfactory notice." *Oxley v. State*, 1997 OK CR 32, ¶ 4, 941 P.2d 520, 522. If review of the record shows the accused was given sufficient notice, no due process violation has occurred. *Id.*

As a threshold matter, the procedural history of this issue merits discussion. Here, the State originally charged the defendant by felony information on December 23, 2016, labeling Count I as "Assault and Battery with Intent to Kill" (O.R. 26). The State subsequently filed two different amended felony informations, though Count I remained entirely unchanged (O.R. 72, 191). Each information derived the statutory authority for the defendant's charge in Count I from 21 O.S.2011, § 652(C).¹⁰ The language of the information read as follows:

¹⁰ 21 O.S.2011, § 652(C) states the following:

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

(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

(O.R. 26, 72, 191). After a preliminary hearing held on March 10, 2017, the defendant was bound over for the crime of Assault and Battery with Intent to Kill, among other crimes (P.H. Tr. 82). At the defendant's jury trial on May 15, 2018, the State began its case by reading the information to the jury, announcing the defendant's charge in Count I as Assault and Battery with Intent to Kill (Tr. II, 234).

On the final day of trial and after the close of all evidence, the parties and the trial court engaged in a colloquy outside the presence of the jury regarding the selection of jury instructions (Tr. V, 1020-29). Though the descriptive label of the defendant's charge on Count I had consistently been "Assault and Battery with Intent to Kill" throughout the proceedings, the State requested the jury instead be given the instruction for Assault and Battery by Means or Force Likely to Produce Death (Tr. V, 1020); *see also* Instruction No. 4-7, OUJI-CR(2d). In support, the State cited this Court's decision in *Goree v. State*, 2007 OK CR 21, ¶¶ 3-5, 163 P.3d 583, 584-85, wherein it was recognized that the Legislature's 1992 amendment to § 652 removed the intent element from sub-section (C) (Tr. V, 1023-24). According to the State's reasoning, because the intent element was removed from § 652(C) (and thus, no specific jury instruction existed for the

conviction be guilty of a felony punishable by imprisonment in the State Penitentiary not exceeding life.

crime of “Assault and Battery with Intent to Kill”), and because the defendant’s charge in Count I was, in each information and throughout the pre-trial proceedings, consistently situated under 21 O.S.2011, § 652(C) (which encompasses the crime of Assault and Battery by Means or Force Likely to Produce Death), the jury should not be instructed on the element of intent (Tr. V, 1023-24). Defense counsel objected to the State’s proposed instruction, insisting that because the State captioned the crime in Count I as “Assault and Battery with Intent to Kill,” the jury should be instructed on the intent element (Tr. V, 1021-22). Though the defense insisted that the jury be required to find the element of intent, defense counsel did not articulate which jury instruction should have been given (Tr. V, 1021-22). Over defense counsel’s objection and noting the preservation of this issue for appeal, the trial court granted the State’s request and instructed the jury on Assault and Battery by Means or Force Likely to Produce Death, under Instruction No. 4-7, OUJI-CR(2d) (O.R. 238-39; Tr. V, 1028-29).

The defendant now challenges the trial court’s decision to instruct the jury as such, contending that because the State’s labeling of Count I included the words “Intent to Kill,” the State should have been required to prove that element. The defendant offers two reasons why instructing the jury on a crime different from the charge originally captioned in the felony information is tantamount to a due process violation. (Appellant’s Brief at 21). First, the defendant alleges the State lacked jurisdiction to seek a conviction for a crime different than the one initially charged. Second, the defendant insists that he lacked sufficient notice of which crime to defend against. Each of these claims is meritless and will be addressed in turn.

A. Proper jurisdiction allowed the State to try the defendant for Assault and Battery by Means or Force Likely to Produce Death.

The defendant first argues that the State had no jurisdiction¹¹ to try the defendant for Assault and Battery by Means or Force Likely to Produce Death, because such offense was “a different crime than the one that [the State] had charged.” (Appellant’s Brief at 21). This Court has held that “a trial court’s jurisdiction is triggered by the filing of an Information alleging the commission of a public offense with appropriate venue.” *Parker v. State*, 1996 OK CR 19, ¶ 21, 917 P.2d 980, 985. Although alleged defects in an information are governed by due process safeguards, such defects are not fatal to the trial court’s jurisdiction. *Id.* Rather, “any failure to allege facts constituting the offense raises due process questions *but does not affect the trial court’s jurisdiction.*” *Id.* (emphasis added). Despite any error in the State’s captioning Count I in the information as “Assault and Battery with Intent to Kill,” the defendant’s charges were properly filed under 21 O.S.2011, § 652(C). That sub-section of the statute includes the crime of Assault and Battery by Means or Force Likely to Produce Death. 21 O.S.2011, § 652(C). Because a defendant’s attack on an allegedly defective information more properly sounds as a due process challenge, the defendant’s jurisdictional complaint should be rejected. *See Parker*, 1996 OK CR 19, ¶ 21, 917 P.2d at 985.

B. The defendant had adequate notice of the charges against him.

The defendant next argues that he was harmed because he “did not know what to defend against.” (Appellant’s Brief at 21). This claim necessitates an analysis of whether the defendant

¹¹ Though the defendant alleges that “the prosecutor simply did not have jurisdiction,” (Appellant’s Brief at 21), considerations of jurisdictional issues in this context turn on whether the *trial court* had jurisdiction to hear the case, not whether the State had jurisdiction to bring those charges in the first place. *See, e.g., Parker v. State*, 1996 OK CR 19, ¶ 21, 917 P.2d 980, 985 (“Jurisdiction is conferred on the trial court by the commission of a public offense where venue properly lies in that trial court.”). As such, the jurisdiction of the trial court will be addressed here.

had sufficient notice of the charge against him in Count I. *See Oxley*, 1997 OK CR 32, ¶ 4, 941 P.2d at 522. Due process requires an accused to have notice of the crimes with which he has been charged. *Parker*, 1996 OK CR 19, ¶ 18, 917 P.2d at 985; *see also* U.S. Const. amends. VI, XIV; Okla. Const. art. 2, §§ 7, 20. The purpose of notice is to allow an accused to prepare an adequate defense to the charges against him. *Parker*, 1996 OK CR 19, ¶ 18, 917 P.2d at 985. Notice can be given by filing an information, which declares the charges brought against the accused, as well as the statutory authority for those charges. *Id.*, 1996 OK CR 19, ¶ 19, 917 P.2d at 985. Though that information must include a statement of facts forming the basis for the charge, the information need not explicitly enumerate or allege each element of the crime charged. *Id.*, 1996 OK CR 19, ¶ 23, 917 P.2d at 986; *see also* 22 O.S.2011, § 401 (establishing the necessary contents of a charging information). Rather, whether adequate notice of the charges was given requires a case-by-case interpretation of both the “four corners” of the charging instrument, along with the materials in pre-trial discovery and the information presented at the preliminary hearing. *Parker*, 1996 OK CR 19, ¶ 24, 917 P.2d at 986; *see also* *Oxley*, 1997 OK CR 32, ¶ 4, 941 P.2d at 522 (holding that, in order to determine whether a defendant’s due process right have been violated, “this Court will look to the entire record including discovery and preliminary hearing transcripts to ascertain whether the accused received satisfactory notice”).

Here, review of the entire pre-trial record shows the defendant was given sufficient notice of his charge for Assault and Battery by Means or Force Likely to Produce Death. First of all, the information listed charges under the correct statute (and sub-section of that statute) governing this crime, 21 O.S.2011, § 652(C). The factual narrative in the charging information gave adequate notice of his crime and, in particular, the element of “means or force likely to produce death,” including language that stated, in pertinent part: “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*" (O.R. 192) (emphasis added). At the time the parties discussed the jury instructions and this issue arose, the trial court made particular note of the statement of facts in the information: "I will also note in the language . . . it seems to be 652(C) language, at least in this Court's reading of it, in that it does not require specific intent as far as the information and the language" (Tr. V, 1025). Though the defendant argues that "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" (Appellant's Brief at 20), nowhere in this statement of facts does the language include any mention of the defendant's "intent to kill" Ms. Clopton (O.R. 192). To the contrary, despite the defendant's claim, the four corners of the charging instrument provided adequate notice to the defendant of his crime of Assault and Battery by Means or Force Likely to Produce Death. *See Parker*, 1996 OK CR 19, ¶ 24, 917 P.2d at 986.

Moreover, the transcript of the preliminary hearing also shows the defendant had sufficient notice of this particular charge. At that hearing, the State presented testimony regarding the extent of Ms. Clopton's injuries, including life-threatening wounds caused when the defendant allegedly beat Ms. Clopton in the head with a frying pan. Ms. Clopton noted that, once taken to the hospital, she required "[b]urr holes" in her skull as a result of her brain swelling (P.H. Tr. 30). Mr. Gregg stated that when he found Ms. Clopton injured on her kitchen floor, "[t]here was a bent-up frying pan that, you know, that looked like, it had been used in the assault . . . It was bent beyond description" (P.H. Tr. 51). Officer Burden testified to his observation of Ms. Clopton's injuries upon his arrival at the scene: "[T]here was blood all over the floor, all over her, and I thought she was dead. She was pale and her lips were blue" (P.H. Tr. 61). Regarding the presence of the bent

frying pan, Officer Burden averred: “The pan looked damaged *as if it had been used as an object to wield against somebody else*” (P.H. Tr. 67) (emphasis added). At the conclusion of the hearing and after the defendant demurred to the State’s evidence, the trial court noted the following:

With respect to the intent to kill, I’ll make the record as clear as I can. The Court is making reference to what was introduced as State’s Exhibit Number 1, which appears at first glance to be a dead body, and it was established that that was the father’s photograph of the victim at the scene after having been in some degree of unconscious state for two days. Her testimony is that they had to drill holes in her head to keep her brain from swelling. That’s sufficient for preliminary hearing.

(P.H. Tr. 81). Clearly, based on the testimony heard at the preliminary hearing, particularly with respect to the severity and extent of Ms. Clopton’s injuries, as well as the manner in which those injuries were caused, the defendant had sufficient notice of the State’s proposed evidence on the element of “by means or force likely to produce death.” *See* 12 O.S.2011, § 652(C); *Parker*, 1996 OK CR 19, ¶ 24, 917 P.2d at 986.

In the context of notice, a similar issue was presented and resolved in the unpublished decision of *Moore v. State*, F-2010-538, slip op. at 2-4 (Okl. Cr. Aug. 24, 2011) (unpublished and attached as Exhibit B). There, appellant was tried and convicted of Assault with Intent to Kill, in violation of 21 O.S.Supp.2007, § 652(C), resulting from appellant’s discharge of a firearm at an officer with the Enid Police Department. *Id.*, slip op. at 1, 3. Though the defendant’s crime was captioned in both the charging information and on the Judgment and Sentence as “Assault with Intent to Kill” under § 652(C), the factual narrative in the information described the alleged crime as a shooting with an intent to kill (which this Court noted should have been charged under § 652(A)). *Id.*, slip op. at 2-3. The trial court’s instructions to the jury fluctuated between Shooting with Intent to Kill and Assault with Intent to Kill, and the jury eventually returned a verdict on the former crime. *Id.*, slip op. at 3. On appeal, under plain error review, this Court found that any

inconsistencies in the way the State captioned and described appellant's crime were overcome by the factual basis in the information, which gave sufficient notice that the State intended to proceed under § 652(A) for Shooting with Intent to Kill. *Id.*, slip op. at 3-4. As in *Moore*, the pre-trial record in the instant case, in particular, the factual basis in the information, clearly indicates the defendant had sufficient notice of his charge for Assault and Battery by Means or Force Likely to Produce Death. *See Parker*, 1996 OK CR 19, ¶ 24, 917 P.2d at 986.

Despite proper notice of the crime charged, the defendant now suggests that the jury should instead have been instructed under the "attempt to kill" section of § 652(C), rather than the "means or force" section. (Appellant's Brief at 19). The deficiencies inherent in this argument are at least two-fold. First, the defendant failed to articulate this argument at the time of trial (Tr. V, 1021-22). Rather, as noted above, although the defense objected to the State's proposed instruction on "means or force," defense counsel was ambiguous as to which instruction was desired instead (Tr. V, 1021-22). Though the trial court has an obligation to give correct and complete instructions to the jury, *see Atterberry v. State*, 1986 OK CR 186, ¶ 8, 731 P.2d 420, 422, the defense failed to articulate which instruction it wanted given, other than to lodge a general objection to the State's request for "means or force" (Tr. V, 1021-22).

Moreover, the defendant's argument ignores the majority holding in *Goree*, 2007 OK CR 21, ¶¶ 3-5, 163 P.3d at 584-85, wherein this Court considered a similar notice issue and recognized that the Legislature's 1992 amendment to § 652 retained an explicit requirement of intent only in subsection (A), Shooting with Intent to Kill. There, appellant claimed error in the trial court's decision to modify the jury instruction for the defendant's charge of Assault and Battery with a Deadly Weapon under 21 O.S.2001, § 652(C), removing the element of intent to kill. *Id.*, 2007 OK CR 21, ¶¶ 1, 3, 163 P.3d at 583-84. Finding no error in the modified instruction, this Court reasoned

that the amended language of § 652(C) included no explicit requirement of intent. *Id.*, 2007 OK CR 21, ¶ 4, 163 P.3d at 584. In so holding, this Court noted: “The Legislature could easily have included an intent requirement in § 652(C) as well. It did not, instead referring to an assault and battery ‘using a deadly weapon’ or ‘by any means likely to produce death.’ Neither of these phrases, on their face, require the State to prove that the defendant intended to kill his victim.” *Id.* According to the majority, absent explicit statutory language requiring an intent to kill in § 652(C), the trial court need not instruct on the element of intent. Here, therefore, because the defendant was charged under § 652(C), and because intent is not required under § 652(C), the trial court did not err by refusing to instruct on the element of intent. *See id.*; *cf. Moore*, F-2010-538, slip op. at 3-4.

Admittedly, the majority in *Goree* left unaddressed the “attempt to kill” section in § 652(C). Judge Lumpkin’s concurrence in *Goree* challenged the majority’s decision, noting that, under § 652(C), an assault and battery that “in any manner attempts to kill” necessarily includes an element of specific intent to kill, because a defendant cannot make an “attempt to kill” without an “intent to kill.” *Goree*, 2007 OK CR 21, ¶ 5, 163 P.3d at 585 (Lumpkin, P.J., concurring in results). A separate concurrence from Judge Lewis found the same flaws in the majority’s holding on the issue of intent. *Id.*, 2007 OK CR 21, ¶¶ 4, 6, 163 P.3d at 586 (Lewis, J., concurring in part, dissenting in part). Though the defendant adopts the logic of Judge Lumpkin’s concurrence in his appellate argument, he offers no authority suggesting the majority’s reasoning in *Goree* does not still control in the context of § 652(C). (Appellant’s Brief at 19). In any event, even if the attempt to kill provision of § 652(C) does, indeed, require an intent to kill (as the concurrences in *Goree* suggest), the instruction for attempt to kill was still the incorrect instruction to give the jury based on the circumstances at hand. For all the reasons discussed above, the facts alleged in the

information and the evidence presented at the preliminary hearing gave the defendant sufficient notice that the State sought to proceed under the “means or force” section of § 652(C). *See Parker*, 1996 OK CR 19, ¶ 24, 917 P.2d at 986. In particular, nowhere in the factual basis in the information did the State alleged an “attempt to kill.” *See Moore*, F-2010-538, slip op. at 3-4. Accordingly, no error occurred in the trial court’s instruction to the jury on means or force.

The defendant also attempts to analogize this issue to the circumstances presented in *Curtis v. State*, 1948 OK CR 40, 86 Okl. Cr. 332, 193 P.2d 309. There, the State charged appellant with Grand Larceny of seven (7) domestic animals, alleging in the information that the value of the hogs stolen exceeded the threshold value for Grand Larceny. *Id.*, 1948 OK CR 40, 86 Okl. Cr. at 334-35, 193 P.2d at 311. The State failed to prove the value of the hogs at trial, however, and the trial court instead instructed the jury on the theory of Larceny of Domestic Animals, a separate crime without a value requirement. *Id.*, 1948 OK CR 40, 86 Okl. Cr. at 338, 193 P.2d at 313. This Court reversed appellant’s conviction for Larceny of Domestic Animals, finding that although the charging information was vague enough to sustain a charge for either crime, once the State elected to proceed at trial on the theory of Grand Larceny, the State could not then abandon that charge after the close of evidence and seek a conviction for Larceny of Domestic Animals instead. *Id.*, 1948 OK CR 40, 86 Okl. Cr. at 345, 348, 193 P.2d at 316, 317.

The defendant’s reliance on *Curtis* is misplaced for multiple reasons, however. First of all, in *Curtis*, the two crimes were derived from entirely separate statutes: Grand Larceny was charged under 21 O.S.A. § 1704, and Larceny of Domestic Animals was derived from 21 O.S.A. § 1716. *Id.*, 1948 OK CR 40, 86 Okl. Cr. at 337, 193 P.2d at 312. Second, these crimes each carried a different punishment potential. *Id.*, 1948 OK CR 40, 86 Okl. Cr. at 348, 193 P.2d at 317. Taken

together, these two factors were central to this Court's reasoning in reversing appellant's conviction:

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.' *He should be able to look at the four corners of the information or indictment and be able to understand the nature of the offense with which he stands charged.*

Id., 1948 OK CR 40, 86 Okl. Cr. at 344, 193 P.2d at 315 (emphasis added).

Here, unlike in *Curtis*, the defendant was charged, convicted, and sentenced under the same sub-section of the same statute, 21 O.S.2011, § 652(C) (O.R. 26, 72, 191, 222, 305). Moreover, whether the defendant was convicted of any variation of Assault and Battery enumerated under 21 O.S.2011, § 652, the defendant's potential maximum punishment remained the same. And here, based particularly on the language in the charging information (which included no mention of any alleged "intent to kill" or "attempt to kill"), the defendant was "able to look at the four corners of the information . . . and understand the nature of the offense with which he stands charged." *Curtis*, 1948 OK CR 40, 86 Okl. Cr. at 344, 193 P.2d at 315; *see also* (O.R. 191). Because the defendant's reliance on *Curtis* is inapposite, and because the defendant was otherwise adequately apprised of the charges against him, the defendant's due process claim must be rejected. *See Parker*, 1996 OK CR 19, ¶ 24, 917 P.2d at 986. On balance, the defendant's request for relief on this basis must fail.

PROPOSITION VI

TRIAL COUNSEL WAS NOT INEFFECTIVE.

In his sixth proposition of error, the defendant contends that his trial counsel was ineffective for failing to object to various alleged errors during trial. Specifically, the defendant claims his counsel should have objected to the joinder of his crimes in one trial, demur to the State's charge in Count XI, and object to his charges in Counts I, II, and III on the basis of 21 O.S.2011, § 11.¹² Because defense counsel was not ineffective in any of the claimed issues, the defendant's argument must be rejected.

This Court reviews claims of ineffective assistance of counsel using the two-part standard in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *See also Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. A defendant alleging ineffective assistance must first show that counsel's performance was constitutionally deficient, meaning that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *see also* U.S. Const. amend. VI. The reasonableness of counsel's performance is evaluated based on the facts, and a strong presumption exists that counsel's performance was reasonable. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."

Id.

¹² Hereinafter referred to as "Section 11."

The defendant must also show that counsel's performance prejudiced his defense, meaning that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687; *see also* *Hanson v. State*, 2009 OK CR 13, ¶ 35, 206 P.3d 1020, 1031 ("[The defendant] must affirmatively prove prejudice resulting from his attorney's actions."). Prejudice is shown by demonstrating that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112, 131 S. Ct. 770, 792, 178 L. Ed. 2d 624 (2011).

A defendant who fails to meet both components of *Strickland* is not entitled to relief on an ineffective assistance claim: "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *Malone*, 2013 OK CR 1, ¶ 14, 293 P.3d at 206. Because the defendant has not demonstrated that counsel's performance was deficient, nor has he shown that prejudice resulted from counsel's performance, his claim of ineffective assistance must be rejected. Each issue raised by the defendant will be addressed in turn.

A. *Counsel was not ineffective for failing to object to joinder.*

The defendant first challenges counsel's failure to object to the joinder of the defendant's crimes in one trial. The defendant claims that counsel's performance was deficient because no reasonable trial strategy existed for not objecting to the joinder of his crimes. As discussed in Proposition I, *supra*, the defendant's crimes were properly joined together because they involved the same type of domestic abuse against the same victim, in roughly the same location, over a relatively short span of time, with the aim of perpetuating a common scheme of domestic control

and anger-fueled physical violence against Ms. Clopton. *See Smith*, 2007 OK CR 16, ¶ 23, 157 P.3d at 1165; *Glass*, 1985 OK CR 65, ¶ 9, 701 P.2d at 768; *supra* Proposition I. Moreover, judicial economy favors the joinder of similar offenses. *See McClellan*, 1988 OK CR 118, ¶ 7, 757 P.2d at 398. Because any objection to the joinder would therefore have been overruled, and because an ineffective assistance claim cannot be predicated on counsel's failure to make a meritless argument, no relief should accord on this basis. *See Washington v. State*, 1999 OK CR 22, ¶ 52, 989 P.2d 960, 976 (when underlying substantive claims fail, so do ineffective assistance of counsel claims); *Hatch v. State*, 1983 OK CR 47, ¶ 9, 662 P.2d 1377, 1381 ("Failure to press meritless claims do[es] not constitute ineffective assistance of counsel.").

Moreover, the defendant attempts to show prejudice by asserting that the joinder combined weakly supported crimes with strongly supported crimes, and that without joinder, the jury would not have convicted him of the crimes committed in December of 2016. (Appellant's Brief at 26). But this argument assumes that an objection to joinder would have been sustained, which is not the case, as shown above. In any event, the jury was instructed to give separate consideration to each crime, and returned separate verdict forms on each count. *See Instruction No. 9-6A, OUJI-CR(2d); (O.R. 210-22, 266)*. This Court presumes that jurors follow the instructions given them. *See Jackson*, 2007 OK CR 24, ¶ 16, 13 P.3d at 602. The defendant has offered nothing other than his bald allegation of prejudice to suggest the jury did not follow this instruction. The defendant's unsupported claim of prejudice warrants no relief. *See Smith*, 2007 OK CR 16, ¶ 38, 157 P.3d at 1168-69; *supra* Proposition I. Because the defendant has failed to show both that his counsel's performance was constitutionally deficient and that counsel's performance caused him prejudice, the defendant's ineffective assistance claim predicated on a challenge to the joinder of his crimes

must be rejected. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *Malone*, 2013 OK CR 1, ¶ 14, 293 P.3d at 206.

B. Counsel was not ineffective for failing to specifically demur to Count XI.

The defendant next argues that his trial counsel was ineffective for not raising a demur to the sufficiency of the evidence on Count XI. (Appellant's Brief at 24, 26). To the contrary, as discussed in Proposition II, *supra*, the elements of the defendant's crime of Interference with Emergency Telephone Call were fully established by the testimony at trial. Ms. Clopton explained that the defendant forcibly took her iPhone and used her thumbprint to access its contents (Tr. III, 458-59). When the defendant refused to leave, Ms. Clopton triggered her alarm system and routed officers to her location (Tr. III, 460-61, 670, 681). The defendant shattered Ms. Clopton's cell phone before also smashing her activated alarm system (Tr. III, 461). Because the evidence at trial established that the elements of this crime were met—particularly because the defendant prevented Ms. Clopton from making an emergency phone call, despite her wish to do so—and because any demur to this charge from defense counsel would have been overruled, the defendant cannot predicate an ineffective assistance claim on this basis. *See Washington*, 1999 OK CR 22, ¶ 52, 989 P.2d at 976; *Hatch*, 1983 OK CR 47, ¶ 9, 662 P.2d at 1381. The defendant's argument must fail accordingly.

C. Counsel was not ineffective on the basis of an alleged Section 11 violation.

Finally, the defendant asserts that his counsel was ineffective for failing to object to an alleged Section 11 violation. On the issue of performance, the defendant claims that his charges in Counts I, II, and III presented a Section 11 violation, and that defense counsel was deficient for not raising an objection on that basis. (Appellant's Brief at 25). To the contrary, the record wholly defies the defendant's claim. Though the defendant makes no mention of this in his argument, at

the close of the preliminary hearing held on March 10, 2017 in Case No. CF-2016-6899, the defendant's counsel forecasted the potential for a Section 11 issue and urged the trial court to merge these crimes. There, defense counsel demurred to the evidence and asserted the following:

Defense Counsel: Also, I don't think the State has alleged that there was a series of altercations, but just one big, long altercation, and there [are] three different charges for that same altercation. I would ask that the Court would look at two of the charges are [sic] superfluous.

(P.H. Tr. 81-82). The trial court acknowledged defense counsel's argument requesting a merger of the counts, announcing as follows: "I'll preserve the issue of merger for the District Court at the time of instruction on sentencing and note that for the record" (P.H. Tr. 82). This issue later arose at trial during the time the parties requested jury instructions, and the trial court there announced its findings on the matter:

The Court: First of all, there was—something came up off the record and let's just discuss the lesser includeds up front. I have off the record indicated—and this is for appellate purposes for the record, you know, I'm baffled by the way the case was filed, it's very confusing to me . . . The Court's issue with it—it is what it is, but, again, it appears that Counts 1, 2, and 3 are the same event or are going to merge.

(Tr. V, 1019-20). It is clear, therefore, based on the discussion of the parties—both at the preliminary hearing and again before the jury was instructed—that defense counsel had argued for the merger of these crimes. Because the defendant's counsel did, indeed, raise a Section 11 challenge to the charges in Counts I, II, and III, the defendant's claim of deficient performance is entirely meritless.

Moreover, on the issue of prejudice, though the jury found the defendant guilty on each of Counts I, II and III, the trial court at sentencing ultimately merged those convictions together and sentenced the defendant only on Count I (Sent. 7-8). In so doing, the trial court noted: "[W]e had no evidence as to whether there were time gaps between the multiple blows that took place. As far

as this court knows, as far as the evidence goes, the inference—the logical inference on this would be that it all happened at the same time" (Sent. 8). As a result of the trial court's merger of his counts, the defendant was sentenced on Count I only (Sent. 8).

Despite the trial court's ultimate merger, the defendant maintains that prejudice was caused by allowing evidence of these crimes to be heard by the jury. (Appellant's Brief at 27). To the contrary, even if Counts II and III had been dismissed on defense counsel's motion, the evidence relating to those counts, to the extent the evidence differed from that in support of Count I, would still have been admissible as *res gestae* evidence to support the defendant's charge in Count I. Evidence is *res gestae* when "a) it is so closely connected to the charged offense as to form part of the entire transaction; b) it is necessary to give the jury a complete understanding of the crime; or c) when it is central to the chain of events." *Warner v. State*, 2006 OK CR 40, ¶ 68, 144 P.3d 838, 868, *overruled on other grounds by Taylor v. State*, 2018 OK CR 6, ¶ 11, 419 P.3d 265, 269. If, as the defendant insists, the crimes were all part of the same transaction, that evidence would have been introduced at trial as *res gestae*, regardless. *See id.* Therefore, the defendant's allegation of prejudice resulting from counsel's performance must fail. In total, having failed to show both that counsel's performance was deficient and that such performance caused him prejudice, the defendant's claim of ineffective assistance should accord no relief. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *Malone*, 2013 OK CR 1, ¶ 14, 293 P.3d at 206. His proposition and argument must be rejected.

PROPOSITION VII

THE DEFENDANT IS NOT ENTITLED TO RELIEF BASED ON ALLEGED CUMULATIVE ERROR.

In the defendant's seventh and final proposition of error, he argues that the sum of all alleged errors in this case warrants relief from his conviction and sentence. This Court has stated unequivocally that “[a] cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by Appellant.” *Baird v. State*, 2017 OK CR 16, ¶ 42, 400 P.3d 875, 886; *see also Martinez v. State*, 2016 OK CR 3, ¶ 85, 371 P.3d 1100, 1119. Because each proposition raised has been addressed and rebutted, and because the State has demonstrated that the defendant's conviction and sentence was reached without error, the defendant's claim for relief based on cumulative error is likewise without merit.

This Court must deny relief on this proposition of error.

CONCLUSION

The defendant's contentions have been answered by both argument and citations of authority. The State contends that no error occurred which would require reversal or modification of the defendant's conviction and sentence. Therefore, the State respectfully requests that Judgment and Sentence be affirmed.

Respectfully submitted,

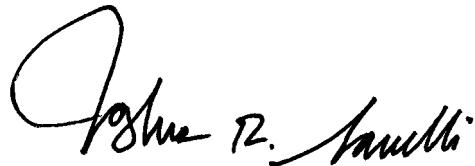
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ORIGINAL



IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

PC 2022 327

FILED

IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

BRENT A. MORRIS,
Petitioner,

APR - 7 2022
JOHN D. HADDEN
CLERK

vs

THE STATE OF OKLAHOMA
Respondent.

**PETITIONER'S BRIEF IN SUPPORT OF POST-CONVICTION APPEAL
PURSUANT TO 22 O.S. § 1087 ARISING FROM A FEBRUARY 7, 2022, ORDER
DENYING POST-CONVICTION RELIEF
IN THE DISTRICT COURT OF TULSA COUNTY CF-2016-6899**

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vs

**THE STATE OF OKLAHOMA
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c. The District Court abused its discretion finding that Appellate Counsel was not ineffective for failing to raise Trial Counsel's ineffectiveness for failing to investigate and consult with an expert witness about Ms. Clopton's use of a diabetic pump.	

d. The District Court abused its discretion denying Petitioner's application finding that Appellate Counsel was not ineffective for failing to raise prosecutorial misconduct for withholding the raw data generated from a DNA test which infringed upon Petitioner's right to have the test independently examined by an expert witness, but it also rendered the expert's testimony inadmissible because there was not sufficient facts or data to support the testimony.

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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BRENT A. MORRIS,)	
Petitioner,)	
)	
-vs-)	
)	
THE STATE OF OKLAHOMA,)	District Court of Tulsa County
Respondent.)	Case No. CF-2016-6899

BRIEF IN SUPPORT

COMES NOW, the Petitioner, **BRENT A. MORRIS**, through his attorney Debra K. Hampton, and submits his Brief in Support of Post-Conviction and his Petition in Error.

JURISDICTION

Jurisdiction is invoked under 22 O.S. § 1087 under the Oklahoma Uniform Post-Conviction Procedures Act. The Petition in Error and Brief in Support have been timely filed.

STATEMENT OF THE CASE

Petitioner was charged by Information on December 23, 2016, the Information both was amended and joined with previous cases until a final Amended Information was produced on May 14, 2018 and filed in Tulsa County District Court Case Number CF-2016-6899. Petitioner proceeded to trial and was convicted by a jury and sentenced to these terms:

Count 1: Assault and battery with intent to kill, in violation of 21 O.S. 2011, § 652(C); 25 years and \$10,000;

Count 2: Domestic assault and battery resulting in great bodily harm, in violation of 21 O.S. 2014, § 644(F); 5 years and \$10,000;

Count 3: Domestic assault and battery with a dangerous weapon, in violation of 21 O.S. 2014, § 644(D)(l); 5 years and \$10,000;

Count 4: Violation of protective order, in violation of 22 O.S. 2011, § 60.6(A); 1 year and \$1,000;

Count 5: Violation of protective order, in violation of 22 O.S. 2011, § 60.6(A); 1 year and \$1,000;

Count 6: Violation of protective order, in violation of 22 O.S.2011, § 60.6(A); 1 year and \$1,000;

Count 7: Domestic Assault & Battery (2nd offense) in violation of 21 O.S.2014, § 644(C); 4 years and \$5,000;

Count 8: Malicious injury to property, in violation of 21 O.S.2011, § 1760; 1 year and \$500;

Count 9: Domestic assault and battery (2nd offense) in violation of 21 O.S.2014, § 644(C); 4 years and \$5,000;

Count 10: Violation of protective order, in violation of 22 O.S.2011, § 60.6; 1 year and \$1,000;

Count 11: Interference with emergency telephone call, in violation of 21 O.S.2011, § 1211.1; 1 year and \$3,000;

Formal sentencing was held on May 23, 2018. The District Court dismissed Counts 2 and 3, because they merged with Count 1. (S. Tr. 8) The Court ran Counts 4, 5, 6, 10, 8 and 11 concurrently with each other and consecutively with Counts 1, 7, 9, and four. These last four counts all ran consecutively to each other. (S. Tr. 9) The Petitioner represented by Court appointed counsel appealed to the Oklahoma Court of Criminal Appeal (OCCA) who affirmed the Judgment and Sentences on August 27, 2020. Petitioner raised these propositions:

- 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 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 COUNTS 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.

On November 22, 2021, Petitioner represented by counsel, Debra K. Hampton, applied for Post-Conviction Relief and Request for an Evidentiary Hearing. On January 4, 2022, the State filed a Response Objecting to the Application. Petitioner filed "Petitioner's Supplemental Brief in Support and Request for an Evidentiary Hearing" on January 5, 2022, and the State filed a Supplemental Response on January 11, 2022. On February 7, 2022, the District Court issued an Order Denying the Application. On February 11, 2022, Petitioner timely filed the jurisdictional Notice of Post-Conviction Appeal. Petitioner raised (2) Propositions of Error:

- I. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE PLAINLY MERITORIOUS ISSUES.
 - A. Appellate Counsel was ineffective for failing to raise the fact that the State Court lacked subject-matter jurisdiction over the alleged offenses.
 - B. Appellate Counsel was ineffective for failing to raise a denial of fundamental fairness because Petitioner was subjected to the overcharging power of the Government in violation of the Sixth and Fourteenth Amendments.
 - C. Appellate Counsel was ineffective for failing to raise Trial Counsel's ineffectiveness for failing to investigate and consult with an expert witness about Ms. Clopton's use of a diabetic pump.

D. Appellate Counsel was ineffective for failing to raise prosecutorial misconduct for withholding the raw data generated from a DNA test which infringed upon Petitioner's right to have the test independently examined by an expert witness, but it also rendered the expert's testimony inadmissible because there was not sufficient facts or data to support the testimony.

STATEMENT OF FACTS

The facts span almost four months as alleged by the State. The alleged offenses occurred in Tulsa, Oklahoma, within Tulsa County. This land is considered Indian land belonging to the Muscogee (Creek) Reservation, Osage Nation and Cherokee Nation.

Petitioner does not dispute the injuries that Charis Clopton ("Ms. Clopton") suffered but he does dispute he caused those injuries as alleged by the State. The Information alleges that between December 8, 2016, and December 10, 2016, that Petitioner assaulted Ms. Clopton. However, the Information as alleged is too broad. On December 8, 2016, Ms. Clopton and Petitioner were in a dating relationship. (Tr. Vol. III. 480) Ms. Clopton went to a bar to attend a surprise party for her friend, Shauna Hermann, at the Mercury Lounge in Tulsa (Tr. Vol. III. 480-81) Ms. Clopton testified that she had seen Petitioner at the bar. (Tr. Vol. III. 490) She remembered going home, sitting on the couch, and then remembered waking up in the hospital. (Tr. Vol. III. 492) Ms. Clopton was viciously beaten at her house; her injuries included broken fingers, much bleeding, and her insulin pump being pulled out¹. Ms. Clopton had no recollection of how she received her injuries. (Tr. Vol. III. 492) Although she testified that when she woke up, she "knew it was probably Brent" who had inflicted her wounds (Tr. Vol. III. 493).

Ms. Clopton had been married to Micah Clopton. (Ms. Clopton also had a protective order against him) On the morning of December 10, 2016, Micah Clopton asked her father, Mr. Gregg to check on her. According to the discussion below Micah Clopton had no reason to be concerned

¹ This fact is crucial to determining the time of the assault.

about Ms. Clopton because he had been withholding visitation from her. At approximately 10:00 a.m. Mr. Gregg unlocked the door and went inside, and found Ms. Clopton on the kitchen floor, lying on her back in a pool of dried and coagulated blood, in what Mr. Gregg described as a “gruesome, horrifying” scene (Tr. Vol. II. 258, 260). There were no signs of forced entry to the home (Tr. Vol. II. 343).

Facts Outside the Record but Relevant and Admissible

Charis filed for a divorce from Micah on April 9, 2014, which sparked a feud between the two parties. Ms. Clopton alleged that a “state of complete and irreconcilable incompatibility.” 12 O.S. § 2202 (D) mandates this Court must take judicial notice of its own docket in Case No. FD-2014-982. Like most divorces involving custody battles, child support and alimony they are often never cordial, especially when one party must satisfy any monetary awards.

On the same date, Ms. Clopton filed for divorce, she simultaneously served Micah Clopton with Discovery Requests and an Application seeking Temporary Orders. On May 20, 2014, Micah Clopton filed a Response to her Motion for Temporary Orders requesting that he be awarded Temporary Custody and that child support be paid to him. On May 27, 2014, Micah Clopton filed a Response and counter claim alleging in part that his wife had committed “adultery.” In Ms. Clopton’s discovery request she asked for Micah Clopton to admit their child had been around an extramarital affair.

On December 3, 2014, Ms. Clopton moved for a “nail bed drug test” at her expense, alleging that Mr. Clopton had a history of abusing drugs and alcohol. Ms. Clopton would have been well suited to know if he had an issue with drugs and alcohol. On the same date, Ms. Clopton also moved for a “nail bed drug test” at her expense, alleging that Brooklyn Green and Zytisha Woodberry, who she believed to live at the same residence as Micah Clopton, may be engaged in

the same behavior as Respondent.

There were further filings in this action, then on October 20, 2016, Micah Clopton moved to terminate the parties' Joint Child Custody Plan and award him sole custody.² Micah Clopton alleged that Ms. Clopton "continues to be in a relationship with one, Brent Allen Morris ("Morris")." In Exhibit 1, Micah Clopton stated he "assisted [Ms. Clopton] with filing her Petition for Protective Order against Morris, has urged [Ms. Clopton] to end her relationship with Morris; however, upon information and belief, [Ms. Clopton] continues to be involved with Morris." *Id.*, at 4. Micah Clopton further alleged:

In addition to the facts cited by Petitioner in her Petition for Protective Order, Petitioner has described other violent incidents she has experienced with Morris including Morris having thrown a beer bottle and punctured a hole in the wall at her residence, breaking the windows at her residence on multiple occasions, ripping her security system out of the wall, breaking her car windows and damaging property at her residence, including her television. This is the same residence where the children stay when they are with Petitioner and, although the children have not been with Petitioner during violent altercations with Morris so far, Respondent avers that this is because the children are residing with him.

Id., at 4-5

On February 15, 2017, Micah Clopton filed an Emergency Motion for Custody Hearing and for Psychological Testing with an affidavit attached as required by 43 O.S. § 107.4 (A) *See* [Exhibit 2] Emergency Motion for Custody Hearing and for Psychological Testing. Micah Clopton alleged:

Since the filing of Respondent's Motion on December 9, 2016, Petitioner's boyfriend, the said Brent Allen Morris ("Morris"), severely beat Petitioner at her place of residence causing her to be hospitalized for a period of over two (2) weeks.

A review of the docket in this divorce case does not indicate a Motion filed on December 9, 2016. Further, on February 16, 2017, Micah Clopton filed an Amended Affidavit in the divorce

² See [Exhibit 1] Motion to terminate joint custody. All exhibits listed herein are as they appeared in the District Court.

case. See [Exhibit 3] Amended Affidavit. Micah Clopton alleged in the affidavit that Ms. Clopton has accused him of breaking into her home.

PROPOSITION I

THE DISTRICT COURT ABUSED ITS DISCRETION DENYING THE PETITIONER'S APPLICATION FOR POST-CONVICTION RELIEF FINDING PETITIONER'S INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIM, RELATED TO THE STATE COURT LACKING SUBJECT MATTER JURISDICITON WAS MERITLESS IS NOT MERELY ERRONEOUS BUT OBJECTIVELY UNREASONABLE IN LIGHT OF SUPREME COURT PRECEDENT.

STANDARD OF REVIEW

This Court reviews the District Court's determination of an application for post-conviction relief for an abuse of discretion. *State ex rel. Smith v. Neuwirth*, 2014 OK CR 16, ¶ 12, 337 P.3d 763, 766. *Stevens v. State*, 2018 OK CR 11, ¶ 12, 422 P.3d 741. An abuse of discretion being defined as "a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161 (quoting *Stouffer v. State*, 2006 OK CR 46, ¶ 60, 147 P.3d 245); *Logan v. State*, 2013 OK CR 2, 293 P.3d 969; *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Smith v. Robbins*, 528 U.S. 259, 289, 120 S.Ct. 746, 765, 145 L.Ed.2d 756 (2000).

ARGUMENT AND AUTHORITY

Petitioner argues the District Court's conclusion that Appellate Counsel was not ineffective is not only erroneous but objectively unreasonable, given United States Supreme Court precedent. Under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a Petitioner must show both (1) deficient performance, by demonstrating that his counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Strickland, supra*, at 687-89. In *Smith v. Robbins*, 528 U.S. 259, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000), the Court recognized the viability of claims of ineffective assistance of Appellate Counsel alleging that even though an appellate attorney appealed certain issues, the attorney "failed to raise

a particular claim” that the defendant maintains should have been appealed. *Id.* at 287-88. The *Robbins* Court held, “it is still possible to bring a *Strickland* claim based on [appellate] counsel’s failure to raise a particular claim.” *Id.* at 288, (citing *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)). “Plainly meritorious” claims and “dead-bang winners” are what the Tenth Circuit Court of Appeals has sometimes described as appellate claims that directly establish both inadequate performance and prejudice. *Hawkins v. Hannigan*, 185 F.3d 1146, 152 (10th Cir. 1999); *U.S. v. Cook*, 45 F.3d 388 (10th Cir. 1995).

a. The District Court’s determination regarding its analysis of its own jurisdiction vest itself with a right clearly preempted by federal law.

The District Court ignores the fact there is a federal preemption to state authority despite race but recognized that was Petitioner’s argument because the definition of “Indian for purposes of criminal jurisdiction is irrelevant” to his subject-matter jurisdiction claim. The District Court’s interpretation of federal law relied upon in the State’s argument that *U.S. v. McBratney*, 104 U.S. 621, 21 S.Ct. 924, 26 L.Ed. 869 (1882), *Draper v. U.S.*, 164 U.S. 240, 17 S.Ct. 107, 41 L.Ed. 419 (1896) and *U.S. v. Ramsey*, 271 U.S. 467, 559-60, 46 S.Ct. 559, 70 L.Ed. 1039 (1926) somehow provide the State with jurisdiction over non-Indian/non-Indian criminal offenses. These cases do not analyze the congressional intent of Oklahoma’s 1906 federal Enabling Act (Act of June 16, 1906, ch. 3335, 34 Stat. 267). Where the Enabling Act disclaims jurisdiction over Indian lands and provides that they “remain subject to [federal] jurisdiction, disposal, and control.” Okla. Const. art. I, § 3. Oklahoma’s Enabling Act was not the concern of the Court in *McGirt*, the Court did not address it. Nor was the Enabling Act before the Court in *U.S. v. Ramsey, supra*, where the Supreme Court applied the broad principles set out in *McBratney* and *Draper*, but the Court did not confront the federal preemption of State jurisdiction, instead, the Court’s opinion in *Ramsey* was based upon

the mistaken belief that the reservations had been “disestablished,” because of the allotment era.

McGirt nor *Ramsey* contemplated the Enabling Act, much less within the scope of federal preemption to State authority over Indian Country. *McBratney* prominently discusses congressional prohibitions or “exceptions” to this general rule under the equal-footing doctrine.

In *McBratney*, a non-Indian, was convicted in federal Court of murdering another non-Indian on a Colorado Indian Reservation. *McBratney, supra*, at 621. In a highly suspect application of statutory construction, the Supreme Court first observed that federal courts could only exercise criminal jurisdiction over places—including Indian Country—within the exclusive jurisdiction of the United States. According to the Court, if Colorado had jurisdiction over the offense, then the Federal Government did not. Colorado had jurisdiction, the Court said, because Congress had admitted it to the Union “upon an equal footing with the original states” and no exception was made for jurisdiction over the Reservation. *McBratney, supra*. Thus, the Court reasoned, Colorado law extended throughout the State, and to the Reservation, as far as that law related to non-Indian against non-Indian crimes.

McBratney’s holding was then again affirmed in *Draper*, where the murder of a non-Indian by a non-Indian occurred on a Montana Reservation. *Draper* addressed the State of Montana’s Enabling Act which provided that the people “agree and declare that they forever disclaim” all title to Indian lands and that “said lands shall remain under the absolute jurisdiction and control of the Congress of the United States.” The Supreme Court ruled that the State, and not the Federal Government, had jurisdiction over the homicide. Despite what commentators believe to be untenable underpinnings, *McBratney and Draper* do not address the law as it applies to the tribes in Oklahoma or the treaties which are still controlling. The *McBratney and Draper* decisions held that states have exclusive jurisdiction to prosecute non-Indian/non-Indian crimes—reading

statehood to “necessarily repeal[]” any “prior statute, or … treaty” creating federal jurisdiction. *See McBratney*, 104 U.S. at 621, 623; *Draper*, 164 U.S. at 244. Both decisions emphasized that they did not address crimes “by or against Indians.” *McBratney*, 104 U.S. at 624; *Draper*, 164 U.S. at 247. These cases both held that the organization and admission of states qualified the former federal jurisdiction over Indian Country included therein by withdrawing from the United States [thus the repeal] and conferring upon the states the control of offenses committed by white people against whites, **in the absence of some law or treaty to the contrary**. *Donnelly v. U.S.*, 228 U.S. 243, 271, 33 S.Ct. 449, 57 L.Ed. 820 (1913).

The State and District Court ignores the treaty provisions that govern this area because it is clear the State could not exercise arbitrary jurisdiction when it was federally preempted. In 1856, the Creeks agreed to cede to the Seminole Tribe a portion of their lands. See Treaty, Aug. 7, 1856, United States—Creek and Seminole Tribes, 11 Stat. 699 (Treaty of 1856). With respect to the lands still held by the Creek Nation, the United States guaranteed the “same title and tenure” as promised and secured under the 1832 and 1833 treaties. *Id.*, art. 3, 11 Stat. at 700. The 1856 treaty reaffirmed that “no State or Territory shall ever pass laws for the Government of the Creek or Seminole tribes of Indians,” and the United States pledged that “no portion of either of the tracts of country defined in [the treaty] shall ever be embraced or included within, or annexed to, any Territory or State.” *Id.*, art. 4, 11 Stat. at 700, *available* at 1856 WL 11367. *See Indian Country, U.S.A., Inc. v. Okla. Tax Comm'n.*, 829 F.2d 967, 971 (10th Cir. 1987) *cert. denied*, 487 U.S. 1218, 108 S.Ct. 2870, 101 L.Ed.2d 906 (1988); *McGirt v. Oklahoma*, 591 U.S. ___, 140 S.Ct. 2452, 2457, 207 L.Ed.2d 985 (2020). Article 4 also provides that “nor shall either, or any part of either, ever be erected into a territory without the full and free consent of the legislative authority of the tribe owning the same.” *U.S. v. Hayes*, 20 F.2d 873, 878 (8th Cir. 1927).

Indian tribes are “domestic dependent nations” that exercise “inherent sovereign authority.” *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (Potawatomi) (quoting *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831)). As dependents, the tribes are subject to plenary control by Congress. *See U.S. v. Lara*, 541 U.S. 193, 200, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004) (“[T]he Constitution grants Congress” powers “we have consistently described as ‘plenary and exclusive’” to “legislate in respect to Indian tribes”). And yet they remain “separate sovereigns pre-existing the Constitution.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). Thus, unless and “until Congress acts, the tribes retain” their historic sovereign authority. *U.S. v. Wheeler*, 435 U.S. 313, 323, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978). The reason the Government made a treaty agreement with the tribes was to protect their sovereign authority. The fact the land under art. 4, could never be embraced or included within, or annexed to, any Territory or State is exactly the treaty provision anticipated by *McBratney* and *Draper*, to deprive a state of jurisdiction. These cases only confirm that Oklahoma lacks subject-matter jurisdiction or sovereign authority over non-Indian/non-Indian offenses.

Further, analysis of the equal-footing doctrine discussed in *McBratney* and *Draper* is not applicable to Oklahoma as SCOTUS already determined “there was nothing in the admission of Oklahoma into a constitutional equality of power with other states which required or permitted a divesting of the title.” *Brewer-Elliott Oil & Gas Co. v. U.S.*, 260 U.S. 77, 88, 43 S.Ct. 60, 67 L.Ed. 140 (1922). *See also U.S. v. Champlin Refining Co.*, 156 F.2d 769 (10th Cir. 1946) holding: “[w]hat title passed by the patents when they were issued in 1906 and 1907, prior to the admission of Oklahoma into the Union... Oklahoma could not adopt a **retroactive rule...which would destroy a title already accrued under federal law** and grant, or would enlarge what actually passed to

Oklahoma at the time of her admission under the constitutional rule of equality.” *Id.* at 773-774. Petitioner argues that the Oklahoma Supreme Court’s first interpretation of the Enabling Act in *Higgins v. Brown*, 1908 OK 28, 20 Okla. 355, ¶ 164, 94 P. 703³, discussed a comparison of laws with other states holding “[b]y the same process of reasoning followed by the Supreme Court of the United States in cases of *U.S. v. McBratney*, 104 U.S. 621, and *Draper v. U.S.*, 164 U.S. 240, we conclude that the Congress, upon the admission of Oklahoma as a State, where it has intended to except out of such state an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words.” The District Court determined Petitioner misreads *Higgins*, however the language is unambiguous and supports Petitioner’s claims.

Further, in *Choate v. Trapp*, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941 (1912), eight thousand plaintiffs from the Choctaw and Chickasaw tribes each held a patent to 320 acres of allotted land issued under the terms of the Curtis Act (June 28, 1898, 30 Stat. 495, 507, c. 517), which contained a provision “that the land should be non-taxable” for a limited time. Before the expiration of that period, the officers of the State of Oklahoma instituted proceedings with a view of assessing and collecting taxes on these lands. However, since the determination in *McGirt* that the reservations were never disestablished the Oklahoma Constitution places all reservation land and all land which the Federal Government has never extinguished their interest and title to beyond the State’s authority. *Choate* held, “[t]he Constitution of the State of Oklahoma itself expressly recognizes that the exemption here granted must be protected until it is lawfully destroyed.” *Id.* at 678. This is precisely why Oklahoma lacks subject-matter jurisdiction or the sovereign authority because the reservation land within the historic boundaries of Oklahoma were never a part of Oklahoma.

³ In *Higgins* it was not contended that the alleged crime was committed on any such excepted reservation. *Id.*

McBratney and *Draper*'s reasoning cannot be squared with Oklahoma's position or the District Court's determination because the State has vested itself with authority that it could have never acquired. As *Donnelly*, *supra*, explains, the State's theory is that statehood acts (1) impliedly "withdrew [federal] control of non-Indian/non-Indian offenses (including under the GCA); and (2) simultaneously "conferred upon the states" that same jurisdiction. *Donnelly*, at 271. And under that theory, *Donnelly*'s holding—that the Federal Government has jurisdiction—means Oklahoma does not. The District Court abused its discretion finding that Petitioner's analysis misconstrues precedent as it is contrary to Petitioner's claims. Petitioner states that because the reservation lands are beyond the sovereign authority of Oklahoma it never had jurisdiction.

Even if Oklahoma would have acted under Public law 280, the State would still lack sovereign authority to regulate any aspect of a reservation because "no portion of either of the tracts of country defined in [the treaty] shall ever be embraced or included within, or annexed to, any Territory or State, nor shall either, or any part of either, ever be erected into a territory without the full and free consent of the legislative authority of the tribe owning the same." *Hayes*, 20 F.2d at 878. Thus, the District Court's reliance on *Currey v. Corp. Comm'n of Okla.* 1979 OK 89, 617 P.2d 177, 179 which relied on *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562,567 (1962) is not allied with the law in Oklahoma as *Kake*, *supra*, is predicated upon an analysis of Alaska's Enabling Act which incorporated Public law 280 into the Government's Constitution. The Tenth Circuit has rejected the State's argument regarding "proprietary rather than governmental interest." See *Seneca-Cayuga Tribe v. State ex rel. Thompson*, 874 F.2d 709, 721, fn. 2 (10th Cir. 1989), See *Indian Country, U.S.A., Inc. v. Okla. Tax Comm'n.*, 829 F.2d at, 976-81, where the Court cited § 1 of the Oklahoma Enabling Act and interpreting it as a general reservation

of Federal and Tribal jurisdiction over Indians and their lands and property. The Tenth Circuit held:

Oklahoma's disclaimer is one both of proprietary and of governmental authority. *Id.* at 976-81. Neither the Oklahoma Supreme Court, nor the State in this litigation, agree with that conclusion. The Oklahoma Supreme Court has held in recent years that the Oklahoma disclaimer is one of proprietary, but not of governmental, authority. *See Currey v. Corporation Comm'n*, 617 P.2d 177, 179-80 (Okla.1980) (disclaimer is one of proprietary interest in Indian lands), *cert. denied*, 452 U.S. 938, 101 S.Ct. 3080, 69 L.Ed.2d 952 (1981); *see also Organized Village of Kake v. Egan*, 369 U.S. 60, 69, 82 S.Ct. 562, 567-68, 7 L.Ed.2d 573 (1961) (construing Alaskan disclaimer as proprietary rather than governmental); *Ahboah v. Housing Auth. of the Kiowa Tribe of Indians*, 660 P.2d 625, 630 (Okla.1983) (confirming *Currey*). We are not bound to follow this interpretation, however, as the Enabling Acts conferring statehood in Oklahoma are federal enactments.

Seneca-Cayuga Tribe v. State ex rel. Thompson, supra, at 721.

The District Court's determination that Appellate Counsel was not ineffective for failing to raise the lack of subject-matter jurisdiction is objectively unreasonable because the State lacked sovereign authority. When a State obtains a conviction in violation of the Federal Constitution, it is always a serious wrong, not only to a particular convict, but to Federal law. *Brown v. Allen*, 344 U.S. 443, 544, 73 S.Ct. 397, 97 L.Ed. 469 (1953). Thus, this action must be remanded with instructions to dismiss.

- b. The District Court's determination that his claim "Appellate Counsel was ineffective for failing to raise a denial of fundamental fairness because Petitioner was subjected to the overcharging power of the Government in violation of the Sixth and Fourteenth Amendment" was barred by res judicata, is objectively unreasonable.**

The District Court found that "Petitioner's Appellate Counsel argued that Trial Counsel's performance was deficient because counsel failed to object to the State filing Counts 1-3 against Petitioner, although these multiple charges allegedly violated the prohibition against double punishment found in 21 O.S. § 11." The District Court further stated, "[o]n direct appeal, Petitioner

raised his double jeopardy objection under an Oklahoma statute and here he raises this same objection under the Fifth Amendment of the United States Constitution. However, even if Petitioner's current objection is slightly different than the objection raised on direct appeal, it is still barred by the doctrine of res judicata."

However, state law is not cognizable in federal habeas thus to exhaust the federal nature of Petitioner's claims he must present it to the State's highest Court even though it is not a Court of competent jurisdiction. Petitioner's argument does not involve state law and therefore cannot be barred by res judicata and therefore the District Court abused its discretion applying a state law analysis to the federal claim. Petitioner argued that Appellate Counsel was ineffective for failing to raise plain error where Petitioner was denied fundamental fairness because of an overcharging power of the Government where it was alleged, he committed multiple offenses, which allegedly occurred on December 9, 2016. Those were 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.2014, § 644(F); Count 3: Domestic assault and battery with a dangerous weapon, in violation of 21 O.S.2014, § 644(D)(1). The jury found Petitioner guilty of all three counts, but the District Court dismissed Counts 2 and 3, because they merged with Count 1. (S. Tr. 8) These offenses violated double jeopardy, where these counts are not "separate and distinct offenses", and the United States Supreme Court has never openly sanctioned such deliberate overcharging. *See North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970); *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 498, 30 L.Ed.2d 427 (1971).

Petitioner's overcharging argument is a denial of fundamental fairness as it was Petitioner's position that because the Double Jeopardy Clause "protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 65 (1969).

Petitioner argues where the same act or transaction violates two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not utilizing the same element test under *Blockburger v. U.S.*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). In *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969) SCOTUS held that the Fifth Amendment guarantee against double jeopardy is enforceable against the states through the Fourteenth Amendment. Under a double jeopardy analysis, it is established that separate statutory crimes need not be identical—either in constituent elements or in actual proof—to be the same within the meaning of the constitutional prohibition. 1 J. Bishop, *New Criminal Law* § 1051 (8th ed. 1892); Comment, *Twice in Jeopardy*, 75 Yale L. J. 262, 268-269 (1965). *Brown v. Ohio*, 432 U.S. 161, 164, 97 S.Ct. 2221, 53 L. Ed.2d 187 (1977).

On March 10, 2017, Petitioner made a demurrer to Count 1 to the evidence of intent to kill which was denied. Petitioner also made a general demurrer that was overruled. Petitioner argues that because the counts were duplicitous in violation of double jeopardy, it denied him fundamental fairness. The multiple charges in Counts 1-3 created prejudice to Petitioner as SCOTUS has addressed these issues and it is established by prior case law to create unfairness in the proceedings.

The District Court abused its discretion finding that Petitioner's reliance "on the concurring opinion in *Ball v. U.S.*, 470 U.S. 856, 867-68 (1985)⁴ to argue that he suffered prejudice due to these multiple charges." The District Court further stated, "[t]he majority's opinion in *Ball* did not agree with these concerns about multiple charges, concluding instead that the Supreme Court "has long acknowledged the Government's broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a particular case." *Ball*, 470 U.S. at 859. However,

⁴ *Ball v. U.S.*, 470 U.S. 856, 867-868, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985)

the majority concluded in *Ball* “that Congress did not intend a convicted felon, in *Ball*’s position, to be convicted of both receiving a firearm in violation of 18 U. S. C. § 922 (h) and possessing that firearm in violation of 18 U.S.C. App. § 1202(a).” *Id.* at 865. Petitioner’s reliance on *Ball*’s concurring opinion is not misplaced. JUSTICE STEVENS, concurring in the judgment and writing:

The views that JUSTICE MARSHALL expressed in his dissent in *Missouri v. Hunter*, 459 U.S. 359, 371-372, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983), succinctly explain why I concur in the Court’s judgment today:

When multiple charges are brought, the defendant is put in jeopardy as to each charge... The prosecution’s ability to bring multiple charges increases the risk that the defendant will be convicted on one or more of those charges. The very fact that a defendant has been arrested, charged, and brought to trial on several charges may suggest to the jury that he must be guilty of at least one of those crimes. Moreover, where the prosecution’s evidence is weak, its ability to bring multiple charges may substantially enhance the possibility that, even though innocent, the defendant may be found guilty on one or more charges as a result of a compromise verdict. The submission of two charges rather than one gives the prosecution the advantage of offering the jury a choice—a situation which is apt to induce a doubtful jury to find the defendant guilty of the less serious offense rather than to continue the debate as to his innocence. *Cichos v. Indiana*, 385 U.S. 76, 81, 87 S. Ct. 271, 17 L.Ed.2d 175 (1966) (Fortas, J., dissenting from dismissal of certiorari).

Ball v. U.S., 470 U.S. at, 867-868.

Petitioner argues that he was denied fundamental fairness because Petitioner was charged with several offenses all based upon the same facts which allegedly occurred simultaneously to the other and not separate and distinct, therefore, a trial on the counts as alleged created undue prejudice. The District Court abused its discretion finding there was no support for Petitioner’s claims but one thing that is fundamental, is the right to a fair trial. Petitioner argues that it is unreasonable to not find prejudice because there was actual error, affecting a “substantial right” which is the same as a “fundamental right.” *Jones v. State*, 1989 OK CR 7, 772 P.2d 922, 925. Where plain error follows the “fundamental error doctrine recognized by prior caselaw.” *Id.* The

State conceded in *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), that federal constitutional errors are “fundamental.” *Buchanan v. State*, 1974 OK CR 111, 523 P.2d 1134, 1137 (violation of constitutional right constitutes fundamental error); *See also, Williams v. State*, 1983 OK CR 16, 658 P.2d 499. Petitioner may have a new trial, free of constitutional errors.

c. The District Court abused its discretion finding that Appellate Counsel was not ineffective for failing to raise Trial Counsel's ineffectiveness for failing to investigate and consult with an expert witness about Ms. Clopton's use of a diabetic pump.

The District Court found “Petitioner argues that his Appellate Counsel was ineffective for failing to raise his Trial Counsel’s failure “to consult with an expert witness because Trial Counsel made no investigation thus making a strategic decision impossible. Application at p. 22.” The District Court recognized that “[m]ore specifically, Petitioner asserts that Victim’s blood glucose levels being found within normal ranges at the time she was tested by paramedics on December 10, 2016, showed the attack on the Victim occurred after the time frame the State asserted at trial and that expert testimony would have proven it was ‘scientifically impossible’ that the attack occurred during this time frame.”

The District Court determined “[t]he OCCA previously rejected a very similar argument in Petitioner’s Proposition IV from his direct appeal...” In Proposition IV, Petitioner argued there was insufficient evidence to convict him of Count 1, Assault and Battery with Intent to Kill the District Court specifically found the Petitioner had argued “the Victim could not have laid for thirty hours with her insulin pump disconnected without her blood sugar falling.” Further, the District Court found:

Although the OCCA did not directly address Petitioner’s blood sugar argument, it found that Petitioner’s conviction on Count I was sufficiently supported based, in part, on the following evidence: The State presented evidence showing [Petitioner] 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.

Id. at pp. 3, 8-9; Tr. Vol. III at pp. 613-22, 629, 633-35, Tr. Vol. IV at pp. 998-1002

The District Court found that “Petitioner engages in much speculation regarding what testimony an expert might have provided regarding the effects of the Victim being without insulin for over thirty hours.” The District Court further determined:

Although the State asserted that the Victim “laid there for over 30 hours,” this statement does not necessarily support Petitioner’s claim that the Victim was without insulin for this long. Tr. Vol. II at p. 242. The evidence does not make clear exactly how or when the Victim’s insulin pump became disconnected. Mr. Morgan, one of the paramedics who treated the Victim, testified the Victim’s insulin pump was still connected to her body but the lines from the pump were no longer connected to the port in the Victim’s arm when he examined her. See Tr. Vol. II at pp. 311-12, 322

The District Court did not address exhibits presented with the underlying application, more than mere speculation, as it is discussed below which demonstrates that Trial Counsel failed to investigate but it also establishes that Appellate Counsel was ineffective for failing to raise that claim on direct appeal thus resulting in prejudice to Petitioner. Petitioner argues that often in criminal cases, the only reasonable defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both. *Harrington v. Richter*, 562 U.S. 86, 106, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011); *Hinton v. Alabama*, 571 U.S. 263, 134 S.Ct. 1081, 188 L.Ed.2d 1 (2014) (per curiam) Under *Strickland*, “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland, supra* at 691; *Wiggins v. Smith*, 539 U.S. 510, 521-22, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); *Hinton v. Alabama, supra*; *Jennings v. Woodford*, 290 F.3d 1006 (9th Cir. 2002); *Rosario v. Ercole*, 601

F.3d 118 (2nd Cir. 2010); *U.S. v. Roane*, 378 F.3d 382 (4th Cir. 2004); *Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997); *Demarest v. Price*, 905 F. Supp. 1432 (D. Colo. 1995); *Stermer v. Warren*, 959 F.3d 704 (6th Cir. 2020). Petitioner argues Appellate Counsel's failure to raise Trial Counsel's ineffectiveness for failing to consult with an expert witness because Trial Counsel made no investigation thus making a strategic decision impossible.

Petitioner further argued that Appellate Counsel inadequately argued on direct appeal regarding Count 1, Assault and Battery with the intent to kill could not have happened as the State alleged. The State's theory was that on the evening of December 8, 2016, Clopton came home from a bar. Then at around 12:30 a.m. on December 9, 2016, the State claimed that Petitioner brutally beat Clopton and pulled out her insulin pump. (Tr. Vol. II. 241) The last outgoing call from Ms. Clopton's phone was made to the defendant at 12:37 a.m., on December 9, 2016. (Tr. Vol. IV. 919-20) After that phone call, all outgoing cell communication from Ms. Clopton's phone ceased. (Tr. Vol. IV. 911, 956) The State claimed that Ms. Clopton laid on the ground for 33 hours and was found by her father on the morning of December 10, 2016. (Tr. Vol. II. 242) However, when found, her blood sugar was in the normal range, and the examiner had no reason to dispute the fact the blood sugar was 117. (Tr. Vol. III. 325) If Ms. Clopton was without insulin for approximately 33 hours, it is scientifically impossible for her blood sugar to have been 117 (normal range).⁵ Ms. Clopton suffered from type I diabetes; the apparatus of that pump was found disconnected from her arm when paramedics arrived on scene (Tr. II, 310-11). Therefore, she must have been assaulted later on the 9th, or in the early hours of the 10th because if she were assaulted on the 8th her glucose levels would not have been within normal range.

⁵ A normal blood glucose level for adults, without diabetes, two hours after eating is 90 to 110 mg/dL.

The District Court found that Petitioner merely speculated as to what an expert would testify to but that was more than speculation. Because an expert would have testified about what an insulin pump is used for as it helps keep your blood sugar in your target range. People who use a pump have fewer big swings in their blood sugar levels. Pumps work well for people who cannot find an insulin dose that keeps blood sugar under control without allowing the erratic blood sugar. An expert would have testified that you should not go longer than 1 to 2 hours with no insulin if you are using a pump. This Court must take judicial notice of the link below.⁶ See [Exhibit 4] Diabetes: Living with an insulin pump; Michigan Medicine.

It is scientifically impossible that the attack happened in the early morning hours of December 9th. Dr. Silvio Inzucchi, clinical director of the Yale Diabetes Center, says “I will see that in someone with 0% insulin production, they will begin to fall ill within 12-24 hours after their last insulin injection, depending on its duration of effect. Within 24-48 hours they will be in DKA.”⁷ This is a serious complication of diabetes that can be life-threatening. DKA is most common among people with type 1 diabetes. See [Exhibit 5]⁸ How Long Can Your Body Survive Without Insulin? DKA is usually triggered by a problem with insulin therapy. Missed insulin treatments or inadequate insulin therapy, a ***malfunctioning or disconnected insulin pump*** can leave you with too little insulin in your system, triggering diabetic ketoacidosis. Alcohol or drug abuse, particularly cocaine, can also trigger DKA. The risk of DKA is highest if you have type 1 diabetes and miss insulin doses.⁹

⁶ <https://www.uofmhealth.org/health-library/zx1815>

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⁷ Diabetic ketoacidosis (DKA)

⁸ <https://www.healthline.com/diabetesmine/ask-dmine-lifespan-sans-insulin#What-happens-when-you-run-out-of-insulin>

⁹ <https://www.mayoclinic.org/diseases-conditions/diabetic-ketoacidosis/symptoms-causes/syc-20371551>

Petitioner argues to corroborate his claim he did not commit the offense, a defense witness, James Gilbert, testified that he was with Morris on the evening of December 9th. He testified that he was with him sometime between 4:00 p.m. and 6:00 p.m. (Tr. Vol. IV. 999) Further, he testified that during his meeting with Morris, he noticed that Morris had a scar on his forehead. (Tr. Vol. IV. 1000) Another witness, Susie Atzbach, testified that the night of December 9, 2016, Morris was at a bar and later went home with her. (Tr. Vol. IV. 633, 638-639) She testified that they left that bar early on the morning of December 10th, between 12:00 and 12:30 a.m. And went to her residence and later Petitioner left. (Tr. Vol. IV. 639)

Further facts to consider

Before the party, Ms. Clopton was at Conor McGee's house with the Petitioner. Though she could not remember whether she told Petitioner her plans for the evening, she took the Petitioner's credit card out with her that night. (Tr. Vol. III. 486-87) Ms. Clopton arrived at the Mercury Lounge sometime before 8:45 p.m. and, during the evening, had two beers and a mixed drink (Tr. Vol. II. 392-93; (Tr. Vol. III. 487) Around 9 or 9:30 p.m., the Petitioner showed up to the party uninvited. (Tr. Vol. II. 392, 402-03; Tr. Vol. III. 490) The Petitioner announced that he was at the party "to pay [Ms. Clopton's] bar tab." (Tr. Vol. II. 403) The Petitioner and Ms. Clopton made eye contact across the party, and Ms. Clopton soon left, driving alone back to her house in Broken Arrow (Tr. Vol. III. 490-91).

- d. The District Court abused its discretion denying Petitioner's application finding that Appellate Counsel was not ineffective for failing to raise prosecutorial misconduct for withholding the raw data generated from a DNA test which infringed upon Petitioner's right to have the test independently examined by an expert witness, but it also rendered the expert's testimony inadmissible because there was not sufficient facts or data to support the testimony.**

The District Court determined that “contrary to Petitioner’s arguments, the prosecutor’s failure to present the “raw data” generated from the DNA testing in Petitioner’s case did not involve a violation of *Brady*¹⁰.” The District Court determined that “Petitioner makes vague, conclusory statements that the absence of this “raw data,” denied him some right to effective cross-examination.” The District Court also found that that the raw data was never in possession of the prosecution, but the fact that a criminal justice agency had tested the evidence it must produce the facts and data relied upon contrary to the District Court’s determination.

“There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.” *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). The Supreme Court has framed the prosecution’s duty to disclose as “broad,” *Id.*, and “has never required a defendant to exercise due diligence to obtain *Brady* material,” *Lewis v. Conn. Comm’r of Corr.*, 790 F.3d 109, 121 (2nd Cir. 2015). But in *Banks v. Dretke*, 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004), while analyzing *Brady* as cause for excusing procedural default, the Court rejected a rule “declaring ‘prosecutor may hide, defendant must seek’” as “not tenable in a system constitutionally bound to accord defendants due process.” *Id.*, at. 696.

Following *Banks v. Dretke*, several circuits have held that a defendant’s diligence in discovering evidence plays no role in a substantive *Brady* claim. *See Dennis v. Sec’y, Penn. Dep’t of Corr.*, 834 F.3d 263, 291 (3d Cir. 2016) (en banc) (clarifying that “the concept of ‘due diligence’ plays no role in the *Brady* analysis”); *Amado v. Gonzalez*, 758 F.3d 1119, 1135 (9th Cir. 2014) (“The prosecutor’s obligation under *Brady* is not excused by a defense counsel’s failure to exercise

¹⁰ *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

diligence with respect to suppressed evidence.”); *U.S. v. Tavera*, 719 F.3d 705, 712 (6th Cir. 2013) (stating that *Banks v. Dretke* “should have ended the practice” of imposing “a broad defendant-due-diligence rule” in *Brady* cases). In sum, “the *Brady* rule imposes an independent duty to act on the Government,” *Tavera*, 719 F.3d at 712—an obligation to disclose favorable evidence when it reaches the point of materiality, regardless of the defense’s subjective or objective knowledge of such evidence. Evidence favorable to the defense encompasses exculpatory evidence, which “tend[s] to establish a criminal defendant’s innocence.” *Exculpatory Evidence*, Black’s Law Dictionary (11th ed. 2019). It also encompasses impeachment evidence, used to undermine a witness’s credibility, for “if disclosed and used effectively,” such evidence “may make the difference between conviction and acquittal.” *U.S. v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). “Impeachment evidence merits the same constitutional treatment as exculpatory evidence.” *Bowen v. Maynard*, 799 F.2d 593, 610 (10th Cir. 1986).

Petitioner argued in the District Court that Ms. Clopton had a bite mark on her right shoulder, and various contusions, abrasions, and lacerations on her body (Tr. Vol. II. 367, 374, 376). A swab of her shoulder bite mark was received from a nurse at Hillcrest Hospital and was also processed (Tr. Vol. II. 367-68). Investigator Weikel booked into evidence the physical items from the crime scene, and the swabs taken, and later submitted an Oklahoma State Bureau of Investigation (OSBI) forensic request to test swabs taken from the frying pan, the clear stain, Ms. Clopton’s hand, the bite mark on Ms. Clopton’s shoulder, and buccal swabs taken from both Ms. Clopton and the defendant (Tr. Vol. IV. 814-16, 824-25, 842,851). A criminalist with the OSBI subjected these items to serology and DNA testing (Tr. Vol. IV. 961, 971-73). The blood on the frying pan belonged to Ms. Clopton alone (Tr. Vol. IV. 982). A “YSTR”¹¹ analysis of both the

¹¹ Short Tandem Repeat (STR) on the Y chromosome.

swab from the clear stain on the kitchen floor and the swab from Ms. Clopton's shoulder bite wound revealed a **partial DNA profile** consistent with the defendant. (Tr. Vol. IV. 985, 991) Analysis of the clear stain from the kitchen floor also detected P30, a protein found in seminal fluid, though no sperm were observed. (Tr. Vol. IV. 977)

Petitioner argued in the District Court that by withholding the raw data produced by the DNA analysis what testimony given regarding the DNA was mere conclusory and not admissible thus resulting in plain error and violating. *Brady, supra*. In claims of *Brady* error, where the elements of the substantive claim itself mirror the cause and prejudice inquiry and proof of one is proof of the other. See *Banks v. Dretke, supra*. A “constitutional claim that implicates ‘fundamental fairness’... compels review regardless of possible procedural defaults...” A showing of prejudice would invariably make showing cause unnecessary. *Murray v. Carrier*, 477 U.S. 478, 494, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). The expert testimony alleged there was a partial DNA profile consistent with the Petitioner but withheld the facts and data generated by the analysis. The STR alleles are identified by the number of core repeats present at the locus. Experienced analysts convert these numeric identifiers into a DNA profile using machine-generated raw data analyzed by a software program and the analyst’s independent manual examination which involves an editing process (see John M. Butler, *Fundamentals of Forensic DNA Typing* at 213 [2010]). *People v. John*, 27 N.Y.3d 294, 298, 52 N.E.3d 1114, 33 N.Y.S.3d 88 (2016).

The evidence produced by DNA analysis is not merely the raw data of matching bands on autoradiographs but encompasses the ultimate expression of the statistical significance of a match. *People v. Barney*, 8 Cal. App. 4th 798, 818, 10 Cal. Rptr. 2d 731 (Ct. App. 1992). The District Court found this case did not support Petitioner’s argument, but the facts in *Barney*, regarding DNA analysis “is not merely the raw data of matching bands on autoradiographs but encompasses

the ultimate expression of the statistical significance of a match.” Further, Petitioner argued the fair trial and due-process rights are implicated when data relied upon by a laboratory in performing tests are not available to the opposing party for review and cross-examination. *State v. Schwartz*, 447 N.W.2d 422, 427 (Minn. 1989). Oklahoma’s discovery code 22 O.S.2020 § 2002(d) establishes a procedural due process and provides that the State shall provide: “any reports or statements made by experts in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons.” These scientific tests, experiments and comparisons are the raw data produced by these tests and without that data, the result of the test is conclusory and thus inadmissible. Therefore, Petitioner was denied the right to a fair trial because withholding the test results it infringed upon his Sixth Amendment right to the effective assistance of counsel by denying him the right to effective cross-examination. The Sixth Amendment Confrontation Clause binds the states and the Federal Government. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

The opinion testimony regarding the DNA testing was not admissible because it was not based upon sufficient facts or data where the testimony brings in facts outside the record and thus it is inadmissible because it is unreliable.

CONCLUSION

WHEREFORE, the Petitioner respectfully prays upon the Honorable Court to Reverse and Remand this action to the District Court with instructions.

IT IS SO PRAYED.

Respectfully submitted,



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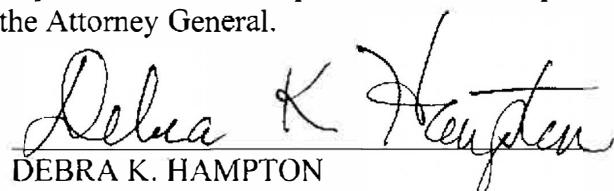
(866) 251-4898 (fax)

hamptonlaw@cox.net

Attorney for Defendant/Petitioner

CERTIFICATE OF SERVICE

This is to certify that on the day of filing, I requested the Clerk to place one file-stamped copy of this instrument in the Notice Receptacle of the Attorney General.



DEBRA K. HAMPTON

ORIGINAL



**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

FILED

**COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA**

BRENT ALLEN MORRIS,

JUL 27 2022

Petitioner,

**JOHN D. HADDEN
CLERK**

v.

No. PC-2022-327

STATE OF OKLAHOMA,

Respondent.

**ORDER AFFIRMING DENIAL OF APPLICATION
FOR POST-CONVICTION RELIEF**

Petitioner, through counsel, appeals from an order of the District Court of Tulsa County denying him post-conviction relief in Case No. CF-2016-6899. A jury convicted Petitioner of numerous domestic-related offenses. He was sentenced to various terms of imprisonment including a twenty-five-year sentence for assault and battery with the intent to kill. The convictions and sentences were affirmed on direct appeal. *Morris v. State*, No. F-2018-551 (Okl.Cr. August 7, 2020) (not for publication).

The District Court denied Petitioner's post-conviction application on February 7, 2022. We review the District Court's determination for an abuse of discretion. *State ex rel. Smith v. Neuwirth*, 2014 OK CR 16, ¶ 12, 337 P.3d 763, 766. An abuse of discretion is any unreasonable

or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

Before the District Court, Petitioner claimed that his appellate counsel was ineffective for failing to present four substantive claims on direct appeal. Claims challenging appellate counsel's effectiveness are appropriate in an initial post-conviction application. *See Logan v. State*, 2013 OK CR 2, ¶ 5, 293 P.2d 969, 973. However, to prevail Petitioner must demonstrate both that counsel's performance was deficient and prejudice, i.e. that but for the deficient performance the outcome of the appeal would have been different. *Strickland v. Washington*, 466 U.S. 668, 695 (1984).

Petitioner first argues that appellate counsel was ineffective for failing to challenge the State's jurisdiction to prosecute him. Petitioner makes no claim that he is Indian. Rather, he claims the fact that his crimes were committed on land belonging to the Creek and/or Cherokee Nations is sufficient alone to divest the State of jurisdiction. The District Court, although it acknowledged that the crimes occurred

in Indian country, disagreed. It rejected Petitioner's claim that State jurisdiction was preempted by the Oklahoma Enabling Act.

Petitioner's claim, if true, would be a radical departure from the rulings of this Court and that of the United States Supreme Court. As far back as *United States v. McBratney*, 104 U.S. 621 (1882), the law has been that a non-Indian charged with committing crimes against other non-Indians in Indian Country is subject to prosecution under state law. *See id.* at 623-24; *Parker v. State*, 2021 OK CR 17, ¶ 35, 495 P.3d 653, 665 (“A defendant’s Indian status or that of a crime victim is an essential element of an MCA offense and must be proved by the prosecution in order to have federal jurisdiction over crimes committed by or against Indians in Indian Country”); *State v. Klindt*, 1989 OK CR 75, ¶ 5, 782 P.2d 401, 403 (a defendant has the burden to prove Indian status for dismissal based on lack of jurisdiction); *Goforth v. State*, 1982 OK CR 48, ¶ 5, 644 P.2d 114, 116 (“fundamental to the appellant’s claim that state jurisdiction was preempted by federal statute is a determination of whether appellant is an Indian”).

These cases, at least implicitly, rejected the notion that statutes or treaties purporting to divest states of criminal jurisdiction survived admission into the union. That is, unless the state’s enabling act

proclaimed otherwise “by express words.” *McBratney*, 104 U.S. at 623-24. As the United States Supreme Court recently observed, “[t]he Oklahoma Enabling Act contains no such express exception.” *Oklahoma v. Castro-Huerta*, 142 S.Ct. 2486, 2504 (2022).

Petitioner’s attempt to conjure up exclusive federal jurisdiction by pointing to Article 1, Section 3 of Oklahoma’s constitution is equally unavailing. This provision has long been construed “to disclaim jurisdiction over Indian lands only to the extent that the federal government claimed jurisdiction. Thus, where federal law does not purport to confer jurisdiction on the United States courts, the Oklahoma Constitution does not deprive Oklahoma courts from obtaining jurisdiction over the matter.” *Goforth*, 1982 OK CR 48, ¶ 8, 644 P.2d at 116. Consequently, Oklahoma has jurisdiction over crimes committed by non-Indians in Indian country. *Goforth*, 1982 OK CR 48, ¶ 9, 644 P.2d at 117. For these reasons, the District Court did not abuse its discretion in rejecting Petitioner’s jurisdictional claim.

The second claim Petitioner presented to the District Court concerned double jeopardy. Petitioner was convicted of, among other crimes, assault and battery with intent to kill, domestic assault and battery resulting in great bodily harm, and domestic assault and

battery with a dangerous weapon. On direct appeal Petitioner claimed that trial counsel was ineffective for failing to object to these counts on multiple punishment grounds in violation of state law. We denied the claim because two of the three counts were dismissed at sentencing due to multiple punishment concerns.

Petitioner's argument on post-conviction is that the claim should have been presented on direct appeal as – or at least included – a Fifth Amendment violation. Among the reasons the District Court denied this claim was a lack of prejudice. Where it is easier to dispose of an ineffectiveness claim on such grounds, "that course should be followed." *Strickland*, 466 U.S. at 670. Here, Petitioner fails to demonstrate that had the claim been presented as he envisions, the result of the direct appeal would have been different. Accordingly, the District Court did not abuse its discretion when it denied relief on this claim.

Petitioner next claims that appellate counsel was ineffective for failing to bring trial counsel to task for failing to investigate. Specifically, Petitioner claims that trial counsel should have consulted with an expert concerning the victim's use of an insulin pump and the effects of insulin deprivation over time. Such investigation could have,

according to Petitioner, been used to challenge his conviction for assault and battery with the intent to kill. The District Court found that the inclusion of expert testimony would not have changed the outcome of the trial. Accordingly, it denied this claim for lack of prejudice.

We note that the sufficiency of the evidence to support the assault and battery conviction was challenged on direct appeal and that one of the arguments raised in support of the challenge was the time of injury based on blood sugar levels. We found the evidence sufficient despite the possibility of competing inferences regarding time of injury. Based on the record before us, Petitioner has failed to establish the District Court's disposition of this claim involved an abuse of discretion.

The final claim presented to the District Court was the assertion that appellate counsel was ineffective for failing to raise a claim of prosecutorial misconduct and/or suppression of evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). As with an ineffectiveness claim, a claim under *Brady* requires a showing of prejudice in addition to a showing that the evidence at issue was favorable to the accused. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

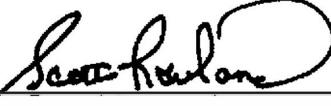
DNA evidence was introduced by the prosecution at trial. Petitioner complains that he was entitled to the “raw data” generated from the testing. Petitioner does not explain precisely what this “raw data” would consist of, how it constitutes exculpatory evidence, or how it could possibly change the outcome of the trial. We therefore conclude that the District Court did not abuse its discretion when it denied relief on this claim.

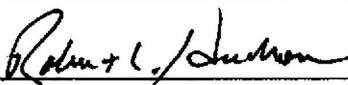
Petitioner has failed to demonstrate that he is entitled to post-conviction relief. Therefore, the order of the District Court denying Petitioner’s application for post-conviction relief is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2022), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision. Petitioner is placed on notice that his state remedies are deemed exhausted on all issues raised in his petition in error, brief, and any prior appeals. See Rule 5.5, *supra*.

IT IS SO ORDERED.

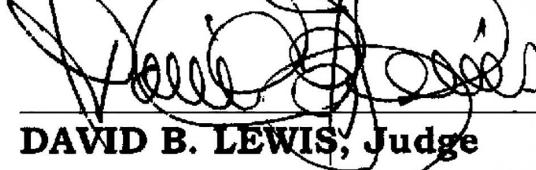
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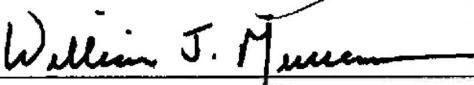
27th day of July, 2022.


SCOTT ROWLAND, Presiding Judge

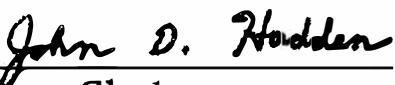

ROBERT L. HUDSON, Vice Presiding Judge


GARY L. LUMPKIN, Judge


DAVID B. LEWIS, Judge


WILLIAM J. MUSSEMAN, Judge

ATTEST:


John D. Hadden
Clerk
PA

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FILED

IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAR 10 2023

BRENT ALLEN MORRIS,

JOHN D. HADDEN
CLERK

Appellant,

PC 2023 2011

v.

Case No.

STATE OF OKLAHOMA,

(Tulsa County Case
No. CF-2016-6899)¹

Appellee.

PETITION IN ERROR
with request for evidentiary hearing²

COMES NOW, the Appellant, BRENT ALLEN MORRIS, *pro se*, and submits this as his 'Petition in Error' with a request for an evidentiary hearing pursuant to Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, T. 22, Ch. 13, App. (2023). A certified copy of the District Court's dismissal is attached as Exhibit 1. On March 6, 2023, Appellant mailed his 'Notice of Intent to Appeal' to the Clerk of Court for Tulsa County. On March 8, 2023, Appellant mailed his 'Designation of Record' to the Clerk of Court for Tulsa County. The instant appeal is presented under the authority of 22 O.S. § 1087, and the *Rules of the Oklahoma Court of Criminal Appeals*.

Appellant requests a remand to the Tulsa County District Court for further proceedings.

In support thereof, Appellant states:

I. Proceedings Below

¹ See OSCN Docket available at <https://www.oscn.net/dockets/GetCaseInformation.aspx?db=tulsa&number=CF-2016-6899>. This Court is required to take judicial notice of the district court and all other related dockets pursuant to 12 O.S. § 2202(D) ("A court shall take judicial notice if requested by a party and supplied with the necessary information.").

² Due process requires that each of Appellant's following claims require an evidentiary hearing. See *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("[W]ritten submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, ... written submissions are a wholly unsatisfactory basis for decision."). See Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, T. 22, Ch. 13, App. (2023).

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OKLAHOMA COURT OF CRIMINAL APPEALS

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Appellant was convicted after jury trial in Tulsa County case number CF-2016-6899 of:

- Count 1 – Assault and Battery with Intent to Kill;
- 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;
- Count 11 – Interference with Emergency Telephone Call;

and the jury recommended the following punishment:

- Count 1 – Assault and Battery with Intent to Kill – 25 years imprisonment;
- Counts 4, 5, 6, and 10 – Violation of Protective Order – 1 year imprisonment in Tulsa County Jail for each count;
- Count 7 and 9 – Domestic Assault and Battery, Second Offense – 4 years imprisonment for each count;
- Count 8 – Malicious Injury to Property – 1 year imprisonment in Tulsa County Jail;
- Count 11 – Interference with Emergency Telephone Call – 1 year imprisonment in Tulsa County Jail;

Judge Drummond announced sentence with counts 1, 7, and 9 running consecutively, or thirty-three (33) consecutive years imprisonment. This Court affirmed Appellant's conviction on Direct Appeal, *see Morris v. State*, No. F-2018-551 (Oklahoma Court of Criminal Appeals) (unpublished), and denied relief on his first Application for Post-Conviction Relief. *See Morris v. State*, No. PC-2022-327 (unpublished).

II. Appellant's Second Application for Post-Conviction Relief

On January 18, 2023 Appellant filed his 'Second Application for Post-Conviction Relief' in the Tulsa County District Court, and filed a supplement to his application on January 24,

2023, noting that his brief in support of his Second Application would follow. *See Exhibit 2* (Supplemented Second PCR Application). *See also* Docket for CF-2016-6899.

Appellant raised the following claims and subclaims:

- I. Ineffective Assistance of Appellate Counsel for Failure to Investigate and Raise Prosecutorial Misconduct
 - a. The State violated Due Process when it failed to investigate other suspects
 - b. The State violated Due Process when it submitted falsified and manufactured evidence it knew to be such
 - c. The State violated Due Process when it manipulated witness testimony it knew to be untrue, allowed the testimony to be heard by the jury, and failed to correct it
 - d. The State suppressed material exculpatory and impeaching evidence, and trial counsel was ineffective for failing to request additional time and assistance
- II. Ineffective Assistance of Appellate Counsel: The State Violated the Sixth Amendment by Intentionally and Unjustifiably Intruding into Petitioner's Attorney-Client Relationship
 - a. Petitioner's pre-trial attorney had an actual conflict of interest, was allowed to withdraw, but still participated in and guided trial preparation while he was employed as a Tulsa County Assistant District Attorney
 - b. Petitioner's trial attorney created a conflict when she kept for herself \$5,000 paid for expert witnesses
 - (i) The trial attorney "retained" her girlfriend/significant other as a defense expert and as her second chair, even though she is unqualified to act as an expert, was not called and did not offer expert testimony, and is not a paralegal or attorney
 - (ii) The trial attorney did not retain or call any expert witnesses and did not refund the \$5,000
- III. Petitioner's pre-trial and trial attorneys caused structural error when they violated Petitioner's constitutional rights to deprive him of his counsel of choice
- IV. Ineffective Assistance of Trial Counsel: Failure to Investigate and Call Fact Witnesses

- V. Prosecutorial Misconduct: the ADA elicited sympathy and inflamed the passions of the jury by crying during Petitioner's trial
- VI. Rule 3.4(E), *Rules of the Oklahoma Court of Criminal Appeals*, is unconstitutional
- VII. This panoply of unconstitutional violations individually and cumulatively requires a new trial

On February 15, 2023, the State filed its 'Response to Petitioner's App for Post-Conviction Relief,' and included a prepared Order for Judge Michelle Keely to sign an instant denial of Appellant's Second PCR application. Judge Keely signed the Order the next day, February 16, 2023. *See* Docket for CF-2016-6899. The face of the docket evidences the fact that Appellant had not received the State's 'Response,' but also that Judge Keely improvidently dismissed his Second PCR Application.

To be clear: (1) Appellant asserts his actual innocence for each count of conviction; (2) each of his claims are newly discovered and could not have been discovered and submitted before his Second Application; (3) or were prevented under Rule 3.4(E), *Rules of the Oklahoma Court of Criminal Appeals*, T. 22, Ch. 13, App. (2023). Appellant made this clear in his initial Second PCR Application and in his Supplement.

III. The State's Response and Motion to Dismiss is Not Supported by Fact or Law

A. Appellant was not allowed to submit a motion in opposition

The OCCA has said "this Court must, like the parties before it, abide by our Rules." *Meyer v. Engle*, 369 P.3d 37, 42 (Okl.Cr. 2016) (*citing Leftwich*, 2011 OK CR 27, ¶ 4, 262 P.3d at 771) (Smith, PJ, specially concurring). It would go beyond common sense, reason, and logic that the district courts – even the Tulsa County District Court – is not required to abide by its own Rules.

Rule 4(e), *Rules of the District Courts of Oklahoma*, T. 12, Ch. 2, App. (2023) allows “[a]ny party opposing a motion, except those enumerated in Section c above, shall serve and file a brief or a list of authorities in opposition within fifteen (15) days *after service* of the motion, or the motion may be deemed confessed.” Rule 4(e)’s “Section c” does not apply here.

This Court has said its Rules and the Rules of the District Courts have the force and effect of a statute, and the plain language of Rule 4(e) – by using the words “[a]ny party” – cannot be restricted to only civil cases.

Instead of allowing Appellant the fifteen- (15) days allowed under Rule 4(e) *after service* (the date Appellant received the State’s motion through the prison’s legal mail system), Judge Keely signed the State’s prepared Order the very next day after it was filed, an instant denial. The face of the Tulsa County docket proves this. *See* Docket entry for February 27, 2023 (Response to State’s Motion to Dismiss with copies to DA and Judge Keely). Appellant’s Rule 4(e) motion in opposition was timely submitted and filed by the Tulsa County Court Clerk.³ *See* Exhibit 3 (Appellant’s ‘Response to State’s Motion to Dismiss’).

B. Judge Keely was not in receipt of Appellant’s ‘Brief in Support’

The State filed its ‘State’s Response to Petitioner’s Application for Post-Conviction Relief’ and Judge Keely signed the State’s prepared ‘Order Dismissing Petitioner’s Application for Post-Conviction Relief’ before Appellant even filed his ‘Brief in Support’ of his ‘Second Application for Post-Conviction Relief.’ This hardly permits the State to make the arguments it submitted, nor Judge Keely to deny instanter Appellant’s Second Application.

Neither the State nor Judge Keely had all the facts and law which support Appellant’s arguments. *See* Judge Keely’s ‘Order Dismissing Petitioner’s Application for Post-Conviction

³ Appellant states for federal habeas purposes that the Tulsa County Court Clerk – for some reason – has delayed filing several documents in this case that were in its receipt for days – and even in excess of one week.

Relief" at p.1 ("This Court has reviewed the Application, the State's Response, and the records in rendering its decision. This Court finds that the Application fails to present any issue of material fact requiring a formal hearing with presentation of witnesses and the taking of testimony; this matter can be decided on the pleadings and records reviewed.") (citation omitted).

Of course there are no issues of material fact in an application. The material facts, affidavits, and statutory, constitutional, and common law in support of an application are submitted in a brief in support of the application. The State and Judge Keely have decided the cart goes before the horse. Not surprisingly so – because in Ms. Hilborn's short tenure in the DA's Office, she has already been involved in several cases with serious prosecutorial misconduct and recognizes the misconduct at issue here is *per se* structural error with a dismissal remedy.

C. 22 O.S. § 1083(B) is inapplicable and improvidently utilized by Judge Keely

Section 1083(B) permits a district court to summarily dispose of an application or post-conviction relief *unless* there exists a material issue of fact. The State did not ask – and Judge Keely did not Order – Appellant to submit his 'Brief in Support' within a certain timeframe so that the State could properly submit a response to his pleadings. *See* Order at p.3.

Because material issues of fact exist and these issues have not been addressed by the district court, this Court should vacate Judge Keely's Order and remand Appellant's case to the Tulsa County District Court for further proceedings.

D. Judge Keely applied 22 O.S. § 1080.1 (eff. Nov. 1, 2022) *ex post facto*

The Oklahoma Legislature recently updated the Post-Conviction Procedure Act, 22 O.S. § 1080, *et seq.*, to require appellants to submit post-conviction claims within one- (1) year of their conviction being final after direct review. The November 1, 2022 version will ostensibly be

applied in Oklahoma in a similar fashion to how federal habeas courts applied the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), meaning any convictions that were final before November 1, 2022 have one- (1) year to file post-conviction proceedings in the district courts. Further, statutory and equitable tolling will also necessarily apply. *See Order at p.3.*

The State's Motion and Judge Keely's Order violate the *ex post facto* clauses of the Oklahoma and United States Constitutions, and this Court should vacate her Order and remand Appellant's case to the Tulsa County District Court for further proceedings.

E. Appellant's known claims could not have been raised earlier because of this Court's Rule 3.4(E)

Under Oklahoma's Post-Conviction Procedure Act, the district court cannot summarily dispose of a (non-capital) application for post-conviction relief if the application raises a genuine issue of material fact, which prevents a finding that either party is entitled to judgment as a matter of law. *See 22 O.S. § 1083(c); see also 22 O.S. § 1083(b)* (Disposition on the pleadings and record is not proper if there exists a material issue of fact). An issue is material in this context if it is one that could be determinative on a claim raised in the post-conviction application, *i.e.*, a fact that could potentially help the applicant establish that he or she was prejudiced by appellate counsel's unreasonable failure to raise a particular claim now raised.

Logan v. State, 293 P.3d 969, 2013 OK CR 2.

The State's contention that Appellant's claims in his Second Application for post-conviction relief are procedurally barred or waived is wrong.

The Post-Conviction Procedure Act contemplates exactly the issues Appellant brings in his Second Application and his soon-to-be filed Brief in Support. Appellant has a "sufficient reason" why he was unable to raise these arguments in his direct appeal and first application for post-conviction relief. *See 22 O.S. § 1086.*

First, and notwithstanding the jury's verdicts, Appellant continues to assert his innocence to each of the counts of conviction. Without limitation, Appellant is not responsible for Ms. Clopton's attack and his trial was negatively influenced by, *inter alia*, prosecutorial misconduct. Under Oklahoma's post-conviction statutes, the only issues that can be raised in post-conviction are those which: "(1)[w]ere not and could not have been raised in direct appeal; and (2) [s]upport a conclusion **either** that the outcome of the trial would have been different but for the errors **or** that the defendant is factually innocent." *Bryan v. State*, 1997 OK CR 69, ¶ 2, 948 P.2d 1230, 1232 (Okl.Cr. 1997). *See also* 22 O.S. § 1086; *Fontenot v. Allbaugh*, 2019 WL 3995957 (E.D. Okla. 2019).

Second, some of Appellant's claims are founded in newly discovered evidence. *See Bryan*, 948 P.2d.

Third, some of Appellant's 'Second PCR Application' claims were explained to his Direct Appeal and Post-conviction counsels, whom **for** whatever reason declined to include them. Because of Rule 3.4(E), *Rules of the Oklahoma Court of Criminal Appeals*, T. 22, Ch. 18, App. (2023), Appellant could not have raised these claims *pro se*. *Bryan*, 1997 OK CR at ¶ 2 (Petitioner's claims "could not have been raised in direct appeal"). "The dual aim of our criminal justice system is 'that guilt shall not escape or innocence suffer.' To this end, we have placed our confidence in the adversary system, entrusting to it the primary responsibility for developing relevant facts on which a determination of guilt or innocence can be made." *U.S. v. Nobles*, 422 U.S. 225, 230 (1975) (citations omitted).

As evidenced *supra*, the adversary system failed here, because the State knows it committed *per se* structural error in Appellant's case and it would rather ignore his State and

Federal Constitutional claims so it can pass the buck to this Court and the federal courts. This unconstitutional.

CLOSING

Appellant prays the Court will remand his case to the District Court of Tulsa County for further proceedings as required under statutory, constitutional, and common law of this State and the United States.

IT IS SO PRAYED.

Dated: March 8, 2023

Respectfully submitted,



Brent Allen Morris
#795282
JCCC Unit 5-S
216 N. Murray St.
Helena, OK 73741

VERIFICATION AND CERTIFICATE OF SERVICE

I, Brent Allen Morris, declare and certify under the penalty of perjury under the laws of Oklahoma that the foregoing is true and correct to the best of my knowledge, information, and belief.

I further declare and certify that on March 8, 2023, the original was mailed to the Clerk of Court for the Oklahoma Court of Criminal Appeals and copies were mailed to the Tulsa County Court Clerk's Office with a request that the Clerk place a file-stamped copy in the **Notice Receptacle of Judge Michelle Keely and the DA's Office**.

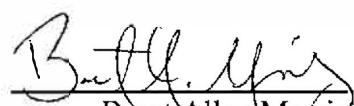


Brent Allen Morris
#795282
JCCC Unit 5-S
216 N. Murray St.
Helena, OK 73741

Affidavit in Forma Pauperis

I, Brent Allen Morris, state that I am a poor person without funds or property or relatives able or willing to assist me in paying for filing the within instrument. I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

Signed this 8th day of March, 2023 at Helena, Alfalfa County, Oklahoma.



Brent Allen Morris
#795282
JCCC Unit 5-S
216 N. Murray St.
Helena, OK 73741

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

BRENT ALLEN MORRIS,

)

Petitioner,

)

vs.

)

STATE OF OKLAHOMA,

)

Respondent.

)

CF-2016-6899

Judge Keely

DISTRICT COURT
FILED
FEB 28 2023
DON NEWBERRY, Court Clerk
STATE OF OKLA. TULSA COUNTY

**ORDER DISMISSING PETITIONER'S APPLICATION FOR POST-CONVICTION
RELIEF**

Petitioner's Application for Post-Conviction Relief comes before this Court for consideration under the Post-Conviction Procedure Act, 22 O.S. §§ 1080-1089. This Court has reviewed the Application, the State's Response, and the records in rendering its decision. This Court finds that the Application fails to present any issue of material fact requiring a formal hearing with the presentation of witnesses and the taking of testimony; this matter can be decided on the pleadings and records reviewed. *Johnson v. State*, 1991 OK CR 124, ¶ 10, 823 P.2d 370, 373-74. Also, this Court finds it unnecessary to appoint counsel for Petitioner. See 22 O.S. § 1082.

STATEMENT OF RELEVANT FACTS

On May 23, 2018, a jury convicted Petitioner with Count 1 – Assault and Battery with Intent to Kill; Count 4 – Violation of Protective Order; Count 5 - Violation of Protective Order; Count 6 – Violation of Protective Order; Count 7 – Domestic Assault and Battery – Second Offense; Count 8 – Malicious Injury to Property; Count 9 – Domestic Assault and Battery – Second Offense; Count 10 – Violation of Protective Order; and Count 11 – Interference with Emergency Telephone Call. The jury recommended the following punishment:

- Count 1 – Assault and Battery with Intent to Kill – 25 years imprisonment
- Count 4 – Violation of Protective Order – 1 year imprisonment in Tulsa County Jail
- Count 5 - Violation of Protective Order - 1 year imprisonment in Tulsa County Jail
- Count 6 – Violation of Protective Order - 1 year imprisonment in Tulsa County Jail
- Count 7 – Domestic Assault and Battery – Second Offense – 4 years imprisonment
- Count 8 – Malicious Injury to Property - 1 year imprisonment in Tulsa County Jail
- Count 9 – Domestic Assault and Battery – Second Offense – 4 years imprisonment
- Count 10 – Violation of Protective Order - 1 year imprisonment in Tulsa County Jail
- Count 11 – Interference with Emergency Telephone Call - 1 year imprisonment in Tulsa County Jail

The Honorable District Judge Doug Drummond sentenced Petitioner in according to the jury's recommendation and elected to run counts 1, 7, and 9 consecutive to each other. The Oklahoma Court of Criminal Appeals affirmed Petitioner's judgment and sentence in 2020. Petitioner filed his first Application for Post-Conviction Relief on November 22, 2021, and it was denied by filed Order on February 7, 2022. This denial was subsequently affirmed by the OCCA. Petitioner now presents his Second Application for Post-Conviction Relief filed January 18, 2023. In it, he raises the following claims for relief:

1. Prosecutorial Misconduct: The State violated Due Process when it manipulated witness testimony it knew to be untrue, allowed the testimony to be heard by the jury, and failed to correct it.
2. The government violated the Sixth Amendment by intentionally and unjustifiably intruding into the Petitioner's attorney-client relationship.
3. Tom Sawyer and Amanda Self caused *per se* structural error when they violated Petitioner's constitutional rights to deprive him of his counsel of choice.
4. Petitioner's trial attorney had an actual conflict of interest.
5. IAC failure to investigate and call fact and alibi witnesses.
6. Prosecutorial Misconduct: ADA Heather Anderson elicited sympathy and inflamed the passion of the jury by crying during Petitioner's trial.
7. This panoply of constitutional violations individually and cumulatively requires a new trial.

ARGUMENT AND AUTHORITY

Oklahoma's Post-Conviction Procedure Act, 22 O.S. § 1080-1089, provides that the District Court may dismiss an application when it is satisfied "on the basis of the application, the answer or motion of respondent, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings." 22 O.S. § 1083(B). Accordingly, dismissal on the pleadings is improper where there exists a material issue of fact. *Id.* So, as in the case at bar, where a Petitioner fails to state a meritorious claim for relief and fails to present any material fact for this Court to consider, it should dismiss the application. Petitioner's Application is fit for dismissal.

I. PETITIONER'S CLAIMS ARE PROHIBITED BY 22 O.S. § 1080.1.

The Oklahoma Legislature has limited post-conviction relief under the Post-Conviction Procedure Act available to petitioners. Under 22 O.S. § 1080.1, petitioners have *one year* to initiate claims for post-conviction relief, and that timeline is calculated based upon the following:

A. A one-year period of limitation shall apply to the filing of any application for post-conviction relief, whether an original application or a subsequent application. The limitation period shall run from the latest of:

1. The date on which the judgment of conviction or revocation of suspended sentence became final by the conclusion of direct review by the Oklahoma Court of Criminal Appeals or the expiration of the time for seeking such review by the Oklahoma Court of Criminal Appeals;
2. The date on which the Governor revoked parole or conditional release, if the petitioner is challenging the lawfulness of said revocation;
3. The date on which any impediment to filing an application created by a state actor in violation of the Constitution of the United States or the Constitution of the State of Oklahoma, or laws of the State of Oklahoma, is removed, if the petitioner was prevented from filing by such action;

4. The date on which the constitutional right asserted was initially recognized by the United States Supreme Court, if the right has been newly recognized by the United States Supreme Court and made retroactively applicable to cases on collateral review; or
5. The date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

B. Subject to the exceptions provided for in this section, this limitation period shall apply irrespective of the nature of the claims raised in the application and shall include jurisdictional claims that the trial court lacked subject-matter jurisdiction.

C. The provisions of this section shall apply to any post-conviction application filed on or after the effective date of this act.

22 O.S. § 1080.1 (effective Nov. 1, 2022). Petitioner's judgment and sentence became final when the OCCA affirmed his judgment and sentences in 2020. Petitioner's current Application is prohibited under 22 O.S. 1080.1, and the Court dismisses his current Application on this basis.

II. PETITIONER'S CLAIM IS PROCEDURALLY BARRED.

Oklahoma's Post-Conviction Procedure Act "provides petitioners with very limited grounds upon which to base a collateral attack on their judgments." *Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973. The Post-Conviction Procedure Act is not intended to provide a second appeal. *Richie v. State*, 1998 OK CR 26, 957 P.2d 1192. Accordingly, "[i]t is not the office of the Post-Conviction Procedure Act, 22 O.S.1991, § 1080 *et seq.* to provide a second appeal under the mask of post-conviction application." *Thomas v. State*, 1994 OK CR 85, 888 P.2d 522, 525. Finality of judgments is of the utmost importance in the post-conviction posture and should be stressed accordingly:

We will narrowly construe these amendments in accordance with the legislature's intent to honor the principle of finality of judgment. The Post-Conviction Procedure Act is not intended to provide a second appeal. We will consider neither issues raised on direct appeal and therefore barred by res judicata, nor issues waived because they could have been raised on direct appeal but were not.

Cannon v. State, 1997 OK CR 13, 933 P.2d 926, 928. This commandment is embodied in the Post-Conviction Procedure Act: “All grounds for relief available to the application under this act must be raised in the original, supplemental or amended application.” 22 O.S. § 1086. The doctrine of *res judicata* procedurally bars issues which were already raised and ruled upon; the doctrine of waiver bars issues which could have been raised on review, but were not. *Id. King v. State*, 2001 OK CR 22, ¶ 4, 29 P.3d 1089, 1090 (noting that petitioner’s claims should have been raised prior to his guilty plea, but most certainly in a direct appeal, and, therefore, his claims were barred). *See also Webb v. State*, 1992 OK CR 38, ¶ 6, 835 P.2d 115, 116, overruled on other grounds (holding that petitioner’s third attorney was procedurally barred from raising an ineffective assistance claim in petitioner’s *second* application for post-conviction relief).

The Legislature has provided a narrow exception, allowing for subsequent applications when there exists a “sufficient reason” why the grounds for relief were not asserted or inadequately asserted in the prior application. 22 O.S. § 1086. Thus, analysis turns to whether there exists a sufficient reason for not raising them or inadequately raising them in his previous application. Petitioner makes no showing whatsoever. The Application consequently fails to advance any reason indicating how his claims were inadequately raised in his prior direct appeal and/or in prior applications; Petitioner fails to overcome the procedural bar imposed by 22 O.S. § 1086. Therefore, the Court dismisses Petitioner’s Application on this basis as well.

CONCLUSION

Petitioner’s claims are both fit for dismissal under 22 O.S. § 1080.1 and procedurally barred under 22 O.S. § 1086. The Court dismisses the Petitioner’s Application for Post-Conviction Relief.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Petitioner’s Application for Post-Conviction Relief is hereby **DENIED**.

SO ORDERED this 16th day of February, 2023.

Michelle Keely
MICHELLE KEELY
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

This Court certifies that on the date of filing, a true and correct copy of the above and foregoing Order was delivered to:

Brent Alan Morris
James Crabtree Correctional Center
216 N. Murray Street
Helena, OK 73741-1017

-&-

Meghan Hilborn, OBA #33908
Assistant District Attorney
500 South Denver, Suite 900
Tulsa, Oklahoma 74103-3832

DON NEWBERRY, COURT CLERK

BY: Heather Hagedorn
Deputy Court Clerk

FILED

FEB 13 2023

Mark C. McCartt, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BRENT ALLEN MORRIS,)
Petitioner,)
v.)
CARRIE BRIDGES, Warden,)
Respondent.)

Case No. 22-CV-0091-CVE-SH

NOTICE OF SUPREME COURT CASE NUMBER

COMES NOW, Petitioner BRENT ALLEN MORRIS, *pro se*, and notifies the Court and Respondent of the case number in his *certiorari* appeal to the United States Supreme Court (SCOTUS).

On February 8, 2023, Petitioner received via the prison legal mail system a letter from the Clerk of the SCOTUS notifying him that his *certiorari* petition was filed on October 19, 2022 and was placed on the docket February 1, 2023 as No. 22-6661.

The Clerk noted that the petition for writ of certiorari was due November 25, 2020, however that would be the due date had Petitioner sought *certiorari* review after his direct appeal. Instead, Petitioner timely sought *certiorari* review after the conclusion of his post-conviction proceedings in the Oklahoma Court of Criminal Appeals (OCCA). As such, Respondent should inform the SCOTUS Clerk in its response that Petitioner's *certiorari* application is, in fact, timely. *See* enclosed Letter from the SCOTUS Clerk, Notice to Respondent, and Waiver. *See also* OSCN for OCCA case no. PC-2022-327 (denied July 27, 2022). Petitioner requests the Court take judicial notice of this and all applicable OSCN dockets.

State Farm Mut. Auto. Ins. Co. v. Boellstorff, 540 F.3d 1223, 1226 n.7 (10th Cir. 2008)

(recognizing that courts "may take judicial notice of ... documents from the public record");

Mail No Court Svc No Orig. Sign

1

C/J C/M/J C/Att'd No Env.

No Cpls No Env/Cpls O/J O/M

155

Arrington v. Williams, 195 F. App'x 761, 764 n.2 (10th Cir. 2006) (taking “judicial notice” of the unpublished decisions of the state courts in [the petitioner’s] direct appeal and request for post conviction relief”).¹

Petitioner requests the Court accept this Notice in compliance with the Court’s Order.

IT IS SO PRAYED.

Dated: February 9, 2023



Brent Morris
#795282
JCCC Unit 5-S
216 N. Murray St.
Helena, OK 73741

VERIFICATION AND CERTIFICATE OF SERVICE

I, Brent Allen Morris, declare and certify under the penalties of perjury under the laws of the United States that I have prepared and examined this ‘Notice of Supreme Court Case Number’ and that the foregoing is true and correct to the very best of my knowledge, information, and belief. 28 U.S.C. § 1746; 18 U.S.C. § 1621.

I further declare I am an inmate confined in a state prison. Today, February 9, 2023, I am placing the original and copies of this ‘Notice’ in the prison’s internal mail system to the Northern District Court with a copy of the same mailed separately to Respondent, first-class postage prepaid. Fed.R.App.P. 4(c)(1); Fed.R.App.P. 25(a)(2)(A)(iii).

Clerk of Court
United States Courthouse
Northern District of Oklahoma
333 W. 4th Street Rm. 411
Tulsa, OK 74103

Theodore M. Peepers
Office of the Attorney General
313 NE 21st Street
OKC, OK 73105



Brent Morris

¹ Petitioner cites all unpublished decisions herein as persuasive authority. See Fed.R.App.P. 32.1(a); 10th Cir. R. 32.1(A).

Brent Morris
#795282
JCCC Unit 5-S
216 N. Murray St.
Helena, OK 73741

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

**Scott S. Harris
Clerk of the Court
(202) 479-3011**

February 1, 2023

Mr. Brent Allen Morris
Prisoner ID #735282
216 N. Murray St.
Helena, OK 73741

Re: Brent Allen Morris
v. Oklahoma
No. 22-6661

Dear Mr. Morris:

The petition for a writ of certiorari in the above entitled case was filed on October 19, 2022 and placed on the docket February 1, 2023 as No. 22-6661.

A form is enclosed for notifying opposing counsel that the case was docketed.

The petition for a writ of certiorari, sent October 19, 2022, was due November 25, 2020; therefore the petition was filed with a notation as to its untimeliness.

Sincerely,

Scott S. Harris, Clerk

by 

Redmond K. Barnes
Case Analyst

Enclosures

Brent Morris #195282
JCCC
Unit 5 South
216 N. Murray St
Tulsa, OK 73141

DAVIA COESH

Clerk of Court
United States Courthouse
Northern District of Oklahoma
333 W. 4th Street Room 411
Tulsa, OK 74103

RECEIVED

FEB 13 2023

Mark C. McCarty, Clerk
U.S. DISTRICT COURT

JCCC
LEGAL MAIL



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ZIP 73141 \$001.50
02-4W 000387825 FEB 10 2023
159



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

2016 DEC 23 PM 3:06

SALLY HOWE SMITH
Plaintiff,
COURT CLERK

CF-2016-6899
Case No. CF-2016-6899

Felony Information

Vs.

Brent Allen Morris

Defendant(s).

DISTRICT COURT
FILED

DEC 23 2016

INFORMATION

SALLY HOWE 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

(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,

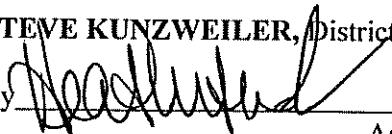
(COUNT 4)
22 O.S. 60.6(A)

BRENT ALLEN MORRIS, on or about 12/8/2016, in Tulsa County, State of Oklahoma and within the jurisdiction of this Court, did commit the crime of **VIOLATION OF PROTECTIVE ORDER**, a Misdemeanor, by unlawfully, willfully violate a Emergency Protective Order entered on the 2/19/2016 in the District Court of Tulsa County, State of Oklahoma, Case No. PO-2016-0651 in the case of Charis Brianne Clopton Plaintiff, vs. Brent Allen Morris Defendant, a copy of said Emergency Protective Order having been served upon the defendant on the 2/22/2016 by personal serve. The Defendant, Brent Allen Morris, did violate said Order by unlawfully and willfully defendant came to Mercury Bar at 1747 S Boston, Tulsa, while victim was present and did not leave,

(COUNT 5)
22 O.S. 60.6(A)

BRENT ALLEN MORRIS, between 12/8/2016 and 12/9/2016, in Tulsa County, State of Oklahoma and within the jurisdiction of this Court, did commit the crime of **VIOLATION OF PROTECTIVE ORDER**, a Misdemeanor, by unlawfully, willfully violate a Emergency Protective Order entered on the 2/19/2016 in the District Court of Tulsa County, State of Oklahoma, Case No. PO-2016-0651 in the case of Charis Brianne Clopton Plaintiff, vs. Brent Allen Morris Defendant, a copy of said Emergency Protective Order having been served upon the defendant on the 2/22/2016 by personal serve. The Defendant, Brent Allen Morris, did violate said Order by unlawfully and willfully defendant went to victim's residence while she was home,

Contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State.

STEVE KUNZWEILER, District Attorney
By 
Assistant

ORIGINAL

WITNESS(ES) ENDORSED FOR THE STATE OF OKLAHOMA

911 OPERATOR	Broken Arrow Police Dept. 1101 N 6th St	Broken Arrow, OK 74012
Dr. Brandon Bailey	Hillcrest Medical Center 1120 S. Utica Ave	Tulsa, OK 74104
Dr. Clinton Baird	Hillcrest Medical Center 1120 S. Utica Ave	Tulsa, OK 74104
Dr. Brian Chalkin D.O.	Hillcrest Medical Center 1120 S. Utica Ave	Tulsa, OK 74104
Criminalist - OSBI	Osbi Lab 800 E. 2nd St	Edmond, OK 73013
Dr. Mark Johnson	Hillcrest Medical Center 1120 S. Utica Ave	Tulsa, OK 74104
Dr. Patel	Hillcrest Medical Center 1120 S. Utica Ave	Tulsa, OK 74104
Dr. Jonathan Schilling	Hillcrest Medical Center 1120 S. Utica Ave	Tulsa, OK 74104
Broken Arrow EMS Unit 1	Emsa Court Monitor Emsa 1417 N Lansing	Tulsa, OK 74106
Katherine Gibson RN-SANE	Tulsa Police Dept. 600 Civic Center	Tulsa, OK 74103
Sgt. Joseph Ethridge Britt III 130	Tulsa County Sheriff's Office 500 S. Denver	Tulsa, OK 74103
Det. Ian Buchanan 160	Broken Arrow Police Dept. 1101 N 6th St	Broken Arrow, OK 74012
Off. Chad Burden 85	Broken Arrow Police Dept. 1101 N 6th St	Broken Arrow, OK 74012
Off. Travis Carr 206	Broken Arrow Police Dept. 1101 N 6th St	Broken Arrow, OK 74012
Off. Chane Cothran 192	Broken Arrow Police Dept. 1101 N 6th St	Broken Arrow, OK 74012
Off. Jim Gunter 130	Broken Arrow Police Dept. 1101 N 6th St	Broken Arrow, OK 74012
Sgt. Scott Lillard	Broken Arrow Police Dept. 1101 N 6th St	Broken Arrow, OK 74012
Dep. David Pool	Tulsa County Sheriff's Office 500 S. Denver	Tulsa, OK 74103
Det. Rhianna Russell 149	Broken Arrow Police Dept. 1101 N 6th St	Broken Arrow, OK 74012
Jonathan Seagraves	Broken Arrow Police Dept. 1101 N 6th St	Broken Arrow, OK 74012
Off. Karen Weikel	Broken Arrow Police Dept. 1101 N 6th St	Broken Arrow, OK 74012
Det. Ian Soergel 198	Broken Arrow Police Dept. 1101 N 6th St	Broken Arrow, OK 74012
Broken Arrow Police Dept. Property Custodian	Broken Arrow Police Dept. 1101 N 6th St	Broken Arrow, OK 74012
Charis Brianne Clopton	402 E Detroit St	Tulsa, OK 74012
Susie Atzbach	1438 E 52nd Pl	Tulsa, OK 74105
Angela Brown	DVIS	

ORIGINAL

Micah David Clopton Green	Unknown	
Justin Wade Cooper	724 S Lakewood Ave	Tulsa, OK 74112
Shauna Cooper	23120 E 68th St	Broken Arrow, OK 74014
Callista Gregg	401 E College St	Broken Arrow, OK 74012
Gene Alan Gregg	401 E College St	Broken Arrow, OK 74012
Sterling Charles Gregg	110 E Dallas	Broken Arrow, OK 74012
William Edward Hermann	408 E Detroit St	Broken Arrow, OK 74012
Jason Coy Herrmann	1926 S Knoxville Ave	Tulsa, OK 74112
Tracy Ann Howard	408 E Detroit St	Broken Arrow, OK 74012
Missy Iski	DVIS	Tulsa, OK 74135
	4300 South Harvard Ave	
	Suite 100	
Conor Thomas McGee	815 S Knoxville	Tulsa, OK 74112
Misty Medcalf	5173 S Troost Ave	Tulsa, OK 74105
Kari N Morgan	4124 S Chestnut Ave	Broken Arrow, OK 74011
Caryl Morris	6805 S Redbud Ave	Broken Arrow, OK 74011
John Rampey	8801 Ridgeview Pl	Sapulpa, OK 74066
Red Roof Inn	4717 S Yale Ave	Tulsa, OK 74135

Intake Attorney: HA
 Prepared by: JM

ORIGINAL

* 1 0 3 6 7 5 7 1 5 4 *

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

(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,

(COUNT 4)
22 O.S. 60.6(A)

BRENT ALLEN MORRIS, on or about 12/8/2016, in Tulsa County, State of Oklahoma and within the jurisdiction of this Court, did commit the crime of **VIOLATION OF PROTECTIVE ORDER**, a Misdemeanor, by unlawfully, willfully violate an Emergency Protective Order entered on the 2/19/2016 in the District Court of Tulsa County, State of Oklahoma, Case No. PO-2016-0651 in the case of Charis Brianne Clopton Plaintiff, vs. Brent Allen Morris Defendant, a copy of said Emergency Protective Order having been served upon the defendant on the 2/22/2016 by personal serve. The Defendant, Brent Allen Morris, did violate said Order by unlawfully and willfully defendant came to Mercury Bar at 1747 S Boston, Tulsa, while victim was present and did not leave,

(COUNT 5)
22 O.S. 60.6(A)

BRENT ALLEN MORRIS, between 12/8/2016 and 12/9/2016, in Tulsa County, State of Oklahoma and within the jurisdiction of this Court, did commit the crime of **VIOLATION OF PROTECTIVE ORDER**, a Misdemeanor, by unlawfully, willfully violate an Emergency Protective Order entered on the 2/19/2016 in the District Court of Tulsa County, State of Oklahoma, Case No. PO-2016-0651 in the case of Charis Brianne Clopton Plaintiff, vs. Brent Allen Morris Defendant, a copy of said Emergency Protective Order having been served upon the defendant on the 2/22/2016 by personal serve. The Defendant, Brent Allen Morris, did violate said Order by unlawfully and willfully defendant went to victim's residence while she was home,

(COUNT 6)
22 O.S. 60.6(A)

BRENT ALLEN MORRIS, on or about 9/29/2016, in Tulsa County, State of Oklahoma and within the jurisdiction of this Court, did commit the crime of **VIOLATION OF PROTECTIVE ORDER**, a Misdemeanor, by unlawfully, willfully violate an Emergency Protective Order entered on the nineteenth day of February, 2016 in the District Court of Tulsa County, State of Oklahoma, Case No. PO-2016-0651 in the case of Charis Clopton Plaintiff, vs. Brent Allen Morris Defendant, a copy of said Emergency Protective Order having been served upon the defendant on the twenty-second day of February, 2016 by personal service. The Defendant, Brent Allen Morris, did violate said Order by unlawfully and willfully sent pictures of victim's missing ring and sent several messages through social media,

ORIGINAL

(COUNT 7)
21 O.S. 644(C)

BRENT ALLEN MORRIS, on or about 7/17/2016, in Tulsa County, State of Oklahoma and within the jurisdiction of this Court, did commit the crime of **DOMESTIC ASSAULT & BATTERY - 2ND OFFENSE**, a Felony, by unlawfully, feloniously, willfully and wrongfully, commit an assault and battery upon the person of one Charis Brianne Clopton, a person with whom the defendant is in a dating relationship, by then and there pulling the victim backwards, causing the victim to fall with force and violence and with the unlawful intent to do him corporal hurt and bodily injury,

(COUNT 8)
21 O.S. 1760

BRENT ALLEN MORRIS, on or about 7/17/2016, in Tulsa County, State of Oklahoma and within the jurisdiction of this Court, did commit the crime of **MALICIOUS INJURY TO PROPERTY**, a Misdemeanor, by unlawfully, willfully, maliciously and wrongfully injure and deface certain personal property owned by one Charis Brianne Clopton and not the property of said defendant, to-wit: vehicle window by then and there breaking out a window of defendant's vehicle with the deliberate and malicious and wrongful intent to injure property of said owner,

(COUNT 9)
21 O.S. 644(C)

BRENT ALLEN MORRIS, on or about 7/23/2016, in Tulsa County, State of Oklahoma and within the jurisdiction of this Court, did commit the crime of **DOMESTIC ASSAULT & BATTERY - 2ND OFFENSE**, a Felony, by unlawfully, feloniously, willfully and wrongfully, commit an assault and battery upon the person of one Charis Brianne Clopton, a current spouse of the defendant, by then and there grabbing and/or kicking him about the head and body with his hands and/or feet with force and violence and with the unlawful intent to do him corporal hurt and bodily injury,

(COUNT 10)
22 O.S. 60.6

BRENT ALLEN MORRIS, on or about 7/23/2016, in Tulsa County, State of Oklahoma and within the jurisdiction of this Court, did commit the crime of **VIOLATION OF PROTECTIVE ORDER**, a Misdemeanor, by unlawfully, willfully violate a Protective Order entered on the 2/19/2016 in the District Court of Tulsa County, State of Oklahoma, Case No. PO-2016-0654 in the case of Charis Brianne Clopton Plaintiff, vs. Brent Allen Morris Defendant, a copy of said Protective Order having been served upon the defendant on the 2/22/2016 by personal serve. The Defendant, Brent Allen Morris, did violate said Order by unlawfully and willfully defendant violated the order by going to said victim residence,

(COUNT 11)
21 O.S. 1211.1

BRENT ALLEN MORRIS, on or about 7/23/2016, in Tulsa County, State of Oklahoma and within the jurisdiction of this Court, did commit the crime of **INTERFERENCE WITH EMERGENCY TELEPHONE CALL**, a Misdemeanor, by unlawfully, willfully and intentionally disrupting, impeding or interfering with an emergency telephone call or intentionally preventing or hindering another person from placing an emergency telephone call, to-wit: grabbing the phone when the victim, Charis Brianne Clopton, tried to call 911 for help,

Contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State.

ORIGINAL

STEVE KUNZWEILER, District Attorney

By Stephanie Gray
Assistant

WITNESS(ES) ENDORSED FOR THE STATE OF OKLAHOMA

911 OPERATOR	Broken Arrow Police Dept. 1101 N 6th St	Broken Arrow, OK 74012
Dr. Brandon Bailey	Hillcrest Medical Center 1120 S. Utica Ave	Tulsa, OK 74104
Dr. Clinton Baird	Hillcrest Medical Center 1120 S. Utica Ave	Tulsa, OK 74104
Dr. Brian Chalkin D.O.	Hillcrest Medical Center 1120 S. Utica Ave	Tulsa, OK 74104
Criminalist - OSBI	Osbi Lab 800 E. 2nd St	Edmond, OK 73013
Dr. Mark Johnson	Hillcrest Medical Center 1120 S. Utica Ave	Tulsa, OK 74104
Dr. Patel	Hillcrest Medical Center 1120 S. Utica Ave	Tulsa, OK 74104
Dr. Jonathan Schilling	Hillcrest Medical Center 1120 S. Utica Ave	Tulsa, OK 74104
Broken Arrow EMS Unit 1	Emsa Court Monitor Emsa 1417 N Lansing	Tulsa, OK 74106
Katherine Gibson RN-SANE	Tulsa Police Dept. 600 Civic Center	Tulsa, OK 74103
Sgt. Joseph Ethridge Britt III 130	Tulsa County Sheriff's Office 500 S. Denver	Tulsa, OK 74103
Det. Ian Buchanan 160	Broken Arrow Police Dept. 1101 N 6th St	Broken Arrow, OK 74012
Off. Chad Burden 85	Broken Arrow Police Dept. 1101 N 6th St	Broken Arrow, OK 74012
Off. Travis Carr 206	Broken Arrow Police Dept. 1101 N 6th St	Broken Arrow, OK 74012
Off. Chane Cothran 192	Broken Arrow Police Dept. 1101 N 6th St	Broken Arrow, OK 74012
Off. Jim Gunter 130	Broken Arrow Police Dept. 1101 N 6th St	Broken Arrow, OK 74012
Sgt. Scott Lillard	Broken Arrow Police Dept. 1101 N 6th St	Broken Arrow, OK 74012
Dep. David Pool	Tulsa County Sheriff's Office 500 S. Denver	Tulsa, OK 74103
Det. Rhianna Russell 149	Broken Arrow Police Dept. 1101 N 6th St	Broken Arrow, OK 74012
Det. Jonathan Seagraves	Broken Arrow Police Dept. 1101 N 6th St	Broken Arrow, OK 74012
Off. Karen Weikel	Broken Arrow Police Dept. 1101 N 6th St	Broken Arrow, OK 74012

ORIGINAL

Det. Ian Soergel 198

Broken Arrow Police Dept.
Property Custodian
Charis Brianne Clopton
Susie Atzbach

Angela Brown
Micah David Clopton Green
Justin Wade Cooper
Shauna Cooper
Callista Gregg
Gene Alan Gregg
Sterling Charles Gregg
William Edward Hermann
Jason Coy Herrmann
Tracy Ann Howard
Missy Iski

Conor Thomas McGee
Misty Medcalf
Kari N Morgan
Caryl Morris
John Rampey
Red Roof Inn

Broken Arrow Police Dept.
1101 N 6th St
Broken Arrow Police Dept.
1101 N 6th St
402 E Detroit St
1438 E 52nd Pl

DVIS
Unknown
724 S Lakewood Ave
23120 E 68th St
401 E College St
401 E College St
110 E Dallas
408 E Detroit St
1926 S Knoxville Ave
408 E Detroit St
DVIS
4300 South Harvard Ave
Suite 100
815 S Knoxville
5173 S Troost Ave
4124 S Chestnut Ave
6805 S Redbud Ave
8801 Ridgeview Pl
4717 S Yale Ave

Broken Arrow, OK 74012
Broken Arrow, OK 74012
Tulsa, OK 74012
Tulsa, OK 74105

,
,
Tulsa, OK 74112
Broken Arrow, OK 74014
Broken Arrow, OK 74012
Broken Arrow, OK 74012
Broken Arrow, OK 74012
Broken Arrow, OK 74012
Tulsa, OK 74112
Broken Arrow, OK 74012
Tulsa, OK 74135

Tulsa, OK 74112
Tulsa, OK 74105
Broken Arrow, OK 74011
Broken Arrow, OK 74011
Sapulpa, OK 74066
Tulsa, OK 74135

ORIGINAL

STATE OF OKLAHOMA,

Case No. CF-2016-6899

Plaintiff,

Vs.

Brent Allen Morris

Defendant(s).

THE STATE FURTHER ALLEGES:

That the said **Brent Allen Morris** was heretofore on 3/18/2011, in Tulsa County, Oklahoma, Case No.CM-2011-0024, convicted of a Misdemeanor, to-wit: the crime of **DOMESTIC ASSAULT & BATTERY** and sentenced to a term of 18 months. Said defendant being represented by counsel at the time, and said conviction being a final judgment in the case.

Contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state.

STEVE KUNZWEILER, District Attorney

By 
Assistant

WITNESS(ES) ENDORSED FOR THE STATE OF OKLAHOMA

DON NEWBERRY	TULSA CO. COURTHOUSE	TULSA	OK
RECORDS CUSTODIAN	TULSA POLICE DEPARTMENT	TULSA	OK
RECORDS CUSTODIAN	TULSA CO. SHERIFF'S OFFICE	TULSA	OK

Intake Attorney: SNJ
Prepared by: BF

ORIGINAL

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

FILED

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 2016-8860

INFORMATION

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,



(COUNT 4)
22 O.S. 60.6(A)

BRENT ALLEN MORRIS, on or about 12/8/2016, in Tulsa County, State of Oklahoma and within the jurisdiction of this Court, did commit the crime of **VIOLATION OF PROTECTIVE ORDER**, a Misdemeanor, by unlawfully, willfully violate an Emergency Protective Order entered on the 2/19/2016 in the District Court of Tulsa County, State of Oklahoma, Case No. PO-2016-0651 in the case of Charis Brianne Clopton Plaintiff, vs. Brent Allen Morris Defendant, a copy of said Emergency Protective Order having been served upon the defendant on the 2/22/2016 by personal serve. The Defendant, Brent Allen Morris, did violate said Order by unlawfully and willfully defendant came to Mercury Bar at 1747 S Boston, Tulsa, while victim was present and did not leave,

(COUNT 5)
22 O.S. 60.6(A)

BRENT ALLEN MORRIS, between 12/8/2016 and 12/9/2016, in Tulsa County, State of Oklahoma and within the jurisdiction of this Court, did commit the crime of **VIOLATION OF PROTECTIVE ORDER**, a Misdemeanor, by unlawfully, willfully violate an Emergency Protective Order entered on the 2/19/2016 in the District Court of Tulsa County, State of Oklahoma, Case No. PO-2016-0651 in the case of Charis Brianne Clopton Plaintiff, vs. Brent Allen Morris Defendant, a copy of said Emergency Protective Order having been served upon the defendant on the 2/22/2016 by personal serve. The Defendant, Brent Allen Morris, did violate said Order by unlawfully and willfully defendant went to victim's residence while she was home,

(COUNT 6)
22 O.S. 60.6(A)

BRENT ALLEN MORRIS, on or about 9/29/2016, in Tulsa County, State of Oklahoma and within the jurisdiction of this Court, did commit the crime of **VIOLATION OF PROTECTIVE ORDER**, a Misdemeanor, by unlawfully, willfully violate an Emergency Protective Order entered on the nineteenth day of February, 2016 in the District Court of Tulsa County, State of Oklahoma, Case No. PO-2016-0651 in the case of Charis Clopton Plaintiff, vs. Brent Allen Morris Defendant, a copy of said Emergency Protective Order having been served upon the defendant on the twenty-second day of February, 2016 by personal service. The Defendant, Brent Allen Morris, did violate said Order by unlawfully and willfully sent pictures of victim's missing ring and sent several messages through social media,

(COUNT 7)
21 O.S. 644(C)

BRENT ALLEN MORRIS, on or about 7/17/2016, in Tulsa County, State of Oklahoma and within the jurisdiction of this Court, did commit the crime of **DOMESTIC ASSAULT & BATTERY - 2ND OFFENSE**, a Felony, by unlawfully, feloniously, willfully and wrongfully, commit an assault and battery upon the person of one Charis Brianne Clopton, a person with whom the defendant is in a dating relationship, by then and there pulling the victim backwards, causing the victim to fall with force and violence and with the unlawful intent to do him corporal hurt and bodily injury,

(COUNT 8)
21 O.S. 1760

BRENT ALLEN MORRIS, on or about 7/17/2016, in Tulsa County, State of Oklahoma and within the jurisdiction of this Court, did commit the crime of **MALICIOUS INJURY TO PROPERTY**, a Misdemeanor, by unlawfully, willfully, maliciously and wrongfully injure and deface certain personal property owned by one Charis Brianne Clopton and not the property of said defendant, to-wit: vehicle window by then and there breaking out a window of victim's vehicle with the deliberate and malicious and wrongful intent to injure property of said owner,

(COUNT 9)
21 O.S. 644(C)

BRENT ALLEN MORRIS, on or about 7/23/2016, in Tulsa County, State of Oklahoma and within the jurisdiction of this Court, did commit the crime of **DOMESTIC ASSAULT & BATTERY - 2ND OFFENSE**, a Felony, by unlawfully, feloniously, willfully and wrongfully, commit an assault and battery upon the person of one Charis Brianne Clopton, a person with whom the defendant is in a dating relationship, by then and there grabbing and/or kicking her about the head and body with his hands and/or feet with force and violence and with the unlawful intent to do her corporal hurt and bodily injury,

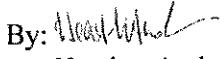
(COUNT 10)
22 O.S. 60.6

BRENT ALLEN MORRIS, on or about 7/23/2016, in Tulsa County, State of Oklahoma and within the jurisdiction of this Court, did commit the crime of **VIOLATION OF PROTECTIVE ORDER**, a Misdemeanor, by unlawfully, willfully violate a Protective Order entered on the 2/19/2016 in the District Court of Tulsa County, State of Oklahoma, Case No. PO-2016-0654 in the case of Charis Brianne Clopton Plaintiff, vs. Brent Allen Morris Defendant, a copy of said Protective Order having been served upon the defendant on the 2/22/2016 by personal serve. The Defendant, Brent Allen Morris, did violate said Order by unlawfully and willfully defendant violated the order by going to said victim residence,

(COUNT 11)
21 O.S. 1211.1

BRENT ALLEN MORRIS, on or about 7/23/2016, in Tulsa County, State of Oklahoma and within the jurisdiction of this Court, did commit the crime of **INTERFERENCE WITH EMERGENCY TELEPHONE CALL**, a Misdemeanor, by unlawfully, willfully and intentionally disrupting, impeding or interfering with an emergency telephone call or intentionally preventing or hindering another person from placing an emergency telephone call, to-wit: grabbing the phone when the victim, Charis Brianne Clopton, tried to call 911 for help,
Contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State.

Steve Kunzweiler
Tulsa County District Attorney

By: 
Heather Anderson, OBA #30838
Assistant District Attorney

WITNESS(ES) ENDORSED FOR THE STATE OF OKLAHOMA

911 OPERATOR NA338460	1101 N 6th St	Broken Arrow, OK 74012
Susie Atzbach	1310 South Jackson Ave	Tulsa, OK 74127
Brandon Bailey NA767487	1120 S. Utica Ave	Tulsa, OK 74104
Dr. Clinton Baird NA616686	1120 S. Utica Ave	Tulsa, OK 74104
Kurt Bickle	INCOG	Tulsa, OK 74103
Sgt. Joseph Ethridge Britt, III	2 W 2nd St Ste 800	Tulsa, OK 74103
I30	Tulsa County Sheriff's Office	
Angela Brown	500 S. Denver	
Det. Ian Buchanan 160	DVIS	
Off. Chad Burden 85	Broken Arrow Police Department	Broken Arrow, OK 74012
1101 N 6th St		
Off. Travis Carr 206	Broken Arrow Police Department	Broken Arrow, OK 74012
1101 N 6th St		
Dr. Brian Chalkin, D.O.	Broken Arrow Police Department	Broken Arrow, OK 74012
NA358548	1101 N 6th St	
Charis Brianne Clopton	1120 S. Utica Ave	Tulsa, OK 74104
Micah David Clopton Green	402 E Detroit St	Broken Arrow, OK 74012
Justin Wade Cooper	11222 South 73rd East Ave	Bixby, OK 74008
Shauna Cooper	724 S Lakewood Ave	Tulsa, OK 74112
Off. Chane Cothran 192	1926 S. Knoxville Ave.	Tulsa, OK 74112
	Broken Arrow Police Department	Broken Arrow, OK 74012
	1101 N 6th St	
Criminalist - OSBI NA641346	PO Box 36307	Oklahoma City, OK 73136-2307
Off. Jamie Dufriend 119	Broken Arrow Police Department	Broken Arrow, OK 74012
1101 N 6th St		
Broken Arrow EMS Unit 1	1417 N. Lansing	Tulsa, OK 74106
NA767477		
Katherine Gibson, RN-SANE	1120 S Utica Ave	Tulsa, OK 74104
NA579615		
JANET GONZALEZ	81 Golf House Rd	Laguna Vista, TX 78578
Callista Gregg	401 E College St	Broken Arrow, OK 74012
Gene Alan Gregg	401 E College St	Broken Arrow, OK 74012
Sterling Charles Gregg		
Off. Jim Gunter I30	Broken Arrow Police Department	Broken Arrow, OK 74012
	1101 N 6th St	
William Edward Hermann	220 E Ft. Worth St.	, 74012
Jason Coy Herrmann	1926 S Knoxville Ave	Tulsa, OK 74112
Tracy Ann Howard	220 E Ft. Worth St.	Broken Arrow, OK 74012
Missy Iski	2121 S. Columbia	Tulsa, OK 74114
Mark Johnson NA767483	1120 S. Utica Ave	Tulsa, OK 74104
Leo Lemire	413 E Greeley St	Broken Arrow, OK 74012
Sgt. Scott Lillard 133	Broken Arrow Police Department	Broken Arrow, OK 74012
	1101 N 6th St	
J D Lindstrom NA407444	125 W 15th St, Suite 100	Tulsa, OK 74119
Off. Joshua McCoy 218	Broken Arrow Police Department	Broken Arrow, OK 74012
1101 N 6th St		
Conor Thomas McGee	need new address	Tulsa, OK 74112

Misty Medcalf	5173 S Troost Ave	Tulsa, OK 74105
Misty Metcalf	500 S. Denver Ave., Suite 900	Tulsa, OK 74103-3832
Kari N Morgan	4124 S Chestnut Ave	Broken Arrow, OK 74011
Caryl Morris	6805 S Redbud Ave	Broken Arrow, OK 74011
Off. Jennifer M Murphy 02261	Tulsa Police Department 600 Civic Center 1120 S. Utica Ave	Tulsa, OK 74103 Tulsa, OK 74104
Dr. Patel NA767485	Broken Arrow Police Department 1101 N 6th St	Broken Arrow, OK 74012
Off. William Payne 207	500 S. Denver 1101 N 6th St	Tulsa, OK 74103 Broken Arrow, OK 74012
David Pool NA583271	8801 Ridgeview Dr	Sapulpa, OK 74066
Broken Arrow Police Dept.	4717 S Yale Ave	Tulsa, OK 74135
Property Custodian NA574418	Broken Arrow Police Department 1101 N 6th St	Broken Arrow, OK 74012
John Rampey	Broken Arrow Police Department 1101 N 6th St	Broken Arrow, OK 74012
Red Roof Inn	1120 S. Utica Ave	Tulsa, OK 74104
Off. Joshua L Russell 211/9872	Broken Arrow Police Department 1101 N 6th St	Broken Arrow, OK 74012
Det. Rhianna Russell 149	Broken Arrow Police Department 1101 N 6th St	Broken Arrow, OK 74012
Dr. Jonathan Schilling NA755551	Broken Arrow Police Department 1101 N 6th St	Broken Arrow, OK 74012
Jonathan Seagraves NA668873	Broken Arrow Police Department 1101 N 6th St	Broken Arrow, OK 74012
Det. Ian Soergel 198	Broken Arrow Police Department 1101 N 6th St	Broken Arrow, OK 74012
Det. Katherine M Still 01740	Tulsa Police Department 600 Civic Center 1101 N 6th St	Tulsa, OK 74103 Broken Arrow, OK 74012
Karen Weikel NA431297		,
Curtis Michael Wolaridge		

STATE OF OKLAHOMA

Plaintiff,

vs.

BRENT ALLEN MORRIS

Defendant.

Case No. CF-2016-6899

THE STATE FURTHER ALLEGES:

That the said **Brent Allen Morris** was heretofore on 3/18/2011, in Tulsa County, Oklahoma, Case No. CM-2011-0024, convicted of a Misdemeanor, to-wit: the crime of **DOMESTIC ASSAULT & BATTERY** and sentenced to a term of 18 months. Said defendant being represented by counsel at the time, and said conviction being a final judgment in the case.

Contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State.

Steve Kunzweiler
Tulsa County District Attorney

By: *Heather Anderson*
Heather Anderson, OBA #30838
Assistant District Attorney

WITNESS(ES) ENDORSED FOR THE STATE OF OKLAHOMA

DON NEWBERRY	TULSA CO. COURTHOUSE	TULSA	OK
RECORDS CUSTODIAN	TULSA POLICE DEPARTMENT	TULSA	OK
RECORDS CUSTODIAN	TULSA CO. SHERIFF'S OFFICE	TULSA	OK

Intake Attorney: HA
Prepared by: JM

1 P R O C E E D I N G S

2 (Following the overnight recess, the
3 following proceedings were had in open court, with
4 all parties present, and outside the presence of the
5 jury:)

6 THE COURT: We're on the record in
7 CF-2016-6899.

8 Mr. Morris is present with his counsel Ms. Self.
9 Ms. Anderson is present for the State.

10 I believe everybody has a new copy of jury
11 instructions; is that correct?

12 MS. SELF: Yes.

13 THE COURT: We'll go back through them all
14 over again. Hold on.

15 First of all, there was -- something came up off
16 the record and let's just discuss the lesser
17 includeds up front.

18 I have off the record indicated -- and this is
19 for appellate purposes for the record, you know, I'm
20 baffled by the way the case was filed, it's very
21 confusing to me. And so I just say that as kind
22 overall deal as far as trying to figure out whether
23 it be lesser includeds or not and what the jury
24 instruction should be.

25 The Court's issue with it -- it is what it is,

1 but, again, it appears that Counts 1, 2, and 3 are
2 the same event or are going to merge. It also
3 appears that the State has alleged three different
4 felonies with potentially three different levels of
5 proof.

6 I have not found any case law that discusses
7 this, but under that umbrella that this is the what
8 the instructions are and this is the charges that
9 were filed.

10 Earlier, today the State -- the Court had
11 initially put in, I believe, it was OUJI 4-10, which
12 the State requested OUJI 4-7. The Court's reasoning
13 for granting that was is that in looking at 4-7, it
14 says it specifically applies to 652(C), which is
15 what the State had on its information.

16 I think that the confusing part of it is the
17 State labeled it assault and battery with intent to
18 kill, which would be 652(A) if I'm reading that
19 correctly. It makes sense to me that both sides
20 have issues with that.

21 But in any regard, I'll allow the Defense to --
22 now that I've agreed with the State, I will allow
23 the Defense to go ahead and make argument on Count 1
24 and the fourth element.

25 Ms. Self?

1 MS. SELF: Thank you, Your Honor.

2 Initially, when the State -- when the judge
3 presented the instructions, I agreed with 4-10
4 because, as you said, he has been charged with and
5 the jury has been advised and they'll get the case
6 that he has been charged with assault and battery
7 with the intent to kill, which indicates that the
8 State must prove that his actions intended a
9 consequence to kill.

10 The way that the State has requested and the
11 instruction has been changed it's now assault and
12 battery with the intent to kill, but we're not
13 requiring the jury to find the element of intent.
14 Instead they have to find the element of force
15 likely to produce death.

16 I think it's very, very confusing and I don't
17 think that it supports the charge for which he
18 actually -- he actually stands accused. And the way
19 that the Jury Instruction Number 12 is in the
20 revised packet, it's not even the way that either
21 we -- jury instruction is phrased, it's an --
22 combination of two different jury instructions
23 because there are two different standards, two
24 different elements of proof. Force in one, intent
25 in the other. And so they don't even actually

1 follow any pattern wording-wise for one jury
2 instruction. It's merged.

3 And I just think that it's confusing to tell the
4 jury that he's been charged with assault and battery
5 with intent to kill but then take out the element
6 that they have to prove that he intended to kill.

7 And that was my objection, Your Honor.

8 THE COURT: And I don't know -- Ms. Self, I
9 don't know that I don't -- that I disagree with you
10 necessarily, but this is kind of where I'm coming
11 down.

12 Well, State, go ahead and make your record.

13 MS. ANDERSON: So my first issue is that
14 it's not a hybrid instruction. OUJI 4-7 says an
15 assault and battery which is the first element, upon
16 another person, and, third, with force likely to
17 produce death. So that is the OUJI. It's not a
18 hybrid, we didn't create something contrary to what
19 is in the OUJIS.

20 The State charged under 652(C) which 652(A)
21 refers to shootings, which does --

22 THE COURT: Well, I guess you should -- at
23 least for purposes of the record, the elephant in
24 the room is why does it say -- I mean, for purposes
25 of the record why does it say assault and battery

1 with intent to kill?

2 MS. ANDERSON: Because that is what the
3 language says in the statute, Your Honor. And --

4 THE COURT: In 652(A)?

5 MS. ANDERSON: 652(C) as well. If you
6 look, it says likely to produce or in any manner
7 attempts to kill another. And it doesn't say
8 specifically intends to kill --

9 THE COURT: Right. It doesn't say intent
10 to kill. I --

11 MS. ANDERSON: Attempts to kill, I think --
12 I'm sorry.

13 THE COURT: I don't recall a case I just
14 read, it was 2007 case. It goes through all of this
15 and says A is specific intent and B and C is not.
16 So it should not be labeled intent to kill.

17 MS. ANDERSON: I believe --

18 THE COURT: So let's start with that, okay?
19 Now, the question is whether the State, when it
20 mislabels something but files it under a different
21 charge, that's really the issue for the Court.

22 MS. ANDERSON: I believe the case the Court
23 was referring to is *Goree v State*. Does that
24 sound --

25 THE COURT: Yes.

1 MS. ANDERSON: -- 2007 --

2 THE COURT: That's it.

3 MS. ANDERSON: -- OKCR 21, which the State
4 agrees it does remove the specific intent from
5 Sections B and C of Section 652. Section A is
6 specific to shooting, which is why the State filed
7 it under C. And when it was filed, that -- that
8 apparently is just how the language pops up. I know
9 it's not --

10 THE COURT: I understand, but that --
11 that's -- anyway, that's the issue. I think the
12 State's basically saying, look, it just happened,
13 there's nothing we can do about it, let's just let
14 it go. So I understand that.

15 I just hope when these things happen you go back
16 and make some course corrections so it doesn't
17 happen again. And this has happened before. And so
18 some of this is, like -- sometimes the State just
19 has to say, hey, maybe we should have done it
20 differently.

21 MS. ANDERSON: I concur, Judge, we should
22 have done it differently this time.

23 THE COURT: Well, Ms. Self, you'll have --
24 you know, I don't know. I'm gonna go ahead and --
25 you know, it'll be a -- you know, potentially appeal

1 issue if there is some sort of conviction, but I'm
2 gonna go ahead and go with the State. And my
3 reasoning is gonna be that it was listed under
4 652(C), that 652(C), both by wording in the statute
5 and by *Goree*, does not require the specific intent.

6 I also will note in the language, even -- which
7 is a little bit confusing, if you get -- but if you
8 take away the caps and what they titled it, it seems
9 to be 652(C) language, at least in this Court's
10 reading of it, in that it does not require specific
11 intent as far as the information and the language.

12 So I'm gonna go ahead and overrule your
13 objection. And certainly you can -- if that becomes
14 an issue on appeal, you have made your record. And
15 I understand your logic. And we'll move on with
16 that.

17 MS. SELF: May I just make one quick
18 comment?

19 THE COURT: Yes, you may.

20 MS. SELF: When I said that it was a
21 hybrid, Judge, I wasn't -- I didn't mean to indicate
22 the elements. But the OUJI that it read -- that is
23 charged 4-7, I understand what the Court's ruling,
24 says, no person may be convicted of assault and
25 battery by means or force likely to produce death

1 unless the State has proved these elements.

2 The OUJI that we have says no person may be
3 convicted of assault and battery with intent to kill
4 unless the State has proven these elements. So it's
5 two separate OUJIs merged together in kind of --
6 because the introductory language is not what 4-7
7 says.

8 THE COURT: When you say "introductory
9 language," you mean assault and battery with intent
10 to kill?

11 MS. SELF: I'm sorry, Judge. I was looking
12 at 4-7, where it says, no person may be convicted of
13 assault and battery by means or force likely to
14 produce death, unless --

15 THE COURT: Right.

16 MS. SELF: That's not what we have in our
17 instructions, or is it?

18 THE COURT: I thought the -- well, we just
19 have -- we have the elements of -- those three
20 elements.

21 MS. SELF: I just wanted to point that out
22 that it says in the actual OUJI, no person may be
23 convicted of assault and battery by means or force
24 likely to produce death unless, and that's not what
25 the instruction that we're providing says.

1 THE COURT: All right. Hold on just a
2 second.

3 off the record a second.

4 (An off-the-record discussion was had.
5 Proceedings then continued in open court, outside
6 the presence of the jury as follows:)

7 THE COURT: Back on the record.

8 So, Ms. Self, what's your remedy to that? To
9 change it to the title of 4-7?

10 MS. SELF: I mean, I -- obviously, I would
11 like to go back to the original instruction because
12 it more closely mirrors the charge and the elements
13 that I think that -- but at any rate, I think we
14 have to pick one or other and not kind of mesh them.

15 THE COURT: All right.

16 MS. ANDERSON: The original --

17 THE COURT: I think that's a good point.

18 MS. ANDERSON: Well, my only objection to
19 that, Judge, is the original instruction of 4-10 is
20 an assault upon a person with the intent to take a
21 human life, it's not an assault and battery.

22 THE COURT: Okay. Hold on. What she's
23 saying, if I understand it, is, instead of saying no
24 person maybe be convicted of assault and battery
25 with intent to kill, she's saying to make it

1 consistent with 4-7, it should say, no person may be
2 convicted of assault and battery by means or force
3 likely to produce death.

4 Am I getting that right?

5 MS. SELF: That's correct, Judge.

6 THE COURT: That's what she's saying.

7 MS. ANDERSON: Then I misunderstood, sir,
8 and I apologize. I misunderstood what she was
9 saying. I -- when she said the original, I thought
10 she meant what was originally in the packet when we
11 first went around, which was my misunderstanding.

12 THE COURT: So is there any -- this is what
13 I would suggest, Ms. Self, I don't -- you're not
14 surrendering any appeal issue on this, but just to
15 make it clear for the jury is that we label in the
16 statement of the case the same way we label it in
17 the jury instruction. And that is, the way it
18 should have been filed, assault and battery by means
19 or force likely to produce death. And the parties
20 are just going to have to explain that, I guess.

21 So that's what I would suggest to avoid what
22 you're saying without surrendering your issue on
23 appeal.

24 MS. SELF: Understood, Your Honor.

25 THE COURT: Any objection to that?

1 MS. SELF: Without surrendering any right
2 to object on appeal, no.

3 THE COURT: All right. State?

4 MS. ANDERSON: It's fine, Judge. No
5 objection.

6 THE COURT: Okay. So we'll move the --
7 we'll change the statement of the case to be called
8 assault and battery by means or force likely to
9 produce death.

10 Ms. Self, also, while we're on lesser
11 includeds -- and we'll go through the instructions,
12 I'm just trying to get the big things out of the way
13 first.

14 This court -- well, I guess this was
15 Ms. Anderson, really, the Defense had requested a
16 lesser included on that same charge, the Court had
17 indicated it would grant it. So if the State wants
18 to make its record regarding that, arguing against
19 the lesser included on Count 1 if you do want to
20 make a record.

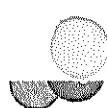
21 MS. ANDERSON: Your Honor, I'm familiar
22 with the case law that allows the Court to add the
23 lesser included and I understand Ms. Self's request
24 of a lesser included. The State's argument is
25 obviously we don't believe that the evidence



INSTRUCTION NO. 11

The defendant is charged with ASSAULT AND BATTERY WITH MEANS OF FORCE LIKELY TO PRODUCE DEATH of one Charis Brianne Clopton between 12-8-16 and 12-10-16 in Tulsa County, Oklahoma.

OUJI-CR 4-1



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

