Appendix A

The Oklahoma Court Of Criminal Appeals Summary Opinion

2024 OK CR 20
IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CHARLES RANDY BOWLDS, JR.,	)	
	)	
Appellant,	)	**FOR PUBLICATION**
	)	
v.	)	**Case No. F-2021-1155**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, JUDGE:

¶1 Appellant, Charles Randy Bowlds, Jr., was tried by jury and convicted in the District Court of Logan County, Case No. CF-2019-45 of: Count 1, Kidnapping, in violation of 21 O.S.Supp.2012, § 741; Count 3, Assault and Battery With a Dangerous Weapon, in violation of 21 O.S.2011, § 645, both After Former Conviction of Two or More Felonies;[1] and Count 4, Domestic Assault and Battery (Misdemeanor), in violation of 21 O.S.Supp.2019, § 644(C). The jury returned guilty verdicts on all counts with sentences of twenty years imprisonment on Counts 1 and 3 and one year imprisonment and

[1] Appellant must serve 85% of his sentence on Count 3 before becoming eligible for parole consideration. 21 O.S.Supp.2015, § 13.1.

payment of a $5,000.00 fine on Count 4. The trial court sentenced Appellant in accordance with the jury's verdict and ordered all counts to run consecutively.

¶2 From this judgment and sentence, Appellant appeals and raises the following counseled propositions of error:

I. STRUCTURAL ERROR OCCURRED WHEN THE ONLY MINORITY JUROR WAS STRUCK BY THE PROSECUTION WITHOUT A NON-PRETEXTUAL, RACE-NEUTRAL REASON, REQUIRING A REVERSAL OF THE CONVICTIONS FOR A NEW TRIAL.

II. THE TRIAL COURT ERRED IN ORDERING THE SENTENCES TO RUN CONSECUTIVELY.

Appellant raises the following *pro se* propositions of error:

I. THE DENIAL OF APPELLANT'S MOTION FOR APPOINTMENT OF COUNSEL FOR FINAL SENTENCING WAS ARBITRARY AND VIOLATED APPELLANT'S SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION [SIC].

II. APPELLANT'S MOTION FOR SELF-REPRESENTATION WAS NOT INTELLIGENTLY, NOR VOLUNTARILY MADE AND THEREFORE RESULTED IN REVERSIBLE CONSTITUTIONAL ERROR.

III. TRIAL COUNSEL ALBERT HOCH, JR. WAS UNPREPARED, INCOMPETENT AND INEFFECTIVE DEPRIVING APPELLANT OF HIS

SIXTH AMENDMENT RIGHT TO THE UNITED STATES CONSTITUTION [SIC].

IV. THE TRIAL COURT ABUSED ITS DISCRETION BY ARBITRARY [SIC] AND CAPRICIOUSLY DENYING HIS HANDWRITTEN *PRO SE* MOTION FOR NEW TRIAL.

¶3 After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that under the law and the evidence, Appellant is not entitled to relief.

I.

¶4 In his first proposition, Appellant makes a *Batson*[2] claim. He specifically argues the State improperly removed prospective juror JR from the jury panel. Review of this claim is for an abuse of discretion as Appellant objected at trial on this basis. *Day v. State*, 2013 OK CR 8, ¶ 15, 303 P.3d 291, 299. An abuse of discretion is a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented or stated otherwise, any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue.

[2] *Batson v. Kentucky*, 476 U.S. 79 (1986).

Neloms v. State, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170 (internal citation and quotation marks omitted).

¶5 Concerning *Batson* challenges, the Supreme Court has summarized the governing standard as follows:

> *Batson* held that the Equal Protection Clause of the Fourteenth Amendment prohibits prosecutors from exercising peremptory challenges on the basis of race. 476 U.S., at 89. When adjudicating a *Batson* claim, trial courts follow a three-step process:
>
> > "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." *Snyder v. Louisiana*, 552 U.S. 472, 476-477 (2008) (internal quotation marks and alterations omitted).
>
> The opponent of the strike bears the burden of persuasion regarding racial motivation. *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam), and a trial court's finding regarding the credibility of an attorney's explanation of the ground for a peremptory challenge is "entitled to 'great deference,'" *Felkner v. Jackson*, 562 U.S. 594, 598 (2011) (per curiam) (quoting

> *Batson*, 476 U.S. at 98, n.21). On direct appeal, those findings may be reversed only if the trial judge is shown to have committed clear error. *Rice v. Collins*, 546 U.S. 333, 338 (2006).

Davis v. Ayala, 576 U.S. 257, 270-71 (2015). This Court follows the teaching of *Batson* and holds the prosecutor's explanation need only be race-neutral and will be deemed to be so "unless a discriminatory intent is inherent in the answer." *Grant v. State*, 2009 OK CR 11, ¶ 26, 205 P.3d 1, 14. Once the prosecutor proffers a race-neutral reason, the burden shifts to the defense to prove discriminatory intent. *Id.*

¶6 The State exercised a peremptory challenge to remove JR[3] from the jury panel. When the defense objected to his removal based upon *Batson*, the State advised the trial court that when asked, JR did not admit he had prior contact with law enforcement. The prosecutor investigated whether all jurors had prior law enforcement contact and learned that JR did. Thus, JR's lack of candor during *voir dire* was the prosecutor's motivation for removing him from the panel. This was a race-neutral reason and there was no *Batson* violation. *See Turrentine v. State*, 1998 OK CR 33, ¶ 11, 965 P.2d 955,

[3] JR's surname is Hispanic.

965 ("that [prospective juror] was not candid with the trial court was a sufficient race-neutral explanation.").

¶7 The record shows no *Batson* violation occurred. Proposition I is denied.

II.

¶8 In his last counseled proposition, Appellant claims the trial court abused its discretion by running his sentences consecutively. The decision whether to run sentences concurrently or consecutively rests in the sound discretion of the trial court and there is no absolute constitutional or statutory right to concurrent sentences. *Riley v. State*, 1997 OK CR 51, ¶ 20, 947 P.2d 530, 534. The abuse of discretion analysis is set forth in Proposition I.

¶9 The fact that the trial court ordered Appellant's sentences to run consecutively is indicative of nothing more than the trial court's adherence to the statutory directive of 22 O.S.2021, § 976, that sentences run consecutively unless the trial court exercises its discretion and runs them concurrently. The record shows that Appellant, a father figure to CW, used a pretext to get her to go alone with him in a vehicle, then drove her to a secluded area where he proceeded to beat her. CW fled into the night to escape Appellant and

he left her alone, never letting anyone know her whereabouts. Appellant fled Oklahoma and United States Marshals had to track him down, finding him in a casino in Las Vegas.

¶10 Based on this record, the trial court did not abuse its discretion in declining to run Appellant's sentences concurrently. Proposition II is denied.

¶11 The following are Appellant's *pro se* propositions.

I.

¶12 Appellant argues in his first *pro se* proposition that the trial court erred in denying his motion for appointment of counsel for his sentencing hearing. The record reflects that the trial court appointed Appellant two different attorneys during the course of this case, Joan Lopez and Albert Hoch. Neither satisfied Appellant and the record establishes his knowing and voluntary choice to represent himself.[4] It appears this Court has not addressed re-appointment of counsel after a valid waiver of counsel. However, the Tenth Circuit has done so and reviews a trial court's decision in that regard for an abuse of discretion. *United States v. Merchant*, 992 F.2d 1091, 1095

[4] Hoch represented Appellant during the trial until after Ginger Williams testified.

(10th Cir. 1993). In considering a request for re-appointment of counsel after a valid waiver of the right to counsel and exercise of the right to self-representation, the Tenth Circuit examines "the degree to which a defendant has shown good cause and the timeliness of the request." *Id.*

¶13 In this case, the record demonstrates Appellant's ardent dissatisfaction with not one, but two, court appointed attorneys and his equally ardent, intelligent and voluntary waiver of his right to counsel and exercise of his right to self-representation. Appellant filed a motion for appointment of counsel for his sentencing hearing on December 7, 2020, eleven days before the hearing date of December 18, 2020. His reason was that he had been sick with COVID and unable to prepare. However, Appellant filed a forty-five page *pro se* motion for new trial on December 2, 2020. The trial court denied Appellant's request, finding Appellant had previously made a knowing, voluntary waiver of his right to counsel, had prepared and filed a lengthy forty-five page motion for new trial and was capable and competent to represent himself at the sentencing hearing. Although the trial court did not address the timeliness of Appellant's motion for appointment of counsel, the record shows it was filed

eleven days prior to the sentencing hearing. This was untimely as opposing parties are generally allowed fifteen days in which to file a response to a motion. Rule 4(e), *Rules for District Courts of Oklahoma*, Title 12, Ch. 2, App. (2021).

¶14 Guided by the analysis in *Merchant*, the trial court did not abuse its discretion in denying Appellant's motion for appointment of counsel for sentencing, as he failed to show good cause for, or timeliness of, his motion. *Pro se* Proposition I is denied.

II.

¶15 In his second *pro se* proposition, Appellant alleges his motion for self-representation was not made intelligently and voluntarily. This proposition has two subparts, A and B. In A, Appellant re-urges the claim made in *pro se* Proposition I, that the trial court abused its discretion in denying his motion for appointment of counsel for sentencing. We denied the claim in that proposition and there is no need for further discussion of it within this proposition.

¶16 Subpart B alleges his waiver of counsel was not made intelligently and voluntarily. To that end, Appellant directs the Court's attention to several portions of the record containing the

colloquy between the trial court and Appellant regarding his request to represent himself and his motion for new trial, as well as to several cases which stand for the tenet that a waiver of counsel must be made knowingly, intelligently and voluntarily. Suffice it to say that the record demonstrates the trial court engaged in an exhaustive colloquy with Appellant regarding his waiver of counsel, one that shows Appellant unquestionably made an intelligent and voluntary waiver of that right and chose to represent himself.

Appellant fails provide argument regarding how this record fails to show the intelligence and voluntariness of his waiver. Thus, he has violated Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18 App. (2024). *Pro se* Proposition II is denied.

III.

¶17 Appellant contends in his third *pro se* proposition that his second court-appointed attorney, Hoch, was ineffective for the following reasons: failing to present the recording he made of CW's phone conversation prior to March 5, failing to present bodycam footage from Oklahoma City Police officers speaking to Williams at her home on March 5, failing to present evidence of CW's alleged thyroid problem, failing to present testimony of CW's younger sister,

failing to present text messages between Appellant and CW, and failing to present tax returns and a lease agreement which Appellant believed would provide him a defense to the kidnaping charge. Again, Hoch represented Appellant at trial through the testimony of Williams. This Court reviews ineffective assistance of counsel claims under the two-part test mandated by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. The *Strickland* test requires an appellant to show: (1) that counsel's performance was constitutionally deficient; and (2) that counsel's deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687.

¶18 The Court begins its analysis with the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. Appellant must overcome this presumption and demonstrate that counsel's representation was unreasonable under prevailing professional norms and that the challenged action could not be considered sound trial strategy. *Id.* When a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed. *Bland v. State*, 2000 OK CR 11, ¶ 113, 4 P.3d 702, 731 (citing

Strickland, 466 U.S. at 697. To demonstrate prejudice an appellant must show that there is a reasonable probability that the outcome of the trial would have been different but for counsel's unprofessional errors. *Id.*, 2000 OK CR 11, ¶ 112, 4 P.3d at 731. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

¶19 The record reveals that at a hearing on October 16, 2020, Appellant requested substitute counsel, alleging Hoch had not obtained or refused to present the above evidence Appellant believed he should have. In response, Hoch told the trial court he believed the items Appellant wanted were collateral to issues in the case and would be of no use to his defense; and in fact, would be detrimental to it. His strategy was not to present this damaging evidence. "This Court has held that '[s]o long as the choices are informed ones, counsel's decision to pursue one strategy over others is virtually unchallengeable.'" *Davis v. State*, 2011 OK CR 29, ¶ 208, 268 P.3d 86, 134 (quoting *Jones v. State*, 2006 OK CR 5, ¶ 78, 128 P.3d 521, 545). The trial court denied Appellant's request and Hoch continued to represent Appellant at trial through the testimony of Williams.

¶20 In this *pro se* proposition, Appellant fails to delineate how any of these items would have aided his defense and simply concludes the items would have been helpful. Thus, his claim that admission of these items would have changed the outcome of his trial is nothing but speculation. *See Lott v. State,* 2004 OK CR 27, ¶ 136, 98 P.3d 318, 351 ("Appellant must present this Court with evidence, not speculation, second guesses or innuendo."). Counsel was not ineffective for failing to present this material.

¶21 Concerning the tax returns, school records and a lease agreement, showing Appellant claimed CW as his child, he is mistaken that these provided a defense to the kidnaping charge. Oklahoma's kidnaping statute, 21 O.S.Supp.2012, § 741, contains no status provision whatsoever. It provides that any person "who without lawful authority, seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away another, with intent . . .[t]o cause such other person to be confined or imprisoned in this state against the will of the other person . . . shall be guilty of a felony . . . ." Appellant argued to the trial court that he stood in *loco parentis* to CW, so he could not be guilty of kidnaping her. The trial court ruled that the claim of in *loco parentis* was not a defense pursuant to Oklahoma law, and evidence

in that regard was inadmissible. Since CW was eighteen, she was legally an adult. Thus, Appellant had no lawful authority to take her anywhere without her consent. *See Logan v. State*, 2013 OK CR 2, ¶ 11, 293 P.3d 969, 975 ("The omission of a meritless claim . . . cannot constitute deficient performance; nor can it have been prejudicial."). Moreover, Appellant testified that he claimed CW and her younger sister on his tax returns, despite the trial court's ruling, so the jury was aware of his contention. Counsel cannot be ineffective for failing to raise a meritless claim.

¶22 Regarding Appellant's claim that CW's medical records should have been admitted, the claim is without merit. Counsel cross-examined both CW's mother and CW regarding whether CW had received diagnosis or treatment for any thyroid or anger issues. Thus, the issue was before the jury. Appellant testified about the issue himself, offering examples of CW's exhibitions of anger.

¶23 Based upon the record, counsel was not ineffective. *Pro se* Proposition III is denied.

IV.

¶24 In his final *pro se* proposition, Appellant faults the trial court for denying his motion for new trial. However, he provides no

argument in support of this claim, nor does he cite to his motion or the transcript of the hearing on the motion, leaving this claim completely undeveloped. Thus, he has waived this claim from appellate review. *See* Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2024); *Knapper v. State*, 2020 OK CR 16, ¶ 89, 473 P.3d 1053, 1080 (finding claim waived under Rule 3.5(A)(5) where it is inadequately developed).

¶25 Appellant's final *pro se* proposition is waived. *Pro se* Proposition IV is denied.

DECISION

¶26 The Judgment and Sentence of the district court is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2024), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF LOGAN COUNTY,
THE HONORABLE PHILLIP CORLEY,
DISTRICT JUDGE**

APPEARANCES AT TRIAL

CHARLES RANDY BOWLDS, JR.,
DEFENDANT, PRO SE

ALBERT HOCH
803 ROBERT S. KERR, #611
OKLAHOMA CITY, OK 73105
COUNSEL FOR DEFENDANT

MICHELLE MCELWEE
ASST. DISTRICT ATTORNEY
301 E. HARRISON AVE., #201
GUTHRIE, OK 73044
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OKLA. ATTORNEY GENERAL
MICHEL A. TRAPASSO
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313 NE 21ST STREET
OKLAHOMA CITY, OK 73105
COUNSEL FOR APPELLEE

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

Appendix B

The District Court of Logan County Judgment And Sentence

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE STATE OF OKLAHOMA SITTING IN AND FOR LOGAN COUNTY

STATE OF OKLAHOMA
LOGAN COUNTY SS:
FILED FOR REC ORD ON
2021 FEB 11 AM 11:00
COURT CLERK
BY _____ DEPUTY

THE STATE OF OKLAHOMA,

Plaintiff,

vs.

CHARLES RANDY BOWLDS JR.
ALIAS: CHARLES RANDY BOWLES JR.

Last four digits of SSN: ***-**-9089
DOB: July, 1975
Place of Birth: Oklahoma
DOC#: 222280
Last four digits of DL#: ****
State of Issuance:

Defendant(s).

1048081398

Case No. CF-2019-45

JUDGMENT AND SENTENCE

Now, on this 18th day of December, 2020, this matter comes on before the undersigned Judge for sentencing and the Defendant, CHARLES RANDY BOWLDS JR., ALIAS: CHARLES RANDY BOWLES, JR., appears personally, Pro Se, the State of Oklahoma represented by Michele McElwee, and the Defendant, having been FOUND GUILTY:

to/of the crime(s) of:

COUNT 1: KIDNAPPING AFTER FORMER CONVICTION OF A FELONY, a FELONY, 21 O.S. § 741, committed on or about the 5th day of March, 2019.

COUNT 3: ASSAULT AND BATTERY WITH A DANGEROUS WEAPON, a FELONY, 21 O.S. § 645, committed on or about the 5th day of March, 2019.

COUNT 4: DOMESTIC ASSAULT AND BATTERY, a MISDEMEANOR, 21 O.S. § 644(C), committed on or about the 5th day of March, 2019.

(X) IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Defendant, CHARLES RANDY BOWLDS JR., ALIAS: CHARLES RANDY BOWLES JR. is guilty of the above described offenses and is sentenced as follows:

TERM OF IMPRISONMENT

Count 1: Sentenced to a term of 20 years to be served in the Oklahoma Department of Corrections. All counts to run consecutively with each other.

Count 3: Sentenced to a term of 20 years to be served in the Oklahoma Department of Corrections. All counts to run consecutively with each other.

Count 4: Sentenced to a term of 1 year in the Logan County Jail. All counts to run consecutively with each other.

Under the custody and control of:
(X) Oklahoma Department of Corrections.

Upon release from such confinement, the Defendant shall serve a term of post-imprisonment supervision, under conditions prescribed by the Department of Corrections, for a period of

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that in addition to the preceding terms, the Defendant is also sentenced to:

COSTS, VCA AND RESTITUTION

(X) The defendant is to report to the Logan County Court Clerk on this date to file a payment plan, and to pay all fines, costs and fees accordingly.

SPECIAL RULES AND CONDITIONS OF PROBATION

Costs of Incarceration
Court Costs

IT IS FURTHER ORDERED that judgment is hereby entered against the Defendant as to the fines, costs, and assessments set forth above.

The Court further advised the Defendant of his rights and procedure to appeal to the Court of Criminal Appeals of the State of Oklahoma, and of the necessary steps to be taken by him to perfect such appeal, and that if he desired to appeal and was unable to afford counsel and a transcript of the proceedings, that the same would be furnished by the State subject to reimbursement of the cost or representation in accordance with Title 22 O.S. § 1355.14. The Court further advised the Defendant that, in the event the above sentence is for a crime involving domestic violence where the Defendant is or was a spouse, intimate partner, parent, or guardian of the victim, or is or was involved in another similar relationship with the victim, it may be unlawful for him or her to possess, purchase, receive, transport or ship a firearm including a rifle, pistol or revolver or ammunition pursuant to federal law under Title 18 U.S.C. § 992(g)(8) or (9), or state law or both.

In the event the above sentence is for incarceration in the Department of Corrections, the Sheriff of Logan County, Oklahoma is ordered and directed to deliver the Defendant to the Lexington Assessment and Reception Center at Lexington, Oklahoma, and leave therewith a copy of this Judgment and Sentence to serve as warrant authority of the Sheriff for the transportation and the imprisonment of the Defendant as herein before provided. The Sheriff to make due return to the clerk of this Court, with his proceedings endorsed thereon.

COURT CLERK'S DUTY

[TRIAL JUDGE TO COMPLETE THIS SECTION]

IT IS FURTHER ORDERED that the Clerk of this Court shall register or report the following circumstances in accordance with the applicable statutory authority:

(X) As to Count(s) 1, the defendant is ineligible to register to vote pursuant to Section 4-101 of Title 26.

( ) Pursuant to Section 985.1 of Title 22, the Court departed from the mandatory minimum sentence of imprisonment as to Count(s) _____.

( ) As to Count(s) _____, the defendant is subject to the Methamphetamine Offender Registry requirements as set forth in Section 2-701 of Title 63.

( ) As to Count(s) _____, the defendant is subject to the Mary Rippy Violent Crime Offenders Registration Act requirements as set forth in Section 594 of Title 57.

( ) Defendant is a lawyer and certified copies of this document shall be transmitted to the Chief Justice of the Supreme Court and the General Counsel of the Bar Association within five (5) days as set forth in Rule 7.2 of the Oklahoma Rules of Professional Conduct, 5 O.S.Supp.2014, ch. 1, app. 1-A.

WITNESS my hand the day and year first above mentioned.

Phillip Corley
Judge of the District Court

Michele McElwee
Assistant District Attorney

(SEAL)
ATTEST: Cheryl Smith, Court Clerk

Deputy Clerk

CLERK'S CERTIFICATION OF COPIES

I, Cheryl Smith, Clerk of the District Court of Logan County, State of Oklahoma, do hereby certify the foregoing to be a true, correct, full and complete copy of the original Judgment and Sentence in the case of Oklahoma v. CHARLES RANDY BOWLDS JR., ALIAS: CHARLES RANDY BOWLES JR. as the same appears of record in my office.

WITNESS my hand and official seal this _____ day of _____, _____.

Cheryl Smith, Court Clerk

By: _____
Deputy Clerk

(SEAL)

SHERIFF'S RETURN

I received this Judgment and Sentence the _____ day of _____, _____, and executed it by delivering the Defendant to the Oklahoma Department of Corrections at Lexington Assessment and Reception Center, on the _____ day of _____, _____.

I also certify the above prisoner has served _____ days in the County Jail on the present charge or charges.

Damon Devereaux, Sheriff

_____
Deputy Sheriff

Appendix C

Appellant's Supplemental Pro Se Brief

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CHARLES RANDY BOWLDS, Appellant, v. THE STATE OF OKLAHOMA, Appellee.	)	Case No. F-2021-1155

APPELLANT'S SUPPLEMENTAL *PRO SE* BRIEF

SUBMITTED BY:

Christopher J. Capraro
Appellate Defense Counsel
Oklahoma Bar No. 35400

P.O. Box 926
Norman, OK 73070
(405) 801-2727

ATTORNEY FOR APPELLANT

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CHARLES RANDY BOWLDS, Appellant, v. THE STATE OF OKLAHOMA, Appellee.	)	Case No. F-2021-1155

APPELLANT'S SUPPLEMENTAL *PRO SE* BRIEF

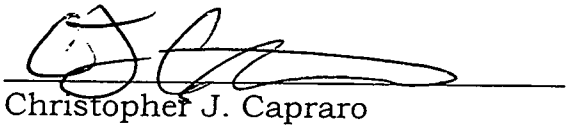
Appellant's Brief-in-Chief was filed August 24, 2023. Pursuant to Rule Number 3.4(E), Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2023), Appellant has requested that appellate counsel submit the following pro se issues to the Court. Appellant's pro se issues are being submitted within sixty (60) days of the filing of the Brief-in-Chief. Appellate counsel has reviewed Appellant's pro se issue and has determined that they are viable and non-frivolous, and certifies them as such.

Appellate counsel submits these issues to the Court and recommends the Court accepts them so that these issues may be preserved for review by this Court and any potential federal court.

THEREFORE, Appellant respectfully requests that this Court grant him leave to file the accompanying Supplemental *Pro Se* Brief of Appellant.

Respectfully submitted,

CHARLES RANDY BOWLDS

By: 

Christopher J. Capraro
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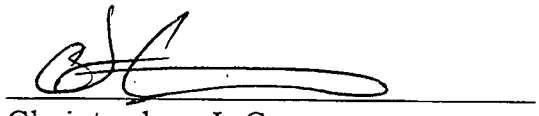
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

This is to certify that on September 14, 2023, a true and correct copy of the foregoing Supplemental *Pro Se* Brief of Appellant was caused to be mailed via United States Postal Service, postage pre-paid, to Appellant at the last-known address, and a copy 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.

Charles Randy Bowlds, No. 222280
Oklahoma State Penitentiary
P.O. Box 97
McAlester OK 74501



Christopher J. Capraro

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

CHARLES BOWLDS,
Appellant,

V. No. F-2021-1155

THE STATE OF OKLAHOMA,
Appellee,

PRO SE SUPPLEMENTAL BRIEF

Comes Now, the above named Appellant, Pro Se, Pursuant to Rule 3.4(E) Rules of the Oklahoma Court of Criminal Appeals Ch. 18, App. of Title 22, in addition to the rule of Liberal Construction, as Set out in Johnson v. Reyna 57 F. 4th 769, 775 (10th Cir. 2023); Haines v. Kerner, 404 U.S. 519, 520-21 (1972). Appellant respectfully request this honorable Court to Consider his Pro Se Supplemental brief. The Appellant futher States a asserts:

PROPOSITION I

THE DENIAL OF APPELLANTS MOTION FOR APPOINTMENT OF COUNSEL FOR FINAL SENTENCING WAS ARBITRARY AND VIOLATED APPELLANTS SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Due to ineffective assistance of Counsel

During trial, Appellant was forced to Proceed Pro Se. Trial Concluded on October 21, 2020, and Final Sentencing was Set For December 18, 2020. Prior to Final Sentencing, Appellant was Stricken with CoVID-19, compelling him to file a MOTION FOR APPOINTMENT of COUNSEL FOR FINAL SENTENCING. On December 18, 2020 Final Sentencing Commenced, and irrespective of the condition Appellant was in, the Honorable Phillip Corley denied the Motion for Appointment of Counsel.

Appellant had Constitutional Rights, Secured by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Corresponding Provisions to the Oklahoma Constitution, to have Counsel Appointed at Final Sentencing. See Gideon V. Wainwright, 372 U.S. 335, 340, 83 S.Ct. 792, 794, 9 L.Ed.2d 799 (1963); U.S. V. Chronic, 4666 U.S. 284, 659 (1984); Strickland V. Washington, 4666 U.S. 668, 686 (1984).

Contentions Considered, Appellant moves this Honorable Court, respectfully, to reverse and remand his Case, in the interest of Justice for a New trial, or for whatever relief the Court finds Equitable.

PROPOSITION II

APPELLANTS MOTION FOR SELF REPRESENTATION WAS NOT INTELLIGENTLY, NOR VOLUNTARILY MADE AND THEREFORE RESULTED IN REVERSIBLE CONSTITUTIONAL ERROR

Due to ineffective assistance of Counsel, Appellant became forced with the Choice to either continue on with incompetent or unprepared Counsel, or elect to Proceed Pro Se.

A. WAIVER WAS NOT INTELLIGENT

Appellant, first directs this Courts attention to the WAIVER of RIGHT TO ATTORNEY Provided by the Honorable Corley. On the second Page of the waiver of right to attorney, Under the Sub title "WAIVER" the waiver provides the following:

"Further, I understand that my waiver of my right to an attorney at this time **[S]hall Not** Preclude me from seeking my right to an attorney in **Future** Proceedings in this Case, and I have been so informed by the Court."

reproduced in relevant part - Emphasis added)

Appellant next directs this Courts attention to Volume 3, Transcripts of Jury Trial Proceedings had on October 20, 2020, SEE Specifically at PAGE 470 lines 14 thru 19. The following Colloquy occurred:

THE Court: If you now Choose to represent yourself and waive your right to an attorney, you do have an Unlimited right to later Change your Mind and Seek an Attorney to represent you in this matter. Do you understand that"

Defendant Charles Bowlds: Yes Sir Your Honor.

Appellants trial Concluded on October 21st 2020. Final Sentencing Commenced approximately two months later, essentially, making the Final Sentencing a "Future Proceeding" inWhich the Court informed Appellant he Would [Not] be Precluded From his Right, - [U]nlimited right, to Seek an attorney at. EVEN if Appellant hadn't been Stricken With Covid-19, Prior to final Sentencing, the Court led Appellant to believe he had a Right to have an attorney appointed at the future Proceeding. The Courts failure to grant Appellants Pro Se Motion for Appointment of Counsel for Final Sentencing rendered the Waiver of Right To Attorney Void, and UNintelligently Made.. SEE Burnham v. State, 2023 OK CR , at 9 (2) quoting Norton V. State, 2002 OK CR 10, 9 15, 43 P. 3d 404, 409 ("The right-to counsel is Fundamental to ensuring the Protection of Practically every other Constitutional right of the accused") Id., 2002 OK CR 10, 9 7, 43 P. 3d at 407; also quoting Lamar V. State, 2018 OK CR 8, 9 29, 419 P. 3d 283, 292 (Setting Forth equirements For an express Waiver of Counsel) also SEE Mathis V. State, 2012 OK CR 1, 9 7, 271 P. 3d 67, 72; United States V. Bishop 2022 WL 7543908; Brown V. State, 2018 OK CR 3 422 P. 3d 155.

B. WAIVER WAS NOT VOLUNTARY

For the Purposes of efficiency, and time, n addition to the Page limitations of this

Supplemental brief, Appellant respectfully request this honorable Court to consider the following referred to documentation set out below:

i. The transcript of the Proceedings From October 16., 2020

ii. Volume 3 Transcript of Jury Trial Proceedings had October 20, 2020, IN CAMERA. SEE Specifically at Pages 462 lines 15 thru 25; 463 lines 1 thru 25; 465 lines 14 thru 25; 466 lines 1 thru 25; 475 lines 20 thru 25; 476 lines 1 and 2; 479 lines 18 thru 25; 480 lines 1 thru 16.

iii. Appellants Pro Se Motion for New Trial, Filed in the District Court of Logan County on December 2, 2020. SEE Specifically Propositions I AND II, AND Proposition III.

SEE Brown v. State, 2018 OK CR 3, ¶17, 422 P.3d 155; lexander v State, 2019 OK CR 19, ¶20 499 P.3d 860 uoting United States v. Padilla, 819 F.2d 952, 955 10th Cir 1987).

Wherefore, Contentions, and above referenced locumentation considered, Appellant respectfully sk, or request this Court to reverse, and emand his case, in the interest of Justice For a New trial.

PROPOSITION III

TRIAL COUNSEL ALBERT HOCH JR. WAS UNPREPARED, INCOMPETENT AND INEFFECTIVE DEPRIVING APPELLANT OF His SIXTH AMENDMENT RIGHT TO THE UNITED STATES CONSTITUTION

For the Purposes of efficiency, and time, in addition to the Page limitations of this Supplemental Brief, Appellant respectfully request this honorable Court to Consider the following referred to documentation set out in the Previous Proposition, Specifically i, ii, and iii.

Appellant further asserts that Mr. Hoch was neffective For Failing to investigate, in order to Present Evidence, which could have been beneficial, and Made available during the course of trial. Mr. Hoch also Failed to obtain readily available evidence which would have verified and or Corroborated Appellants Version of the Facts.

A. FAILED TO INVESTIGATE

The record reflects the Fact of a Phone recording, made by Appellant, the night Prior to the domestic Altercation, (SEE Preliminary Hearing Transcripts Page 32 lines 20-25; Page 33 lines 1-9) Appellant informed trial Counsel Mr. Hoch of the recordings existence, and that the recording could be Easily accessed being that Appellant saved the recording to his Google Cloud account. Mr. Hoch [A]greed that the recording would be beneficial to the defense, and advised

Appellant that he would have his investigator bring a Laptop to the Jail, So We could access My Cloud Account and obtain the recording. This never happened. The recording would not only corroborated Appellants account as to the nature or reason behind the domestic dispute, it would have also Verified the Prosecutrix was intentionally disregarding the truth.

OKLAHOMA CITY POLICE OFFICERS: The record reflects the fact that Oklahoma City Police were at Appellants home the night of March 5, 2019. Officer Bryce Brooks' Incident report, as well as his Preliminary Hearing testimony, disclose that He Contacted the Oklahoma City Police Department, and actually Spoke with Oklahoma City officers that were "already on the scene... investigating" when he arrived at Appellants home. (SEE Preliminary Hearing transcripts Page 49 lines 16 thru 25; P. H. trans. Page 50 lines 1 thru 25.)

It Could be assumed that OKC officers possessed body camera footage, as well as constructed incident reports regarding the domestic disturbance that took Place on March 5, 2019. (SEE Logan County Sheriffs Enclorent / Offense Report #2019-0330). Documentation regarding the domestic disturbance at Appellants home, in Possession of OKC Police officers was evidence. Appellant requested Mr Hoch obtain documentation from the OKC Police Department.

TRAP AND TRACE SEARCH Warrant: The record reflects the fact that United States Marshall

Groom requested Logan County Sheriff Officer Katlin Long ~~SEEK~~ a Trap and Trace Search Warrant on March 8, 2019 by Judge Lewis Duel. On May 4, 2019 Appellant Wrote Logan County Court Clerk requesting Copies of the "Probable Cause affidavit" Heading the Warrant. Appellant requested Indigent defense Counsel Joan Lopez Obtain the Warrant. Appellant also requested Mr. Hock obtain the Warrant, to No Avail.

CHLOEE WILLIAMS: Chloee Williams was home the night the domestic Altercation occurred, and possessed admissible relevant testimony Favourable to Appellants defense. Appellant requested Indigent defense Counsel Joan Lopez and Mr. Koch investigate, inorder to Subpoena Chloee, to No Avail. Chloee could have testified in regards to the domestic disturbance that took place on March 5, 2019.

TEXT MESSAGES: The record reflects that text messages took Place between Appellant and the Prosecutrix on March 4th, 2019, and On the day of March 5th, 2019 relevant to Appellants defense. Appellant requested Counsel Lopez, as well as Mr. Koch investigate, the Appellants Phone, as well as the Prosecutrix Phone inorder to Subpoena and Obtain text messages, to No Avail

PRIMARY CARE PHYSICIAN RECORDS: (PCPR). The PCPR was very important to the defense.

The PCPR would have disclosed that the Prosecutrix was examined just days Prior to the domestic altercation, due to

exhibiting abnormal and aggressive behavior, and that the results of her examination was that she was affected with a condition that affected her thyroid which could cause angry, as well as aggressive behavior. Appellant requested counsel Lopez as well as Mr. Hoch investigate, in order to obtain documentation in regards to the PCPR. To No Avail.

Note, the PCPR was important to the defense in that it disclosed the probability that the Prosecutrix turned the verbal altercation, into a physical altercation considering the angry and aggressive behavior she had been displaying. During trial mr. Hoch attempted to examine the Prosecutrix in relations to her "ANGER ISSUES" as well as her "seeing her doctor about her anger issues" however, Mr. Hochs cross-examination was ineffective due to him being incompetent in regards to the PCPR and the Prosecutrixs condition).

SCHOOL RECORDS:

2017 INCOME TAX RETURN RECORDS:

PCPR:

LEASE AGREEMENT:

Oklahoma Statute Title 21 § 741 has a Status Element. see In re Adoption of 2013 Revisions to Okla. Unif. Jury Instructions

riminal, 309 P.3d 121 (Okla. Crim. App. 2013); also see Apprendi v. New Jersey 530 U.S. 466, 120 S.Ct 2348, 147 L.Ed.2d 435 (2000); also see Behaif v. United States, 588 U.S. ___, 139 S.Ct. 2191 (2019) (In Behaif, the Supreme Court held that, to convict a defendant under 18 U.S.C. § 922(g), the Prosecution "must show that the defendant knew he possessed a firearm [or ammunition] and also that he knew he had the relevant status [as person not to possess] when he possessed it" Behaif, 139 S.Ct. at 2194). The School Records, 2017 Income Tax Return, PCPR, and Lease Agreement, all document Appellant as FATHER" establishing Appellant within the relevant Status, Possessing "Domestic Authority" making him exempt from the Crime of kidnapping. Appellant Requested the aboard mentioned documentation from both Counsel Lopez and Mr Hoch, to No Avail. Strickland V. Washington, 466 U.S. 668 (1984)

PROPOSITION IV

THE TRIAL COURT ABUSED ITS DISCRETION BY ARBITRARY AND CAPRICIOUSLY DENYING HIS HANDWRITTEN PRO SE MOTION FOR NEW TRIAL.

EE Williams V. State 2008 OK CR 19 ¶ 100, 188 P.3d at 227 SEE Yager V. Campbell Cnty. Mem'l Hosp., 731 F.3d 1047, 1054 (10th Cir. 2013) (A District Court abuses ts discretion "when it renders an arbitrary, Capricious, whimsical, or manifestly unreasonble judgment). Appellant moves for a New Trial

CHARLES Boulds

Appendix D

Appellee, The State Of Oklahoma Brief

No. F-2021-1155

OIDS

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CHARLES RANDY BOWLDS, JR.,

Appellant,

-vs-

THE STATE OF OKLAHOMA,

Appellee.

BRIEF OF APPELLEE
FROM LOGAN COUNTY DISTRICT COURT
CASE NO. CF-2019-45

GENTNER F. DRUMMOND
ATTORNEY GENERAL OF OKLAHOMA

MICHEL A. TRAPASSO, OBA #35298
ASSISTANT ATTORNEY GENERAL

313 NE 21st Street
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ATTORNEYS FOR APPELLEE

FEBRUARY 12, 2024

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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CHARLES RANDY BOWLDS, JR.	)	
	)	
Appellant,	)	
	)	
v.	)	**Case No. F-2021-1155**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Charles Randy Bowlds, Jr., hereinafter referred to as the defendant, was charged on March 5, 2019, via Felony Information with Kidnapping, in violation of 21 O.S.Supp.2012, § 741 ("Count I"); Assault With Intent to Commit Rape, in violation of 21 O.S.2011, § 681 ("Count II"); and Domestic Assault and Battery, a misdemeanor, in violation of 21 O.S.Supp.2019, § 644(C) ("Count III"), in Logan County Case No. CF-2019-45 (O.R. 1).[1] The supplement attached to the Felony Information alleged four prior felonies (O.R. 4). On April 1, 2019, the trial court appointed the Oklahoma Indigent Defense System to represent the defendant, with the law office of "WM. Lane Fitz and Associates" as the designee to represent him (O.R. 14). The defendant was

[1] The original record will be referred to as (O.R. __). The transcript of Preliminary Hearing held on June 25, 2019, before the Honorable Susan Worthington, Special Judge, will be referred to as (PH __). Transcript of the March 20, 2020, hearing will be referred to as (3/20/20 Tr. __). Transcript of the April 20, 2020, hearing will be referred to as (4/20/20 Tr. __). Transcript of the June 19, 2020, hearing will be referred to as (6/19/20 Tr. __). Transcript of the October 16, 2020, hearing will be referred to as (10/16/20 Tr. __). The consecutively paginated transcripts of the defendant's jury trial held from October 19 to 21, 2020, will be referred to as (Tr. __). The transcripts of the defendant's sentencing hearing held on December 18, 2020, will be referred to as (S. Tr. __). The State's exhibits will be referred to as (S.E. __).

represented at the Preliminary Hearing on June 25, 2019, by Ms. Joan Lopez ("Ms. Lopez") and Mr. Lane Fitz ("Mr. Fitz") (O.R. 15). Following the Preliminary Hearing, the State added the crime of Assault and Battery With a Dangerous Weapon (PH 61). On September 17, 2019, the State filed the Amended Felony Information charging the defendant with Assault and Battery With a Dangerous Weapon, in violation of 21 O.S.2011, § 645 ("Count III"), and renumbering Domestic Assault and Battery from Count III to Count IV (O.R. 22).

Following a jury trial held before the Honorable Patrick Corley, District Judge, the defendant was convicted of Counts I, III and IV, and acquitted of Count II (Tr. 770). The jury recommended the minimum sentences of twenty years' on both Counts I and III, and a sentence of one year plus a $5,000 fine on Count IV (Tr. 770). Before he elected to proceed *pro se*, the defendant was represented by Mr. Albert Hoch ("Mr. Hoch") at trial, his third court-appointed attorney (Tr. 2). After trial, the defendant filed a forty-plus page *pro* se motion for new trial, on December 2, 2020 (O.R. 182-25). At the sentencing hearing, the trial court denied the motion for new trial before sentencing the defendant in accordance with the jury's verdict, running all those sentences consecutively (S. Tr. 7, 10; O.R. 239). From this judgment and sentence, the defendant has filed his appeal to this court.

STATEMENT OF THE FACTS

In the spring of 2019, Corbee Williams ("the victim") was an eighteen-year-old senior in high school (Tr. 348-49). She lived on Okalee Lane in Edmond, Oklahoma with her mother, Ginger Williams ("Ms. Williams"), her sister ("C.W."), her two brothers, and the defendant (Tr. 348). The defendant and Ms. Williams started dating when the victim was eleven years old and had the two boys together in 2016 and 2017 (Tr. 348, 410). The victim referred to the defendant as her

"stepdad," but he and Ms. Williams were not married (Tr. 348). The victim considered the defendant to be a dad, and she trusted him (Tr. 349).

In the evening of March 5, 2019, the victim was home with Ms. Williams, C.W., and her two younger brothers (Tr. 350). This was a Tuesday, and the previous weekend the defendant had been angry with her regarding a group FaceTime call she had with friends, including a boy named Teon (Tr. 350). Ms. Williams, the defendant, and the victim sat and had a conversation about the call the night it occurred, and the defendant told the victim that she was not in trouble because he knew nothing was going on (Tr. 380). But later that night, the defendant texted the victim saying that he knew something was going on (Tr. 380). On March 5, the defendant arrived home from work at roughly 10 p.m. (Tr. 351). Before coming home, the defendant texted her that he wanted to talk about that phone conversation, but that he was "not upset anymore" (Tr. 353). The victim needed to go to the Walmart on 164th Street, and the defendant elected to take her in Ms. Williams's Ford Explorer (Tr. 350, 360).

When the victim got in the Explorer she could tell the defendant was upset because he was just looking out the window (Tr. 354). He had a recording of the victim's conversation with the boy on his phone and wanted her to listen to it (Tr. 354). As they were leaving the neighborhood the defendant turned left, instead of turning right to go to Walmart, and they started driving in the complete opposite direction of the Walmart (Tr. 355). The victim asked, "Where are we going" and the defendant told her, "We're going to talk about [the phone call] first, and then after that we'll go to Walmart" (Tr. 355). Eventually, they came to a stop on a gravel path near Waterloo Road in Logan County (Tr. 356). There were no houses around, and on one side of the road was a

barbed wire fence with a wooded area behind it (Tr. 357). To the victim, everything seemed "very weird and very suspicious" (Tr. 356-57).[2]

After they came to a stop on the gravel road, the defendant told the victim, "This is [Ms. Williams's] fault. You and [C.W.] are mine" (Tr. 356). At this point the victim opened her door and tried to escape the car (Tr. 358). But then the defendant grabbed a taser gun from the center console of the Explorer, pointed it at her, and told her to grab "the handcuffs" from the passenger side door (Tr. 357-58). She got back in the car and handed him the handcuffs, and then closed her door (Tr. 360). The victim testified that the defendant then told her they could "do this the easy way or the hard way," before telling her to get in the backseat and undress herself (Tr. 360).[3] She testified that she told him "no," and he climbed over to the front passenger seat and straddled her legs with his legs before trying to kiss her (Tr. 360). The victim tried to push the defendant, and he started punching her in the face with his fist and hitting her with the taser gun (Tr. 361). The defendant opened the passenger door and got out of the car, and told the victim that her face was "messed up" (Tr. 362).

With the defendant outside of the vehicle, the victim tried to climb into the driver's seat to take the car and drive away, but he pulled her down and dragged her toward him (Tr. 362-63). The defendant then proceeded to hit her roughly fifteen more times (Tr. 365). The victim never tried to hit him (Tr. 365). The defendant told the victim again to get in the back seat (Tr. 367). She pretended to do so, but then escaped the vehicle and started running towards the wooded area (Tr. 367). As she was running away, she heard the defendant yell, "[Y]ou can run and you can die in

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the woods" (Tr. 367). She also heard the doors to the vehicle start slamming, and then the defendant driving off without coming after her (Tr. 368). The victim did not have her shoes on, but she was able to get through the barbed wire fence, before running through a creek area and jumping another fence before coming to a little red "barn . . . or shed" (Tr. 368). She hid there for roughly ten minutes because she saw a small light and was afraid it was the defendant looking for her (Tr. 368).

While this was happening, Ms. Williams was at home with the other children getting worried (Tr. 414). The trip to Walmart was supposed to be quick, and after roughly thirty minutes Ms. Williams texted the defendant asking where they were (Tr. 415). She did not receive a reply (Tr. 415). After another thirty minutes she texted again, and again did not receive a reply (Tr. 416). She then called both the victim and the defendant, but neither answered the phone (Tr. 416). Ms. Williams started to get a "weird feeling" (Tr. 416). Eventually, the defendant answered one of her calls, and told her that the victim had "jumped out of the car" when they got to the Walmart because she got "upset" (Tr. 416-17). Ms. Williams suggested the defendant go into the Walmart to see if the victim was there, and he simply told her that he was looking for her (Tr. 418). They talked for roughly thirty minutes on the phone, and the defendant told Ms. Williams to continue calling the victim (Tr. 419). Ms. Williams hung up the phone when she heard the defendant arriving back at the house (Tr. 419).

When Ms. Williams saw that the defendant did not have the victim with him, she became frantic and ran past him to get in the Explorer (Tr. 420). The defendant came after her yelling, and when she would not get out of the car he punched the driver's side window hard enough that the glass cracked (Tr. 421). Ms. Williams drove away and started heading to the Walmart to look for the victim (Tr. 421). On her way, she started noticing blood all over the inside of the vehicle and

called the defendant to ask why it was there (Tr. 421). The defendant claimed not to know why there was blood (Tr. 422). There was blood going down the driver's side door, as well as on the passenger's side dash, the steering wheel, and on the passenger seat (Tr. 432-36; S.E. 9, 10, 13, 15, 17). Ms. Williams told him, "[D]on't lie to me. I'm calling the cops" (Tr. 422-23). When no one at Walmart had seen the victim, Ms. Williams called the police, who then came to the Walmart (Tr. 423). Officers then followed her back to her house so she could pick up her other children (Tr. 424). When they got to the house, the defendant had disappeared, and his car was gone (Tr. 424).

Around this time, the victim was walking the road near Waterloo looking for help (Tr. 369). She went past two gated homes with guard shacks at the front, but there was no one there to help her (Tr. 369). She walked further and found a neighborhood, where she eventually knocked on the front door of Ms. LaFonda Tate's home ("Ms. Tate"). It was around midnight when the victim knocked on the door (Tr. 481-82). Ms. Tate was in bed, and when she went to the door and asked who it was, she heard a female's voice say, "I've been hurt. Can you help me?" (Tr. 481). Ms. Tate called 911 and opened the door to see the victim outside (Tr. 483). The victim was bloody from her head all the way down to her feet, and she was "hysterical" (Tr. 483). The victim was also crying and shaking (Tr. 483). Ms. Tate let her in, gave her a blanket, and then got her socks and water (Tr 483). Roughly five minutes after the 911 call, the fire department arrived, followed by paramedics (Tr. 484). Soon after that, Deputy Bryce Brown ("Dpty. Brown") of the Logan County Sheriff's Department arrived to speak with the victim, which conversation was recorded on his body camera (Tr. 515; S.E. 22). The victim was sitting on the couch with blood covering her face (Tr. 514). She was cold and shivering (Tr. 514). He also noticed she was "petrified, crying, [and] upset" (Tr. 514).

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	)	
Appellant,	)	
	)	
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When Ms. Williams saw that the defendant did not have the victim with him, she became frantic and ran past him to get in the Explorer (Tr. 420). The defendant came after her yelling, and when she would not get out of the car he punched the driver's side window hard enough that the glass cracked (Tr. 421). Ms. Williams drove away and started heading to the Walmart to look for the victim (Tr. 421). On her way, she started noticing blood all over the inside of the vehicle and

called the defendant to ask why it was there (Tr. 421). The defendant claimed not to know why there was blood (Tr. 422). There was blood going down the driver's side door, as well as on the passenger's side dash, the steering wheel, and on the passenger seat (Tr. 432-36; S.E. 9, 10, 13, 15, 17). Ms. Williams told him, "[D]on't lie to me. I'm calling the cops" (Tr. 422-23). When no one at Walmart had seen the victim, Ms. Williams called the police, who then came to the Walmart (Tr. 423). Officers then followed her back to her house so she could pick up her other children (Tr. 424). When they got to the house, the defendant had disappeared, and his car was gone (Tr. 424).

Around this time, the victim was walking the road near Waterloo looking for help (Tr. 369). She went past two gated homes with guard shacks at the front, but there was no one there to help her (Tr. 369). She walked further and found a neighborhood, where she eventually knocked on the front door of Ms. LaFonda Tate's home ("Ms. Tate"). It was around midnight when the victim knocked on the door (Tr. 481-82). Ms. Tate was in bed, and when she went to the door and asked who it was, she heard a female's voice say, "I've been hurt. Can you help me?" (Tr. 481). Ms. Tate called 911 and opened the door to see the victim outside (Tr. 483). The victim was bloody from her head all the way down to her feet, and she was "hysterical" (Tr. 483). The victim was also crying and shaking (Tr. 483). Ms. Tate let her in, gave her a blanket, and then got her socks and water (Tr 483). Roughly five minutes after the 911 call, the fire department arrived, followed by paramedics (Tr. 484). Soon after that, Deputy Bryce Brown ("Dpty. Brown") of the Logan County Sheriff's Department arrived to speak with the victim, which conversation was recorded on his body camera (Tr. 515; S.E. 22). The victim was sitting on the couch with blood covering her face (Tr. 514). She was cold and shivering (Tr. 514). He also noticed she was "petrified, crying, [and] upset" (Tr. 514).

Dpty. Brown subsequently went to Ms. Williams's home to speak with her and inform her that the victim was safe and being taken to the hospital (Tr. 528). Ms. Williams told him about the blood in her vehicle, and he took photographs on his work phone while Ms. Williams proceeded to the hospital with her children, mother, and sister in her sister's car (Tr. 528-31). Dpty. Brown then proceeded to the hospital to speak further with the victim (Tr. 531).

The victim was taken to Mercy Hospital and treated for her injuries (Tr. 371). She had to get multiple staples and stitches on her face and knee (Tr. 371). She also had a fractured foot and a skull fracture (Tr, 372; S.E. 1, 8). After returning home from being with the victim at the hospital, Ms. Williams noticed that a taser and handcuffs were sitting on the floor in the living room (Tr. 436-37). Additionally, her wallet was missing (Tr. 437).

Sheriff's Deputy Katlin Long ("Dpty. Long") was tasked with apprehending the defendant (Tr. 563). She started trying to locate him on March 6, 2019 and was able to activate a ping on his cell phone on March 7 (Tr. 565). The defendant's phone pinged at a hotel and a park in Colorado Springs, Colorado, but police there were unable to locate him at either of those places (Tr. 565-66). Eventually, Dpty. Long got a trap and trace warrant for the defendant's phone and got the U.S. Marshals involved (Tr. 566-67). On March 11, 2019, the Marshals informed her that the defendant had been apprehended at a casino in Las Vegas, Nevada (Tr. 568).

The defendant testified in his own defense at trial, alleging the following facts (Tr. 606). He claimed Ms. Williams started having anxiety attacks shortly after the birth of their second son, and that the victim was the "trigger" for this anxiety (Tr. 629). Starting in December 2018, the defendant claimed he started noticing "suspicious" behavior from the victim, particularly as it related to a boy named "Teon" (Tr. 610-12). Specifically, he claimed that he was home from work one day and one of her old phones was "blowing up," and when he looked at who was texting the

phone it just said "bestie" with a heart (Tr. 611). When he sent the victim a picture asking who this was, she called and told him it was a "gay boy" named "Teon" in one of her classes (Tr. 611-12). He also claimed that he later discovered that this boy did not attend her school, and that he had a reputation as a guy who "slept with all the girls" (Tr. 616). The defendant also claimed that around this time he started getting notifications while he was at work showing the victim home from school in the middle of the day, and that soon after she would arrive the home security cameras would be shut off (Tr. 613). Also around this time, the defendant claimed that the victim had been diagnosed with an "overactive thyroid" and that this caused her to have "anger attacks," while also "overreacting to situations" (Tr. 616).

Regarding the March 5, 2019, incident, the defendant testified that he tried to make the victim listen to the recording of her phone conversation, but she tried to jump out of the car, so he accelerated multiple times to prevent her from escaping (Tr. 638-39). When she eventually agreed to listen, she faked like she was taking the earbud and then opened the door and "took off running" (Tr. 639). The defendant admitted that he chased after her, grabbed her, and tried to put her back in the car (Tr. 640). He claimed that as he was trying to put the victim back in the car, she headbutted him multiple times, and then he headbutted her multiple times in response (Tr. 641-42). The defendant denied knowing how the taser got in the car and claimed that the victim grabbed it (Tr. 643-44). He also claimed she hit herself in the face with the taser when he tried to grab it from her (Tr. 644). The defendant admitted to returning to the home, punching and breaking the glass of the Explorer as Ms. Williams was leaving, and entering the home to get money and clothes from his closet (Tr. 650-51). The defendant stated that he went back to the area around Waterloo, but when he saw "police were everywhere," he fled to a friend's house (Tr. 652).

Once at the friend's house, the defendant claimed that he formulated a plan to turn himself in, but he first wanted to "tie up the affairs that needed to be tied up" (Tr. 653). He claimed that he told Ms. Williams he was coming back to the house, but she threatened him that the victim's father and his friends were there (Tr. 653). The defendant also claimed that law enforcement called his brother and lied to him, saying that the defendant had killed the victim (Tr. 655). At that point, he concluded that he did not feel safe, and decided, "I better run, I better leave the state" (Tr. 656).

On cross-examination by the State the defendant admitted to four prior felony convictions (Tr. 660-62). He also admitted that the victim was eighteen at the time of the altercation, that she repeatedly tried to get out of the car, and that he "physically grabbed [the victim]" to get her back in the car (Tr. 663). The defendant also admitted to headbutting the victim "several times" but denied punching her (Tr. 664). He also admitted that the victim was bleeding a lot, and that she had a cut above her eyebrow in the car (Tr. 664-66). The defendant also admitted to fleeing the state, but claimed he was on his way from California to Oklahoma to turn himself in when he was apprehended at a casino in Las Vegas (Tr. 689-90). He also admitted to apologizing to Ms. Williams for "everything that transpired" (Tr. 691).

Additional facts will be discussed as they become relevant.

COUNSELED PROPOSITIONS[4]

PROPOSITION I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN STRIKING J.R. BECAUSE THERE WAS NO *BATSON* ERROR.

[4] Per this Court's January 12, 2024, order, the State responds to both the defendant's counseled appellate brief and his *pro se* supplement to that brief.

In his first counseled proposition, the defendant claims that the trial court committed structural error when "the only minority juror was struck by the prosecution without a non-pretextual, race-neutral reason" (Def. Br. at 11). But because the State specifically articulated that J.R. lied about interactions with law enforcement, the State presented a race-neutral reason to strike J.R., and the defendant ultimately failed to show purposeful discrimination.

A. Standard of Review. This Court reviews a trial court's *Batson*[5] rulings for an abuse of discretion, "since the trial court has the unique benefit of being able to personally assess the demeanor of the prosecutor making the [peremptory] challenge." *Grant v. State*, 2009 OK CR 11, ¶ 26, 205 P.3d 1, 14 (citing *Bland v. State*, 2000 OK CR 11, ¶ 14, 4 P.3d 702, 711).

B. Argument and Authority. Because the State articulated a race-neutral reason for striking J.R., and the court determined there was no purposeful discrimination, the defendant's *Batson* challenge fails.[6]

In *Batson*, the United States Supreme Court held that a criminal defendant may raise an equal protection violation regarding the government's use of peremptory challenges to remove minority jurors from the jury panel where the removal was motivated by racial considerations. *Batson*, 476 U.S. at 96-98. The Court established a three-part analysis for such claims, which analysis this Court has repeatedly used. Specifically, the three-step analysis is as follows:

> 1) the defendant must make a prima facia showing that the prosecutor has exercised peremptory challenges on the basis of race; 2) after the requisite showing has been made, the burden shifts to the prosecutor to articulate a race neutral explanation related to the case for striking the juror in question; 3) the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

---

[5] *Batson v. Kentucky*, 476 U.S. 79 (1986).

[6] Because the State presented a race-neutral explanation for its peremptory strike of J.R., whether the defendant met his burden under *Batson*'s first step is moot. *See Hernandez v. New York*, 500 U.S. 352, 359 (1991).

Bland, 2000 OK CR 11, ¶ 9, 4 P.3d at 710-11 (quoting *Turrentine v. State*, 1998 OK CR 33, ¶ 6, 965 P.2d 955, 964); *Batson*, 476 U.S. at 98 n.20. This Court has determined that the prosecutor's race neutral explanation "need not rise to the level of justifying excusal for cause, but it must be a clear and reasonably specific explanation of [the] legitimate reasons for exercising the challenges." *Turrentine*, 1998 OK CR 33, ¶ 6, 965 P.2d at 964.

More recently, the Supreme Court has explained that "the trial court must consider the prosecutor's race-neutral explanations in light of all the relevant facts and circumstances," and that "[t]he trial judge's assessment of the prosecutor's credibility is often important." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243-44 (2019). Further, the Supreme Court has repeatedly recognized that "these determinations of credibility and demeanor lie **peculiarly within a trial judge's province**." *Id.* at 2244 (emphasis added) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008)); *see Wainwright v. Witt*, 469 U.S. 412, 428 (1985). Accordingly, "[s]ince the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings **great deference**," and appellate review of these determinations is "highly deferential." *Flowers*, 139 S. Ct. at 2244 (citing *Snyder*, 552 U.S. at 477-79) (emphasis added).

Here, the State gave a specific, legitimate explanation for using a peremptory strike on J.R., specifically that he had lied about having prior contacts with law enforcement. *See Turrentine*, 1998 OK CR 33, ¶ 6, 965 P.2d at 964. Specifically, the parties and the court had the following exchange regarding the State's strike of J.R.:

> Mr. Hoch: Judge, I know he's not African American. However, there's only one African American person in this whole jury pool and this is the only minority person that's up there, so – and I don't think *Batson* necessarily has to be the same race.

> . . .
>
> I don't see a race-neutral reason to get rid of him.
>
> . . .
>
> The State: You honor, there hasn't been a pattern established. And I do have a reason to get rid of him. He indicated that he's had no contact with law enforcement. And I looked through – **as I did with every juror**, I looked through information and [found] a number of contacts with [J.R.].
>
> The Court: The Court notes for the record your *Batson* [challenge]. The Court believes the State has satisfied a race-neutral reason for excluding him.

(Tr. 261-62) (emphasis added). Moreover, this Court's decision in *Black v. State* makes clear that this was a sufficient race-neutral reason to strike J.R. Specifically, there the Court concluded that striking a minority prospective juror who did not respond when the panel was asked if they had been "accused or involved" in a criminal matter, despite being accused of burglary, was a sufficient race-neutral reason. *Black v. State*, 2001 OK CR 5, ¶ 32, 21 P.3d 1047, 1061-62. In affirming the trial court's decision that this was a race-neutral reason, the Court held, "[E]xcusal of a potential juror because of a prior criminal record is a legitimate reason for removal." *Id.*, 2001 OK CR 5, ¶ 32, 21 P.3d at 1062. Accordingly, the Court concluded that because the trial court's ruling upholding the challenge was "supported by the record," there was no *Batson* error. *Id.*

Similarly here, J.R. failed to disclose prior contacts with law enforcement despite repeated opportunities to do so. At the start of voir dire the trial court explained to all prospective jurors that they would "take an oath to answer **completely and honestly** all questions asked of [them] by [the court] and the attorneys," and that the purpose of these questions was to "obtain a fair jury" (Tr. 5) (emphasis added). J.R. was then selected as one of the first twelve names (Tr. 5). As part of its own voir dire, the court asked the prospective jurors if anyone had "prior or current legal experience," or "involvement in the legal system" as a victim or defendant, or if any of them had

"problems with the legal system" (Tr. 17). While a number of jurors responded that they did, J.R. was not one of them (Tr. 22-30). During the State's voir dire, the State repeatedly asked the prospective jurors if they had prior experiences with the legal system, if anyone was ever arrested or convicted of a crime, or if anyone had any prior "contact or dealings" with law enforcement (Tr. 64, 76). Again, while other jurors responded in the affirmative, and explained that this would not affect their ability to be impartial, J.R. failed to do so (Tr. 64-70, 76-80). Thus, the State presented a reasonably specific, race-neutral reason for striking J.R. *Purkett v. Elem*, 514 U.S. 765, 767-68 (noting that the "second step of [the *Batson*] process does not demand an explanation that is persuasive, or even plausible"); *Black*, 2001 OK CR 5, ¶ 32, 21 P.3d at 1061-62.

Moreover, though inartfully worded, the trial court's statement that the *Batson* challenge was overruled and that the State had shown a race-neutral explanation was a determination that, based on all relevant circumstances, there was no purposeful discrimination, meeting the third prong of the *Batson* test. *Cf. Cortez-Lazcano v. Whitten*, 81 F.4th 1074, 1076 (10th Cir. 2023) (state court denial of *Batson* claim was not unreasonable despite failing to specifically address relevant circumstances on which the petitioner relied to show purposeful discrimination). This determination by the court that there was no showing of purposeful discrimination is a "finding of fact of the sort accorded great deference on appeal." *Hernandez v. New York*, 500 U.S. 352, 264 (1991). Indeed, that the State's peremptory strike was not racially motivated is further supported when looking at the other four prospective jurors on whom the State used a peremptory strike. *See Flowers*, 139 S. Ct. at 2248 (noting that "[c]omparing prospective jurors who were struck and not struck can be an important step in determining whether a *Batson* violation occurred," and that where a prosecutor's "proffered reason for striking a [minority] panelist applies just as well to an otherwise-similar [non-minority] panelist who is permitted to serve," that tends to prove

purposeful discrimination) (citing *Foster v. Chatman*, 578 U.S. 488, 511 (2016)). Indeed, each of the other prospective jurors struck by the State either had a criminal record, had family with a criminal record, or in the case of R.C., had previously interacted with law enforcement (Tr. 69, 150, 155, 216, 220, 237-38). Accordingly, the trial court determined that the defendant failed to meet his burden of showing purposeful discrimination, and this conclusion is supported by the record. *See Flowers*, 139 S. Ct. at 2248; *see also Black*, 2001 OK CR 5, ¶ 32, 21 P.3d at 1062 (noting that the prosecutor also struck a white prospective juror who belatedly disclosed a misdemeanor conviction). Additionally, the defendant's argument that he was not permitted to respond to the State's proffered race-neutral explanation is meritless (Def. Br. at 9). Mr. Hoch responded after the court rejected the challenge, stating that the defendant wished to object to the entire jury pool because of the "racial balance" (Tr. 262). As such, Mr. Hoch failed to provide any argument regarding whether the State's proffered reason was pretextual, despite ample opportunity to do so (Tr. 262).

PROPOSITION II

THE TRIAL COURT DID NOT ERR IN RUNNING THE DEFENDANT'S SENTENCES CONSECUTIVELY.

In his second counseled proposition, the defendant claims the trial court erred in running his sentences consecutively (Def. Br. at 12-13). This argument fails because it ignores that sentences are presumed to run consecutively unless the court decides otherwise, and because running them consecutively was justified by the facts of this case.

A. ***Standard of Review.*** This Court reviews a trial court's decision to run sentences consecutively for an abuse of discretion. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. 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." *Id.* (citing *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 19, 241 P.3d 214, 225).

B. Argument and Authority. The defendant's argument fails because it ignores that sentences are presumed to run consecutively. Further, his sentence does not shock the conscience, particularly in light of the facts of this case.

Oklahoma law mandates that sentences are to run consecutively "unless a judgment and sentence provides that it is to run concurrently with another judgment and sentence." 21 O.S.2011, § 61.1. Further, this Court will not disturb a sentence within the statutory limits unless, under the facts and circumstances of the case, it is so excessive as to "shock the conscience" of this Court. *Pullen v. State*, 2016 OK CR 18, ¶ 16, 387 P.3d 922, 928. This Court's unpublished decision in *Ray* is applicable here. In that case the appellant claimed the trial court abused its discretion in failing to run his sentences concurrently. In succinctly rejecting that claim, this Court explained, "[S]entences are to run consecutively unless the trial judge, in his or her discretion, rules otherwise." *Ray v. State*, No. F-2017-0035, slip op. at 14 (Okla. Crim. App. Jun. 14, 2018) (unpublished and attached as Exhibit A).[7] Furthermore, the Court concluded that the consecutive sentences of fifteen years on each count did not shock the conscience of the Court in light of the facts and circumstances of the case. *Id.*, slip op. at 15.

Similarly here, the defendant's argument ignores that sentences run consecutively unless the trial court orders otherwise. *Id.*, slip op. at 14. Additionally, his argument that his sentences at

[7] This unpublished decision, and any other unpublished case hereinafter cited is used because no published case would serve as well the purpose for which counsel cites it, and any such decisions are attached hereto as exhibits, pursuant to Rule 3.5(C)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2023).

the minimum for each count are nevertheless excessive because they do not bear "a direct relationship to the nature and circumstances of the offenses" (Def. Br. at 12) is wholly refuted by the record. Indeed, the defendant became angry with the victim because she was having a conversation with a boy, then took that as justification to drive her to a remote location against her will, and repeatedly punch her with his fist and hit her with his taser in the face, at least fifteen times (Tr. 354-55, 357, 361-63, 365). When she was finally able to escape his wrath and run towards the wooded area to the side of the road, the defendant yelled, "[Y]ou can run and you can die in the woods" (Tr. 367). This was after the victim treated him like her father and trusted him, and after he told her that she and C.W. were his (Tr. 348-49, 356). Then the defendant lied to Ms. Williams about what transpired, denied knowing why there was so much blood in the vehicle, and fled the state (Tr. 416-18, 422-23, 656). Accordingly, his minimum sentences running consecutively is appropriate given his conduct during and after the incident on March 5, 2019. *See Kelley v. State*, 2019 OK CR 25, ¶ 19, 451 P.3d 566, 573 (concluding that the defendant's life sentence was within the range of punishment for his crime, and "though harsh, was not patently undeserved based on the evidence").

***PRO SE* PROPOSITIONS**

PROPOSITION I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO REAPPOINT COUNSEL AT FORMAL SENTENCING.

In his first *pro se* proposition, the defendant claims that the trial court's denial of his "motion of appointment of counsel for final sentencing" was arbitrary and violated his Sixth and Fourteenth Amendment rights (Def. Supp. 1-2). This argument fails because the defendant knowingly and voluntarily waived his right to counsel in the middle of trial, firing his third court-

appointed attorney, and the trial court did not abuse its discretion in refusing to reappoint counsel at formal sentencing.

A. Standard of Review. The standard of review applicable to a trial court's decision whether to *reappoint* counsel for a defendant who has elected to proceed *pro se* appears to be an issue of first impression for this Court. The Tenth Circuit, however, has held that a trial court's refusal to allow a defendant to cease self-representation and receive substitute counsel is reviewed for an abuse of discretion. *United States v. Merchant*, 992 F.2d 1091, 1095 (10th Cir. 1993).

B. Relevant Facts. After the State had called the victim and Ms. Williams to testify at trial, the court took a lunch recess (Tr. 460). At the conclusion of the lunch recess, Mr. Hoch announced that the defendant wished to represent himself, and that he had filed the *pro se* motion for self-representation the defendant requested he file (Tr. 460). In that motion, the defendant relied on *Faretta v. California*, 422 U.S. 806 (1975), arguing that he was entitled to represent himself (O.R. 119-20). The defendant also stated he was "now making a clear and unequivocal intention to proceed without counsel," and that he "kn[ew] of the dangers and disadvantages of self-representation" (O.R. 120). Further, he stated his request was "by choice and being made with his eyes open" (O.R. 120).

Mr. Hoch noted the defendant was "well within his right to represent himself," and cited various cases where this Court reversed a conviction where the trial court refused to let a criminal defendant represent himself (Tr. 460). The court then discussed the defendant's decision with him, before swearing him in and having the following exchange:

> The court: Okay. And based upon the motions that you filed, you're literate and able to read and write properly, correct?
>
> The defendant: Yes, sir.

The court: For purposes of the record, your primary language is English, correct?

The defendant: Yes, sir.

The court: Level of education?

The defendant: I got my GED.

The court: And you understand the nature of the charges and the charges filed against you?

The defendant: Yes, sir.

The court: And the range of punishment for those charges?

The defendant: Yes, sir.

The court: **You understand that they – with two prior convictions, Kidnapping and Assault with a dangerous weapon carry 20 to life?**

The defendant: **Yes, sir.**

The court: You understand that?

[The defendant]: Yes, sir.

The court: And the others carry four to life or up to a year; you understand that?

The defendant: Yes, sir.

The court: **You understand that you do have the right to have an attorney, which we have one here. And you've been appointed not one but two counsel previously. Do you understand that?**

The defendant: **Yes, sir.**

The court: **We've gone over this written waiver before. You've been given it before**, so I'm going to give it to you again and have you acknowledge that you understand those rights, as well.

The defendant: Yes, sir.

The court: You understand that you have the right to waive your right to have an attorney in this case, which is what you're requesting at this time correct?

The defendant: Yes, sir.

The court: Once again, explain . . . for the record, why. (Tr. 465).

The defendant: There has not been enough communication between me and my counsel for him to be properly prepared for this trial. And because he's not properly prepared, he is ineffectively proceeding in this trial.

. . .

We never went over discovery. The pictures that were admitted as evidence, I have never seen.

. . .

There has been no preparation between the two of us as a defense.

. . .

I'm continuously telling him, 'listen, here's this. Listen to this. This is what went on.' And he's hushing me, 'hush.' You know, 'Hush.' But . . . it's imperative for me to communicate with him now because I haven't had the opportunity to communicate things prior.

(Tr. 463-65) (emphasis added). Mr. Hoch interrupted at this point and informed the court of the following:

Judge, that's not totally correct. We've gone over discovery in jail.

. . .

Part of what he wants to ask questions about and part of what I'm telling him to be quiet on is, first off, so the jury doesn't hear it. But secondly, it's things that are not going to help, in my opinion. There are certain things that he wants asked that he's right, I'm not going to ask because I think it's detrimental to his case. **He . . . wants certain issues brought up that I think would be detrimental**.

. . .

[H]e's [telling me] 'they're lying.' I can't get up there and say, 'You're lying, you're lying, you're lying.'

. . .

The court: And the court is not going to allow that particular question to a witness. You can argue that in closing arguments, but you cannot ask a witness – claim that they're lying . . . from the podium.

Mr. Hoch: And based on that, Judge, you know, he ought to be able to do what he wants.

(Tr. 467) (emphasis added).

The court then made a further record with the defendant, ensuring the defendant knew that he would be at a severe disadvantage representing himself, having the following exchange:

The court: Let me go on a little bit further. **Has anyone promised you anything or coerced you, in any manner, to waive your right to have an attorney?**

The defendant: **No, sir.**

The court: You have not been to law school, obviously, as you indicated earlier. Have you represented yourself in any other matter?

The defendant: No, sir, Your Honor. Well, [a] civil matter.

. . .

The court: Do you understand that you may be at a disadvantage in this case by not having an attorney represent you?

The defendant: Yes, sir, Your Honor.

The court: You understand you'll be held to the same standards as an attorney, including the prosecuting attorney who's trained and experienced in the law?

The defendant: Yes, sir.

The court: You understand **I will not help and counsel will not help or assist you**?

The defendant: Yes, sir.

The court: Are you knowledgeable about the substantive law related to charges, including lesser included offenses and elements of the charges?

The defendant: No, sir.

The court: You understand you'll be at a disadvantage because of that?

The defendant: Yes, sir.

. . .

The court: Are you familiar with criminal procedures and Rules of Evidence?

The defendant: No, sir.

The court: You understand you'll be held to make objections just like a lawyer in proper . . . proceedings?

The defendant: Yes, sir.

The court: Do you understand that if you engage in any misconduct or act out in the courtroom or attempt to purposely delay the proceeding, you will lose your right to represent yourself?

The defendant: Yes, sir.

The court: I can, **but I'm not required** to . . . appoint a standby attorney to represent you.

. . .

The court: Having reviewed the waiver of the right for an attorney form that you have there, is it your desire at this time to waive your right to have an attorney further represent you?

The defendant: Yes, sir, Your Honor.

(Tr. 468-71) (emphasis added). The defendant then signed and dated the form waiving his right to counsel (Tr. 471). For the remainder of his jury trial, the defendant represented himself *pro se*.

On December 7, 2020, the defendant filed a *Pro Se* Motion for Appointment of Counsel For Final Sentencing (O.R. 228). This motion stated that the defendant was requesting counsel for final sentencing "due to [his] current health condition" (O.R. 229). He claimed that he caught COVID-19 on November 26, 2020, that he blacked out multiple times and hit his head on a metal table in his cell two days later, and that he had a temperature of 102.5 degrees (O.R. 229). Further, he stated that while he sought medical attention on November 28, 2020, his "memory . . . cognitive

thinking, [and his] . . . level of concentration" was affected (O.R. 229). He then claimed that this led him to have "fits of rage and behavior problems," which caused him to be locked in his cell with no access to the law library (O.R. 229). Based on this, the defendant asserted that he was "essentially unable to represent himself" at sentencing (O.R. 229).

At the defendant's sentencing hearing on December 18, 2020, the defendant asked the court to appoint new counsel for him, and the court refused (S. Tr. 3). Specifically, the defendant and the court had the following exchange:

> The court: The court has determined that you are capable of representing yourself which you chose to do during the middle of your trial. So at this time your application for new court appointed counsel is hereby denied.
>
> . . .
>
> The defendant: Your Honor, I fell ill with COVID-19 here recently. Had a temperature of 102 degrees. I [blacked] out twice. [I] hit my head on a metal stool. [I] hit my head on [the] concrete floor.
>
> . . .
>
> I've been in a haz[e] since that happened. My cognitive thinking has been off. My rational thinking has been off. I have been stricken with fatigue. I've been doing nothing but sleeping since then. I got into it with the correctional staff in the jail. I was placed into isolation. I have [had] very little access to the law library.
>
> . . .
>
> The court: The court has reviewed your motion, . . . and because of what you have done with two prior court appointed counsel you are not at this time eligible for court appointed counsel. The Court has determined that you are capable of representing yourself which you chose to do during the middle of your trial. So at this time your application for new court appointed counsel is hereby denied.

(S. Tr. 3-4).

*C. **Argument and Authority.*** Because the defendant knowingly and voluntarily waived his right to counsel, and because he made a dilatory request for the reappointment of counsel not supported by good cause, he was not thereafter entitled to counsel at sentencing.

It appears this Court has not addressed whether and to what extent a defendant has a right himself to cease his self-representation and have counsel reappointed. The Tenth Circuit, examining this issue, holds that:

> Once a defendant exercises his constitutional right to defend himself and proceed *pro se*, he does not have the absolute right to thereafter withdraw his request for self-representation and receive substitute counsel. . . . In reviewing requests for the substitution of counsel, courts consider, *inter alia*, the degree to which a defendant has shown good cause and the timeliness of the request. "It is well within the discretion of the court to deny as untimely requests for counsel made after meaningful trial proceedings have begun."

Merchant, 992 F.2d at 1095 (citations omitted). In *Merchant*, the Tenth Circuit found no abuse of discretion in the district court's refusal to reappoint counsel where the appellant "did a satisfactory job in proceeding *pro se*" and his request for reappointment of counsel "was clearly untimely," as it was "made well after meaningful trial proceedings had begun and after the government had completed nearly two-thirds of its case." *Id.* at 1095-96.

Here, the trial court did not abuse its discretion in refusing to reappoint counsel. The defendant's request for the reappointment of counsel was neither supported by good cause nor timely. *See id.* at 1095. As to cause, the only cause submitted was that he had had COVID, that he had been placed in isolation because of an altercation with jail staff, and that this meant he had "limited access" to the law library (O.R. 229). But none of this explained how it would affect his ability to represent himself at sentencing, particularly where the only issue was whether the sentences should run consecutive or concurrently. *Id.*; *see Ray*, slip op. at 14. Thus, he failed to show good cause, particularly where his own conduct in fighting with jail staff contributed to his

lack of library access (S. Tr. 3-4). *Merchant*, 992 F.2d at 1095.

As to timeliness, the defendant's request for reappointment of counsel was clearly not timely, as it was "made well after meaningful trial proceedings had begun." *See id.* at 1095-96. This request was made more than a month after trial concluded. *See, e.g., id.* (request for reappointment of counsel untimely when made after the government had completed nearly two-thirds of its case); *State v. Fisher*, 355 P.3d 1188, 1189-90 (Wash. App. 2015) (request for reappointment of counsel untimely when made after the State rested its case but before the defense presented its case).

The trial court's refusal to reappoint counsel finds further support in *Marshall v. Rodgers*, 569 U.S. 58, 59, 62 (2013), wherein the Supreme Court reversed the Ninth Circuit's grant of habeas relief to a petitioner who claimed that California state courts violated his Sixth Amendment right to counsel by failing to reappoint counsel to assist him with litigating a motion for new trial after three prior waivers of counsel. In so doing, the Court reasoned that though the Sixth Amendment "safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process," it is also "just as well settled . . . that a defendant also has the right to proceed **without** counsel when he voluntarily and intelligently elects to do so." *Id.* at 62 (emphasis added) (internal quotations omitted) (quoting *Faretta*, 422 U.S. at 807). Accordingly, the Court reversed the grant of relief. *Id.* at 63. Similarly here, though it is true the defendant had a right to counsel at sentencing, his prior knowing and voluntary waiver of that right at trial meant that the court was not required to reappoint counsel for sentencing. *Id.* at 59, 62-63. Indeed, this conclusion is supported by the fact that, as the trial court noted at sentencing, it could not actually appoint another attorney for the defendant (S. Tr. 3). The defendant was first represented by Ms. Lopez and Mr. Fritz, but repeatedly attempted to fire them over disagreements regarding trial strategy

(3/20/20 Tr. 3-5, 8; 4/20/20 Tr. 4-7; 6/19/20 Tr. 5-8). Indeed, the court repeatedly explained over three different hearings that it could not appoint another attorney unless there was a conflict of interest, and that conflict did not exist until the defendant accused Ms. Lopez of lying to the court at the June 19, 2020, hearing on his request for new counsel (6/19/20 Tr. 7-8). Then after the defendant fired Mr. Hoch and elected to proceed *pro se*, he was no longer entitled to court-appointed counsel, which the court explained to him at the sentencing hearing (S. Tr. 3). *See Dixon v. Owens*, 1993 OK CR 55, ¶ 14, 865 P.2d 1250, 1253 (noting that "a defendant is generally entitled to only one court-appointed attorney," and that there is "no right to choose a particular attorney for that appointment"); *see also Johnson v. State*, 1976 OK CR 292, ¶ 33, 556 P.2d 1285, 1294 (noting that an indigent defendant cannot "demand a choice of appointed counsel" and that "personality conflict or disagreement over the conduct of the defense is not sufficient to allow a defendant to discharge his attorney"). Accordingly, the totality of the circumstances, including that the defendant had already fired his three prior court-appointed attorneys, support the trial court's decision here. *Marshall*, 569 U.S. at 59, 62-63.

Such a conclusion is even further supported by the United States District Court of the District of Colorado's decision in *Wellmon v. CO Dep't Corr.*, No. 17-cv-2222-WJM, 2018 WL 10580925 (D. Colo. Dec. 12, 2018) (unpublished), which is persuasive here. There a petitioner raised a habeas claim regarding the fact he was denied reappointment of counsel at trial after previously waiving his right to counsel. *Id.* at *18. In denying relief, the court noted that the petitioner engaged in "manipulative behavior" throughout pre-trial proceedings, repeatedly refusing to defer to court-appointed counsel regarding matters of trial strategy, and even made false claims of sexual-assault against his court appointed counsel. *Id.* at *19. Further, the court also explained that "it was not unreasonable for the trial court to adhere to [the petitioner's] . . . waiver"

because his prior conduct towards counsel "suggested a realistic possibility that if the public defender was reappointed, . . . [the petitioner] would again ask for the public defender to be removed, resulting in a disruption of the proceedings." *Id.* Similarly here, the court properly denied reappointment of counsel as the defendant's prior conduct indicated he would repeatedly disagree with his appointed counsel, potentially delaying proceedings. *Id.* at *18-19.[8]

Alternatively, even assuming that the trial court abused its discretion in refusing to reappoint counsel, the error was harmless. While the Tenth Circuit has held that harmless error analysis does not apply where a defendant did not validly waive counsel, *United States v. Allen*, 895 F.2d 1577, 1580 (10th Cir. 1990), it appears that neither this Court nor the Tenth Circuit has addressed the harmless error analysis that is applicable where a trial court abused its discretion in refusing to reappoint counsel. This is not an issue of constitutional dimension—as a defendant has already waived his constitutional right to counsel at the time he seeks reappointment of counsel, *see Pro Se* Proposition II, below—but rather a matter of trial court discretion. *People v. Elliott*, 139 Cal. Rptr. 205, 213-14 (Ct. App. 1977). This Court has held that all non-constitutional errors are subject to review for harmless error. *Thrasher v. State*, 2006 OK CR 15, ¶ 4, 134 P.3d 846, 851; *see also, e.g.*, *Elliott*, 139 Cal. Rptr. at 213 (holding that harmless error analysis applies to trial court's abuse of discretion in refusing to reappoint counsel). In non-constitutional, abuse-of-discretion situations, an error is harmless unless it had a substantial influence on the outcome or leaves this Court in grave doubt as to whether it had such an effect. *See Simpson v. State*, 1994 OK CR 40, ¶ 36, 876 P.2d 690, 702; *Ochoa v. State*, 2006 OK CR 21, ¶ 32, 136 P.3d 661, 670. The

[8] Indeed, the record of the defendant's hearings in March, April, June, and October of 2020 showed the defendant repeatedly seeking removal of his attorneys because he simply did not like their decisions.

defendant bears the burden of meeting this standard. *See Ochoa v. State*, 2006 OK CR 21, ¶ 32, 136 P.3d 661, 670 (noting that appellant "has not proven this error had a substantial influence on the outcome of the proceeding").

Here, the defendant utterly fails to meet his burden on prejudice because he does not offer any reason formal sentencing would have turned out differently had an attorney been reappointed to represent him (Def. Supp. at 1-2). Indeed, the only argument counsel could have made would address whether the sentences should run consecutively or concurrently, and the defendant himself made an argument on that issue (S. Tr. 11). Specifically, he argued:

> The jury . . . gave me 20 years, the least they could have given me on the kidnapping charge, and the least they could give me on the assault with a dangerous weapon charge indicating to this Court that they weren't satisfied with the State's presentation of the case that the State put on. So I'm going to recommend, Your Honor, at this time, even though I'm not feeling good, if it pleases the Court that my counts be ran concurrently instead of consecutive.

(S. Tr. 11). The State has already discussed *supra* in its analysis of the defendant's second counseled proposition why the trial court properly ran his sentences consecutively. *See Kelley*, 2019 OK CR 25, ¶ 19, 451 P.3d at 573. Accordingly, the defendant made the same argument counsel would have made if reappointed at sentencing, and he has failed to show that the outcome of the proceeding would have been different if he was represented by counsel. *Ochoa*, 2006 OK CR 21, ¶ 32, 136 P.3d at 670. Therefore, assuming this Court concludes counsel should have been reappointed, this proposition should still be denied because he utterly fails to meet his burden of showing prejudice.

PROPOSITION II

THE DEFENDANT'S WAIVER OF COUNSEL WAS KNOWING AND VOLUNTARY.

In his second *pro se* proposition, the defendant claims that his decision to proceed *pro se* was not knowingly and voluntarily given (Def. Supp at 2-3). This argument fails because it is refuted by the record.

A. Standard of Review. A trial court's decision to allow a defendant to exercise his right of self-representation is reviewed for an abuse of discretion. *Mathis v. State*, 2012 OK CR 1, ¶ 18, 271 P.3d 67, 75. "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." *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170 (citing *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 19, 241 P.3d 214, 225). Whether there has been a valid waiver of the right to counsel is determined from the totality of the circumstances, including the "background, experience, and conduct of the accused." *Braun v. State*, 1995 OK CR 42, ¶ 12, 909 P.2d 783, 788.

B. Argument and Authority. Petitioner knowingly and voluntarily elected to proceed *pro se*, and the record conclusively refutes any claim otherwise.

The Sixth Amendment guarantees criminal defendant's the right to waive representation by counsel and proceed *pro se*. *Brown v. State*, 2018 OK CR 3, ¶ 15, 422 P.3d at 162 (citing *Faretta*, 422 U.S. at 835). Nevertheless, the waiver of this right must be knowing and voluntary. *Id.*; *Braun*, 1995 OK CR 42, ¶ 10, 909 P.2d at 787 ("A waiver of counsel is valid only if it is done knowingly and voluntarily. A record of the knowing and voluntary waiver is mandatory, and absent a sufficient record, waiver will not be found.") (internal citations omitted). A waiver is knowing and voluntary when "a defendant is informed of the dangers, disadvantages, and pitfalls

of self-representation," and these dangers must be "rigorously conveyed." *Brown*, 2018 OK CR 3, ¶ 15, 422 P.3d at 162-63 (citing *Iowa v. Tovar*, 541 U.S. 77, 89 (2004)); *see Mathis v. State*; 2012 OK CR 1, ¶ 7, 271 P.3d 67, 71-72 (noting that the defendant must knowingly and intelligently waive the right to counsel after being informed of the "dangers and disadvantages of self-representation"). Nevertheless, this Court has recognized that "an intelligent decision to waive counsel and proceed *pro se* is not the same as a smart or well-thought decision. The issue is whether the defendant was adequately informed and aware of the significance of what he was giving up" in deciding to proceed *pro se*. *Mathis*, 2012 OK CR 1, ¶ 7, 271 P.3d at 71-72. Indeed, this Court stated in *Johnson*:

> The test whether a defendant has intelligently elected to proceed Pro se is not the wisdom of the decision or its effect upon the expeditious administration of justice. It is **only necessary** that a defendant be made aware of the problems of self-representation so the record establishes that he understands that his actions in proceeding without counsel may be to his ultimate detriment.
>
> . . .
>
> [T]he defendant's technical knowledge of the law and its operation at trial is totally irrelevant in the assessment of his knowing exercise to defend himself.

Johnson, 1976 OK CR 292, ¶ 34, 556 P.2d at 1294 (emphasis added).

Here, the record refutes the defendant's claim that his waiver was not knowing and voluntary. To begin, his decision to proceed *pro se* was not the first time he had discussed this with the trial court. At the March 20, 2020, hearing, the defendant asked that he be appointed substitute counsel, and the court informed him he could either proceed with Ms. Lopez or waive his right to counsel, before allowing the defendant to take the waiver form back to his cell to fully review it (3/20/20 Tr. 7-8). At the April 20 hearing, the defendant acknowledged, "[T]his is a very big decision. I didn't understand the magnitude of the decision or request upon making it"

(4/20/2020 Tr. 3). Moreover, in his motion for self-representation, the defendant stated that he was "now making a clear and unequivocal intention to proceed without counsel," and that he "**kn[ew] of the dangers and disadvantages** of self-representation" (O.R. 120) (emphasis added). Further, he stated his request was "by choice and being made with his eyes open" (O.R. 120). Even despite this unequivocal statement that the defendant understood what he was getting himself into, the trial court still made a thorough record to explain that he would be at a severe disadvantage. Specifically, the court and the defendant had the following exchange:

> The court: You have not been to law school, obviously, as you indicated earlier. Have you represented yourself in any other matter?
>
> The defendant: No, sir, Your Honor. Well, [a] civil matter.
>
> . . .
>
> The court: Do you understand that you may be at a **disadvantage** in this case by not having an attorney represent you?
>
> The defendant: Yes, sir, Your Honor.
>
> The court: You understand you'll be **held to the same standards as an attorney**, including the prosecuting attorney who's trained and experienced in the law?
>
> The defendant: Yes, sir.
>
> The court: You understand **I will not help and counsel will not help or assist you**?
>
> The defendant: Yes, sir.
>
> The court: Are you knowledgeable about the substantive law related to charges, including lesser included offenses and elements of the charges?
>
> The defendant: No, sir.
>
> The court: You understand **you'll be at a disadvantage** because of that?
>
> The defendant: Yes, sir.
>
> . . .

The court: Are you familiar with criminal procedures and Rules of Evidence?

The defendant: No, sir.

The court: You understand you'll be held to make objections just like a lawyer in proper . . . proceedings?

The defendant: Yes, sir.

(Tr. 468-71) (emphasis added). Even after this the defendant elected to proceed *pro se*, and accordingly he was fully advised of the dangers and disadvantages of that decision (Tr. 471). *Brown*, 2018 OK CR 3, ¶ 15, 422 P.3d at 162-63 (citing *Tovar*, 541 U.S. at 89); *Mathis*, 2012 OK CR 1, ¶ 7, 271 P.3d 67, 71-72; *Johnson*, 1976 OK CR 292, ¶ 34, 556 P.2d at 1294.

The defendant's claim that he was forced to proceed *pro se* because Mr. Hoch was ineffective and unprepared is similarly meritless. In *Brown*, this Court rejected a similar claim. There, the appellant claimed he was forced to choose between incompetent counsel, or proceeding *pro se*. *Brown*, 2018 OK CR 3, ¶ 17, 422 P.3d at 163. In rejecting this claim, the Court noted that the defendant's complaints were "mere personality conflicts and disagreements" that did not rise to the level of a conflict that would allow for the appointment of a new attorney. *Id.*, 2018 OK CR 3, ¶ 22, 422 P.3d at 163-64. Further, the Court noted that the trial court determined that the appellant's request was "not based on a valid belief that his appointed attorneys were constitutionally ineffective," and the court then warned him that he would be required to know the law and the rules, and that he would be expected to know "as much as his appointed attorneys[.]" *Id.*, 2018 OK CR 3, ¶ 27, 422 P.3d at 164. Accordingly, this Court concluded that "[t]he record is abundantly clear that the trial court advised [the appellant] of the dangers and pitfalls of self-representation," and thus the defendant made a knowing and voluntary waiver of counsel with

respect to the *first stage* of his death penalty trial. *Id.*, 2018 OK CR 3, ¶¶ 39, 82, 422 P.3d at 165, 172.

Similarly here, the defendant discharged counsel due to mere personality conflicts and disagreements regarding trial strategy, as Mr. Hoch made clear to the court during the waiver record that he had discussed the case and discovery with the defendant, and the State confirmed that Mr. Hoch had been working "very hard and competently on behalf of the defendant" (Tr. 467-68, 472). Accordingly, the defendant's decision was not based on a valid belief that Mr. Hoch was unprepared or incompetent, and the court's further admonishment of the dangers of self-representation refutes the defendant's claim that he was forced to proceed *pro se*. This was the second time the defendant had discussed the waiver of counsel, while the defendant also had four prior felony convictions, and as such he waived counsel knowing of the dangers, and the record refutes any claim otherwise. *See Johnson*, 1976 OK CR 32, ¶¶ 37-38, 556 P.2d at 1295-96 (concluding defendant who refused standby counsel and had previously been convicted of two prior felonies made a knowing and intelligent waiver of counsel).[9]

PROPOSITION III

THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE.

In his third *pro se* proposition, the defendant claims that Mr. Hoch was ineffective (Def. Supp. at 5-10). But because the decisions he challenges were reasonable trial strategy, and because he was able to present much of this evidence himself, this argument fails.

A. Standard of Review. To prevail on a claim of ineffective assistance of trial counsel, an appellant must overcome "the strong presumption" that counsel's conduct was within the wide

[9] The defendant reasserts his argument that counsel should have been reappointed, but the State has already addressed this in *Pro Se* Proposition I, *supra*.

range of reasonable professional assistance by showing, "(1) that trial counsel's performance was deficient; and (2) that he was prejudiced by the deficient performance." *Welch v. State*, 2000 OK CR 8, ¶ 14, 2 P.3d 356, 375 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). This Court considers the challenged conduct "on the facts of the case as viewed at the time and ask[s] if it was professionally unreasonable[.]" *Hooks v. State*, 2001 OK CR 1, ¶ 54, 19 P.3d 294, 317. To show that counsel's performance was deficient, the appellant must show 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. The purpose of the effective assistance guarantee of the Sixth Amendment is "not to improve the quality of legal representation," but is rather "simply to ensure that criminal defendants receive a fair trial." *Id.* at 689. Accordingly, "[e]ffective assistance of counsel does not mean that a defendant is entitled to flawless or victorious counsel." *Phillips v. State*, 1999 OK CR 38, ¶ 6, 989 P.2d 1017, 1044. Further, "judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. This Court has repeatedly held that representation will not be deemed inadequate "because in hindsight trial strategy could have been different." *Ashinsky v. State*, 1989 OK CR 59, ¶ 25, 780 P.2d 201, 207-08 (citing *Stover v. State*, 1984 OK CR 14, 674 P.2d 566).

Moreover, if the appellant does not show both that counsel's performance was deficient, *and* that the deficiency caused prejudice, "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. To satisfy the prejudice prong of the *Strickland* test, it is not enough to merely show some conceivable effect on the outcome. *Id.* at 694; *see Head v. State*, 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148. Rather, "[t]he [appellant] must show . . . 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 (emphasis added). As such, the likelihood of a different result must be substantial. *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

B. Argument and Authority. The defendant's argument fails because Mr. Hoch's challenged decisions were reasonable trial strategy, and because the defendant was able to still present much of the evidence and arguments he wished to present to the jury.

The defendant claims Mr. Hoch was ineffective because he "failed to investigate" (Def. Supp. at 6). Specifically, he claims Mr. Hoch failed to present the recording the defendant took of the victim's phone conversation, body camera footage from officers speaking to Ms. Williams and her family at the home on March 5, evidence of the victim's overactive thyroid diagnosis, the testimony of C.W., evidence of his text exchanges with the victim, as well as lease agreements and tax returns that he believes would have supported his "defense" that he could not have kidnapped the victim because he stood in loco parentis (Def. Supp. at 6-7). But this argument fails because Mr. Hoch made a record three days before trial stating that this was trial strategy (10/16/20 Tr. 8-9). *See Harris v. State*, 2007 OK CR 28, ¶ 33, 164 P.3d 1103, 1116 ("where counsel makes an informed decision to **pursue** a particular **strategy** to the exclusion of other strategies, this informed **strategic** choice is virtually unchallengeable") (emphasis in original) (citing *Jones v. State*, 2006 OK CR 5, ¶ 78, 128 P.3d 521, 535).

Specifically, at the October 16 hearing the defendant requested substitute counsel because Mr. Hoch had not gathered the evidence he said he was going to gather. In response, Mr. Hoch made a record regarding the reason for this decision, stating:

> **[I]t's a matter of trial strategy** on bringing in collateral things that **aren't going to help** here, and actually are **detrimental** to his case that he wants to bring, such as this tape of . . . the [victim] with some guy.
>
> . . .

> [I]t's **totally a matter of trial strategy**. And those things are not what's going to help here.

(10/16/20 Tr. 8-9) (emphasis added). Mr. Hoch further explained that he believed the defendant was wanting to bring up matters that were "more detrimental than helpful" and it would be a "disaster" to bring in the items of evidence that he was requesting be admitted (10/16/20 9-10). The court allowed the defendant to be heard, and the defendant specifically stated that he asked Mr. Hoch to admit the recording at trial (10/16/20 Tr. 10-11). Mr. Hoch again explained, "I have explained to him that I think that that should not come in. It is not going to be helpful," and that "trial strategy is the attorney's [role]" (10/16/20 Tr. 10-11). He further clarified, "I've got to stick with what I believe is an appropriate strategy" (10/16/20 Tr. 11). Accordingly, the record specifically shows that Mr. Hoch did not admit evidence the defendant wanted because it would not help and would actually be detrimental to his case. Such a strategic decision cannot be ineffective. *Harris*, 2007 OK CR 28, ¶ 33, 164 P.3d at 1116 (reasonable strategic decisions are virtually unchallengeable); *see Murphy v. State*, 2002 OK CR 24, ¶ 54, 47 P.3d 876, 886-87 (holding counsel was not ineffective for failing to utilize mitigation evidence that "could reasonably be viewed as mitigating to one person," but "aggravating to another"). Thus, Mr. Hoch's performance was not deficient, particularly where he declined to bring in evidence he believed would be detrimental to the defendant's case.

Further, the defendant's assertion that Mr. Hoch was ineffective for failing to admit tax returns or a lease agreement, which he wanted presented to show he stood in loco parentis to the victim and therefore could not be convicted of kidnapping, ignores that Mr. Hoch found this information detrimental, and that the trial court specifically ruled it was inadmissible. Indeed, at the October 16 hearing Mr. Hoch explained that this argument would not be "effective," and the

court explained it had already ruled that the defendant's claimed defense of in loco parentis was based on a federal statute, that Oklahoma law did not provide that defense, and accordingly "there will be no more mentioning of in loco parentis" (10/16/20 Tr. 5). Further, at the March 20, 2020, hearing on the defendant's *pro se* motion to quash the information based on this defense, the court explicitly told the defendant "the in loco parentis defense does not apply in this case" (3/20/20 Tr. 4). Accordingly, Mr. Hoch cannot be ineffective for failing to present a defense he believed would not work, or one that the court had specifically ruled was contrary to Oklahoma law. *Harris*, 2007 OK CR 28, ¶ 33, 164 P.3d at 1116; *see, e.g.*, *Tomlin v. McKune*, 300 F. App'x 592, 599 (10th Cir. 2008) (unpublished) (holding that the Kansas Court of Appeals reasonably rejected habeas petitioner's claim that counsel was ineffective for failing to argue against established Kansas law). Therefore, Mr. Hoch's performance was not deficient, and the defendant fails to meet his burden of showing ineffective assistance.

Moreover, as it relates to the defendant's claim Mr. Hoch should have admitted evidence of the victim's anger issues caused by an overactive thyroid, Mr. Hoch cross-examined the victim about this at trial (Tr. 390). Specifically, he asked the victim if she had been taking medications for "anger issues," and whether she had been to doctors for "treatment" (Tr. 390).[10] Further, he also asked Ms. Williams if the victim had anger issues and if they had taken her to get treatment for those issues (Tr. 446). Accordingly, Mr. Hoch cannot be ineffective because he put this issue before the jury. *See, e.g., Wood v. State*, 2007 OK CR 17, ¶ 44, 158 P.3d 467, 481 (rejecting claim

[10] To clarify, the defendant started representing himself after the State had called the victim and Ms. Williams, was granted his request, and then Ms. Tate (Tr. 481), Deputy Troy Dykes (Tr. 502), Dpty. Brown (Tr. 511), and Dpty. Long (Tr. 560), all testified on behalf of the State with the defendant representing himself. Further, the defendant called Dpty. Brown (Tr. 593), Deputy David Hamilton (Tr. 602), and himself (Tr. 606) to testify in his case-in-chief.

of ineffective assistance where the evidence that would have been presented by witnesses trial counsel failed to call was nevertheless presented through other witnesses at trial); *Parker v. Scott*, 294 F.3d 1302, 1322 (10th Cir. 2005) (affirming denial of habeas relief where counsel was not ineffective for failing to call a witness to present a specific defense because counsel "expos[ed] the jury to [the same] theory of defense" on cross-examination of other witnesses).

Additionally, the defendant also fails to show that he was prejudiced by any claimed ineffectiveness. *Strickland*, 466 U.S. at 687. To satisfy the prejudice prong of the *Strickland* test, it is not enough to merely show some conceivable effect on the outcome. *Id.* at 694; *see Head*, 2006 OK CR 44, ¶ 23, 146 P.3d at 1148. Rather, "[t]he [appellant] must show . . . 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 (emphasis added). Here, the defendant has shown no probability of a different result because he presented much of this evidence through his testimony and closing argument at trial. Indeed, in his testimony he asserted that the victim had an overactive thyroid which caused "mood issues" and caused her to overreact to situations (Tr. 616). He even provided multiple examples of this, first claiming she went "from zero to 120" and started a physical altercation with C.W. when C.W. unplugged her phone charger, and then claiming one time when she was asked to do dishes she started breaking them and became physically aggressive (Tr. 616-18). The defendant even claimed that the victim's mood issues caused her to be the "trigger" for Ms. Williams' anxiety (Tr. 629). That the jury still convicted him despite hearing this evidence means he cannot show a reasonable probability of a different outcome had Mr. Hoch admitted the victim's medical records. *Strickland*, 466 U.S. at 687, 694.

Similarly, the defendant cannot show a reasonable probability of a different outcome if the body camera footage had been admitted, or if he was allowed to present his tax returns and lease

agreements to support his baseless in loco parentis defense. *Id.* Indeed, he was also able to admit a portion of the body camera footage in his case-in-chief (Tr. 593-97). The defendant played a portion of the footage which he alleged showed Dpty. Brown making "threats" against him when speaking with Ms. Williams and her sister, but in actuality it showed Dpty. Brown saying that he "hoped" the defendant had left the State (Tr. 596-97). Further, when discussing the kidnapping crime in closing argument the defendant specifically argued to the jury that the State could not meet the element of "unlawful," because the victim was his daughter (Tr. 735-36). Specifically, the Court permitted the defendant to argue as follows:

> **How can I kidnap my own daughter**? After I kidnap her, where are we going to go. After the kidnapping takes place where are we going to go. We stay in the same house. You heard the testimony of [Ms. Williams]. You heard the testimony of [the victim]. We've been together for seven years.
>
> . . .
>
> In order to find me guilty of kidnapping . . . the State has [to prove] beyond a reasonable doubt each element of the crime. These elements are, first, unlawfully. **The State has not proven unlawfully**. I'm not going to even go into the other elements. We can do away with this one.
>
> . . .
>
> I have the authority to say, 'no,' to that. **[The victim was] still in high school**.
>
> . . .
>
> How can the school have authority over her, but I not have authority over my daughter?

(Tr. 735-36) (emphasis added). The defendant further emphasized this argument when he told the jury that he claimed the victim and her sister as his children on his income tax return (Tr. 758). Thus, the defendant was also able to present these two arguments to the jury yet was still convicted.

Therefore, he cannot show a reasonable probability of a different outcome. *Strickland*, 466 U.S. at 687, 694.

PROPOSITION IV

IT WAS NOT AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO DENY PETITIONER'S MOTION FOR A NEW TRIAL.

In his fourth *pro se* proposition, the defendant claims the trial court erred in denying his fourteen-claim motion for new trial (Def. Supp. at 10). But this argument fails because each ground raised in the motion for new trial was meritless.[11]

A. Standard of Review. Denial of a motion for new trial is reviewed for an abuse of discretion. *Spence v. State*, 2008 OK CR 4, ¶ 9, 177 P.3d 582, 584. 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." *Neloms*, 2012 OK CR 7, ¶ 35, 274 P.3d at 170 (citing *Cuesta-Rodriguez*, 2010 OK CR 23, ¶ 19, 241 P.3d at 225).

B. Argument and Authority. Because each claim raised in the defendant's motion for new trial was meritless, the trial court did not abuse its discretion in denying the motion.

(1) Petitioner was not denied his right to self-representation at the March 20, 2020, hearing. (Addressing Ground I of the Motion for New Trial).

In the first claim in his motion for new trial, the defendant claimed he was denied his Sixth Amendment right to self-representation when, on March 20, 2020, "the trial court did not allow

[11] Notably, the defendant's fourth *pro se* proposition is so undeveloped as to be waived. *See Bowen v. State*, 1980 OK CR 2, ¶ 20, 606 P.2d 589, 594 (noting that *pro se* defendants are "held to the same standard as an attorney"). The defendant provides zero discussion of the substantive issues raised in his motion for new trial, effectively (and improperly) attempting to incorporate argument from the motion into his brief. Regardless, these arguments all fail for the reasons discussed herein. *See infra*.

him to proceed *pro se*" (O.R. 184). This Court has observed that "under *Farretta*, a trial judge has no discretion to deny a **valid** request for self-representation." *Lamar v. State*, 2018 OK CR 8, ¶ 30, 419 P.3d 283, 292 (emphasis added) (citing *Parker v. State*, 1976 OK CR 293, ¶ 5, 556 P.2d 1298, 1300-1301). Accordingly, to validly waive the assistance of counsel and proceed *pro se*, "a defendant must . . . be clear and unequivocal in his desire to proceed *pro se*." *Mathis*, 2012 OK CR 1, ¶ 7, 271 P.3d at 72. Here, the defendant did not make a clear and unequivocal request to proceed *pro se* at the March 20 hearing. Indeed, the defendant actually requested that Ms. Lopez be removed as counsel and that he be appointed "substitute counsel" (3/20/20 Tr. 4-5). Further, at the April 20, 2020, and June 19, 2020, hearings, the defendant again asked that Ms. Lopez be removed as counsel, but that he be appointed substitute counsel, not that he be allowed to proceed *pro se* (4/20/20 Tr. 4-5; 6/19/20 Tr. 5). Even in the October 16 hearing where the defendant sought removal of Mr. Hoch as counsel, he again merely asked that "substitute counsel" be appointed, not that he be allowed to proceed *pro se* (10/16/20 Tr. 8). Therefore, the defendant did not make a clear and unequivocal request to proceed *pro se* until two witnesses into trial, and the trial court did not abuse its discretion in denying the first claim in the defendant's motion for new trial. *Mathis*, 2012 OK CR 1, ¶ 7, 271 P.3d at 72.

(2) Mr. Hoch was not ineffective for failing to file certain motions, admit certain evidence, or in his cross-examination of the victim or Ms. Williams. (Addressing Ground II of the Motion for New Trial).

In the defendant's second claim in the motion for new trial, he argued Mr. Hoch was ineffective for failing to file certain motions, admit certain evidence, and in his cross-examination at trial (O.R. 187). But for the reasons the State discussed in its analysis of the defendant's third *pro se* proposition on appeal, Mr. Hoch rendered effective assistance. To begin, trial counsel made a record at the October 16 hearing that the decisions he was making were strategic. *Harris*, 2007

OK CR 28, ¶ 33, 164 P.3d at 1116 ("where counsel makes an informed decision to **pursue** a particular **strategy** to the exclusion of other strategies, this informed **strategic** choice is virtually unchallengeable") (emphasis added). Further, regarding the motions in limine, Mr. Hoch explained at the same hearing that he had not filed those motions because "the State ha[d] already agreed [t]hey [were] not going to bring in what was in th[ose] motions or anything like that" (10/16/20 Tr. 8). Moreover, Mr. Hoch's cross-examination was also a strategic decision, which this Court has repeatedly concluded it will not second-guess. *Buck v. State*, 2023 OK CR 2, ¶ 8, 525 P.3d 39, 43; *see also Turrentine*, 1998 OK CR 33, ¶ 41, 965 P.2d at 971 ("That the strategy proved unsuccessful is not grounds for branding counsel ineffective."). Thus, this claim was also meritless, and the trial court did not abuse its discretion in denying it.

(3) Petitioner's waiver of counsel was voluntary. (Addressing Ground III of the Motion for New Trial).

In the third ground raised in the motion for new trial, the defendant claimed that his waiver of counsel was not voluntary because he became dissatisfied with Mr. Hoch's "incompetence," and was thus forced to represent himself (O.R. 193-97). But for the same reasons the State has already discussed in its analysis of the defendant's second *pro se* proposition, this argument was meritless. In discussing the defendant's reasons for wishing to proceed *pro se*, it was clear to the trial court that his complaints related to "mere personality conflicts" and disagreements over trial strategy, as Mr. Hoch explained he had discussed discovery, and how they would proceed, with the defendant, and the State affirmed that Mr. Hoch had worked "very hard and competently on behalf of the defendant" (Tr. 467-68, 472). *Brown*, 2018 OK CR 3, ¶¶ 17, 22, 422 P.3d at 163-64. Accordingly, the defendant's wish to proceed *pro se* was not based on a "valid belief that his appointed attorney[] [was] constitutionally ineffective," and because he was subsequently warned

of the dangers of proceeding *pro se*, the defendant's waiver was voluntary (Tr. 468-71). *Id.*, 2018 OK CR 3, ¶ 27, 422 P.3d at 164. Therefore, the trial court properly rejected the third ground of the defendant's motion for new trial.

(4) The trial court did not err in denying the defendant's motion to quash based on the defense of in loco parentis, or in failing to instruct on such a defense, and the kidnapping instruction was correct. (Addressing Grounds IV, VI, and VII of the defendant's motion for new trial).

In the fourth ground of his motion for new trial, the defendant asserted the trial court erred in denying his motion to quash the kidnapping charge because he stood "in loco parentis" when the incident happened with the victim, and therefore could not be charged with kidnapping her (O.R. 47-57, 197-200). In the sixth ground he argued the court erred in refusing to instruct on such a defense (O.R. 202-204). In the seventh ground he claimed that the trial court's instruction on the definition of unlawful was incorrect (O.R. 204-207). On February 24, 2020, the defendant filed a motion to quash the kidnapping charge, arguing he stood in loco parentis when the incident occurred with the victim, and therefore could not have kidnapped her (O.R. 47-57). At the March 20, hearing, Ms. Lopez explained to the court that she had filed that at the defendant's request, and the Court explained to the defendant that the federal cases he cited in that motion "involve[d] the Federal Kidnapping Act which has an exception as it relates to parental kidnapping," and thus the court was not bound by those cases because "Oklahoma does not have that exception in its kidnapping statute" (3/20/20 Tr. 3-4). The Court reaffirmed that such a defense would not be allowed before the jury at the October 16 hearing, prior to voir dire, and throughout trial when the defendant requested he be allowed to present it (10/16/20 Tr. 3-5; Tr. 4, 318, 710-13).

Here, the trial court's denial of the motion to quash, and of any attempt to present this defense to the jury is supported by the fact that Oklahoma law indeed does not contain such a

defense. The kidnapping statute provides that "any person who, without lawful authority, seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away another, with intent . . . [t]o cause such other person to be confined or imprisoned in this state against the will of the other person" is guilty of a felony. 21 O.S.Supp.2012, § 741. Nothing in this statute provides a parental exception to kidnapping. 21 O.S.Supp.2012, § 741. Further, such a conclusion is further supported by this Court's unpublished decision in *Avila v. State*, No. F-2017-1285, slip op. at 3-4 (Okla. Crim. App. May 2, 2019) (unpublished and attached as Exhibit B). There the appellant was convicted of kidnapping his own children. *Id.*, slip op. at 2. On appeal he argued these convictions should be reversed because they infringed on "his constitutionally protected rights as a custodial parent." *Id.*, slip op. at 2. This Court affirmed, holding that the appellant's actions "exceeded any constitutionally protected authority to restrain his children that he possessed as a custodial parent." *Id.*, slip op. at 3-4. If a custodial parent can be convicted of kidnapping, then the defendant could be charged and convicted with kidnapping, particularly when he was not the victim's father or stepfather (Tr. 348-49). And for the same reason, the trial court did not err in failing to instruct the jury on such a defense, nor was the instruction on the definition of unlawful erroneous. *See Hammer v. State*, 1983 OK CR 151, ¶ 12, 671 P.2d 677, 679 (denying claim of instructional error where the instructions "accurately state[d] the applicable law"). Therefore, the trial court did not err in denying the fourth, sixth, and seventh grounds of the defendant's motion for new trial.

(5) It was not error for the trial court not to appoint standby counsel where the defendant objected to the only available standby counsel being appointed. (Addressing Ground V of the Motion for New Trial).

In the fifth ground of the motion for new trial, the defendant claimed that the trial court erred in failing to appoint standby counsel (O.R. 200-204). But this argument ignores that the court was not required to appoint standby counsel, and that when it offered to have Mr. Hoch, the only

available attorney, serve as standby counsel, the defendant explicitly objected. As the State discussed *supra*, a criminal defendant is allowed to waive counsel and proceed *pro se*, provided that waiver is knowing and intelligent. *Brown*, 2018 OK CR 3, ¶ 15, 422 P.3d at 162 (citing *Faretta*, 422 U.S. at 835). And while courts have the discretion to appoint standby counsel, this Court has concluded that a defendant is not entitled to standby counsel except in capital proceedings. *See Lay v. State,* 2008 OK CR 7, ¶¶ 8, 9, 179 P.3d 615, 620 (holding that the trial court did not abuse its discretion in failing to appoint standby counsel to criminal defendant who elected to proceed *pro se*, as this "is not required by either the state or federal Constitution"); *see also Parker*, 1976 OK CR 293, ¶ 9, 556 P.2d at 1301 (holding the defendant's waiver of counsel was knowing, voluntary, and intelligent where he refused the court's offer to appoint his discharged attorney as standby counsel). Here, the defendant was informed that the court was not required to appoint standby counsel when making his waiver of counsel (Tr. 469). Further, he objected to Mr. Hoch serving as standby after the court informed him that Mr. Hoch was the only potential standby counsel (Tr. 477-78). Accordingly, the court did not err in denying the fifth ground of the defendant's motion for new trial. *Lay,* 2008 OK CR 7, ¶¶ 8, 9, 179 P.3d at 620; *Parker*, 1976 OK CR 293, ¶ 9, 556 P.2d at 1301.

(6) For the reasons the State has already discussed, there was no *Batson* error (Addressing Ground VIII of the Motion for New Trial).

In the eighth ground of his motion for new trial, the defendant argued that the State's use of a peremptory strike of J.R. violated his equal protection right (O.R. 207-208). But for the reasons the State discussed in its analysis of the defendant's first counseled proposition, this argument is meritless. Indeed, the State provided a race-neutral reason to strike J.R., specifically that he lied about prior contacts with law enforcement, and the court concluded that, in light of all the relevant

circumstance, the defendant had failed to prove purposeful discrimination (Tr. 261-62). *Cortez-Lazcano*, 81 F.4th at 1076. This determination was supported by the record, particularly the State's other peremptory strikes (Tr. 5, 17, 22-30, 64-70, 76-80, 150, 155, 216, 220, 237-38), and the defendant was given ample opportunity to respond to the state's proffered race-neutral explanation and failed to do so (Tr. 262). Therefore, the trial court did not err in denying the defendant's eighth ground of the motion for new trial. *Flowers*, 139 S. Ct. at 2248; *see also Black*, 2001 OK CR 5, ¶ 32, 21 P.3d at 1062.

(7) The trial court did not err in denying the defendant's ninth ground of the motion for new trial because Juror W.J. was removed by the court and replaced with the alternate. (Addressing Ground IX of the Motion for New Trial).

In his ninth ground of the motion for new trial, the defendant challenged the trial court's failure to grant a mistrial when Juror W.J. repeatedly fell asleep during trial (O.R. 208-10). But this argument was meritless because W.J. was removed by the court and replaced by the alternate (Tr. 530). This Court has repeatedly concluded that the decision to grant or deny a motion for a mistrial lies in the sound discretion of a trial court. *Tate v. State*, 1995 OK CR 24, ¶ 20, 896 P.2d 1182, 1189 (citing *Riley v. State*, 1988 OK CR 144, ¶ 3, 760 P.2d 198, 199). Further, in the context of sleeping jurors, this Court has concluded that trial courts have "inherent power to substitute a juror for good cause." *Coddington v. State*, 2006 OK CR 34, ¶¶ 25-26, 142 P.3d 437, 446. Here, the defendant's argument in this ground of the motion was meritless because the trial court actually removed the sleeping juror. Indeed, though the court did not strike W.J. in chambers, which the defendant argued entitled him to a mistrial (Tr. 516-20), he subsequently struck W.J. when he fell asleep again after proceedings resumed, replacing him with the alternate (Tr. 530). Accordingly,

this ground was properly rejected as meritless (Tr. 520, 530). *Coddington*, 2006 OK CR 34, ¶ 27, 142 P.3d at 446; *Tate*, 1995 OK CR 24, ¶ 20, 896 P.2d at 1189.

(8) The State did not knowingly use perjured testimony. (Addressing Ground X of the Motion for New Trial).

In the tenth ground of the motion for new trial, the defendant claimed the prosecutor "knowingly used perjured and false testimony," specifically from the victim and Ms. Williams (O.R. 210-15). But this argument was meritless because the defendant provided nothing to support that this testimony was false, or that the State knew it was false. The knowing use of false or misleading testimony important to the government's case in chief is a due process violation. *McCarty v. State*, 1988 OK CR 271, ¶ 9, 765 P.2d 1214, 1219 (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974)). This Court has stated it "will not hesitate to reverse a conviction" if the appellant establishes, "(1) certain testimony was in fact misleading, (2) the prosecution knowingly used said testimony, and (3) the testimony was material to guilt or innocence." *Id.* But where the record is insufficient to conclude that the testimony was false, or that the State knew as such, this Court will not grant relief on such a claim. *Id.* (holding the record was insufficient for the court to conclude that the State knowingly used false or misleading testimony); *see Omazla v. State*, 1995 OK CR 80, ¶ 78, 911 P.2d 286, 307 (even though the State's witness's testimony was significantly impeached, such that the "force of the testimony" was "significantly weakened," nothing in the record showed that the State knew the testimony to be false). Here, the defendant provided nothing to support his claim that the State knowingly used false testimony (O.R. 210-15). Indeed, the defendant merely discussed his testimony and the testimonies of Ms. Williams and the victim, arguing that their testimonies were "bizarre," and that many of the victim's allegations "didn't seem probable" (O.R. 210-15). Though he pointed to a single inconsistency between the victim's

testimony at preliminary hearing and trial—whether she used earphones to listen to the recording of her call (O.R. 211-12), this shows the testimony was at most inconsistent, not false, and still fails to show the State knew any such testimony was untrue. *Omazla*, 1995 OK CR 80, ¶ 78, 911 P.2d at 307; *McCarty*, 1988 OK CR 271, ¶ 9, 765 P.2d at 1219.

(9) It was proper for extra security to enter the courtroom after the defendant elected to represent himself. (Addressing Ground XI of the Motion for New Trial).

In his eleventh ground for a new trial, the defendant claimed the court's decision to bring additional uniformed, armed sheriffs into the courtroom after the petitioner elected to proceed *pro se* "created a coercive atmosphere wherein jurors likely felt implicit pressure to return a verdict of guilty" (O.R. 215-18). In reviewing this exact issue, the United States Supreme Court has concluded the presence of "identifiable security officers" is far different from "courtroom practices we might find inherently prejudicial[.]" *Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986). Indeed, in rejecting the contention that such a courtroom practice should only be permitted where "justified by an essential state interest specific to each trial," the Court explained as follows:

> The chief feature that distinguishes the use of identifiable security officers from courtroom practices we might find inherently prejudicial is the **wider range of inferences** that a juror might reasonably draw from the officers' presence.
>
> . . .
>
> [T]he presence of guards at a defendant's trial **need not be interpreted as a sign that he is particularly dangerous or culpable**. Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. **Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards**.

Id. (emphasis added). As such, the Court has specifically concluded that the presence of security officers does not indicate to a jury that the defendant is particularly dangerous or culpable. *See*

Jones v. State, 1995 OK CR 34, ¶¶ 93-95, 899 P.2d 635, 655 (holding that the trial court did not abuse its discretion in having seven peace offers in the courtroom for murder trial of defendant and co-defendant). Here, the defendant provided nothing other than his own assumptions supporting that the jury might find him more culpable, or feel coerced to find him guilty, due to the amount of security in the courtroom (O.R. 215-18). Further, in light of this Court's and the U.S. Supreme Court's decisions that the presence of security does not mean the jurors will take that as an indication of his guilt, such an argument was meritless. *Holbrook*, 475 U.S. at 568-69; *Jones*, 1995 OK CR 34, ¶¶ 93-95, 899 P.2d at 655. Thus, the trial court did not err in denying this meritless claim.

(10) There was sufficient evidence to convict the defendant for assault and battery with a dangerous weapon. (Addressing Ground XII of the Motion for New Trial).

In his twelfth ground for a new trial, the defendant claimed there was insufficient evidence to support his conviction of assault and battery with a dangerous weapon (O.R. 218-22). Specifically, he claimed there was no evidence he hit the victim with the taser, or that he intended bodily harm (O.R. 218-22). This argument was properly denied because it was refuted by the record (Tr. 361). Indeed, the defendant admitted at trial that he committed an assault and battery (Tr. 754). Further, whether the jury believed his testimony that he never hit her with the taser, or believed the victim's testimony that he did, was a credibility determination reserved for the jury. Indeed, this Court has repeatedly concluded that "[t]he credibility of witnesses and the weight and consideration to be given to their testimony are within the **exclusive province** of the trier of facts and the trier of facts may believe the evidence of a single witness on a question and disbelieve several others testifying to the contrary." *Oliver v. State*, 2022 OK CR 15, ¶ 35, 516 P.3d 699, 710 (emphasis added) (citing *Davis v. State*, 2011 OK CR 29, ¶ 83, 268 P.3d 86, 112-13). Here, the

jury believed the victim's testimony that the defendant hit her in the head with the taser, which was corroborated by the fact that she had a gash on her forehead, a skull fracture, and required multiple staples and stitches (Tr. 371-72; S.E. 1, 8). *Id.* Accordingly, the trial court correctly denied this ground of the motion for new trial as well.

(11) The defendant had notice of the crimes with which he was charged, and the court had jurisdiction to try him for those crimes. (Addressing Ground XIII of the Motion for New Trial).

In his thirteenth new trial ground, the defendant claimed the trial court was without jurisdiction to try him for assault and battery with a dangerous weapon because he was unaware of the "nature of the charges against him" (O.R. 222-25). Specifically, he claimed that he was never informed that the crime of assault and battery with a dangerous weapon, added at the conclusion of the preliminary hearing, was ever officially filed, and the State failed to provide a charging document. This argument was baseless, and properly denied by the court. An accused is "entitled to notice of the charge he must be prepared to defend against." *Patterson v. State*, 2002 OK CR 18, ¶ 23, 49 P.3d 925, 931 (citing *Cole v. Arkansas*, 333 U.S. 196, 201 (1948)). In reviewing such a claim, the Court considers "all information made available to the defense before trial," whether through discovery or pretrial hearings, as well as the information within the "four corners" of the charging document. *Patterson*, 2002 OK CR 18, ¶ 23, 49 P.3d at 931; *Morris v. State*, No. F-2018-551, slip op. at 9-11 (Okla. Crim. App. Aug 27, 2020) (unpublished and attached as Exhibit C). Here, on September 17, 2019, the State filed the Amended Felony Information charging the defendant with Assault and Battery With a Dangerous Weapon, in violation of 21 O.S.2011, § 645 (O.R. 22). Furthermore, any confusion by the defendant regarding whether he was charged with this crime or not was resolved at the April 20, 2020, hearing six months before trial where the court informed him that the State had indeed filed an amended information charging

him with assault and battery with a dangerous weapon in September 2019 (4/20/20 Tr. 5). Accordingly, the trial court properly denied this baseless ground for a new trial. *Patterson*, 2002 OK CR 18, ¶ 23, 49 P.3d at 931; *Morris*, slip op. at 9-11.

(12) There was no cumulative error. (Addressing Ground XIV of the Motion for New Trial).

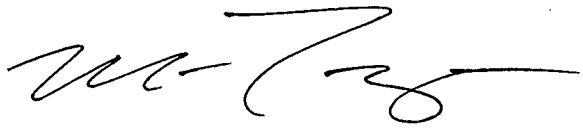
In his fourteenth and final ground for a new trial, the defendant claimed the accumulation of all the errors deprived him of a new trial (O.R. 225). The cumulative error doctrine applies "when several errors occurred at the trial court level, but none alone warrants reversal." *Hanson v. State*, 2009 OK CR 13, ¶ 55, 206 P.3d at 1035 (citing *DeRosa v. State*, 2004 OK CR 19, ¶ 100, 89 P.3d 1124, 1157). While each error standing alone "may be of insufficient gravity to warrant reversal," the combined effect of an accumulation of those errors may require a new trial. *Id.* But where there is no error, there can be no accumulation of error warranting reversal. *See Mack v. State*, 2018 OK CR 30, ¶ 8, 428 P.3d 326, 329 (citing *Engles v. State*, 2015 OK CR 17, ¶ 13, 366 P.3d 311, 315). For all the reasons the State has already discussed in its analysis of this proposition there was no error in denying these props, and therefor there can be no accumulation of error. *Mack v. State*, 2018 OK CR 30, ¶ 8, 428 P.3d at 329.

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 and, therefore, respectfully requests that the Judgment and Sentence be affirmed.

Respectfully submitted,

GENTNER F. DRUMMOND
ATTORNEY GENERAL



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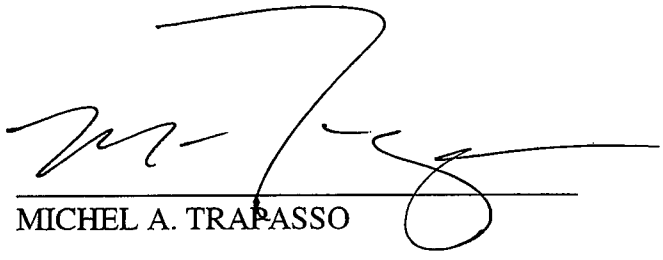

MICHEL A. TRAPASSO

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CAMERON HEATH RAY,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2017-35**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

ROWLAND, JUDGE:

Appellant Cameron Heath Ray appeals his Judgment and Sentence from the District Court of Pontotoc County, Case No. CF-2015-202, for two counts of Assault and Battery with a Deadly Weapon in violation of 21 O.S.2011, § 652(C). The Honorable C. Steven Kessinger presided over Ray's jury trial and sentenced him to fifteen years imprisonment on each count in accordance with the jury's verdicts.[1] Judge Kessinger ordered the sentences to be served consecutively. Ray raises the following issues:

(1) whether the trial judge erred in failing to recuse;

(2) whether the jury panel was tainted;

(3) whether the evidence was legally sufficient to convict him of two counts of Assault and Battery with a Deadly Weapon;

(4) whether the trial court erred in allowing the admission of evidence that was more prejudicial than probative;

(5) whether the trial court erred in denying the motion to suppress evidence;

[1] Under 21 O.S.Supp.2014, § 13.1, Ray must serve 85% of the sentence imposed before he is eligible for parole.

(6) whether his convictions for two counts of Assault and Battery with a Deadly Weapon are contrary to the statutory and constitutional protections against double punishment and double jeopardy;

(7) whether the trial court erred by failing to give the requested instructions on lesser-included offenses;

(8) whether prosecutorial misconduct deprived him of his right to a fair trial;

(9) whether the trial court erred by failing to run the sentences concurrently; and

(10) whether an accumulation of error deprived him of a fair trial.

We find reversal is not required and affirm the Judgment and Sentence of the district court.

1.

Ray challenges the trial judge's failure to recuse himself. The proper procedure to seek recusal of a judge is to first make an in camera request; then file a motion; then re-present the motion to the Chief Judge of the county; then seek a writ of mandamus from this Court to have the assigned judge disqualified. Rule 15, *Rules for District Courts of Oklahoma*, Title 22, Ch. 18, App. (2018); Rule 10.6(B), *Rules for the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018); 20 O.S.2011, § 1403. Because Ray failed to follow proper procedure for disqualification of the judge, the issue of recusal has been waived for review on appeal. *See Welch v. State*, 2000 OK CR 8, ¶ 37, 2 P.3d 356, 322.

While the recusal claim is waived, Ray's claim of judicial bias is not. A defendant can waive his right to preclude a disqualified judge from hearing his case but he does not thereby waive the right to have his trial conducted in a fair and impartial manner; a defendant is always entitled to a fair and impartial trial, not tainted by the personal bias or prejudice of a trial court. *Mitchell v. State*, 2006 OK CR 20, ¶ 87, 136 P.3d 671, 706; Okla. Const. Article II, Section 6. We presume trial judges are impartial. *Frederick v. State*, 2001 OK CR 34, ¶ 176, 37 P.3d 908, 951-52. A defendant asserting a claim that the trial judge was biased must show the trial court harbored prejudice against him which materially affected his rights at trial and that he was prejudiced by the trial court's actions. *See Mehdipour v. State*, 1998 OK CR 23, ¶ 9, 956 P.2d 911, 915. Ray has failed to show that the judge was biased, not impartial, harbored prejudice against him, or that he was in any way prejudiced by the trial court's actions. This proposition is denied.

2.

After the close of the jury trial but before sentencing, Ray filed a motion for a new trial in which he set forth several arguments supporting his request. One of the grounds upon which his motion was based was an allegation of potential juror misconduct. When, as here, a new trial is requested based on juror misconduct alleged to have occurred prior to submission of the case, the appellant bears the burden of showing both juror prejudice and harm as a result of the juror's service. *See Edwards v. State*, 1991 OK CR 71, ¶ 12, 815

P.2d 670, 673. Where alleged juror misconduct was litigated below and involves the factual issues of whether there were improper communications that resulted in the jury considering extraneous information in rendering its verdict, we defer to the trial court's ruling unless it is clearly erroneous. *See Matthews v. State*, 2002 OK CR 16, ¶ 3, 45 P.3d 907, 912.

In the present case, the issue of juror misconduct was litigated at the sentencing hearing. The court ruled that the defense had not met its burden and the motion for new trial was denied. The record before this Court supports the finding that the trial court's ruling was not clearly erroneous; Ray has shown neither juror prejudice nor harm. Relief is not required.

3.

The jury was instructed on the defense of self-defense against the charge that Ray committed the crime of assault and battery with a deadly weapon upon Price. Ray claims that the evidence was insufficient to support his conviction on this count because the State failed to show that he was not acting in self-defense when he shot Price. Once the defense of self-defense is raised, the State bears the burden to disprove it beyond a reasonable doubt. *See* OUJI-CR(2d) 8-49; *McHam v. State*, 2005 OK CR 28, ¶ 10, 126 P.3d 662, 667. "A person is justified in using deadly force in self-defense if that person reasonably believed that use of deadly force was necessary to protect herself from imminent danger of death or great bodily harm." *Bechtel v. State*, 1992 OK CR 55, ¶ 33, 840 P.2d 1, 11; OUJI-CR(2d) 8-46. This standard is a hybrid

standard that combines both objective and subjective elements. *Id.* As such, jurors "must first determine whether the defendant believed that he was faced with imminent danger of death or great bodily harm before he used physical force and then determine whether the defendant's belief was reasonable." *Perryman v. State,* 1999 OK CR 39, ¶ 9, 990 P.2d 900, 904. The State's evidence was sufficient to disprove the claim that Ray shot Price in self-defense.

Ray also claims that the evidence presented at trial was insufficient to support his convictions for assault and battery with a deadly weapon against both Jennifer Ray and Price. To sustain a conviction for assault and battery with a deadly weapon the State is required to prove an assault and battery upon another person with a deadly weapon. *See* 21 O.S.2011, § 652(C). This Court reviews challenges to the sufficiency of the evidence in the light most favorable to the State and will not disturb the verdict if any rational trier of fact could have found the essential elements of the crime charged to exist beyond a reasonable doubt. *Head v. State,* 2006 OK CR 44, ¶ 6, 146 P.3d 1141, 1144. *See also Spuehler v. State,* 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04. In evaluating the evidence presented at trial, we accept the fact-finder's resolution of conflicting evidence as long as it is within the bounds of reason. *See Gilson v. State,* 2000 OK CR 14, ¶ 77, 8 P.3d 883, 910; *Day v. State,* 2013 OK CR 8, ¶ 12, 303 P.3d 291, 298. This Court also accepts all reasonable inferences and credibility choices that tend to support the verdict. *Coddington v. State,* 2006

OK CR 34, ¶ 70, 142 P.3d 437, 456. The evidence noted above, when viewed in a light most favorable to the State, supported the jury's finding, beyond a reasonable doubt, that Ray was guilty of assault and battery with a deadly weapon against both Jennifer Ray and Price. This proposition is without merit and relief is not required.

4.

Ray complains that error occurred when the State was allowed to ask him questions on cross-examination which elicited testimony outside the scope of direct examination. He also complains about evidence introduced by the State for impeachment purposes. The admission of evidence lies within the sound discretion of the trial court and, when the issue is properly preserved for appellate review, we will not disturb the trial court's decision absent a clear abuse of discretion resulting in prejudice. *See Baird v. State,* 2017 OK CR 16, ¶ 37, 400 P.3d 875, 885; *Jones v. State,* 2006 OK CR 5, ¶ 48, 128 P.3d 521, 540). An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the issue; a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts. *Neloms v. State,* 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. Alleged error to which Ray did not object at trial is waived for review of all but plain error. To be entitled to relief under the plain error doctrine, Ray must prove the existence of an actual error that is plain or obvious, and that the error affected his substantial rights, meaning the error affected the outcome of the

proceeding. *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395. This court will correct plain error only if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

Ray first complains that the prosecutor elicited testimony from him during cross examination about his feelings for Jennifer Ray at the time of the trial. The record belies Ray's claim. During cross examination the prosecutor asked Ray if he loved Jennifer Ray on April 5, 2015. Ray responded in the affirmative and added, "And I still do." The prosecutor's question did not elicit Ray's response; it only asked about his feelings for Jennifer Ray at the time she was shot. Ray's answer was not responsive to the question asked and he cannot complain on appeal about any prejudice he may have incurred from his volunteered testimony. There was no error here, plain or otherwise.

After Ray testified that he still loved Jenifer Ray at the time of trial, the prosecution impeached his testimony with a portion of a phone conversation between Ray and his mother recorded while he was in jail. Prior to the admission of this evidence, defense counsel objected arguing that the conversation was not relevant. The objection was overruled but the trial court instructed the jury that the conversation was to be considered for the limited purpose of impeachment to assist the jury in considering the weight and credibility of Ray's testimony; it was not to be considered as proof of guilt or

innocence. The recorded conversation was relevant for this limited purpose and the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. 12 O.S.2011, § 2403. The trial court did not abuse its discretion by allowing the recorded conversation to be admitted into evidence for this limited purpose. Ray's claim is denied.

5.

The vehicle Ray drove on the night of the shooting was seized without a warrant but it was searched only after a warrant had been secured. Ray filed a motion to suppress the evidence found during the search. The motion was argued at a pretrial hearing and subsequently overruled. He argues on appeal that this ruling was error. This Court reviews a trial court's ruling on a motion to suppress evidence based on a complaint of an illegal search and seizure for an abuse of discretion; we defer to the trial court's findings of fact unless they are clearly erroneous, and review legal conclusions *de novo*. *See Cripps v. State*, 2016 OK CR 14, ¶ 6, 387 P.3d 906, 909; *State v. Alba*, 2015 OK CR 2, ¶ 4, 341 P.3d 91, 92.

Ray argues that the warrantless seizure of his pickup was illegal and the live rounds of ammunition found during the subsequent search of the vehicle were inadmissible at trial as fruit of the poisonous tree. The vehicle here unquestionably constituted evidence of the very crime being investigated; Ray had been identified as the assailant and his pickup had been seen leaving the scene of the crime. Because the pickup itself was evidence of the crimes being

investigated, police needed no other authority to seize it. See *Tomlin v. State*, 1994 OK CR 14, ¶ 39, 869 P.2d 334, 342; *Lee v. State*, 1981 OK CR 59, ¶ 3, 628 P.2d 1172, 1173; *Florida v. White*, 526 U.S. 559, 119 S.Ct. 1555, 143 L.Ed.2d 748 (1999). There was no violation of Ray's rights under the Fourth Amendment; the trial court did not abuse its discretion in denying his motion to suppress.

6.

Ray contends that his two convictions for assault and battery with a deadly weapon, for shooting two victims, violated the statutory prohibition against double punishment and constitutional prohibitions against double jeopardy. Ray did not raise this issue before the trial court. Therefore, he has waived appellate review of the claim for all but plain error. *Head*, 2006 OK CR 44, ¶ 9, 146 P.3d at 1144. We review Ray's claim under the analysis set forth in *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

We find that Ray's two convictions for assault and battery with a deadly weapon do not violate Oklahoma's statutory prohibition against double punishment. 21 O.S.2011, § 11(A). The two crimes did not arise out of one act. *See Logsdon v. State*, 2010 OK CR 7, ¶ 17, 231 P.3d 1156, 1164-65 (where there is a series of separate and distinct crimes Section 11 is not violated). *See also Watts v. State*, 2008 OK CR 27, ¶ 16, 194 P.3d 133, 139. Although Ray asserts that the shooting occurred as part of a single act during the struggle over the gun, the State's evidence showed that he deliberately shot Price and

then he deliberately shot Jennifer; there were two separate victims as a result of two separate crimes.

This Court applies the test set out in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932), to evaluate constitutional claims of double jeopardy. *Logsdon*, 2010 OK CR 7, ¶ 19, 231 P.3d at 1165. Under the *Blockburger* test, this Court asks whether each offense requires proof of an additional fact that the other does not. *Id.* Here, the two offenses of assault and battery with a deadly weapon were separate and distinct offenses each requiring proof of an additional fact since he was charged with shooting two different victims. *See Wimberly v. State*, 1985 OK CR 37, ¶ 10, 698 P.2d 27, 31 ("Offenses committed against different individual victims are not the same for double jeopardy purposes though they arise from the same episode."). *See also Whittmore v. State*, 1987 OK CR 192, ¶ 10, 742 P.2d 1154, 1157-58 (there is no double jeopardy or double-punishment violation when separate counts of that crime are charged based on the number of victims involved). There was no error, plain or otherwise. Relief is not required.

7.

Ray argues that the trial court erred in failing to instruct the jury on the lesser offenses of assault and battery with a dangerous weapon and reckless conduct with a firearm as requested. "It is settled law that trial courts have a duty to instruct the jury on the salient features of the law raised by the evidence with or without a request." *Hogan*, 2006 OK CR 19, ¶ 39, 139 P.3d at

923 (*citing Atterberry v. State*, 1986 OK CR 186, ¶ 8, 731 P.2d 420, 422). *See also Soriano v. State*, 2011 OK CR 9, ¶ 36, 248 P.3d 381, 396. This Court reviews a trial court's choice of jury instructions for an abuse of discretion. *See Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 59, 241 P.3d 214, 234 (*citing Eizember v. State*, 2007 OK CR 29, ¶ 111, 164 P.3d 208, 236).

Under the lesser included offense doctrine, "[t]he jury may find the defendant guilty of any offense, the commission of which is necessarily included in that which he is charged." 22 O.S.2011, § 916. A defendant is entitled to a lesser-included offense instruction, however, only when the instruction is warranted by the evidence. *See Ball v. State*, 2007 OK CR 42, ¶ 32, 173 P.3d 81, 90 (*citing Glossip v. State*, 2001 OK CR 21, ¶¶ 28-29, 29 P.3d 597, 603-04). The test for determining whether a lesser-included offense instruction is warranted "is an objective one - we do not ask a jury to consider a lesser offense if no jury could rationally find both that the lesser offense was committed and that the greater offense was not." *Frederick v. State*, 2001 OK CR 34, ¶ 137, 37 P.3d 908, 943-944.

In this case, the jury could not reasonably have found the lesser offense was committed and the greater was not. The evidence showed that Ray used a gun to shoot Jennifer Ray and Price. A gun is a deadly weapon per se, not merely a dangerous one. *See Murphy v. State*, 1944 OK CR 54, 151 P.2d 69, 73 (defendant was not entitled to instruction on assault and battery because the gun used by defendant was "a deadly weapon per se"). Because the gun was a

deadly weapon, no reasonable jury could rationally find Ray guilty of the lesser offense of assault and battery with a dangerous weapon and acquit him of the greater offense of assault and battery with a deadly weapon. The trial judge's decision not to instruct on the lesser offense of assault and battery with a dangerous weapon was justified under the facts and law. The trial judge did not abuse his discretion.

Ray also complains that the trial court erred in refusing to instruct the jury on the lesser related offense of reckless conduct with a firearm. Title 21 O.S.2011, § 1289.11 provides that:

> It shall be unlawful for any person to engage in reckless conduct while having in his or her possession any shotgun, rifle or pistol, such actions consisting of creating a situation of unreasonable risk and probability of death or great bodily harm to another, and demonstrating a conscious disregard for the safety of another person.

Again, the trial court must instruct on any lesser included offense warranted by the evidence. *Jones v. State*, 2006 OK CR 17, ¶ 6, 134 P.3d 150, 154, (*citing Shrum v. State*, 1999 OK CR 41, 991 P.2d 1032). To determine whether lesser-included offense instructions are warranted, this Court looks at whether the evidence might allow a jury to acquit the defendant of the greater offense and convict him of the lesser. *See Harris v. State*, 2004 OK CR 1, ¶ 50, 84 P.3d 731, 750. In this instance, the evidence does not allow such result.

The testimony of the State's witnesses was that Ray shot at them deliberately while he was in full control of the firearm. Ray contends, however, that he pulled the gun and shot Price in self-defense and that the weapon

discharged hitting Jennifer Ray accidentally, as he wrestled with Price. Ray's own testimony that he pulled the gun in self-defense belies any inference that he discharged the firearm as a result of carelessness or rashness in handling it. A jury instruction on the offense was not warranted and the trial court judge did not abuse his discretion by refusing Ray's request.

8.

Ray complains prosecutorial misconduct deprived him of his right to a fair trial. Although defense counsel objected to one of the comments at issue, the others were not met with contemporaneous objection. The alleged misconduct not objected to at trial is reviewed for plain error only. *Harney v. State*, 2011 OK CR 10, ¶ 23, 256 P.3d 1002, 1007. We review Ray's claim under the analysis set forth in *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. Again, this Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.* "[W]e evaluate the alleged misconduct within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel." *Hanson v. State*, 2009 OK CR 13, ¶ 18, 206 P.3d 1020, 1028. Both sides have wide latitude to discuss the evidence and reasonable inferences therefrom. *See Harmon*, 2011 OK CR 6, ¶ 81, 248 P.3d at 943. Relief is only granted where the prosecutor's flagrant misconduct so infected the defendant's trial that it was

rendered fundamentally unfair. *Jones v. State*, 2011 OK CR 13, ¶ 3, 253 P.3d 997, 998. It is the rare instance when a prosecutor's misconduct during closing argument will be found so egregiously detrimental to a defendant's right to a fair trial that reversal is required. *See Pryor v. State*, 2011 OK CR 18, ¶ 4, 254 P.3d 721, 722.

A review of the record in the present case reveals that all but one of the comments at issue were not met with objection at trial. These comments did not affect the trial and cannot be found to have been plain error. The comment to which defense counsel did object was not improper. Considering the alleged misconduct within the context of the entire trial, we find that none of the alleged improper comments, either considered individually or cumulatively, rendered Ray's trial fundamentally unfair. Relief is not warranted.

9.

Ray claims the trial judge abused his discretion by refusing to run his sentences concurrently. The decision to run a defendant's sentences concurrently or consecutively rests within the sound discretion of the trial court. *Neloms*, 2012 OK CR 7, ¶ 35, 274 P.3d at 170. In fact, sentences are to run consecutively unless the trial judge, in his or her discretion, rules otherwise. 21 O.S.2011, § 61.1. As with other decisions left to the trial court's discretion, we will not interfere with that decision unless an abuse of discretion can be shown. *Neloms*, 2012 OK CR 7, ¶ 35, 274 P.3d at 170. The judge exercised his discretion and his exercise of this discretion was not an abuse of

discretion. This Court will not disturb a sentence within statutory limits unless, under the facts and circumstances of the case, it is so excessive as to shock the conscience of the Court. *Pullen v. State*, 2016 OK CR 18, ¶ 16, 387 P.3d 922, 928. Ray's sentence does not meet that test, and no relief is warranted.

10.

Ray claims that even if no individual error in his case merits reversal, the cumulative effect of the errors committed requires a new trial or sentence modification. The cumulative error doctrine applies when several errors occurred at the trial court level, but none alone warrants reversal. Although each error standing alone may be of insufficient gravity to warrant reversal, the combined effect of an accumulation of errors may require a new trial. *Martinez v. State,* 2016 OK CR 3, ¶ 85, 371 P.3d 1100, 1119. Cumulative error does not deprive the defendant of a fair trial when the errors considered together do not affect the outcome of the proceeding. *Baird,* 2017 OK CR 16, ¶ 42, 400 P.3d at 886. And clearly, a cumulative error claim is baseless when this Court fails to sustain any of the alleged errors raised on appeal. *Id.* There were no errors, either individually or when considered together, that deprived Ray of a fair trial. This claim is denied.

DECISION

The Judgment and Sentence of the district court is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title

22, Ch. 18, App. (2018), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF PONTOTOC COUNTY
THE HONORABLE C. STEVEN KESSINGER, DISTRICT JUDGE

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

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

ISAAC AVILA,	)	**NOT FOR PUBLICATION**
	)	
Appellant,	)	
	)	
v.	)	Case No. F-2017-1285
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LEWIS, PRESIDING JUDGE:

Isaac Avila, Appellant, was tried by jury and found guilty of Counts 1 through 4, kidnapping, in violation of 21 O.S.Supp.2012, § 741; Count 5, possession of a firearm during the commission of a felony, in violation of 21 O.S.Supp.2012, § 1287; and Count 6, resisting an officer, in violation of 21 O.S.2011, § 268, in the District Court of Stephens County, Case No. CF-2016-457. The jury sentenced him to five (5) years imprisonment on Count 1, fifteen (15) years imprisonment on each of Counts 2 through 4, five (5) years imprisonment on Count 5, and a $100.00 fine on Count 6. The Honorable G. Brent Russell, Associate District Judge, pronounced judgment and ordered the sentences on Counts 1 and

5 to run concurrently to one another, but consecutively to Counts 2 through 4. Counts 2 through 4 were ordered to run consecutively to one another. Mr. Avila appeals in the following propositions of error:

1. Mr. Avila's convictions for the purported kidnapping of his own children, Counts 2, 3, and 4, must be reversed as they are contrary to the law;
2. Mr. Avila's convictions for the purported kidnapping of his own children, Counts 2, 3, and 4, must be reversed as they are contrary to the evidence;
3. The evidence presented by the State was not sufficient to sustain the verdict of the jury with regard to the charge of kidnapping in Count 1 of the Information;
4. The State's evidence was insufficient to convict Appellant of possession of firearm during commission of a felony;
5. Error occurred when the jury was not instructed with respect to the affirmative defense of consent;
6. Ineffective assistance of counsel denied Mr. Avila due process and his right to a fundamentally fair trial;
7. Appellant's sentence is excessive and should be modified.

Appellant argues in Proposition One that his convictions for kidnapping his own children (Counts 2, 3, and 4) infringe his constitutionally protected rights as a custodial parent and must be reversed. He argues in Proposition Two that these convictions must

be reversed for insufficient evidence. In Proposition Three, he argues that the evidence is also insufficient to support his conviction in Count 1 for kidnapping his estranged wife. In Proposition Four, he challenges the sufficiency of the evidence to convict him of possessing a firearm in the commission of kidnapping.

As pertinent here, a person commits the crime of kidnapping when he or she, without lawful authority, seizes or confines another with intent to cause such person to be confined against the will of the other person. 21 O.S.2011, § 741. In Counts 1 through 4, the State charged, and the jury found Appellant guilty of, "forcibly seizing" and "confining" the victims "without lawful authority and with the intent to cause [them] to be confined/imprisoned against [their] will."

We find from the evidence that Appellant's actions exceeded any constitutionally protected authority to restrain his children that he possessed as a custodial parent. *In re S.B.C., et al,* 2002 OK 83, 64 P.3d 1080 (2002) (recognizing constitutionally protected liberty interest of a parent in the management of children). The

convictions in Counts 2-4 do not infringe Appellant's due process rights.

Reviewing his claims in Propositions Two, Three, and Four, we take the evidence in the light most favorable to the State to determine whether any rational trier of fact could find the elements of kidnapping, and possessing a firearm in the commission of kidnapping, beyond a reasonable doubt. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204. The evidence is sufficient. Propositions Two, Three, and Four are denied.

In Proposition Five Appellant argues that the trial court's failure to instruct the jury on the defense of consent requires reversal. In Proposition Six, he argues that counsel's failure to request instruction on the defense of consent denied him the effective assistance of counsel. Counsel clearly failed to object to the court's instructions or request instructions on this defense at trial, waiving all but plain error.

Appellant must therefore show that a plain or obvious error affected the outcome of the proceeding. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. The Court will correct plain error only where it seriously affects the fairness, integrity, or public reputation

of the proceeding. *Simpson v. State*, 1994 OK CR 40, ¶ 30, 876 P.2d 690, 701. We review his related claim of ineffective counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), requiring that Appellant show not only that counsel performed deficiently, but that Appellant was prejudiced by it. *Id.*, 466 U.S. at 687, 104 S.Ct. at 2064.

We find the trial court's instructions were not plainly or obviously in error, and any error in failing to further instruct on consent did not seriously affect the fairness, integrity, or public reputation of the proceedings. Applying the *Strickland* standard to Appellant's related Sixth Amendment claim, Appellant cannot show either unreasonably deficient performance by counsel or prejudice to his defense from the failure to request these instructions. Propositions Five and Six are denied.

Appellant argues in Proposition Seven that his sentences are excessive. This Court will not disturb any sentence within statutory limits unless, under the facts and circumstances of the case, it is so excessive as to shock the conscience of the Court. *Pullen v. State*, 2016 OK CR 18, ¶ 16, 387 P.3d 922, 928. Appellant's sentences

are supported by the violent and dangerous nature of his actions against vulnerable family members. No relief is warranted.

DECISION

The judgment and sentence is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

APPEAL FROM THE DISTRICT COURT OF STEPHENS COUNTY
HONORABLE G. BRENT RUSSELL, ASSOCIATE DISTRICT JUDGE

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

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

BRENT ALLEN MORRIS,	)	
	)	**NOT FOR PUBLICATION**
Appellant,	)	
	)	**Case No. F-2018-551**
v.	)	
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

HUDSON, JUDGE:

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

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

Property, in violation of 21 O.S.2011, § 1760; and Count 11: Interference with Emergency Telephone Call, in violation of 21 O.S.2011, § 1211.1. The jury recommended the following sentences: Count 1—Twenty five years imprisonment and a $10,000 fine; Counts 4, 5, 6 and 10—one year in the county jail and a $1,000 fine on each count; Counts 7 and 9—four years imprisonment and a $5,000 fine on each count; Count 8—one year in the county jail and a $500 fine; Count 11—one year in the county jail and a $3,000 fine.

The Honorable Doug Drummond, District Judge, presided at trial and sentenced Morris in accordance with the jury's verdicts. Judge Drummond ordered the sentences for Counts 1, 4, 7 and 9 to run consecutively each to the other. Judge Drummond further ordered the sentences for Counts 4, 5, 6, 8, 10 and 11 to run concurrently with each other.[2] Morris now appeals, raising seven propositions of error with this Court:

I. APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED WHEN UNRELATED COUNTS WERE IMPROPERLY JOINED;

II. THERE WAS NO EVIDENCE PRESENTED THAT APPELLANT INTERFERED WITH AN EMERGENCY

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

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

III. THERE WAS MANIFEST NECESSITY TO GRANT A MISTRIAL AFTER A WITNESS MENTIONED A RAPE KIT. THEREFORE, IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT NOT TO GRANT THE MISTRIAL;

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

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

VI. APPELLANT WAS DENIED CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL BASED ON TRIAL COUNSEL'S FAILURE TO OBJECT TO JOINDER AND TO DEMUR TO COUNT 11, AND FAILURE TO OBJECT TO THE SECTION 11 VIOLATION OF COUNT 1, 2, AND 3; AND

VII. THE ACCUMULATION OF ERROR IN THIS CASE DEPRIVED APPELLANT OF DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, § 7 OF THE OKLAHOMA CONSTITUTION.

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

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

Proposition I. Appellant concedes trial counsel did not object to the joinder of counts in this case, let alone request severance. Our review is therefore limited to plain error. *Collins v. State,* 2009 OK CR 32, ¶ 12, 223 P.3d 1014, 1017. To show plain error, Appellant must show an actual error, which is plain or obvious, affected his substantial rights. This Court will only correct plain error if the error seriously affected the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Lamar v. State,* 2018 OK CR 8, ¶ 40, 419 P.3d 283, 294; 20 O.S.2011, § 3001.1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

record also does not show defense counsel was hampered in any way from presenting Appellant's defense due to the State's charging error. Because Appellant was adequately apprised of the charges against him based on the "four corners" of the amended Information together with the materials provided to him at preliminary hearing and through discovery, his due process challenge must be denied. *Parker*, 1996 OK CR 19, ¶ 24, 917 P.2d at 986. Proposition V is denied.

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

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

Proposition VII. We deny relief for purported cumulative error. Appellant has not proven the existence of two or more errors in this appeal that we can cumulate. *See Bosse v. State*, 2017 OK CR 10, ¶ 93, 400 P.3d 834, 866. Review of the record shows this is simply not a case where numerous irregularities during Appellant's trial tended to prejudice his rights or otherwise deny him a fair trial. *Tryon*, 2018 OK CR 20, ¶ 144, 423 P.3d at 655. Proposition VII is denied.

DECISION

The Judgment and Sentence of the District Court is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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

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

Appendix E

Appellant's Supplemental Pro Se Reply Brief

Additional material from this filing is available in the Clerk's Office.