ORIGINAL

Case No. F-2016-62

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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STATE OF OKLAHOMA
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DANIEL K. HOLTZCLAW

Appellant,

vs.

THE STATE OF OKLAHOMA

Appellee.

Appeal from the
District Court of Oklahoma County

BRIEF OF APPELLANT

James H. Lockard
Deputy Division Chief
Oklahoma Bar Assoc. No. 18099

Michael D. Morehead
Appellate Defense Counsel
Oklahoma Bar Assoc. No. 18114

Homicide Direct Appeals Division
Oklahoma Indigent Defense System
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ATTORNEYS FOR APPELLANT

February 1, 2017

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTORY AUTHORITY

CONSTITUTIONAL AUTHORITY

United States Constitutional Authority

Oklahoma Constitutional Authority

OTHER AUTHORITIES

BRIEF OF APPELLANT

This brief is submitted on behalf of Daniel K. Holtzclaw, the defendant in Oklahoma County District Court, who will be referred to by name or as Appellant. Appellee will be referred to as such, or as the State, or as the prosecution. Numbers in parentheses refer to pages from the original record (O.R.) and transcripts of the preliminary hearing (P.H. Tr.), pre-trial hearings (__/__/__ Tr.), jury trial (Tr.), and formal sentencing (S. Tr.).

STATEMENT OF THE CASE

Appellant, Daniel K. Holtzclaw, was charged by Information in Oklahoma County District Court Case No. CF-2014-5869 with eight counts of procuring lewd exhibition, ten counts of sexual battery, seven counts of forcible oral sodomy, six counts of first degree rape, two counts of second degree rape (by instrumentation), one count of indecent exposure, one count of first degree burglary, and one count of stalking. Oklahoma County Assistant District Attorneys Gayland Gieger and Lori McConnell prosecuted the case. Appellant was represented at trial by Messrs. Scott Adams and Robert Gray, both of Oklahoma City. The Honorable Timothy R. Henderson presided over the trial. Appellant was acquitted of eighteen of the thirty-six counts, but he was convicted of three counts of procuring lewd exhibition, six counts of sexual battery, four counts of forcible oral sodomy, four counts of first degree rape, and one count of second degree rape. The jury assessed a sentence of five (5) years in prison for each of the procuring counts; eight (8) years in prison for each of the sexual battery counts; sixteen (16) years in prison for each of all but one of the sodomy counts, assessing punishment of twenty (20) years on the remaining sodomy count; thirty (30) years in prison on each of the first degree rape counts; and twelve (12) years in prison on the second degree rape count. The trial judge formally imposed judgment and sentence on January 21, 2016, ordering the counts to run consecutively, for a combined total of 263 years.

It is from this judgment and sentence that Mr. Holtzclaw appeals.

STATEMENT OF THE FACTS

Daniel Holtzclaw was an Oklahoma City police officer assigned to the Springlake Division, patrolling a high crime area in the northeastern part of Oklahoma City. His regular shift was from 4:00 p.m. to 2:00 a.m. In the early morning hours of June 18, 2014, Officer Holtzclaw completed his shift and logged off of the computer in his car shortly before 2:00 a.m. (St. Exh. 77) On his way home, he was travelling westbound on 50th Street near Lincoln Boulevard when he spotted a vehicle swerving and drifting within the lane. Almost instinctively, he "[lit] it up" and pulled the vehicle over. (*Id.*) Ultimately, finding no evidence to confirm his initial suspicions that the driver, Jannie Ligons, was intoxicated, he let her go and continued home. (*Id.*)

Later that morning, Ms. Ligons and members of her family reported to other police officers that she had been sexually assaulted during that traffic stop. (Tr. 518-20) Sex crimes detective Kim Davis was called in, and she interviewed Ms. Ligons at Integris Southwest Medical Center after the conclusion of a SANE examination. (Tr. 524, 756-57) At the time, fellow sex crimes detective Rocky Gregory was working on investigating similar allegations made by a woman named Terri Morris, who when approached by police during a public disturbance she was engaged in, claimed that she had been sexually assaulted by a police officer. (II P.H. Tr. 111; Tr. 3196-97) The detectives then used records of Officer Holtzclaw's Criminal Information Unit and Varuna System searches to identify the women Officer Holtzclaw had come into contact with while on duty, eventually developing thirteen alleged victims:

Jannie Ligons

Jannie Ligons was the driver Officer Holtzclaw pulled over at around 2:00 a.m. on June 18, 2014. The evening of June 17, she had been visiting friends at a

residence in northeast Oklahoma City. (Tr. 466-67) She denied drinking anything that night, but she admitted to taking one hit off of "a little piece of a joint." (Tr. 468-69) She had a headache around midnight and took a "p.m. something" she had bought from the Dollar Store and lay down on the sofa. Knowing she had to get home to pick up her "fiancé," Richard, to take him to work, she got up at almost 2:00 a.m. and started driving home. (Tr. 471-72) She was driving down 50th St. when she was pulled over by a police officer. (Tr. 474-79)

The officer came to her door and told her he stopped her because she was swerving. She said she was not swerving. (Tr. 480) Seeing a cup in her car, the officer asked her what she was drinking, and she replied that it was "Kool-Aid." He asked her to get out of her vehicle, searched her, and placed her in the back seat of his patrol car. (Tr. 481-84) She testified that after he searched her car, he came back to her and asked how he was supposed to know she did not have anything in her bra. (Tr. 495) She said she started "fidgeting" with her bra, but he said he could not tell like that. She asked if he wanted her to raise her bra up, and he said yes, so she did. Apparently, that was not enough, so she asked if he wanted her to raise her bra up, too, and according to her, he said yes, so she did. She testified that he shined his flashlight on her chest, and she pulled her blouse down. (Tr. 496)

According to her, he then started asking how he was to know she did not have anything in her pants. (Tr. 498) She said he told her to get out of the car, stand up, and pull her pants down. (Tr. 499-502) She testified that he shined his flashlight between her legs, and she pulled them up "real fast" and got back in the car. (Tr. 502) According to her, as she was getting back in the car, he said, "Damn, you have a big ass." (Tr. 504)

When she got back in the car, he was "holding himself," she testified. (Tr. 505) She further testified, "At this point in time he – he wanted me to I guess – whatever you call – whatever you call it. He wanted me to give him some – some oral

sex." (Tr. 506) She knew that because he unzipped his pants and "took it out" and said, "Come on," she testified. (Tr. 507-08) She then put his penis in her mouth "for a minute." (Tr. 508-09)

Based on this testimony, the jury convicted Appellant in Count 15 of procuring lewd exhibition and in Count 16 of forcible oral sodomy. The jury imposed sentences of five and sixteen years, respectively.

Shardayreon Hill

On December 20, 2013, Shardayreon Hill and her cousin were sitting in some random person's pickup truck at Liberty Station Apartments, smoking PCP, when the police suddenly pulled in. (Tr. 1231-32) She and her cousin were both arrested, and a female officer came to search her. (Tr. 1233-33, 1248-50) The officer found another vial of PCP on her person and put it on the hood of the police car, at which point Ms. Hill lurched forward, grabbed the vial in her mouth, and crushed it. (Tr. 1249-51, 1329) After this, she was taken to a local hospital, decontaminated, and put into a recovery room. (Tr. 1250-54

She was handcuffed to the bed, and Officer Holtzclaw remained in the room to supervise her. (Tr. 1254-55) According to her, he kept telling her that her gown was drooping and then at one point came over to her to try and pull the gown up himself, grabbing and cupping her right breast in the process. (Tr. 1257-59) Sometime later, after letting her use his phone to call her mother, he walked to the foot of the bed and said, "If you corroborate [*sic*] with me, you know, I can make these charges go away within a month." (Tr. 1260-66) She testified that he reached his hand under her gown and stuck his fingers in her vagina. (Tr. 1267-69) Shortly after that, he came around and stood to her left side. She testified that he pulled his pants down and made her "rub it first." (Tr. 1270) According to her, he then made her perform oral sex on him, saying at one point, "Ha ha, you never sucked a white dick before." (Tr. 1271-73)

Sometime after she got out of jail, Officer Holtzclaw friended her on Facebook, and they conversed with each other via the messenger feature as well as by text message. (Tr. 1284-87) According to her, he came to her house at some point when he was off duty. (Tr. 1288-89) She testified that he was wanting to have sex with her in the car, but she told him she could not, because she had kids in the house. (Tr. 1292) According to her, he then asked her to give him oral sex and pulled his penis out of his pants, but she kept telling him she could not do that and eventually got out of the car and went back in the house with the kids. (Tr. 1292-94)

After hearing all the evidence, the jury acquitted Appellant of three counts of sexual battery, in Counts 21, 22, and 23; acquitted him in Count 24 of forcible oral sodomy; acquitted him in Count 25 of second degree rape; and acquitted him in Count 26 of indecent exposure.

Tabitha Barnes

On February 27, 2014, Tabitha Barnes was in front of her house at NE 15th Street and Jordan when she came into contact with Officer Holtzclaw. (Tr. 1763) She lived with her three kids, ages 7, 11, and 14, and occasionally her boyfriend, Terry Williams, a registered sex offender. (Tr. 1764) She and her friend, Angela Cooper, were planning to go shopping as soon as funds got posted to their EBT cards. It was cold outside, and they were waiting for the car to warm up when they saw two police cars drive by. (Tr. 1768) Minutes later, one of the cars pulled in behind her car, and the other pulled in front of the house. They were asked to get out of the car and were each placed in the back of separate police cars. (Tr. 1769-70) They were both run for warrants, and Angela was allowed to get out and go into the house, and the other police car drove off. (Tr. 1770, 1774-75)

It was at this point that, according to Ms. Barnes, Officer Holtzclaw made her raise up her shirt, exposing her breasts. (Tr. 1775-79) She testified that he asked her if she had anything under her breasts, and then he lifted her breast up. (Tr.

1780) After this, he told her to get her tickets taken care of and let her go. (Tr. 1782) About a month later, she came home to find a police car in front of her house and an unknown black man lying in the yard. (Tr. 1787-90 She asked Officer Holtzclaw who that was, and he said he did not know. She testified that he then walked over to the man, kicked him, and told him to go on. (Tr. 1790) He then put her in the back his police car and started asking about her "tickets" and had she taken care of them. According to her, he told her he had been in her house, and when she asked who let him in, he said, "I went on in." (Tr. 1794) It was at this point, she said, that he made her pull up her shirt again and also made her pull down her pants, exposing her vagina. (Tr. 1796-99)

Her boyfriend, Terry Williams, was at the house at the time. (Tr. 1792) Williams testified that he was alone in the house when he was awakened by a police officer, who asked him what he was doing there. (Tr. 2136-37) The officer took him outside and ran his name for warrants. (Tr. 2138-39) He swore that the door was shut, but before entering the house, Officer Holtzclaw had reported the incident as an open door. (Tr. 2142; St. Exh. 171) He testified that Officer Holtzclaw told him he would keep harassing him if he saw him again. (Tr. 2149)

Based on this evidence, the jury convicted Appellant of two counts of procuring lewd exhibition, in Counts 4 and 5, and convicted him of one count of sexual battery, in Count 1. However, the jury acquitted him of first degree burglary, in Count 3, and stalking, in Count 6.

Carla Raines

Carla Raines testified that she was walking on 16th Street near Fonshill, coming from her mother's house, when she came into contact with Officer Holtzclaw. (Tr. 2172-74) She testified that he asked her if she had anything on her and kept pointing at her breast area. (Tr. 2174-76) She kept telling him she did not have anything until she finally got to the point that she lifted her shirt and bra up,

exposing her breasts. (Tr. 2177-81) Though she never stated that he asked her outright to expose herself, asked if she felt like she had a choice but to raise up her shirt and bra, she replied, "At one point, not really." (Tr. 2181-82) Based on this evidence, the jury acquitted Appellant of procuring lewd exhibition in Count 2.

Florene Mathis

The first time Florene Mathis came into contact with Appellant was in either December 2013 or January 2014, and nothing inappropriate happened. (Tr. 2297-99) She had a crack pipe on her, which Officer Holtzclaw took and crushed before letting her go on her way. (Tr. 2299) She came into contact with him again in March or April 2014, when she was walking from 16th and Jordan to her sister's house. (Tr. 2301) He had her take everything out of her pockets, handcuffed her, and sat her on the curb while he ran her name. He told her she was clear, but that she still had some warrants she needed to take care of through the city. She testified that when he took the cuffs off, he fondled her right breast. (Tr. 2303) She also had a third interaction with him, during which nothing inappropriate happened. (Tr. 2307-10) This interaction occurred near the home of fellow alleged victim Tabitha Barnes, form whom she worked as a house cleaner and with whom she sometimes smoked crack. (Tr. 2309-10, 2325)

Based on this evidence, the jury acquitted appellant of one count of sexual battery in Count 7.

Rosetta Grate

In April 2014, Rosetta Grate was living with her boyfriend, Will Carter, at 633 Culbertson Drive, a home actually owned by Dr. Shanelle Scheerer, deceased. (Tr. 2522-23, 2634) She was engaged in prostitution in the vicinity of NE 14th and Jordan when Officer Holtzclaw stopped her. (Tr. 2523-24, 2527) She testified that she was tired, because every time she tried to go home, another "date" would pick her up. (Tr. 2527) Officer Holtzclaw found a crack pipe in her purse and made her smash

it on the ground. (Tr. 2529) He then offered her a ride to her house. (Tr. 2530)

According to her, Officer Holtzclaw followed her to the door and into the house, so she started showing him around the place. (Tr. 2536-37) She showed him the upstairs room where she sleeps, and he told her to have a seat. (Tr. 2540-42) She testified that he started unzipping his pants, saying, "[T]his is better than the county jail." According to her, he then took his penis out and put it in her mouth. (Tr. 2422) She testified that this lasted for about five or ten minutes. (Tr. 2544-45) He then, according to her, pulled his penis out of her mouth and told her he wanted her to lie back on the bed. She testified that he got on top of her and put his penis in her vagina. (Tr. 2545) According to her, this went on for another five or ten minutes, before he jumped up, zipped up his pants, and left. (Tr. 2546)

After hearing all the evidence, the jury convicted Appellant of forcible oral sodomy in Count 8, but acquitted him of first degree rape in Count 9.

Regina Copeland

In April 2014, Regina Copeland was an alcoholic, struggling with her addiction. (Tr. 2811) Though she lived on the northwest side of Oklahoma city, she would occasionally drive over to the northeast side of Oklahoma City to drink in a parking lot at 23rd and Martin Luther King. (Tr. 2811-13) On April 25, 2014, she was driving in the area of 15th and Kate when she got stopped by Officer Holtzclaw. (Tr. 2813-14) He asked her if she had been drinking, and she said yes. (Tr. 2814-15) She testified that at one point, he told her to pull her pants down, which she did, along with her underwear, and he told her "it looked phat down there." (Tr. 2819) After searching her car and not finding anything, he told her he was going to take her to detox, she testified. (Tr. 2815-16) According to her, she talked him into letting her drive her car to a relative's house nearby to park it there, rather than leaving it "on the street." (Tr. 2820-23)

According to her, he pulled up in front of the house and picked her up, even

though the Automated Vehicle Locator (AVL) on his car shows that he never went down that street. (Tr. 2822-23, 2933-35) She testified that he then drove her around the block, pulled to the side of the road in a grassy area near a lot of school buses, and "that's when the sexual assault happened." (Tr. 2825) She testified that he had her pull her pants down and turn around facing the back seat. (Tr. 2828-29) Though she testified at preliminary hearing that he had sex with her for about five to ten minutes, (II P.H. Tr. 75), she testified at trial that it lasted about three minutes or so. (Tr. 2829-30) The AVL shows that Officer Holtzclaw's vehicle was stopped for no more than four minutes and thirty-three seconds. (Tr. (2926; St. Exh. 260, 261) He then got in his car and drove off, leaving her there. (Tr. 2831)

Based on this evidence, the jury convicted Appellant of one count of first degree rape in count 29.

Sherry Ellis

Sherry Ellis came into contact with Officer Holtzclaw just one time. She was walking to her cousin's house on Highland. (Tr. 2983) Officer Holtzclaw stopped her and got out of his car. He asked her name and if she had anything illegal on her. to which she said no. She testified that he asked her to turn around and put her hands on the car and then started to search her. (Tr. 2984) According to her, when he searched her, his hands went up under her shirt and felt her breasts under the bra. (Tr. 2985) She testified further that he put his hands down inside her pants, under her underwear, and touched her vagina. (Tr. 2986)

She testified that he put her in the back seat of the car and ran her for warrants. (Tr. 2986-87) It was after this that, according to her, he came back around to the back door, opened the door, and told her to put her feet out of the car and asked her, "What do you think we need to do about this situation?" She said that she asked him what he meant, but he did not answer, and then she looked up and his penis was in her face. (Tr. 2988) She then "sucked his dick." (Tr. 2989)

According to her, he then had her put her feet back in the car, got back in the driver's seat, and drove down a dead end street. He hopped the curb, and they went around to an abandoned school in the vicinity of Highland and Miramar. (Tr. 2989-90) She testified that he got out of the car, opened her car door, and told her to get out. (Tr. 2990) She said he told her to pull her pants down, and then he had sex with her. She was standing up, facing the patrol car. (Tr. 2993-94) When he finished, he told her she was free to go, so she took off walking. (Tr. 2994) Unable to identify Officer Holtzclaw in court, she described her assailant as a heavy built, muscular, black man who was shorter than she. (Tr. 2996-99) She was 5 foot 11 inches tall. (Tr. 2999) She testified the sexual assault lasted five or ten minutes, even though the AVL shows Officer Holtzclaw's car was behind that school for less than four minutes. (Tr. 3007, 3100; St. Exh. 289, 290)

Based on her testimony, the jury convicted Appellant of one count of forcible oral sodomy in Count 10, one count of first degree rape in count 11, and two counts of sexual battery in Counts 33 and 34.

Terri Morris

Terri Morris was coming out of the Liberty Station Apartments at 26th and Lindsay when she was approached by a police officer. (Tr. 3141-42) He asked her name, whether she had anything illegal on her, and if she had any outstanding warrants. (Tr. 3142) She had a crack pipe in her purse. (Tr. 3143-44) She testified that he put her in the back of the car and drove her to some apartments at 24th and Lindsay. (Tr. 3145) According to her, he got out of the car with the crack pipe in his hands and told her she could go to jail for this. She testified that he made her raise up her shirt, exposing her breasts, and unzip her jeans. (Tr. 3148-49) He then asked her for some oral sex, she said, and she did so, because "he was the police." (Tr. 3149-50) He eventually drove her to 26th and Kelly and let her go. (Tr. 3154-55) After considering all the evidence, the jury acquitted Appellant of forcible oral

sodomy in Count 12 and further acquitted him of two counts of procuring lewd exhibition in Counts 35 and 36.

Syrita Bowen

Around 1:00 a.m. on May 21, 2014, Syrita Bowen was walking down 16th Terrace when Officer Holtzclaw pulled up alongside her. (Tr. 3346-47, 3436-37; St. Exh. 327, 328) She testified that he asked her where she was going, where she was heading, and what she was doing. (Tr. 3347) She said he told her she had been at a house that was a drug house, but she claimed she had not been at that house. (Tr. 3348) After asking her if she had any drugs or anything on her, he put her in the back seat of his car and ran her name for warrants. (Tr. 3350-52) She had been drinking, and he told her he could either take her to detox or to jail. (Tr. 3356) At some point, he just put the car in drive and took her to an area known as Dead Man's Curve. (Tr. 3358)

According to her, he told her, "I'm gonna be serious with you. You're gonna have to give me head or sex or I will take your ass to jail." (Tr. 3361) She testified that he got out of the car and opened the back door, unzipped his pants, and she turned toward him and performed oral sex on him. She further testified that he told her to get out, pull her pants down, and bend over in the back seat, which he did, and then he "proceeded to have sex with" her. (Tr. 3363) When he was done, he drove her to the next corner, 13th and Highland, let her go, and drove away. (Tr. 3363, 3367-68)

Based on her testimony, the jury convicted Appellant of forcible oral sodomy in Count 27 and first degree rape in Count 28.

Carla Johnson

Carla Johnson first came into contact with Officer Holtzclaw when she was walking down the street sometime in April 2014. (Tr. 3498-3500, 3505) According to her trial testimony, nothing inappropriate happened on this occasion. She

testified that she came into contact with him again sometime in June. (Tr. 3505) According to her, it was during this contact that, while searching her for drugs or weapons, he grabbed or touched her breasts and put his hand down her pants, under her panties. (Tr. 3509) He then let her go. (Tr. 3510) Based on this testimony, the jury convicted Appellant of two counts of sexual battery in Counts 13 and 14.

Kala Liles

In the early morning hours of June 18, 2014, Kala Lyles was walking down 16th Street near Lottie when she came into contact with Officer Holtzclaw. (Tr. 3603-04, 3685-87; St. Exh. 352, 356) He put her in the back of the car and ran her for warrants, which came back clear. (Tr. 3606-07) He then asked her if she needed a ride and then started driving her toward where she lived with her boyfriend at the Relax Inn at 23rd and Highland. (Tr. 3603, 3608-10) However, when he got to 18th and Highland, he turned down 18th Street, jumped a curb, and pulled in between the buildings of an abandoned school. (Tr. 3615-17)

According to her, he got her out of the car and asked if she had anything illegal on her. (Tr. 3618) She testified that he made her "show [her]self to him," which included exposing both her "cleavage" and her "private." (Tr. 3621) At some point, according to her, he told her that he "bet[s] that pussy is wet." (Tr. 3620) It was then that he had her bend over and "[h]e just pulled it out and he just started raping [her]," she "guess[ed]." (Tr. 3625) He also told her to "raise up and told [her] to suck his dick," though she was unsure of the order of these events. (Tr. 3626) She testified that the sexual intercourse lasted about 20 to 30 minutes, though the AVL shows Officer Holtzclaw's vehicle stopped in that area for no more than about eleven minutes. (Tr. 3627, 3709; St. Exh. 351) When it was over, he let her go from there, she said. (Tr. 3632-33)

After hearing all the evidence, the jury acquitted Appellant of forcible

sodomy in Count 17, acquitted him of two counts of procuring lewd exhibition in Counts 18 and 19, and acquitted him of first degree rape in Count 20.

Adaira Gardner

Officer Holtzclaw first came into contact with Ms. Gardner on June 17, 2014, at approximately 6:57 p.m. (Tr. 3749, 3900) Ms. Gardner, who was 17 years old at the time, lived with her father in Muskogee but was staying for some time with her mother in Oklahoma City on NE 14th between Blackwelder and Indiana. (Tr. 3746) She was walking down the street with two "friends": 40-something-year-old Nathaniel Davis, a.k.a. "Face," and his "girlfriend," 18- or 19-year-old Melodie Coleman, a.k.a. "Chocolate." (Tr. 3749) Face and Chocolate were arguing, screaming at each other, and a police officer rolled up, saying he had gotten a call about a man threatening a woman. (Tr. 3750) Officer Holtzclaw ran them all for warrants and searched Ms. Gardner's purse before letting them go. (Tr. 3751-54, 3757)

Officer Holtzclaw made contact with her again later that evening, shortly before 9:30 p.m. (Tr. 3755, 3901) She was walking alone and almost to her mother's house. (Tr. 3755) She testified that he rolled up next to her and said he was not sure she was who she said she was. (Tr. 3756) She told him her mom lives right down the street, but he said he was not sure if she lived there or not. She had no identification on her. (Tr. 3758) He drove her to her mom's house, but her mom was not at home, and she did not have a key to get into the house. (Tr. 3760)

She testified that while they were on the porch, he said he was going to have to search her. (Tr. 3760) It was a closed-in porch that her mom called a mud room. (Tr. 3761) She was by the door and he started searching her. According to her, he put his hands up under her clothes and touched her breasts. (Tr. 3767) He also reached his hand down under her panties and touched her private area, putting his finger inside her vagina, she testified. (Tr. 3770) After that, according to her, he

said he did not want to take her to jail, did not want to make this harder than it has to be, and told her to bend over, so she did. (Tr. 3772) She testified that he pulled her shorts and panties down, took his penis out, and put it in her vagina. (Tr. 3772-73) She further testified that while he was having sex with her, he would say things like, "Is this the first time you ever fucked a cop?" and "Am I beating it up?" She said this went on for about ten minutes, and then he abruptly pulled out. (Tr. 3773)

During the investigation, she voluntarily submitted to a buccal swab, and her DNA was compared to the unknown female DNA found on the fly area of Officer Holtzclaw's pants, which were taken into evidence at the end of his interview with Detectives Davis and Gregory. (Tr. 3785-86, 4026-29; St. Exh. 77) The DNA was a "match," though Oklahoma City Police chemist Elaine Taylor admitted that it was possible that Ms. Gardner's got onto Appellant's pants by secondary transfer after having searched her purse. (Tr. 3932-33, 4041-72; St. Exh. 394, 395) She also agreed with the prosecutor, however, that the likelihood of transfer DNA-containing epithelial cells is higher if they are contained in a liquid medium, such as vaginal fluids, and that the fact that Officer Holtzclaw's own DNA was supposedly not found on the pants[1] contributes to that opinion. (Tr. 4067, 4073-74)

Based on this evidence, the jury convicted Appellant of one count of sexual battery in Count 30, one count of second degree rape (by instrumentation) in Count 31, and one count of first degree rape in Count 32.

Additional facts will be discussed as they relate to the various propositions of error.

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[1] *But see* Proposition V, *infra*.

PROPOSITION I

THE EVIDENCE WAS INSUFFICIENT TO PROVE THE CHARGED CRIMES: THERE WAS NO EVIDENCE THAT THE ALLEGED "PROCURING LEWD EXHIBITION" OCCURRED IN PUBLIC VIEW; NOR WAS THERE ANY EVIDENCE THAT THE ALLEGED RAPE AND ORAL SODOMY COUNTS WERE ACCOMPLISHED BY MEANS OF THE USE OR THREAT OF FORCE OR VIOLENCE; AND THE EVIDENCE SUPPORTING THE SEXUAL BATTERY COUNTS WAS INSUFFICIENT TO ALLOW ANY RATIONAL TRIER OF FACT TO FIND THE DEFENDANT GUILTY OF THOSE OFFENSES BEYOND A REASONABLE DOUBT.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, as well as corresponding provisions of the Oklahoma Constitution, protects a criminal defendant against conviction except upon proof beyond a reasonable doubt of every element of the offense. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. CONST., amend. XIV; *see also* OKLA. CONST., art. 2, § 7. The standard of proof "beyond a reasonable doubt" is designed to impress "upon the fact finder the need to reach a subjective state of near certitude of the guilt of the accused." *Jackson*, 443 U.S. at 315, 99 S.Ct. at 2787.

The judicial review of the trial court's finding in this regard must take into consideration all of the evidence. *Id.* at 319. On appeal, the standard governing a challenge to evidentiary sufficiency is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find the elements of the offense beyond a reasonable doubt. *Id.* at 319, 99 S.Ct. at 2789; *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559. Such a standard of review is necessary to give "meaning to the standard of proof beyond a reasonable doubt." *People v. Murphy*, 331 N.W.2d 152, 154 (Mich. 1982).

Procuring Lewd Exhibition

Appellant was convicted in Counts 4, 5, and 15 of procuring lewd exhibition, in violation of Title 21, § 1021(A)(2). The jury was instructed on the elements of this offense as follows:

> No person may be convicted of procuring lewd exhibition unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:
>
> First, willfully;
>
> Second, procuring/counseling/assisting any person;
>
> Third, to expose herself to public view or the view of any number of persons;
>
> Fourth, for the purpose of sexual stimulation of the viewer.

(O.R. 424) Appellant has been unable to find any opinions of this Court interpreting or applying this subsection. It is far from clear that the legislature intended this offense to apply to the circumstances alleged in this case.

The gist of the charges against him in these counts is that Appellant compelled these women, under the auspices of his authority as an Oklahoma City police officer, to expose themselves to him for the purpose of sexually stimulating him. Indeed, the language in the Information makes explicit reference to his having "act[ed] under the authority of an Oklahoma City police officer." (O.R. 153-160) Yet compulsion, lack of consent, or exercise of authority are not elements of this offense, which seems to presume, in fact, the voluntary cooperation of the person exposing herself. It is enough that the accused "[p]rocures, counsels, or assists" another person to expose herself "to public view or to the view of any number of persons, for the purpose of sexual stimulation of the viewer." OKLA. STAT. tit. 21, § 1021(A)(2) (2011). Importantly, neither the statute nor the instruction defines "public view" or makes clear whether the "viewer" may be the person who procured the exhibition.

It is important to note that in Subsection (A)(1) of this section, defining the crime of indecent exposure, the term *public place* is used. Because Subsection (A)(2) uses the similar, but distinct, term *public view*, logic dictates that the fact that the exposure takes place in a public place is insufficient for a prosecution

under this subsection. A search for Oklahoma cases interpreting the phrase "public view" yields no directly relevant results. However, *Hulsey v. State*, 1948 OK CR 27, 192 P.2d 301, is instructive. There, the defendant was charged with committing an act which "openly outrages public decency" stemming from his sexually assaulting a young girl in a car on a public street.[2] Because there was evidence that passers by on the street may have been unable to see what was going on inside the car, this Court found that the "defendant was entitled to an instruction defining the offense in such a manner as to submit to the jury the issue as to whether the act complained of was *open to the view of the public* in such a manner that it offended public decency." *Id.* at 306. In each instance alleged against Officer Holtzclaw, the alleged crime occurred at night, in or near Appellant's patrol car. There is no evidence in the record that anyone other than Appellant himself saw the alleged victims expose themselves.

Subsection (A)(2) also refers to "the view of any number of persons, for the purpose of sexual stimulation of the viewer." Some common sense needs to be applied in interpreting this portion of the statute. Clearly, the person or person viewing the exhibition and/or being sexually stimulated must be someone other the person "procuring" the exhibition or the one exposing herself. If not, then couples all over Oklahoma are committing felonies every time they get sexually intimate. Certainly, if Appellant were abusing his power as a police officer to compel female detainees to expose themselves to him, then that would be worthy of criminal prosecution, but as currently written, that is not an element of this offense. Perhaps some other statute was violated by this alleged conduct, but it is clearly not this one. This Court has emphatically stated that it "will not, in order to justify prosecution of a person for an offense, enlarge a statute beyond the fair meaning

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[2] A more specific law prohibiting such conduct was not enacted until after his crime, apparently. *Hulsey*, 192 P.2d at 282-83.

of its language or what its terms justify." *Leftwich v. State*, 2015 OK CR 5, ¶ 15, 350 P.3d 149, 155.

If there is any remaining doubt whether Section 1021(A)(2) applies to the facts of this case, that doubt is resolved in the negative by the very following section, Section 1021.1, which provides in pertinent part that the provisions of Section 1021 "shall not apply to persons who may ... participate in conduct otherwise prescribed by this act, when such ... conduct occurs in the course of law enforcement activities." There can be no doubt that Appellant was engaged in law enforcement activities at all times. In all but one instance, he was on duty, and in all three instances he was in uniform, in his patrol car, and engaged in a *Terry*[3] stop of the alleged victims. While it may seem harsh to apply Section 1021.1 to the facts as alleged in this case, it must be remembered that coercion is not an element of an offense under Section 1021(A)(2), and the legislature may well intend to protect officers from the kind of unfairness we have in this case, where he must search detainees for his own protection, as well as in carrying out his duties to ferret out crime, and thus may find himself the target of unsubstantiated allegations with no ability to defend against them.

Because there is no evidence that anyone but Appellant saw the alleged victims expose themselves, and because it is abundantly clear that this statute was not intended to apply to circumstances such as those alleged to have happened in this case, Appellant's convictions in Counts 4, 5, and 15 must be reversed with instructions to dismiss.

First Degree Rape

Appellant was convicted in Counts 11, 28, and 29 with three counts of first degree rape. The jury was instructed on the elements of this offense as follows:

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[3] *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

> No person may be convicted of rape in the first degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:
>
> First, sexual intercourse;
>
> Second, with a person who was not the spouse of the defendant;
>
> Third, where force or violence was used against the victim or where force or violence was threatened against the victim and the defendant had the apparent power to carry out the threat of force/violence.

(O.R. 430) There is no evidence in this record that Appellant either used or threatened to use force or violence against any of the alleged victims.

Syrita Bowen testified that Appellant told her, "I'm gonna be serious with you. You're gonna have to give me head or sex or I will take your ass to jail." (Tr. 3361) According to her, he then got out of the car and opened the back door, unzipped his pants, and she turned toward him and performed oral sex on him. He then told her to get out, pull her pants down, and bend over in the back seat, which she did, and then he "proceeded to have sex with" her. (Tr. 3363)

Sherry Ellis testified that Appellant asked her, "What do you think we need to do about this situation?" According to her, when she looked up, his penis was in her face, and she performed oral sex on him. (Tr. 2988-89) She testified that he then drove her to another location, told her to get out of the car and to pull her pants down, and then he had sex with her. (Tr. 2990-94)

Regina Copeland testified that, after allowing her to drive her car to a relative's house, he then had her get in his car to take her to detox. (Tr. 2815-16, 2820-23) Instead, however, he drove her around the block to a grassy area on the side of the road, where he told her to get out and had her pull down her pants and turn around facing the back seat. (Tr. 2825, 2828-29) He then had sex with her for about three minutes or so. (Tr. 2829-30)

Adaira Gardner testified that while she was on the porch of her mother's house, Appellant told her he was going to have to search her, so she turned around and he searched her body, groping both her breasts and her vagina. (Tr. 3760-61, 3767, 3770) According to her, he said he did not want to take her to jail, did not want to make this harder than it has to be, and told her to bend over, so she did. (Tr. 3772) She testified that he pulled her shorts and panties down, took his penis out, and put it in her vagina. (Tr. 3772-73)

Clearly there was no evidence of any use or threat of violence in any of these incidents. At least as to Syrita Bowen, there is evidence of a specific threat to take her to jail. Such a threat is arguably implicit with reference to Sherry Ellis, Regina Copeland, and Adaira Gardner. If believed, this would certainly establish the kind of coercion that would render any argument of consent invalid, but it still does not rise to the level of physical force this Court has always held necessary to overcome a victim's resistance for purposes of a conviction for first degree rape. *See, e.g., Lawson v. State,* 1987 OK CR 140, ¶¶ 7-9, 739 P.2d 1006, 1008; *Huckleberry v. State,* 1938 OK CR 70, 81 P.2d 493, 495.

Because there is no evidence that appellant used or threatened force or violence against the alleged victims, his convictions in Counts 11, 28, 29, and 32 must be vacated.

Forcible Oral Sodomy

Appellant was convicted in Counts 8, 10, 16, and 27 of forcible oral sodomy. The jury was instructed on the elements of this offense as follows:

> No person may be convicted of forcible oral sodomy unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:
>
> First, penetration;
>
> Second, of the mouth of the victim;
>
> Third, by the penis of the defendant;

> Fourth, which is accomplished by means of force or violence, or threats of force or violence that are accompanied by the apparent power of execution.
>
> OR
>
> Fourth, committed by a municipal employee upon a person who was under the legal custody, supervision or authority of a municipality of Oklahoma.

You are further instructed that any sexual penetration, however slight, is sufficient to complete the crime.

(O.R. 429)

As with the first degree rape charges, there is no evidence to support a finding that Appellant used or threatened to use any force or violence against any of the victims. As previously indicated, Sherry Ellis testified that Appellant asked her what they needed to do "about this situation," and then she looked up, saw his penis in her face, and then performed oral sex on him. (Tr. 2988-89) Jannie Ligons testified that Appellant unzipped his pants, "took it out," and said, "Come on," at which point she put his penis in her mouth "for a minute." (Tr. 507-09) Syrita Bowen testified that she performed oral sex on Appellant because he threatened to take her to jail. (Tr. 3361-63) Rosetta Grate testified that he started unzipping his pants, saying, "[T]his is better than the county jail." According to her, he then took his penis out and put it in her mouth. (Tr. 2422) None of them testified to any use or threat of physical force or violence.

Furthermore, there is significant doubt as to whether the allegations made by Rosetta Grate ever actually occurred. Though she testified that she spit into her hand and wiped it on a chair after performing oral sex, none of Appellant's DNA was found in that room. (Tr. 2547-48, 2696-2710) She had similarly testified that she wiped her vagina on a towel after sexual intercourse with Appellant, but no such towel was found. (Tr. 2547, 2688-89) Based on this evidence, the jury acquitted

Appellant of first degree rape but convicted him of forcible oral sodomy. It seems plainly evident that the jury simply "split the baby" on these counts, especially in light of the fact that they imposed a twenty-year sentence in Count 8, four years more than they imposed for any of the other sodomy counts. This Court has understandably held that it will "accept 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. That is not the same thing, however, as saying those choices are completely immune from any review whatsoever, a holding that would clearly violate the command that courts must review for more than just whether there is "any evidence" to support the verdict. *Jackson v. Virginia*, 443 U.S. 307, 320, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). Appellant submits that the evidence in this case does not permit a reasonable credibility choice supporting the verdict in Count 8 beyond a reasonable doubt.

Unlike the first degree rape counts, however, a forcible oral sodomy conviction may be supported, as an alternative to the force or violence element, by evidence that the victim was under the custody, supervision, or authority of a municipality and that the defendant was an employee of that municipality. Officer Holtzclaw was certainly a municipal employee, as an Oklahoma City police officer. However, there was no evidence that any of the alleged victims in this case were in the custody, supervision, or authority of Oklahoma City, at least in any way that is appreciably different than how all citizens are subject to the general authority of their duly elected governments.

The only case Appellant has found interpreting this provision is *Burgess v. State*, 2010 OK CR 25, 243 P.3d 461. There, the defendant was the duly elected sheriff of Custer County and had been appointed to serve on the Washita/Custer County Drug Court Team. The person with whom he engaged in sexual activity was a participant in that drug court team. *Id.* ¶ 4, 243 P.3d at 462. Thus, the Court

easily, and correctly, found that the appellant in that case was, in fact, an employee of a state agency, county, or political subdivision that had supervision or authority over the victim. *Id.* ¶¶ 12-18, 243 P.3d at 463-64. Notably, the Court explained the legislative intent of this provision as intending to include within its parameters persons "owing special trust and confidence to those citizens *ordered into* their custody or control." *Id.* ¶ 17, 243 P.3d at 464 (emphasis added). None of these alleged victims was ordered into the custody of any agency of government, and the mere fact that they were detained did not transform them into wards of the state. *See, e.g., Maryland v. Shatzer,* 559 U.S. 98, 113, 130 S. Ct. 1213, 1224, 175 L. Ed. 2d 1045 (2010) (expressly rejecting the notion that subjects of a traffic or *Terry* stop are "in custody").

Because there is no evidence in the record supporting either a finding of use or threat of force or violence or a finding that the victims were in the custody, supervision, or authority of any state agency, county, or political subdivision, Appellant's convictions in Counts 8, 10, 16, and 27 must be vacated.

Sexual Battery

Appellant was convicted in Counts 1, 13, 14, 30, 33, and 34 with sexual battery. The jury was instructed on the elements of this offense as follows:

> No person may be convicted of sexual battery unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:
>
> First, the defendant intentionally;
>
> Second, touched/felt/mauled;
>
> Third, in a lewd and lascivious manner;
>
> Fourth, the body/(private parts);
>
> Fifth, of a person sixteen years of age or older;
>
> Sixth, without his/her consent.
>
> OR

First, a municipal employee of a municipality;

Second, intentionally;

Third, touched/felt/mauled;

Fourth, in a lewd and lascivious manner;

Fifth, the body/(private parts);

Sixth, of a person sixteen years of age or older;

Seventh, who was under the legal custody, supervision or authority of the municipality of Oklahoma.

The words "lewd" and "lascivious" have the same meaning and signify conduct which is lustful and which evinces an eagerness for sexual indulgence.

(O.R. 422-23)

Tabitha Barnes testified that Appellant made her lift her shirt, exposing her breasts, and then lifted her breast up to ensure that she did not have anything hidden under her breasts. (Tr. 1775-80) Carla Johnson testified that while searching her for drugs or weapons, Appellant grabbed or touched her breasts and put his hand down her pants, under her panties. (Tr. 3509) Adaira Gardner similarly testified that Appellant searched her person and put his hands up under her clothes and touched her breasts. (Tr. 3760-61, 3767) Sherry Ellis also testified that while Appellant was searching her, he put his hands under her shirt and touched her breasts and further put his hands down her pants and touched her vagina. (Tr. 3984-86)

Though there was considerable debate over the appropriateness of a male police officer searching a female subject, it was ultimately admitted that there was no policy expressly forbidding such searches. (Tr. 957, 979) Nor is there any duly enacted law of the State of Oklahoma prohibiting such. (Tr. 979) Because Appellant was a duly sworn police officer, acting within the scope of his employment to detain and search persons suspected of illegal activity, it cannot be

said that the evidence in this case proves beyond a reasonable doubt that his searches of these women was done in a "lewd and lascivious manner," however the alleged victims may have subjectively felt about the searches. Indeed, particularly with reference to Sherry Ellis, these alleged offenses were supposed to have been committed by a short, black man, not someone meeting Appellant's physical description. No jury could reasonably find Appellant guilty beyond a reasonable doubt under these facts.

Conclusion

This Court has a duty to set aside a verdict when it is contrary to the law and the evidence. *Moulton v. State*, 1948 OK CR 130, 201 P.2d 268, 272; *see also Avants v. State*, 1983 OK CR 35, ¶ 7, 660 P.2d 1051, 1052; *Frazier v. State*, 1981 OK CR 13, ¶¶ 5-9, 624 P.2d 84, 85. Appellant is aware that it is not for this Court to substitute its judgement for that of the jury's. However, the Court is constitutionally commanded to determine not simply whether the jury was properly instructed or whether there was "any evidence" to support the convictions, but whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt. *Jackson*, 443 U.S. at 318-20, 99 S.Ct. 2788-90. Because the State failed to prove, *beyond a reasonable doubt*, essential elements of the charged crimes, his convictions must be reversed with instructions to dismiss.

PROPOSITION II

PLAIN, FUNDAMENTAL ERROR OCCURRED WHEN THE STATE OF OKLAHOMA WAS ALLOWED TO PROSECUTE THIRTY SIX ALLEGED CRIMES AGAINST THIRTEEN SEPARATE WOMEN, WHO SUPPOSEDLY DID NOT KNOW EACH OTHER, IN ONE TRIAL, ENCOURAGING THE JURY TO CONVICT APPELLANT BASED ON AN AGGREGATE OF THE EVIDENCE PRESENTED, RATHER THAN ADEQUATE PROOF OF EACH INDIVIDUAL CHARGE.

Since statehood, Oklahoma law has provided that an "indictment or information must charge but one offense." OKLA. STAT. tit. 22, 404 (2011). Section 404 does set out some narrow exceptions, not applicable here, but in any case, only

one conviction is anticipated among possible alternative charges. *Id.* In 1968, the Oklahoma Legislature enacted legislation specifically authorizing multiple defendants and counts to be charged in one Information. *See* OKLA. STAT. tit. 22, 436 (2011). Though Section 436 omits language specifically authorizing the charging of multiple counts against a single defendant, as opposed to one or more counts involving multiple defendants, this Court has interpreted Section 436 as authorizing joinder of multiple counts against a single defendant. *See Glass v. State*, 1985 OK CR 65, ¶¶ 4-6, 701 P.2d 765, 767-68 (citing *Dodson v. State*, 1977 OK CR 140, ¶¶ 3-12, 562 P.2d 916, 923 (Brett, J., Specially Concurring); *Hill v. State*, 1979 OK CR 2, ¶ 1, 589 P.2d 1073, 1078-79 (Bussey, J., Specially Concurring)).

Under *Glass*, joinder of multiple counts is permitted "if the separate offenses arise out of one criminal act or transaction, or are part of a series of criminal acts or transactions." *Glass, supra* at ¶ 8, 701 P.2d at 768. In order to meet this standard, the several charged offenses must "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." *Id.* at ¶ 9, 701 P.2d at 768. Importantly, "[m]ere similarity of offenses does not provide an adequate basis for joinder under our statute." *Id.* The purpose of permitting joinder of related offenses is a simple matter of judicial economy, *Smith v. State*, 2007 OK CR 16, ¶ 28, 157 P.3d 1155, 1166. Its purpose is *not* to allow the State to artificially strengthen its case against a defendant by joining multiple separate, if similar, offenses into one trial, and must yield to the right of the defendant to a fundamentally fair trial. OKLA. STAT. tit. 22, 439 (2011) ("If it appears that a defendant or the state is prejudiced by joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide whatever other relief justice requires.").

A person reading for the first time the words "occurring over a relatively short period of time, in approximately the same location," would never dream that they accurately describe the allegations in the present case. The dates of the alleged offenses range from December 2013 to late June 2014. Nevertheless, this Court has previously upheld joinder of offenses spanning a period of over eight months. *Gilson v. State*, 2000 OK CR 14, ¶ 48, 8 P.3d 883, 904–05.[4] While two of the locations were the same, behind an abandoned school and the so-called "Dead Man's curve," most of the offenses occurred at various locations all over the northeastern part of Oklahoma City. Surprisingly, however, this Court has upheld joinder of offenses occurring in separate towns so long as they are within the same county. *Middaugh v. State*, 1988 OK CR 295, ¶ 10, 767 P.2d 432, 435.[5]

Last is the question of whether the evidence overlaps so as to indicate a "common scheme or plan." In a related context, the Court defined a common scheme or plan as a "relationship or connection between crimes ... such that it is possible to infer the existence, in the mind of the accused, of a plan or scheme with each crime comprising a part thereof." *Hall v. State*, 1980 OK CR 64, ¶ 5, 615 P.2d 1020, 1022. Additionally, the word *common* implies:

> that although there may be various crimes, all said crimes must come under one plan or scheme whereby the facts of one crime tend to establish the other *such as where the commission of one crime depends upon or facilitates the commission of the other crime, or where each crime is merely a part of a*

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[4] While the period of time, in *Gilson*, during which the offenses occurred spanned eight months, the Court treated the separate instances of child abuse as a continuing transaction, involving the same victims in the same house. 2000 OK CR 14 at ¶ 48, 8 P.3d at 904-05. That is not the case in the instant case, where the alleged conduct occurred over a period of six months, in various locales, involving thirteen separate, unrelated victims.

[5] Although the charged offenses in *Middaugh* occurred within separate towns within the same county, and the Court did not elaborate as to why "the facts of this case" convinced it that separate towns were treated as "approximately the same location," the period of time during which the illegal conduct occurred was only six weeks. 1988 OK CR 295 at ¶ 10, 767 P.2d at 435. Without further guidance from the Court, it would seem that the only time separate crimes might fail to meet the same approximate location standard would be ones which occur in separate counties, in which case it is highly unlikely one court would properly have venue and jurisdiction over both crimes.

greater overall plan.

Atnip v. State, 1977 OK CR 187, ¶ 11, 564 P.2d 660, 663 (emphasis added). Clearly the common scheme or plan requirement is satisfied only when it is proven that either: (1) a defendant intended, prior to committing the first crime, to commit a series of crimes, or (2) the defendant developed the intent to commit additional crimes as a result of the commission of the first crime.[6] There is no evidence in this case that the defendant planned to commit these crimes. Rather, the evidence, such as it was, clearly indicates crimes of opportunity, not a common scheme or plan. While there is some degree of similarity in the offenses, similarity is not enough. *Glass, supra* at ¶ 9, 701 P.2d at 768.

The Court has also found joinder appropriate where the various crimes involve the same witnesses. *See Brewer v. City of Tulsa*, 1991 OK CR 59, 811 P.2d 604, 607. The only common witnesses in this case were the law enforcement witnesses, which will almost always be the case. The fact witnesses were specific to the offenses pertaining to each alleged victim. Indeed, this case is a microcosm of when offenses should and should not be joined. Clearly, under the facts of this case, all offenses involving the same victim were sufficiently close in terms of time, location, and intent to justify joinder. The offenses involving different victims at significantly different times and significantly different locations should not have been joined into one trial.

Even where Section 436 permits joinder, Section 439 requires severance whenever "a defendant or the state is prejudiced by joinder." Clearly, the

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[6] This Court has applied these definitions to joinder issues both explicitly, *see Brown v. State*, Case No. F-1999-607, slip op. at 5 (Okl.Cr. Oct. 19, 2000) (citing *Atnip, supra*), and implicitly, *see Dyke v. State*, 1986 OK CR 44, 716 P.2d 693, 697 ("Moreover, it is clear that the robberies were committed to facilitate the thieves' common plan to steal receipts from the Skyline Club."). Curiously, however, the Court has also rejected application of those definitions to joinder issues. *See Smith v. State*, 2007 OK CR 16, ¶¶ 27-29, 157 P.3d 1155, 1166.

[A copy of the *Brown* decision is attached to this brief as Appendix A, pursuant to Rule 3.5(C)(3), *Rules of the Court of Criminal Appeals*, Title 22, Chapter 18 (2011), as no other case would serve as well the purpose for which this case is being cited.]

Oklahoma Legislature intends that the judicial economy supporting joinder yield to the right of both parties to a fair trial. The prejudice in this case is manifest. Indeed, the preliminary hearing magistrate explicitly noted that the evidence was insufficient, even under the minimal standards of proof applicable in preliminary hearings, to support several of the charges. (II P.H. Tr. 149-50) The court nevertheless bound the defendant over on those counts because of the evidence of all the crimes as a whole. *Id.* While Appellant was acquitted of one of those counts, he was still convicted of several of them, including four offenses in which the victim described her attacker as a short, black man and indicated that the assault lasted for five to ten minutes, even though Automated Vehicle Locator data proves that Appellant's patrol car was in the area of the alleged assault for less than four minutes. (Tr. 2996-99, 3007, 3100; St. Exh. 289, 290)

The necessity of having all alleged victims viewed collectively by the jury was not lost on the prosecution. During closing argument, the State repeatedly reminded the jury that they should view the alleged victims, not as individuals, but in the aggregate and repeatedly told the jury to consider "all" the victims when evaluating the evidence. For example, "And you heard from the witness stand *all 13 victims* tell you: . . . ." (Tr. 4151); "And Jannie Ligons isn't in the same area of town where he stopped *all of these other victims*." (Tr. 4163); "And finally Jannie Ligons does *just as all the other victims . . . .*" *(Id.);* "I submit to you that for *all of these victims* . . . Officer Holtzclaw has committed sexual battery *against all of them* . . . . " (Tr. 4166); "*All of those victims* testified that . . . ." (Tr. 4174); "How would *all of the victims* who were . . . ." (Tr. 4183); "And that's a reason to give *all these victims* credibility. . . . Why would *all of the victims* have just randomly guessed, . . . ?" (Tr. 4184); "But at the end of the day to believe that the defendant is innocent of all these charges *you have to believe the 13 women . . . .*" (Tr. 4186) Finally, the prosecutor packaged these alleged victims and charges into one item

for the jury to consider when he stated: "But I submit to you when you look at the entirety of the evidence, *and all 13 victims taken together* and Officer Holtzclaw's actions, it's impossible to deny the truth." (Tr. 4188) The message was clear: where's there smoke, there's fire.

While there is substantial evidence corroborating Appellant's contacts with the alleged victims – he was, after all, a police officer assigned to patrol the areas in which these alleged victims lived, worked, and/or recreated – with one exception, there is no evidence of criminal activity apart from the bare testimony of the alleged victims themselves. Only the allegations of Adaira Gardner are substantiated by any physical evidence, and even that is something of an overstatement. *See* Proposition V, *infra*. Most of the alleged victims have had multiple run-ins with the law, including crimes involving deceit or dishonesty. It is astronomically unlikely the State would have been able to obtain the eighteen convictions they did had the charges not been joined together in such a way to suggest that "where there is smoke, there is fire" and to bootstrap poorly supported accusations to charges involving more credible witnesses and, in one case, some degree of independent corroboration.

Because trial counsel failed to object to the joinder in this case, or to request a severance, he has forfeited for Appellant review of all but plain or fundamental error. *Collins v. State*, 2009 OK CR 32, ¶ 12, 223 P.3d 1014, 1017. Plain error review requires the defendant to prove: (1) an actual error was committed; (2) the error was plain or obvious; and (3) that the error affected his substantial rights, meaning that the outcome of trial was affected by the error. *See Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. Fundamental error, on the other hand, is error that goes to the foundation of the case or takes from a defendant a right essential to his defense. *See Simpson v. State*, 1994 OK CR 40, ¶ 12, 876 P.2d 690, 695 (citing, *inter alia*, *Rea v. State*, 1909 OK CR 161, 105 P. 386 (Syllabus 2(c))). Appellant submits

that he qualifies for relief under either standard.

The Supreme Court long ago recognized the dangers inherent in joinder: "[T]he multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense, or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury or otherwise." *McElroy v. United States*, 164 U.S. 76, 80, 17 S. Ct. 31, 32, 41 L. Ed. 355 (1896). Indeed, a criminal defendant has a right to be convicted, if at all, by evidence showing him guilty of the charged offense alone, *Boyd v. United States*, 142 U.S. 450, 458, 12 S.Ct. 292, 295, 35 L.Ed. 1077 (1892); *Brockman* v. State, 1936 OK CR 114, 61 P.2d 273, 275, not on evidence of other, unrelated crimes. When improper joinder has a substantial and injurious effect or influence in determining the jury's verdict, it cannot be said that the defendant has had a fundamentally fair trial and his due process rights are thereby violated. *See, e.g., Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004).

Under the circumstances of this case, it was impossible for Appellant to have a fair trial when being forced to defend against thirty-six counts by thirteen alleged victims over the course of seven months. His conviction must therefore be reversed and remanded for a new trial.

PROPOSITION III

THE CIRCUS ATMOSPHERE THAT PERVADED THROUGHOUT THIS TRIAL DEPRIVED APPELLANT OF A FUNDAMENTALLY FAIR TRIAL CONSISTENT WITH DUE PROCESS OF LAW.

The Sixth Amendment to the United States Constitution, as well as Article II, § 7 of the Oklahoma Constitution, guarantees the right to an impartial jury, which includes the right to a trial by a jury free from outside influences. *Sheppard v. Maxwell*, 384 U.S. 333, 342-63, 86 S.Ct. 1507, 1512-23, 16 L.Ed.2d 600 (1966). The constitutional standard of fairness requires that a defendant have a "panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642,

6 L.Ed.2d 751 (1961). Due process requires a change of venue where a trial judge may be unable to seat a fair and impartial jury due to prejudicial pretrial publicity or an inflamed community atmosphere. *Rideau v. Louisiana*, 373 U.S. 723, 726, 83 S.Ct. 1417, 1419, 10 L.Ed.2d 663 (1961).

While the pre-trial publicity in Appellant's case was not particularly substantial, the publicity turned up dramatically during the trial as a result of incidents occurring around the United States and the growing "Black Lives Matter" movement. Perhaps recognizing this, there was specific questioning of the prospective jurors directed to incidents in Ferguson, Missouri, and Baltimore, Maryland, as well as locally in Oklahoma City involving a police resources officer at a school. (Tr. 125-29, 136-38, 286-90) The first sign of trouble occurred early on the second day of trial, when an unidentified white female with purple glasses and a pink hoodie was approaching jurors from another judge's courtroom and exhorting them to make sure they "convict that ... police officer." (Tr. 269-72) Then, on the third day of trial, a man named Royal Long[7] was caught trying to take photographs in the courtroom. (Tr. 520, 580-81)

At the start of the fifth day of trial, defense counsel Scott Adams brought to the trial court's attention that there had been a story on the news the previous night making a big deal about the racial makeup of the jury not having enough minority representation. (Tr. 1004-05) He further noted that there have been news interviews going on just outside the courtroom where the jurors exit, and that this behavior has been escalating. (Tr. 1004-14) The next day, Mr. Adams informed the trial court that "it's getting really crazy out there in the hallway" when they take breaks. (Tr. 1530) The media were doing interviews again, and it was agreed to cordon off an area for the media to get them away from the stairwell and elevators

[7] It is worth mentioning that alleged victim Jannie Ligons's "fiancé," who testified at trial right after the *in camera* hearing with Royal Long, was named Richard Long.

that the jurors needed to use. (Tr. 1530-36) Mr. Adams further brought to the court's attention that there had been an article on the case on local news station KFOR's Facebook page and that in the comments section of the article, a person by the name of Jesse Tedford claimed to know one of the jurors and that this person had an opinion that the defendant was guilty and would likely vote guilty. (Tr. 1543-47) The jurors were questioned individually and *in camera* about this, but none would admit, at least, to knowing anyone by the name of Jesse or Clarence Tedford. (Tr. 1604-14)

Alleged victim Tabitha Barnes began her testimony near the end of the seventh day of trial. The next day she showed up to court high on Benzodiazepines, PCP, and Seroquel. (Tr. 1812, 1857; Ct. Exh. 11) Her testimony was delayed until later in the day, and given the Hobson's choice of having her testify that day, while still potentially high, or detaining her over the weekend and bringing her back on Monday, at which point it would have been anyone's guess what shape she would have been in, defense counsel reluctantly opted to let her finish her testimony that day. (Tr. 1862-63)

Later in the trial, Mr. Adams informed the court that he could hear people outside the courthouse chanting, "Give him life, give him life," as well as "a number of other things," and that it had been going on all morning. The Court admonished the jury to disregard the chanting, (Tr. 2305-06), which was likely as effective as throwing a skunk into the jury box and instructing them not to smell it. Shortly thereafter, another record was made about the protestors, as there was a man in the hallway or foyer yelling at the jurors "racist cop" and "racist jury." (Tr. 2315-16) Defense counsel's belated request to sequester the jury was denied. (Tr. 2320-21)

In fairness, these matters were not the fault of the State, and it is understandable to some extent why the trial court did not want to take the extreme measures that were obviously necessary, such as moving the trial to another

courtroom higher in the courthouse, if not another courthouse entirely, or to sequester the jury. But in the end, it was Appellant's rights to a fair trial that were sacrificed. At least one court has recognized that circumstances such as these render a fair trial impossible. *See, e.g., State, ex rel. Coburn v. Bennett*, 655 P.2d 502, 507 (1982) (angry mob marching on the courthouse together with public meetings and hostile press). Individually, the issues that occurred throughout the trial may be considered either harmless or properly cured by the trial court's intervention, but when they are considered in the aggregate, it is abundantly clear that it was not possible for Appellant or anyone to get a fair trial under the circumstances attending this trial. Because there is a strong likelihood that these vents had a substantial and injurious effect or influence on the jury's verdicts, Appellant's due process rights and right to a fundamentally fair trial were violated. *See, e.g., Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004).

PROPOSITION IV

APPELLANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL FELL PREY TO OVERZEALOUS PROSECUTORS WHO SHIFTED THE BURDEN OF PROOF TO THE DEFENDANT, ARGUED FACTS NOT IN EVIDENCE, AND IMPROPERLY DISPARAGED OPPOSING COUNSEL, FLAGRANTLY MISREPRESENTING THE EVIDENCE AND PRIOR ARGUMENT.

While counsel to parties involved in a criminal trial are accorded wide latitude in presenting their cases, along with a liberal freedom of speech in closing arguments, *see, e.g., Darks v. State*, 1998 OK CR 15, ¶ 53, 954 P.2d 152, 166, that freedom and latitude is nevertheless subject to the constraints of professional conduct and the right to a fair trial for both parties. *See, e.g., Bechtel v. State*, 1987 OK CR 126, ¶ 12, 738 P.2d 559, 561 ("This Court will not tolerate improper conduct by any attorney and we strongly encourage admonishments from the bench to control any uncalled for behavior.").

A. The Prosecutor's Ethical Abuses Violated Appellant's Due Process Rights.

When a defendant is deprived of a fair trial because of the prosecutor's

misconduct, that defendant's due process rights are violated and reversal is warranted. *See United States v. Gabaldon*, 91 F.3d 91, 93 (10th Cir. 1996)(citing *Greer v. Miller*, 483 U.S. 756, 765, 107 S.Ct. 3102, 3108-09, 97 L.Ed.2d 618 (1987)). Here, the prosecutor's flagrant and pervasive misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986).

1. Shifting the Burden of Proof

During the State's first closing argument, the Assistant District Attorney Lori McConnell initially stated the relevant burden of proof correctly, but then improperly shifted that burden to the defendant by arguing the following:

> But what I do want you to know whenever you go back to that deliberation room is that you have heard absolutely no evidence to justify any of Holtzclaw's action with any of these victims, why he didn't do any of the things that I've talked to you about just now.

(Tr. 4183) Assistant District Attorney Gayland Gieger picked up on this theme in the State's final summation: "There is not one witness – not one witness in six weeks that said he did not commit the sex acts he is accused of. Not one." (Tr. 4292) Not only did this argument shift the burden of proof to the defendant, as the trial court itself seemed to recognize, it was also an improper comment on Appellant's privilege against self-incrimination. Defense counsel's objection was arguably sustained at the bench, but the jury would have no reason to know that, as they were not admonished to disregard the argument. (*Id.*)

It is the State's burden to prove beyond a reasonable doubt every element of the crime charged and the defendant can sit on his hands and do absolutely nothing, if that is his desire. *See e.g. Mitchell v. State*, 1983 OK CR 25, ¶ 11, 659 P.2d 366, 369. A prosecutor's argument asking the jury to draw a negative inference from a defendant's alleged failure to present evidence is clearly improper and requires reversal of Appellant's convictions. *See Sandstrom v. Montana*, 442 U.S. 510, 524,

99 S.Ct. 2450, 2459, 61 L.Ed.2d 39 (1979); *Pettigrew v. State*, 1976 OK CR 228, ¶ 30, 554 P.2d 1186, 1194; *see also Carter v. Kentucky*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981) (defendant entitled to no adverse inference instruction upon request); *Mullaney v. Wilbur*, 421 U.S. 684, 703-04, 95 S.Ct. 1881, 1892, 44 L.Ed.2d 508 (1975); *In Re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970); *Griffin v. California*, 380 U.S. 609, 612, 85 S.Ct. 1229, 1232, 14 L.Ed.2d 106 (1965).

2. Arguing Facts Not In Evidence

While counsel for parties have a liberal freedom of speech in closing argument, that freedom is confined to the evidence actually presented at trial and the logical inferences therefrom. *See Torres v. State*, 1998 OK CR 40, ¶ 48, 962 P.2d 3, 18; *Coulter v. State*, 1987 OK CR 37, ¶ 31, 734 P.2d 295, 302; *Hager v. State*, 1980 OK CR 51, ¶ 119, 612 P.2d 1369, 1373-74. In the State's final summation, Mr. Gieger went beyond the evidence produced at trial when he argued as follows:

> I would suggest to you that the most important thing about Adaira Gardner is the fact that DNA from the walls of her vagina was transferred in vaginal fluids onto the outside and the inside – not of his pockets, not of his cuff, not where he sits, but of the exact location she says his penis came in contact.

(Tr. 4307) As noted in Proposition V, *infra*, conclusion that Ms. Gardner's DNA came from the walls of her vagina is not supported by the available evidence or the current state of science. More fundamentally, however, because no one ever tested the pockets, cuffs, or seat of Appellant's uniform pants, it absolutely cannot be said that there was no DNA present at those locations, as Mr. Gieger argued.

Along these lines, Mr. Gieger also repeatedly and flagrantly misrepresented the evidence presented. First, Mr. Gieger made the following arguments about Appellant's statements in the videotaped interrogation by Detectives Davis and Gregory:

> Here's the kicker: He says in that interview, "I cannot remember if I got an erection whenever I was coming in

> contact with Jannie Ligons." Those are his Words. They're on the video. I cannot remember if I got an erection when I came into contact with 50-something-year-old Jannie Ligons.
>
> * * *
>
> And the fact that an Oklahoma City police officer would ever say I can't remember if I got an erection whenever I'm running somebody on a DUI stop should be shocking and terrifying to us.

(Tr. 4306) But those words did not come from Officer Holtzclaw or, as far as can be told, anywhere in the interview. At one point, Detective Davis asked him if he ever got a "hard on" while talking to Ms. Ligons, to which he replied, "I don't, I don't think I did." When she pressed him on this issue, he twice stated that he was "pretty positive" that he did not get an erection.

With reference to Appellant's sexual activities with his girlfriend, Mr. Gieger made the following inflammatory and unsubstantiated remark:

> And not to be too sarcastic, but maybe a little sarcastic; he had six days of medicated, unconscious intercourse with Kerri Hunt because it happens regularly before they read their Bible verses which would make her preacher daddy really proud I'm sure. That was catty, but it's the evidence.

(Tr. 4303) That was not at all what Kerri Hunt testified to, but a deliberate, perverse, and sick misstatement of her testimony that on *one* occasion, she may not have been conscious of Appellant's romantic overtures on her when he returned home from work. (Tr. 4133) She specifically said that she "would wake up if it were to come to the point of having sex." (*Id.*) While a prosecutor is entitled he strike hard blows, he may not strike foul ones. *Donnelly v. DeChristoforo*, 416 U.S. 637, 648-49, 94 S.Ct. 1868, 1874, 40 L.Ed.2d 431 (1974); *Smith v. State*, 1987 OK CR 235, ¶ 7, 744 P.2d 1282, 1285.

3. Disparaging Defense Counsel

Casting aspersions on defense counsel is forbidden. *Coulter v. State*, 1987 OK

CR 37, ¶ 31, 734 P.2d 295, 302; *McCarty v. State*, 1988 OK CR 271, ¶ 14, 765 P.2d 1215, 1220-21. This Court has held it will not tolerate such improper conduct and has encouraged the trial bench to control this kind of behavior. *Bechtel v. State*, 1987 OK CR 126, ¶ 12, 738 P.2d 559, 561. *See also Jones v. State*, 1987 OK CR 103, ¶ 21, 738 P.2d 525, 530 (arguing that "the 'job' of the appellant's attorneys was to 'get their client Richard Jones off.'"); *Brewer v. State*, 1982 OK CR 128, ¶¶ 6-7, 650 P.2d 54, 58 ("Object, object, when it gets tight, he starts objecting.").

Disparaging defense counsel, and indeed the role of a defense attorney, as well as prejudicially misrepresenting defense counsel's closing argument was a thread woven throughout Mr. Gieger's closing argument:

> Mr. Adams is a fine attorney. He's a fine attorney. And he has spent two-and-a-half hours getting you to focus on things other than his client.

(Tr. 4279) This argument is indistinguishable from the "air defense" and "smoke screen" arguments repeatedly condemned by this Court in the past. *Brown v. State*, 1989 OK CR 33, ¶ 12, 777 P.2d 1355, 1358; *Bechtel, supra* at ¶ 1, 738 P.2d at 561 (Parks, J., Specially Concurring); *Coulter, supra* at ¶ 31, 734 P.2d at 302. But Mr. Gieger did not stop there:

> And Mr. Adams is a fine attorney and so he throws things out. But we're governed by rules.

(Tr. 4280)

> That's good lawyering. But that's not common sense. That's not the real world. And that is not the life of Adaira Gardner and Jannie Ligons and Kala Lyles and Shardayreon Hill.

(Tr. 4282)

> And then Mr. Adams does what defense lawyers have to do **when their client is guilty.**

(Tr. 4289) (Emphasis added.)

> Mr. Adams is a fine criminal defense attorney. He is. But **when your client's guilty** you have to do things that take

the attention off your client.

(Tr. 4295) (Emphasis added.)

Responding to Shardayreon Hill's testimony that Appellant was staring at her as she was naked and having PCP sprayed off of her body by hospital personnel, Mr. Adams pointed out that none of the hospital staff witnessed this, that there was a curtain and not enough room for appellant to have been watching her, and that even if he did see her naked at that point, it was because he was responsible for her, as she was in his custody, and she put herself in that position. (Tr. 4212) It was in that contact that he told jurors that he did not care if Officer Holtzclaw happened to see Ms. Hill naked and neither should they. (*Id.*)

But that is not what Mr. Gieger turned it into. Mr. Gieger turned it into Mr. Adams not caring that Ms. Hill was allegedly raped, because of what she did, and that Mr. Adams did not care about any of the alleged victims, "because they're a bunch of drug-addicted, lying, convicted felons ...." (Tr. 4282-83) "Because of lifestyles they lead, I don't care about them and neither should you." (Tr. 4283) By the end of his argument, Mr. Gieger had turned Mr. Adams's argument into a belief by Mr. Holtzclaw that

> there is I can do this to you because I can and there's a prevailing attitude that because what you have done and the choices you have made I don't care about you and neither should anybody else. That's what his lawyer said. And he is being an advocate for his client.

(Tr. 4304) Not only this argument malign defense counsel and prejudicially misrepresent his argument – including his argument that the complaining witnesses' felony convictions, including crimes involving deceit and dishonesty, must be taken into account when assessing their credibility as witnesses – it also improperly invoked sympathy for the victims. *See, e.g., Tobler v. State*, 1984 OK CR 90, ¶ 16, 688 P.2d 350, 354.

B. Conclusion.

None of this misconduct was objected to at trial. It is an affirmative duty of the trial court, however, "to maintain decorum in keeping with the nature of the proceeding; *the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct.*" *Bechtel, supra* at ¶ 12, 738 P.2d at 561 (emphasis added); *see also Brown v. State*, 1988 OK CR 59, ¶ 16, 753 P.2d 908, 912 ("Trial judges have an affirmative obligation 'to ensure that final argument to the jury is kept within proper, accepted bounds'") (quoting *ABA Standards for Criminal Justice*, § 3-5.8(e) (1980)). This Court has not hesitated to review and redress claims of prosecutorial misconduct where, as here, the prejudice to the accused's right to a fair trial is manifest. *See Tobler, supra* at ¶ 13, 688 P.2d 350, 353 ("We will review these assignments of error because there is no right which is more essential to an accused's defense than the right to a fair trial free from prejudice"); *see also Coulter, supra* at ¶ 32, 734 P.2d 295, 302 ("[T]his Court has consistently held that [failure to object to prejudicial remarks] does not prevent correction of the error when its effect is prejudicial to the fundamental fairness of the proceedings"); *Hager v. State*, 1980 OK CR 51, ¶ 20, 612 P.2d at 1373 ("[T]here were few objections, but many improper remarks").

When a defendant is deprived of a fair trial because of the prosecutor's misconduct, that defendant's due process rights are violated and reversal is warranted. *See United States v. Gabaldon*, 91 F.3d 91, 93 (10th Cir. 1996)(citing *Greer v. Miller*, 483 U.S. 756, 765, 107 S.Ct. 3102, 3108-09, 97 L.Ed.2d 618 (1987)). Under the circumstances of this case, it cannot be said that the evidence was so strong, that verdicts of guilt were so inevitable, as to render the prosecutor's flagrant misconduct "harmless beyond a reasonable doubt." *See, e.g., Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Accordingly, Mr. Holtzclaw's convictions and sentences must be vacated.

PROPOSITION V

APPELLANT WAS DEPRIVED OF THE REASONABLY EFFECTIVE ASSISTANCE OF COUNSEL, GUARANTEED HIM BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE HIS TRIAL ATTORNEY FAILED TO PRESENT AVAILABLE EXPERT TESTIMONY PERTAINING TO THE DNA EVIDENCE, FAILED TO OBJECT TO JOINDER OR REQUEST A SEVERANCE, AND FAILED TO OBJECT TO NUMEROUS INSTANCES OF PREJUDICIAL PROSECUTORIAL ARGUMENT.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to make out a claim of ineffective assistance of counsel, an appellant must show (1) that defense counsel's performance was deficient and (2) that he was prejudiced by the deficient performance. *Id.* at 687. Counsel's performance in this case fellow below this standard and requires that Appellant's convictions be reversed.

A. Deficient Performance

This Court has held that to establish deficient performance an appellant must show actions indicating that counsel breached some duty owed to him, or that counsel's judgment was unreasonable under the circumstances. *Hooper v. State*, 1997 OK CR 64, ¶ 58, 947 P.2d 1090, 1112; *Mitchell v. State*, 1997 OK CR 9, ¶ 6, 934 P.2d 346, 349-350; *Walker v. State*, 1997 OK CR 3, ¶ 25, 933 P.2d 327, 336. Here, counsel failed to present available evidence challenging the state's proof, failed to object to joinder or request a severance, failed to object to improper opinions and characterizations of the evidence by Detectives Davis and Gregory, and failed to object to numerous instances of prosecutorial misconduct.

1. Failure to present available evidence

At the close of the tenth day of trial, Assistant District Attorney Gayland Gieger informed the court on the record that he had previously disclosed to defense counsel that a witness to the stop of Tabitha Barnes indicated that Ms. Barnes was put in handcuffs before the witness was allowed to go back inside the house, which

Mr. Gieger admitted was inconsistent with Ms. Barnes's testimony. (Tr. 2503) This evidence was important not only to impeach Ms. Barnes's credibility, but it also could have repudiated the notion that she was made to expose herself, if she was in handcuffs the whole time. Counsel acknowledged his receipt of this information, (Tr. 2503-04), but inexplicably failed to bring it up during cross-examination of Ms. Barnes or to call the witness himself.

Much more disconcerting, however, was defense counsel's total whiff on the DNA evidence in this case. It is not an overstatement to say that the finding of Adaira Gardner's DNA on the fly of Officer Holtzclaw's uniform pants was the lynchpin of the state's entire case against Appellant. It was the only independent evidence substantiating the claims of any of Appellant's accusers, many of whom have multiple felony convictions and convictions of crimes involving deceit or dishonesty and/or who were completely combative and evasive with defense counsel on cross-examination. While the State was only able to secure convictions on precisely half (curiously) of the counts against Appellant, there is a significant likelihood that they would not have been able to secure convictions on *any* of the counts, but for the DNA evidence.

That DNA evidence certainly seems damning, as it was presented to the defendant's jury. If in fact Ms. Gardner's DNA on Appellant's pants came from cells from her vaginal wall, as argued by the prosecution, (Tr. 4307), then clearly this would have been consistent with only intimate sexual activity. The problem is that the available evidence, and the current state of the science, do not permit such a determination in this case. Indeed, to the extent that any conclusions can be drawn, they are far more consistent with passive transfer, than direct sexual contact. In accordance with Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011), an Application for Evidentiary Hearing on Sixth Amendment Claims (hereinafter, *Application)* supported by matters outside

the trial record is being filed concurrently with Appellant's brief in chief. In this Application, Appellant contends that trial counsel was ineffective in failing to present the testimony of his own DNA expert, challenging the conclusions and representations of the Oklahoma City police chemist Elaine Taylor. This extra-record claim should be considered in conjunction with the remainder of Appellant's claims in order to determine whether counsel's representation, as a whole, fell below minimal constitutional standards of effective representation.

On cross-examination, defense counsel was able to get Ms. Taylor to admit that she cannot say how Ms. Gardner's DNA ended up on Appellant's uniform pants and that she could not "disagree with" the possibility that it could have been a "secondary transfer." (Tr. 4082-83) In his closing argument, he dedicated all of one paragraph to the DNA evidence in this case:

> Despite being told she was investigating an oral sodomy case, the lab never tested for saliva. The DNA lab only tested the fly of Daniel's pants. The DNA lab never tested for semen. The DNA lab only tested for skin cells. And the DNA lab admitted that the skin cells could've been a direct result of secondary transfer, as I suggested from the beginning of this case.

(Tr. 4265) By way of contrast, the prosecution elicited from Ms. Taylor an opinion that the likelihood of transferring epithelial cells is higher if the cells are contained in a fluid that could be absorbed into fabric. (Tr. 4067) The prosecution further elicited from her an opinion that the fact that Officer Holtzclaw was, supposedly, excluded from all four DNA samples taken contributed to her opinion that "it is much more likely for it to be transferred if the epithelial cells are contained in a liquid such as vaginal fluid." (Tr. 4073-74) Based on this, the prosecutor argued in final summation that "DNA from the walls of [Ms. Gardner's] vagina was transferred in vaginal fluids onto the outside and the inside" of the fly of Appellant's uniform pants. (Tr. 4307)

Had defense counsel presented the testimony of his own expert, he could

have refuted Ms. Taylor's conclusions and characterizations of the evidence. First, contrary to her testimony in court, Officer Holtzclaw is *not excluded* from any of the four DNA samples obtained from the fly of his uniform pants. *See Affidavit of Michael J. Spence, Ph.D.*, at p. 3-6 (¶¶ 8, 10-12), attached as Exhibit "A" to accompanying Application. Significantly, Ms. Taylor's trial testimony that Appellant was excluded as a contributor to samples 17Q1 and 17Q2 failed to account for allelic dropout and, indeed, contradicted her own report, finding the comparison inconclusive. *Id.* at 3-4 (¶ 8). Similarly, contrary to her trial testimony that there was no male DNA found in samples 17Q3 and 17Q4, the genetic material contained within the samples *did* contain male DNA, though it fell "below threshold." *Id.* at 6 (¶¶ 12-13)

Perhaps more importantly, though Ms. Taylor indicated in her trial testimony that quantification of the DNA material was done, she was never asked to produce the actual quantities. As it turns out, "only modest quantities of DNA from Ms. Gardner were observed on the fly swabs." *Id.* at 6 (¶ 14) Indeed, a DNA swab of the door handle of Officer Holtzclaw's patrol car yielded a DNA quantity equal to that observed in Item 17Q1, and four or more times that observed in Items 17Q2, 17Q3, and 17Q4. *Id.* Given the extremely small amounts of DNA material observed, together with the extreme sensitivity of current DNA detection technology, the evidence tends far more to support the conclusion that the DNA arrived on Officer Holtzclaw's pants by way of secondary transfer, rather than direct sexual contact, as argued by the prosecution. *Id.* at 3, 7-8 (¶¶ 7, 16-17)

Had defense counsel called his own expert to the stand, he could have expanded on the scientific knowledge supporting the reality of DNA transfer events, rather than the vague "can't disagree with" the possibility of secondary transfer he got from Ms. Taylor. *Id.* at 18-19 (¶ 18) The expert could have further explained to the jury why it was important that the uniform pants were mishandled,

id. at 7 (¶ 15), or why it was important that Ms. Taylor did not do any Alternate Light Source testing on the pants for vaginal secretions, *id.* at 4 (¶ 9), or even to test other areas of the pants as a control to the findings on the fly, *id.* at 7 (¶ 15). Additionally, a defense expert could have explained to the jury the significance of 23 unaccounted alleles observed on Item 17Q1, which could have "created an enormous counter-argument to the prosecution's misguided assessments that secondary DNA transfer events were unlikely – coupled with the misguided conclusion that Ms. Gardner's contribution to the DNA mixture ***must*** have originated from vaginal secretions." *Id.* *Id.* at 5 (¶ 10). Officer Holtzclaw's jury "would have benefitted from hearing these issues addressed by a credible DNA expert, or at least through vigorous cross examination of Ms. Taylor." *Id.*

This Court has been critical of a trial counsel's failure to use available evidence beneficial to the defendant. *Galloway v. State*, 1985 OK CR 42, 698 P.2d 940, 941-42. Even before *Strickland*, the Court indicated it was counsel's duty to investigate and use relevant evidence helpful to the defendant. *Smith v. State*, 1982 OK CR 143, ¶ 19, 650 P.2d 904, 906-07 . One of the most basic duties imposed on trial counsel is to investigate the case. *Id.* at 2066. The American Bar Association Standards for Criminal Justice, Defense Function 4-4.1, maintain that "[i]t is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." *See Jennings v. State*, 1987 OK CR 219, 744 P.2d 212, 214. Trial counsel's failure to fully investigate this case fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 687-88, 104 S.Ct. at 2064.

2. Failure to Object to Joinder

In Proposition II, *supra*, Appellant complained that the allegations of thirteen different women were improperly joined into one trial against him. Trial counsel failed to either object to the joinder or request a severance. When a basis for objecting exists and counsel fails to make the objection, if the error goes to the heart of the case, that failure cannot be considered strategy. *See Aycox v. State*, 1985 OK CR 83, 702 P.2d 1057, 1058; *Collis v. State*, 1984 OK CR 80, ¶¶ 9-12, 685 P.2d 975, 977 (finding counsel's failure to preserve error was ineffective).

3. Failure to Object to Prosecutorial Misconduct

Appellant argued in Proposition IV, *supra*, that the prosecutors engaged in highly improper argument and misconduct. Most of these instances were not actually objected to in this case. While Appellant maintains that the prosecutor's arguments were egregious enough to deny him due process, he was equally prejudiced by his own advocate's inability to respond to the State's prejudicial tactics. If it is determined on appeal that any of these errors were waived in the absence of an objection, Appellant submits that the failure to object is indicative of ineffective assistance of counsel. Since a reasonable trial strategy is one that advances the client's interests, neglecting to object to prejudicial remarks which may serve as the basis for reversal or modification of sentence cannot be considered a viable trial strategy. *Gravley v. Mills*, 87 F.3d 779 (6th Cir. 1996); *People v. Rogers*, 526 N.E.2d 655 (Ill.App.Ct. 1988); *Fossick v. State*, 453 S.E.2d 899 (S.C. 1995).

B. Prejudice

The standard of prejudice under *Strickland* is whether there is a reasonable probability that, but for trial counsel's acts or omissions, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* The facts of this case demonstrate a reasonable probability

that the outcome of Appellant's trial would have been different, but for trial counsel's unprofessional errors or omissions. Most particularly, the DNA evidence on Officer Holtzclaw's uniform pants was the clear centerpiece of the State's case against him, even though the evidence only directly pertained to Count 32. By appearing to substantiate Adaira Gardner's claims, this gave credence to the allegations of other women, even though other evidence either failed to corroborate their claims or in fact contradicted it, including Sherry Ellis's belief that she was sexually assaulted by a short, black man. To be sure, the jury rejected exactly half of the charges against him, but had trial counsel presented his own DNA expert to counter that of the State's expert and to show where she was either mistaken or just flat wrong, and if counsel had interposed proper objections to the other errors occurring in the case, there is a reasonable probability that the jury would have rejected some or all of the eighteen charges for which they returned guilty verdicts.

PROPOSITION VI

UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE, THE 263 YEARS IN PRISON RESULTING FROM THE TRIAL COURT'S ORDERING ALL EIGHTEEN INDIVIDUAL SENTENCES TO BE SERVED CONSECUTIVELY AMOUNTS TO AN UNCONSTITUTIONALLY EXCESSIVE SENTENCE.

An excessive sentence is one which either exceeds the statutory maximum or which, under the facts and circumstances of a given case, is "so excessive as to shock the conscience of the Court." *See Watts v. State*, 2008 OK CR 27, ¶ 10, 194 P.3d 133, 137. The question of excessiveness of punishment must be determined by a study of all the facts and circumstances in each particular case. *Luna v. State*, 1992 OK CR 26, 829 P.2d 69, 74. One of the factors the Court considers in determining whether the sentence is excessive is to examine the sentences the co-defendants received. *See, e.g., Grace v. State*, 1971 OK CR 39, 480 P.2d 285, 288; *Jones v. State*, 1947 OK CR 39, 179 P.2d 484.

Officer Holtzclaw was a young man in his mid-twenties and had lived a

productive and law-abiding life up until he was arrested in this case. Indeed, he had dedicated his life to serving the people of Oklahoma City as a law enforcement officer. His life has been forever ruined by the allegations brought against him, and even assuming *arguendo* that the bare testimony of the alleged victims was sufficient to support his convictions, there is a real danger that many of the convictions were the result not of sufficient evidence in themselves but of the aggregation of the evidence against him, to the point that the jury quite literally split the allegations against him exactly in half. Moreover, the multiple convictions the State was able to obtain against Appellant based on single episodes with each alleged victim, while not amounting to a double jeopardy violation under this Court's jurisprudence, produces an unfair stacking of sentences against Appellant.

The Eighth Amendment prohibits not only barbaric punishment but also disproportionate punishments. *Solem v. Helm*, 463 U.S. 277, 292, 103 S.Ct. 3001, 3010, 77 L.Ed.2d 637 (1983). Too severe a punishment will do little toward advancing the goals of punishment. *See State v. Brennan*, 279 A.2d 900, 904 (N.J. Super. Ct. 1971). Further, inappropriate sentencing undermines the public's confidence in the fair administration of justice. *See State v. Marquez-Sosa*, 779 P.2d 815, 817-18 (Ariz. Ct. App. 1989). This Court may modify a sentence simply in the interest of justice, even where the modification is not based upon a particular irregularity or error but the sentence shocks the conscience of the Court. *See* OKLA.STAT. tit. 22, § 1066 (2011); *Livingston v. State*, 1990 OK CR 40, 795 P.2d 1055, 1058; *Morris v. State*, 1977 OK CR 267, 568 P.2d 1303, 1306; *McCarty v. State*, 1974 OK CR 158, 525 P.2d 1391, 1395. Therefore, Appellant respectfully requests this Court to exercise its authority and, in the interests of justice, modify the sentences by ordering them to be served concurrently.

PROPOSITION VII

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

Even if none of the previously discussed errors can, when viewed in isolation, necessitate reversal of Appellant's conviction, the combined effect of these errors deprived him of a fair trial and requires that his conviction be reversed. *See Skelly v. State*, 1994 OK CR 55, 880 P.2d 401, 407; *Peninger v. State*, 1991 OK CR 60, 811 P.2d 609, 613; *Gooden v. State*, 1980 OK CR 76, 617 P.2d 248, 249-250. Some of these errors were not properly preserved for appellate review; however, this Court has found that considerations of cumulative error override the absence of defense objections or even invited error. *Faubion v. State*, 1977 OK CR 302, ¶ 8, 569 P.2d 1022, 1024. Collectively considered, these errors were not harmless.

Between the unfair joinder of allegations by thirteen different women over a seven-month period, *see* Proposition II, *supra*, and the prosecutor's urging of the jury to convict Appellant based on an aggregate of the evidence presented by all the victims, (Tr. 4141, 4163, 4166, 4174, 4184, 4186, 4188), there is a substantial likelihood that some or all of the eighteen convictions against him were the result of being bootstrapped together. The circus atmosphere that pervaded this trial further substantially injured Appellant's right to a fair trial, *see* Proposition III, *supra*, along with highly prejudicial and inflammatory prosecutorial argument, *see* Proposition IV, *supra*, and trial counsel's own failure to challenge and rebut the scientifically baseless opinions and arguments by chemist Elaine Taylor and Assistant District Attorney Gayland Gieger, *see* Proposition V, *supra*. Together, these errors and incidents paint a clear picture that Appellant could not and did not receive the fundamentally fair trial to which he was entitled. Even if it can be said that the evidence produced against him was sufficient to support his

convictions, under the highly deferential review set out by *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), the evidence was not so strong as to be immune to the avalanche of prejudicial error that occurred in this case.

At the very least, all of the facts and circumstances of this case considered and in the interests of justice, Appellant's 263-year sentence should be modified. *See Suitor v. State*, 1981 OK CR 67, 629 P.2d 1266, 1268-1269; *see also Barnett v. State*, 1993 OK CR 26, 853 P.2d 226, 234.

CONCLUSION

Based on the preceding errors, discussions of facts, arguments and citations of legal authority, the record before this Court and any errors that this Court may note *sua sponte*, Officer Holtzclaw respectfully asks the Court to reverse the Judgment and Sentence imposed against him or order any other relief as justice requires.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the date of filing of the above and foregoing instrument, a true and correct copy of the same was delivered to the Clerk of this Court with instructions to deliver said copy to the Office of the Attorney General of the State of Oklahoma.

JAMES H. LOCKARD

APPENDIX

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SHERMAN NATHANIEL BROWN, Appellant,	)	**NOT FOR PUBLICATION**
v.	)	Case No. F-99-607
THE STATE OF OKLAHOMA, Appellee.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
OCT 19 2000
JAMES W. PATTERSON
CLERK

OPINION

JOHNSON, J.:

Sherman Nathaniel Brown, Appellant, was charged by Information in Okmulgee County District Court (Case No. CRF-98-51) with two counts of Murder in the First Degree, and two counts of Robbery with a Dangerous Weapon. The State filed a Bill of Particulars alleging two aggravating circumstances as to both murders: 1) the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution, and 2) the existence of a probability that defendant would commit criminal acts of violence, constituting a continuing threat to society. Appellant was represented by counsel, in a jury trial, with the Honorable John Maley, District Judge, presiding. The jury found Appellant guilty on all counts. Finding the "continuing threat" aggravating circumstance applicable to both murder counts, but rejecting the "avoid arrest" aggravating circumstance, the jury recommended punishment of life on the robbery charges and life without possibility of parole on the murder charges. The trial court sentenced

Appellant in accordance with the jury's recommendation. From these Judgments and Sentences Appellant has perfected this appeal.

Appellant worked with Ms. Tash at the EZ Mart convenience store in Preston, Oklahoma. State witnesses Ron Orsburn and Robert Miller were in the store at approximately 6:00 a.m. on February 21, 1998, near the end of Appellant's shift. They testified that Ms. Tash was also at the store that morning, and when they exited the store, she and Appellant were the only two in the store. Approximately thirty minutes after the men left, State witness Jim Vogt discovered the body of Ms. Tash in the ladies restroom. She had been shot several times in the head. It was later determined that $1,400 in cash and $2,200[1] in inventory was missing from the store.

On February 24, 1998, three days later, a second robbery occurred at Harvey's Phillips 66. The owner of the station, Mr. William Harvey, was shot several times in the head and was dead prior to the arrival of emergency personnel. Approximately $140.00 was taken from the station. State witness Lester Best testified that he drove through the parking lot at approximately 6:00 p.m. and saw Appellant follow Mr. Harvey into the station. Johnny Laruc, owner of an automotive repair shop near the station, testified that he saw a small-built black man, driving a dark-gray pickup, exit the station around the

[1] The missing inventory was explained by State's witnesses Eugene Varnes, Ben Mondragon, Lisa Fletcher and Angel Martin. All four witnesses had been in the EZ Mart during Mr. Brown's shift on the night of the 21st, and had been allowed to take merchandise from the store without paying. According to the witnesses, Mr. Brown was unhappy about his paycheck, therefore, was not charging for the merchandise.

time Mr. Harvey was shot. Other facts will be revealed as they become relevant to the specific proposition of error.

Appellant raises three propositions of error, only two of which we deem necessary to discuss as this case must be reversed and remanded for separate trials. In his second proposition of error, Appellant claims that the trial court's refusal to sever the charges deprived him of his Due Process rights. First, Appellant complains that the joinder of the Tash robbery/homicide and the Harvey robbery/homicide in a single trial violated 22 O.S.1991, §§ 404[2] and/or 436.[3]

Prior to trial, defense counsel filed a Motion for Severance. Counsel argued, in both the motion and the hearing on the motion, that joinder was improper because the offenses did not arise from the same series of acts or transactions. Appellant contends the trial court's reason for denying his Motion

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[2] § 404. Single offense to be charged - Different counts.

The indictment or information must charge but one offense, but where the same acts may constitute different offenses, or the proof may be uncertain as to which of two or more offenses the accused may be guilty of, the different offenses may be set forth in separate counts in the same indictment or information and the accused may be convicted of either offense, and the court or jury trying the cause may find all or either of the persons guilty of either of the offenses charged, and the same offense may be set forth in different forms or degrees under different counts; and where the offense may be committed by the use of different means, the means may be alleged in the alternative in the same count.

[3] Title 22 O.S.1991, § 435 provides:

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately, provided that all of the defendants charged together in the same indictment or information are alleged to have participated in all of the same acts or transactions charged.

for Severance was upon the belief that § 404 was repealed by the enactment of §§ 436-440[4].

Appellant's argument is two-fold. First, he argues that § 404 rather than § 436 is the controlling statutory authority in his case. Second, he argues that even if § 436 is the controlling authority, joinder was impermissible because the charges did not arise from the same series of acts or transactions.

In interpreting the phrase "series of acts or transaction," this Court explained as follows:

> We have never had occasion to interpret the phrase "series of criminal acts or transactions" in this context. In so construing the statute, we are obligated to employ the common and ordinary meaning of the statutory term. The American College Dictionary defines "series" as a "number of things, events, etc., arranged of occurring in spatial, temporal, or other succession; a sequence." Accordingly, joinder of offenses is proper where the counts so joined 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.

Glass v. State,1985 OK CR 65, ¶9, 701 P.2d 765, 768.

In applying *Glass* to the facts of this case, we find the trial court abused its discretion in denying Appellant's motion for severance of offenses. Assuming *arguendo* the joined offenses refer to the same type of offenses occurring over a relatively short period of time in approximately the same

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[4] *Allison v. State*, 1983 OK CR 169, 675 P.2d 142, 146 (holding §404 was repealed by implication by the enactment of §§ 436-440) and *State v. Lowe*, 1981 OK CR 26, 627 P.2d 442, 443 (denying re-examination of *Dodson v. State*, 1977 OK CR 140, 562 P.2d 916 [Brett, J., specially concurring] and holding § 404 was repealed by implication by §§ 436-440).

location, proof as to each offense do not overlap so as to evidence a common scheme or plan. In speaking of a common scheme or plan, this Court in *Atnip v. State*, 1977 OK CR 187, 564 P.2d 660, 663 said:

> A common scheme or plan contemplates some relationship or connection between the crimes in question. The word, "common" implies that although there may be various crimes, all said crimes must come under one plan or scheme whereby the facts of one crime tend to establish the other such as where the commission of one crime depends upon or facilitates the commission of the other crime, or where each crime is merely a part of a greater overall plan. In such event, the crimes become connected or related transactions, and proof of one becomes relevant in proving the other. (citations omitted.)

Here, there is nothing to indicate that the Tash robbery/homicide and the Harvey robbery/homicide were connected in any manner. In fact, the State argued throughout trial that Appellant's motive for the Tash robbery/homicide was a result of his anger over the repeated tardiness of his paychecks. There was no suggestion that the Tash robbery/homicide depended upon or facilitated the Harvey robbery/homicide. Accordingly, the judgments and sentences are **REVERSED** and this case is **REMANDED** for **SEPARATE TRIALS**.

In as much as resolution of Appellant's first proposition of error is necessary for the retrials, we address that claim. Appellant claims that his

rights under the Fourth Amendment and 22 O.S.Supp.1998, §§ 1223 and 1230[5] were violated by the admission of evidence obtained through the illegal search of his home. Appellant specifically complains that no probable cause existed upon which to issue a warrant, and even if probable cause did exist, there were no exigent circumstances to justify the nighttime execution of the warrant.

At the hearing to suppress the evidence of the search, the Honorable Charles Humphrey, District Judge, found that the search warrant issued by the Honorable John Maley, District Judge, contained legally sufficient facts to establish probable cause for issuing the warrant, but found no exigent circumstances to warrant its nighttime execution. Judge Humphrey concluded that the warrant had been served sometime between 5:50 a.m. and 6:05 a.m. and that there was no evidence showing that the intrusion of Appellant's residence at 5:50 a.m. would be any less abrasive than a search occurring ten

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[5] Section 1230 provides:

§ 1230. Search warrant may be served, when.

Search warrants for occupied dwellings shall be served between the hours of six o'clock a.m. and ten o'clock p.m., inclusive, unless the judge finds the existence of at least one of the following circumstances:

1. The evidence is located on the premises only between the hours of ten o'clock p.m. and six o'clock a.m.;
2. The search to be performed is a crime scene search; or
3. The affidavits be positive that the property is on the person, or in the place to be searched and the judge finds that there is likelihood that the property named in the search warrant will be destroyed, moved or concealed.

If any of the above criteria are met, the issuing magistrate may insert a direction that the warrant be served at any time day or night. Search warrants for sites other than occupied dwellings may be served at any time of the day or night without special direction.

minutes later. Thus, he found that any violation would be "*de minimus*" and therefore harmless.

In *Moore v. State*, 1990 OK CR 5,¶27, 788 P.2d 387, 395, this Court held:

> A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.' ...'Courts should not invalidate warrant[s] by interpreting affidavit[s] in hyper-technical, rather than a commonsense manner.' 'So long as the magistrate had a substantial basis for ...concluding that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more' (*citing Illinois v. Gates*, 462 U.S. 213,236,103 S.Ct. 2317, 2331, 76 L.Ed.2d 527 (1983)).

Here, a review of the affidavit supporting the search warrant and the search warrant reveals that the issuing magistrate was provided with more than sufficient evidence to authorize nighttime service and execution of the warrant. First, two people had been murdered in this small community within the span of just three days and one murder had just occurred less than 12 hours before the warrant was sought. Further, the facts and circumstances positively identified Appellant as the most likely suspect in the killings. *Id.* The issuing magistrate correctly asserted that "blood, hairs, fibers, fingerprints, other microscopic and physical evidence...[was] perishable evidence associated with the crime" (*Id.* at 2) and there existed a substantial possibility that the evidence would be destroyed, moved or concealed. Thus, we disagree with Judge Humphrey's finding that there existed no exigent circumstances to justify a nighttime execution of the warrant. Accordingly, Appellant's arguments

regarding the validity of the warrant and search are without merit and this proposition is denied.

Decision

Judgments and Sentences are **REVERSED** and this case is **REMANDED** for **SEPARATE TRIALS.**

AN APPEAL FROM THE DISTRICT COURT OF OKMULGEE COUNTY
THE HONORABLE JOHN MALEY, DISTRICT JUDGE

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OPINION BY: JOHNSON, J.
STRUBHAR, P.J.: CONCURS
LUMPKIN, V.P.J.: CONCURS IN PART/DISSENTS IN PART
CHAPEL, J.: CONCURS IN RESULT
LILE, J.: CONCURS

RC

LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I dissent to the opinion insofar as it reverses Appellant's convictions and remands the case for a new trial based upon the allegation that the Tash robbery/homicide and the Harvey robbery/homicide were improperly joined in a single trial. In my opinion, the trial court did not clearly abuse its discretion in denying appellant's motion for severance. The facts reveal the crimes involve "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." *Glass v. State*, 1985 OK CR 65, ¶ 9, 701 P.2d 765, 768.

In reversing Appellant's convictions, the opinion relies on *Glass* and on *Atnip v. State*, 1977 OK CR 187, 564 P.2d 660, 663.[1] However, the opinion completely ignores more recent cases applying the principles set forth in *Glass*. *See e.g. Pack v. State*, 1991 OK CR 109, ¶ 8, 819 P.2d 280, 282-283 (trial court did not abuse its discretion in denying motion for severance with respect to separate burglaries -- eight weeks apart -- of elderly men for whom Appellant worked); *Brewer v. City of Tulsa*, 1991 OK CR 59, ¶ 12, 811 P.2d 604, 607 (in absence of a showing of prejudice or a clear abuse of discretion, Court allowed joinder of separate offenses occurring on separate buses during short amount of time); *Middaugh v. State*, 1998 OK CR 295, ¶ 10, 767 P.2d 432, 435

(separate crimes of uttering forged instruments and obtaining merchandise by bad check over a six-week period suggested a common scheme or plan); and *Vowell v. State*, 1986 OK CR 172, ¶ 8, 728 P.2d 854, 857 (where separate crimes of burglary of a home, murder of a passing motorist, and robbery of a convenience store the following day were found to be properly joined as a series of connected acts).

The crimes charged were connected by time, proximity, and evidence, and went beyond "mere similarity." *Glass*, 1985 OK CR 65, ¶ 9, 701 P.2d at 768. Indeed, there is suggestion in the record that the killings might have been racially motivated, as Appellant said he carried a gun because both victims were "racists." (Tr. at 1097.)

I agree there was no Fourth Amendment violation, although it seems to me the opinion attempts to fit a square peg into a round hole by trying to squeeze the facts of this case into the language used in 22 O.S.Supp.1998, § 1230. We need not go down that road. Assuming *arguendo*, the facts did not warrant nighttime service of a search warrant, where you have probable cause and exigent circumstances relating to the commission of a grave offense, as you do here, an officer may search a home without a warrant. *See Welch v. Wisconsin*, 466 U.S. 740, 750-51, 104 S.Ct. 2091, 2098-99, 80 L.Ed.2d 732 (1984).

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[1] Improper joinder was not even an issue in *Atnip*. Rather, that case dealt with the statutory "common scheme or plan" exception to other crimes evidence rule. See 12 O.S.1991, § 2404(B).

CHAPEL, J., CONCURRING IN RESULTS:

I concur in the decision to reverse and remand this case and in the analysis of the improper joinder issue. However, I cannot join the exigent circumstances analysis of 22 O.S.Supp.1998, § 1230. If the warrant was served before 6 a.m., the search was improper because the requisites of 12 O.S.Supp.1998, § 1230(3) were not met.