No. F-2016-62

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DANIEL K. HOLTZCLAW,

Appellant,

-vs-

THE STATE OF OKLAHOMA,

Appellee.

BRIEF OF APPELLEE
FROM OKLAHOMA COUNTY DISTRICT COURT
CASE NO. CF-2014-5869

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STATEMENT OF THE CASE

Daniel K. Holtzclaw, hereinafter referred to as the defendant, was tried by jury for the crimes of Sexual Battery, in violation of 21 O.S.Supp.2013, § 1123(B) (Counts 1, 7, 13, 14, 21-23, 30, 33, 34), Procuring Lewd Exhibition, in violation of 21 O.S.2011, § 1021(A)(2) (Counts 2, 4, 5, 15, 18, 19, 35, 36), Burglary in the First Degree, in violation of 21 O.S.2011, § 1431 (Count 3), Stalking, in violation of 21 O.S.2011, § 1173 (Count 6), Forcible Oral Sodomy, in violation of 21 O.S.2011, § 888 (Counts 8, 10, 12, 16, 17, 24, 27), Rape in the First Degree, in violation of 21 O.S.2011, §§ 1111, 1114 (Counts 9, 11, 20, 28, 29, 32), Rape in the Second Degree, in violation of 21 O.S.2011, § 1111, 1114 (Counts 25, 31), and Indecent Exposure, in violation of 21 O.S.2011, § 1021(A)(1) (Count 26), in Case No. CF-14-5869, in the District Court of Oklahoma County before the Honorable Timothy R. Henderson, District Judge. The defendant was represented by counsel. The jury found the defendant not guilty on Counts 2, 3, 6, 7, 9, 12, 17-26, 35, and 36, but guilty as charged on the remaining counts. The jury set punishment at eight (8) years imprisonment on Counts 1, 13, 14, 30, 33 and 34, five (5) years imprisonment on Counts 4, 5, and 15, twenty (20) years imprisonment on Count 8, sixteen (16) years imprisonment on Counts 10, 16, and 27, thirty (30) years imprisonment on Counts 11, 28, 29, and 32, and twelve (12) years imprisonment on Count 31. The trial court sentenced the defendant in accordance with the jury's verdict and ordered the sentences to run consecutively. From this Judgment and Sentence, the defendant has perfected his appeal to this Court.

STATEMENT OF THE FACTS

At approximately 2:00 a.m. on June 18, 2014, Jannie Ligons was driving home after spending the evening at her friend's home in northeast Oklahoma City when she was pulled over on N.E. 50th, just west of Lincoln Boulevard. The defendant, an Oklahoma City police officer assigned to the Springlake Division who had just finished his shift, approached Ligons' car and told her he stopped her because she was swerving. Ligons was not intoxicated or swerving, and she told the defendant

this (Tr. II 461-72, 475-77, 479-82; Tr. III 525; Tr. IV 841-42).[1]

The defendant had Ligons step to his car where he patted her down and told her if he found anything illegal on her, he would take her to jail. The defendant found nothing incriminating, however, and had Ligons sit in the backseat of his patrol car on the passenger side before he returned to her car. After the defendant went through Ligons' car, he returned to where Ligons was sitting and opened the car door to ask her, "How do I know you don't have anything in your bra?" Ligons fidgeted with her bra and told him she had nothing there. The defendant told her he could not tell from that, and she asked him, "What, you want me to raise my blouse up?" The defendant responded with a yes. Ligons raised her blouse up, and then said, "What, you want me to raise my bra up too?" The defendant again said, "[Y]es." When Ligons raised her bra and exposed her breasts, the defendant shined his flashlight on them before she quickly put her blouse back down. Ligons did as the defendant said because he was a police officer and she was afraid for her life (Tr. II 482-85; Tr. III 495-98).

The defendant then asked Ligons, "How do I know you don't have anything in your pants," and Ligons touched her jeans and assured him she did not. The defendant again said he could not tell that way and told her to stand up so he could check her pants. Ligons protested that he was not supposed to do this to her, but the defendant gave no response. When Ligons stood up between the car and the open door, she asked, "What, sir, you want me to pull my pants down," to which the defendant again responded, "[Y]es." Ligons pulled her pants down to her knees, and the defendant shined his flashlight between her legs before she pulled her pants back up (Tr. III 498-504).

The defendant told Ligons to get back in the car, and as she did so, he told her, "Damn, you have a big ass." By the time she was in the car again with her feet on the ground, the defendant was holding his crotch area. He stood outside the open car door right in front of Ligons, unzipped his pants, took his penis out, and told Ligons, "Come on." Ligons begged the defendant not to make her

[1] The State will refer to the transcripts of the jury trial held in this case from November 2 to December 10, 2015, as (Tr. I-XVIII), to the transcript of the motion for new trial and sentencing hearing held on January 21, 2016, as (Sent. Tr.), and to the original record as (O.R. I-IV).

"do that," and told him she was afraid he was going to shoot her. He promised not to shoot her. Ligons bent her head, looking at the defendant's gun and still fearing he was going to shoot her, and briefly put his penis in her mouth. When she raised up to again tell him she could not do this, he told her to just do it "for a little bit," that he "just got off work," was tired, and did not "have all night." Ligons put the defendant's penis in her mouth again, briefly, before he backed away, put his penis back in his pants and let her out of his patrol car. Based on his acts against Ligons, the jury found the defendant guilty of procuring lewd exhibition and forcible oral sodomy in Counts 15 and 16. Ligons reported the defendant's actions to police that night, triggering an investigation which led to the discovery of twelve other victims. All of the defendant's crimes were committed in Oklahoma County (Tr. III 504-12, 522-25, 755-56; Tr. IV 842-58; Tr. XV 3569-70; Tr. XVIII 4324).

Shardayreon Hill first came in contact with the defendant after she was arrested on December 20, 2013, at the Liberty Station Apartments at N.E. 27th and Lindsay Avenue. During her arrest, Hill crushed a vial of PCP with her mouth and had to be transported to Southwest Medical Center. The defendant was at the hospital when she arrived. After she was given a shower to clean the PCP from her body, she was taken to a recovery room. She was then taken to a smaller room, accompanied by the defendant, where she was handcuffed to the bed. In this room, the defendant grabbed Hill's breast about three times under the guise of helping her pull her hospital gown up. He also told her he could make her charges go away within a month if she cooperated with him before putting his hand up her gown and inserting his fingers into her vagina. The defendant also made Hill perform oral sex on him as he stood at the side of her hospital bed, laughing and telling her while his penis was in her mouth, "[Y]ou never sucked a white dick before." (Tr. V 1213-17; Tr. VI 1249-74).

In January 2014, after Hill's release from jail, she and the defendant began communicating through Facebook, phone and text messages, though whenever Hill tried to talk to him about her criminal case, he would tell her to call him on the phone. At one point in January, the defendant came to Hill's house in his personal car while off duty. He and Hill sat in his car, and while Hill wanted to talk about her case that the defendant had told her would go away, the defendant tried to

talk Hill into having sex with him. When Hill refused, he exposed his penis and asked her for oral sex. Hill refused to do that as well, and went inside the house. For his actions against Hill, the defendant was found not guilty of three counts of sexual battery, forcible oral sodomy, second degree rape, and indecent exposure in Counts 21, 22, 23, 24, 25, and 26 (Tr. VI 1282-1306; Tr. XVIII 4325).

Shortly before midnight on February 27, 2014, Tabitha Barnes was sitting in her car with her daughter and Angela Cooper, Barnes' friend, in front of her house at N.E. 15th and Jordan. They were waiting for the car to warm up when two police cars circled the block and then stopped, one behind her car and one in front of her house. The officers asked them to step out of the car. Barnes' daughter went inside the house, but Barnes and Cooper were placed in separate patrol cars: Barnes in the backseat of the defendant's, and Cooper in the other officer's. The defendant ran Barnes' name for warrants. The defendant asked her if she knew she had city warrants. She told him she did, and that she intended to pay them after she filed her taxes. Barnes knew there was a possibility she could go to jail. By this time, Cooper had exited the other patrol car and gone in the house, and the other officer drove away (Tr. VII 1768-75; Tr. VIII 2130).

The defendant, standing at the open back door of his car, asked Barnes if she had drugs on her person; she told him she did not. The defendant had Barnes lift her shirt and expose her breasts so he could see if she had anything underneath. The defendant told her, "I'm not gonna take you to jail. Just play by my rules." Not wanting to go to jail, she did as the defendant directed. The defendant then wanted to know if she had anything under her breasts, so he raised her breasts up with his hands. The defendant concluded the encounter by telling Barnes he was not going to take her to jail that day, but she needed to take care of her tickets (Tr. VII 1775-82).

On March 25, 2014, Barnes and two of her children returned home to find a police car in front of her house. When she exited her car, the defendant called her name. There was a man lying in Barnes' yard, and she asked the defendant if he was there for him. The defendant walked over to the man, kicked him, and told him to move on. The defendant also told Barnes' children to go in the house and placed Barnes in the back of his patrol car. He asked Barnes if she had taken care of

her tickets; she had not. He then told Barnes he had been in her house.[2] During this encounter, the defendant told Barnes he would not take her to jail, and again made her expose her breasts under the guise of wanting to know if she had anything under her shirt. The defendant then pointed to her pants, asking her what was "down there," and was she going to let him see. Barnes pulled her pants out, and as she wore no underwear, exposed her vaginal area to the defendant (Tr. VII 1787-99).

The defendant again came to Barnes' house the next day, claiming a source told him she had sold "a $20 rock" that day, and asking if she was going to let him in her house. She denied selling any drugs and denied him entry. Barnes called her mother in Texas, whom she had previously told about the defendant, to tell her he was back again. While Barnes was on the phone with her mother, the defendant said that Barnes had tickets, and to "come down here and get her." The defendant then repeated his claim that Barnes had sold drugs and again asked if she was going to let him in; Barnes again said no. The defendant left, but told her he would be back. The next day, Barnes and her children left their home and went to Austin for three months due to the defendant's continued harassment of her. For his actions against Barnes, the defendant was found guilty of sexual battery and two counts of procuring lewd exhibition in Counts 1, 4 and 5, and not guilty of first degree burglary and stalking in Counts 3 and 6 (Tr. VIII 1845-46, 1849, 1883-90; Tr. XVIII 4324).

On March 14, 2014, the defendant stopped Carla Raines as she was walking at N.E. 16th and Fonshill. The defendant placed Raines in the back of his patrol car. With his usual tactic of asking if she had anything on her person, the defendant made Raines lift her shirt and bra and expose her breasts. The defendant was found not guilty of procuring the lewd exhibition of Raines in Count 2 (Tr. IX 2173-81; Tr. XVIII 4323).

Florene Mathis had two contacts with the defendant. On March 25, 2014, the defendant

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[2] Barnes' then-boyfriend, Terry Williams, a convicted sex-offender, was in bed asleep in Barnes' home when the defendant woke him up and took him outside to run his name for warrants. The door was shut before he went to bed. The defendant asked Williams some questions about his status as a sex offender, and told him that if he saw him at that location again, he would keep harassing him. The defendant kept his word, stopping Williams when he was in the area with his friend and running their names (Tr. IX 2137-52).

stopped Mathis as she was walking in the area of N.E. 16th and Jordan. The defendant cuffed Mathis and had her sit on the curb while he ran her name for warrants. When he removed one of the cuffs, he fondled her right breast. On April 14, 2014, the defendant stopped Mathis around N.E. 15th and Jordan, ran her name and saw she still had some city warrants. He crushed the pipe she had in her possession, poured out her liquor, and told her to take care of her warrants. At trial, Mathis testified the defendant assaulted her during the March encounter, but she previously told Oklahoma City Police Detective Kim Davis he groped her during the April contact. The defendant was found not guilty of sexual battery against Mathis on Count 7 (Tr. X 2301-09, 2426-27, 2469; Tr. XVIII 4323).

On April 24, 2014, the defendant stopped Rosetta Grate at N.E. 14th and Jordan. When he asked Grate, who had recently relapsed into drugs, what she was doing, she told him the truth, that she was getting high and engaging in prostitution. She told him she kept getting "dates," *i.e.*, clients, as she tried to walk home. The defendant found a crack pipe in her purse, made her break it herself, and then gave her a ride to 633 Culbertson Drive, where she lived with her boyfriend, Will Carter (Tr. XI 2521-28, 2529-30, 2734).

On the way to the house, the defendant asked Grate about her "specialty" as a prostitute, oral sex. When they arrived, the defendant followed her to the door. Carter was not home, but the door was unlocked, and Grate went inside. She thought the defendant just wanted to make sure she lived there and would leave once she was inside, but he followed her into the house. Nervous and not knowing what else to do, she showed the defendant around the house. In the bedroom where Grate had been relegated because Carter was angry at her for relapsing, the defendant told her to "have a seat." The defendant unzipped his pants, took out his penis, and told her, "[T]his is better than county jail." He then put his penis in Grate's mouth. Though she asked him to move his gun away from her face, the defendant said nothing and just kept moving his penis in her mouth. He pulled his penis out, told her to lie back on her bed, and he inserted his penis in her vagina. The defendant pulled his penis out of Grate's vagina, zipped up his pants, and left. For his crimes against Grate, the defendant was found guilty of forcible oral sodomy, and not guilty of first degree rape, in Counts

8 and 9 (Tr. XI 2522-23, 2535-47; Tr. XVIII 4324).

On April 25, 2014, the defendant pulled Regina Copeland over at the intersection of N.E. 14th and Kelham. The defendant asked her if she had been drinking, she admitted she had, and he asked her to step out of her car. When Copeland was out of the car, the defendant told her to pull her pants down. Thinking a female officer should perform any searches on a female, Copeland asked if he was supposed to do that. Copeland did as she was told though, and pulled her pants and underwear to her knees. The defendant told Copeland it "looked phat down there." After Copeland pulled her pants back up, the defendant told her he was going to take her to detox. She could not talk him out of his decision to take her to detox, but she did persuade him to let her drive her car to her relative's house nearby where it would be safer (Tr. XII 2811-21, 2902).

The defendant followed Copeland, and after she parked her car in front of her relative's house near N.E. 24th and Miramar, he stepped out of his patrol car and instructed her to get in the backseat. Instead of taking Copeland to detox, though, he took her down the street to a secluded area near the city school bus barn, and pulled over to a grassy area. There, after having Copeland step out of the car, the defendant told her to pull her pants down, and to turn around and face the car. Copeland was bent over into the car with her feet outside the car, and the defendant stood behind her and inserted his penis into her vagina. After about three minutes, the defendant stopped and told Copeland to pull her pants back up. The defendant then got back in his patrol car and drove away, leaving Copeland there. The defendant was found guilty of the first degree rape of Copeland in Count 29 (Tr. XII 2822-31, 2893-97, 2961; Tr. XVIII 4326).

In the early morning hours of May 7, 2014, the defendant stopped Sherry Ellis as she walked on Highland near N.E. 18th. The defendant asked her if she had anything illegal; she said she did not. The defendant then had Ellis turn around and put her hands on the car, asking if he could search her. She said yes. The defendant reached up under Ellis' shirt and her bra and touched her breasts, and then put his hands down her pants, inside of her underwear, and touched her vagina. He then placed Ellis in the backseat as he checked her name for warrants. Ellis told him she had city tickets, and

his check confirmed it (Tr. XII 2983-87; Tr. XIII 3063-65, 3076).

Once the defendant learned Ellis had warrants, he opened the back door and told Ellis to turn and put her feet on the ground outside of the car, asking, "What do you think we need to do about this situation?" Ellis asked him twice what he meant before she looked up to find his penis in her face. The defendant did not say anything to Ellis, but she put his penis in her mouth. She knew she had to because she had warrants and he could have taken her to jail (Tr. XII 2988-89).

The defendant then drove Ellis to the dead end of N.E. 18th, over a curb, to a grassy area behind Creston Hills, an abandoned school. When the defendant parked, he exited the vehicle, and opened Ellis' door, telling her to get out and pull her pants down. Ellis faced the police car, and the defendant, standing behind her, inserted his penis in her vagina. When he was finished, he told Ellis she was free to go, and she walked away. For his actions against Ellis, the defendant was found guilty of forcible oral sodomy, first degree rape, and two counts of sexual battery in Counts 10, 11, 33, and 34 (Tr. XII 2989-95; Tr. XIII 3062, 3067-68; Tr. XVIII 4324, 4326).

On May 8, 2014, the defendant stopped Terri Morris as she was leaving the Liberty Station Apartments at N.E. 26th and Lindsay and asked her name and if she had anything illegal. Morris had a crack pipe in her purse which the defendant found. The defendant drove Morris about two blocks where he checked her name for warrants. The defendant held the crack pipe in his hand and told her she could go to jail for it. When he got out of the car, he opened her door, and made her expose her vagina and her breasts to him. The defendant then asked her to give him "some oral." She started crying and at first refused, but after he told her to give him just "three or four licks," the defendant put his penis inside her mouth. The defendant drove Morris to where she was going, but not before driving out of the way to N.E. 32nd and Hill, where there was an open field. At the field, the defendant stopped briefly but then drove Morris, who was hysterical in the backseat, to her destination and dropped her off. For these actions against Morris, the defendant was found not guilty of forcible oral sodomy and two counts of procuring lewd exhibition in Counts 12, 35, and 36 (Tr. XIII 3142-55, 3212; Tr. XVIII 4324, 4326).

Shortly before 1:00 a.m. on May 21, 2014, Syrita Bowen was walking on N.E. 16th, near Highland, when the defendant pulled up and asked her what she was doing. The defendant asked her if she had anything illegal on her, and placed her in the backseat of his car while he ran her for warrants. Bowen heard the dispatcher say she was clear, but because Bowen had been drinking, the defendant told her she had two choices: to go to detox or go to jail. When Bowen told him she would rather just go home, the defendant drove her to a desolate area called Dead Man's Curve, near N.E. 14th and Miramar (Tr. XIV 3345-60, 3435-37, 3439, 3443).

The defendant parked the car and told Bowen, "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." Bowen knew she had to do whatever he asked to avoid jail. The defendant then exited his vehicle, opened her door, unzipped his pants and put his penis in Bowen's mouth. The defendant next made Bowen get out of the car, pull her pants down, and bend over onto the backseat of the car. With Bowen in that position, the defendant inserted his penis into her vagina. After the defendant was finished, she pulled her pants up, got into his vehicle, and they drove away. The defendant let her out at N.E. 13th and Highland, telling her he was almost off duty and could not take her back to where he picked her up. For his crimes against Bowen, the defendant was found guilty of forcible oral sodomy and first degree rape in Counts 27 and 28 (Tr. XIV 3361-69; Tr. XVIII 4325).

Just after midnight on May 26, 2014, the defendant stopped Carla Johnson while she was walking near N.E. 16th and Jordan. The defendant placed Johnson in the back of his car and asked her if she had anything on her; she shook her shirt to show she had nothing. After she came back clear for warrants, the defendant let her out of the car but again asked if she had anything on her. She told him again she had nothing, but he said, "Let me check you," before turning her around to face the car and grabbing her breasts over her clothes with both of his hands. The defendant then put his hands down Johnson's pants, under her panties, and touched her vagina. He then let her go. When she reached N.E. 16th and Kelham, the defendant pulled up beside her and told her she had a warrant for her arrest, and that he did not know what it was for, but she needed to take care of it.

Johnson knew that was not true as she had just heard the dispatcher tell him she was clear. The defendant was found guilty of two counts of sexual battery against Johnson in Counts 13 and 14 (Tr. XV 3505-13, 3558-60; Tr. XVIII 4324).

On June 17, 2014, seventeen-year-old A.G. had two encounters with the defendant. The defendant first stopped A.G. and her two friends, who were arguing, around 7:00 p.m., near Park and Blackwelder. He questioned all three of them and searched A.G.'s purse. When he learned A.G. had city warrants, he told her to take care of them before she turned eighteen. The defendant let the three of them go and they went their separate ways (Tr. XVI 3748-57, 3910). A couple of hours later, A.G. was almost to her mother's house at 1729 N.W. 14th when the defendant pulled up beside her and said, "I'm not sure you are who you say you are." A.G. reminded him he already knew her name and she had no reason to lie. When she told him her mother lived right down the street, he told her he was not sure if she lived there or not. He drove her to her mother's house, though she told him she did not have a key and her mother was not home, so she did not know how she would get in (Tr. XVI 3746, 3756-59, 3911).

When they arrived, the defendant got out and followed A.G. to the enclosed porch of the home. A.G. was trying to get into the house to show the defendant she lived there, though she did not have a key. The defendant told A.G. he needed to search her, and he put his hands up her top, under her bra, and touched her breasts. He then put his hands down her shorts, under her panties, and touched her vagina, putting his finger inside A.G.'s vagina. He reminded A.G. she had warrants, told her he did not want to have to take her to jail, and did not want to make this harder than it had to be. The defendant then bent A.G. over a chair, pulled her shorts and panties down, put his penis in her vagina and asked her, "[I]s this the first time you ever fucked a cop? Am I beating it up?" A.G. was not sure if the defendant ejaculated, but he abruptly stopped, pulled his penis out and zipped it back up in his pants. Before getting in his car and driving away, the defendant told A.G. he might come back later. A.G.'s DNA was found near the zipper on both the inside and outside of the defendant's pants. For his crimes against A.G., the defendant was found guilty of sexual battery,

second degree rape, and first degree rape in Counts 30, 31, and 32 (Tr. XVI 3760-61, 3767-79; Tr. XVII 4050-51, 4069-70; Tr. XVIII 4326).

Around 1:20 a.m. on June 18, 2014, Kala Lyles was walking on N.E. 16th near Lottie when the defendant stopped her and put her in the police car while he ran her name. The defendant told her she was clear for warrants. Lyles tried to refuse the defendant's offer of a ride, but he just started driving and told her he was going to take her where she needed to go. Instead, he drove her to the abandoned Creston Hills school at N.E. 18th, where he jumped the curb and parked between two buildings. There, under his usual guise of needing to know if she had anything on her, the defendant made Lyles expose her breasts and vagina to him. The defendant then made Lyles bend over onto the backseat of the car, and he inserted his penis in her vagina. After that, the defendant made Lyles turn around and squat down, and he put his penis into her mouth. For these actions, the defendant was found not guilty of forcible oral sodomy, two counts of procuring lewd exhibition, and first degree rape in Counts 17, 18, 19, and 20 (Tr. XV 3603-10, 3615-28, 3703; Tr. XVIII 4324-25).

Before letting Lyles walk away, the defendant told her he wanted to see her again the next night. But there was no "next night" for the defendant as a police officer. Just thirty minutes later, he sexually assaulted Ligons, who immediately reported his actions to the police (Tr. II 461-512, 522-25; Tr. XV 3630), and the defendant's reign of terror over the women of northeast Oklahoma City came to an end. Other facts will be discussed as they become relevant.

PROPOSITION I

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE DEFENDANT'S CHALLENGED CONVICTIONS.

In his first proposition, the defendant claims the evidence was insufficient to sustain his convictions for procuring lewd exhibition, first degree rape, forcible oral sodomy, and sexual battery. The defendant's claim lacks merit, and his first proposition must be denied.

To determine whether evidence is sufficient to sustain a conviction, this Court views the evidence "'in the light most favorable to'" the State and determines whether a rational fact finder

could have found the crime's essential elements beyond a reasonable doubt. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04 (citation omitted). "[T]he jury is the exclusive judge of the weight and credibility of the evidence and despite conflicts in the evidence, this Court will not disturb the jury's verdict if there is competent evidence to support it." *Johnson v. State*, 2004 OK CR 23, ¶ 10, 93 P.3d 41, 45. This Court accepts "all reasonable inferences and credibility choices that tend to support the verdict." *Frederick v. State*, 2017 OK CR 12, ¶ 84, 400 P.3d 786, 813, *overruled on other grounds by Williamson v. State*, 2018 OK CR 15, ¶ 51 n.1, 422 P.3d 752, 762 n.1.

A. Procuring Lewd Exhibition

To prove the defendant guilty of procuring lewd exhibition in Counts 4, 5, and 15, the State had to prove the defendant willfully procured any person to expose herself "to public view or to the view of any number of persons" for the sexual stimulation of the viewer (O.R. III 424). *See also* 21 O.S.2011, § 1021(A)(2). The defendant claims the evidence was insufficient because he was the only one who saw his victims expose themselves. The defendant's claim must be denied.

When the defendant stopped Jannie Ligons on N.E. 50th just west of Lincoln Boulevard, he made her expose her breasts, shining his flashlight on them before she put her clothes back down (Tr. II 481-82; Tr. III 495-96). During the defendant's second contact with Tabitha Barnes in front of her house on N.E. 15th, he told Barnes he would not take her to jail, and made her expose her breasts and her vagina (Tr. VII 1787-91, 1796-99). This evidence is sufficient to sustain his convictions on these counts. *Spuehler*, 1985 OK CR 132, ¶ 7, 709 P.2d at 203-04.

Any person who knowingly and willfully "[p]rocures, counsels, or assists any person to expose such person, or to make any other exhibition of such person to public view or to the view of any number of persons, for the purpose of sexual stimulation of the viewer" shall be guilty of a felony. 21 O.S.2011, § 1021(A)(2). The defendant argues the evidence was insufficient because he did not make the women expose themselves to "public view," and because "any number of persons" must refer to someone other than the person procuring the exhibition or the person exposing herself. The defendant's claims must fail.

"The fundamental rule of statutory construction is to ascertain and give effect to the intention of the Legislature as expressed in the statute. Statutes are to be construed according to the plain and ordinary meaning of their language." *Soto v. State*, 2014 OK CR 2, ¶ 7, 326 P.3d 526, 527 (citations omitted). "In interpreting a statute, we look to its purpose, the evil to be remedied, and the consequences of any particular interpretation." *Rousch v. State*, 2017 OK CR 7, ¶ 5, 394 P.3d 1281, 1283. "Where construction of a statute produces anomalous or absurd results, we must presume that such consequences were not intended and adopt a reasonable construction that avoids the absurdity." *Head v. State*, 2006 OK CR 44, ¶ 13, 146 P.3d 1141, 1145.

The defendant first claims the women did not expose themselves to public view because nobody saw their exposure except the defendant. As used in Section 1021(A)(2), "public view" does not require that anyone besides the person procuring and the person exposing actually see the exposure. Though this Court has not defined the term, other courts have. The Court of Appeals of New Mexico has defined "public view," as used in its indecent exposure statute, as requiring "that 'the offense must be intentionally perpetrated in a place accessible or visible to the general public.'" *State v. Artrip*, 811 P.2d 585, 586 (N.M. Ct. App. 1991) (citation omitted). The United States Court of Appeals for the Armed Forces defined "public view" as "'in the view of the public,' and in that context, 'public' is a noun referring to any member of the public who views the indecent exposure." *United States v. Graham*, 56 M.J. 266, 269 (C.A.A.F. 2002). Under either definition, the defendant is guilty of procuring lewd exhibition.

In this case, the defendant's encounters with both women took place in public, on city streets (Tr. III 494; Tr. VII 1788). Both women were in the back of the defendant's police car, but the door was open and their feet were on the ground outside the car when he made them expose themselves (Tr. III 495-507; Tr. VII 1796-99). These locations were accessible and visible to the general public. After the defendant made Ligons expose herself, he was standing at the back of the car about to make her perform oral sex on him when another vehicle passed by and pulled into a nearby parking lot (Tr. III 508). The defendant watched the car pass before turning back to Ligons to make her put his penis

in his mouth (Tr. III 508). Barnes and two of her children had just arrived home when she had her second encounter with the defendant, and he told the children to go in the house before he put Barnes in the back of his police car (Tr. VII 1788-91). Barnes' daughter, A.B., stood on the porch, and when Barnes told the defendant he was scaring her children, he called A.B. to the car to ask if that were true and then sent her inside (Tr. VII 1791, 1795). A.B. went inside but watched from the window, where she saw her mother sitting in the police car with her legs outside the car (Tr. VIII 1820-21).

That nobody else besides the defendant and his victims actually saw their exposure matters not as the defendant made them expose themselves to public view. *Artrip*, 811 P.2d at 586. Under the "public view" requirement, it is also enough that the indecent exposures were viewed by the defendant and the victims themselves as they were members of the public. *Graham*, 56 M.J. at 269. This conclusion is especially warranted when considering that "the purpose of criminalizing public indecency 'is to protect the public from shocking and embarrassing displays of sexual activities.'" *Graham*, 56 M.J. at 269 (citation omitted). Given that this is "the evil to be remedied," that Ligons and Barnes were the ones exposing themselves does not prevent them from being members of the public which the statute seeks to protect. *Rousch*, 2017 OK CR 7, ¶ 5, 394 P.3d at 1283.

The defendant also claims that "any number of persons" must mean the exhibition must be viewed by someone other than the person procuring or the person exposing. This interpretation requires a construction contrary to the plain language of the statute. *Soto*, 2014 OK CR 2, ¶ 7, 326 P.3d at 527. Where the Legislature has provided no caveat to the phrase, such as "other than the person procuring the exhibition or the person exposing himself or herself," the phrase "any number of persons" must mean just that. *Id. See State v. Young*, 1999 OK CR 14, ¶ 27, 989 P.2d 949, 955 (refusing "to interpret a statute to address a matter the Legislature chose not to address"). When the defendant procured Ligons and Barnes to expose themselves, their exposure was viewed by him, for his sexual stimulation. 21 O.S.2011, § 1021(A)(2).

The defendant's concern that the above interpretation would subject couples in Oklahoma to criminal prosecution any time they were intimate is unfounded. The same argument could be

made regarding Section 1021(A)(1), which criminalizes the lewd exposure of oneself. But such a result would be absurd. *Head*, 2006 OK CR 44, ¶ 13, 146 P.3d at 1145. The "evil to be remedied" with the indecent exposure statute "'is to protect the public from shocking and embarrassing displays of sexual activities,'" not to criminalize the acts between two consenting adults in the privacy of their own home. *Rousch*, 2017 OK CR 7, ¶ 5, 394 P.3d at 1283; *Graham*, 56 M.J. at 269. The State presented sufficient evidence to sustain the defendant's convictions for procuring lewd exhibition. *Spuehler*, 1985 OK CR 132, ¶ 7, 709 P.2d at 203-04.[3]

B. Rape in the First Degree

To prove the defendant guilty of first degree rape in Counts 11, 28, 29, and 32, the State had to prove the defendant had sexual intercourse with a person not his spouse, using or threatening to use force or violence with the apparent power of execution (O.R. III 430). *See also* 21 O.S.2011, §§ 1111(A)(3); 1114(A)(5). The defendant's claim that he did not use or threaten force or violence in carrying out his rapes is without merit.

When the defendant learned Sherry Ellis had city tickets, he asked her what they needed to do "about this situation" before making her perform oral sodomy on him (Tr. XII 2988-89). She knew she had to comply because she had warrants and he could have taken her to jail (Tr. XII 2989). The defendant then drove Ellis to an abandoned school where he raped her (Tr. XII 2993-95). The defendant gave Syrita Bowen, who had been drinking, the choice between going to detox or to jail (Tr. XIV 3355-57). Instead, he drove her to Dead Man's Curve where he threatened her with jail if she did not give him "head or sex" (Tr. XIV 3357-61). Bowen knew she had to do whatever he

[3] The defendant also claims Section 1021 does not apply to him because he committed his acts "in the course of law enforcement activities." 21 O.S.2011, § 1021.1(A) (providing that Sections 1021-1024.4 do not apply when the prohibited "conduct occurs in the course of law enforcement activities"). His claim that he is shielded from prosecution is distinct from his claim that the State presented insufficient evidence, and he has thus waived this argument by combining multiple issues into a single proposition. *See* Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017) ("Each proposition of error shall be set out separately in the brief. . . . Failure to list an issue pursuant to these requirements constitutes waiver of alleged error."). His claim that his conduct could in any way be considered "in the course of law enforcement activities" is also absurd. *Head*, 2006 OK CR 44, ¶ 13, 146 P.3d at 1145.

asked to avoid jail (Tr. XIV 3362). The defendant proceeded to rape Bowen and force her to orally sodomize him (Tr. XIV 3363-67). Regina Copeland had been drinking when the defendant pulled her over and told her he was going to take her to detox (Tr. XIV 2814-21). Instead of taking her to detox, though, the defendant drove her to a secluded area where he raped her (Tr. XIV 2825-31). Before raping A.G., the defendant reminded her she had warrants, told her he did not want to have to take her to jail, and did not want to make this harder than it had to be (Tr. XVI 3772-74).

The defendant's threats, implied or explicit, to take each of the above victims to jail or detox was sufficient to prove he threatened the use of force in having sexual intercourse with them. The defendant claims his threats do not rise to the level of physical force which he claims is necessary to prove first degree rape. Contrary to the defendant's claim, Section 111 of Title 21 states that, as used in sex crimes, "the term 'force' shall mean any force, no matter how slight, necessary to accomplish the act without the consent of the victim. The force necessary to constitute an element need not be actual physical force since fear, fright or coercion may take the place of actual physical force." 21 O.S.Supp.2016, § 111(A). Though this statute was enacted after the defendant's trial, its definition of what constitutes force was first approved by this Court over thirty years ago, in *Lawson v. State*, 1987 OK CR 140, 739 P.2d 1006. There, the appellant was tried for first degree rape, and the jury was instructed that "[t]he force necessary to constitute an element of rape need not be actual physical force since fear, fright or coercion may take the place of actual physical force." *Id.*, 1987 OK CR 140, ¶ 11, 739 P.2d at 1008. The appellant claimed the instruction was erroneous because it "blur[red] the distinction" between rape-by-force and rape-by-fear. *Id.* This Court disagreed that there was such a distinction, noting that Section 1114 provided in relevant part that first degree rape shall include "'rape accomplished with any person by means of force, violence, or threats of force or violence accompanied by the apparent power of execution . . . .'" *Id.*, 1987 OK CR 140, ¶ 12, 739 P.2d at 1008 (citation omitted). This Court concluded that the challenged instruction "clearly explain[ed] that the jury may find either force or fear was used in establishing the element of the offense." *Id. See also Hale v. State*, 1995 OK CR 7, ¶ 6, 888 P.2d 1027, 1030 ("The elements of

rape include nonconsensual intercourse by force or fear against a woman not [the defendant's] wife."), *rejected on other grounds by Davis v. State*, 1999 OK CR 48, ¶ 11, 993 P.2d 124, 126.

Here, the defendant threatened the use of force in his first degree rapes of Ellis, Bowen, Copeland and A.G. when he either explicitly or impliedly placed them in fear of going to jail or detox if they did not submit to sexual intercourse with him. *Lawson*, 1987 OK CR 140, ¶¶ 11-12, 739 P.2d at 1008. *See also* 21 O.S.Supp.2016, § 111(A); *Hale*, 1995 OK CR 7, ¶ 6, 888 P.2d at 1030. The evidence is sufficient to sustain his first degree rape convictions, and they must be affirmed. *Spuehler*, 1985 OK CR 132, ¶ 7, 709 P.2d at 203-04.

C. Forcible Oral Sodomy

To prove the defendant guilty of forcible oral sodomy in Counts 8, 10, 16, and 27, the State had to prove the defendant penetrated the mouths of his victims with his penis, either by using or threatening to use force or violence, with the apparent power of execution, or that the crime was committed by a municipal employee upon a person "under the legal custody, supervision, or authority of" an Oklahoma municipality (O.R. III 429). *See also* 21O.S.2011, §§ 888(3), (4). As he did in Proposition I(B), the defendant claims his forcible oral sodomy convictions must be vacated because there was no evidence that he used or threatened force or violence in making his victims perform oral sodomy on him. He also claims there was no evidence of the alternative element that the crime was committed by a municipal employee upon a person in his "legal custody, supervision or authority" (Tr. III 429). The evidence in this case satisfies either element, and his convictions must be affirmed.

Rosetta Grate had a crack pipe in her possession and admitted to engaging in prostitution when the defendant stopped her as she was walking home (Tr. XI 2521-30). When the defendant drove her home and followed her into her bedroom, he told her, "[T]his is better than county jail," before unzipping his pants, taking his penis out, and placing it in her mouth (Tr. XI 2542). Grate took the defendant's statement to mean she had to perform oral sex on him (Tr. XI 2543). After learning Ellis had city tickets, the defendant asked what they needed to do "about this situation"

before making her perform oral sodomy on him (Tr. XII 2988-89). She knew she had to comply because she had warrants and he could have taken her to jail (Tr. XII 2989). Ligons was afraid for her life during her contact with the defendant, as he was a police officer and she could not believe he would say and do the things to her that he was and let her live (Tr. III 498, 504). When the defendant forced Ligons to perform oral sex on him, his gun was in her face, and she was afraid he was going to shoot her with it (Tr. III 506-11). Bowen had been drinking, and the defendant gave her the choice between going to detox or to jail (Tr. XIV 3355-57). He threatened her with jail if she did not give him "head or sex" before raping her and orally sodomizing her (Tr. XIV 3357-67). For the same reasons stated in Proposition I(B), the evidence proved the defendant used or threatened to use force in his acts of forcible oral sodomy against Grate, Ellis, Ligons and Bowen when he either explicitly or impliedly placed them in fear, of their lives or of going to jail or detox, if they did not submit to demands to perform oral sex on him. *Lawson*, 1987 OK CR 140, ¶¶ 11-12, 739 P.2d at 1008. *See also* 21 O.S.Supp.2016, § 111(A); *Hale*, 1995 OK CR 7, ¶ 6, 888 P.2d at 1030.

The defendant also claims there is "significant doubt" that he committed any crime against Grate, pointing to the absence of his DNA from the room where he attacked her, and the fact that he was acquitted of raping her (Def's Brief at 21-22). That his DNA was not found on anything tested in the room was unsurprising. DNA degrades over time, and none of the evidence pertaining to the defendant's crimes against Grate was collected and tested for DNA until over four months after he assaulted her (Tr. XI 2692, 2714, 2727, 2734-35; Tr. XVII 4080). Further, the not guilty verdict on the rape is of no consequence to the guilty verdict for forcible oral sodomy. "Consistency of multiple verdicts is not the test for assessing the validity of a particular verdict in a criminal case. Rather, a verdict is proper if it is supported by sufficient evidence." *Gray v. State*, 1982 OK CR 137, ¶ 20, 650 P.2d 880, 884. The evidence presented by the State was sufficient to prove the defendant guilty of forcible oral sodomy against Grate, and his conviction must stand. *Id. See also Spuehler*, 1985 OK CR 132, ¶ 7, 709 P.2d at 203-04.

The evidence was also sufficient to satisfy the alternative element that the crime was

"committed by a municipal employee upon a person who was under the legal custody, supervision or authority of a municipality of Oklahoma." (O.R. III 429). 21 O.S.2011, § 888(B)(4). The defendant admits he was a municipal employee. His claim that the victims were not in the custody, supervision, or authority of Oklahoma City is without merit.

Each woman in the relevant counts was stopped and questioned by the defendant in his capacity as a police officer (Tr. II 479-85; Tr. XI 2525-26; Tr. XII 2984-87; Tr. XIV 3346-50). Grate accepted the defendant's offer of a ride home, but when the defendant followed her inside, she became nervous and thought perhaps the defendant did not believe she lived there (Tr. XI 2530, 2536-41). She felt like she had to show him around the house to prove she lived there (Tr. XI 2541). After searching, and sexually battering, Ellis, the defendant told her to get into his patrol car (Tr. XII 2984-87). When she did so, he closed the door and ran a warrant check on her (Tr. XII 2986-87). After learning Ellis had city warrants, the defendant forced her to orally sodomize him, and then drove her to another location and raped her (Tr. XII 2988-95). When the defendant pulled Ligons over, it began as a seemingly normal traffic stop, but quickly evolved into a sexual assault when the defendant used his authority as a police officer to make Ligons expose her breasts and vagina, and then perform oral sex on him (Tr. II 479-85; Tr. III 495-512). When the defendant stopped Bowen, he placed her in the backseat of his car while he ran her for warrants (Tr. XIV 3350-53). Bowen was clear for warrants, but because she had been drinking and the defendant smelled alcohol on her breath, he told her he was going to take her to either detox or jail (Tr. XIV 3355-57). He instead drove her to Dead Man's Curve, where he told her she would have to give him "head or sex" or he would take her to jail (Tr. XIV 3357-61). The defendant raped and forced Bowen to perform oral sex on him (Tr. XIV 3363-67).

The above evidence shows that each of these women was in the "legal custody, supervision or authority" of Oklahoma City, by way of the defendant, an Oklahoma City police officer (Tr. III 429). 21 O.S.2011, § 888(B)(4). "A seizure of a person occurs within the meaning of the Fourth Amendment when, in light of all the attendant circumstances, a reasonable person would have

believed he was not free to leave." *Skelly v. State*, 1994 OK CR 55, ¶ 12, 880 P.2d 401, 405. Each of these women was seized by the defendant, and none would have felt free to leave until he was finished sexually assaulting them. *Id.* As such, for the time they were seized by the defendant, they were, at the very least, under his supervision or authority. The evidence in this case is sufficient to support the defendant's forcible oral sodomy convictions under this alternative element. *Spuehler*, 1985 OK CR 132, ¶ 7, 709 P.2d at 203-04.

D. Sexual Battery

To prove the defendant guilty of sexual battery in Counts 1, 13, 14, 30, 33, and 34, the State had to prove the defendant intentionally "touched, felt, or mauled" the body or private parts of a person over the age of sixteen in a lewd and lascivious manner without her consent, or that he, as a municipal employee, committed the crime upon a person "who was under the legal custody, supervision or authority of" an Oklahoma municipality (O.R. III 422-23). *See also* 21 O.S.Supp.2013, §§ 1123(B)(1), (2). The defendant claims the State failed to prove he acted in a lewd and lascivious manner when he, a police officer, performed searches on the women in question. The defendant's claim is entirely without merit and must fail.

When Barnes was still in the defendant's patrol car, he made her lift her shirt up and expose her breasts to show him she did not have any drugs on her person (Tr. VII 1775-79). Barnes knew if she was to be searched, it was supposed to be by a female officer, and she mentioned this to the defendant (Tr. VII 1776-79). The defendant told her he would not take her to jail, and to "[j]ust play by [his] rules." (Tr. VII 1779). He then lifted Barnes' breasts with his hands (Tr. VII 1780-81). When the defendant asked Carla Johnson if she had anything illegal on her, she shook her shirt to show she had nothing (Tr. XV 3507). When the defendant continued to press her as to whether she had anything illegal in her pants, Johnson told him he could call a female officer (Tr. XV 3502-03, 3507-08). After Johnson came back clear for warrants, the defendant let her out of the car, he again asked if she had anything on her, and she again said she did not (Tr. XV 3508). The defendant then told her he was going to check, and he turned her around to the car and grabbed both of her breasts

over her clothes (Tr. XV 3508-10). He then put his hands down her pants, under her panties, and touched her vagina on the skin (Tr. XV 3508-10). In previous searches by female officers, Johnson had never had an officer touch her private parts with bare hands (Tr. XV 3510). When the defendant followed A.G. to the enclosed porch, he told her he would have to search her, and he put his hand up under her clothes and touched her breasts under her bra (Tr. XVI 3767-68). When the defendant stopped and asked Ellis if she had anything illegal on her, she said no (Tr. XII 2984). He then asked her to turn around and put her hands on the car (Tr. XII 2984). When she did as told, the defendant put his hand up her shirt, under her bra, and felt the skin of her breasts (Tr. XII 2985). He then put his hands down her pants, under her panties, and touched her vagina (Tr. XII 2986).

The above evidence was more than sufficient to prove the defendant touched each of his victims in a lewd and lascivious manner. *Spuehler*, 1985 OK CR 132, ¶ 7, 709 P.2d at 203-04. He claims the evidence on this element was insufficient because he was "acting within the scope of his employment" when searching these women (Def's Brief at 24). The evidence of the Oklahoma City Police Department policy was that a male officer had to have a "very strong justification" in order to search a female, such as if the female matched the description of an armed robbery suspect and the officer had reasonable suspicion to believe she had a weapon on her person (Tr. IV 948). Absent such a strong justification, a male officer would have to call a female officer to conduct any search, even a pat down, of a female (Tr. IV 949-50). Even the defendant's victims knew of this policy (Tr. VII 1776-79; Tr. IX 2179; Tr. X 2311; Tr. XII 2817-18; Tr. XV 3502-03, 3507-08). The evidence showed the defendant knew of this policy, too, and abided by it when others were present. When the defendant and Officer Allan Cruz came in contact with Shardayreon Hill, the defendant called a female officer to the scene to search Hill (Tr. V 1214, 1233-34). That his actions were lewd and lascivious, and not within the scope of his employment, is also evidenced by the fact that he went on to further sexually assault Barnes, A.G., and Ellis (Tr. VII 1976-99; Tr. XII 2988-95; Tr. XVI 3770-79). Though he did not commit any further acts against Johnson, he subsequently threatened her with false news of a warrant, when she had previously heard the dispatcher say she was clear (Tr.

XV 3512-13). The State presented more than sufficient evidence that the defendant touched the bodies of his victims in a lewd and lascivious manner. *Spuehler*, 1985 OK CR 132, ¶ 7, 709 P.2d at 203-04.

The defendant also makes a half-hearted claim that the evidence that he committed any crime against Ellis was insufficient because she identified her attacker as a short, black man (Tr. XII 2996, 2999). The remaining evidence presented by the State on his crimes against Ellis overwhelmingly proved it was the defendant who sexually assaulted her (Tr. XIII 3060-3112). *Spuehler*, 1985 OK CR 132, ¶ 7, 709 P.2d at 203-04.

E. Conclusion

The evidence presented by the State was more than sufficient to allow a reasonable juror to find all of the elements of all of the challenged crimes beyond a reasonable doubt. *Spuehler*, 1985 OK CR 132, ¶ 7, 709 P.2d at 203-04. The defendant's first proposition must be denied.

PROPOSITION II

THE MULTIPLE COUNTS AGAINST THE DEFENDANT WERE PROPERLY JOINED FOR ONE TRIAL.

In his second proposition, the defendant claims the joinder of thirty-six counts against him into a singe trial denied him a fair trial. As shown below, the defendant's second claim must fail.

The defendant did not object to the joinder of the offenses at trial and has thus waived appellate review of this claim for all but plain error. *See Collins v. State*, 2009 OK CR 32, ¶ 12, 223 P.3d 1014, 1017 (all but plain error waived where appellant entered plea of not guilty without objecting to joinder). "'Plain error is an actual error, that is plain or obvious, and that affects a defendant's substantial rights, affecting the outcome of the trial.'" *Barnes v. State*, 2017 OK CR 26, ¶ 6, 408 P.3d 209, 213 (citation omitted). "This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice." *Id.* No error, plain or otherwise, occurred as the offenses were properly joined for a single trial, and relief should be denied. *See Sonnier v. State*, 2014 OK CR 13,

¶ 14, 334 P.3d 948, 953 (where there is no error, there is no plain error).

"This Court encourages the joinder of as many offenses as permissible in order to promote judicial economy." *Roth v. State*, 1988 OK CR 200, ¶ 8, 762 P.2d 279, 281. Joinder of offenses is permissible if the separate offenses "are part of a series of criminal acts or transactions," meaning "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. On appeal, the defendant does not claim that the joined counts are not the same type of offenses, but contends the criminal acts did not meet any of the other *Glass* criteria. The State shows to the contrary, and that joinder was proper.

Contrary to the defendant's claim, the time span that the crimes were alleged to have occurred, over a period of six months between December 20, 2013, and June 18, 2014, was relatively short (O.R. I 153-60). In *Devers v. State*, No. F-03-1278, slip op. at 1-2 (Okl. Cr. Jan. 31, 2005) (unpublished and attached hereto as Exhibit A),[4] this Court upheld the joinder of the appellant's three charges, inducing a minor to engage in prostitution (Counts 1 and 2), and indecent proposal to a child (Count 3), which occurred over a six-month period against three unrelated victims. Further, in *Gilson v. State*, 2000 OK CR 14, ¶ 47, 8 P.3d 883, 904, this Court upheld the joinder of the appellant's child abuse murder charge with his charges of child abuse where they occurred over an eight-month time span. The defendant acknowledges this finding, but tries to distinguish it from his case because the separate instances of abuse were treated as a continuing transaction, were alleged to have occurred in the same location, and the victims and witnesses were the same (Def's Brief at 27 n.4). *Id.* However, this Court subsequently cited *Gilson* to uphold the joinder of shooting with intent to kill charges and a first degree murder charge in a case where the only thing it held in

[4] Because the only case directly on point with this issue is the unpublished *Devers* case, no published case would serve as well. This unpublished summary opinion is attached hereto as Exhibit A as persuasive authority in accordance with this Court's Rule 3.5(C)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017).

common with *Gilson* was the eight-month span of the crimes. *See Walker v. State*, No. F-03-764, slip op. at 2 (Okl. Cr. Aug. 27, 2004) (unpublished and attached hereto as Exhibit B)[5] ("Although the eight month time span between offenses is the same length of time we noted in *Gilson* was not the relatively short period of time discussed in our prior case law, the evidence in this case showed a logical relationship between the offenses which warranted a single trial."). Here, the crimes occurred over a six-month period, but, as shown below, the evidence established a logical relationship which warranted that they be joined for a single trial. Especially where, as here, less than one month was alleged to have passed between each crime charged (O.R. I 153-60), a six-month period was a relatively short time span. *Cf. Lott v. State*, 2004 OK CR 27, ¶ 35, 98 P.3d 318, 333-34 (upholding the joinder of two murders which occurred four months apart, and noting the appellant acknowledged the four-month period satisfied the time requirement).

The defendant next contends joinder was improper because most of the offenses occurred "at various locations all over the northeastern part of Oklahoma City." (Def's Brief at 27). In *Smith v. State*, 2007 OK CR 16, ¶ 25, 157 P.3d 1155, 1165, the appellant claimed the joinder of his two murder counts was improper because the sites of the crimes were fifteen miles apart. This Court rejected the appellant's claim, finding that "given Oklahoma City's sprawling geography and the fact that both murders occurred within the city limits in south Oklahoma City, . . . the two murders were committed in sufficiently close proximity." *Id.* The same result is warranted in this case. With the exception of his crimes against A.G., which occurred in the 1700 block of Northwest 14th, the defendant committed all of his crimes in northeast Oklahoma City, and against two of his victims at the same location behind an abandoned school (Tr. XII 1289-90; Tr. XIII 3062, 3067-68; Tr. XV 3615-18, 3703; Tr. XVI 3759-73). However, even the location where he assaulted A.G. was under the defendant's patrol on June 17, 2014 (Tr. XVI 3891-92). The locations of the defendant's crimes

[5] Because the only case directly on point with this issue is the unpublished *Walker* case, no published case would serve as well. This unpublished summary opinion is attached hereto as Exhibit B as persuasive authority in accordance with this Court's Rule 3.5(C)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017).

were sufficiently close for joinder purposes. *Smith*, 2007 OK CR 16, ¶ 25, 157 P.3d at 1165.

Joinder was also proper as evidence of each crime in this case overlapped, evincing a common scheme or plan. "Requiring overlapping proof of a 'common scheme or plan' contemplates that there be a relationship or connection between/among the crimes in question, such that proof of one becomes relevant in proving the other/others." *Collins*, 2009 OK CR 32, ¶ 19, 223 P.3d at 1018. The appellant in *Collins* claimed his rape and kidnapping counts against two separate victims in two separate crimes were improperly joined because the evidence did not show a common scheme or plan. *Id.*, 2009 OK CR 32, ¶ 16, 223 P.3d at 1017. This Court rejected the claim, finding "both encounters, taken together, display Collins' unique predatory pattern and common plan of attack. Evidence of this pattern and common plan is relevant to proving both kidnappings and both rapes." *Id.*, 2009 OK CR 32, ¶ 19, 223 P.3d at 1018. *See also Lott*, 2004 OK CR 27, ¶ 36, 98 P.3d at 334 (finding evidence that entry into both victims' homes was made in the same way, and that the crimes were committed in a similar manner was "sufficient to find that proof of each offense overlapped so as to evidence a common scheme or plan, and therefore allow for joinder of the offenses for trial"). Similarly, in this case, each of the defendant's crimes displayed his "unique predatory pattern and common plan of attack," and "[e]vidence of this pattern and common plan" was relevant to prove his assaults against each woman. *Collins*, 2009 OK CR 32, ¶ 19, 223 P.3d at 1018.

The defendant's method was the same for each encounter, from the victims he chose to the way he attacked them. Each of the defendant's victims were attacked in the Springlake Division of northeastern Oklahoma City, a high-crime area where the citizens usually take care of things themselves rather than call the police due to their general mistrust of them (Tr. IV 919-24). From among a population which was already reluctant to call the police, the defendant, using his position as a police officer, generally chose women who had something he could hold over their heads. With either threats of jail or detox, promises to let them go, promises to not shoot them, or promises to make their charges go away, the defendant used his authority as a police officer to force the women to submit to his sexual demands (Tr. III 508; Tr. VI 1266-68; Tr. VII 1779, 1796-98; Tr. VIII 1883;

Tr. X 2302, 2309; Tr. XI 2542; Tr. XII 2820, 2988; Tr. XIII 3147; Tr. XIV 3355-61; Tr. XV 3512-12; Tr. XVI 3772). Just like in *Collins*, the defendant's "unique predatory pattern and common plan of attack" was relevant to prove each crime against each victim. *Id.*, 2009 OK CR 32, ¶ 19, 223 P.3d at 1018. The joinder of the offenses was proper. *Id.*; *Lott*, 2004 OK CR 27, ¶ 36, 98 P.3d at 334.

In support of his claim that proof of each transaction did not overlap to show a common scheme or plan, the defendant cites to this Court's decisions in *Hall v. State*, 1980 OK CR 64, 615 P.2d 1020, and *Atnip v. State*, 1977 OK CR 187, 564 P.2d 660 (Def's Brief at 27-28). However, these cases deal with the admission of evidence under the common scheme or plan exception to the general rule excluding other crimes evidence found in Section 2404(B) of Title 12. *Hall*, 1980 OK CR 64, ¶ 5, 615 P.2d at 1022; *Atnip*, 1977 OK CR 187, ¶ 11, 564 P.2d at 663. As in this case, the appellant in *Smith* also cited cases dealing with the admission of "common scheme or plan" evidence under Section 2404(B) in arguing the joinder of his offenses was improper. *Smith*, 2007 OK CR 16, ¶¶ 26-29, 157 P.3d at 1165-66. Just as this Court denied the appellant's reliance on such cases in *Smith*, so too should it deny the defendant's reliance on them in this case, as "[t]hese cases have no application to the joinder issue presented here." *Id.*, 2007 OK CR 16, ¶ 29, 157 P.3d at 1166.[6]

The defendant also claims that joinder was improper because the only witnesses common among the crimes were the law enforcement witnesses, and the "fact witnesses were specific to the offenses pertaining to each alleged victim." (Def's Brief at 22). However, this will often be the case with joined counts. It appears this was the situation in *Collins*, where the two victims each testified to the crimes the defendant committed against them, yet this Court found "the interest of judicial economy was well served by joining these two cases." *Id.*, 2009 OK CR 32, ¶ 21, 223 P.3d at 1019. The same result is warranted in this case.

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[6] The defendant cites two cases in which this Court applied the other-crimes-evidence definition of common scheme or plan to joinder issues (Def's Brief at 28 n.6). However, both of those cases pre-date *Smith*. *See Dyke v. State*, 1986 OK CR 44, 716 P.2d 693; *Brown v. State*, No. F-99-607 (Okl. Cr. Oct. 19, 2000) (unpublished and attached to the defendant's brief as Appendix A). As *Smith* is the more recent authority and has rejected this definition of common scheme or plan for joinder, these cases are unpersuasive.

The defendant also claims the joinder of the offenses was improper because the prejudice was "manifest." (Def's Brief at 29). Where the issue has been preserved, this Court requires a defendant to show "actual prejudice" resulting from the joinder in order to establish an abuse of discretion by the trial court in refusing to grant a severance. *Neill v. State*, 1992 OK CR 12, ¶ 34, 827 P.2d 884, 890 (discussing joinder of co-defendants). Indeed, the defendant "must factually demonstrate that the denial of severance deprived him of a fair trial, not merely that a separate trial might have offered him a better chance of acquittal." *Mitchell v. State*, 2011 OK CR 26, ¶ 24, 270 P.3d 160, 171, *overruled on other grounds by Nicholson v. State*, 2018 OK CR 10, ¶ 12, 421 P.3d 890, 895. The defendant claims the joinder prejudiced him because it allowed the State 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." (Def's Brief at 30). The defendant's claim of prejudice is unavailing.

The jurors in this case were instructed "to give separate consideration for each charge in the case," and the fact that they might "return a verdict of guilty or not guilty for one charge should not, in any way, affect [their] verdict for any other charge." (O.R. III 436). "Juries are presumed to follow their instructions." *Sanders v. State*, 2015 OK CR 11, ¶ 15, 358 P.3d 280, 285. The defendant makes no attempt to overcome this presumption, and with good reason, as he cannot. The jury acquitted the defendant on eighteen of the thirty-six counts against him, making it apparent they gave separate consideration to each charge (Tr. XVIII 4323-26). *Smith*, 2007 OK CR 16, ¶ 38, 157 P.3d at 1168 (noting the appellant's jury "was specifically instructed to give separate consideration to each offense" and finding he failed to show that "the jury was unable to compartmentalize the evidence with regard to each count"). Further, evidence of each offense against each victim would have been admissible in the trials of the others pursuant to 12 O.S.2011, § 2413, as evidence of the defendant's propensity to commit sexual assaults. *Lott*, 2004 OK CR 27, ¶ 37, 98 P.3d at 334 (finding the appellant failed to show prejudice from the joinder since "[e]vidence of either offense would have been admissible in a trial of the other pursuant to 12 O.S.1991, § 2404(B) as evidence

of other crimes or wrongs to prove motive, intent, or common scheme or plan"). *See also* 12 O.S.2011, § 2413 ("In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant."). As the defendant cannot show the "actual prejudice" from the joinder which would be required had he preserved this claim, *Neill*, 1992 OK CR 12, ¶ 34, 827 P.2d at 890, he certainly cannot show plain error. *Barnes*, 2017 OK CR 26, ¶ 6, 408 P.3d at 213; *Sonnier*, 2014 OK CR 13, ¶ 14, 334 P.3d at 953. For the above reasons, the defendant's second proposition of error must be denied.

PROPOSITION III

THE DEFENDANT WAS NOT DENIED A FAIR TRIAL AS HIS JURY WAS NOT EXPOSED TO ANY IMPROPER OUTSIDE INFLUENCE.

In his third proposition, the defendant claims the circumstances surrounding the proceedings made it impossible for him to have a fair trial. It is unclear what alleged error the defendant is claiming this Court should remedy on appeal, but what is clear is that he is not entitled to any relief.

In this proposition, the defendant correctly states he is entitled to a fair trial by a jury free from outside influences. *See Harris v. State*, 2004 OK CR 1, ¶ 9, 84 P.3d 731, 740 ("An accused is entitled to be tried by a jury free from outside influences which could affect the fairness of the proceedings."). He then cites various instances during his trial which he claims denied him that right: an unidentified woman on the first day of trial approaching another judge's juror and telling the juror to make sure the "police officer gets convicted" (Tr. II 269-72); a spectator trying to take photographs in the courtroom on the third day of trial (Tr. III 520, 580-81); a television news story airing after the third day of trial regarding the racial makeup of the jury, and individuals other than the players in this case giving interviews outside the courtroom during breaks (Tr. V 1004-15); the continuing news coverage taking place outside the courtroom during breaks (Tr. VI 1530-36); the posting of a comment by a person named Jesse Tedford to a news story about the case on Facebook, stating that he knew one of the jurors and that the juror would vote guilty (Tr. VII 1543-57); Barnes

appearing for her second day of testimony under the influence of drugs (Tr. VIII 1807-14, 1855-68); protesters outside the courthouse chanting, "[G]ive him life" (Tr. X 2303-06); and a protester outside the courtroom yelling, "[R]acist cop" and "racist jury" in front of two jurors during a break (Tr. X 2315-18). Following the final incident with the protester in the hall outside the courtroom, defense counsel requested that the jury be sequestered for the remainder of the trial (Tr. X 2318). The trial court denied the motion (Tr. X 2320-21).[7]

The defendant sets out the above incidents and seems to claim that he need not prove anything beyond the aggregate of the incidents themselves to obtain relief.[8] However, "[p]rejudice is presumed" only "if 'the influence of the news media, either in the community at large or in the courtroom itself, pervaded the proceedings.'" *Moore v. State*, 1990 OK CR 5, ¶ 19, 788 P.2d 387, 393 (quoting *Murphy v. Florida*, 421 U.S. 794, 799, 95 S. Ct. 2031, 2035, 44 L. Ed. 2d 589 (1975)). The defendant's trial does not present such circumstances, and prejudice will not be presumed. *Id.* (finding the record to be "devoid of the egregious publicity which pervaded the trials" in which prejudice was presumed (citations omitted)). Instead, this Court will review the "'totality of the circumstances'" to determine whether the defendant "received a 'fundamentally fair' trial." *Id.*

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[7] The jury was sequestered from the time the case was submitted to them on December 7, 2015, until they reached a verdict on December 10, 2015 (Tr. XVIII 4313-22).

[8] The defendant mentions in passing without any citation to authority that it was "understandable" 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." (Def's Brief at 33-34). However, he never requested a change of venue or courtroom. Though in the opening paragraph of this proposition he cites *Rideau v. Louisiana*, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1961), to state that a change of venue is warranted when prejudicial pretrial publicity has inflamed the community, he admits the pretrial publicity in his case was "not particularly substantial" (Def's Brief at 32). To the extent the defendant is attempting to raise any claim that the trial court should have granted his motion to sequester the jury, or *sua sponte* granted a motion for change of venue, these claims are waived. *See Arganbright v. State*, 2014 OK CR 5, ¶ 39, 328 P.3d 1212, 1221 (finding claim waived that was unsupported by argument and authority). *See also* Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017) (requiring appellant's brief to contain "[a]n argument, containing the contentions of the appellant, which sets forth all assignments of error, supported by citations to authorities, statutes and parts of the record," that "[m]erely mentioning a possible issue in an argument or citation to authority does not constitute the raising of a proposition of error on appeal," and "[f]ailure to list an issue pursuant to these requirements constitutes waiver of alleged error").

(quoting *Murphy*, 421 U.S. at 799).

The record in this case reflects the trial court, as well as counsel for both parties, remained diligent throughout trial to make certain the jurors were not subjected to any improper outside influences. When discussing the unknown person who spoke to another judge's juror - not any juror in this case - the trial court stated it would admonish the venire panel to report if anyone tried to speak to them, and that it would tell the sheriff's office to be on the lookout for anyone matching the person's description (Tr. II 271). The trial court admonished the man who tried to take a photograph to leave his phone off in the courtroom (Tr. III 581). When it was brought to the court's attention that the media were conducting interviews in the hall outside the courtroom, the trial court ordered a deputy to stand in the hall when the jury was on a break to shield them from anyone who might try to make contact (Tr. V 1014). When the issue of the media's continued presence in the hallway outside the courtroom was again brought to the court's attention, the trial court ordered a deputy to cordon off an area for media interviews so the jurors could take the elevators during breaks without encountering cameras (Tr. VI 1533-35). After defense counsel informed the court about the Facebook post by Jesse Tedford, the trial court granted defense counsel's request that it talk to each juror individually to determine if any of them knew Jesse Tedford (Tr. VI 1548, 1555). Each juror was questioned in chambers, and none of the jurors knew a person by the name of Jesse or Clarence Tedford (Tr. VI 1604-14). The State fails to see how Barnes subjected the jury to any improper outside influence with her testimony, whatever her state of intoxication. In any event, defense counsel's request to call her to the stand after postponing her testimony was granted against the trial court's inclination to hold her over the weekend until she was sober (Tr. VIII 1807-14, 1863, 1867-68).[9] When defense counsel approached to complain about the protesters chanting outside, the trial

[9] Defense counsel repeatedly requested that the trial court allow Barnes to testify that day, noting the situation she created could "certainly go to her credibility." (Tr. VIII 1863). Contrary to the defendant's claim on appeal that this decision was a "Hobson's choice" (Def's Brief at 33), the record reveals the choice was instead a strategic one, and one that was successful at least in part: the defendant was found not guilty of burglary and stalking, two of his five crimes against Barnes (Tr. XVIII 4323).

court noted it could not prevent them from protesting as they had a permit, so he admonished the jury to disregard anything they heard because it had "nothing to do with what goes on in this courtroom." (Tr. X 2305-06). When defense counsel requested the jury be sequestered after the incident with the protester yelling, "[R]acist cop" and "racist jury," the trial court denied the request, but stated it would allow the jury to leave first at breaks and recesses and have someone from the sheriff's office clear the floor at that time (Tr. X 2315-21). Finally, at the breaks and at the end of each day, the trial court thoroughly admonished the jury to not talk about the case, to not let anyone talk to them about the case, to report to the bailiff if anyone tried to approach them about the case, to not watch or read any news about the case, and that everything they know about the case should come from inside the courtroom (Tr. I 86-88, 183, 262-63; Tr. II 273, 316, 486-87; Tr. III 579, 634-35, 727-28, 781; Tr. IV 875, 928, 988, 999; Tr. V 1081-82, 1184, 1238-39; Tr. VI 1311-12, 1370, 1447-48, 1529; Tr. VII 1603, 1663, 1732, 1801; Tr. VIII 1854-55, 1942, 1985; Tr. IX 2054, 2124, 2196, 2238; Tr. X 2314, 2346, 2439, 2502; Tr. XI 2571, 2620, 2705, 2760; Tr. XII 2838-39, 2880-81, 2956-57, 3026-27; Tr. XIII 3104, 3139-40, 3194, 3257; Tr. XIV 3316, 3375, 3474-75; Tr. XV 3538-39, 3672, 3739; Tr. XVI 3820, 3852, 3941; Tr. XVII 4009-10, 4102; Tr. XVIII 4149-50, 4188).

The above demonstrates that the trial court took pains to preserve - and did preserve - "the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob." *Murphy*, 421 U.S. at 799. Beyond claiming the admonishment to the jury to disregard the protesters' chants was "likely as effective as throwing a skunk into the jury box and instructing them not to smell it" (Def's Brief at 33), the defendant makes no attempt to show any prejudice remaining after the trial court's actions each time an incident arose. However, "[a]bsent specific evidence to the contrary, this Court will presume that the trial court's instructions were followed." *Price v. State*, 1989 OK CR 74, ¶ 18, 782 P.2d 143, 147-48 (rejecting appellant's claim that "he was undoubtedly prejudiced by hostile crowds and inflammatory media publicity and that the jurors were exposed to a risk of possible annoyance," noting the record revealed "that the jury was properly admonished at the close of each day's proceedings"). The lack

of any evidence to the contrary combined with the jury's acquittal of the defendant on eighteen of the thirty-six counts demonstrates he is unable to overcome the presumption that the jury followed the trial court's repeated and thorough admonitions. *Id.* The totality of the circumstances reveal the defendant received a fundamentally fair trial. *Moore*, 1990 OK CR 5, ¶ 19, 788 P.2d at 393. The defendant's third proposition must be denied.

PROPOSITION IV

THERE WAS NO PROSECUTORIAL ERROR.

In his fourth proposition, the defendant claims prosecutorial error deprived him of a fair trial. For the reasons set out below, the defendant's claim lacks merit and must be denied.

Of the allegations of prosecutorial error raised in this proposition (Tr. XVIII 4183, 4279, 4280, 4282-83, 4289, 4295, 4303, 4304, 4306, 4307), the defendant objected only to one (Tr. XVIII 4292), but on grounds different than the one he raises on appeal. The defendant has therefore waived appellate review of his prosecutorial error claims for all but plain error. *Barnes*, 2017 OK CR 26, ¶ 6, 408 P.3d 209, 213 (failure to object at trial to alleged prosecutorial misconduct waives all but plain error review on appeal); *Harmon v. State*, 2011 OK CR 6, ¶ 36, 248 P.3d 918, 934 ("When a specific objection is made [at] trial, this Court will not entertain a different objection on appeal."). The defendant is not entitled to relief.

This Court "determine[s] whether the challenged actions rendered [the defendant's] trial fundamentally unfair, such that the jury's verdict cannot be relied upon," *Mathis v. State*, 2012 OK CR 1, ¶ 24, 271 P.3d 67, 76, and "evaluate[s] the alleged misconduct within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel." *Hogan v. State*, 2006 OK CR 27, ¶ 88, 139 P.3d 907, 935.

The defendant first claims the prosecutor shifted the burden of proof in closing argument with 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. XVIII 4183). This argument did not shift the burden of proof. "Where the defense has not offered evidence on an issue, the prosecutor may argue that the evidence is uncontroverted." *Bosse v. State*, 2017 OK CR 10, ¶ 85, 400 P.3d 834, 863 (rejecting appellant's claim that prosecutor's argument shifted the burden of proof). Further, immediately preceding the challenged statement, the prosecutor reminded the jury that the burden lay with the State: "Now, it's the State's burden to prove all of these charges that we've gone over the elements of. And the defendant has no burden at all. And the burden never shifts from the State's table to the defense's table." (Tr. XVIII 4183). No relief is warranted on this claim. *Id.* (finding another argument by prosecutor did not warrant a mistrial, "[g]iven that the prosecutor prefaced the comment by stating the correct burden of proof").

The defendant also complains the prosecutor shifted the burden with the argument that there was "not one witness - - not one witness in six weeks that said he did not commit the sex acts he is accused of." (Tr. XVIII 4292).[10] Defense counsel objected to this statement, arguing not that it shifted the burden of proof, but that it was not true because the defendant denied the charges in his interview with police, and that it was a comment on the defendant's right to remain silent (Tr. XVIII 4292). The trial court warned the prosecutor to not "try to shift the burden. No comment on his right to remain silent." (Tr. XVIII 4292). Defense counsel could have made certain any error in the prosecutor's statement was cured by requesting the trial court to admonish the jury to disregard the statement, but for whatever reason, he did not do so. The defendant has therefore invited any error

[10] On appeal, the defendant claims this statement was also a comment on his "privilege against self-incrimination." (Def's Brief at 35). He offers no argument and cites no authority for this claim, thus waiving this undeveloped argument. *See Arganbright*, 2014 OK CR 5, ¶ 39, 328 P.3d at 1221; Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017). In any event, the prosecutor's statement did not "directly and unequivocally call attention" to the defendant's failure to testify, and no relief is warranted. *See Martinez v. State*, 1999 OK CR 33, ¶ 49, 984 P.2d 813, 826 ("before a purported comment at trial on a defendant's failure to testify will constitute reversible error, the comment must directly and unequivocally call attention to that fact").

in this regard and no relief is warranted. *See Cheatham v. State*, 1995 OK CR 32, ¶ 36, 900 P.2d 414, 425 (noting appellant could have requested a jury admonition when he objected, thus "curing any potential error," but he chose not to do so, and while this Court would not second guess counsel's strategy "in not requesting an admonition," neither would it "allow Appellant to now claim reversible error where he invited the error by failing to make the request"). In any event, the jury was reminded repeatedly that the burden of proof lay at all times with the State (Tr. II 367-68, 374-75; XVIII 4183, 4240, 4269-71, 4279; O.R. III 420-34, 441). The prosecutor's single statement does not warrant relief. *See Davis v. State*, 2011 OK CR 29, ¶ 174, 268 P.3d 86, 128 ("'a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone,'" and "[f]rom a practical standpoint, every slight excess by the prosecutor does not require that a verdict be overturned and that a new trial be ordered" (citation omitted)).

The defendant next claims the prosecutor argued facts not in evidence. The first passage he now challenges was as follows:

> I would suggest to you that the most important thing about [A.G.] 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. XVIII 4307). There is nothing improper in this argument as it was supported by the evidence presented at trial. This Court allows "'a wide range of discussion and illustration' in closing argument. Counsel enjoy a 'right to discuss fully from their standpoint the evidence and the inferences and deductions arising from it.'" *Grissom v. State*, 2011 OK CR 3, ¶ 67, 253 P.3d 969, 992 (citations omitted).

A.G.'s DNA was indeed found near the zipper of the defendant's pants on both the outside and the inside (Tr. XVII 4050-51, 4069-70). Elaine Taylor, the State's DNA expert, testified she could not state the source of A.G.'s DNA, whether it was urine, saliva, or vaginal fluid, just that it was "biological material." (Tr. XVII 4064-66, 4074). However, A.G. testified the defendant raped her by inserting his penis into her vagina (Tr. XVI 3773-78). Further, Taylor testified "contact DNA

is very tricky sometimes," where, as in this case, the DNA of the person wearing the clothes will not be on the clothes (Tr. XVII 4073). That contributed to her opinion that there was a "good possibility" that epithelial cells are more likely to be transferred if contained in a liquid, such as vaginal fluid (Tr. XVII 4073). The prosecutor's argument that A.G.'s DNA, found on the inside and outside of the defendant's pants, came from her vagina was supported by the evidence, and not improper. *Grissom*, 2011 OK CR 3, ¶ 67, 253 P.3d at 992.

The defendant also claims the prosecutor's argument that he could not remember if he had an erection during his traffic stop of Ligons argued facts not in evidence (Tr. XVIII 4306). This claim lacks merit. Detective Davis asked the defendant in his interview whether he had a "hard on" while talking to Ligons, and he responded, "I don't . . . pretty positive I didn't get a hard on." (State's Ex. 77 at 57:35-57:49).[11] When the detective asked if he had a "hard on" which Ligons could have misconstrued, the defendant answered, "I don't think I had a hard on." (State's Ex. 77 at 58:21-58:36). While the defendant may not have used the precise words that he could not remember whether he had an erection, the words he did use were just as equivocal. As Detective Davis pointed out in her testimony, whether an officer had an erection during a traffic stop less than twenty-four hours prior is something the officer would certainly remember (Tr. V 1172). The prosecutor's argument was supported by the evidence and fell well within the "'wide range of discussion'" permitted during closing argument. *Grissom*, 2011 OK CR 3, ¶ 67, 253 P.3d at 992.

The defendant's final claim that the prosecutor argued facts not in evidence stems from the following: "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. XVIII 4303). This argument is supported by the evidence. The defendant's first day back on shift was June 17, 2014 (State's Ex. 77 at 1:16:00-1:16:05). Kerri Hunt, who dated the defendant from March 2014 to March 2015, testified her father was a pastor, and she read Bible

[11] Times cited are approximate.

scriptures daily (Tr. XVII 4108, 4111-12). Whenever she did not have time to read her scriptures, however, the defendant would record himself reading them and send the recording to her (Tr. XVII 4112-13). On the night of June 17 to 18, 2014, Hunt took a sleep aid (Tr. XVII 4115). Though the defendant sometimes initiated sex when he got home from work, Hunt testified there was no sexual activity between them when he got home that night (Tr. XVII 4117). She also testified the defendant "could have been" truthful if he told police in his interview that there had been sexual activity, because she "took sleeping medicine" and she "sleep[s] hard when [she] take[s] sleeping medication." (Tr. XVII 4133). According to Hunt, she would wake up "if it were to come to the point of sex," but then said the defendant may have been telling the truth if he told police his penis entered her vagina because she could have slept through it (Tr. XVII 4133-34). The prosecutor's argument was supported by the evidence, and it was not improper. *Grissom*, 2011 OK CR 3, ¶ 67, 253 P.3d at 992. In any event, "every slight excess by the prosecutor does not require that a verdict be overturned and that a new trial be ordered." *Davis*, 2011 OK CR 29, ¶ 174, 268 P.3d at 128.

Finally, the defendant claims the prosecutor disparaged defense counsel during the State's final closing argument (Tr. XVIII 4279, 4280, 4282-83, 4289, 4304). A review of the record, however, reveals the challenged statements were proper comments on the defense raised, not on defense counsel, and in direct response to defense counsel's closing argument. "It is a general rule of this Court that otherwise improper prosecutorial remarks are not grounds for reversal where they are invited, provoked or occasioned by defense counsel or are in reply to [his] statements." *Bryson v. State*, 1994 OK CR 32, ¶ 23, 876 P.2d 240, 252. "Comments, which were 'invited' and did no more than respond substantially in order to 'right the scale', do no warrant reversing a conviction." *Warner v. State*, 2006 OK CR 40, ¶ 182, 144 P.3d 838, 889, *overruled on other grounds by Taylor v. State*, 2018 OK CR 6, ¶ 11, 419 P.3d 265, 269.

Defense counsel argued that the defendant was a good officer who once came to the rescue of another police officer (Tr. XVIII 4231-32, 4276). As that had nothing to do with whether the defendant committed the charged crimes, the prosecutor reminded the jury that defense counsel wanted the jury to focus on things other than the defendant (Tr. XVIII 4279). Defense counsel asked

the jury why the State did not present any evidence regarding the defendant's interactions with the thirty-five people who did not report any inappropriate contact with him (Tr. XVIII 4266-72). The prosecutor argued that if he had tried to introduce evidence of something that did not happen, there would have been relevancy objections, and that lawyers are "governed by rules." (Tr. XVIII 4280).

Additionally, the prevailing theme of defense counsel's argument was an attack on the victims, their families, and their lifestyles (Tr. XVIII 4202-72). Specifically, defense counsel attacked Richard Long, Ligons' fiancé, for going to work instead of accompanying her to the hospital (Tr. XVIII 4202-03). He attacked Ligons for driving daily without a license (Tr. XVIII 4205-06). He attacked Hill for having multiple cell phone numbers, and for "put[ting] herself in this position" of having the defendant see her naked in the hospital, telling the jury, "I don't care and you shouldn't care." (Tr. XVIII 4211-12, 4221-22). He generally attacked each of the victims and argued they should not be believed, either because they had convictions, or drug problems, or both (Tr. XVIII 4205-60). The reason the defendant chose the victims he did was that they were least likely to go to the police, either out of fear of creating more problems for themselves or the simple knowledge that no one would believe a police officer had sexually assaulted them (Tr. VI 1283; Tr. VII 1787; Tr. VIII 1875; Tr. IX 2182-83; Tr. X 2297; Tr. XI 2568-69; Tr. XII 2836, 2996; Tr. XIII 3157; Tr. XIV 3371; Tr. XV 3515-16, 3632; Tr. XVI 3780-81, 3785). Defense counsel's closing argument mirrored the defendant's choices, as he asked the jury not to believe the women for the same reason the defendant chose them: that they were not believable due to either their pasts, or due to their present drug and/or legal problems (Tr. XVIII 4205-60). The prosecutor's arguments in this regard did not disparage defense counsel. Instead, they were entirely proper as they were in response to the arguments raised by defense counsel during closing argument. *Warner*, 2006 OK CR 40, ¶ 182, 144 P.3d at 889; *Bryson*, 1994 OK CR 32, ¶ 23, 876 P.2d at 252. That any of these comments on the victims may also have made them appear sympathetic is not a basis for relief. "Certain facts simply cannot be disentangled from a criminal trial on the basis that they also evoke sympathy." *Cole v.*

State, 2007 OK CR 27, ¶ 54, 164 P.3d 1089, 1101.[12]

Despite the defendant's waiver of this proposition for all but plain error, the State has shown above that all of the defendant's claims of prosecutorial error are without merit. Should this Court find anything improper, however, such error was also harmless. *Logsdon v. State*, 2010 OK CR 7, ¶ 26, 231 P.3d 1156, 1166 (noting that "reversal is not warranted for plain error if the error was harmless"). "This Court will not grant relief based on prosecutorial misconduct unless the State's argument is so flagrant and that it so infected the defendant's trial that it was rendered fundamentally unfair." *Williams v. State*, 2008 OK CR 19, ¶ 124, 188 P.3d 208, 230. Despite the strong evidence of the defendant's guilt on all of the charges, the jury still acquitted him of eighteen of the thirty-six counts against him (Tr. XVIII 4323-26). Evaluating the allegations in the context of the entire trial, it cannot be said that, even if they were improper, they denied the defendant a fundamentally fair trial. *Mathis*, 2012 OK CR 1, ¶ 24, 271 P.3d at 76; *Williams*, 2008 OK CR 19, ¶ 124, 188 P.3d at 230. The defendant's fourth proposition of error must be denied.

[12] The jurors were instructed to not let sympathy enter into their deliberations (O.R. III 451).

PROPOSITION V

THE DEFENDANT RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL.

In his fifth proposition, the defendant claims he received ineffective assistance of counsel. "This Court reviews claims of ineffective assistance of counsel *de novo*, to determine whether counsel's constitutionally deficient performance, if any, prejudiced the defense so as to deprive the defendant of a fair trial with reliable results." *Hanson v. State*, 2009 OK CR 13, ¶ 35, 206 P.3d 1020, 1031 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984)). Failure to make the requisite showing under either prong of the *Strickland* test defeats the defendant's ineffectiveness claim. *Strickland*, 466 U.S. at 700. The defendant's fifth proposition must be denied.

The defendant first claims counsel was ineffective for failing to cross-examine Barnes about the claim of K.C., a teenage girl present during the defendant's contact with Barnes on February 27, 2014 (Tr. X 2503). K.C. told the prosecution the previous Friday that she saw the defendant place Barnes in handcuffs before K.C. went inside the house (Tr. X 2503). The prosecutor noted he told defense counsel about K.C.'s claim before proceedings resumed that afternoon, and defense counsel indicated he was aware of her statement (Tr. X 2503).

"The decision of which witness to call at trial is one of strategy best left to counsel, and generally will not be second-guessed on appeal." *Frederick*, 2017 OK CR 12, ¶ 195, 400 P.3d at 831. K.C.'s statement was of little help to the defense, especially since she claimed she did not see anything that happened after she went inside. Further, even if Barnes' hands were cuffed in front of her, she could still have exposed herself as she testified the defendant made her (Tr. VII 1775-81). The defendant cannot show defense counsel's decision not to question Barnes about K.C.'s statement or present K.C. himself was not a reasonable trial strategy. *Id.* The defendant also cannot show any prejudice resulting from defense counsel's decision not to use this evidence. Given the other evidence which corroborated Barnes' claims that the defendant made repeated visits to her house, including on March 25 and 26, 2014 (Tr. VIII 1817-29, 1847-53; Tr. IX 2014-38), the defendant fails

to show a reasonable likelihood that the jury would have found him not guilty on his February 27, 2014, sexual battery charge had defense counsel used K.C.'s statement. *See Harrington v. Richter*, 562 U.S. 86, 112, 131 S. Ct. 770, 792, 178 L. Ed. 2d 624 (2011) (clarifying that to show prejudice, "[t]he likelihood of a different result must be substantial, not just conceivable").

The defendant also claims defense counsel was ineffective for failing to object to the joinder of the counts against him and to the allegations of prosecutorial error. "It is well established that where there is no error, one cannot predicate a claim of ineffective assistance of counsel upon counsel's failure to object." *Frederick v. State*, 2001 OK CR 34, ¶ 189, 37 P.3d 908, 955. The State showed in Proposition II that the charges were properly joined because the were they same type of offenses, they occurred over a relatively short period of time, in the same approximate location, and the proof of each crime overlapped as to establish a common scheme or plan. *Glass*, 1985 OK CR 65, ¶ 9, 701 P.2d at 768. The State also showed the defendant was not prejudiced by the joinder. *Smith*, 2007 OK CR 16, ¶ 38, 157 P.3d at 1168; *Lott*, 2004 OK CR 27, ¶ 37, 98 P.3d at 334. The defendant cannot show any prejudice resulting from defense counsel's failure to object to the joinder of the charges against him. *Frederick*, 2001 OK CR 34, ¶ 189, 37 P.3d at 955. *See also Barnes*, 2017 OK CR 26, ¶ 17, 408 P.3d at 216 ("'When a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed.'" (citation omitted)).

In Proposition IV, the State demonstrated the defendant's claims of prosecutorial error were without merit. The statements by the prosecutors which the defendant claims argued facts not in evidence were fully supported by the evidence and fell well within the wide range of permissible argument. *Grissom*, 2011 OK CR 3, ¶ 67, 253 P.3d at 992. The arguments which the defendant claims disparaged defense counsel were proper comments on the defense raised and in direct response to defense counsel's closing argument. *Warner*, 2006 OK CR 40, ¶ 182, 144 P.3d at 889; *Bryson*, 1994 OK CR 32, ¶ 23, 876 P.2d at 252. The defendant cannot show any prejudice resulting from defense counsel's failure to object to the alleged prosecutorial error. *See Pavatt v. State*, 2007 OK CR 19, ¶ 66, 159 P.3d 272, 292 (defense counsel was not ineffective for failing to object when

prosecutor's comments were not improper and any objection would have been overruled with no impact on outcome of trial).

Finally, the defendant claims counsel was ineffective for failing to more effectively counter the DNA evidence offered by the State. Though the DNA evidence connected the defendant to only one of his victims, A.G., he claims on appeal that it was the lynchpin of the entire case against him, and that without it, the State would not have been able to secure any convictions. That is simply not the case. The defendant was charged with assaulting thirteen women (O.R. I 153-61). The jury found him guilty of assaulting eight of the women; of those eight, the jury found him guilty of some of the crimes against Barnes and Grate, and not guilty on others (Tr. XVIII 4323-26). Certainly, if the DNA evidence had been the be-all and end-all that the defendant claims it was, the jury would have found him guilty on all counts against all victims. As it was, the verdicts make it clear the jury gave separate consideration to each charge and its supporting evidence. *Cf. Smith*, 2007 OK CR 16, ¶ 38, 157 P.3d at 1168 (noting appellant's jury "was specifically instructed to give separate consideration to each offense" and finding he failed to show "the jury was unable to compartmentalize the evidence with regard to each count"). The State's case did not hinge on the DNA evidence, but if defense counsel had taken the tactic appellate counsel now claims he should have, the evidence would have taken on a much greater importance which would have been devastating to the defendant.

A.G.'s DNA was found near the zipper on both the inside and the outside of the defendant's pants (Tr. XVII 4050-51, 4069-70). Taylor could not state the source of A.G.'s DNA, whether it was urine, saliva, or vaginal fluid, just that it was "biological material." (Tr. XVII 4064-66, 4074). She also testified the defendant was excluded from the DNA on his pants, and that there was no evidence of male DNA on the inside of his pants (Tr. XVII 4058-59, 4070-72). Taylor agreed that, as the defendant was excluded, there was "a very good possibility" that A.G.'s epithelial cells were "contained in a liquid such as vaginal fluid" when they were transferred on to the defendant's pants (Tr. XVII 4073). On cross-examination, Taylor admitted the presence of A.G.'s DNA could have

been the result of a secondary transfer from when the defendant searched her purse during his first contact with her (Tr. XVII 4075-78, 4082-83).

On appeal, the defendant claims defense counsel should have done more to persuade the jury that the presence of A.G.'s DNA on his pants was the result of passive transfer, as opposed to sexual contact. In support, he has filed an Application for Evidentiary Hearing on Sixth Amendment Claims, in accordance with Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017) (hereinafter Application), with an affidavit from Michael J. Spence, Ph. D. The defendant's Amendment to Application was filed under seal in this Court on August 3, 2018.

> To obtain an evidentiary hearing and supplement the record on appeal with additional evidence of ineffective counsel, Appellant must present clear and convincing evidence that there is a strong possibility trial counsel was ineffective for failing to identify or utilize the available evidence. This burden is less onerous than *Strickland's* required showing of deficient performance by counsel and resulting prejudice. The grant of an evidentiary hearing is not a finding that defense counsel actually was ineffective, but a preliminary finding of a strong possibility that warrants a further opportunity to support the claim. Conversely, the *denial* of a request for evidentiary hearing under Rule 3.11(B) necessarily embraces this Court's finding that Appellant has not shown a violation of the Sixth Amendment under *Strickland*.

Williamson, 2018 OK CR 15, ¶ 53, 422 P.3d at 763 (citations omitted and emphasis in original). The defendant cannot show by clear and convincing evidence that there is a strong possibility that trial counsel was ineffective for failing to identify or use this extra-record evidence. The Application, amendment, and the defendant's claim of ineffective assistance of counsel must be denied.

On appeal, the defendant claims that with its own expert, the defense could have refuted Taylor's testimony that the defendant was excluded from any of the DNA on his pants, when in fact her report showed the samples were inconclusive; could have brought out that only a small amount of A.G.'s DNA was present on the defendant's pants, which would have strengthened the theory that it was the result of secondary transfer; could have expanded on the area of secondary DNA transfers, instead of relying on Taylor's testimony that she "can't disagree with" that possibility; could have

explained that the defendant's pants were mishandled; could have explained why it was significant that Taylor did not use an alternate light source to examine the defendant's pants for vaginal secretions; could have explained to the jury why it was important that Taylor did not test other areas of the pants as a control for the findings on the fly; and could have explained to the jury the significance of twenty-three unaccounted for alleles (*see* Application and Def's Brief at 44-45). The record in this case demonstrates that the defense did employ its own DNA expert, but chose not to call that expert, a strategic decision which this Court should not second-guess.

A post-trial *in camera* hearing was held in this case on June 26 and 27, 2017, to determine whether certain records pertaining to Taylor's testimony were subject to discovery by defense counsel.[13] Following the hearing, the trial court issued an order on August 4, 2017, which it amended the same day.[14] These records reveal that the defense employed its own DNA expert, Dr. Brandt Cassidy, who looked at Taylor's findings, was present in the courtroom during Taylor's testimony regarding the presence of A.G.'s DNA on the defendant's pants, and interacted with defense counsel during Taylor's testimony (6/26/17 Tr. 26, 55; 6/27/17 Tr. 289-90, 310-11; Amended Order at 4, 11).

"[C]ounsel may, at times, have legitimate reasons for not calling certain witnesses to testify. The decision of which witness to call at trial is one of strategy best left to counsel, and generally will not be second-guessed on appeal." *Frederick*, 2017 OK CR 12, ¶ 195, 400 P.3d at 831 (citation omitted). This Court has explained:

> When counsel is assailed for failing to present evidence, we consider whether counsel conducted a responsible investigation on the issues involved. A total failure to investigate a viable and relevant aspect of a defense is one thing; a tactical decision not to present certain evidence, after reasonable

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[13] These transcripts, and the trial court's resulting orders remain under seal pursuant to this Court's Order of June 8, 2018. *See* Order of June 8, 2018, at pp. 3-4. The State will refer to these records as (6/26/17 Tr.), (6/27/17 Tr.), and (Amended Order), respectively.

[14] The trial court's initial order mistakenly states that Dr. Spence was present at trial as the defense DNA expert, while the amended order correctly states that expert was Dr. Brandt Cassidy; the orders are otherwise the same (*see* Order and Amended Order of August 4, 2017). The State cites to the Amended Order.

> investigation, is another. When counsel has made an informed decision to pursue one particular strategy over another, that choice is "virtually unchallengeable."

Underwood v. State, 2011 OK CR 12, ¶ 82, 252 P.3d 221, 252 (citation omitted). The record in this case reveals there was no failure by defense counsel to investigate the DNA evidence in any manner. Defense counsel hired an expert, an expert who was hired to look at Taylor's findings and who was present for her testimony. That defense counsel ultimately made the informed choice to not call Dr. Cassidy to testify was a valid strategic decision which is "'virtually unchallengeable.'" *Id.*

Allowing Taylor's testimony that the defendant was excluded from the DNA samples on his pants to stand, instead of eliciting from her that her report actually showed the results were inconclusive, was beneficial to the defendant. The State's theory was that A.G.'s DNA was on the defendant's pants by way of his penis when he vaginally raped A.G. (Tr. XVIII 4307). Testimony that the defendant was excluded from the samples only lent credibility to the defense theory: that her DNA was present as a result of secondary transfer. Defense counsel also used Taylor's failure to test any area of the pants except around the zipper to strengthen that theory, when he asked her, "But there is a way that we could go back and even confirm more fairly that it would be a secondary transfer such as if you had tested the pockets. Did you ever test the pockets of Officer Holtzclaw's pants?" (Tr. XVII 4083). Taylor confirmed she did not test the pockets, the inside of his pockets, or any other area of the pants except that around the zipper (Tr. XVII 4083). This allowed defense counsel to plant the seed in the jurors' minds that A.G.'s DNA would have been present there if tested, without running the danger of confirming that it was not. Further, Taylor testified on cross-examination that while she did not use an alternate light source to examine the defendant's pants for any biological stains, she did use very bright light and a magnifying glass, and found nothing suspicious (Tr. XVII 4083-84). As Taylor admitted she observed nothing suspicious, and testified it was not possible to determine what the source of A.G.'s biological material was, the State fails to see what could be gained from further questions about the light source used to observe stains that Taylor did not see (Tr. XVII 4064-66, 4074, 4078). Finally, defense counsel did well to stay away

from eliciting any testimony about any unaccounted-for alleles, as such questions ran the high risk of raising the possibility of unaccounted-for victims in the minds of the jurors. Defense counsel's decisions to handle the DNA evidence in the manner he did, and to not call the defense expert to testify, were strategic choices which, especially based on this record, are "'virtually unchallengeable.'" *Underwood*, 2011 OK CR 12, ¶ 82, 252 P.3d at 252.

Ultimately, Taylor agreed with what the defendant wanted the jury to know: that while A.G.'s DNA was "biological material," Taylor could not state its source, specifically whether it came from vaginal fluid, and that she could not state how it came to be on the defendant's pants, but its presence could have been the result of secondary transfer from his first contact with A.G. when he went through her purse (Tr. XVII 4050-51, 4064-66, 4074, 4075-78, 4082-83, 4085). That the defendant now claims more should have been done to amplify this evidence is not grounds for labeling defense counsel ineffective.

> "The fact that another lawyer would have followed a different course during the trial is not grounds for branding the appointed attorney with the opprobrium of ineffectiveness, or infidelity, or incompetency. Absent a showing of incompetence, the Appellant is bound by the decisions of his counsel and mistakes in tactic and trial strategy do not provide grounds for subsequent attack."

Lee v. State, 2018 OK CR 14, ¶ 15, 422 P.3d 782, 786 (citation omitted). As the trial court noted, "As is evident in most any type of litigation or trial and in keeping in mind the adversarial process of a jury trial, it is not surprising that four different expert witnesses would not all agree on everything." (Amended Order at 11).[15] The record in this case reveals defense counsel made informed strategic choices concerning how to handle the DNA evidence, complete with the assistance of a DNA expert hired by the defense who was present for Taylor's testimony. Given the evidence that defense counsel chose one strategy over another after a thorough investigation, that

[15] The four different experts referred to by the trial court were Taylor, Dr. Cassidy, Dr. Spence, and Campbell Ruddock, Taylor's supervisor, who reviewed her testimony after trial (Amended Order at 11).

choice is "'virtually unchallengeable,'" and the defendant simply cannot overcome the presumption the defense counsel performed reasonably. *Underwood*, 2011 OK CR 12, ¶ 82, 252 P.3d at 252.

In any event, even if defense counsel had done at trial exactly what the defendant claims on appeal he should have, the evidence still would have proved that A.G.'s DNA was on the inside zipper area of the defendant's pants. All of the testimony in the world about secondary transfer would not have explained how her DNA ended up in this area, an area one would not typically touch when going about his day, even to use the restroom (Tr. XVII 4087). The defendant cannot show any prejudice resulting from his counsel's performance. *Harrington*, 562 U.S. at 112. The defendant's Application, Amendment to Application, and claim of ineffective assistance of counsel must be denied. *Williamson*, 2018 OK CR 15, ¶ 53, 422 P.3d at 763.

For all of the above reasons, the defendant's fifth proposition must be denied.

PROPOSITION VI

THE DEFENDANT'S SENTENCES ARE NOT EXCESSIVE AND SHOULD NOT BE DISTURBED.

In his sixth proposition, the defendant claims that his aggregate sentence of 263 years is excessive. "This Court will not modify a sentence within the statutory range 'unless, considering all the facts and circumstances, it shocks the conscience.'" *Neloms v. State*, 2012 OK CR 7, ¶ 39, 274 P.3d 161, 171 (citation omitted). Further, it is well-settled that the decision to run sentences consecutively or concurrently rests in the sound discretion of the trial court. *See* 22 O.S.2011, § 976 (giving trial court discretion in ordering defendant's sentences to run consecutively or concurrently); *Birdine v. State*, 2004 OK CR 7, ¶ 7, 85 P.3d 284, 286 ("We recognize the decision to run sentences concurrently or consecutively is within the discretion of the trial court."). The defendant's sentences should not be disturbed.

Each of the defendant's individual sentences is well within the sentencing range (Tr. XVIII 4323-26; Sent. Tr. 46). *See* 21 O.S.2011, § 888 (forcible oral sodomy); 21 O.S.2011, § 1021(A) (procuring lewd exhibition); 21 O.S.2011, § 1115 (first degree rape); 21 O.S.2011, § 1116 (second degree rape); 21 O.S.Supp.2013, § 1123(D) (sexual battery). At sentencing, defense counsel asked for the court's "mercy," and for the court to do "the right thing," but made no specific request for concurrent sentences (Sent. Tr. 45). The trial court sentenced the defendant in accordance with the jury's verdicts and ordered the sentences to run consecutively, for a total of 263 years (Sent. Tr. 46).

The defendant was an Oklahoma City police officer who abused his position to sexually prey upon the women he was sworn to protect and to serve (*see* Statement of the Facts). He picked his victims carefully, assaulting women whom he could threaten with jail or detox to gain their compliance with his demands, and whose words alone he knew would not be credible if they reported his crimes (*see* Statement of the Facts). The defendant's sentences are not excessive, and neither they, nor the trial court's decision to run them consecutively, should be disturbed. *Neloms*, 2012 OK CR 7, ¶ 39, 274 P.3d at 171; *Birdine*, 2004 OK CR 7, ¶ 7, 85 P.3d at 286.

Contrary to the defendant's claim on appeal, he was not living "a productive and law-abiding life up until he was arrested in this case." (Def's Brief at 48). To be sure, the law-abiding part of his life ended when he began sexually assaulting the women on his patrol. Additionally, the defendant's sentences are not the result of any kind of "unfair stacking" against him (Def's Brief at 48). Instead, they are the direct result of the individual crimes he chose to commit against Barnes, Grate, Ellis, Johnson, Ligons, Bowen, Copeland, and A.G. *Cf. Doyle v. State*, 1989 OK CR 85, ¶ 16, 785 P.2d 317, 324 ("The Double Jeopardy Clause is not carte blanche for an accused to commit as many offenses as desired within the same transaction or episode."). For the above reasons, the defendant's sentences should not be disturbed and his sixth proposition must be denied.

PROPOSITION VII

THERE WERE NO INDIVIDUAL ERRORS WHICH WARRANTED REVERSAL, AND THEREFORE THE "CUMULATIVE EFFECT" OF THE ALLEGED ERRORS DOES NOT WARRANT RELIEF.

In his seventh and final proposition, the defendant claims the cumulative effect of the alleged errors warrants relief. "A cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by Appellant." *Davis*, 2011 OK CR 29, ¶ 228, 268 P.3d at 138. The State has set forth specific responses herein to rebut each claim and to demonstrate that there was no error. The defendant's convictions and sentences are fully supported by the evidence; neither individual nor cumulative error can be said to have affected the reliability of the jury's verdicts. The defendant's seventh and final proposition must fail.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF MAILING

On this 1st day of October 2018, a true and correct copy of the foregoing was mailed to:

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Filename: 37015.html
Match Number: 1 of 1
Score: 100
ENTRY_DATE: 010505
APPELLANT: James Lorenzo Devers
APPELLEE: State of Oklahoma
JURISDICTION: Court of Criminal Appeals of Oklahoma
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(Johnson)

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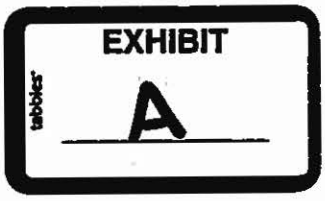
OPINION

James Lorenzo Devers, Appellant, was tried by jury in the District Court of Tulsa County, Case No. CF-2003-1674, where he was convicted of Counts 1 and 2 - Inducing a Minor to Engage in Prostitution and Count 3 - Indecent Proposal to a Child, each after former conviction of two or more felonies. The jury set punishment at life imprisonment and a $25,000 fine on Counts 1 and 2 and life imprisonment without the possibility of parole on Count 3. The Honorable Tom C. Gillert, who presided at trial, sentenced Devers accordingly and ordered the sentences to be served consecutively. From this judgment and sentence, he appeals.

Three teenage boys, sixteen-year-olds M.J. and D.W. and fifteen-year-old D.P., testified against Devers at trial. Each accused Devers of offering to pay them money if each would allow Devers to look at his penis, and even more money if Devers could perform fellatio on them. Each claimed they refused Devers' proposal. M.J. testified that Devers made the proposal to him in February or March of 2003 after Devers had taken him and some other boys out to eat and to the movies. M.J. said that Devers dropped off the other boys and made him the offer when the two were alone in Devers' car in front of M.J.'s house. D.W. testified that Devers made him the proposal in February 2003 when the two were alone in Devers' car just down the street from D.W.'s house. D.W. said Devers had driven one of D.W.'s friends and some other boys home before parking and making D.W. the offer. D.W. testified that Devers apologized to him in the car that "he came at him that way." D.P. testified that Devers made the proposal to him sometime between September 2002 and March 2003 when the two were alone on D.P.'s front porch. Devers later apologized to D.P. and said he was just "playing."

Eventually, the boys told relatives about the incidents and the police were notified. The police arrested Devers in April 2003. Devers confirmed that he made the aforementioned proposals to M.J. and D.P. during an interview on April 14, 2003 with Tulsa Police Detective Charles Haywood, but denied approaching D.W. "in that manner." In May 2003, while in jail awaiting trial, Devers sent letters to D.P.'s mother and to D.W.'s grandmother in which he apologized for his proposals and asked each to drop the charges against him. Other facts will be discussed as they become relevant to the propositions of error raised for review.

In Proposition One, Devers contends the trial court erred when it denied his motion to sever his three counts for trial. Specifically, he claims prejudice resulted from the improper joinder of counts because trying three counts of what amounted to the same offense before the same jury increased the chance the jury would convict on all counts due to the number of victims alleging the same misconduct. The record shows the trial court denied Appellant's motion to sever, finding that the crimes were so distinctive they showed a signature. We will not grant relief on a claim of improper joinder unless the trial court abused its discretion resulting in prejudice to the accused. Gates v. State, 1988 OK CR 77, 24, 754 P.2d 882, 887.



"Joinder of separately punishable offenses 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 v. State, 1985 OK CR 65, 8, 701 P.2d 765, 768; Allison v. State, 1983 OK CR 169, 10, 675 P.2d 142, 146; 22 O.S. 436 (2001). In interpreting the phrase "series of acts or transactions," the Glass Court explained that "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, 1985 OK CR 65, 9, 701 P.2d at 768.

Devers maintains these crimes were wholly separate and independent of each other and that the jury was unfairly influenced by the improper joinder due to the admission of evidence of the separate offenses which would have constituted inadmissible "other crimes evidence" had the counts been severed. We disagree.

The evidence showed that Devers routinely befriended and was in the company of teenage boys. Between September 2002 and March 2003, Devers befriended and offered money to the three teenage male victims in this case in exchange for engaging in a sexual act. Each boy testified that Devers had approached and befriended him by offering such things as friendship and jobs. After spending time with the boys, Devers created a situation in which he was alone with each boy. While alone, Devers offered each boy money if the boy would allow Devers to look at the boy's penis. When each boy refused, the amount of money offered increased. As Devers upped the ante, Devers changed his proposal from simply viewing the boy's penis to performing oral sodomy on the boy. The same peculiar and characteristic behavior pattern manifested in the crimes charged evidenced a common scheme or plan and evidence of each would have been admissible even had the counts been severed, especially under the "greater latitude" rule. See Myers v. State, 2000 OK CR 25, 21-24, 17 P.3d 1021, 1029-30, cert. denied, 534 U.S. 900, 122 S.Ct. 228, 151 L.Ed.2d 163 (2001). Based on our review of the record, we find these crimes were sufficiently connected by time, geographical proximity, and evidence to make joinder proper. Moreover, were we to find error, which we do not, said error would be harmless beyond a reasonable doubt because the evidence as to each separate count was independent and overwhelming. Devers, himself, confessed to two of the charges, making any prejudicial effect of trying the counts together slight. On this record, we find the trial court did not abuse its discretion in denying Devers' motion to sever counts. Therefore, relief is not warranted.

In Proposition Two, Devers claims the trial court incorrectly instructed the jury on the applicable range of punishment for Indecent Proposal to a Child in Count 3. The parties agree there were two conflicting versions of 21 O.S. 1123 (A) (2002) in effect during the six month time span in which Devers was charged with making the indecent proposal to D.P.1 One version hereinafter referred to as Version One for purposes of discussion went into effect November 1, 2002 and contained a more expansive enhancement provision in paragraph 5 for certain repeat offenders. The other version hereinafter referred to as Version Two went into effect June 5, 2002 and was superseded by Version One when Version One went into effect. Devers maintains the trial court should have instructed the jury pursuant to the second version, the less punitive one according to him.

Persons accused of crime, if convicted, should be convicted and sentenced pursuant to the statute in effect at the time the crime was committed. Therefore in this case, if the offense occurred prior to November 1, 2002, Devers should have been convicted and sentenced under Version Two of 21 O.S. 1123 (A) which went into effect June 5, 2002. However, if the offense was committed after November 1, 2002, Devers should have been convicted and sentenced under Version One. Devers was charged in Count 3 with making an indecent proposal to fifteen-year-old D.P. sometime between September 2002 and March 2003; however, at trial, D.P. testified that the proposal was made in September 2002 and that Devers apologized for making the proposal in February/ March 2003. Based on this record, we find Devers should have been convicted and sentenced pursuant to Version Two. Version Two provided:

"A. Any person who shall knowingly and intentionally:

"1. Make any oral, written or electronically or computer-generated lewd or indecent proposal to any child under sixteen (16) years of age for the child to have unlawful sexual relations or sexual intercourse with any person . . .

.

"5. In a lewd and lascivious manner and for the purpose of sexual gratification, urinate or defecate upon a child under sixteen (16) years of age or ejaculate upon or in the presence of a child, or force or require a child to look upon the body or private parts of another person or upon sexual acts performed in the presence of the child or force or require a child to touch or feel the body or private parts of said child or another person, upon conviction, shall be deemed guilty of a felony and shall be punished by imprisonment in the State Penitentiary for not less than one (1) year nor more than twenty (20) years, event as provided in Section 3 of this act.2 The provisions of this section shall not apply unless the accused is at least three (3) years older than the victim. Any person convicted of a second or subsequent violation of subsection A of this section shall be guilty of a felony and shall not be eligible for probation, suspended or deferred sentence. Any person convicted of a third or subsequent violation of subsection A of this section shall be guilty of a felony and shall be punished by imprisonment in the State Penitentiary for a term of life or life without parole, in the discretion of the jury, or in case the jury fails or refuses to fix punishment then the same shall be pronounced by the court."

Section 3 of the Act was Title 21 O.S. 51.1a which also went into effect June 5, 2002 and provided in pertinent part:

"Any person convicted of . . . lewd molestation . . . after having been convicted of either rape in the first degree, forcible sodomy, lewd molestation or sexual abuse of a child shall be sentenced to life without parole."

Because the jury convicted Devers of lewd molestation under 21 O.S. 1123 (A) for making an indecent proposal to a child under 16 and because he had prior convictions for both forcible sodomy and lewd molestation, the trial court should have instructed the jury that if it found Devers had prior convictions for either forcible sodomy or lewd molestation, the punishment was life without the possibility of parole. 21 O.S. 1123 (A) (2002) & 21 O.S. 51.1a .

The record shows the trial court in the instant case followed Version One and instructed the jury that the range of punishment for making an indecent proposal to a child for a person with two or more previous convictions for forcible sodomy or indecent proposal to a child is life or life without parole. The trial court also instructed the jury that the punishment for indecent proposal to a child after two or more previous felony convictions is twenty years imprisonment to life. The jury's recommended sentence of life without parole shows it found that Devers had at least two previous convictions for either forcible sodomy or lewd molestation. Had the trial court given the correct instruction in this case, the only punishment available would have been life without parole. Therefore, any error in the trial court's instruction giving the jury the option of life or life without parole was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967).

In Proposition Three, Devers argues the trial court should have instructed the jury that he would have to serve 85% of the sentence imposed before he could be considered for parole. He claims the failure to inform the jury about the statutory curtailment of parole in 21 O.S. 13.1 (2002) gives rise to the danger that a jury will give a lengthier sentence than was warranted to ensure an offender is incarcerated for a period of time.

Title 21 O.S. 13.1 (2002) requires that persons convicted of certain crimes, including Lewd Molestation, be required to serve not less than eighty-five percent (85%) of any sentence imposed prior to becoming eligible for parole. Persons convicted of the crimes enumerated under 21 O.S. 13.1 also are not eligible to earn credits which have the effect of reducing the length of a sentence to less than eighty-five percent (85%) of the sentence imposed. Defense counsel submitted proposed instructions informing the jury that Devers would have to serve eighty-five percent (85%) of any sentence imposed by the jury on all counts. The trial court rejected the instructions. During deliberations, the jury sent out a note asking, "If given life, what is the minimum term before parole can be considered?" The trial court again declined defense counsel's proposed instructions on21 O.S. 13.1 and told the jury it had all the necessary instructions to reach a verdict.

The trial court did not err in refusing defense counsel's proposed instruction for Counts 1 and 2 as Inducing a Minor to Engage in Prostitution is not an enumerated crime under 13.1 and is not subject to the eighty-five percent rule. Moreover, because the correct sentence on Count 3 for a person with Devers prior convictions was a mandatory life without parole sentence, see Proposition 2, supra., we fail to see how Devers was prejudiced by

the omission of the proposed instruction or the trial court's answer to the jury's question. Accordingly, we find no relief is required.

In Proposition Four, Devers correctly notes that the trial court's instruction setting forth the range of punishment for Counts 1 and 2 combined the term of imprisonment which may be assessed under the habitual offender statute (21 O.S. 51.1 (C) (2002)) with the fine provision from 21 O.S. 1088 (B)(1) (2001), the statute criminalizing Inducing a Minor to Engage in Prostitution. Devers also correctly notes, and the State concedes, that we have found the mixing of punishment provisions, like in the instant case, constitutes error. See Gaines v. State, 1977 OK CR 259, 16, 568 P.2d 1290, 1294 (holding punishment may not be assessed by combining statutes, but must fall within the limitations of one statute only.) Due to this instructional error, we find that Devers' fines on Counts 1 and 2 must be MODIFIED to a fine of $10,000.00. See 21 O.S. 64 (B) (2001).

In Proposition Five, Devers argues his consecutive life sentences are excessive. He argues the sentences are too severe in light of the nature and circumstances of the offense and his troubled childhood. This Court will not reduce a sentence that is within statutory limits unless it is excessive as to shock the conscience of the Court. Rea v. State, 2001 OK CR 28, 5, 34 P.3d 148, 149. The sentences imposed here are within the statutory limits. The jury heard the evidence in this case and of Devers' six prior felony convictions, including three sodomy convictions and one lewd molestation conviction. Based on this record, it cannot be said the sentence is so excessive as to shock the conscience of this Court. Accordingly, this proposition is denied. Having reviewed all of Devers' claims, we find the Judgment and Sentence of the trial court on Count 3 should be and is hereby AFFIRMED. Counts 1 and 2 are AFFIRMED with the fine imposed on those counts MODIFIED to $10,000.00.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY THE HONORABLE TOM C. GILLERT, DISTRICT JUDGE

James Lorenzo Devers, Appellant, was convicted by jury in Tulsa County District Court, Case No. CF-2003-1674, of Counts 1 and 2 - Inducing a Minor to Engage in Prostitution and Count 3 -Indecent Proposal to a Child, each after former conviction of two or more felonies. The jury set punishment at life imprisonment and a $25,000 fine on Counts 1 and 2 and life imprisonment without the possibility of parole on Count 3. The Honorable Tom C. Gillert, District Judge, who presided at trial, sentenced Devers accordingly and ordered the sentences to run consecutively. From this judgment and sentence, he appeals.

AFFIRMED as MODIFIED.

(FOOTNOTES):

1 This section was amended three times during the 2002 Legislative Session, by: (i) Laws 2002, HB 2301, c. 110, s 2, emerg. eff. July 1, 2002; (ii) Laws 2002, SB 1425, c. 455, s 6, emerg. eff. June 5, 2002; and (iii) Laws 2002, SB 1536, c. 460 s 11, eff. November 1, 2002. None of the 2002 amendments was repealed during the 2003 Legislative Session.

2 O.S.L.2002, c. 455, s 3, (Title 21 O.S. 51.1a).

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SUMMARY OPINION

Appellant Patrick M. Walker was tried by jury for Shooting with Intent to Kill (Counts I and II) (21 O.S. 652 (A) (2001)) and Possession of a Firearm, After Former Conviction of a Felony (Count III) (21 O.S. 1283 (2001)), Case No. CF-2001-2098, and First Degree Murder (21 O.S. 701.7 (2001)), Case No. CF-2001-6392, in the District Court of Oklahoma County. In Case No. CF-2001-2098, the jury found Appellant guilty of the lesser included offense of Assault and Battery with a Dangerous Weapon in Counts I and II and recommended as punishment ten (10) years imprisonment in each count. In Case No. CF-200-16392, Appellant was found guilty as charged and a sentence of life imprisonment was recommended. The trial court sentenced Appellant in accordance with the jury's recommendations, ordering the sentences to run consecutively. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of his appeal:

I. Appellant was deprived of due process of the law due to the trial court's error in joining the counts of Shooting with Intent to Kill and the one count of Possession of a Firearm After Former Adjudication for trial with Appellant's First Degree Murder Charge.

A. The joinder of offenses in this case was in Violation of Oklahoma Law.

B. Even if joinder of offenses was permissible under 21 O.S. 436 , the prejudice to Appellant's right to a fair trial required the imposition of separate trials.

II. Appellant was denied his right to a fair trial when the court failed to give necessary instructions stating the applicable law and when the court deviated from OUJICR (2d) on other instructions.

A. The trial court issued erroneous instructions on lesser-included offense where the uniform Instructions clearly and concisely stated the law.

B. The trial court used no uniform instructions for impeachment with prior inconsistent statement and impeachment with prior criminal convictions.

C. The trial court failed to instruct the jury on other crimes evidence.

D. The trial court failed to instruct the jury on the law of transferred intent.

III. The evidence was insufficient to support Appellant's convictions beyond a reasonable doubt.

A. The evidence was insufficient to prove that Appellant intended to commit an assault and battery with a dangerous weapon by use of a firearm upon Mr. Harlan and Ms. Steele.

B. The state failed to prove beyond a reasonable doubt that Appellant did not shoot Harlan in self-defense.

C. The jury was unreasonable in failing to find the offense of first degree manslaughter.

IV. The trial court committed reversible error by admitting evidence that was more prejudicial than probative in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article II , Section 7 / Article II , Section 9 and Article II , Section 20 of the Oklahoma Constitution.

V. Appellant was deprived of the effective assistance of counsel as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article II , Section 7 / Article II , Section 9 and Article II , Section 20 of the Oklahoma Constitution.

VI. The Accumulation of errors deprived Appellant of his right to a fair trial.

After a thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that neither reversal nor modification is warranted under the law and the evidence.

In Proposition I, we find the trial court did not abuse its discretion in joining for a single trial the Shooting with Intent to Kill counts in Case No. CF-2001-2098 and the first degree Murder charge in Case No. CF-2001-6392. See Gilson v. State, 8 P.3d 883, 905 (Okl.Cr.2000). Although the eight month time span between offenses is the same length of time we noted in Gilson was not the relatively short period of time discussed in our prior case law, the evidence in this case showed a logical relationship between the offenses which warranted a single trial. The record shows Appellant was not unduly prejudiced by the joinder. Further, as joinder was permissible other crimes evidence was properly admitted as evidence of a common scheme or plan. See Id.

In Proposition II, any error in failing to instruct the jury pursuant to Oklahoma Uniform Jury Instructions - Criminal (OUJI-CR) (2d) 10-27 in regards to the First Degree Murder count was harmless error. As OUJI-CR (2d) 10-27 was given to the jury in regards to the Shooting with Intent to Kill and Assault and Battery With a Dangerous Weapon counts, under the circumstances of this case it is reasonable to presume the jury applied the contents of 10-27 in their consideration of the murder charge.

The trial court's giving of OUJI-CR (2d) 10-13, the basic instruction on return of verdict, instead of OUJI-CR (2d) 10-24 in this case involving lesser included offenses was error. However, this error was harmless as the correct range of punishment for all charged and lesser included offenses was included in the court's version of OUJI-CR (2d) 10-13. See Smallwood v. State, 763 P.2d 142, 144 (Okl.Cr.1988).

Additionally, the trial court erred in failing to list the specific names of the witnesses included in the impeachment instructions pursuant to OUJI-CR (2d) 920 and 9-22. However, this deviation from the uniform instructions is harmless error as there is no indication the jury had any problem relying on their collective memories in determining the credibility of the witnesses.

The trial court did not err in failing to instruct sua sponte on evidence of other crimes based upon Darlene Whitaker's testimony concerning her attempt to purchase illegal drugs at the Offbeat Motel. This was part of the res gestae of the murder charge; therefore a jury instruction on evidence of other crimes was not warranted.

Lastly, the trial court did not err in failing to give a jury instruction on transferred intent. Such a theory was not supported by the evidence. Further, Appellant benefitted from the lack of an instruction as the uniform instruction on transferred intent, OUJI-CR (2) 4-11, helps to lessen the State's burden of proof. In the absence of a transferred intent instruction, the State had the greater burden to prove Appellant's intent to take a human life (Harlan's) in Count I and his intent to injure Steele in Count II.

In Proposition III, we find the evidence, when viewed in the light most favorable to the prosecution was sufficient to support all of the convictions. See Spuehler v. State, 709 P.2d 202, 203-204 (Okl.Cr.1985). While there may be conflicts in the testimony, we must defer to the jury's resolution of the weight of the evidence and the credibility of the witnesses. Matthews v. State, 45 P.3d 907, 919-920 (Okl.Cr.2002), Smith v. State, 932 P.2d 521, 530 (Okl.Cr.1996). See also Carter v. State, 879 P.2d 1234, 1248 (Okl.Cr.1994) (a reviewing court must accept all reasonable inferences and credibility choices that tend to support the verdict).

In Proposition IV, we find Appellant has failed to meet his burden of showing that playing the videotape of his December 10 interview for the jury was substantially more prejudicial than probative. See Mayes v. State, 887 P.2d 1288, 1309 - 1310 (Okl.Cr.1994).

In Proposition V, we have thoroughly reviewed Appellant's claims of ineffective assistance of counsel and find he has failed to show there is a reasonable probability that but for any omissions by counsel, the result of the trial would have been different. See Bland v. State, 4 P.3d 702, 730 (Okl.Cr.2000) citing Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed. 2d 674 (1984).

Further, we have reviewed Appellant's Application for an Evidentiary Hearing on Sixth Amendment Claims and accompanying affidavits filed with the appellate brief. In the Application, Appellant repeats several of the claims raised in his appellate brief. We find Appellant has failed to show by clear and convincing evidence a strong possibility that defense counsel was ineffective for failing to investigate further and utilize the complained-of evidence. See Short v. State, 980 P.2d 1081, 1108 (Okl.Cr.1999).

In Proposition VI, we find that while certain errors did occur in this case, even considered together, they were not so egregious or numerous as to have denied Appellant a fair trial. See Gilson v. State, 8 P.3d 883, 929(Okl.Cr.2000).

Accordingly, this appeal is denied.

DECISION

The Judgments and Sentences are AFFIRMED. The Application for an Evidentiary Hearing on Sixth Amendment Claims is DENIED.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY THE HONORABLE VIRGIL C. BLACK, DISTRICT JUDGE

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