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

[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.