ORIGINAL

Case No. F-2016-62

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DANIEL KEN HOLTZCLAW,

Appellant,

vs.

THE STATE OF OKLAHOMA,

Appellee.

Appeal from the
District Court of Oklahoma County

REPLY BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT

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REPLY BRIEF OF APPELLANT

This brief is submitted on behalf of Daniel K. Holtzclaw in reply to the Brief of Appellee filed by the State of Oklahoma on October 1, 2018. Mr. Holtzclaw reaffirms and reasserts all arguments advanced in his brief in chief filed February 1, 2017; however, Mr. Holtzclaw replies to certain of the Appellee's arguments as follows.

REPLY TO PROPOSITION I
(Re: Sufficiency of the Evidence)

Regarding the procuring lewd exhibition counts, the State agrees that this Court has not defined the term *public view*, but asks the Court to adopt the definition given by the New Mexico Court of Appeals in interpreting its indecent exposure statute. *See Brief of Appellee* at 17 (quoting *State v. Artrip*, 811 P.2d 585, 586 (N.M. Ct. App. 1991)). Interpretations by other states' courts of different statutes, of course, are of little help interpreting language in an Oklahoma statute. *See, e.g., State v. Smith*, 1921 OK CR 108, 198 P. 879, 879. The phrase "public view" does not have a uniformly recognized fixed meaning. This much is clear from the State's own citations. While the New Mexico court defines the term as any place that is accessible to the general public, the federal court case cited by the State specifically references a "member of the public who views the indecent exposure." *See Brief of Appellee* at 13 (quoting *United States v. Graham*, 56 M.J. 266, 269 (C.A.A.F. 2002)). More importantly, those cases interpret the phrase within the meaning of an indecent exposure statute. As Appellant has already pointed out, *see Brief of Appellant* at 16-17, Oklahoma's indecent exposure statute, contained in a different subsection of the same section as the procuring lewd exhibition charge, uses the term *public place*, which would very reasonably be interpreted as any place that is accessible or visible to the general public. The Oklahoma Legislature's decision to use a *different* term with reference to procuring lewd exhibition clearly evinces a more narrow legislative intent.

Appellant also argued that the language "any number of persons" must be

interpreted to mean at least one person *other than* those involved in the (procuring or carrying out of the) lewd exhibition. *See Brief of Appellant* at 16-17. The State's assertion that this interpretation "requires a construction contrary to the plain language of the statute," *Brief of Appellee* at 14, is not true. Rather, this construction is complementary to the plain language. If it were sufficient that one of the participants in the lewd exhibition observed it, which would necessarily always be true, then there would be no reason for referencing "public view" or "the view of any number of persons." The State's proffered construction would render that language superfluous. *See, e.g., Anderson v. State,* 2018 OK CR 13, ¶ 6, 422 P.3d 765, 769 (Court avoids "any construction which would render any part of the statute superfluous").

As to the very real concern that the State's suggested construction would subject couples to criminal prosecution, the State incorrectly asserts that the same argument could be made regarding the indecent exposure statute. *See Brief of Appellee* at 14-15. The State points out that such a result would be absurd, because "[t]he '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." *Id.* at 14 (citations omitted). However, as noted previously, the indecent exposure statute requires the conduct to occur in a *public place*, and therefore by its express terms does not apply to the privacy of one's home. If the Court were to adopt the State's construction that it is sufficient that one of the participants in the lewd exhibition viewed the exhibition, Oklahoma couples in their private homes would not be so protected, because the statute does not require that the exhibition occur in a public place – it is sufficient if the exhibition is in "public view" **or** in "the view of any number of persons." OKLA.STAT. tit. 21, § 1021(A)(2).

Finally, Appellant argued that he could not be guilty of this crime by operation of Section 1021.1, which shields law enforcement officers, like Appellant, from criminal

liability under Section 1021 for conduct that occurs in the course of law enforcement activities. *See Brief of Appellant* at 18. In a footnote, the State claims that this argument is "waived" for violation of the rule each proposition to be set out separately in the brief. *See Brief of Appellee* at 15, n. 15 (citing Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (Supp. 2017)). Appellant submits that this argument is not, as the state asserts, "distinct from his claim that the State presented insufficient evidence." *Brief of Appellee* at 15, n.3. Application of Section 1021.1 is still a factual issue – *i.e.*, whether the evidence indicates he was or was not engaged in law enforcement activities, as opposed to purely private behavior. The gist of this proposition is that he could not legally be convicted of this crime under the evidence presented. Nevertheless, if it happens that this Court deems this argument waived, but that Appellant would have been entitled to relief had undersigned counsel merely set out the paragraph developing the argument under a separate proposition heading, then Appellant should nevertheless be granted relief for ineffective assistance of appellate counsel. *See, e.g., Garrison v. State*, 2004 OK CR 35, ¶ 168, 103 P.3d 590, 619.

In the same footnote, the State also argues, without explanation, that Appellant's 'claim that his conduct could in any way be considered "in the course of law enforcement activities' is also absurd." *Brief of Appellee* at 15, n.3 (citing *Head v. State*, 2006 OK CR 44, ¶ 13, 146 P.3d 1141, 1145). In all of these instances, Officer Holtzclaw was in uniform, in his police-issued patrol car, and engaged in the activity of detaining persons suspected of unlawful behavior. The State offers not a hint of a suggestion as to how it is "absurd" to say that this is law enforcement activity.

As to the rape counts, Appellant asserted that there was no evidence of the use or threat of force or violence, as required by statute. *See Brief of Appellant* at 18-20; OKLA.STAT, tit. 21, § 1114(A)(3) (2011); Instruction No. 4-120, OUJI-CR(2d); (O.R. 430). In response, the State argues that Appellant's act of "either explicitly or implicitly

plac[ing the alleged victims] in fear of going to jail or detox" constitutes the use or threat of force or violence. *Brief of Appellee* at 16-17 (citing OKLA.STAT. tit. 21, § 111(A) (Supp. 2016) (codifying language from *Lawson v. State*, 1987 OK CR 140, ¶¶11-12, 739 P.2d 1006, 1008). That statute and case, however, stand for nothing more than the unremarkable proposition that first degree rape may be perpetrated *either* by actual force or violence *or* by the *threat* of force or violence. In *Lawson*, for instance, the defendant threatened to kill the victim. *Lawson, supra* at ¶ 2, 739 P.2d at 1007. No such threat of force or violence occurred in the instant case. If the alleged victims are to be believed, Officer Holtzclaw threatened either to arrest them or transport them to detox. No "force or violence," as those terms are commonly understood, are involved here. The notion that transporting a person from one place to another constitutes a use of force or violence is patently absurd.

As to the forcible sodomy counts, the same essential argument applies. A threat of arrest or transport to detox does not constitute either the use or threat of "force or violence," as those words are generally understood. No reasonable person would think that transporting a person from one place to another constitutes the use or threat of "force or violence." An alternate means of committing forcible sodomy is when the alleged victim is"under the legal custody, supervision or authority" of a described government entity. *See* OKLA. STAT. tit. 21, § 888(B)(4) (Supp. 2009). The State argues that having been seized constitutes being under legal custody, supervision, or authority. *See Brief of Appellee* at 18-20. Just because a person is seized within the meaning of the Fourth Amendment, however, does not mean that they are "in custody." *See, e.g., Berkemer v. McCarty,* 468 U.S. 420, 423, 104 S.Ct. 3138, 3141, 82 L.Ed.2d 317 (1984) (*Terry* stops do not constitute legal custody). It is not reasonably likely that the Oklahoma Legislature had such routine detentions in mind. Whatever one may think of Appellant's conduct, if the alleged victims are to be believed, the facts of this case should not simply be shoe-horned into the legal definitions of crimes

that are the closest match the prosecutor could find.

Specifically with reference to Rosetta Grate, the evidence in this case cannot be reasonably deemed as anything approaching proof beyond a reasonable doubt. As already noted in the brief in chief, *see Brief of Appellant* at 21-22, the jury acquitted Appellant of first degree rape of Ms. Grate but convicted him of forcible sodomy, even though the evidence of both was exactly the same: Ms. Grate's uncorroborated testimony. This was a woman who had multiple felony convictions, (Tr. 2609-10), including a documented history of lying to the police, (Tr. 2579) She was high on crack the night Mr. Holtzclaw stopped her, (Tr. 2526), and the forensic evidence (or lack thereof) did not support her clearly untrustworthy testimony.

REPLY TO PROPOSITION II
(re: Prejudicial Joinder)

In his second proposition of error, Appellant complained that the joinder of 36 counts involving 13 different alleged victims was improper and highly prejudicial. *See Brief of Appellant* at 25-31. Predictably, the State argues that the offenses at issue fall within the rather broad interpretation of "occurring over a relatively short period of time, in approximately the same location" given in some recent cases. *See Brief of Appellee* at 23-25 (citing, *inter alia*, *Gilson v. State*, 2000 OK CR 14, ¶ 47, 8 P.3d 883, 904; *Smith v. State*, 2007 OK CR 16, ¶ 25, 157 P.3d 1155, 1165). Appellant maintains that no reasonable person would think that crimes involving 13 alleged victims, occurring at various locations throughout north Oklahoma City over a period of six months, constitutes "a relatively short period of time, in approximately the same location." *See Brie f of Appellant* at 27. It is overly generous to call either this period of time "relatively short" or the locations "approximately the same," but to find both is not justified by any common understanding of the English language.

The purpose of joinder of offenses is to avoid the unnecessary waste of judicial resources of multiple trials, when the evidence can be presented all at once in one trial.

See, e.g., Vowell v. State, 1986 OK CR 172, ¶ 9, 728 P.2d 854, 857. This is the reason for requiring the evidence to "overlap" before joining offenses. *Smith v. State*, 2007 OK CR 16, ¶ 23, 157 P.3d 1155, 1165 (citing *Glass v. State*, 1985 OK CR 65, ¶ 9, 701 P.2d 765, 768). Nevertheless, the Legislature recognized that joining multiple offenses in one trial may cause unfair prejudice to the defendant and therefore prohibited joinder when such prejudice can be shown. *See* OKLA.STAT. tit. 22, § 439 (2011). When the separate crimes are part of a common scheme or plan, then the evidence would be admissible against the defendant at separate trials anyway, so that (A) judicial economy is served by presenting the evidence just once, instead of multiple times, and (B) the defendant is therefore not prejudiced by the jury hearing evidence of multiple crimes. Here, however, had the charges been severed into thirteen trials, there is no way that all thirteen witnesses would have been allowed to testify in all thirteen trials. Accordingly, the State's interest in judicial economy was greatly minimized under the facts of this case. The prejudice to Officer Holtzclaw, however, was manifest and severe. He had a right to be convicted, if at all, by evidence of each of the charged offenses, not by evidence of other crimes he was accused of. *See, e.g., Burks v. State*, 1979 OK CR 10, P.2d, 594 P.2d 771, 772, *overruled in part on other grounds by Jones v. State*, 1989 OK CR 7, 772 P.2d 922. Under the facts of this case, there is a high degree of likelihood that Officer Holtzclaw was convicted, not based on actual evidence proving him guilty of each charged crime, but on an assumption that because so many women accused him of criminal behavior, at least some of it *must* be true. This is especially prejudicial here, where the alleged victims did not, in most cases, come forward of their own volition, but only after they were sought out, interrogated, and in some cases, badgered by police detectives on a mission.

REPLY TO PROPOSITION V
(re: Ineffective Assistance of Counsel)

In responding to Appellant's ineffectiveness claim for failure to present

available expert testimony, the State relies in part upon the sealed order issued by Judge Timothy Henderson after a secret, *ex parte* hearing held on June 26 and 27, 2017. *See Brief of Appellee* at 43. This is one of the many reasons why Appellant's attorneys should have been allowed to attend and participate in this hearing. Just as Appellant feared, the State was able to use that hearing to pre-litigate this issue and obtain a favorable factual finding that Appellant had no ability to contest or explain. Basic fairness dictates that this case should be remanded to give Appellant the same opportunity to litigate this issue that was granted *ex parte* to the State. Indeed, the very fact that the State felt it necessary to go outside the *trial record* to contest Appellant's claim of ineffective assistance of counsel is a tacit admission that an evidentiary hearing is necessary.

The State asserts that trial counsel made an "informed choice not to call" his DNA expert, *see Brief of Appellee* at 44, but there is nothing in this record to show that. Similarly, the State, relying heavily upon Judge Henderson's *ex parte* findings, claims that counsel made "made informed strategic choices concerning how to handle the DNA evidence," *id.* at 45-46. Just as trial counsel's performance should not be judged by the distorting effects of hindsight, so too an appellate court must avoid sheltering deficient performance within the mantle of trial strategy. *See, e.g., Stouffer v. Reynolds*, 168 F.3d 1155, 1165 (10th Cir. 1999). The State's *assumption* that trial counsel was well-informed about the DNA evidence is not borne out by the record.

In opening statement, he told the jury that no one's DNA was found on Appellant's pants but that of Ms. Gardner. (Tr. 454) He repeated this erroneous statement after trial at the combined hearing for sentencing and on the defendant's motion for new trial. (S. Tr. 20) Yet, contrary to Elaine Taylor's testimony, there was definitely male DNA on the pants. *See Affidavit of Michael J. Spence, Ph.D.*, at p. 6 (¶¶ 12-13), attached as Exhibit "A" to the *Application for Evidentiary Hearing on Sixth Amendment Claims*, filed simultaneously with Appellant's brief. There were also 23

unaccounted for alleles. *Id.* at 5 (¶ 10). Moreover, while Ms. Taylor testified that she did a "quantitation plate" on the DNA evidence, (Tr. 4033-34), she was amazingly never asked what that determination of quantity was. If trial counsel were well informed of the DNA evidence in the case, and that there was an extraordinarily low amount of Ms. Gardner's DNA on his pants, *see Affidavit of Michael J. Spence, Ph.D.*, at 3, 6-8 (¶¶ 14, 16-17), it is unlikely he would not have elicited that evidence, if not from his own expert, then at least from Ms. Taylor on cross-examination.

Courts have long recognized the harm arising from misrepresentation and misuse of forensic evidence, particularly DNA evidence. *See, e.g., United States v. Bonds*, 12 F.3d 540, 567-68 (6th Cir. 1993) ("The aura of reliability surrounding DNA evidence does present the prospect of a decision based on the perceived infallibility of such evidence, especially in a case such as this were the evidence is largely circumstantial."); *United States v. Hebshie*, 754 F.Supp.2d 89, 94 (D. Mass. 2010) (overturning a conviction because experts gave flawed scientific testimony and explaining that when forensic evidence is presented at trial, courts must be extra vigilant, because juries may give it "farm more credence than it may deserve" and convict based on unreasonable inferences that deny justice); *Commonwealth v. Curnin*, 565 N.E.2d 440, 441 (Mass. 1991) (DNA evidence in general is highly prejudicial due to its "aura of infallibility"); *State v. Bloom*, 516 N.W.2d 159, 169 (Minn. 1994) ("Prosecutors and trial courts are cautioned that we will not hesitate to award a new trial to a defendant if our review of the trial record reveals that the quantitative or qualitative DNA identification evidence was presented in a misleading or improper way."). This Court has itself seen such harm inflicted by this same crime lab. *See McCarty v. State*, 1988 OK CR 271, 765 P.2d 1215, 1219 (reversing a death penalty conviction because it was secured on the basis of false testimony by a forensic chemist whose "so-called expert opinion was actually a personal opinion beyond the scope of present scientific capabilities"). A well-informed trial lawyer does not allow the

scientific misrepresentations, detailed in Appellant's brief in chief and application for evidentiary hearing, to go unchallenged.

The State also makes several other unsupported statements about the DNA evidence. For instance, the State claims at one point that "[a]llowing 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," because it "only lent credibility to the defense theory: that her DNA was present as a result of secondary transfer." *Brief of Appellee* at 44. But the State also notes that the alleged absence of his own DNA was used by Taylor to support the prosecution's argument that the DNA from Adaira Gardner was transferred in her vaginal fluids. *Id.* at 41.

The State also argues that "[a]ll 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 the day, even to use the restroom." *Id.* at 46. The State cites to page 4087 of Volume XVII of the trial transcripts in support of this argument; however, the argument there that Appellant's unzipping the fly could not explain how Ms. Gardner's DNA got there was based on the (once again erroneous) testimony that his DNA did not transfer to his own pants. The State's argument here also ignores the importance of the mishandling of the pants by Detective Gregory. *See Affidavit of Michael J. Spence, Ph.D.*, at 7 (¶ 15).

Appellant has provided this Court with substantial evidence showing that the jury was affirmatively misled about the DNA evidence in this case. *See Brief of Appellant* at 41-45; *Application for Evidentiary Hearing on Sixth Amendment Claims* (filed on February 1, 2017). None of that evidence, however, is currently a part of the direct appeal record. Moreover, the State is using a factual finding developed at a hearing at which Appellant and his appellate counsel were excluded from participating, to counter Appellant's claims. As such, unless the Court reverses

Appellant's convictions based on one or more of the other, meritorious, substantive issues presented in his brief in chief, it is vital that Appellant be granted a hearing to make this evidence part of the record and to develop that record in support of his ineffective assistance of counsel claims. If trial counsel's failures were truly the result of an informed trial strategy, then the State should have no difficulty establishing that through examination of trial counsel at the hearing.

In any event, the affidavit of Dr. Spence very clearly demonstrates that the jury was fundamentally misled about the significance of the DNA evidence in this case, and that affidavit is corroborated in several material aspects by the evidence that was the subject of the secret *ex parte* hearing held in June 2017. *See Amendment to Application for Evidentiary Hearing on Sixth Amendment Claims (Previously Filed in this Court on February 1, 2017)* (filed under seal in this Court on June 25, 2018). There can be no doubt that the DNA evidence in this case was critical and extended beyond just the counts involving Adaira Gardner, because it was the only independent evidence corroborating any criminal activity by Officer Holtzclaw.[1] A hearing is necessary to allow both parties to subject this evidence to the crucible of adversarial testing so that this Court can fairly resolve Appellant's claims.

CONCLUSION

Mr. Holtzclaw respectfully asks the Court to reverse his conviction and remand the matter either with instructions to dismiss or for a new trial.

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[1] This is not, as the State would have this Court believe, simply a figment of Appellant's imagination. *See Brief of Appellee* at 41. At least two different jurors have spoken publicly about the importance of the DNA evidence in this case, *see Only on KOCO 5: Juror Speaks About Daniel Holtzclaw Trial*, YOUTUBE (Dec. 18, 2015) <https://www.youtube.com/watch?v=XzOK3xZQqxQ> (last accessed Oct. 22, 2018); Susan Welsh, *et al.*, *How the Daniel Holtzclaw Jury Decided to Send the Ex-Oklahoma City Police Officer to Prison for 263 Years*, ABC News (May 20, 2016), <http://abcnews.go.com/US/daniel-holtzclaw-jury-decided-send-oklahoma-city-police/story?id=38549442> (last accessed Oct. 22, 2018), and local news has quoted "some jurors" as saying that the DNA evidence "guaranteed the conviction," *see* Phil Cross, *Emails Show DNA Lab Concerns Related to Holtzclaw Case*, Fox25 News (July 28, 2017) (embedded video) <http://okcfox.com/news/local/emails-show-dna-lab-concerns-related-to-Holtzclaw-case> (last accessed on Oct. 22, 2018).

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

JAMES H. LOCKARD