



FILED IN DISTRICT COURT
OKLAHOMA COUNTY

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

DEC 02 2021

RICK WARREN
COURT CLERK

26 _____

THE STATE OF OKLAHOMA,

Plaintiff,

v.

Case No.: CF-2017-1448

ROBERT LEON HASHAGEN III,

Defendant.

STATE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Comes Now, the State of Oklahoma, by and through First Assistant District Attorney, District 21 District Attorney's Office and offers the following Proposed Findings of Fact and Conclusions of Law following the evidentiary hearing conducted in the above-styled case.

This matter came on for hearing on November 15, 2021 before the Honorable Paul Hesse. Counsel for the State was First Assistant District Attorney, Travis White and for the Defendant, James Lockard and Alex Richard.

This matter was remanded to the District Court by the Oklahoma Court of Criminal Appeals to address claims raised in Defendant/Appellant's Motion for New Trial.¹

¹ Because the Oklahoma Court of Criminal Appeals has sought a broader review of the 'fairness of the trial' and any 'impact the allegations that may be proven true had on that trial', the State has proffered a brief synopsis of the evidence which was introduced in this case and included that in this pleading. *See, Order Remanding for Evidentiary Hearing, Lumpkin, Concur in Results.*

PROPOSED FINDINGS OF FACT

1. Defendant was charged by information in Oklahoma County Case No. CF-2017-1448 with one count of Murder in the First Degree on March 8th, 2017. *See Docket Sheet.*
2. This case was administratively assigned to Judge Tim Henderson on March 8th, 2017. *See Docket Sheet.*
3. This administrative assignment was a routine function within Oklahoma County. *See Evidentiary Hearing (EH) Transcript, pp.11 12, ll. 20-25, 1-2, pp.88-89, ll. 22-25, 1-12.*
4. The first substantive contested motion(s) were argued nearly four (4) years after the charges were filed before Judge Henderson in January, 2021. *See, EH, p.14, ll. 14-22, p. 15, ll. 6-11; p. 91, ll. 15-19.*
5. A sexual relationship between Kelly Collins and Tim Henderson existed between the period of April 2016 through July or August 2018. *See EH, Court's Exhibits Nos. 1 and 2.*
6. By January, 2021, more than two (2) years had passed since any out of court personal relationship had been engaged in between Kelly Collins and Tim Henderson. *EH, Court's Exhibits 1 and 2; Tr. p.16, ll. 19-25.*
7. The existence of a previous sexual relationship between Henderson and Collins was not disclosed to the parties until after the trial of this case. *See EH, p. 53, ll.9-18; pp. 92-93, ll. 18-25, 1-15.*
8. Henderson presided over the jury trial of this case which took place in January/February 2021. *See Docket Sheet.*
9. The State was represented at jury trial by three prosecutors, Jimmy Harmon, Lori McConnell and Kelly Collins with responsibilities essentially designated with

Harmon serving as 'first chair', McConnell, 'second chair' and Collins, 'third' chair. *See EH, p. 89, ll. 13-21.*

10. The 'workload' as it relates to the prosecution of his case was 'fairly even' amongst the prosecutors. *See EH, pp.89-90, ll. 22-25, 1-3.*
11. The Defendant was represented at jury trial by two defense lawyers, Benjamin Munda and Clay Curtis.
12. Trial Counsel Curtis represented the Defendant for the duration of this case. *EH, p.17, ll. 1 2.*
13. At no time during the time in which Henderson operated as a district judge or during the pendency of this case did Curtis formerly challenge Henderson's neutrality as a judge. *EH p. 17, ll.3-8, p. 18, ll.5-8.*
14. There is no evidence that Henderson and Collins engaged in any improper ex parte communications concerning the case against the Defendant before, during or following the trial of this matter. *See Court's Exhibits 1 and 2; EH, pp.96-97, ll. 25, 1-5, p. 148, ll.19-22.*
15. Substantive pretrial issues that were argued before the Court, leading up to and including the trial of this case were as follows:
 - a. Admission of the State's proposed *Burks* evidence;
 - b. Admission of alleged testimonial hearsay provided by the Victim to law enforcement and/or medical personnel;
 - c. Motion to Quash Jury Panel; and
 - d. Defendant's Motion to Exclude DNA Evidence.

See Docket Sheet, See EH Transcript pp.29-33
16. The trial court heard evidence and took argument on the matter of the State's *Burks* notice on January 21, 2021. *See Docket Sheet.*

17. Of these four motions, the Court's decision on the matter of *Burk's* evidence was the perhaps the most contentious and where the trial court committed alleged error as the gatekeeper of evidence at trial. *See EH, p.34, ll.1 14.*
18. ADA Lori McConnell both wrote the pleadings and conducted all of the argument to the trial court in support of the admission of the State's *Burk's* evidence in this case. Collins did not brief or argue the *Burks* evidence. *See Original Record; EH, pp.34-35, ll. 21-25, 1-14, pp.92-93, ll. 20 25, 1 5, 13 17.*
19. There is no evidence McConnell or Harmon had any personal or inappropriate relationship with Henderson at any time prior to, during or since this trial. *See, EH, p.76, ll.14-22, p.97, ll. 6-13.*
20. The Court *denied in part and granted in part*, the State's notice to include evidence of other bad acts which is summarized as follows:
 - a. State was not allowed to introduce concerning the Defendant's history of methamphetamine use;
 - b. State was not allowed to introduce testimony concerning certain statements alleged to have been made by the Defendant to witness Charles Pence;
 - c. State was allowed to introduce testimony from three witnesses who were in a relationship with the Defendant concerning specific instances of violence. These incidents related to *particular* evidence of the Defendant pulling hair, choking, cutting phone lines, possession of a BB gun during a domestic incident and incidents involving an attempt to tie up a former wife/girlfriend with tape. *See Transcript of Proceedings, January 21, 2021.*
 - d. The Court made its ruling on the record as to the *Burks* evidence, holding that said evidence was admissible to establish *identity* which was disputed by the Defendant. The Court held that proof of these prior instances of the Defendant's conduct had been established by clear and convincing

evidence, and that said evidence was necessary to establish identity at trial. *See Transcript of Proceedings, January 21, 2021.*

- e. The State was permitted to introduce testimony concerning statements alleged to have been made by the Defendant about his ability to erase DNA evidence. *See Transcript of Proceedings, January 21, 2021.*
- f. The State was permitted to introduce evidence concerning a previous burglary of the murder victim's residence in 2010 wherein she was assaulted and evidence concerning the Defendant was collected.

See Transcript of Proceedings, January 21, 2021, EH, Transcript pp. 17 18, 50 51.

- 21. The Court gave a limiting instruction to the jury each time *Burks* evidence was introduced by the State. *See Original Record at Jury Trial; EH p.42, ll.7-10.*
- 22. The evidence that was admitted under *Burks* was narrowly tailored and expressed in detail by Judge Henderson. *See Transcript of Proceedings, January 21, 2021.*
- 23. A synopsis of the State's evidence at trial, included but was not limited to:
 - a. In 2010, the Victim was alone in her residence when she encountered an individual standing in her bedroom. The residence was dark, as the burglary occurred during the early morning hours. *See JT Transcript, Vol. II, pp. 212-228.*
 - b. During this burglary, the Victim was choked with a pillow and she was beaten. *See JT Transcript, Vol. II, pp. 212-228.*
 - c. During this burglary, entry to the residence on this occasion was made through a cut screen located on the bathroom window to the residence. *See JT Transcript, Vol. II, pp. 256-291.*
 - d. In 2010, evidence of a cut screen was also found on the back porch of the residence. *See JT Transcript, Vol. II, pp. 212-228.*
 - e. Multiple surfaces were swabbed for possible DNA during the 2010 investigation. *See e.g., JT Transcript, Vol. III, pp. 6-22.*

- f. During the 2010 burglary, the Victim's phone lines had been cut. *See e.g., JT Transcript, Vol. III, p. 180.*
- g. During the 2010 burglary, some evidence concerning the use of bleach in the kitchen area of the residence was indicated. Bleach can destroy DNA. *See JT Transcript, Vol. II, pp. 223-24, 244; Vol. IV, p. 77.*
- h. In 2013, the Victim was again alone in her residence when an individual entered her residence through a back porch after having cut portions of a screen to gain entry. *See e.g., JT Transcript, Vol. IV, pp.181-82, 224-26.*
- i. During this burglary, the Victim was again beaten and this time, also bound with a particular type/brand of Shur-flex duct tape. *See e.g., JT Transcript , Vol. III, pp.29-55, 121-123.*
- j. During this burglary, water was poured on the Victim and in and around the residence at various locations. Testimony was taken that water can work to interfere with the ability to collect DNA evidence. *See JT Transcript, Vol. IV, p. 77.*
- k. Testimony was taken that in the years preceding the burglaries, the Defendant was heard to say that he knew how to destroy DNA. *See JT Transcript, Vol. III, p. 271.*
- l. The Victim's hair had been pulled out in places. What appeared to be a clump of the Victim's hair was found in the bathroom of the residence. *See e.g., JT Transcript , Vol. III, pp.37, 51, 118, 121 123.*
- m. Victim described her attacker as wearing white shoes, light-colored shorts and a camouflage shirt. *See e.g., JT Transcript , Vol. III, pp. 122-123.*
- n. The Defendant's DNA profile could not be excluded from samples collected from both the 2010 burglary and the 2013 burglary. *See e.g., JT Transcript , Vol. III., pp.172-173, Vol. IV, pp.57-58, 132, 137-139.*

- o. The Defendant had access to a particular type of tape which, according to the evidence, was a unique style of tape that was used to tie up the Victim during the 2013 burglary. *See e.g., JT Transcript , Vol. V, pp.43 47, 69.*
- p. Testimony was taken that the Defendant lived two-doors down from the Victim at the time of both the 2010 and 2013 burglaries. *See e.g., JT Transcript, Vol. III, pp. 170, 241, 259 60, Vol. V, p. 21, 112.*
- q. Testimony was taken that after the 2013 burglary, the Defendant was observed in possession of various items of property to include a female breast plate, a jar of change, various ceramic items and a woman's make-up bag. *See JT Transcript, Vol. III, pp. 200 210.*
- r. Testimony was taken that a pair of muddy white sneakers were found in a residence occupied by the Defendant following the burglary. *See JT Transcript, Vol. III, pp. 200 210.*
- s. A jailhouse informant testified that the Defendant told him about why he was in the county jail. The witness testified the Defendant admitted he had burglarized an older woman's home and was wearing a camouflage hunting shirt and some dark jeans. The Defendant told him he cut a screen to make entry. The Defendant said he tied the victim up and that this 'tore the hide off her wrists.' *See JT Transcript, Vol. IV, pp. 175-190.*

CONCLUSIONS OF LAW

1. "The Oklahoma Constitution guarantees a defendant a right to a fair, impartial trial not tainted by the personal bias or prejudice of the trial court." *Welch v. State*, 2000 OK CR 8, ¶ 37 (quoting *Fitzgerald v. State*, 1998 OK CR 68), see *Okla. Const. Art. 2, ¶6.*
2. Further, it is without dispute, a showing of actual subjective bias is not required to establish a due process violation. *Williams v. Pennsylvania*, 579 U.S. 1 (2016). As indicated by the Court of Criminal Appeals in its remand order, the 'real question is

“whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias.” *Williams*, 136 S.Ct. at 1905.

3. The law recognizes that a party to any case has a fundamental right to an impartial judge. See, *Miller v. Carroll (In re B.J.M.)*, 2019 WI App 10 (See also, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009)). “The United States Supreme Court has concluded that “[a] fair trial in a fair tribunal is a basic requirement of due process.” *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009) (quoting *In re Murchison*, 349 U.S. 133, 137, 75 S. Ct. 623, 99 L. Ed. 942 (1955)).
4. There is a presumption that the judge acted “fairly, impartially, and without bias[.]” This presumption may be rebutted. *Miller v. Carroll (In re B.J.M.)*, 2019 WI App 10.
5. Bias *may* reveal itself where there is appearance of bias or where there are facts demonstrating actual bias. *Miller v. Carroll (In re B.J.M.)*, 2019 WI App 10. Relevant in this determination is the *timing* of any improper relationship and any official action taken by the court at issue. See *Id.* (*Court became Facebook ‘friends’ with prevailing litigant, just prior to rendering decision in their favor*).
6. Although “[a] fair trial in a fair tribunal is a basic requirement of due process,” *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955), “most matters relating to judicial disqualification d[o] not rise to a constitutional level.”
7. “All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion. (*citation omitted*). But it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.” *Tumey v. Ohio*, 273 U.S. 510 (1927).

8. The *timing* of a relationship and an allegation of implied or actual bias is relevant. "Another court has distinguished ongoing personal relationships and those in the past, and declined to require disqualification when the lawyer was the judge's campaign manager six years prior to the complaint. *Gluth Bros. Constr. Co. v. Union Nat. Bank*, 548 N.E.2d 1364, 1368 (Ill.App.Ct.1989)." *Pierce v. Pierce*, 2001 OK 97²
9. 'We assess claims of judicial bias against state court judges under the standard announced by the Supreme Court in *Liteky v. United States*, 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994), a case involving statutory recusal standards for federal judges. See *Lyell v. Renico*, 470 F.3d 1177, 1186 (6th Cir. 2006). In *Liteky*, the Supreme Court held that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." 510 U.S. at 555. To show improper prejudice, a judge's comments must "display a deep-seated favoritism or antagonism that would make fair judgment impossible.' *Wilson v. Parker*, 515 F.3d 682 (6th Cir. 2008)
10. Although the Supreme Court traditionally has concluded that personal bias or prejudice alone was not a sufficient basis "for imposing a constitutional requirement under the Due Process Clause," in *Caperton v. A.T. Massey Coal Company*, the Court stated there are circumstances "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Caperton*, 556 U.S. at 877. *Thomas v. 462 Thomas Family Props., LP*, 559 S.W.3d 634 (5th Cir. 2018).
11. Per trial counsel, based upon an objective *Burks* analysis, the introduction of evidence regarding the 2010 burglary of the Victim's residence was understandable. See *EH*, p. 50, ll. 9 15, See e.g., *Miller v. State*, 1981 OK CR 64 (evidence of theft of

² But see, *State v. Wakefield*, 324 Ga. App. 587 (2013)(Court granted new trials where undisclosed sexual relationship with a defense attorney while case was being litigated went undisclosed.)

property taken after victim was raped, admissible to prove identity of defendant as perpetrator of rape).

12. The narrowly tailored evidence concerning particular bad acts towards women was limited to what were *sufficiently similar* instances of conduct that were relevant to establishing the identity of the perpetrator of the murder of Ms. Goodall and not more prejudicial than probative. Further, such evidence was necessary to the State's ability to prove *identity* under the facts of this case. See *Original Record*; see also, *EH p.119, ll. 16-25*; See also, *Williams v. State, 2008 OK CR 19* (where there are 'sufficient similarities' between the prior offense[s] and the offense charged, the decision to admit the evidence is reviewed for an abuse of discretion and any differences between the offenses reflect on the weight of such evidence rather than its admissibility).
13. The State's evidence in this case exceeded that which was necessary to support the Defendant's conviction at jury trial of the offense of Murder in the First Degree – Felony Murder, while the Defendant was in the commission of a Burglary in the First Degree of the residence of Victim Evelyn Goodall.
14. This Court finds that it was not an abuse of discretion to allow limited *Burks* evidence in support of establishing the *identity* of the individual that burglarized the Victim's residence in 2010 and 2013.
15. This Court finds that it was not an abuse of discretion to deny the Defendant's motion to exclude DNA evidence as any consumption of evidence was performed in good faith and prior to charges being filed against the Defendant. Further, any alleged irregularity in the DNA testing process was not detrimental to a valid test, per the testimony at jury trial. See *Arizona v. Youngblood, 488 U.S. 51 (1988)*.
16. This Court has reviewed the record of all the pretrial and trial proceedings had in this case, in addition to testimony and the exhibits introduced at the evidentiary

- hearing of this matter. That this Court has found no evidence of bias being exhibited by the court for or against either party. *See Original Record, EH, p.146, ll. 9 14.*
17. There is no evidence or indication that Jimmy Harmon or Lori McConnell ever engaged in any ex parte or other than professional relationship with Judge Henderson at all times relevant during the pendency of this case.
 18. This Court has reviewed the argument and evidence introduced in support and opposition to the *Burks* evidence and finds that the Court did not abuse its discretion in its decision to admit some of the *Burks* evidence and limit the admission of other *Burks* evidence.
 19. The Court finds that based upon the evidence introduced in this trial, the evidence against the Defendant was consistent with the jury's verdict and that any alleged error in the admission of the *Burks* evidence was harmless. Further, the potential for any prejudice was limited through the proper use of limiting instructions to the jury contemporaneous with the introduction of such evidence. *See generally, Lafayette v. State, 1985 OK CR 5.*³
 20. There is no evidence that Tim Henderson received any benefit, pecuniary or otherwise which would have been contingent upon the outcome of the trial in this case.

³ Juries are presumed to follow the court's instructions. *See, Sanders v. State, 2015 OK CR 11.*

CONCLUSION

As a result of the proposed findings and conclusions, the Court concludes that the verdict of the jury in this case was based upon relevant and admissible evidence. Further, that such evidence was sufficient to support the verdict in this case.

IT IS SO ORDERED this ___ day of ___, 2021.

Respectfully Submitted,




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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the State's Proposed Findings of Fact and Conclusions of Law was mailed/emailed on the date of filing to:

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