ORIGINAL

Case No. F-2019-247

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL GARY PARKER, JR.,

Appellant,

vs.

THE STATE OF OKLAHOMA,

Appellee.

Appeal from the
District Court of Tulsa County
District Court Case No. CF-2018-3184

BRIEF OF APPELLANT

Jamie D. Pybas
Division Chief
Oklahoma Bar Assoc. No. 13000
Homicide Direct Appeals Division
Oklahoma Indigent Defense System
P.O. Box 926
Norman, Oklahoma 73070
(405) 801-2666

ATTORNEY FOR APPELLANT

November 4, 2019

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Michael Gary Parker, Jr., was the Defendant in the District Court and will be referred to by name or as Appellant. Appellee will be referred to as the State or the prosecution. Numbers in parentheses refer to page citations in the original record (O.R.), the transcript of the preliminary hearing (PH.Tr.), transcripts of the motion hearings identified by date (M.Tr.), the transcripts of the jury trial (Tr.), the transcript of the formal sentencing (S.Tr.), and the exhibits (St. or Def. Ex.).

STATEMENT OF THE CASE

Appellant, Michael Gary Parker, Jr., was charged in Tulsa County District Court Case No. CF-2019-247, with Murder in the First Degree, in violation of 21 O.S.2011, § 701.7 (A). (O.R. 11-14, 15-19) He was tried by jury on February 13, 2019, through February 15, 2019, with the Honorable William J. Musseman, Jr., District Judge, presiding. Assistant District Attorneys Mark Collier and John Tjeerdsma prosecuted the case; Beverly Atteberry represented Mr. Parker. On February 15, 2019, Mr. Parker was found guilty of First Degree Manslaughter and the jury deadlocked on sentencing. (O.R. 116-18; Tr.IV 146-47) On March 26, 2019, the trial court imposed a sentence of twenty (20) years imprisonment in the Oklahoma Department of Corrections with the first seventeen (17) years to be served in custody and the last three (3) years to be suspended. (O.R. 148-151; S. Tr. 10)

STATEMENT OF FACTS

On the evening of June 22, 2018, as Lakeisha Carroll was leaving the 007 Club on Sheridan Avenue in Tulsa, she was approached by a man named John Dale Wilson III. (Tr. II 23-24, 174; State's Ex. 13) Ms. Carroll was acquainted with Mr. Wilson, although she did not know him well. Mr. Wilson made suggestive comments to her, giving Ms. Carroll the impression he was "hitting" on her. (Tr.II 25, 34) She knew Mr. Wilson had a girlfriend. Ms. Carroll did not want any trouble with this woman so she told Mr. Wilson she knew he had a "baby momma" named "Felecia."

(Tr.II 26, 35, 37) Mr. Wilson became upset, pulled out a gun and cocked it. (Tr.II 26, 37) Ms. Carroll took off running. When she reached a safe distance, she stopped and looked back to see if Mr. Wilson was still pointing the gun. (Tr.II 27, 37) She saw him waving the gun at three males she could not identify. (Tr.II 28, 39)

Ms. Carroll left the area and went to an after-hours club to meet her mother. She told her mother what happened then went inside the club to speak to Felecia to tell her Mr. Wilson had pulled a gun on her. (Tr.II 29, 30, 41-42) The two started arguing until the club owner told them to leave. (Tr.II 29, 42-43) Ms. Carroll apologized and walked outside to her car. She was sitting in her car getting ready to leave and saw people running. She asked what happened and was told that "somebody had gotten shot." (Tr. II 29, 44)

Carol Poafybitty, Lakeisha's mother, confirmed that she saw her daughter come into the after-hours club "screaming and hollering" that someone had pulled a gun on her. (Tr.II 49, 57) Ms. Poafybitty called the police. (Tr.II 52-54, 62) Tulsa police officers were dispatched to an "assault in progress" at a club located on the southwest corner of Apache and Yale. (Tr.II 104-05) Three patrol cars responded. Ms. Poafybitty approached them and indicated her daughter was the assault victim and was somewhere in the crowd. As the police were taking the report, they heard three or four gunshots go off. A crowd estimated at between 100 and 200 people was milling around outside the club. (Tr.II 106-07) The officers retrieved their rifles and investigated the shooting. (Tr.II 110) They discovered a male victim, identified as Mr. Wilson, on the ground in front of the club. He was not breathing. (Tr.II 114, 123) Emergency responders attempted to resuscitate Mr. Wilson but were unsuccessful. (Tr. II166-67)

Police noticed a firearm in the right front pocket of Mr. Wilson's pants. (Tr.II 169-70: State's Ex. 12, 26) The gun was "ready to fire." (Tr.II 171) It was loaded with a live round in the chamber and a magazine containing five live cartridges. The

hammer was cocked and the safety was off. (Tr. II 171) Mr. Wilson's wife later told police that he left his house that night with his gun and was very upset. (Tr.III 69) Police located Mr. Wilson's red Tahoe in the middle of the parking lot with the engine running, approximately 100 feet from his body. (Tr. II 180-83; State's Ex. 1) The vehicle's doors were open and the interior lights were on. (Tr.III 43, 45)

Tulsa Police Detective John Brown was called to the scene around 2:50 a.m. (Tr.III 13) Police were unable to locate a shooter at the scene but transported several witnesses to the station for interviews with Detective Brown. (Tr.II 115) Waweeta Conchitias said she was at the after-hours club between 2:00 and 2:30 a.m. She heard the argument between Lakeisha and Felecia. She also heard Lakeisha tell her mother, Carolyn, that someone had put a gun on her and to call the police. (Tr.II 214-17) Ms. Conchitias was standing near the entrance to the club when she saw a red truck pull up from Apache street and park right at the entrance. She saw a man get out of the vehicle but did not see where he went. He left his vehicle running. (Tr.II 221, 236) A short time later, she heard three gunshots. (Tr.II 221) She got down on the ground between two vehicles to hide and did not see the actual shooting. After the shots, she attempted to administer CPR to the victim while awaiting emergency responders. (Tr.II 223-24)

Denise Radford was with Ms. Conchitias at the after-hours club waiting to get inside. Security guards were keeping people out of the club at the time because of a commotion going on inside. (Tr.III 80-82) Ms. Radford was holding the door handle when a "guy came from nowhere" and shot another man. (Tr.III 82-83, 99, 111, 112) The shooting victim fell to the ground. (Tr.III 85) Mr. Radford did not see the victim reach for anything before he was shot. (Tr.III 86-88, 114) After the shots were fired, the shooter put the gun in his pocket and walked off "calmly." (Tr. III 88) He got into a silver SUV and drove away. (Tr.III 88; State's Ex. 49)

Larry Craven, 61, was also at the after-hours club that night with his son. He

was walking toward the front door when he saw the victim to the side of the front door. (Tr.III 117-18, 128) Two men got out of a car and approached the club. According to Mr. Craven, the taller of the two men said, "point him out." (Tr.III 119-20, 129, 131) The same man asked "what color shirt he had on." The second man replied, "he got on a maroon shirt." (Tr.III 121) The taller man walked up and shot the victim. Mr. Craven heard three shots. The two men got back in their car and left. (Tr.III 120-22)

Through witness interviews, police were given the name "Patrick Tolon." Detective Brown interviewed Patrick and he acknowledged he was at the 007 club that night with his cousins Roosevelt Tolon and Michael Parker, Jr. (Tr.III 17-18, 48-52) Patrick said Roosevelt and Michael left the club before him and were involved in a disturbance with Mr. Wilson. (Tr.III 19) When Patrick came out a short time later, he saw Mr. Wilson standing outside the club. Mr. Wilson was obviously agitated. Patrick talked to him and tried to calm him down. (Tr.III 19) When Patrick got into the car to leave, Roosevelt and Michael told him Mr. Wilson had pointed a gun at them. (Tr.III 21) Patrick drove Mr. Parker to his residence. He and Roosevelt left in Patrick's truck to go to an after-hours spot. (Tr. III 23) When they got to the club, Roosevelt got out of the car while Patrick remained inside. Patrick heard gunshots and, a few minutes later, Roosevelt came back to the car and said he thought someone might have gotten shot. (Tr.III 23, 62-63)

Detective Brown decided to interview Michael Parker and obtained a search warrant for his residence. When he went to serve the warrant, Mr. Parker was standing in his front yard and was arrested without incident. (Tr. III 25) Police searched the residence while Mr. Parker was transported downtown for questioning. Mr. Parker gave a statement to Detectives Brown and Schilling. (Tr.III 27-33)

Michael Parker, Jr., 41, testified at trial and gave his version of events. In

July 2018, Mr. Parker was living in Tulsa with his wife and children and working at Spirit Aerosystems, where he had been employed assembling aircraft for the past seven years. Prior to that, he had worked for ten years at L&M Roofing company. Mr. Parker did not use drugs and had never been convicted of a felony or misdemeanor involving moral turpitude. (Tr.IV 10-11, 36) He had no record of violent behavior. (Tr.IV 70) On the evening of July 21, 2018, Mr. Parker decided to go to a night club with two of his cousins on his father's side, Roosevelt Tolon and Patrick Tolon. (Tr.IV 11) Mr. Parker did not know these cousins very well. As they were growing up, Mr. Parker did not have much contact with his biological father, a drug addict and alcoholic. (Tr.IV 12) Mr. Parker reconnected with his cousins when they were older. Both Patrick and Roosevelt had felony convictions and had been to prison. (Tr. IV 12-13) As a result, they were not allowed to be around firearms. (Tr. IV 13)

The three men arrived at the 007 Club around 11:30 p.m. (Tr.IV 14) Mr. Parker said he drank a couple of long neck Bud Light beers prior to arriving. (Tr.IV 14) He also drank two or three drinks at the 007 Club, however, he did not believe he was intoxicated when he left the club that night. (Tr. IV 14)

When the club closed, Mr. Parker and his cousins walked outside. Mr. Parker saw a man, later identified as John Wilson, standing there "kind of mouthing some words and he looked angry." (Tr.IV 15) When Mr. Parker walked past Mr. Wilson, he said, "what's up blood?" (Tr.III 34; IV 15) Mr. Parker took this as a sign that Mr. Wilson was a gang member.[1] (Tr.IV 16) Mr. Parker answered, "what's up?" (Tr.IV 16) Mr. Wilson then said, "you up here with that bullshit on." (Tr.IV 16) Mr. Parker assumed Mr. Wilson was talking about the blue t-shirt he was wearing. Mr. Parker

[1] Mr. Parker explained that being born and raised in Tulsa where gang activity was rampant, he knew that "bloods say what's up blood and crips say what's up cuz." (Tr.IV 15) Mr. Parker said he never belonged to a gang and did not have any tattoos. (Tr.IV 16)

speculated Mr. Wilson was angry because Mr. Parker was wearing blue, a color normally associated with crip gangs. (Tr. IV 16-17) Mr. Parker told Mr. Wilson that he was "neutral so I wear whatever I want to wear, I'm a grown man." (Tr.IV 17) Mr. Wilson got angry and pulled his pistol. He put it in Mr. Parker's face and stated, "I kill niggers every day." (Tr. III 34; IV 17) Mr. Parker put his hands in the air and stated, "Look, bro, I don't you [sic] and I ain't got no beef with you. I'm here with my family, we're just up here trying to have a good time." (Tr.III 34; IV 17) Mr. Parker said he got tired of looking down the barrel of the pistol so he said, "matter of fact, I'm gone," and he turned his back and walked away. (Tr.IV 17) Mr. Wilson yelled, "Bitch ass, nigger, you better go on before you get yourself killed." (Tr.IV 17) Mr. Parker said he was so scared he was shaking. (Tr.IV 17)

He went and stood by the driver's side door of Patrick's truck, a white Chevy Colorado. (Tr.IV 18) He could see Mr. Wilson was still pointing the firearm at him so he went around to the passenger side of the truck. He was afraid Mr. Wilson might think he was retrieving a firearm from the truck and start shooting at him. He got down on his knee trying to stay out of Mr. Wilson's sight. (Tr.IV 18) Roosevelt returned to the truck at that point. He told Mr. Parker that Mr. Wilson also pulled a gun on him. (Tr.IV 19-20) Mr. Parker could see Patrick talking to Mr. Wilson. When Patrick finally came to the truck, he said Mr. Wilson told him that they were "talking shit to him." (Tr.IV 20) Mr. Parker denied talking "noise" to Mr. Wilson. He said Mr. Wilson pulled his gun on them for no reason. (Tr.IV 20)

The three men got in the truck and left. (Tr.IV 47-48) Mr. Parker wanted to go home but Patrick and Roosevelt wanted to go to an after-hours club. (Tr.IV 21) They encouraged Mr. Parker to go with them. They claimed that Mr. Wilson would not be there. They were sure someone had called the police on him for pointing his gun at people. (Tr.IV 21, 44) Mr. Parker reluctantly agreed to go to the club but said he first wanted to go home and get his gun. Mr. Parker owned a model 22 Glock, .40

caliber pistol for home security. (Tr.IV 23, 71) He planned on driving his own car back to the after-hours club. (Tr.IV 22, 44) He did not want his cousins to be in the same car with a gun since they were felons. (Tr.III 35; IV 44, 45)

Mr. Parker said the incident with Mr. Wilson had "scared the crap out of me" but during the ride home he had calmed down. (Tr.IV 52-53) He decided to take his gun for protection so he would feel safe. (Tr.IV 22, 50-51) He drove to the club to meet his cousins and parked in a lot near the club. (Tr.IV 23) Roosevelt and Patrick were parked in front of the car wash about 25 feet from Mr. Parker's vehicle. (Tr.IV 25) Mr. Parker estimated there were 100 to 200 people in the area that night. When he got out of the car, he put the gun in his waistband beneath his belt. (Tr.IV 25-26)

Mr. Parker and Roosevelt walked to the club, intending to go inside and get a table for the group. Patrick was still in his truck talking on the phone to some women who were supposed to meet them at the club. (Tr.IV 27, 53) As they approached the club, Mr. Parker saw Mr. Wilson in his peripheral vision. (Tr.IV 27-28) Mr. Parker knew immediately who Mr. Wilson was. He explained, "He put a gun in my face, I'll never forget the guy." (Tr.IV 28) Mr. Wilson was "cussing and fussing" and talking about "this is our spot too, blood, and he reached for his gun." (Tr.IV 29) Mr. Parker said Mr. Wilson pulled up his shirt with one hand and reached with the other hand into his pocket. (Tr.IV 67, 75) When he "went for his pocket," Mr. Parker knew from earlier that night that Mr. Wilson was carrying a gun. (Tr.III 35-36; IV 29) Mr. Parker believed Mr. Wilson was going to shoot him. (Tr.IV 29, 42, 74-75) In reaction, Mr. Parker pulled out his gun and fired as fast and as low as he could because he did not want Mr. Wilson to shoot him first. (Tr.IV 30)

At that point, people were screaming and ducking. Mr. Parker was petrified because he did not know if any other blood gang members were going to get their guns and come after him. (Tr.IV 31) He panicked and ran to his truck. (Tr.IV 32) He had lost track of Roosevelt before the shooting occurred and was not sure where he

went. Mr. Parker dropped his gun on the spot and kicked it under the truck. He jumped in his truck and sped out of the parking lot. (Tr. III 37; IV 32, 57) He went home and told his wife, Crystal, what happened. He did not call the police because he was traumatized by the incident and panicked. (Tr.IV 33, 56-57)

Mr. Parker decided to go back to the scene to retrieve his gun. (Tr.III 37; IV 34) He found it in the parking lot and threw it into a field near the Warehouse Market off South Peoria Avenue.[2] (Tr. III 38; IV 35, 59) He then drove to his stepfather's house and told him what happened. His family was distraught and talked about what to do. His mother was in Memphis and she told him to wait until she got back to Tulsa and they would hire an attorney and he could turn himself in to police. (Tr.IV 35-36, 61)

Mr. Parker decided to go back to his house and wait until his mother returned. He went to work that Monday but could not concentrate and left work early. (Tr.IV 36-37) He was not able to eat, sleep or function normally. The next day, his wife called him and said the police came to her school and took her to the police station for questioning. She was distraught and crying, (Tr.IV 38) Mr. Parker knew the police were coming to his residence so he waited and cooperated with them. They transported him to the station to interview him. (Tr.IV 39) Two separate interviews were conducted. During the first interview, Mr. Parker stopped the questioning and stated he wanted to consult with a lawyer. (Tr. IV 39, 60, 65) While he was waiting to be booked into jail, Detective Brown said something concerning his wife and children. (Tr.IV 40) Mr. Parker thought Detective Brown was threatening to arrest his wife and charge her with being an accessory. He said he became very emotional and decided to talk to the police without his attorney

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[2] The gun was never recovered. Police searched for the firearm in a field across from the Warehouse Market store to no avail. The grass appeared to have been freshly cut. (Tr.II 137-38; IV 61)

because he was afraid for his family. (Tr.IV 40, 64, 72)

Pursuant to a search warrant, police collected several spent .40 caliber shell casings from the backyard of Mr. Parker's residence at 7400 East 2nd Street. (Tr.II 132-35, 141, 143-44; State's Ex. 30-38) Tulsa Police Firearm Examiner Joy Patterson Bucklin examined the .40 caliber Smith & Wesson cartridge casings recovered from the homicide scene as well as those .40 caliber cartridge casings recovered from Mr. Parker's yard. She determined both sets of cartridge casings "were fired from the same weapon." (Tr.II 185; IV 62; State's Ex. 50) Mr. Parker explained those shell casings had been in his backyard since New Year's Eve when people fired them in celebration of the new year. (Tr.IV 62-63)

Dr. Ross Miller, a forensic pathologist with the Office of the Chief Medical Examiner, performed the autopsy of John Wilson on July 22, 2018. (Tr.II 188) On external examination, he noted eight gunshot wounds. These eight wounds were caused by four projectiles. The bullets had passed "through and through," causing both an entrance and a corresponding exit wound for each set. (Tr.II 190-91) Dr. Ross prepared a diagram of his findings, designating the location of each entrance and exit wound. (Tr.II 190; State's Ex. 51) He numbered the four entrance wounds for identification purposes but acknowledged he could not determine the order the shots had occurred. He described gunshot number one as an entrance wound of the central chest, slightly left of the midline. The projectile injured the heart, as well as the aorta and pulmonary artery, and exited Mr. Wilson's left, middle back. (Tr.II 194) Gunshot number two was an entrance wound on the upper, left side of the chest. The bullet damaged the stomach and large intestine before exiting the top of Mr. Wilson's right buttock. (Tr.II 194) Gunshot number three was an entrance wound to the right thigh which passed through the soft tissue and exited the bottom part of the right buttock. (Tr.II 194) The fourth gunshot wound entered the left, upper back by Mr. Wilson's shoulder and exited on his right, upper back,

traveling right to left through soft tissue. (Tr. II 195) Three of the entrance wounds had an upward to downward trajectory and the fourth wound was straight across. (Tr. II 208-09) No bullets were recovered from the body and Dr. Ross did not notice any stippling on the victim's skin or clothing. (Tr.II 209-10)

Dr. Ross determined the manner of death was homicide and the death resulted from blood loss attributable to multiple gunshot wounds. He opined that the gunshot wound to the chest and heart was likely the ultimate cause of Mr. Wilson's death. (Tr. II 189, 204, 212)

Dr. Ross stated that as part of the autopsy, the victim's blood was tested for alcohol and drugs. His blood alcohol level was .17 grams per deciliter, approximately twice the legal limit for impairment when driving an automobile. (Tr.II 206) Drug testing revealed the presence of alprazolam, the generic name for Xanax, and a presumptive positive test for 7-aminoclonazepam, a metabolite of another drug. (Tr.II 206-07) According to Dr. Ross, alcohol and Xanax are both depressants so mixing the two drugs would typically cause psychomotor impairment such as slurring of words, decreased coordination, drowsiness, and basic depressant-type symptoms. (Tr.II 207)

Other facts will be discussed in relevant propositions of error.

PROPOSITION I

THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR. PARKER WAS NOT ACTING IN SELF-DEFENSE WHEN HE SHOT MR. WILSON, RESULTING IN A VIOLATION OF MR. PARKER'S RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7 AND 20 OF THE OKLAHOMA CONSTITUTION.

When evaluating the sufficiency of the evidence to support a conviction, this Court reviews the whole of the evidence in the light most favorable to the State to determine whether any reasonable trier of fact could have found the accused guilty beyond a reasonable doubt under the law governing the offense. *Jackson v.*

Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed.2d 560 (1979); *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559. Fundamental constitutional due process requires that all facts and elements necessary to the commission of the crime charged must be proved by the State beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Jackson v. Virginia*, *supra*. The standard of proof "beyond a reasonable doubt" is designed to impress "upon the fact finder the need to reach a subjective state of near certitude of the guilt of the accused." *Jackson*, 443 U.S. at 315, 99 S.Ct. at 2787.

Mr. Parker was charged originally with first degree malice aforethought murder. (O.R. 11-14, 15-19) Following the presentation of the State's case, defense counsel demurred to the evidence, recognizing that the State's evidence was insufficient to meet its burden of proof. This demurrer was overruled. (Tr.III 141) At the close of evidence, the jury was instructed, over Mr. Parker's objection, on first degree heat of passion manslaughter, and Mr. Parker was convicted of this lesser included offense. (Tr. IV 146-48) Applying the *Jackson* standard to the facts of this case, and reviewing the evidence in the light most favorable to the State, Mr. Parker's conviction should be reversed because the State failed to prove beyond a reasonable doubt that Mr. Parker did not act in self-defense.

Self-defense is an affirmative defense. Once sufficient evidence has been presented to raise the issue, the burden shifts to the State to overcome the defense beyond a reasonable doubt. *Williams v. State*, 1996 OK CR 16, ¶ 1, 915 P.2d 371, 376; *Chapple v. State*, 1993 OK CR 38, ¶¶ 6-7, 866 P.2d 1213, 1215; *Perez v. State*, 1990 OK CR 67, ¶ 8, 798 P.2d 639, 641. A conviction cannot stand if the State failed to disprove the defendant's claim of self-defense. *McHam v. State*, 2005 OK CR 28, ¶ 10, 126 P.3d 662, 667; *Edwards v. State*, 1935 OK CR 121, 58 Okl.Cr. 15, 41, 48 P.2d 1087, 1098.

A person is entitled to use lethal force in defense of himself "when he

reasonably believes such force is necessary to prevent death or great bodily harm to himself or herself or another or to terminate or prevent the commission of a forcible felony." 21 O.S.2011, § 733(2).[3] It is not required for the danger to life or personal security be real "if a reasonable person, in the circumstances and from the viewpoint of the defendant, would reasonably have believed that he/she was in imminent danger of death or great bodily harm." (O.R. 107); Instruction No. 8-46, OUJI-CR(2d); *Hendrick v. State*, 1937 OK CR 166, 73 P.2d 184, 187.

"The law in Oklahoma is clear: There is no duty to retreat if one is threatened with bodily harm." *Neal v. State*, 1979 OK CR 63, ¶ 8, 597 P.2d 334, 337. "[A] citizen is not required to sit on his hands when he is about to become the victim of an assault and battery, but he may resort to appropriate means to resist the force about to be applied." *Townley v. State*, 1959 OK CR 100, ¶ 4, 355 P.2d 420, 438. If the circumstances are such that it appears to the defendant that he is in danger, he has a right to stand his ground and protect himself. *Davis v. State*, 2011 OK CR 29, ¶ 95, 268 P.3d 86, 114; *Guthrie v. State*, 1948 OK CR 58, 87 Okl. Cr. 112, 194 P.2d 895; 21 O.S.2011, § 733; Instruction No. 8-46, OUJI-CR (2d) (O.R. 107).

The issue of self-defense was affirmatively raised through Mr. Parker's testimony at trial that he believed using his gun to shoot the victim was necessary to avoid great bodily injury or death to himself. (Tr. IV 29-30, 42, 74-75) On the basis of this evidence, the trial court issued self-defense instructions. (O.R. 105-12) Because *prima facie* evidence was presented at trial, the State was required to prove beyond a reasonable doubt that Mr. Parker, based upon his perception of the situation, was not acting in self-defense. *See* Instruction No. 8-49, OUJI-CR(2d) (O.R. 108); *Dawkins v. State*, 2011 OK CR 1, ¶ 19, 252 P.3d 214, 220. As the State failed to sustain this burden, the jury's determination that Mr. Parker was

[3] The statute defines forcible felony as "any felony which involves the use or threat of physical force or violence against any person."

not acting in self-defense was manifestly unreasonable and this Court must reverse and dismiss his conviction.

After an unexpected and frightening confrontation in the parking lot of the 007 Club, during which John Wilson pulled a gun and pointed it at Mr. Parker, threatening to shoot him, Mr. Parker was understandably concerned and upset. (Tr. IV 17, 52-53) Mr. Parker backed away from Mr. Wilson and left the scene. (Tr. III 34; IV 17) He did not return to the 007 Club, rather he reluctantly made plans to go to an after-hours club with his cousins. (Tr.IV 21-23, 44) Although he had no reason to expect to see Mr. Wilson at this venue, he decided to take his own gun to make him feel safer just in case any more trouble arose. (Tr.IV 22-23) As Mr. Parker was approaching the front door of the after-hours club, he suddenly saw Mr. Wilson again. (Tr.IV 27-28) Mr. Wilson started acting crazy and cussing at Mr. Parker again. (Tr.IV 29) Mr. Parker saw Mr. Wilson reach for his pocket. Mr. Parker was afraid for his life at that point because he knew Mr. Wilson was carrying a gun. (Tr.III 35-36; IV 29) Mr. Parker felt he he had no choice but to shoot at Mr. Wilson. Mr. Parker drew his own weapon and fired, striking Mr. Wilson four times in rapid succession. (Tr. IV 27-30, 42, 74-75) The position of Mr. Wilson's vehicle in the parking lot, near the front entrance with the engine running and the doors open, supports Mr. Parker's testimony that he believed Mr. Wilson had spotted him and was coming straight for him. (Tr. II 180-83; III 43, 45; State's Ex. 1)

The situation, as seen through the eyes of Mr. Parker, was that he was facing a highly intoxicated man who seemed determined to harm him. Reacting in a way that someone in his same circumstance would act, he shot Mr. Wilson in an effort to avoid what he perceived as a life-threatening situation. Mr. Parker acted in protection of himself as a reaction to a perceived threat of great bodily harm by Mr. Wilson, who possessed a deadly weapon. According to the police, this weapon was cocked, loaded, and ready to fire, with a live round in the chamber and the safety

off. (Tr.II 171) The law requires only that from all the facts known to him, Mr. Parker "reasonably" believed that use of force was necessary to protect himself from "imminent danger of death or great bodily harm." (O.R. 107; Instruction 8-46, OUJI-CR (2d)). Given the circumstances that immediately confronted him, the gunshots he inflicted on Mr. Wilson were justified.

The prosecutor argued that Mr. Parker should not have shot Mr. Wilson, and that the shooting was unnecessary because the victim was not pointing a weapon at the time he was shot. (Tr. IV 108, 131, 134) However, Mr. Parker was not required to wait until Mr. Wilson fired a shot at him before he acted. *See, e.g., Evans v. State*, 1912 OK CR 382, 126 P. 586, 589 (Okl.Cr. 1912). ("[A] man may act safely on appearances, and is not bound to wait until a blow is received . . . ."). *See also Johnson v. State*, 1936 OK CR 66, 58 P.2d 156, 162 (Okl.Cr. 1936) ("that every man has the right to defend himself against any assault is elementary. No man is bound to measure the extent of the injury about to be done before he would be justified in defending himself.")

Mr. Parker recognizes that "[t]his Court will not interfere with a verdict, even where the evidence sharply conflicts, *if evidence supports the jury's finding of guilt.*" *Robinson v. State*, 2011 OK 15, ¶ 17, 255 P.3d 425, 432 (emphasis added). However, the principles embodied in *Jackson v. Virginia*, 443 U.S. at 317, 99 S.Ct at 2788, are based on the recognition that juries do sometimes return verdicts which are factually unsupported. This Court has held that a conviction cannot stand where the State fails to disprove the defendant's claim of self-defense. *McHam v. State*, 2005 OK CR 28, ¶ 10, 126 P.3d 662, 667; *Edwards v. State*, 1935 OK CR 121, 58 Okl.Cr. 15, 48 P.2d 1087. Accordingly, Mr. Parker's conviction for first degree manslaughter must be reversed with instructions to dismiss. *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *Edwards v. State*, 1991 OK CR 71, ¶ 2, 815 P.2d 670, 672.

PROPOSITION II

THE TRIAL COURT ERRED IN INSTRUCTING MR. PARKER'S JURY, OVER HIS OBJECTION, ON FIRST DEGREE MANSLAUGHTER AS A LESSER INCLUDED OFFENSE, WHERE THAT OFFENSE WAS NOT SUPPORTED BY THE EVIDENCE IN VIOLATION OF HIS RIGHTS TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7 AND 20 OF THE OKLAHOMA CONSTITUTION.

At the close of the State's case, the trial court had a brief conversation with the parties concerning proposed jury instructions. The court indicated he was not inclined at that point to instruct on any lesser included offenses. (Tr.III 142) The prosecutor alerted the court that he would be requesting a lesser included instruction on first degree manslaughter at the conference on instructions to be held the following day. (Tr.III 143) The trial court stated:

> But I've been listening to the evidence and what you've put forward is four shots, he walks, he's targeting, I'm not hearing manslaughter, I'm not hearing heat of passion. And I'll tell you, at this point in time, and this is what you'll have to explain to me tomorrow where I'm missing it, zero – not – this isn't about interpretation, there's zero adequate provocation.

(Tr.III 143)

The State countered that manslaughter instructions were appropriate in "cases where it's an unreasonable use of self-defense. " (Tr.III 143, 144, 146) The trial court again opined that he did not see adequate provocation in the evidence presented. He noted that the evidence presented established either a "textbook" case of premeditation or malice aforethought, or, if the jury believed Mr. Parker's statement that the victim was going for a weapon, a case of self-defense and he was entitled to an acquittal. (Tr.III 144-45, 146) The trial court asked the parties to provide authority and he would make a ruling on the issue when the case was submitted to the jury. (Tr.III 144-46)

The following day, after the defense rested, the court revisited the issue. The court indicated after reading case law that a heat of passion manslaughter instruction would be appropriate in the case based on the fact that the jury could

believe that the defendant:

> was overcome with a heat of passion or that he imperfectly exercised self-defense, in that whatever emotional state he was in with all of those different emotions going through him, when he saw the victim and the victim made some movement, he perceived it as some type of threat, although the threat was clearly not real, and it was unreasonable, and he reacted in a heat of passion. And from his testimony and the other testimony the State – that the jury's heard, they could, based upon the elements of manslaughter first degree, find that that heat of passion substituted premeditation and they could return a verdict of guilty on heat of passion, first degree manslaughter.

(Tr.III 82)

Defense counsel again objected to the heat of passion manslaughter instructions, stating:

> I mean, Judge, in the course of this trial, the state's arguments have been that my client did this intentionally by going home, getting his gun, and then going back to the club, expecting to see Mr. Wilson there again, that this was an intentional act. My client, in his statements to Detective Brown, which Detective Brown testified to as well as his testimony today -- my client's testimony today was he was agitated. He did go home, he got a gun for his own protection. He did not do it with the intent of even seeing Mr. Wilson again. He was not angry. There was a time delay, because they left the 007 club, he drove home, got his gun out of the house, he got in his car, he then drove to the after-hours club, was walking in. This wasn't heat of passion. He wasn't -- he even testified -- I was, like, where [sic] you angry? Did you do something because you wanted to punish him or something? And he testified no. There has been no testimony or evidence that he had a heat -- that this rises to the level of heat of passion for a manslaughter instruction.

(Tr.IV 86)

Despite defense counsel's well-founded objection, the trial court instructed the jury on first degree manslaughter as a lesser included offense. (Tr. IV 88) The jury acquitted Mr. Parker of first degree malice aforethought murder but convicted him instead of this lesser offense. (Tr. IV 146-47)

Argument and Authority:

This Court reviews a trial court's decision on which instructions are given to a jury, including lesser included instructions, for an abuse of discretion. *Davis v. State*, 2018 OK CR 7, ¶ 7, 419 P.3d 271, 277; *Simpson v. State*, 2010 OK CR 6, ¶ 16, 230 P.3d 888, 897. An abuse of discretion is defined as a "'clearly erroneous conclusion

and judgment, one that is clearly against the logic and effect of the facts in support of and against the application.'" *Slaughter v. State,* 1997 OK CR 78, ¶ 19, 950 P.2d 839, 848. Further, when the trial court proposes to give lesser offense instructions and the defense objects, the defendant does have a right to affirmatively waive any lesser included offense instruction and proceed on an "all or nothing" approach. *Scott v, State*, 2005 OK CR 3, ¶ 4, 107 P.3d 605, 606. On the record, the defendant must personally and affirmatively waive lesser included offense instructions which are warranted by the evidence. *Ballard v. State*, 2001 OK CR 20, ¶ 8, 31 P.3d 390, 391.

While a defendant is free to adopt an "all or nothing" strategy provided there is a knowing and intelligent waiver with regard to lesser-offense alternatives, the trial court is not bound by that strategy, and may instruct *sua sponte* on any lesser related offenses it believes to be supported by the evidence with or without any formal request by the State. *McHam v. State*, 2005 OK CR 28, ¶ 20, 126 P.3d 662, 670.

This Court requires *prima facie* evidence of the lesser offense to support giving a lesser included instruction. *Davis v. State*, 2011 OK CR 29, ¶ 101, 268 P.3d 86, 116. "*Prima facie* evidence of a lesser included offense is that evidence which would allow a jury rationally to find the accused guilty of the lesser offense and acquit him of the greater." *Id.* Under this test, it was error to instruct the jury on first degree manslaughter over defense counsel's objection because there was no evidence to support a conclusion that Mr. Parker acted with heat of passion. Instruction on a lesser offense under the circumstances of this case only encouraged the jury to reach a compromise verdict.[4] *See, e.g., State v. Sawyer*, 630 A.2d 1064, 1073, 1074, 1077 (Conn. 1993).

The State argued these instructions were warranted under an "imperfect" self-defense theory. The trial court properly declined to give the instruction on this

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[4] The jury deliberated for more than six hours before indicating that they had reached a verdict on the crime but not the punishment. (Tr.IV 143-44; Court's Ex. 3-5)

basis, citing *Mack v. State*, 2018 OK CR 30, 428 P.3d 326. (Tr.IV 79) There, this Court held that Oklahoma law does not recognize a generic "imperfect self-defense" affirmative defense. 2018 OK CR at ¶ 5; 428 P.3d at 328-29. While the trial court was correct in rejecting the State's claim as to imperfect self-defense and initially correctly analyzed this issue, inexplicably, the trial court changed his mind and gave the heat of passion manslaughter instructions, even though they were not warranted by the evidence. This was an abuse of discretion as the evidence presented at Mr. Parker's trial was inadequate to establish the requisite *prima facie* case. There was not sufficient evidence that Mr. Parker's jury could have rationally chosen to acquit him of first degree murder and convict him instead of heat of passion manslaughter.

The elements of first degree manslaughter under 21 O.S.2011, § 711(2), are as follows: (1) adequate provocation of the accused; (2) a passion, such as fear, terror, anger, rage, or resentment engendered in the accused; (3) the homicide occurred while the passion still existed and before the accused had a reasonable opportunity for the passion to cool; and (4) a causal connection between the provocation, the passion, and the homicide. (O.R. 98); *McHam v. State*, 2005 OK CR 28, ¶ 11, 126 P.3d 662, 667; *Cipriano v. State*, 2001 OK CR 25, ¶ 16, 32 P.3d 869, 874.

Element number three is clearly missing in this case in that the homicide did not occur while the "passion existed and before the accused had a reasonable opportunity for the passion to cool." *See* Instruction No. 4-100, OUJI CR 2d. (O.R. 104); *Hawkins v. State*, 2002 OK CR 12, ¶ 34, 46 P.3d 139, 146 (homicide must occur while the passion still exists and before a reasonable opportunity for the passion to cool). In accordance with this requirement, the jury was instructed on the definition of "cooling time":

> There must not be a reasonable opportunity for the passion to cool. This means that the homicide must have occurred while the defendant(s) was/were still affected by the passion or emotion. The homicide must have

> followed the provocation before there was time for the emotion to cool or subside. Whether or not there was a reasonable opportunity for the passion to cool depends upon whether, under all the circumstances of the particular case, there was such a lapse of time between the provocation and the homicidal act that the mind of a reasonable person would have cooled sufficiently, so that the homicide was directed by reason, rather than by passion or emotion.
>
> The length of time that constitutes a reasonable opportunity for the passion to cool may vary according to the circumstances of the particular case.

(O.R. 104; Instruction No. 4-100, OUJI-CR 2d)

According to the State's evidence, the initial confrontation between Mr. Wilson and Mr. Parker outside the 007 Club was over for quite some time before Mr. Parker encountered Mr. Wilson again outside the after-hours club. Mr. Parker was driven home and returned in his own vehicle. (Tr.IV 22-23, 44) He himself testified that he had calmed down by the time he retrieved the firearm from his house. (Tr.IV 51) As defense counsel pointed out, "He was not angry. There was a time delay, because they left the 007 club, he drove home, got his gun out of the house, he got in his car, he then drove to the after-hours club, was walking in." (Tr.IV 85-86) There was more than a reasonable opportunity for any passion on the part of Mr. Parker to cool. Although initially the victim's actions in pointing his gun at Mr. Parker would obviously have engendered a heat of passion, that passion had clearly cooled by the time Mr. Parker encountered Mr. Wilson the second time. Accordingly, the trial court's decision to instruct the jury on this lesser included offense when it was not warranted by the evidence was clearly erroneous.

Finally, in recent years, this Court has strictly enforced a rule that when a defendant, or his attorney, makes statements in the case making every defense save one unavailable, he is not entitled to instructions on other lesser offenses. *See Grissom v. State*, 2011 OK CR 3, ¶ 35, 253 P.3d 969, 982; *Williamson v. State*, 1991 OK CR 63, ¶ 55, 812 P.2d 384, 399; *Sayers v. State*, 1913 OK CR 288, 135 P. 1073, 1077. In fairness, the same rule ought to apply equally to the State. If the State wanted

to charge Mr. Parker, in the alternative, with the crime of first degree manslaughter, it was legally entitled to do so under Title 22, Section 436. *See, Glass v. State*, 1985 OK CR 65, ¶¶ 5-8, 701 P.2d 765, 768. Having chosen not to do so, the State should have been bound by its accusations, in the same manner a defendant would have been similarly bound. Having elected to charge Mr. Parker with first degree murder, the State should not have been allowed to encourage a compromise verdict by obtaining instructions on first degree manslaughter. Because the State's theory of criminal culpability was that Mr. Parker intentionally sought out Mr. Wilson and with malice aforethought caused his death, the State should have been held to proving its case, or suffering defeat.

Based on the foregoing, it is eminently clear that the trial court abused its discretion by instructing the jury on first degree manslaughter, thus inviting it to compromise on a theory of guilty where the evidence did not establish his guilt of any crime.[5] Because the jury acquitted him of the charged offense, the only appropriate remedy is to reverse this case with instructions to dismiss.

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[5] The fact that neither party argued that the evidence supported a heat of passion manslaughter conviction during closing arguments supports that the jury's verdict was a compromise. (Tr. IV 98-138)

PROPOSITION III

MR. PARKER WAS DENIED AN IMPARTIAL JURY COMPOSED OF A FAIR CROSS SECTION OF THE COMMUNITY AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7, 19, AND 20 OF THE OKLAHOMA CONSTITUTION BECAUSE THE STATE ENGAGED IN A PATTERN OF DISCRIMINATION AND EXERCISED PEREMPTORY CHALLENGES AGAINST THREE AFRICAN-AMERICAN JURORS WITHOUT SETTING FORTH SUFFICIENTLY RACE-NEUTRAL REASONS FOR THE CHALLENGES.

"Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process." *Flowers v. Mississippi*, 588 U.S. ___, 139 S.Ct. 2228, 2238, 204 L.Ed.2d 638 (2019), (quoting *Powers v. Ohio*, 499 U. S. 400, 407, 111 S.Ct. 1364, 1369, 113 L.Ed.2d 411 (1991). "The jury acts as a vital check against the wrongful exercise of power by the State and its prosecutors." *Powers*, 409 U.S. at 411, 111 S.Ct. at 1371. Equal justice under law requires a criminal trial free of racial discrimination. "Jury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice." *Id.*

A State may not discriminate on the basis of race when exercising peremptory challenges against prospective jurors in a criminal trial. *Batson v. Kentucky*, 476 U. S. 79, 89, 106 S.Ct. 1712, 1719, 90 L.Ed.2d 69 (1986). "The Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder v. Louisiana*, 552 U. S. 472, 478, 128 S.Ct. 1203, 1208, 170 L.Ed.2d 175 (2008). "In criminal trials, trial judges possess the primary responsibility to enforce *Batson* and prevent racial discrimination from seeping into the jury selection process." *Flowers v. Mississippi*, 588 U.S. ___, 139 S.Ct. at 2243. The *Batson* Court established a three-step process for determining when a strike is discriminatory. First, a defendant must make a *prima facie* showing that a peremptory challenge has been exercised on the basis of race. Once a *prima facie* case of racial discrimination has been established, the prosecutor must provide

race-neutral reasons for the strikes. The trial court must consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties. The trial judge must determine whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the prosecutor instead exercised peremptory strikes on the basis of race. *Batson*, 476 U.S. at 94-98, 106 S.Ct. at 1721-23; *Snyder*, 552 U. S. at 476–477, 128 S.Ct. at 1207. The ultimate inquiry is whether the State was "motivated in substantial part by discriminatory intent."*Flowers*, 588 U.S.__, 139 S.Ct at 2224, (citing *Foster v. Chatman*, 588 U.S.____, 136 S.Ct. 1732, 1754, 195 L.Ed.2d 1)

Mr. Parker is African American (Tr.I 226). Here, the prosecutors engaged in a pattern of strikes against minority jurors, using three of the State's challenges to remove all African American males from the petit jury, excusing jurors D.J., R. W., and J.Y. (Tr. 226-35) Trial counsel objected to each of these peremptory challenges, prompting the trial court to ask the prosecutor to provide a race-neutral reason. The trial court accepted the race-neutral reasons as to each of these three jurors and excused them over defense's objection. (Tr. 226-27, 228-30, 232-35).

This Court reviews a district court's *Batson* rulings for an abuse of discretion. *Day v. State*, 2013 OK CR 8, ¶ 16, 303 P.3d 291, 300. For the reasons discussed below, the trial court abused its discretion by overruling Mr. Parker's objections to the State's peremptory challenges to each of these three African-American prospective jurors. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Miller-El v. Dretke*, 545 U.S. 231, 241, 125 S.Ct. 2317, 2325, 162 L.Ed.2d 196 (2005). An examination of the record related to these prospective jurors supports a conclusion that the State's proffered explanations were either pretextual or not

supported by the record. *See Cleary v. State*, 1997 OK CR 35, ¶ 6, 942 P.2d 736, 743; *Foster v. Chatman*, 578 U.S. __, 136 S.Ct. 1737, 1749, 195 L.Ed.2d 1 (2016).

1. Prospective Juror D.J.:

After all sides had completed questioning the jury panel, the trial court asked the parties to make their peremptory strikes. (Tr. I 226) The State exercised its first peremptory challenge to remove Juror D.J., an African-American male. (Tr.I 226) Defense counsel objected, arguing D.J. was being struck on the basis of his race. In accordance with *Batson*, the trial court asked the State to "show a race-neutral" reason for Juror D.J.'s exclusion. Initially, the trial court even proffered some purported race-neutral reasons on behalf of the State:

> Based upon this record, he has demonstrated contacts with law enforcement that led to pleas in criminal cases and probation, and I see other reasons as well in the record why he could be excused. However, if the State wishes to respond with a race-neutral reason, you may.

(Tr.I 226-27) The State answered:

> Judge, just the nature of the offense that he testified about committing and his attitude towards police officers, the number that he gave in terms of trust of police, you know, in conjunction with everything else, we believe that – and there are a number of other African-Americans, not all of which we intend to kick, and I would say that there is not a racial reason by the State for kicking Mr. James.

(Tr.I 227)

The trial court concluded "the record demonstrates that the exclusion will remain" and Mr. Parker's *Batson* objection to this strike was overruled. (Tr.I 227)

Juror D.J., told the court during voir dire that he was a married man with two children, and was employed in "automotives and physical wellness." (Tr.I 89-90) As to his contact with law enforcement, Juror D.J. indicated that six years previous, when he was 21 years old, he was arrested during a bar brawl in California for assault on a police officer. Juror D. J. explained he was at a club when a fight broke out. Juror D.J. had not been drinking during the incident as he was acting as the designated driver that night. (Tr. 206) He explained that he got into a scuffle with

a man who would not leave a girl alone. Juror D.J. and a couple of other guys told the man to "step off." The man refused to leave the woman alone. Punches were thrown and the bouncer told everyone to go outside. The fight continued outside the bar. A police officer attempted to break up the fight. He grabbed Juror D.J. and the two ended up in a scuffle. (Tr.I 42) When Juror D.J. realized it was a police officer, he tried to run but the officer shot him with a taser gun. (Tr.I 207) Juror D.J. was placed on probation for one year and the arrest was subsequently expunged. (Tr. I 42-43) He said the experience would not affect his ability to be open-minded or to listen to police officers who might testify. He also stated that he would not automatically disregard what police officers stated. He indicated he could be fair to all parties in this case. (Tr. I 44)

Juror D.J. was later questioned by the State about his feelings regarding the credibility of police officers. (Tr. 106) The prosecutor asked him:

> MR. COLLIER: And the reason I picked you out – unfortunately, I hate to bring it up again, is you had a bad incident with a police officer at one time, correct?
>
> JUROR JACKSON: Yes.
>
> MR. COLLIER: And you actually ended up getting charged with a crime, assault on a police officer.
>
> JUROR JACKSON: Yes.
>
> MR. COLLIER: How do you feel about that police officer?
>
> THE COURT: Sorry, you are really soft spoken. Speak up for us. Sorry to put you on the spot, sir.
>
> JUROR JACKSON: He is just doing his job, but it was a bad situation turned worse.
>
> MR. COLLIER: Okay. You don't have any ill will towards him as a result of that?
>
> JUROR JACKSON: For shooting me, yes.
>
> MR. COLLIER: For hitting you with a taser?
>
> JUROR JACKSON: Yeah.

MR. COLLIER: Felt like that was out of bounds –

JUROR JACKSON: Yes.

(Tr. 110-11)

MR. COLLIER: -- correct? Do you feel like it was -- I don't know what word -- you use the word. How would you describe it? Inappropriate?

JUROR JACKSON: He could have went about it a different way.

MR. COLLIER: Okay. well, let me ask you, because let me tell you something, I'm going to be honest with you, if I got tased, I am not sure I could keep from holding that against police officers. I'm not sure I could. I mean, if I got tased in a circumstance that I felt like I shouldn't have been, okay? Do you hold that against police officers? Do you view them you think differently than most people do?

JUROR JACKSON: No.

(Tr. 111)

The prosecutor told a personal story about his own negative experience with the Tulsa Police Department and likened it to how Juror Jackson must have felt after his experience. (Tr. 112) Juror Jackson reiterated that he understood there were good and bad police officers. (Tr. 112)

2. **Prospective Juror R.W.:**

The State exercised its fourth peremptory challenge to remove Juror R. W., an African-American male. (Tr.I 228) Appellant again raised a *Batson* objection, arguing there was no race-neutral reason to strike R.W. (Tr.I 228) Defense counsel pointed out that R.W. was in favor of stricter gun laws and never had any personal law enforcement contact. (Tr.I 229) The trial court asked for a race-neutral reason. (Tr.I 229) The prosecutor replied:

> Judge, for one thing, first of all, his attitude towards guns is one of the race-neutral reasons that we would put forward. Yes, I understand he wants strict gun laws and -- but that isn't actually the reason we were getting into their attitudes toward guns in an effort to discover whether they would be appropriate in this case. He has also -- he cited a six, which one of the lowest people on there, in terms of citing their trust of police officers. He has visited family and friends in prison and has had a number of family members with law enforcement contact. And I think all of those are sufficiently raised race-neutral reasons.

(Tr.I 229-30)

The trial court found "the record demonstrates race-neutral reasons. I will allow excusal." (Tr.I 230)

Prospective Juror R.W. was a married man with three children and worked as an electrical technician. (Tr. I 86-87) In answering the question regarding law enforcement contacts, Juror R. W. told the court that neither he nor his immediate family had any contact with law enforcement. He had a few cousins and friends that had been through the prison system, both in Tulsa and other places. (Tr. I 48) He thought one of his cousins was currently in prison but was not sure where. (Tr. I 49) Despite these experiences, he assured the prosecution he could be fair to both sides if he was selected to the jury. (Tr. I 49, 50) Juror R. W. mentioned that he was in favor of stricter gun control laws because he had children and did not "want to walk into McDonald's while my son's playing and see people with firearms." (Tr. 122)

3. Prospective Juror J.Y:

The State's use of its ninth peremptory challenge to remove Juror J.Y., an African-American male, was also suspect. (Tr.I 232) Defense counsel objected on *Batson* grounds, pointing out that Juror J.Y. was "number three out of four black people we have on this jury that the State has stricken." (Tr.I 232) Counsel argued:

> MS. ATTEBERRY: He is the third African-American male that they are now striking from this jury of 12, out of four African-Americans, which were the only four in the entire jury pool. There were no others in the jury pool, including in the back of the room, Judge.
>
> THE COURT: And I don't remember, who is the next one?
>
> MS. ATTEBERRY: The other one is Dana Jacobs, she is No. 13, Judge.
>
> THE COURT: I remember her.
>
> MS. ATTEBERRY: She is the other African-American. She is the only female we have.
>
> THE COURT: I think you are right. I just finished a trial yesterday so I have somebody else in mind. I think that's right, Ms. Jacobs is the remaining African-American and she is a female. There has been a *Batson* challenge

raised. This is the third African-American that would be stricken. Do you have a race-neutral reason?

(Tr.I 233)

The prosecutor answered:

MR. COLLIER: Yes, Judge. And again, some of his answers in regards to self-defense, but primarily because he is a 6.5 in his evaluation of police officers. I would note that we have left [D. J.] on the jury. She was an eight. And I believe we have stricken everybody who is below that, that would not end up being an alternate. So we, obviously, put a lot of stock in that particular question and have kicked virtually everybody in the five to six range.

THE COURT: What is the race of the victim in this case?

MS. ATTEBERRY: He's African-American, Your Honor.

MR. COLLIER: Yes, Your Honor, that is true.

MS. ATTEBERRY: And actually, Judge, Juror No. 12, right now if we kick Mr. [Y.], Juror No. 12 would be Ms. [N.R.] -- or she is Juror No. 29, [N.R.], and she had a six in regards to rating police officers, Your Honor, so –

MR. COLLIER: I don't think that is true. There will be three in the back that will be alternates. We each kick one, so she is in the alternate pool.

MS. ATTEBERRY: No, Ms. [N.R.] is No. 29. Right now our potential alternates are 31, 32 and 33, which is [M., M., and S.]

MR. COLLIER: That's true. I was backwards on that. And that is true, Ms. [N.R.]'s is lower. But again it's not -- it's not the sole reason. They are both in the six range.

THE COURT: Were there any other reasons on the record for his excusal? Is that it, the number that he gave?

MR. COLLIER: Not just the number, Judge, but some of the answers he gave, as I was questioning him about self-defense and motive and intent. Yeah, Judge, I would also state that his brother -- I think he said his brother has been to prison.

THE COURT: He is the third African-American member kicked from the jury. There are no other African-American males on the jury. Trial court hates to weigh in on telling parties how to exercise their challenges and I understand under *Batson* I have to look at the record for race-neutral reasons to strike someone. There is in the record race-neutral reasons. But I will point out, counsel for the defense is correct, there were three African-American males on this jury and now they are stricken, that pattern is true. I find a race-neutral reason. I will allow the excusal.

(Tr.I 235)

Prospective Juror J. Y. said he was not married, did not have any children, and worked three jobs. (Tr. 86-87) When asked about his or his family's previous contacts with law enforcement, he indicated that within the past three or four years, his younger brother had been in and out of jail in Tulsa. (Tr. 47) He stated those experiences had not caused him any negative feelings about the criminal justice system and he could be fair to the State. (Tr. 48)

Argument and Authorities: Ultimately, the State's purported race-neutral reasons for striking these three African-American male jurors all involved their "attitudes" toward law enforcement and their, or their family's, previous contacts with law enforcement and the criminal justice system. These explanations given by the prosecutor were difficult to credit because the State willingly accepted Caucasian jurors with the same traits that supposedly rendered each of these three African-American males an undesirable juror. The proffered "race-neutral" reasons were merely pretext to conceal racial discrimination.

These numbers referred to by the prosecutor involved a poll he took of the panel, asking each prospective juror to rate how they felt about law enforcement on a scale of one to ten. (Tr. I 156) Juror D.J. answered "five." (Tr.I 159) Juror R.W. answered "six". (Tr. I 157) Juror J.Y. said "six and a half." (Tr.I 157)

As defense counsel pointed out, a non-minority female juror who answered "six" on this law enforcement question, N. R., was selected to the petit jury. (Tr. I 160, 235) Juror N.R. said she was married with two children and worked as a travel nurse. (Tr. 93) Further, Juror N.R. also had prior criminal activity as a juvenile but was not questioned about it in detail. (Tr. 39-40)

Caucasian male Juror B.C., a married, retired United Parcel Service employee, with two children, was selected to the petit jury despite the fact that he revealed a family member with significant involvement with the criminal justice system. He said his little brother was "charged with drugs and went to Granite for

three years." (Tr.I 53-54, 90)

Caucasian female juror, Amanda Barrett, also a seated juror, had contact with law enforcement as a juvenile but was not asked any follow-up questions about her experience. (Tr.I 39)

S.V., a Caucasian female juror, told the prosecutor that her daughter had been arrested on drug charges within the past two years in Tulsa County but she also was not asked details about the incident. (Tr.I 65-66)

G.M., a Caucasian female selected as an alternate juror, told the court about her negative recent dealings with the Tulsa Police Department. She said she had called a Tulsa police supervisor and "reamed him out" because the police did not do their job and had endangered the life of her daughter. (Tr.I 113-14) She also revealed personal contacts with the criminal justice system, stating that in the 1970's, she sold liquor-by-the-drink to an undercover officer and was arrested. She was placed on probation and ultimately her record was expunged. (Tr.I 40-41)

If the State wanted the criminally involved or those with negative views on law enforcement off the jury, then these jurors also should not have made it onto the final jury. "More powerful" even than "bare statistics, . . . are side-by-side comparisons of some black venire panelists who [are] struck and white panelists allowed to serve." *Miller-El v. Dretke*, 545 U.S. 231, 241, 125 S.Ct. 2317, 2325, 162 L.Ed.2d 196 (2005); *see also, Snyder v. Louisiana*, 552 U.S. at 483-484, 128 S.Ct. at 1211-1212. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Miller-El*, 545 U.S. at 241, 125 S.Ct. at 2325.

Another factor supporting discriminatory intent is the prosecutor's demeanor and attitude toward African-Americans. While cross-examining Mr. Parker, the prosecutor referred to African-Americans as "those people."

Specifically, he asked Mr. Parker, "It's kind of a different culture there for those people that hang out there at the after-hours club, isn't it? They don't call the police, do they?" (Tr.IV 49) The prosecutor's assumption that African Americans might not call the police in their neighborhoods is a based on a stereotype, and therefore, inherently racial. The prosecutor's application of a racial stereotype in this situation gives insight into his mindset. The court must evaluate the record and consider each explanation within the context of the trial as a whole because "'[a]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts.'" *Hernandez v. New York*, 500 U.S. 352, 363, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) (quoting *Washington v. Davis*, 426 U.S. 229, 242, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976)); *see also Miller-El*, 545 U.S. at 236; 125 S. Ct. at 2324 (noting that *Batson* requires inquiry into "the totality of the relevant facts about a prosecutor's conduct"; *Batson*, 476 U.S. at 93; 106 S.Ct. at 1721 ("In deciding if the defendant has carried his burden of persuasion, a court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.") *See also State v. Tomlin*, 299 S.C. 294, 299, 384 S.E.2d 707, 710, (1989) (The use of a racial stereotype is evidence of the prosecutor's subjective intent to discriminate and clearly violates the mandates of *Batson*.)

The State's purported reasons for excluding these three minority panelists do not withstand scrutiny, exposing the prosecution's discriminatory intent in Mr. Parker's jury selection. "[R]acial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts." *Powers*, 499 U.S. at 402, 111 S.Ct. at 1366. "Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." *Batson*, 476 U.S. at 85, 106 S.Ct. at 1716. The race-based use of peremptory challenges violates the Equal Protection Clause, compromises the guarantee of trial by impartial jury, and is harmful to the fundamental values of our judicial

system and society as a whole. *Miller-El v. Dretke*, 545 U.S. at 237-38, 125 S.Ct. at 2323; *Powers v. Ohio*, 499 U.S. at 412, 111 S.Ct. at 1371; *Neill v. State*, 1994 OK CR 69, ¶ 16, 896 P.2d 537, 545-546. The Supreme Court stated:

> The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.

Batson, 476 U.S. at 87; 106 S.Ct. at 1718.

The State successfully removed three African-American prospective jurors. The proffered explanations were implausible. Where *Batson* error is present on the record, reversal is the appropriate remedy. *Batson*, 476 U.S. at 100, 106 S.Ct. at 1725; *Ezell v. State*, 1995 OK CR 71, ¶ 9, 909 P.2d 69, 72. Accordingly, Mr. Parker requests that this Court reverse his case and remand it for a new trial.

PROPOSITION IV

THE TRIAL COURT ERRED IN DENYING MR. PARKER'S MOTION TO SUPPRESS HIS STATEMENT TO DETECTIVE JOHN BROWN BECAUSE THE STATEMENT WAS TAKEN IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7, 20, AND 21 OF THE OKLAHOMA CONSTITUTION.

The Fifth Amendment to the United States Constitution provides in part that no person "shall be compelled in any criminal case to be a witness against himself."[6] This constitutional privilege against compulsory self-incrimination "is also protected by the Fourteenth Amendment against abridgment by the States." *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S.Ct. 1489, 1492, 12 L.Ed.2d 653 (1964).

In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the Supreme Court interpreted this clause of the Fifth Amendment "to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." 384 U.S. at 467, 86 S.Ct. at 1625.

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[6] Article II, Section 21 of the Oklahoma Constitution contains a similar provision.

Law enforcement officers must ensure that a suspect in custody is "adequately and effectively apprised of his rights" and must honor those rights when exercised. *Id.*

A suspect has the right to invoke his rights immediately or cut off questioning during interrogation, and if a suspect indicates he or she wishes to remain silent, interrogation must cease. *Michigan v. Mosley*, 423 U.S. 96, 100-01, 96 S.Ct. 321, 325, 46 L.Ed.2d 313 (1975) (quoting *Miranda*, 384 U.S. at 473-74, 86 S.Ct. at 1627); *Robinson v. State*, 1986 OK CR 86, ¶ 5, 721 P.2d 419, 421. The right to silence and the right to have counsel present during custodial interrogation are governed by the same requirements. Before the police are under any duty to halt the interrogation, a suspect's invocation of his Fifth Amendment rights must be unambiguous and unequivocal. *Berghuis v. Thompkins*, 560 U.S. 370, 381-82, 130 S.Ct. 2250, 2259-60, 176 L.Ed.2d 1098 (2010).

The Supreme Court has made it quite clear that, absent a knowing, intelligent and voluntary waiver of the right to counsel, an accused, once he has requested counsel, must be left alone by the police until he has had the opportunity to consult with counsel. When the suspect unambiguously invokes his right to counsel, police may not resume interrogation of the suspect until the suspect reinitiates further communication, exchanges, or conversations with the police or his attorney is physically present at the interrogation session. *Minnick v. Mississippi*, 498 U.S. 146, 156, 111 S.Ct. 486, 492, 112 L.Ed. 2d 489 (1990); *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378 (1981). The rationale of *Edwards* is that once a suspect indicates that "he is not capable of undergoing [custodial] questioning without advice of counsel," "any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the 'inherently compelling pressures' and not the purely voluntary choice of the suspect." *Arizona v. Roberson*, 486 U.S. 675, 681, 108 S.Ct. 2093, 2097, 100 L.Ed.2d 704 (1988). Thus, the State must show both that

the defendant reinitiated discussions and that he knowingly and intelligently waived the right he had invoked.

Here, in accordance with *Edwards*, Mr. Parker invoked his right to counsel during an interrogation by Tulsa Police Detective John Brown on July 24, 2018. This invocation was not scrupulously honored and the resulting statement was the product of coercion, rendering it involuntary in violation of Mr. Parker's rights under the Fifth and Fourteenth Amendments to the United States and corresponding provisions of the Oklahoma Constitution.

Prior to trial, on January 29, 2019, the district court held a *Jackson v. Denno*[7] hearing on the admissibility of Mr. Parker's statement to Detective Brown. Mr. Parker asked the court to suppress the statement on the basis that Mr. Parker had invoked his right to counsel yet Detective Brown improperly continued to question him, resulting in harmful admissions. He argued that Detective Brown reinitiated the interrogation by engaging him in a discussion over what would happen to his wife and children if he did not cooperate and coerced the statement by threatening Mr. Parker's wife with arrest if he did not talk to police. (M.Tr. 1/29/19 25-30)

Detective Brown testified that Mr. Parker was taken into custody after a search warrant was executed on his residence. He was transported to the detective division for an interview. Detective Schilling was also present. (M.Tr. 1/29/19 4-5) Detective Brown denied any improper or coercive action during this interrogation. He acknowledged that after being informed of his *Miranda* rights, Mr. Parker unequivocally stated that he wanted his attorney. (M.Tr. 1/19/19 5, 9, 17) Detective Brown said he told Mr. Parker, "Okay, that's fine" and asked him, "Do you have any questions of me." (M.Tr. 1/29/19 9) Mr. Parker asked if he was going to jail and Detective Brown told him he was being arrested on outstanding misdemeanor

[7] 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

warrants. According to Detective Brown, he concluded the interview and he and Detective Schilling left the room. (M.Tr. 1/29/19 9)

Detective Brown said he came back to the room three or four minutes later and took Mr. Parker into the hallway where he took a photo of Mr. Parker. He then escorted him back to the interview room and turned off the recording system. (M.Tr. 1/29/19 9, 18, 36-37) He left Mr. Parker in the interview room alone for 10 to 15 minutes while he filled out an arrest and booking sheet. (M.Tr. 1/29/19 10) When Detective Brown returned to the room, he gave Mr. Parker a business card. Mr. Parker said he wanted his attorney and Detective Brown told him, "Once you get your attorney, here is my information. There are two sides to every story. I am interested in hearing your side of the story." (M.Tr. 1/29/19 10, 19, 20)

Detective Brown claimed that Mr. Parker then became emotional and said, "I want to tell you what's going on," and he began telling Detective Brown his version of the story. (M.Tr. 1/29/19 10) Detective Brown told Mr. Parker to stop talking because he did not have a notepad to write on and he needed to get Detective Schilling. Detective Brown returned with Detective Schilling, turned the recorder back on, and started the interview again. (M.Tr. 1/29/19 11) Mr. Parker signed the waiver rights form at this time. (M.Tr. 1/19/19 18) In Detective Brown's opinion, even though Mr. Parker had asked for an attorney, he changed his mind and decided to talk. Detective Brown denied that he said anything to Mr. Parker about any negative future consequences for his family for failing to cooperate or anything else that could be construed as a threat or intimidation towards Mr. Parker or his family. (M.Tr. 1/29/19 11, 19, 21) According to Detective Brown, Mr. Parker "voluntarily reengaged with me." (M.Tr. 1/29/19 12)

Mr. Parker, however, told a very different account of the circumstances surrounding his interrogation. At this hearing, Mr. Parker testified that prior to being interviewed by Detective Brown, he had a conversation with his fiancee

Crystal. She was distraught and told him Detective Brown had threatened to arrest her. (M.Tr. 1/29/19 23-24, 26, 30) Detective Brown admitted that he had contacted Crystal earlier that day at her school and transported her downtown for an interview. (M.Tr. 1/29/19 14-15) He claimed he did not recall if he made any mention of her possibly being charged as an accessory, although he acknowledged that he might have told her she could be charged with a crime. (M.Tr. 1/19/19 14, 16) After the interview with Crystal concluded, she was taken back to school and a search warrant was prepared for the Parker residence. (M.Tr. 1/29/19 15-16)

Mr. Parker acknowledged that after he was taken to the interview room and invoked his right to counsel, Detective Brown reentered the interview room and gave him a business card. (M.Tr. 1/29/19 25) Detective Brown warned him that he "knew what was going to happen down the line," implying that he was going to arrest his fiancee, Crystal, if Mr. Parker did not cooperate. He told Mr. Parker that he had even arrested pregnant women in the past. He said that Mr. Parker's children would be taken from them if Crystal was arrested. (M.Tr. 1/29/19 25)

Mr. Parker said when Detective Brown made that threat, he became emotional and started to cry because he thought about his family being displaced and separated. He was afraid his decision to "lawyer up" was going to cause his family to suffer so he agreed to cooperate and talk to the police without the presence of his attorney. (M.Tr. 1/29/19 25, 26, 28, 29)

At the conclusion of the hearing, the trial court found that based on Mr. Parker's demeanor during the interview, he believed "this was a voluntary statement." (M.Tr. 1/29/19 39) The trial court found that Mr. Parker had clearly and unequivocally invoked his right to counsel when he asked for an attorney. (M. Tr. 1/29/19 39) However, the trial court rejected Mr. Parker's claim that when Detective Brown came back in and gave him his business card "it was such a coercive, intimidating environment that he thought his freedom was at stake, his wife's and

family's liberty was at stake, and he was overcome with that coercion and he made a statement." (M.Tr. 1/29/19 41)

The trial court found Mr. Parker's initial invocation of the right to counsel was "overcome by a lawful waiver." (M.Tr. 1/29/19 41) Further, the court held that Detective Brown's actions in returning and giving Mr. Parker his business card was not an effort to interrogate him further. (M.Tr. 1/29/19 42) According to the trial court, the interaction with Mr. Parker at that point was to facilitate him being booked into the jail. (M.Tr. 1/29/19 42) The court concluded that Mr. Parker "reinitiated the interrogation and voluntarily and knowingly waived right to counsel after invocation." (M.Tr. 1/29/19 42)

While normally a district court's ruling on a motion to suppress is reviewed for an abuse of discretion, here, despite counsel's pre-trial motion to suppress, counsel failed to re-urge this motion at trial when Detective Brown testified and recounted the statement and the circumstances surrounding the interrogation for the jury. (Tr.III 25-40) State's Exhibit 52, the signed rights waiver, was admitted without objection. (Tr.III 78) Counsel's lapse in representation by failing to re-raise this objection at trial is addressed in Proposition VI. However, the trial court's determination that Mr. Parker's statement was admissible on grounds that he had voluntarily reinitiated the conversation after invoking his right to counsel was plain error adversely affecting his substantial rights. *Smith v. State*, 2018 OK CR 4, ¶ 8, 419 P.3d 257, 260.

In *Miranda,* the Supreme Court declared: "[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual ...." 384 U.S. at 476, 86 S.Ct. at 1629. In *Berkemer v. McCarty,* 468 U.S. 420, 433, 104 S.Ct. 3138, 3246-47, 82 L. Ed. 2d 317 (1984), the

Court said, "The purposes of the safeguards prescribed by *Miranda* are to ensure that the police do not coerce or trick captive suspects into confessing ...." Similarly, in *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 1141, 89 L.Ed.2d 410 (1986), the Court stated that "the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception."

Psychological coercion generated by concern for a loved one has been recognized as impairing a suspect's capacity for self-control, making his confession involuntary. In *Rogers v. Richmond*, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961), the defendant's confession was obtained only after the police pretended to order that his ailing wife be arrested for questioning. The Supreme Court deemed the confession involuntary and overturned the conviction, emphasizing that convictions based upon coerced confessions must be overturned, "not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system." 365 U.S. at 540-41, 81 S.Ct. at 739. The psychological ploy used against Mr. Parker was similar to that employed in *Rogers*, and his statement was likewise involuntary.

The Supreme Court has long held that in order to be admissible, a statement must be "free and voluntary: that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." *Brady v. United States,* 397 U.S. 742, 753, 90 S.Ct. 1463, 1471, 25 L.Ed.2d 747 (1970) (emphasis added) (quoting *Bram v. United States,* 168 U.S. 532, 542-43, 18 S.Ct. 183, 187, 42 L.Ed. 568 (1897)). A confession is involuntary or coerced if the "totality of the circumstances" demonstrates that the defendant did not freely decide to give the statement.

Arizona v. Fulminante, 499 U.S. 279, 286, 111 S.Ct. 1246, 1251, 113 L.Ed.2d 302 (1991). Under the totality of the circumstances approach, both the characteristics of the accused and the details of the interrogation are considered. *Turner v. State,* 1990 OK CR 79, ¶ 17, 803 P.2d 1152, 1158 (citing *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)).

The totality of the circumstances indicate the police obtained Mr. Parker's statement by threats and coercion and by manipulating his vulnerability regarding his family, by suggesting that his failure to tell the truth would result in the arrest of his fiancee and trouble for his children. Under these circumstances, the statement was not voluntarily given and should have been suppressed. Further, the admission of the statement was not harmless. It is the State's burden to prove beyond a reasonable doubt that the introduction of a coerced confession did not contribute to the defendant's conviction. *Arizona v. Fulminante*, 499 U.S. 279, 296, 111 S.Ct. 1246, 1257, 113 L.Ed.2d 302 (1991); *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (holding that "before a federal constitutional error can be held harmless, the [reviewing] court must be able to declare a belief that it was harmless beyond a reasonable doubt"); *Simpson v. State*, 1994 OK CR 40, ¶ 34, 876 P.2d 690, 701. Because of the profound impact a confession has on the jury, a reviewing court should exercise extreme caution before finding its admission harmless. *Arizona v. Fulminante,* 499 U.S. at 296, 111 S.Ct. at 1258. The evidence against Mr. Parker was not so overwhelming that this Court can conclude beyond a reasonable doubt that his coerced statement did not contribute to his conviction for manslaughter. Accordingly, his conviction must be reversed.

PROPOSITION V

MR. PARKER WAS DEPRIVED OF A FAIR TRIAL BY PROSECUTORIAL MISCONDUCT IN VIOLATION OF HIS RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7 AND 20 OF THE OKLAHOMA CONSTITUTION.

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

The Supreme Court has recognized that the "relevant question" in evaluating prosecutorial misconduct claims is whether the prosecutor's conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). This Court has likewise recognized that allegations of prosecutorial misconduct warrant reversal of a conviction if "the cumulative effect was such [as] to deprive the defendant of a fair trial." *Pryor v. State*, 2011 OK CR 18, ¶ 11, 254 P.3d 721, 726. This Court evaluates such claims "within the context of the entire trial," considering not only the prosecutor's conduct, but also "the strength of the evidence against the defendant" and the conduct of defense counsel. *See, e.g., Harmon v. State*, 2011 OK CR 6, ¶ 80, 248 P.3d 918, 943.

During Mr. Parker's trial, the prosecutor committed flagrant misconduct, in violation of due process and Mr. Parker's right to a fair trial, by improperly shifting the burden of proof, improperly commenting that Mr. Parker tailored his defense

to the testimony at trial, and mischaracterizing the evidence. The prosecution's misconduct so infected the trial with unfairness as to make the resulting conviction and sentence a denial of due process. *Darden v. Wainwright*, 477 U.S. at 181, 106 S.Ct. at 2471.

A. Commenting on the Defense's Failure to Produce Evidence.

During cross-examination of Mr. Parker, as well as closing argument, the prosecutor improperly commented on the defense's failure to produce evidence. This had the effect of impermissibly shifting the burden of proof to the defendant. The prosecutor asked Mr. Parker:

Q. But you told Crystal everything?

A. Yes, sir.

Q. So of course she can verify that to the police given the opportunity?

MS. ATTEBERRY: Objection, Your Honor.

THE COURT: Sustained.

Q. (BY MR. COLLIER) She could have been called by you as a witness? --

MS. ATTEBERRY: Objection, Your Honor.

THE COURT: Sustained.

(Tr.IV 58)

Defense counsel's objections were sustained, but the jury would have no reason to know that the comments were improper, as they were not admonished to disregard them. Undeterred, the prosecutor returned to this subject.

Q. These things that you claim that Mr. Wilson said to you, you don't have anybody willing to come in here and testify –

MS. ATTEBERRY: Objection.

Q. (BY MR. COLLIER) -- to corroborate those?

THE COURT: Sustained. The jury will disregard the comment. As we talked about in jury selection, the burden rests upon the State of Oklahoma period, it never shifts.

(Tr.IV 69)

Later, during closing argument, the prosecutor referred to the fact that Mr. Parker did not call "corroborating" witnesses at trial:

> We then know he becomes engaged with Roosevelt and Patrick and the defendant, we don't know exactly what was said. The only version of this that we have is the defendant's version. And, once again, we can't trust it.
>
> MS. ATTEBERRY: Objection.
>
> THE COURT: Sustained.

(Tr.IV 108-09)

A fundamental pillar of our legal system is that a person is presumed innocent until proven guilty. It is the State's burden to prove beyond a reasonable doubt every element of the crime charged and the defendant can sit on his hands and do absolutely nothing, if that is his desire. *See e.g. Mitchell v. State*, 1983 OK CR 25, ¶ 11, 659 P.2d 366, 369. The defendant is entitled to rely upon this presumption and has absolutely no obligation to offer any evidence in his defense. The State alone bears the burden to prove the defendant guilty. Here, the prosecutor's improper comment on Mr. Parker's purported failure to present witnesses and evidence had the effect of unconstitutionally shifting that burden by misleading the jury into believing that Mr. Parker was required to come forward with evidence. Such comments are forbidden and, accordingly, this case should be reversed. *See Sandstrom v. Montana*, 442 U.S. 510, 524, 99 S.Ct. 2450, 2459, 61 L.Ed.2d 39 (1979); *Lewis v. State*, 1977 OK CR 287, ¶ 17, 569 P.2d 486, 489 (misstatement of law in argument was error); *Pettigrew v. State*, 1976 OK CR 228, ¶ 30, 554 P.2d 1186, 1194; *Payne v. State*, 1974 OK CR 41, ¶ 11, 520 P.2d 694, 697 (argument improperly shifted burden of proof to the defense).

As to the comments for which the trial court sustained the objection and admonished the jury to disregard, it is true that the general rule in Oklahoma, as in most jurisdictions, is that an admonishment to the jury to disregard prejudicial

remarks of counsel usually cures any error. *Kitchens v. State*, 1973 OK CR 356, ¶ 25, 513 P.2d 1300, 1304. The underlying rationale of the rule appears to be that "it cannot be presumed as a matter of law that the jury will fail to heed the admonition given by the court." *Middlebrook v. Imler, Tenny, & Kugler, M.D.'s, Inc.*,1985 OK 66, ¶ 29, 713 P.2d 572, 583. As with any general rule, however, this rule is subject to certain common-sense exceptions, such as where "the comments by the prosecutor are unusually egregious," *Ybarra v. State*, 1987 OK CR 31, ¶ 26, 733 P.2d 1342, 1347, or where the errors are "so prejudicial that [they] would undoubtedly taint the verdict," *Harris v. State*, 2000 OK CR 20, ¶ 39, 13 P.3d 489, 500. In addition, this Court has considered whether the error is likely to make a "sufficiently strong impression on the jury that it will be unable to disregard." *Patton v. State*, 1998 OK CR 66, ¶¶ 66-67, 973 P.2d. 270, 292-93 (distinguishing *United States v. Sands*, 899 F.2d 912 (10th Cir. 1990)). Here, the prosecutor's comments and arguments asking the jury to draw a negative inference from Mr. Parker's alleged failure to present evidence met this level of prejudicial and require reversal.

B. Mischaracterizing the Evidence.

During closing argument, the State mischaracterized the evidence, referring to Mr. Wilson's shooting as an "assassination" and an "execution." (Tr.IV 103, 106) Counsel's objections were overruled. (Tr.IV 103, 106) This improper argument was designed, undoubtedly, in an attempt to inflame the passions and emotions of the jury. *Polk v. State*, 1977 OK CR 99, ¶¶ 7-9, 561 P.2d 558, 560 (it is error when the prosecutor argues facts outside the record to appeal to the passions and prejudices of the jury). Prosecutors should not misstate the evidence or law in closing argument. *Florez v. State*, 2010 OK CR 21, ¶ 6, 239 P.3d 156, 158; *Brewer v. State*, 2006 OK CR 16, ¶ 10, 133 P.3d 892, 894. Although parties have wide latitude in closing argument to discuss the evidence and to make reasonable inferences, this latitude is not unbridled, and relief is warranted where grossly improper comments

affected the accused's right to a fundamentally fair trial. *Hanson v. State*, 2003 OK CR 12, ¶ 16, 72 P.3d 40, 49. Such tactics have been routinely condemned by this Court. *See Howell v. State*, 1994 OK CR 62, ¶ 35, 882 P.2d 1086, 1094; *McCarty v. State*, 1988 OK CR 271, ¶ 12, 765 P.2d 1215 ("It is highly improper for a prosecutor to comment on facts not in evidence.")

C. Allegations Mr. Parker Tailored His Testimony to Fit the Evidence Presented in Court.

During cross-examination of Mr. Parker and closing argument, the prosecutor made improper comments inviting the jury draw the inference that Mr. Parker concocted his testimony to fit the necessary elements of his defense after listening to the evidence at trial. Mr. Parker was present throughout the trial, as was his right. *See Illinois v. Allen*, 397 U.S. 337, 338, 90 S.Ct. 1057, 1058, 25 L.Ed.2d 353 (1970). In fact, Oklahoma law makes a felony defendant's presence during trial mandatory. *See* 22 O.S. 2011, § 583. As was also his right, Mr. Parker testified in his own behalf. (Tr. IV 9-76) Nonetheless, the prosecutor argued in closing:

> Now he says it's his pocket because that's where the gun was. And, of course, he's learned in discovery and through the process of this case –
>
> MS. ATTEBERRY: Objection.
>
> THE COURT: Overruled.
>
> MR. COLLIER: -- that the gun was in his pocket. So what does he do? He changes his story to fit what he knows the facts are, not what he told the detective. So why -- if you went there and the story that he's telling you here today had the slightest bit of truth, why didn't he tell that to the detective? Why didn't he tell them that? Why does he change things up to help himself?

(Tr.IV 108)

The prosecutor also referred to Mr. Parker's testimony during closing argument as "self serving." Defense counsel's objection was sustained. (Tr.IV 133) The prosecutor told the jury Mr. Parker was trying to "use some legal magic words to escape responsibility." (Tr.IV 133-34) Again, defense counsel objection and the court sustained the objection. (Tr. IV 134)

The prosecutor's accusation that Mr. Parker was able to shape his testimony simply because he was present, as he had a right to be, at his own trial, unfairly burdened his exercise of his fundamental rights and deprived him of a fair trial. Appellant recognizes that the Supreme Court held in *Portuondo v. Agard*, 529 U.S. 61, 73, 120 S.Ct. 1119, 1127, 146 L.Ed.2d 47 (2000), that because all witnesses should be treated the same, a prosecutor's comments regarding a defendant's ability to tailor his testimony based on his presence at trial did not violate his federal constitutional rights. In *Hooks v. State*, 2001 OK CR 1, ¶ 43, 19 P.3d 294, 315, this Court followed the *Portuondo* majority and rejected Hooks's claim that the prosecutor should not have argued in closing that his presence at trial allowed him to hear the State's evidence and then create a story to fit it. *Id.*

Appellant would urge this Court to reconsider this position and adopt the sound reasoning of the *Portuondo* dissent, written by Justice Ginsburg. The dissent in *Portuondo* disapproved of the majority's holding, asserting that "[t]he [majority] today transforms a defendant's presence at trial from a Sixth Amendment right into an automatic burden on his credibility." 529 U. S. at 76, 120 S.Ct. 1129. (Ginsburg, J., dissenting, with whom Souter, J., joined). The dissent concluded that the majority's holding produced a "prosecutorial practice that burdens the constitutional rights of defendants, that cannot be justified by reference to the trial's aim of sorting guilty defendants from innocent ones, and that is not supported by our case law." 529 U.S. at 88, 120 S.Ct. at 1135.

As the Supreme Court noted in *Portuondo*, states are free to provide criminal defendants with greater protection than that afforded under the federal constitution. 529 U.S. at 76, 120 S. Ct. at 1129 (Stevens, J., concurring) (noting that the Court's holding does not "deprive States or trial judges of the power either to prevent such argument entirely or to provide juries with instructions that explain the necessity, and the justifications, for the defendant's attendance at trial").

Other States have done so. In *State v. Mattson*, 226 P.3d 482, 496 (2010), the Hawai'i Supreme Court held that it is "improper under the Confrontation Clause of the Hawai'i constitution for a prosecutor to make generic accusations during closing argument that a defendant has tailored his or her testimony based solely on the defendant's exercise of his or her constitutional right to be present at trial."

Likewise, in *State v. Daniels*, 861 A.2d 808, 818 (N.J. 2004), the New Jersey Supreme Court crafted a rule that respects the fundamental rights of a testifying criminal defendant, while simultaneously not allowing the defendant to transform his right to testify into "a license to commit perjury [or] a shield against contradiction." 861 A.2d at 818-19. As the *Daniels* court noted, a testifying criminal defendant is a unique type of witness. "[A] criminal defendant is not simply another witness. Those who face criminal prosecution possess fundamental rights that are 'essential to a fair trial.'" *Id.* at 819 (citing *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965)). The court explained that "[p]rosecutorial comment suggesting that a defendant tailored his testimony inverts those rights, permitting the prosecutor to punish the defendant for exercising that which the Constitution guarantees." *Id.* Thus, the New Jersey Supreme Court explained, "[a]lthough, after *Portuondo*, prosecutorial accusations of tailoring are permissible under the Federal Constitution, we nonetheless find that they undermine the core principle of our criminal justice system – that a defendant is entitled to a fair trial." *Daniels*, 861 A.2d at 819.

There is no doubt that Mr. Parker's credibility was of critical importance to the defense case. The above prosecutorial remarks in Mr. Parker's case were prejudicial and cumulatively contributed to the jury's determination of guilt. The trial court's failure to sustain the objection and/or admonish the jury to disregard these comments was an abuse of discretion. Accordingly, his conviction should be reversed, or, in the alternative, his sentence appropriately modified.

PROPOSITION VI

MR. PARKER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7 AND 20 OF THE OKLAHOMA CONSTITUTION.

In *Strickland v. Washington*, 466 U.S. 668, 681, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the Supreme Court held a conviction cannot stand if defense counsel's performance falls below the objective standards of reasonableness required by the Sixth Amendment and this deficient performance creates a reasonable probability the defendant did not receive a fair trial with a reliable result. The reasonable probability standard does not require a showing of prejudice beyond a reasonable doubt, by clear and convincing evidence, or even by a preponderance of the evidence. Rather, it merely requires a showing sufficient to undermine confidence in the outcome. 466 U.S. at 694-95, 104 S.Ct. at 2068; *Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S.Ct. 1495, 1519, 146 L.Ed.2d 389 (2000) (O'Connor, J., concurring).

A. Failure to Renew Motion to Suppress at Trial.

In Proposition IV, Mr. Parker argued that the admission of his statement to Detective Brown on July 24, 2018, while at the Tulsa County Police Department, was a violation of his constitutional rights. Although counsel objected vigorously to this evidence with a motion to suppress prior to trial, for some inexplicable reason, counsel failed to renew the motion to suppress when the evidence was offered by the State at trial, thus inviting Appellee to respond that any errors regarding the admission of this evidence were waived. Because rulings on pre-trial motions are advisory only, failure to renew the objection at trial waives review of all but plain error. *See, e.g., Kaiser v. State*, 1983 OK CR 156, ¶ 15, 673 P.2d 160, 161. Appellant can detect no rational trial strategy for counsel's failure to object to this prejudicial evidence, which undoubtedly contributed to the jury's finding he was guilty. Defense counsel's failure to protect Mr. Parker's right to a fair trial was

outside the wide range of professionally competent assistance and resulted in prejudice to his client. *Brumfield v. State*, 2007 OK CR 10, ¶ 16, 155 P.3d 826, 834-35 (In order to preserve a claim that evidence should have been suppressed, the defendant must object to the admission of the evidence at trial.) Counsel's failure to renew the motion to suppress at trial was a breach of the duty to act as a reasonably competent attorney. *See Brown v. United States*, 656 F.2d 361, 363 (8th Cir. 1981); *United States v. Foster*, 566 F. Supp. 1403, 1413-14 (D.D.C. 1983).

B. Failure To Utilize Available Evidence.

This Court has found a violation of the Sixth Amendment right to counsel when counsel has failed to investigate or utilize important impeachment evidence, exculpatory evidence or a well-founded defense. *Glossip v. State*, 2001 OK CR 21, ¶ 16, 29 P.3d 597, 601; *Wilhoit v. State*, 1991 OK CR 50, ¶ 4, 816 P.2d 545, 546-47; *Jennings v. State*, 1987 OK CR 219, ¶ 12, 744 P.2d 212, 214-15; *Galloway v. State*, 1985 OK CR 42, ¶ 12, 698 P.2d 940, 941-42. Here, trial counsel failed to call a readily available witness, Roosevelt Tolon III, in support of his self-defense claim and to rebut the State's argument that there was no evidence the victim was reaching for his gun at the time Mr. Parker shot him. (Tr. IV 134) During cross-examination of Mr. Parker, the prosecutor asked him, "so Roosevelt saw everything that you saw?" (Tr.IV 53) He later asked, "These things that you claim that Mr. Wilson said to you, you don't have anybody willing to come in here and testify – to corroborate those." (Tr. IV 69) During closing argument, the prosecutor again pointed out that Mr. Parker did not present any witnesses to corroborate his claim that Mr. Wilson was reaching for his gun:

> And then he finally tells his story and how easy is for him to mitigate? To -- to make his behavior seem -- all he's gotta do is say this. Nobody can corroborate it. Nobody can deny it. You know, he went for -- he went for his pocket. You know he never got the gun out. In fact, what he says to the detective is the defendant pulled his shirt up and went for his waistband area. Now he says it's his pocket because that's where the gun was.

(Tr.IV 108)

At the close of the State's case, defense counsel indicated she was expecting to call Roosevelt Tolon III as her first defense witness. (Tr.III 141) Inexplicably, the next morning, Mr. Tolon was never called as a witness. As detailed in the affidavit attached to Appellant's Application for Evidentiary Hearing on Sixth Amendment Claim ("Application"), Roosevelt Tolon could have provided critical corroboration of Mr. Parker's self-defense claim had counsel followed through with calling him as a witness.[8] *(See* Application, Exhibit A, Affidavit of Jolene Perham, p. 2) Mr. Tolon acknowledged that he and Patrick drove to the after-hours club separately from Mr. Parker. He stated that Patrick remained in the vehicle talking on the phone with some females about meeting them at the club. Mr. Tolon got out of the car and started walking towards the club. As he got near the front door, he saw Mr. Parker coming towards the door. *Id.* He said the man who pulled the gun on them earlier at the 007 club was also walking toward the front door. According to Mr. Tolon, when the man saw Mr. Parker, he immediately started talking "crazy and cussing again." *Id.* Mr. Tolon saw the man reaching toward his waistband. He said he knew from the earlier incident that the man was carrying a gun. Mr. Tolon said he was afraid the man was going to pull it out and start shooting. *Id.* Mr. Tolon said he yelled "aw shit" and took off running back to Patrick's car. *Id.* As soon as he started running away, he heard gunshots. Mr. Tolon said Mr. Parker had been behind him when he took off running. He did not see the shooting so he was not sure who fired the gun. *Id.*

Mr. Tolon said he remembered being told he was going to court to testify for Mr. Parker but for some reason he was never called as a witness. He said he was

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[8] This claim arises from extra-record evidence. Mr. Parker has filed an Application for Evidentiary Hearing on Sixth Amendment Claim concurrently with this brief in accordance with Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

never told why his testimony was not needed. He was willing to testify and would have done so had he been called to appear on Mr. Parker's behalf. *(See* Application, Exhibit A, Affidavit of Jolene Perham, p. 3)

In light of the information contained in this affidavit, which was known to defense counsel, Mr. Tolon should have been called to testify at trial. There was no legitimate strategy behind the failure to call this available witness at trial. The facts of this case demonstrate a reasonable probability that the outcome of Mr. Parker's trial would have been different, but for trial counsel's deficient performance. The State's case against Mr. Parker was not so overwhelming as to foreclose the possibility that additional evidence in his favor would have created reasonable doubt in the mind of at least one juror. *See Patterson v. State*, 2002 OK CR 18, ¶ 18, 45 P.3d 925, 929-30 (counsel ineffective for failure to present exculpatory testimony of available witness who claimed to have seen the victim alive after the alleged date of her murder).

This extra-record claim should be considered with the remainder of Mr. Parker's claims in order to determine whether counsel's representation, as a whole, fell below minimal constitutional standards of effective representation.

C. Conclusion.

As the Supreme Court noted in *Strickland*, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation" but "simply to ensure that criminal defendants receive a fair trial." *Strickland v. Washington*, 466 U.S. at 689, 104 S.Ct. at 2065. The facts of this case demonstrate that counsel's performance fell outside the wide range of professionally competent assistance and that there is a reasonable probability that the outcome of Mr. Parker's trial would have been different, but for trial counsel's unprofessional error or omission. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. Appellant respectfully asks this Court to reverse his case for a new trial.

CONCLUSION

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

Respectfully submitted,

MICHAEL GARY PARKER, JR.,

By: 

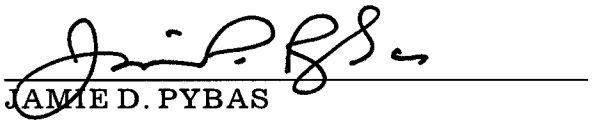
JAMIE D. PYBAS
Oklahoma Bar No. 13000
Division Chief,
Homicide Direct Appeals Division
Oklahoma Indigent Defense System
PO Box 926
Norman, Oklahoma 73070-0926
(405) 801-2666
Fax: (405) 801-2690

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

This is to certify that on November 4, 2019, a true and correct copy of the foregoing Brief of Appellant was mailed, *via* United States Postal Service, postage pre-paid, to Appellant at the address set out below, and a copy was served upon the Attorney General by leaving a copy with the Clerk of this Court.

Michael Gary Parker, Jr., Inmate No. 832555
James Crabtree Correctional Center
216 N. Murray Street
Helena, Oklahoma 73741-1017



JAMIE D. PYBAS