No. F-2024-38

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CODY LEAON BERTRAND,

Appellant,

-vs-

THE STATE OF OKLAHOMA,

Appellee.

BRIEF OF APPELLEE
FROM ROGERS COUNTY DISTRICT COURT
CASE NO. CF-2020-158

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	)	
v.	)	**Case No. F-2024-38**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Cody Leaon Bertrand, hereinafter referred to as the defendant, was convicted, following a jury trial before the Honorable Terrell Crosson, Special Judge, of two counts of Lewd or Indecent Acts to a Child Under 12, in violation of 21 O.S.Supp.2018, § 1123(A)(2), in Rogers County Case No. CF-2020-158 (O.R. 432-34; Tr. 913-14).[1] The defendant was represented by Mr. Jesse Muth ("Mr. Muth") at trial, while the State was represented by Ms. Kali Strain ("Ms. Strain") and Mr. Zachary Cabell ("Mr. Cabell"). The jury recommended the minimum sentence of twenty-five years imprisonment on Count I, and forty-five years imprisonment on Count II (Tr. IV 913-14). At the sentencing hearing, the trial court sentenced the defendant in accordance with the jury's verdict,

[1] The original record will be referred to as (O.R. __). The transcripts of the defendant's jury trial will be referred to as (Tr. __). Transcripts of the hearing on propensity evidence, held December 1, 2021, will be referred to as (12/1/21 Hrg. __). Transcripts of the reliability hearing will be referred to as (RH __). Transcripts of the hearing on the defendant's Indian status will be referred to as (IH __). The transcript of the pretrial hearing on June 26, 2023, will be referred to as (PT I __). The transcript of the second pretrial hearing on August 28, 2023, will be referred to as (PT II __). The transcript of the third pretrial hearing on September 20, 2023, will be referred to as (PT III __). The transcript of the fourth pretrial hearing on September 22, 2023, will be referred to as (PT IV __). The State's exhibits will be referred to as (S.E. __).

running those sentences consecutive to each other and consecutive to another case (S. Tr. 15; O.R. 432-34). From this judgment and sentence, the defendant has filed his appeal to this Court.

STATEMENT OF THE FACTS

Ashley Yarbrough ("Ms. Yarbrough") and the defendant had an on-again off-again relationship beginning in high school when they were both sixteen years old (Tr. 417, 445). They broke up for the fifth or sixth time after she gave birth to their son, R.B. (Tr. 417, 445). Ms. Yarbrough had two older children from prior relationships (Tr. 416-17). The oldest was a boy, A.F., who was born in December 2012 (Tr. 416). Her daughter, L.F., was born in August 2014 (Tr. 416). Though the defendant was not their father, both L.F. and A.F. called him "dad" (Tr. 441-42). In August 2018, the defendant and Ms. Yarbrough were no longer together (Tr. 445). On the evening of August 7, 2018, Ms. Yarbrough was giving L.F. and R.B. a bath when she witnessed L.F. take R.B.'s hand and place it on her (L.F.'s) vagina (Tr. 418). This was deeply concerning, so she drained the water and took L.F. to the living room (Tr. 418-20). Ms. Yarbrough started asking if anyone had ever touched her privates (Tr. 420). Eventually, L.F. stated that the defendant had touched her on her mouth and her bottom (Tr. 422). L.F. clarified further that the defendant put his "big pee pee in [her] mouth," referring to his penis (Tr. 423). Ms. Yarbrough became angry and called the defendant's mother, Kathryn Bertrand ("Ms. Bertrand"), with whom the defendant lived (Tr. 424). Ms. Bertrand's house was in Inola, Oklahoma, and Ms. Yarbrough allowed her children to go see the defendant at that home even after they had broken up (Tr. 428, 446). Ms. Bertrand and the defendant told her the defendant would never do something like that (Tr. 424). Ms. Yarbrough became angry and started cursing the two of them out, and then hung up the phone (Tr. 424). L.F. was still in the living room observing this conversation (Tr. 425). After Ms. Yarbrough hung up on him and Ms. Bertrand, the defendant contacted the police himself to tell

them that they were going to get a call about L.F.'s allegation, and to tell them that the allegation was "bull" (S.E. 3 at 7:00-9:00).[2] After hanging up the phone, Ms. Yarbrough called her parents to inform them of the disclosure, and then called the police (Tr. 425).

Offcr. Marton Williams, an investigator with the Rogers County Sheriff's Office was assigned to the case soon after and scheduled forensic interviews for A.F. and L.F. at the Child Advocacy Center in Claremore, Oklahoma, on August 17, 2018 (Tr. 328, 497). They were each interviewed by Ms. Jodie Hunt ("Ms. Hunt"). L.F. was interviewed first but did not disclose any abuse by the defendant (S.E. 5 at 1:00-27:00). When asked by Ms. Hunt if anyone had ever touched her on an area that was covered by her underwear, L.F. said "[A.F.]" (i.e., her brother) (S.E. 5 at 16:00-18:00). After interviewing L.F., Ms. Hunt interviewed A.F. (S.E. 5 at 28:00). A.F., the brother, did not disclose any abuse by the defendant, but stated that L.F. had done "bad naked things" with the defendant (S.E. 5 at 39:00-44:00). Because L.F. did not disclose any abuse by the defendant in her forensic interview, no charges were filed against the defendant at that time (Tr. 499). Nevertheless, Offcr. Williams left the case open (Tr. 499-500). The Child Advocacy Center recommended that L.F. start attending counseling, and she was referred to Ms. Kim Petty ("Ms. Petty"), who focused on trauma therapy (Tr. 372-74). During the course of her therapy in 2019, L.F. made disclosures of sexual abuse, first stating that the defendant "did bad stuff to [her] in the closet" at his home, and that he was "a bad man," then clarifying that the defendant put his penis in her bottom and in her mouth (Tr. 38-84, S.E. 19).[3] She explained that this had occurred in "the

[2] State's Exhibit 3 was the defendant's interview with police, which was published for the jury at trial (Tr. 510).

[3] State's Exhibit 19 was a report Ms. Petty prepared which detailed L.F.'s disclosures of abuse (Tr. 381, S.E. 19). This report was admitted without objection during her testimony at trial (Tr. 381).

closet" (Tr. 387). Ms. Petty reported this information to the Department of Human Services ("DHS") (Tr. 390, 406; S.E. 19).

On June 15, 2019, Ms. Petty contacted Offcr. Williams regarding L.F.'s disclosure (Tr. 503). Based on this new information, both A.F. and L.F. were interviewed a second time by Ms. Hunt (Tr. 331, 337; S.E. 6-7). L.F. was interviewed on July 24, 2019, while A.F. was interviewed on August 5, 2019 (Tr. 331, 337; S.E. 6-7). In L.F.'s second forensic interview, she disclosed that the defendant and A.F. touched her "pee pee," referring to her vagina (S.E. 7 at 13:00-15:00). She also stated the defendant was a "bad guy" because he "did stuff he [was not] supposed to," before clarifying that he "did [sic] this part and this part" while pointing to the mouth and the bottom on the diagram Ms. Hunt showed her (S.E. 7 at 13:00-15:00). After roughly twenty minutes, L.F. told Ms. Hunt that she wanted to be done (S.E. 7 at 16:00-17:00). In A.F.'s second forensic interview with Ms. Hunt he acknowledged that he was there because of what "[the defendant] did" (S.E. 6 at 8:00-10:00). A.F. disclosed that the defendant would spank him if he refused to do "naked stuff to [L.F.] in the closet" (S.E. 6 at 8:00-10:00). A.F. clarified the defendant made him put his private part "in [L.F.'s] privates" (S.E. 6 at 13:00-15:00). A.F. also explained that this occurred at a house where they were "just visiting" the defendant (S.E. 6 at 17:00-19:00).

In January 2020, Offcr. Williams interviewed the defendant regarding the allegations (Tr. 506; S.E. 3). Towards the beginning of the interview, the defendant claimed that Ms. Yarbrough was coaching the children to make the allegations for monetary gain (Tr. 598; S.E. 3 at 5:00-7:00). He stated that in August 2018 he had informed Ms. Yarbrough he did not have the money to increase his child support payment for R.B., that she became angry, and that was the same day that L.F. allegedly made the disclosure of abuse to Ms. Yarbrough (S.E. 3 at 6:00-7:00). Further, the defendant claimed he had observed Ms. Yarbrough coaching L.F. even when she and he were still

dating (S.E. 3 at 3:00-5:00). Offcr. Williams and the other officer in the interview confronted the defendant with the fact that it did not make sense Ms. Yarbrough was doing this for monetary gain because if he went to prison she would not get any money (S.E. 3 at 7:00-9:00, 17:00). Discussing the allegations more specifically, the defendant admitted that L.F. had been in his closet the day she alleged the abuse occurred, but claimed she was in there by herself because there was a toy chest in there (S.E. 3 at 9:00-11:00). He denied there would be a reason for him and L.F. to be in the closet but could not explain why A.F. had disclosed that indeed happened (S.E. 3 at 12:00-14:00). Offcr. Williams pointed out that the defendant's claim that Ms. Yarbrough was doing this for money was "nonsensical," because the defendant claimed he was Ms. Yarbrough's main source of income and childcare, and that would disappear with him in prison (Tr. 509-10; S.E. 16:00-18:00). The defendant admitted he knew "how it looked," but again claimed she was doing this for money (Tr. 509). As the officers repeatedly pressed him on how A.F. and L.F. would know about the "naked game" and touching private parts, the defendant claimed that A.F. had learned this at his biological father's home (S.E. 3 at 21:00-23:00). Confronted with how A.F. and L.F. separately described abuse in the closet, the defendant admitted there was a time where A.F. and L.F. were in the closet together, but claimed they were simply watching a movie (S.E. 3 at 23:00-25:00). Offcr. Williams believed that the defendant was trying to "control the narrative around the case," as that was common for defendants in interviews (Tr. 553).

At trial the defendant called three witnesses to testify to his good character, and he also testified in his own defense (Tr. 693, 743, 764, 789). The first witness was Ms. Bertrand (Tr. 693). She admitted that A.F. and L.F. were at her house visiting the defendant "a lot" before L.F.'s disclosure (Tr. 694). She claimed that Ms. Yarbrough's parents hated the defendant (Tr. 702). Ms. Bertrand also testified that the defendant had a reputation as a "good guy" (Tr. 727). The defendant

also called Ms. Kathy O'Neal ("Ms. O'Neal") and Ms. Tabitha Brockup ("Ms. Brockup") to testify at trial. Both women testified that they had seen the defendant around children but did not see him do anything inappropriate (Tr. 744, 749, 768). Ms. Brockup testified that the defendant had babysat her two children when they were younger, and that she never felt uncomfortable with the defendant babysitting her children (Tr. 765-68). The defendant also testified in his own defense at trial, denying the allegations (Tr. 789). He referred to L.F. as his "baby girl," saying he was the only father figure in her life (Tr. 790-91). The defendant also claimed that Ms. Yarbrough had previously disclosed a sexual incident between A.F. and another child at his biological father's home (Tr. 795). The defendant also admitted to his prior convictions for eluding a police officer, and possession of a stolen vehicle on direct examination (Tr. 797-98). But he claimed he did not know the vehicle—a motorcycle—was stolen when he purchased it from a friend in Arkansas (Tr. 798-800). Discussing his relationship with Ms. Yarbrough, the defendant described it as "toxic" (Tr. 808). He claimed he frequently had to leave the State after breaking up with her because she would "track [him] down" if he stayed in the State (Tr. 808-10). He also claimed that they broke up about a month prior to L.F.'s disclosure, and that they only broke up because of arguing about the fact that he did not have a job or any money (Tr. 812). The defendant stated that he was allowed to live with Ms. Yarbrough when he had a job and was making money, but when he did not have a job she would "start picking fights" with him to drive him away (Tr. 813). Further, the defendant admitted that he called the police himself after Ms. Yarbrough called him about L.F.'s disclosure (Tr. 814). He claimed this was because he did not commit the abuse, and he wanted to see "what [he] was supposed to do" (Tr. 814). On cross-examination by the State, the defendant admitted that when he was pulled over on the stolen motorcycle he admitted to police that it was in fact stolen (Tr. 816-17). Further, the defendant also admitted that he had previously been convicted of

domestic assault and battery against Ms. Yarbrough. Additional facts will be discussed as they become relevant.

PROPOSITION I: THE STATE HAD AUTHORITY TO PROSECUTE THE DEFENDANT BECAUSE HIS TRIBE IS NOT FEDERALLY RECOGNIZED.

In his first proposition of error, the defendant claims the trial court abused its discretion in determining the State had authority to prosecute him because his tribe is not federally recognized (Def. Br. at 9-20). This argument fails because it is well-settled that a defendant must be a member of a *federally recognized* tribe for the State to be deprived of its authority to prosecute.

A. Standard of Review. Because the defendant raised this issue in the district court, this proposition is reviewed for an abuse of discretion (O.R. 199-217; IH 1-53). On review of Indian status claims, this Court will "afford a district court's factual findings that are supported by the record great deference and review those findings for an abuse of discretion." *Parker v. State*, 2021 OK CR 17, ¶ 34, 495 P.3d 653, 665 (citing *Young v. State*, 2000 OK CR 17, ¶ 109, 12 P.3d 20, 48). But this Court decides the "correctness of legal conclusions based on those facts" without deference. *Id.* (citing *Gomez v. State*, 2007 OK CR 33, ¶ 5, 168 P.3d 1139, 1141-42).

B. Relevant Facts. On February 8, 2023, the defendant filed a Motion to Dismiss Based on Lack of Jurisdiction (O.R. 199-217). In the motion, the defendant claimed that because he was a member of the Sac River and White River bands of the Chickamauga Cherokee Nation, and his crime occurred on land that was traditionally part of the Cherokee Nation reservation, the State was without the authority to prosecute him (O.R. 199). While acknowledging that his tribe was not federally recognized, the defendant argued that they "fit the criteria of Federally recognized Tribe and should be regarded as such for the purposes of criminal prosecution" (O.R. 205). The

State filed a response arguing that the defendant failed to show he was a member of a *federally recognized* tribe at the time of the offenses (O.R. 222-24).

On March 13, 2023, the district court held a hearing to determine the defendant's Indian status (O.R. 226; IH 1). At the hearing, the defendant called Stephanie Jeffords ("Chief Jeffords"), Chief of the Sac River White River Bands of the Chickamauga Cherokee Nation (IH 4). She testified that the defendant had been eligible for enrollment in the tribe since birth because he possessed 1/16 Indian blood as determined from their membership rolls (IH 5-6). Chief Jeffords was unaware when the defendant became an enrolled member, and acknowledged that the date on his CDIB card read "October 5, 2020" (IH 8).[4] Regarding federal recognition, Chief Jeffords acknowledged that their tribe was not on the Bureau of Indian Affairs ("BIA") list of federally recognized tribes, though they had submitted a petition to be acknowledged by the BIA in 1994 that had yet to be resolved (IH 21). Further, when asked by Mr. Muth what assistance her tribe received from the federal government, she stated that the only thing they received was Indian Health Services (IH 23-25). More specifically, Chief Jeffords explained that the tribe "[did not] ask anything from the federal government" (IH 25). Further, when asked by the State on cross-examination why the BIA did not issue her tribe's CDIB cards, Chief Jeffords testified that was because the federal government has "no jurisdiction over [their] sovereign . . . tribe" (IH 27). The defendant also testified in support of the motion at the hearing (IH 43). First, the defendant testified that he became a member of the tribe in 2016, though his mother was the one who filed the application on his behalf (IH 43-44).

[4] Ultimately, the district court determined that the defendant became an enrolled member in 2016, relying on a copy of the "Application Form" which showed an approval date of February 16, 2016 (O.R. 453).

On June 23, 2023, the district court issued its written ruling denying the motion to dismiss (O.R. 453-56). In the ruling, the Court found that the defendant "ha[d] sufficiently established that he is and was at the time of the offense[s] a member of the [tribe]" (O.R. 453). Nevertheless, the district court concluded that "it is clear . . . that the Sac River and White River Bands of Chickamauga Cherokee Nation is not at this time Federally recognized" (O.R. 453-54). In support of that conclusion, the district court noted, "[i]n a 9th Circuit Court of Appeals case the Court found that by virtue of *LaPier v. McCormick*, 986 F.2d 306 (9th Cir. 1993) that there must be Federal recognition of the Tribe which the [d]efendant claims affiliation with. *United States v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015) (O.R. 455). The court also noted that the *Zepeda* Court "found by the Supreme Court's analysis in *United States v. Antelope*, 430 U.S. 641 (1977), that the definition required at least an affiliation with a Federally recognized tribe" (O.R. 455). Thus, the district court concluded that the defendant had not sufficiently proven the second prong of the *Rogers* test, and accordingly overruled the motion to dismiss.

C. Argument and Authority. The defendant's argument fails because his tribe is not federally recognized, and therefore the State had prosecutorial authority in this case. A defendant has "the burden to prove he is an Indian by producing *prima facie* evidence. . . ." *Parker*, 2021 OK CR 17, ¶ 32, 495 P.3d at 664. But the term "Indian" is not "statutorily defined[.]" *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005). Nevertheless, courts have "judicially explicated" the meaning of this term. *Id.* Accordingly, Indian status has two components, such that defendants must produce "prima facie evidence that: (1) he or she has some Indian blood; **and** (2) he or she was recognized as an Indian by a tribe or the federal government." *Wadkins*, 2022 OK CR 2, ¶ 3, 504 P.3d at 607 (emphasis added); *see State v. Klindt*, 1989 OK CR 75, ¶ 5, 782 P.2d 401, 403 (holding defendants bear the burden of proving their Indian status for dismissal based on a lack of state jurisdiction).

A person satisfies the definition "only if **both** parts are met," and thus a person is not Indian if "he fails either prong." *Parker*, 2021 OK CR 17, ¶ 35, 495 P.3d at 665 (emphasis added) (quoting *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012)). Indian blood alone, therefore, is "insufficient" to deprive the State of jurisdiction because "jurisdiction over Indians in Indian country does not derive from a racial classification but from the special status of a formerly sovereign people." *Wadkins*, 2022 OK CR 2, ¶ 3, 504 P.3d at 607-608 (quoting *St. Cloud v. United States*, 702 F.Supp. 1456, 1461 (D.S.D. 1988)). Here, it is undisputed that the defendant has Indian blood, and that he was an enrolled member of the Sac River White River bands of the Chickamauga Cherokee nation at the time of the crimes (O.R. 453-54). But his claim still fails because this tribe is not federally recognized.

The defendant concedes that his tribe is not federally recognized, instead arguing federal recognition is not a requirement by this Court (Def. Br. at 14-16). Nothing could be further from the truth. Indeed, while the defendant argues that this Court's decisions in *Parker* and *Wadkins* did not require that the defendant be a member of a federally recognized tribe, this ignores that each of the tribes in those cases were federally recognized—specifically the Cherokee Nation and the Choctaw Nation, respectively. *Parker*, 2021 OK CR 17, ¶ 33, 495 P.3d at 664-65; *Wadkins*, 2022 OK CR 2, ¶ 4, 504 P.3d at 608. Further, that a tribe must be *federally recognized* is implicit in each opinion. For example, in *Parker* the Court noted the district court's holding that the appellant failed to show "he was recognized by a **federally recognized** Indian tribe," while also noting the State's argument that a defendant must be enrolled in a "**federally recognized** tribe at the time of the offense." *Parker*, 2021 OK CR 17, ¶¶ 33, 37, 495 P.3d at 664-66 (emphasis added). Further, in a footnote denying the appellant's motion to remand for purposes of supplementing the record with DNA evidence and evidence showing post-offense enrollment, this Court implicitly acknowledged

that the tribe must be federally recognized, stating, "[n]either of these is probative of whether, at the time of the crime, he was recognized as an Indian by a **federally recognized tribe** or the federal government." *Id.*, 2021 OK CR 17, ¶ 42 n.16, 495 P.3d at 667 n.16. Similarly, in *Wadkins* the Court noted repeatedly that the Choctaw Nation was a federally recognized tribe. The Court noted that the parties had stipulated—prior to the evidentiary hearing—that the "Choctaw Nation is a **federally recognized** tribe," which further supports the conclusion that federal recognition is required. *Wadkins*, 2022 OK CR 2, ¶ 4, 504 P.3d at 608 (emphasis added). Moreover, later in the opinion the Court acknowledged that to receive free health services reserved for Indians, "[a] Native American must present a CDIB card, membership card, or a letter of descendancy from a **federally recognized** tribe[.]" *Id.*, 2022 OK CR 2, ¶ 13, 504 P.3d at 610 (emphasis added). Accordingly, any argument that this Court's opinions in *Parker* and *Wadkins* did not require that a tribe be federally recognized simply misconstrues those opinions.

The conclusion that a tribe must be federally recognized for a state to lose its authority to prosecute a member is supported by federal law. Federal courts have recognized that it is "the existence of the special relationship between the federal government and the tribe in question that determines whether to subject the individual Indians affiliated with that tribe to exclusive federal jurisdiction for crimes committed in Indian country." *See LaPier v. McCormick*, 986 F.2d 303, 305 (9th Cir. 1993); *see also Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1097 (D.C. Cir. 2003) (noting that a "federally recognized American Indian tribe is entitled to significant privileges, including exemption from state and local jurisdiction"). Indeed, the Supreme Court has concluded that the foundation for federal criminal jurisdiction is the role of the Federal government in regulating tribes as a "separate people with their own political institutions." *United States v. Antelope*, 430 U.S. 641, 646 (1977); *See Richmond v. Wampanoag Tribal Court Cases*,

431 F.Supp.2d 1159, 1169 (D. Utah 2006) ("Federal recognition of tribal existence . . . is a matter of history, ancestry and continuing community").

Furthermore, the Ninth Circuit has conclusively held that a tribe must be federally recognized to deprive the State of jurisdiction to prosecute one of its members. In *LaPier*, the Ninth Circuit addressed a petitioner's challenge to his conviction in Montana state court for criminal charges occurring within the boundaries of the Blackfeet Indian Reservation. *LaPier*, 986 F.2d at 304. His offenses occurred within the boundaries of the Blackfeet Indian Reservation, and he argued that he was an Indian for purposes of federal law because of his membership in the Little Shell Band of Landless Chippewa Indians of Montana. *Id.* at 305-06. But the Ninth Circuit rejected his claim because that tribe was not federally recognized. *Id.* In so holding, the court noted it must defer to the "political departments" to determine whether the federal government recognizes a political tribe, and that the "BIA list [of federally recognized tribes] appears to be the best source to identify federal acknowledged Indian tribes whose members or affiliates satisfy the threshold criminal jurisdiction inquiry." *Id.* at 305. Accordingly, the court concluded that even if the petitioner was "an Indian in an anthropological or ethnohistorical sense, he is not an Indian for purposes of criminal jurisdiction." *Id.* at 306. Notably, the Ninth Circuit reaffirmed this conclusion in *United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015) (en banc)—which the district court relied on in denying the motion to dismiss (O.R. 453-56). There the court clarified that for a defendant to be subject to federal criminal jurisdiction, that defendant's tribe must be federally recognized. *Id.* at 1113-14. In reaching this conclusion, the court noted that "[f]ederal recognition is a formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government." *Id.* at 1114. Accordingly, the court explicitly concluded that "[a] defendant must

have a current relationship with a **federally recognized** tribe." *Id.* at 1113 (emphasis added). Further, such a conclusion is in accord with the Tenth Circuit's determination of this issue. *See United States v. Laskey*, No. 22-5115, 2024 WL 3898299, at *4 (10th Cir. Aug. 22, 2024) (unpublished) (noting that jury was instructed regarding the recognition prong that "if the person is an enrolled member of a **federally recognized** tribe you must find that the person is an Indian," and concluding there was sufficient evidence of Indian status where two witnesses testified that appellant was a member of the Cherokee Nation, a federally recognized tribe). Thus, courts uniformly require that a defendant be a member of a *federally recognized* tribe to deprive the state of criminal jurisdiction.

Here, the defendant's tribe is not federally recognized, as the district court concluded. Indeed, Chief Jeffords even conceded as such when she acknowledged that the tribe was not included on the BIA list of federally recognized tribes (IH 11, 21). *Richmond*, 431 F.Supp.2d at 1165-66 (noting that in the Tenth Circuit the list of federally recognized tribes "may be decisive of the existence of a federal government-to-government relationship," and denying relief where plaintiff's tribe was not federally recognized). Further, Chief Jeffords also admitted that the tribe does not receive any assistance from the federal government other than Indian Health Services, and that the BIA did not issue the tribe's CDIB cards because the federal government has "no jurisdiction over [their] sovereign . . . tribe" (IH 23-27). Therefore, the defendant is not a member of a federally recognized tribe, and the State had the authority to prosecute him. *Id.*; *Wadkins*, 2022 OK CR 2, ¶¶ 4, 13, 504 P.3d at 608, 610; *Parker*, 2021 OK CR 17, ¶¶ 33, 37, 495 P.3d at 664-66.[5]

[5] Of further note, the defendant's argument fails because it would create a jurisdictional gap wherein he could not be prosecuted by the State or the federal government. Indeed, were this Court to determine that the defendant has shown he was recognized as an Indian at the time of these crimes and dismiss the case, then the federal government would be required to prove his Indian status to a jury *beyond a reasonable doubt*, in order to have prosecutorial authority under 18 U.S.C. § 1153. *See Parker,* 2021 OK CR 17, ¶ 32,

PROPOSITION II: THE TRIAL COURT PROPERLY ADMITTED THE TESTIMONY OF THE PROPENSITY WITNESSES UNDER § 2414.

In his second proposition, the defendant claims the trial court improperly admitted propensity evidence from his three nieces M.L. ("M.L."), M.L.M. ("M.L.M.") and M.M. ("M.M.") (Def. Br. at 21-31).[6] But this argument fails because this evidence was relevant, and the probative value was not substantially outweighed by the danger of unfair prejudice. Regardless, any claimed error was harmless in light of the court's jury instructions and the jury's sentences on each count.

A. ***Standard of Review.*** Where, as here, the defendant objected to the admission of the evidence (Tr. 569-77, 600, 614), this Court reviews the trial court's ruling admitting sexual propensity evidence for abuse of discretion. *Vance v. State*, 2022 OK CR 25, ¶¶ 4-5, 519 P.3d 526, 529. An abuse of discretion is "a clearly erroneous conclusion and judgment, contrary to the logic and effect of the facts presented." *Id.*

B. ***Relevant Facts.*** Offcr. Williams discussed the prior allegations with the defendant in his interview (S.E. 3 at 25:00-31:00, 34:00-36:00). He first asked the defendant if he had ever been accused of something similar by anyone else, and the defendant admitted that he was accused by his brother's (Brad's) three daughters (S.E. 3 at 25:00-28:00). He admitted those incidents also

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495 P.3d at 664. But because his tribe is not federally recognized, the federal government would be unable to meet such a burden. *United States v. Brown*, 705 F.Supp.3d 1289, 1291 (N.D. Okla. 2023) (noting that to prosecute a case under the Major Crimes Act, "the Government must prove, as a jurisdictional requisite, that an Indian committed one of the fourteen enumerated crimes . . . within Indian country," and dismissing the indictment that failed to allege defendant was an Indian); *see also Cf. Laskey*, 2024 WL 3898299, at *4 (noting that jury was instructed on the recognition prong that it had to determine "if [the victim] was recognized as an Indian by a **federally recognized** tribe or by the federal government."). Accordingly, this Court should affirm the trial court's conclusion that the State had authority to prosecute the defendant because his tribe was not federally recognized to avoid the defendant getting away with molesting L.F. and A.F.

[6] Although all three of these women were adults at the time of trial, the State uses their initials as they were minors at the time of the acts committed against them and in light of the nature of those acts.

allegedly occurred at his mother's house, but claimed he was only thirteen years old at the time (S.E. 3 at 26:00-30:00). The officers then confronted him with the fact that the defendant had been accused of abuse by five children, and this was either five children being "extremely well coached by evil parents," or he "did some bad things" (S.E. 3 at 29:00-31:00). The defendant responded, "exactly," but claimed he had never abused children (S.E. 3 at 29:00-31:00). When the officers confronted him with the fact that he was the "common denominator" in all of those allegations, the defendant claimed this was because he was "always spending time with the kids" (S.E. 3 at 34:00-36:00).

On November 24, 2021, the State filed its Notice of Intent to Introduce Evidence of Defendant's Other Child Molestation Offenses (O.R. 123). The State noted that it sought to admit this evidence to prove, inter alia, the defendant's common scheme or plan (O.R. 131). The Court held a hearing on the State's motion on December 1, 2021 (12/1/21 Hrg. 1). At the hearing, M.L., M.L.M., and M.M testified to the defendant's actions towards them (12/1/21 Hrg. 6, 25, 39). After the testimony concluded, the court allowed the parties to make argument on the admissibility of the propensity evidence (12/1/21 Hrg. 50). The State argued that the events with the defendant's nieces were similar to those alleged by L.F. (12/1/21 Hrg. 50). The defense argued that even if the court found the *Horn* factors were met, the evidence should still be excluded because it was substantially more prejudicial than probative (12/1/21 Hrg. 53). The defense also argued that the allegations occurred roughly ten years prior to the charged offenses, when the defendant was a juvenile (12/1/21 Hrg. 53-54). Subsequently, the court issued its ruling finding the evidence admissible (12/1/21 Hrg. 62). Specifically, the court noted it had reviewed the law and concluded, "the evidence presented today . . . to be relevant, that these witnesses are credible witnesses, that propensity has been established, and that the evidence is probative." (12/1/21 Hrg. 62).

At trial, the defense reurged its argument for exclusion of the evidence, arguing that the prior act had not been proven except by the three witnesses testifying at the pre-trial hearing, that the evidence was not probative, and that while the material fact these witnesses were being admitted to prove was "very greatly disputed," there was far less prejudicial evidence on which the state could rely (Tr. 573-75). Further, the defense also argued that any relevance was "substantially outweighed by the prejudicial effect that [the evidence was] going to have on the defendant" (Tr. 575). The court noted that it had read the transcript from the hearing on this issue and concluded that it was going to allow the testimony of the three witnesses (Tr. 584-85). Further, the court acknowledged that it was going to read a limiting instruction regarding this evidence prior to the testimony, and in the closing instructions at the conclusion of trial (Tr. 585-86). After the jury was brought back into the courtroom, the court instructed them on the proper use of propensity evidence (Tr. 588-89). Further, the jury was instructed on the proper use of propensity at the conclusion of trial (O.R. 358). This instruction stated:

> You have heard evidence that the defendant may have committed other offenses of child molestation in addition to the offenses for which he is now on trial. You may consider this evidence for its bearing on any matter to which it is relevant along with all of the other evidence and give this evidence the weight, if any, you deem appropriate in reaching your verdict. **You may not, however, convict the defendant solely because you believe he committed these other offenses or solely because you believe he has a tendency to engage in acts of child molestation**. The prosecution's burden of proof to establish the defendant's guilt beyond a reasonable doubt remains as to each and every element of the offense charged.

(O.R. 358) (emphasis added).

C. Argument and Authority. The defendant's argument fails because this evidence was properly admitted, and the probative value was not substantially outweighed by the danger of

unfair prejudice. Further, any claimed error was harmless in light of the court's limiting instruction and the jury's sentences.

(1) The evidence was properly admitted. To begin, this evidence was properly admitted under 12 O.S.2021, § 2414. That statute provides a sexual propensity evidence carve out from the general rule barring evidence of other crimes. 12 O.S.2021, § 2414. Specifically, the statute states that "in a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible," and "may be considered for its bearing on **any matter** to which it is relevant." 12 O.S.2021, § 2414(A) (emphasis added). In determining the relevance of propensity evidence while balancing its probative value and prejudicial effect, this Court has announced four factors: "1) how clearly the prior act has been proved; 2) how probative the evidence is of the material fact it is admitted to prove; 3) how seriously disputed the material fact is; and 4) whether the government can avail itself of any less prejudicial evidence." *Brewer v. State*, 2019 OK CR 23, ¶ 6, 450 P.3d 969, 971. Additionally, this Court has held that when evidence is offered under §§ 2413 and 2414, "the Evidence Code's examples of how other-crimes evidence may be properly used (e.g. to show . . . common scheme or plan)," found in § 2404(B) "are still helpful to the trial court's assessment of probative value, and, consequently, in balancing probative value against unfairly prejudicial effect under § 2403" *James v. State*, 2009 OK CR 8, ¶ 10, 204 P.3d 793, 797-98. Further, "the probative value of other crimes committed by the accused increases when . . . all offenses, taken together, demonstrate a common scheme or plan." *Id.*, 2009 OK CR 8, ¶ 10, 204 P.3d. at 798.

Here, this evidence was clearly relevant. To begin, the prior acts were clearly proved by the propensity witnesses' testimonies at trial. M.L. testified that when she was roughly seven years old, she was groped by the defendant at a family party (Tr. 592). Specifically, while they were

laying on a bed watching the movie *Ice Age*, the defendant started rubbing her arms, which ultimately progressed to him rubbing her vagina over her clothes (Tr. 593). She also testified that the defendant attempted to do this again at a later date when she was sitting with him in the computer room at Ms. Bertrand's home, specifically rubbing her thighs (Tr. 595). Next, M.L.M. testified that the defendant molested her at Ms. Bertrand's home in Inola, and in a similar way (Tr. 602-03). They were laying on the bed watching a movie—this time *Iron Man*—when the defendant started touching her vagina (Tr. 605). He also tried pulling her pants down, but stopped when she yelled at him to stop (Tr. 606). Nevertheless, he continued touching her vagina (Tr. 606). Finally, M.M. testified that when she was roughly seven, roughly around 2009, she went to spend the night at Ms. Bertrand's home in Inola, and that the defendant was living there at the time (Tr. 615). When it was time for her to go to bed, Ms. Bertrand told her to go lay down and watch a movie (Tr. 615). Shortly thereafter, the defendant came in and laid behind her, before reaching into her underwear and rubbing her vagina (Tr. 615). Both M.L.M. and M.M. ultimately disclosed their respective incidents to each other at a sleepover roughly two years later (Tr. 606-07). They then disclosed to their then stepmother (Tr. 608, 619-20). After they disclosed, M.L. also disclosed the abuse (Tr. 596, 620). Further, at trial both M.L.M. and M.M. testified that they did not know L.F., A.F., or Ms. Yarbrough, and that they did not gain anything from their testimony that day (Tr. 611, 623). Moreover, Mr. Muth did not cross-examine M.L. or M.M., and asked only one question of M.L.M. (Tr. 600, 612, 623). As such, each of the three propensity witnesses testified clearly and unequivocally that the defendant molested them—all in strikingly similar ways—around 2009. Thus, the prior acts of molestation were clearly proven by the State. *Brewer*, 2019 OK CR 23, ¶ 7, 450 P.3d at 971.

Additionally, this evidence was highly probative of the material fact it was being admitted to prove—that the defendant touched L.F. on her mouth, body, and/or buttocks (O.R. 57). Indeed, "the probative value of other crimes committed by the accused increases when there is a visible connection between the crimes, or when all of the offenses, taken together, demonstrate a common scheme or plan." *James*, 2009 OK CR 8, ¶ 10, 204 P.3d at 797-98. Here, these prior incidents were remarkably similar to the incident with L.F., as they occurred when the defendant was left alone in a bedroom with these children at either a family member's house, or in most instances Ms. Bertrand's house (Tr. 275-77, 382-84, 422-23, 593-95, 606, 615; S.E. 19). Further, this evidence was probative and necessary because the defendant flatly denied abusing any children, and these witnesses' testimonies "demonstrated [his] propensity to molest young, prepubescent female [family members] [under similar circumstances]." *Perez v. State*, 2023 OK CR 1, ¶ 5, 525 P.3d 46, 48-49. Thus, the second factor also weighed in favor of admission of the propensity evidence. *Brewer*, 2019 OK CR 23, ¶ 7, 450 P.3d at 971.

Further, the third and fourth factors similarly weighed in favor of admission of this evidence. Whether the defendant committed the crimes against A.F. and L.F. was hotly disputed, as he repeatedly denied any such allegation in his interview, and at trial (Tr. 509, 789-91, 837; S.E. 3 at 12:00-18:00, 21:00-25:00, 37:00-39:00). *Brewer*, 2019 OK CR 23, ¶ 7, 450 P.3d at 971. Moreover, while the defendant argues there was less prejudicial evidence available, this argument is belied by the fact that he challenges each other piece of evidence in subsequent propositions (Def. Br. at 31-37, 44-46).[7] Accordingly, the third and fourth factors also weigh in favor of

[7] Indeed, in Proposition III he argues that none of the childrens' hearsay statements should have been admitted, while in Proposition VI he argues that L.F. and A.F.'s uncorroborated testimonies were insufficient to convict him beyond a reasonable doubt.

admitting this evidence. *Brewer*, 2019 OK CR 23, ¶ 7, 450 P.3d at 971. Additionally, the challenged evidence was not substantially more prejudicial than probative, as admission of this evidence revealed a "method of operation common to all of the victims." *Brewer*, 2019 OK CR 23, ¶ 9, 450 P.3d at 972 ("similarities between this case and [the appellant's] prior sexual abuse of the propensity witnesses reveal a method of operation common with all of the victims") (citing *Driver v. State*, 1981 OK CR 117, ¶ 5, 634 P.2d 760, 762-63). Though showing a common scheme or plan is traditionally an exception for other crimes evidence under § 2404(B), such exceptions are "still helpful to the trial court's assessment of probative value," and therefore helpful "in balancing probative value against unfairly prejudicial effect under § 2403." *James*, 2009 OK CR 8, ¶ 10, 204 P.3d at 797-98. In this case, with each of his victims—whether M.L., M.M. and M.L.M., or L.F. and A.F.—the defendant took advantage of situations where he was left alone with prepubescent family members to molest them. (Tr. 275-77, 382-84, 422-23, 593-95, 606, 615; S.E. 19). Further, the challenged testimony provided "critical insight" into the defendant's "motive and capacity to commit these crimes as well as the similar modus operandi" he used to victimize the young, prepubescent females in his life. *Perez*, 2023 OK CR 1, ¶ 6, 525 P.3d at 49; *James*, 2009 OK CR ¶ 10, 204 P.3d at 797-98. Accordingly, this evidence was also properly admitted because it was not substantially more prejudicial than probative. *Brewer*, 2019 OK CR 23, ¶ 9, 450 P.3d at 972.

(2) Any claimed error was harmless. In any event, assuming the court erred in allowing this evidence, the defendant's claim fails because any error was harmless. Indeed, the jury was instructed that they could not convict the defendant of the charged offenses simply because of the propensity evidence (O.R. 358). *See Davis v. State*, 2018 OK CR 7, ¶ 10, 419 P.3d 271, 277 ("A jury is presumed to follow its instructions." (quoting *Blueford v. Arkansas*, 566 U.S. 599, 606

(2012)). Further, that presumption holds true here despite the defendant's arguments to the contrary. Specifically, any assertion that the State argued the defendant was on trial for what he did to five children (Def. Br. at 29) misstates the record.[8] In arguing that five children had testified the State was merely discussing the evidence, not arguing that the defendant was also on trial for the allegations made by the propensity witnesses (Tr. 868). Even accepting the defendant's unsupported assertion, that the jury followed the instruction to not improperly consider this propensity evidence is supported by the fact they were also instructed that closing arguments are not evidence and are for purposes of persuasion only (Tr. 248-49). As such, any claimed error was harmless in light of the court's limiting instruction (O.R. 358). *Davis*, 2018 OK CR 7, ¶ 10, 419 P.3d at 277; *Hayes v. State*, F-2020-209, slip op. at 6 (Okla. Crim. App. May 27, 2021) (noting that the propensity evidence did not appear to have improperly distracted the jury in light of the court's limiting instruction and the jury's sentences) (unpublished and attached as Exhibit A).[9] Additionally, contrary to the defendant's argument, the defendant's sentences further support that this evidence did not improperly influence the jury's verdict, as he was assessed the minimum twenty-five year sentence on Count I, and only forty-five years out of a possible life sentence on Count II. *Howell v. State*, 1981 OK CR 82, ¶ 8, 632 P.2d 1223, 1225 (holding that even though prosecutor's comments were "unacceptable," the "**relative mildness** of the sentence contradicts

[8] The State does not construe the defendant's brief as raising any claims of prosecutorial misconduct with regard to closing arguments, and any such argument is waived by the defendant's inclusion of multiple issues in the same proposition. *See Knapper v. State*, 2020 OK CR 16, ¶ 88, 473 P.3d 1053, 1080 (holding that the appellant's inclusion of issues of the admissibility of evidence and constitutional vagueness into the same proposition of error violated Rule 3.5(A)(5) and resulted in waiver of the entire proposition).

[9] This unpublished decision, and any other unpublished decision hereinafter cited, is cited because no published decision would serve as well the purpose for which counsel cites it, and these decisions are attached hereto pursuant to Rule 3.5(C)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2024).

any claim that the jury was influenced by the arguments in setting the sentence") (emphasis added). Thus, any claimed error was harmless in light of the court's limiting instruction and the sentences assessed by the jury. Accordingly, this proposition is meritless and should be denied.

PROPOSITION III: A.F. AND L.F.'S HEARSAY STATEMENTS WERE PROPERLY ADMITTED, AND ANY CLAIMED ERROR DID NOT AFFECT THE OUTCOME OF TRIAL.

In his third proposition, the defendant claims the trial court erred in allowing L.F.'s and A.F.'s hearsay statements to be admitted at trial through the testimony of Ms. Yarbrough, Ms. Hunt, their forensic interviews, and Ms. Petty, claiming it was "cumulative and improperly and unfairly bolstered their testimony" (Def. Br. at 31-37). But this argument fails because the challenged evidence was not unfairly cumulative, nor did it improperly bolster L.F. and A.F.'s testimonies. Further, any claimed error did not affect the outcome of trial.

A. ***Standard of Review.*** The defendant properly concedes that though he objected to admission of this evidence before trial, no contemporaneous objections were raised at trial (Tr. 305-467). Accordingly, this proposition is reviewable only for plain error. *Knapper*, 2020 OK CR 16, ¶ 24, 473 P.3d at 1065 (holding appellant's failure to raise "a contemporaneous objection" to the challenged evidence waived all but plain error review). Plain errors "are those errors which are obvious in the record, and which affect the substantial rights of the defendant; that is to say that the error affects the outcome of the proceeding." *Daniels v. State*, 2016 OK CR 2, ¶ 3, 369 P.3d 381, 383. This Court will correct plain error only if the error "seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice." *Stewart v. State*, 2016 OK CR 9, ¶ 12, 372 P.3d 508, 511. Further, where there is no plain or obvious error "in light of **controlling authority**," there is no plain error. *Moore v. State*, 2019 OK CR 12, ¶ 35, 443 P.3d 579, 587 (emphasis added).

B. ***Relevant Facts.*** On August 28, 2020, the State filed its Notice of Intent to Introduce Hearsay Statements of Child Under the Age of Thirteen Years (O.R. 18-19). In this motion, the State specifically announced that it intended to introduce L.F.'s statements to Ms. Yarbrough on August 7, 2018, regarding the defendant putting his "big pee pee" in her mouth, as well as her statements to Ms. Hunt during the forensic interview, including "circumstances surrounding, observations made, location, and statements and drawings" regarding the acts of abuse (O.R. 13-14). Further, the State also announced the intent to introduce A.F.'s statements from his second forensic interview with Ms. Hunt, specifically that the defendant made him touch L.F. with his private parts (O.R. 19). Further, it announced the intent to introduce statements L.F. made to Ms. Petty during counseling, including "circumstances surrounding, observations made, location, and statements and drawings regarding" the defendant putting his penis in L.F.'s mouth and doing "bad stuff" to L.F. in the closet at Ms. Bertrand's house (O.R. 19). The reliability hearing was held on December 13, 2021 (RH 1). Both Ms. Yarbrough and Ms. Hunt testified at the hearing, relaying the statements from A.F. and L.F. challenging the abuse (RH 8-61).

At the conclusion of the hearing, the court heard argument from both the State and the defense regarding admission of the evidence (RH 63). The State argued it had met its burden on showing sufficient indicia of reliability and that the statements should be admitted (RH 63-64). Mr. Muth argued there were "stark differences" between what A.F. and L.F. said in their first forensic interviews and what they said in their second forensic interviews (RH 64). Further, he also argued that § 2803.1 was unconstitutional (RH 65). The court took the matter under advisement at the end of the hearing (RH 69), but issued a minute order on January 6, 2022, stating that the "circumstances surrounding the taking of the statements . . . provi[d]e sufficient indication of reliability as to render the statements inherently trustworthy" (O.R. 170).

C. Argument and Authority. Notably, the defendant does not claim these statements should not have been admitted under 12 O.S.Supp.2013, § 2803.1, only that the statements were prejudicially cumulative and bolstered A.F.'s and L.F.'s testimonies (Def. Br. at 31-37). But this argument fails because the challenged statements were not prejudicially cumulative, nor did they bolster A.F.'s or L.F.'s testimonies. Moreover, any claimed error did not affect the outcome of the proceeding. This Court's decision in *Tomblinson v. State*, No. F-2020-160 (Okla. Crim. App. Jul. 29, 2021) (unpublished and attached as Exhibit B) is applicable here. There the appellant argued that the trial court erred in allowing "cumulative hearsay evidence" in the form of the child victim's statements through the testimony of his grandparents, and the forensic interviewer. *Id.*, slip op. at 10. More specifically, the appellant claimed, "in all instances, the allegations of abuse were repeated in a similar fashion with similar substance, none of which revealed more information for the prosecution than any others." *Id.* This Court rejected that argument. *Id.*, slip op. at 12-13. In so holding, the Court explained that "testimony regarding [the child victim's] statements from various witnesses was necessary" because "[e]ach of the witnesses . . . **told a different part of the story**." *Id.* (emphasis added) (citing *Folks v. State*, 2008 OK CR 29, ¶¶ 10-12, 207 P.3d 379, 382); *see Jones v. State*, 1989 OK CR 66, ¶ 12, 781 P.2d 326, 329 (testimony from the child victim and several other witnesses regarding the circumstances surrounding the sexual abuse was found not prejudicially cumulative as the testimony of each witness was "relevant and necessary to explain the circumstances surrounding the sexual abuse"). Further, the court reasoned, "the grandparents' testimony addressed how the allegations first became known and provided details supporting [the child victim's] claims of abuse," while the SANE nurse testified to "the circumstances and findings of her physical examination[.]" *Id.*, slip op. at 13. Accordingly, this Court concluded that "[w]hile there was admittedly some repetition in the testimony of the various witnesses, their testimony and

the forensic interview was not 'needlessly' repetitious and not so cumulative as to be unfairly prejudicial." *Id.*

Similarly here, Ms. Yarbrough, Ms. Hunt, and Ms. Petty's testimonies, in addition to L.F. and A.F.'s second forensic interviews were not prejudicially cumulative because they each told a different part of the story. *Id.*, slip op. at 12-13. Indeed, Ms. Yarbrough's discussion of L.F.'s statements explained the initial disclosure, and what L.F. disclosed, as well as her reaction to the disclosure (Tr. 418-24). First she explained that L.F. disclosed that the defendant had touched her mouth and her bottom, and also that he put his "big pee pee" in her mouth (Tr. 422-23). Additionally, she disclosed that she became angry when talking to the defendant over the phone—with L.F. in the room—and that she started yelling and cussing at him (Tr. 424). Ms. Hunt then testified to the fact that both A.F. and L.F. were interviewed shortly thereafter in 2018, but neither specifically disclosed abuse by the defendant (Tr. 328-43). Moreover, Ms. Hunt discussed the disclosure process, and that Ms. Yarbrough's angry reaction after the initial disclosure likely influenced L.F.'s unwillingness to discuss any abuse by the defendant in her first interview (Tr. 321) ("if somebody close to them gets upset, they take that as they've done something wrong, and that can cause them to shut down and not be able to talk about it"). Additionally, she explained the process surrounding the forensic interviews, and the process of L.F. and A.F.'s disclosures in the second interviews (Tr. 331-40). The recordings of the second forensic interview for A.F. and L.F. revealed what they discussed in those respective interviews—L.F. disclosing that the defendant touched her bottom and her mouth in the closet, and A.F. disclosing that he was made to do "naked stuff" with L.F. in the closet—which was the next step in the story of the abuse (S.E. 6 at 10:00-14:00; S.E. 7 at 13:00-15:00). And Ms. Petty testified to how L.F. gained the courage to fully disclose the abuse, after roughly a year of Trauma Focused Cognitive Behavioral Therapy (Tr.

380-90). Ms. Petty testified that L.F. disclosed that the defendant did "bad stuff" to her in the closet at Ms. Bertrand's home, and that he was a "bad man" (Tr. 382-83). Furthermore, her testimony explained why a second forensic interview was requested for each of the children, as she reported the abuse to DHS (Tr. 381-86). Accordingly, the challenged statements and testimony were not prejudicially cumulative because each witness provided a different piece of the story to explain the circumstances surrounding the abuse and the disclosures. *Jones*, 1989 OK CR 66, ¶ 12, 781 P.2d at 329; *Tomblinson*, No. F-2020-160, slip op. at 12-13.

Nor did this challenged testimony improperly bolster L.F. and A.F.'s trial testimony. The defendant's argument ignores that this Court has most commonly recognized bolstering as "indicating a personal belief in the witness's credibility." *Hammon v. State*, 2000 OK CR 7, ¶ 63, 999 P.2d 1082, 1097. The defendant does not point to any portion of the record where one of these witnesses expressed a personal belief that A.F. or L.F. was telling the truth. Further, whether a statement bolstered the State's case is "for the jury's determination as part of its determination of the weight and credibility of the testimony." *Folks*, 2008 OK CR 29, ¶ 15, 207 P.3d at 383. In *Folks* the Court was addressing the admissibility of a child-victim's statements pursuant to 12 O.S.Supp.2013, § 2803.1. The appellant was convicted of Sexually Abusing a Minor and sentenced to eight years' imprisonment. *Folks*, 2008 OK CR 29, ¶ 1, 207 P.3d at 380. On appeal, he argued that admission of the child victim's recorded interview pursuant to the statute was prejudicial error. *Id.*, 2008 OK CR 29, ¶ 2, 207 P.3d at 380. This Court rejected that claim. *Id.*, 2008 OK CR 29, ¶¶ 13-15, 207 P.3d at 383. In so holding, the Court explained "[w]e recognize that while this interpretation of § 2803.1 may allow the State to present its principal witness twice, it does not invariably operate to allow the State to bolster its version of the facts." *Id.* Further, the Court concluded that the child victim in that case testified and was subject to cross-examination and was

"arguably impeached." *Id.* Moreover, the court reasoned that "[w]hether the recorded statement bolstered the State's case was for the jury's determination as part of its determination of the weight and credibility of the testimony." *Id.*

Similarly here, both A.F. and L.F. testified and were arguably impeached (Tr. 281-82, 299, 302). On cross-examination of L.F., Mr. Muth elicited that Ms. Yarbrough "brought up" the issue of the abuse by asking if she had been touched and by whom, while on cross-examination of A.F. he questioned whether A.F. had been told what to say, which A.F. flatly denied (Tr. 302). And on cross-examination of Ms. Hunt, Mr. Muth elicited that Ms. Yarbrough's method of naming all of L.F.'s male relatives asking if they had touched L.F. was an "awful idea" (Tr. 362-63). Further, Mr. Muth also elicited on cross-examination of Ms. Hunt that it was possible for a child to believe abuse happened but to have had that memory "implanted" by the suggestion of a parent (Tr. 362-63). Moreover, this was in addition to Mr. Muth's argument in his opening statement that the jury was going to see evidence that Ms. Yarbrough had "an axe to grind" and two "very impressionable children" (Tr. 262-63). Thus, Mr. Muth clearly argued to the jury in opening, and then through his cross-examination, that L.F. and A.F. had fabricated their allegations, and the challenged statements were admissible. *Folks*, 2008 OK CR 29, ¶¶ 13-15, 207 P.3d at 383. Accordingly, he has failed to meet his burden of showing plain or obvious error.

(2) Any error did not affect the outcome of trial. Additionally, the defendant's claim also fails because he has not met his burden of showing any claimed error was outcome determinative. *Daniels*, 2016 OK CR 2, ¶ 3, 369 P.3d at 383. To begin, his reliance on cases from other states and federal circuits is insufficient to meet his burden. *Moore*, 2019 OK CR 12, ¶ 35, 443 P.3d at 587 (noting that whether a district court's decision amounts to plain error must be determined "in light of **controlling authority**") (emphasis added). Additionally, his argument that

this evidence was not harmless ignores the strong evidence of his consciousness of guilt, particularly coming from his interview with police.

Indeed, as Offcr. Williams testified, the defendant's statements in the interview were a blatant attempt to control the narrative surrounding the allegations (Tr. 554). He repeatedly claimed that Ms. Yarbrough was coaching A.F. and L.F. to make these allegations because she was seeking monetary gain, and he had no real response when the officers pointed out how nonsensical that assertion was—particularly where his going to prison would eliminate Ms. Yarbrough's main source of child support and childcare (S.E. 3 at 7:00-9:00, 17:00). Further, the defendant admitted that Ms. Yarbrough must believe something happened because she was supporting L.F. and A.F. despite the fact that the defendant was her main source of child support and childcare (S.E. 3 at 19:00-21:00). Perhaps even more damning was the fact the defendant admitted that he called the police before Ms. Yarbrough, to tell them that any allegation was untrue, which Offcr. Williams said was the first time someone had done that in his entire career in law enforcement (S.E. 3 at 6:00-8:00). Moreover, when confronted with the fact that this was either five children being "extremely well coached by evil parents," or "[he] did some bad things" the defendant admitted that he knew "how it looked," and why the officers were asking him those questions (S.E. 3 at 29:00-37:00). Further, the defendant admitted that he was the "common denominator" in all of the allegations because he was "always spending time with the kids" (S.E. 3 at 34:00-37:00). Additionally, this was all in addition to the defendant's admissions that L.F. had been in his closet the day she claimed the abuse occurred, and that there was an occasion where A.F. was in there with her (S.E. 3 at 10:00-11:00, 23:00-25:00). Accordingly, the defendant's own statements provided evidence of his consciousness of guilt, thereby providing circumstantial evidence of his guilt. *See United States v. Isaac-Sigala*, 448 F.3d 1206, 1212 (10th Cir. 2006)

("'[F]alse exculpatory statements made by a defendant are admissible to prove consciousness of guilt and unlawful intent.'") (quoting *United States v. Trager*, 481 F.2d 97, 100 (10th Cir. 1973)); *see also Black v. State*, 2001 OK CR 5, ¶ 61, 21 P.3d 1047, 1070 (explaining that the jury could infer a consciousness of guilt on behalf of the defendant because he disposed of the murder weapon and fled the morning after the fight). Thus, any claimed error did not affect the outcome of the defendant's trial. Accordingly, the defendant's claim fails and should be denied.

PROPOSITION IV: THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S REQUEST FOR REMOTE TESTIMONY FROM ALISHA MUGELE.

In his fourth proposition, the defendant challenges the Court's denial of his request for the defendant's sister-in-law, Alisha Mugele ("Alisha Mugele"), to testify remotely via videoconferencing (Def. Br. at 37-41). But because the court reasonably denied the motion after consideration of the relevant factors and the arguments of counsel, and because the defendant was not deprived of his right to present a defense, this argument fails.

A. ***Standard of Review.*** Because the defendant repeatedly requested that Alisha Mugele be allowed to testify via videoconferencing technology (PT I 4-5; PT II 18-20; PT III 5-65; Tr. 633, 783-87) this argument is preserved and reviewable for an abuse of discretion. *Harris v. State*, 2019 OK CR 22, ¶ 33, 450 P.3d 933, 948 (reviewing for an abuse of discretion trial court's decision denying mistrial or continuance to allow defense expert time to testify at trial). An abuse of discretion is "any unreasonable or arbitrary ruling made without proper consideration of the facts and law pertaining to the issue." *Alexander v. State*, 2019 OK CR 19, ¶ 6, 449 P.3d 860, 864 (citing *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170).

B. ***Relevant Facts.*** On August 24, 2023, the defense filed a Notice of Intent to Request to Allow Witness to Testify by Video Conferencing (O.R. 285). In this motion, the defense informed

the district court that Alisha Mugele was a material witness to the defendant's case, and that she could rebut the propensity testimony of the defendant's nieces M.L., M.L.M., and M.M. (O.R. 285). The motion did not explain how Alisha Mugele's testimony was material, or how it would rebut the propensity testimony (O.R. 285-88). The reason the defense provided as to why videoconferencing technology was necessary was "Alisha Mugele lives in Illinois and is a mother to three children and is unable to travel with them in order to testify on [the defendant's] behalf" (O.R. 285). Further, the motion claimed that because the defendant was indigent he could not afford to provide money or airline tickets to procure her testimony (O.R. 285). Moreover, the motion argued that because the court ruled on December 2, 2021, that the State would be allowed to call the defendant's nieces to testify as propensity witnesses, "[Alisha] Mugele's testimony changed from helpful to vital for [the defendant's] defense" (O.R. 286). After discussing District Court Rule 34(C), the motion concluded with the statement that the defense would "elaborate on the factors enumerated above at the hearing on this request" (O.R. 287).

The State filed an objection to the defense's notice on September 19, 2023 (O.R. 304-06). In the objection, the State asserted this procedure would not allow for "full and effective cross-examination," in addition to the risk of technical difficulties (O.R. 304-05). Further, the State argued that videoconferencing would limit the jury's ability to adequately judge Alisha Mugele's credibility (O.R. 305). At the second pre-trial hearing on August 28, 2023, the defense briefly noted its motion to allow Alisha Mugele to testify remotely, and the court set the matter for hearing on September 20 (PT II 18-20). At that hearing on September 20, the Court took up the defense's motion, first allowing Mr. Muth to be heard in support of the motion (PT III 5). Mr. Muth argued as follows:

> [W]ith regard to [Alisha] Mugele's situation, she lives in Illinois. She's the mother of three children. She works as part of her own career, plus it's my understanding she's also a bookkeeper for her husband's business. It's a situation where [the defendant] has already been found to be indigent. He doesn't have the resources to be able to pay for her travel expenses, to put her in a hotel for an indeterminate amount of time[.]
>
> . . .
>
> [W]e have very little control over when it is that we are actually going to be able to call our witnesses.
>
> . . .
>
> I have no idea, quite frankly, when our case in chief is even going to begin. So to be able to try to coordinate that as best I can, I maintain contact with Ms. Mugele by phone.
>
> . . .
>
> And though she is not a specific witness that can talk to the allegations with which [the defendant] is actually on trial, the previous Court's ruling . . . has made it to where not only does [the defendant] have to defend himself against these two allegations, he also has to defend himself against three allegations that were made more than ten years ago when [the defendant] was a minor. And she can speak specifically to all of those allegations, because those all allegedly had occurred at her home. And, you know, she's a very strong witness and was an outspoken witness at the time and probably one of the large reasons why, you know, charges were never filed against [the defendant] in all of those cases.
>
> . . .
>
> [T]he state has been on notice about her for more than a year.

(PT III 5-7).

The State began its argument in response noting that one of the factors for the court to consider was whether "the proponent of the use of the video conferencing technology has been unable[,] after diligent effort[,] to procure the physical presence of the witness," and the defense provided no argument as to diligence (PT III 8). Further, the State pointed out that the defense had been aware of the propensity witnesses since 2020, before asserting "there has been nothing intimated to the court about what efforts have been actually made to secure this witness" (PT III 9). Regarding the defendant's inability to pay for Alisha Mugele's travel to Oklahoma, the State pointed out that OIDS was able to cover such an expense, stating, in pertinent part:

> I find it hard to believe that OIDS who even right now as we sit here is paying for expert witnesses to appear in a jury trial just one county over in Mayes County couldn't secure the attendance of one witness, a lay witness, for a specific prescribed amount of days in this particular trial. (PT III 9).
>
> . . .
>
> As far as having the witness here for the entire week, I think it's just common sense that that wouldn't . . . be necessary. Our contention is that they had notice. They had . . . three years to arrange this or accumulate the money in order to facilitate the transportation of this witness, for her to clear her schedule, for her to find childcare for her . . . children, and they have offered evidence of doing none of those things.

(PT 9-10). Additionally, the State argued that allowing Ms. Mugele to testify remotely would be prejudicial because "[e]valuating the credibility of a witness is something that is intrinsic to a jury trial" (PT III 10). The State then argued, "in a case where the jury has to evaluate the demeanor, the tone, the responses of the witness, their hesitation to respond, whether they are sweating, whether they are angry, whether they fully answer the question, to trust all of those judgments to technology" would be a mistake. (PT III 10-11) (emphasis added). Moreover, the State argued that remote testimony would not impress upon the witness the solemnity of the proceedings, stating, "the solemnity of the proceedings is someone coming into a courthouse where justice prevails," and that in the courtroom they had "all these banners in the courtroom, equality under the law. We have all of these things that impress upon the witness their duty to tell the truth, and **that is just not going to be the same if she's sitting at home** with or without her children in a room" (PT III 11) (emphasis added). The State also explained that Alisha Mugele absolutely had a motive to lie (PT III 11).

In response, Mr. Muth acknowledged, "[w]ith regard to seeking funding . . . through OIDS to be able to house and lodge [Alisha Mugele]," he "quite frankly . . . didn't even know that was available" (PT III 12-13). The court then inquired of Mr. Muth and Mr. Cabell whether any other

judge in the district had allowed remote testimony by a witness (PT III 15). Neither of them knew of a case where that had been allowed at trial (PT III 15-16). The court subsequently issued its ruling denying the defense's request to have Alisha Mugele testify remotely (PT III 56). In reaching that decision, the court noted that the rule provided the judge "with broad discretion" regarding the use of video conferencing (PT. III 56). The court then discussed the various factors, and explained its ruling as follows:

> Obviously [Mr. Muth] is appointed on this case based upon indigency, but **I have not heard anything specific other than her life situation as to her cost, the cost that would be involved**. I understand the issues as to timing with the State's case and defendant's case, but I have no other evidence other than that on this issue. "The importance of the witness being personally present in the courtroom where the dignity, solemnity, and decorum of the surroundings will impress upon the witness the duty to testify truthfully." I understand the various arguments of both counsels as to a witness actually appearing here and whether or not certain items of the courtroom would be significant. **I think it's very significant, especially in a jury trial, that not only the counsels are able to see the witness but the jury are as well and also that the witness is able to understand that they are a participant in this courtroom** and the court process and are subject to the court's rulings. Number seven is very important, and that is "whether the court is satisfied it can sufficiently know and control the proceedings at the remote location as to . . . effectively extend the courtroom to such location.
>
> . . .
>
> It is the utmost importance of the court to be able to control the proceedings during the same, **and I am not satisfied nor assured that I could do that** with a remote location as proposed at this time.

(PT III 56-60) (emphasis added). The court did however inform Mr. Muth it would be willing to consider the matter further if he was able to procure a courtroom setting in Illinois from which Alisha Mugele could testify (PT III 60). Two days later, the parties and the court met for the final pre-trial hearing on September 22, 2023 (PT IV 1). At this hearing, Mr. Muth informed the court he had been provided an investigator by OIDS to attempt to locate a suitable place in Illinois, but that the defense was requesting a continuance in order to do so (PT IV 38-41). Mr. Muth argued

that "in order to be able to provide [the defendant] with a full and fair defense, [Alisha] Mugele [was] integral" (PT IV 41). The Court overruled the request for a continuance (PT IV 42). The defense case-in-chief began the fourth day of trial, on September 28, 2023 (Tr. 693). During a recess, the court allowed Mr. Muth to make an additional record on Alisha Mugele's testimony (Tr. 783). In this record, Mr. Muth informed the court the defense had been unable to "secure an appropriate location," because he had not actually received an investigator from OIDS (Tr. 784). The court walked through the factors listed in Rule 34(C) again, and denied the request to still have Alisha Mugele testify remotely (Tr. 784-87).

C. ***Argument and Authority.*** The defendant's argument fails because the district court had broad discretion to deny this request, and reasonably concluded that the factors weighed against granting such a request. Further, the defendant was not deprived of his right to present a defense where he was able to present similar evidence through Ms. Bertrand's testimony. Similarly, any error was harmless.

(1) The trial court reasonably denied this request. To begin, the defendant's argument fails because it ignores the district court had broad discretion to grant or deny this request (Def. Br. at 37-41). Oklahoma law provides for videoconferencing in all civil and criminal proceedings in accordance with the Rules for District Courts of Oklahoma. 20 O.S.2021, § 130 ("[t]he use of videoconferencing technology . . . in the district courts is hereby authorized in all stages of civil and criminal proceedings and shall be governed by the Rules for District Courts of Oklahoma"). District Court Rule 34 specifically governs the use of videoconferencing. Rule 34, *Rules for District Courts of Oklahoma*, Title 12, Ch. 2, App. (2023). Relevant for purposes here, that rule requires that any system used shall conform to various requirements, including the requirement that "[v]ideo and sound quality shall be adequate to allow participants to observe the demeanor

and nonverbal communications[.]" Rule 34(A)(6)(c), *Rules for District Courts of Oklahoma*, Title 12, Ch. 2, App. (2023). Further, subsection (C) of the rule provides district courts with "**broad** discretion regarding the use of video conferencing." Rule 34(C), *Rules for District Courts of Oklahoma*, Title 12, Ch. 2, App. (2023) (emphasis added). Moreover, that subsection provides various factors that the court may consider in deciding whether to permit use of this technology, specifically:

> (1) Whether any undue surprise or prejudice would result; (2) Whether the proponent of the use of videoconferencing technology has been unable, after **diligent** effort, to procure the physical presence of a witness; (3) The convenience of the parties and the proposed witness, and the cost of producing the witness in person in relation to the importance of the offered testimony; (4) Whether the procedure would allow for **full and effective cross-examination**, especially where such cross-examination would involve documents or other exhibits; (5) The importance of the witness being personally present in the courtroom where the **dignity, solemnity, and decorum of the surroundings** will impress upon the witness the **duty to testify truthfully**; (6) Whether a physical liberty or other fundamental interest is at stake in the proceeding; (7) Whether the court is satisfied that it can **sufficiently know and control the proceedings at the remote location** so as to effectively extend the courtroom to such location; (8) Whether the participation of an individual from a remote location presents such person in a diminished or distorted sense such that it negatively reflects upon such individual to persons present in the courtroom; (9) Whether the use of videoconferencing diminishes or **detracts from the dignity, solemnity, and formality** of the proceeding such as to **undermine the integrity**, fairness, and **effectiveness**; (10) Whether the person proposed to appear by videoconferencing presents a significant security risk to transport and present personally in the courtroom; (11) Waivers and stipulations of the parties offered and agreed upon and approved by the court, including waiver of any requirement set forth in this Rule, or stipulation to any different or modified procedure; and (12) **Such other factors** as **the court** may, in each individual case, **determine to be relevant**.

Rule 34(C)(1)-(12), *Rules for District Courts of Oklahoma*, Title 12, Ch. 2, App. (2023) (emphasis added). For the reasons discussed below, the district court reasonably denied the defense's request after considering the above enumerated factors.

Indeed, in denying the defendant's request, the Court noted that the defense had failed to furnish any evidence of the cost to procure Alisha Mugele's testimony, as well as the importance of ensuring that it could sufficiently control the proceedings at the remote location and the importance of the dignity, solemnity, and decorum of the surroundings impressing upon her the duty to testify truthfully (PT III 58-60). Further, the court noted that it believed it was "very significant, especially in a jury trial, that not only the [attorneys] are able to see the witness but the jury are as well and also that the witness is able to understand that they are a participant in this courtroom and the court process and are subject to the court's rulings" (PT III 59). The court also explained that it was "[of] the utmost importance . . . to be able to control the proceedings," and that it was not satisfied it could do that with a remote location. Moreover, this was particularly relevant where the defense failed to explain how the court would be able to ensure Alisha Mugele understood that she was a participant and that she was to testify truthfully (PT III 5-7, 12-15). Indeed, Mr. Muth's argument focused on the State's reasons for objecting not being sufficient, and the alleged importance of Alisha Mugele's testimony to the defendant's case (PT III 5-7, 12-15). Furthermore, the defense's argument that Alisha Mugele was a necessary witness should hold particularly little weight where Mr. Muth never actually explained what her testimony would entail (PT III 5-7, 12-15; Tr. 633, 783-84). Though he stated she would rebut the testimony of the defense witnesses, he never explained how, or why any of the four other defense witnesses were unable to similarly rebut that testimony—which is relevant given the fact that Ms. Bertrand was able to provide testimony rebutting those allegations (PT III 5-7, 12-15; Tr. 633, 710-13, 783-84). Additionally, the defendant's argument ignores that the court explicitly considered all of the factors enumerated in District Court Rule 34(C) before concluding they weighed against granting this request (PT III 58-60). Rule 34(C)(1)-(12), *Rules for District Courts of Oklahoma*, Title 12,

Ch. 2, App. (2023). Thus, the defendant's argument that the Court abused its discretion is not supported by the record, as the court thoroughly considered the law and the arguments of each side before denying this request. *Alexander*, 2019 OK CR 19, ¶ 6, 449 P.3d at 864 (an abuse of discretion is "any unreasonable or arbitrary ruling made without proper consideration of the facts and law pertaining to the issue").

(2) The defendant was not deprived of his right to present a defense. Nor was the defendant prevented from presenting a complete defense by the trial court's denial of the motion, as he claims toward the end of this proposition (Def. Br. at 40-41). This Court has held that to prove denial of the right to present a defense, a defendant must show "(1) that the court prevented him from obtaining or presenting evidence; (2) that the court's action was arbitrary or disproportionate to any legitimate evidentiary or procedural purpose," and "(3) that the excluded evidence would have been relevant and material, and . . . vital to the defense." *Harris*, 2019 OK CR 22, ¶ 24, 450 P.3d at 945. Here, the defendant was not prevented from procuring Alisha Mugele's testimony at trial. *Id.* Indeed, as the State explained at the hearing on this motion, the defense knew of the State's intent to call the propensity witnesses back in 2020, and thus had ample time to work with Alisha Mugele to procure her in person testimony (PT III 8). Further, to counter the defense's claim that the defendant could not afford to pay for Alisha Mugele's testimony because he was indigent, the State pointed out that OIDS was able to provide such funds (PT III 9). Mr. Muth acknowledged that he had been unaware of that, and his only response was he would be unable to "secure that before [trial]" (PT III 13). Thus, the record actually indicates that the only one preventing the defendant from procuring Alisha Mugele's testimony was the defendant himself (PT III 9, 13). *Id.*; *see Ake v. State*, 1989 OK CR 30, ¶ 18 n.1, 778 P.2d 460, 464 n.1.

Further, the record also refutes any argument the defendant was prevented from securing testimony or evidence rebutting the propensity witnesses' testimonies. Indeed, Ms. Bertrand testified that she took both M.L.M. and M.M. to Alisha Mugele's house in Illinois after they made the allegations against the defendant, and based on their reactions to seeing the defendant she did not believe their allegations were truthful (Tr. 710-13). Specifically, she and Mr. Muth had the following exchange on direct examination:

> Q: Did you take any steps to, I guess, make sure that they were aware that if they were around, that [the defendant] was also around so that they could make the choice whether or not to be around?
>
> A: Yes, sir, every time.
>
> Q: And after the allegations [were] made, was there ever a period of time to where you had given them this warning but they wanted to be around [the defendant] anyway?
>
> A: Yeah, they still wanted to come out to . . . Alisha [Mugele's] where I was.

(Tr. 710-11). Mr. Muth asked Ms. Bertrand to describe her observation of M.L.M. and M.M.'s interactions with the defendant when they arrived at Alisha Mugele's house, and Ms. Bertrand stated as follows:

> Well . . . whenever I first got back to the house with the girls, [the defendant] was still asleep, because we had gotten there the night before. [The defendant] was still sleeping. And so when we got there I told [Alisha Mugele's son] [PM], . . . "go wake up [the defendant] and tell him to get in the shower. He's got 45 minutes until he has to be at the golf course," because that's where I was taking him.
>
> . . .
>
> [PM] went running through there and so did [M.M.], and then [M.M.] stopped and looked at me. I said, "you are fine, baby, and she continued to run in there and jump on [the defendant] and wake him up."

(Tr. 711-12). Further, she stated that M.L.M. waited in the doorway of the room before she "took off running . . . and she grabbed [the defendant] and hugged him" (Tr. 712). Ms. Bertrand also

asserted that neither of the girls appeared to be afraid of the defendant (Tr. 713). Moreover, she also claimed that she had never seen the defendant have any "sexual type interaction" with any of the girls (Tr. 713). Accordingly, the defendant was not prevented from obtaining evidence or testimony rebutting the allegations of the propensity witnesses. *Harris*, 2019 OK CR 22, ¶ 24, 450 P.3d at 945.

Additionally, the trial court's decision to deny videoconferencing testimony was not arbitrary, or disproportionate to any legitimate evidentiary or procedural purpose. *Id.*, 2019 OK CR 22, ¶ 25, 450 P.3d at 945. Indeed, it was not disproportionate to any legitimate evidentiary purpose to deny this request when the court noted that it believed it was "very significant, especially in a jury trial, that not only the [attorneys] are able to see the witness but the jury are as well and also that the witness is able to understand that they are a participant in this courtroom and the court process and are subject to the court's rulings" (PT III 59). The court also explained that it was not satisfied it could do that with a remote location. Further, as the State argued, allowing this witness to testify remotely would likely affect the jury's ability to adequately judge her credibility (PT III 9-12). Accordingly, the Court's decision was not arbitrary and was entirely proportionate to ensure the court could control the proceedings and ensure only truthful testimony. Rule 34(C)(1)-(12), *Rules for District Courts of Oklahoma*, Title 12, Ch. 2, App. (2023); *Harris*, 2019 OK CR 22, ¶ 25, 450 P.3d at 945.

Additionally, the defendant cannot show that Alisha Mugele's testimony was vital or material to his defense, as he was still convicted despite the jury hearing similar testimony from Ms. Bertrand. *Harris*, 2019 OK CR 22, ¶ 28, 450 P.3d at 946 (noting that appellant was required to show "he was denied the right to present information material to his defense, and a reasonable likelihood that such information, if presented, would have affected the jury's verdict."); *Ashton v.*

State, 2017 OK CR 15, ¶ 32, 400 P.3d 887, 896 (holding appellant was not deprived of right to present a defense when excluded evidence was merely cumulative to his other evidence at trial) (citing *Gourley v. State*, 1989 OK CR 28, ¶ 4, 777 P.2d 1345, 1348). Here, as discussed *supra*, Ms. Bertrand provided ample testimony rebutting the propensity witnesses' testimonies, stating she did not believe the allegations based on how [M.M.] and M.L.M. behaved towards the defendant at Alisha Mugele's house, after the allegations had been made (Tr. 710-16). Further, this was in addition to testimony from the defendant's other witnesses—specifically Ms. O'Neal and Ms. Brockup—that they did not believe the allegations because they had seen the defendant around their children and/or grandchildren and never witnessed anything inappropriate (Tr. 749, 767). But despite being presented with this evidence, the jury still found the defendant guilty. Accordingly, the defendant cannot show that this evidence was vital or material to his defense because it was entirely cumulative, and despite presenting this evidence he was still convicted. *Ashton*, 2017 OK CR 15, ¶ 32, 400 P.3d at 896 (citing *Gourley*, 1989 OK CR 28, ¶ 4, 777 P.2d at 1348). Accordingly, the defendant was not deprived of his right to present a defense by the court's denial of his request to let Alisha Mugele testify via videoconferencing technology. *Harris*, 2019 OK CR 22, ¶¶ 24-28, 450 P.3d at 945-46; *Ashton*, 2017 OK CR 15, ¶ 32, 400 P.3d at 896 (citing *Gourley*, 1989 OK CR 28, ¶ 4, 777 P.2d at 1348). Regardless, for similar reasons any claimed error did not result in prejudice to the defendant.

(3) Any claimed error did not prejudice the defendant. Even assuming this Court disagrees with the State's previous arguments, the defendant's claim fails because any claimed error was harmless. *See Harris*, 2019 OK CR 22, ¶ 33, 450 P.3d at 948 (holding failure to continue trial did not prejudice appellant where he was able to still use the expert witness's report "to its fullest practical value"); *Smallwood v. State*, 1995 OK CR 60, ¶ 29, 907 P.2d 217, 227 ("This

Court has consistently held that it is not error alone that reverses the lower court's judgments, but error plus injury," and "the burden is upon the appellant to establish the fact that he was prejudiced in his substantial rights by the commission of the alleged error."). Indeed, as the State has discussed, the jury was presented with testimony rebutting the propensity witnesses' testimonies, as well as the allegations by A.F. and L.F. (Tr. 710-16, 749, 767). Despite this evidence, the jury still found the defendant guilty (Tr. 913-14). The defendant cannot now claim he was prejudiced by the exclusion of Alisha Mugele's testimony where he presented the same testimony through his other witnesses and was still convicted. *Harris*, 2019 OK CR 22, ¶ 33, 450 P.3d at 948 (holding failure to continue trial did not prejudice appellant where he was able to still use the expert witness's report "to its fullest practical value"). Thus, even if this court disagrees with the State's previous arguments, this claim still fails for a lack of prejudice. Accordingly, this proposition should be denied.

PROPOSITION V: THIS COURT HAS REPEATEDLY CONCLUDED THAT SEX OFFENDER REGISTRATION IS NOT A SALIENT FEATURE OF THE LAW ON WHICH TRIAL COURTS HAVE A DUTY TO INSTRUCT THE JURY.

In his fifth proposition, the defendant claims the trial court abused its discretion in declining to instruct the jury that he would be required to register as a sex offender if convicted (Def. Br. at 41-44). This argument fails because sex-offender registration is not a salient feature of the law on which the jury must be instructed.

A. ***Standard of Review.*** Because the defendant requested an instruction on sex-offender registration multiple times, this proposition is reviewed for an abuse of discretion (RH 81; Tr. 628, 685, 863). *Mason v. State*, 2018 OK CR 37, ¶ 25, 433 P.3d 1264, 1272 ("The determination of which instructions shall be given to the jury is a matter within the discretion of the trial court."). An abuse of discretion is defined as a "clearly erroneous conclusion and judgment . . . that is clearly

against the logic and effect of the facts presented." *Neloms*, 2012 OK CR 7, ¶ 35, 274 P.3d at 170 (quoting *Stouffer v. State*, 2006 OK CR 46, ¶ 60, 147 P.3d 245, 263)).

B. Argument and Authority. In light of this Court's decisions in *Reed v. State*, 2016 OK CR 10, ¶¶ 14-19, 373 P.3d 118, 122-23 and *Duclos v. State*, 2017 OK CR 8, ¶ 18, 400 P.3d 781, 785-86, and his failure to present any new arguments justifying departure from those well settled precedents, the defendant's argument fails. It is "well settled that trial courts have a duty to instruct the jury on the salient features of the law raised by the evidence with or without a request." *Reed*, 2016 OK 10, ¶ 16, 373 P.3d at 123. In *Reed*, the appellant argued that being subject to the requirements of SORA was a "practical consequence of his sentence upon which jurors should have been instructed . . . as this information was necessary to provide the jurors with a complete (and clearer) picture regarding the reality of [his] sentence if they chose to convict." *Id.* This Court summarily rejected that argument. *Id.*, 2016 OK CR 10, ¶¶ 16-19, 373 P.3d at 122-23. In so holding, this Court concluded that "SORA is a regulatory scheme that is entirely separate and distinct from the applicable punishment range," and "sex offender registration is **not a material consequence of sentencing** and is a **collateral matter** outside the jury's purview." *Id.*, 2016 OK CR 10, ¶¶ 17-18, 373 P.3d at 123 (emphasis added). Thus, the Court held that SORA registration is "not a salient feature of the law in sex crime cases upon which trial courts have a duty to instruct." *Id.*, 2016 OK CR 10, ¶ 19, 373 P.3d at 123.

This Court reaffirmed the *Reed* holding in *Duclos*, 2017 OK CR 8, ¶ 18, 400 P.3d at 785-86. In that case the appellant argued the trial court should have instructed the jury on the SORA registration requirements because the jury had "sent out a note asking whether he would have to register as a sex offender." *Id.*, 2017 OK CR 8, ¶ 18, 400 P.3d at 785. In rejecting that argument, this Court first noted the *Reed* holding that SORA registration is not a "salient feature of the law

. . . upon which trial courts have a duty to instruct." *Id.* As such, this Court concluded there was no abuse of discretion because the trial court's instructions "accurately stated the applicable law[.]" *Id.*, 2017 OK CR 8, ¶ 18, 400 P.3d at 786. Thus, the Court reaffirmed its holding from *Reed*, and rejected the argument that juries should be instructed on SORA registration requirements. *Id.* This Court has reaffirmed the *Reed* holding even more recently in *Henigan* and *Dolin*. In reaching this conclusion in *Henigan v. State*, No. F-2021-767 (Okla. Crim. App. Sep. 22, 2022) (unpublished and attached as Exhibit C), the Court noted that it has "repeatedly rejected" this claim that a jury should be instructed on SORA registration. *Id.*, slip op. at 5-6 (citing *Reed*, 2016 OK CR 10, ¶ 19, 373 P.3d at 123 and *Barnes*, 2017 OK CR 26, ¶ 24, 408 P.3d at 218). Accordingly, the Court reasoned that because the trial court had no duty to instruct on SORA registration, "[t]here was no error and relief [was] not required." *Id.*, slip op. at 6. Similarly, in *Dolin v. State*, No. F-2022-401 (Okla. Crim. App. Apr. 4, 2024) (unpublished and attached as Exhibit D), the Court concluded the appellant failed to show plain error from the trial court's failure to submit a SORA instruction. *Id.*, slip op. at 6-7 ("This Court has declined to require instructions on sex offender registration as a consequence of conviction.") (citing *Reed*, 2016 OK CR 10, ¶ 19, 373 P.3d at 123). Further, the Court explained that "[n]o Supreme Court case requires such an instruction," and thus "[the appellant] . . . cannot show the lack of such an instruction is plain or obvious error." *Id.*, slip op. at 6-7.

Similarly here, the defendant's claim fails. He has provided nothing new to justify departure from the well-settled rule that sex offender registration is not a salient feature of the law on which the jury must be instructed. The only justifications the defendant provides for such instruction here are that the SORA registration is similar to the 85% rule and that this registration is a material consequence of sentencing (Def. Br. at 43-44). But that argument was unequivocally

rejected by this Court in *Reed*. *Reed*, 2016 OK CR 10, ¶¶ 18, 373 P.3d at 123 ("[S]ex offender registration is not analogous to the 85% Rule. The 85% rule is a sentencing consequence that has a calculable effect on the term of imprisonment to be imposed.") (internal quotations omitted). The defendant provides no other justification for this Court to reconsider this well-settled rule, and—accordingly—this argument is meritless.

PROPOSITION VI: NEITHER A.F. NOR L.F.'S TESTIMONIES REQUIRED CORROBORATION AND, REGARDLESS, THEIR TESTIMONIES WERE SUFFICIENTLY CORROBORATED.

In his sixth proposition, the defendant claims there was insufficient evidence to sustain his convictions beyond a reasonable doubt because both L.F. and A.F.'s testimonies were so incredible and so "thoroughly impeached" as to be unworthy of belief (Def. Br. at 44-46). But this argument fails because their testimonies did not require corroboration and, regardless, they were thoroughly corroborated.

A. ***Standard of Review.*** In determining whether a sex-crime victim's testimony was in need of, or sufficiently corroborated, "this Court follows the standard for the determination of the sufficiency of the evidence which the United States Supreme Court set forth in [*Jackson v. Virginia*]."[10] *Gordon v. State*, 2019 OK CR 24, ¶¶ 31-32, 451 P.3d 573, 583; *see also Easlick v. State*, 2004 OK CR 21, ¶ 5, 90 P.3d 556, 559. Under this test "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Gordon*, 2019 OK CR 24, ¶¶ 32, 451 P.3d at 583 (quoting *Jackson*, 443 U.S. at 319). Further, "[a] reviewing court must accept all reasons, inferences, and credibility choices that tend to support the verdict."

[10] *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)

Gordon, 2019 OK CR 24, ¶ 32, 451 P.3d at 583 (citing *Taylor v. State*, 2011 OK CR 8, ¶ 13, 248 P.3d 362, 368).

B. Argument and Authority. The defendant's argument fails first because it is waived by his failure to cite any portion of the record in support (Def. Br. at 44-46). In any event, assuming this court excuses his waiver, this claim fails because neither L.F.'s nor A.F.'s testimony required corroboration and, regardless, their testimonies were sufficiently corroborated.

(1) This proposition is waived. To begin, the defendant's argument is waived by his failure to cite any portion of the record in support of his claim. Indeed, the defendant fails to even state what L.F. and A.F. testified to, or how it was ambiguous or impeached (Def. Br. at 44-46). This Court details its requirements for appellate briefs in Rule 3.5(A), mandating "substantial compliance with the form and organization" explained in the text of that rule. Rule 3.5(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2024). Notably, this Court's Rules require that an argument be "supported by citations to the authorities, statutes and parts of the record," and that failure to present "relevant authority in compliance with these requirements" results in the issue being forfeited on appeal. Rule 3.5(A)(5), (C)(6), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2024). Accordingly, the defendant's failure to provide any citation to the record means he has waived his claim in this proposition. In any event, his claim fails for the reasons discussed below.

(2) A.F. and L.F.'s testimonies did not require corroboration. The testimony of a "non-consenting participant in sex crimes" does not require corroboration. *Gordon*, 2019 OK CR 24, ¶ 34, 451 P.3d at 583 (citing *Martin v. State*, 1987 OK CR 265, ¶ 6, 747 P.2d 316, 318). A conviction may be sustained upon the uncorroborated testimony of the victim "unless such testimony appears incredible or so unsubstantial as to make it unworthy of belief." *Gordon*, 2019

OK CR 24, ¶ 34, 451 P.3d at 583 (citing *Jones v. State*, 1988 OK CR 281, ¶ 10, 765 P.2d 800, 802). "Ultimately, even sharply conflicting testimony does not trigger the need for corroboration." *Gordon*, 2019 OK CR 24, ¶ 34, 451 P.3d at 583 (internal quotations omitted) (quoting *Gilmore v. State*, 1993 OK CR 27, ¶ 12, 855 P.2d 143, 145). This Court's decision in *Gordon* is applicable here. In that case, the appellant was convicted of Forcible Oral Sodomy and sentenced to ten years' imprisonment. *Gordon*, 2019 OK CR 24, ¶ 1, 451 P.3d at 578. On appeal, he claimed that the victim's statements were "inconsistent, incredible, and unbelievable," such that corroboration was required, and that because the statements were not corroborated the evidence was insufficient to support his conviction. *Id.* 2019 OK CR 24, ¶ 2, 451 P.3d at 578. This Court rejected that claim. *Id.*, 2019 OK CR 24, ¶¶ 32-35, 451 P.3d at 583-84. In so holding, the Court explained that "although a child may give a slightly different story before trial, corroboration is not required when her testimony at trial is consistent," and that "alleged inconsistencies must relate to the actual criminal act rather than related events" *Id.* The Court explained further that the victim's testimony was "lucid, clear, and unambiguous," and that while it was "not perfect, his overarching description of the sexual act perpetrated by [the appellant] upon him remained consistent throughout his many statements." *Id.* The Court concluded that the victim's testimony was properly admitted, and that reviewing the evidence in the light most favorable to the prosecution, "any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *Id.*

Similarly here, A.F.'s and L.F.'s testimonies do not need corroboration. Indeed, at trial L.F. testified that she was touched on the mouth by the defendant's "boy part," identifying his penis on a diagram, and that this happened when she was three or four years old (Tr. 275). Further, she explained that this happened at Ms. Bertrand's house (Tr. 276). Moreover, throughout her

testimony she consistently reaffirmed that the defendant touched her mouth with his "boy part," or his "part in the middle" (Tr. 275-77). As such, her testimony was consistent and unambiguous. *Id.*, 2019 OK CR 24, ¶¶ 32-35, 451 P.3d at 583-8. The same is true of A.F.'s testimony. The State pointed to the genitals on the boy diagram at trial, and A.F. stated that he knew what the part was called but did not want to say the word (Tr. 290). Further, though he would not say the name of this body part—the penis—he testified that something happened between him and L.F. that was "not good," and that it involved that body part that he did not want to name (Tr. 291-92). Further, he clarified that this body part touched his sister's private parts (Tr. 292-94). Moreover, the defendant provides nothing to support his bald assertions that the testimony was ambiguous, unbelievable, inconsistent, or so thoroughly impeached as to be unworthy of belief (Def. Br. at 44-46). *See Gustafson v. State*, F-2021-702, slip op. at 3 (Okla. Crim. App. May 4, 2023) (holding child victim's testimony "was not so incredible nor was it so thoroughly impeached as to be unworthy of belief," and thus did not require corroboration) (unpublished and attached as Exhibit E). Regardless, this claim also fails because A.F.'s and L.F.'s testimonies were corroborated.

(3) A.F.'s and L.F.'s Testimonies were corroborated. In any event, the defendant's claim fails because A.F.'s and L.F.'s testimonies were corroborated. Indeed, in making this argument the defendant ignores entirely Ms. Yarbrough's and Ms. Petty's testimonies, as well as A.F.'s second forensic interview. Ms. Petty testified that during the course of her therapy in 2019, L.F. made disclosures of sexual abuse (Tr. 380). At first she stated that the defendant "did bad stuff to [her] in the closet" at his home, and that he was "a bad man" (Tr. 382-83). Subsequently, she disclosed to Ms. Petty that the defendant put his penis in her bottom and in her mouth (Tr. 384, S.E. 19). This corroborated her testimony at trial that the defendant touched her mouth with his penis, and that he did so at Ms. Bertrand's house (Tr. 275-77). Further, L.F.'s testimony was also corroborated

by Ms. Yarborough's testimony. Ms. Yarbrough testified at trial that she asked L.F. where the defendant had touched her, and L.F. pointed to her bottom and her mouth, before saying that the defendant "put his big pee pee in her mouth" (Tr. 422-23). Thus, contrary to the defendant's argument, L.F.'s testimony was amply corroborated (Tr. 275-77, 382-84, 422-23; S.E. 19).

A.F.'s testimony was also sufficiently corroborated, specifically by his statements in his second forensic interview (S.E. 6). There, A.F. disclosed that the defendant would spank him if he refused to do "naked stuff to [L.F.] in the closet" (S.E. 6 at 8:00-10:00). When asked by Ms. Hunt what "naked stuff" meant, A.F. explained that it involved "two private parts" (S.E. 6 at 10:00-12:00). After multiple questions from Ms. Hunt regarding what private parts were involved, A.F. clarified by pointing to his genitals and stating the defendant made him put that "in [L.F.'s] privates" (S.E. 6 at 13:00-15:00). A.F. also explained that this occurred at a house where they were "just visiting" the defendant (S.E. 6 at 17:00-19:00). This corroborated his testimony at trial that his part that he did not want to name touched L.F.'s privates (Tr. 291-94). Thus, even assuming A.F.'s and L.F.'s testimonies required corroboration, the record clearly indicates that they were corroborated (Tr. 275-77, 292-94, 382-84, 422-23; S.E. 6, 19). *Gordon*, 2019 OK CR 24, ¶¶ 32-35, 451 P.3d at 583-8. Accordingly, there was sufficient evidence to convict the defendant. *Id.*

PROPOSITION VII: THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

In his final proposition, the defendant claims Mr. Muth provided ineffective assistance by failing to object to the 12 O.S.2021, § 2803.1 evidence at trial. But this argument fails because any such objection would have been meritless. Further, he cannot show prejudice where the trial court would have denied any such objection.

A. ***Standard of Review.*** To prevail on a claim of ineffective assistance of trial counsel, an appellant must overcome "the strong presumption" that counsel's conduct was within the wide range of reasonable professional assistance by showing, "(1) that trial counsel's performance was deficient; and (2) that he was prejudiced by the deficient performance." *Welch v. State*, 2000 OK CR 8, ¶ 14, 2 P.3d 356, 375 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). This Court considers the challenged conduct "on the facts of the case as viewed at the time and ask[s] if it was professionally unreasonable[.]" *Hooks v. State*, 2001 OK CR 1, ¶ 54, 19 P.3d 294, 317. To show that counsel's performance was deficient, the appellant must show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. To satisfy the prejudice prong of the *Strickland* test, it is not enough to merely show some conceivable effect on the outcome. *Strickland*, 466 U.S. at 694; *see Head v. State*, 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148. Rather, "[t]he [appellant] must show . . . there is a **reasonable probability** that, but for counsel's unprofessional errors, the result of the proceeding **would have been different**." *Strickland*, 466 U.S. at 694 (emphasis added). As such, the likelihood of a different result must be substantial. *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

C. ***Argument and Authority.*** To begin, the defendant's claim fails because any objection to the § 2803.1 evidence would have been meritless, as that evidence was admissible. Indeed, the challenged statements were not prejudicially cumulative because each different witness relaying them told a different part of the story and circumstances surrounding the abuse. *Jones*, 1989 OK CR 66, ¶ 12, 781 P.2d at 329. Further, the defendant's argument regarding bolstering again ignores that this Court has traditionally viewed bolstering as the State expressing a personal belief that the witness was credible. *Hammon*, 2000 OK CR 7, ¶ 63, 999 P.2d at 1097. Moreover, Mr. Muth's

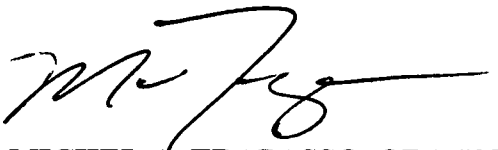
arguments in his opening statement and his questions on cross-examination implied that both A.F. and L.F. had fabricated the allegations, thereby impeaching their testimony and rendering these statements admissible. *Folks*, 2008 OK CR 29, ¶¶ 13-15, 207 P.3d at 383. As such, any claimed objection to this evidence would have been meritless, and counsel is not ineffective for declining to raise meritless objections. *Jackson v. State*, 2016 OK CR 5, ¶ 13, 371 P.3d 1120, 1123. Additionally, the defendant cannot show prejudice because no such objections would have been granted by the district court. *Strickland*, 466 U.S. at 694. Indeed, the district court previously found this evidence admissible after the reliability hearing (O.R. 170; RH 11-13, 38, 45, 63, 65, 69). As such, the defendant cannot show a reasonable probability that any objection would have been granted—and that the evidence would have been excluded—where the trial court specifically found the evidence admissible. *Strickland*, 466 U.S. at 694. Additionally, his argument ignores his own statements that provided substantial evidence of his consciousness of guilt (S.E. 3 at 6:00-11:00, 17:00-21:00, 23:00-25:00, 29:00-37:00). Indeed, the defendant admitted to calling the police before Ms. Yarbrough to tell them that the allegations were "bull," while also acknowledging "how it look[ed]" and why the officers were asking the questions they were asking. Accordingly, Mr. Muth provided effective assistance. *Strickland*, 466 U.S. at 687-94.

CONCLUSION

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

Respectfully submitted,

GENTNER F. DRUMMOND
ATTORNEY GENERAL



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CERTIFICATE OF MAILING

On this 10th day of December, 2024, a true and correct copy of the foregoing was mailed to:

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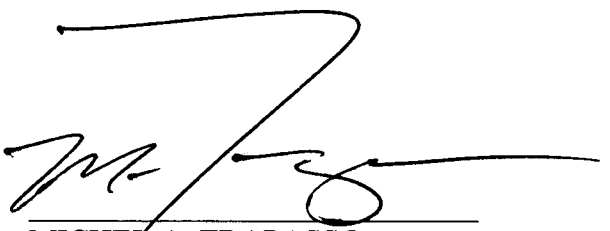


MICHEL A. TRAPASSO

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DUSTIN WAYNE HAYES,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2020-209**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

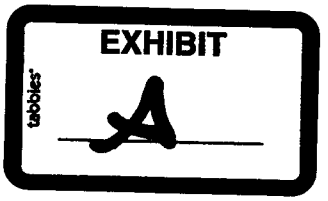
FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAY 27 2021
JOHN D. HADDEN
CLERK

SUMMARY OPINION

ROWLAND, VICE PRESIDING JUDGE:

Appellant Dustin Wayne Hayes appeals his Judgment and Sentence from the District Court of Carter County, Case No. CF-2019-251, for two counts of Lewd or Indecent Acts to a Child Under 16, (Counts 2 and 4) in violation of 21 O.S.Supp.2007, § 1123.[1] The Honorable Thomas K. Baldwin, Associate District Judge, presided over Hayes's jury trial and sentenced him, in accordance with the jury's verdict, to three years imprisonment on each of Counts 2 and 4, with three years post-imprisonment supervision, and ordered the sentences to be served consecutively.

[1] The jury acquitted Hayes of one count of First Degree Rape (Count 1) and one count of Attempted First Degree Rape (Count 3).



Hayes raises one issue for review, namely whether the district court erred in admitting sexual propensity evidence. We find relief is not required and affirm the Judgment and Sentence of the district court.

Hayes claims it was error to admit the sexual propensity testimony of J.H. because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Although Hayes filed a pretrial objection to the State's notice of sexual propensity evidence, he did not object to J.H.'s testimony at trial. His failure to do so forfeits review of this claim for all but plain error. *Brewer v. State,* 2019 OK CR 23, ¶ 4, 450 P.3d 969, 971. He has the burden in plain error review to demonstrate: 1) the existence of an actual error (i.e., deviation from a legal rule); 2) that the error was plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding. *Id.* Even where this showing is made, this Court will correct plain error only where the error seriously affected the fairness, integrity or public reputation of the judicial proceedings or represented a miscarriage of justice. *Id.*; 20 O.S.2011, § 3001.1.

The State filed written notice of its intent to offer sexual propensity evidence, citing 12 O.S.2011, § 2414, two months prior to trial.[2] Hayes later filed a written objection to the State's notice of sexual propensity evidence under Section 2414, noting he had not objected earlier because the parties had agreed to consolidate for trial his two pending cases, involving R.G., S.G., and J.H. The district court ultimately severed for trial Hayes's two pending cases. Prior to jury selection in this case, the district court stated it had previously considered and overruled Hayes's objection to the "State's Burks notice." Our review of the record shows the district court was referring to Hayes's objection to the propensity evidence. The record supports a finding that the district court and prosecutor use "*Burks* notice" as a shorthand for notice required under either 12 O.S.2011, §§ 2404(B) or 2414.

On appeal, Hayes challenges the admission of the propensity evidence, citing the exceptions for admission of other crimes evidence listed in Section 2404(B) and claiming the propensity evidence did

[2] Section 2414 (A) provides "[i]n a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant."

not fall within any of the listed exceptions. Because the evidence was properly admitted under Section 2414, we need not address whether the evidence was also admissible under Section 2404(B).

In *Horn v. State*, the Court set forth the considerations and procedure governing the admission of evidence under 12 O.S.2011, § 2414:

> [T]rial courts should consider, but not be limited to the following factors: 1) how clearly the prior act has been proved; 2) how probative the evidence is of the material fact it is admitted to prove; 3) how seriously disputed the material fact is; and 4) whether the government can avail itself of any less prejudicial evidence. When analyzing the dangers that admission of propensity evidence poses, the trial court should consider: 1) how likely is it such evidence will contribute to an improperly-based jury verdict; and 2) the extent to which such evidence will distract the jury from the central issues of the trial. Any other matter which the trial court finds relevant may be considered....Further, the propensity evidence must be established by clear and convincing evidence. If the defense raises an objection to the admission of the propensity evidence, the trial court should hold a hearing, preferably pre-trial, and make a record of its findings as to the factors set forth above.

Horn, 2009 OK CR 7, ¶ 40, 204 P.3d 777, 786 (citation and footnote omitted).

"Evidence that the defendant has committed sex offenses similar to those for which he is on trial will undoubtedly be

prejudicial to him. The real question, however, is whether it is *unfairly* so." *James v. State*, 2009 OK CR 8, ¶ 10, 204 P.3d 793, 797. Hayes argues the challenged propensity evidence was not sufficiently proved and was far more prejudicial than probative. Admission of the sexual propensity evidence was error, he contends, because it added nothing to the State's case except to unfairly portray him as a man who sexually abused his own daughter. He insists the likelihood his conviction rests upon the improper evidence is "incredibly high" because of the graphic and upsetting nature of the propensity evidence. We disagree.

Our record does not contain the court's specific, pre-trial findings from its review of the admissibility of the challenged propensity evidence.[3] Nevertheless, the record shows that the evidence satisfied the *Horn* factors for admission. J.H.'s detailed testimony provided clear proof of the other crimes evidence. Her testimony was probative of the material fact it was admitted to prove, namely whether Hayes raped and/or molested the victims in this

[3]The district court's references prior to jury selection of its previous ruling concerning admission of the propensity evidence indicates there was some prior consideration of the propensity evidence with the parties a few days before trial.

case—the disputed issue at trial. Her testimony was helpful to the State's case and tended to support a finding that the victims in this case, who did not disclose the abuse for years, were credible. There was a visible connection between the abuse recounted by J.H. and the abuse described by the other victims. And, there was no other less prejudicial evidence that could serve that same purpose. In addition, the record does not reveal any realistic danger that the Section 2414 evidence distracted the jury from the central issues of the trial, especially in light of the district court's limiting instruction explaining the purpose of the Section 2414 evidence and the minimum sentences fixed by the jury. The challenged testimony fell into the category of permissible propensity evidence that augmented the testimony of the victims in this case. For these reasons, we find the district court did not err in admitting the propensity evidence under Section 2414. *Hogan*, 2006 OK CR 19, ¶ 39, 139 P.3d at 923 ("The first step in plain error analysis is to determine whether error occurred.") This claim is denied.

DECISION

The Judgment and Sentence of the district court is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT
OF CARTER COUNTY
THE HONORABLE THOMAS K. BALDWIN,
ASSOCIATE DISTRICT JUDGE

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OPINION BY: ROWLAND, V.P.J.
KUEHN, P.J.: Specially Concur
LUMPKIN, J.: Concur
LEWIS, J.: Concur
HUDSON, J.: Concur

KUEHN, P.J., SPECIALLY CONCURRING:

I write to emphasize to trial courts the importance of following this Court's requirements. Here the trial court correctly heard argument on the State's motion to admit propensity evidence, yet failed to put the hearing or, at least, its findings on the record. The language of *Horn v. State*, 2009 OK CR 7, ¶ 40, 204 P.3d 777, 786 instructs the trial court to "[h]old a hearing, preferably before pre-trial, and make a record of its findings as to the [admissibility] factors." A record of findings helps this Court review any issues on appeal and makes it clear to the parties why the court made the decision.

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL KEITH TOMBLINSON,	)	**NOT FOR PUBLICATION**
Appellant,	)	Case No. F-2020-160
v.	)	
THE STATE OF OKLAHOMA	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, JUDGE:

Appellant Michael Keith Tomblinson was tried by jury and convicted of Sexual Abuse of a Child Under Twelve (21 O.S.Supp.2014, § 843.5(E) in the District Court of Muskogee County, Case No. CF-2019-277. As punishment, the jury recommended a sentence of life in prison and the trial court sentenced accordingly.[1] It is from this judgment and sentence that Appellant appeals.

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

[1] Appellant must serve 85% of his sentence before becoming eligible for consideration for parole. 21 O.S.2011, § 13.1.

I. The court erred in allowing an alternative method of testimony which violated Appellant's confrontation rights.

II. The trial court abused its discretion by permitting cumulative hearsay evidence.

After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that under the law and the evidence no relief is warranted.

In Proposition I, Appellant contends the trial court erred in allowing the 6-year-old victim, D.P., to testify at trial behind a screen without making the requisite findings of necessity. Appellant argues the court's ruling violated his constitutional confrontation rights and state law and requires reversing his conviction for a new trial or in the alternative a favorable modification of his sentence.

Prior to trial, the State filed a Motion for Alternative Method of Testimony pursuant to 12 O.S.2011, § 2611.7 requesting a screen be placed in front of D.P. when he testified. The trial court granted the State's motion over the defense's objection. In granting the motion, the judge commented in part: "this kid just turned six years old. And I actually had to do it for kids older than that. And there's going to be a

jury sitting here. I'm thinking that's not overreaching on the part of the D.A., at all."

D.P. testified on the second day of trial. Before he did so, the court informed the jury:

> And ladies and gentlemen, I need to say a word. We're going to hear next from a witness of what judges often call a witness of tender years. He's six years old. He's going to come testify. And it's kind of standard operating procedure for us to use this screen. And it's for the purpose of this witness. And we do it on a fairly regular basis with witnesses of tender years.

The victim's testimony was brief and not very specific. Defense counsel did not cross-examine D.P.

While the defense objected to the State's motion to use an alternative method of testimony, the arguments made by the defense focused on the admissibility of child hearsay under 12 O.S. § 2803.1. The defense did not object to the use of the screen on the grounds of a confrontation clause violation. Therefore, as Appellant's objection on appeal is different from that raised at trial, our review is for plain error. *Simpson v. State,* 1994 OK CR 40, ¶ 11, 876 P.2d 690, 695. Under the plain error test set forth in *Simpson*, this Court determines whether the appellant has shown an actual error, which is plain or obvious,

and which affects his or her substantial rights. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. 1994 OK CR 40, ¶¶ 10, 26, 30, 876 P.2d 690, 694, 699, 701. *See also Lee v. State*, 2018 OK CR 14, ¶ 4, 422 P.3d 782, 785.

In *Shipman v. State*, 1991 OK CR 93, 816 P.2d 571, this Court addressed a defendant's confrontation rights in trials of child abuse cases:

> The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." The Supreme Court has stated that "it is the literal right to 'confront' the witnesses at the time of trial that forms the core of the values furthered by the Confrontation Clause." *California v. Green*, 399 U.S. 149, 157, 90 S.Ct. 1930, 1934-35, 26 L.Ed.2d 489 (1970). However, the Supreme Court has not held that criminal defendants are guaranteed an absolute right to confront witnesses against them at trial. Under the proper circumstances, the rights conferred by the Confrontation Clause may be outweighed by other important interests. Specifically, the Court has concluded that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). See also *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988). Both *Craig and Coy* involved statutorily authorized procedures where

> criminal defendants were prohibited from directly confronting the witnesses against them in court.

1991 OK CR 93, ¶ 5, 816 P.2d at 573.

This Court further stated:

> In *Craig*, the Supreme Court set forth three requirements that a trial judge must follow in order to make the requisite finding of necessity which precedes the application of special procedures such as those provided for in [22 O.S.Supp.1984] Section 753. This finding must be made on a case by case basis. First, the Court held that in each case "the trial court must hear evidence and determine whether use of the . . . procedure is necessary to protect the welfare of the particular child witness who seeks to testify." *Craig*, 497 U.S. at ___, 110 S.Ct. at 3169. Second, "[t]he trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant." *Id.* Third, "the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, i.e., more than `mere nervousness or excitement or some reluctance to testify.'" *Id.*

1991 OK CR 93, ¶ 9, 816 P.2d at 574.

Since *Shipman*, the Oklahoma Legislature passed 12 O.S.2011, § 2611.7 allowing for alternative methods of testimony. Section 2611.7 states in pertinent part:

> A. In a criminal proceeding, the judge or presiding officer may allow a child witness to testify by an alternative method only in the following situations:
>
> 1. The child may testify otherwise than in an open forum in the presence and full view of the finder of fact if the judge

> or presiding officer finds by clear and convincing evidence that the child would suffer serious emotional trauma that would substantially impair the child's ability to communicate with the finder of fact if required to testify in the open forum; and
>
> 2. The child may testify other than face-to-face with the defendant if the judge or presiding officer finds by clear and convincing evidence that the child would suffer serious emotional trauma that would substantially impair the child's ability to communicate with the finder of fact if required to be confronted face-to-face by the defendant.

Appellant complains on appeal that the trial court failed to comply with the mandates of *Coy v. Iowa*, 487 U.S. 1012, (1988), *Maryland v. Craig*, 497 U.S. 836, (1990), and § 2611.7 as no findings were made that the child victim would suffer serious emotional trauma that would substantially impair the child's ability to communicate with 0the jury.

While the trial court repeatedly acknowledged D.P.'s young age and "tender years", the court did not make the findings required by § 2611.7 of "clear and convincing evidence that the child would suffer serious emotional trauma that would substantially impair the child's ability to communicate with the finder of fact if required to be confronted face-to-face by the defendant" or a similar finding required

by *Coy* and *Craig* regarding the child being traumatized by testifying in front of the defendant. The court's omission in this regard was error.

The next question is whether this error affects Appellant's substantial rights? Appellant acknowledges that D.P.'s testimony was not "particularly damaging" and basically laid the foundation for the admission of the forensic interview. However, he argues that he was harmed because the fact that D.P. testified allowed the State to introduce the hearsay statements D.P. made to his grandparents, his mother, and the forensic interviewer.

Title 12 O.S.Supp.2013, § 2803.1(2)(a), the hearsay exception for "[s]tatements of children not having attained 13 years or incapacitated persons describing acts of physical abuse or sexual contact" provides for the admission of statements by the child victim describing any act of sexual contact. Provided however:

> 2. The child . . .
>
> a. testifies or is available to testify at the proceedings in open court or through an alternative method pursuant to the provisions of the Uniform Child Witness Testimony by Alternative Methods Act or Section 2611.2 of this title, or
>
> b. is unavailable as defined in Section 2804 of this title as a witness. When the child or incapacitated person is unavailable, such statement may be admitted only if there is corroborative evidence of the act.

Contrary to Appellant's interpretation of the law, D.P.'s hearsay statements were admissible because he did testify through an alternative method pursuant to § 2611.2. Even if D.P. did not testify but had been found unavailable, the State would still have been able to admit the hearsay statements, with corroborating evidence. In a plain error analysis, Appellant's argument that because of the trial court's error, we should throw out not only D.P.'s testimony but also that of the grandparents and forensic interviewer has no merit.

Under a plain error analysis, in determining whether the appellant's substantial rights were affected by an error, we look to whether the error affected the outcome of the proceeding. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923 (citing *Simpson*, 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d at 694, 695, 698 and 20 O.S.2001, § 3001.1). In the present case, it is not evident from the record that D.P. testifying behind a screen without a proper finding of necessity affected the outcome of the trial.

Initially, due to Appellant's failure to raise an objection to the screened testimony on confrontation grounds, we do not have any information on the physical aspects of the screen and the configuration

of the courtroom. We do not know whether the screen blocked only the victim's view of Appellant, whether it blocked Appellant's view of the victim, whether it blocked the jury's view of the victim or the victim's view of the jury. It is not clear to what extent Appellant could see or not see the victim during his testimony. (Appellant claims in his brief that the screen kept D.P. out of his sight. However, there is no evidence in the record to support that claim.) Further, we have no information whether the screen played any role in counsel's decision not to cross-examine D.P.

Generally, a defendant bears the burden to provide a sufficient record upon which this Court may decide an issue. *Hill v. State,* 1995 OK CR 28, ¶ 10, 898 P.2d 155, 160. Generally, "[t]his Court will not assume error from a silent record." *Glossip v. State,* 2007 OK CR 12, ¶ 67, 157 P.3d 143, 155. Under the record in this case and these general principles of law, it is hard to find that the mere fact that D.P. testified behind a screen affected the outcome of the trial.

The evidence against Appellant was overwhelming. While D.P.'s trial testimony was brief and not specific in the explanation of the acts committed against him, he provided more detailed statements in the forensic interview. The statements he made to his grandparents,

mother, and forensic interviewer were properly admitted under 12 O.S.Supp.2013, § 2803.1(2)(a). The testimony of each these witnesses was consistent and credible through direct and cross-examinations.

In light of record in this case and the evidence presented at trial, we find the trial court's error in allowing the victim to testify behind a screen without making the requisite statutory findings of necessity did not affect Appellant's substantial rights as it did not affect the outcome of the trial.[2] Finding error, but no plain error, this proposition is denied.

In Proposition II, Appellant contends the trial court erred in permitting cumulative hearsay evidence. Specifically, Appellant complains that allowing the State to present D.P.'s statements through the testimony of his grandparents, Mr. & Mrs. Norton; Ms. Poffel, Ms. James, and the forensic interview was needlessly cumulative and unnecessarily prejudicial. Appellant does not challenge the admissibility of D.P.'s statements under 12 O.S.Supp.2013, § 2803.1 (the record shows the State provided timely notice of the hearsay

[2] If we had found the error violated Appellant's substantial rights and affected the outcome of the trial, we would apply the analysis in *Chapman v. California*, 386 U.S.18 (1967) to determine if the error was harmless.

statements, the trial court held the requisite *in-camera* hearing, and found the statements provided sufficient indicia of reliability so as to render them inherently trustworthy). Appellant now argues that, "in all instances, the allegations of abuse were repeated in a similar fashion with similar substance, none of which revealed more information for the prosecution than any of the others. Presenting the allegations over and over again was clearly more prejudicial than probative, needlessly cumulative, and constitutes improper bolstering."

Appellant filed pre-trial motions *in limine* arguing that having multiple witnesses, namely Mr. and Mrs. Norton, Ms. Poffel, and Ms. James testify to the same hearsay statement, as well as admitting the forensic interview was cumulative and prejudicial to the defense. In a pre-trial motion hearing, the trial court denied the motions noting the potential cumulative effect of the hearsay evidence from the State, but finding it too early to rule on the cumulative nature of the testimony.

At trial, Appellant renewed his objection to the admission of the forensic interview based on its cumulative nature but did not renew his objections to any hearsay testimony given by the Nortons, Ms. James, or Ms. Poffel.

For our purposes on appeal, in those instances where objections were raised, we review the trial court's ruling for an abuse of discretion. *Marshall v. State,* 2010 OK CR 8, ¶ 24, 232 P.3d 467, 474 (a trial court's ruling admitting or excluding evidence is reviewed on appeal for an abuse of discretion, which has been defined as a clearly erroneous conclusion and judgment, that is clearly against the logic and effect of the facts presented). In those instances where no objections were raised, we review under the plain error standard of *Simpson,* 1994 OK CR 40, ¶¶ 10, 26, 30, 876 P.2d at 694, 699, 701.

Here, D.P.'s statements were admissible under an established hearsay exception, 12O.S.Supp.2013, § 2803.1. Testimony regarding those statements from various witnesses was necessary and did not improperly bolster the State's case. *See Folks v. State,* 2008 OK CR 29, ¶¶ 10-12, 207 P.3d 379, 382 (admission of child victim's recorded interview was proper even though the victim testified at trial and as the evidence was subject to the safeguards of § 2803.1); *Jones v. State,* 1989 OK CR 66, ¶ 12, 781 P.2d 326, 329 (testimony from the child victim and several other witnesses regarding the circumstances surrounding the sexual abuse was found not prejudicially cumulative as the testimony of each witness was necessary, and any repetition

was not needless duplication); *Contra Marquez v. State,* 1995 OK CR 17, 890 P.2d 980 (admission of child victim's videotaped interview resulted in the improper bolstering of the victim's trial testimony where victim's statements were found to be inadmissible hearsay).

Each of the witnesses in the present case told a different part of the story. The grandparents' testimony addressed how the allegations first became known and provided details supporting D.P.'s claims of abuse. After D.P. made the allegations to his grandparents he was taken to the police where a forensic interview was conducted. Ms. Poffel testified to the circumstances surrounding the forensic interview of a child and then the D.P.'s actual interview was played for the jury. Ms. James then testified to the circumstances and findings of her physical examination of the victim.

While there was admittedly some repetition in the testimony of the various witnesses, their testimony and the forensic interview was not "needlessly" repetitious and not so cumulative as to be unfairly prejudicial. The probative value of the testimony and the forensic interview was not substantially outweighed by the danger of unfair prejudice or needless presentation of cumulative evidence. *See Postelle v. State,* 2011 OK CR 30, ¶ 31, 267 P.3d 114, 131 (relevant evidence

may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or needless presentation of cumulative evidence). Further, the jury was instructed to determine the weight and credibility of each individual witness.

Reviewing for plain error and otherwise, we find no error in the admission of the forensic interview and testimony from Mr. and Mrs. Norton, Ms. Poffel, and Ms. James. This proposition is denied.

Accordingly, this appeal is denied.

DECISION

The **JUDGMENT and SENTENCE is AFFIRMED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF MUSKOGEE COUNTY
THE HONORABLE NORMAN D. THYGESEN,
ASSOCIATE DISTRICT JUDGE

APPEARANCES AT TRIAL	**APPEARANCES ON APPEAL**
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OPINION BY: LUMPKIN, J.
KUEHN, P.J..: Concur in Results
ROWLAND, V.P.J.: Concur
LEWIS, J.: Concur
HUDSON, J.: Concur

RA

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ANTHONY JAMAR HENIGAN,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2021-767**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

ROWLAND, PRESIDING JUDGE:

Anthony Jamar Henigan was tried by jury before the Honorable Michelle B. Keely, in the District Court of Tulsa County, Case No. CF-2019-5576, and convicted of Sexual Abuse – Child Under 12 (Counts 1/A, 2/B, 4/C, 5/D, 6/E, 9/F, and 10/G), in violation of 21 O.S.Supp.2014, § 843.5(F), Child Abuse by Injury (Count 11/H), in violation of 21 O.S.Supp.2014, § 843.5(A), Domestic Assault and Battery by Strangulation (Counts 13/I and 15/J), in violation of 21 O.S.Supp.2014, § 644(J).[1] The jury assessed punishment at life imprisonment and a $5,000.00 fine on each of Counts 1/A, 2/B, 4/C,

[1] Counts 3, 7, 8, 12, and 14 were dismissed prior to trial.

5/D, 9/F, and 10/G. It assessed punishment at twenty-five years imprisonment and a $5,000.00 fine on Count 6/E, seventeen years imprisonment and a $5,000.00 fine on Count 11/H, two years imprisonment on Count 13/I, and three years imprisonment on Count 15/J. The trial court sentenced Henigan accordingly, ordering the sentences imposed on Counts 1/A, 2/B, 4/C, 6/E, 9/F, 10/G, 11/H, 13/I, and 15/J to run consecutively to each other and Count 5/D to run concurrently with Count 2/B.[2] Henigan appeals raising the following issues:

(1) whether the trial court erred in declining to suppress his statement to the police;

(2) whether he was denied effective assistance of counsel;

(3) whether the trial court erred by failing to give instructions regarding sex offender registration; and

(4) whether cumulative effect of all these errors deprived him of a fair and impartial proceeding.

We find relief is not required and affirm the Judgment and Sentence of the district court.

[2] Under 21 O.S.Supp.2015, § 13.1, Henigan must serve 85% of his sentence of imprisonment on his convictions for Sexual Abuse – Child Under 12 and Child Abuse by Injury before he is eligible for parole consideration.

1.

Henigan argues that the trial court erred in denying the motion to suppress statements to law enforcement because (1) he had been drinking malt liquor when the police arrested and questioned him and, (2) he had an inherent fear of police which rendered him incapable of voluntarily waiving his *Miranda*[3] rights. The trial court conducted a two-day *Jackson v. Denno*[4] hearing to determine the admissibility of the statements Henigan made to law enforcement and held that Henigan voluntarily and knowingly waived his rights. On appeal, this Court reviews a trial court's ruling on a motion to suppress for abuse of discretion. *Bramlett v. State*, 2018 OK CR 19, ¶ 10, 422 P.3d 788, 793. "An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the issue; a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts." *State v. Marcum*, 2014 OK CR 1, ¶ 7, 319 P.3d 681, 683 (citing *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170). We find no abuse of

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).
[4] *Jackson v. Denno*, 378 U.S. 368 (1964).

discretion in the trial court's ruling denying the Motion to Suppress. This claim is denied.

2.

Henigan contends that he was denied constitutionally effective assistance of counsel. This Court reviews claims of ineffective assistance of counsel *de novo*, to determine whether counsel's constitutionally deficient performance, if any, prejudiced the defense so as to deprive the defendant of a fair trial with reliable results. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. Under this test, Henigan must affirmatively prove prejudice resulting from his attorney's actions. *Strickland*, 466 U.S. at 693; *Head v. State*, 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148. "To accomplish this, it is not enough to show the failure had some conceivable effect on the outcome of the proceeding." *Id.* Rather, Henigan must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* This Court need not determine

whether counsel's performance was deficient if the claim can be disposed of on the ground of lack of prejudice. *See Malone,* 2013 OK CR 1, ¶ 16, 293 P.3d at 207.

Henigan complains that trial counsel was ineffective for failing to give a more thorough opening statement and for failing to object to instances of prosecutorial misconduct. Henigan has failed to show that, but for counsel's actions, the result of his trial would have been different. Because he has failed to establish prejudice from his attorney's actions, Henigan's ineffective assistance of counsel claim must be denied.

3.

Henigan contends that the trial court erred when it failed to instruct the jury, as requested, that if convicted, he would have to register as a sex offender. We review this properly preserved claim for an abuse of discretion. *Reynolds v. State*, 2022 OK CR 14, ¶ 19, __ P.3d __, __.

This Court has repeatedly rejected the claim raised by Henigan. In *Reed v. State*, 2016 OK CR 10, ¶ 18, P.3d 118, 122-23, this Court held that "sex offender registration is not a material consequence of

sentencing and is a collateral matter outside the jury's purview." Thus, the Court concluded that, "[r]egistration pursuant to [Sex Offender Registry Act] is not a salient feature of the law in sex crime cases upon which trial courts have a duty to instruct." *Reed*, 2016 OK CR 10, ¶ 19, 373 P.3d at 123. *See also Barnes v. State*, 2017 OK CR 26, ¶ 24, 408 P.3d 209, 218 (finding no error in failure to instruct the jury on sex offender registration); *Duclos v. State*, 2017 OK CR 8, ¶ 18, 400 P.3d 781, 785 (same). Since the trial court had no duty to instruct the jury on sex offender registration, failure to do so was not an abuse of discretion. There was no error and relief is not required.

4.

Henigan claims that even if no individual error in his case merits relief, the cumulative effect of the errors committed requires a new trial or favorable sentence modification. "The cumulative error doctrine applies when several errors occurred at the trial court level, but none alone warrants reversal." *Tafolla v. State*, 2019 OK CR 15, ¶ 45, 446 P.3d 1248, 1263. Although individual errors may be of insufficient gravity to warrant reversal, the combined effect of an accumulation of errors may require a new trial. *Id.* There are no

errors, considered individually or cumulatively, that merit relief in this case. This claim is denied.

DECISION

The Judgment and Sentence of the district court is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2022), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, THE HONORABLE MICHELLE B. KEELY, DISTRICT JUDGE

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OPINION BY: ROWLAND, P.J.
HUDSON, V.P.J.: Concur
LUMPKIN, J.: Concur
LEWIS, J.: Concur
MUSSEMAN, J.: Concur

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

BRYAN LEE DOLIN,	)	**NOT FOR PUBLICATION**
	)	
Appellant,	)	
	)	
v.	)	Case No. F-2022-401
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LEWIS, JUDGE:

Bryan Lee Dolin, Appellant, was tried by jury and found guilty of Count 3, sexual abuse of a child under twelve,[1] in violation of 21 O.S.Supp.2019, § 843.5(F), in the District Court of Washington County, Case No. CF-2020-363. The jury assessed punishment at thirty-two years imprisonment and a $2,500.00 fine. The Honorable Linda S. Thomas, District Judge, pronounced judgment and sentence accordingly.[2] Mr. Dolin appeals in the following propositions of error:

[1] The jury failed to unanimously agree on charges of sexual abuse of a child under twelve in Counts 1 and 2. The trial court declared a mistrial on those counts.

[2] Appellant must serve 85% of the sentence before he is eligible for consideration for parole. 21 O.S.Supp.2015, § 13.1(3).

1. The trial court erred in allowing repeated child hearsay statements into evidence because it was cumulative and resulted in improper bolstering;

2. The testimony of the sexual assault nurse was improper;

3. The trial court erred when it gave the Allen charge;

4. The trial court erred by failing to instruct the jury on the necessity of sex offender registration as a consequence of conviction;

5. Mr. Dolin was denied the effective assistance of counsel;

6. The sentence imposed was excessive; and

7. Accumulation of errors.

In Proposition One, Appellant challenges the trial court's admission of child hearsay statements from the victim as unduly cumulative and unfairly prejudicial. Trial counsel failed to object on these grounds, waiving all but plain or obvious error. This Court will correct plain or obvious error when it seriously affects the fairness, integrity, or public reputation of the proceeding or results in a miscarriage of justice. *Hogan v. State,* 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

The State complied with the pre-trial notice requirements for the admission of the proffered statements under child hearsay rules. 12 O.S.Supp.2013, § 2803.1. The court in a pre-trial hearing determined that the statements were inherently trustworthy, and therefore conditionally admissible at trial under section 2803.1. The child declarant later testified at trial and was subject to cross-examination about the statements. The evidence was relevant to the charges and to the declarant's credibility as put in issue by the defense.

The general relevance of the evidence to the issues on trial was not substantially outweighed by the danger of unfair prejudice, cumulative testimony, or other countervailing statutory factors. 12 O.S.2011, §§ 2401, 2403; *Folks v. State*, 2008 OK CR 29, ¶ 10-12, 207 P.3d 379, 382; *Jones v. State*, 1989 OK CR 66, ¶ 12, 781 P.2d 326, 329. Admission of the evidence under these conditions was within the trial court's broad discretion. As Appellant has not shown plain or obvious error under controlling law, Proposition One is denied.

Proposition Two challenges the admission of the trial testimony of a sexual assault nurse examiner (SANE) relating the victim's hearsay statements about sexual abuse by the Appellant. Trial counsel failed to object on the grounds now asserted, waiving all but

plain error, as defined above. The State argues this testimony was properly admitted under the hearsay exception for statements made for the purpose of diagnosis or treatment under section 2803(4) of Title 12.[3]

We agree. The declarant's apparent motive for the statements included obtaining appropriate care for potential medical conditions related to the abuse, and it was reasonable for a doctor or other medical provider to rely on such statements in determining a diagnosis or treatment. *Kennedy v. State,* 1992 OK CR 67, 839 P.2d 667. That a child is not obviously injured or seeking treatment for a known medical condition does not mean that statements to medical personnel are not "reasonably pertinent" to present diagnosis or treatment, including clinical judgment about the child's well-being in the temporary custody or presence of her suspected abuser. The child's statements were reasonably pertinent to medical diagnosis, and their admission as an exception to the hearsay rule was within the trial court's discretion. Finding no plain or obvious error, Proposition Two is without merit.

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[3] The statute allows hearsay statements "made for purposes of medical diagnosis or treatment and describing medical history, past or present symptoms, pain or sensations, *if reasonably pertinent* to diagnosis or treatment" (emphasis added).

In Proposition Three, Appellant argues the trial court's *Allen*[4] instruction to the deadlocked jury over his counsel's objection coerced the verdict in violation of his rights to a fair trial. The trial court gave OUJI-Cr(2d) Instruction No. 10-11, the uniform deadlocked jury instruction, after the jury announced it was split 9-3 on all counts and "no one is changing their mind." The jury had deliberated almost four and a half hours prior to this announcement.

More than ninety minutes after this initial statement of deadlock and the *Allen* instruction, the jury remained deadlocked on Counts 1 and 2, which alleged more flagrant acts of abuse, but had reached a decision on Count 3. The court directed jurors to complete the verdict form for Count 3. After a time, the jury returned a verdict of guilty in Count 3 but failed to agree on Counts 1 and 2.

The decision to give the uniform deadlocked jury instruction is within the trial court's discretion and will be reversed only upon a showing of abuse of that discretion, meaning the court's decision was contrary to the logic and effect of the facts presented. While Appellant is correct that no verdicts would have resulted if the court had

[4] The instruction is named for a similar type of instruction approved by the Supreme Court in *Allen v. United States*, 164 U.S. 492, 501-02 (1896).

mistried the case upon the jury's first announcement that it was split, such announcements are hardly unusual. We have repeatedly approved the use of the deadlocked jury instruction, even in cases where jurors are deadlocked after four or more hours of deliberation. *Sartin v. State,* 1981 OK CR 157, 637 P. 2d 897; *Thomas v. State,* 1987 OK CR 113, 741 P.2d 482 (finding *Allen* instructions after four-hour deliberation with jury deadlocked were not reversible error). As we found in these cases, we again find that the trial court's instruction was not an abuse of its discretion. Proposition Three is denied.

In Proposition Four, Appellant argues the jury should have been instructed on sex offender registration requirements. He requested no such instruction at trial, waiving all but plain or obvious error, as defined above. This Court has declined to require instructions on sex offender registration as a consequence of conviction. *Reed v. State,* 2016 OK CR 10, ¶ 19, 373 P.3d 118, 123. No Supreme Court case requires such an instruction.[5] Appellant thus cannot show that the

[5] *Alexander v. Wilkerson,* 2015 WL10372329, at *10 (10th Cir. Oct. 27, 2015) (unpublished) (finding no Supreme Court precedent clearly requiring a jury instruction on sex offender registration).

lack of such an instruction is plain or obvious error. Proposition Four is denied.

In Proposition Five, Appellant argues that counsel was ineffective for omitting to raise objections to the hearsay challenged in Propositions One and Two and failing to request a sex offender registration instruction as argued in Proposition Four. We address such complaints applying *Strickland v. Washington,* 466 U.S. 668 (1984), requiring the Appellant to show that counsel's performance was deficient; and that deficient performance prejudiced the outcome.

As we have rejected the underlying legal claims of this allegation on their merits, Appellant cannot show that the failure to object or request such instructions was unreasonably deficient performance by counsel, or that these omissions create any reasonable probability of a different outcome. Appellant fails to establish either deficient performance or prejudice to his defense under *Strickland.* Proposition Five is denied.

In Proposition Six, Appellant contends the sentence is excessive. This Court will not modify a sentence within the statutory range unless, considering all the facts and circumstances, it shocks

our conscience. *Rea v. State,* 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149. The minimum sentence for this crime was twenty-five years. Jurors added seven more years knowing that Appellant must serve 85%, or about twenty-seven years of that term before he is eligible for parole. From the victim's age when harmed, the entire sentence roughly coincides with the victim attaining age forty.

Considering that jurors declined to convict Appellant of two counts charging more flagrant acts of abuse, the sentence assessed indicates that jurors not only paid close attention to the evidence but also intended to remove Appellant from society for an extended period of time. As a logical response to the serious nature of Appellant's crime and his demonstrated threat to public safety, this sentence is not shocking to the conscience. Proposition Six is denied.

Proposition Seven, seeking relief for the accumulation of errors, is foreclosed where the Court has found no individually harmless errors to accumulate. *See Fuston v. State,* 2020 OK CR 4, ¶ 126, 470 P.3d 306, 333. Proposition Seven requires no relief.

DECISION

The judgment and sentence is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2024), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE
DISTRICT COURT OF WASHINGTON COUNTY
THE HONORABLE LINDA S. THOMAS, DISTRICT JUDGE

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OPINION BY: LEWIS, J.
ROWLAND, P.J.: Concur
MUSSEMAN, V.P.J.: Concur
LUMPKIN, J.: Concur
HUDSON, J: Concur

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

JERRY MARTIN GUSTAFSON,	)	NOT FOR PUBLICATION
	)	
Appellant,	)	
	)	
v.	)	Case No. F-2021-702
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LEWIS, JUDGE:

Jerry Martin Gustafson, Appellant, was tried by jury for the crime of child sexual abuse, in violation of 21 O.S.Supp.2014, § 843.5(E) and (F), in the District Court of Payne County case no. CF-2019-381. The jury found the Appellant guilty and recommended a sentence of twenty-five (25) years imprisonment. The Honorable Associate District Judge Stephen Kistler sentenced the Appellant according to the jury's recommendation. Mr. Gustafson appeals in the following proposition of error:

1. The alleged victim was 14 at the time she testified, the trial court erred in admitting her out-of-court statements under the child hearsay statute.

2. H.G.'s testimony was not clear and convincing, it required corroboration. Because the testimony was not adequately corroborated, this court should find that the evidence is insufficient to support the conviction.

3. Mr. Gustafson was denied a fundamentally fair trial when the State elicited surprise testimony concerning evidence not provided to defense counsel during discovery.

Appellant argues in Proposition One that, because the victim had attained the age of fourteen prior to trial, her out of court statements were not admissible under the child hearsay exception found at 12 O.S.2021, § 2803.1. We disagree.

Section 2803.1 of Title 12 is a specific exception to the general hearsay rule and allows for the admission of a statement by a child under thirteen years old describing acts of physical or sexual conduct performed on or with the child. The relevant portions of the statute read: "A statement made by a child who has not attained thirteen (13) years of age, . . . , which describes . . . any act of sexual contact performed with or on the child . . . is admissible in criminal and juvenile proceedings in the courts in this state . . .:" if (1) the statements are found to be reliable, (2) the child testifies or is available to testify, and (3) the proponent gives proper notification to the adverse party. *See* 12 O.S.2021, § 2803.1.

The statute is clear and unambiguous; it is the statement made by a child who is under the age of thirteen which is admissible. No other reading is reasonable. The statute refers to the time the statement was made not to the age at trial. The timing of the trial in relation to the child's age is irrelevant. Appellant's argument has no support, and this proposition is denied.

In Proposition Two, Appellant claims that the victim's testimony required corroboration because the testimony was inconsistent with prior testimony and statements.

> A child victim's testimony does not require corroboration when it is lucid, clear, and unambiguous. Although a child may give a slightly different story before trial, corroboration is not required when her testimony at trial is consistent. Alleged inconsistencies must relate to the actual criminal act rather than related events. Ultimately, even sharply conflicting testimony does not trigger the need for corroboration.

Gordon v. State, 2019 OK CR 24, ¶ 34, 451 P.3d 573, 583-84 [internal citations and quotation marks omitted]. The victim's testimony was not so incredible nor was it so thoroughly impeached as to be unworthy of belief; therefore, it did not require corroboration. *See Applegate v. State,* 1995 OK CR 49, ¶ 16, 904 P.2d 130, 136. This proposition is denied.

In Proposition Three, Appellant claims he was denied a fair trial because the State did not provide sufficient discovery regarding forensic search of his cell phone. Appellant did request discovery, but did not make a contemporaneous objection to the introduction of testimony regarding the search of the phone. The State had informed counsel that nothing was found on Appellant's phone.

The issue arises because text messages between Appellant and the victim were found on the victim's phone, but they were not found on Appellant's phone. Appellant was aware of these messages found on the victim's phone, but defense counsel seemed to be caught off guard when they did not appear on Appellant's phone. The proper time to raise an objection would have been the time the witness started talking about Appellant's phone, but counsel waited until after she had questioned the witness about deleting message on the phone on cross-examination and the State was engaging in redirect-examination.

Because Appellant did not make a timely objection, we review for plain error only. 12 O.S.2021, § 2401; *Nolen v. State,* 2021 OK CR 5, ¶ 114, 485 P.3d 829, 856-57. To be entitled to relief under the plain error rule, an Appellant must show an actual error which is

plain or obvious. *Nolen,* 2021 OK CR 5, ¶ 114, 485 P.3d at 857. He must also show that the error affected his substantial rights, meaning the error prejudicially affected the outcome of the proceeding. *Id.* Moreover, this Court will only grant relief where the error seriously affects the fairness, integrity, or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id., see also Lee v. State,* 2018 OK CR 14, ¶ 4, 422 P.3d 782, 785.

The State correctly informed Appellant that nothing was found on his phone and Appellant knew that incriminating text messages were on the victim's phone. Appellant should not have been surprised by the discrepancy. There were no obvious violations of the rules of discovery. Because there are no plain or obvious errors, there can be no plain error. This proposition is denied.

DECISION

The Judgment and Sentence is **AFFIRMED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2023), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

APPEAL FROM THE DISTRICT COURT OF PAYNE COUNTY, THE HONORABLE STEPHEN KISTLER, ASSOCIATE DISTRICT JUDGE

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ROWLAND, P.J.: Concur
HUDSON, V.P.J.: Concur
LUMPKIN, J.: Concur
MUSSEMAN, J.: Concur