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IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUL 31 2019

No. F-2019-115

JOHN D. HADDEN
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IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

JOSES RIC-E BECK,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

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Appeal from the District
Court of Johnston County
Case No. CF-2017-23

BRIEF OF APPELLANT

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IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

JOSES RIC-E BECK,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. F-2019-115
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

BRIEF OF APPELLANT

Jose's Ric-E Beck, Appellant, will be referred to by name or as Appellant. Appellee will be referred to as the State or the prosecution. Numbers in parentheses refer to page citations in the original record of Johnston County Case No. CF-2017-23 (OR); exhibits (Exh); and the following transcripts: hearing on the request for a competency evaluation held September 26, 2017 (9/26/17 Hr'g); January 11, 2018, competency hearing (1/11/18 Hr'g); preliminary hearing held June 8, 2018 (PH); jury trial held December 10-13, 2018 (TrI, TrII); December 19, 2018, hearing on Appellant's request for a pre-sentencing investigation (12/19/18 Hr'g); hearing to request continuation of sentencing held January 31, 2019 (1/31/19 Hr'g); and the February 7, 2019, sentencing (Sent).

STATEMENT OF THE CASE

On March 29, 2017, the State charged Appellant by information in Johnston County Case Number CF-2017-23 with First Degree Burglary and Aggravated

Assault and Battery (OR 1). A supplemental information alleged two prior felony convictions (OR 5). The State filed an amended (OR 25), a second amended (OR32-34), and ultimately a third amended information, charging Appellant, after three prior felony convictions,¹ with:

- Count 1 - Burglary in the First Degree in violation of 21 O.S.2011, § 1431;
- Count 2 - Aggravated Assault and Battery in violation of 21 O.S.2011, § 646(A)(2) (Shadow Rider);
- Count 3 - Assault with a Dangerous Weapon in violation of 21 O.S.2011, § 645 (Deputy Alyson Orr-Dodd);
- Count 4 - Assault with a Dangerous Weapon in violation of 21 O.S.2011, § 645 (Officer Kelly Perkinson);
- Count 5 - Assault with a Dangerous Weapon in violation of 21 O.S.2011, § 645 (Deputy Brandon Stockard)

(OR 77-78).²

Appellant's appointed counsel requested a competency evaluation on September 27, 2017, which the court granted (9/27/17 Hr'g 2-4). After reviewing the evaluation prepared by Mental Health Services of Southern Oklahoma, the court found Appellant competent to stand trial (1/11/18 Hr'g 3-4; Exh 1). At the

¹October 5, 2015, Failure to Register as Sex Offender in McCurtain County Case No. CF-2015-65 (sentenced to one year); May 2, 2013, Cause/Aid/Abet Minor in Drug Crime in Johnston County Case No. CF-2010-160 (sentenced to two years); August 12, 2008, Lewd/Indecent Proposals/Acts to Child Under Sixteen in Johnston County Case No. CF-2008-38 (sentenced to seven years with final five suspended) (OR 79).

²Counts 3-5 were initially charged as misdemeanor Assaults on a Police Officer in Johnston County Case No. CM-2017-73 (1/11/18 Hr'g Exh 1 p. 1).

conclusion of the June 8, 2018, preliminary hearing, the magistrate overruled Appellant's demurrer to Count 1 (PH 96) and found sufficient probable cause to bind him over on the five counts and the second page as charged (PH 98).

The Honorable Wallace Coppedge, District Judge, presided over Appellant's December 10-13, 2018, jury trial. Mr. Eric Jones represented Appellant. Ms. Fern Smith, Assistant District Attorney, appeared for the State. At the conclusion of the prosecution's case, the court overruled Appellant's general demurrer (TrII 316). Appellant testified in his defense (TrII 317-364). The jury found Appellant guilty on all five counts after two or more former convictions and fixed punishment at 30 years, life, 35 years, 35 years, and 35 years, respectively (TrII 423-424; OR 192-196). The court ordered a pre-sentencing investigation (OR 200; 12/19/18 Hr'g 3), and on February 7, 2019, sentenced Appellant pursuant to the jury's verdict. The court directed Count 5 to run concurrent with Count 4, but otherwise ordered all counts to be served consecutively (Sent 3; OR 218-219).³ Mr. Beck appeals his judgment and sentence.

STATEMENT OF FACTS

In March 2017, Appellant was in a sexual relationship with Brittney Valero and regularly visited her apartment and stayed overnight (TrI 93-94; TrII 318). Appellant believed they were dating (TrI 115; TrII 320), while Ms. Valero testified

³Appellant must serve 85% of his Count 1 sentence prior to being eligible for parole consideration. 21 O.S.Supp.2015, § 13.1(12).

that their relationship was limited to drugs and sex (TrI 93, 114-115, 121). During this time, Ms. Valero was also in a relationship with Mr. Shadow Rider (TrI 126).

On March 24, Appellant brought a backpack over to Ms. Valero's apartment, had sex with her, and spent the night (TrI 100-101, 119, TrII 319; State Exh 270). Ms. Valero left at some point during the night, alleging that Appellant was being violent, and returned the next morning, at approximately 7:30 a.m. (TrI 94-105, 152-154; State Exh 7). Later on March 25, Mr. Rider came to the apartment with his grandmother to bring Ms. Valero cigarettes (TrI 128-129). Mr. Rider suffers from cerebral palsy and uses a crutch to walk (TrI 92-93; 125-126). Appellant observed Mr. Rider outside of Ms. Valero's apartment, became jealous, and attacked him (TrII 321). Appellant punched and kicked Mr. Rider numerous times in the head and body until Mr. Rider's grandmother eventually convinced Appellant to stop (TrI 130-131, 149-150). Mr. Rider and his grandmother left and called the police (TrI 132). Mr. Rider texted Ms. Valero a picture of his facial injuries (TrI 108-109, 133; State Exh 4). Appellant testified that although he was intoxicated and angry, there was no excuse for hurting Mr. Rider and that he regretted doing so (TrII 321-322, 329-330, 342, 361).

The sequence of events thereafter giving rise to the burglary charge was disputed. At some point, Appellant led Ms. Valero by the wrists to show her what he did to Mr. Rider (TrI 106-107, 116-117, 121; TrII 322, 350, 359; State Exh 36C at 1:01:40), which the State alleged constituted an Assault and Battery on

Ms. Valero, i.e., the crime Appellant intended to commit therein (TrII 400; OR 168, 178). And at some point, Appellant kicked in Ms. Valero's back door (TrI 106, 121-122; TrII 322-323; State Exh 12-16, 66). Appellant stated that he was inside Ms. Valero's apartment without incident, guided her outside to show her Mr. Rider's bloodstains, left the residence, and then forced the door open at a later time when he returned to collect his belongings (TrII 322-323, 359-360; State Exh36C at 1:03:30). Ms. Valero's testimony suggested that after Appellant battered Mr. Rider, he immediately broke in through her locked door and dragged her down the hall (TrI 106-108), and the prosecution argued that circumstantial evidence proved this timeline (TrII 390-392, 400-402, 415-416). Ms. Valero testified that she did not give Appellant permission to be inside her apartment that afternoon (TrI 106). Ms. Valero eventually left her apartment and went to the home of a neighbor who called the police (TrI 111, 139-142).

Johnston County Deputies Alyson Orr-Dodd and Brandon Stockard and Officer Kelly Perkinson of the Tishomingo Police Department responded to Mr. Rider's grandmother's home and observed Mr. Rider's injuries (TrI 159-160, 198-199, 220).⁴ The three officers were then dispatched to Ms. Valero's apartment complex (TrI 160-161, 199, 220). The officers saw Appellant yelling in the courtyard and then enter Ms. Valero's apartment after he spotted them (TrI 162,

⁴There was apparently initial confusion whether Mr. Rider's battery occurred inside or outside of Tishomingo city limits (TrI 159-160).

200, 221-222). Appellant exited the apartment's back door and advanced towards the officers with a fixed-blade knife held to his own throat, saying that he would not go back to prison and asking the officers to shoot him (TrI 164-165, 172, 223-224). The knife's handle was wrapped with a cord that was tied to Appellant's wrist (TrII 203, 208, 228; State Exh 24, 25). The officers drew their firearms, yelled commands at Appellant, and retreated while he continually advanced towards them with the knife to his throat (TrI 165-166, 171-172, 204, 224-225). The officers stopped when Appellant was approximately five feet away and when they determined they could no longer safely back up towards the woods (TrI 172, 183, 207, 210, 225-227). The officers said they feared for their lives (TrI 172, 207, 226-229). Deputy Orr-Dodd shot Appellant twice, once in the left upper chest/shoulder area and once in the abdomen (TrI 173; State Exh 58), but there were conflicting accounts of what happened immediately prior thereto.

Appellant testified that he had no intention of attacking the officers and that he lowered the knife and began to crouch down so that he could get on the ground and surrender (TrII 324-326, 338). Deputy Orr-Dodd stated that Appellant quickly lowered the knife from his throat to breast level which indicated a possible attack (TrI 172, 184-185, 187, 189). Deputy Stockard claimed that Appellant took the knife down from his throat and lunged towards Officer Perkinson (TrI 206-207, 215-217). Perkinson testified that Appellant pointed the knife towards him and Orr-Dodd, took a step towards them, and was getting ready to attack (TrI 226,

235, 237, 239-240). Officer Perkinson was equipped with a body camera, but did not activate the device until after Appellant was shot (TrI 228-229; State Exh 6).

The OSBI investigated the incident (TrII 291-292). The agents determined that the distance over which the officers retreated, from Ms. Valero's back door to Deputy Orr-Dodd's shell casings, was over 100 feet (TrII 260; State Exh 69). The casings were 22 feet from the woods to the north and 15 feet from the woods to the west (TrII 281-282; State Exh 21; Def Exh 2, 3). The two shell casings were six feet away from where Appellant started bleeding from the gunshot wounds (TrII 256-257; State Exh 21; Def Exh 1). Agent David Gatlin described that officers are trained on the "21-foot rule," which instructs that a suspect with an edged weapon within that distance poses a life-threatening danger (TrII 304). The OSBI concluded that the officers did not act criminally and were justified in their actions (TrII 293).

After the shooting, a helicopter took Appellant to a hospital in Plano, Texas (TrII 295; State Exh 59). Once he discharged from the hospital, Appellant waived extradition and was transferred to the Johnston County Jail (TrII 295-296; State Exh 3; OR 8). On April 6, 2017, Appellant waived his rights and agreed to an interview with Agent Gatlin (TrII 298; State Exh 7, 36C). Additional facts will be discussed as they relate to the individual propositions of error.

PROPOSITION I

APPELLANT'S CONVICTIONS FOR COUNTS 3, 4, AND 5, BASED ON A SINGLE, SPLIT-SECOND ACT, VIOLATE CONSTITUTIONAL PROHIBITIONS AGAINST DOUBLE JEOPARDY AND STATUTORY PROHIBITIONS AGAINST MULTIPLE PUNISHMENT.

Standard of Review. Where double jeopardy and multiple punishment claims were not raised below, this Court will review for plain error. *Logsdon v. State*, 2010 OK CR 7, ¶ 28, 231 P.3d 1156, 1167.

Argument and Authorities. Appellant exited Ms. Valero's apartment holding a knife to his own throat, asking the officers to shoot him (TrI 164, 223-224). The officers feared that Appellant would harm himself (PH 86). Appellant advanced towards the three officers in this exact same posture until he was within approximately five feet of them (TrI 166, 172, 184, 207, 225). Appellant then lowered the knife from his throat to breast level - which Appellant claimed was in order to surrender, but which the officers interpreted as a threat⁵ - when Deputy Orr-Dodd immediately shot him twice (TrI 172-173; TrII 324).

For this single act, the State charged Appellant with three counts:

COUNT 3: ASSAULT WITH A DANGEROUS WEAPON - a FELONY, on or about the 25th day of March 2017, without justifiable or excusable cause, assault one Deputy Alyson Orr-Dodd with a knife, with intent to do Deputy Alyson Orr-Dodd bodily harm.

⁵Deputy Stockard and Officer Perkinson testified that Appellant's unrecorded movement also included a simultaneous step forward and pointing the knife at Perkinson (TrI 206-207, 216-217, 226, 235, 237, 239-240). Stockard described at preliminary hearing that at the moment Appellant brought the knife "down off his neck [], I felt that he was no longer a threat to himself and he was threatening to us" (PH 93).

COUNT 4: ASSAULT WITH A DANGEROUS WEAPON - a FELONY, on or about the 25th day of March 2017, without justifiable or excusable cause, assault one Officer Kelly Perkinson with a knife, with intent to do Officer Kelly Perkinson bodily harm.

COUNT 5: ASSAULT WITH A DANGEROUS WEAPON - a FELONY, on or about the 25th day of March 2017, without justifiable or excusable cause, assault one Deputy Brandon Stockard with a knife, with intent to do Deputy Brandon Stockard bodily harm.

(OR 77-78, 168).

The State neither argued that any separate action constituted an assault on the officers (TrII 396, 407-408, 416-419), nor was there evidence of such. The jury found Appellant guilty on all three counts and fixed 35-year sentences for each (TrII 423-424; OR 192-196). The court ordered the Count 4 and Count 5 sentences to run concurrently, but consecutive to Count 3 (Sent 3; OR 218-219).

Constitutional protections from double jeopardy bar multiple punishments for the same offense. *Hunnicut v. State*, 1988 OK CR 91, ¶ 10, 755 P.2d 105, 109, citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969); U.S. Const. Amends. V, XIV; Okla. Const. art. II, § 21. Moreover, multiple punishments for a single act are typically prohibited. 21 O.S.2011, § 11; *Davis v. State*, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126-127.

In *Thompson v. State*, the defendant was convicted of two counts of Felonious Pointing for pointing a firearm at two members of a rival gang. *Thompson v. State*, 2007 OK CR 38, ¶¶ 1-3, 169 P.3d 1198, 1200-1201. The evidence showed that Thompson pointed his gun at the victims in a single act. *Id.*,

2007 OK CR 38, ¶ 11, 169 P.3d at 1202. The State claimed that the two convictions were appropriate, because there were two victims. *Id.*, 2007 OK CR 38, ¶ 9, 169 P.3d at 1202. This Court held, however, that while multiple pointings within a single criminal episode could lead to multiple counts, a single act of pointing a firearm at a group of people constitutes only a single violation. *Id.*, 2007 OK CR 38, ¶ 13, 169 P.3d at 1203.

In *Hunnicut*, the defendant paid an undercover officer for a sack containing two pistols and was convicted of two counts of Attempting to Conceal Stolen Property. *Hunnicut*, 1988 OK CR 91, ¶ 14, 755 P.2d at 110. This Court cited Section 11 and opined “[p]resumably, had five pistols been involved, appellant would have been charged with five counts of the crime; had there been twenty weapons in the sack, appellant would have been charged with 20 counts of each crime. We find nothing in our statutes to indicate our legislature intended such a result.” *Id.* This Court determined that the conduct constituted a single transaction and violated double jeopardy. *Id.*, 1988 OK CR 91, ¶ 17, 755 P.2d at 111. *See also Trim v. State*, 1996 OK CR 1, ¶¶ 2-4, 909 P.2d 841, 842-843.

Appellant’s movement, whether it was only slightly lowering the knife from his throat as Orr-Dodd recalled (TrI 189) or also involved stepping and repositioning the knife towards Perkinson as the other officers described (TrI 206-207, 216-217, 226, 235, 237, 239-240), constituted not only a single transaction, but quite literally a single act. The mere proximity of three officers did not justify

three punishments, just as twenty punishments would be improper if twenty officers happened to be present. *Hunnicut*, 1988 OK CR 91, ¶ 14, 755 P.2d at 110; *Thompson*, 2007 OK CR 38, ¶ 13, 169 P.3d at 1203. Appellant's case is distinguishable from instances involving separate acts. See *Lavorchek v. State*, 2019 OK CR 13, ¶¶ 5-7, _ P.3d _ (convictions for multiple assaults during an hour-long armed robbery were permissible); *Burleson v. Saffle*, 2002 OK CR 15, ¶ 5, 46 P.3d 150, 152 (firing "several times" at two people from a vehicle was not a single transaction under double jeopardy); *Wimberly v. State*, 1985 OK CR 37, ¶¶ 8-10, 698 P.2d 27, 30-31 (multiple convictions for Felonious Pointing were justified where Wimberly pointed a gun at different people on separate occasions during the course of events).

Conclusion. Under the facts of this case, Appellant's three punishments for the same offense cannot stand. U.S. Const. Amends. V, XIV; Okla. Const. art. II, § 21. Alternatively, although Appellant's convictions in Counts 3-5 were from the same statute, Section 11 was nevertheless violated by multiple punishments for a single act. *Hunnicut*, 1988 OK CR 91, ¶ 14, 755 P.2d at 110; *Davis*, 1999 OK CR 48, ¶ 13, 993 P.2d at 126-127. Appellant asks this Court to reverse and dismiss his redundant convictions. *Thompson*, 2007 OK CR 38, ¶ 13, 169 P.3d at 1203.

PROPOSITION II

IN THE ALTERNATIVE, THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THREE CONVICTIONS FOR ASSAULT WITH A DANGEROUS WEAPON; APPELLANT'S COUNT 3 AND COUNT 5 CONVICTIONS SHOULD BE REVERSED.

Standard of Review. Due process protects an accused against conviction “except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). Failure to prove an essential element of the offense charged is fundamental error. *Beasley v. State*, 1983 OK CR 92, ¶ 4, 665 P.2d 852, 853. The test for determining the sufficiency of the evidence 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 beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204.

Argument and Authorities. Appellant was convicted of Assault with a Dangerous Weapon against Deputy Orr-Dodd (Count 3), against Officer Kelly Perkinson (Count 4), and against Deputy Brandon Stockard (Count 5) (TrII 423-424; OR 192-196). At best, the evidence established only an Assault with a Dangerous Weapon against Officer Perkinson.

Pursuant to the uniform instructions, the court advised the jury that Assault with a Dangerous Weapon requires:

First, an assault;

Second, upon another person;

Third, with a dangerous weapon;

Fourth, without justifiable or excusable cause;

Fifth, with intent to do bodily harm.

(OR 171)

The court also defined an assault:

An assault is any willful and unlawful attempt or offer to do a bodily hurt to another with force or violence.

(OR 173)

When the three officers arrived at the apartment complex, Appellant came out of Ms. Valero's back door holding a knife to his throat, imploring the officers to shoot him (TrI 164, 223-224). The officers steadily retreated with their guns drawn, as he came towards them in this same manner until their backs were near the woods and Appellant was about five feet away (TrI 166, 172, 184, 207, 225). When Appellant made a sudden movement, Deputy Orr-Dodd shot him twice (TrI 172-173). After Appellant was shot, he turned around and walked back towards the apartments and collapsed (TrI 173, 207).

Deputy Orr-Dodd testified that as he approached, Appellant's attention was on Officer Perkinson (TrI 171). The deputy said that when Appellant quickly brought the knife down from his throat, he posed a threat to all three officers (TrI 172-173). Orr-Dodd did not recall Appellant simultaneously stepping or

attempting to step forward when he lowered his knife (TrI 189), as the other officers described (TrI 206-207, 235).

Deputy Stockard stated that Appellant was looking at Officer Perkinson when he pulled the knife away from his own throat, and that Appellant lunged towards Perkinson with the knife aimed in Perkinson's direction (TrI 206-207, 216-217). Stockard said he feared for Officer Perkinson's life (TrI 207).

Officer Perkinson claimed that when Appellant lowered the knife, he took a step in his direction with the knife held out (TrI 226).⁶ Perkinson testified that although Appellant's conduct did not indicate an obvious attack, he considered Appellant's step forward to be a threat (TrI 235, 237, 239-240). Perkinson stated that he was afraid Appellant would hurt him, and that Deputy Orr-Dodd saved his life by firing when she did (TrI 227).

The officers believed that Appellant was attempting "suicide by cop" as he approached (TrI 224). OSBI concluded that Orr-Dodd's shooting was justified (TrII 293), and the scene was undoubtedly tense. But the mere fact that all three officers were fearful of the situation does not establish that Appellant assaulted each of them. Unless Appellant was superhuman, his singular gesture when lowering the knife, described somewhat differently by each witness, could not have

⁶Perkinson said that he meant to activate his body camera earlier, but did so once he realized it was off after Dodd-Orr shot Appellant (TrI 228-229). There was no testimony about whether the device automatically records any period prior to being activated, i.e. a pre-event buffer time.

been an “attempt or offer to do a bodily hurt” on all three armed officers simultaneously. 21 O.S.2011, § 641. Nor did Appellant’s single act evince an “intent to do bodily harm” to multiple individuals. 21 O.S.2011, § 645. While there was testimony that Appellant assaulted Officer Perkinson (TrI 171, 206-207, 216-217, 227, 235, 237, 239-240), the evidence was insufficient to establish beyond a reasonable doubt that he also committed Assault with a Dangerous Weapon against deputies Orr-Dodd and Stockard.

Conclusion. Even when viewed in a light most favorable to the prosecution, no rational juror could have found the elements satisfied on Counts 3 and 5. Appellant requests that this Court reverse these convictions with instructions to dismiss.

PROPOSITION III

IRRELEVANT AND PREJUDICIAL EVIDENCE OF OTHER CRIMES AND BAD ACTS RENDERED APPELLANT'S TRIAL UNFAIR.

Standard of Review. Where there was no objection at trial, this Court will review the admission of evidence for plain error. *Martinez v. State*, 2016 OK CR 3, ¶ 14, 371 P.3d 1100, 1107-1108.

Argument and Authorities. During his police interview, Appellant told Agent Gatlin that he drinks, smokes, and shoots dope every day (State Exh 36C at 1:06:45). This statement was not redacted from the recording and was presented to the jury (TrII 307). The prosecution emphasized Appellant's statement in closing argument (TrII 399).

Appellant was not charged with drug offenses. However, the State's first witness, Brittney Valero, informed the jury during direct examination that Appellant was her drug dealer (TrI 93).

The State charged Appellant with offenses occurring in the early afternoon on March 25, 2017 (TrI 105), not with any conduct from the day before. But Ms. Valero testified on direct examination that on March 24, Appellant grabbed her, headbutted her, and forced her to kiss him (TrI 100-101).

Generally, evidence of unrelated crimes unduly prejudices the jury and is inadmissible in a criminal trial; a defendant should not be convicted of one offense because he has committed other crimes or because he is a bad person. *Johnson*

v. State, 1982 OK CR 37, ¶ 27, 665 P.2d 815, 822. The State normally may not show a defendant's prior bad acts to establish his propensity for misconduct, as such weighs too heavily with the jury and denies the defendant a fair opportunity to defend against his present charge. *Michelson v. United States*, 335 U.S. 469, 475-476, 69 S.Ct. 213, 218, 93 L.Ed. 168 (1948). Evidence related to other crimes must be suppressed when it is so prejudicial that it denies a defendant of his right to be tried only for the charged offense or where its minimal relevancy suggests it is being offered to show a defendant is acting in conformity with his true character. *Welch v. State*, 2000 OK CR 8, ¶ 8, 2 P.3d 356, 365.

The Oklahoma Evidence Code recognizes this general prohibition and forbids evidence of other crimes to prove a person's character in order to show action in conformity therewith. 12 O.S.2011, § 2404(B). The same applies to prejudicial, non-criminal acts. *Eizember v. State*, 2007 OK CR 29, ¶ 75, 164 P.3d 208, 230. Section 2404(B) also contains an exception and permits evidence of other crimes or acts to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake/accident. Such exceptions must be used with the utmost caution, and any doubts must be resolved in favor of the defendant. *Galindo v. State*, 1978 OK CR 4, ¶ 4, 573 P.2d 1217, 1218.

If the State seeks to introduce § 2404(B) evidence, it must give written notice to the defendant at least ten days before trial. *Burks v. State*, 1979 OK CR 10, ¶ 12, 594 P.2d 771, 774, *overruled in part on other grounds by Jones v. State*,

1989 OK CR 7, 772 P.2d 922. Failure to provide *Burks* notice can be grounds for reversal. *Landtroop v. State*, 1988 OK CR 90, ¶¶ 4-5, 753 P.2d 1371, 1372, *overruled on other grounds by Drew v. State*, 1989 OK CR 1, 771 P.2d 224. The State did not file *Burks* a notice prior to Appellant's trial.

In addition to the notice requirement, for evidence of other crimes to be admissible, it must a) be probative of a dispute issue of the charged crime, b) have a visible connection to the charged crime, c) be necessary to support the State's burden of proof, d) be proven by clear and convincing evidence, e) have probative value that outweighs its prejudicial effect, and f) the court must instruct the jury on the testimony's limited use at the time it is given and during final instructions. *Kirkwood v. State*, 2018 OK CR 9, ¶ 5, 421 P.3d 314, 316.

Evidence that Appellant spent his days drinking, smoking, and shooting dope; was a drug dealer; and battered Ms. Valero on March 24 failed most of the *Kirkwood* requirements. The subject evidence was irrelevant to the instant charges. 12 O.S.2011, §§ 2401, 2402. It lacked a visible connection. It did not tend to resolve a disputed issue and was unnecessary for the State's burden in light of the other evidence at trial. *See Lowery v. State*, 2008 OK CR 26, ¶ 15, 192 P.3d 1264, 1270. It was not used for a valid § 2404(B) purpose. To any extent probative value did exist, it was substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, and/or unfair surprise. 12 O.S.2011, § 2403. The court did not instruct the jury at any point that the other

act evidence could not be used as substantive proof of guilt. *Kirkwood*, 2018 OK CR 9, ¶ 5, 421 P.3d at 316.

Nor was the evidence of other, uncharged offenses *res gestae*. Other crimes may be admissible under the *res gestae* exception where they form part of an entire transaction or where there is a logical connection with the offense charged. *Eizember v. State*, 2007 OK CR 29, ¶ 77, 164 P.3d 208, 230. Evidence is *res gestae* when a) it is so closely connected to the charged offense as to form part of the entire transaction, b) it is necessary to give the jury a complete understanding of the crime, or c) when it is central to the chain of events. *Id.*, quoting *Warner v. State*, 2006 OK CR 40, ¶ 65, 144 P.3d 838, 868. Offenses of a different nature and occurring prior to March 25 were not *res gestae*. Even if they could be construed as such, the evidence was still subject to and would not survive Section 2403 balancing. See *Jones v. State*, 2006 OK CR 5, ¶ 49, 128 P.3d 521, 540 (*res gestae* evidence weighed under § 2403).

The erroneous admission of other crime evidence prejudiced Appellant. Appellant testified and admitted guilt on Count 2 (TrII 321-322). But the other counts were close and contested.

In Count 1, the State charged Appellant with First Degree Burglary for breaking into Ms. Valero's apartment with the intent to assault and batter her therein (OR 168, 178).⁷ Ms. Valero alleged that Appellant grabbed her wrists and

⁷The crime intended therein was amended from Domestic Abuse to simple Assault and Battery during trial (TrII 373-375).

drug her down the hall (TrI 106-107, 117, 121). Appellant claimed that this purported battery occurred *prior* to the only the only “breaking” established by the evidence - Appellant kicking in the apartment’s back door (TrI 106, 121-122; TrII 322-323, 359-60; State Exh36C at 59:00, 1:03:30). Ms. Valero’s neighbor somewhat corroborated Appellant’s account, stating that at one point Appellant left to drop off his son (TrI 141-142). Neither party specifically asked Ms. Valero about the sequence of events (TrI 106-108),⁸ but the State argued that circumstantial evidence, namely Appellant’s rage at the time of assaulting Mr. Rider, proved that Appellant forced the door open immediately prior to grabbing Ms. Valero’s wrists (TrII 390-392, 400-402, 415-416). The State’s timeline evidence for First Degree Burglary was particularly weak, and the admission of improper evidence cannot deemed harmless as to that guilty verdict.

Likewise for Counts 3-5 where Appellant was convicted of Assaulting three officer with a Dangerous Weapon despite conflicting testimony. The undisputed evidence showed that Appellant exited Ms. Valero’s apartment, approached the officer for some distance as they retreated, while he held a knife to his own throat and asked the officers to kill him (TrI 166, 172, 184, 207, 225). There was no evidence at trial that Appellant verbally threatened the officers, and at the officers previously testified that there were no verbal threats (PH 37-40, 91). At the end of

⁸The prosecution likely avoided such specific questions in light of Ms. Valero’s preliminary hearing testimony, where she did not recall much of what occurred on March 25 (PH 50-53, 55-57, 59-61).

this event, Appellant claimed that he had no intention of harming the officers and that he lowered his knife in an effort to surrender (TrII 324-326, 338). Deputy Orr-Dodd essentially corroborated Appellant's account, as she did not recall Appellant stepping or attempting to step forward when he lowered his knife (TrI 189), but testified that the quick lowering of the knife was a potential threat under the circumstances, and she fired out of fear for her and Officer Perkinson's safety (TrI 172-173). Appellant submits that Deputy Orr-Dodd's description of the incident did not amount to an assault. Deputy Stockard and Officer Perkinson testified, however, that as Appellant lowered the knife, he also pointed it at the officers and began to step forward (TrI 206-207, 216-217, 226-227, 235, 239-240). Officer Perkinson's credibility was already tenuous, as he admitted that he failed to activate his body camera (TrI 228-229). The varying testimony did not establish Counts 3-5 beyond a reasonable doubt, and it appears that evidence of Appellant's other crimes and bad acts impacted the verdict.

Moreover, the erroneous admission of the irrelevant and prejudicial evidence affected Appellant's sentences. *See Lowery*, 2008 OK CR 26, ¶ 22, 192 P.3d at 1273. For each count, the jury punished Appellant well above the instructed minimums after two or more prior convictions (OR 184-188).

Conclusion. The court plainly erred by permitting evidence that Appellant drank and shot dope every day (State Exh 36C at 1:06:45); sold drugs (TrI 93); and battered Ms. Valero on a previous occasion (TrI 100-101). The improper

evidence denied Appellant his due process right to a fundamentally fair trial. *Dunkle v. State*, 2006 OK CR 29, ¶¶ 49-50, 139 P.3d 228, 245-246; U.S. Const. amend. V, XIV; Okla. Const. art. II, §§ 7, 20. Appellant asks this Court to reverse his convictions and remand the case for a new trial. Alternatively, Mr. Beck requests favorable modification of his sentence.

PROPOSITION IV

THE TRIAL COURT FAILED TO ADEQUATELY INSTRUCT APPELLANT'S JURY.

Standard of Review. Where no objection is made at trial, this Court reviews claims of erroneous jury instructions for plain error. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

Argument and Authorities. Relevant Oklahoma Uniform Jury Instructions shall be given in criminal cases unless the trial court determines that they do not accurately state the law. 12 O.S.2011, § 577.2. Moreover, the trial court must correctly instruct the jury on the salient features of the law raised by the evidence, even without a request by defense counsel. *Wing v. State*, 1955 OK CR 29, ¶ 34, 280 P.2d 740, 747; 22 O.S.2011, § 856.

A. There Was No Instruction About the Limited Use of Other-Crime Evidence.

The State presented evidence that Appellant used drugs intravenously (State Exh 36C at 1:06:45; TrII 307); dealt drugs to Ms. Valero (TrI 93); and headbutted and forced Ms. Valero to kiss him on the evening prior to the charged conduct (TrI 100-101). In Proposition III, Appellant argues that this prejudicial evidence was irrelevant and not used for a valid purpose under 12 O.S.2011, § 2404(B). Since the evidence was admitted, however, the court was required to instruct the jury on its limited use and that it could not be considered as substantive proof of guilt, both contemporaneously and during final instructions. *Kirkwood v. State*, 2018 OK

CR 9, ¶ 5, 421 P.3d 314, 316; see Instruction No. 9-9, OUJI-CR(2d)(Supp. 2000).

The court provided no such instruction at any point.

The error cannot be considered harmless on Counts 1, 3, 4, and 5. For Count 1, the State offered no direct evidence to counter Appellant's sequence of the events (TrI 106, 121-122; TrII 322-323, 359-60; State Exh36C at 1:03:30), arguing only that the circumstantial evidence of his anger showed that kicked the door in prior to grabbing Valero's wrists (TrII 390-392, 400-402, 415-416). For Counts 3-5, there was conflicting evidence, even among the officers, regarding Appellant's movements as he lowered the knife from his own throat (TrI 172-173, 189, 206-207, 216-217, 226-227, 235, 239-240), and Officer Perkinson failed to activate his body camera and record the incident (TrI 228-229). Given the weak evidence on these counts, it appears that the jury, lacking proper guidance, convicted Appellant based on the propensity evidence. A jury must be instructed so as to preclude the possibility that the conviction rests on an incorrect legal basis. *United States v. Zimmerman*, 943 F.2d 1204, 1214 (10th Cir. 1991).

B. The Court Neglected to Instruct on Voluntary Intoxication, Despite Sufficient *Prima Facie* Evidence.

Appellant was drinking vodka on March 25, 2017 (State Exh 45; TrI 95; TrII 344). Appellant claimed he was not in his right mind (TrII 329) and repeatedly indicated that he was intoxicated (TrII 321, 361; State Exh 36C at 10:45, 14:50, 1:06:50). During closing argument, the State acknowledged that Appellant was drunk (TrII 401).

A defense of voluntary intoxication requires that a defendant be so utterly intoxicated that his mental powers are overcome, rendering it impossible for him to form the specific criminal intent element of the offense. *Jackson v. State*, 1998 OK CR 39, ¶ 67, 964 P.2d 875, 892. When sufficient, *prima facie* evidence is presented which meets the legal criteria for the defense of voluntary intoxication, an instruction should be given. *Id.*, 1998 OK CR 39, ¶ 65, 964 P.2d at 892. The evidence can come from any source, and the court should leave the weighing of evidence to the fact finder. *Id.*, 1998 OK CR 39, ¶ 66, 964 P.2d at 892. There was sufficient evidence of Appellant's intoxication to submit this mitigating defense to the jury. *See Bland v. State*, 2000 OK CR 11, ¶ 56, 4 P.3d 702, 719-720 (defining *prima facie* evidence). Instructions thereon were required, *see* Instruction No. 8-35 et seq., OUJI-CR(2d)(Supp. 2010), and the court's omission constituted error.

The erroneous omission prejudiced Appellant, because Count 1 and Counts 3-5 required specific intent, which could be negated by extreme intoxication. *Kreijanovsky v. State*, 1985 OK CR 120, ¶ 9, 706 P.2d 541, 544 (voluntary intoxication is a defense to the mens rea element of a specific intent offense). First Degree Burglary requires "intent to commit some crime therein" 21 O.S.2011, § 1431. *See Wright v. State*, 1979 OK CR 111, ¶ 6, 617 P.2d 1354, 1354 (burglary contains a specific intent element). Assault with a Dangerous Weapon requires an "intent to do bodily harm," 21 O.S.2011, § 645, and is also a specific-intent crime. *Fairchild v. State*, 1999 OK CR 49, ¶ 32, 998 P.2d 611, 619; *James v. State*, 1979

OK CR 82, ¶¶ 4-5, 599 P.2d 411, 412-413; *Luster v. State*, 1987 OK CR 261, ¶¶ 9-10, 746 P.2d 1159, 1160-1161.

Appellant's bizarre behavior on March 25, the evidence of intoxication (TrII 321, 361; State Exh 36C at 10:45, 14:50, 1:06:50), the State's acknowledgment that he was drunk (TrII 401), and Appellant's statement that he was not in his right mind (TrII 329), strongly suggested that the effects of alcohol compromised Appellant's mental powers. If properly instructed about voluntary intoxication, the jury would not have found beyond a reasonable doubt that Appellant had the requisite intents. Due process protects an accused against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970).

C. The Court Failed to Instruct on Breaking and Entering as a Lesser Included Offense of First Degree Burglary, which the Evidence Warranted.

Appellant admitted kicking open Ms. Valero's back door and entering her apartment, but testified that he did so only to retrieve his belongings, i.e., without any intent to commit a crime. Appellant maintained that the incident where he grabbed Ms. Valero's wrists occurred earlier that day, before he dropped his son off (TrII 322-323, 359-360; State Exh 36C at 59:00, 1:03:30). Ms. Valero's neighbor, Terra James, also testified that Appellant left to drop his son off at some point during the day (TrI 141-142). Ms. Valero testified about the broken door and

that Appellant grabbed her wrists, but did not specifically describe the sequence of events (TrI 105-108).⁹ The State argued that circumstantial evidence of Appellant's rage at the time he battered Mr. Rider established that he forced the door open immediately thereafter (TrII 390-392, 400-402, 415-416).

While the evidence was perhaps conflicting, it certainly sufficed to merit a jury instruction for the lesser included offense of Breaking and Entering, where a defendant does not intend to commit an additional crime inside the dwelling. 21 O.S.2011, § 1438(B). This Court rejects a strict elements test and utilizes the "evidence test" for determining whether an offense is lesser included, to wit: whether evidence was presented at trial which would allow a jury rationally to find the accused guilty of the lesser offense and acquit him of the greater. *State v. Tubby*, 2016 OK CR 17, ¶ 7, 387 P.3d 918, 921; *Shrum v. State*, 1999 OK CR 41, ¶ 10, 991 P.2d 1032, 1036.

A reasonable doubt existed on Count 1's element, "with intent to commit an Assault and Battery" on Ms. Valero (OR 178), due to Appellant's provided timeline and the State's lack of evidence on this point. Unfortunately for Appellant, "where one of the elements of the offense is in doubt, but the defendant appears to be guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." *Hubbard v. State*, 1991 OK CR 81, ¶ 5, 817 P.2d 262, 263, citing *Keeble v. United*

⁹At preliminary hearing, Ms. Valero's recollection of March 25 was poor (PH 50-53, 55-57, 59-61).

States, 412 U.S. 205, 213, 93 S.Ct. 1993, 1998, 36 L.Ed.2d 844 (1973). It appears that this happened in the instant case, and the court's omission of a lesser included Breaking and Entering instruction, despite *prima facie* evidence in support thereof, prejudiced Appellant.

Conclusion. The court plainly erred by not providing a limiting instruction for the other crime evidence, and by not *sua sponte* instructing the jury on the voluntary intoxication defense and the lesser included offense of Breaking and Entering. The improper jury instructions denied Appellant his due process right to a fundamentally fair trial. U.S. Const. amend. V, XIV; Okla. Const. art. II, §§ 7, 20; *Reeves v. State*, 1975 OK CR 87, ¶ 11, 535 P.2d 706, 708. This Court may set aside a judgment or grant a new trial where misdirection of the jury has probably resulted in a miscarriage of justice or substantially violated a constitutional or statutory right. 20 O.S.2011, § 3001.1. Appellant asks this Court to reverse his convictions and remand the matter for a new trial. In the alternative, Mr. Beck requests favorable sentence modification.

PROPOSITION V

PROSECUTORIAL MISCONDUCT PREVENTED A FAIR TRIAL.

Standard of Review. It is the responsibility and duty of the prosecuting attorney to use fair, honorable, reasonable, and lawful means to secure a verdict. *Smith v. State*, 1987 OK CR 235, ¶ 7, 744 P.2d 1282, 1285. Prosecutorial remarks that were not met with a contemporaneous objection are reviewed for plain error. *Hogan v. State*, 2006 OK CR 19, ¶ 87, 139 P.3d 907, 934.

Argument and Authorities. During his interview with Agent Gatlin, Appellant said that every day he drinks, smokes, and shoots dope (State Exh 36C at 1:06:50; TrII 307). As argued in Proposition II, Appellant maintains that this irrelevant and prejudicial statement served no valid purpose and should not have been presented to the jury. In its initial closing argument, however, the State emphasized Appellant's statement, while contrasting him to Mr. Rider who the prosecution depicted as a hard working individual:

[Mr. Rider] goes to work every day, he has a job, he provides for his family. You heard Defendant say on the recording [], his day consists of smoking meth, smoking weed and drinking alcohol. That's his everyday routine.

(TrII 399)

The State referenced Appellant's irrelevant comment in order to demonize him and to suggest that he committed the instant charges in conformity with his unsavory character. *See Welch v. State*, 2000 OK CR 8, ¶ 8, 2 P.3d 356, 365. A

prosecutor should not seek to divert the jury from its duty of deciding the case on the evidence. Standard 3-6.8(c), *American Bar Association Standards for Criminal Justice, Prosecution Function* (4th Ed. 2015).

In rebuttal closing argument, the prosecutor told the jury that during deliberations, it should “pray if you have to.” (TrII 420). This Court has condemned that precise phrase. *Hooks v. State*, 2001 OK CR 1, ¶ 52, 19 P.3d 294, 316. The prosecutor attempted to subvert the court’s instructions to the jurors that they should impartially decide the case based on the evidence and not use any method of chance to arrive at a verdict (OR 156, 161).

A criminal defendant has a due process right to a fundamentally fair trial. U.S. Const. amend. V, XIV; Okla. Const. art. II, §§ 7, 20. This Court evaluates prosecutorial misconduct claims by determining whether the challenged comments so infected the trial that it was rendered fundamentally unfair, such that the jury's verdicts cannot be relied upon. *Miller v. State*, 2013 OK CR 11, ¶ 116, 313 P.3d 934, 974. The State’s improper arguments cannot be considered harmless in Counts 1, 3, 4, and 5 where the evidence was underwhelming. In Count 1, the State relied on a dubious theory of circumstantial evidence to support its proposed timeline (TrII 390-392, 400-402, 415-416). In Counts 3-5, the officers did not record the event (TrI 228-229), and there were conflicting accounts among the three officers about Appellant’s actions when he removed the knife from his own throat (TrI 172-173, 189, 206-207, 216-217, 226-227, 235,

239-240). The prosecutor's unseemly comments apparently impacted sentencing as well, as the jury imposed respective terms of 30 years, life, 35 years, 35 years, and 35 years, all far exceeding the instructed minimum punishments after two former convictions (OR 184-188).

Conclusion. "The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial." *McCarty v. State*, 1988 OK CR 271, ¶ 17, 765 P.2d 1215, 1221, quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 648-649, 94 S.Ct. 1868, 1874, 40 L.Ed.2d 431 (1974) (Douglas, J., dissenting). Even absent contemporaneous objections, when prosecutor's conduct taken as a whole crossed the line of acceptable behavior, relief is warranted. *Bell v. State*, 2007 OK CR 43, ¶ 6, 172 P.3d 622, 624. When there is any doubt as to whether or not prosecutorial misconduct affected the trial, the benefit of the doubt should be given to the accused. *Sykes v. State*, 1951 OK CR 154, 95 Okl.Cr. 14, 18, 238 P.2d 384, 388. Prosecutorial misconduct rendered Appellant's trial unfair and undermined confidence in the jury's determination of guilt and punishment. Mr. Beck requests that his conviction be reversed and that the matter remanded for a new trial. Alternatively, Appellant asks this Court to favorably modify his sentence.

PROPOSITION VI

THE TRIAL COURT ABUSED ITS DISCRETION BY ORDERING APPELLANT'S SENTENCES TO BE SERVED CONSECUTIVELY.

Standard of Review. This Court reviews a trial court's decision to run sentences consecutively for an abuse of discretion. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

Argument and Authorities. In Count 1, Appellant was convicted of First Degree Burglary where kicked Ms. Valero's door in (TrI 106, 121-122; TrII 322-323; State Exh 12-16, 66) and grabbed her wrists (TrI 106-107, 116-117, 121; TrII 322, 350, 359; State Exh 36C at 1:01:40). Appellant regularly visited Ms. Valero's home (TrI 93), had sex with her the night before (TrI 101), and had certain belongings in the apartment on March 25 (TrI 119). According to Appellant, he also at one point had a key to the apartment, he frequently interacted with Ms. Valero's children, and she met his son as well (TrII 318; State Exh 36C at 12:00). Ms. Valero claimed she was traumatized by the incident and Appellant grabbing her wrists, but there was no evidence that she sustained any physical injuries (TrI 116-117). The jury assessed a 30-year sentence (TrII 423; OR 192). Appellant must serve 85% of his Count 1 sentence prior to being eligible for parole consideration. 21 O.S.Supp.2015, § 13.1(12).

In Count 2, Appellant was convicted of Aggravated Assault and Battery for beating up Shadow Rider, a man with cerebral palsy (TrI 92-93; 125-126).

Mr. Rider was adept at computers (TrI 125), and Appellant believed that Mr. Rider configured Ms. Valero's phone so that he could spy on her (State Exh 36C at 9:05). Appellant also believed that he was in a relationship with Ms. Valero and was jealous of Mr. Rider (TrI 115; TrII 320-321, 328). At trial, Appellant expressed remorse for hurting Mr. Rider (TrII 321-322, 329). Obviously Appellant's actions in Count 2 cannot be condoned, but Mr. Rider testified that his most serious injury required six stitches (TrI 132). The jury sentenced Appellant to life imprisonment (TrII 423; OR 193).

As discussed in Propositions I and II, Appellant was convicted in Counts 3-5 of Assault with a Dangerous Weapon on three law enforcement officers. While advancing on the officers, Appellant held a knife to his throat and asked them to shoot him (TrI 164, 166, 172, 184, 207, 223-225), before ultimately lowering the knife (TrI 172-173, 189), and by some accounts simultaneously pointing it and stepping forward (TrI 206-207, 235). The officers perceived Appellant's movements as a threat under the circumstances, and Deputy Orr-Dodd shot Appellant twice, inflicting life-threatening injuries (TrI 173; State Exh 58, 59). For Appellant's single act associated with lowering the knife, the jury found him guilty of all three counts and assessed three 35-year sentences (TrII 423-424; OR 194-196).

The court ordered Count 5 to run concurrently with Count 4, but otherwise directed the terms to run consecutively, for a total of life plus 100 years (Sent 3;

OR 218-219). As the punishments were already substantial for the underlying facts, the court abused its discretion by running four of the terms consecutively.

Further, while Appellant had prior convictions, all of the events on March 25, 2017, occurred while appellant was intoxicated (TrI 95; TrII 321, 329, 344, 361, 401; State Exh 45; State Exh 36C at 10:45, 14:50, 1:06:50) within a relatively short period of time. Modification from consecutive to concurrent is warranted where the crimes occurred near the same time and place. *Taylor v. State*, 1971 OK CR 457, ¶ 4, 490 P.2d 1404, 1405. Moreover, Appellant's competency evaluation noted a long history of substance abuse, including huffing from age 10 and using methamphetamine from age 14 (1/11/18 Hr'g Exh 1 p. 4). The evaluation noted that Appellant reported receiving inpatient treatment for numerous mental health issues including depression, suicidality, and schizophrenia (1/11/18 Hr'g Exh 1 p. 4). Appellant raised similar concerns about his mental health in letters to the court (OR 18-24, 27-31, 53-54). Appellant's hospital records indicate that he was on suicide watch (State Exh 59 pp. 1, 3). Mental health issues mitigate against consecutive sentences. *Nelson v. State*, 2001 OK CR 4, ¶¶ 42-43, 21 P.3d 55, 62.

Conclusion. The district court abused its discretion by ordering four of the sentences to run consecutively. Appellant respectfully requests this Court to order concurrent service of his prison terms.

PROPOSITION VII

THE JOHNSTON COUNTY DISTRICT COURT LACKED JURISDICTION OVER A NATIVE AMERICAN DEFENDANT FOR CRIMES ALLEGED IN INDIAN COUNTRY.

Standard of Review. Matters implicating the district court's jurisdiction are never waived and can be raised at any time. *Smith v. State*, 1977 OK CR 317, ¶ 13, 572 P.2d 262, 265-266. Jurisdictional concerns are questions of law, *Buis v. State*, 1990 OK CR 28, ¶ 2, 792 P.2d 427, 428, which require de novo review, *King v. State*, 2008 OK CR 13, ¶ 4, 182 P.3d 842, 843.

Argument and Authorities. The State of Oklahoma does not have jurisdiction over crimes committed by a Native American in “Indian Country.” *State v. Klindt*, 1989 OK CR 75, ¶ 3, 782 P.2d 401, 403. Regardless of the race of the victims (which the instant record does not establish), an Indian committing a major crime, including burglary and felony assault, within Indian County is subject to the exclusive jurisdiction of the United States. 18 U.S.C. § 1153(A).

The record establishes that Appellant is Native American. The competency evaluation refers to Appellant as Native American (1/11/18 Hr’g Exh 1 p. 3). Appellant’s medical records indicate his race as American Indian or Alaska Native (State Exh 58 p. 1). Appellant’s letters to the court refer to his “tribe (the Chickasaw Nation)” (OR 97). Further the Department of Corrections describes Appellant’s race as American Indian. See <https://okoffender.doc.ok.gov/>.

Indian Country includes all land within the limits of any Indian reservation. 18 U.S.C. § 1151(a). The United States Tenth Circuit concluded that the Congress has not disestablished the Creek Reservation and that the exterior boundaries of the 1866 Creek Nation remain intact. *Murphy v. Royal*, 866 F.3d 1164, 1233 (10th Cir. 2017), *amended on denial of reh'g en banc*, 875 F.3d 896 (10th Cir. 2017). The United States Supreme Court granted certiorari, and the case is pending.

While *Murphy* addressed the Creek Reservation, the same rationale would also apply to the other Five Civilized Tribes, as the State of Oklahoma has argued to the Supreme Court:

Moreover, the decision below could extend to the other tribes whose lands collectively constituted Indian Territory. "The history of the removal of the Muskogee or Creek Nation from their original homes to land purchased and set apart for them ... in the territory west of the Mississippi river does not differ greatly from that of the others of the Five Civilized Tribes." *Woodward [v. DeGraffenried]*, 238 U.S. [284,] 293[, 35 S.Ct. 764, 768, 59 L.Ed. 1310 (1915)]. The Five Tribes confronted the same issues that culminated in the allotment of their lands, the dissolution of their governments, and the merger of all their former territory with Oklahoma Territory to form Oklahoma. *Id.* at 293-96. Thus, although details vary from tribe to tribe, the Five Tribes share an overlapping statutory history...

Carpenter v. Murphy, No. 17-1107 (Petition for a Writ of Certiorari, February 6, 2018, p. 17).

Because the Creek Nation's history parallels that of the Choctaw, Chickasaw, Seminole, and Cherokee Nations, the decision below likely renders more than 19 million acres in eastern Oklahoma "Indian country."

Carpenter v. Murphy, No. 17-1107 (Brief for Petitioner, July 23, 2018, p. 2).

[N]o one has identified any reason why this Court's decision would not apply to the other Five Tribes, or how their statutory histories differ in any material respect.

Carpenter v. Murphy, No. 17-1107 (Supplemental Reply Brief for Petitioner, January 11, 2019, p. 9).

Johnston County and the City of Tishomingo are located within the boundaries of Chickasaw Nation. *See Carpenter v. Murphy*, No. 17-1107 (Petition for Writ of Certiorari, February 6, 2018, p. 17 map). See also the Chickasaw Nation's "Geographic Information" page at: <https://www.chickasaw.net/our-nation/government/geographic-information>.

Conclusion. As Appellant is Native American and the alleged offenses occurred in Indian County, the federal government had exclusive jurisdiction. Appellant requests that this Court reverse his conviction.

CONCLUSION

For the reasons and authorities cited herein, Appellant respectfully requests that the Judgment and Sentence of the District Court be reversed. In the alternative, Appellant request this Court to favorably modify his sentences.

Respectfully submitted,

JOSES RIC-E BECK

By: Chad Johnson

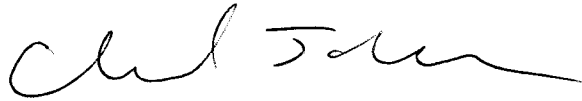
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CERTIFICATE OF SERVICE

This is to certify that on July 31, 2019, a true and correct copy of the foregoing Brief of Appellant was served upon the Attorney General by leaving a copy with the Clerk of the Court of Criminal Appeals for submission to the Attorney General, and a copy was caused to be mailed, via United States Postal Service, postage pre-paid, to Appellant at the address set out below, on the date of filing or the following business day.

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