IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SHEILA DIANE ROYAL,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F-2010-99
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

A. JOHNSON, PRESIDING JUDGE:

Appellant Sheila Diane Royal was tried by jury in a trifurcated proceeding in the District Court of Tulsa County, Case No. CF-2007-3606.[1] The jury convicted Royal of the following felony offenses: Trafficking in Illegal Drugs (Count I), in violation of 63 O.S.Supp.2004, § 2-415, Possession of Firearm, After Former Conviction of a Felony (Count III), in violation of 21 O.S.Supp.2007, § 1283, Unlawful Possession of Marijuana, Second Offense (Count IV), in violation of 63 O.S.Supp.2004, § 2-402, and Failure to Obtain Drug Tax Stamp (Count V), in violation of 68 O.S.2001, § 450.8.[2] The jury found that Royal was an habitual offender – that she had been convicted of two

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[1] All charged offenses, except the firearms possession offense in Count III, were tried to guilt or innocence in Stage 1. Stage 2 was devoted to determining Royal's guilt or innocence on the firearms possession offense in Count III. And, Stage 3 of the trial was devoted to considering Royal's prior convictions for the purpose of sentence enhancement and fixing punishment.

[2] The State dismissed Count II in the second amended Information filed the morning trial began. Due to the dismissal of Count II, the charges were presented to the jury as Counts I through V. In the Judgment and Sentence documents, the counts were numbered as they were filed (Counts I, III, IV, V and VI). For purposes of this opinion, we will refer to the counts as they were numbered in the Information and Judgment and Sentence documents.

or more felonies in the past – and enhanced her punishment. The jury also convicted Royal of misdemeanor Unlawful Possession of Paraphernalia (Count VI), in violation of 63 O.S.Supp.2004, § 2-405.[3] The jury set punishment at life imprisonment without the possibility of parole and a $25,000 fine on Count I, five years imprisonment on Count III, two years imprisonment on Count IV, four years imprisonment on Count V, and one year in the county jail on Count VI. The Honorable Kurt G. Glassco, who presided at trial, sentenced Royal accordingly and ordered the sentences to be served concurrently. From this Judgment and Sentence Royal appeals, raising seven claims of error. We affirm all of Royal's convictions, but modify her sentence for misdemeanor possession of drug paraphernalia because her trial was erroneously bifurcated on that charge.

FACTS

On June 29, 2007, three Tulsa police officers went to a house occupied by Royal and Darius Payne, her boyfriend and co-defendant, to execute an arrest warrant for Felix Oliver. Several of Oliver's warrants listed the home's address and a car registered to Oliver was parked in front of the house. Royal answered the door and told the officers that she did not know Oliver and he did not live there. Payne came to the door within minutes, produced identification and reiterated to the officers that he did not know Oliver and that he was not inside. Both Payne and Royal gave consent for the officers to look around the house to confirm the absence of Oliver. Payne led two of the officers into the

[3] Royal was charged conjointly with Darius Darrell Payne. The two were tried together. Payne appeals his convictions separately in Case No. F-2010-131.

master bedroom. One of the officers looked underneath the bed and saw a set of scales and baggies. He looked around and saw rocks of cocaine base (known as crack cocaine) in plain view on the dresser and floor below it. A baggie containing marijuana was also on the dresser. The officer immediately arrested Payne and handcuffed him. Before placing Payne on the bed to wait for the evidence to be recovered, one of the officers patted the bedcovers for safety reasons and felt a gun. Underneath the blankets was a .380 Lorcin pistol, $5,154.00 in cash and more crack cocaine. The officers collected the evidence from the bed and dresser. No tax stamp was affixed to the crack cocaine. The combined weight of the crack cocaine collected was in excess of five grams.

DISCUSSION

1.
MULTIPLE PUNISHMENT AND DOUBLE JEOPARDY

Royal argues that her convictions on Counts I and V for trafficking in cocaine base and failing to obtain a tax stamp for the drugs violate the statutory prohibition against multiple punishment found in 21 O.S.2001, § 11 and the federal and state constitutional prohibition against double jeopardy. Royal did not raise these claims in the district court. Under *Logsdon v. State,* 2010 OK CR 7, ¶ 15, 231 P.3d 1156, 1164, the claims are waived and review is for plain error only.

In Count I Royal was convicted of trafficking cocaine base and in Count V she was convicted of failing to obtain a tax stamp for the same cocaine base. We consider Royal's Section 11 claim first. *See Mooney v. State,* 1999 OK CR 34, ¶ 14, 990 P.2d 875, 882-83 (holding that traditional double jeopardy

analysis is conducted only if Section 11 does not apply). Royal asserts that her convictions and sentences on Counts 1 and 5 arose out of a single act of possessing a certain quantity of cocaine base. According to Royal, these two convictions violate Section 11 because Section 11 prohibits prosecution of more than one crime if the crimes arise out of a single act.[4]

Our analysis of a Section 11 claim focuses on the relationship between the crimes. *Logsdon,* 2010 OK CR 7, ¶ 17, 231 P.3d at 1165. Where the crimes "'truly arise out of one act,' Section 11 prohibits prosecution for more than one crime, *absent specific legislative intent*" (emphasis added). *Watts v. State,* 2008 OK CR 27, ¶ 16, 194 P.3d 133, 139; *Davis v. State,* 1999 OK CR 48, ¶¶ 12-13, 993 P.2d 124, 126-127. If the legislature intended cumulative punishments or if the criminal acts are separate and distinct, there is no multiple punishment violation under Section 11. *See Logsdon,* 2010 OK CR 7, ¶ 17, 231 P.3d at 1165 (Section 11 is not violated where there is a series of separate and distinct acts).

Royal was convicted of trafficking drugs for her knowing possession of more than five grams of crack cocaine. She was convicted of failing to obtain a tax stamp for possessing a quantity of crack cocaine in excess of seven grams without affixing the appropriate tax stamp. She is being punished for an act of commission (the knowing possession of cocaine base) and an act of omission

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[4] The pertinent part of § 11 states:

[A]n act or omission which is made punishable in different ways by different provisions of this title may be punished under any of such provisions, ... but in no case can a criminal act or omission be punished under more than one section of law.

21 O.S.2001, § 11.

(failing to obtain a tax stamp) involving the same drugs. There is no Section 11 violation here because the legislature has expressed an intent to provide separate punishments for a violation of the Oklahoma Drug Tax Stamp Act (hereafter Tax Act), 68 O.S.2001, §§ 450.1-450.9, and any drug offense committed by a drug dealer.

The Tax Act applies to a "dealer" and requires a "dealer" to pay a tax and affix a stamp evidencing payment of said tax on controlled dangerous substances within Oklahoma. 68 O.S.2001, §§ 450.2 and 450.3. A "dealer" is defined as a person who "in violation of the Uniform Controlled Dangerous Substances Act manufactures, distributes, produces, ships, transports, or imports into Oklahoma or in any manner acquires or possesses ... seven or more grams of any controlled dangerous substance...." 68 O.S.2001, § 450.1(2). It is clear from this statutory language that when the legislature created penalties for the crime of failure to obtain a drug tax stamp, the legislature recognized that the additional drug tax stamp penalties would apply to one who was simultaneously in violation of, and subject to the penalties of, the earlier enacted Uniform Controlled Dangerous Substances Act. Further support that the legislature intended a violation of the Tax Act to be in addition to other punishments is found in 68 O.S.2001, § 450.8(C) which provides: "Nothing in this Act may in any manner provide immunity for a dealer from criminal prosecution pursuant to Oklahoma law." This section makes clear that compliance with the tax stamp requirements does not insulate a dealer who possesses or distributes a taxable substance from prosecution or conviction

under Oklahoma law. Because the legislature intended to provide separate punishments for violations of the Tax Act and other drug crimes, Royal's Section 11 claim is rejected.

In her multiple punishment claim under the federal and Oklahoma Double Jeopardy Clauses, Royal argues that she cannot be convicted of drug trafficking because it is a lesser offense of failing to affix a tax stamp. She bases this argument on the fact that the elements required for "trafficking" under § 2-415 are the same as for the offense of failing to affix the proper tax stamp under §§ 450.1-450.9, except the tax stamp offense requires the added element of requiring a tax stamp to be affixed. Because the elements are almost identical and drug trafficking has fewer elements than failing to affix a tax stamp, Royal claims her trafficking conviction should be dismissed based on the theory that it merged into her tax stamp conviction when the greater number of elements were proved.

In *White v. State,* 1995 OK CR 15, ¶¶ 3-4, 900 P.2d 982, 995-96, this Court briefly addressed on rehearing the double jeopardy consequences involved when the defendant was convicted of both a § 2-415 trafficking violation and a § 450 tax stamp violation. While we did not discuss the legislature's intent as to the cumulative nature of the punishments, we did explicitly hold that "where a defendant is punished for both failing to pay a drug tax and committing a drug offense, all in the same proceeding, no Double Jeopardy problem exists." *Id.* at ¶ 4, 900 P.2d 996 (relying on *Department of*

Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 784, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994)).

The Tenth Circuit Court of Appeals considered and rejected a multiple punishment claim identical to Royal's in *Dennis v. Poppel*, 222 F.3d 1245, 1255-58 (10th Cir.2000). The court's reasoning in that case is consistent with our decision in *White* and our analysis of multiple punishment claims outlined in *Davis*, 1999 OK CR 48, ¶ 13 n. 5, 993 P.2d at 127 n. 5. The Tenth Circuit focused on whether the Oklahoma legislature intended cumulative punishment for such convictions rather than on the elements of the two crimes. *See Dennis*, 222 F.3d at 1255 *citing Missouri v. Hunter*, 459 U.S. 359, 368-69, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983). "If the legislature intended cumulative punishments for both violations and the sentences are imposed in the same proceeding, no double jeopardy violation arises." *Id.* "This is true 'regardless of whether [the] two statutes proscribe the 'same' conduct under [the] *Blockburger* [test,]' which we apply when the legislative intent is unclear." *Id. quoting, Hunter*, 459 U.S. at 368-69, 103 S.Ct. at 679.

The Tenth Circuit concluded, as we did above, that the Oklahoma legislature clearly intended the punishment for the statutory offense of failure to affix tax stamps to be in addition or cumulative to the punishment for the statutory trafficking offense found in the Oklahoma Uniform Controlled Dangerous Substance Act. *Dennis*, 222 F.3d at 1255. The imposition of cumulative punishment intended by the legislature does not result in a double jeopardy multiple punishment violation. *Id.* at 1256. For the reasons expressed

in *White* and *Dennis*, we conclude no double jeopardy issue arose when Royal received cumulative punishments in the same proceeding for the tax stamp and trafficking offenses.

Royal also claims that trial counsel was ineffective for failing to raise a multiple punishment claim in the trial court. Because there is no multiple punishment violation, defense counsel cannot be faulted for failing to raise the issue. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

2.
Unlawful Possession of Marijuana-Second Offense

Royal argues the trial court directed a verdict of guilty on her conviction for felony possession of marijuana without requiring the jury to find that she had a prior drug-related conviction. We will review this claim for plain error because Royal did not object at trial to the jury instruction and verdict form she now challenges. *Hogan v. State,* 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

A first conviction for unlawful possession of marijuana or any other Schedule III, IV or V controlled drug is a misdemeanor. 63 O.S.Supp.2004, § 2-402(B)(2). A second or subsequent conviction for unlawful possession of these controlled substances is a felony. 63 O.S.Supp.2004, § 2-402(B)(2). The State charged Royal with unlawful marijuana possession – second offense because of her four alleged prior convictions for unlawful possession of a controlled substance. (State's Exhibits 31-34) The court submitted the charge in the first stage of trial, instructing the jury that it could convict Royal of unlawful possession of marijuana if the State proved beyond a reasonable

doubt: (1) knowing and intentional; (2) possession; (3) of the controlled dangerous substance of marijuana. The jury returned a guilty verdict without hearing any evidence regarding prior convictions. In the third stage of trial, the trial court instructed the jury that the punishment for possession of a controlled drug – second offense "after 1 or more previous convictions" was imprisonment for two to ten years and a fine of up to $1,000. The court also instructed that the punishment range for possession of a controlled drug – second offense without a previous conviction was up to one year in the Tulsa County Jail and a fine of up to $1,000.

The bifurcation procedure used in this case for felony unlawful possession of marijuana was sanctioned in *Gamble v. State,* 1988 OK CR 41,¶¶ 5-6, 751 P.2d 751, 753. The *Gamble* court held that it was reversible error to admit the defendant's prior conviction for marijuana possession in the first stage of trial because the prior conviction is not an element of the offense [of felony marijuana possession], "but instead, [is] pertinent only for the purpose of enhancement of punishment." *Id.* at ¶ 6, 751 P.2d at 753. The district court's use of the approved bifurcation procedure in this case defeats Royal's claim that the trial court improperly directed a verdict on this charge. The wording of the trial court's instruction on punishment comported with similar enhancement instructions providing a range of punishment if prior convictions are proven and a range of punishment if prior convictions are not proven. The instruction here did not usurp the exclusive province of the jury as trier of fact; rather, the instruction allowed the jury to decide if Royal had a prior conviction

(the distinguishing factor between felony and misdemeanor marijuana possession) and fix her punishment based on the existence of any prior convictions. This claim is denied.

Royal claims that trial counsel was ineffective for failing to object to the instruction or submit a proper instruction in the trial court. Because the instruction adequately stated the applicable law, defense counsel cannot be faulted for failing to object or submit other instructions. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

3.
Bifurcation

Royal correctly argues that the trial court improperly bifurcated her trial on the charge of misdemeanor Possession of Paraphernalia. The jury considered Royal's guilt or innocence of the charge in Stage 1 and fixed punishment in Stage 3. The bifurcation of this charge allowed the jury to hear evidence of her purported four prior convictions – evidence not relevant to punishment for a misdemeanor – before imposing sentence.[5] *See Perryman v. State*, 1999 OK CR 39, ¶ 13, 990 P.2d 900, 905 (bifurcation is not required for unenhanced charges).

According to Royal, prejudice is evident because the jury assessed the maximum penalty for the misdemeanor. We agree. It is difficult to conclude that the jury was not influenced in its sentencing decision on this

[5] The State maintains that the bifurcation was proper, arguing possession of paraphernalia may be enhanced with prior convictions under 63 O.S.Supp.2004, § 2-405. Section 2-405 provides for an enhanced fine for a second, third or subsequent offense of § 2-405. The crime is not otherwise subject to enhancement provisions. Because there was no evidence that Payne had a previous conviction for a violation of § 2-405, the issue of punishment should have been submitted in the first stage of trial.

misdemeanor offense by the substantial evidence of prior convictions. As such, we find the appropriate remedy is to modify Royal's sentence for unlawful possession of paraphernalia from one year in the county jail to three months in the county jail. *Perryman,* 1999 OK CR 39, ¶ 15, 990 P.2d at 905; 22 O.S.2001, § 1066.

4.
Jury Selection

Royal contends that the district court erred in excusing, over objection, two potential jurors for cause. A district court's ruling on a challenge for cause is reviewed for an abuse of discretion. *See Harmon v. State,* 2011 OK CR 6, ¶ 22, 248 P.3d 918, 931.

The district court removed Panelist L.R. for cause because she had an outstanding warrant for her arrest in relation to a misdemeanor case and an outstanding application to revoke a suspended sentence. It appears from the discussion on the matter that the warrant may have been issued in error. Regardless, the warrant had been issued and the trial court judge in this case was without time and procedures to resolve the matter during the jury selection portion of Royal's trial.[6] The pending criminal action and outstanding warrant against L.R. filed by the same district attorney's office involved in Royal's case called into question the panelist's fitness to serve and ability to be fair. The removal for cause of panelist L.R. under these circumstances was not an abuse of discretion.

[6] The district court released L.R. from jury service for the term so she could report to the court handling the application to revoke and get the matter resolved.

The district court removed Panelist H.E. for cause because he failed to disclose prior convictions for driving under the influence. When information about one of the convictions was discovered by the prosecutor and H.E. was questioned individually by the trial court judge, he admitted that he failed to disclose three prior convictions for driving under the influence. He claimed that he was confused about the need for disclosure because the trial court judge asked about crimes excluding traffic offenses. The record shows that the judge had asked early on, "Have any of you [panelists] ever been charged with or accused of a crime? Now I'm not talking about speeding tickets." The question prompted two other panelists to disclose driving under the influence convictions in H.E.'s presence while he said nothing. It was H.E.'s failure to disclose after other panelists had done so that caused the trial court judge to question H.E.'s candor and fitness to serve and ultimately excuse him for cause.

This Court has affirmed the removal for cause of panelists for similar reasons. *See Harris v. State,* 2004 OK CR 1, ¶ 24, 84 P.3d 731, 744 (district court did not abuse discretion in removing a panelist who failed to disclose pending criminal charges and a panelist who failed to disclose a prior conviction). The *Harris* court stated, "[i]f the trial court even suspects that any given prospective juror is not qualified to serve, it should excuse that person from the panel." *Id.* We find, as we did in *Harris,* that Royal has failed to show that she was denied a fair trial or an impartial jury by the removal of these prospective jurors. She had no vested right to have a particular juror out of a

panel and her right is that of objection rather than that of selection. *Id.* The trial court made the necessary record to support its decision. We find no abuse of discretion.

5.
Ruling Restraining Defendant during Trial

Royal claims that the district court erred in requiring her to wear a shock device during trial because there was no evidence she had engaged in disruptive behavior in court or intended to engage in such behavior.

Title 22 O.S.2001, § 15 provides:

> No person can be compelled in a criminal action to be witness against himself; nor can a person charged with a public offense be subjected before conviction to any more restraint than is necessary for his detention to answer the charge, and *in no event shall he be tried before a jury while in chains or shackles* (emphasis added).

In *Sanchez v. State,* 2009 OK CR 31, ¶ 30, 223 P.3d 980, 993, we found that Section 15 removed the discretionary, common-law authority to restrain a defendant before the jury at trial. "Section 15 imposes a strong presumption against such restraint, which can be overcome only by evidence on the record of a defendant's disruptive or aggressive behavior in court or an expressed or implied intention to engage in such behavior." *Id.* The Court in *Sanchez* identified the findings necessary to justify the use of some form of restraint on a defendant during trial:

> Before ordering that any defendant be tried before a jury restrained by a shock sleeve, shackles, or any other form of physical restraint, the District Courts in future cases must make a specific finding on the record that the defendant has engaged in disruptive or aggressive behavior in connection with the proceedings, or made an express or implied threat to disrupt the proceedings or

> endanger public safety during the trial. The Court must further specify the facts supporting this conclusion and demonstrating that restraint of the defendant during the trial is necessary to prevent the disruptive or threatening behavior.

Sanchez, 2009 OK CR 31, ¶ 34, 223 P.3d at 994.

The record shows that the State twice moved to have Royal tried in restraints. According to the parties, the State's first motion was denied after a *Sanchez* hearing.[7] At the *Sanchez* hearing on the second motion, the prosecutor informed the trial court that a deputy had heard Royal say that her husband and co-defendant, Darius Payne, was already serving a life sentence and would be very upset if he got another life sentence. Royal then said "something about running." The same deputy heard Payne questioning another deputy about an inmate who had escaped during his jury trial. Defense counsel for Royal argued in opposition to the use of any kind of restraint, maintaining the alleged statement about running could not be construed as evidence of a threat to disrupt the proceedings during the trial because the deputy did not hear the entire statement to put it in context. Defense counsel also pointed out that Royal's physical condition prevented her from "running anywhere." Defense counsel argued that Royal had been neither disruptive or aggressive in the past nor threatened to be disruptive during the upcoming proceedings. In response, the prosecutor noted that Royal had had several mistrials and the court's interest in proceeding smoothly should prevail.

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[7] A transcript of the hearing on the first motion is not a part of the record before us. It appears from the motion itself that the request was based on the nature of the current charges, the fact that Royal was in custody and the fact that she was already serving a sentence for another conviction.

There was no assertion or evidence, however, that the mistrials were in any way attributed to misbehavior by Royal. The district court confirmed with deputies that the device would be worn around the calf and would not be visible unless Royal wore a dress. The district court ordered Royal to wear the device, but only after one of the deputies consulted with a medical officer regarding Royal's diabetic condition.

The record does not contain the specific findings contemplated under *Sanchez.* There was no evidence that Royal had engaged in disruptive or aggressive behavior in connection with the proceedings or had made an express threat to disrupt the proceedings or endanger public safety during the trial. To find that a statement "something about running" amounted to some expressed or implied threat to escape given the lack of context is not justified. We find the record made here lacks the necessary factual justification sufficient to justify the district court's decision to order Royal restrained with a shock device in this case.

We must now decide if relief is required because violations of Section 15 are not reversible error per se. *Sanchez,* 2009 OK CR 31, ¶ 35, 223 P.3d at 994. This Court has declined to reverse convictions for violations of Section 15 when the restraint was not visible to the jury and there is no claim or evidence the restraint prevented the defendant from assisting his attorney. *See Sanchez,* 2009 OK CR 31, ¶ 36, 223 P.3d at 995; *Ochoa v. State,* 2006 OK CR 21, ¶ 32, 136 P.3d 661, 670; *Phillips v. State,* 1999 OK CR 38, ¶ 55, 989 P.2d 1017, 1034. Royal neither alleges nor presents evidence that the shock device was

visible to the jury. Nor does she allege or present evidence that the device interfered with her ability to participate in her trial or consult with counsel. Hence, we find relief is not warranted because Royal has not proven this error had a substantial influence on the outcome of the proceeding.

6.
Scrivener's Errors

The parties agree that Royal's Judgment and Sentence for failure to obtain a tax stamp indicates a violation of the wrong section of Title 68 and that her Judgment and Sentence for possession of paraphernalia incorrectly indicates that Royal is guilty of a felony, rather than a misdemeanor. An order *nunc pro tunc* is the appropriate vehicle to correct these errors. *See Demry v. State,* 1999 OK CR 31, ¶ 22, 986 P.2d 1145, 1148-49. Royal's Judgment and Sentence for failure to obtain a tax stamp should be corrected through an order *nunc pro tunc* to show a violation of 68 O.S.2001, § 450.8. Royal's Judgment and Sentence for possession of paraphernalia should be corrected through an order *nunc pro tunc* to reflect conviction for a misdemeanor rather than a felony.

7.
Cumulative Error

Royal asks this Court to consider the impact of the errors cumulatively if no individual error warrants relief because of insufficient prejudice. "Cumulative error, however, does not deprive the defendant of a fair trial when the errors considered together do not affect the outcome of the proceedings." *Hanson v. State,* 2009 OK CR 13, ¶ 55, 206 P.3d 1020, 1035, *cert. denied,*

___U.S.___, 130 S.Ct. 808, 175 L.Ed.2d 568 (2009). Royal's claims other than the claim pertaining to bifurcation error in Proposition III, neither individually nor collectively, warrant relief.

DECISION

The Judgment and Sentence of the District Court on Counts I, III, IV and V is **AFFIRMED.** Royal's conviction on Count VI is **AFFIRMED;** the sentence, however, is **MODIFIED** from one year in the county jail to three months in the county jail. We **REMAND** to the district court to correct the Judgment and Sentence documents on Count V by an order *nunc pro tunc* to reflect that failure to obtain a tax stamp is a violation of 68 O.S.2001, § 450.8 and to correct the Judgment and Sentence documents on Count VI by an order *nunc pro tunc* to reflect conviction for a misdemeanor rather than a felony. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE KURT G. GLASSCO, DISTRICT JUDGE

APPEARANCES AT TRIAL
SHARON K. HOLMES
1331 S. DENVER AVE.
TULSA, OK 74119
ATTORNEY FOR DEFENDANT

STEPHANIE MILBURN
ASSISTANT DISTRICT ATTORNEY
500 S. DENVER
TULSA, OK 74103
ATTORNEY FOR STATE

APPEARANCES ON APPEAL
WYNDI THOMAS HOBBS
P. O. BOX 926
NORMAN, OK 73070
ATTORNEY FOR APPELLANT

E. SCOTT PRUITT
OKLAHOMA ATTORNEY GENERAL
JENNIFER L. STRICKLAND
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR APPELLEE

OPINION BY: A. JOHNSON, P.J.
LEWIS, V.P.J.: Concur in Results
LUMPKIN, J.: Concur
C. JOHNSON, J.: Concur in Results
SMITH, J.: Concur

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