IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BOBIE TROY FRYE,	)	
	)	**NOT FOR PUBLICATION**
Appellant,	)	
vs.	)	**No. F-2009-998**
	)	**FILED**
THE STATE OF OKLAHOMA,	)	IN COURT OF CRIMINAL APPEALS STATE OF OKLAHOMA
	)	
Appellee.	)	MAY - 5 2011

SUMMARY OPINION MICHAEL S. RICHIE CLERK

SMITH, JUDGE:

Bobie Troy Frye, Appellant, was tried by jury and convicted of Sexual Abuse of a Child, under 10 O.S.Supp.2002, § 7115(E) (Counts I, II, III, V, & XIV), Procurement of Child for Pornography, under 21 O.S.2001, § 1021.2 (Counts VI & VII), and Possession of Child Pornography, under 21 O.S.2001, § 1024.2 (Counts VIII and XI), in the District Court of Oklahoma County, Case No. CF-2008-5527.[1] In accord with the jury verdict, the Honorable Twyla Mason Gray, District Judge, sentenced Frye to imprisonment for Life on Counts I and II, to imprisonment for 30 years plus 1 day on Counts III and V, to imprisonment for 20 years on Counts VI, VII, and XIV, and to imprisonment for 5 years on Counts VIII and XI, all run consecutively.[2] The Honorable Twyla Mason Gray also ordered Frye to pay a fine of $1000.[3] Frye is before this Court on direct appeal.

Frye raises the following propositions of error:

I. THE TRIAL COURT ERRED IN PRECLUDING DEFENSE COUNSEL FROM QUESTIONING PROSPECTIVE JURORS CONCERNING THEIR ABILITY TO FOLLOW THE LAW REGARDING THE APPROPRIATE RANGE OF PUNISHMENT.

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[1] The remaining counts charged against Frye were dismissed prior to trial.

[2] This Court notes that Counts I, II, III, V, VI, VII, and XIV are subject to the "85% Rule" for the serving of Frye's sentence, under 21 O.S. Supp.2002, § 13.1.

[3] The $1000 fine, which was not imposed by the jury, is challenged in Proposition III. Frye was also ordered to pay costs, fees, and a Victim's Compensation Assessment of $405.

II. THE TRIAL COURT ERRED IN FAILING TO GIVE THE "NO-ADVERSE-INFERENCE" INSTRUCTION WHICH WAS REQUESTED BY THE DEFENSE.

III. THE TRIAL COURT'S IMPOSITION OF A MONETARY FINE WAS INCONSISTENT WITH THE JURY'S VERDICTS AND IS NOT AUTHORIZED BY LAW.

In Proposition I, Frye challenges both the 30-minute time limit that the trial court established for each party's individual voir dire and the court's refusal to let defense counsel question potential jurors about their ability to consider the entire sentencing range at issue for the crimes charged in the case.[4] Frye properly preserved these claims at trial. Hence this Court will review the trial court's limitations on both the extent of voir dire and the topics that could be addressed for an abuse of discretion.[5]

In *Parker v. State*, 2009 OK CR 23, 216 P.3d 841, this Court noted that "the purpose of voir dire is two-fold: to enable the seating of an impartial jury, by revealing bias and grounds to challenge particular prospective jurors for cause, and to afford the parties with adequate information to permit the intelligent exercise of peremptory challenges."[6] We also recognized that "imposing specific time limits, and in particular, short time limits, on voir dire questioning in a criminal trial . . . raises the very real possibility of prejudicing a defendant's right to a fair jury selection process, a fair trial, and a fair sentencing."[7] How much time is "enough" for an adequate voir dire will vary from case to case and is affected by both the nature of the crime(s) charged in the case, which is known before trial, and what

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[4] This Court notes that because Frye did not have any prior convictions, there was no separate "sentencing stage" in his trial.

[5] *See, e.g., Littlejohn v. State*, 2004 OK CR 6, ¶ 49, 85 P.3d 287, 301 ("We have consistently found that the manner and extent of voir dire rests within the discretion of the trial court.").

[6] *Parker*, 2009 OK CR 23, ¶ 18, 216 P.3d at 847 (citations omitted).

[7] *Id.* at ¶ 20, 216 P.3d at 847. Although *Parker* was tried as a capital case and this Court noted that strict limitations on voir dire are particularly dubious in capital cases, *see id.*, *Parker* did not limit its analysis to either capital cases or murder cases.

actually occurs during voir dire, which cannot be known before trial. Hence the trial court must ensure that any time limit placed on voir dire is reasonable at the outset, in terms of the nature and complexity of the case and the crimes and facts at issue, *and* the court must be willing to adjust or extend the time allowed in the event that specific juror answers or other circumstances make clear that the pre-established time limit turns out to be inadequate.

Ultimately, the trial court must ensure that any limits placed on the extent or content of voir dire do not unfairly impact the defendant's right to a fair jury and a fair trial or the ability of defense counsel to represent the defendant effectively.[8] The key question is whether the total voir dire allowed, including the court's own voir dire, is broad enough, both in length and content, to afford the defendant a jury that is free of outside influence, bias, and personal interest and to provide defense counsel a reasonable opportunity to determine that this is so.[9] In the current case, the trial court established both a time limit (30 minutes) and a content limit (no discussion of sentencing ranges). According to the trial judge's remarks, defense counsel was allowed to go 10 minutes over the 30-minute time limit.[10] Yet the court did not allow counsel to ask any further questions after 40 minutes or to ask

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[8] *See, e.g., Romano v. State*, 1993 OK CR 8, ¶ 10, 847 P.2d 368, 375 ("The jury trial system is founded on the impartiality of a body of peers selected by counsel. Voir dire is the procedure designed to give a criminal defendant the opportunity to explore the opinions and personal knowledge of potential jurors who may ultimately decide his fate."); *Warner v. State*, 2006 OK CR 40, ¶ 16, 144 P.3d 838, 859 ("It is the duty of defense counsel to investigate on *voir dire* those matters [that] affect a venireman's qualifications to sit as a juror.").

[9] *Patton v. State*, 1998 OK CR 66, ¶ 9, 973 P.2d 270, 280 ("There is no abuse of [] discretion so long as the voir dire questioning is broad enough to afford the Appellant a jury free of outside influence, bias or personal interest."); *Warner*, 2006 OK CR 40, ¶ 15, 144 P.3d at 859 ("Depriving defense counsel of information that could lead to the intelligent exercise of a peremptory challenge is a denial of an appellant's right to a fair and impartial jury.").

[10] This Court notes that defense counsel's entire voir dire is contained in 30 transcript pages.

any questions at all about the ability of prospective jurors to consider the entire sentencing ranges potentially applicable to Frye's case.

This case involved nine separate counts, including five counts alleging different kinds of sexual abuse of the child victim, two counts of involving the child victim in the production of child pornography, and two counts of possession of other child pornography, which was found on the defendant's laptop computers. The court's own voir dire took most of the first day of trial.[11] A number of potential jurors expressed concerns during the court's voir dire about their ability to be fair and impartial and to presume the defendant innocent in a case about molestation and sexual abuse of a child. In addition, two potential jurors acknowledged (in open court) that they had been sexual abuse victims themselves as children and were struck from the panel by the court, and another was dismissed after bursting into tears at the bench. This Court finds that in such a case, a 30-minute time limit for individual party voir dire is not reasonably calculated to allow the parties adequate examination of prospective jurors to reveal actual bias (sufficient for a for-cause challenge) or enough information (including potential bias) to allow counsel for the parties to intelligently exercise their peremptory challenges. Consequently, this Court finds that in the circumstances of this case, the 30-minute time limit established by the trial court was an abuse of discretion.

Yet the Court cannot ignore the choices made by defense counsel in this case, in terms of using the time provided for voir dire. Rather than following up on

[11] The court's voir dire covered the basic questions on a wide range of topics, including personal connections to the defendant, victim, attorneys, or witnesses; the need for impartial jurors and the presumption of innocence; prior jury service; connections to law enforcement; prior arrests/accusations; and potential jurors' employment and family information.

possible areas of concern raised by questions of the trial court—*e.g.*, potential jurors who had expressed concern about their ability to be fair in a case involving child molestation—or asking specific, pointed questions, defense counsel essentially stuck with her "script" of broad, open-ended questions, which she had filed with the court. Also, potential jurors struggled to understand and answer some of defense counsel's questions. Hence counsel's failure to glean as much information as she might have from the panel was the result of her own choices regarding voir dire, not simply the court's time restriction—which the court did not strictly enforce.

This Court notes that the only area that defense counsel specifically noted at trial that she still wanted to inquire about, but was not allowed to cover during voir dire, is the punishment range issue discussed below.[12] This Court further notes that Frye does not cite any specific concerns about particular potential jurors in his case that his counsel was not allowed to address due to the time limitation, nor does he claim that any of the jurors who actually sat during his trial were biased or not impartial. Under these circumstances (and as further explained below), this Court finds that the time limit imposed by the trial court on defense counsel's voir dire (in effect, 40 minutes) did not, in fact, prejudice Frye, did not render his trial unfair, did not result in an unfair or biased jury, nor did the time limitation render his counsel ineffective. Consequently, this Court finds that although the 30-minute time limit established by the trial court was unreasonable and an abuse of discretion, the actual effect of this time limit, which was not strictly enforced, was harmless beyond a reasonable doubt.

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[12] Frye likewise does not list any other specific areas within his appeal that the time limitation prevented his counsel from addressing at trial.

Frye also challenges the trial court's refusal to allow prospective jurors to be informed of and questioned about the sentencing ranges at issue in the case. Even though defense counsel reminded the trial court that the current "OUJI on introductory instructions tells the Court that the Court is supposed to tell them what the maximum punishment is,"[13] the trial court did not use this introductory uniform instruction or provide any information about the sentence ranges for the crimes charged in the case. Instead, the court simply told prospective jurors that it would talk to them about punishment later and asked whether potential jurors would "impose the sentence that's appropriate based on the facts and the law."

This Court has not previously addressed whether, in non-capital cases, the parties have a right to inform prospective jurors about what sentences are potentially at issue in a case or the right to question prospective jurors about their ability to consider the entire sentencing range for any crimes upon which the defendant could be convicted. In the capital context, the right of the parties to question potential jurors about their ability to consider all of the legally authorized punishments for first-degree murder, including the minimum sentence of "life," is

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[13] Oklahoma's OUJI-CR(2d) 1-5 lists 14 questions that the trial court is supposed to ask prospective jurors. Question 12 contains two options, one for capital cases and one for non-capital cases in which there will not be a second stage. In cases where the death penalty is not at issue and there is no "after former conviction" charge, the court is to instruct/ask as follows:

> Another instruction I will give is that as jurors, if you find the **defendant(s)** guilty, you will have the duty to assess punishment. The punishment for the crime of **[Name the Crime Charged]** is a possible maximum punishment of **(a term in the State Penitentiary for [possible maximum years in Penitentiary])/(a term in the County Jail for [possible maximum jail term]) and/or [a fine of (possible maximum fine)]**.
>
> If selected as a juror and you find the defendant(s) guilty, will each of you assess punishment in accordance with the law?

OUJI-CR(2d) (Supp. 2008) 1-5 (Question 12, Alternate 1 (No Death Penalty)). This portion of Question 12 has existed in this same form since the Second Edition of Oklahoma's Uniform Jury Instructions—Criminal took effect on August 1, 1996.

well established, as is the necessity of each juror being able to consider the entire range of these legally authorized penalties.[14] Yet neither Frye nor the State has cited any authority to this Court regarding whether this line of authority applies equally in the non-capital context. This Court finds that this is an issue of first impression in this Court.

The State correctly notes that this Court has found that it may be proper for a trial court to limit voir dire questioning on an issue upon which the court will eventually instruct the jury.[15] And this Court recognizes that jurors will eventually be instructed, at the end of trial, on all of the sentencing ranges at issue and that these ranges could vary from those of the crimes charged, depending on the evidence actually introduced at trial. Nevertheless, neither the Supreme Court nor this Court has found end-of-trial sentencing instructions adequate in the capital context to avoid the necessity of allowing the parties to question potential jurors during voir dire about their ability to consider the full range of punishments at issue. In addition, the possibility that the State's evidence may not support the original charges or that there could be "lesser included offenses" (as noted by the trial court in this case) would typically only decrease the potential total sentencing

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[14] *See, e.g., Salazar v. State*, 1996 OK CR 25, ¶¶ 20-29, 919 P.2d 1120, 1127-29 (prospective juror who will not consider option of life sentence with parole not eligible to serve on capital jury); *Mitchell v. State*, 2006 OK CR 20, ¶ 39, 136 P.3d 671, 688-99 ("This Court has repeatedly recognized that the standard for capital juror acceptability in Oklahoma is whether, in a case where the law and facts make a defendant eligible for the death penalty, each juror will be willing to *consider* each of the three authorized punishments: the death penalty, life imprisonment without the possibility of parole, and life imprisonment (with the possibility of parole."); *Sanchez v. State*, 2009 OK CR 31, ¶ 44, 223 P.3d 980, 997 ("Due process of law requires that a prospective juror be willing to consider all the penalties provided by law . . . .").

[15] *See, e.g., Sanchez*, 2009 OK CR 31, ¶ 44, 223 P.3d at 997 ("The District Court may properly restrict questions that are repetitive, irrelevant or regard legal issues upon which the trial court will instruct the jury."); *Patton v. State*, 1998 OK CR 66, ¶ 9, 973 P.2d 270, 280 (same).

range at issue (and may not even affect it), without diminishing the relevance of determining *before* trial whether prospective jurors are willing to consider the entire sentencing range at issue for the crimes charged. Furthermore, OUJI-CR(2d) 1-5 (Question 12) already directs that jurors in single-stage, non-capital trials be informed, during the court's opening instructions, of the maximum sentences at issue in a case. Unfortunately, the trial court declined to use this instruction.

Hence this Court finds that in single-stage trials, non-capital defendants must be allowed during voir dire to investigate possible sentencing bias and unwillingness to follow the law among prospective jurors, including unwillingness to consider the entire legally authorized sentencing range(s) at issue in a case. Although Frye was certainly not entitled to jurors who would actually *give* him a minimum sentence (after they learned the specific facts of his crimes), his counsel should have been allowed to ask potential jurors if they would be willing to consider the entire range of legally authorized sentences for the crimes charged in his case, which included no incarceration at all.[16] Consequently, this Court finds that the trial court abused its discretion by its prohibition of any questioning about the ability of potential jurors to consider the full sentencing ranges at issue in the case.

Nevertheless, under the specific circumstances of this case, this Court finds that this limitation, like the time limitation, was harmless beyond a reasonable doubt. This Court concludes that under the facts of this case, the content

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[16] *Cf. Mitchell*, 2006 OK CR 20, ¶ 39, 136 P.3d at 689 ("Thus we have repeatedly held that willingness to 'consider' the death penalty is all that can legally be required of a juror with moral reservations about this penalty . . . . This standard does not require that a juror be willing to state that he or she can think of some situation in which he or she will actually vote to impose or recommend a death sentence." (citations omitted)).

limitation on defense counsel's questioning did not have any impact on the sentences imposed by the jury in this case—nor did the limitation prejudice Frye, render his trial unfair, result in an unfair or biased jury, or render Frye's counsel ineffective. There are certainly cases where a jury's willingness to consider a sentence at the bottom or "low end" of a legally authorized range could be very significant to the defendant's actual given sentence. Yet this Court cannot ignore the fact that the evidence presented at Frye's five-day trial clearly established that he grossly abused the position of trust he enjoyed regarding his great niece (who was then 3 to 6 years old) by sexually abusing her in at least five different ways (Counts I, II, III, V, & XIV), that he forced this same great-niece to participate in the production of child pornography (Counts VI & VII), and that he possessed extensive amounts of child pornography on his laptop computers (Counts VIII & XI). Consequently, this Court concludes that in this particular case, there is no reasonable possibility that a jury would have chosen to sentence Frye anywhere near the "low end" of the sentencing ranges at issue or that a jury would have declined to sentence him to time in prison on any of the counts charged.[17] Thus the trial court's prohibition on voir dire questioning by defense counsel about the sentencing ranges potentially at issue, like the court's time limit on voir dire, though improper and an abuse of discretion, was harmless in this case. And the combined effect of these two limitations in this case was likewise harmless.

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[17] The Court notes that Frye does not challenge the sufficiency of the evidence presented against him at trial regarding any of the nine counts upon which he was convicted. This Court also notes that the jury sentenced Frye to the maximum authorized term of imprisonment on Counts I, II, VI, VII, VIII, and XI. And on Counts III, V, and XIV, for which the authorized range for imprisonment was 0 to life, Frye was sentenced to 30 years plus 1 day, 30 years plus 1 day, and 20 years, respectively.

In Proposition II, Frye challenges the trial court's failure to give a "no-adverse-inference" instruction at his trial, *i.e.*, an instruction informing the jury that it must not draw any adverse inference about the defendant based upon his failure to testify at trial.[18] In *Carter v. Kentucky*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), the Supreme Court held that "the Fifth Amendment requires that a criminal trial judge must give a 'no-adverse-inference' jury instruction when requested by a defendant to do so" and that this constitutional requirement applies fully to criminal defendants in state court.[19] In *Phillips v. State*, 1999 OK CR 38, 989 P.2d 1017, this Court recognized the Supreme Court's holding in *Carter* and likewise held that the failure to give a no-adverse-instruction, when the defendant has requested one, is "a constitutional error."[20] This *Phillips* Court further held that failing to give such an instruction, when requested, is a "trial error," which is subject to a harmless error analysis.[21]

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[18] *See* OUJI-CR(2d)(Supp. 2000) 9-44 ("The defendant is not compelled to testify, and the [f]act that a defendant does not testify cannot be used as an inference of guilt and should not prejudice him/her in any way. You must not permit that fact to weigh in the slightest degree against the defendant, nor should this fact enter into your discussions or deliberations in any manner.").

[19] *Carter*, 450 U.S. at 300, 305, 101 S.Ct. at 1119, 1121-22. The *Carter* Court held as follows:

> The freedom of a defendant in a criminal trial to remain silent "unless he choose to speak in the unfettered exercise of his own will" is guaranteed by the Fifth Amendment and made applicable to state criminal proceedings through the Fourteenth. *Malloy v. Hogan*, 378 U.S. 1, 8, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653 (1964). And the Constitution further guarantees that no adverse inferences are to be drawn from the exercise of that privilege. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). Just as adverse comment on the defendant's silence "cuts down on the privilege by making its assertion costly," *id.* at 614, 85 S.Ct. at 1232, the failure to limit the jurors' speculation on the meaning of that silence, when the defendant makes a timely request that a prophylactic instruction be given, exacts an impermissible toll on the full and free exercise of that privilege. Accordingly, we hold that a state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify.

Id.

[20] *Phillips*, 1999 OK CR 38, ¶¶ 66-67, 989 P.2d at 1036 (citing *Carter*).

[21] *Id.* at ¶¶ 67-69, 989 P.2d at 1036-37.

In the current case, Frye filed a packet of seventeen requested jury instructions, the last of which was OUJI-CR 9-44, Oklahoma's no-adverse-inference instruction; and the State concedes that Frye properly requested this instruction. However, at the instructions conference on the day before Frye's jury was actually instructed, the trial court gave the parties the opportunity to review and object to the court's proposed packet of instructions, which did not include OUJI-CR 9-44. Frye's counsel objected to the court's failure to use two of her other proposed instructions, which were modified versions of uniform instructions, but did not object to the failure to include OUJI-CR 9-44 in the court's instructions.[22] Nor did defense counsel object to the failure to include this no-adverse-inference instruction at the time the court actually instructed the jury. Hence counsel failed to fulfill her duty "to aid the court in avoiding error by raising specific objections at trial," and we review this claim only for plain error.[23]

Because the requirement for the giving of this kind of no-adverse-inference instruction, when requested, is so clear and well known, we find that the trial court's failure to do so was both a constitutional error and plain error.[24] On the other hand, this Court cannot ignore the fact that during voir dire questioning in this case, defense counsel informed prospective jurors that a defendant had a right not to testify and that "[u]nder the law . . . no one can be forced to testify," and that jurors seemed very familiar and comfortable with this right and its significance, including the concept that they were not allowed to hold a defendant's failure to

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[22] In fact, when the trial court asked counsel, after noting counsel's two objections, "Have we covered everything that you have requested that has not been included?" counsel said, "Yes."

[23] *See Phillips*, 1999 OK CR 38, ¶ 66, 989 P.2d at 1036.

[24] *See id.* at ¶ 67, 989 P.2d at 1036.

testify against him. Counsel's questions focused instead on whether potential jurors thought a defendant should testify or whether they would want to testify if they had been accused—both of which seemed to presume that jurors already understood that a defendant was not required to testify—and counsel repeatedly noted her concern that jurors not hold it against her client if he did not testify.

This Court further notes that at no point during trial were *any* comments or improper argument made by the State or anyone else about Frye's failure to testify. Hence while the required instruction was not given, the record suggests that Frye's jurors understood both that Frye had a right not to testify and that if he chose not to testify, that they were not allowed to hold this decision against him. Furthermore, Frye's jury was properly instructed about the presumption of innocence, the burden on the State to prove the charges against Frye beyond a reasonable doubt, *etc.*, and the evidence presented against Frye on all counts was very strong. Consequently, under the circumstances of this case, this Court finds, as we did in *Phillips*,[25] that the trial court's failure to give the no-adverse-inference instruction was harmless beyond a reasonable doubt.

In Proposition III, Frye challenges the trial court's imposition of a $1,000 fine in his case. Frye correctly notes that although the jury was properly instructed on the option of ordering him to pay a monetary fine (in addition to or instead of sentencing him to time in prison or county jail) on all of the counts charged against him. Yet Frye's jury declined to assess any fine on any count. Nevertheless, the trial court imposed a fine of $1,000 at Frye's sentencing. The State concedes that

[25] 1999 OK CR 38, ¶ 69, 989 P.2d at 1037.

this fine was unauthorized by law and improper.[26] This Court agrees and finds that the $1000 fine imposed on Frye was illegal and must be vacated.

DECISION

Frye's convictions and sentences of imprisonment on Counts I, II, III, V, VI, VII, VIII, XI, and XIV are all **AFFIRMED**. The case is **REMANDED**, however, in order for the district court to vacate the $1,000 fine imposed by the court and revise the Judgment and Sentence accordingly. 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 the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE TWYLA MASON GRAY, DISTRICT JUDGE

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[26] *See Howell v. State*, 1981 OK CR 82, ¶ 9, 632 P.2d 1223, 1225 ("[A] judge may not impose a sentence different from that set by the jury."); *Luker v. State*, 1976 OK CR 135, ¶ 12, 552 P.2d 715, 719 ("[T]he trial court exceeded its authority in modifying the sentence assessed by the jury.").

OPINION BY: SMITH, J.

A. JOHNSON, P.J.:	CONCUR
LEWIS, V.P.J.:	CONCUR
LUMPKIN, J.:	CONCUR IN RESULTS
C. JOHNSON, J.:	CONCUR

LUMPKIN, JUDGE: CONCUR IN RESULTS

I concur in affirming the judgments and sentences, but write separately to address Proposition I as I find the trial court did not abuse its discretion in limiting *voir dire.*

It is well established that the manner and extent of *voir dire* questioning is within the discretion of the trial court and any limitations on the conduct of *voir dire* will not be disturbed on appeal absent a clear abuse of that discretion. *Sanchez v. State,* 2009 OK CR 31, ¶ 44, 223 P.3d 980, 997. The trial court may properly restrict questions that are repetitive, irrelevant or regard legal issues upon which the trial court will instruct the jury. *Id.* There is no abuse of discretion as long as the *voir dire* examination affords the defendant a jury free of outside influence, bias or personal interest. *Id.* This Court will not find a clear abuse of that discretion as long as the *voir dire* questioning is broad enough to afford the defendant a jury free of outside influence, bias, and personal interest. *Id.* "An abuse of discretion has been defined as a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented". *Marshall v. State,* 2010 OK CR 8, ¶ 24, 232 P.3d 467, 474 *citing State v. Love,* 1998 OK CR 32, ¶ 2, 960 P.2d 368, 369.

As noted in this Court's opinion, the trial court's *voir dire* took most of the first day and covered a wide range of topics. The record indicates the trial court was quite effective in covering all the key issues and substantially covered the topics addressed in OUJI-CR 2d 1-5. The parties were then given

30 minutes to inquire further. Defense counsel was even given an additional 10 minutes for questioning. The record shows defense counsel did not make the best use of her 40 minutes – lecturing the jury on the law and asking questions on matters which the trial court had either already inquired or would instruct upon.

Defense counsel indicated at trial that she wanted more time to inquire about punishment range issues. However, the record shows that in the trial court's *voir dire*, each juror was asked whether they would be able to impose the sentence that's appropriate based on the facts and the law and each juror answered in the affirmative. Counsel cannot seek a commitment in *voir dire* for a potential juror to render a particular sentence. *See Kephart v. State*, 1951 OK CR 33, 93 Okl. Cr. 451, 460, 229 P.2d 224, 229 (counsel are not permitted to get a statement in advance of the trial as to how the jurors would decide the case on a given state of facts). Further, the willingness to consider all penalties provided by law and not be irrevocably committed to a particular punishment before trial begins is all due process requires of a juror. *Sanchez*, 2009 OK CR 31, ¶ 44, 223 P.3d at 997. Therefore, the only additional question which should have been allowed by the trial court and asked by defense counsel was whether the prospective jurors would consider the full range of sentencing options upon a finding of guilt.

This case is similar to *Parker v. State*, 2009 OK CR 23, ¶ 18, 216 P.3d 841, 847 relied upon in the majority opinion. In that case, this Court found no abuse of the trial court's discretion in limiting the time for *voir dire* as the

appellant did not allege that he was afflicted by any kind of actual prejudice, he failed to identify any specific topics or questions that he was actually prevented from covering with the prospective jurors at his trial, and he failed to identify any jurors that he would have struck with an additional peremptory challenge, if he had been permitted to question them further.

In the present case, Appellant has not alleged he suffered any kind of actual prejudice, he has failed to identify any specific topics or questions that he was actually prevented from covering with the prospective jurors at his trial, and he failed to identify any jurors that he would have struck with an additional peremptory challenge, if he had been permitted to question them further. In short, he has failed to show how the trial court's limitation denied him a fair and impartial jury. A review of the record reveals Appellant's right to a fair and unbiased jury, a reasonable *voir dire* process, and a fair trial were in no way hindered or prejudiced by the trial court's decision to limit the individual *voir dire* questioning. Therefore, I find the trial court's decision was not an abuse of discretion as it was not clearly against the logic and effect of the facts presented.