IN THE COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

WILLIAM HUNTER MAGNESS,	)	
	)	**NOT FOR PUBLICATION**
Appellant,	)	
vs.	)	**No. F-2017-171**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

KUEHN, VICE PRESIDING JUDGE:

Appellant, William Hunter Magness, was convicted by a jury in Okfuskee County District Court, Case No. CF-2015-10, of First Degree Child-Abuse Murder. On February 22, 2017, the Honorable Lawrence W. Parish, District Judge, sentenced him to life imprisonment, in accordance with the jury's recommendation.[1] This appeal followed.

Appellant raises seven propositions of error:

PROPOSITION I. THE STATE FAILED TO PROVE ALL OF THE ELEMENTS OF FIRST DEGREE CHILD ABUSE MURDER BEYOND A REASONABLE DOUBT, RESULTING IN A VIOLATION OF MR. MAGNESS'S RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7 AND 20 OF THE OKLAHOMA CONSTITUTION.

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[1] Appellant must serve 85% of his sentence before parole eligibility. 21 O.S.2011, § 13.1(1).

PROPOSITION II. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO ENSURE MR. MAGNESS WAS PROVIDED WITH THE NECESSARY TOOLS TO MOUNT AN ADEQUATE DEFENSE IN VIOLATION OF HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT AND ARTICLE II §§ 7 AND 20 OF THE OKLAHOMA CONSTITUTION.

PROPOSITION III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PRECLUDING THE ADMISSION OF APPELLANT'S STATEMENT TO OSBI AGENT KURT TITSWORTH IN VIOLATION OF HIS RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7 AND 20 OF THE OKLAHOMA CONSTITUTION.

PROPOSITION IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PERMITTING MICHELLE SCOTT, AN INVESTIGATOR FOR THE DEPARTMENT OF HUMAN SERVICES, TO GIVE IRRELEVANT AND IMPROPER OPINION TESTIMONY IN VIOLATION OF APPELLANT'S RIGHTS TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7 AND 20 OF THE OKLAHOMA CONSTITUTION.

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

PROPOSITION VI. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE ADMISSION OF PREJUDICIAL OTHER CRIMES EVIDENCE AND EXACERBATED THE ERROR BY FAILING TO INSTRUCT THE JURY ON THE LIMITED USE OF THIS EVIDENCE, IN VIOLATION OF MR. MAGNESS'S RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND ARTICLE II, §§ 7 AND 20 OF THE OKLAHOMA CONSTITUTION.

PROPOSTION VII. MULTIPLE INSTANCES OF INEFFECTIVE ASSISTANCE DEPRIVED MR. MAGNESS OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7 AND 20 OF THE OKLAHOMA CONSTITUTION.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we deny Appellant's request for an evidentiary hearing, and affirm his conviction and sentence.

FACTS

Appellant was convicted of using unlawful and fatal force on his 22-month-old son, T.G., on the evening of November 11, 2013. Appellant and the child's mother, Danielle Grice, were not in a relationship at the time; she had custody of T.G. Appellant lived alone in Wetumka. Appellant agreed to watch T.G. for several days beginning Friday, November 8. Because Appellant had to travel out of town for his job on Monday, November 11, he arranged for a friend, Lakin Shannon, to watch T.G. that day. T.G. accompanied Shannon and her family on several outings during that day. Several witnesses noticed a bruise across T.G.'s nose at the time. Appellant told witnesses he accidentally injured the child the preceding Friday, causing a doorknob to hit the child in the face.[2] T.G. was also suffering from some congestion. Other than the nose bruise and congestion, no one noticed

[2] Appellant said that he was carrying bags of groceries into his home and, with his hands full, he kicked the front door open, unaware that T.G. was standing behind the door.

anything particularly unusual about T.G.'s behavior; they described him playing and eating normally.

On Monday evening, Lakin Shannon and her husband returned T.G. to Appellant's home. About two hours later, Appellant called his father and said T.G. was in distress; Appellant's stepmother called 911. Two local ambulances responded to Appellant's home. Many injuries were immediately apparent on the child, including a dilated pupil, bruises on the face and body, and a bruise on the tip of the child's penis. Paramedic Lonnie Ramirez documented these injuries in a contemporaneous report and photographed some of them. A second paramedic also noticed bruises to T.G.'s face and penis before he began medical intervention at the scene. T.G. was transported to a local hospital, and later transferred to a Tulsa facility for more specialized treatment. Sadly, T.G.'s condition did not improve, and he was removed from life support a few days later. The cause of death was a large subdural hematoma on the back of the head, which caused severe brain swelling.

T.G.'s mother testified that when she arrived at the hospital to see her son, the first thing Appellant did was hug her and apologize for

hurting the boy. Later, she asked Appellant how the child received so many injuries. According to Grice, Appellant offered various theories:

> One theory was that [T.G.] was kicked by a horse. He told me that [T.G.] was playing roughly with an 8-year-old boy, he told me that [T.G.] was hit by the door, he told me that [T.G.] had been hit in the – or fell into the windowsill. And then, he also told me that [T.G.] was at the babysitter and that the babysitter could have possibly [done] it.

Given the nature of T.G.'s injuries, medical personnel suspected child abuse. Appellant was interviewed by an agent from the Oklahoma State Bureau of Investigation, as well as an investigator from the Department of Human Services. The account Appellant gave to these investigators was largely consistent with his testimony at trial. Appellant maintained that T.G. woke from his sleep on Monday night in an agitated state, and had a seizure of some sort as Appellant escorted him into the kitchen to get a drink. Appellant said that, other than the accidental nose bruise from the preceding Friday, he saw no bruises on T.G. after the Shannons returned the child to him.

Both parties presented extensive medical expert testimony. All experts agreed that T.G. suffered blunt force trauma to the head, which was the proximate cause of his death. The State's theory was that T.G.'s bruises and fatal head injury were not accidental, but were

inflicted intentionally by Appellant on the evening of Monday, November 11, after the Shannons returned the child to him. The State's experts concluded it was extremely unlikely that a child suffering from a subdural hematoma the size of T.G.'s would not have shown symptoms almost immediately. In other words, they believed it was highly unlikely that T.G. could have sustained the head injury a few days, or even more than a couple of hours, before 911 was called around 10:00 p.m. on November 11. The defense experts disagreed, contending it was entirely possible for a child to sustain a head injury hours, if not days, before symptoms surfaced and life-threatening consequences manifested themselves. The defense also theorized that T.G. was not, in fact, acting normally, as evidenced by the fact that, according to Appellant's father, the child vomited up phlegm and food during a visit on November 9, two days before his collapse. Much testimony was given about T.G.'s retinal hemorrhages, elevated liver-enzyme levels, white-blood-cell count, and other test results, and whether those indices were necessarily influenced by head trauma, or

could simply have been caused by the child's ear infection and mild pneumonia.[3]

As for the bruises to T.G.'s body, the State alleged that these, too, were intentionally inflicted shortly before the 911 call, and that their appearance in the same short time frame as the child's collapse only reinforced the inference that these injuries were not accidental. Besides eyewitness testimony that no bruises (except the one across T.G.'s nose) were present before the child was returned to Appellant, the State's medical experts explained that these bruises were generally to soft tissues, not knees and elbows where children sustain accidental bruises. Perhaps most peculiar was the bruise to T.G.'s penis. The State's medical experts and child-abuse investigator testified that such an injury was rarely seen, and sometimes linked to attempts to potty-train a child. The defense raised the possibility that T.G. might have bruised easily (and accidentally) due to any number of blood disorders. However, no evidence was presented that T.G. actually suffered from such a disorder. Additional facts will be related as relevant to the propositions of error.

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[3] The autopsy confirmed that T.G. had an inner-ear infection. He also had mild pneumonia, possibly caused by being on a hospital ventilator.

DISCUSSION

In Proposition I, Appellant claims that given all of the evidence, no rational juror could have concluded that the only reasonable explanation for T.G.'s fatal injury was intentional, blunt-force trauma, caused by Appellant himself, in the two-hour period after the Shannons brought the child back to him. This Court reviews the totality of evidence to determine if a rational juror could find each element of the offense by proof beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). To be clear, the standard is whether a rational juror could make that determination – not whether an alternative result was theoretically possible. Appellate courts must be careful not to substitute their own assessment of the facts for sound choices made by competent and fair juries. *See White v. State*, 2019 OK CR 2, ¶ 9, 437 P.3d 1061, 1065; *see also United States v. Rakes*, 510 F.3d 1280, 1284-85 (10th Cir. 2007).

The evidence is detailed above. Both sides presented considerable medical testimony. All experts agreed that T.G.'s hematoma was large, serious, and caused by blunt force trauma. When that trauma was likely to have occurred, and whether it was likely to have been accidental, were the only issues in dispute. The experts agreed that no

other conditions (ear infection, mild pneumonia) contributed to the child's death. However, ancillary signs of trauma – bruises to the child's body – were relevant as tending to show that the hematoma was neither accidental nor inflicted at some remote time. No witnesses saw T.G. acting strangely before he was returned to Appellant, and no witnesses saw (with the exception of the bruise across his nose) external trauma, including the bruise to the child's penis, until medical personnel arrived about two hours later. While defense experts theorized that the bruises could have resulted from some sort of genetic or blood disorder, there simply was no evidence that T.G. suffered from any.[4] And the fact remains, the appearance of these bruises curiously coincided with the child's collapse from the effects of the head injury.[5]

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[4] To counter the notion that T.G. might have suffered from a condition that caused him to bruise easily, the State's experts pointed out that the child exhibited no bruising around his shin, where paramedics had inserted a large intraosseous needle. The State's rebuttal expert, Dr. Block, testified that "[blood disorders] may be factors in bruising, but they are not factors in a case where a child who's been perfectly well and perfectly normal and makes it to 22 months and then suddenly has got a trauma and collapse[s]."

[5] The defense speculated that the "doorknob incident" may have been an accidental cause of the hematoma. Besides the fact that there was no evidence that T.G. hit the back of his head (the location of the hematoma) in that incident, that scenario also does not explain the other bruises to the child's body. Defense expert Dr. Shuman did not believe the doorknob incident was likely to have caused the hematoma, or that a blood disorder caused the bruising. He also agreed that the penis bruise was troubling.

Appellant's conduct after the 911 call is also concerning. According to the child's mother, Appellant told her he was sorry and suggested that the injuries were his fault. He later offered other explanations. Appellant left the hospital to be alone in the woods as the child was removed from life support. The jury could reasonably infer that this conduct was at least somewhat peculiar.

We are not unmindful that two prior juries could not reach a unanimous verdict about Appellant's guilt or innocence. But even if it is theoretically possible that T.G. accidentally sustained the hematoma a day (or two, or three) before being returned to his father, through some unknown incident or imagined combination of factors, the sudden appearance of bruises on the child right before his collapse seems to require an entirely unrelated and equally speculative mechanism. A rational juror could conclude, beyond a reasonable doubt, that Appellant was guilty as charged. Proposition I is denied.

In Proposition II, Appellant claims he was denied the basic tools of an adequate defense by the trial court's refusal to either (1) grant a continuance, so that he could earn additional money for transcripts and experts, or (2) declare him indigent, and allocate court funds for those purposes. These decisions are reviewed for an abuse of

discretion. *Marshall v. State*, 2010 OK CR 8, ¶ 44, 232 P.3d 467, 478; *Pleasant v. State*, 1963 OK CR 43, ¶ 7, 381 P.2d 182, 184. An abuse of discretion is an "unreasonable, unconscionable and arbitrary action taken without proper consideration of the facts and law pertaining to the matter submitted." *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 19, 241 P.3d 214, 225. We consider whether the court's rulings worked any prejudice on Appellant's ability to defend himself. *Marshall*, 2010 OK CR 8, ¶ 44, 232 P.3d at 478. We summarize the procedural background before addressing these complaints.

Appellant retained counsel for all three trials. He had been gainfully employed when he was charged and taken into custody. After the first mistrial in May 2016, bond was set at $200,000; Appellant posted bond and returned to his job. In early December 2016 – about two months after the second mistrial, and a few weeks before the third trial was to begin – defense counsel filed a motion for continuance. Counsel alleged that Appellant had exhausted his financial resources and needed extra time to work and make money for transcripts of the second trial and to pay for expert assistance. Counsel filed a motion to proceed *in forma pauperis*, alternatively asking the court to declare

Appellant indigent and provide public funds. The trial court denied both requests, and the third trial began in late January 2017.

A defendant who can establish his indigency is entitled to public funds for the basic tools of a defense. *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956). A mistrial transcript may qualify as a "basic tool." *Britt v. North Carolina*, 404 U.S. 226, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971). However, because the right is rooted in the Equal Protection Clause of the Constitution, the threshold issue is whether the defendant has established his indigency. *See Kirk v. State*, 1976 OK CR 245, ¶¶ 3-5, 555 P.2d 85, 86 (distinguishing indigent's right to transcript on Equal Protection grounds from non-indigent's failure to request transcript in a timely fashion). The burden of showing need rests on the defendant. The fact that a defendant retained counsel, or posted bail, does not disqualify him from receiving public funds, but those facts are relevant to the ultimate determination of whether assistance is warranted. *Bruner v. State ex rel. District Court of Oklahoma County*, 1978 OK CR 65, ¶ 6, 581 P.2d 1314, 1316; *Marton v. State*, 1991 OK CR 40, ¶ 8, 809 P.2d 671, 673.

The prosecutor objected to either a continuance or a finding of indigency, pointing out that Appellant not only posted a $200,000 bond

after the first trial, but was re-hired by his employer and was earning money. The Pauper's Affidavit filed by Appellant offered some relevant information, but was lacking in material respects. It did not specify how much Appellant was earning, and what bills, if any, he had to pay each month. Furthermore, defense counsel never specified how much money was needed, or how long of a continuance was needed for Appellant to earn that amount.[6]

On the record before us, we cannot say the trial court abused its discretion when it denied a continuance and refused to declare Appellant eligible for public assistance. The court simply was not presented with sufficient information about Appellant's finances, nor was it given reasonably specific information about how much money was needed and what the money was needed for. *Marton*, 1991 OK CR 40, ¶ 8, 809 P.2d at 673; *Marshall*, 2010 OK CR 8, ¶ 44, 232 P.3d at 478. Proposition II is therefore denied.

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[6] The hearings on these matters do not reveal why trial counsel needed the entire transcript of the second trial, or why additional funds were needed for experts. A transcription of *voir dire*, and the testimony of most of the fact witnesses, would presumably have been unnecessary; the focus was on the experts' opinions. Defense counsel never specified if he needed funds to explore new angles of expert assistance, or simply to bring his original experts back to Oklahoma for another trial. Finally, we note that from discussions had at the bench before the beginning of the third trial, defense counsel did have certain portions of the second trial transcribed.

In Proposition III, Appellant claims the trial court abused its discretion by refusing to allow him to introduce, into evidence, a videotape recording of his interview with OSBI Agent Kurt Titsworth. We review the trial court's rulings on evidence for an abuse of discretion. *Hanson v. State*, 2009 OK CR 13, ¶ 8, 206 P.3d 1020, 1025-26.

Less than an hour after T.G. died, OSBI Agent Kurt Titsworth interviewed Appellant in a non-custodial setting. The interview, which lasted over two hours, was video-recorded. The State called Agent Titsworth to relate the substance of the interview to the jury through his own testimony.[7] When cross-examining Agent Titsworth, defense counsel offered the video as evidence to impeach the officer and/or refresh his memory about certain statements. The State objected, and the trial court refused to admit the recording on the grounds that a party's unsworn statements are generally hearsay, unless they are offered by the opposing party. 12 O.S.2011, § 2801(B)(2)(a); *Phillips v. State*, 1988 OK CR 103, ¶¶ 6-7, 756 P.2d 604, 607.

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[7] During the first trial, the videotape was introduced by the State and played for the jury, but some jurors had difficulty with the audio quality. The State chose not to present the video at the second and third trials.

Appellant offers several reasons why he should have been allowed to introduce the video interview into evidence. First, he claims it was subject to the "Rule of Completeness." That evidentiary rule provides:

> When a record or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other record that should in fairness be considered contemporaneously with it.

12 O.S.2011, § 2107. The rationale behind this rule is self-evident and reasonable. But the problem with Appellant's argument is that the Rule is not triggered unless the opposing party offers part of the record into evidence; until then, there is nothing yet to "complete." The "record" at issue here was the video of Appellant's unsworn statements to Agent Titsworth. If the State had offered part of the video, then the Rule of Completeness might have been invoked to introduce other parts that the defense felt were relevant to a fair consideration of the issues. But since the State never offered any part of the recording, the Rule of Completeness simply is not applicable here.

Appellant also argues that the video was necessary to impeach Agent Titsworth's testimony on some points and refresh his recollection on others. We disagree. Without objection by the State or interference by the court, defense counsel extensively cross-examined Titsworth

about various things Appellant said (or did not say) and about his demeanor during the interview.[8] Appellant's objections to Titsworth's testimony seem to be more over what inferences could be drawn from the interview, rather than what was actually said. Appellant points to no false or materially misleading information from Titsworth about what he (Appellant) said in the interview. When cross-examining Titsworth, defense counsel set the record straight on points the agent could not specifically recall.

Appellant's final argument is that the video would have permitted him to bolster his testimony with prior consistent statements, *i.e.*, to show the jury that the account he gave at trial was essentially the same one he gave to Titsworth. At trial, Appellant testified on his own behalf, giving a detailed account of what transpired before his son's collapse. He was also able to counter any misleading characterizations Titsworth might have made without resort to the video itself. A witness's prior, unsworn statements may be admissible if they are (1) consistent with his testimony and (2) offered to rebut a charge of recent fabrication. 12 O.S.2011, § 2801(B)(1)(b). But like the Rule of Completeness, this rule

[8] The prosecutor did occasionally object to defense counsel's cross-examination, but these objections did not go to the content of what Titsworth or Appellant said in the interview.

is triggered by unfair mischaracterization by the opposing party; a party may not offer up such unsworn statements in the first instance. Appellant does not point to any part of his cross-examination where the prosecutor suggested that his account of what happened to his son, as given on the witness stand, was at odds with what he told Agent Titsworth. The trial court did not abuse its discretion in refusing to admit the video. *Hanson*, 2009 OK CR 13, ¶ 8, 206 P.3d at 1025-26. Proposition III is denied.

In Proposition IV, Appellant complains that Michelle Scott, an investigator with the Oklahoma Department of Human Services, gave improper opinions of his guilt. Scott was tasked with investigating T.G.'s injuries from a social-services standpoint. She interviewed family members and other witnesses. She also observed Appellant's interview with Agent Titsworth from an adjacent room, and later interviewed Appellant herself. Scott was presented to go over various facts which she considered unusual or troubling in this case. Over defense objection, she was also asked to make an overall determination of whether child abuse was substantiated, and she believed it was. What is more, Scott specifically opined that Appellant was the perpetrator. We review admission of this opinion evidence for an abuse

of discretion. *Barnhart v. State*, 1977 OK CR 18, ¶ 20, 559 P.2d 451, 458.

Witnesses generally relate facts, while the inferences to be drawn from those facts are the jury's province. Scott's experiences as a child-abuse investigator (*e.g.*, the kind of injuries she typically saw, whether penis injuries were common, the sorts of reactions that parents typically have to a severely injured child) were for the most part helpful to the jury. However, Scott's opinion that Appellant was in fact guilty of child-abuse murder was not.

No testimony, lay or expert, should be admitted unless it is helpful to the trier of fact. 12 O.S.2011, §§ 2701, 2702; *Andrew v. State*, 2007 OK CR 23, ¶ 73, 164 P.3d 176, 195, *overruled on other grounds in Williamson v. State*, 2018 OK CR 15, 422 P.3d 752. Testimony is not "helpful" if it draws inferences that jurors are capable of drawing for themselves. "[O]pinion testimony, whether expert or lay, as to whether or not the defendant was criminally responsible at the time of the offense charged should not be admissible." *Coddington v. State*, 2006 OK CR 34, 142 P.3d 437, 462 (Lumpkin, V.P.J., concurring in result and dissenting in part at ¶ 3) (citation omitted). Whatever the witness's personal knowledge or expertise, she should generally refrain from

expressing opinions or giving inferences on the "last step" of deciding who is credible, and who is legally at fault.[9] Scott had no personal knowledge of what happened at Appellant's home on the evening in question. The line between a witness relating helpful information based on experience, and a witness offering an opinion of who is lying and who is guilty, may be a fine one. Prosecutors should take care to avoid crossing it.

Nevertheless, considering the totality of the evidence, there is no reasonable probability that Scott's opinion affected the outcome of the trial. We note that the defense itself capitalized on the opinion of guilt rendered by at least one other expert witness: Dr. Wallace. Part of the defense strategy was to show that State medical examiners and detectives, and Dr. Wallace in particular, had "rushed to judgment" and concluded Appellant was guilty without fairly considering all of the

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[9] As Professor Wigmore observes:

> [The opinion rule] does not exclude any specific class of witnesses or all testimony on a specific subject. It simply endeavors to save time and avoid confusing testimony by telling the witness: "The tribunal is in possession of the same materials of information on this subject as yourself; thus, as you can add nothing to our materials for judgment, your further testimony is unnecessary, and merely cumbers the proceedings."

VII Wigmore, *Evidence* § 1918 (Chabourn rev. 1978) at 11.

facts. That tactic dovetailed with testimony from the defense's own medical experts about what tests, procedures, and possible diagnoses should have been explored by the medical team, but were not. Defense counsel purposefully elicited testimony that Dr. Wallace told Agent Titsworth, "Dad's your guy." Defense counsel also asked Titsworth about this conclusion, trying to show that law enforcement and the State's doctors were biased against Appellant. The "rush to judgment" theme is found from *voir dire* to closing argument.[10] This strategy was entirely legitimate; we only discuss it to show there is no reasonable probability that Scott's similar opinion of Appellant's guilt was so

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[10] In closing, defense counsel said:

> Now, what else did we talk about during opening and voir dire? I believe I told you that *this was a quick decision as to child abuse and that it was Hunter Magness right off the bat. We heard from Dr. Wallace, she made that decision pretty quick.* She gathered a little bit of information from Dani Grice, Tuff's mom, and her boyfriend, I think. She had a conversation with Agent Titsworth before Hunter ever even made it to Agent Titsworth's interview... . *You heard Agent Titsworth, he made up his mind, he made up his mind. Didn't wait to find out what any other evidence said,* didn't talk, do any more investigation about any other possibility because *they had made up their mind and they had their guy. And that's all there was to it.*

(Tr.VII 38) Counsel reminded the jury that the gist of Dr. Dehnel's testimony was, "[T]hey should have done more to rule out other possibilities." (Tr.VII 48) Counsel concluded with: "They don't know. They don't know. They either didn't do their job, they didn't investigate it or they didn't look at anyone else." (Tr.VII 50)

prejudicial that it affected the outcome. Proposition IV is therefore denied.

In Proposition V, Appellant alleges various instances of misconduct by the prosecutor. Some of these instances were objected to, but most were not. We will not grant relief for improper argument unless, viewed in the context of the whole trial, the statements rendered the trial fundamentally unfair, so that the jury's verdicts are unreliable. *Bosse v. State*, 2017 OK CR 10, ¶ 82, 400 P.3d 834, 863.

a. Evoking sympathy for the victim.

Appellant claims that in opening statement, closing argument, and when questioning T.G.'s mother, the prosecutor made references intended to evoke a sympathetic response from the jury. The prosecutor elicited a few facts about the victim, such as what he liked to eat and how he liked to play. She mentioned the regret that T.G.'s mother must have for leaving the child in Appellant's care. None of these comments were met with an objection by defense counsel. Trials of this type are necessarily fraught with emotion; the prosecutor's comments were brief and not dramatic. Calling brief attention to harm occasioned by the charged conduct did not deny Appellant a fair trial. *See Carol v. State*, 1988 OK CR 114, ¶ 10, 756 P.2d 614, 617.

b. Cross-examination of Appellant.

Appellant claims that in cross-examination and closing argument, the prosecutor disparaged his parenting skills and commented on his failure to take responsibility for his conduct. Again, there were no objections to these comments. While counsel should treat all witnesses with respect, cross-examination is, by nature, a pointed and sometimes emotionally-charged endeavor. A prosecutor is not required to treat a testifying defendant with "kid gloves." *Malone v. State*, 2007 OK CR 34, ¶ 44, 168 P.3d 185, 203. Counsel are generally afforded wide latitude in their arguments to a jury, and may make reasonable inferences from the evidence that has been presented. *Nobles v. State*, 1983 OK CR 112, ¶ 12, 668 P.2d 1139, 1142. The prosecutor's comments were fairly based on evidence presented at trial. Appellant complains that the prosecutor made brief references to two mass murderers in closing argument. This is true, but she did not equate Appellant with them; she only pointed out that while people may remember the names of those who commit crimes (and high-profile crimes are the clearest examples), "we often lose sight of the victim in the case." Reading the prosecutor's questions and closing comments in context, we conclude

they were not so unprofessional that they affected the verdict. *Dodd v. State*, 2004 OK CR 31, ¶ 78, 100 P.3d 1017, 1041.

c. Theatrics.

Appellant claims the prosecutor engaged in improper theatrics by hitting an object (a box or book) against a hard surface to demonstrate the infliction of blunt force trauma. This occurred three times – once during examination of Dr. Block, and twice in closing argument. There was no objection to any of these demonstrations. They were brief, based on the evidence presented about how the victim suffered his head injury (blunt force trauma was not disputed), and not so dramatic as to cross the line of propriety. There is an appreciable difference between hitting a book against a table and, say, stabbing a photograph of the homicide victim ("outrageous"; *Brewer v. State*, 1982 OK CR 128, ¶ 5, 650 P.2d 54, 57), or pointing a finger like a gun at a juror's head ("cannot be condoned"; *Jones v. State*, 2006 OK CR 5, ¶¶ 74-75, 128 P.3d 521, 544-45).

d. Commenting on defense experts' fees.

Finally, Appellant notes that the prosecutor grilled two expert witnesses for the defense about their financial and professional motives for participating in this case, and revisited the subject in closing

argument. Defense counsel objected to many of these questions, but the objections were usually overruled. A witness's potential bias and motives for testifying are always relevant to his credibility. *See Livingston v. State*, 1995 OK CR 68, ¶ 15, 907 P.2d 1088, 1093; OUJI-CR (2nd) No. 10-8. We question whether the details (*e.g.* exact dollar figure) of any financial arrangements with an expert witness are relevant, but note that in this case, the prosecutor's inquiry may have backfired. Both of Appellant's experts said they were testifying for free in this third trial. Also, one of the defense experts said that in his career, he had testified more for the prosecution than for criminal defendants.

In summary, we conclude that the cumulative effect of the prosecutor's questions and comments did not deprive Appellant of a fair trial. Proposition V is denied.

In Proposition VI, Appellant complains about the introduction of evidence concerning an ankle injury T.G. sustained about a year before his death. Although the trial court ruled *in limine* that this injury was not probative of any material issue, the court reversed its position after defense counsel allegedly "opened the door" to inquiry about the year-

old injury during trial. The trial court's ruling is reviewed for an abuse of discretion. *Hanson*, 2009 OK CR 13, ¶ 8, 206 P.3d at 1025-26.

Defense counsel asked Dr. Dehnel about "sentinel injuries," which Dehnel described as "a more mild or subtle injury" which might serve as a "warning sign" that a child is being subjected to abuse at the hands of a particular caregiver. Counsel asked Dehnel if he observed any sentinel injuries in this case; he said he did not. On cross-examination, the prosecutor asked Dehnel (over defense objection) if he knew about the prior ankle injury, and if that fact changed his opinion about the child's safety while in Appellant's care.

A defendant will usually not be heard to complain about evidence that he invited. In *Malicoat v. State*, 2000 OK CR 1, 992 P.2d 383, the defendant was charged with child-abuse murder. Evidence that his home was filthy and unsanitary was initially excluded by the trial court as irrelevant. But when defense counsel suggested that the defendant was not just innocent of murder, but a responsible parent to boot, the trial court ruled that he had opened the door to evidence about these squalid living conditions. *Id.* at ¶ 40, 992 P.2d at 403-04. We find no abuse of discretion here, because defense counsel did, in fact, open the

door by highlighting the importance of sentinel injuries, and suggesting there were no such injuries in this case.

Appellant also claims the trial court should have instructed the jury on the limited use of such "other crimes" evidence (T.G.'s ankle injury). While evidence of other crimes is usually subject to certain procedural requirements, *see generally Burks v. State*, 1979 OK CR 10, ¶ 12, 594 P.2d 771, 774, *overruled in part by Jones v. State*, 1989 OK CR 7, ¶ 8, 772 P.2d 922, 925, those requirements do not strictly apply when the defendant invites the evidence. *See Davis v. State*, 1994 OK CR 72, ¶ 6, 885 P.2d 665, 668. Finally, Appellant himself offered a detailed, innocent explanation for the ankle injury in his own testimony, and there was no evidence to rebut that account.[11] The trial court did not abuse its discretion in allowing this evidence. Proposition VI is denied.

In Proposition VII, Appellant claims his trial attorneys provided ineffective assistance. Under *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), he must demonstrate not only that counsel's performance was deficient, but

[11] Also, Dr. Dehnel downplayed the issue; in his experience as a pediatrician and "as indicated in the literature," foot injuries are quite common in toddlers.

also a reasonable probability that counsel's performance caused prejudice – that it undermines confidence in the outcome of the trial. *Bland v. State*, 2000 OK CR 11, ¶ 112, 4 P.3d 702, 730-31. This Court begins with the presumption that counsel's conduct fell within the wide range of reasonable professional assistance; Appellant must demonstrate that counsel's strategic choices were unreasonable under prevailing professional norms and cannot be considered sound trial strategy. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *Bland*, 2000 OK CR 11, ¶ 112, 4 P.3d at 730-31. When a *Strickland* claim can be disposed of on the ground of lack of prejudice, that course should be followed. *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069; *Bland*, 2000 OK CR 11, ¶ 113, 4 P.3d at 731.

Appellant makes four discrete complaints about trial counsel in Proposition VII. Two claims are based on the record alone; the other two rely on supplemental materials which he has submitted, pursuant to our Rules, in an Application for Evidentiary Hearing. We address the two record-based claims first, and consider the extra-record claims in our discussion of the Application.

a. Failing to preserve errors discussed above.

Appellant alleges trial counsel was deficient for failing to take appropriate actions relevant to our discussions of Propositions II through V. The lack of error and/or prejudice was discussed in each of those propositions. Appellant offers no new argument as to how these errors constitute deficient performance. As to Proposition II, Appellant claims counsel should have provided him with a version of the pauper's affidavit that included questions about income. The fact that Appellant was employed while on bond awaiting trial was not disputed; what the trial court lacked was specifics about where Appellant's income was going, if not to prepare for his defense. *See Johnson v. Brock*, 1992 OK CR 83, ¶¶ 5-10, 843 P.2d 852, 853. Appellant points to no information in this appeal record (nor does he offer any supplemental information *via* Rule 3.11(B)) which would establish his indigency at the time he requested public funds.

As to Proposition III, trial counsel's failure to refresh Agent Titsworth's recollection about his interview with Appellant in proper fashion, by having the agent review portions of the recording (*see* 12 O.S.2011, § 2612), rather than attempt to introduce the recording as an exhibit, did not result in prejudice. Appellant fails to show how

Agent Titsworth's testimony would have been materially different (or better for the defense) if he had reviewed the video outside the jury's presence. As noted in Proposition III, (1) defense counsel was given free rein to discuss the video with Agent Titsworth on cross-examination, even quoting from questions and answers in the interview; (2) Agent Titsworth acceded to counsel's interpretations and clarifications almost every time; and (3) Appellant gave additional clarifications about portions of the interview in his own testimony. We thus find no prejudice from defense counsel's omission. *Mack v. State*, 2018 OK CR 30, ¶ 7, 428 P.3d 326, 329.

Appellant faults trial counsel for letting DHS Investigator Scott give her personal opinion of his guilt. While we found Scott's opinion unhelpful to the jury and improper, *see* Proposition IV, we also found no reasonable probability that the error affected the outcome of the trial. The absence of outcome-affecting prejudice means this claim of ineffective counsel fails. *Mack, id.*

Appellant claims his trial counsel was derelict for failing to object to the instances of prosecutor misconduct alleged in Proposition V. We concluded that the prosecutor's comments and questions were proper; hence, any objections to them would properly have been overruled.

Trial counsel's failure to request a limiting instruction regarding evidence of T.G.'s prior ankle injury was not deficient performance, for reasons discussed in Proposition VI. *Martinez v. State*, 2016 OK CR 3, ¶ 84, 371 P.3d 1100, 1119.

b. Opening the door to other-crimes evidence.

As discussed in Proposition VI, defense counsel opened the door to information about T.G.'s prior ankle injury. We found this evidence collateral and not outcome-determinative. Thus, Appellant cannot show prejudice from trial counsel's actions. *Douma v. State*, 1988 OK CR 19, ¶ 16, 749 P.2d 1163, 1168. None of Appellant's record-based claims of ineffective counsel have merit. Proposition VII is therefore denied.

APPLICATION FOR EVIDENTIARY HEARING

Appellant's last two ineffective-assistance claims are based on information provided in his Application for Evidentiary Hearing on Sixth Amendment Claims. Because Appellant's ultimate claim is that trial counsel's conduct did not comport with the Sixth Amendment guarantee to reasonably effective counsel, we review his extra-record materials, and his arguments based thereon, with *Strickland* and its progeny as our guide. However, with regard to these last two claims,

our task is not to adjudicate whether the proffered materials actually meet *Strickland*'s test; we only determine whether Appellant has shown, by clear and convincing evidence, a "strong possibility" that counsel was ineffective, and should be given further opportunity to present evidence in support of his claim. *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 906; Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019). However, if Appellant fails to meet this lighter burden, we "necessarily make the adjudication that Appellant has not shown defense counsel to be ineffective" under *Strickland*. *Simpson, id.* With those principles in mind, we address Appellant's two extra-record claims.[12]

a. Failing to impeach a State witness with misconduct evidence.

Appellant claims trial counsel was deficient for not impeaching Lonnie Ramirez, one of the paramedics who responded to the 911 call,

[12] Appellant's alternative request to file some of this material pursuant to Court of Criminal Appeals Rule 3.11(A) is moot, since we find all of the material is properly submitted as part of his ineffective-counsel claim pursuant to Rule 3.11(B). We also note that Appellant's Application includes not only extra-record material, but some eighteen pages of additional argument. A Rule 3.11 application is not an opportunity to extend arguments that should be made in the brief-in-chief. *See Garrison v. State*, 2004 OK CR 35, ¶ 131 n.36, 103 S.Ct. 590, 612 n.36. We again caution counsel about this practice.

with conduct involving dishonesty.[13] Specific instances of conduct involving dishonesty may be inquired about on cross-examination to impeach a witness's credibility. 12 O.S.2011, § 2608(B). According to documents in the Rule 3.11 Application, trial counsel had this information about Ramirez in his file but did not use it. But confronting Ramirez with this misconduct would not have affected his credibility. Ramirez did not just claim to have seen bruises on T.G.; he photographed them at the scene. Another paramedic corroborated Ramirez' observations. Trial counsel's decision not to use this evidence was a sound strategic move, because it had negligible value in these circumstances. This claim is meritless.

b. Failing to present additional medical testimony.

Appellant claims trial counsel was deficient for not having tissue samples obtained during T.G.'s autopsy examined by an appropriate defense expert. On appeal, Appellant has had those samples (and other materials related to this case) examined by Dr. Zhongxue Hua, a board-certified neuropathologist, who prepared an affidavit of his conclusions. In summary, Dr. Hua concludes that (1) blood clots in T.G.'s dura sinus

[13] Ramirez pled guilty to larceny of a controlled substance in 2016.

tissue suggest that he suffered from cerebral venous thrombosis, or CVT; (2) the ear infection, mastoiditis, and pneumonia T.G. suffered from at the time of death can contribute to CVT, as can head trauma; and (3) T.G.'s death was likely due to a combination of all these factors.

As *Strickland* makes clear, defense counsel's duties include pretrial investigation of theories of defense, and marshaling the information needed to support viable theories. It is impossible, however, to say what defense counsel is required to do without looking to the circumstances of the particular case. *Strickland* declares that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 U.S. at 690-91, 104 S.Ct. 2066.

> [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. To be deficient, the performance must be outside the wide range of professionally competent assistance. Counsel's decisions are presumed to represent sound trial strategy; [f]or counsel's performance to be constitutionally ineffective, it must have been completely unreasonable, not merely wrong.

Barkell v. Crouse, 468 F.3d 684, 689 (10th Cir.2006) (citation omitted).

On the issue of expert witnesses, many courts have recognized that trial counsel is not deficient simply because an additional expert, even an arguably more favorable one, can be located after the trial. *See e.g. Schwieterman v. Smith*, 750 Fed.Appx. 441, 449-450 (6th Cir. 2018); *Hamilton v. Workman*, 217 Fed.Appx. 805, 810 (10th Cir. 2007); *Smith v. Cockrell*, 311 F.3d 661, 675-76 (5th Cir. 2002); *Williams v. Cain*, 125 F.3d 269, 278 (5th Cir. 1997). Appellant highlights the fact that Dr. Hua is a board-certified neuropathologist, unlike any of the experts that defense counsel presented at trial. But the record shows that in advance of the third trial, counsel proposed calling approximately six medical experts, including at least two forensic pathologists who had worked as State Medical Examiners (in Oklahoma and Colorado, respectively), a biomechanist, and a "board-certified physician in anatomic pathology, neuropathology, and forensic pathology." Because trial counsel ultimately did not call most of these experts as witnesses, we are unable to tell to what extent they examined the evidence or what their opinions were. But on this record, and operating with the presumption required by *Strickland*, we cannot conclude that trial counsel's investigative efforts were unreasonable.

Appellant emphasizes that Dr. Hua examined tissue samples which apparently were not examined by any of the defense experts who testified at trial. Importantly, Dr. Hua appears to agree with *every* medical expert who testified at trial in believing that some sort of external head trauma played a part in T.G.'s death. Appellant claims Dr. Hua's opinions corroborate those of the defense experts at trial as to the possibility that the trauma was accidental. This is true to some extent, but Dr. Hua's conclusions are also partially at odds with the other defense experts. Dr. Hua's suggestion that a blood disorder might have played a part in T.G.'s death was at odds not only with the opinions of the State's experts, but with the opinion of at least one defense expert. Finally, Dr. Hua's examination focused on the head injury; his findings fail to adequately explain the bruises to T.G.'s body. Dr. Hua has nothing to say about the bruise to T.G.'s penis.

As explained above, our overarching concern here is not whether some post-trial expert can be found to provide additional favorable evidence for the defense, but whether trial counsel's investigation was lacking at the time it was conducted. We cannot say that it was. Under *Strickland*, Appellant must overcome the presumption that trial counsel conducted a reasonable investigation, which in this case

includes consultation with appropriate medical experts. That presumption is supported by the record, which shows that trial counsel consulted with many medical experts besides the ones actually presented at the third trial. The supplemental materials do not create a strong possibility that trial counsel failed to conduct reasonable investigation, or that counsel's performance was constitutionally deficient, prejudicial, or deprived Appellant of a fair trial. For the reasons given above, Appellant's Application for Evidentiary Hearing on Sixth Amendment Claims is **DENIED**. *Simpson,* 2010 OK CR 6, ¶ 54, 230 P.3d at 906.

DECISION

The Application for Evidentiary Hearing on Sixth Amendment Claims is **DENIED**. The Judgment and Sentence of the District Court of Okfuskee County is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKFUSKEE COUNTY
THE HONORABLE LAWRENCE W. PARISH, DISTRICT JUDGE

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