ORIGINAL

No. F-2016-1169

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

KERRY ELIZABETH LALEHPARVARAN,	)	
	)	
Appellant,	)	
	)	
v.	)	Appeal from the District
	)	Court of Tulsa County
	)	Case No. CF-2015-242
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

BRIEF OF APPELLANT

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IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

KERRY ELIZABETH LALEHPARVARAN, Appellant, v. THE STATE OF OKLAHOMA, Appellee.	)	Case No. F-2016-1169

BRIEF OF APPELLANT

Kerry Lalehparvaran, Appellant, will be referred to by name or as Appellant. Appellee will be referred to as the State or the prosecution. Numbers in parentheses refer to page citations in the original Tulsa County record (O.R.), the State's exhibits (State Exh.), the defense exhibits (Def. Exh.), and the following transcripts:

- the April 29, 2015, preliminary hearing (PH Tr.);
- the November 13, 2015, arraignment and motion hearing (11-13-15 Tr.);
- the January 7, 2016, motion/severance hearing (1-7-16 Tr.);
- the January 8, 2016, severance hearing (1-8-16 Tr.);
- the August 12, 2016, motion hearing (8-12-16 Tr.);
- the September 9, 2016, motion hearing (9-9-16 Tr.);
- the jury trial held October 31 - November 3, 2016 (Tr.I - Tr.IV);
- the December 19, 2016, sentencing (Sent. Tr.).

STATEMENT OF THE CASE

On January 15, 2015, the State charged John Purdy ("Blade") by information with two counts of Child Abuse by Injury. (O.R. 25-27) An amended information was filed the following day, adding a count of Permitting Child Abuse against Ms. Lalehparvaran. (O.R. 28-29) The preliminary hearing was held on April 29, 2015, before the Honorable Martha Carter, Special District Judge. Assistant District Attorney, Sarah McAmis represented the State. Brian Martin represented Mr. Purdy, and James Wirth represented Appellant. At the hearing's conclusion, the court overruled the defendants' demurrers, finding sufficient cause for bindover; granted the State's request to amend the information; and set the matter for formal arraignment. (O.R. 202-214) The amended, single-page information was filed on May 1, 2015 (O.R. 58-60), charging:

- Count 1 - John Purdy; Child Abuse by Injury (head, face, neck, chest abdomen, back, arms, legs, and/or intraoral) against L.L. between 1/2/2015 and 1/9/2015, in violation of 21 O.S.Supp.2014, § 843.5(A).
- Count 2 - John Purdy; Child Abuse by Injury (back and/or buttocks) against L.L. between 1/2/2015 and 1/9/2015, in violation of 21 O.S.Supp.2014, § 843.5(A).
- Count 3 - Kerry Lalehparvaran; Permitting Child Abuse by Injury against L.L. between 1/2/2015 and 1/9/2015, in violation of 21 O.S.Supp.2014, § 843.5(B).
- Count 4 - John Purdy; Child Neglect against L.L. between 1/2/2015 and 1/9/2015, in violation of 21 O.S.Supp.2014, § 843.5(C).
- Count 5 - Kerry Lalehparvaran; Child Neglect against L.L. between 1/2/2015 and 1/9/2015, in violation of 21 O.S.Supp.2014, § 843.5(C).

Mr. Purdy was arraigned and stood mute on July 13, 2015. (O.R. 7-8) Ms. Lalehparvaran moved to quash Counts 3 and 5 on October 23, 2015 (O.R. 99-106), and the State filed a responsive motion on November 2, 2015 (O.R. 107-115). At Appellant's November 13, 2015, arraignment, the court denied Ms. Lalehparvaran's motion and accepted her not-guilty plea. (11-13-15 Tr. 14-16)

Defendant Purdy moved to sever the co-defendants' trials on January 8, 2016 (O.R. 171-174), and the court granted the motion the same day (1-8-16 Tr. 35). On January 12, 2016, the Honorable Doug Drummond, District Judge, accepted Mr. Purdy's blind guilty plea. (O.R. 12, 217-225) He was sentenced to:

- Count 1 - 25 years (18 in, 7 out);
- Count 2 - 25 years (18 in, 7 out);
- Count 4 - 5 years;
- All sentences to run concurrently and concurrent with Mr. Purdy's sentences in Tulsa County cases CF-2015-1512 and CF-2015-2573.

(O.R. 205-215)

On August 12, 2016, and September 9, 2016, the court considered the State's Notice of Intent to Introduce Res Gestae Evidence and/or Evidence of Other Crimes (O.R. 129-140) concerning 1) three prior DHS investigations, 2) Appellant's testimony from the 2015 Deprived Juvenile proceeding, and 3) recorded phone calls between Mr. Purdy and Ms. Lalehparvaran while the former was in county jail. Appellant ultimately only objected to introduction of the

December 2009 DHS investigation. (8-12-16 Tr. 12-16; 9-9-16 Tr. 26-27) The court overruled the objection and approved admission of all of the State's proposed evidence[1]. (9-9-16 Tr. 30)

The jury trial was held on October 31-November 3, 2016, before the Honorable Kelly Greenough, District Judge. Ms. McAmis continued to represent the State, and Brian Boeheim represented Appellant[2]. On the second day of trial, the court held a *Jackson-Denno*[3] hearing (Tr.II 265-295) outside of the jury's presence and ruled that Appellant's non-custodial and post-*Miranda*[4] custodial statements to law enforcement were admissible[5] (347-350). Eight witnesses testified for the State. Ms. Lalehparvaran's demurrer to the evidence was overruled. (Tr.IV 600-601) After the court found Appellant's decision to testify was knowing and voluntary (Tr.IV 601-605), Ms. Lalehparvaran testified as the lone defense witness. Prior to closing arguments, the court denied Appellant's proposed jury instructions, including instructions on duress. (Tr.IV 745-767)

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[1]The State ultimately opted not to use Appellant's testimony from the DHS hearing in its case-in-chief (TR.II 132), but did use it during Appellant's cross examination.

[2]Mr. Wirth withdrew on July 13, 2015 (O.R. 7), and appointed conflict counsel, Boeheim, Freeman, PLLP, began representing Appellant on September 23, 2015 (O.R. 79).

[3]*Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

[4]*Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[5]The pre-*Miranda* custodial statements were redacted from State's Exhibit 20, and State's Exhibit 20A was the version of the interrogation recording presented to the jury. (Tr.III 494-497, 512-513)

After deliberation, the jury found Appellant guilty of the two counts[6] and fixed 30-year punishments for each. (Tr.IV 816; O.R. 321)

At the December 19, 2016, sentencing, the court confirmed that both sides had reviewed the presentence investigation and sentenced Ms. Lalehparvaran in accordance with the jury's verdict[7], denying Appellant's request for partial suspension. The sentences were ordered to run concurrently, and Appellant was given credit for time served. (Sent. 17-18) The corresponding Judgment and Sentence was filed on December 21, 2016. (O.R. 343-350) It is from this judgement and sentence that Ms. Lalehparvaran now appeals.

STATEMENT OF FACTS

Appellant[8] began dating Blade Purdy in 2013. (O.R. 85) They had a child together, T.P., in 2014. (Tr.II 406) After she bailed him out of Rogers County jail in November 2014, Blade came to live with Appellant at her residence at 1437 N. Joplin Avenue in Tulsa. (Tr.III 444-445; Tr.IV 623, 684-685) The household consisted of Appellant, Blade, T.P., 4-year-old L.L.[9], and an older roommate

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[6]At Appellant's trial, Counts 3 and 5 were referred to as "Count A" and "Count B," respectively.

[7]Ms. Lalehparvaran must serve 85% of her sentence before becoming eligible for parole consideration. 21 O.S.Supp.2015, § 13.1(14).

[8]Appellant, Kerry Lalehparvaran, is referred to as "Kerry King" at times in the record.

[9]L.L., the victim in this case, was Ms. Lalehparvaran's daughter from a previous marriage. Appellant also had two older children from the prior marriage who resided in Illinois with Appellant's mother. (Tr.III 451-452)

named Sheila Loftin. (PH Tr. 131-132, 157) Blade took care of the children when Appellant and Ms. Loftin worked. (Tr.IV 624-625) While Blade regularly abused Appellant (Tr.IV 615-621; 685-688), he never harmed Appellant's children until January 2015 (Tr.IV 619).

On Sunday, January 4, 2015, Appellant observed bruises/scrapes on L.L.'s buttocks and a small abrasion on her forehead. (O.R. 53; Tr.III 553; Tr. IV 625-627, 696-697, 702-703) The following Tuesday, Appellant was bathing L.L. and noticed circular bruises on her arms and legs. (PH Tr. 158; Tr.III 448; Tr. IV 627, 704; State Exh. 20 9:15-9:25, 11:35-12:05) When she asked L.L. what happened, the child responded the "Blade was mean." (PH Tr. 158-159; State Exh. 20 9:25-9:35) Blade gave Appellant varying explanations for L.L.'s injuries, including that she slipped on the ice and hit her butt on the porch, that she had fallen down the stairs, that L.L. hurt herself playing, and that she hit her head on the dresser while he spanked her for peeing on herself. (O.R. 53; PH Tr. 142, 157-160; Tr.III 449; Tr. IV 625-626, 696-698; State Exh. 20 7:40-8:20, 10:55-11:20, 39:20-40:10) Appellant was concerned that Blade was not properly caring for the children, and she quit her job to remain at home. (O.R. 53; Tr. IV 628) She hid a wooden paddle (State Exh. 71) that was in the home to ensure that Blade would not use it on L.L. (O.R. 53; PH Tr. 142; State Exh. 20 8:20-8:45). Appellant believed L.L.'s bruises were minor and did not require medical attention. (Tr.IV 625-628)

That Thursday, Appellant and the children accompanied Blade to his Rogers County court appearance. (Tr.IV 710-711; State Exh. 20 13:10-13:45) Ms. Loftin was gone when they returned home and put the children to bed. Blade's friend came over around midnight, and the two men used heroin intravenously. Appellant also took an injection of heroin. Blade's friend left, and Appellant and Blade went to bed. (Tr.IV 628-633)

Appellant recounted that in the early hours of Friday, January 9, 2015, she awoke and noticed that Blade was not in the bed. She went to L.L.'s room and saw that Blade had the paddle and was choking L.L. with his hands. Appellant punched Blade in the face. Blade then choked Appellant, gabbed her hair, and threw her head against the wall multiple times. (Tr. II 273-274; Tr.III 555-556; Tr.IV 634-635; State Exh. 20 13:50-16:00, 35:20-36:40) Blade said that L.L. had caused this trouble and needed to be punished. Attempting to appease Blade and end the attack on L.L., Appellant agreed to hold L.L. while Blade spanked her. (Tr.IV 635-637; State Exh. 20 16:00-17:05, 52:00-53:10) Blade used a leather belt and spanked L.L. with all his might[10]. Appellant told Blade he was hitting L.L. too hard. Blade delivered a second, similar blow. Appellant then covered the child with her body. Blade then used a pillow to hit them both until the stuffing came out. (Tr.IV 637-640; State Exh. 20 17:05-

[10]Blade would later describe his technique as "ni***r striping." (O.R. 190)

23:00) Appellant tried to escape, but when she got to the front door, Blade grabbed her by the throat, drug her to the master bedroom, and told her to stay in there or he would kill her. Blade re-entered L.L's room and locked the door. (Tr.IV 640-641; State Exh. 20 23:00-25:15)

Appellant stood outside L.L.'s bedroom door for approximately eight minutes, listening. She described the sound of "torture," like L.L.'s air was being repeatedly knocked out. Appellant could hear L.L. saying "Mommy, save me." (Tr.IV 641-642; State Exh. 20 25:15-28:10, 53:10-54:00) When Blade finally exited L.L.'s room, Appellant sought to distract him by suggesting they take a shower together. Blade had taken Appellant's phone and kept it throughout the attack on L.L.[11], but after the shower, Appellant was able to momentarily obtain her phone and text her mother "help me." (PH Tr. 165; Tr.IV 642-643; State Exh. 20 28:10-28:45; O.R. 326) Appellant's mother called after Blade had retaken the phone. Blade grabbed Appellant by her throat, hit her face, and made her call her mother back, indicating that everything was okay. (PH Tr. 178-179; Tr. IV 730; State Exh. 20 28:45-30:30) The violence ended for the time being, and Blade told L.L. that she had to stand in the den until morning. Blade made Appellant lay down in bed with him. Appellant tried to keep her eye on L.L.

[11]Blade told the police he did not want 911 to be called, because he had outstanding warrants. (PH Tr. 150)

through the crack in the door, but dozed in and out of sleep. (PH Tr. 165-166; Tr. IV 730; State Exh. 20 42:30-44:45)

At approximately noon on Friday, Appellant bathed L.L. and observed the extent of her injuries. She was unable to get help for L.L., as Blade was still present. (PH Tr. 166; State Exh. 20 41:50-42:15, 45:35-46:30) Ms. Loftin arrived and tried to call 911. Blade took Ms. Loftin's phone and keys and refused to let anyone leave. Blade and Ms. Loftin had an altercation that ended with Ms. Loftin's arm being sliced. (Tr.II 393; State Exh. 20 44:45-45:35) At that time city contractors fortuitously arrived to do work on the property. Appellant answered the door, but was too frightened to ask for help. (Tr.IV 733) She was, however, able to coordinate with Ms. Loftin so that the latter could make contact with the workers once Blade was distracted. (State Exh. 20 46:30-47:30) The contractors called 911. (Tr.II 388-389; State Exh. 1)

Officer Samantha Ramsey arrived at the residence between 2:00-3:00 p.m. (Tr.II 396-397) The officer's affidavit indicated:

> Sheila claimed that Purdy had been fighting and beating all of them. She stated that he refused to let any of them leave the house and took her phone from her as she was trying to call 911. He said they had to stay there for 3 days until she was calm and would not call the police.

(O.R. 42) The police noted bruising all over Appellant's arms and legs. (O.R. 42; Tr.II 411; Def. Exh. 1-6) Appellant and Ms. Loftin told Officer Ramsey that Blade had locked L.L. in the back bedroom. (Tr.II 399) Blade was placed under arrest,

and the officer was able to breach the locked bedroom door and rescue L.L. (Tr.II 400-401) The police observed facial bruises on L.L., who said that Blade hit her and pulled her hair. (Tr.II 402-403) Officer Ramsey took L.L. and Appellant to the Children's Advocacy Center. (Tr.II 403)

Dr. Michael Baxter was the attending pediatrician. L.L. told both the forensic interviewer and Dr. Baxter "Daddy did it," and that he hit her with a paddle. (Tr.III 552) The doctor removed L.L.'s clothes and discovered contusions over her entire body, which he charted on trauma grams. (State Exh. 22-25) The child had bruising on her cheeks, eyelids, ears, and scalp. She had petechial injuries on her forehead, consistent with being struck by the bristle end of a brush. (Tr.III 562-569; State Exh. 26-38, 70) An area of hair was missing from the back of L.L.'s head. (Tr.III 559) The girl had marks on her neck, chest wall, shoulders, wrists, and hands. Bruising around her jaw line and collarbone were consistent with being grabbed or choked. There were defensive injuries on her arms[12]. (Tr.III 569-576; State Exh. 39-52) L.L. had bruises on her sides, abdomen, hips, thighs, calves, knees, and feet. The lineal pattern marks on L.L.'s back suggested she was struck with a belt-like object. (Tr.III 576-582; State Exh. 53-59) Dr. Baxter testified that the bruises were not from normal childhood playing, and he diagnosed abuse. (Tr.III 579-580, 588-589) Dr. Baxter

[12]Blade indicated the bruises on L.L.'s hands were from attempting to "cover[] that ass." (PH Tr. 148)

indicated that it was impossible to determine when each bruise occurred, as bruises cannot be aged with certainty. (PH Tr. 75-77, 87-88, 113) L.L. was transferred to the pediatric emergency center at St. Francis Hospital for further evaluation. (PH Tr. 62-63; Tr.III 586-587) She was administered fluids and released. (PH Tr. 110-112) Dr. Baxter saw L.L. for a follow-up appointment a week later. He observed that her bruises were healing, and that there were no new injuries. (PH Tr. 82, 115)

Appellant was cooperative and gave several accounts of the incident over the next week, which were basically consistent. On January 9, 2015, she described the morning's events to Officer Ramsey (Tr.II 404-407), Dr. Baxter (Tr.III 547-550), and Detective Paula Maker and DHS Child Welfare Investigator, Kristi Simpson (Tr.III 433). Ms. Simpson visited Appellant's home on January 10, 2015, where she obtained additional information[13]. (Tr.III 438) After her arrest, Appellant was interrogated by Detective Maker and Detective Jeanne MacKenzie on January 16, 2015. (Tr.III 507-512; State Exh. 20) Appellant obtained a protective order against Blade, which was dismissed after she failed to appear at court. (Tr.III 515-516; Tr. IV 739-741) Additional facts will be discussed as they relate to the individual propositions of error.

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[13]While at Appellant's home, Ms. Simpson observed numerous bullet and fist holes in the walls, made by Blade and Appellant's ex-husband. (Tr.III 438-444; State Exh. 3-17)

PROPOSITION I

ADMITTING EVIDENCE OF A 2009 DHS INVESTIGATION DENIED APPELLANT HER DUE PROCESS RIGHT TO A FAIR TRIAL.

Standard of Review. This Court reviews a trial court's decision to admit other bad act evidence for an abuse of discretion. *Miller v. State,* 2013 OK CR 11, ¶ 88, 313 P.3d 934, 966.

Argument and Authorities. The State provided notice that it sought to introduce other misconduct evidence, including three prior DHS investigations of Appellant. The first investigation was in 2009 and was related to Appellant's one-year-old son, W.L., testing positive for marijuana. (O.R. 132-133) Appellant objected to the relevance of this investigation before (8-12-16 Tr. 15-18; 9-9-16 Tr. 26-29) and during (Tr.III 469) trial. The court overruled the objections, holding that the evidence was not res gestae, but met the requirements of 12 O.S.2011, § 2404(B) to show motive, knowledge, absence of mistake, or absence of accident. (9-9-16 Tr. 30)

During the State's case-in-chief, a DHS Investigator testified about the 2009 substance abuse referral, indicating that the young child[14] tested positive for drugs while residing with Appellant, her ex-husband, and her ex-husband's aunt; that Appellant sought medical care for W.L.; that Mr. Lalehparvaran and his aunt used drugs regularly; that Appellant denied drug use; and that Appellant disciplined her children by telling them "no" and spanking their bottoms.

[14]The investigator testified that W.L. was actually only one month old at the time.

Appellant posited that W.L.'s positive drug test was likely from second hand smoke (either directly or from Appellant's breast milk) or from accidently eating his father's marijuana roach or one of his great aunt's pills. (Tr.III 468-473) The State emphasized the incident during Appellant's cross examination (Tr.IV 649-652) and closing argument (Tr.IV 774). The jury was given the uniform limiting instruction on other crimes. (O.R. 297; Instruction No. 9-9, OUJI-CR (2d))

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." 12 O.S.2011, § 2404(B). *See also Burks v. State,* 1979 OK CR 10, 594 P.2d 771,*overruled on other grounds by Jones v. State,* 1989 OK CR 7, 772 P.2d 922. "[T]hese exceptions are to be used with the utmost caution, and that when there is any doubt it is to be resolved in favor of the defendant." *Galindo v. State,* 1978 OK CR 4, ¶ 4, 573 P.2d 1217, 1218. To be admissible, *Burks* evidence must be probative of a disputed issue of the crime charged, must be visibly connected to the crime charged, must be necessary to support the State's burden of proof, and the probative value must outweigh prejudice. *Welch v. State,* 2000 OK CR 8, ¶ 8, 2 P.3d 356, 365. Such evidence must be suppressed when it is so prejudicial that denies a defendant his right to be tried only for the charged offense, or where its

minimal relevancy suggests that the evidence is being offered to show a defendant is acting in conformity with his true character. *Id.*

The 2009 DHS referral did not involve L.L., who was not born yet. It did not involve Blade, who Appellant had not met yet. It did not involve child abuse by injury, or Appellant permitting the same. It did not involve child medical neglect, as Appellant sought treatment for W.L. There were no factual similarities or visible connections to the case at bar. The 2009 incident was entirely unnecessary to support the State's burden of proof. The State contended that the evidence was relevant, because it demonstrated Appellant's history of drug use and proclivity for corporal punishment (9-9-16 Tr. 27-28), but the investigator's testimony established neither drug use by Appellant nor improper discipline. The evidence served only to portray Appellant as a bad mother.

The court's justifications for admitting the testimony - motive, knowledge, or absence of mistake/accident (9-9-16 Tr. 30) - were likewise untenable. The 2009 incident did not provide a motive for Appellant to neglect or permit abuse of L.L. in 2015. *See e.g., Douglas v. State,* 1997 OK CR 79, ¶ 73, 951 P.2d 651, 673 (evidence of a prior illegal altercation where gang members disrespected a rival gang's turf was admissible to show motive), *habeas relief granted on other grounds in Douglas v. Workman,* 560 F.3d 1156 (10th Cir. 2009). Nothing from the DHS investigation informed Appellant's alleged guilty knowledge related to the subject charges. *See e.g., Taylor v. State,* 1982 OK CR 88, ¶ 6, 646 P.2d 615, 616 (evidence of a prior burglary proved that the defendant's possession of the stolen

property was knowing). The absence of mistake or accident exception was inapplicable, because Appellant never asserted these defenses at trial. *Lowery v. State,* 2008 OK CR 26, ¶ 13, 192 P.3d 1264, 1269-1270; *United States v. Bell,* 516 F.3d 432, 442 (6th Cir. 2008) (for other act evidence to be admissible for the purpose of showing absence of mistake or accident, the defendant must claim a defense based on some type of mistake or accident).

Assuming *arguendo* that the 2009 referral was slightly probative of a disputed issue, it was still inadmissible, being substantially outweighed by the danger of unfair prejudice and needless cumulation. 12 O.S.2011, § 2403.

A criminal defendant has a due process right to a fundamentally fair trial. U.S. Const. amend. XIV; Okla. Const. art. II, §§ 7, 20. When a constitutional violation is established, reversal is required unless the State can show the error was harmless beyond a reasonable doubt. *Simpson v. State,* 1994 OK CR 40, ¶ 34, 876 P.2d 690, 701, *citing Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Prejudice was evident from Ms. Lalehparvaran's convictions, and particularly her two 30-year sentences. Appellant was sentenced to a prison term nearly twice that of L.L.'s actual abuser. The State cannot demonstrate harmless error beyond a reasonable doubt.

Conclusion. Testimony about the 2009 DHS investigation amounted to improper character evidence, and admission thereof precluded the possibility of a fair trial. Appellant requests that this Court reverse her convictions and remand for a new trial. In the alternative, Ms. Lalehparvaran urges that the erroneously

admitted evidence contributed to her exorbitant 30-year sentences, and favorable modification is required. *See Lowery,* 2008 OK CR 26, ¶¶ 21-23, 192 P.3d at 1273.

PROPOSITION II

ADMITTING 92 MINUTES OF POST-ARREST, RECORDED PHONE CONVERSATIONS BETWEEN THE CO-DEFENDANTS DENIED APPELLANT HER DUE PROCESS RIGHT TO A FAIR TRIAL.

Standard of Review. In the absence of a timely objection at trial, this Court will review for plain error. *Hogan v. State,* 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. To be entitled to relief, an appellant must establish 1) the existence of an actual error (i.e., deviation from a legal rule), 2) that the error was plain and obvious, and 3) that the error adversely impacted his substantial rights by affecting the proceedings' outcome. *Id.*

Argument and Authorities. Appellant was out on bond for seven months in 2015. (O.R. 48-49, 75-78) During that period, before she was advised not to, Appellant accepted 28 jail phone calls from Blade. (Tr.III 516-521; Tr.IV 734-737; State Exh. 21) The State sought to admit six of those recorded calls in their case-in-chief as res gestae evidence, as the recordings contained Appellant's statements that she was high during the event, that she had done nothing wrong, that she would rephrase her description of Blade choking L.L., that she did not testify against her ex-husband, and that she loved Blade and wanted to continue their relationship. (O.R. 138-139; 8-12-16 Tr. 10-11) Appellant did not object. (8-12-16 Tr. 12) During closing argument, the State also contended that the conversations demonstrated Appellant's aggressiveness, and that she was not a meek victim as suggested by the defense. (Tr.IV 807-808)

While some of the State's proffered reasons were not wholly invalid, and while Appellant made select statements that had a degree of probative value, the prosecution could have accomplished its purposes with a properly edited, five-minute exhibit. Presenting 92 minutes of what the State described as "disgusting" and "gross" calls (Tr.IV 807) improperly inflamed the jury against Appellant.

In Call 1 (1 John Purdy #2[15]), Blade apologized to Appellant, telling her "I'm sorry I let the drugs get hold of me." (2:50-3:05) Appellant said she had quit using drugs. (8:30-8:40) Appellant denied telling the police that she suspected Blade of child molestation, saying they twisted her words. (7:15-8:30) Appellant stated she did nothing wrong and should not have been arrested. (11:30-12:00) The remainder of the call involved Blade declaring his love for Appellant and imploring her to provide verbal reciprocation (1:15-2:30, 4:45-5:05, 6:45-7:00, 10:00-11:00, 12:00-12:45, 18:50-19:55, 20:35-20:45); discussion of their "naked videos" (4:30-4:45); Blade accusing Appellant of being unfaithful (3:15-4:00, 20:05-20:35), including "I heard you been fucking with a bitch...a female" (8:40-9:20); Appellant accusing Blade of being unfaithful, including "you say you're my soul mate, but you are out there trying to fuck some other bitch" (14:40-16:10); Appellant's statements about drinking vodka (19:55-20:05); and various discussions about Blade's birthday, the children, friends, church, placing money in Blade's jail

[15]State Exh. 21 contains six files, each representing a different phone call that was played at trial. Appellant references each recording as labeled on the disc.

account, Appellant's hair and weight, and an assortment of threats by Blade. As with the other calls, the mood was mostly jocular.

Call 2 (2 John Purdy #3) contained a statement by Appellant that L.L. is now scared and terrified of men because of Blade. (3:50-4:05) Appellant told Blade that he hurt her baby, and Blade responded that he was "drugged out" and knew that he "fucked up." (0:20-0:45) The parties discussed Ms. Loftin and agreed that she was not present during the incident and could not provide meaningful testimony. (1:30-2:10) Blade repeatedly begged for Appellant to go to the courthouse and marry him. (4:15-6:15, 7:35-7:50, 9:20-9:30, 10:55-12:05) Appellant commented that "if I was married to you, I wouldn't be fucking nobody else." (5:10-5:20) The rest of the conversation included Appellant lamenting that she could no longer smoke marijuana (9:10-9:15); a profanity-laced discussion of T.P.'s DNA test; Appellant accusing Blade of being unfaithful; and talk about Appellant's mattress, her counseling sessions, her future plans to move to Chicago, the pending foreclosure on her home, her ex-husband, Blade's likely prison term, and lawyer fees.

In Call 3 (3 John Purdy #6), Appellant stated "I'm trying to get them to look at me as a fucking victim, and they're trying to look at me as an accomplice, and I wasn't a fucking accomplice to shit. They act like I was in there fucking helping you do that shit to my child." (1:35-1:50) Appellant also said "I was fucked up too [during the incident]" (2:10-2:15), and that the police were twisting her words that

Blade choked L.L. (1:55-2:30). The remainder of the call was Blade threatening Appellant, e.g. "keep your legs closed, or I'm going to kick in your shit," (4:00-4:05), and the two discussing their love, with Blade again proposing marriage. (2:25-4:05)

Call 4 (4 John Purdy #8) was devoid of any discussion of the events of January 9, 2015. Blade and Appellant talked about their prior drug use. (6:45-8:05, 18:00-19:10) Visitation, Blade's drug dealing, his uncle, Appellant's perfume, her conditioner, and her ex-husband were all discussed. Blade expressed his concern that Appellant was being unfaithful: "you just fucked a crack head ni***r," "a whore for one night will probably be a whore on another night," and telling Appellant he would cut her face up with a box cutter if she was a "whore." (8:45-11:20) Appellant also accused Blade of past infidelities, stating "I walked in my room and that bitch [Ashley] was in my bed. What the fuck...what the fuck is that bitch doing in my mother fucking room?" (1:25-3:35) (9:00-9:45, 18:00-18:30) The rest of the recording consisted of talk about their love, making babies together in the future (1:00-1:25, 5:30-6:15, 12:25-14:0020:00-20:50), their "naked pictures" (12:05-12:20), and other sexual matters (Blade: "I wish we could get naked right now. Buck naked. No socks on...Thinking about your ass." (3:35-4:15); Appellant: "You used to keep me up at night trying to get your nut." (4:30-5:30); Blade: "Think nasty about me later when we get off the phone." (14:35-14:50))

In Call 5 (5 John Purdy #9), Appellant had been drinking wine. (12:20-12:40) She referred to Blade as her "baby boy" (1:45-3:00), as the two discussed their love and blew kisses over the phone (with Blade adding, "can you put a little tongue in that for me" (4:00-4:45)). (6:25-7:00, 11:15-12:20) Appellant told Blade she would watch their sexual videos later, because "you know I'm nasty." (5:45-6:05, 10:10-11:10) Appellant again claimed she had done nothing wrong and "shouldn't even have a fucking charge." (8:00-8:15, 9:15-9:35) Blade blamed Appellant for failing to intervene when Sheila asked the city workers to call 911 on January 9, 2015. (9:35-10:00) They both talked about trying to quit drugs. (3:20-4:00) The co-defendants proceeded to discuss T.P. and her hair, Appellant's Google account, and Appellant's incessant complaining which burdened Blade while he was in jail. The call ended with a debate about their respective races. Appellant told Blade, "You can't take my ni***r card. I came from black pussy, ni***r, you came from white pussy." Blade retorted that at least he came from "black nut." (13:45-15:30)

Call 6 (6 John Purdy #14) contained some discussion of the morning L.L. was abused. Appellant told Blade she thought he was going to kill her and L.L. and kidnap T.P. Blade revealed that after he "whooped" L.L. previously, that he sat down with her, and they cried together. (12:45-14:30) Ms. Loftin was then discussed, and Blade told Appellant to call his attorney and ask what would happen to their case if a witness failed to appear. (15:15-16:30) Blade demanded

that Appellant contact her ex-husband and inform him that she was with Blade now. (6:45-9:25) There were conversations about Blade's birthday card, Appellant's plans to move to Texas, her cooking, and her busy schedule. Appellant and Blade talked about their love for one another (10:45-12:30, 17:20-18:20), with Appellant telling her co-defendant that she wanted two more of his babies, because she did not like odd numbers (0:05-1:10). Appellant also advised that she did not wear panties. (16:35-16:45)

A defendant should not be convicted of an offense because of other misconduct or because he is a bad person. *Johnson v. State,* 1982 OK CR 37, ¶ 27, 665 P.2d 815, 822. The overwhelming majority of State's Exhibit 21 was utterly irrelevant to the events of January 2-9, 2015. The probative value of the snippets that were pertinent was exponentially outweighed by the recordings' prejudicial effect. Appellant demonstrated a lack of remorse for L.L., often mentioning the seriousness of the incident, and then seconds later, giggling, laughing, and carrying on with her abuser. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise." 12 O.S.2011, § 2403.

That Ms. Lalehparvaran would continue a relationship with Blade understandably repulsed the jury. Appellant maintains that her romantic

conversations with Blade months after the incident A) were not res gestae evidence as contended by the State, given the temporal and spatial remoteness, *Coates v. State,* 1989 OK CR 16, ¶ 4, 773 P.2d 1281, 1284; and B) amounted to "bad acts" in and of themselves under the circumstances, which were prohibited by 12 O.S.2011, § 2404(B), *Eizember v. State,* 2007 OK CR 29, ¶ 75, 164 P.3d 208, 230 (a non-criminal act is nonetheless governed by § 2404(B) where it carries a stigma that could unduly prejudice an accused). To any extent evidence of the continued relationship was admissible, it could have been proven by a single recorded statement of Appellant. Countless minutes of romantic and sexual banter between the co-defendants was needlessly cumulative and only served to prejudice the jury against the humiliated Appellant.

This Court found plain error under similar circumstances when reversing a First-Degree Murder conviction. *Dunkle v. State,* 2006 OK CR 29, ¶ 49, 139 P.3d 228, 245. In *Dunkle,* the trial court admitted six recorded jailhouse phone calls from the defendant to her lover. *Id.,* 2006 OK CR 29, ¶ 42, 139 P.3d at 243. Rejecting the State's contention that the calls were relevant to show inconsistencies in the defendant's account, this Court determined, much like the instant exhibit, that "Dunkle and Kelly barely refer to what actually happened on the night of the shooting." *Id.,* 2006 OK CR 29, ¶ 46, 139 P.3d at 245. Considering the State's claim that the conversations were admissible to show an attempt to conceal evidence, this Court said "[E]ven if a small portion of the conversation on

July 2, 2003, was admissible, this did not justify the admission of the entire conversation or of the other separate conversations. The prosecutor's arguments at trial suggest that the real purpose of playing this conversation was to expose the jury to the irrelevant (and nauseating) love banter of Dunkle and Kelly." *Id.*, 2006 OK CR 29, ¶ 47, 139 P.3d at 245. After determining that a portion of a recording was properly admissible, this Court stated:

> This isolated portion of a single recording, however, did not justify the trial court's admission of the five other conversations. This Court finds that the trial court abused its discretion in admitting the five other conversations, which together lasted over 69 minutes, with almost no relevant content and substantial content that was both irrelevant and unduly prejudicial. We note that even if we review the court's decision to allow the playing of the recordings only for plain error, the trial court should have quickly realized, upon hearing the recordings at trial, how irrelevant and how unfairly prejudicial they were, and cut them off. This did not happen. We find that the trial court's total failure to limit or constrain this evidence was plain error.

Id., 2006 OK CR 29, ¶¶ 48-49, 139 P.3d at 245.

As in *Dunkle,* admitting 92-minutes of Ms. Lalehparvaran's conversations with Blade rendered her trial fundamentally unfair. The State emphasized the improper character evidence from the calls during closing argument, e.g. "[If] your man has tortured [] your child, do you talk to them like that? Do you make plans for the future with him? Tell him he's your soulmate...Bummer for you [L.L.]. Mommy is still in love. You're on your own, kid." (Tr.IV 807) The jury was provided uniform instructions about avoiding prejudice in their deliberations (O.R. 288; Instruction No. 10-8 OUJI-CR (2d)) and the limited purpose of other misconduct

evidence (O.R. 297; Instruction No. 9-9 OUJI-CR (2d)), however the presumption that a jury will adhere to a limiting instruction evaporates when devastating prejudicial evidence is improperly admitted. *United States v. Jones,* 16 F.3d 487, 493 (2nd Cir. 1994). Prejudice was apparent from the guilty verdicts and especially from Appellant's sentence, as the passive co-defendant received two 30-year terms.

Conclusion. Admitting recordings of the six phone calls constituted plain error, which affected the proceeding's outcome. Ms. Lalehparvaran requests that this Court reverse her convictions and remand for a new, fair trial. Alternatively, Appellant maintains that the inflammatory exhibit led directly to her disproportionate sentence, which should be favorably modified.

PROPOSITION III

APPELLANT WAS DENIED DUE PROCESS OF LAW WHEN THE TRIAL COURT FAILED TO PROPERLY INSTRUCT THE JURY ON DURESS, A DEFENSE APPOSITE TO ANY ALLEGED ILLEGALITY ON JANUARY 9, 2015.

Standard of Review. The trial court denied Appellant's proposed duress instructions. (O.R. 758-760) This Court reviews rulings on jury instructions for an abuse of discretion. *Spence v. State,* 2008 OK CR 4, ¶ 8, 177 P.3d 582, 584.

Argument and Authorities. The Due Process Clause guarantees criminal defendants the right to present a complete defense. *California v. Trombetta,* 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984). The court should instruct the jury on a defense for which a prima facie case has been established. *State v. Malone,* 2007 OK CR 34, ¶ 22, 168 P.3d 185, 197.

"A person is entitled to assert duress as a defense if that person committed a prohibited act or omission because of a reasonable belief that there was imminent danger of death or great bodily harm from another upon oneself, ones spouse, or ones child." 21 O.S.2011, § 156; Instruction 8-20, OUJI-CR (2d). Duress is a complete defense under Oklahoma law. 21 O.S.2011, §§ 152(7), 155. Once asserted, the State must prove beyond a reasonable doubt that the defendant was not acting under duress. Instruction No. 8-22, OUJI-CR (2d). A duress defense is not available to one that fails to use a reasonably safe opportunity to escape. Instruction No. 8-21, OUJI-CR (2d).

The circumstances of January 9, 2015, surpassed "a reasonable belief" by Appellant that she and L.L. were in "imminent danger of death or great bodily harm," as they were both subjected to actual, savage beatings. Dr. Baxter testified as to L.L.'s injuries, which alone satisfied § 156, as duress includes harm to one's child. While L.L. bore the brunt of the Blade's aggression, Appellant suffered as well. Ms. Lalehparvarn testified that on Friday morning Blade compelled her to inject heroin. (Tr.IV 630) Blade hit and choked her, drug her by the hair and threw her against the wall, all repeatedly; he told Appellant he would kill her; he took her phone; and he physically prevented her from escaping through the front door. (Tr.IV 635-642) The State cast aspersions on Appellant's account during closing argument (Tr.IV 777, 805), but Ms. Lalehparvaran's testimony was uncontroverted, and was corroborated by Ms. Loftin (O.R. 42), who Blade also injured and prohibited from leaving (Tr.II 393; State Exh. 20 44:45-49:30); Blade's statements to police (PH Tr. 144-145); and the responding officer, who observed injuries "all over" Appellant (Tr.II 411) and initially arrested Blade for domestic battery, kidnapping and interfering with a 911 call (O.R. 41-44). Further, Appellant was not experiencing Blade's rage in a vacuum, but had been controlled and abused by Blade throughout their relationship (Tr.IV 615-621), including a prior attack that lasted two full nights, where he badly sliced the pregnant Appellant's wrists, arms, calves and thighs. (Tr.IV 685-688). If a reasonable belief

of danger of great bodily harm constitutes "subjection to the power of a superior" under § 155, then actual great bodily harm must also suffice.

The court justified its denial of the instructions in part due to Appellant's opportunity to escape while she was locked outside of L.L.'s bedroom for eight minutes while Blade tortured the girl. (Tr.IV 759-760) Faced with a decision that no parent should have to make, Appellant chose to stay near her daughter. This decision should not foreclose a duress defense. The escape opportunity limitation of Instruction No. 8-21 must be considered in conjunction with § 156's inclusion of "oneself, ones spouse, or ones child." An opportunity to escape is not "reasonably safe" if it involves leaving a statutorily designated individual to be brutalized. *See e.g., United States v. Kuok,* 671 F.3d 931, 949-950 (9th Cir. 2012) (accused Chinese smuggler entitled to duress instruction, as fleeing the country alone - leaving his wife and son in Macau where they were in danger - was not a reasonable escape opportunity).

The court also cited Appellant dozing in and out of sleep after Blade forced her to come to bed with him as a failed escape opportunity. (Tr.IV 760) Appellant testified that Blade "made me lay down," and that she "couldn't stay awake." She was not sure if Blade also fell asleep. (Tr.IV 732) This testimony was the only evidence on the matter and did not clearly establish that there was any safe escape opportunity, much less one sufficient to completely preclude a duress instruction on both counts. Evidence of an affirmative defense "should not be

weighed by the trial court. The trial court should leave the weighing of the evidence to the finders of fact, in whose judgment our system of trial by jury is based." *Malone,* 2007 OK CR 34, ¶ 22, 168 P.3d at 197, *quoting Jackson v. State,* 1998 OK CR 39, ¶ 66, 964 P.2d 875, 892; *see also Ball v. State,* 2007 OK CR 42, ¶ 29, 173 P.3d 81, 89 (the jury must be instructed on the theory of defense where evidence supports it, even if the evidence is discredited).

The court further referenced Appellant's conduct earlier in the week, including her failure to take advantage of escape opportunities, finding "the State's arguments persuasive." (Tr.IV 759) Prosecutor McAmis argued "[T]he State might tend to agree [that duress instructions are warranted] if the defendant was charged, in particular, with the day that the final attack on [L.L.] occurred. However, that is not the case. As you Honor is well aware, the defendant is charged in a date range, including on or about between January 2nd and January 9th, 2015." (Tr.IV 748) Ms. McAmis concluded "[B]ecause she did have the opportunity to avail herself of the situation during that week time period and she chose not to do that...therefore, the Defense is not entitled to that defense." (Tr.IV 753) This reasoning was unsound as to both counts.

The State charged Appellant in Count 3 with "allowing [Blade] to continue to have access to L.L....and as a result L.L. sustained injury to her head, face, neck, chest, abdomen, back, arms, legs and/or intraoral injury...on or about between 1/2/2015 and 1/9/2015." (O.R. 59) As the evidence established that L.L.

sustained all or most of the injuries identified in the Information when Blade attacked her on Friday morning, the jury certainly could have found that Appellant permitted injurious child abuse on January 9, 2015 (see, e.g. the two examples identified by the court *supra*). There was evidence of lesser injuries during the week, and the jury might have found that Appellant permitted child abuse solely from January 2-8, 2015, but this mere possibility was not grounds to reject the instruction. Regardless of what time frame the State charged, if the jury could find the alleged conduct occurred in whole or in part on Friday when Appellant was under duress, then it was improper for the court to usurp the factfinder's role. Instruction 8-21 was included in Appellant's requested instructions (Tr.IV 746), and the jury was more than capable of applying the escape opportunity exception if it was appropriate.

Ms. Lalehparvaran was charged in Count 5 with "failing to obtain timely and/or appropriate medical care for L.L...on or about between 1/2/2015 and 1/9/2015." (O.R. 59) As discussed in the propositions *infra,* any act or omission supporting Count 5 necessarily occurred on January 9, 2015. There was no evidence that L.L. needed medical care before Friday. Possible escape opportunities earlier in the week were irrelevant to and did not justify denying the duress instructions as to Child Neglect.

The court's explanations do not withstand scrutiny. As there was sufficient evidence for the jury to find that Ms. Lalehparvaran was involuntarily subjected

to Blade's control on Friday morning, denying the duress instructions constituted an abuse of discretion. The erroneous denial of the instructions prejudiced Ms. Lalehparvaran. The State would have been unable to prove beyond a reasonable doubt that Appellant was not under duress on January 9, 2015, given evidence of the shocking violence. The danger to Appellant and L.L. was not imminent - it was realized. Instead of being afforded the complete defense to which she was entitled, Appellant was convicted and sentenced to two 30-year terms.

Conclusion. Despite the overwhelming evidence of threatened and actual harm, the court rejected Appellant's requested duress instructions, tendering untenable explanations. This abuse of discretion denied Appellant due process of law. Ms. Lalehparvaran requests reversal of her convictions.

PROPOSITION IV

THE STATE'S FAILURE TO ELECT THE SPECIFIC ACT RELIED UPON FOR COUNT 5, REFLECTED IN THE INDEFINITE JURY INSTRUCTIONS, CONSTITUTED REVERSIBLE ERROR.

Standard of Review. Appellant maintains that the essence of her claim was considered by the court when objecting to the 8-day date range and requesting duress instructions, and that resolving those matters in the State's favor was an abuse of discretion. (Tr.IV 745-760) Alternatively, this proposition is subject to plain error review. *Hogan v. State,* 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

Argument and Authorities. As a general rule, the State must elect which conduct it relies upon to secure a conviction. *Huddleston v. State,* 1985 OK CR 12,

¶ 16, 695 P.2d 8, 10. A defendant must be tried for one offense at a time, and a conviction must be based upon only one act. *Cody v. State,* 1961 OK CR 43, ¶ 38, 361 P.2d 307, 320 "[I]f no motion is made to require the state to elect, the trial court, of its own motion, should require the prosecution to elect upon which of said acts it will rely..." *Id.,* 1961 OK CR 43, ¶ 37, 361 P.2d at 320, *quoting Cooper v. State,* 1925 OK CR 384, 31 Okl.Cr. 217, 221, 238 P. 503, 504. The election principle ensures a defendant's constitutional right to be tried for a single offense[16] and the right to a unanimous jury verdict[17]. *Cody,* 1961 OK CR 43, ¶ 38, 361 P.2d 307, 320, *citing McManus v. State,* 1931 OK CR 110, 50 Okl.Cr. 354, 297 P. 830. A court's failure to require election and precisely instruct the jury constitutes fundamental, reversible error. *Dugan v. State,* 1961 OK CR 38, ¶ 10, 360 P.2d 833, 835. This Court has recognized exceptions to the election requirement where an offense is ongoing or where the evidence indicates separate, continuing acts which are part of a single transaction. *Scott v. State,* 1983 OK CR 118, ¶¶ 17-19, 668 P.2d 339, 342-343 (rape); *Huddleston,* 1985 OK CR 12, ¶ 16, 695 P.2d at 10-11 (child sexual abuse); *Gilson v. State,* 2000 OK CR 14, ¶ 22, 8 P.3d 883, 889 (child physical abuse).

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[16]The constitutional rights implicated include fair trial, double jeopardy (*Cody,* 1961 OK CR 43, ¶ 39, 361 P.2d at 320), and due process (*Cole v. Arkansas,* 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed. 644 (1948)).

[17]Okla.Const., art. II, § 19.

The State announced its intention to charge Appellant with Count 5 at the preliminary hearing (PH Tr. 132-137, 199-202), where evidence was presented that Blade beat L.L. on the morning of Friday, January 9, 2015 (PH Tr. 144-145, 160-166), and that L.L. had injuries consistent with this attack (PH Tr. 39-61). Dr. Baxter testified that individual bruises do not need treatment, but the extensiveness of L.L.'s combined injuries, when he examined her on Friday afternoon, required medical attention (PH Tr. 114), and that failure to seek treatment would constitute neglect (PH Tr. 72-73). While some testimony suggested L.L. had been disciplined and/or had isolated marks earlier in the week (PH Tr. 141, 149), there was no evidence that L.L. required medical assistance prior to Friday's battery. Dr. Baxter testified that bruises could not be aged with certainty (PH Tr. 87-91, 113), and that L.L.'s injuries could have come from multiple impacts during a single incident (PH Tr. 76-77). The evidence at trial was similar.

The evidence did not establish a continuous denial of medical care, but rather two distinct time periods: 1) the morning that Blade inflicted the grievous injuries on L.L. (January 9, 2015), and 2) the week leading thereto (January 2-8, 2015). In the Information, the State conflated these two intervals, charging Appellant with medical neglect from January 2-9, 2015. (O.R. 59) With no explanation in the record, the jury was instructed even more broadly, indicating the charge of failing to provide either adequate medical care *or supervision* over the

same time span. (O.R. 309-310) Accordingly, Appellant could be convicted of Count 5 under three theories:

> A) Failure to provide adequate medical care on January 9, 2015. Any alleged illegality on Friday was subject to a duress defense. See Proposition III.
>
> B) Failure to obtain medical care from January 2-8, 2015. No evidence was presented that L.L. required medical care over this period. See Proposition VI.
>
> C) Failure to properly supervise the child. Count 3 subsumed any such conduct. See Proposition V.

Aware that positions B and C were unsustainable, the State proceeded in this manner solely to thwart the merited duress instructions.(Tr.IV 748-758) The court erred by not requiring the State to elect which of the three alleged offenses it was prosecuting and instructing the jury thereon.

There was no ongoing pattern of medical neglect, and the prerequisites and rationales underlying the single transaction exception - e.g., exclusive access, child witness amalgamation, impossibility of designating an isolated act - were absent. The State nevertheless relied on the exception to circumvent the election requirement. (O.R. 130-131) Appellant was prejudiced, as the jury was not instructed on the duress defense, and as she was sentenced to 30 years on Count 5 with no certainty as to the acts/omissions that supported the conviction.

Conclusion. Appellant did not commit multiple offenses. Testimony established that L.L.'s need for medical attention materialized on Friday morning,

hours before she and Appellant were rescued and taken to the Child Advocacy Center. The court erred by not requiring the State to elect which conduct it relied on for Count 5. Ms. Lalehparvaran requests that this Court reverse her conviction.

PROPOSITION V

TO THE EXTENT THE COUNT 5 CONVICTION WAS BASED ON A FAILURE TO SUPERVISE, IT CONSTITUTED DOUBLE JEOPARDY AND/OR AN IMPERMISSIBLE MULTIPLE PUNISHMENT.

Standard of Review. Double jeopardy and multiple punishment claims are fundamental, and can be raised for the first time on appeal. *Hunnicutt v. State*, 1988 OK CR 91, ¶ 8, 755 P.2d 105, 109. When such claims were not raised at the district court level, this Court will review for plain error. *Head v. State*, 2006 OK CR 44, ¶ 9, 146 P.3d 1141, 1144.

Argument and Authorities. The State charged Appellant in Count 5 with "failing to obtain timely and/or appropriate medical care for L.L....on or about between 1/2/2015 and 1/9/2015." (O.R. 59) L.L. required medical attention after Blade abused her on Friday morning. (Tr.IV 587-588) Appellant was delayed in obtaining medical care, as she was likewise beaten by Blade and under duress. (See Proposition III) The State relied on the eight-day charged date range - an artificially extended range as to medical neglect - to convince the court that a duress instruction was inappropriate. (Tr.IV 745-760) The jury instructions injected further ambiguity by adding "or supervision" to the Count 5 elements. (O.R. 310) The Child Neglect verdict was thus facilitated by the court's failure to

force the State to elect which alleged offense it was prosecuting. (See Proposition IV) Appellant maintains that one of the possible illegalities - failing to provide adequate supervision - was subsumed by Count 3 and thus violated Appellant's protections from double jeopardy and/or multiple punishment.

No person shall be twice subjected to jeopardy for the same offense. U.S. Const. Amends. V, XIV; Okla. Const. art. II, § 21. "Under the *Blockburger* test, two crimes are not the same crime for double jeopardy purposes if both crimes require proof of an element not required by the other." *McElmurry v. State*, 2002 OK CR 40, ¶ 80, 60 P.3d 4, 24, citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). Distinct from the double jeopardy inquiry, Oklahoma statutes prohibit multiple punishments for a single act. 21 O.S.2011, § 11; *Davis v. State*, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126-127.

The jury was instructed on the elements of Permitting Child Abuse (Count 3) as follows:

> 1) A person responsible for a child's health, safety, or welfare;
> 2) willfully or maliciously permitted;
> 3) a willful or malicious act of harm or threatened harm;
> 4) to the health, safety, or welfare;
> 5) of a child under the age of eighteen;
> 6) by another person.
> "Permitted" means authorized or allowed for the care of the child by an individual when the person authorizing or allowing such care knew or reasonably should have known that the child would be placed at risk of abuse.

(O.R. 306)

As it relates to this proposition (failure to obtain medical care excluded), the Child Neglect (Count 5) elements were:

1) A person responsible for a child's health, safety, or welfare;
2) willfully or maliciously;
3) failed or omitted to provide;
4) adequate supervision;
5) for a child under the age of eighteen.

(O.R. 310)

Count 5 contained no additional elements to Count 3. Child Neglect's first and last elements were reflected verbatim in the Permitting Abuse instruction. Count 5's "willfully/maliciously failed/omitted to provide adequate supervision" required no additional proof beyond Count 3's "willfully/maliciously authorized/allowed for the care of the child by [an inappropriate] individual" elements, and failed the *Blockburger* test. Stated otherwise, given the definition of "permitted," Count 3's element 2 subsumed Count 5's elements 2-4.

Additionally, any failures by Appellant to provide L.L. with adequate supervision were the same omissions for which she was convicted and punished under Count 3. A second conviction for the same act/omission contravened Section 11.

Conclusion. If the Child Neglect count relied on inadequate supervision, it violated double jeopardy and Section 11. Appellant requests reversal of her redundant conviction.

PROPOSITION VI

TO THE EXTENT COUNT 5 WAS BASED ON A FAILURE TO PROVIDE MEDICAL CARE, THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTION.

Standard of Review. Due process protects an accused against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). The test for determining the sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979), *adopted in Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204.

Argument and Authorities. As it relates to this proposition (failure to provide supervision excluded), the Child Neglect elements were:

1) A person responsible for a child's health, safety, or welfare;
2) willfully or maliciously;
3) failed or omitted to provide;
4) adequate medical care;
5) for a child under the age of eighteen.

(O.R. 310)

From January 2-8, 2015, there was no evidence that L.L. required medical attention. Ms. Lalehparvaran was the only witness that observed L.L. over this period. She testified that she saw bruising on L.L.'s leg and a light bruise and

scrape mark on her bottom. (Tr.IV 625-627) Dr. Baxter testified that L.L. had substantial injuries Friday afternoon and needed medical care at that time. (Tr.III 588) The doctor previously testified that isolated bruises do not require medical treatment (PH Tr. 110, 114), that there was no way to determine the age of bruises (PH Tr. 75, 87-88), that he did not attempt to determine when each bruise occurred during the examination (PH Tr. 89-91), and that all of L.L.'s bruises could have been made during a single beating (PH Tr. 76-77).

On January 9, 2015, Appellant tried and ultimately succeeded in getting help for L.L. Any delay thereof was not willful or malicious. Ms. Lalehparvaran testified that upon finding Blade in L.L.'s room that morning, she attacked him, but was beaten severely in return. (Tr.IV 633-640) She tried to flee from the house, but was stopped by Blade who choked her and said "You ain't going nowhere." (Tr.IV 641) Appellant texted her mother for help, but Blade took the phone back and made her assure her mother that everything was okay. (Tr.IV 730; State Exh. 20 28:10-28:45, 28:45-30:30) Blade then forced Appellant to come to bed. (Tr.IV 730; State Exh. 20 42:30-44:45) When Ms. Loftin arrived home around noon, Appellant was able to distract Blade while Ms. Loftin sought help from the city workers, who called 911. (State Exh. 20 46:30-47:30; State Exh. 1). After the police arrived, Officer Ramsey took L.L. and Appellant to the Children's Advocacy Center and ultimately to St. Francis Hospital, where L.L. was examined,

administered fluids and released. (Tr.III 586; PH Tr. 110-112) No other witnesses were present Friday morning or contradicted Appellant's account.

Under Oklahoma law, "willful" denotes a general intent crime. *Fairchild v. State,* 1999 OK CR 49, ¶ 34, 998 P.2d 611, 620. "Willful" is defined as "Purposeful. 'Wilful' is a willingness to commit the act or omission referred to, but does not require any intent to violate the law or to acquire any advantage." (O.R. 316; Instruction No. 4-40D, OUJI-CR (2d); 21 O.S.2011, § 92). Viewing the evidence in a light most favorable to the State, a rational juror could not have concluded that L.L. required medical care prior to Friday, or that once medical assistance was needed, that Appellant purposely withheld it. Elements 2, 3, and 4 were not proven beyond a reasonable doubt.

Conclusion. There was insufficient evidence of Appellant willfully/maliciously failing to provide L.L. medical care to support a finding of guilt. This Court has a duty to set aside a verdict when it is contrary to the law and the evidence. *Moulton v. State,* 1948 OK CR 130, 88 Okl.Cr. 184, 191, 201 P.2d 268, 272.

As demonstrated herein and in the previous two propositions, Appellant's Child Neglect conviction and was invalid and only secured by the open-ended charging information and jury instructions, which incorporated multiple potential offenses, all individually without merit. By not electing which alleged offense it was prosecuting, the State was able to prevent Appellant's warranted duress

instructions and allow the jury to integrate various conduct from before and during January 9, 2015, although the charged offense of medical neglect was not continuous in nature. Ms. Lalehparvaran respectfully requests that the Count 5 conviction be reversed with instructions to dismiss.

PROPOSITION VII

PROSECUTORIAL MISCONDUCT PREVENTED A FAIR TRIAL.

Standard of Review. A conviction will not be reversed on allegations of prosecutorial misconduct unless the cumulative effect deprived the appellant of a fair trial. *Garrison v. State*, 2004 OK CR 35, ¶ 128, 103 P.3d 590, 612. Prosecutorial remarks and conduct that were not met with a contemporaneous objection will be reviewed for plain error. *Hogan v. State*, 2006 OK CR 19, ¶ 87, 139 P.3d 907, 934.

Argument and Authorities. The touchstone of alleged prosecutorial misconduct is the fairness of the trial. *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 947, 71 L.Ed.2d 78 (1982). Even absent contemporaneous objections, when prosecutor's conduct, taken as a whole, "crossed the line of acceptable behavior," relief is warranted. *Bell v. State*, 2007 OK CR 43, ¶ 6, 172 P.3d 622, 624. It is the responsibility and duty of the prosecuting attorney to use fair, honorable, reasonable, and lawful means to secure a verdict. *Smith v. State*, 1987 OK CR 235, ¶ 7, 744 P.2d 1282, 1285.

Prosecutor McAmis represented the State throughout the case, and her conduct rendered the proceedings unfair. After Dr. Baxter testified at the preliminary hearing, the State announced that the charges would be amended to include counts of Child Neglect. As noted by both defense counsels, it was clear that Ms. McAmis already planned to amend the Information, but did not make her intentions known until the doctor was dismissed, depriving an opportunity for cross examination related to neglect. The court denied Appellant's request for a continuance. (PH Tr. 132-137, 199-202) The preliminary hearing evidence established that Blade abused L.L. on Friday morning (PH Tr. 144-145, 160-166), that the child had injuries consistent with the described attack (PH Tr. 39-61), and that she needed medical care at that time (PH Tr. 114). Dr. Baxter could not determine that L.L. required medical attention prior to Friday. (PH Tr. 76-77, 87-91, 113) The State nevertheless charged Appellant with neglecting to obtain medical care for L.L. between January 2-9, 2015. (O.R. 58-60) It became evident at trial that while there was no evidence of L.L. needing medical care earlier in the week, the State charged this date range solely to prevent the merited duress instruction. (Tr.IV 745-760) (See Propositions III-VI)

On December 23, 2015, the State filed a notice of intent to introduce evidence of other crimes, including the 2009 DHS investigation (see Proposition I) and the jail phone calls (see Proposition II). (O.R. 129-140) The severance proceedings delayed consideration of the other act evidence, but Ms. McAmis filed

a Notice to the Court falsely claiming to Judge Greenough that Judge Wall had already granted the *Burks* notice. (O.R. 265-268) The court did ultimately rule that the DHS investigations and the jail recordings were admissible, and the State used the evidence at trial, not for a valid 12 O.S.2011, § 2404(B) purpose, but rather to portray Appellant as a bad mother and a an evil person. Ms. McAmis emphasized this character evidence during her opening statement (Tr.II 377-379), Appellant's cross examination (Tr.IV 649-656, 666-674), and closing argument (Tr.IV 807-808).

Over numerous objections, Ms. McAmis badgered Appellant during her lengthy cross examination. (Tr.IV 649-742) "The prosecutor should conduct the examination of witnesses fairly and with due regard for dignity and legitimate privacy concerns, and without seeking to intimidate or humiliate a witness unnecessarily." Standard 3-6.7(a), *American Bar Association Standards for Criminal Justice,* Prosecution Function (4th Ed. 2015) In particular, despite answering each time as best she could, the State asked Appellant whether she should have taken notice of L.L.'s bruises earlier in the week 13 times in succession (Tr.IV 698-701), and repeatedly asked harassing and speculative questions about L.L.'s thoughts and feelings during the abuse that Appellant could not possibly have known, e.g. "Do you feel like your daughter felt loved by you in that moment?" (Tr.IV 718).

The impropriety of Ms. McAmis' closing arguments was not limited to emphasizing Appellant's character, but also included an attempt to shift the burden of proof. The prosecutor contended:

> So if this defendant, if she doesn't somehow convince you that there's no way she could have known [about the threat Blade posed to L.L.] and no way she reasonably should have known and she's not a failure as a mother, if she doesn't somehow convince you of that, she's going to prison.

(Tr.IV 773) This statement, made under the guise of addressing witness credibility, was an improper attempt to shift the burden of proof away from the State. *See Mahorney v. Wallman,* 917 F.2d 469, 474 (10th Cir. 1990) (such prosecutorial comments directly interfere with the fundamental precept guiding the factfinder's evaluation of guilt or innocence - the presumption of innocence). Ms. McAmis also elicited sympathy for L.L., including "Can you begin to imagine how scared, how hurt [L.L.] was?" "Think about this as a child who is screaming for her mommy to save her." (Tr.IV 796) "[L]ook at [L.L.]. A 4-year-old child, who did everything she could to fight off the brutality that was being inflicted upon her. Look at her hands, look at her arms, look at her feet, look at her legs, look at her chest, look at her face, and look at that back." (Tr.IV 811) Prosecutors should not appeal to juror sympathy. *Tobler v. State,* 1984 OK CR 90, ¶¶ 16-18, 688 P.2d 350, 354.

Prosecutor McAmis continued her dubious tactics at sentencing, arguing that Appellant did not deserve leniency, because she rejected the State's plea offer and exercised her right to a jury trial. (Sent. Tr. 4)

Conclusion. A criminal defendant has a due process right to a fundamentally fair trial. U.S. Const. amend. XIV; Okla. Const. art. II, §§ 7, 20. The cumulative effect of improper conduct throughout Appellant's case rendered the proceedings unfair. When there is any doubt as to whether or not prosecutorial misconduct affected the trial, the benefit of the doubt should be given to the accused. *Sykes v. State*, 1951 OK CR 154, 95 Okl.Cr. 14, 18, 238 P.2d 384, 388.Ms. Lalehparvaran requests that her conviction be reversed and remanded for a new trial. Appellant alternatively requests favorable modification of her sentence.

PROPOSITION VIII

APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Standard of Review. Claims of ineffective assistance of counsel are mixed questions of law and fact which are subject to *de novo* review. *Davis v. State*, 2005 OK CR 21, ¶ 7, 123 P.3d 243, 246. To gain relief on an ineffective assistance of counsel claim, an appellant must show that: 1) counsel's representation fell below an objective standard of reasonableness, and 2) counsel's unprofessional errors probably affected the proceeding's result. *Strickland v. Washington*, 466 U.S. 668, 686, 691-692, 104 S.Ct. 2052, 2063-2064, 2067-2068, 80 L.Ed.2d 674 (1984); *Jennings v. State*, 1987 OK CR 219, ¶ 8, 744 P.2d 212, 213-215.

Argument and Authorities. The State's Exhibit 21 consisted of six recorded phone calls between the co-defendants. The calls were largely irrelevant. Despite

the minimal probative value, the undue prejudice to Appellant was substantial. (See Proposition II) There is no indication in the record that counsel objected to the recordings or demanded proper redaction. Counsel apparently considered only hearsay grounds and found none. (8-12-16 Tr. 12) The failure to object to inadmissible evidence is unreasonable and cannot be justified as sound trial strategy. *Collis v. State,* 1984 OK CR 80, ¶¶ 6-14, 685 P.2d 975, 976-978. Had counsel objected, it would have been sustained, as the case of *Dunkle v. State,* 2006 OK CR 29, 139 P.3d 228, was directly applicable. The State was able to present 92 minutes of inflammatory conversations between Appellant and L.L.'s abuser, which almost certainly contributed to her lengthy sentence.

Counsel requested duress instructions and objected to the January 2-9, 2015, date range, which the State relied on to successfully challenge the instructions. (Tr.IV 745-760) Counsel, however, did not specifically demand that the State elect which alleged offense it was prosecuting under Count 5 and did not object to Instruction 29, which added "or supervision" to the medical neglect charge. (O.R. 310) (See Proposition IV) Failure to require election and precisely instruct the jury is fundamental error. *Dugan v. State,* 1961 OK CR 38, ¶ 10, 360 P.2d 833, 835. Counsel's unreasonable advocacy affected the proceeding, as the jury was not instructed on duress. Further, Appellant was convicted and sentenced to 30 years for Child Neglect, which, had counsel demanded election, would have been revealed as being committed under duress (see Proposition III),

violating double jeopardy (see Proposition V), or lacking sufficient evidence (see Proposition VI).

Counsel was also ineffective during the State's closing argument. Ms. McAmis' improper statements shifting the burden of proof and eliciting juror sympathy for L.L. drew no objection. (See Proposition VII) Challenges to the prosecutor's comments would likely have been sustained.

Conclusion. Counsel's unprofessional errors denied Ms. Lalehparvaran's constitutional right to effective assistance of counsel. U.S. Const. amends. VI, XIV; Okla. Const. art. II, §§ 7, 20. Appellant respectfully requests that her convictions be reversed and the matter remanded to the district court for a new trial. In the alternative, Ms. Lalehparvaran requests favorable modification of her sentences.

PROPOSITION IX

APPELLANT'S SENTENCE WAS SHOCKINGLY EXCESSIVE.

Standard of Review. This Court will exercise its authority to modify a sentence when, after a review of the entire record, the sentence is so excessive as to shock the Court's conscience, and it is apparent that injustice has been done. *Livingston v. State,* 1990 OK CR 40, ¶ 11, 795 P.2d 1055, 1058.

Argument and Authorities. The below proceedings produced an absurd result. Despite the State's 20-year recommendation during closing argument (Tr.IV 810-811), the jury sentenced Appellant to 30 years for Permitting Child Abuse and 30 years for Child Neglect (Tr.IV 816). The court ordered accordingly,

refusing to spilt the sentences, and running the terms concurrently. (Sent. Tr. 17-18; O.R. 343-350) Appellant must serve 85% of her sentence before becoming eligible for parole consideration. 21 O.S.Supp.2015, § 13.1(14). Appellant's co-defendant and L.L.'s actual abuser, Blade Purdy, entered a blind plea. (O.R. 217-225) Blade was sentenced to 25 years, with the last seven years suspended, on his two counts of Child Abuse, and five years for Child Neglect. The court ordered his sentences to run concurrently and concurrently with his sentences in two other cases. (O.R. 205-215)

Assuming *arguendo* that Appellant's omissions constituted technical guilt on the two counts, the evidence was still uncontroverted that she quit her job earlier in the week once she suspected Blade of being an inadequate caretaker (O.R. 53; Tr. IV 628); that when she unexpectedly discovered Blade in L.L.'s room on January 9, 2015, she physically attacked him, only to be severely beaten in return (Tr. II 406-411; Tr.IV 634-640; State Exh. 20 13:50-16:00, 17:05-23:00, 35:20-36:40); that she texted for help (PH Tr. 165; Tr.IV 642-643; State Exh. 20 28:10-28:45; O.R. 326); that she attempted to escape (Tr.IV 640-641; State Exh. 20 23:00-25:15); and that she was eventually able to coordinate with Ms. Loftin to contact 911 (State Exh. 20 46:30-47:30). Despite her efforts, which possibly saved L.L.'s life that morning, Appellant was sentenced to twelve more years in prison than Blade for Blade's underlying abuse and a term six times greater than Blade's for failing to obtain the medical care necessitated by his conduct.

At sentencing, Prosecutor McAmis offensively suggested that Appellant's harsh punishment was warranted by refusing to cooperate during plea negotiations and exercising her right to a jury trial. (Sent. Tr. 4) To be sure, Ms. Lalehparvaran's decision to go to trial was regrettable, as the proceeding was saturated with inflammatory and irrelevant evidence, which unfairly demonized her. (See Propositions I, II)

The discussion herein does not minimize the child victim's significant injuries. While L.L. substantially recovered physically within a week (PH Tr. 82, 110-115), she will doubtless have lasting psychological effects from the trauma. But Appellant's deficiencies as a mother pose no further threat to L.L., as her parental rights were apparently terminated. (O.R. 135; 1-7-16 Tr. 28) Ms. Lalehparvaran was a first-time offender, and there was no indication that she herself was dangerous or posed a societal threat. Rather, the record reveals a drug user (Tr.IV 649, 658) that was prone to poor judgment, particularly as it related to men. Appellant suffered surreal abuse over the course of her relationships with both Blade and her ex-husband, including having her arm broken and head hit with a paddle (Tr.IV 608-610); being pistol whipped and shot at with an AK-47 (Tr.III 452-453, 475-481; Tr.IV 611-615; State Exh. 3-17); being hit over the head with a broomstick (O.R. 135); and being sliced on her calves, thighs, arms and cheek, while pregnant (O.R. 135; Tr.III 445-447; Tr.IV 620, 685-688). The record

includes four letters from individuals attesting to Appellant's positive qualities and requesting leniency. (O.R. 325-327, 337-342)

Conclusion: The interests of justice demand favorable modification of the passive co-defendant's 30-year sentences, and Ms. Lalehparvaran respectfully requests that this Court exercise it powers accordingly.

PROPOSITION X

CUMULATIVE ERRORS DEPRIVED APPELLANT OF A FAIR PROCEEDING AND A RELIABLE OUTCOME.

Should this Court find that none of the above propositions, standing alone, warrant relief, Appellant requests that this Court consider the cumulative effect of these errors. Even when trial errors, viewed separately, do not amount to reversible error, their cumulative effect may nevertheless deprive an accused of a fair trial. See, e.g., *Peninger v. State,* 1991 OK CR 60, ¶ 23, 811 P.2d 609, 613; *Chandler v. State,* 1977 OK CR 324, ¶ 13, 572 P.2d 285, 289-290. The proper standard of review for a cumulative error claim must aggregate all errors which were found to be harmless or denied for insufficient prejudice and analyze whether their cumulative effect on the outcome is such that, collectively, they can no longer be determined harmless. *Cargle v. Mullin,* 317 F.3d 1196, 1206-1207 (10th Cir. 2003).

The errors in this case, taken together, deprived Appellant of a fair trial. U.S. Const. amends. V and XIV; Okla. Const. art. II, § 20. Appellant respectfully requests that this Court reverse her convictions and remand the case for a new

trial. In the alternative, Ms. Lalehparvaran requests that this Court favorably modify her sentences as allowed by law.

CONCLUSION

For the reasons and authorities cited herein, Appellant respectfully requests that the Judgment and Sentence of the District Court be reversed. In the alternative, Appellant asks that this Court favorably modify her sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on August 4, 2017, a true and correct copy of the foregoing Brief of Appellant was served upon the Attorney General by leaving a copy with the Clerk of the Court of Criminal Appeals for submission to the Attorney General, and a copy was caused to be mailed, via United States Postal Service, postage pre-paid, to Appellant at the address set out below, on the date of filing or the following business day.

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