

**ORIGINAL**



**IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF OKLAHOMA**

**ROBERT LEON HASHAGEN, III,** )  
 )  
 **Appellant,** )  
 )  
 **v.** )  
 )  
 **THE STATE OF OKLAHOMA,** )  
 )  
 **Appellee.** )

**NOT FOR PUBLICATION**

**Case No. F-2021-203**

**FILED**  
COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

**JUL 13 2023**

**JOHN D. HADDEN**  
CLERK

**SUMMARY OPINION**

**MUSSEMAN, JUDGE:**

Appellant Robert Leon Hashagen, III, appeals his Judgment and Sentence from the District Court of Oklahoma County, Case No. CF-2017-1448, for Murder in the First Degree, in violation of 21 O.S.Supp.2012, § 701.7(B).

Then District Judge Timothy R. Henderson, presided over Appellant's jury trial, held on January 25, 2021, through February 2, 2021, and sentenced him in accordance with the jury's verdict, to life imprisonment. Hashagen appeals raising the following issues:

- I. whether Mr. Hashagen was deprived of a fundamentally fair trial of his guilt or innocence because he was tried before a judge who should have been disqualified from presiding over the case due to a previously undisclosed

- sexual relationship between the judge and one of the prosecutors in the case;
- II. whether Appellant's rights to due process and a fair trial were violated by the improper admission of evidence of the defendant's propensity to commit acts of violence against women;
  - III. whether admission of evidence of the 2013 burglary evidence was prejudicial error because the State failed to prove by clear and convincing evidence that Appellant committed the August 2010 burglary of Ms. Goodall's home;
  - IV. whether the evidence presented at trial was insufficient to prove the charged crimes beyond a reasonable doubt;
  - V. whether Appellant's rights to due process and a fair trial fell prey to overzealous prosecutors who expressed personal opinions of guilt, argued facts not in evidence, and elicited sympathy for the victim; and
  - VI. whether the accumulation of error in this case deprived Appellant of due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article II, § 7 of the Oklahoma Constitution.

We find relief in the form of a new trial is required on Appellant's claim of judicial bias in Proposition I.

### **BACKGROUND**

On September 10, 2021, Appellant filed a Motion for New Trial, Request for Evidentiary Hearing, and Motion to Hold Briefing in Abeyance. Appellant asserted in his first proposition that after the conclusion of his trial, newly discovered evidence emerged of an undisclosed sexual relationship between the trial judge, Henderson,

and one of the three prosecutors who tried the case, Oklahoma County Assistant District Attorney K.C.<sup>1</sup> Appellant requested his case be remanded for an evidentiary hearing, claiming that Henderson's relationship with K.C. raises serious questions as to Appellant's due process right to an impartial tribunal. On October 11, 2021, this Court issued an order remanding the case to the District Court of Oklahoma County for an evidentiary hearing and staying further briefing in this appeal pending the completion of the remanded proceedings. On November 15, 2021, the Honorable Paul Hesse presided over the evidentiary hearing in the District Court of Oklahoma County. Following the evidentiary hearing, Judge Hesse filed his Findings of Fact and Conclusions of Law with this Court on December 20, 2021, recommending a new trial. On January 21, 2022, Appellant timely filed his appeal in this Court, requesting a new trial in light of the newly discovered evidence of a sexual relationship between Henderson and K.C.

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<sup>1</sup> This Court routinely identifies victims of sexual assault using initials. While it is not clear whether the prosecutor in this case was or was not a victim, we identify this individual through the use of initials out of an abundance of caution.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW ON REMAND**

Judge Hesse provided factual findings and conclusions of law following the evidentiary hearing. The relevant findings of fact follow. The State charged Appellant with a felony offense of Murder in the First Degree. The case was then administratively reassigned to then District Judge Henderson. Henderson held a pretrial conference on January 17, 2018, where K.C. appeared for the State. Approximately two years later, K.C. appeared at the motions hearing on January 21, 2021, where she was substantially involved in the State's argument and questioning of witnesses. Following a jury trial, where K.C. questioned multiple witnesses and provided closing argument, the jury found Hashagen guilty of Murder in the First Degree and recommended a punishment of life imprisonment. Thereafter, on March 4, 2021, Henderson sentenced Hashagen to life in prison, pursuant to the jury's recommendation.

Additionally, Judge Hesse found that Henderson and K.C. were involved in an undisclosed, sexual relationship from April of 2016 through summer of 2018. Appellant and his attorneys were unaware of the relationship, and moreover, Henderson nor K.C. disclosed the

relationship to Appellant or his attorneys. Consequently, Appellant and his attorneys failed to request Henderson's recusal or otherwise raise the issue of bias at the lower court. Notably, Judge Hesse confirmed that defense counsel would have requested Henderson's recusal if the relationship between Henderson and K.C. had been disclosed to the parties beforehand.

In his conclusions of law, Judge Hesse found that "[t]he Oklahoma Constitution guarantees a defendant a right to a fair, impartial trial not tainted by the personal bias or prejudice of the trial court." *Welch v. State*, 2000 OK CR 8, ¶ 37, 2 P.3d 356, 372 (quoting *Fitzgerald v. State*, 1998 OK CR 68, ¶ 10, 972 P.2d 1157, 1163). Accordingly, Judge Hesse found that the "circumstances that create the likelihood or the appearance of bias" in this case denied Appellant his constitutional right of due process of law. *Peters v. Kiff*, 407 U.S. 493, 502 (1972). He reasoned that to establish a violation of due process, the court must find that the circumstances objectively require recusal of a judge because "the probability of actual bias... is too high to be constitutionally tolerable." *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 872 (2009) (quoting *Withrow v. Larkin*,

421 U.S. 35, 47 (1975)). Judge Hesse went on to find that the circumstances of an undisclosed past or current sexual relationship between a prosecutor and a judge sufficiently raised an “unconstitutional potential for bias.” *Caperton*, 556 U.S. at 881. Therefore, he concluded that “[a] new trial is the only adequate remedy to redress the Defendant’s denial of due process of law” because the circumstances of this case sufficiently raise an “unconstitutional ‘potential for bias.’” *Caperton*, 556 U.S. at 881.

### **DISCUSSION**

We recently decided in *Fort v. State*, 2022 OK CR 12, ¶ 11, 516 P.3d 690, 694, that in such an extraordinary case where a relationship between the judge and prosecutor was kept secret, we had to determine “whether the effect of these events violate the due process rights of the defendant.” We afford great deference to Judge Hesse’s findings upon remand and agree that the undisclosed relationship violated Hashagen’s due process rights. *See McCarthy v. State*, 2005 OK CR, ¶ 12, 114 P.3d 1089, 1093. Contrary to the State’s argument that the undisclosed relationship ended before trial presents a unique and novel circumstance, we find that this fact is

not materially different from *Fort*, nor does it remove our concern as to the trial judge's potential bias. As in *Fort*, we find that the structural error cannot be found harmless as the sexual relationship between the trial judge and prosecutor "affect[s] the conduct of the entire trial and cannot be separated from it for the purpose of analysis." *Fort*, 2022 OK CR 12, ¶ 13, 516 P.3d at 694 (quoting *Duclos v. State*, 2017 OK CR 8, ¶ 10, 400 P.3d 781, 784). Therefore, Appellant is entitled to a new trial.

### **DECISION**

The Judgment and Sentence of the district court is **REVERSED** and **REMANDED** for a **NEW TRIAL**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2022), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA  
COUNTY, THE HONORABLE TIMOTHY HENDERSON,  
DISTRICT JUDGE**

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**OPINION BY: MUSSEMAN, J.**

HUDSON, V.P.J.: Concur  
LUMPKIN, J.: Dissent  
LEWIS, J.: Dissent  
KIRKLEY, J.<sup>2</sup>: Concur

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<sup>2</sup> Wagoner County District Judge Douglas A. Kirkley sitting by special designation.



**LEWIS, J. DISSENTING:**

I respectfully dissent. Due process requires a judge's recusal when the probability of actual bias on the part of the judge is objectively too great to be tolerable. *See Rippo v. Baker*, 137 S.Ct. 905, 907 (2017)(holding the relevant inquiry is whether the average judge in the situation under review is objectively likely to be neutral rather than unconstitutionally biased).

The objective facts here are the undisclosed existence of a sexual relationship between a trial prosecutor and the then-married trial judge that ended more than two years before the current trial. These facts do not establish an especially high degree of risk that the average trial judge in this situation is objectively likely to be biased in favor of the State and against the defendant.

This is not to condone the judge's, or the prosecutor's, bad behavior. Our legal duty is to rationally assess the probability of an unconstitutional potential for judicial bias being somehow *inherent* in these objective facts. The Court instead expresses its abhorrence at the judge's conduct by expanding *Fort* beyond the probable effect of the facts—that is, beyond the spectacle of “a trial judge having

sexual relations with the prosecutor in the midst of a trial”—and reverses this conviction based on ethics rather than law. *Fort*, 2022 OK CR 12, ¶ 2, 516 P.3d at 695 (Lewis, J., specially concurring).

The failure of the judge and prosecutor to scrupulously avoid the potential for an error of this kind is indeed a betrayal of the high ethical standards to which all legal professionals should aspire. But an objective appraisal of the probability of actual bias respects not only the defendant, but also the courts, the public, crime victims, and family members on both sides who must collectively bear the heavy costs of reversal.

Because the record here does not show an objectively intolerable potential for judicial bias that violated due process, I respectfully dissent.

**LUMPKIN, JUDGE: DISSENTING:**

I dissent to the Court's resolution of this case. As in *Fort*, Appellant has failed to show that he suffered prejudice from judicial bias. Additionally, in this case, the record reveals that the relationship between Judge Henderson and the prosecutor ended over two years prior to Appellant's trial.

As I previously explained in *Fort*, 2022 OK CR 12, ¶ 4, 516 P.3d at 696, Lumpkin, J., dissenting, we review judicial bias claims raised initially on appeal for plain error. As set forth in *Simpson v. State*, 1994 OK CR 40, ¶¶ 2, 11, 23, 30, 876 P.2d 690, 694-95, 698-701, we determine whether Appellant has shown an actual error, which is plain or obvious, and which affects his or her substantial rights. See also *Fitzgerald v. State*, 1998 OK CR 68, ¶ 10, 972 P.2d 1157, 1163 (on a claim of judicial bias, an appellant must show instances of the trial court's actual bias against him which materially affected his rights and prejudiced him). This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Simpson*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701.

As in *Fort*, this Court has not reviewed the record regarding Appellant's allegations of judicial bias and makes no determination of their merit. Rather, it has decided that Judge Henderson's out of court actions with the prosecutor, two years prior to Appellant's trial, alone warrant reversal. This Court bases its decisions on the law and facts relative to each individual case, not the way the Court may feel about the allegations made. The Appellant fails to show any facts within this record to support the claim of bias. With no finding of any error in the judge's conduct of the trial, I must dissent to the Court's decision in this case.