IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICA SHOATE,	)	
Appellant,	)	**NOT FOR PUBLICATION**
v.	)	Case No. F-2014-448
STATE OF OKLAHOMA	)	
Appellee.	)	

OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant Mica Shoate was tried by jury and convicted of Child Abuse Murder (21 O.S.2011, § 701.7(C) (Count II) and Child Neglect (Count III) (21 O.S.2011, § 843.5(C) in the District Court of Tulsa County, Case No. CF-2012-1417. [1] The jury recommended as punishment life imprisonment without the possibility of parole in Count II and life imprisonment in Count III. The trial court sentenced accordingly, ordering the sentence in Count III to run consecutive to Count II.[2] It is from this judgment and sentence that Appellant appeals.

This case concerns the death of 19 month old Zamontay Green. On March 25, 2012, he was in the custody of Appellant and her roommate, Jazmin

[1] Count I was a charge against co-defendant Jazmin Williams. (O.R. 21-27). Ms. Williams has appealed separately. *See* CRF-2014-429.

[2] Appellant must serve 85% of her sentence in Count III before becoming eligible for consideration for parole. 21 O.S.2011, § 13.1.

Williams. At approximately 7:00 p.m., Appellant was driving Williams and the decedent northbound on Lewis in Tulsa, Oklahoma. Officer Helberg, Tulsa Police Department, observed the car driving unusually slow and swerving back and forth. The officer activated his emergency lights to conduct a traffic stop of the car. According to Officer Helberg, Appellant's car "accelerated as fast as it could go for about 100 yards" then took a hard left turn into a parking lot. (Tr. Vol. III, pg. 476). The car came to an abrupt stop and Appellant and Williams jumped out of the car. Appellant ran toward the officer while Williams climbed into the rear passenger door of the car. A panicked Appellant screamed, "my baby is not breathing, my baby is not breathing." (Tr. Vol. III, pg. 484). Not sure of the situation, Officer Helberg drew his service weapon and ordered Appellant to move to the front of her car. He also ordered Williams to get out of the car and move to the front. Helberg radioed for assistance and looked inside the car. He saw the decedent lying on the back seat. The decedent was cold and unresponsive. Officer Helberg radioed for an ambulance.

Five patrol officers responded to Officer Helberg's call. Officers Flanagan, Anderson and Griffith laid the decedent on the trunk of the car and began resuscitation procedures. The officers observed the decedent was cold, limp and unresponsive. Fire and ambulance units arrived within minutes. James Hart, an EMSA paramedic, observed the decedent was lifeless and pale, his heart was not beating, his skin was cool to the touch and his eyes were fixed and dilated. Based upon these observations and considering the resuscitation

attempts that had already been made, Mr. Hart determined that further resuscitation attempts would be futile and declared the decedent dead.

Meanwhile, officers were speaking with Appellant and Williams. Co-defendant Williams told Officer Helberg that the decedent had not been breathing for about an hour before he pulled them over. When asked why the decedent was so cold, Williams told Officer Anderson, "he wasn't breathing so we gave him an ice bath." (Tr. Vol. III, pg. 545). Williams told Officer Bender that the decedent had been dropped off at her apartment that day at approximately 4:00 p.m. She said he was acting tired and sluggish, so she and Appellant put cold water on him and even attempted CPR. Williams told Officer Flanagan that the decedent had been staying with her and Appellant for the last four to five months with DHS (Department of Human Services) approval. However, she explained that the decedent had spent the previous week with an unknown relative of the decedent's mother "somewhere north of Tulsa." (Tr. Vol. III, pg. 591). Williams said the decedent had been at a birthday party earlier that day and had only been returned to her and Appellant around 4:00 p.m., not acting "normal". (Tr. Vol. III, pg. 592-594). She explained that his nose started to bleed and he stopped breathing. Williams claimed they tried to call 911 but could not get through. She also said they waited approximately two hours before driving to the hospital.

Appellant gave a few different details to the officers. She said that a car full of women had picked up the decedent a week earlier, she did not know their names, and he had been returned to her and Williams that day around

4:00 p.m. Appellant claimed that when he was returned, the decedent had symptoms of bronchitis, had trouble breathing and began to spit up blood. She said he soon lost consciousness and became unresponsive. Appellant said they called the decedent's biological mother and tried to get his social security number believing they needed that to call an ambulance. According to Appellant, when the decedent's mother would not give them his social security number, they decided to take him to the hospital themselves. She said that on the way, the car stalled and that was what caught the attention of Officer Helberg.

Detective Ritter, a homicide detective with the Tulsa Police Department, arrived on the scene to interview Appellant and Williams. Williams told Det. Ritter that she and Appellant had had the decedent since Thanksgiving 2011 and that DHS approved of the arrangement. Williams also said that the decedent's grandmother had had him the entire previous week and that he had been returned that day. She told Det. Ritter that the decedent had been in and out of consciousness for about an hour and that they tried CPR at the apartment before heading to the hospital. Williams said the decedent had had a "similar episode" about two weeks earlier.

Appellant told Det. Ritter that someone had picked up the decedent the previous week and returned him about 4:00 p.m. that day. She said the decedent was lethargic, so they gave him a cold water bath. When he started coughing up blood, they pulled him out of the bath. Appellant said they tried to

call the decedent's biological mother to obtain the decedent's social security number but she would not give it to them.

Appellant and Williams were released and driven home only to be arrested the next day and questioned again after an autopsy of the decedent showed blunt force trauma to the head, broken ribs and other injuries to his body.

Appellant and Williams were tried together but neither testified. In addition to the testimony of the various responding police officers, the State also presented testimony from several of Appellant's neighbors. These individuals testified that on the afternoon of March 25, 2012, they heard a woman screaming and yelling and a child crying. One neighbor testified that at approximately 3:00 p.m., she heard a child crying, the sound of hitting, and a woman shouting "shut the f--- up". (Tr. Vol. IV, pg. 858-859, 862). This neighbor said the hitting at first sounded like spanking with an open hand but then turned to what she described as loud punches.

Another neighbor testified there was always yelling and screaming coming from the apartment shared by Appellant and Williams. This neighbor testified that on March 25 at approximately 2:30-3:00 p.m., she heard a woman yelling, "eat your food n------", "stand in the corner", "be quiet", "stop crying" and "don't talk back to me." (Tr. Vol. IV, pgs. 884-885, 895). This neighbor said that on March 25, the yelling, screaming and crying was different than usual, that it was much louder.

Yet another neighbor testified she heard a baby crying and woman "cussing" on March 25 and what she described as a baby "being whooped with a belt". She said she heard a woman shout, "I can do this sh--- all m----- f------ day long n----." (Tr. Vol. IV, pgs. 914-915). She said a little while later, she saw Appellant and Williams put the decedent in their car and drive away. This neighbor said that the next day, March 26, she did not hear any screaming or crying coming from Appellant's and Williams' apartment. (Tr. Vol. IV, pgs. 914-915). Three more neighbors testified to hearing loud screaming, cursing, crying and banging noises coming from the apartment on the afternoon of March 25, 2012.

Ebony Jones, Appellant's long time friend and a Certified Nursing Assistant, testified that on March 25, Appellant called her five or six times between 2:00 and 6:30 p.m. but she was unable to answer the calls. When Ms. Jones was finally able to return Appellant's calls around 6:30 p.m., Appellant told her that something was wrong with the decedent, that he was not responding. She told Appellant to call an ambulance. Appellant told her they had, but they would not come because she did not know the decedent's social security number. Ms. Jones told Appellant she would be right over. However, before Ms. Jones could leave, Appellant called her back and told her not to come because they were taking the decedent to the hospital.

The State also presented evidence of a phone call made by Appellant from the Tulsa County Jail to her brother wherein Appellant said the decedent

was with her and co-defendant Williams all that day and that they "didn't know what to do."

Medical experts testified that the decedent had a large amount of bruises on his face, arms, torso and legs which were not consistent with a fall. Injuries on his back were consistent with being made by a looped-over belt or cord. Experts testified that the decedent suffered multiple injuries that were caused during multiple events and that the injuries were consistent with child abuse. The ultimate cause of death was determined to be blunt force trauma to the head. Facts will be set forth as necessary.

In her first proposition of error, Appellant contends her convictions for First Degree Child Abuse Murder and Child Neglect arose out of the same transaction and thus both convictions violate the prohibition against multiple punishment set forth in 21 O.S.2011, § 11.

Prior to the start of trial, Appellant filed a Motion to Dismiss Count III, Child Neglect, on the grounds the charge violated Section 11. A hearing was held on the first day of trial but the court reserved its ruling until all the evidence was presented. At the close of the prosecution's case, the defense filed a demurrer to Count III on Section 11 grounds. The court again listened to argument and overruled the demurrer finding no Section 11 violation. This procedure has properly preserved the issue for our review and we review the trial court's decision for an abuse of discretion. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and

judgment, one that is clearly against the logic and effect of the facts presented. *State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194.

Title 21 O.S.2011 § 11(A) governs multiple punishments for a single criminal act. Section 11 provides in relevant part that:

> [A]n act or omission which is made punishable in different ways by different provisions of this title may be punished under any of such provisions, ... but in no case can a criminal act or omission be punished under more than one section of law; and an acquittal or conviction and sentence under one section of law, bars the prosecution for the same act or omission under any other section of law.

The proper analysis of a § 11 claim focuses on the relationship between the crimes. *Barnard v. State*, 2012 OK CR 15, ¶ 27, 290 P.3d 759, 767; *Davis v. State*, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126. If the crimes truly arise out of one act, § 11 prohibits prosecution for more than one crime, absent express legislative intent. *Barnard*, 2012 OK CR 15, ¶ 27, 290 P.3d at 767. If the offenses at issue are separate and distinct, requiring dissimilar proof, Oklahoma's statutory ban on "double punishment" is not violated. *Littlejohn v. State*, 2008 OK CR 12, ¶ 16, 181 P.3d 736, 742. Thus, it is first necessary to examine the relationship between the two crimes to determine whether they constitute a single act. *Barnard*, 2012 OK CR 15, ¶ 27, 290 P.3d at 767.

The evidence shows the physical abuse which ultimately resulted in the decedent's death began between 2:00 and 3:00 p.m., March 25, 2012, in an apartment occupied at the time by Appellant, co-defendant Williams and the

decedent. This conduct and the decedent's resulting death established the crime of First Degree Murder. *See* 21 O.S.2011, § 701.7(C).

Evidence also showed that symptoms of blunt force trauma to the decedent's brain would have been immediately visible. These symptoms would range from irritability, vomiting, and irregular breathing to complete loss of consciousness and would necessitate immediate medical treatment.

Appellant stated that the decedent did not act normally that afternoon. She said he had trouble breathing, spit up blood and eventually lost consciousness. This gave rise to Appellant's duty to seek medical attention. Putting the decedent in a cold bath, researching how to perform CPR and even attempting to perform CPR and contacting a friend for advice is not medical treatment. Appellant said she waited an hour to an hour and half after the decedent stopped breathing before taking him to the hospital. The three to four hours of inaction, while the decedent languished before passing away, constituted the crime of Child Neglect. *See* 21 O.S.2011, § 843.5(C).

While the crimes were committed in succession, they were not committed in a single course of conduct. The evidence shows the fatal blow or blows were inflicted then Appellant waited, hoping the decedent would recover on his own, and only attempted to take the decedent to the hospital after it was too late. This evidence shows the commission of two separate and distinct crimes. Therefore we find no violation of the statutory prohibition against multiple punishments and this proposition is denied.

In Proposition II, Appellant contends the trial court erred in failing to order a severance of the trials and that such failure denied her the opportunity to confront her do-defendant.

We review only for plain error as no request for a severance or objection to the joint trial was raised. Under the test for plain error set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, an appellant must show an actual error, that is plain or obvious, affecting his substantial rights, and which seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*, 1994 OK CR 40, ¶ 10, 26, 30, 876 P.2d at 694, 699, 701. *See also Levering v.* State, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395; *Malone v. State,* 2013 OK CR 1, ¶ 41, 293 P.3d 198, 211-212.

Title 22 O.S.2011, § 436, provides that two or more defendants may be charged in the same information if they are alleged to have participated in the same act or series of acts constituting an offense or offenses. However, the trial of two or more co-defendants cannot be joined into one proceeding if they present mutually antagonistic defenses or the State introduces the statement of one non-testifying co-defendant which incriminates another co-defendant. *Plantz v. State,* 1994 OK CR 33, ¶ 7, 876 P.2d 268, 273.

Appellant contends that two video-taped statements made by co-defendant Williams which contained statements inculpatory of Appellant were admitted into evidence. In State's Exhibit 43, co-defendant Williams' first statement to police, she said she went to the kitchen to make dinner while Appellant took the decedent to the back of the apartment and that the

decedent was "acting funny". During this first interview, Williams did not say that she heard Appellant hit, strike, or carry out any other violent act toward the decedent or that the decedent was alone with Appellant for any period longer than a few seconds.

The same statements were repeated by Williams during her second interview the next day and admitted into evidence in State's Exhibit 47. When asked if she thought Appellant would ever hurt the decedent, Williams replied, "never".

Williams' statements did not inculpate Appellant. Even if placing the decedent with Appellant during the time he sustained his injuries was an attempt to cast blame on Appellant, that is not itself a sufficient reason to require separate trials. *Neil v. State,* 1992 OK CR 12, ¶ 8, 827 P.2d 884, 886. There must be mutually antagonistic defenses before severance is required. Mutually antagonistic defenses are established where each defendant attempts to exculpate himself and inculpate his co-defendant. *Plantz v. State,* 1994 OK CR 33, ¶ 9, 876 P.2d 268, 273. Defenses have also been found to be antagonistic when in order for the trier of fact to believe the defense of one defendant, it must necessarily disbelieve the defense of the co-defendant *Id.* Here, neither defendant attempted to exonerate herself by incriminating the other. Both defendants shared a common defense – that someone other than either of them had injured the decedent. Therefore, we find no error, and thus no plain error in the failure to sever the trials.

In Proposition III, Appellant contends the trial court erred in ruling that her statements were made voluntarily to police. Prior to trial, Appellant filed a Motion to Suppress pursuant to *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). At a pre-trial hearing, the trial court ruled that statements made during what was perceived to be a medical emergency would be allowed. The court reserved ruling on other statements as they might come up during trial. Appellant's objections have properly preserved the issue for our review. We review the trial court's denial of the motion to suppress for an abuse of discretion. *Johnson v.* State, 2012 OK CR 5, ¶ 11, 272 P.3d 720, 726; *State v. Kemp*, 2009 OK CR 25, ¶ 12, 217 P.3d 629, 631.

Appellant contends that unwarned statements she made at the scene following the decedent's death, unwarned statements made later that evening at the police station and statements made the next day after being notified of her rights were not voluntary and were improperly admitted in violation of her rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

It is well established that *Miranda* warnings need not be given unless a person is in custody or otherwise significantly deprived of freedom of action. *Bryan v. State*, 1997 OK CR 15, ¶ 15, 935 P.3d 338, 351, *citing Miranda*, 384 U.S. at 444, 86 S.Ct. at 1612. Recently in *Howes v. Fields*, ___ U.S. ___, 132 S. Ct. 1181, 182 L.Ed.2d 17 (2012) the Supreme Court explained:

> As used in our Miranda case law, "custody" is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion. In determining whether a person is in

> custody in this sense, the initial step is to ascertain whether, in light of "the objective circumstances of the interrogation," a "reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." And in order to determine how a suspect would have "gauge[d]" his "freedom of movement," courts must examine "all of the circumstances surrounding the interrogation." Relevant factors include the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning.

132 S. Ct. at 1189.

In the present case, Appellant was detained at the scene on the side of the road, in what was initially a traffic stop. While there may have been up to seven officers present by the end of the investigation, Appellant was not the focus of attention of all the officers. Officers at the scene also attended to the decedent and interviewed co-defendant Williams. While the initial responding officer held Appellant at gunpoint, she was not later questioned at gunpoint. Appellant was not handcuffed or in any manner physically restrained. Officers testified she was not in custody or under arrest, but she was also not free to leave. Appellant was not threatened or coerced or promised anything. She spoke freely with the officers, never tried to stop the interview, and never tried to leave the scene.

Appellant makes a distinction, as she did before the trial court, between statements made prior to and after learning of the decedent's death. Appellant even asserts that her unwarned statements made prior to learning of the decedent's death were properly admitted under the "rescue doctrine" but once the decedent was pronounced dead, the "rescue doctrine" no longer applied

and her unwarned statements from that point on were inadmissible.[3] It is not clear from the record when Appellant was informed that the decedent had passed away. However, it is not necessary to distinguish the timing of her statements in the first interview or determine the applicability of the rescue doctrine. Under the circumstances, Appellant was not in custody at the scene for *Miranda* purposes and her unwarned statements were properly admitted.

Approximately three hours after the initial traffic stop, and at the conclusion of the on scene interview, Appellant was asked to accompany officers to the police station for further questioning. Appellant agreed without hesitation, and officers transported her in their police car. Detectives testified that she was not in custody and not given *Miranda* warnings. Detectives said Appellant was not threatened, coerced or promised anything and spoke freely. The interview was recorded and lasted approximately one hour. Once it was concluded, Appellant was free to leave and officers drove her home.

Once again, Appellant was not arrested while at the police station nor was she physically restrained in any way. She was interviewed by two detectives and freely answered their questions. *Miranda* warnings are not required "simply because the questioning takes place in the station house" *Andrew v. State*, 2007 OK CR 23, ¶ 72, 164 P.3d 176, 195 *citing Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977). Appellant was not in custody during her initial interview at the police station the

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[3] *See Underwood v. State*, 2011 OK CR 12, ¶¶ 23-24, 252 P.3d 221, 236; *Jackson v. State*, 2006 OK CR 45, ¶¶ 21-22, 146 P.3d 1149, 1158-1159.

night of the murder. Therefore, the police were not required to provide her with *Miranda* warnings and her statements were properly admissible.

The next day, an arrest warrant was served on Appellant and she was taken to the police station. At that point, Appellant was in custody and she was advised of her *Miranda* rights. Appellant argues that her warned statement was inadmissible pursuant to *Missouri v. Seibert,* 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004). In *Seibert,* the police admittedly used a protocol for custodial interrogation that calls for not giving *Miranda* warnings until interrogation has produced a confession. 542 U.S. at 604. The Supreme Court found that statements given post-*Miranda* were inadmissible unless measures were taken to ensure, among other things, that a reasonable person would know that any previous unwarned statements were inadmissible. 542 U.S. at 617, 124 S.Ct. at 2613.

Appellant's case is distinguishable from *Seibert.* In *Seibert,* the defendant was under arrest when she was first questioned, without *Miranda* warnings having been given. Under questioning the defendant gave a confession. Appellant was then given a 20 minute break. The same officer, who had initially questioned her, returned, turned on a tape recorder, gave her the *Miranda* warning and obtained a signed waiver of rights. The officer then repeated the interview process. Under these facts, the Supreme Court found that "when Miranda warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and

the consequences of abandoning them.'" 542 U.S. at 613-14, 124 S.Ct. at 2611.

In the present case, Appellant was not under arrest or even in custody when she gave her first statements to police. Her second interview at the police station was conducted the day after the first two interviews and was markedly different from her earlier interviews. By the time of the second interview at the police station, law enforcement had received information from the Medical Examiner regarding the cause of the decedent's death. As Appellant admits in her brief, the second interview at the police station was far more confrontational than earlier interviews had been. The two interviews at the police station were conducted on different days by different detectives. The second interview, with the *Miranda* warning, was not treated as a continuation of the first interview. In fact, Appellant had been allowed to return home after the first interview at the police station.

Unlike *Seibert*, Appellant was not held in custody with *Miranda* warnings intentionally withheld in an attempt to get her to confess. Appellant's post-*Miranda* statements were properly admitted. We find Appellant's statements to police were voluntarily given and properly admitted into evidence. The trial court did not abuse its discretion in overruling the motion to suppress.

In Proposition IV, Appellant complains that *res gestae* evidence was improperly admitted. The State filed a Notice of Intent to Introduce *Res Gestae Evidence and/or Evidence of Other Crimes* and in response the defense filed a *Motion in Limine* and request for hearing on the other crimes evidence. The

trial court denied the request for a hearing and overruled the *Motion in Limine.* The evidence which was the subject of the two motions was testimony by seven of Appellant's neighbors that during the afternoon on the day of the decedent's death they heard screaming, yelling, "whooping", punching, and slapping sounds coming from Appellant's apartment. Appellant's objections to this evidence have properly preserved the claim for appellate review. We review a trial court's decision to admit evidence of other crimes for an abuse of discretion. *Neloms v. State,* 2012 OK CR 7, ¶ 12, 274 P.3d 161, 164.

Title 12 O.S.2011, § 2404(B) prohibits the admission of evidence of "other crimes, wrongs, or acts" to prove the character of a person in order to show action in conformity therewith absent one of the specifically listed exceptions. Evidence of bad acts or other crimes may also be admissible where they form a part of an entire transaction or where there is a logical connection with the offenses charged. *Eizember v. State,* 2007 OK CR 29, ¶ 77, 164 P.3d 208, 230. The *res gestae* exception differs from the listed exceptions to the evidence rule; in that in the listed exceptions, the other offense is intentionally proven, while in the *res gestae* exception, the other offense incidentally emerges. *Id.* Evidence is considered *res gestae,* when: a) it is so closely connected to the charged offense as to form part of the entire transaction; b) it is necessary to give the jury a complete understanding of the crime; or c) when it is central to the chain of events. *Id.*

Testimony from medical experts showed that the decedent had injuries consistent with being made by a looped-over belt or cord and not consistent with

a fall and injuries which could only have been caused by a significant amount of force like a punch or a kick. Testimony showed that the decedent's injuries were consistent with being made during multiple events, and not just one incident. Both Appellant and co-defendant Williams claimed they were at home in their apartment with the decedent by at least 4:00 p.m. that afternoon. Testimony that between 2:00 p.m. and 3:00 p.m. that day, neighbors heard sounds of a physical altercation was properly admitted as *res gestae* as the evidence formed a part of the entire picture of events leading to the decedent's death. As this Court stated in *McElmurry v. State,* 2002 OK CR 40, ¶ 63, 60 P.3d 4, 21-22:

> It is not the duty of the court to anesthetize a crime in order to protect a defendant from the natural consequences of his own intentional acts. The State is permitted to re-create the circumstances known to the witnesses that occurred simultaneously with the crime and incidental to it as part of the res gestae of the crime. These events can be established by both expert and lay witnesses. Res gestae are those things, events, and circumstances incidental to and surrounding a larger event that help explain it.

Appellant argues the evidence inadmissible because none of the witnesses were inside her apartment and could not be certain that it was Appellant who they heard yelling and beating the decedent. Both Appellant and co-defendant Williams were charged with First Degree Child Abuse Murder or in the alternative Permitting Child Abuse Murder. Both defendants were properly linked to noises coming from their apartment while they were inside. The trial court did not abuse its discretion in admitting the *res gestae* evidence.

In Proposition V, Appellant contends that the recording of her phone call made from the Tulsa County Jail to her brother, State's Exhibit 45, was

improperly admitted at trial. She claims the phone call was hearsay and no exception was established for its admission. She also argues the phone call was admitted in violation of the Oklahoma Security of Communications Act. Appellant's objections to admission of the phone call properly preserved the issue for our review. We review a trial court's evidentiary rulings for an abuse of discretion. *Neloms,* 2012 OK CR 7, ¶ 12, 274 P.3d at 164.

Initially, the phone call is not hearsay as it is Appellant's own statements. *Phillips v. State,* 1999 OK CR 38, ¶ 51, 989 P.2d 1017, 1038 ("[a] defendant's own statements are not hearsay"). The phone call was sponsored by Detective Weakly who testified she monitored Appellant's phone calls made at the County Jail between March 26, 2012 and April 11, 2012. Detective Weakly properly authenticated the phone call as having been made by Appellant. *See Hale v.* State, 1988 OK CR 24, ¶ 24, 750 P.2d 130, 137.

The Oklahoma Security of Communications Act, 13 O.S.2011, § 176.1 *et. seq.* "prohibits unauthorized interceptions or endeavors to intercept 'any wire, oral, or electronic communications;' unauthorized use and disclosure of such communications; and the unlawful use, manufacture, or possession of equipment or devices used or intended primarily for use in violation of the Act". *State v. Serrato,* 2007 OK CR 44, ¶ 5, 176 P.3d 356, 358. The Act prohibits the use of any intercepted communication or evidence derived from the illegally intercepted communication as evidence in any trial. 13 O.S.2011, § 176.6.

The Act provides seven enumerated exceptions to its application. 13 O.S.2011, § 176.4. Appellant asserts that only the Department of Corrections,

and not the Tulsa County Sheriff or David L. Moss Criminal Justice Center (where Appellant was incarcerated) is exempt from the provisions of the Act and therefore her phone call was illegally intercepted and recorded and was inadmissible at trial. Appellant has read the statutory exemptions too narrowly.

Section 176.4 provides in pertinent part:

> It is not unlawful pursuant to the Security of Communications Act for:
>
> . . .
>
> 4. a person acting under color of law to intercept a wire, oral or electronic communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception;
>
> 7. an officer or employee of the Oklahoma Department of Corrections to monitor any wire, oral or electronic communication where an incarcerated inmate is a party to that communication, if the inmate is given prior and conspicuous notice of the surveillance or monitoring.

The omitted exemptions pertain to officer, employee or agent of a common carrier; officer, employee or agent of the Federal Communications Commission; and persons not acting under color of law. *See* 13 O.S.2011, § 176.4 (1)(2)(3)(5) & (6). While county sheriffs may not be specifically listed under subsection 7, if they are acting under the color of law, as in monitoring phone calls made by inmates in county jails, the first portion of subsection 4 is met. As for the second portion of the provision, testimony established that the Tulsa County Jail has signs posted all around the telephones stating that phone calls will be monitored and recorded. Additionally, prior to making a phone call, an inmate must acknowledge/consent that the phone call will be

monitored and recorded. Testimony showed that the person receiving the phone call will also get a notification that the phone call is coming from the jail and will be monitored and recorded and in order for the call to be accepted, the recipient must acknowledge/consent to the fact it will be monitored and recorded.

In light of this evidence, as the phone call between Appellant and her brother was completed, they both *de facto* gave their consent to the recording of the call. "[O]ne who voluntarily enters into a conversation with another takes the risk that such person may memorize, record or even transmit the conversation. . . . Once one party consents to the recording of the conversation, the conversation is divested of its private character." *Johnson v. State*, 1995 OK CR 62, ¶ 18, 911 P.2d 918, 924 (internal citations omitted). Therefore, Appellant's phone call was exempt from the prohibitions of the Act and properly admissible at trial. We find no abuse of the trial court's discretion in admitting Appellant's phone call made from jail.

In Proposition VI, Appellant contends the trial court erred by admitting the testimony of Dr. Pfeifer regarding the decedent's autopsy. Appellant asserts that as Dr. Pfeifer did not actually conduct the autopsy, admitting his testimony was a violation of the Confrontation Clause of the Sixth and Fourteenth Amendments to the United States Constitution. Appellant's contemporaneous objections properly preserved the issue for our review. We review for an abuse of discretion. *Marshall v.* State, 2010 OK CR 8, ¶ 24, 232 P.2d 467, 474.

Dr. Sibley conducted the original autopsy on the decedent. Prior to trial, Dr. Sibley left the Medical Examiner's Office. Chief Medical Examiner Pfeifer was endorsed to testify as to the cause and manner of the decedent's death. Dr. Pfeifer testified that in cases where Dr. Sibley had conducted the autopsy, he did not rely on the autopsy report but looked to other documentation to make an independent opinion. He said he did review Dr. Sibley's report, but it was a preliminary report, incomplete and containing inconsistencies. None of Dr. Sibley's report or any of his work including charts, graphs or diagrams was admitted into evidence. The documentation relied upon by Dr. Pfeifer were photographs, x-rays, toxicology reports, investigative narratives, microscopic sections of the decedent's brain and ancillary testing reports. Dr. Pfeifer testified he then prepared and filed his own report, supplemental to that of Dr. Sibley. Dr. Pfeifer testified that in his own opinion, the decedent's death was a homicide.

A defendant's right to confrontation is violated when a medical examiner testifies as to another medical examiner's conclusions. *See Cuestra-Rodriguez v. State*, 2010 OK CR 23, ¶ 39, 241 P.3d 214, 229; *Marshall*, 2010 OK CR 8, ¶ 30, 232 P.2d at 474. In the present case, Dr. Pfeifer testified that despite reviewing some of Dr. Sibley's work, the conclusions he reached were based upon his own independent investigation. We find no abuse of the trial court's discretion in admitting Dr. Pfeifer's testimony.

In Proposition VII, Appellant contends the trial court erred in allowing improper expert medical testimony. First, she complains about testimony from

Detective Carlock regarding lividity and rigor mortis and their relationship to the timing of death, as well as his ability to identify rib fractures. Appellant's repeated objections to the Detective's testimony were sustained. These objections properly preserved the issue for our review. *Neloms,* 2012 OK CR 7, ¶ 12, 274 P.3d at 164.

Detective Carlock's testimony was not offered as expert medical testimony. He first testified to his observations of the decedent at the scene. He said he was not a medical doctor and had no medical training. He testified that his opinions were based upon his training and experience in fourteen years of investigating cases of child abuse, child neglect and child homicide. He also testified to attending the autopsy and his personal observations thereof. The detective did not testify to any medical conclusions or opinions. The trial court did not abuse its discretion in overruling the defense objections and admitting the testimony.

Appellant next complains about testimony from Dr. Passmore regarding a diagnosis of child neglect which she claims improperly invaded the province of the jury. Dr. Passmore, a certified child abuse pediatrician, testified that due to the extensive nature of the decedent's injuries, not seeking medical treatment constituted medical neglect. Appellant's objection properly preserved the issue for our review.

Expert testimony is that which is based on technical or specialized knowledge, skill, training, or education, and which assists the trier of fact. *Day v. State,* 2013 OK CR 8, ¶ 11, 303 P.3d 291, 297 *citing* 12 O.S.2001, § 2702. An

expert opinion may embrace the ultimate issue, as long as it does not tell jurors what result to reach. *Id.* Expert evidence which incidentally corroborates the State's evidence may be admissible. *Id.*

Dr. Passmore's testimony did not improperly tell the jury what result to reach. She testified that "medical neglect" was an actual medical diagnosis, not a legal conclusion. She testified there was no way for her to determine who caused the decedent's injuries or who was responsible for seeking medical care once the severity of the injuries was noticed. We find the trial court did not abuse its discretion in overruling the defense objections and admitting the testimony.

In Proposition VIII, Appellant challenges the trial court's giving of Oklahoma Uniform Jury Instruction Criminal 9-12, regarding the voluntariness of the statements given by the defendants. This objection was not raised at trial; therefore we review only for plain error. *See Levering,* 2013 OK CR 19, ¶ 6, 315 P.3d at 395; *Malone,* 2013 OK CR 1, ¶ 41, 293 P.3d at 211-212.

Instruction No. 18 informed the jury as follows:

> Evidence has been introduced in this case that the defendants made a statement to Officer Mitchell Helberg on March 25, 2012; Officer Wesley Anderson on on [sic] March 25, 2012; Officer David Flanagan on March 25, 2012; Officer Joshua Griffith on March 25, 2012; Officer Mary Bohanaon on March 25, 2012; Officer Justin Ritter on March 25, 2012; and Officer Chris Bender on March 25, 2012 at the scene. Evidence has also been introduced in this case that the defendant made a statement to Detective Heather Weakley on March 25, 2012 and March 26, 2012 at Detective Division; Detective Danielle Bishop on March 26, 2012 and Detective Darren Carlock on March 26, 2012 at Tulsa County Detective Division. Evidence relating to an alleged statement by a defendant outside of court and after a crime has been committed may be considered by

> you, but only with great caution and only if you determine that it was made and it was made voluntarily. Unless you are convinced beyond a reasonable doubt that the statement was voluntary, you should disregard it entirely.
>
> To determine whether the defendant's statement was voluntary, you should consider all the circumstances surrounding it, including the age, education level, physical and mental condition of the defendant, and her treatment while in custody as shown by the other evidence in this case. A statement is voluntary when made by a person exercising his or her free will. A statement made against a person's will in response to force, threat, or promise is not voluntary.
>
> If after considering the evidence you determine that the statement was made by the defendant and was voluntary, you may give it whatever weight you feel it deserves

(O.R. 244).

Appellant contends this instruction should have been modified by designating which statements were given by which defendant to particular witnesses at a particular time. Appellant cites no authority for requiring such specificity in the instruction.

Looking at the instruction in light of the entire record, each law enforcement officer clearly identified the defendant they interviewed. In several instances, recordings of those interviews were played enabling the jury to see and hear which defendant gave a particular statement to a particular officer. There is no indication the jury was confused as to which defendant gave a particular statement. The uniform instruction properly instructed the jury on how to view each statement to determine its voluntariness. We find no error and thus no plain error in Instruction No. 18.

In Proposition IX, Appellant asserts she was denied a fair trial by prosecutorial misconduct. She first directs us to two instances during the questioning of witnesses when defense objections were sustained. Not only did the court sustain the objections but also admonished the State to discontinue any references to the decedent's "murder." The court's ruling cured any error in those instances. *See Young v. State*, 2000 OK CR 17, ¶ 50, 12 P.3d 20, 37. Appellant did not thereafter request an admonishment or object to the lack thereof. *White v. State,* 1986 OK CR 153, ¶ 5, 726 P.2d 905, 907, *reversed on other grounds,* 2006 OK CR 2, ¶ 19, 127 P.3d 1150, 1155. Any failure on the part of the trial court to admonish the jury not to let sympathy or sentiment influence their judgment does not warrant relief as those directions were thoroughly addressed in the written jury instructions.

Appellant next directs us to ten comments made during closing argument which she claims were improper, inflammatory and prejudicial. Seven of these comments were met with objections at trial. Of those seven, five of the objections were sustained. Any error in those comments was cured by the court's ruling. *Young,* 2000 OK CR 17, ¶ 50, 12 P.3d at 37.

Other comments were met with objections but the objections were overruled. In those situations, relief will be granted only where the prosecutor committed misconduct that so infected the defendant's trial that it was rendered fundamentally unfair, such that the jury's verdicts should not be relied upon. *Roy v. State,* 2006 OK CR 47,¶ 29, 152 P.3d 217, 227, *citing Donnelly v. DeChristoforo,* 416 U.S. 637, 645, 94 S.Ct. 1868, 1872, 40 L.Ed.2d

431 (1974). We evaluate alleged prosecutorial misconduct within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel. *Mitchell v. State*, 2010 OK CR 14, ¶ 97, 235 P.3d 640, 661; *Cuestra-Rodriquez v. State,* 2010 OK CR 23, ¶ 96, 241 P.3d 214, 243.

In the first of these comments, the prosecutor argued how DHS had let the decedent down, that "his name was stuck in a pile of paperwork, never to be considered again until he was murdered. And do you know what? The fact that [the decedent] was let down by each and every person didn't stop with his murder." (Tr. Vol. VIII, pg. 1926). The trial court overruled the defense objections on the grounds it was closing argument.

We have long allowed counsel for the parties a wide range of discussion and illustration in closing argument. *Sanchez v. State,* 2009 OK CR 31, ¶ 71, 223 P.3d 980, 1004. Counsel enjoy a right to discuss fully from their standpoint the evidence and the inferences and deductions arising from it. *Id.* We will reverse the judgment or modify the sentence only where grossly improper and unwarranted argument affects a defendant's rights. *Id.* Here, the "murder" reference, made in closing argument, was not improper as it was a fair inference from evidence showing that the decedent did not die a natural death.

Appellant next directs us to comments asking the jury to put themselves in the defendant's situation when she was pulled over by the police. (Tr. Vol. VIII, pg. 1946). The court properly overruled the objection on the grounds it was

closing argument. Reading the comment in context, the prosecutor was explaining Appellant's actions in leaving the decedent alone in the backseat of the car while she drove to the hospital. The prosecutor contrasted Appellant's actions with someone who might hold the baby or place the baby in the front seat. The prosecutor's comments were reasonable attempts to explain Appellant's unusual behavior on the way to the hospital.

The remainder of the comments were not met with any objections. Those comments we review for plain error. *See Malone,* 2013 OK CR 1, ¶ 40, 293 P.2d at 211. Appellant first complains about argument that "[t]his case is about a baby who was literally tortured and beaten to death." (Tr. Vol. VIII, pg. 1923). This was a fair comment on the evidence.

Appellant next complains about a reference to the decedent as a "throw away baby". (Tr. Vol. VIII, pg. 1925). This reference was made during argument that the decedent was helpless to defend himself and unable to get help and that everyone in his life let him down. This was also fair comment on the decedent's short life.

In closing argument, the prosecutor argued that the decedent had been "beat from head to toe, and today in closing argument, we have some new explanations." (Tr. Vol. VIII, pg. 1936). Reading the comment in context, the prosecutor was referring to evidence offering explanations beyond what Appellant and her co-defendant claimed was the cause of the decedent's injuries. This was a reasonable comment on the evidence.

Having thoroughly reviewed Appellant's claims of prosecutorial misconduct we find no error, plain or otherwise, warranting relief.

In Proposition X, Appellant challenges the sufficiency of the evidence supporting her convictions. When reviewing challenges to the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution, to determine whether any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *Rutan v. State,* 2009 OK CR 3, ¶ 49, 202 P.3d 839, 849; *Easlick v. State,* 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559. The credibility of witnesses and the weight and consideration to be given to their testimony are within the exclusive province of the trier of facts. *Id.* Although there may be conflict in the testimony, if there is competent evidence to support the trier of fact's finding, this Court will not disturb the verdict on appeal. *Id.*

Pursuant to 21 O.S.2011, § 701.7(C) the elements of first degree child abuse murder are as follows:

> First, the death of a child under the age of eighteen;
>
> Second, the death resulted from the willful or malicious injuring/ using of unreasonable force;
>
> Third, by the defendant.

These elements were given to the jury in Instruction No. 27. (O.R. 253). Now on appeal, Appellant argues there was a lack of evidence showing that she used any force, much less unreasonable force on the decedent, that the evidence failed to show that the decedent had been within her exclusive or shared control or that she caused the injuries or death of the decedent.

The evidence showed that the fatal injuries were inflicted between 2:00 p.m. and 3:00 p.m. Witnesses testified to hearing noises consistent with physical and verbal abuse and a woman's raised voice coming from Appellant's apartment at that time. While Appellant made statements that the decedent was not returned to her and co-defendant Williams until 4:00 p.m. that day, she also made statements that she was home with the decedent earlier in the day. Dr. Passmore testified there was evidence of impact trauma on the decedent's skull and that she observed a significant amount of blood on the decedent's swollen brain. Dr. Passmore testified that the decedent's death was caused by trauma to the head. She said that symptoms of the decedent's brain injury, ranging from irritability, vomiting, loss of consciousness, and irregular breathing, would have been immediately visible and that such injuries required immediate medical treatment. She said the decedent's injuries were not consistent with a fall but that the injuries were child abuse not explainable by any other cause. Dr. Pfeifer testified that the decedent's injuries were caused by more than one abusive event and that the injuries were consistent with child abuse. He opined that the decedent's cause of death was blunt force trauma to the head and a homicide.

Appellant asserts that testimony showed there were at least two other unknown people around the decedent in the days before his death. Only Appellant and co-defendant Williams claimed in pre-trial statements that the decedent was with people other than themselves prior to the day he died. No evidence supporting these claims was introduced. One of Appellant's

neighbors, Mrs. Greenhaw, testified she saw another person outside of Appellant's apartment on the day of the decedent's death, but said she never saw that person go into or come out of the apartment.

Looking at the evidence in the light most favorable to the state, a reasonable trier of fact could have found beyond a reasonable doubt that the decedent's death resulted from the willful or malicious use of unreasonable force by Appellant and that Appellant was guilty of first degree child abuse murder.

As for the evidence supporting the conviction for Child Neglect, Appellant asserts the State failed to show that she willfully or maliciously failed to provide medical care for the decedent. Evidence showed the fatal injuries were inflicted between 2:00 and 3:00 p.m., that symptoms of the head trauma would have been almost immediately visible in the decedent and that Appellant thereafter waited approximately three to four hours to take him to the hospital. Contrary to Appellant's claims, calling 911 and a friend with medical training, telling that friend not to come help, looking up instructions on how to perform CPR and possibly attempting to perform CPR, and finally driving the decedent to the hospital does not constitute providing medical care to the dying decedent. The evidence shows that Appellant waited, hoping the decedent would recover on his own and only took action once it was too late to save his life. Under this evidence, any rational jury could find her guilty of Child Neglect.

In Proposition XI, Appellant claims she was denied the effective assistance of counsel by counsel's failure to 1) explore her competency when presented with credible evidence that she has a full scale IQ of 67, is disabled due to mental retardation and other learning disabilities; 2) request a severance; and 3) object to the recorded jail phone call as hearsay.

We review Appellant's claims under the standard set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to show that counsel was ineffective, Appellant must show both deficient performance and prejudice. *Goode v. State,* 2010 OK CR 10, ¶ 81, 236 P.3d 671, 686 *citing Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064. *See also Marshall v. State,* 2010 OK CR 8, ¶ 61, 232 P.3d 467, 481. In *Strickland,* the Supreme Court said there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct, *i.e.,* an appellant must overcome the presumption that, under the circumstances, counsel's conduct constituted sound trial strategy. *Goode,* 2010 OK CR 10, ¶ 81, 236 P.3d at 686. To establish prejudice, Appellant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.,* at ¶ 82, 236 P.3d at 686.

Appellant's second and third claims of ineffectiveness are based on allegations of error raised in the appellate brief and fully addressed in this opinion. In Proposition II, we determined that Appellant was not legally entitled to a severance of trials. Counsel's failure to request a severance does not constitute ineffective assistance as any such request would have been denied.

See Eizember v. State, 2007 OK CR 29, ¶ 155, 164 P.3d 208, 244; *Phillips v. State*, 1999 OK CR 38, ¶ 104, 989 P.2d 1017, 1044.

In Proposition V, we addressed the admission of the recorded jail phone call and found it properly admitted into evidence. Any objection to its admission would have been overruled. We will not find counsel ineffective for failing to raise an objection which would have been overruled. *Id.*

Appellant's first claim of ineffectiveness, related to her competency, is raised for the first time in the accompanying *Rule 3.11 Motion to Supplement the Record And/or Order Evidentiary Hearing Regarding Ineffective Assistance of Counsel.* Rule 3.11(B)(3)(6), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015) allows an appellant to request an evidentiary hearing when it is alleged on appeal that trial counsel was ineffective for failing to utilize available evidence which could have been made available during the course of trial. *Warner v. State*, 2006 OK CR 40, ¶ 207, 144 P.3d 838, 893. Once an application has been properly submitted along with supporting affidavits, this Court reviews the application to see if it contains sufficient evidence to show this Court by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence. *Id.* *See also Grissom v. State*, 2011 OK CR 3, ¶ 80, 253 P.3d 969, 995; *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905-906.

In support of her motion, Appellant attaches a signed affidavit from her mother, Renee Shoate. Ms. Shoate states she advised trial counsel that

Appellant was disabled and receiving Social Security Disability benefits for mental retardation. She also states she informed counsel that Appellant had received special education benefits throughout her public education. She states that she showed trial counsel the Social Security Administration Law Judge's finding that Appellant had an IQ of 67 but he declined to take a copy of the determination. Ms. Shoate also stated that she repeatedly advised trial counsel of Appellant's disability.

Ms. Shoate further stated that after the State rested its case, trial counsel informed the court that Appellant had a learning disability but that she was competent to stand trial. She said counsel did not advise the court of Appellant's low IQ or the Social Security Administration Law Judge's finding that she had a severe impairment of mental retardation. She further stated that immediately after trial counsel's averments to the court, she tried to provide him copies of the Social Security Administration Law Judge's finding but counsel did not bring them to the court's attention.

Initially, this Court has found that inclusion in a special education program at school and low I.Q. are not sufficient to raise a doubt as to a defendant's competency to stand trial. These factors are "general, speculative assertions which do not raise a doubt as to Appellant's ability to consult with counsel or understand the nature of the proceedings against him." *Gilbert v. State*, 1997 OK CR 71, ¶ 13, 951 P.2d 98, 105.

Further, the record shows that trial counsel was well aware of Appellant's claims. At the close of the State's case in chief, the trial court

questioned both defendants regarding their decision to testify. Appellant said she had never been treated or diagnosed with a mental illness, mental disability or mental disorder. (Tr. Vol. VII, pgs. 1793-1794). At the conclusion of the questioning, defense counsel stated on the record that he had been in the case since before arraignment and he believed that Appellant was competent to stand trial. Counsel informed the court that Appellant's mother had informed him that Appellant was receiving Social Security benefits for developmental disability issues. Counsel said that despite any developmental disabilities Appellant suffered from, he believed she understood the proceedings and could and had effectively assisted counsel. (Tr. Vol. VII, pgs. 1800-1801). Appellant has not presented any evidence rebutting counsel's statements or conclusions. Surely, counsel was in the best position to determine whether a competency hearing was required. According counsel his due deference, Appellant has not shown that counsel's performance was deficient. *See Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064 (analysis of ineffective assistance claim begins with the presumption that trial counsel was competent).

Having thoroughly reviewed Appellant's application and affidavit, we conclude that Appellant has failed to show with clear and convincing evidence a strong possibility that counsel was ineffective for failing to use the complained of evidence. Appellant is not entitled to an evidentiary hearing on her claim of ineffective assistance of counsel.

Regarding the claim of ineffectiveness raised in the appellate brief, Appellant has not shown trial counsel to be ineffective under the more rigorous federal standard set forth in *Strickland* for ineffective assistance of counsel. *See Simpson,* 2010 OK CR 6, ¶ 53, 230 P.3d at 905-906. This proposition of error is denied.

Accordingly, this appeal is denied.

DECISION

The Judgment and Sentence is **AFFIRMED.** The *Application for Evidentiary Hearing on Sixth Amendment Grounds* is **DENIED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE JAMES M. CAPUTO, DISTRICT JUDGE

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SMITH, P.J.: Concur in Results
JOHNSON, J.: Concur
LEWIS, J.: Concur
HUDSON, J.: Concur