IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CYNDIE DEE JONES,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2015-352**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, VICE PRESIDING JUDGE:

Appellant, Cyndie Dee Jones, was tried by jury trial and convicted of Enabling Child Sexual Abuse (Counts 1 and 2) (21 O.S.Supp.2010, § 843.5(G)) in the District Court of Haskell County, Case No. CF-2013-174.[1] The jury recommended as punishment imprisonment for eighteen (18) years and a $500.00 fine in each count. The trial court sentenced Appellant accordingly and ordered the sentences to run concurrently.[2] The trial court further granted Appellant credit for time served since the jury's verdict and imposed a term of post-imprisonment supervision of three (3) years. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in this appeal:

I. Appellant's convictions constitute double jeopardy.

---

[1] The State charged Appellant with Enabling Child Neglect (Count 3) (21 O.S.Supp.2010, § 843.5(D)) and Contributing to the Delinquency of a Minor (Count 4) (21 O.S.2001, § 856). At the request of the State, the trial court dismissed Count 4 after the close of the evidence. The jury acquitted Appellant of Count 3.

[2] Appellant is required to serve 85% of her sentence of imprisonment prior to becoming eligible for consideration for parole. 21 O.S.Supp.2009, § 13.1.

II. Appellant was erroneously convicted under the general child abuse statute instead of the specific statute governing permitting child abuse.

III. The trial court lacked authority to impose sex offender registration.

IV. The trial court failed to properly instruct the jury that Appellant would receive the additional punishment of sex offender registration if found guilty.

V. Appellant was denied a fair trial by the admission of evidence that was more prejudicial than probative.

VI. Ineffective assistance of counsel deprived Appellant of a fair trial.

VII. Prosecutorial misconduct denied Appellant of a fair trial.

VIII. The trial court abused its discretion by refusing to consider credit for all time served.

IX. Cumulative errors deprived Appellant of a fair trial.

X. Appellant's sentence is excessive.

After thorough consideration of these propositions and the entire record before us on appeal including the original records, transcripts, and briefs of the parties, we have determined that neither reversal nor modification of sentence is warranted under the law and the evidence.

In Proposition One, Appellant contends that her convictions violate the State statutory prohibition against double punishment and constitutional prohibitions against double jeopardy. She concedes that she did not raise this challenge before the District Court and, thus, failed to preserve appellate review of the issue. This Court has long recognized that double jeopardy claims which are not preserved for appeal are reviewable for fundamental error, *i.e.*,

plain error review. *Logsdon v. State*, 2010 OK CR 7, ¶ 15, 231 P.3d 1156, 1164 (reviewing multiple punishment/double jeopardy claims which were not raised in the district court for plain error); *Ashinsky v. State*, 1989 OK CR 59, ¶ 26, 780 P.2d 201, 208 (reviewing multiple punishment claim raised for the first time on appeal for fundamental error).[3] Therefore, we review Appellant's claim pursuant to the test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, and determine whether Appellant has shown an actual error, which is plain or obvious, and which affects her substantial rights. *Id.*, 1994 OK CR 40, ¶¶ 10, 26, 30, 876 P.2d at 694, 699, 701; *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. 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. *Id.*

Reviewing the record, we find that Appellant has not shown the existence of an actual error. Appellant's convictions did not arise out of one act but were separate and distinct. *Sanders v. State*, 2015 OK CR 11, ¶ 6, 358 P.3d 280, 283. Appellant concedes that the offenses occurred at different geographical locations. Count One occurred in Appellant's home. Count Two occurred in a camping trailer. The record further shows that the offenses occurred at different times. Count One was completed before Count Two. Because the offenses occurred at separates locations and times we find that Section 11 was

[3] Merely for the sake of comparison, we note that the Tenth Circuit Court of Appeals has recognized the same rule. *See United States v. Worku*, 800 F.3d 1195, 1198 (10th Cir. 2015) *cert. denied, Worku v. United States*, 15-7518, 2016 WL 763571 (U.S. Feb. 29, 2016); *United States v. Battle*, 289 F.3d 661, 665 (10th Cir. 2002)

not violated. *See Logsdon*, 2010 OK CR 7, ¶ 18, 231 P.3d at 1165 (holding § 11 not violated where offenses occurred at different times on same day and concerned separate victims); *Ziegler v. State*, 1980 OK CR 23, ¶ 10, 610 P.2d 251, 254 (finding that § 11 not violated where burglary was complete upon entry, and evidence of completion of the intended crime was only evidence of intent and not a necessary element of the burglary); *Buchanan v. State*, 1971 OK CR 468, ¶ 9, 490 P.2d 1127, 1129 (recognizing that time and place are factors in determining whether offenses are separate and distinct).

Turning to Appellant's double jeopardy claim, we perform the traditional double jeopardy analysis the United States Supreme Court established in *Blockburger v. United States*, 288 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). *Head*, 2006 OK CR 44, ¶ 15, 146 P.3d 1141, 1146. As the present case involves convictions for two counts of the same criminal statute, we determine whether 21 O.S.Supp.2010, § 843.5(G) prohibits individual acts or a course of action. *Blockburger*, 284 U.S. at 301-03, 52 S.Ct. at 181-82. If the individual acts are prohibited, then each act is punishable separately. *Id.*, 284 U.S. at 302, 52 S.Ct. at 181; *see Burleson v. Saffle*, 278 F.3d 1136, 1142 (10th Cir. 2002). However, if the statute punishes a course of conduct, then there can only be one penalty. *Id.*; *see Burleson*, 278 F.3d at 1142.

Reviewing the plain language of Section 843.5(G), we find that the statute prohibits individual acts. *See State ex. rel. Mashburn v. Stice*, 2012 OK CR 14, ¶ 11, 288 P.3d 247, 250; ("[S]tatutes are to be construed according to the plain and ordinary meaning of their language."). Section 843.5(G) defines "enabling

child sexual abuse" as causing, procuring, or permitting of a willful or malicious act of child sexual abuse. Thus, an individual may be punished for every act of sexual abuse they enable.

In the present case, the State alleged and the evidence established that Appellant enabled Robert Bond to sexually abuse her twelve-year-old daughter at two separate geographical locations. As such, we find that the offenses each required "dissimilar proof." *Doyle v. State*, 1989 OK CR 85, ¶ 15, 785 P.2d 317, 323. Because Count One was completed before Count Two, both counts could be separately punished. *Blockburger*, 248 U.S. at 302-03, 52 S.Ct. at 181, *citing Ebeling v. Morgan*, 237 U. S. 625, 35 S. Ct. 710, 59 L. Ed. 1151 (1915). Accordingly, we find that Appellant has not shown that error, plain or otherwise, occurred. Proposition One is denied.

In Proposition Two, Appellant contends that she should have been charged with the specific crime of Child Endangerment by Knowingly Permitting Sexual Abuse pursuant to 21 O.S.Supp.2009, § 852.1(A)(1) instead of Enabling Child Sexual Abuse under 21 O.S.Supp.2010, § 843.5(G). She concedes that she waived appellate review of this issue for all but plain error, when she did not raise this challenge before the District Court. *Dangerfield v. State*, 1987 OK CR 185, ¶ 3, 742 P.2d 573, 574. Therefore, we review Appellant's claim for plain error pursuant to the test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690. *Levering*, 2013 OK CR 19, ¶ 6, 315 P.3d at 395; *Malone*, 2013 OK CR 1, ¶ 41, 293 P.3d at 211-212.

An examination of the two statutes in the present case reveals that they are merely overlapping. *Satepeahtaw v. State*, 1979 OK CR 47, ¶ 14, 595 P.2d 805, 808. Neither statutory provision is more specific or narrow than the other.[4] *State v. Franks*, 2006 OK CR 31, ¶¶ 6-7, 140 P.3d 557, 558-59; *McWilliams v. State*, 1989 OK CR 39, 777 P.2d 1370, 1372 (holding Section 11 mandates that a crime be brought under specific statutory provisions rather than more general codifications). Therefore, the prosecutor was free to elect to charge Appellant under either of the statutes. *State v. Haworth*, 2012 OK CR 12, ¶ 13, 283 P.3d 311, 316; *Satepeahtaw*, 1979 OK CR 47, ¶ 14, 595 P.2d at 808. Accordingly, we find that Appellant has not shown that error, plain or otherwise, occurred. Proposition Two is denied.

In Proposition Three, Appellant contends that the District Court erred when it imposed the requirement of sex offender registration upon her. She concedes that she waived appellate review of this claim for all but plain error, when she failed to raise this challenge before the District Court. *Hubbard v. State*, 2002 OK CR 8, ¶ 7, 45 P.3d 96, 99. Therefore, we review Appellant's claim pursuant to the test for plain error set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690. *Levering*, 2013 OK CR 19, ¶ 6, 315 P.3d at 395; *Malone*, 2013 OK CR 1, ¶ 41, 293 P.3d at 211-212.

Reviewing the record, we find that Appellant has not shown the existence of an actual error. The plain language of 57 O.S.2011, § 582(A) requires that

[4] We note that this Court in *Fairchild v. State*, 1999 OK CR 49, ¶ 51, 998 P.2d 611, 622-23, decided that the *mens rea* for felony murder of a child under 21 O.S. Supp. 1999, § 701.7(C) was a general intent to commit the act which causes the injury, rather than a specific intent, and that the general intent was included within the terms "willfully" or "maliciously."

any person convicted of an offense provided for in § 843.5 of Title 21 must register as a sex offender if the offense "involved" sexual abuse or sexual exploitation. The Legislature's use of the word "involved" within § 582(A) demonstrates its intent that the requirement of registration be imposed on not only those that commit offenses of sexual abuse or sexual exploitation but also on any person "involved" in such offenses. The record in the present case clearly establishes that Appellant's offenses "involved" child sexual abuse. As such, we find that Appellant has not shown that error, plain or otherwise, occurred. Proposition Three is denied.

In Proposition Four, Appellant contends that the District Court should have *sua sponte* instructed the jury that she would have to register as a sex offender if she were convicted. Appellant's failure to request such an instruction at trial waived appellate review of this issue for all but plain error. *Grissom v. State*, 2011 OK CR 3, ¶ 28, 253 P.3d 969, 980; *Romano v. State*, 1995 OK CR 74, ¶ 80, 909 P.2d 92, 120. Therefore, we review Appellant's claim pursuant to the test for plain error set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690. *Levering*, 2013 OK CR 19, ¶ 6, 315 P.3d at 395; *Malone*, 2013 OK CR 1, ¶ 41, 293 P.3d at 211-212.

Reviewing the record, we find that Appellant has not shown the existence of an actual error. The Legislature has not provided for the jury to assess registration as a punishment and it is not part of the applicable punishment range. *See* 21 O.S.Supp.2010, § 843.5(G); *cf. Harney v. State*, 2011 OK CR 10, ¶ 21, 256 P.3d 1002, 1007; *Hicks v. State*, 2003 OK CR 10, ¶ 3, 70 P.3d 882,

883; 21 O.S.Supp.2010, § 843.5(G). Instead, the Sex Offenders Registration Act is a wholly separate regulatory scheme. Nothing within the Act authorizes a sentencing judge or jury to require or preclude compliance with the Act. 57 O.S.Supp.2010, §§ 581-590.2.

We further find that the Sex Offenders Registration Act was not a salient feature of the law concerning Appellant's case. Registration pursuant to the Act has no bearing on the issue of guilt or the accuracy of any intended sentence or fine. *See Verduzco v. State*, 2009 OK CR 24, ¶¶ 6, 8, 217 P.3d 625, 628 (distinguishing 85% rule from earned credits because 85% rule has calculable effect on term of imprisonment to be imposed). To the contrary, informing the jury about the registration requirement could lead to confusion that such registration is the equivalent to community supervision and that, upon the defendant's release, the burden is on the State to ensure compliance with registration by way of supervision when, in reality, the burden is on the felon, who may or may not comply.

Appellant has not claimed that any aspect of the Sex Offenders Registration Act has been retroactively applied to her. Thus, we find that that the Oklahoma Supreme Court's opinion in *Starkey v. Okla. Dept. of Corrections*, 2013 OK 43, 305 P.3d 1004, is neither controlling nor persuasive in the present case. As the jury instructions, when read as whole, accurately stated the applicable law, we find that Appellant has not shown that error, plain or otherwise, occurred. *Hogan v. State*, 2006 OK CR 19, ¶ 39, 139 P.3d 907, 923. Proposition Four is denied.

In Proposition Five, Appellant contends that the trial court erred when it allowed the State to introduce evidence that she also permitted Robert Bond and James Culley to rape and sexually abuse her daughter in Pittsburg County after the commission of the charged offenses. Appellant argues that this evidence constituted inadmissible other crimes evidence. She further argues that this evidence was clearly more prejudicial than probative.

Appellant challenged the State's introduction of the evidence concerning Culley, thus we review the trial court's ruling admitting this evidence for an abuse of discretion. *Marshall v. State*, 2010 OK CR 8, ¶ 24, 232 P.3d 467, 474. However, Appellant waived appellate review of her challenge to the evidence concerning Bond when she failed to object to this evidence at trial. *Engles v. State*, 2015 OK CR 17, ¶ 2, 366 P.3d 311, 313. Therefore, we review this part of her claim pursuant to the test for plain error set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690. *Engles*, 2015 OK CR 17, ¶ 2, 366 P.3d 313.

Reviewing the record in the present case, we find that Appellant has not shown that error, plain or otherwise, occurred. The State timely filed its Notice of Intent to Introduce Evidence of Other Crimes. Because the challenged evidence established that Appellant knew that both Bond and Culley sexually abused the victim in Pittsburg County, it was properly admissible to establish whether Appellant permitted Bond to sexually abuse her daughter in Haskell County. *Taylor v. State*, 1982 OK CR 88, 646 P.2d 615, 616 (holding other crimes evidence admissible to show knowledge where evidence shows defendant's intent or guilty knowledge). As Appellant's explanation of the

events did not necessarily remove the issue of accident or mistake, the evidence was also admissible under the absence of mistake or accident exception. *Cole v. State*, 2007 OK CR 27, ¶¶ 12-21, 164 P.3d 1089, 1094-95.

We further find that the probative value of the challenged evidence was not substantially outweighed by the danger of unfair prejudice. *Mayes v. State*, 1994 OK CR 44, ¶ 77, 887 P.2d 1288, 1310. The evidence held great probative value as to whether Appellant permitted her daughter to be sexually abused, *i.e.*, knew or reasonably should have known that she would be placed at risk of sexual abuse. *See* Inst. No. 4-40D, OUJI-CR(2d) (Supp.2012) (defining "permit" as "knew or reasonably should have known that the child would be placed at risk of sexual abuse"). The trial court issued contemporaneous and final limiting instructions to the jury concerning its consideration of the evidence. As such, we find that the trial court did not abuse its discretion when it admitted the evidence concerning Culley. Appellant has not shown that error, plain or otherwise, occurred when the trial court admitted the evidence concerning Bond. Proposition Five is denied.

In Proposition Six, Appellant challenges the effectiveness of defense counsel. This Court reviews ineffective assistance of counsel claims under the two-part test mandated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206.

Appellant raises two separate claims of ineffective assistance. She asserts that defense counsel was ineffective for failing to preserve appellate review of

the challenges that she raised in Propositions One through Four. We determined that Appellant had not shown that error, plain or otherwise occurred in each of these propositions. As such, we find that Appellant has not shown a reasonable probability that the outcome of the trial would have been different but for counsel's failure to raise the challenges that she now raises on appeal. *Andrew v. State*, 2007 OK CR 23, ¶ 99, 164 P.3d 176, 198; *Glossip v. State*, 2007 OK CR 12, ¶¶ 110-12, 157 P.3d 143, 161.

Appellant further asserts that defense counsel was ineffective for failing to use available evidence at trial. She sets forth six instances where she alleges that defense counsel failed to use available evidence.

Appellant, first, argues that defense counsel failed to impeach the victim with her testimony from a prior trial in Pittsburg County. Turning to the record, we find that Appellant has not shown ineffective assistance of counsel. It is apparent from the record that defense counsel had a copy of the Pittsburg County trial transcript.[5] Defense counsel read from the transcript in an attempt to impeach the victim on more than one occasion. We cannot ascertain what testimony the Pittsburg County transcript contained beyond these exchanges. The transcript is not in the record on appeal.

Appellant requests that this Court take judicial notice of the transcript pursuant to 12 O.S.2011, § 2002. Supplementation of the record is governed by Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18,

[5] The record reveals that a jury trial was conducted upon the Pittsburg County allegations resulting in a hung jury and a mistrial.

App. (2015). Appellant did not attach the transcript or an affidavit setting forth the alleged testimony to an application for an evidentiary hearing. Because Appellant failed to comply with Rule 3.11(B)(3)(b), we find that she has waived appellate review of her request to supplement the record with this document. As defense counsel used the transcript to impeach the victim, we find that Appellant has not shown that that counsel's performance was constitutionally deficient. *Malone*, 2013 OK CR 1, ¶ 14, 293 P.3d at 206.

Second, Appellant argues that counsel was ineffective for failing to develop testimony from Pastor Milton Allen. Counsel called Allen as a defense witness at trial but Appellant asserts that Allen provided additional testimony at the Pittsburg County trial that was beneficial to her defense. The transcript of that trial is not in the record on appeal. Thus, we cannot ascertain what if anything Allen testified to during the Pittsburg County trial. Appellant did not attach the transcript or an affidavit setting forth the alleged testimony to an application for an evidentiary hearing. Because Appellant failed to comply with Rule 3.11(B)(3)(b), we find that she has waived appellate review of her request to supplement the record with this document.

Reviewing the record on appeal, we find that Appellant has not shown ineffective assistance of counsel. Defense counsel presented favorable evidence through Pastor Allen at Appellant's trial. As such, we find that Appellant has not shown that counsel's performance was constitutionally deficient. *Malone*, 2013 OK CR 1, ¶ 14, 293 P.3d at 206.

Third, Appellant argues that counsel was ineffective for failing to cross-examine Robert Bond concerning his pending legal charges. The record supports Appellant's claim, however, we find that Appellant has not shown that counsel's performance prejudiced the defense. Bond's potential bias or motivation for testifying was apparent. The jury was apprised that the State had charged Bond with six counts of Rape in the First Degree in relation to his acts of sexual intercourse with the victim in Haskell County and he also had charges in Pittsburg County. Bond testified concerning those charges on direct-examination. He related that his case had not gone to preliminary hearing or trial, and explained that he did not have a deal for his testimony beyond the State's agreement to not file any additional charges against him. Bond also recounted that he was on a deferred sentence for Driving Under the Influence that related to an accident wherein the victim's older brother had been injured.

Although Bond had additional criminal matters pending, we find that Appellant has not shown that there is a reasonable probability that the outcome of the trial would have been different had counsel examined Bond concerning those matters. *Id.*, 2013 OK CR 1, ¶ 16, 293 P.3d at 206. In a post-trial hearing, the trial court determined that there were no undisclosed agreements concerning Bond's testimony. The victim's testimony thoroughly corroborated Bond's account. Accordingly, we find that Appellant has not shown ineffective assistance of counsel.

Fourth, Appellant asserts that counsel was ineffective for failing to cross-examine R.N., Lisa Sharp. She argues that counsel should have established

that the medical release that the victim signed at the County Health Department was only valid for her initial visit. The record reveals that defense counsel did not cross-examine Sharp. However, we note that counsel developed similar testimony when Appellant took the stand and testified to the limited information the Health Department gave her. We further note that the Health Department's records were not the source of Appellant's knowledge of the sexual abuse. Instead, Bond and the victim both testified that Appellant encouraged the relationship and took the victim to the Health Department to get her on birth control so that Bond could have sexual intercourse with her. Accordingly, we find that Appellant has not shown that she was prejudiced by counsel's failure to cross-examine Sharp. *Id.*

Fifth, Appellant argues that counsel was ineffective for failing to cross-examine Jimmy Culley concerning the particulars of his guilty plea in the District Court of Pittsburg County Case No. CF-2013-377. Although defense counsel did not cross-examine Culley concerning the particulars of his Pittsburg County case, Culley's potential bias or motivation for testifying was apparent from the evidence. Culley testified on direct-examination that he had pled guilty to five counts of Rape in the Second Degree in the District Court of Pittsburg County Case No. CF-2013-377 and was sentenced to twenty years in and twenty years out for raping the victim in this case. Culley related that he had not been promised anything for his testimony.

Appellant asserts that the State initially charged Culley with twenty-four (24) counts of Rape in the Second Degree After Two or More Felony Convictions

but that the State dismissed twenty-one of those counts. Nothing within the record on appeal supports this contention. As such, we find that Appellant has not shown ineffective assistance of counsel. *Malone*, 2013 OK CR 1, ¶ 14, 293 P.3d at 206.

Sixth, Appellant argues that counsel was ineffective for failing to prevent Appellant from being impeached with her testimony from the Pittsburg County trial. She does not forward how defense counsel should have accomplished this act or point to any omission of counsel. Accordingly, we find that Appellant has not shown ineffective assistance of counsel. *Id.*

Simultaneous with the filing of her Brief, Appellant filed her Motion to Supplement Appeal Record pursuant to Rule 3.11, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2015). She seeks to supplement the record on appeal and requests an evidentiary hearing based upon her claims of ineffective assistance of counsel. The non-record materials Appellant has attached to her motion relate to her claims that counsel was ineffective for failing to cross-examine both Bond and Culley. We thoroughly review and consider Petitioner's motion along with the attached non-record evidence as set forth in *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905.

We find that Appellant has not provided sufficient information to show this Court by clear and convincing evidence that there was a strong possibility that defense counsel was ineffective. The non-record materials do not alter our conclusion that Appellant has not shown a reasonable probability that the

outcome of the trial would have been different but for counsel's omission. Bond's potential bias or motivation for testifying was apparent. The jury heard about his pending rape charges and his deferred sentence. The trial court expressly found that there were no undisclosed agreements for Bond's testimony. Similarly, Culley's potential bias or motivation for testifying was also apparent. Nothing within the non-material records suggests that the State had a deal for Culley's testimony. The evidence of Appellant's guilt was strong. As such, we find that Appellant has not shown a reasonable probability that the outcome of the trial would have been different but for counsel's omission to cross-examine Bond and Culley. *Id.* Appellant's motion is **DENIED**. Proposition Six is denied.

In Proposition Seven, Appellant contends that the prosecutor committed prosecutorial misconduct. She argues that the prosecutor stood in the way of her right to present witnesses when she requested that the trial court advise defense witness, Wayne Rider, of his Fifth Amendment rights. Although the better practice would have been for the prosecutor to have secured Rider's acknowledgment and waiver of his rights after simply reciting those rights like the trial court eventually did, we find that Appellant has not shown that the prosecutor violated her right to present witnesses. *Webb v. Texas*, 409 U.S. 95, 98, 93 S.Ct. 351, 353, 34 L. Ed. 2d 330 (1972) ("[J]udge's threatening remarks, directed only at the single witness for the defense, effectively drove that witness off the stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment."); *Clark v. State*, 1978 OK CR 108, ¶¶ 3-8, 585 P.2d

367, 368-69 (holding prosecution violated defendant's right to present witnesses where witness refused to testify after prosecutor indicated he would file perjury charges against witness if she testified); *Mills v. State*, 1985 OK CR 58, ¶ 3, 733 P.2d 880, 883 (*opinion on rehearing*) ("[I]f a prosecutor threatens a defense witness with future charges by virtue of the witness' testimony, and the witness then refuses to testify, the defendant has been deprived of his right to present witnesses, and reversal of the conviction is required."). Rider did not refuse to testify. Instead, he provided potentially favorable testimony for the defense. Reviewing the record in its entirety, we find that Appellant was not denied a fundamentally fair trial. *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872, 40 L.Ed.2d 431 (1974). Proposition Seven is denied.

In Proposition Eight, Appellant contends that the trial court abused its discretion when it refused to consider the option of granting her credit for the time she spent in custody awaiting trial. The record reveals that the trial court ordered Appellant's sentences to run concurrently and granted her credit for time served back to the jury's verdict but refused to grant her credit for time served while awaiting trial. There is no constitutional or statutory authority for a trial court to give a defendant credit for time served in jail pending trial. *Holloway v. State*, 2008 OK CR 14, ¶ 8 n. 4, 182 P.3d 845, 847 n. 4; *In re Tidwell*, 1957 OK CR 33, ¶ 4, 309 P.2d 302, 304. Instead, it is merely a matter of common practice. *Shepard v. State*, 1988 OK CR 97, ¶ 21, 756 P.2d 597, 602. As such, we find that the trial court did not abuse its discretion by refusing to consider a sentencing option. *See Allen v. City of Oklahoma City*, 1998 OK CR 42, ¶ 4, 965 P.2d 387,

389; *Riley v. State*, 1997 OK CR 51, 947 P.2d 530, 534. Proposition Eight is denied.

As to Proposition Nine, we find Appellant was not denied a fair trial by cumulative error. *Ashinsky v. State*, 1989 OK CR 59, ¶ 31, 780 P.2d 201, 209 ("[A]n accumulation of error argument will be rejected where all of the alleged errors are meritless."); *Bechtel v. State*, 1987 OK CR 126, 738 P.2d 559, 561. Proposition Nine is denied.

As to Proposition Ten, we find that, under all the facts and circumstances of the case, Appellant's overall sentence is not so excessive as to shock the conscience of the Court. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149; *Freeman v. State*, 1994 OK CR 37, ¶ 38, 876 P.2d 283, 291. Proposition Ten is denied.

DECISION

The judgment and sentence is **AFFIRMED**. Appellant's Motion to Supplement Appeal Record is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF HASKELL COUNTY
THE HONORABLE BRIAN C. HENDERSON, ASSOCIATE DISTRICT JUDGE

APPEARANCES AT TRIAL

ROGER HILFIGER
ATTORNEY AT LAW
620 WEST BROADWAY
P.O. BOX 791
MUSKOGEE, OK 74402
COUNSEL FOR DEFENDANT

APPEARANCES ON APPEAL

KIMBERLY D. HEINZE
APPELLATE DEFENSE COUNSEL
P.O. BOX 926
NORMAN, OK 73070
COUNSEL FOR APPELLANT

DANITA WILLIAMS
ADAM SCHARN
ASSISTANT DISTRICT ATTORNEYS
202 EAST MAIN, STE 11
STIGLER, OK 74462
COUNSEL FOR THE STATE

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
JENNIFER L. CRABB
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST ST.
OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE

OPINION BY: LUMPKIN, V.P.J.

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

SMITH, P.J., CONCURRING IN RESULT:

I concur in the result reached by the majority, but continue to urge that the jury be advised of the applicability of the Sex Offenders Registration Act.