

- IX. The trial court erred in failing to instruct that Tyrone Ward and Kim Richardson were accomplices as a matter of law;
- X. The trial court erred in “correcting” defense counsel’s explanation of corroboration necessary to convict upon the testimony of an accomplice and materially misled the jury on this subject;
- XI. The trial court abused its discretion in granting the State’s challenge for cause of Juror Watson;
- XII. The trial errors cumulatively deprived Downey of a fair trial and reliable verdict; AND
- XIII. The trial court erred in ordering \$5,000 to be paid in restitution without evidence regarding economic loss.

After thorough consideration of the entire record before us on appeal including the original record, transcripts, briefs and exhibits of the parties, we find reversal is required by the law and evidence. We find merit in Proposition XII, in which Downey claims accumulated error deprived him of a fair trial with a reliable result. Accumulation of error may warrant reversal, where numerous serious errors infect the trial process.¹ Accumulated error in Propositions I, III, V, VI, VIII, IX, and X require reversal in this case. The remaining propositions are moot.²

In Proposition I, the State concedes that the trial court erred in allowing victim impact evidence to be presented in the guilt/innocence stage of a one-stage, non-capital felony trial.³ The testimony was prejudicial, and the record does not support the State’s claim that the improperly admitted evidence

¹ *Fitzgerald v. State*, 1998 OK CR 68, 972 P.2d 1157, 1175.

² We note in Proposition XIII Downey correctly argues that the trial court failed to determine the amount of restitution in accordance with statutory requirements. 22 O.S.2001, § 991a(A)(1)(a); *Taylor v. State*, 2002 OK CR 13, ¶ 5, 45 P.3d 103. These requirements should be followed in future proceedings in this case.

³ 21 O.S.2001, § 984.1; *Perryman v. State*, 1999 OK CR 39, 990 P.2d 900, 905; *Cooper v. State*, 1995 OK CR 22, 894 P.2d 420, 421. Regarding Downey’s claim that photographs of the victim while alive were introduced in error, we note this Court has consistently ruled that pictures of

affected neither the jury's verdict nor sentencing recommendation. We find merit to Downey's claim in Proposition III that the trial court erred in refusing to allow Downey's father to testify based on the Rule of Sequestration, in his case-in-chief, after Downey was unexpectedly impeached during cross-examination.⁴ We further find in Proposition III that the prosecutor improperly used this ruling when he argued that Downey could have called his father to testify about the matter, but did not because his father's testimony would not have supported him.⁵ We find in Proposition V that the newly discovered evidence, suggesting that Officer Sturges had seriously misstated the facts in his testimony rebutting Downey's account of police interviews, was material, not cumulative, and creates a reasonable probability that, had the jury heard it, it would have changed the outcome.⁶ As the State admits, the newly discovered evidence had a direct bearing on the credibility of both Sturges and Downey. Agent Sturges's comprehensive account contradicted Downey's in almost every respect, and left the clear inference, exploited by the State in

the victim while alive are not admissible in the guilt-innocence stage of trial. The trial court's decision squarely contravened the settled law at the time.

⁴ *Edwards v. State*, 1982 OK CR 204, 655 P.2d 1048, 1051-52; *Thompson v. State*, 1975 OK CR 204, 541 P.2d 1328, 1337; *Wald v. State*, 1973 OK CR 343, 513 P.2d 330, 333. We reject the State's suggestion that the father's testimony was not necessary since it was predictable. We also disagree with the State's claim that any error was harmless since the identity of the signatory on Downey's IRS check had no bearing on Downey's guilt or innocence of the crime charged. Whether Downey was testifying truthfully had every bearing on the jury's determination of his credibility. This case turned on credibility – whether the jury was convinced by the co-defendants and the State's witnesses, or Downey and his witnesses. This decision denied Downey the opportunity to offer a witness who would rebut the State's claim that he was lying.

⁵ *Paxton v. Ward*, 199 F.3d 1197, 1216-18 (10th Cir. 1999); *Hooks v. State*, 2001 OK CR 1, 19 P.3d 294, 314, n. 51, *cert. denied*, ___ U.S. ___, 122 S.Ct. 371, 151 L.Ed.2d 282.

⁶ *Ellis v State*, 1992 OK CR 45, 867 P.2d 1289, 1303, *cert. denied*, 513 U.S. 863, 115 S.Ct. 178, 130 L.Ed.2d 113; *Reed v. State*, 1983 OK CR 12, 657 P.2d 662, 664, *cert denied*, 464 U.S. 933, 104 S.Ct. 337, 78 L.Ed.2d 307. The evidence was newly discovered because Downey could not

closing, that Downey was lying to the jury. The record reflects the jury's concern with witness credibility, and jurors were entitled to hear information that Downey's testimony about police interviews was accurate.

We find in Proposition VI that the trial court erred in allowing the State to impeach a defense witness with a deferred judgment.⁷ We find merit in Proposition VIII, noting that the trial court's "supplemental instructions" on the law of felony murder might have increased juror confusion because they did not answer the jury's question, which went to witness credibility, and might have been interpreted as an expression of the court's views on the merits of the case.⁸ In Proposition IX, the jury should have been instructed that Downey's co-defendants, who were charged with the same crime as he, were accomplices as a matter of law.⁹ In Proposition X we find the trial court erred in *sua sponte* giving an oral instruction during defense counsel's closing argument which contradicted the written instructions, and may have confused or misled jurors as to the proper understanding of the law of corroboration.¹⁰

have been expected to anticipate that a law enforcement officer would testify in rebuttal with egregiously inaccurate statements, requiring pre-trial investigation.

⁷ 12 O.S.2001, § 2609; *Cline v. State*, 1989 OK CR 69, 782 P.2d 399, 401; *White v. State*, 1985 OK CR 84, 702 P.2d 1058, 1062; *Belle v. State*, 1973 OK CR 448, 516 P.2d 551, 552. The State does not appear to contest the error, but argues it had no effect on the verdict.

⁸ *Caffey v. State*, 1983 OK CR 39, 661 P.2d 897, 901; *Scaggs v. State*, 1966 OK CR 107, 417 P.2d 331, 336; *French v. State*, 1964 OK CR 125, 397 P.2d 909, 912; *Jarman v. State*, 57 Okl.Cr. 226, 47 P.2d 220, 222 (1935).

⁹ *Wackerly v. State*, 2000 OK CR 15, 12 P.3d 1, 10-11, *cert. denied*, 532 U.S. 1028, 121 S.Ct. 1976, 149 L.Ed.2d 768 (2001); *Anderson v. State*, 1999 OK CR 44, 992 P.2d 409, 418, *cert. denied*, 531 U.S. 850, 121 S.Ct. 124, 148 L.Ed.2d 79 (2000); *Moss v. State*, 1994 OK CR 80, 888 P.2d 509, 520.

¹⁰ 22 O.S.2001, § 952; *Omalza v. State*, 1995 OK CR 80, 911 P.2d 286, 303; *Atterberry v. State*, 1986 OK CR 186, 731 P.2d 420, 422; *French*, 307 P.2d at 912; *Townley v. State*, 1959 OK CR 100, 355 P.2d 420, 444.

Decision

The Judgment and Sentence of the District Court is **REVERSED** and **REMANDED** for a new trial.

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LUMPKIN, P.J.:	CONCUR IN RESULTS
JOHNSON, V.P.J.:	CONCUR
STRUBHAR, J.:	CONCUR IN RESULTS
LILE, J.:	DISSENT

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