

- IV. The trial court erred by failing to determine whether Appellant could pay restitution without imposing manifest hardship on her family and it was improper for the Court to assess triple damages based in part on possible restitution from the counts in which Appellant was acquitted;
- V. Appellant's punishment and the assessment of triple the amount of alleged restitution arising from the same conduct violates the Fifth Amendment's double jeopardy prohibition and the prohibition against double punishment;
- VI. The trial court abused its discretion and violated Appellant's right to due process when it discouraged Appellant from testifying on her behalf and by refusing to allow her to present evidence on her behalf;
- VII. Appellant should be granted a new trial because her estranged husband may have committed perjury and may be, at the very least, an accomplice;
- VIII. The trial court erred by allowing the note board used by the prosecution during closing argument to go back with the jury during deliberations;
- IX. Appellant was denied her right to a speedy trial;
- X. There was no verdict rendered at the second stage of the trial that defendant was guilty of the prior felony conviction; therefore it was error for the trial court to sentence Appellant as if she had been found guilty of a former felony conviction;
- XI. The jury was incorrectly instructed as to the punishment for embezzlement; and
- XII. Appellant should be granted relief based upon cumulative error.

After a thorough consideration of these propositions and the entire record before us, including the original record, transcripts, and briefs of the parties, we find reversal is not required, but modification is, due to admitted error on the applicable range of punishment, as set forth further below.

With respect to proposition one, we find Appellant's intentions to represent herself unequivocally expressed, evidence of competency was submitted, and the trial judge let Appellant know of the dangers of self-representation numerous times. Furthermore, standby counsel was appointed, and Appellant consulted with said counsel throughout the trial. While there have been better examples of a waiver of the right to counsel, we find the record adequately shows a knowing and intelligent waiver of Appellant's right to counsel. *Nave v. State*, 1991 OK CR 42, ¶ 15-16, 808 P.2d 991, 994.

With respect to proposition two, we find Appellant was not denied a fair trial due to prosecutorial misconduct, and there is no plain error concerning the incidents raised. *Simpson v. State*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 693.

With respect to proposition four, we find the trial judge should have made a finding, based upon submitted evidence including the restitution forms, regarding whether or not restitution would impose a financial hardship on Appellant's family. 22 O.S.2001, § 991(A)(1)(a); *Honeycutt v. State*, 1992 OK CR 36, 834 P.2d 993, 1000-01. However, this does not void the restitution order, as 22 O.S.2001, § 991f(C)(2)(b) requires the amount of restitution to be determined regardless of financial resources and section J of that statute allows the trial judge to defer a hearing on payment of restitution and to amend it as the situation progresses. Petitioner's recourse, therefore, is not to petition this Court for relief, but rather to direct requests for adjustment of restitution to the district court at the time that her sentence has been fully discharged, on the basis of financial hardship. In so finding, we reject Appellant's claim that

the Adkar Shriners was not a “victim” that suffered an “economic loss” and that the trial judge based her treble damage restitution amount, in part, on the claims for which she was acquitted.

With respect to proposition five, we find no violation of double jeopardy or double punishment protections in the assessment of restitution in addition to the incarceration time, as this is clearly what the legislature intended under 22 O.S.2001, § 991a. “With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” *Missouri v. Hunter*, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983).

With respect to proposition six, we find no evidence in the record that the trial court abused its discretion or violated Appellant’s right to due process by discouraging her from testifying on her own behalf or by refusing to allow her to present evidence.

With respect to proposition seven, we find the issue of the hypothetical perjury and/or complicity of Appellant’s husband was waived at trial when Appellant raised no motions in that regard, did not contemporaneously object, and declined to cross-examine her husband when he was on the witness stand. *Simpson*, 1994 OK CR 40, ¶ 2, 876 P.2d at 693. With respect to proposition eight, we find the record indicates jurors received only a blank notepad during deliberations, rather than unadmitted demonstrative notes used by the prosecutor at trial. The motion for evidentiary hearing and motion to

supplement the record on appeal with evidence supporting the allegations raised in propositions seven and eight are denied. Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2007).

With respect to proposition nine, we find Appellant's right to a speedy trial was not denied as most of the delay was attributable to Appellant's own actions. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d. 101 (1972).

And finally, with respect to propositions three, ten, eleven, and twelve, we find Appellant's sentence must be modified, as the forty year sentence exceeds the sentencing range for the crime of Embezzlement by an officer after one previous felony conviction. Rather than two years to life, the statutes in question (21 O.S.2001, §§ 1452, 1462, 1705 & 21 O.S.2001, § 51.1(A)(3)), provide that the proper sentencing range for this crime at the time it was committed was imprisonment not exceeding ten years. Accordingly, Appellant's sentence for Count I must be modified, as set forth below. We find no error in the trial court's determination that Appellant had one prior felony conviction, as she stipulated to that point. Moreover, we find no cumulative error requiring relief beyond that relating to the sentencing error.

DECISION

Appellant's conviction under Count I is hereby **AFFIRMED**, but her sentence is hereby **MODIFIED** to ten (10) years imprisonment, along with the fine and restitution ordered by the District Court. Furthermore, the District Court's decision, during the pendency of this appeal, to suspend the balance of Appellant's sentence is declared null and void. While 22 O.S.2001, 982a

expressly authorizes the court imposing a sentence to modify such sentence any time within twelve (12) months after the sentence is imposed and does not limit this authority if the case is pending on appeal, the modification here took place after that twelve month period. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY

THE HONORABLE DYNDA POST, DISTRICT JUDGE

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