

the prosecutor to present additional prior convictions as aggravating evidence in violation of Oklahoma statutory law. This denied Appellant a reliable sentencing proceeding in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

- III. Inadequate pretrial investigation of Appellant's defense resulted in ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution.
- IV. Appellant's aggregate sentence of fifty years in prison is excessive and should be modified.

After a 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 Appellant's conviction in Count 2 must be reversed.

In Proposition One, Appellant contends that his convictions are based upon a single act and, thus, violate 21 O.S.2011, § 11. Our case law on this point is well defined and readily resolves the issue.

Appellant preserved appellate review of this claim when he orally raised the issue before the trial court at sentencing. See *Logsdon v. State*, 2010 OK CR 7, ¶ 15, 231 P.3d 1156, 1164; *Head v. State*, 2006 OK CR 44, ¶ 9, 146 P.3d 1141, 1144. We review the trial court's decision to deny Appellant's motion for an abuse of discretion. *Sanders v. State*, 2015 OK CR 11, ¶ 4, 358 P.3d 280, 283. 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. *Id.*; *State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194.

The trial court overruled Appellant's motion finding that different acts caused the injuries to Sloan's throat and facial bones. Although there was no expressly worded intent stated by the Legislature within Section 644(F) and 644(J) of Title 21 O.S.2011, the trial court found that the Legislature's act of designated different subsections (as well as different punishments) for each of the acts established that the Legislature intended to separately punish both of the crimes.

Title 21 O.S.2011, § 11(A) governs multiple punishments for a single criminal act. *Sanders*, 2015 OK CR 11, ¶ 5, 358 P.3d at 283.

The proper analysis of a Section 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, Section 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.

~~*Id.*, 2015 OK CR 11, ¶ 6, 358 P.3d at 283. Where there are a series of separate~~
and distinct crimes, Section 11 is not violated. *Logsdon*, 2010 OK CR 7, ¶ 17, 231 P.3d at 1164-65; *Watts v. State*, 2008 OK CR 27, ¶ 16, 194 P.3d 133, 139; *Lewis v. State*, 2006 OK CR 48, ¶ 3, 150 P.3d 1060, 1061. Thus, it is first necessary to examine the relationship between the two crimes to determine

whether they constitute a single act. *Sanders*, 2015 OK CR 11, ¶ 6, 358 P.3d at 283.

In *Weatherly v. State*, 1987 OK CR 28, 733 P.2d 1331, this Court considered whether multiple blows delivered by a defendant constitute a single offense or may serve the basis for separate convictions. *Id.*, 1987 OK CR 28, ¶ 18, 733 P.2d at 1336-37. This Court determined that multiple blows during a criminal transaction do not constitute a single act where a significant gap of time exists between the blows so that the transaction may not be called uninterrupted or unintermittent. *Id.*, 1987 OK CR 28, ¶¶ 19-20, 733 P.2d at 1338.

Applying this analysis to present case, we find that the trial court's conclusion that different acts caused Truecella Sloan's injuries was clearly against the logic and effect of the facts presented. The record reveals that there was not a significant gap of time between Appellant's attacks with his left and right hands. Appellant strangled Sloan with his left hand while simultaneously striking her in the face with his right fist. Because Appellant's attacks were uninterrupted, we find that the offenses were not separate and distinct but constituted a single act.

We reach the same result as to the trial court's conclusion that the Legislature intended separate punishment for the two offenses. We note that absent express legislative intent, one act that violates two separate criminal provisions cannot be punished twice. *Barnard*, 2012 OK CR 15, ¶ 27, 290 P.3d at 767; *Lewis*, 2006 OK CR 48, ¶ 3, 150 P.3d at 1061; *Davis*, 1999 OK CR 48,

¶ 13, 993 P.2d at 126. We set forth an example of the requisite language in *Davis*, stating:

For example, Violation of a Protective Order is punishable by imprisonment and/or fine. Title 22 O.S.1991, § 60.6. This statute specifically provides that “the provisions of this subsection shall not affect the applicability of Sections 644, 645, 647 and 652 of Title 21.”

Davis, 1999 OK CR 48, ¶ 13 n. 5, 993 P.2d at 127 n. 5.

As the trial court recounted in its written order, there is no expressly worded intent within 21 O.S.2011, § 644 for the offenses set forth in subsections (F) and (J) to be separately punished. Therefore, we find the trial court abused its discretion when it denied Appellant’s motion.

Because Appellant's two convictions violate the multiple punishment provisions of § 11, Appellant's conviction in Count 2 for Domestic Assault and Battery Resulting in Great Bodily Injury is reversed with instructions to dismiss. Based upon this conclusion, we need not address Appellant's double jeopardy claim. *Sanders*, 2015 OK CR 11, ¶ 12, 358 P.3d at 284-85, *citing* *Barnard*, 2012 OK CR 15, ¶ 26, 290 P.3d at 767 (because § 11 complements the double jeopardy protections of the Oklahoma and United States Constitutions, a traditional double jeopardy analysis is conducted only if § 11 does not apply).

In Proposition Two, Appellant contends that the trial court erred when it failed to hold the trial in a single-stage proceeding. He argues that the State should not have been allowed to introduce evidence concerning two additional felony convictions after he had admitted that he had four felony convictions

during his testimony in the first stage of the trial. Our case law on this point is well defined and readily resolves the issue.

Title 22 O.S.2011, § 860.1 mandates a two-stage proceeding in cases where the defendant is prosecuted after former conviction of a felony. See *Chapple v. State*, 1993 OK CR 38, ¶¶ 17-18, 866 P.2d 1213, 1216-17. This “procedure is intended to shield a criminal defendant ‘from prejudicial misuse of his former convictions by the jury during the determination of guilt’ in criminal trial.” *Grissom v. State*, 2011 OK CR 3, ¶ 47, 253 P.3d 969, 985-86, quoting *Chapple*, 1993 OK CR 39, ¶ 19, 866 P.2d at 1217. A defendant may waive this statutory protection by confessing the former conviction under oath at trial. *Ray v. State*, 1990 OK CR 15, ¶ 7, 788 P.2d 1384, 1386. However, “it is within the trial court’s discretion to allow a defendant to waive bifurcated proceedings and to try, in a single stage, an offense charged after a former conviction of a felony.” *Wills v. State*, 1981 OK CR 140, ¶ 6, 636 P.2d 372, 375; *Avants v. State*, 1975 OK CR 214, ¶ 9, 544 P.2d 539, 542; *Carney v. State*, 1965 OK CR 120, ¶ 11, 406 P.2d 1003, 1005; See also *Sanders v. State*, 2015 OK CR 11, ¶ 13, 358 P.3d 280, 285 (reviewing trial court’s decision to hold two stage trial 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. *Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d at 1194.

Turning to the present case, the trial court overruled Appellant's objection to a two-stage proceeding and explained that it was not mandatory that the court hold a single stage trial when the defendant admits his prior convictions. The trial court noted that the State had not had the opportunity to present all six of the alleged prior felony convictions because Appellant had only admitted those felony convictions for which he could be impeached.

Reviewing the record we find that the trial court's conclusion and judgment was not clearly against the logic and effect of the facts presented. The provisions recognizing the admissibility of prior felony convictions for enhancement of sentence and for impeachment are distinct and have different admissibility requirements. *See Platt v. State*, 2008 OK CR 20, ¶ 4, 188 P.3d 196, 201 (recognizing difference in limits on use of prior convictions within 12 O.S.2001, § 2609 and 21 O.S.Supp.2007, § 51:1(A)). Generally, proof of after former felony conviction under the provisions of 21 O.S.2011, § 51.1 must include evidence of identity of person; that the charged offense was committed within ten years of the date following completion of the execution of the sentence for the former conviction; that the defendant was represented by counsel; and the finality of the conviction. *Wright v. State*, 1979 OK CR 111, ¶ 12, 617 P.2d 1354, 1356-57.

We note that Oklahoma law does not limit the number of priors that the State may allege and attempt to prove in order to meet the enhancement provisions set forth in 21 O.S.2011, § 51.1. The State is permitted to introduce evidence concerning former convictions even if the criminal defendant is willing to concede to his or her prior felony convictions in order to meet its burden of

proof. See *Smallwood v. State*, 1995 OK CR 60, 907 P.2d 217, 228 (holding Appellant's willingness to concede that there is no dispute over evidence is not determinative of the admissibility of the evidence).

The record in the present case reveals that the State filed a second page alleging that Appellant had six felony convictions. However, the trial court sustained Appellant's pretrial motion *in limine* excluding evidence of Appellant's 1995 felony convictions in the first stage of the trial on the basis that they were stale for impeachment purposes pursuant to 12 O.S.2011, § 2609(B). Appellant admitted four felony convictions when he took the witness stand in the first stage of the trial, but he did not confess all six of the former convictions the State had alleged in the second page of the Information with sufficiency to constitute *prima facie* proof. Appellant testified and admitted his felony convictions for arson and burglary in the second degree in 2000; admitted that he had sustained two more felony convictions in 2013, but made no mention of the 1995 convictions. Further, Appellant did not confess representation by counsel or attest to the finality of the convictions. Because the State had not had the opportunity to present evidence on the issue of Appellant's former felony convictions, we find that the trial court did not abuse its discretion.

Appellant argues that the State's admission of the certified judgment and sentence documents in the second stage of the trial violated *Malone v. State*, 2002 OK CR 34, 58 P.3d 208. We are not persuaded by this argument. In *Malone*, this Court found that evidence in aggravation or mitigation of punishment is only admissible in those cases where the issue of punishment has

been left to the trial judge pursuant to the provisions of 21 O.S.2011, § 973. *Malone*, 2002 OK CR 34, ¶¶ 7-8, 58 P.3d at 209-10. As the State in the present case introduced the certified judgment and sentence documents to establish Appellant's former felony convictions to meet the requirements for sentence enhancement under § 51.1(C), we find that *Malone* is distinguishable from the present case. The judgment sentence documents were not evidence in aggravation of punishment but instead served the purpose of establishing the requirements for sentence enhancement. Proposition Two is denied.

In Proposition Three, Appellant contends that he received ineffective assistance of counsel. Our case law on this point is well defined and readily resolves the issue.

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). *Mitchell v. State*, 2011 OK CR 26, ¶ 139, 20 P.3d 160, 190. The *Strickland* test requires an appellant to show: (1) that counsel's performance was constitutionally deficient; and (2) that counsel's deficient performance prejudiced the defense. *Bland v. State*, 2000 OK CR 11, ¶ 112-13, 4 P.3d 702, 730-31 (citing *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064).

When a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed. *Phillips v. State*, 1999 OK CR 38, ¶ 103, 989 P.2d 1017, 1043 (citing *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069). To demonstrate prejudice an appellant must show

that there is a reasonable probability that the outcome of the trial would have been different but for counsel's unprofessional errors. *Bland*, 2000 OK CR 11, ¶ 112, 4 P.3d at 730-31. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112, 131 S.Ct. 770, 792, 178 L.Ed.2d 624 (2011).

Appellant asserts that counsel failed to develop evidence concerning the fact that Truecella Sloan's injuries occurred when she was assaulted at a bar by two other women because counsel waited until five days before trial to contact anyone at the bar. Appellant concedes that nothing within the record supports his allegation that defense counsel failed to timely investigate his defense. Accordingly, we find that Appellant has not shown ineffective assistance of counsel.

Simultaneous with the filing of his Brief, Petitioner filed his Motion to Remand for Evidentiary Hearing pursuant to Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015). He seeks to supplement the record on appeal and requests an evidentiary hearing based upon his claim of ineffective assistance of counsel.

We review this motion pursuant to the analysis set forth in *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905-906.

As the rules specifically allow Appellant to predicate his claim on allegations "arising from the record or outside the record or a combination of both," *id.*, it is, of course, incumbent upon this Court, to thoroughly review and consider Appellant's application and affidavits along with other attached non-record evidence to determine the merits of Appellant's ineffective assistance of

counsel claim. Our rules require us to do so in order to evaluate whether Appellant has provided sufficient information to show this Court by clear and convincing evidence that there is a strong possibility trial counsel was ineffective for failing to utilize or identify the evidence at issue. Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007). This standard is intended to be less demanding than the test imposed by *Strickland* and we believe that this intent is realized. Indeed, it is less of a burden to show, even by clear and convincing evidence, merely a strong possibility that counsel was ineffective than to show, by a preponderance of the evidence that counsel's performance actually was deficient and that but for the unprofessional errors, the result of the proceeding would have been different as is required by *Strickland*. Thus, when we review and grant a request for an evidentiary hearing on a claim of ineffective assistance under the standard set forth in Rule 3.11, we do not make the adjudication that defense counsel actually was ineffective. We merely find that Appellant has shown a strong possibility that counsel was ineffective and should be afforded further opportunity to present evidence in support of his claim. However, when we review and deny a request for an evidentiary hearing on a claim of ineffective assistance under the standard set forth in Rule 3.11, we necessarily make the adjudication that Appellant has not shown defense counsel to be ineffective under the more rigorous federal standard set forth in *Strickland*.

Id.

Turning to the non-record materials attached to Petitioner's application, 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.

We need not decide whether trial counsel's performance was deficient because Appellant has not demonstrated prejudice from trial counsel's alleged unprofessional actions. *Phillips*, 1999 OK CR 38, ¶ 103, 989 P.2d at 1043. Appellant has not forwarded the name of any witness or the substance of any evidence that trial counsel should have presented. We note that Appellant's

allegation that two women attacked Sloan conflicted with his trial testimony that a single women attacked Sloan and that Sloan fell on her face as she attempted to escape the woman. We further note that all of Appellant's varied explanations for Sloan's injuries were wholly inconsistent with Sloan's testimony, her documented injuries, and the physical evidence at the scene. None of Appellant's accounts explain the injuries on Sloan that were consistent with strangulation. As such, we find that he has not shown there is a reasonable probability that the outcome of the trial would have been different but for counsel's alleged error. Accordingly, Appellant's motion is **DENIED**.

Recognizing that his claim fails to meet the requisite standard for an evidentiary hearing pursuant to Rule 3.11, Appellant argues that the Rule is contrary to the United States Supreme Court's Opinion in *Massaro v. United States*, 538 U.S. 500, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003). He asserts that the burden in Rule 3.11 interferes with his right to pursue a Sixth Amendment claim on appeal.

Appellant's argument is unfounded. In *Sporn v. State*, 2006 OK CR 30, ¶ 6, 139 P.3d 953, 954, this Court determined that the United States Supreme Court did not require the states to adopt the rule announced in *Massaro*. We reaffirmed the requirement that available ineffective assistance of trial counsel claims be made on direct appeal as a viable alternative to the federal procedures established in *Massaro*. *Id.*, 2006 OK CR 30, ¶ 7, 139 P.3d at 954. In *Simpson*, we explained that the requisite showing for an evidentiary hearing within Rule 3.11 is less demanding than the test imposed by *Strickland*.

Simpson, 2010 OK CR 6, ¶ 53, 230 P.3d at 905-906. Proposition Three is denied.

In Proposition Four, Appellant contends that his aggregate sentence of fifty years is excessive. In Proposition One, we determined that Appellant's conviction in Count 2 for Domestic Assault and Battery Resulting in Great Bodily Injury must be reversed because it violated the multiple punishment provisions of 21 O.S.2011, § 11. Accordingly, we find that Appellant's claim is rendered moot.

DECISION

The Judgment and Sentence of the District Court as to Count 1 is **AFFIRMED**. Appellant's Motion to Remand for Evidentiary Hearing is **DENIED**. Appellant's Conviction for Domestic Assault and Battery Resulting in Great Bodily Injury in Count 2 is **REVERSED** with instructions to dismiss. This matter is remanded to the District Court for entry of Judgment and Sentence consistent with this Opinion. 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 TULSA COUNTY
THE HONORABLE DOUG DRUMMOND, DISTRICT JUDGE

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JOHNSON, J.: Concur
LEWIS, J.: Concur
HUDSON, J.: Concur