

JUL - 2 2013

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

RALPH T. SMITH, JR.,)

Appellant,)

v.)

THE STATE OF OKLAHOMA,)

Appellee.)

NOT FOR PUBLICATION

Case No. F-2012-08

OPINION

C. JOHNSON, JUDGE:

Appellant, Ralph T. Smith, Jr., was convicted by a jury in the District Court of Tulsa County, Case No. CF-2007-1722, of Kidnapping (Count I), First Degree Robbery (Count II), Attempted Rape - First Degree (Count III), Forcible Sodomy (Count IV), First Degree Rape (Count V) and Unlawful Possession of a Controlled Drug (Count VI). The jury assessed punishment at twenty years imprisonment on each of Counts I, II and IV, thirty-five years imprisonment on Count III, life in prison without the possibility of parole on Count V and five years imprisonment on Count VI. The trial court sentenced Smith in accordance with the jury's recommendation and ordered that the sentences be served consecutively. From this Judgment and Sentence Smith has filed a timely appeal to this Court.

FACTS

Around 1:00 or 2:00 p.m. on March 28, 2007, seventy-six year old R.C. took her ninety-eight year old friend to the Creek Casino in Tulsa where they both played the slot machines. While there, R.C. sat down to play a slot

machine that was next to one Smith was playing. After a while, Smith told R.C. he needed to use the restroom and he asked her to watch his machine while he was gone. R.C. did this for Smith who left to go play another slot machine shortly after he returned from the restroom. R.C. and her friend changed slot machines a while later and when they moved, R.C. sat near Smith again. After R.C. lost most of her money, Smith reached over and put a hundred dollars in her machine. She told him that she had money and that he didn't need to put money in her machine but Smith told her to go ahead and play it. When R.C. had played about fifty dollars, she won a thousand dollars. She cashed the ticket and gave Smith half of the winnings. As they visited, Smith told R.C. that he needed to go to Catoosa but his friends had taken his truck so he was going to have to get a taxi to take him. R.C. told him that she drove through Catoosa on her way to her home in Inola and she offered to give him a ride to Catoosa so he wouldn't have to pay a taxi. R.C. said that she needed to take her friend home first and fix her some supper but she agreed to drive back to the casino when she was finished to pick up Smith and give him a ride to Catoosa.

After R.C. picked up Smith at the casino they drove toward Catoosa. As R.C. started to pull over at Catoosa, Smith grabbed her arm and twisted it. He told her that she couldn't stop and he couldn't get out because "they" were after him. She became frightened and offered to let Smith take her car but he wouldn't let her get out. Smith took out a pipe and began to smoke some white stuff. R.C. drove on toward Inola where Smith told her to take him to her

house. She drove around until she couldn't think of anything else to do and then she finally drove to her house. When they got to her house, Smith walked around making sure that no one else was there. He then took R.C. upstairs, smoked some more of the white stuff and forced her to undress. Smith tried to rape her vaginally but was unable to penetrate her so he forced her to orally sodomize him and he ejaculated in her mouth.¹

After this sexual assault, Smith forced R.C. back into her car and he drove her to Tulsa. He took the money out of her purse and used her cell phone to make a call. He then drove around the north side of Tulsa until he stopped by the side of a gas station. As they sat in the car, a man drove up beside them, stopped and got into the back seat of their car. Smith gave the man some money and the man gave him a pouch containing a white substance that looked like the white stuff R.C. had seen Smith smoke earlier. When the man left, Smith drove the car into an alley across from the gas station and smoked the substance he had purchased. He told R.C. that he was going to take her to a motel, get a room and lock her in the bathroom and leave. He drove to a motel in Tulsa and they both went into the office where Smith got them a room. Smith had told her to keep quiet and not cause any trouble so R.C. did not alert the desk clerk that she was not there willingly because she was afraid Smith would hurt her and the clerk as Smith was "really drugged up." Once in the room, Smith attempted to rape R.C. again. When he was unsuccessful, he went through her things, found a suppository she carried in

¹ R.C.'s vagina had been sewn partially closed after a vaginal hysterectomy.

her bag with her nursing supplies and inserted it in her vagina.² He was then able to penetrate her. When he was finished, Smith allowed R.C. to use the bathroom where she wiped herself with a washrag. When she came back into the room, Smith was agitated because he thought she had called 911 for help. He took R.C.'s credit cards and cell phone and left in her car.

When Smith was gone, R.C. called her grandson who was an Oklahoma Highway Patrolman. He was not at home but she spoke with his wife and told her what had happened. R.C. next called the front desk at the motel and told the clerk what had happened. The clerk called the police. R.C.'s grandson was first to arrive at the scene and the ambulance arrived shortly thereafter. R.C. was taken to the rape center at Hillcrest Hospital where she was examined by a nurse. R.C.'s arms were bruised and her genitalia were torn and swollen. After she left the hospital her grandson took her to the police station where they took her statement. A subsequent search of the motel room revealed that the contents of R.C.'s purse and medical bag were strewn about the room. A plastic baggie containing what was later determined to be cocaine base was also found on the floor in the room. The washcloth R.C. used to wipe herself after the assault was found in the bathroom and submitted for DNA testing. The DNA profile obtained from sperm found on the cloth was consistent with Smith's DNA profile.

² R.C. was a registered nurse and carried some supplies with her in a bag.

PROPOSITIONS

1.

Interstate Agreement on Detainers Act

In his first proposition Smith argues that the trial court erred in not dismissing the case with prejudice due to violation of the speedy trial provisions of the Interstate Agreement on Detainers Act (IADA). He specifically asserts that the State failed to bring him to trial within 180 days of his written notice to the Tulsa County prosecutor and the Tulsa County District Court of his request for final disposition of this case pursuant to Article III of the Interstate Agreement on Detainers Act. 22 O.S.2011, § 1347. The record reflects that Smith filed a motion below to dismiss the charges against him for lack of speedy trial under the IADA. A hearing was held on this motion and Smith's request was denied. Smith asserts on appeal that this ruling was in error. This Court will conduct a *de novo* review of the trial court's application of the IADA to the present case. See *State v. Davis*, 2011 OK CR 22, § 5, 260 P.3d 194, 195 (regarding questions of statutory construction). See also *U.S. v. Jones*, 454 F.3d 642, 646 (7th Cir. 2006) (regarding Interstate Agreement on Detainers Act).

The IADA is a uniform act adopted to encourage the "expeditious and orderly disposition" of untried charges pending against prisoners in other states. *Ullery v. State*, 1999 OK CR 36, ¶ 8, 988 P.2d 332, 340; 22 O.S.2011, § 1347, Art. I. When, as in the present case, a defendant requests a final disposition of retainer the time limit within which to try the defendant is 180

days from the date of receipt of the prisoner's request. 22 O.S.2011, § 1347, Art. III. The IADA provides two exceptions to this speedy trial requirement. Article III(a) provides that the trial time period is subject to any necessary or reasonable continuance based upon good cause which is shown in open court when the prisoner or his counsel is present and Article VI(a) tolls the time period when the prisoner is "unable to stand trial, as determined by the court having jurisdiction over the matter." *Id.* See also *Gallimore v. State*, 1997 OK CR 46, ¶ 17, 944 P.2d 939, 942.

The record in the present case reflects that Smith committed the crimes which are the subject of this case on March 28, 2007, and a warrant was issued for his arrest the following day. Smith was arrested in Jasper County, Missouri on March 30, 2007, and held in custody there for crimes committed in Missouri. At his booking, Jasper County Officials became aware of Smith's Tulsa warrant and notified Tulsa County that Smith was in custody. On this same day, the Tulsa County Sheriff's Office placed a hold via the law enforcement teletype system with the Jasper County Sheriff's Office to prevent Smith from being released from Jasper County while Tulsa County decided whether or not they were going to extradite Smith back to Tulsa.

Extradition proceedings were started and a "governor's warrant" was sent to Jasper County Sheriff's Office on June 18, 2007. Smith was not transported to Tulsa, however, because he was taken to the Fulton State Medical Hospital on September 13, 2007. He was returned to Jasper County on January 30, 2008 and held there pending trial on one of his Missouri

charges. On July 22, 2009, Smith was transported to Missouri Department of Corrections Western Regional Diagnostic Center on St. Joseph, Missouri.

On October 28, 2009, Smith sent Tulsa County District Attorney's Office Inmate's Notice of Place of Imprisonment and Request for Disposition of Indictments, Informations or Complaints pursuant to the IADA. The Tulsa County District Attorney's Office contacted Missouri Department of Corrections Western Regional Diagnostic Center on December 15, 2009 to arrange a transport of Smith back to Oklahoma. Tulsa County learned at this point that a few days earlier, on December 11, 2009, Smith had been writted back to Jasper County on a robbery charge. Smith remained in Jasper County until April 13, 2010, when he was transported to the Fulton State Medical Hospital again. On August 5, 2010, Smith was returned to Jasper County where he remained pending the outcome of the robbery case. Smith's sentencing proceeding on the robbery conviction was held on November 5, 2010, and he was sent to Tulsa County shortly thereafter on November 16, 2010.³

At the hearing on the motion to dismiss, the district court judge found that on November 6, 2009, Smith properly executed a request for transfer to the State of Oklahoma to dispose of his Tulsa cases and he was not transported until November 16, 2010 – over one year later.⁴ The judge acknowledged that this was clearly not within the 180 day time limit required

³ Smith was originally sentenced on the robbery conviction on July 13, 2009. However, he appealed this conviction and was granted resentencing which took place in Jasper County on November 5, 2010.

⁴ Although the Request for Disposition of Indictments, Informations or Complaints was dated October 28, 2009, November 6, 2009 was the date the Tulsa County prosecutor acknowledged receipt of the notice.

by Article III of IADA. However, the judge noted that the evidence showed that for 115 days, from April 13, 2010 to August 5, 2010, Smith was at Fulton State Hospital in Missouri undergoing a competency evaluation and during this time, the 180 day time limit was tolled. The district judge also found that the time Smith was in the Jasper County Jail, he was there for a legitimate purpose related to the resolution of his pending Missouri charges and this legitimate purpose tolled the 180 day time limit because during his time in the Jasper County Jail he was unavailable to the State of Oklahoma. Thus, the court ruled, the time that Smith was in the Missouri Department of Corrections Western Regional Diagnostic Center and available for transport to Oklahoma after he filed his request for transfer was considerably shorter than the 180 day time limit allowed by the IADA.

Smith does not take issue with the district court's ruling regarding his time spent in Fulton State Hospital in Missouri undergoing a competency evaluation. Indeed, the district court's ruling in this regard is supported by this Court's decision in *Ullery*, 1999 OK CR 36, at ¶ 13, 988 P.2d 332 at 342 (competency proceedings and a necessary and reasonable continuance, granted for good cause, tolled the IADA time limit). However, Smith does assert that the district court's ruling that the time he spent in the Jasper County Jail awaiting resentencing tolled the 180 day time limit was in error. We disagree. By its plain terms, the IADA requires that a prisoner subject to detainer must have "entered upon a term of imprisonment in a penal or correctional institution of a party state" at the time the detainer was lodged to invoke the

speedy trial provisions of the IADA. 22 O.S.2011, § 1347, Art. III. Thus, several jurisdictions hold that a prisoner is deemed unable to stand trial during the time in which the sending jurisdiction is actively prosecuting a prisoner on current and pending charges. *State v. Pair*, 5 A.3d 1090, 1100-01, 416 Md. 157, 175-176 (2010) (and cases cited therein). It is also widely held that the “unable to stand trial” language includes periods of delay caused by the defendant’s own actions. See *U.S. v. Ellerbe*, 372 F.3d 462, 468, 362 U.S.App.D.C. 95, 101 (C.A.D.C.,2004) (and cases cited therein).

The record indicates that at the time Smith requested transfer to the State of Oklahoma to dispose of his Tulsa cases he was incarcerated at Missouri Department of Corrections Western Regional Diagnostic Center but he only remained there for about a month before he was writted back to Jasper County for resentencing on a Missouri robbery conviction he had appealed. Prior to resentencing, Smith was transferred to Fulton State Hospital where he remained until he was returned to Jasper County to where he was resentedenced. On November 10, 2010, Tulsa County received notice that the pending action involving Smith was resolved and he was turned over to Tulsa County officials on November 16, 2010. This Court finds that the time Smith spent at Fulton State Hospital for mental health evaluation and time that he spent at Jasper County awaiting resentencing as a result of his appeal of his robbery conviction tolled the 180 day time limit for his return to Oklahoma to stand trial on his Tulsa County charges. There was no violation of the violation of the speedy

trial provisions of the Interstate Agreement on Detainers Act and Smith's argument requires no relief.

2.

Sentencing Instructions

In his second proposition Smith asserts that the trial court erred in instructing the jury that the punishment range for the offense of kidnapping without a previous conviction was up to twenty years imprisonment because the actual punishment range provided for by statute at the time Smith committed this crime was for a term of imprisonment not exceeding ten years. 21 O.S.Supp.2006, § 741. As Smith did not object to the instruction given by the trial court we review only for plain error. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. Under plain error review, we grant relief only if we conclude that the error was not harmless or that the error constitutes a miscarriage of justice or a substantial violation of a constitutional or statutory right. *See Logsdon v. State*, 2010 OK CR 7, ¶ 26, 231 P.3d 1156, 1166; *Andrew v. State*, 2007 OK CR 23, ¶ 112, 164 P.3d 176, 199-200. Where a sentence is infirm due to instructional error on punishment, this Court may modify within the range of punishment, modify to the minimum punishment allowable by law, or remand to the trial court for re-sentencing. *Scott v. State*, 1991 OK CR 31, ¶ 14, 808 P.2d 73, 77. *See also Taylor v. State*, 2002 OK CR 13, ¶ 4 n.3, 45 P.3d 103, 105 n.3.

In this instance, the erroneous instruction allowed the jury to sentence Smith to a term of imprisonment ten years above the maximum sentence

allowed by statute. The State concedes that Appellant's sentence was beyond the statutorily prescribed range of punishment, and suggests this Court modify the sentence to the maximum allowed by statute. We agree and modify Appellant's sentence in Count I to ten years imprisonment.

Smith argues in his third proposition that the trial court erred in giving the jury an instruction allowing them to impose post-imprisonment supervision on Count III (Attempted Rape, First Degree), Count IV (Forcible Sodomy) and Count V (First Degree Rape) because post-imprisonment supervision was not part of the punishment scheme allowed by statute at the time that the crimes were committed.⁵ Although this instruction was not objected to at trial, we find that it was plain error and not harmless as it led to the imposition of an unlawful punishment. *See Logsdon*, 2010 OK CR 7, ¶ 27, 231 P.3d at 1166. Again, the State concedes this error. Accordingly, Smith's sentences on Counts III, IV and V must be modified to exclude the imposition of post-imprisonment supervision.

3.

Ineffective Assistance of Trial Counsel

In his fourth proposition Smith argues that he was denied his constitutional right to the effective assistance of counsel.⁶ This Court reviews claims of ineffective assistance of counsel under the two-part *Strickland* test

⁵ See 21 O.S.Supp.2007, § 888 (imposing post-imprisonment supervision for forcible sodomy with November 1, 2007, effective date); 21 O.S.Supp.2007, § 1115 (imposing post-imprisonment supervision for rape with November 1, 2007, effective date).

⁶ Although Smith represented himself during the first stage of trial, trial court reappointed counsel in a representative capacity for the second stage of trial.

that requires an appellant to show: (1) that counsel's performance was constitutionally deficient; and (2) that counsel's performance prejudiced the defense, depriving the appellant of a fair trial with a reliable result. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Davis v. State*, 2005 OK CR 21, ¶ 7, 123 P.3d 243, 246. It is not enough to show that counsel's failure had some conceivable effect on the outcome of the proceeding. Rather, an appellant must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Head v. State*, 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Smith specifically argues that he was denied his constitutional right to the effective assistance of counsel by trial counsel's failure to object to the instructional errors raised in Propositions II and III. As noted above, the instructional errors require modification of Smith's sentences and accordingly, although counsel was ineffective for failing to object to the instructions given or request proper instructions, this error has been remedied.

4.

Prosecutorial Misconduct

In Proposition V, Smith argues that prosecutorial misconduct deprived him of a fair trial. In second stage closing argument the prosecutor told the jury that they should seek justice and impose a very lengthy sentence upon Smith. He said, "You can tell him how long your sentence should be. Start at

28 trillion.” Instead of objecting to this argument at this point, defense counsel addressed it directly in his closing argument stating:

I would suggest to you that that’s nothing but vengeance. Let’s get back to where we are. Let’s get back to reality. There is nothing to be proved. That’s an astronomical number with no meaning whatsoever. It’s not about setting records, it’s not about winning and losing. It’s about what the law allows in this case and what is proper.

The prosecutor pursued the same line of argument again in his final closing. When defense counsel objected arguing that the requested sentence was not only bizarre and improper but also shocked the conscience, the prosecutor interrupted saying that he was finished and the objection was not ruled upon. Smith argues on appeal that the prosecutor’s argument was improper as it asked the jury to impose a greater sentence than was allowed by law. He alleges that the practical effect was to ask the jury to impose a sentence of life without parole on every count and he was prejudiced by this because the jury sentenced him to the maximum allowed by law on all but one count.

“This Court will not grant relief based on prosecutorial misconduct unless the State’s argument is so flagrant and that it so infected the defendant's trial that it was rendered fundamentally unfair.” *Williams v. State*, 2008 OK CR 19, ¶ 124, 188 P.3d 208, 230. A prosecutor may make a recommendation as to punishment. *Young v. State*, 2000 OK CR 17, ¶ 96, 12 P.3d 20, 45. The punishment requested by the prosecutor in this case, however, was considerably beyond the permissible range of punishment and was therefore inappropriate. Where the jury was properly instructed they sentenced Smith within the range of punishment allowed by law. As noted

above in discussion of Propositions II and III, where the jury was not properly instructed, this Court has modified the sentences imposed to ones within the range of allowable punishment. Given the magnitude of the State's evidence against Smith and the severity of the crimes committed, we find that the inappropriate argument did not deprive Smith of a fair trial or affect the jury's finding of guilt or assessment of punishment. We need not grant further sentencing relief.

5.

Jurisdiction

Smith argues in Proposition VI that the district court erred in failing to dismiss Counts III (Attempted Rape) and IV (Forcible Sodomy) for lack of jurisdiction because the acts which formed the basis for these counts occurred in Rogers County at R.C.'s home rather than in Tulsa County where the charges were tried. This Court has held that, "a trial court's jurisdiction is triggered by the filing of an Information alleging the commission of a public offense with appropriate venue." *Cummings v. State*, 1998 OK CR 45, ¶ 26, 968 P.2d 821, 831-832, quoting *Parker v. State*, 1996 OK CR 19, ¶ 21, 917 P.2d 980, 985. Article 2, section 20, of the Oklahoma Constitution directs that the accused has the right to be tried in the county in which the crime was committed. However, "[w]hen a public offense is committed, partly in one county and partly in another county, or the acts or effects thereof, constituting or requisite to the offense, occur in two or more counties, the jurisdiction is in either county." 22 O.S.2011, § 124.

The record reflects that Smith kidnapped R.C. in Tulsa County, forced her to drive to her home in Rogers County where he forced her to sodomize him and attempted to rape her before he forced her to go with him back to a motel in Tulsa County where he robbed and raped her. The forcible sodomy and attempted rape were predicated by the kidnapping and cannot be considered in isolation. Smith's prosecution in Tulsa County for sodomy and attempted rape was not barred merely because these two of the series of crimes were committed in Rogers County. *See Richie v. State*, 1995 OK CR 67, ¶ 14, 908 P.2d 268, 274 (Where the murder was preceded by the offense of kidnapping this Court found that the murder could "neither be considered in isolation, nor as factually distinct from the antecedent kidnapping." Thus, the prosecution of the defendant in Tulsa County for kidnapping and murder was not barred merely because the murder may have occurred in Pawnee County.). *See also Sheldon v. State*, 1990 OK CR 34, ¶ 9, 793 P.2d 866, 871 (Where the victim was kidnapped and raped in Oklahoma County and murdered in Seminole County, this Court held that venue was proper in either county at the State's discretion.). The decision to try Smith in Tulsa County for each of the crimes committed upon R.C. was not in error.

6.
Pro Se Supplemental Brief

In addition to the brief submitted by his appellate counsel, Smith also tendered a *pro se* brief in which he raised eight issues and, in a request to exceed the page limitation on his *pro se* supplemental brief, one additional

proposition. In an order filed on September 25, 2012, this Court granted Smith's motion to file *pro se* brief and denied his request to exceed the page limitation.

Having reviewed the proffered *pro se* brief, and having again reviewed appellate counsel's request to file that brief, we find that our permission for Smith to file the supplemental *pro se* brief was improvidently granted. This Court's rules require that *pro se* legal arguments be submitted to this Court by the attorney of record subject to the following conditions:

The attorney of record shall review any requested "*pro se*" legal arguments to ensure only viable, non-frivolous arguments are incorporated into the brief prepared and submitted by the attorney. Any motion to supplement or amend legal arguments must contain a certification by the attorney of record that the attorney has examined the *pro se* arguments, and that the arguments and authority submitted comply with the Rules of this Court. The attorney shall also list the reasons for the recommendation that the supplemental arguments be accepted.

Rule 3.4(E), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013). Further, Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013) requires, among other things, that an appellant's brief shall include arguments "containing the contentions of the appellant, which sets forth all assignments of error, supported by citations to the authorities, statutes and parts of the record."

In the present case, appellate counsel certified that he reviewed the arguments contained within the *pro se* supplemental brief and he asserted that the arguments and authority substantially complied with the Rules of this Court. Appellate counsel's "Request to File Pro Se Supplemental Brief," did

not certify that the tendered brief contained “only viable, non-frivolous arguments,” but stated instead that “[i]f undersigned counsel felt the additional arguments offered by Ralph T. Smith, Jr. in his *pro se* brief to be good and convincing ones, he would have raised them in Appellant’s initial brief.” Counsel went on to note that “Appellant asks that his *pro se* supplemental brief be permitted to be filed, be reviewed on its merits, and not be considered frivolous.”

In addition, where appellate counsel purports to list the reasons for the recommendation that the supplemental arguments be accepted, counsel offers no reasons for his recommendation but rather generally restates the issues raised by Smith and attempts to remedy the failure of the *pro se* brief to cite to portions of the record by explaining the “Exhibits” referenced by Smith in his *pro se* supplemental brief.⁷ With regard to the “Exhibits” referenced by Smith but not a part of the record, appellate counsel also has filed an Application for an Evidentiary Hearing and Motion to Supplement the Record. Counsel avers that these exhibits are necessary to support Smith’s *pro se* claim of ineffective assistance of counsel and asks this Court to supplement the record with those documents referred to as “Exhibits” which are not part of the record. Thus, in conjunction with his claim of ineffective assistance of counsel, appellate counsel filed a Rule 3.11 motion for an evidentiary hearing asserting that trial

⁷ In most instances Smith does not make references to the record in support of the claims raised in his *pro se* brief as is required. See *Lott v. State*, 2004 OK CR 27, ¶ 169, 98 P.3d 318, 358 (applying Rule 3.5(A)(5) and holding that “this Court will not review allegations of error that are neither supported in the record or by legal authority.”). Rather, he references “Exhibits” which are not marked accordingly within the record and, in some instances, are not part of the record.

counsel was ineffective for failing to utilize available evidence and adequately investigate and identify other evidence which could have been made available during the trial. Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013). To warrant an evidentiary hearing under Rule 3.11(B)(3)(b)(i), Smith's application and supporting materials must set forth "sufficient information 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." The application and supporting materials fall far short of this and the motion for an evidentiary hearing is denied.

Having found that appellate counsel's request to file *pro se* supplemental brief was not in made in adequate compliance with this Court's rules and that in numerous regards the *pro se* supplemental brief itself falls short of what is required, Smith's tendered *pro se* supplemental brief is not accepted for filing. See Rule 3.4(E), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013)("This Court will summarily deny '*pro se*' briefs which are merely forwarded by the appellant's attorney without compliance with the requirements of this Rule [3.4(E)].").

DECISION

The Judgment of the district court is **AFFIRMED**. Smith's Sentence on Count I is **MODIFIED** to ten years imprisonment and his Sentences on Counts III, IV and V are **MODIFIED** to remove the imposition of post-imprisonment supervision. This Court's Order of September 25, 2012, granting Smith's Request to File Pro Se Supplemental Brief is **VACATED** as improvidently granted, and the request is now **DENIED**. The Clerk shall return all copies of

Smith's *pro se* briefs to him as not accepted for filing. Smith's Application for an Evidentiary Hearing and Motion to Supplement the Record is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE WILLIAM C. KELLOUGH, DISTRICT JUDGE**

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OPINION BY C. JOHNSON, J.

LEWIS, P.J.: CONCUR
SMITH, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR IN RESULT
A. JOHNSON, J.: CONCUR