



V. The trial court's sentencing policy was an abuse of discretion because it punished Mr. Stephens for exercising his right to jury trial by refusing consideration of a concurrent sentence.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm Appellant's convictions, but modify his sentences to run concurrently.

As to Propositions I and II, we find the trial court did not abuse its discretion in denying Appellant's request for a competency evaluation or for an expert to investigate his mental illness at the time of the crime as Appellant failed to present facts "sufficient to raise a doubt" in the court's mind concerning Appellant's competency to stand trial and his sanity at the time of the crime. See 22 O.S.2001, §§ 1175.3 & 1176 (A); *Cargle v. State*, 909 P.2d 806, 816 (Okl.Cr.1995), *cert. denied*, 519 U.S. 831, 117 S.Ct. 100, 136 L.Ed.2d 54 (1996).

As to Proposition III, we find the trial court did not deny Appellant a fair trial by refusing to allow evidence and give instructions on his defense of mental illness/capacity or by prohibiting the defense from presenting Appellant's mental capacity as mitigation. See *Malone v. State*, 58 P.3d 208, 210 (Okl.Cr.2002)(holding there is no provision for the presentation of mitigating evidence in a non-capital jury trial.); *Frederick v. State*, 37 P.3d 908, 931 (Okl.Cr.2001)(stating Oklahoma law does not provide for a diminished capacity defense except for the insanity defense and the intoxication defense). As to Proposition IV, we find Appellant has failed to meet his burden and

establish that defense counsel was ineffective. *Matthews v. State*, 45 P.3d 907, 918 (Okl.Cr.), *cert. denied*, \_\_\_U.S.\_\_\_, 123 S.Ct. 665, \_\_\_L.Ed.2d\_\_\_ (2002).

As to his final proposition, we find that the record indicates the trial judge declined to consider all possible sentencing options based upon a “policy” of running sentences consecutively. This constitutes an abuse of discretion as it is incumbent upon a trial court to consider all sentencing options available. *See Allen v. City of Oklahoma City*, 965 P.2d 387, 389 (Okl.Cr.1998); *Riley v. State*, 947 P.2d 530, 534-535 (Okl.Cr.1997). Accordingly, under the facts presented here, we hereby **MODIFY** the sentences in Counts 1 and 2 to run concurrently. 22 O.S.2001, § 1066.

### **DECISION**

The Judgment and Sentences imposed in Tulsa County District Court Case No. CF-2000-3194 are hereby **AFFIRMED** and **MODIFIED** to run concurrently each with the other.

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**OPINION BY: STRUBHAR, J.**

JOHNSON, P.J.: CONCUR

LILE, V.P.J.: CONCUR IN PART/DISSENT IN PART

LUMPKIN, J.: CONCUR IN RESULT

CHAPEL, J.: CONCUR IN PART/DISSENT IN PART

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**CHAPEL, JUDGE, CONCURS IN PART/DISSENTS IN PART:**

I concur in affirming the convictions in this case. I would, however, remand the matter for resentencing with instructions to allow Appellant to present evidence of mental illness as mitigation.