IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TUCKER RYAN MCGEE,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F-2015-393
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

JOHNSON, JUDGE:

Appellant Tucker Ryan McGee was tried by jury in the District Court of Custer County, Case No. CF-2013-440, and convicted of First Degree Malice Aforethought Murder in violation of 21 O.S.2011, § 701.7(A). The jury assessed punishment at life imprisonment without the possibility of parole. The Honorable F. Doug Haught, who presided at trial, sentenced McGee accordingly. From this Judgment and Sentence McGee appeals, raising the following issues:

(1) whether the district court erred in giving a non-uniform instruction on First Degree Manslaughter and failing to instruct the jury on the lesser included offense of Second Degree Depraved Mind Murder;

(2) whether the district court erred by submitting a flight instruction;

(3) whether the district court erred by failing to provide the jury with a verdict form for the lesser included offense of First Degree Manslaughter;

(4) whether the district court erred in submitting the State's requested non-uniform instruction on the defense of voluntary intoxication;

(5) whether the district court erred by failing to give the Oklahoma uniform jury instruction on reenactments;

(6) whether he was deprived of a fair trial by the admission of irrelevant and prejudicial evidence;

(7) whether prosecutorial misconduct deprived him of a fair trial;

(8) whether the district court erred by excluding impeachment evidence of bias;

(9) whether the district court erred by failing to remove a juror for cause;

(10) whether he was deprived of a fair trial because grand jury counsel had an actual conflict of interest;

(11) whether he received effective assistance of counsel;

(12) whether cumulative error deprived him of a fair trial; and

(13) whether his sentence of life without the possibility of parole is unconstitutional.

We affirm McGee's conviction for First Degree Malice Aforethought Murder, but vacate his sentence of life without the possibility of parole and remand the matter to the district court for re-sentencing.

Background

On October 14, 2012, sixteen-year-old JaRay Wilson disappeared. JaRay had been having behavior problems and using drugs in the months before her disappearance. She refused to adhere to her parents' curfew and they restricted her activities. They allowed her to go to church with a friend on October 7, but JaRay refused to come home afterwards unless her parents gave in to her demand to abandon her curfew. The Wilsons refused and urged

JaRay to come home and accompany them on a trip to Wyoming. JaRay refused to come home or go to Wyoming, but she had contact with her parents every day either through text message(s) or telephone call(s) from October 8 through 14. JaRay's parents tried, without success, to reach her on October 15. When JaRay did not respond to texts or answer their telephone calls, her parents grew worried that something was wrong and reported her missing on October 16.

Early in the investigation information surfaced leading investigators to suspect that JaRay was a possible victim of human trafficking. Agents with the Oklahoma Bureau of Narcotics Human Trafficking Division conducted much of the investigation surrounding JaRay's disappearance. Agents were able to piece together JaRay's activities and various locations on October 14. Their investigation revealed that the last known people to see JaRay were Appellant McGee and Cody Godfrey. Both McGee and Godfrey admitted they were with JaRay in the early evening on the 14th. Each said that they dropped her off at the University Apartments in Weatherford where someone else was picking her up, and that they never saw or heard from her again.

Agents conducted numerous interviews and followed up on all alleged sightings of JaRay and possible leads. Despite their best efforts, agents could not advance JaRay's timeline past the evening of the 14th when she was with McGee and Godfrey. After fourteen months, new information concerning the case was scarce and the investigation had failed to produce any productive

leads. To preserve information garnered during the investigation, witnesses and potential suspects, including McGee and Godfrey, were subpoenaed to appear before the multicounty grand jury to memorialize their testimony. McGee and Godfrey testified before the grand jury on December 10, 2013, and each repeated the story they had concocted and provided during previous interviews. McGee and Godfrey agreed to come to Oklahoma City for another interview on December 16, 2013. Godfrey's interview was scheduled first and he arrived ready to cooperate with police because the secret had been "eating at him" and he wanted to do the "right thing." Godfrey agreed to take police to JaRay's body and testify truthfully in exchange for a seven year suspended adult sentence for accessory to first degree murder.

Godfrey testified at trial that he met up with McGee mid-afternoon on October 14 to hang out and smoke synthetic marijuana known as K2. He noticed McGee had a satchel and McGee showed him a .22 semi-automatic pistol that was inside and said sarcastically, "we could kill JaRay." Godfrey did not take McGee seriously, and the two went to pick up JaRay from a friend's house. From there, the three headed to the "weed patch" north of Weatherford. They parked off the roadway and stood around talking and smoking K2 for several hours.[1] JaRay was on her telephone much of the time texting and witnesses and telephone records confirmed her phone usage. One of the last

[1] Although he and McGee were intoxicated, Godfrey said they were not so impaired that they were unable to function.

texts she sent said she was out in the country with McGee and Godfrey and that she "needa leave. Like f__k" and that she felt "sketched out."

Godfrey explained that McGee became agitated, short and sarcastic with JaRay and that McGee retrieved the gun from his satchel and put it in his waistband. McGee's action made Godfrey uneasy and he feared something bad was going to happen. When JaRay said she wanted some methamphetamine, Godfrey volunteered to go get it so he could get away. He said that as he drove off, he saw McGee in the rearview mirror point the gun at JaRay's head and fire. He turned the car around and pulled alongside McGee. JaRay was making noises causing McGee to ask why she was not dead. McGee stepped toward JaRay and shot her again in the head. Godfrey helped McGee move JaRay's body over a fence under some trees. McGee instructed Godfrey to drive around while he moved her body farther into a wooded area. As Godfrey was headed toward Weatherford, Caleb McLemore pulled up with McGee in his truck. The three went back out into the country and smoked K2. McGee told Godfrey that McLemore knew about JaRay's murder, but said nothing else about what he had told him. After a couple of hours, McGee and Godfrey headed back to Weatherford; they dumped JaRay's purse and backpack at a car wash. The next day McGee, Godfrey and McLemore returned to the crime scene. McLemore dropped McGee and Godfrey off and the two buried JaRay's body in a shallow grave. McLemore corroborated Godfrey's testimony about the night of the 14th and McGee's admission about killing JaRay.

Before Godfrey led authorities to JaRay's body, he participated in several recorded telephone calls with McGee during which McGee was crying and writing a letter to his mother. Officers found the letter during the execution of a search warrant at his home. In the letter, McGee apologized to his mother and wrote that he would probably be "locked up" for a long time. He admitted he "messed up" and claimed he would do anything to "go back." Two days before McGee's arrest on December 17, 2013, he confessed to Alfred Pendelton that he had killed JaRay. McGee's jury rejected his voluntary intoxication defense and attempts to shift blame to Godfrey.

1. Lesser Included Offense Instructions

McGee claims the district court improperly submitted a non-uniform jury instruction on first degree manslaughter, rendering the instructions inadequate to properly state the law. He also claims the district court erred by not providing the jury with an instruction on the lesser offense of second degree depraved mind murder. We review a district court's rulings on jury instructions for an abuse of discretion, and will find no abuse of discretion if the instructions as a whole state the applicable law. *See Barnard v. State*, 2012 OK CR 15, ¶ 20, 290 P.3d 759, 766.

It is true that the trial court must instruct on any lesser included offense warranted by the evidence. *Jones v. State*, 2006 OK CR 17, ¶ 6, 134 P.3d 150, 154, (citing *Shrum v. State*, 1999 OK CR 41, 991 P.2d 1032) (lesser included instructions should be given if supported by any evidence). An underlying requirement of *Shrum*, however, is that a lesser offense instruction should not

be given unless the evidence would support a conviction for the lesser offense. *Id. See also Harris v. State*, 2004 OK CR 1, ¶ 50, 84 P.3d 731, 750 (To determine whether lesser-included offense instructions are warranted, this Court looks at whether the evidence might allow a jury to acquit the defendant of the greater offense and convict him of the lesser).

McGee submitted a list of requested jury instructions, including instructions on first degree misdemeanor manslaughter and first degree heat of passion manslaughter (OUJI-CR2d 4-94 and 4-95). He also requested instructions on the defense of voluntary intoxication (OUJI-CR2d 8-40 through 8-43). Defense counsel announced during the jury instruction conference that, by agreement, the fifth element of the first degree manslaughter instruction (Instruction No. 41) had been "reworded" to conform with the defense of voluntary intoxication. Defense counsel offered a general objection to any instruction given that was not in accordance with the requested defense instructions. He did not, however, identify any other objectionable instruction. McGee complains on appeal that the district court's non-uniform Instruction No. 44—that repeated the language of the first degree manslaughter statute in 21 O.S.2011, § 711—nullified the elements in Instruction No. 41 that had been modified to incorporate his voluntary intoxication defense. This is so, he argues, because Instruction No. 44 "reintroduced the element of heat of passion" as well as "elements on each of the other forms of first degree manslaughter." *Appellant's Brief* at 9. McGee claims Instruction No. 44 reads

that *each* form of manslaughter must necessarily be present in order to convict. We disagree.

Instruction No. 44 simply provided that homicide is first degree manslaughter in the following three instances and discretely numbered each instance as provided in 21 O.S.2011, § 711. Instruction No. 41 provided the elements of first degree manslaughter the parties agreed were applicable to the facts in this case. A fair reading of these two instructions together shows that the jury was presented with four ways homicides fall into the category of first degree manslaughter. Contrary to McGee's claim, Instruction No. 44 neither nullified Instruction No. 41 nor left his jury without the lesser offense of first degree manslaughter to consider.

McGee also argues the evidence supported an instruction on second degree depraved mind murder because carrying a loaded gun in his waistband while impaired from smoking K2 showed a depraved mind through imminently dangerous conduct. This claim is without merit. The evidence showed that McGee had the gun with him and that he suggested killing JaRay when he met Godfrey that afternoon before the two smoked K2. The idea of killing JaRay was already on McGee's mind. Contrary to McGee's claim, the evidence did not suggest that he shot JaRay while he was impaired and recklessly handling the gun; the evidence showed instead that he deliberately pointed the gun at JaRay's head and fired. Dismayed that she was not dead, he stepped toward her and intentionally fired a second shot into her head. He then went about

hiding her body and disposing of her belongings. McGee continued covering up his misdeed recognizing its wrongfulness and his criminal liability. Any intoxication from smoking K2 did not prevent McGee from acting with reason and common sense. Based on the record, the district court did not err in denying McGee's request for an instruction on second degree murder because it was not warranted by the evidence. This claim is denied.

2. Flight Instruction

McGee argues the district court erred in giving a "flight" instruction (Instruction No. 23) because there was no evidence he fled the scene or concealed himself from law enforcement. As noted above, defense counsel lodged only a generic, non-specific objection to any instruction given that was not in accordance with the requested defense instructions. Unlike the first degree manslaughter instruction which was briefly discussed, there was no reference or discussion with respect to the flight instruction. Because McGee failed to object to the given flight instruction; review is for plain error only. *See Coddington v. State*, 2011 OK CR 17, ¶ 69, 254 P.3d 684, 711; *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

In *Mitchell v. State*, 1993 OK CR 56, ¶ 11, 876 P.2d 682, 685, this Court held that "instructions on flight pertaining to departure should only be given in cases where the evidence is controverted by the defendant and as an exception rather than as a rule." The Court further explained:

> [W]here the state offers evidence of the conduct tending to prove flight, and defendant offers evidence in explanation of such conduct,

> it is proper to submit the question of flight to the jury as a matter of fact for their determination, and to instruct them that, if they find beyond a reasonable doubt that defendant fled, it may be considered as a circumstance tending to prove guilt.

Id., ¶ 9, 876 P.2d at 684 (quoting *Bruner v. State*, 1925 OK CR 275, 238 P. 1000 (emphasis added by *Mitchell* court)).

The State concedes that it was error to submit a flight instruction in this case. *See Dawkins v. State*, 2011 OK CR 1, ¶ 16, 252 P.3d 214, 219. The State makes a convincing argument, however, that under the circumstances the error does not require relief in this case, and we agree. Jurors considered and rejected McGee's defense of voluntary intoxication. Not only did Cody Godfrey testify that he witnessed McGee shoot JaRay two times in the head, Caleb McLemore and another friend testified that McGee confessed to them that he had killed her. McGee all but admitted to his mother that he was responsible for JaRay's death in the letter he wrote to her apologizing for his behavior and stating he would likely be in prison for a long time. The circumstances of the crime were also corroborated by physical evidence. Given the strength of the evidence of McGee's guilt, we find the erroneous submission of the flight instruction did not affect the jury's verdict. *See id.* For these reasons, no relief is required and this claim is denied.

3. Verdict Form

McGee claims the district court erred by failing to submit a lesser offense verdict form. The omission of the verdict form he maintains left his jury without a way to record a verdict for the lesser offense of first degree

manslaughter that was submitted as an available option. The parties dispute whether this claim has been properly preserved for review. This Court need not labor over the preservation issue in this case because there was no harm from the alleged error, a necessary condition for relief whether review is for an abuse of discretion or plain error.

Defense counsel inquired about the proposed verdict form during the jury instruction conference. The verdict form had a space to check for a guilty verdict followed by a blank space for the jury to write in the crime and a blank space the jury could check for a verdict of not guilty.[2] Defense counsel claimed that if he asked for anything other than a not guilty verdict, the verdict form required him to "state that my client is guilty of some crime." Counsel stated that if the court had a verdict form for first degree manslaughter "then I can do it." The district court found the proposed verdict form provided "two options" and granted defense counsel an exception.[3] Counsel's exact difficulty with the proposed verdict form was not well

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[2] The proposed verdict form contained the caption of the case and stated:

VERDICT
COUNT 1 –MURDER IN THE FIRST DEGREE – MALICE AFORETHOUGHT

We, the jury, empaneled and sworn in the above-entitled cause, do, upon our oaths, find as follows:

Defendant is:

_____Guilty of _____ and fix punishment at _____.

_____Not Guilty

[3] It is not clear whether the two options the court meant were guilty or not guilty or guilty of murder or manslaughter since the court submitted instructions on both murder and manslaughter.

explained or entirely clear and he did not specifically request the uniform verdict form for lesser offenses (OUJI-CR2d 10-25).

McGee's jury received instructions on first degree murder and first degree manslaughter. Instruction No. 41 listed the elements of first degree manslaughter and instructed the jury that it must consider first degree manslaughter if it had reasonable doubt about McGee's guilt for first degree murder. Defense counsel discussed the verdict form during closing argument. He explained that the jury could write either first degree murder or first degree manslaughter in the first blank following the word "guilty" and then write the appropriate punishment in the second blank or find McGee not guilty and check the corresponding blank. The prosecutor argued that the evidence required a verdict of guilty of first degree murder, but urged the jury to find McGee guilty of first degree manslaughter if the State had not met its burden of proof for murder. We observe the jury asked no questions during deliberations concerning its options for guilt or about expressing its verdict on the verdict form. We conclude from the record that the jury was well aware of its options and how to present its decision on the verdict form. Although using the uniform lesser offense verdict form is the better practice, we find the use of the verdict form in this case in lieu of the uniform verdict form did not prejudice McGee or affect the jury's decision.

4. Voluntary Intoxication Instruction

McGee claims the district court's non-uniform jury instruction concerning the defense of voluntary intoxication (Instruction No. 36) was

"superfluous and cumulative and served only to confuse the jury."[4] *See Appellant's Brief* at 17. McGee failed to object to the challenged instruction with specificity; our review is for plain error only. *See Coddington*, 2011 OK CR 17, ¶ 69, 254 P.3d at 711; *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

McGee contends, without explanation, that Instruction No. 36 could have confused the jury concerning the applicability of his voluntary intoxication defense. On the contrary, Instruction No. 36 provided an accurate statement of the law on voluntary intoxication. *See Grissom v. State*, 2011 OK CR 3, ¶ 44, 253 P.3d 969, 985; *Cuesta-Rodriguez v. State*, 2011 OK CR 4, ¶ 7, 247 P.3d 1192, 1195. As such, we cannot find submission of Instruction No. 36 amounted to error. This claim is denied.

5. Reenactment Evidence Instruction

McGee claims the district court erred in failing to instruct his jury on re-enactment evidence. *See* OUJI-CR2d 9-46. McGee neither requested an instruction on reenactment evidence nor objected to its omission; review is for plain error only. *See Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

This Court addressed the admission of video or computer generated crime scene reenactments in *Harris v. State*, 2000 OK CR 20, ¶ 16, 13 P.3d 489, 495. In that murder case, the Court considered the admission of two video

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[4] Instruction No. 36 read:

> A defense of voluntary intoxication requires that a defendant first, be intoxicated and, second, be so utterly intoxicated, that his mental powers are overcome. Mere consumption of an intoxicating substance is not sufficient to raise the voluntary intoxication defense without a showing that it prevented the defendant from forming a premeditated intent.

reenactments: one that showed two live actors recreating the expert witness' theory of the shooting based upon bullet trajectories through the victim's body and the other that showed a computer animation based upon the trajectory of the bullet. *Id.* at ¶ 6, 13 P.3d at 492. We held that such evidence must be properly authenticated and relevant; its probative value must not be substantially outweighed by the danger of unfair prejudice or confusion of the issues. Such evidence must not be misleading, unduly cumulative or a surprise. *Id.* The district court should also give a cautionary instruction when the reenactment evidence is introduced. *Id.* at ¶ 17.

The so-called reenactment evidence now challenged by McGee is not computer-generated or a video crime scene reenactment of the murder in this case. The challenged evidence consists of digital photographs taken by Oklahoma State Bureau of Investigation (OSBI) agents at the crime scene on the same day as the victim's murder two years later. The purpose of the photographs was to show the lighting conditions at the time of the murder to assist the jury in evaluating Godfrey's testimony that he was able to see McGee shoot JaRay in his rearview mirror as he was driving away. These photographs were not the equivalent of video or computer reenactments in which the actions of an earlier event or incident are recreated or repeated. Therefore, there was no reason to follow the procedures outlined in *Harris* and an instruction on reenactment evidence was not warranted in this case. This claim is denied.

6. Evidentiary Issues

McGee argues he was denied a fair trial by the admission of irrelevant, prejudicial evidence much of which he contends constituted bad character evidence that cast him in an unfavorable light. He complains of evidence that he had a "Dexter" television show poster on his bedroom wall and possessed "Dexter" videos, evidence of his facial expressions at the time of his arrest, evidence concerning the condition of his home during the execution of the search warrant, evidence that Crystal Godfrey disliked him and thought he was a bad influence, evidence of Cody Godfrey's behavior at the crime scene, ballistics evidence, evidence that he sold Winchester .22 caliber ammunition to David Hartlein as well as evidence that his dad possessed Winchester .22 caliber ammunition, and evidence of his mother's concealed carry license. McGee lodged no objections to the admission of this evidence, and we will review this complaint for plain error only. *See Sanders v. State*, 2015 OK CR 11, ¶ 27, 358 P.3d 280, 287.

"Relevant evidence is evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Postelle v. State*, 2011 OK CR 30, ¶ 31, 267 P.3d 114, 131; 12 O.S.2001, § 2401. "Relevant evidence need not conclusively, or even directly, establish the defendant's guilt; it is admissible if, when taken with other evidence in the case, it tends to establish a material fact in issue." *Taylor v. State*, 2011 OK CR

8, ¶ 40, 248 P.3d 362, 376. "When measuring the relevancy of evidence against its prejudicial effect, the court should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." *Mitchell v. State*, 2010 OK CR 14, ¶ 71, 235 P.3d 640, 657; *see also Mayes v. State*, 1994 OK CR 44, ¶ 77, 887 P.2d 1288, 1310. Issues concerning relevancy and materiality of evidence are matters within the sound discretion of the trial court. *Id.* A trial court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or needless presentation of cumulative evidence. *Grissom v. State*, 2011 OK CR 3, ¶ 59, 253 P.3d 969, 989–90; 12 O.S.Supp.2003, § 2403.

We reject McGee's claim that the admission of this evidence denied him a fair trial. Almost all of the evidence was plainly relevant and its probative value was not substantially outweighed by the danger of unfair prejudice. 12 O.S.2011, § 2403. The alleged bad character evidence showed McGee's state of mind, consciousness of guilt and refuted his voluntary intoxication defense and his alternative defense incriminating Cody Godfrey. *See* 12 O.S.2011, § 2404(B). Although the relevancy of the "Dexter" poster and videos is questionable, admission of this evidence did not affect the verdict or sentence in this case. This claim is denied.

7. Prosecutorial Misconduct

McGee complains that several instances of prosecutorial misconduct deprived him of a fair trial. He claims specifically that the prosecutor asked

improper leading questions of Caleb McLemore and Gregory McGee,[5] argued facts not in evidence and improperly invoked sympathy for the victim. Only one of the challenged instances was met with a timely objection while the remainder were not. Those comments not met with objection will be reviewed for plain error only. *See Malone v State*, 2013 OK CR 1, ¶¶ 40-41, 293 P.3d 198, 211.

This Court grants relief on a prosecutorial misconduct claim when the misconduct effectively deprived the defendant of a fair trial or a fair and reliable sentencing proceeding. *Harmon v. State*, 2011 OK CR 6, ¶ 80, 248 P.3d 918, 943. In making that determination, we evaluate the prosecutor's arguments within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel. *Id.*; *see also Brewer v. State*, 2006 OK CR 16, ¶ 13, 133 P.3d 892, 895 (reversal is not required unless in light of entire record defendant suffered prejudice); *Paxton v. State*, 1993 OK CR 59, ¶ 69, 867 P.2d 1309, 1329 (holding that alleged errors of prosecutorial misconduct should not, on an individual basis, serve as cause for reversal, but require reversal only if the cumulative effect deprived defendant of fair trial). It is the rare instance when a prosecutor's misconduct

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[5] McGee also includes a number of other transcript references that he claims involve the use of improper leading questions. He has waived these allegations by failing to set out these issues separately. Mere mention of a possible issue within an argument or citation of authority does not sufficiently raise the error and the failure to set out an issue pursuant to the Rules constitutes waiver of the alleged error. Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016).

during closing argument will be found so detrimental to a defendant's right to a fair trial that reversal is required. *See Pryor v. State*, 2011 OK CR 18, ¶ 4, 254 P.3d 721, 722.

After reviewing the prosecutor's questioning and reading the challenged comments in context, considering the corresponding arguments of defense counsel as well as the strength of the evidence, we find nothing in these challenged questions or comments, individually or cumulatively, that deprived McGee of a fair trial. *See Harmon*, 2011 OK CR 6, ¶ 80, 248 P.3d at 943. The challenged comments fall within the wide latitude the parties possess to argue the evidence and an inference that may be drawn from it. *See Mitchell v. State*, 2011 OK CR 26, ¶ 135, 270 P.3d 160, 189; *Coddington v. State*, 2011 OK CR 17, ¶¶ 72-73, 254 P.3d 684, 712; *Duvall v. State*, 1991 OK CR 64, ¶ 17, 825 P.2d 621, 628-29. There was no error here and this claim is denied.

8. Bias Evidence

McGee claims the district court violated his Sixth Amendment right of confrontation as well as abused its discretion in excluding impeachment evidence showing Cody Godfrey's bias. McGee sought to introduce evidence that Godfrey listened to violent rap music with lyrics about raping and killing women. Godfrey admitted he listened to a lot of rap music on cross-examination, but before he could name his favorite song the district court sustained the prosecutor's relevancy objection. At the conclusion of Godfrey's testimony, defense counsel made an offer of proof stating that such music "will

have an impact on what he acts and what he does." Before the defense case-in-chief, the prosecutor moved *in limine* to exclude evidence concerning the rap groups and songs that Godfrey enjoyed, arguing the evidence was irrelevant. Defense counsel maintained the State's motion was directed at Kyle Suderman whom counsel intended to ask on direct examination about a statement that he would not socialize with Godfrey because of Godfrey's taste in violent rap music against women. Neither during Godfrey's testimony nor the defense case-in-chief did defense counsel argue that Godfrey's taste in music showed bias. The district court sustained the State's motion. We review the district court's ruling for an abuse of discretion. *See Neloms v. State,* 2012 OK CR 7, ¶ 25, 274 P.3d 161, 167.

We explained the admissibility of bias evidence in *Livingston v. State,* 1995 OK CR 68, ¶ 15, 907 P.2d 1088, 1092-93:

> Exposure of a witness's motive to testify is a proper and important function of cross-examination. This Court has held that bias is never collateral and the right to impeach for bias is construed liberally; a witness may be cross-examined on any matter tending to show bias or prejudice. When determining whether evidence of bias should be admitted for impeachment, the trial court should determine (1) whether the facts are such that the showing of bias for impeachment is relevant under 12 O.S.1991, § 2401; (2) if the evidence is admissible under 12 O.S.1991, § 2402; and (3) if admissible, whether the evidence should still be excluded under 12 O.S.1991, § 2403.

(footnotes omitted).

Evidence of bias refers to a witness's relationship with a party that causes the witness to slant testimony either for or against a party. *Douglas v.*

State, 1997 OK CR 79, ¶ 42 n. 12, 951 P.2d 651, 667 n. 12. "Bias may involve favoritism, animosity, or self-interest." *Id. quoting* 3 Leo Whinery, Oklahoma Evidence, Commentary on the Law of Evidence, § 47.08 at 340. McGee claims on appeal that evidence of Godfrey's taste in music would have undermined his credibility and shown bias. We disagree.

Evidence of Godfrey's plea bargain with the prosecution constituted evidence of bias. It provided motivation for him to testify favorably for the State. His taste in music, however, failed to provide a reason for him to slant his testimony. The evidence concerning Godfrey's music preferences falls more aptly in the category of character evidence because McGee hoped it would show that Godfrey acted in conformity with the music he enjoyed and that he was the actual killer. Defense counsel acknowledged the purpose of the evidence when he stated his belief that the music affected how Godfrey acted. The district court neither erroneously excluded evidence of bias in violation of McGee's right of confrontation nor abused its discretion in excluding this evidence. This claim is denied.

9. Juror Issue

McGee argues he was deprived of a fair and impartial jury. He contends the district court abused its discretion when it failed to excuse Juror R.H. for cause and seat an alternate juror once it was discovered that R.H. failed to disclose that he knew District Attorney Angela Marsee. We review the district

court's ruling for an abuse of discretion. *See Mitchell v. State,* 2010 OK CR 14, ¶ 19, 235 P.3d 640, 647.

The record shows that on the second day of trial District Attorney Marsee disclosed that she had been on the same Kiwanis trip with Juror R. H. several years before. Defense counsel expressed concern that R.H. failed to mention his acquaintance with Marsee and that he had noticed during testimony that R.H. was smiling and making eye contact with her. District Attorney Marsee said it was not until she was on her way home the day before that she realized she might know the juror. The district court found nothing significant about the matter or the juror's behavior that day. The next morning District Attorney Marsee clarified the record on the matter; she informed the court that in 2010 her husband was the president of the Kiwanis Club in Weatherford and that they went on a cruise with two other club leaders and their spouses. She believed, but was not certain, that Juror R.H. was the spouse of the president elect on the trip. She recalled having dinner and going to a show as a group, but noted the rest of the time the couples were on their own and did not interact. She recalled no further contact with Juror R.H. since that time. She said defense counsel did not express any significant concerns when she first told him about the matter, but worried about the clarity of the record that was made the day before. Out of an abundance of caution, she urged the court to question Juror R.H. about the matter, and defense counsel joined in that request. She also maintained that defense counsel's claim that Juror R.H. was

making more eye contact with her than other jurors was baseless, and the district court agreed. The district court questioned Juror R.H. outside the presence of the other jurors. Juror R.H. acknowledged he was on the trip and said there was nothing about the experience that would interfere with his ability to be fair and impartial. He was positive that he would not favor District Attorney Marsee over the defense. Defense counsel objected, stating he would likely have used a peremptory to remove R.H. had he known about his acquaintance with the district attorney. The district court granted defense counsel an exception, but was satisfied R.H. could be fair and impartial.

During *voir dire,* the prospective jurors were never asked if they knew the prosecutors or defense counsel. They were asked instead whether any of the attorneys had ever represented them and whether they knew any of the witnesses, the defendant or the victim. Neither Juror R.H. nor the other prospective jurors were asked if they were acquainted with the attorneys. Contrary to McGee's claim, Juror R.H. did not withhold the information about his acquaintance with the district attorney. When asked about it, he was honest and forthcoming. The record shows that the juror's contact with the district attorney occurred more than five years before McGee's trial and that the contact was remote. The district court's ruling that Juror R.H. could be fair and impartial is supported by the record. We find no error. *See Edwards v. State,* 1991 OK CR 71, ¶¶ 12-15, 815 P.2d 670, 673-74.

10. Conflict of Interest

Both McGee and Godfrey testified before the Fourteenth Multicounty Grand Jury in Oklahoma City on December 10, 2013. A lawyer from the Oklahoma County Public Defender's Office was appointed to represent both men during the grand jury proceedings that included representation at their respective appearances before the grand jury as well as at follow-up interviews the next week. Godfrey decided to reveal the truth about JaRay's murder after his grand jury appearance, but did not discuss his decision with anyone. When Godfrey arrived on December 16th for his follow-up interview, he told grand jury counsel that he wanted to cooperate with investigators. Grand jury counsel informed representatives of the Attorney General's office of Godfrey's intention and wrote out a statement for Godfrey covering the "overall events" that happened with JaRay on October 14, 2012. Godfrey withheld some details and investigators confronted him about the omissions in his statement.[6] He answered their questions and Godfrey, with grand jury counsel's assistance, reached a tentative cooperation agreement that required him to give truthful testimony against McGee and any other unknown co-conspirators as well as lead investigators to JaRay's body. (State's Exhibit 25) Meanwhile, McGee sat in the lobby awaiting his interview.[7]

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[6] Godfrey admitted during his testimony that he failed the interview apparently in reference to a failed polygraph.

[7] Although McGee reported on December 16, 2013 for his post grand jury interview, the record does not disclose whether he was interviewed. Agent Veazey testified only that he saw McGee in the lobby with his mother. The agents were occupied with Godfrey working out the details of his cooperation agreement and then attempting to locate JaRay's body. Her body was not found until the next day and agents then arrested McGee in Weatherford.

McGee argues grand jury counsel's representation of Godfrey at the follow-up interview that culminated in the negotiated cooperation agreement violated his right to conflict-free counsel. He maintains the opposing loyalties grand jury counsel owed to him and Godfrey created an actual conflict of interest that adversely affected his lawyer's performance. This conflict, McGee claims, prevented grand jury counsel from advocating the truthfulness of his statements before the grand jury, maintaining his innocence and pursuing a plea bargain on his behalf. As in the Sixth Amendment context concerning conflicts of interest, McGee contends that he need not show prejudice provided he can show that an actual conflict of interest adversely affected his lawyer's performance.

McGee admits that his Sixth Amendment right to counsel had not yet attached during the grand jury process because he had not been formally charged with JaRay's murder. *See Warner v. State*, 2006 OK CR 40, ¶ 55, 144 P.3d 838, 866. Instead, he argues his statutory right to counsel at grand jury proceedings guaranteed him the right to conflict-free representation based on due process principles. Under 22 O.S.2011, § 355(B)(1), a witness subpoenaed to appear and testify before a multicounty grand jury is entitled to the assistance of counsel. If the witness is unable to retain counsel, counsel shall be appointed. 22 O.S.2011, § 355(B)(3). Counsel is allowed to be present in the grand jury room during the witness' questioning and is allowed to advise the witness, but is not allowed to make objections or arguments or otherwise

address the multicounty grand jury or its legal advisor. 22 O.S.2011, § 355(B)(4).

Neither we nor the parties have found any cases from this Court discussing the statutory right to counsel before a multicounty grand jury. We recognize that the scope of this right to counsel is different than the Sixth Amendment right to counsel because of the nature of the proceedings. The Sixth Amendment right to counsel attaches at the initiation of adversarial proceedings when the right to a fair trial is at stake. Grand jury proceedings, on the other hand, are investigatory and the statutory right to counsel at those proceedings is focused on protecting one's Fifth Amendment right against self-incrimination. It seems only logical, however, that if the State affords the right to counsel for persons subpoenaed before a grand jury that this right encompasses a right to effective counsel free from conflicts of interest. Otherwise the right to counsel makes little sense. *See Braun v. State*, 1997 OK CR 26, 937 P.2d 505, 516 (Chapel, P.J. concurring in result.) That said, case law concerning violations of the Sixth Amendment right to counsel may be instructive, but not necessarily controlling.

McGee and Godfrey were appointed counsel under section 355(B) and grand jury counsel appeared with them during their testimony before the multicounty grand jury. McGee and Godfrey were the prime suspects in JaRay's disappearance because they were the last known people with her before she vanished. Grand jury counsel recognized that McGee and Godfrey

were both targets of the grand jury and that the potential existed for conflicting interests, and he told them before their testimony that only one of them would "get a deal," but not both. Irrespective of whether grand jury counsel should have agreed to the concurrent representation from the beginning, the potential for conflict did not turn into an actual conflict during McGee's and Godfrey's testimony before the grand jury. Their testimony was consistent and their interests were not in conflict. Each repeated the same story before the grand jury that they had told law enforcement and their stories remained consistent. Because their interests were aligned, grand jury counsel was not precluded from representing both men during their testimony before the grand jury.

Grand jury counsel's representation, however, did not end there; he appeared for Godfrey's scheduled interview on December 16th when Godfrey decided to cooperate and implicated McGee. Grand jury counsel assisted Godfrey in avoiding a murder charge in exchange for Godfrey's testimony against McGee. This, of necessity, required grand jury counsel to portray McGee as the guilty party. Although the potential for conflict may not have materialized during their grand jury testimony, grand jury counsel's assistance to Godfrey in negotiating the cooperation agreement was clearly adverse to, and inconsistent with, his concurrent professional obligations to McGee. Under the Rules of Professional Conduct, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." Rule 1.7(a), *Rules of Professional Conduct,* Title 5, Ch. 1, App.3-A (2016). Rule 1.7 provides:

A concurrent conflict of interest exists if:

> (1) the representation of one client will be directly adverse to another client; or
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Despite the existence of a conflict of interest, concurrent representation is permissible under certain conditions. Those conditions are not present in this case.[8] Once it became apparent that Godfrey's interests were adverse to McGee's, grand jury counsel should have withdrawn and each should have been appointed separate counsel for the duration of the grand jury process. McGee maintains the appropriate remedy in this case is to reverse his conviction and remand the matter for a new trial in which the State is precluded from using Godfrey's statements and testimony obtained as a result of the cooperation agreement negotiated by conflicted counsel. We disagree.

Grand jury counsel assisted a client who had decided on his own to aid the government's investigation in giving a statement that was adverse to another client. There is no evidence grand jury counsel purposefully chose Godfrey over McGee or used confidential information obtained from McGee against him. Godfrey succumbed to the pressure produced from repeated interviews and a possible upcoming polygraph examination and heeded grand

[8] Under Rule 1.7, a lawyer may represent a client, despite the existence of a concurrent conflict of interest, if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.

jury counsel's warning to both clients that the first one to come forward would get any deal to be had. Had grand jury counsel revealed the conflict and withdrawn, we are certain Godfrey, with the assistance of separate counsel, would have made the same statement and negotiated substantially the same deal that resulted in the instant murder charge against McGee. This is somewhat analogous to an inevitable discovery situation. We note that once Godfrey came forward and the criminal case against McGee was filed, McGee was at all times represented by separate, conflict-free counsel as required by the Sixth Amendment. On this record we cannot find that the concurrent conflict of interest deprived McGee of a fair trial as a result of ineffective assistance of counsel. At most, the concurrent conflict of interest prevented McGee from receiving a favorable pre-trial plea offer, something not guaranteed. *See Jiminez v. State,* 2006 OK CR 43, ¶ 6, 144 P.3d 903, 905. Moreover, there was convincing independent evidence of McGee's guilt, not the least of which included his confessions to Caleb McLemore and Alfred Pendelton. Because there was no violation of a constitutional right and because McGee was represented at trial by conflict free counsel, we will not grant relief without a showing of prejudice, *i.e.,* a reasonable probability that the outcome of McGee's trial would have been different. This claim is denied.

11. Ineffective Assistance of Counsel

McGee contends he was deprived of his constitutional right to effective assistance of counsel at trial. He argues that defense counsel was ineffective

for failing to object to the instances of prosecutorial misconduct challenged above and failing to object to the introduction of Godfrey's testimony because of grand jury counsel's conflict of interest. He also contends that grand jury counsel was ineffective for failing to recognize and inform him about the conflict of interest created by counsel's concurrent representation.

This Court reviews an appellant's claim of ineffective assistance of counsel to determine whether he has shown that counsel's performance was constitutionally deficient and that such deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. Under this test, McGee must not only overcome the presumption of competence but 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. We need not determine whether counsel's performance was deficient if the claim of ineffective assistance can be disposed of on the ground of lack of prejudice. *See Malone*, 2013 OK CR 1, ¶ 16, 293 P.3d at 207.

We reject McGee's ineffective assistance of counsel claim based on defense counsel's failure to object to the alleged instances of prosecutorial misconduct because there was no error. We further find relief is neither warranted for defense counsel's failure to object to the admission of Godfrey's testimony on the basis of grand jury counsel's conflict of interest nor grand

jury counsel's failure to disclose the conflict because McGee has not established the necessary prejudice. This claim is therefore denied. *See Malone*, 2013 OK CR 1, ¶ 16, 293 P.3d at 207.

In conjunction with this claim McGee filed an Application for Evidentiary Hearing on Sixth Amendment Claims contemporaneously with his brief, attaching documents to support a claim that defense counsel was ineffective for failing to discover and use medical records and cellphone records to impeach Cody Godfrey's testimony[9] and for failing to object to spectators wearing t-shirts supporting JaRay during trial.[10]

This Court will order an evidentiary hearing if "the application and affidavits . . . contain 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 complained-of evidence." Rule 3.11(B)(3)(b)(i), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016). Having reviewed McGee's Request for an Evidentiary Hearing to develop this claim and the materials offered to support that request, we find that he has failed to meet his burden. Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016). Therefore, McGee is not

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[9] McGee argues his medical and prescription records and cell phone records show that he could not have been burying JaRay's body at the time Cody Godfrey claimed they buried her on October 15, 2012.

[10] McGee submits affidavits from two jurors concerning the t-shirts. One juror states that he saw three unidentified people in the courtroom wearing t-shirts bearing the phrase "Justice for JaRay." The second juror states he saw numerous people all wearing the same t-shirt with "some type of wording on it." He does not state what the words were. Neither juror states that the t-shirts had any influence on him or other jurors. McGee also includes a photograph of JaRay's parents at sentencing wearing t-shirts with the phrase "Justice for JaRay."

entitled to an evidentiary hearing to further develop his allegations that counsel was ineffective, and his motion, as well as this claim, are DENIED. See *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905-06.

12. Cumulative Error

McGee claims that even if no individual error in his case merits relief, the cumulative effect of the errors committed requires that his case be reversed or his sentence modified. The cumulative error doctrine applies when several errors occurred at the trial court level, but none alone warrants reversal. *DeRosa v. State*, 2004 OK CR 19, ¶ 100, 89 P.3d 1124, 1157. Although each error standing alone may be of insufficient gravity to warrant reversal, the combined effect of an accumulation of errors may require a new trial. *Id.* Cumulative error does not deprive the defendant of a fair trial when the errors considered together do not affect the outcome of the proceeding. Moreover, a cumulative error claim has no merit when this Court fails to sustain any of the errors raised on appeal. *See Jones v. State*, 2009 OK CR 1, ¶ 104, 201 P.3d 869, 894. There are no errors, considered individually or cumulatively, that merit reversal of McGee's conviction in this case. *Id.*; *DeRosa*, 2004 OK CR 19, ¶ 100, 89 P.3d at 1157.

13. Constitutionality of Life Without Parole Sentence

McGee was granted leave to file a supplemental brief challenging the constitutionality of his sentence based on the United States Supreme Court's recent ruling in *Montgomery v. Louisiana*, 577 U.S.___, 136 S.Ct. 718, 193

L.Ed.2d 599 (2016).[11] McGee, who was 17 years old at the time of the murder, contends his sentence of life without the possibility of parole is unconstitutional under the Eighth Amendment.

The Eighth Amendment principles of law governing juvenile sentencing have evolved significantly in United States Supreme Court precedents over the past few years, specifically in *Graham v. Florida*,[12] *Miller v. Alabama*,[13] and *Montgomery v. Louisiana*, *supra*. We briefly discuss these decisions as a framework for our federal constitutional analysis.

In 2010, the Court held in *Graham* that the Eighth Amendment prohibits a juvenile offender from being sentenced to life in prison without parole for nonhomicide crimes. *Graham*, 560 U.S. at 79, 130 S.Ct. at 2032–33. The *Graham* Court was the first to apply a categorical classification under the Eighth Amendment to a so-called "term-of-years" sentence. *Id.* at 61, 130 S.Ct. at 2022. The defendant in *Graham* committed the crimes of armed burglary and attempted armed robbery when he was sixteen years old and he was sentenced to the maximum term on both crimes: life imprisonment for the armed burglary, and fifteen years for the attempted armed robbery. *Id.* at 57, 130 S.Ct. at 2020. Because the State of Florida had abolished its parole system, the life sentence imposed on Graham was, in effect, a mandatory life term. *Id.* The Court held that Graham's sentence violated the Eighth

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[11] McGee asks leave to file a Reply Brief to the State's Supplemental Brief. Under the circumstances of this case, we find the motion should be GRANTED.

[12] 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

[13] 567 U.S.___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

Amendment because it "guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes." *Id.* at 79, 130 S.Ct. at 2033.

In reaching its decision, the *Graham* Court found an emerging national consensus against mandatory imposition of life terms upon juvenile nonhomicide offenders. *Id.* at 67, 130 S.Ct. at 2026. Relying on its reasoning in *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L. Ed.2d 1 (2005) holding the death penalty unconstitutional for murder defendants who were under 18 at the time of their capital crimes, the Court noted that juvenile offenders have a lessened moral culpability as compared to adult offenders, and they are less deserving of the most severe punishments. *Id.* at 68, 130 S.Ct. at 2026, 176 L. Ed.2d at 841. The Court explained that penological goals in retribution, deterrence or incapacitation were insufficient to justify sentences of life without parole for juvenile nonhomicide offenders. *Id.* at 71–74, 130 S.Ct. at 2028–30. Although the *Graham* Court concluded that all mandatory life sentences for juvenile nonhomicide offenders are unconstitutional, it tempered that holding explaining that

> A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and

> rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.

Id. at 75, 130 S.Ct. at 2030.

Two years after *Graham*, the Court decided *Miller* and extended its *Graham* holding to juveniles convicted of homicide offenses. *Miller*, supra, 567 U.S. at ___, 132 S.Ct. at 2469. The Court in *Miller* declared unconstitutional any statutory sentencing scheme that mandated a sentence of life in prison without the possibility of parole for juvenile homicide offenders. *Id. Miller* involved the consolidated appeals of two juveniles who were fourteen years old at the time they committed their respective homicide crimes. *Id.* at ___, 132 S.Ct. at 2460. Both were tried as adults and eventually sentenced to mandatory life without parole terms. *Id.* State law in each case mandated life without parole and stripped the trial judges of any discretion to deviate from that maximum penalty. *Id.* In considering these circumstances, the *Miller* Court reaffirmed its reasoning in *Graham* concerning the diminished culpability of juvenile offenders as compared to adult offenders. *Id.* at ___, 132 S.Ct. at 2464–69. The Court explained that "none of what [Graham] said about children—about their distinctive (and transitory) mental traits and environmental

vulnerabilities—is crime-specific." *Id.* at ___, 132 S.Ct. at 2465. Much of the *Graham* reasoning is therefore applicable to any life-without-parole sentence imposed on a juvenile. *Id.* As the majority in *Miller* observed:

> [T]he mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations. By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes *Graham's* (and also *Roper's*) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.

Id. at ___, 132 S.Ct. at 2466.

Unlike *Graham*, however, *Miller* placed no categorical prohibition against the imposition of life-without-parole sentences on juvenile homicide offenders, so long as the sentencing judge was vested with, and appropriately exercised, the discretion to consider factors such as the defendant's youth in imposing that sentence.

Earlier this year, the Supreme Court held in *Montgomery v. Louisiana*, *supra*, 136 S.Ct. at 734, that *Miller's* holding applies retroactively to cases of juvenile offenders whose convictions and sentences were final when *Miller* was decided in 2012. Included with its retroactivity ruling, the Court further expounded the principles expressed in *Graham* and *Miller*. *Montgomery* involved a juvenile who murdered a deputy sheriff in 1970 when he was seventeen years old. *Id.* at ___, 136 S.Ct. at 725. At the time of Montgomery's final conviction the jury's verdict of guilt without capital punishment required the trial court to

impose a sentence of life without parole. The sentence was automatic under Louisiana law and Montgomery had no opportunity to present mitigation evidence to justify a less severe sentence. *Id.* at ___, 136 S.Ct. at 725–26.

In holding that *Miller* applied retroactively to cases on collateral review such as Montgomery's case, the Court noted that *Miller* established, in part, a new substantive rule of law (*i.e.*, "*Miller's* conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders raises a grave risk that many are being held in violation of the Constitution"). *Id.* at ___, 136 S.Ct. at 736. The Court acknowledged that *Miller's* holding had a procedural component as well because it required "a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence." *Id.* at ___, 136 S.Ct. at 735. The hearing *Miller* prescribes—where "youth and its attendant characteristics" are considered as sentencing factors—is necessary to separate those juveniles who may be sentenced to life without parole from those who may not and is necessary to give effect to *Miller's* substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity. *Id.* *Miller,* the Court explained, was no less substantive than its earlier decisions in *Roper* and *Graham,* noting before *Miller* every juvenile convicted of a homicide offense could be sentenced to life without parole and after *Miller* it would be the "rare" juvenile offender who received that same sentence. *Id.* at ___, 136 S.Ct. at 734. The Court made clear that *Miller* did more than require a

sentencer to consider a juvenile offender's youth before imposing life without parole because sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption. *Id.* at ___, 136 S.Ct. at 734. The Court stressed that *Miller* "rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." *Id.* at ___, 136 S.Ct. at 734 (*quoting Penry v. Lynaugh*, 492 U .S. 302, 330, 109 S.Ct. 2934, 2953, 106 L. Ed.2d 256, 285 (1989)).

No published opinion by this Court has applied the principles of *Miller* and *Montgomery* to a juvenile sentence. Guided by these recent precedents, we first turn to McGee's principal claims of an Eighth Amendment violation. The specific holding of *Graham*, pertaining to juvenile nonhomicide offenders, is inapplicable to the present case because McGee was convicted of murder and his life without parole sentence was imposed for that homicide. Hence, it is *Graham's* broader principles recognizing the special aspects of juvenile offenses that relate to this case; *Graham's* specific prohibition of life-without-parole sentences for nonhomicide juvenile offenders does not control. Instead, the principles in *Miller* and *Montgomery*, both addressing juvenile homicide cases, govern our decision here.

McGee argues that the Court in *Montgomery* did more than give the holding in *Miller* retroactive effect; he insists the Court clarified and broadened the scope of *Miller*, and held that life without the possibility of parole is always

unconstitutional for a juvenile, unless he is "permanently incorrigible" and "irreparably corrupt." He maintains that after *Montgomery,* unless the sentencer makes a finding beyond a reasonable doubt that the juvenile offender is "permanently incorrigible" and "irreparably corrupt" the juvenile offender may not be exposed to a sentence of life without the possibility of parole. He asserts his jury made no such findings in imposing his life without parole sentence and therefore he is entitled to resentencing or sentence modification.

The State maintains that *Miller* and *Montgomery* are inapplicable to McGee because his life without parole sentence was not mandatory under Oklahoma law.[14] *See* 21 O.S.2011, § 701.9. We agree that the core issue presented in *Miller* concerned the mandatory imposition of a natural-life sentence. But there is no genuine question that the rule in *Miller* as broadened in *Montgomery* rendered a life without parole sentence constitutionally impermissible, notwithstanding the sentencer's discretion to impose a lesser term, unless the sentencer "take[s] into account 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" Montgomery, 577 U.S. at ___, 136 S.Ct. at 733, *quoting Miller,* 567 U.S. at ___, 132 S.Ct. at 2469. "*Miller* requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence." *Id.* at ___, 136 S.Ct. at 734. *Montgomery* makes clear that *Miller's* distinction between

[14] McGee's jury was given the punishment options of life imprisonment with or without the possibility of parole.

children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption are factors in the sentencing equation for any juvenile facing life without parole. *Id.* We therefore find *Miller* and *Montgomery* applicable in this case.

The next related question under *Miller* and *Montgomery* is whether McGee's sentencer, in exercising discretion, appropriately took into account the special characteristics of a juvenile offender in imposing a life without parole sentence. McGee argues his jury heard no evidence on, and made no factual findings of, permanent incorrigibility and irreparable corruption prior to imposing life without parole. McGee recognizes that the Court in *Montgomery* adopted neither a formal fact-finding requirement nor mandated any formal framework. Nevertheless, he contends the Supreme Court provided guidance on the type of evidence a sentencer must consider in deciding punishment for juvenile homicide offenders when it identified mitigation evidence Montgomery might have presented, specifically evidence of "his young age at the time of the crime; expert testimony regarding his limited capacity for foresight, self-discipline, and judgment; and his potential for rehabilitation." *Id.* at ___, 136 S.Ct. at 726. Without such evidence being considered by his sentencing jury, McGee claims his sentence violates the Eighth Amendment.

The State maintains that McGee's sentencer appropriately took his age and other mitigating circumstances into account in fixing punishment. The State argues the district court was the sentencer in this case and that it

considered the jury's recommendation on punishment, McGee's youth, intoxication and mental state as well as defense counsel's argument concerning *Miller v. Alabama* before imposing a sentence of life without parole at McGee's formal sentencing hearing. The State also argues McGee's jury likewise considered mitigating circumstances—namely his youth, drug, tobacco and alcohol use, the psychoactive effects associated with smoking K2 and evidence concerning McGee's prior suicide attempt—before recommending life imprisonment without parole.

Jury sentencing is a statutory right in Oklahoma. Title 22 O.S.2011, § 926.1 provides:

> In all cases of a verdict of conviction for any offense against any of the laws of the State of Oklahoma, the jury may, and shall upon the request of the defendant assess and declare the punishment in their verdict within the limitations fixed by law, and the court shall render a judgment according to such verdict, except as hereinafter provided.

Section 926.1 vests the jury with authority to render punishment. Once a defendant elects a jury trial and the jury decides punishment within the applicable range of punishment in its verdict, the trial court must impose the jury's punishment verdict. *See Luker v. State,* 1976 OK CR 135, ¶ 12, 552 P.2d 715, 719. As the Court explained in *Redell v. State,* although section 926 (now 926.1) provides that the jury "may" fix punishment, "we feel the statutory intent is to give the jury an opportunity to pass upon the issue of punishment whether or not so requested; and if the jury find the defendant guilty and fail to agree on the punishment, or assess a punishment greater than the highest

limit declared by law for the offense for which the defendant is convicted, *then and only then* can the trial court assess and declare a punishment as provided in 22 O.S.1971, § 927, and § 928."[15] (Emphasis added) *Redell,* 1975 OK CR 229, ¶ 31,543 P.2d 574, 581-82; *see also Love v. State,* 2009 OK CR 20, ¶ 3, 217 P.3d 116, 117; *Morrison v. State,* 1980 OK CR 74, ¶ 19, 619 P.2d 203, 209. The district court charged McGee's jury with the task of deciding punishment, instructed on the punishment options, provided the appropriate verdict forms, and the prosecutor specifically asked the jury to sentence McGee to life imprisonment without parole. The sentencer in this case was McGee's jury.

McGee's jury understandably found him guilty of first degree murder from the evidence presented. This was a heinous crime, and an orchestrated complicity involving others in an attempt to avoid detection. Though this trial included significant information concerning McGee's youth, substance abuse and social background, the majority of the mitigating evidence was not pertinent to deciding whether McGee's crime reflected only transient immaturity or whether his crime reflected permanent incorrigibility and irreparable corruption. There was no evidence of important youth-related considerations, such as the juvenile's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) "the incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a

[15] Presentence investigation reports are not for the purpose of aiding the trial court in deciding whether to deviate from a jury's verdict but in deciding whether to suspend or defer a sentence or in deciding whether to run multiple counts consecutively or concurrently.

plea agreement) or his incapacity to assist his own attorneys"; and (3) whether the circumstances suggest "possibility of rehabilitation." *Miller*, 567 U.S. at ___, 132 S.Ct. at 2468. Nor was there any evidence concerning adolescent brain development and its effect on behavior and the juvenile's capacity to consider the consequences of his wrongful acts. We must therefore conclude that McGee's sentence of life without parole is constitutionally infirm under *Miller*.

We turn now to the appropriate remedy for this sentence infirmity. When the Constitution prohibits a particular form of punishment for a class of persons, an affected defendant is entitled to a meaningful procedure "through which he can show that he belongs to the protected class." *Montgomery*, 577 U.S. ___, 136 S.Ct. at 735 (*citing Atkins v. Virginia*, 536 U.S. 304, 317, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). We agree with McGee that the executive commutation process may not serve as an adequate remedy. This is so because the opportunity to seek a sentence commutation through a procedure largely without evidentiary rules, with no right to obtain expert assistance or testimony, no cross-examination, compulsory process, or the assistance of counsel cannot meaningfully enforce *Miller's* prohibition. We find that *Miller* requires a sentencing trial procedure conducted before the imposition of the sentence, with a judge or jury fully aware of the constitutional "line between children whose crimes reflect transient immaturity and those *rare* children

whose crimes reflect irreparable corruption."[16] *Montgomery*, 577 U.S.___, 136 S.Ct. at 734 (emphasis added). For the reasons we have discussed, McGee's sentence of life without parole must be vacated and the matter remanded for re-sentencing to determine whether the crime reflects McGee's transient immaturity, or an irreparable corruption and permanent incorrigibility warranting the extreme sanction of life imprisonment without parole.

DECISION

The Judgment of the district court is **AFFIRMED**. The sentence of life without the possibility of parole is **VACATED** and the matter **REMANDED** to the district court for re-sentencing. 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 delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CUSTER COUNTY
THE HONORABLE F. DOUG HAUGHT, DISTRICT JUDGE

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[16] Pending action by the Committee for the Oklahoma Uniform Jury Instructions-Criminal, we promulgate the following instruction to aid trial courts in future cases where juveniles face a possible sentence of life without the possibility of parole.

LIFE WITHOUT PAROLE PROCEEDINGS - JUVENILES

Under the law of the State of Oklahoma, every person found guilty of murder in the first degree shall be punished by imprisonment for life without the possibility of parole, or imprisonment for life with the possibility of parole.

You are further instructed that the defendant was a juvenile when this crime was committed. The law regards juvenile offenders generally as having lesser moral culpability and greater capacity for change than adult offenders. An offender's youth matters in determining the appropriateness of the sentence in this case.

You are therefore instructed to consider, in determining the proper sentence, whether the defendant's youth and youth-related characteristics, as well as any other aggravating and mitigating circumstances, and the nature of the crime, reflect the defendant's transient immaturity as a juvenile; or, on the other hand, irreparable corruption and permanent incorrigibility.

No person who committed a crime as a juvenile may be sentenced to life without the possibility of parole unless you find beyond a reasonable doubt that the defendant is irreparably corrupt and permanently incorrigible.

APPEARANCES AT TRIAL

RANDOLPH S. MEACHAM
ATTORNEY AT LAW
P. O. BOX 1236
CLINTON, OK 73601
ATTORNEY FOR DEFENDANT

ANGELA C. MARSEE
DISTRICT ATTORNEY
S. BROOKE GATLIN
ASSISTANT DISTRICT ATTORNEY
P. O. BOX 36
ARAPAHO, OK 73620
ATTORNEY FOR STATE

APPEARANCES ON APPEAL

MARY PATRICIA TATE WESTMAN
P. O. BOX 926
NORMAN, OK 73070
ATTORNEY FOR APPELLANT

E. SCOTT PRUITT
OKLAHOMA ATTORNEY GENERAL
JAY SCHNIEDERJAN
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR APPELLEE

OPINION BY: JOHNSON, J.
SMITH, P.J.: Concur
LUMPKIN, V.P.J.: Concur in Part and Dissent in Part
LEWIS, J.: Concur
HUDSON, J.: Concur in Part and Dissent in Part

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LUMPKIN, VICE PRESIDING JUDGE: CONCURRING IN PART/DISSENTING PART.

I concur in affirming the Appellant's conviction for First Degree Murder, however, I must dissent to the decision to vacate Appellant's sentence and remand for resentencing.

I accede that the United States Supreme Court has determined the mandatory punishment of life without the possibility of parole is an unconstitutional penalty for juvenile offenders.[1] *Miller v. Alabama*, 132 S.Ct. 2455, 2460, 2469, 183 L.Ed.2d 407 (2012). The Supreme Court now requires that "a sentencer [] consider a juvenile offender's youth and attendant characteristics" when determining the appropriate sentence. *Montgomery v. Louisiana*, 136 S.Ct. 718, 734, 193 L.Ed.2d 599 (2016), *citing Miller*, 132 S.Ct. at 2471.

Despite acknowledging the Supreme Court has not adopted a formal fact-finding requirement nor mandated any formal framework, the majority's opinion requires specific evidence as to "transient immaturity;" "adolescent brain development and its effect on behavior," "the juvenile's

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[1] I continue to be dismayed at the United States Supreme Court's determination of cases through the populist prism of "national consensus." *See Blonner v. State*, 2006 OK CR 1, ¶ 4 n. 1, 127 P.3d 1135, 1145 n.1 (Lumpkin, V.P.J., concurring in part/dissenting in part). I do not believe that this mantra has any relevance to the interpretation of Constitutional language. *Id.* There is no legal basis for the use of public opinion polls in the interpretation of a Constitutional right. *Mitchell v. State*, 2010 OK CR 14, ¶ 79 n. 17, 235 P.3d 640, 658 n. 17. Instead, it is the duty of the judiciary to follow the law as our Constitution specifically sets out. *Lambert v. State*, 1999 OK CR 17, ¶ 6, 984 P.2d 221, 245 (Lumpkin, V.P.J., concurring in results).

capacity to consider the consequences of his wrongful acts," and "whether his crime reflected permanent incorrigibility and irreparable corruption." However, the Supreme Court has not required proof of specific aggravating circumstances as it has required in death penalty cases. *See Gregg v. Georgia*, 428 U.S. 153, 195, 198, 96 S.Ct. 2909, 1935, 2937, 49 L.Ed.2d 859 (1976) (requiring specific jury findings as to aggravators, *i.e.*, the circumstances of the crime or the character of the defendant, as a prerequisite to the imposition of the death penalty). Instead, the Supreme Court has only required that a judge or jury be allowed to consider "youth and its attendant characteristics, along with the nature of [the] crime" in its determination of punishment. *Miller,* 132 S.Ct. at 2460.

Thus, this Court should not review for specific "magic" words in order to determine whether a particular sentencing proceeding met the requirements of *Miller.* Instead, it is enough if this Court reviews the totality of the evidence to see if the jury had an opportunity to consider the offender's youth and attendant characteristics along with the nature of the crime.

The record is sufficient in the present case for this Court to conclude that the sentence of life without the possibility of parole is appropriate. The totality of the evidence reveals that the jury and trial

court in the present case were able to consider Appellant's youth and attendant characteristics along with the nature of the crime in determining the appropriate sentence. Judge Hudson has ably detailed the evidence which the jury had the opportunity to consider in determining Appellant's sentence and I join in his factual analysis of this issue.

This case is distinctly different from what this Court determined in *Murphy v. State*, 2002 OK CR 32, 54 P.3d 556, after the United States Supreme Court rendered its decision in *Atkins v. Virgina*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). In *Murphy*, the Oklahoma Legislature had passed legislation dealing with mental retardation and the procedure to address it while Murphy's capital post-conviction application was pending in this Court. *Murphy*, 2002 OK CR 32, ¶ 27 n. 13, 54 P.3d at 566-67 n. 13. Governor Keating vetoed that Legislation and shortly thereafter the Supreme Court handed down its mandate in *Atkins*. *Id.*, 2002 OK CR 32, ¶ 27 n. 14, 54 P.3d at 566-67 n. 14. Hemmed in by these difficult circumstances, this Court, with the aid of both the mandate in *Atkins* and the legislative intent in the vetoed legislation, adopted an intermediate procedure pending final resolution by the Oklahoma Legislature. *Id.*, 2002 OK CR 32, ¶ 30, 54 P.3d at 567.

Thereafter, the Oklahoma Legislature codified *Murphy* at 21 O.S.Supp.2006, § 701.10b.

We do not have the guidance which was present in *Murphy*. All we know is that the United States Supreme Court has held unconstitutional mandatory life without parole sentences for individuals who committed their offense while under 18 years of age.[2] As the United States Supreme Court has not mandated a specific procedural format for the consideration of evidence in this case as they did in *Gregg*, this Court should not be legislating such a format, especially, when it conflicts with existing statutes. This is a matter to be addressed by the Oklahoma Legislature.

In both *Miller* and *Montgomery* the Supreme Court alluded to various types of evidence that can be admitted to allow a fact finder to consider the defendant's "youth and attendant characteristics" along with the nature of the crime. However, these evidence possibilities were not mandated. The judge and the jury in the present case were afforded that opportunity. In failing to just review the evidence in this case to

[2] Appellant was not subject to a mandatory sentence of life without the possibility of parole. The punishment for First Degree Murder where the State is not seeking the death penalty is either life imprisonment or life imprisonment without parole. 21 O.S.2011, § 701.10-1(A). In addition, Appellant's jury was provided with the option of an offense which did not carry a sentence of life without the possibility of parole. The trial court instructed the jury concerning the lesser included offense of first degree manslaughter. *See* 21 O.S.2011. § 715. The sentencing judge had the benefit of a pre-sentence investigation report prior to sentencing Appellant and retained the authority to suspend the execution of Appellant's sentence in whole or in part. 21 O.S.2011, § 991a.

determine if it was sufficient to allow the judge and jury to consider the defendant's youth and attendant characteristics, the Court seeks to impose the requirement that there must be a separate sentencing procedure in this type of case when neither our statutes or the United States Supreme Court allow nor mandate it. In addition, it appears the Court is mandating certain types of evidence in order to micromanage the trial. I disagree with that effort. Instead, we should, at this time, merely review the evidence presented pursuant to the test promulgated by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) and adopted by this Court in *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204, and determine the sufficiency of the evidence presented to support the sentence.

Taking the evidence in the light most favorable to the prosecution, we should find that a rationale sentencer could have concluded that the sentence of life without parole was appropriate. Appellant's sentence does not constitute cruel and unusual punishment under *Miller*. Therefore, Appellant's sentence should be affirmed

I further dissent to the proposed jury instruction for life without parole proceedings for juvenile offenders. Through this instruction, the majority legislates a procedure that does not exist by statute or United States Supreme

Court precedent. The proposed jury instruction goes far beyond what is required in *Miller.*

I must further note that in reviewing several of the propositions of error, the Court touts plain error review but fails to set forth the scope of that review. To avoid confusing appellate practitioners and the federal courts, this Court should set out the requirements for plain error so that the consistency of this Court's opinions is clear. This Court reviews for plain error pursuant to the test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, and determine whether the appellant has shown an actual error, which is plain or obvious, and which affects his or her substantial rights. *Id.*, 1994 OK CR 40, ¶¶ 10, 26, 30, 876 P.2d at 694, 699, 701; *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*; *Jackson v. State*, 2016 OK CR 5, ¶ 4, 371 P.3d 1120, 1121

As to Proposition One, I reiterate my doubt as to the long-term viability of *Shrum v. State*, 1999 OK CR 41, 991 P.2d 1032, persists. The lack of objective criteria in our determination of lesser included offenses creates an unintentional mischief in our District Courts, *i.e.*, it becomes a subjective "feeling" test rather than an objective legal analysis which

can be equally and consistently applied. *Shrum*, 1999 OK CR 41, ¶¶ 3-8, 991 P.2d at 1038 (Lumpkin, V.P.J, Concurring in results). This Court should adopt the test that I outlined in footnote 6 of *Davis v. State*, 2011 OK CR 29, ¶ 101 n. 6, 268 P.3d 86, 115 n. 6.

As to Proposition Two, I maintain that the jury should be instructed upon flight each time evidence of flight is presented. *Mitchell v. State*, 1993 OK CR 56, ¶ 3, 876 P.2d 682, 687 (Lumpkin, P.J., concurring in part/dissenting in part). Without the guidance of an instruction upon flight, the jury could jump to the conclusion that a defendant was *ipso facto* guilty just because he or she left the scene. *Id.*

As to Proposition Three, I find that Appellant has shown the existence of an error that is plain and obvious. *Malone*, 2013 OK CR 1, ¶ 42, 293 P.3d at 212. The jury should have been provided with separate verdict forms for each option. *Wilson v. State*, 1994 OK CR 5, 871 P.2d 46, 49; Inst. No. 10-25, OUJI-Cr(2d) (2000 Supp.). However, I agree that Appellant has not shown that he was prejudiced by this error. *Id.* As such, no relief is required. *Jackson*, 2016 OK CR 5, ¶ 4, 371 P.3d at 1121 ("[T]his Court will correct plain error only if the error seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice." (quotations and citation omitted).

HUDSON, JUDGE: CONCURRING IN PART/DISSENTING IN PART

I agree Appellant's first degree murder conviction should be affirmed. However, I disagree with the majority's resolution of Appellant's constitutional challenge of his life without the possibility of parole sentence pursuant to *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016). The majority finds Appellant's sentence infirm in light of *Montgomery* and *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). I disagree. After careful review of the record evidence and proceedings in this case, I find both the jury and sentencing judge had a sufficient "opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles," including Appellant's youth. *See Miller*, 132 S. Ct. at 2475.

We must be mindful that the Court in *Miller* specifically addressed the constitutionality of a *mandatory* life without parole sentencing scheme, which Oklahoma does not have. In finding that the "Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders", *id.*, 132 S. Ct. at 2470, the Court reasoned in part that:

> Mandatory life without parole for a juvenile *precludes* consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him.

Id., 132 S. Ct. at 2468 (emphasis added).

Notably, the Court in *Montgomery* did not expand the Court's holding in *Miller*. At issue in *Montgomery* was whether *Miller* should be applied retroactively. *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 725. Granted, it is undeniable that the Court utilized *Montgomery* to provide additional guidance—albeit in *dicta*, *see People v. Holman*, 58 N.E.3d 632, 642-43 (Ill. App. 2016)—regarding the implications of *Miller*, which this Court cannot discount despite Oklahoma's non-mandatory life without parole sentencing option. Appellant acknowledges that the Supreme Court has not adopted a formal fact-finding requirement nor mandated any formal framework. Nor has the Court categorically banned life sentences without the possibility of parole for juvenile offenders.

Under the circumstances of this case, the jury at trial—as well as the trial judge at formal sentencing—had the opportunity to consider all the mitigating circumstances related to Appellant and his offense. *See Miller*, 132 S. Ct. at 2463 (punishment should be proportionate to both the offender and the offense). The State's evidence established Appellant's age at the time of the crime (Appellant turned 18 just ten days after the murder, Tr. 472) and his use of a variety of drugs as a teenager, including marijuana, Ecstasy, Lotab, Xanax, mushrooms, methamphetamine and K2, a synthetic marijuana (Tr. 475-83, 1181-83, 1229-35, 1237). The testimony showed that Appellant frequently smoked marijuana and K2 and that he used K2 prior to the killing (Tr. 478-79,

504-14, 899-904, 907, 1181-84, 1205, 1229-30, 1237, 1275, 1280-81). Additionally, Appellant was involved in selling hydrocodone powder (Tr. 1194). Photographs of Appellant's bedroom were admitted and showed evidence of drug activity and alcohol use (Tr. 1014-24, 1044-45). Appellant too had a poster on his bedroom wall, and DVDs, for the television show Dexter which features a serial killer (Tr. 467-68, 1020).

The State introduced a letter penned by Appellant to his mother in which he seemingly expressed remorse for the killing (Tr. 691, 694-96). In that same letter, Appellant wrote that "[s]omething hasn't been right in my head for a while now. Of course, I didn't tell anyone. I wish I had." (Tr. 696, 1149-50; State's Ex. 41). Crystal Godfrey, the mother of one of Appellant's co-defendants, testified that she forbid her son from associating with Appellant. Godfrey described how her first meeting with Appellant ("he couldn't make eye contact. He couldn't give a firm handshake") caused her to believe he was "a punk" who should not be hanging around her son (Tr. 986-87).

The defense testimony of Sheila McGee, Appellant's mother, provided the jury with the type of comprehensive background information often seen in capital sentencing proceedings. Ms. McGee testified that Appellant was a "difficult" child who was "very emotional, quiet, kind of introverted" and did not enjoy group interaction with other children (Tr. 1444). McGee described how Appellant, starting in kindergarten and first grade, was a disciplinary problem in school. Appellant acted out, was attention-seeking and did not want to join in activities with the other children (Tr. 1444-45). This behavior continued in

second and third grade and Appellant was, according to McGee, "very hyperactive in class" (Tr. 1445).

Appellant was diagnosed in fourth grade with attention deficit hyperactivity disorder (ADHD) and he was prescribed Concerta by a doctor (Tr. 1445-46). According to McGee, the Concerta "helped slow [Appellant] down a little bit" and his behavior improved. Appellant was able to complete his homework with extra help both from his teachers and mother (Tr. 1446). McGee described Appellant as an "average C student" which satisfied her considering Appellant's attention problems (Tr. 1447). Appellant continued taking Concerta until ninth grade when his parents allowed him to stop due to the side effects (Tr. 1446-47).

McGee testified about her separation from Appellant's father when Appellant was in seventh grade and the divorce which followed four years later (Tr. 1447). The separation prompted Appellant to start playing very violent, mature-rated video games like Grand Theft Auto and Call of Duty (Tr. 1448). In hindsight, McGee believes the video games were a bad influence on Appellant which she should not have let him play (Tr. 1448). After graduating middle school, Appellant attended Weatherford High School where he dropped out during the second semester of his junior year (Tr. 1448-49). Six months later, Appellant passed the GED test (Tr. 1449).

Prior to dropping out of high school, Appellant began associating with co-defendants Caleb McLemore and Cody Godfrey and he was away from home more often. During this period, Appellant's behavior became more reckless.

McGee described one instance in which Appellant's dad gave him a Mini Cooper when he turned 16. Not long after, Appellant wrecked the vehicle by speeding down a Weatherford street, pulling the emergency brake and rolling the car. When confronted by his parents, Appellant had no explanation for this reckless behavior (Tr. 1449).

A few months later in June 2011, Appellant attempted suicide by taking a handful of Ecstasy tablets that he stole from a friend (Tr. 1449-50). Appellant was taking Celexa, an antidepressant, shortly before the suicide attempt (Tr. 1460). Appellant was rushed to the emergency room where he admitted to the suicide attempt (Tr. 1450. 1463). After being released from the Weatherford hospital, Ms. McGee drove Appellant to St. Anthony Hospital's behavioral unit where Appellant was admitted for treatment. He remained there for seven days (Tr. 1450). Appellant's treatment included family therapy meetings (Tr. 1461). Upon his release, Appellant was prescribed Zoloft and his parents were ordered to watch him closely (Tr. 1450). Appellant was also instructed to follow up with psychological counseling so he began seeing Dr. Robyn Cowperthwaite, an Oklahoma City psychiatrist, and Joshua Farmer, a counselor in her office (Tr. 1451).

Appellant attended counseling "on and off for the next two years" (Tr. 1451, 1465). Appellant continued taking Zoloft and was given Trazodone to help him sleep at night (Tr. 1451). McGee testified that Appellant did not want to take the Trazodone because he preferred staying up late into the night, playing video games and hanging out with his friends (Tr. 1451). During this

time period, McGee suspected Appellant was using marijuana because she smelled it on him (Tr. 1451). When confronted by his parents, Appellant admitted using marijuana (Tr. 1462). McGee punished Appellant by taking away his video game controllers, his cell phone and computer access. McGee also grounded Appellant and would not let him see his friends (Tr. 1451-52).

When McGee eased these restrictions, Appellant's behavior became unpredictable and aggressive (Tr. 1452). According to McGee, Appellant "would start yelling for no reason at all, and then later he would feel bad for it and apologize." (Tr. 1452). Appellant tore off the door from his bedroom but could not explain why. Appellant also threw a remote control through the living room wall. Appellant usually felt bad after his aggressive behavior; McGee believed Appellant could not control his violent behavior (Tr. 1452). However, McGee did not seek additional psychological counseling for Appellant's increasingly aggressive behavior (Tr. 1465-67).

When asked to describe Appellant's relationship with other people, McGee testified "he is very kind" and that Appellant "tends to be more of a follower than a leader. He is always willing, you know, to help out a friend or do what they ask of him." (Tr. 1455).

The defense also presented testimony from Dr. Thomas Kupiec, a pharmacologist, to provide expert testimony concerning the effects of synthetic marijuana. Dr. Kupiec described the possible effects of K2 (Tr. 1470-87). This included tachycardia (a fast heart beat), agitation, irritability, drowsiness, lethargy, hallucinations, delusions, confusion and dizziness (Tr. 1487). Dr.

Kupiec noted that K2 could cause psychosis in an individual (Tr. 1487). Dr. Kupiec described K2 as a very dangerous drug that has a detrimental effect on the human mind (Tr. 1508-09). Dr. Kupiec opined that Appellant was intoxicated from K2 at the time of the murder. However, because it is unknown how much K2 Appellant consumed, Dr. Kupiec could not say the level of intoxication Appellant suffered. Nor could Dr. Kupiec say that Appellant could not form malice aforethought (Tr. 1484-86).

The jury had the opportunity to consider this evidence both in determining Appellant's guilt—i.e., whether he was guilty of first degree malice aforethought murder or the lesser-included offense of manslaughter—and in recommending Appellant's sentence (O.R. 287-89). Again, the punishment for first degree murder under Oklahoma law is life or life without parole so there is no mandatory life without parole sentencing option for this crime. 21 O.S.2011, § 701.9; 21 O.S.Supp.2013, § 701.10-1(A). At formal sentencing, the trial court considered not only the mitigating evidence presented at trial but also the background information for Appellant conveyed in the presentence investigation report in imposing the life without parole sentence recommended by the jury (S. Tr. 7). 22 O.S.2011, § 982(B). The trial court's decision at formal sentencing is particularly significant considering 1) defense counsel's arguments based on *Miller v. Alabama* and *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982) that Appellant's youth, continuous use of drugs and other mitigating factors warranted a straight life sentence (S. Tr. 3-6); and 2) the trial court's authority at formal sentencing to deviate from the

jury's recommended sentence under the extenuating circumstances mandated under *Miller* and *Montgomery* by imposing a straight life sentence should the mitigating evidence so warrant. 22 O.S.2011, §§ 926.1, 982; *Fite v. State*, 1993 OK CR 58, ¶ 2, 873 P.2d 293, 297-98 (Lumpkin, P.J., Specially Concurring).

The total record evidence—particularly the defense mitigation evidence—allowed both the trial court and jury to consider whether JaRay Wilson's murder was a product of the transient "immaturity, irresponsibility, impetuousness, and recklessness" of Appellant's youth, *Miller*, 132 S. Ct. at 2467 (quoting *Johnson v. Texas*, 509 U.S. 350, 368, 113 S. Ct. 2658, 2658, 125 L. Ed. 2d 290 (1993)), or whether Appellant is "the rare juvenile offender whose crime reflects irreparable corruption." *Miller*, 132 S. Ct. at 2469. The trial court did not restrict Appellant's presentation of mitigating evidence at trial and Appellant did not present additional evidence at formal sentencing. On appeal, Appellant offers no specifics concerning the evidence he claims should have been presented. Instead, he speaks abstractly, referring to the need to present expert testimony "regarding the juveniles [sic] capacity for foresight, self-discipline, and judgment; and his potential for rehabilitation." Aplt. Supp. Br. at 5. In my opinion, this is far too speculative a basis for us to remand for further sentencing proceedings—particularly where defense counsel was aware of, and specifically argued, the need to sentence Appellant to a straight life sentence in light of *Miller*. In other words, if there is evidence relating to mitigating circumstances that should have been presented at trial, Appellant has failed to tell us what it is. Hence, the jury and trial court in the present

case were able to consider the "mitigating qualities of youth" in determining Appellant's sentence, *Miller*, 132 S. Ct. at 2467 (quoting *Johnson*, 509 U.S. at 367, 113 S. Ct. 2658). For the above reasons, Appellant's judgment and sentence should be affirmed.

While under the specific circumstances presented in this case Appellant's sentence does not violate the Eighth Amendment prohibition of cruel and unusual punishment as set forth in *Miller* and *Montgomery*, I fear this case may well be the exceptional one. Whether this Court agrees with it or not, the handwriting is on the wall. Clarifying *Miller* in *Montgomery*, the United States Supreme Court clearly interprets the Eighth Amendment to prohibit life without parole *in the majority* of juvenile homicide offender cases, restricting imposition of this sentence to the rare juvenile "whose crime reflects irreparable corruption". *Miller*, 132 S. Ct. at 2469. Thus, this matter highlights the need in cases of this type for the sentencer to be presented with and consider mitigating circumstances like that discussed in *Miller* and *Montgomery*. Ultimately, legislative intervention will be necessary to address the procedural framework needed. *See* 22 O.S.2011, § 975.