

imprisonment on each of the remaining counts. The trial court sentenced Appellant accordingly and ordered the sentences to run as follows: Counts 1 and 2 to run concurrently to one another, Counts 3-5 to run concurrently to one another, Counts 6-8 to run concurrently to one another, with each group of sentences to run consecutively to each other and to Count 11. It is from this judgment and sentence that Appellant appeals.²

Appellant raises the following propositions of error in this appeal:

- I. Mr. Walker's multiple convictions and sentences for a single criminal act violates [sic] Section 11 and his constitutional protection against double jeopardy.
- II. The trial court abused its discretion by allowing the testimony of a substitute medical examiner whose testimony was based entirely upon the report of the doctor who actually performed the autopsy in violation of Mr. Walker's right to confront witnesses under the federal and state constitutions.

After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts and briefs of the parties, we have determined that reversal

² This appeal only concerns Count 1 (second degree felony murder of Florencio Jiminez) and Count 2 (robbery of Florencio Jiminez by two or more persons).

of Appellant's conviction on Count 2 is required. Further relief is not warranted under the law and the evidence.

In Proposition One, Appellant contends his convictions for both second degree felony murder in Count 1 and the underlying felony of robbery by two or more persons in Count 2, violate the provisions of both 21 O.S.2011, § 11 and the Double Jeopardy Clause. The State properly concedes that conviction of both these crimes violates Section 11 and the Double Jeopardy Clause.

We review this claim for an abuse of discretion. *Sanders v. State*, 2015 OK CR 11, ¶ 4, 358 P.3d 280, 283. "An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *Id.* We find the trial court abused its discretion in failing to dismiss Count 2.

Appellant was convicted in Count 1 of the murder of the victim while in the commission of the crime of robbery by two or more persons. In Count 2, he was convicted of the crime of robbery of the victim by two or more persons. "Under Oklahoma law, felony murder and the underlying felony merge into one offense." *Lambert v. State*,

1999 OK CR 17, ¶ 13, 984 P.2d 221, 228. Section 11 provides in pertinent part: “[b]ut an act or omission which is made punishable in different ways by different provisions of this title may be punished under any of such provisions . . . but in no case can a criminal act or omission be punished under more than one section of law . . .”

Therefore, the robbery of the victim, culminating in his murder, was one act. Because Appellant was also convicted in Count 2 of the robbery of the victim, he was punished twice for a single act in violation of Section 11. As a result, the district court abused its discretion in failing to dismiss Count 2. Appellant was convicted of both second degree felony murder and the underlying predicate felony of robbery by two or more persons; consequently, the robbery conviction must be reversed and remanded with instructions to dismiss. *Alverson v. State*, 1999 OK CR 21, ¶ 81, 983 P.2d 498, 521. Accordingly, Appellant’s conviction on Count 2 is reversed and remanded to the district court with instructions to dismiss.

In Proposition Two, Appellant asserts that his confrontation rights were violated because the medical examiner who performed the autopsy on the victim, Dr. Mary Goolsby, did not testify. Instead, Dr. Clay Nichols, Dr. Goolsby’s supervisor, testified. We review this

claim for an abuse of discretion as we did in *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 29, 241 P.3d 214, 227.

The Confrontation Clause guarantees the right of a defendant in a criminal trial to be confronted with witnesses against him. *Crawford v. Washington*, 541 U.S. 36, 42, 124 S. Ct. 1354, 1359, 158 L. Ed. 2d 177 (2004). The admission of testimonial hearsay against a defendant where the declarant does not testify and the defendant had no right of cross-examination of the declarant violates the Confrontation Clause. *Id.* at 51-52. Testimonial hearsay includes statements made during custodial interrogation, affidavits, prior testimony not subject to cross-examination by the defendant or statements that the declarant would reasonably expect to be used prosecutorially. *Id.*

In *Cuesta-Rodriguez*, 2010 OK CR 23, ¶ 35, 241 P.3d at 228, we held that a medical examiner's autopsy report is a testimonial statement and the person who prepared the report is a witness for purposes of the Confrontation Clause. We determined that a Confrontation Clause violation occurred because the medical examiner's testimony included recitations about the diagrams created and conclusions arrived at by the non-testifying medical

examiner in the autopsy report. *Id.*, 2010 OK CR 23, ¶ 39, 241 P.3d at 229.³

Having reviewed Dr. Nichols's opinion testimony, we find it was proper opinion testimony. See 12 O.S.Supp.2011, § 2703 (an expert may rely upon inadmissible evidence in forming his or her opinions, provided the evidence is of the type "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject . . ."). See also *Marshall v. State*, 2010 OK CR 8, ¶ 30, 232 P.3d 467, 475-76 (it is proper for an expert witness to testify to his or her own conclusions based upon the testing of other professionals in the field if reasonably relied upon by other experts in the field).

Dr. Nichols's testimony was based upon his participation in the victim's autopsy and upon his review of the autopsy report. Thus, his opinion that the victim died from anoxic brain damage due to blunt trauma to the neck was proper.

Moreover, Dr. Nichols's testimony did not violate Appellant's confrontation rights. In the instant case, unlike in *Cuesta-Rodriguez*,

³ In my concurrence in *Cuesta-Rodriguez*, 2010 OK CR 23, ¶ 9, 241 P.3d at 249 (Lumpkin, J., concurring), I make clear that a reviewing medical examiner can state his or her own opinions without offending the tenets of *Crawford*.

Dr. Nichols did not recite Dr. Goolsby's conclusions from the autopsy report, or any of her descriptions of injuries shown thereon. Dr. Nichols testified he reached his own opinion of the cause of the victim's death based upon his participation in the autopsy, photos and information he discussed with Dr. Goolsby. Thus, there was no Confrontation Clause violation resulting from Dr. Nichols's testimony. Proposition Two is denied.

DECISION

The Judgment and Sentence of the District Court is hereby **AFFIRMED** in all respects with the exception of Count 2. That Count is reversed and remanded to the district court with instructions to dismiss. Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2019), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE MICHELE D. MCELWEE, DISTRICT JUDGE

APPEARANCES AT TRIAL

RYAN SULLIVAN
TANYA JONES
ASST. PUBLIC DEFENDERS
320 ROBERT S. KERR
OKLAHOMA CITY, OK 73102
COUNSEL FOR DEFENDANT

APPEARANCES ON APPEAL

MARVA A. BANKS
ASST. PUBLIC DEFENDER
320 ROBERT S. KERR
OKLAHOMA CITY, OK 73102
COUNSEL FOR APPELLANT

ROBERT MCCLATCHIE
REBECCA HILL
ASST. DISTRICT ATTORNEYS
320 ROBERT S. KERR
OKLAHOMA CITY, OK 73102
COUNSEL FOR THE STATE

MIKE HUNTER
ATTORNEY GENERAL OF OKLA.
AMBER MASTERS
ASST. ATTORNEY GENERAL
313 N.E. 21ST ST.
OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE

OPINION BY: LUMPKIN, J.

LEWIS, P.J.: Concur in Results
KUEHN, V.P.J: Concur
HUDSON, J.: Concur
ROWLAND, J.: Recuse

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