IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MARK WALLACE WILLIAMS, Appellant, v. THE STATE OF OKLAHOMA, Appellee.	)	Case No. F-2012-172 Not for Publication

SUMMARY OPINION

SMITH, VICE PRESIDING JUDGE:

Mark Wallace Williams, Appellant, was tried by jury and convicted of Attempted Burglary in the First Degree, After Former Conviction of a Felony ("AFCF"), under 21 O.S.2001, §§ 1431 & 42 (Count 1); Possession of Controlled Dangerous Substance (methamphetamine), AFCF, under 63 O.S.Supp.2004, § 2-402 (Count 2); Possession of Material with Intent to Manufacture, AFCF, under 63 O.S.Supp.2005, § 2-401(G)(1) (Count 3); Unlawful Possession of Drug Paraphernalia, under 63 O.S.Supp.2004, § 2-405 (Count 4); and Resisting an Officer, under 21 O.S.2001, § 268 (Count 5), in the District Court of Rogers County, Case No. CF-2008-115. In accord with the jury verdict, the Honorable J. Dwayne Steidley, District Judge, sentenced Williams to imprisonment for 14 years on Count 1, 20 years on Count 2, Life on Count 3, 1 year in county jail on Count 4, and 1 year in county jail on Count 5, with all counts to be run concurrently.[1] Williams is before this Court on direct appeal.

[1] This Court notes that none of Williams' crimes are subject to the "85% Rule," under 21 O.S. Supp.2008, § 13.1(1). This Court also notes that the Judgment and Sentence document in this

Williams raises the following propositions of error:

I. APPELLANT'S ARREST WAS UNLAWFUL AND ANY EVIDENCE OBTAINED THEREBY SHOULD HAVE BEEN SUPPRESSED AND THIS MATTER DISMISSED.

II. IN THE ALTERNATIVE, THE WARRANTLESS SEARCH OF THE TAN VOLVO WAS UNLAWFUL AND THE EVIDENCE DERIVED THEREFROM SHOULD HAVE BEEN SUPPRESSED AND COUNTS 2, 3, AND 4 SHOULD HAVE BEEN DISMISSED.

III. THE TRIAL COURT ERRED IN ADMITTING APPELLANT'S PRE-*MIRANDA* STATEMENTS.

IV. THE EVIDENCE PRESENTED IN SUPPORT OF COUNT 1 IS INSUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION FOR ATTEMPTED BURGLARY IN THE FIRST DEGREE AND [COUNT 1] SHOULD BE REVERSED AND DISMISSED.

V. PLAIN ERROR WITHIN THE JURY INSTRUCTIONS WARRANTS REVERSAL OF APPELLANT'S CONVICTIONS.

VI. APPELLANT WAS NOT COMPETENT TO STAND TRIAL. ERRORS OCCURRING AT THE COMPETENCY JURY TRIAL ALLOWED APPELLANT TO BE CONVICTED WHILE HE WAS INCOMPETENT.

VII. COMPETENCY COUNSEL AND/OR PETITIONER WAS INEFFECTIVE FOR FAILING TO INVESTIGATE APPELLANT'S MENTAL HEALTH HISTORY. IN THE ALTERNATIVE, THE TRIAL COURT ERRED IN CONSTRUCTIVELY EXCLUDING EVIDENCE OF APPELLANT'S INCOMPETENCY.

VIII. IN LIGHT OF APPELLANT'S INCOMPETENCY, APPELLANT WAS NOT CAPABLE OF KNOWINGLY AND INTELLIGENTLY WAIVING HIS RIGHT TO COUNSEL.

In Proposition I, Williams argues that his arrest was illegal and, consequently, that all the evidence discovered as a result of this arrest should have been suppressed. The legality of Williams' warrantless arrest by Officer Steve Cox depends upon whether the facts known to Cox at the time were sufficient to permit a prudent person to conclude that there was probable cause to believe that Williams had committed or was committing a criminal offense. *See, e.g., Torres v. State*, 1998 OK CR 40, ¶ 22, 962 P.2d 3, 12-13. Following a December 19, 2008 hearing on his motion to suppress and dismiss, the trial court found that Williams' arrest was lawful and supported by probable cause.

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case incorrectly states that Williams pled guilty to all five counts, when he actually was found guilty on all counts at a jury trial.

This Court agrees. Cox had been informed by police dispatch that there was a "burglary in progress" at 510 East 5th Street in Claremore and that the perpetrator was sitting in a tan vehicle in the driveway of this address. When Cox arrived at this address, Williams was sitting in the driver's seat of his tan Volvo in the driveway. And when Cox approached and asked Williams, at gunpoint, what he was doing there, Williams responded, "I don't know." This Court finds that the trial court reasonably concluded that Cox had adequate probable cause to arrest Williams for either burglary or attempted burglary at this point. Hence the arrest was legal, and the evidence obtained thereafter was not the fruit of an illegal arrest. Proposition I is rejected accordingly.

In Proposition II, Williams challenges the warrantless searches of his car, both the search of the passenger area and the search of the trunk area (and the black bag within the trunk). In a January 2009 Court Order, the trial court found that the search of the passenger area of Williams' car was incidental to his lawful arrest and that the extension of this search to the trunk of the car was warranted by the facts of this case. The State acknowledges that the law governing the search of vehicles incident to the arrest of a vehicle occupant was changed and narrowed by the Supreme Court's April 2009 decision in *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), which was decided after the search of Williams' car and the court's ruling in this case.

Gant held as follows: "Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle

contains evidence of the offense of arrest." *Id.* at 351, 129 S.Ct. at 1723. Since Williams was sitting handcuffed in Cox's police vehicle at the time his car was searched, Williams' arrest, standing *alone*, does not justify any search of his vehicle, which was no longer within Williams' "reaching distance." *See Baxter v.* State, 2010 OK CR 20, ¶ 4, 238 P.3d 934, 935-36 (applying *Gant* to find that warrantless search of defendant's car was not justified by arrest of defendant, who was sitting handcuffed in police patrol car at time of search). On the other hand, Williams' arrest for the offense of burglary/attempted burglary did justify a search of the passenger compartment of his vehicle for evidence of this crime. In fact, the search of Williams' car did reveal evidence potentially related to such a crime, namely, a socket wrench or "ratchet" with the top wrapped in masking tape and a set of walkie-talkies. This evidence, along with the channel locks found in Williams' back pocket and the work gloves he was wearing at the time of his arrest, were reasonably interpreted as potential evidence of the crime of burglary or attempted burglary.

The search of the trunk of Williams' car, however, was not justified by his arrest for such a crime. Nevertheless, this Court finds that the search of the car's trunk and its contents—and indeed of the entirety of Williams' car—was justified by an entirely separate and distinct rationale, *i.e.*, that of inevitable discovery through an inventory search. Williams' car was sitting in a private residential driveway, where it was not welcome, when he was arrested. Hence Williams' car needed to be and was towed away. Consequently, police officers were entitled to conduct an inventory search of the entire contents of Williams'

car; and it was inevitable that this inventory search, whether conducted at the scene or later, would eventually reveal all the materials related to the use and manufacture of methamphetamine that were found in the trunk of Williams' car. *See Nix v. Williams*, 467 U.S. 431, 448, 104 S.Ct. 2501, 2511, 81 L.Ed.2d 377 (1984) ("[When] the evidence in question would inevitably have been discovered without reference to the police error or misconduct, there is no nexus sufficient to provide a taint and the evidence is admissible."). Consequently, this Court finds that the trial court properly denied Williams' motion to suppress. Even though the trial court's rationale for denying this motion is not correct under current law, the *evidence* discovered during these searches was properly admitted at Williams' trial, *i.e.*, it should not have been suppressed, even under current law. Proposition II is rejected accordingly.

In Proposition III, Williams challenges the trial court's admission of his "I don't know" response to Officer Cox's initial inquiry asking what Williams was doing there (parked in the driveway of Smith's home). Although Williams filed a pre-trial motion to suppress his "I don't know" response, the trial court deferred ruling on this issue until trial—and then Williams failed to object when this evidence was admitted at trial. Hence Williams has waived this claim; and we review only for plain error. *See, e.g., Cheatham v. State*, 1995 OK CR 32, ¶ 48, 900 P.2d 414, 427.

This Court concludes that Williams has not established plain error regarding the admission of the "I don't know" statement. Furthermore, this Court finds that any possible error in this regard was harmless beyond a

reasonable doubt. At trial, the jury was allowed to view the videotape of Williams in Cox's police car being *Mirandized* and then making numerous statements. Within this videotape Williams makes various other statements—both directly to Cox and when he is left alone—indicating that Williams is very confused and does not know why he came to Smith's home that day. Hence the "incriminating value" of this statement was rather limited, and the statement was consistent with other trial evidence. Proposition III is rejected accordingly.

In Proposition IV, Williams argues that the evidence presented at trial was insufficient to support his Count 1 conviction for attempted first-degree burglary. This Court evaluates such sufficiency claims to determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (emphasis in original); *see also Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04 (quoting *Jackson*).

Although the evidence was far from overwhelming that Williams was attempting to burglarize Smith's residence, this Court finds that the evidence was sufficient under the *Jackson/Spuehler* standard. Williams was charged and convicted of *attempted* first-degree burglary. Smith's testimony that Williams came through one exterior door and tried to open the locked door into the laundry room, without ever knocking—and that Williams kept trying to open this door and became more "forceful" after discovering that it was locked—was sufficient to support the jury's finding that Williams *attempted* to "break" into

Smith's residence, even though he did not successfully break in and did not in any way harm or threaten Smith when she briefly opened the door herself. The evidence was also sufficient to allow the jury to infer that Williams had the intent to commit a crime inside Smith's apartment, even though the evidence in this regard was not overwhelming. Williams had no legitimate reason to be at Smith's residence, tried to enter without permission or invitation, was wearing leather gloves, had a set of channel locks in his back pocket and a wrapped socket wrench in his car (both of which could be "burglar's tools"), and was never able to provide any coherent reason for why he was at Smith's residence that day.

Although the jury could have chosen to believe Williams' testimony that he believed/hoped he had work to do there and that he never intended to commit any crime—or even that he was simply confused and disoriented and didn't know what he was doing at the time—viewing the evidence in the light most favorable to the State, as we must, the evidence presented was sufficient to support a rational jury finding that Williams committed the crime of attempted first-degree burglary. Proposition IV is rejected accordingly.

In Proposition V, Williams argues that the trial court committed plain error when it instructed his jury that Counts 1, 2, and 3 were charged as being after *two* prior felony convictions, which was incorrect and contrary to the Information and Amended Information filed in the case. The parties agree that because Williams did not object to the now-challenged instructions at trial, we review only for plain error. *See Barnard v.* State, 2012 OK CR 15, ¶ 13, 290 P.3d 759, 764. The State concedes on appeal that because Williams' two prior convictions were

"transactional" and from the same case, Williams' jury should have been instructed that he had one prior felony, rather than two, and that the sentencing ranges for his crimes should have been based upon a single prior conviction.[2]

Williams argues that the errors in three of his jury instructions, regarding the jury's verdict on each of Counts 1, 2, and 3, warrant a new trial. The three instructions at issue all specifically state that Williams "has admitted that he has 2 previous convictions," but that the jury "may not consider these previous convictions as proof of guilt in the case before you" and that the prior convictions can only be considered "for the purpose of determining the punishment if you find that the defendant is guilty" on those counts. This Court finds that Williams has totally failed to establish that this instructional error had any impact regarding his convictions. Hence Williams is not entitled to a new trial.

The same three instructions also state the sentencing ranges for Counts 1, 2, and 3, noting that the range provided in each is for someone who committed the charged crime "after 2 previous convictions." The State concedes that the jury should not have been told that Williams had two prior convictions, nor should the jury have been told that his sentencing ranges were based upon two prior convictions. Nevertheless, the State maintains that the sentencing ranges cited with these instructions were the correct ranges on Counts 1, 2, and 3 for someone who had only one prior conviction. Hence the State maintains that the

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[2] The record in this case is clear that in 2005 in Tulsa County, in Case No. CF-2004-4324, Williams was convicted, after a plea of *nolo contendere*, of one count of possession of controlled drug with intent to distribute and one count of possession of a firearm while in commission of a felony, with an offense date for both of 9/30/2004. The State cited these two convictions in the second-page "Supplemental Information for After Former Conviction of Felony" filed with both Informations in this case, charging Williams with previously being convicted of "a felony."

clear error within Williams' jury instructions did not prejudice or harm Williams. *See Barnard*, 2012 OK CR 15, ¶¶ 14-17, 290 P.3d at 764-65 (applying harmless error doctrine to determine whether obvious or "plain" error within a jury instruction, which was not challenged at trial, affected the defendant's substantial rights, such that he is entitled to relief under "plain error" doctrine). We address each instruction/count individually.

Regarding Count 1, the trial court instructed Williams' jury that the sentencing range for attempted first-degree burglary (after two prior felony convictions) was "imprisonment in the State penitentiary for a term of 14 years to Life." Williams' jury sentenced him to imprisonment for 14 years on this count, *i.e.*, the minimum under the cited range. The correct sentencing range for attempted first-degree burglary, with one prior conviction, was 10 years to Life. *See* 21 O.S.2001, §§ 1431 & 42, 21 O.S.Supp.2002, § 51.1(A)(1), and 57 O.S.Supp.2007, § 571(2).[3] Hence Williams' jury was incorrectly instructed in this regard, and this error was "plain" in the sense of being clear. In addition, this Court finds that this instructional error affected the defendant's substantial rights (and cannot be found to be "harmless"), since it misstated the minimum sentence for Count 1—and Williams' jury then chose to give him the minimum sentence within the (incorrect) range provided. Thus Williams has established non-harmless plain error regarding this instruction.

[3] It should be noted that when the trial court was warning Williams what he would be facing if he went *pro se*, the trial court stated that the punishment for attempted first-degree burglary "with one after former," would be "10 to life," and the prosecutor agreed that this was correct.

Regarding Count 2, the trial court instructed Williams' jury that the sentencing range for possession of methamphetamine (after two prior felony convictions) was imprisonment for "4 years to 20 years." Williams' jury then sentenced him to imprisonment for 20 years, *i.e.*, the maximum under the cited range. Under 63 O.S.Supp.2004, § 2-402(B)(1), the correct sentencing range for this offense, for both second *and* subsequent violations, was imprisonment for 4 to 20 years. Hence the sentencing range cited on Count 2 was actually correct. Consequently, despite the clear errors within the jury instruction regarding Count 2, this Court finds that Williams has *not* shown that he was prejudiced or that his substantial rights were impacted by these errors or by the jury's decision to sentence him to 20 years on Count 2 (*i.e.*, the maximum). Hence Williams is not entitled to relief regarding his sentence on Count 2.

Regarding Count 3, the trial court instructed Williams' jury that the sentencing range for "possession of material with intent to manufacture" (after two prior felony convictions) was imprisonment for "14 years to Life." Williams' jury sentenced him to imprisonment for Life on this count, *i.e.*, the maximum under the cited range. The correct sentencing range for this offense, with one prior felony conviction, was 14 years to life. Hence the range given Williams' jury on this count was likewise correct. Once again, despite the clear errors within the jury instruction regarding Count 3, this Court finds that Williams has *not* shown that he was prejudiced or that his substantial rights were impacted by these errors or by the jury's decision to sentence him to the maximum sentence

within this range, *i.e.* to Life. Hence Williams is not entitled to relief regarding his sentence on Count 3.

This Court finds that although the trial court committed "plain" error within the jury instructions regarding Counts 1, 2, and 3, these instructional errors were harmless regarding Counts 2 and 3. On the other hand, Williams has established non-harmless plain error regarding Count 1. This Court further finds that because Williams' jury chose to sentence him to the *minimum* sentence within the (incorrectly) cited range provided, Williams' sentence on Count 1 should likewise be modified to the minimum sentence within the correct range. It is therefore modified to imprisonment for 10 years.

In Proposition VI, Williams argues that he was not competent to stand trial and that errors committed during his competency jury trial allowed him to be convicted while he was incompetent. Whether a defendant is "competent" or not depends upon "whether the accused has sufficient ability to consult with his lawyer and has a rational as well as actual understanding of the proceedings against him." *Ryder v. State*, 2004 OK CR 2, ¶ 54, 83 P.3d 856, 869 (citing *Bryson v. State*, 1994 OK CR 32, ¶ 11, 876 P.2d 240, 249). The standard of review for evaluating a finding of competency at a competency trial is whether there was any evidence presented that reasonably supports the competency finding made by the trier of fact. *Id.*

Williams' competency was evaluated three separate times before his trial and a fourth time after his trial. In the first competency evaluation, he was found competent. In the second competency evaluation, the same doctor (Dr.

Peter Rausch) found Williams to be incompetent, because he was not able to rationally assist his counsel.[4] At a subsequent jury trial on Williams' competency, which Williams requested, Dr. Rausch testified, but so did Williams. Williams' testimony was logical and coherent, and the jury found that Williams was *not* incompetent. A third pre-trial competency evaluation by Dr. Rausch likewise found that Williams was competent; and Williams (by then acting *pro se*) stipulated to this competency finding. In addition, a fourth post-trial (but pre-sentencing) evaluation likewise found Williams to be competent.

This Court finds that although there is substantial evidence in the record that Williams suffers from some level of mental illness, the severity of which varies greatly over time, his competency has been repeatedly and thoroughly evaluated, and a jury reasonably found that he was competent. Furthermore, the trial court remained constantly vigilant at Williams' criminal trial to ensure that he was competent and remained competent, both to be tried and to represent himself.[5] This Court finds that there was more than adequate evidence in the record to support the finding of the jury at Williams' competency trial that Williams was competent to be tried. This Court further finds that Williams has

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[4] This report provided very specific examples of how Williams' mental state had declined, the paranoid and delusional thinking that he was then reporting, and how this disordered thinking could significantly impair Williams' ability to rationally consult with and assist his counsel.

[5] On the morning of the third and final day of Williams' trial, after his standby counsel again expressed her concerns (in chambers) about Williams' competency, the trial court stated:

> I think you have made your point. I understand what you are saying. Again, for whatever purpose it may serve, he had a jury trial. When he had his hearing on him wanting to represent himself, he appeared to be more than competent. And at this point in time, I do not have a medical basis upon which to find that he is not competent. And the mere fact that he is acting, true enough, in some bizarre ways, which the Court will continue to monitor—and the Court has talked about with him—until I reach a decision that I think his conduct in the courtroom rises to the—the threshold, if you will, of being incompetent, I am gonna continue to let him represent himself as long as that's what he wants to do.

not established that the trial court abused its discretion by prohibiting Williams' father from testifying at this competency trial (a prohibition requested by Williams), and also that Williams cannot establish that the testimony of his father would have made any difference in the jury's competency determination. *See Washington v. State*, 1999 OK CR 22, ¶ 21, 989 P.2d 960, 970. Finally, this Court finds that Williams has failed to establish that he was, in fact, incompetent at the time of his criminal trial. Proposition VI is rejected accordingly.

In Proposition VII, Williams argues that his "competency counsel" was ineffective for failing to investigate his mental health history. In order to establish ineffective assistance, Williams must demonstrate that the performance of his counsel was deficient and unreasonable and that he was prejudiced thereby. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Williams v. Taylor*, 529 U.S. 362, 390-91, 120 S.Ct. 1495, 1511-12, 146 L.Ed.2d 389 (2000). And in order to establish prejudice, Williams must demonstrate that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

Williams fails to show either inadequate performance by his competency counsel or prejudice regarding the alleged failure of his counsel to "investigate" his mental health history.[6] This Court notes that Williams' second competency evaluation (which found him incompetent) was completed in September of 2009,

[6] It is not even entirely clear who Williams is referring to as his "competency counsel," since Williams was seeking to be found *competent*, not incompetent, at his competency trial, and his counsel was representing him with this same goal. Meanwhile, attorney Janice Steidley, who was appointed as Williams' guardian *ad litem*, was seeking to establish his incompetence.

over four months before Williams' competency trial on February 2, 2010, and that Dr. Rausch testified at Williams' competency jury trial consistently with his written evaluation. Dr. Rausch focused upon Williams' delusions and paranoia and how these conditions (reported and observed during Rausch's September 2009 interview with Williams) could prevent Williams from being able to rationally communicate with and assist his counsel.[7]

Williams' Proposition VII claim is especially poorly developed regarding how the now-cited "mental health history" evidence would likely have changed the result at Williams' competency trial. The history of this case clearly establishes that Williams' mental state varies greatly over time; yet the focus of any competency determination is always the defendant's competency at a particular time—usually, the present. Through the very diligent efforts of his guardian *ad litem* attorney, who vigorously maintained that Williams was *incompetent* and in need of treatment, Williams' competency jury was provided with substantial evidence suggesting that he was both mentally ill and incompetent. On the other hand, the jury was also able to directly observe Williams and listen to his testimony. And Williams testified, rather reasonably, that he had wanted an MRI due to the conflicting diagnoses he'd received from Dr. Rausch, denied believing he was a "guinea pig" for any government agencies, maintained that he was competent, and attributed the "goofy" things he had said and had written in past letters to the court to the fact that he was "awful mad" about his charges.

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[7] Williams apparently did reveal some of his mental health history to Dr. Raush, since Dr. Rausch's report notes that Williams was evaluated on two prior occasions in the past, but that these evaluations did not lead to Williams receiving treatment.

Although more information apparently came out later (particularly after Williams' criminal trial was over), regarding past behavior strongly suggesting that Williams has been suffering from some kind of mental illness for quite a while, Williams totally fails to establish a "reasonable probability" that such information would have made a difference to the decision of his competency jury. Williams' ineffective assistance claim in this regard is rejected entirely.

This Court notes that on August 2, 2012, Williams tendered for filing in this Court a ***Motion to Supplement the Appellate Record and Request for Evidentiary Hearing Pursuant to Rule 3.11(A) and (B)(3)(b)—Ineffective Assistance of Trial Counsel***. This motion is hereby **ACCEPTED FOR FILING**. Within this motion Williams argues that under this Court's Rule 3.11(A) and Rule 3.11(B)(3)(b), this Court should supplement the record in this case with the materials attached to the motion and consider these materials in connection with his Proposition VII claim on appeal. Williams attaches two documents to this motion: (1) a Competency Evaluation by Dr. A. Eugene Reynolds, dated July 3, 2012, finding that Williams is incompetent, and (2) an affidavit from Williams' ex-wife, Sally Williams, dated July 26, 2012.

Under Rule 3.11(A), this Court can "within its discretion, direct a supplementation of the record, when necessary, for a determination of any issue; or, when necessary, may direct the trial court to conduct an evidentiary hearing on the issue." *See* Rule 3.11(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011). Under Rule 3.11(B)(3)(b), this Court can allow supplementation and/or order that the appellant be given an evidentiary hearing

only if his application and proffered affidavits "contain sufficient information to show this Court by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence." *See* Rule 3.11(B)(3)(b)(i), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011).

This Court finds that Williams has not shown that this Court should allow supplementation of the record or that Williams should be granted an evidentiary hearing under either Rule 3.11(A) or Rule 3.11(B)(3)(b). This Court finds that no such supplementation or evidentiary hearing is "necessary" for the determination of any issue in Williams' appeal, under Rule 3.11(A). This Court further finds that Williams' proffered documents totally fail to establish "a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence." The July 2012 competency evaluation, which is based upon clinical interviews with Williams in April of 2012, in the context of *this* case, could not possibly establish that Williams' counsel (or his appointed guardian *ad litem*) was ineffective at the time of Williams' competency trial in February of 2010.

The current case is *not* one where the issue of Williams' competency was simply ignored or never questioned or evaluated. His competency was repeatedly evaluated and tested, both by a mental health expert (four times, only one of which resulted in a finding of incompetence) and at a full jury trial (which effectively rejected the single finding by the mental health expert that Williams was incompetent). The proffered competency report strongly suggests that Williams, who is now incarcerated, may have become incompetent by the spring

of 2012. Although this is truly sad and very unfortunate, in the context of this particular case, this circumstance falls far short of establishing a strong possibility that either of Williams' attorneys was ineffective at the time of his competency trial—or that Williams was, in fact, incompetent at the time of his competency trial or his jury trial. This Court further finds that the material contained within the affidavit from Williams' ex-wife likewise fails to suggest that either of Williams' attorneys were constitutionally ineffective or that Williams was incompetent at the time of his competency trial or his criminal trial. Hence Williams' *Motion to Supplement the Appellate Record and Request for an Evidentiary Hearing Pursuant to Rule 3.11(A) and Rule 3.11(B)(3)(b)* should be and hereby is **DENIED**.

Within Proposition VII of his brief, Williams purports to make a secondary argument that somehow the trial court "constructively excluded" evidence of his incompetency. Williams totally fails to clearly articulate this argument, let alone back it up with legal and factual support. Hence this argument has been waived. We further note that our review of the record in this case finds no plain error in this regard. Hence Proposition VII is rejected entirely.

In Proposition VIII, Williams asserts that because he was incompetent to be tried, he was likewise unable to make a knowing and intelligent waiver of his constitutional right to the assistance of counsel at trial. In order to validly waive the assistance of counsel, a defendant must make a "knowing and intelligent" decision, which requires being informed of the benefits of counsel and the dangers and disadvantages of self-representation. *See Faretta v. California*, 422

U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975). In *Mathis v. State*, 2012 OK CR 1, 271 P.3d 67, this Court recently noted that "in order to validly waive the assistance of counsel and proceed *pro se*, a defendant must be competent to make this decision and must be clear and unequivocal in his desire to proceed *pro se*." *Id.* at ¶ 7, 271 P.3d at 72 (citing *Fitzgerald v. State*, 1998 OK CR 68, ¶ 6, 972 P.2d 1157, 1162).

Williams acknowledges in his brief that the competency standard for being tried is the same as the competency standard for self-representation. Williams also acknowledges that after he was found competent by a jury, the trial court ordered a third competency evaluation, before allowing him to elect to represent himself at trial. Williams was found competent in this third evaluation and stipulated to the accuracy of this competency finding shortly before his trial began. This Court finds, once again, that the trial court was very attuned to ensuring that Williams was competent at the time of his trial and that he was competent to represent himself throughout this trial. The record in this case supports the trial court's conclusion that Williams was indeed competent to be tried and to represent himself.

As we noted in *Mathis*, "an 'intelligent' decision to waive counsel and proceed *pro se* is not the same as a 'smart' or well-thought decision." *Id.* at ¶ 8, 271 P.3d at 72. Williams was thoroughly warned of the dangers of self-representation, encouraged to allow an attorney to represent (or at least assist) him, and repeatedly given the opportunity to change his mind, even after his trial commenced. This Court further notes that, like the defendant in *Mathis*,

Williams chose to proceed *pro se* with the knowledge that he would be appointed standby counsel to assist him; and he sought this assistance repeatedly during his trial. Hence Williams did not totally give up "the assistance of counsel" when he chose to represent himself. *See id.* at ¶ 17, 271 P.3d at 74-75. And Williams' desire to represent himself was stated clearly and unequivocally before and throughout his trial. This Court finds that the record supports the trial court's decision to allow Williams to represent himself and that Williams totally fails to establish that his waiver of the assistance of counsel at trial was invalid. Proposition VIII is rejected accordingly.

Decision

Williams' **CONVICTIONS ON COUNTS 1, 2, 3, 4, and 5** are hereby **AFFIRMED**, and his **SENTENCES ON COUNTS 2, 3, 4, and 5** are likewise **AFFIRMED**. Williams' **SENTENCE ON COUNT 1**, however, must be and hereby is **MODIFIED TO IMPRISONMENT FOR 10 YEARS**. In addition, Williams' Motion to Supplement the Appellate Record and Request for an Evidentiary Hearing Pursuant to Rule 3.11(A) and Rule 3.11(B)(3)(b) is **DENIED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF ROGERS COUNTY
THE HONORABLE J. DWAYNE STEIDLEY, DISTRICT JUDGE

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LUMPKIN, J.: CONCUR IN RESULT
C. JOHNSON, J.: CONCUR
A. JOHNSON, J.: CONCUR