

to one another. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in this appeal:

- I. District Attorney Investigator Vaught's video-taped interview with Mr. Huff was obtained in violation of Mr. Huff's Fifth Amendment right to counsel and should not have been admitted at trial.
- II. Numerous instances of the introduction of inadmissible hearsay violated Mr. Huff's constitutional rights to a fair trial, due process of law and confrontation.
- III. The admission of Mr. Huff's un-redacted statements to District Attorney Investigator Vaught containing inadmissible other crimes/bad acts evidence violated Mr. Huff's constitutional rights to a fair trial and due process of law.
- IV. Mr. Huff was denied his right to a fair trial because the trial court failed to provide his jury the mandatory instruction on other crimes.
- V. The State's evidence was insufficient to prove the essential elements of the crimes charged beyond a reasonable doubt.
- VI. Because the trial court mis-instructed the jury on the offense of Count 5, Mr. Huff's conviction for child sexual abuse must be reversed.
- VII. Prosecutorial misconduct deprived Mr. Huff of his rights to due process and a fair trial under the Fifth, Sixth, and

Fourteenth Amendments.

- VIII. Mr. Huff was deprived of the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution.
- IX. Under all of the facts and circumstances of this case, Mr. Huff's sentences are excessive.
- X. The cumulative effect of all the errors addressed above deprived Mr. Huff of a fair trial.

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 under the law and the evidence no relief is warranted.

In Proposition I, Appellant argues his Fifth Amendment right against self-incrimination was violated after District Attorney Investigator Vaught failed to heed his request for an attorney and continued to question him. Appellant did not file a motion to suppress his statements to Vaught, nor did he object at trial prior to the admission of the video of this interview. Accordingly, we review this claim for plain error. *Van White v. State*, 1999 OK CR 10, ¶ 44, 990 P.2d 253, 267. We use the plain error test found in *Simpson v. State*, 1994 OK CR 40, ¶¶ 3, 11, 23 30, 876 P.2d 690, 694-95, 698. Under that test, we determine whether Appellant has shown an actual error,

which is plain or obvious, and which affects his or her substantial rights. 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.*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701. See also *Jackson v. State*, 2016 OK CR 5, ¶ 4, 371 P.3d 1120, 1121; *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395; *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

In *Miranda v. Arizona*, 384 U.S. 436, 478-79, 86 S. Ct. 1602, 1630, 16 L. Ed. 2d 694 (1966), the Supreme Court held that prior to questioning by police officials, a defendant, who is in custody or otherwise deprived of his freedom of action in any significant way, must be advised of his constitutional rights, specifically, his right to remain silent and his right to counsel. “[A]n accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.” *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1885, 68 L. Ed. 2d 378 (1981). The defendant’s request for counsel must

be unambiguous so that a reasonable police officer would understand the request to be for an attorney. *Davis v. United States*, 512 U.S. 452, 459, 114 S. Ct. 2350, 2355, 129 L. Ed. 2d 362 (1994). “If the suspect’s statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.” *Id.*, 512 U.S. at 461-62, 114 S. Ct. at 2356.

After Appellant’s arrest, Vaught interviewed him. Prior to commencement of the interview, Vaught read Appellant his *Miranda* rights. Appellant stated, “I don’t know how to get a lawyer” and asked, “[h]ow do I go about getting a lawyer?” Vaught asked Appellant if he still wanted to speak with him after he made his ambiguous statements about an attorney. Thereafter, Appellant executed a waiver of his *Miranda* rights and continued speaking with the investigator.

Appellant did not request an attorney, he simply asked how he could get one for him and his wife, apparently to represent them at trial. His statements were not an unambiguous request for legal representation during the interview as required by *Davis*, but were at best, a request for information about hiring an attorney in the future. *Cf. LaFevers v. State*, 1995 OK CR 26, ¶¶ 4-9, 897 P.2d 292, 298-300

(no *Miranda* violation where the appellant initially waived his *Miranda* rights, but when asked by police to give body samples, he told them he would after he spoke with a lawyer; when police asked him if he wanted to end the interview, the appellant declined and affirmatively agreed to continue to talk with police). We find Appellant did not unambiguously request an attorney and he waived his right to counsel. Consequently, no error and therefore, no plain error occurred. *Tryon v. State*, 2018 OK CR 20, ¶ 35, 423 P.3d 617, 632. Proposition I is denied.

In his second proposition, Appellant claims the admission of hearsay evidence deprived him of a fair trial and violated his confrontation right. He specifically references evidence regarding the lack of running water at the Huffs' trailer home, Huff's statements, K.H.'s statements presented at sentencing, statements of Deputy Stover and Dennis Mull and a statement made by the prosecuting attorney regarding a conversation he had with K.H.

We review this claim for plain error as Appellant failed to object at trial to any of the instances about which he now complains. *Tryon*, 2018 OK CR 20, ¶ 38, 423 P.3d at 632. As set forth in Proposition I,

we utilize the test for plain error found in *Simpson*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701.

Pursuant to 12 O.S.2011, § 2801(A), hearsay is defined as a statement, made by the declarant, other than one made by the declarant while testifying at the trial, offered in evidence to prove the truth of the matter asserted.

Appellant references several witnesses' testimony that they were told there was no running water in the trailer. Stover, Vaught and Deputy Tice were told there was no water in the trailer for longer than a week. J. Huff, Appellant's father who lived adjacent to the Huff's trailer, stated the trailer had been without running water for "three or four weeks" at the time of Appellant's arrest.

While the testimony of the witnesses about what another person told them regarding the status of running water in the Huff trailer was hearsay by definition, its admission did not constitute plain error. Nothing about this testimony affected Appellant's substantial rights. The complained of testimony reflected that of J. Huff who testified about the trailer's lack of running water based upon his own personal knowledge. Thus, the hearsay statements were cumulative to his testimony.

Furthermore, Appellant admitted the trailer had no running water in his statement to Vaught. Appellant's characterization of evidence regarding the lack of running water to the home as "critical" to the child neglect charges is ridiculous. The pictures of the Huff trailer show that even if there was running water in the trailer, it certainly was not used to clean it. Furthermore, authorities who saw the Huff children testified they were dirty and smelly. Therefore, any running water also was not used to clean the children. Finally, the condition of the trailer was such that it could not have occurred in a few days. We find that while the hearsay evidence was admitted in error, there was no plain error in the admission of the evidence because it had no effect on Appellant's substantial rights. *Cf. Martinez v. State*, 2016 OK CR 3, ¶ 54, 371 P.3d 1100, 1114 (where hearsay evidence was cumulative to proper testimony about an undisputed issue, it could cause no prejudice; thus, its admission was harmless).

Appellant complains about Stover's testimony regarding Huff's statements to him when he interviewed her. Stover testified Huff admitted she knew about the sexual messages between Appellant and M.H., but did not tell him who told her or when she learned of

them. She also told Stover she checked Appellant's phone after she learned of the allegations against Appellant, but did not see the text referred to and she told Stover she did not believe the allegations against Appellant. However, the complained of evidence was offered against his co-defendant Huff. Therefore, it was not hearsay pursuant to 12 O.S.2011, § 2801(B)(2)(A). Furthermore, Appellant admitted he deleted the messages he sent to M.H. Hence, there was nothing new in Stover's testimony that Huff told him she did not see the messages on Appellant's phone. The jury was instructed that it could only consider this evidence against Huff. Jurors are presumed to follow the instructions given to them. *Jones v. State*, 1988 OK CR 267, ¶ 10, 764 P.2d 914, 917. There was no error in the admission of this testimony and therefore, no plain error. *Mack v. State*, 2018 OK CR 30, ¶ 6, 428 P.3d 326, 329.

Appellant next complains about testimony from Dennis Mull, Huff's father. Mull's testimony was part of Huff's case-in-chief. In summary, Mull testified Huff was not in total agreement with Appellant regarding the nudist lifestyle and Huff was upset about M.H. using Huff's vibrator. Mull also testified that he spoke with Appellant regarding M.H. and the vibrator and Appellant told Mull he

was going to speak with Huff about it. Mull further testified that Appellant did not tell Mull he was concerned about M.H.'s use of the vibrator. Again, Huff's statements to Mull were not hearsay pursuant to Section 2801(B)(2)(A) and were offered on her behalf. Similarly, Appellant's statements to Mull were not hearsay under Section 2801(B)(2)(A). Moreover, Mull's testimony did not indicate that Appellant was unconcerned about M.H.'s use of the vibrator, only that he did not express these feelings to Mull. Similarly, Mull's testimony did not convey that Appellant instituted nudism in the home or was the sole reason M.H. had the vibrator. The jury was properly instructed to give separate consideration to each defendant and to each charge. Appellant fails to show any error in this testimony. As there was no error, there is no plain error. *Mack*, 2018 OK CR 30, ¶ 6, 428 P.3d at 329.

Appellant contends the prosecutor made an argument at sentencing repeating hearsay statements K.H. made to him prior to the sentencing hearing, *i.e.*, that the child was happy to have clean clothes and go to school. The evidence code, other than the provisions applicable to a claim of privilege, does not apply to sentencing proceedings. 12 O.S.2011, § 2103(B)(2). Therefore, this claim fails.

There was no error and thus, no plain error in the prosecutor's sentencing argument. *Mack*, 2018 OK CR 30, ¶ 6, 428 P.3d at 329.

Appellant finally argues Stover's and Mull's testimony about their conversations with Huff, presented at trial, and the prosecutor's reference during sentencing to a conversation he had with K.H., violated his rights under the Confrontation Clause. 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.*, 541 U.S. at 51-52, 124 S. Ct. at 1364-65. Testimonial hearsay includes statements made during custodial interrogation, affidavits, prior testimony not subject to cross examination by the defendant or statements which the declarant would reasonably expect to be used prosecutorially. *Id.*

Concerning the use of K.H.'s statements to the prosecutor during sentencing, the Confrontation Clause is inapplicable to sentencing proceedings in non-capital cases. *Williams v. Oklahoma*,

358 U.S. 576, 584, 79 S. Ct. 421, 426, 3 L. Ed. 2d 516 (1959). Accordingly, no error occurred from the admission of the subject statements.

With regard to Mull's testimony about his conversations with Huff, presented at trial, the statements related by Mull were clearly non-testimonial. They were made during a father/daughter conversation where there could be no reasonable belief that they would be used at some later trial. *Miller v. State*, 2004 OK CR 29, ¶ 26, 98 P.3d 738, 744. Thus, there was no Confrontation Clause violation based upon this testimony.

As to Stover's testimony about Huff's statements to him, presented at trial, the statements were testimonial as they were made during a police interview. However, their admission did not offend the Confrontation Clause. In *Bruton v. United States*, 391 U.S. 123, 126, 88 S. Ct. 1620, 1622, 20 L. Ed. 2d 476 (1968), the Supreme Court held that a defendant's confrontation rights are violated when his non-testifying co-defendant's confession naming the defendant as a participant in the crime is admitted in their joint trial. In *Plantz v. State*, 1994 OK CR 33, ¶ 37, 876 P.2d 268, 279-80, applying *Bruton*, this Court found no confrontation violation where a non-testifying co-

defendant's statements were admitted.

The statements neither directly inculpated Appellant nor exculpated codefendant Bryson regarding the crimes charged. Further, the statements do not relate to the crime itself. The Confrontation Clause guarantees the accused the right to be confronted with the witnesses against her. These statements did not make codefendant Bryson a witness against Appellant under the *Bruton* analysis. Therefore, Appellant was not denied her constitutional right of confrontation by the admission of Detective Gibson's testimony.

Id. In the present case, Huff's statements to Stover, while they did relate to the charged crime of child sexual abuse, did not inculpate Appellant, nor exculpate Huff. They did not transform her into a witness against him as contemplated by *Bruton*. The jury was properly instructed regarding its use of this evidence. There was no Confrontation Clause violation based upon these statements. As there was no error, there was no plain error. *Tryon*, 2018 OK CR 20, ¶ 42, 423 P.3d at 633. Proposition II is denied denied.

In Proposition III, Appellant maintains his right to a fair trial and due process was violated by the admission of the un-redacted video of his statement to Vaught. He argues he spoke about two prior arrests he had in Missouri, his hospitalization based upon a

psychological hold after the first arrest and an accusation against him of domestic violence. On the video, Appellant also mentioned an incident with Missouri public schools that involved attorneys and the State. Appellant characterizes this information as inadmissible other crimes/bad acts evidence.

Appellant failed to object to the admission of the video on this basis. Therefore, we review for plain error only. *Kirkwood v. State*, 2018 OK CR 9, ¶ 6, 421 P.3d 314, 317. As set forth in Proposition I, we utilize the test for plain error found in *Simpson*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701.

Generally, evidence of a defendant's prior bad acts or other crimes is inadmissible to show that he or she acted in conformity therewith on a particular occasion. This rule is codified at 12 O.S.2001, § 2404(B) and provides pertinently:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

“An act that is not a violation of the criminal law is nonetheless governed by § 2404(B) where it carries a stigma that could unduly prejudice an accused in the eyes of the jury.” *Eizember v. State*, 2007 OK CR 29, ¶ 75, 164 P.3d 208, 230. We find the complained of evidence was other crimes or bad acts evidence which was improperly admitted. However, we find its admission did not constitute plain error.

Where a defendant admits engaging in the conduct that resulted in the charges filed against him and sufficient other evidence is properly admitted to support the jury’s finding of guilt, incidental but erroneous admission of evidence of other uncharged crimes is harmless. *Cf. Malicoat v. State*, 2000 OK CR 1, ¶ 38, 992 P.2d 383, 403 (the appellant admitted engaging in the conduct that caused the victim’s death and other evidence showed the extent of her injuries; therefore, the incidental erroneous admission of pictures of other non-lethal injuries on the victim’s body which did not result in criminal charges against the appellant, was harmless).

In the present case, Appellant admitted he sent the subject messages to M.H. and he admitted engaging in other questionable behaviors with M.H. Moreover, the evidence of neglect was

overwhelming, as was the evidence of exposure of all the children to inappropriate sexual material. Thus, Appellant has failed to show this error affected the outcome of the proceeding. Accordingly, the error in admitting the un-redacted video was not plain error. *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395. Proposition III is denied.

In Proposition IV, Appellant contends the trial court should have, *sua sponte*, instructed the jury regarding the use of the other crimes evidence addressed in Proposition III. Appellant failed to object to the jury instructions, so review of this claim is for plain error. *Lee v. State*, 2018 OK CR 14, ¶ 4, 422 P.3d 782, 785. We again utilize the test for plain error found in *Simpson*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701.

As shown above, no plain error occurred based upon the admission of the un-redacted video. The evidence of Appellant's guilt was overwhelming and Appellant did not request a limiting instruction. Therefore, no plain error resulted from the trial court's failure to *sua sponte* issue a limiting instruction. *Cf. Rutan v. State*, 2009 OK CR 3, ¶ 78, 202 P.3d 839, 855 (where any error in admitting bad acts evidence was harmless and the appellant did not request a limiting instruction, no plain error occurred in the failure of the trial

court to give a limiting instruction regarding the jury's use of the evidence). Proposition IV is denied.

In Proposition V, Appellant challenges the sufficiency of the State's evidence to support his guilty verdicts. This Court follows the standard for the determination of the sufficiency of the evidence which the United States Supreme Court set forth in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04. Under this test, "[t]he relevant question is 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*, 443 U.S. at 319, 99 S. Ct. at 2789; *Easlick*, 2004 OK CR 21, ¶ 5, 90 P.3d at 558-59; *Spuehler*, 1985 OK CR 132, ¶ 7, 709 P.2d at 203-04. A reviewing court must accept all reasons, inferences, and credibility choices that tend to support the verdict. *Taylor v. State*, 2011 OK CR 8, ¶ 13, 248 P.3d 362, 368. Circumstantial evidence can provide proof of an element of a crime. See *Hamby v. State*, 1986 OK CR 89, ¶¶ 4-7, 720 P.2d 345, 346 (where victim testified she saw the defendant naked in doorway moving his hand around on his genitals,

but did not see his genitals, circumstantial evidence showed that a reasonable person could properly infer that the defendant exposed his private parts in a public place and the defendant's conviction was properly supported by sufficient evidence).

The State was required to prove the following elements of the crime of child neglect beyond a reasonable doubt:

First, a person responsible for the child's health, safety, or welfare;

Second, willfully or maliciously;

Third, failed to provide adequate shelter, sanitation, hygiene, appropriate education; or

Fourth, failed to protect from exposure to sexual materials that are not age-appropriate;

Fifth, for a child under the age of eighteen.

Appellant argues that the State failed to prove the third and fourth elements sufficiently.

His first argument is that the DHS worker testified that based upon her observations of the children "the conditions alone did not support a conclusion that any of the three children in the home" were abused or neglected. This is a blatant misstatement of the testimony. Defense counsel asked the worker why the fact that M.H. was dirty

caused the worker to believe she was abused. What the worker stated in response to that question was, "had her [M.H.] being dirty been the only concern, I would not have felt she had been abused or neglected." It is clear that DHS initially became involved based upon a referral regarding sexual abuse, but the dirtiness of the children and the condition of the trailer led to further investigation of Huff and Appellant.

Secondly, Appellant maintains that the State based much of its neglect case on the fact that the trailer had no running water and argues the most it could have been out was three or four weeks. The evidence showed that L.H. had been in Missouri since May 20, 2016, so Appellant argues she likely would not have been in the trailer since the water went out. Both of these arguments completely ignore the State's evidence of the conditions inside the trailer which showed the trailer was virtually uninhabitable. Piles of animal feces lay throughout the trailer and the scent of animal urine and rotting food was overwhelming. Mounds of trash and clothing hid the floor from view. In the bathroom, a trash bag contained used toilet paper and feminine hygiene products. A dead cat lay in the bathtub. Stagnant water clogged the kitchen sink and it was piled high with dirty dishes.

J. Huff testified the trailer was clean and had running water immediately prior to the time the Huffs moved into it. He further testified that the State's exhibits depicting the inside of the trailer accurately showed how it looked between the dates of February of 2016 after the Huffs moved into it, until June of 2016. Even if the water was only out for one week prior to the Huffs' arrests, the abysmal conditions of the trailer existed far longer than one week. *See Rutan*, 2009 OK CR 3, ¶ 49, 202 P.3d at 849 (“[a]lthough there may be conflict in the testimony, if there is competent evidence to support the jury's finding, this Court will not disturb the verdict on appeal.”). Appellant's argument that L.H. was not exposed to these horrible living conditions is simply incredible.

Appellant also argues the State failed to sufficiently prove the fourth element of child neglect, *i.e.*, that he failed to protect the children from exposure to sexual materials that are not age-appropriate. Again, Appellant ignores the evidence of the wealth of sexual material lying around the trailer in plain sight of these young children. There were two dildos and a book called “Letters to Penthouse” lying out in the open in the master bedroom and bathroom. A pink dildo/vibrator was lying in the dining room in plain view.

Notably, the Huffs gifted this dildo to M.H. sometime prior to June of 2016. Because these items were lying out in the open in the trailer, they were readily accessible to all of the children. *See Mitchell v. State*, 2018 OK CR 24, ¶ 11, 424 P.3d 677, 682 (circumstantial evidence may be sufficient to support a conviction). Based upon the above evidence, any rational trier of fact could find Appellant guilty of child neglect beyond a reasonable doubt.

Appellant claims the State insufficiently proved he committed child sexual abuse. The Information charged Appellant in Count 5 with child sexual abuse “by willfully/maliciously making lewd and indecent proposals and lewd and indecent acts to M.H., a minor child, who was 14 years old at that time, by lewd or indecent proposals and by looking or touching upon her body in a lewd or lascivious manner.” The jury was instructed on the elements of child sexual abuse as follows:

First, a person willfully or maliciously engaged in;
Second, making lewd and indecent acts and proposals;
Third, with a child under the age of eighteen.

The jury also received instruction that “malicious” means “a wish to vex, annoy or injure another person,” “willful” means “[p]urposeful,”

and “lewd” means “obscene, indecent, lascivious, lecherous.” Appellant argues the State failed to prove the second element.

Recently, in *A.O. v. State*, 2019 OK CR 18, ¶¶ 8-9, __ P.3d __, we held that in order to convict a defendant of violating 21 O.S.Supp.2014, § 843.5(E), the State must prove each element of the underlying crime beyond a reasonable doubt. Relatedly, we further held the jury must be instructed on each element of the underlying crime. *Id.*, 2019 OK CR 18, ¶ 10, __ P.3d at __. In *A.O.*, the juvenile appellant was charged with violating Section 843.5(E) by committing lewd acts against the victim. Section 843.5(E) defines child sexual abuse as including “lewd or indecent acts or proposals, of a child under eighteen years by another.” The lewd acts are set forth in 21 O.S.Supp.2017, § 1123(A) and (B). One of the elements in Section 1123(A) is that the defendant must be three years older than the victim of the lewd acts. The appellant was not three years older than his victim and the State acknowledged there was no evidence of this element. The jury was not instructed on this age element. *Id.*, 2019 OK CR 18, ¶¶ 7-8, __ P.3d at __. Thus, we held as above and reversed and remanded the matter to the District Court for entry of an order modifying the appellant’s juvenile adjudication order to show

adjudication for one count of assault and battery. *Id.*, 2019 OK CR 18, ¶¶ 11-12, __ P.3d at __.

Unlike in *A.O.*, the State presented overwhelming evidence of Appellant's lewd and indecent acts and proposals to M.H. Appellant's and M.H.'s ages, 29 and 15, respectively, at the time of the crime were proven. The word "lewd" was defined for the jury as "obscene, indecent, lascivious, lecherous." Appellant ignores most of the evidence presented in support of this crime. The messages Appellant sent to M.H. contained numerous requests by Appellant that M.H. "role-play" with him. There was also an anime cartoon of a young woman in her underwear. Appellant tried to get M.H. to role-play with him by messaging her that she could pretend he was a good friend of hers and reminding her that theirs was an "open family." Appellant told M.H. that what they were talking about was private and should not be a problem for her. He told M.H. no one would know anything said in the messages. When M.H. hesitated to role-play, Appellant told her he would hold her tenderly, softly whisper to her and lightly kiss her neck. Appellant asked M.H. how she wanted to start the role-play. She responded that she did not know and Appellant told her he had read some of her texts and he thought she had an idea about "how

to start . . . lick . . .” After this message, Appellant sent a purple, smiling devil emoji. The dates of many of the messages were May 13 and 14, 2016. The sexual nature of these messages is readily apparent.

Appellant also revealed numerous instances of his lewd behavior with M.H. in his statement to police: he popped M.H.’s back and hugged her while she was shirtless; he massaged M.H.’s legs and thighs while she was shirtless; he got out of the shower naked in front of M.H.; he let M.H. sit on his lap, after M.H. and L.H. walked in on him and Huff having sexual intercourse, while he had an erection; he accidentally ripped M.H.’s bathing suit top and perhaps touched her breasts while swimming; and he picked lice from M.H.’s hair while he was naked and she was in a towel. Appellant finally admitted that he and Huff gave M.H. the pink dildo/vibrator.

Appellant also claims that much of the above activity occurred prior to the time his family came to Oklahoma. However, Appellant stated to Stover that his family moved to Oklahoma in late 2015. Nothing in the record shows any of the above incidents occurred in Missouri. In light of the above evidence, any rational trier of fact could

have found Appellant guilty of child sexual abuse beyond a reasonable doubt. Proposition V is denied.

Appellant's separate claim within this proposition regarding the general verdicts found by the jury is waived. Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019), provides, "[e]ach proposition of error shall be set out separately in the brief" and that the argument in support of the proposition shall cite to the record and authorities. Appellant failed to comply with this rule.

In his sixth proposition, Appellant contends the trial court improperly instructed the jury regarding Count 5, child sexual abuse. He argues the jury should have been instructed regarding the specific acts and/or proposals that it could consider in determining guilt on Count 5. Review of this claim is for plain error since Appellant lodged no objection to the jury instructions. *Stewart v. State*, 2016 OK CR 9, ¶ 25, 372 P.3d 508, 513-14. As set forth in Proposition I, we utilize the test for plain error found in *Simpson*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701.

The jury was instructed on the elements of child sexual abuse as follows:

First, a person willfully or maliciously engaged in;
Second, making lewd and indecent acts and proposals;
Third, with a child under the age of eighteen.

The jury also received instruction that “malicious” means “a wish to vex, annoy or injure another person,” “willful” means “[p]urposeful,” and “lewd” means “obscene, indecent, lascivious, lecherous.”

Pursuant to *A.O., 2019 OK CR 18, ¶ 10, __ P.3d at __*, the jury should have been instructed on the underlying elements comprising child sexual abuse. These elements are found in Instruction No. 4-129, OUII-CR (2d). As relevant here, lewd or indecent proposals are defined in that instruction as an oral, written or electronically generated lewd or indecent proposals to a child under sixteen for the child to have unlawful sexual relations or intercourse with any person. Lewd and indecent acts are defined in that instruction as looking upon, touching, mauling or feeling the body or private parts of a child under sixteen years in any lewd or lascivious manner.

The State concedes the trial court did not give these additional instructions, but argues this omission was harmless. Although our decision in *A.O., 2019 OK CR 18, ¶ 10, __ P.3d at __*, requires instruction on the underlying acts comprising child sexual abuse, we

agree that on the facts of this case, the error was harmless. Unlike in *A.O.*, where no evidence was presented of the missing age element, ample evidence of the underlying elements of lewd or indecent proposals and lewd acts was presented in the present case. Furthermore, the jury was instructed on the definition of the word “lewd” which forms the basis of the conduct Appellant was alleged to have committed and which is prohibited by Section 843.5(E).

In *Stewart*, 2016 OK CR 9, ¶ 26, 372 P.3d at 514, we held the omission of an element from a jury instruction is error, but such an error can be harmless. In making the harmlessness determination, “the inquiry is whether it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.” *Id.*, 2016 OK CR 9, ¶ 28, 372 P.3d at 514; *see also Neder v. United States*, 527 U.S. 1, 17, 119 S. Ct. 1837, 1838, 144 L. Ed. 2d 35 (1999) (“[W]here a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless.”).

As previously discussed, the evidence in this case is overwhelming. Appellant himself described his numerous lecherous and sexually charged encounters with M.H. He admitted many of these involved touching and massaging M.H. while M.H. was topless (State's Exhibit 32). Appellant's messages to M.H. undoubtedly conveyed his offers for licking and kissing M.H. and his desire for her to engage in sexual activity with him (State's Exhibit 25). Appellant freely admitted sending the messages. Appellant was twenty-nine years old in June of 2016 and his daughter, M.H., was fifteen. The only possible inference from the evidence presented in this case is that Appellant was grooming M.H. in order to attain his ultimate goal of engaging in sexual intercourse with her.

This record makes it clear "beyond a reasonable doubt that a rational jury would have found the defendant guilty [of child sexual abuse] absent the error." *Stewart*, 2016 OK CR 9, ¶ 28, 372 P.3d at 514. Therefore, the error was harmless and had no influence on the outcome of the proceeding. Consequently, there was no plain error. *See Barnard v. State*, 2012 OK CR 15, ¶ 15, 290 P.3d 759, 764 (where the instructional error is harmless, it cannot "have affected

[Appellant's] substantial rights under our plain error test.”). Proposition VI is denied.

Appellant's attempt to raise a separate claim within this proposition that his convictions violate statutory prohibitions against multiple punishment for a single act is waived because it is not contained in a separate proposition of error. Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019), provides pertinently, “[e]ach proposition of error shall be set out separately in the brief.”

In Proposition VII, Appellant argues that prosecutorial misconduct deprived him of a fair trial and due process. He concedes he has waived review of this claim for all but plain error. *Malone v. State*, 2013 OK CR 1, ¶ 40, 293 P.3d 198, 211. We utilize the plain error test found in *Simpson*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701, fully set forth in Proposition I. We review claims of prosecutorial error “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.” *Mitchell*, 2010 OK CR 14, ¶ 97, 235 P.3d at 661. We grant relief on prosecutorial misconduct claims only “where the

prosecutor's misconduct is so flagrant and so infected the defendant's trial that it was rendered fundamentally unfair." *Jones v. State*, 2011 OK CR 13, ¶ 3, 253 P.3d 997, 998.

"In the examination of jurors, wide latitude must be given the parties to enable them to obtain a jury free of outside influence, bias or personal interest." *Strube v. State*, 1987 OK CR 144, ¶ 10, 739 P.2d 1013, 1016. Moreover, prosecutors have wide latitude in closing argument to discuss the evidence and reasonable inferences therefrom. *Hanson v. State*, 2003 OK CR 12, ¶ 13, 72 P.3d 40, 49.

Appellant initially claims the State failed to amend the Information as it indicated it would after the preliminary hearing. We find Appellant has waived this claim because he failed to move to quash the Amended Information and entered his plea to it at formal arraignment. See *Berry v. State*, 1992 OK CR 41, ¶ 9, 834 P.2d 1002, 1005 (where the appellant entered a plea at formal arraignment, he waived any irregularities which may have occurred at preliminary hearing); *Money v. State*, 1985 OK CR 46, ¶ 5, 700 P.2d 204, 206 (same); *Crawford v. State*, 1984 OK CR 89, ¶ 14, 688 P.2d 347, 350 (irregularities in bind over order waived where the appellant entered a plea at formal arraignment); and *Hambrick v. State*, 1975 OK CR 86, ¶

11, 535 P.2d 703, 705 (“When a defendant, upon arraignment, pleads to the merits and enters on trial, he waives . . . any irregularities [in the preliminary examination].”). Cf. *Thompson v. State*, 2018 OK CR 5, ¶ 4, 419 P.3d 261, 262 (review of the trial court’s denial of the appellant’s motion to quash Supplemental Information waived where the appellant failed to timely assert that the evidence at preliminary hearing was insufficient before he entered his plea at formal arraignment); *Brennan v. State*, 1988 OK CR 297, ¶ 7, 766 P.2d 1385, 1387 (a plea on the merits operates as a waiver of preliminary hearing).

Appellant next claims the prosecutor asked prospective jurors numerous questions during *voir dire* meant to prejudice him and detract from his presumption of innocence. “The purpose of *voir dire* examination is to discover whether there are grounds to challenge prospective jurors for cause and to permit the intelligent use of peremptory challenges.” *Postelle v. State*, 2011 OK CR 30, ¶ 43, 267 P.3d 114, 134. “In the examination of jurors, wide latitude must be given the parties to enable them to obtain a jury free of outside influence, bias or personal interest.” *Strube v. State*, 1987 OK CR 144, ¶ 10, 739 P.2d 1013, 1016.

Appellant first points to the prosecutor's questions in his discussion about children and sexual abuse. As shown in the record, the prosecutor inquired of jurors if any of them believed children could be responsible for or complicit in their own sexual abuse. Pursuant to 21 O.S.Supp.2014, § 843.5(E), children under the age of sixteen cannot consent to sexual activity prohibited by its provisions. Jurors' beliefs to the contrary may have affected their ability to be free from personal interest as addressed by *Strube*. There was nothing improper about this questioning. As there was no error, there was no plain error. *Mack*, 2018 OK CR 30, ¶ 6, 428 P.3d at 329.

Appellant next argues the prosecutor improperly asked prospective jurors if any of them had ever "role-played" with their children "via text or Facebook" using "sexually explicit cartoons." This is a blatant misstatement of the prosecutor's comments and questions. The prosecutor asked the panel if any of them had ever role-played with their children via text or Facebook (Tr. 63). What he did not do was ask them if they utilized "sexually explicit cartoons" during these activities as stated by Appellant. The prosecutor asked the panel if they were familiar with anime, animated people such as those found in cartoons. After a juror's affirmative response, the prosecutor asked the

panel if “the typical anime that we’re talking about or that you’ve seen, does that involve any sexually explicit cartoons?” Again, there was nothing improper about this line of questioning, as it served to show panel members’ familiarity with anime. As there was no error, there was no plain error. *Mack*, 2018 OK CR 30, ¶ 6, 428 P.3d at 329.

Furthermore, great care was taken by defense counsel (Tr. 67-79) and the prosecutor (Tr. 99-100, 104-05, 120-24, 134-35, 149, 160-61), to ensure that every potential juror understood the presumption of Appellant’s innocence. The jury was properly instructed regarding this presumption.

Appellant maintains that the prosecutor erred by referencing Mull’s testimony in his closing argument. He argues he was not provided an opportunity to cross-examine Mull so the prosecutor’s reference to this testimony violated his right to a fair trial. The record belies argument. After Huff’s attorney completed his re-direct of Mull, the trial court allowed Mull to step down from the witness stand and announced the court would recess for a break. When the court reconvened, Appellant’s counsel said nothing regarding cross-examination and announced Appellant “had no further witnesses to call.” Defense counsel plainly chose not to cross-examine Mull.

The prosecutor made three references to Mull's testimony. During his first closing argument, the prosecutor mentioned Mull's testimony that the trailer was messy in March of 2016, but not as bad as it was in June of 2016. He also mentioned Mull's observations about the condition of the trailer during his second closing argument. These references were cumulative to J. Huff's and the officers' testimony about the conditions of the trailer. Finally, the prosecutor mentioned Mull testified that M.H. had tried in the past to jump out of a window because she was not allowed to go out with her boyfriend.

These passages do not directly mention Appellant. Moreover, Huff called Mull as a witness. Therefore, the prosecutor could certainly reference his testimony with regard to Huff. *See Ashton v. State*, 2017 OK CR 15, ¶ 49, 400 P.3d 887, 899 ("As the prosecutor's argument was reasonably based upon the evidence, we find that Appellant has not shown that error, plain or otherwise occurred."). The prosecutor was careful in his arguments to separate the two defendants. The trial court instructed the jury that it must give separate consideration to each charge and to each defendant and that the jury could not use one defendant's confession against the other defendant. *Cf. Harmon v. State*, 2011 OK CR 6, ¶ 81, 248 P.3d

918, 943 (where prosecutor's argument did not misinform the jury about considering certain evidence, and the jury was properly instructed on the use of the evidence, there was no error in the argument). There was no error in the prosecutor's argument and thus, no plain error. *Mack*, 2018 OK CR 30, ¶ 6, 428 P.3d at 329. Proposition VII is denied.

In Proposition VIII, Appellant alleges his counsel was ineffective. He argues his counsel failed to do the following: to request discovery and file motions as addressed in Proposition I; to object to prejudicial hearsay as addressed in Proposition II; to redact the videos of his police interviews and object to other crimes evidence as addressed in Proposition III; to request an instruction on other crimes evidence as addressed in Proposition IV; to request a proper instruction on child sexual abuse as addressed in Proposition VI; and to object to alleged prosecutorial misconduct as addressed in Proposition VII. Appellant further argues his counsel was ineffective for opening the door to evidence of other crimes and for failing to present readily available evidence in support of his defense. The last claim is the subject of Appellant's *Application for Evidentiary Hearing on Sixth Amendment Claim* pursuant to Rule 3.11(B)(3)(b)(1), *Rules of the Oklahoma Court of*

Criminal Appeals, Title 22, Ch. 18, App. (2019).

We review ineffective assistance of counsel claims under the two-part test mandated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). *Malone*, 2013 OK CR 1, ¶ 14, 293 P.3d at 206. The *Strickland* test requires an appellant to show: (1) that counsel's performance was constitutionally deficient; and (2) that counsel's deficient performance prejudiced the defense. *Id.*, (citing *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064).

The Court begins its analysis with the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. Appellant must overcome this presumption and demonstrate that counsel's representation was unreasonable under prevailing professional norms and that the challenged action could not be considered sound trial strategy. *Id.* When a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed. *Bland v. State*, 2000 OK CR 11, ¶ 113, 4 P.3d 702, 731 (citing *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069). To demonstrate prejudice an appellant must show that there is a reasonable

probability that the outcome of the trial would have been different but for counsel's unprofessional errors. *Id.*, 2000 OK CR 11, ¶ 112, 4 P.3d at 731. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112, 131 S. Ct. 770, 792, 178 L.Ed.2d 624 (2011).

This Court reviews an application under Rule 3.11(B)(3)(b) pursuant to the analysis set forth in *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905–06. We review and consider an appellant's application and affidavits along with other attached non-record evidence to determine whether the appellant has shown clear and convincing evidence of a strong possibility that counsel was ineffective and should be afforded further opportunity to present evidence in support of his claim. *Id.*

We found in Propositions I-IV, VI and VII that Appellant failed to show the occurrence of plain and reversible error. As a result, Appellant has not shown his counsel was ineffective as alleged, *i.e.*, he has failed to show a reasonable probability that the outcome of the trial would have been different but for counsel's failures. *Runnels*, 2018 OK CR 27, ¶¶ 38, 426 P.3d at 623-24 (where no plain and reversible error occurred, no reasonable probability that the outcome

of the trial would have been different but for counsel's failures was shown).

Appellant also argues counsel was ineffective for opening the door to evidence of other crimes. During cross-examination of Vaught, defense counsel asked him if he knew of any crimes Appellant committed before June 14, 2016. Vaught responded, "[n]ot within the State of Oklahoma." Counsel then questioned Vaught about his knowledge of any actual harm which had occurred to the children from living in the Huff trailer and Vaught admitted he had no such knowledge. Thereafter, counsel asked Vaught if he contacted other district attorney offices "in any other county besides Lincoln or Pottawatomie to see if there were any similar crimes or cases against Mr. or Mrs. Huff?" At that point, a bench conference occurred during which a discussion transpired regarding Vaught's possible answer which might raise the issue of other investigations in Missouri. At the conclusion of the bench conference, Vaught did not remember the question so defense counsel asked him if he caused "any investigation in the offices of any other district attorneys in Oklahoma besides Lincoln and Pottawatomie County as part of your investigation in this case?" Vaught responded in the negative.

Based upon this questioning, it is plain that defense counsel wanted the jury to know that Appellant was not the subject of any additional investigations in Oklahoma with regard to his children. Defense counsel sought to minimize the State's evidence of neglect by having Vaught admit he did not know of any actual physical harm sustained by the children. The jury already knew that Appellant had some involvement with authorities in Missouri because of his interview with Vaught. Eliciting the fact that there were no other investigations of Appellant in Oklahoma served to support the theory that if the children suffered no actual physical harm and Appellant was not the subject of any other investigations, the State's evidence was not sufficient to support a conviction. This was a reasonable strategy and counsel was not ineffective for using it. "So long as the choices are informed ones, counsel's decision to pursue one strategy over others is 'virtually unchallengeable.'" *Jones v. State*, 2006 OK CR 5, ¶ 78, 128 P.3d 521, 545 (citing *Strickland*, 466 U.S. at 690-91, 104 S. Ct. at 2066). That the strategy was unsuccessful does not mean counsel was ineffective. *Turrentine v. State*, 1998 OK CR 33, ¶ 41, 965 P.2d 955, 971.

Appellant finally contends defense counsel should have

presented evidence that the water pump at the trailer was broken and that he attempted to replace the pump. This contention is the subject of Appellant's *Application for Evidentiary Hearing on Sixth Amendment Claim*. Appellant attaches to this application his own affidavit, an affidavit from an OIDS investigator and printouts from the business where he purchased the water pump.

The fact that the trailer had no running water was undisputed. In his interview with Vaught, Appellant claimed the water pump had been broken for a week prior to his arrest and that he was trying to get a replacement pump. Based upon his attached materials, Appellant did not try to get a replacement pump until two days before his arrest, which was also after DHS received the referral about the Huffs. Although Appellant argues the date upon which the trailer had no running water was significant, none of the attached materials show the date upon which the water pump ceased functioning. Thus, these materials prove nothing about the length of time the trailer was without running water. J. Huff stated the trailer had been without water for "three or four weeks" prior to Appellant's arrest. Again, the attached materials prove nothing and do not refute the State's evidence that the water was out for a significant period of time. The

conditions inside the Huff trailer were horrible and disgusting. It is simply incredible that the trailer morphed into that state over a period of one week.

Appellant's proffered materials in support of his *Application for Evidentiary Hearing on Sixth Amendment Claim* fail to show by clear and convincing evidence that there is a strong possibility that trial counsel was ineffective for failing to utilize or identify this evidence. *Simpson*, 2010 OK CR 6, ¶ 53, 230 P.3d at 905–06. Accordingly, his application is denied.

Because he has failed to provide sufficient proof to warrant an evidentiary hearing, Appellant cannot show defense counsel was ineffective under the *Strickland* standard for failing to utilize this evidence. *Simpson*, 2010 OK CR 6, ¶ 53, 230 P.3d at 906. Proposition VIII is denied.

In his ninth proposition, Appellant claims his sentence is excessive. He makes no claim that his sentence lies outside the statutory range of punishment for his crime. He seeks modification of his thirty-year aggregate sentence. This Court will not disturb a sentence within statutory limits unless, under the facts and circumstances of the case, it is so excessive as to shock the

conscience of the Court. *Baird v. State*, 2017 OK CR 16, ¶ 40, 400 P.3d 875, 886.

Appellant allowed his three children and a young family member to live in filth and squalor and exposed them to sexual materials far too mature for their ages. He sexually abused M.H. The trial court mercifully ran his sentences concurrently. Appellant repeatedly refers to information contained in his Pre-Sentence Investigation Report. This is improper and we will not consider such information. 22 O.S.Supp.2017, § 982. The jury found Appellant to be deserving of significant punishment. Nothing about Appellant's sentence shocks the conscience of this Court. Proposition IX is denied.

In his final proposition, Appellant asserts that the combined errors in his trial rendered his trial unfair. Only three errors were found, one in Proposition II regarding the admission of hearsay, one in Proposition III regarding the admission of other crimes or bad acts evidence and one in Proposition VI, that the trial court mis-instructed the jury regarding Count 5, child sexual abuse. As shown in those propositions, the errors were harmless and did not affect Appellant's substantial rights. "Cumulative error does not require relief where the

errors, considered together, do not affect the outcome of the proceedings.” *Bosse v. State*, 2017 OK CR 19, ¶ 2, 406 P.3d 26, *cert. denied*, 138 S. Ct. 1264, 200 L. Ed. 2d 421 (2018). Any errors found in this case did not require relief, and when considered cumulatively, do not require reversal or modification of the sentence. Therefore, relief on a cumulative error basis is not warranted. Proposition X is denied.

DECISION

The **JUDGMENT and SENTENCE is AFFIRMED**. The Application for Evidentiary Hearing pursuant to 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. (2019), the **MANDATE is ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF LINCOLN COUNTY
THE HONORABLE CYNTHIA FERRELL ASHWOOD, DISTRICT
JUDGE

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OPINION BY: LUMPKIN, J.
LEWIS, P.J.: Concur
KUEHN, V.P.J.: Concur in Part Dissent in Part
HUDSON, J.: Concur
ROWLAND, J.: Concur

RA

KUEHN, V.P.J., CONCUR IN PART AND DISSENT IN PART:

I agree this case should be affirmed,¹ but write separately to address portions of the legal analysis.

In Proposition I Appellant claims his statement to police was introduced in violation of his constitutional rights. He claims the statement was inadmissible because he had been advised of his rights to silence and counsel, and had in fact invoked his right to counsel. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Davis v. United States*, 512 U.S. 452, 458–59 (1994). Defense counsel objected at trial to the taped statement, and the trial court ruled on that objection. Review of a claim of constitutional error places the burden on the State to show any error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967).²

¹ I continue to believe that the crime of child sexual abuse, as found in 21 O.S. §§ 843.5(E) and (F), is unconstitutional. *A.O. v. State*, 2019 OK CR 18, 447 P.3d 1179, 1187 at ¶ 13 (Kuehn, V.P.J., dissenting). However, the Majority of this Court does not agree. When reviewing convictions under this statute, I apply the current law on the basis of *stare decisis*.

² The Majority's deployment of the standard "plain error" test neglects the fact that the burden on the prejudice question shifts to the State for these kinds of claims. When the unpreserved error involves a constitutional right, we modify our plain-error analysis to accommodate the greater significance of the right at stake. In those cases involving errors of a constitutional nature, we introduce the test set out in *Chapman v. California*, 386 U.S. 18, 23-24 (1967) and *Neder v. United States*, 527 U.S. 1, 15-16 (1999). *Barnard v. State*, 2012 OK CR 15, ¶¶ 13-15,

The Majority *incorrectly* evaluates this proposition under a plain error analysis, faulting defense counsel for neither filing a motion to suppress nor objecting to the video statement before it was admitted at trial. In fact, trial counsel objected when the evidence was offered, and the trial court ruled on the objection, preserving the claim for full appellate review.³

The initial question, however, is whether there was any error at all; I find there was not. Appellant's statements asking the investigator what procedure he should use to obtain a lawyer were not an unequivocal request to have a lawyer present during the questioning. Appellant was "seeking to clarify his right to counsel, not actually

290 P.3d 759, 764. Following *Chapman* and *Neder* on the prejudice issue, if the defendant manages to show a plain or obvious violation of a constitutional right, then the burden shifts to the State to show, beyond a reasonable doubt, that the error was harmless. This differs from traditional plain-error analysis, where the burden remains on the defendant to show prejudice. It would, of course, make no sense for the analysis to include *both* prejudice inquiries. "If the error [] is harmless under the *Chapman-Neder* test, it cannot, by definition, have affected the outcome . . . , and cannot have affected [the defendant's] substantial rights under our plain error test." *Barnard*, 2012 OK CR 15, ¶ 15, 290 P.3d at 764.

³ The Majority incorrectly faults defense counsel for not timely objecting to the admissibility of the statement. The problem is, the State did not divulge that a video existed until two days before trial. In any event, defense counsel did object when the statement was introduced at trial and counsel heard Appellant, on the recording, utter a question about obtaining counsel. The trial court rightly heard argument on the objection and stood by its ruling that the tape was admissible. This preserves the error for review.

invoking it.” See *United States v. Sierra-Estrada*, 248 F. App'x 973, 982 (10th Cir. 2007). After answering Appellant’s questions, the investigator asked him if, knowing all he now knew about his rights, he still wanted to talk. Appellant answered, “Yes, I will talk to you, no problem.” Appellant was also told he could stop the interview at any time for an attorney to be present, yet he never requested or inquired about an attorney again during the lengthy interview. The trial judge correctly overruled the Fifth Amendment objection, and there was no error in admitting the taped interview.

In Proposition II, I am unable to tell whether the Majority is treating this as a claim that Appellant’s right to confrontation was violated – which, of course, requires a *Chapman* review – or merely a claim that hearsay was improperly admitted, which we would review for plain error. The Majority appears to do both. Appellant clearly raises this as a Confrontation Clause claim. I agree with the majority that there was no violation of the Confrontation Clause. The evidence admitted against Appellant’s co-defendant was not used against him, and did not violate his right to confrontation. Neither the trial testimony from a witness’s personal experience, nor evidence presented to the trial court at sentencing, were hearsay, and the

Confrontation Clause is not at issue there. In light of Appellant's admission that his trailer had no water, I agree that the hearsay evidence presented through law enforcement officers regarding the lack of water was harmless beyond a reasonable doubt. I find the Majority's double analysis of this claim – first for plain error and then under the Confrontation Clause – unnecessary.

I agree with the Majority that sufficient evidence supported Appellant's convictions. I note that Appellant was charged in the Information under 21 O.S. § 843.5 with child sexual abuse "by willfully and maliciously making lewd and indecent proposals and lewd and indecent acts . . . by lewd or indecent proposals and by looking or touching upon her body in a lewd or lascivious manner." Jurors were instructed that the elements of this crime were that a person willfully or maliciously engaged in making lewd and indecent acts and proposals with a child under the age of eighteen. Jurors were also instructed on definitions of lewd, willful, and malicious. Because I believe that Section 843.5 stands alone as a separate crime, which prohibits willful or malicious sexual abuse of a child under eighteen, I find both the charge and the instruction to be proper under the statute.

A.O. v. State, 2019 OK CR 18, 447 P.3d 1179, 1184 at ¶ 2 (Kuehn, V.P.J., dissenting).

However, I am at a loss to understand how the Majority reconciles these instructions with the majority opinion in *A.O.*⁴ That opinion clearly and explicitly requires that the elements of any given charge under Section 843.5 must *specifically* include each element of the underlying crime, here pled as lewd acts and indecent proposals. *A.O.*, 2019 OK CR 18, ¶ 9, 447 P.3d at 1182. That plainly did not occur here. The elements of lewd or indecent proposals or acts require that the acts be knowing and intentional – not willful or malicious – and that they be committed against a defendant who is at least three years older than a child who is under the age of sixteen. 21 O.S. § 1123. Neither the Information nor the instructions reflect these elements.

The Majority here seems to decide that despite these significant omissions, which were enough to require reversal in *A.O.*, overall the

⁴ *A.O.* was decided while this appeal was pending. *A.O.* overruled the only law governing instruction on child sexual abuse at the time of Appellant's trial, *Huskey v. State*, 1999 OK CR 3, 989 P.2d 1. Appellant asked this Court for permission to supplement his brief in chief with a proposition of error based on this change in the law. Our Rules allow for supplemental briefs if the issue to be addressed is one of first impression. Rule 3.4(F)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020). The Majority inexplicably denied this request. I would have granted it.

erroneous instructions were nearly accurate so they must be harmless. The Majority appears to rely primarily on the strength of the evidence against Appellant. I agree that error in instructing on elements may be harmless. *Neder*, 527 U.S. at 17. I fail to see how explicitly instructing on *the wrong* intent and age requirements can be, as the Majority concludes, harmless beyond a reasonable doubt. Under these instructions, jurors had no opportunity to consider the elements this Court stated are required in A.O. Under the A.O. analysis, the Majority should be reversing this conviction.