IN THE APPELLATE COURT OF THE CHOCTAW NATION

JONATHAN [redacted] ADAMS,

Appellant,

vs.

CHOCTAW NATION OF OKLAHOMA,

Appellee.

NO. ACC-23-2

District Court No. CF-22-172

Author: Judge Jones

AMENDED OPINION

Appellant, Jonathan Adams, appeals a judgment of the Choctaw Nation District Court, dated September 12, 2023, entered by the Honorable Richard Branam. After a three day jury trial, which began on July 24, 2023 and concluded on July 26, 2023, the Jury found Defendant Guilty of Six Counts of Child Sexual Abuse. On September 12, 2023, the trial court sentenced Appellant to three years on each count, with Counts 1-3 running consecutively, and Counts 4-6 running concurrently with each other and Counts 1-3, for a total of nine years.

Appellant now raises the following issues on appeal: 1) whether this matter should be remanded for an evidentiary hearing by an independent judge to review the audio tapes, stenographic notes and copies of the transcript to determine whether the record is insufficient for the Appellant to mount an appeal, or, in the alternative, be remanded for a new trial; and 2) whether this matter should be remanded for a new trial due to the trial Court's denial of Appellant's Motion to Dismiss Counts 4 and 6.

We, the Choctaw Nation Court of Appeals, hereby AFFIRM the Judgment and Sentence entered by the Honorable Judge Richard Branam herein on September 12, 2023.

I. BACKGROUND AND PROCEDURAL HISTORY

On or about March 28, 2020, Appellant lived with his minor children, S.A. and E.A. and their mother, Jennifer Camp, in Cowlington, Oklahoma, located within the boundaries of the Choctaw Nation Reservation of Oklahoma. On that day, when S.A. was seven (7) years old, she told her grandmother, Teresa Moore, that her mouth was hurting. Later that day, S.A. told her mother (Ms. Camp) that "dad put his pee pee in her mouth," causing "white stuff" to be in her mouth.

Ms. Camp then confronted Appellant. Appellant initially denied the allegations. Ms. Camp testified that Appellant then became angry and raped her in front of S.A. and her eight (8) year old brother, E.A. After the rape, Appellant made both children clean up blood from his attack and rape of Ms. Camp. Appellant also told Ms. Camp that he would "put bullet [in her] head if she told anyone what had happened." Appellant then left their family home with their son, E.A., and went to his parent's home.

Shortly thereafter, Ms. Camp's sister, Sarah Camp, arrived at their family home to borrow a trailer. Sarah took Ms. Camp and S.A. to her home in Sallisaw, Oklahoma. Shortly after arriving hat her home, S.A. then told Sarah Camp that her "pee pee" was hurting because Appellant had touched her there. Sarah then confronted Ms. Camp and she reluctantly disclosed what had occurred at the marital home. Sarah and Ms. Camp then questioned S.A. in more detail. Sarah notified the police of these allegations.

The following day, Ms. Camp took S.A. to the LeFlore County Child Advocacy Network, child advocacy center, where she was given medical exam by Melea McCormick, Sexual Assault Nurse Examiner (SANE). S.A. was also forensically interviewed by Tracy Van Kooten. During her interview, S.A. disclosed that Appellant "put his pee in my mouth" resulting in "milkus" coming out in her mouth, which she spit out. She also disclosed that Appellant put his "pee-pee" in her "pee-pee" and in her "booty" and that when he did, Appellant would put "slobber" on his "pee-pee." S.A. also disclosed that Appellant put his mouth on her "pee-pee," and that he would move his tongue on her "pee-pee." S.A. also stated that Appellant would also make her hold his "pee pee" with her hand, and described it as feeling "weird and "big." S.A. also disclosed that Appellant would also touch her "pee-pee" with his fingers. S.A. stated that when Appellant would touch her "pee-pee" it would hurt, and she would tell him that it would hurt but he would not stop. S.A. identified her mouth as what she called "mouth," her vagina as her "pee pee," her buttocks as her "booty" and Appellant's penis as his "pee pee" on anatomical drawings used during the interview. S.A. also stated that Appellant told her not to tell Ms. Camp about what happened and threatened to shoot Ms. Camp if S.A. ever told anyone.

Mr. Van Kooten described S.A.'s disclosures as appropriate for her age. During direct examination at trial, over two years after the interview, S.A. stated that Appellant had put his "no no" in her mouth, her "bad spot" and her "heinie" "a lot of times." (Tr.Vol.HI at 19).

E.A. was also present at the child advocacy center when S.A. was being interviewed. E.A. disclosed to Alyssa Essman that he had seen Appellant molesting S.A. on their couch. This led to E.A. being forensically interviewed the following day. During that interview, E.A. disclosed he had seen Appellant pull his pants down while holding S.A. down on the living room couch. E.A. also testified that he saw Appellant put S.A.'s mouth on his "bad spot," and putting his "bad spot" on S.A.'s "bad spot" (indicating the

groin area). At trial, E.A. testified that Appellant had threatened to kill him if he told anyone about it.

The Choctaw Nation filed a Criminal Information against the Appellant on April 7, 2021, in the Choctaw Nation District Court Case Number CF-2021-43, alleging three felony counts of Child Sexual Abuse, in violation of Section 843.1 of the Choctaw Nation Criminal Code, as follows:

> COUNT 1: Child Sexual Abuse - on or between January 2019 and the 28th day of March 2020, by willfully and maliciously sexually abusing S.A., a minor child, who was under the age of 12 at the time, by putting his penis in her mouth, . . . in the Choctaw Nation reservation.
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> COUNT 2: Child Sexual Abuse - on or between January 2019 and the 28th day of March 2020, by willfully and maliciously sexually abusing S.A., a minor child, who was under the age of 12 at the time, by placing his mouth on her vagina, . . . in the Choctaw Nation reservation.
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> COUNT 3: Child Sexual Abuse - on or between January 2019 and the 28th day of March 2020, by willfully and maliciously sexually abusing S.A., a minor child, who was under the age of 12 at the time, by putting his penis in her anus, . . . in the Choctaw Nation reservation.

A preliminary hearing was conducted on November 10, 2022. At preliminary hearing, the Nation offered evidence to support Counts 1, 2, and 3 of it's Criminal Information. The Nation also introduced evidence to support three additional counts of Child Sexual Abuse, more specifically that Appellant also touched S.A.'s vagina with his fingers, made S.A. touch his penis, and inserted his penis into S.A.'s vagina.

After the evidence was submitted, the Nation requested that the trial Judge bind the Defendant over on all of the three counts listed in the original criminal information, and also made the following request:

> And I would ask for the Court for leave – for leave of the Court to also add in the additional allegations of putting the defendant placing his mouth on the child's vagina and placing his fingers on the child's vagina at this time, Your Honor.

Defendant entered a general demurrer. The Court took all matters under advisement and requested additional briefing on the issue of child witness testimony. Appellant filed his brief on November 21, 2022. The Nation filed its Brief on December 1, 2022. In its Brief, the Nation requested that the Court add one more additional Count of Child Sexual Abuse, for a total of six (6) counts.

On February 21, 2023, the trial Court overruled the Appellant's demurrer "as to Counts 1 through 6 of Child Sexual Abuse." The Nation filed an Amended Information on February 21, 2023, listing six counts of Child Sexual Abuse against the Defendant. Counts 1, 2, and 3 were identical to Counts 1, 2, and 3 in the original Information. Counts 4, 5, and 6 were added as follows:

> COUNT 4: Child Sexual Abuse - on or between January 2019 and the 28th day of March 2020, by willfully and maliciously sexually abusing S.A., a minor child, who was under the age of 12 at the time, by putting his penis in her vagina, . . . in the Choctaw Nation reservation.
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> COUNT 5: Child Sexual Abuse - on or between January 2019 and the 28th day of March 2020, by willfully and maliciously sexually abusing S.A., a minor child, who was under the age of 12 at the time, by putting his fingers in her vagina, . . . in the Choctaw Nation reservation.
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> COUNT 6: Child Sexual Abuse - on or between January 2019 and the 28th day of March 2020, by willfully and maliciously sexually abusing S.A., a minor child, who was under the age of 12 at the time, by forcing her to put her hand on his penis, . . . in the Choctaw Nation reservation.

The parties then re-appeared on February 28, 2023, to conclude the preliminary hearing. Appellant then rested as to the preliminary hearing. The Court then conducted a formal arraignment, and Appellant entered a plea of not guilty to the Amended Information.

On July 12, 2023, Appellant moved to dismiss Counts 4 and 6. Appellant alleged that the "the record is devoid of the Nation requesting the Defendant be bound over on the two additional counts found in the Amended Information." The Nation responded, noting its request in the demurrer briefing, and the evidence in support of the additional counts at the preliminary hearing. The Trial Court denied Appellant's Motion to Dismiss Counts 4 and 6 on July 21, 2023, with the Order being filed on July 26, 2023, the final day of trial.

This matter came on for Jury Trial on July 24, 2023 and concluded on July 26, 2023. At trial, the parties stipulated that Appellant was member of the Cherokee Nation. The evidence also showed that the alleged acts of Child Sexual abuse occurred at Appellant's home which is located within the boundaries of Choctaw Nation reservation. After the Nation rested, Appellant demurred to the Nation's evidence. The trial court overruled Appellant's demurrer. Appellant then waived his right to testify and rested

without calling any witnesses. After being instructed and hearing closing arguments, the jury returned guilty verdict on all six counts of Child Sexual Abuse.

The trial Court then Ordered a presentence investigation and sentencing was set on September 12, 2023. On September 12, 2023, Judge Branam sentenced the Appellant to three years on Counts 1, 2, and 3, all to run consecutively with one another, and three years each on Counts 4, 5, and 6, to run concurrently with Counts 1, 2, and 3, for a total of nine years, with credit for time served. Appellant was further Ordered to pay $15,000.00 in fines and $1150.00 in court costs.

II. STANDARD OF REVIEW

Pursuant to Section 1051 of the Choctaw Code, the Scope of Review on Certiorari to the Choctaw Court of Appeals shall be prescribed by the Court of Appeals. In reviewing criminal cases, there are differing standards of review depending on the type of issue being appealed. These standards of review are as follows:

1. **Questions of Law (De Novo Review)**: When an appeal raises a purely legal issue, such as a question of statutory interpretation or the constitutionality of a law, the appellate court reviews the issue *de novo*, meaning they review it independently without deferring to the lower court's conclusions.

2. **Factual Findings (Clear Error or Sufficiency of the Evidence)**: Appellate courts usually defer to the trial court's factual findings, reversing only if those findings are clearly erroneous. When reviewing sufficiency of the evidence claims, we must do so in a light most favorable to the prosecution to determine whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt.

3. **Discretionary Decisions (Abuse of Discretion)**: Rulings made by the trial court during trial, such as evidentiary decisions, jury instructions, and sentencing, are reviewed under an "abuse of discretion" standard. The appellate court will only overturn these if it finds that the trial court made a decision that was arbitrary, unreasonable, or outside the bounds of judicial reasonableness.

4. **Plain Error Review**: When a defendant raises an issue on appeal that was not preserved by objection during trial, the appellate court may review it for "plain error." To reverse under this standard, the Appellant must prove: 1) the existence of an error by the trial court; 2) that said error was plain or obvious; and 3) that said error affected the Appellant's substantial rights, meaning that error affected the outcome of the trial. See Pelts v. Choctaw Nation, No. ACC-2022-4 (March 21, 2023).

5. **Cumulative Error Review**: If multiple errors are raised, the appellate court may consider whether the cumulative effect of these errors deprived the defendant of a fair trial, even if no single error would warrant reversal on its own.

In his first proposition of error, Appellant identifies twenty-six (26) bench conferences (conducted during the jury trial as a result of objections by the parties) and a portion of the third day of the trial proceedings in which an issue of jury tampering addressed with the trial Court that were not recorded nor transcribed by the court reporter. Therefore, these portions of the jury trial are not part of the trial transcript herein. As a result, Appellant argues that he has been deprived of a full and fair opportunity to present appellate issues to this Court in violation of his Fourteenth Amendment rights to due process. As discussed above, the standard of review for an alleged denial of a constitutional right is an independent de novo review on appeal.

In it's Reply Brief, the Nation argues that the United States Constitutional guarantees of due process do not apply to the Choctaw Nation. The Nation points to United States. United States v. Shavanaux, 647 F.3d 993, 996-97 (10th Cir. 2011) which held that the Fifth and Fourteenth Amendments of the U.S. Constitution do not apply to Indian Nations, whose existence predates that of the United States. The Nation argues that the Bill of Rights does not constrain Indian Tribes and that the Choctaw Nation's exercise of its inherent power of self-govemment "is constrained only by 'the supreme legislative authority of the United States.'" Id. at 997, quoting Talton v. Mayes, 163 U.S. 376 (1896).

However, Section 1 of Article IV of the Choctaw Nation Constitution (Bill of Rights) states that:

> Nothing in this Constitution shall be interpreted in a way which would diminish the rights and privileges that tribal members have as citizens of this Nation, the State of Oklahoma, the United States of America or under any Act of the Congress of the United States.

Contrary to the Nation's argument, the Bill of Rights as set forth in the Choctaw Nation Constitution mandates that all tribal members shall have the same rights they possess as citizens of the United States of America and of the State of Oklahoma. Therefore, the rights and privileges set forth in the United States Constitution were adopted by the Constitution of the Choctaw Nation. Therefore, the standard of Review for the Appellant's first proposition on Appeal is an independent de novo review.

In his second proposition, Appellant alleges that the trial court committed plain error by improperly binding the Appellant over on Counts 4 and 6 as set forth in the Nation's Amended Criminal Information. The standard of review for this proposition is "Plain Error Review."

III. DISCUSSION

Appellant raises two issues on appeal, the first 1) whether this matter should be remanded for an evidentiary hearing by an independent judge to review the audio tapes, stenographic notes and copies of the transcript to determine whether the record is insufficient for the Appellant to mount an appeal, or, in the alternative, be remanded for a new trial; and 2) whether this matter should be remanded for a new trial due to the trial Court binding the Appellant over on counts 4 and 6 as set forth in the Nation's Amended Information. The Court will address these issues in Order.

A. Whether this matter should be remanded for an evidentiary hearing by an independent judge to review the audio tapes, stenographic notes and copies of the transcript to determine whether the record is insufficient for the Appellant to mount an appeal, or, in the alternative, be remanded for a new trial.

Appellant alleges that there were twenty-six (26) bench conferences, during the jury trial, that were not recorded nor transcribed and are not part of the record. In his Brief-In-Chief, Appellant briefly summarizes nine of these bench conferences alleging that they had "unknown objections" and contents. However, the Nation, in it's reply Brief, provided more detail as to the unrecorded bench conferences, as follows:

1. During voir dire, the Nation asked jurors about the elements of the crime alleged in all six counts, and proceeded to ask if they would require additional elements not required by the instructions. Defense counsel objected without specifying the basis and asked to approach. Alter the bench conference, the trial court directed the prosecutor to "Keep it short" and the prosecutor continued with her questions. This Court agrees with the Nation in that a plain reading of the objection is that it was to the discussion of the elements of the offense, and it was clearly overruled.

2. During the testimony of S.A.'s grandmother, Teresa Moore, she was asked a question about something S.A. had disclosed to her about her sexual abuse. Defense counsel objected, and a bench conference was had. The jury was then excused and the parties argued the objection in full on the record without the jury present. Defense counsel plainly objected to the statements, and their recordings (Nation's Exhibits 7 and 8) as inadmissible hearsay, due to a claimed failure to comply with notice requirements. The trial court overruled that objection. Defense counsel then interposed objections based on the best evidence rule, objected to the statements as cumulative, hearsay and unfairly prejudicial, and was again overruled. The record is clear as to the nature of the objection and the trial court's ruling in this instance.

3. During defense cross-examination of S.A.'s mother, Jennifer Camp, defense counsel asked her about a letter she had allegedly written in May 2020. Defense counsel then asked if Jennifer had changed her statement in that letter, to which the Nation objected and the parties had a bench conference. Defense counsel then resumed, and her first three questions to the witness established that she did not write the letter, that someone else had written it for her, and she could not remember if she had told the writer what to put down. Furthermore, the letter and its contents were not offered into evidence. Therefore, the Court cannot consider its contents.

4. During direct examination of S.A.'s aunt, Sarah Camp, the witness testified about S.A. disclosing to her that her "pee pee" hurt because Appellant "had touched her." Defense counsel objected, the Nation noted that "this has already been ruled on," and a bench conference was held. The prosecutor was then permitted to go ahead and ask about the statement. It is apparent that the trial Court had previously dealt with this matter in its pretrial hearing held July I7, 2023. At that hearing, the defense sought an order in limine barring Sarah Camp from testifying about this disclosure from S.A. Appellant's attorney also objected to this statement as cumulative, violating his right to confront S.A., a violation of the best evidence rule, and failure to provide it in discovery. Those objections were each overruled at the pre-trial conference and were clearly overruled were at trial.

5. During the cross-examination of Dalton Loggains (the Lighthorse investigator assigned to the case) defense counsel asked a question about whether there was a DNA sample collected from S.A. The witness testified that there was not a DNA sample. Appellant's counsel then asked if there was a SANE exam. The Nation objected asked to approach, and the jury was excused. The parties then had a discussion outside the jury's presence. After hearing argument, the trial court limited questioning to the existence and nature of buccal swabs, and barred questions about the SANE exam, which apparently was not conducted. The Nation's objection appears to have been assuming facts not in evidence due to the nonexistent SANE exam. The Nation's objection was sustained.

6. Also during Investigator Loggains' testimony, the Nation asked a Loggains what a buccal swab was. Investigator Loggains began to answer, and defense counsel objected. The parties approached the bench. After the conference, the prosecutor immediately asked the exact same question and was permitted to proceed. Based on the record, it is unclear exactly what the basis of Appellant's objection was to this question. It is clear from the record that buccal swabs were taken from both S.A. and Appellant, and that those were submitted to the Oklahoma State Bureau of Investigation (OSBI). Defense counsel was then allowed to argue that issue in closing to the jury as a basis for concluding that there was reasonable doubt.

7. The Nation called Doris Adams, Appellant's mother, and questioned her about a disclosure of abuse that S.A. made at school in 2018. During her direct, the Nation asked Adams a question about whether S.A. had told her that she had made a disclosure at school. Appellant objected and the parties had a bench conference. After the conference, the Court allowed the questioning to proceed. Adams testified that she was told about the disclosure, that she had told Appellant about the disclosure, and that she had not made a report to law enforcement. The record does not set forth the basis of Appellant's objection.

8. The Nation offered its Exhibit 9, E.A.'s forensic interview, and defense counsel objected to it based on authentication. After a bench conference, the objection was overruled. Appellant asserts that "the basis for the Court's ruling was not given." However, the question then is whether there was any basis to exclude the forensic interview based on a lack of authentication. The witness, Alyssa Essman, identified Nation's Exhibit 9 as a true and accurate copy of E.A.'s forensic interview, which she had brought with her. This sufficiently authenticated the exhibit in the absence of evidence that it was somehow altered from the original. See Choctaw Nation Criminal Procedure Code (CNCPC) § 3003 (duplicate generally admissible); Martin v. State, 1988 OK CR 241, 11 10, 763 P.2d 711 (testimony that copy of recorded interview was an "accurate copy" sufficient for admissibility).

9. When the Nation offered its Exhibit 13, S.A.'s forensic interview, Appellant objected based on hearsay, and the parties had a bench conference. The Court then announced that the objection was overruled, and admitted the exhibit.

Appellant further alleges that the trial transcript fails to include a discussion between the parties' attorneys and the court regarding potential jury tampering. Appellant states that his trial attorney witnessed Appellant's friend and employer, Mr. Cordel, speaking with a juror after the close of evidence on the second day of the trial. Prior to resuming the trial on the third day, July 26, 2024, Appellant's counsel advised the trial judge who then made a preliminary inquiry into possibility of jury tampering. According to Appellant's Brief in Chief, this juror admitted under oath that Mr. Cordel spoke to her regarding the trial and how she would vote for the Appellant. An inquiry was also made of the Appellant who had no knowledge of Mr. Cordel's activities that day. None of this appears to in the trial transcript before this Court.

Appellant asserts that he is "limited in what he can now argue despite the actual preservation of the issue on appeal" because "the basis for the Court's ruling was not given." However, this Court may decide the issue on any basis supported by the record. Vance v. State, 2022 OK CR 25, 11 5, 519 P.3d 526. Rulings made by the trial court during trial, such as evidentiary decisions, jury instructions, and sentencing, are reviewed under an "abuse of discretion" standard. The appellate court will only overturn these if it finds that the trial court made a decision that was arbitrary, unreasonable, or outside the

bounds of judicial reasonableness. However, due to the deficiencies in the record, the Court must also make an independent de novo review.

Title 25 of the United States Code, Section 1302 sets forth the Constitutional Rights guaranteed to Indians facing criminal prosecution by an Indian Tribe. Section 1302(c)(5) of Title 25 states that:

> In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall – (5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

Pursuant to Section 1051 of the Choctaw Nation Criminal Procedure Code, defendants shall have, as a matter of right, the right to an appeal of the adverse judgment against them in all felony cases. This section also tasks the trial court with the "preparation and authentication of a transcripts." Section 1055 further tasks the district court clerk with providing certified copies of the record and transcripts to the Court of Appeals. Rule 2.2 of the Rules of the Choctaw Nation Court of Appeals sets forth the form and contents of the record to be submitted to the Court of Appeals. Rule 2.2(C) also provides that:

> If no transcript has been previously prepared and no tape recording is available for any portion of the trial proceedings, the trial attorneys may stipulate or submit affidavits as to what transpired during the proceeding not transcribed or recorded. The trial judge shall enter an order adjudicating any matters upon which the attorneys cannot agree regarding what transpired during the unrecorded or un-transcribed proceedings.

Rule 2.4(B) of the Rules of the Choctaw Nation Court of Appeals further states that:

> The provisions of these rules do not abrogate the ultimate responsibility of the appellate attorney from the time of employment or appointment to represent the appellant to ensure the records necessary for commencing the appeal are complete and filed in a timely manner. The attorney shall utilize an application for writ of mandamus or other appropriate means to ensure the timely filing of all records necessary to complete the appeal.

A proper record of a trial includes a full and complete transcript of the trial proceedings. This transcript must be sufficiently complete to allow the Appellate Court to make due consideration of any issues raised on appeal. See Wiswell v. State, 1918 OK CR 63, 173 P. 662, 663; Draper v. Washington, 372 U.S. 487, 499, 83 S.Ct. 774, 9 L.Ed. 2d 899 (1963). Transcripts from trial proceedings should include all objections and argument thereon, as well as the testimony of the witnesses. However, a complete record

"does not translate automatically into complete verbatim transcript." Mayer v. City of Chicago, 404 U.S. 189, 194, 92 S. Ct. 410, 414, 30 L.Ed. 2d 372 (1971). It is clear that the trial Court committed error in failing to insure that all bench conferences regarding objections were duly recorded so they could be properly transcribed for the record by the court reporter. However, the question before this Court is whether or not this failure was reversible error.

This issue was directly addressed in by the Oklahoma Court of Criminal Appeals in Parker v. State. In that case, the Court found that there were thirty-four instances of bench conferences, held outside the presence of the jury and not transcribed by the court reporter. The appellant claimed that the argument made during the bench conferences "were critical" but did not allege that any error occurred during any of those conferences. The Oklahoma Court of Criminal held that "[i]t is not error alone that requires the reversal of judgments of conviction, but error plus injury, and the burden is on the appellant to establish the fact that he was prejudiced in his substantial rights by the commission or error." Parker v. State, 1994 OK CR 11 23-27 887 P2d 290, 294 (quoting Harrall v. State, 1984 OK CR 11 7, 674 P.2d 581, 584). See also Herron v. Fannie Mae, 861 F.3d 160, 173 (D.C.Cir. 2017) (holding that when a trial court made a ruling off the record, appellant had a duty to use available procedures to supplement the record; failure to comply made "meaningful appellate review . . . virtually impossible . . . and we have no option but to defer to the district court's ruling"). This issue was also addressed by the 10th Circuit in United States v. Haber, 251 F.3d 881 (10th Cir. 2001). In that case, the Court held that failure to properly record and transcribe bench conferences is reversible error only when it "makes it impossible to determine whether or not prejudicial error was committed." Id. at 889.

The Court in Haber also addressed an issue raised by Appellant in the case at bar. In Haber, as in the case at bar, the appellant's appeal counsel was not the same as his trial counsel. On appeal the appellant argued that it is impossible to determine whether the failure to properly record the bench conferences resulted in prejudicial error because "because his appellate counsel did not represent him at trial, and thus was not present to know what happened during the bench conferences." The Court declined this argument and held that "[a]ll other circuits considering the issue have concluded that, whether or not appellate counsel is new, the defendant must show the transcript errors specifically prejudiced his ability to appeal." Id. at 890.

In the case at bar, Appellant does not claim that any of the rulings in, or resulting from, the twenty-six bench conferences that were not recorded were prejudicial to him. Likewise, Plaintiff made no allegations or argument that the claim of jury tampering was prejudicial to him. Appellant merely argues that these items were left out of the trail transcript, and, as a result, Appellant claims he cannot make claims of error.

Perhaps more concerning than the unrecorded bar conferences, is the unrecorded discussion of alleged jury tampering. Appellant stated that the person who allegedly committed the acts of jury tampering was his friend and employer. Based on the allegations made by Appellant in his Brief in Chief, the attempt was made to persuade the juror to reach a verdict in favor of the Appellant. It is clear from the record that this did not occur. If is also clear from the argument of the Appellant, that the Court addressed this issue and determined that said attempt either did not occur or did not affect the juror's ability to continue to serve as a juror. Appellant has made no argument or provided any basis whatsoever to show that the trial court's handling of this issue caused him any prejudice in this matter.

However, the record clearly states what testimony or evidence was being offered at trial, the objections that were made by the parties, and the trial court's ruling on said objections. The only things missing was the parties' argument to the court and outside the hearing of the jury. If Appellant has any legal basis to support his objections, he had the right to argue them to this Court in his Brief in Chief. He has not done so. Appellant only argues that his appellant counsel is unable to make raise these issues on appeal because he is unaware what argument was made in the bench conferences. This Court agrees with Appellant that he could not have taken steps to correct the deficiencies in the transcript prior to the notice of completion of record. There is nothing in the record that suggest Appellant was aware of the deficiencies prior to obtaining a copy of the trial transcript until after the record was complete.

However, as states above, the Appellant still must show errors in the transcript that prejudiced his ability to appeal, regardless of whether or not the appellate counsel is new. Appellant has failed to make such an argument and merely argued that his appellate attorney cannot determine what issues to appeal, if any, without reading the discussions at the bench conferences from the trial transcript.

Upon a de novo review of the record, we find there is a sufficient record to show what evidence was being offered, that an objection was made, and how the court ruled on the objections. We further find that it is clear that none of the rulings made by the trial court in the unrecorded bench conferences, nor any rulings in regards to the allegations of jury tampering, show any harm or prejudice to the Appellant nor to his ability to perfect an appeal. Therefore, this Court finds there is no reversible error on the part of the trial court under the Appellant's first contention of error.

B. Whether this matter should be remanded for a new trial due to the trial Court binding the Appellant over on counts 4 and 6 as set forth in the Nation's Amended Information.

The purpose of the preliminary hearing is to establish probable cause that a crime was committed and probable cause that the defendant committed the crime." Title 75 of the C.N.C.P.C. § 258. Pursuant to Title 75 of the C.N.C.P.C. § 264:

> If, however, it appears from the examination that any public offense has been committed, and that there is sufficient cause to believe the defendant guilty thereof, the magistrate must in like manner endorse on the complaint an order signed by the magistrate to the following effect:
>
> It appearing to me that the offense named in the within complaint mentioned (or any other offense, according to the fact, stating generally the nature thereof), has been committed, and that there is sufficient cause to believe the within named A. B. guilty thereof. I order that the defendant be held to answer the same.

The Choctaw Nation Criminal Procedure Code, in regards to preliminary hearings, were adopted from Oklahoma Statues (22 O.S. § 258 et. seq.). Title 75 of the C.N.C.P.C., Section 264, mirrors 22 O.S. § 264. Therefore, this Court will turn to established Oklahoma case law where none exists from the Choctaw Nation Appellate Courts. After reviewing the Oklahoma case law, we find that it is consistent with Choctaw procedure and we therefore adopt that ruling. In Trimble v. Territory, 15 Okl. 620, 86 P.2d 64 (1904), the Oklahoma Supreme Court held that "By the language of the statute [22 O.S. § 264] he [the examining magistrate] is not confined to the offense alone charged in the information, or even in the warrant, but to the offense which he finds upon examination has been committed." Id. at 65. In Trimble the preliminary hearing magistrate discharged the Defendant for the charge of "stealing a steer" as set forth in the original criminal complaint, but bound the Defendant over for trial on the offense of grand larceny. The Court of Criminal Appeals, in Filler v. State, 23 Okl.Cr. 282, 214 P. 568 (1923) held that "An examining magistrate may hold the accused for trial for the offense originally charged, or for any other offense, as the facts may warrant." See also Webster v. District Court of Okla. Co., 1970 OK CR 80, 473 P.2d 277, ¶ 5-8. Furthermore, the Nation may amend its Criminal Information "in matter of substance or form at any time before the defendant pleads, without leave, and may be amended after plea on order of the court where the same can be done without material prejudice to the right of the defendant; no amendment shall cause any delay of the trial, unless for good cause shown by affidavit." Title 75 of the C.N.C.P.C. § 304.

Preliminary hearing magistrates, in the Choctaw Nation District Court, have the authority to discharge the defendant for lack of admissible evidence, bind the defendant

over for trial on the charges listed in the Nation's Criminal Information, and to amend the charges or add additional charges, based on the evidence offered the preliminary hearing. The trial court's decision on a motion attacking a magistrates bindover order will only be reversed if this Court finds that it was clearly erroneous. See State v. Heath, 2011 OK CR 5, 246 P.3d 723, ¶ 7. This Court further finds the preliminary hearing magistrate's decision to bind the Appellant over on Counts 1, 2, and 3 (as set forth in the original criminal information) and to find there was sufficient evidence to bind the Appellant over on three additional counts, based on the evidence offered at the preliminary hearing, was not clearly erroneous and supported by the evidence.

Appellant further contends that the trial Court erred in failing to enter a proper bindover order, pursuant to 75 of the C.N.C.P.C. § 264. Both parties agree that the preliminary hearing magistrate's bind-over order failed to include the proper language and endorsement on the Information as required by § 264. However, Appellant did not raise any objection to the preliminary hearing magistrate's order, on these grounds prior to trial. Nor did Appellant raise any objection to the Amended Criminal Information.

As stated by the Appellant in his Brief in Chief, when a defendant raises an issue on appeal that was not preserved by objection during trial, the appellate court may review it for "plain error." To reverse under this standard, the Appellant must prove: 1) the existence of an error by the trial court; 2) that said error was plain or obvious; and 3) that said error affected the Appellant's substantial rights, meaning that error affected the outcome of the trial. See Pelts v. Choctaw Nation, No. ACC-2022-4 (March 21, 2023). Additionally, plain errors will only be corrected if the error seriously affects the fairness, integrity, or public reputation of the judicial proceedings or would otherwise result in miscarriage of justice. Runnels v. State, 2018 OK CR 27, 11 l8, 426 P.3d 614, 619.

In Campion v. State, 1934 OK CR 50, 33 P.2d 511, the Oklahoma Court of Criminal Appeals held that a proper endorsement on the criminal information (as required by 22 O.S. § 264) is unnecessary, so long as there is record that the magistrate found sufficient evidence to bind the defendant over for trial., Id. at 512-13.

Therefore, we hold that the preliminary hearing magistrate's Order on February 21, 2023, which bound the Appellant over on six counts of child sexual abuse, did not comply with Section 264. Failure to comply with the requirements of this section is error. However, we further hold that said error did not seriously affect the affects the fairness, integrity, or public reputation of the judicial proceedings, nor did it otherwise result in the miscarriage of justice. Therefore, we decline to hold that said error is reversible error.

We further hold that the cumulative effect of the errors found herein did not deprive the Appellant of a fair trial and decline to reverse the trial court on the grounds of cumulative error.

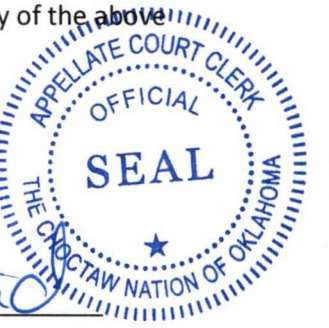
IV. CONCLUSION

The Court finds no reversible error due to the trial transcript failing to include verbatim arguments of counsel during bench conferences. The Court further finds no plain error in the Court binding the Appellant over on Counts 4 and 6 as set forth in the Amended Criminal Information. The Court further finds no cumulative error which was sufficient to deprive the Appellant of a fair trial. Therefore, the Choctaw Nation District Court Order is hereby AFFIRMED.
Per Curiam

CERTIFICATE OF DELIVERY

I hereby certify that on the 5th day of December, 2024, a true and correct copy of the above pleading was emailed to:

Tribal Prosecutor @ tribalprosecutor@choctawnation.com
Public Defender @ publicdefenders@choctawnation.com



Sandy Stroud, Appellate Court Clerk