

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA,)
 Plaintiff,)
vs.)
)
 Defendant.) Case no.

DEFENDANT’S MOTION IN LIMINE

COMES NOW, the defendant above, by and through this attorney of record in the above styled matter and moves this Court to order the State of Oklahoma, the District Attorney, his assistant prosecutors, and all of the State’s witnesses in the above styled matter to refrain from arguing during voir dire examination, opening statements, closing statements, questions, answers, statements, objections, or by means of any other device to any of the following matters stated hereinafter.

It should be observed that some remarks are so prejudicial that even an admonishment to the jury is not sufficient to cure the defect and that in some cases once the bell has been rung, then “the bell could not be unrung” and that “an overzealous attitude is, in most instances, detrimental to the prosecution and often results in a *retrial* of the case at *considerable expense* to the state.” See, *Wright v. State*, Okl.Cr., 325 P.2d 1089, 1093 (1958).

I.

USE OF HYPOTHETICAL QUESTIONS IN VOIR DIRE

The State of Oklahoma should be prohibited from presenting or using any hypothetical questions in voir dire pursuant to Rule 6 of the Rules for the District Courts.

II.

LEADING QUESTIONS

The State of Oklahoma should be prohibited from asking leading questions in its case in chief on direct examination or any of its witnesses except as provided by 12 O.S. §2611(D).

III.

LAY OPINION

The State of Oklahoma has listed as witnesses in this case certain “lay” witnesses who should be prohibited from testifying beyond the scope of what the law allows a lay witness to testify. Okla. Stat. Tit. 12 § 2701.

IV.

INTRODUCTION OF EVIDENCE/CHAIN OF CUSTODY

The State of Oklahoma should be prohibited from presenting any item of evidence unless the State adequately establishes the existence of such evidence with qualified expert testimony and an appropriate chain of custody. *Ervin v. State*, 580 P.2d 1002 (Okla.Crim.App. 1978), and *Driskell v. State*, 1983 OK CR 22, 659 P.2d 343; see also, *Faulkenberry v. State*, 1976 OK CR 131, 551 P.2d 271; *Conde-Hernandez v. State*, 1977 OK CR 204, 565 P.2d 705.

V.

INADMISSIBLE EVIDENCE

The State of Oklahoma should be prohibited from offering any inadmissible evidence, including the prosecutor’s asking of legally objectionable questions in the

presence of the jury, for the purpose of calling the jury's attention to such inadmissible evidence.

VI.

BAD ACTS

The State of Oklahoma should be prohibited from offering any evidence of alleged other bad acts of the Defendant.

VII.

HEARSAY EVIDENCE

The State of Oklahoma should be prohibited from offering any hearsay evidence, unless the State first provides a foundation for the same as coming under one of the statutory exceptions to the hearsay rule. Okla. Stat. Tit. 12 §§2801, 2802, 2803 and 2804.

VIII.

STATEMENTS OF DEFENDANT

Prior to the introduction of any confessions, the defendant requests an *in camera hearing*, outside the presence of the jury, in accordance with *Jackson v. Denno*, 84 S.Ct. 1774, 878 U.S. 368 (1964); and *Pickens v. State*, 885 P.2d 678 (Okla.Crim. App. 1994).

Additionally, the State of Oklahoma should be prohibited from offering testimony as to statements of the Defendant until a foundation has been laid for a proper arrest without a warrant. *Kaupp v. Texas*, 123 S.Ct. 1843 (2003). In addition, the State of Oklahoma should be prohibited from offering testimony as to statements of the

Defendant until a foundation has been laid that she was properly advised of his/her rights.

IX.

TESTIMONY OF WITNESSES

That all witnesses be admonished by the party calling them that they are to refrain from volunteering information and should respond only to the questions asked.

X.

DEFENDANT'S RIGHT TO REMAIN SILENT

The State of Oklahoma should be prohibited from soliciting any testimony as to the Defendant's silence or from commenting on the Defendant's silence. It is improper and prejudicial for the prosecuting attorney to comment on the post-arrest silence of the defendant or silence of the defendant after *Miranda* warnings have been given. *Doyle v. Ohio*, 426 U.S. 610 (1976). "It is error for the prosecutor to comment — either directly or indirectly — at any stage of trial — upon the defendant's right to remain silent." *Hanf v. State*, 560 P.2d 207, 211 (Okla. Cr. 1977).

XI.

ARGUING FACTS NOT IN EVIDENCE

That it is improper for a prosecutor to mislead a jury by arguing facts not in evidence. *Bland v. State*, 2000 OK CR 11, ¶ 101, 4 P.3d 702, 728.

XII.

PREJUDICIAL ARGUMENTS

The State of Oklahoma should be prohibited from making prejudicial arguments such as put yourselves in the shoes of the victim, or finding him not guilty will be a

license to commit crime, or comments about the parole system or time off for good behavior, or “name calling” and the like. The Oklahoma Court of Criminal Appeals has held that: “To convict and punish a person through the influence of prejudice and caprice is as pernicious in its consequences as the escape of a guilty man.” *Lime v. State*, 1971 OK CR 9, 479 P.2d 608. It is improper to make reference to the probability of defendant committing future crimes. *Ibid*. It is improper and prejudicial for a prosecutor to use arguments calculated to inflame the passions or prejudices of the jury, or to go outside the record for appealing to passion or prejudice. *Bennett v. State*, 1976 OK CR 47, 546 P.2d 659, cert. Denied, 426 U.S. 940; ABA Standards for Criminal Justice 3-5.8 (c) (2nd Ed. 1982).

It is improper for the prosecuting attorney during closing argument to invade the **province of the jury** to determine the truth or falsity of the testimony of the witnesses appearing before them by telling the jury in absolute terms that the defendant lied on the stand, *Robertson v. State*, Okl.Cr., 521 P.2d 1401 (1974); see also, *Fulks v. State*, Okl.Cr., 481 P.2d 769 (1971).

XIII.

IMPROPER STATEMENTS OF THE LAW TO THE JURY

The State of Oklahoma should be prohibited from making any mis-statements of the law to the jury or mis-characterizations of the jury instructions.

It is improper for a prosecutor to tell a jury they must determine guilt or innocence. It is the jury's duty to determine whether the State has demonstrated guilt beyond a reasonable doubt. If the State fails to sustain its burden, the jury must find the defendant not guilty. *Vuletich v. State*, 1987 OK CR 61, 735 P.2d 568, 569 (Okl.Cr.

1987). If the State fails to sustain its burden, the jury must find the defendant not guilty. See 22 O.S. 1981 § 836. A determination of innocence is not required.

WHEREFORE, the defendant respectfully requests this Court to exercise its discretion and make an order absolutely prohibiting the District Attorney, his assistant prosecutors, and all of the State's witnesses from commenting, stating, or otherwise insinuating during voir dire examination, opening statements, closing statements, questions, answers, statements, objections, or by means of any other device to any of the above and foregoing matters stated herein.

Respectfully submitted,

Glen R. Graham OBA 12110
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CERTIFICATE OF DELIVERY

The undersigned does hereby certify that on the _____ day of _____, 20____, a true and correct copy of the above and foregoing instrument was hand-delivered to the Tulsa County District Attorney's Office, 500 S. Denver Ave., Tulsa, Oklahoma.

By: _____
GLEN R. GRAHAM