

CHARLES FREDERICK WARNER

I. Procedural History

The evidence in this case shows that during the afternoon of August 22, 1997, Charles Frederick Warner ("Defendant") brutally raped and murdered 11-month-old Adrianna Waller. The Oklahoma Court of Criminal Appeals ("OCCA") summarized the evidence presented at Defendant's jury trial as follows:

¶ 2 Appellant was charged and convicted of the first degree rape and murder of 11 month old Adrianna Waller. The victim and her mother, Shonda Waller, lived with Appellant and his two children, six year old Charvon and five year old Vonnita. Two year old Dashja, Appellant's daughter from another relationship, stayed with them on occasion. On August 22, 1997, Appellant left early that morning to pay a traffic fine at city court. He returned home at approximately 10:00 to 10:30 a.m. Ms. Waller prepared lunch for Appellant and the older children and fed the victim baby food. At approximately noon, Ms. Waller left for the grocery store. All four children remained at home with Appellant. At the time Ms. Waller left, the victim was dressed in a jumpsuit. Ms. Waller returned home at approximately 2:00 to 2:30 p.m. She glanced in the master bedroom and saw the victim lying on the bed. The victim appeared to be sleeping. Ms. Waller noticed the victim was dressed only in her diaper. Later that afternoon, Appellant and Ms. Waller decided to take all the children with them to run errands. Ms. Waller intended to get the victim ready but Appellant stopped her and volunteered to retrieve the victim from the bedroom. Appellant returned to the living room holding the victim and saying that she was not breathing. When Appellant handed the victim to Ms. Waller, the victim was limp. Ms. Waller began screaming and told Appellant to take them to the emergency room. Appellant drove Ms. Waller and all the children to the emergency room. On the way, Ms. Waller gave the victim CPR.

¶ 3 They arrived at the hospital at approximately 3:40 p.m. Emergency personnel took the victim and continued

resuscitation efforts. All efforts failed and the victim was pronounced dead at 4:07 p.m. Emergency charge nurse Robin Justice was cleaning the victim before Ms. Waller saw her when she noticed bright red blood around the victim's rectum and tears to the rectum. Ms. Justice testified at trial that the injuries appeared to be fresh and recent. She called police and notified the attending physicians Drs. McCreight and Hill.

¶ 4 Dr. McCreight observed bright red blood staining the skin around the victim's rectum and tears around the rectum. X-rays indicated two skull fractures, one of which was depressed, and two fractures to the left jaw. Dr. McCreight testified that the injuries were recent, consistent with a violent shaking and inconsistent with a fall from a bed to a carpeted floor. He also testified that upon sustaining such injuries, the victim would not be able to eat, drink or play. His diagnosis was sexual and physical abuse.

¶ 5 In conducting the subsequent autopsy, the medical examiner Dr. Choi, determined the cause of death to be multiple injuries to the victim's head, chest, and abdomen. She determined the manner of death to be a homicide. Dr. Choi testified the victim suffered a crushing type injury to her head and internal injuries to her brain. The victim's jaw and three ribs were fractured, her liver was lacerated, and her spleen and lungs were bruised. There were bruises on the victim's chest the size of adult fingertips. She also observed retinal hemorrhages in the victim's eyes, which she testified were consistent with the victim being violently shaken. Additionally, Dr. Choi observed six different tears around the victim's rectum, which she testified were consistent with blunt force penetration. Dr. Choi also testified that upon receiving her injuries, the victim would not have been able to eat, drink or play.

¶ 6 Interviewed first at the hospital, Appellant told officers he brought the victim, her mother, and the children to the emergency room. He said he had been in the master bedroom with the victim and two year old Dashja. He said Dashja gave the victim something to drink. After a while he left the room. When he returned to the bedroom between approximately 2:00

and 3:00 p.m., the victim was lying on the floor crying. He picked her up and noticed she had hit her head. He said she seemed to be dazed. He tried to comfort her and laid her on the bed to sleep. When he returned to get her at approximately 3:30 p.m., she was not breathing. Later, when Appellant was arrested, he complained to officers that the knuckles on his right hand were sore.

¶ 7 In a subsequent search of Appellant's home, officers discovered a sexually explicit videotape in the VCR located in the master bedroom, and a jar of Vaseline and a bottle of aloe vera jel nearby.

¶ 8 At trial, Appellant's son Charvon testified Appellant was the only adult with the children when Ms. Waller went to the store. He said that on the day the victim died, he saw Appellant in the master bedroom shaking her. He said Appellant was often angry with the victim because of her crying and general noisiness. Charvon admitted that he had previously testified the victim died because she was "beat up".

¶ 9 In his defense, Appellant presented eight witnesses. These included medical experts who testified that the victim would have immediately lost consciousness upon sustaining the head injury, her injuries were consistent with hitting her head on a wooden bed frame, and the injuries to her chest could have occurred during CPR. Defense witnesses also testified that Charvon had said he had lied when he said he saw Appellant hit the victim, that Ms. Waller had originally said Appellant drove her to the store and she waited for him to take her home, that Appellant was left handed, and that he took good care of the victim.

¶ 10 During the second stage of trial, in addition to incorporating all evidence from the first stage, the State presented evidence showing that Appellant's four year old daughter Vonnita had been physically abused by Appellant, that Appellant physically punished Charvon and Vonnita by whipping them with a belt or electrical cord, and that Appellant had physically abused his ex-wife Vonricca Warner. In

mitigation, Appellant presented thirteen witnesses. The jury found the existence of the two alleged aggravating circumstances, “continuing threat” and “especially heinous, atrocious or cruel” and recommended the death penalty. The trial court sentenced accordingly.

Warner v. State, 144 P.3d 838, 856-57 (Okla. Crim. App. 2006).

Based on this evidence, Defendant was originally tried and convicted in the District Court of Oklahoma County, State of Oklahoma, Case No. CF-1997-5249 of Murder in the First Degree (Count 1) and Rape in the First Degree (Count 2). The jury recommended a sentence of 999 years imprisonment for Count 2.

In a separate penalty phase, the jury found the existence of two statutory aggravating circumstances: (1) the murder was especially heinous, atrocious or cruel; and (2) the existence of a probability that Defendant would commit criminal acts of violence that would constitute a continuing threat to society. The jury recommended a sentence of death for Murder (Count 1). Defendant was sentenced in accordance with the jury's verdict.

Defendant's judgment and sentence was reversed and remanded for a new trial by the OCCA. *Warner v. State*, 29 P.3d 569 (Okla. Crim. App. 2001).¹

On March 24, 2003, a new trial was commenced. However, after the State's opening statement, a request for a mistrial was requested by Defendant and ultimately granted by the trial court.

¹The OCCA found that the trial court (1) erred in refusing to remove certain prospective jurors for cause; and (2) erred in failing to grant Defendant a continuance to obtain a second stage mitigation witness.

On June 16, 2003, a new trial was commenced and completed. Upon retrial Defendant was again convicted of Murder in the First Degree (Count 1) and Rape in the First Degree (Count 2). The jury recommended a sentence of 75 years imprisonment for Rape. Finding the same aggravating circumstances proven beyond a reasonable doubt, the jury once again recommended a sentence of death for Murder. Defendant was sentenced in accordance with the jury's verdict.

Defendant's judgment and sentence was affirmed by the OCCA, *Warner v. State*, 144 P.3d 838 (Okla. Crim. App. 2006), and rehearing was denied. On May 14, 2007, the United States Supreme Court denied certiorari review. *Warner v. Oklahoma*, 550 U.S. 942 (2007).

Defendant also sought post-conviction relief. On December 19, 2006, the OCCA denied relief. *Warner v. State*, PCD-2003-897, slip op. (Okla. Crim. App. Dec. 19, 2006)(unpublished).

Thereafter, Defendant filed a petition for writ of habeas corpus in the United States District Court for the Western District of Oklahoma. On August 31, 2011, the federal district court denied the petition. *Warner v. Workman*, 814 F. Supp. 2d 1188 (W. D. Okla. 2011).

Defendant appealed the denial of federal habeas relief to the United States Court of Appeals for the Tenth Circuit. On April 1, 2013, the Tenth Circuit affirmed the district court's denial of relief. *Warner v. Trammell*, 520 Fed. Appx. 675 (10th Cir. 2013).

Defendant thereafter sought certiorari review of the Tenth Circuit's decision. On January 13, 2014, the United States Supreme Court denied Defendant's petition for writ of certiorari. *Warner v. Trammell*, ___ S. Ct. ___, 2014 WL 102619 (2014).

Recognizing that Defendant had exhausted all state and federal appeals, the OCCA set Defendant's execution date for March 27, 2014. Pursuant to Article VI, § 10, of the Oklahoma Constitution, Defendant now seeks executive clemency from the Governor of the State of Oklahoma.

II. Statement of the Facts

A. The Murder. Only a few months prior to August 22, 1997 – the day of the rape and murder – Shonda Waller and the victim, 11-month-old Adrianna Waller, moved in with Defendant, and his two children, five-year-old Vonnita and six-year-old Charvon (Tr. 715-16).² Shonda and Defendant had been intimate and he had asked her on several occasions to engage in anal sex but she had refused (Tr. 725) During the two weeks prior to the rape/murder, Shonda had rejected all his requests for sexual relations but one (Tr. 725)

The morning of the rape/murder, Defendant left early to pay a traffic fine at city court (Tr. 717). When Shonda woke up, at approximately 8:00 a.m., Adrianna had crawled into Shonda's bed and was playing with Shonda's hair. The two stayed in bed for a while. Adrianna was playful and happy (Tr. 718). When Shonda changed Adrianna's diaper that morning, she did not see anything wrong with Adrianna – no cuts or blood on her rectum (Tr.

²The evidence revealed that Defendant also took care of his two-year-old daughter, Dashja when her mother was at work.

719-20). When Defendant returned, Shonda went to the grocery store around noon, leaving Defendant to care for Adrianna and his three children (Tr. 723, 728).

Defendant's seven-year-old son, Charvon Warner, testified Defendant did not like Adrianna because she cried a lot (Tr. 863). Charvon testified that on the day Adrianna died, he saw Defendant shake Adrianna, while holding her with his hands around her body (Tr. 864-65).³ Charvon testified Shonda wasn't home when this occurred and that he immediately went to his sister's bedroom (Tr. 866). He testified the Defendant was very angry that day (Tr. 871).⁴

Shonda returned between 2:00 and 2:15 p.m. (Tr. 780). Shonda took a glimpse in the master bedroom and saw Adrianna lying on the bed (Tr. 731). Later in the afternoon, plans were made for Defendant, Shonda and the children to run an errand. Defendant went into the bedroom to get Adrianna. Defendant brought Adrianna out, telling Shonda that Adrianna was not breathing (Tr. 733). Defendant drove to Mercy Hospital, with Shonda attempting CPR on Adrianna along the way (Tr. 734).

³Initially, Charvon told Rebecca Price, a child welfare supervisor for the Department of Human Services, that he never saw Defendant hit Adrianna – he only heard Defendant yell at her (Tr. 1095). Later, Charvon's statement changed when questioned by Office Willy Edwards. Ms. Price testified that it was very normal for a child to refuse to give information that would hurt a parent. Ms. Price testified it was much more unlikely for a child to give information against a parent if that child has been exposed to abuse because they know what will happen if they talk. However, after a child is comfortable with their new surroundings and they feel safe, they will open up (Tr. 1100-02). As will be discussed in more detail later, Charvon was exposed to much abuse from Defendant in the home.

⁴Charvon testified he had seen Defendant shake Adrianna before (Tr. 868).

They arrived at the hospital at 3:40 p.m. (Tr. 567). After resuscitation efforts failed, Adrianna was declared dead at 4:07 p.m. (Tr. 575, 606). Robin Justice, the charge nurse in the emergency room at Mercy Hospital, began to clean Adrianna so that Shonda could hold her baby one last time (Tr. 576). Ms. Justice was going to change Adrianna's diaper. When she pulled down the old diaper, however, she saw loss of integrity around the rectum and red blood indicating a very recent injury; there were tears to the rectum. Ms. Justice called security and the attending physician, Dr. McCreight (Tr. 576-77).

Dr. McCreight noted the red blood staining on the skin around Adrianna's rectum and observed that the tears in the rectal mucosa extended the full thickness of the skin into the rectum (Tr. 610, 612). Dr. McCreight testified that the blood around the rectum appeared fresh (Tr. 614).⁵ X-rays at the hospital indicated two skull fractures, one of which was depressed; in addition there were two fractures to her left jaw and her ribs (Tr. 616). Dr. McCreight testified that it would be extremely unusual for a rib to break during CPR (Tr. 603).⁶ The doctor's diagnosis was physical and sexual abuse (Tr. 618).

The medical examiner, Dr. Chai Choi, found the cause of death was multiple injuries to the head, chest, and abdomen and the manner of death was homicide (Tr. 897). Adrianna

⁵Evidencing that the rape and murder occurred close in time.

⁶Likewise, Dr. Chai Choi, the medical examiner, testified that bones of small children are not easy to break as they are more flexible and not as brittle as adult bones (Tr. 603). Similarly, Dr. Ann Spencer testified that she had seen many children after parents had attempted CPR – no rib fractures were ever seen (State's Exhibit 2, Tr. 502). Defense witness, Dr. Phillip Nowicki disagreed, however, testifying rib fractures and tears of liver could be caused by CPR (Tr. 1049, 1053).

had a crushing injury associated with a fracture to her skull and internal injuries to her brain. Dr. Choi testified Adrianna's skull was depressed or caved in (Tr. 900). Dr. Choi testified the head fractures were consistent with being punched or thrown against a hard object (Tr. 919). There were also retinal hemorrhages indicating Adrianna had been shaken (Tr. 922-23).

In addition, Adrianna suffered from fractures to her jaw and three ribs,⁷ her liver was lacerated, and her spleen was bruised (Tr. 900, 906-07, 913-17). Dr. Choi testified that the injury to the liver was consistent with a hard punch or stomping.⁸ She testified it looked as if the liver was sandwiched between Adrianna's backbone and the top of that area of her body (Tr. 919-20). Dr. Choi also saw six different tears of the anal skin around the rectal entry but not inside the rectal canal, which was consistent with blunt force penetration rather than being cut (Tr. 929-30).⁹ The largest tear was approximately one-third of an inch long (Tr. 929).¹⁰ Dr. Choi also identified fine petechii – “about seven blood spots underneath skin” – at the urethra opening. (Tr. 930). She testified the nature of the injury is a pressing

⁷Two ribs on the right side and one on the left were fractured (Tr. 916).

⁸Later, Defendant complained that the knuckles on his right hand were sore when the officer touched them while checking his handcuffs; Defendant did not elaborate on why his knuckles hurt and the officer did not ask (Court's Ex. 1, Tr. 620). Defense witness, Dr. Nowicki, testified that if a fist had been used to cause Adrianna's head injuries, there would have been damage to the hand (Tr. 1045).

⁹Nurse Justice testified that nothing in treatment would have caused the anal tears or the internal injuries (Tr. 579, 581).

¹⁰The autopsy report is attached at App. 1-19.

bruise, consistent with “the skin reacting to pressure in a pretty small focused area from some type of blunt object” (Tr. 931).

Dr. Choi testified that Adrianna would have rapidly lost consciousness once she received the injuries to her head (Tr. 939).¹¹ Adrianna would not have been able to get around, play with her toys or another child, or take and drink a glass of water (Tr. 936).

Dr. Ann Morie Spencer, a pediatric emergency medicine specialist at Children’s Hospital, was unavailable at Defendant’s re-trial and her testimony from his first trial was read to the jury (Tr. 818). Dr. Spencer testified she had examined the pictures of Adrianna’s injuries (Court’s Ex. 2, Tr. 449-500). She testified the injuries to Adrianna’s rectum indicated force applied to her rectal area shortly before death; the injuries were inconsistent with a hard stool but not with an adult penis or other firm object being violently placed in the area (Court’s Ex. 2, Tr. 505-06). Dr. Spencer testified that it would take a considerable amount of force to cause such injuries since that area does not tear easily (Court’s Ex. 2, Tr. 506). She also testified that Adrianna’s skull and head injuries were not consistent with a fall from two to four feet (Court’s Ex. 2, Tr. 507). She testified that a depressed skull fracture, as seen with Adrianna, indicated much more violence, such as a high speed motor accident, or a fall from a distance much greater than four feet (Court’s Ex. 2, Tr. 507-08). Dr. Spencer

¹¹Defense witness, Dr. Nowicki, agreed with this assessment (Tr. 1044). He also agreed that the cause of the head injury was impact with a hard object (Tr. 1045). Dr. Nowicki testified that after the injury Adrianna would have lived only thirty to sixty minutes (Tr. 1053).

also testified that the injuries to Adrianna's ribs, liver and spleen were consistent with shaken baby syndrome (Court's Ex. 2, Tr. 508).

Officer William Loftis responded to the hospital as a technical investigator (Tr. 649). He was present and took photographs while the medical examiner was examining Adrianna (Tr. 650). He saw the tearing between the vaginal and rectal area; he also noticed the presence of some lubricant around the vaginal and rectal area (Tr. 653-54).¹² State's Exhibit No. 12 showed the glistening of the lubricant on Adrianna's body (Tr. 653).¹³ Later, at Defendant's house, an open jar of vaseline and an open bottle of aloe vera were found in the bedroom next to the VCR containing a pornographic videotape depicting adults engaged in sexual relations (Tr. 670-72).¹⁴

B. Defendant's Statements. Over the course of time, Defendant gave several different accounts of what happened the day of Adrianna's death. At the hospital, Defendant

¹²Officer Loftis's report is attached at App. 20.

¹³A photograph of Adrianna at the hospital, as well as State's Exhibit 12 are attached at App. 21-22.

¹⁴As noted by the OCCA:

Shonda Waller further testified she had been watching a videotape called "The Crow" when she left for the store and that she had left the tape in the VCR when she left the house. Pursuant to a search waiver, police found a different videotape in the VCR. The videotape found in the VCR was cued up to a scene of sexually explicit behavior between men and woman. Also near the VCR and TV, police found a jar of Vaseline and a jar of aloe vera gel. Waller testified those items were normally kept in the bathroom.

Warner, 144 P.3d at 868. A diagram of the home, as well as the photographs of the items found in the bedroom, and the report of Officer Griffin describing his findings are attached at App. 23-27.

told Officer Tim Ballard that he had brought Adrianna, Shonda, and his two children to the hospital (Court's Ex. 1, Tr. 608). He stated he had been at home in the bedroom with Adrianna and his two-year-old baby, Dashja, and then had left the room. He claimed that Dashja was sitting on the bed with Adrianna, giving Adrianna water (Court's Ex. 1, Tr. 610-11).¹⁵ When he returned to the bedroom, sometime between 2:00 and 3:00 p.m., he heard Adrianna crying (Court's Ex. 1, Tr. 611). Adrianna was lying on the floor. When he picked her up, he noticed she had hit her head and he tried to comfort her (Court's Ex. 1, Tr. 612). She appeared a little dazed and he laid her down where she could sleep (Court's Ex. 1, Tr. 612). When he returned again to the room, around 3:30 p.m., Adrianna was not breathing (Court's Ex. 1, Tr. 613). App. 28-29.

Defendant's next statement, also obtained the night of the murder, was given at the police station to Detective Eric Mullenix.¹⁶ During this interview, Defendant told the events of the entire day. Defendant explained that at approximately 7:15 a.m. he got up, got dressed and left to go to Municipal Court to pay some fines. He stated that Shonda, Adrianna, Charvon, Vonnita and Dashja were all at home when he left. Defendant stated he paid his ticket and returned home between 11:00 a.m. and noon. Shortly after returning home, Defendant explained that he left again and went to the bank. After he returned home, Shonda

¹⁵This statement was not true as Dr. Choi testified that there was no water in Adrianna's system when she died (Tr. 936).

¹⁶Portions of this interview have been provided to the Board. The DVD runs for approximately 25 minutes equaling 21 pages. App. 30. In addition, a transcript of the excerpted portions from the videotape is provided for the Board's convenience. App. 31-48.

left to go grocery shopping – sometime shortly after noon. Defendant stated that he stayed home, watched television, and played with his children. Defendant claimed that Adrianna was asleep on the bed. He initially claimed to have checked on her only once. Defendant then stated that Dashja was in the bedroom playing with Adrianna. Defendant stated he heard a noise and then a cry. Defendant claimed he entered the bedroom and saw Dashja getting down from the bed and Adrianna on the floor. Defendant said he picked up Adrianna, comforted her, and placed her back on the bed on her stomach. He said he checked on her later and she appeared to be snoring. Asked again how many times he checked on Adrianna, he now claimed it was one time after she fell from the bed. Defendant then said that after Shonda returned home and the groceries were unloaded, he decided he and Dashja would leave.¹⁷ When he went to the bedroom to dress, he saw Adrianna was in a weird position. He took Adrianna to Shonda. Shonda took Adrianna and “freaked out”. They then sped to the hospital. App. 49-53.¹⁸

At Defendant’s initial jury trial, on March 8, 1991, Defendant’s story changed. Although the morning events remained similar, with a little more elaboration, it was the events of the afternoon that changed significantly. Defendant testified that after he returned

¹⁷He was going to take Dashja home and get a telephone for his home.

¹⁸This is Officer Mullenix’s narrative of Defendant’s interview. On page 4 of the narrative, Defendant tells Officer Mullenix that Shonda “freaked out”. (App. 52). Shonda’s statement, also given the night of the murder, was very similar to Defendant’s statement given that same night. Officer Mullenix’s narrative of the interview is attached at App. 54-60.

from the bank, he, Shonda and all of the children went to the grocery store. The defendant testified:

From there, she wanted to go grocery shopping so we got the kids and I took them to Buy-for-Less. All of us went inside. No, I dropped her off at the store basically. She asked me to wait till [sic] so she could go inside to verify that she indeed had food stamps on the access card

(3/8/99 Tr. 752). App. 63-68. Defendant testified that after Shonda acknowledged she did have food stamps, he and the children returned home, arriving at approximately 1:00 p.m. Defendant claimed he remained home approximately 15 minutes. He claimed that he then left the home with Charvon and Dashja. Defendant stated that he left five-year-old Vonnita and 11-month-old Adrianna alone in the home (3/8/99 Tr. 753-54). According to Defendant's testimony, he did not return to his home until after he had picked up Shonda from the grocery store, returning home at approximately 2:45 or 3:00 p.m. (Tr. 752-56).

Defendant then testified:

That is when, after putting the groceries up, I sat down and Ms. Waller gave me a Coke to drink and at the time she was telling me about all the arrangements she had made [about getting a telephone].

She was asking me to – she was asking me to go to the store, to IGA, which is in the same direction that we had just left. She was telling me go there and pay for the connection fee and that if I go there at a certain time, that by that day the telephone company could come out and turn the phone on.

* * *

I myself went back to my room to get dressed to go – to go to pay for IGA because prior I wasn't getting out of the car. This

time I was actually going inside to go pay for this and take my daughter, my two-year-old daughter, Dasia [sic] Warner, to her mother, Michelle Shavers.

* * *

As I went to the back, I went into the room. While I was getting ready, wiping the sweat off myself, that's when I noticed, look inside the mirror behind me, that's when I noticed the baby looked different so -- so I shake on the baby and I noticed that she wasn't breathing correctly.

(3/8/99 Tr. 757-58).¹⁹ App. 67-68.

Defendant told a different version to Michelle Shavers, Dashja's mother. Defendant told Ms. Shavers that after he dropped off Shonda at the grocery store, he almost had a wreck and that Adrianna hit her head. App. 61-62.

Finally, at Defendant's 2003 trial, although Defendant did not testify, the story changed once again. The crux of the story, without any testimony about leaving the children home alone or almost having an accident, was that Defendant drove Shonda to the grocery store and picked her up. The implication was that Shonda injured Adrianna when they returned home from the grocery store.²⁰ This implication, however, was proven untrue by the testimony of Charvon.

¹⁹Defendant claimed that on the way to the hospital, Shonda had told him what to tell the police (3/8/99 Tr. 759). Of course, we know from Defendant's earlier statement that Shonda, upon finding out Adrianna wasn't breathing, "freaked out". We also know from the testimony of the staff at Mercy Hospital that Shonda was hysterical when she arrived at the hospital (Tr. 568, 598, 608).

²⁰As the OCCA noted, it was through cross-examination of Shonda Waller that Defendant "set out his defense that the victim's injuries did not occur until Ms. Waller returned home from the grocery store." *Warner*, 144 P.3d at 862.

C. **The Aggravating Circumstances.** The jury found the existence of two aggravating circumstances, namely: (1) the existence of a probability that Defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (2) the murder was especially heinous, atrocious or cruel. The OCCA found that the evidence supported the jury's determination of both circumstances. *Warner*, 144 P.3d at 879-81.

1. **Continuing Threat.** The evidence was sufficient to support the jury's finding of the existence of a probability that Defendant would commit criminal acts of violence that would constitute a continuing threat to society. Finding the evidence sufficient to support this aggravating circumstance, the OCCA stated:

A finding that the defendant would commit criminal acts of violence that would constitute a continuing threat to society is appropriate when the evidence establishes the defendant participated in other unrelated criminal acts and the nature of the crime exhibited the calloused nature of the defendant. To prove this aggravating circumstance, this Court has held the State may present any relevant evidence, in conformance with the rules of evidence, including evidence from the crime itself, evidence of other crimes, admissions by the defendant of unadjudicated offenses or any other relevant evidence.

The State's evidence showed that in addition to the evidence of the rape and murder of the victim, [Defendant] had physically abused and attempted to vaginally rape the victim shortly before her death. The State's evidence also showed [Defendant] had physically abused Vonnita Warner; that on more than one occasion [Defendant] had choked and beat his ex-wife Vonricca Warner while she was pregnant with Vonnita; and other occasions he had thrown his ex-wife to the ground, thrown her up against a wall in their home, and forced her to have sexual relations with him against her will. This evidence shows a pattern of escalating violent conduct that supports the jury's

finding of the probability of future dangerousness, which constitutes a continuing threat to society.

Warner, 144 P.3d at 879-80 (citations omitted).

To support this aggravating circumstance, the State presented evidence that Defendant physically abused his daughter, Vonnita. Kathleen Hatlelid, a physician assistant at Children's Hospital, examined Vonnita on August 25, 1997. Ms. Hatlelid testified to finding multiple linear and loop shaped scars on Vonnita's right cheek and jaw, her front and back chest, her thighs and her left arm (Tr. 1278).²¹ The loop marks were consistent with an extension cord being used to whip Vonnita (Tr. 1280). A box shaped scar on Vonnita's right shoulder was consistent with being caused by a belt buckle (Tr. 1280). Ms. Hatlelid testified Vonnita was physically abused, probably many times (Tr. 1281).

Charvon testified Defendant used a belt or extension cord to punish. At Defendant's first trial, Charvon testified that Defendant hit Vonnita "real hard." (3/8/99 Tr. 843). Charvon testified that he saw the marks on Vonnita's arms, back and legs caused by Defendant's "discipline" (Tr. 1300). Charvon had told Ms. Hatlelid that while living in California with their mother, Vonnita "was talking and using single word phrases." App.69-74. Charvon told the jury how, while living with Defendant, Vonnita didn't talk. Once out of Defendant's custody, Vonnita had begun to communicate again – talking to their grandmother (Tr. 1301).²²

²¹Photographs of Vonnita and a diagram of the injuries are attached at App. 75-80 (Ex. 51-57).

²²At Defendant's first trial, Charvon testified that while living with Defendant, Vonnita seemed unhappy, but once Defendant was no longer around, Vonnita appeared happy (3/8/99 Tr. 844).

Vonricca Warner, Defendant's ex-wife, testified that in November, 1990, when she told Defendant she was pregnant with Charvon, Defendant became angry and choked her until she fell to the floor (Tr. 1306-07). In November, 1991, when she was approximately three months pregnant with Vonnita, Defendant became angry with her because she did not do what he had instructed her to do. Defendant grabbed her and Charvon, put them in the car, and said they were going for a ride. As he was driving, he yelled and punched Vonricca. Defendant was driving toward the lake and told Vonricca he was going to drown her. When Defendant stopped the car, he started to pull her out, but instead returned to the car and drove to a park. As soon as the car stopped, Vonricca started running. The defendant grabbed her, pulled her by her hair, lifted her up and body slammed her to the ground. Vonricca had issues with her pregnancy after this abuse and delivered Vonnita three months early (Tr. 1308-18).

Vonricca also told of another event, in July, 1992, when Defendant choked her until she passed out. It was at this point that she left Defendant (Tr. 1319). Unfortunately, six months later, she returned to Defendant. Vonricca stayed another five months, took the children and returned to California (Tr. 1320).

In California, Vonricca joined the military and left the children with her parents. Defendant sued for custody of the children in Oklahoma and, before Vonricca could fight for

He also testified that he did not miss his dad (3/8/99 Tr. 845-46).

custody, an order was signed and the children were taken by Defendant to Oklahoma (Tr. 1321-22).

Detective Willy Edwards interviewed Defendant concerning the child abuse to Vonnita. Defendant admitted to harming Vonnita. He admitted to hitting her with the belt and a cable cord. App. 81-88. In addition, Defendant admitted giving Vonricca “pure hell”. App. 88.

2. **Especially Heinous, Atrocious or Cruel.** The evidence was also sufficient to support the circumstance that the murder was especially heinous, atrocious or cruel. The OCCA has limited this aggravating circumstance to cases in which the murder of the victim was preceded by torture or serious physical abuse. This abuse can be inflicted through conscious physical suffering or extreme mental cruelty. *Warner*, 144 P.3d at 880. In discussing the evidence which supported the aggravating circumstance found by the jury that the murder was especially heinous, atrocious or cruel, the OCCA found as follows:

The medical evidence concerning when the victim would have lost consciousness was conflicting. Dr. Choi testified the autopsy revealed a violent shaking and crushing-type force caused the victim's injuries. On cross-examination, she said she could not determine which injury, to the victim's head, chest, liver or abdomen, happened first. She said the head injury would not result in the immediate loss of consciousness. She stated her overall impression was that the victim was injured then she rapidly lost consciousness. Dr. Choi said she could not put an exact time frame on the occurrence of the events. On cross-examination, Dr. Choi admitted that at Appellant's previous trial, she testified that it was more likely that the victim lost consciousness at the same time the injuries were received.

Dr. Spencer testified that in reviewing photos of the victim's injuries, the injuries were consistent with shaken baby syndrome. She said the injuries to the victim's anal area were consistent with a firm object being violently placed there. She did not give an opinion as to whether the victim lost consciousness. Charvon Warner testified he saw Appellant shake the victim the day she died. Scared of Appellant, Charvon said he then hid in his sister's room. Additionally, in Appellant's interview with Officer Ballard, Appellant said while Shonda was at the store, he was in the bedroom with the victim and Dashja. He said he left the room only to return to find the victim lying on the floor crying. Defense witness Phillip Nowicki, a professor of pediatrics at Ohio State University, testified that after reviewing the victim's medical records, he believed she would have lost consciousness immediately upon sustaining the head injury.

The jury is the exclusive judge of the weight and credibility of the evidence. Despite conflicts in the evidence, this Court will not disturb the jury's finding if there is competent evidence to support it. Reviewing the evidence in the light most favorable to the State, the evidence is sufficient to support the jury's finding that the victim consciously suffered pain from the anal rape and violent shaking at Appellant's hands prior to her death.

Warner, 144 P.3d at 880-81. The evidence clearly showed that Defendant violently raped and murdered Adrianna. Even though evidence on the exact sequence of the injuries inflicted on Adrianna was somewhat lacking, as found by the United States District Court for the Western District of Oklahoma, a “reasonable fact finder could conclude that the sequence included injuries causing physical suffering before Victim was rendered unconscious.” *Warner*, 814 F. Supp. 2d at 1238.

D. Defendant's Other Illegal/Bad Acts. At Defendant's first trial, in March 1999, evidence was admitted revealing Defendant's sexual abuse to Vonnita. Ms. Hatlelid testified

that her examination of Vonnita revealed a total loss of tissue in the bottom part of her hymenal opening. She testified “If you think of the hymenal tissue as a clock face with 12:00 at the top and 6:00 at the bottom, from 3:00 down around the bottom up to 9:00 there was no hymenal tissue left.” She continued: “Then from 1:00 to 3:00 and 11:00 up to 9:00, there were very thin rims of tissue, very little tissue left, but there were remnants of hymenal tissue on those upper sides. But in the posterior part of the hymenal tissue, that part of the hymenal tissue was totally missing.” (3/8/99 Tr. 891-92). When asked the significance of these findings, Ms. Hatelid testified:

That typically indicates, not always, but typically indicates penile/genital trauma, contact. Just because of the way of gravity and the penis pushing down on the bottom part of that vaginal canal opening, that’s where we are going to get findings in the hymenal tissue most likely, if there’s been penile/genital contact.

(3/8/99 Tr. 892). Vonricca testified that after the murder – when she obtained custody of the children – when she changed Vonnita’s diaper, she noticed that Vonnita would make sure that her legs were closed shut. She also saw little marks or scars on her private area (3/8/99 Tr. 867). Vonricca testified that Vonnita would place her hands in her private area to prevent her from touching her. This behavior continued for approximately eight months (3/8/99 Tr. 869).

E. Lack of Remorse. Inspector (Retired) Eric Mullenix, who interviewed Defendant the night of the murder, has expressed how struck he was by Defendant’s total lack of emotion or remorse for the death of Adrianna. Inspector Mullenix writes: