IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ROBERT PERNELL HURD,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	Case No. F-2014-100
	)	
STATE OF OKLAHOMA	)	
	)	
Appellee.	)	

OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant Robert Pernell Hurd was tried by jury and convicted of three counts of Child Sexual Abuse, After Former Conviction of Two or More Felonies, (21 O.S.2011, § 843.5(F)) in the District Court of Pottawatomie County, Case No. CF-2011-706. The jury recommended as punishment imprisonment for life without the possibility of parole for each count and the trial court sentenced accordingly, ordering the sentences to run consecutively. It is from this judgment and sentence that Appellant appeals.

A.W. testified at trial that when she was seven years old Appellant, her mother's boyfriend, told her he was going to "make a woman" out of her. Although not understanding what Appellant meant, A.W. was nevertheless scared. Appellant made a similar declaration to A.W.'s mother, Crystal Berry, telling her he was going to have sex with A.W. when she turned eight years old. At one point, Appellant forced A.W. to watch while he and her mother had sex.

A few days later, Appellant forced A.W. to have sexual intercourse and oral sex with him. Appellant warned A.W. not to tell anyone or he would kill her mother.

In Proposition I, Appellant contends his convictions cannot be upheld as the evidence failed to show he was a person responsible for A.W.'s health, safety or welfare as required by statute. Appellant was charged with three counts of sexual abuse of a child under the age of twelve pursuant to 21 O.S.2011, § 843.5(F). Under the provisions of § 843.5(E) and (F) and 10A O.S. 2011, § 1-1-105(2)(b) the State is required to prove that the defendant was a person responsible for the child's "health, safety, or welfare".[1] The term "person responsible for a child's health, safety or welfare" is defined in pertinent part in Instruction 4-40D, Oklahoma Uniform Jury Instructions (2d) Supp. 2012 (OUJI-CR) as: "[a] parent/(legal guardian)/custodian/(foster parent)/(a person eighteen years of age or older with whom the child's parent cohabitates or any other adult residing in the home of the child)".

When reviewing challenges to the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution, to determine whether any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *Rutan v. State*, 2009 OK CR 3, ¶ 49, 202

[1] Subsection 843.5(E) prohibits child sexual abuse while subsection 843.5(F) specifically prohibits the sexual abuse of a child under twelve years of age. Subsection 843.5(E) states that "'child sexual abuse' means the willful or malicious sexual abuse" as defined by Section 1-1-105(2)(b) of Title 10A. While the reference to Section 1-1-105(2)(b) is not specifically included in Section 843.5(F), we find it applies to that subsection. Title 10A O.S.2011, § 1-1-105(2)(b) provides that "'[s]exual abuse' includes but is not limited to rape, incest, and lewd or indecent acts or proposals made to a child, as defined by law, by a person responsible for the health, safety, or welfare of the child."

P.3d 839, 849; *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559. The credibility of witnesses and the weight and consideration to be given to their testimony are within the exclusive province of the trier of facts. *Id.* Although there may be conflict in the testimony, if there is competent evidence to support the trier of fact's finding, this Court will not disturb the verdict on appeal. *Id.*

Appellant was not A.W.'s parent but rather her mother's boyfriend. Testimony regarding whether he lived with A.W. and her mother came primarily from Crystal Berry. On cross-examination, she testified that Appellant did not live with her, that he had "his own place". (Tr. Vol. II, pg. 211). She explained that he would drop by from time to time and sometimes spent the night. She said he did not have primary responsibility for A.W. and her younger brother but he did "take care of them". (Tr. Vol. II, pg. 212).

On re-direct examination, Berry testified that Appellant had a key to her house and he could come and go as he pleased. She said he bathed at the house, ate meals there and paid her bills. She explained that she left Appellant with the children when she went out in the evenings and that when she was out of the house Appellant was responsible for the children's welfare.

A.W. testified that Appellant stayed at her house often on school nights and that there were many nights she and her brother were left alone with Appellant while her mother went out to the casino.

Appellant relies on *Townsend v. State*, 2006 OK CR 39, 144 P.3d 170 to argue that unlike the babysitter in that case who was found to have met the

definition of a "person responsible" under the child abuse statutes, he was never shown to have actively sought to care for A.W. or explicitly accepted any responsibility for her.

In *Townsend*, this Court explained that the statutory provisions defining "persons responsible for a child's health, safety or welfare" do not specifically require the person to have any duty to care for the child in question. 2006 OK CR 39, ¶ 4, 144 P.3d at 171. The Court went to say that "[t]o find that a person who voluntarily accepts responsibility for a child, for a significant period of time, is not responsible for the child's health, safety and welfare flies in the face of common sense and basic statutory interpretation." *Id.* at ¶ 6, 144 P.3d at 172.

While evidence of Appellant's cohabitation with Berry was conflicting, our review of the sufficiency of the evidence is not an occasion for choosing from among the conflicting inferences those we find more or less plausible. *See Hancock v. State*, 2007 OK CR 9, ¶ 70, 155 P.3d 796, 813. Here, there was sufficient evidence to show that on the numerous occasions when he was left alone with A.W. and her brother, Appellant was relied upon to be responsible for the children's health, safety and welfare. While Appellant argues he had nothing more than a dating relationship with Berry, his many contacts with her household – having a key to her house; paying her bills; frequently bathing, eating and sleeping there and occasionally being home alone with the children - transcended mere dating status. Appellant clearly accepted responsibility for A.W.'s welfare when he was left alone with her. Viewing the evidence in the

light most favorable to the State, we find Appellant meets the definition of a person responsible for A.W.'s health, safety and welfare. This proposition of error is denied.

In Proposition II, Appellant contends the trial court erred in modifying Instruction No. 16. Appellant's timely objection properly preserved the issue for our review. Instruction No. 16, OUJI-CR 2d 4-40D, set out the definitions for terms used in the child sexual abuse statutes. Under the definition of "Person responsible for a Child's Health, Safety or Welfare", Instruction No. 16 stated:

> Person Responsible for a Child's Health, Safety or Welfare -
>
> A person eighteen years of age or older with whom the child's parent cohabitates or any other adult residing in the home of the child, **this definition can also include a "babysitter".**
>
> Reference: 10A O.S. 2011, § 1-1-105(50), ***Townsend v. State,* 2006 OK CR 39, ¶¶ 4-5.**

(O.R. 182).

The bolded language was added by the trial court and is not included in the uniform instruction.

The determination of which instructions shall be given to the jury is a matter within the discretion of the trial court. *Ciprano v. State*, 2001 OK CR 25, ¶ 14, 32 P.3d 869, 873. Absent an abuse of that discretion, this Court will not interfere with the trial court's judgment if the instructions as a whole, accurately state the applicable law. *Id.* An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the

facts and law pertaining to the matter at issue or a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194; *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

The Uniform Jury Instructions-Criminal shall be given unless the court determines the uniform instruction does not accurately state the law. 12 O.S.2011, § 577.2. *See also Marquez-Burrola v. State*, 2007 OK CR 14, ¶ 26, 157 P.3d 749, 758.

Appellant first argues that the modified instruction expanded the scope of the offense to include people the legislature did not include in the statute. As addressed in Proposition I, we held in *Townsend* that a babysitter met the statutory definition of a person responsible for a child's health, safety and welfare and that Appellant could be considered as a person responsible for the victim's health, safety and welfare. To the extent the instruction restated the holding of *Townsend*, we find the trial court did not abuse its discretion by giving the additional language.

Appellant also argues that by placing the word babysitter within quotation marks, the trial court intentionally emphasized the part of the instruction which fit the prosecution's case. This argument is not supported by the record. The record indicates the additional language was inserted into the uniform instruction to make it consistent with *Townsend*, and not to emphasize the prosecution's case. (Tr. Vol. II, pg. 319). In fact, the State's theory was not that Appellant was a babysitter in the sense that he was not

hired to take care of the children while their mother was away, but that he was responsible for the children when left alone with them because of his co-habitation with their mother.[2] There is no explanation in the record for why the term is in quotation marks. That the term is commonly used to refer to a person hired to take care of children while their parents are away as well as to those who volunteer, without remuneration, take care of children while their parents are away, is a possible explanation. However, regardless of the reason behind the punctuation marks used, the language inserted into the uniform instruction was consistent with this Court's holding in *Townsend* and therefore accurately stated the applicable law. The trial court did not abuse its discretion in giving Instruction No. 16 and this proposition of error is denied.

In Proposition III, Appellant contends the trial court erred in admitting hearsay statements made by A.W. to therapist Mary Brazier and forensic interviewer Carol Hargis without first holding a hearing under 12 O.S.2011, § 2803.1 to determine the reliability of those statements. The State filed a pre-trial notice regarding its intended use under 12 O.S.2011, § 2803.1 of A.W.'s statements regarding her sexual contact with Appellant made to Brazier and Hargis as well as to other witnesses. (O.R. 39). The defense filed an objection and the trial court heard arguments prior to the first day of trial. Argument centered on whether A.W.'s statements were admissible under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The trial court ruled the statements were admissible as long as A.W. testified. The

[2] Babysitter defined as "one hired to care for one or more children when the parents are away". *Webster's II New Riverside University Dictionary*, 1984 Edition, pg. 144.

admissibility of the statements under § 2803.1 was not discussed. (Tr. Vol. I, pgs. 17-18).

Under § 2803.1, statements of a child under the age of thirteen relating to physical or sexual abuse against the child are admissible only if it is determined those statements appeared reliable under the circumstances under which they were made, and that the time, content and totality of circumstances surrounding the taking of the statements provide sufficient indicia of reliability so as to render the statements inherently trustworthy. *F.D.W. v. State*, 2003 OK CR 23, ¶ 3, 80 P.3d 503. The failure to determine the reliability of the hearsay statements in a pre-trial hearing is error. *Id., Kennedy v. State*, 1992 OK CR 67, ¶ 17, 839 P.2d 667, 671. However, such error is subject to a harmless error analysis. *Simpson v. State*, 1994 OK CR 40, ¶ 34, 876 P.2d 690, 701. The error in failing to hold the § 2803.1 hearing in *Simpson* did not warrant reversal "[b]ecause we have no grave doubts this failure had a substantial influence on the outcome of trial." *Id.*, 1994 OK CR 40, ¶ 37, 876 P.2d at 702. The Court noted that the child victim testified at trial and afforded the defendant his right of confrontation and her testimony was consistent and virtually identical to the testimony of the school psychologist and the social worker. This Court said such an evidentiary record afforded this Court the ability to determine the reliability of the testimony admitted pursuant to Section 2803.1. *Id.* This Court observed that had the judge heard the same evidence *in camera*, there is no doubt that he would have found the testimony admissible. *Id.*

On appeal, Appellant does not analyze the hearsay statements to determine their credibility, but argues the error was not harmless because except for the testimony of Brazier and Hargis, the rest of the State's witnesses were "people of questionable credibility involved in a highly emotional family dispute over custody of [A.W.]". (Appellant's brief, pg. 27). However, in order to conduct a harmless error review, we need to look at the hearsay statements under the § 2803.1 criteria.

A.W.'s statements to Ms. Hargis were presented to the jury through a videotape of the forensic interview. On the videotape, Ms. Hargis asks open-ended questions and carefully establishes the importance of A.W. telling the truth. On her own initiative, A.W., then nine years old, uses the term "disgusting" to describe what she eventually called a man's "private parts". When asked if something happened to her that she did not want to have happen to her, she looked upset and gave a long pause. She eventually said that she was living with her "nana and pa" and that they told her to tell the truth about what had happened. The terminology used by A.W. during the interview was consistent with that of a nine year old and her responses appeared to be spontaneous. Her description of the sexual abuse was consistent throughout the interview. Had the statements by A.W. to Ms. Hargis been reviewed *in-camera,* the trial court would have found them inherently reliable and thus admissible.

Ms. Brazier was a licensed therapist who took A.W. as a patient in April 2012, approximately six months after the abuse, upon referral from the Department of Human Services. Ms. Brazier testified that A.W. had been having

behavioral problems in foster care; she was frightened of men and was physically aggressive with children who merely brushed up next to her. Brazier said the goal of her treatment was to help A.W. better cope with her new environment and with flashbacks and memories of the past. She diagnosed A.W. as suffering from Post Traumatic Stress Disorder (PTSD) from sexual abuse. Brazier testified that it was not until approximately eleven months into her treatment that A.W. disclosed any of the specifics of the sexual abuse she had suffered. Brazier testified that terms used by A.W. to describe the abuse were consistent with that of a child of her age. Considering Brazier's emphasis on treatment over specific disclosure of the sexual abuse and the delay in reporting, we find the time, content and totality of circumstances surrounding A.W.'s statements to Brazier provide sufficient indicia of reliability so as to render them inherently trustworthy. If the judge had heard Brazier's testimony *in camera* he would have found A.W.'s hearsay statements reliable and admissible.

At trial, A.W. testified immediately after Ms. Brazier. She was subject to a thorough cross-examination. Her testimony of repeated sexual abuse was consistent with that of Ms. Hargis and Ms. Brazier. [3]

Having thoroughly reviewed the record, we have no grave doubts that the trial court's failure to hold the requisite § 2803.1 *in-camera* hearing had a substantial influence on the outcome of trial because if the judge had heard all of the evidence concerning the statements before trial, he would have ruled the

[3] Appellant's challenge to A.W.'s credibility, within this proposition challenging the admission of the hearsay statements, is not properly raised and will not serve as a substitute for a substantive claim challenging the victim's credibility or the sufficiency of the evidence.

statements admissible. *See J.J.J. v. State,* 1989 OK CR 77, ¶ 5, 782 P.2d 944, 946. This holding renders moot the State's argument that A.W.'s statements to Ms. Brazier were also admissible under 12 O.S.2011, § 2803(4) and Appellant's argument that if the testimony from Hargis and Brazier had been excluded the State would have been forced to rely on the testimony of people with credibility concerns. Accordingly, this proposition of error is denied.

In Proposition IV, Appellant challenges the sufficiency of the evidence supporting his convictions in Count I and III for forcible oral sex. He argues the exact same language was used in the felony informations charging with him two counts, however there was no evidence that more than one act of oral sex occurred. Therefore, Appellant claims, one of the two counts must be vacated.

Both Appellant and the State correctly note that during her trial testimony, A.W. did not recount any incident of being forced to perform oral sex. Evidence supporting the charges in Counts I and III came from other sources. A.W.'s mother, Crystal Berry, testified that she witnessed an incident where A.W. performed oral sex on Appellant. Angelique Tyler, A.W.'s step-grandmother, testified that A.W. told her she been forced to perform oral sex on Appellant.

In her taped interview with Carol Hargis, A.W. said she was forced to perform oral sex on Appellant. A.W. initially said that Appellant was sitting on the edge of the bed naked and that she was on the floor on her knees when Appellant grabbed the back of her head and pulled it towards his penis. She said this happened "just one time".

After a short break in the interview, Ms. Hargis returned to the subject and asked some follow up questions about the oral sex. A.W. testified that her mother witnessed the oral sex, the "last time" that it happened. When asked if she meant the oral sex "happened one time ever or just one time when it happened", A.W. replied "one time when it happened."

Andrea Hamilton, a forensic interviewer with the Oklahoma State Bureau of Investigation assigned to the Child Abuse Team, testified to general issues pertaining to child sexual abuse forensic interviews. She stated that she did not know anything about A.W.'s case. Ms. Hamilton testified that abused children often have a "script memory" when having to recount multiple instances of abuse. She explained that when multiple instances have occurred, it is often overwhelming for a child to recount each instance. So interviewers listen for key phrases such as "that time", "usually", and "most of the time" with the understanding that when multiple instances of sexual abuse "start to blend together and you get a script." (Tr. Vol. I, pg. 141).

In contrast, Ms. Hamilton testified that abused children can also have the much more precise "episodic memory" that is involved when one incident is described. She explained that when children are recounting one episode trauma, they tend to be more organized, detailed, specific and consistent. (Tr. Vol. I, pgs. 140-141).

Mary Brazier testified that A.W. told her in their therapy sessions about Appellant taking her head in his hands and pushing it toward his penis. (Tr. Vol. II, pg. 258). Brazier also testified that she had continued to see A.W. since she

prepared a trauma narrative (admitted as State's Exhibit 10) approximately nine months earlier detailing A.W.'s sexual abuse disclosures. She testified that A.W. had since that time reported additional instances of Appellant making her perform oral sex. (Tr. Vol. II, pgs. 263-264).

Reviewing this evidence in the light most favorable to the State, we find the jury could have found beyond a reasonable doubt sufficient evidence to support two counts of forcible oral sex. *See Rutan,* 2009 OK CR 3, ¶ 49, 202 P.3d at 849.

In Proposition V, Appellant contends the presentation of materials from his "pen pack" deprived him of a fair trial and warrants remand for a re-sentencing hearing. A "pen pack" usually consists of a judgment and sentence, photograph and fingerprints of the convicted person and is created and maintained by the Department of Corrections. *Frazier v. State,* 1994 OK CR 31, ¶ 9, 874 P.2d 1289, 1291. However, in the present case additional information from Appellant's prison file, including discipline for menacing other inmates, an assessment deeming him a sex-offender with a high risk to reoffend, failure to complete a sexual offender treatment program and probation violation reports was admitted into evidence. Defense counsel's timely objection has preserved the issue for our review. We therefore review the trial court's decision to admit the evidence for an abuse of discretion. *Marshall v. State,* 2010 OK CR 8, ¶ 24, 232 P.3d 467, 474.

The State concedes and we agree that the additional information in this case was improperly admitted. In *Bean v. State,* 1964 OK CR 59, 392 P.2d 753

this Court held that the defendant's previous prison record was inadmissible stating:

> To permit any testimony or evidence *as to the details* of the former convictions, or as in this case, the prison record, tends to place too much inference thereon and tends to further prejudice the defendant. The information *should not* be a part of this record as it tends to describe the crime in detail.

1964 OK CR 59, ¶¶ 7-8, 392 P.2d at 754 -756.

This Court has consistently found references to parole, revocation of suspended sentences or acceleration of a deferred sentence should be removed from a pen pack before it is presented to the jury. *See Carter v. State*, 1987 OK CR 248, ¶ 24, 746 P.2d 193, 197; *Marks v. State*, 1981 OK CR 134, ¶ 4, 636 P.2d 349, 350-351.

In *Bean*, this Court found that where there is the possibility that the introduction of the prison record might have affected the jury's determination of the sentence, but could not have been the reason for the guilty verdict; this Court will not reverse the conviction, but in the interest of justice will modify the sentence imposed. 1964 OK CR 59, ¶ 12, 392 P.2d at 756.

In the present case, properly included in the pen pack was a Judgment and Sentence from a 1995 guilty plea to 2 counts of Indecent or Lewd Acts with a Child and 1 count of Indecent Exposure, as well as Judgments and Sentences from 1989 and 1999 reflecting convictions for drug-related offenses. Under 21 O.S.2011, § 51.1a any person convicted of sexual abuse of a child after having been convicted of either rape in the first degree, forcible sodomy,

sexual abuse of a child or lewd molestation shall be sentenced to life without parole.

Under these circumstances, we find there is no possibility that the introduction of the prison record might have affected the jury's determination of the sentence because once the prior convictions for lewd molestation were admitted, the only sentence authorized by law was life imprisonment without the possibility of parole. Therefore no legal reason exists for a resentencing hearing and this proposition is denied.

In his final proposition of error, Appellant contends the second stage verdict forms were so misleading as to deny him a fair sentencing proceeding and warrant remanding the case for re-sentencing. Specifically, Appellant objects to the following verdict form given to the jury for each of the three counts:

> We, the jury, empaneled and sworn in the above-entitled case, do, upon our oath, find as follows: Defendant is:
>
> _____ Guilty of the crime of Sexual Abuse – Child Under 12 after conviction of Lewd Acts with a minor under 16 and fix punishment at life imprisonment without parole.
>
> _____ Not Guilty of the crime of Sexual Abuse – Child Under 12 after conviction of Lewd Acts with minor under 16.

(O.R. 205-207).

Appellant did not raise an objection at trial to the verdict forms therefore we review only for plain error. Under the test for plain error set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, an appellant must show an actual error, that is plain or obvious, affecting his substantial rights, and which

seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*, 1994 OK CR 40, ¶ 10, 26, 30, 876 P.2d at 694, 699, 701. *See also Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395; *Malone v. State*, 2013 OK CR 1, ¶ 41, 293 P.3d 198, 211-212.

The judge gave the jury the following limiting instruction prior to second stage closing arguments:

> Ladies and gentlemen of the jury, instruction number 33: By your verdict in the first part of this trial you have already found the defendant guilty of the crime of sexual abuse of a child under 12. You must now determine the proper punishment.
>
> The defendant has been charged with having previously been convicted of lewd acts with a minor under 16. The law presumes that the defendant has not been previously convicted as the State has charged.
>
> You may consider the previous conviction only if the State has proved beyond a reasonable doubt, one, the fact of the conviction; and two, that the defendant is the same person who was previously convicted. The punishment for sexual abuse of a child under 12 after former conviction of lewd acts with a minor under 16 is imprisonment in the state penitentiary for a term of life sentence without parole.
>
> If you find the defendant guilty of sexual abuse child under 12 after conviction of lewd acts with a minor under 16, you shall return a verdict of guilty by marking the verdict form appropriately. Fill in the appropriate space on the verdict form and return the verdict form to court.
>
> If you have a reasonable doubt of the defendant's guilt to the charge of sexual abuse child under 12 after conviction for lewd acts with a minor under 16, you shall then return a verdict form of not guilty by marking the verdict form appropriately and return it to the court.

(Tr. Vol. II, pgs. 335-336).

This is consistent with the written instruction given to the jury. (O.R. 200). When read in context of the second stage jury instructions, the verdict form was appropriate. It clearly gave the jury the option of finding Appellant guilty after former conviction of a felony or not guilty after former conviction of a felony. This case is clearly distinguishable from *Dyke v. State*, 1986 OK CR 44, 716 P.2d 693, relied upon by Appellant where "not guilty" verdicts were not submitted to the jury.

While neither the verdict form nor the instructions set forth the range of punishment if Appellant was found not guilty after former conviction of a felony, Appellant's claim that the jury was led to believe that he might be released if they did not find him guilty after former conviction of a felony is mere speculation. There is no indication in the record that the jury was misled by the verdict form. Further, there was sufficient evidence to support the jury's finding that the State had proved Appellant's prior convictions for lewd molestation of a child. Accordingly, we find no error in the verdict forms and thus no plain error. This proposition is denied.

Accordingly, this appeal is denied.

DECISION

The Judgment and Sentence is **AFFIRMED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF POTTAWATOMIE COUNTY
THE HONORABLE JOHN CANAVAN, DISTRICT JUDGE

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OPINION BY: LUMPKIN, V.P.J.
SMITH, P.J.: CONCUR IN PART/ DISSENT IN PART
JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR

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SMITH, P.J., CONCURRING IN PART/DISSENTING IN PART:

I would affirm the conviction but remand for resentencing based on cumulative error.