IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

PHILLIP PAUL MORRISON,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F-2015-302
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

JOHNSON, JUDGE:

Appellant Phillip Paul Morrison was tried by jury in the District Court of Washington County, Case No. CF-2014-155, and convicted of Lewd Acts with a Child under Sixteen (Count 1), in violation of 21 O.S.2011, § 1123(A)(2), First Degree Rape (Count 3), in violation of 21 O.S.2011, § 1114(A)(1), and Sodomy (Count 4), in violation of 21 O.S.2011, § 888(B)(1), each After Former Conviction of a Felony.[1] The jury assessed punishment at life imprisonment without the possibility of parole on each count. The Honorable Curtis L. DeLapp, who presided at trial, sentenced Morrison accordingly. From this Judgment and Sentence Morrison appeals, raising the following issues:

(1) whether the district court erred in failing to follow the requirements of 22 O.S.2011, § 894 before allowing the jury to view videotaped forensic interviews during deliberations;

(2) whether the district court erred by explaining to the jury why a witness was unavailable to testify;

(3) whether prosecutorial misconduct deprived him of a fair trial;

[1] Morrison was acquitted of Count 2 – Lewd Acts with a Child under Sixteen.

(4) whether the introduction of other crimes evidence deprived him of a fair trial;

(5) whether a witness' statement was more prejudicial than probative;

(6) whether the absence of a reliability hearing required by 12 O.S.2011, § 2803.1 requires reversal;

(7) whether insufficient evidence deprived him of a fair trial;

(8) whether the admission at trial of information about pardon and parole requires sentence modification; and

(9) whether cumulative error deprived him of a fair trial.

We find relief is not required and affirm the judgment and sentence of the district court.

Background

From August 2012 until August 2013, Wendy Neumann lived in a house on her parents' property south of Bartlesville with her two children, C.N. and L.N. In between June 30, 2013 and August 20, 2013, when C.N. was eight years old, Phillip Morrison started visiting Neumann at her house. Morrison and Neumann had known each other from school and had recently renewed their friendship. During this time Neumann was taking drugs that affected her ability to care for her children.

On August 23, 2013, C.N. and L.N. were removed from Neumann's custody and placed in foster care with Neumann's cousin, Toni Parry. On March 10, 2014, after a visit with his mother at D.H.S., C.N. told Parry about incidents of sexual abuse Morrison committed upon him when he lived with Neumann. About one month later, after confirming that Morrison was in jail,

C.N. told Parry about other incidents of sexual abuse he had suffered at Morrison's hands. Parry reported both disclosures to D.H.S.

At trial C.N. testified that Morrison touched his "wiener" more than once with his hand. He also testified that Morrison put his "wiener" in C.N.'s mouth and in his butt. He testified that this hurt and that Morrison told him that if he told anyone Morrison would hurt him and kill his mother.

1.

C.N. was interviewed twice by Jennifer Chafin, a forensic interviewer at the Ray of Hope Advocacy Center, after the allegations of sexual abuse were disclosed. These interviews were videotaped and admitted into evidence at trial. During deliberations the jury requested that they be allowed to view the videotaped interviews again. This request was granted by the trial court without objection. In his first proposition Morrison complains that the trial court erred in allowing jurors to view the videotape of C.N.'s interviews with the forensic investigator during deliberations without first making certain determinations required by 22 O.S.2011, § 894. Because Morrison did not object to the procedure at trial we review for plain error. To be entitled to relief for plain error, a defendant must show: (1) the existence of an actual error; (2) that the error is plain or obvious; and (3) that the error affected his substantial rights, meaning that the error affected the outcome of the proceeding. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

Videotaped exhibits which are testimonial in nature are treated differently than those which are not and jurors should not have unrestricted access to any recorded exhibit which is testimonial in nature. Title 22 O.S.2011, § 894 provides as follows:

> After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony or if they desire to be informed on a point of law arising in the cause, they must require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to the district attorney and the defendant or his counsel, or after they have been called.

Before allowing the taped testimony to be replayed for the jury, a trial court is required to determine the "exact nature of the jury's difficulty, isolate the precise testimony which can solve it, and weigh the probative value of the testimony against the danger of undue emphasis." *Martin v. State*, 1987 OK CR 265, ¶ 18, 747 P.2d 316, 320. Thus, the first question to be determined to resolve the issue before us is whether the videotape of C.N.'s interview is testimonial, as Morrison asserts, or nontestimonial.

The United States Supreme Court explained the difference as follows:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 822, 126 S.Ct. 2266, 2273-74, 165 L.Ed.2d 224 (2006). Using this standard, the videotape made during the forensic

investigator's interviews with C.N. was testimonial and should not have been replayed during jury deliberations without the trial court first taking the precautions required by section 894.

While the trial court's failure to follow the requirements of section 894 was actual, obvious error, it did not affect the outcome of the proceeding. The jury was not allowed unrestricted viewing of the videotaped interview during deliberations but rather was allowed to view the interviews one additional time in the presence of the defendant and counsel in the controlled environment of the courtroom. We are convinced that the departure from the requirements of 22 O.S.2011, § 894 was not prejudicial to Morrison. *See Mitchell v. State*, 2011 OK CR 26, ¶ 130, 270 P.3d 160, 188 (presumption of prejudice from non-compliance with 894 may be overcome on appeal where appellate court is convinced that, on the face of the record, no prejudice to the defendant occurred). We find that the error was harmless.

2.

Wendy Neumann was endorsed as a witness by both the State and the defense. At trial, however, only the defense wanted to call her to testify. Before the defense called Neumann the trial court was informed that she had been charged with child neglect and if called as a witness would refuse to testify invoking her Fifth Amendment right against self-incrimination. Defense counsel asked that Neumann be declared unavailable as a witness and that her preliminary hearing testimony be read into the record and submitted as

evidence. This request was granted but before Neumann's preliminary hearing testimony was read into the record the trial court told the jury that Neumann was unavailable as a witness because she was currently in jail and refused to testify at trial, as was "her right." Neither party objected to the trial court's statements regarding Neumann's absence from trial. On appeal, however, Morrison complains that the trial court erred by explaining to the jury that Neumann would not testify because she had invoked her Fifth Amendment right against self-incrimination. Morrison's failure to object to the trial court's comment to the jury waives review for all but plain error. *See Postelle v. State*, 2011 OK CR 30, ¶ 54, 267 P.3d 114, 137.

Title 12 O.S.2011, § 2513 supports the position that claims of privilege are to be kept from the jury's knowledge at trial. This statute provides that:

> A. A claim of privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.
> B. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.
> C. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

This Court has held that section 2513 requires the claim of privilege be asserted outside the jury's presence, "to the extent practicable." *Jackson v. State*, 1998 OK CR 39, ¶ 28, 964 P.2d 875, 886. *See also Banks v. State*, 2002 OK CR 9, ¶ 21, 43 P.3d 390, 398.

While the trial court did not explicitly tell the jury that Neumann had invoked her Fifth Amendment right against self-incrimination, the explanation given by the court certainly alluded to this fact. The trial court's comment does not necessarily require reversal. In determining whether reversible error exists, appellate courts have looked "to the surrounding circumstances in each case, focusing primarily on two factors, each of which suggests a distinct ground of error. First . . . error may be based upon a concept of prosecutorial misconduct, when the Government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege . . . . A second theory seems to rest upon the conclusion that, in the circumstances of a given case, inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant." *Namet v. United States*, 373 U.S. 179, 186-87, 83 S.Ct. 1151, 1154-55, 10 L.Ed.2d 278 (1963)(internal citations omitted). The record supports the finding that conscious steps were taken to have Neumann assert her privilege outside the presence of the jury and the State did not build its case out of inferences arising from use of the testimonial privilege. Additionally, Nuemann's assertion of the privilege against self-incrimination did not add critical weight to the prosecution's case in a form not subject to cross-examination. We find that the trial court's comment to the jury was not plain error as it did not affect the outcome of the proceeding. *See Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. Relief is not required.

3.

Morrison argues he was denied a fair trial because of numerous improper remarks made by the prosecutor during the trial. Because no comment at issue was met with objection at trial, our review on appeal is for plain error only. *See Malone v State*, 2013 OK CR 1, ¶ 40, 293 P.3d 198, 211.

This Court grants relief on claims of prosecutorial misconduct only when the misconduct effectively deprived the defendant of a fair trial or a fair and reliable sentencing proceeding. *Harmon v. State*, 2011 OK CR 6, ¶ 80, 248 P.3d 918, 943. In making that determination, we evaluate the prosecutor's comments within the context of the entire trial, "considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel." *Id.*; *see also Brewer v. State*, 2006 OK CR 16, ¶ 13, 133 P.3d 892, 895 (reversal is not required unless in light of entire record defendant suffered prejudice). It is the rare instance when a prosecutor's misconduct during closing argument was so egregiously detrimental to a defendant's right to a fair trial that reversal is required. *See Pryor v. State*, 2011 OK CR 18, ¶ 4, 254 P.3d 721, 722.

During direct examination, when asked what part of Morrison's body touched a part of his body, C.N. testified that he did "not remember." In closing argument, the prosecutor told the jury, "What did he say? I don't remember. I think you all can tell by looking at the little boy that he

remembers, he just didn't want to say it to you all, to 12 strangers." Morrison complains on appeal that this statement improperly bolstered the witness' testimony and improperly vouched for his credibility.

The record shows, however, that after C.N. testified that he did not remember, the prosecutor reminded him that he had talked to others about what had happened and also reminded him that he needed to tell the truth even if it was difficult. When the prosecutor asked the question again, C.N. responded, "It's disgusting." C.N. then went on to testify that Morrison put his "wiener" in both his mouth and his butt. The prosecutor's statements in closing argument that C.N. did remember but was embarrassed to say it to twelve strangers was neither improper bolstering nor vouching for the witness' credibility, but rather was proper comment on the evidence. *See Coddington v. State*, 2011 OK CR 17, ¶ 72, 254 P.3d 684, 712 (both parties have wide latitude to argue the evidence and inferences from it).

Morrison also complains that the prosecutor improperly stated his own opinion throughout closing argument and appealed for sympathy for the victim. He notes that the prosecutor prefaced several statements with words like "I think." While the better practice would have been to use phrases like "I submit" or "the evidence shows," the comments at issue did not rise to the level of plain error. Most were reasonable inferences from the evidence and none can be found to have affected the outcome of the proceedings. *See Carol*

v. State, 1988 OK CR 114, ¶¶ 7-9, 756 P.2d 614, 617. Relief is not required upon the allegations of prosecutorial misconduct.

4.

In his fourth proposition Morrison argues he was denied a fair trial by the admission of evidence of other crimes and bad acts. The admission of evidence lies within the sound discretion of the trial court and, when the issue is properly preserved for appellate review, we will not disturb the trial court's decision absent an abuse of discretion. *Pavatt v. State*, 2007 OK CR 19, ¶ 42, 159 P.3d 272, 286. The record shows, however, that no objection was made to the evidence of other crimes and bad acts. Failure to object to the admission of other crimes evidence at the time of its introduction at trial, waives all but plain error. *Wood v. State*, 1998 OK CR 19, ¶ 35, 959 P.2d 1, 10.

"The basic law is well established - when one is put on trial, one is to be convicted - if at all - by evidence which shows one guilty of the offense charged; and proof that one is guilty of other offenses not connected with that for which one is on trial must be excluded." *Lott v. State*, 2004 OK CR 27, ¶ 40, 98 P.3d 318, 334. Title 12 O.S.2011, § 2404(B) prohibits the admission of evidence of other crimes or bad acts to prove the character of the person to show action in conformity therewith, unless the evidence is relevant to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Evidence that forms part of the entire transaction, is central to the chain of events and is necessary to give the jury a complete

understanding of the crime is admissible without resort to section 2404(B). *See Jackson v. State*, 2006 OK CR 45, ¶ 28, 146 P.3d 1149, 1160.

Morrison first challenges the admission of evidence that he stole candy when he took the kids to the grocery store. Not only did counsel not object to the introduction of this evidence, he elicited it from the witness during his cross examination of C.N. This isolated and invited reference to Morrison taking candy without paying for it did not rise to the level of plain error.

During the forensic interview C.N. told Chafin that on one occasion Morrison gave him a bottle of beer. Morrison complains on appeal that the reference to him giving C.N. beer was inadmissible other crimes evidence. The State argues that this gesture by Morrison toward C.N. was inextricably intertwined with the sexual abuse as it showed his attempt to create an atmosphere of secrecy with C.N. We agree and find no error in its admission into evidence.

Morrison next asserts that the State introduced inadmissible other crimes evidence through Parry's testimony that C.N. told her about an instance where he saw Morrison put his hands down C.N.'s mother's pants and slap her face while she was passed out. This prompted Parry to ask C.N. if Morrison had ever done anything like that to him which is how C.N. came to reveal that Morrison had sexually abused him. When read in context it becomes clear that this evidence was inextricably intertwined with the events of how the case unfolded.

Morrison finally complains that Parry's testimony that C.N. asked her if Morrison was in jail, and her response that he was introduced other crimes evidence at trial. The record shows that after Parry told C.N. that Morrison was in jail C.N. revealed to her that Morrison had sodomized him. This testimony also explained how C.N. came to reveal what Morrison had done to him.

The challenged evidence was directly connected to the factual circumstances of the crime and provided necessary contextual and background information to the jury. "When measuring the relevancy of evidence against its prejudicial effect, the court should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." *Harmon v. State*, 2011 OK CR 6, ¶ 48, 248 P.3d 918, 937, *quoting Mitchell v. State*, 2010 OK CR 14, ¶ 71, 235 P.3d 640, 657. The probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. 12 O.S.2011, § 2403. There was no error in the admission of the evidence at issue in this proposition and this claim is denied.

5.

Morrison claims in his fifth proposition that Parry's testimony that she told C.N. that Morrison was in jail was more prejudicial than probative because it had the effect of showing the jury that C.N. feared Morrison and that Morrison was a dangerous person. Again, because this comment was not met with objection at trial our review on appeal is for plain error only. *Wood v. State*, 1998 OK CR 19, ¶ 35, 959 P.2d 1, 10. The exchange between C.N. and

Parry where Parry told C.N. that Morrison was in jail was relevant, as noted above, because it helped the jury understand why C.N. was comfortable revealing to Parry the extent of Morrison's sexual abuse upon him. It helped explain why C.N. waited so long to disclose this information. The probative value of this evidence was not substantially outweighed by the danger of unfair prejudice and there was no error in its admission into evidence at trial. 12 O.S.2011, § 2403.

6.

Morrison complains that the trial court erred in allowing C.N.'s hearsay statements into evidence without first holding a reliability hearing as is required by 12 O.S.2011, § 2803.1. (Hearsay statements by children under the age of thirteen describing an act of sexual contact performed on them by another are admissible as long as a hearing is held to determine their reliability and the child either testifies or is unavailable to testify.). We have previously recognized that failure to hold a hearing in accordance with the directives of section 2803.1 is error but that such error is subject to harmless error review. *Simpson v. State*, 1994 OK CR 40, ¶¶ 19, 37, 876 P.2d 690, 698, 702.

As stated above, section 2803.1 requires that the trial court hold a hearing outside the presence of the jury in which the trial court determines whether the time, content and circumstances of the statement provide sufficient indicia of reliability to establish the trustworthiness of the statement. Furthermore, the child must testify at trial or be declared unavailable as a

witness. The safeguards of the statute protect not only the trustworthiness of the statement, but also a defendant's right to cross-examination. Morrison argues that C.N.'s hearsay statements did not meet the section 2803.1 criteria for admissibility because he disclosed the sexual abuse after being asked if he had been touched inappropriately and he gave differing accounts of what had happened. The fact that C.N. first disclosed that he had been sexually abused by Morrison in response to a question does not render the hearsay untrustworthy. The record shows that C.N.'s accounts of abuse were never materially inconsistent or unbelievable. Furthermore, C.N. testified at trial and was subject to cross-examination. Accordingly, we find that the record demonstrates that the hearsay statements met the test of trustworthiness required by statute and that the failure to hold a hearing as required by section 2803.1 did not seriously affect the fairness, integrity, or public reputation of the proceedings. The failure to hold the section 2803.1 hearing was harmless beyond a reasonable doubt as it did not affect Morrison's substantial rights or the outcome of the proceeding. Admission of the statements, therefore, does not constitute reversible error.

7.

Morrison argues in his seventh proposition that the evidence presented at trial was insufficient to support his conviction. This Court reviews challenges to the sufficiency of the evidence in the light most favorable to the State and will not disturb the verdict if any rational trier of fact could have found the

essential elements of the crime charged to exist beyond a reasonable doubt. *Head v. State*, 2006 OK CR 44, ¶ 6, 146 P.3d 1141, 1144. *See also Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04. In evaluating the evidence presented at trial, we accept all reasonable inferences and credibility choices that tend to support the verdict. *Coddington v. State*, 2006 OK CR 34, ¶ 70, 142 P.3d 437, 456.

Morrison characterizes C.N.'s testimony as "confusing, contradictory and sometimes unlikely" and argues that it was insufficient to support his conviction. We disagree. While C.N. was clearly hesitant to testify about the abuse he suffered, his testimony was neither confusing nor "unlikely." His accounts of the material details of the abuse were largely consistent. We find that, when viewed in a light most favorable to the defense, the jury could have found each element of the charged crimes to exist beyond a reasonable doubt. There was no error here.

8.

At the beginning of the second stage of trial the prosecutor read the second page of the Information and revealed to the jury that Morrison had previously been convicted of lewd or indecent proposal to child under 16 and had been sentenced to ten years imprisonment with all but the first two years suspended. Morrison argues in his eighth proposition that this reference to pardon and parole was improper and requires that his sentence be modified. It is true that references to probation and parole, including suspended

sentences, should not be submitted to the jury. *Hunter v. State*, 2009 OK CR 17, ¶ 9, 208 P.3d 931, 933. Because, however, Morrison failed to object, this Court will review for plain error only. *Hunter,* 2009 OK CR 17, ¶ 8, 208 P.3d at 933.

In *Hunter* this Court found that it is error for jurors to learn that a defendant received a suspended sentence because it allows for speculation about probation and parole policies and such information may adversely influence the defendant's sentence. *Id.*, 2009 OK CR 17, ¶¶ 9-10, 208 P.3d at 933-34. In *Hunter,* we found plain error and that relief was required because the prosecutor stated during the reading of the Information that the defendant had previously received suspended sentences and then argued in closing that the defendant deserved a long sentence because he had several chances to change but did not. *Id.* This case, however, is distinguishable from *Hunter* where there was a range of possible punishment. As Morrison acknowledges, upon finding that the State had proved his prior felony conviction beyond a reasonable doubt the jury only had one sentencing option; the only possible punishment on each count was life without the possibility of parole. While Morrison has shown actual error in the prosecutor's reference to his prior suspended sentence, he has not shown that this error adversely affected his sentence. There was no plain error and relief is not required.

9.

Morrison claims that even if no individual error in his case merits relief, the cumulative effect of the errors committed requires that his case be reversed or his sentence modified. The cumulative error doctrine applies when several errors occurred at the trial court level, but none alone warrants reversal. *DeRosa v. State,* 2004 OK CR 19, ¶ 100, 89 P.3d 1124, 1157. Although each error standing alone may be of insufficient gravity to warrant reversal, the combined effect of an accumulation of errors may require a new trial. *Id.* Cumulative error does not deprive the defendant of a fair trial when the errors considered together do not affect the outcome of the proceeding. Moreover, a cumulative error claim has no merit when this Court fails to sustain any of the errors raised on appeal. *See Jones v. State,* 2009 OK CR 1, ¶ 104, 201 P.3d 869, 894. There are no errors, considered individually or cumulatively, that merit relief in this case. *Id.*; *DeRosa,* 2004 OK CR 19, ¶ 100, 89 P.3d at 1157. This claim is denied.

DECISION

The Judgment and Sentence of the district court is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2016), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF WASHINGTON COUNTY
THE HONORABLE CURTIS L. DeLAPP, DISTRICT JUDGE

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OPINION BY: JOHNSON, J.
SMITH, P.J.: Concur
LUMPKIN, V.P.J.: Concur in Results
LEWIS, J.: Concur
HUDSON, J.: Concur in Results

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LUMPKIN, VICE PRESIDING JUDGE: CONCURRING IN RESULT

I concur in affirming the judgment and sentence but write separately because the opinion utilizes the wrong standard in Proposition One.

The test to decide whether an exhibit is recorded testimony or a recorded exhibit under 22 O.S.2011, §§ 893, 894, is separate and distinguishable from the determination of "testimonial statements of a witness" for Confrontation Clause purposes. *See Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 1365, 158 L.Ed.2d 177 (2004).

This Court has fashioned the rule for the proper use of audio and video recordings during jury deliberations. *Stouffer v. State*, 2006 OK CR 46, ¶ 131, 147 P.3d 245, 271; *Davis v. State*, 1994 OK CR 72, ¶ 17, 885 P.2d 665, 669; *Cannon v. State*, 1995 OK CR 45, ¶ 37, 904 P.2d 89, 104. If the recording is an exhibit it may go with the jury into deliberations like any other exhibit. *Id.*; 22 O.S.2011, § 893. However, if the recording is testimony then the recording may not go with the jury into deliberations. *Id.* Instead, recorded testimony may only be replayed for the jury pursuant to the requirements set forth in § 894 and our decision in *Martin v. State*, 1987 OK CR 265, 747 P.2d 316. *Cannon*, 1995 OK CR 45, ¶ 37, 904 P.2d at 104; *Duvall v. State*, 1989 OK CR 61, ¶¶ 11-12, 780 P.2d 1178, 1180. This Court has maintained this bright line rule through the course of numerous decisions. *Stouffer*, 2006 OK CR 46, ¶ 131, 147 P.3d at 271.

In *Martin*, the minor victim testified through both a videotape made pursuant to 22 O.S.Supp.1984, § 753 and in-person.[1] *Martin*, 1987 OK CR 265, ¶¶ 8-9, 747 P.2d at 318-19. This Court found that it was error for the trial court to permit the jury to take the videotape back into the jury room during deliberation because the videotape was not merely an exhibit but was the minor victim's testimony. *Id.*, 1987 OK CR 265, ¶¶ 11-18, 747 P.2d at 319-20. In *Duvall v. State*, 1989 OK CR 61, 780 P.2d 1178, this Court found that audiotapes of conversations between the informant and the defendant during a drug deal constituted exhibits which the trial court could allow the jury to take to the deliberation room. *Id.*, 1989 OK CR 61, ¶¶ 9-12, 780 P.2d 1178, 1180. In *Pfaff v. State*, 1992 OK CR 28, ¶ 2, 830 P.2d 193, 195-96, this Court determined that a videotape which depicted both the crime scene and the defendant walking towards the crime scene confessing "you've caught me" was not a testimonial exhibit and thus there was no error in the trial court's decision to allow the jury to review it. *Id.*, 1992 OK CR 28, ¶¶ 3-4, 10, 830 P.2d at 195-96. In *Allen v. State*, 1994 OK CR 13, 871 P.2d 79, we determined that the defendant's audiotaped conversation with the police was not the testimony of a witness at trial. *Id.*, 1994 OK CR 13, ¶ 42, 871 P.2d at 95. In *Alverson v. State*, 1999 OK CR 21, 983 P.2d 498, this Court determined that the convenience store surveillance videotape which depicted the offense did not constitute a testimonial exhibit. *Id.*, 1999 OK CR 21, ¶¶ 38-39, 983 P.2d at 513. In *Cannon*, we determined that the defendant's audiotaped confession was

[1] This statutory provision has since been repealed. 2003 OKLA. SESS. LAWS CH. 405, § 11.

not "a representation of the testimony of a witness at trial" and thus the audiotape could be treated like any other exhibit. *Cannon*, 1995 OK CR 45, ¶ 37, 904 P.2d at 104. Therefore, the proper analysis of the recording in the present case is to determine whether it contains either actual testimony or a representation of the testimony of a witness at trial.

I note that we do not know what direction the United States Supreme Court will take with the "testimonial" test it first developed in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). As the analysis set forth in *Martin*, *Pfaff*, and *Duvall* is the proper determination for "testimony" pursuant to 22 O.S.2011, §§ 893, 894, this Court should maintain the distinction between the analysis of these two separate types of claims.

In the present case, Appellant did not object to the jury viewing the recording, again. Thus, he waived appellate review of his claim for all but plain error review. *Welch v. State*, 1998 OK CR 54, ¶ 41, 968 P.2d 1231, 1245. This Court reviews a plain error claim pursuant to the test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690. Under this test, an appellant must show an actual error, which is plain or obvious, and which affects his substantial rights. *Malone v State*, 2013 OK CR 1, ¶ 41, 293 P.3d 198, 211-212 *cert. denied*, *Malone v. Oklahoma*, 134 S. Ct. 172, 187 L. Ed. 2d 119 (2013); *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395; *Simpson*, 1994 OK CR 40, ¶¶ 10, 26, 30, 876 P.2d at 694, 699, 701. This Court will correct plain error only if the error seriously affects the fairness, integrity or public

reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*

Applying the analysis from *Stouffer*, *Martin*, *Pfaff*, and *Duvall* to the present case, I find that Appellant has shown the existence of an actual error. The recording of the forensic interviews was a representation of the child-victim's testimony and the video constituted a testimonial exhibit. *See* 12 O.S.Supp.2013, § 2803.1(A)(2) (providing that child hearsay statement regarding physical or sexual abuse admissible when child is unavailable to testify or to corroborate child's testimony). Accordingly, the trial court's failure to follow the requirements of § 894 constituted an actual error, that was plain or obvious.

Moving forward into the Court's plain error analysis, I find that this error did not affect the outcome of the trial. *Mitchell v. State*, 2011 OK CR 26, ¶ 130, 270 P.3d 160, 188. As Appellant has not shown that the jury's viewing the video in its entirety, a second time, seriously affected the fairness, integrity or public reputation of the trial or otherwise represents a miscarriage of justice, no relief is required. *Levering*, 2013 OK CR 19, ¶ 6, 315 P.3d at 395.

As to Proposition Eight, I note that the opinion misstates the holding in *Hunter v. State*, 2009 OK CR 17, 208 P.3d 931. This Court did not hold that "it is error for jurors to learn that a defendant received a suspended sentence." Instead, this Court in *Hunter* reiterated: "We have long held that parties should not refer to probation and parole policies in order to influence a sentence." *Id.*, 2009 OK CR 17, ¶ 10, 208 P.3d at 933. Because the prosecutor read the

Information and explicitly told the jurors in *Hunter* that the defendant had previously received suspended sentences and urged the jurors during closing argument to sentence the defendant, in part, on this improper basis this Court modified the appellant's sentence. *Id.*, 2009 OK CR 17, ¶¶ 10-11, 208 P.3d at 933-34.

Reviewing Appellant's claim in the present case pursuant to the test set forth in *Simpson*, I agree that Appellant has shown the existence of an actual error, which is plain or obvious. *Malone*, 2013 OK CR 1, ¶ 41, 293 P.3d at 211-212. The prosecutor should not have informed the jury while reading the Information that Appellant had previously received a suspended sentence. However, Appellant has not shown that this error seriously affected the fairness, integrity or public reputation of the trial or otherwise represents a miscarriage of justice. Therefore, no relief is required. *Levering*, 2013 OK CR 19, ¶ 6, 315 P.3d at 395.

I am authorized to state that Judge Hudson joins this vote and writing.