

FILED
IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA
STATE OF OKLAHOMA

MAR 12 2006

JAMES A. SHERFIELD,

Appellant,

v.

STATE OF OKLAHOMA

Appellee.

MICHAEL S. RICHIE
CLERK

NOT FOR PUBLICATION

Case No. F-2006-699

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

Appellant James A. Sherfield was tried by jury and convicted of six (6) counts of Sexual Abuse of A Child (10 O.S.Supp.2002, § 7115), Case No. CF-2004-6280, in the District Court of Oklahoma County. The jury recommended as punishment imprisonment for one (1) year in each of Counts I and IV, five (5) years in each of Counts II and V, and seventeen (17) years in each of Counts III and VI. The trial court sentenced accordingly, ordering the sentences in Counts I, II, and III to be served concurrently to each other but consecutively to Counts IV, V, and VI. Counts IV, V, and VI were ordered to be served concurrently with each other but consecutively to Count I, II, and III. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of his appeal:

- I. The trial court committed reversible error by allowing the State to exercise peremptory challenges against minority jurors without establishing race-neutral reasons, which denied Appellant an impartial jury composed of a fair cross-

section of the community in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article II, §§ 7 and 20 of the Oklahoma Constitution.

- II. Duplicate charges, convictions, and punishments violate Appellant's constitutional protection against double jeopardy and/or double punishment.
- III. Admission of other crimes or bad acts evidence prejudiced the jury, deprived Appellant of a fundamentally fair trial, and warrants reversal of the conviction or modification of the sentence.
- IV. Appellant was prejudiced by improper admission of expert testimony and argument as to the truthfulness of key state witnesses.
- V. The physician assistant's purported "diagnosis" of "sexual abuse by history with the grandfather as the alleged perpetrator" overstepped the bounds of proper expert opinion, to constitute a prejudicial personal opinion, which told the jury Appellant had sexually abused the complainant.
- VI. An error in the amended judgment and sentence should be corrected by an order *nunc pro tunc*.
- VII. Cumulative errors deprived Appellant of a fair trial and reliable verdict and sentence.

After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that neither reversal nor modification is warranted under the law and the evidence.

In Proposition I, we find no plain error in the trial court allowing the State to excuse potential jurors Ms. H and Ms. A with peremptory challenges. Defense counsel's timely objection to the peremptory strikes and request for a *Batson* hearing were insufficient to establish a *prima facie* showing that the prosecutor exercised the peremptory challenges on the basis of race. See

Black, 1994 OK CR 4, ¶¶ 25-26, 871 P.2d 35, 42-43 citing *Batson v. Kentucky*, 476 U.S. 79, 96-97, 106 S.Ct. 1712, 1722-24, 90 L.Ed.2d 69 (1986), *contra Cleary v. State*, 1997 OK CR 35, ¶ 6, 942 P.2d 736, 742. Appellant failed to make any argument or show any facts or relevant circumstances raising an inference that the prosecutor used the peremptory strikes to exclude veniremen from the jury on account of their race. *Id.* However, even if we were to find Appellant made his required *prima facie* showing, our review of the record reveals the trial court's finding that there was no purposeful discrimination in the exercise of the peremptory strikes was correct.

In Proposition II, we find Appellant's convictions for six counts of Child Sexual Abuse were not duplicative and do not violate his constitutional protection against double jeopardy and double punishment. The evidence in this case sufficiently proves six separate and distinct offenses and does not indicate the offensive acts were merely part of one continuing offense or that they merged into one offense. *See Gregg v. State*, 1992 OK CR 82, ¶ 27, 844 P.2d 867, 878; *Salyer v. State*, 1988 OK CR 184, ¶¶ 12 - 16, 761 P.2d 890, 893 - 894. As 21 O.S. 2001, § 11 was not violated by the multiple charges, Appellant's double jeopardy claim also fails. *See Davis v. State*, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126 (claims of multiple charges/punishment reviewed first under section 11, only if section 11 does not apply does traditional double jeopardy analysis occur

In Proposition III, we find evidence of Appellant's physical abuse of all of the children was properly admitted as *res gestae* of the charged offenses. The

evidence gave the jury a complete understanding of the crimes, it incidentally emerged as the events surrounding the crimes were revealed and it explained why the victim did not come forward with her allegations sooner. See *McElmurry v. State*, 2002 OK CR 40, ¶ 63, 60 P.3d 4, 21-22; *Rogers v. State*, 1995 OK CR 8, ¶ 21, 890 P.2d 959, 971; *Shelton v. State*, 1990 OK CR 34, ¶ 11, 793 P.2d 866, 871. This case is distinguishable from *Mitchell v. State*, 2005 OK CR 15, ¶ 56, 120 P.3d 1196, 1210 where the commission of the acts of physical abuse against the murder victim did not prove the defendant sexually abused the victim also. In the present case, the evidence showed the physical abuse paved the way for the commission of the sexual abuse and helped ensure a continuation of that abuse. In this manner, evidence of the physical abuse was properly admitted under the “common scheme or plan” exception to the prohibition of other crimes evidence. See *Jones v. State*, 1989 OK CR 66, ¶¶ 15-16, 781 P.2d 326, 329. The evidence was properly admitted as its probative value was not substantially outweighed by the danger of unfair prejudice. See 12 O.S. 2001, § 2402. Giving the uniform jury instruction appropriately limited the jury’s consideration of the evidence. See *Lafayette v. State*, 1985 OK CR 5, ¶ 15, 694 P.2d 530, 532.

In Proposition IV, we find no plain error in the admission of Detective Ozuna’s testimony. His testimony was not offered as that of an expert in interviewing children and he did not vouch for the credibility of the victim. Therefore, his testimony is distinguishable from that prohibited in *Lawrence v. State*, 1990 OK CR 56, ¶ 4, 796 P.2d 1176. Further, the record reflects the

prosecutor did not vouch for the credibility of State's witness Judy Sandoval in closing argument. Reviewing only for plain error, the prosecutor's comments were well within the bounds permitted on closing argument. *See Bland v. State*, 2000 OK CR 11, ¶ 89, 4 P.3d 702, 726.

In Proposition V, this Court has previously upheld the admission of testimony by physician's assistant Hatlelid concerning "sexual abuse by history". *Warner v. State*, 2006 OK CR 40, ¶ 23, 144 P.3d 838, 860; *Mitchell v. State*, 2005 OK CR 15, ¶ 52, 120 P.3d 1196, 1210. In the present case, the witness testified the results of the victim's physical examination were "normal". Any error in admitting the witness's opinion testimony in the absence of any supporting physical evidence was harmless error. *See U.S. v. Charley*, 189 F.2d 1251, 1266 (10th Cir. 1999). This testimony was slight when compared to the properly admitted evidence. In light of the strength of the properly admitted evidence, any improperly admitted testimony from Ms. Hatlelid did not substantially affect the outcome of the trial and we are not left with any grave doubts that the testimony denied Appellant any substantial rights. *Simpson v. State*, 1994 OK CR 40, ¶ 37, 876 P.2d 690, 702.

In Proposition VI, we find the case should be remanded to the District Court for the issuance of an order *nunc pro tunc* to correct the Amended Judgment and Sentence to read that the costs, fees, victims compensations assessment and attorney fees are imposed "as ordered by the District Court". *See Dunaway v. State*, 1977 OK CR 86, ¶ 19, 561 P.2d 103, 108.

In Proposition VII, although certain errors did occur in this case, even considered together, they were not so egregious or numerous as to have denied Appellant a fair trial. *Gilson v. State*, 2000 OK CR 14, ¶ 177, 8 P.3d 883, 929. Therefore, no new trial or modification of sentence is warranted

Accordingly, this appeal is denied.

DECISION

The Judgment and Sentence is **AFFIRMED**. **The case is remanded to the District Court with instructions to enter an Order Nunc Pro Tunc** correcting the Amended Judgment and Sentence to read that the costs, fees, VCA and attorney fees are imposed **as ordered by the District Court**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE VIRGIL C. BLACK, DISTRICT JUDGE

APPEARANCES AT TRIAL

JASON SPANICH
228 ROBERT S. KERR
OKLAHOMA CITY, OK 73102
COUNSEL FOR APPELLANT

C. WESLEY LANE II
DISTRICT ATTORNEY
MATT BALLARD
ASSISTANT DISTRICT ATTORNEY
320 ROBERT S. KERR, STE. 505
OKLAHOMA CITY, OK 73102
COUNSEL FOR THE STATE

APPEARANCES ON APPEAL

KIMBERLY HEINZ
P.O BOX 926
NORMAN, OK 73070
COUNSEL FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
THEODORE M. PEEPER
ASSISTANT ATTORNEY GENERAL
313 N.E. 21st ST.
OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE

OPINION BY: LUMPKIN, P.J.

C. JOHNSON, V.P.J.: DISSENT
CHAPEL, J.: DISSENT
A. JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR IN RESULT
RA

CHAPEL, J., DISSENTING:

I disagree with the majority's resolution of Proposition V, and would find the expert's testimony was improper and prejudicial. The victim in this case testified that Sherwood had abused her and described the abuse. Witness Hatelid, a physician assistant, took a history of the case from the victim and examined her. The physical examination was normal. Hatelid testified that her diagnosis was child sexual abuse by Sherfield, as a result of the child's verbal history of the events. That is, Hatelid testified that she diagnosed child sexual abuse because the victim told her Sherwood abused her and described the abuse. This is exactly what the jury heard from the victim herself.

I fail to see how Hatelid's testimony could in any way have aided the jury in making its determination of the facts. Expert testimony, whether it is scientific, technical, or otherwise specialized, is only admissible if it assists the jury to determine an issue.¹ Hatelid specifically stated that her opinion resulted only from the child's explanation, not from any physical examination or other use of her medical expertise. The jury was just as qualified to listen to the victim's story and believe it as Hatelid was. Hatelid's testimony added nothing new to the evidence which might help jurors.

The majority states that we have previously upheld Hatelid's diagnosis of "sexual abuse by history". However, *Warner v. State* does not support that conclusion.² In *Warner*, Hatelid's physical examination revealed injury consistent with sexual abuse. If Hatelid found physical evidence supporting

¹ 12 OS.2001, § 2702.

the charges, then her testimony was not based solely on the history given by the victim, distinguishing it from this case. In addition, the opinion never suggests that Hatelid testified to a diagnosis of sexual abuse by history; her expert testimony was based on her observations and examination of the victim, and the results of that examination.³ The same distinction is made in *Mitchell v. State*.⁴ In that case Hatelid testified regarding extensive injuries she found during the course of the victim's physical examination; she never testified as to a diagnosis of sexual abuse by history.⁵ There is no published case in which this Court has upheld testimony from Hatelid or anyone else regarding a diagnosis of sexual abuse by history.

The majority suggests this distinction is unimportant. I disagree. In *Warner* and *Mitchell* Hatelid testified as an expert regarding the results of her physical examination of the victims, which revealed injuries, as informed by the history presented to her. This testimony would of course assist jurors who had not made a physical examination of the victim, would not be qualified to do so, and would be unlikely to understand what they saw if they had. By contrast, Hatelid here testified to nothing more than what the victim already told the jury. Her opinion was not based on her specialized knowledge and was worth no more than jurors' own opinions, formed after hearing the victim.

Although Hatelid's improper testimony did not aid jurors, I believe it did improperly influence them. Jurors place great weight on expert opinion. Here,

² 2006 OK CR 40, 144 P.3d 838.

³ *Id.* at 860.

⁴ 2005 OK CR 15, 120 P.3d 1196.

Hatelid told jurors she heard the same story they did and she believed the victim, to the point that she based her diagnosis on the victim's account alone. Hatelid did not just imply that, in her expert opinion, the victim had told the truth about being sexually abused. That in itself would be error. She went farther and stated that, again in her expert opinion, Sherfield had committed the abuse. Hatelid could not have named a perpetrator from a physical exam. The only possible source for that opinion was the victim. Hatelid put the imprimatur of authority on the victim's testimony. I would reverse and remand the case for a trial free of this improper and prejudicial "diagnosis".

⁵ *Id.* at 1210.