IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

ALISHIA FAITH MACKEY,	)	
	)	
Appellant,	)	
	)	NOT FOR PUBLICATION
- vs -	)	
	)	Case No. F-2005-58
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

A. JOHNSON, JUDGE:

Alishia Faith Mackey[1] was tried by jury in the District Court of Muskogee County, Case No. CF-2004-57, and found guilty of permitting child abuse in violation of 10 O.S. 2001 § 7115(B) (Count 1) and failure to report child abuse in violation of 10 O.S. 2001 § 7103 (Count 2). The jury set punishment at twenty years imprisonment on the permitting count and imposed a $500 fine on the failure to report count.[2] Associate District Judge Norman D. Thygesen sentenced Mackey in accordance with the jury's verdict. From this judgment and sentence, Mackey appeals.

Mackey raises the following claims: (1) her rights under the Confrontation Clause of the United States and Oklahoma Constitutions were violated when the child-victim was permitted to testify at trial from behind a screen; (2) the district court erred by not instructing the jury *sua sponte* on the

[1] Mackey's first name is spelled inconsistently throughout the record as either "Alisha" or "Alishia." Documents contained in the record bearing Mackey's signature indicate that she signs her name as "Alishia." Additionally, Mackey's brief-in-chief and reply brief are captioned with the name "Alishia." Accordingly, this opinion adopts the spelling "Alishia."

[2] Failure to report child abuse is a misdemeanor. *See* 10 O.S. 2001 § 7103C.

affirmative defense of duress and her trial attorney was constitutionally ineffective for not requesting it; (3) the district court erred by not instructing the jury *sua sponte* on the statutory child abuse defense found at 21 O.S. 2001 § 852.1 and her trial attorney was constitutionally ineffective for not requesting it; (4) the district court erred by restricting cross-examination of two witnesses; (5) her convictions for permitting child abuse and failure to report child abuse constitute impermissible multiple punishments for the same act in violation of the double jeopardy provisions of the United States and Oklahoma Constitutions as well as the statutory multiple punishment prohibitions at 21 O.S. 2001 § 11; (6) she was denied due process by prosecutorial misconduct during closing argument and through public comments made by the prosecutor prior to trial; (7) her twenty year sentence on the permitting child abuse conviction is excessive; and (8) the cumulative effect of errors in her case require reversal of her convictions or modification of her sentence.

We briefly address each of these claims:

(1) *Maryland v. Craig*, 497 U.S. 836, 855, 110 S.Ct. 3157, 3169, 111 L.Ed.2d 666 (1990), holds that to comply with the Confrontation Clause requirement of face-to-face confrontation between an accused and the witnesses against her, a State must make a showing of necessity in order to protect a child-witness from the trauma of testifying by means other than face-to-face with the defendant in a child abuse case. This constitutional requirement is embodied in the Uniform Child Witness Testimony by Alternative Methods Act, codified at 12 O.S. Supp. 2004 §§ 2611.3-2611.9.

Section 2611.7 provides in relevant part that in a criminal proceeding a child-witness may testify other than face-to-face "if the judge . . . finds by clear and convincing evidence that the child would suffer serious emotional trauma that would substantially impair the child's ability to communicate with the finder of fact if required to be confronted face-to-face by the defendant." In this instance, the record contains no finding of necessity by the district court, and contains no evidence of necessity presented by the State. Therefore, we conclude that Mackey's confrontation rights were violated. Nonetheless, the error was harmless and does not warrant reversal because the remaining evidence of guilt was more than sufficient to support Mackey's convictions on both counts. *See Coy v. Iowa*, 487 U.S. 1012, 1021-22, 108 S.Ct. 2798, 2803, 101 L.Ed.2d 857 (1988)(holding that denial of confrontation rights is subject to harmless error analysis and explaining that after finding confrontation error, harmlessness must be determined on basis of remaining evidence).

(2) The district court did not commit error, plain or otherwise, by not instructing the jury *sua sponte* on the defense of duress. In this instance, the duress theory was neither supported by the evidence, nor tenable as a matter of law. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923; *Cipriano v. State*, 2001 OK CR 25 ¶¶ 22-23, 30, 32 P.3d 869, 875-76. *Cf. Carter v. State*, 1994 OK CR 49, ¶¶ 39-41, 879 P.2d 1234, 1240 (finding no error for trial court's refusal to instruct on second degree murder or first degree manslaughter where defendant's defense at trial was that he was not involved in murder and giving of instruction would have been inconsistent with defense

of non-involvement); *Denson v. State*, 1970 OK CR 73, ¶¶ 3-5, 481 P.2d 190, 191(finding that despite defendant's testimony of past beatings, defendant's testimony did not support duress instruction where defendant testified that she accompanied companion into store and left with no knowledge that companion had taken jewelry because defendant was attempting to establish defense of absence of criminal intent due to lack of knowledge of crime). Because there was no error, trial counsel was not ineffective. *Frederick v. State*, 2001 OK CR 34, ¶ 189, 37 P.3d 908, 955.

(3) The district court did not commit error, plain or otherwise, for not instructing the jury on the statutory defense to child abuse contained in 21 O.S. 2001 § 852.1. The defense provided by § 852.1(A) is expressly limited to defense against charges brought under that statute. *See* 21 O.S. 2001 § 852.1(A)("it is an affirmative defense to **this** paragraph if the person had a reasonable apprehension that any action to stop the abuse would result in substantial bodily harm to the person or the child")(emphasis added). Mackey was charged under 10 O.S. § 7115(B), not § 852.1(A). Therefore, she was not entitled to the defense provided by § 852.1(A). Because Mackey was not entitled to the defense as a matter of law, trial counsel was not ineffective for not requesting it. *Frederick v. State*, 2001 OK CR 34, ¶ 189, 37 P.3d 908, 955.

(4) The district court neither abused its discretion nor committed plain error in restricting cross-examination of Deputy Brenda Ellis and Mackey's niece Katherine Hall. *See Lott v. State*, 2004 OK CR 27, ¶ 126, 98 P.3d 318, 349-50 (applying plain error review and denying relief by holding that objection

brought at close of witness testimony was not timely for purpose of preserving error); *Scott v. State*, 1995 OK CR 14, ¶ 19, 891 P.2d 1283, 1292 (holding that inquiry into criminal arrests is permissible for impeachment purposes by exposing bias, but such evidence must, among other things, be relevant under 12 O.S. § 2401); *Mooney v. State*, 1999 OK CR 34, ¶ 52, 990 P.2d 875, 890 (holding that even impeachment evidence must be relevant).

(5) The conviction and punishment for permitting child abuse in violation of 10 O.S. 2001 § 7115(B) and failure to report child abuse in violation of 10 O.S. 2001 § 7103 does not violate constitutional double jeopardy principles. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932). However, because Mackey's twenty year sentence for permitting child abuse in violation of 10 O.S. 2001 § 7115(B) and her $500.00 fine for failure to report child abuse in violation of 10 O.S. 2001 § 7103 both arise from the same act, those punishments violate the statutory prohibition against double punishment found at 21 O.S. 2001 § 11. *Davis v. State*, 1999 OK CR 48, ¶¶ 7, 13, 993 P.2d 124, 125-26. Accordingly, we find that the Judgment and Sentence on Count 2 (failure to report child abuse in violation of 10 O.S. 2001 § 7103) must be vacated and that portion of the case dismissed.

(6) Despite improper comments being made by the prosecutor during closing argument about sparing the guilty, threatening the innocent, and letting evil flourish, when those comments are considered in light of the entire record, they did not deprive Mackey of a fair trial nor affect the jury's finding of guilt or punishment. *Wackerly v. State*, 2000 OK CR 15, ¶ 30, 12 P.3d 1, 12.

Furthermore, under the circumstances of this case, Mackey was not deprived of her due process right to a fair trial from pretrial publicity. *Harvell v. State*, 1987 OK CR 177, ¶¶ 13-14, 742 P.2d 1138, 1141.

(7) Considering the nature and circumstances of the offense, Mackey's twenty year sentence does not shock the conscience of the Court. Accordingly, we decline to modify her sentence. *Sanders v. State*, 2002 OK CR 42, ¶ 19, 60 P.3d 1048, 1051; *Lee v. State*, 1981 OK CR 152, ¶ 22, 637 P.2d 879, 885.

(8) Mackey's cumulative error argument is without merit. Although we have found harmless error in two instances and granted relief in another, when all the errors are considered in the aggregate, no further relief is required. The total accumulation of error did not render her trial fundamentally unfair, taint the jury's verdict, or render sentencing unreliable on the single remaining count of conviction. *Hogan v. State*, 2006 OK CR 19, ¶ 98, 139 P.3d 907, 937.

DECISION

The Judgment and Sentence on Count 1 (permitting child abuse in violation of 10 O.S. 2001 § 7115(B)) is **AFFIRMED**. The case is **REMANDED** with direction that the district court vacate the Judgment and Sentence on Count 2 (failure to report child abuse in violation of 10 O.S. 2001 § 7103) and dismiss that portion of the case. Under Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18 App. (2005), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

APPEARANCES AT TRIAL

CORRINE O'DAY
ATTORNEY AT LAW
314 W. BROADWAY
MUSKOGEE, OK 74401
ATTORNEY FOR DEFENDANT

DAVID PIERCE
ASSISTANT DISTRICT ATTORNEY
MUSKOGEE COUNTY
COURTHOUSE
MUSKOGEE, OK 74401
ATTORNEY FOR STATE

APPEARANCES ON APPEAL

JARROD STEVENSON
APPELLATE DEFENSE COUNSEL
GENERAL APPEALS DIVISION
OKLAHOMA INDIGENT DEFENSE
SYSTEM
P.O. BOX 926
NORMAN, OK 73070-0926
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL
OF OKLAHOMA
JENIFER L. STRICKLAND
ASSISTANT ATTORNEY GENERAL
313 N.E. 21st STREET
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR APPELLEE

OPINION BY: A. JOHNSON, J.
CHAPEL, P.J.: Concur in Part, Dissent in Part
LUMPKIN, V.P.J.: Concur in Part, Dissent in Part
C. JOHNSON, J.: Concur in Part, Dissent in Part
LEWIS, J.: Concur

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CHAPEL, PRESIDING JUDGE, CONCURS IN PART/DISSENTS IN PART:

I concur in affirming the Permitting Child Abuse (Count I). However, I would modify the sentence to ten (10) years.

I am authorized to state that Judge Charles Johnson joins in this opinion.

LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the Court's affirmance of the judgment and sentence in Count 1, but write separately to address Proposition 5. I find no violation of the statutory prohibition against double punishment. The offenses in this case do not arise from the same act, but involve two separate and distinct crimes with differing elements. The offense of permitting child abuse was a completed crime by the time the offense of failure to report child abuse occurred. The evidence shows that after discovering her son had been molested, Appellant did not contact the authorities but rather informed a relative. Later, when confronted by investigators from the Department of Human Services, Appellant did not report the abuse. This evidence clearly shows two separate crimes. I would therefore affirm the judgment and sentence in Count 2, and dissent to the Court's decision to reverse with instructions to dismiss.