IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ALFRED GENE RYAN,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2005-649**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

Appellant Alfred Gene Ryan was tried in the District Court of Kay County, Case No. CF-04-38, and convicted of First Degree Rape (Count I) in violation of 21 O.S. 2001, § 1114(A)(1) and Lewd Molestation (Count III) in violation of 21 O.S. Supp. 2002 § 1123.[1] The jury set punishment at twenty (20) years imprisonment on Count I and ten (10) years imprisonment on Count III, with $2,500.00 fines on both counts. The judge sentenced Appellant accordingly and ordered the sentences to run consecutively. Appellant now appeals his convictions and sentences, raising the following propositions of error:

I. The trial court committed reversible error by finding that Appellant was not in custody for *Miranda* purposes;

II. Unreliable hearsay admitted under 12 O.S. 2004 § 2803.1 violated Appellant's right to confrontation;

III. Admission of testimonial hearsay violated Appellant's right to confrontation;

[1] A second rape count was dismissed at preliminary hearing, and Appellant was acquitted of a second lewd molestation count, Count IV.

IV. The trial court committed reversible error by submitting audio-taped testimony to the jury during deliberations;

V. Appellant was denied a fundamentally fair trial by the D.H.S. worker's improper voucher of the child's credibility;

VI. Discussion of child accommodation syndrome during voir dire and subsequent testimony deprived Appellant of due process of law;

VII. Admission of other crimes evidence deprived Appellant of a fundamentally fair trial;

VIII. Defective jury instruction resulted in structural error;

IX. The trial court failed to instruct the jury on the 85% rule which requires reversal;

X. Counsel was ineffective for failing to impeach "junk science" testimony; and

XI. Accumulation of errors deprived Appellant of a fair trial.

However, after reviewing these propositions, the briefs, and the entire appellate record, we find reversal is not required. Nevertheless, Appellant's sentence must be modified.

With respect to proposition one, we find the trial court did not abuse its discretion by ruling that, when interviewed by the police, Appellant was not in custody for the purpose of *Miranda*. The trial court's decision was thorough and supported by the law and facts. In addition, the record indicates a free and voluntary exchange between Appellant and the interviewing officer, one that was free from coercion. Considering all of the circumstances of the interrogation, a reasonable person in Appellant's position would have felt he or she was at liberty to terminate the

interrogation and leave. *Yarborough v. Alvarado*, 541 U.S. 652, 663, 124 S.Ct. 2140, 2149, 158 L.Ed.2d 938 (2004). In fact, he was allowed to leave at the conclusion of the interrogation. As such, we find no abuse of discretion in the admission of Appellant's videotaped statement.

With respect to proposition two, we find the trial court did not abuse its discretion by admitting the child hearsay under 12 O.S. 2004 § 2803.1 or by finding it to be reliable. *Hughes v. State*, 1991 OK CR 18, ¶ 8, 815 P.2d 182, 185. Nor was Appellant's right to confrontation violated.

With respect to proposition three, we agree that the audiotaped interviews of the child victims in this case appear to be "testimonial" in nature. *Davis v. Washington*, __ U.S. __, 126 S.Ct. 2266, 2274, 165 L.Ed.2d 224 (2006). Nevertheless, there was no violation of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), because the victims testified at trial and were subject to cross-examination.

The fact that defense counsel decided not to cross-examine them regarding those statements at trial appears to have been a matter of trial strategy, as the girls had either forgotten the events by trial, recanted their earlier statements, or chose not to revisit the issue in front of a crowd. *White v. Illinois*, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992). Appellant's Confrontation Clause argument fails, as does his claim of ineffective assistance for not adequately preserving this issue. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80

L.Ed.2d 674 (1984).

With respect to proposition four, we find that the trial court's decision to allow jurors to take the audiotaped exhibit of the child victims' interview with police into the deliberation room appears to be consistent with the "bright line" rule referenced in *Davis v. State*, 1994 OK CR 72, 885 P.2d 665. *See Martin v. State*, 1987 OK CR 265, 747 P.2d 316 (videotaped testimony not allowed); *Duvall v. State*, 1989 OK CR 61, 780 P.2d 1178 (audio-tapes of the defendant in a drug buy allowed); *Banks v. State*, 1991 OK CR 51, 810 P.2d 1286 (defendant's tape recorded extra-judicial statement, admitted as an exhibit, allowed). However, to the extent that it could be argued that admission was improper as per *Pfaff v. State*, 1992 OK CR 28 ¶ 9, 830 P.2d 193, we find that case to be distinguishable, any such error was not of Constitutional magnitude and was harmless, especially in light of Appellant's significant admissions. *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, 693-95.

With respect to proposition five, we find any improper vouching that occurred was invited by defense counsel's cross-examination and is not the basis for a claim of error. *Ellis v. State*, 1992 OK CR 45, ¶ 28, 867 P.2d 1289, 1299; *Pierce v. State*, 1990 OK CR 7, ¶ 10, 786 P.2d 1255, 1259. Further, the prosecutor did not improperly vouch during closing arguments, and defense counsel's unfortunate cross-examination does not rise to the level of ineffective assistance under *Strickland.*

With respect to proposition six, we find the *voir dire* discussions

and trial testimony did not violate the teachings of *Davenport v. State*, 1991 OK CR 14, 806 P.2d 655 and did not deprive Appellant of due process of law.

With respect to proposition seven, we agree that improper other crimes evidence was admitted in this case, partially due to a lack of proper objection by defense counsel. 12 O.S.2001, § 2404(B). That error did not affect the guilt/innocence determination, however, although it may have affected sentencing.

With respect to propositions eight and ten, we find the record does not adequately support Appellant's claim that a jury instruction amounted to structural error or that his counsel was ineffective for allowing a witness to testify as to "junk science."

With respect to proposition nine, we find Appellant's jury should have been instructed that his convictions were subject to the "85% rule" in 21 O.S.Supp.2003, § 13.1, despite the fact that his trial took place before *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273 was handed down.[2] Sentence modification is the proper remedy in this case.

With respect to proposition eleven, we find the accumulated errors referenced above make sentence modification appropriate.

DECISION

The judgments and sentences are hereby **AFFIRMED**, except that the sentences on Counts I and III are hereby **MODIFIED** to run

[2] I reach this conclusion on the basis of *stare decisis*, although I stand by my earlier

concurrently. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF KAY COUNTY
THE HONORABLE D.W. BOYD, DISTRICT JUDGE

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CHAPEL, J.: CONCUR IN RESULT
A. JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR IN RESULT

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writings that Anderson does not require such retroactive application.