IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ERIC JOSIAH MARDIS,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2014-942**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, VICE PRESIDING JUDGE:

Appellant, Eric Josiah Mardis, was tried by jury and convicted of Lewd Acts With a Child Under Sixteen (Counts 1-5) (21 O.S.Supp.2010, § 1123) and Engaging in a Pattern of Criminal Offenses in Two or More Counties (Count 6) (21 O.S.Supp.2004, § 425) in District Court of Oklahoma County Case Number CF-2012-4660. The jury recommended as punishment imprisonment for one hundred (100) years, each, as to Counts 1 through 5 and imprisonment for two (2) years as to Count 6. The trial court sentenced Appellant accordingly and ordered the sentences to run consecutively.[1] It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in this appeal:

I. The prosecutor's improper cross-examination of Mr. Mardis about his confidential mental health records obtained in the course of the youthful offender proceedings injected irrelevant and unduly prejudicial information into the trial depriving Mr. Mardis of a fair trial and reasonable sentence.

[1] Any person convicted of Lewd Acts With a Child in violation of 21 O.S.2011, § 1123 shall be required to serve 85% of any sentence of imprisonment prior to becoming eligible for consideration for parole. 21 O.S.Supp.2009, § 13.1.

II. Because the 502 year sentence in this case is the functional equivalent to a life without parole sentence it is cruel and unusual and violates the Eighth Amendment to the United States Constitution pursuant to *Graham v. Florida* and *Miller v. Alabama.*

III. Mr. Mardis' 502 year sentence is disproportionately excessive under the federal and state constitutions and requires modification or resentencing.

IV. The evidence was insufficient to prove Mr. Mardis' guilt beyond a reasonable doubt and therefore his convictions must be reversed and remanded with instructions to dismiss.

V. Mr. Mardis' fundamental right to confront the witnesses was violated by the admission of testimonial hearsay through physician's associate Lauren Donaldson in violation of the United States Constitution and the Oklahoma Constitution.

VI. Trial errors when considered in a cumulative fashion, warrant a new trial or a sentence modification.

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 Appellant's judgments of guilt shall be affirmed but he is entitled to sentencing relief based upon evidentiary error.

In Proposition One, Appellant challenges the State's cross-examination of him with facts drawn from the youthful offender study filed of record in his case. He asserts that evidence concerning his juvenile mental health history was irrelevant and unduly prejudicial. He further asserts that the information was privileged. Although Appellant objected to the prosecutor's initial question, he did not raise the challenge he now raises on appeal. Therefore, we find that Appellant has waived appellate review of his claim for all but plain error. *Harmon v. State,*

2011 OK CR 6, ¶ 36, 248 P.3d 918, 934 ("When a specific objection is raised at trial, this Court will not entertain a different objection on appeal.").

We review Appellant's 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, affecting 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. We 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.*

Reviewing the record, we find that the contents of the youthful offender study were neither confidential nor privileged. The juvenile court ordered a youthful offender study, including a psychological evaluation, for the purpose of determining whether to sentence Appellant as an adult pursuant to 10A O.S.2011, § 2-5-208(C). Since the State charged Appellant as a youthful offender, the youthful offender study filed of record in the case was not confidential. 10A O.S.2011, § 2-5-204(C); § 2-6-102(C)(1). Because the statements within the psychological evaluation were made in the course of a court-ordered examination the statements were not privileged. 12 O.S.2011, § 2503(D)(2);

Nonetheless, we find that Appellant has shown the existence of an error that is plain or obvious on the record. Appellant's juvenile mental health history held little if any probative value. The challenged testimony did not tend

to establish a material fact in issue. *Postelle v. State*, 2011 OK CR 30, ¶ 31, 267 P.3d 114, 131. It did not elucidate, modify, explain, contradict or rebut Appellant's testimony on direct-examination. *Malone*, 2013 OK CR 1, ¶ 45, 293 P.3d at 212. Appellant's mental health history was wholly immaterial to the issue of his truthfulness and collateral to any issue in the case. *Mitchell v. State*, 2011 OK CR 26, ¶ 64 270 P.3d 160, 177; *Hawkins v. State*, 1986 OK CR 58, ¶¶ 7-8, 717 P.2d 1156, 1158-59; *See Levering*, 2013 OK CR 19, ¶ 19, 315 P.3d at 397-98 (finding no evidence to suggest witness' mental health records had any relevance to her ability to perceive and tell the truth). Giving the challenged evidence its maximum probative value and minimum prejudicial value, we find that the probative value was substantially outweighed by the danger of unfair prejudice. *Mayes v. State*, 1994 OK CR 44, ¶ 77, 887 P.2d 1288, 1310.

We harbor no grave doubt that the jury's determination of guilt was not materially affected by the evidentiary error. *Neloms v. State*, 2012 OK CR 7, ¶ 33, 274 P.3d at 169; *Simpson*, 1994 OK CR 40, ¶ 37, 876 P.2d at 702. The remaining evidence strongly favored the jury's verdict and we find that the error was harmless as to Appellant's guilt.

We cannot reach the same conclusion as to the jury's assessment of punishment. Although Appellant's extensive abuse of the child supported more than a minimum sentence in this case, it appears that the challenged evidence materially affected the jury's sentencing decision. Therefore, we find that Appellant's sentences in Counts 1 through 5 should be modified to

imprisonment for fifty (50) years each. *McIntosh v. State*, 2010 OK CR 17, ¶¶ 10-11, 237 P.3d 800, 803; *Scott v. State*, 1991 OK CR 31, ¶ 14, 808 P.3d 73, 77.

In Proposition Two, Appellant contends that any sentence imposed upon him which is beyond his natural life expectancy constitutes the infliction of cruel and unusual punishment under the Eighth Amendment because he was under the age of eighteen (18) years old when he committed the offenses. We are not persuaded by this argument. Since Appellant was not sentenced to imprisonment for life without parole, Appellant's case is distinguishable from the United States Supreme Court's pronouncements in *Graham v. Florida*, 560 U.S. 48, 30 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), and *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). We further note that Appellant's jury had the opportunity to consider Appellant's age as a mitigating circumstance before determining his sentences. *Miller*, 132 S.Ct.at 2475.

The Eight Amendment does not forbid imposition of the functional equivalent of a life without parole sentence (*i.e.*, a sentence beyond reasonable life expectancy) on a juvenile nonhomicide offender. *See Graham*, 560 U.S. at 75, 30 S. Ct. at 2030 ("[W]hile the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life."). It is enough that such an offender have some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. *Id.*

As addressed in Proposition One, evidentiary error requires modification of Appellant's sentences in Counts 1 through 5 to imprisonment for fifty (50) years in each count. The District Court sentenced Appellant to imprisonment for two (2) years in Count 6 and ordered Appellant's sentences to run consecutively. The overall length of Appellant's sentences is 252 years. Although 21 O.S.Supp.2009, § 13.1 requires that Appellant serve 85% of any sentence for Lewd Acts With a Child prior to becoming eligible for consideration for parole, Appellant will be eligible for parole. Appellant's sentences are also subject to commutation according to the provisions of Section 10 of Article VI of the Oklahoma Constitution. *Hemphill v. State*, 1998 OK CR 7, ¶ 11, 954 P.2d 148, 151; 57 O.S.2011, § 332. Thus, Appellant will have some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation as to each of his sentences.

Because the jury had the opportunity to consider Appellant's age and maturity before making its determination of sentence and Appellant will have some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, we find that Appellant's sentences do not violate the Eighth Amendment's prohibition against cruel and unusual punishment. Proposition Two is denied.

In Proposition Three, Appellant contends that the overall length of his sentences is excessive. Our determinations in Propositions One and Two render this proposition moot. *Barnard v. State*, 2012 OK CR 15, ¶ 42, 290 P.3d 759, 770

In Proposition Four, Appellant challenges the sufficiency of the evidence supporting his convictions. Reviewing the evidence in the light most favorable to the prosecution, we find that any rational trier of fact could have found the essential elements of the offenses beyond a reasonable doubt. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559; *Plantz v. State*, 1994 OK CR 33, ¶ 43, 876 P.2d 268, 281; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204. The child victim's testimony was not incredible or so thoroughly impeached as to be unworthy of belief. *Applegate v. State*, 1995 OK CR 49, ¶ 16, 904 P.2d 130, 136; *Remine v. State*, 1988 OK CR 156, ¶ 11, 759 P.2d 230, 232. Instead, his testimony was consistent and did not require corroboration as a matter of law. *Id.*; *Gilmore v. State*, 1993 OK CR 27, ¶ 12, 855 P.2d 143, 145. Even so, other evidence sufficiently corroborated the child's account. *Salyer v. State*, 1988 OK CR 184, ¶ 22, 761 P.2d 890, 895 ("State's evidence of the child's personality and behavior changes after the attack was sufficient to corroborate [ ] testimony."). Proposition Four is denied.

In Proposition Five, Appellant contends that he was denied his right to confrontation when the physician's associate testified as to the behavioral changes that the child's mother had stated when the physician's associate took the child's history. Appellant argues that the mother's statement constituted inadmissible testimonial hearsay pursuant to *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

The trial court determined that the testimony fell within the statements made for purpose of medical diagnosis exception to the hearsay rule. We review

the trial court's ruling admitting the evidence for an abuse of discretion. *Marshall v. State*, 2010 OK CR 8, ¶ 24, 232 P.3d 467, 474. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, if reasonably pertinent to diagnosis or treatment are not excluded by the hearsay rule. *Kennedy v. State*, 1992 OK CR 67, ¶ 11, 839 P.2d 667, 670 ("One provision of the law permitting admission of hearsay statements is the 'statements for purposes of medical diagnosis or treatment' exception."); *Drake v. State*, 1988 OK CR 180, ¶ 15, 761 P.2d 879, 882; 12 O.S.2011, § 2803(A)(4). Based upon the record, we find that the trial court's conclusion is not clearly against the logic and effect of the facts presented. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

We further find that Appellant was not denied his right to confrontation. Because the mother testified at trial and was subject to cross-examination, we find that the Confrontation Clause did not constrain the use of the mother's prior statements to the physician's associate. *Goode v. State*, 2010 OK CR 10, ¶ 32, 236 P.3d 671, 679 ("[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."); *Stouffer v. State*, 2006 OK CR 46, ¶ 70, 147 P.3d 245, 264 (finding *Crawford* does not apply when the declarant testifies at trial). Proposition Five is denied.

As to Proposition Six, we find that Appellant was not denied a fair trial by cumulative error. *Ashinsky v. State*, 1989 OK CR 59, ¶ 31, 780 P.2d 201, 209; *Bechtel v. State*, 1987 OK CR 126, 738 P.2d 559, 561. In Proposition One we

found that evidentiary error required modification of Appellant's sentences for Lewd Acts with a Child in Counts 1 through 5. However, this sole error cannot support an accumulation of error claim. *Hope v. State*, 1987 OK CR 24, ¶ 12, 732 P.2d 905, 908. Proposition Six is denied.

DECISION

The Judgment and Sentence of the District Court on Count 6 is **AFFIRMED**. Appellant's convictions for Lewd Acts With a Child in Counts 1 through 5 are **AFFIRMED** but the sentences are **MODIFIED** to imprisonment for Fifty (50) years in each count to be served consecutively as ordered by the trial court. This matter is remanded to the District Court for entry of Judgment and Sentence consistent with the Opinion. 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 the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE GLENN M. JONES, DISTRICT JUDGE

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OPINION BY: LUMPKIN, V.P.J.

SMITH, P.J.: Concur in Results
JOHNSON, J.: Concur
LEWIS, J.: Concur in Part/Dissent in Part
HUDSON, J.: Concur in Part/Dissent in Part

LEWIS, J., Concurring in Part/Dissenting in Part:

I concur in affirming Appellant's convictions. However, I dissent to modifying his sentence.

HUDSON, JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in affirming Mardis's convictions. I disagree, however, with the majority's finding of plain or obvious error in Proposition One. The record herein does not support a finding that error, plain or otherwise, occurred. Even assuming error, such error does not seriously affect the fairness, integrity or public reputation of the juridical proceeding or otherwise represent a miscarriage of justice. *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395; 20 O.S.2011, § 3001.1. Thus, I dissent to modifying Appellant's sentences in Counts 1 through 5 to fifty (50) years imprisonment each.