

Appellant, Ganey Marques Fairley, was tried and convicted by jury in Tulsa County District Court, Case No. CF-2017-1754, of Count 1: Child Abuse by Injury, in violation of 21 O.S.Supp.2014, § 843.5(A); and Count 2, Child Neglect, in violation of 21 O.S.Supp.2014, § 843.5(C). The jury recommended a sentence of twenty-five years imprisonment on Count 1 and five years imprisonment on Count 2 (O.R. 151-52). The Honorable William J. Musseman, Jr., District Judge, sentenced Fairley in accordance with the jury's verdicts, ordered credit for time served and imposed

various costs and fees.¹ Judge Musseman also ordered Fairley's sentences to run consecutively. Fairley now appeals, raising the following propositions of error on appeal:

- I. SEVERAL INSTANCES OF PROSECUTORIAL MISCONDUCT DEPRIVED APPELLANT OF A FAIR TRIAL IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION;
- II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO INSTRUCT THE JURY TO NOT CONSIDER EVIDENCE OF PRIOR ABUSE ALLEGATIONS AGAINST APPELLANT AS SUBSTANTIVE EVIDENCE OF GUILT DURING THE CROSS-EXAMINATION OF DR. DEHNEL;
- III. THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO INSTRUCT THE JURY TO NOT CONSIDER EVIDENCE OF PRIOR ABUSE ALLEGATIONS AGAINST APPELLANT AS SUBSTANTIVE EVIDENCE OF GUILT IN THE JURY INSTRUCTIONS; and
- IV. APPELLANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we have determined that under the law and the

¹ Under 21 O.S.Supp.2015, §13.1, Fairley must serve a minimum of 85% of both his sentences before he is eligible for parole.

evidence the judgments of guilt should be **AFFIRMED** but the case should be **REMANDED FOR RESENTENCING** on all counts.

In Proposition I, Appellant contends prosecutorial misconduct denied him a constitutionally fair trial. He argues the prosecutor committed misconduct during her cross-examination of Appellant's expert witness, Dr. Peter John Dehnel, and during closing argument. Both claims relate to a prior abuse allegation against Appellant that involved his biological son, E.F.² Appellant specifically challenges the breadth of the prosecutor's cross-examination of Dr. Dehnel regarding his knowledge of the prior abuse allegation as well as her continued references to the prior allegation during closing argument. Appellant contends the extensive detail in which the prosecutor questioned Dr. Dehnel regarding the prior abuse allegation went beyond testing "his level of knowledge by which he [] testified as to his diagnosis" and

² Notably, the State sought to introduce evidence of the prior abuse allegation pursuant to *Burks v. State*, 1979 OK CR 10, ¶ 12, 594 P.2d 771, 774, *overruled on other grounds by Jones v. State*, 1989 OK CR 7, ¶ 8, 772 P.2d 922, 925. At the pre-trial *Burks* hearing, the trial court concluded that while the proffered evidence was relevant to prove absence of mistake or accident, its probative value was comparatively minimal, and thus the risk of prejudice outweighed any probative value offered. However, the court determined that the challenged evidence would be a permissible subject for cross-examination if the defense's expert witness, Dr. Dehnel, admitted having no knowledge of this prior incident.

amounted to misconduct. He further asserts the prosecutor's references to the prior allegation during closing argument improperly encouraged the jury to consider this allegation as substantive evidence that Appellant similarly abused the victim, C.M.

This Court will not grant relief for alleged prosecutorial misconduct unless, viewed in the context of the whole trial, the misconduct rendered the trial fundamentally unfair, so that the jury's verdict is unreliable. *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471, 91 L. Ed. 2d 144 (1986) ("The relevant question is whether the prosecutors' [misconduct] so infected the trial with unfairness as to make the resulting conviction a denial of due process.") (internal quotations omitted); *Tryon v. State*, 2018 OK CR 20, ¶ 142, 423 P.3d 617, 655; *Sanders v. State*, 2015 OK CR 11, ¶ 21, 358 P.3d 280, 286.

In those instances in which Appellant objected to the prosecutor's challenged conduct, preserving the error for appeal, we review for an abuse of discretion. *Bosse v. State*, 2017 OK CR 10, ¶ 82, 400 P.3d 834, 863. No abuse of discretion will be found unless the trial court's determination was "a clearly erroneous conclusion

and judgment . . . that is clearly against the logic and effect of the facts presented.” *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170 (citation and internal quotation marks omitted). We review Appellant’s remaining allegations of misconduct for plain error only. To be entitled to relief for plain error, Appellant must show: (1) the existence of an actual error (i.e., deviation from a legal rule); (2) that the error is plain or obvious; and (3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding. *Musonda v. State*, 2019 OK CR 1, ¶ 6, 435 P.3d 694, 696. This Court will only correct plain error “if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice.” *Id.*; *Baird v. State*, 2017 OK CR 16, ¶ 25, 400 P.3d 875, 883.

As to the prosecutor’s cross-examination of Dr. Dehnel, the parties on appeal agree *to an extent* that Appellant’s prior allegation of child abuse was relevant. See 12 O.S.2011, § 2705; *Tryon*, 2018 OK CR 20, ¶ 96, 423 P.3d at 644-45. Appellant argues however that the State’s line of questioning went beyond its permissible purpose and was an improper attempt by the State to prove

Appellant similarly abused C.M. Appellant submits the prosecutor need only to have asked Dr. Dehner if he knew about the prior abuse allegation to assess his knowledge and the correlating soundness of Dr. Dehnel's medical opinion. Instead, Appellant asserts the prosecutor essentially testified to the specifics of the prior allegation through her cross-examination of Dr. Dehnel.

Cross-examination into matters affecting the credibility of a witness is generally permissible. *Tryon*, 2018 OK CR 20, ¶ 142, 423 P.3d at 655; 12 O.S.2011, § 2611. However, upon review, it is apparent that the prosecutor's line of questioning regarding the prior abuse allegation went too far. Her questioning quickly transitioned from an appropriate attack on the credibility of Dr. Dehnel's expert medical conclusions to a conduit to present facts not in evidence for the purpose of attacking the credibility of Appellant's version of events. We thus find that the degree of detail regarding Appellant's prior abuse allegation that was presented to the jury solely through the prosecutor's cross-examination of Dr. Dehnel was more prejudicial than probative.³ *See Id.*, 2018 OK CR

³ Notably, despite defense counsel's request, a contemporaneous limiting instruction advising the jury of the prior abuse allegation's narrow purpose was not given.

20, ¶ 96, 423 P.3d at 644-45; 12 O.S.2011, §§ 2403, 2705; 12 O.S.Supp.2013, § 2703. Although we typically give the trial court deference regarding evidentiary rulings, the trial court erred in allowing the prosecutor to persist with this line of questioning.

This error was compounded considerably by the prosecutor's continued reference to the prior abuse allegation, as facts in evidence, during closing argument. Contrary to the State's assertion on appeal that the prosecutor's argument fell within the "wide latitude" of appropriate argument, the prosecutor's argument relating to the prior abuse allegation was improper. The prosecutor's remarks were not made for the purpose of challenging the credibility of Dr. Dehnel's expert medical conclusions but were aimed directly at challenging Appellant's contention that C.M.'s injuries were accidental or the result of pneumonia.

During her initial closing argument, the prosecutor characterized Appellant's prior abuse allegation to the jury as fact, arguing "it wasn't until this afternoon when I began my cross-examination of Dr. Dehnel that you got to hear the final very important piece of information *about this defendant and about his history*. Now, you have heard it all and *you have all the facts . . .*

and now it is time for this defendant to be held accountable for what he did to [C.M.]” The prosecutor continued to treat the prior abuse allegation as facts in evidence during her final closing argument. These remarks were not directed at the credibility of Dr. Dehnel’s expert opinion, but were leveled at Appellant with the goal of dismantling the credibility of Appellant’s “fall story.” The prosecutor compared the facts of the prior allegation with the facts relating to C.M., underscoring for the jury that Appellant was “telling the same story with a whole new baby[.]”. Shortly thereafter, she remarks “I am telling you the facts” and asks the jury if they believe Appellant’s “fall story.” In regard to this question, the prosecutor then asked the jury: “How many times in your life have you fallen with a baby and hurt his head so bad that he had to go to the hospital? If it’s happened to you twice, darn that’s some pretty bad luck.” Continuing to focus on the implications of the prior abuse allegation, the prosecutor references Appellant’s apparent bad luck arguing, “I would certainly hope that if [Appellant’s] luck is that bad, he needs to not walk outside in a thunderstorm because he is going to get hit with lightening. So

either [Appellant] is literally the most unlucky person in all the world or he is a child abuser.”

The prosecutor did not, as the State asserts on appeal, relate her remarks regarding the prior abuse allegation back to the soundness of Dr. Dehnel’s medical conclusions. Her remarks focused squarely on the credibility of Appellant’s “fall story.” Yet, the prosecutor’s implications were wholly unsupported by competent evidence offered at trial. Thus, this Court finds the prosecutor’s argument improper. *See Green v. State*, 1980 OK CR 34, ¶ 9, 611 P.2d 262, 265 (holding that right of liberal argument “does not permit the prosecutor to bolster his argument by implications which are unsupported by competent evidence offered at trial”); *ABA Standards for Criminal Justice for the Prosecution Function: Court Hearings and Trial* § 3-6.9 Facts Outside the Record (4th ed. 2018) (“When before a jury, the prosecutor should not knowingly refer to, or argue on the basis of, facts outside the record, unless such facts are matters of common public knowledge based on ordinary human experience, or are matters of which a court clearly may take judicial notice, or are facts the prosecutor

reasonably believes will be entered into the record at that proceeding.”).

Given our finding of error, this Court must next address whether the prosecutor’s misconduct so infected Appellant’s trial with unfairness as to make the jury’s verdicts unreliable. *Hogan v. State*, 2006 OK CR 19, ¶ 88, 139 P.3d 907, 935. To make this determination, “we evaluate the [prosecutor’s] misconduct 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.” *Tafolla v. State*, 2019 OK CR 15, ¶ 28, 446 P.3d 1248, 1260 (quoting *Hanson v. State*, 2009 OK CR 13, ¶ 18, 206 P.3d 1020, 1028). While it is undoubtedly the rare instance when a prosecutor’s misconduct will be found so egregiously detrimental to a defendant’s right to a fair trial that relief is required, this is one of those rare cases. *See Pryor v. State*, 2011 OK CR 18, ¶ 4, 254 P.3d 721, 722.

In assessing the impact of the prosecutorial error, we note that the jury was instructed pursuant to OUJI-CR (2d) No. 9-42A at the

close of evidence.⁴ However, given the nature of the prosecutorial error, which provided extensive details regarding the prior allegation of child abuse made against Appellant that mirrored the facts in the present case, this instruction, and others given to the jury that related to the testimony of expert witnesses, did not fully neutralize the impact of the prosecutorial error that occurred here.

As to the reliability of the jury's findings of guilt, we find the prosecutor's error did not contribute to the jury's findings of guilt as the State presented substantial evidence against Appellant. It is uncontroverted that Appellant was the sole individual caring for C.M. when the baby's injuries occurred. Despite the obvious

⁴ Pursuant to OUJI-CR (2d) 9-42A, the jury was instructed:

In addition to testimony from Dr. Conway, Dr. Baxter and Dr. Dehnel as to their opinions, you have also heard their testimony as to information they relied upon in reaching their conclusions. This testimony was admitted solely to enable you to evaluate their opinion testimony, and you should not consider it for any other purpose in reaching a verdict.

As explained in the Notes on Use of Instruction No. 9-42A, "[t]his Instruction is only needed when testimony concerning the *basis* for the opinion of a witness is admitted and the *basis* of the opinion would not otherwise be admissible, for example, if the opinion is based on hearsay." Notes on Use, Inst. No. 9-42A, OUJI-CR (2d) (citing *Lewis v. State*, 1998 OK CR 24, ¶ 22, 970 P.2d 1158, 1167-68; *Ake v. State*, 1989 OK CR 30, ¶ 31, 778 P.2d 460, 467) (emphasis added). Notably, the Notes on Use also advises that the instruction "should normally be given both at the time the basis for the opinion testimony is admitted and with the final jury instructions." Notes on Use, Inst. No. 9-42A, OUJI-CR (2d). Such was not done in this case.

severity of C.M.'s injuries, Appellant inexplicably did not call 911. Once C.M.'s mother called 911 and an ambulance was dispatched to the scene, neither Appellant nor C.M.'s mother mentioned C.M. having past or present respiratory issues when the responding EMT was gathering information from them regarding the incident and C.M.'s medical history. Dr. Baxter, a board-certified child abuse pediatrician subspecialist, evaluated C.M. at the hospital. Based on his experience and expertise, Dr. Baxter opined that C.M. could not have sustained his injuries as a result of the accident and pneumonia explanations offered by the defense. Dr. Baxter's medical diagnosis for C.M.'s injuries was abusive head trauma, physical abuse and child medical neglect. Moreover, Appellant's post-offense conduct demonstrated a consciousness of guilt. See *Dodd v. State*, 2004 OK CR 31, ¶¶ 31-34, 100 P.3d 1017, 1030-31. At the hospital, Appellant initially provided a false name, date of birth and social security number to Detective Aubrie Thompson, a child crisis investigator with the Tulsa Police Department. Appellant additionally threatened self-harm and attempted to strangle himself with his handcuffs while being formally interviewed

by Det. Thompson at the Detective Division of the Tulsa Police Department.

Thus, in light of this strong evidence, we find the prosecutorial error did not render the jury's guilty verdicts unreliable. The same, however, cannot be said as to the jury's sentencing recommendations. The role the prosecutorial error played in the jury's sentencing recommendations is a far more difficult determination. While Appellant's guilt is certain, finding the prosecutor's overreaching conduct played *no* role in the jury's punishment assessment is a dubious reach.⁵ We cannot say with confidence that the prosecutor's impermissible cross-examination of Dr. Dehnel, relaying in depth the details of the prior abuse allegation lodged against Appellant, and her subsequent argument, utilizing these details to challenge Appellant's version of the events,

⁵ Notably, in *O'Neal v. State*, F-2013-958 (Okl.Cr. April 5, 2016) (unpublished), this Court found the same prosecutor committed prosecutorial misconduct when she theatrically used a demonstrative aid during closing argument. While in my view the prosecutor's demonstration in that case did not amount to prosecutorial misconduct, *see O'Neal* (Hudson, J. Concur in Part/Dissent in Part), the circumstances presented in the present case are a horse of a different color. Here, the prosecutor's expansive introduction of the details of the prior abuse allegation and subsequent use of these details, as facts in evidence, during closing argument was improper. The prior abuse allegation was wholly unsupported by competent evidence offered at trial.

did not divert the jury from its duty to determine the punishment strictly on the facts in evidence.

For these reasons, we affirm Appellant's judgments of guilt but vacate his sentences and remand the case for resentencing.

This determination largely renders moot Appellant's remaining three propositions of error. To the extent any of Appellant's remaining allegations are not rendered moot by our resolution of Proposition I, we find they entitle Appellant to no further relief. Given the substantial evidence of Appellant's guilt any error which may have occurred in relation to these claims was harmless as to the jury's findings of guilt. Any impact the alleged errors may have had on the jury's sentence recommendations is cured by the Court's remand for resentencing.

DECISION

The judgments of the district court are **AFFIRMED**. Appellant's sentences are **VACATED** and the matter **REMANDED FOR RESENTENCING**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE WILLIAM J. MUSSEMAN, JR., DISTRICT JUDGE

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OPINION BY: HUDSON, J.

LEWIS, P.J.: CONCUR IN RESULT

KUEHN, V.P.J.: CONCUR

LUMPKIN, J.: CONCUR IN PART/DISSENT IN PART

ROWLAND, J.: CONCUR

LUMPKIN, JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in affirming the Judgment in this case but dissent to remanding the case for resentencing. If the prosecutor's conduct was as egregious as the opinion describes, then this misconduct would have affected the finding of guilt, and not just sentencing.

However, I find no error in the prosecutor's cross-examination of the defense expert. The prosecutor properly challenged the expert's credibility and his lack of knowledge of Appellant's history. The prosecutor's closing argument then focused on the evidence of abuse and neglect comprising the offense on trial. I find no reason to remand the case for resentencing.