

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

ALAN DEAN O'BRYANT,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

) NOT FOR PUBLICATION
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)
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) Case No. F-2018-294
)

) **FILED**
) **IN COURT OF CRIMINAL APPEALS**
) **STATE OF OKLAHOMA**

) **AUG 29 2019**
)

SUMMARY OPINION

**JOHN D. HADDEN
CLERK**

LEWIS, PRESIDING JUDGE:

Alan Dean O'Bryant, Appellant, was tried by jury and found guilty of Counts 1-4, sexual abuse of a child, in violation of 21 O.S.Supp.2014, § 843.5, in the District Court of Oklahoma County, Case No. CF-2015-7659. The jury sentenced Appellant to life imprisonment and a \$500.00 fine on each count. The Honorable Timothy R. Henderson, District Judge, pronounced judgment and sentence accordingly and ordered the sentences served consecutively with credit for time served.¹ Mr. O'Bryant appeals in the following propositions of error:

¹Appellant must serve 85% of his sentence before being eligible for consideration for parole. 21 O.S.Supp.2015, § 13.1(14).

1. Mr. O'Bryant was denied effective assistance of counsel in violation of his federal and state constitutional rights;
2. The trial court erred by admitting hearsay;
3. The trial court erred by admitting testimony that bolstered witness credibility;
4. The prosecution improperly vouched for witness and called Mr. O'Bryant a liar;
5. The child hearsay statute is unconstitutional;
6. The cumulative errors warrant a new trial.

Appellant argues in Proposition One that he was denied the effective assistance of counsel and has filed a motion for an evidentiary hearing in connection with this claim. See Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, 22 O.S.Supp.2018, Ch. 18, App.

This Court reviews this claim to determine whether counsel's performance was unreasonably deficient under prevailing professional norms; and, if so, whether that performance deprived Appellant of a fair trial with a reliable result. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). We review Appellant's accompanying motion for evidentiary hearing, the attached affidavits, and extra-record evidence to determine whether Appellant has provided sufficient

information to show clear and convincing evidence of a strong possibility that trial counsel was ineffective. Rule 3.11(B)(3)(b).

This standard is less demanding than *Strickland*, as it is easier to show clear and convincing evidence of a *strong possibility* that counsel was ineffective than to show, by a preponderance of the evidence, that counsel's performance was both unreasonably deficient and resulted in prejudice. When we grant an evidentiary hearing under this standard, we do not find that counsel *was* ineffective, but that Appellant has shown a strong enough possibility that he should be afforded a further opportunity to develop his claim. When we deny a request for evidentiary hearing, we necessarily find that Appellant has not shown defense counsel to be ineffective under at least one of the two required prongs of *Strickland*. *Simpson v. State*, 2010 OK CR 6, ¶ 47, 230 P.3d 888, 904.

Appellant claims that trial counsel's conduct amounted to ineffective assistance for several reasons. First he claims that counsel was ineffective for failing to memorialize the victim's mother's statements before she changed her opinion about the validity of the accusations and presenting evidence of her continued

contact with Appellant even after she presumably changed her opinion and divorced Appellant. Next he claims that counsel was ineffective for failing to object to the victim's hearsay statements as cumulative evidence. He claims next that counsel was ineffective in failing to object to prejudicial testimony and the hearsay evidence presented by a medical expert. Lastly, Appellant claims counsel was ineffective in failing to adequately advise him of his right to testify or remain silent and in failing to prepare him for the possibility of testifying.

After reviewing these claims, we find that trial counsel's actions did not fall below reasonable standards of professional conduct. Appellant has not shown that the strategy chosen by trial counsel was deficient. Any objections that trial counsel might have made to the complained of evidence would have been properly overruled. Finally, we find that the motion for evidentiary hearing does not show by clear and convincing evidence a possibility that trial counsel was ineffective.

Reviewing Appellant's Proposition One and his motion for evidentiary hearing under these standards, we find that no relief is

warranted. Proposition One and the motion for evidentiary hearing are denied.

In Proposition Two Appellant argues the trial court erred by improperly admitting hearsay testimony. The admission of evidence lies within the sound discretion of the trial court and, when the issue is properly preserved for appellate review, we will not disturb the trial court's decision absent an abuse of discretion. *Pavatt v. State*, 2007 OK CR 19, ¶ 42, 159 P.3d 272, 286. An abuse of discretion is a clearly erroneous conclusion and judgment, contrary to the logic and effect of the facts presented. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

In Proposition Two Appellant claims that the trial court erred by allowing hearsay testimony pursuant to 12 O.S.Supp.2013, § 2803.1. The trial court held a thorough hearing pursuant to § 2803.1 and ruled that the hearsay was admissible. We find no abuse of discretion in this ruling. Proposition Two is denied.

Appellant claims in Proposition Three that the trial court improperly admitted testimony of the examining doctor, the DHS worker, the forensic interviewer, and L.W.'s mother that bolstered L.W.'s credibility.

An expert witness may not vouch for the truthfulness or credibility of a witness. *Bench v. State*, 2018 OK CR 31, ¶ 90, 431 P.3d 929, 957. “Vouching” occurs when a witness indicates a personal belief in another witness's credibility by implicitly indicating that information not presented to the jury supports the witness's testimony. *Id.*, see *Nickell v. State*, 1994 OK CR 73, ¶ 7, 885 P.2d 670, 673.

Vouching only occurs if the jury could reasonably believe that the witness is indicating a personal belief in another witness's credibility. *Warner v. State*, 2006 OK CR 40, ¶ 24, 144 P.3d 838, 860-61, *overruled on other grounds by Taylor v. State*, 2018 OK CR 6, 419 P.3d 265.

First, regarding the medical expert's opinion, an expert opinion may embrace the ultimate issue as long as it does not tell the jury what result to reach. *Day v. State*, 2013 OK CR 8, ¶ 11, 303 P.3d 291, 297. Expert testimony generally tends to show that another witness is telling the truth or not. *Id.* In this case, the expert testimony incidentally corroborated the other evidence, but it did not tell jurors what result to reach. There is, therefore, no error in the expert testimony.

Regarding the other witnesses, we find that Appellant failed to object to their testimony, thus we review for plain error. *Nicholson v. State*, 2018 OK CR 10, ¶ 18, 421 P.3d 890, 896-97. To obtain relief, Appellant must now show that a plain or obvious error affected the outcome of the proceeding. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. The Court will then correct plain error only where it seriously affects the fairness, integrity, or public reputation of the proceedings. *Simpson v. State*, 1994 OK CR 40, ¶ 30, 876 P.2d 690, 701. This Court will not grant relief based on prosecutorial misconduct unless the State's misconduct is so flagrant that it rendered the trial or sentences fundamentally unfair. *Nicholson*, 2018 OK CR 10, ¶ 18, 421 P.3d at 896-97.

We find that the testimony was proper. It did not improperly vouch for the victim, nor did it improperly tell the jury what result to reach, thus there can be no plain error.

Lastly, with regard to the introduction of the recording of the forensic interview as cumulative, Appellant admits there were no objections on this ground. Title 12 O.S.2011, § 2403, provides that relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of . . . needless presentation

of cumulative evidence.” Here, the introduction of the recording was probative and its probative value was not substantially outweighed by the needless presentation of cumulative evidence. There is no plain error here. Appellant’s Proposition Three is denied.

In Proposition Four Appellant claims the prosecution improperly vouched for L.W. and called Appellant a liar. None of the alleged misconduct was objected to at trial, therefore, review will be for plain error only as set forth above. The prosecutor’s argument was in direct response to defense counsel’s argument regarding the victim’s veracity. Further, the prosecutor was merely comparing the victim’s motivation to lie versus Appellant’s motivation to lie. The prosecutor’s arguments can be described as proper comments on the evidence during closing argument, or proper comments in response to the arguments of defense counsel. *See Ball v. State*, 2007 OK CR 42, ¶ 57, 173 P.3d 81, 95 (Counsel are allowed a liberal freedom in their argument and inferences; reversal is not required unless a defendant’s rights are affected). The argument does not amount to plain error. This proposition is denied.

Appellant argues in Proposition Five that the Child Hearsay Statute is unconstitutional. Appellant did not raise this issue

below, therefore, we review for plain error only, as defined above. Appellant concedes this Court has previously determined the child hearsay statute to be constitutional. *Jones v. State*, 1989 OK CR 66, ¶¶ 9-11, 781 P.2d 326, 328 (holding that the statute neither violates the confrontation clause nor due process); and *Matter of W.D.*, 1985 OK 65, ¶ 11-12, 709 P.2d 1037, 1042 (Holding that § 2803.1 does not violate equal protection). We find no reason to revisit this issue now. Proposition Five is denied.

Finally, in Proposition Six, Appellant claims that the accumulation of errors denied him a fair trial and that he should be granted a new trial. We find that there are no individual errors requiring relief. As we find no error that was harmful to Appellant, there is no accumulation of error to consider. *Barnett v. State*, 2011 OK CR 28, ¶ 34, 263 P.3d 959, 969. Proposition Six is, therefore, denied.

DECISION

The judgment and sentence is **AFFIRMED**. Appellant's motion for evidentiary hearing is **DENIED**. 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 the delivery and filing of this decision.

**APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE TIMOTHY R. HENDERSON, DISTRICT JUDGE**

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OPINION BY: LEWIS, P.J.
KUEHN, V.P.J.: Concur
LUMPKIN, J.: Concur in Results
HUDSON, J.: Concur
ROWLAND, J.: Concur

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