IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOHNNY ALDRIC SAMPLES, III,	)	
	)	**NOT FOR PUBLICATION**
Appellant,	)	
	)	
v.	)	**Case No. F-2018-850**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, JUDGE:

Appellant, Johnny Aldric Samples, III, was tried by jury and convicted of four counts of Child Sexual Abuse, in violation of 21 O.S.Supp.2014, § 843.5(E) (Counts 1-4), after former conviction of two or more felonies, in the District Court of Oklahoma County, Case Number CF-2016-7860.[1] The jury recommended as punishment life imprisonment on each count. The trial court sentenced Appellant accordingly and ordered the sentences to run consecutively to one another. From this judgment and sentence Appellant appeals.

Appellant raises the following propositions of error in this appeal:

[1] Appellant will be required to serve 85% of his sentences before becoming eligible for parole. 21 O.S.Supp.2015, § 13.1.

I. Mr. Samples was denied due process and a fair trial when the trial court improperly admitted hearsay statements of B.L. under 12 O.S.Supp.2013, § 2803.1.

II. Mr. Samples was denied due process and a fair trial when the trial court improperly admitted irrelevant evidence under 12 O.S.2011, § 2404(B).

III. The State's evidence was insufficient to prove beyond a reasonable doubt that Mr. Samples sexually abused B.L.

IV. The State's evidence was insufficient to prove beyond a reasonable doubt that Mr. Samples sexually abused C.L.

V. Mr. Samples was denied effective assistance of counsel to which he was entitled under the 6th and 14th Amendments to the United States Constitution and Art. 2, §7 and 20 of the Oklahoma Constitution.

VI. Mr. Samples' convictions should be reversed as the cumulative effect of errors deprived him of a fair trial.

VII. The trial court abused its discretion in ordering Mr. Samples to serve his sentences consecutively, therefore resulting [in] a constitutionally excessive sentence.

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 under the law and the evidence no relief is warranted.

In Proposition I, Appellant contends B.L.'s hearsay statements were improperly admitted pursuant to 12 O.S.Supp.2013, § 2803.1

since she was sixteen when she made them and did not have "a disability" as set forth in the statute. We review this claim for plain error since Appellant did not object on this basis in the trial court. *Martinez v. State*, 2016 OK CR 3, ¶ 53, 371 P.3d 1100, 1113-14. Our test for analyzing plain error is found in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690. Under the *Simpson* test, we determine whether Appellant has shown an actual error, which is plain or obvious, and which affects his or her substantial rights. *Id.*, 1994 OK CR 40, ¶¶ 3, 11, 23, 30, 876 P.2d at 694-95, 698-701. 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.*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701.

Section 2803.1(A) allows the admission at trial of statements made by "a child thirteen (13) years of age or older who has a disability . . . which describes any act of . . . sexual contact performed with or on the child or incapacitated person by another . . . ." It requires a hearing, outside the presence of the jury, for the trial court to determine if "the time, content and totality of circumstances surrounding the taking of the statement provide sufficient indicia of reliability so as to render it inherently trustworthy." Section

2803.1(A)(1) provides that the trial court, in determining the trustworthiness of the statement, may consider, among other things, the spontaneity and consistent repetition of the statement, the declarant's mental state at the time of the statement, whether the terminology used is unexpected of an incapacitated person and whether lack of a motive to fabricate exists. *Id.*

Section 2803.1(C) defines disability as follows: "[a]s used in this section, 'disability' means a physical or mental impairment which substantially limits one or more of the major life activities of the child or the child is regarded as having such an impairment by a competent medical professional." The phrase, "major life activities" is described in 10 O.S.2011, § 1408(D)(4), as including "self-care," "receptive and expressive language," "learning," "mobility," "self-direction," "capacity for independent living," and "economic self-sufficiency."

On the first day of trial, the court held a hearing regarding the admissibility of B.L.'s statements as required by Section 2803.1. DHS child welfare specialist, Giovanna Redeagle, testified that B.L. did not function mentally in accordance with her chronological age, but functioned with the mind of a "younger child." Redeagle further testified that B.L. used "small words" and her vocabulary was not that

of a sixteen-year-old. Oklahoma City Police Detective Scott Blankenship, who interviewed B.L., also testified B.L. did not act like a normal sixteen-year-old and was not mentally sixteen, but was more like a ten to twelve-year-old. Bonnie Hernandez, B.L.'s caretaker, testified B.L. did not function as a normal sixteen-year-old and she could not clean herself appropriately. Hernandez further testified B.L. was perhaps on a nine or ten-year-old level and received social security disability. The trial court viewed the video interview between Detective Blankenship and B.L. and observed her demeanor and limited communication abilities. Dr. Carrie Barton, emergency room physician at Norman Hospital who treated B.L. in March 2016, testified B.L.'s presentation in the emergency room was consistent with a diagnosis of autism and B.L.'s presentation was that of someone younger than sixteen.

We find the evidence supports the trial court's determination that B.L. was a disabled child within the ambit of Section 2803.1. There was no error in the trial court's finding. Proposition I is denied.

In Proposition II, Appellant complains the trial court abused its discretion in admitting evidence that Joanna Cortez, B.L.'s and C.L.'s mother, committed suicide. As Appellant objected at trial to the

admission of this evidence, we review the claim for an abuse of discretion. *Willis v. State*, 2017 OK CR 23, ¶ 20, 406 P.3d 30, 35. "An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the issue; a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts." *State v. Farthing*, 2014 OK CR 4, ¶ 4, 328 P.3d 1208, 1209.

The State gave notice to the defense that it would seek to admit at trial evidence of Cortez's suicide. The trial court held a hearing regarding the admissibility of this evidence. The prosecutor argued the evidence was *res gestae* because it gave the jury a complete picture of Cortez's whereabouts and showed the police did not simply focus on Appellant and nothing else. Defense counsel objected that the evidence was too prejudicial, that no one knew why Cortez killed herself and it would allow the jury to believe she committed suicide because the children's testimony about the abuse was true. The trial court found the evidence admissible.

Oklahoma County Sheriff's Office Investigator Michael Belanger testified that Cortez hanged herself in the Oklahoma County Jail on September 22, 2016. Pictures of young children were in her cell.

Oklahoma City Police detectives interviewed Cortez the day before and gave her the pictures.

Any marginal relevance of evidence of Cortez's suicide was "substantially outweighed by the danger of unfair prejudice . . . ." 12 O.S.2011, § 2403. Thus, the trial court abused its discretion in admitting the evidence. However, this error was harmless. *See Willis v. State*, 2017 OK CR 23, ¶ 21, 406 P.3d 30, 35 ("Admitting evidence that is more prejudicial than probative is subject to a harmless error analysis."). An error is harmless, and thus not a proper basis for reversal, when the court finds beyond a reasonable doubt that there is no reasonable probability that the error might have contributed to the verdict. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705 (1967); *Myers v. State*, 2000 OK CR 25, ¶ 59, 17 P.3d 1021, 1035, *overruled on other grounds*, *James v. State*, 2007 OK CR 1, 152 P.3d 255.

The evidence against Appellant was overwhelming. Both children testified clearly about what Appellant did to them and their testimony was consistent with their statements about the abuse. Appellant's testimony was incredible and contradicted his previous statements. Proposition II is denied.

In Proposition III, Appellant argues the State failed to prove sufficiently the element of penetration as required for his conviction on Count 4, which charged Appellant with child sexual abuse by "inserting his penis into the vagina of B.L., who at the time was thirteen years of age. . . ." This Court follows the standard for the determination of the sufficiency of the evidence which the United States Supreme Court set forth in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204. Under this test, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Easlick*, 2004 OK CR 21, ¶ 5, 90 P.3d at 558-59; *Spuehler*, 1985 OK CR 132, ¶ 7, 709 P.2d at 203-204.

This Court must accept all reasons, inferences, and credibility choices that tend to support the verdict. *Taylor v. State*, 2011 OK CR 8, ¶ 13, 248 P.3d 362, 368. "Where evidence conflicts, [this Court] must presume on appellate review that the jury resolved any conflicts in favor of the prosecution." *Robinson v. State*, 2011 OK CR 15, ¶ 17,

255 P.3d 425, 432 (citing *McDaniel v. Brown,* 558 U.S. 120, 133, 130 S. Ct. 665, 673, 175 L. Ed. 2d 582 (2010)).

B.L. testified that Appellant raped her numerous times on the floor of the shed.[2] When asked what rape meant, B.L. struggled to verbalize a definition of that term, but ultimately testified Appellant's "part" touched her "front" part on the inside and that it hurt. Additionally, B.L. told Detective Blankenship, Appellant "put her on the ground" and put "a private into her private." As B.L. waited to speak with Dr. Barton, she disclosed to Hernandez, "Johnny had been sticking his private into her private, and it hurt her really bad," and B.L. told Redeagle Appellant raped her and "put his private parts inside her private parts."

We note it is not necessary for the witness to give a graphic, anatomically correct definition of penetration in order for the jury to find that a defendant committed the crime of rape. *See Bales v. State,* 1992 OK CR 24, ¶¶ 5-6, 829 P.2d 998, 999 (finding victim's testimony that the appellant "f---ed" her sufficiently descriptive of sexual intercourse so as to encompass rape).

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[2] Appellant, Cortez and the children lived in a shed in his grandmother's backyard. The shed had no running water and there was only one bed.

The trial court instructed the jury with the following instructions of the charged crime against B.L.:

> As to Count 4, no person may be convicted of Sexual Abuse of a Child unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:
>
> First, a person willfully engaged in;
> Second, rape;
> Third, with a child under the age of eighteen.

Instruction No. 4-39, OUJI-CR(2d), and

> No person may be convicted of Rape in the First Degree unless he State has proved beyond a reasonable doubt each element of the crime. These elements are:
>
> First, sexual intercourse;
> Second, with a person who was not the spouse of the defendant;
> Third, where force was used against the victim.

Instruction No. 4-120, OUJI-CR(2d). In addition, the jury received definitions of the words, "force" and "sexual intercourse." "force" was defined pertinently as: "any force, no matter how slight, necessary to accomplish the act without consent of the victim. The force necessary to constitute an element need not be actual physical force since fear, fright or coercion may take the place of actual physical force." "Sexual intercourse" was defined pertinently as: "the

actual penetration of the vagina by the penis. Any sexual penetration, however slight, is sufficient to complete the crime of rape."

The above evidence sufficiently supports Appellant's conviction for sexually abusing B.L. by putting his penis into her vagina. The jury received proper instructions regarding the charged crime elements and the State's burden to prove each element beyond a reasonable doubt. Proposition III is denied.

In Proposition IV, Appellant contends his convictions for sexually abusing C.L. are not supported by sufficient evidence. He relies for this contention upon his recitation of various minor inconsistencies between C.L.'s testimony and her statements. As stated above, this Court follows the standard for the determination of the sufficiency of the evidence which the United States Supreme Court set forth in *Jackson*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789. We also accept all reasons, inferences, and credibility choices that tend to support the verdict. *Taylor*, 2011 OK CR 8, ¶ 13, 248 P.3d at 368. We further presume the jury resolved any conflicts in the evidence in favor of the State. *Robinson*, 2011 OK CR 15, ¶ 17, 255 P.3d at 432.

The State charged Appellant in Counts 1-3 with sexually abusing C.L. by "touching the vaginal area of C.L., who was at the

time seven (7) years of age . . . ." C.L. testified Appellant touched the skin of her "girl part," or her "front part" with his hand under her underwear when she was seven or eight and they were in the shed. She further testified Appellant touched her while he "touched his part," his front part by putting "his hands in his pants and started touching it."C.L. testified Appellant touched her a second time, touching the skin of her front part and making an "uh kind of sound" while Cortez and B.L. were at the store. Appellant's hand was moving and touching his front part like he did the first time. The third time Appellant touched C.L. was when Cortez and B.L. were in the house and C.L. and Appellant were in the shed. Appellant touched C.L.'s "girl part" on top of her underwear. When she told him to stop, he refused and told C.L. if she told anyone, he would kill her mother.

In addition to this clear testimony, C.L. made statements to Hernandez, her counselor, Dee Van Duser and forensic interviewer, Addison Buchner, describing these same three occurrences. While there were some inconsistencies between these statements and C.L.'s testimony, they were minor and her description of Appellant's abuse was very consistent. As far as C.L.'s delay in disclosing the abuse, Van Duser testified children frequently delay disclosure until they

feel safe and develop a rapport with caregivers or counselors. Moreover, Appellant threatened to harm Cortez if C.L. told anyone about the abuse, so C.L. was afraid to disclose.

The trial court properly instructed the jury regarding the elements of child sexual abuse Appellant was charged with having committed against C.L. as follows:

> As to Counts 1 through 3 no person may be convicted of Sexual Abuse of a Child unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:
>
> First, a person willfully engaged in;
> Second, lewd/indecent acts;
> Third, with a child under the age of twelve.

Instruction No. 4-39, OUJI-CR(2d), and

> No person may be convicted of Lewd Acts With a Child Under Sixteen unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:
>
> First, the defendant knowingly and intentionally;
> Second, touched;
> Third, the body or private parts;
> Fourth, of a child under sixteen years of age;
> Fifth, in any lewd or lascivious manner, and
> Sixth, the Defendant was at least three years older than the child.

Instruction No. 4-129, OUJI-CR(2d).

The jury heard the inconsistencies and found C.L. credible as it was entitled to do. The jury received proper instructions regarding the charged crimes' elements and the State's burden to prove each element beyond a reasonable doubt. Based on the above evidence, Appellant's convictions for sexually abusing C.L. on three different occasions are supported by sufficient evidence. Proposition IV is denied.

Appellant claims in Proposition V that his counsel was ineffective for failing to adequately object to the admission of B.L.'s hearsay statements, pursuant to Section 2803.1, on the basis of her lack of disability. We review ineffective assistance of counsel claims under the two-part test mandated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. The *Strickland* test requires an appellant to show: (1) that counsel's performance was constitutionally deficient; and (2) that counsel's deficient performance prejudiced the defense. *Id.*, (citing *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064). When a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed. *Bland v. State*, 2000 OK CR

11, ¶ 113, 4 P.3d 702, 731 (citing *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069). To demonstrate prejudice an appellant must show that there is a reasonable probability that the outcome of the trial would have been different but for counsel's unprofessional errors. *Id.*, 2000 OK CR 11, ¶ 112, 4 P.3d at 731. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112, 131 S. Ct. 770, 792, 178 L.Ed.2d 624 (2011).

As fully addressed in Proposition I, the trial court found B.L. suffered from a disability such that her statements were properly admissible pursuant to Section 2803.1. Because we found no error in Proposition I, Appellant has not shown his counsel's performance was deficient or that he suffered any prejudice. *Harris v. State*, 2007 OK CR 28, ¶ 41, 164 P.3d 1103, 1118 ("As we have found no error in the previous propositions, counsel cannot be ineffective for failing to raise objections to issues contained therein."). Proposition V is denied.

In Proposition VI, Appellant claims the combined errors in his trial denied him the right to a constitutionally guaranteed fair trial. When there have been numerous irregularities during the course of a trial that tend to prejudice the rights of the defendant, reversal will

be required if the cumulative effect of all the errors is to deny the defendant a fair trial. *Bechtel v. State*, 1987 OK CR 126, ¶ 12, 738 P.2d 559, 561. We found error occurred in Proposition II due to the admission of evidence of Cortez's suicide. However, we found the error harmless beyond a reasonable doubt. "Where a single error has been addressed, there is no cumulative error." *Bosse v. State*, 2017 OK CR 10, ¶ 93, 400 P.3d 834, 866. Proposition VI is denied.

In his final proposition, Appellant claims the trial court abused its discretion by running his sentences consecutively to one another. Sentences are to run consecutively unless the trial judge, in his or her discretion, rules otherwise. 21 O.S.2011, § 61.1; *Riley v. State*, 1997 OK CR 51, ¶ 20, 947 P.2d 530, 534. In the context of this decision, an abuse of discretion "can be found where the trial court's decision is not supported by the facts or law of the case." *See Kamees v. State*, 1991 OK CR 91, ¶ 21, 815 P.2d 1204, 1208-09, *overruled on other grounds by Davis v. State*, 2018 OK CR 7, 419 P.3d 271.

Appellant's crimes were despicable. In order to sexually abuse these children, one of whom was autistic and the other only seven-

years old, Appellant plied their mother with methamphetamine.[3] He threatened to kill the children's mother if the younger child told anyone about his abuse. The facts and law of this case clearly support Appellant's sentence. Proposition VII is denied.

DECISION

The **JUDGMENT and SENTENCE is AFFIRMED.** 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.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE BILL GRAVES, DISTRICT JUDGE

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[3] Appellant told Detective Blankenship Cortez was on "meth" and he "wasn't going to pay for it anymore."

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

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KUEHN, V.P.J., CONCURRING IN RESULT:

I continue to believe that the crime of child sexual abuse, as found in 21 O.S.Supp.2014, §§ 843.5(E) and (F), is unconstitutional. *A.O. v State*, 2019 OK CR 18, 447 P.3d 1179, ¶ 13, 1187 (Kuehn, V.P.J., dissenting). However, the Majority of this Court does not agree. When reviewing convictions under these statutes I will apply the current law on the basis of *stare decisis*. For that reason, I concur in result.

Appellant was convicted of child sexual abuse by rape and by committing lewd and indecent acts and proposals to a child under eighteen. His jury was partially instructed on the elements of those underlying offenses. In *A.O.*, we held that in child sexual abuse cases under 21 O.S. § 843.5, a trial court must instruct on the elements of any underlying sex offense, overruling *Huskey v. State*, 1999 OK CR 3, 989 P.2d 1. *A.O.*, 2019 OK CR 18, ¶ 10, 447 P.3d at 1182. *A.O.* substantively changed the law regarding proof of, and instruction on, child sexual abuse. This substantive change, which was a significant departure from this Court's previous rulings, constituted an issue of first impression.

A.O. was decided during the pendency of this appeal. The only law governing instruction on child sexual abuse at the time of trial was *Huskey*, which *A.O.* overruled. Appellant asked this Court for permission to supplement his brief in chief with a proposition of error based on the change in law, claiming that it affects his case. A supplemental brief may be filed if the issue to be addressed is one of first impression. Rule 3.4(F)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019). The Majority inexplicably denied this request.[1] I would have granted it.

[1] The Majority apparently relied, not on any statute or case law, but on the "Notes on Use" which follow the text of the uniform jury instruction for child sexual abuse, OUJI-CR 2d 4-39. These "Notes on Use" were provided by the Committee for Preparation of Uniform Jury Instructions, and are intended to aid courts and parties. They are not the law.