

JUN 29 2004

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA  
COURT CLERK

DONNIE JOE BACON, )  
 )  
 Appellant, ) NOT FOR PUBLICATION  
 )  
 -vs- ) No. F-2001-1224  
 )  
 STATE OF OKLAHOMA, )  
 )  
 Appellee. )

**SUMMARY OPINION**

**STRUBHAR, JUDGE:**

Appellant, Donnie Joe Bacon, was convicted in the District Court of Oklahoma County of two counts of Child Abuse, After Former Conviction of Two or More Felonies, in Case No. CF-2000-5538. The jury trial was held before the Honorable Susan P. Caswell. The jury assessed punishment at twenty-five years imprisonment on one count and forty-seven years imprisonment on the other. The trial court sentenced Appellant accordingly, ordering the sentences to run consecutively.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm Appellant's Judgment and modify his Sentence. In reaching our decision, we considered the following propositions of error and determined this result to be required under the law and the evidence:

- I. Detective Dexter Nelson's violation of a pretrial order violated Appellant's fundamental right to a fair trial under the Sixth and

Fourteenth Amendments and Article II, §§ 7 and 20 of the Oklahoma Constitution.

- II. The improper admission of other crime and bad act evidence violated Appellant's fundamental right to a fair trial under the Sixth and Fourteenth Amendments, Article II, §§ 7 and 20 of the Oklahoma Constitution and 12 O.S.1991, §§ 2403 and 2404(B).
- III. The prosecution's failure to disclose or defense counsel's failure to adequately investigate, request and use the January 20, 2000 and September 22, 2001 letters from Michael Adkins to the prosecution and Department of Human Services Referral Reports violated Appellant's Sixth and Fourteenth Amendment rights to Due Process, to confrontation and to effective assistance and meaningful adversarial testing.
- IV. Inadmissible evidence denied Appellant Due Process and a fair trial and was plain reversible error. Alternatively, Appellant was denied effective assistance of counsel. Overall, trial counsel failed to effectively advocate his client's cause and subject the prosecution's evidence to the crucible of meaningful adversarial testing.
- V. Prosecutorial misconduct and trial errors, cumulatively, denied Appellant Due Process and require reversal or a sentence modification.

### **DECISION**

We find with regard to Appellant's first proposition that the pretrial order was violated when Detective Dexter testified about the finding of the medical examiner. While the reference to the medical examiner's involvement was clearly error, in light of the evidence presented supporting Appellant's guilt of the crimes charged, we find, beyond a reasonable doubt, that the admission of the improper evidence did not contribute to the verdict of guilt. However, we

cannot find beyond a reasonable doubt that it did not contribute to the sentence imposed. This error, along with error discussed in the following propositions, requires Appellant's sentences be modified.

Appellant's second proposition also requires relief. Much of the evidence of other crimes about which Appellant complains was indeed inadmissible as this evidence, showing that Appellant physically abused children of both genders and of various ages as well as adults of both genders both in his family and outside of it in a variety of ways over a period of approximately seventeen years neither fell within any of the established exceptions to the rule prohibiting the admission of other crimes evidence nor was relevant to any other legitimate issue. 12 O.S.1991, § 2404(B). *See also Burks v. State*, 594 P.2d 771, 774-75 (Okl.Cr.1979), overruled in part on other grounds by *Jones v. State*, 772 P.2d 922 (Okl.Cr.1989). Further, even if this Court were to accept the State's assertion that the other crimes evidence was relevant, this evidence, admitted in the magnitude in which it was, would not all have been admissible as its probative value was far outweighed by its prejudicial impact. 12 O.S.2001, § 2403. However, in light of the evidence properly admitted relating to the crimes charged, we also find beyond a reasonable doubt, that the admission of the improper evidence did not contribute to the verdict of guilt. We cannot find beyond a reasonable doubt that it did not contribute to the

sentence imposed. Thus, this error, along with error discussed in Proposition I, requires Appellant's sentences be modified.

As to Appellant's third proposition, we find that the record from the evidentiary hearing supports the finding that there was compliance with the mandates of *Dodd v. State*, 993 P.2d 778, 784 (Okl.Cr.2000). Further, the record does not support the assertion that evidence favorable to the accused was suppressed by the State resulting in prejudice to the accused in violation of *Brady*. See *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 1948, 144 L.Ed.2d 286 (1999).

Regarding Proposition IV, we find that most of the alleged defects in defense counsel's representation related to the other crimes evidence introduced at trial. As to these alleged defects, we find that any resulting prejudice did not affect the jury's determination of guilt but may have affected the sentencing decision and this prejudice is remedied by this Court's modification of the sentence. The alleged defects which may have affected issues relating to guilt or innocence, were not been so prejudicial as to undermine the verdict of guilt. *Humphreys v. State*, 947 P.2d 565, 577-78 (Okl.Cr.1997). See also *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Further, a review of the record for plain error reveals none requiring reversal of Appellant's conviction.

Finally, we find no prosecutorial misconduct or cumulative error requiring reversal of Appellant's conviction. *Bland v. State*, 4 P.3d 702, 727 (Okla.Cr.2000).

The Judgment of the trial court is **AFFIRMED** and his Sentence is **MODIFIED** to twenty years imprisonment on each count with the counts to run consecutively.

**APPEARANCES AT TRIAL**

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**OPINION BY: STRUBHAR, J.**  
JOHNSON, P.J.: CONCUR  
LILE, V.P.J.: DISSENT  
LUMPKIN, J.: CONCUR  
CHAPEL, J.: DISSENT

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**CHAPEL, JUDGE, DISSENTING:**

I would reverse and remand for a new trial.