

AUG 28 2001

JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RANDY SCOTT BUCSOK)

Appellant,)

v.)

THE STATE OF OKLAHOMA)

Appellee.)

Case No. F-2000-1156

SUMMARY OPINION

CHAPEL, JUDGE:

Randy Scott Bucsok was tried by a jury and convicted of Count I: Lewd Molestation in violation of 21 O.S.1991, § 1111; Count II: Rape by Instrumentation in violation of 21 O.S.1991, § 888; and Count III: Lewd Molestation in violation of 21 O.S.1991, § 1111 in the District Court of Rogers County, Case No. CF-99-238. In accordance with the jury's recommendation, the Honorable Dynda Post sentenced Bucsok to ten (10) years imprisonment on Count I, thirty (30) years imprisonment on Count II, and twenty (20) years imprisonment on Count III. Judge Post suspended ten (10) years of the defendant's twenty (20) year sentence on Count III and ordered the sentences to run consecutively. Bucsok has perfected his appeal to this court.

Bucsok raises the following propositions of error:

- I. Error of the trial court in disallowing the testimony of Shell and Kemble.
- II. Error of the trial court in admitting hearsay testimony of Katie through witnesses Beattie and Prather.

- III. Error of the trial court in allowing the jury to hear evidence of uncharged crimes without sufficient notice.
- IV. Error of the trial court in excluding testimony of Katie's masturbation as offered to explain the injury to Katie's genitalia.

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits of the parties, we reverse the judgment of the lower court and remand the case for a new trial. We find in Proposition I reversible error in the trial court's ruling to bar the testimony of Shell and Kemble.¹

We reverse and remand on Proposition I alone, however, we review Propositions II, III, and IV to aid at re-trial. We find in Proposition II that the trial court properly allowed Beattie and Prather to testify regarding the victim's

¹ With respect to Shell, the trial court abused its discretion in declaring Shell incompetent to testify. *Lancaster v. State*, 541 P.2d 1343 (Okl.Cr.1975) (holding that only a clear abuse of discretion warrants relief upon a trial court's ruling not to permit a child to testify). Nothing at trial or in the Evidence Code allows for her demeanor to be the basis for incompetence. 22 O.S.Supp.1998, § 2002. Shell meets the basic requirements for competence and the weight given to her testimony is a decision for the jury. *See Hawkins v. State*, 891 P.2d 586, 594 (Okl.Cr.1994) (holding that "a child is a competent witness under Section 2603 if she (1) has personal knowledge of the matters at issue, and (2) has taken an oath or similar affirmation to tell the truth.").

With respect to Kemble, the trial court abused its discretion in precluding her testimony. Although Bucsok's counsel failed to disclose the change in Kemble's testimony, exclusion of this evidence is too severe a sanction because it impaired Bucsok's ability to defend himself. We have previously held that exclusion of evidence is too severe "where the evidence is material and the violations are not blatant, willful, or calculated." *See Hooks v. State*, 19 P.3d 294, 306 (Okl.Cr.2001). Bucsok's counsel discovered Kemble's change in testimony on the day trial began. Although counsel failed to notify the State of this change, nothing in the record indicates that this discovery violation was flagrant.

Other reasons the trial court noted as grounds for barring Kemble's testimony also do not support precluding the evidence. The trial court's observations that Kemble's testimony "conveniently changed" and that she was "incredibly hostile" are subjects for cross-examination and the weight given to her testimony is ultimately a decision for the jury.

The State's case against Bucsok relies primarily on the testimony of his nine year old daughter, Kathryn Bucsok. The testimony of Shell and Kemble is material to Bucsok's defense because it questions the veracity of his daughter's testimony and whether or not the

statements to them.² In Proposition III, we find no plain error in admitting the testimony of Dr. Barnes but error in admitting the testimony of Prather.³ We find in Proposition IV that the trial court did not abuse its discretion in excluding the testimony of Karen Bucsok.⁴

Decision

The Judgment of the trial court is **REVERSED**. The case is hereby **REMANDED** to the trial court for a new trial.

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molestation occurred. This testimony could have created a reasonable doubt in the minds of the jury. Therefore, the trial court's error in barring these witnesses requires reversal.

² 12 O.S.1991, § 2803.1 (the statement of a child are admissible if the "court finds, in a hearing conducted outside the jury, that the time, content and totality of circumstance surrounding the taking of the statement provide sufficient indicia of reliability..."). The trial court did not abuse its discretion in allowing the testimony of Beattie and Prather. Both testified in camera and their testimony repeated the same nature and sequence of events contained in Katie's testimony before the court.

³ See *Bales v. State*, 829 P.2d 998, 1000 (Okla. Cr. 1992). (holding that this Court often applies, in sexual abuse cases, an exception to the general rule in *Burkes* allowing the admission of evidence showing a "continuing pattern of abuse" sufficiently connected to incidents alleged at trial). Dr. Barnes' testimony concerning the condition of Katie's genitals offered observations to support a pattern of previous sexual abuse consistent with the charges at trial. Also, Prather's testimony suggesting evidence of uncharged crimes is inadmissible. It is irrelevant under 12 O.S.1991, § 2403 because it suggests that Bucsok is the perpetrator of hypothetical crimes. Additionally, the testimony is inadmissible under 12 O.S.1991, § 2404(B) because it suggests uncharged crimes in an attempt to show evidence of Bucsok's character. This testimony should not have been admitted.

⁴ 12 O.S. Supp. 2000, § 2412(B)(1), (C) (a defendant must file a written motion no later than fifteen (15) days before trial if they intend to introduce evidence of specific instances of sexual behavior offered as proof of the source of injury). Here, the trial court sustained a motion in limine barring testimony from Karen Bucsok, Katie's aunt, that she witnessed Katie masturbating at age five. The trial court did not abuse its discretion because this evidence is to attenuated and unrelated. The masturbation Karen observed occurred 4 years prior to the alleged molestation. Additionally, Dr. Barnes's testimony indicated that such masturbation could not cause Katie's injuries.

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OPINION BY: CHAPEL, J.

LUMPKIN, P.J.:	CONCUR IN RESULTS
JOHNSON, V.P.J.:	CONCUR
STRUBHAR, J.:	CONCUR
LILE, J.:	CONCUR IN RESULTS

LILE, JUDGE: CONCURS IN RESULTS

The trial transcript in this case reveals that the trial court did not allow Shell to testify because of doubts as to her competence coupled with the belief that Shell's testimony was improper impeachment because it did not completely contradict the victim's testimony (Tr. II, p. 561-562). However, the two statements were "sufficiently inharmonious" to allow the jury to hear it for impeachment purposes. *Crussel v. Kirk*, 1995 OK 41, 894 P.2d 1116; 3 L. Whinery, *Oklahoma Evidence, Commentary on the Law of Evidence*, §§ 47.25 et seq. (1994).