

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DALE ANTHONY CHAMBERS,)
)
 Appellant,) NOT FOR PUBLICATION
)
 v.) Case No. F-2010-1079
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUL 13 2012

OPINION

A. JOHNSON, PRESIDING JUDGE:

MICHAEL S. RICHIE
CLERK

Appellant Dale Anthony Chambers was tried by jury and convicted in the District Court of Bryan County, Case No. CF-2009-573, of two counts of Child Sexual Abuse, in violation of 21 O.S.Supp.2009, § 843.5(E). The jury recommended as punishment ten years imprisonment on Count 1 and five years imprisonment on Count 2. The Honorable Mark R. Campbell, who presided at trial, sentenced Chambers accordingly and ordered Chambers's sentences to be served consecutively. From this Judgment and Sentence Chambers appeals, raising the following issues:

- (1) whether the crime of child sexual abuse existed at the time it was alleged to have occurred;
- (2) whether it was proper to admit the nurse examiner's expert medical opinion that the "Clinical Evaluation" was consistent with sexual abuse or whether it constituted improper expert opinion evidence by overstepping the bounds of proper expert opinion;
- (3) whether he was denied his right to confrontation by the admission of a sexual assault examination form which contained statements by a non-testifying witness;
- (4) whether he was prejudiced by improper jury instructions;

- (5) whether fundamental error occurred when the trial court failed to instruct the jury regarding a crucial aspect of a conviction for child sexual abuse;
- (6) whether the trial court abused its discretion by refusing to consider concurrent sentences;
- (7) whether he received the effective assistance of counsel; and
- (8) whether cumulative error deprived him of a fair trial.

Chambers's claim in his third proposition – that he was denied a fair trial and his right of confrontation by the admission of testimonial hearsay – requires discussion and relief. Because we find reversal is required on that claim, we do not address his other claims.

Facts

Chambers's twelve-year-old step-daughter testified that he had sex with her while her mother was either at school or visiting her grandmother. The abuse started at the beginning of 2009 and ended in October 2009 after she told her mother about it. C.A. testified that Chambers showed her videos of adults having sex on the family computer in the living room and would have her sit on his penis. C.A. also said that Chambers masturbated in front of her and made her masturbate him by rubbing his penis with her hands. C.A. recounted that her mother left Chambers after a heated argument. C.A.'s mother asked her several times that day if Chambers had done anything to her and C.A. initially said no, but ultimately told her mother about the abuse. C.A. said she lied at first because she was afraid that she would be in trouble. C.A. testified that she knew her mother was angry with Chambers the day her

mother pressed her about possible abuse. C.A. testified that she was angry with Chambers as well that day because he had been yelling at her mother. C.A. explained that she was angry with Chambers, and not her mother, because her mother “had been trying to go to school and get a job and everything, and all he did was sit around on the computer.” C.A. was resentful that Chambers played on the computer while she cared for her younger brothers. C.A. admitted her life “would have been a whole lot better if [Chambers] wasn’t there” and that she did not love him like a real father.

Confrontation Clause

Chambers claims that his Sixth Amendment right to confront witnesses against him was violated by the admission of testimonial hearsay evidence, specifically information contained in C.A.’s sexual assault exam/investigation form (State’s Exhibit 6).¹ Sara Richards, the Sexual Assault Nurse Examiner (SANE) nurse, examined C.A. and filled out portions of the form after C.A. had been interviewed. The form contained handwritten information obtained during the interview from an unidentified forensic interviewer who did not testify. The form also contained a handwritten conclusion from a non-testifying physician who reviewed the SANE nurse’s conclusions.² Because Chambers did not object to the admission of the form, review is for plain error. *Mitchell v. State*, 2011 OK CR 26, ¶ 72, 270 P.3d 160, 179. A defendant must

¹ Chambers also claims that trial counsel was ineffective for failing to object to the admission of the form in Proposition VII.

² This signature under the conclusion appears to be the same as the signature on the physician signature line on the form. The conclusion stated, “vaginal introitus is of sufficient size & flexibility that penetration could occur as disclosed by pt & consistent with findings on this exam.”

satisfy a four-prong test to be successful under plain error review: there must be (1) an error, (2) that is plain, (3) which affects substantial rights, and (4) seriously impairs the fairness, integrity, or public reputation of judicial proceedings. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

Sara Richards, the SANE nurse, testified that she worked for the C/Sara House, a child advocacy center in Ardmore, Oklahoma. The center is a “one-stop place for children to go, to tell their story, [and] to get medical attention.” A representative from the Department of Human Services (hereafter DHS) is present so the alleged child victim is required to tell his or her story only one time. Richards identified the sexual assault exam form used by C/Sara House to document an investigation of child sexual abuse and testified that she completed “part of it” during her examination of C.A. The prosecutor initially showed the form to Richards to refresh her memory of the date of her examination. The prosecutor also questioned Richards about the anatomical diagram in the form where Richards documented the location of notches on C.A.’s hymen. Richards circled those notches on the diagram in front of the jury. Richards then explained why she concluded that C.A.’s exam was a “normal exam” given the notches observed on the hymen. The form was admitted, without objection, at the conclusion of Richards’s direct examination. On cross-examination, Richards said that she reviewed C.A.’s history on the form recorded there by the forensic interviewer. Richards testified that she did not take a full history from C.A. because C.A. had been interviewed and it would defeat the advocacy center policy to make her repeat her story. Richards

explained that much of C.A.'s history had been written on the form by the forensic interviewer and Richards saw no need to duplicate that information.³ Richards testified that she filled out the "Medical History" portion of the form that reported C.A. had no major surgeries or allergies. She also documented there that C.A. did not take birth control, was current on her immunizations, and had never been pregnant.

Shane Harkey, the investigating police officer in this case, testified that C.A. was interviewed at the ABC House in Durant, Oklahoma by a forensic interviewer. According to Officer Harkey, the ABC House is a home that is specifically set up for conducting forensic interviews with children. There are microphones and cameras to record the interview in a child-friendly atmosphere. Officer Harkey monitored C.A.'s interview and was able to communicate with the forensic interviewer during the interview. Officer Harkey explained to the jury that he was part of an MDT (multidisciplinary team) in

³ For example, the interviewer had written on the form:

"[C.A.] stated that she noticed some blood on the toilet paper after perp penetrated his penis in her."

"[C.A.] was forced to masturbate the perp by using her hand."

"[C.A.] disclosed that her stepfather used penial penetration around a year ago and since then he has put the tip of his penis in her vagina, put his finger in her vagina. [C.A.] stated that the perp ejaculates."

"[C.A.] disclosed to forensic interviewer on 10/26/09 that her stepfather put his penis (shoved) it in her vagina around a year ago. [C.A.] reported that her stepfather since then (on a regular basis puts the tip of his penis in her vagina, puts his finger in her vagina."

[C.A.] stated that it was painful when her stepfather shoved his penis in her vagina ([C.A.] noticed blood on toilet paper afterwards). [C.A.] reported that it also hurts when her stepfather puts his finger in her vagina.

[C.A.'s] mother (T.A.) informed worker and detective that she has noticed [C.A.] scratching the outside of her clothing (on vagina) area and when her mom tells her to stop...[C.A.] states that she cannot help it.

Worker and detective are concerned about the possibility of [C.A.] being pregnant (pre-ejaculation when stepfather puts the tip of penis inside of her vagina).

which child protective services workers with DHS and the police conduct joint investigations so the child victim does not have to be interviewed multiple times.⁴ Officer Harkey was not asked about State's Exhibit 6. During deliberations, the jury asked to review the form and it was given to the jury for consideration.

The Sixth Amendment to the United States Constitution requires that in all "criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him." U.S. Const. amend. VI; *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965)(applying Sixth Amendment to States). In *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 1365, 158 L.Ed.2d 177 (2004), the United States Supreme Court held that the Sixth Amendment's right to confrontation bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." The Court declined, however, to offer a full definition for the term "testimonial," but wrote only that, at a minimum, the term applies to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68, 124 S.Ct. 1354. In *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 24 (2006), the Court addressed the issue of whether responses to inquiries by a police

⁴ By statute, Oklahoma utilizes a multidisciplinary child abuse team (MDT) developed by the district attorney to investigate reports of child sexual abuse. 10A O.S.Supp.2009, § 1-9-102. The team members include mental health professionals, law enforcement, medical personnel, child protective services workers, MDT child abuse team coordinators or Child Advocacy Center personnel and district attorneys or assistant district attorneys. 10A O.S.Supp.2009, § 1-9-102(B). These teams are tasked with conducting joint investigations of reports of child abuse. 10A O.S.Supp.2009, § 1-9-102(C).

operator during the course of a 911 call are testimonial statements for Confrontation Clause purposes. Expanding on *Crawford*, the Court explained:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822, 126 S.Ct. at 2274.

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), the Supreme Court held that reports prepared by analysts at a state crime laboratory declaring that a substance was cocaine were testimonial statements, and that the analysts who prepared the reports were witnesses for purposes of the Sixth Amendment. *Id.* at 2532. Thus, absent a showing that the analysts were unavailable to testify and that the defendant had a prior opportunity to cross-examine them, the defendant was entitled to confront the analysts at trial. *Id.* The Supreme Court rejected the argument that public or business records are categorically nontestimonial. “Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. But that is not the case if the regularly conducted business activity is the production of evidence for use at trial.” *Id.* at 2538 (internal citation omitted).

In *Cuesta-Rodriguez v. State*, 2010 OK CR 23, 241 P.3d 214, this Court considered whether the defendant was denied his right to confront witnesses against him by the admission of hearsay information contained in an autopsy report. There the Chief Medical Examiner testified in place of the medical examiner, who performed the autopsy on the victim and who had since retired. *Id.*, 2010 OK CR 23, ¶ 28, 241 P.3d at 226. The Chief Medical Examiner testified regarding the examination of the body conducted by the retired medical examiner and gave his own opinions on the victim's injuries and cause of death based on the observations of the retired medical examiner as recorded in the autopsy report.⁵ *Id.*, 2010 OK CR 23, ¶ 28, 241 P.3d at 227. The Court held that given the duties of a medical examiner to turn over autopsy results to the district attorney's office and other law enforcement agencies, it is obvious that a medical examiner's words in autopsy reports involving violent or suspicious deaths constitute statements that the medical examiner should reasonably expect to be used in a criminal prosecution. Hence, under *Crawford* and *Melendez-Diaz*, such statements are testimonial and subject to the rules of confrontation. *Id.*, 2010 OK CR 23, ¶¶ 34-35, 241 P.3d at 228.

The *Cuesta-Rodriguez* court made clear that the Rules of Evidence could not override the accused's right to confrontation. It specifically noted that the Rules of Evidence dealing with experts and their ability to use hearsay to form opinions (12 O.S.Supp.2002, §§ 2703, and 2705) could not be used as a basis

⁵ The Court noted that the autopsy report, itself, was not admitted; rather, the Chief Medical Examiner used the contents of the autopsy report to show the basis for his opinions regarding the victim's injuries and death. *Id.*, 2010 OK CR 23, ¶ 38, 241 P.3d at 229.

for admission of the hearsay evidence contained in the autopsy report in the absence of confrontation.⁶ *Id.*, 2010 OK CR 23, ¶ 39, 241 P.3d at 229 (Rules of Evidence cannot “trump the Sixth Amendment’s right of confrontation.”). As such, the Court held that it violated the defendant’s right of confrontation to admit the autopsy diagrams drawn by the retired medical examiner and to allow the Chief Medical Examiner’s testimony about what the retired medical examiner said in his autopsy report because the defendant had no opportunity to cross-examine the retired medical examiner about his findings and conclusions. *Id.*

The sexual assault exam report generated by members of the multidisciplinary team in C.A.’s case was prepared for expected use in a criminal trial. The forensic interviewer questioned the child as part of a police investigation of child sexual abuse. The forensic interview was equivalent to police interrogation of an alleged crime victim. The questioning was monitored by the police and the interview was conducted for the purpose of establishing or proving past events likely relevant to later criminal prosecution rather than

⁶ The Court stated:

Under § 2703, an expert witness may base an opinion on facts or data that are not admissible in evidence, provided that the inadmissible facts or data are of a type reasonably relied on by experts in the particular field. Under this rule, an expert may base an opinion solely on inadmissible hearsay. *Lewis v. State*, 1998 OK CR 24, ¶ 19, 970 P.2d 1158, 1166–67. Under § 2705, an expert witness may generally disclose on direct examination the facts or data underlying his opinion. *Id.* Under certain limited circumstances, an expert witness may disclose the facts and data underlying his opinion even if they are inadmissible as evidence. 12 O.S.Supp.2002, § 2705(d); *Lewis*, 1998 OK CR 24, ¶ 19, 970 P.2d at 1166–67.

Cuesta-Rodriguez, 2010 OK CR 23, ¶ 39, 241 P.3d at 229.

to address some ongoing emergency. Furthermore, given the multidisciplinary team framework, it is obvious that the forensic interviewer's and physician's words recorded in this advocacy center report involving allegations of child sexual abuse constitute statements that the interviewer and physician should reasonably expect to be used in a criminal prosecution. Therefore under the *Crawford*, *Davis*, *Melendez-Diaz* and *Cuesta-Rodriguez* holdings, the report—with its hearsay statements of the non-testifying forensic interviewer and physician—falls under the category of testimonial evidence subject to the demands of the Confrontation Clause. Admission of the report is a violation of the Sixth Amendment unless the declarants were unavailable and Chambers had a prior opportunity to cross-examine the non-testifying witnesses. The record neither shows that the witnesses were unavailable nor that Chambers had a prior opportunity to cross-examine them. We find that it was error to admit the report with the many annotations of the non-testifying forensic interviewer and the conclusion of the non-testifying physician.

This Court must decide under plain error review whether the confrontation error in this case affected Chambers's substantial rights and seriously impaired the fairness of his trial. Even though we review for plain error, rather than error, the harmless error rules of the United States Supreme Court and this Court direct our analysis. *See Chapman v. California*, 386 U.S. 18, 23-24, 87 S.Ct. 824, 827-828, 17 L.Ed.2d 705 (1967); *Taylor v. State*, 2011 OK CR 8, ¶ 39, 248 P.3d 362, 375; *Cuesta-Rodriguez*, 2010 OK CR 23, ¶ 40, 241 P.3d at 230; *Marshall v. State*, 2010 OK CR 8, ¶ 31, 232 P.3d 467, 476.

This is because the only way to determine whether the admission of testimonial hearsay affected Chambers's substantial rights is to evaluate the error for its effect on the jury verdict, the same test applied in *Taylor*, *Cuesta-Rodriguez*, and *Marshall*, albeit for harmless error, not plain error.

We discussed harmless error analysis recently in *Harmon v. State*, 2011 OK CR 6, ¶ 32, 248 P.3d 918, 933. The Court stated:

The question *Chapman* instructs the "reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993). The Court, in *United States v. Hasting*, 461 U.S. 499, 510–511, 103 S.Ct. 1974, 1981, 76 L.Ed.2d 96 (1983), stated that the question under *Chapman* is whether, absent the constitutional error, it is clear beyond a reasonable doubt that the jury would have returned a guilty verdict.

In *Cuesta-Rodriguez*, 2010 OK CR 23, ¶ 40, 241 P.3d at 230, the Court stated that a violation of a defendant's confrontation right does not require automatic reversal where the weight of the rest of the evidence is overwhelming and the prejudicial effect of the inadmissible evidence is insignificant. The question to be resolved then, is whether it appears beyond a reasonable doubt that the confrontation error did not contribute to the jury's verdict, or in other words, whether it is clear beyond a reasonable doubt that a rational jury would have found Chambers guilty absent the error. If the error in this case is harmless, it cannot, by definition, have affected the outcome of Chambers's trial. Therefore, it could not have affected his substantial rights under our plain error test.

In deciding whether admission of testimonial hearsay is harmless, we consider the importance of the witness's testimony to the State's case, whether the testimony was cumulative of other evidence, the presence or absence of evidence corroborating or contradicting the out-of court statements on material points, and the overall strength of the prosecution's case. *See Cuesta-Rodriguez*, 2010 OK CR 23, ¶ 44, 241 P.3d at 231 (listing factors to consider in determining if confrontation clause error is harmless error).

The SANE nurse was an important witness for the prosecution. She noted abnormalities in the form of notches on C.A.'s hymen that caused her concern. According to Nurse Richards, the notches could be a normal variance and that is what prompted her to consider C.A.'s exam "normal," but with the history C.A. provided the notches were "very concerning" to her and consistent with possible penetration. The testimonial hearsay of the forensic interviewer documenting the interview with C.A. tended to reinforce C.A.'s trial testimony regarding the acts of sexual abuse as well as served to validate the SANE nurse's concerns. While the forensic interviewer's statements in the report were somewhat duplicative of C.A.'s testimony, the forensic interviewer repeatedly used the term "perp" to refer to Chambers instead of his name or "stepfather." Repeated use of the term "perp" was prejudicial because the negative moniker indicated a belief in the victim's account rather than a detached report of C.A.'s allegations. The result is that the testimonial hearsay bolstered C.A.'s credibility and likely tipped the scales in favor of conviction. It is inconceivable that C.A. used the term "perp" during her interview and there

is no way to know what other editorializing or translating was done of C.A.'s statements by the forensic interviewer because the forensic interviewer was not subject to cross-examination about C.A.'s interview and demeanor.

The forensic interviewer also noted a concern that C.A. could be pregnant. There was no evidence C.A. was ever pregnant and the expression of such a concern in the investigative report could only be prejudicial to Chambers. This case consisted of the allegations of the victim and a denial by the defendant. There was no DNA evidence obtained from bedding, towels or carpet to corroborate C.A.'s allegations that Chambers had sex with her. C.A.'s physical exam was normal. C.A. was upset with Chambers at the time she made the allegations. She felt that he did not provide for the family and that her mother was left to shoulder all responsibility by herself. Furthermore, C.A. believed her life would be better if Chambers was not in it.

In Chambers's case, it is not clear that a rational jury would have found him guilty of the crime of child sexual abuse had the testimonial hearsay been excluded. The jury obviously took the report into account in making a decision in this matter because it specifically asked for the report during deliberations. Material points in the testimonial hearsay concerning C.A.'s allegations of sexual abuse were not corroborated by physical evidence. While the evidence was sufficient to support a conviction in this case, it was far from overwhelming. On this record, we cannot say that the confrontation error was harmless and that the error did not affect Chambers's substantial rights.

Under our test, the error amounts to plain error in this case and this case must be remanded for a new trial.

DECISION

The Judgment and Sentence of the District Court is **REVERSED** and the matter **REMANDED** for a new trial. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF BRYAN COUNTY
THE HONORABLE MARK R. CAMPBELL, DISTRICT JUDGE

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