

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

BRIAN WHEATLEY FIRE,)
)
 Appellant,)
)
 -vs-)
)
 STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION
No. F-2002-548

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

AUG - 6 2003

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

STRUBHAR, J.:

Appellant, Brian Wheatley Fire, was tried by jury in the District Court of Oklahoma County, Case No. CF-2000-4192, and was found guilty of seven counts of Lewd Molestation. The jury recommended twenty years imprisonment on each count. The Honorable Susan W. Bragg, who presided at trial, sentenced Appellant accordingly and ordered the sentences to be served consecutively. From this judgment and sentence, he appeals.

Appellant raises the following propositions of error for review:

- I. Testimony from several witnesses improperly vouched for the credibility of the prosecutrix, was cumulative and denied Appellant a fair trial;
- II. The State's failure to provide defense counsel with all available reports as requested in the defense's motion for discovery violated *Brady v. Maryland* and violated Mr. Fire's fundamental due process rights under the federal and state constitutions;
- III. Appellant's fundamental right to call witnesses and due process right to a fair trial was violated when the trial court denied his request to call Ann Lecrone after late notice of the report she prepared for Children's Hospital;
- IV. The improper admission of evidence of an uncharged crime, of which Appellant could have defended against with proper notice, deprived Appellant of a fair trial;

- V. The prosecutor improperly asked questions on cross-examination commenting on Appellant's post-arrest silence, which constitutes fundamental error;
- VI. Insufficient evidence was presented at trial to support Appellant's conviction as A.F.'s testimony was so controverted and inconsistent that it is unworthy of belief and therefore required corroboration;
- VII. The trial judge committed reversible error by admitting hearsay statements in violation of the Sixth and Fourteenth Amendments, Article 2, § 20 of the Oklahoma Constitution, and Okla.Stat. Tit. 12, § 2803.1; and
- VIII. Prosecutorial misconduct and trial errors, when considered in a cumulative fashion, warrant a new trial or a modification of Mr. Fire's sentence.

After thorough consideration of these propositions and the entire record before us on appeal, including the original record, transcripts, briefs and exhibits of the parties, we reverse Appellant's convictions and remand his case for a new trial.

In reviewing the above claims, we find the combination of two errors denied Appellant a fair trial and requires relief. The first error occurred when the social worker/forensic interviewer improperly vouched for the credibility of A.F. by giving her opinion that A.F. was essentially telling the truth. *See Lawrence v. State*, 796 P.2d 1176, 1177 (Okl.Cr.1990). This case is very similar to *Resendiz v. State*, Case No. F-98-921 (unpublished)(Sept. 17, 1999), in which the social worker's testimony "dance[d] around the issue of [the alleged victim's] credibility, with the State asking essentially every conceivable question except whether [the social worker] personally believed [the alleged victim] was telling the truth." *Resendiz*, slip op. at 2. The social worker here did not limit her testimony to the common behaviors of child victims and her observations of

A.F.; rather, she commented on how A.F. fit the profile and was believable. Such questions and testimony invade the jury's province to determine the credibility of the witnesses.

In addition, Ruth Kiser, A.F.'s school counselor, testified she believed A.F. was telling the truth. Though she was not specifically qualified as an expert in child sexual abuse cases, the State did elicit that she held a masters degree in counseling and education and had been a counselor for eight years. The State further established that part of the Kiser's job was to take care of abuse cases. A review of her testimony shows she did not testify simply as a lay witness. Accordingly, we find her opinion on A.F.'s truthfulness was error under *Lawrence*, 796 P.2d at 1177.

The second error occurred when the prosecutor repeatedly impeached Appellant with his post-arrest silence on cross-examination and then made reference to it again in closing argument. This Court has repeatedly held that it violates the Due Process Clause to impeach an accused with his post-arrest silence. *Parks v. State*, 765 P.2d 790, 793 (Okl.Cr.1988); *Smith v. State*, 744 P.2d 1282, 1284 (Okl.Cr.1987). We have found such error reversible when the State cross-examined the defendant about his post-arrest silence and referred to his silence during closing argument. *Parks*, 765 P.2d at 793; *Wood v. State*, 748 P.2d 523, 525-26 (Okl.Cr.1987); *Smith*, 744 P.2d at 1284-85. Here, the State did both. While the evidence in this case is strong, this is not a case where the prosecutor asked an isolated question. Rather, the prosecutor asked

Appellant repeatedly why he had not talked to the police. While Appellant failed to object, this error when coupled with the State impermissibly vouching for the victim necessitates relief.

DECISION

The Judgment and Sentence of the trial court is **REVERSED AND REMANDED FOR NEW TRIAL.**

APPEARANCES AT TRIAL

RONALD SKIP KELLY
ATTORNEY AT LAW
ONE N. HUDSON
OKLAHOMA CITY, OK 73102
ATTORNEY FOR APPELLANT

CONNIE POPE
ASSISTANT DISTRICT ATTORNEY
320 ROBERT S. KERR
SUITE 505
OKLAHOMA CITY, OK 73102
ATTORNEY FOR THE STATE

APPEARANCES ON APPEAL

ANDREA DIGLIO MILLER
ATTORNEY AT LAW
228 ROBERT S. KERR
SUITE 550
OKLAHOMA CITY, OK 73102
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL
OF OKLAHOMA
KELLYE BATES
ASSISTANT ATTORNEY GENERAL
2300 N.LINCOLN BLVD., SUITE112
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR APPELLEE

OPINION BY: STRUBHAR, J.

JOHNSON, P.J.: CONCUR
LILE, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR IN RESULT
CHAPEL, J.: CONCUR

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