

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

GENE DOUGLAS GRAHAM,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

**NOT FOR PUBLICATION**

Case No. F-2013-1199

**FILED**  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

MAR 24 2015

MICHAEL S. RICHIE  
CLERK

**SUMMARY OPINION**

**LEWIS, JUDGE:**

Appellant, Gene Douglas Graham, was tried by jury and found guilty of Count 2, lewd molestation, in violation of 21 O.S.2011, § 1123, in the District Court of Delaware County, Case No. CF-2012-288. The jury sentenced Appellant to twenty-five (25) years imprisonment.<sup>1</sup> The Honorable Barry V. Denney, Associate District Judge, pronounced judgment and sentence, suspending all but thirteen (13) years imprisonment, and imposing a \$1,000.00 fine. Mr. Graham appeals in the following propositions of error:

1. The evidence was insufficient to prove the intent element of lewd molestation;
2. A ruling by the trial judge denied Appellant the opportunity to present a defense;

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<sup>1</sup> The jury found Appellant not guilty in Counts 1 and 3, alleging lewd molestation of the same victim. Appellant must serve 85% of his sentence in Count 2 before being eligible for consideration for parole. 21 O.S.2011, §§ 13.1(18).

3. Comments on Appellant's right to remain silent deprived Appellant of a fair trial and due process of law;
4. Prosecutorial misconduct deprived Appellant of a fair trial;
5. Ineffective assistance of counsel cost Appellant a fair trial and a fair appeal;
6. The trial court erred by admitting testimony by an expert who did not know specifics about the case and who testified to an issue of fact on a matter of general knowledge;
7. Cumulative error deprived Appellant of a fair trial.

In Proposition Two,<sup>2</sup> Appellant argues the trial court committed reversible error by excluding his testimony concerning an eviction notice<sup>3</sup> he received before making an arguably incriminating statement to police denying that he had touched anyone. When Appellant sought to testify about the notice on his direct examination, the prosecutor objected that it had not been disclosed in pre-trial discovery. The prosecutor also objected to the admissibility of the eviction notice

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<sup>2</sup> Proposition One argues that the evidence is insufficient to support the conviction. Because we conclude that this conviction must be reversed, this claim is moot.

<sup>3</sup> The actual contents of the eviction notice are immaterial to our decision. Appellant attempted to testify to his awareness of the accusations based on the contents of the notice, and was prohibited from giving this testimony. Defense counsel had a copy of the eviction notice in court at trial. If the notice had been otherwise, the prosecutor might have impeached Appellant after a brief continuance. Appellate counsel has attached a copy of what purports to be the same eviction notice to a motion to supplement the record and remand for an evidentiary hearing in connection with a claim of ineffective assistance of counsel. The eviction notice was never offered in evidence and is not part of the appellate record. Appellant's motion to supplement the record or remand for evidentiary hearing is denied as moot for reasons further explained below. We will not comment further on whether the notice itself might be offered or admitted in evidence.

itself on grounds of non-disclosure, to which the trial court added, at one point, the view that the notice was hearsay.

The trial court ultimately excluded the eviction notice from evidence, though the defense had never offered it; and prohibited the defendant from mentioning the eviction notice to explain how he was aware of accusations against him when he made his pre-emptive statement to the police denying having touched anyone. The trial court instructed the jury to disregard any testimony about the eviction notice, which had been very briefly mentioned before the prosecutor's objection. We presume the jury followed this instruction. Appellant was permitted to testify in a general way that he was aware of an accusation against him involving acts of perversion to a child when police approached him for questioning.

We review the exclusion of evidence as a sanction for violations of discovery for abuse of the trial court's discretion. *Morgan v. District Court*, 1992 OK CR 29, ¶ 11, 831 P.2d 1001, 1005. An abuse of discretion is a clearly erroneous conclusion and judgment, one that is contrary to the logic and effect of the facts presented. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. The Criminal Discovery Code provides for exclusion of evidence as a sanction for non-compliance, but this Court has found in several cases that exclusion was "too severe a sanction," which often imperils the defendant's right to a fair trial. *Allen v. State*, 1997 OK CR 44, ¶ 11, 944 P.2d 934, 937. We have repeatedly said where the violation "is not willful, blatant or calculated gamesmanship,

alternative sanctions are adequate and appropriate.” *Id.*, 1997 OK CR 44, ¶ 11, 944 P.2d at 937.

The trial court’s exclusion of Appellant’s testimony about receiving the eviction notice containing accusations against him was clearly erroneous and an abuse of discretion. The State admits on appeal that a criminal defendant has no obligation to give the prosecution a pre-trial disclosure or summary of the defendant’s expected testimony. *See* 22 O.S.2011, § 2002 (generally excluding statements or testimony from the defendant from pre-trial disclosure requirements). Testimony that the Appellant received a document whose contents made him aware of these accusations was material to his defense, and was not wrongfully withheld from the prosecution in violation of the discovery code. Sanctioning the defense was contrary to the logic and effect of the facts presented.

Nor was the proposed testimony about Appellant’s receipt of the document objectionable as hearsay. Appellant wanted to testify about receiving the eviction notice to show why a subsequent statement was made, not for the truth of matters asserted within the document itself. Appellant’s testimony concerning the contents of the eviction notice was therefore not hearsay. 12 O.S.2011, § 2801(A)(3); *Miller v. State*, 2004 OK CR 29, ¶¶ 49-50, 98 P.3d 738, 748-49 (finding statement offered to show its effect on subsequent statements by the witness was not offered for its truth, and thus not hearsay).

Few constitutional rights are more fundamental than the right to be heard and present a defense. *Gore v. State*, 2005 OK CR 14, ¶ 21, 119 P.3d 1268, 1275, (citing *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973)). The erroneous exclusion of Appellant's testimony limited his right to testify in his defense, *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987), and warrants reversal unless harmless beyond a reasonable doubt. *Bartell v. State*, 1994 OK CR 59, ¶ 15, 881 P.2d 92, 97. The State presented a strong case, but the jury returned verdicts of not guilty in two counts. The remaining verdict was obtained after the exclusion of defense testimony on an important aspect of the case. Because there is a reasonable possibility that this error contributed to the conviction, it is not harmless beyond a reasonable doubt. *Gore*, 2005 OK CR 14, ¶ 32, 119 P.3d at 1277-78. The conviction is reversed.

We address only the remaining propositions that might affect a second trial. In Proposition Three, Appellant claims a prosecution witness's comment on his request for an attorney after receiving the *Miranda* warning was error. Counsel failed to object to this testimony at trial, waiving all but plain error. To obtain relief, Appellant must show an actual error that is plain or obvious affected the outcome of the proceeding. *Simpson v. State*, 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d 690, 694, 695, 698.

This Court has repeatedly held that neither the prosecutor nor a prosecution witness may comment in argument or testimony on a defendant's

invocation of *Miranda* rights to remain silent or consult with an attorney. *Dungan v. State*, 1982 OK CR 152, 651 P.2d 1064; *Kreijanovsky v. State*, 1985 OK CR 120, 706 P.2d 541 (finding comment on post-*Miranda* silence or request for attorney was fundamental error); *Clark v. State*, 1988 OK CR 154, 759 P.2d 1038 (holding inquiry during state's case was constitutional error, but harmless). *Littlejohn v. State*, 1986 OK CR 8, 713 P.2d 22 (finding more extensive questioning, over objection, was reversible error). Counsel raised no objection at trial, and we have no occasion to consider whether the testimony was harmless. The evidence was improperly admitted and should be excluded from the State's case in chief on re-trial.

In Proposition Four, Appellant claims prosecutorial misconduct denied a fair trial. Defense counsel failed to object to the challenged comments at trial, and we find no comments rising to the level of plain error, as defined above. The prosecutor capitalized to some degree in his closing argument on the trial court's erroneous exclusion of defense evidence, but it was not misconduct to argue the facts in the most favorable light under the evidence admitted. Any prejudicial effect from this error is remedied by reversal of the conviction.

Appellant claims in Proposition Five that counsel was ineffective in failing to (1) identify the eviction notice in pre-trial discovery and utilize it; and (2) failing to object to improper testimony on Appellant's request for an attorney. Appellant also filed a motion to supplement the record and remand for an evidentiary hearing pursuant to Rule 3.11, 22 O.S.Supp.2014, Ch. 18, App., attaching a

copy of the purported eviction notice. These claims are moot. Proposition Five and the motion to supplement the record and remand for an evidentiary hearing are denied.

Proposition Six argues that expert testimony by a sexual abuse expert was erroneously admitted. Again, no objection was entered at trial and we review only for plain error. Similar expert testimony on the typical behavior of abuse victims has been approved in other cases. *Abshier v. State*, 2001 OK CR 13, ¶ 120, 28 P.3d 579, 604. We find no error in the admission of this testimony. Proposition Six is denied.

Proposition Seven, arguing cumulative error, is moot.

#### **DECISION**

The Judgment and Sentence of the District Court of Delaware County is **REVERSED** and **REMANDED FOR A NEW TRIAL**. Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF DELAWARE COUNTY  
THE HONORABLE BARRY V. DENNEY, ASSOCIATE DISTRICT JUDGE**

**APPEARANCES AT TRIAL**

KATHY BAKER  
16 EAST 3<sup>rd</sup> STREET  
GROVE, OK 74344  
ATTORNEY FOR DEFENDANT

NICHOLAS LELECAS  
ASST. DISTRICT ATTORNEY  
327 S. 5<sup>TH</sup> ST.  
JAY, OK 74346  
ATTORNEY FOR THE STATE

**APPEARANCES ON APPEAL**

LISBETH MCCARTY  
P.O. BOX 926  
NORMAN, OK 73070-0926  
ATTORNEY FOR APPELLANT

E. SCOTT PRUITT  
ATTORNEY GENERAL  
WILLIAM R. HOLMES  
ASSISTANT ATTORNEY GENERAL  
313 N.E. 21<sup>st</sup> ST.  
OKLAHOMA CITY, OK 73105  
ATTORNEYS FOR APPELLEE

OPINION BY LEWIS, J.  
SMITH, P.J.: Concur  
LUMPKIN, V.P.J.: Concur in Results  
A. JOHNSON, J.: Concur