

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAR - 3 2005

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICAH ANANIAS HORN,

MICHAEL S. RICHIE
CLERK

Appellant,

) NOT FOR PUBLICATION

v.

) Case No. F-2003-1089

THE STATE OF OKLAHOMA,

Appellee.

SUMMARY OPINION

CHAPEL, PRESIDING JUDGE:

Micah Ananias Horn was tried by jury and convicted of Committing Indecent or Lewd Acts with a Child in violation of 21 O.S.2001, § 1123, in the District Court of Oklahoma County, Case No. CF-2001-4277. In accordance with the jury's recommendation the Honorable Tammy Bass-Jones sentenced Horn to eight (8) years imprisonment. Horn appeals this conviction and sentence.

Horn raises eight propositions of error in support of his appeal:

- I. Horn was denied a fair trial and due process of law by the introduction of evidence regarding the results of the polygraphs examination in this case;
- II. Horn should receive a new trial because his confession, admitted into evidence, was involuntarily given;
- III. The prosecutor's argument eliciting sympathy for the complainant's testimony was improper, especially in light of the exclusion of evidence relating to the witness's potential bias;
- IV. The evidence was insufficient to prove that the touching in this case was sexual in nature;
- V. Prosecutorial misconduct prejudiced Horn's right to a fair determination of guilt or innocence;
- VI. The sentence imposed was excessive;
- VII. The trial court erred in failing to consider Horn's request for a suspended sentence; and

VIII. The cumulative effect of all the errors addressed above deprived Horn of a fair trial.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find that Propositions I and V require reversal. As the remaining propositions are moot, we do not consider them.

In Proposition I, Horn correctly complains that inadmissible polygraph evidence may have influenced the verdict. Polygraph evidence is not admissible in an Oklahoma criminal trial for any purpose.¹ The jury saw and heard a videotape in which a police officer asked Horn whether he would be willing to take a polygraph test, which, he said, would show whether Horn was telling the truth. Later, the prosecutor asked Horn whether the police did not believe his claim of innocence because he “had just taken an examination.” The clear inference was that Horn had failed the polygraph test. The combination of the tape and the prosecutor’s reference to an examination was error. This impermissible reference to the polygraph could not be cured by an instruction to the jury. This case required the jury to believe either Horn or the victim. As no independent corroborating evidence supported the victim’s testimony, we cannot conclude that this error was harmless.

In Proposition V, the prosecutor impermissibly attempted to define the burden of “beyond a reasonable doubt”. This Court has consistently warned

¹ *Thornburg v. State*, 1999 OK CR 32, 985 P.2d 1234, 1241-42, *cert. denied*, 529 U.S. 1113, 120 S.Ct. 1970, 146 L.Ed.2d 800 (2000). Inadmissibility for any purpose includes the State’s

parties against attempts to define this burden for jurors.² We have allowed prosecutors to argue that the burden is “not beyond a shadow of a doubt”³ or “not beyond any doubt.”⁴ These phrases describe the narrowest possible limits of the “beyond a reasonable doubt” burden. However, the prosecutor here told jurors they could “actually convict the defendant and have doubts in your mind.” This broad definition significantly dilutes the State’s burden of proof by removing limits on the phrase “reasonable doubt”. This sort of argument is exactly why this Court has prohibited attempts to define the burden of proof.

Decision

The Judgment and Sentence of the District Court is **REVERSED** and **REMANDED** for a new trial. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. 2004, the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

suggested “limited purposes” of rebuttal or evaluating whether Horn’s confession was voluntary.

² See, e.g., *Phillips v. State*, 1999 OK CR 38, 989 P.2d 1017, 1028, *cert. denied*, 531 U.S. 837, 121 S.Ct. 97, 148 L.Ed.2d 56 (2000); *Al-Mosawi v. State*, 1996 OK CR 59, 929 P.2d 270, 279, *cert. denied*, 522 U.S. 852, 118 S.Ct. 145, 139 L.Ed.2d 92 (1997); *Romano v. State*, 1995 OK CR 74, 909 P.2d 92, 116, *cert. denied*, 519 U.S. 855, 117 S.Ct. 151, 136 L.Ed.2d 96 (1996).

³ *Phillips*, 989 P.2d at 1028;

⁴ *Hammon v. State*, 1995 OK CR 33, 898 P.2d 1287, 1305.

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OPINION BY: CHAPEL, P. J.

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JOHNSON, J.: CONCURS IN RESULTS

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