

DEC - 2 2003

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

OSCAR LEE LAMB,)
)
Appellant,)
v.)
STATE OF OKLAHOMA)
)
Appellee.)

NOT FOR PUBLICATION

Case No. F-2002-1370

SUMMARY OPINION

LUMPKIN, JUDGE:

Appellant Oscar Lee Lamb was tried by jury and found guilty of two counts of Rape by Instrumentation (21 O.S.2001 § 1111.11), Case No. CF-2001-120, in the District Court of Murray County. The jury recommended as punishment five (5) years imprisonment in each count. The trial court sentenced accordingly, ordering the sentences to run consecutively. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of his appeal:

- I. Reversible error was committed in allowing unadmitted evidence in the jury room, and, the trial court erred in refusing to grant Appellant's motion for new trial alleging that Appellant was prejudiced by the presence of these extrinsic materials in the jury room.
- II. The trial court committed fundamental error when it allowed an expert witness to invade the providence of the trier of fact by giving an expert opinion on the truthfulness of a witness's story.

After a thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the

parties, we have determined that Proposition II requires reversal and remand for a new trial.

In Proposition I, we find the taking of exhibits, which had not been admitted into evidence, to the jury room during deliberations was error. However, that error was harmless as a review of the record shows the information in those exhibits had been fully explored at trial. Therefore, we find no reasonable possibility prejudice could have resulted from the presence of the exhibits in the jury room. *See Johnston v. State*, 673 P.2d 844, 848 (Okl.Cr.1983), *Edwards v. State*, 637 P.2d 886, 887 (Okl.Cr.1981).

In Proposition II, we find the admission of expert testimony from Dr. Ernst at trial transcript pages 321-22; 324 and 325 regarding the truthfulness of the victim to be plain error.¹ *Lawrence v. State*, 796 P.2d 1176, 1177 (Okl.Cr.1990) (expert testimony may not be admitted to tell the jury who is correct or incorrect, who is lying and who is telling the truth). *See also Davenport v. State*, 806 P.2d 655, 659 (Okl.Cr.1991). This error was not harmless in light of the contested nature of the evidence. To rebut the State's case against Appellant, the defense presented four witnesses, including Appellant. He consistently denied the allegations against him. In the face of such evidence, testimony by an expert can often make a difference in who the jury finds to be the more credible witness, the victim or the defendant. As we cannot say with any certainty that Dr. Ernst's

¹Appellant's failure to file a contemporaneous objection to the testimony warrants review for plain error only. *Simpson v. State*, 876 P.2d 690, 698-699 (Okl.Cr.1994).

expert opinion did not impact the verdict, the case should be reversed and remanded for a new trial.

DECISION

The Judgment and Sentence is **REVERSED AND REMANDED FOR A NEW TRIAL.**

AN APPEAL FROM THE DISTRICT COURT OF MURRAY COUNTY
THE HONORABLE JOHN H. SCAGGS, DISTRICT JUDGE

APPEARANCES AT TRIAL

CHRISTOPHER H. BOX
2208 S.W. 59TH ST.
OKLAHOMA CITY, OK 73119
COUNSEL FOR APPELLANT

MITCHELL SPERRY
DISTRICT ATTORNEY
JOHNNY S. LOARD
ASSISTANT DISTRICT ATTORNEY
MURRAY COUNTY COURTHOUSE
SULPHUR, OK 73086
COUNSEL FOR THE STATE

APPEARANCES ON APPEAL

MICHAEL GASSAWAY
ONE NORTH HUDSON, 11TH FLOOR
OKLAHOMA CITY, OK 73102
COUNSEL FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
PATRICK T. CRAWLEY
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL
OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE

OPINION BY: LUMPKIN, J.
JOHNSON, P.J.: CONCUR
LILE, V.P.J.: CONCUR
CHAPEL, J.: CONCUR
STRUBHAR, J.: CONCUR

RC