

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LEROY MITCHELL, JR.,)
)
 Appellant,)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2005-874

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP 19 2006

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

CHAPEL, PRESIDING JUDGE:

After a non-jury trial, Leroy Mitchell, Jr. was convicted of First Degree Rape in violation of 21 O.S. 2001, § 1114 in Atoka County District Court Case No. CF-2005-14. The Honorable Doug Gabbard sentenced Mitchell to fifteen (15) years' imprisonment with the last five (5) years suspended. Mitchell appeals this Judgment and Sentence.

Mitchell raises the following propositions of error:

- I. Unreliable hearsay admitted under 12 O.S.Supp.2004, § 2803.1 violated Appellant's right to confrontation.
- II. Admission of testimonial hearsay violated Appellant's right to confrontation.
- III. Appellants statements were coerced and were uncorroborated by competent evidence.
- IV. Appellant's right to due process was violated by other crimes evidence.
- V. Trial counsel was ineffective.
- VI. The cumulative effect of all errors was to deprive Appellant of a fair trial.

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits of the parties, we find Mitchell is entitled to a new trial. We find in Propositions I and II that Mitchell was denied a fair trial by the admission of testimonial hearsay in violation of the Confrontation Clause and the trial court's failure to make the required reliability findings on the admission of hearsay pursuant to 12 O.S.2001, § 2803.1.¹ We do not address Propositions VI and VII due to the relief recommended in Propositions I and II.

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. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

¹ *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct.1354, 158 1.Ed.2d 177 (2004)(testimonial hearsay only admissible if it has been subject to cross-examination and witness unavailable); *Mitchell v. State*, 120 P.3d 1196, 1207 (Okl.Cr.2005) citing *People v. R.F.*, 825 N.E.2d 287 (Ill.App. 2005)(child's statements of sexual abuse to investigating officer testimonial); *Davis v. Washington*, __ U.S. __, 126 S.Ct. 2266, 2273-74, __ L.Ed.2d __ (2006) (finding statements in non-emergency situation made to police to prove events relevant to criminal prosecution testimonial); *Snowden v. State*, 846 A.2d 36 (Md.App.2004)(statements by child to child welfare worker pursuant to similar child sexual abuse hearsay statute testimonial). The victim's testimonial hearsay statements were improperly admitted through the testimony of the investigating police officers. The victim's statements were never subject to cross-examination as she did not testify at or prior to trial and there was no evidence that she was unavailable to testify. Thus, her statements to the officers should not have been admitted at trial. This error requires reversal as the prosecution was based primarily on these statements and without the statements the verdict is questionable. Moreover, the trial court failed to make reliability findings required by § 2803.1 for the admission of the child victim's statements to the officers prior to trial. *F.D.W. v. State*, 80 P.3d 503, 504 (Okl.Cr.2003)(mandates trial courts to make reliability findings on record).

ATTORNEYS AT TRIAL

JIM KEMP
830 NORTH BROADWAY
ADA, OKLAHOMA 74820
ATTORNEY FOR DEFENDANT

GREG JENKINS
ASSISTANT DISTRICT ATTORNEY
ATOKA COUNTY COURTHOUSE
ATOKA, OKLAHOMA 74525
ATTORNEY FOR THE STATE

OPINION BY: CHAPEL, P. J.

LUMPKIN, V.P.J.:	CONCUR
C. JOHNSON, J.:	CONCUR
A. JOHNSON, J.:	CONCUR
LEWIS, J.:	SPECIALLY CONCUR

ATTORNEYS ON APPEAL

BOBBY G. LEWIS
P.O. BOX 926
NORMAN, OKLAHOMA 73070
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
WILLIAM R. HOLMES
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL
OKLAHOMA CITY, OKLAHOMA 73105
ATTORNEYS FOR APPELLEE

LEWIS, JUDGE, SPECIALLY CONCURS:

I would reverse on Proposition II only. Admission of testimonial hearsay violated appellant's right of confrontation.