

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JUN 8 2011
MICHAEL S. RICHIE
CLERK

JEFFREY EUGENE ROWAN,)
)
Appellant,) NOT FOR PUBLICATION
)
v.) Case No. F-2009-385
)
THE STATE OF OKLAHOMA,)
)
Appellee.)

ORDER GRANTING MOTION FOR NEW TRIAL AND DISMISSING APPEAL

Currently before the Court in conjunction with Appellant Jeffrey Eugene Rowan's appeal is his motion for a new trial brought under 22 O.S.2001, §§ 952, 953, and Rule 2.1(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18 App. (2011). Rowan was tried by jury and convicted in the District Court of Pittsburg County, Case No. CF-2008-337, of Child Sexual Abuse by a Person Responsible for a Child's Health, Safety, or Welfare, in violation of 10 O.S.Supp.2007, § 7115(E).¹ The jury set punishment at thirty-five years imprisonment. The Honorable James D. Bland, who presided at trial, sentenced Rowan accordingly.

For the reasons set forth below, Rowan's motion for a new trial is granted and the case is remanded to the District Court of Pittsburg County for a new trial. Because we remand for new trial, it is not necessary to address the claims raised in Rowan's appeal. The appeal is therefore dismissed as moot.

¹ Since renumbered as 21 O.S.Supp.2009, § 843.5.

BACKGROUND

In the summer of 2008, Rowan and his wife Melissa lived together in Pittsburg County near Indianola. Living in the household with them were the couple's infant son, Melissa's three-year-old daughter M.D., and Melissa's eleven-year-old brother. On August 5, 2008, the Department of Human Services (DHS) received a complaint of child sexual abuse concerning M.D. Amanda Britt, a DHS investigator, and Deputy Kevin Martin, an investigator from the Pittsburg County Sheriff's Office, were dispatched to the Rowan residence. The Rowans were informed that there had been an allegation of sexual abuse, and the Rowans agreed to follow the investigators to the Child Advocacy Center in McAlester for an interview.

Rowan was given *Miranda*² warnings and agreed to talk to investigators. When he was told that DHS had a report that M.D. was being sexually abused, Rowan initially denied knowledge of any abuse. On further questioning, however, he acknowledged that he sometimes bathed M.D. He said he did not have a washcloth so he used his hand to bathe her. He demonstrated how he washed M.D.'s vaginal area by moving his hand in a circular motion. He said he would use his fingers to clean the inside lips of her vagina. Rowan said that he may have penetrated her vagina with his finger because there was one instance where she jerked away like it hurt her. When asked if he had an erection while bathing M.D., Rowan said he may have been erect, but stated

² *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

that he did not always know when his penis was erect. Later, he said he did sometimes have an erection while bathing M.D.

Rowan also described an incident in which M.D. came into his bedroom right after he and his wife had just finished having sex and his wife had gone into the kitchen. Rowan said that he was getting out of bed and still had an erection when M.D. came into the room and approached him with her mouth open as if she wanted to give him oral sex, which he described as a "BJ." Rowan explained that because he had just had sex with his wife, he did not ejaculate in M.D.'s mouth. Specifically, he said, "[i]t was pre-cum, I didn't blast her out or nothing." He said further that was the only time he put his penis in M.D.'s mouth.

Rowan said that M.D. got into bed with him and his wife about half the time. He stated that he always slept nude, but while M.D. usually wore panties, she was occasionally nude. Rowan told the investigators that on nights when his wife was working, M.D. would touch his penis. According to Rowan, M.D. also touched his scrotum because she liked to feel the texture.

Rowan described another instance to the investigators in which he and M.D. were in bed nude and M.D. climbed over him to get to her baby brother who was in a crib next to the bed. According to Rowan, as she climbed over him, they assumed the "69" position and he may have gotten saliva on her vagina. Rowan told the investigators that the saliva transfer only occurred because he was talking at the time and he emphatically stated that he "didn't eat her out or nothing."

Stacy Scroggins, a physician assistant, examined M.D. on August 6, 2008. Ms. Scroggins had performed over 400 child sexual abuse examinations and testified as an expert in the area of child sexual abuse in several counties. Ms. Scroggins had also treated M.D. as her primary care provider. Two or three months earlier, during a routine visit, Ms. Scroggins noticed M.D. displaying sexualized behavior such as rubbing Ms. Scroggins legs up under her skirt, touching her vaginal area over her skirt, or touching her breasts and breasts of other women in the clinic.

During the August 6, 2008 exam, Scroggins observed evidence of scarring on M.D.'s hymen and a notch on her hymen in another location. While Scroggins testified that the notch was likely caused by a penetrating injury, she also stated that it could have been a genetic deformity. Additionally, Ms. Scroggins observed scar tissue on the anus indicating a "healed traumatic injury," but also acknowledged that it could have been caused by a large bowel movement. When called by the State as a rebuttal witness, however, Ms. Scroggins testified that she had conducted a genital-anal examination of M.D. in 2007, after M.D. allegedly had been physically abused by her biological father and found no abnormalities in either the hymen or anus.

Rowan's wife, Melissa, testified at trial. She did not believe Rowan was guilty. She claimed that there were inconsistencies in the reports of her interview with investigators. She also testified that even when she was working overnight she, not Rowan, bathed the children. She did say, however, that for

a time while she was recovering from surgery, Rowan would bathe M.D. while she, Melissa was home, but that he would only do the child's hair and back because by that time, three-year-old M.D. had been taught to wash her vaginal area by herself. Melissa testified that she saw M.D. insert her fingers, and on one occasion a crayon, into her vagina. Melissa testified further that she found M.D. in bed with Rowan just one time when she returned from work. In that instance, Rowan, nude, was under the comforter and M.D., in panties, was on top of the comforter under her own blanket.

Rowan testified at trial. He claimed that the investigator's reports of his statements were inaccurate. He denied touching M.D. inappropriately. He said that when he bathed M.D., he only cleaned her to the waist and that the three-year-old cleaned herself below the waist.

Rowan was tried on March 9 and 10, 2009. He was sentenced on April 16, 2009. Judgment and sentence was entered on April 20, 2009. Rowan filed his Petition in Error with this Court on May 11, 2009. On October 13, 2009, he filed his Brief-in-Chief and an accompanying Motion for New Trial.

The motion for new trial includes a sworn affidavit from Rowan's trial counsel stating that on or about July 15, 2009, while this appeal was pending, he was notified by the Pittsburg County District Attorney that physician assistant Stacy Scroggins had her license suspended for a drug problem and that she was being treated at an inpatient drug rehabilitation facility. Trial counsel stated further that he notified Rowan's appellate counsel of this information approximately two weeks later, on July 31, 2009.

Also included with the motion for new trial is a copy of an order entered by the Oklahoma Board of Medical Licensure and Supervision on September 17, 2009, in which physician assistant Stacy Scroggins is named as the defendant. The order concludes that Scroggins had engaged in numerous instances of unprofessional conduct and it placed her on probation for five years under a list of conditions limiting her ability to practice medicine. The order contained a lengthy set of stipulated findings of facts. In short, the stipulated facts were that in the period from late 2007 through April 2009, Scroggins forged and fraudulently wrote prescriptions and falsely obtained prescription medications such as Propoxyphene, Hydrocodone, Hydrocodone cough syrups, and Lortab, for her personal use. Significantly, it was during this period that Scroggins examined M.D. and testified at Rowan's trial.

In its Brief-in-Chief, the State noted Rowan's motion for a new trial, but purported to reserve its right to respond only "[i]f this Court finds the motion has merit" (Aplee's Brief at 1, n.2). By an order entered on February 15, 2011, the State was directed to respond to Rowan's motion. The State filed its response on March 17, 2011.

DISCUSSION

In his motion for a new trial, Rowan claims that the evidence of Scroggins' fraudulent activities and drug abuse would have been valuable evidence with which to impeach her professional competence and truthfulness. He contends, therefore, that this newly discovered evidence requires that the case be remanded for a new trial.

In *Hunter v. State*, 1992 OK CR 19, ¶ 15, 829 P.2d 64, 67, this Court set out the test for granting a new trial based on newly discovered evidence as follows:

- (1) the evidence must be material;
- (2) the evidence could not have been discovered before trial with due diligence;
- (3) the evidence cannot be cumulative; and
- (4) the evidence must create a reasonable probability that, had the newly discovered evidence been introduced at the original trial, it would have changed the outcome.

The parties do not dispute that the evidence of Scroggins' drug abuse and fraudulent prescription activities could not have been discovered before trial with due diligence. Additionally, there is no dispute that the evidence is material. Scroggins' testimony provided the only evidence, other than Rowan's admissions to investigators, that M.D. had been sexually abused. Furthermore, Scroggins' testimony is not cumulative. Other than Scroggins' testimony about her observations of signs of trauma to M.D.'s genitalia and anal area, no other physical evidence of actual sexual abuse was introduced at trial. Thus, the only question to be answered in deciding this motion for new trial is whether there is a reasonable probability this newly discovered evidence would have changed the outcome had it been introduced at trial. Put another way, the issue presented here is whether there is a reasonable probability that this newly discovered evidence might have been sufficient to raise a reasonable doubt as to guilt.

In *Patterson v. State*, 2002 OK CR 18, ¶ 20, 45 P.3d 925, 930, this Court stated that “[w]hen material evidence is not presented at trial, the justice in the finding of guilt is of overriding concern.” The Court then explained that:

This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

Patterson, 2002 OK CR 18, ¶ 20, 45 P.3d at 930 (quoting *Hunter*, 1992 OK CR 19, ¶ 15, 829 P.2d at 67).

In this instance, the trial evidence consisted of the following: (1) testimony by investigators Britt and Martin repeating Rowan’s words of confession; (2) testimony by Rowan denying and rebutting the alleged confession; (3) testimony by Rowan’s wife that tended to parallel Rowan’s testimony, but provided no corroboration of Rowan’s confession; and (4) testimony by physician assistant Scroggins that she observed physical and behavioral signs of sexual abuse in the child-victim. Distilled to its essence then, the only evidence implicating Rowan in abusing M.D. is his confession. This by itself, however, is insufficient to support a conviction because a confession cannot justify a conviction unless it is corroborated. That is, a confession must “be supported by ‘substantial independent evidence which would establish . . . [its] trustworthiness.’” *Fontenot v. State*, 1994 OK CR 42, ¶ 20, 881 P.2d 69, 78 (quoting *Opper v. United States*, 348 U.S. 84, 93, 75 S.Ct.

158, 164, 99 L.Ed. 101 (1954)); *see also* Instruction No. 9-13, OUJI-CR(2d)("[a] confession alone does not justify a conviction unless it is corroborated, that is confirmed and supported by other evidence of the material and basic fact or facts necessary for the commission of the offense charged"). Absent any other evidence tending to establish the trustworthiness of Rowan's confession, the full weight of corroboration must be borne by Scroggins' testimony. Consequently, any credible evidence casting doubt on the trustworthiness of Scroggins' testimony - the single strand of evidence tending to corroborate Rowan's confession - must be viewed as potentially sufficient to create reasonable doubt.³

Here, the stipulated order entered by Oklahoma Board of Medical Licensure and Supervision sets out dozens of instances in which Scroggins

³ The State suggests that Scroggins' testimony was cumulative by arguing that even if her testimony had been excluded in its entirety the outcome of the trial would not have been different because Rowan's wife's testimony corroborated his admissions to investigators. Unfortunately, the State points to just two areas in which Melissa Rowan's testimony corroborated Rowan's inculpatory statements. First, the State argues that Rowan's admissions are corroborated by Melissa Rowan's testimony that she came home from work one morning and found Rowan in bed naked under the covers with M.D. on top of the covers, but under her own blanket, wearing only panties. This testimony hardly lends trustworthiness to Rowan's statements that he put his penis in M.D.'s mouth shortly after having sexual relations with his wife and with the wife nearby in the kitchen. Nor does it lend any credence to Rowan's admissions that he may have penetrated M.D.'s vagina with his finger while bathing her, or that on other occasions he allowed her to touch his penis and scrotum, or that one time he got saliva from his mouth on her genital area as she and he were in a "69" position. At most, this testimony touches on Rowan's statement to investigators that M.D. slept in the same bed with him and his wife half of the time. But, as evidence of just one single instance, the testimony is more inconsistent with Rowan's half-the-time statement than it is consistent. Therefore, it cannot be considered corroborative. *See e.g., Rogers v. State*, 1995 OK CR 8, ¶ 35, 890 P.2d 959, 975 (holding that each material element of offense need not be corroborated by facts independent of confession, and holding further that inconsistencies may exist between facts proven and facts related in confession, so long as inconsistencies do not overwhelm similarities). Second, while the State is correct to point out that Melissa Rowan's testimony about seeing three-year-old M.D. insert a crayon into her vagina is consistent with Rowan's statement to investigators that he was aware of such behavior on her part, this testimony does nothing to corroborate the statements Rowan made to investigators about his own interactions with the child.

fraudulently wrote prescriptions and falsely obtained prescription medications for her personal use. These instances of dishonesty and professional misconduct all related to Scroggins' position as a physician assistant and cast serious doubt on her trustworthiness and professional competence. It is entirely possible that had this information been presented to the jury, Scroggins' credibility would have been impeached to the point that jurors could not find that her testimony corroborated Rowan's confession.⁴ Consequently, because this new evidence has the potential to produce a different outcome, the case must be remanded for a new trial.

Rowan's motion for a new trial is **GRANTED**. The case is **REMANDED** for a new trial. The appeal is **DISMISSED** as moot. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this order.

IT IS SO ORDERED.

⁴ The State contends that while Scroggins might have been impeached on cross-examination with the new evidence, her testimony would remain admissible and could still serve to corroborate Rowan's admissions. Thus, the State suggests the outcome of the trial would remain unaffected. While it is true that Scroggins' testimony would remain admissible even with the new evidence, the State's argument begs the question of whether this evidence of Scroggins' dishonesty and professional misconduct might be sufficient to raise a reasonable doubt in juror's minds as to whether her testimony corroborated Rowan's inculpatory admissions. As we note in the main text, it is our belief that the proffered evidence of Scroggins' dishonesty and professional misconduct is of such a nature that it could persuade a reasonable juror that her testimony was not credible. Rowan's admissions, therefore, would become uncorroborated, and the jury could not return a guilty verdict. As a result, contrary to the State's assertion, there is a distinct possibility a jury could return a different verdict with this new evidence placed before it.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 3rd day
of June, 2011.

Arlene Johnson
ARLENE JOHNSON, Presiding Judge

David B. Lewis
DAVID B. LEWIS, Vice Presiding Judge

Gary L. Lumpkin DISSENT
GARY L. LUMPKIN, Judge

Charles A. Johnson
CHARLES A. JOHNSON, Judge

Clancy Smith JOINS IN
CLANCY SMITH, Judge JUDGE
LUMPKIN'S
DISSENT

ATTEST:

Clerk

RC

LUMPKIN, JUDGE: DISSENT

With all due respect, I find the Court fails to focus on the materiality of the proffered impeachment evidence set out in the Motion for New Trial. For the following reasons I must dissent to the order granting a new trial.

The alleged newly discovered evidence concerns Physician Assistant Stacy Scroggins who examined the victim. Information provided by Appellant shows that Scroggins was using and abusing CDS (Hydrocodone, Propoxyphene, CoughTuss Liquid), and forging prescriptions for the same medicines at the time of her examination of the victim in August 2008 and in March 2009, when she testified at Appellant's trial. Affidavits provided by Appellant show that on April 20, 2009, a complaint citation was issued against Scroggins by the Board of Medical Licensure with a restriction which read "agreement not to practice". As of September 17, 2009, Scroggins was placed on five year probation, her license was suspended and she was sent to rehab.

The Motion for New Trial appears to be timely filed. Sentencing was held April 16, 2009. It is claimed that the new evidence was not discovered by trial counsel until July 15, 2009, and appellate counsel until July 31, 2009. The Motion for New trial was tendered for filing with this Court on October 13, 2009.

In a signed affidavit, trial counsel states that it was not until July 15, 2009, that an Assistant District Attorney told him that Scroggins had her license suspended and was in an inpatient drug rehab facility. Trial counsel

states that he informed appellate counsel on July 31, 2009. Trial counsel states that neither he nor appellate counsel was aware of the information previously.

The Order states there is no dispute between the parties that evidence of Scroggins' fraudulent activities could not have been discovered before trial, and that the evidence in question is material. I don't think that is an accurate assessment of the briefs. The State's argument is "even if we assume *arguendo* that the defendant meets the first three parts of the test, he fails to meet the fourth. There is no reasonable probability that the proffered evidence . . . would have resulted in an acquittal if it had been used to impeach her testimony." I don't think this necessarily concedes the first 2 parts of the test for newly discovered evidence. See *Hunter v. State*, 1992 OK CR 19, ¶ 15, 829 P.2d 64, 67.

Even so, I don't think the evidence could have been discovered prior to trial. According to the Order Accepting Voluntary Submittal to Jurisdiction from the Medical Licensure Board it wasn't until February 2009, that Scroggins' employer confronted her about his discovery of her fraudulent prescription writing and she admitted herself to outpatient treatment on March 9, 2009. It appears the medical licensure board began investigating Scroggins in April 2009. It wasn't until April 20, 2009 that an official complaint was lodged against Scroggins - this was after Appellant's April 16, 2009, sentencing. The record presented to this Court does not reflect the investigation conducted by the medical licensure board prior to that time was a

public record. Nor does the record reveal the district attorney's office was involved with the investigation or had anything to do with the penalties imposed as a result of that administrative hearing.

As for the materiality of the evidence, I find it is only impeachment evidence and therefore not grounds for a new trial. This Court has repeatedly said that a new trial on newly discovered evidence will not be granted where the new evidence only tends to discredit or impeach the witness for the State and where it would not change the result of the trial. *Smith v. State*, 1992 OK CR 3, ¶ 15, 826 P.2d 615, 618; *Lee v. State*, 1987 OK CR 108, ¶ 9, 738 P.2d 173, 177; *Godbey v. State*, 1987 OK CR 3, ¶ 6, 731 P.2d 986, 988; *Stoner v. State*, 1977 OK CR 239, ¶ 21, 568 P.2d 298, 301; *Trowbridge v. State*, 1972 OK CR 271, ¶ 42, 502 P.2d 495, 508; *Jones v. State*, 1972 OK CR 184, ¶ 11, 499 P.2d 932, 934; *England v. State*, 1954 OK CR 132, ¶ 34, 276 P.2d 270, 277-78; *McKissack v. State*, 61 Okla.Crim. 65, 65 P.2d 1239, 1242 (1937).

The State's evidence at trial consisted of testimony by the investigators regarding Appellant's confession and testimony by Physician Assistant Scroggins regarding her examination of the victim. Scroggins' testimony regarding her examination was consistent with Appellant's admissions to the investigators. As the State says in its brief, "impeachment of her testimony with evidence of prescription drug abuse would not have shown her testimony was false or that the victim did not have behavioral as well as physical signs of sexual abuse." (Appellant's brief, pg. 7). Appellant has not shown that Scroggins' examination of the victim or trial testimony was affected by her drug

Scroggins' examination of the victim or trial testimony was affected by her drug use. Nor has he shown that even if her credibility had been challenged by the evidence, that her testimony was insufficient to corroborate Appellant's confession. As the State argues, "impeaching her credibility, however, is not the same as excluding her testimony."

The defense case at trial consisted of testimony from Appellant and his wife. Appellant denied and rebutted his confession. His wife's testimony, while not offered for corroboration, sufficiently corroborated his confession. Each material element does not need to be corroborated by facts independent of the confession. *Littlejohn v. State*, 1989 OK CR 75, ¶ 36, 989 P.2d 901, 911. Her testimony that she came home from work and found him in bed naked with the 3 year old victim offered sufficient corroboration of Appellant's confession.

In light of the corroboration offered by the testimony of Scroggins and Appellant's wife, Appellant has failed to show a reasonable probability he would have been acquitted if he had been able to impeach Scroggins with evidence of her drug abuse/forgery of prescriptions.

I am authorized to state that Judge Smith joins in this dissent.