

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA,
Appellant,
-vs.-
JAMES LEE SHARROCK,
Appellee.

NOT FOR PUBLICATION

No. S-2008-953

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUN 19 2009

ACCELERATED DOCKET SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

PER CURIAM:

Appellee was charged by Information in the District Court of Hughes County, Case No. CF-2008-81, with two counts of Child Sexual Abuse. Following presentation of the State's evidence at preliminary hearing, the Honorable Timothy L. Olsen, Associate District Judge, sitting as Magistrate, found the State presented insufficient evidence to bind Appellee over for trial on Count 2 of the Information. In so holding, the Magistrate found he could not consider the out-of-court statements made by the four-year-old child alleged to have been abused in Count 2. The State had attempted to introduce that child's statements into evidence through the testimony of two adult witnesses who had either interviewed or examined the child. The Magistrate concluded the child hearsay statements recounted by those two adults were inadmissible under 12 O.S.Supp.2008, § 2803.1, because the four-year-old did not testify at the preliminary hearing and was not available to testify at that hearing.¹

¹To the extent relevant to this appeal, Section 2803.1 states:

A. A statement made by a child who has not attained thirteen (13) years of age . . . which describes any act of physical abuse against the child . . . or any act of sexual

The State appealed the Magistrate's decision under the authority of 22 O.S.2001, § 1089.1. The Honorable Rodney D. Ring, Special Judge, was duly appointed to hear the appeal. On October 8, 2008, Judge Ring upheld the Magistrate's orders.

The State now appeals to this Court, and its appeal was regularly assigned to this Court's Accelerated Docket under Section XI of the *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2009). The Court held oral argument on May 28, 2009, and it duly considered Appellant's proposition of error raised on appeal:

Proposition

The preliminary hearing magistrate incorrectly applied the provisions of 12 O.S. § 2803.1(a)(2)(a) when he found the phrase "is available to testify at the proceedings" required the physical presence of a child witness in the courthouse for preliminary hearing, and therefore, he erred in striking the testimony of Linda Hurst and Regan Green.

contact performed with or on the child . . . by another, is admissible in criminal and juvenile proceedings in the courts in this state if:

1. . . .
2. The child . . . either:
 - a. *testifies or is available to testify at the proceedings* in open court or through an alternative method pursuant to the provisions of the Uniform Child Witness Testimony by Alternative Methods Act or Section 2611.2 of Title 12 of the Oklahoma Statutes, or
 - b. is unavailable as defined in Section 2804 of this title as a witness. When the child . . . is unavailable, such statement may be admitted only if there is corroborative evidence of the act.

12 O.S.Supp.2008, § 2803.1 (emphasis added). The omitted subsection (A)(1) of this statute requires the trial court, before admitting the out-of-court statement *at trial*, to first hold a hearing outside the presence of the jury to determine "that the time, content and totality of circumstances surrounding the taking of the statement provide sufficient indicia of reliability so as to render it inherently trustworthy." 12 O.S.Supp.2008, § 2803.1(A)(1). Subsection (A)(1), however, has been held inapplicable to preliminary hearings. See *Kennedy v. State*, 1992 OK CR 67, ¶ 13, 839 P.2d 667, 670-71 ("[A]s the only burden on the State at the preliminary hearing is to establish probable cause . . . we find no reason to conduct any 2803.1 hearing at the preliminary hearing stage. Indeed, the reliability or unreliability of any evidence goes toward establishing or failing to establish probable cause.").

After hearing oral argument, and after a thorough consideration of Appellant's proposition of error and the entire record before us on appeal, by a vote of four (4) to zero (0), we affirm. In state appeals brought under the procedures codified at 22 O.S.2001 & Supp.2008, §§ 1089.1-1089.7, this Court reviews the factual findings of the Magistrate and the reviewing judge for an abuse of discretion.² In the case now before us, whether the child witness was actually present and available to testify at the preliminary hearing was a factual determination which the Magistrate was required to make in deciding whether the child hearsay should be admitted under Section 2803.1(A)(2)(a). The record on appeal reveals circumstances from which the Magistrate could reasonably conclude the child witness was not available to be called to testify. Accordingly, Appellant is unable to show that either the Magistrate or the reviewing judge abused their discretion in finding the hearsay was inadmissible.

DECISION

The final rulings and orders of the Magistrate and the reviewing judge in Hughes County District Court, Case No. CF-2008-81, are **AFFIRMED**. Pursuant to Rule 3.15 of this Court's *Rules*, **MANDATE IS ORDERED ISSUED** upon the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF HUGHES COUNTY
BEFORE THE HONORABLE TIMOTHY L. OLSEN,
ASSOCIATE DISTRICT JUDGE, SITTING AS MAGISTRATE,
AND BEFORE
RODNEY D. RING, SPECIAL JUDGE, ASSIGNED FOR REVIEW

² See *State v. Swicegood*, 1990 OK CR ,48, ¶ 7, 795 P.2d 527, 529 ("In the present case, the State failed to meet its burden to show that the crime of Cultivation of Marijuana was committed and the magistrate properly sustained the defendant's demurrer. Absent an abuse of the discretion in reaching that decision, the magistrate's ruling will remain undisturbed.")

APPEARANCES AT TRIAL

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C. Johnson, P.J.:	Concurs
A. Johnson, V.P.J.:	Concurs
Lumpkin, J.:	Not participating
Chapel, J.:	Concurs
Lewis, J.:	Concurs in results

RA