

**FEB - 6 2006**  
**MICHAEL S. RICHIE**  
**CLERK**

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

DONALD EUGENE STEVENSON, )  
 )  
 Appellant, )  
 v. )  
 )  
 STATE OF OKLAHOMA )  
 )  
 Appellee. )

**NOT FOR PUBLICATION**

Case No. F-2004-971

**SUMMARY OPINION**

**LUMPKIN, VICE-PRESIDING JUDGE:**

Appellant Donald Eugene Stevenson was tried by jury and convicted of Child Abuse (10 O.S. Supp. 2002, § 7115), After Former Conviction of Two or More Felonies, Case No. CF-2003-457 in the District Court of Pottawatomie County. The jury recommended as punishment one hundred (100) years plus three (3) months imprisonment. The trial court sentenced accordingly. It is from this judgment and sentence that Appellant appeals.

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

- I. Admission of cumulative victim impact evidence including a highly prejudicial video tape of the victim's recovery and day-to-day care necessitates a new trial or a favorable modification of the resulting inflated sentence.
- II. Irrelevant and improper evidence and instruction indicating Appellant might serve less time than the jury imposed resulted in an inflated sentence.
- III. The cumulative effect of all the errors addressed above deprived Appellant of a fair trial.

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 under the law and the evidence, reversal is not warranted but the sentence should be modified.

In Proposition I, we review only for plain error as Appellant raised no objections to the testimony of witnesses Caplinger and Mills. *See Simpson v. State*, 1994 OK CR 40, ¶ 11, 876 P.2d 690, 693. Their testimony as to the victim's medical condition at the time of trial and his day-to-day care was relevant to show the extent of the victim's injuries. *See Jackson v. State*, 2001 OK CR 37, ¶ 1, 41 P.3d 395, 401, fn. 3; *Fox v State*, 1976 OK CR 307, ¶ 11, 556 P.2d 1281, 1283. The testimony was not cumulative to that of Dr. Stuemky, who saw the victim for only two days while at Children's Hospital. Further, this was not victim impact evidence as provided for in 22 O.S.2001, § 984. *See Ledbetter v. State*, 1997 OK CR 5, ¶ 24, 933 P.2d 880, 889-890; *Cargle v. State*, 1995 OK CR 77, ¶ 76, 909 P.2d 806, 828. *See also Perryman v. State*, 1999 OK CR 39, ¶ 14, 990 P.2d 900, 905. Therefore, the trial court did not abuse its discretion in admitting the testimony and we find no plain error. *See Williams v. State*, 2001 OK CR 9, ¶ 94, 22 P.3d 702, 724.

The trial court also did not abuse its discretion in admitting a videotape of visits with the victim at the Children's Center. *See Duckett v. State*, 1995 OK CR 61, ¶ 27, 919 P.2d 7, 16. The videotape in this case was relevant in showing the extent of the victim's injuries and the extent of the harm suffered by the victim at the hands of Appellant. The tape corroborated the testimony of

Caplinger and Mills, and it corroborated Dr. Stuemky's testimony that the baby's injuries were such that they could not have been caused accidentally. Appellant's agreement that the baby suffered massive severe injuries does not make the tape inadmissible as it remains the State's burden to prove the corpus delicti of the crime and the videotape is relevant for that purpose. *See Phillips v. State*, 1999 OK CR 38, ¶ 48, 989 P.2d 1017, 1033. While the videotape is admittedly prejudicial, that prejudice does not outweigh its probative value. *See* 12 O.S.2001, § 2402. Additionally, counsel was not ineffective for failing to object to the testimony of Caplinger and Mills as their testimony was properly admitted. Therefore, any objection by counsel would have been overruled. As such, counsel cannot be found ineffective for failing to raise an objection which would have been overruled. *See Phillips*, 1999 OK CR 38, ¶ 104 989 P.2d at 1084.

In Proposition II, we find plain error occurred in the trial court's admission of State's Exhibits 10 and 11. These exhibits included inadmissible details of Appellant's prior convictions. *See Cooper v. State*, 1991 OK CR 26, ¶ 16, 806 P.2d 1136, 1139; *Bean v. State*, 1964 OK CR 59, 392 P.2d 753. This evidence improperly influenced the jury to recommend an excessive sentence. Accordingly, Appellant's sentence is modified to life imprisonment.<sup>1</sup>

In Proposition III, the only error in this case is the admission of certain irrelevant details of Appellant's prior convictions. Appellant's sentence has been modified accordingly. No further relief is necessary.

**DECISION**

The Judgment is **AFFIRMED**. The Sentence is **MODIFIED to life imprisonment**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF POTTAWATOMIE COUNTY  
THE HONORABLE DOUGLAS L. COMBS, DISTRICT JUDGE

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**OPINION BY: LUMPKIN, V.P.J.**

CHAPEL, P.J.: CONCUR  
C. JOHNSON, J.: CONCUR  
A. JOHNSON, J.: CONCUR  
LEWIS, J.: CONCUR

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<sup>1</sup> While I question the appropriateness of modifying a sentence of a term of years to life imprisonment, I accede to the decision of the majority in this case.