

AUG 29 2002

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

NANCY S. PARROLL
CLERK

KARYN JO WEBB,)	
)	
Appellant,)	NOT FOR PUBLICATION
)	
-vs-)	No. F-2001-985
)	
STATE OF OKLAHOMA,)	
)	
Appellee.)	

SUMMARY OPINION

STRUBHAR, JUDGE:

Appellant, Karyn Jo Webb, was tried by a jury in the District Court of Tulsa County and convicted of Injury to a Minor Child in Case No. CF-98-6255. The case was tried before the Honorable Thomas C. Gillert. The jury assessed punishment at fourteen years imprisonment and the trial court sentenced Appellant accordingly. From this Judgment and Sentence Appellant has appealed to this Court.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we reverse and remand for a new trial. In reaching our decision, we considered the following propositions of error and determined this result to be required under the law and the evidence:

- I. Ineffective assistance of counsel prevented Appellant from establishing her innocence.

- II. The trial court erred in failing to provide a lesser included instruction.

In her first proposition, Appellant claims she was denied her Sixth Amendment right to the effective assistance of trial counsel. Appellant asserts that defense counsel rendered deficient representation by failing to investigate and present medical evidence to show that the child's injuries could have been caused by means other than shaking, by failing to discover and utilize exculpatory evidence in the available medical records, by failing to conduct meaningful cross examination of the State's medical experts, by failing to discover and utilize Appellant's statement to the police and by failing to find and present character evidence.

"To prevail on a claim of ineffective assistance of counsel, Appellant must overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance by showing: [1] that trial counsel's performance was deficient; and [2] that he was prejudiced by the deficient performance." *Humphreys v. State*, 947 P.2d 565, 577-78 (Okl.Cr.1997). See also *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). "To establish prejudice, Appellant must show a reasonable probability that, but for trial counsel's errors, the result of his [trial] would have been different." *Humphreys*, 947 P.2d at 578. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*,

466 U.S. at 694, 104 S.Ct. at 2068. Appellant must demonstrate that counsel's representation was unreasonable under prevailing professional norms and that the challenged action could not be considered sound trial strategy. *Id.* at 688-89, 104 S.Ct. at 2065-66.

To facilitate review of the alleged deficiencies not supported by the trial record, this Court granted Appellant's request for an evidentiary hearing on Sixth Amendment claims pursuant to Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2002). This hearing was held on April 30, 2002. Although the district court found that trial counsel was left without a medical expert five days prior to trial, did not request a continuance or make any effort to retain another medical expert, but instead relied upon his own review of the medical records and did not understand the significance of venous sinus thrombosis, and was aware of the existence of various character witnesses but decided not to use them, the district court concluded that Appellant was not denied her Sixth Amendment right to effective assistance of trial counsel. We disagree.

While it is true that trial counsel did make an initial attempt to secure a medical expert, when this attempt failed, he did not properly seek a continuance, he made no attempt to get another expert witness to testify or even get an expert to help him understand the medical records. This was

particularly important in a case where the most significant part of the State's case against Appellant was the testimony of medical experts. Upon deciding to defend this case without the assistance of a medical expert, trial counsel attempted to show that his client was not the type of person who would harm a child and he did so without utilizing available character witnesses. Trial counsel's performance was in fact deficient, was not sound trial strategy, and prejudiced Appellant. As Appellant was denied her Sixth Amendment right to effective assistance of counsel, this case should be remanded to the district court for a new trial.

As this case requires relief be granted on the issue raised in Proposition I, we decline to address that raised in Proposition II.

DECISION

The Judgment and Sentence of the trial court is **REVERSED** and **REMANDED** for a **NEW TRIAL**.

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

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