

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RICHARD HAROLD BAZEMORE,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

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)
) **NOT FOR PUBLICATION**
)

) **Case No. F-2012-499**
)

) **FILED**
) **IN COURT OF CRIMINAL APPEALS**
) **STATE OF OKLAHOMA**

) **MAY 15 2013**
)

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

LUMPKIN, JUDGE:

Appellant, Richard Harold Bazemore, was tried by jury and convicted of Sexual Abuse of a Child (Counts I-VI) (10 O.S.Supp.2008, § 7115) and Lewd or Indecent Acts With a Child Under Sixteen (Count VIII) (21 O.S.Supp.2008, § 1123) in the District Court of Oklahoma County, Case Number CF-2011-2365.¹ The jury recommended as punishment life imprisonment each in Counts I through VI and imprisonment for twenty-five (25) years in Count VIII. The trial sentenced accordingly and assessed a victim's compensation assessment of \$50.00 in each count, a \$150.00 laboratory fee, and \$300.00 fee for the preparation of the Pre-Sentence Investigation Report. The trial court further ordered the sentences in Counts I through VI to run currently with each other but consecutively to Count VIII.² It is from this judgment and sentences that Appellant appeals.

¹ The jury acquitted Appellant of Exhibiting Obscene Materials to a Child (Counts VII) (21 O.S.Supp.2008, § 1021).

² Appellant will be required to serve 85% of his sentences pursuant to 21 O.S.Supp.2009, § 13.1.

Appellant raises the following propositions of error in this appeal:

- I. Numerous instances of prosecutorial misconduct deprived Appellant of a fair trial.
- II. Because the State failed to present evidence of separate and distinct offenses, Appellant's convictions for six counts of abuse cannot stand.
- III. The trial court exceeded its authority when it assessed costs in excess of the statutory maximum.

In Proposition One, we find that Appellant waived appellate review of his prosecutorial misconduct claim for all but plain error when he failed to raise these specific challenges as trial. *Harmon v. State*, 2011 OK CR 6, ¶ 85, 248 P.3d 918, 945; *Romano v. State*, 1995 OK CR 74, ¶ 54, 909 P.2d 92, 115. As Appellant has not shown the existence of an actual error, we find that plain error did not occur. *Hogan v. State*, 2006 OK CR 19, 139 P.3d 907; *Simpson v. State*, 1994 OK CR 40, ¶ 26, 876 P.2d 690, 698-99. The sex toys as well as the shoebox in which they were discovered were part of the *res gestae* of the offenses and the prosecutor properly sought to introduce them into evidence. *Warner v. State*, 2006 OK CR 40, ¶ 68, 144 P.3d 838, 868. As Appellant testified concerning the shoebox and sex toys on direct-examination, the prosecutor's cross-examination of Appellant concerning the items was proper. *Lott v. State*, 2004 OK CR 27, ¶ 127, 98 P.3d 318, 350; 12 O.S.2011, § 2611(C). Although some of the prosecutor's questions to the victim could have evoked an emotional response from the jury, the prosecutor did not overtly seek sympathy for the victim. *Jackson v. State*, 2007 OK CR 24, ¶ 27, 163 P.3d 596, 604; *Warner*, 2006 OK CR 40, ¶ 190, 144 P.3d at 890. As the victim was a child of

tender years asked to discuss an extremely sensitive subject and admittedly reluctant to testify, we find that the prosecutor's questions were proper. See *Powell v. State*, 2000 OK CR 5, ¶ 79, 995 P.2d 510, 529; *Carol v. State*, 1988 OK CR 114, ¶ 6, 756 P.2d 614, 616-17. This Proposition is denied.

In Proposition Two, Appellant challenges the sufficiency of the evidence supporting his convictions. Reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found each and every element of the six offenses of sexual abuse of a child as well as each and every element of the offense of lewd or indecent acts with a child under 16 beyond a reasonable doubt. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204; 10 O.S.Supp.2008, § 7115; 21 O.S.Supp.2008, § 1123.

To the extent that Appellant's argument could be interpreted as also raising double punishment, double jeopardy, or sufficiency of notice claims within this proposition, we find that Appellant has waived the alleged errors. *Murphy v. State*, 2012 OK CR 8, ¶ 23, 281 P.3d 1283, 1291; Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2013) ("Merely mentioning a possible issue in an argument or citation to authority does not constitute the raising of a proposition of error on appeal."). This Proposition is denied.

In Proposition Three, we find plain error occurred. Title 22 O.S.Supp.2002, § 982(A) establishes that the assessment of a presentence investigation fee shall be "not less than Five Dollars (\$5.00), nor more than Two

Hundred Fifty Dollars (\$250.00).” As the trial court ordered Appellant to pay a \$300.00 presentence investigation fee, we find that Appellant has shown the existence of an actual error that is quite clear and obvious on the record despite the absence of any objection. *Simpson*, 1994 OK CR 40, ¶ 26, 876 P.2d at 699. As the presentence investigation fee exceeds the statutory maximum, we further find that Appellant has shown that the error affected his substantial rights. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. Reviewing this plain error in the same manner as preserved error we cannot say that the error was harmless. *Simpson*, 1994 OK CR 40, ¶ 2, 876 P.2d at 692 (holding that plain error, like preserved error, is subject to harmless error analysis). Therefore, we modify the presentence investigation fee from \$300.00 to \$250.00.

DECISION

Appellant’s convictions are hereby **AFFIRMED**, but the presentence investigation fee is modified to \$250.00. This matter is **REMANDED** to the District Court for further proceedings consistent with this Opinion. The Judgment and Sentences are otherwise **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2013), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE BILL GRAVES, DISTRICT JUDGE

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OPINION BY: LUMPKIN, J.
LEWIS, P.J.: CONCUR
SMITH, J.: CONCUR
C. JOHNSON, J.: CONCUR
A. JOHNSON, J.: CONCUR

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