IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BENJAMIN HARRY CRIDER, II	)	
	)	Not For Publication
Appellant,	)	
v.	)	Case No. F-99-1422
	)	
THE STATE OF OKLAHOMA	)	
	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, JUDGE:

Benjamin Harry Crider, II, was tried by jury and convicted of Murder in the First Degree in violation of 21 O.S.Supp.1999, § 701.7, in the District Court of Oklahoma County, Case No. CF-98-2944. In accordance with the jury's recommendation the Honorable Tammy Bass-Jones sentenced Crider to life imprisonment. Crider appeals from this conviction and sentence and raises nine propositions of error:

I. The evidence produced at trial was insufficient to prove the crime of murder beyond a reasonable doubt;
II. Crider's trial was infected throughout with improper, irrelevant, and purely speculative expert opinion which, when considered as a whole, deprived Crider of a fair trial;
III. The trial court erred in excluding evidence of an alternative suspect;
IV. The admission of derivative testimonial evidence arising from the illegal search of Crider's residence violated his constitutional rights;
V. Plain error was committed when Detective Neilson was allowed to insinuate to the jury that Crider had sexually molested Crystal Dittmeyer;
VI. Extraneous evidence, not admitted at trial, was injected into the jury deliberations;
VII. Misconduct during closing arguments irrevocably tainted Crider's trial; and

VIII. The accumulation of error in this case deprived Crider of due process.

After thorough consideration of the entire record before us on appeal including the original record, transcripts, briefs and exhibits of the parties, we find error in Proposition II requires reversal. We do not address the issues raised in the remaining propositions.[1]

We briefly set forth facts. Twelve-year-old Crystal Dittmeyer disappeared sometime after 1:00 p.m. on Thursday, June 13, 1996. Crider was Crystal's stepfather. The State alleged Crider injured or killed Crystal at the family apartment, removed her body in a garment bag, transported it in his state-issued car, and disposed of it at an unknown location. The State presented circumstantial evidence, including: (1) a small pool of Crystal's blood and a bloody towel found in the master bedroom; (2) disarray in the master bathroom, which Crystal was not allowed to use; (3) Crider's inability to

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[1] We briefly address the issue of prosecutorial misconduct. In Proposition VII Crider complains of prosecutorial misconduct in closing argument. We agree that prosecutors repeatedly improperly attempted to shift the burden to Crider to answer where Crystal was and who killed her, asked the jury to have sympathy for Crystal and her family in remarks not invited by defense counsel's closing statement, and appealed to societal alarm by stressing that jurors would decide whether any body would be safe, and arguing no body would be were Crider acquitted (in context, these statements were not references to Crystal's missing body). *See, e.g., Jackson v. State*, 1988 OK CR 236, 763 P.2d 388, 390; *Wilson v. State*, 1998 OK CR 73, 983 P.2d 448, 470, *cert. denied*, 528 U.S. 904, 120 S.Ct. 244, 145 L.Ed.2d 205 (1999); *Martinez v. State*, 1999 OK CR 33, 984 P.2d 813, *cert. denied*, 529 U.S. 1102, 120 S.Ct. 1840, 146 L.Ed.2d 782 (2000). These errors, standing alone, do not require relief, but we admonish the prosecutors to avoid these arguments in the future. Also in closing argument the prosecutor, Mr. Wintory, stressed the importance of the doctor's evidence in refuting Crider's believability, and incorrectly stated that this was not the State's witness (arguing that "his doctor" could not support Crider's claim of illness). In fact, Dr. Diehl was called by and testified for the State, and Mr. Wintory conducted the direct examination. We note that throughout the lengthy trial counsel engaged in squabbling, bickering, and other unpleasant activity with one another and the trial court. While neither side's conduct was beyond reproach, the prosecution received the

account for time discrepancies and excess mileage on his state-issued car, and inconsistencies in his explanations; (4) a patterned injury resembling a bite mark on Crider's left forearm; (5) certain sections of the back seat in Crider's state-issued car reacted positively to luminol, a presumptive test for blood, and one spot contained a mixture of human DNA from which Crystal could not be excluded; (6) areas where Crider had the opportunity to hide or dispose of Crystal's body; and (7) Crider's garment bag was missing and he purchased a new one after Crystal's disappearance.[2]

In Proposition II Crider complains about three separate areas of expert opinion. In three subpropositions he argues (a) that the State's expert evidence regarding Crider's patterned injury was not helpful to the trier of fact and should not have been admitted because it did not meet scientific standards of reliability; (b) the evidence of luminol tests conducted in Crider's state car should not have been admitted because it was irrelevant and did not assist the trier of fact; and (c) Detective Bemo's lengthy testimony and exhibits regarding a rural area of Yukon and discourse on general ways in which suspects might dispose of bodies was irrelevant, confusing, and misleading to the jury. Crider claims he was prejudiced by each of these areas of testimony. He preserved these issues exhaustively by repeated objections at trial.

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bulk of admonishment from the trial court. This Court understands the strong emotions generated by this case, but we strongly encourage counsel to refrain from this type of conduct.

[2] Police searched Crider's apartment with a warrant on June 21, 1999, and generated substantial evidence regarding the new garment bag. The trial court properly ruled that the warrant was defective and that the search's scope exceeded the warrant, and correctly sustained Crider's motion to suppress all the direct evidence of the search.

Each claim of error has some merit, and together the errors warrant relief. We begin our analysis of all three claims with the statutes governing admissibility of evidence and expert opinion testimony. Relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[3] All relevant evidence is admissible except as otherwise provided by law, but irrelevant evidence is not admissible.[4] "Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise."[5] Any evidence which did not tend to make more or less probable a fact of consequence to the question of whether Crider killed Crystal should not have been admitted. Nor should the trial court have admitted relevant evidence where its probative value on the question of Crider's guilt or innocence was substantially outweighed by the danger that it would confuse the issues or mislead the jury.

"If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education

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[3] 12 O.S.1991, § 2401.
[4] 12 O.S.1991, § 2402.
[5] 12 O.S.1991, § 2403.

may testify in the form of an opinion or otherwise."[6] The technical or specialized knowledge offered must help the jury understand the evidence or determine a fact in issue. If the jury can reach its conclusion without expert advice, or if the opinion concerns an irrelevant, confusing or misleading fact, it should not be admitted.

In Subproposition A, Crider complains the State's forensic odontologist, Dr. Coury, should not have been allowed to present his opinion on the nature and source of Crider's patterned injury.[7] Dr. Chrz also gave an opinion based on the same evidence. This evidence derived from a novel application of scientific techniques. We first discuss Crider's complaint about the method Dr. Coury used to determine whether Crystal could have been the source of Crider's patterned injury. The defense, the dentists, the prosecutor, and the trial court all agreed Dr. Coury employed a novel method in conducting his analysis. On appeal the State suggests the only "novel" element is the lack of dental casts. This is precisely the point. All three experts agreed that any bite mark analysis attempting to exclude or include any individual as a biter should ideally be made using direct comparison with a dental cast, recent photographs

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[6] 12 O.S.1991, § 2702.

[7] The experts' opinion had three parts – whether the patterned injury was a bite mark, if so whose, and whether it could have been made by the car part Crider claimed was the source of the injury. In Dr. Coury's opinion the patterned injury was a probable bite mark, Crystal was possibly the biter, and he could exclude the car part. Dr. Chrz believed the patterned injury was a possible bite mark, Crystal was possibly the biter, and he had not analyzed the car part evidence, but thought it would be very difficult for that to be the source of Crider's injury. Dr. Glass, testifying for Crider, stated there was not enough information from the June 20th photographs for him to analyze the patterned injury as a bite mark, Dr. Coury's technique for determining whether Crystal was a potential biter lacked any scientific basis and he did not

or the individual's teeth and the patterned injury. That was not possible here since Crystal's body was never found. Not only were there no dental casts of Crystal's teeth, there were no contemporaneous dental records.

Dr. Coury searched for other information which might help him extrapolate Crystal's probable bite pattern. Crystal was twelve years old when she disappeared. Her last available dental x-rays were taken when she was seven. They show her baby teeth, with the permanent teeth visible behind them still in her jawbone. Dr. Coury had four Glamour Shots Kids photographs, where Crystal's smile showed her front teeth, taken when she was eleven. The record is unclear as to when, but at some point before her disappearance Crystal saw an optometrist, who measured the interpupillary distance between her eyes. Another photograph taken when Crystal was ten years old showed her wearing a sweater with buttons, and Dr. Coury obtained a button from that sweater.

First Dr. Coury examined the x-rays. He noted that the x-rays themselves had inherent distortion and magnification problems. Although dentists use a standard mathematical formula to allow for those problems, Dr. Coury could not use the formula because he did not have the necessary information. He confirmed that the x-rays were taken with an 8-inch source, but could not determine the distance from the teeth to the film, or the film to

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enough information to make that analysis, and the car part could have been the source of the injury.

the x-ray source. Dr. Coury further agreed that nobody could determine the distance from the permanent teeth – the objects he sought to measure – to any certain point, since the permanent teeth were still embedded in Crystal's jaw and could not be accurately measured. In addition, all the experts agreed x-ray films contain some magnification, and Dr. Coury could not determine to what extent the film itself magnified the image of Crystal's permanent teeth. As he could not solve for those variables, Dr. Coury could not quantify or resolve the problems of x-ray distortion and magnification.

Acknowledging the distortion and magnification problems, Dr. Coury hand-traced the outline of the biting edges of Crystal's permanent teeth from their position within the jawbone as seen on the x-rays. Dr. Coury noted that the four upper incisors were most relevant to his analysis of Crider's patterned injury. However, given the distortion in the photographs and because the outside incisors appeared to be turning in the jaw and were possibly not yet in place, Dr. Coury only used the two central incisors in reaching his conclusion. Ultimately, rather than compare the central incisors' whole biting surface with Crider's patterned injury, Dr. Coury looked only at a portion of the two central incisors and the space between Crystal's teeth as measured from the x-rays and photographs. Dr. Coury admitted that although the permanent teeth in Crystal's jaw would have remained the same size, the space between her front teeth might have changed as she aged. He explained he chose this portion of the bite surface because it best correlated with the dimension of Crider's

patterned injury. Thus Dr. Coury's opinion regarding Crystal's possible dentition at the time of her disappearance rests on a portion of the biting surface of two teeth, chosen because it fit the State's pre-existing theory that Crystal caused the patterned injury on Crider's arm.

Dr. Coury next used the four Glamour Kids photographs taken when Crystal was eleven. He measured the distance between Crystal's pupils in each picture. He then took the interpupillary distance measurement from her optometrist's exam and used it for a known actual distance correlation, comparing it with the eye measurements he had taken from each picture. He used this comparison to determine the ratio between the actual known (optometrist) dimensions and the dimensions in the Glamour Shots pictures. Dr. Coury figured the ratio for all four photographs to determine the actual dimensions of Crystal's face in the photographs. Although the optometrist's measurement was referred to as a known distance correlation, the record does not show when or how that measurement was taken, exactly what portion of the eye it measured, or whether that matched the portion of the eyes Dr. Coury measured in each photograph. Dr. Coury also measured the button from one of Crystal's sweaters and compared it with the picture of the same button visible in a fifth, older, photograph, as a further known actual distance correlative. Dr. Coury was aware that camera distortion affected each of the four Glamour Shots pictures, and in fact he got four different pupil-to-pupil measurements. He explained that he used all four measurements to make

sure he was "in the ballpark". Using the ratio determined from the button and interpupillary measurement, Dr. Coury measured the actual distance of the central biting surface of Crystal's central incisors, as seen in the four photographs, as 17.67 millimeters, 17.18 millimeters, 16.38 millimeters, and 16.1 millimeters, depending on the picture. Dr. Coury neither averaged these figures nor used a median figure among the pictures. Instead, from the four possible figures, he testified that the actual biting surface of part of Crystal's central incisors was 17.67 millimeters. The record offers no explanation as to why Dr. Coury picked this number to be the most accurate of the four, other than that his comment that it best correlated with Crider's patterned injury.

Dr. Coury subsequently used his hand tracings and made computer-generated images of the x-ray film showing the central incisors, then compared these with the patterned injury on Crider's arm. He also compared the 17.67 millimeter measurement of Crystal's projected bite pattern. He determined that Crystal could not be excluded as the biter and stated he believed she was a possible biter. Dr. Coury admitted the computer-generated overlays, which duplicated the x-ray film, suffered from distortion and magnification problems and would have been larger than Crystal's actual teeth. In his opinion, the numerous uncertainties caused by distortion, magnification, and variable measurements did not invalidate his calculations because he was trying to exclude a person as a source of the injury, not specifically identify a person.

Both parties agree this Court has held bite mark evidence is generally admissible.[8] However, the State wrongly suggests this decides the matter. We held bite mark evidence was admissible where an expert compared a patterned injury with a dental mold or the alleged biter's actual teeth. No such comparison was possible here. As Dr. Coury used a completely untested method of his own devising in order to determine whether Crystal could have cause Crider's patterned injury, the trial court was correct in holding an *in camera* hearing to determine the admissibility of this evidence.

Daubert v. Merrill Dow Pharmaceuticals is the seminal case regarding admission of expert opinion testimony.[9] This Court adopted *Daubert* in *Taylor v. State.*[10] Scientific and other expert opinion evidence is admissible if it is reliable and assists the trier of fact. The trial court acts as a gatekeeper to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."[11] In determining whether proffered evidence meets a standard of scientific reliability the trial court must review the following factors: (1) whether the proposed method can be or has been tested, i.e. its falsifiability,

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[8] *Kennedy v. State*, 1982 OK CR 11, 640 P.2d 971, 978. In *Wilhoit v. State*, 1991 OK CR 50, 816 P.2d 545, we reversed and remanded because defense counsel was ineffective for failing to pursue bite-mark evidence where the failure had no strategic purpose. The State cites cases from several other jurisdictions holding bite mark evidence was acceptable. However, none of those cases involve the peculiar facts present here. Either experts based their opinions at least in part on comparison of the injury with dental casts of the suspected biter, or the opinion went only to identification of a patterned injury as a bite mark.

[9] 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). *Daubert* referred specifically to scientific evidence, but was expanded to include expert testimony based on technical or other specialized knowledge in *Kumho Tire v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

[10] 1995 OK CR 10, 889 P.2d 319, 328-29.

[11] *Daubert*, 509 U.S. at 589, 113 S.Ct. at 2795.

refutability or testibility; (2) whether the method is subject to peer review and publication, or other similar scrutiny by the scientific community; (3) the method's known or potential rate of error; and (4) the proposed technique's general acceptance in the relevant scientific community.[12] We determined in *Taylor* that a trial court's decision to admit novel scientific evidence (as was presented in this case) should be subject to our independent, thorough review, rather than simply a review for abuse of discretion.[13] We have used this standard of review in subsequent cases.[14] Recently *Gilson v. State,*[15] without citing *Taylor* or discussing the appropriate standard of review, appeared to apply the abuse of discretion standard. However, in reaching its conclusion the *Gilson* Court conducted a thorough independent review of the testimony. We conclude that despite the phrasing in *Gilson* the Court adheres to its determination in *Taylor*, and consequently conduct an independent review of the evidence. Under either standard the trial court should not have admitted Drs. Coury and Chrz's opinions as to whether Crystal could have been excluded as the cause of Crider's patterned injury.

Daubert first directs the reviewing court to determine whether testimony suggests the proposed method can be or has been tested, or is capable of being falsified or refuted by independent repetition. The testimony here

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[12] *Young v. State,* 1998 OK CR 62, 992 P.2d 332, 340, *cert. denied,* 528 U.S. 837, 120 S.Ct. 100, 145 L.Ed.2d 84 (1999); *Taylor,* 889 P.2d at 330; *Daubert,* 509 U.S. at 593-95, 113 S.Ct. at 2796-97.

[13] *Taylor,* 889 P.2d at 332.

[14] *Young,* 992 P.2d at 340-41; *Wood v. State,* 1998 OK CR 19, 959 P.2d 1, 18.

overwhelmingly shows Dr. Coury's method had never been tested. The State's consistent characterization of this method as a novel application of known techniques is misleading. While forensic odontologists may routinely use x-ray films for analytical or diagnostic purposes, testimony showed that Dr. Coury could not employ the mathematical formulae used to correct for inherent distortion and magnification problems. Thus insofar as use of x-rays is a routine technique in dentistry, the routine was not used in Dr. Coury's method. Evidence suggested optometrists routinely measure interpupillary distance, but Dr. Coury did not use those measurements for an optometrical purpose. Mathematicians frequently compare known factors to an unknown in order to determine ratio and proportion. However, the mere use of a standard mathematical technique does not render Dr. Coury's method commonplace – any formula is only as good as the data entered into it. Following the State's suggestion, the trial court noted that Dr. Coury's measurements had not been tested or done before, "not specifically in a bite mark case but in other retrospects [sic]." This misstates the *Daubert* analysis. "Scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes."[16] The question is not whether these techniques may be used for other purposes in other fields, but whether they have been shown to be reliable when used for the purpose offered. The *in camera* testimony offered no claim that Dr. Coury's method had ever been used or even tested elsewhere. There

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[15] 2000 OK CR 14, 8 P.3d 883, 908.

was no evidence regarding the likelihood that the method could be tested or refuted, or how easily the results could be falsified. Dr. Chrz testified only that he discussed Dr. Coury's work, not that he himself tried to replicate it.

Turning to the second factor, the evidence showed Dr. Coury's method had neither been published nor subjected to peer review, nor apparently subjected to any type of rigorous scrutiny within the scientific community. The trial court noted that Dr. Chrz had reviewed Dr. Coury's work. However, Dr. Chrz said only that he had looked at Dr. Coury's technique, not that he had examined the scientific method. He stated the technique was "extremely novel" and noted Dr. Coury did what he could with the materials he had in order to "get in the ballpark" and "get a feel" for whether Crystal could be excluded as a potential biter. Dr. Chrz's abbreviated evaluation neither rises to the level of scrutiny normally associated with peer review, nor amounts to an endorsement of Dr. Coury's methods. Regarding the third factor, we agree with the trial court that the error rate was not established by the evidence. As the method was completely new and untested, nobody ventured testimony regarding the potential rate of error.

Turning to the fourth factor, *Daubert* suggests that a known technique with only minimal support in the scientific community may justifiably attract skepticism.[17] Here, we are presented with an unknown technique with no support in the scientific community. Dr. Chrz noted the lack of materials

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[16] *Daubert*, 509 U.S. at 591, 113 S.Ct. at 2795-96; *Taylor*, 889 P.2d at 330.

usually necessary to reach a conclusion excluding a specific person as the source of a patterned injury. He testified that the technique, although extremely novel, worked very well under those circumstances as long as the results were not stated to any degree of scientific certainty. Dr. Coury also noted that he was not attempting to identify or exclude any person with scientific certainty. Dr. Glass believed Dr. Coury's methods were completely untested, riddled with error, and untrustworthy.

Daubert noted that, in determining the admissibility of opinion evidence, a trial court should keep in mind all the rules of evidence. Section 2703 provides that expert opinions should be based on facts or data "of a type reasonably relied upon by experts in the particular field."[18] All the experts at trial relied on the American Board of Forensic Odontology, Inc. [ABFO] published guidelines for analyzing bite marks. The introductory standards to the guidelines note that any new analytical methods should be (a) thoroughly explained, (b) scientifically sound and duplicated by other forensic experts, and (c) where possible should use at least one ABFO accepted technique.[19] Regarding analysis of a particular person as a suspected biter, the guidelines suggest the forensic dentist should (1) get recent dental records; (2) photograph the suspected biter's teeth using particular standards; (3) conduct a clinical examination, noting any idiosyncrasies which would aid in identifying the

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[17] *Daubert*, 509 U.S. at 594, 113 S.Ct. at 2797.
[18] 12 O.S.1991, § 2703; *Daubert*, 509 U.S. at 595, 113 S.Ct. at 2797-98.

person's bite; (4) take dental impressions and bite exemplars, including sample bites and study casts; and (5) where appropriate, get saliva samples.[20] None of these things were possible in this case, and the method was not duplicated by other experts. Given these deficiencies, Dr. Coury's method does not appear to comport with the ABFO guidelines recommendations for new scientific analysis of bite mark evidence.

The trial court indicated the evidence would be admitted unless the defense offered studies showing that Dr. Coury's method was totally unreliable. This stands the *Daubert/Taylor* analysis on its head. The trial court is a gatekeeper charged with determining whether evidence shows a particular novel scientific method is reliable. A *Daubert* hearing was necessary here because the State wished to introduce evidence of a novel scientific technique. All parties agreed the technique was untested. As the party wishing to introduce the evidence, the State had the burden to produce evidence from which the trial court could determine whether, under the *Daubert* factors, the technique was reliable and would assist the jury. The trial court erred in shifting the burden and requiring the defense to produce studies showing that an untested method was unreliable.

Independent analysis of the *Daubert* factors does not support the trial court's conclusion that Dr. Coury's method was reliable. Looking further at the

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[19] *Bitemark Guidelines & Standards*, American Board of Forensic Odontology, Inc. DBA 10281 (Appellant's Brief, Appendix].

[20] *Bitemark Guidelines & Standards*, DBA 10279, DBA 10283-84.

§ 2702 requirements for expert opinion testimony, the evidence also does not support the trial court's conclusion that the expert opinions reached through Dr. Coury's method assisted the jury. Expert evidence must be necessary to explain some scientific or technical issue which lay jurors would otherwise find difficult to understand. The evidence must require an explanation involving some special skill or knowledge before jurors can understand the facts and draw conclusions.[21] If the expert opinion does not help jurors understand the evidence, it is not relevant. After engaging in the complicated exercise described above, the most either Dr. Coury or Dr. Chrz would say was that Crystal was "possibly" the source of Crider's patterned injury. The ABFO guidelines define a "possible" biter as "could have done it; may or may not have"; and "teeth like the suspect's could be expected to create a mark like the one examined but so could other dentitions."[22] In common usage "possible" means something that may or may not be done, or could happen.[23] "Possible" as an ABFO term of art does not appear to differ from the word's common usage. We must thus conclude Dr. Coury and Dr. Chrz determined that, based on their analysis, Crystal might or might not have caused Crider's patterned

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[21] *Malicoat v. State*, 2000 OK CR 1, 992 P.2d 383, 398, *cert. denied*, 531 U.S. 888, 121 S.Ct. 208, 148 L.Ed.2d 146; *Gabus v. Harvey*, 1984 OK 4, 678 P.2d 253, 256.

[22] *Bitemark Guidelines & Standards*, DBA 10294. The accompanying ABFO comment notes that "possible" is "approximately synonymous with 'consistent with'" but is more generally understandable. *Id.*

[23] *See, e.g.*, The Merriam-Webster Dictionary (1997) at 572: "(1) being within the limits of ability, capacity, or realization (2) being something that may or may not occur (3) able or fitted to become." Black's Law Dictionary (5th Edition) at 1049, defines "possible" as "Capable of existing, happening, being, becoming or coming to pass; feasible, not contrary to nature of things; neither necessitated nor precluded; free to happen or not."

injury. The jury could have determined as much from looking at the pictures of the injury and taking the other evidence into account. Expert opinion was not necessary to suggest that Crystal could have bitten Crider. This "possibility" did not tend to make more or less probable any fact of consequence. The evidence was not only unreliable, it did not aid the jury.

We conclude after a thorough independent review that the scientific technique Dr. Coury used was neither reliable nor helpful to the jury. Drs. Coury and Chrz should not have testified, based on this method, that Crystal could not be excluded as the biter. Consequently there was no need to admit Dr. Glass's testimony regarding this method or conclusion. *Daubert* noted that expert evidence could be both "powerful and quite misleading" because jurors would have difficulty in evaluating it.[24] The substantial prejudicial effect of this evidence is apparent. This case was based on extremely weak circumstantial evidence. Jurors heard two experts use junk science to say Crystal could have bitten Crider. This was the best evidence connecting Crider to Crystal on June 13, 1996, and supporting the State's theory that Crider and Crystal engaged in a struggle which led to her death. Given the importance of the evidence to the State's case, and the substantial prejudice, we cannot say the erroneous admission of this evidence was harmless.

We briefly turn to Crider's remaining complaints about the bite mark evidence. After independent review of the evidence, we conclude the trial court

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[24] *Daubert*, 509 U.S. at 595, 113 S.Ct. at 2797-98.

did not err in allowing Drs. Coury and Glass to give opinions as to whether Crider's patterned injury was a bite mark. Both doctors testified that they followed the ABFO guidelines and accepted practices in reaching their conclusions. Evidence and case law indicate that, despite the ABFO recommendations, it is not uncommon for a dentist to form an opinion about a patterned injury merely from observation. Where there is no attempt to identify a person as the biter, the guidelines and practice offer more leeway for experts to determine whether a patterned injury may be a bite. Dr. Coury testified Crider's injury was "probably" a bite mark. The ABFO guidelines define "probable bitemark" as "The pattern strongly suggests or supports origin from teeth but could conceivably be caused by something else."[25] This opinion requires a higher degree of scientific certainty than the "possible" category, and could have assisted the jury in determining whether or not Crider's patterned injury was a bite. However, Dr. Chrz's opinion that the injury was a "possible" bite mark should not have been admitted, for the reasons discussed above. Dr. Glass testified that, using the ABFO guidelines, he did not have enough information to analyze the patterned injury as a bite mark. This opinion also could assist the jury in evaluating Dr. Coury's use of the ABFO guidelines.

We similarly conclude that the trial court did not err in admitting Dr. Coury's and Dr. Glass's opinions regarding the car part as a source of the injury. Dr. Coury took casts of the car part, similar to dental casts, and both

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[25] *Bitemark Guidelines & Standards*, DBA 10291.

experts compared photographs of Crider's injury to those casts as well as the part itself. Although they reached opposite conclusions, each expert used techniques well within the ABFO guidelines in conducting his analysis. However, Dr. Chrz examined neither the car part nor the casts, nor did any independent analysis. The trial court should not have admitted his opinion regarding whether the car part could have been the source of Crider's injury.

In summary, we first conclude that the trial court erred in admitting all expert opinion as to whether Crystal could be included or excluded as the source of Crider's patterned injury. We find this error is not harmless, and in conjunction with other evidentiary errors warrants relief. We further find that the trial court properly admitted Drs. Coury and Glass's opinions on the nature of the patterned injury itself, and whether or not the car part was its source.

In Subproposition B Crider claims the trial court erred in allowing the State to present evidence of luminol presumptive testing for blood in Crider's state vehicle. Over Crider's objection the State presented testimony and photographic evidence that five spots on the back seat upholstery of Crider's car reacted to a luminol test for blood. Luminol is a presumptive test; while it reacts to blood, it also reacts to bleach, metals and some other substances. Subsequent testing did not confirm the presence of blood in any of the five spots. However, a mixture of human DNA was found in one small spot. The State's expert determined Crystal could not be excluded from the DNA mixture and Crider's expert disagreed.

Both parties acknowledge that we have found luminol testing admissible as a presumptive test for blood.[26] The State argues this resolves this proposition. However, Crider raises a different issue. He argues that, since subsequent testing did not confirm the presence of blood, the luminol evidence was irrelevant, misleading and confusing to the jury. We agree. Evidence of luminol testing went to the presence of blood in Crider's car, tending to show that Crystal's body was there at some time after she disappeared. If no confirmatory testing had occurred the luminol evidence alone would be relevant as an indication that there might have been blood in Crider's car. If the areas which reacted to luminol were subsequently confirmed as blood, the luminol evidence would be relevant as supporting the finding of blood on the seat. However, here subsequent testing did not confirm the spots on the seat were blood. Since the spots were not blood, the luminol evidence alone did not tend to make any material fact at issue more or less likely.[27] However, it could mislead the jury and confuse the issues. Whether the State's expert witnesses believed the characteristics of the luminol reaction denoted the presence of blood became irrelevant when tests showed there was no blood. The State, apparently misunderstanding the claim, suggests that Crider's complaint goes

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[26] *Robedeaux v. State*, 1993 OK CR 57, 866 P.2d 417, 425, *cert. denied*, 513 U.S. 833, 115 S.Ct. 110, 130 L.Ed.2d 57 (1994). Throughout trial, Mr. Wintory cited *Slaughter v. State*, 1997 OK CR 78, 950 P.2d 839, *cert. denied*, 525 U.S. 886, 119 S.Ct. 199, 142 L.Ed.2d 163 (1998), in support of various claims that evidence was admissible, and the State relies on that case here. We note that *Slaughter* has no precedential value beyond the law of the case; nor did *Slaughter* do more than cite *Robedeaux* in a general discussion of luminol evidence. The admissibility of luminol evidence was not at issue in *Slaughter*.

[27] 12 O.S.1991, § 2401.

to the weight of the evidence rather than its admissibility. On the contrary. If the evidence was not relevant, it should not have been admitted regardless of Crider's ability to attack it on cross-examination.

The trial court should not have admitted evidence of the four spots which reacted to luminol but were not connected to any human agent through subsequent testing. However, evidence that the fifth spot reacted to luminol was admissible. That spot was significantly smaller than the other areas which reacted to luminol. As the small spot subsequently tested positive for human DNA, the jury might infer it could have been blood from the combination of its reaction to luminol and the presence of human DNA. This combination – a reaction to a presumptive test for blood plus DNA – tended to make more or less probable a material fact at issue.

Although we find one portion of the luminol evidence was admissible, the error in admitting the remainder of the evidence was not harmless. This evidence could only prejudice Crider. The State used it to infer through witnesses that a large amount of blood was present on the seat. The prosecutor argued in closing that Crider left transfers of blood on the seat in several different places when he loaded Crystal's body in the car. The State used the luminol evidence to support the theory that Crider put Crystal's body in his car and hid it somewhere before disposing of it permanently. The prosecutor specifically referred to "blood" when discussing the areas which had reacted to luminol. As subsequent tests did not confirm blood for any spot,

and only one small spot was mixed with DNA, this was misleading. Since the evidence of the four larger areas was irrelevant, it had no probative value. We are left only with the presence of substantial prejudice, confusion of the issues, and the danger the jury was misled.[28] In combination with other errors, this claim warrants relief.

In Subproposition C, Crider argues the trial court erred in allowing Detective Bemo to give irrelevant and speculative testimony. Prosecutors alleged Crider disposed of Crystal's body after he killed her. Crider could not account for all the mileage he put on his state car odometer. He also could not account for all his time on June 13 or on the following Saturday morning. Prosecutors argued Crider spent that time driving to unknown locations to hide Crystal's body. A variety of witnesses, including Detective Bemo, testified without objection that Crider (1) had a storage locker, and (2) had access to an empty house the family had recently rented but into which they had not yet moved. Crystal's body was not found in either place, and prosecutors argued that Crider could have used one or the other to hide Crystal temporarily. Prosecutors did not seek to admit any photographs of either location.

The day trial began, police received a tip that Crider might have disposed of Crystal's body in a rural area in Yukon near the house he formerly shared with his ex-wife. During the trial, police photographed the area and searched it thoroughly but did not find Crystal's body or any indication a body had ever

[28] 12 O.S.1991, § 2403.

been there. The State wanted to admit evidence of the Yukon location. The trial court ruled the State could discuss the location but prohibited any pictures showing digging or other aspects of the search for Crystal's body. The trial court stated it would allow the evidence since previous witnesses had testified that Crider's ex-wife and doctor lived in Yukon. Detective Bemo described the Yukon location in detail, comprising over twenty pages of transcript, and the State introduced one map and twenty-five pictures of the area. Crider's objection was overruled.

Relevant evidence must tend to make some fact at issue more or less probable. On appeal, the State echoes the prosecutor's trial argument that the extensive testimony and exhibits from Yukon were necessary because the State had to prove that Crider belonged to the class of persons who had access to or knowledge of a place where a body would be difficult to find. Such proof would certainly help the State's case. Detective Bemo's testimony did not provide that proof. Detective Bemo testified at length, with many pictures, about a place where Crider did not put Crystal's body. As she was not there, Crider's knowledge of the rural Yukon location did not put him in that class of persons who knew where to dispose of dead bodies. There was no other reason to admit this evidence.

The evidence about the Yukon property was not relevant as it did not tend to make Crider's ability to hide Crystal's body more or less probable. It neither placed Crider at the scene of any crime nor indicated his guilt, and

could only create prejudice through unwarranted suspicion.[29] The main unanswered question in this seven-week trial was the location of Crystal's body. With so little to go on, jurors were compelled to pay attention to any evidence which even suggested Crider might be guilty, relevant or not. Moreover, this evidence almost certainly misled the jury. Detective Bemo testified the Yukon property was the type of place where a person could bury a body without being observed, and where the elements could hasten decomposition. The jury was told the photographs had been taken within the last two weeks in response to a tip, and that police did not find Crystal in the stream on the property. However, prosecutors argued vigorously in closing that Crider could have disposed of Crystal at the Yukon location. Mr. Wintory said Crider put her in the creek and "got away with murder." In Proposition VI and the accompanying application for an evidentiary hearing, Crider claims one juror drove out to Yukon with her husband to verify the time frame after Detective Bemo testified. At the least, the emphasis on the Yukon location served to confuse the issues. Crider was charged with killing Crystal in Oklahoma City. Whether and where he put her after he killed her was peripheral to the crime itself.

We do not suggest the State could not argue that Crider might have disposed of Crystal's body in the Yukon area. He told police he went to Yukon the Saturday after Crystal's disappearance. He used to live in Yukon and was

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[29] *Morris v. State*, 1979 OK CR 136, 603 P.2d 1157, 1159.

familiar with the surrounding area. Like the evidence of the storage locker and rental house, this evidence would be relevant as an alternative reasonable explanation for Crider's time and mileage discrepancies and Crystal's disappearance. We hold merely that the lengthy, detailed exposition regarding an area where police searched and did not find any sign of Crystal did not assist the trier of fact. It had no probative value and was both prejudicial and misleading, and should not have been admitted. In connection with other errors, this requires relief.

Crider also claims Detective Bemo should not have testified generally about ways in which suspects may dispose of bodies, nor about his experience with the effects of the elements on decomposing bodies. Crider casts this testimony as improper and irrelevant personal opinion. However, Detective Bemo was testifying as an expert. Where there is not a question of novel scientific methods, admission of expert evidence is within the trial court's discretion.[30] We cannot say the trial court abused its discretion in admitting this evidence. The average juror has neither a specialized knowledge of the effect of the elements on dead bodies nor experience with ways in which suspects dispose of bodies in various situations.[31] The location or disposition of Crystal's body was a material fact at issue, as it tended to show whether or not she was dead. Detective Bemo's testimony helped the jury understand

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[30] *Taylor*, 889 P.2d at 331.
[31] 12 O.S.1991, § 2702; *Malicoat*, 992 P.2d at 398.

what may have happened to Crystal's body after her death and was proper expert opinion evidence.

In conclusion, after independent review we find in Proposition II that the trial court erred in admitting a portion of the expert opinion regarding the bite mark evidence. Although the remainder of the bite mark evidence was proper, Crider was substantially prejudiced by the error and it is not harmless. We find the trial court abused its discretion in admitting evidence of luminol testing and the Yukon location. These errors are not harmless because this evidence was completely irrelevant, misleading and prejudicial. Given the particular facts of this case, this Court cannot speculate on the jury's conclusions had they not heard this evidence. This proposition should be granted and the case should be reversed and remanded for a new trial.[32]

Decision

The Judgment and Sentence of the District Court is **REVERSED** and **REMANDED** for a new trial.

[32] Crider's request to exceed the ten-page limitation for reply brief, filed March 29, 2001, is **GRANTED**. His Application for Evidentiary Hearing on Extraneous Information, filed November 3, 2000, is **DENIED** as **MOOT**.

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OPINION BY: CHAPEL, J.

LUMPKIN, P.J.:	DISSENT
JOHNSON, V.P.J.:	CONCUR
STRUBHAR, J.:	CONCUR
LILE, J.:	DISSENT

LUMPKIN, PRESIDING JUDGE: DISSENT

History, once again, repeats itself. Just as the Court reached out to address an issue not raised in the appeal of *Taylor v. State*, 889 P.2d 319, 341 (Okl.Cr.1995)(Lumpkin, J., concur in result), the Court now seeks to apply the process adopted through *dicta* as a preemptive adjudication of an issue not ripe for adjudication in the present case.[1]

The Court's preemptive adjudication of a legal issue in this case arises by its extensive analysis of a process which was not used to identify the individual who made the bite marks on the arm of the Appellant. At most, the expert testimony merely advised the court and the trier of fact that the evidence could neither identify the victim as the maker of the marks on the Appellant's arm, nor could the evidence exclude the victim as the maker of the marks. At no time did the experts seek to establish that this process could identify the maker of the marks. The experts merely set out the procedures utilized in the attempt to identify the maker of the marks. As a result, evidence regarding the attempts that were made to identify the maker of the marks were relevant and not in any way prejudicial to the rights of the Appellant. The issue then, as well as now, turns on the question of the sufficiency of

[1] It is interesting that in the present case, the Court, in effect, applies the standard enunciated in *Frye v. United States*, 293 F. 1013, 1014(D.C.Cir.1923) in its adjudication of the admissibility of scientific evidence. As I stated in my separate writing to *Taylor*, "whatever the label, an appellate court, which is bound to the evidentiary record presented in the trial court and which verifies the trial court's decision through the use of peer review writings and analysis from other courts, is substantially applying the *Frye* standard." 889 P.2d at 343.

the evidence to convict. The direct and circumstantial evidence in this case is more than sufficient to sustain the findings of the trier of fact in this case. In its desire to apply this Court's holding in *Taylor* to the facts of this case, the Court disregards the actual facts presented to the jury and seeks to make an analytical statement not warranted under the evidence in this record.

The Court's opinion presents a tainted view of the bite-mark analysis in the case. The opinion would have us believe that the procedure used in the analysis was made up of distorted and unreliable figures.

However, a review of the actual method shows that the analysis was based on concrete evidence and common equations. First, the opinion presents the interpupillary measurement as unreliable because of a failure to show when or how the measurement was taken, exactly what portion of the eye it measured, or whether that matched the portion of the eyes Dr. Coury measured in each photograph. However, the trial transcript indicates that the interpupillary measurement is a standard based on the distance between the center of each pupil, and that such standards were adopted by Dr. Coury in his analysis. (Trial Tr. pg. 2938) To say that measurements made as part of routine optical exams are not reliable is rather obtuse. Eye care in this country has evolved to a trade standard by which one can take measurements from any eye care specialist, including interpupillary measurements, to any maker of

eyewear to obtain glasses or contacts which are patient and disorder specific.

The opinion also points out that Dr. Coury's measurements resulted in three different measurements. Nevertheless, all fell within a range of 1.57 millimeters. (Trial Tr. pg. 2947-49) This evidence was introduced solely to show that it is well within the realm of possibility that a specific individual perpetrated the probable bite-mark, and it was reliable to the level of certainty necessary to form this opinion. The greatest amount of room for error in this analysis was in the possibilities of any gap that might have been between the victim's front teeth. However, that possibility of error was minute when compared to the extraordinary difference between the actual injury and what the Appellant claims caused that injury.

Second, the opinion states that Crystal's teeth could not be accurately measured because they had not yet emerged. Still, expert testimony showed that the teeth involved in this inquiry were at a point of calcification such that the victim's teeth, at the time represented in the x-ray, were essentially the size they would remain throughout her life.

As previously stated, the bite-mark evidence was not presented to show the actual identity of the person making the mark on Appellant's arm. It was offered, and accepted by the court, to show the victim could not be excluded as a potential maker of the marks, nor could the victim be identified as the maker of the marks.

This Court consistently adheres to the standard of review set forth in *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), as set forth in the *dicta* of *Taylor v. State*, 889 P.2d 319 (Okl.Cr.1995) and our holding in *Gilson v. State*, 8 P.3d 883, 907-08 (Okl.Cr.2000). The test enunciated takes into account the following factors: 1) whether the proposed method can be or has been tested, i.e. its falsifiability, refutability or testibility; 2) whether the method is subject to peer review and publication, or other similar scrutiny by the scientific community; 3) the method's known or potential rate of error; and 4) the proposed technique's general acceptance in the relevant scientific community.

Granted, the methods in this case were novel as a whole. However, they cannot be said to fail the first prong of the *Daubert* test. Novel methods had to be imposed because this case presented a rather unique situation. The possible biter was missing and presumed dead. In fact, the methods are not novel in their individual application, but only in the utilization of those methods in combination.

There is nothing novel about optometric measurement, nor is there anything novel to the technique of using two measurements to determine a ratio. Both are settled scientific inquiries. American Board of Forensic Odontologists (ABFO) Guidelines allow for progression of accepted procedures through investigation using properly designed experiments or collecting information from observations. Though the method had not

been tested, it could clearly be repeated or replicated to test, refute or determine if falsified. Though the opinion states otherwise, ABFO accepted methods were utilized throughout the process designed by Dr. Coury. Indeed, upon review, Dr. Chrz, Vice-President of the nation's premier board of standards in the area of forensic odontology, stated the procedure followed good scientific method. "Dr. Coury followed the ABFO guidelines." (Trial Tr. pg. 3206)

Though Dr. Coury's method was not the subject of publication or wide-scale peer review, it was scrutinized by Dr. Chrz. According to Dr. Chrz, "Dr. Coury worked with the materials that he had at hand and he did it very, very well." (Trial Tr. pg. 3215) When asked if Dr. Coury used established techniques in a way that produced a reliable result, Dr. Chrz responded, "Yes." (Trial Tr. pg. 3215)

As I stated previously, it is important to note that the evidence obtained through the bite-mark analysis was not used to identify the injury unequivocably as a bite-mark, nor was it used to point out any one person as the biter. Rather, Dr. Coury used the ABFO terminology to describe the injury as a probable bite-mark, and to point out that there was no evidence, such as unique characteristics of tooth location or size of bite, which could eliminate Crystal as the possible biter. The jury was asked not to consider any information concerning the testimony other than the patterned injury as probably a bite-mark, and Crystal could not be excluded as the possible biter.

The District Court considered the questioned material in a *Daubert* hearing, and using its discretion determined that the evidence was reliable and, while not determinative, could be of assistance to the jury as the trier of fact. I find nothing in the record of this trial to show that the District Court abused its discretion in making that decision. However, I do find this Court, in this opinion, has rushed to seek to answer an issue which is not ripe for adjudication due to the fact the expert witnesses merely stated they could not exclude, or say the marks were made by, the victim.

In addition, I continue to urge my colleagues to abandon the use of the "reasonable hypothesis" test in cases involving circumstantial evidence. As I have previously written, this test was predicated solely upon federal caselaw, which has since been overruled, and therefore the Court is without a legal basis upon which to continue to apply this test. I have previously stated my belief this Court should adopt a unified *Spuehler*-type approach to evaluating the sufficiency of the evidence in all cases, whether they contain both direct and circumstantial evidence or whether they contain entirely circumstantial evidence. *See White v. State*, 900 P.2d 982 (Okl.Cr.1995)(Lumpkin, J., specially concurring). I re-urge that here because the Court seeks to use a standard for evidentiary review which is not supported by the law.