

NOV 18 2002

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA
MICHAEL S. RICHIE
CLERK

JOSE FAJARDO,)
) NOT FOR PUBLICATION
Appellant,)
v.) Case No. F 2001-1506
)
THE STATE OF OKLAHOMA,)
)
Appellee.)

SUMMARY OPINION

JOHNSON, VICE-PRESIDING JUDGE:

Appellant, Jose Fajardo, was convicted by a jury in Marshall County District Court, Case No. CF 1999-157, of Lewd Molestation, in violation of 21 O.S. § 1123 (Count I), and Indecent Proposal to a Child, in violation of 21 O.S. § 1123 (Count II).¹ Jury trial was held July 28, 2001, before the Honorable John H. Scaggs, District Judge. The jury set punishment at five (5) years imprisonment on Count I and fifteen (15) years imprisonment on Count II. Formal sentencing was held on October 24th, 2001. Judge Scaggs sentenced Appellant in accordance with the jury's verdicts and ordered Appellant to serve the sentences consecutively. Appellant filed this appeal.

Appellant raises nine propositions of error:

1. The Court erred in failing to excuse for cause Juror Waggoner and thereby denying Mr. Fajardo his right to a fair trial.
2. Appellant was denied effective assistance of counsel by counsel's failure to timely subpoena and have present for trial a critical defense witness.

¹ Appellant was charged in a fifth amended Information with Count III - Rape by Instrumentation. He was found not guilty of that offense.

3. Appellant's alleged acts constitute one continuous act therefore the convictions violate constitutional double jeopardy protections.
4. Improper prosecutorial comments were fundamental in denying Mr. Fajardo a fair trial.
5. The court erred in admitting photographs of Shariah Lewis presented by the State.
6. The court erred in not allowing defense counsel to rebut testimony of Shariah Lewis by presenting evidence of untruthful statements.
7. The court erred in allowing another attorney to be at and participate in the trial that was not a party.
8. Because the sentences imposed are excessive under the facts and circumstances of this case, the sentences must be reduced.
9. The accumulation of errors occurring at trial, as evidenced by the aforementioned propositions, mandates that this case be remanded for a new trial.

After thorough consideration of the record before us, including the Original Record, transcripts, and briefs and arguments of the parties, we have concluded that the claim raised in Proposition Seven warrants relief. Appellant's convictions must therefore be reversed and remanded for a new trial.

With respect to Proposition Seven, we find the trial court committed reversible error and violated Appellant's right to due process when it allowed a "special advocate" for the victim to participate in the trial. There is no statutory authority for the appointment of special advocate in a lewd molestation/indecent proposal case. While the Child Abuse Reporting and Prevention Act in Title 10 allows for the appointment of an advocate to represent a child who is a victim of child abuse or neglect, Appellant was not

charged with child abuse or any offense under Title 10. The State did not allege the child victim was a victim of child abuse. Appellant was charged under Title 21 with lewd molestation and indecent proposal. As there was no statutory authority for the appointment of a child advocate in this case, the appointment of such an advocate was fundamental error. See 10 O.S.Supp.1995, § 7112 (A); see also *Conner v. State*, 1992 OK CR 68, ¶ 7, 839 P.2d 1378, 1380 (“fundamental error” was committed when a special advocate was appointed without statutory authority).

We cannot find this error was harmless. The victim’s advocate took an active role in the trial by cross-examining witnesses and his questions helped the State prove its case. He took an active and adversarial role. Had he remained passive, we might find the error harmless. However, his active advocacy placed Appellant in a “two against one” trial situation and we cannot find it was harmless beyond a reasonable doubt. This error therefore requires this matter be reversed and remanded for a new trial. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Conner*, 1992 OK CR 68, ¶ 9, 839 P.2d at 1380; *Cooper v. State*, 1996 OK CR 38, ¶ 4, 922 P.2d 1217, 1218.

The remaining propositions are hereby rendered moot and need not be addressed.

DECISION

The Judgment and Sentences imposed in Marshall County District Court, Case No. CF 99-157, are hereby **REVERSED AND REMANDED FOR A NEW TRIAL.**

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OPINION BY: JOHNSON, V.P.J.

LUMPKIN, P.J.: CONCURS
CHAPEL, J.: CONCURS
STRUBHAR, J.: CONCURS
LILE, J.: CONCURS

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