

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SOLLY LEE MARTIN, JR.,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F 2004-816

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAR - 8 2006

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

LEWIS, JUDGE:

Solly Lee Martin, Jr., Appellant, was tried by jury in the District Court of Ottawa County, Case No. CF-2003-128, before the Honorable Robert G. Haney, District Judge. Martin was convicted of the following crimes, and he received the corresponding sentences.

Count I: Lewd Molestation in violation of 21 O.S.2001, § 1123
twenty (20) years imprisonment;

Count II: Attempted Forcible Oral Sodomy in violation of 21
O.S.2001, § 888 – ten (10) years imprisonment;

Count III: Child Sexual Abuse in violation of 10 O.S.2001, § 7115 -
– life imprisonment;

Count IV: Second Degree Rape in violation of 21 O.S.2001, §§
1111 and 1114 – fifteen (15) years;

Count V: Child Sexual Abuse in violation of 10 O.S.2001, § 7115
– life imprisonment; and

Count VI: Child Sexual Abuse in violation of 10 O.S.2001, § 7115
– life imprisonment.

Counts one, two and three were ordered to be served concurrently with each other. Counts four and five were ordered to be served concurrently with each other, and consecutively with counts one, two and three. Count six was ordered to run consecutively. From the Judgments and Sentences, Martin has perfected his appeal to this Court.

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

- I. Appellant was denied a fair trial when the trial court refused to allow presentation of evidence concerning the complainant's prior sexual activity with her boyfriend to rebut evidence of physical injury offered by the State.
- II. Because the introduction of irrelevant, but highly prejudicial, testimony by two of the State's witnesses deprived Appellant of a fair trial, his case must be remanded for a new trial or the sentence modified.

After thorough consideration of Martin's propositions of error and the entire record before us on appeal, including the original record, transcripts, and briefs, we have determined that the judgment of the District Court should be affirmed; however, due to error raised in Proposition II, the sentence should be modified.

In reaching our decision, we find, in Proposition I, that Martin has failed to preserve this issue for review, by failing to provide a record of the evidence he intended to introduce at trial. *See Guthrie v. State*, 1984 OK CR 46, ¶ 10, 679 P.2d 278, 280 (holding Appellant has the responsibility of preserving a record at the trial court for future review of his claims); *Turner v. State*, 1990 OK

CR 79, ¶ 8, 803 P.2d 1152, 1156 (holding this Court will not presume error from a silent record).

In Proposition II, we find that Martin has waived all but plain error by failing to raise contemporaneous objections at trial. *Pickens v. State*, 2001 OK CR 3, ¶ 33, 19 P.3d 866, 878. We find that the expert testimony regarding the victims' behavior while undergoing therapy and the opinions that their behavior was consistent with the behavior of victims of chronic sexual abuse was not error. *See Davenport v. State*, 1991 OK CR 14, ¶ 19, 806 P.2d 655, 660 (holding similar testimony concerning "child accommodation syndrome" was admissible); *United States v. Charley*, 198 F.3d 1251, 1269 (10th Cir.1999)(holding testimony that victim's symptoms were consistent with symptoms of sexual abuse victims, in general, was not improper vouching).

We find that one expert went too far in her testimony regarding the future effect this crime would have on the victims. The testimony amounted to improper victim impact evidence. *Perryman v. State*, 1999 OK CR 39, ¶ 14, 990 P.2d 900, 905 (holding that sentencing juries in non-enhanced, non-capital crimes should not be exposed to victim impact evidence). We further find that this testimony amounted to plain error, and the testimony substantially affected Martin's right to a fair and reliable sentencing. Therefore, we conclude that Martin's sentences should be modified as outlined below.

DECISION

The judgments of the District Court shall be **AFFIRMED**; however, all of the sentences shall be ordered **MODIFIED** to run concurrently with each other. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2004), the **MANDATE** is **ORDERED** issued upon delivery and filing

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OPINION BY: LEWIS, J.

CHAPEL, P.J.: CONCURS
LUMPKIN, V.P.J.: CONCURS IN RESULT
C. JOHNSON, J.: CONCURS
A. JOHNSON, J.: CONCURS

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