IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

GENE PAUL RAY,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2001-338**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

Appellant, Gene Paul Ray, was tried by jury in the District Court of Tillman County, Case No. CF-99-62, and convicted of two counts of Lewd Molestation, Counts V and VI, in violation of 21 O.S.1991 § 1123. He was simultaneously found not guilty on six other sex-related charges.[1] The jury set punishment at ten (10) years imprisonment on each count, and the trial judge sentenced Appellant accordingly, ordering the sentences to be served consecutively. Appellant now appeals his convictions and sentences.

Appellant raises the following propositions of error in this appeal:

I. Whether the trial court committed reversible error and violated Appellant's Due Process Right when it allowed a Special Advocate to prosecute Appellant; and

II. Whether the trial court erred when over objection it allowed a State's expert to testify about child sexual accommodation syndrome without the safeguards mandated in Davenport v. State;

[1] Ray was acquitted of the following: Count I – Forcible Oral Sodomy; Counts II and III – First Degree Rape; Count IV – Attempted First Degree Rape; Counts VII and VIII – Lewd Molestation.

III. Whether the court erred when over objection it allowed the State to bolster the child witness' accusations by first presenting a parent's hearsay testimony, resulting in an erroneous verdict and unreliable sentence;

IV. Whether the trial court erred when, over objection, it allowed the State to join allegations by three separate accusers in one criminal information when the allegations did not arise out of one criminal act or transaction and were not a part of a series of criminal acts or transactions. Further, whether the trial court erred in allowing the jury to hear prejudicial uncharged information relating to the six counts that resulted in an erroneous verdict and unreliable sentencing;

V. Whether, under Oklahoma statutory and case law and the Due Process Clause of the United State and Oklahoma Constitutions, the trial court erred when, over objection and request for a mistrial, it allowed the State to "impeach" Appellant by exposing his DUI arrests, thereby denying Appellant his right to a fair trial and reliable verdict; and

VI. Whether the numerous irregularities occurring during this trial tended to prejudice Appellant's rights sufficiently to warrant reversal.

After a thorough consideration of these propositions and the entire record before us, we find several propositions have merit. Appellant's convictions must therefore be reversed, and the matter must be remanded for a new trial.

With respect to proposition one, we find the trial court committed reversible error and violated Appellant's Due Process rights when it allowed a "special advocate" for the victims to co-prosecute Appellant. First, the "special advocate was wrongly appointed.[2] While the Child Abuse Reporting and Prevention Act in Title 10 allows for the appointment of a "special advocate" to represent a child who is the alleged victim of child abuse or neglect, Appellant was not charged with the crime of child abuse (or any offense under Title 10),

nor were the victims alleged to be victims of child abuse. Appellant was charged with crimes under Title 21, i.e., rape, sodomy, and lewd molestation. *See* 10 O.S.Supp.1995, § 7112(A); *see also Conner v. State*, 839 P.2d 1378, 1380 (Okl.Cr.1992)("fundamental error" was committed when a special advocate was appointed without statutory authority.) Second, the special advocate actively participated and took on an adversarial role in the trial to such an extent that the defense was essentially double-teamed. *See Cooper v. State*, 922 P.2d 1217, 1218 (Okl.Cr.1996)(where the Court warned it would be "difficult to conceive of many instances when the child advocate can participate in the examination of the witnesses and other parts of the trial without becoming a second advocate against the accused.") The special advocate here participated in most of the significant pre-trial hearings and motions, *voir dired* the jury, interposed objections, examined witnesses, bolstered the child's credibility, rehabilitated the victims after they had been impeached, and corroborated the child's story. His role was not a limited one.

With respect to proposition two, we find the trial court erred when it allowed, over objection, the State's expert to testify about child sexual accommodation syndrome without the safeguards mandated in *Davenport v. State*, 806 P.2d 655, 658-59 (Okl.Cr.1991). Under Davenport, it was clearly improper to present such testimony prior to the testimony of the victims.[3]

---

[2] The State concedes error, but claims it was harmless.

[3] The State concedes the "better practice would have been to have this witness testify after the alleged victims." Nevertheless, it argues there was no technical error, because the expert testified about the syndrome after the parents testified (but before the alleged victims) in order "to explain a long delay in reporting the sexual abuse." *See Davenport*, 806 P.2d at 659. We find this argument, under the facts of this case, winks at *Davenport*.

While we concede *Davenport* is susceptible to two interpretations, we hold here that in any case in which the victims do in fact testify, evidence of child sexual accommodation syndrome should only be allowed **after** the victims' testimony has been completed. Otherwise, the expert testimony results in improper bolstering of the victims' stories. Here, the error, standing alone, may possibly have been harmless because the jury was properly instructed of the correct use of the syndrome (i.e., it is not to be used as a diagnostic tool) during the expert's testimony, the expert admitted she had not examined the victims and was not testifying that the syndrome applied to them, and the expert was effectively cross-examined about problems associated with its use.[4] However, due to improper closing argument by the prosecutor regarding the syndrome and other bolstering issues presented by this trial, we find the error combined with other errors discussed in this opinion to deny Appellant a fair trial.

With respect to proposition three, we find the trial court erred by allowing the State to bolster the testimony of the alleged child victims by first presenting the hearsay testimony of their parents. This, in turn, allowed the jury to hear the claims of abuse six times, rather than three, and to some degree made the victims claims more credible. *See Tome v. United States*, 513 U.S. 150, 157-58, 115 S.Ct. 696, 701, 130 L.Ed.2d 574 (1995)("The Rule speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told."); *Marquez v. State*, 890 P.2d 980, 985, (Okl.Cr.1995) (case reversed

[4] We take no position, under this record, about whether the syndrome continues to be a generally accepted doctrine in the psychiatric field. We note only that legitimate questions have been raised concerning the syndrome's use in Court, especially in a non-"intrafamily" situation. The jury was apprised of those concerns, however.

and remanded for a new trial based, in part, upon bolstering, where the State "was able to essentially present its principal witness three times, once through Stephanie's in-court testimony and twice in the videotape.")

We are not saying it was error for the parents to testify before the children, for they surely had corroborating testimony to give about how and when the allegations of abuse surfaced. Here, however, the trial court erroneously allowed the parents to testify regarding virtually every statement their children ever made to them regarding the allegations during the relevant period of time, under the blanket understanding that the statements were not being offered for the truth of the matter asserted. We find, however, the majority of these statements were hearsay without an applicable exception,[5] the admission of which was not harmless. *Simpson v. State*, 876 P.2d 690, 701-2 (Okl.Cr.1994).

We find proposition four is moot, given the jury verdict and our decision to reverse and remand this case for a new trial. With respect to proposition five, we find the trial court erred by allowing the prosecution, during cross-examination, to "impeach" Appellant's assertion of being a caring and helpful person by showing he had experienced serious drinking problems since the time the instant allegations were made. Specific instances of conduct of a

[5] 12 O.S.2001, § 2801(4)(a)(2) provides that a statement is not hearsay if "the declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is... consistent with the declarant's testimony and is offered to rebut an express or implied charge of recent fabrication or improper influence or motive." Here, the testimony was not used to rebut a charge of recent fabrication, but was given as direct testimony before the victim even testified. The statement's were not admissible under 12 O.S.Supp.2000, § 2803.1, for two of the alleged victims were older than thirteen. Further, the statements were not categorically admissible simply to show that they were made or to show

witness, for the purpose of attacking or supporting his credibility, may be inquired into on cross-examination, but only if probative of his truthfulness or untruthfulness. 12 O.S.2001, § 2608(B). Furthermore, character evidence is not admissible to prove action in conformity therewith, except evidence of a pertinent trait of character offered by an accused "or by the prosecution to rebut the same." 12 O.S.2001, § 2404(A). Appellant's claim of being helpful and caring was not rebutted by asking about his problems with alcoholism following the accusations brought here. Further, the information was not probative of truthfulness.

In proposition six, Appellant claims cumulative error deprived him of a fair trial. We agree the errors raised in propositions one, two, three, and five combined to deny Appellant a fair trial.

DECISION

The judgments and sentences are hereby **REVERSED** and the case is hereby **REMANDED** to the District Court of Tillman County for a new trial on Counts V and VI, Lewd Molestation, against J.B., consistent with this Opinion.

AN APPEAL FROM THE DISTRICT COURT OF TILLMAN COUNTY
THE HONORABLE DAVID BARNETT, ASSOCIATE DISTRICT JUDGE

APPEARANCES AT TRIAL

JOE E. WHITE, JR.
DEREK B. SMITH
900 N.E. 63RD STREET
OKLAHOMA CITY, OK 73154
COUNSEL FOR APPELLANT

APPEARANCES ON APPEAL

RICHARD O'CARROLL
SHARISSE O'CARROLL
O'CARROLL & O'CARROLL
2171 N. VANCOUVER
TULSA, OKLAHOMA 74127
COUNSEL FOR APPELLANT

---

that the parents were "concerned."

DAN DEAVER
JIMMY HARMON
ASSISTANT DISTRICT ATTORNEYS
FIRST FLOOR
JACKSON COUNTY COURTHOUSE
ALTUS, OKLAHOMA 73521
COUNSEL FOR THE STATE

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
WILLIAM R. HOLMES
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE

MICHAEL D. EVANS
MASSAD, EVANS & KENT
120 N. 9TH STREET
P.O. BOX 606
FREDERICK, OK 73542
SPECIAL ADVOCATE

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

RC