IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ROBERT RESENDEZ	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-98-921**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant, Robert Resendez, was tried by a jury and convicted of three counts (Counts I, II and V) of Rape by Instrumentation in violation of 21 O.S.1991, § 1114(A)(5), and two counts (Counts III and IV) of Lewd Molestation in violation of 21 O.S.Supp.1992, § 1123(A)(2) in Garfield County District Court Case No. CF-96-445. The jury recommended sentences of fifteen (15) years imprisonment for Counts I, II, and V and ten (10) years imprisonment on Counts III and IV. The trial judge sentenced Appellant accordingly and ordered the sentences on all five counts to run consecutively. Appellant now appeals his convictions and sentences.

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

I. Appellant was prejudiced by the State's presentation of collateral evidence in rebuttal;

II. Improper expert testimony regarding the truthfulness of the prosecutrix requires reversal of Appellant's convictions;

III. Appellant was prejudiced by the prosecutor's misconduct;

IV. Appellant was prejudiced by the trial court's improper exclusion of expert testimony; and

V. Appellant's sentences are excessive and should be modified.

After a thorough consideration of these propositions and the entire record before us, we reverse Appellant's convictions and remand his case for a new trial.

In proposition two, Appellant claims improper expert testimony regarding A.H.'s truthfulness was admitted during his trial and requires reversal of his convictions. He asserts that a social worker was allowed to improperly vouch for A.H.'s credibility. We agree.

Appellant filed a pre-trial motion regarding the testimony of Elizabeth Pidcock, a licensed social worker who counsels children and families regarding abuse, family conflict and marital problems. Appellant sought to prevent the State from presenting Ms. Pidcock from testifying "as to the truthfulness of any of the alleged victims. . . ." He pointed out that mental health professionals have no special ability for telling whether an individual is telling the truth. The State agreed, and the trial court sustained the motion in a pre-trial hearing.

During the trial, Ms. Pidcock was called to the stand. Her entire testimony dances around the issue of A.H.'s credibility, with the State asking essentially every conceivable question except whether Ms. Pidcock personally believed A.H. was telling the truth. Such testimony is improper.

Ms. Pidcock testified regarding her experience in evaluating children whom she had determined fabricated a story. In determining whether a child was fabricating a story, she looked to see if a child's words and sentence structure were adult or child like. She looked for unbelievable details. She looked at demeanor and mood. She testified that "children who are younger, especially between the ages of three and six, like to please adults so much. So you have to be extremely careful with that age group about your questioning so

that you get accurate information." She testified this was less of a problem with children over six. She claimed crying was inconsistent with a fabricated story and children who fabricate are less likely to give a lot of detail.

Ms. Pidcock then compared these general characteristics of children with A.H.'s characteristics. The prosecutor asked, "What observations, if any, did you make as it pertains to her age and whether her story was fabricated?" Ms. Pidcock replied, "it was my opinion that her story was not fabricated." The defense counsel objected. The prosecutor agreed with the objection and then asked to rephrase the question. Of course, by this time the jury has already heard the impermissible testimony. No admonishment was requested or given.

Thereafter, Ms. Pidcock testified that A.H's demeanor was consistent with her story of abuse. She spoke of how A.H. was "guarded and nervous," had a "sad expression on her face," "she would look down and hang her head," and was "spontaneous". Additionally, Ms. Pidcock testified that A.H.'s spontaneity, detail, use of age appropriate terms, and description of separate and distinct incidents were "inconsistent with a fabricated story." She testified that A.H. seemed to know the difference between a truth and a lie. Ms. Pidcock discovered nothing which would indicate A.H. had a motive to fabricate. She testified that she observed nothing which is consistent with a fabricated story.

Beyond the pretrial motion and the one objection noted above, defense counsel did not object to any of this testimony. His trial strategy seemed to be to question Ms. Pidcock's objectivity during cross-examination. He suggested Ms. Pidcock saw A.H. in a clinical role rather than in a forensic role and that caused her to be more inclined to believe what A.H. told her. Defense counsel called Dr. Stephen R. Close to the stand to explain how a clinical evaluation is

for the purpose of treatment, while a forensic evaluation was aimed more toward answering questions relevant to court. He testified that clinical evaluations, like Ms. Pidcock's, tend to be less objective.

While it clearly appears defense counsel's trial strategy was to attack Ms. Pidcock's testimony through cross examination and competing "expert" testimony, most of this testimony should not have been admitted. A plain reading of the transcript leads one to conclude that Ms. Pidcock was called to the stand for the sole purpose of vouching for A.H.'s credibility.

In *Lawrence v. State*, 796 P.2d 1176 (Okl.Cr.1990), a case which bears an eerie resemblance to Appellant's, the Defendant was charged with lewd molestation. During the State's case-in-chief, the State called a social worker to testify about an interview she had conducted with the ten year old victim. The State asked the witness if, based upon her experience, she had formed any kind of opinion as to what the child had told her. The social worker explained how ten year olds do not lie about these things. She described how the child had expressed a great deal of shame. She testified that children this age "have no reason to tell these stories. It doesn't make them feel good."

This Court found the social worker's testimony was impermissible opinion on a witness's credibility. The Court held "an expert witness cannot vouch for the truthfulness or credibility of an alleged victim," noting the vast majority of courts find such testimony inadmissible because it is the jury's job to weigh the truthfulness of a witness. The error was found to be fundamental, even though defense counsel had failed to object. Because there was no physical evidence to support the conviction and the State relied solely on testimony, the Court could not find the error to be harmless.

Lawrence is the controlling authority in this jurisdiction on the issue presented. It is indistinguishable from the present case. Here, the testimony invaded the jury's province to a greater degree than in *Lawrence*. Not only did the witness testify that children over six do not fabricate such stories, she also testified it was her opinion A.H. was truthful. She then went through a laundry list of indicators to support the issue of truthfulness, finding repeatedly that A.H.'s testimony was inconsistent with a fabricated story. However, she admitted during cross-examination that she was unaware of any test accepted by her profession which would determine truthfulness. She also admitted her testimony was just "subjective opinion." (Tr. II at 89-90).

No physical evidence was presented. This was a "he said, she said" case, one which came down to credibility. The defense succeeded in bringing out some inconsistencies in A.H.'s testimony. Like *Lawrence*, we cannot find the error to be harmless.[1] Ms. Pidcock's testimony might have had a "substantial influence" on the jury. *Simpson v. State*, 876 P.2d 690, 702 (Okl.Cr.1994).

Ms. Pidcock was never qualified as an expert witness. Even if she had been, her own admissions demonstrate she had no specially recognized ability to determine whether someone is truthful or not. In *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the United States Supreme Court held Federal Rule of Evidence 702 imposes a special gatekeeping obligation upon a trial judge to "ensure that any

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[1] See also *McCarty v. State*, 765 P.2d 1215, 1218 (Okl.Cr.1988)(recognizing that, in spite of 12 O.S.1981, § 2704, bolstering the credibility of complaining witnesses through expert testimony usurp's the jury's fact-finding function); *Mitchell v. State*, 884 P.2d 1186, 1197 (Okl.Cr.1994)(finding the trial court was proper to exclude testimony from a psychologist regarding the interpretation of the defendant's attitude and body language during an interview).

and all scientific testimony ... is not only relevant, but reliable." The Court has recently noted Rule 702 makes no relevant distinction between "scientific" knowledge and "technical" or "other specialized" knowledge. *Kumho Tire Co., Ltd. v. Carmichael*, __ U.S. __, 119 S.Ct. 1167, 1174, 143 L.Ed.2d. 238 (1999). *Daubert*'s gatekeeping requirement ensures that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. *Id.*, 119 S.Ct. at 1176. Had a *Daubert* analysis been used, it is likely this testimony would have been excluded.

The State argues any error was harmless because the evidence was overwhelming. Significantly, the State bases this conclusion on A.H.'s credibility. The State also cites *Davenport v. State*, 806 P.2d 655, 659 (Okl.Cr.1991), arguing Ms. Pidcock's testimony helped the jury determine a fact in evidence. However, *Davenport*, a case which allowed testimony regarding "child accommodation syndrome" in rebuttal, is clearly distinguishable.

In light of proposition two, we also note three incidents of improper closing argument by the prosecutor. The prosecutor argued:

> What defense counsel would have you believe is true. If you shouldn't believe a girl that tells that story because if that's all you had to believe then we'd all be charged. What are we saying? What are we saying? Rape our kids. Molest our kids but do it privately. Don't let us see it. When a child screams for help, we're not going to listen because we didn't have a video tape, we didn't have a confession, we didn't have multiple eye witnesses . . . So do it in private. Is that what we're saying? If that's the case and what defense counsel said is true, then when, if ever, are our children protected? They're not. They're not. . . . If you don't listen to our children, who will?

Furthermore, the prosecutor stated that in order to believe Appellant, you had

to "disbelieve Beth Pidcock even now because she can't be objective." This demonstrates the prosecutor's intent in relying on Ms. Pidcock on the issue of credibility.

While these incidents, standing alone, may or may not have required reversal, they are relevant to our consideration of harmless error in proposition two. The prosecutor's arguments invoked societal alarm, improperly vouched for A.H.'s credibility, and went beyond the bounds of acceptable argument.

DECISION

The judgments and sentences are hereby **REVERSED** and the matter is remanded to the district court of Garfield County for a new trial.

AN APPEAL FROM THE DISTRICT COURT OF GARFIELD COUNTY
THE HONORABLE JOHN W. MICHAEL, DISTRICT JUDGE

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

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LILE, JUDGE: SPECIALLY CONCURS

I concur that our case law, specifically *Lawrence v. State*, 1990 OK CR 56, 796 P.2d 1176, requires the result reached. I believe that Appellant's failure to object at trial waives the error complained of and this did not constitute fundamental error.