No. F-2012-506

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

CHARLES ALLEN DYER, Appellant, v. THE STATE OF OKLAHOMA, Appellee.	)	Appeal from the District Court of Stephens County Case No. CF-2010-17

BRIEF OF APPELLANT

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IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

CHARLES ALLEN DYER,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. F-2012-506
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

BRIEF OF APPELLANT

Charles Allen Dyer, submits this, his Appellant's brief, appealing his conviction and sentence from Stephens County District Court Case No. CF-2010-17.

Mr. Dyer was the defendant in the district court and will be referred to by name or as the Appellant. Appellee will be referred to as the state or prosecution. Numbers in parentheses refer to page citations in the original record (O.R.), the transcripts of the preliminary hearing (P Tr.), various motions hearings (M Tr. (Date)), the January 2012 mistrial (Tr. (Date)), the April 16-19, 2012, jury trial (Tr. Day ___ at ___), and the sentencing proceeding (S Tr.).

STATEMENT OF THE CASE

On January 20, 2010, the state filed an information charging Mr. Dyer with a single count of child sexual abuse in violation of 21 O.S.Supp.2009, § 843.5(E). (O.R. 1) On July 16, 2010, the state filed an amended information which added

a charge of concealing stolen property. (O.R. 51) Mr. Dyer was bound over on these charges at the conclusion of a preliminary hearing held on July 19, 2010. (P Tr. 165-69; O.R. 53) The charge of concealing stolen property was severed for purposes of trial and later dismissed. (M Tr. (4/4/2011) at 11; O.R. 165, 454)

Mr. Dyer was first tried in April of 2011 before the Honorable Joe H. Enos, District Judge. At this trial, Appellant was represented by retained counsel, David W. Hammond. The state was represented by Ms. Carrie Hixon and Mr. James E. Walters. After deliberating for seven hours, the jury was unable to reach a unanimous verdict and a mistrial was declared. (O.R. 220)[1]

Mr. Dyer's second trial began on January 23, 2012. At this proceeding, he was represented by retained counsel, Mr. Al Hoch. The state was represented by Ms. Hixon and Mr. Walters. The day after the trial began, Judge Enos declared a mistrial, at the request of the defense, after it became known that the District Attorney's office had mailed juror survey forms to several venire persons selected as members of Mr. Dyer's jury. (Tr. (1/24/2012) at 100, 102)[2]

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[1] The evidentiary portion of the April 2011, mistrial was designated and is included in the record on appeal. Citation to this transcript will identify the name of the witness, the date the testimony was given and the page number of the transcript where the cited testimony is found, e.g., "(Charles Dyer 2/28/2011 at 37)."

[2] The correspondence was mailed to persons who had served as jurors in trials that concluded the proceeding week. (Tr. (1/24/12) at 68) Three members of Mr. Dyer's jury received the letters. (Tr. (1/24/12) at 70)

On April 16-19, 2012, Appellant was again tried by jury before Judge Enos.[3] Mr. Hoch remained as defense counsel and the state was again represented by Ms. Hixon and Mr. Walters. The jury found Mr. Dyer guilty as charged. (Tr. Day 4 at 226) Formal sentencing occurred on June 5, 2012. Consistent with the jury's recommendation, Mr. Dyer was sentenced to 30 years' imprisonment. (S Tr. 8; O.R. 439-40)

STATEMENT OF FACTS

In June of 2000, Appellant and Valerie Dyer married. (Tr. Day 2 at 19; Tr. Day 4 at 87) At the time of the marriage, Appellant was 19 years old and serving in the Marine Corps. Valerie was 16 years old. (Tr. Day 2 at 19-21) The couple spent the first two years of their marriage living in California where Mr. Dyer was stationed. (Tr. Day 2 at 21-23; Tr. Day 4 at 87) When Mr. Dyer's enlistment expired in 2002 the couple returned to Oklahoma where they lived with Mr. Dyer's parents in rural Stephens County. (Tr. Day 2 at 26; Tr. Day 4 at 89, 97)

Valerie was pregnant when she left California and in November of 2002 she gave birth to a girl, H.D. (Tr. Day 2 at 24; Tr. Day 4 at 97) When H.D. was approximately one month old, the family moved to Tennessee where they initially lived with Mr. Dyer's sister and her husband, Amy and Larry Dark. (Tr. Day 2

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[3] The separately-bound, separately-paginated volumes comprising the transcript of the trial that resulted in Mr. Dyer's conviction are identified by the court reporter in the following manner: "Day 1 – Volume 1," "Day 2 – Volume 1," "Day 3 – Volume 3," and "Day 4 – Volume 1"). This transcript will be cited as "(Day ___ at ___)."

at 29-33; Tr. Day 3 at 155; Tr. Day 4 at 97-98) The Dyers would spend approximately two-and-a-half years in Tennessee where both Valerie and Appellant worked and Mr. Dyer also went to school. (Tr. Day 2 at 30-31, 36; Tr. Day 3 at 165-66; Tr. Day 4 at 99-101)

In 2005, Mr. Dyer re-enlisted in the Marine Corps and the family moved back to California. (Tr. Day 2 at 39-40; Tr. Day 4 at 103-04) In September of 2008, Valerie and H.D. returned to Oklahoma where they lived with Mr. Dyer's parents for several months before renting a house in Duncan, Oklahoma. Mr. Dyer remained in California to complete his second tour of duty in the Marine Corps. (Tr. Day 2 at 43-44)

Valerie testified that she and H.D. returned to Oklahoma because Mr. Dyer wanted to save money to ease the transition back into civilian life. (Tr. Day 2 at 44, 48, 51) As time passed, however, Valerie started to suspect more sinister motives and began to question Appellant about why she and H.D. were in Oklahoma. (Tr. Day 2 at 46, 50-51) According to Valerie, after she and H.D. had lived in the rental house for some four to six months, Mr. Dyer told her that "[h]e did not want us anymore and that [H.D.] was in the way." (Tr. Day 2 at 51)

Mr. Dyer's explanation for the couple's martial difficulties was quite different. He testified that in 2004, when the family was living in Tennessee, Valerie told him that she wanted to be with other men and that she did not want to be married anymore. (Tr. Day 4 at 120) The couple received counseling from

Appellant's father, an ordained minister, and decided to return to Oklahoma. (Tr. Day 4 at 88, 103) Mr. Dyer quit college and returned with his family to Stephens County where he began working for the Stephens County Sheriff's Department. (Tr. Day 4 at 102-03) Mr. Dyer believed when he left the sheriff's department in 2005 to re-enlist in the Marine Corps that his marriage was stable. (Tr. Day 4 at 103)

However, in 2007, Mr. Dyer was deployed to Iraq for eight months. (Tr. Day 4 at 105) During this time, the marriage became strained, perhaps because Mr. Dyer's combat deployment all but precluded his ability to have contact with his family. (Tr. Day 4 at 105) At any rate, while Mr. Dyer was serving in Iraq, Valerie began experiencing depression, to the extent that on several occasions she "cut herself." (Tr. Day 2 at 100; Tr. Day 4 at 8, 108-09) In addition to taking Zoloft, a medication prescribed to combat the depression, she began illicitly taking Xanax and Valium. (Tr. Day 4 at 109) Mr. Dyer began to worry about his wife's condition and about her ability to care for their daughter. (Tr. Day 4 at 109) Mr. Dyer testified that his concern for Valerie caused him to lose focus and nearly caused his early and un-welcomed return from Iraq, but he was ultimately permitted to complete his combat tour. (Tr. Day 4 at 112)

When Mr. Dyer returned from Iraq, he vowed to become closer to his wife and daughter. (Tr. Day 4 at 115) However, Valerie was still abusing prescription drugs and had started drinking heavily. Within a year of Mr. Dyer's return, she

began to have seizures and became an even more unreliable caregiver to H.D. (Tr. Day 2 at 100-01; Tr. Day 4 at 115)

The realization that Valerie was unfit to provide consistent, long-term care for H.D. came at a time when Mr. Dyer was training for his second combat deployment to Iraq. (Tr. Day 4 at 115-16) Although Mr. Dyer wanted to return to Iraq, he was not permitted to do so because of the circumstances that existed within his family. (Tr. Day 4 at 117) His desire to return to battle frustrated, Mr. Dyer admitted that he began to be resentful towards Valerie. During this time frame, Valerie returned to Oklahoma with H.D. (Tr. Day 4 at 120) Despite his resentment, Mr. Dyer characterized his marriage to Valerie as "good" during this time in the sense that "we weren't arguing about anything." Mr. Dyer was, however, continuing to try to get Valerie to "stop her bad habits," which included drinking heavily and prescription drug use. (Tr. Day 4 at 121)

In April of 2009, while Mr. Dyer was in California and Valerie and H.D. were in Duncan, Valerie told him that she was using marijuana. (Tr. Day 2 at 56-57) Mr. Dyer knew that members of Valerie's family used the drug in the presence of children and he suspected that Valerie was using marijuana around H.D. (Tr. Day 4 at 124-25) For the next several months, until Mr. Dyer was honorably discharged from the Marine Corps, he and Valerie frequently had heated arguments over the phone. (Tr. Day 4 at 128-29) Mr. Dyer threatened to get custody of H.D. and Valerie vowed to do whatever it took, including lying, to

maintain custody of her daughter. (Tr. Day 4 at 130) Near the end of Appellant's second hitch in the Marine Corps, Valerie attempted to make good on her threat. She called Appellant's chain of command in California and reported that Mr. Dyer had threatened to kill her and H.D. Mr. Dyer was arrested and detained until a subsequent investigation revealed that the allegations were false. (Tr. Day 4 at 130-31; Tr. Charles Dyer 4/28/2011 at 26-27)

After he was honorably discharged from the service in the summer of 2009, Mr. Dyer returned to Oklahoma. (Tr. Day 2 at 52-53) He served Valerie with divorce papers he prepared. The documents sued Valerie for divorce on the grounds that she had committed adultery. Valerie admitted that she signed the documents because she was fearful that she would lose custody of H.D. due to her adultery and drug use. (Tr. Day 2 at 59)

In August of 2009, Appellant returned to California and began a romantic relationship with Valerie's one-time best friend, Amanda Monsalve. (Tr. Day 2 at 68; Tr. Day 4 at 5, 123) Appellant informed Valerie of the relationship near the first of December, 2009. (Tr. Day 4 at 14, 131, 156) Valerie admitted that she was shocked and hurt by Appellant's relationship with her former best friend. (Tr. Day 2 at 70) Appellant and Monsalve testified that Valerie was furious. (Tr. Day 4 at 15, 132)

On December 4, 2009, Appellant returned to Stephens County. He was accompanied by Monsalve and her six-year-old daughter, Illiana. (Tr. Day 4 at 15,

156) Appellant rented a trailer home near his parents' residence. (Tr. Day 2 at 69; Tr. Day 4 at 15) Mr. Dyer testified that in the ensuing weeks he and Valerie argued. They argued over the divorce, custody of H.D., money, Appellant's relationship with Monsalve and Valerie's relationship with her boyfriend. (Tr. Day 4 at 134-35) Valerie admitted that on December 14, 2009, she posted a message on Facebook expressing her wish that Appellant's penis would fall off. (Tr. Day 2 at 105) Appellant and Monsalve each described an incident that occurred after a Christmas program on December 20, 2009, which was the first time Valerie saw Appellant and Monsalve together. (Tr. Day 4 at 132) Mr. Dyer testified that Valerie "completely lost it." (Tr. Day 4 at 134) Monsalve testified that Valerie "was right in [Mr. Dyer's] face. I mean, you couldn't get any closer, just screaming at him." "F-you, F-you." (Tr. Day 4 at 20)

Despite the hostilities, or perhaps as a result of them, H.D. spent the majority of her Christmas break from school with Appellant. Valerie dropped H.D. off at Appellant's trailer on December 17, 2009. (Tr. Day 4 at 28, 135, 157) Monsalve had intentionally absented herself from the home because she did not want to be present when Valerie arrived. (Tr. Day 4 at 136) Appellant testified that he "got into a huge argument with Valerie and Valerie ended up getting into her car and crying and I was on the phone with Amanda for a while telling her what was going on." (Tr. Day 4 at 136)

On the evening of December 24, 2009, H.D. was returned to Valerie by Amy Dark, Appellant's sister, who was in town with her family for the holidays. The following evening, Amy, Monsalve and some other family members picked H.D. up from Valerie's home. (Tr. Day 4 at 28, 135) Appellant's mother, Janet Dyer, Monsalve, and Appellant each testified that H.D.'s visit with Appellant ended when Valerie picked the child up from Appellant's parents' home on the evening of Sunday, January 3, 2010. (Tr. Day 3 at 177; Tr. Day 4 at 43, 138)

Valerie testified that shortly after she picked H.D. up, the child, while taking a bath, reluctantly told her that Appellant had been inappropriately touching her. (Tr. Day 2 at 72-76, 79-80)[4] Valerie also testified that the child's vagina appeared "really red and swollen and open." (Tr. Day 2 at 75) Oddly, Valerie was unable to remember the date, or even the day, that H.D. revealed this information to her. During the 2012 trial that resulted in Mr. Dyer's conviction, Valerie testified that the disclosure occurred during "the end of December '09." (Tr. Day 2 at 73, 121) Valerie was adamant, however, that she reported the allegation to the authorities the day after it was made. (Tr. Day 2 at 84, 125)

On January 12, 2010, seven-year-old H.D. was forensically interviewed by Jessica Taylor at the Mary Abbott Children's House in Norman, Oklahoma.

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[4] State's witnesses Valerie Dyer and Jessica Taylor, who forensically interviewed H.D., were permitted to testify concerning statements purportedly made by the child pursuant to 12 O.S.Supp.2004, § 2803.1, which makes such hearsay statements admissible provided certain conditions are met. As required by the statute, the trial court held a hearing to determine the reliability of the statements. At the conclusion of the hearing, the court found that the statute's reliability requirement was satisfied and deemed the statements admissible. (M Tr. (4/8/2011) at 166; Tr. Day 2 at 76-78)

(M Tr. 4/12/2011 at 85; Tr. Day 3 at 33) An audio/video recording of the interview was shown to the jury. (Tr. Day 3 at 49, 89) **See** State's Ex. 3. In essence, H.D. claimed that her father kissed her vagina and placed his penis in her vagina and mouth. (Tr. Day 3 at 42-45) She claimed that the abuse occurred multiple times and began when the family lived in California. (Tr. Day 3 at 43, 46) During the interview, H.D. repeatedly claimed that she was last abused on January 2, 2010, in Appellant's trailer home. **See** State's Ex. 3.

On January 13, 2010, H.D. was physically examined by Dr. Preston Waters. (Tr. Day 3 at 122) Dr. Waters testified that he found "a complete absence of hymen posteriorly," a condition he found "highly suspicious for an abusive penetrating sort of injury." (Tr. Day 3 at 130) The examination revealed no other outward signs of abuse. (Tr. Day 3 at 128)

Several defense witnesses testified that H.D. was acting normally during her stay with her father. Amy Dark testified that she was extremely close to H.D. and that she saw nothing unusual occur between Appellant and H.D. and that there were "absolutely no issues" apparent during the Christmas break. (Tr. Day 3 at 154, 166, 168) The testimony of Janet Dyer was similar. (Tr. Day 3 at 175, 177)

Monsalve testified that she was present, along with her daughter, at the trailer with Appellant and H.D. for the vast majority of the Christmas break. (Tr. Day 4 at 28) Prior to trial, Monsalve had consulted banking records and performed other tasks to refresh her memory as to her activities during the

Christmas break. (Tr. Day 4 at 61, 77) Monsalve recalled that she did not leave the home at any time during January 2, the date H.D. claims she was last abused by Appellant. (Tr. Day 4 at 30-31) In fact, Monsalve testified that from December 31 through January 3, the date H.D. was returned to Valerie, Appellant and H.D. were never alone in the trailer. (Tr. Day 4 at 33) According to Monsalve, the last time Appellant was alone with H.D. was December 28, 2009, when they were outside together shooting a toy pistol H.D. had received as a Christmas gift. (Tr. Day 4 at 62, 76)

Concerning January 2, Monsalve testified that that day she painted the bedroom that her daughter and H.D. shared and the girls slept in the living room that night to avoid the paint fumes. (Tr. Day 4 at 34) Monsalve also recalled that Appellant punished H.D on January 2 by making her sit in a corner and that H.D. was upset and crying. (Tr. Day 4 at 40-41) Monsalve stated that on January 3, 2010, prior to taking H.D. to Appellant's parents' home for her eventual return to Valerie, her daughter and H.D. showered together. As she turned on the water for the girls, Monsalve saw H.D., unclothed, and did not notice anything unusual about the condition of the child's vagina. (Tr. Day 4 at 38)

Finally, Monsalve testified that she received an e-mail from Valerie on January 11, 2010. The subject line of the e-mail was: "Ha-ha ha-ha." The e-mail read: "Thanks for taking him. I hope you enjoy him. Good luck. He's going to need it." (Tr. Day 4 at 46-47) Given Valerie's history of making false reports

against Appellant, the e-mail made him suspect that Valerie had again accused him of committing some, unknown, crime. The following day, he and Monsalve went to the Stephens County Sheriff's Department to see if charges, of any kind, had been filed. (Tr. Day 4 at 43, 46) Mr. Dyer was arrested at that time.

Appellant testified and adamantly denied abusing his daughter. (Tr. Day 4 at 82-161) Additional facts will be addressed in the propositions of error that follow.

PROPOSITION I

MR. DYER FAILED TO RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE II, SECTION 20 OF THE OKLAHOMA CONSTITUTION.

A. Standard of Review.

Claims of ineffective assistance of counsel are evaluated under the two-prong test of **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, it must be determined whether counsel's performance was deficient, whether it was unreasonable under prevailing professional norms and could not be considered sound strategy. Second, it must be determined whether counsel's deficient performance prejudiced the defense of the case. **Id.** at 687, 104 S.Ct. at 2064. Prejudice is shown if there is a reasonable probability that, but for counsel's errors, the outcome of the proceeding would have been different. A reasonable probability is one sufficient to undermine confidence in the trial's outcome. **Id.** at 694, 104 S.Ct. at 2068. These determinations are made using a *de novo* standard of review. **See United States v. Orange**, 447 F.3d 792, 796 (10th Cir. 2006) ("A claim for ineffective assistance of counsel presents a mixed question of fact and law, which we review *de novo.*").

B. Counsel's Performance was Deficient Because He Failed to Call Certain Witnesses.

Prior to Appellant's 2012 trial, Valerie Dyer had admitted on multiple occasions, under oath, that she would do or say anything – including committing

perjury – to keep Appellant from obtaining custody of H.D. For example, during the cross-examination of Valerie by defense counsel at the July 2010, preliminary hearing, the following occurred:

Q He [Appellant] told [you] that he was going to try to get custody of his daughter, didn't he?

A Yes.

Q That upset you, didn't it?

A Of course.

Q Did you tell Mr. Dyer that you would do anything or say anything to keep him from getting his daughter?

A Yeah.

(P Tr. 110) Valerie made similar admissions during an April 2011, motions hearing (M Tr. (4/8/2011) at 122) and during the first trial. (Tr. Valerie Dyer 4/25/2011 at 38, 72)

Essentially, Appellant's theory of defense at his first trial was that Valerie, fearing she would lose custody of H.D. and angered by Appellant's relationship with her one-time best friend, concocted the allegations and then coached H.D. to repeat them. In September of 2011, Appellant's original attorney, Mr. Hammond, withdrew from the case and was replaced by Mr. Hoch. (O.R. 287, 290) Despite the change in counsel, Appellant could have reasonably expected his theory of defense to remain unchanged. After all, the first trial had ended with a hung jury and, less than two weeks before the third trial began, Mr. Hoch filed a witness list

that listed the same witnesses previously listed by Mr. Hammond. (O.R. 105-10; 365-71)

Like Mr. Hammond, Mr. Hoch called *some* of the same witnesses to present Appellant's defense to the jury. These witnesses consisted of Appellant's sister, Amy Dark; his mother, Janet Dyer; his girlfriend, Amanda Monsalve and Appellant. (Tr. Day 3 at 154, 173; Tr. Day 4 at 4, 82) However, several witnesses who testified at the first trial were conspicuously absent during the 2012 trial. The absence of these witnesses left the presentation of Appellant's theory of defense dismally incomplete. Among the witnesses who testified at the first trial but did not testify at the last trial were sheriff's deputies Joshua Seely and Christopher Lemons, Oklahoma State Bureau of Investigation (OSBI) criminalists Sara Ferrero and Ashleigh Sosebee and computer expert Marvin Dutton. In addition, Appellant contends that defense counsel should have called OSBI Special Agent and forensic computer expert Donald Rains.

These witnesses would have cast devastating questions about Valerie's credibility regarding the circumstances of the alleged disclosure and reporting of the purported abuse, and would have demonstrated the utter lack of any corroborating physical evidence concerning the accusation that the alleged abuse occurred in Mr. Dyer's home. In addition, the testimony of defense computer expert Dutton and OSBI Agent Rains about searches and downloads made on

Valerie's computer would have significantly substantiated Mr. Dyers' defense theory that the allegations were concocted by his scorned and vengeful ex-wife.

Deputies Seely and Lemons possessed information which bore directly on Valerie Dyer's credibility. To begin with, Deputy Seely could have testified, as he did at the first trial, that Valerie reported the allegations on Friday, January 8, 2010. (Tr. Joshua Seely 4/27/2011 at 12, 20) This, in itself, is no trivial matter because, although Valerie has never been able to recall when the alleged disclosure occurred, she has testified that the child returned to her the day before school started. (Tr. Valerie Dyer 4/25-26/2011 at 44, 80) According to Janet Dyer, Monsalve and Appellant, Valerie picked H.D. up on the evening of January 3, 2010. (Tr. Day 3 at 177; Day 4 at 43, 138) According to Rodney Calhoun, an administrator with the Duncan Public School System, classes did, in fact, resume on Monday, January 4, 2010.[5]

The date that Valerie contacted authorities is important in light of her unyielding insistence that she reported the abuse to the Stephens County Sheriff's Department the day after H.D. disclosed the abuse to her. (Tr. Day 2 at 84, 125)[6] Had Deputy Seely testified that Valerie did not report until January 8, 2010, the jury would have been forced to conclude that either H.D. did not disclose on the

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[5] An *Application for an Evidentiary Hearing on Sixth Amendment Claims* has been contemporaneously filed with this brief. Attached to the Application is Appellant's Ex. 1, the affidavit of Mr. Calhoun.

[6] Throughout the course of this litigation, Valerie has consistently maintained that she reported the abuse the day after it was disclosed to her. (P Tr. 103; M Tr. (4/8/2011) at 123-24, 128; Tr. Valerie Dyer 4/25, 26/ 2011 at 50-51, 81)

day that she returned from the visit with her father, or Valerie delayed reporting the allegations to the authorities for five days. Either scenario is fundamentally at odds with Valerie's testimony as to how the disclosure occurred and had the jury known this, it would have done much to undermine her credibility.

Deputy Seely could have also testified, as he did during the 2011 trial, that Valerie's January 8, 2010, report to the sheriff's department included a report of two prior accusations of sexual abuse by H.D. against her father; one when the family lived in California and the other during the summer of 2009, shortly after Appellant got out of the Marine Corps and returned to Oklahoma. (Tr. Joshua Seely 4/27/2011 at 19) According to Seely's probable cause affidavit, Valerie claimed that she confronted Appellant following each of H.D.'s prior disclosures. (O.R. 2)

This information would have further undermined Valerie's credibility with respect to her account of the alleged disclosure that occurred following H.D.'s visit with Appellant. Valerie testified that following the visit, H.D. "was crying more and not acting like herself." (Tr. Day 2 at 72-73) Valerie claimed that she asked the child what was wrong and H.D. told her that she did not want to talk about it or that she did not want to tell her mother what was wrong. (Tr. Day 2 at 73-74) This caused Valerie to think that "maybe she got grounded or got a spanking." (Tr. Day 2 at 74) According to Valerie's account, even when H.D. began complaining that her vagina was hurting, Valerie's reaction was to think

that perhaps the child drank too much soda or had a urinary tract infection. (Tr. Day 2 at 74-75, 124) In light of Valerie's claim that H.D. had accused Appellant of sexually abusing her as recently as the summer of 2009, and given that Valerie found these accusations credible enough to confront Appellant about them, it seems incredulous that she would react to the child's demeanor and complaints in the way she described to the jury at the third trial.

Deputies Seely and Lemons were also important defense witnesses because they took various items from Appellant's trailer and submitted them to the OSBI for testing. As previously noted, Appellant and Monsalve went to the Stephens County Sheriff's Office on the afternoon of January 12, 2010. Appellant did so because the e-mail Valerie sent to Monsalve on the previous day made him suspect that Valerie had made some type of false allegation against him. (Tr. Amanda Monsalve 4/27/2011 at 18-19; Tr. Charles Dyer 4/28/2011 at 52-53) Appellant also wanted the help of the sheriff's office in enforcing his visitation rights with H.D. (Tr. Joshua Seely 4/27/2011 at 16; Tr. Charles Dyer 4/28/2011 at 54-55) Shortly after he arrived at the sheriff's office, Appellant was arrested and placed in jail. (Tr. Charles Dyer 4/28/2011 at 55, 77) Monsalve, who had accompanied Appellant to the sheriff's office, testified at the first trial that she remained at the sheriff's office for several hours after Appellant's arrest while the Department of Human Services contemplated the removal of Monsalve's daughter from her care. (Tr. Amanda Monsalve 4/27/2011 at 18, 20, 30) Monsalve did not

return to the trailer she shared with Appellant until deputies executed a search warrant for the premises during the late-evening hours of January 12, 2010. (Tr. Joshua Seely 4/27/2011 at 7;Tr. Amanda Monsalve 4/27/2011 at 21)

The search warrant authorized officers to seize items "that could have been worn or used by the victim and that could possibly contain DNA evidence of Charles Dyer." (Tr. Christopher Lemons 4/27/2011 at 5) The officers, who had been informed that the abuse had occurred both in the master bedroom and in the living room, seized pillows, sheets, quilts and a comforter – all of the bedding – from the bed in the master bedroom. They also took the cushion covers from the furniture in the living area. (Tr. Christopher Lemons 4/27/2011 at 8)

At the trial that resulted in Appellant's conviction, Monsalve testified that she gave officers panties and pajamas belonging to H.D. The garments had not been laundered and Monsalve believed that H.D. had worn the panties from the evening of December 31, 2009, to January 3, 2010. (Tr. Day 4 at 37-38) Monsalve's account is consistent with the testimony of Deputies Lemons and Seely at the first trial. Deputy Lemons characterized Monsalve as "fully cooperative" during the search and stated that the pajamas and panties were retrieved from the "dirty clothes hamper." (Tr. Christopher Lemons 4/27/2011 at 6, 8) Deputy Seely also observed Monsalve retrieve the pajamas and panties from the hamper. (Tr. Joshua Seely 4/27/2011 at 8)

Although the jury that convicted Appellant did not know it, the seized items were submitted to the OSBI where testing was performed by criminalists Sara Ferrero and Ashleigh Sosebee. Ferrero tested the bedding taken from Appellant's bedroom for the presence of blood, semen and seminal fluid. (Tr. Sara Ferrero 4/27/2011 at 5) Although Ferrero found spermatozoa on a sheet and on the comforter, no seminal fluid, or other fluid, was found on the pajamas or on the panties worn by H.D. on January 2, 2010, the date she claims she was last abused by Appellant. (Tr. Sara Ferrero 4/27/2011 at 7-9)

Sosebee subjected various stains found on the bedding to DNA testing. (Tr. Ashleigh Sosebee 4/27/2011 at 6-7) The substances matched the known DNA of Appellant and Monsalve, and, in one instance, Monsalve's daughter could not be excluded as a possible contributor of a mixed-substance stain. (Tr. Ashleigh Sosebee 4/27/2011 at 8-11) Sosebee did not find any DNA which could have originated from H.D. (Tr. Ashleigh Sosebee 4/27/2011 at 11; O.R. 42-47)

Deputies Seely and Lemons also had information about Valerie's computer which was valuable to the defense. Sometime after Valerie and H.D. returned to Oklahoma in September of 2008, Appellant sent her a computer. Valerie mentioned this fact in passing during her testimony at the final trial. (Tr. Day 2 at 52) During cross-examination, Valerie claimed that many people had access to her computer and she denied using to the computer to view pornography or to conduct various internet searches. (Tr. Day 2 at 113, 121-22)

What the jury did not know was that several days after she reported H.D.'s allegations to the sheriff's department, Valerie gave the computer to Deputy Lemons. (Tr. Christopher Lemons 4/27/2011 at 10) She did so because the computer had once belonged to Appellant and Valerie claimed that it contained child pornography. (Tr. Christopher Lemons 4/27/2011 at 10)

In April of 2011, Deputy Seely transported the computer from the Stephens County Sheriff's Department to Applied World Technology, in Duncan, Oklahoma, where Marvin Dutton "cloned" the computer's hard drive. (Tr. Joshua Seely 4/27/2011 at 17-18) This was done at the request of David Hammond, who was Appellant's defense counsel at the time. (Tr. Joshua Seely 4/27/2011 at 17)

During the first trial, Dutton testified that he first began working with computers in the military in 1962 and has continued to work with computers, in various capacities, since that time. (Tr. Marvin Dutton 4/27/2011 at 4-7) In 1980, Dutton founded Applied World Technology, a company that, among other things, designs and manufactures computer systems. (Tr. Marvin Dutton 4/27/2011 at 4, 7)

Dutton testified that he cloned – or made an exact duplicate of – the computer's hard drive. (Tr. Marvin Dutton 4/27/2011 at 9-10) The cloned data indicated that the computer had been used on December 25, 2009, eight days before the alleged disclosure, to conduct internet searches "in reference to child abuse and custody of children versus how to gain custody" and "[h]ow to report

crimes against children." (Tr. Marvin Dutton 4/27/2011 at 23) According to Dutton, there were "probably 20 different searches" done on December 25, 2009, "all in reference to the same line of sexual abuse, misconduct of a child, and what's required to report – what's required to file such a case." (Tr. Marvin Dutton 4/27/2011 at 14) Dutton also testified that the computer was used to visit various pornographic websites during the end of December 2009 and the first days of January 2010. (Tr. Marvin Dutton 4/27/2011 at 16)

The jury that convicted Mr. Dyer also did not know that days after the first trial resulted in a mistrial, the prosecution requested that the OSBI perform a forensic examination of the computer "for any evidence of the possession of child pornography, any electronic communications between [CHARLES] DYER and VALERIE DYER, and an analysis of the Internet history from October 2009 through January 2010." Appellants Ex. 2.[7]

According to Agent Rains' report, the computer did not contain child pornography, as Valerie had told Deputy Lemons. In a finding consistent with Dutton's testimony, Agent Rains found that the computer "was used to access Internet search engines or websites and search for terms related to 'parental rights.'" Agent Rains also found the computer to contain 1,083 graphic image files

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[7] Appellant's Ex. 2 is the affidavit of David Hammond and the report of OSBI agent Donald Rains. According to the affidavit, the Stephens County District Attorney's Office provided Mr. Hammond with a copy of Agent Rains' report prior to the time that Mr. Hammond withdrew as Mr. Dyer's counsel in September 2011. The affidavit and report are attached to the *Application for an Evidentiary Hearing on Sixth Amendment Claims* filed contemporaneously with this brief.

which depicted pornography. The images were accessed on six different dates beginning on December 25, 2009, and ending on January 12, 2010. The report indicates that 97 pornographic images were downloaded before H.D. made the alleged disclosure and 438 pornographic images were downloaded on January 11, 2010, one day before H.D. was forensically interviewed by Jessica Taylor.

C. The Failure to Present the Witnesses was Prejudicial.

Appellant contends that if the above-described evidence had been presented to the jury, there is, at least, a reasonable probability that the outcome of his trial would have been different. Appellant's jury had no concrete evidence concerning when the alleged disclosure was made by H.D. to Valerie or when Valerie reported the allegations to the Stephens County Sheriff's Department. In what is obviously an error, Valerie testified that the disclosure was made around "the end of December of '09." (Tr. Day 2 at 73) On cross-examination, Valerie testified that she did not remember the date of the disclosure. (Tr. Day 2 at 125) However, during the first trial, Valerie acknowledged that the disclosure was made "the day before school started." (Tr. Valerie Dyer 4/25-26/2011 at 90)

Given this state of affairs, it was important for the defense to demonstrate to the jury that H.D.'s school reconvened on Monday, January 4, 2010.[8] **See** Appellant's Ex. 1. This fact is consistent with Valerie's earlier testimony and the

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[8] Despite Valerie's claim that H.D. did not attend school the week following the disclosure, school records obtained by previous defense counsel indicate that H.D. attended school every day the following week except, Friday January 8, 2010. (Tr. Valerie Dyer 4/25-26/2011 at 80) **See** Appellant's Ex. 1.

testimony of Janet Dyer, Monsalve and Appellant, that the child was returned to Valerie on the evening of January 3, 2010. (Tr. Day 3 at 177; Day 4 at 43, 138) Mr. Dyer's jury should have known that the alleged disclosure occurred on January 3 and that Valerie did not report the allegations until January 8. (Tr. Joshua Seely 4/27/2011 at 12, 20)

The combination of this evidence indicates that Valerie, who claimed that she was faced with a tearful seven-year-old with an obvious vaginal injury who was reporting sexual abuse against her father for the third time, waited five days before she reported the allegations to authorities. Alternatively, the evidence suggests that H.D. did not disclose the abuse on the day that she returned to Valerie's home. The omitted evidence would have rendered Valerie's emotional and tearful account of H.D.'s disclosure completely unworthy of belief. (Tr. Day 2, at 74)

Defense counsel's failure to call OSBI criminalists Ferrero and Sosebee also was prejudicial. During her forensic interview, H.D. claimed that she was raped and sodomized on Appellant's bed and in the living room of the trailer on January 2, 2010. **See** State's Ex. 3. The jury knew that Monsalve gave clothing belonging to H.D. to deputies on the evening of January 12, 2010, and that the clothing included panties worn by H.D. from December 31, 2009 to January 3, 2010. (Tr. Day 4 at 37-38) Monsalve also testified that officers took bedding from the bed in the master bedroom. (Tr. Day 4 at 35) The jury did not know, however, that subsequent testing of these items failed to reveal any evidence to corroborate

H.D.'s claims of abuse. (Tr. Sara Ferrero 4/27/2011 at 7-9; Tr. Ashleigh Sosebee 4/27/2011 at 11; O.R. 42-47)

Finally, given that Appellant's theory of defense was that H.D. made the allegations because she was coached to do so by Valerie, defense counsel's failure to inform the jury about the activity found on Valerie's computer was, unquestionably, prejudicial. Had the jury known that in the days before the alleged disclosure was made, Valerie's computer was used to research "what's required to file" a sexual abuse case, Appellant's theory of defense would have been made more believable. (Tr. Marvin Dutton 4/27/2011 at 14) Even more powerful would have been testimony from Agent Rains indicating that an extensive amount of pornography was downloaded on Valerie's computer the day before H.D. was forensically interviewed. This evidence would have given force to Appellant's claim that H.D. had been coached.

There can be no reasonable strategic reason for the failure to call these witnesses. The deputies, the criminalists, and Marvin Dutton are each listed on the witnesses list filed by Mr. Hoch on April 3, 2012, less than two weeks before trial. (O.R. 365-71) Despite defense counsel's professed intention to call the witnesses, he did not do so and the result devastated the defense of Mr. Dyer's case. As to Agent Rains, defense counsel knew, or should have known, that his forensic examination of Valerie's computer uncovered information that was vital to Mr. Dyer's defense.

D. Conclusion.

"'Omissions [that] cannot be explained convincingly as resulting from a sound trial strategy, but instead arose from oversight, carelessness, ineptitude, or laziness,' may fall below the constitutional minimum standard of effectiveness." **Rosario v. Ercole**, 601 F.3d 118, 130 (2nd Cir. 2010) (quoting **Eze v. Senkowski**, 321 F.3d 110, 112 (2nd Cir. 2003)). Appellant contends that this is such a case. Accordingly, this Court should find that counsel's failure to call the witnesses identified in this proposition constitutes deficient performance. The Court should also find that Mr. Dyer was prejudiced by his counsel's deficiencies. The defense advanced during the first trial included the testimony of the witnesses identified in this proposition, with the exception of Agent Rains. That trial did not end in Mr. Dyer's conviction. Mr. Dyer's conviction in a trial in which the testimony of the above-described witnesses was excluded should lead this Court to conclude that Appellant has sufficiently demonstrated a reasonable probability that, but for counsel's errors, the outcome of his trial would have been different. Accordingly, this Court should reverse Appellant's conviction and remand this case to the district court for a new trial. In the alternative, the Court should provide Mr. Dyer with the opportunity to demonstrate that, but for the deficiencies of his trial counsel, the result of his trial would have been different by remanding the case to the district court for an evidentiary hearing. **See** *Application of an Evidentiary Hearing on Sixth Amendment Claims*, filed contemporaneously with this brief.

PROPOSITION II

THE ADMISSION OF IMPROPER CHARACTER EVIDENCE AND EVIDENCE OF "BAD ACTS" DEPRIVED MR. DYER OF THE RIGHT TO A FAIR TRIAL.

A. Standard of Review.

In this proposition of error, Appellant contends that a plethora of evidence was introduced by the state simply to show that he was a bad person. Under the circumstances of this case, Appellant contends that this Court should conclude that the errors complained of in this proposition have been preserved for appellate review.

As previously noted, Appellant's first trial ended with a hung jury. (O.R. 220) During that trial, defense counsel objected during the direct examination of Valerie Dyer when the prosecutor began to ask her about how Appellant treated her when she first discovered that she was pregnant with H.D. The objection was overruled. (Tr. Valerie Dyer 4/25-26/2011 at 9)

Valerie testified again in January of 2012, before defense counsel's request for a mistrial was granted. During this testimony, the prosecution asked Valerie a series of questions about Appellant's alleged attempt to alienate her from her family after H.D. was born. (Tr. 1/24/2012 at 38-39) Defense counsel approached the bench and made the following objection: "I don't see where any of this is getting anywhere towards what's charged, other than to try to

prejudice the jury to say he's a bad guy." The objection was, again, overruled. (Tr. 1/24/2012 at 40)

Thus, on two occasions, counsel for Mr. Dyer voiced objections to the prosecution's elicitation of evidence of bad character and each time the objections were overruled. Prior to the third trial, the court made clear that its previous rulings were still in effect. (M Tr (12/30/2011) at 17; Tr. Day 1 at 7) Under these circumstances, the Court should find that the errors identified in this proposition are preserved for appellate review. As such, the trial court's decision to admit evidence should be reviewed for an abuse of discretion. **Williams v. State**, 2008 OK CR 19, 188 P.3d 208, 218.

Alternatively, the claim should be reviewed for plain error. Under this standard of review, this Court will grant relief if it concludes that the error was not harmless or that the error constitutes a miscarriage of justice or a substantial violation of a constitutional or statutory right. **McIntosh v. State**, 2010 OK CR 17, 237 P.3d 800, 803.

B. Argument and Authority.

Title 12 O.S.2001, § 2404(B) prohibits the admission of evidence of "other crimes, wrongs, or acts" to prove the character of a person in order to show action in conformity therewith, absent one of the specifically listed exceptions. An act that is not a violation of the criminal law is nonetheless governed by Section

2404(B) where it carries a stigma that could unduly prejudice an accused in the eyes of the jury. **Freeman v. State**, 1988 OK CR 192, 767 P.2d 1354, 1355.

When the state seeks to introduce evidence of a crime or act other than the one charged, it must comply with the procedures set out in **Burks v. State**, 1979 OK CR 10, 594 P.2d 771, 772, *overruled on other grounds by* **Jones v. State**, 1989 OK CR 7, 772 P.2d 922. **Burks** requires, in part, the state to give pre-trial notice of the other crimes or bad acts evidence it intends to introduce.

To be admissible under Section 2404(B),

> evidence of other crimes must be probative of a disputed issue of the crime charged, there must be a visible connection between the crimes, evidence of the other crime(s) must be necessary to support the State's burden of proof, proof of the other crime(s) must be clear and convincing, the probative value of the evidence must outweigh the prejudice to the accused and the trial court must issue contemporaneous and final limiting instructions.

Marshall v. State, 2010 OK CR 8, 232 P.3d 467, 477 (citing **Lott v. State**, 2004 OK CR 27, 98 P.3d 318, 334-35 (in turn citing **Burks v. State**, 594 P.2d at 772)).

Although the prosecution here provided no pre-trial notice, it repeatedly elicited evidence calculated solely to besmirch Mr. Dyer's character in violation of Section 2404(B). This evidence was introduced during the testimony of Valerie Dyer. She testified that Appellant "couldn't stand" her family and that shortly after their marriage he "grounded" her and would not let her talk on the phone for two weeks because calls to her family had run up a phone bill. (Tr. Day 2 at 44-45)

Valerie also testified that her marriage to Appellant changed for the worse when she became pregnant with H.D. because Mr. Dyer never wanted children. (Tr. Day 2 at 25) According to Valerie, Mr. Dyer became "angry" and "disgusted," he called the pregnancy a "cancer in [her] stomach," berated her for being "fat" and insisted that she obtain an abortion. (Tr. Day 2 at 24-27) Valerie testified that Appellant called her names and that he would "fake punch" or "play punch" her – striking her in the stomach and "it would hurt." (Tr. Day 2 at 25)

Valerie testified that after H.D. was born, she felt like a single parent:

> He wouldn't let her sleep in the same room with me in a bassinet. He would make her sleep in another room where I could barely hear her cry and then he would nudge me and go, "Go get your 'F-ing' kid,"and he would never get up with her.

(Tr. Day 2 at 31)

According to Valerie, Appellant also isolated her and H.D. from Valerie's family. (Tr. Day 2 at 29) She testified that the family's move to Tennessee occurred because "[h]e didn't want my family to be around [H.D.]. That was his main concern, and he just wanted, I guess, that control." (Tr. Day 2 at 30)

While living in Tennessee, Valerie began working at Wal-Mart. (Tr. Day at 36) Valerie testified that she sometimes did not get home from work until after midnight and that Appellant was sometimes neglectful of H.D.: "there's times where I came home and [H.D.] was – was plain nasty and a huge diaper and – and he's sitting on the computer playing video games." (Tr. Day 2 at 38) Valerie also testified that Appellant had essentially abandoned her and H.D. prior to their

return to Oklahoma in 2008, and that he rarely talked to H.D. on the phone while he remained in California to complete his obligation to the Marine Corps. (Tr. Day 2 at 47-50)

Mr. Dyer contends that the testimony outlined above was not proffered for any proper purpose, but was introduced to portray him as a bad person in the eyes of the jury. The nature of Appellant's relationship with Valerie following their marriage in 2000, whether Mr. Dyer wanted children and his degree of attentiveness towards his wife and child are completely irrelevant to whether he committed the acts charged. Accordingly, this evidence should have been excluded by 12 O.S.2011, § 2402, which makes irrelevant evidence inadmissible. Even if there was some arguable relevance to this testimony, it nevertheless should have been excluded by 12 O.S.Supp.2003, § 2403, because its marginal relevance is vastly exceeded by the danger of unfair prejudice.

Even though the actions of Appellant, as described in the testimony, did not necessarily rise to the level of criminal acts, the evidence is nevertheless governed by Section 2404(B) because it unquestionably concerns bad acts. As such, this evidence was subject to the pre-trial notice required in **Burks**. As previously noted, no such notice was provided. Also absent was a limiting instruction, informing jurors that they could not consider the other act evidence as evidence of guilt for the charged crime.

This Court has granted relief where evidence has been introduced in violation of Section 2404(B). For example, in **Coates v. State**, 1989 OK CR 16, 773 P.2d 1281, the defendant was convicted of various misfeasance crimes stemming from her employment as a county treasurer. Included in the evidence introduced at the trial by the state was testimony indicating that the defendant threatened a political opponent, that she was lax in matters pertaining to her personal taxes and that she watched television while at work. This Court found that the evidence should not have been admitted because it was not relevant and any marginal probative value it had was substantially outweighed by the danger of unfair prejudice. 773 P.2d at 1285-86. Additionally, with respect to much of the evidence at issue, the Court noted that the state had failed to comply with the **Burks** pre-trial notice requirement and concluded that reversal was required because the "highly inflammatory" evidence "tended only to show that appellant was a person worthy of punishment rather than showing her guilt for the crimes charged in the Information." **Id.** at 1286-87.

The analysis this Court used in **Coates** is equally applicable to the case at bar. The Court should find that the evidence complained of was irrelevant under 12 O.S.2001, § 2401 and otherwise inadmissible under 12 O.S.Supp.2003, § 2403 because its "probative value is substantially outweighed by the danger of unfair prejudice[.]" As in **Coates**, the totality of the improperly admitted evidence should be viewed as "highly inflammatory." Particularly inflammatory was the testimony

claiming that Appellant punched Valerie in the stomach during her pregnancy and that he neglected his daughter when she was in diapers. These separate, uncharged acts were not admissible for any legitimate purpose. Rather, this evidence, like all evidence identified in this proposition of error, was "a subterfuge for showing to the jury that the defendant is a person who deserves to be punished." **Turner v. State**, 1981 OK CR 2, 629 P.2d 1263, 1265 (quoting **Burks**, 594 P.2d at 775).

C. Conclusion.

Mr. Dyer contends that, as in **Coates**, the improper admission of other act evidence should result in a reversal of his conviction. In the event the Court concludes that reversal is not required, it should acknowledge the probability that the jury considered the improper evidence in assessing punishment and modify his sentence accordingly.

PROPOSITION III

THE TRIAL COURT ERRED WHEN IT REFUSED TO PERMIT DR. RAY HAND TO TESTIFY FOR THE DEFENSE.

A. Standard of Review.

A trial court's decision regarding the sufficiency of the qualifications of a potential expert witness is reviewed on appeal for an abuse of discretion. **Riggle v. State**, 1978 OK CR 121, 585 P.2d 1382, 1387.

B. Argument and Authority.

Prior to the first trial, the defense made known its intent to call Dr. Ray Hand, a clinical psychologist, who had reviewed the audio/video recording of the forensic interview of H.D. by Jessica Taylor. (O.R. 108) The state objected, and on April 8, 2011, the court held a hearing to decide the issue. (O.R. 133-37)

At the hearing, defense counsel explained the purpose of Dr. Hand's testimony:

> I understand that the Court has already made a finding that the jury is going to be able to look at the [recording of the forensic] interview. I still think the Defendant has the right to present testimony to the jury by expert opinion so the jury will know from the Defendant's standpoint what the proper interviewing techniques are.
>
> We're not asking Dr. Hand to substitute his opinion on whether or not this child is telling the truth, but I think that it's important for a jury who is not experienced in interviewing, even though they can look at the tape, to listen to the Defendant's expert so they can make a determination on how much weight to actually give – to give this interview. And I think based on the nature of the charge and the complications involving interviews, I think it's very important for the Defendant to present his side as far as how the interviewing should be done.

(M Tr. (4/8/2011) at 222)

At the conclusion of the hearing, the court granted the state's motion to exclude the testimony of Dr. Hand, finding that the defense had failed to sufficiently establish his qualifications. (M Tr. 4/8/2011 at 226) Prior to the third Tr (12/30/2011) at 17; Tr. Day 1 at 7) Appellant contends that the trial court abused its discretion when it prohibited the defense from calling Dr. Hand.[9]

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" **Crane v. Kentucky**, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986) (quoting **California v. Trombetta**, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984)). This right encompasses the right to call witnesses whose testimony is "relevant and material" to the defense. **Washington v. Texas**, 388 U.S. 14, 23, 87 S.Ct. 1920, 1925, 18 L.Ed.2d 1019 (1967). "The right to offer the testimony of witnesses ... is in plain terms the right to present a defense.... This right is a fundamental element of due process of law." **Id.** at 19, 87 S.Ct. at 1923.

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[9] Appellant maintains that this claim should be reviewed under the abuse of discretion standard despite the fact that defense counsel made no complaint concerning Dr. Hand's exclusion prior to the third trial. One of the purposes of objections is to permit the trial judge to exercise discretion and avoid error. **See McDonald v. State**, 1971 OK CR 383, 498 P.2d 776, 779. Here, the state objected to Dr. Hand's proposed testimony and the court exercised its discretion following a contested hearing. When the court reaffirmed its previous rulings, it made additional objection futile and the alleged error should be considered preserved. Alternatively, Appellant contends that prohibiting the defense from calling Dr. Hand constitutes reversible error under the plain error standard of review. **See McIntosh v. State**, 2010 OK CR 17, 237 P.3d 800, 803.

"Whether Appellant was denied the right to present a defense ultimately turns on whether the evidence at issue was admissible." **Simpson v. State**, 2010 OK CR 6, 230 P.3d 888, 895. To be admissible, evidence must be relevant. 12 O.S.2011, § 2402. "'Relevant evidence' means evidence having 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." 12 O.S.2011, § 2401. The proffered testimony of Dr. Hand easily met these requirements.

At the time Dr. Hand testified at the hearing, he had been a licensed psychologist for almost 30 years and he had "conducted interviews of various sorts, forensic interviews and clinical interviews over most of [his] career." (M Tr. (4/8/2011 at 185) Dr. Hand explained that he developed an interest in forensic interviewing in the 1980s and that he had studied "the research and the interviewing process and issues associated with interviewing children to develop a perspective on the range of factors that has – have an effect on the context of the interview, the interviewer and the interviewee." (M Tr. 4/8/2011 at 186)

With regard to formal training, Dr. Hand explained that he attended various workshops over the course of his career – one as recently as 2010 – that addressed interviewing children and "the research relevant to that kind of interviewing." (M Tr. 4/8/2011 at 186, 189) Dr. Hand testified that his education related to forensic interviews based on sexual abuse complaints and that he has conducted

more than a dozen such interviews. (M Tr. 4/8/2011 at 188) Dr. Hand estimated that he had previously testified regarding interview techniques on some 12 to 15 occasions. (M Tr. 4/8/2011 at 189)

According to Dr. Hand, because child witnesses are "somewhat more vulnerable," it was important that the interviewer "develop a sense of rapport" and an understanding of the child's developmental level, including their capacity to understand what truth is, and then begin a process of questioning that "allows the children under the best circumstances to in a narrative manner explain what happened to them." (M Tr. 4/8/2011 at 191) Dr. Hand emphasized:

> the challenge is to take the time and have the patience to elicit a narrative from the child and allow the child to generate and use their own language and the research conducted by Ceci and Bruck, among others, has indicated that that tends to get the best and most accurate information from the child.

(M Tr. 4/8/2011 at 193)

This was not what Dr. Hand saw when the studied the audio/video recording of H.D.'s forensic interview. Dr. Hand was of the opinion that Taylor "was in a hurry and she didn't allow the child to develop a narrative and she jumped in with questions." (M Tr. 4/8/2011 at 193) Dr. Hand testified that as a result, "one wonders about the accuracy of the kinds of information that was brought into the interview." (M Tr. 4/8/2011 at 198) Dr. Hand also questioned Taylor's use of anatomically detailed dolls during the interview, noting that forensic psychologists discourage the use of forensic dolls because children

exposed to them may tend to offer more fantastic details than children interviewed without them. (M Tr. 4/8/2011 at 194)

At the conclusion of the hearing, the court granted the state's motion and would not allow Dr. Hand to testify, stating:

> Mr. Hammond, I just don't think you carried the burden here. I'm concerned by Dr. Hand's testimony that he – concerning the issue of his familiarity with his forensic interviewing techniques. He's self-taught. He relies upon various authors and persons that he's relies, but he says it's based on – and he can't really tell and show this Court what is his specific protocol other than he's developed it.

(M Tr. 4/8/2011 at 226) Appellant contends that the court's decision in this regard is an abuse of discretion.

"This Court has recognized that an 'expert witness' is someone with specialized knowledge in a particular field, who has acquired this knowledge through study, training, experience, or a combination of these, and 'who has experience and knowledge in relation to matters [that] are not generally known.'" **Webster v. State**, 2011 OK CR 14, 252 P.3d 259, 279 (quoting **Andrew v. State**, 2007 OK CR 23, 164 P.3d 176, 195 and **Kennedy v. State**, 1982 OK CR 11, 640 P.2d 971, 977). Clearly, Dr. Hand's testimony established that he had acquired a great deal of knowledge regarding interview techniques. That some of this knowledge may have come through self-study should not have disqualified him from the role of an expert. **See Harris v. State**, 2004 OK CR 1, 84 P.3d 731, 747 (An "expert" need not hold a professional degree. Rather, any combination of

education, training and experience may qualify a person as an expert on a particular subject).

C. Conclusion.

This Court should find that the trial court erred when it precluded the defense from presenting the testimony of Dr. Hand to the jury and that the effect of this error was to deny Mr. Dyer of his constitutional right to present a complete defense. Accordingly, Appellant's conviction should be reversed and remanded for a new trial.

PROPOSITION IV

MR. DYER SHOULD BE AFFORDED RELIEF ON THE BASIS OF CUMULATIVE ERROR.

"This Court has recognized than when there are 'numerous irregularities during the course of [a] trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors was to deny the defendant a fair trial.'" **DeRosa v. State**, 2004 OK CR 19, 89 P.3d 1124, 1157 (quoting **Lewis v. State**, 1998 OK CR 24, 970 P.2d 1158, 1176).

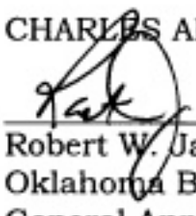
Mr. Dyer respectfully submits that the errors identified in Propositions I-III of this brief, when viewed in the aggregate, entitle him to a new trial.

CONCLUSION

For the foregoing reasons, Appellant's conviction should be reversed and his case remanded to the district court for a new trial. In the alternative, the case should be remanded to the district court to allow Appellant to demonstrate, at an evidentiary hearing, that he is entitled to a new trial on the basis of ineffective assistance of counsel. In the final alternative, Appellant's sentence should be substantially modified.

Respectfully submitted,

CHARLES ALLEN DYER



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CERTIFICATE OF SERVICE

This is to certify that on January 17, 2013, a true and correct copy of the foregoing Brief of Appellant was served upon the Attorney General by leaving a copy with the Clerk of the Court of Criminal Appeals for submission to the Attorney General, and was caused to be mailed, via United States Postal Service, postage pre-paid, to Appellant at the address set out below, on the date of filing or the following business day.

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Robert W. Jackson