TABLE OF AUTHORITIES

CASES

Alverson v. State,
1999 OK CR 106, 983 P.2d 498 46

Barnett v. State,
2011 OK CR 28, 263 P.3d 959 28

Bernay v. State,
1999 OK CR 37, 989 P.2d 998 33

Bland v. State,
2000 OK CR 11, 4 P.3d 702 .... 15, 26, 27

Carter v. State,
2008 OK CR 2, 177 P.3d 572 .... 32, 33, 36

Cullen v. Pinholster,
563 U.S.___,131 S. Ct.1388, 179 L. Ed. 2d 557 (2011) . . . 13, 14, 28

Daubert v. Merrill Dow Pharmaceuticals, Inc.,
509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) 43

Eizember v. State,
2007 OK CR 29, 164 P.3d 208 .... 28, 29, 35

Gilson v. State,
2000 OK CR 14, 8 P.3d 883 .... 36, 42, 43, 46

Harrington v. Richter,
562 U.S.___, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) 13, 14

Head v. State,
2006 OK CR 44, 146 P.3d 1141 .... 12, 13

Hogan v. State,
2006 OK CR 19, 139 P.3d 907 30

Jones v. State,
2009 OK CR 1, 201 P.3d 869 25

Lambert v. State,
1999 OK CR 17, 984 P.2d 221 34

Lott v. State,
2004 OK CR 27, 98 P.3d 318 .... 25, 29

Marshall v. State,
2010 OK CR 8, 232 P.3d 467 34

Owens v. State,
1976 OK CR 316, 557 P.2d 457 30

Phillips v. State,
1999 OK CR 38, 989 P.2d 1017 .... 15, 28

Rutan v. State,
2009 OK CR 3, 202 P.3d 839 .... 29, 36

Sattayarak v. State,
1994 OK CR 64, 887 P.2d 1326 35

Scott v. State,
1983 OK CR 58, 663 P.2d 17 35

Smallwood v. State,
1995 OK CR 60, 907 P.2d 217 34

Stouffer v. State,
2006 OK CR 46, 147 P.3d 245 34

Strickland v. Washington,
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) .... *passim*

Welch v. State,
2000 OK CR 8, 2 P.3d 356 29

Williams v. Taylor,
529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) 12

STATUTES

10 O.S.Supp.2009, § 7115 1

12 O.S.2011, § 2403 29

12 O.S.2011, § 2404 29

21 O.S.Supp.2009, § 843.5 1

21 O.S.2001, § 1713 1

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Charles Allen Dyer, hereinafter referred to as defendant, was charged with child sexual abuse in violation of 10 O.S.Supp.2009, § 7115 (now renumbered as 21 O.S.Supp.2009, § 843.5(E)). A second charge, concealing stolen property in violation of 21 O.S.2001, § 1713, was added and severed from the child sexual abuse charge, and was later dismissed. On April 26-27, 2011, defendant was tried in Stephens County Case No. CF-2010-17 before the Honorable Joseph H. Enos, District Judge, and the trial concluded in a deadlocked jury. On January 23, 2012, Judge Enos began a second trial, but during the presentation of the State's first witness, Valerie Dyer, the judge determined he must declare a mistrial because the State inadvertently mailed juror survey forms to several individuals on defendant's jury. On April 16-19, 2012, defendant was tried again, and the jury found him guilty of child sexual abuse, and recommended punishment of thirty years imprisonment. The trial court sentenced defendant in accordance

with the jury's recommendation (O.R. 439-40, Tr. S 8).[1] Defendant appeals from the Judgment and Sentence.

STATEMENT OF THE FACTS

Valerie Dyer and defendant were married in 2000, when Valerie was sixteen years old and defendant was nineteen. After living with defendant's parents in Stephens County for about one month, the couple moved to California where defendant was stationed with the Marine Corps. In 2002, at the end of defendant's duty, the couple returned to Oklahoma. Valerie was six months pregnant at the time. H.D. was born in November of 2002. Defendant did not want a child, and his marriage to Valerie deteriorated from the time he learned she was pregnant, eventually ending in divorce (Tr. Day 2 at 23, 27).

A month after H.D. was born, defendant told Valerie they were moving to Tennessee, where defendant's sister, Amy Dark, lived. They lived in Jonesboro, Tennessee, for two or two and one half years, living first with defendant's sister, then after six months, they got their own place. Defendant worked, then quit to

---

[1]References to the Original Record and transcripts are indicated by page as follows:

Original Record	(O.R.__)
April 8, 2011 evidentiary hearing	(Tr. 4/8/2011)
April 27, 2011 trial testimony	(Tr. 4/27/2011 [witness]___)
August 12, 2011 hearing	(Tr. 8/12/2011__)
Sept. 11, 2011 motions hearing	(Tr. 9/11/2011__)
December 30, 2011 motion hearing:	(Tr. 12/30/2011__)
January 24, 2012 trial:	(Tr. 1/24/2012__)
April 16-19, 2012 Trial Day 1, 2, or 3:	(Tr. Day__ at__)
Sentencing hearing:	(Tr. S __).

take classes, and Valerie got a job at a Wal-Mart store. After a year and a half, Valerie quit her job, then defendant quit college and reenlisted in the Marine Corps. The couple left Tennessee and returned to Oklahoma while defendant waited to go back to the Marines. They were in Oklahoma a year and a half, then, when H.D. was almost three, defendant was readmitted to the Marines, and they moved to Camp Pendleton, California (Tr. Day 2 at 40). According to Valerie, defendant was uninterested in H.D. and unsupportive of Valerie, and their relationship was terrible. They fought constantly.

When H.D. was about four, defendant started to show more interest in H.D. Valerie thought that had a positive effect on their marriage. They were not arguing as much, and their relationship was more relaxed and normal. However, in late September of 2008, when H.D. was almost six, defendant bought a plane ticket to send Valerie and H.D. back to Oklahoma. Defendant had one year remaining in the Marines, and told Valerie he was sending her and H.D. back to Oklahoma to save money for that year. Valerie and H.D. returned to Oklahoma, and lived with defendant's parents for a couple of months. According to Valerie, she and defendant spoke by phone only about once a week, and he never asked to speak with H.D. (Tr. Day 2 at 42-44).

Defendant wanted Valerie to live with his parents, but Valerie decided to get her own home. She got a job and rented a house for herself and H.D. Defendant

did not send her any money to help. Their relationship was not good. Valerie was suspicious about defendant's motive for sending her and H.D. away. Valerie started to question defendant, and finally, about six months after he sent Valerie to Oklahoma, he told her he did not want her anymore, and H.D. was in the way. Valerie was angry but it did not come as a shock (Tr. Day 2 at 51). Defendant accused Valerie of adultery, and Valerie admitted she dated other men, but only after defendant told her he was finished with her. Defendant also accused her of smoking marijuana, and she admitted she did that (Tr. Day 2 at 55-56, 147).

In the summer of 2009, defendant left the Marine Corps and returned to Oklahoma. He lived with his parents, in a tent on their property (Tr. Day 3 at 180). Valerie testified that although defendant was hurt that she was dating someone, and filed for divorce, they were civil toward each other, and defendant was seeing H.D. Per their agreement, defendant would pick up H.D. to spend every other weekend with him (Tr. Day 2 at 57-58, 61)

Also in the summer of 2009, defendant traveled to California and returned with Valerie's former friend, Amanda Monsalve, informing Valerie that Monsalve was going to live with him (Tr. Day 2 at 66-68). Monsalve had been Valerie's best friend when she was in California. Valerie was shocked and hurt. She had shared everything with Monsalve, and felt betrayed when Monsalve moved in with defendant. Defendant and Monsalve rented a house near defendant's parents.

He had been seeing H.D. frequently before going to California, and it was the same when he and Monsalve moved in together. From that time until Christmas of 2009, Valerie had a civil relationship with defendant and Monsalve. Defendant was seeing H.D. frequently, which Valerie thought was great (Tr. Day 2 at 72).

In December of 2009, when H.D. was seven years old, H.D. stayed with defendant and Monsalve for most of the Christmas break. At the end of her visit, sometime between the end of December and the first week of January, Valerie picked up H.D. from defendant's home and noticed H.D. was crying and not acting like herself. Valerie asked what was wrong, and H.D. said, "nothing. I don't want to talk about it." Valerie took H.D. home and drew a bath for her. The tub was filling up and H.D. kept crying. H.D. repeated that she did not want to tell Valerie what was wrong. Valerie pressed her to tell, and H.D. said, "I'm afraid of what Dad might do." Valerie took off H.D.'s clothes, and H.D. was complaining of her "bo-bo," referring to her vagina. "It hurts, Mama." Valerie thought H.D. had a urinary tract infection, but H.D. kept saying, "I don't want him to find out." H.D. sat in the tub and Valerie noticed her vagina was not normal. It was very red and swollen and open (Tr. Day 2 at 72-75).

Valerie kept asking H.D. what was wrong, and H.D. kept saying, "I don't want him to find out. I don't want – I don't want Daddy to find out," "Mommy, you pinky promise that you won't tell Daddy." Valerie said, "I pinky promise" and after

a minute, H.D. said, "Mommy, he touches my bo-bo." She grabbed herself in the vaginal area and said, "Daddy touches it." Valerie left the room so H.D. would not see her cry. She did not know what to do (Tr. Day 2 at 79-80). Valerie's cousin, Laurie Crosby, and her family were at her house. Crosby saw Valerie crying and asked what was wrong. Valerie told Crosby what H.D. said to her. Valerie went back to the bathroom. H.D. was getting out of the tub. As Valerie helped H.D. dry off, H.D. kept repeating, "Mommy, you pinky promised. You pinky promised." Valerie agreed not to tell (Tr. Day 2 at 83).

The next day Valerie reported H.D.'s disclosure to law enforcement. First she went to the Department of Human Services, then to the Women's Haven, then to the Duncan police. The police said it was out of their jurisdiction, so she went to the sheriff's department and filed a report. The sheriff's department made an appointment for H.D. to be examined by a doctor, and also for a forensic interview (Tr. Day 2 at 84, 91-92).

While Valerie was at the sheriff's department, defendant phoned her about having H.D. stay with him the next weekend. Valerie did not tell defendant she was at the sheriff's department, and told defendant she wanted to keep H.D. with her that weekend. Defendant was asking questions and sounded nervous on the phone, as if he knew there was something going on (Tr. Day 2 at 85-86).

Forensic interviewer Jessica Taylor testified she interviewed H.D. on January 12, 2010 at the Mary Abbott Children's House in Norman. Ms. Taylor described her credentials and interviewing methodology, and testified as to H.D.'s disclosures of defendant's sexual abuse during the interview. Ms. Taylor testified that H.D.'s responses and details were consistent with an uncoached child (Tr. Day 3 at 46).

Following the direct and cross examination of Ms. Taylor, the jury viewed her videotaped interview with H.D. (Tr. Day 3 at 6, 89, State's Ex. 3).

A review of the videotape reflects that Ms. Taylor initially asked H.D. general questions, explained the configuration of the interview room, and pointed out the video recording equipment. Ms. Taylor asked H.D. a number of questions to establish rapport and that H.D. knew the difference between the truth and a lie. Ms. Taylor stressed the importance of telling only the truth during the interview, and that it was important that H.D. correct her if she said something incorrect (State's Ex. 3 at 7:10-7:55).

Ms. Taylor asked H.D. her age, birthday, and the names of everyone who lived in the same house with her. Ms. Taylor asked H.D. if she knew why she was there, and H.D. said, "no." Ms. Taylor told H.D. they were going to talk about body parts, and asked H.D. to identify body parts on a drawing of a girl and a boy.

As she identified the body parts, H.D. told Ms. Taylor she called a vagina a "bo-bo," and a penis was a "weiner" (State's Ex. 3 at 15:00, 16:15).

Ms. Taylor asked H.D. if she got kisses, and H.D. responded that her mom kissed her lips and cheek, and that those kisses were okay. Asked if H.D. ever got any kisses that were not okay, H.D. responded, "[y]es." Ms. Taylor asked, "[t]ell me about that, and H.D. replied, "My Dad does it on my bo-bo" (State's Ex. 3 at 17:15). Taylor defendant kissed her bo-bo, and that he took off her clothes and his clothes, and he put her clothes on the pillow (State's Ex. 3 at 21:30). H.D. showed with the paper figures how defendant would lie on top of her, with his head on her vaginal area and his hands holding her legs (State's Ex. 3 at 25:00-27:00). H.D. stated this happened more than one time.

H.D. said she could not explain what happened, and Ms. Taylor then gave H.D. anatomically correct dolls to help H.D. show her what defendant did (State's Ex. 3 at 27:33). Ms. Taylor asked H.D. to show her what happened with the dolls (State's Ex. 3 at 29:00). H.D. undressed both dolls. H.D. said she was lying on the pillow, and defendant lay on top of her. H.D. showed Ms. Taylor what defendant would do to her vagina. H.D. explained and demonstrated with the dolls. H.D. said defendant gets on top of her, and puts "this" into her, as she showed Ms. Taylor the doll's penis and inserted it into the female doll's vagina. When Ms. Taylor asked, "How does that feel?" H.D. responded, "it hurts. His body

is pushing really hard, and it hurts. It is moving up and down, and hurts whenever it goes up" (State's Ex. 3 at 33:00). Ms. Taylor gave H.D. the paper drawings, and asked her to circle the body parts when defendant puts his "weiner" into her "bo-bo," and H.D. circled the penis and the vagina on the drawings (State's Ex. 3 at 33:50).

Ms. Taylor asked if defendant ever made H.D. kiss any part of his body, and H.D. said it was kind of embarrassing to her, but after hesitating, H.D. asked for the drawing of the boy (State's Ex. 3 at 35:50). Pointing to the drawing, H.D. said she put her mouth on defendant's "weiner." Defendant would say he was almost done, and stuff would squirt in her mouth. It was "yucky stuff" and looks "yellow." H.D. said defendant's "weiner" was inside her mouth, and she would swirl her tongue on it (State's Ex. 3 at 37:00).

In response to Ms. Taylor's questions, H.D. said she kissed defendant's penis more than one time, defendant had kissed her vagina more than one time and defendant put his penis in her vagina more than one time. The first time the abuse occurred was when she was four. Also, all of these things happened both in Oklahoma and in California. All of those things happened both at defendant's house and at defendant's mother's house (State's Ex. 3 at 44:40).

At trial, H.D. testified she remembered her interview with Jessica Taylor, and she remembered everything she told Ms. Taylor.

[PROSECUTOR]:	[t]he things that you told Jessica in that interview, did those things really happen to you?
[WITNESS]:	Yes.
[PROSECUTOR]:	Who did those things to you, [H.D.]?
[WITNESS]:	[Defendant].
[PROSECUTOR]:	And who is [Defendant]?
[WITNESS]:	My dad.

(Tr. Day 3 at 97). H.D. testified no one asked her to lie or make anything up about defendant, specifically, that her mother never asked her to lie about defendant.

H.D. testified she did not want to talk to Ms. Taylor, and in some parts of the interview, she was embarrassed to answer Ms. Taylor's questions, and some of the times she said "I don't know" and "I don't remember" to Ms. Taylor was because she was embarrassed. H.D. was unwilling to tell the jury the details of what defendant did to her, but testified the things she told Ms. Taylor really happened to her (Tr. Day 3 at 97-99). H.D. testified that in addition to the things she told Ms. Taylor, defendant did things to her in his tent that was beside the house.

Dr. Preston Waters, M.D. examined H.D. on January 13, 2010. Dr. Waters testified he performed physical examinations of children when there were suspicions of sexual abuse. Dr. Waters did not do a rape exam, because he had been told the alleged abuse was too long ago for there to be DNA evidence (Tr. Day

3 at 118, 122-24). Dr. Waters did a physical exam, then a genital examination. There was no exterior bruising or scarring. That did not surprise him because most exams are normal, even where abuse is confessed. The genital area receives a lot of circulation, and heals very quickly. The reported abuse was more than a week prior to the exam, so he did not expect to see any outward signs of abuse.

Dr. Waters testified that the appearance of the hymen posteriorly is of particular importance for evidence of abuse. The posterior hymen is the power part if the child is lying on her back; or the portion of the hymen toward the anus. An accidental injury, even by a bicycle or bed post, would injure the anterior, not posterior, hymen (Tr. Day 3 at 129-30). When Dr. Waters examined H.D., he found a complete absence of posterior hymen. This was "highly suspicious for an abusive penetrating sort of injury" (Tr. Day 3 at 130). The only explanation was forceful penetration (Tr. Day 3 at 132). The only conclusion more certain than "highly suspicious" would be "definitive" such as pregnancy, or an STD, or the presence of semen, or bruising or bleeding from an acute injury (Tr. Day 3 at 131). Dr. Waters also testified that there could be redness, swelling, abnormal openness of the vaginal area within a day or two of the alleged abuse (Tr. Day 3 at 132).

The defense presented the testimony of defendant's sister Amy Dark, defendant's mother Janet Dyer, defendant's girlfriend Amanda Monsalve, and defendant took the stand in his own defense. Among the testimony presented in

defense of defendant, both defendant and Dark testified they believed H.D. had been sexually abused by someone, but not by defendant (Tr. Day 3 at 157-59, 166, 172, Day 4 at 159).

The State will present additional facts as they may be relevant to its responses to defendant's propositions of error discussed below.

PROPOSITION I

DEFENDANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

In his first proposition of error, defendant contends he was deprived of the effective assistance of counsel. Specifically, defendant claims trial counsel failed to present several defense witnesses. Defendant does not sufficiently support his claim that trial counsel was ineffective, and his proposition lacks merit.

To establish ineffective assistance of counsel, the defendant must prove that his counsel's performance was deficient and that such deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *See also Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)(reaffirming the *Strickland* standard). Under this test, the defendant must affirmatively prove prejudice resulting from his attorney's actions. *Strickland*, 466 U.S. at 693, 104 S. Ct. at 2067; *Head v. State*, 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148. The defendant must show that there is a

reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Id.*

In *Strickland,* the Supreme Court recognized that "intrusive post-trial inquiry into attorney performance" could potentially "encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense." *Strickland,* 466 U.S. at 690, 104 S. Ct. at 2066. In two 2011 decisions, the Supreme Court again emphasized its finding that the *Strickland* standard is intended to be a difficult standard for a defendant to meet:

> Surmounting *Strickland's* high bar is never an easy task. An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence. **The question is whether an attorney's representation amounted to incompetence under prevailing professional norms**, not whether it deviated from best practices or most common custom.

Harrington v. Richter, 562 U.S.___, 131 S. Ct. 770, 778, 178 L. Ed. 2d 624 (2011) (internal citations and quotation marks omitted) (emphasis added); *see also Cullen*

v. Pinholster, 563 U.S.___,131 S. Ct.1388,1408, 179 L. Ed. 2d 557 (2011) (*quoting Richter,* 131 S. Ct. at 788).

Further, "while in some instances even an isolated error can support an ineffective-assistance claim if it is sufficiently egregious and prejudicial, it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Richter,* 131 S. Ct. at 791 (internal citations and quotation marks omitted). "[*S*]*trickland* specifically commands that a court 'must indulge [the] strong presumption' that counsel 'made all significant decisions in the exercise of reasonable professional judgement'." *Pinholster,* 131 S. Ct. at 1407 (internal citations omitted). The Supreme Court clarified in *Richter*:

> In assessing prejudice under *Strickland,* the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, ***Strickland* asks whether it is reasonably likely the result would have been different.** This does not require a showing that counsel's actions more likely than not altered the outcome, but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case. **The likelihood of a different result must be substantial, not just conceivable.**

Richter, 131 S. Ct. at 778 (internal citations and quotation marks omitted) (emphasis added).

This Court has held that the prejudice determination is based upon whether the outcome of the trial would have been different but for defense counsel's unprofessional errors. *See Bland v. State*, 2000 OK CR 11, ¶ 112 n.11, 4 P.3d 702, 730. Further, "when a claim of ineffective assistance of counsel can be disposed of on the ground of lack of prejudice, that course should be followed." *Id.*; *Phillips v. State*, 1999 OK CR 38, ¶ 103, 989 P.2d 1017, 1043 (*citing Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069).

Potential Testimony of the Omitted Witnesses

Defendant claims defense counsel was ineffective because he did not present the testimony of sheriff's deputies Joshua Seely and Christopher Lemons, OSBI criminalists Sara Ferrero and Ashleigh Sosebee, computer expert Marvin Dutton, and OSBI agent Don Rains. With the exception of Agent Rains,[2] defendant bases his claims on the witnesses' testimony at defendant's first trial on April 27, 2011. Their testimony from the first trial was made part of the record for purposes of this appeal, and is summarized as follows:

Deputy Joshua Seely

Deputy Seely testified he participated in the search of defendant's home on January 12, 2011. The purpose of the search was to collect clothing and bedding

[2]Defendant also claims in an Application for Evidentiary Hearing filed contemporaneously with his Brief, the ineffectiveness of trial counsel is shown by evidence that could be presented through OSBI Special Agent Don Rains. The State will address the claims raised in defendant's application in a separate section, entitled "Claims Supported by Extra-Record Evidence," *infra* at 23-26.

that might bear DNA evidence. Defendant's girlfriend Amanda Monsalve was present and cooperated with them, retrieving H.D.'s pajamas and panties from a clothes hamper, and giving Seely bedding from defendant's bed in the master bedroom. The officers also took covers from a cushion from the living room couch, and two cushions from the love seat because there was an allegation that one of the incidents took place on a couch (Tr. Seely 4/27/2011 at 5, 8-10).

Deputy Seely testified that on January 8, 2011, Valerie came to the sheriff's office to file a report that H.D. disclosed defendant touched her inappropriately. Deputy Seely contacted the Mary Abbott House in Norman to set up a forensic interview. Seely also testified that on January 12, 2011, defendant came in to file a complaint against Valerie because she was preventing him from seeing H.D. Deputy Seely told defendant he was a suspect in an investigation, and read defendant his *Miranda* rights. Defendant asked for a lawyer, so they did not ask him any questions (Tr. Seely 4/27/2011 at 12, 16).

Deputy Seely testified that Valerie Dyer brought a computer to the sheriff's department, and Seely took the computer to have Marvin Dutton of Applied World Technology make a copy of the hard drive. Mr. Dutton cloned the hard drive and gave Seely the cloned copy (Tr. Seely 4/27/2011 at 17).

Deputy Christopher Lemons

Deputy Lemons testified he accompanied Deputy Seely to the Mary Abbott House and observed the forensic interview of H.D. Lemons also assisted in the

search of the Dyer house. A few days later, Valerie Dyer brought them a computer she and defendant had in California. She said she had seen child pornography on it at one time (Tr. Lemons 4/27/2011 at 10). The computer sat in the sheriff's office for eight months. Deputy Lemons asked Lieutenant Guthrie what to do with the computer, and Guthrie instructed him to keep it until the DA's office directed what they wanted to do with it. A few days later, Lemons noticed the computer was gone. There were no break-ins and the office was kept locked (Tr. Lemons 4/27/2011 at 12).

In September of 2010, defendant was at the courthouse for a hearing relating to Monsalve's child, and someone came into the sheriff's office and reported an altercation. Deputy Lemons went outside and saw Valerie yelling at defendant. He separated them, and Lieutenant Guthrie directed him to arrest defendant for violating Valerie's protective order. Charges were not filed, and defendant was released (Tr. Lemons 4/27/2011 at 13-14).

Sara Ferrero and Ashleigh Sosebee

Sara Ferrero, a criminalist at the OSBI Lawton laboratory, testified that she analyzed H.D.'s pajamas and panties and the bedding seized from defendant's house. The items were analyzed for the presence of bodily fluids such as blood or semen. There were no fluids found on the pajamas or panties, and there were two stains containing spermatozoa on a bed sheet, and one stain on the comforter. Ms. Ferrero did not test the cushion covers. She only looked for male reproductive

fluid, not for female vaginal secretions. She would not expect a prepubescent child to have any secretions. (Tr. Ferrero 4/27/2011 at 6-10, 13-14).

OSBI criminalist Ashleigh Sosebee performed DNA analysis on the spermatozoa stains. Sosebee tested the stains against samples from defendant, Monsalve, H.D., and Monsalve's five year-old daughter, I.C. The DNA from the three stains on the sheets matched defendant. Monsalve's DNA could not be excluded as contributing to the epithelial, or skin cell fraction of one stain, and on the other stain, both Monsalve and I.C. could not be excluded as DNA contributors, but H.D. could be excluded (Tr. Sosebee 4/27/2011 at 7-8, 14).

Marvin Dutton

Marvin Dutton, owner of Applied World Technology, testified that on the Friday before the April 27, 2011 trial, Deputy Seely brought a computer owned by Valerie and defendant to his business to have the hard drive cloned. Dutton reviewed the clone, and on December 25, 2009, someone used the computer to search child welfare and law websites on the topics of reporting child abuse, and what is required to convict someone of crimes against children. There were about twenty other searches that day, all of which were on sexual abuse, misconduct of a child, and what is required to file a case. One of the searches under child welfare was a search for adoption (Tr. Dutton 4/27/2011 at 13-14). Someone searched pornographic websites during that same time frame, and during four days in early January. There is no way to tell who did the searches. The

computer belonged to defendant as well as Valerie, and could have been accessed by defendant remotely. There were two accounts on the computer, Valerie's and defendant's. The websites were accessed under defendant's account (Tr. Dutton 4/27/2011 at 15-17, 21-22). On August 1, 2011, at a motions hearing, Dutton testified again, stating that some time after the computer left his possession, seventeen files were modified or created (Tr. Dutton 8/1/2011 at 11).

Discussion

Defendant's proffered evidence is insufficient to show that trial counsel was ineffective. The testimony contained in the previous trial transcripts, even with the addition of defendant's Rule 3.11 evidence, would not have changed the outcome. Even if all of these witnesses testified as promised, none of their testimony would disprove the evidence that convicted defendant; thus, counsel's decision not to call these witnesses did not prejudice defendant. *See Strickland*, 466 U.S. at 693–94, 104 S. Ct. at 2068 (holding that to establish prejudice sufficient to warrant finding of ineffective assistance, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

Defendant contends Seely's testimony would have revealed the actual date Valerie reported the abuse was January 8, 2010. Defendant claims this would have damaged Valerie's credibility by showing either she did not report the abuse

the day after H.D.'s revelation, or that H.D. actually disclosed the abuse to her a few days after returning from her visit with defendant.

Seely's expected testimony that Valerie reported the abuse on January 8, 2010, rather than a few days earlier, would not have changed defendant's outcome. Valerie candidly testified she was not sure what date H.D. told her of the abuse (Tr. Day 2 at 125), and defense counsel's thorough cross-examination of Valerie effectively demonstrated Valerie was possibly mistaken about the date she reported H.D.'s allegations (Tr. Day 2 at 120, 125). If defense counsel had further emphasized the date discrepancy, at most it would have supported Valerie's testimony that her initial reaction to H.D.'s outcry was that the child's external injury, her visibly irritated and swollen vaginal area, was caused by a urinary tract infection. The additional evidence Valerie may have been mistaken about when she reported the abuse, or whether the child was home for a few days before disclosing it to her, would not have affected the fact that H.D. told Valerie defendant was sexually abusing her, prompting her to go to the authorities.

Defendant also suggests Seely would have testified that Valerie's report to the sheriff's department, as documented in his probable cause affidavit,[3] revealed

---

[3]Defendant mistakenly claims Seely's April 27, 2011, testimony also established that H.D. made two earlier disclosures of defendant's abuse (Appellant's Brief at 17). However, at the April 27, 2011 trial Seely testified that H.D. disclosed defendant abused her in California, and in December of 2009 (the disclosure that resulted in this conviction), but did not mention a disclosure in the summer of 2009 (Tr. 4/27/2011 at 19).

H.D. twice previously told Valerie defendant was abusing her. According to defendant, this would undermine Valerie's testimony that she was taken by surprise by H.D.'s disclosure.

Contrary to defendant's claim, the fact that H.D. had twice before informed her mother of defendant's abuse did not discredit Valerie's testimony that when H.D. complained her vagina hurt, Valerie wondered if she had a urinary tract infection (Tr. Day 2 at 74). Valerie's initial confusion would be understandable, in light of the fact that the child had a history of urinary tract infections (Tr. Day 2 at 124). If defense counsel had presented Seely's testimony that Valerie confronted defendant four or five months earlier with H.D.'s disclosures, it would have only strengthened and corroborated the evidence that the abuse had been going on a long time. In addition, the fact that Valerie confronted defendant twice in the past about H.D.'s allegations undermines the defense's position that Valerie manufactured the allegation and coached H.D. in response to recent custody and jealousy issues arising late in 2009. Finally, if defense counsel elicited Seely's testimony from the probable cause affidavit, the State would likely have cross-examined Seely to present the details of those prior disclosures:

> In her written statement Dyer states that the first time H.D. disclosed was a couple of years ago in California. H.D. told Dyer that while they lived in California [defendant] would touch her "no-no" spot whenever Dyer would leave to go to the store. Dyer states she confronted defendant about it and he stated H.D. was

> lying and he would talk to her about it. Dyer states that H.D. later told her it was all a dream because [defendant] had got mad at her and told her mommy was lying. In her statement Dyer states that the second time H.D. disclosed anything was about four or five months ago. Dyer states that defendant had just got back from California and was living with his parents. Dyer states that H.D. would stay with [defendant] over the weekends. Dyer states that H.D. told her again that [defendant] touched her in her "no-no spot." Dyer confronted [defendant] a second time and he told her that H.D. was just trying to get him in trouble and that he stumbled over his words.

(O.R. 2). It is probable that counsel would have chosen to avoid the State's cross-examination of Seely and the emphasis on the details of the probable cause affidavit, when there was nothing to gain for defendant.

Defendant claims Officers Seely and Lemons would have testified they seized bedding from defendant's bed, and H.D.'s pajamas and panties from the dirty clothes hamper at defendant's home, and OSBI criminologists Sosebee and Ferrero would have testified that no DNA from H.D. was identified on any of the items. There would be no benefit to defendant from this testimony.

H.D. was clear in her forensic interview that defendant first removed her clothes. Therefore, the evidence there were no bodily fluids or DNA from defendant on H.D.'s clothing was entirely consistent with the child's statements, and would have been of no use to defendant. On the other hand, Sosebee and Ferrero would have also testified that there was no DNA from H.D. on her own

pajamas or panties. This would have called into question the testimony of Ms. Monsalve that these pajamas and panties were worn by the child for three days and had not been laundered, particularly considering Monsalve's testimony on cross-examination that defendant was concerned his DNA might be on H.D.'s clothing:

[PROSECUTOR]: Defendant was even concerned, wasn't he, that his DNA would be on those clothes?

[WITNESS]: He was concerned that they would be in –

[PROSECUTOR]: Ma'am, that's just a "yes" or "no" answer.

[WITNESS]: Yes.

[PROSECUTOR]: In fact, you had a jail – a phone conversation with him about that very issue, didn't you?

[WITNESS]: Yes.

[PROSECUTOR]: And he explained it away by saying, "After sex with you he wiped himself off on them and it might be there." Isn't that what he said?

[WITNESS]: Yes.

(Tr. Day 4 at 67-68).

As for Dutton's testimony relating to the Dyers' computer, when the computer's hard drive was cloned and the clone was examined, it showed that in December/January of 2009/10, someone conducted internet searches on child

abuse and child custody, and the computer had also been used to visit pornographic websites, although not child pornography.

Defendant claims defense counsel should have presented this evidence to support his position that Valerie manufactured the allegation against him and showed pornography to H.D. to coach the child for her interview. However, Dutton testified the searches were conducted on defendant's, not Valerie's account, and that the computer could have been accessed remotely (Tr. Dutton at 21-22). In addition, Valerie testified several people had access to and used the computer, including a friend who was going through her own custody battle at the time (Tr. Day 2 at 121-22). Moreover, testimony about the computer would open the door to the evidence that the reason the sheriff's department had the Dyers' computer was because Valerie brought it to them after the search of defendant's home, reporting she had seen child pornography on it (Tr. Lemons at 10).

Reasonably competent trial counsel might well have determined that the best prospect for acquittal lay in discrediting the state's witnesses on cross-examination, rather than asking the jury to focus on these additional witnesses, who would not have diminished the inculpatory testimony of the State's evidence, and could have raised further questions. Thus, there is no reason to believe that defense counsel's decision not to present additional witnesses was anything other than a tactical decision. *See Strickland*, 466 U.S. at 689 (requiring a petitioner to

overcome the presumption that counsel's decision "might be considered sound trial strategy").

Claim Supported by Extra-Record Evidence

In an Application for Evidentiary Hearing, filed contemporaneously with his Brief, defendant requests an evidentiary hearing to add evidence to the record to support his claim of ineffective assistance of counsel. When reviewing an Application for Evidentiary Hearing on Sixth Amendment claims:

> this Court reviews the application to see if it contains "sufficient evidence to show this Court by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence." Rule 3.11(B)(3)(b)(i). In order to meet the "clear and convincing" standard set forth above, Appellant must present this Court with evidence, not speculation, second guesses or innuendo.

Jones v. State, 2009 OK CR 1, ¶ 85, 201 P.3d 869, 890. This Court has held, "to meet the 'clear and convincing' standard set forth above, Appellant must present this Court with evidence, not speculation, second guesses or innuendo." *Lott v. State*, 2004 OK CR 27, ¶ 136, 98 P.3d 318, 351.

Defendant contends an evidentiary hearing is warranted to establish that defense counsel's failure to call the witnesses discussed above was prejudicial. Defendant's application for an evidentiary hearing must be denied, as defendant "failed to show by clear and convincing evidence a strong possibility that defense

counsel was ineffective for failing to utilize or identify the complained-of evidence." *Bland v. State*, 2000 OK CR 11, ¶ 130, 4 P.3d 702, 734.

Defendant submits the affidavit and school records of a Duncan public school official as proof that H.D. went back to school on January 4, 2010, after winter break, to discredit Valerie's testimony regarding the date of the child's disclosure. As discussed above, evidence calling into question Valerie's recollection of the date of H.D.'s disclosure or Valerie's subsequent report to law enforcement would not have affected the fact of the disclosure or the evidence of abuse. Defendant's proffered evidence does not warrant an evidentiary hearing.

Defendant also proffers an affidavit from his previous defense attorney, David Hammond, sponsoring the report of OSBI Special Agent Don Rains, of the contents of the Dyers' computer hard drive. The Rains report reflects that Valerie originally brought the computer to law enforcement to be examined because she alleged defendant was viewing child pornography on it. After defendant's first trial, the District Attorney's Office requested him to search the Dyers' computer, already cloned and examined by Dutton, and which was still in the state's possession. As Dutton had testified, a search of the hard drive revealed the computer had been used to create and store pornographic images between December 25 and 31, 2009, and between January 5 and 12, 2010.[4] The computer

[4]Presumably, the "2011" dates on page 3 of the Rains report are typographical errors, and should be "2010."

was also used during the same time frame to search for information on parental rights and custody. Rains found no evidence the computer was used to possess child pornography.

The Rains report appears to be cumulative of the Dutton testimony, and it is unclear how its additional information would support an ineffective assistance of counsel claim. Furthermore, like Lemons' testimony, the Rains report also reveals the *res gestae* evidence that Valerie Dyer asked law enforcement to examine the computer because she alleged defendant was accessing child pornography. For this reason, defense counsel would have reasonably chosen to omit the evidence of the computer search, which would have produced no exculpatory evidence for him.

To warrant an evidentiary hearing under Rule 3.11(B)(3)(b)(i), defendant's application and affidavit must set forth "sufficient information to show this Court by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence." *Id.* Defendant's application simply does not show, by "clear and convincing" evidence, a strong possibility that counsel was ineffective by failing to present the evidence of Rains's examination of the computer hard drive, or the Duncan public school records. Defendant has not shown the requisite evidence of a strong possibility his trial counsel's performance was deficient, or that he was prejudiced by the

deficient performance, meaning that there is a reasonable probability that, but for counsel's unprofessional errors, his outcome would have been different. *Barnett v. State*, 2011 OK CR 28, ¶ 9, 263 P.3d 959, 962-63. Accordingly, no evidentiary hearing is necessary and this Court should deny defendant's Application for Evidentiary Hearing and his claim of ineffective assistance of counsel.

Defense counsel actively cross-examined every State witness, and presented several witnesses to testify in support of defendant. "That counsel could have done more is insufficient to warrant a finding of ineffectiveness." *Phillips v. State*, 1999 OK CR 38, ¶ 106, 989 P.2d 1017, 1044. Defendant fails to show a "substantial likelihood of a different result" at trial but for the ineffective assistance of trial counsel as alleged in this appeal. *Pinholster*, 131 S. Ct. at 1410. This Court must deny his first proposition of error.

PROPOSITION II

THE TRIAL COURT DID NOT IMPROPERLY ADMIT EVIDENCE OF PRIOR BAD ACTS OF DEFENDANT.

In his second proposition of error, defendant claims the trial court erred by admitting evidence of his prior bad acts. Defendant's claims lack merit.

This Court's review of a trial court's decision to allow the introduction of "other crimes" evidence is based on an abuse of discretion standard. *Eizember v. State*, 2007 OK CR 29, ¶ 99, 164 P.3d 208, 234. The general rule is that, when an accused is placed on trial, he is to be convicted by evidence that shows him

guilty of the offense charged and not of other offenses not connected with the charged offenses. Evidence that a defendant committed other crimes, however, is admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. *Lott v. State,* 2004 OK CR 27, ¶ 40, 98 P.3d 318, 334; *Welch v. State,* 2000 OK CR 8, ¶ 8, 2 P.3d 356, 365; 12 O.S.2011, § 2404(B). An act that is not a violation of the criminal law is nonetheless governed by § 2404(B) if it carries a stigma that could unduly prejudice an accused in the eyes of the jury. *Rutan v. State,* 2009 OK CR 3, ¶ 74 n.7, 202 P.3d 839, 854 n.7. *Eizember,* 2007 OK CR 29, at ¶ 75, 164 P.3d at 230. Prior to admitting the evidence of other crimes or bad acts, the trial court must weigh the probative value against the danger of unfair prejudice. 12 O.S.2011, § 2403.

The State disagrees with defendant's assertion that his contemporaneous objection to testimony in the January 24, 2012, trial preserved his claim for appellate review. As this Court is aware, defendant's April 26-27, 2011, trial ended with a deadlocked jury, and his January 24, 2012, trial ended with a mistrial declared during the testimony of the State's first witness, Valerie Dyer. It is true that during defendant's January 24, 2012, trial, the defense objected to Valerie's testimony that defendant isolated her and H.D. from her family (Tr. 1/24/2012 at 38-39). However, defendant did not object at his present trial, and his objection at the previous trial did not preserve error for his April 2012 trial.

See Owens v. State, 1976 OK CR 316, ¶ 16, 557 P.2d 457, 460 (objections must be made at the time of trial).

Defendant refers to Judge Enos's December 30, 2011, ruling that he would carry over his rulings on certain motions made for the first, April 27, 2011, trial. Specifically, Judge Enos stated that rulings on motions memorialized in specified court minutes would remain in effect (Tr. 12/30/2011 at 18-19, Tr. Day 1 at 7, O.R. 167, 373). Defendant's objection was not a motion memorialized in a court minute. Nor was the objection made until the January 24, 2012 trial, after the court's ruling and the court minutes it referred to, and therefore would not have been covered by the ruling in any event. Because defendant did not object to the admission of the evidence he now raises as improperly admitted, this Court should review for plain error. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

Defendant complains the trial court erred by admitting evidence he was hostile toward Valerie during her pregnancy and that he isolated Valerie from her family. Defendant's complaint is disingenuous as Valerie's description of her perceptions of defendant's shortcomings is precisely the basis of his defense. As defendant states in his Proposition I, defendant's defense was that Valerie was an angry and scorned wife, and she invented the accusations against him, and coached H.D. to accuse him of sexually abusing her. Indeed, the defense's

witness lists consistently notified the State defendant intended to present Valerie and other witnesses for the purpose of showing Valerie's animosity toward defendant, as follows:

- Valerie Dyer . . .will testify about issues relative to her animosity and hatred against the Defendant;
- Amanda Monsalve . . will testify about Valerie Dyer's hatred toward the defendant;
- Amy Dark . . . will testify about the Defendant's relationship with H.D. and the Defendant's family relationship with H.D. Will testify about Valerie Dyer's hatred toward the Defendant;

and

- [Defendant] will . . . testify regarding his relationship with Valerie Dyer.

(O.R. 172-73, 224-28). Thus, this Court should reject defendant's complaint that the same testimony he intended to offer was in fact offered by the State.

Defendant complains of Valerie's testimony that defendant isolated her from her family. The evidence actually reflects that defendant was uncomfortable having Valerie's family around the baby because he thought her family was doing drugs around the baby. A month after H.D. was born, defendant informed Valerie they were moving to Tennessee to live with his sister. Valerie testified:

[WITNESS]: He didn't want my family to be around [H.D.]. That was his main concern, and he just wanted, I guess, that control. . . . as soon as that baby was – [H.D.] was born he just wanted that control of who got to see her and he said, "well, I think it's best that we go to Tennessee."

(Tr. Day 2 at 30). On cross-examination, defense counsel elicited testimony to explain that defendant was concerned that members of Valerie's family used drugs when H.D. was present, and that was why he did not want her family around the baby (Tr. Day 2 at 111-12). Valerie's complained of comment, that defendant "couldn't stand" her family, read in context, was part of the evidence that defendant was concerned about her family doing drugs around the baby:

> [PROSECUTOR]: What was [defendant's] attitude toward your family at that time?
>
> [WITNESS]: Oh, he couldn't stand my family. Again, that's that control. He didn't want me to be around my family and he didn't want [H.D.] to be around them, but it was okay for – [H.D.] could go around his family and it was just – he just didn't like my family.

(Tr. Day 2 at 44-45).

Defendant complains of Valerie's testimony he acted angry and nasty when she became pregnant, poked her and called her names, and was uninterested in H.D. The testimony was evidence that defendant did not want a child, lost interest in his wife, and was rude to his wife and disinterested and inattentive to his child. None of the evidence revealed that defendant committed a crime or "bad act," but rather was simply morally questionable behavior. *Carter v. State,* 2008 OK CR 2, 177 P.3d 572, (acts do not automatically fall under the category of other crimes or bad acts simply because they are morally questionable). If the

testimony suggested other crimes or bad acts, it was at most an implication. As such, it is not evidence of other crimes, and it does not warrant relief. *See also Bernay v. State*, 1999 OK CR 37, ¶ 25, 989 P.2d 998, 1008 ("[T]he mere suggestion of another crime, without more, will not trigger the general rules regarding the admission of other crimes evidence.").

In *Carter*, this Court reviewed a complaint that the trial court erroneously admitted the contents of certain telephone calls, claiming that it was inadmissible evidence of bad acts. This Court stated:

> While we . . . agree with the defense that portions of the intercepted discussions were not relevant and could have been redacted, we find the vast majority of the "incidents" are not evidence of other crimes or even necessarily bad acts, but simply discussions that frame Appellant's "sexually active" character. As such, we find no plain error in their admission[.]
> . . . Acts do not automatically fall under the category of other crimes or bad acts simply because they are morally questionable.

Carter, 2008 OK CR 2, at ¶ 13, 177 P.3d at 576. As in *Carter*, the complained-of testimony here was not inadmissible evidence of other crimes or bad acts. The statements described features of defendant's troubled marriage and conflict in his family, and explained the couple's separation, and H.D.'s visits with defendant without Valerie present.

In any event, defendant was not unduly prejudiced by the complained of testimony. To the extent the evidence was unflattering, the jury instruction

limiting its consideration of evidence of other crimes or bad acts channeled the jury's consideration of the evidence:

> Evidence has been received that the defendant has allegedly committed offenses other than that charged in the information. You may not consider this evidence as proof of the guilt or innocence of the defendant of the specific offense charged in the information. This evidence has been received solely on the issues of the defendant's alleged motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity or absence of mistake or accident. This evidence is to be considered by you only for the limited purpose for which it was received.

(O.R. 396, OUJI-CR 9-9). In *Marshall v. State*, 2010 OK CR 8, ¶¶ 38-42, 232 P.3d 467, 477, such an instruction was held to effectively limit the jury's use of other crimes evidence. The testimony was dwarfed by the evidence of defendant's crimes against H.D. Considering H.D.'s interview, her testimony confirming it, and the corroborating physical evidence that H.D. had no posterior hymen, it is unlikely that the complained-of statements prejudiced defendant or contributed to the jury's verdict. *See Stouffer v. State*, 2006 OK CR 46, ¶ 67, 147 P.3d 245, 264. If this Court finds any plain error in the admission of the evidence, defendant is not entitled to relief, for he must prove "error plus injury." *Smallwood v. State*, 1995 OK CR 60, ¶ 29, 907 P.2d 217, 227 (finding the defendant bears the burden of showing any error plus injury to obtain relief based on an alleged error). In *Lambert v. State*, 1999 OK CR 17, ¶ 49, 984 P.2d 221,

236, this Court found certain other crimes evidence irrelevant and improperly admitted, but also found its admission harmless in light of the evidence of the defendant's guilt. The remaining evidence amply supports defendant's conviction; therefore, even if this Court finds plain error in the admission of the challenged evidence, it is harmless. *See also Sattayarak v. State*, 1994 OK CR 64, ¶ 12, 887 P.2d 1326, 1332 ("[G]iven the other evidence, this [improperly admitted other crimes evidence] probably did not affect the outcome of the trial and is not reversible error.").

Defendant also claims that the specifics required for a proper *Burks* notice were not followed. Assuming for the sake of argument the complained-of testimony was evidence of bad acts, the State would contend that, as the evidence was inextricably related to the defendant's defense, was presented without objection in his April 25-26 trial, and was covered by the defense's notification of what its witnesses would present, no additional pre-trial notice was required. *Eizember*, 2007 OK CR 29, ¶ 81, 164 P.3d at 232. The purpose of the notice is to insure against surprise on the part of the defense and to allow him time for the defense to be heard prior to the information being placed before the jury. *Scott v. State*, 1983 OK CR 58, ¶ 6, 663 P.2d 17, 19. Here there was no element of surprise and the purpose behind the notice requirement was served. See also

Rutan, 2009 OK CR 3, at ¶ 75, 202 P.3d at 854 (a defendant has a claim of error under *Burks* only if he can show he was surprised by the evidence).

There was no evidence of prior bad acts or crimes, and defendant cannot show the testimony harmed him. *See Carter v. State*, 2008 OK CR 2, ¶ 13, 177 P.3d 572, 576 (not every questionable act falls under the category of other crimes or bad acts). This Court should deny defendant's proposition of error.

PROPOSITION III

THE TRIAL COURT PROPERLY EXCLUDED DEFENDANT'S EXPERT WITNESS'S TESTIMONY.

In his third proposition of error, defendant contends the trial court improperly prevented him from presenting the expert testimony of Dr. Ray Hand, Ph.D. Dr. Hand would have testified about alleged deficiencies in the interview techniques applied by the forensic interviewer. Defendant's proposition lacks merit.

The trial court's decision to exclude expert testimony is reviewed for an abuse of discretion. *Gilson v. State*, 2000 OK CR 14, ¶ 68, 8 P.3d 883, 908.

As presented above, the Stephens County sheriff's department arranged for H.D. to be interviewed by forensic interviewer Jessica Taylor, and the trial court ruled the interview admissible. In response, the defense notified the State it intended to present the testimony of Dr. Hand:

> Dr. Ray Hand . . . May testify about issues relating to the interview of H.D. Will testify about the leading nature of

> the questions and proper techniques for interviews for
> sexual (sic) abused children.

(O.R. 108). On April 5, 2011, the State filed a motion to exclude the testimony of Dr. Hand because he lacked credentials in the conducting of forensic interviews, and because Dr. Hand had no ability to render an opinion on H.D.'s cognitive ability (O.R. 135-38). On April 8, 2011, the trial court held a hearing to determine the admissibility of Dr. Hand's testimony (Tr. 4/8/2011).

At the hearing on Dr. Hand's testimony on April 8, 2011, Dr. Hand testified he had been a licensed psychologist since 1982, and had a Ph.D. in Counseling Psychology. He served as a consultant to the Oklahoma County Juvenile Shelter to interview children to determine their treatment needs. Dr. Hand had done psychological assessments for DHS. Dr. Hand testified he interviews juveniles with regard to their clinical needs, to determine whether they need treatment, whether they need interventions. He does not interview the juveniles in reference to sexual abuse complaints (Tr. 4/8/2011 at 183-86).

With regard to his experience and education in forensic interviewing, Dr. Hand stated he had been interested in forensic interviewing since the 1980s. His knowledge in the area is derived from self-study, and he has attended a workshop that addressed interviewing of children through the Center for Child Abuse and Neglect, and on September 30-October 1, 2010, he attended a forensic psychology workshop in Kansas City presented by the Association of Family and Conciliation

Courts (Tr. 4/8/2011 at 186, 189). Dr. Hand candidly described his experience in forensic interviewing of children with sex abuse allegations as limited:

> [PROSECUTOR]: Sir, in the past have you performed forensic interviews on sexual abuse complaints by minors?
>
> [WITNESS]: Yes.
>
> [PROSECUTOR]: Would you tell the Court how many – how many you have done?
>
> [WITNESS]: Oh, not a lot. Not like the people who work at the Care Centers who do hundreds, but I've done, oh, more than a dozen.

(Tr. 4/8/2011 at 188).

Dr. Hand testified in his career he reviewed about a dozen video interviews of minors in sex abuse cases, including interviews he conducted. Dr. Hand described his process of interviewing as "similar to the standard kind of processes that are available – that are taught around" (Tr. 4/8/2011 at 190-91). He described favorably a process called Finding Words, based on the notion of finding a rapport with the child, and an understanding of their developmental level, and their capacity to understand what truth is, and then begin questioning that allows children in a narrative manner to describe what happened to them. Dr. Hand also would consider the child's age, cognitive ability, intellectual ability, and ability to use language. It is best to elicit a narrative from the child, and it is important to avoid leading questions. Dr. Hand testified that forensic psychologists discourage

the use of anatomical dolls because they "tend to throw a wild card into the interview process," and he has not used them. According to Dr. Hand, children are taken aback by anatomical dolls, and the use of the dolls affects their accuracy (Tr. 4/8/2011 at 193-94). Dr. Hand then testified that the American Association of Child Abuse Prevention has a different approach, and it recommends the use of anatomically correct dolls to gather information once there are allegations (Tr. 4/8/2011 at 196).

Dr. Hand testified he reviewed the video of H.D.'s interview. He stated forensic interviewing was not a "black and white" process, and the interviewer did a "workman like job" and tried hard to be appropriate. She worked at having the kindhearted attitude. Dr. Hand stated his concerns were that the interviewer did not give H.D. time to develop a narrative, and asked leading questions. The anatomical dolls came out "in a hurry" and the child was not encouraged to provide information in her own words (Tr. 4/8/2011 at 196). According to Dr. Hand, the interviewer was experienced, and conducted her interview a lot like interviews are conducted around the state. Dr. Hand stated his concerns did not go to the "ultimate truth" but that the details could be influenced by the leading questions and anatomically correct dolls (Tr. 4/8/2011 at 198).

On cross-examination, Dr. Hand testified his education and training was in clinical treatment, not investigation of child sexual abuse, and not forensic

interviewing (Tr. 4/8/2011 at 201). In his private practice, he does not deal with child sexual abuse. He has not attended any of the leading forensic interviewing courses (Tr. 4/8/2011 at 206-09). Dr. Hand described himself as a forensic interviewer based on his independent research, his personal and professional practice, and his experience (Tr. 4/8/2011 at 213). The prosecutor continued:

> [PROSECUTOR]: Do you hold yourself out as an expert in the field of forensic interview? And when I use the term forensic interviewing I'm referring to that of like the interview that you watched, one of investigative nature, not a therapeutic nature?
>
> [DR. HAND]: I'm not sure I hold myself out as an expert. I have experience in that area. I have training in that area. I'm not a big horn blower. I feel like I have some important information to share regarding the research in that area and I have put a good deal of energy over the last ten or fifteen years into learning about that material. So I have some information. I think it's useful.

(Tr. 4/8/2011 at 213). Dr. Hand conceded he had no training on the use of anatomically correct dolls. He conceded that the use of focused recall, multiple choice, and yes/no questions as well as open ended questions can be appropriate in interviews. Although he had testified that it is possible for children to misrepresent details to get what they want, Dr. Hand did not point to anything in H.D.'s interview that led him to believe she was doing so:

> [PROSECUTOR]: Anything in that interview lead – did anything in that interview lead you to believe that [H.D.] was

misrepresenting details in order to gain some sort of advantage?

[DR. HAND]: Not – no.

[PROSECUTOR]: Okay.

[DR. HAND]: I wasn't suggesting in this particular matter that there was something there. At the same time I don't know how many times this child has been interviewed in the past.

[PROSECUTOR]: So other –

[DR. HAND]: You know, there are other – there are a whole variety of issues in addition.

[PROSECUTOR]: Other than just speculation? I mean, there's nothing that you have evidence of to lead you to believe –

[DR. HAND]: No.

[PROSECUTOR]: –that she's fabricating?

[DR. HAND]: No.

(Tr. 4/8/2011 at 218).

The defense argued the testimony should be admitted to tell the jury what proper interviewing techniques are, and to help the jury know how much weight to give the interview. The defense argued Dr. Hand should be able to give his expert testimony on his concerns with the interview, on the basis of his research and his qualifications, particularly as a member of the Board of Psychology and a 39-year licensed psychologist (Tr. 4/8/2011 at 222-23).

Judge Enos considered the fact that Dr. Hand did not interview H.D. or know her circumstances, and he had no specifics regarding H.D. Judge Enos sustained the State's motion in limine, addressing defense counsel Hammond:

> 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 relies, but he says it's based on – he can't really tell and show this Court what is his specific protocol other than he's developed it. He hasn't been able to articulate to the Court what he found to be questionable about leading questions. Nor has he interviewed this child. I just don't think under these circumstances that you've carried your burden. I'll sustain the State's motion and objection.

(Tr. 4/8/2011 at 226).

The judge's rationale and conclusion was proper and entirely within his discretion. In *Gilson v. State*, 2000 OK CR 14, ¶¶ 61-68, 8 P.3d 883, 907-08, the defendant wanted to call an expert witness, Dr. Wanda Draper, to testify regarding the credibility of child victims' statements. Dr. Draper would have testified about factors that determined whether a child was a competent witness, and that improper interview techniques could "taint" a child's ability to accurately relate an incident.

This Court noted that Dr. Draper could not show that her theory of the effect of trauma on a child's ability to testify could be tested, or whether it was

generally accepted in the field of child development. Dr. Draper had stated only that there was a "great possibility" that improper interviewing techniques could impact a child's ability to relate an event. Dr. Draper had interviewed the child victims only once, asking each child five or six uniform questions. *Id.*, 2000 OK CR 14 at ¶¶ 66-68, 8 P.3d at 908.

This Court held that the trial court did not abuse its discretion in excluding Dr. Draper's expert testimony. Of particular relevance to this case, this Court addressed the inadmissibility of evidence that was confusing and speculative:

> Once the trial court determined that the children were competent witnesses, Dr. Draper's testimony [about failing to properly interview a child] would have been confusing and its speculative nature would not have been relevant to the jury's determination of the credibility of the children's testimony.

Id., 2000 OK CR 14, at ¶ 68, 8 P.3d at 908. This Court stated, "Dr. Draper's testimony did not meet the *Daubert*[5] requirements of 'scientific knowledge' and the testimony would not have assisted the trier of fact." *Id.*

Similarly, in this case, the trial court did not abuse its discretion. The judge examined the prospective expert witness and determined his testimony was not substantiated. Dr. Hand was unclear in his testimony, stating both that use of anatomically correct dolls can prompt false responses (Tr. 4/8/2011 at 194), and

---

[5] *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

also that use of anatomically correct dolls may be appropriate, once the interviewee has made an allegation (Tr. 4/8/2011 at 195-96).

Dr. Hand's testimony, if admitted, would have amounted to a generalized critique of the technique used to interview H.D. Dr. Hand conceded that interviewing children who are allegedly victims of sexual abuse was not his area of expertise, and he had conducted "not a lot" of such interviews (Tr. 4/8/2011 at 187-88, 213). Defense counsel and Dr. Hand conceded Dr. Hand was not familiar with the particulars of H.D.'s circumstances (Tr. 4/8/2011 at 218, 224). He could not identify any specific questions which were leading (Tr. 4/8/2011 at 216-17).

Defendant has not shown the trial court abused its discretion in excluding Dr. Hand's expert testimony. Dr. Hand's expertise in the relevant area was limited, and the trial court's ruling that Dr. Hand was not qualified to offer expert testimony on the interview techniques employed by Ms. Taylor is supported by the record. In addition, Dr. Hand testified the best way to get "accurate" information is to elicit a narrative from the child, and that some researchers believe that use of anatomical dolls "affects their accuracy" and prompts children to offer "fantastic details" (Tr. 4/8/2011 at 192, 194). Though the defense and the proposed expert claimed his testimony would not comment on H.D.'s credibility, it is difficult to imagine how testimony that is intended to point out how a child's responses are

not "accurate" and how she might have offered "fantastic details" cannot be viewed by the trial judge as going to the credibility of that child. Under these circumstances, the trial judge did not abuse his discretion by excluding the proposed expert testimony.

Furthermore, defendant cannot show that he was prejudiced by the absence of Dr. Hand's testimony. Defendant was permitted to cross-examine the interviewer and H.D. Any lay person with common sense would be aware that suggestive or leading questioning can affect an interviewee's responses. There was no need for an expert to teach this to the jury. If Dr. Hand had presented his evidence to the jury, the prosecutor would have thoroughly impeached it by revealing the same weaknesses shown at the hearing, that Dr. Hand had not conducted any research himself, and that he was not experienced in conducting or evaluating interviews on child sexual abuse victims. The jury also viewed the interview in question, and would undoubtedly consider the interview free of leading questions, and the child's responses and demeanor to be remarkably credible. This Court should deny defendant's third proposition.

PROPOSITION IV

THERE WERE NO INDIVIDUAL ERRORS WHICH WARRANT REVERSAL, AND THE CUMULATIVE EFFECT OF THE ALLEGED ERRORS DO NOT WARRANT REVERSAL.

In his final proposition of error, defendant claims the cumulative effect of alleged trial errors warrants relief. Having thoroughly addressed each of defendant's propositions of error, and contending that none of the allegations individually merit relief, the State asserts that the cumulative effect of the allegations do not justify relief.

In *Gilson*, 2000 OK CR 14, at ¶ 177, 8 P.3d at 929, this Court acknowledged its repeated holdings that "a cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by Appellant." *See Alverson v. State*, 1999 OK CR 106, ¶ 78, 983 P.2d 498, 520 (where there is no individual error there can be no reversal for cumulative error). None of defendant's contentions of error has merit. Therefore, this Court should reject his allegation of cumulative error.

CONCLUSION

The State has answered defendant's contention by both argument and citations of authority. The State contends that no error occurred which would require reversal, and therefore respectfully requests that this Court affirm

defendant's Judgment and Sentence and deny defendant's application for evidentiary hearing.

Respectfully submitted,

E. SCOTT PRUITT
ATTORNEY GENERAL

JUDY KING, OBA #14957
ASSISTANT ATTORNEY GENERAL

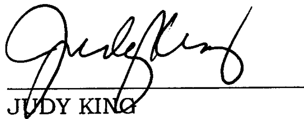
313 NE 21st Street
Oklahoma City, OK 73105
(405) 521-3921
(405) 522-4534 FAX

ATTORNEYS FOR APPELLEE

CERTIFICATE OF MAILING

On this 16th day of May, 2013, a true and correct copy of the foregoing was mailed to:

Robert W. Jackson
Appellate Defense Counsel
P.O. Box 926
Norman, OK 73070



JUDY KING