

APPENDIX

APPENDIX

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APPENDIX A

**IN THE COURT OF CRIMINAL APPEALS OF
THE STATE OF OKLAHOMA**

NOT FOR PUBLICATION

Case No. F-2017-69

[Filed September 6, 2018]

ADAM CLAYTON ZILM,)
)
Appellant,)
)
v.)
)
THE STATE OF OKLAHOMA,)
)
Appellee.)

SUMMARY OPINION

ROWLAND, JUDGE:

Appellant Adam Clayton Zilm appeals his Judgment and Sentence from the District Court of Tulsa County, Case No. CF-2012-3037, for Sexual Abuse of a Child Under 12, in violation of 21 O.S.2011, § 843.5. The Honorable Kurt G. Glassco, District Judge, presided over Zilm's jury trial and sentenced him to thirty-six years imprisonment and a \$500.00 fine in

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accordance with the jury's verdict.¹ Zilm appeals his Judgment and Sentence, raising the following issues:

- (1) whether he was denied due process when the State coerced the child victim to testify falsely at the first preliminary hearing;
- (2) whether prosecutorial misconduct deprived him of a fair trial;
- (3) whether multiple erroneous evidentiary rulings prejudiced him resulting in a fundamentally unfair trial;
- (4) whether the trial court erred in refusing to suppress his statement made to the police;
- (5) whether he received ineffective assistance of counsel; and
- (6) whether an accumulation of error deprived him of a fair trial.

We find relief is not required and affirm the Judgment and Sentence of the district court.

1.

Zilm complains on appeal that the State coerced and elicited from the child victim inculpatory testimony at the first preliminary hearing known to be false and, when she could not be pressured into denying the truth of her recantation, used the child victim's false preliminary hearing testimony to impeach her trial testimony. This, he asserts, violated the basic

¹ Under 21 O.S.2011, § 13.1 Zilm must serve 85% of the sentence imposed before he is eligible for parole.

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constitutional guarantee of fundamental fairness and due process under the Fourteenth Amendment.

If it is true that the State sponsored testimony at the preliminary hearing known to be false and then impeached the child victim's trial testimony with the false evidence at trial, this conduct would indeed violate Zilm's right to a fair trial. *See Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) (finding due process violation where state failed to correct known false testimony). *See also Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972); *Omalza v. State*, 1995 OK CR 80, ¶ 77, 911 P.2d 286, 307; *Hall v. State*, 1982 OK CR 141, ¶ 16, 650 P.2d 893, 896-97. The State has a duty to disclose false testimony which goes either to the merits of the case or the credibility of the witness. *Hall*, 1982 OK CR 141, ¶ 16, 650 P.2d at 897. The burden is on the defendant to show that (a) testimony was false or misleading, (b) the prosecution knowingly used it, and (c) its admission of false testimony was material to guilt or innocence. *Omalza*, 1995 OK CR 80, ¶ 77, 911 P.2d at 307. The fact that a witness's testimony is impeached does not by itself establish the State knowingly used false testimony. *Id.*, 1995 OK CR 80, ¶ 78, 911 P.2d at 307. Mere inconsistencies or conflicts between witnesses' testimony will not support a claim that prosecutors used perjury to obtain a conviction. *Taylor v. State*, 1976 OK CR 255, ¶ 22, 555 P.2d 1073, 1078.

To obtain relief for the State's use of false evidence at trial it is a logical prerequisite that an appellant first show that the testimony complained of was actually false. Zilm fails to meet his burden of showing

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that the State knowingly used or failed to correct false evidence material to guilt or innocence in this prosecution. Zilm was not denied his due process right to a fair trial.

2.

Zilm complains prosecutorial misconduct deprived him of his right to a fair trial. Defense counsel objected to most of the comments at issue thus preserving alleged error for review on appeal. Comments not met with contemporaneous objection at trial are reviewed for plain error only. *Harney v. State*, 2011 OK CR 10, ¶ 23, 256 P.3d 1002, 1007. “On claims of prosecutorial misconduct, relief will be granted only where the prosecutor committed misconduct that so infected the defendant’s trial that it was rendered fundamentally unfair, such that the jury’s verdicts should not be relied upon.” *Sanders v. State*, 2015 OK CR 11, ¶ 21, 358 P.3d 280, 286. In making that determination, we evaluate the prosecutor’s comments within the context of the entire trial, considering the propriety of the prosecutor’s actions, the strength of the evidence against the defendant, and the corresponding arguments of defense counsel. *Mitchell v. State*, 2010 OK CR 14, ¶ 97, 235 P.3d 640, 661; *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 96, 241 P.3d 214, 243. We will grant relief only where grossly improper and unwarranted argument affected a defendant’s rights. *Sanchez v. State*, 2009 OK CR 31, ¶ 71, 223 P.2d 980, 1004.

Zilm first complains that the prosecutor improperly threatened to bring perjury charges and reopen the juvenile case if the defense called the victim’s older sister to testify at trial. He asserts that this had a

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chilling effect on his right to present a defense. The comments at issue were not threats, veiled or otherwise, to prosecute the witness for perjury or to reopen the juvenile case. There was no error here.

Zilm also complains that during closing argument the prosecutor accused defense counsel of coaching the child victim to record a conversation she had with a DHS case worker. Defense counsel objected arguing that the comment impugned his character. While the prosecutor's argument was speculative, it did not impugn defense counsel's character.

Next, Zilm complains that the prosecutor improperly commented on his exercise of his right to trial. During closing argument the prosecutor stated, "It's wrong that you [Zilm] violated a little girl and then put her through the next four years to get to this day." Defense counsel objected to this comment and asked for a mistrial. The trial court denied the request for mistrial but sustained the objection and admonished the jury to disregard the improper comment. "[T]his Court has repeatedly held that an admonishment cures the error from improper testimony or an improper comment at trial, unless the improper testimony or comment was such that it appears to have 'determined' the result of the defendant's trial." *Hannon v. State*, 2011 OK CR 6, ¶ 39, 248 P.3d 918, 935, quoting *Parker v. State*, 2009 OK CR 23, ¶ 26, 216 P.3d 841, 849. A defendant's decision to exercise his constitutionally protected right to a jury trial is a factor which cannot be used against him at trial to influence the jury in their determinations regarding guilt or sentencing. *Barnes v. State*, 2017 OK CR 26, ¶ 10, 408 P.3d 209, 214. While

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the comment at issue was not a direct comment on Zilm's exercise of his right to trial, it was implied and to this extent, it was improper. The error, however, was cured by the trial court's admonishment and relief is not required.

Finally, Zilm complains that he was prejudiced when the prosecutor engaged in "inflammatory courtroom histrionics." Defense counsel objected and asked that the jury be admonished or that a mistrial be granted. The trial court denied the motion for mistrial and admonished the prosecutor. Again, we will only grant relief on a claim of prosecutorial misconduct where it was grossly improper and affected the defendant's rights. *See Sanchez*, 2009 OK CR 31, ¶ 71, 223 P.2d at 1004. Relief is not warranted here.

3.

Zilm argues that the trial court erred in admitting the hearsay statements the child victim made to her neighbor and to the SANE nurse, as well as the child victim's testimony from the first preliminary hearing. Defense counsel objected to the introduction of this evidence preserving the error for review on appeal. *See Pullen v. State*, 2016 OK CR 18, ¶ 10, 387 P.3d 922, 927. We review the trial court's ruling on the admissibility of evidence for an abuse of discretion. *Id.*

The trial court held a reliability hearing regarding the admissibility of statements made by a child under thirteen years of age as is required by 12 O.S.2011, § 2803.1. The trial court held that the child victim's hearsay statements made to her neighbor lacked sufficient indicia of reliability under section 2803.1 and should be suppressed. The State appealed this pretrial

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ruling to this Court. This Court found in an unpublished opinion, that the trial court did not abuse its discretion in suppressing the hearsay statements made to the neighbor. *State v. Zilm*, S-2014-812 (Okla. Cr. Aug. 6, 2015).

At trial, the neighbor testified about the hearsay statements the child victim made to her. Defense counsel objected noting that the statements had been judicially found to be unreliable. The State argued that the statements were admissible under the excited utterance exception to the hearsay rule and the trial court allowed their introduction under 12 O.S.2011, § 2803(2). Zilm argues on appeal that the trial court's ruling was error.

The statements at issue provide a text book example of excited utterances. *See Martinez v. State*, 2016 OK CR 3, ¶ 50, 371 P.3d 1100, 1113 ("An excited utterance must meet three foundational requirements: (1) a startling event or condition; (2) a statement relating to that startling event or condition; (3) made while the declarant is under the stress of excitement caused by the startling event or condition."). Although the trial court found at the reliability hearing that the statements lacked sufficient indicia of reliability for admissibility under section 2803.1, that ruling is not inconsistent with the court's ruling at trial that the statements were admissible as excited utterances under section 2803(2). This is an instance where the statements, although inadmissible under one exception to the hearsay rule, were admissible under a different exception. The trial court did not abuse its discretion in allowing the admission of the child victim's hearsay

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statements made to the neighbor under the excited utterance exception to the hearsay rule.

Zilm also argues that the trial court erred in allowing the State to introduce the hearsay statement the child victim made to the SANE nurse during the exam. This statement, made the same morning as the sexual assault, was made for purposes of receiving medical diagnosis and treatment and was admissible under 12 O.S.2011, § 2803(4). *See Kennedy v. State*, 1992 OK CR 67, ¶¶ 10-12, 839 P.2d 667, 670 (statements made by sexual abuse victim during the course of an interview with a doctor for the purpose of diagnosis and treatment were properly admitted under 2803(4)). The trial court did not abuse its discretion in allowing the admission of the child victim's hearsay statement made to the SANE nurse.

Finally, Zilm argues the trial court erred in allowing the State, over defense objection, to impeach the child victim's trial testimony with her sworn testimony from the first preliminary hearing because her testimony at this earlier proceeding was unreliable. As the State points out, any party may impeach its own witness. 12 O.S.2011, § 2607. This Court has held, however, that:

[T]he State must follow the law regarding impeachment evidence. A witness subject to cross-examination must testify and be given a chance to explain or deny any discrepancy between that testimony and previous statements before evidence of the previous statement is admissible. At that point the witness may be impeached with the specific inconsistent portions of her statement.

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Stiles v. State, 1999 OK CR 19, ¶ 6, 989 P.2d 955, 958. *See also* 12 O.S.2011, § 2613 (a party may impeach a witness with prior inconsistent statements).

The State called the child victim to testify and she was a hostile witness. She testified inconsistently with her testimony from the first preliminary hearing and the State impeached her trial testimony with her testimony from the first preliminary hearing. Prior to the admission of this evidence, the trial court instructed the jury, both during trial and again in written instructions, that the inconsistent prior testimony could only be used for impeachment purposes and was not evidence of proof of guilt or innocence. The child victim was afforded the opportunity through direct and cross examination to explain her inconsistent prior testimony. The trial court did not abuse its discretion in allowing the State to impeach her trial testimony with her prior inconsistent testimony. This proposition does not warrant relief.

4.

The morning the sexual assault was reported, Tulsa police detectives interviewed Zilm at his parents' house and the interview was audio recorded. Zilm subsequently filed a motion to suppress his statement arguing that it was inadmissible because the statement was made during a custodial interrogation and the detectives did not advise him of his rights pursuant to *Miranda v. Arizona*.² Prior to trial the court held a

² 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

*Jackson v. Denno*³ hearing to address the admissibility of Zilm's statement. The trial court denied Zilm's motion to suppress and Zilm argues on appeal that this ruling was error. We review the trial court's ruling on a motion to suppress for an abuse of discretion. See *Bramlett v. State*, 2018 OK CR 19, ¶ 10, 422 P.3d 788, 793, citing *State v. Pope*, 2009 OK CR 9, ¶ 4, 204 P.3d 1285, 1287. We defer to the trial court's findings of fact unless they are clearly erroneous and we review the trial court's legal conclusions derived from those facts *de novo*. *Bramlett*, 2018 OK CR 19, ¶ 10, 422 P.3d at 793, citing *Gomez v. State*, 2007 OK CR 33, ¶ 5, 168 P.3d 1139, 1141-42.

It is well established that "police officers are not required to administer Miranda warnings to everyone whom they question." *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977). Rather, Miranda warnings are only required when a person is subject to a custodial interrogation which occurs where questioning is initiated by law enforcement officers after a person has been taken into custody or is otherwise deprived of his freedom in any significant way. *Miranda*, 384 U.S. at 467, 86 S.Ct. at 1624. See also *Little v. State*, 1981 OK CR 46, ¶ 4, 627 P.2d 445, 447. A person is in custody for purposes of *Miranda* when there is "a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Stansbury v. California*, 511 U.S. 318, 322, 114 S.Ct. 1526, 1529, 128 L.Ed.2d 293 (1994) (*per curiam*), quoting *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983) (*per*

³ 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

curiam). The relevant inquiry as to whether a suspect is in custody is how a reasonable person in the suspect's position would have understood the situation. *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317 (1984). If a reasonable person facing the same factual circumstances would have felt he or she was not at liberty to terminate the interrogation and leave, the person is in custody for Miranda purposes. *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 465, 133 L.Ed.2d 383 (1995). The record strongly supports the conclusion that Zilm was not in custody at the time he made his statement to the detectives and that his statement was the product of a free and deliberate choice. The trial court's decision denying Zilm's motion to suppress was not an abuse of discretion.

Zilm also argues on appeal that his statement was not knowingly and voluntarily made because he asked the detectives if he needed a lawyer and was told that he did not. This was not argued below. Zilm neither raised it in his motion to suppress nor argued it at the *Jackson v. Denno* hearing. Zilm has therefore waived consideration of this issue except as it may constitute plain error. *Cheatham v. State*, 1995 OK CR 32, ¶ 48, 900 P.2d 414, 427. To be entitled to relief for plain error, Zilm must prove that an error occurred, that the error is plain and obvious, and that the error affected his substantial rights. *See Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. He has not made this showing.

5.

Zilm contends that he was denied constitutionally effective assistance of counsel. This Court reviews

claims of ineffective assistance of counsel *de novo*, to determine whether counsel's constitutionally deficient performance, if any, prejudiced the defense so as to deprive the defendant of a fair trial with reliable results. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. Under this test, Zilm 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. "To accomplish this, it is not enough to show the failure had some conceivable effect on the outcome of the proceeding." *Id.* Rather, Zilm 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.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* This Court need not determine whether counsel's performance was deficient if the claim can be disposed of on the ground of lack of prejudice. *See Malone*, 2013 OK CR 1, ¶ 16, 293 P.3d at 207.

Zilm argues that after the prosecutor made veiled threats to file perjury charges against a proffered defense witness defense counsel should have made a record of the other witnesses the defense intended to call but decided not to because of the prosecutor's threats. Zilm has failed to show either that counsel's performance was deficient or that this alleged deficient performance affected the outcome of his case. Without such proof, his ineffective assistance of counsel claim is denied.

In conjunction with this claim, Zilm filed a motion to supplement the record and application for evidentiary hearing on claim of ineffective assistance of counsel contemporaneously with his brief attaching supporting affidavits. This Court will order an evidentiary hearing if “the application and affidavits . . . contain sufficient information to show this Court by clear and convincing evidence [that] 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), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018). Having reviewed Zilm’s request for an evidentiary hearing to develop his claims and the materials offered to support that request, this Court finds that he has failed to meet his burden as he has not shown a strong possibility that the outcome of his trial would have been different. Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018). Zilm is not entitled to an evidentiary hearing to further develop his ineffective assistance of counsel allegations, and his motion, as well as this claim, is denied. *See Simpson v. State*, 2010 OK CR ¶ 53, 230 P.3d 888, 905-06.

6.

Zilm claims that even if no individual error in his case merits reversal, the cumulative effect of the errors committed requires a new trial or sentence modification. The cumulative error doctrine applies when several errors occurred at the trial court level, but none alone warrants reversal. Although each error standing alone may be of insufficient gravity to warrant reversal, the combined effect of an accumulation of errors may require a new trial.

Martinez v. State, 2016 OK CR 3, ¶ 85, 371 P.3d 1100, 1119. Cumulative error does not deprive the defendant of a fair trial when the errors considered together do not affect the outcome of the proceeding. *Baird v. State*, 2017 OK CR 16, ¶ 42, 400 P.3d 875, 886. And clearly, a cumulative error claim is baseless when this Court fails to sustain any of the alleged errors raised on appeal. *Id.* There were no errors, either individually or when considered together, that deprived Zilm of a fair trial. This claim is denied.

DECISION

The Judgment and Sentence of the district court is **AFFIRMED**. Motion to Supplement the Record on Appeal and for Evidentiary Hearing is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018), the **MANDATE is ORDERED** issued upon delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT
OF TULSA COUNTY
THE HONORABLE KURT G. GLASSCO,
DISTRICT JUDGE**

APPEARANCES AT TRIAL

ALLEN M. SMALLWOOD
ATTORNEY AT LAW
1310 S. DENVER AVE.
TULSA, OK 74119
COUNSEL FOR DEFENDANT

SARAH McAMIS
ASSISTANT DISTRICT ATTORNEY
500 S. DENVER AVE., #900

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TULSA, OK 74103
COUNSEL FOR STATE

APPEARANCES ON APPEAL

JAMES L. HANKINS
929 N.W. 164TH STREET
EDMOND, OK 73013
COUNSEL FOR APPELLANT

MIKE HUNTER
OKLAHOMA ATTORNEY
GENERAL
DONALD D. SELF
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
COUNSEL FOR APPELLEE

OPINION BY: ROWLAND, J.

LUMPKIN, P.J.: Concur
LEWIS, V.P.J.: Concur
HUDSON, J.: Concur
KUEHN, J.: Concur

APPENDIX B

**IN THE DISTRICT COURT IN AND FOR
TULSA COUNTY, OKLAHOMA**

Case No. CF-2012-3037

Count No. 1

[Filed January 20, 2017]

State Of Oklahoma,)
)
-vs-)
)
ZILM, ADAM CLAYTON)
SS#: XXX-XX-7899)
DOB: XX-XX-1081)
)

JUDGMENT AND SENTENCE
All Time In Custody
FELONY

Now, this **20TH DAY OF JANUARY, 2017** this matter comes on before the Court for sentencing and the defendant appears personally and by his or her Attorney of record, **ALLEN SMALLWOOD** and the State of Oklahoma is represented by **SARAH MCAMIS** and the Court Reporter, **CINDY WORKMAN**.

The defendant has entered a plea of **not guilty** and is found **guilty by JURY** of the crime of: **SEXUAL ABUSE - CHILD UNDER 12, in violation of 21 O.S. 843.5 F**

Date Of Offense: 06/04/2012.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court that the defendant, is guilty of the stated offense and is sentenced to **THIRTY SIX (36) YEARS** all under the custody and control of the **DEPARTMENT OF CORRECTIONS WITH CREDIT FOR TIME SERVED.**

Upon release from such confinement, the Defendant shall serve a term of post-imprisonment supervision, under conditions prescribed by the Department of Corrections, for a period of: **ONE (1) YEAR**

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that in addition to the preceding terms, and the general miscellaneous costs of this action, the defendant is also sentenced to: **assessed fine in the amount of \$500.00, plus costs.**

IT IS FURTHER ORDERED BY THIS COURT THAT JUDGMENT IS HEREBY ENTERED against the defendant for all costs, fees, fines, and assessments ordered in this action and he or she is ordered to report immediately upon conclusion of this sentencing hearing, or within ten (10) days of discharge, if the defendant is currently incarcerated, to the Tulsa County Court Clerk to pay all costs, fines, fees, and assessments ordered in this action - or - to the Tulsa County Court Cost Administrator to make arrangements to pay the costs, fines, fees, and assessments as ordered pursuant to the Rule 8 Hearing held this day.

The Court further advised the defendant of his or her right to appeal to the Court of Criminal Appeals of the State of Oklahoma and of the necessary steps to be

taken by him or her to perfect such appeal, and that if he or she desired to appeal and was unable to afford counsel and a transcript of the proceedings, that the same would be furnished by the State, subject to reimbursement in accordance with 22 § O. S. 1355.14, 20 § O. S. 106.4 (b), and, ADC-72-33.

In the event the above sentence is for incarceration in the Department of Corrections, the Sheriff of Tulsa County, Oklahoma, is ordered and directed to deliver the defendant to the Lexington Assessment and Reception Center at Lexington, Oklahoma, and leave therewith a copy of this Judgment and Sentence to serve as warrant and authority for the imprisonment of the defendant as provided herein. A second copy of this Judgment and Sentence to be warrant and authority of the Sheriff for the transportation and imprisonment of the defendant as herein before provided. The Sheriff is to make due return to the clerk of this Court with his proceedings endorsed thereon.

COURT CLERK'S DUTY

[TRIAL JUDGE TO COMPLETE THIS SECTION]

IT IS FURTHER ORDERED that the Clerk of this Court shall register or report the following circumstances in accordance with the applicable statutory authority:

(X) As to Count(s) 1, the defendant is ineligible to register to vote pursuant to Section 4-101 of Title 26.

() Pursuant to Section 985.1 of Title 22, the Court departed from the mandatory minimum sentence of imprisonment as to Count(s) ____.

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() As to Count(s) _____, the defendant is subject to the Methamphetamine Offender Registry requirements as set forth in Section 2-701 of Title 63.

() Defendant is a lawyer and certified copies of this document shall be transmitted to the Chief Justice of the Supreme Court and the General Counsel of the Bar Association within five (5) days as set forth in Rule 7.2 of the Oklahoma Rules of Professional Conduct, 5 O.S.Supp.2014, ch. 1, app. 1-A.

Witness my hand the day and year first above mentioned

Witness my hand this 20 DAY OF
JANUARY, 2017

/s/Kurt G. Glassco
JUDGE KURT G. GLASSCO

ATTESTATION:

DON NEWBERRY

District Court Clerk Tulsa County

By: /s/Kim Thomas
KIMBERLY ANN THOMAS, Deputy

OFFICER'S RETURN OF SERVICE

Received this order the ____ day of _____, ____, and executed it by delivering said defendant to the Warden of the Lexington Assessment and Reception Center at Lexington, Oklahoma on the ____ day of _____, _____.

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STANLEY GLANZ, SHERIFF, TULSA COUNTY,
OKLAHOMA

By: _____
Deputy

COURT CLERK'S CERTIFICATION

I, DON NEWBERRY, District Court Clerk for Tulsa, Oklahoma, hereby certify that the foregoing is a true, correct and full copy of the instrument herewith set out as appears on record in the Court Clerks Office of Tulsa, Oklahoma.

Dated this the ____ day of _____, ____.

DON NEWBERRY, DISTRICT COURT CLERK,
TULSA COUNTY, OKLAHOMA

By: _____, Deputy

**ADDITIONAL FINDS AND FACTS AND
CONCLUSIONS OF LAW**

At the time of formal sentencing the sentencing judge, on the record, shall either complete the additional findings or review form 13.8(A) which has been completed by the parties to ensure its accuracy. Upon completion of the form it shall be ordered filed of record and be attached as Exhibit 1 to the Uniform Judgment and Sentence filed in the case.

EXHIBIT 1: Additional Findings of the Court to Case No. CF12-3037 Defendant Adam Zilm in the District Court of _____ County.

I. Original Charges

(A copy of the information may be attached instead)
Please list any additional charges on a separate attached sheet.

Offense	Statute Citation
<u>Sexual abuse - child under 12</u>	<u>21OS 843.5F</u>

II. Prior Felony Convictions

Please list all prior felony convictions or attach the OSBI rap sheet.

Offense	Date	Statute Citation
_____	_____	_____
_____	_____	_____
_____	_____	_____

III. Enhancer Information

1. Did the offender commit the current offense with the use of a weapon within the immediate possession and control of the offender? o Yes o No If yes, please indicate type of weapon.

2. For persons who are victims of violent crimes, please indicate the age of the victim(s) 11

3. If the controlling offense was a theft offense (larceny, embezzlement, fraud, concealing stolen property) what was the total amount involved in that offense?

\$ _____

4. If the controlling offense was a drug offense, what was the predominant drug and what was the amount of that drug (specify grams, ounces, etc.)?

Drug Type: _____

Quantity: _____

IV. Offender Characteristics

(A copy of the pre-sentence investigation may be attached instead.)

Gender (Circle)

Male Female

Race (Circle)

White Black Hispanic
Native American Asian

This exhibit shall not be admitted into evidence in any future prosecutions.

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Certified this 20th Day of January, 17.

/s/ _____
Attorney for State

/s/ _____
Attorney for Defendant

/s/ _____
Judge of the District Court

Form 5176 (3-06)

APPENDIX C

**IN THE COURT OF CRIMINAL APPEALS OF
THE STATE OF OKLAHOMA**

NOT FOR PUBLICATION

Case No. S-2014-812

[Filed August 6, 2015]

STATE OF OKLAHOMA,)
)
Appellant,)
v.)
)
ADAM CLAYTON ZILM,)
)
Appellee.)

OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellee Adam Clayton Zilm was charged in the District Court of Tulsa County with Sexual Abuse of A Minor (21 O.S.2011, § 843.5F), Case No. CF-2012-3037. After a Preliminary Hearing held on November 6, 2013, and in preparation for trial, the Honorable Kurt Glassco, District Judge, scheduled a hearing on the Reliability of the Out-of-Court Statements of a Child under the Age of 12 years pursuant to 12 O.S.2011, § 2803.1. This Reliability Hearing was conducted on September 9 & 12, 2014. The court ruled that the

hearsay statements made by the child victim K.A. to forensic interviewer Amy Howard and to neighbor Katherine Sanford lacked sufficient indicia of reliability and would be suppressed. The State announced its intent to appeal in open court and brings this appeal pursuant to 22 O.S.2011, §§ 1053(4) & 1053(5). The State raises the following proposition of error:

- I. The District Court erred when finding that the child hearsay statements should be suppressed and denied.

Initially, the State asserts that by ruling the hearsay statements would not be admissible, the trial court suppressed a substantial part of the State's proof of the pending charge and as a result substantially impaired and restricted the State's ability to prosecute the case.

Title 22 O.S. 2011, § 1053 provides, in part, that the State may appeal:

Upon a pretrial order, decision, or judgment suppressing or excluding evidence where appellate review of the issue would be in the best interests of justice.

We find that the State's appeal is proper and review of this issue is in the best interests of justice. *State v. Pope*, 2009 OK CR 9, ¶¶ 2-3, 204 P.3d 1285, 1286-87. We review a trial court's ruling on a suppression motion for an abuse of discretion. *Id.*, 2009 OK CR 9, ¶ 4, 204 P.3d at 1287. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and

judgment, one that is clearly against the logic and effect of the facts presented. *Id. State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194.

Testifying in the Reliability Hearing in this case were forensic interviewer Amy Howard and Katherine Sanford, a neighbor of the victim K.A. They both testified to statements describing sexual abuse made by the victim K.A. within twenty-four hours of the alleged abuse. Also testifying was K.A. She testified to statements inconsistent with the proffered hearsay. She testified that there had been no abuse, that she had had a nightmare about a previous molestation, that she had been told what to say in the forensic interview, and that as early as a week after the reported abuse until the Reliability Hearing she had repeatedly tried to tell those in authority it was all a mistake.

The State argues on appeal that the trial court should not have allowed the child victim to testify at the Reliability Hearing and that the trial court should not have considered statements made by the victim subsequent to the proffered hearsay statements. The State asserts that 21 O.S.2011, § 2803.1 does not suggest or imply that a single proffered statement should be compared to any other statements made by the same child nor does the statute provide that any subsequent statements of the child should be considered. The State contends the statute repeatedly refers to the trial court's review of each separate and singular statement and that the court is limited to considering the "four corners" of the proffered statement. Appellee argues to the contrary that the statute provides that in considering the time, content

and totality of circumstances surrounding the taking of the proffered statement, the court can consider statements made subsequent to the proffered statement.

Initially, we find that the trial court did not abuse its discretion in permitting the child victim to testify at the Reliability Hearing. Under the circumstances of this case, the determination of the reliability of the hearsay statements required it. *See F.D.W. v. State*, 2003 OK CR 23, ¶5, 80 P.3d 503, 504 (“[i]n some cases, the determination of reliability may require that the child witness testify, or that a separate hearing with the court be conducted”).

Turning to 12 O.S.2011, § 2803.1, the statute provides in pertinent part:

A. A statement made by a child who has not attained thirteen (13) years of age, . . . which describes any act of physical abuse against the child . . . or any act of sexual contact performed with or on the child . . . is admissible in criminal and juvenile proceedings in the courts in this state if:

1. The court finds, in a hearing conducted outside the presence of the jury, that the time, content and totality of circumstances surrounding the taking of the statement provide sufficient indicia of reliability so as to render it inherently trustworthy. In determining such trustworthiness, the court may consider, among other things, the following factors: the spontaneity and consistent repetition of the statement, the mental state of the declarant,

whether the terminology used is unexpected of a child of similar age or of an incapacitated person, and whether a lack of motive to fabricate exists; . .

This Court has not previously addressed the State's claim that the court is limited to the "four corners" of the child hearsay statement in making its reliability determination. Instead, the Court has repeatedly referred to the trial court's consideration of the "totality of the circumstances surrounding the taking of the statement" and that the various factors listed in the statute are not the only factors that can be considered in making the fundamental reliability/trustworthiness determination. *See State v. Juarez*, 2013 OK CR 6, ¶ 9, 299 P.3d 870, 873; *F.D.W.*, 2003 OK CR 23, ¶3, 80 P.3d at 503-504.

The State directs us to *Davenport v. State*, 1991 OK CR 14, 806 P.2d 655 to argue that the trial court should have allowed the proffered child hearsay statements to go to the jury, along with any inconsistent testimony and subsequent recantations. We find *Davenport* is distinguishable from the present case in that the issue before us is the admissibility of the child hearsay statements, not the weight and credibility of those statements.

Section 2803.1 is a specific exception to the general hearsay rule. If the criteria of the section are met and the hearsay statement is found sufficiently trustworthy it is admissible if the child either testifies, is available to testify pursuant to the provisions of 12 O.S. § 2611.2 or is unavailable pursuant to 12 O.S. § 2804. *Folks v. State*, 2008 OK CR 29, ¶ 10, 207 P.3d 379, 382. Looking to the language of the statute it provides that the court

may consider “the time, content and totality of circumstances surrounding the taking of the statement” in determining the reliability and trustworthiness of the hearsay statement. This “totality of circumstances” includes but is not limited to the spontaneity and consistent repetition of the statement, the mental state of the declarant, whether the terminology used is unexpected of a child of similar age or of an incapacitated person, and whether a lack of motive to fabricate exists. By not limiting the “totality of the circumstances” to the listed factors, the Legislature has allowed the trial court to consider any information properly before it at the time of making its reliability determination which relates to the trustworthiness of the hearsay statement.

In the present case, the child victim’s testimony at the Reliability Hearing was inconsistent with the hearsay statements offered by Amy Howard and Katherine Sanford. The trial court did not abuse its discretion in considering K.A.’s sworn testimony and in suppressing the proffered hearsay statements on the basis that they lacked sufficient indicia of reliability so as to render them inherently trustworthy.

After thorough consideration of this proposition of error and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we find the District Court did not abuse its discretion in suppressing the hearsay statements. The order of the District Court sustaining the motion to suppress should be affirmed.

DECISION

The ruling of the District Court granting the motion to suppress is AFFIRMED.¹ Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015), the MANDATE is ORDERED issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT
OF TULSA COUNTY
THE HONORABLE KURT G. GLASSCO,
DISTRICT JUDGE

APPEARANCES IN DISTRICT COURT

TIM HARRIS
DISTRICT ATTORNEY
SARAH MCAMIS
ASSISTANT DISTRICT ATTORNEY
500 S. DENVER
TULSA COUNTY COURTHOUSE
TULSA, OK 74013
COUNSEL FOR THE STATE

ALLEN M. SMALLWOOD
1310 SOUTH DENVER AVE.
TULSA, OK 741192
COUNSEL FOR THE DEFENSE

APPEARANCES ON APPEAL

TIM HARRIS
DISTRICT ATTORNEY

¹ The Appellee's Motion to File Amended Response Brief and Request to File Supplemental Exhibit to Brief are GRANTED.

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SARAH MCAMIS
ASSISTANT DISTRICT ATTORNEY
500 S. DENVER, STE. 900
TULSA COUNTY COURTHOUSE
TULSA, OK 74013
COUNSEL FOR APPELLANT

ALLEN M. SMALLWOOD
1310 SOUTH DENVER AVE.
TULSA, OK 74119
COUNSEL FOR APPELLEE

OPINION BY: LUMPKIN, V.P.J.
SMITH, P.J.: CONCUR
JOHNSON, J.: CONCUR
LEWIS, J.: DISSENT
HUDSON, J.: CONCUR

RA

LEWIS, J., DISSENTING:

I respectfully dissent to the Court's Opinion in this case. The "time, content and totality of circumstances" surrounding the taking of the two statements at issue here provide sufficient indicia of reliability so as to render them inherently trustworthy pursuant to 12 O.S.2011, § 2803.1.¹

The trial court abused its discretion by placing undue emphasis on the victim's later recantation, which, in my opinion, has no bearing on the admissibility of the earlier statements. The later recantation does not fall within the "totality of the circumstances surrounding the taking of the statements," as the recantation came at a later time during which the victim may have been under improper influence to change her story. *See Mitchell v. State*, 2005 OK CR 15, ¶ 36, 120 P.3d 1196, 1207 ("circumstantial guarantees of trustworthiness that support admission of hearsay . . . are those which existed at the time the statement was made") The earlier statements are just as inherently trustworthy as the victim's sworn testimony at the reliability hearing and are admissible. Any question as to the weight of the conflicting statements should be left to the fact-finder during a trial on the merits.

¹ Although not fully developed, it is possible that the first statement made to the neighbor Katherine Sanford was an excited utterance under our reasoning in *Marquez v. State*, 1995 OK CR 17, 890 P.2d 980.

APPENDIX D

**IN THE COURT OF CRIMINAL APPEALS OF
THE STATE OF OKLAHOMA**

Case No. F-2017-69

[Filed November 7, 2018]

ADAM CLAYTON ZILM,)
)
Appellant,)
v.)
)
THE STATE OF OKLAHOMA,)
)
Appellee.)

**ORDER DENYING PETITION FOR
REHEARING**

Zim was tried by jury and convicted of Sexual Abuse of a Child Under 12, in violation of 21 O.S.2011, § 843.5, in the District Court of Tulsa County, Case No. CF-2012-3037. The jury assessed punishment at thirty-six years imprisonment and a \$500.00 fine. The Honorable Kurt G. Glassco, District Judge, sentenced Zim accordingly. Zim appealed his Judgment and Sentence to this Court. Zim filed a timely Petition for Rehearing in this matter after his Judgment and Sentence was affirmed by this Court on September 6, 2018. *Zilm v. State*, Case No. F-2017-69 (Okl.Cr. September 6, 2018) (unpublished).

This Court will review petitions for rehearing to determine if:

- (1) Some question decisive of the case and duly submitted by the attorney of record has been overlooked by the Court, or
- (2) The decision is in conflict with an express statute or controlling decision to which the attention of this Court was not called either in the brief or in oral argument.

Rule 3.14, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018).

The decision handed down in this case adequately disposed of the issues raised relying upon appropriate authority and all questions duly submitted were reviewed by the Court prior to rendering the decision in this case.

IT IS THEREFORE THE ORDER OF THE COURT that the Petition for Rehearing is **DENIED**. The Mandate previously issued in this case will remain in effect.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 7th day of November, 2018.

/s/Gary L. Lumpkin
GARY L. LUMPKIN, Presiding Judge

/s/David Lewis
DAVID LEWIS, Vice Presiding Judge

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/s/Robert L. Hudson

ROBERT L. HUDSON, Judge

/s/Dana Kuehn

DANA KUEHN, Judge

/s/Scott Rowland

SCOTT ROWLAND, Judge

ATTEST:

/s/ John D. Hadden

Clerk