

ORIGINAL



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

LONNIE D. BROWN,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAY 31 2023

**JOHN D. HADDEN
CLERK**

No. PC-2023-386

**ORDER AFFIRMING DENIAL OF APPLICATION
FOR POST-CONVICTION RELIEF**

On May 1, 2023, Petitioner appealed to this Court from an order of the District Court of Cleveland County denying his application for post-conviction relief in Case No. CF-2011-1341. A jury found Petitioner guilty of First Degree Rape (victim under 14)(Count 1), First Degree Rape by Instrumentation (Count 2), Forcible Sodomy (Count 3), Lewd or Indecent Acts to Child Under 16 (Count 4), and Lewd or Indecent Acts to Child Under 16 (Count 5). Petitioner was sentenced pursuant to the jury's verdict to life imprisonment without the possibility of parole for both Counts 1 and 2; twenty years imprisonment for Count 3; and life imprisonment for both Counts 4 and 5. The trial court ordered the sentences to be served concurrently.

This Court affirmed Petitioner's conviction. *See Brown v. State*, No. F-2013-1003 (Okl.Cr. October 23, 2014)(not for publication).

On December 5, 2018, Petitioner, through counsel, filed an application for post-conviction relief in Case No. CF-2011-1341 in the District Court arguing he received ineffective assistance of appellate counsel. In a very thorough order filed in the trial court on March 3, 2023, the Honorable Lori Walkley, District Judge, denied Petitioner's application for post-conviction relief. Judge Walkley addressed and denied each of Petitioner's ineffective assistance of counsel claims on its merits. Relying on *Logan v. State*, Judge Walkley noted that Petitioner's conviction was affirmed by this Court on direct appeal and that any issues raised in his direct appeal were barred by res judicata, and issues which could have been raised, but were not, were waived. *See Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973; 22 O.S.2011, § 1086. Judge Walkley considered each argument and relied upon *Strickland v. Washington* to determine that appellate counsel's performance was not objectively unreasonable and that Petitioner failed to demonstrate a reasonable probability that due to the alleged errors the outcome of the appeal would have been different. *See Strickland v. Washington*, 466 U.S. 668 (1984). We agree.

We review the trial court's determination for an abuse of discretion. *State ex rel. Smith v. Neuwirth*, 2014 OK CR 16, ¶ 12, 337 P.3d 763, 766. 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. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

Petitioner argues in this post-conviction appeal that Judge Walkley's denial of post-conviction relief was an abuse of discretion. On appeal, Petitioner raises the following propositions:

- I. THE DISTRICT COURT ABUSED ITS DISCRETION DENYING THE PETITIONER'S APPLICATION FOR POST-CONVICTION RELIEF AS THE COURT FAILED TO SPECIFY WHAT DOCUMENTS WERE CONSIDERED IN ITS DECISION INFRINGING UPON THE PETITIONER'S STATUTORY RIGHT TO REDRESS ON APPEAL IN A POST-CONVICTION PROCEEDING.
- II. THE DISTRICT COURT ABUSED ITS DISCRETION DENYING POST-CONVICTION RELIEF BECAUSE APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE PLAIN ERROR WHICH DENIED PETITION A SIXTH AMENDMENT RIGHT.

In Proposition I, Petitioner argues Judge Walkley's order failed to adequately specify what documents the trial court relied upon in making its decision. In her March 3, 2023, order Judge Walkley

addressed each of Petitioner's arguments in detail in conclusion held:

In this matter, Petitioner/Defendant fails to overcome the presumption that appellate counsels conduct fell [within] the wide range of reasonable professional assistance. Furthermore, Petitioner/Defendant has failed to demonstrate that he was prejudiced by the actions of appellate counsel by showing a likelihood of a different result on appeal, particularly in light of the totality of evidence adduced at trial as noted by the Court in their Opinion of October 23, 2014. Therefore, Petitioner/Defendant's Application for Post-Conviction Relief is DENIED.

Judge Walkley's order was more than sufficient to satisfy this Court's Rule 5.4, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2023) and 22 O.S.2011, § 1084. Petitioner's Proposition I is without merit.

Petitioner's second proposition argues he was denied effective assistance of appellate counsel. Claims of ineffective assistance of appellate counsel may be raised for the first time on post-conviction, as it is usually a petitioner's first opportunity to allege and argue the issue. As set forth in *Logan*, 2013 OK CR 2, ¶ 5, 293 P.3d at 973, post-conviction claims of ineffective assistance of appellate counsel are reviewed under the standard for ineffective assistance of counsel set forth in *Strickland*. See *Smith v. Robbins*, 528 U.S. 259, 289 (2000) ("[Petitioner] must satisfy both prongs of the *Strickland* test in

order to prevail on his claim of ineffective assistance of appellate counsel."). Under *Strickland*, a petitioner must show both (1) deficient performance, by demonstrating that his counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-89. And we recognize that "[a] court considering a claim of ineffective assistance of counsel must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104 (2011)(quoting *Strickland*, 466 U.S. at 689).

We find no merit in the claim that Petitioner was denied effective assistance of appellate counsel as alleged in his post-conviction application. The Post-Conviction Procedure Act is not a substitute for a direct appeal, nor is it intended as a means of providing a petitioner with a second direct appeal. *Fowler v. State*, 1995 OK CR 29, ¶ 2, 896 P.2d 566, 569; *Maines v. State*, 1979 OK CR 71, ¶ 4, 597 P.2d 774, 775-76.

In his brief, Petitioner alleges Judge Walkley erred in denying his claim that he was denied effective assistance of appellate counsel. Petitioner makes several different claims within the context of his argument that his appellate counsel was ineffective. He argues his appellate counsel inadequately argued otherwise winning claims and that his appellate counsel overlooked meritorious claims. There is nothing in this case that indicates appellate counsel was ineffective in the claims actually raised in his direct appeal or that had appellate counsel argued any of these omitted issues on appeal it would have changed the result of his appeal. Petitioner's arguments are speculation and second-guessing of his attorney's strategies. A review of the record makes it clear these claims are unsupported. Petitioner does not establish any deficient performance by appellate counsel in these claims. *Strickland*, 466 U.S. at 687-89.

After examining Petitioner's claims of ineffective assistance of counsel, pursuant to the *Logan* and *Strickland* standards stated above, Petitioner has failed to establish that appellate counsel's performance was deficient or objectively unreasonable and Petitioner has failed to establish any resulting prejudice. As a result,

Petitioner's ineffective assistance of appellate counsel claims are without merit.

As Petitioner has failed to establish he is entitled to post-conviction relief, the order of the District Court of Cleveland County in Case No. CF-2011-1341, denying Petitioner's application for post-conviction relief is **AFFIRMED**.

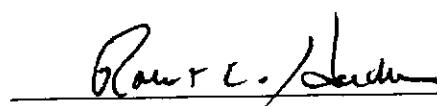
Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2023), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

IT IS SO ORDERED.

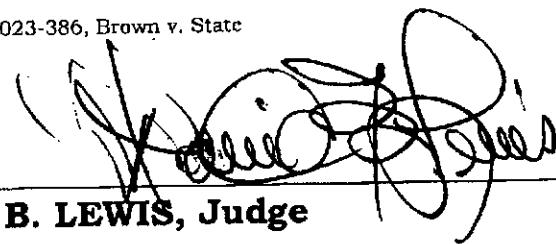
WITNESS OUR HANDS AND THE SEAL OF THIS COURT this

31st day of May, 2023.

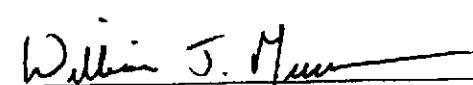

SCOTT ROWLAND
SCOTT ROWLAND, Presiding Judge


ROBERT L. HUDSON, Vice Presiding Judge


GARY L. LUMPKIN, Judge

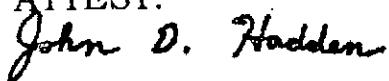


DAVID B. LEWIS, Judge



WILLIAM J. MUSSEMAN, Judge

ATTEST:



John D. Hadden

Clerk

PA



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STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY }

FILED

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

MAR 03 2023

STATE OF OKLAHOMA,

Plaintiff,

vs.

LONNIE DEE BROWN,

Defendant.

In the office of the
Court Clerk MARILYN WILLIAMS

CF-2011-1341

**ORDER DENYING DEFENDANT'S APPLICATION FOR POST-CONVICTION
RELIEF**

This matter comes before the Court pursuant to the Remand Order from the Court of Criminal Appeals to further assess the ineffective assistance of appellate counsel claim. After receiving briefing from counsel and after review of the record herein, this Court finds and orders as follows:

1. Petitioner/Defendant was charged with Rape, First Degree, Rape, First Degree by Instrumentation, Forcible Sodomy, two (2) counts of Lewd or Indecent Acts to a Child Under 16 and a Pattern of Criminal Offenses by an Information filed by the State of Oklahoma. Petitioner/Defendant, represented by highly qualified private counsel, maintained his right to a jury trial and thus, this matter was tried to a jury ending in a verdict of guilty as to Counts I-IV. Subsequently, Petitioner/Defendant, again represented by highly qualified private counsel, appealed his convictions. The convictions were affirmed. Approximately four (4) years following mandate issuing in this matter, Petitioner/Defendant presents the instant Application for Post-Conviction Relief.

2. Petitioner/Defendant raises a claim of Ineffective Assistance of Appellate Counsel in his Original Application for Post-Conviction Relief as well as in the Supplement filed two (2)

years thereafter. In particular, Petitioner/Defendant claims that appellate counsel was ineffective for failing to raise the following claims on appeal:

- a. Improper bolstering by the State in voir dire;
- b. Improper bolstering by Det. Horstkoetter in his interview with Defendant that was played to the jury regarding the victim's credibility as well as his belief in Defendant's guilt;
- c. Prejudice resulting from a pre-trial discovery violation depriving Defendant of a fair trial;
- d. Improper bolstering of the testimony of the victim in the testimony of Candace Ladd; and,
- e. Ineffective assistance of trial counsel in failing to subject the expert witness to meaningful cross examination.

3. The Post-Conviction Procedure Act, 22 O.S. §1080, *et seq.*, is neither a substitute for a direct appeal nor a means for a second appeal. *Maines v. State*, 1979 OK CR 71, ¶ 4, 597 P.2d 774, 775-76; *Fox v. State*, 1994 OK CR 52, ¶ 2, 880 P.2d 383, 384. The scope of the Act is strictly limited and does not allow for litigation of issues available for review at the time of direct appeal. *Johnson v. State*, 1991 OK CR 124, ¶¶ 3-4, 823 P.2d 370, 372; *Castro v. State*, 1994 OK CR 53, ¶ 2, 880 P.2d 387, 388. All issues that were previously raised and ruled upon on direct appeal are procedurally barred from further review under the doctrine of res judicata, and any issue that could have been previously raised, but was not, is waived. *Logan v. State*, 2013 OK CR 2, ¶ 3, 293 P.3d 969, 973.

4. An exception to this rule exists where a court finds sufficient reason for not asserting or inadequately presenting an issue in prior proceedings. 22 O.S.2011, § 1086; *Berget v. State*, 1995 OK CR 66, ¶ 6, 907 P.2d 1078, 1081. This requires a showing that some impediment external to the defense prevented the petitioner and counsel from properly raising the claim. *Johnson*, 1991 OK CR 124, ¶ 7, 823 P.2d at 373. Petitioner has the burden of establishing that his claim could not have been previously raised and thus is not procedurally barred.

Robinson v. State, 1997 OK CR 24, ¶ 17, 937 P.2d 101, 108. In this case, Defendant/Petitioner's underlying claims of error could have been raised in the timely appeal he filed but were not. Because the underlying claims were not raised, the only remaining issue is whether appellate counsel was ineffective in failing to do so.

5. In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984), the United States Supreme Court set forth the test for reviewing an ineffectiveness of counsel claim. The same standard applies to both ineffective assistance of trial counsel claims and ineffective assistance of appellate counsel claims. Under *Strickland*, a petitioner "must show both (1) deficient performance, by demonstrating that his counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding. . .would have been different." *Logan v. State*, 2013 OK CR 2 ¶5
6. It is well settled that appellate counsel need not raise every issue on appeal. In *Woodruff v. State*, 1996 OK CR 5, the Court stated: "It is the role of appellate counsel to carefully select and develop the legal issues to be presented to the court and not raise every non-frivolous issue conceivable." See also, *Mitchell v. State*, 1997 OK CR 9: "An attorney's failure to raise an arguably meritorious claim on appeal, without proof that the omission was professionally deficient, will not support a finding of deficient performance." The most instructive case in making a determination on an ineffective assistance of appellate counsel is *Slaughter v. State*, 1998 OK CR 63. Like the instant matter, the petitioner in *Slaughter* claimed that appellate counsel was ineffective for failing to investigate, develop, and present all facts and issues relevant to the constitutionality of Petitioner's conviction and sentence; raise valid appellate issues with respect to trial counsel, and

present a persuasive ineffective assistance of counsel claim, thereby breaching a duty to Petitioner. The *Slaughter* Court adopted the three-prong test set forth in *Walker v. State*, 1997 OK CR 3, for reviewing ineffective assistance of appellate counsel claims. "Under this analysis, 1) the threshold inquiry is whether appellate counsel actually committed the act which gave rise to the ineffective assistance allegation. If a petitioner establishes appellate counsel actually did the thing supporting the allegation of ineffectiveness, this Court then 2) determines whether the performance was deficient under the first of the two-pronged test in *Strickland*, 466 U.S. at 677-78, 104 S.Ct. at 2059. If this burden is met, 3) this Court then considers the mishandled substantive claim, asking whether the deficient performance supports a conclusion "either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent." *Walker*, 933 P.2d at 333 n. 25 (quoting 22 O.S.Supp.1995, § 1089(C)(2))."

7. Regarding issues raised for the first time on post-conviction, the *Slaughter* Court reiterated that failing to raise all possible issues does not constitute deficient appellate performance. See above authority as well as *Slaughter*. Therefore, the first issue must be to determine whether Appellate Counsel failed to develop viable claims to raise on appeal. That inquiry does not require an evidentiary hearing as a thorough record exists already.
8. Petitioner/Defendant claims that appellate counsel was ineffective for failing to raise an assignment of error resulting from the State bolstering its case during voir dire and eroding the presumption of innocence. In particular, Petitioner/Defendant points to Volume 1 of the Trial Transcript at pages 147-161. In review of the entirety of voir dire, it is clear that no improper statements were made that resulted in prejudice to

Defendant/Petitioner. In particular, as to the pages cited, it should be noted that no objection was raised by defense counsel to the line of questioning in voir dire. It has long been held that alleged errors must be properly preserved for appellate review. Failure to object to the offending statement waives all claims of error and the appellate court will only review the same for plain error. See *Vaughn v. State*, 1985 OK CR 29: "We have held in *Fiorot v. State*, 641 P.2d 551 (Okl. Cr. 1982) that total failure of the accused to request the jury be admonished to disregard prosecutorial comments results in a waiver of alleged errors.". In *Hancock v. State*, 2007 OK CR 9, the Court stated:

"In subproposition III (C), Appellant argues the instructional errors were compounded by prosecutorial misstatements of law in closing argument. The claim is waived by the failure to object. Reviewing the comments for plain error, we reverse only if the comments had "a 'substantial influence' on the outcome," or leave the reviewing court "in 'grave doubt' as to whether it had such an effect." *Simpson v. State*, 1994 OK CR 40, ¶ 36, 876 P.2d 690, 702. Counsel for the State and defense are entitled to a liberal freedom of speech in arguing the facts and competing inferences of the case from their opposing points of view. *Frederick v. State*, 2001 OK CR 34, ¶ 150, 37 P.3d 908, 946; *Bland v. State*, 2000 OK CR 11, ¶ 97, 4 P.3d 702, 728. Reversal is required only where grossly improper and unwarranted argument affects a defendant's rights. *Howell v. State*, 2006 OK CR 28, ¶ 11, 138 P.3d 549, 556, *citing* *Hanson v. State*, 2003 OK CR 12, ¶ 13, 72 P.3d 40, 49.

In this matter, the voir dire of the State was intended to determine whether the potential jurors could listen to the testimony of a child and whether that testimony could be sufficient in their minds. While the voir dire was "chatty", it was not inappropriate and it certainly was not "grossly improper". Appellate counsel would have been aware that the alleged error was not properly preserved for appellate review and that, upon review of the transcript, that the questioning was not "grossly improper". Therefore, appellate counsel's failure to raise this issue on appeal would not have met the first prong of the *Walker* and/or *Strickland* tests.

9. Petitioner/Defendant asserts that appellate counsel failed to raise errors in the admission of Det. Horstkoetter's interview with the Defendant. In particular, Petitioner/Defendant asserts that in the interview, Det. Horstkoetter impermissibly vouched for the credibility of the victim and stated his opinion as to the guilt of the Defendant. Petitioner/Defendant cites no authority to support his position that these are viable claims that should have been raised. However, there is a plethora of authority that indicates that a wide range of investigatory techniques do not violate Due Process. In *Darity v. State*, 2009 OK CR 27, the Court of Criminal Appeals stated:

In *Swink v. State*, 1976 OK CR 219, 554 P.2d 795, this Court held that a deception practiced against unwitting defendants by undercover officers, who thereby secured an invitation to defendant's house to purchase drugs, did not violate the Fourth Amendment or invalidate the seizure of incriminating evidence. The Court in *Swink* noted that "[t]he Supreme Court has long recognized that the use of deception by law enforcement officials in the detection of crime is not in itself improper." *Id.* at ¶ 5, 554 P.2d at 797, citing *Grimm v. United States*, 156 U.S. 604, 610, 15 S.Ct. 470, 472, 39 L.Ed. 550, 552 (1895), *et al.* Likewise, nothing in the Oklahoma Statutes or Constitution requires that police always deal truthfully with the targets of criminal investigations. *Pierce v. State*, 1994 OK CR 45, 878 P.2d 369 (rejecting claim that statements made to police in attorney's office were inadmissible because police deceived appellant during the interview); *see also Frazier v. Cupp*, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969) (officers lawfully obtained confession by falsely telling suspect that his cousin had already confessed).

10. These propositions of error, like the prior proposition, does not require an evidentiary hearing but merely a review of the record herein. In particular, the testimony of Det. Horstkoetter is instructive. He was questioned by the State and cross-examined by the defense on these very issues leaving factual questions of whether he believed the statements he made to the defendant at the time of the interview or whether those statements were investigatory strategy. Further, the offending "bolstering" was brought out very pointedly by defense counsel. However, assuming *in arguendo* that appellate

counsel failed to present a viable issue, Petitioner/Defendant cannot establish that appellate counsel's failure to raise the issue was objectively unreasonable based upon the authority set forth above nor can he establish that "but for" the failure to raise the issue that the result of the appeal would have been different. In the Opinion issued by the Court of Criminal Appeals in this case on October 23, 2014, the Court stated:

Furthermore, there was sufficient evidence presented at trial supporting the charges against Brown, including pornography found on Brown's computer that corroborated S.B.'s testimony. S.B. had knowledge of sexual acts well beyond her years and was able to describe in detail an adult male penis. She experienced emotional problems at school during the time she claimed she was being abused by Brown. She also reported vaginal bleeding in 2010 that was dismissed as a rash because she had not yet reported Brown's abuse. Based on this record, we find the district court's failure to comply with *Martin* before allowing the jury to view the DVD was harmless.

This error, if any, would be no different based upon the totality of the evidence in this case. Therefore, these two propositions are denied.

11. Petitioner/Defendant's next proposition of error is based upon appellate counsel's failure to raise the issue of a pre-trial discovery violation that deprived Defendant of a fair trial. Inherent in Petitioner/Defendant's argument is that (a) the State did not provide full disclosure of the substance of Donaldson's testimony, (b) the Court failed to conduct a *Daubert* hearing regarding the basis of Donaldson's testimony, and, (c) the Court erred in failing to grant the request for a mistrial based upon Donaldson's testimony all resulting in substantial prejudice to Petitioner/Defendant. The record in this matter does not support Petitioner/Defendant's contentions. First, it is clear that Petitioner/Defendant had ample notice of the basis of Donaldson's testimony. All reports and underlying documentation that her testimony was based upon was produced in discovery to Petitioner/Defendant. The complaint seems to be that the State did not provide enough

detail regarding the substance of Donaldson's testimony. However, as all supporting documentation was produced, Petitioner/Defendant could have conducted further pretrial investigation by simply speaking with Donaldson. That was not done.

Second, a *Daubert* hearing is only necessary if the basis of the expert testimony is novel. Petitioner/Defendant's contention that 12 O.S. §2702 requires a *Daubert* determination for all expert testimony is simply not supported by law. In *Oliver v. State*, 2022 OK CR 15, when finding that a nurse's testimony that the nature and extent of the injuries to the victim were consistent with strangulation and a detective's testimony regarding the effects of lack of oxygen to the brain did not involve "novel scientific evidence" the Court of Criminal Appeals held: "When expert testimony concerns novel scientific evidence, then it must be subjected to the pre-trial analysis set forth in *Daubert*. *Taylor v. State*, 1995 OK CR 10, ¶ 44, 889 P.2d 319, 339...As the evidence at issue was not novel scientific evidence, no *Daubert* hearing was required. No error occurred in the admission of Thompson's and Mosier's testimony."

Because no pretrial discovery violation occurred and the trial court was not required to hold a *Daubert* hearing, the resulting denial of the request for a mistrial was not error. Therefore, appellate counsel's failure to raise this issue on appeal did not fall below the objective standard set forth in *Strickland*. This proposition is denied.

12. Petitioner/Defendant next contends that appellate counsel failed to raise the issue of improper bolstering of the testimony of the victim with the testimony of Candace Ladd. In *Nickell v. State*, 1994 OK CR 73 at ¶ 4 of Judge Lumpkin's Special Concurring Opinion, Judge Lumpkin set forth the definition of "bolstering".

While the term "bolstering" is not specifically defined in the Evidence Code, its concept is addressed within the provisions of 12 O.S. 1991 § 2608 [12-2608], as it relates to reputation or opinion evidence of character of a witness for truthfulness or untruthfulness. However, under the facts of this case, the Court is not presented with opinion evidence relating to a witness, but the very basis of the witnesses' testimony. At common law, the concept of "bolstering" was addressed within the term "rehabilitation". The reason was this type of evidence for truthfulness was generally excluded until the witnesses' credibility was attacked. See *Jackson v. State*, 12 Okl.Cr. 406, 157 P. 945 (1916) (error to admit prior consistent statement before witness impeached). See also 4 J. Wigmore, *Evidence*, § 1104, pp. 233-34 (J. Chadbourne ed. 1972); 3 L. Whinney, *Oklahoma Evidence*, § 47.31, pg. 377 (1994); *United States v. Sherman*, 171 F.2d 619, 622 (2d Cir. 1948) (Judge Learned Hand reasoned: "[t]he reason for . . . exclusion [of an earlier consistent account] is because it has not been made on oath rather than because it has no probative value, although courts have often spoken as though it had none.") Therefore, "bolstering" constitutes nothing more than "preemptive rehabilitation" of a witness. In other [885 P.2d 678] words, it is the timing of the evidence based on the anticipated attempt to impeach a witness which is at issue and, to a degree, it is addressed in Section 2608.

Upon review of the entirety of the testimony of Candace Ladd, it is clear that the claimed "bolstering" was elicited upon redirect based upon questions asked about the child's veracity by the defense on cross-examination. The exchange was proper redirect and was not a preemptive attempt at rehabilitation of S.B.'s propensity for truthfulness.

Furthermore, the complained of testimony was not objected to during the trial and therefore, would only be grounds for appeal if the admission was plain error. Based upon the totality of Candace Ladd's testimony as well as the evidence noted above, appellate counsel's failure to raise the issue on appeal does not fall below the standard set forth in *Strickland*. This proposition is denied.

13. Petitioner/Defendant's final proposition (contained in the Supplement) is that appellate counsel failed to raise the issue of trial counsel's ineffective cross-examination of the State's expert witness. A review of the transcript indicates that trial counsel conducted a thorough cross-examination of Ms. Donaldson. This finding together with the findings related to the proposition concerning the alleged pretrial discovery violation leads to the

conclusion that appellate counsel's failure to raise this issue on appeal did not fall below the standard set forth in *Strickland*. This proposition is also denied.

14. In *Oliver v. State*, 2022 OK CR 15, the Court of Criminal Appeals held:

The Court begins its analysis with the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. Appellant must overcome this presumption and demonstrate that counsel's representation was unreasonable under prevailing professional norms and that the challenged action could not be considered sound trial strategy. *Id.* "When a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed." *Bland v. State*, 2000 OK CR 11, ¶ 113, 4 P.3d 702, 731. To demonstrate prejudice an appellant must show that there is a reasonable probability that the outcome of the trial would have been different but for counsel's unprofessional errors. *Id.*, 2000 OK CR 11, ¶ 112, 4 P.3d at 731. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

In this matter, Petitioner/Defendant fails to overcome the presumption that appellate counsel's conduct fell below the wide range of reasonable professional assistance.

Furthermore, Petitioner/Defendant has failed to demonstrate that he was prejudiced by the actions of appellate counsel by showing a likelihood of a different result on appeal, particularly in light of the totality of evidence adduced at trial as noted by the Court in their Opinion of Octboer 23, 2014. Therefore, Petitioner/Defendant's Application for Post-Conviction Relief is DENIED.

15. This is a final judgment on Petitioner/Defendant's Application for Post-Conviction Relief. The final judgment may be appealed to the Court of Criminal Appeals on a petition in error filed either by Petitioner/Defendant or the State **within thirty (30) days from the entry of this judgment. A notice of intent to appeal and request to stay must be filed within ten (10) days of the entry of the judgment in order for the Court to consider a stay of execution of the judgment pending appeal.** The Court of

Criminal Appeals may vacate any order staying execution of judgment prior to the conclusion of the appeal.

16. The Clerk of the Court shall send a certified copy of this Order shall be sent to Counsel for Petitioner/Defendant and Counsel for the State.

IT IS SO ORDERED this 27th day of February, 2023.



LORI M. WALKLEY
District Judge

I HEREBY CERTIFY THAT THE FOREGOING IS A
TRUE AND CORRECT AND COMPLETE COPY
OF THE INSTRUMENT HEREWITNESS SET OUT AS IT
APPEARS ON RECORD IN THE COURTCLERK'S
OFFICE OF CLEVELAND COUNTY, OKLAHOMA.

WITNESS MY HAND AND SEAL THIS 7 DAY OF

MARILYN WILLIAMS COURT CLERK

BY *Marilyn Williams* DEPUTY

2023