IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LYNUAL MCELROY	)	
	)	NOT FOR PUBLICATION
Appellant,	)	
v.	)	Case No. F-98-760
	)	
STATE OF OKLAHOMA	)	
	)	
Appellee.	)	

SUMMARY OPINION

LILE, JUDGE:

Lynual McElroy was charged in case number CF-97-3089 in the District Court of Tulsa County, Oklahoma, with the felony of Sexually Abusing a Minor Child in violation of 10 O.S.1991, § 7115. Defendant was tried before the Honorable Thomas C. Gillert, District Judge, on April 7-8, 1998. Defendant was represented by counsel. The jury returned a verdict of guilty and assessed punishment at life imprisonment and a fine of $5,000. The trial court sentenced Appellant in accordance with the jury verdict. From this judgment and sentence Appellant has perfected his appeal.

Appellant raises the following propositions of error:

1. Mr. McElroy was deprived of a fair trial when the prosecution introduced evidence of other crimes against both him and defense witness Snyder.

2. Mr. McElroy was deprived of a fair trial when numerous witnesses were allowed to testify that Mr. McElroy

did not deny the allegations when confronted by authorities; and when witnesses were allowed to give their opinions about his failure to deny the allegations, about whether sexual abuse took place, and about whether his wife was willing to protect their children from child abuse. Mr. McElroy was also deprived of effective assistance of counsel when his attorney failed to object to this testimony.

3. Mr. McElroy was deprived of a fair trial when the trial court excluded important evidence which was necessary for Mr. McElroy's defense.

4. Mr. McElroy was deprived of a fair trial when the prosecutor appealed to the jury's sympathy for the alleged victim during closing arguments.

In proposition one, Appellant claims introduction of evidence that he showed a sexually explicit video tape to the victim, his 8-year-old-daughter, T.E., was in violation of *Burks v. State*, 1979 OK CR 1979, 594 P.2d 771, 774-775 (overruled in part on other grounds by *Jones v. State*, 1989 OK CR 7, 772 P.2d 922, 925). There was no objection at trial to testimony about the video tape, and therefore Appellant waived all but plain error. We find no plain error here.

Appellant was not surprised by the testimony at trial because T.E. had testified in detail about the video tape at preliminary hearing. *McLendon v. State*, 1989 OK CR 29, ¶ 16, 777 P.2d 948, 952. The evidence was properly admitted as part of the res gestae of the crime. *Burks v. State*, 1979 OK CR 10, ¶ 12, 594 P.2d 771, 774. Appellant also complains that defense witness Snyder was asked on cross-examination if his own step-daughter, Tammy McElroy (Appellant's wife), had accused

Snyder of sexually molesting her when she was eleven years old. This was proper impeachment for bias. *Martinez v. State*, 1995 OK CR 52, 904 P.2d 138; *Beck v. State*, 1991 OK CR 126, 824 P.2d 385, 388.

Appellant also complains, under this proposition, that trial counsel was ineffective for failing to object to this evidence at trial. Since the evidence was not improper, Appellant fails to satisfy the first prong of the test in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) to show that counsel's performance was deficient. There was no deficiency, and Appellant's claim in proposition one of ineffective assistance of trial counsel is denied. As we find no error in proposition one, it is denied.

In proposition two, there was no contemporaneous objection, so we examine for plain error only. Appellant's failure to deny allegations that he raped his 8-year-old daughter when confronted by those allegations while he was not under arrest was properly admitted against him. *Cooper v. State*, 1983 OK CR 154, ¶ 16, 671 P.2d 1168, 1174; *Dunham v. State*, 1988 OK CR 211, ¶ 14, 762 P.2d 969, 973.

Appellant also objects in proposition two, to the admission of opinion evidence by DHS worker, Kirsten Thiel. There was no objection at trial, and all but plain error was waived. Thiel was entitled to give her opinion about child abuse as an expert. Also there was no plain error as her testimony was based upon and was merely cumulative to Dr. Inhoff's

testimony. By not objecting to her opinion evidence at trial, trial counsel was able to get favorable evidence before the jury that Appellant's wife, Tammy, did not believe Appellant had molested their daughter, T.E. Thus, the jury was told that Tammy believed T.E. was lying without calling Tammy to the stand. We find it was not plain error to admit the evidence. We further find that it was reasonable trial strategy to not object to the opinion evidence, and there was no deficient performance or ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Appellant's second proposition is denied.

Appellant alleges in proposition three that he was not permitted to develop his defense. Counsel at trial questioned Dr. Inhoff about a statement defendant's younger daughter, 7-year-old A.T., had made to her. The witness testified, "This is purely recollection, because the subpoena was not to discuss [A.T.]. My recollection is that at the time she did not have a disclosure, and her examination was normal." This testimony was favorable to Appellant as it tended to negate any suspicion that he had molested the 7-year-old daughter, A.T. The witness had exhausted her memory of what the 7-year-old had told her. She stated she had not brought A.T.'s chart with her. Counsel did not ask her to retrieve the chart, nor did he make an offer of proof. Error may not be predicated on a ruling excluding evidence unless the substance of the

evidence was made known to the judge by an offer of proof. 12 O.S.1991, § 2104(A)(2); *Vanscoy v. State*, 1987 OK CR 50, 734 P.2d 825, 828. Appellant's third proposition is denied.

Appellant did not object to the prosecutor's comment in closing argument, and we find no plain error. The single comment complained of on appeal did not prejudice the jury and did not deprive Appellant of a fair trial. *Langdell v. State*, 1982 OK CR 205, ¶ 5, 657 P.2d 162, 164. The fourth proposition is denied.

After a thorough consideration of the above propositions and the entire record before us including the original record, transcripts, and the briefs of the parties, we find that appellant's propositions of error are without merit and are denied.

DECISION

The Judgment and Sentence of Life Imprisonment and a $5,000 fine imposed by the jury and trial court is hereby **AFFIRMED**.

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OPINION BY: LILE, J.

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LUMPKIN, V.P.J.: CONCURS IN RESULTS
JOHNSON, J.: CONCURS
CHAPEL, J.: CONCURS IN RESULTS

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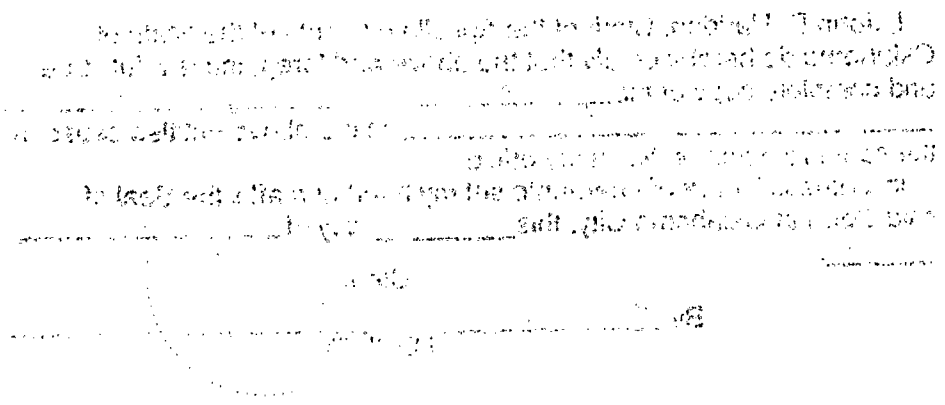

I, John D. Hadden, Clerk of the Appellate Courts of the State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of the Summary Opinion in the above entitled cause, as the same remains on file in my office.

In Witness Whereof I hereunto set my hand and affix the Seal of said Court at Oklahoma City, this 11 day of June 2024.

Clerk

By Candace Duncan
DEPUTY