IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ALFONZO DANIEL,	)	
	)	NOT FOR PUBLICATION
Appellant,	)	
v.	)	Case No. F 2004-773
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

C. JOHNSON, JUDGE:

Appellant, Alfonzo Daniel, was charged in Oklahoma County District Court, Case No. CF 98-460, with First Degree Rape, in violation of 21 O.S.Supp.1995, § 1111 (Count 1), Lewd Acts with a Child under Sixteen, in violation of 21 O.S.Supp.1995, § 1123 (Count 2), and Making Indecent Proposals to a Child under Sixteen, in violation of 21 O.S.Supp.1995, § 1123 (Count 3). Jury trial was held on June 28th – 30th, 2004, before the Honorable Susan Caswell, District Judge. The jury found Mr. Daniel guilty of Counts 2 and 3 and set punishment at twenty (20) years on each count. Judge Caswell ordered Mr. Daniel to serve the sentences consecutively. Thereafter, Mr. Daniel filed this appeal.

Mr. Daniel raises twelve propositions of error:

1. The trial court erred in admitting the videotaped interview of Appellant where it had already been found to be inadmissible;

2. The trial court erred when it ruled that the videotaped interview was given involuntarily, without having watched the entire videotape;

3. The trial court erred in allowing the hearsay statements of the prosecutrix to be introduced through the testimony of a social worker;

4. The admission of Marcus Ford's testimony was error because it was prejudicial but lacked any relevance to the present case;

5. It was error to admit the videotape of Mr. Daniel's interview, after the police officer who conducted the interview had already testified in detail about the interview; the cumulative nature of this evidence prejudiced they (sic) jury against Mr. Daniel;

6. Mr. Daniel was prevented from presenting his defense when the trial court restricted his cross-examination of the prosecutrix;

7. The trial court committed fundamental error by giving two non-uniform instructions which were not necessary to instruct the jury on the relevant law, but which prejudiced the Defendant by making the state's theory of the case part of the law of the case;

8. The trial court erred in not recusing herself or, in the alternative, informing defense counsel of the court's possible conflict of interest in Appellant's case;

9. The prosecutors' repeated appeal to the jury's sympathy for the alleged victim deprived Appellant of a fair trial and requires that the convictions be reversed or, in the alternative, the sentences (be) modified;

10. It was error to allow the prior testimony of Marcus Ford to be read to the jury, as there was no proof that Ford was unavailable to testify in person;

11. The trial court erred in denying Appellant's request to enforce the plea agreement;

12. The conviction for Lewd Molestation was not supplied by sufficient evidence;

13. The cumulative effect of all these errors deprived Mr. Daniel of a fair trial.

After thorough consideration of the entire record before us on appeal, including the Original Record, the transcripts, exhibits, and briefs of the parties, we find reversal is warranted and this case must be remanded for a new trial.

The claim raised in Proposition 1 warrants relief. The State concedes admission of Mr. Daniel's videotaped interview violated principles of *res judicata. Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014, 1022 (10th Cir. 2001). The improper admission of an involuntary confession is subject to harmless error analysis. *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302 (1991); *Chapman v. California*, 386 U.S. 18, 23-24, 87 S.Ct. 824, 827-828, 17 L.Ed.2d 705 (1967).

We cannot find the admission of Mr. Daniel's videotaped interview harmless beyond a reasonable doubt. The error was not a small or simple defect that had little chance of changing the result of the trial. *See Mitchell v. State*, 2005 OK CR 15, ¶ 80, 120 P.3d 1196, 1216 ("[T]here may be some constitutional errors which in the setting of a particular case are *so unimportant and insignificant* that they may, consistent with the Federal Constitution, be deemed harmless, not requiring automatic reversal of the conviction." (emphasis added, citations omitted)). Accordingly, Mr. Daniel's convictions must be reversed and remanded for a new trial.

The remaining claims of error need not be addressed.

DECISION

The Judgments and Sentences imposed for Counts 2 and 3, in Oklahoma County District Court, Case No. CF 1998-460, are hereby **REVERSED AND REMANDED FOR A NEW TRIAL**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE SUSAN CASWELL, DISTRICT JUDGE

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OPINION BY: C. JOHNSON, J.
CHAPEL, P.J.: CONCURS
LUMPKIN, V.P.J.: DISSENTS
A. JOHNSON, J.: CONCURS
LEWIS, J.: CONCURS

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LUMPKIN, VICE PRESIDING JUDGE: DISSENTS

In her order recommending that Appellant's petition for Writ of Habeas Corpus be granted, the Honorable Valerie Couch, U. S. Magistrate, found the improper admission of Appellant's videotaped statements was not harmless error as it had "a substantial injurious effect on the jury's verdict". *Daniel v. Sutter*, CIV-2002-209-C (May 23, 2003).[1] This was due in great part to the fact that only Appellant's admission on the tape supported the victim's testimony that Appellant was ever in the vacant house with the victim and her younger sister, A.H. The victim's younger sister did not testify at the first trial.

At Appellant's second trial, A.H. did testify and corroborated the victim's testimony that Appellant was at the vacant house with the girls. A.H. testified that she and her sister went to the vacant house because they thought they saw their oldest brother there. A.H. testified the girls got into the vacant house through the back door. Once inside, A.H. said Appellant came out from the back bedroom into the living room where A.H. and the victim were sitting on the floor talking. A.H. testified that after awhile, Appellant told her to go get some water so he could flush the toilet in the house. A.H. left for her aunt's nearby house. When A.H. returned with the water to the vacant house, she found the door locked. She knocked on the door, but when no one answered she went back to her aunt's house and sat on the porch. A.H. said she went

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[1] The Honorable Robin Cauthron, U.S. District Judge, adopted the Magistrate's Report and Recommendation in its entirety and granted the Petition for Writ of Habeas Corpus. *Daniel v. Sutter*, CIV-2002-209-C (July 23, 2003).

back to the vacant house a second time and knocked again. But still no one answered. A.H. went back to her aunt's house to wait for her sister. When A.H. saw her sister come out of the vacant house, the victim was crying (although she would not tell A.H. why she was crying).

Thus, unlike the situation in the first trial, the victim's testimony placing Appellant at the vacant house was corroborated by testimony other than Appellant's statements on the videotape. With A.H.'s testimony, the victim's testimony that Appellant was in the vacant house with the two sisters is fully corroborated. In addition, A. H.'s testimony was direct evidence as to the emotional condition of the victim as she left the house after being there alone with Appellant. As Appellant did not confess to any wrongdoing on the videotape, and as his presence in the vacant house with the two girls was corroborated by testimony other than the videotape, the improper admission of the tape was harmless beyond a reasonable doubt as there is no reasonable probability that the videotape might have contributed to the conviction. *See Bartell v. State,* 1994 OK CR 59, ¶ 14, 881 P.2d 92, 97 citing *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Therefore, I dissent to the reversal of the conviction and the remand for a new trial.