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

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| **ALONZO GABRIEL DAVISON,** | ) | |
| | ) | |
| **Appellant,** | ) | **NOT FOR PUBLICATION** |
| | ) | |
| **v.** | ) | **Case No. F-2002-1437** |
| | ) | |
| **THE STATE OF OKLAHOMA,** | ) | |
| | ) | |
| **Appellee.** | ) | |

**SUMMARY OPINION**

**LUMPKIN, JUDGE:**

Appellant, Alonzo Gabriel Davison, was tried by jury in the District Court of Tulsa County, Case Number F-2002-1687, and convicted of Lewd Molestation (Count 1), after former conviction of two or more prior felonies, in violation of 21 O.S.Supp.2000, § 1123, and Sexually Abusing a Minor Child (Count II), after former conviction of two or more felonies, in violation of 10 O.S.2001, § 7115.[1] The jury set punishment at fifty (50) years imprisonment on Count I and seventy-five (75) years imprisonment on Count II. The trial judge sentenced Appellant in accordance with the jury's determination and ordered the sentences to be served consecutively. Appellant now appeals.

Appellant raises the following propositions of error in this appeal:

I. Appellant's right to trial by an impartial jury and due process were violated when the trial court denied his motions to excuse two jurors for cause. One of those jurors ultimately remained on the jury after all peremptory challenges allotted to the defense were exercised. Presence of a biased juror on

[1] Appellant was acquitted of a third charge, Assault and Battery – Domestic. His lewd molestation conviction was originally charged as a second count of sexually abusing a minor child, but jurors convicted him of the lesser crime of lewd molestation.

the jury violated the 6th Amendment of the Federal Constitution and Article II, Section 20 of Oklahoma's Constitution;

II. Appellant's Constitutional right to confront witnesses was violated when the trial court admitted State's Exhibit I, a prerecorded interview of the complaining witness by Jaime Vogt that constituted improper hearsay;

III. The trial court erred in making the videotape available to the jury for repeated and unrestricted viewing during deliberations;

IV. The trial court abused its discretion in refusing Appellant's request for a one-stage proceeding, after Appellant took the stand in the guilt phase of trial and admitted his prior convictions;

V. Failure to properly answer the jury's question about pardon and parole prevented the jury from giving an informed assessment of the appropriate punishment; and

VI. Cumulative errors deprived Appellant of a fair trial and reliable verdict.

After a thorough consideration of these propositions and the entire record before us, including the original record, transcripts, and briefs of the parties, we find reversal is not required with respect to Appellant's convictions. However, his sentences must be modified.

With respect to proposition one, we find two somewhat competing legal principals come into play. First, a trial judge enjoys broad discretion in deciding which members of the venire possess actual bias and should be excused for cause. *Warner v. State*, 2001 OK CR 11, ¶ 6, 29 P.3d 569, 572. Second, "all doubts regarding juror impartiality must be resolved in favor of the accused. . . ." *Id.* In other words, we allow trial judge's broad discretion in jury selection matters, for they are the ones dealing with potential jurors face to

face. However, this Court qualifies that discretion with the expectation that a trial judge's decision will remove all doubts concerning juror impartiality.

Here, we cannot say all doubts regarding impartiality were removed with respect to two potential jurors, one who ultimately served on the jury. One juror revealed, *in camera*, that her stepfather had molested her repeatedly for many years, an allegation disturbingly similar to the claims in this case. That incident had never been effectively resolved by her family or by legal proceedings. While the juror claimed, somewhat nobly, she could put those experiences aside, we find the danger was too great she could not. *See Hawkins v. State*, 1986 OK CR 58, ¶ 4, 717 P.2d 1156, 1158 (finding it was "apparent" a potential juror could not be impartial even though she stated she could).

A second potential juror, who ultimately served on the jury, was persistent in voicing concerns about her sensitivity to the issue of child abuse. The juror voiced several concerns. She had "problems with child abuse." It was a "very sensitive, emotional topic" for her and she was "not very tolerant with it." She intervenes if she ever sees a mother hitting a child. If she had to hear a "case like that (she) would be very much for the child...." She believed many adults charged with child abuse are not convicted. She considered herself "probably biased toward the child". She attempted to reveal a particular abuse case she was aware of, but was cut off. She described herself as an "emotional person about child abuse." She stated she could give the defendant a fair trial "if he didn't do it." She admitted it would be upsetting to hear the victim, whom she would give a higher credibility. She was "very partial to a child who has been

hurt." She indicated she might respond vocally in court and could not imagine hearing a sexual abuse case. The juror was somewhat rehabilitated and ultimately said she could follow the law. The trial judge was thorough and sincere. He did not use his discretion lightly. Nevertheless, we cannot say all doubts regarding juror impartiality were removed. There is simply no reason to roll the dice when a juror is this adamant about a position that would seemingly compromise her partiality.

An improper denial of a challenge for cause will not be prejudicial unless the record shows the erroneous ruling reduced the number of the appellant's peremptory challenges to his prejudice. In order to show prejudice, the appellant must demonstrate he was forced, over objection, to keep an unacceptable juror. *Grant v. State,* 2002 OK CR 36, ¶ 12, 58 P.3d 783, 790;[2] *Matthews v. State,* 2002 OK CR 16, ¶16, 45 P.3d 907, 915; *Warner v. State,* 2001 OK CR 11, ¶ 10, 29 P.3d 569, 573-74; *Powell v. State,* 1995 OK CR 37, 906 P.2d 765, 772; *Hawkins v. State,* 717 P.2d at 1158.

Here, one juror who should have been dismissed for cause sat on the jury. But was Appellant forced to keep this juror on the panel, over objection?

Defense counsel exercised all five peremptory challenges. He first dismissed four potential jurors other than the two he had challenged for cause. (Concerning these four—Lansdown, [3] Chitwood, [4] Dudley, [5] and Holmes[6]—the

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[2] *Judgment vacated, Grant v. Oklahoma,* __ U.S. __, 124 S.Ct. 162, 157 L.Ed.2d 12, (2003).

[3] Lansdown had been removed from a previous jury the day before on a peremptory challenge. He had previously served on a civil jury. He has a friend who is a police officer and his brother in law was one too. He had been the victim of a car theft and had his laptop stolen. His neighbor had been busted for a meth lab, and the potential juror had offered his home to police to use as a stakeout. He believes our legal system is flawed, and prefers the system in Saudia

record reveals clear reasons why the defense wanted to exclude them.) For his final peremptory, counsel had to choose between the two jurors whom he had challenged for cause.

Was defense counsel required to get rid of the two jurors he had challenged for cause before dismissing other jurors who were arguably as "unacceptable" or objectionable?[7] We see no logical reason to absolutely require a defendant to remove jurors who *should have been dismissed for cause* over other jurors who are equally objectionable, or worse. Indeed, there are times when a person has such strong positions on an issue or their relationships clearly favor one point of view that their ability to be fair and impartial is highly questionable, even though they may not qualify for a cause challenge.

However, there must be a record made, an offer of proof that the other jurors removed were equally unacceptable to the defendant's position in order to

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Arabia, where a rapist is executed two days after the crime. He believes children are more likely to lie than other witnesses and was prejudiced against prior felons. He believes child abuse was the second worst crime, behind murder.

[4] Chitwood's wife is an attorney. He had served on a criminal jury where the defendant was found guilty. He was the foreperson. He found the charges in this case to be extremely grievous.

[5] Dudley was extremely quiet during *voir dire*, perhaps more so than any other candidate. He was retired, 67, and spoke fondly about his kids and grandkids. He had a high school education. His daughter had been burglarized, and the crime was never resolved. He believes child abuse is second to murder in terms of worst crimes.

[6] Holmes held a police science degree, and had worked with some police departments, performing analytical studies of police department procedures. He had a military background, having formerly served in Vietnam. He had served on a military jury twice, both resulting in convictions. He knew several policemen and had always wanted to be a cop. He ranked the instant offense extremely high on the list of inappropriate behavior, especially if the defendant was a prior felon.

[7] According to *Ross v. Oklahoma*, "[i]t is a long-settled principle of Oklahoma law that a defendant who disagrees with the trial court's ruling on a for-cause challenge must, in order to preserve the claim that the ruling deprived him of a fair trial, exercise a peremptory challenge to remove the juror." 487 U.S. at 89, 108 S.Ct. at 2279. "Even then, the error is grounds for reversal only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him." *Id.* This rule is neither arbitrary nor irrational, and it defeats a due process

preserve the claim. This was not done here. Counsel should have made a record why he used his client's peremptory challenges to get rid of other jurors, Mr. Dudley in particular, over the jurors he had challenged for cause.

More importantly and ultimately fatal to this claim, our cases have consistently required counsel to request additional peremptory challenges in order to preserve error. *See Young v. State*, 1998 OK CR 62, ¶ 16, 992 P.2d 332, 338; *Salazar v. State*, 1996 OK CR 25, ¶ 28-29, 919 P.2d 1120, 1128-29. Had counsel made an appropriate record on why he did not dismiss the cause-challenged jurors first and then requested an additional peremptory, his claim of prejudice might survive. Under these specific circumstances, however, we find the claim is waived.

With respect to propositions two and three, we find error occurred when a prerecorded videotape interview of one of the complaining child victims was admitted into evidence pursuant to 12 O.S.2001, § 2803.1, over repeated objections.[8] See *Curtis v. State*, 1988 OK CR 85, 763 P.2d 377, 378 (recognizing section 2803.1 "by its own terms does not purport to apply to prerecorded videotaped statements"); *Conner v. State*, 1992 OK CR 68, 839 P.2d 1378, 1379; *Burke v. State*, 1991 OK CR 116, 820 P.2d 1344, 1348.[9]

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claim. *Id.*

[8] The interview was conducted by a member of the Children's Justice Center. During the interview, the child says Appellant put his "privacy" in her "private" and bottom. ("That goes in that." "His privacy went up there.") She also claimed he put his finger in her private. Compare this to her trial testimony, which did not specifically establish penetration.

[9] *Huskey v. State*, 1999 OK CR 3, 989 P.2d 1, is clearly distinguishable. There, the videotape did not concern a police interview, but was a videotape of the child playing with anatomical dolls. Moreover, the evidence was also admitted under another hearsay exception. *Huskey*'s discussion of section 2803.1, arguably dicta, may now be in jeopardy, due to the holding in *Crawford v. Washington*, __ U.S. __, __ S.Ct. __, __ L.Ed.3d __ (2004) (holding the Sixth Amendment's

We find, however, the error was harmless as to guilt or innocence. *Bartell v State*, 1994 OK CR 59, 881 P.2d 92, 99. First, the child testified at trial and was subject to cross-examination. Second, Appellant also attempted sexual acts against two others, the child's sister and her aunt. Thus, the child's testimony was somewhat corroborated. Third, the child's testimony at trial established a violation of section 7115 for sexual abuse as a lewd or indecent act.

Admittedly, the evidence was somewhat strengthened by showing the videotape, for there the child established penetration. However, penetration is not required for a conviction under the statute. Moreover, the child's claim that it hurt when Appellant touched her privates with his establishes at the very least attempted penetration.

We find no "reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1966). The same, however, cannot be said about the sentence. Appellant received consecutive sentences of fifty and seventy-five years. Hearing the child victim testify twice regarding this issue would have had an emotional impact. Additionally, the jury heard about insertion of Appellant's finger in her vagina, and the child's fear Appellant would try to kill her family with a knife. Thus, modification of the sentence is in order. Such relief renders the issue raised in proposition three moot.

With respect to proposition four, we find no abuse of discretion in the trial court's decision to hold a bifurcated trial, despite Appellant's appearance in the

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confrontation clause "demands what the common law required: unavailability and a prior

first stage and admission of his previous convictions. *Wills v. State*, 1981 OK CR 140, 636 P.2d 372, 375; *Jones v. State*, 1974 OK CR 172, 527 P.2d 169, 173. Moreover, sentence modification renders much of this claim moot.

With respect to proposition five, we find no error occurred when the trial judge refused to answer the jury's questions regarding pardon and parole or inform them of the "eighty-five percent rule" set forth in 21 O.S.2001, §§ 12.1 and 13.1. The trial court did not abuse its discretion by denying the requested instruction.[10]

With respect to proposition six, we find no accumulation of error requiring additional relief from that already granted.

**DECISION**

Appellant's convictions are hereby **AFFIRMED.** However, his sentences on Counts I and II are hereby modified to forty-five (45) years on each count, to be served concurrently.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE P. THOMAS THORNBRUGH, DISTRICT JUDGE

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opportunity for cross-examination" before such "testimonial" witness statements are admitted.) *See also, Husky v. State*, 989 P.2d 7, 8 (Lumpkin, J., Concur in Results).

[10] This Court has addressed this identical claim in several non-published cases during the two years. *See e.g., Wilkerson v. State*, F-2002-1212 (Okl.Cr. 10-20-2003)(not for publication); *Jones v. State*, F 2002-1011 (Okl.Cr. August 28, 2003)(not for publication); *Johnson v. State*, F 2001-523 (Okl.Cr. June 14, 2002)(not for publication), and *King v. State*, F 2001-1170 (Okl.Cr. August 30, 2002)(not for publication). In each of these cases, the Court has not required an instruction on the 85% rule be given.

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**OPINION BY: LUMPKIN, J.**

JOHNSON, P.J.: CONCUR
LILE, V.P.J.: CONCUR IN RESULT
CHAPEL, J.: CONCUR IN RESULT
STRUBHAR, J.: CONCUR IN RESULT

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