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

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| TIMMY HOWARD DICKEY,<br><br>Appellant,<br>v.<br><br>THE STATE OF OKLAHOMA,<br><br>Appellee. | ) | No. F-2011-1019<br>Not for Publication |



**SUMMARY OPINION**

**SMITH, VICE PRESIDING JUDGE:**

Timmy Howard Dickey, Appellant, was tried by jury and convicted of Child Sexual Abuse, in violation of 21 O.S.Supp.2010, § 843.5(E) (Count I), in the District Court of Caddo County, Case No. CF-2010-279. In accord with the jury verdict, the Honorable S. Wyatt Hill, Associate District Judge, sentenced Dickey to imprisonment for 5 years.[1] Dickey is properly before this Court on direct appeal.

Dickey raises the following propositions of error:

I. THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S DEMURRER AND IN FAILING TO DIRECT A VERDICT IN DEFENDANT'S FAVOR AS TO THE CHARGE OF SEXUAL ABUSE SINCE THE STATE FAILED TO PRESENT ANY EVIDENCE THAT DEFENDANT WAS A PERSON RESPONSIBLE FOR THE HEALTH, SAFETY OR WELFARE OF [B.D.] AS THAT TERM IS DEFINED IN 10A O.S. § 1-1-105(50).

II. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY CONCERNING THE DEFINITION OF A PERSON RESPONSIBLE FOR A CHILD'S HEALTH, SAFETY, AND WELFARE, WHICH IS SET OUT IN OKLAHOMA UNIFORM JURY INSTRUCTION CR-4-40D.

III. THE COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT A CUSTODIAN AS THAT TERM IS USED IN 10A O.S. § 1-1-105(50) AND AS THAT TERM IS DEFINED IN 10A O.S. § 1-1-105(16), MEANS "AN INDIVIDUAL OTHER THAN A PARENT, LEGAL GUARDIAN OR INDIAN CUSTODIAN, TO WHOM LEGAL CUSTODY OF THE CHILD HAS BEEN AWARDED BY THE COURT. AS USED IN THIS TITLE, THE TERM CUSTODIAN SHALL NOT MEAN THE OKLAHOMA DEPARTMENT OF HUMAN SERVICES."

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[1] Dickey was also ordered to pay costs, a Victim's Compensation Assessment of $500, and restitution in the amount of $2,675.

On December 6, 2010, Dickey was charged by Information with one count of Child Sexual Abuse, under 21 O.S.Supp.2010, § 843.5(E). The Information charged that Dickey committed this crime "on or about the 4th day of December, 2010, by willfully and/or maliciously sexually abusing [B.D.], a minor child, who was 17 years of age at that time, by having sex with [B.D.] when he was a person responsible for her health & safety." The Affidavit of Probable Cause filed with the Information stated as follows: "On December 5, 2010, 17-year-old B.D. reported she had been raped by her uncle, TIMMY HOWARD DICKEY. DICKEY is B.D.'s biological uncle. B.D.'s mother is DICKEY'S sister."

The propositions in this appeal are all premised on the same basic claim, *i.e.*, that Dickey was not, in fact, "a person responsible for the health, safety, or welfare" of B.D., as is required for a conviction of "child sexual abuse," under 21 O.S.Supp.2010, § 843.5(E). This Court agrees that the crime of child sexual abuse under § 843.5(E) requires, as an element, that the defendant be "a person responsible for the health, safety, or welfare" of the child victim. *See* 21 O.S.Supp.2010, § 843.5(E) (explicitly incorporating definition of "sexual abuse" found at 10A O.S., § 1-1-105(2)(b)); 10A O.S.Supp.2009, § 1-1-105(2)(b) (defining "sexual abuse" as requiring that abuse be "by a person responsible for the health, safety, or welfare of the child"); *see also* OUJI-CR 4-39 (listing "person responsible for the child's healthy, safety or welfare" as first element of child sexual abuse under § 843.5(E)). [2]

[2] *See also Cox v. State*, 2006 OK CR 51, ¶ 24, 152 P.3d 244, 253 ("Thus, an essential element of the offense of child sexual abuse . . . is that the defendant must have been a person responsible for the child's health, safety, or welfare."); *see also Huskey v. State*, 1999 OK CR 3, ¶ 12, 989 P.2d 1, 7.

This Court recognizes that the record in this case is inadequate to establish that Dickey was, at the time he was alleged to have raped his niece, "a person responsible for [B.D.'s] health, safety, or welfare." *See* 10A O.S.Supp.2009, § 1-1-105(50) (listing categories of persons who can qualify as a "[p]erson responsible" in this context); OUJI-CR 4-41 (defining "person responsible" element according to categories listed in 10A O.S., § 1-1-105(50)).[3] The only "person responsible" category even potentially applicable to Dickey is that of "custodian."[4] However, the record in this case clearly establishes that Dickey cannot qualify as a "custodian," either as this Court interpreted the term in *Townsend v. State*, 2006 OK CR 39, ¶¶ 5-6, 144 P.3d 170, 172 (defining "custodian" to include "a babysitter" "who voluntarily accepts responsibility for a child, for a significant period of time"), or as it was more recently defined at 10A O.S.Supp.2010 § 1-1-105(16) (requiring that a "custodian" be someone granted legal custody by a court).[5] Thus Dickey is correct that this Court cannot affirm his conviction for child sexual abuse under § 843.5(E).

Nevertheless, the record in this case leaves no real doubt regarding the fact that Dickey committed a serious sexual crime against his niece, B.D., just days before her 18th birthday.[6] Furthermore, the Information clearly alleged that

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[3] These same "person responsible" categories now appear at 10A O.S.Supp.2012, § 1-1-105(51).

[4] Dickey was not B.D.'s parent, legal guardian, or foster parent and had never lived in B.D.'s home. In fact, Dickey had no regular interaction with or relationship with B.D. (beyond being her uncle) until shortly before the night at issue. As a young child, B.D. was bitten by Dickey's dog and was then awarded some kind of annual insurance settlement. B.D. initially contacted Dickey, shortly before the night in question, about obtaining her annual (birthday-based) settlement payment.

[5] This Court concludes that even if *Townsend's* finding that the term "custodian" can include babysitters could still be considered good law, the record in this case *cannot* support a finding that Dickey was entrusted with B.D.'s care. B.D. admitted at trial that she lied to her father and step-mother on the night in question about where she was going, because she did not think they would let her drive alone to Dickey's home in Hinton, and she did not want them to prohibit her from going.

[6] B.D. was apparently raped by Dickey shortly after midnight on December 5, 2010, just days before her 18th birthday. In fact, B.D. consistently reported—in her initial reports to police that morning

Dickey's crime consisted of "having sex with" B.D., and there has never been any question in this case that B.D. is the biological niece of Dickey. The current case is one in which justice clearly calls for a modification of the crime upon which Dickey was convicted.[7] 22 O.S.2011, § 1066. The State has proposed that Dickey's conviction be modified to either First-Degree Rape, under 21 O.S.Supp.2008, § 1114(A)(5), or Incest, under 21 O.S.Supp.2007, § 885. Although the Affidavit of Probable Cause put Dickey on notice that he was accused of raping B.D.—and the testimony of B.D. at trial would certainly support a conviction for first-degree rape—this Court finds that it is more appropriate to modify Dickey's conviction to incest.

During an afternoon interview on December 5, 2010, Dickey admitted to O.S.B.I. Agent Dannie Sanders that he had had "consensual sex" with B.D.—after repeatedly denying having any sexual encounter with his niece. Since Dickey admitted to having sexual intercourse with his niece (though not to raping her), and this act constitutes the crime of incest, under § 885, this Court finds that Dickey's conviction in Count I should be modified to one for Incest. Dickey's sentence shall remain the same as given by the jury, *i.e.*, imprisonment for 5 years.[8]

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and again at trial—that Dickey actually said, at the time, "I've been waiting until you turned 18 to f--- you." B.D. also consistently reported and testified that she reminded Dickey that she was his niece and that Dickey said he "didn't care." In addition, B.D. consistently reported and testified that she tried to fight Dickey off, that she said "no" over 20 times to his advances, that he overpowered her, and that Dickey had forced vaginal intercourse with her against her will and without her consent.

[7] *See Brewer v. State*, 2006 OK CR 16,¶ 18, 133 P.3d 892, 895; *McArthur v. State*, 1993 OK CR 48, ¶ 10, 862 P.2d 482, 484-85; *Cox v. State*, 1961 OK CR 46, ¶¶ 8-9, 361 P.2d 506, 508; *see also* 28 U.S.C. § 2106 (authorizing federal appellate courts to modify a judgment or court order "as may be just under the circumstances"); *Tinder v. United States*, 345 U.S. 565, 570, 73 S.Ct. 911, 913, 97 L.Ed. 1250 (1953).

[8] The sentencing range for incest is imprisonment for up to 10 years. *See* 21 O.S.Supp.2007, § 885.

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits, we find that Dickey's conviction should be modified to one for Incest and that his sentence should be affirmed.

## DECISION

Dickey's **COUNT I CONVICTION** for child sexual abuse is **MODIFIED TO A CONVICTION FOR INCEST**, under 21 O.S.Supp.2007, § 885, and Dickey's **SENTENCE** of imprisonment for 5 years is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2013), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CADDO COUNTY
THE HONORABLE S. WYATT HILL, ASSOCIATE DISTRICT JUDGE

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**OPINION BY: SMITH, V.P.J.**
LEWIS, P.J.: DISSENT
LUMPKIN, J.: DISSENT
C. JOHNSON, J.: CONCUR
A. JOHNSON, J.: CONCUR

**LEWIS, PRESIDING JUDGE, DISSENT:**

I respectfully dissent to the Court's resolution of this case. The definition of custodian found in *Townsend v. State*, 2006 OK CR 39, ¶ 6, 144 P.3d 170, 172, applies to the crime of child sexual abuse. That definition states that a custodian is a person who has physical custody of a child for some period of time, under common meaning. *Id.*

> To find that a person who voluntarily accepts responsibility for a child, for a significant period of time, is not responsible for the child's health, safety and welfare flies in the face of common sense and basic statutory interpretation.

*Id.* The evidence clearly indicates that Dickey invited his juvenile, female niece over for an overnight stay. In that act, he voluntarily incurred responsibility for a minor child and assumed responsibility for the "health, safety and welfare" of the child for the time that she was at his home. The instructions given by the trial court were consistent with this Court's precedent.

The evidence also indicated that, while the niece was in Dickey's custody, he forcibly raped her. The evidence was, therefore, sufficient for any rational trier of fact to find the essential elements of child sexual abuse beyond a reasonable doubt. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559.

I would affirm both Dickey's conviction and sentence in this case, thus I dissent to the Court's Opinion.

**LUMPKIN, JUDGE: DISSENT**

This Court has erroneously concluded that "a person responsible for the health, safety, or welfare" is a requisite element of the offense of child sexual abuse as set forth in 21 O.S.Supp.2010, § 843.5(E). *See Cox v. State*, 2006 OK CR 51, ¶ 24, 152 P.3d 244, 253. As this conclusion is contrary to the long establish rules of statutory interpretation, I respectfully dissent to the Court's resolution of the present case.

> Statutes are to be construed to determine the intent of the Legislature, reconciling provisions, rendering them consistent and giving intelligent effect to each. *Lozoya v. State*, 1996 OK CR 55, ¶ 17, 932 P.2d 22, 28; *State v. Ramsey*, 1993 OK CR 54, ¶ 7, 868 P.2d 709, 711. It is also well established that statutes are to be construed according to the plain and ordinary meaning of their language. *Wallace v. State*, 1997 OK CR 18, ¶ 4, 935 P.2d 366, 369-370; *Virgin v. State*, 1990 OK CR 27, ¶ 7, 792 P.2d 1186, 1188.

*State v. Young*, 1999 OK CR 14, ¶ 27, 989 P.2d 949, 955. "We are mindful that elementary rules of statutory interpretation require us to avoid any statutory construction which would render any part of a statute superfluous or useless." *State v. Doak*, 2007 OK CR 3, ¶ 17, 154 P.3d 84, 87. "Each part of the various statutes must be given intelligent effect." *State ex. rel. Mashburn v. Stice*, 2012 OK CR 14, ¶ 11, 288 P.3d 247, 250.

The plain and ordinary meaning of the language within § 843.5(E) reveals that the Legislature intended to cause "Any parent *or other person* who shall willfully or maliciously engage in child sexual abuse" to be subject to prosecution for said offense. (emphasis added). Section 843.5(E) incorporates

the definition of "child sexual abuse" from 10A O.S.Supp.2009, § 1-1-105(2)(b). This definition references "by a person responsible for the health, safety, or welfare of the child." However, the plain and ordinary language "Any . . . other person" within § 843.5(E) reveals the Legislature's intent for the statute to apply to any person. By requiring proof that the person was "responsible for the health, safety or welfare of the child" this Court has rendered this language superfluous or useless.

I would overrule *Cox* and affirm Appellant's conviction and sentence in the present case.