IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RONNIE ODELL GARGUS,	)	
	)	
Appellant,	)	
v.	)	Case No. F-2003-1261
	)	NOT FOR PUBLICATION
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, JUDGE:

Ronnie Odell Gargus was tried by jury and convicted of Rape by Instrumentation, under 21 O.S.2001, § 1111.1 (Count I); five counts of Sodomy, under 21 O.S.2001, § 886 (Counts II, III, IV, V, and VI); and Lewd Acts with a Child, under 21 O.S.2001, § 1123(A) (Count VII), in Comanche County, Case No. CF-2002-471.[1] In accordance with the jury's recommendation, the Honorable Allen McCall sentenced Gargus to imprisonment for twenty (20) years on Count I, imprisonment for eight (8) years on Count II, imprisonment for eight (8) years on Count III, imprisonment for eight (8) years on Count IV, imprisonment for eight (8) years on Count V, imprisonment for eight (8) years on Count VI, and imprisonment for fifteen (15) years on Count VII, with each of the sentences to be served consecutively. Gargus appeals his convictions and his sentences.

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[1] Although the Amended Information and the Judgment and Sentence documents in this case both reference 21 O.S., § 1123(A)(5) for the Count VII Lewd Acts with a Child count, the language of the Amended Information and the instructions to Gargus' jury both make clear that he was actually charged and convicted under 21 O.S.2001, § 1123(A)(1). Hence the Judgment and Sentence document should be corrected, via an order *nunc pro tunc*, to reflect that the Count VII

Gargus raises two propositions of error in support of his appeal.

I. Because the trial court improperly prohibited Appellant from cross-examining the State's expert witness about his bias in testifying against Appellant, this Court must remand the case for a new trial.

II. Because the trial court imposed restitution without first giving Appellant notice or making the State offer any proof of the amount sought, this Court must remand the matter to the district court for a proper hearing.

Regarding Proposition I, while it is generally impermissible to impeach a witness with evidence regarding an arrest or charge that has not resulted in a conviction,[2] this Court has acknowledged that in certain situations, a defendant's broad right to confront and cross-examine the witnesses against him, regarding possible bias or motivation for testifying, may include allowing inquiry regarding a particular witness' pending criminal case (or prior case that did not result in a conviction).[3] This Court has recognized the Supreme Court's cases establishing this broad right of confrontation, as well as the corresponding necessity that otherwise inadmissible evidence must sometimes be allowed in as part of a defendant's right to thoroughly cross-examine State witnesses for bias.[4]

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conviction is under 21 O.S.2001, § 1123(A)(1).

[2] *See, e.g., McDonald v. State*, 1988 OK CR 245, 764 P.2d 202, 205-06 (reaffirming "general rule . . . that mere accusations of criminal activity, or of an arrest or charges not amounting to convictions, are not available to the State for impeachment purposes").

[3] *See, e.g., Scott v. State*, 1995 OK CR 14, 891 P.2d 1283, 1291-92 (summarizing general prohibition on impeachment by evidence of prior arrest and limitation upon this rule in cases where prior arrest(s) admissible to show possible bias by State witness). *McDonald* left open the possibility that such evidence might be admissible to show witness bias. *See* 764 P.2d at 206 n.1.

[4] *See, e.g., Davis v. Alaska*, 415 U.S. 308, 315-19, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (defendant's constitutional right to confront and cross-examine State's witness for bias can include right to present evidence regarding witness's juvenile record, even though such evidence would otherwise be inadmissible under State's policy of protecting privacy of such records); *Delaware v. Van Arsdall*, 475 U.S. 673, 678-80, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (defendant's constitutional right to cross-examine State witness for bias includes right to present evidence of dismissal of criminal charge against witness, after he agreed to meet with prosecutor).

In *Beck v. State*,[5] we adopted the approach used by the United States Supreme Court, in *United States v. Abel*,[6] for evaluating whether particular impeachment evidence relating to a witness's possible bias should be admitted in a criminal case.[7] Evidence relating to a witness's bias is almost always relevant in a criminal case, since the jury is always expected to evaluate the credibility of witnesses.[8] Hence whether a witness' prior arrest or pending criminal case should be admitted to establish possible bias by that witness ultimately depends upon an evaluation of the evidence under the principles of § 2403, in particular, whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice,[9] as well as any federal or state law specifically governing the evidence at issue.[10]

Gargus was able to cross-examine Dr. Rarick about the fact that he had a pending felony charge against him, because of which he had surrendered his

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[5] 1991 OK CR 126, 824 P.2d 385.

[6] 469 U.S. 45, 49-52, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984) (whether particular impeachment for bias evidence is admissible in criminal trial is evaluated under both Federal Rules of Evidence and "common law of evidence").

[7] We stated:

> The trial court in ruling on evidentiary issues regarding bias evidence for purposes of impeachment, and this Court in reviewing those rulings, shall determine: first, is the fact situation such that the showing of bias to impeach a witness is relevant under 12 O.S. 1981 § 2401; second, is the evidence admissible under 12 O.S. 1981 § 2402; and third, even though admissible, should it be excluded under 12 O.S. 1981 § 2403.

824 P.2d at 389.

[8] *See Abel*, 469 U.S. at 52 ("Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony."); *Mitchell v. State*, 1994 OK CR 70, 884 P.2d 1186, 1198-99 ("Witness bias is always relevant, impeachment evidence which establishes bias is always relevant, and such evidence, when otherwise appropriate, is admissible.").

[9] *See* 12 O.S.2001, § 2403.

medical license and was no longer practicing medicine, and also about whether Rarick had a "deal" or any expectation of leniency in his own case, based upon his testimony against Gargus. Gargus notes, however, that the jury was left to guess about the nature and seriousness of Rarick's criminal charge, and argues that "[h]ad the charge been any offense other than the same charges against Appellant, the significance would not have been as great." The fact that Dr. Rarick was charged with the same type of offense that Gargus was on trial for would likely have been very significant and disturbing to the jury,[11] though it is hard to say definitively whether this is a factor that should have weighed in favor of admitting or excluding the evidence. Gargus has never alleged or even hinted that there was any possibility that Dr. Rarick sexually abused R.M.[12] Gargus' entire argument regarding Rarick's criminal case has always been about the possibility that Rarick would shade his testimony to possibly curry favor with the State, which is an argument Gargus was free to make to the jury.

The State was able to establish that Dr. Rarick's medical examination of R.M. significantly pre-dated the criminal case against Rarick, and that Rarick's trial testimony was based upon and consistent with the original medical examination. Furthermore, the State's case against Gargus was a strong one,

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[10] In *Martinez v. State*, 1995 OK CR 52, 904 P.2d 138, we summarized the *Beck* test as follows: "Three factors govern admissibility of this evidence: it must be (1) relevant, (2) otherwise admissible under constitutional and statutory authority, and (3) its probative value must not be substantially outweighed by the danger of unfair prejudice." *Id.* at 141 (citing *Beck*).

[11] This interpretation is supported by the fact that the potential juror who knew about the kind of charge filed against Dr. Rarick candidly stated she would be unable to view him as "credible."

[12] Hence this case is unlike *Martinez v. State*, 904 P.2d 138, in which we reversed the defendant's capital murder convictions because he was prohibited from cross-examining an eleven-year-old

even absent Rarick's testimony, based upon R.M.'s own credible testimony, the fact that the instruments of his abuse were found, as R.M. said they would be, in particular places in Gargus' home, and Gargus' admissions about allowing/helping R.M. put the "blue plug" in his rectum. Under these specific circumstances, this Court finds that any possible error in the trial court's refusal to allow Gargus to cross-examine Rarick regarding the charge and specific allegations in his own criminal case was harmless beyond a reasonable doubt.[13]

Regarding Proposition II, Gargus has waived his claim that he was not properly notified regarding the requested restitution, since he made no challenge whatsoever to the requested restitution at the trial court level.[14] Yet his claim regarding the inadequate evidentiary basis for the current restitution award is valid. As we noted in *Taylor v. State*,[15] the trial court "may order restitution 'if the extent of damages to the victim is determinable with reasonable certainty.'"[16] *Taylor*, like the current case, involved a restitution claim for a victim's lost wages, which we held was a properly reimbursable restitution claim, although

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boy—who testified that he saw the defendant setting the fires that killed his two sisters—about the fact that he himself had a history of setting fires to the family home. *Id.* at 139-42.

[13] *See Van Arsdall*, 475 U.S. at 684 (holding that "constitutionally improper denial of a defendant's opportunity to impeach witness for bias, like other Confrontation Clause errors, is subject to *Chapman* harmless-error analysis"); Beck, 824 P.2d at 390 (whether constitutional error in limiting defendant's cross-examination of State witness for bias is harmless, under *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), evaluated by assessing "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case") (citing *Van Arsdall*).

[14] Gargus does not dispute that Mr. Malt, the father of R.M., is himself a "victim," under 22 O.S.2001, § 991f(A)(2), or that the type of damages sought are recoverable under § 991f(A)(3).

[15] 2002 OK CR 13, 45 P.3d 103.

[16] *Id.* at 105 (quoting 22 O.S.Supp.1999, § 991a(A)(1)(a)); *see also* 22 O.S.Supp.2001, § 991a(A)(1)(a).

the victim in *Taylor*, like Mr. Malt, did not properly support her claim with any testimony or other evidence.[17] In *Taylor*, we remanded the case for an evidentiary hearing, in order for evidence to be presented such that the trial court could properly calculate its restitution award "with reasonable certainty."[18] We do the same in the current case, regarding the entire amount of the restitution ordered, since neither the medical expense claim nor the lost wages claim was supported by evidence at the trial court level.

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits of the parties, we find that all of Gargus' convictions should be affirmed, but that the Judgment and the Judgment and Sentence document should be corrected regarding Count VII. In addition, Gargus' prison sentences on each of the seven counts upon which he was convicted are affirmed, though the case must be remanded for an evidentiary hearing on the proper amount of restitution.

Decision

Gargus' **CONVICTIONS** for Count I, Rape by Instrumentation; Counts II, III, IV, V, and VI, Sodomy; and Count VII, Lewd Acts with a Child, as well as his **SENTENCES OF IMPRISONMENT** on each of these counts, to run consecutively, are all **AFFIRMED**. This case is **REMANDED**, however, for correction of the Judgment and Sentence document, through an order *nunc pro*

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[17] *See id.* at 105-06.

tunc by the district court, to reflect that the Count VII conviction for Lewd Acts with a Child is actually under 21 O.S.2001, § 1123(A)(1), and for an evidentiary hearing on the proper amount of restitution.

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LUMPKIN, J.: CONCUR IN RESULTS

[18] *Id.*; *see also Honeycutt v. State*, 1992 OK CR 36, 834 P.2d 993, 1000 (noting that while no particular amount or type of evidence is mandated, "the requirement of proof of a victim's loss" is "[i]nherent in the definition of reasonable certainty").