IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DEITRIC BENARD PIERSON,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	No. F-2004-874
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LEWIS, JUDGE:

Deitric Benard Pierson, Appellant, was convicted of Sexual Abuse of a Child in violation of 10 O.S.Supp.2002, § 7115(E) in the District Court of Oklahoma County, Case No. CF-2003-3541, before the Honorable Jerry D. Bass, District Judge. The jury assessed punishment at life imprisonment, and the trial court sentenced accordingly.

Pierson has perfected an appeal of the District Court's Judgment and Sentence. In support of the appeal, Pierson raises the following propositions of error:

1. Introduction at trial of voluminous hearsay from the alleged victim, who refused to testify, denied Appellant's constitutional right to confront and cross-examine the witnesses against him, and the statute under which the hearsay evidence was admitted is unconstitutional in part.

2. The State's use of peremptory challenges to remove prospective jurors based on race denied Appellant a fair trial by a jury comprised of a fair cross-section of the community, in violation of Appellant's rights to due process and equal protection.

3. The trial court erred in failing to instruct the jurors that Appellant would have to serve 85% of any prison sentence imposed, prior to earning points or being considered for parole.

4. Appellant's sentence is excessive and should be modified.

5. Appellant's conviction should be reversed or the sentence modified, based on cumulative error.

After thorough consideration of Pierson's propositions of error and the entire record before us on appeal, including the original record, transcripts, exhibits, and briefs, we have determined that the judgment of the District Court shall be affirmed, but the Sentence should be modified.

A short recitation of the facts is necessary to the resolution of the issues in this case. Twelve-year-old L.H. told her mother that Pierson, L.H.'s stepfather "messed with her." She later told her mother that Pierson stuck his thing in her. L.H. told her grandmother that Pierson pulled her pants down and stuck his thing down between her legs. L.H. showed her mother and grandmother a shirt that Pierson had stained with his ejaculate. DNA testing revealed a positive match.

At the hospital, L.H. was interviewed by a hospital social worker. L.H. told her that Deitric got on top of her and held her hands down with one of his hands. With the other hand, Deitric unzipped his pants and he pulled her shorts and panties down to her ankles. She said that Deitric got some liquid stuff on her shirt. She said that the liquid stuff came from his "weenie." L.H. told the social worker that Deitric rubbed his penis on her pubic hairs and put it in her private and it hurt. She said he was on her for about three minutes.

Both the social worker and the treating physician testified that this statement was used to determine a course of treatment and diagnosis. The doctor was unable to do an examination because, by that time, L.H. was extremely agitated and refused to be examined.

Later, that same evening, L.H. was interviewed by a police officer; his testimony regarding the statement mirrored that of the social worker. A few days after the incident, L.H. was interviewed by a police detective. She told the detective the same story she told the social worker and the police officer on the night of the incident.

In proposition one, we find that the admission of testimony is left to the sound discretion of the trial court, and this Court will not reverse that decision unless an abuse of discretion is shown. *Pickens v. State*, 2001 OK CR 3, ¶ 21, 19 P.3d 866, 876. An abuse of discretion is "a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *C.L.F. v. State*, 1999 OK CR 12, ¶ 5, 989 P.2d 945, 946.

We find that the trial court followed 12 O.S.Supp.1998, § 2803.1, and found "that the that the statements appeared reliable *under the circumstances under which they were made*, and that the time, content and totality of *circumstances surrounding the taking of the statement* provide sufficient indicia of reliability so as to render them inherently trustworthy." *F.D.W. v. State*, 2003 OK CR 23, ¶ 4, 80 P.3d 503, 504 [emphasis in original]. Pierson objected on these grounds, but he did not object on confrontation clause grounds even though *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177

(2004), was decided prior to the start of his trial.[1] Therefore, we review for plain error only.

The United States Supreme Court, in *Crawford*, held that the confrontation clause requires that testimonial hearsay statements may be admitted as evidence against an accused at a criminal trial only when the declarant is unavailable to testify and the defendant has had a prior opportunity to cross-examine the declarant. *Crawford*, 124 S.Ct. at 1369-1374; *See Mitchell v. State*, 2005 OK CR 15, ¶ 16, 120 P.3d 1196, 1202. The Supreme Court noted non-testimonial hearsay might still be admissible against an accused in a criminal trial if the declarant were unavailable and the statement bore an adequate indicia of reliability. *Id.*

The Court in *Crawford* did not explicitly define testimonial statements, but it did discuss three types of statements they considered to be testimonial: ex parte in-court testimony, extra-judicial statements contained in formalized testimonial materials, and statements made under circumstances which would lead an objective witness to reasonably believe that such statement would be available for use at a later trial. *Crawford*, 124 S.Ct. at 1364. "Whatever else the term [testimonial] covers, it applies at a minimum . . . to police interrogations." *Id.*, 124 S.Ct. at 1374.

Several hearsay statements are at issue here. We find, under the facts of this case that the statements the victim made to her mother and to her grandmother were non-testimonial. We find that the statements made to the

[1] Crawford was decided on March 8, 2004. The trial in this case commenced on March 31, 2004.

social worker at the hospital, whether or not they were testimonial in nature, were admissible under the "medical diagnosis and treatment" exception. 12 O.S.2001, § 2803(4)("Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations; if reasonably pertinent to diagnosis or treatment."); *See Kennedy v. State*, 1992 OK CR 67, ¶ 11, 839 P.2d 667, 670.

Although we find that the statements to the police officer and to the police detective were testimonial in nature under the *Crawford* analysis, their admission was harmless as the statements merely mirrored those statements that were properly admitted. *See* 20 O.S.2001, § 3001.1 (Reversal may not be predicated on error "unless it is the opinion of the reviewing court that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right."). Here there was no miscarriage of justice in the conviction and the admission did not constitute a *substantial* violation of a constitutional or statutory right. Therefore, we grant no relief based on this proposition

We find, in proposition two, that the trial court determined that the race neutral reasons offered by the State were sufficient. "The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995). Pierson has not persuaded us that the trial court abused its discretion in finding that the State's race neutral reasons were legitimate and did not deny equal protection. *Id.*; *Cleary v. State*, 1997 OK CR

35, ¶ 6, 942 P.2d 736, 742-43. Accordingly, we find no error in this proposition.

In proposition three, we find that, based on *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273, plain error occurred in the trial court's failure to instruct the jury that Pierson would be required to serve 85% of his sentence before being eligible for credits and for parole, and to further instruct that the current Pardon and Parole policy is to treat a life sentence as forty-five (45) years. Therefore, we find that a modification of Pierson's sentence to a term of thirty (30) years is appropriate.[2]

We find that the issues raised in proposition four are moot due to the modification of Pierson's sentence. In proposition five, we find that there is no error to accumulate and no further relief is warranted based on a cumulative error review. *Lott v. State*, 2004 OK CR 27, ¶ 165, 98 P.2d 318, 357.

DECISION

The judgment of the District Court shall be **AFFIRMED**; however, the sentence shall be ordered **MODIFIED** to a term of thirty (30) years imprisonment.[3] 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.

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[2] Contrary to our esteemed colleague's special vote, Appellant must serve 85% of this thirty (30) year sentence (or 25.5 years) before becoming eligible for parole, not the asserted ten (10) years. *See* 21 O.S.Supp.2002, § 13.1. The suggestion of modification to fifty (50) years would actually increase the time Appellant would serve before becoming eligible for parole.

[3] Any fines and costs imposed shall remain unmodified.

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OPINION BY: LEWIS, J.

CHAPEL, P.J.: CONCURS
LUMPKIN, V.P.J.: CONCURS IN PART/DISSENTS IN PART
C. JOHNSON, J.: CONCURS
A. JOHNSON, J.: CONCURS

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LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in affirming the conviction in this case but dissent to the modification of the sentence. The jury sentenced Appellant to life in prison. That means he is to be in prison for the remainder of his natural life absent parole or commutation. The fact that the Pardon and Parole Board considers life to be 45 years for the purpose of when to first consider a defendant for parole does not take away from the fact Appellant was sentenced to life in prison. To modify to 30 years in this case from a life sentence disregards the import of the jury decision. It means Appellant must only serve 30 years rather than actual life and makes him eligible to be considered for parole after only 10 years. I cannot agree to this draconian modification. I still believe *Anderson* should not be applied retroactively. At most I would only modify to 50 years or better yet remand to the trial court for actual resentencing.