IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DENISE SUE WATIE,	)	NOT FOR PUBLICATION
	)	
Appellant,	)	
	)	
v.	)	Case No. F-2005-129
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

C. JOHNSON, JUDGE:

Appellant, Denise Sue Watie, was convicted by a jury in Tulsa County District Court, Case No. CF-2004-1533, of Sexually Abusing a Minor (10 O.S.Supp.2002, § 7115(E)). The jury recommended punishment of eight years imprisonment. On January 24, 2005, the Honorable Thomas C. Gillert, District Judge, sentenced Appellant in accordance with the jury's recommendation, and Appellant timely filed this appeal.[1]

Appellant raises the following propositions of error:

1. Appellant was unfairly prejudiced by the court's error in allowing the State to present bolstering and cumulative evidence.

2. Appellant was denied a fair trial by the court's error in failing to suppress Appellant's involuntary confession.

3. Appellant's statements to police should have been suppressed because she was not advised of her *Miranda* rights prior to questioning.

4. Appellant was denied a fair trial by the court's refusal to instruct the jury that at least 85% of the sentence set by the jury would be served in prison.

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[1] Appellant was convicted of participating in the sexual abuse of her son. Appellant's boyfriend and co-defendant, David Raborn, ultimately pled guilty and received a sentence of eight years imprisonment with four years suspended.

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

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm the judgment, but modify the sentence. As to Proposition 1, the complainant's videotaped interview with a forensic interviewer was admitted at trial consistent with 12 O.S.2001, § 2803.1 which, by its own terms, permits certain out-of-court statements that may very well be repetitive of certain portions of a testifying complainant's testimony. The trial court followed the procedures outlined in the statute; admission of the tape was not an abuse of discretion. 12 O.S.2001, §§ 2403, 2803.1; *Wauqua v. State*, 1985 OK CR 6, ¶ 11, 694 P.2d 532, 535; *Hayden v. State*, 1986 OK CR 10, ¶ 11, 713 P.2d 595, 597. Proposition 1 is denied.

As to Propositions 2 and 3, authorities interviewed Appellant at her home, in the company of others, after Appellant's son made allegations of sexual abuse and was taken into protective custody. She eventually made incriminating admissions during the interview. Appellant acknowledged, before the interview began, that she was free to terminate it at any time. Appellant was not under arrest, or restrained in any way, when the interview was conducted; when the authorities were eventually asked to leave, they did. Because the totality of circumstances do not support a finding that the interview amounted to a "custodial interrogation," the officers were not required to warn Appellant of her rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). *See California v. Beheler*, 463 U.S. 1121, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983); *Bryan v. State*, 1997 OK CR 15, 935 P.2d 338, 351; *Aylor v. State*, 1987 OK CR 190, ¶¶ 10-14, 742 P.2d 591, 593-94 (interview with social worker was not a custodial setting that would require *Miranda* warnings). The interview with Appellant was frank and

sometimes emotional. The authorities warned Appellant that her failure to either confirm or deny the accusations against her boyfriend would not be helpful in getting her children returned to her. At no time was Appellant threatened to admit any particular conduct. Considering the totality of circumstances, and having considered the audio recording of the interview, we cannot say that Appellant's statements were involuntary. *Van White v. State*, 1999 OK CR 10, ¶ 45, 990 P.2d 253, 267. Propositions 2 and 3 are denied.

As to Proposition 4, we agree that on her specific and timely request, Appellant's jury should have been informed that, by law, she must serve 85% of any sentence imposed. *Anderson v. State*, 2006 OK CR 6, ¶ 25, ___ P.3d ___. Appellant contends that a sentence modification is an appropriate remedy, and under the circumstances, we agree. Appellant's sentence is hereby **MODIFIED** from eight years imprisonment to six years imprisonment. Our disposition of Proposition 4 renders Proposition 5 moot.

DECISION

The Judgment of the district court is **AFFIRMED**. The Sentence is **MODIFIED** to six years imprisonment. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE THOMAS C. GILLERT, DISTRICT JUDGE

APPEARANCES AT TRIAL

JULIA D. ALLEN
HANSON & HOLMES
5918 E. 31st STRET
TULSA, OK 74135

APPEARANCES ON APPEAL

S. GAIL GUNNING
INDIGENT DEFENSE SYSTEM
P. O. BOX 926
NORMAN, OK 73070
ATTORNEY FOR APPELLANT

JOSEPH W. HARRIS
ATTORNEY AT LAW
4867 S. SHERIDAN, SUITE 701
TULSA, OK 74145
ATTORNEYS FOR DEFENDANT

WILLIAM J. MUSSEMAN
ASSISTANT DISTRICT ATTORNEY
500 S. DENVER
TULSA, OK 74103
ATTORNEY FOR THE STATE

W. A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
JENNIFER B. MILLER
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR THE STATE

OPINION BY C. JOHNSON, J.

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

RB

CHAPEL, PRESIDING JUDGE, CONCURS IN PART/DISSENTS IN PART:

I concur in affirming the conviction in this case and in the decision to modify the sentence. I disagree only with the extent of the modification. In this case the victim, the victim's father (and defendant's ex-husband), and the victim's grandmother all indicated they did not want to see the defendant sentenced to prison and the defendant had no prior convictions. Moreover, the state offered a plea deal of one year to be served and three years suspended. I would modify the sentence to four years with two years suspended.

LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN RESULTS

I concur in results based on *stare decisis* and accede to the majority's decision to apply *Anderson v. State* to cases pending on appeal at the time of that decision. However, I believe the Court should apply the plain language of *Anderson v. State*, 2006 OK CR, ¶ 25, ___ P.3d ___, which states

> While this decision gives effect to the legislative intent to provide juries with pertinent information about sentencing options, **it does not amount to a substantive change in the law. A trial court's failure to instruct on the 85% Rule in cases before this decision will not be grounds for reversal.** (emphasis added)

The plain reading of the decision reveals it is not a substantive change in the law, only a procedural change, and it should only be applied in a prospective manner. Therefore, based on the plain language of *Anderson,* I would affirm both the judgment and sentence but submit to the will of the majority in this case.