IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL EUGENE WILLIAMS,	)	
	)	**NOT FOR PUBLICATION**
Appellant,	)	
v.	)	**Case No. F-97-1740**
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

PER CURIAM:

Michael Eugene Williams was tried by a jury for the crime of Child Abuse of his two and one-half month-old daughter in violation of 10 O.S.Supp.1996, § 7115, in case number CF-97-150 in the District Court of Bryan County, Oklahoma, before the Honorable Farrell M. Hatch. Defendant was represented by counsel. The jury returned a verdict of guilty of Child Abuse (Neglect of Child)[1] and set punishment at life imprisonment. The trial court sentenced defendant in accordance with the jury's verdict. From this judgment and sentence defendant has perfected this appeal.

Defendant was tried jointly with his wife, Donna Doreen Williams, who was charged with Child Abuse in case number CF-97-149. She was

[1] The heading for 10 O.S.Supp.1996 § 7115 is entitled "Abuse or neglect of child." "Abuse" and "neglect" under the facts of this case are equivalent terms.

represented by separate counsel, also received a life sentence for Child Abuse (Neglect of Child), and has appealed separately.

Appellant raises the following propositions of error:

> 1. The jury was improperly instructed on a crime for which Mr. Williams was not charged — the misdemeanor offense of omission to provide for a child – and found Mr. Williams guilty of that offense. Accordingly, his conviction must be reversed, or his sentence modified to reflect the misdemeanor conviction.
>
> 2. The trial court erred in failing to follow the provisions of the Delayed Sentencing Program for Young Adults provisions of Title 22, Oklahoma Statutes, Sections 996-996.3.
>
> 3. The trial court erred in admitting evidence of Dakota's alleged failure to thrive; the evidence was irrelevant to the death of Chevelle and highly prejudicial.
>
> 4. Appellant was denied a fair trial by the admission of prejudicial hearsay statements made by Co-Defendant Donna Williams.
>
> 5. Appellant was prejudiced by the irrelevant testimony of the medical examiner that Chevelle's death was a homicide.
>
> 6. The state presented insufficient evidence that Appellant willfully failed to provide proper nutrition and medical assistance for Chevelle.
>
> 7. Mr. Williams was denied a fair trial by the improper admission of irrelevant, prejudicial, and hearsay testimony.
>
> 8. Mr. Williams's sentence was excessive.

After a thorough consideration of the above propositions and the entire record before us including the original record, transcripts, and the briefs of the parties, we find that appellant's propositions of error are

without merit and are denied, with the exception of Proposition 8 which we find warrants modification of sentence. The judgment and sentence of life imprisonment imposed by the jury and trial court is therefore modified to twenty-five (25) years imprisonment.

Under the first proposition, we find that no error occurred. Although the elements of the misdemeanor offense of Omitting to Provide for a Minor Child are similar to the elements of the crime of Child Abuse filed in this case, it is within the discretion of the prosecutor to determine which charge should be filed. *Williams v. State*, 1990 OK CR 39, ¶ 4, 794 P.2d 759, 761; *Ward v. State*, 1981 OK CR 52, ¶ 11, 628 P.2d 376, 378-379. The jury was properly charged with the elements of Child Abuse (Neglect of Child), 10 O.S.Supp.1996, § 7115, and the Appellant was convicted of that felony offense. As the Court said recently in *Huskey v. State*, 1999 OK CR 3, ¶ 9, 989 P.2d 1, 6: "The Legislature evidently intended § 7115, child abuse, to be a separate crime encompassing activity already prohibited by other statutes."

In proposition two, Appellant complains that the trial court denied his request that the court order the Department of Corrections to prepare a Specialized Offender Accountability Plan under the Delayed Sentencing Program for Young Adults, Title 22 O.S.1991, §§ 996 through 996.3. The Delayed Sentencing Program for Young Adults, 22 O.S.1991, at § 996.1, however, excludes "child beating" from its application. "Beating or

Injuring of Children" was the original title given by the publisher to 21 O.S.Supp.1963, § 843. The word "beat" was later deleted from § 843, and the publisher's title was changed to "Abuse of Children." We find that all crimes described in § 843 were intended to be included in the term "child beating" and excluded from the provisions of § 996.3. Section 843 was amended again in 1995, renumbered as 10 O.S.Supp.1995, § 7115, and re-titled "Abuse or neglect of child." All provisions of this successor statute, which are substantially unchanged, are likewise exempt from the provisions of § 996.3.

In any event, Appellant would not fall within the provisions of the Delayed Sentencing Program for Young Adults because by its terms it only applies "[u]pon a verdict of guilty or a plea of guilty or nolo contendere of an offender. . . ." 22 O.S.1991, § 996.3. " 'Offender' means any adult eighteen (18) through twenty-one (21) years of age. . . ." 22 O.S.1991, § 996.1. We have said, "Prior to sentencing, selected offenders who have either pled guilty, nolo contendere or received a guilty verdict, are eligible for this program, which is in lieu of the presentence investigation." *State v. Hunter*, 1990 OK CR 13, ¶ 7, 787 P.2d 864, 866. Michael Williams by the time of the jury verdict of guilt in November 1997, was already 22 years old, and was outside the scope of the program.

In proposition three, we find that evidence was properly admitted that Defendants Donna and Michael Williams' older son, Dakota, when he was an infant, had been removed from their home due to neglect and failure to thrive. Appellant incorrectly states that there was no limiting instruction. The court gave a limiting instruction, #16A, OUJI-CR (2d) 9-9, which told the jury that they could not consider evidence of defendants' alleged misconduct towards Dakota as proof of the guilt of the defendant of the specific offense charged in the information. The instruction also said: "This evidence has been received solely on the issue of the defendants' alleged intent of common scheme or plan, knowledge (absence of a mistake or accident)." *Id.* We said in *Gideon v. State*, 1986 OK CR 112, ¶ 9, 721 P.2d 1336, 1338, a child abuse case, "This Court has consistently held that, in cases of this nature, past injuries are admissible to rebut any claim that the latest injury occurred through accident or simple negligence."

Appellant did not object to Donna Williams testifying about Dakota. It was not enough to object before trial to consolidation of his and his wife's cases for purposes of trial. If Appellant objected to Donna testifying at their joint trial, he should have objected to her testimony at the time it was offered. In fact, Appellant instead of cross-examining his wife and co-defendant, asked permission to reopen his case and examine her as if on direct. He then questioned her about Dakota having been

taken from them by DHS.

As we said in *Glass v. State*, 1961 OK CR 34, ¶ 45, 361 P.2d 230, 240, "It has been repeatedly held that counsel may not through their questioning invite error and then later complain of such evidence. *Logan v. State*, 95 Okl.Cr. 76, 239 P.2d 1044." We therefore reject Appellant's third proposition of error.

In his fourth proposition of error, Appellant claims improper hearsay statements made by Co-Defendant Donna Williams were admitted in their joint trial. We find that there were no contemporaneous objections to any of the statements complained of. Therefore, they were waived except for plain error. *Shelton v. State*, 1990 OK CR 34, ¶ 10, 793 P.2d 866, 871. We find no plain error here. There was no prejudice to Appellant, and any error in their admission was harmless beyond a reasonable doubt. *Simpson v. State*, 1994 OK CR 40, ¶ 36, 876 P.2d 690, 702.

Mr. Williams did make a hearsay objection before one question of OSBI Agent Reanae Childers (which is not complained of on appeal), and did ask for and was granted a limiting instruction. The court told the jury, when requested by Mr. Williams attorney: "The jury will be instructed that the testimony of this witness regarding what the mother said, cannot be considered as to the Defendant, Mr. Williams." Appellant made no further objection to Agent Childers' testimony.

Also in this proposition, Appellant claims that he was prejudiced by several things his wife Donna testified to at the trial. However there were no contemporaneous objections. He alleges in his brief that "defense counsel objected to this testimony" (at Tr. 472, 473); however the defense counsel objecting at those pages was Donna's own attorney. There was no objection from Appellant. We find no plain error. Donna Williams' testimony was not hearsay as to Michael Williams. It was direct trial testimony subject to cross-examination. *Hackney v. State*, 1994 OK CR 29, ¶ 4, 874 P.2d 810, 813. We find no merit to Appellant's fourth proposition.

In proposition five Appellant complains that the pathologist, Dr. Choi, testified that the manner of Chevelle's death was "homicide." The court instructed the jury that the witness had used the term in a medical sense, and defendant's counsel cross-examined her about the medical meaning of the term. At the beginning of her testimony, counsel for each defendant interrupted the testimony of Dr. Choi, after she had stated she was a forensic pathologist and a physician, to stipulate that she was an expert witness.

Experts are permitted to state conclusions based upon their expertise and the information, such as medical history and age of the child, available to them. 12 O.S.1991, § 2702 ("[A] witness qualified as an expert by knowledge, skill, experience, training or education may

testify in the form of an opinion or otherwise.") A pathologist is qualified to testify about cause of death. *See Revilla v. State*, 1994 OK CR 24, ¶¶ 19-20, 877 P.2d 1143, 1150 (Dr. Newland testified that based upon the information he received from third parties and his observations on the decedent's body, he concluded that the injuries were caused by "non-accidental trauma.") We further find that Chevelle's death was relevant to "failure to provide nutrition and medical assistance," and was properly admitted.

Contrary to Appellants claim in proposition six, we find, after viewing the evidence in the light most favorable to the state, a rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204. Therefore, this proposition has no merit.

Appellant complains in proposition seven, that he was denied a fair trial by admission of irrelevant, prejudicial, and hearsay testimony.

First, he complains that Dr. Howell, the emergency room doctor at the Texoma Medical Center was allowed to testify that a lay person would have recognized that Chevelle was acutely ill. An expert can testify about matters within their area of expertise. 12 O.S.1991, § 2702. Appellant cites no authority to support this complaint and therefore it is waived. *Sandefur v. State*, 1969 OK CR 265, ¶ 8, 461 P.2d at 956. This was not error.

Second, Appellant complains that a nurse was allowed to testify about the general lack of cleanliness and hygiene of Appellant and the children. The children smelled of urine. Again Appellant cites no case law. *Id.* We find this testimony was relevant to neglect of a child, and no error occurred.

Third, Appellant complains about a nurse in Durant being asked about calling Texoma Medical Center to confirm whether Appellants had been there the night before. An objection was sustained by the trial court, but there was no request to admonish the jury to disregard the testimony. It is therefore waived. *Wade v. State*, 1981 OK CR 14, ¶ 14, 624 P.2d 86, 90. In any event, there could be no prejudice, because it was consistent with Appellant's voluntary statement to Agent Childers previously admitted into evidence.

Forth, Appellant complains that the nurse testified she offered to call their minister for them after Chevelle had died. The court sustained an objection on grounds of relevancy, but there was no request that the jury be admonished. *Wade v. State*, 1981 OK CR 14, ¶ 14, 624 P.2d 86, 90. No authority has been cited by Appellant and this issue has therefore been forfeited on appeal. *Sandefur*, 1969 OK CR 265, ¶ 8, 461 P.2d at 956.

Fifth, Appellant objects that admission of evidence of Chevelle's death was irrelevant. We have dealt with that issue above and find that

death of the child was part of the res gestae, was relevant to issues of child abuse and neglect, and was properly admitted. No Burks notice was required where the other offense is "actually a part of the res gestae of the crime charged. . . ." *Burks v. State*, 1979 OK CR 10, ¶ 12, 594 P.2d 771, 774, *overruled in part on other grounds by Jones v. State*, 1989 OK CR 7, ¶ 8, 772 P.2d 922, 925. We reject proposition seven.

Finally, in proposition eight, under all the facts and circumstances, the sentence of life imprisonment does shock the conscience of the Court and warrants modification to twenty five (25) years imprisonment.

DECISION

The sentence of Life Imprisonment is hereby **MODIFIED** to a term of Twenty-Five (25) Years in Prison, and the Judgment and Sentence is in all other respects **AFFIRMED**.

ATTORNEYS AT TRIAL

JAMES THORNLEY
DISTRICT ATTORNEY
MARK CAMPBELL
EMILY CARNEY
ASSISTANT DISTRICT ATTORNEYS
BRYAN COUNTY COURTHOUSE
DURANT, OK 74701
ATTORNEYS FOR THE STATE

M. BRENT BOYDSTON
ATTORNEY AT LAW
132 NORTH THIRD STREET
DURANT, OK 74702
ATTORNEY FOR DEFENDANT

ATTORNEYS ON APPEAL

NANCY WALKER-JOHNSON
APPELLATE DEFENSE COUNSEL
1623 CROSS CENTER DRIVE
NORMAN, OK 73019
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
PATRICK T. CRAWLEY
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OK 73104
ATTORNEYS FOR APPELLEE

PER CURIAM OPINION

STRUBHAR, P.J.: CONCURS
LUMPKIN, V.P.J.: CONCURS
JOHNSON, J.: CONCURS
CHAPEL, J.: CONCURS
LILE, J.: CONCURS IN PART AND DISSENTS IN PART

RA