Case No. F-2022-746

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DALLAS NORTON,

Appellant,

VS

THE STATE OF OKLAHOMA

Appellee.

Appeal from the District Court of Cleveland County District Court Case NoCF-19-1273

BRIEF OF APPELLANT

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OTHER AUTHORITY

Appellee- nzme

vagina, pursuant to 21 O.S.Supp.2018, $ 1123(A) (2) It was alleged that this occurred between June 1, 2018, and January 1, 2019. (OR 1)

A preliminary hearing was held in this case on January 15, 2021. Appellant Count 2 lewd or indecent acts to a child under 16 years of age, by forcing B.J. (DOB 10/16/2007) to touch his penis, pursuant to 21 O.S.Supp.2018, $ 1123(A)(2) was added to the Information The time period allegedfor both Counts 1 and 2 were amended and bound over as occurring between September 1,2017,and June 1,2019. (OR 39, PHTr. 69-74) An Amended Information was filed on January 26, 2021, in conformity with the preliminary hearing bind-over order. (OR 39-40)

Various pretrial motions were heard on January 21, 2022, and January 31, 2022 At those hearings, the judge took admission of the forensic interview under advisement until the court had time to review the recorded interview itself. (Mo.Tr.I5-37,Mo TrII3-6) At jury trial, the court ruled that the forensic interview of B.J. a child under 12 years of age, done Christi Cornett, was admissible pursuant to 12 0.5.2021, 8 2803.1. (OR 229, Tr III 5-6) by

Bailey Ferguson, who babysat for Appellant and B.J?s mother, Tiffany Norton; testified that while working for them, Appellant began saying things to her that made her feel uncomfortable. (Tr.1/31/22 5-13) Ferguson added that after she quit babysitting for them, she remained in contact with Mr. Norton through texts and Snap Chat. She said Appellant later sent her two, unsolicitedphotos depicting his penis. Ferguson also stated that in the July of 2019, she spoke with Tiffany Norton and told Ms. Norton about the comments made by Dallas Norton and the unsolicited photos she had received from Appellant . (Tr.1/31/22 15-27) After the testimony and arguments of counsel, over the objections of Appellant, the trial court ruled that Bailey Ferguson's testimony would be admissible at trial. The court held it to be res gestae that was central to the chain of events. The judge further noted that B.J.'s mother could testify about the conversation she had with father in Arizona question B.J. about Appellant . (OR 111, Tr.1/31/22 43-58)

Prior to his actual testimony at trial, the judge also heard B.J.'s father, Jeffrey Jackson's, testimony concerning hearsay statements B.J. had made to him about Appellant. This was initially heard outside the presence of the jury. (Tr II 168-184) The trial court then ruled that Mr. Jackson could testify as to what B.J. had told hÃm pursuant to 12 0.5.2021, $ 2801.3. (OR204, Tr.II 184-185)

From June 21-24, Mr. Norton's jury trial was held. At the conclusion of the trial, the jury returned a verdict of guilt as to both Counts 1 and 2,lewd molestation of a child under 16 years of age, and assessed a sentence of 25 years on each count. TrIV 102) The verdicts were sealed under 38 0.8.2021, $ 36. On August (OR 227, sentenced Dallas Norton in accordance with thejury verdict but 31,2022, the judge but the first 18 years of Appellant's 25-year sentence in Count 1, and suspended all of Appellant's sentence in Count 2. The court ran Counts 1 suspended all 25 years to each other. (Sent.Tr. 56-58) Mr. Norton was ordered to pay and 2 consecutively assessment, a DNA fee of$150.00, $48.00 towards $100.00 victim's compensation incarceration, and court costs of $2,496.14. (OR 273-275) Attached the costs of his Sentence are Appellant's Special Conditions for Sex Lo Lhe Judgment and conditions were signed by Mr. Norton; his attorney, an Attorney Offenders. Those the District Judge whotried his case. Furthermore, the Summary for the State, and After Jury Trial, Disposition Order; and Rules and Conditions of FactslSentencing are filed with the Judgment and Sentence. (OR 276-286) of Probatlon

Narlan 1 600 Pawn Run anything. Appellant was taking care of the paperwork. Mr. Norton had moved into an apartment, and they both

started dating other people . (Tr.II50-54)

On July 14, 2019, Tiffany Norton ran into Bailey Ferguson at Wal-Mart Her new boyfriend, Zach, was with her. Ferguson relayed some information that was concerning to her. As a result of her meeting with their former babysitter, Mrs. Norton contacted her ex-husband to inquire of B.J. as to why she did not want to come home and to ask her if anything had happened to her. (Tr.II 54-56) After she heard back from her ex-husband, Tiffany Norton called Appellant and accused him of inappropriately touching B.J. Dallas Norton denied any wrongdoing with B.J. Later that evening while B.J. was still in Arizona, a Norman Police Officer came to the house and took Mrs. Norton's statement. Within a week, B.J. was brought back to Oklahoma her father and was taken in for a forensic interview Although Tiffany Norton claimed she never discussed the situation with B.J., she acknowledged B.J.knew why she was takenin for the forensic interview. (Tr.56-60) by

In cross-examination, Mrs. Nortonadmittedthat B.J.called Appellant "Dad" throughout their relationship. Shortly before leaving for Arizona in of 2019, the defense presented a photo of B.J. wearing Dallas Norton's coveralls. B.J. thought it was funny. B.J. was admittedly happy, comfortable, and not at all distressed wearing Appellant's oversized coveralls . (Tr.II89-91,Def.Ex. 7) May

Bailey Ferguson testified she knew Dallas Norton because he was a family friend. Ferguson stated she had babysat for Mr. Norton for close to a year when he was married to Tiffany Norton and they lived on Fawn Run Crossing. Ferguson noted that she was 17 years of age and a full-time, on-line high school student during this time. (Tr.II129-132) Ferguson indicated she came to a point where she wanted to find another jobThe children were getting unruly and she was also

unhappy with what she was being Ferguson added that Appellant had started making comments to her about her physical appearance which made her uncomfortable Based on the overall situation, Ferguson found a different job (Tr.II134-137) Aftershe had quit babysitting, Ferguson said she and Dallas Norton remained friends on social media. At some point after she turned 18, Appellant sent her two unsolicited photos of his penis on Snap Chat. After receiving those photos, Ferguson explained she "opened them, swiped them, and blocked him (Tr.II 138-145) At some point after that, Ferguson stated she ran into Tiffany Norton at Wal-mart At that meeting, they discussed why she had babysitting for them Ferguson told Mrs. Norton about not being enough, Appellant's comments, and also the strange photos she had recently received. (Tr II 145-146) paid . quit paid

Bailey Ferguson acknowledged Dallas Nortonnever made anyrequests of her to do anything physical, nor had he ever tried to do anything inappropriate with her. Ferguson added she never saw Appellant do anything inappropriate to Or with B.J. She also stated B.J. always seemed comfortable around Mr. Norton. Finally, Ferguson admitted she once even initiated a joke with someone else that Dallas Norton was her "baby daddy,' and they both laughed about it. (Tr.II 150-151,154)

B.J. was visiting him in the summer of 2019 Jackson indicated after a conversation he had with his ex-wife, he and his current wife, Caitlin, spoke with B.J and asked her if anything had happened to her. (TrII 168-171, 186-189) Initially, B.J. said, "She was okay and that everything was fine, but Mr. Jackson said her facial expressions and the way she answered questions made him think something had happened. A feW minutes went by, then B.J. explained, "Something did happen she kind of gave me the details B.J. said she had gone to her mom and Appellant 's bedroom to spend some time with them When her mom went to the kitchen, that was when Dallas reached over and started touching her on her vagina. Mr. Jackson and hÃs wife dld not press B.J. for further information. When they finished talking, Mr. Jackson called B.J .'s mother and told her Mr. Norton had touched B.J. Shortly thereafter, he called the Norman Police Department and gave them all of the informatlon he had at that time The next B.J. spoke again with her step mom. Mr . Jackson stated he called the Norman Police again and provided them with that additional information. (Tr.II171-176,190-196,201-204,213-217) Later, B.J.'s father brought day ,

her back to Norman, Oklahoma, for her forensic interview. (Tr.II175,212)

B.J. testified that when she was 10 or 11 years old, her mother, Tiffany, was in a relationship with and married Dallas Norton. She, her mom, Mr. Norton, her two brothers, and Appellant's three children all lived together in a house on Fawn Run Crossing. B.J. liked Appellant, and said he was "like a dad" to her. All six kids along, but B.J. stated her mom and Mr. Norton fought and even broke up for awhile_ At some point, B.J. stated her feelings towards Appellant changed. Before Mr. Norton and her mom married, B.J. said she had gone into the master bedroomto cuddle with him B.J's mom was gone to a concert with friends and her brothers and step brother were in the living room While she was on the bed with him, Appellant touched her thigh with his hand, then moved hÃs hand up and touched her vagina with two fingers. B.J. added Appellant then grabbed her hand and made her touch his penis on top of his underwear. (TrII239-248,252-255) B.J. stated she took her hand away, went to the main bathroom, and then went to her B.J. said she did not tell anyone because she was scared. She also thought her mom and Appellant were happy. (Tr.II 256-259) got

B.J. stated Appellant later tried to touch her "boobs. One day when Mr. Norton had picked her up from school, they were wrestling. He unhooked her bra and touched the side of her body. B.J.indicated she off of Appellant, her bra back on, and then they went to the store Ironically, B.J. said she was "still okay with wrestling with him after that" happened. (Tr.II 260-263) B.J. noted there was one other time Mr. Norton tried to touch her. She said her mom was in the kitchen cooking while Appellant, and Riley, his youngest daughter were sitting on the couch all three covered with a blanket. B.J. stated, "He moved his hand and tried to touch my vagina. She explained she up and went into the kitchen with her mom (Tr.II263-267) put got she, got

B.J. then detailed how she came to tell her father and stepmother what had happened. After she had been swimming and showered; theytook her to the porch and asked her, "Has Dallas or anybody ever done anything to you like touch you Or anything?" She said she told

them, "I didn't tell them all the details, but I told them like where and like kind of how B.J. added she never told her dad "all those things; but "Itold my step mom most of them (Tr.II 271-273) B.J. said when she came back to Oklahoma, she hadto go talk to somebody about what had happened. She stated that when she went to the blue house, no one had told her she was going there B.J. claimed she did not know she was going there to talk about what had happened to her. (Tr.II275-276) When questioned, B.J. stated she was certain her mother was not home the night the incident happened in the bedroom with Appellant . She was adamant she never told her dad that her mom was home the night in question B.J. also testified that the first time she spoke to her dad and step mom on the porch, she gave them all the details about where it happened and what he touched She did provide more "stuff" later after that first disclosure. why

When asked, B.J. also stated that first day on the porch, the only incident she told her dad about was the one that happened on the bed. (Tr.II 291-292,299, 304)

Norman Police Detective Sean Judy testified he was assigned as the lead detective in this case Although he did not attend B.J.'s forensic interview on July 22, 2019, he later received a copy and reviewed the recorded interview. Judy also received copies of the initial report made by B.J.'s father, Jeffrey Jackson, and the second report made when Jackson called again. Officer Judy concluded that as a result ofthe length oftime between the allegations and their report to police, there would not be any items of evidentiary value to to collect in this investigation (TrIII 7-15, 19-20, 25) Judy also testified that Officer Pierce's initial report from B.J.'s father was this had happened in the living roomnot in the bedroom He knew when he reviewed the forensic interview, "[tJhat B.J.hadreportedthat Mr. Norton walked into the living room wearing nothing but his underwear and sat down next to her on the couch and touched her vagina. (Tr.III29-30,34-35, St.Ex.6) try

Finally, forensic interviewer Christi Cornett testified about her forensic interview of B.J. done on July 22, 2019. B.J.s mother brought her to the Abbott Children's House. B.J. disclosed to Cornett that her mom's boyfriend, Dallas Norton, because they were not married at the time, had touched her vagina with his fingers. B.J.also told her that "he made her hand touch his penis. (Tr.III 75,109, 116) Cornett indicated that rapport building did not take very long during this interview because B.J. knew she was there. Ms. Cornett was questioned, "As soon as you asked her (B.J.) why she was there at the Mary Abbott House, she toldyouimmediately why she wasthere, didn't she?" Cornett answered, "Correct. When asked, "She said she wasthere because hermomusedto have a boyfriend and he touched her inappropriately?" Cornett again replied, "Correct.The forensic Mary why

interview was introduced into evidence and played for the jury as State's Exhibit 6 . (Tr.III 117,121-122, 149, St.Ex.6 10:.00-10:55) During the interview, Ms. Cornett indicated B.J. disclosed details about an instance in the bedroom when Appellant touched B.J's vagina. B.J. also told her about another instance when Mr. Norton almost touched her when he unhooked her bra. Cornett verified B.J. said there was another time, but she did not provide any details about that event. (Tr.III129-130)

When asked about exact details B.J. provided about the touching, B.J. told Cornett she was lying on her stomach when Appellant touched her vagina. B.J.did not tell her that she was lying on her back when the touching occurred. And during the interview, Ms. Cornett agreedthat B.J. only described one time where anything inappropriate happened and that was on the bed. Cornett also agreed that B.J. never told her, "at any point during the interview that this event where her vagina was touched happened when Mr. Norton walked into the living room wearing nothing but his underwear, sat down next to her on the sofa, and then began rubbing her vagina (TrIII 147-150, 154) When questioned further by defense counsel, Cornett agreed there was "a difference between [a child] remembering more stuff later and changing a story entirely ' Cornett also agreed that while remembering more and adding more is normalin the disclosure process; that isnot the same as a child that changes significant details of their allegations. Ms. Cornett stated, "Throughthe process of disclosure, significant orthose core details willremain the same . Cornett further admitted when asked that, "There's alsothe possibility that the child is not telling the truth, but that was beyond the scope of her role as a forensic interviewer. (Tr III146-147)

Additional facts will be discussed as they relate to each proposition of errOr.

PROPOSITION [

THERE WAS INSUFFICIENT EVIDENCE TO PROVE MR. NORTON WAS GUILTY OFTWO COUNTS OFLEWD MOLESTATION BEYOND A REASONABLE DOUBT .

Standard of Review: The Due Process Clause 'protectsthe accused against conviction except upon proof beyond a reasonable doubt of every fact necessaryto constitute the crime with which he is charged ' In re Winship, 397 U.S.358,364, 90 S.Ct 1068, 1073, 25 L.Ed.2d 368 (1970) . After Winship, the critical inquiry by a reviewing court of the sufficiency of the evidence is whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson V. Virginia, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2788-89, 61 L.Ed 2d 560 (1979) Jackson) _ However, sufficiency of the evidence is a question of law subject to de novo review_ United States v. Wilson, 107 F.3d 774, 778 (lOth Cir. 1997) .

While this Court's review as to the sufficiency of evidence is generally viewed as highly deferential, the Supreme Court also recognized that it is not the job of an appellate court to merely rubber stamp a jury's verdict and, therefore, held that a "mere modicum" of evidence cannot rationally support a conviction beyond a reasonable doubt. Explicitly rejecting the "any evidence" standard, the Supreme Court stated:

That the Thompson [v. Louisville] , 362 U.S.199,80 S.Ct. 624,4 L.Ed.2d 654(1960)] "no evidence" rule is simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt is readily apparent. "[A] mere modicum of evidence may satisfy a no evidence' standard Jacobellis v. Ohio, 378 U.S.184,202, 84 S.Ct . 1676 , 1686 , dissenting)_ Any evidence that is relevant that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence, cf. Fed. Rule Evid 401 could be deemed a mere modicum But it could not seriously be argued that such a "modicum" of evidence could by itself rationally support a conviction beyond a reasonable doubt. The Thompson doctrine simply fails to supply a workable or even a predictable standard for determining whether the due process command of Winship has been honored.

Id. at 320, 99 S.Ct. at 2787. This is the legal standard by which Mr. Norton's sufficiency claim should be analyzed.

While Oklahoma law allows conviction for sex crimes on the uncorroborated testimonyof a prosecutrix or complainant, where the testimonyis contradictory or inherently improbable and uncorroborated, it will not justify Or support a conviction_ De Armond V. State, 1955 OK CR 73, 285 P.2d 236 (rape conviction reversed; corroboration required where claimant's testimony is contradictory, uncertain, improbable, or she has been impeached) ; White v. State, 1954 OK CR 30, 268 P.2d 310, 311 (corroboration rule applied to lewd molestation prosecutions); Cape v. State, 61 Okl.Cr. 173,66 P.2d 959,964 (1937) .

It is well established that a conviction for allegations of sexual abuse can be had on the uncorroborated testimony of the prosecutrix only if her testimony is clear and convincing. Where the prosecutrix's testimony is improbable, contradictory or inconsistent, corroboration is required. CR 272, 747 P.2d 964, 965-966; Winrow v. State, 1982 OK CR 61, 645 P.2d 1019,1020; De Armond v.State, 1955 OK CR 73,285 P.2d 236,238; Woolridge v. State, 97 Okl.Cr. 326, 263 P.2d 196, 201 (1953); Maxwell v. State, 78 Okl.Cr. 328, 148 P.2d 214, 217 (1944); Westonv.State, 77 Okl.Cr. 51,138P.2d 553,554 (1943)This evidence should not be s0 slight as toleave the finder of fact to speculate as to the defendant's guilt . Howard v. State, 79 Okl.Cr. 247,153 P.2d 831, 833 (1944) - this long-standing requirement of Oklahoma law:

This court does not hold with some that, as a matter of law, rape or assault with intent to rape cannot be established by the uncorroborated testimony of the prosecutrix, but in common with all courts recognizes that, without such corroboration, her testimony must be clear and convincing

This Court continued, explaining the purpose of corroborating testimony:

The rule in such cases is that corroborating testimony should tend to show the material facts necessary to establish the commission of the crime It is not indispensable that such corroboration should be furnished by positive and direct evidence; but proof of circumstances sufficient to authorize a conviction.

Id_

Accordingly, the well-settled law in Oklahoma requires a reviewing court to examine the testimony of the complaining witness. Unless the testimony is clear and convincing, then it must be corroborated. See Gilmore v. State, 1993 OK CR 27,1 11, 855 P.2d 143; Ray v State, 1988 OK CR 199,762 P.2d 274; Reddell v State, 1975 OK CR 229,115,543 P.2d 574.

In this case, there were several different stories of what Dallas Norton allegedly did to B.J. Appellant demurred to the State's evidence because of all of theinconsistencies andcontradictions, but it was overruled. (Tr.III 164) According to the initial reports made to the police, B.J.had told her father the inappropriate touching incident happened in the living room, not the bedroom. (Tr.III 24-30) that Mr. Norton walkedintothe living room wearing nothing but his underwear and sat down next to her onthe couch and touched her vagina.' (Tr.III34-35)

B.J.'s father, Jeffrey Jackson, testified quite differently about what B.J.told him and his wife, Caitlin, when they questioned her on their porch in Arizona. At trial, Jackson said they "just asked her if everything was okay, if anything had happened to her to cause her to be upset or anything like that. In fact, Mr. Jackson denied using Appellant's name when they asked B.J. if anything had involved anything sexual. happened, and also denied ever indicating the questions was actually specific a5 to (Tr.II 171, 195) However, B.J. said her dad'6 inquiry and asked me, has Dallas or Appellant touching her: "They took me to the anybody ever done anything to you like touchyou or anything?" (Tr.II271-272) porch

that she was okay and Mr_ Jackson indicated that B.J. at first responded said, "No,Ihave something I need "nothing's happening. After a long pause, B.J. "She said that she had gone to the to tell you.' (Tr.II 171-172) At that point, bedroom to spend some time with her mother and Dallas. That her mother had gone to the living or the kitchen, I'm sorry, to cook food, and that's when Dallas came over and started touching her" on her vagina with his hand under her shorts. B.J. also stated that was the only time Appellant had touched her vagina. Jackson said they did not want to press her. When they finished talking to her, he called B.J.s mother; and then immediately called the Norman Police Department andtold them what B.J. had told themAfter B.J. made additional statements to her step mom about Appellant, Mr. Jackson called the Norman Police Department a secondtime and relayed that additionalinformation. He felt like they needed to know the full story. When asked if he recalled B.J. ever saying anything in her initial remarks about Appellant making her touch his penis, Jackson responded, "I don't remember clearly on that part of it.' He added. B.J. later told his wife Appellant had touched her vagina one other time. (Tr.II176-179, 196-197) Mr. Jackson stated it was not until the next when B.J. told his wife about an incident in the living room when Appellant had allegedly walked in wearing only his underwear, sat down beside B.J., and tried to touch her vagina. During that alleged incident, "he wanted her to touch his penis. (TrII 180) B.J. thoughtit was around Christmastime, but "she didn'trememberthe specific day

She also did not know if it was this Christmas or the one prior to that. (Tr.II181) Mr. Jackson was asked if what he told Officer Pierce the night you called him, right told him B.J.s father replied that it was the same information. He further noted it had been three years ago, "s0 Idon't remember clearly right now.= (Tr.II205)

B.J's own testimony lacks believability. At trial, B.J. claimed that nobody told her why she went to the blue house:

[MS. AUSTIN]: So when you came back here to Oklahoma, did you have to go and talk to somebody about what happened

[B.J.]:

Yes.

[MS. AUSTIN]: at that house, the blue house? And when you went there, did anyone tellyou kind of what you were going there for?

[B.J.]:

No.

[MS. AUSTIN]:

What did you thinkit was?

[B.J.]:

Idon't really know.

[MS. AUSTIN]: Did you know that you were going to go talk about what had happened to you?

[B.J.] No.

(Tr.II276)

However, that was the polar opposite of what B.J. told Ms. Cornett in the actual forensic interview. Christi Cornett testified that B.J. knew exactly why she had been brought there. When asked by Cornett, B.J.immediatelytold her she was there because hermom's former boyfriend hadtouched herinappropriately. (TrIII 117,121-122,149, St.Ex.6 10:00-10:55)

Further contradictions became apparent when B.J. initially testified. She stated she was lying on her stomach onthe bed when Appellant touched her: [MS. AUSTIN]: S0 were you what part of your body was lying on the bed?

[B.J.J: My stomach.

[MS. AUSTIN]: Okay. 80 you're lying on your stomach watching the bed watching the TV across the room?

[MS. AUSTIN]: Okay. And you're on your stomach you said?

[B.J.]: Uh-huh, yes.

(Tr II 246)

Shortly thereafter, B.J.was asked the same question, 'What part ofyou body is touching the bed?" However, her answer changed, "Idon't remember Ithink on my back. The prosecutor inquired further, "Your back. And are you laying like facing the ceiling or are you facing one way or the other?" To which B.J. replied, "I don' remember ' (Tr.II 248) In the forensic interview, B.J. indicated she was laying withherstomachonthe bed when she claimed Appellant touched her vagina (Tr.III 147-148, St.Ex.6 10:30-13.05) It remained unclear from whether she was on her stomach, or her back, or if this ever even really happened.

During the forensic interview, as well as during her in trial testimony, B.J. never disclosed any allegedincident inthe living room where Appellant supposedly walked into the room only wearing his underwear, sat down on the couch, and touched her vagina. (Tr.III 219-309, TrIII 154, St.Ex.6) That direct conflicts with what B.J 's dad told the police and what he testifiedto at trial as detailed above.

Two different versions were given about the supposed incident in the mom left the bedroom and went to the kitchen, and Appellant then touched B.J. on her vagina. It simply does not make any sense that this occurred when mom could walk back into the master bedroom at any second. It also does not make sense that the

bedroom door was wide open with B.J 's two brothers and step brother just down the hall on the living room couch.

B.J. testified at trial that her mother, Tiffany Norton, had installed video cameras in their house on Fawn Run Crossing to record the kids and see what went on in the house_ (TrII302) Bailey Ferguson also said there were surveillance cameras in the house in question. (TrII 156) No investigation was done in this regard because Chief Investigator Detective Judy never even knew there were any such recording devices inthe house where this allegedly occurred. (TrIII44) While there is no way of knowing if anything could have come from reviewing

these video cameras, this total lack of investigation is just further support for Dallas Norton's argument that there was insufficient evidence to convict him in this case

Another fact establishing there was insufficient evidence to prove Dallas Norton ever touched or harmed B.J. is how she jokingly on Appellant's large sized coveralls and took a silly photo of herself to show her mother. Ms_ Norton admitted B.J. who always called Appellant "Dad, was happy and completely comfortable wearing Mr. Norton's plus sized coveralls . (Tr.II89-91, Def.Ex.7) put 29

Taking all of these contradictions and inconsistencies into account, B.J.s story was wholly insufficient, without corroboration, to convict Appellant. This Court has required corroboration even where the prosecutrixis more credible than inthe case at bar. In Woolridge v. State, 97 Okl.Cr. 326,263 P.2d 196,198 (1953), the twelve-year-old victim testified the defendant put his private parts in her. There was also testimony the victim's hymen was ruptured. Id. at 199 Commenting that there was a delay in reporting the incident, and that the victim's testimony contained a number of "Idon't remember" responses, this Court held the victim's testimony required corroboration. Id. at 201.

In De Armond v. State, 1955 OK CR 73,285 P.2d 236, 240, the eleven-year-old vlctlm testlfled that "[the defendant] got on top of me and stuck his private parts Into mlne, She had prevlously told her mother the defendant stuck his private parts "to" hers. Id. There was further medlcal evidence the victim's female organs were swollen, sore and lacerated. Id at 248. The Court reversed the defendant's convictlon, concluding that there was Insufficlent corroboration. Id. at 249. The evldence In De Armond was far more consstent and plausible than the evidence in thls case, Furthermore, the evldence In De Armond was to some degree corroborated Corroboratlon Is sÃmply lacking In the instant case.

On several occaslons, this Court has reversed where there was greater evidence of corroboration than in the present case In Woolridge V State, 97 Okl.Cr. 326, 263 P.2d 196, 201 (1953), the Court held the injury to the hymen alone was not sufficient corroboration. More than slight corroboration is required in order to convict. See Weston v. State, 77 Okl.Cr. 51,138 P.2d 553,554 (1943)

This Court has consistently held that it will carefully examine the record in a rape case to assure that the evidence of the prosecutrix is clear and convincing and Is not inconsistent, incredible, or contradictory. Holmes v. State, 1972 OK CR 359, 505 P.2d 189, 191-192 This level of scrutiny was further defined in Gamble V. State, 1978 OK CR 36, 576 P.2d 1184,1185-1186, where this Court stated:

to authorize reversal of a conviction for rape on the grounds thet theevidenceis too inherentlyimprobableto support a convictions the improbability of the prosecutrix' testimony must arise from a contradictory and unsatisfactory nature, or the witness of such thoroughly impeached, that the reviewing must be s0 testimony Is clearly unworthy of belief court must say that such law to sustaln a conviction. and insufficient as a matter of

In the present case, the complaining witness' testimony was contradictory, unbelievable, and incredible.

This Court's reason for applying the corroboration rule was explained in White V. State, 1954 OK CR 30, 268 P.2d 310. This Court held corroboration was required "because ofthe ease with which such a case can be made. Id. at 311. The present case illustrates with alarming clarity the concerns raised in White; the State's case relied solely on uncorroborated statements made by B.J .

Due to the nature of B.J.'s testimony and other statements, Appellant's conviction cannot stand unless this Court finds that her testimony has been adequately corroborated. This Court addressed the sufficiency of corroborating evidence in Cooper v. State, 1977 OK CR 266, 1 12,568 P.2d 1300:

Inrape case,or alleged attempted rape, corroboration of prosecutrix's contradictory, uncertain, improbable or impeached testimony should be of such dignity as to give it weight with jury on question whether crime was committed and should not consist of such slight circumstances as to leave court and jury to speculate as to such fact and defendant's guilt .

Id. at 1303 (quoting Howard v. State, 79 Okl.Cr. 247,153 P.2d 831 (1944)) -

"The right to a jury trial guarantees to the criminal accused a fair trial by a panel ofimpartial 'indifferent' jurors. See Morgan v.Illinois, 504 U.S. 719, 727,112 S.Ct. 2222, 2229, 119 L.Ed.2d 492 (1992) This Court is well aware of the emotional and alarming responses these types of allegations bring out in a jury. In Davis v State, 1954 OK CR 89, II 28-29,272 P.2d 478, defense counsel stated and this Court responded,

"The crime charged is s0 reprehensible that, no matter how innocent a man may be, it is almost impossible for him to a fair and impartial trial before an unbiased jury. It is unbelievable to the ordinary layman that a child would concoct such a story unless the same was true _ However, courts and attorneys have had ample opportunity to learn that such stories of being molested are often untrue get

These observations are, in the opinion of this Court, sound, and demand particular caution and deliberation.

The only reasonable conclusion in a case based on such minimal evidence is that the verdict resulted from passion or prejudice, andis therefore contraryto law. See Cape v.State, 61 Okl.Cr. 173,185,66 P.2d 959,964 (1937) This Court will closely scrutinize the testimony in such cases and will reverse where it appears incredible and too unsubstantial to support the judgment. Louis v. State, 92 Okl.Cr. 156, 222

As demonstrated above, the evidence the State presented to support the convictions in the instant case is legally insufficient. As Ms Cornett testified to, remembering more information is a normal part of the disclosure process, but that is not the same as changing one's

story entirely. Significant or core details should remain the same(Tr.III146-147) Many significant and core details of B.J.S storey repeatedly changedthroughout this case. Accordingly, Dallas Norton's convictions violate his Fourteenth Amendment rights to due process of law as well as the carefully guarded principles of In re Winship, 397 U.S.358,364,90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970) _ See Const amend. XIV . Additionally, because Oklahoma law requires the type of testimony used to support Appellant's convictions to be corroborated, the failure to enforce that requirement acts to independently violate Appellant's due process rights. See Hicks v. Oklahoma, 447

Conclusion: Based on all of the above facts and this Court should reverse and remand Dallas Norton's convictions to the district court with instructions to dismiss. See Burks V. United States, 437 U.S. 1, 1l, 98 S.Ct_ 2147, 57 L.Ed.2d 1 (1978) ("The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence law,

which it failed to muster in the first proceeding. [footnote omitted] "); Edwards v

PROPOSITION II

THE TRIAL COURT IMPROPERLY ADMITTED THE EXTREMELY PREJUDICIAL AND IRRELEVANT TESTIMONY OF BAILEY FERGUSON AS RES GESTAE EVIDENCE AT DALLAS NORTON'S JURY TRIAL.

Standard of Review: Evidence of "other crimes is not admissible when that evidence is more prejudicial than probative. See 12 0.8.2021, 82404(B) , James v. State, 2007 OK CR 1, 1 3,152 P.3d 255, 256-257. Admission or exclusion of evidence is within the trial court's discretion. P.2d 92, 100-101. Oklahoma law provides, "[i]n jury cases, proceedings shall be conducted, to the extent practicable, s0 as to prevent inadmissible evidence from being presented to the jury by any means Oklahoma law further provides that appellate relief may be granted "for error in any matter of pleading or procedure" in which "it is the opinion of the reviewing court that the error complained ofhas probably resultedin a miscarriage ofjustice, or constitutes a substantial violation of a constitutional or statutory right. 2021, $ The defendant's constitutional rights include due process of law and fair trial before an impartial jury. See U.S. Const. amend. V, VI, XIV; Okla_ Const. art _ II, 88 7,20.

In this case, Dallas and Tiffany Norton's babysitter, Bailey Ferguson, was allowed to testify at jury trial that after she had turned 18 years old and after she had quit babysitting for the Norton's, Appellant sent her two unsolicited photos of his erect penis on Snapchat. Ferguson was also permittedtotell the jury that while she was babysitting, but shortly after she turned 18 years old, Appellant started

making comments to her about how nice her body looked or how wellshe was filling out. (Tr.1/31/2210-12,18-22,45-58, Tr.II 134-145)

The way the prosecution linked the details of Ferguson's testimony to this case was that Ferguson inadvertently ran into Tiffany Norton at Wal-mart in July of 2019At that meeting, Ms. Norton asked Ferguson why she had previously and suddenly babysitting for the Nortons. (Tr.II54-56,145-146) It was at that time that Ferguson told Tiffany Norton about the comments Appellant had started making to her while she was their babysitter. Ferguson also told Ms. Norton about Appellant having recently sent her photos of his penis. (Tr.II 54-56, 134-137, 145146) As a result of this conversation, Tiffany Norton contacted her ex-husband in Arizona to ask B.J.if Appellant had ever done anything to her. (Tr.II54-56) quit

A hearing was held on January 31, 2022, where the admissibility of Bailey Ferguson's detailed testimony was addressed. The defense cited 12 0.8.2021, $ 2404 (B) , and argued that this evidence of other crimes, wrongs, Or acts was not admissible to prove Appellant committed lewd acts against B.J. Defense counsel further argued Appellant's comments to Ferguson or any photos he may have sent her did not 'prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. See 2404(B) . It would be unfair for Dallas Norton to be convicted based on this prejudicial, irrelevant evidence being presented by the prosecution simply to prove Appellant was a creepy or a bad person. Furthermore, Ferguson's testimony would only confuse the issues for the jury Without causing severe prejudice to Appellant in the eyes of the jury, Tiffany Norton could testify that she met Ferguson in Wal-mart, that Ferguson told her some concerning information, and that information caused her to contact her exhusband in Arizona to question B.J. about Appellant-

The State argued Ferguson's testimony was res gestae, citing Eizember v. State, 2007 OK CR 29,164 P.3d 208, claiming that evidence of bad acts constitutes res gestae if that evidence is necessary to give the jury a complete understanding of the crime, or is s0 closely connected to the charged offense as to form a part of the entire transaction, or is central to the chain of the events of the crime (Tr.1/31/2249-52) However, Ferguson's testimony is not connected to the charged offense and is not central to the chain of events of the crime. The babysitter's testimony, without unnecessary and prejudicial details, simply explains how B.J. came to disclose the alleged molestation by Appellant .

The facts in Eizember are in no way comparable to the facts in Mr. Norton's case. In Eizember, 2007 OK CR 29, II 74-79, 164 P.3d 208, 229-231, the trial court admitted evidence about an extramarital affair the defendant had with a married woman, as well as evidence of a burglary, threat to "get even" with her, discharge of a weapon during a struggle with some of the victims, and burglaries committed while on the run from authorities. It was determined that this evidence was necessaryto help establish motive for Eizember's crimes. Id. Nothing about Bailey Ferguson's testimony related to any possible motive by Mr. Norton

The Eizember case, 2007 OK CR 29,1 77,164 P.3d at 230 defined the following: "Evidence is considered res gestae when: a) it is s0

closely connected to the charged offense as to form part of the entire transaction; b) it is necessary to give the jury a complete understanding of the crime; or c) whenit is centralto the chain Bailey Ferguson's testimony about Appellant's comments and the photos he sent were not s0 closely connected to the alleged lewd acts as to form part of the entire transaction, were not necessary to give the jury a complete

understanding of the crime, and were not central to the chain of events. As such, Ferguson's testimony did not constitute res gestae in this case

The State also cited Jackson v. State, 2006 OK CR 45, 146 P.3d 1149, and Warner V. State, 2006 OK CR 40, 144 P.3d 838, as support for admission Ferguson's testimony at trial against Dallas Norton. (Tr.1/31/2253-55) Those cases are both distinguishable from the case at bar. In Jackson v. State, 2006 OK CR 45, 11 26-32,146 P.3d 1149, 1160,the court admitted evidence that Jackson had injured the child prior to the murder because it was "necessary to give the jury a complete understanding Of the crime and was central to the chain events. It was inextricably entwined with the crime charged. Id. Unlike Ferguson's testimony against Mr. Norton, the injury to the child was the motive for Jackson killing the child's mother It was the specific reason he fought with the mother and ultimately killed her. The injury ofthe child happened the same day as Jackson murdered the child's mother. It did not happened months later like the photos were sent. In Jackson, the injuries tothe child themselves were relatedto the actual crime itself, and not to a much later disclosure some information that started the investigation itself. Jackson v.State is not applicable here.

The facts of Warner v. State, 2006 OK CR 40,144 P.3d 838,also do not support admission of Bailey Ferguson's testimony against Dallas Norton. In Warner, 2006 murder and first degree rape. Evidence was admitted that a sexually explicit tape was played while the child's mother was gone to the store and the defendant was home with the victim The videotape, along with lubricants, were evidence of what Warner was watching, doing, and thinking when he was with the child immediately prior to him committing the actual rape and murder. Id., 2006 OK CR 40, I 67-70,

144 P.3d at 868-869 . Those facts are s0 far removed from the case at bar that Warner is wholly inapplicable to Dallas Norton's case.

144 P.3d at 867-868,about other crimes evidence:

When other crimes evidence is s0 prejudicial it denies a defendant his right to be tried only for the offense charged, or where its minimal relevancy suggests the possibility the evidence is being offered to show a defendant acted in conformity with his true character, the evidence should be suppressed.

That is precisely the case here Bailey Ferguson's testimony is not related whatsoever to the crimes charged against Appellant. If her testimony had any relevancy, it was extremely minimal at best. The babysitter's testimony is also greatly removed in time, long after the alleged offenses were supposed to have occurred. Any connection to the alleged lewd acts is s0 tenuous and far fetched that Ms. Ferguson's testimony should never have been admitted at jury trial.

The problem with Eizember, Jackson, and Warner is that all of these cases require the other crimes or bad acts evidence to refer to the chain of events leading up to the crime itself. The testimony from Ferguson about Appellant's improper comments and later sending her photos do not encompass the chain Of events leading up to the crime itself. Rather, Ferguson's testimony merely provides insight into how B.J. came to reveal information about what happened to her months after the alleged acts had already occurred. According to BLACK'S LAW DICTIONARY 1l16, abridged 9th ed. (2010), res gestae is "the events at issue, or other events contemporaneous with themThere is nothing contemporaneous about Ferguson's testimony.

At the conclusion of the hearing on the admissibility of Bailey Ferguson's testimony, over the objection of defense counsel, the judge improperly ruled that

her testimony wasres gestae evidence that was centralto the chain of eventsto this crime (Tr.1/31/2252-53,55-58) Whenthis testimony was presented at trial, defense counsel renewed Appellant's objection for the record, incorporating multiple defense arguments against admission of Bailey Ferguson's testimony:

Judge, we re-urge our objection to this testimony at all relating to prior bad acts_ The Court has previously found that it's res gestae because it explains why Tiffany Norton called the father, who then asked the accuser about inappropriate touching. That has already been established and it was established through the testimony of Tiffany. She was told she testified to the jury that she was told that there was the babysitter said that there was inappropriate comments. And as a result of that, she contacted her husband out in Arizona and asked him to ask. S0 thats been established in a way that isn'tquite as damaging to the defendant than allowing uncharged bad acts which have been universally recognized since the beginning of time, the principle is that youre to be convicted if at all, on the charges that you're charged with on the crimes that you're charged with_

This evidence and testimony from this witness is extremely prejudicial, andit has no more bearing on this case as far as relevance than to explain why this young lady was or B.J. was asked about inappropriate touching. That's already been done Ms. Norton said that she ran into the babysitter, and the babysitter told her that he had sent some inappropriate messages or made her feel uncomfortable. S0 that has already been established. We object to it. That's where this should end

(Tr.II127-128)

As Ferguson continued to provide her detailed testimony, Mr_ Nedwick renewed his objections and preserved them for this appeal. (Tr.II136,138)

Evenif this Court determines Bailey Ferguson's detailed testimonyto beres gestae evidence, it would still be inadmissible under 12 0.8.2021, $ 2403 , Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury Testimony about some comments Appellant made to Ms. Ferguson about her appearance and him sending her two photos of penis definitely created unfalr prejudice, confused the jury as to Appellant's guilt or innocence as to the crime charged, and misled Mr. Norton's jury as to the purpose of the jury trial.

Conclusion: For all of the reasons detailed above, Bailey Ferguson's testimony was not res gestae evidence It did not tell the story, or any part of the story, Of the crime charged in this case Furthermore, if deemed to have even minimal relevance, the overwhelming prejudice to Mr. Norton would render it inadmissible against Appellant at trial. As such, Dallas Norton's convictions should be set aside in this case and Appellant be granted a new trial in this matter.

PROPOSITION III

DALLAS NORTON WAS DENIED DUE PROCESS OF LAW AND HIS RIGHT TO A FAIR AND IMPARTIAL JURY IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS THE UNITED STATES CONSTITUTION , AND ARTICLE 2, 88 7, 19 & 20 OF THE OKLAHOMA CONSTITUTION, WHEN HIS ATTORNEY FAILED TO REMOVE AN OBVIOUSLY BIASED, TAINTED , ANTI-DEFENSE JUROR DURING VOIR DIRE.

Standard Review: The Sixth Amendment to the United States an accused in all criminal prosecutions is entitled to a trial by an impartial jury. "One of the purposes of voir dire is to ensure a criminal defendant's right to a fair and impartial jury. "In essence, the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors . Morgan v. Illinois, 504 U.S. 719, 727, 112 S.Ct. 2222,2229,119 L.Ed.2d 492 (1992) See also Underwood v. State, 2011 OK CR 12, 1 94, 252 P.3d 221, 255 (citing Irvin v. Dodd, 366 U.S. 717, 81 S.Ct. 1639 (1961) ("The right to a fair trial, guaranteed to every litigant, includes the right to a body

The denlal of & constitutional rlght is entitled to an independent de novo review on appeal. See 759, n 3, 74 L.Ed.2d 973 (1983) (the accused is entitled to an independent determination on the merits as to constitutional claims) This Court on appeal should conduct an Independent review ofthe evidence on dispositive constitutional issues 502 (1984) .

The central issue is whether Appellant has been afforded a fair trial before an impartial jury, as guaranteed by the United States Constitution and the Oklahoma Constitution. See U.S. Const. amend. VI; Okla. Const. art. II, 8819,20 Even "[oJne biased or prejudiced juror is enough to require remand to assure the Appellant receives a fair trial. Perez Enriquez Vv. State, 1987 OK CR 164, 1 2, 740 P.2d 1204, 1205-1206 (burglary conviction reversed where juror bias was disclosed after conclusion of trial) _ If there is any doubt about a juror's ability to remain impartial, those doubts "should be resolved in favor of the accused. Underwood This rule of caution applies to trial courts and to reviewing courts as well. Grant v. State, 2009 OK CR 11,122.205 P.3d 1,12. Mr. Norton was denied his right to an impartial jury when his attorney failed to challenge or remove Juror M.K. who was, at minimum, impliedly biased.

It was an unreasonable trial strategy of defense counsel to allow M.K. to remain on the jury panel in this case_ Juror M.K.? should have been removed with one Of Appellant's peremptory challenges by Defense Counsel Nedwick. In voir dire,the prosecutor, Assistant District Attorney (ADA) Whatley, asked prospective jurors if they knew anyone who had ever been a victim Of sexual abuse. The conversation between the State's attorney and prospective Juror M.K. went as follows:

[MS. WHATLEY]: Was there ever did you know of anybody like do you know of anyone who's ever been a victim of sexual abuse?

[PROSPECTIVE JUROR MK]: Yes. [MS. WHATLEY]: Okay. If you're uncomfortable answering, that's okay.

Is it a like a friend or a close family member?

[PROSPECTIVE JUROR MK.J: My daughter's best friend.

[MS. WHATLEY]: Okay. Now, were you did you did you see that did you see that happen?

[PROSPECTIVE JUROR MK]:

[MS. WHATLEY]: Do you believe that it happened even though you didn't see it happen?

[PROSPECTIVE JUROR MK.J: Yes.

[MS. WHATLEY]:

And why is that?

[PROSPECTIVE JUROR MK.]: Well, because she said s0, and at the end ofthe she took her own life because of it. day

[MS. WHATLEY]:I'm sorry. Idid not know that Im s0 sorry. Did you is other have any other experiences with like with sexual abuse of

children?

[PROSPECTIVE JUROR M.K.J: with a child. My

'Although Juror MK 's name appears throughout Volume I of the jury trial transcript as well as inthe original record, OR,inboth the (Name of Sealed Documents): Peremptory Challenges and (Name challenge, or those jurors who served, for the purposes of this brief, and in an effort t0 protect Juror MK's identity; the juror in question will be referred to as MK. Or Juror MK. throughout this briet.

[MS. WHATLEY]: Your cousln?

[PROSPECTIVE JUROR M.K.J: Uh-huh.

[MS. WHATLEYI: Okay.

Was thls Ilke a cousin that you're

(Tr.129-130)

When defense counsel had hls opportunlty to question potential jurors, includlng MK. about the dlsturblng Information she had given about her daughter's best frlend, Mr.Nedwicknever asked JurorM.K.anyfollowup questions whatsoever. (Tr. 129, 201-230) After that shocking information was provided by Juror M.K. about the suicide of her daughter's best friend as a result of her being molested, no one asked M.K. any additional questions as to how that situation would impact her abllity to serve on this Jury or whether or not she could even be fair. (Tr. 129-230) When defense counsel exercised Appellant's five peremptory challenges, M.K.wasnot removed andremainedto serve on Mr. Norton'sjury panel. was allowed by defense counsel to serve on Appellant's jury panel. There was absolutely no reasonable or logical trial strategy for Mr. Nedwickto allow M.K.to serve on this jury panel.

Trial counsel's failure to appropriately and reasonably use a peremptory challenge to remove Juror M.K. prejudiced Dallas Norton Appellant recognizes that peremptory challenges are not constltutlonally guaranteed. However, forover a century It has been recognized that they are one of the "most important rights secured to the accused, and provide the means to achieve the end result of the Neill v. State, 1992 OK CR 12,141,827 P.2d 884,891; Ross V.

"[Tlhe right 'Indlfferent' Jurors. Fallure to glve an accused a falr hearing violates even the minimal standard of due process. Id Thls error vlolated Appellant's due process rights as well as hls right to effectlve legal counsel. (Alsosee Proposition V.)

Conclusion: Defense counsel falled to use a reasonable trial strategy and remove a Juror who was clearly biased In favor of the prosecution. In Golden V. State, 2006 OK CR 2, 1 18, 127 P.3d 1150, 1154, this Court noted that, "[tJhe use of peremptory challenges In voir dire is the principle method Of securing a In addition, this Court is supposed to resolve all doubts regarding juror impartiality in the defendant's favor. Tibbetts State, 1985 OK CR 43 , 1 11 , 698 P.2d 942, 946; Hawkins v. State, 1986 OK CR 58, I 5, 717 P.2d 1156, 1158 The Sixth Amendment tothe United States Constitution and Article II, 8 20,ofthe Oklahoma Constitution both provide that an accused in all criminal prosecutions is entitled to a trial by an impartialjury. Dallas Norton was deprived his constitutional rights to due process and a fair, Impartial jury. Const. amends. VI, VIII & XIV; Okla_ Const art 2 , 88 7, 9, 19 and 20. The presence of a very biased juror, M.K. constitutes obvious, fundamental error. Mr. Norton's convictions and sentences should be vacated and reversed and Appellant granted a new trial.

PROPOSITION IV

THE STATE COMMITTED PROSECUTORIAL MISCONDUCT RESULTING IN PREJUDICE TO DALLAS NORTON IN THIS CASE.

Standard of Review: This Court should determine if improprieties by the prosecutlon prejudlced the defendant to a degree that compromises a denialof due

process of law_ See U.S. Const. amends. V, XIV; Okla. Const. art 7 19; Donnelly v DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974) (prosecutor's comments denied defendant due process); Tart v. State, 1981 OK CR 113,634 P.2d 750 (ABA Standards adopted)

A The State improperly bolstered the credibility of the State's witnesses.

When arguing to the jury that B.J.s testimony was true, the prosecutor stated, "Think about it, ladies and gentleman Why would she say those things? What motive did B.J.have to make any of this up? She had absolutely no motive to make it up. Her mother had no motive to put her up to it. Assistant District Attorney (ADA) Austin argued even further, "What did she gain? Absolutely nothing. (Tr.IV61-62)

Later, the State's attorney argued to the jury why they should believe B.J"s father's testimony:

There's a lot of discussion about, oh, it's inconsistent because of what Jeffrey Jackson said and that the story was wrong and the lie was unraveling Remember what you have heard. B.J. told her dad what happened to her then he told the police That is one person's story on top of another, on of another, on top of another She initially told her dad. But what we're holding Jeffrey Jackson to is a standardthat isimpossible. An impossible standard. Jeffrey Jackson; tell us word for word what happened when your daughter uttered the most

unthinkable , terrifying, horrifying things that you have to hear from your daughter And he's like, oh, my God, I have to keep all these things straight. But he can't because his daughteris telling him these things Does he it wrong maybe? Sure we know he's not lying when he comes in here and testifies because he's trying to remember what his daughter said If it was a lie, they would haverehearsedit _ top get

(Tr.IV62-65) (Emphasis added)

Then, the prosecutor further argued B.J. was telling the truth, the time she comes in here, she's able to talk about that We've been through a year of ~By

counseling, and she's able to give details about what happened on the couch, "B.J is coming in here and telling you what happened to her.

Later, the State's attorney continued with this misconduct, "B.J. has absolutely no motive to make this story up and no motive to lie .* (Tr.IV 72)

As ADA Austin got closer to her final remarks to the jury, the prosecutor's reprehensible bolstering increased,

She (B.J.) went to a year of counseling. If you're making it up, as a kid as a 12, 13-year-old going to counseling for a year, you're certainly going to give it up at that point if it's not true, because you're not going to want to go to counseling all the time for a year. We know she's telling the truth on that.

(Tr.IV 78) (Emphasis added.)

Finally, the prosecutor argued, "There's absolutely no reason for B.J. to disclose what happened to her on July 14, 2019, unless it happened. No other reason: (Tr.IV 79)

Vouching for a witness' credibility, such as the State repeatedly did this Bechtel v. State, 1987 OK CR 126, 738 P.2d 559, 561 (Parks, J. specially concurring, 1 1); United States v. Swafford, 766 F.2d 426,428 (lOth Cir. 1985) at argument constitutes impermissible vouching if the jury reasonably believes the prosecutor is indicating a personal belief in the witness credibility. See also In United States v. Stafford, 766 F.2d 426, 428 (1Oth Cir. 1985), the Tenth Circuit Court of Appeals stated "We continue to hold that vouching by an attorney as to the veracity of a witness is improper conduct and an

error which this court will carefully review. United States v. Ludwig, 508 F.2d 140,

It is the sole responsibility of jurors to determine credibility of witnesses. See United States v. Binder, 769 F.2d 595, 602 (9th Cir. 1985), overruled on other grounds by United States v. Morales, 108 F.3d 1031 (9th Cir. 1997) The State's repeated andimproper vouching of B.J . and also her father, at Dallas Norton's trial invaded the province of the jury .

B The State improperly violated the presumption ofinnocence.

When arguing to the jury about B.J.in this case, the prosecutors referred to her as the "victim. Early in the first closing argument, ADA Whatley referred to B.J.as a "victim. (Tr.IV 26) In the final closing, the State's attorney argued, "She went from stepdaughter, mom's boyfriend, he went to abuser, and she's a victim because of a choice he made. (Tr.IV 73) Near the very end of the State's remarks before the jury went to deliberate, Ms. Austin argued that Appellant had made B.J. avictim in her own home. (Tr.IV97)

It is improper for the State to call B.J., the complainant, a "victim because a "victim" is commonly understood to be a person who has been the object of a crime Or a wrongdoing. This violated Appellants presumption of innocence because he had pled not guilty. (Tr.II9-10) An individual's right to be presumed innocent has beenlong been recognized in American jurisprudence. In re Winship As was detailed above, the prosecutionis prohibited from expressing their personal opinion during a trial about a witness' credibility or whether a witness is telling the truth. United States v. Young, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 1048, 84 L.Ed.2d 1 (1985) Robertson V . State, 1974 OK CR 87, 1 10, 521 P.2d 1401,1402. Therefore, when these prosecutors

called B.J. a victim, they were telling the jury Appellant was guilty, thereby violating Mr . Norton's presumption ofinnocence.

C_ The State improperly sought to inflame the passions of the jury by seeking sympathy for B.J., the complaining witness.

In closing remarks to the jury, the State argued; "He took advantage of a little girl's trust and a little girl just wanting to have a dad in her life that lived close by They prosecutor continued arguing to the jury, in that bed, in that home when he took that from her. He took her took her innocence from her." (Tr.IV93)

Inclosing arguments, the prosecutionsought sympathy fromthejuryforB.J.

Takeinto consideration this happeneain her own home, a place where she should be safe, a place where you shouldn't have to worry about people doing things to you and perpetrating crimes upon you and making you a victim in your own home You should be safe_ You should be able to feel safe there always.

(Tr.IV97)

As she finished making her last remarks to the jury, ADA Austin continued seeking sympathy for B.J. from the jury, "She talks about being scared she's scared of what would happen if she tells she lived on that fear. She lived with this secret, (Tr.IV 97-98) Shortly thereafter, the prosecutor argued, "He took B.J.'s first sexual experience from her.

This Court stated in Pickens v. State, 1993 OK CR 15, 1 157,850 P.2d 328, 342, "It is improper for the prosecution to ask jurors to have sympathy for victims. Tobler V State, [1984 OK CR 90, 16,] 688 P.2d 350, 354 (Okl.Cr.1984) The prosecutor's attempt to invoke sympathy for the victim is reprehensible. Id. 1984 OK CR 90 at I1 14, 16, 688 P.2d at 353-354. Appeals to the emotions and sympathy ofthe jury are improper. Garrison v. State, 2004 OK CR 35, I1116-117,128,103 P.3d

590, 610-612; Atterberry v. State, 1986 OK CR 186, 1 12, 731 P.2d 420, 423; McCarty

The State should not use arguments solely to inflame the prejudices Or sympathy of the jury_ Garrison v. State, 2004 OK CR 35, 117, 128, 103 P.3d 590, 610-612 See also Tart v. State, 1981 OK CR 113, 1 8, 634 P.2d 750, 752, Dupree V. 514 P.2d 425, 426-428 (reversal of conviction granted); Sier v. State, 1973 OK CR 452, 11 7-9, 517 P.2d 803, 804-805; Pickens v State, 1993 OK CR 15,157,850 P.2d 328 (error found but not enough to reverse) _

D The prosecutors improperly sought to shift the burden of proof to the defense.

counsel) talked about, think about if this happened, what about this if this happened. You are to consider the evidence that you have In fact, he just talked about a lot of things you have no evidence of. (Tr.IV 61) The prosecutor telling the jury not to consider evidence that was not presented is telling the juryto ignore the fact that the State failed to meet their burden of proof. It is defense counsels job to argue to the jury where the State's evidence is lacking. It is also the jury's legal obligation

[tJo draw such reasonable inferences from the testimony and exhibits as you feel are justified when considered with the aid of the knowledge whichyou each possess in common with other persons. You may make deductions and reach conclusions which reason and common sense lead you to draw from the fact which you find to have been established by the testimony and evidence in the case

Instruction No. 9-1, OUJI-CR(2d) _ (OR 212)

The law requires jurors to make reasonable inferences and deductions from the evidence presented. The jury should also make reasonable inference and

deductions from the evidence not presented or missing from the State's case. To tell the jury to ignore missing evidence was improper and contrary to law.

In closing arguments, the prosecutor also arguedto thejury, "Ifyou'llnotice, defense counseldidn't ask Tiffany Norton anything about those cameras. He didn't askifthey were there,ifwere working, what was going on at the time " (Tr.IV 68-69) The State persisted in arguing about how the jury had not been provided this evidence, "You do not have that information. You have no idea if those cameras were even there before they married because no one was asked a time frame about those cameras . (Tr.IV 69) The defense had no burden to present any evidence about the cameras in question, or anything else for that matter. they got

It is not the accused person's burden to prove their innocence. The above detailed arguments were repeated attempts by the prosecution to effectively and improperly lowerthe State's burden ofproof as to Dallas Norton's guilt. This Court statedin Flores v.State, 1995 OK CR 9,896 P.2d 558,561, "[CJourts must be vigilant to avoid the dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.*

In a criminal trial, the accused; the accused is has no obligation to prove his innocence a criminal trial, the State has the duty to prove the charges against the accused; the accused is not obligated to prove his innocence. See Miller v. State, supra, 3 Okl.Cr. 374, I 7,106 P. 538,539 (1910)_

'It should be noted this argument was also highly misleading because the testimony about the cameras in the house on Fawn Run Crossing was not presented until after Ms. Norton was already done testifying. Ms. Norton was the first witness at trial. There was no evidence about the cameras until the (TrII 28-103, 156, 302) This misleading and improper argument by the State should not be tolerated by this Court

This presumption of innocence is a statutory right in Oklahoma under 22 0.8.2021 $ 836, which dictates, A defendant in a criminal trial is presumed to be innocent untilthe contraryis proved, andin case of reasonable doubt asto whether his guilt is satisfactorily shown, he is entitled to be acquitted. See also Miller v. State, 3 Okl.Cr. 374, 106 P. 538 (1910); Coffin v. United States, 156 U.S.432, 453, 15 S.Ct. 394, 403, 39 L.Ed. 481 (1895), In re Winship, 397 U.S. 358, 363, 90 S.Ct. 1068, 1072,25 L.Ed.2d368 (1970); Estelle v. Williams,425 U.S.501,503,96 S.Ct.1691,1692, 48 L.Ed.2d 126 (1976) 39 L.Ed. 481 (1895), the Supreme Court emphasized the presumption of innocence in favor of the accused is the undoubted law, and its enforcement lies at the foundation of our criminal law.

When a misconduct, the defendant's due process rights are violated and reversal is warranted. See United States v. Gabaldon, 91 F.3d 91, 93 (lOth Cir. 1996) (citing Greer v. Miller, 483 U.S. 756, 765,107 S.Ct. 3102, 3108-3109, 97 L.Ed.2d 618 (1987)) . Reversal is the correct remedy when grossly improper argument affects a defendant's rights. Coates V State, 2006 OK CR 24, 1 4, 137 P.3d 682, 684. See Hanson v. State, 2003 OK CR 12, I1 13-14, 72 P.3d 40, 49.

Conclusion: The effects of this prosecutorial misconduct prejudiced Appellant and should not go uncorrected this Court. Tart v. State, 1981 OK CR will continue to increase both in severity and frequency. The violation of rights which are basic to a fair trial can never be treated as harmless error. Holloway v Arkansas, 435 U.8.475,489,98 S.Ct. 1173,1181,55 L.Ed.2d 426 (1978) . Ifthereis any doubt at all that these improper, prosecutorial arguments affected this trial, the by

benefit of the doubt should be given to the accused. Sykes v. State, 1951 OK CR 154, 95 Okl.Cr. 14, 18, 238 P.2d 384, 387. Based on all the above facts and law, Appellant was deprived of a fair trial, an impartial jury, and due process of law. U.8.Const. amends. V, VI, and XIV; Okla. Const. art. II, 8 $ 7,19,20 Dallas Norton's convictions should be reversed and Appellant should be granted a new trial.

PROPOSITION V

DALLAS NORTON WAS PREJUDICED BY INEFFECTIVE ASSISTANCE OF COUNSEL:

Standard of Review: A claim of ineffective assistance of counsel is a mixed question oflaw and fact. Therefore, this Court will review such mixed questions de

A lawyer's first duty is to zealously represent his or her client. Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994) . A lawyer is also obligated to protect his or her client's rights. Birchfield v. Harrod, 1982 OK CIV APP 2,1 32, 640 P.2d 1003 , 1009.

In opening statements, defense counsel went into details about what the evidence would show in support of Mr. Norton's case_ Mr. Nedwick stated there would be evidence about how Appellant's son, Austin, was injured and badly burned on November 26, 2016, while in his mother's case. Trial counsel indicated there would be evidence that Appellant had to quit his job to take care of Austin and his other children. Counsel added that B.J.s mother, Tiffany, contacted Appellant on Facebook about her sympathy over Austin who was still in the hospital. (Tr.II 16-18) Although bits and pieces of this puzzle were contained in the State's case, the defense counsel did not present any evidence. (Tr.III 165, Part.Tr. 3-7)

Defense counsel further Indicated there would be evidence that B.J.s mom and Appellant moved in together and married, which was proven by the State. However, when the two adults were separated, defense counselstated the evidence would show, "B.J. would stIll request to go over and hang out with Dallas and you're golng to hear from those witnesses that they actually did things together durlng that time he was out of that home. Mr. Nedwick told the jury that Appellant's girlfrlend at that time, Shyanne Pike, would testify about the things that B.J. and Appellant did together during that separation. However, the defense never presented any witnesses and andthe jury neverheard anything from Ms. Pike. (Tr.II19-21, Tr.III 165, Part.Tr. 3-7) Defense counsel also stated that B.J. would be very specific and limited as to the time frame when she alleged this had occurred, which also did not turn out to be true at jury trial. (Tr.II21-26,181)

It was an unreasonable trial strategy for defense counsel to promise to call witnesses and saythe defense would provideimportant pieces of evidence, andthen wholly failto present a case. Iftrial counselhad any doubts whatsoever about what case the defense would present, Mr. Nedwick should have reserved his opening statement until the conclusion of the State's case. making promises to the jury that were not kept by the defense, both defense counsel and Dallas Norton lost their credibility with the jury great undermining Appellant's claim of actual innocence in this case. By

Trial counsel was ineffective in voir dire for failing to recognize the bias Juror M.K. had against his client, for failing to ask follow up questions about the situation in an effort to remove M.K. for cause, and at a minimum, for failing to remove MK. from Mr. Norton's jury panel with a peremptory challenge. (See Propositlon III.) Defense counsel was also ineffective for failing to object to the

repeated instances of prosecutorial misconduct by the State's attorneys in these proceedings _ (See Proposition IV.) It was ineffective for trial counsel to call the house where B.J. alleged this occurred a "crime scene, when Appellant's entire position at trial was that no crimes whatsoever had been committed. (Tr.IV 51)

As noted by the Supreme Court, "Of all rights that an accused person has, the right to be represented by counsel is far the most pervasive, for it affects his ability to assert any other right he may have. United States v. Cronic, 466 U.8.648, 654,104 S.Ct. 2039,2044, 80 L.Ed.2d 657 (1984) . by

In evaluating ineffective assistance of counsel, this Court has consistently applied the two-prong Strickland test. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984) _ See also Jennings v. State, 1987 OK CR 219, 11 7-8, 744 P.2d 212, 213-215. The defendant must show: (1) that defense counsel's "representation fell below an objective standard of reasonableness, and (2) a "reasonable probability that, but for counsels unprofessional errors, the result of the proceeding would have been different. Jennings, 744 P.2d at 214, 1 8. See also Strickland, 466 U.S. at 686, 691- 692, 104 S.Ct. at 2064, 2067-2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. The requirements for a finding of ineffective assistance of counsel are satisfied in the case at bar. Trial counsel promised to present a case, but wholly failed to do

s0 . Defense counsel failed to remove Juror MK. and later failed to object to prosecutorial misconduct during these proceedings. The impact ofthese oversights is immeasurable

Conclusion: The Sixth Amendment to the Constitution and the Oklahoma Constitution entitle a defendant to effective assistance of counsel at all critical stages of a criminal proceeding . United States v. Cronic, 466 U.S. 648, 659,

Const. art II, 8 20 Further, "[i]t haslong been recognized that the right to counselis the right to the effective assistance of counsel. Id. 466 U.S. at 654, 104 S.Ct. at 2044 . Appellant has demonstrated counsel's deficient performance and the resulting prejudice . Because Dallas Norton was denied the effective assistance of counsel, Appellant is requesting a reversal of his convictions andthat anewtrial be granted in this case-

PROPOSITION VI

THE CUMULATIVE EFFECT OF ALL THESE ERRORS DEPRIVED APPELLANT OF A FAIR TRIAL AND WARRANT RELIEF FOR DALLAS NORTON.

Appellant requests this Court consider the cumulative effect of the errors presented in Propositions I through V. Should this Court find that none of the errors standing alone warrant relief, Dallas Norton asks this Court to consider the cumulative effect of allthese errors.

Even when errors, viewed separately, do not amount to reversible error, their cumulative effect may nevertheless deprive a criminal defendant Of a fair trial and/or fair proceedings. Peninger v. State, 1991 OK CR 60, 1 23, 811 P.2d 609, 613; Chandler v. State, 1977 OK CR 324, I1 13-14, 572 P.2d 285,289-290. This Court has previously ruled that the cumulative error argument has merit when other errors raised by the defendant are valid but are insufficient individually to require relief. Ashinsky v.State, 1989 OK CR 59,1 31, 780 P.2d 201,209.

The cumulative effect Of the errors in this case cannot be considered harmless beyond areasonable doubt . See Cargle v. Mullin, 317 F.3d 1196,1220-1221, 1224-1225 (1Oth Cir . 2003) . The errors in this case, taken together, deprived Appellant of a fair jury trial. U.S. Const. amends. V, XIV; Okla. Const. art. II, $ 20

Therefore, Dallas Norton respectfully asks this Court to vacate his conviction and either dismiss his case or remand this matter for a new trial.

CONCLUSION

For all of the reasons and authorities cited herein, Appellant respectfully requests this Court reverse his convictions for two counts oflewd molestation with instructionsto dismiss . In the alternative, Dallas Norton asks he be granted a new jury trialin this case

Respectfully submitted, DALLAS CHRISTOPHER NORTON

By:

anders

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CERTIFICATE OF SERVICE

This is to certify that on April 2023 a true and correct copy of the foregoing Brief of Appellant was mailed, via United States Postal Service, postage pre-paid,to Appellant at the address set out below_ and a copy was served upon the Attorney General this date by leaving a copy with the Clerkofthe Court of Criminal Appeals for submission to the Attorney General.

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