RELEASED FOR PUBLICATION BY ORDER OF
THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS

STATE OF OKLAHOMA

DIVISION 4

ORIGINAL

IN THE MATTER OF M.I.C. and R.E.C., alleged deprived children.	)	
JOHN MATTHEW C. and KATRINA C.,	)	
Appellants,	)	
vs.	)	No. 90,388 (cons. with 90,447)
STATE OF OKLAHOMA,	)	
Appellee.	)	FOR PUBLICATION

APPEAL FROM THE DISTRICT COURT OF
BRYAN COUNTY, OKLAHOMA

Honorable Rocky L. Powers, Trial Judge

REVERSED AND REMANDED WITH DIRECTIONS

D. Michael Haggerty, II
Haggerty & Haggerty
Durant, Oklahoma — For Appellant Father

M. Brent Boydston
Durant, Oklahoma — For Appellant Mother

Emily Carney
Assistant District Attorney
Durant, Oklahoma — For Appellee State

Ken Rainbolt
Mickle, Rainbolt & Wilhite
Durant, Oklahoma — For Minor Children

REIF, J.

Appeal No. 90,388 and Appeal No. 90,447 arise from the judgment entered on the jury verdict determining that M.I.C. and R.E.C. were deprived and terminating the parental rights of their natural father and natural mother. Appeal No. 90,388 was filed by father and Appeal No. 90,447 was filed by mother. These appeals have a common record, because the State proceeded against father and mother jointly below. We have consolidated these appeals for review and disposition in a single opinion. Upon review, we reverse. The State alleged "the children do not have the proper parental care and the home is an unfit place for the children [because] a four-month-old sibling of the . . . children has been heinously and shockingly abused by the father and the mother failed to protect her from such abuse." The sibling of M.I.C. and R.E.C. mentioned in the State's allegation had died mysteriously. Even though the Medical Examiner could not determine the cause of death, the autopsy revealed that the deceased infant had suffered eight broken ribs at some time in the two to five week period before her death. State witnesses testified that father admitted that he had squeezed the deceased infant out of anger and frustration during that general time frame. The State based mother's culpability on the fact that she left the primary care of the children to father despite recognizing that he sometimes handled the children "too rough."

I.

The deceased sibling of M.I.C. and R.E.C. died in the early morning hours of March 25, 1997. The State did not allege that the deceased sibling died as the result of abuse or neglect by either father or mother. Indeed, the Medical Examiner's report generally indicated that the cause of death was "unknown," and the manner of death was "undetermined." The report further states: "There is no definitive anatomic cause of death in this child." The report notes that the child was "well-developed, well-nourished" and that the "[e]xternal exam fails to reveal any evidence of traumatic injury and appears within normal limits." In particular, the "[n]eck, chest, abdomen and back are within normal limits." It was only upon x-ray and internal examination that the deceased child's healing, broken ribs were discovered. The autopsy report placed the healing period between two and three weeks.

In his testimony, the Medical Examiner confirmed the findings reflected in the autopsy report. While acknowledging that the broken ribs were "consistent with child abuse," the Medical Examiner stated the broken ribs "certainly played no role in the death." On cross examination, the Medical Examiner indicated that the healing of the rib fractures might extend back as much as five weeks.

In other words, the deceased child had been subjected to rib fracturing trauma some time during the period of February 19, 1997, through March 11, 1997. It should be stressed that the

basis of the termination of mother's parental rights was her alleged failure to protect the deceased child from alleged abuse by father during this time. Review of the evidence relating to this time frame reveals that there is simply no evidence to support a finding that mother knew or should have known of abuse during this time.

The evidence that the State relies upon to support termination of mother's parental rights for failure to protect consists largely of statements that mother made to others. The statements by mother fall within three general time-based categories: (1) statements that predate the suspected abuse time frame; (2) statements that seem to fall within the time frame; and, (3) statements made after the deceased child's death. Most of the statements made by mother before the suspected abuse time frame are of little relevance. However, even if they are considered, all of the statements attributed to mother, taken with the observations of babysitters and others, do not show knowledge of abuse or failure to protect.

Babysitter Sharon Wyrick kept chronological notes of her care of the children and certain events relating to the parents and children. These notes refer to R.E.C. and the deceased child as "the twins" and record their birth on November 29, 1996. Between December 2, 1996, and January 6, 1997, Mrs. Wyrick kept the twins a total of fourteen days and overnight on nine of those days. The next time Mrs. Wyrick kept the twins was January 16 through January 18. After taking the twins home on this

occasion, mother phoned Mrs. Wyrick to ask about R.E.C.'s swollen lip. Mother called later and indicated that she had taken the child to the doctor. Mother also indicated that she was leaving father, but a day or two later informed Mrs. Wyrick the whole family, including father, was going to Washington from February I through February 14. The notes reflect the absence of the family during that time and that mother began requesting Mrs. Wyrick to keep the twins the day after their return. Mrs. Wyrick next kept the twins February 23, 24, and 25. Neither her notes nor testimony report anything unusual about the twins on this occasion which is within the time frame of father's suspected abuse. The last time Mrs. Wyrick kept the twins was March 16 and 17. In both her notes and testimony, she relates a bump on the head of R.E.C.'s twin who would later die. Mrs. Wyrick's notes end with the following observation: "I never considered that the children were being abused. I thought they [mother and father] were just careless and maybe not supervising [M.I.C.] with the babies. I never saw them treating any of the babies in a rough manner."

In her testimony, Mrs. Wyrick related that the first time she kept the twins and M.I.C. was the day after mother and the twins came home from the hospital. She reported that mother was crying and stated: "I can't handle it . . . I never wanted these babies and I can't handle it [and the father] can take care of them, he's the one that wanted the children." At this point in her testimony, Mrs. Wyrick was asked about a statement that

mother made before the twins were born. Mrs. Wyrick related that mother considered giving the twins up to foster care or to her mother, but later decided that "it wouldn't be the right thing to do." Mrs. Wyrick also related a statement by mother that the reason she asked Mrs. Wyrick to keep the children so often was that "[father] didn't do babies, that they made him nervous." Mrs. Wyrick further testified about a knot she observed on the head of R.E.C.'s twin on March 16 and 17. Mother told Mrs. Wyrick that the knot occurred while the child was in father's care. March 16 and 17 is outside the suspected period of the rib fracturing trauma. Significantly, other than the swollen lip and knot on the head, Mrs. Wyrick reported no signs of any other injuries to the children.

Babysitter Francis Phillips indicated that she began keeping the twins when they were almost two months old. This would have been the latter part of January 1997. According to Mrs. Wyrick's chronology, Mrs. Phillips would have first kept the children in the period from January 19 through January 30. Also, based on Mrs. Wyrick's notes, it appears that the next periods in which Mrs. Phillips would have cared for the children would be February 15 through 22, February 26 through March 15, and March 18 through 22. March 22 was the last time she kept the children.

According to Mrs. Phillips, during one of these periods, mother went to work, and told Mrs. Phillips "she wanted -- just wanted to work, although she wasn't going to be making much money, she would give me the paycheck to get away from the kids

and have hospital insurance." Without fixing a time frame, Mrs. Phillips also acknowledged that mother mentioned the subjects of "giving the children up" and "foster care," but added that mother "never did make a decision on it to me." Mrs. Phillips also recounted three instances when mother volunteered that father would "never hurt these babies" and that Mrs. Phillips "couldn't figure out why she kept stressing this to me." On each occasion, mother had related that something had happened to one of the twins. However, Mrs. Phillips did not relate that she ever observed any injury to the children. Mrs. Phillips was specifically asked if there was anything that mother ever did, other than these incidents of saying father "never [hurt] these babies," that led her to believe that mother knew of abuse. Mrs. Phillips answered "No."

There can be little doubt that mother made extensive use of the babysitting services of Mrs. Wyrick and Mrs. Phillips to get away from the children, but there is nothing in their testimony that reveals that mother knew of any abuse of the children by father, or that she failed to protect the deceased child from abuse by father. Next to mother and father, Mrs. Wyrick and Mrs. Phillips would have been in the best position to notice any signs of abuse on the children, and they did not report anything to indicate that the children were being abused.

As concerns mother's actions and statements following the child's death, there is again nothing to show mother knew of rib fracturing abuse of the deceased child between February 19, 1996,

and March 11, 1996. Both of the police detectives and the district attorney investigator who interviewed mother, all testified that mother did not say anything to them that would indicate she knew of any abuse of the children prior to the death of the child. The intake caseworker for the Department of Human Services interviewed mother after the child's death. The caseworker indicated that mother did not disclose any information about how the injuries could have occurred. The caseworker noted in her report that "It's unclear if [mother] could protect her children or if she knew of any abuse to the children." The caseworker further indicated that mother did not know how the child had died and wanted to find out how it happened. The caseworker testified that mother did disclose the instances of previous unexplained injuries involving the swollen lip and knot on the head. However, the caseworker stated the mother did not indicate whether she knew that father had caused those injuries and that mother took the children to the hospital on both occasions.

The court-appointed special advocate (CASA volunteer) interviewed mother on April 2, 1997. The CASA volunteer related that mother stated that she could not cope with the children, that she liked to be away from them as much as possible and that she had gone out and gotten a job strictly to get away from the kids. The CASA volunteer asked mother whether she had failed to protect her children, and the CASA volunteer reported the following response:

> Well if you mean by the fact that I had nothing to do with them for days at a time, left their care totally up to John and did not pay any attention to what was going on with them, then yes. I just couldn't cope and John never said he was having trouble handling them.

The CASA volunteer further testified that mother said that she had seen father sometimes pick up the babies out of their playpens so hard that they would cry and that "she knew sometimes [father] was too rough with [the babies]." On cross-examination, the CASA volunteer acknowledged that (1) there was no indication that mother abused the children, (2) the only indication of mother's knowledge of abuse was mother's statement that father was "too rough" with the children, and (3) there was nothing in her report "which would lead a person to believe that anybody . . . picked the children up and squeezed them in such a manner as to break their ribs."

Lastly, the State relied on mother's statements and inquiries about the child's death, and her different accounts of what she did when she came home the night of the child's death. This evidence, however, forms the weakest link in the State's chain of evidence to support an adjudication of M.I.C. and R.E.C. as deprived and for the termination of mother's parental rights on the ground of failure to protect. The chief problem with the relevance and probative value of such evidence lies in the fact that the State did not allege, and none of the evidence demonstrated, that the child <u>died</u> from abuse or neglect by anyone. The death of the child was an issue in this case <u>only</u>

because the autopsy revealed multiple healing rib fractures that were consistent with abuse of the child during the period between February 19, 1997, and March 11, 1997. The testimony of the funeral personnel, the CASA volunteer, and the foster mother of the children about inquiries mother made, her varying statements concerning the cause of the child's death, and her varying accounts of what she did when she came home from work the night of the child's death, do not tend to prove any issue bearing on mother's failure to protect the children from abuse during the period of February 19, 1997, and March 11, 1997.

The evidence in this case certainly portrays mother as an immature and unsympathetic maternal figure. However, the evidence is woefully insufficient to support even an inference that she knew father was squeezing any of the children hard enough to break eight ribs. Such injuries were discovered only after a specialized forensic x-ray and internal examination in the course of an autopsy. They were not noticed by two babysitters or any of the medical personnel to whom mother took the children whenever she was concerned about injuries or illness that she noticed. Significantly, Medical Examiner stated that: "There would be nothing about the child that would tell you it had rib fractures, until you did the autopsy." He explained that "[w]ith a squeezing or a [force] something like that, then it's very possible there wouldn't be any external bruising, [b]ecause a child's chest is very compliant or very flexible . . . you can break a rib and not have any external injuries." Even permitting

the jury to give the greatest weight to all of the evidence adverse to mother, we nonetheless conclude that it was insufficient to meet the State's burden to adjudicate M.I.C. and R.E.C. as deprived and to terminate mother's parental rights to M.I.C. and R.E.C.

II.

In their respective briefs, father and mother have argued that they were denied a fair trial by reason of the excessive participation by counsel for the children. They both rely on Cooper v. State, 1996 OK CR 38, ¶8, 922 P.2d 1217, 1218, to support their requests for reversal of the judgment and a new trial.

In review of Cooper, we agree that it provides persuasive guidance for evaluating the actions of court-appointed counsel for children in deprived/termination proceedings as they impact a fair trial. However, we cannot adopt all of the pronouncements in Cooper as the standard for deprived/termination proceedings. We reach this conclusion, because the court of criminal appeals was construing the role of court-appointed counsel for the children as it was defined and limited by a specific statute applicable to criminal prosecutions. We do not believe that the role of children's counsel in a deprived/termination proceeding should be similarly limited.

One principle in Cooper that we find applicable is the duty of "the trial bench to weigh the interests of the child needing representation against the . . . right to a fair trial and to

carefully scrutinize the participation of child advocates [to avoid putting] appointed counsel in the role of 'special prosecutor.'" Id. In the instant case, we find several instances where the actions of court-appointed counsel were blatantly prosecutorial and contributed to the denial of a fair trial.

The most serious instance was the use of the pending criminal charge in the cross-examination of father. Laughlin v. Lamar, 237 P.2d 1015-16 (Okla. 1951), involved an appeal from a judgment on a jury verdict awarding the plaintiff damages sustained in a vehicle collision. "At the trial, over the objection of the defendant, plaintiff was permitted to introduce in evidence a Justice of the Peace criminal docket showing the filing of a criminal complaint against the defendant for reckless driving by reason of this collision and the receipt of $19 as payment of fine and costs." Id. The supreme court adopted the rule that "where defendant had plead guilty, only the plea of guilty is admissible. Other matters of record in the criminal case are not." The court held that, in the absence of a plea, "any evidence relative to the criminal charge was inadmissible and highly prejudicial." Id. The supreme court reversed the judgment and remanded the cause for a new trial.

The court of criminal appeals has squarely held that "it is improper to offer evidence that one has been charged with a crime . . . for the purpose of affecting [one's] credibility as a witness," even if the purpose is "to show that [witness] has a

personal interest." Powell v. State, 203 P.2d 892, 895 (Okla. Crim. App. 1949) (citations omitted). In cases of "a concerted effort . . . to inject into the case evidence that was incompetent and highly prejudicial," proffering evidence that one has been charged with a crime will constitute reversible error. Id.[1]

The second instance of excessive participation by counsel for the children involved counsel's efforts to admit a written statement by father during the state's case in chief. Even though counsel for the children in a deprived/termination proceeding should cross examine the state's witnesses to elicit testimony and evidence that bears on the best interests of the children, counsel for the children should not be involved in the offer and admission of evidence to aid the State in meeting its adversarial burden vis-à-vis the parents.[2]

Counsel for the children further displayed a prosecutorial role in his cross examination of father. In questioning father about family photographs that father had offered into evidence, counsel for the children twice inquired about the absence of a photograph of father squeezing the deceased child hard enough to break eight ribs. Counsel for children compounded the prejudice

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[1]Counsel for the children made specific reference to the criminal charge in closing argument to support his contention that father had a motive to lie. It is reasonably clear that use of the criminal charge was "concerted effort" to bring the pending charge to the attention of the jury.

[2]Additionally, counsel for the children cross examined father extensively about the statement.

of this inquiry by his comment during cross examination that "I can understand why there wasn't one [i.e. a photograph of father squeezing the child hard enough to break ribs]" and by his statement during closing argument -- "I asked him if he can bring in the photograph of him when he squeezed the life out of his child and he said he couldn't do it."

Lastly, counsel for the children twice improperly emphasized the death of the child to support his otherwise proper argument that termination of the parental rights of father and mother may be in the best interests of M.I.C. and R.E.C. In his opening remarks of closing argument, counsel for the children stated: "Well, on the behalf of [M.I.C. and R.E.C.], as their attorney, I want to thank you. I wish I could say that I was thanking you on behalf of [the deceased child]. Unfortunately, this trial is about six months too late to do any good for her." Again, at the conclusion of his closing argument, counsel for the children stated: "If you believed a word of what [father] had to say, I want you to walk into that jury room . . . and you find those children are not deprived and send them right back over there [i.e. to father and mother]. If we have to bury two more, well we'll just do that."

In view of the foregoing, we must conclude, as did the court in Cooper, "[t]his resulted in Appellant [father] being 'double teamed' and put into the same 'two against one' situation . . . found to constitute reversible error." The effect of "dual

prosecutors" in either a criminal case or a deprived/termination proceeding is the denial of a fair trial.

Our decision in this case to reverse and remand for a new trial should not be taken as criticism of either the trial court or counsel for the children. Both the trial court and counsel for the children had little or no guidance to follow in the discharge of their respective duties. We wish to emphasize that counsel for the children discharged his solemn court-appointed duty toward M.I.C. and R.E.C. diligently, capably, and earnestly. We do not believe or suggest that he intended to prejudice the parents' right to a fair trial. We believe that he simply followed his zeal to protect his clients' best interests across the thin line between advocate for the children and prosecutorial adversary with the parents.

III.

Even though the prosecutorial role by counsel for the children is a sufficient basis for reversal of the deprived adjudication and termination judgment as to father, we find it necessary to address the other issues raised by father. We do so to provide guidance for the retrial of this case and for future proceedings.

First, it is not error for the deprived adjudication and termination of parental rights to be tried in a single proceeding. There is both specific statutory authority for such action under 10 O.S. Supp. 1997 § 7006-1.1(6)(a) and case law approval to do so. In the Matter of R.J.W., 1990 OK 23, 789 P.2d

233, In the Matter of Jerry L., 1983 OK 43, 662 P.2d 1372. See also In the Matter of S.T.G., 1991 OK 11, 806 P.2d 636. Deprived and termination proceedings based on heinous and shocking abuse or severe harm or injury are clearly exceptions to the service plan requirements discussed in P.E.K. v. State, 1994 OK CIV APP 56, 875 P.2d 451.

Second, deprived and termination proceedings are special statutory proceedings for which the legislature has prescribed the procedure to be followed. There is no provision for or mention of the application of the discovery code. While we do not believe that the legislature intended to prohibit discovery in deprived and termination proceedings, we do believe that the legislature meant to leave discovery within the discretion of the trial court. In the instant case, we find no abuse of discretion by the trial court in quashing the discovery code requests utilized by father and mother in favor of the State's voluntary "open file" disclosure. However, there is one particular in which traditional discovery by means of deposition would have been appropriate, if its use had not been chilled by the trial court's general position that the discovery code did not apply at all. Although it is too late to help in this case, we hold that a parent should be accorded the opportunity to depose any witness who is going to testify about an alleged confession or admissions upon which the State is going to rely in support of the deprived adjudication and termination. In the instant case, father was unfairly surprised (despite the State's commendable open file

disclosure) by two witnesses who testified about seriously damaging statements by father which were not recorded in the written material that the State had provided father's counsel.

Third, statements by parents that are obtained without the benefit of a Miranda warning are admissible in deprived and termination proceedings, even if it could be said that the statements were made during custodial interrogation. The exclusionary rule of Miranda was intended to protect the right against self-incrimination and the right to remain silent in the context of criminal prosecutions. A parent in a deprived and termination proceeding is not afforded comparable rights, and can be called as a witness. In the Matter of C.C., S.C., and R.C., 1995 OK CIV APP 127, 907 P.2d 241. In addition, we note the constitutional protections against unreasonable searches and seizures, including searches and seizures by defective warrants, are not limited to criminal prosecutions. Accordingly, an "absolute" exclusionary rule as recognized in Turner v. City of Lawton, 1986 OK 51, 733 P.2d 375, for evidence from illegal searches and seizures, should not be recognized for evidence obtained in violation of the Miranda protections afforded to a criminal accused. Exclusion should be limited to the criminal prosecution context. As concerns father's argument that his statements should be excluded because they were involuntary, the court should instruct the jury that they are to determine whether the statements are voluntary or involuntary, and to give them weight only if they determine they are voluntary.

Finally, continuance of a deprived and termination proceeding, like discovery, is not addressed by the procedure prescribed by the legislature for such special statutory proceedings. Again, we do not believe that the legislature intended that there not be continuances, but instead meant that the matter of continuance be left to the discretion of the trial court. In the instant case, we find no abuse of discretion in denying father's motion for continuance on the ground that there were certain medical records that father's medical expert had not reviewed. The record does not indicate that father's medical expert was at any disadvantage in evaluating the Medical Examiner's autopsy report. In addition, father's medical expert had the benefit of medical records that revealed no signs of injury to either M.I.C. or R.E.C. Furthermore, father and mother had equal access with the State to all medical records of medical treatment that they had obtained for their children. We simply fail to see how father was prejudiced by the denial of his request for continuance.

IV.

In Appeal No. 90,447, the judgment on the jury verdict finding M.I.C. and R.E.C. deprived and terminating mother's parental rights is reversed, because the State's evidence was insufficient to establish that mother failed to protect the deceased sibling of M.I.C. and R.E.C. from abuse by father as alleged by the State. We remand with directions to dismiss as to mother.

In Appeal No. 90,388, we reverse the judgment on the jury verdict finding M.I.C. and R.E.C. deprived and terminating father's parental rights, because father was denied a fair trial by the prosecutorial actions of counsel for the children. We remand with directions to grant father a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

GOODMAN, J. (sitting by designation), concurs in result, and RAPP, J., concurs specially.

RAPP, J., specially concurring

I concur specially only to state the majority's characterization of children's counsel is exceedingly lenient. I would hold he forgot his role of children's counsel and became, instead, a prosecutor whose interests were not aligned with those of his clients or their best interests and, in doing so, failed as counsel for the children.

July 21, 1998

I, James W. Patterson, Clerk of the Appellate Courts of the State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of the Memo Opinion in the above entitled cause, as the same remains on file in my office.

In Witness Whereof I hereunto set my hand and affix the Seal of said Court at Oklahoma City, this 21st day of March 2000.

Clerk

By Marilyn Velasquez
DEPUTY

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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STATE OF OKLAHOMA,	)	
Appellee.	)	

ORDER

The Court of Civil Appeals' opinion in the above styled and numbered cause is ordered withdrawn from publication.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 13th DAY OF MARCH, 2000.

CHIEF JUSTICE

HARGRAVE, V.C.J., HODGES, LAVENDER, OPALA, KAUGER, WATT and BOUDREAU, JJ., concur.
SUMMERS, C.J. and WINCHESTER, J., not participating.

ORIGINAL

IN THE COURT OF CIVIL APPEALS

STATE OF OKLAHOMA

DIVISION 4

IN THE MATTER OF M.I.C. and R.E.C., alleged deprived children.

JOHN MATTHEW C. and KATRINA C.,

Appellants,

vs.

STATE OF OKLAHOMA,

Appellee.

No. 90,388
(cons. with 90,447)

CORRECTION ORDER

It is hereby ordered that the opinion of this court in the above-styled case filed on July 21, 1998, be corrected as follows:

On page 1, delete first and second lines reading: "RELEASE FOR PUBLICATION BY ORDER OF THE COURT OF CIVIL APPEALS".

Also on page 1, in the case style, under the case number, insert the word "NOT" to read "NOT FOR PUBLICATION".

On page 2, line 9 from top of page, the first paragraph should end with the words "we reverse" and the second paragraph should begin with the words "The State alleged...."

On page 15, two lines from bottom of page, "§ 7006-1.1(6)(a)" should be corrected to read as "§ 7006-1.1(a)(6)".

DONE BY ORDER of the Court of Civil Appeals, Division 4, this 15th day of March, 2000.

John F Reif

JOHN F. REIF
Presiding Judge