IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

DUSTIN LEE McCORMACK,	)	
Appellant,	)	NOT FOR PUBLICATION
- vs -	)	
	)	Case No. F-2005-323
STATE OF OKLAHOMA,	)	
Appellee.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JAN 11 2007
MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

A. JOHNSON, JUDGE:

Dustin Lee McCormack, Appellant, waived his right to jury trial and was tried and found guilty by the Honorable Janice P. Dreiling in the District Court of Washington County, Case No. CF-2003-145, for the crimes of Forcible Oral Sodomy in violation of 21 O.S. 2001, § 888(B)(4)(Count 1) and Indecent Exposure in violation of 21 O.S. 2001, §1021 (A)(1)) (Count 2). Before sentencing, McCormack moved the district court for a new trial via a petition for a writ of error coram nobis. The district court granted the writ, set aside the finding of guilt, and ordered a new trial. [1] At his second trial, a jury found McCormack guilty on the forcible oral sodomy charge (Count 1) and not guilty on the indecent exposure charge (Count 2). The jury fixed punishment at

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[1] In *Campbell v. State,* 1972 OK CR 195, ¶¶ 3-4, 500 P.2d 303, this Court held that with enactment of the Post-Conviction Procedure Act (codified at 22 O.S. § 1080-1088), "[t]he ancient common law Writ of Error Coram Nobis, previously available on certain narrow grounds involving errors of fact, no longer lies in criminal cases in Oklahoma" (internal citation omitted). In light of the statutory abrogation of this writ, it appears the district court's grant of the writ in McCormack's case was error. However, that issue is not before the Court. Therefore, we do not address it here.

imprisonment not to exceed eighteen months. The trial court sentenced McCormack accordingly.

McCormack appeals the judgment and sentence by raising the following claims:

(1) The forcible sodomy statute at 21 O.S. 2001, § 888(B)(4) is unconstitutionally vague;

(2) The district court erred by refusing to permit polygraph evidence to be introduced at his sentencing hearing;

(3) Trial counsel was constitutionally ineffective for waiving a jury trial in favor of a non-jury bench trial and for waiving the right to call and cross-examine witnesses at that proceeding; and

(4) Trial counsel was constitutionally ineffective for failing to file a motion for change of venue.

We briefly address each of these claims:

(1) Title 21 O.S. 2001 § 888(B)(4), is not unconstitutionally vague. Section 888(B)(4) defines forcible sodomy as:

> Sodomy committed by a state, county, municipal or political subdivision employee or a contractor or an employee of a contractor of the state, a county, a municipality or political subdivision of this state upon a person who is under the legal custody, supervision or authority of a state agency, a county, a municipality or a political subdivision of this state.

Contrary to McCormack's assertions, the language of this provision is clear enough that any person of ordinary intelligence would not have to guess that a public school teacher committing sodomy with a public high school student at school, during school hours, is committing a prohibited act. A person of ordinary intelligence would know as a matter of common sense that a public school teacher is an employee of a state, county, or political entity and that a

public school student is a person under the supervision of that entity. *See State v. Thomason*, 2001 OK CR 27, ¶ 7, 33 P.3d 930, 932 (explaining that whenever reasonably possible, this Court construes statute to uphold its constitutionality and "statute is void only when it is so vague that men of ordinary intelligence must necessarily guess at its meaning").

(2) McCormack fails to meet his burden of demonstrating that the trial court abused its discretion in excluding polygraph evidence at his sentencing hearing. McCormack did not designate the transcript of the sentencing proceeding as part of the record in this appeal. Therefore, there is no record of the alleged error before us, much less a record sufficient to permit review of the propriety of the challenged evidentiary ruling. S*ee Ellis v. State*, 1990 OK CR 43, ¶ 6, 795 P.2d 107, 109 ("burden rests with appellant to include all necessary records and transcripts for review"); *Cardenas v. State*, 1985 OK CR 21, ¶7, 695 P.2d 876,878 ("[i]t is the appellant's burden to include enough of the record on appeal to permit the review of alleged error"). Furthermore, the claim fails even when considered more directly on the merits. It is well settled in this jurisdiction that the results of a polygraph test are presumptively unreliable and therefore "are not admissible for **any** purpose." *Paxton v. State*, 1993 OK CR 59, ¶ 42, 867 P.2d 1309, 1323 (emphasis added). *See also Birdsong v. State*, 1982 OK CR 120, ¶ 8, 649 P.2d 786, 788; *Fulton v. State*, 1975 OK CR 200, ¶ 4, 541 P.2d 871, 872. Under this standard, without any evidence rebutting the presumed unreliability of the allegedly proffered

polygraph results, McCormack fails to demonstrate that the trial court abused its discretion in refusing to admit that evidence at his sentencing hearing.

(3) With regard to McCormack's claim that trial counsel provided constitutionally deficient representation by opting for a bench trial in lieu of a jury trial and by then waiving cross-examination and presentation of defense witnesses in that proceeding, he fails to show how he was prejudiced on retrial by counsel's alleged unprofessional conduct in the first trial. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Davis v. State*, 2005 OK CR 21, ¶ 7, 123 P.3d 243, 246 (establishing two-part test for ineffective assistance of counsel claims requiring appellant to show that counsel's performance was constitutionally deficient and that it prejudiced defense, depriving appellant of fair trial with reliable result). Any deficient representation that occurred at the bench trial (e.g, waiver of jury, failure to cross-examine, or failure to call witnesses), was cured when the trial court set aside the result of that trial in its entirety and ordered a new trial before a jury.[2] Furthermore, unlike the bench trial where the judge found McCormack guilty of forcible sodomy and indecent exposure, the jury ultimately acquitted him of indecent exposure on retrial. Thus, even if we assume as true McCormack's assertion that the passage of time between his two trials caused the public to perceive him as someone who actually engaged in an act of indecent exposure (an assertion lacking any support in the record), the

[2] The trial transcript in not included in the record on appeal. In the absence this transcript, and lacking any indication to the contrary in the record available to us, we necessarily assume that McCormack neither waived nor was denied the right to call and cross-examine witnesses at his jury trial.

perception, if any, was obviously harmless because the jury returned a verdict in his favor by finding him not guilty on the indecent exposure count.

(4) Finally, McCormack complains that trial counsel was ineffective for failing to file a motion for change of venue. In support of this claim, McCormack asserts he could not have obtained a fair trial in Washington County because in the time between his two trials there were fifty-seven references in the Bartlesville newspaper to his case. McCormack fails to point to where these prejudicial newspaper articles can be found in the record and our search of the record fails to disclose any such materials. Furthermore, the record contains no transcript of the voir dire proceeding. Without a voir dire transcript, we are unable to determine if jurors were examined for bias or media exposure, much less determine whether the purported pretrial publicity affected the jury to the extent that McCormack was denied a fair trial. Because this claim lacks any basis in the record before us, it is denied. *See e.g. Bernay v. State*, 1999 OK CR 37, ¶ 21, 989 P.2d 998, 1007 (holding that appellant must develop claim beyond mere bald assertions); *Ellis v. State*, 1990 OK CR 43, ¶ 6, 795 P.2d 107, 109 ("burden rests with appellant to include all necessary records and transcripts for review"); *Cardenas v. State*, 1985 OK CR 21, ¶ 7, 695 P.2d 876,878 ("[i]t is the appellant's burden to include enough of the record on appeal to permit the review of alleged error"); *Hill v. State*, 1987 OK CR 230, ¶ 3, 745 P.2d 410, 411 ("This Court will not presume error from a silent record . . . the appellant has a duty to insure that sufficient record is provided this Court to determine the issues raised"). *See also* Rule 3.11, *Rules*

of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18 App. (2005)(providing procedure for party to supplement record on appeal with matters not presented to trial court or included as part of trial court record with special provisions related to ineffective assistance of counsel claims).

DECISION

The Judgment and Sentence is **AFFIRMED**. Under Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18 App. (2005), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

APPEARANCES AT TRIAL
KEVIN BUCHANAN
ATTORNEY AT LAW
530 S.E. DELAWARE
BARTLESVILLE, OK 74003
and
DONN F. BAKER
ATTORNEY AT LAW
319 WEST DELAWARE
TAHLEQUAH, OK 74464
ATTORNEYS FOR DEFENDANT

SHELLY CLEMENS
ASSISTANT DISTRICT ATTORNEY
WASHINGTON COUNTY
COURTHOUSE
420 SOUTH JOHNSTONE
BARTLESVILLE, OK 74003
ATTORNEY FOR STATE

APPEARANCES ON APPEAL
MICHAEL D. DENTON, JR.
DENTON LAW FIRM
1102 EAST STATE HIGHWAY 152
MUSTANG, OK 73064
and
JERRY S. MOORE
DENTON LAW FIRM
236 SOUTH MUSKOGEE
TAHLEQUAH, OK 74464
ATTORNEYS FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
WILLIAM R. HOLMES
ASSISTANT ATTORNEY GENERAL
313 N.E. 21st STREET
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR APPELLEE

OPINION BY: A. JOHNSON, J.
LUMPKIN, P.J.: Concur
C. JOHNSON, V.P.J.: Concur
CHAPEL, J.: Concur in Results
LEWIS, J.: Concur

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