

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

GORDON FIFE FRANKLIN,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION
Case No. F-2005-228

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

APR - 5 2007

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

A. JOHNSON, JUDGE:

Gordon Fife Franklin, Appellant, was tried by jury in the District Court of Oklahoma County, Case No. CF-2004-3103, and was found guilty of Kidnapping in violation of 21 O.S.2001, § 741, Assault and Battery with a Dangerous Weapon in violation of 21 O.S.2001, § 645, and Cruelty to Animals in violation of 21 O.S.Supp.2003, § 1685, each after former conviction of two or more felonies. The jury recommended 250 years imprisonment on each count. The Honorable Virgil C. Black, who presided at trial, sentenced him accordingly and ordered the sentences to be served concurrently. From this Judgment and Sentence, Franklin appeals.

This case raises the following issues:

1. Whether the trial court erred in admitting the preliminary hearing testimony of the alleged victim, in admitting photographs depicting Franklin being arrested, and in admitting expert testimony regarding domestic violence;
2. Whether the trial evidence was sufficient to sustain Franklin's convictions;

3. Whether the trial court erred in failing to instruct the jury that a leather belt is not per se a dangerous weapon;
4. Whether the trial court erred in failing to instruct the jury on the definition of “great bodily injury”;
5. Whether the trial court erred in admitting Franklin’s Judgment and Sentence reports without redacting the sentences he received and whether defense counsel was ineffective for failing to request the documents be redacted;
6. Whether Franklin’s sentence is excessive; and
7. Whether the aggregate impact of the errors committed during trial necessitates relief.

We find that Franklin’s conviction for Cruelty to Animals must be reversed with instructions to dismiss and that the sentences on his remaining convictions must be modified for the reasons discussed below

1

The trial court erred in admitting the actual transcript of the victim’s preliminary hearing testimony into evidence because she acknowledged her inconsistent statements made under oath and penalty of perjury. *Neal v. State*, 1992 OK CR 58, ¶ 6, 837 P.2d 919, 920 citing *Kelsey v. State*, 1977 OK CR 300, ¶ 9, 569 P.2d 1028; see also *State v. McBlair*, 1983 OK CR 144, ¶ 4, 670 P.2d 606, 608; *Graves v. State*, 1977 OK CR 158, ¶ 20, 563 P.2d 646, 651; *Sims v. State*, 1987 OK CR 2, ¶ 6, 731 P.2d 1368, 1370. The error, however, is harmless in this case because the trial court also admitted an affidavit from the victim and a tape recording of her recanting her preliminary hearing testimony.

With the admission of this evidence, the danger the jury would place undue emphasis on the victim's preliminary hearing testimony was eliminated.

We further find error, if any, in the admission of the two photographs of Franklin being arrested was harmless. *See Gilbert v. State*, 1997 OK CR 71, ¶¶ 80-81, 951 P.2d 98, 119. With respect to the expert testimony in this case, we find that the trial court exercised proper discretion in considering the detective's qualifications and holding that his knowledge, training and experience was sufficient to qualify him as an expert witness in the field of domestic violence. *Harris v. State*, 2004 OK CR 1, ¶ 37, 84 P.3d 731, 747; *Slaughter v. State*, 1997 OK CR 78, ¶ 19, 950 P.2d 839, 849; 12 O.S.2001, § 2702.

2

We find that the trial evidence was sufficient to justify Franklin's convictions for Assault and Battery with a Dangerous Weapon and Kidnapping. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *see also Jones v. State*, 2006 OK CR 5, ¶ 32, 128 P.3d 521, 537. We do not find, however, that the trial evidence was sufficient to justify Franklin's conviction for Cruelty to Animals. The evidence is sufficient to support a finding that Franklin hit the pit bull dog and caused the scratches on its head. That alone is not enough. The record must demonstrate that the defendant "cruelly" injured the animal. The dog's injury was minimal and insufficient to support a finding of suffering or the infliction of a high degree of pain. The dog was not incapacitated in any way and was active when the police arrived.

There was no evidence the three minor scratches required medical attention or that the dog was even momentarily disabled. The victim testified that Franklin hit the dog and pushed it off of the sofa when it threatened him. His conviction for Cruelty to Animals must be reversed with instructions to dismiss.

3

Franklin did not object to the trial court's instruction defining "dangerous weapon;" review is for plain error only. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. The court's instruction was an accurate statement of the law. Without proof of error, Franklin cannot show plain error. This claim is denied.

4

The trial court did not abuse its discretion in refusing, out of concern for confusion of the issues, to include the definition of "great bodily injury" in the jury instructions. *Patton v. State*, 1998 OK CR 66, ¶ 49, 973 P.2d 270, 288. The instructions, as a whole, accurately stated the applicable law.

5 and 6

We find that Franklin's 250 year sentences for kidnapping and assault and battery with a dangerous weapon are excessive and were driven by improper considerations. The Judgments and Sentences admitted to prove his prior convictions for purposes of enhancing his sentences for his current crimes showed that almost all of Franklin's counts were running concurrently with each other and concurrent to other cases. They also showed he committed the current crimes before the expiration of the sentences in his

previous cases. Such information is not to be considered by the jury. See *Cooper v. State*, 1991 OK CR 26, ¶ 16, 806 P.2d 1136, 1139. Not surprisingly, the jury asked three questions during deliberations about the amount of time Franklin would serve.

It appears Franklin's jury struggled to fashion an appropriate sentence in this case in light of the erroneous information revealed on his prior judgments and sentences, the facts of the case and Franklin's outbursts during court proceedings.¹ The record supports a finding that the jury's recommendation of 250 years imprisonment on all counts was influenced by the unredacted sentencing information on Franklin's judgments and sentences. It is also likely that the jury had difficulty ignoring Franklin's behavior during trial. Under the circumstances of this case, it is understandable and reasonable that the jury wanted Franklin to serve a considerable amount of time for his offenses, but the sentences imposed here are excessive and shock the conscience of this Court. See *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149. Under these circumstances, we find it appropriate to modify Franklin's excessive sentences to 55 years imprisonment for both kidnapping and assault and battery with a dangerous weapon to be served concurrently.

7

Franklin's conviction for cruelty to animals must be reversed and dismissed for insufficient evidence. His sentences on the remaining two counts

¹ While the trial court was reading instructions, Franklin started yelling and stood up. Franklin also cursed his attorney in the presence of the jury before he was removed for a

must be modified because they are excessive. Any other errors committed in this case, even when considered collectively, do not require additional relief.

DECISION

Franklin's Judgment and Sentence for Cruelty to Animals is **REVERSED** and remanded to the district court with instructions to **DISMISS**. His convictions for Assault and Battery with a Dangerous Weapon and Kidnapping are **AFFIRMED** as **MODIFIED**. The district court is instructed to modify the Judgments and Sentences on these convictions from 250 years imprisonment on each to 55 years imprisonment on each to be served concurrently. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

portion of testimony. The trial court instructed the jury not to allow Franklin's outbursts to affect its verdict.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE VIRGIL C. BLACK, DISTRICT JUDGE

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

RE

LUMPKIN, PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I dissent to the reversal of the conviction for Cruelty to Animals as the Court has not properly applied the language of the statute. Under 21 O.S. Supp.2003, § 1685, the issue is whether the animal was “cruelly beaten or injured” not the amount or severity of injury suffered by the animal. While the victim testified that Appellant hit the dog and pushed it off the sofa, other evidence showed the dog had been beaten with a man’s belt. The credibility of witnesses and the weight and consideration to be given to their testimony are within the exclusive province of the trier of facts and the trier of facts may believe the evidence of a single witness on a question and disbelieve several others testifying to the contrary. *Bland v. State*, 2000 OK CR 11, ¶ 29, 4 P.3d 702, 714. Although there may be conflict in the testimony, if there is competent evidence to support the jury's finding, this Court will not disturb the verdict on appeal. *Id.* On appellate review this Court accepts all reasonable inferences which tend to support the jury's verdict. *Scott v. State*, 1991 OK CR 31, ¶ 4, 808 P.2d 73, 76. Here, all reasonable inferences from the evidence support the jury’s verdict.

I also disagree with the attempt to sanitize Appellant’s prior convictions. If the jury is to make proper sentencing decisions, they have a right to know the truth about the defendant. Under the circumstances of this offense, together with the record of prior convictions, it shocks my conscience to modify the sentence to 55 years concurrently. Especially, since we all know the

sentence will not mean what it says under Pardon and Parole Board rules. I would affirm the Judgment and Sentence.