

JUN 15 2006

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

MICHAEL McWHIRT,]	
]	
Appellant,]	
]	
v.]	Case No. F-2005-105
]	
THE STATE OF OKLAHOMA,]	
]	
Appellee.]	

S U M M A R Y O P I N I O N

LEWIS, JUDGE:

Michael McWhirt, Appellant, was tried by jury in the District Court Tulsa County, Case No. CF-2004-1402, and found guilty of Count 1, kidnapping, in violation of 21 O.S. 2001 § 741; Count 2, sexual battery, in violation of 21 O.S.Supp. 2003 § 1123 (B); Count 3, rape by instrumentation, in violation of 21 O.S.Supp. 2002 § 1111; Count 4, forcible sodomy, in violation of 21 O.S.Supp. 2002 § 888; Count 5, forcible sodomy, in violation of 21 O.S.Supp. 2002 § 888; Count 6, rape in the first degree, in violation of 21 O.S. § 1114; Count 7, rape by instrumentation, in violation of 21 O.S.Supp. 2002 § 1111; Count 8, rape in the first degree, in violation of 21 O.S. § 1114; and Count 9, forcible sodomy, in violation of 21 O.S.Supp. 2002 § 888.

The jury sentenced Appellant to ten (10) years imprisonment on Count 1; five (5) years imprisonment on Count 2; fifteen (15) years imprisonment on Count 3; twenty (20) years imprisonment on Count 4; twenty (20) years imprisonment on Count 5; life imprisonment on Count 6; fifteen (15) years

imprisonment on Count 7; life imprisonment on Count 8; and twenty (20) years imprisonment on Count 9. The Honorable Gordon McAllister, Jr., District Judge, imposed judgment and sentence, ordering all terms served consecutively. Mr. McWhirt appeals, raising the following propositions of error:

1. Appellant Was Denied A Fair Trial Because The Testimony About Blood Was More Prejudicial Than Probative.
2. The Prohibition Against Being Free From Double Jeopardy Was Violated.
3. Prosecutorial Misconduct Deprived Appellant Of A Fair Trial.
4. The Trial Court Erred By Failing To Remove Sleeping Jurors.
5. The Sentences Were Excessive.
6. Cumulative Error Deprived Appellant Of A Fair Trial.

Appellant's evidentiary objections in Proposition 1 are waived by failure to object at trial. 12 O.S. 2001 § 2104 (A)(1). Reviewing for plain error, the Court finds none. Testimony and exhibits depicting animal blood seen by the complaining witness in Appellant's van corroborated the testimony of the complaining witness and were probative of her credibility. The jury was not misled as to the source of the blood. The corresponding claim of ineffective assistance of counsel based on the failure to object is also denied. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984).

In Proposition 2, the Court finds Appellant's convictions neither subject to multiple punishments for a single criminal act nor violate the constitutional prohibitions against double jeopardy. 21 O.S. 2001 § 11; *Ziegler*

v. State, 1980 OK CR 23 ¶ 10, 610 P.2d 251, 254; *Doyle v. State*, 1989 OK CR 85, ¶ 16-18, 785 P.2d 317, 324.

In Proposition 3, Appellant claims prosecutorial misconduct denied him a fair trial. We disagree. The challenged questioning of Appellant concerning prior statements to third parties is waived by failure to object. *Weatherly v. State*, 1987 OK CR 28, 733 P.2d 1331. These questions did not implicate Appellant's right to remain silent in the face of custodial interrogation. *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S.Ct. 2240, 2245, 49 L.Ed.2d 91 (1976); *Bland v. State*, 2000 OK CR 11, ¶ 108, 4 P.3d 702. The trial court also sustained an objection to the prosecutor's cross-examination of Appellant asking whether this is "the first time we ever hear your story is today, isn't it?" This cured the error. *White v. State*, 1995 OK CR 15, ¶ 22, 900 P.2d 982, 992. Appellant also claims the prosecutor's argument, "I submit to you that the defense story is a carefully crafted story around the State's evidence," constituted reversible error. Our cases are to the contrary. *McElmurry v. State*, 2002 OK CR 40, ¶ 136, 60 P.3d 4, 31; *Dodd v. State*, 2004 OK CR 31, ¶ 77, 100 P.3d 1017, 1041. The prosecutor's attempt to vouch for the complaining witness by reference to other witnesses' apparent belief that she was telling the truth met with an objection, sustained by the trial court, curing any error. Appellant's remaining arguments alleging prosecutorial misconduct are unconvincing. No relief is required.

Proposition 4 argues that the trial court's failure to *sua sponte* excuse sleeping jurors denied Appellant a fair trial and a unanimous verdict. The record here reflects a single statement by defense counsel during a bench conference that two jurors are "dozing on us." Counsel never identified these jurors, nor was this allegation verified by any evidence or judicial notice of the fact. No relief concerning the alleged dozing of these jurors was requested from the trial court at the time. The record lacks any factual support that would show plain error occurred. The issue is waived. *Randleman v. State*, 1976 OK CR 160, ¶ 21-23, 552 P.2d 90.

Appellant seeks relief in Proposition 5 on the ground that his sentences are excessive. The jury imposed the maximum sentences available for Appellant's offenses. Life sentences and similar terms of imprisonment for this type of criminal episode are not unusual. Cf. *Commander v. State*, 1987 OK CR 43, 734 P.2d 313 (abduction, assault, and rape, with 10 years, 143 years, and 147 years respectively); *Jones v. State*, 1988 OK CR 267, 764 P.2d 914 (75 years); *Doyle v. State*, 1989 OK CR 85, 785 P.2d 317 (abduction and rape, with 125 years on each count of rape; 30 years for each count of sodomy). The sentences are within the authorized statutory range for these offenses and do not shock the conscience. *Cipriano v. State*, 2001 OK CR 25, 32 P.3d 869.

The jury was not instructed that Appellant must serve 85% of his sentences for rape and forcible sodomy, 21 O.S.Supp. 2003 § 13.1, resulting in plain error under our decision in *Anderson v. State*, 2006 OK CR 6, ___ P.3d

____. This trial predates our decision in *Anderson*, but we apply *Anderson* to all cases involving an 85% offense pending on direct appeal at the time *Anderson* was decided. Considering the facts and circumstances presented here, the instructional error had no substantial influence on the outcome and requires no relief. 20 O.S. § 3001.1. *Simpson v. State*, 1994 OK CR 40, ¶ 36, 876 P.2d 690.

Appellant's Proposition 6, arguing for reversal due to cumulative error, is without merit.

DECISION

The Judgments and Sentences of the District Court of Tulsa County are **AFFIRMED**. Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE GORDON McALLISTER, JR., DISTRICT JUDGE

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OPINION BY LEWIS, J.

CHAPEL, P.J.: Concurs in Results
LUMPKIN, V.P.J.: Concurs in Results
A. JOHNSON, J.: Concurs
C. JOHNSON, J.: Concurs