IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOE LEE BIRMINGHAM,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

Case No. F-2008-214

SUMMARY OPINION

LEWIS, JUDGE:

Joe Lee Birmingham, Appellant, was tried by jury in the District Court of Oklahoma County, Case Number CF-2003-3533, and convicted of three counts of lewd and indecent acts with a child under sixteen, in violation of 21 O.S.Supp.2002, § 1123 (Version 1). Appellant was acquitted of a charge of indecent exposure. The jury sentenced Appellant to four (4) years imprisonment for each offense. The Honorable Susan Bragg, District Judge, imposed judgment and ordered the sentences served consecutively. Mr. Birmingham appeals in the following propositions of error:

1. Appellant Was Prejudiced By The Trial Court's Refusal To Admit Relevant Evidence Of Appellant's Medical Condition, Which Was Essential To Appellant's Defense.

2. Mr. Johnson Received Ineffective Assistance Of Counsel.

3. The Evidence Was Insufficient To Support Appellant's Convictions On Counts I, III, And IV—Lewd Or Indecent Acts With A Child Under Sixteen Years Of Age.

4. Appellant Was Prejudiced By The Trial Court's Failure To Sufficiently Instruct The Jury On All Salient Features Of The Law Applicable To Appellant's Case.

5. Appellant Was Prejudiced By The Trial Court's Error In Allowing Count I Of The Information To Be Amended Following The State's Trial Evidence.

6. Appellant Was Prejudiced By The Prosecutor's Improper Closing Argument.

7. Appellant's Sentence Is Excessive And Should Be Modified.

8. Appellant Was Prejudiced By Cumulative Error.

Appellant argues in Proposition One that the exclusion of evidence that he suffers from Amyotrophic Lateral Sclerosis (ALS), or Lou Gehrig's Disease, denied him a fair trial. The right of the accused to confront the prosecution's witnesses, and to present his own witnesses to establish a defense, is a fundamental element of due process of law. *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967). This right is not absolute, but extends to evidence which is "relevant and material to the defense." *Washington*, 388 U.S. at 23, 87 S.Ct. at 1925, *quoted in Sherrick v. State*, 1986 OK CR 142, ¶ 6, 725 P.2d 1278, 1282. Appellant's defense to the charges was that he did not touch his accuser in the way she described. He testified that he was physically incapable of touching her as alleged, because he has no control of his thumbs. However, Appellant admitted that he rubbed the complaining witness' legs on the occasions alleged in the Information. Appellant was therefore physically capable of touching the victim, and whether he touched her private parts in any lewd or lascivious manner was a question for the jury. Evidence of his ALS made it no more or less probable that Appellant touched the complaining witness as she

alleged, and was to that extent irrelevant to his defense. The District Court did not abuse its discretion in excluding evidence of Appellant's ALS at trial. Proposition One is denied.

In Proposition Two, Appellant claims he was denied effective assistance of counsel by counsel's unreasonable failure to conduct an adequate *voir dire* and effectively use peremptory challenges, failure to present evidence that Appellant's touching of the complaining witness was part of standard karate instruction, failure to request proper jury instructions, and failure to present evidence of Appellant's ALS at trial or sentencing. In connection with his claims regarding evidence of ALS, Appellant has filed an *Application to Supplement Appeal Record On Claim of Ineffective Assistance of Trial Counsel and/or Request for Evidentiary Hearing.*

Under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), Appellant must show counsel's performance was objectively unreasonable under prevailing professional norms; and that counsel's substandard representation creates a reasonable probability that the outcome of the trial would have been different. *Jiminez v. State*, 2006 OK CR 43, ¶ 5, 144 P.3d 903, 905. A reasonable probability is one that undermines confidence in the outcome. *Jones v. State*, 2006 OK CR 5, ¶ 91, 128 P.3d 521, 548. When a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed. *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069. Reviewing Appellant's claims according to the *Strickland* standard, we find that Appellant has not shown how counsel's allegedly unprofessional acts

and omissions create any reasonable probability of a different outcome at trial or sentencing.

Specifically, Appellant has not shown that counsel's *voir dire* resulted in a trial before a biased tribunal or jurors who were unqualified to serve. Counsel's failure to present evidence of standard karate instruction methods caused no prejudice to Appellant, because the acts alleged (touching a girl's body and private parts in any lewd or lascivious manner) were not part of any approved karate instruction method. We have already addressed how evidence of Appellant's ALS was not relevant to his defense, as he denied the inappropriate touching altogether rather than claiming he touched the complaining witness' private parts by accident or mistake as a result of his disability. Since Appellant's defense was not accident or mistake, nor was counsel ineffective for failing to request instructions on this defense. As to presenting evidence of ALS as a mitigating factor, such evidence is inadmissible in a non-capital trial. *Malone v. State*, 2002 OK CR 34, 58 P.3d 208, 209. The District Court was aware of Appellant's condition at sentencing despite the absence of any formal evidence about his ALS. Appellant cannot show any reasonable probability of a different outcome as a result of counsel's failure to present such evidence at formal sentencing. Proposition Two, and Appellant's *Application to Supplement Appeal Record On Claim of Ineffective Assistance of Trial Counsel and/or Request for Evidentiary Hearing,* are denied.

In Proposition Three, we review Appellant's challenge to the sufficiency of the evidence to determine whether the evidence, viewed in the light most

favorable to the State, would permit any rational trier of fact to find the elements of the charged offense beyond a reasonable doubt. *Spuehler v. State*, 1985 OK CR 132, 709 P.2d 202. The evidence here demonstrates every element of the charged offenses. Proposition Three is denied.

Appellant's belated attack on the jury instructions in Proposition Four is waived by a failure to object or request different instructions at trial. *Price v. State*, 1989 OK CR 74, 782 P.2d 143. We review the instructions only for plain error. Appellant's argument that the District Court should have *sua sponte* given instructions on the defense of accident is frivolous. Appellant's defense was that the complaining witness and her mother had framed him, pure and simple. We also summarily reject Appellant's argument that the District Court should have instructed the jury on the requirement of sex offender registration as a consequence of conviction.

Appellant next complains that the District Court omitted a definition of the terms "lewd" and "lascivious" from its instruction on the elements of the offense. The District Court's instruction clearly deviated from the uniform instructions for no apparent reason. OUJI-CR(2d) 4-139. The jury was properly instructed as to the material elements of the offense and was not misled by the lack of a further definition of the terms "lewd" or "lascivious." *Martin v. State*, 1975 OK CR 63, ¶¶ 10-11, 534 P.2d 685, 688. We have no grave doubt that the error had a substantial influence on the outcome of the trial, and thus no relief is warranted. *Simpson v. State*, 1994 OK CR 40, ¶ 36, 879 P.2d 690, 702.

Appellant also argues the District Court erred in failing to instruct the jury he would have to serve 85% of any sentences imposed for his crimes, as we required in *Anderson v. State,* 2006 OK CR 6, 130 P.3d 273. The claim is also waived by failure to object or request a different instruction at trial. We have consistently reviewed such claims for plain error when raised on direct appeal, even in cases tried before our decision in *Anderson. Carter v. State,* 2006 OK CR 42, 147 P.3d 243. As we have seen in other cases of *Anderson* error, a specific combination of factors convinces us that the lack of important "information about the length of time served on sentences . . . creates grave doubt that the lack of an 85 % instruction prejudicially impacted the sentencing deliberations." *Ball v. State,* 2007 OK CR 24, ¶ 56, 173 P.3d 81, 95; *Carter,* at ¶ 7, 147 P.3d at 245.

The jury gave Appellant a relatively lenient sentence in each of three counts, and acquitted him in a fourth count. The jury was not entirely unaware of Appellant's medical condition, although its progressive and ultimately fatal trajectory was not in evidence. We also consider the fact that pre-*Anderson* sentences affected by the 85% Rule are potentially tainted by jurors' "rounding up" of sentences to account for their uninformed guesses about the impact of parole. *Anderson,* at ¶ 23, 130 P.3d at 282. The jury clearly intended that Appellant be punished for his criminal acts, and he has been punished. After careful consideration of this unique case, we find an order remanding for re-sentencing is likely an ineffective remedy for Appellant due to the advanced stage of his disease and its progressive deterioration of his

mental and physical abilities. We therefore modify Appellant's sentences of four (4) years imprisonment each in Counts I, III, and IV to be served concurrently.

In Proposition Five, Appellant argues the amendment to the District Court Information at the close of the State's evidence to conform to the proof was reversible error. We find this procedure was entirely proper and did not prejudice Appellant's defense. *Sykes v. State*, 1952 OK CR 86, 96 Okl.Cr. 9, 246 P.2d 379. In Proposition Six, Appellant claims the prosecutor's misconduct denied him a fair trial. We disagree. The prosecutor's arguments were fair comments on the evidence and the jury's duty to resolve questions of credibility of witnesses. In Proposition Seven, Appellant claims his sentence is excessive, and in Proposition Eight, he seeks relief from cumulative error. Given our resolution of Proposition Four, we find no further relief is required. Propositions Five, Six, Seven, and Eight are denied.

DECISION

The Judgment and Sentence of the District Court of Oklahoma County is **MODIFIED** to **FOUR (4) YEARS IMPRISONMENT** in each of Counts I, III, and IV, all to be served **CONCURRENTLY,** and as modified, is **AFFIRMED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2008), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE SUSAN BRAGG, DISTRICT JUDGE

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G. LUMPKIN, J.: Concur
C. CHAPEL, J.: Concur