IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SHAWN CONRAD FREEMAN	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2017-758**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, JUDGE:

Appellant, Shawn Conrad Freeman, was tried by jury and convicted of Kidnapping (Counts 1, 4, 9 and 15) (21 O.S.Supp.2012, § 741), Forcible Sodomy (Counts 2, 5, 7, 10, and 17) (21 O.S.2011, § 888), Rape in the First Degree (Counts 3, 6, 8, and 11) (21 O.S.2011, § 1115), and Robbery in the First Degree (Count 16) (21 O.S.2011, § 798) in District Court of Tulsa County Case Number CF-2015-6211.[1] The jury recommended as punishment imprisonment for twenty (20) years and a $10,000.00 fine, each, in Counts 1-2, 4-5, 7, 9-10, 15 and 17; imprisonment for life and a $10,000.00 fine, each, in Counts 3, 6, 8, and 11; and imprisonment

[1] The State dismissed Counts 12, 13, and 14 at preliminary hearing.

for five (5) years and a $1,000.00 fine in Count 16. The trial court sentenced Appellant in accordance with the jury's recommendation and ordered the sentences to run consecutively. It is from this judgment and sentence that Appellant appeals.[2]

Appellant raises the following propositions of error in this appeal:

I. Convictions and sentences for Kidnapping, Rape, and Forcible Sodomy violated Mr. Freeman's right to be free from multiple punishment under 21 O.S.2011, § 11.

II. Plain, fundamental error occurred when the State was allowed to prosecute fourteen alleged crimes against four separate women, who supposedly did not know each other, in one trial, encouraging the jury to convict Mr. Freeman based on an aggregate of the evidence presented, rather than adequate proof of each individual charge.

III. The trial court erred by ruling that a key State's witness was unavailable for trial and permitted the State to read her preliminary hearing testimony to the jury.

IV. The State failed to prove all of the elements beyond a reasonable doubt required for the offense of Robbery.

V. Prosecutorial misconduct deprived Mr. Freeman of his rights to due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments to the U.S.

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[2] Appellant is required to serve 85% of his sentences prior to becoming eligible for consideration for parole. 21 O.S.2011, § 13.1.

Constitution and Article II, §§ 7 and 20 of the Oklahoma Constitution.

VI. Mr. Freeman received ineffective assistance of counsel.

VII. Mr. Freeman received excessive sentences.

VIII. Cumulative error deprived Mr. Freeman of a fair trial.

IX. Inaccuracy in the Judgment and Sentence on Count 16 should be corrected by entry of a *Nunc Pro Tunc* Judgment and Sentence.

After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts and briefs of the parties, we have determined that neither reversal nor modification of sentence is warranted under the law and the evidence but remand this matter to the District Court to correct the scrivener's error identified in Proposition Nine.

In Proposition One, Appellant contends that his convictions for Kidnapping, Rape, and Forcible Sodomy violate the State statutory proscription against multiple punishments as well as constitutional prohibitions against double punishment. He concedes that he waived appellate review of this claim for all but plain error when he failed to raise this challenge at trial. *Logsdon v. State*, 2010 OK CR 7, ¶ 15, 231 P.3d 1156, 1164); *Head v. State*, 2006 OK CR 44, ¶ 9,

146 P.3d 1141, 1144. Therefore, we review Appellant's claim pursuant to the test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, and determine whether Appellant has shown an actual error, which is plain or obvious, and which affects his substantial rights. *Baird v. State*, 2017 OK CR 16, ¶ 25, 400 P.3d 875, 883. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*

Appellant's convictions for Kidnapping, Rape, and Forcible Sodomy do not violate 21 O.S.2011, § 11 because the offenses constitute separate and distinct crimes. *Sanders v. State*, 2015 OK CR 11, ¶ 6, 358 P.3d 280, 283; *Logsdon*, 2010 OK CR 7, ¶ 18, 231 P.3d at 1165.[3] As each act was completed before the next, the offenses were separated by time and were separately punishable. *Doyle v. State*, 1989 OK CR 85, ¶ 16, 785 P.2d 317, 324; *Riley v. State*, 1997 OK CR 51, ¶ 13, 947 P.2d 530, 533.

[3] This Court has explicitly repudiated the "mere means to some other ultimate objective, or part of some primary offense" test. *Davis v. State*, 1999 OK CR 48, ¶ 10, 993 P.2d 124, 126.

Appellant's convictions for Kidnapping, Sodomy, and Rape do not violate the prohibition against double jeopardy set forth in *Blockburger v. United States*, 288 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). We have long recognized that kidnapping, rape, and sodomy are separate and distinct offenses, each requiring dissimilar proof of their several elements. *Doyle v. State*, 1989 OK CR 85, ¶ 16, 785 P.2d 317, 324; *Stockton v. State*, 1973 OK CR 200, ¶ 5, 509 P.2d 153, 154-55.

Since Appellant's convictions constitute separate and distinct offenses under both § 11 and *Blockburger*, we find that he has not shown that error, plain or otherwise, occurred. Proposition One is denied.

In Proposition Two, Appellant contends that the trial court erred by failing to sever the trial of his fourteen counts. The State charged all of the offenses in a single Information. Appellant concedes that at no point in the proceedings did he either request a severance or object to the joinder of the offenses. Therefore, we find that he has waived appellate review of this claim for all but plain error. *Collins v. State*, 2009 OK CR 32, ¶ 12, 223 P.3d 1014, 1017; *Huddleston v. State*, 1985 OK CR 12, ¶ 12, 695 P.2d 8, 10. We review Appellant's

claim for plain error under the test set forth above and determine whether Appellant has shown an actual error, which is plain or obvious, and which affects his substantial rights. *Baird v. State*, 2017 OK CR 16, ¶ 25, 400 P.3d 875, 883.

Reviewing the record, we find that Appellant has not shown the existence of an actual error. The offenses were properly combined in a single Information and joined for trial. The acts alleged within the fourteen counts were part of "a series of criminal acts or transactions," involving the same type of offenses, occurring relatively close in time, in approximately the same location, and proof as to each of the offenses overlapped sufficiently to create a logical connection between the offenses. *Smith v. State*, 2007 OK CR 16, ¶¶ 29-31, 157 P.3d 1155, 1166; *Lott v. State*, 2004 OK CR 27, ¶ 34, 98 P.3d 318, 333; *Gilson v. State*, 2000 OK CR 14, ¶ 48, 8 P.3d 883, 905. Joinder of the offenses did not deprive Appellant of a fundamentally fair trial. *Mitchell v. State*, 2011 OK CR 26, ¶ 24, 270 P.3d 160, 171, overruled on other grounds by *Nicholson v. State*, 2018 OK CR 10, ¶ 24, 421 P.3d 890. Evidence of any of the offenses would have been admissible in a trial of the other as either proof of identity under 12 O.S.2011, § 2404(B) or sexual propensity

evidence as set forth in 12 O.S.2011, § 2413(A). See *Lott*, 2004 OK CR 27, ¶ 37, 98 P.3d at 334. Proposition Two is denied.

In Proposition Three, Appellant contends that the trial court erred when it found one of the victims was unavailable to testify at trial and admitted the transcript of her testimony from preliminary hearing. He argues the admission of the transcript violated his constitutional rights to confrontation.

Reviewing the record, we find that the trial court did not abuse its discretion. *Willis v. State*, 2017 OK CR 23, ¶ 13, 406 P.3d 30, 34. The trial court's determination that the victim was unavailable despite the good faith and due diligence of the prosecution was not a clearly erroneous conclusion or judgment. *Barber v. Page*, 390 U.S. 719, 724–25, 88 S. Ct. 1318, 1322, 20 L. Ed. 2d 255 (1968); *Stouffer v. State*, 2006 OK CR 46, ¶ 82, 147 P.3d 245, 265; *Cleary v. State*, 1997 OK CR 35, ¶ 16, 942 P.2d 736, 744; 12 O.S.Supp.2014, § 2804(A). Appellant had been given a full and fair opportunity to cross-examine the victim at the preliminary hearing. The transcript of that testimony afforded the trier of fact a satisfactory basis for evaluating the truth of her prior statement. *Mancusi v. Stubbs*, 408 U.S. 204, 216, 92 S.Ct. 2308, 2315, 33 L.Ed.2d 293 (1972);

California *v. Green*, 399 U.S. 149, 165, 90 S.Ct. 1930, 1938-39, 26 L.Ed.2d 489 (1970); *Howell v. State*, 1994 OK CR 62, ¶ 18, 882 P.2d 1086, 1091. Because the witness was unavailable, and Appellant had a prior opportunity to cross-examine the witness at preliminary examination, admission of the transcript at trial did not violate Appellant's right to confrontation. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 1374, 158 L.Ed.2d 177 (2004). Proposition Three is denied.

In Proposition Four, Appellant challenges the sufficiency of the evidence supporting his conviction for Robbery in the First Degree. This Court follows the standard for the determination of the sufficiency of the evidence which the United States Supreme Court set forth in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204. Under this test, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319, 99

S.Ct. at 2789; *Easlick*, 2004 OK CR 21, ¶ 5, 90 P.3d at 558-59; *Spuehler*, 1985 OK CR 132, ¶ 7, 709 P.2d at 203-204.

Taking the evidence in the present case in the light most favorable to the State, we find that any rational trier of fact could have found the requisite elements of the charged offense beyond a reasonable doubt. The evidence tended to show that through threats and physical violence Appellant wrongfully took the victim's dentures and cellphone from her person and carried them away. *Trevino v. State*, 1987 OK CR 89, ¶ 3, 737 P.2d 575, 577; *Webb v. State*, 1987 OK CR 18, ¶ 7, 732 P.2d 478, 479; Instruction Number 4-141, OUJI-CR(2d)). Proposition Four is denied.

In Proposition Five, Appellant contends that prosecutorial misconduct deprived him of a fair trial. He concedes that he waived appellate review of this claim for all but plain error when he failed to object to the prosecutor's comments at trial. Therefore, we review his claim pursuant to the test set out above and determine whether he has shown an actual error, which is plain or obvious, and which affects his substantial rights. *Malone v State*, 2013 OK CR 1, ¶ 41, 293 P.3d 198, 211-212.

Reviewing the record, we find that Appellant has not shown the existence of an actual error within any of his allegations. The argument of counsel at the formal sentencing hearing two months after trial did not deprive Appellant of fundamentally fair sentencing proceeding. See *United States v. Bustamante*, 454 F.3d 1200, 1202 (10th Cir. 2006) (constitutional requirement of confrontation does not apply to non-capital sentencing proceedings.; *Malone*, 2013 OK CR 1, ¶ 26, 293 P.3d 198, 209 (This Court presumes that trial court acting as trier of fact only considers competent and admissible evidence in reaching a decision); 12 O.S.2011, § 2103(B)(2) (Evidence Code does not apply to formal sentencing proceedings).

The prosecutor did not misstate the evidence during trial or closing argument. *Sanders v. State*, 2015 OK CR 11, ¶ 21, 358 P.3d 280, 286; *Langley v. State*, 1991 OK CR 66, ¶ 24, 813 P.2d 526, 531. Similarly, he did not misstate the law concerning kidnapping, the presumption of innocence or the 85% Rule during closing argument. *Runnels v. State*, 2018 OK CR 27, ¶¶ 28-30, 426 P.3d 614, 621-22; *Lee v. State*, 2018 OK CR 14, ¶ 10, 422 P.3d 782, 785; *Williams v. State*, 2001 OK CR 9, ¶ 20, 22 P.3d 702, 711. The prosecutor's remarks did not impermissibly shift the burden of

proof. *Roy v. State*, 2006 OK CR 47, ¶ 44, 152 P.3d 217, 231-32; *Robinson v. State*, 1995 OK CR 25, ¶ 22, 900 P.2d 389, 398.

Reviewing the entire record, the cumulative effect of the prosecutor's comments did not deprive Appellant of a fair trial. *Daniels v. State*, 2016 OK CR 2, ¶ 13, 369 P.3d 381, 385. Therefore, we find that Appellant has not shown that error, plain or otherwise, occurred. Proposition Five is denied.

In Proposition Six, Appellant challenges the effectiveness of defense counsel. This Court reviews ineffective assistance of counsel claims under the two-part test mandated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206.

Appellant argues that counsel was ineffective for failing to raise the challenges that he now raises in Propositions One, Two, Three, and Five. We determined in those propositions that Appellant had not shown that error, much less plain and reversible error, had occurred. Since the merits of the underlying claims have been rejected, we find that Appellant has not shown ineffective assistance

of counsel. *Glossip v. State*, 2007 OK CR 12, ¶¶ 110-12, 157 P.3d 143, 161.

Appellant further argues that counsel was ineffective for failing to use available evidence to impeach two of the victims at trial. He admits that nothing in the record supports this allegation. As such, we conclude that Appellant has not shown ineffective assistance of trial counsel under *Strickland*. Proposition Six is denied.

Contemporaneous with the filing of his Brief, Appellant filed his *Application to Supplement the Appeal Record, or in the Alternative, Request for Evidentiary Hearing Pursuant to Rule 3.11 on Sixth Amendment Claim of Ineffective Assistance of Counsel.* He seeks to supplement the record with information he asserts that trial counsel should have used to impeach two of the victims.

Reviewing Appellant's application, affidavit, and attachments we find that Appellant has not established clear convincing evidence of a strong possibility that counsel was ineffective for failing to utilize the cited information to impeach the two victims at trial. *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905–906. The alleged impeachment evidence was cumulative to other impeachment evidence at trial. Therefore, we find that Appellant

has not shown a reasonable probability that the outcome of the trial would have been different absent counsel's failure to introduce the proffered evidence. Appellant's Application is **DENIED**.

In Proposition Seven, Appellant contends that his sentences are excessive. Reviewing all of the facts and circumstances of the case, we find that Appellant's sentences are not so excessive as to shock the conscience of the Court. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149; *Freeman v. State*, 1994 OK CR 37, ¶ 38, 876 P.2d 926, 930. Proposition Seven is denied.

In Proposition Eight, Appellant claims the combined errors in his trial denied him the right to a constitutionally guaranteed fair trial. When there have been numerous irregularities during the course of a trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors is to deny the defendant a fair trial. *Bechtel v. State*, 1987 OK CR 126, ¶ 12, 738 P.2d 559, 561. We have not identified any error during the course of the trial in the present case. Therefore, no new trial or modification of sentence is warranted and this assignment of error is denied. *Baird v. State*, 2017 OK CR 16, ¶ 42, 400 P.3d 875, 886 Proposition Eight is denied.

As to Proposition Nine, we find the existence of a scrivener's error in the Judgment and Sentence document in Count 16. The Judgment and Sentence imposed a $10,000.00 fine, however, the jury recommended and the trial court sentenced Appellant to a $1,000.00 fine. This obvious clerical error should be corrected by order *nunc pro tunc*. *Head v. State*, 2006 OK CR 44, ¶ 30, 146 P.3d 1141, 1149; *Arnold v. State*, 1987 OK CR 220, ¶ 9, 744 P.2d 216, 218; *Dunaway v. State*, 1977 OK CR 86, ¶ 19, 561 P.2d 103, 108. Upon remand, the district court is directed to enter an order *nunc pro tunc* correcting the Judgment and Sentence document to accurately reflect the $1,000.00 fine imposed at sentencing.

DECISION

The Judgment and Sentence of the District Court is hereby **AFFIRMED**. This matter is **REMANDED** to the District Court with instructions to enter an order *nunc pro tunc* correcting the Judgment and Sentence in Count 16 to accurately reflect the $1,000.00 fine imposed at sentencing. Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2018), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY,
HONORABLE WILLIAM D. LAFORTUNE, DISTRICT JUDGE

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LEWIS, P.J.: Concur
KUEHN, V.P.J.: Concur
HUDSON, J.: Concur
ROWLAND, J.: Concur