IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CHRISTOPHER WAYNE GOLDMAN,	)	
	)	**NOT FOR PUBLICATION**
Appellant,	)	
v.	)	Case No. F-2015-457
	)	
STATE OF OKLAHOMA	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, VICE PRESIDING JUDGE:

Appellant Christopher Wayne Goldman was tried by jury and convicted of First Degree Rape (Count I) (21 O.S.2011, § 1111); Rape by Instrumentation (Count II) (21 O.S.2011, § 111.1); Forcible Sodomy (Count III) (21 O.S.2011, § 888) and Incest (Count IV) (21 O.S.2011, § 885), Case No. CF-2013-421, in the District Court of Muskogee County. The jury recommended as punishment imprisonment for ten (10) years in Counts I and II, seven (7) years in Count III and three (3) years in Count IV. The trial court sentenced accordingly, ordering the sentences in Counts I, II and III to run concurrently to each other and consecutively to Count IV, with three (3) years of post-imprisonment supervision.[1] It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of his appeal:

[1] Appellant must serve 85% of his sentence in Counts I and III before becoming eligible for consideration for parole. 21 O.S.2011, § 13.1.

I. The prosecution's case was insufficient to prove Appellant was guilty of Count I – First Degree Rape, Count III – Forcible Oral Sodomy, or Count IV – Incest, beyond a reasonable doubt.

II. The presentation of highly prejudicial, irrelevant and improperly admitted evidence by the State violated Appellant's rights to due process, an impartial jury panel, and a fair trial.

III. The prosecutor argued evidence to the jury that had never been admitted at trial and misstated facts in evidence resulting in prejudice to Appellant.

IV. The trial court erroneously failed to give Oklahoma Uniform Jury Instruction OUJI-CR 9-6A and also erroneously failed to advise the jury that Appellant would be subject to the additional punishment of sex offender registration if convicted in this case.

V. Appellant was prejudiced by ineffective assistance of counsel.

VI. The cumulative effect of all these errors deprived Appellant of a fair trial and warrant relief for Appellant.

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 under the law and the evidence, Count IV must be reversed and dismissed.

In Proposition I, Appellant challenges the sufficiency of the evidence to support the convictions for first degree rape (Count I), forcible sodomy (Count III) and incest (Count IV). Under our case law, convictions for both rape and incest based upon the same act is a violation of 21 O.S.2011, § 11(A) which warrants relief. *Hale v. State,* 1995 OK CR 7, ¶ 6, 888 P.2d 1027, 1030, *abrogated on other grounds, Davis v. State,* 1999 OK CR 48, ¶¶ 9-13, 993 P.3d

124, 126. The evidence in this case shows that the rape and incest convictions were based on the same act. This error was not raised before the trial court. Under 12 O.S.2011, § 2104, this Court may take notice of plain errors affecting the Appellant's substantial rights although the errors were not brought to the attention of the Court. Under a plain error review, an appellant must show an actual error, which is plain or obvious, affecting his substantial rights. *Malone v State*, 2013 OK CR 1, ¶ 41, 293 P.3d 198, 211-212; *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395; *Simpson v. State*, 1994 OK CR 40, ¶¶ 10, 26, 30, 876 P.2d 690, 694, 699, 701. We will correct plain error only if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.* *See also* 20 O.S. 2011, § 3001.1.

In the present case, the prosecution for both rape and incest for the same act represents a violation of Appellant's substantial rights in that he received an additional conviction and sentence had the error not been made. Allowing this statutorily proscribed double punishment to stand would undoubtedly bring the fairness and integrity of the entire trial into serious question. Appellant's conviction in Count IV for Incest is the result of plain error that rises to the level requiring reversal of the conviction. We therefore find it necessary to reverse with instructions to dismiss Count IV.

As a result, our review of the sufficiency of the evidence is limited to Counts I and III. Challenges to the sufficiency of the evidence are reviewed in the light most favorable to the prosecution to determine whether any rational

trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *Rutan v. State*, 2009 OK CR 3, ¶ 49, 202 P.3d 839, 849; *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559.

Title 21 O.S.2011, § 1113 states that "any sexual penetration, however slight, is sufficient to complete the crime" of rape. Therefore, penetration of the female vagina by the defendant's penis must be proven as an element of the crime. *Bales v. State*, 1992 OK CR 24, ¶¶ 5-6, 829 P.2d 998, 999 *citing Commander v. State*, 1987 OK CR 43, ¶ 5, 734 P.2d 313, 315. The testimony need not be graphic; it is sufficient if there is some testimony to show penetration. *Id.* 1992 OK CR 24, ¶ 6, 829 P.2d at 999-1000. The same standard applies for a conviction for sodomy. Proof of penetration, however slight, is sufficient to support a conviction for sodomy. *Riley v. State*, 1997 OK CR 51, ¶ 6, 947 P.2d 530, 532; *Salyers v. State*, 1988 OK CR 88, ¶ 7, 755 P.2d 97, 100; *Hicks v. State*, 1986 OK CR 7, ¶ 8, 713 P.2d 18, 20. *See also* 21 O.S.2011, § 887.

The record in this case contains some conflict in the evidence of penetration. However, despite these conflicts, this Court will not disturb the jury's verdict if there is competent evidence to support it. *Rutan*, 2009 OK CR 3, ¶ 49, 202 P.3d at 849. On appellate review this Court accepts all reasonable inferences which tend to support the jury's verdict. *Id.* Viewing the evidence in the light most favorable to the State, all reasonable inferences support the jury's finding that penetration occurred and the verdicts of guilt in Counts I and III.

In Proposition II, we review Appellant's challenge to the admissibility of evidence of his conduct in the police interrogation room for plain error. Pursuant to the test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, an appellant must show an actual error, which is plain or obvious, affecting his substantial rights. *Malone,* 2013 OK CR 1, ¶ 41, 293 P.3d at 211-212; *Levering,* 2013 OK CR 19, ¶ 6, 315 P.3d at 395; *Simpson*, 1994 OK CR 40, ¶¶ 10, 26, 30, 876 P.2d at 694, 699, 701. We will correct plain error only if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*

Hours after being accused of sexually assaulting his niece, Appellant waited in an interview room to be interrogated by police. Video of his wait caught him placing his hand in his pants, rubbing his genital area, pulling his hand out and sniffing it. Appellant then spit in his hand, placed it back inside his pants and rubbed his genital area. He did this more than once. When asked later to explain his actions, he said he could not remember if anything sexual happened with his niece, but if it did, he wanted to remove any sexual odor from his genitals.

Appellant's conduct fits the definition of "post offense conduct" sometimes referred to as "admissions by conduct" relevant to show a defendant's consciousness of guilt, *i.e.,* his identity as the perpetrator of the charged offense. *Dodd v. State,* 2004 OK CR 31, ¶ 33, 100 P.3d 1017, 1031. A defendant's post-offense conduct is relevant if it tends in any degree to show consciousness of guilt, and should not be excluded unless it concerns matters

that would overshadow the issues in the case and distract the jury into punishing the defendant simply for being a bad person. *Dodd*, 2004 OK CR 31, ¶ 36, 100 P.3d at 1031. Here, Appellant's conduct is distasteful but his explanation of his conduct is directly related to the criminal charges against him. There was no error, and thus no plain error in the admission of the evidence.

We review for abuse of discretion the trial court's admission of testimony from Chasady Radebaugh that Appellant patted her backside before she went to bed in the victim's house the night before the victim's sexual assault and that Appellant was standing by her bedroom door the next morning. *See Davis v. State*, 2011 OK CR 29, ¶ 156, 268 P.3d 86, 125 (the admission of evidence is left to the sound discretion of the trial court and will not be disturbed absent an abuse of discretion).

Appellant's conduct was not evidence of another crime or bad act, but was relevant to show his conduct near the time of the crimes. Even if we were to find the evidence was not relevant, any error in its admission was harmless beyond a reasonable doubt because we can say from a review of the record, that Radebaugh's testimony did not have a substantial influence on the outcome of the trial. *See Welch v. State*, 2000 OK CR 8, ¶ 29, 2 P.3d 356, 370. Therefore, the trial court did not abuse its discretion in admitting the evidence.

In Proposition III, we evaluate Appellant's claims of prosecutorial misconduct within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence

against the defendant and the corresponding arguments of defense counsel. *Mitchell v. State*, 2010 OK CR 14, ¶ 97, 235 P.3d 640, 661; *Cuestra-Rodriquez v. State*, 2010 OK CR 23, ¶ 96, 241 P.3d 214, 243. Relief will be granted only where the prosecutor committed misconduct that so infected the defendant's trial that it was rendered fundamentally unfair, such that the jury's verdicts should not be relied upon. *Bosse v. State*, 2015 OK CR 14, ¶ 75, 1203, 1232; *Roy v. State*, 2006 OK CR 47,¶ 29, 152 P.3d 217, 227.

We find the prosecutor's reference in closing argument to portions of the Preliminary Hearing transcript not admitted at trial did not deny Appellant a fair trial. *See Pickens v. State*, 1993 OK CR 15, ¶ 64, 850 P.2d 328, 343 (in determining whether a prosecutor's closing remarks were outside the record and so prejudicial as to warrant a reversal, the error is to be considered in light of the evidence and whether the remarks can be said to have influenced the verdict against the appellant). The comments were made in response to defense counsel's characterization of the evidence during closing argument and were consistent with the testimony at trial. *See Warner v. State*, 2006 OK CR 40, ¶ 182, 144 P.3d 838, 889 (comments upheld which responded to and were invited by defense counsel).

In Proposition IV, we review for plain error Appellant's claims the trial court erred in failing to instruct the jury that they must give separate consideration to each charge and that if convicted, Appellant would be required to register as a sex offender. *See Daniels v. State*, 2016 OK CR 2, ¶ 3, ___ P.3d ___; *Marshall v. State*, 2010 OK CR 8, ¶ 55, 232 P.3d 467, 480.

Oklahoma Uniform Jury Instructions-Criminal 2d 9-6A (OUJI-CR 2d 9-6A) instructs the jury that they must give separate consideration for each charge in the case. This instruction is not required unless any party has made a timely request for it. *Taylor v. State*, 2011 OK CR 8, ¶¶ 14-18, 248 P.3d 362, 368. Here, Appellant did not request the instruction be given to the jury. The absence of the instruction did not deny Appellant a fair trial as the jury was otherwise adequately instructed. Further, nothing in the record suggests the jury did not give separate consideration to each offense. *See Miller v. State*, 2013 OK CR 11, ¶ 136, 313 P.2d 934, 980. We find no error and thus no plain error in the absence of the instruction.

Regarding the absence of an instruction on sex offender registration, it is well established that the trial court is to instruct the jury on the salient features of the law, including the applicable range of punishment the jurors may consider under the law and facts of the case. *Hogan v. State*, 2006 OK CR 19, ¶ 39, 139 P.3d 907, 923; *Hicks v. State*, 2003 OK CR 10, ¶ 3, 70 P.3d 882, 883; *Simpson v. State*, 1992 OK CR 13, ¶ 13, 827 P.2d 171, 174. The trial court must instruct the jury as to all of the punishment options listed within the statute which sets forth the applicable range of punishment for the charged offense. *Harney v. State*, 2011 OK CR 10, ¶ 21, 256 P.3d 1002, 1007; *Hicks*, 2003 OK CR 10, ¶ 4, 70 P.3d at 883. However, the trial court need not explain the underlying legal basis establishing the range of punishment. *Simpson*, 1992 OK CR 13, ¶ 13, 827 P.2d at 174.

In *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273, this Court determined that jurors should be instructed upon the effect of the 85% rule and reasoned that, with this information jurors could more accurately gauge their intended sentences and avoid the uncertainty as to the length of time a defendant will actually serve. *Id.*, 2006 OK CR 6, ¶¶ 11, 23, 130 P.3d at 279, 282. In *Verduzco v. State*, 2009 OK CR 24, 217 P.3d 625, this Court explained that the 85% rule is a sentencing consequence which has a calculable effect on the term of imprisonment to be imposed. *Id.*, 2009 OK CR 24, ¶¶ 6, 8, 217 P.3d at 628.

Registration as a sex offender is not a part of the statutory ranges of punishment for the charged offenses in this case or a salient feature of the law. As the applicable statutes (21 O.S.2011, §§ 1111, 1111.1, 888 and 885) do not provide a judge or jury with the option of imposing, delaying, altering, or suspending registration as a sex offender, registration is not within a jury's province.

Instead, the Sex Offenders Registration Act is a wholly separate regulatory scheme. The Act identifies certain individuals as a sex offender and requires those persons to register with both the Oklahoma Department of Corrections and the local law enforcement authority. 57 O.S.2011, § 582(A), § 583(A). Before a person, who will be subject to the provisions of the Sex Offenders Registration Act, is due to be released from a correctional institution, the Departments of Corrections is required to assign the person a numeric risk level based on the level of risk the person poses to the community. 57

O.S.2011, § 582.1. An individual subject to the provisions of the Act has a continuing duty to register for periods ranging from fifteen (15) years from the date of completion of his or her sentence up to life, based upon the assigned risk level. 57 O.S.2011, § 583(C), (D). The Act also places restrictions on employment and residency. 57 O.S.2011, §§ 589, 590, and 590.1.

Nothing in the Sex Offenders Registration Act authorizes a sentencing judge or jury to require or preclude compliance with the Act. 57 O.S.2011, §§ 581-590.2. Because the Legislature has not provided for the jury to assess registration as a punishment, it is not part of the applicable punishment range. *Cf. Harney v. State*, 2011 OK CR 10, ¶ 21, 256 P.3d 1002, 1007; *Hicks*, 2003 OK CR 10, ¶ 4, 70 P.3d at 883.

We further find that the Sex Offenders Registration Act was not a salient feature of the law concerning Appellant's case. Registration pursuant to the Sex Offenders Registration Act has no bearing on the issue of guilt or the accuracy of any intended sentence or fine. To the contrary, informing the jury about the registration requirement could lead to confusion that such registration is the equivalent to community supervision and that, upon the defendant's release, the burden is on the State to ensure compliance with registration by way of supervision when, in reality, the burden is on the felon, who may or may not comply. As registration pursuant to the Act does not have a calculable effect on the term of imprisonment to be imposed, it is not a salient feature of the law concerning Appellant's convictions.

Relying upon the Oklahoma Supreme Court's opinion in *Starkey v. Okla. Dept. of Corrections*, 2013 OK 43, 305 P.3d 1004, Appellant argues that registration as a sex offender is part of his punishment. In *Starkey*, the Oklahoma Supreme Court determined whether the Department of Corrections had violated the prohibition against *Ex Post Facto* laws when it retroactively applied the 2007 and subsequent amendments to the Sex Offenders Registration Act to a Texas sex offender who had resided in Oklahoma since 1998. *Id.*, 2013 OK 43, ¶¶ 1-8, 18, 305 P.3d at 1009-10, 1013. *Starkey* recognized that the Legislature intended the Sex Offenders Registration Act to be a civil regulatory scheme, but that its punitive effect was excessive in relation to its non-punitive public safety purpose and therefore found that retroactive application of the amendments violated the *Ex Post Facto* clause of the Oklahoma Constitution. *Id.*, 2013 OK 43, ¶¶ 43, 79, 81, 305 P.3d at 1020, 1030-31.[2] *Starkey* did not address the question presented in this case, *i.e.*, whether it is necessary for the sentencing jury to be informed about the registration requirements of the Sex Offenders Registration Act. As Appellant has not claimed that any aspect of the Sex Offenders Registration Act has been retroactively applied to him, we find that *Starkey* is neither controlling nor persuasive in the present case.

[2] Since *Starkey*, the Oklahoma Supreme Court has held that the correct Sex Offenders Registration Act registration requirements to apply are those in effect when the sex offender was either convicted in Oklahoma or when a sex offender convicted in another jurisdiction enters Oklahoma and becomes subject to those requirements. *Luster v. State, ex rel. Dept. of Corrections*, 2013 OK 97, ¶ 16, 315 P.3d 386, 391; *Cerniglia v. Oklahoma Dept. of Corrections*, 2013 OK 81, ¶ 6, 349 P.3d 542, 544-45.

As the trial court was not obligated to instruct jurors about the registration requirements of the Sex Offenders Registration Act we find that Appellant has not shown that error, plain or otherwise, occurred.

In Proposition V, we review Appellant's claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to show that counsel was ineffective, Appellant must show both deficient performance and prejudice. *Goode v. State,* 2010 OK CR 10, ¶ 81, 236 P.3d 671, 686 *citing Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064. *See also Marshall v. State,* 2010 OK CR 8, ¶ 61, 232 P.3d 467, 481. In *Strickland,* the Supreme Court said there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct, *i.e.,* an appellant must overcome the presumption that, under the circumstances, counsel's conduct constituted sound trial strategy. *Goode,* 2010 OK CR 10, ¶ 81, 236 P.3d at 686. To establish prejudice, Appellant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.,* at ¶ 82, 236 P.3d at 686.

Appellant claims counsel was ineffective for failing to object to the introduction of the video of his conduct in the police interrogation room and to the police testimony surrounding his conduct. This claim was reviewed for plain error in Proposition II and the evidence was found to be properly admitted as post-offense conduct. Finding the evidence properly admitted, we find counsel

was not ineffective for failing to raise an objection which would have been overruled. *Rutan*, 2009 OK CR 3, ¶ 81, 202 P.3d at 855-56.

Appellant also finds counsel ineffective for failing to request OUJI-CR 2d 9-6A instructing the jury to give separate consideration to each offense. In Proposition IV, we found the absence of such an instruction was not plain error as the instructions given to the jury adequately informed the jury of the applicable law, and there was nothing in the record to suggest the jury did not give separate consideration to each offense. In the absence of any error, Appellant has failed to show how she was prejudiced by counsel's failure to request the instruction. *Gilson v. State*, 2000 OK CR 14, ¶ 166, 8 P.3d 883, 926-927.

In Proposition VI, Appellant contends the combined errors in his trial denied him the right to a constitutionally guaranteed fair trial. None of the errors raised by Appellant warrant relief. This Court's plain error review pursuant to 12 O.S.2011, § 2104 found one error warranting relief as to Count IV. No further relief is warranted. Where a single error has been addressed, there is no cumulative error. *See Bosse v. State*, 2015 OK CR 14, ¶ 86, 360 P.3d 1203, 1235.

DECISION

The Judgments and Sentences in Counts I, II and III are **AFFIRMED.** **The** Judgment and Sentence in Count IV is **REVERSED WITH INSTRUCTIONS TO DISMISS.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF MUSKOGEE COUNTY
THE HONORABLE THOMAS H. ALFORD, DISTRICT JUDGE

APPEARANCES AT TRIAL

MICHAEL LITTLEFIELD
224 N. 4TH ST.
MUSKOGEE, OK 74401
COUNSEL FOR DEFENDANT

LARRY D. MOORE
DISTRICT ATTORNEY
TIM KING
ASSISTANT DISTRICT ATTORNEY
MUSKOGEE COUNTY COURTHOUSE
MUSKOGEE, OK 74401
COUNSEL FOR THE STATE

APPEARANCES ON APPEAL

VIRGINIA SANDERS
P.O. BOX 926
NORMAN, OK 73070
COUNSEL FOR APPELLANT

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
JENNIFER B. WELCH
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST ST.
OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE

OPINION BY: LUMPKIN, V.P.J.
SMITH, P.J.: Concur
JOHNSON, J.: Concur in Result
LEWIS, J.: Concur
HUDSON, J.: Concur

RA