IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

VERNON LEROY JAMES,	)	
	)	Not for Publication
Appellant,	)	
v.	)	Case No. F-2008-1095
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, JUDGE:

Vernon Leroy James was tried by jury and convicted of First Degree Rape in violation of 21 O.S.2001, § 1114, in the District Court of Muskogee County, Case No. CF-2007-1063. In accordance with the jury's recommendation the Honorable Jeff Payton sentenced James to life imprisonment. James must serve 85 percent of his sentence before being eligible for parole consideration. James appeals from this conviction and sentence.

James raises two propositions of error in support of his appeal:

I. Prosecutorial misconduct deprived James of a fair trial; and
II. The trial court erred by instructing the jury on the issue of flight.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find prosecutorial misconduct in argument and admission of evidence requires that James's sentence be modified. We find in Proposition I that the prosecutor improperly and prejudicially engaged in argument during opening statement, and that James's objection to this improper argument should have been

sustained.[1] We further find that the prosecutor improperly appealed to the jury's sympathy for the victim during closing argument.[2] We finally find in Proposition I that the trial court erred in admitting all eighteen photographs of the rape. Admission of evidence, including photographs, is within the trial court's discretion.[3] The photographs were relevant. However, there comes a point at which relevant photographs become cumulative and prejudicial.[4] Several of these photos were almost identical, and repetition of these images could not have been necessary for jurors to either decide James's guilt or arrive at an appropriate punishment.[5] The prejudicial effect of admission of all eighteen photographs, combined with the errors in opening and closing argument, warrant sentence modification.

We find in Proposition II that the trial court did not err in giving a flight instruction over James's objection. The flight instruction should only be given

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[1] Opening statements are intended to introduce jurors to the evidence the parties expect to present, and are not an appropriate forum for argument. *Hammon v. State*, 1995 OK CR 33, 898 P.2d 1287, 1306.

[2] Parties have wide latitude in closing argument to discuss the evidence and inferences from it, and improper argument will not warrant relief unless the defendant is prejudiced and deprived of a fair trial. *Bell v. State*, 2007 OK CR 43, 172 P.3d 622, 624. Appeals to sympathy for the victim, such as the request for jurors to return a "priceless" verdict and sentence recommendation, are improper. *Bell*, 172 P.3d at 624. The comment that the victim should have been playing with dolls was proper argument from the evidence. While the reference to a song which had nothing to do with the crime or trial was irrelevant, it did not rise to the level of plain error. 20 O.S.2001, § 3001.1.

[3] *Fritz v. State*, 1991 OK CR 62, 811 P.2d 1353, 1364.

[4] *Fritz*, 811 P.2d at 1365; *President v. State*, 1979 OK CR 114, 602 P.2d 222, 226.

[5] The State argues that jurors had to see each picture to determine the victim's credibility, because she testified that James took the pictures. In addition to the victim's testimony, James admitted to police that he took the pictures. Further, a glance at any of the photos shows it would have been physically impossible for the victim to take them herself. The State also appears to argue that the pictures were not repetitive or prejudicial because they were all taken during the commission of the crime. This argument suggests the State misunderstands the nature of the prohibition against unnecessarily cumulative photographic evidence. It is not that pictures may have been taken after the crime or in a different location, as with autopsy photos.

where the evidence is controverted by the defendant — that is, where the defendant offers an explanation for his flight.[6] However, James admitted to the crime and placed himself at the scene. We have held that these circumstances remove the improper assumption, inherent in the flight instruction, that the defendant committed the crime.[7]

Decision

The Judgment of the District Court is **AFFIRMED**. The Sentence is **MODIFIED** to forty-five (45) years imprisonment. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2009), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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OPINION BY: CHAPEL, J.

C. JOHNSON, P.J.:	CONCUR
A. JOHNSON, V.P.J.:	CONCUR
LUMPKIN, J.:	CONCUR IN PART/DISSENT IN PART
LEWIS, J.:	CONCUR IN RESULTS

The problem is that at some point, even with relevant and otherwise admissible photographs, enough becomes too much.

[6] *Mitchell v. State*, 1993 OK CR 56, 876 P.2d 682, 685. James argues that any error in instruction might have influenced the jury's sentencing recommendation. The issue of flight goes to guilt rather than sentencing. *Mitchell*, 876 P.2d at 684.

[7] *Powell v. State*, 1995 OK CR 37, 906 P.2d 765, 778-79; *Mitchell*, 876 P.2d at 685. *See also Graham v. State*, 2001 OK CR 18, 27 P.3d 1026, 1028 (defendant not prejudiced where he admitted he was at the scene and fled).

LUMPKIN, JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the Court's decision to affirm the verdict of guilty in this case, however I must dissent to the modification of the sentence.

The evidence was overwhelming in this case due to the chutzpah of the Appellant. On November 10, 2007, Appellant took advantage of D. H.'s mother being away at work, had D. H. disrobe, and proceeded to anally rape this seven year old girl. Whether for the purpose of preserving the act for future review and gratification or merely to exhibit his hubris for committing the repeated act, Appellant took a series of photos on a digital camera which detailed his sequential acts of abuse. The Court is concerned about the utilization of all 18 photos as evidence in this case. I can understand why the defense would be concerned because the photos reveal the savagery of the attack on this young girl, however, the Court should only be concerned with the relevancy and probative value of the evidence. The photos were definitely relevant and probative of the acts committed. These are photos of the crime and the victim at the time the crime was being committed, not after the fact photos such as an autopsy. Any repetition of the photos is due solely to the actions of the Appellant and the length of time he took to sexually assault this young girl. Not only are the photos relevant, they are imperative to the proof of how the crime was committed and emphasizes the extended nature of the crime which goes both to determination of guilt and the appropriate sentence. *See Patton v. State*, 1998 OK CR 66, ¶ 60, 973 P.2d 270, 290 Citing *McCormick v. State*, 845

P.2d 896, 898 (Okl.Cr.1993) ("the only consideration to be made is whether the pictures are unnecessarily hideous, such that the impact on the jury can be said to be unfair". And, "there is no requirement that the visual effects of a particular crime be down played by the State. *Id.*".); *Mayes v. State*, 1994 OK CR 44, ¶ 77, 887 P.2d 1288, 1310 ("When measuring the relevancy of evidence against its prejudicial effect, the court should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.")

I also believe the Court makes something out of nothing in determining the use of a metaphor by the prosecuting attorney in closing argument was error. The jury, as all juries in Oklahoma, was advised that statements of counsel are not evidence. The use of the terms from a credit card commercial to render a verdict that would be "priceless" to the Appellant is nothing more than asking the jury to let the Appellant know his conduct was unacceptable. Regardless, the jury did not impose the maximum sentence of Life Without Parole in this case, thus it is hard to show their verdict was anything more than a well reasoned decision based on the evidence. In this regard, the sentence was more likely the result of Appellant chronicling the events of the sexual assault on digital photos than any comments by the prosecutor. There is no basis of fact in this record that the argument of counsel had any impact on the verdict of guilt or punishment. Instead, it appears the Court is seeking to grant mercy to the Appellant. Over 250 years ago, Adam Smith, a leading expositor of economic thought, made the observation on justice that "mercy to

the guilty is cruelty to the innocent".[1] While today that thought may seem rather draconian, it does contain a basic human truth.

[1] Adam Smith, "The Theory of the Moral Sentiments" (1759), "Part II: Of Merit and Demerit; or, of the Objects of Reward and Punishment Consisting of Three Parts; Section II: Of Justice and Beneficence; Chap. III: Of the utility of this constitution of Nature". ("They reflect that mercy to the guilty is cruelty to the innocent, and oppose to the emotions of compassion which they feel for a particular person, a more enlarged compassion which they feel for mankind".)