IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JONATHAN BEAR ROBE NAHWOOKSY,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F-2012-236
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

A. JOHNSON, JUDGE:

Appellant Jonathan Bear Robe Nahwooksy was tried by jury in the District Court of McCurtain County, Case No. CF-2011-149, and convicted of First Degree Rape, After Former Conviction of Two or More Felonies (Count 1), in violation of 21 O.S.Supp.2011, §§ 1114(A) & 1115, and Second Degree Rape by Instrumentation (Count 2), in violation of 21 O.S.Supp.2011, §§ 1111.1 & 1116. The jury fixed punishment at thirty years imprisonment on Count 1 and five years imprisonment on Count 2.[1] The Honorable Gary L. Brock, Special Judge, who presided at trial, sentenced Nahwooksy according to the jury's verdict and ordered the sentences to be served consecutively. From this Judgment and Sentence Nahwooksy appeals.

Appellant Nahwooksy had sex with his second cousin K.M. when she was fourteen years old. The DNA profile developed from semen obtained during the sexual assault examination that followed that incident matched the DNA profile

[1] Under 21 O.S.Supp.2011, § 13.1, Nahwooksy must serve 85% of the sentence imposed in Count 1 before he is eligible for parole.

of Nahwooksy. The issue for the jury at trial was whether Nahwooksy thereby committed first degree forcible rape or second degree rape.

Nahwooksy's first claim—that he was denied a fair trial because of prosecutorial misconduct—requires discussion and relief through modification of the sentence imposed at trial. This relief is also sufficient to redress error, if any, that occurred at trial as a result of the admission of inappropriate material in second stage for sentence enhancement, the omission of an instruction on mandatory post-imprisonment supervision required by 21 O.S.2011, §§ 1111.1 & 1115, ineffective assistance of counsel and any claim of excessive sentence. *See Appellant's Brief* Propositions 2 through 5. For that reason, we will not address those claims further.

This Court will grant relief on a prosecutorial misconduct claim only when the misconduct effectively deprived the defendant of a fair trial or a fair and reliable sentencing proceeding.[2] *Harmon v. State,* 2011 OK CR 6, ¶ 80, 248 P.3d 918, 943. We evaluate the prosecutor's arguments 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. *Id.; see also Brewer v. State,* 2006 OK CR 16, ¶ 13, 133 P.3d 892, 895 (reversal is not required unless in light of

[2] Some of the allegations of error were preserved for appeal and some were not. Although defense counsel did not object to every remark now raised, he did make objections throughout trial, the majority of which were summarily overruled. Nevertheless, the statements not met with objection are reviewed for plain error only. *See Malone v State,* 2013 OK CR 1, ¶¶ 40-41, 293 P.3d 198, 211 (plain error is error that counsel failed to preserve through a timely trial objection, but upon appellate review, is clear from the record and affected the defendant's substantial rights).

entire record defendant suffered prejudice); *Paxton v. State,* 1993 OK CR 59, ¶ 69, 867 P.2d 1309, 1329 (holding that alleged errors of prosecutorial misconduct should not, on an individual basis, serve as cause for reversal, but instead require reversal only if the cumulative effect deprived defendant of fair trial). It is the rare instance when a prosecutor's misconduct during closing argument was so egregiously detrimental to a defendant's right to a fair trial that reversal is required. *See Pryor v. State,* 2011 OK CR 18, ¶ 4, 254 P.3d 721, 722. We have often found that modification of sentence is an adequate remedy for prosecutorial misconduct. *See e.g., Bell v. State,* 2007 OK CR 43, ¶ 6, 172 P.3d 622, 624; *Brewer,* 2006 OK CR 16, ¶ 17, 133 P.3d at 895.

The issue in this case was whether the sex between K.M. and Nahwooksy was forced or consensual (first or second degree rape). The jury's decision on this issue necessarily depended upon its assessment of K.M.'s credibility, and consequently both sides asked questions and made argument designed to either support or tear down K.M.'s credibility. Taken as a whole, the prosecutor's conduct crossed the line of acceptable behavior to Nahwooksy's prejudice.

The prosecutor posed questions on re-direct examination of Captain Chipps-Bray, the investigating officer, unrelated to the subject probed on cross examination concerning K.M.'s motive to testify and alleged threats made to her. The prosecutor asked Chipps-Bray about her work with "victims" and her contact with them throughout a case.

Q. What you saw, does your work with victims sometimes go beyond taking the report?

A. Yes, ma'am.

Q. You often have contact with them –

[Defense counsel]: Objection, Your Honor; leading.

Q. -- from that point throughout the case?

A. What I advise any victim –

[Defense counsel]: Objection, Your Honor; beyond the scope of my cross examination.

THE COURT: Overruled.

A. What I advise any of my victims or anybody that I ever take a report from I hand them my card –
[Defense counsel]: Objection as to what she always does or ever does.

THE COURT: Overruled.

A. **And I tell them they can call me 24 hours a day, seven days week (sic), 365 days a year because that's what we're here for.** I don't have-

[Defense counsel]: Objection, Your Honor, non-responsive.

THE COURT: Overruled.

A. There's many hats that a police officer wears and that's one of them; **we have to be there for the victim.**

The prosecutor then asked Chipps-Bray if K.M.'s demeanor the Friday before trial was unusual for a rape victim. (Tr. 176) Over objection, Chipps-Bray offered:

A. Every single victim is different. Her age, for her age and what she has gone through—.

[Defense counsel]: Objection; move to strike as non-responsive.

A. Especially being the age that she is and being a family member there is confusion back and forth; she is pulled in several different ways, and especially if she's been contacted by the family members.

Q. **And do you feel like it's part of your job to be encouraging to these victims from day one?**

A. **Most definitely.**

The prosecutor concluded by confirming with Chipps-Bray that she had been nothing but encouraging to K.M. and had not threatened her in any way. The majority of the questions in this exchange were irrelevant and beyond the scope of cross-examination. The purpose of this exchange was to evoke sympathy for K.M. and to portray Chipps-Bray as a concerned and trustworthy public servant who champions the rights of credible victims like K.M. We have held that the guilt stage of trial is no place for even subtle appeals to sympathy for the victim. *Bell,* 2007 OK CR 43, ¶ 7, 172 P.3d at 624.

The subject turned next to K.M.'s safety. The prosecutor asked, based on Chipps-Bray training and experience with sexual assault victims, if she was worried about K.M. when she met with her the Friday before trial. (Tr.178) Chipps-Bray said she was "very concerned." Defense counsel's objections were overruled and Chipps-Bray testified that K.M. had been very emotional and depressed throughout the case and that she had "great concerns" because K.M. "was going to be with family members and stuff over the weekend to assure that she would be okay." Chipps-Bray said that safety precautions were taken

to make sure that K.M. wasn't going to be left alone "for safety reasons." (Tr. 178) She said she would have been very concerned had K.M. not appeared for trial. (Tr. 179) When asked if K.M.'s emotions were odd, Chipps-Bray said, "[w]e have no right to tell her how she should feel, especially with this happening at the age that she is; she doesn't understand emotion." (Tr. 179)

This exchange left the impression, without evidence, that K.M. was in physical danger because she was the complaining witness in Nahwooksy's rape trial. The lack of evidentiary support for these questions allowed jurors to draw unwarranted inferences to Nahwooksy's prejudice. The exchange also left the impression that any uncertainty about K.M.'s believability based on her reactions and behavior could be dismissed because she was a young victim who was incapable of fully understanding "emotion." These appeals to victim sympathy were improper. *See Bell,* 2007 OK CR 43, ¶ 7, 172 P.3d at 624.

The prosecutor also made improper comments during closing argument invoking victim sympathy and portraying herself and the investigating detective as champions of the victim and of justice.

During closing argument for the defense, defense counsel argued the facts and evidence that weighed against finding K.M. a credible witness. He briefly noted victims often do not want to testify for a variety of reasons, but that the prosecution in this case would not permit K.M. not to testify because this was a rape case. The prosecutor responded to this cursory argument by

warning the jury not to allow defense counsel to "distract" them from the evidence with "smokescreens." She argued:

> Now the Defense, he kind of wants to try to distract you from the evidence and I think that you probably noticed that. He's putting up some smokescreens here to distract you from the evidence. One of his tactics here to distract you is to try to make me and Captain Chipps-Bray the bad guys here; we're the bad guys, we have made this poor girl do this, we have forced her to come and do this. **Oddly enough we are the people that will fight for victims. We're not the bad guys here.** That's the bad guy.

The prosecutor crossed the line of acceptable argument when she proclaimed that she and Captain Chipps-Bray represented the victims in that community. *See Roy v. State,* 2006 OK CR 47, ¶ 45, 152 P.3d 217, 232 (improper for prosecutor to suggest the State represents the victim or her family). Defense counsel's objection was overruled and the prosecutor persisted in this "don't be distracted" theme. She explained:

> Don't let the Defense distract you from that evidence. Okay. **There's a lot more that goes on with these cases than just coming to court.** This is what the public sees. You guys see us whenever we come to court and we put on a trial. **There's a lot more that goes on to these cases than just here in the courtroom. I have been talking with [K.M.] for months now**, she is a 15 year old girl now; she has a lot of questions, she is very confused.

The implication from this argument was that the prosecutor knew more about the victim and the case, based on information not presented in court, that supported conviction. Cases are to be decided based solely on the evidence presented in court. Although the parties have great latitude to argue the evidence and inferences therefrom to support their case, *Mack v. State,* 2008 OK CR 23, ¶ 9, 188 P.3d 1284, 1289, the arguments must have some basis in

fact from the evidence presented at trial. *See Bell,* 2007 OK CR 43, ¶¶ 10 & 11, 172, P.3d at 626 (improper for prosecutor to argue facts not in evidence and to vouch for herself or case); OUJI-CR2d 10-2.

The prosecutor then exceeded the boundary of acceptable argument when she said:

> And I have got a young daughter, a baby girl on the way and I would hope that if something were to happen to my daughters that **I would have a prosecutor that would fight for them the way that I fought for [K.M.], the way that Lori Chipps has fought for [K.M.]**.

The prosecutor's blatant appeal to emotion by bringing up her unborn child and her portrayal of herself and Captain Chipps-Bray as champions of victims exceeded the bounds of fair comment on the evidence and entered the prohibited realm of argument intended to arouse the passions and prejudices of the jury. This was unquestionably improper. *See Pryor,* 2011 OK CR 18, ¶ 5, 254 P.3d at 722-23 (argument ridiculing the defense and comments beyond evidence is prohibited); *Ward v. State,* 1981 OK CR 102, ¶ 3, 633 P.2d 757, 758 ("[a]rguments beyond the scope of the evidence can only be intended to arouse the passions and prejudices of the jurors and are improper"); *ABA Standards for Criminal Justice: Prosecution and Defense Function* § 3–5.8(c) and (d) (3rd ed. 1993) ("The prosecutor should not make arguments calculated to appeal to the prejudices of the jury ... The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence").

The impropriety did not stop there. The prosecutor argued that it was difficult for K.M. to testify in front of an audience about such a traumatic event

and that K.M. understandably was hesitant to testify before trial and worried that she could not get through it. The prosecutor crossed the line into improper argument again when she offered her personal feelings about the matter:

> I knew she could; I knew she could do it, and I encouraged her from day one, you can do this, you're stronger than you are giving yourself credit for. And she did it; she made it through.

This personal opinion of support went beyond arguing the evidence and inferences to support K.M.'s credibility and was improper. *See Bell*, 2007 OK CR 43, ¶ 10, 172 P.3d at 626 (improper for prosecutor to vouch for herself or case).

The prosecutor then discussed her concern for K.M. in the months before trial. She said:

> I have been worried that she may disappear, she would run away. I have been afraid that she would hurt herself. We on Friday put safety measures in place to make sure that she got through the weekend okay.

K.M. never testified about being suicidal, running away or experiencing any threatening family backlash because of this case.[3] Chipps-Bray indicated that K.M. had been upset and depressed, but offered no evidence supporting the necessity of safety measures or evidence substantiating K.M.'s fragile and unstable emotional state. By weaving this thread of innuendo concerning K.M.'s mental state and personal safety into her argument, the prosecutor was appealing to jurors' emotions and prejudices and again insinuating that she knew more about the case based on information not presented at trial. This

[3] K.M. testified that Nahwooksy's mother pressured her not to testify, but offered no specifics of what that meant.

argument was improper and these remarks went beyond the evidence to evoke sympathy for K.M. *See Pryor,* 2011 OK CR 18, ¶ 8, 254 P.3d at 724 (improper for prosecutor to bolster argument with implications that are unsupported by competent evidence); *Jackson v. State,* 2007 OK CR 24, ¶ 27, 163 P.3d 596, 604 (improper for a prosecutor to ask jury to have sympathy for victims).

The record shows there were several instances of improper argument in this case. The record further shows that many of the prosecutor's remarks were not met with contemporaneous objection although some were. The question is whether the erroneous argument prejudiced Nahwooksy. The evidence against Nahwooksy was more than sufficient to support a first degree rape conviction and K.M.'s demeanor after her encounter with Nahwooksy was consistent with her allegation of forcible rape. Her testimony about the rape was fairly consistent. She also had an injury to her vagina, a tear, that supports a finding of forcible rape. Undoubtedly the prosecutor crossed the line of acceptable argument several times and the worst of her remarks cannot be excused as invited by or in response to defense counsel. The improper argument made in this case, both objected-to and not, drawing attention to the prosecutor's pregnancy, aligning the prosecutor and the police with the victim and the fight for justice, appealing to sympathy for the victim, and implying the prosecutor knew more about the case than she was allowed to present at trial, likely had some impact on the jury's verdict. Given the strength of the evidence in this case, we find the error adversely influenced the jury's sentencing

decision rather than its finding of guilt. Sentence modification is the appropriate remedy here. Nahwooksy's sentence on Count 1 is modified from thirty years to twenty years and his sentences on Counts 1 and 2 are ordered to run concurrently rather than consecutively.

DECISION

The Judgment of the district court is **AFFIRMED.** The sentence on Count 1 is **MODIFIED** to twenty years imprisonment and the sentence on Count 2 is ordered to be served concurrently with Count 1. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2013), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF MCCURTAIN COUNTY
THE HONORABLE GARY L. BROCK, SPECIAL JUDGE

APPEARANCES AT TRIAL

ALLEN MALONE
113 N. CENTRAL
IDABEL, OK 74745
ATTORNEY FOR DEFENDANT

EMILY HERRON
MARK UPTEGROVE
ASSISTANT DISTRICT ATTORNEYS
MCCURTAIN COUNTY COURTHOUSE
108 N. CENTRAL AVE.
IDABEL, OK 74745
ATTORNEYS FOR STATE

APPEARANCES ON APPEAL

TERRY J. HULL
P. O. BOX 926
NORMAN, OK 73070
ATTORNEY FOR APPELLANT

E. SCOTT PRUITT
OKLAHOMA ATTORNEY GENERAL
ASHLEY L. LITTLE
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR APPELLEE

OPINION BY: A. JOHNSON, J.
LEWIS, P.J.: Concur in Results
SMITH, V.P.J.: Concur
LUMPKIN, J.: Concur in Results
C. JOHNSON, J.: Concur