IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

VALENTA E. THOMPSON,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
v.	)	Case No. F-2008-60
	)	FILED
THE STATE OF OKLAHOMA,	)	IN COURT OF CRIMINAL APPEALS STATE OF OKLAHOMA
	)	
Appellee.	)	MAY 21 2009
		MICHAEL S. RICHIE CLERK

SUMMARY OPINION

CHAPEL, JUDGE:

Valenta E. Thompson was tried by jury and convicted of Count II, First Degree Rape in violation of 22 O.S.Supp.2006 § 1111; Count IV, Sodomy (Anal) in violation of 21 O.S.Supp.2002, § 886; Count VI, Kidnapping in violation of 21 O.S.Supp.2004, § 741; Counts VII and VIII, Assault and Battery (Misdemeanor) in violation of 21 O.S.Supp.2006, § 644; Count IX, Sodomy (Oral) in violation of 21 O.S.Supp.2002, § 886; and Count XI, Intimidation of a Witness in violation of 21 O.S.2001, § 455, all after former conviction of two or more felonies, in the District Court of Muskogee County, Case No. CF-2006-754[1] In accordance with the jury's recommendation the Honorable Michael Norman sentenced Thompson to life imprisonment on each of Counts II, IV, VI and IX; ninety (90) days incarceration in each of Counts VII and VIII; and thirty (30) years imprisonment (Count XI), all sentences to run concurrently. Thompson appeals from these convictions and sentences.

Thompson raises eleven propositions of error in support of his appeal:

[1] Thompson was acquitted of Counts I, III, V, and X.

I. Thompson was denied due process of law in the convictions on Count IV — Anal Sodomy, and Count XI — Witness Intimidation, by the trial court's failure to instruct the jury on the essential elements of the charges;

II. The evidence was insufficient to support Thompson's conviction on Count II — rape in the First Degree;

III. The sentences on Counts II and IX must be vacated or modified because they are based on erroneous jury instructions as to punishment;

IV. Thompson was denied due process and a fair trial by the SANE nurse's testimony, which exceeded acceptable limits of forensic science and comprised plain error;

V. Thompson's conviction on Count IV should be reversed because the Information failed to allege a valid offense under Oklahoma law, and Thompson received no notice of any other offense based on the allegations of Count IV;

VI. Thompson was prejudiced by the prosecutor's improper questioning of a prosecution witness and the court's error in allowing testimony regarding plea discussions;

VII. The prosecutor's argument misled the jurors to believe they had a duty to "enforce the law" by convicting Thompson;

VIII. Thompson was prejudiced by ineffective assistance of counsel;

IX. Thompson's conviction on Count XI — Witness Intimidation should be reversed with instructions to dismiss, based on insufficient evidence;

X. Thompson's conviction on Count XI — Witness Intimidation violates constitutional and statutory protections against double jeopardy and double punishment; and

XI. Thompson should be granted relief based on cumulative error.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find that Counts IV and XI must be reversed and remanded. No further relief is required.

In Proposition I Thompson correctly claims that the jury was not instructed on the elements of either Count XI or Count IV. A defendant has a right "to have the jury instructed on, and be convicted by proof beyond a reasonable doubt of, each element of the crime."[2] Failure to instruct the jury on

[2] *Pinkley v. State*, 2002 OK CR 26, 49 P.3d 756, 759; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970); 20 O.S.2001, § 3001.1.

the elements of each charged crime may constitute plain error.[3] The State concedes the error as to Count XI.[4] Regarding Count IV, the State admits jurors were not instructed on the elements of anal sodomy but argues that the instruction on forcible oral sodomy, plus the evidence at trial, was sufficient to inform jurors of the elements of anal sodomy.[5] There may have been enough evidence to support the charge, but the jury had no guidance as to how that evidence should be applied. Jurors did not know what the elements were, so could not have found they existed. The State's arguments are unpersuasive. The jury was not instructed regarding the actions necessary to support either a conviction for anal sodomy, or for witness intimidation. Counts IV and XI must be reversed and remanded. Propositions IX and X are rendered moot by this decision.

Thompson claims in Proposition III that his life sentences for Counts II and IX were affected by erroneous jury instructions. Jurors were instructed that those crimes, when committed after a conviction for first degree rape, were punishable by life imprisonment without the possibility of parole. Thompson

---

[3] *Pinkley*, 49 P.3d at 758-59.

[4] We note that the evidence apparently fails to support this charge. The elements of witness intimidation "are: (1) willfully (2) causing or threatening or procuring, or harassing (3) physical or mental harm (4) to a person (5) with the intent to prevent the person from appearing in court to testify OR with the intent to make the person alter his testimony. . . ." 21 O.S.2001, § 455; *Pinkley v. State*, 2002 OK CR 26, 49 P.3d 756, 758. *See also Mehdipour v. State*, 1998 OK CR 23, 956 P.2d 911, 914-15 (discussing elements of crime). The statute specifies that the potential witness must be one who has been summoned, subpoenaed, or endorsed as a witness on a criminal Information. The entire basis for this charge was Thompson's threat to M.G. during the course of the night, that if he killed L.K. he'd have to kill M.G. too because she was a witness. These circumstances do not constitute the crime defined by this statute.

[5] The State suggests that the term "anal sodomy" is a commonly understood term; so is "oral sodomy", yet the State does not argue that the jury instructions defining this crime are unnecessary. We note that Thompson was not charged with forcible oral sodomy. In Counts IX

claims this instruction was incorrect. As to Count II, first degree rape, he is mistaken. The statute under which Thompson's sentences were enhanced provides: "Any person convicted of rape in the first degree, forcible sodomy, lewd molestation or sexual abuse of a child after having been convicted of either rape in the first degree, forcible sodomy, lewd molestation or sexual abuse of a child shall be sentenced to life without parole."[6] This statute was in effect at the time Thompson committed these crimes. The State alleged Thompson had one prior rape conviction along with three other prior convictions. Despite this, and despite the fact that Thompson stipulated to all his prior offenses, the jury sentenced Thompson to life imprisonment. This suggests that jurors took into account the three non-rape priors and chose to sentence Thompson under the portion of the instruction which provided a range of up to life imprisonment for two or more priors, not including a conviction for first degree rape. This instruction was not in error and Thompson's sentence is within the range of punishment.

The instruction regarding Thompson's sentence for Count IX is problematic. Both parties argue from the premise that Thompson was found guilty in Count IX of forcible oral sodomy. He was not. The Information clearly charges Thompson with a violation of 21 O.S.Supp.2002, § 886 (oral sodomy) in Count IX. This was never amended to forcible oral sodomy. The verdict form states Thompson is guilty of oral sodomy, and the Judgment and Sentence

---

and X he was charged with oral sodomy under 21 O.S.Supp.2002, § 886; force is not an element of this crime.

[6] 21 O.S.Supp.2002, § 51.1a.

reflects a conviction for oral sodomy under § 886. Despite the language of the Information the trial court and both parties agreed that the jury should be instructed on forcible oral sodomy. As Thompson was not charged with forcible oral sodomy, the enhancement section authorizing life without parole did not apply and jurors should not have received that instruction.

Thompson asks this Court to modify his life sentence for Count IX. The penalty for oral sodomy is up to ten years imprisonment;[7] the penalty for oral sodomy after two or more previous convictions is up to life imprisonment.[8] The jury's sentencing recommendation in Count IV suggests that jurors found at lest three of Thompson's four alleged prior convictions. A sentence of life imprisonment is within the range of punishment here, and no modification is necessary.

We find in Proposition VI that the trial court erred in allowing the prosecutor to specifically refer to plea bargains, and elicit a similar reference to plea bargains from a witness. Evidence of plea bargains is inadmissible in a criminal case.[9] The State argues that the trial court was correct in holding that Thompson opened the door by asking about the delay in submission of evidence to the crime laboratory. This is not a case where a prosecutor asked an open-ended question exploring further a topic defense counsel had introduced, eliciting an improper response. Here, the prosecutor herself

---

[7] 21 O.S.Supp.2002, § 886.
[8] 21 O.S.Supp.2002, § 51.1(C); the penalty for oral sodomy after one previous conviction is also life imprisonment. 21 O.S.Supp.2002, § 51.1(A)(2)
[9] 12 O.S.2001, § 2410; *Fritz v. State*, 1991 OK CR 62, 811 P.2d 1353, 1363; *Shriver v. State*, 1980 OK CR 36, 632 P.2d 420, 425-26.

deliberately brought up an issue she knew to be inadmissible, injecting it into her question and implicitly encouraging her witness to repeat the inadmissible evidence in a subsequent answer. This was error. However, our cases discussing this issue have conditioned relief on the specific contents of the inadmissible testimony. We have granted relief where testimony showed the defendant made statements in connection with and relevant to an actual offer to plead guilty.[10] Even extending this to testimony that a defendant engaged in plea negotiations, the improper testimony here was not this definite. Although her question implied it, the prosecutor did not ask whether Thompson had entered into plea negotiations, and the witness's response to her subsequent question was very general. Under these circumstances, this error requires no relief.

We find in Proposition II that, taking the evidence in the light most favorable to the State, any rational trier of fact could find beyond a reasonable doubt that L.K. was not Thompson's spouse and that Thompson raped L.K.[11] We find in Proposition IV that the SANE nurse's testimony did not improperly tell jurors what result to reach.[12] We find in Proposition V that Count IV of the

---

[10] *Fritz*, 811 P.2d at 1363; *Gillum v. State*, 1984 OK CR 61, 681 P.2d 87, 88.

[11] *Dodd v. State*, 2004 OK CR 31, 100 P.3d 1017, 1041-42. Thompson claims that the State failed to show L.K. and Thompson were not married. The prosecutor did not specifically ask whether the two were spouses. However, L.K. testified she had never seen or met Thompson before picking him up with M.G. shortly before the crimes occurred. This Court accepts reasonable inferences and credibility choices supporting the jury's verdict. *Bell v. State*, 2007 OK CR 43, 172 P.3d 622, 627.

[12] We review for plain error. A medical expert with specialized knowledge of sexual assaults may testify that a victim's injuries are consistent with forcible, rather than consensual, sexual activity. *Lott v. State*, 2004 OK CR 27, 98 P.3d 318, 342-43. The SANE nurse testified that in her experience injuries such as M.G.'s were not consistent with consensual sex, and that L.K.'s injuries were inconsistent with masturbation or use of a sex toy. This did not tell jurors what result to reach. Most of the statements Thompson claims as error were made regarding M.G.'s

Information charged Thompson with committing with anal sodomy under 21 O.S.Supp.2002, § 886, and that constitutes a crime in Oklahoma.[13] We find in Proposition VII that the prosecutor did not tell jurors their job was to enforce the law by returning a guilty verdict.[14] We find in Proposition VIII that counsel was not ineffective for failing to object to errors raised in Propositions I, IV, V and VII.[15] We find in Proposition XI that no accumulated error requires relief.[16]

Decision

The Judgments and Sentences on Counts II, VI, VII, VIII and IX are **AFFIRMED**. The Judgments and Sentences on Counts IV and XI are **REVERSED** and **REMANDED** for proceedings consistent with this Opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title

---

SANE examination. Thompson was acquitted of the sex offenses naming M.G. as a victim and cannot have been harmed by these statements. Thompson did not request a *Daubert* hearing on the admissibility of the SANE exam testimony and the trial court did not err in failing to hold such a hearing *sua sponte*.

[13] *Newsom v. State*, 1988 OK CR 229, 763 P.2d 135, 139. A person may not be charged with anal sodomy for consensual sexual activity between adults. *Garcia v. State*, 1995 OK CR 58, 904 P.2d 144, 145; *Post v. State*, 1986 OK CR 30, 715 P.2d 1105, 1109. While Thompson raised consent as a defense, the absence of jury instructions on the crime ensured that jurors were not improperly instructed regarding consent. The error in instruction is separate from the issue of whether a crime was charged.

[14] We review for plain error. The statements in question did not explicitly demand justice from jurors or equate enforcement with a guilty verdict. They appear, instead, to be an inept attempt at the common argument that police arrest criminals, the State prosecutes them, and jurors decide the facts of the case. While these statements skirt the line of acceptable argument, "error in argument will not warrant relief unless the defendant is deprived of a fair trial and has suffered prejudice." *Bell*, 172 P.3d at 624. The prosecutor's argument was focused on the idea that jurors should convict Thompson of all charges even if they were not sympathetic to the victims. Jurors acquitted Thompson of four counts. This suggests they were not improperly swayed by these statements.

[15] Thompson cannot show that counsel's performance was deficient and this deficient performance created errors so serious he was deprived of a fair trial with reliable results. *Harris v. State*, 2007 OK CR 28, 164 P.3d 1103, 1114; *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003); *Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052, 2069-70, 80 L.Ed.2d 674 (1984). We will not find counsel ineffective if a defendant shows no prejudice from counsel's acts or omissions. *Harris*, 164 P.3d at 1114-1115. We found no errors in Propositions IV, V or VII. We granted relief on the instructional errors raised in Proposition I, and no further relief is necessary.

[16] *Bell*, 172 P.3d at 627. Error in instruction requires that Counts IV and XI be reversed and remanded. We found that error raised in Proposition VI did not require relief. In response to the issues raised in Proposition III, we found the jury was erroneously instructed regarding the possible sentence range for oral sodomy, Count IX, but determined that this error did not require relief. There is no further error to accumulate and no further relief is required.

22, Ch.18, App. (2009), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

ATTORNEYS AT TRIAL

R. JAY COOK
COOK & HILFIGER
620 WEST BROADWAY
MUSKOGEE, OKLAHOMA 74401
ATTORNEY FOR DEFENDANT

NIKKI BAKER-DOTSON
ASSISTANT DISTRICT ATTORNEY
220 STATE STREET
MUSKOGEE, OKLAHOMA 74401
ATTORNEY FOR STATE

ATTORNEYS ON APPEAL

S. GAIL GUNNING
APPELLATE DEFENSE COUNSEL
P.O. BOX 926
NORMAN, OKLAHOMA 73070
ATTORNEY FOR PETITIONER

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
DONALD D. SELF
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OKLAHOMA 73105
ATTORNEYS FOR RESPONDENT

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

LUMPKIN, JUDGE: CONCUR IN PART/DISSENT IN PART

The trial court's failure to instruct on the elements of anal sodomy was harmless error. The defendant did not object to the instructions as given on the basis of maximum punishment, thereby waiving all but plain error in that regard. *Eizember v. State*, 2007 OK CR 29, ¶ 106, 164, P.3d 208, 235. There was sufficient evidence to prove the elements of the crime of forcible sodomy as there is uncontroverted evidence the defendant forced the victim to disrobe and he subsequently inserted his penis in her anus by force. (Tr. 117). The Supreme Court has held the failure to specifically list the elements of a crime is harmless error and anything more would create an undue burden on the court, i.e., failure to instruct a jury regarding an element of an offense which was uncontested by the defense, and which was supported by overwhelming evidence, is subject to harmless error analysis. *Neder v. United States*, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).

In *Primeaux v. State*, 2004 OK CR 16, ¶ 81, 88 P.3d 893, 909, the jury instructions for malice murder and the underlying crime of armed robbery failed to include the use of a knife, but this court held:

"The evidence of the use of a knife was overwhelming and uncontested, we find that the failure to include, in the instructions, the element of 'with the use of a knife' was harmless beyond a reasonable doubt."

(*Id.* 88 P.3d at 909)

The jury was instructed on the elements of forcible oral sodomy regarding Count 9 under § 888, and Appellant was subsequently convicted of forcible sodomy in Counts 4 and 9. The only distinction drawn between § 886, which defines sodomy, and § 888 is force. The elements of forcible anal sodomy and forcible oral sodomy are identical, except for the part of the body violated. The legal term sodomy alone includes both oral and anal. *Virgin v. State*, 1990 OK CR 27, ¶ 6, 792 P.2d 1186, 1188

Under the facts of this case and the statutory language, the instruction on forcible oral sodomy was enough to illustrate to the jury the elements of either crime. Likewise, sodomy is a commonly understood term in English vernacular. This Court has held words of common understanding do not require a definition for the jury. *Myers v. State*, 2005 OK CR 22, ¶ 14, 130 P.3d 262, 269.

Jury instructions are within the sound discretion of the trial court and that discretion shall not be disturbed on appeal so long as the instructions as a whole, fairly and accurately state the applicable law. *Williams v. State*, 2001 OK CR 9, ¶ 22, 22 P.3d 702, 711. The jury instructions in their entirety clearly state the governing law on forcible sodomy.

There are substantive points presented in all the footnotes of this opinion. The holding on multiple propositions of error are contained completely in the footnotes. "While there are exceptions, statements in footnotes are generally regarded as *dicta*, having no precedential value." *Cannon v. State*, 1995 OK CR 45, (Lumpkin concur in result) ¶ 2, 904 P.2d 89,

108, (citing *Wainwright v. Witt*, 469 U.S. 412, 422, 105 S.Ct. 844, 851, 83 L.Ed.2d 841 (1985)). While the holdings in these footnotes bear on the issues presented, they should be contained in the opinion, not in footnotes.

I would affirm the judgments and sentences in all Counts, except Count XI which the State concedes, therefore I must dissent to the Court's decision to reverse and remand Count IV.