IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

RYAN ANTHONY VAN WINKLE,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
-vs-	)	No. F-2005-620
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee,	)	

SUMMARY OPINION

A. JOHNSON, JUDGE:

Ryan Anthony Van Winkle, Appellant, was tried by jury in the District Court of Tulsa County, Case No. CF-2004-1395, and convicted of Count 1 - Assault with a Dangerous Weapon (21 O.S.2001, § 645) and Count 2 - Forcible Oral Sodomy (21 O.S.Supp.2002, § 888).[1] The jury fixed punishment at five years imprisonment for Count 1 and eight years imprisonment for Count 2. The Honorable Rebecca Brett Nightingale sentenced Van Winkle accordingly and ordered the sentences to be served consecutively. From this judgment and sentence, he appeals.

This case raises the following issues:

1. Whether Van Winkle's convictions for both assault with a dangerous weapon and forcible oral sodomy violate 21 O.S.2001, § 11A and the Double Jeopardy Clause;

2. Whether the trial court erred in overruling Van Winkle's motion to suppress his statements to police;

[1] The trial court dismissed Count 3 - Attempted Forcible Sodomy and the jury acquitted Van Winkle of Count 4 - Sexual Battery.

3. Whether the trial court erred in failing to give Van Winkle's requested instruction on voluntary intoxication;

4. Whether Van Winkle received ineffective assistance of counsel at trial; and

5. Whether Van Winkle was denied a fair trial by improper argument by the State during closing argument.

We have reviewed these issues and find only the first claim merits discussion.

Multiple Punishment

Van Winkle contends his convictions for forcible sodomy and assault with a dangerous weapon violate Oklahoma's statutory prohibition against multiple punishments for a single act (21 O.S.2001, § 11) and the Double Jeopardy Clause. He contends that the crimes merge because they are part of the same act (the assault with a dangerous weapon is the same act that made the sodomy forcible). Van Winkle raised this issue in the sentencing hearing. [2]

Title 21 O.S.2001, § 11A provides that "an act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions ... but in no case can it be punished under more than one[.]" "The proper analysis of a Section 11 claim focuses on the relationship between the crimes." *Jones v. State,* 2006 OK CR 5, ¶ 63, 128 P.3d 521, 542; *Davis v. State,* 1999 OK CR 48,

[2] This Court considers double jeopardy claims so fundamental that it will consider them even if not properly preserved for appeal. *Hunnicutt v. State,* 1988 OK CR 91, ¶ 8, 755 P.2d 105, 109; *Gentry v. State,* 1977 OK CR 152, ¶ 19, 562 P.2d 1170, 1175; see also *Salyer v. State,* 1988 OK CR 184, ¶ 9, 761 P.2d 890, 892.

¶ 13, 993 P.2d 124, 126. "One act that violates two criminal provisions cannot be punished twice, absent specific legislative intent. This analysis does not bar the charging and conviction of separate crimes which may only tangentially relate to one or more crimes committed during a continuing course of conduct." *Davis,* 1999 OK CR 48, ¶ 13, 993 P.2d at 126-27. "Section 11 is not violated where offenses arising from the same transaction are separate and distinct and require dissimilar proof." *Jones,* 2006 OK CR 5, ¶ 63, 128 P.3d at 543. This Court conducts traditional double jeopardy analysis only if Section 11 does not apply. *Id.*

The question presented here is whether Van Winkle's assault was a separate and distinct act from the sodomy or whether it was part of the same act that made the sodomy forcible. The evidence showed Van Winkle grabbed the victim and put a box knife to her throat, threatened her, and continued to hold the knife as he straddled her and negotiated for sex. Fearing for her safety she agreed to sodomize Van Winkle if he put the knife down, got off her, and sat in a chair. To prove forcible sodomy the State had to show, among other things, that Van Winkle used threats of force or violence accompanied by the apparent power of execution.[3] The victim testified on re-direct that she agreed to sodomize Van Winkle because she believed it was the only way she would be able to leave alive since he threatened her with the knife.

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[3] The elements of forcible sodomy are (1) penetration (2) of the mouth of the victim (3) by the penis of the defendant (4) by threats of force/violence accompanied with the apparent power of execution. Instruction No 4-128, OUJI-CR(2d) (Supp. 2003). (O.R. 34)

It is apparent that the charges arise out of the same event. The threats of force or violence to accomplish the sodomy came from Van Winkle holding the box knife to his victim and threatening to use it if she would not have some kind of sex with him.

This series of events is distinguishable from those cases wherein one crime is completed before another one begins.[4] The force the defendant employed here is an inextricable part of the crime of forcible oral sodomy. Under the circumstances the assault and sodomy are not separate and distinct crimes. Van Winkle's assault with a dangerous weapon conviction must be reversed with instructions to dismiss.

The remainder of Van Winkle's claims do not require relief. The trial court did not err in overruling his motion to suppress.[5] Van Winkle's claim that the trial court erred in failing to give his requested instruction on voluntary intoxication is moot because his assault with a dangerous weapon conviction must be reversed. We find that Van Winkle has failed to show that trial counsel was ineffective for failing to secure an expert to testify about methamphetamine intoxication.[6] Nor

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[4] *See e.g. Davis v. State*, 1999 OK CR 48, ¶ 8, 993 P.2d 124 (Defendant's crime of larceny completed when he left the house with the purse with requisite intent and the larceny of an automobile was then a separate event, even though the keys for the car were in the purse.); *Ziegler v. State*, 1980 OK CR 23, ¶¶ 9-10, 610 P.2d 251, 253-54 (defendant completed the crime of burglary upon entry of the dwelling, and the other crimes the defendant was charged with occurring inside the house did not violate section 11 because they were not elements of burglary).

[5] *See Davis v. State*, 2004 OK CR 36, ¶ 34, 103 P.3d 70, 80; *State v. Goins*, 2004 OK CR 5, ¶ 7, 84 P.3d 767, 768; *Lee v. State*, 1983 OK CR 41, ¶ 6, 661 P.2d 1345, 1349-50.

[6] *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Davis v. State*, 2005 OK CR 21, ¶ 7, 123 P.3d 243, 246.

do we find that he has shown plain error from the prosecutor's minor misstatement about his defense in closing argument.[7]

DECISION

The Judgment and Sentence of the trial court on Count 2 is **AFFIRMED.** Count 1 is **REVERSED with INSTRUCTIONS to DISMISS.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2005), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

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OPINION BY: A. JOHNSON, J.
CHAPEL, P.J.: Concur
LUMPKIN, V.P.J.: Concur in Part, Dissent in Part
C. JOHNSON, J.: Concur
LEWIS, J.: Concur

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[7]*DeRosa v. State,* 2004 OK CR *Bland v. State,* 2000 OK CR 11, ¶101, 4 P.3d 702, 72819, ¶ 63, 89 P.3d 1124, 1147.

LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the Court's decision to affirm the forcible sodomy conviction, but I must dissent to the decision to reverse the assault with a dangerous weapon Count.

This Court has held that the proper analysis of a claim under 21 O.S. 2001 § 11 focuses on the relationship between the crimes. *Davis v. State*, 1999 OK CR 48 ¶ 13, 993 P.2d 124. In *Davis*, we specifically stated that § 11 offers no greater protection than what is spelled out in its language. *Id* at ¶ 9. Therefore, under § 11, one act that violates two criminal provisions cannot be punished twice, absent specific legislative intent. *Id* at ¶ 13. To determine whether § 11 has been violated, we must first determine whether the appellant has received multiple punishments, under different provisions of the criminal code, for a single act. If the act results in the commission of separate and distinct crimes then, § 11 does not apply. However, if the acts do not constitute separate and distinct crimes, we must determine whether the legislature has intended to punish criminal defendants under multiple statutes.

Here the appellant asserts that the crime of assault and battery with a dangerous weapon, 21 O.S. 2001 § 645, is encompassed by his violation of Oklahoma's forcible sodomy provision 21 O.S. 2002 Supp. 888. It is true that 21 O.S. 2002 Supp. § 888 requires force or violence, or the threat of either and the apparent power of execution of such. Here, the appellant used the box knife to apply force and threat of continued force to the victim in order to procure the

sodomy; therefore, I am inclined to agree with my colleague that the force applied is part of the crime of forcible sodomy. This, however, does not put an end to the analysis. This Court has held that § 11 does not always preclude multiple punishments because "it was not intended as a method of carte blanche extending to the accused the prerogative of committing as many offenses as he desired within the same transaction with the protective shield of permitting only one prosecution to arise and be pursued from that transaction. To permit such procedural prohibitions would indeed be contra the general concept that the penal statutes are imposed with the intent of deterring criminal offenses." *Hill v. State*, 1973 OK CR 288, 511 P.2d 604.

This Court's task, therefore, is to determine and give effect to the intent of the Legislature, as expressed in the statute. *Anderson v. State*, 1998 OK CR, 972 P.2d 32. For this, we look to the evils and mischief to be remedied and to the natural and absurd consequences of any particular interpretation. *id.* The Legislature, in enacting 21 O.S. 888, was not concerned with the punishment of the use of force; rather, this provision was enacted to punish non-consensual sodomy. This was in response to a growing trend among the many jurisdictions that consensual sexual contact, of this type, between persons of the opposite sex, was no longer an "abomination" or a "crime against nature." Therefore, a fair reading of the statute, in light of its history, indicates that the crime of forcible sodomy is committed when perpetrated against persons who are not able to consent statutorily, 888(B)(1), those unable to consent mentally, B(2), and in situations when the perpetrator is in a position

of trust or authority, B(3). In these instances, the State is not required to show that the victim did not consent to the sexual contact because it is implied. However, sub. C requires a showing that the victim did not consent to the sexual contact because both parties are able to consent and neither has a fiduciary duty to the other. The show of force or threat of force is merely a mechanism by which the court is able to ascertain that the victim did not consent to the contact. The evil the statute seeks to remedy then is the unwanted sexual contact.

This is not to say that multiple punishments under separate statues may be enforced in every instance of forcible sodomy. Rather, when the force used to procure the sodomy goes beyond that necessary to show lack of consent, § 11 should not operate to preclude multiple punishments. The Supreme Court of Wyoming has addressed this question and held that. " [t]he different elements result in a conclusion that, under these circumstances, the legislature intended to punish the crimes separately. *McDermott v. Wyoming*, 870 P.2d 339 (Wyo. 1994). The Wyoming Court held that the state was required to prove an additional fact, use of the knife, that it was not required to prove in connection with the first-degree sexual assault, fellatio. The Court stated that, "the threat to use the knife is found only in the elements of aggravated assault and does not match the application of physical force charged in connection with the sexual assault." *id. at* 346. The Court was satisfied that the circumstances did not demand the merger of the aggravated assault charge with the sexual assault. This Court should reach a similar result here.

Additional evidence of the Legislature's intent to punish the use of a knife separately is found in 21 O.S. Supp. 2006 § 1287. The language of the statute is clear and unambiguous.

> Any person who, while committing or attempting to commit a felony, possesses a ...knife, dagger, dirk, switchblade knife, ...in addition to the penalty provided by statute for the felony committed or attempted, upon conviction shall be guilty of a felony for possessing such weapon or device, which shall be a separate offense from the felony committed or attempted and shall be punishable by imprisonment in the State Penitentiary for a period of not less than two (2) years nor for more than ten (10) years for the first offense...

Here the Legislature has left little if any doubt that the use of an offensive weapon, during the commission or attempted commission of a felony, will be separately punished. This Court has held that § 11 precludes punishment under §1287 where the felony committed or attempted requires the use of an offensive weapon. *Hammon v. State*, 1995 OK CR 33 ¶ 71, 898 P.2d 1287. However, our forcible sodomy statute does not require the use of an offensive weapon in order to be convicted. The only showing required of the State is that the sodomy was procured by force or threat of force, i.e. without consent from the victim. Thus, a conviction and punishment for both sodomy and use of the offensive weapon does not violate the appellant's rights to be free from multiple punishments.

Lastly, an interpretation of Oklahoma's Forcible Sodomy statute that would preclude multiple punishments in all situations, where the force used to procure the sexual contact is greater than that necessary to show the victim did not consent, would lead to absurd results and violate the intent of our Legislature. Granted, there is a wide range of conduct that may be punishable

as simple assault and battery; however, the legislature has made it very clear that it intends to further punish certain types of assaults and batteries. The use of dangerous weapons and assaults that result in great bodily harm are such acts. I find it difficult to give construction to the statute that would preclude punishment when the force used results in broken bones of the victim, or in the instance that the force used to procure the sodomy was the kidnapping of the victims children. One could think of a myriad of instances where the force used is severely disproportional to the necessary showing; taken to a logical conclusion, it cannot follow then, that the legislature intended to preclude multiple punishments in such situations.

In the instance where the force used to procure the sodomy amounts to a simple assault and battery, the force used should merge with the sodomy and may not be punishable under separate statutes. However, where, as here, the force used amounts to assault and battery with a dangerous weapon the Oklahoma Legislature has expressed a clear intent to further punish, there should be no merger and § 11 should not operate to preclude multiple punishments. I respectfully dissent to this opinion because it would preclude punishment of the force used to procure sodomy, no matter how excessive that force be in violation of our Legislature's express intent.