IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SEAN MICHAEL JOHNSON,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-99-1465**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

Appellant, Sean Michael Johnson, was tried by jury in the District Court of Oklahoma County, Case No. CF-98-4321, and convicted of: First Degree Rape (Count I), in violation of 21 O.S.1991, §§ 1111, 1114, and 21 O.S.Supp.1993, § 1111;[1] Forcible Oral Sodomy (Count II), in violation of 21 O.S.1991, §§ 886, 888 and 21 O.S.Supp.1992, §§ 886, 888; and Lewd Acts with a Child Under Sixteen (Count 3),[2] in violation of 21 O.S.1991, § 1123 and 21 O.S.Supp.1992, § 1123. The jury recommended sentences of fifteen (15) years imprisonment on Count I, five (5) years imprisonment on Count II, and five (5) years imprisonment on Count III. The trial judge sentenced Appellant accordingly and ordered the sentences to be served consecutively. Appellant now appeals his convictions and sentences.

Appellant raises the following propositions of error in this appeal:

I. The trial court failed in its duty to instruct as to an election of offenses or the unanimity beyond a reasonable doubt requirement of a particular act of rape (lewd molestation), constituting fundamental reversible error under Oklahoma law and a due process violation of the 14th Amendment;

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[1] The information alleged acts occurring over a period of time between May 1, 1992 and October 31, 1995. During this period of time, the applicable statutes were amended.

[2] Under Count III, Appellant was charged with First Degree Rape, by penetration of the anus. However, the jury convicted him of the lesser charge of Lewd Acts with a Child Under Sixteen.

II. The State's failure to follow certification procedures, follow or notice concerning reverse certification procedures and youthful offender act, in conjunction with withholding evidence affecting punishment and credibility, violates Oklahoma substantive law and procedure, as well as 14th Amendment due process, requiring reversal;

III. The admission of the videotape interrogation of Appellant was plain error in violation of 10 O.S. 1109, Article II, §§ 7, 9, and 21 of the Oklahoma Constitution and the 6th and 14th Amendments to the U.S. Constitution, requiring reversal;

IV. The playing of Appellant's videotaped arrest, while he was shackled and handcuffed to the chair for thirty-seven minutes to the jury, was a violation of the 14th Amendment's presumption of innocence and due process of law;

V. The State failed to prove the material elements of rape counts one and three as instructed upon by the court and failed to disprove Appellant's exculpatory statement -- with those convictions not meeting the 14th Amendment's sufficiency of the evidence standard;

VI. Sundry and miscellaneous fundamental reversible errors committed by the prosecutor, including "side-bar" remarks and "speaking objections" before the jury, which individually and collectively denied Appellant a 14th Amendment fair trial and require a reversal or reduction of sentence;

VII. The accumulation of irregularities and errors denied Appellant a fair trial and due process in violation of his 5th, 6th, and 14th Amendment rights; and

VIII. Appellant was denied the effective assistance of counsel at trial in violation of his 6th and 14th Amendment rights.

After a thorough consideration of these propositions and the entire record before us, including the original record, transcripts, and briefs of the parties, we have determined neither reversal nor modification is required with- respect to Appellant's convictions and sentences under Counts II and III. However, Appellant's conviction and sentence under Count I is hereby modified, as set forth below.

With respect to proposition one, we find Appellant's election and unanimity arguments are without merit, insofar as they relate to Count II and III, and, for the most part, as to Count I. *See Huddleston v. State,* 1985 OK CR 12, ¶ 16, 695 P.2d 8, 10-11. *See also Reupert v. State,* 1997 OK CR 65, ¶ 12, n. 13, 947 P.2d 198, 202, n. 13; *Jones v. State,* 1989 OK CR 66, ¶ 17, 781 P.2d 326, 329-330; *Drake v. State,* 1988 OK CR 180, ¶ 7, 761 P.2d 879, 881-82; *Williams v. State,* 1986 OK CR 101, ¶11, 721 P.2d 1318, 1321.

However, Appellant also raises serious concerns about jury instruction twelve in this proposition, and those concerns must be considered in conjunction with arguments raised in proposition five (sufficiency of the evidence) and proposition eight (ineffective assistance of counsel). Accordingly, we find instruction twelve, which allowed the jury to consider a three and a half year time period -- including two years when Appellant was under eighteen -- as one continuous act, was contradictory to instructions six and eleven, which required Appellant to be over eighteen when the offenses were committed.[3]

These contradictory instructions amount to plain error. However, due to the unique circumstances of this case, including our consideration of the jury instructions in their entirety, the wording of the amended information, the testimony at trial, the applicable statutes, and the specific arguments raised on appeal, we find the error was harmless with respect to Counts II and III.[4]

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[3] The trial court could have instructed the jury that first degree rape and forcible sodomy can be committed by a person under the age of eighteen, so long as force, violence, or threats of force or violence accompanied by apparent power of execution was used. *See* 21 O.S.1991, § 1114 and 21 O.S.Supp.1992, § 888. No such instruction was given or requested.

[4] The instructional error had no impact on Appellant's conviction for lewd molestation, as this offense only requires a defendant to be three (3) years older than the victim, and the victim to be under sixteen. Furthermore, the error had no impact on Appellant's conviction for forcible

However, we find the instructional error, along with trial counsel's failure to raise an objection thereto, might have had a substantial influence on the jury's verdict with respect to Count I and cannot be considered harmless. *Simpson v. State*, 1994 OK CR 40, ¶ 36, 876 P.2d 690, 702. Based upon our review of the entire record, we find the evidence and law warrants a modification of Appellant's conviction on Count I to second degree rape, and Appellant's sentence under Count I is hereby modified to five (5) years. *See* 22 O.S.1991, § 1066; *McArthur v. State*, 1993 OK CR 48, ¶ 15 and ¶ 2, 862 P.2d 482, 486 (discussing the Court's statutory power to modify a judgment and sentence.)

With respect to proposition two, we find under the Juvenile Code, Appellant would have been subject to the reverse certification laws from May 1, 1992 to October 31, 1995, because he was over sixteen and therefore "considered an adult." While those laws provided for parental notification and the opportunity to request certification as a child, Appellant was twenty-two years old at the time he was arrested and charged. Parental notification was therefore not an issue. Furthermore, because of Appellant's age, there were no options available to him in the juvenile system. *See W.D.C. v. State*, 1990 OK CR 71, ¶ 7, 799 P.2d 142, 144 (trial court denied certification as a child, in part, because defendant was eighteen and was no longer eligible for children's residential facilities through the Department of Human Services); 10 O.S.1991, § 1139. We find the Youthful Offender Act inapplicable as per 10 O.S.Supp.1997 § 7306-2.2. The record does not support the remaining claims in this proposition.

With respect to proposition three, we find 10 O.S. § 1109 was no longer in

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oral sodomy, because the victim testified to one act of sodomy accomplished through force, and

effect when Appellant was questioned. Even if it had been in effect, Appellant was not a child but was an adult at the time he was questioned. With respect to proposition four, we find the record does not sufficiently demonstrate a due process violation or deprivation of the presumption of innocence. Even if jurors did see Appellant momentarily handcuffed, we have previously found a lack of reversible error when jurors see a defendant briefly in handcuffs outside the courtroom. *Mehdipour v. State*, 1998 OK CR 23, ¶ 14, 956 P.2d 911, 917.

With respect to proposition five, we find Appellant's sufficiency arguments are without merit and moot due to the analysis, resolution, and relief granted with respect to proposition one. Furthermore, Appellant's arguments concerning the State's failure to disprove his exculpatory statements are without merit.

With respect to proposition six, we find the record supports four objectionable actions by the prosecutor. However, prosecutorial misconduct will not cause a reversal of judgment or modification of sentence unless its cumulative effect is such as to deprive the defendant of a fair trial and fair sentencing proceeding. *Martinez*, 1999 OK CR 33, ¶ 48, 984 P.2d 813, 826. Here, the cumulative effect of these fairly minor incidents did not deprive Appellant of a fair trial or sentencing proceeding.

We find no relief is warranted with respect to proposition seven. With respect to proposition eight, we find one instance of deficient performance, relating to counsel's handling of 12 O.S.Supp.1998, § 2803.1, but a lack of prejudice. Except as set forth in proposition one, counsel's assistance did not fall below prevailing professional norms. *Strickland v. Washington*, 466 U.S. 668,

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Appellant raises no sufficiency of the evidence issue with respect to Count II.

688, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984).

DECISION

Appellant's conviction under Count I is hereby **MODIFIED** to second degree rape and his sentence under Count I is **MODIFIED** to five (5) years imprisonment. The judgments and sentences on Counts II and III are hereby **AFFIRMED.** All sentences shall be served consecutively. This matter is remanded to the district court for further proceedings consistent with this opinion.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE RAY C. ELLIOT, DISTRICT JUDGE

APPEARANCES AT TRIAL

CARSON L. CARTER III
200 NORTH HARVEY AVENUE
OKLAHOMA CITY, OK 73102
COUNSEL FOR APPELLANT

LOU KEEL
ASSISTANT DISTRICT ATTORNEY
OFFICE OF THE DISTRICT ATTORNEY
OKLAHOMA COUNTY COURTHOUSE
OKLAHOMA CITY, OK 73102
COUNSEL FOR THE STATE

APPEARANCES ON APPEAL

MAC OLYER
ONE NORTH HUDSON, SUITE 700
OKLAHOMA CITY, OK 73102
COUNSEL FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
JAMES F. KELLY
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE

OPINION BY: LUMPKIN, P.J.
JOHNSON, V.P.J.: CONCUR
CHAPEL, J.: DISSENT
STRUBHAR: CONCUR
LILE, J.: CONCUR

RB

CHAPEL, JUDGE, DISSENTING:

These offenses occurred at a time when the defendant was a juvenile and were charged after he reached majority. Our statutes provide little or no guidance for this situation and I confess that I have no good answer to all the problems created thereby. However, I am not persuaded that we can simply ignore our juvenile procedures simply because the accused has reached majority, especially in a case such as this one where the accused is mentally retarded.

I agree the Youthful Offender Act is not applicable to these offenses. The Juvenile Code is applicable. Apparently, these offenses would have been, under the code, reverse certification crimes. In a reverse certification case the defendant, and his parents, must be given notice that he has the right to apply to be certified as a juvenile. That notice was not given in this case and I believe such failure was error.

I can envision circumstances, and this may be one, where an adult might be successful in showing that he or she ought to be certified as a child to answer for a reverse certification charged crime. Thus, I believe that the notice required by the Juvenile Code ought to be given irrespective of the age of the accused when charged. If the accused seeks certification, the requisite hearing ought to be held to determine whether or not he or she should be certified as a child to answer the charges.

It might be possible, in some cases, to determine from the facts and circumstances that an individual would not have been successful in seeking

reverse certification and in such a case a conviction might be affirmed. This is clearly not such a case. I would reverse and remand these charges with directions that Johnson must be notified of his right to seek certification as a child.