FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP 6 2001

JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LARRY ALAN SCHROEDER,	)	NOT FOR PUBLICATION
	)	
Appellant,	)	
v.	)	Case No. F 2000-515
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

JOHNSON, VICE-PRESIDING JUDGE:

Appellant, Larry Alan Schroeder, was tried by a jury in Oklahoma County District Court, Case No. CF 99-2717, and convicted of First Degree Burglary, in violation of 21 O.S.1991, § 1431 (Counts I and IV) and Forcible Oral Sodomy, in violation of 21 O.S.1991, §§ 886, 888 (Count II). Schroeder was also tried and convicted in Case No. CF 99-2998 of Second Degree Rape, in violation of 21 O.S.1991, § 1111 (Counts I and II), Forcible Oral Sodomy, in violation of 21 O.S.1991, §§ 886, 888 (Counts III, VI, VIII, and XIX), Indecent or Lewd Acts with a Child Under Sixteen, in violation of 21 O.S.1991, § 1123 (Count IV), First Degree Burglary, in violation of 21 O.S.1991, § 1431 (Counts V and VII), First Degree Rape, in violation of 21 O.S. §§ 1111, 1114 (Count XV), Kidnapping, in violation of 21 O.S.1991, § 745 and 10 O.S.1991, § 7115 (Counts XVI and XVII), and Sexual Abuse of a Child, in violation of 21 O.S.1991, §§ 886, 888 (Count XVIII). Jury trial was held on January 10, 12-14, 18-21, 24, 25, 2000 before the Honorable Susan Bragg, District Judge.

The jury set punishment in Case No. CF 99-2717 at ten (10) years imprisonment on Counts I and IV, and twenty (20) years imprisonment on Count II. In Case No. CF 99-2998, the jury set punishment at fifteen (15) years imprisonment on Counts I and II; twenty (20) years imprisonment on Counts III, VI, VIII, and XIX; fifteen (15) years imprisonment on Count IV; ten (10) years imprisonment on Counts V and VII; seventy-five (75) years imprisonment on Count XV; twenty-five (25) years on Count XVI; twelve (12) years on Count XVII; and fifteen (15) years on Count XVIII.

Formal sentencing was held April 17, 2000. Judge Bragg sentenced Appellant in accordance with the jury's verdicts, and ordered the sentences be served consecutively. From the Judgment and Sentences imposed, Appellant filed this appeal.

Appellant raised ten propositions of error:

> 1. The evidence was insufficient to establish "proof of guilty beyond a reasonable doubt" standard mandated by the fourteenth amendment Due Process requirement of the United States Constitution;
>
> 2. The trial court's consolidation of counts and Informations was an abuse of discretion in disregard of this Court's case law, which prejudiced Appellant under the facts of this case and constituted a denial of fourteenth amendment Due Process;
>
> 3. The identification procedures, including extra-judicial identification by alleged victims and third parties to the alleged victim extra-judicial identifications; bolstering of the witness identifications; improper courtroom re-enactments of identification nylon hose mask and the trial court's failure to give the cautionary eyewitness identification requested defense instruction violated any

semblance of a fair trial or Due Process in violation of the fifth, sixth, and fourteenth amendments;

4. There was double jeopardy and/or a merger of offenses under the facts and circumstances of the case, which prohibits separate punishments, or at the minimum prohibits consecutive sentencing;

5. The trial court erred in overruling Appellant's Motion to Quash Arrest Warrant and suppress fruits of illegal detention without bond, as Appellant was being held without bond without a hearing or any safeguard of *Brill v. Gurich*, and as such the detention was a violation of the Oklahoma Constitution, Article 2, Section 7 and 8, as well as the fourth, fifth and fourteenth amendments of the United States Constitution;

6. The prosecutor's/DNA expert's opinion herein was improper and invaded the province of the jury, as well as failed to establish the mathematical probability procedural/conclusional rendering it inadmissible/prejudicial in violation of this Court's decisions and fourteen amendment Due Process;

7. The trial court abused her discretion and abandoned her responsibility at sentencing by deferring to what she believed was the intent of the jury, mandating modification/concurrent sentences and/or remand to a different/impartial judge;

8. Improper, unethical and prejudicial conduct of the prosecutor which denied Petitioner fourteenth amendment Due Process and fundamental fairness, requiring reversal or at the minimum modification of sentence;

9. The accumulation of irregularities, errors and prosecutorial misconduct denied Appellant a fair trial, justifying reversal or at the minimum modification of sentence as being violative of Petitioner's fifth, sixth, eighth, and fourteenth amendment rights; and,

10. Appellant was denied effective assistance of counsel at trial in violation of his sixth and fourteenth amendment rights.

After thorough consideration of these propositions and the entire record before us on appeal, including the original record, transcripts, and briefs of the

parties, we have determined that relief is required on Counts V, VII, XVI, and XVII of CF 99-2998 for the reasons set forth below. The remaining convictions and sentences are affirmed.

When the sufficiency of evidence is challenged on appeal, the proper standard of review is whether there was sufficient evidence from which a rational trier of fact could find all the essential elements of the offense. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204. This Court accepts all reasonable inferences and credibility choices which tend to support the jury's verdicts. *Bryan v. State*, 1997 OK CR 15, ¶ 37, 935 P.2d 335, 358, *cert. denied*, 522 U.S. 957, 118 S.Ct. 383, 139 L.Ed.2d 299. Appellant challenges the sufficiency of the evidence relating to his convictions for Counts I and IV in CF 99-2717, and Counts V, VII, XV, XVI, and XVII in CF 99-2998. We find the State presented sufficient evidence to sustain the convictions for Rape (Count XV) in CF 99-2998, and for two counts of Burglary (Counts I and IV) in Case No. CF 99-2717.[1]

However, the evidence presented was not sufficient to prove the element of "breaking" in Counts V and VII of Case No. CF 99-2998. *Roberts v. State*, 2001 OK CR 14, ¶¶ 9-11, f. 14, -- P.3d -- (breaking requires any act of physical force, however slight, by which obstructions to entering are removed; going through an open door or window does not constitute burglary breaking). Therefore, the

[1] Appellant does not challenge the sufficiency of the evidence going to Count 2 in CF 99-2717 or Counts I-IV, VI, VIII, XVIII, and XIX.

convictions and sentences in Counts V and VII of Case No. CF 99-2998 are hereby **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS.**

Appellant also challenges the sufficiency of the evidence relating to his convictions for Kidnapping for Purpose of Extortion (Counts XVI and XVII in Case No. CF 99-2998). While we find reversal is warranted on those convictions, relief is not warranted based upon the sufficiency of the evidence. Rather, we find Appellant's convictions in Counts XVI and XVII of Case No. CF 99-2998 violate the statutory prohibition against double punishment as set forth in Proposition Four. 21 O.S.1991, § 11. Appellant was specifically charged with kidnapping for "purpose of extorting sexual gratification" and the State's theory at trial was that Appellant kidnapped the two victims for the purpose of sexual gratification.

For the kidnapping convictions to stand, we must find Appellant's specific intent was to kidnap the victims for the purpose of extorting sexual gratification. To prove intent, we would necessarily have to get into his sexual actions in the Rape charge (Count XV), or the Forcible Oral Sodomy charge (Count XIX) or the Sexual Abuse charge (Count XVIII). The kidnappings in Counts XVI and XVII and the sexual assaults in Counts XV, XVIII, and XIX were so closely connected as to be inseparable in terms of time, place and casual relation that the conduct of one tended to be explanatory of each other.[2] The kidnappings became, in

[2] The evidence at trial showed Appellant grabbed the two victims by the neck and dragged them a few feet further into the ditch before assaulting them.

effect, an underlying felony which merged as one of the elements of rape, sexual abuse, and forcible oral sodomy.[3] As the kidnappings for purpose of extorting sexual gratification was merely the means to commit the rape, the forcible oral sodomy, and the sexual abuse, we find those convictions must be **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS.**

The remaining merger/double jeopardy arguments set forth in Proposition Four, relating to Counts I, II, III, XV, XVIII, and XIX of CF 99-2998, do not require relief. *Salyer v. State*, 1988 OK CR 184, ¶¶ 12-15, 761 P.2d 890, 893.

The decision to grant or deny severance is within the discretion of the trial court and absent an abuse of that discretion, resulting in prejudice to the defendant, the trial court's decision will not be disturbed on appeal. *Gilson v. State*, 2000 OK CR 14, ¶ 49, 8 P.3d 883, 905. We find joinder of the offenses in this case was proper and no relief is warranted on Proposition Two.

In Proposition Three, we find no plain error occurred as a result of the prosecutor's opening statement commenting on the victims' identification of Appellant or from the third-party bolstering of the victims' identification. *Ellis v. State*, 1982 OK CR 151, ¶ 16, 651 P.2d 1057, 1062 (prosecutor's comments within the range of permissible comment); *Lougin v. State*, 1988 OK CR 21, ¶ 7, 749 P.2d 565, 567 (third-party testimony about extrajudicial identification is

[3] Had Appellant been charged with kidnapping under 21 O.S.1991, § 741, the result might have been different, as the underlying intent would not have been for the purpose of committing a rape. *See e.g. Doyle v. State*, 1989 OK CR 85, ¶ 17, 785 P.2d 317, 323.

not reversible error where the defendant is positively identified by eye-witness and there is sufficient evidence to justify the defendant's conviction).

Proposition Five also does not require relief. The proper method for review of the trial court's decision to deny bail is through a writ of habeas corpus, and the time to file an appeal from that denial has passed. *See* Rule 10.6(C), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2001). Even *if* bail were improperly denied, such would not render Appellant's prior arrest invalid or the subsequent seizure of his body fluids improper. The issuance of the arrest and search warrant was proper and supported by probable cause and the evidence would still have been discovered. *See e.g. Hooper v. State*, 1997 OK CR 64, ¶¶ 7-10, 947 P.2d 1090, 1097, *cert. denied*, 524 U.S. 943, 118 S.Ct. 2353, 141 L.Ed. 722 (1998); *Mollett v. State*, 1997 OK CR 28, ¶ 15, 939 P.2d 1, 7; *Pennington v. State*, 1995 OK CR 79, ¶ 42, 913 P.2d 1356.

The admission of the DNA expert's testimony was proper and no plain error occurred. *Taylor v. State*, 1995 OK CR 10, ¶¶ 29-37, 889 P.2d 319, 338; 12 O.S.1991, § 2702. Proposition Six is denied.

The trial court did not abuse its discretion in running the sentences consecutively. 22 O.S.1991, § 976; *Sherrick v. State*, 1986 OK CR 142, ¶ 16, 725 P.2d 1278, 1284. Proposition Seven is denied.

In Proposition Eight, Appellant complains prosecutorial misconduct denied him of a fair trial. To the complained of comments and conduct which

were not met with contemporaneous objection, Appellant has waived all but plain error and no plain error occurred. *Anderson v. State*, 1999 OK CR 44, ¶ 40, 992 P.2d 409, 421. One "side bar" comment was objected to, and the objection was sustained which cured any error. *Woodruff v. State*, 1993 OK CR 7, ¶ 64, 846 P.2d 1124, 1140, *cert. denied*, 510 U.S. 934, 114 S.Ct. 349, 126 L.Ed.2d 313 (1993). No plain error occurred from the courtroom demonstration involving the nylon hose mask. *See e.g. Brown v. State*, 1989 OK CR 33, ¶ 12, 777 P.2d 1355, 1358. Further, the prosecutor was not required to disclose discovery material relating to its rebuttal witness or to give notice of that testimony. *Goforth v. State*, 1996 OK CR 30, ¶ 3, 921 P.2d 1291, 1292; *Freeman v. State*, 1984 OK CR 60, ¶¶ 3-4, 681 P.2d 84, 85-86.

Accumulation of error raised in Proposition Nine also does not warrant relief. Although we have found relief is required on some counts, as discussed above, no other error has been identified which affected a substantial right, went to the foundation of the case or contributed to the jury's verdicts. *Malicoat v. State*, 2000 OK CR 1, ¶ 53, 992 P.2d 383, 406, *cert. denied*, -- U.S. --, -- S.Ct. -- , 2000 WL 979248 (2000).

Lastly, we find trial counsel's representation did not fall below the objective standard of reasonableness outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and Appellant has demonstrated neither deficient performance nor any resulting prejudice.

DECISION

The Judgment and Sentences in Counts I, II and IV of Case No. CF 99-2717, and Counts I, II, III, IV, VI, VIII, XV, XVIII, and XIX of Case No. CF 99-2998 are hereby **AFFIRMED**. The Judgment and Sentences in Counts V, VII, XVI, and XVII of Case No. CF 99-2998 are hereby **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS**

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CHAPEL, J.: CONCURS
STRUBHAR, J.: CONCURS
LILE, J.: CONCURS IN PART/DISSENTS IN PART

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LILE, JUDGE: CONCURS IN PART/DISSENTS IN PART

I concur with the Court's decision on all counts except Counts V and VII in case number CF-99-2998. I dissent to reversal of Counts V and VII because there is sufficient direct and circumstantial evidence in the record to support the convictions for first degree burglary. I agree that Counts XVI and XVII must be reversed because they establish violations of 21 O.S. 1991, § 11, not because of any now rejected analysis as being a means to commit the rape but simply because the actual acts committed were in fact part of the rape (i.e. the same act) which can only be punished once under 21 O.S. 1991, § 11.