

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP 21 2001

STATE OF OKLAHOMA

JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JACK ALBERT LOWE,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

) NOT FOR PUBLICATION

) Case No. F-2000-897

SUMMARY OPINION

LILE, JUDGE:

Appellant, Jack Albert Lowe, was found guilty at jury trial of First Degree Burglary (Count I) and Rape in the First Degree by Instrumentation (Count II), in Case No. CF-97-126, in the District Court of Adair County. The Honorable John C. Garrett, District Judge, sentenced Appellant in accordance with the jury's verdicts to imprisonment for twenty (20) years on Count I and 1,000 years on Count II. Appellant has perfected his appeal to this Court, of his conviction and sentence on Count II.

Appellant raises the following propositions of error in support of his appeal:

- (I) THE TRIAL EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THE ESSENTIAL ELEMENT OF PENETRATION.
- (II) MR. LOWE'S SENTENCE IS EXCESSIVE AND SHOULD BE MODIFIED.

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 that modification is necessary under the facts and the law.

With regard to Proposition I, we find that looking at the evidence in the light most favorable to the prosecution, the State did not prove beyond a reasonable doubt even slight penetration which is required to support a conviction of rape by instrumentation. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204; *Kitchen v. State*, 69 P.2d 411, 414, 61 Okl.Cr. 435, 443, (1937). However, the State did prove lewd molestation, a lesser included offense of rape by instrumentation, and Appellant's jury was instructed accordingly. *Shrum v. State*, 1999 OK CR 41, ¶ 10, 991 P.2d 1032, 1037; *Riley v. State*, 1997 OK CR 51, ¶ 15, 947 P.2d 530, 534. The judgment of the trial court is modified from Rape by Instrumentation to Lewd Molestation. In light of his two prior felony convictions and the facts of this case, Appellant's sentence is modified to life imprisonment. 22 O.S. 1991, § 1066; *McArthur v. State*, 1993 OK CR 48, 862 P.2d 482; *Stokes v. State*, 86 Okl.Cr. 21, 190 P.2d 838, 839 (1948); 21 O.S.Supp.1999, § 51.1(B).

With regard to Proposition II, we find the modification of Appellant's sentence from 1,000 years to life is within the parameters set forth by 21 O.S.Supp.1999, § 51.1(B) and does not shock the conscience of the court. *Maxwell v. State*, 1989 OK CR 22, ¶ 12, 775 P.2d 818, 820.

DECISION

The Judgment on Count II is **MODIFIED** to Lewd Molestation and the Sentence is **MODIFIED** to life imprisonment, to be served consecutively with the twenty (20) year sentence for First Degree Burglary. The Judgment and Sentence on Count I is **AFFIRMED**.

ATTORNEYS AT TRIAL

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OPINION BY: LILE, J.

LUMPKIN, P.J.: CONCURS
JOHNSON, V.P.J.: CONCURS
CHAPEL, J.: CONCURS
STRUBHAR, J.: CONCURS

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