IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

JERRY LEON McMANUS, JR.,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
-vs-	)	No. F-2000-912
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

STRUBHAR, JUDGE:

Appellant Jerry Leon McManus, Jr., was charged with Kidnapping (Count I), Assault and Battery With a Dangerous Weapon (Count II), First Degree Rape by Instrumentation (Counts III and IV), Forcible Anal Sodomy (Counts V, VI, VIII, IX and XI), Forcible Oral Sodomy (Counts VII, X and XII) and First Degree Rape (Count XIII), each After Former Conviction of Two or More Felonies, in the District Court of Muskogee County, Case No. CF-98-736. The trial court directed a verdict of not guilty as to Counts X, XI and XII and the jury found Appellant guilty on all remaining counts. Punishment was assessed at life imprisonment on each count with the sentences to run concurrently.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we modify the Judgment and Sentence on Counts III and IV and affirm Appellant's Judgment and Sentence on all remaining Counts. In reaching our decision, we considered

the following propositions of error and determined this result to be required under the law and the evidence:

I. The trial court erred in failing to instruct the jury on the elements of First Degree Rape by Instrumentation.

II. The trial court erroneously allowed other crimes evidence to be introduced to the jury.

III. Appellant was denied a fair trial because of the prosecutor's improper remarks.

IV. The evidence was insufficient to sustain Appellant's conviction of Rape by Instrumentation and Anal Sodomy.

V. Blatant and prejudicial hearsay was improperly allowed before the jury and reversal of Appellant's convictions and sentences is mandatory.

VI. The trial errors complained of herein cumulatively denied Appellant his right to a fair trial under the United States and Oklahoma Constitutions and therefore, his convictions and sentences must be reversed.

DECISION

We find merit in Appellant's first proposition wherein he contends the trial court omitted an element of the crime of First Degree Rape by Instrumentation in its instructions to the jury. By not requiring the jury to find that bodily harm occurred, the trial court instructed the jury on the elements of the lesser included offense of Second Degree Rape by Instrumentation. See 21 O.S.1991, § 1114(A)(4)&(B); OUJI-CR 4-125 & 4-126. Thus, as Appellant was convicted by the jury of Second Degree Rape by Instrumentation, we hereby modify his

Judgment on Counts III and IV to reflect conviction of this lesser included crime and modify his Sentence on these same Counts to fifteen years imprisonment on each count as is provided in 21 O.S.1991, § 1116.

We find in Appellant's second proposition that the reference to Appellant's prior criminal act was improper as it was extremely remote in time and not relevant to show any of the exceptions to the *Burks* rule. *Burks v. State*, 594 P.2d 771, 774-75 (Okl.Cr.1979), overruled in part on other grounds by *Jones v. State*, 772 P.2d 922 (Okl.Cr.1989). However, this isolated and somewhat vague reference to Appellant's prior criminal act cannot be found to have influenced the verdict or to have deprived Appellant of his fundamental right to a fair trial. Accordingly, this error was harmless beyond a reasonable doubt.

Appellant's third proposition warrants no relief as many of the remarks at issue were met with objection and the jury was appropriately admonished, thus curing any error. *See Welch v. State*, 2 P.3d 356, 369-70 (Okl.Cr.2000). Other remarks at issue which were met with objection but overruled can be found to have been fair comments on the evidence. The few comments not met with objection did not rise to the level of plain error. Two remarks which were met with objection and which were inappropriate do not require relief as they

cannot be found to have affected the overall fairness of Appellant's trial. *Powell v. State,* 995 P.2d 510, 539 (Okl.Cr.2000).

We find Appellant's fourth proposition to be without merit as any discrepancies in the victim's testimony did not render her testimony so insubstantial and incredible as to be unworthy of belief. Thus corroboration was not required. *See Gilmore v. State,* 855 P.2d 143, 145 (Okl.Cr.1993). Further the evidence was sufficient to support beyond a reasonable doubt Appellant's conviction for Rape by Instrumentation in Count IV and all four counts of Anal Sodomy. *Spuehler v. State,* 709 P.2d 202, 203-04 (Okl.Cr.1985).

Appellant's fifth proposition warrants no relief as the improper introduction of hearsay testimony was harmless beyond a reasonable doubt in light of the significant evidence of Appellant's guilt. *See McIntosh v. State,* 810 P.2d 373, 376 (Okl.Cr.1991).

Finally, the cumulative effect of the errors at trial did not deny Appellant his right to a fair trial. Thus, relief is not warranted. *See Anderson v. State,* 992 P.2d 409, 425 (Okl.Cr.1999).

Appellant's Judgment on Counts III and IV is **MODIFIED** to Second Degree Rape by Instrumentation and his Sentence on these Counts is **MODIFIED** to fifteen years imprisonment. His Judgment and Sentence on all remaining Counts is **AFFIRMED**.

APPEARANCES AT TRIAL

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