IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DAVID LYNN NELSON,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	Case No. F 2004-1198
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

A. JOHNSON, JUDGE:

David Lynn Nelson, Appellant, was tried by jury in the District Court of Tulsa County, Case No. CF-2003-5705, and convicted of two counts of Rape by Instrumentation (counts 1 and 7)(21 O.S.2001, § 1111.1), four counts of Forcible Oral Sodomy (counts 2, 3, 5 and 8)(21 O.S.Supp.2002, § 888), two counts of First Degree Rape (counts 4 and 6)(21 O.S.Supp.2002, § 1111 and 21 O.S.2001, § 1114) and one count of Attempted Rape (count 9)(21 O.S.2001, § 42; 21 O.S.Supp.2002, § 1111), each after former conviction of four prior felonies. The jury fixed punishment at 40 years imprisonment and a $5,000.00 fine on counts 1, 7 and 9 and life imprisonment and a $10,000.00 fine on all other counts. The Honorable Caroline E. Wall sentenced Nelson accordingly and ordered the sentences to run concurrently. From this judgment and sentence, he appeals.

Nelson raises four claims of error:

1. He was denied effective assistance of trial counsel;

2. He was prejudiced by the omission of an instruction on 21 O.S.Supp.2002, § 13.1 (the "85% Rule");

3. The evidence was insufficient to prove forcible oral sodomy alleged in Count 3; and

4. His nine convictions violate the Double Jeopardy Clause and Oklahoma's statutory prohibition against multiple punishments for a single act (21 O.S.2001, § 11).

As for his first claim, Nelson has not proved trial counsel was ineffective for making strategic decisions about impeaching the victim, about foregoing lesser included offense instructions, nor for failing to object to indirect vouching of the victim, an extra-judicial identification, or to the admission of other crimes evidence.[1] His fourth claim is also without merit. Nelson's nine convictions neither violate 21 O.S.2001, § 11A nor the Double Jeopardy Clause because the crimes are separate and distinct and require dissimilar proof.[2] Nelson's second and third propositions merit further discussion.

Instruction on the 85% Rule

Nelson asks this Court to modify his sentence because the trial court refused to instruct the jury that he would be parole ineligible until he served 85% of any sentence imposed for these crimes. The trial court refused defense

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[1] *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.

[2] *Jones v. State*, 2006 OK CR 5, ¶ 63, 128 P.3d 521, 542; *McElmurry v. State*, 2002 OK CR 40, ¶ 80, 60 P.3d 4, 24; *Davis v. State*, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126.

counsel's proposed instruction on 21 O.S.Supp.2002, § 13.1. This Court has held it is error not to give an instruction on the 85% Rule, when requested, so that jurors have accurate information about sentencing. *Anderson v. State*, 2006 OK CR 6, ¶¶11-13, 130 P.3d 273, 278.

Nelson was sentenced to life in prison and a $10,000 fine for counts 2, 3, 4, 5, 6 and 8 and, 40 years in prison and a $5,000 fine for counts 1, 7 and 9, all to run concurrently with each other. The jury did send out a note seeking information about how much time Nelson would serve. The questions were not answered. To remedy any adverse effect of failing to instruct the jury on the 85% Rule, we modify Nelson's life sentences to 45 years in prison and leave undisturbed his 40 year sentences.

Sufficiency of the Evidence

Nelson argues his forcible sodomy conviction in Count 3 must be reversed because the State failed to prove penetration. We review claims challenging the sufficiency of the evidence by considering the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jones v. State,* 2006 OK CR 5, ¶ 32, 128 P.3d 521.

Any sexual penetration, however slight, is sufficient to satisfy the penetration element for forcible sodomy. 21 O.S.2001, § 887. Evidence that establishes slight penetration varies from case to case. *Compare Hicks v. State*, 1986 OK CR 7, ¶8, 713 P.2d 18, 20 (Evidence that the defendant placed his

mouth on the victim's vagina for six to ten seconds, without more, is insufficient to establish the element of penetration for forcible sodomy)[3] *with Riley v. State*, 1997 OK CR 51, ¶ 7, 947 P.2d 530, 532 (evidence the defendant kissed and licked a five-year-old girl's vagina was sufficient for a rational trier of fact to find penetration).

The victim never testified specifically that Nelson penetrated her vagina during the act of cunnilingus alleged in Count 3. Instead, she said that "he moved to where he was orally going down on me" and that his mouth was on her vagina. This case is indistinguishable from *Hicks*. Count 3 must be reversed with instructions to dismiss.

DECISION

The Judgment and Sentence of the trial court on Counts 1, 7 and 9 is **AFFIRMED.** Count 3 is **REVERSED with INSTRUCTIONS to DISMISS.** The Judgment of the trial court on Counts 2, 4, 5, 6 and 8 is **AFFIRMED** and the sentences on those counts is **MODIFIED** to 45 years imprisonment. 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.

[3] The *Hicks* Court asked the legislature to rewrite the sodomy statutes and eliminate the use of "delicate" language so enforcement of the crime would be less complicated. It also asked the legislature to eliminate the element of penetration for sodomy. *Hicks*, 1986 OK CR 7, ¶ 9, 713 P.2d at 20.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE CAROLINE E. WALL, ASSOCIATE DISTRICT JUDGE

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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

RB

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

I dissent to the reversal of the conviction in Count 3. The victim's statements describing Appellant's conduct was sufficient to establish penetration. *See Riley v. State*, 1997 OK CR 51 ¶ 7, 947 P.2d 530, 532. Her testimony and the reasonable inferences drawn therefrom was sufficient to support a conviction for forcible oral sodomy. *See Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559.

Further, I concur in the affirmance of the judgments and convictions in the remaining Counts. However, I accede to the application of Anderson in this case based solely on the principle of *stare decisis*.[1]

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[1] I believe the Court should apply the plain language of *Anderson* which states:

> While this decision gives effect to the legislative intent to provide juries with pertinent information about sentencing options, **it does not amount to a substantive change in the law. A trial court's failure to instruct on the 85% Rule in cases before this decision will not be grounds for reversal." *Id.***

2006 OK CR 6, ¶ 25 (emphasis added). The plain reading of the decision reveals it is not a substantive change in the law, only a procedural change, and it should only be applied in a prospective manner.