IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JONATHAN DWIGHT HARJO,	]	
	]	
Appellant,	]	
	]	
v.	]	Case No. F-2004-1261
	]	
THE STATE OF OKLAHOMA,	]	
	]	
Appellee.	]	

SUMMARY OPINION

LEWIS, JUDGE:

Jonathan Dwight Harjo, Appellant, was tried by jury and found guilty of rape in the first degree, in violation of 21 O.S.Supp. 2004 § 1111, after former conviction of a felony, in Tulsa County District Court, Case No. CF-2004-1314. Appellant was represented by counsel. The jury sentenced Appellant to fifteen (15) years imprisonment. The Honorable Jesse S. Harris, District Judge, imposed judgment and sentence according to the jury verdict.

Mr. Harjo appeals, raising the following propositions of error:

1. It Was Reversible Error For The Trial Court To Deny Appellant The Right To Confront The Alleged Rape Victim About Prior Sexual Conduct For The Purpose Of Impeachment.

2. It Was Error To Admit A Videotape Of Appellant's Statement To Police After The Interviewing Detective Had Already Testified As To The Relevant Portions Of The Tape. In The Alternative, Defense Counsel's Failure To Redact Irrelevant And Prejudicial Portions Of The Tape Constituted Ineffective Assistance Of Counsel.

3. It Was Reversible Error To Fail To Instruct On The Lesser Offense Of Sexual Battery Or, In The Alternative, To Not Require An Affirmative Waiver Of The Instruction By Appellant. Further, Defense Counsel's

Failure To Advise Appellant Of His Right To A Lesser-Included Instruction Constituted Ineffective Assistance Of Counsel In Violation Of The Sixth And Fourteenth Amendments To The United States Constitution.

4. It Was Error For The Trial Court To Deny Appellant's Request For An 85% Instruction Pursuant To 21 O.S. Supp. 2002 § 13.1.

5. Appellant's Sentence Should Be Modified To Ten Years In Prison, The Minimum For First Degree Rape After Former Felony Conviction.

In Proposition 1, the Court finds no abuse of discretion in the trial court's limitation on Appellant's cross-examination of the complaining witness. Appellant's constitutional right to confront his accuser was not abridged by the trial court's ruling. *Heavener v. State,* 1985 OK CR 109 ¶ 11, 706 P.2d 905, 908. *Delaware v. Van Arsdall,* 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

In Proposition 2, the Court finds the videotape of Appellant's statement was properly admitted and not unduly cumulative. 12 O.S. 2001 § 2403. The error, if any, in the admission of the videotape was cured by the trial court's admonition to the jury. *Welch v. State,* 2000 OK CR 8 ¶ 26, 2 P.3d 356, 369-370. Appellant cannot show deficient performance or prejudice arising from trial counsel's failure to seek redaction of the videotape before it was admitted. *Davis v. State,* 1999 OK CR 16, ¶ 38, 980 P.2d 1111, 1120.

In Proposition 3, the Court finds that Appellant was not entitled to a lesser-included offense instruction on sexual battery. 21 O.S.Supp. 2003 § 1123. *Vaughn v. State,* 1985 OK CR 29 ¶ 15, 697 P.2d 963, 967. *Milligan v. State,* 1983 OK CR 113 ¶ 6, 668 P.2d 336, 338. *Epley v. State,* 1951 OK CR,

94 Okl.Cr. 308, 319, 235 P.2d 711, 721. Because Appellant was not entitled to the instruction, Appellant cannot demonstrate that his trial counsel provided deficient representation by failing to advise Appellant of his right to such an instruction.[1] *Lockett v. State,* 2002 OK CR 30, ¶ 15, 53 P.3d 418, 424.

In Proposition 4, Appellant alleges reversible error in the trial court's refusal to instruct the jury that Appellant would serve 85% of his sentence for rape. 21 O.S.Supp. 2003 § 13.1. Any prejudice to Appellant from this error is cured by modification of Appellant's sentence to ten (10) years imprisonment. *Anderson v. State,* 2006 OK CR 6, ___ P.3d ___. Modification of Appellant's sentence renders Proposition 5 moot.

DECISION

The Judgment of the District Court of Tulsa County is **AFFIRMED.** The Sentence is **MODIFIED** to ten years imprisonment. Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

[1] Appellant's *Motion For Supplementation Of The Record And Request To Remand For Evidentiary Hearing* is granted to supplement the record with Appellant's proffered materials. The Application For Evidentiary Hearing is denied.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE JESSE HARRIS, DISTRICT JUDGE

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OPINION BY LEWIS, J.
CHAPEL, P.J.: Concur
LUMPKIN, V.P.J.: Concur in Part/Dissent in Part
A. JOHNSON, J.: Concur
C. JOHNSON, J.: Concur

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

I concur in the decision to affirm the conviction in this case, but I disagree that the facts warrant a sentence modification. Therefore, I dissent with respect to the relief granted on proposition IV.

The sentence range for the convicted crime, first-degree rape, is 10 years to life imprisonment. The prosecutor requested that the jury impose an 80-year sentence, but the jury instead recommended that Appellant serve 15 years. That is a generous sentence for this crime and is in no way shocking to the conscience.

In *Anderson v. State*, 2006 OK CR 6, ¶ 23, ___ P.3d ___ (Okl.Cr. 2006), this Court stated there is "no good reason not to provide Oklahoma's sentencing juries with this critical information about how the sentences they give are required to be served." However, there is also "no good reason" to modify every sentence in every case that presents this same issue. It seems to me that the power to modify includes the power to not modify, at least in those cases where the sentence the defendant received is blatantly reasonable. It makes no sense to institute a rule of *per se* modification where no semblance of prejudice has been shown.[1]

As per *Anderson*, I too find that instructional error occurred. However, I find no modification is warranted under the facts of this case.

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[1] However, if we were to someday adopt a rule of *per se* modification for these types of cases, I would still modify this particular sentence by reducing it no more than 30 days.