IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SHAYNATHIAN RASHAUD HICKS,	]	
	]	NOT FOR PUBLICATION
Appellant,	]	
	]	
v.	]	Case No. F-2005-1058
	]	
THE STATE OF OKLAHOMA,	]	
	]	
Appellee.	]	

SUMMARY OPINION

LEWIS, JUDGE:

Shaynathian Rashaud Hicks, Appellant, was tried by jury in the District Court of Atoka County and found guilty of indecent exposure, in violation of 21 O.S.Supp.2003, § 1021(A)(1) (Case No. CF-2004-183); attempted rape, in violation of 21 O.S.Supp.2002, § 1115 (Case No. CF-2004-184); injury to a minor child, in violation of 10 O.S.Supp.2002, § 7115 (Case No. CF-2004-186); two counts of transferring fluid upon a county employee, in violation of 21 O.S.2001, § 650.9 (Case No. CF-2004-187); domestic abuse in the presence of a minor, a misdemeanor, in violation of 21 O.S.Supp.2004, § 644(C) (Case No. CM-2004-322); and resisting an officer, a misdemeanor, in violation of 21 O.S.2001, § 268 (Case No. CM-2004-323). The jury sentenced Appellant to four (4) years imprisonment for indecent exposure; ten (10) years imprisonment for attempted rape; ten (10) years imprisonment for injury to a minor child; two (2) years imprisonment for each count of transferring fluid upon a county employee; one (1) year in jail for domestic abuse in the presence of a minor;

and one (1) year in jail for resisting an officer. The Honorable Richard E. Branam, District Judge, imposed judgment and sentence, ordering all terms served concurrently except the ten (10) year sentence for injury to a minor child. Mr. Hicks appeals in the following propositions of error.

1. The Evidence Was Insufficient To Support Appellant's Conviction For Indecent Exposure.

2. The Evidence Was Insufficient To Support Appellant's Conviction For Attempted Rape In The First Degree.

3. The Evidence Was Insufficient To Support Appellant's Conviction For Injury Of A Minor Child.

4. In CF-2004-187 The Evidence Was Insufficient To Support Count I, Transfer Of Bodily Fluid Upon A County Employee.

5. Appellant's Constitutional Right To Confront The Witnesses Against Him Was Denied By Admission Of Preliminary Hearing Testimony Of Witnesses The Court Found Unavailable.

6. Appellant Was Prejudiced By Errors In Instructing The Jury.

7. The Prosecutor's Misconduct Denied Appellant A Fair Trial.

8. Appellant Was Prejudiced By Judicial Bias In The Trial.

9. Appellant Was Prejudiced By The Trial Court's Erroneous Instruction On Punishment For Attempted First Degree Rape.

10. Appellant's Sentences Are Excessive And Should Be Modified.

11. Appellant's Convictions Should Be Reversed Or Modified, And/Or The Sentences Modified, Based On Cumulative Error.

We review Appellant's challenges to the sufficiency of the evidence in Propositions 1 through 4 to determine whether the evidence, viewed in the light most favorable to the State, would permit any rational trier of fact to find the

elements of the charged offenses beyond a reasonable doubt. *Speuhler v. State*, 1985 OK CR 132, ¶ 7 709 P.2d 202, 203-204. In Proposition 1, Appellant argues persuasively that the State failed to present sufficient evidence that his inappropriate act of urination, which formed the basis for the charge of indecent exposure, was done "lewdly." Indecent exposure is the lewd exposure of the person or private parts in any public place or place where other persons are present to be offended or annoyed. 21 O.S.2001, § 1021. The element of lewdness requisite to this offense is "an unlawful indulgence in lust, eager[ness] for sexual indulgence," in conjunction with a prohibited exposure. *McKinley v. State*, 1926 OK CR, 33 Okl.Cr. 434, 436, 244 P. 208. Even under our deferential test for sufficiency of the evidence, the State's proof cannot rationally support a conclusion that Appellant lewdly exposed himself within the meaning of the statute. The conviction for indecent exposure is reversed and remanded with instructions to dismiss. The remaining arguments in Propositions 2 through 4 are denied.

In Proposition 5, Appellant challenges the District Court's ruling that two prosecution witnesses were unavailable, and the resulting admission of their transcribed testimony from the preliminary examination. We find the District Court's ruling that the witnesses were unavailable supported by the record. The District Court's admission of the transcripts was not an abuse of discretion and did not deny Appellant his constitutional right to confront his accusers. *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968); *Primeaux*

v. State, 2004 OK CR 16, ¶ 64, 88 P.3d 893; *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

Proposition Six argues that errors in the instructions to the jury denied Appellant a fair trial. Appellant has waived all but plain error by failing to object to the instructions at trial. *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690. Jury instructions are committed to the sound discretion of the District Court. *Dill v. State*, 2005 OK CR 20, ¶ 11, 122 P.3d 866, 869. We consider the jury instructions as a whole to determine whether they fairly and accurately state the law. *Ashinsky v. State*, 1989 OK CR 59, 780 P.2d 201. Appellant fails to show plain error in the District Court's instructions to the jury. This proposition is waived.

In Proposition 7, Appellant argues prosecutorial misconduct denied him a fair trial. We have reviewed the alleged instances of prosecutorial misconduct and most are waived by failure to object. The prosecutor's arguments to the jury consisted mainly of fair comments and reasonable inferences based in the evidence. Reversal is a proper remedy when grossly improper and unwarranted argument affects a defendant's rights. *Coates v. State*, 2006 OK CR 24, 137 P.3d 682. Such was not the case in this trial. Proposition 7 is denied. Appellant's claim in Proposition 8 that reversal is required due to judicial bias is fanciful, if not frivolous, and is likewise denied.

Appellant shows in Proposition 9 that the District Court instructed on an improper range of punishment. The District Court erred by instructing the jury

that the range of punishment for attempted rape was not less than two and one-half (2 ½) years. The correct minimum punishment for attempted rape is not less than five (5) years imprisonment, the same as the punishment for a completed rape. 21 O.S.2001, § 42(1). The instructions also set no maximum punishment, though section 42(1) limits the available sentence to one-half (1/2) the maximum punishment for the completed offense. The maximum punishment for rape is life imprisonment. 21 O.S.Supp.2002, § 1115.

Appellant fails to show cause for reversal. The incorrect instruction on the minimum punishment could not have prejudiced Appellant; if anything, the instruction suggested the crime of attempted rape is less serious and punishable by a lesser term than it actually is. The failure to fix an upper range of punishment did not prejudice Appellant, either. The charge of injury to a minor child also carried up to life imprisonment, yet the jury chose ten (10) years for that offense as well, indicating that the jury was not influenced in either the attempted rape or injury to a minor child convictions by the unlimited upper range of punishment given in the instructions. The jury chose sentences at the low end of the authorized range in both cases. Appellant has not shown that the misdirection of the jury here probably resulted in a miscarriage of justice or denied a substantial statutory or constitutional right. 20 O.S.2001, § 3001.1. Proposition 9 is denied.

In Proposition 10, Appellant seeks modification of the sentence due to the absence of a jury instruction explaining that Appellant must serve 85% of

his sentences for attempted rape and injury to a minor child before he is eligible for parole. *Anderson v. State,* 2006 OK CR 6, 130 P.3d 273; 21 O.S.Supp.2003, § 13.1. Defense counsel requested leave to inform the jury that some of Appellant's charges carried sentences subject to the 85% rule of 21 O.S.Supp.2003, § 13.1. The District Court refused this request. Appellant's trial predates our decision in *Anderson*, but we review *Anderson* errors in cases pending when *Anderson* was decided to "determine whether the error resulted in a miscarriage of justice or constitutes a substantial violation of a constitutional or statutory right." *Carter v. State*, 2006 OK CR 42, ¶ 5, 147 P.3d 243, 244.

We take notice that Appellant was eighteen years of age when these crimes were committed. He had no prior criminal record. During deliberations, the jury asked two questions about sentencing: "Is our sentence a recommend [sic] or is [sic] the Judge set the amount of time served?," and "How many years will he serve if we give him 20 years?" The District Court replied that the jury had the law and evidence necessary to a decision. This exchange is not materially different from the questions asked by the juries in *Anderson* and *Carter,* and the answers those juries received from the bench. *Cf. Anderson,* at ¶ *10,* 130 P.3d at 277-278 (jury asked how many years had to be served before a person was eligible for parole); *Carter,* at ¶ 5, 147 P.3d at 244 ("What is the minimum # of years served before coming up for parole?"). As in those cases, the Court finds that the failure to give the jury an instruction on

the 85% rule "prejudicially impacted the sentencing deliberations." *Carter*, at ¶ 7, 147 P.3d at 245.

After receiving the District Court's response that it had all the proper law and evidence, the jury sentenced Appellant to a total of thirty (30) years incarceration. We infer from the jury's question, the response, and the ultimate outcome that the jurors engaged in "'rounding up' their sentences, in an attempt to account for their uninformed guesses about the impact of parole." *Carter*, at ¶ 6, 147 P.3d at 245, *quoting Anderson*, at ¶ 23, 130 P.3d at 282. However, nothing in the record suggests the jury intended to sentence Appellant to *less than* twenty (20) years imprisonment. In addition to the ten (10) year sentences for attempted rape and injury to a minor child, the jury assessed four (4) years—of an available ten (10) year maximum—for indecent exposure; the maximum of two (2) years imprisonment in each fluid transfer offense; and the maximum jail time for both misdemeanors, amounting to another ten (10) years incarceration.

The prejudice readily attributable to the *Anderson* error is this *additional* ten (10) years imprisonment ultimately imposed by the jury *after* it was denied information about the effect of the 85% Rule on a proposed twenty-year sentence. The District Court reversed this prejudicial impact at formal sentencing, when it effectively imposed a total of twenty (20) years imprisonment, rather than the thirty (30) years assessed by the jury. On these facts, we find neither remand for re-sentencing nor further modification of the

sentence on appeal is warranted. Appellant's Proposition 11, seeking relief from cumulative error, is also denied.

DECISION

The Judgment and Sentence of the District Court of Atoka County in Case No. CRF-2004-183 (Indecent Exposure) is **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS.** The remaining Judgments and Sentences are **AFFIRMED.** 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.

AN APPEAL FROM THE DISTRICT COURT OF ATOKA COUNTY
THE HONORABLE RICHARD E. BRANAM, DISTRICT JUDGE

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OPINION BY LEWIS, J.
LUMPKIN, P.J.: Concurs in Result
C. JOHNSON, V.P.J.: Concurs
CHAPEL, J.: Concurs
A. JOHNSON, J.: Concurs