IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TODD WAYNE MCFARLAND,	)	
	)	Not for Publication
Appellant,	)	
v.	)	Case No. F-2006-17
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, JUDGE:

Todd Wayne McFarland was tried by jury and convicted of Count I, Sexual Battery in violation of 21 O.S.2001, § 1123, and Count II, Second Degree Rape by Instrumentation in violation of 21 O.S.2001, §§ 1111.1, 1114, in the District Court of Creek County, Case No. CF-2001-552. In accordance with the jury's recommendation the Honorable Douglas W. Golden sentenced McFarland to three (3) years imprisonment and a $10,000 fine (Count I); and five (5) years imprisonment and a $10,000 fine (Count II). McFarland appeals from these convictions and sentences.

McFarland raises four propositions of error in support of his appeal:

I. The crimes of sexual battery and second degree rape by instrumentation in Counts I and II were a series of crimes based upon a single criminal transaction constituting double punishment and double jeopardy in violation of the Fifth and Fourteenth Amendments to the United States Constitution, Article 2, Section 21 of the Oklahoma Constitution and Okla. Stat. Tit. 21, § 11(A);

II. Improper statements made by the prosecutor during closing argument deprived McFarland of a fair trial;

III. The fine assessed McFarland for Count II was based upon an erroneous jury instruction and thus should be vacated or modified; and

IV. Under the facts of the case McFarland's sentence is excessive and should be modified.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find that McFarland's sentence for Count II must be modified. No further relief is required. We find in Proposition I that neither the statutory prohibition against multiple punishment nor double jeopardy are violated by McFarland's convictions.[1] We find in Proposition II that the prosecutor occasionally overstepped the bounds of proper argument to McFarland's prejudice.[2] We find in Proposition IV that McFarland's sentence is not excessive.[3]

We find in Proposition III that the jury was incorrectly instructed on the imposition of a fine on Count II. That fine was imposed pursuant to a statute which provides that a fine may be imposed, but does not require it.[4] The instruction second degree rape by instrumentation included a range of possible imprisonment "*and* a fine of up to $10,000." This instruction required jurors

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[1] 21 O.S.2001, § 11; *Jones v. State*, 2006 OK CR 5, 128 P.3d 521, 543 (we decide whether a defendant is charged with and convicted of separate crimes which are only tangentially related to one or more crimes committed during a continuing course of conduct). We have upheld convictions for separate sexual offenses, proved separately, even when no significant lapse of time separated the offenses. *Doyle v. State*, 1989 OK CR 85, 785 P.2d 317, 323; *Eberhart v. State*, 1986 OK CR 160, 727 P.2d 1374, 1379; *Clark v. State*, 1984 OK CR 6, 678 P.2d 1191, 1191-92. While there was no lapse of time between the acts charged in Counts I and II, the record shows they were two separate incidents and the first was completed before the second began, so § 11 is not violated. As the crimes have different elements and require dissimilar proof, there is no violation of double jeopardy. *Mooney v. State*, 1999 OK CR 34, 990 P.2d 875, 883.

[2] Both parties have wide latitude to argue and make inferences from the evidence, and error in argument will not warrant relief unless the defendant is deprived of a fair trial and has suffered prejudice. *Brewer v. State*, 2006 OK CR 16, 133 P.3d 892, 895; *Spears v. State*, 1995 OK CR 36, 900 P.2d 431, 445. The prosecutor expressed her personal opinion of McFarland's guilt. *Jones v. State*, 1988 OK CR 267, 764 P.2d 914, 917 (error to state "The defendant is guilty. He did it.") She invoked sympathy for the victim. *Garrison v. State*, 2004 OK CR 35, 103 P.3d 590, 610-11; *Spears*, 900 P.2d at 445; *Wilson v. State*, 1998 OK CR 73, 983 P.2d 448, 470. In claiming guilt was uncontested and arguing that guilt was proved by evidence of a restraining order, the prosecutor misstated evidence and argued irrelevant evidence.

[3] *Rea v. State*, 2001 OK CR 28, 34 P.3d 148, 149.

to impose a fine, although there is no such statutory requirement. The State argues that the instructions were taken from the uniform jury instructions and are presumptively correct. However, this is not the case. The trial court correctly used the appropriate instruction format for punishment, but did not correctly fill in the blanks regarding the statutory fine available. The use of the phrase "*and* a fine of" does not, as the State suggests, imply that jurors may not recommend a fine at all. Although McFarland did not object to the instructions, this error in instruction constitutes a substantial violation of a constitutional or statutory right, and requires relief.[5] In combination with the improper argument discussed in Proposition II, the fine imposed on Count II must be vacated.

Decision

The Judgments of the District Court are **AFFIRMED**. The Sentence for Count I is **AFFIRMED**. The Sentence for Count II is **MODIFIED** to **VACATE** the $10,000 fine. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

[4] 21 O.S.2001, § 64(B).
[5] 20 O.S.2001, § 3001.1.

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OPINION BY: CHAPEL, J.

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LEWIS, J.:	CONCUR IN RESULTS