IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES LYMAN MAHAFFEY,	)	
	)	
Appellant,	)	
v.	)	No. F-2010-267
	)	Not for Publication
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

SMITH, JUDGE:

James Lyman Mahaffey, Appellant, was tried by jury and convicted of Assault & Battery with a Deadly Weapon AFCF, under 21 O.S.Supp.2007, § 652(C) (Count I); Kidnapping AFCF, under 21 O.S.Supp.2007, § 741 (Count II); and Possession of Firearm After Conviction AFCF, under 21 O.S.Supp.2007, § 1283 (Count III), in the District Court of Grady County, Case No. CF-2009-45.[1] In accord with the jury verdict, the Honorable Richard G. Van Dyck, District Judge, sentenced Mahaffey to imprisonment for Life on Count I, imprisonment for 10 years on Count II, and imprisonment for 6 years on Count III, all run consecutively.[2] Mahaffey is before this Court on direct appeal.[3]

Mahaffey raises the following propositions of error:

I. THE TRIAL COURT ERRED WHEN IT GRANTED APPELLANT'S REQUEST TO PROCEED AS A *PRO SE* LITIGANT.

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[1] The crimes listed as Counts II and III are based upon their presentation at trial and the jury's verdicts. In the Information, Count II was Possession of Firearm After Conviction, and Count III was Kidnapping. Counts I and II were after two convictions; Count III was after one conviction.

[2] The court correctly noted that Mahaffey's jury indicated on the verdict forms that the jury wanted the convictions "to be served consecutively." Mahaffey was also ordered to pay a Victim's Compensation Assessment of $250 and costs. This Court notes that Count I is subject to the "85% Rule" for the serving of this sentence, under 21 O.S. Supp.2007, § 13.1.

[3] This Court notes that although the defendant's convictions and sentences are consistently documented in the record, including in the jury's verdicts and in the transcript of sentencing, the record does not contain an actual Judgment & Sentence document.

II. PROSECUTORIAL MISCONDUCT, INCLUDING A MATERIAL MISSTATEMENT OF LAW IN THE SECOND STAGE OF THE TRIAL, DEPRIVED APPELLANT OF A FAIR TRIAL AND A FAIR SENTENCING PROCEDURE.

In Proposition I, Mahaffey asserts that the trial court erred in allowing him to represent himself. The Supreme Court and this Court have recognized that defendants have a constitutional right, under the Sixth Amendment, to represent themselves at trial if they choose to do so.[4] Both Courts have also recognized that because the right to the assistance of counsel is likewise a fundamental constitutional right, a defendant who desires to represent himself/herself must first "knowingly and intelligently" waive the benefits of counsel, after being informed of "the dangers and disadvantages of self-representation."[5] And in order to validly waive the assistance of counsel and proceed *pro se*, a defendant must be competent to make this decision and must be clear and unequivocal in his/her desire to proceed *pro se*.[6]

Mahaffey asserts that his invocation of his right to represent himself was not "unequivocal," that he may not have been competent to make a valid waiver, that he was not adequately warned of the disadvantages of self-representation, and therefore that his waiver of the assistance of counsel was invalid.[7] The record does not support Mahaffey's claims.

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[4] *See Faretta v. California*, 422 U.S. 806, 818-21, 95 S.Ct. 2525, 2532-34, 45 L.Ed.2d 562 (1975); *Parker v. State*, 1976 OK CR 293, ¶ 4, 556 P.2d 1298, 1300 ("*Faretta* established that a defendant has an independent fundamental right guaranteed by the Sixth Amendment . . . to represent himself at all stages of criminal proceedings if he elects to do so.").

[5] *Faretta*, 422 U.S. at 835, 95 S.Ct. at 2541; *see also Parker*, 1976 OK CR 293, ¶¶ 5-6, 556 P.2d at 1300-01.

[6] *See Fitzgerald v. State*, 1998 OK CR 68, ¶ 6, 972 P.2d 1157, 1162.

[7] Mahaffey's final Proposition I claim—that his standby counsel was too active—will be addressed separately.

On May 14, 2009, the Honorable Timothy A. Brauer conducted a *Faretta* hearing on Mahaffey's request to represent himself.[8] During this hearing the court reviewed the charges, the former convictions charged, and the punishment ranges potentially at issue. The court examined Mahaffey about his desire to represent himself, his age, his ability to read and write, his education, any determinations that he was incompetent, his understanding of the preliminary hearing, and anything that could possibly affect his ability to understand the proceedings at issue. The court advised Mahaffey regarding his right to the assistance of counsel, that counsel would be appointed for him if he was indigent, that attorneys with the Indigent Defense System "represent their clients very well," and that he would be "at a severe disadvantage" if he chose self-representation, particularly since he would be facing experienced and knowledgeable prosecutors. The court also explained that if Mahaffey chose to represent himself, he would have to comply with the Rules of Evidence and other court rules, that State evidence could come in that would otherwise not be allowed, that he might fail to raise a defense that he otherwise could have raised, and that even a small error on his part could "change the whole outcome of the trial" or result in "a life sentence."[9] The court informed Mahaffey that if he chose to represent himself, the court would appoint standby counsel for him. The court also noted that it would allow Mahaffey to change his mind and still have appointed counsel, as long as he gave adequate notice of this desire.

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[8] Mr. Albert Hoch was appointed to serve as Mahaffey's standby counsel at this hearing.

[9] Standby counsel Hoch also questioned Mahaffey and confirmed his awareness that by representing himself, he would give up the chance to claim ineffective assistance of counsel.

At the conclusion of the hearing, the court found that Mahaffey was competent, that he understood the nature of what was at stake, and that he had made a knowing and intelligent waiver of his right to counsel. Hence the court ruled that Mahaffey would be allowed to proceed *pro se*. Thereafter, Mahaffey never wavered in his desire to proceed *pro se*, and he represented himself at both the preliminary hearing and at trial. He also had standby counsel at both the preliminary hearing and at trial, namely, Marvin Quinn.

Mahaffey asserts that his waiver of counsel was not "unequivocal," because at one point during the hearing, he asked a question about how the appointment of counsel process worked. This Court finds, upon review of the entire hearing, that the single question asked by Mahaffey did not at all undermine the clear and unequivocal nature of his repeatedly expressed desire to represent himself. The trial court's finding that Mahaffey was competent to choose self-representation was well supported by the record, and this finding was not undermined by the fact that he had prior convictions for drug-related offenses. Nor does the record in this case suggest that Mahaffey was "mentally impaired," simply because he did not always represent himself in the manner that a competent attorney might have. This Court also finds that the court's warnings to Mahaffey about the dangers and disadvantages of self-representation were thorough and adequate.

Mahaffey's final Proposition I challenge is that his standby counsel was too active in representing him—thereby violating his right to represent himself. The record supports Mahaffey's claim that his standby counsel was quite active.[10] On

[10] At trial, standby counsel made some objections on Mahaffey's behalf, challenged the propriety of

the other hand, Mahaffey did his own opening and closing statements, made objections, questioned all the witnesses who appeared, and maintained control of his case. Mahaffey never once indicated any displeasure with standby counsel's "active assistance." Consequently, this Court rejects all of the claims made in Mahaffey's Proposition I.

In Proposition II, Mahaffey asserts that the prosecutor committed misconduct during his trial that deprived him of a fair trial and a fair sentencing.[11] Mahaffey raises five different "instances" of prosecutorial misconduct at his trial: (1) references to his indigency during voir dire, (2) commenting on his failure to testify, (3) quoting Bible verses as evidence during closing argument, (4) telling the jury that "Life means 45 years", and (5) addressing the victim by her first name. This Court must determine whether the challenged remarks rendered Mahaffey's trial so fundamentally unfair that the jury's verdicts cannot be relied upon.[12] Mahaffey seeks either a new trial or a modification of his sentences.

Mahaffey cites two examples of the prosecutor allegedly drawing improper attention to his indigency. Since he raised no objection at trial, we review only for plain error.[13] First, during voir dire, the prosecutor was attempting to address the issue of whether jurors would hold the State to a "higher standard" because

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the State's proof of a former conviction during second stage, and more than once presented Mahaffey's position to the court on an issue. Mahaffey sometimes referred to standby counsel as "his counsel," and the court sometimes encouraged Mahaffey to consult with "his counsel."

[11] Mahaffey maintains, in particular, that the improper remarks made by the prosecutor were an attempt to take unfair advantage of his decision to represent himself.

[12] *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872, 40 L.Ed.2d 431 (1974); *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986).

[13] *See Brown v. State*, 2008 OK CR 3, ¶¶ 11-12, 177 P.3d 577, 580.

Mahaffey had chosen to represent himself.[14] Mahaffey asserts that because the phrase "court-appointed counsel" was used, the prosecutor was notifying the jury that he is indigent. Second, while questioning Easter, the prosecutor asked what problems they were having in their marriage, and Easter mentioned that Mahaffey was "not working" and "didn't have a job." This Court finds that neither instance constituted an improper reference to indigency. In the first remark, the prosecutor was simply attempting to emphasize to the jury that Mahaffey's self-representation was the result of his own *choice*, not necessity. And the second example was not even truly a reference to Mahaffey being indigent. Neither remark nor the combination of the two constitutes misconduct or plain error.

Mahaffey's second challenge is much more troubling. During her final, first-stage closing argument, the prosecutor stated as follows: "Let's talk about the reasons not to believe the defendant. The defendant, he told you that there's two sides to every story. Did we hear that other side? I didn't hear—I did not hear his side of the story." Immediately after this comment was made, the trial court interrupted and called the parties to the bench. The trial court sternly admonished the prosecutor that she could not comment on the defendant's failure to testify, "period."[15] Mahaffey did not request that the jury be admonished to disregard the prosecutor's remark, nor did the court do so.[16]

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[14] The prosecutor asked: "Are you going to hold me to a higher standard just because he's representing himself? . . . . I mean, do you understand, he has an opportunity for court-appointed counsel, but that he chose to represent himself[?]"

[15] The court noted, "I don't know how we're going to cure this at this time" and directed the prosecutor to "[m]ove on to something else." When Mahaffey attempted to address the court, saying "Judge—" the court simply stated, "Overruled." And that was the end of the bench conference.

[16] The court did not allow Mahaffey to voice any request when he attempted to address the court. However, the court's remark about not knowing how "to cure this" suggests that the court was

The prosecutor's statement "I did not hear his side of the story" was a clear comment on the defendant's failure to testify. The jury was well aware that only Easter and Mahaffey were present at the time of the charged crimes, that Easter had testified and given "her side" of the story, and that Mahaffey had not testified. While there are situations where a prosecutor's reference to a lack of defense evidence does not constitute a comment on the defendant's failure to testify, such as when a prosecutor describes the State's case as "uncontroverted,"[17] the prosecutor's remarks herein directed jurors' attention to the fact that they had not *heard testimony from Mahaffey* during the trial.[18] The prosecutor's remarks, though not quite an explicit comment on his failure to testify, were clearly intended to persuade jurors that they should be suspicious of Mahaffey's defense because he had failed to testify and present "his side of the story." Hence the comment imposed an improper "penalty" on Mahaffey for his exercise of his Fifth Amendment right not to testify.[19]

Nevertheless, in the entire context of this case, this Court finds, beyond a reasonable doubt, that this improper comment was harmless in terms of Mahaffey's convictions. The testimony of Easter and the other witnesses,

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cognizant of the potential need to admonish the jury . . . but then failed to do so.

[17] *See, e.g., Mehdipour v. State*, 1998 OKCR 23, ¶ 12, 956 P.2d 911, 916 ("This Court has repeatedly held a prosecutor may state that evidence is uncontroverted." (citation omitted)).

[18] In *Harris v. State*, 1982 OK CR 74, 645 P.2d 1036, this Court reversed the defendant's conviction for first-degree rape, where the prosecutor "urged the jury to draw an adverse inference from the appellant's silence." *Id.* at ¶ 9, 645 P.2d at 1038. The *Harris* Court noted that no "penalty may be exacted for an accused's failure to give up his right to remain silent," *id.* at ¶ 8, 645 P.2d at 1038 (citing *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)), and reversed the conviction despite the lack of an objection by the defendant.

[19] *See Griffin*, 380 U.S. at 614-15, 85 S.Ct. at 1232-33.

including the emergency room physician who treated her,[20] along with the photographs of how battered Easter looked the next day, convincingly established the crimes alleged and how brutally Mahaffey had beaten his wife. This case was *not* one where the victim's testimony was "uncorroborated."[21] Any potential impact on Mahaffey's sentence will be further addressed *infra.*

Mahaffey's third assertion of prosecutorial misconduct involves the State's final closing argument in the first stage of trial. The State had introduced into evidence, without objection, two undated letters that Mahaffey had written to Easter from jail. The second letter introduced (State's Exhibit 24) contained eight different references to Bible verses from the book of Proverbs.[22] Although the prosecutor questioned Easter about some of the statements in both letters, she did not make any reference to the citations to Proverbs during questioning. Nor did the State attempt to put on evidence regarding the content of the cited verses.

Nevertheless, the prosecutor began her closing argument by reminding the jury about the letters that Mahaffey had written to his wife and noting that he referred to some Bible verses in the one letter. The prosecutor continued:

> And, you know, I'll be honest. I've had these—these letters in my possession for a while, and I just hadn't looked those verses up, because he just—just cites the verse, doesn't say what it says, like Proverbs 12:4, Proverbs 6:34. I didn't look those up, among everything else. And yesterday those verses were looked up.

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[20] The emergency room doctor testified that he had never previously seen petechiae around the eyes of a non-corpse victim like that which he observed on Easter, which corroborated her testimony about being choked to the point of losing consciousness.

[21] *Cf. Harris*, 1982 OK CR 74, ¶ 2, 645 P.2d 1036, 1037 (reversing first-degree rape conviction for improper comment on defendant's "silence," where "State's case-in-chief consisted mainly of the uncorroborated testimony of J.C.W., the appellant's thirteen-year-old stepdaughter.").

[22] The letter did not contain any actual quotations from the Bible, just a vertical list of references in the left-hand column, under the word "Proverbs," in "chapter #: verse #" format.

> And you'll get a copy of this letter to take back with you and to look at. Proverbs 6:34 that he quotes to Cindy, "Jealousy arouses a husband's fury and he will show no mercy when he takes revenge." That's the verses [sic] he quoted to her.
>
> There's another one. "A fool's lips bring him strife, and his mouth invites a beating."
>
> I guess the defendant has never seen where it says, "Husbands, love your wives as Christ loves the church." Guess maybe we overlooked that.

Because Mahaffey failed to object at trial, we review this claim only for plain error.

In *Glossip v. State*, 2001 OK CR 21, ¶¶ 30-36, 29 P.3d 597, 604-05, this Court addressed a situation where a juror brought a Bible into the jury room and may have referred to it during deliberations.[23] The Court recognized that such "extraneous material" could have an improper influence on a jury's verdict and noted that "outside reference material, including but not limited to Bibles or other religious documents . . . , should not be taken into or utilized during jury deliberations."[24] Mahaffey maintains that the prosecutor's argument put this same kind of extraneous material before his jury.

This Court finds that the prosecutor's use of the Bible quotations during her closing argument was improper. Although Mahaffey had invoked two of the three quoted Bible verses in a letter to Easter, the actual *content* of these verses was not put into evidence; and the verses could not otherwise have been looked up by the jury during deliberations.[25] Hence the prosecutor was effectively putting on new evidence during her closing argument about the "real meaning" of

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[23] The *Glossip* Court did not have to decide whether the Bible incident required relief in that case, because the Court had already decided to reverse the defendant's capital conviction based on ineffective assistance of counsel. *See Glossip*, 2001 OK CR 21, ¶ 36, 29 P.3d at 605.

[24] *Id.* at ¶ 35-36, 29 P.3d at 605.

[25] *See id.* It should be noted herein that Mahaffey does not argue that it would have been improper for the State to have brought out the content of these verses during its presentation of evidence.

one of the letters. And the content of the two cited verses reflected *much* more negatively on Mahaffey than did the bare letters—since the Bible verses suggested that he was actually telling his wife: (1) you got what you deserved, because of the foolish things you said, and (2) that violence and "no mercy" are what should be expected when a husband becomes jealous.[26] Hence filling in the content of the cited Bible verses was potentially quite prejudicial. It was also plain error. The potential sentencing impact of this misconduct will be considered below.

Mahaffey next challenges the prosecutor's characterization of a "life sentence," which was made later during her second-stage closing argument. While reviewing the jury's sentencing instructions, the prosecutor stated:

> In that same instruction, you are told what life is. We always get these notes from the jury that say[], "What's life? Does life mean life?" Life means 45 years. That's what life means. And it tells you that in that instruction. And it also tells you, so if you convict the defendant after two prior convictions and you sentence him to life, he would have to serve 85 percent of 45 years.

Again, Mahaffey failed to object to these remarks, waiving all but plain error.

The source of the instruction that the prosecutor was "explaining" to the jury is *Anderson v. State*, 2006 OK CR 6, ¶¶ 24-25, 130 P.3d 273, 282-83, which held that juries should be informed regarding the impact of Oklahoma's statutory "85 Percent Rule," under which defendants convicted of certain crimes will not be *eligible to be considered for parole* until at least 85% of the sentence imposed on those crimes has been served.[27] *Anderson* noted that under the current policy of

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[26] In the text of the letters, Mahaffey tells his wife that he loves and misses her, that they were "perfect for each other," that he wants to come home "and just start again," *etc.*

[27] This Court notes that OUJI-CR(2d) 10-13A and 10-13B were adopted in response to *Anderson*.

the Oklahoma Pardon and Parole Board, parole eligibility for a sentence of "life" would not occur until the defendant had served at least 85% of 45 years.[28]

The prosecutor's quoted remarks misstate the meaning of the 85% Rule regarding a sentence of "life" and of OUJI-CR 10-13B.[29] Life does not "mean" 45 years, nor does the instruction state that the defendant will "have to serve 85 percent of 45 years." The uniform instruction clearly and properly instructs the jury that under the 85% Rule, the defendant will not be *eligible for parole* on Count I (Assault & Battery with a Deadly Weapon) until he has served at least 85% of any sentence imposed—and that 85% of any "life" sentence would be 38 years and 3 months. The prosecutor's remarks suggested that Mahaffey would be released after he had served this amount of time—rather than that he would first become eligible for parole consideration at this time. This was plain error.

The prosecutor's remarks in *Florez v. State*, 2010 OK CR 21, ¶ 5, 239 P.3d 156, 158, that the defendant "will only do 85 percent of what you give him" and that "[h]e's not going to do all of it" were more explicit in (incorrectly) advising the jury that the defendant would serve only 85% of his given sentence—rather than that he could not possibly be given parole until he had served at least 85%.[30] But unlike in *Florez*, the actual sentences imposed by Mahaffey's jury do *not* suggest

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[28] *See* 2006 OK CR 6, ¶ 24, 130 P.3d at 282-83.

[29] *See* OUIJI-CR(2d) 10-13B ("A person convicted of [Specify Crime in 21 O.S.Supp., § 13.1] shall be required to serve not less than eighty-five percent (85%) of the sentence imposed before becoming eligible for consideration for parole . . . . If a person is sentenced to life imprisonment, the calculation of parole eligibility is based upon a term of forty-five (45) years, so that a person would be eligible for consideration for parole after thirty-eight (38) years and three (3) months.").

[30] In *Florez*, this Court found that the prosecutor had "grievously misled jurors into believing that Florez would, by statute, be released before serving the entirety of any term of years they imposed." 2010 OK CR 21, ¶ 6, 239 P.3d at 158.

that this argument was harmless beyond a reasonable doubt.[31] The remedy for this potentially prejudicial misconduct will be addressed below.

Finally, Mahaffey challenges the fact that throughout his trial, the prosecutor addressed and referred to the victim by her first name.[32] Yet neither Mahaffey nor his standby counsel ever challenged this obvious practice. Hence we review it only for plain error. While it is generally thought to be a better practice to refer to other parties and witnesses by their last names, this Court finds no plain error herein. Mahaffey totally failed to object to this patent (and correctable) practice; and this Court declines to find that he was prejudiced by it.

This Court has found that the prosecutor committed misconduct in this case on three occasions: (1) when she effectively commented on Mahaffey's failure to testify, (2) by quoting from the Bible in a way that brought in new and potentially prejudicial evidence during her first-stage closing argument, and (3) by inaccurately summarizing the 85% Rule as it relates to a sentence of "life." Although the first two instances of misconduct occurred during the first stage of Mahaffey's trial, this Court concludes that the prosecutor's remarks, considered individually and cumulatively, were harmless beyond a reasonable doubt regarding Mahaffey's convictions.

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[31] In *Florez*, the prosecutor had asked for a sentence of 16 years on the crime of assault and battery by force likely to produce death, but the jury only sentenced the defendant to 8 years, which does not suggest that the jury was affected or that the defendant was harmed by the prosecutor's improper summary of the 85% Rule. *See id.* at ¶ 9, 239 P.3d at 159.

[32] In his brief, Mahaffey references "at least 30 times" that the prosecutor addressed the victim as simply "Cindy," while she was testifying, and notes that the prosecutor repeatedly referred to the victim in this same way throughout the trial.

This Court cannot conclude, however, that these three instances of prosecutorial misconduct were harmless regarding Mahaffey's sentences.[33] Although Mahaffey's crimes were very significant, this Court cannot conclude, beyond a reasonable doubt, that the jury's sentencing verdicts were unaffected by the prosecutor's improper conduct. In particular, the fact that the jury specifically requested that all three of Mahaffey's sentences "be served consecutively" suggests that his jury was *very* concerned with the total amount of time that he would actually serve.[34] While this concern may have been purely the result of the jury's reaction to the facts of this case, this Court cannot conclude, beyond a reasonable doubt, that the jury's sentencing verdicts were not affected by the prosecutor's improper remarks, particularly her reading of the Bible quotations and her inaccurate description of the meaning of a "life" sentence. Hence we cannot confidently conclude that the prosecutor's misconduct was harmless. This Court finds that the most appropriate remedy for the prosecutor's misconduct in this case is to order that the three counts in this case be served concurrently, rather than consecutively.[35]

DECISION

Mahaffey's **CONVICTIONS** on Counts I, II, and III are all **AFFIRMED**. His **SENTENCES** of imprisonment for Life, imprisonment for 10 years, and imprisonment for 6 years on these three counts, respectively, are likewise

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[33] This Court need not and does not decide whether any of these instances of misconduct would have required relief when considered separately. Together, they do necessitate relief.

[34] This Court notes that Mahaffey's jury sent out four notes during sentencing deliberations: two asking how Mahaffey's sentences would be served, one indicating jurors could not "come to a consensus," and a final note stating that the jurors were "now renegotiating!"

[35] Since no Judgment & Sentence document was originally entered in this case, we remand the case for entry of a Judgment & Sentence that is consistent with this opinion.

AFFIRMED. The case is **REMANDED**, however, for the district court **TO ISSUE A JUDGMENT & SENTENCE** document reflecting these convictions and sentences and also, consistent with this opinion, that these counts will be **SERVED CONCURRENTLY**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF GRADY COUNTY
THE HONORABLE RICHARD G. VAN DYCK, DISTRICT JUDGE

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OPINION BY: SMITH, J.

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LEWIS, V.P.J.:	CONCUR IN RESULTS
LUMPKIN, J.:	CONCUR IN PART/DISSENT IN PART
C. JOHNSON, J.:	CONCUR

LUMPKIN, JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the Court's decision to affirm the judgments and sentences in this case, but I disagree that modification of the sentences to be served concurrently, rather than consecutively, is required.

This was a brutal and egregious crime. The evidence was uncontradicted, thus leaving the issue of what the appropriate sentence would be. Appellant's stand-by counsel did an excellent job of seeking to assist Appellant in his decision to represent himself. While an attorney or judge might find fault with the discussed comments and argument by the prosecuting attorney, due to the fact they are aware of the intricacies of the law, I do not find them so blatant as to justify the modification of the sentence. The only real error was when the prosecutor sought to fill in the blanks as to what the Bible verses said, not because they were Bible verses but because the testimony had not been presented as a part of the victim's testimony. If the victim had, in fact, looked up the verses then the content would have been admissible as a part of Appellant's communication to her. Receipt of the information in that manner would not be the same as having considered extraneous material in the jury room. The opinion's reliance on *Glossip* is misplaced. In *Glossip* the jury received extraneous material, i.e. a Bible, during the deliberations. See *Glossip v. State*, 2001 OK CR 21, ¶¶ 30-36, 29 P.3d 597, 604-05. What happened in this case by the prosecutor's comments was the

error of arguing facts not in evidence. See *Bland v. State*, 2000 OK CR 11, ¶ 101, 4 P.3d 702, 728.

Likewise, I have a problem with the Court's discussion of the meaning of a life sentence and the 85% Rule. This is exactly the potential problem I noted in my separate writing to *Florez v. State*, 2010 OK CR 21, ¶¶ 5-6, 239 P.3d 156, 158, "Once the door is opened to talking about parole, it is a slippery slope and difficult to establish parameters for the application of 21 O.S.Supp. 2007, § 13.1". *Id.* ¶1, 239 P.3d at 159 (Lumpkin, J., concurring in result). The prosecutor's comments on the Rule were within the parameters of the instruction and this Court's discussion of the issue. The opinion infers more of an interpretation of what was actually said than an average juror would glean from it. We should not read more into these statements than was actually presented to the jury and realize they will not be giving common words more emphasis than the words deserve. Any error is harmless beyond a reasonable doubt based on these facts.

Due to the fact our statutes state sentences will be served consecutively, unless order by the sentencing judge to run concurrently, I find no basis to modify the sentences in this case to run concurrently. *See* 21 O.S.2001, § 61.1 (". . . the sentence which is first received at the institution shall commence and be followed by those sentences which are subsequently received at the institution regardless of the order in which the judgments and sentences are rendered by the respective courts, unless a judgment and sentence provides it

is to run concurrently with another judgment and sentence.") There is nothing in this record that would warrant an order to serve the sentences concurrently.