IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KEIGHTON JON BUDDER,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	Case No. F-2010-555
	)	
STATE OF OKLAHOMA	)	
	)	
Appellee.	)	

OPINION

LUMPKIN, JUDGE:

Appellant Keighton Jon Budder was tried by jury and convicted of First Degree Rape (Counts I and III) (21 O.S.Supp.2008, § 1114); Assault and Battery with a Deadly Weapon (Count II) (21 O.S.Supp.2007, § 652); and Forcible Oral Sodomy (Count IV) (21 O.S.Supp.2009, § 888), in the District Court of Delaware County, Case No. CF-2009-269. The jury recommended as punishment imprisonment for life without the possibility of parole in each of Counts I and III, life imprisonment in Count II, and twenty (20) years in Count IV. [1] The trial court sentenced accordingly ordering the sentences to run consecutively. It is from this judgment and sentence that Appellant appeals.

[1] Pursuant to 21 O.S.2001, § 13.1, Appellant must serve 85%of the sentences for First Degree Rape and Forcible Oral Sodomy before being considered for parole.

On August 10, 2009, 17 year old K.J. held a party at her parent's home in Colcord, Oklahoma. K.J. and her friends were celebrating the start of their senior year at Colcord High School. During the evening, the 16 year old Appellant arrived at the party with three other male students, Anthony, Ben and Dakota. Appellant was not a friend of K.J.'s and had not been invited to the party. Nevertheless, she let him stay as two of the young men in the group had been invited to the party and because they arrived with a "thirty pack" of beer.

Most of the students at the party spent their time "playing beer pong" and "sitting around talking". During the course of the party, Appellant made K.J. feel "really uncomfortable". At one point, she sat down on a loveseat to send text messages on her cell phone. Appellant said down beside her. K.J. tried to "scoot away" from him. Appellant told K.J. his name and asked K.J. her name. Appellant also asked "if it would be too much" to ask for her phone number? K.J. that it was "too much to ask", explaining she had a boyfriend. When Appellant asked a second time for her phone number, K.J. offered to give her cell phone to Appellant so he could put his phone number in it. She did so in the hope that Appellant would then leave her alone, and with the intent of deleting the number later.

As the evening wore on, Appellant spent most of his time drinking beer. Whenever he walked past K.J., he would slap her on the leg. When the party ended, K.J. inquired if everyone had a ride home. While she was doing so,

Appellant went to her bedroom. K.J. had Anthony get Appellant out of her room. This was the second time during the evening that K.J. had to have someone get Appellant out of her bedroom.

Anthony, Ben and Dakota indicated they did not have a ride home, so K.J. offered to take them in her mother's Malibu. As it turned out, Dakota ended up getting a ride with someone else, so Appellant asked if he could take his place. However, when it came time for the group to leave, Appellant was nowhere to be found. As the others searched for him, K.J. went to her bedroom to put on her boots. As she did so, Appellant jumped out from behind the bedroom door. K.J. would later describe Appellant's conduct as "creepy".

As K.J. drove, the boys continued to drink beer. Ben sat in the front passenger seat and was the first to be dropped off. K.J. then drove to the trailer park where Anthony lived. Appellant had initially indicated he would exit with Anthony and spend the night with him. However, when it came time for Appellant to get out of the car he refused. He eventually moved to the front seat and said he wanted K.J. to take him to his aunt's house.

Appellant directed K.J. where to drive. She ended up on an unfamiliar dirt road in the woods. There were no lights anywhere, either street lights or car lights. When K.J. asked Appellant how much further she had to drive, Appellant replied, "fifty yards". Suddenly, Appellant reached over, placed K.J. in a headlock and cut her throat. K.J. screamed. Appellant then stabbed her repeatedly on her stomach, arms and legs. She tried, unsuccessfully, to get out

of the still moving car. She was eventually able to dive out of the car onto her hands. Appellant grabbed one of her boots and followed her out of the car. The car ended up rolling into a ditch.

Lying on her back in the middle of the dirt road, K.J. tried to send a text message for help. However, Appellant saw her, grabbed the phone and threw it into the woods. Appellant got on top of K.J. and punched her in the face. He then grabbed her hair, "wired it up in his hand" and slammed K.J.'s head against the rocks in the road. K.J. later testified that "everything went black". When she came to, she felt Appellant lying on top of her, removing her shorts and underwear. Appellant threw K.J.'s clothes into the woods and tried to rape her. Despite feeling weak from the loss of blood and afraid that she was going to die, K.J. fought Appellant, trying to push him off of her. Unsuccessful in his rape attempt, Appellant jerked K.J. up and pushed her toward the car. There he forced her to bend over the open driver's door and raped her.

Appellant then opened the driver's side passenger door and pushed K.J. inside the car. She fell onto her back in the back seat. Appellant came in after her, lifting her shirt and bra and attempting to "suck" on K.J.'s breasts. K.J. put her arms in the way. Appellant told her to "quit" and she complied. He then pulled her out of the car and bent her over the rear fender. He pulled her shirt off over her head. K.J. pressed the shirt against her bleeding neck. Appellant then anally raped her. When he was finished, he pushed her back into the car. Apparently changing his mind, Appellant pulled her out of the

car, so he could lie down in the back seat. He then made K.J. get on top of him. Appellant raped K.J. again, telling her "your pussy is so good". After some time, Appellant pulled out of K.J., grabbed her head, and shoved it onto his penis. K.J. bit down in an attempt to get Appellant to stop, but it had no effect.

After forcing K.J. to sodomize him, Appellant told K.J. to "stroke" his penis. K.J. complied and at Appellant's directions, began masturbating him. Eventually, K.J. heard Appellant snore and realized he had fallen asleep. K.J. took the opportunity to get away from the car and run down the road for help. With the exception of her boots, K.J. was naked. She eventually came to a house and went to the front door, shouting for help. No one came. Noticing a pickup parked out front, K.J. thought if the homeowner believed the truck was being stolen, she could get some attention and some help. She opened the driver's door to the truck. As the inside light came on, and the truck began "dinging"', Ms. Burton came out of the house and yelled at K.J. to get out of her truck. K.J. shouted to Ms. Burton that she needed help, that she had been attacked. Ms. Burton helped the bleeding K.J. into her home, gave her towels to cover up with and a drink of water. Ms. Burton let K.J. use her phone to call her mother. With the help of her grandson, Ms. Burton then called 911.

K.J.'s mother, her 21 year old brother, T.J., and his friend D.M. arrived at Ms. Burton's home soon thereafter. K.J. told them what had happened. T.J. and D.M. went looking for Appellant. They found the Malibu parked in a ditch as K.J. described and Appellant passed out in the backseat. Appellant's

white t-shirt was covered in blood and his pants were around his ankles. The only lights in the area were the headlights of T.J.'s pickup truck. T.J. looked through the trunk of the Malibu and found a tire tool so he could keep Appellant "where he was" until law enforcement arrived. T.J. shouted at Appellant until he woke up. Despite T.J.'s warnings not to do so, Appellant attempted to get out of the car. T.J. hit him on the head with the tire tool. When Appellant refused to cooperate, T.J. hit him on the head again, a little harder. Appellant tried a third time to get out of the car, T.J. swung at him but missed. This was enough however to convince Appellant to lie back down.

The Chief of Police soon arrived, ordered Appellant out of the car and attempted to handcuff him. Appellant resisted, swinging at the officer, "cussing at everyone telling them he was going to kill everyone." Chief Hunt eventually subdued Appellant and placed him under arrest. While the chief talked with T.J. and others on the scene, Appellant attempted to escape. Chief Hunt caught him in time and had Appellant sit on the ground until backup arrived. Appellant complied but remained angry and very vocal. He was eventually taken into town and booked into jail.

Meanwhile, K.J. was transported to the hospital and taken immediately to surgery. In addition to the injuries associated with the violent sexual assaults, and the slicing wound to her neck, K.J. suffered approximately seventeen stab wounds.

Appellant testified in his own behalf. He admitted he had been to K.J.'s party, and talked to her, although he did not know her well. He said that earlier that day he had consumed a liter of Kentucky Deluxe with his cousin and drank more whiskey at the home of another cousin. At K.J.'s party, he drank a shot of Bacardi and approximately five beers before he "passed out" on the floor. Appellant said someone woke him up and told him to get on the bed so he did.

When it was time to leave the party, Appellant's friends had to wake him up and help him into K.J.'s car. Appellant testified he did not remember getting into the car, and that he fell asleep while they were driving. Appellant said he woke up when Anthony was dropped off. He said that K.J. asked him to go somewhere with her. So, he moved into the front passenger seat; but while they were driving, he again passed out. Appellant denied asking K.J. to take him to his aunt's home. Appellant testified that when he woke up, he was face down on the ground and did not see K.J. anywhere around. He said he heard people talking, a "muffled scream", the sound of a loud truck, and someone saying, "get him". Appellant said he thought someone had hit him in the head, but he could not remember anything after that. The next thing he remembered, he was being arrested and he did not know why. Appellant remembered threatening those at the scene because he was confused and angry. Appellant said someone went through his pockets and pushed his

pants down. He said he fell asleep again and did not know how he ended up in the jail.

In his first proposition of error, Appellant contends his life without parole sentences in Counts I and III for First Degree Rape are excessive and must be modified in light of *Graham v. Florida*, ___ U.S. ___, 130 S.Ct. 2011, 176 L.Ed. 2d 825 (2010). The State agrees. In *Graham v. Florida*, the U.S. Supreme Court held that a sentence of life without parole violates the Eighth Amendment when applied to juvenile offenders who did not commit a homicide. The Court stated in part:

> In sum, penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders. This determination; the limited culpability of juvenile nonhomicide offenders; and the severity of life without parole sentences all lead to the conclusion that the sentencing practice under consideration is cruel and unusual. This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole. This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment. Because "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood," those who were below that age when the offense was committed may not be sentenced to life without parole for a non-homicide crime.

130 S.Ct. at 2030 (internal citations omitted).

Appellant clearly falls under *Graham* as he was 16 years when he committed the crimes charged in Counts I and III.

When a decision of the U.S. Supreme Court results in a "new rule," that rule applies to all criminal cases still pending on direct review. *Schriro v.*

Summerlin, 542 U.S. 348, 351-352, 124 S.Ct. 2519, 2522, 159 L.Ed.2d 442 (2004) *citing Griffith v. Kentucky,* 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). *See also Hogan v. State,* 2006 OK CR 19, 2006 OK CR 27, 139 P.3d 907, 919 (new standard of review applies retroactively to all cases reviewed on appeal subsequent to adoption of standard). Appellant was convicted in April 2010. *Graham v. Florida* was decided in May 2010. Under *Schriro* and *Griffith, Graham* plainly retroactively applies to Appellant's case. Therefore, Appellant's sentences in Count I and III are modified to life imprisonment with the possibility of parole.

In his second proposition of error, Appellant asserts that not only is the sentence in each of the four counts excessive, but the aggregate sentence imposed by running the sentences consecutively should shock the conscience of this Court. He argues that due to his intoxication at the time of the crimes, his young age and the erroneous limitation on his presentation of mitigating evidence, his sentences should be reduced and modified to run concurrently, or in the alternative the case should be remanded for resentencing.

The question of excessiveness of punishment must be determined by a study of all the facts and circumstances of each case. *Rackley v. State,* 1991 OK CR 70, ¶ 7, 814 P.2d 1048, 1050; *Rogers v. State,* 1973 OK CR 111, ¶ 11, 507 P.2d 589, 590. This Court has repeatedly held that if a sentence is within the statutory guidelines, we will not disturb that sentence unless, under the facts and circumstances of the case, it is so excessive as to shock the conscience of the

Court. *Rea v. State,* 2001 OK CR 28, ¶ 5, 34 P.3d 148; Bartell *v. State,* 1994 OK CR 59, ¶ 33, 881 P.2d 92, 101.

As addressed above in Proposition I, Appellant's sentences of life imprisonment without the possibility of parole in Counts I and III were illegal and his sentences have been modified to life imprisonment with the possibility of parole. 21 O.S.Supp.2009, § 1115 (First Degree Rape is punishable by death or imprisonment for five years to life without parole). The remaining sentences are also within statutory range. In Count II, Appellant was sentenced to life in prison for Assault and Battery with a Deadly Weapon. The statutory range of punishment is any term up to life in prison. 21 O.S.Supp.2007, § 653(C). In Count IV, Appellant was sentenced to twenty years imprisonment for Forcible Oral Sodomy, the maximum allowed by 21 O.S.Supp.2009, § 888(A).

Appellant asserts modification is due in part because at the time of the crimes he was only sixteen years old and was intoxicated to the extent he "blacked out". Appellant admits that while intoxication is not a defense to the elements of the charges in this case, and that the level of his intoxication would not have supported a voluntary intoxication defense, his intoxication can be considered by this Court, along with his youth, in determining the appropriateness of sentence modification.

In cases relied upon by Appellant, the age of the defendant alone warranted modification of the sentence only in so far as the United States Supreme Court ruled that juveniles could not be sentenced to death. In all

other cases, age was only one of many considerations in determining the appropriateness of a particular sentence. Likewise, intoxication alone has not been considered sufficient to warrant sentence modification, but can be considered along with other evidence. In *Stanley v. State*, 1971 OK CR 360, ¶ 12, 489 P.2d 495, relied upon by Appellant, this Court modified the sentence of one year in the county jail for pointing a dangerous weapon due to the defendant's intoxication at the time of the crime and because there were serious evidentiary questions.

In the present case, the record indicates the jury and judge were well aware of Appellant's age and his level of intoxication at the time of the crimes. Appellant testified in some detail to the alcohol and beer he had consumed before the party and at the party, that he had become "plain drunk" and "passed out", and that he had "passed out" or "blacked" out on previous occasions when drinking. However, the evidence also showed that Appellant voluntarily drank to excess and that his conduct during the crimes was not consistent with a person having "passed out" or "blacked out". There is no indication the evidence of intoxication was in any way ignored by the judge or jury. Based upon this record, we see no reason for modification.

Appellant also contends his sentences were excessive because he was not allowed to present "mitigating evidence" in regard to sentencing at his jury trial and at formal sentencing. In *Malone v. State*, 2002 OK CR 34,¶¶ 6-7, 58 P.3d 208, 209-210, we held that under 22 O.S.2001, §§ 970-973, when the jury

assesses punishment "there simply is no provision allowing for mitigating evidence to be presented in the sentencing stage of the trial" of a non-capital case. Appellant requests this Court reconsider our decision in *Malone* and adopt the reasoning from Judge Chapel's dissent that this Court should "adopt a second, sentencing, stage in non-capital felony proceedings, during which the jury may hear evidence in aggravation and mitigation of the crime, in order to assist in the determination of an appropriate individualized sentence." *Id.*, 58 P.3d at 211.

In *Malone* we explained:

> Oklahoma's criminal statutes allow non-capital defendants, at the time of formal sentencing, to explain to the trial judge "any legal cause" they have why judgment should not be pronounced against them" citing 22 O.S.2001, § 970. But 22 O.S.2001, § 971 qualifies the phrase "any legal cause" by giving specific grounds for such a showing of cause, i.e., insanity and those grounds that would support a motion for new trial in 22 O.S.2001, § 952. This appears to be a purely legal matter-except where there is the discovery of new evidence-and the full extent of "allocution" provided under Oklahoma law, except as set forth below.
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> 22 O.S.2001, § 973 allows "either party" at the sentencing stage to raise "circumstances which may be properly taken into view, either in aggravation or mitigation of punishment," but only in those cases where the issue of punishment has been left to the judge. In all other cases, i.e., when the defendant has demanded the jury to assess punishment or the trial judge has allowed the jury to assess punishment, there simply is no provision allowing for mitigating evidence to be presented in the sentencing stage of the trial. This is a limitation enacted by our Legislature, and the limitation is undoubtedly constitutional.

2002 OK CR 34,¶¶ 6-7, 58 P.3d at 209-210.

We see no reason to depart from this reasoning, and decline Appellant's invitation to reconsider our decision. As Appellant was tried by jury for non-capital offenses we find no error in the absence of any "formal presentation" of mitigating evidence. This statutory limitation on the formal presentation of mitigating evidence did not deny Appellant the opportunity to present his defense. Appellant, like all criminal defendants, had the opportunity to present to the trier of fact any evidence to mitigate or lessen culpability and/or punishment, limited only by relevancy concerns. As we said in *Malone:*

> Certain evidence that may be in fact "mitigating" or "aggravating" will inevitably be introduced throughout any trial, although that evidence is admitted to prove the elements of the crime, to support a legal defense, or to impeach a witness. A criminal defendant's story will in fact be told, by the witnesses he or she chooses and through his or her own testimony.

2002 OK CR 34, ¶ 8, 58 P.3d at 210.

Appellant further argues that 22 O.S.2001, § 973 violates equal protection because he would have been able to present mitigating evidence if he had chosen to be sentenced by the judge. Appellant did not challenge the constitutionality of this statute before the trial court. Therefore, we review his claim only for plain error. *Head v. State*, 2006 OK CR 44, ¶ 9, 146 P.3d 1141, 1144.

State laws are presumed valid when analyzing an equal protection claim. *Love v. State*, 2009 OK CR 20, ¶ 6, 217 P.3d 116, 118. S*ee also State v. Howerton,* 2002 OK CR 17, ¶ 16, 46 P.3d 154, 157 ("[e]very presumption must be indulged in favor of the constitutionality of an act of the Legislature, and it

is the duty of the courts, whenever possible, to harmonize acts of the Legislature with the Constitution.") Parties alleging the unconstitutionality of a statute have the burden of proof. *Howerton,* 2002 OK CR 17, ¶ 18, 46 P.3d at 158. Appellant must show that § 973 impermissibly interferes with his exercise of a fundamental right or operates to his disadvantage as a member of a suspect class, or show that the statute is not rationally related to a legitimate state interest." *Love,* 2009 OK CR 20, ¶ 6, 217 P.3d at 118. Appellant has failed to meet his burden. We have previously found § 973 constitutional. *Malone,* 2002 OK CR 34, ¶ 7, 58 P.3d at 210. Appellant has not convinced us otherwise.

Having reviewed and rejected Appellant's reasons for modifying his sentences, we find that under the facts and circumstances of this case, modification of the sentences in Counts II and IV is not warranted, and further modification of the sentences in Counts I and III to a sentence less than life imprisonment is not warranted.

Finally, we find no abuse of the trial court's discretion in running the sentences consecutively. There is no absolute constitutional or statutory right to receive concurrent sentences. 22 O.S.2001, § 976. In fact, sentences are to run consecutively unless the trial judge, in his or her discretion, rules otherwise. *Id.,* 21 O.S.2001, § 61.1. *See also Riley v. State,* 1997 OK CR 51, ¶ 1, 947 P.2d 530, 535 (Lumpkin, J., concur in results); *Pickens v. State,* 1993 OK CR 15, ¶ 41, 850 P.2d 328, 338. Due to the shocking brutality of the crimes committed by

Appellant, we find no abuse of the trial court's discretion in allowing the sentences to run consecutively as our statutes contemplate. This proposition is denied.

In his third proposition of error, Appellant challenges the effectiveness of trial counsel. He argues counsel was ineffective for 1) failing to object to photographs admitted into evidence, to the prosecutor's leading of the State's witnesses and the prosecutor's closing argument, and to irrelevant evidence and other crimes evidence; 2) waiving opening statement; 3) failing to sufficiently advocate for Appellant regarding sentencing; and 4) failing to present mitigating evidence.

An analysis of an ineffective assistance of counsel claim begins with the presumption that trial counsel was competent to provide the guiding hand that the accused needed, and therefore the burden is on the accused to demonstrate both a deficient performance and resulting prejudice. *Eizember,* 2007 OK CR 29, ¶ 151-152, 164 P.3d at 244, *citing Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *Strickland* sets forth the two-part test which must be applied to determine whether a defendant has been denied effective assistance of counsel. *Id.* First, the defendant must show that counsel's performance was deficient, and second, he must show the deficient performance prejudiced the defense. *Id.* Unless the defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result

unreliable. *Id.* The burden rests with Appellant to show that there is a reasonable probability that, but for any unprofessional errors by counsel, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

As the U.S. Supreme Court recently said in *Harrington v. Richter,* ___ U.S. ___, 131 S.Ct. 770, 791-792, ___ L.Ed. 2d ___ (2011)

> In assessing prejudice under *Strickland,* the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." The likelihood of a different result must be substantial, not just conceivable. (internal citations omitted).

Appellant first complains that counsel failed to raise any objections to the photographs despite the trial court's reservations and warning to the prosecutor concerning the prejudicial and cumulative nature of the photographs. Specifically, Appellant complains about photographs of the victim's healed wounds, two "nearly identical" photos of the victim's belt and bra, and repetitive photographs of the car and its bloody interior.

The admissibility of photographs is a matter within the trial court's discretion and absent an abuse of that discretion; this Court will not reverse the trial court's ruling. *Warner v. State,* 2006 OK CR 40, ¶ 167, 144 P.3d 838, 887. Photographs are admissible if their content is relevant and their probative

value is not substantially outweighed by their prejudicial effect. *Id.* The probative value of photographs can be manifested in numerous ways, including showing the nature, extent and location of wounds, establishing the *corpus delicti* and depicting the crime scene.

Each of State's Exhibits 83-99 was a photograph of a different healed stabbed wound to a different area of the victim's body. The photographs were taken approximately three months after Appellant's assault on K.J. Appellant claims these photos were prejudicial as the jury had already seen photos of the wounds shortly after they were inflicted. However, the photos of the open wounds did not depict each wound; as did the photos of the healed wounds, nor did they adequately illustrate the location of each wound. The photos of the healed wounds clearly showed the location of the wounds on the victim's body and the size of each wound (as they measured by a ruler also seen in the photograph). Apart from K.J.'s testimony and the photographs, no other testimony concerning the stab wounds was admitted. The healed wounds and the resulting visible extensive scarring, was relevant and admissible as it showed the injuries inflicted by Appellant's own hand had lasting consequences for the victim. *See Le v. State*, 1997 OK CR 55, ¶ 25, 947 P.2d 535,548 (photographs of victim's wounds admissible as they showed defendant's "handiwork"). *See also Stouffer v. State,* 2006 OK CR 46, ¶¶ 102-104, 147 P.3d 245, 268 (photographs of victim's scars inadmissible as they showed work of surgeon and not that of defendant). Accordingly, as the

photographs were properly admitted into evidence, counsel's failure to raise any objection does not satisfy the requirements of *Strickland* because any such objections would have been properly overruled. *Cruse v. State*, 2003 OK CR 8, ¶ 11, 67 P.3d 920, 923.

Counsel's failure to object to two photographs of the victim's belt and bra was likewise not indicative of ineffective assistance. Contrary to Appellant's claim, the photographs were not "nearly identical". State's Exhibit 28 primarily depicted the victim's belt as it is shown in the middle of the photo with the bra partially visible in the bottom left corner. State's Exhibit 29 primarily depicted the bloodied bra with the belt partially visible off to the side. These two photos are not so cumulative as to be prejudicial and any such objection by counsel would have been overruled.

With respect to photos of the car, 41 were admitted. (State's Exhibits 15-27, 42-69). Thirteen of those showed the car at the crime scene. Of those, four photos showed the interior while nine depicted the exterior of the car. Twenty-eight photos of the car parked in a garage were admitted, with eleven photos showing the exterior and seventeen showing the interior of the car. Each photograph depicts a different angle or area of the car. In the photographs taken at the darkened crime scene, the car is illuminated only by the headlights of two nearby cars, while the garage photos were taken in a fully lighted area. The photographs corroborate the testimony of K.J. and others at the scene that there was blood everywhere inside and outside of the car. Images of smeared blood

and blood droplets, as well as finger and hand prints, also corroborated the victim's description of the attack occurring in various areas of the car. Further, as the car was essentially the "crime scene", the photos helped establish the *corpus deliciti* of the crime. While the trial judge appropriately warned the prosecutor concerning the volume of photographs offered, we find those admitted into evidence were not needlessly cumulative and that counsel was not ineffective for failing to raise objections.

Appellant next argues counsel was ineffective in failing to object to the prosecution's leading questions during his examination of the victim. The record shows defense counsel raised one objection during direct examination and one objection during re-direct examination that the prosecutor was leading the witness. At one point in direct, the judge noted that the prosecutor had "been leading all day." (Tr. Vol. I, pg. 211). During re-direct, counsel's objection caused the prosecutor to rephrase his question and brought a warning from the judge that he would cut the prosecutor off if he was merely going to bolster the victim's testimony. (Tr. Vol. I, pg. 292).

Under 21 O.S. 2001, § 2611(D) "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony." Here, the record shows the prosecutor did lead the witness to a certain extent. However, a closer look shows the crux of the victim's testimony, namely her account of the physical attack and rapes, was not established through leading questions. The majority of the leading

questions was used to develop that testimony. Having thoroughly reviewed the record, defense counsel's failure to raise additional objections does not satisfy the *Strickland* standard as Appellant cannot show how he was prejudiced by counsel's omissions. *See Jones v. State*, 1976 OK CR 261, ¶ 13, 555 P.2d 261, (leading questions by both prosecutor and defense counsel held not so prejudicial as to affect jury's verdict).

Appellant next finds counsel ineffective for failing to object to testimony by the State's experts, including the serologist and fingerprint examiner from the Oklahoma State Bureau of Investigation (OSBI), and the Sexual Assault Nurse Examiner (SANE) nurse, regarding their general procedures for performing their jobs. Appellant calls this evidence "irrelevant" as it had no application to the case at hand.

Contrary to Appellant's argument, this testimony was highly relevant as it laid the foundation for establishing the witnesses as experts and as it provided the foundation for how they conducted their jobs in relation to Appellant's case.[2] This testimony was relevant in aiding the jury in its determination of the credibility of those witnesses and the weight to be

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[2] Appellant specifically points out the SANE nurse, Ms. Spurrier, who testified to her general protocol but also testified she did not follow that protocol in this case. Ms. Spurrier testified that she was not able to strictly follow her usual procedures because the severity of the victim's injuries required immediate surgery and she had to wait until after surgery to do her examination. The relevancy of Spurrier's testimony was not impacted by her inability to perform her usual procedure. Further, while defense counsel did not object during the witnesses' testimony, counsel did argue in closing that Spurrier did very little in this case.

accorded their testimony. Counsel was not ineffective for failing to raise an objection to this relevant evidence.

Appellant further argues defense counsel was ineffective for failing to object to inflammatory and irrelevant other crimes evidence. Specifically he refers to testimony that during his arrest he threatened to kill those at the scene. As addressed in Proposition IV, evidence of Appellant's threats was not other crimes evidence but *res gestae* of the charged offenses. Therefore, as the evidence was properly admitted, counsel was not ineffective for failing to raise an objection which would have been denied.[3]

Appellant further finds counsel ineffective for failing to object to the prosecutor's closing argument. Appellant claims the prosecutor severely distorted his theory of defense by arguing that the defendant claimed there was a conspiracy against him. The record shows that Appellant's defense was that he was framed by the victim's boyfriend and that the State did not prove that he sexually assaulted K.J. To rebut this defense and in response to defense counsel's closing argument, the prosecutor essentially argued that Appellant's defense only worked if all of the prosecution witnesses acted together to assault the victim and then to cover it up. While the prosecutor was the first to use the term "conspiracy", his argument was based on the evidence and did not totally

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[3] The record shows the trial judge questioned the State's intent in presenting the evidence and admonished the prosecutor that further evidence of Appellant's threats ran the risk of giving the defense an issue on appeal. However, the court found the testimony given to that point relevant and admissible. (Tr. Vol. II, pgs. 377-378). The issue was not addressed again until Appellant's testimony where he admitted threatening those present at his arrest. (Tr. Vol. III, pgs. 718-729).

distort the theory of defense. Any error in defense counsel's failure to raise an objection did not render the result of the trial unreliable.

Appellant also claims counsel failed to object to the prosecutor's vouching for the victim. Appellant refers us to the prosecutor's statement during closing argument that, "I submit to you what [the victim] has told you about what happened in her car is true . . . Again, I submit to you what [the victim] has told you is true." (Tr. Vol. IV, pgs. 806-807).

"Argument or evidence is impermissible vouching only if the jury could reasonably believe that the prosecutor is indicating a personal belief in the witness' credibility, either through explicit personal assurances of the witness' veracity or by implicitly indicating that information not presented to the jury supports the witness' questions in a manner that tended to bolster the credibility of the State's witness." *Pickens v. State*, 2001 OK CR 3, ¶ 42, 19 P.3d 866, 880. Here, the prosecutor's comments were based upon the evidence as he reviewed it for the jury. His comments were not explicit personal assurances of the victim's credibility nor were they a hint at some extrajudicial evidence of guilt. The comments simply did not constitute improper vouching. Therefore, counsel was not ineffective for failing to raise an objection.

Appellant next finds counsel ineffective for failing to give an opening statement. "Whether to make an opening statement in any case is a strategic decision counsel must make." *Taylor v. State*, 2000 OK CR 6, ¶ 38, 998 P.2d 1225, 1235, *overruled on other grounds, Malone v. State*, 2007 OK CR 34, ¶ 22,

168 P.3d 185, 196, n. 48. We will not second guess counsel's trial strategy. *Id.*, ¶ 34, 998 P.2d at 1235. Appellant has not shown that trial counsel's decision not to make an opening statement was prejudicial or that it impacted the verdict. *Id.*

Appellant next argues counsel failed to present a complete defense by failing to offer admissible mitigating evidence and argument in regards to the guilt/innocence determination. Specifically, Appellant asserts that counsel should have obtained an expert to explain the possible effects of alcohol, that counsel should not have suggested in closing argument that Appellant did not rape the victim, and that counsel should have asked the jury for mercy in sentencing. Appellant now asserts trial counsel's omissions failed to subject the State's case to proper "adversarial testing".

As addressed in Proposition II, since this is a non-capital case, Appellant was not legally entitled to present "mitigating evidence". *Malone,* 2002 OK CR 34,¶¶ 6-7, 58 P.3d at 209-210. Therefore, counsel was not ineffective for failing to present evidence he was not legally entitled to present. In so far as Appellant asserts evidence from an expert to explain the possible effects of alcohol was admissible during the guilt/innocence stage, he concedes the evidence would not have been sufficient to establish a voluntary intoxication defense or "character evidence". (Appellant's brief, pg. 33 n. 9). *See* 21 O.S. 2001, § 153 ("[n]o act committed by a person while in a state of voluntary intoxication shall

be deemed less criminal by reason of his having been in such condition". *See also Jones v. State,* 1982 OK CR 112, ¶ 13, 648 P.2d 1251, 1255.

Despite the seemingly inadmissible nature of the evidence, Appellant stands firm in his argument that such evidence would have been relevant in the jury's determination of his credibility for guilt/innocence purposes as well as the jury's determination of punishment. We fail to see the relevance of the evidence. Generally speaking, the possible side effects of alcohol are not a topic most laypeople need an expert to set out. Further, it is not clear from the record whether Appellant has been evaluated by any experts concerning the possible side effects of his consumption of alcohol. The relevance of the possible side effects of alcohol on someone other than Appellant is questionable. Additionally, while Appellant sees his alcohol consumption as an addiction, which with supporting evidence could have benefitted his defense, it can also been seen as voluntary conduct which results in Appellant harming others and the presentation of such evidence would be detrimental to Appellant. What could reasonably be viewed as mitigating evidence to one person may be viewed as aggravating evidence to another. *Murphy v. State*, 2002 OK CR 24, ¶ 54, 47 P.3d 876, 886-887.

The decision to call witnesses is a strategic decision which this Court will not second guess on appeal. *Matthews v. State*, 2002 OK CR 16, ¶ 32, 45 P.3d 907, 919. Based upon the record before us, counsel's decision not to call an expert on the possible side effects of alcohol consumption was reasonable trial

strategy which we will not second guess. The record shows counsel extensively questioned Appellant on the amount of alcohol he drank the day and night of the party and the effects of that alcohol. Counsel sufficiently presented the issue for the jury's consideration. Appellant has failed to show that if counsel had presented any expert testimony, that the result of the trial would have been different.

In closing argument, defense counsel told the jury the defense did not mean to diminish the injuries and suffering of the victim, but they questioned whether she was sexually assaulted by Appellant. Counsel based this argument on Appellant's own testimony that he did not remember sexually assaulting the victim, Nurse Spurrier's abbreviated sexual exam, results of DNA testing which did not show "matches" between the DNA taken from the victim and Appellant's DNA, and other evidence suggesting Appellant had been "set up" by the victim's boyfriend. Appellant argues counsel was ineffective because the jury would have resented the attack on the credibility of the victim who had suffered so much. That is always a risk for defense counsel. It's the job of defense counsel to challenge the victim's credibility and to weigh the benefits of doing so with the risk of alienating the jury. Here, counsel clearly weighed those factors and attempted to minimize any risk by essentially apologizing to the jury for the argument and attempting to make it clear to the jury that the defense did not mean to imply the victim was in any way responsible for the horrendous suffering

she endured. Counsel's closing argument does not warrant a finding of ineffectiveness.

Appellant next argues counsel was ineffective for failing to make a plea of mercy before the jury. This was a one stage trial. For counsel to argue for minimal sentencing would have been inconsistent with Appellant's own testimony that he did not attack the victim and would have been a concession of guilt. Counsel's argument regarding sentencing was a matter of trial strategy. Under the circumstances of this case, we find counsel's strategy reasonable and not subject to second guessing.

Appellant next asserts counsel was ineffective for failing to present mitigating evidence and argument to the court at formal sentencing. Specifically, he argues that counsel could have presented to the court evidence contained within affidavits included in his contemporaneously filed *Application for Evidentiary Hearing on Sixth Amendment Grounds,* and that counsel should have insisted that the parole officer who prepared the pre-sentence investigation report testify at the sentencing hearing.

Contrary to his earlier argument, Appellant admits that at formal sentencing counsel did argue there were "mitigating circumstances" for the court to consider before imposing sentence and these included Appellant's young age and the "ravages of alcohol and marijuana". (S. Tr. pgs. 4-5). However, Appellant argues counsel was ineffective for failing to present any evidence in support of his arguments, evidence which could have "provided the court with a balanced view

of the pros and cons of running Appellant's sentences concurrently and ordering treatment during incarceration". (Appellant's brief, pg. 41).

In his *Application to Supplement Appeal Record In Regard To Claim of Ineffective Assistance of Trial Counsel and Application for Evidentiary Hearing,* Appellant requests this Court allow supplementation of the record on appeal with documents which were not presented to the trial court but could have been presented through supporting witnesses at Appellant's formal sentencing. These documents include copies of Appellant's records from Cherokee Nation Jack Brown Treatment Center; Kansas, Oklahoma, Public Schools; and Oklahoma Juvenile Authority. (Exhibits A – V).[4]

As addressed in Proposition II, the parameters of formal sentencing are very limited. When a defendant has elected to have the jury determine punishment, as in Appellant's case, state statutes do not allow for the presentation of "mitigating evidence" in a non-capital case such as Appellant's. *See Malone*, 2002 OK CR 24, ¶¶ 6-7, 58 P.3d at 209-210 *citing* 22 O.S2001, §§ 970-973. Prior to the trial court's pronouncement of the sentence, the defendant

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[4] Rule 3.11(B)(3)(6), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011) allows an appellant to request an evidentiary hearing when it is alleged on appeal that trial counsel was ineffective for failing to "utilize available evidence which could have been made available during the course of trial. . . ." *Short v. State*, 1999 OK CR 15, ¶ 93, 980 P.2d 1081, 1108-1109. Once an application has been properly submitted along with supporting affidavits, this Court reviews the application to see if it contains sufficient evidence to show this Court by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence. *Id.* In order to meet the "clear and convincing" standard set forth above, Appellant must present this Court with evidence, not speculation, second guesses or innuendo. *Id. Simpson v. State*, 2010 OK CR 6, 230 P.3d 888.

may offer any legal cause limited to either a reasonable ground for believing the defendant is insane or grounds that would support a motion for new trial. *Id.* If no such legal cause is shown, the trial court must pronounce sentence. *Id.*

Appellant had no legal grounds to present "mitigation evidence" to the jury. Therefore, we will not find counsel ineffective for failing to present evidence he was not legally able to present. Reviewing the affidavits submitted by Appellant in his *Application for Evidentiary Hearing*, they concern Appellant's history of alcohol abuse, troubled home life, school discipline and behavioral problems, and in-patient treatment with Oklahoma Juvenile Authority. None of the affidavits contain any information which supports a claim that Appellant was insane or that a new trial is warranted.

Appellant insists that had the trial judge had some documentation of Appellant's troubled history and some scientific evidence, he would not have relied on his own personal experience in rendering sentencing. As discussed above, the evidence Appellant now offers was not the kind of evidence which could be presented at formal sentencing. Further, the judge did not merely rely on his own personal experiences in imposing sentence. In pronouncing sentencing, the judge made his feelings about the case quite clear. He commented that after sitting through the jury trial and reviewing the Pre-Sentence Investigation Report (PSI), "this is probably the cruelest case that I have ever presided over in the twelve years I have been here. Short of killing the victim, I don't know that there was any more degradation that could have been

heaped upon this victim that what was heaped upon her during this episode." (S.Tr. pg.6). The judge momentarily injected a personal note that he had family members who were half Native American and had trouble with alcohol. However, he did not attribute Appellant's alcohol problems with the fact he was Native American. Rather, based upon findings in the PSI and the evidence at trial, the judge said that Appellant was one of those people that when they drink too much alcohol, they "want to hurt somebody". The judge told Appellant, "when you drink too much, you just get mean". (S. Tr. Pg. 7). The judge went on to state that Appellant's age was the only redeeming value and the PSI indicated Appellant was a likely repeated offender. The judge said he found no reason to allow Appellant out of prison "to get drunk and hurt somebody else." (S.Tr. pgs. 7-8). Appellant has failed to show that any evidence he now offers would have had any impact at formal sentencing.

Having thoroughly reviewed the evidence contained in the affidavits attached to the *Application for Evidentiary Hearing,* we find Appellant has failed to show by clear and convincing evidence that there is a strong possibility trial counsel was ineffective for failing to present evidence he was not legally able to present at formal sentencing. His request for an evidentiary hearing on this issue is **DENIED.**

Further, we find counsel was not ineffective for failing to require the preparer of the PSI to appear at sentencing. Contrary to Appellant's argument, the Confrontation Clause does not apply at sentencing proceedings. *United*

States v. Martinez, 413 F.3d 239, 242-243 (2nd Cir. 2005) *citing Williams v. Oklahoma*, 348 U.S. 576, 584, 79 S.Ct. 421, 426, 3 L.Ed. 516 (1959). The court quite clearly considered the information contained in the PSI prior to sentencing and Appellant has failed to show he was prejudiced by the inability to cross-examine the preparer.

Finally, Appellant finds counsel ineffective for failing to argue that the sentences should be run concurrently. Based upon the trial court's comments at sentencing, any such request for concurrent sentences would have been overruled. Appellant has not shown any prejudice by counsel's omission.

Having thoroughly reviewed Appellant's claims of ineffective assistance of counsel, we find Appellant has failed to carry his burden to show either deficient performance by counsel, or prejudice from the omission of this specific evidence. Merely because appellate counsel may have defended the case in a different manner is not grounds for finding trial counsel ineffective. *See Shultz v. State*, 1991 OK CR 57, ¶ 9, 811 P.2d 1322, 1327. This proposition is denied.

In his fourth proposition, Appellant contends the trial court erred in admitting evidence of uncharged offenses. Specifically, Appellant refers to testimony regarding his threats made at the scene of the crime that "he was going to kill everyone", that "he was going to scalp him or something like that", and he "threatened to send people after us to kill and all that". (Tr. Vol. II, pgs. 326-27, 350, 371). Appellant did not raise any objection to this evidence,

therefore, we review only for plain error. *Simpson v. State*, 1994 OK CR 40, ¶ 11, 876 P.2d 690, 695.

The record reflects Appellant's statements were made while he was being arrested. Both T.J. and his friend D.M. testified to finding Appellant at the scene as described by K.J. – "passed out" in the back seat of the car with his pants down. The witnesses testified they had to wake Appellant up and it was clear he was intoxicated. The witnesses testified Appellant was combative, cursed and threatened those at the scene and even attempted to leave then scene prior to the police chief's arrival. This conduct continued through his arrest.

Title 12 O.S.2001, 2404(B) prohibits the admission of evidence of "other crimes, wrongs, or acts" to prove the character of a person in order to show action in conformity therewith absent one of the specifically listed exceptions. *Eizember v. State*, 2007 OK CR 29, ¶ 75, 164 P.3d 208, 230. An act that is not a violation of the criminal law is nonetheless governed by § 2404(B) where it carries a stigma that could unduly prejudice an accused in the eyes of the jury. *Id.* When the State seeks to introduce evidence of a crime other than the one charged, it must comply with the procedures in *Burks v. State*, 1979 OK CR 10, ¶ 2, 594 P.2d 771, 772, *overruled in part on other grounds, Jones v. State*, 1989 OK CR 7, 772 P.2d 922. *Id.* Evidence of bad acts or other crimes may also be admissible where they form a part of an "entire transaction" or where there is a "logical connection" with the offenses charged. *Id.* 2007 OK CR 29, ¶ 77, 164 P.3d at 230. This *res gestae* exception differs from the other listed exceptions

to the evidence rule; in that in the listed exceptions, the other offense is intentionally proven, while in the *res gestae* exception, the other offense incidentally emerges. *Id.* "Evidence is considered *res gestae*, when: a) it is so closely connected to the charged offense as to form part of the entire transaction; b) it is necessary to give the jury a complete understanding of the crime; or c) when it is central to the chain of events." *Id.*

The evidence in this case was not introduced as evidence of other crimes, but as evidence of the charged crimes and the surrounding circumstances. Although the evidence in this case occurred after the commission of the criminal offenses, it still falls under the *res gestae* exception as it helped to give the jury a full picture of the crime. *Fontenot v. State*, 1994 OK CR 42, ¶ 47, 881 P.2d 69, 83. As this Court stated in *McElmurry v. State,* 2002 OK CR 40, 60 P.3d 4:

> It is not the duty of the court to anesthetize a crime in order to protect a defendant from the natural consequences of his own intentional acts. The State is permitted to re-create the circumstances known to the witnesses that occurred simultaneously with the crime and incidental to it as part of the res gestae of the crime. These events can be established by both expert and lay witnesses. Res gestae are those things, events, and circumstances incidental to and surrounding a larger event that help explain it.

2002 OK CR 40, ¶ 63, 60 P.3d at 21-22:

Further, during direct examination, Appellant admitted making the threats. He explained that he fell asleep in K.J.'s car and woke up on the ground. He said he was pushed around and his pants were pulled down. He

admitted at least three times to threatening those at the scene because he didn't understand why he was being arrested, his requests to pull his pants up were ignored, he was falsely being accused of rape, he was angry and people were laughing at him. (Tr. Vol. III, pgs. 718-729).

Therefore, even if the evidence of the threats should not have been introduced by the State, the evidence came in through Appellant's own testimony and he cannot now complain of error. *Lott v. State*, 2004 OK CR 27, ¶ 103, 98 P.3d 318, 345 (an appellant will not be permitted to profit by an alleged error which he or his counsel in the first instance invited by opening the subject or by their own conduct). We find Appellant was not prejudiced by the evidence. Therefore, no relief is warranted and this proposition is denied.

In his final proposition of error, Appellant contends the accumulation of error warrants reversal of his convictions and at the very least modification of his punishment. This Court has repeatedly held that a cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by Appellant. *Williams v. State,* 2001 OK CR 9, ¶ 127, 22 P.3d 702, 732 (and cases cited therein). However, when there have been numerous irregularities during the course of a trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors is to deny the defendant a fair trial. *Id.*

In the present case we found that Appellant's sentences of life without the possibility of parole in Counts I and III for First Degree Rape were illegal

and those sentences have been appropriately modified. No further errors have been found to warrant relief. Reviewing the cumulative effect of any errors we find they do not require reversal or further sentence modification as none were so egregious or numerous as to have denied Appellant a fair trial. *Id.* Accordingly, this proposition of error is denied.

DECISION

The Judgments in Counts I – IV are **AFFIRMED.** The Sentences in Counts II and IV are **AFFIRMED,** and the Sentences in Counts I and III are **MODIFIED TO LIFE IMPRISONMENT WITH THE POSSIBILITY OF PAROLE.** The *Application to Supplement Appeal Record In Regard To Claim of Ineffective Assistance of Trial Counsel and Application for Evidentiary Hearing* is **DENIED.** 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 DELAWARE COUNTY
THE HONORABLE ROBERT G. HANEY, DISTRICT JUDGE

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C. JOHNSON, J.: CONCUR
SMITH, J.: CONCUR

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