

BRIAN KEITH FULLERTON,
Appellant,
vs.
THE STATE OF OKLAHOMA,
Appellee.

No. F-2018-629

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP 26 2019

SUMMARY OPINION

JOHN D. HADDEN
CLERK

Appellant, Brian Keith Fullerton, was convicted by a jury in Oklahoma County District Court, Case No. CF-2016-4430, of four counts of Lewd Acts with a Child Under Sixteen. The Honorable Bill Graves, District Judge, sentenced him in accordance with the jury's recommendation to life imprisonment on each count. Dividing the four counts into two pairs, the court ordered each pair of life terms to be served concurrently, but one pair to be served consecutively to the other. Appellant must serve 85% of each sentence before parole consideration.

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

PROPOSITION I. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A CONVICTION FOR BOTH COUNT 1 AND COUNT 2 LEWD ACTS WITH A CHILD UNDER THE AGE OF SIXTEEN (16) BECAUSE THE STATE FAILED TO PROVE MR. FULLERTON TOUCHED L.D. ON THE VAGINA MORE THAN ONE TIME.

PROPOSITION II. THE INFORMATION FILED IN THIS CASE WAS INSUFFICIENT AS IT FAILED TO APPRISE MR. FULLERTON OF WHAT HE WAS CHARGED WITH AND IS NOT SPECIFIC ENOUGH TO ALLOW HIM TO PLEAD FORMER JEOPARDY SHOULD THE STATE SEEK TO FILE OTHER CHARGES IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FEDERAL AND STATE CONSTITUTIONS.

PROPOSITION III. THE PROSECUTORS INVOKED IMPROPER SYMPATHY TOWARD THE VICTIM, L.D., AND APPEALED TO THE JURY'S EMOTIONS VIOLATING MR. FULLERTON'S RIGHT TO A FAIR TRIAL.

PROPOSITION IV. TRIAL ERRORS, WHEN CONSIDERED IN ACCUMULATIVE FASHION, WARRANT A NEW TRIAL.

After thorough consideration of these propositions, the briefs of the parties, and the record on appeal, we affirm. Appellant was convicted of sexually abusing a four-year-old girl over a period of several months. In Proposition I, he claims the victim's descriptions of the abuse were so vague that a jury could not reasonably find he had committed the acts described in Counts 1 and 2 more than once. We disagree. The victim's many statements to family members, coupled with her statements to a forensic interviewer, and her illustration of the contact on an anatomical drawing, consistently point to the conclusion that Appellant committed the described conduct more than once. The evidence supports conviction on both counts. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Applegate v. State*, 1995 OK CR 49, ¶ 18, 904 P.2d 130, 136-37. Proposition I is denied.

As to Proposition II, since Appellant never challenged the specificity of the Information below, he has waived this complaint for all but plain error. *Allen v. State*, 1987 OK CR 45, ¶ 5, 734 P.2d 1304, 1306. Under plain-error review, Appellant must show that a plain or obvious error affected the outcome of the proceedings. *Thompson v. State*, 2018 OK CR 32, ¶ 6, 429 P.3d 690, 692. The factual allegations of the Information were sufficiently specific to enable Appellant to prepare a defense to the charges, and to advance a plea of former jeopardy to any subsequent charges, of similar nature, involving the same victim at the same time and place. *Kimbrow v. State*, 1990 OK CR 4, ¶ 8, 857 P.2d 798, 800. There is no error. Proposition II is denied.

As to Proposition III, Appellant claims the prosecutor's final closing argument unfairly invoked sympathy for the victim. Appellant did not object to the prosecutor's closing comments at the time, so we review for plain error. *Harney v. State*, 2011 OK CR 10, ¶ 23, 256 P.3d 1002, 1007.

There was no plain error. So long as a prosecutor's comments are based on the evidence presented, the fact that they might engender an emotional response is not necessarily grounds for relief. *See Jackson v. State*, 2007 OK CR 24, ¶ 27, 163 P.3d 596, 604. That was the case here. The prosecutor discussed the victim's young age and intimidation at

being called to testify in a courtroom full of strange adults, and the long-term effects of the abuse. These comments were based on what the jurors heard and saw. Proposition III is denied.

As to Proposition IV, having found no error in the preceding propositions, there can be no cumulative error. *Tilford v. State*, 1967 OK CR 91, ¶ 32, 437 P.2d 261, 268. Proposition IV is denied.

DECISION

The Judgment and Sentence of the District Court of Oklahoma County is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE BILL GRAVES, DISTRICT JUDGE

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OPINION BY KUEHN, V.P.J.

LEWIS, P.J.: CONCUR
LUMPKIN, J.: CONCUR IN RESULTS
HUDSON, J.: CONCUR
ROWLAND, J.: CONCUR