

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DRE EDWARD BARHAM,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION
Case No. F-2012-633

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
APR 25 2014

SUMMARY OPINION

A. JOHNSON, JUDGE:

MICHAEL S. RICHIE
CLERK

Appellant Dre Edward Barham was tried by jury in the District Court of Nowata County, Case No. CF-2010-64, and convicted of Lewd Molestation (Count 2), in violation of 21 O.S.Supp.2009, § 1123, and Forcible Sodomy (Count 3), in violation of 21 O.S.Supp.2009, § 888.¹ The jury set punishment at five years imprisonment and a \$5,000.00 fine on Count 2 and twelve years imprisonment and a \$5,000.00 fine on Count 3. The Honorable Curtis L. DeLapp, who presided at trial, sentenced Barham accordingly and ordered the sentences to be served consecutively.² From this Judgment and Sentence Barham appeals, raising the following issues:

- (1) whether his simultaneous convictions for Lewd Molestation and Forcible Sodomy violated the prohibitions against double jeopardy and double punishment;
- (2) whether the evidence was sufficient to convict him of Lewd Molestation;

¹ The magistrate at preliminary hearing found insufficient evidence to bind Barham over on second degree rape (Count 1) and furnishing alcohol to a minor (Count 4).
² Under 21 O.S.Supp.2011, § 13.1, Barham must serve 85% of the sentence imposed on each count before he is eligible for parole.

- (3) whether the admission of other crimes evidence deprived him of a fair trial;
- (4) whether the trial court abused its discretion by refusing to consider concurrent sentences because he exercised his right to a jury trial;
- (5) whether the jury was erroneously instructed as to the range of punishment for fines in Counts 1 and 2;
- (6) whether prosecutorial misconduct deprived him of a fair trial and caused the jury to render excessive sentences;
- (7) whether his sentences are excessive; and
- (8) whether the cumulative effect of all the errors raised deprived him of a fair trial.

We affirm the Judgment of the District Court on Count 3 - Forcible Sodomy. Modification of Barham's sentence on this conviction, however, is required. Furthermore, we find that Barham's conviction for Lewd Molestation (Count 2) must be reversed with instructions to dismiss for the reasons discussed below.

1. Multiple Punishment

Barham's claim—that his convictions for lewd molestation and forcible sodomy violate the prohibitions against multiple punishment for a single offense—has merit and requires relief.³

³ Barham raised the multiple punishment issue before trial, but renewed neither his constitutional double jeopardy claim nor his statutory multiple punishment claim at trial. Review is for plain error only. See *Barnard v. State*, 2012 OK CR 15, ¶ 25, 290 P.3d 759, 767. To be entitled to relief under the plain error doctrine, the appellant must prove: 1) the existence of an actual error (i.e., deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.2d 907, 923 If these elements are

Title 21 O.S.2001, § 11(A) governs multiple punishments for a single criminal act.⁴ “The proper analysis of a § 11 claim focuses on the relationship between the crimes.” *Head v. State*, 2006 OK CR 44, ¶ 11, 146 P.3d 1141, 1144; *see also Davis v. State*, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126. Section 11 does not bar the charging and conviction of two separate crimes which may only tangentially relate to one or more crimes committed during a continuing course of conduct. *Davis*, 1999 OK CR 48, ¶ 13, 993 P.2d at 127. “Section 11 is not violated where offenses arising from the same transaction are separate and distinct and require dissimilar proof.” *Jones v. State*, 2006 OK CR 5, ¶ 63, 128 P.3d 521, 543. A traditional double jeopardy analysis is conducted if Section 11 does not apply. *Id.*

The Information alleged the crime of lewd molestation based on inappropriate touching for sexual gratification. The evidence showed there was no physical contact except for Barham touching the victim’s mouth with his penis. The prosecutor’s closing argument focused on Barham’s looking upon the victim’s naked body immediately before he put his penis in her mouth. The acts of looking upon the victim’s body and sodomy were part of one action.

proven, this Court will correct plain error only if the error “seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings” or otherwise represents a “miscarriage of justice.” *Id.*

⁴ Section 11 provides in relevant part that:

[A]n act or omission which is made punishable in different ways by different provisions of this title may be punished under any such provisions, . . . but in no case can a criminal act or omission be punished under more than one section of law; and an acquittal or conviction and sentence under one section of law, bars the prosecution for the same act or omission under any other section of law.

Based on the evidence presented and the State's theory of the case, we find these actions cannot be parsed into two crimes and that multiple convictions is prohibited by Section 11 and our case law. Therefore, Barham's conviction for lewd molestation must be reversed with instructions to dismiss. The resolution of this claim renders the claims raised in Propositions 2 and 4 moot.⁵

2. Other Crimes Evidence

Reviewing for plain error only, we find Barham has not shown that admission of evidence about him mixing cough syrup with the victim's Sprite and being present when his friends plied her with alcohol was error. See *Postelle v. State*, 2011 OK CR 30, ¶ 30, 267 P.3d 114, 131, *cert. denied*, ___U.S.___, 133 S.Ct. 282, 184 L.Ed.2d 165 (2012) (appellate review is for plain error only where defendant fails to object to admission of evidence at trial). The evidence was inextricably intertwined with the charged offense and the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice.⁶ *Harmon v. State*, 2011 OK CR 6, ¶ 48, 248 P.3d 918, 937 (quoting *Mitchell v. State*, 2010 OK CR 14, ¶ 71, 235 P.3d 640, 657) ("When measuring the relevancy of evidence against its prejudicial effect, the court should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value."). The challenged evidence was

⁵ In Proposition 2, Barham challenges the sufficiency of the evidence supporting his conviction for lewd molestation. In Proposition 4, he claims the district court abused its discretion in running his sentences consecutively.

⁶ The State is not required to follow the requirements of *Burks v. State* concerning the admission of other crimes evidence when the evidence is inextricably intertwined and not offered under 12 O.S. § 2404 (B). See *Hiler v. State*, 1990 OK CR 54, ¶ 6, 796 P.2d 346, 348-49.

directly connected to the factual circumstances of the crime and provided necessary contextual and background information to the jury. There was no error in the admission of this evidence and this claim is denied. *See Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923 (“[t]he first step in plain error analysis is to determine whether error occurred”).

3. Jury Instruction on Range of Punishment

The forcible sodomy statute (21 O.S.Supp.2009, § 888) does not provide for a fine upon conviction. When a statute does not prescribe a fine upon conviction, Title 21 O.S.Supp.2010, § 64 applies.⁷ Any fine under Section 64 is optional rather than mandatory. Both the court’s instruction on the range of punishment for forcible sodomy and its response to the jury’s question during deliberations about a fine were erroneous because each conveyed that some amount of fine up to \$10,000.00 was mandatory. To remedy this plain error, we vacate Barham’s \$5,000.00 fine on Count 3.

4. Prosecutorial Misconduct

Prosecutorial misconduct did not deprive Barham of a fair trial. The record shows that the prosecutor did not invoke societal alarm during closing argument. *See McElmurry v. State*, 2002 OK CR 40, ¶ 151, 60 P.3d 4, 34 (explaining prohibited societal alarm argument). Nor did the prosecutor commit misconduct by presenting evidence of alleged other crimes because the

⁷ Section 64 states in relevant part, that “upon conviction for any felony punishable by imprisonment in any jail or prison, in relation to which no fine is prescribed by law, the court or jury *may* impose a fine on the offender not exceeding ten thousand dollars.” (Emphasis added.)

evidence was inextricably intertwined with, and directly connected to, the factual circumstances of the charged crimes.

5. Excessive Sentence

Barham's multiple punishment claim has merit and requires dismissal of his lewd molestation conviction. His sentence for forcible sodomy must be modified based on an erroneous instruction on the range of punishment concerning a fine. The other claims of error he contends wrongly affected his sentence have been rejected.

This Court will not disturb a sentence within statutory limits unless, under the facts and circumstances of the case, it is so excessive as to shock the conscience of the Court. *Gomez v. State*, 2007 OK CR 33, ¶ 18, 168 P.3d 1139, 1146; *Rea v. State*, 2001 OK CR 28, ¶ 5 n.3, 34 P.3d 148, 149 n.3. Barham's twelve year sentence for forcible sodomy does not meet that test and no further relief is warranted.

6. Cumulative Error

Other than the multiple punishment error and instructional error discussed above, there are no other errors that merit additional relief in this case based on a cumulative error analysis. *Jones v. State*, 2009 OK CR 1, ¶ 104, 201 P.3d 869, 894; *DeRosa v. State*, 2004 OK CR 19, ¶ 100, 89 P.3d 1124, 1157. This claim is denied.

DECISION

The Judgment of the district court and his twelve year sentence on Count 3 is **AFFIRMED**. The \$5000.00 fine imposed on Count 3 is **VACATED**. Barham's conviction on Count 2 is **REVERSED with Instructions to DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF NOWATA COUNTY
THE HONORABLE CURTIS L. DELAPP, DISTRICT JUDGE

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SMITH, V.P.J.: Concur
LUMPKIN, J.: Concur in Results
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