

JAN 23 2003

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA
MICHAEL S. RICHIE
CLERK

DANNY JOE BOOMERSHINE,)
) NOT FOR PUBLICATION
Appellant,)
v.) Case No. F 2002-101
)
THE STATE OF OKLAHOMA,)
)
Appellee.)

S U M M A R Y O P I N I O N

JOHNSON, PRESIDING JUDGE:

Appellant, Danny Joe Boomershine, was convicted by a jury in Creek County District Court, Case No. CF 2000-449, of Forcible Sodomy, in violation of 21 O.S.Supp.1998, § 888, and Rape by Instrumentation, in violation of 21 O.S.Supp.1998, § 1111.1. Jury trial was held before the Honorable Joe Sam Vassar, District Judge, on May 7-9, 2001. The jury set punishment at three hundred (300) years imprisonment and imposed a Twenty Thousand Dollar (\$20,000.00) fine on each count. Formal sentencing was held on June 27, 2001, and Appellant was sentenced in accordance with the jury's verdict. Judge Vassar ordered the sentences to be served consecutively. From the Judgment and Sentence imposed, Appellant filed this appeal.

Appellant raises five propositions of error:

1. Mr. Boomershine was denied a fair trial in violation of due process of law because the State repeatedly attacked him for exercising his right to remain silent;
2. The simultaneous convictions for Count 1, Forcible Sodomy, and Count 2, Rape by Instrumentation, violated the statutory prohibition against double punishment and double jeopardy;

3. Prosecutorial misconduct denied Mr. Boomershine a fair trial;
4. Mr. Boomershine's sentence is excessive and should be modified; and,
5. The cumulative effect of all these errors deprived Appellant of a fair trial.

After thorough consideration of the propositions raised, including the Original Record, transcripts, and briefs and arguments of the parties, we have determined that no relief is required for the reasons set forth below.

Generally, any comment on a defendant's exercise of his right to remain silent is error. *White v. State*, 1995 OK CR 15, ¶ 22, 900 P.2d 982, 992. Only one of the comments complained of in Proposition One was met with objection. The trial court sustained the objection and thus cured the error. *See Torres v. State*, 1998 OK CR 40, ¶ 45, 962 P.2d 3, 17, *cert. denied*, 531 U.S. 850, 121 S.Ct. 124, 148 L.Ed.2d 79 (2000). No other objections were made and we review for plain error. *Simpson v. State*, 1994 OK CR 40, ¶ 12, 876 P.2d 690, 695. The prosecutor's comments on Appellant's silence were error; however, we find the error did not contribute to the verdict and no relief on Proposition One is required. *Cleary v. State*, 1997 OK CR 35, ¶¶ 81-82, 942 P.2d 736, 753, *cert. denied*, 523 U.S. 1079, 118 S.Ct. 1528, 140 L.Ed.2d 679.

Appellant's convictions for both Forcible Sodomy and Rape by Instrumentation violate neither the statutory provision against double punishment nor double jeopardy. 21 O.S.2001, § 11; *Hale v. State*, 1995 OK CR 7, ¶ 3, 888 P.2d 1027, 1028; *Mooney v. State*, 1999 OK CR 34, ¶¶ 14, 17,

990 P.2d 875, 883-884, *United States v. Dixon*, 509 U.S. 688, 704, 113 S.Ct. 2849, 2860, 125 L.Ed.2d 556 (1993).

The comment complained of in Proposition Three could have elicited sympathy for or prejudice to Appellant. Appellant cannot show it affected his fundamental rights and no relief is required. *Hooks v. State*, 2001 OK CR 1, ¶ 40, 19 P.3d 294, 314, *cert. denied*, --- U.S. ---, 122 S.Ct. 371, 151 L.Ed.2d 282 (2001).

The sentences imposed when considered individually are not excessive and do not shock the conscience of the Court. See 21 O.S.Supp.1998, §§ 888, 1111.1, and 1114; *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149. However, we find the aggregate consecutive sentence of six hundred years to be excessive and hereby modify the sentences to run concurrently.

The single error identified was harmless beyond a reasonable doubt and no accumulation of error occurred. *Matthews v. State*, 2002 OK CR 16, ¶ 57, 45 P.3d 907, 924.

DECISION

The Judgments imposed in Creek County District Court, Case No. CF 2000-449, are **AFFIRMED** but the sentences **MODIFIED** to run concurrently.

APPEARANCES AT TRIAL

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OPINION BY: JOHNSON, P.J.

LILE, V.P.J. CONCURS
LUMPKIN, J: CONCURS IN RESULT
CHAPEL, J.: CONCURS IN PART/DISSENTS IN PART
STRUBHAR, J.: CONCURS

RB

CHAPEL, JUDGE, CONCURS IN PART/DISSENTS IN PART:

I concur in affirming the convictions in this case. However, I would modify the sentences to life.