

APR 22 2011

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

ALLEN EUGENE BRATCHER,)	
)	
Appellant,)	NOT FOR PUBLICATION
)	
v.)	Case No. F-2009-794
)	
THE STATE OF OKLAHOMA,)	
)	
Appellee.)	

SUMMARY OPINION

A. JOHNSON, PRESIDING JUDGE:

Appellant Allen Eugene Bratcher was tried by jury and convicted in the District Court of Garfield County, Case No. CF-2007-786, of Lewd Molestation, in violation of 21 O.S.Supp.2007, § 1123. The jury set punishment at seventy years imprisonment. The Honorable Ronald G. Franklin, who presided at trial, sentenced Bratcher accordingly. From this Judgment and Sentence Bratcher appeals, raising the following issues:

1. whether his sentence is excessive;
2. whether prosecutorial misconduct deprived him of a fair trial and resulted in an excessive sentence;
3. whether failure to instruct the jury *sua sponte* to determine whether his statement was voluntary prior to considering it during deliberation resulted in fundamental error;
4. whether he received effective assistance of counsel; and
5. whether cumulative error deprived him of a fair trial.

Bratcher asks that we reverse his conviction based on these alleged errors or, alternatively, modify his sentence. We find reversal is not required, but modify his sentence to a term of imprisonment of thirty years.

1.

In light of the facts and circumstances of this case, most notably the prosecutor's appeal to the jury to sympathize with the victim and that this is the only occurrence of molestation of which Bratcher has been accused, Bratcher's sentence of seventy years shocks our conscience and must be modified. *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.3.¹

2.

The prosecutor's comments during *voir dire* and his opening statement were not improper and Bratcher fails to show how they deprived him of either a fair trial or sentencing. The prosecutor's statements during his second closing were, however, improper appeals for sympathy for the victim. We have repeatedly condemned the attempts of prosecutors to inflame the jury's passions by asking the jury to sympathize with the victim. *See e.g. Bell v. State*, 2007 OK CR 43, ¶ 7, 172 P.3d 622, 624 (the guilt stage of trial is no place for even subtle appeals for sympathy); *Cruse v. State*, 2003 OK CR 8, ¶

¹ In Bratcher's claim that his sentence is excessive he challenges the trial court's failure to act on the testimony of the mitigating witnesses he presented at trial. While our decision to modify Bratcher's sentence renders this claim moot, we note that the trial court erred by permitting Bratcher to present mitigating witnesses at the sentencing hearing because Bratcher allowed the jury to decide his sentence. 22 O.S.2001, § 973; *see Malone v. State*, 2002 OK CR 34, ¶ 7, 58 P.3d 208, 209-210 (opinion on rehearing)(holding that § 973 only permits the post-trial/pre-sentencing presentation of aggravating and mitigating evidence not presented at trial when a judge rather than a jury is responsible for determining the defendant's sentence).

10, 67 P.3d 920, 923 (“[s]ympathy for the victim is not a proper consideration in a criminal trial”).

While relief is not always required, the remarks in this case, which provided a foundation for the prosecutor’s request for a seventy year sentence, resulted in an excessive sentence. We, therefore, modify Bratcher’s sentence to a term of imprisonment of thirty years.

3.

The voluntariness of Bratcher’s statement was determined by the trial court at a *Jackson v. Denno*² hearing. After the trial court’s decision, Bratcher’s attorney adopted a strategy which embraced the tape and argued that it showed Bratcher’s belief that what occurred was an accident. Bratcher fails to demonstrate how the trial court’s failure to give Instruction No. 9-12 OUI-CR(2d)³ *sua sponte* resulted in fundamental miscarriage of justice or deprived him of a statutory or constitutional right. 20 O.S.2001, § 3001.1. This claim is accordingly rejected.

4.

Trial counsel’s decision on how aggressively to question a witness is a matter of trial strategy which we will not second guess. *See Grant v. State*, 2009 OK CR 11, ¶ 53, 205 P.3d 1, 22 (“recognizing that there are many ways to handle any given case, and that counsel must make many strategic decisions along the way”). Bratcher also fails to show how he was prejudiced by the

² *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964) (established the right of a defendant to an *in camera* determination on the voluntariness of a confession).

³ Instruction No. 9-12 requires the jury to find that a defendant’s statement was voluntarily given before considering it as evidence.

waiver of his preliminary hearing. While he alleges counsel was ineffective for waiving the hearing, he signed the waiver. The State, in consideration of Bratcher's waiver, amended the Information and dropped the sentencing enhancement. In light of our disposition of Bratcher's prosecutorial misconduct claim, his claim that trial counsel was ineffective for failing to object is moot.

5.

We find that Bratcher's cumulative error claim warrants no further relief.

DECISION

The conviction is **AFFIRMED**. The sentence is **MODIFIED** to a term of imprisonment of thirty years. 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 delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF GARFIELD COUNTY
THE HONORABLE RONALD G. FRANKLIN, DISTRICT JUDGE

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OPINION BY: A. JOHNSON, P.J.
LEWIS, V.P.J.: Concur in Results
LUMPKIN, J.: Concur in Part and Dissent in Part
C. JOHNSON, J.: Concur
SMITH, J.: Concur in Part and Dissent in Part

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LUMPKIN, JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the Court's decision to affirm the conviction. However, I must dissent to the modification of sentence. The prosecutor did nothing to inflame the jury. He gave a reasoned closing that provided a reasonable basis for the jury to fix punishment. Appellant failed to object to any of the State's closing remarks and our review is limited to plain error review. *Simpson v. State*, 876 P.2d 690 (Okla.Cr.1994); *Bartell v. State*, 881 P.2d 92 (Okla.Cr.1994). That failure to object gives a better gauge as to the impact of the statements now raised on appeal. I would find no error, plain or otherwise, and would affirm both the judgment and sentence.

SMITH, J., CONCURRING IN PART AND DISSENTING IN PART:

I agree with the majority in affirming the conviction, but I would modify the sentence to forty-five years.