

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL RALPH CONROY,)
)
 Appellant,)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2006-1282

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

AUG 21 2008

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

CHAPEL, JUDGE:

After a jury trial in the District Court of Logan County, Case No. CF-2004-240, Michael Conroy was convicted of Count I: First Degree Rape in violation of 21 O.S.Supp. 2002, § 1111; Count II: Kidnapping in violation of 21 O.S.Supp. 2004, § 741; Count III: Domestic Abuse – Assault and Battery in violation of 21 O.S.2001, §644; Count IV: Forcible Oral Sodomy in violation of 21 O.S.Supp. 2002, § 888; and Count V: Assault and Battery with a Dangerous Weapon in violation of 21 O.S.2001, § 645, all After Former Conviction of Two or More Felonies. In accordance with the jury’s recommendation, the Honorable Donald Worthington sentenced Conroy to fifty (50) years’ imprisonment for each of Counts I, II, IV and V and one (1) year in the county jail and a \$3000.00 fine for Count III. The trial court ordered the sentences to be served concurrently. Conroy has perfected his appeal to this Court.

Conroy raises the following propositions of error:

- I. The trial court erred by permitting introduction of prejudicial other crimes evidence not permitted by law.

- II. The trial court erred by admitting the State's exhibits, which were not properly authenticated.
- III. The conviction is not supported by the weight or sufficiency of the evidence.
- IV. The OSBI sexual assault report was rank hearsay and improperly admitted into evidence.
- V. The trial court erred in failing to give the required 85% service of sentence instruction to the jury.
- VI. The prior judgment and sentences were improperly admitted in the second stage proceedings and Mr. Conroy's sentence was improperly enhanced.
- VII. The State improperly filed the Fourth Amended Information to the material prejudice of the Appellant.
- VIII. Mr. Conroy's right to effective assistance of counsel was violated.

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and parties' exhibits, we find that Conroy's convictions should be affirmed but the case must be remanded for resentencing. We find in Proposition I that the letters and map written by Conroy were properly admitted as admissions by conduct establishing his consciousness of guilt.¹ We find in Proposition II that the letters and maps

¹ *Anderson v. State*, 992 P.2d 409, 416 (Okla. Cr. 1999) (acts of "admissions by conduct" are committed after the crime for which a defendant is charged, whereas "other crimes" evidence generally describes conduct that occurs before commission of the crime for which a defendant is on trial); *Douglas v. State*, 951 P.2d 651, 668 (Okla. Cr. 1997) (defendant's attempts to prevent a witness's testimony are admissible as an admission by conduct). The letters and map prepared by Conroy after he was charged with the above crimes, which detailed his plan to solicit the victim's kidnap and confinement to obstruct her testimony, were properly admitted as admissions by conduct and were not inadmissible other crimes evidence.

written by Conroy were properly admitted into evidence.² We find in Proposition III that the evidence was sufficient to support the convictions for the crimes charged.³ We find in Proposition IV that the sexual assault report was properly admitted into evidence under an exception to the hearsay rule.⁴ We find in Proposition V that the trial court's failure to instruct the jury on the 85% rule requires a new sentencing hearing.⁵ We find that Propositions VI and VII are moot due to the relief recommend in Proposition V. We find in Proposition VIII that trial counsel was not ineffective.⁶

Decision

The Judgments are **AFFIRMED** and the Sentences **REVERSED and REMANDED** for a new sentencing hearing. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE is ORDERED** issued upon the delivery and filing of this decision.

² *H.W. v. State*, 759 P.2d 214, 217 (Okl.Cr.1988(admission of evidence discretionary with trial court). The trial court did not abuse its discretion in admitting this evidence. Moreover, any question regarding the foundation or authenticity of these documents goes to their evidentiary weight rather than to their admissibility. *Alverson v. State*, 983 P.2d 498, 509 (Okl.Cr.1999).

³ *Spuehler v. State*, 709 P.2d 202, 203-04 (Okl.Cr.1985). Based upon the overwhelming evidence of Conroy's guilt, a rational trier of fact should have convicted him of all charges.

⁴ *Drake v. State*, 761 P.2d 879, 882 (Okl.Cr.1988)(medical report of examining physician admissible pursuant to § 2803 of the evidence code).

⁵ *Anderson v. State*, 130 P.3d 273, 279-283 (Okl.Cr.2006)(requiring 85% instruction in appropriate cases) and OUJI-CR 2d 10-13A and 10-13B. All of Conroy's sentences may have been affected by the failure to properly instruct the jury on this issue. As a result of this possibility, we find that Conroy must be resentenced on all counts.

⁶ *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Any arguments regarding ineffective assistance of trial counsel are mooted by the relief in Proposition V. We also find that the examining nurse's testimony and the medical report (see Proposition IV) were properly admitted. Trial counsel cannot be ineffective for failing to raise a baseless objection.

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OPINION BY: CHAPEL, J.

LUMPKIN, P.J.:	CONCUR IN PART/DISSENT IN PART
C. JOHNSON, V.P.J.:	CONCUR
A. JOHNSON, J.:	CONCUR
LEWIS, J.:	CONCUR

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LUMPKIN, PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the Court's decision to affirm the convictions in this case, but I must dissent to the remand for resentencing. The trial judge allowed defense counsel to advise the jury in closing argument that the 85% rule applied to some of the offenses. This was sufficient to advise the jury of the effect of their sentencing decision. In addition, the judge at sentencing ordered the sentences to be served concurrently further ameliorating the effect of the sentences. I would affirm the judgments and sentences. This victim has suffered enough and the Appellant has been afforded each of his constitutional rights.