

SEP 20 2002

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

CHESTER CRELLER, SR.,)	NOT FOR PUBLICATION
)	
Appellant,)	
v.)	Case No. F 2001-962
)	
THE STATE OF OKLAHOMA,)	
)	
Appellee.)	

SUMMARY OPINION

JOHNSON, VICE-PRESIDING JUDGE:

Appellant, Chester Creller, Sr., was convicted by a jury in Muskogee County District Court, Case No. CF 2000-588, of First Degree Rape, in violation of 21 O.S.1991, § 1114(A)(1) (Count 1), Forcible Oral Sodomy, in violation of 21 O.S.Supp.2000, § 888 (Count 2), and Incest, in violation of 21 O.S.Supp.1999, § 885 (Count 3). Jury trial was held on May 17th, 20th, and 21st, 2001, before the Honorable Thomas Alford, Associate District Judge. The jury set punishment at one hundred (100) years imprisonment on Count 1; twenty (20) years imprisonment on Count 2, and ten (10) years imprisonment on Count 3. Formal sentencing was held on August 6, 2001, and Judge Alford ordered Appellant to serve Counts 1 and 2 consecutively, but Count 3 to run concurrently with Count 1. From the Judgment and Sentences imposed, Appellant filed this appeal.

Appellant raises six propositions of error:

1. Appellant's convictions must be reversed because the trial court had no jurisdiction to try Appellant.

2. The trial court erred by allowing late amendment of the Information in this case, and the trial was unfairly delayed.
3. The trial court erred by failing to comply with the statutory procedure regarding the alleged victim's testimony.
4. Double jeopardy was violated when Appellant was convicted of both Rape and Incest.
5. Other crime evidence deprived Appellant of a fair trial and due process of law.
6. The prosecutor's actions denied Appellant a fair trial.

After thorough review of the propositions raised, the entire record before us, including the original record, transcripts, exhibits and briefs of the parties, we find Proposition 4 has merit. Appellant's convictions for both First Degree Rape (Count 1) and Incest (Count 3) violate 21 O.S.Supp.1999, § 11 as they were based upon a single act. Therefore, we find Appellant's conviction for Incest (Count 3) should be reversed and remanded with instructions to dismiss. The remaining propositions raised do not warrant relief.

The trial court had jurisdiction to try Appellant on the second Amended Information which was filed in the district court and served upon Appellant. Further, the State properly amended the Information and the amendment did not materially prejudice the rights of the defendant. 22 O.S.2001, § 304; *Strunk v. State*, 1969 OK CR 30, ¶ 3, 450 P.2d 216, 219 (information may be amended in matters of form or substance when it can be done without prejudice to the substantial rights of the accused).

The trial court erred by not following the procedure set forth in 22 O.S.2001, § 753. However, in light of the overwhelming evidence presented at

trial, we find the error harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 22, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Shipman v. State*, 1991 OK CR 93, ¶ 12, 816 P.2d 571, 575. We also find any error in the admission of other crimes evidence was harmless beyond a reasonable doubt. *Lambert v. State*, 1999 OK CR 17, ¶ 48, 984 P.2d 221, 235-236, *cert. denied*, -- U.S. -- , 120 S.Ct. 816, 145 L.Ed.2d 687 (2000). We also find no plain error occurred as a result of the prosecutor's closing argument. Defense counsel did not object to the complained of arguments and even though arguably were designed to elicit sympathy for the victim, we find the argument was not so egregious as have affected the jury's verdict or to warrant relief.

DECISION

The Judgment and Sentences imposed in Muskogee County District Court, Case No. CF 2000-588, for Counts 1 and 2 are hereby **AFFIRMED**; Count 3 is **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS**.

APPEARANCES AT TRIAL

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OPINION BY: JOHNSON, V.P.J.

LUMPKIN, P.J: CONCURS

CHAPEL, J.: CONCURS

STRUBHAR, J.: CONCURS

LILE, J.: CONCURS

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