

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

EARL ANDREW DAHL, JR.,)
)
)
 Appellant,)
 v.)
)
 STATE OF OKLAHOMA)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2005-1282

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

FEB - 6 2007

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

LUMPKIN, PRESIDING JUDGE:

Appellant Earl Andrew Dahl, Jr., was tried by jury and convicted of Rape by Instrumentation (Counts 1-5 and 26-30)) (21 O.S.Supp.1999, § 1111; 21 O.S.1991, §§ 1111.1 and 1114); Forcible Oral Sodomy (Counts 6-15) (21 O.S. Supp. 1999, § 888); and Lewd Acts with a Child Under Sixteen (Counts 16-25 and 31-50)) (21 O.S.Supp.1999, § 1123); Case No. CF-2003-5810, in the District Court of Oklahoma County. The jury recommended as punishment ten (10) years imprisonment in each of Counts 1-5, 21-30, and 46-50; seven (7) years imprisonment in each of Counts 6-20 and 36-45; and fifteen (15) years imprisonment in each of Counts 31-35. The trial court sentenced accordingly, ordering the sentences to run consecutively. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of his appeal:

- I. The evidence was insufficient to sustain the convictions and Appellant was wrongly convicted of all fifty counts.

- II. The trial court abused its discretion in ordering the sentences Appellant received to all run consecutive, and as a result of the court ordering the sentences to be served consecutively Appellant's sentences were excessive.
- III. The prosecutor improperly asked unduly prejudicial questions on cross-examination.
- IV. The trial court erred in not giving Appellant's requested instruction that he must serve at least 85% of the sentence imposed.
- V. The trial errors complained of herein cumulatively denied Appellant's right to a fair trial under the United States and Oklahoma Constitutions and therefore, his convictions and sentences must be reversed.

After a thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that the judgments are affirmed under the law and the evidence, but the case must be remanded for resentencing.

In Proposition I, reviewing the evidence in a light most favorable to the State, a rational trier of fact could have concluded beyond a reasonable doubt that Appellant committed the crimes as charged. *See Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559. All of the statutory elements were established by the State's evidence and the victim's testimony was clear, consistent, and believable. *See Applegate v. State*, 1995 OK CR 49, ¶ 16, 904 P.2d 130, 136 (a conviction for a sexually related offense may be had on the uncorroborated testimony of the victim where his/her testimony is not inherently improbable or unworthy of credence).

In Proposition II, after considering all the facts and circumstances of this case, we find the find the proposition is rendered moot as we remand the case

to the trial court for resentencing under Proposition IV. *See Battenfield v. State*, 1991 OK CR 82, ¶ 27, 816 P.2d 555, 565; *Rogers v. State*, 1973 OK CR 111, ¶ 11, 507 P.2d 589, 590.

In Proposition III, any error in the prosecutor's questioning of Appellant regarding his attraction to teenage girls was cured by the trial court's sustaining of the defense objection. *See Slaughter v. State*, 1997 OK CR 78, ¶ 110, 950 P.2d 839, 869.

In Proposition IV, we find the trial court's failure to give Appellant's requested instruction on the 85% Rule had a substantial influence on the jury's sentencing determination. *See Carter v. State*, 2006 OK CR 42, ¶ 5, ___ P.3d ___, ("[a] violation of *Anderson* is a type of instructional error [which] we do not automatically reverse . . . but rather determine whether the error resulted in a miscarriage of justice or constitutes a substantial violation of a constitutional or statutory right".) To correct this error we remand for resentencing. See 22 O.S. 2001, § 929. At the resentencing hearing, the trial court is to instruct the jury on the 85% Rule, 21 O.S. 2001, § 13.1. *See Oklahoma Uniform Jury Instructions – Criminal 10-13(A)*.

In Proposition V, reviewing for cumulative error, we find the only error warranting relief concerns sentencing. *See Williams v. State*, 2001 OK CR 9, ¶ 127, 22 P.3d 702, 732. As we have determined the case should be remanded for resentencing, no further relief is necessary.

DECISION

The Judgment is **AFFIRMED** and the case is **REMANDED FOR RESENTENCING**. 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 delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE JERRY D. BASS, DISTRICT JUDGE

APPEARANCES AT TRIAL

ROBERT L. WYATT
KEITH NEDWICK
P.O. BOX 1947
OKLAHOMA CITY, OK 73101
COUNSEL FOR APPELLANT

C. WESLEY LANE, II
DISTRICT ATTORNEY
SARAH MCAMIS
ASSISTANT DISTRICT ATTORNEY
320 ROBERT S. KERR, STE. 505
OKLAHOMA CITY, OK 73102
COUNSEL FOR THE STATE

APPEARANCES ON APPEAL

BILL ZUHDI
P.O. BOX 1077
OKLAHOMA CITY, OK 73101
COUNSEL FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
PRESTON SAUL DRAPER
ASSISTANT ATTORNEY GENERAL
313 N. E. 21ST
OKLA. CITY, OK 73105
COUNSEL FOR THE STATE

OPINION BY: LUMPKIN, P.J.

C. JOHNSON, V.P.J.: CONCUR
CHAPEL, J.: CONCUR
A. JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR

RB