

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
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STATE OF OKLAHOMA

APR 23 2007

MICHAEL S. RICHIE
CLERK

DAVID MICHAEL GRAHAM,)
)
 Appellant,)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION
Case No. F-2006-429

SUMMARY OPINION

CHAPEL, JUDGE:

After a jury trial in Delaware County District Court Case No. CF-2005-198, David Graham was convicted of three Counts of Lewd Molestation in violation of 21 O.S. O.S.Supp.2002, § 1123.¹ Following the jury's recommendation, the Honorable Barry V. Denny sentenced Graham to serve consecutive sentences of twenty (20) years' imprisonment for each count but suspended the final ten (10) years subject to the rules and conditions of probation. The trial court also ordered Graham to pay each of three victims \$10,000.00 in restitution. Graham has perfected his appeal to this Court.

Graham raises the following propositions of error:

- I. Prosecutorial misconduct deprived Appellant of a fair trial.
- II. The trial court erred by not responding to the jury's question regarding sentencing with information that Appellant would have to serve 85% of any sentences imposed.
- III. The trial court erred by imposing restitution of \$10,000 per count when there was no factual basis supporting it.

¹ At preliminary hearing, an additional count of Lewd Molestation was dismissed.

IV. Under the facts and circumstances of this case, the imposition of three twenty-year sentences should shock conscience of this court.

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits of the parties, we find that while reversal is not required, modification of Graham's sentence, including the trial court's order of restitution, is required under the law and evidence. We find in Proposition I that although there was some prosecutorial misconduct, none affected Graham's conviction and any misconduct that may have affected Graham's sentence is remedied by the relief granted in Proposition II.² We find in Proposition II that Graham's jury should have been instructed, that based upon the crime for which he was charged and convicted, he must serve 85% of his sentence before he is eligible for parole.³ This error requires this Court to modify Graham's sentences to be served concurrently.⁴ We find in Proposition III that, as the State properly conceded, the trial court's

² In response to Graham's first contention of prosecutorial misconduct, we find there was no error as the prosecutor did not personally vouch for the victims' credibility. *Nickell v. State*, 885 P.2d 670, 673 (Okla. Cr. 1994). In response to Graham's second contention of error, we find that Dr. Mease impermissibly testified that he believed the victims were "telling the truth" when he interviewed them. *Lawrence v. State*, 796 P.2d 1176, 1177 (Okla. Cr. 1990) (witness cannot give an opinion regarding the truthfulness of a witness). However, this error was harmless beyond a reasonable doubt as the evidence of Graham's guilt was overwhelming and any affect this error may have had on sentencing is remedied by the relief recommended in Proposition II. Finally, Graham argues that the prosecutor improperly stated that Graham was caught before he moved on to the "next step" implying that had Graham not been caught he would have committed more serious sexual offense in the future. Graham did not object to the comment, waiving all but plain error. There was no plain error as to Graham's guilt because the comment did not deny him a substantial right or prejudice him. Additionally, any affect this comment may have had on the severity of Graham's sentence is remedied by the relief recommended in Proposition II.

³ 21 O.S.2001, §§ 12.1, 13.1.

restitution orders were not supported by any evidence and must be dismissed. We find Proposition IV that any argument that Graham's sentences were excessive is mooted by the relief recommended in Proposition II.

Decision

The Judgments are **AFFIRMED** and the Sentences are **MODIFIED** to be served concurrently and the order of restitution is **DISMISSED**. 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.

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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 IN RESULTS

⁴ *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273, 282. Graham receives the benefit of *Anderson* as his case was pending at trial or on appeal after *Anderson* was decided. *Carter v. State*, 2006 OK CR 42, 147 P.3d 243, 244.

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

I concur in the Court's decision to affirm the convictions in this case, however, I must dissent to the modification of the sentences to run concurrent.

There is no error upon which to modify the sentences entered by the jury and imposed by the trial judge. The jury asking the question "Are there any guidelines on how to sentence, other than min or max?" and the trial judge advising them to use the ranges provided in the instructions in no way implicates the provisions of 21 O.S. 2001, §§ 12.1, 13.1. The Appellant did not request an instruction on the 85% rule and the jurors had no question about parole.

The trial court ordered the sentences to run consecutively, but that is the way sentences are to be served by operation of the law. See 21 O.S. 2001, § 61.1. I find no basis in fact for the Court's largess by modifying the sentences to run concurrently. Therefore, I dissent to the modification of sentence in this case.