IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TIMOTHY GRIFFITH,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2005-911**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAR 21 2007

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

Appellant, Timothy Griffith, was tried by jury in the District Court of Oklahoma County, Case Number F-2002-2883, and convicted of two counts of Attempted First Degree Rape, counts I and VIII, in violation of 21 O.S.2001, §§ 42, 1111, 1114, and 1115 and eight counts of sexual abuse of a child, counts III-VII and X-XII, in violation of 10 O.S.2001, § 7115.[1] The jury set punishment at five (5) years imprisonment on each of the attempted rape counts and three (3) years imprisonment and a $500 fine on each of the eight child sexual abuse counts. The trial judge sentenced Appellant in accordance with the jury's determination and ordered all sentences to run consecutively.

Appellant now appeals his convictions and sentences, raising the following propositions of error:

I. Duplicate charges, convictions, and punishments violate Appellant's Constitutional protection against double jeopardy and/or double punishment;

[1] Appellant was acquitted of two additional counts of attempted first degree anal rape, Counts II and IX.

II. Appellant was denied due process of law by conviction and punishment for "attempted rape in the first degree" under the general attempt statute regarding assault with intent to rape (commit a felony);

III. Alternatively (to proposition II), Appellant was prejudiced by the trial court's failure to instruct the jury on the lesser-related offense of assault with intent to rape and trial counsel was ineffective for failing to request such jury instruction;

IV. Appellant was prejudiced by improper bolstering of the prosecutrix's testimony through admission of a videotape of the prosecutrix's interview at the care center and testimony from four adult witnesses who repeated the prosecutrix's prior consistent statements;

V. Appellant was prejudiced by the trial court's error in admitting child hearsay evidence of which the defense received no notice from the state, as required by section 2801.3 of Title 12;

VI. Appellant was denied a fair trial by the physician assistant's purported "diagnosis" of "sexual abuse by history," which was misleading and invaded the province of the jury to decide the central issue of whether the prosecutrix's allegations against Appellant were true;

VII. Appellant was denied due process of law by the trial court's erroneous exclusion of evidence and jury instruction regarding Appellant's theory of defense to the allegations on which he was tried;

VIII. The trial court's order that Appellant's sentences be served consecutively rendered Appellant's aggregate sentence excessive; and

IX. Appellant was prejudiced by cumulative error.

After thoroughly considering these propositions and the entire record before us, including the original record, transcripts, and briefs, we find reversal or modification is not required as to any of the convictions or sentences, except count VIII, which must be reversed and dismissed for reasons set forth below.

With respect to proposition one, we find the record sufficiently supports eight separate counts of child sexual abuse and two counts of attempted rape. There was no double jeopardy or double punishment violation. *Davis v. State*, 1999 OK CR 48, 993 P.2d 124, 126; *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932); *Gilson v. State*, 2000 OK CR 14, ¶ 23, 8 P.3d 883, 900.

With respect to propositions two and three, we find no Due Process violation as the District Attorney had discretion to charge two counts of attempted first degree rape, rather than assault with intent to commit rape, under the facts of this case. 21 O.S.2001, § 681; 21 O.S.2001, § 42. Because, under these specific facts, the prosecutor had leeway to charge under either statute, a lesser-included offense instruction was not mandatory. We thus find no plain error or ineffective assistance with respect to this issue. *Simpson v. State*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 693; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

With respect to propositions four and five, we find no reversible error with respect to any bolstering that may have occurred. 12 O.S.Supp.2003, § 2403. This was a hard-fought case and, for the most part, the adult witnesses were used to corroborate the circumstances of the crime and to counter Appellant's claims of fabrication. We also find no error with respect to the hearsay claims, and the trial judge did not abuse her discretion in admitting the evidence following the reliability hearing. 12 O.S.Supp.2004, § 2803.1.

With respect to proposition six, we find the witness did not vouch for the

child's credibility, nor tell jurors what outcome they should reach. Moreover, there was no abuse of discretion in allowing this evidence in. *Warner v. State*, 2006 OK CR 40, ¶ 22, 144 P.3d 838.

With respect to proposition seven, we find the trial judge abused her discretion by sustaining the motion in limine and refusing to allow Appellant to present his full defense of physical impossibility to the attempted rape claims. This error complicates our ability to find two separate acts of attempted rape in this case and merits some relief.

With respect to propositions eight and nine, we find Appellant's overall sentence is not excessive, especially as modified below, and we find no cumulative error requiring any further relief. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148-49.

DECISION

The judgments and sentences are hereby **AFFIRMED**, except that the judgment and sentence on Count VIII, Attempted First Degree Rape, is hereby **REVERSED** and **DISMISSED** pursuant to our finding in proposition seven. 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.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE SUSAN P. CASWELL, DISTRICT JUDGE

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CHAPEL, J.: CONCUR IN RESULT
A. JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR IN RESULT

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