IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

EARNEST RAY KINGERY, JR.,	)	
	)	Not for Publication
Appellant,	)	
v.	)	Case No. F-2006-1015
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, JUDGE:

Earnest Ray Kingery, Jr. was tried by jury and convicted of rape in the first degree in violation of 21 O.S.2001, § 1114(A)(1) and 21 O.S.Supp.2002, § 1115, in the District Court of Cherokee County, case No. CF-2006-149. In accordance with the jury's recommendation the Honorable Mark Dobbins sentenced Kingery to seventy (70) years imprisonment. Kingery appeals from this conviction and sentence.

Kingery raises seven propositions of error in support of his appeal:

I. Kingery was prejudiced by the forensic interviewer's testimony vouching for the credibility of the child witnesses;
II. Kingery was unfairly prejudiced by erroneous admission of evidence of acts similar to the charge on trial that involved another alleged victim;
III. Kingery was prejudiced by the trial court's coercion of the verdict by giving an unwarranted "Allen" charge;
IV. Kingery's constitutional right to remain silent was violated by the prosecutor's improper implication of guilt in Kingery's failure to come forward and contact police subsequent to service of a search warrant at his residence;
V. Kingery was prejudiced by the trial court's coercion of the verdict by giving an unwarranted "Allen" charge;
VI. Kingery's sentence is excessive and should shock the conscience of the Court; and
VII. Kingery should be granted relief based on cumulative error.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find that Kingery's sentence must be modified.

In Proposition II Kingery claims that E.R.K.'s testimony was improper and prejudicial other crimes evidence. Kingery was originally also charged with raping E.R.K., the victim's brother. E.R.K. was not available at the preliminary hearing and that charge was dismissed. Before trial began, the prosecutor gave notice that he intended to use E.R.K.'s testimony of the crimes against him to prove motive, opportunity, intent, preparation, plan, knowledge and identity, to show the absence of mistake or accident, and to show the existence of a common scheme or plan. The trial court ruled that E.R.K.'s testimony would be admissible. E.R.K. testified that he saw Kingery rape the victim, and also testified that Kingery anally raped him several times.

Kingery claims that E.R.K.'s testimony was merely prejudicial hearsay which encouraged jurors to convict him on the basis of crimes other than those against the victim. This Court has recently reaffirmed the law regarding the admission of other crimes evidence:

> The following factors are necessary for the use of other crimes evidence. There must be a visible connection between the other crimes evidence and the charged crimes. The evidence must go to a disputed issue and be necessary to support the State's burden of proof, and its probative value must outweigh the danger of unfair prejudice. It must be established by clear and convincing evidence. The jury must be properly instructed on the limited purpose for which the evidence may be considered. If the evidence is offered to show a common scheme or plan, it must embrace

the commission of crimes so related to each other that proof of one tends to establish the other.[1]

All these factors are present in E.R.K.'s testimony.[2] Kingery anally raped his son and daughter in the same way, at the same location, during the same time period. The contemporaneous nature of the crimes and locations, the similarity of the acts, and the close relationship between the victims and Kingery, all suggest the existence of a common scheme or plan.[3] Admission of E.R.K.'s testimony, in itself, was not error.

E.R.K.'s testimony was admissible to show a common scheme or plan. However, the record is replete with other testimony, references, and argument portraying E.R.K. as a second victim in the case. The forensic interviewer testified at length and in detail about her interview with E.R.K.; in fact, she testified about that interview before describing the interview with S.R.K. Officer Vanscoy testified that he interviewed "the two victims, the Defendant's children." Deputy Chennault testified that Kingery had allegedly molested two of his children. April Morton, a DHS investigator, testified that her investigation involved the Kingery children, and a referral concerned Kingery "molesting his children." In addition, E.R.K. testified before the victim did. In opening statement the prosecutor told jurors they would hear about "these

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[1] *James v. State*, 2007 OK CR 1, 152 P.3d 255, 257.

[2] The jury was properly instructed on the use of the evidence. The trial court modified the standard OUJI instruction to include the word "misconduct" rather than "crimes". However, as the State notes, this was apparently at Kingery's request; his proposed instruction also uses the word "misconduct". Kingery fails to show how the word "misconduct" prejudiced him, and the instruction as modified was not improper.

[3] These facts distinguish this case from *Wells v. State*, 1990 OK CR 72, 799 P.2d 1128, where the victims were of differing ages and the previous abuse was remote in time and location. This is also true of the other cases on which Kingery relies.

sexually abused children" deciding to come forward and tell about the "terrible things that were done to them," background information about "the children," and the children's' interviews and reports. Kingery objected during the opening statement, but his objection was overruled based on the previous trial judge's ruling. The prosecutor's first closing argument focused on S.R.K.. However, in second closing argument, the prosecutor stated Kingery "destroyed his family" and "destroyed these two little lives," and referred to "these two young, brave children." Finally, he asked the jurors, when considering punishment, "What is the proper number of years for a father whose [sic] given the gift of two children and the mom left and then takes advantage of that for his own sexual gratification?" "I just ask that once you find the defendant guilty you make the punishment long enough that he'll never get out again and he'll never have an opportunity to hurt these children anymore."

Jurors were consistently told that, despite the charged crime, there were two victims. They were asked to sentence Kingery for raping two children. They returned a seventy-year sentence. While it was not error to admit E.R.K.'s testimony, the combined weight of the testimony and argument regarding E.R.K. was unduly prejudicial. The victim's testimony was sufficient to convict Kingery of the charged crime. However, the record supports our conclusion that the improper testimony and argument affected the jury's determination of sentence. Kingery's sentence is modified to twenty-five (25) years imprisonment.

We find in Proposition I that the expert forensic investigator did not give an opinion regarding the victim's truthfulness.[4] We find in Proposition III that the prosecutor's error in referring to Kingery's invocation of his right to silence was harmless.[5] We also find, in Proposition IV, that the prosecutor's error in referring to Kingery's failure to come forward to law enforcement was harmless.[6] We find in Proposition V that the trial court did not err in *sua sponte* giving an *Allen* charge to the jury.[7] Because Kingery's sentence must be modified, Proposition VI is moot. We find in Proposition VII that no further relief is required.

Decision

The Judgment of the District Court is **AFFIRMED**. The Sentence is **MODIFIED** to twenty-five (25) years imprisonment. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007),

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[4] *Lawrence v. State*, 1990 OK CR 56, 796 P.2d 1176, 1177.

[5] *White v. State*, 1995 OK CR 15, 900 P.2d 982, 992. The victim testified that Kingery raped her, and E.R.K. testified that he saw Kingery rape the victim. Officer Vanscoy stated that Kingery denied the allegations against him. The prosecutor did not raise the topic in closing argument.

[6] *Golden v. State*, 2006 OK CR 2, 127 P.3d 1150, 1153-54; 20 O.S.2001, § 3001.1. The jury heard that the officer served a notice of search, not an arrest warrant; there was no time frame given for the lapse between search and arrest; the prosecutor did not raise the issue in closing. A prosecutor may not ask why a defendant did not come forward when he knew there was a warrant for his arrest. *Farley v. State*, 1986 OK CR 42, 717 P.2d 111, 112-113. The State relies on *Jones v. State*, 2006 OK CR 5, 128 P.3d 521, 539. The defendant in *Jones* did not testify. We held it was not error for the State to discuss the defendant's flight from the scene, and a flight instruction to be given, where the defendant had made admissible statements to police explaining his flight. That key circumstance is not present here, and *Jones* does not apply.

[7] *Ellis v. State*, 1990 OK CR 43, 795 P.2d 107, 109; *Cole v. State*, 1988 OK CR 288, 766 P.2d 468, 361; *Darks v. Mullin*, 327 F.3d 1001, 1013 (10th Cir. 2003). *See also U.S. v. Seasholtz*, 435 F.2d 4, 7 (10th Cir. 1970) (no error in *Allen* charge where there was no general deadlock, charge was addressed to all jurors, and no record that trial court coerced jurors to a verdict). *Allen v. United States*, 164 U.S. 492, 501-02, 17 S.Ct. 154, 157, 41 L.Ed. 528 (1896), authorizes trial courts to instruct juries regarding the value of continued deliberations and a unanimous verdict, after a deadlock or deliberations over a significant period of time. Kingery's reliance on *Cohee v. State*, 1997 OK CR 30, 942 P.2d 211, 215, is misplaced. *Cohee* offers guidelines which may be used as necessary, at a trial court's discretion. These guidelines are intended to complement the law on *Allen* charges, not add further requirements.

the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

ATTORNEYS AT TRIAL	**ATTORNEYS ON APPEAL**
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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 PART/DISSENT IN PART

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

I join with Judge Lewis in concurring in the affirming of the conviction in this case but dissenting to the modification of the sentence. The testimony by both S.R.K. and E.R.K. was proper and the evidence was appropriate for the jury to consider for both guilt and sentence. The jury was properly instructed on the use of the evidence. Therefore, if the evidence was admissible and the jury was correctly instructed on the use of that evidence, there can be no valid basis for modifying the sentence. The record is void of any improper testimony and the argument by counsel was based on properly admitted evidence. Therefore, I would affirm both the conviction and sentence.

LEWIS, JUDGE, CONCURS IN PART, DISSENTS IN PART:

I concur in affirming the convictions in this case. However, I respectfully dissent to modifying Appellant's sentence.