

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUL - 9 2002
JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

EUGENE KIRK,)
)
 Appellant,)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

Case No. F-2001-278

OPINION

CHAPEL, JUDGE:

Eugene Kirk was tried by jury and convicted of Count I: First Degree Murder in violation of 21 O.S.Supp. 1998, § 701.7; Count II: Domestic Abuse After Former Conviction of Domestic Abuse in violation of 21 O.S.Supp. 1998, § 644; and Count III: Assault and Battery with a Dangerous Weapon in violation of 21 O.S.Supp. 1998, § 645, in the District Court of Oklahoma County, Case No. CF-2000-585. In accordance with the jury's recommendation, the Honorable Twyla Mason Gray sentenced Kirk to life imprisonment without the possibility of parole for Count I, forty (40) years' imprisonment for Count II, and forty (40) years' imprisonment for Count III to be served consecutively. Kirk now appeals from these convictions and sentences.

FACTS

On January 24, 2000, Eugene Kirk was living with his companion, Reva Gail Sweetin, in a trailer in an R.V. park located near I-35 and 122nd street. That evening, Kirk's friend Billy Whiting called and said he wanted to visit. Kirk gave Whiting directions to a nearby gas station and told him to call when

he got there. After Whiting did so, Kirk drove to the station and led Whiting back to the trailer, where they and Sweetin talked, ate, and drank vodka.

The three then decided to go to bed. Intoxicated, Whiting repeatedly rolled off of the couch and onto the floor despite Kirk's attempts to help. Kirk finally went to the bedroom and ordered Sweetin to help Whiting while he went to bed. Sweetin found Whiting on the living room floor and vomit on the kitchen floor. She cleaned up the mess, then tried to help Whiting stay on the couch and fall asleep. After several minutes, Kirk came out of the bedroom, walked into the kitchen, and retrieved a knife with which he threatened Sweetin and Whiting. Apparently he may have thought that Sweetin and Whiting were engaged in sexual activity. Kirk attacked the two, striking Sweetin repeatedly and attempting to stab Whiting. Kirk eventually fatally stabbed Whiting.

In Proposition I, Kirk argues that the evidence was insufficient to support any of his convictions. He specifically claims that they were based on the testimony of two unreliable witnesses: an admitted perjurer (Sweetin) and a jailhouse informant (Doyle Bertschy). Our review considers the evidence in a light most favorable to the State to determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.¹

The evidence from Sweetin and Bertschy indicated that Kirk exited the bedroom and retrieved a knife from the kitchen, threatened Sweetin and

Whiting, then attacked them as described above. One could easily question their credibility and the defense did just that. Sweetin and Bertschy were thoroughly cross-examined on all points. This Court resolves all reasonable inferences and credibility choices in reviewing the sufficiency of the evidence to support the jury's verdict.² This Proposition is without merit.

In Proposition II, Kirk asserts that his convictions for Count II: Domestic Abuse After Former Conviction of Domestic Abuse and Count III: Assault and Battery with a Dangerous Weapon violate the statutory protections against multiple punishment because both convictions were for the same act. Title 21 O.S. 1991, §11 provides that "in no case can a criminal act or omission be punished under more than one section of the law."³ Here, Kirk attacked Sweetin once and assaulted her with his fists and a knife.⁴ Only one act of assault occurred, with no temporal separation. Thus, Kirk's conviction for Count II violates his protection against multiple punishment requiring reversal and remand to the trial court with instructions to dismiss.

In Proposition III, Kirk claims that the prosecutor impermissibly vouched for Sweetin's credibility in closing argument by repeatedly stating that she had "told the truth." Kirk's failure to object to these comments waived all but plain

¹ *Spuehler v. State*, 709 P.2d 202, 203-04 (Okl.Cr.1985).

² *Bernay v. State*, 989 P.2d 998, 1008 (Okl.Cr.1999), *cert. denied*, 531 U.S. 834, 121 S.Ct. 92, 148 L.Ed.2d 52 (2000).

³ Section 11 protects against separate punishment where offenses that arise from a single criminal act are not separate and distinct.

⁴ *See Hale v. State*, 888 P.2d 1027 (Okl.Cr.1995) (holding that a defendant could not be convicted of both rape and incest because he committed one act of sexual intercourse).

error,⁵ which does not exist. The prosecutor's statements did not indicate personal belief in Sweetin's truthfulness; they merely responded to the challenge to Sweetin's credibility by reiterating that her story (in prior statements and testimony) had remained consistent and thus truthful.⁶ This Proposition is denied.

In Proposition IV, Kirk asserts that improper "other crimes" evidence was introduced through the prosecutor's question regarding Kirk's ex-wife Nina: "Did you ever see any injuries on her face?" Kirk's immediate objection was sustained, along with an admonishment to the jury to disregard the question. The admonishment cured any error.⁷ This Proposition is denied.

In Proposition V, Kirk argues that the trial court erred in refusing to give his requested instructions on impeachment by prior bad acts.⁸ We agree. In her testimony, Sweetin admitted to lying under oath and therefore committing perjury in a prior trial. Clearly, this is a prior bad act that goes directly to Sweetin's veracity, requiring the trial court to give the jury the requested instruction. However, we find the error was harmless beyond a reasonable doubt. The evidence against Kirk was substantial, Sweetin's credibility was

⁵ *Selsor v. State*, 2 P.3d 344, 354 (Okl.Cr.2000), *cert. denied*, 532 U.S. 1039, 121 S.Ct. 2002, 149 L.Ed.2d 1004, (2001).

⁶ *Cargle v. State*, 909 P.2d 806, 823 (Okl.Cr.1995), *cert. denied*, 519 U.S. 831, 117 S.Ct. 100, 136 L.Ed.2d 54, (1996)(impermissible vouching only if prosecutor stating a personal belief in witness's truthfulness).

⁷ *Hammon v. State*, 898 P.2d 1287, 1305 (Okl.Cr.1995)(trial court's admonishment cures any potential error).

⁸ OUJI-CR 2d 9-21 Evidence – Impeachment by Prior Bad Acts.

adequately challenged at trial, and the jury was sufficiently informed through other instructions on issues affecting witness credibility.⁹

In Proposition VI, Kirk argues that the trial court erred in instructing the jury on impeachment of the defendant by prior conviction.¹⁰ Kirk's objection at trial to the instruction was overruled. A trial court's decision regarding jury instructions will not be overturned absent an abuse of discretion.¹¹ Here, there was no abuse as the instruction was appropriate because Kirk was impeached with former convictions.¹² This Proposition is denied.

In Proposition VII, Kirk argues that he is entitled to relief due to the accumulation of error in the case. While we have determined that Kirk's conviction for Domestic Abuse After Former Conviction of Domestic Abuse must be reversed and remanded with instructions to dismiss, there was no other error either individually or cumulatively requiring relief.¹³ This Proposition is denied.

⁹ *Phillips v. State*, 989 P.2d 1017, 1037 (Okla. Cr. 1999), *cert. denied*, 531 U.S. 837, 121 S.Ct. 97, 148 L.Ed.2d 56 (2000) (omission of instruction harmless error). It should also be noted that Sweetin's perjury occurred when in a separate trial, she refused to testify truthfully that Kirk had assaulted her. This cuts both ways, as it shows that Sweetin lied under oath but that she did so to protect her companion.

¹⁰ OUJI-CR 2d 9-23.

¹¹ *Paxton v. State*, 867 P.2d 1309, 1316 (Okla. Cr. 1993), *cert. denied*, 513 U.S. 886, 115 S.Ct. 227, 130 L.Ed.2d 153 (1994).

¹² We note that the Committee Comments suggest that it is the better practice to only give this instruction "when requested by the party who called the impeached witness, since trial strategy may dictate that the jury's attention not be directed again at the close of the evidence to the fact that a party, or the witness of a party, has been convicted previously." OUJI-CR 2d 9-23, Committee Comments. We agree with Kirk that this would be the better practice.

¹³ *Selsor v. State*, 2 P.3d at 354.

Decision

The Judgments and Sentences for Count I: First Degree Murder and Count III: Assault and Battery with a Dangerous Weapon are **AFFIRMED**. The Judgment and Sentence for Count II: Domestic Abuse After Former Conviction of Domestic Abuse is **REVERSED** and **REMANDED** with instructions to dismiss.

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OPINION BY: CHAPEL, J.

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JOHNSON, V.P.J.:	CONCUR
STRUBHAR, J.:	CONCUR IN RESULTS
LILE, J.:	CONCUR IN PART/DISSENT IN PART

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