

- II. The sentences imposed against Appellant are excessive, in part because of prosecutorial misconduct, and should be modified.

After a thorough consideration of these propositions and the entire record before us, including the original record, transcripts, and briefs of the parties, we find merit in propositions one and two, requiring modification of Count V and modification of Appellant's sentences, as further addressed below.

With respect to proposition one, we find plain error occurred when Appellant was convicted of First-Degree Rape by Instrumentation without the crucial element of "bodily harm" in the jury instruction. See 21 O.S.1991, § 1114(A). This reduced the crime, as instructed, to Second-Degree Rape by Instrumentation, rather than the crime of first-degree rape. Due to this instructional error and the absence of evidence of "bodily harm," Count V must be therefore be modified to the lesser crime of second-degree rape by instrumentation. See *McArthur v. State*, 862 P.2d 482, 485 (Okl.Cr.1993) (Robbery with Dangerous Weapon modified to the lesser-included offense of Robbery in the First Degree.) With respect to the remainder of this proposition, we find Appellant had adequate notice of the charges against him, and he was not denied due process. *Parker v. State*, 917 P.2d 980, 986 (Okl.Cr.1996).

With respect to propositions two and three, we find Appellant was prejudiced, insofar as sentencing is concerned, when the prosecutor was allowed to introduce "other crimes" evidence of an event occurring several months after the incidents alleged in the information. We find this evidence did not qualify under any stated exception to 12 O.S.1991, § 2404(B), was not *res gestae*

evidence, and any marginal relevance it may have had was substantially outweighed by the danger of unfair prejudice and confusion of the issues. 12 O.S.1991, § 2403. We find such evidence did not affect the guilt or innocence determination. The resulting sentences, however, were likely impacted by this evidence. The claims of prosecutorial misconduct do not require further action.

DECISION

Appellant's conviction under Count V is hereby **MODIFIED** to a conviction for Second Degree Rape by Instrumentation, and his sentence is modified to twenty (20) years. The convictions on Counts I through IV are hereby **AFFIRMED**, but the sentences on Counts I through IV are hereby **MODIFIED** to forty years on each count. All sentences are ordered to run consecutively.

AN APPEAL FROM THE DISTRICT COURT OF ROGERS COUNTY
THE HONORABLE JACK K. MAYBERRY, ASSOCIATE DISTRICT JUDGE

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OPINION BY: LUMPKIN, P.J.
JOHNSON, V.P.J.: CONCUR
CHAPEL, J.: CONCUR
STRUBHAR, J.: CONCUR
LILE, J.: CONCUR

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