

1111.1. The victim herein was aware that the acts were being committed, but was led to believe the actor was her husband, not Appellant, and Appellant used this fact to his advantage. In light of the plain and ordinary meaning of the statutory language at issue, and the particular facts in this case, we have no difficulty concluding that the complainant was not aware of the “nature” of the acts being committed, and that fact was known to Appellant at the time. *Id.*; *Ex parte Childers*, 1957 OK CR 44, ¶ 6, 310 P.2d 776, 777-78; *see also Stadler v. State*, 1996 OK CR 23, 919 P.2d 439, 442 (Lumpkin, J., concurring in result). Proposition 1 is denied.

As to Proposition 2, the Judgment and Sentence does not specify the degree of Rape by Instrumentation that Appellant was convicted of. The State concedes that it never alleged or proved either of the special circumstances which would elevate Appellant’s conduct to First Degree Rape by Instrumentation. 21 O.S.2001, § 1114. The trial court’s imposition of sentence in light of the range applicable to First Degree Rape by Instrumentation was therefore plain error. *Fite v. State*, 1993 OK CR 58, ¶ 6, 873 P.2d 293, 295. Because we cannot say how application of the correct punishment range would have affected the trial court’s decision, we hereby **REMAND** to the district court for resentencing, and for *nunc pro tunc* correction of the Judgment and Sentence to reflect that Appellant was found guilty of Rape by Instrumentation in the Second Degree. *Kamees v. State*, 1991 OK CR 91, ¶ 20, 815 P.2d 1204, 1206.

DECISION

The Judgment of the district court is **AFFIRMED**. The case is **REMANDED** to the district court for reconsideration of sentence under the correct punishment range, and for *nunc pro tunc* correction of the Judgment and Sentence to reflect the offense of conviction as Rape by Instrumentation in the Second Degree.

AN APPEAL FROM THE DISTRICT COURT OF BRYAN COUNTY
THE HONORABLE ROCKY L. POWERS, ASSOCIATE DISTRICT JUDGE

APPEARANCES AT TRIAL

JACK HAGGARD
ATTORNEY AT LAW
125 N. THIRD
DURANT, OK 74701
ATTORNEY FOR DEFENDANT

EMILY REDMAN
ASSISTANT DISTRICT ATTORNEY
117 N. THIRD
DURANT, OK 74701
ATTORNEY FOR THE STATE

OPINION BY JOHNSON, P.J.

LILE, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR
CHAPEL, J.: CONCUR
STRUBHAR, J.: CONCUR

APPEARANCES ON APPEAL

BILLY J. BAZE
INDIGENT DEFENSE SYSTEM
P. O. BOX 926
NORMAN, OK 73070
ATTORNEY FOR APPELLANT

W. A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
KEELEY L. HARRIS
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR THE STATE