

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JIMMY ALLEN PHILLIPS,)
)
 Appellant,)
 v.)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION
Case No. F-2004-576

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUN 8 2005

MICHAEL B. RICHIE
CLERK

SUMMARY PINI

CHAPEL, PRESIDING JUDGE:

After a jury trial in Rogers County District Court Case No. CRF-2003-324, Jimmy Phillips was convicted of two counts of Rape by Instrumentation in violation of 21 O.S.2001, § 1114.¹ Following the jury's recommendation, the Honorable Terry H. McBride sentenced Phillips to serve consecutive sentences of twelve (12) years' imprisonment and twenty-two (22) years' imprisonment for the two counts. Phillips has perfected his appeal to this Court.

Phillips raises the following proposition of error:

Mr. Phillips was denied a fair trial because of the improper remarks made by the prosecutor during closing argument.

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and parties' exhibits, we find that reversal is not required but that Phillips's sentence should be modified to be served concurrently. We find in Proposition I that the prosecutor's improper arguments require relief.²

¹ Phillips had also been charged with two counts of Lewd Molestation that were dismissed prior to trial.

² The prosecutor improperly stated that he "believed" in his case, that by abusing a child the defendant "kicked sand in the eyes of God," and that the last tear shed in this case would be "God's." The comments are improper and arguably prejudicial. Regardless, relief should be

Decision

The Judgments are **AFFIRMED** and the Sentences are ordered **MODIFIED** to be served concurrently. Pursuant to Rule 3.15, *Rules* of the Oklahoma Court of Criminal Appeals, Title 22, Ch18, App.2004, the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

ATTORNEYS AT TRIAL

WILLIAM R. HIGGINS
417 WEST FIRST STREET
CLAREMORE, OKLAHOMA 74017
ATTORNEY FOR DEFENDANT

PATRICK ABITBOL
ASSISTANT DISTRICT ATTORNEY
ROGERS COUNTY COURTHOUSE
CLAREMORE, OKLAHOMA 74017

ATTORNEYS ON APPEAL

GLOYD McCOY
119 N. ROBINSON, SUITE 1000
OKLAHOMA CITY, OKLAHOMA 73102
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
JENNIFER B. MILLER
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL
OKLAHOMA CITY, OKLAHOMA 73105
ATTORNEYS FOR APPELLEE

OPINION BY: CHAPEL, P. J.

LUMPKIN, V.P.J.: CONCUR IN RESULTS
C. JOHNSON, J.: CONCUR
A. JOHNSON, J.: CONCUR

granted. The Prosecutorial misconduct in this case does not warrant reversal. Some form of relief, however, is warranted. Otherwise there is no incentive against such improper argument. *See Hooks v. State*, 19 P.3d 294, 317 (OkI.Cr.2001), *cert. denied*, 534 U.S. 963, 122 S.Ct. 371, 151 L.Ed.2d 282.