

SEP - 3 2004

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA
MICHAEL S. RICHIE
CLERK

REMIGIO RIVAS,)	
)	NOT FOR PUBLICATION
Appellant,)	
v.)	Case No. F 2003-648
)	
THE STATE OF OKLAHOMA,)	
)	
Appellee.)	

SUMMARY OPINION

JOHNSON, PRESIDING JUDGE:

Appellant, Remigio Rivas, was convicted by a jury in Oklahoma County District Court, Case No. CF 2001-5709, of First Degree Rape by Instrumentation, in violation of 21 O.S.2001, §§ 1111, 1111.1, and 1114 (Count 1), and of Lewd Acts with a Child under Sixteen, in violation of 21 O.S.2001, § 1123 (Counts 2-4), after prior conviction a felony. Jury trial was held on April 21st – April 24th, 2003, before the Honorable Tammy Bass-Jones, District Judge. The jury set punishment at One Hundred (100) years imprisonment on each count. Judgment and Sentence was imposed on June 6, 2003, in accordance with the jury's verdict, and Judge Bass-Jones ordered the sentences be served consecutively. Thereafter, Appellant filed this appeal.

Appellant raises seven propositions of error:

1. The trial court abandoned the role of impartial judge and became an advocate by questioning a State's child witness in chambers after excluding the parties and the child's father;
2. The prosecution presented improper evidence and made inflammatory argument including comments upon Mr. Rivas' right to remain silent, contrary to his Fifth Amendment rights guaranteed by the Oklahoma and United States Constitutions;

3. Admission of other crimes evidence prejudiced the jury, deprived Appellant of a fundamentally fair trial, and warrants reversal of the conviction or modification of the sentence;
4. Irrelevant, improper, and misleading evidence resulted in an inflated sentence;
5. Mr. Rivas was denied a fair trial before an unbiased jury by the trial court's plain error in allowing biased jurors to remain on the jury and defense counsel's ineffectiveness in failing to properly challenge all biased jurors for cause and preserve the full complement of peremptory challenges;
6. Ineffective assistance of counsel denied Mr. Rivas' right to a fundamentally fair trial; and,
7. The cumulative effect of all the errors addressed above deprived Appellant of a fair trial.

After thorough consideration of the propositions raised, the Original Record, transcripts, briefs and arguments of the parties, we have determined Appellant's conviction and sentence should be affirmed, but the sentences modified as set forth below.

Nothing in the trial court's conduct was so grossly prejudicial that Appellant was deprived of a fundamentally fair trial and no relief is required on Proposition One. *Peters v. State*, 1986 OK CR 169, ¶ 8, 727 P.2d 1386, 1388.

Prosecutorial questions and argument relating to the silence of family members was not an improper comment on Appellant's right to remain silent. *Slaughter v. State*, 1997 OK Cr 78, ¶ 124, 950 P.2d 839, 872 (right to remain silent is a personal right which cannot be asserted on behalf of another). The prosecutor's comments on Appellant's access to witnesses and evidence was permissible and argument relating to reasonable doubt was not

error. *Pickens v. State*, 2001 OK CR 3, ¶ 39, 19 P.3d 866, 879, *cert. denied*, 536 U.S. 961, 122 S.Ct. 2668, 153 L.Ed.2d 842 (2002); *Phillips v. State*, 1999 OK CR 38, ¶ 22, 989 P.2d 1017, 1028. The prosecutor did not engage in improper vouching. *McElmurry v. State*, 2002 OK CR 40, ¶ 136, 60 P.3d 4, 31. Trial counsel's objection to improper argument relating to Appellant's lack of admission of guilt was sustained and no admonishment was requested.

This Court will not reverse a conviction for prosecutorial misconduct unless the cumulative effect of such conduct deprived the defendant of a fair trial. *Pickens*, 2001 OK CR 3, ¶ 44, 19 P.3d at 881. No relief is warranted on Proposition Two.

The admission of other crimes evidence did not deprive Appellant of a fundamentally fair trial. *See e.g. Huskey v. State*, 1999 OK CR 3, ¶ 3, 989 P.2d 1, 3; *Pickens v. State*, 2001 OK CR 3, ¶ 21, 19 P.3d at 876 (admissibility of evidence is within the discretion of the trial judge and reversal is not warranted absent a clear abuse of discretion).

We find merit to Proposition Four. State's Exhibits 2 and 4 referred to a prior felony conviction which should not have been disclosed to the jury. State's Exhibit 3 was irrelevant as it was the wrong docket sheet. Trial counsel's failure to object to the admission of these exhibits or his failure to request the exhibits be redacted fell below an objective standard of reasonableness as there was no valid reason for putting this prejudicial information before the jury during second stage proceedings. Evidence of an earlier prior conviction likely contributed in some form to the jury's imposition

of punishment and we cannot say with confidence that it did not. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Accordingly, we grant relief on Proposition Four and hereby modify each of Counts 1-4 from one hundred (100) years imprisonment to seventy-five (75) years imprisonment.

Proposition Five is denied. The record does not demonstrate Appellant was tried by a biased jury or that trial counsel was ineffective for failing to challenge certain jurors. The trial court properly denied the request that Juror Callaway be excused for cause. *Harris v. State*, 2004 OK CR 1, ¶ 18, 84 P.3d 731, 742 (judging the credibility of potential juror's promises to be fair and impair is left to the trial court); *see also Hawkins v. State*, 1986 OK CR 58, ¶ 6, 717 P.2d 1156, 1158; *Hanson v. State*, 2003 OK CR 12, ¶ 11, 72 P.3d 40, 48.

Overall, trial counsel's performance was reasonable and he provided adequate assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). However, as noted in Proposition Four, we can find no valid reason for trial counsel's failure to object to the irrelevant and prejudicial evidence offered by the State to prove Appellant's prior conviction. We modify as previously noted, and no further relief on this proposition of error is required.

We have granted relief on the error identified in Proposition Four. No additional errors were identified which, individually or cumulatively, warrant relief. *Ashinsky v. State*, 1989 OK CR 59, ¶ 31, 780 P.2d 201, 209.

DECISION

The convictions on Counts 1 – 4 in Oklahoma County District Court, Case No. CF 2001-5709, are hereby **AFFIRMED**, but the sentences are **MODIFIED** to Seventy-Five (75) years imprisonment on each Count, to run concurrently.

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OPINION BY: JOHNSON, P.J.

LILE, V.P.J. : CONCURS
LUMPKIN, J.: CONCURS IN RESULTS
CHAPEL, J.: CONCURS
STRUBHAR, J.: CONCURS