

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BRIAN TYRONE SCOTT,)
)
 Appellant,)
 v.)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-01-998

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

AUG 15 2002

SUMMARY OPINION

NANCY S. PARRILL
CLERK

CHAPEL, JUDGE:

Brian Tyrone Scott was tried by jury and convicted of Count I, First Degree Burglary in violation of 21 O.S.1991, § 1431; Count II, Forcible Sodomy in violation of 21 O.S.1991, § 888; Count III, Assault and Battery with a Dangerous Weapon in violation of 21 O.S.1991, § 652, Count IV, Unauthorized Use of a Motor Vehicle in violation of 21 O.S.1991, § 1720; Count V, Assault and Battery Upon a Police Officer in violation of 21 O.S.1991, § 649(B); Count VI, Malicious Injury to Property in violation of 21 O.S.1991, § 1760; and Count IX, Kidnapping to Hold for Service in violation of 21 O.S.1991, § 741, in the District Court of Okmulgee County, Case No. CF-2000-5044.¹ In accordance with the jury's recommendation the Honorable Charles M. Humphrey sentenced Scott to fifteen (15) years imprisonment (Count I); twenty (20) years imprisonment (Count II); ten (10) years imprisonment (Count III); five (5) years imprisonment on each of Counts IV and V; one (1) year imprisonment (Count

¹ Scott was acquitted of Count VIII, Rape by Instrumentation. Count VII was dismissed at preliminary hearing.

VI); and ten (10) years imprisonment (Count IX). Scott appeals from these convictions and sentences.

Scott raises five propositions of error in support of his appeal:

- I. Scott's conviction for burglary, malicious injury to property, kidnapping, forcible oral sodomy, and assault with a dangerous weapon violates the prohibitions against double punishment and double jeopardy;
- II. Scott's conviction for kidnapping must be reversed because there was no evidence of the specific intent to kidnap, and because the evidence showed at most an attempt to commit a crime;
- III. Scott was denied a fair trial when the trial court refused to allow defense counsel to present evidence regarding the victim's motive to falsely accuse him;
- IV. The trial court's decision to run Scott's sentences consecutively resulted in an excessive sentence and should be modified; and
- V. The Judgment and Sentence should be modified to accurately state Scott's convictions.

After thorough consideration of the entire record before us on appeal including the original record, transcripts, briefs and exhibits of the parties, we find that the law and evidence requires Count IX, Kidnapping, be reversed with instructions to dismiss. We also find an Order should be entered *nunc pro tunc* correcting the Judgment and Sentence to accurately reflect Scott's remaining convictions and sentences.

We find in Proposition I that Scott's convictions for burglary, assault and battery with a dangerous weapon, forcible oral sodomy, and malicious injury to property do not violate either double jeopardy or Oklahoma's statutory prohibition against double punishment.² We further find that Scott's convictions for kidnapping to hold for service and forcible oral sodomy do not

² *Mooney v. State*, 1999 OK CR 34, 990 P.2d 875, 883-84; *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932) (no double jeopardy violation under

violate double jeopardy.³ However, we find that those two convictions do violate the § 11 prohibition against multiple punishment for a single act. In the double jeopardy context, this Court held in *Doyle v. State* that kidnapping for secret confinement and rape are separate crimes, where the kidnapping was not done for the purpose of rape and the rape was separated from the kidnapping.⁴ Here, however, as the State argues in Proposition II, Scott was charged with kidnapping to hold to service, and the “service” intended was oral sex (forcible sodomy), which Scott immediately forced the victim to perform.⁵ “If the crimes truly arise out of one act as they did in *Hale*, then Section 11 prohibits prosecution for more than one crime.”⁶ Following these cases, the record supports the conclusion that the purpose of the kidnapping here was to hold the victim and make her perform oral sex, which occurred at once. After the sex, although the parade of crimes continued, the kidnapping ended. We hold that § 11 does not permit Scott’s convictions for both kidnapping and forcible oral sodomy. Consequently, Scott’s conviction of kidnapping in Count IX is DISMISSED, and Count II, forcible oral sodomy, is AFFIRMED. Our resolution of this issue makes Proposition II moot.

“same evidence” test where each crime requires proof of an element different from the others); 21 O.S.2001, § 11.

³ *Mooney*, 990 P.2d at 883-84.

⁴ *Doyle v. State* 1989 OK CR 85, 785 P.2d 317, 324.

⁵ The phrase “hold to service” encompasses “any acts or services, or the forbearance of same, done at the command of the perpetrator, through force, inveiglement or coercion, for the benefit of the perpetrator.” *Perry v. State*, 1993 OK CR 5, 853 P.2d 198, 201; OUJI-CR (2nd) 4-114. The crime requires that some service be performed for the perpetrator’s benefit. *Carter v. State*, 1988 OK CR 250, 764 P.2d 206, 209, *overruled on other grounds Edwards v. State*, 1991 OK CR 71, 815 P.2d 670, 672.

⁶ *Davis v. State*, 1999 OK CR 48, 993 P.2d 124, 126.

We find in Proposition III that the trial court did not abuse its discretion in refusing to allow the defendant to introduce irrelevant evidence.⁷ We find in Proposition IV that the trial court did not abuse its discretion in running Scott's sentences consecutively.⁸ We find in Proposition V that the Judgment and Sentence incorrectly states the crimes for which Scott was convicted in Counts III and IV. We REMAND the case to the district court with instructions to vacate the judgments and sentences on Counts III and IV, Case No. CF-2000-5044, and enter an Order *nunc pro tunc* reflecting that Scott was convicted of Count III, Assault and Battery with a Dangerous Weapon in violation of 21 O.S.1991, § 652; and Count IV, Unauthorized Use of a Motor Vehicle in violation of 21 O.S.1991, § 1720.

Decision

The Judgments and Sentences as to Counts I, II, V, and VI are **AFFIRMED**. Count IX is **DISMISSED**. The case is **REMANDED** to the District Court with instructions to **VACATE** the judgments and sentences on Counts III and IV, Case No. CF-2000-5044, and enter an Order *nunc pro tunc* reflecting that Scott was convicted of Count III, Assault and Battery with a Dangerous Weapon in violation of 21 O.S.1991, § 652; and Count IV, Unauthorized Use of a Motor Vehicle in violation of 21 O.S.1991, § 1720.

⁷ *Dennis v. State*, 1994 OK CR 34, 879 P.2d 1227, 1232, *cert. denied*, 528 U.S. 975, 120 S.Ct. 422, 145 L.Ed.2d 330 (1999) (determination of relevancy of evidence is within trial court's discretion, and ruling will not be disturbed absent showing of abuse of discretion with prejudice). Scott alleges but completely fails to show how the evidence in question went to bias or credibility or gave the witness a motive to lie about the crimes.

⁸ *Kamees v. State*, 1991 OK CR 91, 815 P.2d 1204, 1208-09 (decision whether to run sentences consecutively or concurrently is within the trial court's discretion); *Walker v. State*, 1989 OK CR 65, 780 P.2d 1181, 1183 (abuse of discretion under these circumstances occurs where the trial court's conclusion and judgment is clearly against the logic and effect of the facts).

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OPINION BY: CHAPEL, J.

LUMPKIN, P.J.: CONCUR
JOHNSON, V.P.J.: CONCUR IN RESULTS
STRUBHAR, J.: CONCUR
LILE, J.: CONCUR

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