

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

JAMES EARL WARE,)
)
Appellant,)
)
-vs-)
)
STATE OF OKLAHOMA,)
)
Appellee,)

NOT FOR PUBLICATION

No. F-2004-1147

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUN 14 2006

MICHAEL S. RICHIE
CLERK

OPINION

A. JOHNSON, JUDGE:

James Earl Ware, Appellant, was tried in a bench trial before the Honorable Twyla Mason Gray in the District Court of Oklahoma County, Case No. CF-2003-4319. Judge Gray found Ware guilty of Count 2 - First Degree Rape in violation of 21 O.S.Supp.2002, § 1111 and 21 O.S.2001, § 1114 and Count 4 - Lewd Molestation in violation of 21 O.S.Supp.2002, § 1123, each after former conviction of two or more felonies.¹ She sentenced Ware to 20 years on each count and ordered his sentences to run concurrently.

Ware raises two claims: the first challenging the sufficiency of the trial evidence and the second challenging the sufficiency of the Information. Only the first claim merits discussion. The second claim is denied because Ware failed to prove the alleged defect in the Information amounts to plain error. *See Tilley v. State*, 1998 OK CR 43, ¶ 4, 963 P.2d

¹ Ware was acquitted of Count 3 - First Degree Rape by Instrumentation and Counts 1 and 5 - Lewd Molestation.

607, 610. The Information and record are sufficient for Ware to plead former jeopardy should the State seek to prosecute him further. *Doyle v. State*, 1989 OK CR 85, ¶ 26, 785 P.2d 317, 326.

Facts

D.P. testified Ware molested her on several occasions while babysitting her at his parent's house when she was 12 years old.² She testified he did the same types of things to her at her house and related a specific instance where he attempted unsuccessfully to remove her pants. Her testimony revealed only one occasion in which he actually penetrated her. Her testimony was somewhat corroborated by her younger brother who testified that he walked in on Ware kissing D.P. early one morning while everyone else was still asleep.

Ware denied having sex with or attempting to have sex with D.P. He claimed D.P.'s younger brother lied about what he saw because Ware caught him having sex with D.P.³ He explained he did not report the children's sexual contact because he feared both would be beaten by their mother.

Sufficiency of the Evidence

Ware contends the evidence was insufficient to prove beyond a reasonable doubt that he raped and molested D.P. His claim is based on a statement made by the trial judge. She stated that Ware's testimony on his own behalf convinced her the prosecution had met its burden of

² D.P. referred to Ware as her uncle. Ware was the uncle of D.P.'s mother's boyfriend.

³ D.P.'s brother was seven years old when D.P. was twelve years old.

proof. Ware argues that this statement demonstrates that the court had impermissibly shifted the burden to the defendant to prove his innocence.⁴ He maintains the believability of his testimony had no bearing on whether the State had met its burden of proof and that the court's statement indicates the judge did not find the victim believable. He argues if the judge was unsure whether the state had met its burden of proof at the end of the State's case she should have sustained his demurrer.

By presenting evidence in defense, Ware waived examination of the sufficiency of the evidence at the end of State's case-in-chief. *Snow v. State*, 1994 OK CR 39, ¶ 12, 876 P.2d 291, 295. We review the trial evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *Garrison v. State*, 2004 OK CR 35, ¶ 61, 103 P.3d 590, 603. This Court accepts all reasonable inferences and credibility choices that support the finder of fact's verdict and we must affirm the conviction so long as, from the inferences reasonably drawn from the record evidence, the finder of fact might fairly have concluded the defendant was guilty beyond a reasonable doubt. *Lockett v. State*, 2002 OK CR 30, ¶ 42, 53 P.3d 418, 431.

⁴ The trial court stated:

And I will tell you that what persuaded me that the State had met their burden of proof was the testimony of the Defendant in this particular case. Up to that point my mind was very open and still not certain that the State was going to meet their burden of proof. But, I believe Mr. Ware's testimony is what finally convinced me. (Tr. 182)

The judge has the duty in a non-jury trial to consider all of the applicable law as it pertains to the State's burden of proof and the defenses raised. *O.W.M. v. State*, 1997 OK CR 49, ¶ 17, 946 P.2d 257, 262. She must also weigh the evidence, make credibility determinations and ultimately decide the facts. When the evidence had been submitted, the trial judge outlined her findings, noting that the law allows the finder of fact to believe or disbelieve all or part of the testimony presented. She listed body language, tone of voice, attitude and demeanor as factors she considered in making her credibility decisions. After considering all the evidence, she found the testimony of the child victim and her younger brother credible, and rejected Ware's testimony.⁵ The trial judge's remarks, read in their entirety, do not support a finding that she did not follow the law or improperly shifted the burden of proof; rather, they show she weighed the evidence and decided the facts.

Ware also challenges the trial evidence, arguing the evidence supporting the two counts for which he was convicted was no stronger than the evidence supporting the three counts for which he was acquitted. Sifting through the evidence in this case was no easy task. D.P. recounted various acts of molestation, some of which were charged while others were not. The court acquitted Ware of lewd molestation for touching D.P.'s vagina (Count 1), rape by instrumentation (Count 3) and lewd molestation

⁵ Specifically, the trial judge said that she did not believe any adult would not report a brother and sister engaged in sexual intercourse because they thought someone would get a "whooping." She also noted her doubt as to the possibility that a seven year old boy could physically engage in sexual intercourse.

for rubbing his penis on D.P.'s vagina (Count 5) not because it did not believe D.P., but because D.P. did not testify to the specific acts alleged. The court convicted Ware on Counts 2 and 4. D.P. did testify that Ware forcibly inserted his penis into her vagina and the trial court found this testimony sufficient to convict Ware of first degree rape as alleged in Count 2. We agree.

We find, however, that the evidence is not sufficient to sustain Count 4. Count 4 alleged that Ware rubbed his penis on D.P.'s vagina and tried to insert it. While D.P. testified that Ware rubbed his penis in her face, there was no evidence that Ware rubbed his penis on her vagina except the time when he actually penetrated her. The only other similar incident testified to by D.P. occurred when Ware took D.P. into the living room and attempted to remove her pants. There was no testimony, however, that his penis came into contact with her vagina during this incident. Count 4 must be reversed with instructions to dismiss.

DECISION

The Judgment and Sentence of the trial court on Count 2 is **AFFIRMED**. Count 4 is **REVERSED with INSTRUCTIONS to DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2005), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

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OPINION BY: A. JOHNSON, J.
CHAPEL, P.J.: Recused
LUMPKIN, V.P.J.: Concur in Results
C. JOHNSON, J.: Concur
LEWIS, J.: Concur

RE

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