

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JAN - 4 2001

JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

WILLIAM DEAN CARTER,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F 99-1293

SUMMARY OPINION

LILE, JUDGE:

Appellant, William Dean Carter, was convicted, after a jury trial, of four counts of Lewd Acts with a Child, in violation of 21 O.S.1991, §1123, in the District Court of Oklahoma County, Case No. CF-93-1715. The Honorable Twyla Mason Gray, District Judge, in accordance with the jury verdict, sentenced Appellant to three twenty (20) year terms (counts one, two and four) and one ten (10) year term of imprisonment (count five).¹ From these Judgments and Sentences, Carter has perfected his appeal.

Carter raises the following propositions of error in support of his appeal:

1. Mr. Carter's Sixth and Fourteenth Amendment rights to the United States constitution and corresponding provisions of the Oklahoma Constitution were violated when he was charged with and convicted of violating Okla. Stat. Tit. 21, § 1123 after the expiration of the statute of limitations.

¹ An additional count of lewd acts with a child (Count three) was dismissed before trial and is not of consequence here.

2. The prosecution improperly commented upon Mr. Carter's pre-arrest silence and failure to present any evidence of innocence at trial, in violation of Appellant's Fifth Amendment rights to the United States Constitution and corresponding provisions of the Oklahoma constitution.
3. Mr. Carter's right to a fair trial was impaired by the trial court's failure to adhere to the requirements of Okla. Stat. Tit. 12, §2803.1 (supp.1999), thereby allowing inadmissible hearsay to be introduced during trial, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Oklahoma Constitution.
4. Mr. Carter's Fourteenth Amendment rights to the United States Constitution were violated when the prosecutor engaged in prosecutorial misconduct during closing arguments.
5. Mr. Carter's convictions are barred by the prohibition against double jeopardy contained in the Fifth Amendment to the United States Constitution and in corresponding provisions of the Oklahoma Constitution.
6. The accumulation of errors in this case so infected the trial with unfairness that Mr. Carter was denied due process of law.

After thorough consideration of this proposition and the entire record before us on appeal, including the original record, transcripts, and briefs, we have determined that the judgments and sentences for counts one and two shall be affirmed; the judgments and sentences for counts four and five shall be reversed and remanded with instructions to dismiss.

In proposition one, we find that Carter's convictions in counts one and two should be affirmed, but Carter's convictions in counts four and five should be dismissed. Carter was originally charged, by Information, with two counts of first degree rape of a child under 14 years of age. This Information was filed

eight months after the victims had disclosed the abuse to authorities. Over five years after the disclosure, the Information was amended to include an alternative count two of lewd acts with a child and two additional counts of lewd acts with a child (counts four and five). During trial the jury was instructed that they could convict Carter of the charges in the Information, including the alternative count two, as well as, the lesser offense of lewd acts with a child in count one, over objection by trial counsel. Carter complains that the instructions regarding the lesser offense for count one; the alternative count two; and the additional counts four and five were barred by the statute of limitations, 22 O.S.Supp.1994, § 152.

We find that Carter was on notice of the lesser offense, lewd acts with a child, for count one and the alternative count two, also lewd acts with a child, at the time the original Information was filed. Both offenses were necessarily included in the greater charged offenses as they included all of the evidence that was used to form the first degree rape accusation, except for the penetration element of rape. Therefore, the filing of the original Information tolled the statute of limitations for the charged offense as well as these lesser offenses. *Riley v. State*, 1997 OK CR 51, ¶ 15, 947 P.2d 530, 533-34 and *Shrum v. State*, 1999 OK CR 41, ¶ 11, 991 P.2d 1032, 1037 (Defendant is on notice of charged offense as well as offenses necessarily included in charged offense); *See Thacker v. Marshall*, 1958 OK CR 97, 331 P.2d 488, 493 and *Inverarity v. Zumwalt*, 97

Okl.Cr. 294, 262 P.2d 725, 727 (1953) (filing of preliminary information, in good faith, tolls the statute of limitations).

We find that the convictions for counts four and five, added to the Information more than five years after discovery of the crimes, must be dismissed. A defendant cannot be convicted of lewd acts with a child if the prosecution was commenced after the running of the five year statute of limitations period. 22 O.S.Supp.2000, § 152(A); *State v. Day*, 1994 OK CR 67, ¶ 16, 882 P.2d 1096, 1098.

We find, in proposition two, that the prosecutor's comments and the testimony regarding the investigation and length of time between these acts and the trial did, tangentially, reveal Carter's pre-arrest silence and lack of cooperation. However, because the evidence of guilt was overwhelming, any relationship between these comments and Carter's right to remain silent was harmless beyond a reasonable doubt. *White v. State*, 900 P.2d 982, 992 (Okl.Cr.1995), citing, *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

In proposition three, we find that the notice and hearings held pursuant to 12 O.S.Supp.2000, § 2803.1 were sufficient for the trial court to make a determination that the hearsay statements were reliable. We find, in proposition four, that any error in the "duty to convict" comment was cured by the trial court sustaining the objection and trial counsel waived any further by not asking that the jury be admonished. *Martinez v. State*, 1999 OK CR 33, ¶ 44-49, 984 P.2d

813, 825-26. The alleged "disparaging comments" were nothing more than proper comment noting that the State's evidence was uncontroverted. *Koonce v. State*, 1985 OK CR 26, ¶ 29, 696 P.2d 501, 508. Where the prosecutor addressed a juror by name, the error was cured when the prosecutor agreed not to continue. *Montgomery v. State*, 1968 OK CR 210, ¶ 20, 447 P.2d 469, 473. Lastly, Carter has waived any claim that the prosecutor misstated the evidence, unless it rose to the level of plain error, because he failed to object at trial. There was no plain error here.

We find, in proposition five, that double jeopardy was not implicated because Carter requested the mistrial during the first trial necessitating the second trial. *Napier v. State*, 1991 OK CR 120, ¶ 10, 821 P.2d 1062, 1064-65. The State's opening statement regarding Carter's admission, which was not provided in discovery, was not so egregious so as to bar a second trial, after the mistrial had been granted. *Napier*, 821 P.2d at 1065, *Oregon v. Kennedy*, 456 U.S. 667, 679, 102 S.Ct. 2083, 2091, 72 L.Ed.2d 416 (1982). In proposition six, we find that the errors, when viewed in a cumulative fashion, do not warrant further relief

The judgments and sentences in counts one and two of the trial court are **AFFIRMED**. The judgments and sentences in counts four and five are **REVERSED** and **REMANDED** with instructions to **DISMISS**.

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OPINION BY: LILE, J.

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

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