

FEB 4 2000

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES W. PATTERSON,
CLERK**JAY DEE DETRICK,**

Appellant,

v.

STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

Case No. F-99-311

SUMMARY OPINION**CHAPEL, JUDGE:**

Jay Dee Detrick was tried by jury and convicted of Rape in the First Degree in violation of 21 O.S.1991, §§ 1114(A)(1) & 1115, in the District Court of Kingfisher County, Case No. CF-97-90. In accordance with the jury's recommendation, the Honorable Ronald G. Franklin sentenced Detrick to two hundred (200) years imprisonment. Detrick appeals from this conviction and sentence.

Detrick raises three propositions of error in support of his appeal:

- I. Detrick was prejudiced by the trial court's failure to give requested jury instructions on lesser-included offenses that were supported by the evidence;
- II. Detrick was prejudiced by the prosecutor's improper argument to the jury; and
- III. Detrick's sentence is excessive and should be modified.

After thorough consideration of the entire record before us on appeal including the original record, transcripts, briefs and exhibits of the parties, we find reversal is not required by the law and evidence. We find in Proposition I

that, under the circumstances of this case, neither incest nor second-degree rape were lesser included offenses, and the trial court did not err in refusing Detrick's requested instructions on those crimes.¹ We find in Proposition II that the prosecutor's misstatement of law in voir dire did not shift the State's burden of proof, and any error in argument neither denied Detrick a constitutional or statutory right, nor went to the foundation of his case.² We find in Proposition III that Detrick's sentence of 200 years is excessive, and modify it to forty-five (45) years.³

Decision

The Judgment of the District Court is **AFFIRMED**. The Sentence is **MODIFIED** to forty-five (45) years imprisonment.

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¹ 21 O.S.1991, §§ 885, 1114; 21 O.S.Supp.1995, § 1111; OUJI-CR (2nd) 4-137. The prosecutor had the option of charging Detrick with any one of these offenses, and the decision to charge him with first degree rape was within the prosecutor's discretion. 21 O.S.Supp.1997, § 11; *Funkhouser v. State*, 1988 OK CR 109, 763 P.2d 695, 697, *cert. denied*, 490 U.S. 1066, 109 S.Ct. 2066, 104 L.Ed.2d 631 (1989).

² 20 O.S.1991, § 3001.1.

³ *Jones v. State*, 1998 OK CR 36, 965 P.2d 385, 386.

OPINION BY: CHAPEL, J.

STRUBHAR, P.J.:	CONCUR
LUMPKIN, V.P.J.:	CONCUR IN PART/DISSENT IN PART
JOHNSON, J.:	CONCUR
LILE, J.:	CONCUR IN PART/DISSENT IN PART

LILE, JUDGE: CONCURS IN PART/DISSENTS IN PART

I concur that the conviction should be affirmed. I do not find the sentence to be excessive. Oklahoma has a long history of jury sentencing, which has worked quite well. It certainly has fewer flaws than any non-jury sentencing scheme.

We have wisely rejected a proportionality review. *Maxwell v. State*, 775 P.2d 818 (In spite of this, the proportionality language occasionally pops up in an opinion, without discussion, as it did in *Jones v. State*, 1998 OK CR 36, 965 P.2d 385, 386; the correct test is set forth in *Barnett v. State*, 1993 OK CR 26, 853 P.2d 226). This sentence is not so excessive that it shocks the conscience of the court. It should be affirmed.

I am authorized to state that Judge Lumpkin joins in this concurs in part/dissents in part.