IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MARLON L. JOHNSON, Appellant,	)	NOT FOR PUBLICATION
v.	)	Case No. F 2002-1339
THE STATE OF OKLAHOMA, Appellee.	)	

SUMMARY OPINION

JOHNSON, PRESIDING JUDGE:

Appellant, Marlon L. Johnson, was convicted by a jury of Kidnapping, in violation of 21 O.S.2001, § 741 (Count 2), First Degree Rape, in violation of 21 O.S.2001, §1114(A) (Count 3), and of Forcible Sodomy, in violation of 21 O.S.2001, § 888 (Count 4), after former conviction of a felony, in Tulsa County District Court, Case No. CF 2002-267. Jury trial was held on September 16th through 18th, 2002, before the Honorable Deirdre O. Dexter, Associate District Judge. The jury found Appellant guilty and set punishment at thirty-five (35) years on each count. Formal sentencing was held on October 24, 2002, and Appellant was sentenced according to the jury's verdict. Judge Dexter ordered the sentences to be served consecutively and imposed a One Thousand Dollar ($1,000.00) fine. From the Judgment and Sentences imposed, Appellant filed this appeal.

Appellant raises eight (8) propositions of error:

1. The State's failure to distinguish the allegations contained in Count 1 from the allegations contained in Count 3 require the reversal of Appellant's conviction in Count 3. Under the unique facts of this

case, it is impossible to verify whether the verdict in Count 3 was unanimous;

2. There was insufficient evidence that Appellant was guilty of kidnapping. It was error for the trial court to overrule his demurrer at the close of the State's case;

3. Appellant's convictions for kidnapping and rape violate 21 O.S. § 11;

4. Appellant received ineffective assistance of counsel in violation of the Oklahoma and United States Constitutions;

5. The "SANE" nurse was improperly used to bolster the testimony of Shelley Triplett;

6. Prosecutor misconduct served to deprive Appellant of his right to a fair trial pursuant to the Oklahoma and United States Constitutions;

7. Based upon sentencing error described in detail below, this Court should modify Appellant's sentence(s). Appellant's sentence is, in effect, a life term, which should "shock the conscience" of this Court
   a.) The close proximity in space and time between the crimes for which Appellant was convicted supports modification of his sentence(s);
   b.) The trial judge must state her reason for denying defense counsel's request for concurrent sentencing in order to provide this Court with the means to evaluate Appellant's claim that the court abused its discretion by imposing consecutive terms; and
   c.) The trial court failed to consider the fact that most of Appellant's convictions were for crimes that will require him to serve 85% of his sentence prior to becoming eligible for parole; and,

8. Based upon the accumulation of all error argued in Appellant's brief, this Court should reversed his convictions and remand for a new trial. In the alternative, this Court should modify Appellant's sentences.

After thorough consideration of the propositions raised and the entire record before us on appeal, including the original record, transcripts, briefs and

exhibits of the parties, we have that Count 3 should be reversed and remanded to the district court with instructions to dismiss, and the remaining convictions affirmed for the reasons set forth below.

Appellant was tried for two separate counts of first degree Rape based upon identical language in the Information. Prior to trial, the State did not amend the Information on either Count to identify which rape occurred where. At trial, the trial court did not require the State to elect which facts it relied upon for each separate act of rape and the jury was not so instructed. Although the jury's verdicts were unanimous, because we do not know that each individual juror relied upon the same set of facts to convict Appellant on the rape alleged in Count 3, we cannot be sure the jury unanimously agreed that the same rape occurred based upon the same set of facts. Any description that would have identified the prosecuted offense for the jury would have been sufficient. Because this Court cannot be certain the jury did not return a patchwork verdict based upon different facts, Count 3 must be reversed and remanded to the district court with instructions to dismiss. *Cody v. State*, 1961 OK CR 43, 361 P.2d 307; *Franks v. State*, 1981 OK CR 138, ¶ 16, 636 P.2d 361, 366; Okla. Const. Art.II, § 19.

In Proposition Two, we find the evidence was sufficient to sustain the jury's verdict for kidnapping. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204; *Lockett v. State*, 2002 OK CR 30, ¶ 42, 53 P.3d 418, 431, *cert. denied*, --- U.S. ---, 123 S.Ct. 1794, 155 L.Ed.2d 673 (2003).

Proposition Three is rendered moot because Count 3 is reversed and remanded with instructions to dismiss.

We find Appellant's trial counsel was not ineffective under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and Proposition Four is denied. The Motion for Supplementation of Record and Request to Remand for Evidentiary Hearing is denied as Appellant has not shown by clear and convincing evidence that there exists a strong possibility that his trial counsel was ineffective. *See* Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2003).

Proposition Five is also denied as the testimony of the SANE nurse was admissible and did not improperly exceed the boundaries of her training and experience. *See e.g. Romano v. State*, 1995 OK CR 74, ¶ 21, 909 P.2d 92, 109, *cert. denied*, 519 U.S. 855, 117 S.Ct. 151, 136 L.Ed.2d 96 (1996); 12 O.S.2001, § 2704.

"Allegations of prosecutorial misconduct will not cause a reversal of judgment or modification of sentence unless their cumulative effect is such as to deprive the defendant of a fair trial and fair sentencing proceeding." *Spears v. State*, 1995 OK CR 36, ¶ 60, 900 P.2d 431, 445, *cert. denied*, 516 U.S. 1031, 116 S.Ct. 678, 133 L.Ed.2d 527 (1995). Although the prosecutor engaged in some improper argument, we find the effect of these arguments, standing alone or cumulatively, do not amount to plain error and do not require reversal or modification of sentence.

There is no requirement that the trial court state its reasons for imposing consecutive sentences and absent proof that the trial court flatly refused to consider concurrent sentences or did not believe he could impose concurrent sentences, we will presume the decision was in compliance with the law. *Riley v. State*, 1997 OK CR 51, ¶, 947 P.2d 530, 535; *see also Allen v. City of Oklahoma City*, 1998 OK CR 42, ¶ 4, 965 P.2d 387, 389. Further, Appellant has not shown the trial court did not consider the "85%" law in imposing consecutive sentences. Proposition Seven is denied as the decision to run sentences concurrently or consecutively rests within the discretion of the trial court. *Sherrick v. State*, 1986 OK CR 142, ¶ 16, 725 P.2d 1278, 1284.

We reverse Count 3 for the reasons set forth above. The prosecutorial comments which were improper did not rise to the level of plain error or in combination and no other error has been identified. Proposition Eight does not warrant relief. *Toles v. State*, 1997 OK CR 45, ¶ 71, 947 P.2d 180, 193, *cert. denied*, 524 U.S. 958, 118 S.Ct. 2380, 141 L.Ed.2d 746 (1998).

DECISION

The Judgment and Sentences imposed in Tulsa County District Court, Counts 2 and 4, are hereby **AFFIRMED**. Count 3 is **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS**.

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OPINION BY: JOHNSON, P.J.
LILE, V.P.J. : CONCURS IN PART/DISSENTS IN PART
LUMPKIN, J.: CONCURS IN PART/DISSENTS IN PART
CHAPEL, J.: CONCUR
STRUBHAR, J.: CONCUR

LILE, VICE PRESIDING JUDGE: CONCURS IN PART/DISSENTS IN PART

The Appellant was charged with two counts of rape, first behind La Petite Academy and the second at a nearby loading dock. The jury acquitted on one charge and convicted on the other. The Information and the evidence leave no doubt as to which rape the Defendant was convicted of.

The Assistant Attorney General quite properly asserts that: "Nothing in the record calls into question the jurors' understanding of the Information in conjunction with the evidence, and the defendant offers nothing but speculation in support of his argument."

The law requires that we examine not just the information, but also the evidence in a case like this. *Hain v. State,* 1993 OK CR 22, 852 P.2d 744.

The Court's reversal of this conviction and order that the charge be dismissed are inexplicable.

I am authorized to state that Judge Lumpkin joins in this writing.