

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DENNIS LYNN MILLER,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

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NOT FOR PUBLICATION

Case No. F-2011-877

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JAN - 7 2013

OPINION

MICHAEL S. RICHIE
CLERK

LEWIS, VICE PRESIDING JUDGE:

Appellant, Dennis Lynn Miller, was tried by jury and convicted of the following offenses in the District Court of Muskogee County, case number CF-2010-416, before the Honorable Norman D. Thygesen, Associate District Judge. The jury sentenced Miller to the corresponding terms of imprisonment, and Judge Thygesen sentenced accordingly, ordering that the sentences be served consecutively.¹

Count one: child sexual abuse, in violation of 10 O.S.Supp.2006, § 7115 (currently renumbered as 21 O.S.2011, § 843.5); Imprisonment for twenty-five (25) years.

Count two: first degree rape, in violation of 21 O.S.Supp.2007, §§ 1111 and 1114; Imprisonment for Life without the possibility of parole.

Counts three and four: forcible oral sodomy, in violation of 21 O.S.Supp.2009, § 888; Imprisonment for ten (10) years on each count.

¹ Miller must serve not less than eighty-five percent (85%) of the sentences in counts one through four prior to becoming eligible for consideration for parole. 21 O.S.2011, § 13.1

Count five: attempted first degree rape, in violation of 21 O.S.Supp.2007, §§ 1114; Imprisonment for five (5) years

Count six, kidnapping, in violation of 21 O.S.Supp.2009, § 741; Imprisonment for one (1) year

Count seven, assault and battery with a dangerous weapon, in violation of 21 O.S.Supp.2006, § 645; Imprisonment for (1) one year; and

Count eight, intimidation of a witness, in violation of 21 O.S.2001, § 455; Imprisonment for three (3) years.

From the Judgment and Sentence Miller has perfected his appeal to this Court raising several propositions of error. We conclude, after thorough consideration of the propositions of error and the entire record before us on appeal, including the original record, transcripts, exhibits and briefs of the parties, that the conviction and sentence for count seven shall be reversed and remanded with instructions to dismiss. The remainder of the convictions and sentences shall be affirmed.

Miller married the mother of the victim when the victim, L.M., and her sister, K.M., were five and three, respectively. Sometime later, Miller adopted both of the girls.

About the time L.M. turned thirteen, Miller began methodically and progressively molesting her. It began by Miller touching L.M.'s breasts, buttocks and vagina. In 2008, for the first time, Miller inserted his finger in L.M.'s vagina. L.M. called her boyfriend, went to his house, and told her boyfriend's mother, Jennifer Appling, about the incident.

Prior to and during this time, Miller used physical violence to discipline L.M., which made her very afraid of him. Sometime in 2007, Miller thought

L.M. had called DHS, so he became angry, grabbed a paddle, and broke it over L.M.'s head. L.M.'s mother tried to intervene, and Miller grabbed her by the throat, and slammed her against the wall. Needless to say, L.M. was extremely afraid to report the abuse, but finally did tell Appling.

After L.M. told Appling, Appling called the police, who interviewed L.M. about the abuse. As a result, Miller was forced to leave the home, while court proceedings commenced. The absence of Miller, caused L.M.'s mother, Jennifer Miller, to become very depressed, according to L.M. Mrs. Miller even threatened to commit suicide, saying that she couldn't "live without him."

At one point L.M. left home to live somewhere else and finally ended up at crisis therapy center. When she came back home, her mother was still in the same frame of mind. L.M. told her mother that she "would take it all back."

Mrs. Miller drove L.M. to the district attorney's office, and L.M. recanted her story. Mr. Miller was then allowed back into the house. Everything was fine for a few months. Mrs. Miller was happy and there was not as much anger from Mr. Miller.

Then, in December 2008, Miller forced L.M. to have sexual intercourse with him. Miller entered L.M.'s bedroom and told her to take off her clothes, and she did. He undressed, crawled on top of her and stuck his penis in her vagina. L.M. complied because she was afraid of what he might do if she disobeyed. She did not report the incident.

Miller continued to have intercourse with L.M. for up to four to five times a week until April, 2010. During these times, Miller would threaten to put a 22

in L.M.'s head. Miller also threatened to "snap her neck" if she did not comply, while he forced L.M. to perform oral sex on him. Miller also placed his mouth on L.M.'s vagina several times before intercourse. Miller would conceal this activity by sending Mrs. Miller and L.M.'s sister to the store for items, while he raped L.M.

The abuse ended when L.M. became concerned that Miller would start abusing her little sister after L.M. turned eighteen and left home. So in April 2010, L.M. refused to comply. L.M. fought back and was injured. Miller then walked away. Later Miller told L.M. that she had until the next day to "pull her head out of her ass, or it was going to get ugly."

The next day, Miller entered L.M.'s room and another physical confrontation erupted. Miller grabbed L.M. and pushed her into the dresser. L.M. was injured and slid into the floor. Miller left the room and locked L.M. inside the room. Miller was cussing and calling her names. L.M. was finally allowed to leave to go to school.

L.M. had told a friend about the rapes the day before, and on this day, the authorities came and talked to L.M. She told them the whole story. After L.M. gave her statement, the DHS worker, Rockolyn Daniels, accompanied L.M. and her sister back to the house to get some items. Mr. and Mrs. Miller were supposed to be at the police station; however, while L.M. and her sister were at the house, their parents arrived home.

L.M. and her sister ran from the home. Miller chased them down the alley. L.M. was on the phone with Daniels and Daniels was able to send the

police to intercept L.M. and her sister. L.M. testified that Miller was yelling the whole time he was chasing her, but she could not tell what he was saying.

On appeal, Miller raises several propositions which can be broadly classified as, first, issues relating to other crimes evidence and failure of trial counsel to object to the other crimes evidence (propositions one and five), and second, issues attacking the sufficiency of the evidence of several of the crimes for which he was convicted (propositions two through four).

Miller's claims regarding the admission of other crimes evidence were not properly preserved at trial. On the one occasion when an objection was interjected, it was only after defense counsel had started questioning the witness about the same conduct. Generally, when objections are raised, this Court reviews the admission of other crimes evidence under an abuse of discretion standard; however, as in this case, when the issue is not preserved pursuant to 12 O.S.2011, § 2104, we review for plain error only. *Harmon v. State*, 2011 OK CR 6, ¶ 36, 248 P.3d 918, 934 (holding that other crimes evidence introduced without preserving the specific issue at trial would be reviewed for plain error only).

Plain error requires; "1) the existence of an actual error (i.e., deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding." *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d. 907, 923.

The prohibition against "other crimes" evidence, generally, prevents a person from being convicted because of illegal or "bad" conduct not connected

to the charged offense. Rather a defendant is to be convicted by evidence showing him guilty of the offense charged.

Evidence that a defendant committed other crimes, however, is admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. *Lott v. State*, 2004 OK CR 27, ¶ 40, 98 P.3d 318, 334; *Welch v. State*, 2000 OK CR 8, ¶ 8, 2 P.3d 356, 365; 12 O.S.2001, § 2404(B). Section 2404(B) reads:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

Williams v. State, 2008 OK CR 19, ¶ 36, 188 P.3d 208, 218-19. Acts do not automatically fall under the category of other crimes or bad acts simply because they are morally questionable. *Carter v. State*, 2008 OK CR 2, ¶ 13, 177 P.3d 572, 576. However, an act that is not a violation of the criminal law is nonetheless governed by § 2404(B) if it carries a stigma that could unduly prejudice an accused in the eyes of the jury. *Eizember v. State*, 2007 OK CR 29, ¶ 75, 164 P.3d 208, 230.

Miller first complains about “the most prejudicial items of other crimes evidence.” This evidence consisted of other sexual activities involving Miller and his wife. The information came up when Mrs. Miller was testifying. She testified that they had other females that participated in the bedroom and one was Ambre Miller (a relative). There was no contemporaneous objection to the testimony. In fact, defense counsel began cross-examining Mrs. Miller about the “group sex.” After clarifying the testimony, defense counsel asked for a

mistrial, which was denied. Defense counsel then asked for an instruction to disregard the testimony. Finally, the trial court instructed the jury to disregard her last remarks as unresponsive to questioning.

The testimony interjected by the witness did not garner an objection by defense counsel. Then counsel invited the witness to expand on the subject matter. Finally, the trial court instructed the jury to disregard the subject matter. We find that, under the circumstances, the instruction by the trial court cured any potential error. See *Mooney v. State*, 1999 OK CR 34, ¶ 41, 990 P.2d 875, 887-88. Further, Miller's substantial rights were not affected by the testimony as the testimony did not affect the outcome of this trial. *Id.* See also *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d. at 923.

The next piece of evidence for which Miller complains concerned his method of receiving compensation from employment. The prosecutor asked the victim whether anyone in the family worked during the day. She said that Miller worked "for cash under the table." The prosecutor asked what she meant and she said that "he got paid in cash, and they didn't report it, so he didn't have to pay taxes." She went on to testify that they would discontinue her mother's disability and other government benefits if they reported the income, and they would have to pay taxes on the income. There was no objection to this line of questioning. We review for plain error only.

It was evident that the prosecutor did not expect to go down this road when the witness spontaneously stated that Miller got paid under the table; however, the prosecutor went further and delved into irrelevant subject matter.

Even though this evidence was irrelevant and tended to show that Miller might have been defrauding the government, we find that this evidence was not unfairly prejudicial, and, due to the credibility and weight of the State's case, the evidence did not affect the verdict in this case.

The next piece of evidence concerns evidence that the Oklahoma Department of Human Services (DHS) had investigated the home on at least twelve occasions. Defense counsel made no objections to the information regarding DHS investigations. In some respect, the many investigations, which resulted in findings of no wrongdoing, worked toward Miller's favor, as his whole defense was that the allegations against him were false, and were an attempt to get even or punish him for a perception that he employed overly strict child rearing methods. Miller may have employed reasonable trial strategy in allowing this evidence to come forth. Even so, this testimony did not affect the outcome of this trial, thus there is no plain error here.

Next, Miller complains about evidence that he hit L.M. over the head with a paddle, hard enough to break the paddle, then threw Mrs. Miller into the wall when she tried to intervene. There were no objections to this evidence. The evidence that Miller was violent toward the victim gave reason for her failure to report the ongoing forced sexual intercourse that occurred between 2008 and 2010. It also formed the basis to show that she feared what would happen if she refused to comply with Miller's demands.

Miller complains about questioning regarding his sons and whether they lived in the home. Defense counsel interjected an objection at one point which

was sustained. There was nothing in this testimony to suggest that Miller had committed acts which would be considered "other crimes." Therefore, the testimony does not amount to error.

Finally, and unrelated to other crimes evidence, Miller complains that the prosecutor improperly impeached one of his witnesses, Delbert Murphy, by asking whether he had been treated for a mental health problem at the V.A. He responded that he had not, and there was no objection to the questioning. This questioning did not affect the outcome of this trial; there was no plain error here.

In sum, the alleged other crimes evidence for which Miller complains did not affect his substantial rights, as the evidence of his guilt was overwhelming. The victim's testimony was not unbelievable or incredible nor was it impeached. The testimony was lucid, clear and unambiguous. There was no plain error in exposing the jury to this evidence.

Because there were no objections to this evidence, Miller argues, in proposition five, that counsel was ineffective in failing to object to the other crimes evidence. In order to prevail on an ineffective assistance claim, an appellant must show that counsel made errors so egregious that counsel was not functioning as counsel guaranteed by the Sixth Amendment, and he must show he was prejudiced by the deficient performance - that counsel's errors deprived him of a fair trial with a reliable outcome. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

We have determined that the evidence did not prejudice Miller. In so doing, Miller cannot also show that he was prejudiced by Counsel's failure to object. *See Jones v. State*, 2011 OK CR 13, ¶ 4, 253 P.3d 997, 998. Therefore, his ineffective assistance claim is rejected.

In propositions two, three, and four, Miller argues that there was insufficient evidence to support certain convictions. In reviewing the sufficiency of the evidence, this Court examines the evidence in a light most favorable to the State to determine whether there was sufficient evidence for any rational trier of fact to find the essential elements of the offense beyond a reasonable doubt. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04.

In proposition two, Miller claims that there was insufficient evidence to support the rape and forcible oral sodomy charges. Miller specifically attacks the element requiring "force, violence, or threats of force or violence accompanied by apparent power of execution." *See* 21 O.S.Supp.2007, §§ 888, and 1114. Evidence showed that Miller used force and violence to get what he wanted. He threatened her by telling her he would shoot her in the head. He also told her he would snap her neck. When L.M. refused to comply, Miller attacked her. The evidence was sufficient for the jury to find that Miller used force or the threat of violence against L.M. in order to sexually assault her. *See Lawson v. State*, 1987 OK CR 140, ¶¶ 8-9, 739 P.2d 1006, 1008.

In proposition three, Miller claims that there was insufficient evidence to support the attempted kidnapping charge. He claims that there was no

evidence to show that Miller had any intent to “secretly confine” L.M. Kidnapping requires that a person have the intent to confine someone against their will. See 21 O.S.Supp.2007, § 741. Miller, on the final occasion he tried to have sex with her, took her keys and her phone, then he blocked her from exiting her room, confining her to her room. Miller was cursing and calling L.M. names. There was sufficient evidence for the jury to find all the elements of attempted kidnapping.

Finally, in proposition, four, Miller attacks the conviction for assault and battery with a dangerous weapon. The State charged that Miller used the dresser as a dangerous weapon. Any object can become a dangerous weapon in the manner and use of the object; the object does not have to be a dangerous weapon, *per se*. See *McDaniel v. State*, 1973 OK CR 222, ¶ 13, 509 P.2d 675, 680; *Hay v. State*, 1968 OK CR 209, ¶ 16, 447 P.2d 447, 451. This Court has stated that any object used in a manner likely to produce death or great bodily injury can be a dangerous weapon. *Hay*, 1968 OK CR 209, ¶ 16, 447 P.2d at 451-52. Great bodily injury is a bodily injury which creates either a substantial risk of death, causes serious, permanent disfigurement, or causes prolonged loss or impairment of the function of any bodily member or organ. See OUJI-CR 2d 6-35 (Supp.2003). Great bodily injury has also been defined as “bone fracture, protracted and obvious disfigurement, protracted loss or impairment of the function of a body part, organ or mental faculty, or substantial risk of death.” 21 O.S.Supp.2002, § 646.

In this case, Miller shoved L.M. against a dresser. It is not apparent that she suffered more than a bruise. The manner in which the dresser was used in this case did not make the dresser a dangerous weapon likely to cause great bodily injury. The conviction for assault and battery with a dangerous weapon must, therefore, be reversed and remanded with instructions to dismiss.

DECISION

Miller's convictions and sentences for counts one through six and count eight of the Judgment and Sentence are **AFFIRMED**. The conviction and sentence for count seven is **REVERSED** and **REMANDED** with instructions to **DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF MUSKOGEE COUNTY
THE HONORABLE NORMAN D. THYGESEN, ASSOCIATE DISTRICT JUDGE**

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LUMPKIN, J.: Concurs

C. JOHNSON, J.: Concurs

SMITH, J.: Concurs