

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SCOTT ALLEN PHILLIPS,)
)
 Appellant,)
 vs.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. F-2011-1062

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUN 20 2013

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

SMITH, VICE PRESIDING JUDGE:

Scott Allen Phillips was tried by jury and convicted of Lewd Molestation in violation of 21 O.S.Supp.2008, § 1123, in the District Court of Tulsa County, Case No. CF-2010-2619.¹ In accordance with the jury's recommendation the Honorable Kurt G. Glassco sentenced Phillips to twenty-five (25) years imprisonment, with a period of five years of supervised probation. Phillips must serve 85% of his sentence before becoming eligible for parole consideration. Phillips appeals from this conviction and sentence.

Phillips raises six propositions of error in support of his appeal:

- I. Although the State only alleged a single count of lewd molestation involving O.W., the prosecutor presented evidence that the child had been touched multiple times over a twenty-month period. The State should have been required to elect which act of touching it relied upon for a conviction in Count One;
- II. Under the facts presented, the evidence was insufficient to support a conviction.
- III. It was an abuse of discretion for the district court to refuse to consider the suspension of Appellant's sentence because he refused to enter a blind plea; Punishing Appellant for asserting his right to jury trial constitutes a violation of his Fifth, Sixth and Fourteenth Amendment rights pursuant to the United States Constitution;

¹ Phillips was acquitted of two other counts of lewd molestation involving different victims.

- IV. It was error for the court to refuse defense counsel's request to interview jurors. As a result, Appellant was denied a reliable sentencing proceeding in violation of the Fourteenth Amendment to the United States Constitution;
- V. It was error to admit prerecorded videotaped interviews with the alleged victims and permit the jurors to watch the videos a second time during deliberations. The evidence served to improperly bolster the alleged victims' trial testimony. The error undermined Appellant's right to a fair trial in violation of the Fourteenth Amendment; and
- VI. The district court improperly limited defense counsel's *voir dire*. Under the facts of the case before this Court, Appellant suffered prejudice and his conviction must be reversed for a new trial.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we find that the law and evidence support Phillips' conviction and sentence, but the case must be remanded to the District Court for consideration of whether Phillip's sentence, as recommended by the jury, should be suspended as he requested at sentencing.

We find in Proposition I that there was no plain error in admitting testimony of multiple instances of abuse, within the time frame charged in the Information. Phillips failed to object to the testimony and we review for plain error. We first determine whether error (a deviation from a legal rule) occurred, and, if so, whether it was plain or obvious. *Barnard v. State*, 2012 OK CR 15, ¶ 13, 290 P.3d 759, 764. The Evidence Code provides in a lewd molestation case that, with fifteen days notice, the State may offer evidence of other offenses of child molestation. 12 O.S.Supp.2008, § 2414(B). The State did not provide a separate notice of the multiple events, but O.J.W. testified at trial that Phillips touched her multiple times during the time period charged in the Information. Moreover, as early as August 19, 2010 – several months before trial – the State gave notice that it intended to offer several statements detailing multiple instances of molestation against all three

alleged victims. As a practical matter, the notice requirement of § 2414 was met. In addition, no election of offenses is required where a person, standing in a parental role and with exclusive access to the child, commits sexual acts against the child over a period of time. *Gilson v. State*, 2000 OK CR 14, ¶ 21, 8 P.3d 883, 899; *Huddleston v. State*, 1985 OK CR 12, ¶ 16, 695 P.2d 8, 10-11. Phillips argues that he does not fit within this exception. The facts in this case justify a conclusion that *Gilson* and *Huddleston* apply. As there was no error in admitting the evidence, there is no plain error.

We find in Proposition II that, taking the evidence in the light most favorable to the State, any rational trier of fact could find beyond a reasonable doubt that Phillips molested O.J.W. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559. To sustain a conviction for lewd molestation the State must prove beyond a reasonable doubt that Phillips, while at least three years older than the victim, knowingly and intentionally touched or felt the body or private parts of a child under sixteen in a lewd and lascivious manner. 21 O.S.Supp.2008, § 1123; OUJI-CR 2d 4-129. *Heard v. State*, 2009 OK CR 2, ¶ 4, 201 P.3d 182, 182-83. We accept all reasonable inferences and credibility choices supporting the jury's verdict. *Coddington v. State*, 2006 OK CR 34, ¶ 70, 142 P.3d 437, 456. The jury determines the credibility of witnesses, and we will not disturb a verdict if competent evidence supports the jury's findings, even where evidence conflicts. *Rutan v. State*, 2009 OK CR 3, ¶ 49, 202 P.3d 839, 849. We presume that the trier of fact resolved any evidentiary conflicts in the prosecution's favor, and defer to their resolution. *McDaniel v. Brown*, 558 U.S. 120, 133, 130 S.Ct. 665, 673, 175 L.Ed.2d 582 (2010).

The jury was properly instructed that: "The words "lewd" and "lascivious" have the same meaning and signify conduct which is lustful and which evinces an eagerness for sexual indulgence." OUJI-CR 2d 4-129; O.R. 111. We have noted that "[t]he night and day distinction between acts of compassion and those motivated by wanton salacity is one which the reasonable person could not confuse." *Whaley v. State*, 1976 OK CR 302, ¶ 4, 556 P.2d 1063, 1064. The testimony supports the jury's finding that Phillips' actions were lewd and lascivious. *Allen v. State*, 1987 OK CR 45, ¶¶ 10-12, 734 P.2d 1304, 1307; *Rich v. State*, 1954 OK CR 7, ¶ 12, 266 P.2d 476, 480. Phillips also argues that the State failed to prove he was an adult when the crime was committed. As the State argues, this is no longer an element of the crime. The statute now only requires that the defendant be more than three years older than a victim under the age of sixteen. 21 O.S.Supp.2008, § 1123. Ample evidence supported this element.

We find in Proposition III that the trial court failed to consider Phillips' application for a suspended sentence on its merits.² The decision to grant a suspended sentence is within the trial court's discretion. *Stratton v. City of Tulsa*, 1988 OK CR 84, ¶ 12, 753 P.2d 931, 933. We review this decision for abuse of discretion. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue; a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192,

² Phillips does not claim his sentence was excessive, and his sentence is within the range of punishment and justified under the facts and circumstances of this case. Our resolution of this Proposition does not disturb the jury's sentence recommendation.

1194 (citations omitted). A trial court must consider an application for suspended sentence on its merits, and may not deny consideration of that application because a defendant has received a jury trial. *Jones v. State*, 1976 OK CR 272, ¶¶ 22- 23, 557 P.2d 447, 451; *Gillespie v. State*, 1960 OK CR 67, ¶ 19, 355 P.2d 451, 457, *overruled on other grounds*, *Hill v. State*, 1972 OK CR 209, 500 P.2d 1075. At sentencing, the trial court refused Phillips' request to suspend part of his sentence. The trial court stated he had warned the parties before trial to try and resolve the case then, because he would impose whatever sentence the jury recommended. He further noted that jurors had listened to the evidence and said, "[I]f that's what the people say the punishment should be, that's what it will be. That's what I will impose." The trial court's statements are almost identical to those found to be error in *Jones* and *Gillespie*. Although the trial court did not flatly state he would not suspend Phillips' sentence because Phillips had exercised his right to jury trial, the trial court made clear that, after a jury verdict, he would impose the jury's recommendation in every case (including Phillips). This proposition is granted, and the case remanded for the trial court to consider whether Phillips's sentence should be suspended as he requested at the sentencing hearing. This Court expresses no opinion on whether any portion of Phillips' sentence should be suspended. We direct the trial court to grant or deny Phillips' request for suspended sentence after thoroughly considering everything presented at the sentencing hearing, and further direct that the record reflect that consideration.³

³ In connection with this claim Phillips has tendered for filing a motion for supplementation of record and request for a Rule 3.11(A) evidentiary hearing. We have independently allowed supplementation of the record under Rule 3.11(A) where a defendant submitted affidavits from parties below, directly

We find in Proposition IV that the trial court did not err in refusing to allow Phillips to contact jurors after the trial but before sentencing. Inquiry into jury deliberations is prohibited by statute. The statute states: “[A] juror shall not testify as to any matter or statement occurring during the course of the jury's deliberations or as to the effect of anything upon the juror’s mind or another juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes during deliberations.” 12 O.S.Supp.2002, § 2606(B). This lends finality to judgments, discourages fraud and perjury, and ensures jurors will not be induced to “repent of their verdict and endeavor to revoke it.” *Weatherly v. State*, 1987 OK CR 28, ¶ 10-11, 733 P.2d 1331, 1334-35; *see also Matthews v. State*, 2002 OK CR 16, ¶ 14, 45 P.3d 907, 915. The record does not show that jurors were affected by any type of improper outside information. Phillips argues that the jurors could have discussed information developed in deliberations, presumably regarding their opinions about Phillips’ guilt or the length of his sentence, which would have been relevant to the trial court’s sentencing decision. This is precisely the type of information which is prohibited by the statute. *Harris v. State*, 2007 OK CR 32, ¶ 16, 167 P.3d 438, 444; *Wood v. State*, 2007 OK CR 17, ¶ 42 n. 29, 158 P.3d 467, 480 n.29; *Hawkins v. State*, 2002 OK CR 12, ¶ 45, 46 P.3d 139, 148. Phillips argues he has a right to present mitigating evidence and a right of allocution at sentencing. He admits the State

involved in the trial, which addressed a record issue of great importance in a capital trial. *Coddington v. State*, 2011 OK CR 17, ¶ 21, 254 P.3d 684, 698. Phillips’ proffered material does not fall into that category, and is not necessary for us to make a determination of the issues. *Coddington*, 2011 OK CR 17, ¶ 21, 254 P.3d at 698; Rule 3.11(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013). Phillips’ motion to supplement the record is denied.

presented no evidence in aggravation, and he presented letters and testimony from friends and family supporting him. Phillips appears to argue that having information about jury deliberations would be mitigating evidence for the trial court to consider in his case. This use of juror testimony would be prohibited by statute.

We find in Proposition V that the trial court did not abuse its discretion in admitting and replaying the videotape of the victim's forensic interview. *Folks v. State*, 2008 OK CR 29, ¶ 15, 207 P.3d 379, 383; *Martin v. State*, 1987 OK CR 265, ¶18, 747 P.2d 316, 320. Videotapes, as well as other testimony, may be admissible under § 2803.1 if the trial court finds that the time, content and totality of circumstances surrounding the taking of the statements provide sufficient indicia of reliability so as to render them inherently trustworthy. *Folks*, 2008 OK CR 29, ¶ 10, 207 P.3d at 382. "Whether the recorded statement bolstered the State's case was for the jury's determination as part of its determination of the weight and credibility of the testimony." *Folks*, 2008 OK CR 29, ¶ 15, 207 P.3d at 383. As there was no error, there is no plain error. *Barnard*, 2012 OK CR 15, ¶ 13, 290 P.3d at 764.

We find in Proposition VI that the trial court did not abuse its discretion in limiting Phillips' *voir dire* questioning. *Williams v. State*, 2008 OK CR 19, ¶ 27, 188 P.3d 208, 217. The purpose of *voir dire* is to reveal bias and grounds to challenge particular prospective jurors for cause, and to give the parties adequate information to intelligently exercise peremptory challenges. *Parker v. State*, 2009 OK CR 23, ¶ 18, 216 P.3d 841, 847. The trial court may impose limitations on the parties, "as long as the *voir dire* questioning is broad enough to afford the defendant a jury free

of outside influence, bias, and personal interest.” *Id.* The record shows that the disputed questions were beyond the scope and purpose of proper *voir dire*.

DECISION

The Judgment and Sentence of the District Court of Tulsa County are **AFFIRMED**. The case is **REMANDED** for consideration of Phillips’s request for suspended sentence, consistent with this Opinion. Phillips’ Motion for Supplementation of Record and Request for Evidentiary Hearing should be **FILED** and is **DENIED**. 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 TULSA COUNTY
THE HONORABLE KURT G. GLASSCO, DISTRICT JUDGE

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OPINION BY: SMITH, V.P.J.

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LUMPKIN, J.: CONCUR
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LEWIS, JUDGE, CONCURS IN PART, DISSENTS IN PART:

I concur in the decision to affirm Appellant's conviction, however I dissent to remanding this matter for resentencing. I find no abuse of discretion in the trial judge's decision not to suspend any of the 25 year sentence.