

MAY 12 2000

JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DONALD ROY ROGERS, JR., a/k/a)
DONALD RAY ROGERS, JR.,)
)
Appellant,)
)
v.)
)
STATE OF OKLAHOMA,)
)
Appellee)

NOT FOR PUBLICATION

No. F 1999-485

SUMMARY OPINION

JOHNSON, JUDGE:

Appellant, Donald Roy Rogers, Jr., a/k/a Donald Ray Rogers, Jr., was convicted of Attempted Kidnapping in Creek County District Court, Case No. CF 97-478, in violation of 21 O.S.1991, § 741, after former conviction of two or more felonies. Jury trial was held on February 3rd-4th, 1999, before the Honorable Joe Vassar, District Judge. The jury found Appellant guilty and assessed punishment at twenty-five (25) years' imprisonment. Formal sentencing was held on March 19, 1999, and Judge Vassar pronounced sentence in accordance with the jury's verdict. From the Judgment and Sentence imposed, Appellant filed this appeal.

Appellant raised two propositions of error:

1. Admission of other crimes evidence prejudiced the jury, deprived Appellant of his fundamental right to a fair trial, constitutes reversible error and warrants reversal of his conviction, and

2. There was insufficient evidence to convict Mr. Rogers of attempt kidnapping.

After thorough consideration of propositions raised and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we have determined that Appellant's conviction should be affirmed, but his sentence modified for the reasons set forth below.

Evidence of other crimes may be relevant and admissible under one of the grounds set forth at 12 O.S.1991, § 2404(b). *Burks v. State*, 1979 OK CR 10, ¶ 2, 594 P.2d 771, 772, *overruled on other grounds in Jones v. State*, 1989 OK CR 7, 772 P.2d 922. However, such evidence should be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise." 12 O.S.1991, § 2403. Here, we believe the admission of testimony showing Appellant rubbed the back of another girl at the ball field was more prejudicial than probative, confused the issues and misled the jury.

To determine whether the evidence was sufficient to sustain a conviction, this Court looks to the evidence in a light most favorable to the State and determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203; *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S.Ct. 2781, 2791, 61 L.Ed.2d 560 (1979). This Court accepts all reasonable

inferences and credibility choices that tend to support the trier of fact's verdict. *Pierce v. State*, 1994 OK CR 45, ¶ 18, 878 P.2d 369, 374. We will not interfere with a verdict when there is competent evidence in the record from which the jury could reasonably conclude that the defendant was guilty as charged. *Rice v. State*, 1983 OK CR 97, ¶ 8, 666 P.2d 233, 235; *Jones v. State*, 1970 OK CR 51, ¶ 9, 468 P.2d 805, 807.

Reviewing the evidence in a light most favorable to the State, we find the evidence was sufficient to show Appellant committed the crime of attempting kidnapping beyond a reasonable doubt. However, under the very unique facts of this case, we find the admission of other crimes evidence was more prejudicial than probative and contributed to the jury's determination of sentence. Accordingly, we find Appellant's sentence should be modified to minimum sentence of twenty (20) years' imprisonment. 22 O.S.1991, § 1066 (This Court has the power to reverse, affirm, or modify the judgment or sentence . . .).

Decision

The Judgment of the trial court is hereby **AFFIRMED** and Sentence is **MODIFIED** to twenty (20) years' imprisonment.

AN APPEAL FROM THE DISTRICT COURT OF CREEK COUNTY
THE HONORABLE JOE VASSAR, DISTRICT JUDGE

APPEARANCES AT TRIAL

PETER ASTOR AND
VICKI ROBERTS
P. O. BOX 998
OKMULGEE, OK 74447
ATTORNEYS FOR DEFENDANT

MICHAEL LOEFFLER
ASST. DISTRICT ATTORNEY
P. O. BOX 1006
SAPULPA, OK 74067
ATTORNEY FOR THE STATE

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

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APPEARANCES ON APPEAL

THOMAS PURCELL
OKLA. INDIGENT DEFENSE SYSTEM
1623 CROSS CENTER DRIVE
NORMAN, OK 73019
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
WILLIAM R. HOLMES
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OK 73104-4894
ATTORNEYS FOR APPELLEE

LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the Court's affirmance of the conviction. However, I cannot find in the evidence presented any basis in law or fact to modify the sentence. I would affirm both the judgment and sentence.