IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LINCOLN HOPKINS,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-99-150**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant, Lincoln Hopkins, was tried by jury in the District Court of Oklahoma County, Case No. CF-98-951, and convicted of: Arson in the First Degree, in violation of 21 O.S.Supp.1996, § 1401 (Count I); Kidnapping for Purpose of Extorting Sexual Gratification, in violation of 21 O.S.1991, § 745 (Count II); Assault and Battery with a Deadly Weapon, in violation of 21 O.S.1991, § 645 (Count III); and Rape in the First Degree, in violation of 21 O.S.1991, § 1111 and 21 O.S.1991, § 1114 (Count IV).[1] The jury recommended a sentence of one hundred (100) years imprisonment on each of the four counts. The trial court sentenced Appellant accordingly and ordered the sentences to run consecutively. Appellant now appeals his convictions and sentences.

Appellant raises the following propositions of error in this appeal:

I. Appellant was denied fair warning in violation of due process of law that he would be subject to prosecution for first degree arson as a result of his alleged actions against Denise Johnson;

II. Appellant's convictions for rape and kidnapping for the purpose of extorting sexual gratification violate constitutional and statutory prohibitions against double jeopardy;

---

[1] Appellant was acquitted of Count V (Assault and Battery with a Deadly Weapon, in violation of 21 O.S.1991, § 645) and Count VI (Rape in the Second Degree by Instrumentation in violation of 21 O.S.1991, § 1111 and 21 O.S.1991, § 1114).

III. The evidence was insufficient to support Appellant's conviction for rape in the first degree; and

IV. Appellant's one-hundred year sentences are excessive, disproportionate, and constitute cruel and unusual punishment.

After a thorough consideration of these propositions and the entire record before us, including the original record, transcripts, and briefs of the parties, we have determined neither reversal nor modification is required with respect to counts one through three. However, count four must be reversed and dismissed, for the reasons set forth below.

With respect to proposition one, raised for the first time on appeal, we find Appellant has not met his burden of proving the 1996 amendment to the first degree arson statute (21 O.S.Supp.1996, § 1401), relating to the "burning of a person," is unconstitutionally vague, violates due process, or violates Article 5, § 57 of the Oklahoma Constitution. *See White v. State*, 900 P.2d 982, 987 (Okl.Cr.1995) ("statutes are presumptively constitutional, and the burden of proving unconstitutionality rests with the party challenging the statute.") The wording of the amended statute is sufficiently definite for ordinary people to understand the conduct being prohibited, and Appellant has provided no evidence that the statute has been applied in an arbitrary or discriminatory manner. *Wilkins v. State*, 985 P.2d 184, 186 (Okl.Cr.1999).

We further find the 1996 amendment has a "logical connection" to the former statute, which proscribed the burning of an inhabited or occupied building. *See* 21 O.S.1991, § 1401; *Gray v. State*, 601 P.2d 117, 122 (Okl.Cr.1979). The obvious purpose of this statute, prior to its amendment,

was to protect people, not property. Interpreting Article 5, § 57 of our Constitution broadly, with due regard to its purpose not to hamper legislation but to check and prevent deception, we further find the amendatory language in the first degree rape statute is germane and cognate to the subject matter expressed in the title. *Hatch v. State*, 662 P.2d 1377, 1383 (Okl.Cr.1983); *Williams v. State*, 648 P.2d 843, 845 (Okl.Cr.1982); *King v. State*, 640 P.2d 983, 987 (Okl.Cr.1982). The "title of an act need not be an abstract of the statute's content as long as it reasonably relates (to the) matters involved." *Ephriam v. State*, 629 P.2d 1277, 1278 (Okl.Cr.1981). Such is the case here.

With respect to proposition two, we find Appellant's convictions for both First Degree Rape and Kidnapping for Purpose of Extortion (of sexual gratification, as charged in the information) violates the statutory prohibition against double punishment. 21 O.S.1991, § 11. Had Appellant been charged with kidnapping under 21 O.S.1991, § 741, rather than 21 O.S.1991, § 745, there would likely be no double punishment violation. However, Appellant was specifically charged with Kidnapping for Purposes of Extortion "by seizing and confining (the victim) for the purpose of extorting sexual gratification from her, contrary to the provisions of Section 745 of Title 21 . . . ."[2] We must take the information as it is drafted, and the State's theory at trial was that Appellant kidnapped the victim for the purpose of sexual gratification.

In *Doyle v. State*, 785 P.2d 317, 323 (Okl.Cr.1989), the defendant claimed he had been subjected to multiple punishments by being convicted of kidnapping (under Section 741, rather than Section 745) and rape. The Court

[2] O.R. at 1.

rejected this claim under *Blockburger*.[3] However, in resolving a merger issue raised by the defendant in the same proposition, the Court said:

> The information alleged that Appellant kidnapped the victim "with the unlawful and felonious intent ... to cause [the victim] to be secretly confined and imprisoned.... against her will." . . . **The intent of the kidnapping was not for the purpose of rape** and a review of the facts shows that the rape was sufficiently separate from the kidnapping so that it was not an included element.

Doyle, 785 P.2d at 324 (emphasis added). *Doyle* thus implies the result would be different if a defendant were prosecuted for both rape and kidnapping for purpose of extorting rape.[4]

For Appellant's kidnapping conviction to stand, we must find his specific intent was to kidnap the victim for purpose of extorting sexual gratification. To prove that intent, we would necessarily have to get into his sexual actions, which are also covered by the rape charge (and the second degree rape charge of which he was acquitted). If you remove the elements of rape, you do not have enough facts to support the kidnapping charge. Furthermore, the force used to kidnap for purposes of extorting sexual gratification (beating the victim with a pole and tying her to the bed) was the same force used to accomplish the

---

[3] *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932); *but see Brumbelow v. State*, 488 P.2d 1298, 1305 (Okl.Cr.1971) (where the court held two defendants could not be punished for both kidnapping and rape, which was one transaction, without ever distinguishing between whether the kidnapping charge was brought under Section 741 or Section 745.)

[4] The State's brief does not address *Doyle*, but instead focuses upon an earlier case, *Stockton v. State*, 509 P.2d 153 (Okl.Cr.1973). In the 1970s, this Court decided several cases, including *Stockton*, which dealt with the double punishment or double jeopardy implications of charges of first degree rape and kidnapping. *See e.g. Futerll v. State*, 501 P.2d 901 (Okl.Cr.1972); *Brumbelow v. State*, 488 P.2d 1298, 1305 (Okl.Cr.1971); *Householder v. Ramey*, 485 P.2d 247 (Okl.Cr.1971). These cases, decided within a few years of each other, are inconsistent with each other and in their application of the legal principals involved. Consequently, they provide this Court with little guidance, and they are less reliable than *Doyle* and *Littlejohn v. State*, F-88-865, an unpublished case, cited by Appellant, which analyzes the applicable law. *See* Rule 3.5(C)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (1999).

rape.

Focusing on the relationship between the crimes, we can see both crimes, as charged in the information, arise out of the same acts. *See Davis*, 993 P.2d at 126 ("The proper analysis of a claim raised under Section 11 is then to focus on the relationship between the crimes. If the crimes truly arise out of one act . . ., then Section 11 prohibits prosecution for more than one crime.") Accordingly, Appellant's conviction for First Degree Rape (Count IV) must be and is hereby reversed.

With respect to proposition three, we find the issue raised as to the sufficiency of the evidence of rape is now moot due to our resolution of Proposition Two. Finally, with respect to proposition four, given the horrible nature of this crime, the severity of the beating and the burning, the implausible story Appellant told police, Appellant's five prior convictions, our reversal of Count IV, and the fact that the sentences are were within the range established by the legislature, the remaining sentences are not so excessive as to shock the conscience of the Court. *Freeman v. State*, 876 P.2d 283, 291 (Okl.Cr.1994).

DECISION

The judgments and sentences on Count I, II, and III are hereby **AFFIRMED.** The judgment and sentence on Count IV is hereby **REVERSED and REMANDED** to the District Court of Oklahoma County with instructions to dismiss.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE NANCY L. COATS, DISTRICT JUDGE

APPEARANCES AT TRIAL

BERT RICHARD
ASSISTANT PUBLIC DEFENDER
611 COUNTY OFFICE BUILDING
OKLAHOMA CITY, OK 73102
COUNSEL FOR APPELLANT

LOU KEEL
ASSISTANT DISTRICT ATTORNEY
505 COUNTY OFFICE BUILDING
OKLAHOMA CITY, OK 73102
TULSA, OKLAHOMA 74103
COUNSEL FOR THE STATE

APPEARANCES ON APPEAL

CAROLYN L. MERRITT
ASSISTANT PUBLIC DEFENDER
611 COUNTY OFFICE BUILDING
OKLAHOMA CITY, OK 73102
COUNSEL FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
JAMES F. KELLY
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OKLAHOMA 73104-4894
COUNSEL FOR THE STATE

OPINION BY: LUMPKIN, V.P.J.
STRUBHAR, P.J.: CONCUR
JOHNSON, J.: CONCUR
CHAPEL, J.: RECUSE
LILE, J.: CONCUR

RE

WIN

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

K.R.J.,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

No. J-2000-481

ACCELERATED DOCKET ORDER

Appellant has appealed to this Court seeking reversal of an Oklahoma County District Court order granting the State's Motion for Imposition of Adult Sentence in Case No. CF-99-3005. On appeal, Appellant raises two propositions of error:

> 1. The State failed to produce evidence to meet their burden of "clear and convincing evidence" that Appellant would not reasonably complete a plan of rehabilitation or the public would not be adequately protected if Appellant was sentenced as a Youthful Offender; and
>
> 2. The trial court abused its discretion in sustaining the State's motion to impose sentence as an adult.

Pursuant to Rule 11.2(A)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (1999), this appeal was automatically assigned to the Accelerated Docket of this Court. The propositions of error were presented in oral argument July 6, 2000, pursuant to Rule 11.2(F). At the conclusion of oral argument, this Court voted, four to zero (4 - 0), to reverse the order of the trial court and remand this matter for a new Youthful Offender hearing.

A review of the record reveals the State failed to present any evidence in support its motion for imposition of adult sentencing. The only evidence admitted at the April 4, 2000, Youthful Offender hearing shows K.R.J. could complete a plan of rehabilitation and would not pose a threat to the public if placed in a secured facility. Since the State failed to present any evidence in

support of its motion, we find it failed to meet its statutory burden of establishing by clear and convincing evidence that K.R.J. is not amenable to rehabilitation or that the public could not be adequately protected. Finally, because the State failed to meet its burden of proof, we find it was an abuse of discretion by the trial court to sustain the State's motion. *See C.G. v. State*, 1999 OK CR 7, ¶ 10, 989 P.2d 936.

IT IS THEREFORE THE ORDER OF THIS COURT, by a vote of 4 - 0, that the order of the District Court of Oklahoma County granting the State's motion for Imposition of Adult Sentence in Case No. CF-99-3005 is **REVERSED** and this case is **REMANDED** with instructions that a new Youthful Offender hearing be conducted. **IT IS FURTHER ORDERED** that the Oklahoma County Public Defender's Office's Motion to File Amicus Curiae Brief is **DENIED**.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 12th day of July, 2000.

RETA M. STRUBHAR, Presiding Judge

GARY L. LUMPKIN, Vice Presiding Judge

Chad S. Chapel (Specially Concurring)
CHARLES S. CHAPEL, Judge

Steve Lile CZR
STEVE LILE, Judge

ATTEST:
Clerk