IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JEFFERY TALLON,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**No. F-2014-931**
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

HUDSON, JUDGE:

Appellant Jeffrey Tallon was tried and convicted by a jury in a bifurcated proceeding in Tulsa County District Court, Case No. CF-2012-3647, for Count 1: First Degree Rape by Instrumentation, After Former Conviction of One Felony, in violation of 21 O.S.2011, § 1114(A)(6); and Count 2: Aggravated Assault and Battery, After Former Conviction of One Felony, in violation of 21 O.S.2011, § 646. The jury recommended life imprisonment and a $10,000.00 fine on Count 1 and ten (10) years imprisonment and a $10,000.00 fine on Count 2. At formal sentencing, the Honorable James M. Caputo, District Judge, sentenced Appellant in accordance with the jury's verdicts and ordered the sentences for each count to run consecutively. Tallon now appeals.[1]

Appellant alleges eight propositions of error on appeal:

I. APPELLANT'S CONVICTION FOR BOTH RAPE AND AGGRAVATED ASSAULT AND BATTERY VIOLATES THE PROHIBITIONS AGAINST DOUBLE PUNISHMENT AND DOUBLE JEOPARDY;

[1]Appellant is required to serve at least 85% of his sentence for First Degree Rape by Instrumentation before being eligible for parole. 21 O.S.2011, § 13.1(10).

II. THE TRIAL COURT'S DENIAL OF APPELLANT'S REQUEST TO REMAND FOR PRELIMINARY HEARING ON THE NEW CHARGE OF RAPE BY INSTRUMENTATION WAS ERROR;

III. THE JURY'S FINDING OF A PRIOR CONVICTION WAS NOT SUPPORTED BY THE EVIDENCE;

IV. THE FINE IMPOSED UPON APPELLANT IN COUNT TWO WAS GREATER THAN ALLOWED BY LAW;

V. THE TRIAL COURT COMMITTED PLAIN ERROR IN MISINSTRUCTING APPELLANT'S JURY AS TO THE MAXIMUM SENTENCE FOR THE OFFENSE OF RAPE BY INSTRUMENTATION AFTER ONE FORMER FELONY CONVICTION;

VI. APPELLANT'S CONVICTION MUST BE REVERSED WITH INSTRUCTIONS TO DISMISS BECAUSE HE WAS DEPRIVED OF A SPEEDY TRIAL;

VII. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR RAPE; and

VIII. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ADMITTED PHOTOGRAPHS THAT VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we find that no relief is required under the law and evidence as to Appellant's convictions and his judgments are therefore **AFFIRMED.** However, Appellant's sentences are **REVERSED AND REMANDED FOR RESENTENCING.**

1.

Appellant did not raise his double punishment and double jeopardy claims at any point in the district court proceedings. He has therefore waived review on appeal of all but plain error. *See, e.g., Barnard v. State,* 2012 OK CR

15, ¶ 25, 290 P.3d 759, 767. The record evidence shows that the aggravated assault and battery inflicted by Appellant on the victim was complete before Appellant ever raped the victim. There is no violation of 21 O.S.2011, § 11. *Sanders v. State*, 2015 OK CR 11, ¶¶ 6, 8, 358 P.3d 280, 283-84; *Logsdon v. State*, 2010 OK CR 7, ¶ 17, 231 P.3d 1156, 1165; *Davis v. State*, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 127; *Gregg v. State*, 1992 OK CR 82, ¶ 27, 844 P.2d 867, 878. Hence, there is no error—plain or otherwise. *See Bosse v. State*, 2015 OK CR 14, ¶ 74, 360 P.3d 1203, 1232 ("Because there was no error, there was no plain error.").

Appellant's double jeopardy claim also does not reveal error, plain or otherwise. *Id.* The crime of first degree rape by instrumentation alleged in this case required a showing of sexual penetration of the anus which was not required to be shown to prove aggravated assault and battery. Additionally the crime of aggravated assault and battery requires a showing of great bodily injury inflicted upon the person assaulted which the crime of first degree rape by instrumentation does not. 21 O.S.2011, §§ 646(A)(1), 1114(A)(6). Thus, there is no double jeopardy violation because each crime requires proof of an additional fact which the other does not. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932); *Davis*, 1999 OK CR 48, ¶¶ 4-5, 993 P.2d at 125. Relief is denied for Proposition I.

2.

The State's amendment of the information did not substantially alter the Count 1 charge or necessitate information on new issues. 22 O.S.2011, § 304;

Sadler v. State, 1993 OK CR 2, ¶ 41, 846 P.2d 377, 386. That is particularly clear considering that the basic thrust of the original and amended charges is identical, namely, that the victim was raped anally. The record shows that the issue of the mechanism and manner of penetration was examined by both parties at preliminary hearing. The amendment of the information was therefore proper. *See State v. Harrison*, 1989 OK CR 27, ¶ 3, 777 P.2d 1343, 1344 (a new preliminary hearing is unwarranted where no new evidence would be presented in support of the amended charge). Relief is denied for Proposition II.

3.

To prove the existence of Appellant's prior California conviction, the prosecutor introduced a certified copy of the California abstract of judgment showing Appellant's conviction after guilty plea on January 15, 2009, for the crime of Battery on Cohabitator, in violation of California Penal Code 273.5. The year of this offense is listed as 2008 and the abstract of judgment makes clear that the crime for which Appellant was convicted is a felony under California law. However, no information is provided on this document concerning the particular facts of Appellant's crime. And, the State presented no supplemental evidence—like the indictment, information, or plea paperwork reciting a factual basis for the plea—to establish the particular facts of Appellant's California crime.

Defense counsel objected to admission of the abstract of judgment, arguing that California Penal Code 273.5 criminalized a broad array of conduct

and behavior, some of which would amount merely to misdemeanor offenses under Oklahoma law. Because the State did not present evidence or testimony relating the precise criminal conduct for which Appellant was convicted in California, the defense argued that evidence of the California prior felony conviction was inadmissible under 21 O.S.2011, § 54 which states:

> Every person who has been convicted in any other State, government or country of an offense which, if committed within this State, would be punishable by the laws of this State by imprisonment in the penitentiary, is punishable for any subsequent crime committed within this State, in the manner prescribed in Section [51.1] of this act, and to the same extent as if such first conviction had taken place in a court of this State.

The trial court overruled Appellant's objection. The trial court found that the California abstract of judgment clearly showed Appellant was convicted of a felony in that state. And while the California statute is more broadly defined, the trial court ultimately concluded that California Penal Code 273.5 more closely follows the Oklahoma felony statute for Domestic Assault and Battery by Strangulation and therefore Appellant's prior California felony conviction was admissible for purposes of sentence enhancement.

The nature of Appellant's prior conviction was a legal question for the Court. *Tice v. State*, 1955 OK CR 59, ¶ 11, 283 P.2d 872, 877. There being no dispute that Appellant's conviction was valid in California, "the charge must then be measured by Oklahoma's Statutes, to determine if the indictment alleged facts sufficient to constitute [a] crime . . . for which the defendant could be convicted of a felony, punishable in the penitentiary." *Id.* "It is the

characterization under Oklahoma law which is determinable as to whether or not the foreign offense would be a penitentiary offense in Oklahoma." *Fischer v. State*, 1971 OK CR 120, ¶ 7, 483 P.2d 1165, 1168.

Because the State presented no evidence relating the particular facts of Appellant's California crime, we are left with comparing the provisions of the California statute under which Appellant was convicted with any applicable Oklahoma statutory provisions covering the same conduct. *See Millwood v. State*, 1986 OK CR 106, ¶ 6, 721 P.2d 1322, 1324 (State was entitled to enhance punishment for Oklahoma conviction using prior conviction arising from general court-martial for the offenses of rape and sodomy where rape and sodomy were defined in the Uniform Code of Military Justice with language "remarkably similar" to the counterpart Oklahoma statutes).

Oklahoma does not have a crime specifically titled "Battery on Cohabitator" but the Oklahoma assault and battery statute does contain a misdemeanor crime of domestic abuse which prohibits some of the same conduct prohibited by the California statute. 21 O.S.Supp.2006, § 644(C); 21 O.S.Supp.2008, § 644(C).[2] The State correctly notes that several other Oklahoma statutes criminalize as felonies behavior that is likewise prohibited under California Penal Code 273.5. *See* 21 O.S.Supp.2006, § 644(D) (domestic abuse resulting in "great bodily injury"); *id.*, § 644(H) (domestic abuse by strangulation). *See also* 21 O.S.Supp.2008, § 644(D), (H). This is largely irrelevant, however, considering that we have absolutely no proof showing the

[2]We review Oklahoma law at the time of the foreign conviction. *Fischer*, 1971 OK CR 120, ¶¶ 7, 9, 483 P.2d at 1168.

specific conduct leading to Appellant's California felony conviction for Battery on Cohabitator. With only the statute to guide our analysis, we cannot say that the California prior felony conviction is eligible for use as a second or subsequent offense. Hence, the State failed to show that the conduct for which Appellant was convicted in California constituted a felony under Oklahoma law at the time it was committed. The trial court erred in overruling Appellant's objection to the admission of California conviction and we therefore must grant sentencing relief in this case.

Appellant urges that we modify his sentences. However, Appellant does not suggest the sentences he believes would be appropriate for his crimes. Under the circumstances presented here, we find remand for resentencing is appropriate on both counts.

4.

In his fourth proposition of error, Appellant complains that the $10,000.00 fine imposed by the jury on Count 2 was erroneous. This claim is rendered moot in light of the sentencing relief granted on other grounds. For purposes of retrial, however, we note (as the State concedes on appeal) that the specific prescription of fine for aggravated assault and battery in 21 O.S.2011, § 647—i.e., a fine not more than $500.00—is the correct range for the fine in Count 2.

5.

Appellant's complaint that the maximum punishment for Count 1, first degree rape by instrumentation after one prior felony conviction, is life imprisonment—not life without parole as the jury was instructed—is also rendered moot in light of the sentencing relief we granted on other grounds. We therefore do not reach this claim.

6.

This Court reviews Sixth Amendment speedy trial claims de novo, applying the four balancing factors established in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101 (1972). *See Ellis v. State*, 2003 OK CR 18, ¶¶ 24-64, 76 P.3d 1131, 1135-41, as corrected (Sept. 10 and Oct. 24, 2003); *Bauhaus v. State*, 1975 OK CR 34, ¶¶ 11-27, 532 P.2d 434, 438-42. The four balancing factors to be weighed are: (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his rights, and (4) the prejudice to the defendant. *Barker*, 408 U.S. at 530, 92 S. Ct. at 2192. "These are not absolute factors, but are balanced with other relevant circumstances in making a determination." *Lott v. State*, 2004 OK CR 27, ¶ 7, 98 P.3d 318, 327.

In this case, the speedy trial analysis focuses on the period running from Appellant's August 14, 2012, arrest to the commencement of Appellant's jury trial on October 14, 2014—a period of 791 days or 26 months. *United States v. Marion*, 404 U.S. 307, 320-21, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971). While this delay is not presumptively prejudicial, the length of the delay necessitates

inquiry into the remaining three factors set forth in *Barker v. Wingo*. *See Lott*, 2004 OK CR 27, ¶ 9, 98 P.3d at 328; *Ellis*, 2003 OK CR 18, ¶¶ 29-30, 76 P.3d at 1136-37; *McDuffie v. State*, 1982 OK CR 150, ¶ 5, 651 P.2d 1055, 1056.

After careful and thorough review of these factors, we find that both Appellant and the State contributed to a portion of the delay. The reasons for the delay were both valid and neutral. There is no evidence that the prosecution acted in bad faith or deliberately delayed commencement of trial. *See Henderson v. State*, 1987 OK CR 205, ¶ 12, 743 P.2d 1092, 1094. In summary, the State's conduct resulted in a 287 day delay which weighs in Appellant's favor but only slightly. Appellant's conduct resulted in a 290 day delay which weighs in the State's favor. *Vermont v. Brillon*, 556 U.S. 81, 90-91, 94, 129 S. Ct. 1283, 173 L. Ed. 2d 231 (2009). Basically, half of the overall delay in this case was attributable to the defense and the other half was attributable to the State.

Turning to the third speedy trial factor—assertion of the right by the accused during the length of the delay—Appellant first made an affirmative request for a speedy trial ten (10) days before commencement of his jury trial on October 13, 2014. "The defendant's assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Barker*, 407 U.S. at 531-32. Here, Appellant moved for continuance on January 24, 2014, to prepare his own case and he asserted no speedy trial claim or any other objection even as two earlier trial settings were vacated. It is not enough that Appellant moved to dismiss after

the delay has already occurred. "Such a motion could be, indeed may well be, strategic. The question, instead, is whether the defendant's behavior during the course of the litigation evinces a desire to go to trial with dispatch." *United States v. Batie*, 433 F.3d 1287, 1291 (10th Cir. 2006). Appellant's delay in asserting the speedy trial right in this case weighs against him.

Finally, the fourth *Barker* factor—prejudice to the defendant—weighs in favor of the State. Appellant offers in his brief on appeal no tangible prejudice that he claims to have suffered to his defense from delay attributable to the State and none is apparent. The State's DNA testing of the victim's scrotal swab resulted in key defense evidence used by Appellant to urge for acquittal at trial. Indeed, Appellant argues in his brief on appeal that this evidence was crucial to the defense. The record therefore shows Appellant's defense was in no way impaired from the delay and, in one key respect, the defense actually benefitted from the delay with the DNA evidence.

Having addressed each of the four speedy trial factors, we find the first factor weighs in Appellant's favor. As to the second factor, we find the reasons for the delay are not decisively for Appellant or the State. In other words, our analysis of this factor results in a virtual draw or a tie. Finally, as discussed earlier, the third and fourth factors weigh in the State's favor. Hence, there is no speedy trial violation and relief is denied for Proposition VI.

7.

Taken in the light most favorable to the State, sufficient evidence was presented to allow any rational trier of fact to find beyond a reasonable doubt

each element of first degree rape by instrumentation as alleged in Count 1. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2787, 61 L. Ed. 2d 560, 571 (1979); *Davis v. State*, 2011 OK CR 29, ¶ 74, 268 P.3d 86, 111; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04); 21 O.S.2011, §§ 1111.1, 1113, 1114(A)(6). Relief is denied for Proposition VII.

8.

Photographs are admissible so long as their probative value outweighs their prejudicial effect. Photographs are not excludable merely because they may be considered inflammatory or gruesome. *Welch v. State*, 2000 OK CR 8, ¶ 31, 2 P.3d 356, 371. We review the trial court's admission of evidence for an abuse of discretion. *Id.*, 2000 OK CR 8, ¶ 30, 2 P.3d at 370. An abuse of discretion has been defined as "a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *State v. Nelson*, 2015 OK CR 10, ¶ 11, 356 P.3d 1113, 1117. The trial court did not abuse its discretion as the challenged photographs were relevant, not cumulative and their probative value outweighed the danger of unfair prejudice. Relief is denied for Proposition VIII.

DECISION

The judgments of the district court are **AFFIRMED**. However, Appellant's sentences are **REVERSED AND REMANDED FOR RESENTENCING**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE JAMES M. CAPUTO, DISTRICT JUDGE

APPEARANCES AT TRIAL

MATTHEW DAY
ISAIAH PARSONS
PARSONS & DAY, L.L.C.
525 SOUTH MAIN ST., SUITE 312
TULSA, OK 74103
COUNSEL FOR DEFENDANT

BEN FU
HEATHER ANDERSON
ASSISTANT DISTRICT ATTORNEYS
TULSA COUNTY COURTHOUSE
500 SOUTH DENVER, SUITE 900
TULSA, OK 74103
COUNSEL FOR THE STATE

APPEARANCES ON APPEAL

THOMAS PURCELL
P.O. BOX 926
NORMAN, OK 73070
COUNSEL FOR APPELLANT

E. SCOTT PRUITT
OKLAHOMA ATTORNEY GENERAL
JAY SCHNIEDERJAN
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
COUNSEL FOR APPELLEE

OPINION BY: HUDSON, J.
SMITH, P.J.: CONCUR
LUMPKIN, V.P.J.: CONCUR
JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR