

AUG -4 2016

MICHAEL S. RICHIE
CLERK

2016 OK CR 18
IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ASHLEY REED PULLEN,

Appellant,

v.

STATE OF OKLAHOMA,

Appellee.

FOR PUBLICATION

No. F-2015-138

SUMMARY OPINION

HUDSON, JUDGE:

¶1 Appellant Ashley Reed Pullen was tried and convicted by a jury for the crime of First Degree Rape by Narcotic or Anesthetic Agent, in violation of 21 O.S.2011, § 1111(A)(4), in Tulsa County District Court, Case No. CF-2014-1074.¹ The jury recommended a sentence of life imprisonment with the possibility of parole. At formal sentencing, the Honorable William J. Musseman, District Judge, sentenced Appellant in accordance with the jury's verdict. Pullen now appeals.²

¶2 Appellant alleges five propositions of error on appeal:

- I. THE DISTRICT COURT'S DECISION TO ADMIT INSTANCES OF "BAD ACT" EVIDENCE IN THIS CASE VIOLATED RELEVANT PROVISIONS OF THE OKLAHOMA EVIDENCE CODE AND ULTIMATELY DENIED APPELLANT THE RIGHT TO DUE PROCESS AND A FAIR TRIAL UNDER THE

¹Appellant was tried alternatively on this same count for First Degree Rape, in violation of 21 O.S.2011, § 1111(A)(5). The jury also found Appellant guilty on this alternative charge and recommended a sentence of life imprisonment with the possibility of parole. At the election of the prosecutor, the trial court dismissed the First Degree Rape conviction leaving only the conviction for First Degree Rape by Narcotic or Anesthetic Agent.

²Appellant is required to serve at least 85% of his sentence before becoming eligible for parole. 21 O.S.Supp.2014, § 13.1(10).

FOURTEENTH AMENDMENT TO THE [UNITED STATES]
CONSTITUTION;

- II. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH BY PROOF BEYOND A REASONABLE DOUBT THAT APPELLANT WAS THE PERSON WHO RAPED THE ALLEGED VICTIM IN THIS CASE;
- III. THE DISTRICT COURT IMPROPERLY ADMITTED HEARSAY TESTIMONY WHERE THE ALLEGED VICTIM TOLD HER SISTER THAT SHE HAD BEEN RAPED. UNDER THE FACTS OF THIS CASE, THE TESTIMONY WAS NOT ADMISSIBLE UNDER ANY RECOGNIZED EXCEPTION TO THE HEARSAY PROHIBITION UNDER OKLAHOMA LAW;
- IV. REPEATED EFFORTS BY THE PROSECUTOR IN CLOSING ARGUMENT TO GARNER SYMPATHY FOR THE VICTIM CONSTITUTED MISCONDUCT IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION; and
- V. APPELLANT'S LIFE SENTENCE IS EXCESSIVE AND SHOULD BE MODIFIED.

¶3 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 and Appellant's Judgment and Sentence should be **AFFIRMED**.

1.

¶4 We review a trial court's ruling admitting evidence for an abuse of discretion. *Levering v. State*, 2013 OK CR 19, ¶ 15, 315 P.3d 392, 397. "An abuse of discretion has been defined as a conclusion or judgment that is clearly against the logic and effect of the facts presented." *State v. Hooley*, 2012 OK CR 3, ¶ 4, 269 P.3d 949, 950. Because Appellant did not preserve below his challenge to the propensity evidence on grounds that it was

inadmissible under 12 O.S.2011, § 2413, we review this issue solely for plain error. Appellant agreed during pre-trial proceedings that testimony from M.W., C.S., T.B. and L.P. was admissible under § 2413. At trial, Appellant limited his objection to these witnesses' testimony on grounds that it was inadmissible under 12 O.S.2011, § 2404(B). Appellant has therefore waived all but plain error review concerning the admissibility of the challenged testimony under § 2413. *Romano v. State*, 1995 OK CR 74, ¶ 18, 909 P.2d 92, 109 (“[w]here a defendant makes a specific objection at trial no different objections will be considered on appeal.”).

¶5 Appellant fails to show actual error, let alone plain error, from the admission of the propensity evidence in this case. *Malone v. State*, 2013 OK CR 1, ¶ 41, 293 P.3d 198, 211-12 (discussing three-part plain error test). Reviewing the propensity evidence in light of the factors for admissibility articulated in *Horn v. State*, 2009 OK CR 7, ¶ 40, 204 P.3d 777, 786 and *Johnson v. State*, 2010 OK CR 28, ¶ 6, 250 P.3d 901, 903, the trial court did not abuse its discretion. M.W., C.S., T.B. and L.P. described a similar pattern in which all four women: 1) were in their early 20s; 2) were lured in January or early February 2014 during the nighttime to Appellant's apartment under the guise of meeting their Facebook friend Corey Davis; 3) waited for Corey at Appellant's apartment for a substantial period of time while Corey communicated via text message and online that he would arrive soon; 4) drank shots of vodka at Appellant's suggestion; 5) blacked out for a lengthy period of time after drinking the shots; 6) awoke the next morning in Appellant's

apartment with only Appellant and/or his young son present; and 7) never met Corey Davis. The State also proved by clear and convincing evidence that Appellant sexually assaulted M.W., C.S., T.B. and L.P. while they were blacked out at his apartment. 12 O.S.2011, § 2413(A), (D).

¶6 The above described sexual propensity evidence was relevant to prove both identity and absence of mistake or accident in relation to the charged offense. A disputed issue at trial was the identity of the person who raped K.S. The State had no direct evidence of the perpetrator's identity as K.S. did not see Appellant have sex with her and could not be certain someone else was in the apartment. Also, there was no physical evidence showing Appellant had sex with K.S. The many similarities between the crimes described by the propensity witnesses and the charged offense were highly relevant to show the identity of K.S.'s rapist. All of these similarities demonstrate a highly peculiar method of operation which is so unusual and distinctive as to be like a signature. The unique similarities portrayed in the testimony from M.W., C.S., T.B. and L.P. presented clear and convincing evidence of Appellant's identity as the perpetrator of the charged offense. *Welch v. State*, 2000 OK CR 8, ¶ 11, 2 P.3d 356, 366; *Johnson v. State*, 1985 OK CR 152, ¶ 4, 710 P.2d 119, 120-21.

¶7 The propensity evidence was also relevant to show absence of mistake or accident. At trial, the defense suggested K.S. was rendered unconscious at Appellant's apartment from the interaction of the vodka shots K.S. drank with the many prescription medications she was using. Testimony from the propensity witnesses concerning the pattern in which Appellant lured

them to his apartment and how they passed out after drinking vodka shots at which time Appellant sexually assaulted them tended to bolster the State's theory that K.S.'s blackout was caused not by prescription medications but, instead, GHB/GBL stealthily administered by Appellant.

¶8 The probative value of the propensity evidence far outweighed the danger of unfair prejudice. 12 O.S.2011, § 2403. There was no less prejudicial evidence that could be used as a substitute for the propensity evidence. The trial court's use of the OUJI-CR 9-10A limiting instruction, which emphasized the limited nature of the propensity evidence and correctly told jurors the manner in which they could consider it, also favors admissibility. *See Johnson*, 2010 OK CR 28, ¶ 15, 250 P.3d at 905. Under the total circumstances, the challenged evidence was admissible under 12 O.S.2011, § 2413. The district court therefore did not abuse its discretion in admitting this evidence. Because there is no error, there is no plain error. *Bosse v. State*, 2015 OK CR 14, ¶ 43, 360 P.3d 1203, 1223. Relief is denied for Proposition I.

2.

¶9 "We review sufficiency of the evidence claims in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Davis v. State*, 2011 OK CR 29, ¶ 74, 268 P.3d 86, 111 (citing *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 2787, 61 L. Ed. 2d 560, 571 (1979) and *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04). This analysis requires examination of the entire record. *Young v. State*, 2000

OK CR 17, ¶ 35, 12 P.3d 20, 35. “This Court will accept all reasonable inferences and credibility choices that tend to support the verdict.” *Davis*, 2011 OK CR 29, ¶ 74, 268 P.3d at 111. Taken in the light most favorable to the State, any rational trier of fact could find beyond a reasonable doubt from the record evidence that Appellant had sexual intercourse with K.S. after drugging her with GHB/GBL as a means of forcing the victim to consent. Circumstantial evidence alone may be sufficient to establish the identity of the accused as the person who committed the charged offense. *See, e.g., Hardy v. State*, 1977 OK CR 149, ¶¶ 15-16, 562 P.2d 943, 947; *Mack v. State*, 1973 OK CR 242, ¶ 7, 509 P.2d 1372, 1374; *Fowler v. State*, 1953 OK CR 71, 97 Okl.Cr. 34, 35, 257 P.2d 537, 538. Relief is denied for Proposition II.

3.

¶10 Appellant timely objected to Shandi Clouse’s testimony that K.S. told her she had been raped, thus preserving this issue for appellate review. Again, we review a trial court’s ruling admitting evidence for an abuse of discretion. *See Levering*, 2013 OK CR 19, ¶ 15, 315 P.3d at 397. The record confirms that K.S. made the statement to Shandi about being raped roughly twelve (12) hours after the rape. Title 12 O.S.2011, § 2803(2) provides that a statement “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition” is not excluded by the hearsay rule.

¶11 Upon review, we find that the trial court abused its discretion in admitting this testimony. *Taylor v. State*, 2011 OK CR 8, ¶¶ 29-31, 248 P.3d

362, 372-73. There is no persuasive showing that K.S. was still under the excitement of the startling event or that the statement's nearness to the stimulating event excludes the possibility of premeditation and fabrication. *Id.*, 2011 OK CR 8, ¶ 29, 248 P.3d at 372. The passage of twelve hours provided K.S. an extended opportunity for reflection. It appears that this opportunity for reflection, as well as K.S.'s previous failure to disclose the rape to several people, caused K.S. renewed anguish. Even though K.S.'s statements were spontaneous, and there is no evidence that she told anyone about the rape prior to telling Shandi Clouse, the record shows that the challenged statement was not made under the stress of the startling event, i.e., the rape itself, but events which transpired in the twelve hours afterwards. "The substantial lack of contemporaneity undermines the reliability of the statements here and thereby defeats the rationale for the hearsay exception." *Id.*, 2011 OK CR 8, ¶ 30, 248 P.3d at 373.

¶12 The error arising from the admission of this testimony was nonetheless harmless. K.S. testified in court to virtually the same thing in great detail and was subject to cross-examination. Relief is therefore denied for Proposition III. *Beavers v. State*, 1985 OK CR 146, ¶ 7, 709 P.2d 702, 705; *Martin v. State*, 1973 OK CR 269, ¶ 8, 510 P.2d 1394, 1395; 20 O.S.2011, § 3001.1.

4.

¶13 Both parties have wide latitude in closing argument to argue the evidence and reasonable inferences from it. We will not grant relief for

improper argument unless, viewed in the context of the whole trial, the statements rendered the trial fundamentally unfair, so that the jury's verdicts are unreliable. *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471, 91 L. Ed. 2d 144 (1986); *Bosse*, 2015 OK CR 14, ¶ 75, 360 P.3d at 1232. The trial court sustained objections to two of the prosecutor's arguments now challenged on appeal. The trial court's actions cured any error arising from these comments. *Johnson v. State*, 2013 OK CR 12, ¶ 16, 308 P.3d 1053, 1057; *Hanson v. State*, 2009 OK CR 13, ¶ 19, 206 P.3d 1020, 1028; *Mack v. State*, 2008 OK CR 23, ¶ 9, 188 P.3d 1284, 1289.

¶14 In the third challenged passage, the prosecutor made a sentencing recommendation based on the facts of the case and the harm to the victim. "It is improper for the prosecution to ask jurors to have sympathy for victims." *Bland v. State*, 2000 OK CR 11, ¶ 97, 4 P.3d 702, 728. Review of the record in the present case, however, does not reveal improper sentencing argument designed to invoke sympathy for the victim. Rather, the challenged argument falls within the bounds of the wide latitude of discussion allowed in closing argument. It is therefore not grounds for claiming prosecutorial misconduct. *Carol v. State*, 1988 OK CR 114, ¶ 10, 756 P.2d 614, 617; *Croan v. State*, 1984 OK CR 69, ¶ 10, 682 P.2d 236, 238.

¶15 In summary, the challenged arguments—taken individually or collectively—did not deny Appellant a fundamentally fair trial in violation of due process. Relief for Proposition IV is denied.

5.

¶16 “This Court will not modify a sentence within the statutory range ‘unless, considering all the facts and circumstances, it shocks the conscience.’” *Neloms v. State*, 2012 OK CR 7, ¶ 39, 274 P.3d 161, 171 (quoting *Rea v. State*, 2001 OK CR 28, ¶ 5 n.3, 34 P.3d 148, 149 n.3). The sentence imposed in this case was well within the statutory range of punishment for this crime. See 21 O.S.2011, § 1115. The evidence shows Appellant lured K.S. to his apartment under the guise of meeting a fictitious online friend he created, surreptitiously drugged K.S. with GHB/GBL as a means to force her to submit to sexual intercourse and then proceeded to have sexual intercourse with her while she was blacked out. The evidence shows this was part of a common scheme Appellant utilized against several women for his own sexual gratification. We have found no error in Appellant’s other propositions of error suggesting that the jury was unfairly prejudiced in its sentencing verdict. The only error found—the erroneous admission of hearsay testimony from Shandi Clouse as discussed in Proposition III—was found harmless. There is no indication this error in any way impacted the jury’s sentencing verdict. All things considered, the life sentence imposed in this case is factually substantiated and justified under the facts presented here. The sentence imposed does not shock the conscience. Relief is denied for Proposition V.

DECISION

¶17 The Judgment and Sentence of the district court is **AFFIRMED**. 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 WILLIAM J. MUSSEMAN, DISTRICT JUDGE

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