

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

JERRY LEE McNATT,

*Appellant,*

v.

THE STATE OF OKLAHOMA,

*Appellee.*

) NOT FOR PUBLICATION  
)  
)  
)  
)  
)  
)  
)  
)  
)

Case No. F-2015-1048

**FILED**  
**IN COURT OF CRIMINAL APPEALS**  
**STATE OF OKLAHOMA**

**MAY 25 2017**

**MICHAEL S. RICHIE**  
**CLERK**

**SUMMARY OPINION**

**LEWIS, VICE-PRESIDING JUDGE:**

Appellant, Jerry Lee McNatt, was tried by jury and found guilty of Counts 1 and 2, first degree rape, in violation of 21 O.S.Supp.2008, § 1114(A)(2); and Count 4, forcible sodomy, in violation of 21 O.S.Supp.2007, § 888(B)(2), in the District Court of Muskogee County, Case No. CF-2009-504.<sup>1</sup> The jury sentenced Appellant to twenty-five (25) years imprisonment in each of Counts 1 and 2, and twenty (20) years imprisonment in Count 4. The Honorable Thomas H. Alford, District Judge, pronounced judgment and ordered the sentences served concurrently.<sup>2</sup> Mr. McNatt appeals in the following propositions of error:

1. The trial should not have proceeded because there is no transcript record of the trial judge questioning Appellant to ensure that he understood the consequences of a waiver of the balance of the preliminary hearing;

---

<sup>1</sup> The jury acquitted Appellant of Counts 3 and 5, which respectively charged him with first degree rape by instrumentation and forcible sodomy.

<sup>2</sup>Appellant must serve 85% of the sentences before being eligible for consideration for parole or earned credits. 21 O.S.Supp.2007, § 13.1(10, 15).

2. The State's evidence failed to prove beyond a reasonable doubt that the eighteen-year-old alleged victim lacked the capacity to consent;
3. The trial judge erred by refusing to grant a mistrial;
4. There were several instances of improper commentary on Mr. McNatt's right to remain silent;
5. The testimony about the vaginal scar was more prejudicial than probative;
6. Appellant was deprived of the effective assistance of counsel;
7. Prosecutorial misconduct deprived Appellant of a fair trial;
8. There exists no recorded hearing to show that the trial judge ever conducted a pre-trial hearing to determine the reliability of C.W.N.'s testimony;
9. The trial court erred by failing to instruct the jury properly regarding punishment for rape as the statute was in effect at the time of the alleged events;
10. Cumulative error deprived Appellant of a fair trial.

In Proposition One, Appellant argues the record is inadequate to establish his waiver of further preliminary examination. A district court has no jurisdiction to try the defendant for a felony unless the defendant has had, or waived, a preliminary examination. *Wyatt v. State*, 69 Okl.Cr. 93, 96, 100 P.2d 283 (1940); Okla. Const. Art. II, § 17. After preliminary examination had begun, Appellant entered a written waiver as a result of discussions that failed to produce an agreed disposition in this case. Appellant entered a not guilty plea at district court arraignment, changed counsel, and later filed a motion seeking to reclaim his preliminary hearing, which the trial court denied.

We have long followed the waiver rule that “[i]f the defendant upon arraignment pleads to the merits and enters on the trial, he waives the right to preliminary examination, or, *if one was held*, any irregularities therein.” *Muldrow v. State*, 16 Okl.Cr. 549, 555, 185 P. 332 (Okl.Cr. 1919)(emphasis added). We find Appellant’s written waiver was sufficient, and his demand for further preliminary examination was properly denied. Proposition One requires no relief.

Appellant’s Proposition Two challenges the legal sufficiency of the evidence that he had sexual intercourse and engaged in sodomy with “a person incapable through mental illness or any unsoundness of mind of giving legal consent.” On appellate review, this Court must take the evidence in the light most favorable to the prosecution, and determine whether any rational trier of fact could find the elements of the crimes charged beyond a reasonable doubt. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04 (quoting *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 2787, 61 L.Ed.2d 560 (1979)). The evidence of the victim’s incapacity to consent was legally sufficient. Proposition Two is denied.

Proposition Three argues that the trial court should have granted a mistrial based on the prosecutor’s hand gestures during the testimony of witnesses. The trial court’s ruling on a motion for mistrial is ordinarily reviewable only for abuse of discretion. *Tate v. State*, 1995 OK CR 24, ¶ 20, 896 P.2d 1182, 1188. An abuse of discretion is “a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented.” *C.L.F. v. State*, 1999 OK CR 12, ¶ 5, 989 P.2d 945, 946. The trial court heard evidence and argument on Appellant’s claim that the prosecutor was using hand gestures to influence the testimony of

witnesses, and found no credible evidence to support this claim. There was no abuse of discretion. Proposition Three is without merit.

In Proposition Four, Appellant argues that the prosecutor and defense counsel improperly commented on, and elicited evidence of, his exercise of the privilege against self-incrimination. The cited instances of such testimony either drew no objection, or were actually elicited by defense counsel. Appellant waived all but plain error review by failing to timely object at trial, *Simpson v. State*, 1994 OK CR 40, ¶¶ 2, 23, 876 P.2d 690, 692-93, 698, and must now show that a plain or obvious error (deviation from an established legal rule) affected the outcome of the proceeding. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. We will correct plain error only if it seriously affects the fairness, integrity or public reputation of the proceeding. *Simpson*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701. Moreover, reversal cannot be predicated on error invited by the defense. *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 73, 241 P.3d 214, 237.

The Fifth Amendment guarantees the right to remain silent at trial, and prevents the prosecution from commenting on the exercise of this right. *Griffin v. California*, 380 U.S. 609, 614, 85 S.Ct. 1229, 1232-33, 14 L.Ed.2d 106 (1965). Appellant testified at his trial. Further, a suspect's pre-arrest, pre-*Miranda* silence in response to an accusation involves no compulsion in violation of the Fifth Amendment. *Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980). We find that neither the brief mention (in the prosecution's case-in-chief) that Appellant retained a lawyer and declined an investigator's request for an interview about the allegations, nor defense counsel's subsequent inquiry along

these lines, violated Appellant's Fifth Amendment rights. *Cooper v. State*, 1983 OK CR 154, ¶ 16, 671 P.2d 1168, 1174 (holding that Fifth Amendment is not violated by evidence that a person, not in custody or under indictment, remained silent in the face of criminal accusations). Proposition Four is without merit.

In Proposition Five, Appellant argues the admission of testimony about a scar on the victim's hymen was reversible error. Appellant failed to timely object and waived all but plain error, as defined above. The sexual assault nurse examiner testified that during the examination, she observed a small scar on the victim's hymen consistent with the reported acts of intercourse. This evidence was relevant to the element of penetration, and its relevance was not substantially outweighed by the danger of prejudice or other countervailing statutory factors. 12 O.S. 1981, § 2401- 2403. Admission of this evidence involved no plain or obvious legal error. Proposition Five is denied.

In Proposition Six, Appellant alleges ineffective assistance in counsel's failure to object to the testimony about his engagement of counsel and refusal to be interviewed by an investigator; and defense counsel's additional questions concerning these facts, as discussed in connection with Proposition Four. To prevail, Appellant must prove that counsel's performance was constitutionally deficient, and that it deprived him of a fair trial with a reliable result. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064. In our discussion of Proposition Four, we found no error in the admission of this evidence, either in the State's case or during inquiry by the defense. Necessarily then, counsel's failure to object to the evidence, and his own further inquiry along these lines for tactical

reasons, were neither unreasonably deficient nor prejudicial to the defense. *Phillips v. State*, 1999 OK CR 38, ¶ 104, 989 P.2d 1017, 1044. Proposition Six is therefore denied.

Proposition Seven argues that prosecutorial conduct in closing argument requires reversal. All but one of the challenged arguments met no objection at trial, waiving all but plain error, as defined above. Relief will be granted for prosecutorial misconduct only where it effectively deprives the defendant of a fair trial or sentencing. *Cuesta-Rodriguez*, 2010 OK CR 23, ¶ 96, 241 P.3d at 243. We evaluate the challenged conduct of the prosecutor within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence and corresponding arguments of defense counsel. *Hanson v. State*, 2009 OK CR 13, ¶ 18, 206 P.3d 1020, 1028. Viewing the challenged comments both individually and cumulatively in proper context, we find no plain or obvious error. Proposition Seven is denied.

In Proposition Eight, Appellant argues, for the first time on appeal, that the trial court erred when it failed to conduct an *in camera* hearing on the reliability of the victim's trial testimony. Counsel cites 12 O.S.2011, § 2803.1, which governs the admissibility of certain hearsay statements by children under 13 or incapacitated adults. Appellant sought no reliability hearing in the trial court, waiving all but plain error, as defined above. Appellant's defense at trial was to *deny* that the victim was incapacitated, yet he now insists that her *in-court* testimony required a pre-trial reliability hearing ordinarily reserved only for hearsay

statements by incapacitated persons and young children. Reviewing only for plain error, Proposition Eight is without merit.

Proposition Nine challenges the range of punishment for rape contained in the trial court's instructions. We review only for plain error, as no objection was entered to these instructions at trial. The crimes were committed between November 1, 2008 and April 30, 2009, when HB 1760, Okla. Sess. Laws. 2007, Ch. 261, § 18, later codified at 21 O.S.Supp.2008, § 1115, provided that first degree rape is punishable by death, imprisonment for not less than five (5) years, life, or life without parole. This amendment became effective November 1, 2007. The trial court's instructions told jurors that first degree rape was punishable by imprisonment for not less than five (5) years, life, or life without parole. There is no plain or obvious error. Proposition Nine is therefore denied.

Proposition Ten argues that cumulative error requires relief. We found no error in the previous propositions. Where there is no error, no error will accumulate. *Parker v. State*, 2009 OK CR 23, ¶ 28, 216 P.3d 841, 849. Proposition Ten requires no relief.

### **DECISION**

The Judgment and Sentence of the District Court of Muskogee County is **AFFIRMED**. Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App. (2017), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF MUSKOGEE COUNTY  
HONORABLE THOMAS H. ALFORD, DISTRICT JUDGE**

**APPEARANCES AT TRIAL**

LOWELL HOWE  
436 COURT STREET, STE. C  
MUSKOGEE, OK 74401  
ATTORNEY FOR DEFENDANT

NIKKI BAKER  
ASST. DISTRICT ATTORNEY  
MUSKOGEE COUNTY COURTHOUSE  
MUSKOGEE, OK 74401  
ATTORNEY FOR STATE

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

**APPEARANCES ON APPEAL**

LISBETH L. MCCARTY  
P.O. BOX 926  
NORMAN, OK 73070-0926  
ATTORNEY FOR APPELLANT

E. SCOTT PRUITT  
ATTORNEY GENERAL  
JENNIFER L. CRABB  
ASSISTANT ATTORNEY GENERAL  
313 N.E. 21ST ST.  
OKLAHOMA CITY, OK 73105  
ATTORNEYS FOR APPELLEE