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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TUCKER DLAYNE FREEMAN, Appellant, v. STATE OF OKLAHOMA Appellee.	)	**NOT FOR PUBLICATION** Case No. F-2019-738

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
FEB - 4 2021
JOHN D. HADDEN
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SUMMARY OPINION

LUMPKIN, JUDGE:

Appellant Tucker Dlayne Freeman was tried and convicted of four counts of First Degree Rape (Counts I-IV) (21 O.S.Supp.2015, § 1111 and 21 O.S.2011, § 1114); Aggravated Assault and Battery (Count V) (21 O.S.2011, § 646); First Degree Burglary (Count VI) (21 O.S.2011, § 1431); Assault While Masked (Count VII) (21 O.S.2011, § 1703); and Kidnapping (Count VIII) (21 O.S.Supp.2012, § 741), in the District Court of Oklahoma County, Case No. CF-2017-4654. The jury recommended as punishment imprisonment for life in each of Counts I-IV; five (5) years in prison and a $500.00 fine in Count V; and twenty (20) years in prison in each of Counts VI-VIII, with a $500.00 fine in Count VII. The trial court sentenced accordingly

ordering the sentences in Counts I-V to be served consecutively and the sentences in Counts VI-VIII to be served concurrently, with the sentences in Counts VI-VIII to run concurrently to Counts I-V.[1] It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of his appeal:

I. Appellant suffered double punishment under 21 O.S.Supp.2019, § 11 because the conviction of Aggravated Assault and Battery (Count 5) was part of the same criminal transaction as Assault While Masked (Count 7).

II. There was insufficient evidence to support beyond a reasonable doubt that charge of Aggravated Assault and Battery (Count 5).

III. Appellant suffered double punishment under 21 O.S.Supp.2019 § 11 because the convictions of four counts of Rape in the First Degree as they were all based on the same criminal transaction.

IV. It was reversible error for the prosecutor to elicit evidence of Appellant's post-arrest silence, in violation of the Fifth Amendment.

V. Irrelevant and prejudicial evidence deprived Appellant of a fair trial.

VI. Prosecutorial misconduct robbed Appellant of a fair trial when the prosecutor exhibited personal

[1] Appellant must serve 85% of his sentence in each of Counts I-IV and Count VI becoming eligible for consideration for parole. 21 O.S.2011, § 13.1.

disdain for the defendant and introduced unwarranted attacks on his character.

VII. The accumulation of error in this case deprived Appellant of the due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article II, § 7 of the Oklahoma Constitution.

After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we find that under the law and the evidence no relief is warranted.

In Proposition I, Appellant argues the trial court erred in failing to grant his motion to dismiss either Count V or Count VII on the grounds of multiple punishment. Appellant argued before the trial court, as he does now on appeal, that Count V, Aggravated Assault and Battery, and Count VII, Assault While Masked, constitute a single crime which cannot be prosecuted and punished as two separate crimes under 21 O.S.2011, § 11. As Appellant's objection was presented and ruled on by the trial court, our review on appeal is for an abuse of discretion. *Sanders v. State,* 2015 OK CR 11, ¶ 4, 358 P.3d 280, 284. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law

pertaining to the matter at issue or a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *Id.*

In *Sanders*, 2015 OK CR 11, ¶¶ 5-6, 358 P.3d at 284 this Court said:

> Title 21 O.S.2011, § 11(A) governs multiple punishments for a single criminal act. Section 11 provides in relevant part that:
>
> [A]n act or omission which is made punishable in different ways by different provisions of this title may be punished under any of such provisions, ... but in no case can a criminal act or omission be punished under more than one section of law; and an acquittal or conviction and sentence under one section of law, bars the prosecution for the same act or omission under any other section of law.
>
> The proper analysis of a Section 11 claim focuses on the relationship between the crimes. Barnard v. State, 2012 OK CR 15, ¶ 27, 290 P.3d 759, 767; Davis v. State, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126. If the crimes truly arise out of one act, Section 11 prohibits prosecution for more than one crime, absent express legislative intent. Barnard, 2012 OK CR 15, ¶ 27, 290 P.3d at 767. If the offenses at issue are separate and distinct, requiring dissimilar proof, Oklahoma's statutory ban on "double punishment" is not violated. Littlejohn v. State, 2008 OK CR 12, ¶ 16, 181 P.3d 736, 742. Thus, it is first necessary to examine the relationship between the two crimes to determine whether they constitute a single act. Barnard, 2012 OK CR 15, ¶ 27, 290 P.3d at 767.
>
> "[T]he factors to consider in a Section 11 analysis are: 1) the particular facts of each case; 2) whether those facts set out separate

and distinct crimes; and 3) the intent of the Legislature." *Id.* 2015 OK CR 11, ¶ 8, 358 P.3d at 2804.

In Count V, Appellant was charged with Aggravated Assault and Battery pursuant to 21 O.S.2011, § 646. The elements of this offense, as were provided to the jury, are:

> First, an assault and battery;
> Second, upon another person who is aged, decrepit, or incapacitated;
> Third, by [a] person(s) of robust health or strength.

(OUJI-CR 2d 4-24); Instruction No. 19.

In Count VII, Appellant was charged with Assault while Masked pursuant to 21 O.S.2011, § 1303. The elements of this offense, as provided to the jury, are:

> First, assaulted another;
> Second, with a dangerous weapon;
> Third, while masked or in disguise.

(OUJI-CR 2d 5-51); Instruction No. 27.

The evidence showed that A.E. was sound asleep when she was jolted awake by the masked Appellant pressing a chemically soaked rag over her face. A.E. testified that Appellant forcefully pressed the rag over her mouth and nose causing her to struggle to breathe.

At some point, A.E. was able to move and fight back. She struggled with Appellant for what she thought was 10 or 15 minutes. She was able to raise up and eventually stand up. For his part, Appellant attempted to keep the rag over her mouth and nose while getting behind A.E. and trying to get her arms behind her. During the struggle, A.E. bit one of Appellant's gloved hands. With her arms behind her, she tried to pull off the ski mask but succeeded only in scratching Appellant's face. Appellant used his legs and knees to force A.E. down to the ground. He stepped on her bare foot. During this struggle, the curtains on her window were ripped down and her mattress was nearly flipped over. When the exhausted A.E. gave up and went limp, Appellant handcuffed her hands behind her and pushed her onto the bed.

Under these facts, two separate crimes occurred. Appellant's forceful placing of the chemically soaked rag over the sleeping A.E.'s face constituted the crime of Aggravated Assault and Battery. Once A.E. woke up, saw that her assailant wore a mask, and began to fight back, the ensuing struggle with the masked attacker was the commission of the crime of Assault while Masked. The chemically soaked rag – which burned A.E. and rendered her throat, voice, and

lungs nearly useless - being the dangerous weapon required for the Assault while Masked charge. These facts show that A.E. did not merely suffer from one long assault but from two separate and distinct assaults. That the two crimes occurred in rapid succession does negate the fact that separate crimes occurred. *Salyer v. State*, 1988 OK CR 184, ¶ 14, 761 P.2d 890, 893.

In arguing that the two convictions violated Section 11, Appellant directs us to the charging language of the felony information wherein he argues the alleged crimes were both completed once Appellant placed the chemically soaked rag on A.E.'s mouth, causing injury. Appellant asserts the language in the Informations shows the acts were "completed simultaneously, with no temporal separation, and against a single victim."

In the felony Information, Count V reads in pertinent part:

> . . . the crime of Aggravated Assault and Battery was feloniously committed in Oklahoma County, Oklahoma, by Tucker Dlayne Freeman, who was of robust health and strength, willfully and knowingly put a chemical covered rag over the mouth and nose of A.E. who was an incapacitated person, unable to defend herself, with his hands causing injuries to her mouth . . .

The felony Information in Count VII, charging Assault while Masked, reads in pertinent part:

> . . . the crime of Assault while Masked or in Disguise was feloniously committed in Oklahoma County, Oklahoma, by Tucker Dlyane Freeman, who willfully and intentionally assaulted A.E. with a dangerous weapon, specifically an instrument of punishment, a rag soaked in a chemical and handcuffs, by assaulting and raping A.E. while being masked . . .

That the chemically soaked rag is described in both counts does not render the two assaults one crime. Further, neither does the fact that Appellant was masked during both assaults. What sets the crimes apart is the initial assault of the victim while she was asleep or incapacitated, providing for a charge and conviction for Aggravated Assault and Battery. The further assault occurring once A.E. was awake, observed her assailant was masked, and fought back only to be eventually subdued and handcuffed established the Assault while Masked offense.

The last of the *Sanders* factors to consider in a Section 11 analysis is the intent of the Legislature. The language of the two statutes involved here indicates the Legislature's intent to create two distinct crimes. The language of Section 1303 prohibits the commission of an assault, with a dangerous weapon, while the

perpetrator is masked or in disguise. This statute is found in Part VI of Title 21 prohibiting crimes against the public peace. By the language used, the statute is aimed at prohibiting the use of deception or disguise during the commission of a crime. Further, the statute would seem to require that someone, in this case, the victim, see that the perpetrator was masked or in disguise.

Aggravated Assault and Battery as set out in 21 O.S. § 646 is found in the Chapter 20 listing of crimes against the person. This statute includes language specifically prohibiting assaults on the "aged, decrepit, or incapacitated" by "a person of robust health or strength". By its language, this statute is aimed at protecting the most vulnerable and defenseless of victims who are not able to defend themselves. The limitations in Section 646 set it apart from the other types of assault and battery – domestic abuse, assault and battery with a dangerous weapon, assault and battery on a police officer, etc.

The language used by the Legislature in Section 646 and Section 1303 show the Legislature intended to create two distinct crimes. Under the evidence in this case, Appellant committed two assaults – the first perpetrated on the incapacitated (sleeping) victim and the second on the victim who was awake, able to defend herself, and who

observed her assailant was wearing a mask. The evidence shows that Appellant's convictions in Counts V and VII were based on separate and distinct acts for which he can be prosecuted, convicted, and punished. The convictions do not violate the statutory ban on double punishment. This proposition is denied.

In Proposition II, Appellant challenges the sufficiency of the evidence in Count V, Aggravated Assault and Battery. Title 21 O.S. § 646 provides in pertinent part:

> An assault and battery becomes aggravated when committed under any of the following circumstances:
>
> . . .
>
> 2. When committed by a person of robust health or strength upon one who is aged, decrepit, or incapacitated, as defined in Section 641 of this title.

Appellant argues that the elements of this crime were not met as there was no evidence A.E. was "incapacitated". Appellant asserts that when the assailant placed the chemically soaked rag on A.E.'s face, she was not incapacitated. Both Appellant and the State acknowledge that "incapacitated" is not defined in the statute.

Appellant directs us to 22 O.S.2011, § 991a-15, Elderly and Incapacitated Victim's Protection Act. There "incapacitated person" is defined as "any person who is disabled by reason of mental or physical

illness or disability to such extent the person lacks the ability to effectively protect self or property." Appellant argues A.E. does not meet this definition as she suffered none of the listed criteria, and neither Section 991a-15 nor Section 646 refer to someone who is "only restrained in their movement" as being incapacitated. We find the definitions used in the Elderly and Incapacitated Victims Protection Act are not applicable in this case as that act specifically applies to the protection of elderly citizens.

In its response, the State asserts that because Section 646 does not contain a specific statutory definition, we must look to the common ordinary meaning of the term as directed by *Anderson v. State,* 1998 OK CR 67, ¶ 5, 972 P.2d 32, 34.

Merriam-Webster Dictionary, 2016 Edition, sets forth several definitions for the term "incapacitate" including "deprived of capacity or natural power"; "disable", "the quality or state of being incapable especially: lack of physical or intellectual power or of natural or legal qualifications".

The State also directs us to other statutory uses of the word, as recommended by *Anderson.* 1998 OK CR 67, ¶ 6, 972 P.2d at 34. In 2016, the Legislature enacted 21 O.S.Supp.2016, § 112 defining

sexual assault. The statute references "consent" as an element of the crime. In Section 113, the Legislature said in pertinent part:

> Consent cannot be:
>
> 1. Given by an individual who:
>
> a. is asleep or is mentally or physically incapacitated either through the effect of drugs or alcohol or for any other reason, . . .

21 O.S.Supp.2016, § 113.

The dictionary definitions and case law from other jurisdictions cited by the State, are instructive and can help guide our analysis. However, "the rules of statutory construction are well settled. Statutes are to be construed according to the plain and ordinary meaning of their language." *Luna-Gonzales v. State*, 2019 OK CR 11, ¶ 4, 442 P.3d 171, 173. "The fundamental principle of statutory construction is to ascertain and give effect to the intention of the Legislature as expressed in the statute." *Id.* "We look to each part of the statute, to other laws on the same or related subjects, to the statute's apparent purpose, and to the natural or absurd consequences of any particular interpretation." *Lewis v. City of Oklahoma City*, 2016 OK CR 12, ¶ 2, 387 P.3d 899, 900. Statutes are to be interpreted to produce a reasonable result and to promote, rather than to defeat, the general

purpose and policy of the law. *Owens v. State,* 1983 OK CR 85, ¶ 2, 665 P.2d 832, 834.

The reference in the sexual assault statutes to persons asleep or physically incapacitated as unable to give consent provides a guide to the intent of the Legislature's meaning of incapacitated for purposes of the offense of Aggravated Assault and Battery. Understanding the term incapacitated in its normal meaning, we find an incapacitated victim includes a sleeping victim. By specifically describing its victims as "aged, decrepit, or incapacitated", Section 646 addresses those victims who are physically unable or incapable of protecting themselves from harm or whose capacity to resist is substantially impaired. Section 646 is aimed at protecting those individuals who society recognizes as the most vulnerable of victims. A sleeping victim falls into that category. A sleeping victim has little if any chance to protect or defend him or herself, just like an aged or decrepit victim.

In the present case, A.E. was sound asleep when Appellant first placed the chemically soaked rag over her face. Appellant's act of standing over the sleeping victim - unaware of her surroundings, unable to react or protect herself, and incapacitated - and placing the

chemically soaked rag on her face constituted the offense of Aggravated Assault and Battery.

Challenges to the sufficiency of the evidence are reviewed 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 charged beyond a reasonable doubt. *Mitchell v. State*, 2018 OK CR 24, ¶ 11, 424 P.3d 677, 682. In reviewing sufficiency of the evidence claims, this Court does not reweigh conflicting evidence or second-guess the decision of the fact-finder; we accept all reasonable inferences and credibility choices that tend to support the verdict. *Id.*, 2018 OK CR 24, ¶ 11, 424 P.3d at 682. The evidence in this case was sufficient to prove, beyond a reasonable doubt, the commission of the crime of Aggravated Assault and Battery.

In Proposition III, Appellant contends that his convictions for four counts of First Degree Rape violate Section 11, and therefore the multiple counts should be consolidated into one conviction. This objection was raised before the trial court. Therefore, our review on appeal is for an abuse of discretion. *Sanders*, 2015 OK CR 11, ¶ 4, 358 P.3d at 284.

Appellant argues that his "inappropriate sexual conduct" with the victim constituted only a single act as the sexual intercourse occurred in a short period of time, in a small apartment, and against a single victim. He admits there were multiple acts of sexual intercourse, but argues under the circumstances, they constitute a single act of rape.

The analysis used by this Court to determine whether multiple crimes occurred is set forth in Proposition I. The law and evidence in this case shows that the elements of first degree rape were satisfied in each of the four instances. 21 O.S. §§ 1111 & 1114. Each criminal act was separate in time. Appellant forced the victim to have sexual intercourse shortly after handcuffing her and restraining her on the bed. After the first rape, Appellant searched A.E.'s apartment for marijuana. After finding the marijuana, he raped her a second time, followed by a "smoke break" to roll a marijuana cigarette on her back and smoke it. He then searched her apartment for cash before raping her a third time. Afterwards, using a pillow sham he had put over her head, he took time to wipe her back, after he ejaculated on her, and clean himself. After a few minutes, Appellant raped A.E. for a fourth time. After the first two rapes had been vaginal, the third and fourth

rapes were either vaginal and anal or only vaginal. (A.E.'s testimony regarding the third and fourth rapes was inconsistent on this point). The evidence showed there was a sufficient break between each act of intercourse. After each act of intercourse and subsequent action, Appellant clearly formed the intent to rape/assault A.E. an additional time. Each act of forceful intercourse constituted a separate act of rape.

Contrary to Appellant's argument, this Court has often found separate sexual acts constitute separate offenses even where they occur close in time. *See Doyle v. State,* 1989 OK CR 85, ¶ 18, 785 P.2d 317, 324; *Colbert v. State,* 1986 OK CR 15, ¶¶ 10 & 14, 714 P.2d 209, 211-212.

In the present case, the four crimes did not arise out of the same act. While the acts may have shared some commonality - forced intercourse - they did not arise out of the same course of conduct. There was a temporal break between each act of forced intercourse so that Appellant clearly formed the intent, four separate times, to rape A.E. The evidence shows that Appellant's convictions in Counts I - IV were based on separate and distinct acts for which he can be

prosecuted, convicted, and punished. The convictions do not violate the statutory ban on double punishment. This proposition is denied.

In Proposition IV, Appellant contends the prosecutor improperly cross-examined him on his post-arrest silence, and therefore his convictions should be vacated and his case remanded for a new trial. Appellant specifically refers to questioning by the prosecutor regarding any comments made by Appellant to the investigating detective after he had been asked for a DNA sample. The prosecutor's questioning was met with objections from the defense that were subsequently overruled. Therefore, our review on appeal is for an abuse of discretion. *See Underwood v. State*, 2011 OK CR 12, ¶ 45, 252 P.3d 221, 242.

Generally, the prosecution may not comment on the defendant's post-arrest, post-*Miranda* silence. *Warner v. State*, 2006 OK CR 40, ¶ 179, 144 P.3d 838, 888 (citing *Doyle v. Ohio*, 426 U.S. 610, 617 (1976)). *See also Romano v. State*, 1995 OK CR 74, ¶ 13, 909 P.2d 92, 108; *Kreijanovsky v. State*, 1985 OK CR 120, ¶ 6, 706 P.2d 541, 543. However, in the present case, the challenged inquiry was not about Appellant's post-arrest silence. The testimony showed that Appellant was not in custody for the assault against A.E. at the time authorities asked for a DNA sample. He was not Mirandized nor questioned about

the assault. A search warrant issued for the DNA sample was not served because Appellant voluntarily complied with the request. He was not arrested until several weeks after giving the sample.

Contrary to Appellant's argument, this is not a case of post-arrest silence but one of pre-arrest silence. The Supreme Court has clearly established a distinction between post-arrest and pre-arrest silence. *See Jenkins v. Anderson*, 447 U.S. 231, 238 (1980). In *Bosse v. State*, 2017 OK CR 10, 400 P.3d 834, 868 this Court said:

> The United States Supreme Court distinguishes silence which occurs following the receipt of warnings pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), from silence prior to receipt of such warnings. In Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), the Supreme Court determined that due process prohibited prosecutors from using a criminal suspect's silence, at the time of arrest and after receiving his Miranda warnings, for impeachment purposes at trial. Id., 426 U.S. at 619, 96 S.Ct. at 2245. This result was compelled by the Miranda decision. Id., 426 U.S. at 617, 96 S.Ct. at 2244. In Jenkins v. Anderson, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980), the Supreme Court determined that this rule did not apply to a suspect's pre-arrest silence prior to receipt of Miranda warning's implicit promise that any silence will not be used against him. Id., 447 U.S. at 240, 100 S.Ct. at 2130.

See also Smith v. State, 1982 OK CR 89, ¶ 22, 656 P.2d 277, 282-83.

In the present case, Appellant testified in his own defense. His characterization of the assault on A.E. as rough, consensual sex was

made for the first time at trial. As a general rule, any matter is a proper subject of cross examination which is responsive to testimony given on direct examination or which is material or relevant thereto and which tends to elucidate, modify, explain, contradict or rebut testimony given in chief by the witness or which tests the witnesses' accuracy, memory, veracity or credibility. *Malone v. State*, 2013 OK CR 1, ¶ 45, 293 P.3d 198, 212. "A witness who offers one-sided versions of his own past conduct subjects himself to cross-examination aimed at showing the jury that he is not telling the whole truth about that conduct, and therefore, cannot be trusted to tell the truth about other matters either". *Dodd v. State,* 2004 OK CR 31, ¶ 73, 100 P.3d 1017, 1039-1040.

The scope of cross-examination rests within the sound discretion of the trial court. Only in cases of clear abuse of this discretion, resulting in manifest prejudice, will this Court reverse the trial court's decision. *Mitchell v. State*, 2011 OK CR 26, ¶ 58, 270 P.3d 160, 177. Here, Appellant voluntarily took the witness stand. The prosecutor's attempted impeachment related to Appellant's pre-arrest silence and therefore did not violate the Fifth Amendment. The trial court did not

abuse its discretion in overruling the defense objections and allowing the inquiry.

In Proposition V, Appellant complains about the admission of four (4) pieces of evidence, arguing they were not relevant but more prejudicial than probative. All of the evidence now challenged on appeal was met with contemporaneous objections at trial. Therefore, our review on appeal is for an abuse of discretion. *Wall v. State*, 2020 OK CR 9, ¶ 5, 465 P.3d 227, 231-32.

The law on relevant evidence is well established. Relevant evidence is evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. 12 O.S.2011, § 2401. *See also Postelle v. State*, 2011 OK CR 30, ¶ 31, 267 P.3d 114, 131. "Relevant evidence need not conclusively, or even directly, establish the defendant's guilt; it is admissible if, when taken with other evidence in the case, it tends to establish a material fact in issue." *Postelle*, 2011 OK CR 30, ¶ 31, 267 P.3d at 131. Relevancy and materiality of evidence are matters within the sound discretion of the trial court. *Id.*

Relevant evidence may 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.2011, § 2403. When measuring the relevancy of evidence against its prejudicial effect, the court should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value. *Hammick v. State*, 2019 OK CR 21, ¶ 18, 449 P.3d 1272, 1277.

Appellant first complains about the admission of a sexually explicit phone call between himself and his girlfriend. Appellant was asked about the phone call he made from jail once trial had started, and admitted he had made the call. Appellant argues that the evidence of the phone call was only admitted in order "to paint [him] in a negative light to inflame the passions of the jury against [him]." The State asserts the evidence was appropriate impeachment of Appellant's credibility and veracity.

By taking the witness stand, Appellant squarely "placed his credibility at issue." *Bunn v. State*, 1977 OK CR 52, ¶ 8, 561 P.2d 969, 972. As a general rule, any matter is a proper subject of cross examination which is responsive to testimony given on direct

examination or which is material or relevant thereto and which tends to elucidate, modify, explain, contradict or rebut testimony given in chief by the witness or which tests the witnesses' accuracy, memory, veracity or credibility. *Malone v. State*, 2013 OK CR 1, ¶ 45, 293 P.3d 198, 212. "A witness who offers one-sided versions of his own past conduct subjects himself to cross-examination aimed at showing the jury that he is not telling the whole truth about that conduct, and therefore, cannot be trusted to tell the truth about other matters either". *Dodd,* 2004 OK CR 31, ¶ 73, 100 P.3d at 1039-1040.

Here, Appellant testified that he and the victim had rough consensual sex and that her version of a violent rape was a lie. However, his version of events was raised for the first time at trial and there were many inconsistencies in Appellant's testimony and lapses in his memory. "The prosecutor rightfully spent a great deal of time on cross-examination asking [Appellant] questions which were designed to impeach his credibility and to discredit this direct examination testimony." *Charm v. State,* 1996 OK CR 40, ¶ 54, 924 P.2d 754, 769.

Even if the phone call was not particularly relevant to Appellant's credibility, the trial court did not abuse its discretion in allowing the

prosecutor's inquiry. Evidence of Appellant's guilt was substantial. The jury was instructed on the presumption of innocence and the State's burden of proof. The jury was also instructed that they were to determine the credibility of each witness and the weight to be given their testimony. We presume the jury followed their instructions. *Sanders*, 2015 OK CR 11, ¶ 15, 358 P.3d at 285.

Appellant next objects to the prosecutor's questions regarding Appellant's failure to tell Detective Conley when he took the DNA sample that the sex with A.E. was consensual. This is the same evidence challenged in Proposition IV. In that proposition, Appellant argued admission of his post-arrest silence violated the Fifth Amendment. He now calls the exchange the improper admission of evidence of his pre-arrest silence and argues the evidence was not relevant and was more prejudicial than probative.

In *Farley v. State*, 1986 OK CR 42, 717 P.2d 111, we found that inquiry by the prosecution as to why a defendant did not turn himself in to make a statement to the police is improper noting that "evidence of prearrest silence does not increase the probability that a defendant's testimony is false [and] [t]herefore such evidence is irrelevant under 12 O.S.1981 § 2401." *Id.* 1986 OK CR 42, ¶ 6, 717 P.2d at 113. However

this Court also recognized situations where such comments were proper in "circumstances under which prior silence may be viewed as inconsistent with testimony and hence may be used to impeach the testimony of a witness." *Id.* 1986 OK CR 42, ¶ 4, 717 P.2d at 112. This Court has since upheld comments on pre-arrest silence. *Hogan v. State*, 1994 OK CR 41, ¶ 20, 877 P.2d 1157, 1161.

Unlike *Farley*, this is not a situation where the defendant failed to report to the police station upon learning of an arrest warrant for him. Here, nothing was said about Appellant's arrest at the time of the DNA sample and in fact, he was not arrested until weeks later. By the time Appellant was asked to give a DNA sample, he knew from the victim that she had been raped and that he was a possible suspect. His failure to offer any explanation at the time for the likely result of the DNA test was relevant to evaluating the credibility and veracity of Appellant's trial testimony that the sex was consensual.

The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Aside from the inquiry regarding the pre-arrest silence, it was made clear to the jury that Appellant was raising the defense of consensual sex for the first time at trial. He was thoroughly cross-examined on his version of events.

Further, as he told the jury, he did not come forward with his version of events because he was afraid his words would be twisted. On this record, the trial court did not abuse its discretion in admitting evidence of Appellant's pre-arrest silence.

The next two pieces of evidence we consider jointly as they were both found in Appellant's abandoned car. The car was found in an impound lot approximately two months after the commission of the crimes in this case. As a result of a search warrant, the car was searched approximately one month later. Among the items found in the car were two (2) handwritten journals. There was no signature or any indication of who wrote the journals. Some entries in the journals dated back to 2016 and other entries were not dated. In portions of the journal, the author said he was going to do something bad, that he had messed up his life and had to kill himself, and that he planned to steal a car, go on a road trip and commit holdups.

Also found in the car were receipts for payments to the Oklahoma County Court Clerk's Office, the Oklahoma County District Attorney's Office, and Oklahoma City Municipal Court. Each receipt bore Appellant's name and the amount paid and remaining balance. None

of the receipts made any explicit reference to a prior crime or even indicated the subject of the payments.

Appellant admitted on the witness stand that he wrote the journals but claimed they were written a year or two before the crimes on trial occurred. Whether the journals were written a year before the assault on A.E. or at a more contemporaneous time, the writings were probative of Appellant's state of mind, consciousness of guilt, motive and intent. "Whether it amounts to immediate departure from the crime scene, subsequent failure to subject himself to legal process, or any attempt to otherwise influence the proceedings against him, a defendant's post-offense conduct may be relevant to establish his identity as the perpetrator of the original offense." *Dodd,* 2004 OK CR 31, ¶ 34, 100 P.3d at 1031.

Regarding the receipts, the trial court found they were indicative of Appellant's dominion and control of the car. Testimony had been offered that the car was owned by another person but was given to Appellant to use as his own. The receipts did not reference any prior crimes. While the jury might have inferred Appellant had been in some trouble because he was making payments to municipal court and the District Attorney, the fact that a particular piece of evidence is subject

to varying interpretations does not, by itself, render it inadmissible. *Dodd*, 2004 OK CR 31, ¶ 36, 100 P.3d at 1031. *See also White v. State*, 2019 OK CR 2, ¶ 15, 437 P.3d 1061, 1068. The probative value of both the receipts and the journal entries was not substantially outweighed by the danger of unfair prejudice. The trial court did not abuse its discretion in admitting the evidence. This proposition is denied.

In Proposition VI, Appellant contends he was denied a fair trial as the prosecutors improperly expressed their opinion of guilt as they "openly showed their disdain for the Appellant by a rambling and mocking cross-examination of the Appellant as well as inappropriately disparaging the Appellant throughout closing argument." None of the comments challenged here were met with contemporaneous objections at trial. Therefore, our review on appeal is for plain error. *Tafolla v. State*, 2019 OK CR 15, ¶ 24, 446 P.3d 1248, 1259. Under the standard set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, we determine whether Appellant has shown an actual error, which is plain or obvious, and which affects his substantial rights. *Duclos v. State*, 2017 OK CR 8, ¶ 5, 400 P.3d 781, 783. This Court will only correct plain error if the error seriously affects the fairness, integrity

or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*

Specifically, Appellant refers us to the prosecutor's cross-examination regarding: 1) the exchange between Appellant and the prosecutor addressed in Proposition V regarding the sexually explicit phone call between Appellant and his girlfriend; 2) comments mocking Appellant and questioning his sexual ability; and 3) accusations that Appellant was lazy and his "proclivity for smoking marijuana."

Appellant argues that during closing argument, the prosecutor repeatedly showed his disdain for Appellant by: 1) discussing evidence showing the motive for the attack on the victim; 2) Appellant's use of marijuana and his inability to keep a job; and 3) his belief that he was "sexually desirable".

We evaluate alleged prosecutorial misconduct within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel. *Sanders,* 2015 OK CR 11, ¶ 21, 358 P.3d at 286. We will reverse the judgment or modify the sentence only where grossly improper and unwarranted argument affects a defendant's rights. *Id.* The prosecutor's misconduct

must have so infected the defendant's trial so that it was rendered fundamentally unfair, such that the jury's verdicts should not be relied upon before relief will be granted. *Id.*

Appellant does not cite specific case law to support his argument that each of the comments outlined constituted plain error. Instead, he relies primarily on *Mitchell v. State,* 2006 OK CR 20, 136 P.3d 671. In *Mitchell,* this Court found that the prosecutor had committed "serious and potentially prejudicial misconduct." *Id.* 2006 OK CR 20, ¶ 103, 136 P.3d at 711. The present case is clearly distinguishable from *Mitchell.* Initially, the present case contains no record of the theatrics involved in *Mitchell* and does not present an "emotional crescendo" to the proceedings as in *Mitchell.* Further, unlike the record of objections to the prosecutor's conduct in *Mitchell,* the current record shows no objections were raised at trial.

Generally, prosecutors are to refrain from giving their opinion as to guilt. *Owens v. State,* 2010 OK CR 1, ¶ 17, 229 P.3d 1261, 1267-68. However, when that opinion is reasonably based on the evidence, there is no error. *Id.* It is only error when the prosecutor exhorts the jury to abandon its duty to consider the evidence and convict based

only on the prosecutor's opinion. *Williams v. State*, 2008 OK CR 19, ¶ 107, 188 P.3d 208, 228.

Here, in both the prosecutor's cross-examination of Appellant and his closing argument, he referred to the evidence and specifically, Appellant's own testimony. While some of the prosecutor's comments may have seemed a bit crass and unprofessional, those comments were often based on Appellant's own words, and the reasonable inferences therefrom.

As we said in *Brewer v. State*, 2006 OK CR 16, ¶ 14, 133 P.3d 892, 895 (internal citations omitted):

> Of course, no criminal trial is perfect. "[I]n the heat of argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be prejudicial to the accused." "[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." Id. Plus, we have always held that prosecutors have a broad freedom of speech and range of discussion.

Having thoroughly reviewed Appellant's challenges to the prosecutor's conduct individually and cumulatively, we find the prosecutor's conduct was not so improper or prejudicial so as to have infected the trial so that it was rendered fundamentally unfair.

Appellant was convicted based upon the strength of the evidence against him and not because of any remarks by the prosecutor. He has not shown that his guilty verdicts were the result of the prosecutor's comments or that the comments affected his substantial rights. Any error in the prosecutor's comments was isolated and did not rise to the level of plain error. This proposition is denied.

In Proposition VII, Appellant argues the accumulation of errors denied him a fair trial. This Court has held that a cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by Appellant. *Engles v. State*, 2015 OK CR 17, ¶ 13, 366 P.3d 311, 315; *Williams v. State*, 2001 OK CR 9, ¶ 127, 22 P.3d 702, 732. None of the errors raised by Appellant warrant relief. Therefore, we find no relief is warranted by the accumulation of errors. This proposition is denied.

Accordingly, this appeal is denied.

DECISION

The **JUDGMENT and SENTENCE is AFFIRMED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE RAY C. ELLIOTT, DISTRICT JUDGE

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OPINION BY: LUMPKIN, J.
KUEHN, P.J..: Concur in part/dissent in part
ROWLAND, V.P.J.: Concur
LEWIS, J.: Concur in part/dissent in part
HUDSON, J.: Concur

KUEHN, P.J., CONCUR IN PART/ DISSENT IN PART:

I concur in affirming Appellant's convictions and sentences on Counts 1-4 and 6-8. However, I believe Count 5 (Aggravated Assault and Battery) should be dismissed for insufficient evidence. I cannot agree that the victim was "incapacitated."

The victim testified that she was awakened by Appellant placing a rag, soaked with chemicals, to her face. She instantly realized that she was now a crime victim. She promptly looked at her alarm clock to note the time, knowing that at some point (if she survived), she would be asked when the crime occurred. And she fought back.

The Majority reasons that the victim was "incapacitated" because she was asleep when Appellant first approached her. Interestingly, this novel theory was never advanced at trial. Rather, the prosecutor claimed that the victim was incapacitated by the handcuffs that Appellant (later) used to restrain her.[1] If Appellant's application of chemicals to the victim's face had rendered her

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[1] In closing argument, the prosecutor described Aggravated Assault and Battery this way: "'Upon another person who is incapacitated.' ... Ladies and gentlemen, she said that at the end of that fight he handcuffed her. Handcuffed her. She wasn't going anywhere. ... And when he put his handcuffs on her, that's when we met that second element, because she becomes incapacitated... ."

unconscious (as perhaps he thought it would), then the facts might have supported a finding that the victim was incapacitated. But that is not what happened. The victim in this case was not unconscious during any material part of the assault.[2] I would therefore vacate the conviction on Count 5.

I am authorized to state Judge Lewis joins in this separate writing.

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[2] Aggravated Assault and Battery may be proven two ways – (1) by showing that the perpetrator was of robust health or strength and that the victim was aged, decrepit, or incapacitated, or (2) by showing that the victim suffered great bodily injury. 21 O.S.2011, § 646. Given the many crimes alleged in this case, both theories run into potential double-punishment problems. The State's theory at trial as to Count 5 – that the assault and battery was "aggravated" because Appellant used handcuffs – poses a potential double-punishment problem with the Kidnapping charge (Count 8). And while the victim's injuries might well have supported a finding that she suffered "great bodily injury," that theory appears to overlap with the elements of Assault While Masked (Count 7), where the State's theory that Appellant used a "dangerous weapon" while wearing a mask required the jury to consider the extent of the injuries caused by the chemicals. *See* OUJI-CR 4-23, 4-24, 4-28, 5-51.