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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JASON BRADY SAIN,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

Case No. F-2017-1158

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAR 28 2019

JOHN D. HADDEN,
CLERK

SUMMARY OPINION

LEWIS, PRESIDING JUDGE:

Jason Brady Sain, Appellant, was tried by jury and found guilty of Count 1, first degree rape, in violation of 21 O.S.2011, § 1114(A)(5); Count 2, kidnapping, in violation of 21 O.S.Supp.2012, § 741; and Count 3, domestic abuse, in violation of 21 O.S.Supp.2014, § 644(C); in the District Court of Grady County, Case No. CF-2016-338. The jury found Appellant committed these offenses after former conviction of two (2) or more felonies and sentenced him to life imprisonment in Counts 1 and 3, and twenty (20) years imprisonment in Count 2. The Honorable Kory Kirkland, District Judge, pronounced judgment and ordered the sentences

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FROM COURT OF
CRIMINAL APPEALS

Appendix A

served consecutively.¹ Mr. Sain appeals in the following propositions of error:

1. Prosecutorial misconduct robbed Mr. Sain of a fair trial when the prosecutor disparaged the defense for calling a witness, ridiculed Defendant's theory of the case, and played on the passions and sympathies of the jury;
2. The interrogation tapes were improperly redacted and disclosed evidence of other bad acts to the jury;
3. The expert testimony about the cycle of violence was prejudicial and insinuated bad acts by Mr. Sain that were not in evidence;
4. Mr. Sain's sentence is excessive and should be modified, because two consecutive life sentences and an additional twenty year sentence are excessive and should shock the conscience of the Court;
5. Mr. Sain suffered double punishment under 21 O.S.2011, § 11 because the kidnapping and the rape conviction arose out of one act;
6. There was insufficient evidence of the elements of "seizes or confines" and "with the intent to confine that person against that person's will"; accordingly Mr. Sain's conviction for kidnapping must be reversed and the count dismissed;
7. Mr. Sain was denied his right to present a defense when the trial judge refused to send the jury instruction concerning consent as a defense to kidnapping to the jury;

¹ Appellant must serve 85% of his sentence in Count 1 before being eligible for consideration for parole. 22 O.S.Supp.2015, § 13.1(10).

8. The accumulation of error in this case deprived Appellant of 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.

In Proposition One, Appellant claims prosecutorial misconduct deprived him of a fair trial. The majority of the alleged misconduct was not objected to at trial, and will be reviewed for plain error only. *Nicholson v. State*, 2018 OK CR 10, ¶ 18, 421 P.3d 890, 896-97. To obtain relief, Appellant must now show that a plain or obvious error affected the outcome of the proceeding. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. The Court will then correct plain error only where it seriously affects the fairness, integrity, or public reputation of the proceedings. *Simpson v. State*, 1994 OK CR 40, ¶ 30, 876 P.2d 690, 701. This Court will not grant relief based on prosecutorial misconduct unless the State's misconduct is so flagrant that it rendered the trial or sentences fundamentally unfair. *Nicholson*, 2018 OK CR 10, ¶ 18, 421 P.3d at 896-97.

We agree with the Appellant that a series of comments² in which the prosecutor pointedly criticized the defense for calling

² The prosecutor's closing argument including the following comments:

Appellant's young son as a witness resulted in plain or obvious constitutional error. "The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense." *Washington v Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967). This right is essential to the due process of law in a criminal trial. *Id.*

We recently found plain constitutional error in a prosecutor's argument criticizing the defendant's decision to plead not guilty and stand trial, finding that "a defendant's decision to exercise this constitutionally protected right is a factor which cannot be used against him at trial to influence the jury in their guilt or sentencing determinations." *Barnes v. State*, 2017 OK CR 26, ¶ 10, 408 P. 3d 209, 214.

Not only was [S.S.] forced to see adult things that happened on October 1st, 2016, but he was made to come in here into an adult environment and relive those a year later.

[T]here's a reason that 5-year-olds are not typically drug into a courtroom in adult proceedings.

[Appellant] puts forth this little 5-year-old boy, which I submit to you, ladies and gentlemen, a court of law talking about the rape of your mother by your father is not a place for children, but the defendant -- the child was called to testify.

He's a 5-year-old boy, ladies and gentlemen. This is not the place for him. This is not his -- you know, defendant talked about the arena of truth. This is not the 5-year-old boy's arena.

evidence supporting the convictions, the extremely violent nature of the crimes themselves, and Appellant's record of prior violent and non-violent felony convictions convince us that the prosecutor's comments did not contribute unfairly to either the convictions or the sentences imposed by the jury. Reviewing the remainder of Appellant's allegations of prosecutorial misconduct, we find no additional plain or obvious errors, and no relief is warranted. Proposition One is therefore denied.

In Proposition Two, Appellant argues that the trial court's failure to redact prejudicial information from his recorded statements to police resulted in reversible error. Trial counsel failed to object to these recordings (which were redacted in part) as they were offered in evidence, waiving all but plain error, as defined above. We find no plain or obvious error that affected the outcome of the proceeding in the admission of these statements. Proposition Two is denied.

In Proposition Three, Appellant challenges the trial court's admission of expert testimony about the "Cycle of Violence." Because trial counsel made no contemporaneous objection to this testimony, we review for plain error only, as defined above.

Because this testimony was not plainly or obviously erroneous, Proposition Three is without merit. *Harris v. State*, 2004 OK CR 1, ¶ 39, 84 P.3d 731, 748 (finding expert testimony on the Cycle of Violence was admissible to aid jury's understanding of dynamics of abusive domestic relationships).

In Proposition Four, Appellant claims that his sentence is excessive and should be modified. This Court will not disturb a sentence within statutory limits unless, under the facts and circumstances of the case, it is so excessive as to shock the conscience of the Court. *Pullen v. State*, 2016 OK CR 18, ¶ 16, 387 P.3d 922, 928. Appellant's sentences do not meet that demanding test, and no relief is warranted.

Appellant argues in Proposition Five that his convictions for both rape and kidnapping punish him twice for a single criminal act, in violation of 21 O.S.2011, § 11. We note here that section 11 does not bar the charging and conviction of separate and distinct crimes committed during a continuing course of conduct. Under the governing principles established in *Davis v. State*, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126-127, Appellant's convictions violate neither section 11, nor the constitutional prohibitions against

double jeopardy. See also, *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932). Proposition Five is therefore denied.

Appellant claims in Proposition Six that the State failed to prove the essential elements of kidnapping. We address this claim by viewing the evidence in the light most favorable to the State, and asking whether any rational trier of fact could find the defendant guilty of the charged crime beyond a reasonable doubt. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04. Appellant's conviction for kidnapping is supported by legally sufficient evidence. Proposition Six is denied.

Next, in Proposition Seven, Appellant argues the trial court denied him his right to present a defense when the court refused to allow a jury instruction on consent as a defense to the charge of kidnapping. We review the trial court's rulings on requested instructions for abuse of discretion. *Tucker v. State*, 2016 OK CR 29, ¶ 25, 395 P.3d 1, 8. An abuse of discretion is a clearly erroneous conclusion, contrary to the logic and effect of the facts presented. *Stouffer v. State*, 2006 OK CR 46, ¶ 60, 147 P.3d 245, 263. The trial court's conclusion that the evidence presented did

not fairly raise the question of the victim's consent is not clearly erroneous or contrary to the logic and effect of the facts. Proposition Seven is therefore without merit.

In Proposition Eight, Appellant argues that the accumulation of errors entitles him to reversal or modification. We found constitutional error in the prosecutor's comment abridging the Appellant's right to present witnesses in his defense, but found that error harmless beyond a reasonable doubt. We find no other individually harmful errors, and no accumulation of prejudicial effects. *Barnett v. State*, 2011 OK CR 28, ¶ 34, 263 P.3d 959. Proposition Eight requires no relief.

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. (2019), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**APPEAL FROM THE DISTRICT COURT OF GRADY COUNTY
THE HON. KORY KIRKLAND, DISTRICT JUDGE**

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OPINION BY: LEWIS, P.J.
KUEHN, V.P.J.: Concur
LUMPKIN, P.J.: Concur in Results
HUDSON, J.: Concur
ROWLAND, J.: Concur

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