CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: 5-3-21

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

PRENTISS MORRIS,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2019-464**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, JUDGE:

Appellant, Prentiss Morris, was tried by jury in the District Court of Creek County, Case No. BCF-2018-152, and convicted of Count 1, First Degree Rape, in violation of 21 O.S. Supp. 2017, § 1114, after Former Conviction of a Felony. The jury recommended punishment of twenty years imprisonment and the trial court sentenced him accordingly.[1] From this judgment and sentence, Appellant appeals.

Appellant raises the following propositions of error in this appeal:

I. The trial judge erred by denying the motion to quash the former felony.

[1] Appellant will be required to serve 85% of his sentence before becoming eligible for parole. 21 O.S.Supp.2015, § 13.1. The jury acquitted Appellant of Count 2, First Degree Burglary.

Appendix A

II. The trial judge abused his discretion by improperly removing a juror for cause.

III. Prosecutorial misconduct denied Appellant a fair trial.

IV. The Trial Court [sic] erred by permitting the testimony of the mother of the alleged victim regarding the alleged victim's mental problems.

V. Appellant was denied his right to present a defense.

VI. The testimony of [A.W.] was not credible enough to meet the standard of beyond reasonable doubt; thus the conviction must be reversed.

VII. An evidentiary harpoon by a witness deprived Appellant of a fair trial and due process of law.

VIII. The trial court erred by failing to instruct the jury that Appellant would be required to register as a sex offender.

IX. Evidence of other crimes deprived Appellant of a fair trial.

X. The admission of other crime evidence with no notice of intent to offer such evidence by the Prosecutor was a violation of Appellant's right to a fair trial and Due Process of Law.

XI. Cumulative error deprived Appellant of a fair trial.

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 have determined that under the law and the evidence, Appellant is not entitled to relief.

I.

Appellant argues in his first proposition that the trial court erred by denying his motion to quash. Specifically, he contends he should have received the benefit of a change in the law regarding use of a prior drug possession conviction to enhance punishment in a subsequent case. Appellant's argument is patently meritless.

Review of the trial court's ruling on a motion to quash is for an abuse of discretion. *State v. Farthing*, 2014 OK CR 4, ¶ 4, 328 P.3d 1208, 1209. An abuse of discretion is a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented or, stated otherwise, any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170 (internal citation and quotation marks omitted).

"[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Products*, 511 U.S.

244, 265 (1994). "Thus, the general common law rule of statutory construction is that statutes and amendments are to be construed to operate only prospectively unless the legislature clearly expresses an intent to the contrary." *State v. Hurt*, 2014 OK CR 17, ¶ 8, 340 P.3d 7, 9. The record reveals that Appellant's crime occurred on June 14, 2018, long before the change in 21 O.S.Supp.2018, § 51.1 took effect. As shown in Section 51.1, the statute expresses no legislative intent that its provisions operate retroactively. Accordingly, there was no abuse of discretion in the trial court's denial of the motion to quash. Proposition is denied.

II.

In his second proposition, Appellant claims the trial court improperly excused juror L.S. for cause. The record reflects that the prosecutor exercised a peremptory challenge to juror L.S. and the trial court did not remove the juror for cause. Appellant does not challenge the prosecutor's removal of L.S. by peremptory challenge. Thus, he fails to show any error. Proposition II is denied.

III.

In Proposition III, Appellant alleges numerous instances of prosecutorial misconduct deprived him of a fair trial. Specifically, he argues the prosecutor made prejudicial statements during *voir dire*, improperly invoked sympathy for A.W., engaged in improper questioning, gave her personal opinion of Appellant's guilt, made an improper societal alarm argument and improperly vouched for A.W. Where the defense objected to these statements, review is for an abuse of discretion. *Washington v. State*, 1999 OK CR 22, ¶ 21, 989 P.2d 960, 970. An abuse of discretion is a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented or, stated otherwise, any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue. *Neloms*, 2012 OK CR 7, ¶ 35, 274 P.3d at 170 (internal citation and quotation marks omitted).

[redacted] review is for plain error. *Wall v. State*, 2020 OK CR 9, ¶ 31, 465 P.3d 227, 235. As set forth in *Simpson v. State*, 1994 OK CR 40, ¶¶ 2, 11, 23, 30, 876 P.2d 690, 694-95, 698-701, we determine whether Appellant has shown an actual error, which is plain or obvious, and which affects his or her

substantial rights. 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 [redacted] *Id.*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701.

This Court reviews claims of 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." *Mitchell v. State*, 2010 OK CR 14, ¶ 97, 235 P.3d 640, 661. "Relief will be granted on claims of prosecutorial misconduct only where the prosecutor committed misconduct that so infected the defendant's trial that it was rendered fundamentally unfair, such that the jury's verdicts [redacted]" *Sanders v. State*, 2015 OK CR 11, ¶ 21, 358 P.3d 280, 286. Moreover, prosecutors have wide latitude in closing argument to discuss the evidence and reasonable inferences therefrom. *Hanson v. State*, 2003 OK CR 12, ¶ 13, 72 P.3d 40, 49.

Allegation regarding *voir dire*. The record reflects that the trial court sustained defense counsel's objections to two comments made

by the prosecutor and admonished the jury after one of them. "[W]here the objections were sustained, any error was cured." *Bever v. State*, 2020 OK CR 13, ¶ 61, 467 P.3d 693, 705. We find any error was cured by the trial court's action in sustaining the defense objections.

Allegations regarding sympathy. In three of the complained of instances, defense counsel objected, the trial court sustained the objection and admonished the jury to disregard the instances. Any error occurring due to these occurrences was cured. *Bever*, 2020 OK CR 13, ¶ 61, 467 P.3d at 705. "We find that the admonishment to the jury was sufficient to cure any error and no plain error occurred." *Jones v. State*, 2006 OK CR 5, ¶ 46, 128 P.3d 521, 540.

Appellant complains that the prosecutor's use of the word "rapist" during opening statement invoked sympathy for A.W. Defense counsel objected that the term was argumentative and inflammatory. There was nothing objectionable about use of the word rapist. The prosecutor used it at the conclusion of her opening statement, having summarized the evidence the State would present to prove Appellant committed the charged crimes. *See Hammon v.*

State, 1995 OK CR 33, ¶ 87, 898 P.2d 1287, 1306 ("purpose of opening statement is to apprise the jury of the evidence the attorneys expect to present during trial."). There was no error and no abuse of the trial court's discretion in overruling the defense objection.

Appellant also contends error occurred from the prosecutor's question to Officer Jamill Wenzel if, in her training and experience, A.W.'s interview was "consistent with someone who'd been traumatized and was retelling their story?" The officer answered affirmatively. Appellant's defense was that he and A.W. had consensual sex and she was making up her allegations because Appellant was seeing other women. It is not improper for the State to rebut a claim of the defense. *See Bosse v. State,* 2015 OK CR 14, ¶ 78, 360 P.3d 1203, 1233-34 (the prosecutor properly argued to the jury that the [redacted] by the evidence and no burden shifting occurred). The prosecution may also properly respond to the defense theory or to the defense characterization of the State's case. *Taylor v. State,* 2011 OK CR 8, ¶ 56, 248 P.3d 362, 379; *Browning v. State,* 2006 OK CR 8, ¶ 43, 134 P.3d 816, 841. No error resulted from this question and answer.

Appellant argues certain statements of the State during closing argument about A.W.'s physical and mental condition evoked sympathy for A.W. That A.W. was [redacted] was an inescapable fact. The evidence showed Appellant took advantage A.W.'s disabilities. It certainly was not error for the State to remind the jury of A.W.'s limitations. "Certain facts simply cannot [redacted] on the basis that they also evoke sympathy." *Cole v. State*, 2007 OK CR 27, ¶ 54, 164 P.3d 1089, 1101. No error occurred from these statements.

Allegations regarding societal alarm. In one instance, defense counsel objected and the trial court sustained the objection and admonished the jury. As set forth above, where an objection is sustained, any error is cured. *Bever*, 2020 OK CR 13, ¶ 61, 467 P.3d at 705; *Jones*, 2006 OK CR 5, ¶ 46, 128 P.3d at 540.

Next, Appellant complains of the prosecutor's description of his consent defense contained in a hypothetical scenario where a woman is raped and identifies the man who raped her. The prosecutor asked the jury what defense the man would put forth. Defense counsel

objected and the trial court overruled the objection. The prosecutor continued, telling the jury that the consent defense explains the physical evidence. "The prohibited 'societal alarm' argument is one that mentions crimes committed by other persons and not attributable to the defendant on trial such as arguments that the crime rate is increasing." [redacted] 2002 OK CR 40, ¶ 151, 60 P.3d 4, 33. This was not a societal alarm argument as the prosecutor was not speaking of actual crimes committed by other persons but was offering a similar scenario to that of the instant case in order to explain the logic of the consent defense. There was no error in this argument and no abuse of the trial court's discretion in overruling the defense objection.

Allegations that the prosecutor gave her personal opinions of appellant's guilt during closing argument. The prosecutor recounted Appellant's testimony about his long criminal history. She then told the jury "it seemed to me that [the defendant] was proud of that lifestyle that he's chosen for himself" and that he had chosen to disregard law. Given his detailed testimony about his history and drug use, as well as his [redacted], this was a reasonable

inference for the prosecutor to make. *Cf.* [redacted] OK CR 15, ¶ 30, 446 P.3d 1248, 1260 ("Here, taken in context, the prosecutors did not improperly state their personal opinion of guilt, but permissibly argued that the evidence supported a finding of guilt.").

Appellant next argues the prosecutor mocked the defense when she stated to the jury, after reminding the jury of his changed testimony about how long he had been in a relationship with A.W., that Appellant was just "making stuff up." Given Appellant's differing statements about the duration of his relationship with A.W., this was certainly a reasonable inference. *See* [redacted], 2017 OK CR 10, ¶ 82, 400 P.3d 834, 863 ("Both parties have wide latitude in closing argument to argue the evidence and reasonable inferences from it."). Appellant maintains the prosecutor erred in arguing to the jury that he gets violent when he needs money "I guess" for drugs. Again, this was a reasonable inference based upon [redacted] witnesses' testimony about Appellant's drug use and his behaviors in seeking money. *Bosse*, [redacted] OK CR 10, ¶ 82, 400 P.3d at 863. No error resulted from these comments.

Allegations of vouching. Appellant lastly maintains the prosecutor vouched for A.W. Appellant complains of the prosecutor's statements to the jury that she "believe[s] that the evidence indicates" A.W. testified consistently with her recorded interview. This statement came during the prosecutor's discussion of the element of force or violence and how the evidence presented supported proof of the element. "'Vouching" occurs when an attorney or witness indicates a personal belief in a witness's [redacted] explicit personal assurances of the witness's veracity or by implicitly indicating that information not presented to the jury supports the witness's testimony." *Bench v. State*, 2018 OK CR 31, ¶ 90, 431 P.3d 929, 957, *cert. denied*, 140 S. Ct. 56 (2019). Clearly the prosecutor was not telling the jury her personal opinion of A.W.'s veracity, but was directing th[redacted] at the recorded statements and compare them to A.W.'s testimony in order to reach its own decision. There was no error in this statement. *Cf. Howell v. State*, 2006 OK CR 28, ¶ 16, 138 P.3d 549, 557 (it is appropriate for the State to refer to evidence admitted at trial during closing argument and to argue to

the jury how the evidence supports the State's burden of proof). Proposition III is denied.

IV.

In Proposition IV, Appellant alleges A.W.'s mother, Eva Frazier, gave improper testimony regarding A.W.'s disabilities. He argues this evidence was not relevant to any issue in the case. We review this properly preserved claim for an abuse of discretion as set forth in Proposition I. [redacted] 2013 OK CR 19, ¶ 15, 315 P.3d 392, 397.

"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." *Postelle v. State*, 2011 OK CR 30 ¶ 31, 267 P.3d 114, 131; 12 O.S.2001, § 2401. "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." [redacted] ¶ 40, 248 P.3d at 375–76. "Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion

an easy target for Appellant and its probative value is not substantially outweighed by its prejudicial effect. The trial court properly [redacted] A.W.'s mental and physical state. Accordingly, there was no abuse of discretion in the admission of this evidence. Proposition IV is denied.

V.

Appellant contends in his fifth proposition that he was denied his right to present a defense. He specifically argues the trial court erroneously excluded evidence that A.W. told someone she previously engaged in sexual intercourse with Appellant. Review of this properly preserved claim is for an abuse of discretion as set forth in Proposition I. *Dill v. State*, 2005 OK CR 20, ¶ 5, 122 P.3d 866, 868.

Appellant sought to put on testimony of Alicia Perry that A.W. told her A.W. had slept with Appellant previously. He characterizes this testimony as impeachment evidence not offered to prove its truth, but to show A.W.'s rape allegation was false. The State objected that any such testimony was [redacted] the evidentiary requirements of the Rape Shield Statute. The [redacted] the evidence.

Pursuant to Oklahoma's "Rape Shield" statute, 12 O.S.2011, § 2412, inquiry at trial into certain aspects of a victim's sexual conduct is prohibited. That statute provides pertinently as follows:

> A. In a criminal case in which a person is accused of a sexual offense against another person, the following is not admissible:
>
> 1. Evidence of reputation or opinion regarding other sexual behavior of a victim or the sexual offense alleged.
>
> 2. Evidence of specific instances of sexual behavior of an alleged victim with persons other than the accused offered on the issue of whether the alleged victim consented to the sexual behavior with respect to the sexual offense alleged.
>
> B. The provisions of subsection A of this section do not require the exclusion of evidence of:
>
> 1. Specific instances of sexual behavior if offered for a purpose other than the issue of consent, including proof of the source of semen, pregnancy, disease or injury;
>
> 2. False allegations of sexual offenses;

As shown above, the statute allows **evidence** of specific instances of sexual behavior if offered for a purpose other than the issue of consent and evidence of false allegations of sexual offenses. Appellant argues Perry's testimony was offered to show A.W.'s rape allegation was false. Perry's testimony was not evidence of specific instances of sexual behavior, nor was it evidence of [redacted]

offenses. Perry never saw Appellant and A.W. having sex, her proposed testimony was simply that A.W. told her they did. Such testimony had nothing to do with false allegations of a sexual offense. The testimony is nothing but hearsay, *i.e.*, an out of court statement offered for the truth of the matter asserted [redacted]. Finally, Appellant testified fully and completely that his sexual encounter with A.W. was consensual. He presented his consent defense to the jury. The trial court did not abuse its discretion in excluding Perry's testimony. Proposition V is denied.

VI.

In Proposition VI, Appellant alleges his conviction is not supported by sufficient evidence. Specifically, he argues A.W.'s testimony was so inconsistent as to be incredible. This Court follows the standard for the determination of the sufficiency of the evidence which the United States Supreme Court set forth in [redacted] 443 U.S. 307, 319 (1979); *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04. Under this test, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319; *Easlick*, 2004 OK CR 21, ¶ 5, 90 P.3d at 558-59; *Spuehler*, 1985 OK CR 132, ¶ 7, 709 P.2d at 203-04. A reviewing court must accept all reasons, inferences, and credibility choices that tend to support the verdict. *Taylor*, 2011 OK CR 8, ¶ 13, 248 P.3d at 368. "The credibility of witnesses and the weight and consideration to be given to their testimony are within the exclusive province of the trier of facts and the trier of facts may believe the evidence of a single witness on a question and disbelieve several others testifying to the contrary." *Davis v. State*, 2011 OK CR 29, ¶ 83, 268 P.3d 86, 112-13.

The State had to prove the following elements of first degree rape beyond a reasonable doubt:

> First, sexual intercourse;
>
> Second, with a person who was not the spouse of the defendant;
>
> [redacted]where force/violence was used against the victim or where force/violence was threatened against the victim and the defendant had the apparent power to carry out the threat of force/violence.

Instruction No. 4-120, OUJI-CR (2d). Although Appellant points to portions of A.W.'s testimony that he maintains are inconsistent and argues the State failed to prove each element of first degree rape beyond a reasonable doubt, he fails to identify [redacted] elements of the crime were not proven sufficiently.

Appellant's DNA was found on a swab from inside A.W.'s vagina. A.W. testified Appellant forced his way into her apartment, demanded money and when she did not give him money, grabbed her by the hair and forced her into the bedroom. Thereafter, he made her disrobe, stuffed something in her mouth, put her face in a pillow, threatened her with harm and raped her. Any inconsistencies in A.W.'s testimony, such as did she remove her bra, were insignificant with regard to proof of the elements of rape. Appellant testified and the jury saw him and heard his testimony. That the jury disbelieved Appellant and believed A.W. regarding the rape is completely appropriate. *Davis,* 2011 OK CR 29, ¶ 83, 268 P.3d at 112-13. Appellant's conviction is supported by [redacted] Proposition VI is denied.

VII.

Appellant complains in this proposition that A.W. launched what he terms an evidentiary harpoon when she testified he was a drug user. Review of this claim is for plain error as set forth in Proposition III since Appellant objected to the testimony at trial on a different basis than that of evidentiary harpoon which he now asserts. *Soriano v. State*, 2011 OK CR 9, ¶ 41, 248 P.3d 381, 398.

During cross-examination of A.W., defense counsel asked her about her relationship with Appellant. A.W. responded that she first discovered Appellant was married, and then she found out "that he's into drugs, hard core drugs." Defense counsel objected to A.W.'s statement as being "nonresponsive and inflammatory" and stated he thought to preserve the record he had to move for a mistrial. It does not appear that he in fact moved for a mistrial. The trial court admonished the jury to disregard A.W.'s statement and instructed A.W. to listen carefully to the questions.

The complained of testimony was not an evidentiary harpoon as it was spontaneously given by a lay witness and did not prejudice Appellant. He testified at length about [redacted]se. Furthermore, the trial court's prompt action in admonishing the jury cured any

registration. Appellant offers nothing which persuades [redacted] decision in *Reed*. Proposition VIII should be denied.

IX.

In this proposition, Appellant argues the admission of so-called other crimes evidence deprived him of a fair trial. His argument centers on three instances. We review this claim for plain error as set forth in Proposition III since there was no objection at trial to the admission of the complained of evidence. *White v. State*, 2019 OK CR 2, ¶ 15, 437 P.3d 1061, 1067-68.

Generally, evidence of a defendant's prior bad acts or other crimes is inadmissible to show that he or she acted in conformity therewith on a particular occasion. 12 O.S.2011, § 2404(A). In *Kirkwood v. State*, 2018 OK CR 9, ¶ 5, 421 P.3d 314, 316, this Court held as follows regarding admission of evidence pursuant to the exceptions found in Section 2404(B):

> Evidence of other crimes must be (a) probative of a disputed issue of the charged crime; (b) there must be a visible connection between the crimes; (c) the evidence must be necessary to support the State's burden of proof; (d) proof of the evidence must be clear and convincing; (e) the probative value of the evidence must outweigh its prejudicial effect; and (f) the trial court must instruct

jurors on the limited use of the testimony at the time it is given and during final instructions.

When weighing the probative value of this evidence against its prejudicial effect, the evidence is given "its maximum probative force and minimum reasonable prejudicial value." [redacted] OK CR 23, ¶ 9, 450 P.3d 969, 972.

Appellant first complains that Officer Michael Randall referenced a prior crime when he testified he spoke with Appellant at the police station "in reference to an unrelated investigation we had going on." Randall also indicated he had prior history with Appellant. Appellant contends this testimony was other crimes evidence because it implied that he was under suspicion in the unrelated investigation. Contrary to Appellant's contention, this evidence served to explain how Randall came to obtain Appellant's statement. *Cf. Sanders*, 2015 OK CR 11, ¶ 28, 358 P.3d at 287(officer's testimony about the appellant's contacts with the victim's house was not other crimes evidence but evidence of why police served the appellant's arrest warrant at that location). The evidence implied only that Appellant had prior encounters with the police, not that he committed prior crimes. There is nothing criminal about speaking

with police or assisting them with their investigations. Appellant's argument to the contrary is nothing more than speculation. This testimony was properly admitted.

Appellant next considers other crimes evidence A.W.'s testimony that Appellant threatened to kill her if she told anyone that he raped her, that Appellant sometimes would take her money to get beer but would not return to her apartment and that on the night of the rape, Appellant demanded money from her. This testimony is part of the *res gestae* of the crime charged. "Evidence is considered part of the *res gestae* when (1) it is so closely connected to the charged offense as to form part of the entire transaction; (2) it is necessary to give the jury a complete understanding of the crime; or (3) it is central to the chain of events." *Tafolla*, 2019 OK CR 15, ¶ 16, 446 P.3d at 1257, citing *Jackson v. State*, 2006 OK CR 45, ¶ 28, 146 P.3d 1149, 1160. "*Res gestae* are those things, events, and circumstances incidental to and surrounding a larger event that help explain it." [redacted] 2002 OK CR 40, ¶ 63, 60 P.3d 4, 22. Clearly, A.W.'s relationship with Appellant was closely connected to his rape of her and showed how he came to know her and to have access to her. In this regard, A.W.'s

crimes evidence. Therefore, no notice was required. Proposition X is denied.

XI.

Appellant lastly argues the accumulation of error deprived him of a fair trial. "A cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by Appellant." *Fuston v. State*, 2020 OK CR 4, ¶ 126, 470 P.3d 306, 333. As we have found no error in the preceding propositions, Appellant is not entitled to relief on a cumulative error basis. Proposition XI is denied.

DECISION

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. (2020), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CREEK COUNTY
THE HONORABLE KELLY HAKE, DISTRICT JUDGE

APPEARANCES AT TRIAL	**APPEARANCES ON APPEAL**
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