

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

WILLIS DAVID MCPHERSON,)
)
 Appellant,)
)
 v.)
)
 STATE OF OKLAHOMA)
)
 Appellee.)

NOT FOR PUBLICATION
Case No. F-2014-294

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUL 15 2015
MICHAEL S. RICHIE
CLERK

OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant Willis David McPherson was tried by jury and convicted of First Degree Burglary (Count I) (21 O.S.2011, § 1431); Rape by Instrumentation (Counts II and VI) (21 O.S.2011, § 1111:1); Sodomy (Count III) (21 O.S.2011, § 888); First Degree Rape (Counts V and VIII) (21 O.S.2011, § 1111); Kidnapping (Count IX) (21 O.S.2011, § 741) and Assault with a Dangerous Weapon (Counts X and XI) (21 O.S.2011, § 645) in the District Court of Tulsa County, Case No. CF-2012-818. The jury recommended as punishment imprisonment for twenty (20) years and a \$5,000.00 fine in Count I; life in prison and a \$10,000.00 fine in each of Counts II, III, VI, IX, X and XI and life in prison without the possibility of parole and a \$10,000.00 fine in Counts V and VIII. The trial court sentenced accordingly, ordering the sentences in Counts I, II, III, VIII, IX, X and XI to run concurrently with each other but consecutively to the sentences in Count V and VI and the sentences in Counts V and VI were to run concurrently with each other. It is from this judgment and sentence that Appellant appeals.

This appeal involves the prosecution of two separate crimes. The first occurred on February 16, 2012, when K.H. was jogging in LaFortune Park in Tulsa, Oklahoma. At approximately 5:30 a.m., a man later identified as Appellant emerged from the trees and ran up behind K.H. He told her to stop but she continued to run. He followed her, grabbed her around the waist, told her to shut up and threw her to the ground. Appellant told her to do what he wanted and he would let her go. He asked K.H. her age and if she had ever had sex before. Hoping to deter Appellant, she lied and said she was only sixteen. Undeterred, Appellant pulled up her shirt and fondled her and pulled down her pants and raped her. When he was finished, he asked for her phone number. Once Appellant left the scene, K.H. contacted police. As a result of the ensuing investigation and DNA testing, it was determined that Appellant could not be excluded from the DNA swabs taken from K.H. and that the random match probability of selecting another person with the same DNA profile was 1 in 200 trillion African Americans. For these acts, Appellant was charged and convicted of First Degree Rape and Rape by Instrumentation.

Four days later, on February 20, 2012, at approximately 1:00 a.m., Appellant knocked on S.J.'s door in the Windsor Village Apartments in Tulsa, Oklahoma. Carrying her three month old baby, S.J. looked through the front door's peephole. She thought the man on the other side resembled her baby's father. As she opened the door, she quickly realized the man was not who she thought, but was Appellant a man she had recently met through a cousin. S.J. tried to close the door but Appellant pushed it open. Pulling out a knife, he told

her to put down her baby. S.J. tried to run, but Appellant caught her. S.J. screamed and fought to get away from Appellant. He put his fingers in her mouth and choked her with his arm until she nearly lost consciousness. Regaining her strength, she managed to throw the knife beyond Appellant's reach. Appellant ripped off her underwear and attempted to rape her but could not complete the act. In an attempt to achieve an erection, he forced S.J. to commit oral sodomy. He again tried to rape S.J. but again was unable to complete the act. Appellant then said that was all he wanted and he was done. Unable to find the knife he carried to the scene, he took one of S.J.'s kitchen knives. He threatened to return and kill S.J. if she called the police. As soon as he left, she phoned the police. For these acts, Appellant was charged and convicted of First Degree Burglary, Rape by Instrumentation, Sodomy, First Degree Rape, Kidnapping and two counts of Assault with a Dangerous Weapon.

In Proposition I, Appellant asserts that joining in a single trial the charges involving two different victims violated his rights to a fair trial and failed to meet the criteria for joinder of offenses. Therefore, he claims, his convictions and sentences should be reversed for new, separate trials.

Joinder of offenses is permitted pursuant to 22 O.S.2011, § 438. This section provides that multiple offenses may be combined for trial "if the offenses could have been joined in a single indictment or information". This Court has allowed joinder of separately punishable offenses allegedly committed by the accused if the separate offenses "rise out of one criminal act or transaction, or are part of a series of criminal acts or transactions." *Mitchell*

v. State, 2011 OK CR 26, ¶¶ 23-24, 270 P.3d 160, 170-171 citing *Glass v. State*, 1985 OK CR 65, ¶ 8, 701 P.2d 765, 768. When there is a series of criminal acts or transactions, “joinder of offenses is proper where the counts so joined refer to the same type of offenses occurring over a relatively short period of time, in approximately the same location, and proof as to each transaction overlaps so as to evidence a common scheme or plan.” *Id.*

Offenses may be severed for trial when either the prosecution or the defense appears to be prejudiced. 22 O.S.2011 § 439. The decision to grant or deny severance is within the discretion of the trial court, and this Court will not disturb its ruling on appeal absent a clear showing of abuse of that discretion. *Mitchell*, 2011 OK CR 26, ¶ 24, 270 P.3d at 171. To establish an abuse of discretion, the appellant must factually demonstrate that the denial of severance deprived him of a fair trial, not merely that a separate trial might have offered him a better chance of acquittal. *Id.*

The State filed all of the charges arising from the two attacks in a single information. Prior to trial, the defense filed a motion for separate trials for each victim. The State opposed the motion and the trial court denied the motion to sever finding the crimes to be of the same type, committed in a relatively short time frame, in the same geographic area and with a consistent method of operation. (Tr. Vol. I., pg. 10-11). We review the court’s decision for an abuse of discretion.

To support his argument, Appellant sets out in his appellate brief a list of differences between the two attacks. However, our case law looks to the

similarities between the offenses to determine whether joinder is proper. *Mitchell*, 2011 OK CR 26, ¶ 25, 270 P.3d at 171; *Collins v. State*, 2009 OK CR 32, ¶ 1, 223 P.3d 1014, 1015; *Lott v. State*, 2004 OK CR 27, ¶ 34, 98 P.3d 318, 333; *Glass*, 1985 OK CR 65, ¶ 9, 701 P.2d at 768.

Looking to the similarities between the two offenses in this case, we find both were sex crimes, occurring within four days and four blocks of one another and both victims identified their assailant by sight. Both crimes occurred within walking distance of Appellant's home. Appellant attacked both victims by surprise in the early morning hours, and took steps to conceal his identity. The attack on K.H. occurred in a location where the street lights were not working, Appellant came from out of the trees to attack her, and he wore a type of dark head covering. When Appellant knocked on S.J.'s door, he wore a hoodie covering his head and part of his face. Appellant pushed each victim to the ground to keep her quiet, forcibly removed each woman's underwear, and began each assault by putting his fingers in the victims' vagina followed by his penis. Appellant did not wear a condom during either assault. He told K.H. to do what he wanted and he would let her go. After the rape of S.J., Appellant told her that was all he wanted. These similarities are sufficient to support the joinder.

Many of the differences cited by Appellant were due to the fact that S.J. physically struggled with Appellant while K.H. did not. Appellant's threats to kill S.J. and attempts to choke her were likely the result of her resistance. Appellant's failure to achieve an erection with S.J. is not a sufficient distinction

as it was certainly his goal to do so, as evidenced by his act of forcible sodomy against S.J.

Appellant also argues that the two crimes did not evince a common scheme or plan as there was no evidence the commission of the first offense paved the way for the commission of the second offense or that the second offense was dependent on the commission of the first offense. Appellant confuses the standard for admitting evidence of other crimes with that of joinder. Under 12 O.S.2011, § 2404(B), evidence of crimes other than that for which the defendant is on trial may be admitted if there are “unique similarities between the crimes amounting to a ‘signature,’ with the common scheme and plan exception, which requires a relatedness between the crimes such that the other crime paved the way for the current offense or the second offense is dependent on the first.” *Neloms v. State*, 2012 OK CR 7, ¶ 14, 274 P.3d 161, 164. However, with the joinder of offenses, the evidence must show that proof as to each crime overlaps so as to evidence a common scheme or plan. “Requiring overlapping proof of a ‘common scheme or plan’ contemplates that there be a relationship or connection between/among the crimes in question, such that proof of one becomes relevant in proving the other/others.” *Collins*, 2009 OK CR 32 at ¶ 19, 223 P.3d at 1018. Here, the similarities in the two crimes sufficiently overlapped as to show Appellant’s “predatory pattern and common plan of attack.” *Id.*

Further, we find Appellant was not prejudiced by the joinder. Contrary to his argument, neither offense needed to be bolstered by evidence of the other.

Evidence of each offense was overwhelming. K.H.'s identification of Appellant was confirmed by DNA testing. S.J. had briefly met Appellant on a previous occasion and referred to him by his middle name. He was apprehended in S.J.'s apartment complex a few hours after the rape and she identified him as her assailant. Appellant's complaints about the identifications and DNA evidence are more fully addressed in Propositions II and III. Evidence of the sexual assaults would have been admissible in separate trials, even if only to demonstrate Appellant's propensity to commit such acts. *See Horn v. State*, 2009 OPK CR 7, ¶ 25, 204 P.3d 777, 784.

Additionally, the jury was instructed to give separate consideration to each charge, that each charge was to be decided based on the law and evidence relevant to that charge, that they should not let their verdict for one charge affect their verdict on other charges, and that the defendant was presumed innocent and the State had the burden of proving each charge beyond a reasonable doubt. Juries are presumed to follow their instructions. *Ryder v. State*, 2004 OK CR 2, ¶ 83, 83 P.3d 856, 875.

Accordingly, we find the trial court did not abuse its discretion in joining the offenses as Appellant was not denied a fair trial. This proposition of error is denied.

In Proposition II, Appellant contends the trial court erred in denying his motion to suppress DNA test results due to an insufficient chain of custody. We review a trial court's ruling on a suppression motion for an abuse of discretion. *Johnson v. State*, 2012 OK CR 5, ¶ 11, 272 P.3d 720, 726; *Gomez*

v. State, 2007 OK CR 33, ¶ 5, 168 P.3d 1139, 1141; *State v. Goins*, 2004 OK CR 5, ¶ 7, 84 P.3d 767, 769. 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; a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. *See also Gomez*, 2007 OK CR 33, ¶ 5, 168 P.3d at 1141-42.

The purpose of the chain of custody rule is to guard against substitution of or tampering with the evidence between the time it is found and the time it is analyzed. *Alverson v. State*, 1999 OK CR 21, ¶ 22, 983 P.2d 498, 509. Although the State has the burden of showing the evidence is in substantially the same condition at the time of offering as when the crime was committed, it is not necessary that all possibility of alteration be negated. *Id.* If there is only speculation that tampering or alteration occurred, it is proper to admit the evidence and allow any doubt to go to its weight rather than its admissibility. *Id.* Any weakness in chain of custody goes to the weight to be given to the evidence and does not prevent admissibility. *Frederick v. State*, 2001 OK CR 34, ¶ 105, 37 P.3d 908, 937.

During his investigation into the rape of K.H., Detective Russo developed a number of potential suspects, including Appellant. Detective Russo was later assigned to investigate the attack on S.J. At that time, Appellant was in custody for the attack on S.J. Detective Russo believed the two cases were similar.

Detective Russo approached Appellant and Appellant agreed to speak with the detective. Although Russo suspected Appellant was involved in the rape of K.H., he only questioned him about the attack on S.J. Later that same day, Russo obtained a search warrant and procured buccal swabs of Appellant's mouth and penis. Russo placed each sample in a protective sleeve, then placed each sleeve in a separate envelope, sealed each envelope, initialed them and wrote property receipt number BF-9927 on each envelope. Russo also wrote "mouth" and "penis" on the respective envelopes. Russo placed the buccal swabs and a DVD of Appellant's recorded interview in his locked desk drawer, to which only he had the key. The DVD and buccal swabs were placed in the property room the following day. The envelopes containing the buccals swabs were presented to Detective Russo at trial as State's Exhibits 2 and 3. He testified they were in the same condition as when he turned them into the property room except for the addition of yellow tape placed on them by the lab, a bar code placed on them by the property room and a TRACIS number. Russo testified the purpose of the bar code and TRACIS number was to "insure (sic) there's no switching of samples." (Tr. Vol. III, pg. 667).

Appellant asserts that the possibility of substitution or tampering was not negated as neither Appellant's name nor social security number was put on the envelopes. Appellant argues that Detective Russo even admitted that he did not know who the samples belonged to. Appellant's argument and reference to the record are disingenuous. Detective Russo testified at trial that the swabs contained in State's Exhibits 2 and 3 were those taken from Appellant. (Tr. Vol.

III, pgs. 666-668). In the pre-trial motion to suppress hearing, in response to questioning as to why the *Miranda*¹ form and search warrant bore different social security numbers for Appellant, Detective Russo testified he did not know which number actually belonged to Appellant. (Tr. Vol. I, pg. 46-47). Detective Russo never expressed any uncertainty regarding the source of the samples contained in State's Exhibits 2 and 3.

Analyst Byron Smith, who conducted the actual DNA testing in this case, testified it was not uncommon to receive samples without a suspect's name. He said that in such a situation he merely called the officer who made the lab request to get the name of the suspect. In this case, while Appellant's name was not on the sample envelopes, the lab request form submitted by Detective Russo identified Appellant as the source of the samples.

Smith testified that the samples which could not be excluded from the rape of K.H. came from property receipt number 9927. Appellant's claim that samples for the other suspects in the rape of K.H. were also submitted under property receipt number 9927 is not supported by the record. Detective Russo testified that DNA samples taken from other suspects were collected in the field, not the police station like Appellant's. He testified the other suspects' samples bore the property receipt number BF-9850. Russo testified that none of the DNA swabs taken from any other suspects bore the property receipt number 9927. Appellant's own trial exhibits, Defense Exhibits 2 and 3, show that the samples

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

taken from Appellant were the only ones bearing the number 9927 and samples taken from other suspects bore the number 9850. The evidence showed that none of the other suspects' DNA matched that of K.H.'s rapist.

Appellant also asserts the inconsistencies in the social security number casts doubt on the source of the swabs. First, it is not clear how the social security listed on the search warrant affects the chain of custody of the buccal swabs when Detective Russo testified the swabs were clearly taken from Appellant.

Regardless, any inconsistencies in the social security number recorded for Appellant were the result of Appellant's own conduct. Appellant told the arresting officer the last digits of his social security number were 2133. During his interview with Detective Russo, Appellant gave a social security number ending in 3232 which was placed on the *Miranda* waiver form. The search warrant prepared by Detective Russo contained a social security number ending in 2133. Russo testified he obtained that social security number from a TRACIS report of Appellant's past police contacts. Russo testified that in those prior cases, Appellant had provided his social security number. In the pauper's affidavit subsequently filed with the trial court, Appellant stated his social security number ended in 2133. Therefore, any confusion in the number was the result of Appellant's own doing and not cause for relief from this Court.

Based upon for the foregoing, the record does not support Appellant's claim that the "dizzying confusion over whether the buccal swabs linked to K.M.H. rape actually came from Appellant raises the real possibility of tampering

and misidentification.” (Appellant’s brief, pg. 15). The record clearly shows Detective Russo took reasonable precautions to preserve the evidence in its original form and that the DNA swabs linked to the rape of K.H. were taken from Appellant. Appellant’s inconsistent statements regarding his social security number raises only speculation of tampering or misidentification, insufficient to warrant relief. The trial court did not abuse its discretion in denying the motion to suppress the DNA results.

Appellant further argues that suppression of the DNA results was also warranted because the record does not contain the search warrant affidavit or the return on the search warrant. This claim was raised in the Motion to Suppress. At the suppression hearing, defense counsel asked Detective Russo whether he presented the judge with a written affidavit in seeking the search warrant for a body sample search. He testified he did so, that it was dated the same date as the search warrant and he presented them to the judge “hand-in-hand”. When asked where the affidavit was, Detective Russo replied that “it should be on file, ma’am.” (Tr. Vol. I, pg. 43). Questioning then turned to the social security number on the search warrant.

“A search warrant shall not be issued except upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and the place to be searched.” 22 O.S.2011, § 1223. “Any peace officer who executes a search warrant must forthwith return the warrant to the magistrate who authorized the warrant . . . together with a written inventory of the property taken.” 22 O.S.2011, § 1233. Appellant has

cited no authority supporting his assertion that error occurs if the record does not contain an affidavit for a search warrant or show that a return was made on the warrant.

The burden of proving the invalidity of a search warrant or the execution of a search warrant rests on the defense. *Gamble v. State*, 1976 OK CR 54, ¶ 16, 546 P.2d 1336, 1341 (validity of execution of search warrant); *Enochs v. State*, 1945 OK CR 73, 161 P.2d 87, 88 (validity of search warrant). When the record does not contain the affidavit nor search warrant, this court will presume that the search warrant was legal. *Enochs*, 161 P.2d at 88. See also *VanHorn v. State*, 1972 OK CR 97, ¶ 8, 496 P.2d 121, 123.

In the present case, the search warrant is contained in the record. See State's Exhibit 58A. The warrant indicates an affidavit was presented to the judge. Detective Russo testified that he presented an affidavit to the judge and that he had sufficient information to obtain the search warrant. The failure to comply with statutory requirements in making the return of a search warrant does not constitute reversible error, in the absence of a showing of resulting prejudice. *McMillon v. State*, 1952 OK CR 94, 247 P.2d 295, 298. Appellant does not challenge the sufficiency of the evidence supporting the issuance of the warrant. He has not shown any resulting prejudice from the absence of the affidavit and return from the record and has not rebutted the presumption the search warrant was legal. This proposition of error is denied.

In Proposition III, Appellant asserts the trial court erred in denying his motion to suppress K.H.'s identification. He argues that her identification was

unreliable because 1) she first identified him at Preliminary Hearing where he was the only prisoner in the courtroom and dressed in jail clothing with handcuffs; 2) her identification at Preliminary Hearing came after she had failed to identify Appellant in a photo lineup; 3) her Preliminary Hearing identification was equivocal; 4) she saw a photograph of Appellant on the internet before making her identification at Preliminary Hearing; 5) information provided by prosecutors tainted her identification; and 6) her initial description of her attacker was vague.

The admission of evidence is left to the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Davis v. State*, 2011 OK CR 29, ¶ 156, 268 P.3d 86, 125. To constitute an abuse of discretion, the trial court's conclusion or judgment must be clearly against the logic and effect of the facts presented. *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶14, 241 P.3d 214, 224.

The record reflects that at Preliminary Hearing, the prosecutor asked K.H. what the man who raped her looked like. She replied, “[l]ike the man over there” (pointing to the defendant). When asked if she saw the man who attacked her in the courtroom, she identified Appellant. (Tr. PH, pgs. 26-27).

On cross-examination, K.H. explained that she had been presented with two photo lineups. She told police that there was an individual who looked like her attacker in each lineup, but she was not certain. She testified that prosecutors had told her that her attacker would be in the courtroom during the Preliminary Hearing. K.H. also testified that the prosecutors told her there was a

DNA match in her case and that the defendant had raped someone else. (Tr. PH, pgs. 37-42).

On re-direct examination, K.H. explained that the prosecutors had told her they would ask her what her attacker looked like. She said she asked the prosecutors, "if I knew it was the guy in the room, do I just tell you that's him?" She said the prosecutors told her to just tell the truth. When asked why she identified the defendant, K.H. replied, "[b]ecause I knew it was him" based on her memory of the rape. (Tr. PH., pgs. 47-49).

At trial, K.H. unequivocally identified Appellant as her attacker. On cross-examination, she testified that prior to the Preliminary Hearing, no one told her who she should identify. She admitted that she failed to identify Appellant from a photo lineup but explained that she told the detective her attacker looked similar to a picture in the lineup but she did not want to identify the wrong person. She testified she said she was "very sure" Appellant was the man who raped her.

"Reliability is the linchpin in determining the admissibility of identification testimony." *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977). The cases before this Court addressing unduly suggestive eyewitness identification procedures usually involve out of court identifications conducted by the police, such as photographic lineups or personal show ups. *Postelle v. State*, 2011 OK CR 30, ¶ 27, 267 P.3d 114, 130; *Young v. State*, 2000 OK CR 17 ¶ 30, 12 P.3d 20, 34; *Pennington v. State*, 1995 OK CR 79, ¶ 32, 913 P.2d 1356, 1365. This case involves the pre-trial but in court identification of Appellant at Preliminary Hearing. While the fact patterns differ, we find the same

law can be applied that unnecessarily suggestive pre-trial identification procedures alone are not sufficient to render eyewitness identification testimony at trial inadmissible. *Myers v. State*, 2006 OK CR 12, ¶ 20, 133 P.3d 312, 322; *Snow v. State*, 1994 OK CR 39, ¶ 6, 876 P.2d 291, 295; *Cole v. State*, 1988 OK CR 288, ¶ 7, 766 P.2d 358, 359. The inquiry at this point becomes “whether under all the circumstances, the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification.” *Pennington*, 1995 OK CR 79, ¶ 33, 913 P.2d at 1365 quoting *Manson v. Brathwaite*, 432 U.S. at 107, 97 S.Ct. at 2249. A courtroom identification will not be invalidated due to prior suggestive procedures if it can be established that it was independently reliable under a totality of the circumstances. *Id.* To determine the reliability of an eyewitness' in-court identification, this Court utilizes a test which includes consideration of all the surrounding circumstances plus the following:

- 1) prior opportunity of the witness to observe the defendant during the alleged criminal act;
- 2) degree of attention of the witness;
- 3) accuracy of the witness' prior identification;
- 4) the witness' level of certainty; and,
- 5) the time between the crime and the confrontation.

Harmon v. State, 2011 OK CR 6, ¶ 45, 248 P.3d 918, 936. See also *Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972); *Myers*, 2006 OK CR 12, ¶ 20, 133 P.3d at 322-323; *Pennington*, 1995 OK CR 79, ¶ 33, 913 P.2d at 1365-66.

Assuming arguendo, the procedures surrounding K.H.'s Preliminary Hearing identification were unnecessarily suggestive; her identification of

Appellant at trial was sufficiently independently reliable to be admissible. K.H. testified that she was approximately 11 inches from Appellant for approximately 10 minutes and got a "good look" at him. She said she was "about eye to eye" with him. (Tr. Vol. II, pg. 330). She testified she saw Appellant when he first approached her, during the rape, and afterwards when he asked for her phone number. Despite the fact the street lights were not working in the area, the rising sun provided enough light for her to see Appellant's entire face and body. She testified she would recognize him if she saw him again. The Preliminary Hearing was held only two months after the rape.

K.H. further testified that the first time she identified Appellant was at Preliminary Hearing, having been unable to previously pick his picture out of a photo lineup. K.H. explained that she found it easier to identify someone in person, rather than in a photograph. Detective Russo testified that it was not unusual for a witness to fail to make a photo identification but be able to make an in-person identification.

K.H. also explained that she told Detective Russo that her attacker looked similar to one of the pictures he showed her, but she did not want to identify the wrong person. She testified that prior to the Preliminary Hearing, no one told her who she should identify. She maintained she was "very sure" Appellant was the man who raped her. (Tr. Vol. II, pg. 344).

Based upon this record, we find K.H.'s identification of Appellant at trial was sufficiently independently reliable from her Preliminary Hearing identification so as to be properly admissible. Additionally, her identification was

confirmed by the DNA results. The trial court did not abuse its discretion in denying the motion to suppress and admitting K.H.'s identification of Appellant.

In Proposition IV, Appellant complains that he was denied a fair trial by several instances of prosecutorial misconduct. Appellant admits that many of the comments challenged on appeal were not met with contemporaneous objections at trial. Those comments we review for plain error only. *Malone v. State*, 2013 OK CR 1, ¶ 40, 293 P.2d 198, 211. Under the test for plain error set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, an appellant must show an actual error, that is plain or obvious, affecting his substantial rights, and which seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*, 1994 OK CR 40, ¶ 10, 26, 30, 876 P.2d at 694, 699, 701. “[P]lain error is subject to harmless error analysis.” *Id.*, 1994 OK CR 40, ¶ 20, 876 P.2d at 698. See *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395; *Malone*, 2013 OK CR 1, ¶ 41, 293 P.3d at 211-212.

On claims of prosecutorial misconduct, relief will be granted 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 should not be relied upon. *Roy v. State*, 2006 OK CR 47, ¶ 29, 152 P.3d 217, 227, citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872, 40 L.Ed.2d 431 (1974). 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. *Mitchell v. State*, 2010 OK CR 14, ¶ 97, 235 P.3d 640, 661; *Cuestra-Rodriguez v. State*, 2010 OK CR 23, ¶ 96, 241 P.3d 214, 243.

Appellant initially complains the prosecutor misled the jury during his cross-examination of Temeaco Sisco, Appellant's sister and alibi witness for the rape of S.J. Specifically, Appellant argues that the prosecutor accused Sisco of withholding information and not coming forward in a timely manner, even though she knew all along she was the alibi witness.

Ms. Sisco testified on direct examination that she told Detective Russo over the phone that Appellant arrived at her home between 1:15 and 1:30 a.m. on the morning S.J. was raped. She said that Russo's report, which she reviewed before her testimony, incorrectly stated the time as 12:30 to 1:00 a.m. Sisco testified that she told Russo that once Appellant arrived home, he went to sleep while she stayed up to look at Facebook. She said she went to bed around 2:30 a.m. and Appellant was still asleep.

On cross-examination, the prosecutor asked Sisco whether she had prepared a written statement, reviewed police reports or talked to Appellant or his lawyers about her testimony. None of these questions were met with objection from defense counsel. Sisco testified that no one ever asked her for a written statement. She explained that the first time she reviewed Russo's report was right before she testified. On re-direct she confirmed that no one showed her Detective Russo's report until the day of her testimony. When asked about the time discrepancy between her testimony and Detective Russo's report, she replied

that she thought the detective was mistaken in the times he wrote down. The prosecutor asked if she knew that her testimony regarding the time Appellant arrived home conflicted with the testimony of her cousin Kesha Stokes that she and Appellant didn't leave a bar until a little after 1:00 a.m. Sisco said she wasn't aware of any conflicting testimony.

This record does not support Appellant's claim that the jury was misled by the prosecutor's questioning. Contrary to Appellant's argument, there was no implication that Sisco had a duty to review the police reports and she was not "berated for not coming forward" with information as Appellant claims. It was important for the prosecution to point out the differences between Detective Russo's report, Sisco's testimony and that of Kesha Stokes. The jury was left to weigh those inconsistencies as they saw fit. A statement is not misleading simply because it is the view taken by the adverse party. *Grant v. State*, 2009 OK CR 11, ¶ 64, 205 P.3d 1, 24-25. We find no error and thus no plain error in this questioning.

Appellant asserts that over counsel's objection, Sisco was confronted with photographs which had not been made available in discovery; photographs which he claims improperly injected gang evidence. The record shows the prosecutor introduced three photographs, State's Exhibits 64, 65, and 66, which Sisco agreed accurately depicted Appellant's appearance at the time of the rapes. Defense counsel's objection on grounds that the photographs were not included in the discovery materials was overruled. Sisco agreed the pictures showed Appellant was of medium build with "some stockiness in his shoulder". (Tr. Vol.

IV, pgs. 815-816). Appellant claims the photos were an improper attempt to attack his character as in one photo he is seen making a gang sign. This objection was not raised at trial. Therefore, we review only for plain error.

The photographs were introduced to support S.J.'s description of her assailant as having a medium build. State's Exhibit 64 showed virtually all of Appellant's upper body. No testimony or argument was presented to the jury suggesting any gang affiliation by Appellant. Other crimes that are obvious only to defense counsel are not inadmissible as evidence of other crimes. *Robinson v. State*, 1988 OK CR 98, ¶ 3, 755 P.2d 113, 114. We find no error.

Appellant claims that in closing argument, the prosecutor strayed outside the record by claiming that Appellant was portrayed in State's Exhibit 65 as "a lot smaller guy" than he was at trial. No objection was raised to this comment. Reviewing for plain error, we find none. S.J. testified that her attacker was of medium build. The defense argued that Appellant was a "big guy" therefore S.J.'s identification was unreliable. The prosecutor argued that Appellant was bigger by the time of trial than he had been when State's Exhibits 64-66 were taken because he had been sitting in jail. The prosecutor's comment was a reasonable inference on the evidence. *See Sanchez v. State*, 2009 OK CR 31, ¶ 71, 223 P.3d 980, 1004.

Appellant next complains that the prosecutor attacked his character during the questioning of Ms. Sisco. The prosecutor asked Sisco whether Appellant could have committed the rapes and whether he respected women. When she testified that Appellant could not have committed the rapes because he

was respectful to the women he was around, the prosecutor asked Sisco if she was aware of posts Appellant had put on Facebook where he reached out to “single” women, “beautiful” women and “bad ass yella bone women” because he “want[s] sex”, “don’t (sic) like bein (sic) single” and “need[s] a good woman by [his] side”. This evidence was admitted as State’s Exhibit 67, over defense counsel’s objection. (Tr. Vol. IV, pg. 859).

Detective Russo had testified that Appellant told him he could not have committed the rapes because he could not maintain an erection. Appellant states in his brief that a “yella bone” is a light skinned woman which fits the description of K.H. (Appellant’s brief, pg. 24). Evidence of the Facebook posts was relevant in rebutting Appellant’s claim that he did not commit the rapes. There was nothing improper in the prosecutor’s questioning.

Appellant further claims the prosecutor misrepresented Ms. Stokes’ testimony in his cross-examination of Ms. Sisco. The prosecutor asked Ms. Sisco, over defense counsel’s objection, if she was aware that Stokes “told Detective Russo” that during the early morning hours of February 20, she did not drop Appellant off at Ms. Sisco’s house. The judge overruled the objection, stating that his recollection was not clear, so he would let the jury decide if that was the testimony. (Tr. Vol. IV, pg. 829). Sisco testified that she knew for a fact that Stokes dropped Appellant off at her house because they talked about it as Stokes was on her way to Sisco’s house.

The record shows that Ms. Stokes had testified that she dropped Appellant off at his sister’s (Ms. Sisco) house. However, she also testified that she did not

remember what she told police in her interview shortly after the crime as she had been drinking at the time she and Appellant parted ways and that two years had passed since she talked with police. She did not deny that the police report said she did told Detective Russo that she did not drop Appellant off at his sister's house on February 20. The prosecutor's questions to Ms. Sisco regarding Stokes' testimony were reasonable inferences on the evidence.

Appellant next turns his attention to closing argument. He directs us to the following comment:

[T]his case is not necessarily about that we've met all those elements in there because we know someone broke into [S.J.'s] house, we know someone held her down and raped her and stuck his fingers in her vagina. We know someone pinned [K.H.] underneath a tree in LaFortune Park and raped her and put his fingers in her vagina. We know someone held a knife up to [S.J.], threatened to kill her while she's holding a child. The elements of all these crimes are not what you're here for today.

What you're here for today is to tell us who did that to those girls, who robbed those girls of their innocence and punish the person who did that.

(Tr. Vol. IV, pg. 873).

This remark was not met with a contemporaneous objection. Therefore, we review only for plain error. The challenged comment came at the beginning the prosecutor's closing argument. He went on to explain that the jury would be given a packet of instructions which was their "road map to determine that question of who done it in this particular case." (Tr. Vol. IV, pg. 873). Referring to the instructions, the prosecutor informed the jury that the State had the burden to prove beyond a reasonable doubt that the crime happened and that the defendant committed the crime and that Instruction No. 3 explained the State's

burden of proof. (Tr. Vol. IV, pgs. 873-874). After discussing the evidence, the prosecutor stated that the instructions contained the elements of the crimes, elements the State had to prove beyond a reasonable doubt. The prosecutor concluded the first part of his closing argument by stating that all of the evidence pointed to the defendant. (Tr. Vol. IV, pgs. 882, 889).

Reading the challenged comments in context, and the closing argument in its entirety, we find the prosecutor did not try to persuade the jury to ignore the law nor did he give his personal opinion of guilt. Any improper statements were clarified and corrected by later comments appropriately informing the jury of the applicable law and evidence in this case.

Appellant next complains the prosecutor “took pains to denigrate and attack defense counsel” by arguing that defense counsel was attempting to distract the jury from the evidence. Appellant directs us to comments that defense counsel’s inquiries into the victims’ identification of the defendant, labeling of the buccal swabs and challenges to the chain of custody was defense strategy to turn the spotlight away from the defendant and his actions. (Tr. Vol. IV, pgs. 884, 887-887). We review only for plain error as no contemporaneous objections were raised.

The prosecutor’s arguments were a response to argument raised by defense counsel during trial and were reasonable inferences on the evidence. *Davis v. State*, 2011 OK CR 29, ¶ 181, 268 P.3d 86, 129. Any aspersions the comments may have cast on defense counsel's integrity were not such as to deny

Appellant a fair trial. *Id.* The record shows Appellant was convicted based on the evidence of his crimes and not improper remarks by the district attorney. *Id.*

Appellant asserts the prosecutor's final second stage argument comparing rape to murder was not based on the evidence. (Tr. Vol. IV, pg. 940). Reviewing only for plain error, we find none. In second stage closing argument, the prosecutor discussed with the jury how to punish someone. She said they should consider the defendant's actions and what he did to conceal the bad thing he did. She argued that when the jury looked at what was done, K.H. jogging alone in the early morning, grabbed by surprise and raped, it was an "intimate crime", "one of the most egregious crimes against a person that a person can offend." She continued:

You have murder and you have rape, ladies and gentlemen. Rape is close, rape is personal, rape is one on one. Sex is reserved for the most intimate of relationships, and this man made her have sex with him. What did he do and what did he say when he was making that? Take into consideration the fact that as he's putting his penis in her vagina, he's looking at her and he literally asks her how old are you. She tells him 16. She looks young. This was two years ago.

(Tr. Vol. IV, pg. 940).

The prosecutor's comments were not improper as they were clearly based on the evidence.

Finally, Appellant argues the prosecutor denigrated his right to hold the State to its burden of proof by asking the jury to punish more severely because by going to trial, he made young women come into court repeatedly to tell their stories to strangers. Again, reviewing for plain error, we find none.

The prosecutor argued in part that in determining punishment, the jurors could take into consideration that K.H. had to tell numerous people what happened to her. The prosecutor made no reference, direct or indirect, to Appellant's decision to go to trial. See *DeRosa v. State*, 2004 OK CR 19, ¶ 64, 89 P.3d 1124, 1147-48 (“[w]hile prosecutors must guard against remarks that could unduly burden a defendant's exercise of constitutional rights, appellate courts must evaluate prosecutorial remarks within the specific context within which they arise, and not presume that a prosecutor intends—or that a jury will comprehend—an oblique but inappropriate interpretation, rather than a more direct, lawful one”).

Having thoroughly reviewed Appellant's claims of prosecutorial misconduct for plain error, along with other comments met with objections, none of the comments, either singly or individually were such as to deprive Appellant of a fair trial. *Duckett v. State*, 1995 OK CR 61, ¶ 47, 919 P.2d 7, 19. Contrary to Appellant's claim, the prosecutor's comments did not determine his verdict, evidence showing that he sexually assaulted K.H. and S.J. did. No relief is warranted on this claim and this proposition of error is denied.

In Proposition V, Appellant complains the “trial record was replete with inadmissible hearsay not coming within any exception to the rule generally barring hearsay evidence.” (Appellant's brief, pg. 28). The majority of the challenged testimony was not met with contemporaneous objections. In those cases, we review only for plain error. *Malone*, 2013 OK CR 1, ¶ 40, 293 P.2d at

211. In other instances, we review admission of the testimony for abuse of discretion. *Davis*, 2011 OK CR 29, ¶ 156, 268 P.3d at 125.

Appellant initially complains about the admission of testimony regarding descriptions given by K.H., S.J., and Mylania Hamilton, S.J.'s cousin. Officer Lambert testified, without objection, to K.H.'s description of the man who raped her. Officer Hading testified, over defense objection and with an admonition to the jury that the testimony could not be used as direct evidence of identification, that S.J. said she knew her attacker because her cousin had brought him to her home previously. Over another objection, Officer Hading testified that after Ms. Hamilton came to the scene, she supplied the name "Willie Mo", said she didn't know his real name but knew that he lived in the apartment complex behind S.J.'s complex, on the second floor with his sister. Appellant asserts the officers' testimony was inadmissible hearsay designed to improperly bolster the testimony of the victims and came within no exceptions to the hearsay rule.

To constitute hearsay, testimony must be offered to prove the truth of the matter asserted. 12 O.S.2011, § 2801(3). The Hearsay Rule does not preclude a witness from testifying about the actions he or she took as a result of a conversation with a third party. *Marshall v. State*, 2010 OK CR 8, ¶ 42, n. 5, 232 P.3d 467, 477 n. 5 citing *Fontenot v. State*, 1994 OK CR 42, ¶ 41, 881 P.2d 69, 82; *Stouffer v. State*, 2006 OK CR 46, ¶ 76, 147 P.3d 245, 265; *Powell v. State*, 2000 OK CR 5, ¶ 98, 995 P.2d 510, 552.

Here Officer Lambert testified that he spoke with K.H. immediately after the rape, and that as a result he took her back to LaFortune Park to locate the

scene of the rape. His testimony regarding her description of her assailant was not to prove the truth of the matter asserted, but to explain the officer's subsequent actions.

Likewise, Officer Hading's testimony that S.J. said she knew her attacker from a previous encounter and that Ms. Hamilton supplied a nickname and possible residence was not offered to prove the truth of those matters, but to show how Officer Hading proceeded with the investigation which resulted in Appellant's arrest. Therefore, as the statements did not constitute hearsay, we find no error and no abuse of the trial court's discretion in their admission.

Appellant next complains about testimony from Officer Holloway, admitted over defense counsel's objection, that S.J. said her rapist had a white bandage on his face. Officer Holloway testified that Appellant was detained in the guard shack at the apartment complex where S.J. lived and that Appellant had bandages on the left side of his face. Holloway testified that when he subsequently interviewed S.J., she told him her assailant had a bandage on his face. She also identified Appellant in a photo lineup. As a result, Officer Holloway placed Appellant under arrest and transported him to the police station.

Again, we find the testimony about the bandage helped explain the officer's actions leading to Appellant's arrest. The trial court did not abuse its discretion in admitting this testimony.

Appellant further complains about testimony by Matthew Rea, the security guard at the apartment complex, that when he showed S.J. a photograph of Appellant which he had taken on his cell phone, she identified him as her rapist.

The trial court overruled the defense objection finding the testimony admissible as a statement of identification. A statement of identification is not hearsay so long as the declarant testifies and is subject to cross-examination. 12 O.S.2011, § 2801(B)(1)(c); *Powell*, 2000 OK CR 5, ¶ 96, 995 P.2d at 532. Here, S.J. testified that when she returned home from Hillcrest Hospital, a friend called and said Appellant was being held by security personnel at her apartment complex. She said that the security guard showed her a picture of Appellant that he had taken on his cell phone and she identified Appellant as her assailant. Rea's testimony was a statement of identity and therefore properly admitted.

Finally, Appellant challenges testimony given by the two sexual assault examiners, Janet Chappell and Patricia Evans, regarding statements made by K.H. and S.J. Appellant claims that statements made by the victims to the nurses about what happened during their respective assaults were not given for the purpose of seeking medical care or treatment, but was to collect evidence in connection with the police investigation. We review only for plain error as no contemporaneous objections were raised at trial. *Malone*, 2013 OK CR 1, ¶ 40, 293 P.2d at 211.

Hearsay is admissible if it contains statements "made for the purposes of medical diagnosis or treatment describing medical history . . . if reasonably pertinent to diagnosis and treatment." 12 O.S.2011, § 2803(4). Testimony is admissible under this section if: 1) the declarant's motive was consistent with receiving medical care; and 2) it was reasonable for the medical professional to

rely on the information in diagnosis or treatment. *Kennedy v. State*, 1992 OK CR 67, ¶ 11, 839 P.2d 667, 670.

Both sexual assault exams were performed at Hillcrest Medical Center. Both witnesses testified that medical treatment is provided for rape victims who need it. Ms. Chappell explained that the emergency room was right upstairs from her exam room if a victim needed more medical attention. Ms. Evans testified that the purpose of collecting a history from the victims was to assist the nurse in providing treatment, as well as to document evidence. While both victims were transported to the hospital by the police, it is reasonable to assume they were taken for purposes of receiving medical treatment for injuries received in the sexual assaults, as well as for purposes of obtaining evidence. This is especially so in S.J.'s case as she received injuries separate from those suffered in the sexual assault. Accordingly, we find no error, and thus no plain error in the admission of this testimony.

In Proposition VI, Appellant contends he was denied a fair trial by an evidentiary harpoon injected by Detective Russo. In describing the steps taken to locate K.H.'s attacker, the detective testified that police physically canvassed the area; broadcast information to the media; received tips from Crime Stoppers; and reviewed records of prior police contacts in the area, narrowed by race, gender, and criminal activity, not necessarily limited to sex offense and burglary. Detective Russo testified that based upon this type of investigation, he developed a list of possible suspects. He confirmed that Appellant's name was on that list.

An evidentiary harpoon is improper testimony by an experienced officer who voluntarily and not in response to a question willfully interjects information regarding other crimes intending to prejudice a defendant, where the statement does prejudice the defendant. *Riley v. State*, 1997 OK CR 51, ¶ 9, 947 P.2d 530, 533. Testimony is usually not an evidentiary harpoon when it is a direct response to questioning from the prosecutor. *Id.*

Here, Detective Russo testified that Appellant was developed as a possible suspect but he did not specify whether that was due to the canvass, media, a tip or prior contact with police. There was no evidence suggesting Appellant committed another offense. Detective Russo's testimony did not constitute an evidentiary harpoon. We find no error and thus no plain error.

In Proposition VII, Appellant argues the jury was improperly instructed that the maximum punishment for the two counts of first degree rape was life imprisonment without the possibility of parole. No contemporaneous objections were raised at trial to the instructions; therefore we review only for plain error. *Malone*, 2013 OK CR 1, ¶ 40, 293 P.2d at 211.

The punishment range for first degree rape is five years to life or life without the possibility of parole. 21 O.S.2011, § 1115. In this case, the State sought to enhance punishment based on one prior felony conviction. Pursuant to the general sentencing enhancement statute, 21 O.S.2011, § 51.1(A)(1), the punishment range for a violent felony, including first degree rape, after one prior felony conviction, is ten years to life. Appellant was sentenced to life without parole for both of his first degree rape convictions. He argues on appeal

that a sentence of life without parole is not authorized under § 51.1(1). He admits it “may seem to be an absurd result”, but argues the correct range of punishment for first degree rape after one prior felony conviction must be ten years to life, not life without parole.

The goal of statutory construction is to discern the intent of the Legislature. A statute should be given a construction according to the fair import of its words taken in their usual sense, in connection with the context, and with reference to the purpose of the provision. This Court may also consider the natural or absurd consequences of any particular interpretation.

Howrey v. State, 2002 OK CR 22, ¶ 8, 46 P.3d 1282, 1284 (internal quotation marks and citations omitted). The Legislature does not enact statutes to be warped or twisted and interpreted to suit a particular situation. *Beaird v. Ramey*, 1969 OK CR 195, ¶ 5, 456 P.2d 587, 589. The Legislature “is never presumed to have done a vain thing.” *Nesbitt v. State*, 2011 OK CR 19, ¶ 19, 255 P.3d 435, 440; *State v. District Court of Oklahoma County*, 2007 OK CR 3, ¶ 17, 154 P.3d 84, 87.

The obvious purpose of § 51.1 is to provide greater punishment for repeat offenders. Appellant’s interpretation of the statute would result in a lesser punishment. Certainly the Legislature did not intend to lighten the punishment for repeat offenders.

In *Fields v. State*, 1972 OK CR 194, 501 P.2d 1390, the defendant was convicted of first degree rape after one prior conviction and sentenced to one thousand (1,000) years in prison. He challenged his sentence as excessive. Rejecting his challenge, this Court found:

Appellants were convicted of the crime of First Degree Rape, After Former Conviction of a Felony. Rape in the First Degree is punishable by death or imprisonment in the penitentiary, not less than Five (5) Years in the discretion of the jury, or in case the jury fails or refuses to fix the punishment, the same shall be pronounced by the Court. 21 O.S.1971, s 1115. Further, under the Oklahoma Statutes dealing with second and subsequent offenses, if the offense of which such person is subsequently convicted is such that upon a first conviction an offender would be punishable by imprisonment in the penitentiary for any term exceeding five (5) years, such person is punishable by imprisonment in the penitentiary for a term not less than ten (10) years, and could have imposed the ultimate punishment of death, or any number of years under the statute.

1972 OK CR 194, ¶ 22, 501 P.2d at 1393.

Since *Fields* was decided, the Legislature amended § 1115 to include punishments of life and life without parole for first degree rape. As we said in *Fields*, a convicted rapist with a prior conviction is subject not only to the enhanced minimum punishment provided in § 51.1, but also the maximum punishment provided in the rape statute itself. Therefore, the trial court properly instructed the jury that the maximum range of punishment was life in prison without the possibility of parole. Finding no error, we find no plain error and deny this proposition of error.

In his final proposition of error, Appellant argues the cumulative effect of all the errors set out in his appellate brief denied him a fair trial. A cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by Appellant. *Eizember v. State*, 2007 OK CR 29, ¶ 158, 164 P.3d 208, 245; *Lott v. State*, 2004 OK CR 27, ¶ 166, 98 P.3d 318, 357. None of the propositions of error raised herein warrant relief. Therefore, Appellant's request for reversal of his convictions and modification of his sentence 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. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE WILLIAM C. KELLOUGH, DISTRICT JUDGE

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JOHNSON, J.: CONCUR IN RESULT
LEWIS, J.: CONCUR
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