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

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| **ROBERT BRADLEY CHAMPLAIN,** | ) | |
| | ) | |
| **Appellant,** | ) | **NOT FOR PUBLICATION** |
| | ) | |
| **v.** | ) | **No. F-2014-1078** |
| | ) | |
| **STATE OF OKLAHOMA,** | ) | |
| | ) | |
| **Appellee.** | ) | |

**SUMMARY OPINION**

**HUDSON, JUDGE:**

Appellant Robert Bradley Champlain was tried by a jury in Mayes County District Court, Case No. CF-2013-471, for three counts of Lewd Molestation, After Former Conviction of Two or More Felonies, in violation of 21 O.S.2011, § 1123. The jury found Appellant guilty as charged and recommended a sentence of life imprisonment on each count. The Honorable Terry H. McBride, District Judge, sentenced Champlain in accordance with the jury's verdicts and ordered the sentences for all three counts to run consecutively.[1] Champlain now appeals and raises the following propositions of error:

I. THE TRIAL COURT'S EXPRESSED POLICY OF RUNNING SENTENCES CONSECUTIVELY IF APPELLANT ELECTED TO GO TO JURY TRIAL VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE TWO, SECTION TWENTY OF THE OKLAHOMA CONSTITUTION, AND 22 O.S.2011, § 976;

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[1]Champlain is required to serve not less than eighty-five percent (85%) of his sentence of imprisonment on each count before becoming eligible for consideration for parole. 21 O.S.2011, § 13.1(18).

II. APPELLANT'S PRIOR FELONY CONVICTIONS WERE IMPROPERLY PROVEN, RESULTING IN PREJUDICE TO APPELLANT;

III. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE APPELLANT'S PRIOR CONVICTIONS WERE FINAL FOR PURPOSES OF ENHANCING PUNISHMENT IN THE SECOND STAGE OF TRIAL;

IV. THE STATE PRESENTED INSUFFICIENT EVIDENCE AS TO COUNT 3, LEWD MOLESTATION, OCCURRING "ON OR ABOUT THE 24TH DAY OF DECEMEBER, 2012," BASED ON A VARIANCE IN THE ALLEGATION AND THE EVIDENCE;

V. PROSECUTORIAL MISCONDUCT DEPRIVED APPELLANT OF A FAIR TRIAL, VIOLATED HIS CONSTITUTIONAL RIGHTS, AND CREATED FUNDAMENTAL ERROR IN THIS CASE;

VI. THE TRIAL COURT COMMITTED PLAIN ERROR BY IMPROPERLY GIVING OUJI-CR 10-3, THE GENERAL CLOSING CHARGE, AND BY FAILING TO INSTRUCT THE JURY REGARDING SEX OFFENDER REGISTRATION;

VII. APPELLANT WAS PREJUDICED BY INEFFECTIVE ASSISTANCE OF COUNSEL;

VIII. APPELLANT RECEIVED AN EXCESSIVE SENTENCE IN THIS CASE; and

IX. THE CUMULATIVE EFFECT OF ALL THESE ERRORS DEPRIVED APPELLANT OF A FAIR TRIAL AND WARRANT RELIEF FOR APPELLANT.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we find that no relief is required under the law and evidence and Appellant's judgment and sentence should be **AFFIRMED** except for the imposition of post-imprisonment supervision which is **VACATED.** The trial court is also **ORDERED** to correct the Judgment and Sentence *nunc pro tunc* to reflect that

all three of Appellant's crimes were committed on or between December 24, 2012 and November 19, 2013.

**1.**

The determination of consecutive and concurrent sentences is left to the sound discretion of the trial court. 22 O.S.2011, § 976; *Riley v. State*, 1997 OK CR 51, ¶ 20, 947 P.2d 530, 534. Before we can modify a sentence imposed by the trial court, it must be shown that the trial court abused its discretion in assessing punishment. *Id.* We have defined an abuse of discretion by the trial court as "any unreasonable, unconscionable and arbitrary action taken without proper consideration of the facts and law pertaining to the matter submitted." *Id.*, 1997 OK CR 51, ¶ 20, 947 P.2d at 534-35. It is Appellant's burden to show that the trial court abused its discretion. *See, e.g., Knighton v. State*, 1996 OK CR 2, ¶ 42, 912 P.2d 878, 890; *Akins v. State*, 1950 OK CR 28, 91 Okl.Cr. 47, 58, 215 P.2d 569, 575.

The record does not show that the trial court had a policy of running sentences consecutively solely because a defendant requests a jury trial, let alone that the trial court ran Appellant's sentence's consecutively because of such a policy. At the pre-trial hearing, the trial court correctly advised Appellant of the governing Oklahoma law which dictates that sentences are to be served consecutively unless otherwise ordered by the Court. 21 O.S.2011, § 61.1; 22 O.S.2011, § 976; *Warnick v. Booher*, 2006 OK CR 41, ¶ 11, 144 P.3d 897, 900. This was part of the trial court's overall attempt to advise Appellant of the potential consequences of rejecting the State's plea offer and going to

trial. The record of formal sentencing is consistent with the trial court exercising its discretion in choosing to run Appellant's sentences consecutively. *Riley*, 1997 OK CR 51, ¶ 21, 947 P.2d at 535. Relief is denied for Proposition I.

**2.**

Appellant objected at trial to the admission during sentencing of State's Exhibits 4 and 5, the judgment and sentence documents showing his prior felony convictions, solely on grounds that they were not properly authenticated because the court clerk was not present to sponsor either exhibit. Appellant has therefore waived all but plain error review of this claim. *Stewart v. State*, 2016 OK CR 9, ¶ 12, __P.3d__. Under the plain error test, Appellant must show an actual error, which is plain or obvious, and which affects his substantial rights, meaning the error affected the outcome of the proceeding. *Id.* We will correct plain error only if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*

"The longstanding rule is that parties are not to encourage jurors to speculate about probation, pardon or parole policies." *Id.*, 2016 OK CR 9, ¶ 14, __P.3d__. To show error, Appellant must show "in light of the totality of the circumstances, the prosecution made such an unmistakable reference to the pardon and parole system of Oklahoma to result in prejudice to the defendant." *Id.* The prosecutor did not expressly refer to the rules and conditions of probation made part of State's Exhibit 4 or otherwise claim that Appellant had received a suspended sentence. Because there is no error associated with the

admission of State's Exhibit 4, there is no plain error. *Id.*, 2016 OK CR 9, ¶ 18, __P.3d.__.

The prosecutor erred by reading that portion of the Page Two allegation relating to Appellant's stipulation to the motion to revoke suspended sentence as reflected in State's Exhibit 5. *Hunter v. State*, 2009 OK CR 17, ¶ 9, 208 P.3d 931, 933. However, the prosecutor did not argue that Appellant deserved a longer sentence because of the suspended sentence or its subsequent revocation. Thus, while the prosecutor's error was plain or obvious, the error was harmless and did not affect Appellant's substantial rights. *Barnard v. State*, 2012 OK CR 15, ¶ 13, 290 P.3d 759, 764; *Simpson v. State*, 1994 OK CR 40, ¶ 36, 876 P.2d 690, 702. Relief is denied for Proposition II.

**3.**

Appellant's prior felony convictions arose from guilty pleas and were 11 and 14 years old at the time of his trial in the present case. Additionally, the defense presented no rebutting evidence showing Appellant's convictions were not final. This represented sufficient circumstantial evidence to submit the question of Appellant's prior felony convictions to the jury. *Hendricks v. State*, 1985 OK CR 39, ¶ 17, 698 P.2d 477, 481 (overruled on other grounds by *Cleary v. State*, 1997 OK CR 35, ¶ , 942 P.2d 736, 745 *and Parker v. State*, 1996 OK CR 19, ¶ 23 n.4, 917 P.2d 980, 986 n.4 (internal citations omitted)); *Cervantes v. State*, 1976 OK CR 278, ¶ 19, 556 P.2d 622, 627. Because there is no error, there is no plain error. *See Bosse v. State*, 2015 OK CR 14, ¶ 43, 360 P.3d 1203, 1223; *Kirkendall v. State*, 1986 OK CR 143, ¶ 7, 725 P.2d 882, 884.

**4.**

Appellant's challenge to the sufficiency of the evidence supporting Count 3 is actually a challenge to the sufficiency of the Information. Appellant did not object below to the sufficiency of the Information thus waiving review on appeal of all but plain error. *Jackson v. State*, 2016 OK CR 5, ¶ 4, __P.3d.__; *Conover v. State*, 1997 OK CR 6, ¶ 10, 933 P.2d 904, 909. There is no plain error. The State is not required to plead a specific date in the information for the charged offenses unless time is a material element of the offense. 22 O.S.2011, § 405; *Lemmon v. State*, 1975 OK CR 147, ¶ 22, 538 P.2d 596, 601. Moreover, the State "is not required to prove an offense took place on the exact date charged." *Robedeaux v. State*, 1995 OK CR 73, ¶ 8, 908 P.2d 804, 806. "The defendant may be convicted upon proof of the commission of the offense at any time within the Statute of Limitations and prior to the date of the filing of said Information." *State v. Holloway*, 1973 OK CR 440, ¶ 4, 516 P.2d 1346, 1347.

The question whether there is a material variance between the allegations charging Appellant with lewd molestation in Count 3 and the proof submitted to the court which bars a conviction "depend[s] greatly on whether it may later expose defendant to being placed in jeopardy for the same offense or tend to mislead him in answering the charges against him." *McCoy v. State*, 1975 OK CR 117, ¶ 9, 536 P.2d 1309, 1312. "The test for the sufficiency of an information must be determined on the basis of practical rather than technical considerations; hairsplitting is to be avoided." *Nealy v. State*, 1981 OK CR 142, ¶ 5, 636 P.2d 378, 380. Time was not a material element of the charged

offenses in this case. B.B. was 13 years old at the time of trial so everything she testified about occurred when she was under 16 years of age as required by 21 O.S.2011, § 1123(A)(2). Appellant does not show unfair surprise which prejudiced his defense based on the date listed in the Count 3 charge and the proof submitted at trial. Indeed, Appellant was advised orally by the magistrate of the additional Count 3 charge which was added at preliminary hearing and its corresponding date range. Also, the State proved at trial commission of the Count 3 charge well within the statute of limitations governing this offense, *see* 22 O.S.2011, § 152(C)(1), and prior to the date of the filing of the Information in this case.

Appellant is also not in danger of being placed in jeopardy for the same offense. The trial court's instructions had the effect of conforming the Count 3 allegations—and the jury's consideration of same—to the proof at trial. *See Blueford v. Arkansas*, __U.S.__, 132 S. Ct. 2044, 2051, 182 L. Ed. 2d 937 (2012) (jurors are presumed to follow their instructions). By telling the jury in Instruction No. 3 that the date range for the allegations in all three counts was "on or between December 24, 2012 and November 19, 2013", the written charge had the same effect as if the trial court granted an oral motion by the prosecutor to amend the information during the trial so the date listed conformed to the proof.[2]

[2]The Judgment and Sentence erroneously states that all three counts in this case were committed "on or about the 24th day of December, 2012." The trial court is **ORDERED** to correct the Judgment and Sentence *nunc pro tunc* to reflect that all three of Appellant's crimes were committed on or between December 24, 2012 and November 19, 2013.

Appellant fails to show a plain or obvious error which affects his substantial rights. 22 O.S.2011, § 410; *Kimbro v. State*, 1990 OK CR 4, ¶ 8, 857 P.2d 798, 800; *Jones v. State*, 1969 OK CR 151, ¶¶ 9-12, 453 P.2d 393, 396-97; *Sweden v. State*, 1946 OK CR 81, 83 Okl.Cr. 1, 5-6, 172 P.2d 432, 434-35. Relief is denied for Proposition IV.

**5.**

Both parties have wide latitude in closing argument to argue the evidence and reasonable inferences from it. We will not grant relief for improper argument unless, viewed in the context of the whole trial, the statements rendered the trial fundamentally unfair, so that the jury's verdicts are unreliable. *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986); *Bosse*, 2015 OK CR 14, ¶ 75, 360 P.3d at 1232. Appellant made timely objections in some instances, thus preserving his prosecutorial misconduct claims for appellate review. Some of the alleged instances of prosecutorial misconduct, however, drew no objection from Appellant thus waiving on appeal all but plain error. *Barnett v. State*, 2011 OK CR 28, ¶ 8, 263 P.3d 959, 962. Regardless, Appellant has not shown based on the challenged comments that the prosecutor's tactics or argument were fundamentally unfair.

Appellant also challenges the admission of B.B.'s testimony that Appellant attempted to look at her naked while she was in the shower. By combining multiple issues in a single proposition, however, this claim is waived from review. *See* Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal*

*Appeals*, Title 22, Ch.18, App. (2015); *Collins v. State*, 2009 OK CR 32, ¶ 32, 223 P.3d 1014, 1023. Relief is denied for Proposition V.

**6.**

Appellant has waived on appeal all but plain error review of his instructional challenges. *Jackson*, 2016 OK CR 5, ¶ 4. There is no abuse of discretion from a trial court's failure to instruct on registration pursuant to the Sex Offenders Registration Act. *Reed v. State*, 2016 OK CR 10, ¶¶ 14-19, __P.3d__. The trial court's failure to include in the general closing charge language that Appellant had entered a plea of not guilty to the charged offenses was plain or obvious error. 12 O.S.2011, § 577.2; OUJI-CR 10-3. However, the jury was repeatedly informed that Appellant had entered a plea of not guilty to the charges against him, including during the trial court's opening instructions. Appellant's substantial rights were thus not affected by this instructional error as it did not affect the outcome of the proceedings. *Levering*, 2013 OK CR 19, ¶ 6, 315 P.3d at 395 (discussing three-part plain error test).

Appellant's challenge to the date range listed in Instruction No. 3 for the Count 3 charge also does not reveal plain error. Appellant never alleged unfair surprise from the State's charges and he provides no coherent theory on appeal showing prejudice to his defense. Moreover, the trial court did not abuse its discretion because the date listed in the general closing charge for Count 3 was consistent with the evidence presented at trial and Appellant never objected to the instructions. Relief is denied for Proposition VI.

**7.**

To prevail on an ineffective assistance of counsel claim, the defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Appellant does not show deficient performance and prejudice with any of his ineffective assistance of counsel claims. Proposition VII is denied.

**8.**

This Court will not modify a sentence within the statutory range "unless, considering all the facts and circumstances, it shocks the conscience." *Neloms v. State*, 2012 OK CR 7, ¶ 39, 274 P.3d 161, 171 (quoting *Rea v. State*, 2001 OK CR 28, ¶ 5 n.3, 34 P.3d 148, 149 n.3). Appellant's sentences are within the statutory sentencing range. His sentences are also factually substantiated and supported by the record evidence and are not excessive. Relief for this part of Proposition VIII is denied. However, Appellant's challenge to the imposition of post-imprisonment supervision at formal sentencing warrants relief. Title 21 O.S.2011, § 1123(F) provides that post-imprisonment supervision does not apply to defendants sentenced to life or life without parole. The trial court therefore erred in imposing post-imprisonment supervision for Appellant.[3]

[3]We decline the State's invitation to take judicial notice of a certified copy of the amended judgment and sentence attached to its response brief. This document is not part of the record on appeal before the Court in this case.

**9.**

Appellant is not entitled to relief for alleged cumulative error. *Postelle v. State*, 2011 OK CR 30, ¶ 94, 267 P.3d 114, 146; *Pavatt v. State*, 2007 OK CR 19, ¶ 85, 159 P.3d 272, 296. Relief for Proposition IX is denied.

**DECISION**

The Judgment and Sentence of the district court is **AFFIRMED** except for the imposition of post-imprisonment supervision which is **VACATED** and the matter is **REMANDED** to the district court with instructions to **MODIFY** the Judgment and Sentence consistent with this opinion. The trial court is **FURTHER ORDERED** to correct the Judgment and Sentence *nunc pro tunc* to reflect that all three of Appellant's crimes were committed on or between December 24, 2012 and November 19, 2013. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF MAYES COUNTY
THE HONORABLE TERRY H. MC BRIDE, DISTRICT JUDGE

**APPEARANCES AT TRIAL**

MISTY SEATON FIELDS
ATTORNEY AT LAW
P.O. BOX 399
MOUNDS, OK 74047
COUNSEL FOR DEFENDANT

GLEN DRESBACK
ASSISTANT DISTRICT ATTORNEY
ONE COURT PLACE, SUITE 250
PRYOR, OK 74361
COUNSEL FOR THE STATE

**APPEARANCES ON APPEAL**

VIRGINIA SANDERS
P.O. BOX 926
NORMAN, OK 73070
COUNSEL FOR APPELLANT

E. SCOTT PRUITT
OKLAHOMA ATTORNEY GENERAL
KEELEY L. MILLER
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
COUNSEL FOR APPELLEE

**OPINION BY: HUDSON, J.**
**SMITH, P.J.: CONCUR IN RESULTS**
**LUMPKIN, V.P.J.: CONCUR IN RESULTS**
**JOHNSON, J.: CONCUR IN RESULTS**
**LEWIS, J.: CONCUR**

**LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN RESULTS**

I concur in the decision in this case but write separately to address a problem which has recently confronted this Court in more than one instance. This case presents the confluence of several legal principles which affect the notice pleading responsibility of the prosecution in a criminal proceeding. While I emphasize that Oklahoma is a notice pleading state, *Parker v. State*, 1996 OK CR 19, ¶ 24, 917 P.2d 980, 986, the question arises as to what is sufficient notice when alleging the commission of multiple offenses during the same period of time. This is a situation we see often in child sex abuse and lewd molestation prosecutions.

The District Attorney retains broad discretion as to whether, when and how to prosecute crime. *State v. Haworth*, 2012 OK CR 12, ¶ 13, 283 P.3d 311, 316. *See also State v. Franks*, 2006 OK CR 31, ¶ 6, 140 P.3d 557, 558 ("prosecutors have broad discretion in deciding what charges to bring.") The District Attorney has the authority to elect to prosecute in a single count a continuous offense committed during a specified period of time or to charge in separate counts separate offenses committed during a specified period of time. The problem arises when the State elects to charge the commission of multiple offenses in separate counts but alleges the same time period for all of the offenses. This problem has repeated itself several times during the last few months in cases this Court has reviewed on appeal. It is hard to discern if this

has become an accepted practice within the District Attorney system or if it is just a reflection of lazy, sloppy prosecutors.

There are various principles of a law at issue in this problem. They include:

A defendant has a right to be informed of the charges he or she must face. *Parker,* 1996 OK CR 19, ¶ 19, 917 P.2d at 985.

It is within the prosecutor's discretion to charge the commission of multiple acts during a specified period of time as one crime as set out in one count or charge multiple acts as a separate crimes set out in separate counts in the felony information. *See State v. Franks*, 2006 OK CR 31, ¶ 6, 140 P.3d at 558.

An information will be found sufficient if it does not mislead the defendant and does not expose the defendant to double jeopardy. *Kimbro v. State*, 1990 OK CR 4, ¶ 5, 857 P.2d 798, 800.

Title 21 O.S.2011, § 11 and double jeopardy principles require this Court on appeal to determine when the commission of multiple offenses is alleged, whether the offenses are separate crimes warranting separate punishment or one continuous act warranting only a single punishment. *See Sanders v. State,* 2015 OK CR 11, ¶ 6, 358 P.3d 280, 283.

Unless time is a "material ingredient" of the offense, we have not required the State to plead a particular moment in which the crime occurred. *Robedeaux v. State,* 1995 OK CR 73, ¶ 8, 908 P.2d 804, 806. We have allowed the State to describe the time of the charged offense as "on or about" or

occurring between two specific dates. *Id.* However, the time frame alleged must be within reasonable limits and specifically applicable to each charge. *See Kimbro*, 1990 OK CR 4, ¶ 7, 857 P.2d 798, 801.

The charging information gives notice to the defendant as to the manner in which the prosecution will proceed, whether as a single continuous offense or multiple separate acts. *See Curtis v. State,* 86 Okla. Crim. 332, 193 P.2d 309, 343 (1948) ("the purpose of a descriptive label [in the charging part of the information] is to evidence the prosecutor's election, and intention as to the offense he believes covers the unlawful acts.") However, when a prosecutor sets out three or four separate counts and alleges each occurred within the same time frame, the State confuses the two methods of setting out the charges against the defendant. While *Parker* sets out the record that can be considered in determining whether proper notice was given to meet constitutional muster, 1996 OK CR 19, ¶ 24, 917 P.2d at 986, it does not give the State *carte blanche* authority to "hide the ball" on its manner of prosecution. The information is the vehicle which puts a defendant on notice as to the prosecution's intent and should at least set out a separate time frame for each alleged offense. The State should be bound by the election it makes in its pleading through the information.

In the case before us, the State sets out three separate offenses but used the same time frame for each. There is no way to tell if these three instances are one continuous course of conduct or separate and distinct acts which satisfy both Section 11 and double jeopardy protections. If the acts are

separate and distinct, by my own experience I know that the State, if a proper investigation was conducted, could have set out more distinct time frames for each alleged offense.

I am not advocating the Court do away with the requirement of notice pleading set out in *Parker*, but I am advocating the Court require true notice pleading when the State seeks to prosecute multiple violations of the law in order that the court and the defense can discern what the State's election truly is and ensure that the State is not merely giving notice of propensity evidence it seeks to present. While the prosecution has broad discretion in determining which criminal charge to bring, this discretion is not without limits. *Childress v. State*, 2000 OK CR 10, ¶ 18, 1 P.3d 1006, 1011.