IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

JAMES LORENZO DEVERS, Appellant, -vs- STATE OF OKLAHOMA, Appellee.	)	NOT FOR PUBLICATION No. F-2003-1278

OPINION

JOHNSON, JUDGE:

James Lorenzo Devers, Appellant, was tried by jury in the District Court of Tulsa County, Case No. CF-2003-1674, where he was convicted of Counts 1 and 2 – Inducing a Minor to Engage in Prostitution and Count 3 – Indecent Proposal to a Child, each after former conviction of two or more felonies. The jury set punishment at life imprisonment and a $25,000 fine on Counts 1 and 2 and life imprisonment without the possibility of parole on Count 3. The Honorable Tom C. Gillert, who presided at trial, sentenced Devers accordingly and ordered the sentences to be served consecutively. From this judgment and sentence, he appeals.

Three teenage boys, sixteen-year-olds M.J. and D.W. and fifteen-year-old D.P., testified against Devers at trial. Each accused Devers of offering to pay them money if each would allow Devers to look at his penis, and even more money if Devers could perform fellatio on them. Each claimed they refused Devers' proposal. M.J. testified that Devers made the proposal to him in February or March of 2003 after Devers had taken him and some other boys out

to eat and to the movies. M.J. said that Devers dropped off the other boys and made him the offer when the two were alone in Devers' car in front of M.J.'s house. D.W. testified that Devers made him the proposal in February 2003 when the two were alone in Devers' car just down the street from D.W.'s house. D.W. said Devers had driven one of D.W.'s friends and some other boys home before parking and making D.W. the offer. D.W. testified that Devers apologized to him in the car that "he came at [him] that way." D.P. testified that Devers made the proposal to him sometime between September 2002 and March 2003 when the two were alone on D.P.'s front porch. Devers later apologized to D.P. and said he was just "playing."

Eventually, the boys told relatives about the incidents and the police were notified. The police arrested Devers in April 2003. Devers confirmed that he made the aforementioned proposals to M.J. and D.P. during an interview on April 14, 2003 with Tulsa Police Detective Charles Haywood, but denied approaching D.W. "in that manner." In May 2003, while in jail awaiting trial, Devers sent letters to D.P.'s mother and to D.W.'s grandmother in which he apologized for his proposals and asked each to drop the charges against him. Other facts will be discussed as they become relevant to the propositions of error raised for review.

In Proposition One, Devers contends the trial court erred when it denied his motion to sever his three counts for trial. Specifically, he claims prejudice resulted from the improper joinder of counts because trying three counts of

what amounted to the same offense before the same jury increased the chance the jury would convict on all counts due to the number of victims alleging the same misconduct. The record shows the trial court denied Appellant's motion to sever, finding that the crimes were so distinctive they showed a signature. We will not grant relief on a claim of improper joinder unless the trial court abused its discretion resulting in prejudice to the accused. *Gates v. State,* 1988 OK CR 77, ¶ 24, 754 P.2d 882, 887.

"[J]oinder of separately punishable offenses is permitted if the separate offenses arise out of one criminal act or transaction, or are part of a series of criminal acts or transactions. *Glass v. State,* 1985 OK CR 65, ¶ 8, 701 P.2d 765, 768; *Allison v. State,* 1983 OK CR 169, ¶ 10, 675 P.2d 142, 146; 22 O.S.2001, § 436. In interpreting the phrase "series of acts or transactions," the *Glass* Court explained that "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." *Glass,* 1985 OK CR 65, ¶ 9, 701 P.2d at 768.

Devers maintains these crimes were wholly separate and independent of each other and that the jury was unfairly influenced by the improper joinder due to the admission of evidence of the separate offenses which would have constituted inadmissible "other crimes evidence" had the counts been severed. We disagree.

The evidence showed that Devers routinely befriended and was in the company of teenage boys. Between September 2002 and March 2003, Devers befriended and offered money to the three teenage male victims in this case in exchange for engaging in a sexual act. Each boy testified that Devers had approached and befriended him by offering such things as friendship and jobs. After spending time with the boys, Devers created a situation in which he was alone with each boy. While alone, Devers offered each boy money if the boy would allow Devers to look at the boy's penis. When each boy refused, the amount of money offered increased. As Devers upped the ante, Devers changed his proposal from simply viewing the boy's penis to performing oral sodomy on the boy. The same peculiar and characteristic behavior pattern manifested in the crimes charged evidenced a common scheme or plan and evidence of each would have been admissible even had the counts been severed, especially under the "greater latitude" rule. *See Myers v. State,* 2000 OK CR 25, ¶¶ 21-24, 17 P.3d 1021, 1029-30, *cert. denied*, 534 U.S. 900, 122 S.Ct. 228, 151 L.Ed.2d 163 (2001). Based on our review of the record, we find these crimes were sufficiently connected by time, geographical proximity, and evidence to make joinder proper. Moreover, were we to find error, which we do not, said error would be harmless beyond a reasonable doubt because the evidence as to each separate count was independent and overwhelming. Devers, himself, confessed to two of the charges, making any prejudicial effect of trying the counts together slight. On this record, we find the trial court did

not abuse its discretion in denying Devers' motion to sever counts. Therefore, relief is not warranted.

In Proposition Two, Devers claims the trial court incorrectly instructed the jury on the applicable range of punishment for Indecent Proposal to a Child in Count 3. The parties agree there were two conflicting versions of 21 O.S.Supp.2002, § 1123 (A) in effect during the six month time span in which Devers was charged with making the indecent proposal to D.P.[1] One version hereinafter referred to as Version One for purposes of discussion went into effect November 1, 2002 and contained a more expansive enhancement provision in paragraph 5 for certain repeat offenders. The other version hereinafter referred to as Version Two went into effect June 5, 2002 and was superceded by Version One when Version One went into effect. Devers maintains the trial court should have instructed the jury pursuant to the second version, the less punitive one according to him.

Persons accused of crime, if convicted, should be convicted and sentenced pursuant to the statute in effect at the time the crime was committed. Therefore in this case, if the offense occurred prior to November 1, 2002, Devers should have been convicted and sentenced under Version Two of § 1123 (A) which went into effect June 5, 2002. However, if the offense was committed after November 1, 2002, Devers should have been convicted and

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[1] This section was amended three times during the 2002 Legislative Session, by: (i) Laws 2002, HB 2301, c. 110, § 2, emerg. eff. July 1, 2002; (ii) Laws 2002, SB 1425, c. 455, § 6, emerg. eff. June 5, 2002; and (iii) Laws 2002, SB 1536, c. 460 § 11, eff. November 1, 2002. None of the 2002 amendments was repealed during the 2003 Legislative Session.

sentenced under Version One. Devers was charged in Count 3 with making an indecent proposal to fifteen-year-old D.P. sometime between September 2002 and March 2003; however, at trial, D.P. testified that the proposal was made in September 2002 and that Devers apologized for making the proposal in February/March 2003. Based on this record, we find Devers should have been convicted and sentenced pursuant to Version Two.

Version Two provided:

> A. Any person who shall knowingly and intentionally:
> 1. Make any oral, written or electronically or computer-generated lewd or indecent proposal to any child under sixteen (16) years of age for the child to have unlawful sexual relations or sexual intercourse with any person . . .
> 5. In a lewd and lascivious manner and for the purpose of sexual gratification, urinate or defecate upon a child under sixteen (16) years of age or ejaculate upon or in the presence of a child, or force or require a child to look upon the body or private parts of another person or upon sexual acts performed in the presence of the child or force or require a child to touch or feel the body or private parts of said child or another person, upon conviction, shall be deemed guilty of a felony and shall be punished by imprisonment in the State Penitentiary for not less than one (1) year nor more than twenty (20) years, **except as provided in Section 3 of this act.**[2] The provisions of this section shall not apply unless the accused is at least three (3) years older than the victim. Any person convicted of a second or subsequent violation of subsection A of this section shall be guilty of a felony and shall not be eligible for probation, suspended or deferred sentence. Any person convicted of a third or subsequent violation of subsection A of this section shall be guilty of a felony and shall be punished by imprisonment in the State Penitentiary for a term of life or life without parole, in the discretion of the jury, or in case the jury fails or refuses to fix punishment then the same shall be pronounced by the court.

Section 3 of the Act was Title 21 O.S.Supp.2002, § 51.1a which also went into effect June 5, 2002 and provided in pertinent part:

> Any person convicted of . . . lewd molestation . . . after having been convicted of either rape in the first degree, forcible sodomy, lewd molestation or sexual abuse of a child shall be sentenced to life without parole.

Because the jury convicted Devers of lewd molestation under § 1123 (A) for making an indecent proposal to a child under 16 and because he had prior convictions for both forcible sodomy and lewd molestation, the trial court should have instructed the jury that if it found Devers had prior convictions for either forcible sodomy or lewd molestation, the punishment was life without the possibility of parole. 21 O.S.Supp.2002, §§ 1123 (A) & 51.1a.

The record shows the trial court in the instant case followed Version One and instructed the jury that the range of punishment for making an indecent proposal to a child for a person with two or more previous convictions for forcible sodomy or indecent proposal to a child is life or life without parole. The trial court also instructed the jury that the punishment for indecent proposal to a child after two or more previous felony convictions is twenty years imprisonment to life. The jury's recommended sentence of life without parole shows it found that Devers had at least two previous convictions for either forcible sodomy or lewd molestation. Had the trial court given the correct instruction in this case, the only punishment available would have been life without parole. Therefore, any error in the trial court's instruction giving the jury the option of life or life without parole was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967).

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[2]O.S.L.2002, c. 455, § 3, (Title 21, § 51.1a).

In Proposition Three, Devers argues the trial court should have instructed the jury that he would have to serve 85% of the sentence imposed before he could be considered for parole. He claims the failure to inform the jury about the statutory curtailment of parole in 21 O.S.Supp.2002, § 13.1 gives rise to the danger that a jury will give a lengthier sentence than was warranted to ensure an offender is incarcerated for a period of time.

Title 21 O.S.Supp.2002, § 13.1 requires that persons convicted of certain crimes, including Lewd Molestation, be required to serve not less than eighty-five percent (85%) of any sentence imposed prior to becoming eligible for parole. Persons convicted of the crimes enumerated under § 13.1 also are not eligible to earn credits which have the effect of reducing the length of a sentence to less than eighty-five percent (85%) of the sentence imposed. Defense counsel submitted proposed instructions informing the jury that Devers would have to serve eighty-five percent (85%) of any sentence imposed by the jury on all counts. The trial court rejected the instructions. During deliberations, the jury sent out a note asking, "If given life, what is the minimum term before parole can be considered?" The trial court again declined defense counsel's proposed instructions on § 13.1 and told the jury it had all the necessary instructions to reach a verdict.

The trial court did not err in refusing defense counsel's proposed instruction for Counts 1 and 2 as Inducing a Minor to Engage in Prostitution is not an enumerated crime under § 13.1 and is not subject to the eighty-five

percent rule. Moreover, because the correct sentence on Count 3 for a person with Devers prior convictions was a mandatory life without parole sentence, *see* Proposition 2, *supra.*, we fail to see how Devers was prejudiced by the omission of the proposed instruction or the trial court's answer to the jury's question. Accordingly, we find no relief is required.

In Proposition Four, Devers correctly notes that the trial court's instruction setting forth the range of punishment for Counts 1 and 2 combined the term of imprisonment which may be assessed under the habitual offender statute (21 O.S.Supp.2002, § 51.1 (C)) with the fine provision from 21 O.S.2001, § 1088 (B)(1), the statute criminalizing Inducing a Minor to Engage in Prostitution. Devers also correctly notes, and the State concedes, that we have found the mixing of punishment provisions, like in the instant case, constitutes error. *See Gaines v. State,* 1977 OK CR 259, ¶ 16, 568 P.2d 1290, 1294 (holding punishment may not be assessed by combining statutes, but must fall within the limitations of one statute only.) Due to this instructional error, we find that Devers' fines on Counts 1 and 2 must be **MODIFIED** to a fine of $10,000.00. *See* 21 O.S.2001, § 64(B).

In Proposition Five, Devers argues his consecutive life sentences are excessive. He argues the sentences are too severe in light of the nature and circumstances of the offense and his troubled childhood. This Court will not reduce a sentence that is within statutory limits unless it is so excessive as to shock the conscience of the Court. *Rea v. State,* 2001 OK CR 28, ¶ 5, 34 P.3d

148, 149. The sentences imposed here are within the statutory limits. The jury heard the evidence in this case and of Devers' six prior felony convictions, including three sodomy convictions and one lewd molestation conviction. Based on this record, it cannot be said the sentence is so excessive as to shock the conscience of this Court. Accordingly, this proposition is denied. Having reviewed all of Devers' claims, we find the Judgment and Sentence of the trial court on Count 3 should be and is hereby **AFFIRMED.** Counts 1 and 2 are **AFFIRMED** with the fine imposed on those counts **MODIFIED to $10,000.00.**

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE TOM C. GILLERT, DISTRICT JUDGE

James Lorenzo Devers, Appellant, was convicted by jury in Tulsa County District Court, Case No. CF-2003-1674, of Counts 1 and 2 – Inducing a Minor to Engage in Prostitution and Count 3 – Indecent Proposal to a Child, each after former conviction of two or more felonies. The jury set punishment at life imprisonment and a $25,000 fine on Counts 1 and 2 and life imprisonment without the possibility of parole on Count 3. The Honorable Tom C. Gillert, District Judge, who presided at trial, sentenced Devers accordingly and ordered the sentences to run consecutively. From this judgment and sentence, he appeals. **AFFIRMED as MODIFIED.**

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OPINION BY: JOHNSON, J.:
CHAPEL, P.J.: CONCUR IN PART/DISSENT IN PART
LUMPKIN, V.P.J.: CONCUR
LILE, J.: CONCUR IN RESULT

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