IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

HERBERT EDSEL HAILEY, II,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
-vs-	)	No. F-2003-802
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

STRUBHAR, JUDGE:

Appellant, Herbert Edsel Hailey, II, was convicted in the District Court of Oklahoma County, Case No. CF-2001-1679, of Possession of Obscene Material Involving the Participation of a Minor (Count 1), First Degree Rape by Instrumentation (Count 2), Forcible Oral Sodomy (Counts 3, 4, 7, 8, 10, 15 and 18), Indecent or Lewd Acts With a Child Under Sixteen (Counts 5 and 19), First Degree Rape (Counts 6 and 9), Second Degree Rape (Counts 11, 12, 13 and 16), Second Degree Rape by Instrumentation (Counts 14 and 17), Sexual Exploitation of a Child (Count 20), Procuring the Participation of a Minor in Photographs Depicting Sexual Activity (Counts 21, 22 and 24) and Making Lewd or Indecent Proposals to a Child Under Sixteen (Count 23). The jury trial was held before the Honorable Susan P. Caswell. The jury assessed punishment at twenty years imprisonment and a $25,000.00 fine on Count 1; life imprisonment on Counts 2, 6 and 9; twenty years imprisonment on Counts

3, 4, 5, 7, 8, 10, 15, 18, 19 and 23; fifteen years imprisonment on Counts 11, 12, 13, 14, 16 and 17; life imprisonment and a $5,000.00 fine on Count 20; and thirty years imprisonment on Counts 21, 22 and 24. The trial court sentenced Appellant accordingly, ordering the sentences to run consecutively.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm in part, reverse in part and modify in part. In reaching our decision, we considered the following propositions of error and determined this result to be required under the law and the evidence:

I. The trial court erred in allowing Appellant to be impeached with a hearsay allegation that he had molested his adopted sister.

II. Appellant was deprived of a fair trial when the prosecutor told the jury that Appellant had molested his sister as well as other unnamed people; that Appellant no longer had the right to the presumption of innocence; that Appellant was responsible for the child pornography industry; and appealed to the jury's sympathy for the alleged victims.

III. The trial court committed reversible error when it admitted photographs that violated Appellant's right to a fair trial.

IV. The trial court erred by allowing the prosecution to improperly cross-examine a defense witness with evidence that was cumulative and irrelevant, but extremely prejudicial.

V. The prosecutor deprived Appellant of a fair trial by making allegations of other crimes during cross examination for which no supporting evidence was ever produced.

VI. The trial court committed fundamental error, and prejudiced Appellant in the eyes of the jury, by telling the jury that Appellant's bond had been revoked.

VII. Where the prosecution charges the same offense, occurring over the same period of time, in two separate counts, only one conviction can be sustained; therefore one of these duplicate counts should be vacated.

VIII. Under the facts of this case, Appellant's convictions for both causing a child to participate in pornography (Count 22) and lewd acts with a child (Count 19) violated the prohibitions against double jeopardy and double punishment.

IX. The crime of sexual exploitation, as charged in Count 20, did not exist during the entire time frame charged by the State, therefore Appellant's conviction on this charge should be vacated.

X. Appellant's alleged offense of simple possession of child pornography should have been prosecuted under the specific law involving simple possession of such matter, rather than the general statute that covers the more serious offenses of manufacturing and distributing child pornography, therefore his sentence should be modified to five years or less; in the alternative, the trial court committed fundamental error by not instructing on the more specific offense.

XI. The sentences in Counts 21, 22 and 24 exceeded the statutory maximum and should be modified.

XII. Because Count 2 charged Appellant with committing rape by instrumentation on a child under 16 years of age, which constitutes second degree rape, it was error for Appellant to be convicted of first degree rape on this count.

XIII. The trial court abused its discretion when it ran all of Appellant's sentences consecutively.

XIV. The cumulative effect of all these errors deprived Appellant of a fair trial.

XV. Appellant was deprived of effective assistance of counsel by his trial attorney's failure to object to improper comments and failure to present evidence.

DECISION

As to Appellant's argument in Proposition I, we find that the erroneous admission of hearsay did not contribute to the verdict or the sentence and was harmless beyond a reasonable doubt. *Welch v. State*, 2 P.3d 356, 370 (Okl.Cr.2000). Further, any violation of the confrontation clause was also harmless beyond a reasonable doubt. *See Humphreys v. State*, 947 P.2d 565, 574 (Okl.Cr.1997).

With regard to error raised in Proposition II, we find that the comments complained of did not rise to the level of plain error. *See Matthews v. State*, 45 P.3d 907, 920 (Okl.Cr.2002). Further, constitutional error was harmless beyond a reasonable doubt.

Appellant's argument in Proposition III requires no relief as the error complained of was harmless beyond a reasonable doubt and did not deny Appellant his constitutional right to due process.

Error raised in Proposition IV requires no relief as the error complained of cannot be found to have prejudiced Appellant under the circumstances of this case. *Bland v. State*, 4 P.3d 702, 727 (Okl.Cr.2000).

Proposition V requires no relief as the questions asked did not constitute improper impeachment. *Somers v. State,* 541 P.2d 258, 261 (Okl.Cr.1975).

Similarly, error raised in Proposition VI warrants no relief as the trial court's comment to the jury cannot fairly be found to have tainted the verdict.

We find in Proposition VII that Appellant was neither exposed to double jeopardy or double punishment. *Kimbro v. State,* 857 P.2d 798, 800 (Okl.Cr.1990).

In Proposition VIII, we find that Appellant's convictions on Counts 19 and 22 arose from two separate and distinct acts which, although occurring in close proximity to one another, do not violate either the constitutional prohibition against double jeopardy or the statutory prohibition against double punishment. *See Davis v. State,* 916 P.2d 251, 261 (Okl.Cr.1996); *Hale v. State,* 888 P.2d 1027, 1028 (Okl.Cr.1995).

We agree with Appellant in Proposition IX, that during part of the time Appellant was charged with committing the crime of Sexual Exploitation, such a crime did not exist. Thus, his conviction for acts which were only a crime after 1995 violates *ex post facto* provisions of the federal constitution. *Selsor v. State,* 2 P.3d 344, 350 (Okl.Cr.2000). Because the child abuse statute as amended in 1995 clearly added elements not included in the earlier version

and these are the elements he was charged with having committed, Appellant's conviction on Count 20 must be reversed with instructions to dismiss.

Appellant's argument in Proposition X is also meritorious. Appellant should have been charged with possession of pornography under the specific statute rather than the general statute. *See Lozoya v. State*, 932 P.2d 22, 28-29 (Okl.Cr.1996). Thus, his Judgment and Sentence should be corrected to reflect his conviction on Count 1 to be under 21 O.S.Supp.2000, § 1024.2 and his sentence on Count 1 modified to the maximum punishment provided under section 1024.2, five years imprisonment and a $5,000.00 fine.

Proposition XI also requires relief as Appellant's sentences on Counts 21, 22 and 24 exceeded the statutory maximum and are each hereby modified to twenty years imprisonment under 21 O.S.Supp.2000, § 1024.2.

Appellant's request for relief in Proposition XII fails as the charging language in Count 2 was wholly adequate to give Appellant notice that he was charged with first degree rape by instrumentation and was thus required to defend against this crime. *See Parker v. State*, 917 P.2d 980, 986 (Okl.Cr.1996).

We also decline to grant relief in Proposition XIII as the trial court did not abuse its discretion in ordering that Appellant's sentences run consecutively. *Pickens v. State*, 850 P.2d 328, 338 (Okl.Cr.1993).

As to Proposition XIV, we note that relief has been granted on allegations of error in which it was warranted. None of the other errors, either considered singly or cumulatively, require any relief as any other irregularities were harmless beyond a reasonable doubt. *Black v. State*, 21 P.3d 1047, 1078 (Okl.Cr.2001).

Finally, Appellant neither provides this Court with evidence sufficient to show that he is entitled to an evidentiary hearing under Rule 3.11(B)(3)(b)(i), Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App. (2004) nor does the record show that counsel's alleged deficient performance prejudiced his right to a fair trial with a reliable result. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

The Judgment and Sentence of the trial court is **REVERSED** with instructions to **DISMISS** as to Count 20. Appellant's convictions on all other counts are **AFFIRMED**. However, his Judgment and Sentence should be corrected to reflect his conviction on Count 1 to be under 21 O.S.Supp.2000, § 1024.2 and his sentence on Count 1 is hereby **MODIFIED** to the maximum punishment provided under section 1024.2, five years imprisonment and a $5,000.00 fine. Further, his Sentence on Counts 21, 22 and 24 are each hereby **MODIFIED** to twenty years imprisonment.

APPEARANCES AT TRIAL
STEVEN HOLDEN
DUKE HOLDEN
1420 LINWOOD BLVD
OKLAHOMA CITY, OK 73106
ATTORNEYS FOR APPELLANT

CONNIE POPE
JOEL-LYN MCCORMICK
320 ROBERT S. KERR, STE 505
OKLAHOMA CITY, OK 73102
ATTORNEYS FOR THE STATE

APPEARANCES ON APPEAL
THOMAS PURCELL
O.I.D.S
P.O. Box 926
NORMAN, OKLAHOMA 73070
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF
OKLAHOMA
SANDRA D. RINEHART
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR APPELLEE

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

CHAPEL, J., CONCURS IN PART/DISSENTS IN PART:

I concur in the majority opinion in all respects except one. I would modify the sentences to run concurrently.