IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JESSE JAMES STOUT,	)	**NOT FOR PUBLICATION**
	)	
Appellant,	)	
	)	
v.	)	Case No. F-2009-177
	)	
THE STATE OF OKLAHOMA	)	
	)	
Appellee.	)	

SUMMARY OPINION

LEWIS, JUDGE:

Jesse James Stout, Appellant, was tried by jury and found guilty Counts 1 through 8, sexual abuse of a child, in violation of 10 O.S.Supp.2006, § 7115; and Counts 9 through 11, exhibition of obscene materials to a minor child, in violation of 21 O.S.Supp.2006, § 1123(A)(5)(d), in the District Court of Oklahoma County, Case No. CF-2006-7200.[1] The jury sentenced Appellant to forty-three (43) years imprisonment on Count 1 and 2; forty (40) years imprisonment on Count 3, 4, 5, and 6; thirty (30) years imprisonment on Count 7 and 8; and fifteen (15) years imprisonment on Count 9, 10, and 11. The Honorable Virgil Black, District Judge, imposed judgment and sentence accordingly. Judge Black ordered sentences ran consecutively. Mr. Stout appeals in the following propositions of error:

1. The trial court erred in denying Appellant's motion to suppress his confession.

2. The trial court erred in submitting eight separate counts of sexual abuse to the jury instead of three counts of sexual abuse.

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[1] 10 O.S.Supp.2006, § 7115 and 21 O.S.Supp.2006, § 1123(A)(5)(d) are 85 percent offenses. 21 O.S.Supp.2006, §§ 13.1(7), 13.1(11).

3. The trial court erred in allowing the State to amend counts 9 through 11 at the end of trial to allow the State to charge three 85% crimes not pled in the information and not instructing the jury on the 85% law.

Appellant first argues that the trial court erred in denying his motion to suppress his confession because he invoked his Fifth and Sixth Amendment rights to counsel prior to questioning. When ascertaining whether a suspect has invoked his right to counsel, we consider the totality of the circumstances. *Dennis v. State*, 1999 OK CR 23, ¶ 14, 990 P.2d 277, 284. We review the trial court's findings of fact for clear error and conduct a *de novo* review of the record. *Thrasher v. State*, 2006 OK CR 15, ¶ 12, 134 P.3d 846, 850. "[O]nce a suspect has been advised of his right to deal with police only through counsel . . . interrogation may continue unless the suspect invokes that right unequivocally." *McHam v. State*, 2005 OK CR 28, ¶ 30, 126 P.3d 662, 672. We find that Appellant's question to the investigating officer was not an unequivocal invocation of his right to counsel. Appellant's testimony at trial shows that he understood his right to speak with an attorney prior to questioning and to not answer questions. See *McHam*, 2005 OK CR 28, ¶ 29, 126 P.3d 662, 672. Appellant was not threatened or coerced to waive his rights or give his statement. *Davis v. State*, 2004 OK CR 36, ¶ 33, 103 P.3d 70, 80. Appellant has not shown that his waiver of the right to counsel or his subsequent statements were involuntary.

Appellant also argues that because he had been appointed counsel prior to the interrogation, the detective violated his Sixth Amendment rights. The

Sixth Amendment right to counsel is offense specific and does not attach until the prosecution is commenced. *Texas v. Cobb*, 532 U.S. 162, 167, 121 S.Ct 1335, 1340, 149 L.Ed.2d 321, 328 (2001). Since Appellant was not charged with any offense relating to the sexual abuse of J.S. at the time of questioning, his right to counsel on these charges had not attached. *Warner v. State*, 2006 OK CR 40, ¶ 55, 144 P.3d 838, 866. Therefore, the detective's questioning did not violate his constitutional rights. Proposition One is denied.

In his second proposition, Appellant argues that his eight convictions under 10 O.S.Supp.2006, § 7115 were submitted to the jury in violation of *Huddleston v. State*, 1985 OK CR 12, 695 P.2d 8. In *Huddleston v. State*, the Court said that "when a child of tender years is under the exclusive domination of one parent for a definite and certain period of time and submits to sexual acts at that parent's demand, the separate acts of abuse become one transaction within the meaning of this rule." *Id.*, 1985 OK CR 12, ¶ 16, 695 P.2d at 10-11. The "election" rule referenced in *Huddleston* is implicated only where the State fails to specify the alleged acts that constitute the charged offenses. *Cody v. State*, 1961 OK CR 43, ¶¶ 35-39 361 P.2d 307, 319-20. The record demonstrates that the State specifically set forth each allegation of abuse, and the jury was instructed to consider each of these allegations separately. The rule of "election" set forth in *Huddleston* has no application here. Proposition Two is denied.

In his final proposition, Appellant argues that the trial court erred in allowing the State to amend the information on Counts 9 through 11 at the

close of trial, and subsequently instructing the jury to determine Appellant's guilt of a different crime than the original charge. "[I]nformation may be amended in matter of substance or form . . . after plea on order of the court where the same can be done without material prejudice to the right of the defendant." 22 O.S.2001 § 304. "This court will thus ask whether the Information gives the Defendant notice of the charges against him and apprises him of what he must defend against at trial." *Parker v. State*, 1996 OK CR 19, ¶ 24, 917 P.2d 980, 986. Appellant was charged by information with three counts of exhibition of obscene materials to a minor child, an alleged violation of 21 O.S.Supp.2003, § 1021(B). At the close of its case-in-chief, the State moved to amend the information to allege a violation of 21 O.S.Supp.2006, § 1123(A)(5)(d), lewd or indecent acts with a child under sixteen by exhibiting obscene materials. The State argued Appellant was not prejudiced by the amendment because section 1123(A)(5)(d) was a lesser included offense of section 1021(B), which "contains all the elements of 1021(B), minus some of the additional elements, so it is by definition, a lesser included . . . and the punishment goes down from 10 to 30, to 3 to 20."

Although all of the elements of section 1123(A)(5)(d) are contained within section 1021(B), a violation of section 1123 is an "85 percent crime" and is therefore not a lesser included offense of section 1021(B) in the situation presented here. 21 O.S.Supp.2006, § 13.1(11). The district court attempted to circumvent this problem by ignoring the 85 percent requirement of section 13.1(11). This was error as well. *Anderson v. State,* 2006 OK CR 6, ¶ 25, 130

P.3d 273, 283. A district court has no authority to ignore the penalty for crime(s) fixed by statute. *Patterson v. Oklahoma*, 44 Okl.Cr. 298, 303, 280 P. 862, 864 (1929). Section 1021(B) carries a greater *abstract* range of punishment—ten (10) to thirty (30) years—than section 1123's three (3) to twenty (20) year range. However, the 85 percent rule mandates that certain penalties for this offense will carry a greater term of imprisonment than a conviction under section 1021(B). Here, Appellant's fifteen (15) year sentences in each of these three counts, subject to the 85 percent rule, are greater punishments than the same sentences under section 1021(B). We find the trial court erred in allowing amendment of the information and instructing the jury to consider whether Appellant committed lewd or indecent acts with a child under section 1123(A)(5)(d). This amendment materially prejudiced Appellant in violation of his due process rights. The convictions in Counts 9, 10, and 11 are reversed and remanded.

DECISION

The Judgment and Sentence of the District Court of Oklahoma County in Counts 1 through 8 is **AFFIRMED**. Counts 9, 10, and 11 are **REVERSED** and **REMANDED** for a new trial. Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2010), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE VIRGIL C. BLACK, DISTRICT JUDGE

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OPINION BY LEWIS, J.
C. JOHNSON, P.J: Concurs
A. JOHNSON, V.P. J.: Concurs in Result
LUMPKIN, J: Concurs in Part/Dissents in Part

A. JOHNSON, VICE PRESIDING JUDGE, CONCURRING IN RESULT:

I join the majority opinion in affirming Appellant's convictions in Counts 1 through 8. I cannot, however, agree with the analysis of that opinion in reversing Appellant's convictions in Counts 9, 10 and 11, and concur only in that result.

I find the convictions in Counts 9, 10 and 11 must be reversed because the late amendment of the Information (i.e., mid-trial after the State rested its case) materially prejudiced Stout's ability to present a defense. I reach this conclusion because the statutory elements of the crimes charged in the amended Information are so different from those in the original Information that the newly charged crimes likely would have required a different defense strategy from the outset. Specifically, the elements of the offense of showing a minor obscene material for the purpose of inducing the minor to lewdly expose herself to others, or make an exhibition of herself to others for the sexual stimulation of viewers, or for the purpose of preparing, publishing, or distributing obscene material or child pornography, in violation of 21 O.S.Supp.2006, § 1021(B)(2), as charged under the original Information, are much different from the elements of the crime of showing obscene materials to a child in a lewd and lascivious manner for the purpose of sexual gratification, in violation of 21 O.S.Supp.2006, § 1123(A)(5)(d), as charged under the amended Information.

LUMPKIN, JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the affirmance of Counts 1-8. However, I dissent to the reversal of Counts 9-11. The Court's finding that Appellant was materially prejudiced by the amending of the information is based upon a faulty analysis of lesser included offenses. Statutory sentencing provisions are not a consideration in the determination of the existence of lesser included offenses.

In determining the existence of a lesser included offense as defined in 22 O.S. 2001, § 916, we look first to the elements of the alleged lesser offense and whether they are necessarily included within the elements of the greater offense. Based upon the statutory elements, if the greater offense cannot be committed without necessarily committing the alleged lesser offense, or stated another way if the establishment of the elements of the greater offense necessarily establishes all the elements required to prove the alleged lesser included offense, we proceed to the second part of the analysis and look to the evidence presented at trial. If the evidence adduced at trial supports a *prima facie* case of the elements of the alleged lesser offense, a lesser included offense pursuit to § 916 has been established. *See Bland v. State,* 2000 OK CR 11, ¶ 56, 4 P.3d 702, 720 (*prima facie* evidence defined as "[e]vidence good and sufficient on its face," such that the evidence "is sufficient to establish a given fact ... and which if not rebutted or contradicted, will remain sufficient ... to sustain a judgment in favor of the issue which it supports."). This analysis

does not include punishment provisions which are neither statutory elements nor evidence.

In the present case, a comparison of the relevant statutory elements shows that the commission of the offense of Exhibition of Obscene Materials to a Minor Child, pursuant to 21 O.S.Supp.2003, § 1021(B) necessarily includes the commission of the offense of Lewd or Indecent Acts With a Child Under Sixteen by Exhibiting Obscene Materials, pursuant to 21 O.S.Supp.2006, § 1123(A)(5)(d). Further, the uncontradicted evidence presented at trial showed that Appellant willfully and knowingly exhibited pornographic movies to the child victim. This evidence was sufficient to establish a *prima facie* case of Lewd or Indecent Acts With a Child Under Sixteen by Exhibiting Obscene Materials and § 1123(A)(5)(d) was properly recognized as a lesser included offense of § 1021(B). Based upon the foregoing, the trial court did not abuse it discretion in amending the information to a lesser included offense of the charged offense.

Further, this amendment did not prejudice Appellant. The trial court did not err in determining that § 1123(A)(5)(d) was not an 85 percent crime as Lewd or Indecent Acts With a Child by Exhibiting Obscene Materials is not one of the specifically enumerated 85 percent crimes pursuant to 21 O.S.Supp.2006, § 13.1. As a result, amending the information to allege violations of § 1123(A)(5)(d) did not subject Appellant to a more severe punishment than he was subject to under the originally charged § 1021(B) offenses. Therefore, as

the amendment did not result in any material prejudice to Appellant, I find no reason for reversal and would affirm the convictions in Counts 9, 10, and 11.