IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SIDNEY LEON CRITTENDEN,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	Case No. F 2000-152
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LILE, JUDGE:

Appellant, Sidney Leon Crittenden, was charged with, count I, First Degree Rape by Instrumentation (21 O.S.1991, § 1111.1), and, count II, Lewd Molestation (21 O.S.Supp.1992, § 1123) in the District Court of Creek County, Case No. CF-99-33-B. Appellant was convicted of two counts of Lewd Molestation.[1] The Honorable Donald D. Thompson, District Judge, sentenced Appellant forty-five years imprisonment and a $1000 fine on each count, in accord with the jury verdict. From the Judgment and Sentence, Appellant has perfected his appeal to this Court.

Appellant raises the following propositions of error in support of his appeal:

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[1] The trial court amended count I, at the conclusion of the State's case, to the lesser offense of Lewd Molestation.

1. Admission of other crimes evidence prejudiced the jury, deprived Appellant of his fundamental right to a fair trial, constitutes reversible error, and warrants reversal of appellant's convictions.

2. Appellant's convictions for two separate offenses, which arose from a single transaction, violate the prohibitions against double punishment and double jeopardy.

3. The trial judge erred by presentation of multiple prior felonies to the jury, when those felonies arose from a single transaction.

4. Prosecutorial misconduct denied the appellant a fair trial and constituted fundamental error.

5. The sentences imposed are excessive and should be modified.

After thorough consideration of the entire record before us on appeal including the original record, transcripts, briefs and exhibits of the parties, we find merit in proposition two and have determined that the conviction and sentence in count one shall be affirmed and the conviction and sentence in count two shall be reversed and remanded with instructions to dismiss.

We find, in proposition one, that the admonishment by the trial court cured any perceived error resulting from the statement by the lay witness indicating a prior crime. *Stemple v. State*, 2000 OK CR 4, 994 P.2d 61, 67. In proposition two, we find that, although the victim stated that this was not the first time and "it happened more than once," the evidence adduced at trial did not show sufficiently, beyond a reasonable doubt, that a separate act of molestation occurred within the time period set forth in the Information.

See Colbert v. State, 1986 OK CR 15, 714 P.2d 209, 212 (separate counts affirmed even when occurring within minutes of each other, however, evidence must be sufficient to show separate and distinct acts); *see also Kimbro v. State*, 1990 OK CR 4, 857 P.2d 798, 800 (convictions for separate counts of the same crime must be shown to have occurred within, or on or about the time alleged in the Information).

In proposition three, we find that the prosecution was not required to choose which conviction it intended to use to support the one prior conviction when a series of offenses is considered one offense. *Young v. State*, 2000 OK CR 17, 12 P.3d 20, 40-41. We find, in proposition four, that of the prosecutorial misconduct cited only one instance drew an objection. We find that in this instance the argument was reasonably supported by the evidence.[2] *Bland v. State*, 2000 OK CR 11, 4 P.3d 702, 728. The remaining comments did not rise to the level of plain error. In fact, the comments regarding "reasonable doubt" were only attempts to dispel commonly held attitudes; thus, were not error. *Phillips v. State*, 1999 OK CR 38, 989 P.2d 1017, 1028. In proposition five, we find that the sentence for count one does not shock the conscience of the Court.

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[2] The comment regarded the evidence of penetration. Although the trial court amended count one because it did not believe there was sufficient proof for this element to go to the jury, we find that there was sufficient evidence to make a reasonable inference of digital penetration.

DECISION

The judgment and sentence of the trial court is **AFFIRMED** as to count one. The judgment and sentence in count two is **REVERSED** and **REMANDED** with instruction to **DISMISS**.

APPEARANCES AT TRIAL

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OPINION BY: LILE, J.

LUMPKIN, P.J.: CONCURS
JOHNSON, V.P.J.: CONCURS
CHAPEL, J.: CONCURS IN RESULT
STRUBHAR, J.: CONCURS

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