IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

WILLIE WEST KING, JR.,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
v.	)	
	)	Case No. F-2001-1170
STATE OF OKLAHOMA	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

Appellant Willie West King, Jr., was tried by jury and convicted of two counts of Lewd Molestation of a Child Under Sixteen Years Old (21 O.S.Supp.1999, § 1123), After Former Conviction of Two or More Felonies, Case No. CF-2000-221, in the District Court of Texas County. The jury recommended as punishment sixty-five (65) years imprisonment in each count and the trial court sentenced accordingly, ordering the sentences to run consecutively. It is from this judgment and sentence that Appellant appeals.

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

I. The jury instruction on the elements of the offense was fundamentally defective as it omitted an essential element of the crime.

II. The evidence is insufficient to support the conviction in Count II.

III. The trial court erred in refusing to give an instruction on the necessity of corroboration.

IV. Failure to inform the jury the Appellant would serve 85% of the sentence assessed before being considered for parole, coupled with the prosecutor's misleading argument, resulted in an excessive sentence.

V. The trial court erred in admitting records from Texas that were not properly authenticated.

VI. The trial errors cumulatively deprived Appellant of a fair trial and reliable verdicts.

After a thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that reversal is warranted only as to Count II.

In Proposition I, we find the failure to include the 6th element of the offense of lewd molestation in Instruction No. 12's statement of the elements of the offense plain error. However, we find this error to be harmless. *Ellis v. Ward,* 13 P.3d 985, 986 (Okl.Cr.2000). The absence of that one sentence from the instruction did not determine the verdict or deny Appellant a statutory or constitutional right. The jury was adequately instructed in other instructions and through other areas of the trial that Appellant could not be convicted of the offense unless they found his touching of the victim to have been "characterized by or expressing lust or lewdness" or "obscene, lustful, indecent, lascivious, lecherous."

In Proposition II, we find the evidence insufficient to support the allegation that Appellant touched the victim's body or private parts as alleged in Count II. The evidence showed more of an attempted molestation than the completed act of lewd molestation. Therefore, the conviction in Count II is reversed with instructions to dismiss.

In Proposition III, the trial court properly refused an instruction on the necessity of corroboration of the victim's testimony. The victim's testimony was not inherently improbable or unworthy of belief nor was she so thoroughly impeached so as to warrant an instruction on corroboration. *Roldan v. State,* 762 P.2d 285, 286 (Okl.Cr.1988). *See also Applegate v. State,* 904 P.2d 130, 136 (Okl.Cr.1995), *Salyer v. State,* 761 P.2d 890, 895 (Okl.Cr.1988).

In Proposition IV, we find no plain error in the trial court's omission of a jury instruction that pursuant to 21 O.S.Supp.2000, §§ 12.1 & 13.1 Appellant would have to serve 85% of his sentence before he could be considered for parole. *See Bland v. State,* 4 P.3d 702, 719 (Okl.Cr.2000). A jury needs to be instructed on parole only when parole is a sentencing option. *See Applegate v. State,* 904 P.2d 130, 136 (Okl.Cr.1995); *Mayes v. State,* 887 P.2d 1288, 1316 (Okl.Cr.1994). Life without parole was not a punishment option in this case. Therefore, the court was not required to instruct the jury on parole.

Further, we find prosecutorial misconduct did not contribute to an excessive sentence. A prosecutor is permitted to make a recommendation as to punishment. *Hammer v. State,* 760 P.2d 200, 204 (Okl.Cr.1988); Mahorney *v. State,* 664 P.2d 1042, 1047 (Okl.Cr.1983). Neither this Court nor the Legislature has required that juries must be informed that in certain cases, a defendant must serve 85% of his sentence before becoming eligible for parole. The jury's recommendation of 65 years was within the range of the lightest sentence recommended by the prosecution. Under the evidence in this case, including Appellant's three prior convictions, the sentence imposed was not so

excessive as to shock the conscience of the Court. Therefore, we cannot find the jury was improperly influenced in their sentencing deliberations by the prosecutor's closing argument.

In Proposition V, we find the trial court did not abuse its discretion in admitting evidence of the prior convictions from Texas as the record shows the documents were properly authenticated pursuant to 12 O.S. 2001, § 2902. *See New v. State, 760* P.2d 833, 835 (Okl.Cr.1988). *See also Carter v. State,* 746 P.2d 193, 198 (Okl.Cr.1987), *Hill v. State,* 648 P.2d 1268, 1270 (Okl.Cr.1982).

In Proposition VI, we find Appellant was not denied a fair trial by cumulative error. While error did occur in this case, the cumulative effect of the errors was not so great as to deny Appellant a fair trial. *See Lewis v.* State, 970 P.2d 1158, 1176 (Okl.Cr.1998).

DECISION

The Judgment and Sentence is Count I is **AFFIRMED.** The Judgment and Sentence in Count II is **REVERSED WITH INSTRUCTIONS TO DISMISS.**

AN APPEAL FROM THE DISTRICT COURT OF TEXAS COUNTY
THE HONORABLE RYAN D. REDDICK, ASSOCIATE DISTRICT JUDGE

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

RE

CHAPEL, JUDGE, CONCURS IN PART/DISSENTS IN PART:

I concur in Reversing and Dismissing Count II. However, I would also modify the sentence in Count I to 20 years, as a sentence of 65 years is clearly disproportionate.