IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

TOMMIE LOYD PAYNE, Appellant, -vs- STATE OF OKLAHOMA, Appellee.	)	NOT FOR PUBLICATION No. F-2004-368 FILED IN COURT OF CRIMINAL APPEALS STATE OF OKLAHOMA JUN 10 2005 MICHAEL S. RICHIE CLERK

SUMMARY OPINION

A. JOHNSON, J.:

Tommie Loyd Payne, Appellant, was charged in the District Court of Muskogee County, Case No. CF-2003-48, with 101 counts of sex crimes against his daughter.[1] A jury trial was held and the jury acquitted Payne of 97 counts and convicted him of Count 41 – Second Degree Rape, Count 62 – Forcible Sodomy, Count 86 – Second Degree Rape by Instrumentation and Count 98 – Lewd Molestation. The jury recommended fifteen (15) years imprisonment on Counts 41 and 86 and twenty (20) years imprisonment on Counts 62 and 98. The Honorable Mike Norman, who presided at trial, sentenced Payne accordingly and ordered the sentences to be served consecutively. From this judgment and sentence, Payne appeals and raises the following propositions of error for review:

[1]Payne was charged with 31 counts of First Degree Rape (Counts 1-31), 21 counts of Second Degree Rape (Counts 32-52), 24 counts of Forcible Sodomy (Counts 53-76), 7 counts of First Degree Rape by Instrumentation (Counts 77-83), 5 counts of Second Degree Rape by Instrumentation (Counts 84-88), 12 counts of Lewd Molestation (Counts 89-100) and 1 count of Exhibiting an Obscene Motion Picture to a Minor (Count 101).

I. The sodomy instruction given combined alternative elements that permitted a conviction upon a finding that the defendant's penis penetrated the prosecutrix's vagina. As a result, the verdict on that count is constitutionally infirm because of the possibility that there was a violation of double jeopardy;

II. Under the peculiar facts of this case, the convictions for lewd molestation and rape by instrumentation are duplicative and violate the prohibition against double jeopardy; and

III. The trial court failed to order a pre-sentence investigation report and improperly relegated to the jury the decision whether the sentences would be served concurrently or consecutively.

In Proposition I, Payne contends his convictions and sentences for both forcible sodomy and second degree rape are multiplicitous and violate the prohibition against double jeopardy. Payne raises his multiplicity challenge for the first time on appeal. We, therefore, review for plain error. ***See Kinchion v. State,*** 81 P.3d 681, 684 (Okl. Cr. 2003). Plain errors are errors that counsel failed to preserve through a trial objection but which, upon appellate review, are clear from the record and affect substantial rights. ***See Selsor v. State,*** 2 P.3d 344, 352 (Okl. Cr. 2000). This Court has recognized that double jeopardy errors affect substantial rights and are willing to correct those errors when found even absent preservation of the issue for appeal. ***See Robertson*** v. ***State,*** 888 P.2d 1023, 1025 (Okl. Cr. 1995)(reviewing double jeopardy claim not properly preserved by objection because double jeopardy errors are fundamental); ***Salyer v. State,*** 761 P.2d 890, 892 (Okl. Cr. 1988)(reviewing double jeopardy claim ***sua sponte); Hunnicutt v. State,*** 755 P.2d 105, 109 (Okl.

Cr. 1988)(double jeopardy claim is so fundamental that it can be raised by this Court, even if it was not adequately preserved on appeal.). But see, Johnson v. State, 611 P.2d 1137 (Okl. Cr. 1980) (while there are some constitutional protections that may never be waived, this is not true of the double jeopardy protection).

Payne contends the double jeopardy violation resulted from the district court's sodomy instruction,[2] arguing the instruction allowed the jury to convict him of sodomy based on the same conduct comprising his second degree rape conviction.[3] Because the jury's verdict on his sodomy conviction possibly rests on a constitutionally infirm theory resulting in multiple punishment for the same conduct, he claims his sodomy conviction must be set aside under the rule enunciated in *Stromberg* v. California, 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed 1117 (1931).

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[2] INSTRUCTION NUMBER 27 read:

FORCIBLE ORAL SODOMY

No person may be convicted of forcible oral sodomy unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, penetration;
Second, of the mouth or vagina of the victim;
Third, by the mouth or penis of the defendant;
Fourth, by a person over the age of eighteen on a child under the age of sixteen.

[3] Count 62 charged Payne with:

FORCIBLE SODOMY, a felony, by on or between 10/1/99 and 10/31/99 engaging in penetration of the mouth of K.P. by the penis of Tommie Loyd Payne, when K.P. was less than sixteen (16)years old and defendant was 37 years old.

Count 41 charged:

RAPE – SECOND DEGREE, a felony, by on or between 10/9/99 and 10/15/99 having sexual intercourse involving vaginal penetration with K.P., when K.P. was less than sixteen (16)years old.

Whether a defendant's sentence violates the prohibition against double jeopardy is a question of law which we review de novo. See *Hanes* v. State, 973 P.2d 330, 332 (Okl. Cr. 1998). The Double Jeopardy Clause of both the Oklahoma and the federal constitution protects persons from multiple punishment for the same offense. North Carolina v. *Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656 (1969);Davis v. State, 845 P.2d 194, 196 (Okl. Cr. 1993). Also, Oklahoma has a statutory prohibition protecting persons from multiple punishment for a single act. 21 O.S.2001, § 11. This Court uses the test enunciated in Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 2d 306 (1932) to resolve multiplicity claims and to decide whether a conviction violates the multiple punishment prohibition of the Double Jeopardy Clause. *McElmurry* v. State, 60 P.3d 4, 24 (Okl. Cr. 2002). "Under the Blockburger test, two crimes are not the same crime for double jeopardy purposes if both crimes require proof of an element not required by the other." Id.

We must review the district court's instructions to the jury to determine if the crimes are the same and subjected Payne to multiple punishment for the same offense. Jury instructions are sufficient if, taken as a whole, they accurately state the applicable law. *Cleary* v. State, 942 P.2d 736, 745 (Okl. Cr. 1997). Misdirection of the jury does not warrant reversal unless this Court finds that such error has probably resulted in a miscarriage of justice or constitutes a

substantial violation of a constitutional or statutory right. 20 0.S.2001, § 3001.1.

The record shows the district court's sodomy instruction combined the uniform sodomy instruction's alternatives to cover both fellatio and cunnilingus in a single instruction. While theoretically the instruction could be read to allow a forcible oral sodomy conviction for penile/vaginal penetration, we find under the circumstances of this case there is no reasonable possibility that the jury would have been misled by the instruction as given. The prosecutor read the charges to the jury outlining the acts of forcible oral sodomy and second degree rape. K.P. testified that during October 1999 Payne put his penis in her vagina and had sex with her. K.P. further testified that during October 1999 Payne put his penis in her mouth. The prosecutor during closing arguments outlined the acts constituting forcible oral sodomy and rape. The title of the instruction was "FORCIBLE ORAL SODOMY." The trial court gave a separate instruction covering the elements of second degree rape. The adjective "oral" is of common everyday understanding and in sexual terms would not include penile/vaginal penetration, but would encompass genital/mouth contact. The foregoing compels us to find that the jury would not have convicted Payne of forcible oral sodomy for penetrating K.P.'s vagina with his penis. Sodomy and second degree rape are not the same crime under Blockburger or under a reasonable interpretation of the instructions given. We, therefore, find no plain error

because Payne has not been punished twice for a single offense. His convictions for both forcible oral sodomy and second degree rape stand.

In Proposition II, Payne contends his conviction for lewd molestation must be reversed under the facts of this case because it is a lesser included offense of rape by instrumentation. Thus, he claims convictions for both lewd molestation and rape by instrumentation violate double jeopardy subjecting him to multiple punishment for the same offense. Payne raises this multiplicity claim for the first time on appeal as well. We again review this claim for plain error. *Kinchion*, 81 P.3d at 684.

The Fifth Amendment protection against double jeopardy forbids cumulative punishment for a greater and lesser included offense. *Brown v. Ohio*, 432 U.S. 161, 169, 97 S. Ct. 2221, 2227, 53 L. Ed. 2d 187 (1977). Because the greater offense is the same offense for purposes of double jeopardy as any lesser included offense, conviction for both the greater and the lesser is barred as it would result in multiple punishment. ***See*** *Todd v. Lansdown*, 747 P.2d 312, 314 (Okl. Cr. 1987). Charges reflecting both a greater offense and a lesser-included offense are necessarily multiplicitous. The record shows the State charged Payne in Count 98 with lewd molestation for fondling the vagina of K.P. between 10/01/99 and 10/31/99 and in Count 86 with rape by instrumentation for using his finger to penetrate K.P.'s vagina between 10/01/99 and 10/31/99.[4] The only difference between these two crimes is

[4]The Second Amended Information charged:

penetration. In Riley *v.* State, 947 P.2d 530, 533-34 (Okl. Cr. 1997), this Court held that lewd molestation was a lesser included offense of rape because all of the essential elements of lewd molestation were included in the rape charge, except penetration. The same is true in the instant case concerning the crimes of rape by instrumentation and lewd molestation. Counts 86 and 98 are therefore multiplicitous because they are a greater and lesser included offense in this case. Punishing Payne for both acts violates the constitutional prohibition against double jeopardy.

These convictions also violate § 11 as there was no evidence showing separate and distinct acts. At trial, K.P. repeated the same answer for every time period that distinguished the numerous counts in the Information, including October 1999. She testified only about Payne inserting his finger into her vagina and did not discuss him fondling her. Because Payne would have to touch K.P.'s vagina to penetrate it with his finger(s), such conduct is one act. Based on this record, we find Payne is entitled to relief under the plain error doctrine. We find his conviction for lewd molestation cannot stand because it is a lesser included offense of rape by instrumentation as charged here and because the acts were not separate and distinct. *Brown,* 432 U.S. at

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Count 86: RAPE BY INSTRUMENTATION-SECOND DEGREE, a felony, by on or between 10/1/99 and 10/31/99 using his fingers to penetrate the vagina of K.P., without her consent, when K.P. was less than sixteen (16)years old.
Count 98: LEWD MOLESTATION, a felony, by on or between 10/1/99 and 10/31/99 knowingly and intentionally feeling the private parts of K.P. in a lewd and lascivious manner by fondling her vagina, when K.P. was less than 16 years old and Tommie Loyd Payne was 37 years old.

169, 97 S. Ct. at 2227; *Davis v. State*, 916 P.2d 251, 261 (Okl. Cr. 1996); *Hate v, State*, 888 P.2d 1027, 1028 (Okl. Cr. 1985).

As to Proposition III, we find the district court erred in failing to conduct a presentence investigation (PSI) under 22 O.S.Supp.2002, § 982, as that section is mandatory unless waived. However, we find that the lack of a PSI creates no "grave doubts" that its omission had a "substantial influence" on the outcome of the sentence imposed as Payne was given the opportunity to present mitigating evidence at his sentencing hearing. *Hilt*, 898 P.2d 155, 163 (Okl. Cr. 1995). Therefore, any error in the failure to conduct a PSI is harmless and not grounds for relief. We also find that the district court did not abuse its discretion in considering the jury's wishes in rendering its sentencing decision and ordering Payne's sentences to be served consecutively.

DECISION

The Judgment and Sentence of the district court on Counts 41, 62 and 86 is **AFFIRMED.** Count 98 must be **REVERSED with instructions to DISMISS.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF MUSKOGEE COUNTY
THE HONORABLE MIKE NORMAN, DISTRICT JUDGE

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

RE

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

I concur in affirming Counts 41 and 86 and reversing Count 98 for the reasons stated in the majority opinion. I dissent, however, to affirming Count 62, Forcible Sodomy, and would reverse that count as well. See Stromberg *v.* California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed.117 (1931) and Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (If "a case is submitted to a jury on even one constitutionally infirm theory, the conviction must be set aside.").

LUMPKIN, V.P.J.: CONCUR IN RESULT

I concur with results reached by the Court's decision in this case.

The jury in this case came to a just result when reviewing the reality of this multi-count trial. A total of one hundred and one separate charges were presented to this jury, and the record is replete with evidence supporting an extended period of sexual abuse suffered by the victim at the hands of this confessed predator. Given this record, there is no doubt the jury arrived at a determination of how long they wanted Appellant to be incarcerated and then structured the guilty verdicts and sentences to meet that desire.[1] These types of jury negotiations are not unusual, and the jury's final determination and generosity[2] should not be diluted by the Court, especially where, as here, the law and evidence supports each conviction and sentence. However, this Court is bound by the record presented to it. And, the counts selected by the jury to fashion the sentence they found just are in conflict with the law enunciated in the opinion. As a result, Count 98 must be dismissed. Tragically, there was more than sufficient evidence to support any number of additional counts if one of those had been selected rather than Count 98. But, they did not

Upon review of the applicable law and evidence, I would affirm each of the judgments and sentences rendered.

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[1] *See* Tr.Tran. 706-07.

[2] In reality, based on the sufficiency of the evidence to support the charges, the sentences should have totaled hundreds of years, not just seventy.