**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

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| WILLARD DEAN JACKSON, | ) | |
| | ) | |
| Appellant, | ) | NOT FOR PUBLICATION |
| | ) | |
| v. | ) | Case No. F-2005-1285 |
| | ) | |
| THE STATE OF OKLAHOMA, | ) | |
| | ) | |
| Appellee. | ) | |



**OPINION**

**LEWIS, JUDGE:**

Willard Dean Jackson, Appellant, was tried by jury in the District Court of Oklahoma County, Case Number F-2002-5822, and convicted of lewd or indecent proposal to a child under sixteen (16), after former conviction of two (2) or more felonies, in violation of 21 O.S.Supp.2002, § 1123. The jury sentenced Appellant to life imprisonment without parole. The District Court, Honorable Barbara G. Swinton, imposed judgment and sentence accordingly. Mr. Jackson appeals.

This unusual case began in mid-2002, when an unknown male caller dialed a wrong number and contacted L.P., a fifteen year old female. In a series of phone conversations over several weeks, L.P. came to know the caller, and despite the fact that L.P. revealed how old she was, their conversations became increasingly sexual. The caller told L.P. he was six feet to six feet, one inch tall; twenty three years old; light-skinned black; green eyes; curly black hair; married to an African American; worked at a Shawnee phone company;

his name was Mike; and he went by the name of Catman at clubs and Catman 4545 on the internet. "Mike" told L.P. he was a "player" who frequented clubs and liked white women.

The charge in the instant case arose from two specific topics of discussion between "Mike" and L.P. First, he told L.P. he could take nude photos of her and that she could make between $4,000 to $6,000 for them. L.P. said she wasn't interested and Mike changed the subject. It appears Mike only raised this possibility one time. The more frequent subject of conversation was masturbation. Mike asked L.P. if she ever touched herself, and described how he would "jack off." He asked L.P. to finger herself while he listened and masturbated. L.P. refused these overtures.[1]

L.P.'s mother eventually learned of these conversations and informed police. Investigators traced a call from Mike to a break room pay phone of an axle factory in Shawnee, Oklahoma. The call had been placed during the company's 3:30 to midnight shift, on the 5:20 "dinner" break, when about 15-20 hourly employees working. Appellant was the only black male hourly employee working in the building at that particular time. Appellant admitted to investigators that he sometimes went by the name of Catman. However, a co-worker testified that L.P.'s computer screen name and phone number were written on a bathroom wall, visible to all employees. There were also instructions to go to a certain website and to enter the name Catman.

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[1] The State also alleged initially that Appellant violated the statute by proposing that L.P. have "sexual relations" with another girl while he watched and masturbated. This allegation was stricken after preliminary hearing.

In Proposition One, Appellant claims his conviction must be reversed because the State failed to prove the elements of making lewd or indecent proposals to a child under sixteen in violation of 21 O.S.Supp.2002, § 1123. We agree. The five sub-paragraphs in paragraph (A) of section 1123 define various ways to commit the crime of making lewd or indecent proposals to a child under sixteen.[2] The relevant uniform instruction, OUJI-CR(2d) 4-129, also lists these various ways of violating the statute. Appellant's jury was instructed, pursuant to section 1123(A)(1), that the State must prove: (1) the defendant, who was at least three years older than the victim; (2) knowingly

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[2] Any person who shall knowingly and intentionally:

1. Make any oral, written or electronically or computer-generated lewd or indecent proposal to any child under sixteen (16) years of age for the child to have unlawful sexual relations or sexual intercourse with any person; or

2. Look upon, touch, maul, or feel the body or private parts of any child under sixteen (16) years of age in any lewd or lascivious manner by any acts against public decency and morality, as defined by law; or

3. Ask, invite, entice, or persuade any child under sixteen (16) years of age to go alone with any person to a secluded, remote, or secret place, with the unlawful and willful intent and purpose then and there to commit any crime against public decency and morality, as defined by law, with the child; or

4. In any manner lewdly or lasciviously look upon, touch, maul, or feel the body or private parts of any child under sixteen (16) years of age in any indecent manner or in any manner relating to sexual matters or sexual interest; or

5. In a lewd and lascivious manner and for the purpose of sexual gratification, urinate or defecate upon a child under sixteen (16) years of age or ejaculate upon or in the presence of a child, or force or require a child to look upon the body or private parts of another person or upon sexual acts performed in the presence of the child or

and intentionally; (3) made an oral lewd[3] or indecent proposal; (4) to a child under sixteen years of age; (5) for the child to *have unlawful sexual relations or intercourse with any person.*

Viewing the trial evidence and inferences in the light most favorable to the State, Appellant lewdly proposed to L.P. that she permit him to take nude photos of her (or take them herself and provide the photos to him), and asked L.P. to finger herself while he listened over the phone and masturbated. The evidence fails to show that Appellant ever proposed that L.P. engage in "unlawful sexual relations or intercourse with any person."[4] Appellant's specific acts—though lecherous and depraved—*do not* violate the provisions of section 1123. His conviction for this crime cannot stand.

In past cases where the State's proof fails to establish an essential element of the charged offense, but the evidence discloses conduct that is clearly criminal, this Court has frequently exercised the power to direct a judgment of conviction entered against the defendant for the crime shown by the facts.[5] *Lebo v. State,* 1928 OK CR 180, 40 Okl.Cr. 116, 267 P. 288

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force or require a child to touch or feel the body or private parts of said child or another person...

[3] The instructions defined lewd as conduct which is lustful and evinces an eagerness for sinful indulgence.

[4] The State argues for an expansive definition of the term "sexual relations" to support the conviction this case. However, that definition would include virtually any sexual act proscribed by the law in regard to minors. We find such an interpretation is overbroad and is inconsistent with the plain meaning of the term "sexual relations," which in both the law and the "real world" simply means acts of intercourse, including oral and anal sex.

[5] In so doing, we comply with 22 O.S.2001, § 1067, which provides: When

(conviction for assault with intent to rape modified to aggravated assault where evidence failed to show intent); *Kirkpatrick v. State,* 1942 OK CR 104, 75 Okl.Cr. 28, 128 P.2d 246 (rape conviction modified to assault with intent to rape); *Yeager v. State,* 1946 OK CR 57, 82 Okl.Cr. 326, 169 P.2d 579 (burglary conviction modified to illegal entry); *Vandiver v. State,* 1953 OK CR 130, 97 Okl.Cr. 217, 261 P.2d 617 (assault with intent to commit kidnapping modified to simple assault); *Woolridge v. State,* 1953 OK CR 153, 97 Okl.Cr. 326, 263 P.2d 196 (rape conviction modified to assault with intent to rape); *Cox v. State,* 1961 OK CR 46, 361 P.2d 506 (aggravated battery modified to simple battery); *Jones v. State,* 1976 OK CR 238, 555 P.2d 63 (assault with intent to commit felony modified to assault and battery). In the interests of justice, we follow the same course here.[6]

The facts proved at trial make out a violation of 21 O.S.Supp.2002, § 1021(B), by which it is a felony to willfully solicit a minor to perform or prepare any obscene material or child pornography, punishable as a first offense by imprisonment for ten (10) years to thirty (30) years. From the specific

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a judgment against the defendant is reversed, and it appears that no offense whatever has been committed, the Criminal Court of Appeals must direct that the defendant be discharged; but if it appears that the defendant is guilty of an offense although defectively charged in the indictment, the Criminal Court of Appeals must direct the prisoner to be returned and delivered over to the jailer of the proper county, there to abide the order of the court in which he was convicted.

[6] This presents no difficulty as a matter of due process because the Appellant is deemed to have notice that he may be convicted of the charged crime or any lesser-included or lesser-related offense. 22 O.S.2001, § 916; *Dill v. State,* 2005 OK CR 20, 122 P.3d 866 (finding State's allegations, including victim's age and defendant's age, as well as allegation of unlawful sexual relations, provided adequate notice to support conviction for lewd molestation

allegations of the information, we find that Appellant was plainly on notice of the accusation that he lewdly solicited a child to engage in pornography by asking L.P. to be photographed nude or provide him with nude photographs; that he had a fair opportunity to defend himself against the substance of that accusation at trial; and that he is guilty of the crime of soliciting a minor for child pornograpy beyond a reasonable doubt.

The conviction for making a lewd or indecent proposal to child under sixteen is REVERSED, and this case is REMANDED to the District Court with directions to enter a judgment of conviction against Appellant for soliciting a minor for child pornography in violation of 21 O.S.Supp.2002, § 1021(B). The District Court shall conduct a re-sentencing proceeding before a jury, unless waived by Appellant, to determine the proper sentence.[7] Because we vacate the jury's verdict and remand for entry of a modified judgment against Appellant for violating section 1021(B), Appellant's challenges in Propositions Two and Three to the admission of other crimes evidence at trial are moot.

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in trial for statutory rape).

[7] We decline to impose sentence on this modified judgment of conviction because no jury has considered an appropriate sentence within the range of punishment for Appellant's crime. With his two prior convictions, life without parole was mandatory upon Appellant's conviction under section 1123. The question of his sentence for conviction under section 1021(B) should be submitted first to a jury. 22 O.S.2001, §§ 1066-1067.

## DECISION

The conviction is hereby **REVERSED** and **REMANDED** with instructions that the District Court enter judgment of conviction against Appellant for solicitation of a minor for child pornography, in violation of 21 O.S.Supp.2002, § 1021(B), and conduct a re-sentencing proceeding before a jury, unless waived by Appellant, to determine the sentence. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE BARBARA G. SWINTON, DISTRICT JUDGE

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

**A. JOHNSON, JUDGE, DISSENTING:**

Under the authority of 22 O.S.2001, § 1066 it is appropriate for this court to modify a conviction to a lesser included offense after a reversal of the greater offense for insufficient evidence. That much is settled law and supported by the cases cited in the majority opinion.

It should be obvious, however, that such judicial action is restricted and guided by state and federal constitutional requirements of due process and fundamental fairness.[1] A modification to a lesser included or closely related offense does not violate a defendant's right to due process because he is deemed to be on notice of lesser offenses whether pled by the State or not, and because the finder of fact had the opportunity to consider and determine the essential elements of the lesser offense.

Today the majority convicts Jackson of 21 O.S.Supp.2002, § 1021(B) a child pornography offense—a crime with elements never charged by the State and never considered by a jury.

The preparation for and trial of any child pornography charge is quite different from that required by the charge brought against Jackson. And this court cannot say with any confidence that a properly instructed jury would have found him guilty of this substitute crime.

For those reasons I dissent and would reverse this conviction. I am authorized to state that Judge Chapel joins in this dissent.

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[1] The majority opinion appears to rely on 22 O.S.2001, § 1067 to authorize its modification here. That statutory construction is questionable. More important, the constitutional analysis remains the same.