IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMIE CRUZ,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F-2007-200
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

C. JOHNSON, VICE PRESIDING JUDGE:

Appellant, Jamie Cruz, was charged in the District Court of Oklahoma County, Case No. CF-2005-5624, with three counts of Indecent or Lewd Acts with a Child Under Sixteen, After Former Conviction of Indecent or Lewd Acts with a Child Under Sixteen. The jury convicted Appellant on Counts I and II and acquitted him on Count III. It assessed punishment at life imprisonment without the possibility of parole on each of Counts I and II. The trial court sentenced Appellant accordingly, ordering the sentences to run concurrently. From this Judgment and Sentence Appellant has filed a timely appeal to this Court.

FACTS

In 2005, when T.M. was eight years old, his grandmother, Mildred Siever, and uncle, Joshua Eldeen, lived in different apartments in the same complex in Oklahoma City. Appellant lived in the same apartment complex and was friends with Eldeen. T.M. met Appellant when he was visiting at Eldeen's apartment. When Appellant would come to Eldeen's apartment, he and T.M.

would watch TV, play games and wrestle. Occasionally, Appellant would baby sit T.M. while Eldeen was at work. On one occasion, while Appellant and T.M. were wrestling, Appellant put his hand inside T.M.'s pants and underwear and fondled his penis. T.M. alleged that Appellant touched his penis on the outside of his clothes two other times. Appellant told him not to tell anyone because he didn't want his "Uncle Jamie to go to jail."

PROPOSITIONS

Trial in this case was originally schedule for June 12, 2006. It was continued three times and was finally set for February 5, 2007. One week before trial, on January 29, 2007, defense counsel filed a written request for a fourth continuance stating that "[d]ue to competing commitments in other cases in addition to recent personal difficulties between September 18, 2006 and this date, defense counsel has been unable to complete a complicated motion to suppress which, if successful, counsel believes would be dispositive of this case." The trial court denied defense counsel's motion for continuance on January 30, 2007. On February 2, 2007, defense counsel filed an eighteen page motion to suppress with supporting brief and documentation. The trial court noted that the motion to suppress was out of time and declined to consider the motion on its merits. Appellant argues on appeal that the trial court erred in refusing to consider the merits of the motion to suppress and in failing to suppress Appellant's admissions.

Appellant first complains that the trial court abused its discretion in denying defense counsel's request for a fourth continuance. Appellant

acknowledges the well established rule that "[t]he decision to grant or deny a motion for continuance is addressed to the sound discretion of the trial court whose decision will not be disturbed unless an abuse of discretion is proved." *Warner v. State*, 2001 OK CR 11, ¶ 14, 29 P.3d 569, 575. However, he avers that the trial court did abuse its discretion in denying the requested continuance because the court denied the continuance upon the erroneous belief that it was defense counsel's fourth request and that defense counsel was delaying tactically and/or without due diligence.

The record reflects that of the three prior motions for continuance, the defense requested the first, the second was requested by both parties and the third was requested by the State. While the trial court appeared to have misunderstood that both parties requested the second continuance, it did acknowledge that the State had requested the third continuance. However, the trial court noted in its order denying the continuance that at a status conference held on September 18, 2006, defense counsel was instructed to file a timely motion to suppress so that the State could have time to respond to the same. On February 5, 2007, when the parties were addressing pretrial issues, the trial court noted again that motion for continuance was denied because defense counsel had known for a year the issues to be presented in the motion to suppress and still had not filed the motion in a timely fashion.

It is not dispositive that the trial court may have incorrectly recalled that defense counsel alone requested the second continuance or believed that counsel was delaying tactically. Rather, it is sufficient that the record indicates

that defense counsel knew of the issue to be advanced in a motion to suppress well in advance of trial and yet failed to file a timely motion or adequately explain the failure to do so.[1] On the record before this Court we cannot find that the trial court abused its discretion in denying defense counsel's request for a continuance or for refusing to consider the merits of the untimely motion.

Appellant also argues that if this Court finds that the trial court did not abuse its discretion in denying defense counsel's motion for continuance and in subsequently declining to consider the merits of the motion to suppress, we should find that defense counsel's delay in filing the motion to suppress resulted in the denial of Appellant's constitutional right to effective assistance of counsel. This Court reviews claims of ineffective assistance of counsel under the two-part *Strickland* test that requires an appellant to show: [1] that counsel's performance was constitutionally deficient; and [2] that counsel's performance prejudiced the defense, depriving the appellant of a fair trial with a reliable result. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Davis v. State,* 2005 OK CR 21, ¶ 7, 123 P.3d 243, 246.

At the time that the sexual assaults which are the subject of this appeal took place, Appellant was serving ten year suspended sentences for five counts of Indecent or Lewd Acts with a Child Under Sixteen. As part of his probation, he was attending sex offender treatment counseling. On September 7, 2005,

[1] Defense counsel attached no affidavit to the motion to suppress further explaining why the motion was delayed.

Appellant took a polygraph examination during which he was asked questions about his sexual activity. After he was advised that he had not passed the polygraph examination he made admissions which the polygraph examiner revealed to Appellant's sex-offender counselor and his probation officer. These admissions were, in turn, revealed to the police who initiated an investigation. On September 21, 2005, Appellant was interviewed by Oklahoma City Detective Bryan Carter. After being advised of his *Miranda* warnings, Appellant made the admissions which were admitted into evidence at trial and which are the subject of the motion to suppress.

Appellant argues on appeal that the admissions he made to the polygraph examiner were illegally obtained in violation of his privilege against self-incrimination guaranteed by the Fifth Amendment of the United States Constitution and Art. II, §§ 7 & 21 of the Oklahoma Constitution. He asserts that without his illegally obtained admissions, there would have been no investigation, no derivative evidence and no prosecution. Essentially, he claims that the admissions he made to Detective Carter and the evidence obtained as a result of those admissions should have been suppressed as they were "fruit of the poisonous tree."

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." While this prohibition clearly applies to a defendant's criminal trial, it has also been held to apply to "any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal

proceedings." *Lefkoeitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316, 322, 38 L.Ed.2d 274 (1973). The United States Supreme Court has also held that "[a] defendant does not lose this protection by reason of his conviction of a crime; notwithstanding that a defendant is imprisoned or on probation at the time he makes incriminating statements, if those statements are compelled they are inadmissible in a subsequent trial for a crime other than that for which he has been convicted." *Minnesota v. Murphy*, 465 U.S. 420, 426, 104 S.Ct. 1136, 1141-42, 79 L.Ed.2d 409 (1984).

As a general rule, the Fifth Amendment privilege is not self-executing. If a defendant "desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment." *United States v. Monia*, 317 U.S. 424, 427, 63 S.Ct. 409, 410-11, 87 L.Ed 376 (1943). An exception to this rule has been found to exist in certain narrowly defined situations where a "relevant factor was held to deny the individual a 'free choice to admit, to deny, or to refuse to answer.'" *Garner v. United States*, 424 U.S. 648, 657, 96 S.Ct. 1178, 1183, 47 L.Ed.2d 370 (1976) *quoting Lisenba v. California*, 314 U.S. 219, 241, 62 S.Ct. 280, 292, 86 L.Ed. 166 (1941). One such exception is where an individual's refusal to answer incriminating questions subjects him to a penalty.

The United States Supreme Court addressed the penalty situation in the probationary context in *Minnesota v. Murphy*, 465 U.S. 420, 426, 104 S.Ct. 1136, 1141-42, 79 L.Ed.2d 409 1984). The Court in *Murphy* explained that a state creates a penalty situation if it "expressly or by implication" suggests

"that invocation of the privilege would lead to revocation of probation." *Murphy*, 465 U.S. at 435, 104 S.Ct. at 1146. It also noted, however, that there is nothing in the Fifth Amendment that diminishes the general obligation of individuals on probation to appear and answer questions truthfully. *Id.* 465 U.S. at 427, 104 S.Ct. at 1142. This is true even if the questions are asked in the context of a polygraph examination.[2] *See United States v. Locke*, 482 F.3d 764, 767 (5th Cir.2007). *See also United States v. Lee*, 315 F.3d 206, 212 (3d Cir.2003). The Constitution does not prevent a state from revoking an individual's probation if that person refuses to answer questions that violate an express condition of probation but pose no realistic threat of incrimination in a separate criminal proceeding. *Murphy*, 465 U.S. at 435 n. 7, 104 S.Ct. at 1146 n. 7. The state may not, however, revoke probation if an individual refuses to answer questions which call for information that would incriminate the individual in pending or later criminal proceedings. *Id.* 465 U.S. at 435, 104 S.Ct. at 1146.

In *Murphy*, the defendant, who was on probation after having received a suspended sentence for conviction of a sex-related crime, was required to participate in a sex offender treatment program, report to his probation officer and be truthful with the probation officer. During the course of a meeting with

[2] While Appellant likens the requirement that he submit to polygraph examinations to that condemned by this Court in the unpublished case of *Childers v. Booher*, HC-2001-0440 (May 9, 2002), we find the two situations to be inapposite. The appellant in *Childers*, while incarcerated and in order to receive earned time credits, was required to attend a sex offender program and admit guilt to his crimes of incarceration regardless of pending appeals. As is noted below, such is not the case here.

his probation officer, Murphy admitted to having committed an earlier rape and murder. Murphy sought to suppress the confession he made to his probation officer claiming that the confession was compelled in violation of his Fifth Amendment rights.

The Court found in *Murphy* that the facts did not present a penalty situation as there was no "reasonable basis for concluding that Minnesota attempted to attach an impermissible penalty to the exercise of the privilege against self-incrimination." *Id.* 465 U.S. at 437, 104 S.Ct. at 1148. The Court noted that Murphy was initially informed that failure to comply with the probation conditions could result in a probation revocation hearing. *Id.* 465 U.S. at 421, 104 S.Ct. at 1139. However, he was not "expressly informed during the crucial meeting with his probation officer that an assertion of the privilege would result in imposition of the penalty." *Id.* 465 U.S. at 438, 104 S.Ct. at 1148.

In the present case, the record reflects that Appellant agreed to the Rules and Conditions of Supervised Probation which required him to attend sex offender counseling as directed by the Department of Corrections. The Sex Offender Treatment Program required Appellant to take polygraph examinations. Appellant alleges that he was told by his probation officer and his sex-offender program counselor that he would be removed from the program and go to prison if he did not agree to the polygraph examination. The record reflects that Appellant's probation officer, Jack Boling, told him that, "if he did not take the polygraph examination, he'll be a program failure in the

treatment, and that I would submit a violation report, and then it would be up to the DA's office to whether they filed an application to revoke his ten-year suspended sentence." Thus, Appellant was advised that revocation of his suspended sentence was a possibility, not a certainty, for failing to take the exam, not for failing to answer all questions. He was not informed that invocation of his privilege against self-incrimination would result in a penalty.[3]

As in *Murphy*, we cannot find that Appellant was deterred from invoking his Fifth Amendment privilege against self-incrimination by an objectively reasonably perceived threat of revocation. While Appellant was required to take the polygraph examination and was also required to answer questions relevant to his probationary status, he was not foreclosed from invoking his Fifth Amendment right to refrain from answering questions which posed a realistic threat of incrimination in a separate criminal proceeding. As the State did not put Appellant in a penalty situation it was incumbent upon him to assert his privilege against self incrimination. Because he did not do so, his statements cannot be deemed compelled.

Because the motion to suppress would properly have been denied, defense counsel's performance cannot be determined deficient for failing to file a timely motion to suppress. Appellant was not denied his Sixth Amendment right to effective assistance of counsel. This proposition warrants no relief. In his second proposition, Appellant complains that several evidentiary and trial

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[3] Appellant, by signing the form acknowledged the following: "I further understand that I do not have to answer any questions the examiner asks me and that I am free to terminate the examination and leave the testing room at any time."

errors denied him his Due Process right to a fundamentally fair trial. The introduction of evidence is left to the sound discretion of the trial court and this decision will not be disturbed absent an abuse of discretion. *Andrew v. State,* 2007 OK CR 23, ¶ 23, 164 P.3d 176, 187. An abuse of discretion is "a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented...." *C.L.F. v. State,* 1999 OK CR 12, ¶ 5, 989 P.2d 945, 946.

Appellant first complains about the introduction of other crimes evidence. Evidence of other crimes, wrongs or bad acts is not admissible to prove the character of a person in order to show action in conformity therewith. 12 O.S.2001, § 2404(B). It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. 12 O.S.2001, § 2404(B); *Burks v. State,* 1979 OK CR 10, ¶ 2, 594 P.2d 771, 772, *overruled in part on other grounds in Jones v. State,* 1989 OK CR 7, ¶ 8, 772 P.2d 922, 925. However, as Appellant correctly asserts, even other crimes evidence which is admissible under a specified exception must display probative value sufficient to outweigh any prejudicial effect. *Burks,* 1979 OK CR 10, ¶ 8, 594 P.2d at 773.

Prior to trial, the State filed a notice of intent to offer other crimes evidence, specifically that Appellant had fondled the penis of a ten year old boy, K.B., on five separate occasions between February and March of 1999. It was clarified prior to trial that because Appellant indicated in his interview with

Detective Carter that when he touched the penis of the victim in the present case, he did so accidentally, the State was offering the other crimes evidence for the limited purpose of showing absence of mistake or accident. As it was incumbent upon the State to prove that Appellant's actions in this case were knowing and intentional, this evidence was relevant to show absence of mistake or absence. We find the probative value of this evidence was not outweighed by the danger of unfair prejudice. *See* 12 O.S.2001, § 2403. Further, the record reflects that the trial court issued a limiting instruction directing the jury that evidence of other crimes or bad acts was not to be considered proof of guilt or innocence of the offenses on trial, but was to be considered solely as evidence of Appellant's absence of mistake or accident. As the trial court did not abuse its discretion in admitting the other crimes evidence, this argument is denied.

Appellant next complains that the trial court erred in redacting portions of the video taped interviews of Appellant and the victim. He argues that the redactions violated 12 O.S.2001, § 2107, which provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which should in fairness be considered contemporaneously with it.

The portions of the taped interviews which were redacted were those statements indicating that the victim's father told the victim that that Appellant was a registered sex offender and had taken and failed a polygraph examination and Appellant's own statements made during his interview about

his sexual history and the polygraph examination. Appellant argues that this evidence was relevant to show both his and the victim's state of mind. He also asserts that it was relevant to the jury's determination of the victim's credibility.

It is well established by the jurisprudence of this Court that the results of polygraph tests are not admissible for any purpose. *Matthews v. State*, 1998 OK CR 3, ¶ 18, 953 P.2d 336, 343. *See also Paxton v. State*, 1993 OK CR 59, ¶ 42, 867 P.2d 1309, 1323. This is true even upon stipulation of the parties. *Wilson v. State*, 1981 OK CR 9, ¶ 2, 624 P.2d 80, 81. Further, the trial court's decision to preclude the introduction of evidence of Appellant's prior sex offenses was proper under 22 O.S.2001, 860.1, which provides that, "[t]he trial shall proceed initially as though the offense charged was the first offense; when the indictment or information is read all references to prior offenses shall be omitted; during the trial of the case no references shall be made nor evidence received of prior offenses except as permitted by the rules of evidence...." Accordingly, we cannot find that the trial court abused its discretion in redacting this evidence.

Next, Appellant asserts that the trial court erred in allowing the State to amend the Information after the jury had been sworn. Appellant properly advises that amendments to the Information in form or substance may be allowed at any time so long as the defendant is not materially prejudiced. 22 O.S.2001, § 304. *See also Banks v. State*, 2002 OK CR 9, ¶ 8, 43 P.3d 390, 396. However, he claims that when the trial court allowed the State to amend

the Information to reflect that the offenses were committed between January 1, 2005 and September 12, 2005, instead of between August 1, 2005 and September 12, 2005, this amendment did materially prejudice the defense. The record belies this claim as Appellant's own admissions indicate that he had notice of this time frame and accordingly, of the evidence against which he would have to defend. The trial court did not abuse its discretion in granting the State's request to amend the Information.

At trial, the State introduced evidence that Appellant had touched T.M.'s penis under his clothing on an occasion not charged in the Information. Defense Counsel objected to the admission of this evidence and the State argued that it was admissible as part of the *res gestae* of the crimes charged. Defense counsel's objection was overruled and Appellant argues on appeal that the trial court's ruling on the admissibility of this evidence was in error.

Evidence of bad acts or other crimes may be admissible as *res gestae* where such evidence forms part of an "entire transaction" or where there is a "logical connection" with the offenses charged. *Eizember v. State*, 2007 OK CR 29, ¶ 77, 164 P.3d 208, 230. "Evidence is considered *res gestae*, when: a) it is so closely connected to the charged offense as to form part of the entire transaction; b) it is necessary to give the jury a complete understanding of the crime; or c) when it is central to the chain of events." *Warner v. State*, 2006 OK CR 40, ¶ 68, 144 P.3d 838, 868. In the present case, we find that the evidence that Appellant touched the victim's penis on another occasion when the two were wrestling is *res gestae* as it was so closely connected to the charged

offense as to form part of the transaction. We further find that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. Thus, the trial court's ruling regarding the admissibility of the evidence was not in error.

Appellant also argues that error occurred because the State did not specify which "under the clothing" touching it was relying upon to prove Count I. As the State notes, defendant raised no objection to this at trial and accordingly, all but plain error has been waived. *Hancock v. State*, 2007 OK CR 9, ¶ 72, 155 P.3d 796, 813. Appellant acknowledges, however, that election of offenses is not required when separate acts are treated as a single transaction. "[W]here all the evidence tending to prove the crime is that it was a continuous act and application of force, and there is no basis in the evidence for a belief or a reasonable doubt that a part of the transaction occurred and a part did not occur, nor that one or more of the accused may be guilty and the others not, then there is but one crime, one continuous act, and there need be no election." *See Colbert v. State*, 1986 OK CR 15, ¶ 12, 714 P.2d 209, 211-12 citing *McManus v. State*, 50 Okl.Cr. 354, 297 P. 830, 832. As we have found the evidence at issue to be part of a single transaction, there was no error, plain or otherwise, in the State's failure to elect the act upon which it was relying for a conviction in Count I.

Next, Appellant alleges that error occurred when T.M. was referred to as 'the victim" during trial. He claims that use of this term diminished the presumption of innocence. In support of this claim Appellant cites to several

cases from other jurisdictions. As we do not find this argument or authority to be persuasive, we do not find that the trial court abused its discretion in overruling defense counsel's objection to the use of this term.

Finally, Appellant complains that Detective Carter improperly vouched for the credibility of the child witness by stating, "I think that the children are more honest than adults when it comes to things that have happened to them like this." This comment was, indeed, improper. *See Lawrence v. State,* 1990 OK CR 56, 796 P.2d 1176. However, as it was not met with objection, all but plain error has been waived. In light of the evidence properly admitted at trial, we cannot find that this improper comment affected Appellant's substantial rights or affected the outcome of the proceeding. *Hogan v. State,* 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. Thus, the error does not constitute reversible plain error. We also find that although counsel's failure to object to this improper comment may have rendered her performance deficient, this deficient performance cannot be found to have prejudiced the defense, depriving Appellant of a fair trial with a reliable result. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Thus, Appellant was not denied his constitutional right to the effective assistance of counsel.

Appellant claims that the errors alleged in his second proposition, when considered cumulatively, warrant relief. This Court has recognized that when there are "numerous irregularities during the course of [a] trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors was to deny the defendant a fair trial." *DeRosa v. State,*

2004 OK CR 19, ¶ 100, 89 P.3d 1124, 1157, quoting *Lewis v. State*, 1998 OK CR 24, ¶ 63, 970 P.2d 1158, 1176. The errors alleged in Appellant's second proposition, considered both singly and cumulatively, do not require relief because they did not render his trial fundamentally unfair or taint the jury's verdict.

In his third proposition, Appellant argues that the trial court placed restrictions on jury selection which violated his right to Due Process and to a fundamentally fair trial. The record reflects that trial court limited counsels' questioning of prospective jurors to thirty minutes although it informed counsel that this time restriction was not rigid and if an issue came up which required more time, it would be allowed. As the State correctly notes, this Court reaffirmed in *Malicoat v. State*, 2000 OK CR 1, 992 P.2d 383, that:

> The manner and extent of voir dire, as well as the decision to conduct individual voir dire, are within the trial court's discretion. The voir dire process allows attorneys to see when a challenge for cause exists and permit the intelligent use of peremptory challenges. This Court looks not at whether any specific question was allowed but at whether the overall questioning gives the defendant sufficient opportunity to discover grounds to excuse any particular juror.

Malicoat, 2000 OK CR 1, ¶ 6, 992 P.2d at 393 (footnotes omitted). In *Malicoat*, we found that the trial court's imposition of a time limit on general voir dire was an appropriate exercise of the court's discretion in expediting the trial proceedings. It did not, in that case, deny counsel sufficient opportunity to discover grounds to excuse any particular juror. Nor was it found to deny Malicoat a fair and impartial jury. Appellant has given us no compelling reason to find otherwise in the present case. Accordingly, this proposition

warrants no relief.

Appellant was charged and convicted of Indecent or Lewd Acts With a Child Under Sixteen under 21 O.S.Supp.2003, § 1123(A). The State sought to enhance this conviction with Appellant's former conviction for the same crime.[4] The jury was instructed that the punishment for Indecent or Lewd Acts With a Child Under Sixteen after one previous conviction was imprisonment in the State Penitentiary for a term of life without the possibility of parole. Appellant argues in his fourth proposition that the jury was improperly instructed on the punishment range in this case.

The trial court sentenced Appellant under 21 O.S.Supp.2002, § 51.1a which provides that:

> Any person convicted of rape in the first degree, forcible sodomy, lewd molestation or sexual abuse of a child after having been convicted of either rape in the first degree, forcible sodomy, lewd molestation or sexual abuse of a child shall be sentenced to life without the possibility of parole.

Appellant argues that he should have been sentenced under the more specific sentencing provisions of section 1123(A), the statue under which he was convicted. This statue provides three sentencing options: 1) one to twenty years imprisonment for a first offense; 2) one to twenty years imprisonment for a second violation without eligibility for probation, suspended or deferred sentence; and 3) imprisonment for life or life without the possibility of parole

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[4] In 2001, Appellant was convicted in the District Court of Oklahoma County, Case No. CF-99-2479, of five counts of Lewd Molestation. The record supports Appellant's assertion that these counts arose out of a series of events closely related in time and location. Further, the State concedes on appeal that Appellant's case was enhanced by "not five, but one, prior conviction" as the prosecutor stated the same at trial. Thus, Appellant was charged with a single conviction for purposes of enhancement.

for a third violation of section 1123(A).

This Court addressed the apparent conflict between sections 1123(A) and 51.1a in the unpublished opinion of *Steven Lynn Smith v. State*, Case No. F-2005-716 (July 3, 2007). In that opinion, we noted that both statutes at issue were amended in 2002 and both were very specific. However, we found the decisive factor to be that a footnote within 21 O.S.Supp.2002, § 1123(A) specifically removed from the section 1123(A) enhancement provisions, the enhancement of a conviction under section 1123(A) where the prior conviction is for first degree rape, forcible sodomy, lewd molestation or sexual abuse of a child. In such cases we found that the footnote directed the sentence be enhanced under section 51.1a.[5]

The case at bar cannot be similarly decided. Although the 2002 version of section 1123(A) with the footnote directive to the enhancement provisions of 51.1a has not been expressly repealed, a duplicate section of 1123(A) was amended in 2003.[6] This version of section 1123(A), which does not include the footnote directive, was specifically amended as follows:

> Any person convicted of a second or subsequent violation of subsection A of this section shall be guilty of a felony punishable as provided in this subsection and shall not be eligible for probation, suspended sentence or deferred sentence.

21 O.S.Supp.2003, § 1123(A).

This Court will not presume the legislature to have done a vain thing.

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[5] This Court noted in *Smith* that it was relying upon the amendment of section 1123(A) by Oklahoma Session Laws 2002, c. 455, § 6, emerg. eff. June 5, 2002.
[6] Oklahoma Session Laws 2003, c. 159, § 1 eff. Nov. 1, 2003.

Huskey v. State, 1999 OK CR 3, ¶ 9, 989 P.2d 1, 6. While the elementary rules of statutory interpretation require us to avoid any construction which would render any part of a statute superfluous or useless, we must attempt to construe the plain, ordinary meaning of statutory language, while giving effect to the expressed intention of the Legislature. *Byrd v. Caswell*, 2001 OK CR 29, ¶ 6, 34 P.3d 647, 648-49. However, where reconciliation between conflicting statutes is not possible, this Court has held that the later statute controls. *Taylor v. State*, 1982 OK CR 8, ¶ 5, 640 P.2d 554, 556. *See also* 75 O.S.2001, § 22.

In the present case, the language of the different statutory versions conflict so that reconciliation of the different amendments is unfeasible. The 2002 amendment to section 1123(A) directs enhancement under the section 51.1a, which was enacted in 2002. The 2003 amendment to section 1123(A) includes no reference to section 51.1a but rather specifically directs enhancement under provisions within section 1123(A). As the 2003 amendment was last in time, this is the statute under which Appellant's conviction should have been enhanced. Although defense counsel did not object to the enhancement instructions at trial, failure to properly instruct on the range of punishment was plain error warranting relief. *Quilllen v. State*, 2007 OK CR 22, ¶ 6, 163 P.3d 587, 590; *Taylor v. State*, 2002 OK CR 13, ¶ 4, 45 P.3d 103, 105. Appellant could not legally be sentenced to life imprisonment without the possibility of parole. He could however, be sentenced to between one and twenty years imprisonment without eligibility for

probation, suspended or deferred sentence. We remand this case to the district court for resentencing on both Counts I and II in accordance with the forgoing discussion.

As we have granted relief based upon allegations of error raised in Proposition IV, we need not address Appellant's excessive sentence argument raised in Proposition V.

DECISION

The Judgment of the district court on Counts I and II is **AFFIRMED**. The Sentence of the district court on Counts I and II is **REVERSED** and the case is **REMANDED** to the district court for **RESENTENCING**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2008), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE TWYLA MASON GRAY, DISTRICT JUDGE

APPEARANCES AT TRIAL

CINDY VIOL
ASSISTANT PUBLIC DEFENDER
320 ROBERT S. KERR
OKLAHOMA CITY, OK 73102
ATTORNEY FOR DEFENDANT

PAMELA STILLINGS
JIMMY HARMON
ASSISTANT DISTRICT ATTORNEYS
320 ROBERT S. KERR, STE. 505
OKLAHOMA CITY, OK 73102
ATTORNEYS FOR THE STATE

APPEARANCES ON APPEAL

CAROLYN L. MERRITT
ASSISTANT PUBLIC DEFENDER
320 ROBERT S. KERR
OKLAHOMA CITY, OK 73102
ATTORNEY FOR APPELLANT

W. A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
KEELEY L. HARRIS
ASSISTANT ATTORNEY GENERAL
313 N.E. 21st ST.
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR THE STATE

OPINION BY C. JOHNSON, V.P.J.

LUMPKIN, P.J.: CONCURS
CHAPEL, J.: DISSENTS
A. JOHNSON, J.: CONCURS
LEWIS, J.: CONCURS

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CHAPEL, J., DISSENTING:

Cruz claims admission of the evidence resulting from his polygraph violated his right not to incriminate himself. I agree. No American citizen can be compelled to be a witness against himself.[1] This right attaches in formal or informal civil or criminal proceedings, where a person's answers might incriminate him in future criminal proceedings.[2] Even a person already convicted of a crime, imprisoned or on probation or parole, cannot be compelled to make incriminating statements which will be used against him.[3] Usually a defendant is required to assert this privilege. However, the right applies and the privilege need not be specifically asserted where a person is compelled to either decide to incriminate himself or suffer a penalty — where circumstances imposed by the State deny the defendant a free choice to admit, deny or refuse to answer the questions.[4] This may happen when probation is granted upon certain conditions including questioning, and the State, "either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation."[5] The United States Supreme Court has concluded that, under those circumstances, the State creates "the classic penalty situation, the failure to assert the privilege would be excused, and the

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[1] U.S. Const. Amendment V.
[2] *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316, 322, 38 L.Ed.2d 274 (1973).
[3] *Minnesota v. Murphy*, 465 U.S. 420, 426, 104 S.Ct. 1136, 1141-42, 79 L.Ed.2d 409 (1984).
[4] *Garner v. United States*, 424 U.S. 648, 657, 96 S.Ct. 1178, 1183, 47 L.Ed.2d 370 (1976).
[5] *Murphy*, 465 U.S. at 435, 104 S.Ct. at 1146.

probationer's answers would be deemed compelled and inadmissible in a criminal prosecution."[6]

The majority opinion correctly states the law but does not apply it to the facts of this case. Cruz was on probation. One condition of his probation was to take polygraph examinations. During these examinations he was asked questions about his sexual activity with children, and his answers to those questions incriminated him in a crime. If Cruz refused to take the polygraph he could be imprisoned for failing to comply with the conditions of probation. Because he did not refuse, his answers led to an investigation. Along with the results of that investigation his answers were used against him in a subsequent criminal trial. He was convicted and sentenced to life without parole. This looks to me like a classic example of a defendant who is compelled to answer questions on penalty of imprisonment, and whose answers are used against him in a criminal trial.

The majority states that Cruz was not specifically told, at the time of the polygraph, that if he refused to take it his probation would be revoked — that is, it was merely possible that he would go to prison. Because there was only the possibility of a penalty, the majority concludes there was no penalty and Cruz was not compelled to answer polygraph questions. This is not supported by the evidence. Cruz was told when he was put on probation that any failure to comply with any condition of probation, including taking a polygraph, could result in a probation revocation hearing. The evidence shows at least that Cruz

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[6] *Id.*

was told that if he refused the polygraph his probation officer would tell the District Attorney he was in violation and the District Attorney could choose whether to revoke his sentence. Cruz, of course, maintains that he was told if he didn't take the test he'd go to prison. There is no dispute that the questions in the polygraph would, and did, result in incriminating answers.

The record shows that Cruz was required to take the polygraph, that there was a very real possibility he would go to prison if he refused, and that the polygraph questions were both relevant to his probationary status and incriminated him in a new crime. Cruz could not choose to invoke his privilege against self-incrimination, and thus avoid incriminating himself by taking the polygraph, without being reported in violation of his probation. He had already been told this could or would result in his return to prison. Taking all these facts into account, I cannot agree with the majority's conclusion that Cruz had no "objectively reasonably perceived threat of revocation."[7] It seems to me that Cruz had a very objective and reasonable fear, based on the information told him, that if he refused the polygraph he would go to prison. His "choice" was to take the polygraph and admit wrongdoing, or take the polygraph, lie about his actions and fail, as he did. During the examination itself this failure led to his admissions of criminal conduct, which were then used against him in a criminal trial. I would find that Cruz's statements were compelled and should not have formed the basis of new criminal charges. I would reverse.

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[7] Slip Opinion at 9.