IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JEFFREY MARLER,	)	NOT FOR PUBLICATION
	)	
Appellant,	)	
	)	
v.	)	Case No. F-2007-575
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

C. JOHNSON, VICE-PRESIDING JUDGE:

Appellant, Jeffrey Marler, was convicted by a jury in Tulsa County District Court, Case No. CF-2006-3255, of three counts of Sexual Abuse of a Minor (10 O.S. § 7115) and one count of Possession of Child Pornography (21 O.S.Supp.2003, § 1021.2). On June 4, 2007, the Honorable Clancy Smith, District Judge, sentenced Appellant in accordance with the jury's recommendation to twenty-five years imprisonment on each of the sexual abuse counts, and to ten years imprisonment on the child pornography count, and ordered that the sentences be served consecutively. The trial court also imposed $500 fines on each count. This appeal followed.

Appellant raises the following propositions of error:

1. The trial court erred in admitting evidence of uncharged sexual abuse.

2. The trial court erred by failing to comply with 22 O.S. § 894 and by inappropriately instructing the jury during deliberations.

3. Appellant's sentence for Possession of Child Pornography is in excess of the maximum term provided by law.

4. The trial court erred in sustaining the State's objections to

questions regarding consent.

5. Appellant received ineffective assistance of counsel.

6. The trial court should have responded to the jury's question about consecutive and concurrent service of sentences.

7. The trial court erred by assessing fines when the jury did not.

8. Cumulative error requires reversal or modification.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we find it necessary to modify the sentence on Count 5, vacate the fines imposed on all counts, and otherwise affirm. As to Proposition 1, evidence of other, uncharged acts of sexual abuse, committed by a defendant against the same child complainant, is admissible when it tends to show a pattern of psychological domination and "grooming" for further abuse. 12 O.S.2001, § 2404(B); *Little v. State*, 1986 OK CR 132, ¶ 5, 725 P.2d 606, 607; *Huddleston v. State*, 1985 OK CR 12, ¶ 17, 695 P.2d 8, 11. The trial court did not abuse its discretion in admitting evidence that, for several years before the acts charged in the Information, Appellant had been inappropriately touching his step-daughter and threatening harm if she resisted or disclosed the abuse.[1] Proposition 1 is denied.

As to Proposition 2, the record does not reflect whether the trial court followed 22 O.S.2001, § 894 when the jury submitted a written question during

[1] The complainant in this case testified that Appellant began fondling her when she was about seven or eight years old, and that the abuse escalated to intercourse when she was about fourteen years old. She testified to numerous acts of intercourse besides those charged in the Information. Proposition 1 only challenges evidence of abuse prior to the complainant's

deliberations. However, given that the court's written answer to the question was appropriate under the circumstances, we find any assumed deviation from § 894 was harmless beyond a reasonable doubt. *Harris v. State*, 2007 OK CR 28, ¶¶ 8-11, 164 P.3d 1103, 1109-1110. Nor did the trial court err in failing to give a "deadlocked jury" instruction *sua sponte* under these circumstances. The record does not indicate how long the jury had deliberated before the note was sent, and the question asked did not necessarily indicate an impasse in deliberations. Proposition 2 is denied.

As to Proposition 3, although Appellant was convicted and sentenced for possessing child pornography under 21 O.S. § 1021.2, the same conduct is punished less harshly under 21 O.S. § 1024.2. We conclude that the more specific provision (§ 1024.2) controls over the more general one, and therefore **MODIFY** Appellant's Judgment on Count V to reflect a conviction under 21 O.S. § 1024.2, and **MODIFY** the sentence to five years imprisonment.[2] 22 O.S.2001, § 1066; *McWilliams v. State*, 1989 OK CR 39, ¶ 10, 777 P.2d 1370, 1372.

As to Proposition 4, Appellant concedes that consent is not a defense to any of the charges, but claims he was prejudiced when the trial court sustained the State's objections to the use of that term in the defense's cross-

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fourteenth birthday.

[2] Both statutes punish the possession of child pornography. Section 1021.2 sets the maximum prison term at twenty years, while § 1024.2 sets the maximum term at five years. Section 1021.2 is broader in scope, punishing not only possession of child pornography, but also causing a child to participate in the making of same. Although the evidence in this case showed that Appellant in fact made his step-daughter participate in a sexually explicit video, the jury's instructions only called for a finding of whether or not Appellant possessed child pornography.

examination of the complainant and elsewhere. While counsel was admonished not to use the term "consent," the court freely allowed counsel to cross-examine the complainant about the same subjects as they pertained to her credibility – *e.g.*, the fact that she did not actively resist Appellant's advances in every instance, and the fact that she did not report the abuse for many years. Defense counsel touched on these issues again several times in closing argument. The evidence Appellant complains about was, in fact, presented to the jury for whatever value it might have had. Consequently, Appellant's assignment of error is meritless. Proposition 4 is denied.

As to Proposition 5, trial counsel was not ineffective for eliciting testimony that Appellant had allegedly committed more acts of abuse than those charged in the Information. The defense strategy was to show inconsistencies in the complainant's accounts, thereby impeaching her credibility. This was a reasonable strategy under the circumstances. *Pierce v. State*, 1990 OK CR 7, ¶ 45, 786 P.2d 1255, 1267. Counsel's failure to request a contemporaneous limiting instruction on the use of other crimes evidence elicited by the State did not affect the outcome of the trial. *Cheney v. State*, 1995 OK CR 72, ¶ 69, 909 P.2d 74, 91. Finally, because the complainant identified herself on the sexually explicit videotape, defense counsel had little choice but to admit its obscene nature; read in context, this was not an outright concession of guilt. *Lott v. State*, 2004 OK CR 27, ¶ 51, 98 P.3d 318, 337. Trial counsel was not ineffective. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Proposition 5 is denied.

As to Proposition 6, the trial court's answer to the jury's question about service of sentences was entirely proper. Therefore, Appellant can show no prejudice from the court's failure to deliver the answer in open court, pursuant to 22 O.S.2001, § 894. *Baker v. State*, 1998 OK CR 46, ¶ 7, 966 P.2d 797, 798. Proposition 6 is denied.

As to Proposition 7, the State concedes that the trial court erred in imposing fines after the jury had been instructed on this option but declined to do so. We agree, and **VACATE** the fines imposed on all counts. 22 O.S.2001, § 926.1. As to Proposition 8, the errors requiring relief have been remedied, and because no other errors have been identified, there is no cumulative error. *Bell v. State*, 2007 OK CR 43, ¶ 14, 172 P.3d 622, 627. Proposition 8 is denied.

DECISION

The Judgment on Count 5, Possession of Child Pornography, is **MODIFIED** to reflect a conviction under 21 O.S.2001, § 1024.2, and the sentence thereon is **MODIFIED** to five years imprisonment. The fines imposed on all counts are hereby **VACATED**. In all other respects, the Judgment and Sentence of the district court is **AFFIRMED**. 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 TULSA COUNTY
THE HONORABLE CLANCY SMITH, DISTRICT JUDGE

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OPINION BY C. JOHNSON, V.P.J.
LUMPKIN, P.J.: CONCURS
CHAPEL, J.: CONCURS IN PART/DISSENTS IN PART
A. JOHNSON, J.: CONCURS
LEWIS, J.: CONCURS

RB

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

I concur in affirming the convictions in this case. However, I would modify the sentences to run Counts I, II, and IV concurrent.