IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RICKY LOUIS HUNTER,	)	
	)	Not for Publication
Appellant,	)	
v.	)	Case No. F-2007-856
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, JUDGE:

Ricky Louis Hunter was tried by jury and convicted of Count I, Lewd or Indecent Proposals or Acts to a Child Under 16 in violation of 21 O.S.Supp.2003, § 1123(A)(1)(Version Two); and Count II, Unlawful Use of Computer to Violate 21 O.S. § 1123(A)(1) in violation of 21 O.S.2001, § 1958, in the District Court of Craig County, Case No. CF-2006-37. In accordance with the jury's recommendation the Honorable J. Dwayne Steidley sentenced Hunter to forty-five (45) years imprisonment (Count I) and ten (10) years imprisonment (Count II). Hunter appeals from these convictions and sentences.

Hunter raises seven propositions of error in support of his appeal:

I. Hunter's convictions in both Count One and Count Two constitute double punishment in violation of the Fifth and Fourteenth Amendments to the United States Constitution, Article Two, Section Twenty-one of the Oklahoma Constitution and Section Eleven of Title Twenty-one of the Oklahoma statutes;

II. Version Two of Section 1123 of Title 21 of the Oklahoma statutes is unconstitutional as it punishes criminal intent when there is no possibility to ever complete the prescribed crime in violation of the Fifth and Fourteenth Amendments to the United States Constitution, Article Two, Section seven of the Oklahoma Constitution;

III. The evidence was insufficient to prove Hunter's guilt in both Count One and Count Two in violation of the Fifth and Fourteenth Amendments to

the United States Constitution, Article Two, Section seven of the Oklahoma Constitution;

IV. The improper comments made by the prosecutor so invaded the proceedings as to deprive Hunter of a fair trial and resulted in the jury imposing an excessive sentence;

V. Hunter was denied the effective assistance of counsel in violation of the sixth and Fourteenth Amendments to the United States constitution and Article Two, Section Twenty of the Oklahoma constitution;

VI. Considering the facts and circumstances by which Hunter was convicted, the sentence imposed was excessive in violation of the eighth and Fourteenth Amendments to the United States constitution and Article Two, Section Nine of the Oklahoma constitution; and

VII. The accumulation of errors deprived Hunter of a fair trial in violation of the fifth and Fourteenth Amendments to the United States constitution and Article Two, Section seven of the Oklahoma constitution.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find that Count II must be dismissed.

We find in Proposition I that under the narrow circumstances of this case, Hunter's convictions for making a lewd or indecent proposal to a child under sixteen and unlawful use of a computer to commit that offense violate the Section 11 statutory prohibition against multiple punishment.[1] That statute is violated where a defendant is punished twice, under different statutes, for a single criminal act or offense. Focusing on the relationship betweens the crimes, if charged crimes arise from one act, as opposed to separate and distinct crimes, then § 11 is violated.[2] Hunter argues that the evidence showed both crimes were proved by evidence of a single course of

[1] 21 O.S.2001, § 11. The State in reply focuses on the language of the jury instructions, and argues that the elements of the crimes differ and Hunter committed multiple acts (using a computer and making the proposition) in the course of the crime. Under the circumstances of this case this argument must fail.

action. We do not hold that a person can never be convicted of both these crimes. However, here, the charging language in the Information was unusually specific. It is that very specificity which ensures that the convictions violate § 11, because the charges use almost identical language and clearly describe only a single crime.[3]

Count I charged Hunter with making lewd or indecent proposals in violation of § 1123(A)(1) by:

> [H]ave contact with one Jessica of Vinita by computer internet access and thereby arrange a meeting to have sexual relations with Jessica of Vinita, well knowing said Jessica of Vinita was a supposed female of an age of fourteen years and the Defendant was at least 3 years older than the victim. (Information, O.R. 1]

Count II charged Hunter with unlawful use of a computer to violate § 1123(A)(1) in violation of § 1958 by:

> [U]sing a computer for the purpose of violating Title 21 O.S. Section 1123 (A)(1) with the intent to obtain sexual relations with a 14 year old girl by using a computer to communicate with a 14 year old girl known as Jessica from Vinita and arrange a meeting with the 14 year old girl known as Jessica from Vinita at her residence for sexual relations. [Information, O.R. 1]

Hunter was charged both with using a computer to contact Jessica and arrange to meet and have sexual relations, and with using a computer to contact Jessica and arrange to meet and have sexual relations. It is clear that one crime is not tangentially related to the other, nor does this constitute a series of separate and distinct crimes arising during a single course of conduct.[4] The Information charges the same crime twice. This proposition is granted, and Count II is dismissed.

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[2] *Davis v. State*, 1999 OK CR 48, 993 P.2d 124, 126; *Hale v. State*, 1995 OK CR 7, 888 P.2d 1027, 1030.
[3] *Lacy v. State*, 2007 OK CR 20, 171 P.3d 911, 913.
[4] *Davis*, 993 P.2d at 126-27.

We find in Proposition II that Title 21, Section 1123(A)(1) Version Two is neither unconstitutionally vague, nor punishes criminal intent rather than a criminal act. We find the statute defines the offense with sufficient specificity that ordinary people understand what conduct is prohibited, the offense described is not indeterminate, and the language does not encourage arbitrary enforcement.[5] Hunter suggests Version Two punishes thoughts rather than acts. This is not the case. When interpreting a statute we are guided by the statute's entire text, and avoid any interpretation which would render part of the text superfluous or useless.[6] On its face, § 1123(A)(1) requires a defendant to perform an action before any crime occurs. The statute says a person may not "*make any oral, written or electronically or computer-generated lewd or indecent proposal*"[7] to a person he believes to be under the age of sixteen. A defendant must do more than think about making the proposal, he must make it. That overt act is what is punished.

Hunter claims that he is being punished merely for thinking he was proposing sex to an underage girl. His real argument is that the Legislature has criminalized behavior that would not otherwise be criminal. Hunter argues it would not be a crime for him to engage in explicit sexual banter, or even agree to meet with, Officer Lawhorn, or any other consenting adult.[8] He suggests that

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[5] *U.S. v. Williams*, __ U.S. __, 128 S.Ct. 1830, 1846, 170 L.Ed.2d 650 (2008); *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). *See Edmondson v. Pierce*, 2004 OK 23, 91 P.3d 605, 629-30; *State v. Patton*, 1992 OK CR 57, 837 P.2d 483, 484; *Lock v. Falkenstine*, 1963 OK CR 32, 380 P.2d 278, 282.

[6] *King v. State*, 2008 OK CR 13, 182 P.3d 842, 844.

[7] 21 O.S.Supp.2003, § 1123(A)(1) (emphasis added).

[8] Insofar as Hunter suggests that he therefore committed no crime, I note that the fact he was not actually communicating with an underage girl means it would have been factually

§ 1123(A)(1) requires citizens to guess whether their written or spoken "fantasies of an underage teenage sexual partner" will constitute a felony even if they never act on those fantasies. On the contrary, the statute clearly says that any person who actually makes a lewd proposal to someone they believe to be underage is committing a crime. This offense is explicit, and citizens need not guess as to its meaning.[9] As the State notes, other jurisdictions have found similar statutes withstand various constitutional challenges.[10] The statutory provision is not vague.

We find in Proposition III that, taking the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt that Hunter used a computer to make lewd proposals to a person he believed to be under the age of sixteen.[11] We further find that the jury was not properly instructed on the element that the defendant believed the victim to have been under age sixteen. Hunter did not object to this instruction

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impossible for him to consummate any sexual activity with an underage girl, and factual impossibility is not a defense. *See Commonwealth v. Disler*, 884 N.E.2d 500, 507 (Mass. 2008); *State v. Andrews*, 870 N.E.2d 775, 781 (Ohio App. 1 Dist. 2007) *Hix v. Commonwealth*, 270 Va. 335, 619 S.E.2d 80, 86 (2005);

[9] *Mayberry v. State*, 1979 OK CR 134, 603 P.2d 1150, 1153.

[10] *Commonwealth v. Disler*, 884 N.E.2d 500, 507-08 (Mass. 2008) (statute prohibiting enticement of a person defendant believes to be a child not vague under due process clause); *Podracky v. Commonwealth*, 662 S.E.2d 81, 141 (Va.App. 2008) ((statute prohibiting transmission of sexually explicit material to person defendant believes to be a minor does not violate First Amendment); *Simons v. State*, 944 So.2d 317, 324-29 (Fla. 2006) (statute prohibiting transmission of sexually explicit material to person defendant believes to be a minor does not violate First Amendment or Commerce Clause); *People v. Arndt*, 879 N.E.2d 980, 996-97 (Ill.App. 1 Dist. 2004) (statute prohibiting knowing solicitation of one whom defendant believes to be a child does not violate First Amendment); *State v. Snyder*, 801 N.E.2d 876, 883-84 (Ohio App. 3 Dist. 2003) (statute prohibiting soliciting person defendant believes to be a minor but who is actually a police officer posing as a child of thirteen but less than sixteen years old does not violate due process clause); *State v. Backlund*, 672 N.W.2d 431, 435 (N.Dak. 2003) (statute prohibiting luring by computer person defendant believes to be a minor does not violate commerce clause, First Amendment).

[11] *Dodd v. State*, 2004 OK CR 31, 100 P.3d 1017, 1041-42.

and we review for plain error.[12] Although the instruction was improper, under the narrow facts of this case no relief is required.[13]

We find in Proposition IV that although the prosecutor's name-calling did not rise to the level of plain error, the repeated appeals to societal alarm were error.[14] However, given the consequences of our resolution of Proposition I, no further relief is required. We find in Proposition V that trial counsel was not ineffective for failing to object to the prosecutor's comments in closing argument.[15] We find in Proposition VI that no further sentencing relief beyond the dismissal of Count II is required. We find in Proposition VII that there is no cumulative error requiring relief.[16]

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[12] *Pinkley v. State*, 2002 OK CR 26, 49 P.3d 756, 758 (failure to include elements of the crime in instruction may constitute plain error).

[13] *Marquez-Burrola v. State*, 2007 OK CR 14, 157 P.3d 749, 759 (failure to instruct on all elements of malice murder did not require relief under circumstances of case). Jurors were instructed that Hunter was charged with making lewd proposals to Jessica of Vinita, who was "a supposed female of an age of fourteen years". The evidence clearly showed that Jessica was actually Deputy Lawhorn, an adult male, and just as clearly showed that Hunter believed Jessica was a fourteen-year-old girl. Jurors could have understood from the context of the instructions given and the evidence presented that they had to find Hunter believed Jessica to be under sixteen years of age.

[14] Both parties have wide latitude to discuss and make inferences from the evidence, and we will not grant relief unless a defendant is prejudiced and deprived of a fair trial. *Bell v. State*, 2007 OK CR 43, 172 P.3d 622, 624. This Court does not approve of name-calling, but the prosecutor's characterization was harsh but a reasonable argument from the evidence. *Hanson v. State*, 2003 OK CR 12, 72 P.3d 40, 50. The State concedes that the societal alarm comments were error but argues that no relief is required. We will not overturn a conviction for prosecutorial misconduct unless that result is justified by the context of the entire trial. *Brewer v. State*, 2006 OK CR 16, 133 P.3d 892, 895. Although highly improper, the prosecutor's appeals to societal alarm could not, given the evidence, have inappropriately affected the jury's guilty verdict.

[15] Hunter must show that counsel's performance was deficient and this deficient performance created errors so serious he was deprived of a fair trial with reliable results. *Harris v. State*, 2007 OK CR 28, 164 P.3d 1103, 1114; *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003); *Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052, 2069-70, 80 L.Ed.2d 674 (1984). We will not find counsel ineffective if a defendant shows no prejudice from counsel's acts or omissions. *Harris*, 164 P.3d at 1114-1115.

[16] We found error in Proposition I requiring dismissal of Count II. An error in instruction in Proposition II required no relief under the circumstances of this case. Error in Proposition IV was effectively cured by the consequences of the dismissal of Count II. No further relief is

Decision

The Judgment and Sentence of the District Court as to Count I is **AFFIRMED**. The Judgment and sentence of the District Court as to Count II is **DISMISSED**. 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.

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C. JOHNSON, V.P.J.: CONCUR
A. JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR

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required. We found no other error which could accumulate. *Alverson v. State*, 1999 OK CR 21, 983 P.2d 498, 520.