IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RICKEY DEWAYNE PRINCE,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2009-1002**
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, JUDGE:

Appellant, Rickey Dewayne Prince, was tried by jury and convicted of Possession of Child Pornography (Counts 1 and 2) (21 O.S.2001, § 1021.2); Indecent Exhibition of Obscene Material to Minor Child (Count 3) (21 O.S.Supp.2007, § 1021(B)(2)); Lewd Molestation (Counts 4, 5, 6, 10, 11, and 12 (21 O.S.Supp.2003, § 1123); First Degree Rape (Counts 7, 8 and 9) (21 O.S.2001, § 1114); and Forcible Sodomy (Counts 13, 14, and 15) (21 O.S.Supp.2002, § 888) in the District Court of Pontotoc County Case Number CRF-2007-572. The jury recommended as punishment imprisonment for twenty (20) years each in Counts 1, 2, 13, 14, and 15; thirty (30) years in Count 3; sixty (60) years each in Counts 4, 5, 6, 10, 11, and 12; and imprisonment for life without the possibility of parole in Counts 7, 8, and 9. The trial court sentenced accordingly and ordered the sentences to run

consecutively.[1] It is from these judgments and sentences that Appellant appeals.

Appellant raises the following propositions of error in this appeal:

I. Mr. Prince Was Denied A Fair Trial By Improper Vouching For Truthfulness Of The Victims' Testimony.

II. The Charges Of Possession Of Child Pornography Should Have Been Charged Under the Specific Statute.

III. The Sentences In Counts 4-6 And Counts 10-12 Violate Constitutional Protection *Ex Post Facto* Laws.

IV. It Was Error To Admit Mr. Prince's Statement Without Conducting The Required *Jackson v. Denno* Hearing.

V. The Trial Court Erred By Failing To Instruct The Jury On The Voluntariness Of Mr. Prince's Statement.

VI. Child Hearsay Statements Were Inadmissible Because No Hearing Pursuant To Section 2803.1 Was Conducted To Determine If The Statements Were Reliable.

VII. The Evidence Was Insufficient To Convict Mr. Prince In Counts 3-15 Based Upon The Improbable Testimony Of The Victims And Lack Of Independent Corroboration.

VIII. The Evidence Was Insufficient To Convict Mr. Prince In Count 1 And Count 2 Because The State Failed To Prove All Of The Elements Of The Crime.

IX. Mr. Prince Was Denied A Fair Trial By The Improper Comments And Questioning By The Prosecutor.

X. Mr. Prince Was Denied The Effective Assistance Of Defense Counsel.

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[1] Appellant will be required to serve 85% of his sentences for Possession of Child Pornography, Lewd Molestation, First Degree Rape and Forcible Sodomy pursuant to 21 O.S.Supp.2007, § 13.1.

XI. The Length And Consecutive Nature Of Mr. Prince's Sentences Imposed Was Excessive.

XII. The Accumulation Of Errors Deprives Mr. Prince Of A Fair Trial.

In his first proposition, Appellant contends that the Sexual Assault Nurse Examiner improperly vouched for the truthfulness of the victims' testimony when she testified that her medical findings as to each victim were consistent with the victim's statement given in the medical history. Appellant further contends that the prosecutor improperly vouched for the victims' testimony when he relied upon the medical findings in closing argument and argued that the victims' accounts were consistent. Appellant failed to raise a timely challenge to the testimony and argument at trial. Thus, he has waived appellate review for all but plain error. *Simpson v. State*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 692. We find that impermissible vouching did not occur as the jury could not have reasonably believed that either the witness or the prosecutor indicated a personal belief in the victims' testimony. *Warner v. State*, 2006 OK CR 40, ¶ 24, 144 P.3d 838, 860-61; *Lawrence v. State*, 1990 OK CR 56, ¶ 4, 796 P.2d 1176, 1177. As plain error did not occur, this proposition is denied.

In his second proposition, Appellant contends that he should have been charged and tried under the specific provisions of 21 O.S.2001, § 1024.2 rather than 21 O.S.2001, § 1021.2. Appellant did not raise a timely challenge before the trial court to the prosecutor's election to proceed under 21 O.S.2001, § 1021.2. As such, he has waived appellate review of the instant challenge for all

but plain error. *Head v. State*, 2006 OK CR 44, ¶ 9, 146 P.3d 1141, 1144; *Tinney v. State*, 1985 OK CR 165, ¶ 10, 712 P.2d 65, 67. We find that plain error occurred. Both Section 1024.2 and Section 1021.2 cause the possession of child pornography to be unlawful. As Section 1024.2 is the more specific statute in the present case, it supersedes Section 1021.2. *Maloney v. State, 1975 OK CR 22, ¶ 3, 532 P.2d 78, 79.* Because the elements of unlawful possession of child pornography are the same under both statutory provisions, the error does not affect Appellant's conviction. However, the error affected Appellant's substantial rights because it caused him to be subject to a greater potential maximum sentence. *Simpson v. State*, 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d 690, 694, 695, 698; *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923; 20 O.S.2001, § 3001.1. We modify Appellant's sentences in Counts 1 and 2 to imprisonment for five (5) years in each count. Appellant's Judgment and Sentence must be corrected to clearly state that the conviction is under Section 1024.2.

In his third proposition, Appellant contends that his sentences for lewd molestation in Counts 4, 5, 6, 10, 11, and 12 constitute an *ex post facto* violation. Appellant failed to raise a timely challenge to the trial court's instruction to the jury regarding the applicable punishment range. As such he has waived appellate review of the alleged error for all but plain error. *Simpson v. State*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 692. As the trial court failed to instruct the jury regarding the penalty imposed by law for the crime on the date of its commission, we agree with the State's concession of plain error.

Pollard v. State, 1974 OK CR 63, ¶¶ 3-7, 521 P.2d 400, 401-02; *Allen v. State*, 1991 OK CR 35, ¶ 20, 821 P.2d 371, 375-76 *citing Miller v. Florida*, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987). We modify Appellant's sentences for lewd molestation in Counts 4, 5, 6, 10, 11, and 12 to imprisonment for twenty (20) years in each count.

In his fourth proposition, Appellant contends that the trial court erred when it admitted his inculpatory statements to the undersheriff without conducting a *Jackson v. Denno*[2] hearing. Appellant did not challenge the voluntariness of his statements to the undersheriff or timely request an *in camera* hearing before their admission at trial. As such Appellant has waived appellate review of the instant challenge for all but plain error. *Rowe v. State*, 1989 OK CR 54, ¶ 3, 779 P.2d 594, 595; *Lambert v. State*, 1999 OK CR 17, ¶ 60, 984 P.2d 221, 238. We find that plain error did not occur. "A defendant does not have the right to a *Jackson v. Denno* hearing as to the voluntariness of his inculpatory custodial statements where he does not object to the admission of the statements." *Davis v. State*, 1999 OK CR 16, ¶ 24, 980 P.2d 1111, 1118; *Humphreys v. State*, 1997 OK CR 59, ¶ 18, 947 P.2d 565, 573; *Wainwright v. Sykes*, 433 U.S. 72, 86, 97 S.Ct. 2497, 2506, 53 L.Ed.2d 594 (1977).

Appellant attempts to excuse his failure to challenge the voluntariness of his statements at trial by claiming ineffective assistance of counsel. The record reflects that Appellant voluntarily met with the undersheriff, was advised of his *Miranda* rights and knowingly and voluntarily gave the statements. As such,

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[2] *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

Appellant has not shown a reasonable probability that the outcome of the trial would have been different but for counsel's failure to challenge the voluntariness of the statements. *Bland v. State*, 2000 OK CR 11, ¶ 112, 4 P.3d 702, 730-31. This proposition is denied.

In his fifth proposition, Appellant contends that the trial court erred when it failed to *sua sponte* instruct the jury regarding the voluntariness of his statements to the undersheriff. Appellant did not request that the trial court instruct the jury under OUJI-CR(2d) 9-12, 9-13 (Supp.2008). As such he has waived appellate review of the instant challenge for all but plain error. *Jones v. State*, 2006 OK CR 5, ¶ 39, 128 P.3d 521, 538. The instructions set forth in OUJI-CR(2d) 9-12, 9-13 (Supp.2009) are only given upon request of the defendant following a *Jackson v. Denno* hearing. *Parent v. State*, 2000 OK CR 27, ¶¶ 18-22, 18 P.3d 348, 352-53. As Appellant neither challenged the admission of his statements at trial nor requested that the jury be instructed upon the voluntariness of his statements, the trial court did not err when it omitted the instructions. As set forth in proposition three, the record reflects that Appellant voluntarily met with the undersheriff, was advised of his *Miranda* rights and knowingly and voluntarily gave the statements. Plain error did not occur and this proposition is denied.

In his sixth proposition, Appellant contends that the trial court erred when it failed to conduct a hearing under 12 O.S.Supp.2004, § 2803.1 prior to the admission of the children's' statements to their mother regarding sexual abuse. The State concedes error but argues that the error was harmless. We

agree. Appellant waived appellate review of the instant challenge for all but plain error when he failed to timely challenge the admission of the testimony at trial. We have previously recognized that failure to have a hearing in accordance with the directives of § 2803.1 constitutes plain error but that such error is subject to harmless error review. *Simpson*, 1994 OK CR 40, ¶¶ 19, 37 876 P.2d at 698, 702. As in *Simpson*, the error in the present case is harmless as it did not have a substantial influence on the outcome of the trial. *Id.* This proposition is denied.

In proposition seven, Appellant contends that the victims' testimony must have been corroborated in order for it to be sufficient to support his convictions in Counts 3 through 15. As the victims' testimony was lucid, clear and unambiguous, corroboration was not required. *Applegate v. State*, 1995 OK CR 49, ¶ 16, 904 P.2d 130, 136; *Salyer v. State*, 1988 OK CR 184, ¶ 22, 761 P.2d 890, 895. Taking the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crimes charged beyond a reasonable doubt. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204. This proposition is denied.

In proposition eight, Appellant contends that the evidence was insufficient to support his convictions in Counts 1 and 2 because the State failed to prove that the images constituted child pornography. Taking the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the individuals depicted in the images were under the

age of 18 years-old beyond a reasonable doubt. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204; OUJI-CR(2d) 4-139 (Supp.2009). This proposition is denied.

In proposition nine, Appellant contends that prosecutorial misconduct deprived him of a fundamentally fair trial. Appellant did not raise a timely challenge to the questions or argument at trial. As such, he has waived appellate review of the instant challenge for all but plain error. *Romano v. State*, 1995 OK CR 74, ¶ 54, 909 P.2d 92, 115. We find that plain error did not occur. As set forth in proposition one, impermissible vouching did not occur. *Warner*, 2006 OK CR 40, ¶ 24, 144 P.3d at 860-61. The prosecutor's references to the victims' ages were not improper appeals for victim sympathy but fell within the wide latitude of discussion permitted both the state and the defense in closing argument. *Garrison v. State*, 2004 OK CR 35, ¶ 117, 103 P.3d 590, 610-11; *Short v. State*, 1999 OK CR 15, ¶ 72, 980 P.2d 1081, 1104. The victims' ages were an essential element of the charges. OUJI-CR(2d) 4-120, 4-128, 4-129, 4-15 (Supp.2008). Reviewing the entire record, the prosecutor's comments regarding the victims' lost innocence did not deprive Appellant of a fair trial. *Warner*, 2006 OK CR 40, ¶ 197, 144 P.3d at 891; 12 O.S.Supp.2004, 2803.1; OUJI-CR(2d) 10-8 (Supp.2009). This proposition is denied.

In proposition ten, Appellant raises numerous instances where he asserts that his trial counsel rendered ineffective assistance. Appellant's claims that trial counsel's failure to timely object to prosecution under 21 O.S.2001, § 1021.1 in Count 1 and 2 and the trial court's erroneous instruction upon the sentencing

ranges for Counts 4, 5, 6, 10, 11, and 12 are rendered moot by the relief granted in propositions two and three. *Roy v. State,* 2006 OK CR 47, ¶ 28, 152 P.3d 217, 227. As to Appellant's remaining claims, a review of the record reveals that Appellant is unable to show a reasonable probability that the outcome of the trial would have been different but for any unprofessional errors by defense counsel. *Bland v. State*, 2000 OK CR 11, ¶ 112, 4 P.3d 702, 730-31; *Phillips v. State*, 1999 OK CR 38, ¶ 103, 989 P.2d 1017, 1043 ("When a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed.") *citing Strickland v. Washington,* 466 U.S. 668, 697, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984). This proposition is denied.

In proposition eleven, Appellant contends that his sentences are excessive. We find that Appellant's sentences, as modified by this Court, are within the applicable statutory ranges and when considered under all the facts and circumstances of the case, are not so excessive as to shock the conscience of the Court. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149; F*reeman v. State*, 1994 OK CR 37, ¶ 38, 876 P.2d 283, 291. This proposition is denied.

In proposition twelve, Appellant contends that the combined errors in his trial denied him the right to a constitutionally guaranteed fair trial. We find Appellant was not denied a fair trial by cumulative error. *Ashinsky v. State*, 1989 OK CR 59, ¶ 31, 780 P.2d 201, 209; *Bechtel v. State*, 1987 OK CR 126, 738 P.2d 559, 561. We found error in propositions two, three, and four. In viewing the cumulative effect of these errors we do not find that they require reversal of Appellant's convictions as none were so egregious or numerous as to

have denied Appellant a fair determination of his guilt. *Williams v. State*, 2001 OK CR 9, ¶ 127, 22 P.3d 702, 732. This proposition is denied.

DECISION

Appellant's convictions for Possession of Child Pornography are **AFFIRMED**, but the sentences are **MODIFIED** to imprisonment for five (5) years in each count. The case is **REMANDED** to the District Court for the correction of the Judgment and Sentence document to reflect that the convictions for Possession of Child Pornography are under 21 O.S.2001, § 1024.2. Appellant's convictions for Lewd Molestation are **AFFIRMED** and the sentences are **MODIFIED** to imprisonment for twenty (20) years in each count. The Judgment and Sentence as to all remaining counts is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2010), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF PONTOTOC COUNTY
THE HONORABLE THOMAS S. LANDRITH, DISTRICT JUDGE

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LEWIS, J.: CONCUR IN RESULT
SMITH, J.: CONCUR

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