

MAY 16 2019

JOHN D. HADDEN,
CLERK



IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

RODGER DALE STEVENS,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

Case No. F-2017-1098

SUMMARY OPINION

ROWLAND, JUDGE:

Appellant Rodger Dale Stevens appeals his Judgment and Sentence from the District Court of Creek County, Case No. BCF-2016-412, for Performing a Lewd Act in the Presence of a Minor, After Former Conviction of Two or More Felonies, in violation of 21 O.S.Supp.2015, § 1123(A)(5). The Honorable Joe Sam Vassar, District Judge, presided over Stevens' jury trial and sentenced him, in accordance with the jury's verdict, to life imprisonment.¹ Stevens appeals raising the following issues:

- (1) whether the evidence was sufficient to prove the elements of performing a lewd act in the presence of a child;

¹ Under 21 O.S.Supp.2015, § 13.1, Stevens must serve 85% of his sentence of imprisonment before he is eligible for parole consideration.

- (2) whether he was denied a fair trial from the use of the habitual offender statute, 21 O.S.2011, § 51.1(B), to enhance his sentence;
- (3) whether he was denied a fair trial from the admission of irrelevant and prejudicial evidence;
- (4) whether prosecutorial misconduct deprived him of a fair trial;
- (5) whether he received the effective assistance of trial counsel; and
- (6) whether his sentence is excessive.

We find relief is not required and affirm the Judgment and Sentence of the district court.

1. Sufficiency of the Evidence

Stevens contends his conviction must be reversed because of insufficient evidence. He argues the State failed to prove beyond a reasonable doubt that the victim's presence during his own masturbation was for sexual gratification. He maintains the sexual gratification element of the crime is directed at the act of exposing the child to the sexual act rather than the sexual act itself. He admits his conduct arguably violated the law and could support convictions for either indecent exposure or outraging public

decency.² Accordingly, he asks the Court either to remand his case for trial on indecent exposure and outraging public decency or to modify his conviction to the appropriate crime and remand for resentencing.

Evidence is sufficient to support a conviction if, viewing the evidence and all reasonable inferences from it in the light most favorable to the State, any rational trier of fact could find the defendant guilty beyond a reasonable doubt. *Coddington v. State*, 2006 OK CR 34, ¶ 70, 142 P.3d 437, 456; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04. This Court does not reweigh conflicting evidence or second-guess the fact-finding decisions of the jury; we accept all reasonable inferences and credibility choices that tend to support the verdict. *See Day v. State*, 2013 OK CR 8, ¶ 12, 303 P.3d 291, 298; *Coddington*, 2006 OK CR 34, ¶ 70, 142 P.3d at 456. We further recognize that the law makes no distinction between direct and circumstantial evidence and either, or any combination of the two, may be sufficient to support a conviction. *Miller v. State*, 2013 OK CR 11, ¶ 84, 313 P.3d 934, 965. “Pieces of

² Stevens’ jury received instructions on both of these crimes.

evidence must be viewed not in isolation but in conjunction, and we must affirm the conviction so long as, from the inferences reasonably drawn from the record as a whole, the jury might fairly have concluded the defendant was guilty beyond a reasonable doubt.” *Matthews v. State*, 2002 OK CR 16, ¶ 35, 45 P.3d 907, 919-20.

The evidence showed that Stevens put lotion on his penis and masturbated in front of a seven-year-old boy who was seated on the bed a few feet away. Stevens asked the boy to disrobe while he masturbated. The victim’s testimony in this case provided compelling proof that Stevens derived sexual gratification from exposing the boy to his sex act. Moreover, Stevens’ texts to the victim’s mother evidenced a consciousness of guilt. The jury understandably rejected the notion that Stevens’ motive for masturbating in front of the boy was not for his own sexual gratification but to teach the boy to be comfortable with his own body. Based on the evidence, we find any rational jury could find the necessary elements of performing a lewd act in the presence of a child under 12. This claim is rejected.

2. Sentence Enhancement

Stevens argues using the general habitual offender statute, 21 O.S.2011, § 51.1(B), to enhance his sentence resulted in the State's erroneous presentation of aggravating evidence of his prior convictions in the sentencing stage of his bifurcated trial without the defense having the concomitant right to present mitigating evidence, resulting in a grossly inflated sentence. He contends Section 1123(A) provides the specific enhancement provision applicable to his case that controls over Section 51.1. He maintains Section 51.1 was misused in this case because: (1) application of Section 51.1 created a clearly unintended anomaly that the minimum sentence for an offender with prior convictions was five years **less** than for a first time offender of Section 1123(A); and (2) there was no enhancement of sentence based on prior convictions because the maximum sentence was the same under both Section 1123(A) and Section 51.1(B) and, as noted previously, the minimum sentence was less for a former felon under Section 51.1. According to Stevens, he should have been tried in a single stage proceeding without presentation of his prior convictions and his jury instructed

the range of punishment was not less than twenty-five years imprisonment.³ Because Stevens neither objected to the bifurcation of his trial nor to the admission of his prior convictions for sentence enhancement, review is for plain error only. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. Stevens has the burden in plain error review to demonstrate that an error, plain or obvious under current law, adversely affected his substantial rights. *Id.* Only if he does so will this Court entertain correcting the error provided the error seriously affected the fairness, integrity or public reputation of the judicial proceedings or represented a miscarriage of justice. *Id.*

The Legislature set the range of punishment for a violation of Section 1123(A) of a child under 12 at “not less than twenty-five (25) years” and the range of punishment for an offender convicted of an enumerated offense in 57 O.S.Supp.2015, § 571 with two or more previous convictions at twenty years to life imprisonment.⁴ 21

³Stevens claims the range of punishment instruction of 20 years to life imprisonment was wrong, but the error concerning the minimum sentence inured to his benefit.

⁴ Section 571 provides a list of violent crimes, including lewd or indecent proposition or lewd or indecent acts with a child under sixteen (16) years of age, as provided in Section 1123 of Title 21.

O.S.2011, § 51.1(B). The Legislature established a specific penalty for three or more convictions of offenses under Section 1123(A) as well as a specific penalty for a conviction under Section 1123(A) that was preceded by two convictions of certain other sex offenses.⁵ The Legislature, however, did not address sentence enhancement in Section 1123(A) for those offenders with prior convictions that fall outside of Section 1123's specific enhancement provisions.

In interpreting statutory provisions we must avoid any construction which would make any part of the statutes superfluous or useless. *King v. State*, 2008 OK CR 13, ¶ 7, 182 P.3d

⁵ Section 1123 provides in pertinent part:

Except as provided in Section 51.1a of this title, any person convicted of a second or subsequent violation of this subsection shall be guilty of a felony punishable as provided in this subsection and shall not be eligible for probation, suspended or deferred sentence. Except as provided in Section 51.1a of this title, any person convicted of a third or subsequent violation of this subsection shall be guilty of a felony punishable by imprisonment in the custody of the Department of Corrections for a term of life or life without parole, in the discretion of the jury, or in case the jury fails or refuses to fix punishment then the same shall be pronounced by the court. Any person convicted of a violation of this subsection after having been twice convicted of a violation of subsection A of Section 1114 of this title, Section 888 of this title, sexual abuse of a child pursuant to Section 843.5 of this title, or of any attempt to commit any of these offenses or any combination of convictions pursuant to these sections shall be punished by imprisonment in the custody of the Department of Corrections for a term of life or life without parole.

842, 844. The text of the statutes must guide our decision. *Id.* “In order to give effect to the Legislature’s expressed intentions we construe statutes using the plain and ordinary meaning of their language.” *Id.* Specific statutes control over general ones. *Id.* “Where possible, this Court will interpret conflicting statutory language to reconcile the provisions, make them consistent and give each provision effect.” *Id.* If the Legislature enacts a statute for a specific situation, we should give effect to that intent. *Id.* To discern legislative intent we may look to each part of the statute, similar statutes, the evils to be remedied, and the consequences of any particular interpretation. *Id.*

Some criminal offenses, such as lewd or indecent acts committed against children under 12, are so reprehensible under society’s standards that the Legislature provided lengthy sentences with higher minimum sentences for a first violation. The Legislature, in enacting Section 51.1, evidenced its intent to punish repeat offenders more severely than the average first-time offender and to allow the sentencer to take the habitual offender’s prior record into account in deciding punishment for subsequent

offenses. The State elected, as is its right, to enhance Stevens' sentence under Section 51.1 and Stevens' jury was properly instructed on the range of punishment.

Contrary to Stevens' claim, the State's presentation of so-called aggravating evidence of his prior convictions in the sentencing stage of his bifurcated trial did not deny him a fair trial because of an inability by the defense to present mitigating evidence. Stevens, as any other offender exposed to sentence enhancement under Section 51.1(B), had an equal opportunity to introduce relevant evidence to contest the existence or validity of the alleged prior convictions the State introduced.⁶ That is all the law requires.

The fact that enhancement under Section 51.1(B) did not result in Stevens' exposure to a greater punishment range does not make the habitual offender statute inapplicable. Generally, sentence enhancement statutes provide for an additional term of imprisonment to be added to the base term of an offense upon proof

⁶ Stevens stipulated to his prior convictions during second stage. The district court admitted State's Exhibits 6, 7, and 8, the Judgment and Sentence documents of Stevens' three previous convictions, but informed the jury the court would not reveal what the convictions were for or submit them for review during deliberations.

of some additional element, such as prior convictions. It is the additional element that essentially reclassifies the offense to a higher level with a longer sentence. Nevertheless, the Legislature has, in its wisdom, punished some crimes more severely because of the perceived harm to society. The power to define crime and to prescribe punishment lies with the Legislature. *M.A.W. v. State*, 2008 OK CR 16, ¶ 15, 185 P.3d 388, 392. Under Section 51.1(B), the State, as the prosecution did in this case, may present evidence of the defendant's prior felony conviction(s) for the jury's consideration in deciding the appropriate punishment. Based on this record, Stevens has not shown it was error to hold a bifurcated trial and admit his prior convictions. *Hogan*, 2006 OK CR 19, ¶ 39, 139 P.3d at 923 ("The first step in plain error analysis is to determine whether error occurred.") This claim is denied.

3. Evidentiary Issues

Stevens argues admission of details about the nature of his relationship with the victim's mother amounted to plain error. Specifically, he complains that her testimony, admitted without objection, involving Stevens' proposal of a "sugar daddy

relationship” and offer of financial support in exchange for sex was irrelevant. He also claims her testimony concerning his alleged threats and pressure not to end the relationship lest she receive no more money was also irrelevant and prejudicial. Because Stevens did not object to the testimony, review is for plain error only under the plain error test. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

Stevens concedes that the existence of his sexual relationship with the victim’s mother “was not in itself unfairly prejudicial and was arguable (sic) admissible as part of the *res gestae* to explain why the victim was left alone with” him. He contends, however, that evidence of the “illicit details” of the relationship and the alleged threats he made about ending the relationship were unnecessary to the State’s proof and that the evidence was more prejudicial than probative.

“Evidence is considered part of the *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.” *Vanderpool*, 2018 OK CR 39, ¶ 24, 434 P.3d 318, 324. The

Evidence Code permits the exclusion of relevant evidence if its probative value is *substantially* outweighed by the danger of, among other things, unfair prejudice. 12 O.S.2011, § 2403; *Harmon v. State*, 2011 OK CR 6, ¶ 48, 248 P.3d 918, 936–37.

The influence Stevens had over the victim’s mother put in context other evidence and explained why she continued to allow Stevens to have contact with her son. Nor was the probative value of the challenged evidence substantially outweighed by the danger of unfair prejudice. Because the challenged evidence gave the jury a complete understanding of the crime and was not unfairly prejudicial, this claim is rejected.

4. Prosecutorial Misconduct

Stevens argues he was denied a fair trial because of prosecutorial misconduct. He challenges three statements made by the prosecutor, two during first stage closing argument and one during second stage closing argument. Only one of the challenged statements drew an objection. A prosecutor’s conduct not met with objection is reviewed for plain error only. *Mitchell v. State*, 2018 OK CR 24, ¶ 30, 424 P.3d 677, 686.

Both parties have wide latitude in closing argument to argue the evidence and reasonable inferences from it. *Pullen v. State*, 2016 OK CR 18, ¶ 13, 387 P.3d 922, 927. This Court will not grant relief on a claim of prosecutorial misconduct unless improper argument effectively deprived the defendant of a fair trial or a fair and reliable sentencing proceeding. *Id.* We evaluate the prosecutor's comments within the context of the entire trial, "considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel." *Harmon*, 2011 OK CR 6, ¶ 80, 248 P.3d at 943. It is the rare instance when a prosecutor's misconduct during closing argument was so egregiously detrimental to a defendant's right to a fair trial that reversal is required. *See Pryor v. State*, 2011 OK CR 18, ¶ 4, 254 P.3d 721, 722.

There is nothing in any of the challenged comments, individually or cumulatively, that exceeds the wide latitude parties have to discuss the evidence and reasonable inferences from it. *Pullen*, 2016 OK CR 18, ¶ 13, 387 P.3d at 927. The record reveals the prosecutor's challenged closing argument remarks, read in

context, are based on the evidence. Based on the record, Stevens has not shown the existence of an error. *Hogan*, 2006 OK CR 19, ¶ 39, 139 P.3d at 923 (“The first step in plain error analysis is to determine whether error occurred.”) Because the remarks fall within the latitude of argument permitted by this Court, no relief is warranted. *Pullen*, 2016 OK CR 18, ¶ 13, 387 P.3d at 927. This claim is denied.

5. Ineffective Assistance of Counsel

Stevens argues he was denied a fair trial because of ineffective assistance of counsel. Stevens faults defense counsel for failing to object to use of the habitual offender statute for sentence enhancement and to the presentation of his prior convictions (Proposition 2), for failing to object to admission of details about the nature of his relationship with the victim’s mother (Proposition 3) and for failing to object to the alleged prosecutorial misconduct (Proposition 4). This claim is without merit.

This Court reviews claims of ineffective assistance of counsel to determine: (1) whether counsel’s performance was constitutionally deficient; and (2) whether counsel’s performance

prejudiced the defense so as to deprive the defendant of a fair trial with reliable results. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. Under this test, Stevens must affirmatively prove prejudice resulting from his attorney's actions. *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067; *Head v. State*, 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148. "To accomplish this, it is not enough to show the failure had some conceivable effect on the outcome of the proceeding." *Head*, 2006 OK CR 44, ¶ 23, 146 P.3d at 1148. Rather, he must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* This Court need not determine whether counsel's performance was deficient if there is no showing of harm. See *Malone*, 2013 OK CR 1, ¶ 16, 293 P.3d at 207.

Stevens' claims concerning sentence enhancement, Dougherty's testimony and allegations of prosecutorial misconduct have been rejected in the preceding propositions. See Propositions

2, 3, and 4, *supra*. He cannot show on this record that, but for counsel's actions, the result of his trial would have been different. Because he has failed to establish the necessary prejudice from his attorney's actions, his ineffective assistance of counsel claim is denied.

6. Excessive Sentence

Stevens contends his life sentence for masturbating in the presence of a young boy with no evidence of inappropriate touching is excessive, barbaric and grossly disproportionate. To support his excessive sentence claim, he notes the prosecutor offered "five in, ten out" prior to trial. "This Court will not disturb a sentence within statutory limits unless, under the facts and circumstances of the case, it shocks the conscience of the Court." *Thompson v. State*, 2018 OK CR 32, ¶ 16, 429 P.3d 690, 694.

This conviction was Stevens' fourth felony conviction. His jury heard all the evidence and chose to impose the maximum punishment and the district court imposed that verdict. The crime committed was indefensible with the very real potential of lasting emotional harm for the victim. The sentence is within the range of

punishment and does not meet this Court's "shock the conscience" test. This claim is denied.

DECISION

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. (2019), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CREEK COUNTY THE HONORABLE JOE SAM VASSAR, DISTRICT JUDGE

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KUEHN, V.P.J.: Concur

LUMPKIN, J.: Concur

HUDSON, J.: Concur