IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BRANDON DONELL HARRIS,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	No. F-2007-381
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LEWIS, JUDGE:

Brandon Donell Harris was convicted of, count 1, Child Sexual Abuse in violation of 10 O.S.Supp.2002, § 7115(E), count 2, Lewd or Indecent Proposals in violation of 21 O.S.2001, § 1123, and count 3, Forcible Oral Sodomy in violation of 21 O.S.Supp.2001, § 888, in the District Court of Oklahoma County, Case No. CF-2006-3558, before the Honorable Ray C. Elliott, District Judge. The jury assessed punishment at seventeen years imprisonment on count one and two years imprisonment on both counts two and three. The trial court sentenced accordingly, ordering that the sentences be served consecutively. Harris has perfected an appeal of the District Court's Judgment and Sentence raising the following propositions of error:

1. Because the State failed to prove beyond a reasonable doubt that Appellant committed the act of sexual abuse of a child, this Court must reverse the conviction and remand it with instructions to dismiss.

2. Appellant's conviction for count 2, lewd acts with a child under sixteen, must be reversed because the specific crime charged was not committed.

3. Numerous instances of prosecutorial misconduct deprived Appellant of a fair trial.

4. The trial court made improper comments during voir dire which had adverse affects on the defense of the case.

After thorough consideration of Harris's propositions of error and the entire record before us on appeal, including the original record, transcripts, exhibits, and briefs, we have determined that count two of the Judgment and Sentence of the District Court shall be reversed and remanded with instructions to dismiss, the remaining counts shall be affirmed.

In proposition one, we find that the evidence, when viewed in a light most favorable to the state, was sufficient to prove the elements of sexual abuse of a child 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, 203-04; *See Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1970).

In proposition two, we find that the crime for which Harris was convicted, proscribed in 21 O.S.Supp.2005, § 1123(A)(5)(e), requires live sexual acts performed in the presence of the child. This part of the statute makes it a "felony for any person to knowingly and intentionally: . . . in a lewd and lascivious manner and for the purpose of sexual gratification . . . cause, expose, force or require a child to look upon sexual acts performed in the presence of the child . . . ." We find that the words of the statute are clear and unambiguous leaving no room for interpretation. *See Wallace v. State*, 1997 OK CR 18, ¶ 4, 935 P.2d 366, 369-370; *see also* 25 O.S.2001, § 1. The words require the performance of sexual acts in the presence of a child. The words of

this specific paragraph of the statute do not prohibit sexual acts performed outside the presence of the child, recorded and later played for the child on a television as was done in this case.

Other portions of this same statute make it a "felony for any person to knowingly and intentionally: . . . in a lewd and lascivious manner and for the purpose of sexual gratification . . . force or require a child under sixteen . . . to view any obscene materials . . . defined by Sections 1024.1 [of title 21]."[1] This section would prohibit the kind of activity involved in this case where the appellant made the victim watch images on a television engaging in oral sodomy, so that the appellant could show the four year old victim how to perform the same acts on him. Unfortunately, the jury in this case was not given to opportunity to determine whether Appellant was guilty of this crime.

Because the jury was instructed on, and found Appellant guilty of, a crime not committed by Appellant, count two must be reversed and remanded with instructions to dismiss.

In propositions three and four, we initially find that there were no objections to the alleged error at trial, thus we review for plain error only. In order to show plain error an appellant must prove actual error which is plain or obvious, and he must show that the error affected substantial rights affecting the outcome of the proceeding. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

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[1] Appellant was initially charged under 21 O.S.Supp.2005, § 1021 (exhibiting obscene materials to a minor for specific purposes outlined in the section; however, the State was allowed to amend the Information at trial.)

With regard to the alleged improper argument of the prosecutor, urged in proposition three, we find that both parties to a trial have wide latitude during closing argument to discuss evidence and reasonable inferences from such evidence, and relief is warranted only where grossly improper comments affect the defendant's right to a fundamentally fair trial. *Hanson v. State*, 2003 OK CR 12, ¶13, 72 P.3d 40, 49. We find that the argument of the prosecutor here did not amount to plain error as the argument did not affect Appellant's substantial rights so as to affect the outcome of the trial.

With regard to the alleged improper comments of the trial court during the opening instructions to the jury, we find that the comments, likewise, did not did not amount to plain error. The comments read in context with the entire colloquy emphasized the importance of giving full attention to the witnesses and the final instructions of the trial court regarding the elements of the offenses. Furthermore, the comments did not affect Appellant's substantial rights so as to affect the outcome of the trial.

DECISION

Count two of the Judgment and Sentence of the District Court is **REVERSED** and **REMANDED** with instructions to **DISMISS**, the remaining counts are **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.

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OPINION BY: LEWIS, J.

LUMPKIN, P.J.: Concur in Part/Dissent in Part
C. JOHNSON, V.P.J.: Concur
CHAPEL, J.: Concur in Results
A. JOHNSON, J.: Concur

LUMPKIN, PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the Court's decision to affirm Counts 1 and 3, however I must dissent to the decision to reverse and dismiss Count 2.

As the opinion accurately sets out, originally Count 2 was charged pursuant to 21 O.S. Supp. 2005, § 1021. However, at the close of the evidence the state moved, and the Court granted, an amendment to 21 O.S. Supp. 2005, § 1123. The state only specified the Section number, not the subpart of the Section. The opinion seems to assume by the instruction given that the change was amended to Section 1123 (A)(5)(e) because the instruction utilized the language "to look upon sexual acts performed in the presence of the child". However, the instruction could just have well been pursuant to Section 1123 (A)(5)(d), which prohibits forcing a child under sixteen years of age to "view any obscene materials", etc., as such terms are defined by Sections 1024.1 and 1040.75 of Title 21. Subsection (d) is that which in fact conforms to the proof under Section 1123 as requested by the state. In fact, it is sub-section (d) that has the language of "any child under sixteen (16) years of age" in it. Sub-section (e) does not contain the requirement of being under sixteen, it merely says "a child" without reference to age. Therefore, the instruction given, referring to "any child under sixteen years of age", more clearly identifies sub-section (d) as the intended amendment. Thus, the word "performed" is surplusage and should be disregarded.

In addition, even if there is error, it is an instructional error, not failure to present sufficient proof of the crime. Since it is an instructional error, it should be remanded for trial under the proper instructions. *See Williams v. State,* 1953 OK CR 41, 255 P.2d 532. The evidence is sufficient to prove guilt in this case.