

JUN 10 2003

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA
MICHAEL S. RICHIE
CLERK

JACK LEROY HELMS,)	
)	
Appellant,)	NOT FOR PUBLICATION
v.)	Case No. F-2002-552
)	
THE STATE OF OKLAHOMA,)	
)	
Appellee.)	

SUMMARY OPINION

CHAPEL, JUDGE:

Jack Leroy Helms was tried by jury and convicted of Unlawful Possession of Obscene Pictures of Minors, under 21 O.S.Supp.2000, § 1021.2, in Jefferson County District Court, Case No. CF-2001-78.¹ The Honorable George W. Lindley presided over the trial. In accordance with the jury's recommendation, the Honorable Joe Enos sentenced Helms to imprisonment for fifteen (15) years.² Helms appeals his conviction and his sentence.

Helms raises the following propositions of error:

- I. Mr. Helms' alleged offense of simple possession of child pornography should have been prosecuted under the specific law involving simple possession of such matter, rather than the general statute that covers the more serious offense of manufacturing and distributing child pornography, therefore his sentence should be modified to five years or less.

¹ The Information accused Helms of violating 21 O.S. § 1021(A)(3), and the Judgment and Sentence states that Helms was convicted of violating this provision. Yet Helms was charged and tried under the language of 21 O.S.Supp.2000, § 1021.2, and the parties agree that this is the section upon which his conviction was based. Regardless, the Court's resolution of Proposition I resolves this discrepancy as well.

² Although Judge Lindley presided over his trial, Helms was sentenced by Judge Enos. At the time of sentencing, Judge Enos offered to allow Helms to defer his sentencing, in order to be sentenced by the judge who had heard the trial evidence, but Helms elected to be sentenced immediately by Judge Enos.

- II. The trial court should have instructed under section 1024.2 as a lesser included offense.
- III. The admission of other crimes evidence prejudiced the jury, deprived Mr. Helms of his fundamental right to a fair trial, and warrants reversal of the convictions.
- IV. The sentence imposed is excessive.
- V. There was insufficient evidence that Mr. Helms possessed child pornography.

Regarding Proposition I, the State concedes that Helms should have been charged and tried under 21 O.S.Supp.2000, § 1024.2, rather than 21 O.S.Supp.2000, § 1021.2, under this Court's decisions holding that when two provisions prohibit the same criminal act, a defendant should be charged under the statute that more specifically applies to the act, rather than a broader, more general statute.³³ Because the elements of unlawful possession of child pornography are the same under these provisions, this does not affect Helms's conviction, though the Judgment and Sentence must be corrected to clearly state that the conviction is under Section 1024.2. In addition, this Court finds that Helms's sentence should be modified to imprisonment for two (2) years.

Regarding Proposition II, this Court's resolution of Proposition I renders this issue moot.

³³ See, e.g., *McWilliams v. State*, 1989 OK CR 39, 777 P.2d 1370, 1372 ("Section 11 of Title 21 mandates that a crime be brought under specific statutory provisions rather than more general codifications," and finding that charge under more general provision cannot be harmless error where general provision provided for greater maximum penalty); *Short v. State*, 1977 OK CR 44, 560 P.2d 219, 220-21 (reversing conviction for first degree manslaughter under general statute, where negligent homicide statute applied specifically to fatal accidents arising from reckless operation of a motor vehicle); *Maloney v. State*, 1975 OK CR 22, 532 P.2d 78, 79 (noting the "basic rule of construction which provides that when a general statute and a specific statute declare unlawful the same act or omission, the specific statute supercedes the general statute").

Regarding Proposition III, Helms did not object to any of the challenged evidence at trial, and there was no error in the admission of references to methamphetamine, since it was clear that the evidence referred only to Helms's brother-in-law. Furthermore, there was no plain error in the admission of Exhibit 2, since at least some of the pictures were properly admissible to show the absence of mistake or accident regarding the charged offense.⁴

Regarding Proposition IV, this Court is modifying Helms's sentence, and his new sentence certainly is not excessive.⁵

Regarding Proposition V, when considered in the light most favorable to the State, the circumstantial evidence that Helms personally downloaded the pornographic picture attached to the email, his wife's testimony about observing him viewing such pictures, the fact that numerous similar pictures were found undeleted in his email account, and Rouse's testimony that Helms stated that the situation had gotten "out of hand" were together sufficient to support Helms's conviction for unlawful possession of child pornography.⁶

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits of the parties, we find that Helms's conviction for Unlawful Possession of Obscene Pictures of

⁴ See 12 O.S.1991, § 2404(B); see also *Salazar v. State*, 1993 OK CR 21, 852 P.2d 729, 736 (noting that evidence of other crimes may be admitted where there is a "logical connection" with the charged offense). Furthermore, to the extent that Helms could have been unfairly prejudiced by the improper admission of some, but not all, of this child pornography evidence, the prejudice related only to his sentence; and any such prejudice is resolved by this Court's decision regarding Proposition I.

⁵ See *Sanders v. State*, 2002 OK CR 42, 60 P.3d 1048, 1051.

Minors should be affirmed, but that the Judgment and Sentence must be corrected to reflect that this conviction is under 21 O.S.Supp.2000, § 1024.2. In addition, Helms's sentence should be modified to imprisonment for two (2) years.

Decision

Helms's **CONVICTION** for Unlawful Possession of Obscene Pictures of Minors is **AFFIRMED**. The case is **REMANDED**, however, for correction of the Judgment and Sentence document, through an order *nunc pro tunc* by the district court, to reflect that this conviction is under 21 O.S.Supp.2000, § 1024.2. In addition, Helms's **SENTENCE** is **MODIFIED** to imprisonment for two (2) years.

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⁶ See *Jackson v. Virginia*, 443 U.S. 307, 319-20, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Spuehler v. State*, 1985 OK CR 132, 709 P.2d 202, 203-04 (adopting *Jackson* standard).

OPINION BY: CHAPEL, J.

JOHNSON, P.J.: CONCUR

LILE, V.P.J.: CONCUR

LUMPKIN, J.: CONCUR IN RESULTS

STRUBHAR, J.: CONCUR