

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ANTHONY MARNETTE HURST,)
)
 Appellant,) Not for Publication
 v.) Case No. F-2006-191
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

OCT 10 2007

SUMMARY OPINION

CHAPEL, JUDGE:

MICHAEL S. RICHIE
CLERK

Anthony Marnette Hurst was tried by jury and convicted of Lewd Molestation in violation of 21 O.S.Supp.2003, § 1123, in the District Court of Comanche County, Case No. CF-2004-474. In accordance with the jury's recommendation the Honorable Keith B. Aycock sentenced Hurst to thirteen (13) years imprisonment. Hurst appeals from this conviction and sentence.

Hurst raises four propositions of error in support of his appeal:

- I. The trial court failed to properly instruct the jury thereby denying Hurst a fair trial;
- II. The trial court failed to suppress certain evidence which was illegally obtained by law enforcement in violation of Hurst's Fourth Amendment rights;
- III. The trial court committed error in restricting Hurst's attorney from commenting on certain impeachment evidence in his closing argument before the jury; and
- IV. The accumulation of error deprived Hurst of a fair trial in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 2, § 7 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 Hurst's sentence must be reversed and the case remanded for resentencing.

We find in Proposition I that Hurst is entitled to the benefit of our decision in *Anderson v. State*,¹ requiring instruction on the 85% Rule where it applies. Hurst faced a potential sentence of one to twenty years and this was his first offense. His request for an 85% Rule instruction was denied and jurors asked for guidance in sentencing. Under these circumstances, this Court will not speculate about the sentence a properly instructed jury might impose, but remands the case for resentencing with a properly instructed jury.

We further find in Proposition I that the trial court did not err in refusing to give an instruction on eyewitness identification.² We also find in Proposition I that the trial court did not err in refusing to instruct the jurors on the provisions of 21 O.S.2001, § 1040.13a as a lesser included offense.³ We find in Proposition II that the search warrant comported with statutory requirements,⁴ the affidavit supporting the warrant was sufficient to support a finding of

¹ 2006 OK CR 6, 130 P.3d 273. See *Carter v. State*, 2006 OK CR 42, ¶ 4, 147 P.2d 243, 244.

² A cautionary instruction on eyewitness identification is not required: "(1) if there was a good opportunity for positive identification; (2) if the witness is positive in his identification; (3) if the identification is not weakened by prior failure to identify; and (4) if the witness remains positive as to the identification, even after cross-examination." *Langley v. State*, 1991 OK CR 66, 813 P.2d 526, 530. The victim had good opportunity to make a positive identification, did so, and never wavered. His mistake as to Hurst's age and inability to identify Hurst's car do not warrant this instruction.

³ *Shrum v. State*, 1999 OK CR 41, 991 P.2d 1032, 1036. Hurst was specifically charged with lewd molestation by touching and fondling the victim's penis. However, the lewd molestation statute encompasses computer-generated lewd or indecent proposals to a child. 21 O.S.2001, § 1123(A). 21 O.S.2001, § 1040.13a prohibits facilitating, encouraging, offering or soliciting sexual conduct, or communicating with a minor for sexual interest, using any technology including computers. Both are felonies. The statutory language appears to support the trial court's conclusion that, at most, § 1040.13a is an "included" offense of § 1123, but is not lesser.

⁴ 22 O.S.2001, §§ 1221, 1225(A). 22 O.S.2001, § 1226 sets forth a standard warrant format. This warrant does not strictly follow the prescribed heading form. However, it contains all the required information and substantially complies with the statutory format. A technical construction of the warrants statutes should not defeat the ends of justice and permit the guilty to escape through technicalities. *Wagner v. State*, 72 Okla.Cr. 393, 117 P.2d 162, 167-68.

probable cause,⁵ and the record does not support Hurst's claim that the search occurred before the warrant was executed or served. We find in Proposition III that the trial court did not err in sustaining the State's objection when defense counsel made a misstatement of fact in argument which would be potentially misleading to the jury, and we further find this ruling did not impede Hurst's ability to impeach the victim.⁶ We find in Proposition IV that, as there is no error, there is no cumulative error.⁷

Decision

The Judgment of the District Court is **AFFIRMED**. The Sentence of the District Court is **REVERSED** and the case is **REMANDED** for resentencing. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

⁵ An affidavit must name the person and particularly describe the property and place to be searched. 22 O.S.2001, § 1223. We review the claim to determine "whether, under the totality of the circumstances, a magistrate can make a practical, common sense decision there is a fair probability that evidence or contraband will be found at a particular place," and defer to the magistrate's finding. *Browning v. State*, 2006 OK CR 8, 134 P.3d 816, 826. The suspect's residence is a natural place to look for evidence of a crime. *Browning*, 134 P.3d at 827; *Jones v. State*, 2006 OK CR 5, 128 P.3d 521, 536. The affidavit recites computer contacts between Hurst's screen name and various other addresses and repeats Hurst's confession that he had communicated online and set up the meeting which resulted in his arrest. Given this information, the magistrate did not err in finding probable cause that a computer, containing evidence of crime, might be found in Hurst's house.

⁶ The record shows defense counsel referred several times to the victim's juvenile adjudication in closing argument, effectively using it to impeach the victim's testimony. The victim did not commit the lewd molestation, and was not adjudicated delinquent, until after he met with Hurst in June 2004. To argue that he was "already" adjudicated was misleading.

⁷ *Alverson v. State*, 1999 OK CR 21, 983 P.2d 498, 520.

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