

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

BOOKER JAMES JOHNSON, JR.,)
)
 Appellant,)
)
 -vs-)
)
 STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. F-2003-673

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP 01 2004

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

STRUBHAR, J.:

Booker James Johnson, Jr., Appellant, was tried by jury in the District Court of Tulsa County, Case No. CF-2002-4539, where he was convicted of Count 1 - Procuring a Minor to Participate in the Preparation of Obscene Material and Count 2 - Possession of Child Pornography. The jury set punishment at twenty (20) years imprisonment on Count 1 and a fine of \$25,000 for Count 2. The Honorable Rebecca Brett Nightingale, who presided at trial, sentenced Appellant accordingly. From this judgment and sentence, he appeals.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs of the parties, we affirm the judgments as modified hereafter. The following propositions of error were considered:

1. Forcing Appellant to defend against the charges in Count one and Count two in the same jury trial violated provisions of Oklahoma statutory law, as well as the Oklahoma and United States Constitutions;

2. The jury was improperly instructed as to the range of punishment in Count one of the Information;
3. The jury was instructed pursuant to the wrong statute in Count two of the Information. Appellant's fine must be modified to \$5,000, the maximum permitted pursuant to 21 O.S.2001, § 1024.2;
4. Appellant's right to a fair trial was further compromised by the prosecutor's suggestion in closing argument that the charges against him be considered together, and not independently, as required by the Oklahoma and United States Constitutions;
5. Appellant received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution;
6. It was a violation of due process and the Oklahoma Criminal Discovery Code to deny Appellant access to the computer hard drive(s) or a report of their contents; and
7. The accumulation of error during Appellant's trial denied him his constitutional right to a fair trial and requires reversal of his convictions.¹

As to Proposition 1, we find the trial court did not abuse its discretion resulting in prejudice to the accused when it denied Appellant's motion to sever Counts 1 and 2. *See Bear v. State*, 762 P.2d 950, 955 (Okl.Cr.1988); *Gates v. State*, 754 P.2d 882, 887 (Okl.Cr.1988).

As to Proposition 2, we find the trial court abused its discretion when it instructed the jury on the elements of 21 O.S.Supp.1999, § 1021.2 and the punishment provisions of 21 O.S.Supp.1999, § 1021 (B). Section 1021 (B) prohibits the procurement of a minor to perform any of the acts outlined in § 1021 (A)(1), (2), (3) or (4), making the minor the actor not the participant. This interpretation distinguishes § 1021 (B) from 1021.2 and makes § 1021 inapplicable to the facts of this case. Consequently, the trial court erred in

¹ In conjunction with the filing of Appellant's Reply Brief, appellate counsel filed a request for oral argument. We find oral argument is not necessary in this matter and therefore the request

giving the jury the punishment range for § 1021 instead of § 1021.2. Because the Information charged the crime outlined in § 1021.2, the jury was given the uniform jury instruction on the elements of § 1021.2 and the jury convicted Appellant upon those elements, we find the instruction error is remedied by modifying Appellant's sentence from twenty years imprisonment to ten years imprisonment. 22 O.S.2001, § 1066. In addition, Appellant's Judgment and Sentence must be corrected to clearly state that the conviction is under Section 1021.2.

As to Proposition 3, we find that Appellant should have been charged and punished in Count 2 under 21 O.S.Supp.1999, § 1024.2, rather than 21 O.S.Supp.1999, § 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.² Accordingly, Appellant's Judgment and Sentence must be corrected to clearly state that the conviction is under Section 1024.2. In addition, this Court finds that Appellant's sentence should be modified to a \$5,000 fine.

for oral argument is **DENIED**. Rule 3.8, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2004).

² See, e.g., *McWilliams v. State*, 777 P.2d 1370, 1372 (Okla.Cr.1989) ("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*, 560 P.2d 219, 220-21 (Okla.Cr.1977)(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); *Helms v. State*, Case No. F-2002-552 (Okla.Cr.2003) (unpublished opn.)(modifying conviction and sentence for possession of child pornography under 21

As to Proposition 4, we find the trial court's admonishment was sufficient to cure any error stemming from the prosecutor's improper remarks and that the improper comments did not affect the verdicts *Welch v. State*, 2 P.3d 356, 369-70 (Okl.Cr.), *cert. denied*, 531 U.S. 1056, 121 S.Ct. 665, 148 L.Ed.2d 567 (2000).

As to Proposition 5, we find Appellant cannot prevail on his claim of ineffective assistance of trial counsel because he cannot show his trial counsel's performance was deficient and was not sound trial strategy and/or that he was prejudiced by his counsel's alleged deficient performance. *Lockett v. State*, 53 P.3d 418, 424 (Okl.Cr.2002) *cert. denied*, 538 U.S. 982, 123 S.Ct. 1794, 155 L.Ed.2d 673 (2003). *See also Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). We have also reviewed Appellant's Application for an Evidentiary Hearing and find that it too should be denied. Rule 3.11 (B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22,, Ch. 18, App. (2004).

As to Proposition 6, we have reviewed the record and find there is no evidence to support Appellant's claim that he was denied access to or was not provided with any evidence he had requested. The record shows three instances in which Appellant acknowledged that he had received all discovery materials requested as of that particular date, the latest acknowledgement was signed approximately two weeks prior to trial. At trial, Appellant did not object to the

admission of the cyber crimes investigator's testimony or the images that he recovered from Appellant's computer hard drive. Accordingly, we find no relief is required.

As to his final proposition, we have reviewed the alleged errors raised above in the aggregate and find the relief ordered is sufficient to correct the aforementioned errors. Accordingly, no further relief is required.

DECISION

Johnson's conviction in Count 1 for Procuring a Minor to Participate in the Preparation of Obscene Material 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.1999, § 1021.2. In addition, Johnson's **SENTENCE** in Count 1 is **MODIFIED** to ten years imprisonment.

Johnson's conviction in Count 2 for Unlawful Possession of Child Pornography 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.1999, § 1024.2. In addition, Johnson's **SENTENCE** in Count 2 is **MODIFIED** to a fine of \$5,000.

APPEARANCES AT TRIAL

RICHARD COUCH
ASST. TULSA COUNTY
PUBLIC DEFENDER
423 S. BOULDER, STE. 300
TULSA, OK 74103
ATTORNEY FOR APPELLANT

JOE PICKARD
LARRY EDWARDS
ASSISTANT DISTRICT ATTORNEYS
500 S. DENVER
SUITE 900
TULSA, OK 74103
ATTORNEYS FOR THE STATE

APPEARANCES ON APPEAL

STUART SOUTHERLAND
ASST. TULSA COUNTY
PUBLIC DEFENDER
423 S. BOULDER, STE. 300
TULSA, OK 74103
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL
OF OKLAHOMA
PRESTON SAUL DRAPER
ASSISTANT ATTORNEY GENERAL
2300 N.LINCOLN BLVD., SUITE112
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR APPELLEE

OPINION BY: STRUBHAR, J.

JOHNSON, P.J.: CONCUR
LILE, V.P.J.: CONCUR IN RESULT
LUMPKIN, J.: CONCUR IN RESULT
CHAPEL, J.: CONCUR

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