

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

LAWRENCE GRANT STEWART,	)	NOT FOR PUBLICATION
	)	
Appellant,	)	
	)	
v.	)	Case No. F-2010-615
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

FILED  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA  
SEP - 1 2011

**S U M M A R Y O P I N I O N**

**C. JOHNSON, JUDGE:**

MICHAEL S. RICHIE  
CLERK

Appellant, Lawrence Grant Stewart, was convicted by a jury in Pontotoc County District Court, Case No. CF-2009-49, of several crimes involving child sexual abuse: Count 1, Lewd Molestation of a Minor (21 O.S.Supp.2008, § 1123); Count 2, Lewd Molestation of a Minor (21 O.S.Supp.2008, § 1123); Count 3, First Degree Rape by Instrumentation (21 O.S.Supp.2007, § 1111.1); Count 4, Forcible Oral Sodomy (21 O.S.Supp.2007, § 888); Count 5, Child Sexual Abuse (10 O.S.Supp.2008, § 7115); and Count 6, First Degree Rape (21 O.S.Supp.2008, § 1114). The jury recommended punishment as follows: Counts 1, 2, 3 and 6, twenty-five years imprisonment; Count 4, twenty years imprisonment; and Count 5, thirty years imprisonment. On June 24, 2010, the Honorable Thomas S. Landrith, District Judge, sentenced Appellant in accordance with the jury's recommendation, ordering all sentences to be served consecutively to one another.<sup>1</sup> This appeal followed.

<sup>1</sup> Appellant is required to serve at least 85% of his sentences before being eligible for parole. 21 O.S. § 13.1(10), (15) (18).

Appellant raises the following propositions of error:

1. Appellant was denied the effective assistance of trial counsel.
2. Multiple convictions and sentences for both Child Sexual Abuse (Count 5), and the acts upon which that charge is based (Counts 1-4 and 6), violate Appellant's protections from double jeopardy and double punishment.
3. Multiple convictions and sentences for both Lewd Molestation (Count 1) and Rape by Instrumentation (Count 3) violate Appellant's protections from double jeopardy and double punishment.
4. Consecutive service of Appellant's sentences is excessive under the circumstances of the case.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we reverse one count on double-punishment grounds, but otherwise affirm. In Proposition 1, Appellant claims his trial counsel was ineffective for disclosing to the jury, during Appellant's direct examination, (1) Appellant's criminal history (all of which he claims was inadmissible for impeachment purposes) and (2) Appellant's refusal to talk to police about the charges (thereby commenting on Appellant's exercise of his constitutional right to silence). In evaluating counsel's performance, we presume that counsel was competent and that his strategic choices were reasonable ones. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984); *Sellers v. State*, 1995 OK CR 11, ¶ 9, 889 P.2d 895, 898. Revealing the defendant's criminal history can be a sound trial strategy, even when the admissibility of some of it is questionable. *See Lamb v. State*, 1988 OK CR 106,

¶ 8, 756 P.2d 1236, 1238; *Stover v. State*, 1984 OK CR 14, ¶ 12, 674 P.2d 566, 568. And a defendant's post-arrest silence is inadmissible only if it is clearly the product of specific warnings about the right to silence – a fact that is absent from this record. *Guy v. State*, 1989 OK CR 35, ¶ 14, 778 P.2d 470, 474; *Fletcher v. Weir*, 455 U.S. 603, 607, 102 S.Ct. 1309, 1312, 71 L.Ed.2d 490 (1982). Trial counsel's performance is not judged by whether another attorney might have made different strategic choices. *Stover*, 1984 OK CR 14 at ¶ 7, 674 P.2d at 568. We cannot say that trial counsel's strategic decisions were so inappropriate as to undermine confidence in the outcome of Appellant's trial. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *Phillips v. State*, 1999 OK CR 38, ¶ 129, 989 P.2d 1017, 1049. Proposition 1 is denied.

As to Proposition 2, the State failed to allege any specific sexual activity as the basis for the charge in Count 5, Child Sexual Abuse. The State's theory seems to be that Oklahoma law permits a separate conviction and sentence, in addition to that for the underlying sexual abuse, when the abuser is a parent, guardian, or other custodian of the child. We find no authority supporting this position. See 10 O.S.Supp.2008, 7115(E), 10 O.S.Supp.2007, § 7102(B); OUJI-CR (2nd) No. 4-39. The conviction and sentence on Count 5 constitutes double punishment under these facts. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932); *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977); *McKinnon v. State*, 1982 OK CR 153, ¶¶ 5-8, 651 P.2d 1066, 1067. Accordingly, Count 5 is **REVERSED WITH INSTRUCTIONS TO DISMISS**.

As to Proposition 3, separate convictions for fondling the complainant's genitals, and for digital penetration of the complainant's genitals, did not constitute double punishment for a single criminal act under the evidence presented. The complainant testified that Appellant touched her private parts while she was clothed, and digitally penetrated her after he made her undress. Evidence of discrete criminal acts supports separate convictions for each offense. *Salyer v. State*, 1988 OK CR 184, ¶ 15, 761 P.2d 890, 893; *Peninger v. State*, 1986 OK CR 113, ¶¶ 19-20, 721 P.2d 1338, 1341-42. Proposition 3 is denied.

Finally, as to Proposition 4, the decision to order consecutive or concurrent service of sentences is a matter within the trial court's discretion, and we find that discretion was properly exercised here. 22 O.S.2001, § 976; *Riley v. State*, 1997 OK CR 51, ¶ 20, 947 P.2d 530, 534. Proposition 4 is denied.

#### **DECISION**

Count 5, Child Sexual Abuse, is **REVERSED WITH INSTRUCTIONS TO DISMISS**. In all other respects, 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. (2011), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF PONTOTOC COUNTY  
THE HONORABLE THOMAS S. LANDRITH, DISTRICT JUDGE

**APPEARANCES AT TRIAL**

BILL SMITH  
ATTORNEY AT LAW  
925 N.W. 6th STREET  
OKLAHOMA CITY, OK 73106  
ATTORNEY FOR DEFENDANT

JAMES E. TILLISON  
ASSISTANT DISTRICT ATTORNEY  
105 W. 13th STREET  
ADA, OK 74820  
ATTORNEY FOR THE STATE

**OPINION BY C. JOHNSON, J.**

A. JOHNSON, P.J.: CONCUR  
LEWIS, V.P.J.: CONCUR  
LUMPKIN, J.: CONCUR IN RESULTS  
SMITH, J.: CONCUR

RE

**APPEARANCES ON APPEAL**

TERRY J. HULL  
INDIGENT DEFENSE SYSTEM  
P.O. BOX 926  
NORMAN, OK 73070  
ATTORNEY FOR APPELLANT

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA  
LORI S. CARTER  
ASSISTANT ATTORNEY GENERAL  
313 N.E. 21st ST.  
OKLAHOMA CITY, OK 73105  
ATTORNEYS FOR THE STATE