IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MARCUS DEJUAN BERRY,)
)
Appellant,)
v.)
)
THE STATE OF OKLAHOMA,)
)
Appellee.)

NOT FOR PUBLICATION
No. F-2010-547

OPINION

SMITH, JUDGE:

Marcus Dejuan Berry was tried by jury and convicted of Lewd Molestation, Third Offense, under 21 O.S.Supp.2009, § 1123(A) (Count I); and Kidnapping AFCF, under 21 O.S.Supp.2009, § 741 (Count II), in Tulsa County, Case No. CF-2009-3832. In accord with the jury's recommendation, the Honorable William C. Kellough, District Judge, sentenced Berry to imprisonment for Life Without Parole and a fine of $10,000 on Count I, and to imprisonment for Life and a fine of $10,000 on Count II, run consecutively.[1] Berry appeals his convictions and sentences and is properly before this Court.

FACTS

Around 8:00 p.m., on August 12, 2009, C.S., who was twenty-three months old, wandered out of her grandmother's Tulsa home while her mother

[1] Because Berry had two prior convictions for lewd molestation (in 1986 and 1993), the only possible sentences for Count I were imprisonment for life or imprisonment for life without parole. 21 O.S.Supp.2009, § 1123(A)(5). Berry also had six other prior felony convictions (1976 assault with a dangerous weapon, 1981 second-degree burglary, 1986 and 1987 driving under the influence 2nd offense, 1993 first-degree burglary, and 2008 sex offender living within 2000 feet of school). Berry's jury was not informed of any of these convictions during the guilt phase of his trial. The sentencing phase was then conducted in two stages. During the sentencing stage on Count I, Berry's jury learned about his prior lewd molestation convictions, but not the others. During the sentencing stage on Count II, Berry's jury was informed of his six other convictions.

was busy out back and her grandmother was working in the home. It was Laura Gonzalez's birthday, and she had brought her two daughters to their grandmother's home for the evening. Although they weren't really celebrating the birthday, Laura testified that she had dressed C.S. up and that C.S. was wearing a long, pink, eyelet-lace dress with a long-sleeve, pink shirt. Anita Gonzalez, C.S.'s grandmother, testified that C.S and her seven-year-old sister were in the living room watching television and that by 8:00 p.m., C.S. had fallen asleep on the floor. C.S.'s uncle, Jose Fabian Gonzalez (Fabian), who was 19, testified that C.S. was asleep on the floor around 8:00 p.m. and that he moved her to the couch and then went to his room.

A short time later, C.S. woke up and began wandering around. At the time, Laura was busy washing and cleaning out her car, which was parked behind the home, and Anita was busy cleaning and sorting in the home. When Fabian came back out of his room, he noticed C.S. was no longer in the living room. When he asked Anita where she was, she indicated that C.S. was in a bedroom or perhaps with her mother outside. When he asked Laura where she was, she indicated that C.S. was inside with her grandmother. At that point they all started looking all over the house for C.S. and then called 911 when they couldn't find her.

Eduardo Abarca, a neighbor from a few houses down, was outside throwing a ball to his dog when he noticed the pink-clad toddler kneeling in the

street on Yorktown Avenue.[2] She was throwing sticks at the dogs that were in the yard at the house across the street from her grandmother's home. Abarca noticed a man pull up in a white truck with a red stripe, look at the little girl crouched in the street, and then make a beckoning motion for her to come to him. C.S. stood up, hesitated, and then walked over to the driver's door and extended her arms toward the driver. The driver reached out the window, picked the little girl up, placed her on the seat next to him, and drove away. Abarca went into his house and remarked to his wife, "That would be some shit if I—if what I saw just—just saw was a little girl get kidnapped." Abarca did not, however, report what he had seen to anyone . . . until he heard the screaming and yelling of the Gonzalez family in the neighborhood, as they went door-to-door in search of C.S. Abarca identified Defendant Marcus Berry as the man driving the truck and who took the little girl.[3] Berry was 56 years old at the time.

Not long after 8:00 p.m. that same evening, Tulsa Police Officers Mark Wollmershauser, Jr., and Stephanie Blann were returning to their district after responding to a 911 call. They were driving east along West Apache—east of 33rd West Avenue, in a sparsely populated area of Tulsa—when Wollmershauser, who was driving, noticed the tail section of an older pickup truck parked 50 to 75 feet north of the road. The truck was parked on a gravel inlet, in an area of high brush and trees.[4] Thinking that the truck might be an abandoned stolen vehicle,

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[2] Abarca testified at preliminary hearing, but did not appear at trial and was declared "unavailable." His preliminary hearing testimony was read before the jury during Berry's trial.
[3] Abarca also testified that he had seen this same truck and same driver "many times" in the neighborhood. And Anita Gonzalez identified a picture of Berry's truck as one that she specifically remembered seeing in her neighborhood on a number of occasions during the preceding year.
[4] This area of Tulsa is actually in Osage County. The kidnapping was in Tulsa County.

which would mean waiting around for a tow truck and doing paperwork, Wollmershauser considered doing nothing and drove a few blocks further. He testified that he then "reminded" himself, "I'm not that kind of officer," and asked Blann if she'd seen the truck. She hadn't. Wollmershauser then turned around and went back to check it out.

When they pulled in and Wollmershauser shined his spotlight on the rear of the truck, the officers could see an adult black male, *i.e.*, Marcus Berry, turn and look at them and then begin moving around, rocking, ducking, and looking down at his waist area. Worried that the man was retrieving a weapon, Wollmershauser ordered him to put his hands outside the truck. The man briefly showed his hands through his window, but then pulled them back in and continued moving around. As the officers approached, the truck began backing up, and the officers took out their weapons. Wollmershauser again ordered the man to show his hands and put the truck in park, which Berry then did.

When Wollmershauser came up to the driver's window, the first thing he noticed was that Berry's khaki pants were unbuttoned, unzipped, and pulled down around his thighs and that his belt was undone. His grey boxer shorts, however, were pulled up. When asked if someone was with him, Berry responded, "Yes, my daughter-in-law." The officers assumed Berry had been having sex with an adult woman, who was no longer in the truck, and began glancing around in the tall grass surrounding the truck. Wollmershauser then asked, "Well, where is she?" Berry then moved his right arm and revealed little

C.S., sitting right next to him on the bench seat. She was still wearing the little pink dress and shirt, but was not wearing a diaper or panties.[5]

The officers immediately decided to arrest Berry for some kind of sexual crime against the child and got him out of the truck and put him in handcuffs. As Wollmershauser was walking Berry to his police car, Berry stated, "Kill me. Just fucking kill me now." Wollmershauser was holding onto Berry's shirt and pants, which were falling down, when he saw a wet spot on the shirt and asked Berry what it was. Berry indicated it was "sweat," and when Wollmershauser asked if it was "come," Berry responded, "Uh, I don't know." When asked who the little girl was, Berry stated that he had found her walking along the side of the road. At that point, standing next to Wollmershauser's patrol vehicle, a dispatch came over the radio about a missing two-year-old Hispanic female wearing a pink dress. The officers knew immediately that they had found this child and informed dispatch. Around 9:15 p.m., the Gonzalez family was informed that C.S. had been found and was being taken to the hospital, where she was reunited with her mother later that night.[6]

Officers Wollmershauser and Blann both testified about how unusually unresponsive and unemotional C.S. was that night. Blann testified that she tried to comfort the child as she held her, but that C.S. didn't smile, cry, make any vocalizations, or even look at her. Vanessa Bowmaster, the EMSA paramedic

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[5] Berry later told an officer that the little girl had had a messy diaper and that he cleaned her up. The dirty diaper and some "napkins" were found in the area described by Berry, a few blocks from the Gonzalez home.

[6] Tulsa Police Officer Paula Maker testified that she received the dispatch regarding a missing child around 8:30 or 8:45 p.m. and that she was the first to arrive at the Gonzalez home. On her way there, Maker learned that a child matching the description of the missing child had been located by other officers, but she did not immediately give this information to the Gonzalez family.

who first examined C.S., likewise described her as not making a sound, completely limp, non-responsive to stimuli (including the teddy bear they offered her), and totally non-interactive for 30-45 minutes.[7] Bowmaster did not, however, find evidence of physical harm or trauma to C.S., other than a little bit of dried blood on her lip and an abrasion on her lower leg.[8] C.S. was then transported to Hillcrest Hospital for a sexual assault examination.

Pat Evans was the SANE (Sexual Assault Nurse Examiner) nurse who examined C.S. She testified that the results of C.S.'s sexual assault examination were normal, with no sign of trauma. Evans described C.S. as "listless" and just lying there during the exam, however, which was quite unusual. Both Evans and an officer who observed the exam testified that C.S. did not become interactive or start acting "normal" until she was reunited with her mother after the exam.

DNA testing done on the swabs taken from C.S.'s fingernails, cheek, neck, navel, mouth, gluteal crease, anus, external genitalia, and vagina did not reveal any evidence of seminal fluid or any DNA material from Berry. Testing also did not reveal any seminal fluid or DNA material on Berry's khaki pants, shirt, or underwear, or on C.S.'s clothes.[9] Initial testing did reveal possible "amylase activity," which is an enzyme concentrated in saliva, on swabs taken from C.S.'s cheek, external genitalia, and vagina, but further testing did not confirm the presence of saliva. And DNA testing done on the various swabs taken from

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[7] Bowmaster testified that they were called at 9:01 p.m. and arrived at the scene at 9:10 p.m.
[8] Laura Gonzalez testified that the only evidence of new physical injury that she observed on her daughter was the dried blood on her lip and a bruise on her cheek.
[9] Berry's underwear initially tested positive for seminal fluid, but further testing did not indicate the presence of any sperm cells, *i.e.*, did not confirm the presumptive test for semen.

Berry, including from his penis, did not reveal any DNA material from C.S.[10] Ultimately, testing could not confirm the presence of either saliva or semen on any of the items or areas tested, on either Berry or C.S.[11] Nor did testing reveal any of Berry's DNA on C.S. or any of C.S.'s DNA on Berry.

ANALYSIS

In Proposition I, Berry raises a double punishment claim under Section 11 of Title 21.[12] Berry argues that if the jury convicted him of lewd molestation based on the first alternative charged against him, his Count I conviction for Lewd Molestation is based upon the "same act" as his Count II conviction for Kidnapping. Because Berry did not raise this claim in the trial court, we review it only for plain error.[13]

This Court has consistently held that Section 11 prohibits convicting a defendant of more than one offense based upon the "same act." In *Davis v. State*, 1999 OK CR 48, 993 P.2d 124, this Court summarized the proper approach to claims raised under Section 11 as follows:

> The proper analysis of a claim raised under Section 11 is [] to focus on the relationship between the crimes. If the crimes truly arise out of one act[,] as they did in *Hale*, then Section 11 prohibits prosecution for more than one crime. One act that violates two criminal provisions cannot be punished twice, absent specific legislative intent.

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[10] Oddly, the swab taken from Berry's penis did not even reveal any of his own DNA.
[11] Samples taken from the mouths of Berry and C.S. were not tested for saliva or amylase activity.
[12] *See* 21 O.S.2001, § 11 ("[A]n act or omission which is made punishable in different ways by different provisions of this title may be punished under any of such provisions, . . . but in no case can a criminal act or omission be punished under more than one section of law.")
[13] *See Logsdon v. State*, 2010 OK CR 7, ¶ 15, 231 P.3d 1156, 1164.

Id. at ¶ 13, 993 P.2d at 126-27. In *Hale v. State*, 1995 OK CR 7, 888 P.2d 1027, this Court overturned the defendant's conviction for incest under Section 11, because it was based upon the same act of forced sexual intercourse with his sister as his conviction for first-degree rape.[14] Although the *Davis* majority rejected the "ultimate objective" and "primary offense" analysis of the *Hale* majority,[15] the *Davis* majority likewise clearly affirmed the *result* in *Hale*.[16] And this Court has consistently interpreted Section 11 as prohibiting separate criminal convictions based upon the same act or series of acts.

In the Second Amended Information, Berry was charged with lewd molestation in Count I under two theories, under two separate sub-sections: (1) under 21 O.S.Supp.2009, § 1123(A)(3), that he "asked, invited, enticed, or persuaded" a child under age 16 "to go alone with [him] to a secluded, remote, or secret place, with the unlawful and willful intent and purpose then and there to commit a crime against public decency and morality" with the child; and in the alternative, (2) under 21 O.S.Supp.2009, § 1123(A)(2), that he "looked upon, touched, and felt the body and private parts" of a child under 16 "in a lewd and lascivious manner."[17] The jury was likewise instructed on both of these theories of lewd molestation (in reverse order) and delivered a general verdict of guilty.[18]

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[14] *Hale*, 1995 OK CR 7, ¶ 6, 888 P.2d at 1030 ("[O]nly one act of intercourse was completed.").
[15] *See id.* at ¶¶ 3-4, 888 P.2d at 1028-29.
[16] *See Davis*, 1999 OK CR 48, ¶ 10 n.2, 993 P.2d at 126 n.2 ("The defendant's one act of forcible sexual intercourse with his sister could have been charged as incest or rape, but not both, because of Section 11.").
[17] In the First Amended Information, Berry was also charged under a third alternative theory, under 21 O.S.Supp.2009, § 1123(A)(5)(b), that he ejaculated in the presence of the child victim, but this theory was dropped from the successor information and not mentioned at trial.
[18] Berry's jury was instructed in accord with OUJI-CR(2d) (Supp. 2000) 4-129, which provides six alternative sets of instructions for crimes charged under 21 O.S., § 1123(A), which correspond

Hence Berry's jurors were instructed that they could convict him of lewd molestation if they unanimously determined:

> First, the defendant was at least three years older than the victim;
> Second, who knowingly and intentionally;
> Third, asked, invited, enticed, or persuaded;
> Fourth, any child under sixteen years of age [*i.e.*, C.S.];
> Fifth, to go alone with [him];
> Sixth, to a secluded, remote, or secret place;
> Seventh, with the unlawful and willful intent and purpose;
> Eighth, to commit lewd molestation [upon her] by looking upon, touching, mauling, or feeling [her] body or private parts . . . in a lewd or lascivious manner.

During the instructions conference, the trial court commented as follows on the difference between the two options provided in Instruction 19 for convicting the defendant of lewd molestation:

> In the first option, the jury has the prerogative of finding that the evidence showed that the lewd and lascivious acts actually occurred. In the second alternative, as I read it, it becomes more of an attempt crime; that is, the removal of a child to a secret or secluded place with the unlawful and willful intent and purpose. So it seems to me the legislature is providing these two alternatives that are similar, but there are rather important distinctions.

The Tulsa District Attorney, who tried the case along with an assistant district attorney, confirmed that this interpretation was shared by the State.

During closing argument, the State repeatedly emphasized its theory of the case, namely, that Berry kidnapped C.S. with the sole purpose of sexually molesting her. The Assistant District Attorney began his initial closing argument by arguing, "Ladies and gentlemen, there's no doubt about it: Marcus Berry

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with the six different factual scenarios or "theories" by which the crime of "lewd molestation" is defined in § 1123(A). Berry's jury was provided with the uniform instructions for the second and third of these six options, which correspond, in turn, with the elements of § 1123(A)(2) and § 1123(A)(3). These two options were separated by the words: "AND/OR," at the suggestion of the State, in order to conform to the language of the Second Amended Information.

kidnapped [C.S.] on April [sic] the 12th, 2009, with the only intent of sexually molesting her." He argued that "[c]hild molesters are opportunists," that Berry was a child molester, and that "[C.S.] was Mr. Berry's opportunity on August the 12th, 2009, as he was driving through that neighborhood." As far as the kidnapping count, the prosecutor emphasized that "[i]t doesn't matter for what period of time," *i.e.,* for how long, Berry intended to confine C.S., and that "[h]e intended to confine her when he took her from her home." He then pointed out the "two theories of lewd molestation" that were contained in the instruction for lewd molestation and summarized them. He noted that the word "or" used throughout the instructions "means 'or' just like in our normal, common, everyday language: either/or. You don't have to have all of it. It just means 'or.'"

During the State's final closing argument, the District Attorney again emphasized that the jury could (and should) convict Berry of lewd molestation "even if you find he didn't touch her," under the "asked, invited, enticed, or persuaded" theory of lewd molestation. He continued:

> In the State of Oklahoma, you don't even have to complete the lewd molestation, if that was your intention. Now, you may not like that law. But you know what? You told me, and you promised the State of Oklahoma you would apply the law given to you, and that's the law in the State of Oklahoma. You don't even have to complete the act to be guilty of it, under our set of laws. . . . And there's no doubt you can find from the evidence that Marcus Berry had the unlawful and willful intent and purpose to commit lewd molestation.

The District Attorney also argued that the jury could infer from the evidence, particularly all the circumstantial evidence in the case, that Berry had, in fact, molested C.S. Yet, he acknowledged that there was "no physical evidence" that

Berry had completed the act of sexual molestation that he intended to commit against C.S. when he kidnapped her.[19]

This Court finds that in this particular case, any Count I conviction of lewd molestation under the "asked, invited, enticed, or persuaded" theory would be based upon the "same act" as Berry's Count II conviction for kidnapping. Under this theory of lewd molestation, Berry committed the crime of lewd molestation when he beckoned C.S. over to his truck and then picked her up and placed her on the seat next to him, with the intent to take her to some secluded place and molest her. This is the same act (or series of acts) by which Berry kidnapped C.S., *i.e.*, when he beckoned her over to his truck and then picked her up and placed her on the seat next to him, with the intent to confine her (in order to molest her). Under this theory of lewd molestation, Berry's crimes of lewd molestation and kidnapping were committed by the same acts, over exactly the same time period, and against the same victim.

This Court notes that the crime of lewd molestation under § 1123(A)(3) is for asking/inviting/enticing/persuading the child victim "to go alone with [the defendant] to a secluded, remote, or secret place," with the intent to molest that child. The focus of the statute is on defendants who approach children and attempt to seclude and isolate them, by tempting them to go *alone* with the defendant, to a "secret place," away from the gaze and protection of others, in

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[19] During the State's final closing, the District Attorney argued as follows:

> And, you know, it's a good thing that child has no physical evidence [of being molested]. That's good for that child. If we had found it, we'd have presented it to you. But do you think we're going to run the risk of not presenting that to you? You know darn well the defense would be all over that.

order to molest them. That the defendant actually ask, invite, entice, or persuade the child victim (a) *to go alone with him*, (b) *to a secluded, remote or secret place*, are the fifth and sixth elements of this crime under Oklahoma's uniform jury's instructions, which were used in this case. Hence the asking, inviting, enticing, or persuading of the child victim must have a certain *content, i.e.*, it must be "to go alone with [the defendant] to a secluded, remote, or secret place."

This particular crime was not complete in the current case until Berry actually picked up little C.S. and placed her on the seat next to him. Successfully beckoning C.S. over to his truck, which was within a public roadway, did not constitute enticing or persuading C.S. *to go alone with him to a secluded, remote, or secret place.* Merely beckoning this (not-quite) two-year-old Hispanic child over to the side of Berry's truck, by itself, did not communicate the required content under § 1123(A)(3). It is only when C.S. is actually lifted up into Berry's truck and placed on the seat next to him that the forbidden *content* of what Berry is enticing and persuading C.S. to do becomes apparent and is accomplished. It is only at this point that Berry has actually "enticed" or "persuaded" C.S., "to go alone with him," "to a secluded, remote, or secret place," where he intends to molest her.[20] This Court notes that although Berry's later actions and how he and C.S. are found provide evidence of Berry's intent to molest C.S., the enticing/persuading crime of lewd molestation was accomplished when C.S. was taken into Berry's truck.

[20] And the truck is part of the "secluded place," in which he intends to molest her.

It must be emphasized that this Court does *not* conclude that a victim must be actually "seized" by the defendant (as C.S. was) or that specific words must be used to convey the prohibited asking, invitation, enticement, or persuasion under § 1123(A)(3). In fact, as in the current case, evidence of actual words being used is not even required. Rather, the entire circumstances of the encounter must be evaluated by the fact-finder to determine if the prohibited type of asking, inviting, enticing, or persuading occurred. When Berry successfully gets C.S. into his truck, with the intent to molest her, he has completed the crime of § 1123(A)(3) lewd molestation. And it is at this same moment and by exactly the "same act(s)" that Berry kidnaps little C.S. Hence the crime of "asked/invited/enticed/persuaded" lewd molestation and the crime of kidnapping were committed by the same "act(s)" in this case. Thus it violates Oklahoma's Section 11 prohibition against double punishment to separately convict and punish Berry for both of these crimes.

The State argues in its brief that Berry did actually molest C.S. and that this act was separate and distinct from his act of kidnapping her. This Court agrees that if Berry had been charged only with lewd molestation by "looking upon, touching, mauling, or feeling" the private parts of C.S., there would be no Section 11 double punishment issue in this case, since the crime of kidnapping would be totally separate and prior to the crime of lewd molestation. In addition, if Berry's jury had been provided with separate verdict forms for the two theories of lewd molestation charged against him, *and* the jury had found him guilty

under *both* theories, this would likewise avoid the Section 11 double punishment problem in this case.[21]

In *Alverson v. State*, 1999 OK CR 21, 983 P.2d 498, this Court affirmed the defendant's convictions for both first-degree murder (Count I) and robbery with a dangerous weapon (Count II), even though robbery with a dangerous weapon was the underlying felony for an alternative felony murder charge on Count I, because the jury's verdict forms clearly indicated that it had found the defendant guilty under *both* the malice-murder theory and the felony-murder theory. *Id.* at ¶¶ 80-82, 983 P.2d 520-21. Hence because this Court could determine, for certain, that Alverson's jury had convicted him of malice murder (and not merely felony murder), the traditional rule of reversing the underlying felony count—in a case where a jury delivers a general verdict of guilty on first-degree murder, when felony murder was an alternative to malice murder—did not apply. Unfortunately, this Court cannot have this same certainty in the current case.

In *Wilson v. State*, 1998 OK CR 73, 983 P.2d 448, this Court summarized the traditional rule as follows:

> When a defendant is charged with alternative theories of murder and the jury's verdict form does not specify under which theory, malice murder or felony murder, the defendant was found guilty[,] "the verdict must be interpreted as one of felony-murder in order that appellant receive the benefit of the rule that a defendant cannot be convicted of felony-murder and the underlying felony."

Id. at ¶ 60, 983 P.2d at 463 (quoting *Munson v. State*, 1988 OK CR 124, ¶ 28, 758 P.2d 324, 332). The State acknowledges this general rule, citing both

[21] This Court notes that Berry's appeal does not raise a sufficiency of the evidence challenge in relation to either of his convictions or in regard to either theory of lewd molestation.

Alverson and *Browning v. State*, 2006 OK CR 8, ¶ 34, 134 P.3d 816, 838 (overturning convictions for first-degree arson *and* robbery with firearms, since both alleged as possible underlying felony of felony murder, in dual alternatives to malice murder, where jury returned general guilty verdict on first-degree murder). The State then argues, however, without citation to any authority, that this approach is unique to the felony murder context. This Court cannot agree. We can no more allow for a violation of Section 11 than we can allow for a violation of the traditional "felony murder/underlying felony" rule. And, we find plain error in the current case in this regard.

Because it is entirely possible that Berry's jury convicted him of lewd molestation under the "asked, invited, enticed, or persuaded" theory, and did not also unanimously conclude that he had actually molested C.S., *i.e.*, did not also find him guilty under the "looked upon, touched, mauled, felt" theory, this Court cannot uphold Berry's separate conviction for kidnapping. Under Section 11 and the specific facts and circumstances of this case, this Court cannot affirm both Berry's Count I lewd molestation conviction and his Count II kidnapping conviction. Thus we reverse his kidnapping conviction.

This Court notes that this decision is *not* a finding that little C.S. was not actually kidnapped. She undoubtedly was kidnapped. Nor is this decision a finding that C.S. was not actually molested by Berry. She may have been actually molested (looked upon, touched, mauled, or felt)—and if not actually molested, she was almost certainly about to be molested—and Berry does not challenge the sufficiency of the evidence on either theory of lewd molestation

charged against him. Hence this Court need not and does not decide this issue. Rather, because it is possible and perhaps even likely that Berry's jury convicted him of lewd molestation based upon the "same act" as the act of kidnapping C.S.—when he successfully enticed her over to his truck and then lifted her up into the truck with him—this Court must reverse Berry's kidnapping conviction (which carries a lesser sentence) under Oklahoma law. This Court notes that Berry's jury convicted him upon both counts charged in only 47 minutes and that the evidence on the "asked, invited, enticed, or persuaded" theory of lewd molestation was overwhelming.

In Proposition II, Berry raises a number of errors made within the Judgment and Sentence documents in this case.[22] The State acknowledges that these documents are inaccurate and should be corrected. Regarding Count II, this claim is rendered moot by this Court's decision on Proposition I that this conviction must be reversed. Regarding Count I, however, this Court orders that the Judgment and Sentence for Berry's Count I conviction for Lewd Molestation should be corrected to accurately reflect what occurred in this case.

Hence, after thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits of the parties, this Court affirms Berry's Count I conviction and sentence for lewd molestation, but finds that his Count II conviction for kidnapping must be reversed and that the Judgment and Sentence on Count I must be corrected.

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[22] These errors include language suggesting that Berry pled guilty, language suggesting that he was convicted by the court (rather than a jury), and the list of former convictions on Count I, which suggests that this conviction was for Lewd Molestation "AFCF," under 21 O.S.Supp.2002, § 51.1, rather than "Lewd Molestation, Third Offense," under 21 O.S.Supp.2009, § 1123(A)(5).

Decision

Berry's Count I conviction for Lewd Molestation and his sentence of imprisonment for Life Without Parole and a fine of $10,000 is **AFFIRMED**. Berry's conviction for Kidnapping on Count II is **REVERSED** and **DISMISSED**. In addition, this case is **REMANDED** for correction of the Judgment and Sentence document on Count I, through an order *nunc pro tunc* by the district court, to reflect that Berry was found guilty, after trial by jury, of Lewd Molestation, Third Offense. 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 TULSA COUNTY
THE HONORABLE WILLIAM C. KELLOUGH, DISTRICT JUDGE

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OPINION BY: SMITH, J.

A. JOHNSON, P.J.:	CONCUR
LEWIS, V.P.J.:	CONCUR
LUMPKIN, J.:	CONCUR IN PART/DISSENT IN PART
C. JOHNSON, J.:	CONCUR

LUMPKIN, JUDGE: CONCURRING IN PART/DISSENTING IN PART

I concur that the Judgment and Sentence in Count I should be affirmed and the documents should be corrected to accurately reflect what occurred in this case. However, I must dissent to the reversal of Appellant's conviction for kidnapping in Count II.

Without any discussion as to why a change in the law is necessary, a majority of this Court adopts a wholly new analysis for the determination of double punishment claims. Instead of applying the rule that this Court adopted in *Davis v. State*, 1999 OK CR 48, 993 P.2d 124, this opinion sets forth a "series of acts" review. Using dicta within dicta the opinion seeks to justify the position that has been taken.[1] Instead of focusing on the act that comprises the offense of lewd molestation, as the language of 21 O.S.2001, § 11 tells us, the opinion determines what evidence supports an inference that the crime occurred. Application of this novel review leads to an incorrect result in the present case and creates an anomaly in our case law.

The Oklahoma statutory provision against double punishment is set forth in 21 O.S.2001, § 11(A). *Id.*, 1999 OK CR 48, ¶¶ 6-7, 993 P.2d at 125-26. For twelve years this Court has consistently reviewed double punishment claims under the same analysis, to wit:

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[1] There are, at least, fourteen (14) instances of dicta or assertions unsupported by any authority within the opinion. This type of analysis is inconsistent with our role as appellate judges. *See Dennis v. State*, 1999 OK CR 23, ¶ 8, 990 P.2d 277, 289 (Lumpkin, V.P.J., concurring in part/dissenting in part) ("The plenary power of a court of last resort to interpret and apply the law carries with it an awesome responsibility to exercise self-discipline and adherence to precedent as it fulfills its role."); *Flores v. State*, 1995 OK CR 31, ¶ 6 n. 2, 899 P.2d 1162, 1172 n. 2 (Lumpkin, J., dissenting) ("We are bound by our oaths and role as appellate judges to interpret [the law] as it is, and not how we wish it were.").

> The proper analysis of a claim raised under Section 11 is then to focus on the relationship between the crimes. If the crimes truly arise out of **one act**. . . then Section 11 prohibits prosecution for more than one crime. One act that violates two criminal provisions cannot be punished twice, absent specific legislative intent. This analysis does not bar the charging and conviction of separate crimes which may only tangentially relate to one or more crimes committed during a continuing course of conduct.

Id., 1999 OK CR 48, ¶ 13, 993 P.2d at 126-27 (emphasis added). Where there are a series of separate and distinct crimes, Section 11 is not violated. *Id.*, 1999 OK CR 48, ¶ 12, 993 P.2d at 126. Therefore, this Court determines "[i]f the crimes truly arise out of one act. *Id.*, 1999 OK CR 48, ¶ 13, 993 P.2d at 126; *Logsdon v. State*, 2010 OK CR 7, ¶ 17, 231 P.3d 1156, 1164-65; *Watts v. State*, 2008 OK CR 27, ¶ 16, 194 P.3d 133, 139; *Head v. State*, 2006 OK CR 44, ¶ 11, 146 P.3d 1141, 1144-45.

Applying the proper analysis to the present case, Appellant's convictions for lewd molestation and kidnapping are a series of separate and distinct crimes. The kidnapping alleged in Count II occurred and was completed when Appellant forcibly seized C.S.'s person and confined her in the seat of his pickup with the intent to confine the young child. 21 O.S.Supp.2009, § 741; Inst. No. 4-110, OUJI-CR(2d) (Supp.2010). Depending upon which theory is applied, the lewd molestation was completed either before or after the kidnapping.

The State charged Appellant in the alternative under two separate subsections of 21 O.S.Supp.2009, § 1123(A). The State first alleged that

Appellant was guilty of lewd molestation under § 1123(A)(3). Pursuant to this subsection it is a felony for any person to knowingly and intentionally;

> Ask, invite, entice, or persuade any child under sixteen (16) years of age, or other individual the person believes to be a child under sixteen (16) years of age, to go alone with any person to a secluded, remote, or secret place, with the unlawful and willful intent and purpose then and there to commit any crime against public decency and morality, as defined by law, with the child;

21 O.S.Supp.2009, § 1123(A)(3). Under this theory of Count I, the lewd molestation was completed before the kidnapping. The offense was completed when Appellant stuck his hands out of the driver's side window, with the unlawful and willful intent and purpose then and there to commit any crime against public decency and morality, and motioned to C.S. to "come here." C.S. was alone. The front seat of Appellant's pickup was sufficient to seclude C.S. from public view. C.S. took a few steps in response to Appellant's gesture. (Tr. III, 478-79). Once Appellant beckoned C.S. to come to him, the offense was complete. The kidnapping then occurred when Appellant thereafter took the young child and confined her in the vehicle.

The opinion goes to great lengths to attempt to explain why the offense was not complete upon Appellant's beckoning for the child to join him. The opinion resorts to examining "[t]he focus of the statute" and analyzing the "content" of Appellant's communication. However, none of this analysis is supported by our case law.

The opinion's reasoning as to why Appellant's act of beckoning to C.S. was insufficient to complete the offense is fundamentally flawed. First, the opinion determines that § 1123(A)(3) requires the defendant to communicate

"certain content" to the child. However, reviewing the plain language of the statute, there is no requirement that a child know what the defendant is requesting, inviting, enticing or persuading her to do. *State v. Young*, 1999 OK CR 14, ¶ 27, 989 P.2d 949, 955 ("[S]tatutes are to be construed according to the plain and ordinary meaning of their language."). Instead, the fifth element of the offense, "to go alone with [him]," is the status of the child. Inst. No. 4-129, OUJI-CR(2d) (Supp.2010). This fact may be established by evidence indicating that the invitation was made to the child and no one else.

Second, the opinion confuses the requirement of the sixth element, "to a secluded/remote/secret place." Inst. No. 4-129, OUJI-CR(2d) (Supp.2010). The opinion determines that the offense was not completed in the present case until Appellant placed C.S. inside his pickup because she was on a public roadway. However, reviewing the plain language of the statute, the requirement of "to a secluded, remote or secret place" obligates the State to prove that the defendant designed for the child to go to a secluded, remote, or secret place. 21 O.S.Supp.2009, § 1123(A)(3); *Young*, 1999 OK CR 14, ¶ 27, 989 P.2d at 955. A plain reading of the statute reveals that it is not a requirement that the request, invitation or enticement occur in a secluded, remote or secret place. *Id.*; *See King v. State*, 1971 OK CR 364, ¶¶ 2, 11, 489 P.2d 493, 493-94 (holding that the trial court properly denied the defendant's demurrer where the defendant approached the victim in a neighborhood with other newsboys before taking him up a hill to a remote and secluded place). Similarly, there is no requirement that the request, invitation, or persuasion

contain the specific content of "a secluded, remote, or secret place." *Id.*; *See also Munn v. State*, 1969 OK CR 245, ¶¶ 12-13, 459 P.2d 628, 631 (finding sufficient evidence to support conviction for offense of lewd molestation where victim went with the defendant because she mistakenly thought he was a lake ranger reprimanding her for playing with a duck).

Third, the opinion presumes that § 1123(A)(3) requires that the child be successfully enticed or persuaded. Reviewing the plain language of the statute, this offense is comprised of the act of asking, inviting, enticing or persuading. *Young*, 1999 OK CR 14, ¶ 27, 989 P.2d at 955. There is no requirement within the statute that the child actually go alone with the defendant to a secluded, remote or secret place. 21 O.S.Supp.2009, § 1123(A)(3). Under the plain language of the statute, it is illegal to make the request, invitation, or enticement. *Id.*

Fourth, the opinion confuses evidence that a crime occurred with the actual act that comprises the offense. In *Davis*, this Court reaffirmed that "[o]ne act that violates two criminal provisions cannot be punished twice, absent specific legislative intent." *Davis*, 1999 OK CR 48, ¶ 13, 993 P.2d at 126-27. This Court used *Hale v. State*, 1995 OK CR 7, 888 P.2d 1027, as an example where two crimes arose from one act. *Id.* A defendant may not be convicted of both rape and incest upon only one act of sexual intercourse. *Id.*, 1999 OK CR 48, ¶ 13 n. 4, 993 P.2d at 126 n. 4; *Hale*, 1995 OK CR 7, ¶ 6, 888 P.2d at 1030. "Another classic example of a proper Section 11 analysis is robbery with a firearm which could be charged as pointing a firearm or robbery

with a firearm, but not both." *Id.*, 1999 OK CR 48, ¶ 10 n. 2, 888 P.2d at 126 at n. 2.

In contrast, § 11 does not bar the charging and conviction of "separate crimes which may only tangentially relate to one or more crimes committed during a continuing course of conduct." *Id.*, 1999 OK CR 48, ¶ 13, 993 P.2d at 127. The clearest example of separate crimes that are tangentially related is found within *Ziegler v. State*, 1980 OK CR 23, 610 P.2d 251. In *Ziegler*, this Court found that the defendant's convictions for first degree burglary, rape, sodomy and unauthorized use of a motor vehicle were a series of separate and distinct crimes. *Id.*, 1980 OK CR 23, ¶ 10, 610 P.2d at 254. "[T]he convictions did not violate Section 11 because the burglary was complete upon the forced entry with the intent to commit a crime and the crimes committed inside the residence were not necessary elements of burglary." *Davis*, 1999 OK CR 48, ¶ 12, 993 P.2d at 126 (*citing Ziegler*, 1980 OK CR 23, ¶ 10, 610 P.2d at 254).

Turning to the facts of the present case, the offenses were separate crimes which only tangentially related to each other. When Appellant beckoned C.S., standing alone on the street, to come to him, the offense of lewd molestation under § 1123(A)(3) was complete. Appellant's design to seclude C.S. is apparent from the facts. Appellant did not approach the child and redirect her to safety. Instead, he beckoned her to come to his truck. (Tr. III, 478-79). The front seat of Appellant's pickup was sufficient to seclude the small child from general view. As the act of actual seclusion is not a necessary element of lewd molestation under § 1123(A)(3), Appellant's convictions do not

violate § 11. *Davis*, 1999 OK CR 48, ¶ 12, 993 P.2d at 126. The evidence that Appellant actually picked up C.S. and secluded her in the front seat of the pickup is only evidence of Appellant's design to seclude the child; it is not a necessary element under § 1123(A)(3). *See Ziegler*, 1980 OK CR 23, ¶ 10, 610 P.2d at 254. As such, the crimes are tangentially related and occurred during a course of continuing conduct but they are separate crimes that do not violate § 11. *Davis*, 1999 OK CR 48, ¶ 12, 993 P.2d at 126; *Ziegler*, 1980 OK CR 23, ¶ 10, 610 P.2d at 254.

The State alleged in the alternative that Appellant was guilty of lewd molestation under § 1123(A)(2). Pursuant to this subsection it is a felony for any person to knowingly and intentionally;

> Look upon, touch, maul, or feel the body or private parts of any child under sixteen (16) years of age in any lewd or lascivious manner by any acts against public decency and morality, as defined by law;

21 O.S.Supp.2009, § 1123(A)(2). Under this alternative theory of Count I, the lewd molestation occurred after the kidnapping was completed. After the child was taken, Appellant committed the acts comprising this alternative theory of lewd molestation. Appellant was discovered in a rural area of Tulsa sitting in the seat of his pickup. (Tr. III, 494-503). When Appellant became aware of the officers' presence, he began rocking, ducking, and looking down at his waist area. His hands were down near his thighs and waist. Officers discovered that Appellant's pants were unfastened, open and pulled down past the waistband of his boxer briefs. (Tr. III, 503-09). Appellant's actions led the investigating officer to believe that Appellant was either masturbating or having sex with

someone. Officers located C.S. wedged to Appellant's right side. C.S. was not wearing any underwear or a diaper. (Tr. III, 519-23). Upon his arrest, Appellant exclaimed: "Kill me. Just fucking kill me now." (Tr. III, 523-25). It is reasonable to infer from this circumstantial evidence that after Appellant kidnapped C.S. from the neighborhood street, Appellant removed the child's diaper, looked upon the child in a lewd or lascivious manner, and masturbated.

Regardless of which theory Appellant's conviction for lewd molestation rests, the kidnapping was completed at a separate time. There was a definite break in time and actions between the offenses. The kidnapping and lewd molestation were separate and distinct crimes that did not truly arise out of one act. *Davis*, 1999 OK CR 48, ¶ 13, 993 P.2d at 126-27. Therefore, I would affirm Appellant's Count II conviction for kidnapping.