IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DAVID GLEN HEARD,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**No. F-2014-478**
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

HUDSON, JUDGE:

Appellant David Glen Heard was tried and convicted by a jury in Tulsa County District Court, Case No. CF-2006-2945, for two counts of Lewd Molestation, in violation of 21 O.S.Supp.2006, § 1123(A). The State sought enhancement, alleging Appellant's convictions were after two or more prior felony convictions. However, the jury found the existence of only one prior felony conviction and sentenced Heard to twenty (20) years imprisonment on each count. The Honorable William J. Musseman, Jr., District Judge, sentenced Heard in accordance with the jury's verdicts and ordered the sentences on both counts to run consecutive each with the other.[1] The trial court also ordered Heard to serve a three (3) year term of post-imprisonment

[1] Heard is required to serve not less than eighty-five percent (85%) of his sentence of imprisonment before becoming eligible for consideration for parole. 21 O.S.2011, § 13.1(18).

supervision, under conditions prescribed by the Department of Corrections. Heard now appeals.[2]

On June 15, 2006, sometime after 11:30 p.m., Nettie Dunevant, her daughter Tabanna, and Tabanna's two daughters, B.D. and T.D., went to the Wal Mart at 81st and Lewis in Tulsa in search of greeting cards and swimwear for the children. B.D. was two years old at the time; T.D. was seven. That night, the girls wore matching dresses sent to them by an aunt. Once inside the store, they went to the greeting card aisle. Nettie and Tabanna took turns pushing the shopping cart in which B.D. was riding. T.D. chose to walk.

After Nettie, Tabanna and the children began looking at greeting cards, Appellant, a 53 year old man, got down on the floor and looked up the opening of T.D.'s dress. Nettie described Appellant as "leering" under T.D's dress. At some point, Appellant stood up. His hair—like his overall appearance—was disheveled. Appellant made the statement "nice cards," an apparent reference to the Snoopy greeting cards the girls were perusing while Appellant looked up T.D.'s dress.

Startled by Appellant's actions, Tabanna and Nettie picked T.D. up and put her in the shopping cart with her sister. Nettie told her daughter that Appellant was a "P" meaning pedophile. Nettie confronted Appellant, asking

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[2] Heard's case comes to this Court after previously having his guilty plea and resulting twenty-five (25) concurrent sentences to these same charges affirmed by this Court, *see Heard v. State*, 2009 OK CR 2, 201 P.3d 182 (order denying post-conviction relief), but reversed by the Tenth Circuit based on its finding that plea counsel was ineffective in advising Heard to plead guilty. *See Heard v. Addison*, 728 F.3d 1170 (10th Cir. 2013). Pursuant to the federal habeas court's order, the trial court on remand allowed Heard to withdraw his guilty plea and proceed to trial (1/6/2014 Tr. 2-4; 1/13/2014 Tr. 2-3, 15-18).

him "[w]hy? What are you doing?" Appellant flinched, chuckled and "moved his shoulders trying to decide." Nettie and Tabanna tried to move away from Appellant but he followed them as they pushed the shopping cart with B.D. and T.D. towards the little girls' swimwear.

Appellant wandered through the little girls' clothing section where Glenda Ridenour and her nine-year old daughter, C.R., were browsing. Glenda and C.R. were in town for a scholarship pageant and went to Wal Mart because they forgot C.R.'s shoes and needed to buy a new pair. As Glenda and C.R. browsed the clothing, Appellant was squatted down in the aisle, fumbling with socks on a store display. He was blocking Glenda and C.R.'s path. When Glenda attempted to pass through the narrow aisle with her shopping cart, she told Appellant "excuse me" but he ignored her. Glenda repeated this three times before Appellant moved.

Glenda and C.R. moved on to the shoe department at the back of the store where they browsed the footwear. Eventually, C.R. sat down on the floor and tried on a pair of tennis shoes. About this time, Glenda noticed Appellant at the end of the shoe aisle "kind of fumbling around again, mumbling words[.]" Appellant was wearing a large ACE bandage on his left knee and his right arm. Glenda became alarmed because she believed Appellant was following her. At some point, Appellant told Glenda that he was looking for shoes for his daughter but it was hard to determine what she likes. C.R. couldn't help but notice that Appellant did not have a little girl with him that night. Glenda

simply shrugged her shoulders and ignored him. Glenda noticed Appellant had Polly Pocket dolls and other little girl toys in his shopping cart.

Glenda kept an eye on Appellant while C.R., who was wearing a skirt and t-shirt, was sitting on the ground with her knees pulled up and her legs apart, trying on shoes. Glenda eventually noticed Appellant on the ground, leaned over with his face touching the floor while looking up C.R.'s skirt. Appellant's arms were on the ground and he slid on the floor using his ACE bandages. Glenda felt "very violated" by what she saw and spoke with store employees, some of whom also noticed Appellant's unusual behavior. Shortly thereafter, Appellant was intercepted in the store parking lot by an off-duty police officer who was working store security. The officer observed a pornographic magazine depicting sexually explicit material in a bag Appellant retrieved from his car. A records check showed Appellant was a registered sex offender. Appellant was on supervised probation at the time for felony convictions from Creek County for Performing Sexual Acts in the Presence of a Child Under Sixteen and Taking a Child to a Secluded Place for Immoral Purposes.

Appellant was later arrested and interviewed by Detective Scott Murphy. Appellant acknowledged during that interview, which was videotaped, to being on supervised probation for child sex crimes and to seeing T.D. and C.R. in different parts of Wal Mart that night. He admitted seeing the little girls' panties and vaginal area (their "stuff") but portrayed the whole affair as mere casual glances that lasted only a few seconds. Appellant agreed with Detective Murphy's statement that the pornographic magazine found in his car, and

seeing the little girl in the shopping cart with her legs spread and panties exposed, "got you going" and "took control of you[.]" But Appellant denied following the children and their mothers around the store. Appellant said he left the store because he knew he was not supposed to be looking at "a private spot", that the girls were not the appropriate age for him and that he would feel violated if someone were looking at him that way. Appellant discussed throughout the interview the difficulty he had using the "interventions" he learned during counseling to stop looking at the little girls in the store. Appellant said too that he did not know what could happen if he stayed in the store, that it was possible he could return to his "pattern" and start having sexual thoughts. That would put Appellant in a cycle allowing him to go where kids hang out which, he admits, is not right, and "who knows where it could go from there. I mean, it could escalate. Anywhere."

Appellant raises eight propositions of error on appeal. After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we find that under the law and evidence Appellant's judgments and sentences should be **AFFIRMED** except for the imposition of post-imprisonment supervision which should be **VACATED** and the matter **REMANDED** to the trial court with instructions to **MODIFY** the judgments and sentences consistent with the analysis in this opinion.

In Proposition I, Appellant complains that 21 O.S.Supp.2006, § 1123(A)(2)[3] is unconstitutionally vague, in violation of the Fourteenth Amendment's Due Process Clause. Appellant targets use of the words "[l]ook upon" in § 1123(A)(2) as being void for vagueness. Appellant argues this language allows arbitrary and discriminatory enforcement of the statute "if a police officer perceives more than a casual glance at a child[.]" Aplt. Br. at 9. Appellant tells us this is true despite this Court's interpretation of § 1123(A)(2) in resolving his previous state post-conviction proceedings. *See Heard v. State,* 2009 OK CR 2, ¶¶ 7-10, 201 P.3d 182, 183. Appellant raised this claim below and the district court rejected it. This claim is therefore preserved for appellate review.[4]

"We review a claim concerning the constitutionality of a statute *de novo.*" *Leftwich v. State,* 2015 OK CR 5, ¶ 37, 350 P.3d. 149. "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct

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[3] Title 21, O.S.Supp.2006, § 1123(A)(2) provides: "[i]t is a felony for any person to knowingly and intentionally . . . [l]ook 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" where "the accused is at least three (3) years older than the victim."

[4] While there is unquestionable overlap of subject matter between the void-for-vagueness challenge presently before the Court and Appellant's previous statutory challenge to the validity of his guilty plea, barring merits review of the present claim on grounds of res judicata or collateral estoppel as urged by the State on appeal is inappropriate because this Court has not reviewed the merits of this particular constitutional issue. *Cf. Leftwich v. State,* 2015 OK CR 5, ¶¶ 36-41, 350 P.3d. 149 (reviewing separately appellant's void-for-vagueness challenge to the statute used to support her prosecution in light of this Court's interpretation of that same statute in an earlier part of the opinion).

is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983). *See, e.g., Hill v. Colorado*, 530 U.S. 703, 732, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000); *Leftwich*, 2015 OK CR 5, ¶ 37.

"Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk. Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis." *Maynard v. Cartwright*, 486 U.S. 356, 361, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988). *See State v. Johnson*, 1992 OK CR 72, ¶¶ 7-8, 877 P.2d 1136, 1140. "Animating this rule is the courts' aspiration to avoid invalidating penal statutes on vagueness grounds 'simply because difficulty is found in determining whether certain marginal offenses fall within their language.'" *United States v. Cardenas-Alatorre*, 485 F.3d 1111, 1114 n.7 (10th Cir. 2007) (quoting *United States v. Nat'l Dairy Products Corp.*, 372 U.S. 29, 32, 83 S. Ct. 594, 9 L. Ed. 2d 561 (1963)).

Because § 1123(A)(2) does not implicate First Amendment freedoms, Appellant's vagueness claim must be evaluated as the statute is applied to the facts of this case. *Chapman v. United States*, 500 U.S. 453, 467, 111 S. Ct. 1919, 114 L. Ed. 2d 524 (1991) (citing *United States v. Powell*, 423 U.S. 87, 92, 96 S. Ct. 316, 46 L. Ed. 2d 228 (1975)). The State correctly notes that Appellant does not argue on appeal that § 1123(A)(2) was unconstitutionally

vague *as applied to him.* Resp. Br. at 14. Instead, Appellant argues—over the span of two pages in his opening brief—that the statute is void for vagueness in light of hypothetical situations in which it may be applied. Aplt. Br. at 8-9.

"We consider whether a statute is vague as applied to the particular facts at issue, for '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" *Holder v. Humanitarian Law Project,* 561 U.S. 1, 18-19, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010) (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982)). *See also Nat'l Dairy Products Corp.*, 372 U.S. at 33 ("In determining the sufficiency of the notice a statute must of necessity be examined in light of the conduct with which a defendant is charged."). A proper void-for-vagueness challenge in this case must address whether the statute sufficiently warned Appellant that positioning himself on the ground in order to look up the skirts of young girls in order to see their vaginal area fell within § 1123(A)(2)'s prohibition of "look[ing] upon . . . 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." *Cf. Leftwich,* 2015 OK CR 5, ¶¶ 36 & 40 (rejecting vagueness challenge to Soliciting and/or Accepting a Bribe from Another for Withdrawal of Candidacy statute by analyzing whether appellant had notice that she was a candidate accepting a bribe to withdraw from her race); *Johnson,* 1992 OK CR 72, ¶ 10, 877 P.2d 1136, 1140 (rejecting vagueness challenge to Operating a Chop Shop statute by analyzing "whether

[the statute] adequately notified Appellees that their alleged actions would be unlawful. Should appellees have known that possession of three motor vehicles and seven motor vehicle parts, with knowledge that the identification numbers had been obliterated or removed, would constitute a felony under Section 1503(C)(1)?").

This Appellant does not do. Instead, he challenges the constitutionality of § 1123(A)(2) based on *any* hypothetical "looking" upon a clothed child. Aplt. Br. at 8-9 ("this [Court's] narrowing in *Heard* now requires that whenever a person finally realizes that he is 'looking upon' a clothed child, he must immediately think to look away before he is suspected of having lewd thoughts towards the child."). The record evidence in this case does not support this approach. This Court previously held that "[u]nder the plain wording of the statute, Heard committed the felony when he followed two underage girls into a store and positioned himself so as to see under their dresses and see their panties, his admitted intent." *Heard*, 2009 OK CR 2, ¶ 9, 201 P.3d at 183.

The evidence presented at Appellant's jury trial showed the same. Basically, Appellant followed two underage girls around Wal Mart and positioned himself so he could look under their dresses and see their vaginal area. Appellant admitted during his videotaped interview to looking at each victim's "private spot" and realizing that it was wrong. Appellant admitted he would feel violated and ashamed if someone did that to him. He also agreed with Detective Murphy's statement that the pornographic magazine, and seeing

the little girl in the shopping cart with her legs spread and panties exposed, "got you going" and "took control of you."

Appellant's conduct in this case is prohibited by the plain language of § 1123(A)(2). Appellant previously argued that because his victims were wearing panties, he could not have violated the statute. This Court, however, rejected this interpretation in Appellant's earlier post-conviction proceedings based on the plain language of the statute, particularly § 1123(A)(2)'s requirement that the looking upon be done in a "lewd and lascivious" manner. *Heard*, 2009 OK CR 2, ¶¶ 9-10, 201 P.3d at 183 ("We do not read the statute to criminalize every casual glance at a child; we focus our inquiry in the showing that the defendant's knowing and intentional conduct was 'lewd or lascivious.'"). Notably, Appellant argued during pre-trial proceedings before the trial court that he was not challenging the phrase "lewd or lascivious" as being unconstitutionally vague in light of this Court's holding in *Reed v. State*, 1986 OK CR 64, ¶¶ 3-6, 718 P.2d 373, 374-75 (O.R. 162). The phrase "lewd or lascivious" provides further definition of the conduct prohibited by § 1123(A)(2). *Cf. Nat'l Dairy Products Corp.*, 372 U.S. at 35 (finding that the additional element of predatory intent alleged in the indictment and required by the statute provides further definition of the prohibited conduct in the case). This Court's interpretation of § 1123(A)(2) in *Heard* is consistent with our previous interpretation and application of § 1123 in "touching" cases "where a requirement of nudity is not attached" to the words "lewd or lascivious." *Heard*, 2009 OK CR 2, ¶ 10, 201 P.3d at 183.

While doubts as to the applicability of the language in marginal fact situations may be conceived, we find that § 1123(A)(2) provided fair notice to Appellant that positioning himself on the ground to look up the skirts of young girls in order to see their vaginal areas was a criminal offense. "[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." *Powell*, 423 U.S. at 93 (quoting *Nash v. United States*, 229 U.S. 373, 377, 33 S. Ct. 780, 57 L. Ed. 2d 1232 (1913)).

Appellant's assertion that § 1123(A)(2) authorizes or encourages arbitrary or discriminatory enforcement lacks merit. Appellant argues that § 1123(A)(2) "vests full discretion in the police to determine the lawfulness of a suspect's actions." Aplt. Br. at 9. This, Appellant argues, may lead police to find reasonable suspicion to support an investigative detention whenever a police officer "perceives more than a casual glance at a child . . . ." Aplt. Br. at 9. "As always, enforcement requires the exercise of some degree of police judgment," *Hill*, 530 U.S. at 733 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 114, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)), and we find the degree of judgment at issue here is acceptable. The plain language of § 1123(A)(2), along with our holding in *Heard*, eliminates the possibility of the indiscriminate investigative detentions imagined by Appellant on appeal. Moreover, "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority

of its intended applications." *Hill*, 530 U.S. at 733. All things considered, relief for Proposition I is denied.

In Proposition II, Appellant challenges the admission of trial testimony by T.H. that Appellant molested her in 1998. Appellant argues that this propensity evidence was inadmissible under 12 O.S.2011, § 2414. Appellant preserved in district court the claims now raised in Proposition II. The issue therefore is whether the trial court abused its discretion in admitting T.H.'s testimony at trial. *Neloms v. State*, 2012 OK CR 7, ¶ 25, 274 P.3d 161, 167 ("This Court reviews a trial court's evidentiary rulings for an abuse of discretion."). "An abuse of discretion has been defined as a conclusion or judgment that is clearly against the logic and effect of the facts presented." *State v. Hooley*, 2012 OK CR 3, ¶ 4, 269 P.3d 949, 950.

We hold that the trial court did not abuse its discretion in admitting T.H.'s testimony. This evidence was relevant to show motive, intent and absence of mistake or accident and met all of the factors required for admissibility under § 2414. The probative value of this evidence was not substantially outweighed by the danger of unfair prejudice, confusion of issues or its tendency to mislead the jury. *See Johnson v. State*, 2010 OK CR 28, ¶ 6, 250 P.3d 901, 903-04; *Horn v. State*, 2009 OK CR 7, ¶ 40, 204 P.3d at 786-87 (both restating standard for admissibility). The jury was also provided the OUJI-CR (2d) 9-10A limiting instruction immediately prior to T.H.'s testimony and again in the written charge. This limiting instruction told the jury they could not convict Appellant based solely on the propensity evidence. We

presume the jurors followed this limiting instruction. *Head v. State*, 2006 OK CR 44, ¶ 26, 146 P.3d 1141, 1148. Appellant fails to show an abuse of discretion from the trial court's careful and conscientious balancing of the evidence in this case. Relief for Proposition II is therefore denied.

In Proposition III, Appellant challenges Instruction No. 33 which told the jury:

> You are advised that if you recommend a sentence of imprisonment for two years or more, David Glen Heard shall be required to serve a term of post-imprisonment community supervision under conditions determined by the Department of Corrections, in addition to the actual imprisonment. Any term of post-imprisonment community supervision shall be for at least three years, and I will determine the actual term of post-imprisonment community supervision after your verdict. If the sentence is life, there will be no post-imprisonment community supervision.

(O.R. 348). Appellant's argument on appeal is simply that post-imprisonment supervision was not authorized under Oklahoma law when he committed the two counts of lewd molestation charged in this case. According to the record, Appellant committed both counts of lewd molestation in this case on June 15, 2006. The statute authorizing post-imprisonment supervision for lewd molestation did not go into effect until November 1, 2007. 21 O.S.Supp.2007, § 1123(F); *Barnard v. State*, 2012 OK CR 15, ¶¶ 35-36, 290 P.3d 759, 769-70.

The State acknowledges that Appellant's crimes occurred on June 15, 2006, before the post-imprisonment supervision law went into effect on November 1, 2007, and that Instruction No. 33 was erroneously given in light of this Court's holding in *Barnard v. State*. "It is not error alone that requires reversal of judgments of conviction, but error plus injury, and the burden is on

the appellant to establish the fact that he was prejudiced in his substantial rights by the commission of error." *Harrall v. State*, 1984 OK CR 20, ¶ 6, 674 P.2d 581, 583.

Here, the trial court's erroneous instruction was harmless. The jury did not impose post-imprisonment supervision and Appellant does not claim that Instruction No. 33 in any way influenced the jury's verdict to his detriment. Rather, he cites as error the trial court's imposition at formal sentencing of a three (3) year post-imprisonment supervision period. Aplt. Br. at 16; (S. Tr. 9; O.R. 366, 369). Appellant does not ask this Court to vacate the jury's verdicts in his case. This is most likely because Instruction No. 33, if anything, was beneficial to the defense. Knowing that the defendant would have to serve an additional three years of mandatory post-imprisonment supervision could make jurors feel comfortable imposing a shorter term of imprisonment. What's more, there is no apparent downside to the instruction—a fact confirmed by Appellant's failure to claim any prejudice to the jury's finding of guilt or its recommendation of sentence.

Absent a showing of prejudice resulting from the trial court's use of Instruction No. 33, the instructional error here was harmless. 20 O.S.2011, § 3001.1. However, Appellant's claimed error based on the trial court's imposition of a three year period of post-imprisonment supervision does require relief. The trial court erred in imposing post-imprisonment supervision in this case and relief is warranted on Proposition III.

In Proposition IV, Appellant alleges reversible error based on the admission at trial of a portion of State's Exhibit 4, the DVD depicting Detective Murphy's interview of Appellant. The trial court ordered a portion of Detective Murphy's interview with Appellant to be redacted. Specifically, the trial court ordered every statement after Appellant said at the 70 minute mark "I don't want to say anything else, I just want to go to a jail" to be redacted. The trial court concluded this was an unequivocal invocation by Appellant of his right to remain silent, thus necessitating termination of the interview. *See Robinson v. State*, 1986 OK CR 86, ¶ 5, 721 P.2d 419, 421.

In light of the trial court's ruling, the balance of Appellant's interview with Detective Murphy was admissible. This included an exchange between Detective Murphy and Appellant at the 63 minute mark of the tape (approximately 1:03:40 on the counter) concerning a written statement Appellant made to his probation officer about masturbating at home to thoughts of the children he encountered at Wal Mart. When confronted with this statement during the interview, Appellant denied it. Appellant said he only wrote that statement because he thought that's what his probation officer wanted to hear. Appellant said he masturbated to a pornographic magazine only (State's Ex. 4 – 1:03:40).

On appeal, Appellant challenges the admissibility of this portion of State's Exhibit 4 in light of this Court's holding that "[m]asturbation in front of a computer monitor displaying images of children is neither sexual assault, nor molestation of child" admissible under 12 O.S.2011, § 2414. Aplt. Br. at 18

(quoting *Neloms v. State*, 2012 OK CR 7, ¶ 13, 274 P.3d 161, 164). Additionally, Appellant urges that this same evidence is inadmissible under 12 O.S.2011, § 2404(B). Aplt. Br. at 18.

Appellant did not raise this specific objection below thus waiving review for all but plain error. *See Stemple v. State*, 2000 OK CR 4, ¶ 33, 994 P.2d 61, 69. This Court has defined plain error as "going to the foundation of the case or taking from the defendant a right essential to his defense." *Grissom v. State*, 2011 OK CR 3, ¶ 28, 253 P.3d 969, 980 (quoting *Simpson v. State*, 1994 OK CR 40, ¶ 12, 876 P.2d 690, 695). Again, the admission of evidence is reviewed for an abuse of discretion. *Neloms*, 2012 OK CR 7, ¶ 25, 274 P.3d at 167. *See also Hooley*, 2012 OK CR 3, ¶ 4, 269 P.3d at 950 (defining "abuse of discretion").

Appellant fails to show error, let alone plain error, with the admission of the challenged evidence. "The prosecution is entitled to present statements or admissions made by a defendant, whether they are truthful, untruthful, or self-contradictory." *McElmurry v. State*, 2002 OK CR 40, ¶ 41, 60 P.3d 4, 19. As this Court has held, "[c]learly there are many times when videotapes contain both portions which are, and which are not admissible." *Jackson v. State*, 2007 OK CR 24, ¶ 14, 163 P.3d 596, 601. "It is a well-settled rule that statements made by a defendant, so closely with the commission of the offense charged as to be considered a part of the res gestae, are admissible." *Spradling v. State*, 1951 OK CR 31, 93 Okl.Cr. 431, 435, 229 P.2d 212, 215. "Evidence is considered res gestae, and not other crimes or bad acts evidence when: a) it is

so closely connected to the charged offense as to form part of the entire transaction; b) it is necessary to give the jury a complete understanding of the crime; or c) when it is central to the chain of events." *See Warner v. State*, 2006 OK CR 40, ¶ 68, 144 P.3d 838, 868.

The challenged evidence here was admissible as res gestae evidence. Appellant's statement that he went home and masturbated to mental images and thoughts he had of the children he encountered at Wal Mart was relevant to show Appellant's motive, intent and absence of mistake or accident. These were critical issues in the case. At the least, the challenged evidence was admissible under 12 O.S.2011, § 2404(B) considering the visible connection between the charged offenses in the present case and Appellant's admitted act of masturbation. Appellant told his probation officer that he masturbated to mental images of the children he saw at Wal Mart. This would include the victims in the present case. This evidence was unquestionably relevant and its probative value clearly outweighed the danger of unfair prejudice. The jury was also provided the uniform limiting instruction for § 2404(B) evidence, thus limiting any possible misuse of this evidence (O.R. 333). Thus, no error—let alone plain error—arose from the trial court's admission of this evidence. Relief for Proposition IV is denied.

In Proposition V, Appellant claims prosecutorial misconduct based on the prosecutor's statement during closing argument "that Appellant should be held accountable because he looked at the children and then went home and masturbated to the thought of them." Aplt. Br. at 20 (citing 4 Tr. 470, 499).

Appellant says this argument was "grossly unwarranted and affected [his] rights [sic] to a fair trial." Aplt. Br. at 21. The record shows Appellant did not object below to either passage from the prosecutor's closing argument now challenged on appeal. He has therefore waived all but plain error review. *Harris v. State*, 2004 OK CR 1, ¶ 64, 84 P.3d 731, 754 (failure to object to prosecutor's closing argument waives all but plain error).

The challenged comments do not amount to error, let alone plain error "going to the foundation of the case or taking from the defendant a right essential to his defense." *Grissom*, 2011 OK CR 3, ¶ 28, 253 P.3d at 980. Rather, the challenged comments represent fair comment on the record evidence. *See Pavatt v. State*, 2007 OK CR 19, ¶ 63, 159 P.3d 272, 292 ("Counsel enjoy significant latitude in arguing their respective positions, so long as the arguments are based on evidence the jury has received."). Here, the State could reasonably argue that Appellant's actions at Wal Mart were part of a plan to satisfy his sexual urges and compulsion for young girls which culminated in him masturbating at home to mental images of his victims after committing the lewd molestations. Review of the total record shows that the challenged comments did not deprive Appellant of a fundamentally fair trial in violation of due process. *See Andrew v. State*, 2007 OK CR 23, ¶ 128, 164 P.3d 176, 202 ("no trial will be reversed on the allegations of prosecutorial misconduct unless the cumulative effect was such to deprive Appellant of a fair trial."). Relief is therefore unwarranted for Proposition V.

In Proposition VI, Appellant argues that his trial counsel was ineffective for failing to object to the portion of his videotaped interview, discussed in Proposition IV above, in which he admitted masturbating. Recycling his arguments from Proposition IV, Appellant says that because this evidence was inadmissible under either § 2404(B) or § 2414, counsel should have objected to its admission.

To prevail on an ineffective assistance of counsel claim, the defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). As discussed in Proposition IV, the evidence Appellant says trial counsel should have challenged was admissible. Thus, trial counsel was not ineffective for failing to make meritless objections. *Logan v. State*, 2013 OK CR 2, ¶ 11, 293 P.3d 969, 975. Relief is unwarranted for Proposition VI.

Petitioner's cumulative error argument in Proposition VII likewise does not warrant relief. "A cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by Appellant. Even when there have been procedural irregularities during the course of a trial, relief is warranted only if the cumulative effect of all the errors denied Appellant a fair trial." *Pavatt*, 2007 OK CR 19, ¶ 85, 159 P.3d at 296 (internal citations omitted). As shown previously, all of Appellant's propositions of error lack merit with the exception of the trial court's imposition at formal sentencing of post-imprisonment supervision. This error had no impact on the jury's

verdicts and we correct the trial court's error in this regard on appeal. Accordingly, relief for cumulative error is unwarranted. *Id.*, 2007 OK CR 19, ¶ 85, 159 P.3d at 297.

Finally, we deny relief for Appellant's excessive sentence claim in Proposition VIII. This Court will not modify a sentence within the statutory range "unless, considering all the facts and circumstances, it shocks the conscience." *Neloms*, 2012 OK CR 7, ¶ 39, 274 P.3d at 171 (quoting *Rea v. State*, 2001 OK CR 28, ¶ 5 n.3, 34 P.3d 148, 149 n.3). Additionally, "[t]his Court reviews a trial court's decision to run a defendant's sentences consecutively or concurrently for an abuse of discretion." *Id.*, 2012 OK CR 7, ¶ 35, 274 P.3d at 170 (citing *Kamees v. State*, 1991 OK CR 91, ¶ 21, 815 P.2d 1204, 1208-09).

Appellant was convicted of two counts of Lewd Molestation After One Prior Felony Conviction. Appellant's twenty year sentence on each lewd molestation count was well within the prescribed ten year to life imprisonment range of punishment. 21 O.S.Supp.2002, § 51.1(A)(1); 21 O.S.Supp.2006, § 1123(A). The jury had overwhelming proof that before Appellant ever set foot in Wal Mart on June 15, 2006, he was a convicted sex offender on supervised probation for sex crimes against a child (State's Exs. 1 & 4). The balance of evidence presented—including T.H.'s testimony and evidence of Appellant's actions in Wal Mart—established overwhelmingly that Appellant is a pedophile who cannot control his sexual attraction to young girls. Appellant's statements to police during his videotaped interview illustrated in clear terms his

attraction to young girls while showing too that his actions at Wal Mart involved far more than mere casual glances at the panties of his young victims.

The record evidence shows that everything Appellant did in Wal Mart was a product of his compulsive sexual attraction to young girls. Appellant's conduct in the present case, standing alone, is outrageous. That is particularly so considering the relative youth of T.D. and C.R (seven and nine years old respectively). Appellant, who at age 53 admitted to Detective Murphy that he had been in jail his entire life, followed these young girls and their mothers around Wal Mart so he could look under their dresses and see their vaginal areas. Appellant's actions in the present case, standing alone, are deserving of the twenty year sentences selected by the jury for each lewd molestation count.

Under the total circumstances, the sentences imposed by the jury in this case are not excessive and do not shock the conscience. The twenty year sentences imposed by the jury for each count balances the fact that Appellant did not actually touch the victims with his outrageous behavior and the evidence showing Appellant is a clear and present danger to any young girls he may ever encounter.

As for the decision to run the sentences on both counts consecutively, the trial court stated at formal sentencing that he gave serious consideration to a concurrent sentence but decided against it. The Court cited the fact that Appellant was on supervised probation for his Creek County child sex offenses at the time of his sex offenses at Wal Mart. The Court also noted Appellant's discussion of how his "interventions" weren't working at Wal Mart that night

which, of course, meant his therapy was not working. Appellant's prior felony convictions for child sex crimes, along with the nature of the acts in the present case against two separate victims in Wal Mart, resulted in the trial court running both sentences consecutively.

The trial court did not abuse its discretion in running Appellant's sentences consecutively. The trial court gave full and reasoned consideration to concurrent sentences in this case but declined in light of Appellant's background, his prior felony convictions and the nature of the acts at issue here. The trial court's sentencing decision is affirmed. Relief for Proposition VIII is denied.

DECISION

The Judgments and Sentences of the district court are **AFFIRMED** except for the imposition of post-imprisonment supervision which is **VACATED** and the matter is **REMANDED** to the district court with instructions to **MODIFY** the Judgments and Sentences consistent with this opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE WILLIAM J. MUSSEMAN, JR., DISTRICT JUDGE

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OPINION BY: HUDSON, J.
SMITH, P.J.: CONCUR
LUMPKIN, V.P.J.: CONCURS IN RESULTS
JOHNSON, J.: CONCUR
LEWIS, J.: CONCURS IN RESULTS