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

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| ROBERT CLAUDE McCORMICK, | ) | |
| | ) | |
| Appellant, | ) | **NOT FOR PUBLICATION** |
| | ) | |
| v. | ) | Case No. F-2007-165 |
| | ) | |
| THE STATE OF OKLAHOMA, | ) | |
| | ) | |
| Appellee. | ) | |



**SUMMARY OPINION**

**PER CURIAM:**

Appellant Robert Claude McCormick was tried by jury and convicted of Child Sexual Abuse (Count I) (10 O.S.2001, § 7115(E)) and Child Abuse (Count II) (10 O.S.2001 § 7115(A)), in the District Court of Bryan County, Case No. CF-2002-105. The jury recommended as punishment life imprisonment for each count. The trial court sentenced accordingly, ordering the sentences to be served consecutively. It is from this judgment and sentence Appellant now appeals.

Appellant raises the following proposition of error in this appeal:

> I. Instructions which allowed the jury to convict Appellant of child abuse on the basis of the same conduct used to support the child sexual abuse count rendered the punishments imposed multiplicious in violation of the double jeopardy clause.

After thorough consideration of this proposition and the entire record before us, including the original record, transcripts, and briefs of the parties, we find reversal is not required, but modification of the sentence is

necessary.

In his sole proposition of error, Appellant claims the jury instructions rendered the punishments imposed multiplicious in violation of the double jeopardy clause. Appellant did not object to the instructions at trial; therefore, this Court reviews for plain error only. *Simpson v. State,* 1994 OK CR 40, ¶2, 876 P.2d 690, 693.

Appellant argues the term "sexual abuse" is listed within the instructions on both child abuse and child sexual abuse and permitted the jury to convict him of two crimes based on the single act of sexual abuse. Although the instruction on child abuse given in this case was a uniform instruction, specifying sexual abuse as the type of harm inflicted was inappropriate and confusing. Any error in the instruction is subject to a harmless error analysis. *See Ellis v. Ward,* 2000 OK CR 18, ¶ 4, 13 P.3d 985, 986. For the error to be deemed harmless, the Court must find beyond a reasonable doubt it did not contribute to the jury's verdict. *Id.* 2000 OK CR 18, ¶ 3, 13 P.3d at 986.

In the present case, the error did not contribute to the jury's verdict. The remaining instructions thoroughly instructed the jury on the crimes of child abuse and child sexual abuse. The evidence clearly showed Appellant committed two separate crimes – child sexual abuse based upon his sexual relationship with the child and child abuse based upon his using the child to help him manufacture methamphetamine.

Appellant's double punishment argument also fails because

Appellant's crimes did not arise out of a single act. The proper analysis of a claim raised under 21 O.S.2001, § 11 is "to focus on the relationship between the crimes. If the crimes truly arose out of one act... then Section 11 prohibits prosecution for more than one crime". *Davis v. State,* 1999 OK CR 48, ¶13, 993 P.2d 124, 126-27. The crime of child sexual abuse was completed when Appellant forced M.K. to have sexual intercourse with him. The child abuse act was completed when Appellant forced M.K. to participate in the making of the methamphetamine. Appellant was convicted of two separate and distinct crimes and the actions taken to complete these crimes did not arise out of one act.

Since Appellant's Section 11 claim fails, this Court looks to a traditional double jeopardy analysis to determine whether double jeopardy was violated. *Jones v. State,* 2006 OK CR 5, ¶63, 128 P.3d 521, 543. This Court applies the "same elements" test, i.e., whether each offense requires proof of at least one element that the other does not. *Blockburger v. U.S.*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932). Applying the *Blockburger* test to Appellant's case, it is clear the elements of sexual abuse of a child and child abuse are different and require different proof. This proposition is denied.

While we find the error did not affect the verdict of guilt, there is a question of the impact on sentencing. Therefore, the sentences are **MODIFIED** to be served concurrently.

## DECISION

The judgments and sentences are hereby **AFFIRMED** and the sentences are **MODIFIED** to be served concurrently. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE FARRELL M. HATCH, RETIRED ACTIVE DISTRICT JUDGE.

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**OPINION BY: PER CURIAM**
LUMPKIN, P.J.: CONCUR IN PART/DISSENT IN PART
C. JOHNSON, V.P.J.: CONCUR
CHAPEL, J.: CONCUR
A. JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR IN RESULTS

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**LUMPKIN, PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART**

I concur in the Court's decision to affirm the judgments and sentences in this case. However, I must dissent to the Court's *sua sponte* decision to modify the sentences to run concurrently. By operation of law, sentences are required to be served consecutively unless the sentencing judge believes there is merit to ordering the sentences to be served concurrently. The trial judge in this case failed to find a legal basis to run the sentences concurrently and I find that was a correct decision under the facts of this case. I would affirm the judgments and sentences as imposed by the District Court.