Appendix A

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

RANDALL DUANE THRONEBERRY,	)	**NOT FOR PUBLICATION**
Appellant,	)	**Case No. F-2017-963**
v.	)	
STATE OF OKLAHOMA,	)	
Appellee.	)	

O P I N I O N

HUDSON, JUDGE:

Appellant, Randall Duane Throneberry, was tried by a jury and convicted in Oklahoma County District Court, Case No. CF-2015-6679, of Lewd Acts with a Child Under 16, in violation of 21 O.S.Supp.2013, § 1123(A), After Former Conviction of a Felony (Lewd Acts with a Child). In accordance with the jury's recommendation, the Honorable Timothy R. Henderson, District Judge, sentenced Throneberry to life imprisonment without the possibility of parole.[1]

[1] Throneberry's trial was bifurcated. During the sentencing phase, the jury found that Throneberry had a prior lewd molestation conviction. As a result, as discussed *infra* in Proposition II, life without the possibility of parole was the only sentencing option available to the jury. 21 O.S.2011, § 51.1a.

Judge Henderson also imposed various costs and fees. Throneberry now appeals.

FACTS

In August 2015, Gloria Faudoa and her daughter, R.F., who was eight years old at the time, were living with Ms. Faudoa's niece, Elizabeth (Missy) Wyninger, at 231 Southeast 46th Street in Oklahoma City. David Menchaca, Ms. Faudoa's uncle and Missy's father, his wife Lorene Menchaca, and Missy's children also lived at the residence.

Around the third week of August 2015, Throneberry, who was a friend of Mr. Menchaca, spent the weekend at Missy's residence because he wanted to drink alcohol. Throneberry slept in the living room on the couch both nights that he stayed there. On his second night at the house, R.F. and her mother also slept in the living room—R.F. on a loveseat and her mother in a recliner. In addition, three other children staying at the house that night slept on the living room floor on a pallet.

That night, after R.F. and the other children had gone to sleep in the living room, Ms. Menchaca walked into the living room and noticed Throneberry standing by the loveseat where R.F. was

sleeping. He had his hand under R.F.'s blanket. Throneberry claimed to be looking for a DVD, and Ms. Menchaca warned him to stay away from the children. Ms. Menchaca testified that R.F's mother was asleep in the recliner when this took place.[2]

The next morning, August 16, 2015, R.F. awoke to find Throneberry standing at the end of the loveseat by her feet. R.F. fell back asleep and when she awoke the second time, Throneberry was still standing by the loveseat. R.F. again fell asleep, but when she awoke the third time, her leg was raised. R.F. tried to lower it, but Throneberry raised it back up. This happened four separate times. Throneberry then put his hand inside R.F.'s shorts and placed his fingers inside her vagina. Fearful Throneberry would hurt her, R.F. initially pretended to be asleep. However, wanting him to stop, R.F. began moving around and managed to roll over to her side. Throneberry stopped when this occurred and ran to the bathroom.

R.F. quickly got up and retrieved her iPad after Throneberry went into the bathroom. When he came out of the bathroom, Throneberry asked R.F. if she was playing her favorite game and then

[2] Ms. Menchaca testified this took place around 11 p.m. Ms. Faudoa, however, testified that she stayed up until three or four in the morning talking with Throneberry.

asked if she wanted some gum. R.F. answered affirmatively and then tried to wake her mother by asking her to start the water in the shower. R.F. was hoping her mother would accompany her to the bathroom so R.F. could lock the bathroom door and tell her what happened. However, her mother, a heavy sleeper due to taking pain medication and a sleeping pill, directed R.F. to turn the water on herself.

After R.F. took a shower, she returned to the living room and Throneberry was gone. R.F's mother told her that Throneberry had gone to church. R.F. then told her mother what Throneberry had done to her. Missy and the Menchacas were awakened, and the police were called. R.F. was taken to Children's Hospital later that morning where she was examined by a member of the child protection team. She was subsequently interviewed by Kara Marts, a forensic interviewer at the CARE Center, on August 24, 2015.

ANALYSIS

Proposition I. Throneberry challenges the testimony of Gloria Faudoa concerning her daughter R.F.'s demeanor and mental condition after the alleged sexual abuse occurred. Throneberry argues this evidence amounted to improper victim impact evidence.

The admission of evidence lies within the sound discretion of the trial court and when the issue is properly preserved for appellate review we will not disturb the trial court's decision absent an abuse of discretion. *Coddington v. State*, 2011 OK CR 17, ¶ 65, 254 P.3d 684, 710. The record shows, however, that Throneberry failed to object at trial to the now challenged testimony. He has thus waived review of this alleged error for all but plain error. *Williamson v. State*, 2018 OK CR 15, ¶ 12, 422 P.3d 752, 757; *Davis v. State*, 2018 OK CR 7, ¶ 14, 419 P.3d 271, 278.

"To be entitled to relief under the plain error doctrine, [Throneberry] must show the existence of an actual error (i.e., deviation from a legal rule), that is plain or obvious, and that affects his substantial rights, meaning the error affected the outcome of the proceeding." *Musonda v. State*, 2019 OK CR 1, ¶ 6, 435 P.3d 694, 696. If these elements are met, plain error will only be corrected "if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice." *Id.*; *Baird v. State*, 2017 OK CR 16, ¶ 25, 400 P.3d 875, 883.

Upon review, we find no error, plain or otherwise, surrounding the admission of the challenged testimony of Faudoa. Evidence

concerning changes in R.F.'s demeanor and mental condition after the sexual abuse was relevant to counter the defense's theory that R.F. was lying and supported R.F.'s credibility. *See Frederick v. State*, 2001 OK CR 34, ¶ 94, 37 P.3d 908, 934 (finding no improper victim impact evidence, *per se*, was introduced as the evidence alleged to be victim impact evidence was admitted for other relevant purposes). Moreover, the relevance of this evidence was not substantially outweighed by the danger of unfair prejudice. 12 O.S.2011, §§ 2401, 2403. Proposition I is thus denied.

Proposition II. Throneberry challenges the trial court's admission of D.W.'s testimony regarding Throneberry's sexual abuse of her when she was seven years old. The trial court admitted D.W.'s testimony as sexual propensity evidence pursuant to 12 O.S.2011, § 2414.[3] Throneberry asserts the trial court's admission of D.W.'s testimony was more prejudicial than probative. Throneberry specifically contends the challenged propensity evidence was more prejudicial than probative because (1) the circumstances of D.W.'s

[3] The trial court additionally found D.W.'s testimony was admissible pursuant to 12 O.S.2011, § 2404(B) as other crimes evidence showing a common scheme. Throneberry's claim, however, focuses on the trial court's admission of D.W.'s testimony as propensity evidence.

abuse were different from those of R.F.; (2) D.W.'s testimony was presented prior to that of R.F.; and (3) the presentation of D.W.'s testimony precluded the jury from finding in the sentencing phase of trial that Throneberry had no prior lewd molestation conviction.

Throneberry's failure to make an objection during trial to the challenged propensity evidence limits our review to that of only plain error.[4] *Brewer v. State*, 2019 OK CR 23, ¶ 4, 450 P.3d 969, 971. Throneberry fails to meet his heavy burden of demonstrating plain error on appeal. *See Lamar v. State*, 2018 OK CR 8, ¶ 41, 419 P.3d 283, 294 (appellant has "the heavy burden of demonstrating plain error" on appeal) (quoting *Stewart v. State*, 2016 OK CR 9, ¶ 27, 372 P.3d 508, 514).

Title 12 O.S.2011, § 2414 provides for admission of propensity evidence in child molestation cases. Propensity evidence "is admissible, and may be considered for its bearing on any matter to

[4] While Appellant objected to D.W.'s testimony at the close of the pre-trial hearing regarding its admissibility, he failed to renew his objection to the evidence at the time it was presented to the jury. *See Lowery v. State*, 2008 OK CR 26, ¶ 9, 192 P.3d 1264, 1268 (reviewing for plain error where defense counsel challenged the evidence during a hearing, but "failed to renew his objection at the time it was actually offered at trial").

which it is relevant." 12 O.S.2011, § 2414. As we recently discussed in *Brewer*:

> In determining the relevance of propensity evidence, trial courts should consider the following factors: 1) how clearly the prior act has been proved; 2) how probative the evidence is of the material fact it is admitted to prove; 3) how seriously disputed the material fact is; and 4) whether the government can avail itself of any less prejudicial evidence. In addition, when analyzing the dangers of admitting propensity evidence trial courts should consider: 1) how likely is it such evidence will contribute to an improperly based jury verdict; and 2) the extent to which such evidence will distract the jury from the central issues of the trial. Trial courts may consider other relevant matters, including the credibility of the accuser in the other act, and must ensure that the other acts are shown by clear and convincing evidence.

Id., 2019 OK CR 23, ¶ 6 (internal citations and quotations marks omitted).

In the present case, the trial court properly held a pre-trial hearing to address the admissibility of D.W.'s testimony pursuant to 12 O.S.2011, § 2414. *Horn v. State*, 2009 OK CR 7, ¶ 40, 204 P.3d 777, 786 ("If the defense raises an objection to the admission of the propensity evidence, the trial court should hold a hearing, preferably pre-trial, and make a record of its findings[.]"). D.W. testified at the hearing. In addition, the State introduced evidence of Throneberry's lewd molestation conviction that stemmed from his sexual abuse of

D.W.[5] At the conclusion of the hearing, the trial court found Throneberry's prior sexual abuse of D.W. had been shown by clear and convincing evidence. The trial court further found D.W.'s testimony was "very probative" and the "probative value of admitting this evidence [was] not substantially outweighed by the danger of unfair prejudice[.]" In addition, the trial court found that D.W.'s testimony was admissible pursuant to 12 O.S.2011, § 2404(B) as the evidence "show[ed] both a common scheme and would show an identity relationship[.]"

Upon review, we find the trial court committed no error, plain or otherwise, in finding the challenged propensity evidence admissible based on the clear and convincing evidence set forth by the State. Moreover, giving the challenged evidence its maximum probative force and minimum reasonable prejudicial value, the probative value of the propensity testimony was not substantially outweighed by the danger of unfair prejudice. *See Welch v. State*, 2000 OK CR 8, ¶ 14, 2 P.3d 356, 367 ("When balancing the relevancy of evidence against its prejudicial effect, the trial court should give the evidence its

[5] Throneberry was convicted on a plea of guilty to this offense.

maximum reasonable probative force and its minimum reasonable prejudicial value.").

Contrary to Throneberry's assertion on appeal, the similarities between this case and the circumstances of D.W.'s abuse are significant and include: D.W. and R.F. were roughly the same age when the abuse occurred; Throneberry was a "friend" of both girls' families and managed to stay overnight with them; he watched both victims as they slept before he actually abused them; and sexual abuse of both victims involved Throneberry placing his hand inside their clothing and inserting his fingers into their vaginas. These similarities reveal a method of operation common with both victims and are probative and indicative that R.F. did not fabricate the sexual abuse committed upon her. *See Brewer*, 2019 OK CR 23, ¶ 9.

We further reject Throneberry's claim that R.F.'s testimony was improperly bolstered by the fact that the jury heard D.W.'s testimony before hearing that of R.F. D.W. was the State's first witness at trial. Because D.W. testified before the jury had a chance to evaluate R.F.'s credibility, Throneberry argues the State in effect bolstered the credibility of R.F. Throneberry's argument is purely speculative and conclusory. Moreover, he provides this Court with no authority in

support of this contention. This argument is thus so inadequately developed on appeal as to be waived from our review. Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019) (requiring argument in support of a proposition of error supported by citations to the authorities, statutes and parts of the record).

Throneberry likewise fails to provide legal authority to support his argument that admission of the challenged propensity evidence precluded the jury from finding during the sentencing phase of trial that he did not have a prior felony conviction for lewd molestation.[6] Throneberry has therefore waived review of this claim. Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019).

Having found no error, plain or otherwise, occurred, Proposition II is denied.

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[6] Notably, D.W. never testified that Throneberry was charged with any crime or that he had a felony conviction stemming from his abuse of her. Moreover, the jury was properly instructed pursuant to OUJI-CR (2d) No. 10-21 that "[t]he law presumes that the defendant has NOT been previously convicted" and that the jury "may consider the previous conviction only if the State has proved [the alleged conviction] beyond a reasonable doubt[.]" (O.R. 188). "Juries are presumed to follow their instructions." *Sanders v. State*, 2015 OK CR 11, ¶ 15, 358 P.3d 280, 285.

Proposition III. Throneberry challenges the enhancement of his sentence pursuant to 21 O.S.2011, § 51.1a. He argues on appeal that his sentence should have been enhanced pursuant to 21 O.S.Supp.2013, § 1123(A)—the statutory provision under which he was charged.

Throneberry did not raise this specific legal ground in his argument to the trial court.[7] Our review on appeal is thus limited to plain error. *See Tafolla v. State*, 2019 OK CR 15, ¶ 18, 446 P.3d 1248, 1258. We find no error, plain or otherwise, occurred.

Section 51.1a, enacted in 2002, provides:

> Any person convicted of rape in the first degree, forcible sodomy, lewd molestation or sexual abuse of a child after having been convicted of either rape in the first degree, forcible sodomy, lewd molestation or sexual abuse of a child shall be sentenced to life without parole.

By contrast, Section 1123(A), as amended in 2013, provides in pertinent part:

> ***Except as provided in Section 51.1a of this title,*** any person convicted of a second or subsequent violation of this subsection shall be guilty of a felony punishable as provided in this subsection and shall not be eligible for probation, suspended or deferred sentence.

[7] Throneberry challenged the constitutionality of Section 51.1a at trial, but did not object based upon the argument he presents here.

(emphasis added). The phrase "[e]xcept as provided in Section 51.1a of this title" was added in 2013, and specifically directs the State to Section 51.1a for punishment enhancement in cases where the defendant is a repeat violator of Section 1123(A).

There can never be a situation where Section 51.1a does not apply if a defendant's current and prior convictions are both for the lewd and/or indecent acts proscribed by Section 1123(A) (as opposed to the lewd and indecent proposals also proscribed by Section 1123(A)). Thus, with regard to these offenses, the enhancement provisions of Sections 1123(A) and 51.1a are irreconcilable, and the later-enacted statute controls. 75 O.S.2011, § 22;[8] *State v. District Court of Oklahoma County*, 2007 OK CR 3, ¶ 18, 154 P.3d 84, 87-88 (finding where reconciliation of two statutes is unfeasible, the later enacted statute controls).

The 2013 amendment to Section 1123 was the latest enactment and expresses the Legislature's current intention, i.e., that

[8] Section 22 provides:

> If the provisions of any code, title, chapter or article conflict with or contravene the provisions of any former code, title, chapter or article, the provisions of the latter code, title, chapter or article must prevail as to all matter and questions arising thereunder out of the same subject matter.

punishment enhancement for repeat offenders of Section 1123 be pursuant to Section 51.1a. Throneberry's sentence was thus properly enhanced. Proposition III is denied.

Proposition IV. At the conclusion of the sentencing stage of trial, the jury was instructed that Throneberry's punishment must be set at life without the possibility of parole if they found Throneberry had previously been convicted of lewd molestation. The jury was further instructed that they could impose a fine not exceeding $10,000.00.[9] Throneberry objected to this instruction arguing that Section 51.1a violates due process as it precludes the jury from determining punishment in violation of *Hicks v. Oklahoma*, 447 U.S. 343, 100 S. Ct. 2227 (1980). Throneberry reasserts this claim on appeal.

Throneberry's reliance on *Hicks* is misplaced. As this Court observed in *Swart v. State*:

> *Hicks* did not establish a constitutional right to a jury's assessment of punishment; rather, *Hicks* states that due process is offended if an accused is arbitrarily deprived of a right granted by state statute. *Id.*[, 447 U.S.] at 346, 100 S. Ct. at 2229. "[T]he extent of [an] appellant's

[9] The jury was also instructed that if they found Throneberry had no prior lewd molestation conviction, the punishment range was not less than twenty-five years nor more than life imprisonment and that they could impose a fine not to exceed $10,000.00.

> constitutional right to be sentenced by a jury turns on the extent to which the Oklahoma state legislature has created such a right." *Drennon v. Hess*, 642 F.2d 1204, 1205 (10th Cir.1981). The decision whether to establish, expand, or limit such a statutorily created right is purely within the authority of the Legislature. It is only when such a right has been established by the Legislature, and then is subsequently abrogated in an improper manner by state officials, that federal due process is offended. *Accord Drennon v. Hess, supra.*

Swart v. State, 1986 OK CR 92, ¶ 7, 720 P.2d 1265, 1268 (internal footnote omitted).

Sentencing in Oklahoma is a matter of statute. Oklahoma's statutory right to jury sentencing lies in 22 O.S.2011, § 926.1.[10] *Luna v. State*, 2016 OK CR 27, ¶ 17, 387 P.3d 956, 961 ("Jury sentencing is a statutory right in Oklahoma."); *see also Clemons v. Mississippi*, 494 U.S. 738, 746, 110 S. Ct. 1441, 1447 (1990) (There is no federal constitutional right to jury sentencing under the Sixth Amendment). Moreover, just as the right to jury sentencing in Oklahoma was legislatively created, "[t]he matter of defining crimes and fixing the

[10] Title 22 O.S.2011, § 926.1 provides:

> In all cases of a verdict of conviction for any offense against any of the laws of the State of Oklahoma, the jury may, and shall upon the request of the defendant assess and declare the punishment in their verdict within the limitations fixed by law, and the court shall render a judgment according to such verdict, except as hereinafter provided.

degrees of punishment is one of legislative power." *Salyers v. State*, 1988 OK CR 88, ¶ 7, 755 P.2d 97, 100. *See also Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149 ("Legislatures, not courts, define punishment."). It thus stands to reason that the Legislature has the authority to constrict a defendant's statutorily created right to jury sentencing through the sentencing scheme it promulgates. *Swart*, 1986 OK CR 92, ¶ 7, 720 P.2d at 1268.

As to the punishment for a second conviction under 21 O.S.Supp.2013, § 1123, the Legislature, by directing punishment enhancement pursuant to 21 O.S.2011, § 51.1a, has confined the scope of punishment to a sentence of life without parole. And in doing so, the Legislature decidedly limited Throneberry's statutory right to be sentenced by a jury. Therefore, as Throneberry's statutory right to jury sentencing was not abrogated in any manner, no due process violation occurred. Proposition IV is denied.

Propositions V and VI. In his final two propositions of error, Throneberry further challenges his mandatory life without parole sentence arguing his sentence violates the Eighth Amendment as it is: (1) grossly disproportionate to the crime that was committed; and (2) excessive.

The concept of proportionality is central to both Throneberry's claims. In Proposition V, Throneberry specifically argues Section 51.1a erroneously removed all discretion from the jury and the court to set a proportionate sentence considering the facts and the circumstances of each particular case. He thus contends this lack of discretion renders his sentence unconstitutional. He expands upon this argument further in Proposition VI, arguing that Oklahoma's "shock the conscience" standard falls short of the proportionality review guaranteed by the Eighth Amendment and the Supreme Court in *Solem v. Helm*, 463 U.S. 277, 289, 103 S. Ct. 3001 (1983).

This Court has not previously addressed a claim that Section 51.1a violates the Eighth Amendment. For the reasons set forth below, we find Throneberry's mandatory life without parole sentence pursuant to Section 51.1a is not violative of the Eighth Amendment. While his sentence is severe, it is not "grossly disproportionate" to the crime. Nor does it "shock the conscience" of this Court.

"The Eighth Amendment . . . contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'" *Ewing v. California*, 538 U.S. 11, 20, 123 S. Ct. 1179, 1185 (2003) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 996-997, 111 S. Ct. 2680 (1991) (Kennedy,

J., concurring in part and concurring in judgment)). It "does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin*, 501 U.S. at 1001, 111 S. Ct. at 2705. In addition, the Supreme Court has not extended the line requiring "individualized sentencing" beyond capital cases. *Harmelin*, 501 U.S. at 996, 111 S. Ct. at 2702; *see also Lockett v. Ohio*, 438 U.S. 586, 602, 98 S. Ct. 2954, 2963 (1978). Mandatory sentences in noncapital cases are therefore constitutionally permissible. *Dodd v. State*, 1994 OK CR 51, ¶ 13, 879 P.2d 822, 826 (citing *Harmelin*, 501 U.S. at 994-95, 111 S. Ct. at 2701 ("mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history")).

Moreover, as noted *supra*, "the length of the sentence actually imposed is purely a matter of legislative prerogative."[11] *Rummel v. Estelle*, 445 U.S. 263, 274, 100 S. Ct. 1133, 1139 (1980). *See also Rea*, 2001 OK CR 28, ¶ 5, 34 P.3d at 149 ("Legislatures, not courts,

[11] An Eighth Amendment principle of "gross proportionality" would come into play, however, in extraordinary cases. *Rummel v. Estelle*, 445 U.S. 263, 274 n.11, 100 S. Ct. 1133, 1139 n.11; *see also Lockyer v. Andrade*, 538 U.S. 63, 77, 123 S. Ct. 1166 (2003) ("gross proportionality" principle "reserves a constitutional violation for only the extraordinary cases.").

define punishment."). The Supreme Court has repeatedly emphasized the importance of judicial deference to legislative policy choices. *Ewing*, 538 U.S. at 23, 123 S. Ct. at 1186-87; *Harmelin*, 501 U.S. at 998-99, 111 S. Ct. at 2703-04 (Kennedy, J., concurring in part and concurring in the judgment); *Rummel*, 445 U.S. at 274-75, 100 S. Ct. at 1139-1140. *See also Applegate v. State*, 1995 OK CR 49, ¶ 9, 904 P.2d 130, 134. With specific regard to recidivist statutes, the Supreme Court has recognized that states have a "public-safety interest in incapacitating and deterring recidivist felons[.]" *Ewing*, 538 U.S. at 29, 123 S. Ct. at 1190. *See also Rummel*, 445 U.S. at 278, 100 S. Ct. at 1141 (recidivist statutes are "a societal decision that when [a prior felon] commits yet another felony, he should be subjected to the admittedly serious penalty").

While life without parole is a severe penalty, this Court has upheld similar sentences for drug offenses. *See Ott v. State*, 1998 OK CR 51, ¶ 12, 967 P.2d 472, 477; *Dodd*, 1994 OK CR 51, ¶ 12–17, 879 P.2d at 826–27. Moreover, through its enactment of enhancement provisions over the years, the Oklahoma Legislature has clearly indicated a "particular intent to protect children" from sexual abuse. *Applegate*, 1995 OK CR 49, ¶ 9, 904 P.2d at 134; *see also* 21

O.S.Supp.1992, § 1123(A); 21 O.S.Supp.2002, § 51.1a; 21 O.S.2013, § 1123 (directing enhancement pursuant to Section 51.1a when the defendant has a prior lewd molestation conviction). We cannot find that the Oklahoma Legislature was unreasonable when it set the punishment at life without parole for second time offenders of certain enumerated sexual offenses. 21 O.S.2011, § 51.1.a. *See McKune v. Lile*, 536 U.S. 24, 32, 122 S. Ct. 2017, 2024 (2002) (plurality opinion) ("Sex offenders are a serious threat in this Nation.").

Moreover, upon review, we find this is not one of the rare "extraordinary" cases in which relief based upon gross disproportionality is warranted. *See Maxwell v. State*, 1989 OK CR 22, ¶ 11, 775 P.2d 818, 820 (rejecting "proportionality" review for sentences *except* in "cases involving life sentences without the possibility of parole"). The crime of Lewd Acts with a Child under 16 is an extremely serious offense. Throneberry, thirty-eight years old at the time of this offense, is a repeat child molester, i.e., a child sexual predator. Through his recidivism—his second offense being essentially a replication of his previous lewd molestation offense—he has demonstrated that he poses a grave risk to children. *See United States v. Kebodeaux*, 570 U.S. 387, 395-96, 133 S. Ct. 2496, 2503–

2504 (2013) ("recidivism rates among sex offenders are higher than the average for other types of criminals"); *McKune*, 536 U.S. at 33, 122 S. Ct. at 2024 (sex offenders are "much more likely than any other type of offender to be rearrested for a new rape or sexual assault."). Moreover, Throneberry's targeted victims were young, vulnerable girls. D.W. was seven years old when Throneberry molested her and R.F. was eight years old. All things considered, Throneberry's sentence is not "grossly disproportionate" to the crime he committed. Nor does his sentence shock the conscience of this Court. *See Baird*, 2017 OK CR 16, ¶ 40, 400 P.3d at 886 ("This Court will not modify a sentence within the statutory range unless, considering all the facts and circumstances, it shocks our conscience."); *Rea*, 2001 OK CR 28, ¶ 5, 34 P.3d at 149 (declining to abandon our "shock the conscience" standard of sentence review in favor of a "proportionality" standard on the basis that "[l]egislatures, not courts, define punishment"). Propositions V and VI are thus denied.

DECISION

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. (2020), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE TIMOTHY R. HENDERSON, DISTRICT JUDGE

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OPINION BY: HUDSON, J.
LEWIS, P.J.: SPECIALLY CONCUR
KUEHN, V.P.J.: CONCUR
LUMPKIN, J.: SPECIALLY CONCUR
ROWLAND, J.: CONCUR

LEWIS, PRESIDING JUDGE, SPECIALLY CONCURRING:

I concur in the Court's conclusion that Appellant's sentence for lewd acts with a child in violation of 21 O.S.Supp.2013, section 1123(A), after a former conviction of lewd acts with a child, was properly enhanced to the mandatory life without parole provided by 21 O.S.2011, section 51.1a. I also agree that the distinct crimes of lewd or indecent *proposals or enticements* to children (hereafter, just lewd or indecent proposals)—the crimes defined at sections 1123 (A)(1) and (A)(3)—are at least sometimes subject to different sentencing treatment than the lewd or indecent *acts* prohibited in sections 1123(A)(2), (A)(4), and (A)(5).

This interpretive insight makes sense of the Legislature's use of the phrase "lewd molestation" in both the "85% Rule" and 21 O.S.2011, section 51.1a, and points us toward a proper understanding of the formidable penalty clauses of section 1123(A) itself. I do not join the majority's conclusion that section 1123(A)'s penalty provisions are irreconcilable with either section 51.1a or other applicable sentencing statutes. The Court can derive the correct penalties from this statute by recognizing that phrases like

"second or subsequent violation" and "third or subsequent violation" carry no fixed legislative meaning, and should (if possible) be interpreted within the context of the relevant sentencing statutes as a whole.

The enhanced penalty provisions of section 1123(A)[1] must be read not only in context with the proviso, "Except as provided in

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[1] The entire penalty provision in section 1123(A) reads as follows, with the language most pertinent to this discussion in boldface type:

> Any person convicted of any violation of this subsection shall be punished by imprisonment in the custody of the Department of Corrections **for not less than three (3) years nor more than twenty (20) years, except when the child is under twelve (12) years of age** at the time the offense is committed, and in such case the person shall, upon conviction, be punished by imprisonment in the custody of the Department of Corrections **for not less than twenty-five (25) years**. The provisions of this subsection shall not apply unless the accused is at least three (3) years older than the victim, except when accomplished by the use of force or fear. **Except as provided in Section 51.1a of this title**, any person convicted of **a second or subsequent violation of this subsection** shall be guilty of a felony **punishable as provided in this subsection** and **shall not be eligible for probation, suspended or deferred sentence. Except as provided in Section 51.1a of this title**, any person convicted of **a third or subsequent violation of this subsection** shall be guilty of a felony punishable by imprisonment in the custody of the Department of Corrections **for a term of life or life without parole**, in the discretion of the jury, or in case the jury fails or refuses to fix punishment then the same shall be pronounced by the court. Any person convicted of a violation of this subsection **after having been twice convicted of a violation of subsection A of Section 1114 of this title, Section 888 of this title, sexual abuse of a child pursuant to Section 843.5 of this**

Section 51.1a of this title," but also with a view to their effects on the general enhancement statutes for violent felony offenders in sections 51.1(A)(1) and 51.1(B).[2] Considered as a whole, these provisions set forth a coherent set of specific enhancements for specific violations of section 1123 by specific kinds of offenders.

"Lewd molestation," (lewd or indecent *acts* with a child) is defined *by name* as an 85% crime;[3] and when committed after even *one* conviction of a sex crime enumerated in section 51.1a (first degree rape, forcible sodomy, lewd molestation, or sexual abuse of a child) carries a *mandatory* term of life without parole. In this light, section 1123(A)'s reference to a "second or subsequent violation of this subsection" clearly does *not* refer to a second or third conviction

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> **title, or of any attempt to commit any of these offenses or any combination of convictions pursuant to these sections** shall be punished by imprisonment in the custody of the Department of Corrections **for a term of life or life without parole.**

[2] Under 57 O.S.2011, section 571, both "lewd or indecent proposition" and "lewd or indecent act" with a child under sixteen are "violent" offenses, and thus *are* subject to enhancement under the general provisions of 21 O.S.2011, sections 51.1(A)(1) and (B), in the absence of the more specific penalty enhancements sometimes provided in section 1123(A).

[3] 21 O.S.Supp.2019, § 13.1(18).

of *lewd molestation*. Such a reading would be absurd in light of section 51.1a.

Section 1123(A) instead uses the phrases "second or subsequent violation of this subsection" and "third or subsequent violation of this subsection," to mean certain violations of section 1123(A) committed after former conviction of either one, or two or more, *non-51.1a* felonies. Thus, a conviction of lewd molestation *or* lewd or indecent proposal after *one* former non-51.1a felony conviction is punishable "as provided in this subsection," by applying the general enhancement for a second, violent felony conviction provided by section 51.1(A)(1).[4] The enhanced penalty range is thus

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[4] This reading gives consistent effect to, rather than creating conflict with, 21 O.S.Supp.2019, section 51.1(A)(1), which says, in pertinent part:

> *[E]very person* who, having been convicted of any felony, commits any crime after such conviction, within ten (10) years of the date following the completion of the execution of the sentence . . . is punishable therefor as follows:
>
> 1. If the offense for which the person is subsequently convicted is an offense enumerated in Section 571 of Title 57 of the Oklahoma Statutes and the offense is punishable by imprisonment in the custody of the Department of Corrections for a term exceeding five (5) years, such person is punishable by imprisonment in the custody of the Department of Corrections for a term in the range of ten (10) years to life imprisonment (emphasis added).

10 years to life imprisonment, with the added proviso from section 1123(A) that such a sentence "shall not be eligible for probation, suspended, or deferred sentence."

The remaining provisions of section 1123(A) thereafter treat lewd molestation and lewd or indecent proposals *differently* in understandable ways. A "third or subsequent violation" of section 1123(A) is best understood as a conviction for *lewd molestation* after two or more prior *non-51.1a* convictions, and is made punishable by "life or life without parole," an understandably harsher increase from the general enhancement range (20 years to life) for a third, violent felony offense under section 51.1(B).[5]

But why read the phrase "third or subsequent violation" as limited to *lewd molestations* committed by twice-convicted felons?

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[5] 21 O.S.Supp.2019, section 51.1(B) provides, in pertinent part:

> Every person who, *having been twice convicted of felony offenses*, commits a subsequent felony offense which is an offense enumerated in Section 571 of Title 57 of the Oklahoma Statutes, within ten (10) years of the date following the completion of the execution of the sentence, and against whom the district attorney seeks to enhance punishment pursuant to this section of law, is punishable by imprisonment in the custody of the Department of Corrections for a term in the range of twenty (20) years to life imprisonment (emphasis added).

Because this construction permits sensible application of the otherwise somewhat perplexing *final* sentence of section 1123(A), which provides, in pertinent part:

> Any person convicted of *a violation of this subsection* after having been twice convicted of a violation of subsection A of Section 1114 of this title **[that is, first degree rape]**, Section 888 of this title **[that is, forcible sodomy]**, **sexual abuse of a child** pursuant to Section 843.5 of this title, or of any attempt to commit any of these offenses or **any combination of convictions** pursuant to these sections shall be punished by . . . life or life without parole (emphasis added).

By process of elimination, the "violation of this subsection" mentioned in this sentence *cannot* mean lewd molestation after two former convictions (or combinations of convictions) of first degree rape, forcible sodomy, or sexual abuse: *That* crime is already punishable (after even *one* prior conviction of these enumerated types) by a mandatory life without parole in section 51.1a.

Nor can it mean lewd molestation *or* lewd or indecent proposal after two or more prior, ordinary felony convictions. The former (lewd molestation) is a "third or subsequent violation" already punishable by "life or life without parole" in the earlier text. The latter (lewd or indecent proposal), by inference, remains punishable at 20 years to

life under section 51.1(B), so that this final sentence can be given *its intended effect*: punishing a lewd or indecent *proposal* by someone twice-convicted of these enumerated *sex* crimes with life or life without parole.

The specific "violation of this subsection" in this last sentence therefore means the crime of *lewd or indecent proposal,* when committed after two or more convictions of *any combination* of first degree rape, forcible sodomy, or sexual abuse; and is here made punishable by "life or life without parole." With this reading, we effect the Legislature's understandable intent to provide a *minimum* of life, or life without parole, rather than the general range of 20 years to life that would otherwise apply under section 51.1(B).

This construction gives full effect to the express penalty provisions in section 1123(A), producing a matrix of penalties logically consistent with distinctions made elsewhere by the Legislature between lewd molestation and lewd or indecent proposal, to wit:

- Lewd molestation, in violation of § 1123(A)(2), (4), (5)
  - unenhanced: 3 to 20 years;
  - victim under 12: not less than 25 years;

- after a former enumerated *51.1a* conviction: life without parole;
- after 1 former *non-51.1a* felony conviction: 10 years to life;
- after 2 or more former *non-51.1a* felony convictions: life, or life without parole.

- Lewd or indecent proposal, in violation of § 1123(A)(1), (3)
  - unenhanced: 3 to 20 years;
  - victim under 12: not less than 25 years;
  - after 1 former felony conviction: 10 years to life;
  - after 2 or more felony convictions: 20 years to life;
  - after 2 or more convictions (or combination of convictions) of first degree rape, forcible sodomy, or sexual abuse: life, or life without parole.

In this way, the sentencing provisions of section 1123(A) can be applied in conjunction with other relevant sentence enhancement provisions in sections 51.1a, 51.1(A)(1), and 51.1(B).

LUMPKIN, JUDGE: SPECIALLY CONCUR

I concur in affirming the Judgment and Sentence. However, I write separately to emphasize that this Court does not engage in a proportionality review of sentences recommended by juries and imposed by judges. As we explained in *Rea v. State*, 2001 OK CR 28, 34 P.3d 148:

> the "preeminent requirement" in fashioning proper appellate review of sentences is to respect and give purpose to the sentencing scheme promulgated by the legislature. Legislatures, not courts, define punishment. . . . Oklahoma law permits the sentencing body (judge or jury) to impose a sentence anywhere within a specified statutory range. Given that our state legislature has afforded such broad discretion to the sentencer, our "shock the conscience" standard provides an appropriate scope of review.

2001 OK CR 28, ¶ 5, 34 P.3d at 149 (internal citations omitted).

The opinion recognizes the rare case where the Eighth Amendment principle of "gross proportionality" would be at issue. However, we must remember such cases are extremely exceptional, "hen's-teeth" rare, and such a proportionality review is not applicable in the average case.

Appendix B

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due
USCA CONST Amend. V full text United States Code Annotated Constitution of the United States *(Approx. 2 pages)*

United States Code Annotated
Constitution of the United States
Annotated
Amendment V. Grand Jury; Double Jeopardy; Self-Incrimination; Due Process; Takings

U.S.C.A. Const. Amend. V full text

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Takings without Just Compensation

Currentness

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<Historical notes and references are included in the full text document for this amendment.>
<For Notes of Decisions, see separate documents for clauses of this amendment:>
<USCA Const. Amend. V--Grand Jury clause>
<USCA Const. Amend. V--Double Jeopardy clause>
<USCA Const. Amend. V--Self-Incrimination clause>
<USCA Const. Amend. V-- Due Process clause>
<USCA Const. Amend. V--Takings clause>

HISTORICAL NOTES

Proposal and Ratification

The first ten amendments to the Constitution were proposed to the Legislatures of the several states by the First Congress on September 25, 1789, and were ratified on

December 15, 1791. For the states which ratified these amendments, and the dates of ratification, see Historical Notes under Amendment I.

U.S.C.A. Const. Amend. V full text, USCA CONST Amend. V full text
Current through P.L. 116-91. Some statute sections may be more current, see credits for details.

End of Document

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTEC

USCA CONST Amend. XIV-Full Text United States Code Annotated Constitution of the United States *(Approx. 2 pages)*

United States Code Annotated
Constitution of the United States
Annotated
Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

U.S.C.A. Const. Amend. XIV-Full Text

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Currentness

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or

judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<Section 1 of this amendment is further displayed in separate documents according to subject matter,>

<see USCA Const Amend. XIV, § 1-Citizens>

<see USCA Const Amend. XIV, § 1-Privileges>

<see USCA Const Amend. XIV, § 1-Due Proc>

<see USCA Const Amend. XIV, § 1-Equal Protect>

<sections 2 to 5 of this amendment are displayed as separate documents,>

<see USCA Const Amend. XIV, § 2,>

<see USCA Const Amend. XIV, § 3,>

<see USCA Const Amend. XIV, § 4,>

<see USCA Const Amend. XIV, § 5,>

HISTORICAL NOTES

Proposal and Ratification

This amendment was proposed to the legislatures of the several States by the Thirty-ninth Congress, on June 13, 1866. On July 21, 1868, Congress adopted and transmitted to the Department of State a concurrent resolution, declaring that "the legislatures of the States of Connecticut, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, New Hampshire, Massachusetts, Nebraska, Iowa, Arkansas, Florida, North Carolina, Alabama, South Carolina, and Louisiana, being three-fourths and more of the several States of the Union, have ratified the fourteenth article of amendment to the Constitution of the United States,

duly proposed by two-thirds of each House of the Thirty-ninth Congress: Therefore, Resolved, That said fourteenth article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State." The Secretary of State accordingly issued a proclamation, dated July 28, 1868, declaring that the proposed fourteenth amendment had been ratified by the legislatures of thirty of the thirty-six States. The amendment was ratified by the State Legislatures on the following dates: Connecticut, June 25, 1866; New Hampshire, July 6, 1866; Tennessee, July 19, 1866; New Jersey, Sept. 11, 1866; Oregon, Sept. 19, 1866; Vermont, Oct. 30, 1866; Ohio, Jan. 11, 1867; New York, Jan. 10, 1867; Kansas, Jan. 11, 1867; Illinois, Jan. 15, 1867; West Virginia, Jan. 16, 1867; Michigan, Jan. 16, 1867; Minnesota, Jan. 16, 1867; Maine, Jan. 19, 1867; Nevada, Jan. 22, 1867; Indiana, Jan. 23, 1867; Missouri, Jan. 25, 1867; Rhode Island, Feb. 7, 1867; Wisconsin, Feb. 7, 1867; Pennsylvania, Feb. 12, 1867; Massachusetts, Mar. 20, 1867; Nebraska, June 15, 1867; Iowa, Mar. 16, 1868; Arkansas, Apr. 6, 1868; Florida, June 9, 1868; North Carolina, July 4, 1868; Louisiana, July 9, 1868; South Carolina, July 9, 1868; Alabama, July 13, 1868; Georgia, July 21, 1868. Subsequent to the proclamation the following States ratified this amendment: Virginia, Oct. 8, 1869; Mississippi, Jan. 17, 1870; Texas, Feb. 18, 1870; Delaware, Feb. 12, 1901; Maryland, Apr. 4, 1959; California, May 6, 1959; and Kentucky, Mar. 18, 1976.

The Fourteenth Amendment originally was rejected by Delaware, Georgia, Louisiana, North Carolina, South Carolina, Texas and Virginia. However, the State Legislatures of the aforesaid States subsequently ratified the amendment on the dates set forth in the preceding paragraph. Kentucky and Maryland rejected this amendment on Jan. 10, 1867 and Mar. 23, 1867, respectively.

The States of New Jersey, Ohio and Oregon "withdrew" their consent to the ratification of this amendment on Mar. 24, 1868, Jan. 15, 1868, and Oct. 16, 1868, respectively.

The State of New Jersey expressed support for this amendment on Nov. 12, 1980.

Ohio and Oregon reratified the amendment on March 12, 2003, and April 25, 1973, respectively.

U.S.C.A. Const. Amend. XIV-Full Text, USCA CONST Amend. XIV-Full Text
Current through P.L. 116-91. Some statute sections may be more current, see credits for details.

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§ 1123. Lewd or indecent proposals or acts as ... § 1123. Lewd or indecent proposals or acts as ... https://nextcorrectional.westlaw.com/Docume...

§ 1123. Lewd or indecent proposals or acts as to child under 16 or person believed to be under 16--Sexual batte
OK ST T. 21 § 1123 Oklahoma Statutes Annotated Title 21. Crimes and Punishments Effective: November 1, 2018

Oklahoma Statutes Annotated
Title 21. Crimes and **Punishments**
Part IV. Crimes Against Public Decency and Morality
Chapter 45. Rape, Abduction, Carnal Abuse of Children and Seduction

Effective: November 1, 2018

21 Okl.St.Ann. § 1123

§ 1123. Lewd or indecent proposals or acts as to child under 16 or person believed to be under 16--Sexual battery

Currentness

A. It is a felony for any person to knowingly and intentionally:

1. Make any oral, written or electronically or computer-generated lewd or indecent proposal to any child under **sixteen (16) years of age**, or other individual the person believes to be a child under **sixteen (16) years of age**, for the child to have unlawful sexual relations or sexual intercourse with any person; or

2. 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; or

3. 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; or

4. In any manner lewdly or lasciviously look upon, touch, maul, or feel the body or private parts of any child under **sixteen (16) years of age** in any indecent manner or in any manner relating to sexual matters or sexual interest; or

5. In a lewd and lascivious manner and for the purpose of sexual gratification:

a. urinate or defecate upon a child under **sixteen (16) years of age**, or force or require a child to defecate or urinate upon the body or private parts of another, or for the purpose of sexual gratification,

b. ejaculate upon or in the presence of a child,

c. cause, expose, force or require a child to look upon the body or private parts of another person,

d. force or require 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 view any obscene materials, child pornography or materials deemed harmful to minors as such terms are defined by Sections 1024.1 and 1040.75 of this title,

e. cause, expose, force or require a child to look upon sexual acts performed in the presence of the child, or

f. force or require a child to touch or feel the body or private parts of the child or another person.

Any person convicted of any violation of this subsection shall be **punished** by imprisonment in the custody of the Department of Corrections for not less than three (3) years nor more than twenty (20) years, except when the child is under twelve (12) years of age at the time the offense is committed, and in such case the person shall, upon conviction, be **punished** by imprisonment in the custody of the Department of Corrections for not less than twenty-five (25) years. The provisions of this subsection shall not apply unless the accused is at least three (3) years older than the victim, except when accomplished by the use of force or fear. Except as provided in Section 51.1a of this title, any person convicted of a second or subsequent violation of this subsection shall be guilty of a felony **punishable** as provided in this subsection and shall not be eligible for probation, suspended or deferred sentence. Except as provided in Section 51.1a of this title, any person convicted of a third or subsequent violation of this subsection shall be guilty of a felony **punishable** by imprisonment in the custody of the Department of Corrections for a term of life or life without parole, in the discretion of the jury, or in case the jury fails or refuses to fix **punishment** then the same shall be pronounced by the court. Any person convicted of a violation of this subsection after having been twice convicted of a violation of subsection A of Section 1114 of this title, Section 888 of this title, sexual abuse of a child pursuant to Section 843.5 of this title, or of any attempt to commit any of these offenses or any combination of convictions pursuant to these sections shall be **punished** by imprisonment in the custody of the Department of Corrections for a term of life or life without parole.

B. No person shall commit sexual battery on any other person. "Sexual battery" shall mean the intentional touching, mauling or feeling of the body or private parts of any person **sixteen (16) years of age** or older, in a lewd and lascivious manner:

1. Without the consent of that person;

2. When committed by a state, county, municipal or political subdivision employee or a contractor or an employee of a contractor of the state, a county, a municipality or political subdivision of this state upon a person who is under the legal custody, supervision or authority of a state agency, a county, a municipality or a political subdivision of this state, or the subcontractor or employee of a subcontractor of the contractor of the state or federal government, a county, a municipality or a political subdivision of this state;

3. When committed upon a person who is at least **sixteen (16) years of age** and is less than twenty (20) years of age and is a student, or in the legal custody or supervision of any public or private elementary or secondary school, or technology center school, by a person who is eighteen (18) years of age or older and is an employee of the same school

system that the victim attends; or

4. When committed upon a person who is nineteen (19) years of age or younger and is in the legal custody of a state agency, federal agency or a tribal court, by a foster parent or foster parent applicant.

As used in this subsection, "employee of the same school system" means a teacher, principal or other duly appointed person employed by a school system or an employee of a firm contracting with a school system who exercises authority over the victim.

C. No person shall in any manner lewdly or lasciviously:

1. Look upon, touch, maul, or feel the body or private parts of any human corpse in any indecent manner relating to sexual matters or sexual interest; or

2. Urinate, defecate or ejaculate upon any human corpse.

D. Any person convicted of a violation of subsection B or C of this section shall be deemed guilty of a felony and shall be punished by imprisonment in the custody of the Department of Corrections for not more than ten (10) years.

E. The fact that an undercover operative or law enforcement officer was involved in the detection and investigation of an offense pursuant to this section shall not constitute a defense to a prosecution under this section.

F. Except for persons sentenced to life or life without parole, any person sentenced to imprisonment for two (2) years or more for a violation of this section shall be required to serve a term of post-imprisonment supervision pursuant to subparagraph f of paragraph 1 of subsection A of Section 991a of Title 22 of the Oklahoma Statutes under conditions determined by the Department of Corrections. The jury shall be advised that the mandatory post-imprisonment supervision shall be in addition to the actual imprisonment.

G. Any parent or person responsible for the child's health, safety or welfare who violates subsection A, B or C of this section when the victim is at least sixteen (16) years of age but less than eighteen (18) years of age, upon conviction, shall be guilty of a felony and shall be punished by imprisonment in the custody of the Department of Corrections for not more than ten (10) years. For purposes of this section, "person responsible for a child's health, safety or welfare" shall include, but not be limited to:

a. a parent,

b. a legal guardian,

c. custodian,

d. a foster parent,

e. a person eighteen (18) years of age or older with whom the child's parent cohabitates,

f. any other adult residing in the home of the child,

g. an agent or employee of a public or private residential home, institution, facility or day treatment program as defined in Section 175.20 of Title 10 of the Oklahoma Statutes, or

h. an owner, operator or employee of a child care facility, as defined by Section 402 of Title 10 of the Oklahoma Statutes.

Credits

Laws 1945, p. 95, § 1; Laws 1947, p. 232, § 1; Laws 1951, p. 60, § 1; Laws 1955, p. 186, § 1; Laws 1965, c. 97, § 1, emerg. eff. May 12, 1965; Laws 1981, c. 206, § 1, emerg. eff. May 26, 1981; Laws 1983, c. 42, § 1, eff. Nov. 1, 1983; Laws 1985, c. 112, § 4, eff. Nov. 1, 1985; Laws 1989, c. 113, § 1, eff. Nov. 1, 1989; Laws 1990, c. 224, § 4, eff. Sept. 1, 1990; Laws 1992, c. 289, § 3, emerg. eff. May 25, 1992; Laws 1997, c. 133, § 299, eff. July 1, 1999; Laws 1999, 1st Ex.Sess., c. 5, § 200, eff. July 1, 1999; Laws 2000, c. 175, § 2, eff. Nov. 1, 2000; Laws 2000, c. 334, § 1, eff. Nov. 1, 2000; Laws 2002, c. 110, § 2, eff. July 1, 2002; Laws 2002, c. 460, § 11, eff. Nov. 1, 2002; Laws 2003, c. 159, § 1, eff. Nov. 1, 2003; Laws 2006, c. 284, § 2, emerg. eff. June 7, 2006; Laws 2007, c. 261, § 19, eff. Nov. 1, 2007; Laws 2008, c. 3, § 14, emerg. eff. Feb. 28, 2008; Laws 2009, c. 234, § 125, emerg. eff. May 21, 2009; Laws 2010, c. 226, § 5, eff. Nov. 1, 2010; Laws 2013, c. 138, § 1, eff. Nov. 1, 2013; Laws 2015, c. 67, § 3, eff. Nov. 1, 2015; Laws 2017, c. 128, § 3, eff. July 1, 2017; Laws 2018, c. 167, § 4, eff. Nov. 1, 2018.

Editors' Notes

HISTORICAL AND STATUTORY NOTES

The 2003 amendment, in subsection A, in the introductory paragraph, inserted "It is a felony for", and substituted "to" for "who shall", and rewrote paragraph 5, which prior thereto read:

"5. In a lewd and lascivious manner and for the purpose of sexual gratification, urinate or defecate upon a child under sixteen (16) years of age or ejaculate upon or in the presence of a child, or cause or expose or force or require a child to look upon the body or private parts of another person or upon sexual acts performed in the presence of the child or force or require a child to touch or feel the body or private parts of said child or another person, upon conviction, shall be deemed guilty of a felony and shall be punished by imprisonment in the State Penitentiary for not less than one (1) year nor more than twenty (20) years. The provisions of this section shall not apply unless the accused is at least three (3) years older than the victim. Any person convicted of a second or subsequent violation of subsection A of this section shall be guilty of a felony and shall not be eligible for probation, suspended or deferred sentence. Any person convicted of a third or subsequent violation of subsection A of this section shall be guilty of a felony and shall be punished by imprisonment in the State Penitentiary for a term of life or life without parole, in the discretion of the jury, or in case the jury fails or refuses to fix punishment then the same shall be pronounced by the court. Any person convicted of a violation of this subsection after having been twice convicted of a violation of subsection A of Section 1114 of this title, Section 888 of this title, sexual abuse of a child pursuant to Section 7115 of Title 10 of the Oklahoma Statutes, or of any attempt to commit any of these offenses or any combination of convictions pursuant to these sections shall be punished by imprisonment in the State Penitentiary for a term of life or life without parole."

Laws 2007, c. 261, § 19, added subsection E.

Laws 2008, c. 3, § 14, in subsection A, in the concluding paragraph, in the first sentence, added ", except when the child is under twelve (12) years of age at the time the offense is committed, and in such case the person shall, upon conviction, be punished by imprisonment in the custody of the Department of Corrections for not less than twenty-five (25) years".

Section 3 of Laws 2007, c. 325, amending this section, was repealed by Laws 2008, c. 3, § 15.

Laws 2009 c. 234, § 125, in subsection A, in the last paragraph, substituted "843.5 of this title" for "7115 of Title 10 of the Oklahoma Statutes".

Laws 2010, c. 226, § 5, in subsection A, in the final, undesignated paragraph, inserted ", except when accomplished by the use of force or fear"; in subsection B, added paragraph designations, added paragraph 3, and made other, non-substantive changes; inserted subsection C, and relettered subsequent subsections; and in subsection D, inserted "or C".

Laws 2013, c. 138, § 1, in subsection A, twice substituted "Except as provided in Section 51.1a of this title, any" for "any".

Section 6 of Laws 2002, c. 455, amending this section, was repealed by Laws 2013, c. 138, § 2.

Laws 2015, c. 67, § 3, in subsection A, paragraph 5, subparagraph f, substituted "the child" for "said child"; and in subsection B, added paragraph 4, and made nonsubstantive changes.

Laws 2017, c. 128, § 3, in subsection B, paragraph 2, inserted ", or the subcontractor or employee of a subcontractor of the contractor of the state or federal government, a county, a municipality or a political subdivision of this state".

Laws 2018, c. 167, § 4, in subsection A, paragraph 5, subparagraph a, added "or force or require a child to defecate or urinate upon the body or private parts of another, or for the purpose of sexual gratification"; and added subsection G.

LAW REVIEW AND JOURNAL COMMENTARIES

Calling A Spade A Spade: Understanding Sex Offender Registration As **Punishment** and Implications Post-Starkey. Alex Duncan, 67 Okla.L.Rev. 323 (2015).

RESEARCH REFERENCES

ALR Library

50 American Law Reports, Federal 2nd Series 443, What Constitutes "Aggravated Felony" for Which Alien Can be Deported or Removed Under § 237(A)(2)(A)(III) of Immigration and Nationality **Act** (8 U.S.C.A. § 1227(A)(2)(A)(III))--Crime of Violence Under 8 U.S.C.A. § 1101(A)(43)(F).

89 American Law Reports 295, Reduction by Appellate Court of **Punishment** Imposed by Trial Court.

Forms

2A Vernon's Oklahoma Forms 2d § 1.5.50, **Lewd** Molestation and Sexual Battery.

2A Vernon's Oklahoma Forms 2d § 10.5, **Lewd**, Indecent Proposals, or **Acts** Against Children or Minors in Pornography.

2A Vernon's Oklahoma Forms 2d § 10.10, Rape, Sodomy, **Lewd Acts** With Minors, Pornography With Minors, or Child Abuse.

Vernon's Oklahoma Forms 2d, Oklahoma Uniform Jury Instructions--Criminal 4-129, [**Lewd Acts** (Molestation) With]/[Indecent Proposals To] a Child Under **Sixteen**-Elements.

NOTES OF DECISIONS

Validity

Specific enhancement provision within **lewd** molestation statute mandating sentencing options of life or life without parole for persons convicted of a third violation of the statute was not unconstitutionally vague and prevailed over general enhancement provision of statute. Applegate v. State, Okla.Crim.App., 904 P.2d 130 (1995). Sentencing And **Punishment** ⇐ 1210

This section prohibiting any person over **18 years of age** from knowingly and intentionally making any oral or written **lewd** or indecent proposal to any child under **16** years **of age** for child to have unlawful sexual relations or sexual intercourse with any person was not overbroad or violative of First Amendment guarantee of free speech. Reed v. State, Okla.Crim.App., 718 P.2d 373 (1986). Constitutional Law ⇐ 2247; Infants ⇐ 1006(12)

Statute prohibiting any person over **18 years of age** from knowingly and intentionally making any oral or written **lewd** or indecent proposal to any child under **16** years **of age** for child to have unlawful sexual relations or sexual intercourse with any person was not void for vagueness under due process clauses of Fifth and Fourteenth Amendments. Reed v. State, Okla.Crim.App., 718 P.2d 373 (1986). Constitutional Law ⇐ 4509(15); Infants ⇐ 1006(12)

This section, which provided that "Any male person over **sixteen** years or female person over eighteen years **of age** who shall knowingly and intentionally make any oral or written **lewd** or indecent proposal to any child under the **age of** fourteen years for such child to have unlawful sexual relations or sexual intercourse with him or her or any other person * * * shall be deemed guilty of a felony * * * * was not so vague as to be violative of due process. Mayberry v. State, Okla.Crim.App., 603 P.2d 1150 (1979). Constitutional Law ⇐ 4509(15); Infants ⇐ 1006(12)

This section, which provided that "Any male person over **sixteen** years or female person over eighteen years **of age** who shall knowingly and intentionally make any oral or written **lewd** or indecent proposal to any child under the **age of** fourteen years for such child to have unlawful sexual relations or sexual intercourse with him or her or any other person * * * shall be deemed guilty of a felony," was not overbroad or violative of U.S.C.A.Const. Amend. 1 guarantee of free speech. Mayberry v. State, Okla.Crim.App., 603 P.2d 1150 (1979). Constitutional Law ⇐ 4509(15); Infants ⇐ 1006(12)

This section making it criminal offense to intentionally and designedly look upon body of any child under **age of 14** in **lewd** or lascivious manner did not violate due process on ground that it was unconstitutionally vague; the night and day distinction between **acts** of compassion and those motivated by wanton salacity is one which reasonable person cannot confuse. Whaley v. State, Okla.Crim.App., 556 P.2d 1063 (1976). Constitutional Law ⇐ 4509(15); Infants ⇐ 1006(12)

Oklahoma Court of Criminal Appeals (OCCA) reasonably concluded that Oklahoma statute prohibiting the touching of any child under **16 years of age** in any **lewd** or lascivious

manner was sufficiently clear to put an ordinary person on notice that sexual touching through a child's clothing was prohibited, and thus defendant was not entitled to a certificate of appealability (COA) to appeal district court's denial of habeas corpus petition on grounds that Oklahoma statute was unconstitutionally vague, even though statute did not indicate that touching a victim through clothing was prohibited. Crowder v. Martin, C.A.10 (Okla.)2018, 742 Fed.Appx. 389, 2018 WL 3913479. Habeas Corpus ⚖ 464; Habeas Corpus ⚖ 818

Double jeopardy

Convicting defendant of both making **lewd** or indecent proposals to a child after one former conviction and using a computer system or network for purpose of committing a felony violated double jeopardy statute and was plain error, where both charges alleged identical crimes arising from same conduct of using a computer to make a **lewd** or indecent proposal to a child under **16 years of age**. Barnard v. State, Okla.Crim.App., 290 P.3d 759 (2012). Criminal Law ⚖ 1030(2)

By putting his penis in five-year-old victim's vagina and anus, defendant committed two separate **acts** constituting two separate crimes of **lewd** molestation, even though **acts** occurred on same occasion. Riley v. State, Okla.Crim.App., 947 P.2d 530 (1997), rehearing denied. Criminal Law ⚖ 29(12)

Fact that defendant was charged with two offenses, i.e., oral sodomy and taking indecent liberties with a child under the **age of 14** years, even though both arose from the same incident, did not constitute double jeopardy as the factual and legal elements of the crimes are so different as to render prosecution for both offenses proper even though they might arise from the same incident. Webb v. State, Okla.Crim.App., 538 P.2d 1054 (1975). Double Jeopardy ⚖ 148

Where State and defendant's attorney stipulated to trial of charges of oral sodomy and taking indecent liberties with a child under the **age of 14** years simultaneously, the joint trial did not violate defendant's protection against double jeopardy; defendant was bound by stipulation of counsel. Webb v. State, Okla.Crim.App., 538 P.2d 1054 (1975). Double Jeopardy ⚖ 81; Stipulations ⚖ 14(11)

State prisoner's claim that, after state appellate court reversed his conviction for making a **lewd** or indecent proposal to a child under **16**, and directed trial court to enter a judgment of conviction for soliciting a minor for child pornography, which it concluded was a lesser included offense, a subsequent charge on the solicitation offense would violate his rights under the Double Jeopardy Clause, and seeking an injunction against future prosecution, was not ripe for review, where state had not yet provided a second information containing particular factual allegations to compare to original charge and trial. Jackson v. Whetsel, C.A.10 (Okla.)2010, 386 Fed.Appx. 795, 2010 WL 2881518, Unreported. Federal Courts ⚖ 2177

Construction and application

Defendant's Oklahoma conviction of sexual battery was a "crime of violence" which could be used to enhance his sentence for being a felon in possession of a firearm; state statute at issue presupposed lack of consent, which implicated serious potential risk of physical injury to another. U.S. v. Rowland, C.A.10 (Okla.)2004, 357 F.3d 1193. Sentencing And **Punishment** ⚖ 1263

Elements necessary to prove guilt of **lewd** molestation are that the defendant (1) was at least three years older than the victim, (2) knowingly and intentionally, (3) looked upon, touched, mauled, or felt (4) the body or private parts (5) of any child under **16 years of age**, and (6) in a **lewd** or lascivious manner. Heard v. State, Okla.Crim.App., 201 P.3d 182 (2009), subsequent habeas corpus proceeding 2012 WL 1081166, reversed 728 F.3d 1170. Infants ⚖ 1594; Sex Offenses ⚖ **16**

"Force or require" element of crime of **lewd** or indecent **acts** did not apply to charge of child abuse accomplished through **lewd** or indecent **acts**. Huskey v. State, Okla.Crim.App., 989 P.2d 1 (1999), rehearing denied, appeal from denial of habeas corpus 57 Fed.Appx. 828, 2003 WL 191548. Infants ⚖ 1559

That alleged fondling of complainant's breasts occurred through a comforter would not preclude the touching from constituting **lewd** molestation. Moss v. District Court of Tulsa County, Okla.Crim.App., 795 P.2d 103 (1989). Infants ⚖ 1594; Sex Offenses ⚖ 21(1)

Defendant, charged with **lewd** molestation, after former conviction of felony, was not denied fair and impartial jury trial due to alleged highly prejudicial influences emanating from bench, which contention was based on judge's subsequent removal from bench and "popular suspicions" surrounding judge. Whaley v. State, Okla.Crim.App., 556 P.2d 1063 (1976). Criminal Law ⚖ 655(1)

Acts of an adult in putting his fingers in private parts of child under fourteen years of age, and in placing his tongue in her mouth and otherwise mauling and feeling of her, are indecent **acts**. Mooney v. State, Okla.Crim.App., 273 P.2d 768 (1954). Sex Offenses ⚖ 21(4)

"**Lewd**" and "lascivious" have same meaning, and refer to an unlawful indulgence in lust or eagerness for sexual indulgence. Rich v. State, Okla.Crim.App., 266 P.2d 476 (1954).

In prosecution for intentionally molesting body of a child, relationship between defendant and prosecutrix and their prior acquaintanceship or lack of acquaintanceship were important factors in determining whether **acts** alleged constituted molestation. Rich v. State, Okla.Crim.App., 266 P.2d 476 (1954). Infants ⚖ 1582; Sex Offenses ⚖ 40

Application of penalty provision which was amended in 1992 to include the imposition of life in prison or life in prison without parole for a third violation of section was not ex post facto where defendant's first two felony convictions occurred before provision was added; defendant had ample notice of the new enhanced **punishment** prior to his third offense in 2003. Durbin v. Province, C.A.10 (Okla.)2011, 448 Fed.Appx. 785, 2011 WL 3733866, Unreported, certiorari denied 132 S.Ct. 1148, 565 U.S. 1180, 181 L.Ed.2d 1022. Constitutional Law ⚖ 2816; Sentencing and **Punishment** ⚖ 1219

Younger abstention was not warranted in state prisoner's habeas proceeding challenging his conviction on uncharged lesser-included offense of solicitation of a minor to perform or prepare obscene material or child pornography, after state appellate court reversed conviction for making a **lewd** or indecent proposal to a child under **16**, where state

proceedings did not provide prisoner an adequate opportunity to present his claim that conviction of a crime for which he was not charged or tried by jury violated his rights under the Sixth Amendment; prisoner could not raise his federal claims in a state petition for post-conviction relief because state's highest court had already rejected his claims. Jackson v. Whetsel, C.A.10 (Okla.)2010, 388 Fed.Appx. 795, 2010 WL 2881518, Unreported. Federal Courts ⚖ 2646

Convicting state prisoner of offense for which he was neither charged nor tried violated his due process rights, and, thus, state appellate court's order reversing prisoner's conviction for making a **lewd** or indecent proposal to a child under **16**, and directing trial court to enter a judgment of conviction for soliciting a minor for child pornography, which it concluded was a lesser included offense, was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, warranting federal habeas relief. Jackson v. Whetsel, C.A.10 (Okla.)2010, 388 Fed.Appx. 795, 2010 WL 2881518, Unreported. Constitutional Law ⚖ 4582; Habeas Corpus ⚖ 474; Habeas Corpus ⚖ 500.1

Consent

Age of consent to sexual activity is statutorily defined; in the absence of mental illness or any other unsoundness of mind, the legislature has set the age of consent for sexual activity at 16 years of age. Arganbright v. State, Okla.Crim.App., 328 P.3d 1212 (2014). Infants ⚖ 1544

A child under **14** cannot, as a matter of law, consent to sexual **acts** with an adult and, as a result, cannot be considered to be an accomplice whose testimony must be corroborated. Salyer v. State, Okla.Crim.App., 761 P.2d 890 (1988). Criminal Law ⚖ 507(7)

Penetration

Crime of **lewd** molestation did not require penetration for its commission and, therefore, no instruction on penetration was required. Price v. State, Okla.Crim.App., 782 P.2d 143 (1989). Infants ⚖ 1666(2); Sex Offenses ⚖ 389

Nakedness

Statute governing offense of **lewd** molestation does not require the child's body or private parts looked upon, touched, mauled, or felt to be naked. Heard v. State, Okla.Crim.App., 201 P.3d 182 (2009), subsequent habeas corpus proceeding 2012 WL 1081166, reversed 728 F.3d 1170. Infants ⚖ 1594; Sex Offenses ⚖ 21(1)

Intent

Defendant could be convicted of **lewd** molestation even though he did not see young girls' naked bodies or naked private parts; defendant committed offense when he followed girls into store and positioned himself so as to see under their dresses and see their panties, which was his admitted intent. Heard v. State, Okla.Crim.App., 201 P.3d 182 (2009), subsequent habeas corpus proceeding 2012 WL 1081166, reversed 728 F.3d 1170. Infants ⚖ 1582

Indictment or information

Indictment that charged defendant with rape and forcible oral sodomy did not charge crimes against public decency and morality and, therefore, indictment could be amended to charge defendant with committing **lewd** or indecent **acts** with children. Gregg v. State, Okla.Crim.App., 844 P.2d 867 (1992), rehearing denied. Indictment And Information ⚖ 159(2)

Issue whether information charging defendant with **"Lewd** Molestation" was fatally defective for failure to allege that **acts** done by defendant were done in a **lewd** and lascivious manner was not properly before the Court of Criminal Appeals for review where defendant had failed to address the issue in his motion for new trial. Abbott v. State, Okla.Crim.App., 655 P.2d 558 (1982). Criminal Law ⚖ 1064(2)

Sufficiency of affidavit

Even if all allegedly false information in arrest warrant affidavit were excluded, affidavit would still contain enough facts showing that police officer had probable cause to believe that arrestee violated Oklahoma statute criminalizing making a **lewd** or indecent proposal to a child under the **age of 16**, and thus arrestee could not prevail on his § 1983 malicious prosecution claim against officer, based on allegation that affidavit contained false statements and omissions. Jackson v. Hogan, C.A.10 (Okla.)2016, 672 Fed.Appx. 870, 2016 WL 7118318, rehearing denied, certiorari denied 138 S.Ct. 205, 199 L.Ed.2d 135. Civil Rights ⚖ 1088(4)

Presumptions and burden of proof

State was not required to prove that defendant was at least three years older than some actual child, or that his indecent proposal to have sexual relations or intercourse was made to an actual child who was younger than the **age of 16** in prosecution for making **lewd** or indecent proposals to a child after one former conviction; the State needed to prove only that the indecent proposal was made to any individual defendant believed to be under **16 years of age** and that defendant was at least three years older than that pretextual child. Barnard v. State, Okla.Crim.App., 290 P.3d 759 (2012). Infants ⚖ 1591

Statute governing offense of **lewd** molestation does not criminalize every casual glance at a child; a court focuses its inquiry on the showing that the defendant's knowing and intentional conduct was **"lewd** or lascivious." Heard v. State, Okla.Crim.App., 201 P.3d 182 (2009), subsequent habeas corpus proceeding 2012 WL 1081166, reversed 728 F.3d 1170. Infants ⚖ 1582

Witnesses

In prosecution for **lewd** molestation involving defendant's children, defendant's 11-year-old daughter was properly allowed to testify, despite her contradictory statements and her inability to read, as daughter indicated that she knew difference between right and wrong, that she knew what she was saying, and that she knew she could be **punished** if she lied; her limitations bore upon her credibility rather than her competence to testify. Webb v. State, Okla.Crim.App., 684 P.2d 1208 (1984). Witnesses ⚖ 40(1)

In prosecution which resulted in conviction for making **lewd** and indecent proposals to a child under **age of 14**, after former conviction of a felony, victim, who was six years old at

time of incident and seven years old at time of trial, was properly allowed to testify, having demonstrated to trial court that she knew what it meant to tell truth and consequences of telling a lie, and having taken oath and being in possession of personal knowledge about offense. Davis v. State, Okla.Crim.App., 647 P.2d 450 (1982). Witnesses ⚖ 40(1)

Admissibility of evidence--In general

Testimony of minor victim's grandfather that victim stated he was angry with defendant because defendant was gay was admissible in lewd molestation and sodomy prosecution to show victim's state of mind. Applegate v. State, Okla.Crim.App., 904 P.2d 130 (1995). Criminal Law ⚖ 419(2.20)

In prosecution for lewd molestation involving defendant's children, children's foster mother's testimony as to children's sexual conduct subsequent to crime charged was admissible as tending to show that child witness' testimony was not fabricated, since normal children of ages two through 11 do not on their own initiative engage in acts which foster mother observed of incest and oral and anal sodomy without having had more than superficial exposure to such conduct. Webb v. State, Okla.Crim.App., 684 P.2d 1208 (1984). Criminal Law ⚖ 338(6)

---- Due process, admissibility of evidence

State trial court's exclusion of expert testimony did not render lewd molestation trial fundamentally unfair in violation of due process; district court "truth qualified" the victim before she testified to the incidents in question, her testimony was powerful, jury heard multiple times about the limitations of child victim testimony, including that it is common for child victims to elaborate upon information they previously disclosed and to disclose additional incidents over time, and nontrivial evidence favoring the defense was admitted at trial, including evidence that the child had been potentially exposed to adult videos, an alternative, potential source of her advanced knowledge of sexual behavior, and evidence of the victim's mother's ongoing sexual relationship with defendant. Williamson v. Parker, C.A.10 (Okla.)2017, 705 Fed.Appx. 677, 2017 WL 2986898, certiorari denied 138 S.Ct. 560, 199 L.Ed.2d 441. Constitutional Law ⚖ 4683; Criminal Law ⚖ 474.3(3)

State trial court's state law evidentiary rulings at lewd molestation trial did not violate defendant's due process rights when viewed collectively; evidence that the victim had sung phrase "Get a New Daddy" from song did not establish that she knew the full lyrics, which provided ways to get rid of father through false accusations, court admitted evidence victim had access to adult videos and only excluded video made by defendant and victim's mother, defense counsel was able to cross examine all witnesses who presented hearsay statements, and pornographic images on defendant's computer were legally relevant, as they suggested that the victim had been exposed to porn. Williamson v. Parker, C.A.10 (Okla.)2017, 705 Fed.Appx. 677, 2017 WL 2986898, certiorari denied 138 S.Ct. 560, 199 L.Ed.2d 441. Constitutional Law ⚖ 4647; Criminal Law ⚖ 661

---- Hearsay, admissibility of evidence

In prosecution which resulted in conviction for making lewd and indecent proposals to a child under age of 14, after former conviction of a felony, declarations made by victim to neighborhood girl, including victim's statement that defendant had said to her, "grab this," were sufficiently spontaneous to be admitted under excited utterance exception to hearsay rule; further, statement did not constitute hearsay under title 12, § 2801 providing that statement is not hearsay if it is offered against party and is his own statement. Davis v. State, Okla.Crim.App., 647 P.2d 450 (1982). Criminal Law ⚖ 364(1); Criminal Law ⚖ 419(1.10)

In prosecution for taking indecent liberties with a child under the age of 14, trial court properly admitted, under the excited utterance exception to the hearsay rule, testimony that the six-year-old victim was screaming "He hurt me, he hurt me" immediately after the alleged incident; fact that victim was deemed incompetent to testify because of her age did not preclude admission of the victim's out-of-court declarations where the declarations were made nearly contemporaneously with the alleged offense. Bishop v. State, Okla.Crim.App., 581 P.2d 45 (1978). Criminal Law ⚖ 366(7)

---- Prior sexual history, admissibility of evidence

Trial court's exclusion of evidence offered by defendant about child-victim's prior sexual history was not so prejudicial to be reversible error in prosecution for lewd or indecent acts, forcible oral sodomy, and first and second-degree rape, even though defendant claimed that evidence could have mitigated sentence returned by jury; defendant offered only speculation on whether jury would have been influenced by evidence about victim's prior sexual abuse by her father and by her mother's boyfriends. Gregg v. State, Okla.Crim.App., 844 P.2d 867 (1992), rehearing denied. Criminal Law ⚖ 1177.3(2)

Evidence tending to show that child-victim had engaged in sexual conduct with her father and with her mother's boyfriends before defendant had any contact with her was not relevant or admissible in prosecution for lewd or indecent acts, forcible oral sodomy, and first and second-degree rape, even though defendant claimed that evidence could have mitigated sentence returned by jury. Gregg v. State, Okla.Crim.App., 844 P.2d 867 (1992), rehearing denied. Infants ⚖ 1737(2); Sex Offenses ⚖ 234

---- Other offenses, admissibility of evidence

Defendant could not complain of allowance of repeated testimony about a similar offense at same time on eight-year-old sister of alleged victim, in prosecution for lewd and lascivious conduct with a minor, since such testimony had been originally elicited by the defendant in the cross-examination of victim's mother. Thomas v. State, Okla.Crim.App., 560 P.2d 1011 (1977). Criminal Law ⚖ 1137(5)

In prosecution for lewdly and lasciviously touching and feeling of private parts of nine year old girl, evidence that defendant, shortly after offense charged was committed, again met child in a theatre, pulled her up to him and put his head against her, was admissible. Mooney v. State, Okla.Crim.App., 273 P.2d 768 (1954). Criminal Law ⚖ 373.22

Corroboration

Court applies the same standards for corroboration in cases of lewd or indecent acts with a child under age 16 as it does in rape cases; conviction may be sustained upon the uncorroborated testimony of the victim unless the testimony appears so incredible or so unsubstantial so as to make it unworthy of relief. Jones v. State, Okla.Crim.App., 765 P.2d

800 (1988). Infants ⚖ 1753(2); Sex Offenses ⚖ 304

State's burden of proof in prosecution for **lewd** and indecent **acts** with a child under the **age of 16** is a sufficient safeguard against possible fabrication so that there is no per se rule of corroboration in **lewd** molestation cases. Jones v. State, Okla.Crim.App., 765 P.2d 800 (1988). Infants ⚖ 1753(2); Sex Offenses ⚖ 309

Conviction for indecent or **lewd** proposal to a child can be sustained upon uncorroborated testimony of the prosecuting witness unless such testimony appears incredible and so unsubstantial to make it unworthy of belief. Roldan v. State, Okla.Crim.App., 762 P.2d 285 (1988). Infants ⚖ 1753(2); Sex Offenses ⚖ 304

Testimony of minor victim of **lewd** molestation and sodomy was not required to be corroborated since minor's testimony was lucid, clear and devoid of ambiguity. Salyer v. State, Okla.Crim.App., 761 P.2d 890 (1988). Infants ⚖ 1753(2); Sex Offenses ⚖ 304

Testimony of minor victim of **lewd** molestation and sodomy was sufficiently corroborated, if such corroboration was required, by evidence of minor's personality and behavior changes after attack. Salyer v. State, Okla.Crim.App., 761 P.2d 890 (1988). Infants ⚖ 1753(2); Sex Offenses ⚖ 309

Five-year-old victim was not an accomplice to **lewd** molestation of herself; thus, corroboration of her testimony by other evidence tending to connect defendant with commission of offense was not required for conviction. Eide v. State, Okla.Crim.App., 551 P.2d 275 (1976). Criminal Law ⚖ 507(7)

Thirteen-year-old complaining witness' testimony that he accepted ride in defendant's automobile, that defendant threatened him with his fist and fondled his private parts was neither improbable nor contradictory and did not require corroboration by additional evidence as to the principal facts in order to sustain conviction of **lewd** molestation of a child under **age 14**. Still v. State, Okla.Crim.App., 484 P.2d 549 (1971). Infants ⚖ 1749; Sex Offenses ⚖ 276; Sex Offenses ⚖ 304

Weight and sufficiency of evidence--In general

Evidence was sufficient to sustain conviction for **lewd** molestation; two minor victims testified that each was molested by defendant on several occasions, testimony of investigating officer established that defendant gave details similar to those given by victims, and victims' parents confirmed that victims provided the same reports to them. Applegate v. State, Okla.Crim.App., 904 P.2d 130 (1995). Infants ⚖ 1753(2); Sex Offenses ⚖ 309

Statement of nine-year-old stepson and stepson's trial testimony was corroborated by defendant's own confession that he had twice performed oral sodomy on stepson and supported convictions for oral sodomy, crime against nature, and **lewd** molestation, despite stepson's attempts to recant statements at trial. Davenport v. State, Okla.Crim.App., 806 P.2d 655 (1991). Infants ⚖ 1753(2); Sex Offenses ⚖ 309

Uncorroborated testimony of 13-year-old boy that defendant attempted to feel his crotch in public restroom and asked to "feel it" was sufficient to sustain defendant's conviction for indecent proposal to a child under **16 years of age** despite defendant's evidence showing his truth and veracity. Roldan v. State, Okla.Crim.App., 762 P.2d 285 (1988). Infants ⚖ 1749; Sex Offenses ⚖ 304

Conviction for two counts of **lewd** molestation was supported by testimony of female relative of defendant as to two incidents which occurred when she was nine years old. Collins v. State, Okla.Crim.App., 751 P.2d 200 (1988). Infants ⚖ 1746; Sex Offenses ⚖ 256

Testimony of five-year-old victim that defendant removed victim's pants and underwear, placed his hands and mouth on victim's penis and corroborating testimony that other witnesses observed victim with his pants down, followed defendant into an adjoining bedroom and saw him trying to fasten his pants, was sufficient to support defendant's conviction of **lewd** molestation. Weeks v. State, Okla.Crim.App., 745 P.2d 1194 (1987). Infants ⚖ 1749; Infants ⚖ 1750; Sex Offenses ⚖ 258; Sex Offenses ⚖ 309

Defendant's statement to 15-year-old prosecutrix, "I want to make love to you," was oral **lewd** or indecent proposal to have unlawful sexual relations, for purposes of this section prohibiting any person over **18 years of age** from knowingly and intentionally making any oral or written **lewd** or indecent proposal to any child under **16 years of age** for child to have unlawful sexual relation or sexual intercourse with any person, particularly where coupled with defendant's statement that he was going to do it anyway and defendant's continual kissing and fondling of prosecutrix. Reed v. State, Okla.Crim.App., 718 P.2d 373 (1986). Infants ⚖ 1746; Sex Offenses ⚖ 258

Evidence, including testimony of an eyewitness, was sufficient to sustain conviction of **lewd** molestation of a nine-year-old deaf female despite claim that defendant had merely attempted to comfort and assist what he thought to be a lost child. Abbott v. State, Okla.Crim.App., 655 P.2d 558 (1982). Sex Offenses ⚖ 259

Evidence, including evidence that defendant asked 13-year-old child "do you want to screw," was sufficient to sustain defendant's conviction of indecent proposal to child, though there assertedly was no proof that such words on part of defendant were a **lewd** or indecent proposal of sexual relations or sexual intercourse. Mayberry v. State, Okla.Crim.App., 603 P.2d 1150 (1979). Infants ⚖ 1746; Sex Offenses ⚖ 258

Testimony by seven-year-old girl that, as she was walking to school, defendant approached her and told her to take off her pants, that defendant put his finger in her rectum, and that defendant then pulled down his pants and "told me to suck his peter" and that she did so was sufficient to sustain defendant's convictions for oral sodomy and taking indecent liberties with a child under the **age of 14** years. Webb v. State, Okla.Crim.App., 538 P.2d 1054 (1975). Infants ⚖ 1746; Sex Offenses ⚖ 254

Act of kissing seven-year-old girl and playing with or touching her pelvic area was sufficient to violate **lewd** molestation statute and was sufficient evidence to submit to jury issue whether defendant was eager for sexual indulgence. Tollison v. State, Okla.Crim.App., 514 P.2d 693 (1973). Infants ⚖ 1665(2); Sex Offenses ⚖ 346

Evidence sustained conviction of defendant, who assertedly placed his hand between legs of 12-year-old girl while she was asleep, and taking indecent liberties with female child under **age of 14 years**. Ball v. State, Okla.Crim.App., 509 P.2d 908 (1973). Infants ⚖

1749; Sex Offenses ⚖ 256

Clear, convincing and consistent testimony of 9-year-old girl which was substantially corroborated by testimony of police officer as to defendant's confessions sustained conviction for **lewd** molestation of minor. Miller v. State, Okla.Crim.App., 418 P.2d 220 (1966). Infants ⚖ 1753(2); Sex Offenses ⚖ 309

Evidence was sufficient to show defendant exposed himself for the purpose of receiving sexual gratification, and thus to support conviction for **lewd acts** with a child; there was evidence that defendant licked the victim's vagina, masturbated before her to the point of ejaculation, placed her mouth on his penis, and made her touch his penis. Williamson v. Parker, C.A.10 (Okla.)2017, 705 Fed.Appx. 677, 2017 WL 2986898, certiorari denied 138 S.Ct. 560, 199 L.Ed.2d 441. Infants ⚖ 1750; Sex Offenses ⚖ 259

Evidence was sufficient to establish that defendant touched the child victim in a **lewd** or lascivious manner, as required to support conviction for **lewd** molestation of a child, under Oklahoma law, where victim testified that defendant touched her genital area with a vibrator when she was 10 years old. Belvin v. Addison, C.A.10 (Okla.)2014, 561 Fed.Appx. 684, 2014 WL 1328144. Infants ⚖ 1594; Sex Offenses ⚖ 21(1)

---- Intent, weight and sufficiency of evidence

Evidence was sufficient to support defendant's conviction for indecent proposal to child; taped conversation supported conclusion that defendant was persuading child to go to secluded place for the purpose of taking nude photographs, and fact that there was to be series of posing sessions provided logical basis for jury to determine that defendant intended to **lewdly** and lasciviously look upon child. Allen v. State, Okla.Crim.App., 734 P.2d 1304 (1987). Infants ⚖ 1746; Sex Offenses ⚖ 290

Assistance of counsel

Minimally competent counsel would have recognized likely defense based on Oklahoma's **lewd** molestation statute's text and Oklahoma Court of Criminal Appeals' (OCCA) failure to provide permissible narrowing construction in its published cases, and thus defendant charged with **lewd** molestation was denied effective assistance of counsel due to counsel's failure to recognize likely defense based on fact that victims' private parts were clothed, even though OCCA rejected defense in defendant's post-conviction proceeding, where OCCA had recognized defense in two prior unpublished decisions, defense counsel had access to OCCA's unpublished decisions, counsel's decision to advise defendant to plead guilty without mentioning viable defenses was not justifiable on any strategic basis, it was reasonably probable that bringing those cases to prosecutor's attention during plea negotiations could have resulted in better bargain, lesser charges, or even dismissal of case or that trial court may have dismissed case, defendant received concurrent 25 year sentences, and defendant immediately attempted to withdraw his plea upon discovering cases. Heard v. Addison, C.A.10 (Okla.)2013, 728 F.3d 1170. Criminal Law ⚖ 1909; Criminal Law ⚖ 1920

Argument and conduct of counsel

State's comments in prosecution for indecent **acts** towards children, that "lessons" defendant wished to teach children were not kind of lessons jurors should permit, were not fundamentally prejudicial so as to deprive defendant of fair trial. Reynolds v. State, Okla.Crim.App., 717 P.2d 608 (1986). Criminal Law ⚖ 2149

Where defendant used absolutely no force on either of child victims, let alone took any action that would have placed their lives in jeopardy, reference of prosecutor to unsolved child murders arising out of unsolved child molestation cases was outside scope of evidence and not reasonable inference that could be drawn from evidence; however, in light of overwhelming evidence of guilt that was presented, in prosecution for rape, crimes against nature, and **lewd act** with child under 14, and relatively light sentences imposed for each individual crime, prosecutor's improper statement did not call for reversal of judgment or sentence. Bauwens v. State, Okla.Crim.App., 657 P.2d 176 (1983). Criminal Law ⚖ 1171.3; Criminal Law ⚖ 2118; Criminal Law ⚖ 2123

Although evidence of defendant's guilt of **lewd** molestation was overwhelming, justice would best be served by giving defendant the benefit of doubt as to effect of District Attorney's inflammatory argument and reference to defendant's alleged rape of 13-year-old prosecutrix and by modifying judgment and sentence from 20 years' imprisonment to 15 years' imprisonment. Behley v. State, Okla.Crim.App., 521 P.2d 418 (1974). Criminal Law ⚖ 1184(4.1)

Election of one of several acts

Where state proves more than one **act** of **lewd** molestation of female child, trial court on own motion should either require prosecution to elect upon which of such **acts** it relies, or should treat **act** of which state first introduces evidence which tends in any degree to prove offense as election, and limit jury to consideration of such particular **act** as basis for conviction and should limit proof of other **acts** as corroboration or as showing relation of parties. Dugan v. State, Okla.Crim.App., 360 P.2d 833 (1961). Criminal Law ⚖ 678(1); Criminal Law ⚖ 678(3); Criminal Law ⚖ 678(4)

Where evidence showed several **acts** of **lewdness** upon which conviction for **lewd** molestation of female child could be based, and trial court by instruction permitted jury to base conviction on any one of such **acts**, without requiring state to elect, and without treating first **act** proven as an election, and verdict was general, judgment would be reversed. Dugan v. State, Okla.Crim.App., 360 P.2d 833 (1961). Criminal Law ⚖ 1168(2); Criminal Law ⚖ 1172.1(2.1)

Instructions

To the extent that jury may have read two instructions together to permit substitution of a law enforcement officer using deception for an actual child victim in prosecution for making **lewd** or indecent proposals to a child after one former conviction, effect was ultimately curative of omission from instruction of element of mere belief that indecent proposal to have sexual relations or intercourse was made to an actual child who was younger than **16** because substitution led to same result that would have been permitted under omitted language: a finding that, as a result of detective's artifice and deception, defendant **believed** he was propositioning a child under **16 years of age**. Barnard v. State, Okla.Crim.App., 290 P.3d 759 (2012). Criminal Law ⚖ 823(4)

Omission in jury instruction of element of offense that mere belief that indecent proposal to have sexual relations or intercourse was made to an actual child who was younger than the **age of 16** was harmless beyond a reasonable doubt in prosecution for making **lewd** or indecent proposals to a child after one former conviction, where it was clear beyond a reasonable doubt that a rational jury would have found him guilty of crime despite incomplete jury instruction because of his belief of his intended child-victim's **age** was supported by strong uncontroverted evidence, including that police officer posing as pretextual child told defendant several times that she was 12 years old. Barnard v. State, Okla.Crim.App., 290 P.3d 759 (2012). Criminal Law ⇔ 1173.2(2)

Exclusion of phrase concerning public decency and morality in instruction defining offense of **lewd** molestation of minor child was not fundamental error. Reeves v. State, Okla.Crim.App., 818 P.2d 495 (1991). Criminal Law ⇔ 1038.1(4)

Failure to include word "intentionally" in definition of offense of **lewd** molestation of minor child was not fundamental error. Reeves v. State, Okla.Crim.App., 818 P.2d 495 (1991). Criminal Law ⇔ 1038.1(4)

Defendant was not entitled to instruction on corroboration in prosecution for **lewd** and indecent **acts** on a child under the **age of 16** where the children's memory and veracity were thoroughly tested on cross-examination and their testimony was not inconsistent, incredible, or contradictory. Jones v. State, Okla.Crim.App., 765 P.2d 800 (1988). Infants ⇔ 1666(2); Sex Offenses ⇔ 421

Defendant could not challenge potentially overbroad jury instruction on crime of **lewd** molestation where no objection was made to instruction at trial, alternate instruction was not offered at trial, and defense counsel specifically stated that he had no objection to instructions. Drake v. State, Okla.Crim.App., 761 P.2d 879 (1988). Criminal Law ⇔ 1038.1(4); Criminal Law ⇔ 1038.3; Criminal Law ⇔ 1137(3)

In prosecution for **lewd** molestation involving defendant's children, judge's comments during jury deliberation were not improper, as comments did not express or imply opinion but merely expressed concern over jury's progress and instructed jury that each count was to be considered separately as to guilt or innocence. Webb v. State, Okla.Crim.App., 684 P.2d 1208 (1984). Criminal Law ⇔ 864

In prosecution for **lewd** molestation involving defendant's children, defendant was not entitled to requested instructions concerning need for evidence to corroborate his daughter's testimony, which was not improbable or incredible even though there was some conflict and confusion and for which, as to each of three counts for which defendant was found guilty, there was corroborating medical evidence. Webb v. State, Okla.Crim.App., 684 P.2d 1208 (1984). Infants ⇔ 1666(2); Sex Offenses ⇔ 421

The absence of objections to instructions defining terms "**lewd** and lascivious" in prosecution for **lewd** molestation amounted to a failure to preserve for appeal the issue of error in the instructions. Abbott v. State, Okla.Crim.App., 655 P.2d 558 (1982). Criminal Law ⇔ 1038.1(6)

In prosecution which resulted in the conviction for taking indecent liberties with a child under the **age of 14** years, trial court did not err in refusing to give defendant's requested instruction as to lesser included offenses of assault and battery and contributing to delinquency of a minor, where testimony of seven-year-old victim was believable and uncontroverted and was corroborated by testimony of witness who heard events in question, by victim's mother and by others and defendant did not testify nor did he produce any evidence in his defense. Alger v. State, Okla.Crim.App., 603 P.2d 1154 (1979). Criminal Law ⇔ 795(2.80)

Where defendant, in prosecution for **lewd** molestation, made timely objection to instruction defining sexual indulgence but did not suggest an instruction in the alternative, defendant had waived right to challenge the objectionable instruction on appeal. Tollison v. State, Okla.Crim.App., 514 P.2d 693 (1973). Criminal Law ⇔ 1038.3

Where defendant cited no authority to support proposition that trial court, in prosecution for **lewd** molestation, erred in failing to instruct jury on lesser included offense mainly simple assault and battery, Court of Criminal Appeals would not consider contention, it not being apparent that defendant had been deprived of a fundamental right. Tollison v. State, Okla.Crim.App., 514 P.2d 693 (1973). Criminal Law ⇔ 1130(5)

Sentence and punishment--In general

Sentencing defendant for **lewd** molestation under amended statute, which provided that upon third conviction for **lewd** molestation sentence options are life or life without parole and which took effect after offenses were committed, violated ex post facto clauses. Applegate v. State, Okla.Crim.App., 904 P.2d 130 (1995). Sentencing And **Punishment** ⇔ 1219

By creating specific enhancement provision for **lewd** molestation, legislature indicated a particular intent to protect children from repeat molesters. Applegate v. State, Okla.Crim.App., 904 P.2d 130 (1995). Sentencing And **Punishment** ⇔ 1209

Six sentences of life without parole for six counts of **lewd** molestation after two former **lewd** molestation convictions did not shock the conscience, and thus, were not excessive; testimony showed defendant touched one minor victim outside of his clothing and touched another minor victim in the shower and orally sodomized him, defendant had two prior convictions for **lewd** molestation, and sentences were within statutory range. Applegate v. State, Okla.Crim.App., 904 P.2d 130 (1995). Sentencing And **Punishment** ⇔ 1422

Jury could consider parole when it deliberated sentencing defendant with the option of life without parole in prosecution for **lewd** molestation and forcible sodomy. Applegate v. State, Okla.Crim.App., 904 P.2d 130 (1995). Sentencing And **Punishment** ⇔ 117

Sentence composed of consecutive terms of 200 years for first-degree rape, 20 years for sodomy, ten years for **lewd** molestation and ten years for indecent exposure was not excessive. Spencer v. State, Okla.Crim.App., 795 P.2d 1075 (1990). Infants ⇔ 1673; Obscenity ⇔ 252; Sentencing And **Punishment** ⇔ 645; Sex Offenses ⇔ 434; Sex Offenses ⇔ 435

Trial court was not empowered to assess penalty of $250 against defendant, to be paid to court fund as recoupment of attorney fees, in sentencing defendant to one year in penitentiary for making indecent proposal to child under **16**. Nevious v. State,

Okla.Crim.App., 774 P.2d 1070 (1989). Costs ⚖ 318

Sentence of eight years for indecent proposal to child under **age of 16** was not shocking to court or excessive. Roldan v. State, Okla.Crim.App., 762 P.2d 285 (1988). Infants ⚖ 1670; Sex Offenses ⚖ 436

Sentences of 20 years on each count of indecent or **lewd acts** with a child under **16** and on aiding and abetting indecent liberties with child under **16**, to run concurrently, were not excessive. Salyers v. State, Okla.Crim.App., 755 P.2d 97 (1988). Infants ⚖ 1673; Sex Offenses ⚖ 436

Sentences of eight years for child stealing and 15 years for **lewd** molestation, which were each less than maximum provided by statute and which were ordered to run concurrently, were not excessive. Lamora v. State, Okla.Crim.App., 717 P.2d 113 (1986). Infants ⚖ 1670; Kidnapping ⚖ 41; Sex Offenses ⚖ 436

Imposition of sentences of ten years' imprisonment for offense of oral sodomy and five years' imprisonment for offense of taking indecent liberties with a child under the **age of 14** years on defendant who committed the crimes on a seven-year-old girl was within the range provided by law and did not shock the conscience of the court and was thus not excessive. Webb v. State, Okla.Crim.App., 538 P.2d 1054 (1975). Infants ⚖ 1670; Sex Offenses ⚖ 434

Seven-year sentence for **lewd** molestation did not constitute cruel, unusual, and inhumane **punishment**. Tollison v. State, Okla.Crim.App., 514 P.2d 693 (1973). Sentencing And **Punishment** ⚖ 1504

Sentence of one year imprisonment for taking indecent liberties with female child under **age of 14** years was not excessive, in that such sentence was minimum allowed for such offense. Ball v. State, Okla.Crim.App., 509 P.2d 908 (1973). Infants ⚖ 1670; Sex Offenses ⚖ 436

Ten-year sentence imposed on defendant for taking indecent liberties with female under the **age of 14** years, a crime for which maximum **punishment** is 20 years, after fair trial wherein evidence amply supported verdict was not excessive and was not imposed as result of passion or prejudice. Epperson v. State, Okla.Crim.App., 406 P.2d 1017 (1965). Infants ⚖ 1670; Sex Offenses ⚖ 436

Where defendant had entered prosecutrix' home, touched her arm and neck, and asked her to go with him, and where jury was unable to agree upon **punishment**, defendant's **acts** did not justify imposition of maximum sentence for molesting body of child, and sentence was reduced from five years' imprisonment to two years' imprisonment. Rich v. State, Okla.Crim.App., 266 P.2d 476 (1954). Criminal Law ⚖ 1184(4.1)

Defendant's consecutive 15-year sentences on four counts of indecent or **lewd acts** with a child under **16** were not grossly disproportionate in violation of Eighth Amendment's protection against cruel and unusual **punishment**, although defendant was 70 years old at time of sentencing; sentences were within statutory range of **punishment** for crimes. Powers v. Dinwiddie, C.A.10 (Okla.)2009, 324 Fed.Appx. 702, 2009 WL 840598, Unreported. Infants ⚖ 1673; Sentencing And **Punishment** ⚖ 1508; Sex Offenses ⚖ 436

---- Admissibility of evidence, sentence and punishment

Record in prosecution for the taking of indecent liberties with a female child under **14** years **of age** disclosed that trial judge had not taken into consideration in determining sentence, as claimed by defendant, testimony introduced by state through police officer at hearing on aggravation or mitigation of sentence. Sprouse v. State, Okla.Crim.App., 441 P.2d 481 (1968). Sentencing And **Punishment** ⚖ 316

---- Prior convictions, sentence and punishment

Defendant's prior Oklahoma **lewd** molestation conviction was not "forcible sex offense," and thus was not "crime of violence" under sentencing guideline requiring enhanced base offense level if defendant convicted of firearms offense had prior felony conviction of either crime of violence, even if his conduct fell within ambit of comparable federal statute, where statute of conviction swept more broadly than federal statute. United States v. Gieswein, C.A.10 (Okla.)2018, 887 F.3d 1054, habeas corpus dismissed 2018 WL 2020540, certiorari denied 139 S.Ct. 279, 202 L.Ed.2d 202, rehearing denied 2019 WL 660280. Sentencing and **Punishment** ⚖ 793

Sentences of 150 years imprisonment for each count of forcible oral sodomy and **lewd** or indecent **acts** with child under **age of 16** were not excessive given nature of offenses and defendant's two prior convictions, one of which was for child molestation. Virgin v. State, Okla.Crim.App., 792 P.2d 1186 (1990). Infants ⚖ 1673; Sex Offenses ⚖ 434

Sentence of 150 years' imprisonment on each of two counts of first-degree rape after former conviction of felony and two counts of **lewd** molestation after former conviction of felony, with three counts running concurrently and one count consecutively to first count, was not so excessive as to shock court's conscience. Collins v. State, Okla.Crim.App., 751 P.2d 200 (1988). Infants ⚖ 1673; Sex Offenses ⚖ 435

Sentence of defendant to 30 years imprisonment upon conviction of **lewd** molestation after former conviction of a felony was not excessive, in view of circumstances of the case, which involved a five-year-old victim, and fact that defendant had been convicted two years previously of the same crime. Weeks v. State, Okla.Crim.App., 745 P.2d 1194 (1987). Infants ⚖ 1673; Sentencing And **Punishment** ⚖ 95; Sentencing And **Punishment** ⚖ 122; Sex Offenses ⚖ 436

Sentence of 60 years in prison was not excessive for defendant convicted of indecent proposal to child under the **age of 14** after former conviction of two or more felonies. Allen v. State, Okla.Crim.App., 734 P.2d 1304 (1987). Infants ⚖ 1670

Twenty-year sentence imposed following conviction for offense of **lewd** molestation, after former conviction of a felony, was not excessive in view of defendant's prior conviction for rape in the first degree. Delancy v. State, Okla.Crim.App., 596 P.2d 897 (1979). Sentencing And **Punishment** ⚖ 1422

Although judgment and sentence of defendant's prior conviction for indecent exposure, used to enhance **punishment** for offense of **lewd** molestation, failed to disclose that defendant was represented by counsel or waived counsel, appearance docket showing that defendant was represented by counsel on his prior conviction was credible evidence

indicating that defendant was represented. Engram v. State, Okla.Crim.App., 545 P.2d 1285 (1976). Sentencing And **Punishment** ⚖ 1379(2)

---- Enhancement, sentence and punishment

Defendant's prior conviction for indecent proposal to child, in violation of Oklahoma law, qualified as "crime of violence," within meaning of sentencing guidelines, as required for **16**-level enhancement to his sentence, resulting in **54**-month prison term for his guilty plea to being alien present in United States after deportation, since prior conviction was necessarily included in scope of guidelines' enumerated offense generically designated as sexual abuse of minor. U.S. v. Martinez-Zamaripa, C.A.10 (Okla.)2012, 680 F.3d 1221. Sentencing and **Punishment** ⚖ 793

Habeas corpus

Conclusion of the Oklahoma Court of Criminal Appeals (OCCA) that evidence was sufficient for a state court conviction for **lewd** or indecent **acts** with a child under **16** was reasonable, and thus defendant was not entitled to a certificate of appealability (COA) to appeal district court's denial of habeas corpus petition on grounds of insufficient evidence; testimony of five witnesses, including alleged victim, directly inculpated defendant. Crowder v. Martin, C.A.10 (Okla.)2018, 742 Fed.Appx. 389, 2018 WL 3913479. Habeas Corpus ⚖ 493(3); Habeas Corpus ⚖ 818

Trial counsel's conduct in discussing the advantages and disadvantages of testifying in prosecution for engaging in **lewd** or indecent **acts** with a child under **16** in violation of Oklahoma law was reasonable, and thus defendant was not entitled to a certificate of appealability (COA) to appeal district court's denial of habeas corpus petition based on ineffective assistance of trial counsel; defendant acknowledged on the record that defendant understood it was his decision whether to testify at trial. Crowder v. Martin, C.A.10 (Okla.)2018, 742 Fed.Appx. 389, 2018 WL 3913479. Habeas Corpus ⚖ 486(4); Habeas Corpus ⚖ 818

Review

State court's determination that petitioner was not denied effective assistance of counsel due to trial counsel's failure to disclose existence of viable defenses he could have asserted to charges against him under Oklahoma's **lewd** molestation statute was contrary to clearly established federal law in *Strickland v. Washington*, and thus was not entitled to deference on federal habeas review, even though state court ruled in petitioner's case that defenses were not viable, where state court's pronouncement on law in petitioner's case represented marked departure from only available law on books at time petitioner pleaded guilty. Heard v. Addison, C.A.10 (Okla.)2013, 728 F.3d 1170. Habeas Corpus ⚖ 486(2)

State appellate court's rejection of constitutional sufficiency of evidence claims regarding habeas petitioner's convictions of sexual battery, **lewd** molestation, and attempted **lewd** molestation involved neither unreasonable application of *Jackson v. Virginia* review standard nor unreasonable determination of the facts; all seven victims testified at length about incidents, their testimony demonstrated pattern of behavior supporting inference of requisite element of unlawful sexual indulgence. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. §§ 2254(d); Okla. Stat. tit. Webber v. Scott, C.A.10 (Okla.)2004, 390 F.3d 1169. Habeas Corpus ⚖ 493(3)

Failure of defendant to address in his motion for new trial issue with respect to allowing competency questioning of child victim of **lewdness** to be conducted in presence of jury operated to preclude consideration of issue on appeal. Abbott v. State, Okla.Crim.App., 655 P.2d 558 (1982). Criminal Law ⚖ 1064(6)

Federal habeas relief was not available on petitioner's claim that prosecutor's decision to charge him with making **lewd** or indecent proposals to a child under **16** rather than with more specific offense of solicitation of child prostitution was erroneous under state law, especially given that state's highest appellate court ruled on direct appeal that charges brought against petitioner were proper. Haney v. Addison, C.A.10 (Okla.)2008, 275 Fed.Appx. 802, 2008 WL 1913380, Unreported, certiorari denied 129 S.Ct. 766, 555 U.S. 1086, 172 L.Ed.2d 758, rehearing denied 129 S.Ct. 1408, 555 U.S. 1209, 173 L.Ed.2d 652. Habeas Corpus ⚖ 497; Habeas Corpus ⚖ 770

Plain error

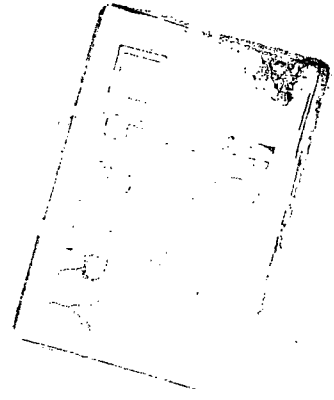
Plain error in prosecuting defendant for both making **lewd** or indecent proposals to a child after one former conviction and using a computer system or network for purpose of committing defendant's double jeopardy substantial rights under double jeopardy statute and required reversal of conviction for using a computer system or network for purpose of committing a felony, where defendant would not have received a second felony conviction and ten-year sentence had error not been made, and allowing statutorily proscribed double **punishment** to stand would undoubtedly bring fairness and integrity of entire trial into serious question. Barnard v. State, Okla.Crim.App., 290 P.3d 759 (2012). Criminal Law ⚖ 1030(1)

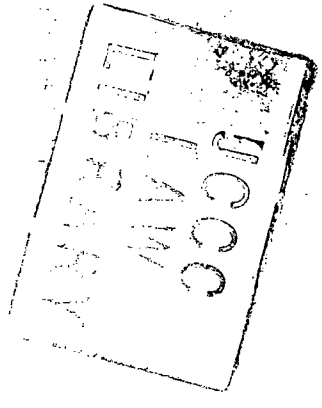
Harmless error

District court's procedural error in determining that defendant's prior Oklahoma **lewd** molestation conviction was "crime of violence" under Sentencing Guidelines was harmless, where, at defendant's original sentencing, district court varied upward from advisory Guidelines range of 188 to 235 months' imprisonment on ground that guidelines did not give sufficient effect to depth and breadth, persistence and depravity and harmfulness of defendant's criminal conduct, and imposed sentence of 240 months, and, on resentencing, district court determined that revised range was 92 to 115 months, but elected to impose same sentence of 240 months' imprisonment to protect public from further crimes, noting that defendant's record had worsened by time of resentencing, and stating that it would have imposed higher sentence but for statutory maximum. United States v. Gieswein, C.A.10 (Okla.)2018, 887 F.3d 1054, habeas corpus dismissed 2018 WL 2020540, certiorari denied 139 S.Ct. 279, 202 L.Ed.2d 202, rehearing denied 2019 WL 660280. Criminal Law ⚖ 1163(1); Criminal Law ⚖ 1177.3(2)

21 Okl. St. Ann. § 1123, OK ST T. 21 § 1123
Current with emergency effective provisions through Chapter 322 of the First Regular Session of the 57th Legislature (2019)

Document





WESTLAW

§ 51.1a. Second offense of rape in the first degree, forcible sodomy, lewd molestation or sexual abuse of a child
OK ST T. 21 § 51.1a Oklahoma Statutes Annotated Title 21. Crimes and Punishments *(Approx. 2 pages)*

Oklahoma Statutes Annotated
Title 21. Crimes and Punishments
Part I. In General
Chapter 2. General Provisions
Second and Subsequent Offenses

21 Okl.St.Ann. § **51.1a**

§ **51.1a**. Second offense of rape in the first degree, forcible sodomy, lewd molestation or sexual abuse of a child

Currentness

Any person convicted of rape in the first degree, forcible sodomy, lewd molestation or sexual abuse of a child after having been convicted of either rape in the first degree, forcible sodomy, lewd molestation or sexual abuse of a child shall be sentenced to life without parole.

Credits
Laws 2002, c. 455, § 3, emerg. eff. June 5, 2002.

21 **Okl**. St. Ann. § **51.1a**, OK ST T. 21 § **51.1a**
Current with enacted legislation of the First Regular Session of the 57th Legislature (2019)

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