

SEP 15 2006

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**  
**MICHAEL S. RICHIE**  
**CLERK**

CHARLES ANTHONY WILLINGHAM,	)	
	)	
Appellant,	)	<b>NOT FOR PUBLICATION</b>
	)	
v.	)	Case No. F 2005-281
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

**SUMMARY OPINION**

**LEWIS, JUDGE:**

Charles Anthony Willingham, Appellant, was convicted of four counts of lewd molestation in violation of 21 O.S.2001, § 1123, in the District Court of Grady County, Case No. CF-2003-357, before the Honorable Richard G. Van Dyck, District Judge. The jury assessed punishment at, count one, ten (10) years imprisonment; counts two and three, fifteen (15) years imprisonment; and count four, twenty (20) years imprisonment (60 years total). Trial court sentenced accordingly, ordering that the sentenced be served consecutively. Willingham has perfected an appeal of his convictions and sentences.

Willingham raises the following propositions of error in support of his appeal:

- I. Defense counsel rendered ineffective assistance of counsel in failing to request a contemporaneous limiting instruction from the trial court when the numerous instances of other crimes and bad acts evidence were received into evidence. Absent any limiting instruction contemporaneous with the reception of this evidence at trial, the jury had no direction

regarding the proper scope for which this evidence could be considered, the limiting instruction given the jury at the close of the case did not cure the lack of limiting instructions contemporaneous with the reception of the evidence.

- II. The failure of the trial information to allege specific dates on which the allegations were committed left Mr. Willingham exposed to double jeopardy concerns and completely prevented Mr. Willingham from presenting any meaningful and effective defense to the charges against him in violation of both the Federal and State Constitutions.
- III. Defense counsel rendered ineffective assistance in failing to utilize Mr. Willingham's medical records at trial. These medical records would have considerably strengthened Mr. Willingham's defense because they would have corroborated his testimony regarding his medical condition and the timing of his surgery, would have eliminated the ability of the prosecution to argue to the jury during rebuttal closing argument that Mr. Willingham was lying about his surgery and his medical condition and would have cast considerable doubt upon the veracity of the allegations in all four counts.
- IV. Dr. Bonner's testimony regarding child accommodation syndrome improperly bolstered J.W.'s credibility and was tantamount to improperly telling the jury that J.W. was telling the truth. Defense counsel rendered ineffective assistance in failing to request a limiting instruction directing the jury as to the purpose for which they could consider Dr. Bonner's testimony.
- V. Improper comments by the prosecutor during closing argument deprived Mr. Willingham of a fair trial.
- VI. Mr. Willingham's total sixty year sentence is excessive and warrants modification given the facts in his case, including the prosecutor's improper and prejudicial comments. A modification of his sentences to run them concurrently rather than consecutively is certainly warranted due to the apparent policy of the district court to punish those who exercise their constitutional right to jury trial.

VII. The cumulative effect of the errors discussed above requires the reversal of Mr. Willingham's convictions or in the alternative a modification of his punishments.

After thorough consideration of Willingham's propositions of error and the entire record before us on appeal, including the original record, transcripts, and briefs, we have determined that the judgments of the District Court should be affirmed, but the sentences should be modified to run concurrently.

In reaching our decision, we find, in propositions one and three, that Willingham has not shown that counsel was ineffective for failing to request a contemporaneous instruction and for failing to utilize available medical evidence.<sup>1</sup> He cannot show that he was prejudiced by this failure, and he cannot show that the failures fell below objective standards of performance. *Strickland v. Washington*, 466 U.S. 668, 688 and 694, 104 S.Ct. 2052, 2064 and 2068, 80 L.Ed.2d 674 (1984). In proposition two, we find that the Information filed in this case was sufficient to give Willingham notice of the charges he would have to defend against and sufficient to protect him from double jeopardy. *See Parker v. State*, 1996 OK CR 19, ¶ 24, 917 P.2d 980, 986, *Kimbro v. State*, 1990 OK CR 4, ¶ 7, 857 P.2d 798, 800.

In proposition four, we find that the expert testimony regarding the child accommodation syndrome was proper *See Davenport v. State*, 1991 OK CR 14,

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<sup>1</sup> Willingham filed an application for evidentiary hearing pursuant to Rule 3.11, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App. (2006). We find that Willingham has not shown by clear and convincing evidence that there is a strong possibility that trial counsel was ineffective for failing to utilize the evidence, thus the motion for evidentiary hearing is denied.

¶ 19, 806 P.2d 655, 660; *United States v. Charley*, 198 F.3d 1251, 1269 (10<sup>th</sup> Cir.1999)(holding testimony that victim's symptoms were consistent with symptoms of sexual abuse victims, in general, was not improper vouching). Counsel's failure to request a limiting instruction on this evidence did not constitute ineffective assistance of counsel, as Willingham has not shown how he was prejudiced by the failure to request said instruction. *Strickland*. In proposition five, we find that most of the comments of the prosecutor were not met with contemporaneous objections, thus we review for plain error. There was no plain error in the comments which were merely asking the jury to judge the credibility and motivations of each witness. *Nickell v. State*, 1994 OK CR 73, 885 P.2d 670. We find that the trial court did not abuse its discretion in failing to grant a mistrial when the prosecutor attempted to elicit sympathy for the victim. As there was no request that the jury be admonished, we review for plain error only. *Patton v. State*, 1998 OK CR 66, ¶ 126, 973 P.2d 270, 302. There was no plain error here. The final jury instructions advised the jury that they were not to allow sympathy to enter into their deliberations, thus their deliberations were properly channeled and no plain error occurred here.

In proposition six, we find that Willingham's sentences should be modified by running the sentences concurrently as they shock this Court's conscience under the circumstances of this proposition. In proposition seven, we find that There is no individual error in this case. When there are no

individual errors to accumulate, this proposition must fail. *Lott v. State*, 2004

OK CR 27, ¶ 165, 98 P.2d 318, 357

### **DECISION**

The judgments of the District Court shall be **AFFIRMED**. The sentences imposed shall be **MODIFIED** by ordering that they run concurrently. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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#### **OPINION BY: LEWIS, J.**

**CHAPEL, P.J.:** Concur  
**LUMPKIN, V.P.J.:** Concur in Part/Dissent in Part  
**C. JOHNSON, J.:** Concur  
**A. JOHNSON, J.:** Concur

### **LUMPKIN, V.P.J.: CONCUR IN PART/DISSENT IN PART**

Appellant repeatedly molested his adopted daughter over an extended period of time while she was in middle school. His actions were despicable and sickening, and the amount of control he exercised over the child was appalling, even in the context of “these sorts of cases.”

The Court’s summary opinion finds no individual error in any of Appellant’s seven propositions. And yet, it also grants relief by modification with respect to proposition six, which raises the specter of an excessive sentence. In so doing, the opinion finds Appellant’s sentences should be modified “by running the sentences concurrently as they shock this Court’s conscience under the circumstances of this proposition.”

The Court gives no hint what those “circumstances” may be, however. More than likely, there are none.

Appellant was facing twenty years on each of the four counts of which he was charged and convicted. The jury set punishment at the maximum on only count four. He received ten years on two other counts, and fifteen years on one other. These are more than reasonable “under the circumstances of this proposition” and case.

Under our statutes, sentences are presumed to run consecutively, unless the district court finds concurrent sentences are warranted. There’s nothing in this record to suggest the Court did not consider concurrent sentences. I therefore dissent to the modification of these wholly proper sentences.