IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BOBBY M. ELLIS,	)	NOT FOR PUBLICATION
Appellant,	)	
v.	)	Case No. F-2006-826
THE STATE OF OKLAHOMA,	)	
Appellee.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
OCT. 12 2007
MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

C. JOHNSON, VICE-PRESIDING JUDGE:

Appellant, Bobby M. Ellis, was charged by Amended Information in the District Court of Kay County, Case No. CF-2003-536, with commission of the following crimes: First Degree Rape (Counts I and IV); Lewd Molestation (Counts II and V) and Preparing Child Pornography (Counts III and VI). The jury found Appellant guilty on all counts and assessed punishment at 75 years imprisonment on each of Counts I and IV; 20 years imprisonment on each of Counts II and V; and 10 years imprisonment and $1,000 fine on each of Counts III and VI. At sentencing, the trial court imposed punishment in accordance with the jury's verdict ordering Appellant's sentences to run consecutively. From this Judgment and Sentence the defendant has perfected his appeal to this Court.

Appellant raises the following propositions of error:

1. Appellant was subjected to double jeopardy and double punishment for the offense of preparing child pornography.
2. The Judgment and Sentence should be modified to accurately state the conviction imposed.

3. The sentences imposed against Mr. Ellis are excessive and should be modified.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm Appellant's Judgment and Sentence on Counts I-V and we reverse Count VI with instructions to dismiss.

As to Proposition I, we find that Appellant's conviction for two counts of Preparing Child Pornography for a single video tape violated the constitutional prohibition against double jeopardy. *See Hunnicutt v. State*, 1988 OK CR 91, 755 P.2d 105. *See also Trim v. State*, 1996 OK CR 1, ¶¶ 2-4, 909 P.2d 841, 842-43. Accordingly, Appellant's conviction for Preparing Child Pornography in Count VI must be reversed with instructions to dismiss.

With regard to Proposition II, Appellant accurately notes, and the State concedes, that Counts III and VI in the Judgment and Sentence reflect that he was convicted of Soliciting a Minor for indecent Exposure/Obscene Material, in violation of 21 O.S.2001, §1021(B)(1). Appellant was actually convicted of Preparing Child Pornography, in violation of 21 O.S.2001, §1021(A)(4). Although Appellant's conviction on Count VI must be reversed with instructions to dismiss based upon error raised in Proposition I, his remaining conviction on Count III must be remanded to the District Court for an Order *Nunc Pro Tunc* correcting the Judgment and Sentence to reflect the appropriate conviction for Preparing Child Pornography.

Finally, Appellant claims that the sentences were excessive. He was sentenced to a total of 210 years on six counts and the sentences were ordered to run consecutively. Relief granted in Proposition I reduced this time to 200 years imprisonment. Although this is not a significant reduction, Appellant

was convicted of raping his two young step-daughters and admitted in open court to molesting them and preparing child pornography. The Appellant showed no remorse for what he had done and, in fact, blamed the child victims for seducing him. The sentences imposed do not shock the conscience of the Court and were not excessive. *Rea v. State*, 2001 OK CR 28, ¶ 5, n.3, 34 P.3d 148, 149 n.3.

DECISION

The Judgment and Sentence of the district court on Counts I-V is **AFFIRMED**. Appellant's conviction on Count VI is **REMANDED** to the district court with instructions to **DISMISS**. Further, the district court is ordered to issue an Order *Nunc Pro Tunc* correcting the Judgment and Sentence to reflect that the conviction for Count III is Preparing Child Pornography. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF KAY COUNTY
THE HONORABLE D.W. BOYD, DISTRICT JUDGE

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OPINION BY C. JOHNSON, V.PJ.

LUMPKIN, P.J.:	CONCURS IN PART/DISSENTS IN PART
CHAPEL, J.:	CONCURS IN RESULTS
A. JOHNSON, J.:	CONCURS
LEWIS, J.:	CONCURS

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

I concur in the Court's affirming the convictions and sentences in Counts I-V. However I must dissent to the decision to reverse and dismiss Count VI.

The Court misapplies the provisions of 21 O.S.Supp.2003, § 1021(A)(4). This statute does not prohibit the mere possession of the tape involved, it prohibits the making or preparing of the tape. It is readily apparent the portions of the tape involving each of the victims were made or prepared at different times with different victims. This is not like our cases involving possession of stolen property where various items of stolen property are singularly possessed at the same time. The theft of each of those items could still have been prosecuted separately, just as the separate and distinct making or preparing of each of the segments on the tape in question. If this were a case where the Appellant was charged with mere possession of the tape, I could agree with the Court. However, he is not charged with possession but with the making or preparing of the child pornography. The making or preparing occurred at separate times with separate victims and thus are separate crimes. I would affirm all the Counts.