IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ROCKY DALE ARMSTRONG,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2014-453**
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

HUDSON, JUDGE:

Appellant Rocky Dale Armstrong was tried by jury and convicted in Beaver County District Court, Case No. CF-2013-3, of Count 1: Lewd or Indecent Proposals to a Child Under 16, in violation of 21 O.S.Supp.2008, § 1123(A)(1); Count 2: Lewd or Indecent Acts to a Child Under 16, in violation of 21 O.S.Supp.2008, § 1123(A)(2); Count 3: Forcible Oral Sodomy, in violation of 21 O.S.Supp.2009, § 888(B)(1); Count 4: First Degree Rape by Instrumentation (Victim Under 14), in violation of 21 O.S.Supp.2008, § 1114(A)(7); Count 5: Lewd or Indecent Acts to a Child Under 16, in violation of 21 O.S.Supp.2008, § 1123(A)(5); Count 6: Lewd or Indecent Proposals to a Child Under 16, in violation of 21 O.S.Supp.2009, § 1123(A)(1); Count 7: Lewd or Indecent Acts to a Child Under 16, in violation of 21 O.S.Supp.2009, § 1123(A)(2); Count 8: First Degree Rape by Instrumentation (Victim Under 14), in violation of 21 O.S.Supp.2008, § 1114(A)(7); Count 9: Lewd or Indecent Acts to a Child Under 16, in violation of 21 O.S.Supp.2009, § 1123(A)(5); Count 10: Lewd or Indecent Acts to a Child Under 16, in violation of 21 O.S.2011, § 1123(A)(2).

The jury sentenced Appellant to twenty (20) years imprisonment on Counts 1, 2, 3, 5, 6, 7 and 9, fifty (50) years imprisonment on Count 10, and life without parole on Counts 4 and 8. The Honorable Clark Jett, Associate District Judge, presided over the trial and pronounced judgment and sentence accordingly. The trial court ordered the sentences for all ten counts to run concurrent, each with the other.[1] Appellant now appeals his convictions and sentences. We affirm.

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[1]The trial court originally pronounced judgment and sentence on February 21, 2014, but vacated the original judgment and sentence because it was rendered without benefit of the pre-sentence investigation (PSI) report mandated for Appellant's crimes. *See* 22 O.S.2011, § 982(A), (B), (E) & (F). Appellant filed his Notice of Intent to Appeal and Designation of Record Form within ten (10) days of the *second* pronouncement of judgment and sentence conducted in this case (but not the first), and filed his Petition in Error within ninety (90) days of the *second* pronouncement of a judgment and sentence (but not the first). Presiding Judge Smith, at the author's request, issued an Order on May 28, 2015, directing Appellant to show cause why the present appeal should not be dismissed for lack of jurisdiction. *See Blades v. State*, 2005 OK CR 1, ¶ 3, 107 P.3d 607, 608 ("Once a defendant has been sentenced by a District Court, the District Court loses jurisdiction over the case."); *LeMay v. Rahal*, 1996 OK CR 21, ¶¶ 22-25, 917 P.2d 18, 22-23 (trial court jurisdiction ends with acceptance of valid guilty plea and pronouncement of agreed sentence in open court). Appellant, through counsel, filed a timely response addressing this Court's jurisdiction.

Based upon our review of that response, along with the pertinent authorities and parts of the record, we **FIND** that this Court has jurisdiction to hear this appeal. The trial court's original pronouncement of *judgment* was valid and remains in force. 22 O.S.2011, §§ 970-72; *Davis v. State*, 1993 OK CR 3, ¶¶ 9-13, 845 P.2d 194, 197-98 (trial court had no authority to vacate convictions where the facts of the case address the sentencing powers of the trial court and not the validity of the judgment of guilt). *See also Robertson v. State*, 1995 OK CR 6, ¶ 9 n.11, 888 P.2d 1023, 1025 n.11 ("the trial court's power to vacate a judgment is separate and distinct from its power to vacate a sentence.") (discussing *Davis*, *supra*). The trial court had authority to pronounce *sentence* after the court's receipt and consideration of the PSI report made mandatory here by statute for which no exception applies. 22 O.S.2011, § 982(A), (B), (E) & (F); *Smith v. State*, 1979 OK CR 30, ¶¶ 12-13, 594 P.2d 784, 787. *Cf. Ex parte Lyde*, 1920 OK CR 150, 17 Okl.Cr. 618, 191 P. 606, 608 (trial court's pronouncement of judgment in the defendant's absence "is illegal and wholly void" where, *inter alia*, Oklahoma statutes require that judgment be pronounced in open court in the defendant's personal presence). We therefore proceed to adjudicate this appeal. However, the trial court is **ORDERED** to correct the judgment and sentence by order *nunc pro tunc* to reflect that judgment was pronounced on February 21, 2014.

I. BACKGROUND.

In December 2007, Appellant and his wife, Mildred, obtained legal guardianship of three sisters, C.A., C.H. and D.A., and one brother, I.A., and moved them to the Armstrong home in Forgan, Oklahoma. Prior to this, all four children lived with a foster family in Kansas. J.G., the children's mother (and Mildred Armstrong's half-sister), relinquished her parental rights in an agreement with Kansas authorities after being charged with robbery. This allowed Appellant and Mildred to obtain legal guardianship of the four children who were their nieces and nephew. C.A. was ten (10) years old, C.H. was eight (8) years old and D.A. was four (4) years old when they moved to Forgan in December 2007 to live with Appellant and Mildred.

The testimony in this case paints a horrifying account of sexual abuse inflicted against all three sisters prior to their removal years later from the Armstrong home. C.A. and C.H. described for the jury years of sexual abuse by Appellant while living in the Armstrong home. Oklahoma authorities removed the children from the Armstrong home after C.A. disclosed Appellant's sexual abuse against her to a teacher at the Forgan school. C.A.'s disclosure occurred in October 2012 after her sister D.A. told her about being sexually abused by Appellant. The children were removed from the Armstrong home on October 29, 2012 and were returned to foster care. Additional facts will be presented below as needed.

II. SUFFICIENCY OF THE INFORMATION.

In Proposition I, Appellant argues that the broad date ranges embodied in Counts 1—9 of the second amended Information resulted in a lack of specificity that negated his due process right to present a defense. Citing the Due Process provisions of the United States and Oklahoma constitutions, Appellant urges that he was unable to defend against the allegations in these nine counts because "it was impossible for [Appellant] to account for each day for three and a half years." Aplt. Br. at 7-8. Appellant also argues that the State violated the state and federal double jeopardy provisions, and the state multiple punishment provision, by pleading the first nine counts in the Information using broad date ranges. Simply, Appellant argues that he may be subject to subsequent prosecution for the same acts. Aplt. Br. at 9 (citing U.S. Const. amends. V, XIV; Okla. Const. art. 2, § 21; 21 O.S.2011, § 11).

"The test to assess the sufficiency of the information is two-pronged: (1) whether the defendant was in fact misled by it, and (2) whether conviction under it would expose the defendant to the possibility of being put in jeopardy a second time for the same offense." *Sims v. State*, 1988 OK CR 193, ¶ 10, 762 P.2d 270, 272. "The test is not whether the information could have been more definite or certain, but whether it contained the elements of the offense." *Id.* Our decisions in this area focus on whether the defendant had notice of the charges against him and was apprised of what he must meet at trial. *See Miles v. State*, 1996 OK CR 24, ¶ 4, 922 P.2d 629, 630. Each case is reviewed "by looking at the Information itself plus material available to the defendant at preliminary hearing or through discovery to determine whether the defendant

received sufficient notice to satisfy due process requirements." *Id.* "[I]f the Information and material available to a defendant do not provide him with notice of the particular crime he must defend against, then the Information will violate due process by failing to provide sufficient notice." *Id.*

In the present case, each count in the Information was pled using a broad range of dates. As discussed below, the date range for each count was based upon testimony presented by each victim at Appellant's preliminary hearing describing separate and distinct acts of sexual abuse corresponding to each charged count.[2] Indeed, after the presentation of testimony from all three victims, the preliminary hearing judge granted a continuance to allow the defense an opportunity to review the preliminary hearing transcript and lodge a specific demurrer based on alleged variances between the testimony and the allegations in the original Information. When proceedings resumed, the prosecutor presented an amended Information reflecting the particulars of all three victims' preliminary hearing testimony. The preliminary hearing judge entered a bind over order on the counts contained in the amended Information. Appellant re-urged this claim before the district court in a motion to quash the information filed, and heard, before district court arraignment. Defense counsel renewed this motion at trial. Proposition I is therefore preserved for appellate review.

A. Counts 1—5. Counts 1—5 alleged various crimes committed by Appellant against C.A. Counts 1, 2 and 5 were alleged in the second amended

[2]Preliminary hearing testimony from each victim was presented on March 11, 2013.

Information[3] to have occurred "between the 7th day of May 2009, and the 15th day of October 2012." Counts 1, 2 and 5 of the Information state in pertinent part:

> **COUNT 1: LEWD OR INDECENT PROPOSALS TO CHILD UNDER 16 ~ a FELONY, between the 7th day of May 2009, and the 15th day of October, 2012, did unlawfully, knowingly and intentionally make oral lewd and indecent proposals to C.A. (DOB: 5/7/1997), to wit: to let him touch her private parts, for her to look upon touch and feel his penis, and for her to allow him to have sexual intercourse with her, at a time when C.A. was under 16 years of age and Rocky Dale Armstrong was over 53 years of age.**
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> **COUNT 2: LEWD OR INDECENT ACTS TO CHILD UNDER 16 ~ a FELONY, between the 7th day of May, 2009, and the 15th day of October, 2012, by knowingly and intentionally looking upon, touching and feeling the body and private parts, to wit: the breasts and vagina, of C.A. (DOB: 5/7/1997) in a lewd and lascivious manner against public decency at a time when C.A. was under 16 years of age and Rocky Dale Armstrong was over 53 years of age.**
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> **COUNT 5: LEWD OR INDECENT ACTS TO A CHILD UNDER 16 ~ a FELONY, between the 7th day of May, 2009, and the 15th day of October, 2012, the Defendant then and there did knowingly and intentionally in a lewd and lascivious manner for the purpose of sexual gratification require C.A. (DOB: 5/7/1997) to touch or feel the body parts of the defendant by requiring C.A. to touch his penis and rub him to the point of ejaculation at a time when C.A. was under 16 years of age and Rocky Dale Armstrong was over 53 years of age.**

[3]The second amended Information was read to the jury and reflects the same date ranges, crimes and particular factual allegations for each count as the amended Information. The only apparent amendment made in the second amended Information is the punishment range listed for Count 10.

(O.R. 72-73). The date range alleged in Counts 1, 2 and 5 was based on C.A.'s preliminary hearing testimony that Appellant began touching her around age 12 and that the sexual abuse ended sometime in early October 2012—a few weeks before C.A. and her siblings were removed from the Armstrong home. C.A. could not remember any specific date or time when any of the crimes she described had occurred. So the prosecutor utilized what C.A. *could* remember, i.e., the approximate dates of the first and last instances of abuse as well as C.A's age and school status when various instances of abuse occurred. C.A. described for the magistrate several separate and distinct acts of sexual abuse falling into all three counts within the date range alleged.

C.A. testified that her birthday was May 7, 1997, and at time of preliminary hearing she was a 15 year old high school freshman. According to C.A.'s preliminary hearing testimony, Appellant started touching her vagina around age 12 when they were watching a sci-fi show on television in Appellant's bedroom. C.A. was in fifth grade and had been living in Appellant's house about a year. Appellant touched C.A.'s vagina the first time over her clothes. After that, C.A. testified that Appellant touched her vagina "pretty regular, like, once a week or so." This always happened in Appellant's bedroom. Appellant touched C.A.'s vagina both on the outside and the inside. Appellant also rubbed C.A.'s breasts over and under her clothes.

C.A. described how Appellant asked her to "rub his legs" while they were watching television on Appellant's bed. After coercing C.A. to actually rub his legs, Appellant asked her to rub his penis "up and down" often to the point of

ejaculation. Appellant often told C.A. that he "was hurting and that he needed to be relieved." This meant that Appellant wanted C.A. "to rub him and come." In late December 2011, Appellant asked C.A. to "rub his leg" before he would let C.A. go to a friend's birthday party. However, C.A. testified that she refused to rub Appellant's penis that day.

On one occasion, Appellant asked C.A. if he could look at her vagina "just a little bit" while they were watching television in Appellant's bedroom; C.A. complied after Appellant became agitated when she said no. Appellant asked C.A. more than once whether he could put his penis inside her. When C.A. told Appellant no, he replied "you will when you get older." C.A. was 13 or 14 years old the first time Appellant asked if he could put his penis inside of her.

The last time anything like this happened to C.A., Appellant rubbed C.A.'s vagina inside her clothes. C.A. testified this happened three (3) or four (4) weeks before C.A. and her siblings were removed from the Armstrong home in October 2012. On cross-examination, C.A. clarified that Appellant touched her vagina for the last time "[t]owards the beginning, not quite the middle[ ]" of October—shortly before moving out of the Armstrong home.[4] On re-direct, C.A. explained that the last time Appellant molested her, they were at home and Appellant asked if C.A. wanted to watch television. After Appellant and C.A.

[4]C.A. initially testified at preliminary hearing that she stopped living at the Armstrong home on "October 20 something" but in response to the prosecutor's follow-up question agreed that it could have been October 29th. The probable cause affidavit stated that C.A. and her siblings were removed from the Armstrong home by the Department of Human Services on October 29, 2012. At trial, C.A.'s testimony was more certain as to when she last lived in the Armstrong home, stating definitively that the last time she was there was on October 29, 2012.

started watching television "for awhile, and then he just like reached over and started rubbing."

Count 3 was alleged to have occurred "between the 7th day of May, 2010, and the 15th day of October, 2012[.]" Count 4 was alleged to have occurred "on or between the 7th day of May, 2009, and the 6th day of May, 2011[.]" Counts 3 and 4 state in pertinent part:

> **COUNT 3: FORCIBLE ORAL SODOMY ~ a FELONY, between the 7th day of May, 2010, and the 15th day of October, 2012, by penetrating the vagina of C.A. (DOB: 5/7/1997), a minor child under the age of sixteen, with the mouth of the defendant by licking the vagina and inserting his tongue into the vagina of C.A. at a time when C.A. was under 16 years of age and Rocky Dale Armstrong was over 53 years of age.**
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> **COUNT 4: FIRST DEGREE RAPE BY INSTRUMENTATION – (VICTIM UNDER AGE 14) ~ a FELONY, on or between the 7th day of May 2009, and the 6th day of May, 2011, by knowingly and intentionally penetrating the vagina of C.A. (DOB: 5/7/1997) with his finger at a time when C.A. was less than 14 years of age and Rocky Dale Armstrong was over 53 years of age.**

(O.R. 72).

Count 3 was supported by C.A.'s preliminary hearing testimony that, when she was 13 or 14 years old, Appellant removed C.A.'s clothing while she was laying on his bed. Appellant then put her legs over her head and licked the inside and outside of her vagina. When C.A. resisted and told him to stop, Appellant responded "[d]on't tell me to stop." When C.A. said "I don't like it", Appellant said "[y]ou are a lesbian." Appellant put his mouth on C.A.'s vagina many other times.

Count 4 is supported by C.A.'s testimony that Appellant touched her vagina inside and outside repeatedly, nearly once a week, beginning around age 12 and ending in October 2012. The date range in Count 4, however, only covers rape by instrumentation inflicted when C.A. was under 14 years of age. *See* 21 O.S.Supp.2008 § 1114(A)(7). Hence, the Count 4 date range runs from C.A.'s 12th birthday to the day before her fourteenth birthday.

B. Counts 6—9.

Counts 6—9 alleged various crimes committed against C.H. The date range alleged for all four counts is June 11, 2010 through October 29, 2012. C.H. testified at preliminary hearing that she was born June 11, 1999. Thus, June 11, 2010 was C.H.'s eleventh birthday. October 29, 2012 is the last day the children were in the Armstrong household.[5] At the time of preliminary hearing, C.H. was 13 years old and in seventh grade. Counts 6 and 7 of the information read as follows:

> **COUNT 6: LEWD OR INDECENT PROPOSALS TO CHILD UNDER 16 ~ A FELONY, between the 11th day of June, 2010, and the 29th day of October, 2012, did unlawfully, knowingly and intentionally make oral lewd and indecent proposals to C.H. (DOB 6/11/1999), to-wit: to let him touch her private parts, for her to look upon touch and feel his penis, and for her to allow him to perform oral sodomy upon her at a time when C.A. [sic] was under 16 years of age and Rocky Dale Armstrong was over 53 years of age.**
>
> **COUNT 7: LEWD OR INDECENT ACTS TO CHILD UNDER 16 ~ a FELONY, between the 11th day of**

[5]C.H. testified at preliminary hearing that the last date she lived in the Armstrong home was on the last day of October 2012. As discussed in footnote 4, however, the evidence at trial was undisputed that the victims were removed from the Armstrong home on October 29, 2012.

June, 2010, and the 29th day of October, 2012, by knowingly and intentionally looking upon, touching and feeling the body and private parts, to-wit: the breasts and vagina, of C.H. (DOB: 6/11/1999) in a lewd and lascivious manner against public decency and morality when C.H. was under 16 years of age and Rocky Dale Armstrong was over 18 years of age.

(O.R. 73).

The date range alleged for Counts 6 and 7 was supported by testimony from C.H. detailing several distinct episodes in which Appellant touched her vagina and her breasts. C.H. was able with some of these incidents to provide a more limited time frame during which Appellant perpetrated the lewd or indecent acts or proposals against her. C.H.'s descriptions of her age, her grade in school and the time of year associated with these particular incidents fell within the general date range alleged by the State and provided a more limited time frame in which some of the lewd or indecent acts or proposals occurred. Of course, C.H.'s testimony made clear that Appellant regularly inflicted the lewd or indecent act or proposals on C.H.—so much so that C.H. could not remember them all. The specific acts relating to Counts 6 and 7 for which C.H. could remember specific times fell between her eleventh birthday and C.H.'s removal from the Armstrong home.

C.H. testified at preliminary hearing that Appellant first started touching her vagina when she was 9 years old and in third grade. This started approximately one (1) year after she started living at the Armstrong home.[6] It

[6]The undisputed evidence at trial was that the victims moved into the Armstrong home in December 2007.

always started when Appellant asked C.H. to rub his leg and it always happened in Appellant's bedroom. Appellant touched C.H.'s private area too many times for her to count. However, the touching of her vagina started before Appellant made C.H. touch his penis. C.H. was in the fifth or sixth grade the first time Appellant made her touch his penis. Appellant did something inappropriate to C.H. fifty percent (50%) of the time she went into Appellant's bedroom to watch television. Appellant asked C.H. to watch television in his bedroom every other day. However, C.H. testified she did not watch TV in Appellant's bedroom very often. The first time Appellant touched C.H.'s vagina she was in Appellant's bedroom, watching television. C.H. testified that the last time Appellant touched her inappropriately was during the summer of 2012, before she returned to school.

C.H. described the first time she could remember Appellant touching her vagina. This occurred when Appellant touched C.H.'s vagina while she, C.A. and Appellant were watching television on Appellant's bed. Appellant was sitting between the two girls on the bed. Appellant reached behind C.H., ran his hands up her shorts, moved her underwear and rubbed the outside of C.H.'s vagina with his fingers. This made C.H. uncomfortable. C.A. was watching television and therefore did not see Appellant rubbing C.H.'s vagina. C.H. did not say anything to her sister while this was occurring. C.A. recalled that this incident happened late on a weekend night—she and her sister were watching television because they did not have to go to school the next day.

C.H. could not, however, remember what grade she was in, the time of year or what the weather was like when this occurred.

The next time something like this happened, C.H. went home from school with Appellant after C.H. went to the counselor's office to report bullying by the other students. C.H. testified she was in sixth grade when this happened. The weather was warm and it was towards the end of the school year, in April, when this happened. Appellant came to the school, picked up C.H. at the counselor's office and the pair went home. No one was home when they arrived. C.H. went to her bedroom, changed into some shorts and asked to borrow some lotion. Appellant told C.H. to take her shorts and panties off in his bedroom and apply the lotion there. When C.H. said "no", Appellant told her to do it anyway.

C.H. complied, taking off her shorts and panties in Appellant's presence in his bedroom. Appellant then told C.H. to get on the bed. Again, C.H. complied. Once she was on the bed, Appellant started touching and rubbing the outside of C.H.'s vagina with his fingers. C.H. testified this hurt. When C.H. said "stop" Appellant responded "no" and continued rubbing her vagina.

When C.H. was 11 years old, Appellant touched her breasts in the kitchen while she was wearing her brother's Under Armor shirt with shorts. Appellant looked at her and said "You're finally growing some." C.H. could not remember the precise date this occurred or even the time of year. However, C.H. recalls that she was 11 years old when it happened.

C.H. described how Appellant asked her if he could put his mouth on her vagina. C.H. told him "no" to which Appellant responded "Why not?" C.H. denied that Appellant ever put his mouth on her vagina.

C.H. described another incident which occurred two years prior to her preliminary hearing testimony. C.H. asked Appellant if he could teach her about sex. Appellant said yes. C.H. expected simply that Appellant would talk to her about sex. Instead, Appellant showed her about sex physically. When this occurred, C.H. was standing in front of Appellant while he was sitting on his bed. C.H. cannot remember anything else about this episode.

Count 8 of the Information reads as follows:

> **COUNT 8: FIRST DEGREE RAPE BY INSTRUMENTATION ~ (VICTIM UNDER AGE 14) ~ a FELONY, between the 11th day of June 2010, and the 29th day of October, 2012, by knowingly and intentionally penetrating the vagina of C.H. (DOB: 6/11/1999), a minor child under fourteen years of age, with his finger, at a time when C.H. was less than 14 years of age and Rocky Dale Armstrong was over 53 years of age.**

(O.R. 73).

C.H. testified that Appellant put his fingers inside of her vagina "[l]ots of times"—possibly more than thirty (30) times. She testified this usually happened on weekends but not every weekend. C.H. described one such instance for the preliminary hearing judge. C.H. testified that C.A. asked her one day if Appellant was touching her. This occurred on the same day Appellant made C.H. lay on the bed and prop up her legs so he could spread them apart. Appellant touched C.H.'s vagina on the outside and also inserted

his fingers inside her vagina. C.H. testified this hurt. When C.H. told Appellant to stop, he said "no." Eventually, Appellant pulled away and C.H. left the bedroom after putting her panties and shorts back on. C.H. does not remember the precise date this happened, the year of this episode or even how old she was.[7]

Hence, Appellant was provided notice of a single, distinct episode in which C.H. testified Appellant committed first degree rape by instrumentation against her as alleged in Count 8. Beyond this, C.H. described an on-going pattern of sexual attacks during which Appellant committed the first degree rape by instrumentation against C.H. alleged in Count 8. The State utilized C.H.'s testimony (discussed in connection with Counts 6 and 7) showing that Appellant's lewd proposals and lewd acts fell between C.H.'s eleventh birthday and C.H.'s removal from the Armstrong home as the date range for Count 8.

Count 9 of the Information states the following:

> **COUNT 9: LEWD OR INDECENT ACTS TO A CHILD UNDER 16 ~ a FELONY, between the 11th day of June, 2010, and the 29th day of October, 2012, the Defendant then and there did knowingly and intentionally in a lewd and lascivious manner for the purpose of sexual gratification require C.H. (DOB: 6/11/1999) to look upon, and to touch or feel the body parts of the defendant by requiring C.H. to view him while naked, to touch his penis and rub him to the point of ejaculation at a time when C.H. was under 16 years of age and Rocky Dale Armstrong was over 53 years of age.**

(O.R. 73).

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[7]C.A. described a similar incident in her preliminary hearing testimony. However, C.A. did not provide a specific date for this incident.

C.H. testified at preliminary hearing that Appellant asked her on numerous occasions to rub his legs and, when she would comply, Appellant told C.H. to keep moving up his legs until she reached the top of his thigh. At that point, Appellant told C.H. to touch his penis. C.H. complied and Appellant told her to "go up and down." Appellant got mad if C.H. refused. C.H. continued rubbing Appellant's penis in this way, sometimes until something came out of it.

When asked how many times this happened, C.H. testified she did not know "[b]ecause he made me do it too much." C.H. also does not remember how old she was the first time Appellant made her rub his penis but she does recall being in fifth or sixth grade the first time it happened. C.H. does not know how many times Appellant made her touch him inappropriately.

C.H. recalled one occasion when Appellant undressed in C.H.'s presence in his bedroom. C.H. testified that Appellant said he was going to take a shower; then Appellant took his shorts off and stood naked in front of her. This was the only time C.H. saw Appellant naked. Appellant made C.H. touch him on this occasion after he took off his shorts and moved in front of her. C.H. resisted, stating several times "no" to which Appellant demanded "touch him . . . I said touch him." C.H. testified that she touched it for a second and then left.

C. Analysis.

The crux of Appellant's complaint is that the State did not allege a specific date for each charged offense. Thus, Appellant reasons, he was unable

to prepare an adequate defense because of the broad date ranges alleged for each count. Under Oklahoma law, the State is not required to plead a specific date in the information for the charged offenses unless time is a material element of the offense. 22 O.S.2011, § 405; *Lemmon v. State*, 1975 OK CR 147, ¶ 22, 538 P.2d 596, 601 ("Unless the statute defining the offense makes the date a material element, as in the case of Sunday closing or 'blue laws,' the date need not be specifically alleged."). Moreover, the State "is not required to prove an offense took place on the exact date charged." *Robedeaux v. State*, 1995 OK CR 73, ¶ 8, 908 P.2d 804, 806 (quoting *Jones v. State*, 1969 OK CR 151, ¶ 10, 453 P.2d 393, 396). "The defendant may be convicted upon proof of the commission of the offense at any time within the Statute of Limitations and prior to the date of the filing of said Information." *State v. Holloway*, 1973 OK CR 440, ¶ 4, 516 P.2d 1346, 1347.

In the present case, the State did allege a specific date range for Counts 1—9 based on C.A.'s and C.H.'s description of events in their preliminary hearing testimony. In *Kimbro v. State*, 1990 OK CR 4, 857 P.2d 798, this Court approved of the State's use of a four (4) month date range to charge a defendant with multiple counts of forcible anal sodomy and forcible oral sodomy. *Id.*, 1990 OK CR 4, ¶¶ 5-9, 857 P.2d at 799-800. The Court stated the governing rule as follows: "An Information will be found sufficient if it does not mislead the defendant and does not expose the defendant to double jeopardy." *Id.*, 1990 OK CR 4, ¶ 5, 857 P.2d at 800. The victim in *Kimbro* was "a seven year old boy with an undeveloped sense of time." *Id.*, 1990 OK CR 4, ¶

6, 857 P.2d at 800. His testimony clearly described one act of forcible anal sodomy and one act of forcible oral sodomy. The victim could not testify when these acts occurred except to say it was hot outside. The victim also could not provide a clear account of how many times the acts occurred. However, a treating physician testified that the victim reported to him that the acts of forcible anal sodomy occurred more than once. *Id.*

In rejecting Kimbro's claim that the information under which he was prosecuted was too vague to provide adequate notice or to prevent subsequent prosecution for the charged offenses, this Court held that "the prosecutor satisfied his duty to inform the accused within reasonable limits and as best known by the State, the time frame in which these acts were believed to have occurred." *Id.*, 1990 OK CR 4, ¶ 7, 857 P.2d at 800. The four month date range did not make the information constitutionally infirm because "[t]o hold otherwise would create undue risk to child victims who for legitimate reasons are unable to specify the date or dates on which they were molested." *Id.*[8] Kimbro was also not exposed to double jeopardy because "jeopardy has attached to all alleged sexual acts between Appellant and [the victim] during the period of time specified in the Information." *Id.*, 1990 OK CR 4, ¶ 8, 857 P.2d at 800. Thus, under the double jeopardy clauses of both the state and federal constitutions, Kimbro was protected "from being tried a second time for

[8]Notably, the Tenth Circuit has rejected constitutional notice challenges in child abuse prosecutions involving much longer time frames than *Kimbro*. *See Hunter v. New Mexico*, 916 F.2d 595, 600 (10th Cir. 1990) (three years); *Parks v. Hargett*, No. 98-7068, 1999 WL 157431, at *4 (10th Cir. Mar. 23, 1999) (unpublished) (seventeen months).

the same acts which led to this conviction." *Id.* (citing Okla. Const. art. 2, § 21; U.S. Const. amend. V).

In the present case, the prosecutor informed Appellant as best known to the State the date range involved with each charged offense. The particulars of Counts 1—9 were based on the preliminary hearing testimony of C.A. and C.H. The young female victims in the present case could not provide more specific dates for the various acts of sexual abuse inflicted upon them because Appellant—their legal custodian—so frequently abused them. The sexual abuse endured by these victims was part of their daily lives. Nonetheless, C.A. and C.H. provided definite testimony concerning individual acts of abuse supporting each count. As noted by the district court in rejecting Appellant's motion to quash, C.A. and C.H. were able to describe foundational events in their lives from which they could estimate the timing of many of these particular instances of abuse. The district court aptly noted that this is to be expected from alleged victims of a tender age who do not measure time in the same way as adults. "Certainly, prosecutors should be as specific as possible in delineating the dates and times of abuse offenses, but we must acknowledge the reality of situations where young child victims are involved." *Valentine v. Konteh*, 395 F.3d 626, 632 (6th Cir. 2005). Here, "[t]he children testified with appropriate specificity—exact date and time would be an impossible burden for a child to sustain." *Crispino v. State*, 7 A.3d 1092, 1105 (Md. 2010). Under these circumstances, Appellant was provided sufficient notice of the charged

offenses based on the allegations in the Information along with the victims' preliminary hearing testimony.

Appellant's complaint that he was unable to prepare an adequate defense based on the broad date ranges set forth in the information does not alter our conclusion that the information here was adequate. Appellant's trial defense was that the victims were lying about the sexual abuse they say he inflicted upon them because of the discipline and chores Appellant instituted in the Armstrong home. Towards this end, the defense presented testimony from the victims' previous foster parents to show that the victims acted out sexually prior to moving to the Armstrong home, that the children received counseling for sexual abuse while in foster custody, that C.H. had a problem with lying and stealing, that the children had no discipline and hated doing chores and that the children made false allegations of child abuse against their foster parents in Kansas. The defense presented testimony relating to the victims' resistance to the discipline imposed by Appellant upon all of the children living in the Armstrong residence. Based on this testimony, the defense urged, the children had the motive and capacity to fabricate the accounts of sexual abuse contained in their testimony. Additionally, the defense utilized inconsistent statements by the victims concerning the various sexual acts inflicted upon them by Appellant in an attempt to impeach their credibility.

The defense further challenged the victims' testimony by presenting evidence of the victims' absence from the Armstrong home over a period of two summers. Appellant acknowledges that he presented testimony at trial from

his step-daughter Nicole Rae Carranza that the victims allegedly spent several months at her home in Texas during the summer of 2011 and 2012. Aplt. Br. at 12-13. Defense testimony from Appellant's son, Dusty Armstrong, was that the victims spent two consecutive summers at Carranza's Texas home.[9] C.A. was adamant in her trial testimony on cross-examination that the first time she could ever remember Appellant doing anything inappropriate to her was the summer between her fifth and sixth grade year. However, C.A. testified that she went to Texas to visit Ms. Carranza the summer between her seventh and eighth grade year. Both the prosecutor and defense elicited testimony from C.A. at trial that the sexual abuse described by C.A. was a normal part of life that happened "[p]retty much everyday." Moreover, C.A. testified that the sexual abuse she described happened more in the summer.

Appellant also highlights the testimony elicited at trial concerning the large number of people living in—or coming and going from—the Armstrong residence. Aplt. Br. at 12. The defense used this fact as a basis to challenge the victims' credibility. Nothing about the broad time frames alleged in Counts 1—9 prevented Appellant from urging as part of his defense that the victims' allegations lacked credibility because of the large number of people living in the home. The same is true of a defense strategy attacking the credibility of C.A.'s accounts of everyday sexual abuse by Appellant which escalated in summer in

[9]Dusty Armstrong's testimony, however, was that the first summer the victims stayed with Carranza was the summer she moved to Abilene. According to Carranza, she moved to Abilene on July 15, 2010.

light of the victims' summer trips to Texas to visit Ms. Carranza. Indeed, defense counsel pursued these very themes at trial.

Appellant's argument that he is entitled to relief because he was prejudiced in his ability to present an alibi defense lacks merit. The present case involves alleged sexual abuse by a dominant caretaker or disciplinarian against multiple young victims in the home which occurred over a period of months or even years before being reported to law enforcement. *See Gilson v. State*, 2000 OK CR 14, ¶¶ 21-23, 8 P.3d 883, 899-900 (separate acts of child physical or sexual abuse may be charged as a single, continuous offense when perpetrated by those acting in a parental or caretaker role during the alleged time frame). "In child sexual abuse cases involving a continuous course of sexual abuse, and evidence of frequent, secretive offenses over a period of time, credibility, not alibi, is the only issue." *State v. Taylor*, 797 P.2d 158, 160 (Idaho Ct. App. 1990). *See also State v. Wilson F.*, 823 A.2d 406, 415 (Conn. App. Ct. 2003); *Malee v. State*, 809 A.2d 1, 7 (Md. Ct. Spec. App. 2002); *People v. Jones*, 792 P.2d 643, 657-58 (Cal. 1990); *People v. Obremski*, 207 Cal. App. 3d 1346, 1353, 255 Cal. Rptr. 715, 719-20 (Cal. Ct. App. 1989). Appellant was able to present alibi evidence with respect to some incidents which also challenged the victims' credibility as part of the broader defense theory. Moreover, Appellant was able to test the victims' veracity and memory and deny participation. In other words, Appellant fit his defense to the facts of the case. All things considered, Appellant was not deprived of his constitutional right to present a defense.

Kimbro is dispositive of Appellant's double jeopardy claim. Simply, "jeopardy has attached to all alleged sexual acts between Appellant and [the victims] during the period of time specified in the Information." *Id.*, 1990 OK CR 4, ¶ 8, 857 P.2d at 800. The testimony of C.A. and C.H. provided specific examples of the sexual abuse they suffered as alleged in each count. In many instances, their testimony established a more limited date range in which these instances of sexual abuse occurred. Thus, Appellant was protected from being tried a second time for the same acts which led to his convictions. Relief for Proposition I is denied.

III. DOUBLE JEOPARDY AND MULTIPLE PUNISHMENT CLAIMS.

In Proposition II, Appellant complains that his convictions on Count 2: Lewd or Indecent Acts to a Child Under 16 and Count 4: First Degree Rape by Instrumentation (Victim Under Age 14), violate the double jeopardy prohibitions in the United States and Oklahoma Constitutions as well as the Oklahoma statutory prohibition against multiple punishments in 21 O.S.2011, § 11. In Proposition III, Appellant makes the same argument regarding his convictions on Count 7: Lewd or Indecent Acts to a Child Under 16 and Count 8: First Degree Rape by Instrumentation. Aplt. Br. at 15-22.

Appellant did not raise these claims at any point in the district court proceedings. He has therefore waived review on appeal of all but plain error. *Barnard v. State*, 2012 OK CR 15, ¶ 25, 290 P.3d 759, 767 (double jeopardy and statutory multiple punishment claims not raised during trial proceedings are waived for all but plain error review); *Logsdon v. State*, 2010 OK CR 7, ¶ 15,

231 P.3d 1156, 1164 (same); *Head v. State*, 2006 OK CR 44, ¶ 9, 146 P.3d 1141, 1144 (same). "Under plain error analysis, the first task is to determine whether error (i.e., deviation from a legal rule) occurred, and if so, whether that error was plain or obvious." *Barnard*, 2012 OK CR 15, ¶ 25, 290 P.3d at 762.

Appellant argues that Lewd or Indecent Acts to a Child Under 16 under 21 O.S.Supp.2008—2009, § 1123(A)(2) is a lesser-included offense of First Degree Rape by Instrumentation under 21 O.S.Supp.2008, § 1114(A)(7) and therefore his convictions on Counts 2, 4, 7 and 8 violate double jeopardy and the § 11 multiple punishment provision because the state did not allege distinct, separate occurrences on these counts. Appellant reasons that it is impossible to commit the crime of First Degree Rape by Instrumentation without also committing the crime of Lewd or Indecent Acts to a Child Under 16. Aplt. Br. at 17, 21.

A. Multiple Punishment.

Appellant's statutory multiple punishment argument does not reveal plain error. Title 21, O.S.2011, § 11 provides in pertinent part:

> [A]n act or omission which is made punishable in different ways by different provisions of this title may be punished under any of such provisions, . . . but in no case can a criminal act or omission be punished under more than one section of law; and an acquittal or conviction and sentence under one section of law, bars the prosecution for the same act or omission under any other section of law.

The focus of the multiple punishment analysis under our case law is the relationship between the crimes:

> If the crimes truly arise out of one act . . . then Section 11 prohibits prosecution for more than one crime. One act that violates two criminal provisions cannot be punished twice, absent specific legislative intent. This analysis does not bar the charging and conviction of separate crimes which may only tangentially relate to one or more crimes committed during a continuing course of conduct.

Davis v. State, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126-27 (footnotes omitted). "Where there is a series of separate and distinct crimes, . . . Section 11 is not violated." *Logsdon*, 2010 OK CR 7, ¶ 17, 231 P.3d at 1165 (citing *Davis*, 1999 OK CR 48, ¶ 12, 993 P.2d at 126).

In the present case, the Information alleged in Count 2 that Appellant committed the crime of Lewd or Indecent Acts to a Child Under 16 by "looking upon, touching and feeling" C.A.'s breasts and vagina. Count 4, however, alleged that Appellant committed the crime of First Degree Rape by Instrumentation by penetrating C.A.'s vagina with his finger. The touching and feeling of C.A.'s breasts and vagina alleged in Count 2 clearly references an act of touching and feeling the outside of C.A.'s breasts and vagina. The penetration of C.A.'s vagina with Appellant's finger alleged in Count 4, by contrast, alleges an entirely different form of tactile manipulation than merely touching or feeling the outside of C.A.'s breasts and vagina as alleged in Count 2. Hence, the acts alleged in Counts 2 and 4 represent two distinctly separate acts.

C.A.'s trial testimony shows that Appellant performed multiple acts of inserting his finger into C.A.'s vagina and multiple acts of touching and feeling her vagina during the date range alleged for both counts. C.A. testified that the

first time Appellant touched her was during the summer between her fifth and sixth grade years in school. This would have occurred in the summer of 2009.[10] C.A. testified that Appellant rubbed her vagina over her clothes while sitting on Appellant's bed and watching television. C.A. also testified that she was 12 or 13 years old the first time Appellant rubbed her vagina and then started "jamming" his finger in and out of her vagina repeatedly. C.A. testified that this hurt and happened on more than one occasion. The first time this occurred would have been sometime between May 7, 2009 and May 6, 2011—precisely as alleged in Count 4. The rape by instrumentation described in this part of C.A.'s testimony was clearly separate and distinct from when Appellant rubbed C.A.'s vagina over her shorts. Moreover, each instance in which Appellant touched C.A.'s vagina or jammed his finger into her vagina was a completed crime at the instance the touching or insertion occurred. We have held that separate sexual acts constituted separate offenses, even where they occurred close in time to one another. *See, e.g., Riley v. State*, 1997 OK CR 51, ¶ 13, 947 P.2d 530, 533.

Appellant's convictions on Counts 2 and 4 clearly arise from distinct and separate acts. The same is true concerning Appellant's convictions on Counts 7 and 8. Count 7 of the Information alleged that Appellant committed the crime of Lewd or Indecent Acts to a Child Under 16 by "looking upon, touching and feeling" C.H.'s breasts and vagina. Count 8, by contrast, alleged that Appellant committed the crime of First Degree Rape by Instrumentation by

[10]C.A. was 16 years old and in tenth grade when she testified on January 7, 2014. Her date of birth is May 7, 1997.

penetrating C.H.'s vagina with his finger. For the same reasons discussed earlier concerning Counts 2 and 4, the allegations set forth in Counts 7 and 8 clearly alleged separate and distinct acts.

C.H. testified that the first time she can remember Appellant touching either her breasts or vagina occurred when she was 11 or 12 years old and in fifth grade. This occurred when Appellant both touched the outside of her vagina and inserted his fingers into her vagina while she was sitting on Appellant's bed watching the movie "Egor." C.H. testified that the only other time she can remember this happening was when Appellant touched the outside of her vagina, and inserted his fingers into her vagina, after being picked up by Appellant at the counselor's office at school. This occurred in April during C.H.'s fifth or sixth grade year in school. C.H. also described a separate incident in sixth grade when Appellant "thumped" or "flicked" one of her breasts and told her she was "finally growing some."

C.H.'s testimony described separate and distinct acts occurring on separate dates alleged within the date ranges contained in Counts 7 and 8. Again, separate sexual acts constitute separate offenses, even where they occurred close in time to one another. *See, e.g., Riley*, 1997 OK CR 51, ¶ 13, 947 P.2d at 533. The specific instances of sexual abuse described in C.H.'s testimony, standing alone, show separate and distinct crimes occurring on separate dates that were part of a continuing course of conduct by Appellant. Under the circumstances presented here, Appellant fails to show a violation of

Section 11. Thus, he fails to show plain error with his multiple punishment challenge to Counts 7 and 8.

In summary, Appellant's convictions on Counts 2, 4, 7 and 8 therefore do not violate the statutory multiple punishment provision and there is no plain error.

B. Double Jeopardy.

Appellant's convictions on Count 2, 4, 7 and 8 also do not violate the prohibition against double jeopardy. The Supreme Court has held:

> The Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656 (1969) (footnotes omitted). Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense. *See Gore v. United States*, 357 U.S. 386, 78 S. Ct. 1280, 2 L. Ed. 2d 1405 (1958); *Bell v. United States*, 349 U.S. 81, 75 S. Ct. 620, 99 L. Ed. 2d 905 (1955); *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 2d 872 (1874).

Brown v. Ohio, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977).

In resolving double jeopardy claims, we apply the long-standing test established by the Supreme Court in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932):

> [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two

> offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Id., 284 U.S. at 304. *See Davis v. State*, 1999 OK CR 48, ¶¶ 4-5, 993 P.2d 124, 125 (applying *Blockburger* test to double jeopardy claim involving violation of two distinct statutory provisions by an alleged same act or transaction).

Appellant argues that, because we have held that lewd molestation is a lesser-included offense of first degree rape by instrumentation, *Riley*, 1997 OK CR 51, ¶ 14, 947 P.2d at 533-34, his double jeopardy theory is meritorious under *Brown v. Ohio*, 432 U.S. 161, 169, 97 S. Ct. 2221, 2227, 53 L. Ed. 2d 187 (1977). In *Brown*, the Supreme Court held that "the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense." *Id.* Counts 2, 4, 7 and 8 in the present case, however, do not involve successive prosecution or cumulative punishment of *the same act* under different statutes. As discussed above, these counts involve separate and distinct acts occurring at different times within the date ranges alleged. In *Brown*, by contrast, the defendant pled guilty to joyriding and was subsequently prosecuted for auto theft based *on the same act.* Brown was caught driving the car in Wickliffe, Ohio on December 8, 1973—nine days after stealing the car in East Cleveland, Ohio. *Id.*, 432 U.S. at 162. Brown was charged by Wickliffe authorities for joyriding in the car; the date alleged for this crime was December 8, 1973—the day Brown was arrested in the car. After pleading guilty to this charge and serving a thirty day jail sentence, Brown was charged in Cuyahoga County court with a new crime—auto theft—based on his

theft of the same car. *Id.*, 432 U.S. at 162. The date alleged for this crime was November 29, 1973—the day Brown stole the car. *Id.*, 432 U.S. at 162-63. Brown ultimately pled guilty to the auto theft charge on the condition that the court would consider his claim of former jeopardy on a motion to withdraw his plea. *Id.*, 432 U.S. at 163.

Under Ohio law, the lesser-included misdemeanor offense of joyriding required no proof beyond that which was required for conviction of the greater felony offense of auto theft. In other words, the prosecutor who has established auto theft under Ohio law has necessarily established the lesser crime of joyriding. *Id.* at 163-64, 167-68. In applying the *Blockburger* "same elements" test, the Supreme Court held that "[t]he greater offense is . . . by definition the 'same' for purposes of double jeopardy as any lesser offense included in it." *Id.*, 432 U.S. at 168.

For current purposes, a critical component of *Brown* is the Supreme Court's rejection of the Ohio Court of Appeals's conclusion that the defendant there "could be convicted of both crimes because the charges against him focused on different parts of his 9-day joyride." *Id.*, 432 U.S. at 169. The Supreme Court reasoned that the applicable Ohio statutes "make the theft and operation of a single car a single offense." *Id.*, 432 U.S. at 169. Hence, there was only one crime for Double Jeopardy purposes.

A similar situation does not arise in the present case. As discussed earlier in connection with Appellant's multiple punishment argument, the prosecutor in the present case alleged—and proved—in a single trial proceeding

separate and distinct acts of lewd molestation and first degree rape by instrumentation inflicted against both victims leading to Appellant's convictions on Counts 2, 4, 7 and 8. The prosecutor too utilized dissimilar proof to support all four counts. To be sure, these counts allege separate acts of lewd molestation and first degree rape by instrumentation as continuous offenses perpetrated by a parental caretaker over the same time period for Counts 7 and 8 (June 11, 2010 to October 29, 2012) and nearly the same time period for Counts 2 and 4 (Count 2: May 7, 2009 to October 15, 2012 and Count 4: May 7, 2009 to May 6, 2011). But this Court has consistently held that the Double Jeopardy Clause does not foreclose a defendant's conviction of two or more separate sex crimes even though the violations occurred within minutes of one another. *Doyle v. State*, 1989 OK CR 85, ¶ 18, 785 P.2d 317, 324. As held by this Court:

> Merely because the crimes were committed in rapid succession does not negate the fact that separate crimes were committed, so long as a separation does exist. The Double Jeopardy Clause is not carte blanche for an accused to commit as many offenses as desired within the same transaction or episode.

Id., 1989 OK CR 85, ¶ 16, 785 P.2d at 324 (internal citation omitted). Appellant's convictions and sentences on Counts 2, 4, 7 and 8 are consistent with this Court's holding that separate and complete sex crimes may be charged individually even when they occur in close proximity.

"The concept of double jeopardy has been used as a tool of statutory construction to determine 'what [the legislature] has made the allowable unit of prosecution.'" *Hunnicutt v. State*, 1988 OK CR 91, ¶ 12, 755 P.2d 105, 110

(quoting *United States v. Universal C.I.T. Corp.*, 344 U.S. 218, 221, 73 S. Ct. 227, 97 L. Ed. 2d 260 (1952)). The Supreme Court has held that the "Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983). In the present case, Appellant's convictions and sentences on Counts 2, 4, 7, and 8 are permissible under Oklahoma law as separate and distinct offenses occurring close in time to one another which required dissimilar proof. Unlike in *Brown*, Appellant was not punished twice for the same act. All things considered, Appellant fails to show a double jeopardy violation arising from his convictions on Counts 2, 4, 7 and 8. Thus, there is no plain error. Relief is therefore denied for Propositions II and III.

IV. THE TESTIMONY OF J.G.

In Proposition IV, Appellant challenges the admission at trial of testimony from J.G., the biological mother of C.A., C.H. and D.A. J.G. described for the jury her prior sexual abuse by Appellant when she resided both as a child and as an adult at the Armstrong home years earlier. Appellant argues that this testimony was inadmissible under either 12 O.S.2011, § 2413 or 12 O.S.2011, § 2414. In Proposition V, Appellant claims that J.G.'s testimony contained impermissible victim impact testimony. Appellant requests reversal of his convictions and remand for a new trial based on the errors and prejudice alleged in these two propositions.

A. Pre-Trial Proceedings.

The State filed a pre-trial notice of its intent to admit J.G.'s testimony as other crimes or bad acts evidence under 12 O.S.2011, § 2404(B).[11] The district court held a pre-trial hearing at which J.G. testified. The State argued this testimony was admissible primarily under 12 O.S.2011, §§ 2413 and 2414 as so-called sexual propensity evidence. The State also argued J.G.'s testimony was admissible under § 2404(B) as common scheme or plan evidence. The defense urged that J.G.'s testimony was inadmissible because it did not satisfy the requirement of having a visible connection to the charged offenses, did not show a common scheme or plan and was therefore inadmissible. The defense also challenged the credibility of J.G.'s testimony and argued that her testimony was unfairly prejudicial. The court ruled preliminarily that J.G.'s testimony was admissible under a combination of 12 O.S.2011, §§ 2404(B), 2413 and 2414. However, the defense was cautioned that it was required to renew its objections at trial.

B. Trial Proceedings.

Immediately prior to J.G. being called as a witness at trial, the trial court again ruled that J.G.'s testimony was admissible and made a further record concerning the specific grounds supporting admissibility under *Horn v. State*, 2009 OK CR 7, 204 P.3d 777. The trial court found J.G.'s proposed testimony relevant to material, disputed issues in the case and, despite the prejudicial nature of J.G.'s testimony, found the danger of unfair prejudice did not

[11]This notice stated too that the prosecutor intended to introduce testimony from J.G.'s sister, E.Q., concerning Appellant's sexual abuse of E.Q. Ultimately, however, E.Q. was not called by the State as a witness at trial.

outweigh the probative value of this testimony. Additionally, the trial court found the allegations of sexual abuse contained in the State's pre-trial notice were proven by clear and convincing evidence in light of J.G.'s testimony at the pre-trial hearing. *Id.*, 2009 OK CR 7, ¶¶ 40-41, 204 P.3d at 786-87. The trial court concluded by reaffirming its preliminary ruling admitting J.G.'s testimony and gave Appellant a continuing objection to J.G.'s testimony. The trial court proposed that the OUJI-CR (2d) 9-10A limiting instruction be read to the jury after J.G.'s testimony as well as being included in the written charge at the end of the trial. Both parties agreed with the trial court's proposed course of action on the limiting instruction. J.G. then took the stand. At the conclusion of her testimony, the trial court read the limiting instruction previously discussed and again provided this same instruction as part of the written charge given to the jury at the end of the trial.

C. Analysis.

Appellant preserved below his Proposition IV claim that J.G.'s testimony was inadmissible under §§ 2404(B), 2413 and 2414. For that claim, the issue is whether the trial court abused its discretion in admitting J.G.'s testimony at trial. *Neloms v. State*, 2012 OK CR 7, ¶ 25, 274 P.3d 161, 167 ("This Court reviews a trial court's evidentiary rulings for an abuse of discretion."). "An abuse of discretion has been defined as a conclusion or judgment that is clearly against the logic and effect of the facts presented." *State v. Hooley*, 2012 OK CR 3, ¶ 4, 269 P.3d 949, 950.

Title 12, O.S.2011, § 2413(A) provides:

> In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

Section 2413(C) provides that "[t]his rule shall not be construed to limit the admission or consideration of evidence under any other rule."

Title 12, O.S.2011, § 2414(A) provides:

> In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

Section 2414(C) too provides that "[t]his rule shall not be construed to limit the admission of consideration of evidence under any other rule."

This Court has held that propensity evidence under §§ 2413 and 2414 must be proved by clear and convincing evidence and is subject to the balancing test for all relevant evidence set forth in 12 O.S.2011, § 2403—i.e., whether its probative value is substantially outweighed by its prejudicial effect. *Johnson v. State*, 2010 OK CR 28, ¶ 6, 250 P.3d 901, 903; *Horn v. State*, 2009 OK CR 7, ¶ 40, 204 P.3d 777, 786. Additionally:

> [T]rial courts should consider, but not be limited to 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. When analyzing the dangers that admission of propensity evidence poses, the trial court 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. Any other matter which the trial court finds relevant may be considered.

Johnson, 2010 OK CR 28, ¶ 6, 250 P.3d at 903-04 (quoting *Horn*, 2009 OK CR 7, ¶ 40, 204 P.3d at 786).

Reviewing J.G.'s testimony in light of the factors for admissibility addressed in *Horn* and *Johnson*, the trial court did not abuse its discretion. J.G.'s testimony was relevant to multiple issues at trial. Evidence of Appellant's many acts of child molestation and sexual assaults against J.G. was remarkably similar to the charged offenses involving her biological children. All four victims were sexually attacked by Appellant in his home while living under the primary care of both Appellant and Mildred. The testimony of all four victims demonstrates a distinctive manner of operation, or modus operandi, in which Appellant obtained custody of young girls who were previously in foster care—all of whom were related to his wife—and began sexually assaulting them, usually in his bedroom, in the family home in Forgan. J.G.'s testimony provided critical corroboration of C.A.'s and C.H.'s accounts of Appellant claiming he was in pain and needed the girls to rub his legs for relief. This, in turn, led to C.A., C.H. and J.G. being forced to perform various sexual acts demanded by Appellant as described in their testimony. J.G.'s testimony concerning Appellant's method of withholding social privileges when she resisted his sexual advances corroborated similar accounts provided by C.A. and C.H. in their testimony. In summary, J.G.'s testimony was

relevant to show how Appellant was able to groom his young victims for continued sexual abuse over a period of years.

The corroboration of the testimony of C.A., C.H. and D.A. was not only a critical issue at trial for the State, it was *the* issue at trial. Appellant's trial defense was that the victims were lying about the sexual abuse they say he inflicted upon them because of the discipline and chores Appellant instituted in the Armstrong home. As previously discussed, the defense attacked the victims' credibility by presenting testimony showing the victims acted out sexually prior to moving to the Armstrong home, that the children received counseling for sexual abuse while in foster custody, that C.H. had a problem with lying and stealing, that the children had no discipline and hated doing chores and that the children made false allegations of child abuse against their foster parents in Kansas. The defense also presented testimony relating to the victims' resistance to the discipline imposed by Appellant upon all of the children living in the Armstrong residence. Based on this testimony, the defense urged, the children had the motive and capacity to fabricate the accounts of sexual abuse contained in their testimony. Additionally, the defense utilized inconsistent statements by the victims concerning the various sexual acts inflicted upon them by Appellant in an attempt to impeach their credibility.

Testimony from J.G. was critical testimony, presented from an adult who lived in the Armstrong household years earlier, showing the common scheme or plan used by Appellant to select and groom his victims for years of child sexual

abuse. Indeed, J.G.'s testimony concerning Appellant's sexual assault of her numerous times as an adult showed the sheer powerlessness his victims had over their ability to escape Appellant's sexual attacks. J.G.'s testimony also provided corroboration for the description by C.A., C.H. and D.A. of being sexually attacked in the Armstrong home while other people were inside the house. C.A., C.H. and D.A. all testified that they were sexually attacked by Appellant when Mildred or their siblings were in close proximity in the house. The defense emphasized the large number of people living in, and visiting, the Armstrong home as a basis to challenge the victims' credibility for the charged offenses.

Appellant argues that J.G.'s description of the sexual acts inflicted upon her by Appellant, which included sexual intercourse and J.G.'s performance of oral sex on Appellant, was too dissimilar to be relevant to the charged offenses. Aplt. Br. at 27-28. To be sure, the sexual abuse described in J.G.'s testimony involved sex acts—and one incident of physical abuse—not reported by C.A., C.H. or D.A. And J.G. described being sexually abused by Appellant several times outside the Armstrong home when she rode with Appellant while he was driving a truck. These differences, however, go merely to the weight of J.G.'s testimony, not its admissibility, and do not undermine the remarkable similarities present in the testimony of all four victims.

The trial court concluded that the prior acts of lewd molestation and sexual abuse were proven by clear and convincing evidence through J.G.'s testimony—a finding fully supported by the record. Notably, the trial court

referenced its observation of J.G. during her testimony at the pre-trial hearing in so ruling. Appellant does not challenge that finding on appeal. Additionally, the trial court observed that, while there was "some possibility" that J.G.'s testimony might lead to an improperly based jury verdict, the trial court did not believe this would occur. Considering the visible connection between the charged offenses and Appellant's prior sex crimes detailed in J.G.'s testimony, we conclude that the highly probative value of this evidence is not outweighed by the danger of unfair prejudice. *James v. State*, 2009 OK CR 8, ¶ 10, 204 P.3d 793, 798 ("the probative value of other crimes committed by the accused increases when there is a visible connection between the crimes, or when all of the offenses, taken together, demonstrate a common scheme or plan."). Our conclusion is bolstered in light of the limiting instruction provided to the jury both immediately after J.G. testified and in the written charge. Although J.G.'s testimony was unquestionably prejudicial to Appellant, we cannot find under the total circumstances that it was unfairly so. *Id.*, 2009 OK CR 8, ¶ 10, 204 P.3d at 797 ("Evidence that the defendant has committed sex offenses similar to those for which he is on trial will undoubtedly be prejudicial to him. The real question, however, is whether it is *unfairly* so.") (citing 12 O.S.2001, § 2403). We thus find the trial court did not abuse its discretion in admitting J.G.'s testimony.

Most of Appellant's challenge to J.G.'s testimony on appeal is centered on her testimony concerning life after she moved out of the Armstrong home at age 18. In Proposition IV, Appellant challenges the admissibility of this particular

testimony under §§ 2413 and 2414. Testimony by J.G. concerning her subsequent drug addiction, her many relationships and residences, and details about her criminal offenses after leaving the Armstrong home, Appellant argues, was irrelevant and unfairly prejudicial to the defense. Appellant also challenges J.G.'s testimony concerning how she came to live with Appellant and Mildred as well as her testimony concerning Appellant's possible parentage of C.A. Aplt. Br. at 28-36. In Proposition V, Appellant argues this portion of J.G.'s testimony was inadmissible victim impact testimony. Aplt. Br. at 32-36.

At no point during the trial proceedings did Appellant make a specific objection to J.G.'s testimony concerning her background or her description of life after leaving the Armstrong home. Notably, J.G. testified to these very matters at the pre-trial hearing. Appellant has therefore waived on appeal all but plain error review of his challenge to J.G.'s testimony concerning her background and the details of her life after leaving the Armstrong home. *See Simpson v. State*, 1994 OK CR 40, ¶ 11, 876 P.2d 690, 693.

"To be entitled to relief under the plain error doctrine, Appellant must prove: 1) the existence of an actual error (i.e., deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding." *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395. "If these elements are met, this court will correct plain error only if the error 'seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings' or otherwise

represents a 'miscarriage of justice.'" *Id.* (quoting *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923).

J.G.'s testimony concerning her placement in foster care in her biological parents' absence, as well as her testimony that she went to live with Appellant and Mildred after Mildred "all the sudden" contacted J.G.'s caseworker and wanted for her to go live with them, does not amount to plain error. Rather, it provides mere background to explain how J.G. came to be under Appellant's custody and care and therefore subject to his sexual attacks. It also bolstered the commonality of the plight endured by C.A., C.H., D.A. and J.G. which, in turn, bolstered the State's theory of a common scheme or plan employed by Appellant in choosing his victims. Hence, this evidence was highly probative and admissible. *See James*, 2009 OK CR 8, ¶ 10, 204 P.3d at 798.

Appellant challenges J.G.'s testimony concerning the parentage of C.A. Specifically, Appellant challenges J.G.'s testimony that Appellant might be the father of C.A. This testimony too is not plain error. J.G. testified that she left the Armstrong home when she was 18 years old and pregnant. This despite Appellant's command that she would not leave his home until J.G. either married or had obtained the age of 25. J.G. described her pregnancy as one of the catalysts for her decision to leave the Armstrong home. When asked who the father of this child was, J.G. expressed some hesitation in answering that the father was Billy Suter. When asked if she was sure, J.G. testified "I want to believe so." The following exchange then occurred:

Q. If it's not Billy Suter, who might it be, [J.G.]?

A. Rocky.

(Tr. 403). The prosecutor then changed the subject, questioning J.G.—again, without objection—about the identity of C.H.'s father (Lupe) and J.G.'s life with him in Kansas.

J.G.'s testimony concerning Appellant being the father of C.A. was speculative at best. Yet, the jury was fully aware of J.G.'s uncertainty concerning C.A.'s paternity. The defense emphasized this uncertainty by eliciting from J.G. on cross-examination that she never took action to determine the paternity of C.A. or otherwise seek child support on C.A.'s behalf from anyone. Under the total circumstances, any error in admitting this testimony was not outcome determinative in light of the properly admitted portion of J.G.'s testimony detailing Appellant's repeated sexual attacks of her over a period of four years when she was a teenager. Hence, there is no plain error.

Appellant's complaint that the prosecutor, during questioning, referred to Appellant's sexual attacks on J.G. as rape also does not show plain error. The prosecutor's reference to J.G. being raped at transcript page 399 was based on J.G.'s earlier description of Appellant forcing her to have sex when she was 15 years old. The prosecutor's reference to J.G. being raped in this passage was therefore unquestionably accurate and does not amount to plain error. *See* 21 O.S.2001, § 1111(A)(1) & (3) (defining rape as, *inter alia*, sexual intercourse involving vaginal or anal penetration accomplished with a male or female who is not the spouse of the perpetrator where the victim is under 16 years of age or

where force or violence is used or threatened accompanied by apparent power of execution to the victim).

Appellant also challenges the prosecutor's question in the following passage:

> Q. [J.G.], when was the last time that Rocky Armstrong raped you?
>
> A. My mother passed away, and I met him in Muskogee, so I can get a ride with him to the funeral and everything, and during the night he stopped on the side of the road and he needed to be relieved. And that's the last time.

(Tr. 412). Although J.G. testified she was 27 years old when this occurred, the balance of J.G.'s testimony demonstrates that she considered this last encounter as a continuation of Appellant's sexual attacks on her as a child. Indeed, when J.G. returned to live in the Armstrong residence in 2006 as an adult, she testified that Appellant's sexual attacks against her resumed the same as when she had lived there as a child. This was not "consensual sex" as Appellant now claims, Aplt. Br. at 29, but rather an unwilling sexual attack against J.G. that illustrated the power and control Appellant exercised over J.G. even as an adult. This, in turn, was relevant to show the jury *inter alia* the precise dynamic making it so difficult for Appellant's much younger victims in the charged offenses to report Appellant's sex crimes against them. Under the total circumstances, we do not find error, let alone plain error, based on the prosecutor's challenged question. *See Malone v. State*, 2013 OK CR 1, ¶¶ 42 & 48, 293 P.3d 198, 212, 213 (no plain error based on prosecutorial misconduct where there was no error in the prosecutor's questionings). Nor do we find

error based on the trial court's admission of J.G.'s testimony concerning Appellant's sexual assaults of her as an adult under § 2413.

We also find no plain error arising from testimony concerning J.G.'s drug addiction, her relationships and living arrangements, and details about her criminal offenses after leaving the Armstrong home. One of the defense themes at trial was that J.G.'s account of sexual abuse by Appellant could not be believed because she was a drug addict, a convicted felon and an individual who simply defied society's rules. Defense counsel cited during his opening statement J.G.'s drug addiction, her convictions for robbery and larceny as well as her incarceration for these crimes as a basis to discredit her testimony. Defense counsel urged that the evidence would show Appellant insisted upon strict discipline from his children and that J.G. did not do well in such an environment because "[s]he couldn't follow the rules." J.G.'s convictions for robbery and larceny, and her inability to maintain custody of her children because of her drug abuse, defense counsel argued, illustrated J.G.'s inability to follow the rules of society.

On cross-examination, the defense resumed this theme by eliciting from J.G. the details of the larceny she committed against an elderly woman while living in Forgan while using methamphetamine. Defense counsel elicited too that J.G. was on probation for this larceny when she committed the robbery resulting in her 15 year prison sentence. Additionally, defense counsel questioned J.G. about her methamphetamine use and allegations of sexual

abuse against her children in J.G.'s home which resulted in C.A., C.H. and D.A. being taken into protective custody by Kansas authorities.

Defense counsel elicited from J.G. too that Appellant ran a strict household where the children were required to do their homework and pull their weight. J.G. admitted on cross that her inability to follow the rules is partly the reason she is incarcerated today. This testimony, combined with J.G.'s admissions that she returned to Appellant's residence to live as an adult, and sent notes thanking Appellant and Mildred for taking custody of C.A., C.H. and D.A., helped fuel the overall defense theme that J.G. alone was responsible for her own plight and her allegation of sexual assault by Appellant were simply unbelievable.

Under the total circumstances, it is clear that the defense relied upon details of J.G.'s relationships, drug abuse and crimes as much as, if not more, than the prosecution did in pursuing its theory of the case. The prosecutor simply elicited this aspect of J.G.'s testimony in anticipation of Appellant's use of this evidence to attack J.G.'s credibility. We find no plain error in the elicitation of this evidence by the prosecutor as there is no possible prejudice to Appellant. *See Torres v. State*, 1998 OK CR 40, ¶ 29, 962 P.2d 3, 14 (where there is no prejudice in the admission of evidence, there is no plain error).

This is not a case, as Appellant urges, where the State over-emphasized J.G.'s sad life circumstances in order to foster sympathy for her in the jury's eyes. In the portions of the state's closing argument cited by Appellant, *see* Aplt. Br. at 35, the prosecutor does nothing more than argue that J.G.'s

testimony was credible in light of her candor, demeanor and life circumstances and suggest that J.G.'s testimony corroborated the testimony of C.A., C.H. and D.A. This does not amount to plain error. Rather, it represents reasonable comment and argument by the prosecutor based on properly admitted evidence. *See Sanchez v. State*, 2009 OK CR 31 ¶ 71, 223 P.3d 980, 1004 (counsel enjoys the "right to discuss fully from their standpoint the evidence and the inferences and deductions arising from it.") (quoting *Frederick v. State*, 2001 OK CR 34, ¶ 150, 37 P.3d 908, 946); *Banks v. State*, 2002 OK CR 9, ¶ 41, 43 P.3d 390, 401 ("both parties may freely discuss, during argument, reasonable inferences from the evidence; error only occurs if a grossly unwarranted argument affects the defendant's rights."). The prosecutor also did not misstate the limiting instruction given for J.G.'s testimony as Appellant now alleges. Aplt. Br. at 35. On the contrary, the prosecutor reiterated what Instruction No. 26 of the written charge stated, namely, that J.G.'s testimony concerning Appellant's previous sexual assaults and child molestation against her could be considered for any matter the jury believed was appropriate. The prosecutor's passing reference to J.G.'s pain and life circumstances was simply part of the state's argument that J.G.'s testimony was credible. Appellant therefore fails to show plain error based on this claim.

Appellant's claim that J.G.'s testimony included inadmissible victim impact testimony does not warrant relief. "We have held it is improper for the prosecution to ask jurors to have sympathy for victims." *Powell v. State*, 1995 OK CR 37, ¶ 43, 906 P.2d 765, 777 (internal citations omitted). Further, the

admission of victim impact evidence during the guilt-innocence phase of a trial is error. *Id.* The portion of J.G.'s testimony now challenged on appeal, however, does not represent victim impact testimony. As discussed above, evidence relating to J.G.'s drug addiction, her relationships and living arrangements, and details about her criminal offenses was utilized by both parties to advance their particular theories of the case. The balance of J.G.'s testimony was properly admitted under §§ 2413 and 2414. We therefore find no error, let alone plain error, from the State's use of the challenged evidence. Relief is therefore unwarranted for Proposition V.

V. CUMULATIVE ERROR.

In Proposition VI, Appellant claims that relief is warranted based on cumulative error "[s]hould this Court find that reversal is not supported by any single error addressed in Propositions I through V[.]" Aplt. Br. at 37. Appellant's cumulative error claim lacks merit. "A cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by Appellant. Even when there have been procedural irregularities during the course of a trial, relief is warranted only if the cumulative effect of all the errors denied Appellant a fair trial." *Pavatt v. State*, 2007 OK CR 19, ¶ 85, 159 P.3d 272, 296 (internal citations omitted). As shown previously, all of Appellant's propositions of error lack merit with the possible exception of J.G.'s speculative testimony concerning the parentage of C.A. However, as discussed earlier, this error had no impact on the jury's verdicts. Accordingly, relief for cumulative error is unwarranted. *Id.*, 2007 OK CR 19, ¶ 85, 159 P.3d at 297.

VI. EXCESSIVE SENTENCE.

In Proposition VII, Appellant requests modification of his sentences based on the alleged evidentiary errors associated with J.G.'s testimony. Appellant argues that the sentences imposed on all ten counts are a reflection of J.G.'s testimony which Appellant claims was improperly admitted. Aplt. Br. at 39-40. This Court will not modify a sentence within the statutory range "unless, considering all the facts and circumstances, it shocks the conscience." *Neloms*, 2012 OK CR 7, ¶ 39, 274 P.3d at 171 (quoting *Rea v. State*, 2001 OK CR 28, ¶ 5 n.3, 34 P.3d 148, 149 n.3).

Appellant's sentences are not excessive. First, Appellant does not dispute that all of his sentences are within the statutory range. Second, we found J.G.'s testimony—with one possible exception—properly admitted and that the jury was properly instructed with the uniform limiting instruction relating to this evidence. We find J.G.'s speculative testimony relating to the paternity of C.A. was not outcome determinative with respect to the jury's sentencing verdicts. We also find this testimony was not responsible for the high sentences imposed by the jury in this case. On the contrary, the sentences imposed in this case—which include two sentences of life without possibility of parole for the first degree rape by instrumentation convictions in Counts 4 and 8—are a direct result of the horrifying account of sexual abuse conveyed in the testimony of C.A., C.H. and D.A.

The record shows Appellant sexually abused all three sisters in the family home for years. Appellant groomed his young victims to remain silent

about the abuse they endured by manipulating their access to the type of social privileges common to their school-aged peers and, in some cases, by threatening them. C.A., C.H. and D.A. were young, school-aged girls charged to the care of Appellant and his wife. D.A., the youngest victim, was only nine (9) years old when Appellant put his hand up her shorts and touched her vagina underneath her panties. Instead of fulfilling his parental responsibilities towards these children, Appellant groomed C.A., C.H. and D.A. to fulfill his sexual urges in his bedroom at the family home. As discussed earlier, J.G.'s testimony certainly corroborated the testimony of the victims in the charged offenses. The prosecutor's use of this evidence was permissible. We have thoroughly reviewed the record in this case and can confidently say that the sentences imposed in this case do not shock the conscience of the Court. Rather, it is Appellant's crimes that shock the Court's conscience. All things considered, Appellant's sentences are not excessive. Relief is denied on Proposition VII.

DECISION

The Judgment and Sentence of the district court is **AFFIRMED**. The trial court is **ORDERED** to correct the judgment and sentence *nunc pro tunc* to reflect that Appellant's convictions were pronounced on February 21, 2014. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF BEAVER COUNTY
THE HONORABLE CLARK JETT, ASSOCIATE DISTRICT JUDGE

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LUMPKIN, V.P.J.: CONCUR IN RESULTS
JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR