IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ANTHONY PAUL FREE,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F-2006-1086
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

LEWIS, JUDGE:

Appellant, Anthony Paul Free, was convicted by jury of, Lewd Molestation in violaton of 21 O.Supp.2004, § 1123, after former conviction of a similar offenses,[1] in the District Court of Tulsa County, Case No. CF-2005-5639, before the Honorable Tom C. Gillert, District Judge. In accordance with the jury verdict, Judge Gillert sentenced Free to life without the possibility of parole. From the District Court's Judgment and Sentence, Free has perfected his appeal to this Court.

FACTS

Free was at the home of Rachell Harper, the adult daughter of his girlfriend, Patricia Leroy, in the evening of December 10, 2005. Also in the

[1] Apparently Free was sentenced to mandatory life without parole pursuant to 21 O.S.Supp.2004 § 51.1a. However, § 1123 has its own enhancement which is inconsistent with § 51.1a. Because we are reversing Free's conviction and sentence, we need not delve into this morass.

house were Harper, her seven-year-old niece, T.H., and Harper's disabled cousin. Leroy had left the house and Harper was assisting her disabled cousin with a bath. This left Free and T.H. alone in the living room.

T.H. said that Free had been tickling her until Leroy left the house. Then, Free stopped tickling and began touching her. She testified that Free touched her breasts, her bottom and touched her "privates."

Rachell Harper testified that she stepped from the bathroom to give her cousin some privacy. She entered the living room and saw Free on the couch leaning over T.H. with his hand up her skirt between her legs. Rachell asked T.H. to come help her in the bathroom, in order to get her away. Once T.H. was away from Free, Rachell asked her what was going on. T.H. told Rachell that Free was touching her "privates." Rachell then called the police.

Rachell admitted that she had been drinking and had taken some prescription medication just prior to this incident, but she denied that she was drunk. She insisted that she was only slightly "buzzed."

PROPOSITION OF ERROR

The State was allowed to introduce evidence, over Free's objection, showing that Free had committed prior acts of child sexual abuse twenty years earlier in Arkansas. In his sole proposition, Free claims that the trial court abused its discretion, and committed reversible error, when it allowed the State to introduce this evidence.

The State presented the testimony of Floyd Hancock, a former police officer from Springdale, Arkansas. Hancock investigated the prior allegations against Free, which involved Free's nine-year-old nephew. Hancock testified that Free admitted that he allowed his nephew to perform oral sex on him at five separate occasions over a period of months. Hancock prepared a written statement which was signed by Free. This statement was introduced by the State.[2]

The trial court allowed the statements into evidence under the "greater latitude rule" announced in *Myers v. State*, 2000 OK CR 25, ¶¶ 21-25, 17 P.3d 1021, 1029-30. In doing so, the trial court voiced concerns that the statements would not be admissible pursuant to cases decided prior to *Myers*.[3] In discussing this issue, the trial court was concerned whether *Myers* would remain settled law. Subsequent to this trial, *Myers* was found to be unworkable, and thus overruled.

While Free's case was pending appeal, this Court decided *James v. State*, 2007 OK CR 1, 152 P.3d 255. In *James* this court rejected the greater latitude rule and held that prior sexual crimes could only be introduced pursuant to 12 O.S.2001, § 2404(B), and our case law decided prior to *Myers*. *James*, 2007

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[2] Free was convicted of three counts of "carnal abuse" in Washington County, Arkansas, as a result of these offenses. These convictions also served to enhance Free's sentence in the case at bar.

[3] In *Myers*, this Court did not abandon the general admissibility of evidence tests found in 12 O.S.2001, § 2402 and § 2403, even for sex crimes evidence. *See Myers*, 2000 OK CR 25, ¶ 25, 17 P.3d at 1030. Any relevance of the other crimes evidence presented in this case is clearly substantially outweighed by the danger of unfair prejudice.

OK CR 1, ¶ 4, 152 P.3d 255 at 257. Furthermore, we held that (1) there must be a visible connection between the other crimes evidence and the charged crimes; (2) the evidence must go to a disputed issue and be necessary to support the State's burden of proof; (3) the probative value of the evidence must outweigh the danger of unfair prejudice; and (4) the evidence must be clear and convincing. *James*, 2007 OK CR 1, ¶ 3, 152 P.3d 255 at 257; *see Bryan v. State*, 1997 OK CR 15, ¶ 33, 935 P.2d 338, 356-57.[4] According to *James*, in order to be admissible under § 2404(B), there must be a visible connection between the crimes. This visible connection prohibits the introduction of other crimes evidence which merely shows a defendant's character and his propensity to commit similar acts, which is prohibited by 12 O.S.2001, § 2404(A) and (B).

The long held general rule is that a defendant should be tried on evidence showing guilt of the offense charged, rather than evidence indicating guilt of other unrelated crimes. *Burks v. State*, 1979 OK CR 10, 594 P.2d 771, 772, *overruled in part on other grounds, Jones v. State*, 1989 OK CR 7, 772 P.2d 922; *Roulston v. State*, 1957 OK CR 20, ¶ 11, 307 P.2d 861, 867, *citing a long history of cases including Smith v. State*, 1911 OK CR 37, 5 Okl.Cr. 67, 113 P. 204, (1911). This rule states the general rule, however, evidence of other

[4] Holding that the other crimes must be probative to the crime charged; there must be a visible connection between the crimes; the evidence of other crimes must be necessary to support the State's burden of proof; proof of the other crimes must be clear and convincing, and the trial court must issue limiting instructions.

crimes may be admissible pursuant to § 2404(B).[5] Still yet, courts must find that the proffered evidence is relevant, and they must balance the admissibility of relevant evidence against certain dangers. *See* 12 O.S.2001, §§ 2402 and 2403.

In the present case, we find that evidence of Free's prior offenses have no visible connection to the current acts. In fact, the gender of the victims is different and the acts are different. Furthermore, these prior acts are so remote in time, that there is little probative value for their admission. Our statutes prohibit evidence of a person's character or a trait of his character offered for the purpose of action in conformity therewith. Other crimes evidence should not be admitted where its minimal relevancy suggests the possibility the evidence is being offered to show a defendant is acting in conformity with his true character. *Bryan*, 1997 OK CR 15, ¶ 33, 935 P.2d at 357. The minimal relevance of the other crimes evidence in this case suggests that this evidence is only being offered to show propensity, an improper reason for admission under our statutes. Thus we find that the trial court improperly ruled on its admission.

When erroneous rulings are made that constitute a substantial violation of a constitutional or statutory right, we have no choice but to reverse. *See* 20 O.S.1991, § 3001.1. The right violated in this case is the fundamental right to

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[5] We note that shortly after our decision in *James*, the Legislature enacted two statutes effective April 30, 2007, in which evidence of other child molestation or sexual assault offenses "is admissible, and may be considered for its bearing on any matter to which it is relevant."

be convicted by evidence of the charged offense and not by evidence of similar unrelated offenses. *Roulston*, 1957 OK CR 20, ¶ 11, 307 P.2d at 867.

DECISION

The Judgment and Sentence of the District Court is **REVERSED** and **REMANDED** for a **NEW TRIAL**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeal*, Title 22, Ch.18, App. (2008), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

ATTORNEYS AT TRIAL

DAVID PHILLIPS
ASSISTANT PUBLIC DEFENDER
TULSA COUNTY
423 SOUTH BOULDER, SUITE 300
TULSA, OK 74103
ATTORNEY FOR DEFENDANT

JARED SIGLER
JAKE CAIN
ASSISTANT DISTRICT ATTORNEYS
TULSA COUNTY
500 SOUTH DENVER
TULSA, OK 74103
ATTORNEYS FOR STATE

ATTORNEYS ON APPEAL

STEPHEN GREUBEL
ASSISTANT PUBLIC DEFENDER
TULSA COUNTY
423 SOUTH BOULDER, SUITE 300
TULSA, OK 74103
ATTORNEY FOR APPELLANT

W. A. DREW EDMONDSON
ATTORNEY GENERAL
WILLIAM R. HOLMES
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR APPELLEE

OPINION BY: LEWIS, J.

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

LUMPKIN, PRESIDING JUDGE: DISSENT

I dissent to the Court's analysis and action in this case and write separately to address this Court's technical application of *James* rather than *Myers*. In formulating the "greater latitude" rule for the admissibility of other crimes evidence in sexual assault cases, this Court undertook a thorough historical and legal analysis of the issue in *Myers*. By contrast, the analysis in *James* is more of an "I don't like it" analysis. The federal courts have long had Fed R. Evid. 413, allowing this type of evidence, and now Oklahoma has enacted the same rule of evidence in 21 O.S. Supp. 2007, §§ 2413-2414. The Legislature has now defied the process that is due persons charged with these types of crimes. I would affirm the judgment and sentence in this case.

A. JOHNSON, JUDGE, CONCURS IN PART/DISSENTS IN PART:

I concur that this trial judge erred in admitting evidence of a prior act of child sexual abuse; and I agree with the legal analysis the majority employs in arriving at that conclusion. I dissent, nonetheless, to the reversal of this judgment and sentence.

As the majority opinion finds, Free's confession to police about the sexual abuse he committed against a different child-victim more than twenty years earlier fails to meet the visible connection requirement in *James v. State*, 2007 OK CR 1, ¶ 3, 152 P.3d 255, 256-57, because there was no connection shown between the acts Free confessed to in 1985 and the act charged in this case.

The admission of that evidence was error. That error, however, does not mandate reversal under the facts of this case. Despite some inconsistencies between the victim's and the aunt's testimony and despite some attempts by defense counsel to attack the credibility of the eyewitness aunt, I cannot believe the jury's verdict would have been different if the offending evidence had been excluded in its entirety because the remaining evidence of guilt was strong. *See e.g., Edington v. State*, 1991 OK CR 21, ¶ 7, 806 P.2d 81, 83 (holding that defendant bears burden of establishing prejudice of any alleged error to warrant reversal); 20 O.S.2001, § 3001.1 ("[n]o judgment shall be set aside . . . for error in any matter of pleading or procedure unless it is the opinion of the reviewing court that the error complained of has probably resulted in a

miscarriage of justice or constitutes a substantial violation of a constitutional or statutory right); *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

In this case the child testified about the details of the lewd act committed against her and the child's aunt corroborated that testimony by providing her own first-hand account of seeing Free's hand up the victim's skirt when she entered the living room. Disregarding any issues of witness credibility, this evidence by itself is sufficient to sustain the guilty verdict.

Nor would I find reason to modify the sentence in this case. Title 21 O.S.Supp.2004, § 51.1a provides:

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

Because of the operation of that statute upon this case, it is not possible to conclude that the improperly admitted confession had any impact on the sentence even if it is assumed the jury was somehow inflamed by its subject. At the sentencing phase of trial, once the State introduced evidence of Free's Arkansas conviction for "carnal abuse" (i.e., the judgment and sentence document and penitentiary records) and the jury determined from that evidence that Free was a prior convicted sex abuser, the jury's discretion to impose any sentence other than life without parole was extinguished by statute. Regardless of how the jury's passions may have been inflamed by the confession, its discretion was statutorily cabined into a single sentencing

option. Therefore, even if the erroneously admitted confession had not been allowed as evidence, the sentencing result would remain unchanged.