IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DELBERT L. GIBSON,	)	NOT FOR PUBLICATION
	)	
Appellant,	)	
	)	
v.	)	Case No. F-2006-854
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

C. JOHNSON, VICE-PRESIDING JUDGE:

Appellant, Delbert L. Gibson, was convicted by a jury in Oklahoma County District Court, Case No. CF-2002-6165, of two counts of lewd molestation (21 O.S.Supp.2002, § 1123(A), after conviction of two or more felonies. On July 26, 2006, the Honorable Tammy Bass-Jones, District Judge, sentenced Appellant to life imprisonment without the possibility of parole on both counts. This appeal followed.

Appellant was charged with sexually fondling two minors, thirteen-year-old A.P. and eleven-year-old D.P., at their home on September 7, 2002. Appellant had been in a relationship with the girls' grandmother. The girls testified at trial that Appellant came to their home when they were home alone and asked if they had received any mail for him. This was unusual to them because the girls' grandmother usually accompanied Appellant to the residence. When A.P. went into her mother's room to see if there was any mail, Appellant followed her, shut the door behind him, pushed A.P. to the bed, covered her mouth, and began fondling her genitals and breasts. A.P. fought

off Appellant's advances and kicked him in the groin. Appellant then left the room and went to the kitchen where D.P. was. He placed his hands under D.P.'s shirt and fondled her breasts. After demanding that Appellant leave the home, the girls telephoned their mother. The complainant's stepfather testified that he came home in time to witness Appellant driving away from the residence. The police were notified, and the complainants were subsequently interviewed by a forensic child abuse investigator. Additional facts will be related below as relevant to the resolution of this appeal.

Appellant raises four propositions of error. In Proposition 1, he claims he was denied his constitutional right to a speedy trial. U.S.Const. Amends. VI, XIV; Okl.Const. art. 2, § 7. We consider four factors to determine whether this right was violated: (1) the length of delay from accusation to trial, (2) the reason for the delay, (3) whether the defendant timely asserted his right to a speedy trial, and (4) any prejudice the delay may have caused. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); *Lott v. State*, 2004 OK CR 27, ¶ 7, 98 P.3d 318, 327. Appellant was formally charged in November 2002, and an arrest warrant was issued contemporaneously. Appellant was not arrested until March 2005. Jury trial was held in June 2006. Appellant focuses his complaint on the delay between formal accusation and arrest, a period of approximately two years and four months. The delay in this case is sufficient to trigger inquiry into the other three factors. *Doggett v. United States*, 505 U.S. 647, 651-54, 112 S.Ct. 2686, 2690-91, 120 L.Ed. 2d 520 (1992); *Conley v. State*, 1990 OK CR 66, ¶ 4, 798 P.2d 1088, 1089. However, the remaining

three factors do not weigh in Appellant's favor. Appellant concedes that at no time before trial did he make any complaint about delay in apprehension or prosecution. By failing to do so, Appellant forfeited his opportunity to make a factual record on the two remaining factors: the reasons for the delay and potential prejudice to the defense. *See Ferguson v. State*, 1984 OK CR 32, ¶¶ 3-4, 675 P.2d 1023, 1026 (defendant's failure to raise and make a record on issue at the trial level prevented this Court from considering the merits of the claim on appeal). Appellant now claims that the State knew he lived in Arkansas and simply did not bother to apprehend him, but there is simply no record to firmly establish that assertion.[1] Nor does Appellant offer any convincing theory as to how he might have been prejudiced, assuming the delay was not attributable to him. Given that, as far as the record shows, the only witnesses to Appellant's activities at the complainants' home were the complainants and Appellant himself, we fail to see any prejudice. The complainants were old enough at the time of the offense to comprehend and relate their experiences; their accounts were consistent with each other; both complainants testified at trial, and Appellant had the opportunity to do the same. Considering all the relevant factors, Appellant was not denied a speedy trial. *Conley*, 1990 OK CR 66 at ¶¶ 6-7, 798 P.2d at 1089-1090. Proposition 1 is therefore denied.

[1] The record suggests that Appellant traveled often, and that after the alleged incident, Appellant's frequent contact with the complainants' grandmother abruptly stopped.

In Proposition 2, Appellant complains that other-crimes evidence denied him a fair trial. In the guilt stage of trial, the State presented testimony that some twenty years before, while working as a school photographer, Appellant fondled the genitals of a ten-year-old female student. The State gave pretrial notice of this evidence as required by *Burks v. State*,[2] and the trial court permitted the evidence in light of the "greater latitude" this Court had sanctioned for other-crimes evidence in sex-abuse cases. *See Myers v. State*, 2000 OK CR 25, ¶¶ 21-24, 17 P.3d 1021, 1029-1030. As Appellant points out, this Court subsequently disavowed the "greater latitude" rule advanced in *Myers*. *James v. State*, 2007 OK CR 1, ¶ 4, 152 P.3d 255, 257.

We have long held that there should be some "visible connection" between the crime with which the defendant is charged, and the other-crimes evidence the State seeks to introduce.[3] We agree with Appellant that the

---

[2] 1979 OK CR 10, 594 P.2d 771, *overruled in part on other grounds, Jones v. State*, 1989 OK CR 7, 772 P.2d 922.

[3] *Burks*, 1979 OK CR 10 at ¶ 8, 594 P.2d at 773 ("We have previously stated that 'for evidence of other offenses to be admissible, there must be a visible connection between the crimes' (citations omitted)); *O'Neal v. State*, 1955 OK CR 134, ¶ 7, 291 P.2d 375, 376 ("It has been held that where the trial court cannot clearly see a visible connection between the other alleged offenses to the one charged, or when they are remote as to time, he should refuse to admit the other offenses in evidence"); *Bunn v. State*, 85 Okl.Cr. 14, 21, 184 P.2d 621, 624 (1947) ("We have said that in order for other offenses to be admissible against the accused to show a common scheme or plan or intent that they must not be remote as to time and there must be a visible connection between the crimes" (citation omitted)); *Hall v. State*, 67 Okl.Cr. 330, 350, 93 P.2d 1107, 1117 (1939) ("The commission of an independent offense is not proof in itself of the commission of another crime; yet it cannot be said to be without influence on the mind, for certainly if one be shown to be guilty of another equally heinous, it will produce a more ready belief that he might have committed the one with which he is charged, and is liable to inflame the minds of the jurors, and cause them to believe the prisoner guilty. ... From the nature and prejudicial character of such evidence against the defendant, that at different places and different times he had committed a similar crime to that for which he is being tried, it is obvious it should not be received by the trial court unless the mind plainly perceives that the commission of the one tends by a visible connection to prove the commission of the other by the prisoner").

State's attempt to demonstrate that the prior molestation was 'visibly connected' to the instant offenses was less than convincing. There was no particularly distinctive *modus operandi* linking the instant offenses with the prior molestation. The only things the offenses appear to have had in common were that they all generally involved the fondling of young girls. As such, the prior molestation suggested nothing more than a general propensity to commit such acts, which is not a legitimate use of other-crimes evidence in the guilt phase of a trial. 12 O.S.2001, § 2404(B); *see also Burks*, 1979 OK CR 10 at ¶ 15, 594 P.2d at 775. While we recognize that the trial court admitted the evidence at a time when the "greater latitude" rule still had currency, having subsequently disavowed that view, we find that the evidence did not comport with Oklahoma evidence law. 12 O.S.2001, § 2404(B); *James*, 2007 OK CR 1 at ¶ 4, 152 P.3d at 257.

Nevertheless, under the particular circumstances of this case, we cannot say the improperly-admitted evidence contributed to the jury's verdict. First, we note that even before the evidence was offered, the trial court instructed the jury that the past offense was not to be used as substantive evidence of Appellant's guilt, unlike the situation in *James*. And as we noted above, the two complainants in this case were old enough, at the time of the offense, to comprehend and relate their experiences. Their testimony at trial was consistent with each other; the testimony of D.P. was also consistent with her prior statements to a forensic investigator made shortly after the incident, which were also offered into evidence pursuant to 12 O.S.2001, § 2803.1.

Appellant did not testify or offer any evidence to contradict or impeach the complainants' claims. On this record, we are convinced that evidence of the prior molestation offered in the guilt stage of trial was harmless beyond a reasonable doubt.[4] *Burks*, 1979 OK CR 10 at ¶ 9, 594 P.2d at 774 (other-crimes error was harmless as to one co-defendant, given the strength of the evidence).

We also reject Appellant's second other-crimes evidence complaint. One of the complainants testified about past incidents where Appellant would attempt to put his hand inside her pants while giving her a ride on his motorcycle. Defense counsel did not object to this line of questioning until after it was completed, thereby waiving all but plain error. *See Luna v. State*, 1992 OK CR 26, ¶ 6, 829 P.2d 69, 72. Defense counsel claimed surprise at this testimony, but later in the trial he reviewed his discovery materials and conceded that he had, in fact, been given notice of it. Given the mutually corroborative testimony of the two complainants about the incidents alleged in the Information, we find no plain error. Proposition 2 is denied.

In Proposition 3, Appellant claims the trial court erred in instructing the jury on the applicable punishment range for his crimes. Appellant was charged with two counts of lewd molestation as defined in 21 O.S.Supp.2002, § 1123(A). The State also alleged that Appellant had two prior sex-related felony

---

[4] Because we find, in Proposition 3, that Appellant's sentences must be modified, we need not address the effect of the other-crimes evidence on sentencing. We note, however, that the other-crimes evidence introduced in the guilt stage was the basis for one of Appellant's two prior sex-abuse convictions introduced in the punishment stage.

convictions: one, a 1986 Oklahoma conviction for lewd molestation, and the other, a 1989 Kansas conviction for rape. Consistent with 21 O.S.Supp.2002, § 51.1a, the trial court instructed the jury that, if it found the existence of both prior convictions, it was obligated to return a mandatory sentence of life imprisonment without possibility of parole. The jury did find the existence of both prior convictions, and sentenced accordingly.

Appellant claims that 21 O.S. § 1123, under which he was charged, contains the applicable punishment range, and that a mandatory life-without-parole sentence is not found there. The State counters that the trial court has broad discretion in crafting jury instructions; that Appellant has waived any instruction error by failing to object at trial; and that in any event, the trial court's application of the mandatory sentence provided in 21 O.S. § 51.1a was proper. We reject the State's first two arguments. The applicable punishment range is a matter of law, and instructions thereon are either correct or not. And whether Appellant's criminal history called for a mandatory life-without-parole sentence is of such great importance that we find any potential error would rise to the level of plain error, reviewable even without a timely objection by the defense. *Quillen v. State*, 2007 OK CR 22, ¶ 6, — P.3d —; *Ellis v. State*, 1988 OK CR 9, ¶ 3, 749 P.2d 114, 115. We therefore turn to the relevant statutes to determine the applicable punishment options in this case.

Oklahoma's lewd molestation statute, 21 O.S. § 1123, contains not only the elements of the offense, but also the punishment range.[5] In 1992, § 1123 was amended to provide enhanced punishment for 'serial molesters':

> A. Any person who shall knowingly and intentionally:
> . . .
> Look upon, touch, maul, or feel the body or private parts of any child under sixteen (16) years of age in any lewd or lascivious manner by any acts against public decency and morality, as defined by law . . .
>
> shall be deemed guilty of a felony and shall be punished by imprisonment in the Oklahoma State Penitentiary for not less than one (1) year nor more than twenty (20) years. The provisions of this section shall not apply unless the accused is at least three (3) years older than the victim. *Any person convicted of a second violation of subsection A of this section shall not be eligible for probation, suspended or deferred sentence. Any person convicted of a third or subsequent violation of subsection A of this section shall be punished by imprisonment in the State Penitentiary for a term of life or life without parole,* in the discretion of the jury, or in case the jury fail or refuse to fix punishment then the same shall be pronounced by the court.

21 O.S.Supp.1992, § 1123(A) (emphasis added). Curiously, the subsequent-offense language only concerned prior convictions for lewd molestation (§ 1123(A)); it did not expressly apply to other types of sex offenses, even those which involve or could involve children, such as first-degree rape or forcible sodomy.

In 2002, our Legislature enacted a somewhat broader habitual-offender provision aimed at sex offenders. Title 21, § 51.1a provides:

---

[5] Although commonly referred to as "lewd molestation," § 1123(A) prohibits a broader range of sexual conduct with minors, including indecent proposals.

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

Yet, for reasons unknown, when enacting § 51.1a, the Legislature did not delete conflicting punishment language from § 1123(A), and has neglected to do so ever since.[6]

Appellant claims that the punishment provisions in § 1123(A) should apply in his case, because (1) he has a prior lewd molestation conviction, and (2) his prior Kansas conviction for "rape" was deemed a "Class B felony" in Kansas, and is therefore not equivalent to a "first degree" rape conviction so as to trigger the provisions of § 51.1a. He claims that even if his prior Kansas conviction is relevant for sentence-enhancement purposes, the "mixed" nature of his criminal history should invoke the general habitual-offender statute, 21 O.S.Supp.2002, § 51.1 (a provision distinct from § 51.1a). Whether Appellant's sentences are enhanced under § 1123 or § 51.1, the possibilities do not include a mandatory life-without-parole result, found only in § 51.1a. The State argues that the punishment range for the Kansas offense is similar to the punishment range for first-degree rape in Oklahoma, and that the mandatory life-without-

---

[6] Section 1123 was amended three times in the same session that enacted § 51.1a. One of these amendments is found in the *very same bill* that promulgated § 51.1a. The other two amendments had an effective date *after* the effective date of the new § 51.1a, and neither appears to contemplate the conflicts with § 51.1a. *See* Laws 2002, ch. 455, § 3, emerg. eff. June 5, 2002 (amending 21 O.S. § 51.1a) ; Laws 2002, ch. 455, § 6, emerg. eff. June 5, 2002 (amending 21 O.S. § 1123); Laws 2002, ch. 110, § 2, eff. July 1, 2002 (amending 21 O.S. § 1123); Laws 2002, ch. 460, § 11, eff. Nov. 1, 2002 (amending 21 O.S. § 1123). We are concerned with the version of § 1123 in effect on September 7, 2002, which is the date the offenses here allegedly occurred; that version did not change the punishment provisions first promulgated in 1992, which are excerpted in the text above.

parole provision in § 51.1a applies in any event because § 51.1a impliedly repeals conflicting language in § 1123(A).

If Appellant had only one prior felony conviction, for lewd molestation, his primary argument might well prevail, since the habitual-offender language of § 1123, specifically directed at prior convictions under "this section," appears to remain in effect. Despite obvious conflicts between the two statutes, § 1123 has been amended several times since enactment of § 51.1a in 2002, and the legislature has yet to clear up the confusion.[7] However, Appellant's prior Kansas conviction is also for a sex offense, denominated "rape" by the laws of Kansas. To determine whether the Kansas conviction is equivalent to one of the sex offenses enumerated in § 51.1a, we must consider the nature of that offense and compare it with our own laws.[8] The parties focus on the punishment range for the Kansas conviction. Yet, both § 51.1a and § 1123 are concerned with the nature of the prior offense, not the severity of its punishment. Thus, for our purposes here, how Kansas *punishes* rape is not as important as how Kansas *defines* rape.

At the time Appellant was convicted in Kansas, the statute under which he was charged, K.S.A. 21-3502, defined rape as sexual intercourse under any of the following circumstances:

---

[7] *See* 75 O.S.2001, § 22 (where statutory provisions conflict, the general rule is that the last provision enacted should prevail); *State v. District Court of Oklahoma County*, 2007 OK CR 3, ¶¶17-18, 154 P.3d 84, 87-88 (75 O.S. § 22 applies even where conflicting statutory amendments are enacted in the same legislative session).

[8] *See generally Dunham v. State*, 1988 OK CR 211, ¶¶ 20-21, 762 P.2d 969, 975; *Fischer v. State*, 1971 OK CR 120, ¶¶ 6-10, 483 P.2d 1165, 11-67-68.

(1) when the victim is overcome by force or fear;

(2) when the victim is "unconscious or physically powerless";

(3) when the victim is incapable of giving consent "because of mental deficiency or disease, which condition was known by the offender or was reasonably apparent to the offender"; or

(4) when the victim is incapable of giving consent "because of the effect of any alcoholic liquor, narcotic, drug or other substance administered to the victim by the offender, or by another person with the offender's knowledge, unless the victim voluntarily consumes or allows the administration of the substance with knowledge of its nature."

K.S.A. 21-3502 (1983).[9]

During that same period of time, Oklahoma law designated the following kinds of sexual intercourse as first degree rape:

(1) intercourse committed by a person over eighteen years of age upon a person under fourteen years of age;

(2) intercourse committed upon a person incapable through mental illness or any unsoundness of mind of giving legal consent regardless of the age of the person committing the crime;

(3) intercourse accomplished with any person by means of force, violence, or threats of force or violence accompanied by apparent power of execution regardless of the age of the person committing the crime.

21 O.S.Supp.1986, § 1114(A); 21 O.S.Supp.1984, § 1111. All other forms of rape were considered rape in the second degree. 21 O.S.Supp.1986, § 1114(B).

At all times relevant to our purposes, first degree rape, as defined by Oklahoma law, included *most, but not all* of the alternatives listed in the

[9] Appellant was convicted in Kansas in 1989. From 1983 until 1993, K.S.A. 21-3502 defined rape in the manner described above. *See Carmichael v. State*, 18 Kan.App.2d 435, 856 P.2d 934, 941 (1993), *reversed in part*, 255 Kan. 10, 872 P.2d 240 (1994).

Kansas rape statute. For example, Appellant could have been convicted under K.S.A. 21-3502 for having sexual intercourse with an unconscious victim. Such conduct would have been considered *second degree* rape in Oklahoma (unless the victim also happened to be under the age of fourteen). *Stadler v. State*, 1996 OK CR 23, ¶ 6, 919 P.2d 439, 441.

From the record before us, we are unable to determine the exact nature of the offense Appellant was convicted of in Kansas. All the State's evidence established was that it was a felony sex offense, and that much Appellant does not dispute. Under the circumstances, we find the enhancement provisions of 21 O.S.Supp.2002, § 51.1(B) to be applicable, and we hereby **MODIFY** Appellant's sentence to twenty-five years imprisonment on each count, to be served concurrently with each other. *Chambers v. State*, 1988 OK CR 255, ¶¶ 12-14, 764 P.2d 536, 538.

Finally, in Proposition 4, Appellant claims that the errors previously identified cumulatively denied him a fair trial. Having found no error in Proposition 1, harmless error in Proposition 2, and having already corrected the error in Proposition 3, there is no error to accumulate. *Lott v. State*, 2004 OK CR 27, ¶ 167, 98 P.3d 318, 357. Proposition 4 is denied.

DECISION

The Judgment of the district court is **AFFIRMED**, but the Sentence is **MODIFIED** to twenty-five years imprisonment on each count, to be served concurrently with each other. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE TAMMY BASS-JONES, DISTRICT JUDGE

APPEARANCES AT TRIAL

MICHAEL TREVINO
TOM ELLIOTT
ASSISTANT PUBLIC DEFENDERS
320 ROBERT S. KERR, SUITE 611
OKLAHOMA CITY, OK 73102
ATTORNEYS FOR DEFENDANT

PAMELA STILLINGS
SARAH McAMIS
ASSISTANT DISTRICT ATTORNEYS
320 ROBERT S. KERR, SUITE 505
OKLAHOMA CITY, OK 73102
ATTORNEYS FOR THE STATE

APPEARANCES ON APPEAL

CAROLYN MERRITT
ASSISTANT PUBLIC DEFENDER
320 ROBERT S. KERR, SUITE 611
OKLAHOMA CITY, OK 73102
ATTORNEY FOR APPELLANT

W. A. DREW EDMONDSON
ATTORNEY GENERAL
PRESTON SAUL DRAPER
ASSISTANT ATTORNEY GENERAL
313 N. E. 21st ST.
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR THE STATE

OPINION BY C. JOHNSON, V.P.J.
LUMPKIN, P.J.: CONCURS IN RESULTS
CHAPEL, J.: CONCURS IN RESULTS
A. JOHNSON, J.: CONCURS
LEWIS, J.: CONCURS IN RESULTS

RB