IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CODY ROBERT GRENEMYER, Appellant, v. THE STATE OF OKLAHOMA, Appellee.	))))))))	Not for Publication Case No. F-2008-1199

OPINION

CHAPEL, JUDGE:

Cody Robert Grenemyer was tried by jury and convicted of Counts I and IV, Rape in the First Degree in violation of 21 O.S.2001, § 1114(A)(1); and Counts II and III, Lewd Molestation in violation of 21 O.S.Supp.2002, § 1123, in the District Court of Rogers County, Case No. CF-2007-119. In accordance with the jury's recommendation the Honorable J. Dwayne Steidley sentenced Grenemyer to two sentences of life imprisonment without the possibility of parole (Counts I and IV) and twenty (20) years imprisonment on each of Counts II and III. All sentences run consecutively. Grenemyer must serve 85% of his sentences on each count before being eligible for parole consideration. Grenemyer appeals from these convictions and sentences, raising six propositions of error.

Cody and Jennifer Grenemyer had two daughters, S.G. and T.G. Cody also was father to Jennifer's two oldest daughters, Krystal and Ronelle. During 2006 and 2007 Cody raped S.G. and molested T.G. Cody had previously raped and molested Krystal and molested Ronelle over several years while they lived

at home. Although Krystal began claiming Cody sexually abused her while she was in elementary school, and continued to so claim until she left the house as a teenager, he was not criminally prosecuted for those claims. Krystal and Ronelle both testified that the abuse began after the death of their middle sister, who was drowned as a toddler in a swimming pool accident. All the girls also testified that Cody was an alcoholic, drank almost every night, and was drunk when he committed the sexual abuse. Krystal and Ronelle were removed from the Grenemyer home by Colorado authorities and lived with family members for several years after Krystal's first accusations. Eventually the girls were reunited with their parents and sisters, two of whom were born in the interim, and moved to Oklahoma.

Krystal continued to claim she was molested by Cody. After a family fight, a neighbor became involved, the girls were removed from their home in Mayes County, and an investigation was started. Krystal testified in this proceeding that before police were called, she told Jennifer about the abuse and Cody admitted it to both of them. There was no criminal prosecution. At that time Ronelle denied being abused to Mayes County authorities, but testified in this proceeding that she had been abused and lied to those authorities because she did not want to live in a foster home again. The younger girls were returned to the home and Krystal was sent to live with relatives in Colorado. After she was returned to Oklahoma as a teenager, she lived with the Grenemyers briefly then moved out of the home.

By 2007, both older sisters were adults. Krystal lived in another town in Oklahoma and Ronelle lived in Colorado. On February 19, 2007, Krystal, Ronelle, S.G. and T.G. had a conference call. The younger girls told their older sisters that Cody was abusing them. Together the girls planned to go overnight to Krystal's house, then join Ronelle in Colorado. They intended to call the Grenemyers after they left the house, and demand that S.G. and T.G. be allowed to live with Ronelle or they would call police. Before they could carry out the plan, S.G. wrote a note to a friend, saying that she and T.G. had to leave and live with their sister in Colorado because they were being sexually abused. The friend told her mother, and on February 22, 2007, a school counselor and the police were notified. S.G. and T.G. were taken into Department of Human Services (DHS) custody and placed with an aunt and uncle who later adopted them. Both girls testified they believed Jennifer knew about the abuse.

Grenemyer denied raping or abusing any of the four girls. He suggested that S.G. and T.G. were urged to fabricate their claims by Krystal and Ronelle, and that Krystal ultimately instigated all the claims of abuse and had engaged in a vendetta against him since she was five or six years old. Cody also admitted he was an alcoholic and told police that had he committed the acts he would not have remembered them because he would have been drunk. Jennifer Grenemyer admitted that Krystal had told her Grenemyer raped and abused her, but testified that she chose to believe her husband over her children.

In Proposition I Grenemyer claims his constitutional right to present a complete defense was violated when the trial court excluded information that S.G. and T.G. had previously been molested by another man. In 2005, William Humphrey, a family friend, was convicted of sexually abusing S.G., T.G., and another child. Grenemyer sought to introduce this evidence at trial. The State vigorously opposed its introduction, claiming the evidence violated the rape shield law. The trial court considered this argument but concluded that the Humphrey evidence was not prohibited under the rape shield statute. However, the trial court concluded that the Humphrey evidence was not relevant to the current proceedings, and thus not admissible. This decision was not an abuse of discretion.[1]

First, the Humphrey evidence was not protected under the rape shield law. That statute is designed to protect victims of sexual abuse from claims that a jury should conclude a victim consented to the alleged crime because the victim had previous sexual experience. However, the statute allows introduction of evidence of specific sexual behavior if offered to show something other than consent, such as the source of an injury.[2] Grenemyer did not offer the Humphrey evidence to show that the girls consented to his criminal actions; he denied committing either rape or molestation. The trial court correctly concluded that, under these circumstances, the rape shield statute did not apply.

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[1] *Dill v. State*, 2005 OK CR 20, 122 P.3d 866, 868.
[2] *Dill*, 122 P.3d at 868; 12 O.S.2001, § 2412(B)(2).

However, Grenemyer was unable to articulate precisely why the Humphrey evidence was relevant. Relevant evidence is that which tends to make any fact of consequence to the action more or less probable.[3] Relevant evidence should not be admitted if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or the possibility that it will mislead the jury.[4] Grenemyer first notes that there were factual similarities between the facts in the Humphrey case and the charged crimes. This is unsurprising, as both cases involve sexual abuse of the same child victims.[5] Grenemyer argues that the victims only accused him after being molested by Humphrey; he appears to claim on appeal that the victims "transferred" their similar claims to Grenemyer. [Appellant's brief at 19] Grenemyer did not offer the Humphrey evidence to show that the victims were mistaken about their assailant, or that Humphrey committed the acts with which Grenemyer was charged. Practically speaking, he could not have done so, since Humphrey was imprisoned during most of the time in which the charged offenses occurred. Grenemyer consistently denied that the charged acts ever happened, and appeared to claim at trial that S.G. and T.G. used their experiences with Humphrey to fabricate claims against him. The victims, tragically, were apparently sexually abused in similar fashion by two different

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[3] 12 O.S.2001, § 2401.
[4] 12 O.S.2001, § 2403.
[5] There are significant factual differences between the cases. S.G. testified that Grenemyer raped her, by putting his penis in her vagina. Humphrey was convicted of touching S.G.'s breasts and vagina. T.G. testified that Grenemyer did not have sexual intercourse with her, but touched her breasts and vagina. Humphrey was convicted of attempting to rape T.G., and putting his penis on her vagina. That is, each victim testified that Grenemyer performed on her an act other than the act Humphrey was convicted of performing.

adult men. This does not make the facts of the first abuse relevant to the second abuser's criminal trial.

Grenemyer claims that the Humphrey evidence was necessary to test the victims' credibility. This argument is not persuasive. T.G. testified to having nightmares, some lifelong and some occurring within the last two or three years. Grenemyer claims the Humphrey evidence might in part explain those nightmares, and that Grenemyer would testify the nightmares were related to the Humphrey case. Grenemyer does not claim that T.G. would so testify. S.G. testified that, since Grenemyer was her father and his actions happened often, she did not realize that his rape and abuse of her were wrong until around December 2006. She testified that she was doing research for school and realized that Grenemyer shouldn't be "doing that stuff". Grenemyer argues that this revelation came after Humphrey had been tried and convicted for molesting S.G., implying that her story was not consistent with her knowledge based on the Humphrey case. Grenemyer argues that he should have been able to attack the victims' credibility by using the Humphrey evidence to show jurors what was "in the girls' heads" after that case. [Appellant's brief at 16] Insofar as Grenemyer suggests that the Humphrey evidence could have explained the victims' knowledge of sexual acts or terms, we have already held that evidence of other sexual encounters is irrelevant when introduced for this purpose.[6]

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[6] *Dill*, 122 P.3d at 868.

Grenemyer relies on *Walker v. State*.[7] In that case, a child victim accused the defendant of rape and testified that, before the rape, she was a virgin. He wanted to offer evidence that she had previously accused two other men of rape and thus was lying either about those accusations or about her virginity at his trial. We reversed, finding that under those unusual circumstances the defendant should have been allowed to impeach the victim's credibility by cross-examining her about her previous claims.[8] Those circumstances are not present here. The record does not support any conclusion that either S.G. or T.G. testified falsely on any matter which could be refuted by the Humphrey evidence. At most, Grenemyer argues that the Humphrey evidence could have offered an alternative explanation for T.G.'s testimony about nightmares and S.G.'s realization that Grenemyer's actions were wrong.

Evidence that S.G. and T.G. were previously abused by another adult man was not necessary to impeach their credibility. It was not relevant to show how the victims may have acquired knowledge of sexual acts or vocabulary. It was not offered to show that Humphrey committed the charged crimes. Any remote probative value the evidence might have had, and we do not hold any existed, was outweighed by the substantial danger of unfair prejudice to the victims, confusion of the issues, and the possibility that the jury could have been misled. The trial court did not abuse its discretion in refusing to admit this evidence.

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[7] 1992 OK CR 73, 841 P.2d 1159.
[8] *Walker*, 841 P.2d at 1161-62.

In Proposition II Grenemyer claims his sentences violate the *ex post facto* law because the punishment of life imprisonment without the possibility of parole was not in effect at the time of the offenses. Our resolution of Proposition III renders this claim moot. We note, however, that it has no merit. Grenemyer was accused of committing rape and sexual abuse during 2006 and 2007. In 2002, the Legislature provided that any person convicted of first degree rape was subject to punishment of a term of years not less than five years, life imprisonment, or life imprisonment without the possibility of parole.[9] This statute was in effect at the time of the charged offenses and provides for the punishment imposed by Grenemyer's jury.

Grenemyer claims in Proposition III that he was denied a fair trial by the admission of excessive and unfairly prejudicial propensity evidence. This claim has some merit. The law in effect at the time of Grenemyer's trial allowed evidence of commission of other child molestation offenses which may be relevant to show a propensity to commit the charged crimes.[10] Under this statute, the trial court admitted testimony by Krystal and Ronelle describing their own sexual abuse at Grenemyer's hands, their lengthy history of domestic trouble related at least in part to the abuse, and their belief regarding Jennifer Grenemyer's knowledge of the abuse. The defense attorneys did not object to the evidence, stating on the record that they believed the statute prohibited them from making any objection. We thus review the claim for plain error.

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[9] 21 O.S.Supp.2002, § 1115.
[10] 12 O.S.Supp.2007, § 2414.

While the statute allows admission of this type of propensity evidence, the statute does not give the prosecution carte blanche to admit any and all evidence of prior sexual offenses. The evidence must be both relevant to the charged offenses and not unfairly prejudicial.[11] A trial court must balance the probative value of the evidence against its potential for prejudice. Specifically, the trial court must consider 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."[12] The trial court's consideration is not limited to these factors. In addition, "[w]hen 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."[13] The passage of the statute does not lessen the trial court's duty to weigh the admissibility of the evidence.

There is no indication in the record that the trial court here engaged in any weighing process, or considered any of the factors above, before admitting the propensity evidence offered here. The testimony of S.G. and T.G. together covered 209 pages of trial transcript. Krystal's testimony alone took up 309 pages of transcript, and Ronelle's testimony covered another 80 pages. That is,

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[11] *Horn v. State*, 2009 OK CR 7, 204 P.3d 777, 785-86. *See also United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998).
[12] *Horn*, 204 P.3d at 786.

the propensity evidence admitted in this case was almost twice the length of the testimony regarding the charged offenses. At times all parties seemed to forget that Krystal was not a victim of the charged offenses. Essentially, the court tried Grenemyer for Krystal's allegations in this prosecution. There comes a time in any prosecution when enough evidence is too much. That point was reached, and passed, in this case. Certainly, some evidence from Krystal and Ronelle would have been admissible, including very damaging allegations that Grenemyer was a frequent abuser and admitted it, and Jennifer Grenemyer was aware of the abuse. However, admission of such an overwhelming amount of propensity material created the serious risk that jurors were distracted from the central issues of the trial – Grenemyer's sexual abuse of S.G. and T.G.

After thoroughly reviewing the record, we find that this evidence did not affect the verdicts of guilt. S.G. and T.G. were credible witnesses whose consistent testimony amply supported the jury verdicts. However, we cannot reach the same conclusion regarding the jury's recommended sentence. The sheer volume of prejudicial evidence very likely distracted the jury and provided an improper basis for the sentence recommendation. Jurors were instructed not to consider the propensity evidence as substantive evidence of guilt. This instruction alone, given the extreme amount of propensity evidence, was not enough to compensate for the complete absence in the record of any attempt to balance the propensity evidence in order to limit its prejudicial effect. This error substantially violated Grenemyer's right to be tried and sentenced for the

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[13] *Id.*

charged crimes, rather than for other offenses.[14] Grenemyer's sentences of life imprisonment without parole must be modified to life imprisonment on each count. We do not modify the trial court's decision to run these sentences consecutively.

Grenemyer claims in Proposition IV that he was denied due process of law by the prosecutors' conduct during *voir dire*. He complains that the prosecutor improperly asked hypothetical questions using the facts of his case. Grenemyer failed to object to these questions and has waived all but plain error. We find none. Grenemyer relies on District Court Rule 6, which prohibits *voir dire* questions asking a juror how she would decide a case based on a hypothetical question involving law or facts.[15] We have held this rule prohibits questions which assume both particular facts of the case and that the trial court will instruct the jury in any particular way, and ask jurors to state how they would decide under the proposed assumptions.[16]

The questions about which Grenemyer complains did not seek to have jurors state how they would decide a question based on a given set of facts, and were not improper. Counsel for co-defendant Jennifer Grenemyer questioned jurors about their experiences with alcohol abuse, and whether those experiences would affect their view of the case if evidence showed alcohol abuse was a factor here. After this prosecutors asked jurors whether they thought alcohol abuse could excuse a parent's bad behavior. The prosecutors,

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[14] 20 O.S.2001, § 3001.1.
[15] 12 O.S.2001, Ch. 2, App., Rule 6.

aware that S.G. and T.G. would testify to instances of sexual abuse they had not immediately reported, also asked jurors whether they had any preconceived notions as to when these or other child victims should report sexual abuse. None of these questions assumed the truth of the State's version of the facts and asked jurors to decide an issue based on those facts. Rather, the questions attempted to discover whether prospective jurors had biases, based on evidence likely to be presented, which would impair their ability to fairly decide the case. This is one purpose of *voir dire*.[17] The questions violated neither case law nor Rule 6.

In Proposition V Grenemyer argues that his sentences are excessive. Our resolution of Proposition IV renders this claim moot.

Grenemyer argues in Proposition VI that the accumulation of error in his case requires relief. We found no error in Propositions I, II, or IV. We further found that error in Proposition III requires modification of Grenemyer's sentences for first degree rape. No further relief is required.[18]

Decision

The Judgments of the District Court are **AFFIRMED**. The Sentences on Counts II and III are **AFFIRMED**. The Sentences on Counts I and IV are **MODIFIED** to life imprisonment with the possibility of parole, to run consecutively. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2010), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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[16] *Scott v. State*, 1982 OK CR 108, 649 P.2d 560, 562; *Kephart v. State*, 93 Okl.Cr. 451, 229 P.2d 224, 229-30 (1951).

[17] *Parker v. State*, 2009 OK CR 23, 216 P.3d 841, 847.

[18] *Bell v. State*, 2007 OK CR 43, 172 P.3d 622, 627 (no cumulative error where single error has been addressed).

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