IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

MARTY LEE LANGLEY,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F 2012-639
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LEWIS, PRESIDING JUDGE:

Appellant, Marty Lee Langley, was convicted of lewd molestation (after former conviction of one felony)[1] in violation of 21 O.S.Supp.2002, § 1123, in the District Court of Marshall County, case number CF-2011-52, before the Honorable Wallace Coppedge, District Judge. The jury set punishment at twenty (20) years imprisonment, and the trial court sentenced Langley accordingly.[2] Langley now appeals.

1. Improper comments by the prosecutor during closing argument deprived Mr. Langley of a fundamentally fair trial.

2. Because B.B.'s testimony was not "clear and convincing," it required corroboration. Because the testimony was not adequately corroborated, this court should find that the evidence is insufficient to support Mr. Langley's conviction.

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[1] Appellant stipulated that he had four prior convictions; however, the trial court instructed on all possible ranges of punishment. The jury indicated on their verdict form that they found Langley guilty after one previous conviction.

[2] A conviction for lewd molestation requires a defendant to serve not less than eighty-five percent of the sentence of imprisonment imposed. 21 O.S.2011, § 13.1.

3. The trial court erred in failing to require the prosecutor to "elect between acts."

4. Mr. Langley failed to receive the effective assistance of counsel.

5. Mr. Langley should be afforded relief on the basis of cumulative error.

After thorough consideration of Langley's propositions of error and the entire record before us on appeal, including the original record, transcripts, exhibits, and briefs, we have determined that error raised in proposition three requires reversal and remand for a new trial.

In proposition three, Langley points out that two separate and unrelated incidents of lewd molestation were alleged in a single count of lewd molestation, and the jury was instructed that they could find him guilty if they found either of the acts occurred. Langley argues that the failure of the trial court to require the State to elect which of the two acts of molestation it would rely on to prove its case, and the failure of the trial court to properly instruct the jury accordingly, deprived him of his right to a unanimous verdict pursuant to Article 2, Section 19 of the Oklahoma Constitution.

Langley was charged with "knowingly and intentionally looking upon, touching, feeling the body or private parts of . . . [B.B.], and having . . . [B.B.] touch his penis, when she was under the age of 16 years . . . ." The jury was instructed that the elements (in part) of lewd molestation were that Langley "attempted to touch the private parts of the alleged victim, or causing the victim to touch the private parts of the defendant; . . . ." The facts adduced at trial indicated that on one occasion Langley caused the victim to touch his

private parts, and on another occasion Langley attempted to touch the private parts of the victim.

We first note that no objection to the Information or instructions was made at the trial court, nor did Langley ask the trial court to have the prosecution elect upon which incident it was basing its prosecution. Therefore, this Court it limited to a review for plain error only.

> 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. *See Simpson v. State*, 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d 690, 694, 695, 698; 20 O.S.2001, § 3001.1. 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." *Simpson*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701 (citing *United States v. Olano*, 507 U.S. 725, 736, 113 S.Ct. 1770, 1779, 123 L.Ed.2d 508 (1993); 20 O.S.2001, § 3001.1.

Hogan v. State, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. We find that plain error occurred in this case.

This Court has held that in a prosecution for sexual assault where evidence of more than one incident is placed before the jury, either the State must elect for which offenses it seeks conviction or the trial court must instruct the jury to consider the first offense for which the State presented evidence as the charged crime. *See Cody v. State*, 1961 OK CR 43, ¶ 37, 361 P.2d 307, 319-20. Earlier, in *Smith v. State*, 1921 OK CR 217, 20 Okl.Cr. 124, 127, 201 P.663, 664, this Court stated:

> It has been repeatedly held in this state that a person may be tried for, and convicted of, only one offense at a time, and while proof of other acts of intercourse, in a prosecution for statutory rape occurring both prior to and subsequent to the one relied upon for a conviction, may be proved for the purpose of showing the intimate relations existing between the parties, etc., the conviction must be based solely upon one of such acts and not all of them. [citation omitted]

We have carved out exceptions to the above rule. One exception is when a child of tender years is under the exclusive domination of one parent for a definite and certain period of time and submits to sexual acts at that parent's demand, the separate acts of abuse become one transaction within the meaning of this rule. *Gilson v. State,* 2000 OK CR 14, ¶ 21, 8 P.3d 883, 899; *Drake v. State,* 1988 OK CR 180, ¶ 7, 761 P.2d 879, 882; *Huddleston v. State,* 1985 OK CR 12, ¶ 16, 695 P.2d 8, 10-11. The other exception is when separate acts of the same sexual crime occur within a short period of time and only one count is alleged. *See Williams v. State,* 1986 OK CR 101, ¶ 11, 721 P.2d 1318, 1321 (holding that two instances of penetration in a short period of time where only one count of rape was charged did not require the State to elect which instance it was relying on for conviction); *Scott v. State,* 1983 OK CR 118, ¶ 19, 668 P.2d 339, 342-43 ("when a continuous application of force is used and no reasonable doubt exists as to the occurrence of each act" no election is required). The evidence presented in this case supports neither exception.

Here, the victim was a guest at the home of Langley, who was married to the victim's sister, on two separate occasions when these two incidents occurred. There was no evidence that the victim was under the exclusive

domination of Langley for a definite and certain period of time, nor was there evidence that these two acts occurred within a short period of time.

The reasoning for forcing the State to elect which incident it relies upon for conviction is that a defendant has a constitutional right to a verdict in which all of the jurors concur upon the same criminal act or transaction pursuant to pursuant to Article 2, Section 19 of the Oklahoma Constitution. *See Cody*, 1961 OK CR 43, ¶ 38, 361 P.2d at 320; *McManus v. State*, 1931 OK CR 110, 50 Okl.Cr. 354, 358, 297 P. 830, 831.

Our cases make it clear that error occurred in this case, and the error is plain and obvious from the record, thus overcoming the first two hurdles of plain error review. Further, this Court cannot say that the error did not affect the outcome of this case. It is impossible to determine upon which incident the jury based its verdict, as they were given the option of choosing either incident, not both. Therefore, we determine that this error affected Appellant's substantial rights and affected the outcome of this trial. We further find that this error was not harmless, as the error seriously affected the fairness of the proceeding. We find, consequently, that this case must be reversed and remanded for a new trial.[3]

In addition to the error outlined above, we find it necessary to address the error alleged in proposition one. In this proposition we find that the prosecutor erroneously asked the jury to convict Langley to prevent him from

[3] Nothing in this Opinion prohibits the State from prosecuting Appellant for both of the alleged molestation incidents alleged at trial by charging separate counts.

committing future acts of molestation against "little girls." This Court has consistently held that it is improper for the State to urge a jury to convict a defendant because he will commit future crimes. *Brewer v. State*, 1982 OK CR 128, ¶ 8, 650 P.2d 54, 58. In the retrial of this case, the prosecution should refrain from such argument. The remaining propositions of errors require no discussion.

DECISION

The Judgment and Sentence of the district court shall be **REVERSED** and **REMANDED** for a **NEW TRIAL**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF MARSHALL COUNTY
HONORABLE WALLACE COPPEDGE, DISTRICT JUDGE

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OPINION BY: LEWIS, P.J.

SMITH, V.P.J.: Concurs
LUMPKIN, J.: Concurs
C. JOHNSON, J.: Concurs
A. JOHNSON, J.: Concurs