IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. S-2012-834
	)	
JEFFREY ARIEL PORRAS,	)	
	)	
	)	
Appellee.	)	

OPINION

A. JOHNSON, JUDGE:

The State of Oklahoma appeals an order entered by Judge Lori M. Walkley of the District Court of Cleveland County on September 6, 2012 in Case No. CF-2008-358, granting Porras' motion to dismiss Counts 4, 5, 6, and 7. We exercise jurisdiction under 22 O.S.2011, § 1053(6) and affirm the district court's ruling.

Jeffrey Porras, a physician, is charged in Cleveland County in a Third Amended Information with five counts of sexual battery in violation of 21 O.S. § 1123(B), one count of rape in the second degree by instrumentation in violation of 21 O.S.2001, § 1111.1, and one count of engaging in a pattern of criminal offenses in two counties in violation of 21 O.S.Supp.2004, § 425. Each of the sexual assault counts alleges an offense against a different victim committed while the victim was receiving medical treatment from Porras at either his Oklahoma County or Cleveland County office. All five sexual battery counts allegedly occurred between January and October of 2007, with Counts 1-3 alleged to have occurred in Cleveland County, and Counts 6

and 7 in Oklahoma County. The rape count, charged as Count 5, allegedly occurred in Oklahoma County in 2005, two years before any of the other Oklahoma County counts. Count 4 charged Porras with engaging in a pattern of criminal offenses in Cleveland and Oklahoma Counties from June 3, 2005 to October 31, 2007, with the offenses alleged in Counts 1, 2, 3, 5, 6, and 7 serving as the underlying offenses.

Reasoning that the alleged acts were not all part of the same plan, scheme, or adventure, the trial court judge concluded that joinder of the Oklahoma County counts and the Cleveland County counts for trial in Cleveland County was not proper under 21 O.S. § 425(B) which permits joinder of counts for trial in a single county where the charged offenses occur in multiple counties if the offenses consist of a pattern of criminal offenses that are part of the same "plan, scheme, or adventure." Joinder of such counts for trial in a single county is discretionary, however, not mandatory. 22 O.S.Supp.2004, § 125.1. The judge's decision to dismiss the counts is therefore reviewed for an abuse of discretion.

An abuse of discretion is "a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *Stouffer,* 2006 OK CR 46, ¶ 60, 147 P.3d at 263. In this instance, the trial court judge's decision to dismiss the Oklahoma County counts and the pattern of offenses count is not a clearly erroneous judgment that runs counter to the logic and effect of the facts. The alleged offenses did not occur over a short period of time, but were spread out over a two year period with more than

thirty days separating all but two. *Cf. Glass v. State*, 1985 OK CR 65, ¶¶ 8-9, 701 P.2d 765, 768 (requiring that joinder of offenses under 22 O.S.1981 § 436 as a series of acts or transactions requires, among other things, that offenses occur over "relatively short period of time"). Additionally, none of the Oklahoma County counts was facilitated by or dependent upon the Cleveland County counts. *Cf. Knighton v. State*, 1996 OK CR 2, ¶ 37, 912 P.2d 878, 889-890 (holding that evidence of other crimes is admissible under 12 O.S.1981, § 2404(B) where the crimes are part of a common scheme or plan and that the term common scheme or plan contemplates "some relationship or connection between the crimes [such that] the facts of one crime tend to establish the other such as where the commission of one crime depends upon or facilitates the commission of the other"). Nor was proof of any of the Cleveland County counts necessary to prove the Oklahoma County counts. *Cf. Glass*, 1985 OK CR 65, ¶ 9, 701 P.2d at 768 (requiring that joinder of offenses under 22 O.S.1981 § 436 as a series of acts or transactions requires, among other things, that "proof as to each transaction overlaps so as to evidence a common scheme or plan"). Under these circumstances, where the alleged crimes were not interdependent in any way and were not part of some greater overall plan, the trial court judge's decision to dismiss the counts as not part of the same plan, scheme, or adventure was not against the logic and effect of the facts presented. The decision to dismiss the Oklahoma County counts was not an abuse of discretion.

DECISION

The Order of the District Court, granting Porras' motion to dismiss Counts 4, 5, 6, and 7 is **AFFIRMED**. 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 delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY
THE HONORABLE LORI WALKLEY, DISTRICT JUDGE

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OPINION BY: A. JOHNSON, J.
LEWIS, P.J.: Concur
SMITH, V.P.J.: Concur in Results
LUMPKIN, J.: Dissent
C. JOHNSON, J.: Concur

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LUMPKIN, JUDGE: DISSENT

I dissent to affirming the trial court's granting the motion to dismiss.

Title 21 O.S.2011 § 425 provides:

A. Any person who engages in a pattern of criminal offenses in two or more counties in this state or who attempts or conspires with others to engage in a pattern of criminal offenses shall, upon conviction, be punishable by imprisonment in the Department of Corrections for a term not exceeding two (2) years, or imprisonment in the county jail for a term not exceeding one (1) year, or by a fine in an amount not more than Twenty-five Thousand Dollars ($25,000.00), or by both such fine and imprisonment. Such punishment shall be in addition to any penalty imposed for any offense involved in the pattern of criminal offenses. Double jeopardy shall attach upon conviction.

B. For purposes of this act, "pattern of criminal offenses" means:

1. Two or more criminal offenses are committed that are part of the same plan, scheme, or adventure; **or**

2. A sequence of two or more of the same criminal offenses are committed and are not separated by an interval of more than thirty (30) days between the first and second offense, the second and third, and so on; **or**

3. Two or more criminal offenses are committed, each proceeding from or having as an antecedent element a single prior incident or pattern of fraud, robbery, burglary, theft, identity theft, receipt of stolen property, false personation, false pretenses, obtaining property by trick or deception, taking a credit or debit card without consent, or the making, transferring or receiving of a false or fraudulent identification card.

C. Jurisdiction and venue for a pattern of criminal offenses occurring in multiple counties in this state shall be determined as provided in Section 1 of this act.

(Footnotes omitted) (emphasis added).

As set out above, the language of the statute creates three ways to commit a pattern of criminal offenses. By a plain reading of the statute, the methods of commission are listed in the alternative, with an "or" separating (B)(1),(2) and (3). This indicates the Legislature intended for either one of the listed alternatives to establish a pattern of criminal offenses.

Subsection (B)(1) does not include a time limit as does (B)(2). The language of (B)(1) indicates the Legislature intended to cover different crimes against different victims but that are part of the same plan, scheme or adventure that occur more than 30 days apart.

In *Knighton v. State*, 1996 OK CR 2, ¶ 37, 912 P.2d 878, 889 this Court found:

> A common scheme or plan contemplates some relationship or connection between the crimes in question ... The word, "common" implies that although there may be various crimes, all said crimes must come under one plan or scheme whereby the facts of one crime tend to establish the other such as where the commission of one crime depends upon or facilitates the commission of the other crime, or where each crime is merely a part of a greater overall plan.

While this definition was set out in a discussion of 12 O.S. § 2404(B) other crimes evidence, it is applicable in the present case.

Here, we have separate crimes that all have a common theme and were facilitated in the same way. All of the victims were the defendant's patients, all of the victims were women, all of the crimes occurred in the defendant's doctor's office while a nurse was not in the room and all victims were touched inappropriately under the guise of medical treatment. The facts show the defendant used his position as a physician to perpetuate his plan/scheme to

sexually abuse women. The pleadings show that in relation to each other, the crimes occurred over a relatively short period of time, all within 2 years. That these crimes occurred in two separate counties is the exact situation contemplated by § 425. The defendant was able to continue his predatory behavior by moving his office over the county line. Simply because he moved his practice during the execution of his plan to sexually abuse his female patients, the defendant should not benefit by having fewer charges filed against him and requiring the victims to testify numerous times. I find the charged crimes sufficiently established a pattern of criminal offenses under § 425(B).

Based on the foregoing, I find the trial court did not properly apply 21 O.S. 2011, § 425(B) to the facts of this case and therefore abused its discretion in granting the motion to dismiss.