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**IN THE COURT OF CRIMINAL APPEALS**
**OF THE STATE OF OKLAHOMA**

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| **STATE OF OKLAHOMA,** | ) | |
| | ) | |
| **Appellant,** | ) | **NOT FOR PUBLICATION** |
| | ) | |
| **v.** | ) | **Case No. S-2019-242** |
| | ) | |
| **WESLEY WARREN PERITT WEAVER, II,** | ) | |
| | ) | |
| **Appellee.** | ) | |



**OPINION**

**HUDSON, JUDGE:**

On January 5, 2017, Wesley Warren Peritt Weaver, II, was charged with Sexual Abuse—Child Under 12, in violation of 21 O.S., § 843.5[1] in the District Court of Craig County, Case No. CF-2017-4. Weaver was bound over at preliminary hearing.[2] On March 4, 2019, Appellant, the State of Oklahoma, filed a *Notice to Introduce Evidence of Defendant's Other Sexual Assault Offense(s) and/or Other Child*

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[1] Weaver was charged in this case with sexually abusing A.W. between January 1, 2011 and October 24, 2016. This date range implicates the 2010 and 2014 amended versions of 21 O.S., § 843.5, as well as the 2009 and 2012 amended versions of 10A O.S., § 1-1-105.

[2] In conformance with the evidence presented at preliminary hearing, the State filed an amended information on February 12, 2019.

*Molestation Offense(s).* Weaver filed a written objection to the State's notice on March 12, 2019. At a motion hearing held that same day, the Honorable Shawn S. Taylor, District Judge, heard evidence and argument on the State's motion to admit sexual propensity evidence and took the matter under advisement. The motion hearing resumed on March 28, 2019, at which time Judge Taylor denied the State's request and the State announced its intent to appeal.

Appellant, the State of Oklahoma, now appeals, raising the following issue:

> I. TRIAL COURT ERRED IN ITS ANALYSIS AND ULTIMATE FINDINGS AND ORDER REGARDING THE ADMISSION OF THE APPELLANT'S PROPOSED PROPENSITY EVIDENCE.

We exercise jurisdiction pursuant to 22 O.S.2011, § 1053(6).[3] After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we **AFFIRM** the district court's order for reasons discussed below.

[3] Title 22, Section 1053(6) allows an appeal by the State "[u]pon a pretrial order, decision or judgment suppressing or excluding evidence in cases alleging violation of any provisions of Section 13.1 of Title 21 of the Oklahoma Statutes."

## BACKGROUND

**Present Case.** Appellee is charged with sexually abusing his daughter, A.W., between January 1, 2011 and October 24, 2016. A.W. was born on August 8, 2007.

Preliminary hearing was held on February 9, 2018. The State presented two witnesses—A.W.'s mother Kimberly Weaver and forensic interviewer Jody K. Hunt. Mrs. Weaver testified that on the evening of October 24, 2016, she and A.W. were in the car driving home when A.W. spontaneously stated, "Mommy, Daddy put his bad spot in my butt." "Bad spot" is the verbiage A.W. uses for a penis. A.W. appeared scared and was crying. Unsure what to do, Mrs. Weaver called her mother who instructed her to take A.W. to the hospital. Before entering the hospital, A.W. assured her mother that she was telling the truth. While at the hospital, A.W. said Appellee began sexually abusing her when she was six or seven years old. At some point that night, A.W. told her mother that the abuse occurred when her mother left the house "to go to the store or something". Mrs. Weaver never observed any warning signs indicating A.W. was being abused.

A.W. was interviewed at the Children's Advocacy Center in Claremore on November 4, 2016, by forensic interviewer Jody K. Hunt. At the beginning of the interview, Hunt established that A.W. understood the difference between a truth and a lie. During the course of the interview, A.W. began withdrawing and appeared to struggle with talking about what had happened. She "worked herself up against one of the walls, which was the furthest at the back of the room and [ ] pulled her knees up to her chest[.]" While A.W. was able to verbalize that something bad had happened to her, she ultimately described the abuse by writing it down on a piece of paper. Her description consisted of—"He told me to go in his room[,]" and "[h]e put his bad spot on my but [sic]." She later verbalized that the abuse occurred in her parent's bed and that "she was laying on her stomach and [Appellee] was on top of her from behind[.]" It would "last for a short time and then stopped[.]" A.W. never disclosed any form of penetration.

A.W. verbalized "bad spot" as "where you use the bathroom". She also identified the "penis" on an anatomical drawing of a male as the "bad spot" and identified the buttocks/bottom on an anatomical

drawing of a girl as a "butt".[4] A.W. thought the abuse had happened "maybe once or twice a month since she was seven." After each occurrence, Appellee told her not to tell or he "would take her away."

**Proposed Sexual Propensity Evidence.** At the March 12, 2019, motion hearing, the State presented the testimony of two witnesses in relation to its motion to admit sexual propensity evidence[5]—the alleged prior victim A.A. and forensic interviewer Jody Hunt. Appellee presented one witness—A.A.'s mother Kimberly Anderson.

A.A. testified Appellee sexually molested her when she was between five and seven years old and living in Hughson, California. A.A. and Appellee are cousins. A.A. was born on October 25, 1989, and is four years younger than Appellee, who was born in March 1985. The day of the alleged abuse, A.A., her sister Elizabeth, Appellee and Appellee's stepbrother Carl were at the Hughson City

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[4] Notably, the record on appeal does not contain any of the exhibits admitted during the preliminary hearing—State's Exhibit 1 (a photograph of "the papers and what [A.M.] wrote that day"; State's Exhibits 2 (the anatomical drawing that A.W. marked what she was referencing as "bad spot"); State's Exhibit 3 (the anatomical drawing of a girl where A.W. marked what she considered a "butt"); and Defendant's Exhibit 1 (a close-up of State's Exhibit 1).

[5] The trial court addressed multiple pending motions at this hearing.

Pool. A.A. was wearing a one piece bathing suit. While in a shallow part of the pool, Appellee touched A.A.'s upper thigh within an inch of her vagina and asked A.A. if she "liked that" and if she "wanted to go home." A.A. said she wanted to go home. The four children subsequently got out of the pool and walked to Appellee's house. Once at the house, the group walked through the house and out to a tin shed located in the backyard.

There were two twin mattresses laying on the floor inside the shed. Appellee told A.A. to lay down on one of the mattresses. A.A. complied, laying with her back on the mattress. Carl and Elizabeth each laid on the other mattress. Appellee then laid on top of her, "moved over" A.A.'s bathing suit and "started having sex with [her] with his penis in [her] vagina". Meanwhile, Carl and Elizabeth engaged in the same activity. Appellee never said anything to A.A. during this sexual encounter. Afterward, A.A. went home. She never told anyone "because [Appellee] made like it wasn't wrong" saying, "This is what people do." Appellee also told A.A. that she couldn't tell her grandparents. A.A. believed she would get in trouble if she told her grandfather.

A.A. "always remember[ed]" the incident. However, she "kept quiet about [the encounter] from 1995 or '96 until 2018"—approximately a year after Appellee was charged in the present case. During this time span, A.A. acknowledged she went to counseling for approximately a year in 2001 or 2002 because her sister had been sexually abused by their stepfather. She never "raised this issue" during this period of counseling. A.A. decided to come forward to be a voice for the alleged victim in the present case that A.A. didn't have. A.A. further acknowledged she was evicted by Appellee in 2016 from the home she was living in that he owned.

Forensic interviewer Jody Hunt testified "delayed disclosure" was common in sexual abuse cases. According to a recent newsletter Hunt read, "60 to 80 percent of victims do not disclose until they're adults."

A.A. did not mention the alleged abuse to her mother, Kimberly Anderson, until A.A. was "[m]aybe 28 or 29". A.A. was 29 years old at the time of the motion hearing. The fact A.A. waited to make this disclosure "shock[ed]" Anderson because she and her five children had attended "sexual abuse therapy" three or four times a week for a year. The abuse alleged by A.A. "was never brought up" during these

counseling sessions. When A.A. did disclose the alleged abuse to Anderson, A.A. asserted, "[Appellee] had touched her down there but he was never in her vaginal [sic]. It was a rub like through your panties or whatever but there was never no [sic] penetration[.]"

Following the testimony of these witnesses, Judge Taylor heard brief argument from both parties and took the evidence and argument under advisement. The court ultimately denied the State's request on March 28, 2019, and the State announced its intent to appeal.

## DISCUSSION

Appellant contends Judge Taylor abused his discretion when he denied the State's pretrial request to introduce sexual propensity evidence. In appeals brought pursuant to § 1053, this Court reviews the trial court's ruling for an abuse of discretion. *State v. Hovet*, 2016 OK CR 26, ¶ 4, 387 P.3d 951, 953. "[W]e defer to the trial court's factual findings unless those findings are clearly erroneous, and review the trial court's legal conclusions *de novo*." *State v. Keefe*, 2017 OK CR 3, ¶ 7, 394 P.3d 1272, 1275. "An abuse of discretion is any unreasonable or arbitrary action made without proper consideration of the relevant facts and law, also described as

a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts." *State v. Hodges*, 2020 OK CR 2, ¶ 3, __P.3d__ (quoting *Hovet*, 2016 OK CR 26, ¶ 4, 387 P.3d at 953).

Sexual propensity evidence is admissible pursuant to 12 O.S.2011, §§ 2413 and 2414. *Brewer v. State*, 2019 OK CR 23, ¶ 5, 450 P.3d 969, 971; *James v. State*, 2009 OK CR 8, ¶ 4, 204 P.3d 793, 794-95; *Horn v. State*, 2009 OK CR 7, ¶¶ 25, 27, 37, 41, 204 P.3d 777, 784, 786. "To be admissible, challenged propensity evidence 'must be established by clear and convincing evidence.'" *Brewer*, 2019 OK CR 23, ¶ 5, 450 P.3d at 971 (quoting *Horn*, 2009 OK CR 7, ¶ 40, 204 P.3d at 786). Moreover, the admission of such evidence is "subject to the balancing test for all relevant evidence—whether its probative value is substantially outweighed by its prejudicial effect." *Johnson v. State*, 2010 OK CR 28, ¶ 6, 250 P.3d 901, 903 (citing *Horn*, 2009 OK CR 7, ¶ 40, 204 P.3d at 786). *See also* 12 O.S.2011, § 2403. The trial court thus has the responsibility "to consider, on a case-by-case basis, whether the probative value of the proffered evidence is substantially outweighed by an unfairly prejudicial effect." *James*, 2009 OK CR 8, ¶ 9, 204 P.3d at 797; *Horn*, 2009 OK CR 7, ¶ 40, 204 P.3d at 786. As set forth in *Brewer*:

> In determining the relevance of propensity evidence, trial courts should 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." *Horn*, 2009 OK CR 7, ¶ 40, 204 P.3d at 786. In addition, when analyzing the dangers of admitting propensity evidence trial courts 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." *Id.*

*Brewer*, 2019 OK CR 23, ¶ 6, 450 P.3d at 971.

When balancing the relevancy of the proffered propensity evidence against its prejudicial effect, the trial court should give "the challenged evidence its maximum probative force and minimum reasonable prejudicial value[.]" *Id.* at ¶ 9, 450 P.3d at 972. As the Court in *James* advised, trial courts may find it helpful to look to 12 O.S.2011, § 2404(B) for "examples of how other-crimes evidence may properly be used (e.g. to show motive, opportunity, or common scheme or plan)," when making its "assessment of probative value, and, consequently, in balancing probative value against unfairly prejudicial effect under § 2403." *James*, 2009 OK CR 8, ¶ 10, 204 P.3d at 797-98. "Trial courts may [also] consider other relevant matters, including the credibility of the accuser in the other act[.]"

*Brewer*, 2019 OK CR 23, ¶ 6, 450 P.3d at 971 (citing *Horn*, 2009 OK CR 7, ¶ 40, 204 P.3d at 786).

In the present case, Judge Taylor denied the State's request to admit the propensity evidence finding chiefly that the probative value of the proffered evidence was outweighed by the danger of unfair prejudice. A finding that the State failed to establish the alleged prior sexual abuse by clear and convincing evidence was also implicit in the court's findings.

Upon review, we cannot find the trial court abused its discretion—i.e. made an unreasonable or arbitrary ruling without proper consideration of the relevant facts and law. While Judge Taylor was somewhat scattered in the soliloquy of his decision, referencing *Burks v. State*,[6] 12 O.S.2011, §§ 2403, 2404 and 2414, contrary to the State's assertion on appeal, the record shows Judge Taylor properly considered the relevant and applicable law relating to the admission of sexual propensity evidence.[7] *Magnan v. State*, 2009

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[6] *Burks v. State*, 1979 OK CR 10, ¶ 12, 594 P.2d 771, 774, *overruled on other grounds by Jones v. State*, 1989 OK CR 7, ¶ 8, 772 P.2d 922, 925.

[7] Judge Taylor specifically noted he had reviewed the parties' briefs, and following his ruling, assured the State that its analysis of the issue was based on several factors, including sections 2413 and 2414.

OK CR 16, ¶ 51, 207 P.3d 397, 412 (a judge is presumed to know the law and consider only that evidence which is competent and admissible). The trial court's consideration of *Burks* and § 2404(B) in assessing the relevancy of the proffered sexual propensity evidence and balancing its probative value against its unfair prejudicial effect, was not ungrounded in law. *James*, 2009 OK CR 8, ¶ 10, 204 P.3d at 797-98; *see also Pullen v. State*, 2016 OK CR 18, ¶ 6, 387 P.3d 922, 926 (disputed sexual propensity evidence found relevant to prove both identity and absence of mistake or accident in relation to the charged offense).

Moreover, the trial court's conclusions and judgment do not clearly go against the logic and effect of the facts presented. Judge Taylor's concerns regarding the credibility of A.A.'s testimony are reasonably rooted in the facts. While delayed disclosure is common in sexual abuse cases, the court's consideration of A.A.'s lack of disclosure while she was attending "sexual abuse therapy" along with her mother and siblings was not unreasonable given the unique circumstances presented here. Further, when A.A. finally disclosed the sexual abuse to her mother approximately twenty years after it allegedly occurred, she maintained Appellee "touched her down

there" but never penetrated her with his penis. Rather, it was "a rub" through A.A.'s panties.

Despite the disturbing nature of this case, we cannot find on the facts presented here that the trial court unreasonably or arbitrarily determined the State failed to establish the proffered sexual propensity evidence by clear and convincing evidence. The State is thus unable to overcome the high hurdle of showing the trial court's exclusion of the proffered evidence amounted to a clear abuse of discretion. The State's sole proposition of error is denied.

## DECISION

The March 28, 2019 ruling of the trial court denying Appellant's motion to introduce sexual propensity evidence in this case is **AFFIRMED** and this case is **REMANDED** to the trial court for further proceedings not inconsistent with this opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2020), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CRAIG COUNTY
THE HONORABLE SHAWN S. TAYLOR, DISTRICT JUDGE

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**OPINION BY: HUDSON, J.**
**LEWIS, P.J.: CONCUR IN RESULTS**
**KUEHN, V.P.J.: CONCUR IN RESULTS**
**LUMPKIN, J.: SPECIALLY CONCUR**
**ROWLAND, J.: SPECIALLY CONCUR**

**ROWLAND, JUDGE, SPECIALLY CONCURRING:**

The record reflects that the trial judge conflated the requirements for the admission of other crimes evidence under 12 O.S.2011, § 2404(B) and *Burks v. State,* 1979 OK CR 10, 594 P.2d 771, with the requirements for the admission of propensity evidence under 12 O.S.2011, §§ 2413 & 2414. These statutes serve completely different purposes, and the distinctions are significant. Under section 2404(B) and *Burks*, evidence of other crimes and bad acts is not admissible to prove character but may be admissible for other purposes such as motive, opportunity, or intent; it may not be used to show one's propensity to commit a certain crime. In contrast, sections 2413 and 2414 are intended, by design, to prove a defendant's propensity to commit acts of sexual assault. It is for this reason the 10th Circuit Court of Appeals called passage of the nearly identical federal rule a "sea change" in the law of evidence. *United States v. Guardia,* 135 F.3d 1326, 1330 (10th Cir. 1998).

To be admissible under *Burks*, the following requirements must be met:

> [E]vidence of uncharged offenses or bad acts must be probative of a disputed issue of the crime charged, there must be a visible connection between the crimes, evidence

> of the other crime(s) must be necessary to support the State's burden of proof, proof of the other crime(s) must be clear and convincing, the probative value of the evidence must outweigh the prejudice to the accused and the trial court must issue contemporaneous and final limiting instructions.

*Eizember v. State,* 2007 OK CR 29, ¶ 76, 164 P.3d 208, 230; *James v. State,* 2007 OK CR 1, ¶ 3, 152 P.3d 255, 256–57; *Lott v. State,* 2004 OK CR 27, ¶ 40, 98 P.3d 318, 334–35.

The sexual propensity evidence statutes and our cases construing them set forth no such heightened requirements for admissibility. Rather, under sections 2413 and 2414, evidence of a prior sexual assault is admissible against a defendant currently charged with a sexual assault where: (1) there was evidence from which a jury could reasonably find, by clear and convincing evidence, that the prior sexual assault occurred, and (2) the probative value of the propensity evidence is not substantially outweighed by the danger of unfair prejudice pursuant to 12 O.S.2011, § 2403. *Brewer v. State,* 2019 OK CR 23, ¶ 5, 450 P.3d 969, 971; *Horn v. State,* 2009 OK CR 7, ¶ 40, 204 P.3d 777, 786.

It is true, that in weighing the probative value of propensity evidence against its prejudicial effect, a trial court may consider the

same factors considered for the admission of other crimes evidence under section 2404(B) including whether there is a visible connection between the crime charged and the prior crime or bad act. *See James v. State*, 2009 OK CR 8, ¶ 10, 204 P.3d 793, 797-98. *See also Horn*, 2009 OK CR 7, ¶ 40, 204 P.3d 777, 786. However, the permissive language used in *James* and *Horn* provides guidelines for weighing the probative value of propensity evidence against its prejudicial effect, rather than an exclusive list of factors required for consideration. This point is critical given the vastly different purposes served by section 2404(B) and sections 2413 and 2414. When offered under section 2404(B) trial courts rightly approach the admission of other crimes evidence with caution given that it is inadmissible to prove propensity under this section. However, in keeping with legislative intent, "regarding the admission of evidence tending to show the defendant's propensity to commit sexual assault or child molestation, courts are to liberally admit evidence of prior uncharged sex offenses...." *Horn*, 2009 OK CR 7, ¶ 20, 204 P.3d at 783 (citing *United States v. Benally*, 500 F.3d 1085, 1089-90 (10th Cir. 2007) (internal quotations omitted)).

In this case, when ruling on the admissibility of evidence regarding the prior sexual offense, the trial judge did not acknowledge the distinctions between evidence introduced to show propensity under sections 2413 and 2414 and other crimes evidence introduced for a purpose admissible under section 2404(B). Rather, the trial judge analyzed the admissibility of the proffered evidence exclusively under *Burks*, failing to limit consideration of the *Burks* factors to the narrow, permissible purpose of weighing the probative value of the evidence against its prejudicial impact. The trial court failed to liberally construe the sexual propensity statutes to effect their purpose and this, was an abuse of discretion.

Despite this error, the trial judge's finding that the witness was not credible goes to the inability of the State to show by clear and convincing evidence that the prior acts occurred. I therefore concur in the result reached by the majority opinion.

I am authorized to state that Judge Lumpkin joins in this writing.