

NOV 20 2009

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ALFRED BURKE, JR.,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

MICHAEL S. RICHIE
CLERK
NOT FOR PUBLICATION

Case No. F-2009-15

SUMMARY OPINION

C. JOHNSON, PRESIDING JUDGE:

Appellant, Alfred Burke, Jr., was convicted after jury trial in Oklahoma County District Court, Case No. CF-2008-1002, of Kidnapping and Forcible Oral Sodomy both After Former Conviction of Two or More Felonies. The jury assessed punishment at 273 years imprisonment on each count. The trial court sentenced Appellant accordingly, ordering the sentences be served consecutively. It is from this Judgment and Sentence that Appellant appeals to this Court.

Appellant raises the following propositions of error:

1. Title 12 O.S.Supp.2007, § 2413 is unconstitutional pursuant to the Due Process Clauses of the Oklahoma and United States Constitutions, as well as Art. II, §§ 17 and 20 of the Oklahoma Constitution.
2. The trial court erred by admitting propensity evidence that was more prejudicial than probative in contravention of *Horn v. State*.
3. Appellant's 273 year sentence is excessive and disproportionate to the crime.
4. The sentence rendered in this case violated 22 O.S.2001, § 952 and therefore the court erred in not granting a new trial.

5. The trial court erred by not granting a mistrial upon the introduction of evidence of other crimes.
6. Trial errors, when considered in a cumulative fashion, warrant a new trial or a modification of Appellant's sentence.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm Mr. Burke's judgment and modify his sentence. As to Proposition I, we find that 12 O.S.Supp.2007, § 2413 does not violate the due process clauses of Oklahoma and United States Constitution. See *Horn v. State*, 2009 OK CR 7, 204 P.3d 777; *United States v. Enjady*, 134 F.3d 1427 (10th Cir. 1998). Nor do we find it to be violative of Okla. Const, art. II, §§ 17 and 20.

With regard to Proposition II, we agree with Appellant that 12 O.S.Supp.2007, § 2413 does not allow the carte blanche admission of other crimes evidence as this evidence is still required to be both relevant and, under 12 O.S.2001, § 2403, not unfairly prejudicial. In *Horn v. State*, 2009 OK CR 7, 204 P.3d 777, this Court acknowledged the same. See also *United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998)); *United States v. Guardia*, 135 F.3d 1326, 1331 (10th Cir. 1998). In analyzing the impact of the propensity evidence admitted in this case, we find that given the victim's unwavering testimony that Appellant had assaulted her and the corroborating DNA evidence, it was unlikely that the propensity evidence contributed to an improperly-based jury verdict. However, the admission of the marginally

probative and very prejudicial evidence that Appellant committed an earlier sexual assault is likely to have been distracting to the jury and to have contributed to the sentencing decision. While it is true that at the time of Appellant's trial, the trial court did not have the benefit of guidance from this Court on how to determine the admissibility of propensity evidence under section 2413, the trial court's admission of the propensity evidence in light of the factors to be weighed constituted an abuse of discretion in this case. Accordingly, we remedy this error by modifying Appellant's sentence to life imprisonment on each count with the sentences to run concurrently.

In Appellant's third proposition he claims that his sentences are excessive. Given that Appellant's sentences warrant modification pursuant to error raised in Proposition II, above, this claim need not be addressed further.

With regard to error raised in Proposition IV, on the record before this Court, it cannot be found that the trial court abused its discretion in denying Appellant's motion for a new trial based upon 22 O.S.2001, § 952. *McKay v. Tulsa*, 1988 OK CR 238, ¶¶ 12-14, 763 P.2d 703, 706; *Pierce v. State*, 1990 OK CR 7, ¶¶ 38-39, 786 P.2d 1255, 1266.

In Proposition V we find that the trial court did not abuse its discretion in denying Appellant's motion for a mistrial based upon evidence which merely suggested that Appellant may have committed a crime in the past. *Bernay v. State*, 1999 OK CR 37, ¶ 25, 989 P.2d 998, 1008. Further, the other evidence complained of in this proposition was properly admitted as it was part of the

res gestae of the criminal acts for which Appellant was being tried. *Eizember v. State*, 2007 OK CR 29, ¶ 77, 164 P.3d 208, 230.

In his final proposition of error Appellant claims that the trial errors, when considered cumulatively, warrant a new trial or sentence modification. This Court has recognized that when there are “numerous irregularities during the course of [a] trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors was to deny the defendant a fair trial.” *DeRosa v. State*, 2004 OK CR 19, ¶ 100, 89 P.3d 1124, 1157, quoting *Lewis v. State*, 1998 OK CR 24, ¶ 63, 970 P.2d 1158, 1176. Upon review of Appellant’s claims for relief and the record in this case this Court concludes that although his trial was not error free, any errors and irregularities, even when considered in the aggregate, do not require reversal of Appellant’s judgment. His sentence, however, is modified pursuant to error raised in Proposition II.

DECISION

The Judgment of the district court is **AFFIRMED** and Sentence is **MODIFIED** to life imprisonment on each count with the sentences to run concurrently. We also find that Appellant’s request for an oral argument shall be **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2009), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE VIRGIL C. BLACK, DISTRICT JUDGE

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OPINION BY C. JOHNSON, P.J.

A. JOHNSON, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR IN PART/DISSENT IN PART
CHAPEL, J.: CONCUR
LEWIS, J.: CONCUR IN RESULT

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LUMPKIN, JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the Court's decision to affirm the judgments of guilt in this case, but due to the fact I find no error, I must dissent to the modification of the sentences.

The Appellant's defense in this case was consent, and due to the victim's strong testimony coupled with the DNA evidence, that was about the only defense he could attempt. By raising the defense of consent the Appellant made the testimony of the prior sexual assault victim extremely relevant and probative pursuant to 12 O.S.Supp.2007, § 2413. Based on the requirement of the state to disprove consent in this case, the evidence of the prior sexual assault was extremely probative, especially when it was committed by Appellant using the same drive-by technique as he and his son used in this case. Thus the probative value outweighed the prejudice of the evidence, and Section 2413 fulfilled its purpose of removing predators from our society.