IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

GEORGE LUTHER CARTER, III.,	)	
	)	NOT FOR PUBLICATION
Appellant,	)	
v.	)	Case No. F 2005-288
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

C. JOHNSON, JUDGE:

Appellant, George Luther Carter, III, was tried by a jury in Lincoln County District Court, Case No. CF 2003-305, for Sexual Abuse of a Child, in violation of 10 O.S.Supp.2002, § 7115. Jury trial was held on February 9, 2005, before the Honorable Paul Vassar, District Judge. The jury found Carter guilty and set punishment at thirty (30) years imprisonment. Carter was sentenced in accordance with the jury's verdict on March 23, 2005. Thereafter, he filed this appeal.

Mr. Carter raises three (3) propositions of error:

1. The trial court erred in allowing evidence of other crimes;

2. Admission of the videotape was not harmless beyond a reasonable doubt; and,

3. The verdict was against the clear weight of the evidence.

After thorough consideration of the propositions raised, the Original Record, transcripts and briefs of the parties, we reverse and remand this case for a new trial for the reasons set forth below.

Prior to trial, the State filed a *Burks* notice, setting forth its intent to introduce the testimony of S.P. who would testify that "on or between January 1, 2000 and December 13, 2001 ... the Defendant ... did commit the crime of Rape, First Degree by Instrumentation of a Child Under 14, by using his finger to penetrate S.P.'s vagina ... The trial court denied defense counsel's objection to admission of the evidence based upon the greater latitude rule discussed in *Myers v. State*, 2000 OK CR 25, ¶¶ 21-24, 17 P.3d 1021, 1030.

Thereafter, 10 year old S.P. testified that while she, the Defendant, M.P. and Josh played "vampire" in 2001 or 2002, she and Carter hid in a closet while M.P. and Josh looked for them. S.P. said while they were in the closet, Carter unbuttoned her pants, put his finger between her private parts, kissed her neck, and told her not to tell. S.P. told an adult a year later.

12 O.S.2001, 2404(B) provides that "evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." The greater latitude rule, discussed in *Myers*, provides for more liberal admission of other crimes in sex crime cases in which the victim is a child.

In *Myers*, we recognized the similarities in the evidence of other crimes which were admitted in that case which were probative of motive, intent, and common scheme or plan. "In all three instances Appellant was acquainted with the victim; the victims were lured into automobiles; all of the victims were

forcefully and sexually assaulted; the assailant threatened to kill the first two victims and did kill the third." *Myers*, 2000 OK CR 25, ¶ 19. "Another reason for admission was to show motive." *Id.* at 20. We also expressly noted the procedural safeguards which stand to protect an accused from the admission of "unduly prejudicial evidence of other crimes: (1) the evidence must be offered for a proper purpose under § 2404; (2) the evidence must be relevant under § 2402; (3) the probative value of the evidence must outweigh its prejudicial value under § 2403; and (4) if requested, a limiting instruction on the proper use of the evidence must be given." *Id.* at 25.

The greater latitude rule discussed in *Myers* does not provide for the admission of any other sex crime allegation against a child without regard to the procedural safeguards set forth in our evidentiary statutes. *See Lott v. State*, 2004 OK CR 27, 98 P.3d 318 (Court engaged in "other crimes" analysis, noting the similarity of the other crimes, the distinct method establishing a visible connection between the crimes, and the necessity of the admission of the evidence to support the State's burden of proof.) While greater latitude may be afforded in permitting other crimes evidence in sexual assault cases involving children, it does not absolve the proponent of the evidence from presenting sufficient facts from which some visible connection between the other crime and the instance crime can be deduced.

"To be admissible, evidence of other crimes 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." *Lott*, 2004 OK CR 27, ¶ 40, 98 P.3d at 334-335; *Welch v. State*, 2000 OK CR 8, ¶ 8, 2 P.3d 356, 365. "When other crimes evidence is so prejudicial it denies a defendant his right to be tried for only the offense charged, or where its minimal relevancy suggests the possibility the evidence is being offered to show a defendant is acting in conformity with his true character, the evidence should be suppressed." *Lott*, *id.* at ¶ 41. Where the claim is properly preserved, the State must show on appeal the admission of this evidence did not result in a substantial miscarriage of justice or constitute a substantial violation of a constitutional or statutory right. *Id.*

Here there were no similarities in the allegation made by S.P. to the offense alleged in this case except the identity of the alleged perpetrator. The offense was a "different offense," against a different victim and the alleged act did not prepare the way for the commission of the offense against M.P. It was totally unnecessary to the State's burden of proof except to show that Carter was a bad person who acted in conformity with this alleged past conduct. The commission of one did not depend upon the commission of the other. A common scheme or plan is not established by the mere allegation that the accused committed another sexual offense against a child in the past. *See Wells v. State*, 1990 OK CR 72, 799 P.2d 1128, 1130 (alleged sex crimes against other children related to defendant two, six and nine years earlier,

which were factually different to the charged offenses do not qualify for admissibility under the common scheme or plan exception to the general rule of inadmissibility of other crimes evidence). To hold that any other allegation that the defendant had committed a sex crime against a child under the greater latitude rule without more would "allow the State to prove appellant's character to show he acted in conformity therewith and would allow the exception to engulf the rule." *Id.*

The trial court abused its discretion when it admitted this evidence. *H.W. v. State*, 1988 OK CR 138, ¶ 9, 759 P.2d 214, 218. We cannot be sure the admission of this testimony did not affect the jury's verdict. Accordingly, Carter's conviction for Sexual Abuse of a Child is hereby reversed and remanded for a new trial. *Wells*, 1990 OK CR 72, 799 P.2d at 1131. Because we grant relief on Proposition One, the remaining propositions of error need not be addressed.

DECISION

The Judgment and Sentence imposed in Lincoln County District Court, Case No. CF 2003-305, is hereby **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. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF LINCOLN COUNTY
THE HONORABLE PAUL M. VASSAR, DISTRICT JUDGE

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OPINION BY: C. JOHNSON, J.

CHAPEL, P.J. :	CONCURS
LUMPKIN, V.P.J. :	DISSENTS
A. JOHNSON, J.:	CONCURS
LEWIS, J.:	CONCURS

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LUMPKIN, VICE-PRESIDING JUDGE: DISSENT

I respectfully dissent to the Court's decision in this case. I find the admission of S.P.'s testimony in this case was proper and that Appellant was not prejudiced by its admission.

It is clear from reading the Opinion that the Court is unimpressed with the "greater latitude" rule announced in *Myers v. State*, 2000 OK CR 25, ¶ 23, 17 P.3d 1021, 1029, despite the fact that the opinion received four concurring votes and only one concurring in result vote—from Judge Chapel. And so, today's opinion is mostly about attacking that rule, rather than deciding the case pursuant to it on its merits. That is disappointing, because we do not have to apply "greater latitude" to resolve this case.

The Opinion finds that there "were no similarities in the allegation made by S.P. to the offense alleged in this case except the identity of the alleged perpetrator." That is far from true. Both victims were young girls under the age of ten at the time of the respective events. Both victims were "playing" with Appellant when the act occurred. Both events occurred within Appellant's home. In both instances, Appellant told the victims that the activity was a secret. Both victims were closely related to Appellant—a relationship that placed him in the role of father figure. Furthermore, while I do not believe time is a factor in applying the

exceptions in 12 O.S.2001, § 2404(B),[1] the two offenses were only separated by two years.

It cannot seriously be argued, then, that the trial judge abused his discretion in admitting this evidence. Rather, the trial judge correctly applied the statutory exception for a common plan or scheme.

With respect to proposition two, which isn't addressed in the Opinion, I find the videotape's admission was at best harmless error and Appellant suffered no prejudice as a result. See my concur in result opinion in *Huskey v. State*, 1999 OK CR 3, 989 P.2d 1, 7 (finding it logical to interpret § 2803.1 as to not deal with videotaped statements). Applying a harmless error analysis, Appellant had the opportunity to cross-examine the victim from the videotape at trial. Any discrepancies in the various testimonies are issues to be weighed by the jury in the assessment of the credibility and reliability of the testimonies.

[1] See, e.g., my dissent in *Wells v. State*, 1990 OK CR 72, 799 P.2d 1128, 1131.