

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TIMOTHY MARK DUNIVAN,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2005-232

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUL 25 2006

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

C. JOHNSON, JUDGE:

Appellant, Timothy Mark Dunivan, was convicted after jury trial in Tulsa County District Court, Case No. CF-2004-437, of three counts of Sexually Abusing a Minor (10 O.S.2001, § 7115) (Counts 1, 2, and 5), and two counts of Child Abuse (10 O.S.2001, § 7115) (Counts 3 and 4). The jury recommended sentences of fifty years imprisonment and a \$500 fine on each of Counts 1, 2, and 5, and six years imprisonment and a \$500 fine on each of Counts 3 and 4. On March 3, 2005, the Honorable Rebecca Brett Nightingale, District Judge, sentenced Appellant in accordance with the jury's recommendation, ordering the sentences to be served consecutively. Appellant then timely filed this appeal.

Appellant raises the following propositions of error:

1. Appellant's constitutional rights were violated when he was charged with violating 10 O.S. § 7115 after the expiration of the statute of limitations.
2. Improper admission of other crimes evidence inflamed and prejudiced the jury, depriving Appellant of a fair trial.
3. Under the facts of the case, Appellant's sentence is excessive and should be modified.

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 in part and reverse in part.

Appellant was convicted of physically and sexually abusing his minor daughter over a period of several years. The victim eventually became pregnant by her father and gave birth to the child. DNA evidence confirmed that Appellant was the father of the child. Appellant testified at trial, admitting numerous instances of intercourse and not disputing the paternity of the child. The victim testified that her father also repeatedly battered her and threatened to kill her or her mother if she ever disclosed the abuse. The victim eventually disclosed the abuse to authorities in 2004, when she was twenty-one years old.

In Proposition 1, Appellant claims that all five charges were barred by the statute of limitations. He contends that because Oklahoma's general statute of limitations (22 O.S. § 152) did not expressly refer to prosecutions under 10 O.S. § 7115 at the time the crimes were committed, such prosecutions for physical and sexual abuse of a child, by a parent or other guardian, should be subject to the "catch-all" limitations period of three years. 22 O.S.Supp.1994, § 152(F). The State contends that prosecutions under § 7115 should be governed by the same seven-year limitations period that governed all other prosecutions for rape.¹ 22 O.S.Supp.1994, § 152(C).

Appellant's claim requires us to determine the intent of the legislature. Did the legislature intend to impose a seven-year limitations period for all

¹ The State contends, alternatively, that (1) the 2000 amendments to 22 O.S. § 152, specifically adding § 7115 crimes to the group of crimes subject to a seven-year limitations period, should be applied retroactively to the crimes in this case; or (2) the running of the statute of limitations should be tolled by Appellant's threats to harm the victim or her mother if she disclosed the abuse. Given our resolution of Proposition 1, we find it unnecessary to discuss these arguments in detail.

kinds of rape, including rape of a child, but only a three-year limitations period when the victim of the rape happens to be the defendant's own child or ward? We do not believe such an illogical result was intended. *Taylor v. State*, 1962 OK CR 161, ¶¶ 13-15, 377 P.2d 508, 510-11 (whenever possible, statutes should be interpreted to avoid illogical or absurd results). There is no hint in the relevant statutory language that the legislature intended to treat one kind of rape differently from another in this regard. Rather, the legislature's failure to specifically mention § 7115 in the statute of limitations after enactment of the former appears to have been a mere oversight. This interpretation is supported by the fact that in 2000, the legislature did add a specific reference to § 7115 in the statute of limitations, adding it to the group of sex crimes subject to a seven-year limitations period. See Laws 2000, c. 245, § 3. Prior to that amendment, no other legislative enactment or judicial interpretation suggested a contrary interpretation. Furthermore, the definition of "sexual abuse" as used in § 7115 has always expressly required reference to the definitions of "rape" found in Title 21, Oklahoma Statutes, which are subject to a seven-year limitations period. 10 O.S.Supp.1998, § 7102(B)(6). Thus, we find that the prosecutions in Counts 1, 2, and 5 were subject to a seven-year limitations period, and that the filing of charges in February 2004, for conduct committed between July 1997 and June 1999, was not time-barred.

However, the same cannot be said for the charges of physical abuse of a child in Counts 3 and 4. At the time the crimes were committed (between January 1998 and March 1999), the plain language of 22 O.S. § 152 made no special provision for any type of battery except sex crimes; generic physical abuse was governed by the three-year "catch-all" limitations period. Thus, Appellant's convictions for physical abuse of a child were time-barred and must be vacated. *State v. Day*, 1994 OK CR 67, 882 P.2d 1096, 1098.

As to Proposition 2, evidence that Appellant sexually abused his daughter prior to the time frames in the Information, and that he physically threatened the victim's mother, was properly admitted to show a common scheme or plan of sexual abuse, and to substantiate the victim's claim that Appellant threatened harm to her or her mother if she disclosed the abuse. *Jones v. State*, 1989 OK CR 66, ¶¶ 14-16, 781 P.2d 326, 329; *Salyers v. State*, 1988 OK CR 88, ¶ 11, 755 P.2d 97, 101-02. This proposition is denied.

Finally, given Appellant's testimony that he had intercourse with his own daughter more times than he could remember, the sentences in Counts 1, 2 and 5 are not shocking to the conscience. *Beihl v. State*, 1988 OK CR 213, ¶ 3, 762 P.2d 976, 977. Proposition 3 is denied.

DECISION

The Judgment and Sentence as to Counts 3 and 4 (Child Abuse) is **REVERSED WITH INSTRUCTIONS TO DISMISS**. The Judgment and Sentence as to Counts 1, 2 and 5 (Sexual Abuse of a Minor) is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE REBECCA BRETT NIGHTINGALE, DISTRICT JUDGE

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OPINION BY C. JOHNSON, J.

CHAPEL, P.J.: CONCURS

LUMPKIN, V.P.J.: CONCURS IN RESULTS

A. JOHNSON, J.: CONCURS

LEWIS, J.: CONCURS

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