

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUN 24 2002
JAMES WALKER
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

EDWARD JILES FLOWERS,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. 2001-412

SUMMARY OPINION

JOHNSON, VICE-PRESIDING JUDGE:

Appellant, Edward Jiles Flowers, was charged in Carter County District Court Case No. CF-2000-430 with Count 1: Rape by Instrumentation (21 O.S.1991, § 1114(A)(4)); Counts 2 and 3: Lewd Molestation (21 O.S.Supp.1992, § 1123(A)(2)); and Count 4: Lewd Acts with a Child (21 O.S.Supp.1992, § 1123(A)(5)). Jury trial was held January 29-31, 2001 before the Honorable Thomas Walker, District Judge. The jury found Appellant guilty as charged on all counts but was unable to agree on punishment. On March 28, 2001, the trial court imposed punishment as follows: Count 1, fifteen years; Count 2, twenty years; Count 3, eight years; and Count 4, two years. The sentences were ordered to run consecutively. Appellant timely perfected this appeal.

Appellant raises the following propositions of error:

1. Admission of other crimes evidence prejudiced the jury, deprived Appellant of a fair trial, and warrants reversal.
2. Testimony on the Child Accommodation Syndrome prejudiced Appellant by improperly bolstering the victim's credibility and was used as substantive evidence of guilt.
3. Appellant was prejudiced by the prosecutor's closing argument which improperly vouched for the credibility of the witnesses for the State.

4. The trial court erred in admitting the videotape interview of the child complainant.
5. Appellant was denied a fair trial because the trial court allowed the jury to view the videotape interview of the child victim during deliberations.
6. Appellant was denied his right to cross-examination and to present a defense.
7. Appellant was deprived of effective assistance of counsel.
8. The accumulation of error deprived Appellant of due process of law.

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 **REVERSE AND REMAND FOR A NEW TRIAL.**

In Proposition 1, Appellant claims he was denied a fair trial when the State was allowed to present evidence, in its case in chief, that Appellant had sustained a previous conviction for child molestation. Before any allegations of abuse were made in the instant case, the Department of Human Services had been informed through a telephone tip that Appellant was a convicted child molester and was living in a home with young children. In response to this tip, a police officer reviewed court documents relating to Appellant's 1980 conviction for sodomy. A subsequent visit to Appellant's home, and interviews with his two minor step-children, revealed no allegations of abuse. The charges in this case were filed after Appellant's minor step-daughter made allegations of abuse several months after this initial DHS visit.

At trial, the State presented court documents relating to Appellant's 1980 sodomy conviction, as well as testimony from the DHS worker and police officer involved in the investigation. The officer who reviewed the case file testified that the victim in the 1980 conviction was Appellant's 10-year-old stepson, but

admitted he had no personal knowledge of these facts.

Before trial, Appellant filed a motion *in limine* to exclude the evidence, which the trial court denied. Appellant lodged objections at the time the evidence was presented. This claim is therefore preserved for review. The State offered two reasons why Appellant's prior conviction should be admitted. First, the State contended it was necessary to explain to the jury why the DHS social worker made the initial visit to Appellant's home. Second, the State contended that the prior offense was admissible under 12 O.S.1991, § 2404(B) to establish a "common scheme or plan" comprising the instant charged offenses.

We cannot agree that evidence of Appellant's prior conviction for a sex offense was necessary to explain the actions of the DHS social worker in making the initial visit to Appellant's home. The initial visit by DHS did not reveal any allegations of abuse. While the State contends it was necessary to establish the time frame of the alleged offenses, the time frame was never in dispute. The reason for the visit was not relevant at trial, because it did not tend to make any fact of consequence more or less probable. 12 O.S.1991, § 2401. Furthermore, any tangential relevance pertaining to this collateral issue was substantially outweighed by the unfairly prejudicial effect of telling the jury, from the outset in a child-molestation prosecution, that Appellant had previously been convicted of sexual assault, assertedly against a child. 12 O.S.1991, § 2403; *Wilkett v. State*, 1984 OK CR 16, ¶ 12, 674 P.2d 573, 576; *Ritchie v. State*, 1981 OK CR 91, ¶ 6, 632 P.2d 1244, 1245.

Nor can we conclude that the State established admissibility of the prior conviction, under 12 O.S.1991, § 2404(B), as part of a "common scheme or plan" which included the instant offense. While greater latitude may be afforded in permitting other-crimes evidence in sexual assault cases, *see Myers*

v. State, 2000 OK CR 25, ¶ 24, 17 P.3d 1021, 1030, *cert. denied*, ___ U.S. ___, 122 S.Ct. 228, 151 L.Ed.2d 163 (2001), that does not absolve the proponent of the evidence from presenting sufficient facts from which some visible connection between the other crime and the instant offense can be deduced. Here, the State presented little more than the fact that the prior offense was sex-related and allegedly involved a stepson Appellant had in the 1970's. A common scheme or plan is not established by the mere fact that the accused has committed a similar offense in the past. *Wells v. State*, 1990 OK CR 72, ¶ 8, 799 P.2d 1128; *Hall v. State*, 1980 OK CR 64, ¶¶ 5-7, 615 P.2d 1020, 1022. The other-crimes evidence was presented over Appellant's objection and in the State's case in chief, before Appellant had any opportunity to "open the door" to such evidence through testimony about his good character. *Douglas v. State*, 1997 OK CR 79, ¶ 44, 951 P.2d 651, 667, *cert. denied*, 525 U.S. 884, 119 S.Ct. 195, 142 L.Ed.2d 159 (1998); *Wall v. State*, 1988 OK CR 125, ¶ 5, 763 P.2d 103, 105. We conclude that Appellant was denied a fair trial when the jury was informed of his prior conviction under these circumstances.

Our disposition of Proposition 1 renders the remaining claims of error moot.

DECISION

The Judgment and Sentence of the district court is **REVERSED AND REMANDED FOR A NEW TRIAL.**

AN APPEAL FROM THE DISTRICT COURT OF CARTER COUNTY
THE HONORABLE THOMAS S. WALKER, DISTRICT JUDGE

APPEARANCES AT TRIAL

JOYCE ELLIS
ATTORNEY AT LAW
P. O. BOX 1568
ARDMORE, OK 73402
ATTORNEY FOR DEFENDANT

CRAIG LADD
TAMMY BACHMAN
ASSISTANT DISTRICT ATTORNEYS
CARTER COUNTY COURTHOUSE
ARDMORE, OK 73401
ATTORNEYS FOR THE STATE

OPINION BY JOHNSON, V.P.J.

LUMPKIN, P.J.: CONCURS
CHAPEL, J.: CONCURS
STRUBHAR, J.: CONCURS
LILE, J.: CONCURS

APPEARANCES ON APPEAL

MARY BRUEHL
INDIGENT DEFENSE SYSTEM
1623 CROSS CENTER DRIVE
NORMAN, OK 73019
ATTORNEY FOR APPELLANT

W. A. DREW EDMONDSON
ATTORNEY GENERAL
SANDRA HOWARD
SR. ASST. ATTORNEY GENERAL
112 STATE CAPITOL
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR THE STATE

RC