

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

STATE OF OKLAHOMA,

Appellant,

v.

TRAVIS RAY FOWLER,

Appellee.

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Case No. S-2013-790

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

JUL - 1 2014

MICHAEL S. RICHIE  
CLERK

**OPINION**

**A. JOHNSON, JUDGE:**

The State of Oklahoma appeals the August 19, 2013 order entered by the Honorable Lester D. Henderson of the District Court of Creek County in Case No. CM-2011-260, sustaining, in part, Appellee Fowler's Objection to State's Supplemental Notice of Intent to Introduce Evidence of Other Crimes. The district court's ruling prohibited the testimony of Terri East, Fowler's former girlfriend, about an alleged incident of domestic violence that occurred on October 17, 2012, in which she was the victim. We exercise jurisdiction under 22 O.S.2011, § 1053(5) and affirm the district court's ruling.

**BACKGROUND**

The State charged Fowler by Information on May 24, 2011, with Domestic Assault and Battery in the Presence of a Minor in violation of 21 O.S.2011, § 644(F), a Misdemeanor. The Information alleged that Fowler assaulted and battered his wife Andrea Fowler in the presence of their five-year-old son.

Fowler waived jury trial and the case was set for a bench trial. Before the trial date, however, the State filed notice of its intent to introduce evidence of other crimes committed by Fowler,<sup>1</sup> specifically that: (1) Fowler had committed a similar assault and battery in 2012 against his on-again off-again girlfriend Terri East while she was holding their seven-month old baby in her arms; (2) Fowler was convicted in 1998 in New Mexico of battery upon a household member as the result of beating a different girlfriend while her young daughters called 911 for help; and (3) Fowler assaulted and battered his wife Andrea in 2009 in the presence of their then three-year old son.

Fowler objected to all the proposed evidence and moved to dismiss the charged count. The trial court denied the motion to dismiss, but sustained the objection to the 1998 New Mexico conviction as too remote in time. The trial court overruled the objections to the 2009 assault against Fowler's wife and the 2012 assault against East. On the morning of trial, however, the trial court reversed its ruling on the 2012 attack on East holding it inadmissible. Citing *Owens v. State*, 2010 OK CR 1, ¶¶ 14-15, 229 P.3d 1261, 1266-1267, the trial court held the evidence inadmissible because it was neither probative of Fowler's identity, nor probative of showing a common scheme or plan. The trial court did not address the State's argument that the evidence was necessary to prove absence of mistake or accident. With the evidence of the 2012 incident ruled

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<sup>1</sup> See *Burks v. State*, 1979 OK CR 10, 594 P.2d 771, *overruled in part on other grounds by Jones v. State*, 1989 OK CR 7, 772 P.2d 922..

inadmissible, the State announced its intent to appeal, and this appeal followed.<sup>2</sup>

### **FACTS**

The State asserts that Fowler and his estranged wife Andrea got into a quarrel on the morning of November 22, 2010, after Andrea arrived to take their five-year-old son, T.F., to school and voiced complaints that Fowler's delay in getting the child ready would make her late for work. Fowler picked up a child-sized rocking chair during the argument and held it in a threatening manner. When Andrea tried to take the child out of the apartment, Fowler grabbed her, lifting her off the floor. Andrea screamed for help, and Fowler threw her down, jumped on her back and ground her face into the carpet. A person outside heard Andrea's cry for help and called out, "Where you at?" The person's response prompted Fowler to cease the attack, call 911 and report that Andrea was trying to kidnap their son. T.F. witnessed the entire event.

### **DISCUSSION**

The single issue raised in this appeal is whether the trial court properly excluded evidence of Fowler's 2012 assault and battery against Terri East as improper evidence of other crimes, wrongs, or acts. Our standard of review for appeals under § 1053(5) is abuse of discretion. *State v. Love*, 1998 OK CR 32, ¶ 2, 960 P.2d 368, 369. An abuse of discretion is any unreasonable or arbitrary action made without proper consideration of

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<sup>2</sup> Appellee Fowler has not entered an appearance in this appeal.

the relevant facts and law, also described as a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161,170. Absent an abuse of discretion, we will not disturb the trial court's ruling.

A "defendant should be convicted, if at all, by evidence showing guilt of the offenses charged, rather than evidence indicating guilt for other crimes." *James v. State*, 2007 OK CR 1, ¶ 3, 152 P.3d 255, 256. In general, evidence of other crimes is not admissible to show that a person is acting in conformity with a character trait. *James*, 2007 OK CR 1, ¶ 3, 152 P.3d at 256-257. The Legislature has codified five exceptions to this general rule in 12 O.S.2001, § 2404(B), and permits the admission of such evidence as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

The State contends that the excluded evidence would show that in October 2012, well after Fowler had been charged in the instant case, Fowler was involved in another incident of domestic violence in front of a child. The State argues that the evidence is admissible to show an absence of mistake or accident.<sup>3</sup>

In *James*, 2007 OK CR 1, ¶ 3, 152 P.3d at 257, this Court explained that for evidence to be admissible under any of Section 2404(B)'s exceptions:

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<sup>3</sup> The State concedes that the trial court correctly decided the evidence does not qualify under the identity or plan exceptions.

There must be a visible connection between the other crimes evidence and the charged crimes. The evidence must go to a disputed issue and be necessary to support the State's burden of proof, and its probative value must outweigh the danger of unfair prejudice. It must be established by clear and convincing evidence.

Here, the evidence the State seeks to introduce fails *James'* threshold requirement that there be a visible connection between the other crimes evidence and the charged crime. Although the two crimes are similar, the victims are different, the locations are different, and they occurred months apart. Contrary to the State's assertions, nothing about the evidence of the assault on East tends to disprove that the attack against Andrea was the result of mistake or accident because there is no evidence showing the attacks were connected in any way.<sup>4</sup>

On the facts presented here, the only way the evidence of Fowler's assault on East could support an inference of absence of mistake or accident in the attack on Andrea is if it is assumed that the attack against East tends to show that Fowler had a propensity to engage in such attacks and because of that propensity, the attack against Andrea was not accidentally or mistakenly undertaken. This is precisely the type of character evidence forbidden by 12 O.S.2011, § 2404(B). Based on this record, we find the trial judge did not abuse his discretion in excluding evidence of the 2012 assault and battery against East.

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<sup>4</sup> This is not so concerning Fowler's previous assault on Andrea and the trial court found that evidence admissible.

**DECISION**

The August 19, 2013, Order of the District Court sustaining Fowler's objection to the State's Supplemental Notice of Intent to Introduce Evidence of Other Crimes is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2014), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CREEK COUNTY  
THE HONORABLE LESTER D. HENDERSON, SPECIAL JUDGE

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**OPINION BY: A. JOHNSON, J.**  
**LEWIS, P.J.: Concur**  
**SMITH, V.P.J.: Concur**  
**LUMPKIN, J.: Concur in Results**  
**C. JOHNSON, J.: Concur**

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