

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CECIL RAY JOHNSON,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

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) NOT FOR PUBLICATION
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) No. F-2008-381
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FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAY 12 2009

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

LEWIS, JUDGE:

Cecil Ray Johnson, Appellant, was convicted of Kidnapping in violation of 21 O.S.Supp.2004, § 741, after former conviction of two or more felonies, in the District Court of Oklahoma County, Case No. CF-2006-910, before the Honorable Tammy Bass-LeSure, District Judge.¹ The jury assessed punishment at twenty (20) years, and the trial court sentenced accordingly. Johnson has perfected an appeal of the District Court's Judgment and Sentence raising the following propositions of error:

1. The State presented insufficient evidence to prove beyond a reasonable doubt that Cecil Ray Johnson committed the crime of kidnapping in violation of the due process clauses of the federal and state constitutions.
2. The other crimes evidence in this case was improperly admitted because there was no visible connection between it and the charged crime, it did not go to a disputed issue in this case, it was not needed to support the State's burden of proof, and its probative value did not outweigh its unfair prejudice.

¹ Appellant was acquitted of a count of assault and battery with a dangerous weapon, 21 O.S.2001, § 645.

After thorough consideration of Johnson's propositions of error and the entire record before us on appeal, including the original record, transcripts, exhibits, and briefs, we have determined that the judgment and sentence of the District Court shall be reversed and the case remanded for a new trial due to error found in proposition two.

In proposition one, we find, when viewed in a light most favorable to the State, the evidence was sufficient to establish the kidnapping elements of "forcible seizure and confinement" and "intent to confine." See *Turner v. State*, 1990 OK CR 6, ¶¶ 11-14, 786 P.2d 1251, 1254-55; *Jenkins v. State*, 1973 OK CR 165, ¶ 6, 508 P.2d 660, 662.

Even though the evidence was sufficient for a conviction, we find, in proposition two, that the introduction of inadmissible other crimes evidence caused substantial violation of Johnson's right to a fair trial. The charges in this case were not sex crimes for which prior crimes are relevant pursuant to 12 O.S.Supp.2007, § 2413 and 2414; therefore, our analysis of this claim is based on 12 O.S.2001, § 2404(B) and cases related thereto.

The long held general rule is that a defendant should be tried on evidence showing guilt of the offense charged, rather than evidence indicating guilt of other unconnected crimes. *Burks v. State*, 1979 OK CR 10, ¶ 2, 594 P.2d 771, 772, *overruled in part on other grounds in Jones v. State*, 1989 OK CR 7, 772 P.2d 922; *Roulston v. State*, 1957 OK CR 20, ¶ 11, 307 P.2d 861, 867, *citing a long history of cases including Smith v. State*, 1911 OK CR 37, 5 Okl.Cr. 67, 113 P. 204 (1911). However, an exception to the general rule is that

evidence of other crimes may be admissible pursuant to § 2404(B). Still yet, courts must find that the proffered evidence is relevant, and they must balance the admissibility of relevant evidence against certain dangers. See 12 O.S.2001, §§ 2402 and 12 O.S.Supp.2003, § 2403.

We held in *James v. State*, 2007 OK CR 1, 152 P.3d 255, (1) there must be a visible connection between the other crimes evidence and the charged crimes; (2) the evidence must go to a disputed issue and be necessary to support the State's burden of proof; (3) the probative value of the evidence must outweigh the danger of unfair prejudice; and (4) the evidence must be clear and convincing. *James*, 2007 OK CR 1, ¶ 3, 152 P.3d 255 at 257; see *Bryan v. State*, 1997 OK CR 15, ¶ 33, 935 P.2d 338, 356-57.² According to *James*, in order to be admissible under § 2404(B), there must be a visible connection between the crimes. This visible connection prevents the introduction of other crimes evidence which merely shows a defendant's character and his propensity to commit similar acts, which is prohibited by § 2404.

In the present case, we find that evidence of Johnson's prior uncharged "bad acts" occurring ten years prior have no visible connection to the current acts. Furthermore, these prior acts are so remote in time, that there is little probative value for their admission. Our statutes prohibit evidence of a person's character or a trait of his character offered for the purpose of action in

² Holding that the other crimes must be probative to the crime charged; there must be a visible connection between the crimes; the evidence of other crimes must be necessary to support the State's burden of proof; proof of the other crimes must be clear and convincing, and the trial court must issue limiting instructions.

conformity therewith. Other crimes evidence should not be admitted where its minimal relevancy suggests the possibility the evidence is being offered to show a defendant is acting in conformity with his true character. *Bryan*, 1997 OK CR 15, ¶ 33, 935 P.2d at 357. The minimal relevance of the other crimes evidence in this case suggests that this evidence is only being offered to show propensity, an improper reason for admission under our statutes. Thus we find that the trial court improperly ruled on its admission.

When erroneous rulings are made that constitute a substantial violation of a constitutional or statutory right, we have no choice but to reverse. *See* 20 O.S.1991, § 3001.1. The right violated in this case is the fundamental right to be convicted by evidence of the charged offense and not by evidence of similar unrelated offenses. *Roulston*, 1957 OK CR 20, ¶ 11, 307 P.2d at 867.

DECISION

The judgment sentence of the District Court is **REVERSED** and the case is **REMANDED** for a **NEW TRIAL**. 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.

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OPINION BY: LEWIS, J.

C. JOHNSON, P.J.: Concur
A. JOHNSON, V.P.J.: Concur
LUMPKIN, J.: Dissent
CHAPEL, J.: Concur

LUMPKIN, JUDGE: DISSENT:

I dissent to the reversal of this case as I find the other crimes evidence admissible as probative of Appellant's intent and lack of mistake. *See Lott v. State*, 2004 OK CR 27, ¶ 40, 98 P.3d 318, 334. *See also Cole v. State*, 2007 OK CR 27, ¶ 20, 164 P.3d 1089, 1095. Evidence that 10 years before the kidnapping in the case occurred, Appellant picked up a woman under the guise of taking her home but took her to a remote area where he raped her was properly admitted as showing Appellant's intent to confine the victim in this case until he could have sex with her. The evidence disputed Appellant's claim that he had no intention of confining her; that he was only trying to calm her down when, according to Appellant, she went crazy; and that he was trying to prevent her from damaging the door, and therefore he was physically unable to unlock the door and let her out of the building. Based upon this record, the trial court did not abuse its discretion in admitting the evidence.