

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

THE STATE OF OKLAHOMA, )  
 )  
 Appellant, )  
 vs. )  
 )  
 THOMAS BRADLEY PORTON, )  
 )  
 Appellee. )

NOT FOR PUBLICATION

No. S-2013-483

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

DEC - 3 2013

**SUMMARY OPINION**

**SMITH, VICE PRESIDING JUDGE:**

MICHAEL S. RICHIE  
CLERK

Thomas Bradley Porton is charged with two counts of Sodomy - Victim under Sixteen in violation of 21 O.S.2011, § 888(B)(1) (Counts 1 and 2), eleven counts of Lewd or Indecent Acts with a Child under Sixteen in violation of 21 O.S.2011, §1123(A)(2) (Counts 3, 5, 6, 9, 10, 26, 27, 29, 30, 34 and 39), eleven counts of Furnishing an Alcoholic Beverage to a Person under Twenty-One in violation of 37 O.S.2011, § 538(F) (Counts 4, 7, 8, 11, 21, 24, 31, 33, 36, 37, and 38), twelve counts of Exhibition of Obscene or Indecent Material in violation of 21 O.S.2011, § 1021(B) (Counts 12, 13, 14, 15, 16, 18, 20, 22, 25, 28, 32 and 35), one count of Lewd or Indecent Proposal to a Child under Sixteen in violation of 21 O.S.2011, § 1123(A)(1) (Count 19), one count of Performing a Lewd Act in the Presence of a Minor in violation of 21 O.S.2011, § 1123(A)(5) (Count 23), one count of Sexual Battery in violation of 21 O.S.2011, § 1123(B) (Count 40), one count of Practicing Medicine without a License 59 O.S.2011, § 491(A)(2) (Count 41), and one count of Rape in the Second Degree

in violation of 21 O.S.2011, § 1114 (Count 42), in the District Court of McCurtain County, Case No. CF-2012-197.

Porton was bound over at preliminary hearing. The State filed a Notice of Intent to Offer Evidence of Other Crimes and Bad Acts and a Supplemental Notice of Intent to Offer Evidence of Other Bad Acts. After a hearing, the Honorable Jana K. Wallace ruled that certain evidence of other bad acts was not admissible.

The State appeals, raising one proposition of error which is divided into two sub-propositions.

- I. The District Court abused its discretion in ruling the photographs seized from the defendant's computer inadmissible.
  - A. The photographs seized from the defendant's computer are admissible as part of the *res gestae* of the case.
  - B. The photographs seized from the defendant's computer are admissible as proper evidence of other bad acts.

After thorough consideration of the entire record before us, including the original record, transcripts and briefs, we find that the law and evidence do not require relief.

The State appeals under 22 O.S.2011, § 1053(5), which allows for expedited State appeals where a trial court has suppressed or excluded evidence and appellate review would be in the best interests of justice. This statutory provision was added to allow the State to bring what is essentially an interlocutory appeal, where evidence has been suppressed but the case continues. We have construed "best interests of justice" as used in Section 1053(5) "to mean that the evidence suppressed forms a substantial part of the

proof of the pending charge, and the State's ability to prosecute the case is substantially impaired or restricted absent the suppressed or excluded evidence.” *State v. Sayerwinnie*, 2007 OK CR 11, ¶ 6, 157 P.3d 137, 139.

On appeal, the State does not assert that the photographs excluded from evidence form a substantial part of their case such that the prosecution of Porton will be substantially impaired without the evidence. The State’s failure to demonstrate that appellate review is in the best interest of justice is fatal to their appeal under Section 1053(5). Nevertheless, because Porton is charged with a number of crimes listed in 22 O.S.2011, § 13.1, we find that review of the State’s arguments is authorized by 22 O.S.2011, § 1053(6).

A trial court’s decision regarding the admissibility of other crimes evidence is reviewed for an abuse of discretion. *Neloms v. State*, 2012 OK CR 7, ¶ 12, 274 P.3d 161, 164. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the issue; a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts. *Neloms*, 2012 OK CR 7, ¶ 35, 274 P.3d at 170. The trial court extensively analyzed the issue and concluded that the 12,000 photographs seized from a search of Porton’s computer were not part of the *res gestae* of the crimes charged. The trial court further concluded that the prejudicial effect of the photographs grossly outweighed any probative value they might have to establish Porton’s motive, intent, common scheme or plan in the commission of the charged offenses. The State has failed to establish that the trial court abused its discretion in these findings.

**DECISION**

The State's appeal from the District Court order excluding evidence is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF MCCURTAIN COUNTY  
THE HONORABLE JANA K. WALLACE, DISTRICT JUDGE

**ATTORNEYS AT MOTION HEARING**

JOHNNY LOARD  
FIRST ASSISTANT DISTRICT  
ATTORNEY  
MCCURTAIN COUNTY DISTRICT  
ATTORNEY'S OFFICE  
108 N. CENTRAL  
IDABEL, OK 74728  
COUNSEL FOR STATE

ALLEN R. MALONE  
MALONE & ASSOCIATES, P.C.  
113 N. CENTRAL AVE.  
IDABEL, OK 74745  
ATTORNEY FOR DEFENDANT

**ATTORNEYS ON APPEAL**

JOHNNY LOARD  
FIRST ASSISTANT DISTRICT  
ATTORNEY  
MCCURTAIN COUNTY DISTRICT  
ATTORNEY'S OFFICE  
108 N. CENTRAL  
IDABEL, OK 74728  
COUNSEL FOR STATE

ALLEN R. MALONE  
MALONE & ASSOCIATES, P.C.  
113 N. CENTRAL AVE.  
IDABEL, OK 74745  
ATTORNEY FOR DEFENDANT

**OPINION BY: SMITH, V.P.J.**

LEWIS, P.J.: CONCUR IN RESULT  
LUMPKIN, J.: DISSENT  
C. JOHNSON, J.: CONCUR  
A. JOHNSON, J.: CONCUR

### **LUMPKIN, JUDGE: DISSENT**

I respectfully dissent to the denial of the State's Appeal. First, I cannot agree with the restriction that this Court has placed on the State's right to bring an appeal pursuant to 22 O.S.2011, § 1053(5). As I wrote in *State v. Sayerwinnie*, 2007 OK CR 11, 157 P.3d 137:

I must respectfully dissent to the Court's analysis and decision in this case. In applying the statutory language, "review of the issue would be in the best interest of justice", the focus of the Court should be on the correctness of the trial court's decision and not on the quantum of the State's evidence the suppressed statement represents. This Court has no way of truly knowing how substantial the suppressed evidence is to the State's case. However, we do have the ability to determine as a matter of law, applying all the legal presumptions, whether the decision of the trial judge is legally sustainable.

*Id.*, 2007 OK CR 11, ¶ 1, 157 P.3d at 139 (Lumpkin, P.J., dissenting).

Second, I would find that the district court abused its discretion in the present case when it determined that the 12,000 pornographic photographs seized from Appellee's computer were inadmissible bad character evidence. *State v. Love*, 1998 OK CR 32, ¶ 2, 960 P.2d 368, 369. The State alleged that the photographs were part of the *res gestae* of the offense but, alternatively, sought admission of the photographs under the motive, intent, preparation, or common scheme or plan exceptions to the general prohibition against other crimes evidence. (O.R. 299). The district court determined that "the 12,000 pictures are not admissible under the *res gestae* exception and even if they qualified under the *res gestae* exception, th[eir] probative value is grossly

outweighed by their prejudicial effect.” (O.R. 373, 378). However, the district court did not make any determination of the photographs’ admissibility under the motive, intent, preparation or common scheme or plan exceptions. (O.R. 339, 370-73, 375-78).

This Court has clearly held that evidence of other crimes or bad acts is admissible where it tends to establish absence of mistake or accident, common scheme or plan, motive, opportunity, intent, preparation, knowledge and identity. *Lott v. State*, 2004 OK CR 27, ¶ 40, 98 P.3d 318, 334-335. These exceptions are part of the very statute governing other crimes and bad acts evidence. 12 O.S.2011, § 2404(B).

Turning to the present case, the State’s theory and argument is that Appellant lured teenage males to his home and enticed them to engage in the exact same sexual acts depicted within the 12,000 photographs. The evidence presented at the motion hearing and preliminary hearing tended to support this theory. Therefore, the district court abused its discretion when it wholly failed to consider the photographs’ admissibility under the motive, intent, and preparation exceptions.

Further, the district court’s written Findings of Fact and Conclusions of Law noticeably omits any reference to the investigating officers’ testimony that photographs of the alleged victims were interspersed in the 12,000 photographs. (O.R. 370-73, 375-78). The investigating officer testified that as he reviewed the 12,000 pornographic images, he came across pictures of one of

the alleged victims partially clothed. The images of the alleged victim were followed by more pornographic images. These images, were in-turn, followed by more pictures of alleged victims at the lake, and still more pornographic images. (Mtn. Tr. 63-64). As images of the alleged victims in a semi-state of undress were interspersed within the pornographic photographs, there is a visible connection between Appellees' bad act of possessing the 12,000 images and the charged offenses. Accordingly, the district court's determination that the photographs have no connection to the charged offenses is clearly against the logic and effect of the facts presented and the district court abused its discretion. *See Walker v. State*, 1989 OK CR 65, ¶ 5, 780 P.2d 1181, 1183.

The district court also abused its discretion when it weighed the photographs' probative value against their prejudicial effect. The district court failed to give the photographs their maximum reasonable probative force. *Mayes v. State*, 1994 OK CR 44, ¶ 77, 887 P.2d 1288, 1309-10 ("When measuring the relevancy of evidence against its prejudicial effect, the court should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value."). The photographs are not simply "gay" pornography, as suggested by the district court. Instead, the photographs are illustrative of Appellee's motive, intent, and preparation. As a result, the photographs hold great probative value as to whether the charged offenses actually occurred. However, the district court did not consider the photographs' probative value for these purposes. (O.R. 339, 370-73, 375-78).

Further, the district court did not consider the visible connection associated with Appellee's possession of photographs of the alleged victims interspersed within the 12,000 images. Based upon the record on appeal, it appears that Appellee somehow associated the alleged victims with the exact same sexual activity for which he has been charged. Giving the photographs their maximum reasonable probative force and their minimum reasonable prejudicial value, the photographs' probative value is not substantially outweighed by their prejudicial effect. Therefore, the district court abused its discretion when it determined that the prejudicial effect of the photographs grossly outweighed their probative value.

As a pre-trial ruling on the admissibility of evidence is merely advisory and not conclusive, I would remand this case to the district court to determine at trial whether the photographs were admissible under the motive, intent, preparation or common scheme or plan exceptions to the prohibition against other bad acts evidence. *Conover v. State*, 1997 OK CR 6, ¶ 24, 933 P.2d 904, 911.