

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 Appellant's convictions, but find that modification of sentence is warranted. Appellant was charged with sexually molesting his minor daughter. In Proposition 1, Appellant claims the trial court erred in permitting (1) evidence that Appellant had beaten his daughter at some time prior to the molestation events; (2) a suggestion that Appellant had also severely beaten his minor son on one occasion; and (3) testimony that in 1979, Appellant had sexually assaulted a teenage girl. The trial court did not abuse its discretion in permitting a reference to Appellant beating the complainant; this evidence was relevant as a possible factor in the complainant's reluctance to report the sexual abuse. *Dodd v. State*, 2004 OK CR 31, ¶ 51, 100 P.3d 1017, 1034-45. The prosecutor's reference to a claim that Appellant had also beaten his son was proper impeachment of a defense witness. *Jiminez v. State*, 1976 OK CR 23, ¶ 10, 545 P.2d 1281, 1284.

As for the evidence that Appellant had sexually assaulted a teenage girl in 1979: While 12 O.S.Supp.2007, § 2413 permits evidence of the defendant's propensity to commit certain sexual offenses in certain circumstances, it is still the trial court's responsibility to carefully consider whether the State's proffer contains information whose probative value is substantially outweighed by its unfairly prejudicial effect. 12 O.S.Supp.2003, § 2403; *James v. State*, 2009 OK CR 8, ¶ 9, 204 P.3d 793, 797; *Horn v. State*, 2009 OK CR 7, ¶ 27, 204 P.3d 777, 784. In this case, the sexual-propensity witness testified that some thirty

years ago, when both she and Appellant were teenagers, he threatened her with a knife, kidnaped her, robbed her, and sexually assaulted her over a period of several hours. In our view, the circumstances of this event had marginal relevance to the issue of whether Appellant sexually molested his own daughter. While portions of the witness's testimony may have been admissible, her references to crimes not of a sexual nature were more prejudicial than probative. Although we are confident these references did not influence the jury's verdict as to Appellant's guilt, they might well have affected the sentences imposed. We therefore **MODIFY** Appellant's four sentences to be served concurrently with one another. *Lowery v. State*, 2008 OK CR 26, ¶¶ 21-22, 192 P.3d 1264, 1273.

As to Proposition 2, the trial court's cautionary instruction on sexual-propensity evidence was not taken from the Uniform Jury Instructions (OUJI); the OUJI Commission has yet to promulgate an instruction for this type of evidence. However, the instruction used was more specifically tailored to the evidence in question than the standard OUJI instruction on other-crimes evidence. We find no error in its use.¹ The trial court's limiting instructions on

¹ The instruction, modeled after one used in United States military courts, and similar to one approved by the Tenth Circuit Court of Appeals (see *United States v. Schroder*, 65 M.J. 49, 55-56 (C.A.A.F. 2007); *United States v. McHorse*, 179 F.3d 889, 903 (10th Cir.1999)), read:

You have heard evidence that the defendant committed another offense of sexual assault in addition to the offenses charged in the information. You may consider this evidence for its tendency, if any, to show the defendant's predisposition or inclination to engage in acts of sexual assault. This evidence of predisposition or inclination to engage in acts of sexual assault is to be considered by you along with all of the other evidence and given the weight, if any, you deem appropriate in reaching your verdict. You may not, however, convict the defendant solely because you believe he committed this other offense or solely because you believe he is predisposed or inclined to engage in acts of

other bad-acts evidence, based on OUJI-CR (2nd) No. 9-9, were entirely appropriate. We find no error here.

As to Proposition 3, the State presented three witnesses with expertise in various aspects of child sexual abuse. None of them improperly vouched for the credibility of the complainant. Their education and experience helped the jurors understand the pressures and motivations which can arise in such cases. *Harris v. State*, 2004 OK CR 1, ¶ 39, 84 P.3d 731, 748; *Johnson v. State*, 2004 OK CR 25, ¶ 16, 95 P.3d 1099, 1104. Proposition 3 is denied.

In Proposition 4, Appellant complains about several comments made by the prosecutor in cross-examination and closing argument. Most were not objected to, and we find no plain error in them. *Simpson v. State*, 2010 OK CR 6, ¶¶ 25-26, — P.3d —. The only objectionable comments dealt with the details of Appellant's past crimes which bore no relevance to his propensity to commit sexual assault. Appellant's status as a convicted felon was properly placed in evidence when he testified on his own behalf; but as we explained with regard to Proposition 1, the particulars of those past crimes did not tend to make the existence of any material fact more or less probable. *Dodd v. State*, 2004 OK CR 31, ¶ 70, 100 P.3d 1017, 1039; *Robinson v. State*, 1987 OK CR 195, ¶ 7, 743 P.2d 1088, 1090-91. However, any unfair prejudice from these comments is sufficiently remedied by our resolution of Proposition 1.

As to Proposition 5, for the reasons stated above, we find any errors

sexual assault. The prosecution's burden of proof to establish the defendant's guilt beyond a reasonable doubt remains as to each and every element of each offense charged.

complained of to be sufficiently remedied by modification of Appellant's sentences. *Watts v. State*, 2008 OK CR 27, ¶ 20, 194 P.3d 133, 140. No new trial is warranted.

DECISION

The judgment of the district court is **AFFIRMED**, but Appellant's four sentences of life imprisonment are **MODIFIED** to be served concurrently. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2010), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE VIRGIL C. BLACK, DISTRICT JUDGE

APPEARANCES AT TRIAL

JASON SPANICH
ATTORNEY AT LAW
228 ROBERT S. KERR, SUITE 100
OKLAHOMA CITY, OK 73102
ATTORNEY FOR DEFENDANT

JIMMY HARMON
ASSISTANT DISTRICT ATTORNEY
320 ROBERT S. KERR, SUITE 505
OKLAHOMA CITY, OK 73102
ATTORNEY FOR THE STATE

OPINION BY C. JOHNSON, P.J.

A. JOHNSON, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR
LEWIS, J.: CONCUR

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APPEARANCES ON APPEAL

TERRY J. HULL
INDIGENT DEFENSE SYSTEM
P.O. BOX 926
NORMAN, OK 73070
ATTORNEY FOR APPELLANT

W. A. DREW EDMONDSON
ATTORNEY GENERAL
DONALD D. SELF
ASSISTANT ATTORNEY GENERAL
313 N. E. 21st ST.
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR THE STATE