

APR 17 2000

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

JAMES W. PATTERSON  
CLERK

CLEVE LANCE BILLINGS,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

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**NOT FOR PUBLICATION**

Case No. F 99-381

**OPINION**

**LILE, JUDGE:**

Appellant Cleve Lance Billings was convicted of Lewd Molestation, after two prior convictions for Lewd Molestation, 21 O.S.Supp.1999, § 1123, after a jury trial in the District Court of Murray County, Case Number CF-98-196, before the Honorable John H. Scaggs, District Judge. In accordance with the jury verdict, Judge Scaggs sentenced Billings to life without the possibility of parole. From this judgment and sentence Billings has perfected his appeal.

On the evening of April 3, 1997, Billings' eight year old granddaughter, J.P., was visiting Billings and his wife. J.P. was sitting on Appellant's lap watching television. Billings placed his hand down the front of J.P.'s panties and asked her if it felt good. J.P. then got up and went to call her grandmother, Betty Powers, to come pick her up.

Powers testified that she went to pickup J.P. Powers noticed that J.P. had been crying. J.P. told Powers that Billings had put his hands down her

panties on her private parts. Powers reported the incident to DHS the next day. Powers also made a written statement to the Police Department on April 4th. Charges were filed on October 2, 1998, a year and a half later.

The State introduced evidence that Billings molested his daughter, Rebecca Billings, between seventeen and nineteen years prior to this trial; molested two other girls sixteen years prior (which resulted in convictions in 1983); and had molested Katie Simms in 1998 (subsequent to this crime).

Billings called J.P.'s mother, Cynthia Chronister, in his case in chief. Chronister testified that the victim told her that she was sitting on Billings' lap and that Billings was patting her leg and that Billings did not touch her anywhere else. Clela Davis, Chronister's friend also testified that this is the story that J.P. told.

Chronister thought that J.P.'s testimony was false. Chronister claimed that Billings (her father) had never molested her and she denied ever telling anyone that he had molested her. She did say that Appellant was mean and evil when she was growing up. Betty Powers, OSBI agent Cathey and DHS worker Grinstead all testified that Chronister told them that her father had molested her when she was young.

Billings first claims that the evidence of the other crimes introduced by the State confused the issues at trial, and unfairly prejudiced him. The State filed its notice to introduce evidence of other crimes pursuant to *Burks v. State*, alleging that the evidence was relevant to show intent, knowledge, absence of

mistake, and common scheme or plan. Billings objected to the evidence and a pre-trial hearing was held. The trial court stated that the evidence would be admissible pursuant to the *Burks*<sup>1</sup> notice because it relates to common scheme or plan; absence of mistake and “it falls under an exception, regardless of what exception.” The trial court also stated that the evidence fell under common scheme or plan because “pedophilia is a condition that causes you to perform these acts over a period of time.”

After three of the other victims had testified, the trial court stated “after I’ve heard this testimony I’m more convinced than ever that your client is probably a pedophile and that this testimony shows an on-going motive, intent, common scheme or plan, lack of mistake or accident. . . . I think that is admissible to show that because I think the law -- the social sciences are very clear that unless there is in-depth and complete therapy this is a recurring behavior. That’s why I’m letting it in.”

Oklahoma Statutes provide that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.” 12 O.S.1991, § 2404(B). The uncharged offenses must be probative to the crime charged, there must be a visible connection between the crimes, the evidence of other

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<sup>1</sup> *Burks v. State*, 1979 OK CR 10, 594 P.2d 771.

crimes must be necessary to support the State's burden of proof, proof of the evidence must be clear and convincing, and the trial court must issue limiting instructions. *Bryan v. State*, 1997 OK CR 15, ¶ 33, 935 P.2d 338, 356-57; *See Burks v. State*, 1979 OK CR 10, ¶ 12-17, 594 P.2d 771, 774-75, *overruled in part in Jones v. State*, 1989 OK CR 7, 772 P.2d 922.

After determining the evidence falls within an exception, the trial court must determine whether the “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise.” 12 O.S.1991, § 2403; *Bear v. State*, 1988 OK CR 181, ¶ 23, 762 P.2d 950, 956; 2 Whinery, *Oklahoma Evidence*, § 15.15 (1994)

Our statute prohibits evidence of a person’s character or a trait of his character offered for the purpose of action in conformity therewith. Further, 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. In this case, the fact that the trial court allowed the evidence because the evidence revealed that Appellant is a pedophile indicates that the trial court admitted the evidence to show Appellant’s character.

In *Wells v. State*, 1990 OK CR 72, 799 P.2d 1128, this Court reversed a rape and lewd molestation convictions because evidence of other crimes had been admitted. In *Wells*, the appellant had molested his daughter, S.W., twice

when she was seven years old. The other crimes evidence consisted of evidence that appellant had raped S.W.'s aunt, T.B., 6-7 years prior, when T.B. was 13; attempted to rape another aunt, Y.B., 9 years prior, when Y.B. was 12; and molested S.W.'s cousin, C.J., 2 years prior, when C.J. was 11.

Like this case, in *Wells*, the State argued that the other crimes evidence was admissible under the common scheme or plan exception. However, the Court reasoned that the crimes were factually different from the charged offenses and they were two, six to seven, and nine years prior. *Wells*, 1990 OK CR 72, ¶ 8, 799 P.2d at 1130. The Court also reasoned that the prior crimes were against different victims, therefore, they did not prepare the way for the current crimes and the current crimes did not depend on the other alleged crimes contrary to *Huddleston v. State*, 1985 OK CR 12, 695 P.2d 8. *Wells*, 1990 OK CR 72, ¶ 8, 799 P.2d at 1130. The only thing linking the crimes was the fact that they were all against female children to whom appellant was related. *Id.*

The Court finally reasoned that “[t]o hold that the other alleged crimes are admissible would be allowing the State to prove appellant’s character to show that he acted in conformity therewith and would allow the exception to engulf the general rule.” *Id.*

The same reasoning applies here. The common scheme or plan exception is dependent upon the "relationship or connection between the crime charged and the crime or crimes sought to be admitted. *Hall v. State*, 1980 OK

CR 64, ¶ 5, 615 P.2d 1020, 1022. Similarity between crimes, without more, is insufficient to permit admission." However, "[t]he commission of separate offenses characterized by a highly peculiar method of operation will suffice to show a common scheme." *Id.* Furthermore, the instant crime was not dependent on the prior crimes, nor did the prior crimes prepare the way for the current crime.

Likewise, the prior crimes did not provide a motive for the commission of the crime against J.P. See 2 Whinery, *Oklahoma Evidence*, § 15.16 (1994); citing *Stewart v. State*, 1988 OK CR 108, ¶ 20, 757 P.2d 388, 395 (Evidence that a defendant assaulted someone other than the victim, without more, would not be relevant to establish a motive to commit an assault on the victim of the crime). The prior crimes merely showed that Billings had a motive to molest young prepubescent girls, which is his character.

It is undeniable that after hearing the evidence that Billings had molested other young girls, the jury was predisposed to finding him guilty of the offense against J.P. We apply the test established in *Mayes v. State*, 1994 OK CR 44, ¶ 77, 887 P.2d 1288, that "[w]hen 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."

It is clear that the probative value was substantially outweighed by the danger of unfair prejudice; therefore, we have no choice but to reverse and

remand this case for a new trial. In as much as it pains us to place an innocent victim in the position of having to testify once again and relive this horrendous crime, it is our duty to see that the law is applied correctly.

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 v. State*, 1957 OK CR 20, ¶ 11, 307 P.2d 861, 867.<sup>2</sup>

Billings' two remaining propositions are moot.

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<sup>2</sup> Oklahoma has followed a very narrow view of the admissibility of other crimes evidence. Many jurisdictions have relaxed their rules to allow evidence of other crimes, especially in cases involving sex crimes against children. Arkansas has adopted a "pedophile exception." *Greenlee v. State*, 884 S.W.2d 947, 950 (Ark.1994). Louisiana has a "lustful disposition exception" and Indiana has a statute recognizing a "depraved sexual instinct exception." *State v. Miller*, 718 So.2d 960, 963-64, (La.1998); Ind. Code, Title 35, Art. 37, Ch. 4, § 15 (1999). Under Rule 414 of the Federal Rules of Evidence, in a child molestation case, evidence of other instances of child molestation is admissible. Georgia law provides for admission of such evidence "because a sexual offense committed against a young child requires a special lascivious motivation or bent of mind which generally will have some probative value in determining an accused's motivation or bent of mind in a subsequent trial for child molestation." *Swift v. State*, 495 S.E.2d 109, 112 (Ga.App.1997). The Rhode Island court has expanded the list of exceptions to allow evidence of prior acts to show the defendant's lewd disposition or intent. *State v. Tobin*, 602 A.2d 528, 531 (R.I.1992).

Missouri has stated that "[e]vidence of repeated acts of sexual abuse of children demonstrates, per se, a propensity for sexual aberration and a depraved sexual instinct and should be recognized as an additional, distinct exception to the rule against the admission of uncharged crimes." *State v. Lackterman*, 812 S.W.2d 759, 768 (Mo.App.E.D.1991), cert. denied, 503 U.S. 983, 112 S.Ct. 1666, 118 L.Ed.2d 387 (1992). Other States follow suit: West Virginia - *State v. Edward Charles L.*, 398 S.E.2d 123, 133 (W.Va.1990)(a lustful disposition to children generally); North Carolina - *State v. Raye*, 326 S.E.2d 333, 335 (N.C.App.1985), review denied, 332 S.E.2d 183 (N.C.1985)(unnatural lust of the defendant).

Nevada has said: "Evidence that an accused possesses a specific emotional propensity for sexual aberration is relevant and outweighs the prejudicial probability that a jury might convict for general rather than specific criminality." *Findley v. State*, 577 P.2d 867, 868 (Nev.1978).

**DECISION**

The judgment and sentence of the trial court is **REVERSED** and **REMANDED** for a **NEW TRIAL**.

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**LUMPKIN, V.P.J.: CONCURS**  
**JOHNSON, J.: CONCURS**  
**CHAPEL, J.: CONCURS IN RESULTS**

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