IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

CLARENCE RAY HASTINGS,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
-vs-	)	No. F-98-316
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

STRUBHAR, PRESIDING JUDGE:

Appellant, Clarence Ray Hastings, was convicted of Sexual Child Abuse, in the District Court of Craig County, Case Number CF-96-140, following a jury trial before the Honorable James D. Goodpaster. Following its return of a guilty verdict, the jury recommended that Appellant be sentenced to serve a term of ten years imprisonment. The trial court sentenced Appellant accordingly.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we reverse. In reaching our decision, we considered the following propositions of error and determined this result to be required under the law and the evidence:

I. The prosecutrix's testimony was so controverted and inconsistent that it was unworthy of belief and therefore, the trial court should have required corroboration.

II. The trial court erred in allowing the state to read into the record the transcript of the prosecutrix's testimony from the preliminary hearing.

III. The trial court erred in allowing into evidence allegations of other alleged crimes as against the Appellant.

IV. Appellant was denied a fair trial by the appointed child advocate's "prosecutorial" performances during the early stages of the trial.

V. The trial court erred when it overruled Appellant's Motion to Dismiss.

DECISION

Because we find that this case warrants reversal on error raised in Proposition III, we need not fully address the other propositions. In his third proposition, Appellant complains that he was prejudiced by introduction of "other crimes" evidence. Appellant refers to the testimony of JoAnn Bergman (mother of the victim), Carla Waterson (sister-in-law of Appellant), and Sheryl Ferguson (Appellant's niece). Each testified that Appellant had molested them when they were around the same age as the victim in the present case. This testimony was offered in the prosecution's case-in-chief as evidence of a "common scheme or plan."

It is well established that evidence of crimes other than those for which the defendant is on trial is neither relevant or admissible to prove that he is guilty of the current offenses. *Burks v. State*, 594 P.2d 771 (Okl.Cr.1979), *overruled in part on other grounds*, 772 P.2d 922 (1989). An exception to this general rule is that "when evidence of similar offenses tends to show a system, plan, or scheme embracing the commission of two or more crimes so related to

each other that the proof of one tends to establish the other," such evidence may be admissible. *Little v. State*, 725 P.2d 606, 607 (Okl.Cr.1986). However, in order for this exception to apply, there must be significant facts which support the finding of a common scheme or plan. For instance, in *Little* this court found it significant that both victims were sexually molested at home when their mother was away. Both testified that they feared the appellant. When either refused his advances, the defendant used a combination of pouting and temper outbursts to have his way. The Court found that the defendant had used the same coercive system on both of his minor stepdaughters, over whom he had control and dominion as a stepparent, to fulfill a common scheme which was to satisfy his sexual desires. *Id*, at 607. Conversely, in *Wells v. State*, 799 P.2d 1128, 1130 (Okl.Cr.1990), this Court held reversal was required where the other alleged crimes used as evidence against the defendant were factually different from the charged offenses and purportedly occurred two, six or seven, and nine years prior to the crimes with which the defendant was charged. The only similarities of the other crimes to the crime charged were the ages of victims at time of molestation and that the victims were related to the defendant.

In the present case, the witnesses each testified that Appellant had molested or raped them when they were children. According to their testimony,

Appellant had done different things to each witness - all different from what he was accused of having done to J.A.L. The incidents of abuse to the witnesses occurred around twenty years prior to the events which were the subject of the present case. Appellant used threats against some of the witnesses but not all of them. As in *Wells*, it appears that the only commonality between the present act and the prior acts is that they occurred against family members when the victims were around the same age. This is not enough to constitute a common scheme or plan. Accordingly, the other crimes evidence should not have been admitted at trial. The testimony that Appellant had molested and sexually assaulted others was extremely prejudicial and cannot be found to have been harmless. This error requires reversal for a new trial.

Appellant argues in his fourth proposition that the child advocate and the prosecution "double-teamed" him during the trial. This Court has cautioned against allowing a child advocate to cross a line and becoming a prosecutor rather than victim advocate. See *Cooper v. State*, 922 P.2d 1217 (Okl.Cr.1996). While the child advocate in the present case acted appropriately, for the most part, some of his actions may have come close to crossing the line drawn in 21 O.S.Supp.1992, § 846(G)(1). Accordingly, we caution against allowing the child advocate to participate in those phases of the

trial other than those specified in section 846(G)(1) and for purposes other than protecting and representing the child victim at retrial.

The Judgment and Sentence of the trial court is **REVERSED** and **REMANDED** for a **NEW TRIAL**.

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OPINION BY: STRUBHAR, P.J.
LUMPKIN, V.P.J.: DISSENT
JOHNSON, J.: CONCUR
CHAPEL, J.: CONCUR
LILE, J.: DISSENT

LILE, JUDGE: DISSENTS

The trial court conducted a thorough pre-trial hearing on the admissibility of the evidence. The court properly concluded that the evidence was admissible pursuant to two exceptions to *Burks v. State*, 1979 OK CR 10, 594 P.2d 771. This case is similar to *Little v. State*, 1986 OK CR 132, 725 P.2d 606. This evidence was properly admitted and reversal is not warranted. I respectfully dissent.

I am authorized to state that Judge Lumpkin joins in this dissent.