IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ROBERT CHARLES ROBINSON	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-98-724**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant, Robert Charles Robinson, was tried by a jury and convicted of two counts of Lewd Molestation in violation of 21 O.S.Supp.1992, § 1123, in Tulsa County District Court Case No. CF-97-4069. The jury recommended a sentence of four (4) years imprisonment on Count I and twenty (20) years imprisonment on Count II. The trial judge sentenced Appellant in accordance with this recommendation and ordered the sentences to run consecutively. Appellant now appeals his conviction and sentence.

Appellant raises the following propositions of error in support of his appeal:

I. The evidence is insufficient to sustain Appellant's convictions; and

II. The trial court erred in allowing the State to admit the Complainant's prior written statement into evidence.

After a thorough consideration of these propositions and the entire record before us, including the original record, transcripts, and briefs of the parties, we have determined as follows:

With respect to the first proposition of error, we find after viewing the evidence in the light most favorable to the State and accepting all reasonable

inferences and credibility choices that tend to support the jury's verdict, any rational trier of fact could have found the essential elements of Count II beyond a reasonable doubt. *Spuehler v. State*, 709 P.2d 202, 203-204 (Okl.Cr.1985). However, under that same standard, we find a rational trier of fact could not have found the essential elements of Count I beyond a reasonable doubt. We therefore reverse Count I with instruction to dismiss.

Concerning Count I, the elements necessary to prove Appellant guilty of violating 21 O.S.Supp.1992, § 1123 are: (1) the defendant was at least three years older than the victim; (2) who knowingly and intentionally; (3) looked upon, touched, mauled or felt; (4) the body or private parts; (5) of any child under sixteen years of age; and (6) in a lewd or lascivious manner. *See* OUJI-CR-4-129; O.R. at 50. Under the facts of this case, the State proved all of the elements, except number four.

Appellant certainly looked upon his thirteen year old step-daughter in an intentionally lewd and lascivious manner. His actions are disgusting, repugnant, immoral, and unacceptable. However, to be criminal under the charging statute, Appellant must have looked upon the child's **body or private parts**. While the statute does not say "naked body" or "naked private parts," we believe the pairing of the word "body" with the term "private parts" indicates the legislature intended something more than the act of staring between the legs of someone who is wearing both underwear and boxer shorts, even under the circumstances set forth in this case. It seems to us that certain parts of the body are referred to as "private parts" because we tend to keep them hidden from public view.

However, in reaching this decision, we are not saying a conviction could

never be had under this statute where a defendant is looking upon a clothed or partially clothed victim in a lewd or lascivious manner. We can envision several scenarios where such a conviction is possible. We will review any such similar charges on a case-by-case basis as they arise.[1]

With respect to Count II, we find the trial court did not abuse its discretion when it admitted State's exhibit one over Appellant's hearsay objection. We have previously found that statements which are offered simply to show that they were made and not to prove their truth are not hearsay. *See Hain v. State*, 919 P.2d 1130, 1143 (Okl.Cr.1996).

DECISION

The judgment and sentence with respect to Count I is hereby **REVERSED** and **DISMISSED**. The judgment and sentence with respect to Count II are hereby **AFFIRMED.**

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE B.R. BEASLEY, ASSOCIATE DISTRICT JUDGE

APPEARANCES AT TRIAL	**APPEARANCES ON APPEAL**
ALLEN R. MALONE 201 WEST 5TH STREET TULSA, OK 74119 COUNSEL FOR APPELLANT	ALLEN SMITH 1623 CROSS CENTER DRIVE NORMAN, OK 73019 COUNSEL FOR APPELLANT

[1] Appellant could have been charged with sexual abuse of a child under 10 O.S.Supp.1996, § 7115. His actions of requesting his stepdaughter to spread her legs and staring between her legs would seemingly constitute "lewd or indecent acts or proposals" by a person responsible for the child's welfare. *See* 10 O.S.Supp.1996, § 7102(B)(5).

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

RE

CHAPEL, JUDGE, DISSENTING:

I dissent. I agree Count I must be dismissed. However, I cannot agree to the gratuitous comments concerning sexual abuse being a proper charge for the charged conduct. Moreover, the Court's resolution of Proposition II is patently incorrect. The victim's prior written statement was clearly hearsay, and thus was erroneously admitted.

On cross-examination of the victim, D.B., defense counsel implied that D.B. was unduly influenced by events which occurred between the charged offenses and the writing of the statement and provided a motive for fabrication. At the conclusion of D.B.'s testimony, the prosecutor offered State's Exhibit One into evidence. D.B. composed this statement at the request of her grandmother after she told her grandmother what Robinson did. This statement was written in July 1997, eight to nine months after the incidents between Robinson and D.B. occurred. During this time, D.B.'s mother and Robinson separated and divorced, and Robinson had a financial dispute with D.B.'s grandparents.

Defense counsel made timely objection to the admission of the statement, asserting it was hearsay. As the prosecutor responded to defense counsel's objection, the trial court cut him off, and asked when the statement was written. After finding the statement was written in July 1997, the trial court admitted the statement.[1]

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[1] The exchange between counsel and the trial court follows:

A statement is not hearsay if the declarant testifies at trial or hearing and is subject to cross-examination concerning the statement and the statement is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.[2] Although consistent with her testimony, D.B.'s written statement postdated an alleged motive to lie or be unduly influenced by the events that occurred between the charged offenses and the writing of the statement. *Plotner v. State*[3] applies a bright-line, two-prong test, which must be satisfied to admit a prior consistent statement. "First, there must have been a suggestion that the witness has either fabricated his trial testimony or has been unduly influenced. Second, it must be established that the consistent statement was made prior to the time when there was a motive for the witness

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"MR. YOULL: Judge, at this time the State would move to enter State's Exhibit Number 1.

THE COURT: All right. Any objection?

MR. MALONE: Yes, that's hearsay. I would object. Out-of-court statement made for the truth of the matter asserted.

MR. YOULL: State has not offered it for the truth of the matter asserted. It goes to corroborate what several - -

THE COURT: Okay. Was the date established on this?

MR. YOULL: Excuse me, sir?

THE COURT: What was the date that the testimony established on this?

MR. YOULL: I think the testimony it was - - the grandmother had indicated about the time period, and I believe the mother also indicated, July.

THE COURT: One is in, and exceptions allowed. You can see it at the end of trial, ladies and gentlemen, when you have time to read it."

(Tr. at 121-22).

From this exchange, it is pure speculation to glean the rationale for the trial court's admission of the statement.

[2] 12 O.S. 1991, § 2801 (4)(a)(2).

to lie or there was an exercise of improper influence."[4] This analysis is also made in *Tome v. United States,*[5] where the United States Supreme Court applied an identical test, creating a temporal test for the basis of admitting prior consistent statements. In reversing a molestation conviction, the Supreme Court held that the admission of a prior consistent statement[6] must predate a motive to lie or be improperly influenced, after a statement has satisfied 801 (d)(1)(B). Application of *Plotner* and *Tome* to this case shows that D.B.'s statement, although consistent, did not predate an allegation of a motive to lie or be unduly influenced. Therefore, State's Exhibit One should not have been admitted, and the objection by defense counsel should have been sustained on hearsay grounds.

Additionally, the admission of State's Exhibit One was prejudicial to Robinson's right to a fair trial, as the statement contained materials extraneous to the charged offenses. Where D.B.'s statement was consistent with her testimony, the statement should have been considered for evidence, and analyzed under section 2801(4)(a)(2) and the *Plotner/Tome* test. However, the balance of D.B.'s statement, which made claims that Robinson told her he had killed two persons and buried the bodies, as well as Robinson telling D.B. he knew the person convicted of a local murder was not the person who actually

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[3] 762 P.2d 936 (Okl.Cr.1988), *overruled on other grounds by Parker v. State,* 917 P.2d 980 (Okl.Cr.1996).
[4] 762 P.2d at 943 (quoting L. Whinery, *Guide to the Oklahoma Evidence Code* 263 (1985)).
[5] 513 U.S. 150, 115 S.Ct. 696, 130 L. Ed.2d 574 (1995).
[6] *See* FRE 801 (d)(1)(B).

committed the crime, was unduly prejudicial, and should not have been considered for admission as evidence. This material did not relate to the charged offenses, and should have been redacted prior to any consideration of the portion claimed as a consistent statement.

The judgment and sentence with respect to Count I should be reversed and dismissed. The judgment and sentence with respect to Count II should be reversed and remanded for a new trial.