

MAY - 4 2001

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

**JAMES W. PATTERSON
CLERK**

CHRISTOPHER EDWARD
VANANDEN,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

) NOT FOR PUBLICATION

) Case No. F 2000-446

SUMMARY OPINION

JOHNSON, VICE-PRESIDING JUDGE:

Appellant, Christopher Edward VanAnden, was tried by a jury in Grady County District Court, Case No. CF 99-223, for the crimes of First Degree Rape by Instrumentation (Count 1), in violation of 21 O.S.Supp.1999, § 1111.1, and Lewd Molestation (Count 2), in violation of 21 O.S.Supp.1999, § 1123. The Honorable David Powell, Associate District Judge, presided at trial. The jury returned guilty verdicts and set punishment at five (5) years imprisonment on Count 1 and three (3) years imprisonment on Count 2. Formal sentencing was held March 30, 2000, and Judge Powell ordered the sentences be served concurrently. From the Judgment and Sentences imposed, Appellant filed this appeal.

Appellant raised the following propositions of error:

1. At preliminary hearing, Mr. VanAnden was prevented from presenting the testimony of Jessica VanAnden, whose testimony would have proven the state's evidence was insufficient to bind appellant over for trial;

2. Mr. VanAnden was denied due process of law by the introduction into evidence of his involuntary written statement;
3. Insufficient evidence existed to convict Mr. VanAnden of rape by instrumentation or lewd molestation;
4. Admission of other crimes evidence prejudiced the jury, deprived Mr. VanAnden of his fundamental right to a fair trial, and warrants reversal of the sentences;
5. The instructions to the jury did not adequately inform the jury about the law; and,
6. The cumulative effect of all the errors addressed above deprived Mr. VanAnden of a fair trial.

After thorough consideration of these propositions and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we have determined that this case must be reversed and remanded for a new trial. Appellant's claim that the admission of other crimes evidence was unduly prejudicial and denied him of his fundamental right to a fair trial is well-taken.

Evidence of other crimes is not admissible as proof of bad character to show a person acted in conformity therewith but "may . . . 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). Although the State filed a Notice of its intent to offer evidence that Appellant previously sexually abused his other sister while the family resided in North Carolina, the Notice did not set forth the specific exception under which the evidence was offered and the State did not specify the exception it was offered

under at trial. On appeal, the State contends the other crimes evidence showed a “continuing pattern of abuse and system of coercion” which “supplies a sufficient connection” between the incident to be admissible.

We disagree. The other crimes evidence admitted here does not fall into the “continuing pattern of abuse” exception or into any exception set forth in § 2404(B). 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 proof of one tends to establish the other, the evidence may be admissible. See *e.g. Bales v. State*, 1992 OK CR 24, ¶ 10, 829 P.2d 998, 1000 (other crimes evidence of abuse of same victim over period of two years admissible to show a continuing pattern of abuse); *Little v. State*, 1986 OK CR 132, ¶ 5, 725 P.2d 606, 607 (other crimes evidence of other step-daughter admissible under “same coercive system” where defendant convinced girls he was molesting them for their benefit, their mother knew and approved, various lewd physical acts and gestures grew into intercourse, molestations occurred while mother was away); *Wells v. State*, 1990 OK CR 72, ¶ 8, 799 P.2d 1128, 1130 (other crimes evidence of defendant’s rape, attempted rape and molestation of different victim two to nine years prior to the case, which were factually different, were not admissible); *Huddleston v. State*, 1985 OK CR 12, ¶ 17, 695 P.2d 8, 10-11 (evidence of prior molestation of same victim a few months before rape occurred was admissible to show “common scheme or plan” by preparing the way for the rape).

In this case, the State did not prove that Appellant had committed other crimes or bad acts against his other sister by clear and convincing evidence and any alleged factual similarities were recanted by the witness prior to trial. Further, the other crimes or bad acts were alleged to have occurred some four to six years earlier and the State did not show a common scheme or plan, a continuing pattern of abuse or sufficient connection between the two offenses to render this evidence admissible.

Because this evidence did not fall into one of the recognized exceptions under § 2404(B) and because it has been adequately preserved for review, the State must show on appeal that admission of the other crimes evidence did not result in a miscarriage of justice or constitute a substantial violation of a constitutional or statutory right. *Welch v. State*, 2000 OK CR 8, ¶ 10, 2 P.3d 356, 365. This the State cannot do. We are convinced the prejudicial nature of this evidence substantially outweighed any probative value it might have had. We cannot say this error did not affect the jury's finding of guilt and imposition of sentence where the minimum sentence was imposed on Count 1 and only a three (3) year sentence was imposed on Count 2.

Accordingly, we find Appellant was prejudiced, and denied a fair trial, by the improper admission of other crimes evidence. Because a new trial is warranted on this claim, the remaining propositions need not be addressed.

Decision

The Judgment and Sentences of the trial court are **REVERSED**, and this case is hereby **REMANDED FOR A NEW TRIAL**.

APPEARANCES AT TRIAL

DANIEL JAMES
ATTORNEY AT LAW
2601 NW EXPRESSWAY, SUITE 201
OKLAHOMA CITY, OK 73112
ATTORNEY FOR DEFENDANT

LESLEY MARCH
ASSISTANT DISTRICT ATTORNEY
GRADY COUNTY COURTHOUSE
CHICKASHA, OK 73108
ATTORNEY FOR THE STATE

APPEARANCES ON APPEAL

KATRINA CONRAD-LEGLER
APPELLATE DEFENSE COUSEL
1623 CROSS CENTER DRIVE
NORMAN, OK 73019
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
JAMES F. KELLY
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OKLAHOMA 73104
ATTORNEYS FOR APPELLEE

OPINION BY: JOHNSON, V.P.J.

LUMPKIN, P.J.: CONCURS IN RESULT
CHAPEL, J.: CONCURS IN RESULT
STRUBHAR, J.: CONCURS
LILE, J.: CONCURS IN RESULT

RC

LILE, JUDGE: CONCURS IN RESULTS

The evidence of the older sister's allegations of similar treatment at the hands of Appellant did not meet the burden of proof (clear and convincing) established in *Burks v. State*, 1979 OK CR 10, 594 P.2d 771, and should not have been admitted for that reason alone. Because I cannot say that the evidence had no effect on the verdict, under the specific facts of this case, I would remand for a new trial.