IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

ALBERT ELDEN DEAN,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
-vs-	)	No. F-2000-948
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

STRUBHAR, JUDGE:

Appellant, Albert Elden Dean, was convicted of Sexual Abuse of a Child, in the District Court of Oklahoma County, Case No. CF-99-1560. The jury trial was held before the Honorable Susan P. Caswell. The jury assessed punishment at twenty-five years imprisonment and 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 affirm Appellant's judgment and modify his sentence to ten years imprisonment. 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 trial court erred in admitting evidence of bad character on rebuttal.

II. Prosecutorial misconduct denied Appellant a fair trial and constituted fundamental error.

III. The sentence imposed against Appellant is excessive and should be modified.

DECISION

As to Appellant's first proposition, we find that the rebuttal testimony complained of was improper as it did not explain, repel, disprove, or contradict facts given in evidence by an adverse party. *See Hall v. State*, 698 P.2d 33, 37 (Okl.Cr.1985). *See also Quilliams v. State*, 779 P.2d 990, 992 (Okl.Cr.1989). Thus, the trial court abused its discretion in allowing the complained of testimony into evidence over defense objection. Further, the evidence that Andrews had told Gehrig that she needed to check into Appellant's background because he has nine children of his own he was not allowed to see was irrelevant as it did not have any tendency to make more or less probable the fact that Appellant sexually abused the victim in this case. *See* 12 O.S.1991, § 2401. This evidence was highly prejudicial as a jury could infer from it that Appellant may have committed similar acts upon his own children. We find that in light of the strong evidence of guilt, the improper evidence did not affect the jury's determination of guilt. However, we also find that this evidence may have affected the jury's decision in sentencing, as the jury may well have decided to sentence Appellant more harshly after learning that he was not

allowed to see any of his own nine children. Accordingly, we modify Appellant's sentence to ten years imprisonment.

Appellant's second proposition warrants no relief as some of the comments at issue were not improper, *See Hammon v. State*, 898 P.2d 1287, 1305 (Okl.Cr.1995), and those that bordered upon impropriety did not affect the verdict.

Finally, Appellant's claim of excessive sentence is rendered moot by this Court's modification of the sentence based upon error raised in Proposition I.

The Judgment of the trial court is **AFFIRMED** and the Sentence is **MODIFIED** to ten years imprisonment.

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