

JUL - 3 2007

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA
MICHAEL S. RICHIE
CLERK

STEVEN LYNN SMITH,)
)
 Appellant,)
 v.)
)
 STATE OF OKLAHOMA)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2005-716

OPINION

LUMPKIN, PRESIDING JUDGE:

Appellant Steven Lynn Smith was tried by jury and convicted of Indecent or Lewd Acts with Child Under Sixteen (21 O.S.Supp.2003, § 1123(A)), After Former Conviction of A Felony, Case No. CF-2004-4179, in the District Court of Oklahoma County. The jury recommended as punishment life in prison without the possibility of parole and the trial court sentenced accordingly. It is from this judgment and sentence that Appellant appeals.

In 2004, ten (10) year old T.C. lived with her parents in Colorado. Her father worked at various jobs and her mother worked as a waitress at a truck stop. Appellant, who was in his early fifties, was a regular customer at the truck stop and befriended T.C.'s parents. They fed him and allowed him to stay in their home instead of the shelter where he had been living. They also allowed him to stay with T.C. when their work schedules prevented them from being home. At Appellant's instigation, he and T.C. played a game called "husband and wife". Appellant gave T.C. a ring he had found to wear as a wedding ring. She wore it on her pinky finger. The two held hands when they

took walks and watched television. Appellant kissed her on the lips. Appellant told T.C. if she didn't cooperate with him, he would divorce her.

In July 2004, T.C.'s grandmother passed away in Oklahoma City. T.C. and her family drove to Oklahoma City to clean out the grandmother's apartment and move some belongings back to Colorado. Despite the fact they had known Appellant less than 2 months, T.C.'s parents allowed Appellant to travel with them. During this time T.C.'s mother was ill with cancer and passed away that December.

On July 13, 2004, Appellant wanted to take T.C. swimming in the apartment complex pool. T.C.'s father would not give her permission but her mother said it was fine. Appellant took T.C. to the pool while her parents remained in the apartment.

While at the pool, Appellant and T.C. began to draw the attention of others at the pool. At least 4 women at the pool observed Appellant pin T.C. against the side of the pool in the deep end. They saw Appellant grab between the victim's legs, pull the top of her swimsuit down, and fondle her breasts. The women thought T.C. looked scared. To make sure of what they were seeing, a couple of them put on goggles and swam near Appellant and T.C. They observed Appellant bounce T.C. on his knee and rub her vagina on his knee; fondle her between her legs, rubbing his hand back and forth; and hold the back of her head while he kissed and "sucked" on her bottom lip. At one point, he tried to force her hand inside his swimsuit but after getting her fingertips inside, T.C. jerked her hand away. If T.C. tried to swim away, Appellant would

follow her. He was seen whispering in T.C.'s ear frequently and once was overheard to say, "if you tell anybody".

The women noticed that Appellant and T.C. got out of the pool at least three times. One of the times T.C. exited the pool, the bottom of her swimsuit was pulled to the side, revealing her vaginal area. The first time they left the pool area holding hands and returned after approximately 5 minutes. They sat at a table and drank a soda. They held hands and Appellant caressed T.C.'s arm. When they got back in the pool, the suspicious activity continued, with Appellant's conduct escalating. If T.C. tried to pull away, Appellant pulled her closer. Each time they left the pool, Appellant and T.C. were holding hands. The women observing this activity described it not as holding the hand of a child but as holding hands with a boyfriend or girlfriend with fingers intertwined. The third and final time they left the pool, Appellant grabbed T.C. by the wrist and nearly dragged her away. The women thought T.C. looked like she was not having fun and only once did she have a smile on her face.

After watching the suspicious activity for approximately two hours, the women decided to call the police. When Appellant and T.C. left the pool the last time, the women believed he had heard one of them say they were calling the police.

The police arrived on the scene and spoke with the women at the pool first. They then found Appellant, T.C., and her parents at the grandmother's apartment. T.C.'s parents were shocked to see the police at their door. T.C. denied that anything inappropriate had occurred between her and Appellant at

the pool. Appellant told police, "we" were at the pool for a couple of hours and "nothing happened". Appellant also apologized, saying he was sorry for "this whole thing". Appellant was put into a police car and taken to the police station for further questioning. While in the police car, Appellant volunteered that his "first time" had been with his 7 year old daughter and he was sorry about it. T.C. was taken into protective custody and placed in a Department of Human Services (DHS) shelter that evening.

At trial, T.C. testified she thought of Appellant as a grandfather. She described the game of "husband and wife" they played. She testified she knew the difference between a "good touch" and a "bad touch" and testified that Appellant did not touch her inappropriately in the pool. When she showed signs of being upset during her testimony, she explained she was upset because her mother had passed away and she missed her.

A.C., T.C.'s father, testified he lost custody of T.C. because of his poor choices in friends and was accused of putting T.C. in danger. He said he was uneasy about Appellant's relationship with T.C. He saw them hold hands and kiss on the lips. However, his wife said she would handle the situation and after that things seemed to subside. A.C. testified that despite his concerns about Appellant, he and his wife left T.C. with Appellant because of their work schedules.

The women at the pool, Ms. White, Ms. Neider, and Ms. Depriest (a fourth woman was not located for trial) consistently testified to their observations of the suspicious activity at the pool. The State also offered the

testimony of Lt. William Patten, Oklahoma City Police Department, who interviewed Appellant on July 15, 2004. After being *Mirandized* and waiving his rights, Appellant stated in part he was trying to protect himself. He described T.C. as a “beautiful little person” and “beautiful little lady”. Patten testified that Appellant never questioned how the women at the pool could see underwater. Appellant also admitted he was arrested in 1990 for the sexual assault of his 7 year old daughter. He claimed he just woke one morning to find her giving him “head”. Appellant admitted to kissing T.C. on the lips while in the pool but denied the allegations of fondling. He then said that if he had touched her, it was through her clothes and it was an accident. He admitted to giving her ring and playing “husband and wife”.

The defense rested without presenting any witnesses. Further facts will be stated as necessary.

In his first assignment of error, Appellant challenges the sufficiency of the evidence supporting his conviction. He argues that because the victim testified that no crime occurred, the remaining “speculative inconsistent testimony” was insufficient to support the conviction. Further, he asserts that if any statutory offense is supported by the testimony at trial, it is that set out in 21 O.S.2001, § 22, outraging public decency.

Sufficiency of the evidence claims are reviewed under the well established test, “whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt.” *Easlick v. State*, 2004 OK CR 21,

¶ 15, 90 P.3d 556, 559. See also *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204. The credibility of witnesses and the weight and consideration to be given to their testimony are within the exclusive province of the trier of facts and the trier of facts may believe the evidence of a single witness on a question and disbelieve several others testifying to the contrary. *Bland v. State*, 2000 OK CR 11, ¶ 29, 4 P.3d 702, 714. Although there may be conflict in the testimony, if there is competent evidence to support the jury's finding, this Court will not disturb the verdict on appeal. *Id.* On appellate review this Court accepts all reasonable inferences which tend to support the jury's verdict. *Scott v. State*, 1991 OK CR 31, ¶ 4, 808 P.2d 73, 76.

It is uncontested in this case that the victim did not testify as to the abuse committed by Appellant at the pool, nor did she testify to any abuse in pretrial interviews. However, that does not end our review of the evidence. Other testimony at trial would cause a reasonable trier of fact to question the veracity of that testimony. The victim testified to unrelated instances of conduct between herself and Appellant which could be considered inappropriate conduct with a child. T.C. testified she did not want to tell the jury about the game of "husband and wife" because it was embarrassing and she was worried her father might get in trouble. She also testified that she understood she was in DHS custody because the authorities thought her parents should have protected her and that she repeatedly told everyone that she wanted to go home. She testified she might be returned to her father's custody at his hearing the following month.

The victim's father testified he had lost custody of T.C. because of poor choices he had made and because he had put T.C. in danger. He testified he was seeking to regain custody of T.C., that his next court date was the following month, and the determination of the custody issue could depend on the outcome of Appellant's criminal trial.

The jury also heard from Lt. Patten who was with the police department's sex crimes unit. He testified that during his investigation, there was a possibility T.C.'s parents could have been charged with permitting sexual abuse. He also testified that in many sex crimes, the perpetrator has a bond or special relationship with the child victim, and they tend to manipulate and groom the child to trust them and not to tell anyone about their activities.

The above testimony sufficiently put before the jury more than one possible explanation as to why T.C. did not testify to any abuse in the pool – if she admitted the abuse her father might not regain custody of her and she had been groomed by Appellant not to talk about it. Considering all of the above testimony, a rational trier of fact could have determined the victim was not being completely truthful when she denied the occurrence of the abuse.

Further, testimony from the eyewitnesses at the pool tends to support the verdict. While the women may have collaborated on their observations at the pool, there is no indication their testimony at trial was a collaborative effort. Despite Appellant's assertion, the women's testimony did not "expand into hyperbole during repetition". The record reflects their testimony was consistent not only with each other, but each witnesses' testimony was consistent in itself

from pre-trial interviews to trial. The women were thoroughly cross-examined by defense counsel. That the women may have been as much as 12 to 25 feet away from Appellant and the victim when they observed the suspicious activity, that much of the molestation occurred under water and possibly in the dark, and why they waited over 2 hours before calling the police are issues of credibility for the jury to decide. Each woman consistently testified that in her observation, Appellant's actions were deliberate, repeated, and not accidental. Here, the jury obviously chose to believe the women over the victim's denials.

Additionally, the jury could also properly consider Appellant's statements to the police that he was "sorry for the whole thing", and that even if he had touched the victim inappropriately, it was through her clothes and accidental.

Reviewing in the light most favorable to the prosecution, and accepting all reasonable inference which support the jury's verdict, a rational trier of fact could have found beyond a reasonable doubt that Appellant committed the crime of lewd molestation. *See Abbott v. State*, 1982 OK CR 198, ¶ 2, 655 P.2d 558, 559 (conviction under § 1123 upheld despite the victim's inability to testify because she was deaf and could only communicate with difficulty through sign language and an interpreter).

Further, despite testimony by the eyewitnesses that they were offended by their observations, Appellant's conduct clearly falls under 21 O.S. 2001, § 1123, and not 21 O.S.2001, § 22, openly outraging public decency. Section 22 provides in part:

Every person who willfully and wrongfully commits any act which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which openly outrages public decency, and is injurious to public morals, although no punishment is expressly prescribed therefore by this Code, is guilty of a misdemeanor.

By contrast, § 1123 provides in pertinent part:

A. It is a felony for any person to knowingly and intentionally:

2. Look upon, touch, maul, or feel the body or private parts of any child under sixteen (16) years of age in any lewd or lascivious manner by any acts against public decency and morality, as defined by law;

Appellant's conduct falls under the more specific statute, prohibiting the intentional lewd touching of a child. *See Hulsey v. State*, 86 Okla. Crim. 273, 192 P.2d 301 (1948) (§ 1123 would have been controlling in case where defendant was charged with taking indecent liberties with a child for touching the victim in her private parts while seated in car and in view of others but for the fact the offense occurred prior to the passage of the act. Defendant was to be punished only if information charged under general statute prohibiting acts openly outraging public decency and injurious to public morals). *See also Rachel v. State*, 71 Okla. Crim. 33, 107 P.2d 813 (1940) (section 22, making it an offense to commit any act which openly outrages public decency and is injurious to public morals, is directed against acts which are committed openly and affect the public). Accordingly, this proposition of error is denied

In his second proposition of error, Appellant contends he was denied a fair trial by evidence of other crimes. The record reflects that pursuant to

Burks v. State, 1979 OK CR 10, ¶ 2, 594 P.2d 771, 772 ¹, the State filed a pre-trial notice that it was going to introduce Appellant's interview with Lt. Patten wherein he stated that he awoke one day to find his seven year old daughter giving him "head". Appellant said he had no idea why his daughter did it and was surprised she would do it with the blinds and windows open. Appellant said he had been convicted for the act and served three years. The State argued such evidence was admissible under the "greater latitude" exception set out in *Myers v. State*, 2000 OK CR 25, ¶ 24, 17 P.3d 1021, 1030, and to prove plan, scheme, motive, design, and intent.

Defense counsel objected to the notice arguing the evidence was more prejudicial than probative. In a pre-trial hearing, the State argued the evidence proved intent and was necessary to disprove Appellant's claim of accidental touching. The State also argued the similarities between the case of Appellant's daughter and the present case such as abuse by a caretaker/father figure on a young child warranted admission of the evidence. The trial court overruled the defense objections and admitted the evidence under 12 O.S. 2001, § 2404, common scheme or plan or absence of mistake exception.

Evidence of other crimes or bad acts 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

¹ overruled in part on other grounds, *Jones v. State*, 1989 OK CR 7, ¶ 8, 772 P.2d 922, 925.

O.S.2001, § 2404(B). To be admissible, evidence of other crimes must be probative of a disputed issue of the crime charged, there must be a visible connection between the crimes, evidence of the other crime(s) must be necessary to support the State's burden of proof, proof of the other crime(s) must be clear and convincing, the probative value of the evidence must outweigh the prejudice to the accused and the trial court must issue contemporaneous and final limiting instructions. *Bryan v. State*, 1997 OK CR 15, ¶ 33, 935 P.2d 338, 356-57. When other crimes evidence is so prejudicial it denies a defendant his right to be tried only for the offense charged, or where its minimal relevancy suggests the possibility the evidence is being offered to show a defendant is acting in conformity with his true character, the evidence should be suppressed. *Id.*

Finding the “greater latitude rule” for the admission of other crimes evidence in sexual assault cases “unworkable”, a majority of this Court has recently overruled *Myers*. See *James v. State*, 2007 OK CR 1, ___ P.3d ___ (Lumpkin, V.P.J. dissenting). Although I dissented to that opinion, it is applied in this case based upon *stare decisis*.

The only evidence of the prior crime was Appellant’s statement. The evidence in this case fails to show any nexus or visible connection between the previous crime and the crime for which Appellant was convicted. Further, proof of the prior crime was not clear and convincing. Although the trial court gave the jury a limiting instruction, we cannot be sure that the prejudicial nature of

the evidence did not contribute to the finding of guilt.² Therefore, this case must be reversed and remanded for a new trial.

In Proposition III, Appellant asserts the trial court improperly instructed the jury that the punishment for a second offense of lewd acts with a child was life without the possibility of parole. The determination of which instructions shall be given to the jury is a matter within the discretion of the trial court. *Williams v. State*, 2001 OK CR 9, ¶ 22, 22 P.3d 702, 711. Absent an abuse of that discretion, this Court will not interfere with the trial court's judgment if the instructions as a whole, accurately state the applicable law. *Id.*

Appellant argues there is a conflict between the sentencing provisions of 21 O.S. Supp. 2002, § 1123(A), under which he was charged, and 22 O.S. Supp. 2002, § 51.1a, the Habitual Offender Act. Section 1123(A) provides in pertinent part:

A. Any person who shall knowingly and intentionally:

1. Make any oral, written or electronically or computer-generated lewd or indecent proposal to any child under sixteen (16) years of age for the child to have unlawful sexual relations or sexual intercourse with any person; or
2. Look upon, touch, maul, or feel the body or private parts of any child under sixteen (16) years of age in any lewd or lascivious manner by any acts against public decency and morality, as defined by law; or
3. Ask, invite, entice, or persuade any child under sixteen (16) years of age to go alone with any person to a secluded, remote, or secret place, with the unlawful and willful intent and purpose then and there to commit any crime against public decency and

² My dissent in *James* foresaw the negative effect the Court's decision would have on this type of case and now it has come to fruition.

morality, as defined by law, with the child; or

4. In any manner lewdly or lasciviously look upon, touch, maul, or feel the body or private parts of any child under sixteen (16) years of age in any indecent manner or in any manner relating to sexual matters or sexual interest; or

5. In a lewd and lascivious manner and for the purpose of sexual gratification, urinate or defecate upon a child under sixteen (16) years of age or ejaculate upon or in the presence of a child, or force or require a child to look upon the body or private parts of another person or upon sexual acts performed in the presence of the child or force or require a child to touch or feel the body or private parts of said child or another person,

upon conviction, shall be deemed guilty of a felony and shall be punished by imprisonment in the State Penitentiary for not less than one (1) year nor more than twenty (20) years, except as provided in Section 3 of this act. [FN 1] The provisions of this section shall not apply unless the accused is at least three (3) years older than the victim. Any person convicted of a second or subsequent violation of subsection A of this section shall be guilty of a felony and shall not be eligible for probation, suspended or deferred sentence. Any person convicted of a third or subsequent violation of subsection A of this section shall be guilty of a felony and shall be punished by imprisonment in the State Penitentiary for a term of life or life without parole, in the discretion of the jury, or in case the jury fails or refuses to fix punishment then the same shall be pronounced by the court.

[FN1] O.S.L.2002, c. 455, § 3 [Title 21, § 51.1a]. (emphasis added).

Title 21 O.S. 2001, § 51.1a, “second offense of rape in the first degree, forcible sodomy, lewd molestation or sexual abuse of a child” provides:

Any person convicted of rape in the first degree, forcible sodomy, lewd molestation or sexual abuse of a child after having been convicted of either rape in the first degree, forcible sodomy, lewd molestation or sexual abuse of a child shall be sentenced to life without parole. (emphasis added).

Appellant argues, as he did before the trial court, that as he was convicted as a second offender, the proper range of punishment was between 1 and 20 years, without an opportunity for any type of statutory probation, pursuant to 21 O.S. 2001, § 1123(A). He asserts that § 1123(A) is applicable as the more specific of the two statutes. He argues any other interpretation would render meaningless the enhancement provisions for third and subsequent convictions under § 1123(A) as all second offenders would already be sentenced to life without parole.

The State responds, as they did before the trial court, that § 51.1a is the more specific statute regarding sex crimes and its punishment option of life without the possibility of parole applies in this case. The State asserts that for convictions under § 1123(A), where the prior convictions were for offenses listed in § 51.1a, enhancement is proper under § 51.1a. However, if the prior conviction is for an offense not listed in § 51.1a, enhancement falls under the provisions of § 1123(A).

After lengthy discussions on the issue, the trial court gave what it characterized as a “stair-step” instruction, which offered the jury three separate sentencing options. If the jury found Appellant guilty after one prior conviction for Lewd Molestation or Sexual Abuse of a Child, the range of punishment was life in prison without the possibility of parole. If the jury found Appellant guilty after one prior conviction (nothing was said about the type of prior conviction), the range of punishment was ten (10) years to life in prison. If the jury found Appellant guilty, without a previous conviction, the range of punishment was one to twenty (20) years in prison.

The apparent conflicts between § 1123(A) and § 51.1a have not been addressed by this Court previously. It is a classic rule of statutory construction that statutes are to be construed to determine, if possible, the intent of the Legislature, reconciling provisions, rendering them consistent and giving intelligent effect to each. *Lozoya v. State*, 1996 OK CR 55, ¶ 17, 932 P.2d 22, 28-29. When there is a conflict between various statutes applying to the same situation, the more specific of the two governs. *Id.* Statutes are to be interpreted to produce a reasonable result and to promote, rather than to defeat, the general purpose and policy of the law. *Owens v. State*, 1983 OK CR 85, ¶ 2, 665 P.2d 832, 834.

Both of these statutes seem to be very specific, and both are 2002 amendments. The footnote in § 1123(A) seems to be the differentiating factor. When the footnote is read in context of § 1123(A), along with the session laws, this becomes slightly clearer. The footnote specifically removes from the § 1123(A) enhancement provisions the enhancement of a conviction under § 1123(A) where the prior conviction is for first degree rape, forcible sodomy, lewd molestation or sexual abuse of a child and places the enhancement of that sentence under the provisions of § 51.1a. If the prior conviction is for an offense not listed in § 51.1a, enhancement of the sentence for a conviction under § 1123(A) remains within the § 1123(A) enhancement provisions.

Laws 2002, c. 455, § 3, emerg. eff. June 5, 2002, shows the codification of 21 O.S. 2002, § 51.1a. Laws 2002, c. 455, § 6, emerg. eff. June 5, 2002, shows the addition and insertion into § 1123(A) of the language, “except as

provided in Section 3 of this act.” This indicates the Legislature’s intent to take the sentencing of defendants who have two or more convictions for first degree rape, forcible sodomy, child molestation or child sexual abuse out of the general provisions of § 1123(A) and sentence those repeat offenders to life imprisonment without the possibility of parole pursuant to § 51.1a.

The sentencing provisions of § 1123(A) are not well drafted and the footnote appears misplaced. The statute initially addresses the punishment for a first offense under § 1123(A), then jumps to the punishment for the repeat offender under § 51.1a, then addresses the punishment for a second and subsequent violation of subsection A. To this writer, it would make more sense to state the punishment for a first offense under § 1123(A), a second and subsequent offense under § 1123(A), then exempt out the § 1123(A) conviction where the prior offense is for first degree rape, forcible sodomy, lewd molestation or sexual abuse of a child.

Regardless, as Appellant’s prior conviction was for “Lewdness with a Minor” (out of Nevada), which equates to lewd molestation,³ he falls under footnote 1 of § 1123(A) and if found guilty of the prior conviction, he is subject

³ 21 O.S. 2001, § 54:

Every person who has been convicted in any other state, government or country of an offense which, if committed within this state, would be punishable by the laws of this state by imprisonment in the penitentiary, is punishable for any subsequent crime committed within this state, . . . to the same extent as if such first conviction had taken place in a court of this state.

to a sentence of life without parole. Therefore, that portion of the trial court's instruction was correct.

Appellant also challenges that portion of the instruction regarding his prior conviction. First, he asserts it was unnecessary to submit the question to the jury as he admitted the prior conviction. Further, he asserts the nature of his prior conviction is a question of law, not one of fact for the jury.

When a defendant confesses, under oath, the prior conviction, there is no question of fact within the jury's province as to whether the defendant is guilty of only the primary offense or of the primary offense after former conviction. *Reed v. State*, 1978 OK CR 58, ¶ 14, 580 P.2d 159, 162. *See also Dodd v. State*, 1999 OK CR 20, ¶ 7, 982 P.2d 1086, 1088 (if a defendant takes the stand and admits his guilt of those charges, there is no need for a separate determination of guilt). Here, Appellant did not take the witness stand and he did not admit to his prior conviction under oath. Evidence of the prior conviction came out only during the testimony of Lt. Patten. Despite Appellant's claim he was convicted of a prior crime, it was up to the prosecutor to determine if in fact a valid legal conviction existed and if so, present evidence to that effect to the jury. Therefore, the trial court properly left the question of the existence of the prior conviction to the jury.

However, we do agree with Appellant that the nature of the prior conviction was a legal question for the Court, not a factual question for the jury. A conviction from another state may be used to enhance the sentence for a violation of Oklahoma law if the out of state conviction is for an offense

which, if committed within this State would be punishable by the laws of this State by imprisonment in the penitentiary. 21 O.S. 2001, § 54. See also *Collums v. State*, 1982 OK CR 190, ¶¶ 12 -13, 654 P.2d 1070,1072-73; *Fischer v. State*, 1971 OK CR 120, ¶ 7, 483 P.2d 1165, 1168. Whether the prior conviction meets the above requirement is a legal determination for the judge, not the jury.

Therefore, the trial court erred in giving the jury the choice between finding Appellant guilty of a non-descript prior conviction or a lewd conduct prior conviction. However, this error is harmless as the jury was properly instructed on the range of punishment for a first offense and for a second and subsequent lewd conduct conviction, the only two sentencing options in this case. Having thoroughly reviewed Appellant's challenges to the punishment instruction, we find the trial court did not abuse its discretion by instructing the jury that the punishment for a second and subsequent conviction for lewd acts with a child was life in prison without the possibility of parole.

In his fourth proposition of error, Appellant contends the trial court erred in holding a bifurcated trial. He argues that because he admitted both the existence and nature of his prior conviction during his interview with Lt. Patten, he waived bifurcation and his trial should have been conducted in a single stage proceeding.

Title 22 O.S. 2001, § 860.1 provides that where a defendant is charged as a habitual offender, the trial shall be held in two stages. In the first stage, the jury is to determine only the defendant's guilt of the offense charged

without any reference made to prior convictions. If the defendant is found guilty in the first stage, a second stage is held in which the jury receives evidence of the defendant's prior convictions and determines his punishment for the offense on trial. Bifurcation may be waived by a defendant, and it is within the trial court's discretion to determine whether a defendant has waived his right to a bifurcated proceeding. *Wills v. State*, 1981 OK CR 140, ¶ 6, 636 P.2d 372, 375.

The defendant's "admission" of his prior conviction must come under oath during his testimony at trial in order to constitute a waiver of bifurcation. *Dodd*, 1999 OK CR 20, ¶ 7, 982 P.2d 1086, 1088; *Camren v. State*, 1991 OK CR 75, ¶ 12, 815 P.2d 1194, 1196; *Ray v. State*, 1990 OK CR 15, ¶ 7, 788 P.2d 1384, 1386; *Reed v. State*, 1978 OK CR 58, ¶ 14, 580 P.2d 159, 162. As discussed in the prior proposition, Appellant did not take the witness stand. Evidence of his prior conviction came in during the first stage testimony of Lt. Patten concerning his interview with Appellant. This does not constitute an "admission" of the existence of the prior conviction or a waiver of bifurcation. Therefore, the trial court properly held a two stage proceeding. This assignment of error is denied.

In his fifth proposition of error, Appellant contends the trial court erred ruling that forensic examiner Amy Baum could not testify at trial. Appellant asserts the defense subpoenaed Ms. Baum and she was present and prepared to testify. Appellant argues Ms. Baum's testimony was proper rebuttal evidence admissible as non-hearsay for both impeachment by non-verbal inconsistent

conduct pursuant to 21 O.S. 2001, §§ 2801(A)(c) & 2801(B)(1)(a), and as rehabilitation by a prior consistent statement offered to rebut the State's claim that T.C.'s refusal to implicate Appellant was the result of improper influences on the child by Appellant and the situation pursuant to 12 O.S. § 2801(B)(1)(b). Appellant contends the prejudice is obvious because absent the evidence, the State was able to pursue uncontested its theme throughout trial that there were reasons why T.C. would not admit to the jury what Appellant had done to her at the pool. Appellant argues the recorded interview with Ms. Baum shows that before T.C. was traumatized by being taken away from her parents, she spoke calmly and comfortably about the incident and said the claims by the women at the pool were untrue.

The record reflects that Amy Baum, a DHS forensic interviewer, conducted an interview with T.C. at Children's Hospital on either July 13 or July 14, 2004. The interview was taped and a DVD was made. Defense counsel attempted to admit the DVD of the interview during the cross-examination of Lt. Patten. The State objected, arguing Lt. Patten was not the proper witness to sponsor the evidence as he was not present during the interview nor had he seen the DVD of the interview.

During an *in-camera* hearing, the State informed the court it had subpoenaed Ms. Baum to testify but had since determined not to call her as a witness because T.C. did not say that Appellant had touched her inappropriately. For that reason, the State determined the interview and DVD recording of the interview were not relevant to the State's case. Defense

counsel complained that since the State wasn't to going to call Ms. Baum to testify, the defense would be prejudiced because Baum was the only witness who could lay a proper foundation for the DVD. Defense counsel admitted she had endorsed Ms. Baum as a witness however she had not subpoenaed her prior to trial.

The trial court explained to defense counsel that it was not the State's responsibility to subpoena defense witnesses, that defense counsel had its own subpoena power to get the witness to court, and apparently the defense failed to use that power in this case. The trial court acknowledged that at a pre-trial hearing, the State indicated that while it was uncertain whether it would call Ms. Baum as a witness, it was unlikely that she would be called to testify. Despite the trial court's obvious dissatisfaction with defense counsel's conduct, the court allowed defense counsel the opportunity to subpoenaed Ms. Baum during trial.

Contrary to Appellant's assertions on appeal, there is no indication Ms. Baum was present at trial and ready to testify. The prosecutor indicated the decision had been made not to call her as a witness prior to the start of testimony and she had been released from the State's subpoena. The prosecutor informed the court she had given defense counsel the phone number she had for Ms. Baum and defense counsel responded that investigators were trying to locate the witness.

Defense counsel also argued for admission of the evidence under 12 O.S. 2001, § 2803.1 to show T.C.'s demeanor and attitude. However, the trial court

ruled the evidence did not fall under § 2803.1 as the defense had not met the notice requirements (as no notice had been provided) and T.C. had not made any statements describing any sexual contact. The trial court then reviewed the DVD of the interview. The court found T.C. had not made any statements describing sexual contact between herself and Appellant, and ruled the interview inadmissible under § 2803.1. Defense counsel then informed the court they had located Ms. Baum and she would be available to testify the next day. However, in light of the court's ruling regarding admissibility of the DVD, defense counsel was not sure whether Baum would be called as a witness.

Now on appeal, Appellant has not repeated his argument for admission under § 2803.1, but asserts the evidence was proper rebuttal evidence for which no notice need be given. Initially, the defense did not offer Ms. Baum and the DVD of the interview as rebuttal evidence. The defense did not seek to admit the evidence to explain any unexpected evidence from the State. It was only after the defense was not able admit the DVD of the interview through Lt. Patten, and after the defense realized the State was not going to call Baum to testify, did the defense seek to call her as a witness. Any testimony Baum may have given concerning the victim's demeanor was cumulative not rebuttal. As the trial court noted, T.C. testified that any difference in her demeanor between the time of the interview and the trial was due to the fact her mother had passed away by the time of trial and she missed her.

Further, Baum would not have been a true rebuttal witness. Under usual trial proceedings, rebuttal is an opportunity for the State to present witnesses,

for whom no notice is required, to rebut the defense case-in-chief. *See Short v. State*, 1999 OK CR 15, ¶ 25, 980 P.2d 1081, 1084. The defense does not present rebuttal witnesses until surrebuttal. Baum's testimony does not qualify as surrebuttal evidence. *Id.* Accordingly, Baum was subject to the provisions of the discovery code and the defense was not excused from providing timely notice of her testimony. Appellant was not prejudiced by the court's exclusion of Ms. Baum's testimony as the testimony was cumulative to that given by T.C. and Lt. Patten. Therefore, we find the trial court did not abuse its discretion in denying the defense request to present Ms. Baum's testimony. This assignment of error is denied.

Appellant asserts in his sixth proposition of error that the trial court erred in failing to give his requested instruction that the crime charged was an "85%" crime. Under 21 O.S. Supp. 2002, § 13.1(8), persons convicted of certain crimes are required to serve, at a minimum, 85% of their sentence before becoming eligible for parole. Although indecent and lewd acts with a minor is among those offenses enumerated in § 13.1(8), Appellant was found guilty as a repeat offender under 21 O.S. Supp. 2003, § 51.1a and subject to a mandatory life sentence without the possibility of parole. Therefore, as the sentencing scheme in this case did not provide for the possibility of parole, the jury did not need to be instructed on the "85% Rule". The trial court did not abuse its discretion in denying the requested instruction. *See Williams*, 2001 OK CR 9, at ¶ 22, 22 P.3d at 711. This assignment of error is denied.

DECISION

The Judgment and Sentence is **REVERSED AND REMANDED FOR A NEW TRIAL.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE TAMMY BASS-JONES, DISTRICT JUDGE

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OPINION BY: LUMPKIN, P.J.

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RESULTS
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LEWIS, J.: CONCUR IN RESULTS

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