



1.

Terrell contends that he was denied a fair trial by the admission of prejudicial other crimes evidence. He argues that it was error to admit his former step-daughter's testimony that he molested and raped her repeatedly over a four year period. Terrell lodged timely objections at trial, preserving this claim for review. This Court reviews the trial court's ruling admitting the testimony for an abuse of discretion. *Smith v. State*, 2007 OK CR 16, ¶ 57, 157 P.3d 1155, 1174.

"A defendant should be convicted, if at all, by evidence showing guilt of the offenses charged, rather than evidence indicating guilt for other crimes." *James v. State*, 2007 OK CR 1, ¶ 3, 152 P.3d 255, 257. Other crimes evidence is not admissible to show that a person is acting in conformity with a character trait. 12 O.S.2001, § 2404 (B). "Evidence of a prior bad act may be admissible if it is offered for a purpose specifically identified in § 2404(B)." *James*, 2007 OK CR 1, ¶ 3, 152 P.3d at 257. The *James* court reiterated the following factors that are necessary for the use of other crimes evidence: 1) there must be a visible connection between the other crimes evidence and the charged crimes; 2) the evidence must go to a disputed issue and be necessary to support the State's burden of proof; 3) its probative value must outweigh the danger of unfair prejudice; and 4) it must be established by clear and convincing evidence. *Id.* The jury must also be properly instructed on the limited purpose for which the evidence is received. *Id.* "If the evidence is offered to show a common scheme or plan, it must embrace the commission of

crimes so related to each other that proof of one tends to establish the other.”

*Id.*

The crimes committed against the victim in this case and Terrell’s former step-daughter are visibly connected because both girls testified that Terrell committed the same act against them and threatened them afterwards not to tell anyone about what had happened. Both girls were family members and the alleged molestation occurred when both girls were about the same age. Terrell’s step-daughter’s testimony about his fondling of her was relevant to show an absence of mistake in this case, Terrell’s intent, and provided support and context for Terrell’s statement to the victim here that he had “played this game before and won.”<sup>1</sup> Her testimony was not limited, however, and she was allowed to detail years of abuse at the hands of Terrell, including many instances of rape by instrumentation with various inanimate objects. The degree of detail provided to the jury about these rapes was more prejudicial than probative, and although we typically give the trial court deference regarding the admissibility of evidence, the trial court erred in allowing this testimony.<sup>2</sup>

We must decide whether the admission of this other crimes evidence affected the outcome of Terrell’s trial. The testimony of the victim in this case

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<sup>1</sup> The trial court failed to give a limiting instruction prior to Terrell’s former step-daughter’s testimony, but did include a limiting instruction in its final instructions limiting the evidence to prove common scheme or plan and absence of mistake or accident.

<sup>2</sup> This past session, the legislature passed 12 O.S.Supp.2007, § 2414 that allows the admission of any relevant offenses or instances of child molestation committed by the defendant when he is charged with child molestation. This evidence remains subject to the balancing test in 12 O.S.Supp.2002, § 2403.

was credible and unimpeached. She had no motive to fabricate. Terrell's voluntary intoxication defense, on the other hand, was refuted. Evidence of Terrell's guilt was strong. We find that the admission of this other crimes evidence did not affect the jury's finding of guilt and was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). We cannot, however, find that the testimony did not affect Terrell's sentence. The jury sentenced Terrell to the maximum of twenty years for briefly fondling the victim. Given the inflammatory nature of the improper other crimes evidence and the prosecutor's remarks in opening and closing statement about it, we cannot say that the other crimes evidence did not contribute to the jury's decision to impose the maximum punishment. Thus, we find that Terrell's sentence should be modified to ten years imprisonment. *See* 22 O.S.2001, § 1066.

2.

The trial court did not err in admitting a photograph of the victim depicting her appearance at the time of the incident. *Jackson v. State*, 2006 OK CR 45, ¶ 55, 146 P.3d 1149, 1166; 12 O.S.2001, §§ 2402-2403. The probative value of the exhibit was not substantially outweighed by the danger of needless presentation of cumulative evidence. Nor was the photo unfairly prejudicial.

3.

Terrell's excessive sentence claim is moot and will not be considered further given our decision to modify his sentence based on the error discussed above.

**DECISION**

Terrell's conviction for Lewd Molestation is **AFFIRMED** as **MODIFIED**. The district court is instructed to modify the Judgment and Sentence on his conviction from twenty years imprisonment to ten years imprisonment. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF SEQUOYAH COUNTY  
THE HONORABLE A.J. HENSHAW, ASSOCIATE DISTRICT JUDGE

**APPEARANCES AT TRIAL**

ROGER HILFIGER  
620 W. BROADWAY STREET  
MUSKOGEE, OK 74402  
ATTORNEY FOR DEFENDANT

RICHARD L. GRAY, JR.  
DISTRICT ATTORNEY  
JEFF SHERIDAN  
ASSISTANT DISTRICT ATTORNEY  
SEQUOYAH COUNTY COURTHOUSE  
120 E. CHICKASAW STREET  
SALLISAW, OK 74955  
ATTORNEYS FOR STATE

**APPEARANCES ON APPEAL**

KIMBERLY ADAMS  
900 S. MAIN  
McALESTER, OK 74501  
ATTORNEY FOR APPELLANT

W. A. DREW EDMONDSON  
OKLAHOMA ATTORNEY GENERAL  
STEPHANIE D. JACKSON  
ASSISTANT ATTORNEY GENERAL  
313 N.E. 21<sup>ST</sup> STREET  
OKLAHOMA CITY, OK 73105  
ATTORNEYS FOR APPELLEE

**OPINION BY: A. JOHNSON, J.**  
**LUMPKIN, P.J.: Concur in Part / Dissent in Part**  
**C. JOHNSON, V.P.J.: Concur**  
**CHAPEL, J.: Concur**  
**LEWIS, J.: Concur in Results**

RB

**LUMPKIN, PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART**

I concur in the Court's decision to affirm the conviction in this case. However, I must dissent to the modification of the sentence. The Court concludes the evidence of other crimes was properly admitted with proper limiting instructions to the jury. It seems the only complaint is the detail of the acts committed. The facts are the facts and the sentence is supported by the facts in this case.