

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

**FILED**  
**IN COURT OF CRIMINAL APPEALS**  
**STATE OF OKLAHOMA**  
**JAN 19 2017**

**MICHAEL S. RICHIE**  
**CLERK**

**JIMMY LEE FIELDS,**

**Appellant,**

**v.**

**THE STATE OF OKLAHOMA,**

**Appellee.**

**Case No. F-2016-42**

**OPINION**

**LUMPKIN, PRESIDING JUDGE:**

Appellant, Jimmy Lee Fields, was tried by jury and convicted of Child Sexual Abuse (21 O.S.2011, § 843.5) After Former Conviction of Sexually Abusing a Minor Child in District Court of Tulsa County Case Number CF-2015-1475.<sup>1</sup> The jury recommended as punishment imprisonment for life without the possibility of parole. The trial court sentenced accordingly. It is from this judgment and sentence that Appellant appeals.

**FACTS**

In December of 2014, Melissa Castro had a dispute with her boyfriend. She moved out of his home in Oologah. Appellant was Castro's paternal uncle. He allowed Castro and her two children to move into his home in Tulsa, Oklahoma. During this time, Appellant sexually abused X.C., Castro's fourteen-year-old daughter.

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<sup>1</sup> The State also charged Appellant with Failing to Register as a Sex Offender (Count 2) (57 O.S.2011, § 583). The trial court severed this count for trial. At sentencing, the State dismissed Count 2.

Castro went back and forth between Oologah and Appellant's home in Tulsa. Most frequently, X.C. remained at Appellant's home. Appellant was sixty-nine years old. He could not walk without assistance. X.C. helped Appellant with his medication. She pushed his wheelchair during medical trips.

Appellant gave X.C. money for food, clothes, and entertainment. Whenever X.C. needed something, Appellant asked her to sit on his lap. Appellant placed his hands on X.C.'s knees or around her sides.

During the summer of 2014, X.C. became uncomfortable with Appellant's touches. Appellant touched her inner thigh and the side of her chest. If anyone else entered the room, Appellant moved his hand away. On several occasions, Appellant ran his hand across her breasts as she got up off his lap. Appellant also placed his hand under X.C.'s shirt and touched her stomach.

On one occasion, X.C. playfully poked her popsicle into Appellant's bare chest when he was sitting in his recliner. Appellant told X.C. to sit on his lap. When she got near him, he grabbed her "boob."

Appellant's home only had two bedrooms. Since Appellant shared the home with his nephew, X.C. slept in a recliner in the living room. She did not have any space of her own. One night, X.C. went into Appellant's bedroom and lay in Appellant's bed. Appellant placed his arm around her. When X.C. complained that it was hot and tried to remove his arm, Appellant just repeated: "I just want to hold you. Babe." X.C. declared that she was hungry, got up and left the room.

In late June or early July, X.C. had an episode where she suffered chest pain around six o'clock in the evening. She went into Appellant's bedroom, laid on Appellant's bed and tried to sleep. Appellant came into the room and asked X.C. what was wrong. After X.C. explained that her chest hurt just under her collarbone, Appellant laid down next to her. X.C. was not bothered when Appellant rubbed her collarbone area. However, Appellant moved down and massaged X.C.'s chest. When Appellant stuck his hand up her hoodie and felt around her breast, X.C. freaked out and froze in place. Appellant caressed X.C. over the top of her bra. He tried but was unable to get his fingertips up under her undergarment. Appellant informed X.C. that she had to move her bra. Alarmed, X.C. stated: "it's inside my body; it's fine." However, Appellant did not stop until X.C. moved his hand away. X.C. got up and did not go back into Appellant's room.

When school started in August, X.C. told her best friend what had happened and the friend reported the matter to the school counselor. After X.C. disclosed Appellant's sexual abuse, the counselor contacted the Department of Human Services and the Tulsa Police Department.

Appellant voluntarily met with Detective Liz Eagan on November 18, 2014. Eagan conducted a video recorded interview with Appellant. During the interview, Appellant admitted that he had asked X.C. to sit on his lap on quite a few occasions. He further admitted that he had slept in the same bed as X.C. and put his arm around her. However, Appellant asserted that he had treated X.C. as if she had been his own child.

Appellant recounted the incident with the popsicle stick. He admitted that he had grabbed X.C.'s breast but claimed he was just joking around. He agreed that he probably should not have done it but explained that X.C. had touched him with the popsicle and related that X.C. and her mother grabbed each other in a similar fashion.

Appellant acknowledged that he felt over and around X.C.'s breast during the occasion in which she had complained of chest pain. He admitted that he had felt up under X.C.'s shirt but over her bra. Appellant related that he knew that he should not have done this but explained that, in light of the many instances of breast cancer in the family, he was worried about X.C.'s health.

Appellant admitted that it was a mistake to touch X.C., however, he asserted that none of the touching was sexual. He explained that he was unable to have sex.

Appellant had previously been convicted of Sexually Abusing a Minor Child in District Court of Tulsa County case number CF-2000-1203. During the investigation of the offense, Appellant had confessed to Officer Dan Graham of the Sand Springs Police Department that he had sexually abused his step-granddaughter. His written confession explained that he started out giving her a leg massage, sleeping in the same bed, and touching her breasts when they wrestled. He further related that they pinched each other's breasts. Appellant confessed that he progressed to fondling his step-granddaughter's breasts and ultimately penetrated her with his finger on two separate occasions.

## DISCUSSION

In his first proposition of error, Appellant challenges the trial court's admission of the other crimes evidence. He argues that the evidence concerning his molestation of his step-granddaughter lacked relevance and its prejudicial effect deprived him of a fair trial.

This Court reviews a trial court's ruling admitting or excluding evidence for an abuse of discretion. *Marshall v. State*, 2010 OK CR 8, ¶ 24, 232 P.3d 467, 474. An abuse of discretion has been defined as a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented or, stated otherwise, any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

Eleven days before trial, the State filed its Notice of Intent to Introduce Evidence of Other Crimes in the present case seeking admission of the challenged evidence as sexual propensity evidence pursuant to 12 O.S.2011, § 2414. The State also alleged that the challenged evidence was admissible under 12 O.S.2011, § 2404(B).

The basic law is well established-when one is put on trial, one is to be convicted-if at all-by evidence which shows one guilty of the offense charged; and proof that one is guilty of other offenses not connected with that for which one is on trial must be excluded. *Burks v. State*, 1979 OK CR 10, ¶ 2, 594 P.2d 771, 772, *overruled in part by Jones v. State*, 1989 OK CR 7, ¶ 7, 772 P.2d 922, 925 (finding trial court's failure to *sua sponte* give limiting instruction does not

automatically constitute reversible error). In *James v. State*, 2009 OK CR 8, 204 P.3d 793, we determined that § 2414 provides for admission of other instances of lewd molestation where the defendant is charged with an offense of lewd molestation. *Id.*, 2009 OK CR 8, ¶¶ 4-5, 204 P.3d at 795. Section 2414(D) includes within the definition of “an offense of child molestation” any conduct proscribed by § 1123 of Title 21. Evidence that a defendant has committed other instances of lewd molestation may be considered for any relevant purpose, including the defendant’s propensity to commit the charged offense. *Id.*, 2009 OK CR 8, ¶ 8, 204 P.3d at 796; *Horn v. State*, 2009 OK CR 7, ¶ 38, 204 P.3d 777, 786.

Although the evidence in the present case clearly met the other sexual offenses exception within § 2414, the State failed to timely provide notice of its intent to offer evidence under this rule. Therefore, the trial court did not consider the admissibility of the evidence under this exception.

Prosecutors throughout the State should take notice that admission of other sexual offenses under § 2414 requires greater advance notice than the ten (10) day notice for the admission of other crimes evidence pursuant to 12 O.S.2011, § 2404(B). *See Burks*, 1979 OK CR 10, ¶ 12, 594 P.2d at 774. Section 2414(B) requires the State to disclose its intent to offer evidence of other sexual offenses, including the statements of any witnesses or a summary of the substance of any testimony that is expected to be offered, *at least fifteen (15) days before the scheduled trial.* (emphasis added). This requirement gives the defendant an opportunity to obtain a pretrial determination on the

admissibility of the evidence. *See Burks*, 1979 OK CR 10, ¶ 12, 594 P.2d at 774 (holding requirement of notice of intent to introduce other crimes evidence allowed defendant an opportunity to obtain pretrial ruling); *Horn*, 2009 OK CR 7, ¶ 40, 204 P.3d at 786 (holding trial court shall hold pretrial hearing to determine admissibility of sexual propensity evidence if the defense raises an objection). The State must meet the fifteen day requirement unless, as § 2414 provides, the trial court permits the State to provide notice at a later time for good cause shown.

In the present case, the State did not attempt to show good cause for the late notice. Instead, the State argued that the challenged evidence was admissible under § 2404(B) as it showed motive, opportunity, intent, common scheme or plan, and lack of mistake or accident. The trial court held a hearing and found that the evidence was admissible.

Reviewing the record, we find that the trial court's determination was not a clearly erroneous conclusion and judgment. Section 2404(B) provides that evidence of other crimes, wrongs, or acts may be admissible for other purposes, including absence of mistake or accident, common scheme or plan, motive, opportunity, intent, preparation, knowledge and identity. *Lott v. State*, 2004 OK CR 27, ¶ 40, 98 P.3d 318, 334. 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. *Id.*

The evidence concerning Appellant's molestation of his step-granddaughter met the motive, intent and absence of mistake or accident exceptions set forth in § 2404(B). Evidence of other crimes is admissible to show absence of mistake or accident where the defendant either raises a defense of accident or mistake or his explanation of the events in question would not necessarily remove the issue of accident or mistake. *Cole v. State*, 2007 OK CR 27, ¶¶ 12-21, 164 P.3d 1089, 1094-95. Evidence of other crimes is admissible where it tends to show a defendant's intent. *Taylor v. State*, 1982 OK CR 88, 646 P.2d 615, 616.

We find that the challenged evidence was probative of a disputed issue of the charged crime. The crucial issue at trial was Appellant's intent in touching X.C.'s breast. The State alleged in the Information that Appellant had sexually abused X.C. by lewdly touching her breast. Appellant wholly admitted to touching X.C.'s breast during his interview with Detective Eagan. However, his pretrial explanation did not remove the issue of accident or mistake. Appellant asserted that the touching was not lustful or for sexual gratification but was simply a mistake. At trial, defense counsel argued that Appellant had not touched X.C.'s breast "with a sexual intent," instead, he asserted that Appellant had simply checked X.C.'s chest out of concern for her health. As the Appellant's prior acts of lewd molestation of his step-granddaughter tended to rebut Appellant's claim of mistake and instead established that Appellant had



lewdly or lustfully touched X.C., the evidence was probative of a disputed issue at trial.

We further find that there was a visible connection between the challenged evidence and the charged offense. In both instances, Appellant lewdly touched, the body or private parts of a child under sixteen years of age contrary to the provisions of 21 O.S.2011, § 1123. Appellant touched X.C., his great-niece, in a virtually identical fashion and pattern as to how he molested his step-granddaughter fourteen years prior.

Evidence concerning the other instances of sexual molestation was necessary to support the State's burden of proof. Although the sheer number of occurrences pointed to a lewd or lustful motive or intent, no other evidence held as great of probative value concerning Appellant's intent than the challenged evidence. Appellant's identical behavior with his two young relatives evinced the lewdness of the touches.

We further find that the State sufficiently proved the other instances of sexual molestation. The written confession which Appellant gave during the prior investigation established the other instances of lewd molestation by clear and convincing evidence.

Giving the challenged evidence its maximum reasonable probative force and its minimum reasonable prejudicial value, we find that the probative value of the challenged evidence was not substantially outweighed by the danger of unfair prejudice. *Mayes v. State*, 1994 OK CR 44, ¶ 77, 887 P.2d 1288, 1310 ("When measuring the relevancy of evidence against its prejudicial effect, the

court should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.”). Since the challenged evidence held great probative value concerning Appellant’s motive, intent, and rebutted Appellant’s claim of accident or mistake, the evidence was properly admissible.

Finally, the record reveals that the trial court instructed the jurors concerning the limited purpose for which the jury could consider the other crimes evidence. Therefore, we find that the trial court did not abuse its discretion when it determined that the challenged evidence was admissible in the present case.

However, judges and prosecutors should take note that the Legislature has prescribed notice requirements in both § 2404 and § 2414. Prosecutors are not free to shirk the responsibility of providing notice of other sexual offense evidence under the guise of labeling the evidence other crimes evidence. Trial judges must determine if the failure to comply with the requisite time requirements prejudiced the accused as with any other *discovery violation*. See *Jones v. State*, 2009 OK CR 1, ¶ 46, 201 P.3d 869, 883; *Powell v. State*, 2000 OK CR 5, ¶ 52, 995 P.2d 510, 524; 22 O.S.0211, § 2002(E)(2).

In the present case, Appellant was not prejudiced by the State’s failure to timely provide notice of its intent to offer the challenged evidence. The prosecutor disclosed the substance of the evidence to the defense, including the police reports and Appellant’s written statement concerning the prior sexual offense, more than forty-five days prior to the scheduled trial. Therefore, no relief is required. Proposition One is denied.

In his second proposition of error, Appellant contends that the trial court erred when it denied his request for instructions on the lesser offense of misdemeanor Assault and Battery. As Appellant requested these instructions at the jury instruction conference, we review the trial court's determination for an abuse of discretion. *Eizember v. State*, 2007 OK CR 29, ¶ 111, 164 P.3d 208, 236; *Cipriano v. State*, 2001 OK CR 25, ¶ 14, 32 P.3d 869, 873.

At trial, the State argued that Appellant was not entitled to a lesser included instruction because he had defended against the charge by proclaiming his innocence. Noting that an instruction upon Assault and Battery would be confusing, the trial court agreed and refused to give the requested instruction.

Reviewing the record, we find that the trial court's determination was not a clearly erroneous conclusion and judgment. "This Court has long recognized the rule of law that a defendant is not entitled to instructions on any lesser included offense when he defends against the charge by proclaiming his innocence." *Harney v. State*, 2011 OK CR 10, ¶ 11, 256 P.3d 1002, 1005. This rule applies where the defendant takes the stand as a witness and makes such admissions as to render every theory of defense unavailable save actual innocence. *Grissom v. State*, 2011 OK CR 3, ¶ 34, 253 P.3d 969, 982. It also applies where the defendant makes admissions by counsel during trial that render every defense unavailable save actual innocence. *Id.*, 2011 OK CR 3, ¶ 35, 253 P.3d at 982.

In the present case, Appellant defended against the charge by proclaiming his innocence. Relying upon Appellant's statements within the recorded interview, defense counsel made admissions which rendered every

theory of defense unavailable save actual innocence. Therefore, we find that the trial court did not abuse its discretion when it denied the requested instruction. Proposition Two is denied.

### **DECISION**

The judgment and sentence is hereby **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY  
THE HONORABLE SHARON HOLMES, DISTRICT JUDGE

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**OPINION BY: LUMPKIN, P.J.**

LEWIS, V.P.J.: Concur in Results  
JOHNSON, J.: Concur in Results  
SMITH, J.: Concur  
HUDSON, J.: Concur