IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

COREY ANTWONNE HIGHTOWER,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	No. F-2007-102
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LEWIS, JUDGE:

Corey Antwonne Hightower was convicted of, count 1, Forcible Oral Sodomy in violation of 21 O.S.Supp.2002, §§ 886 & 888, count 2, Resisting Arrest in violation of 21 O.S.2001, § 268, and count 3, Indecent Exposure in violation of 21 O.S.Supp.2001, § 1021, in the District Court of Oklahoma County, Case No. CF-2006-1097, before the Honorable Ray C. Elliott, District Judge. The jury assessed punishment at eleven years, eight months and three years respectively. The trial court sentenced accordingly, ordering that the sentences in counts one and two be served concurrently, but consecutively to count three.

Hightower has perfected an appeal of the District Court's Judgment and Sentence raising the following propositions of error:

1. Mr. Hightower's convictions for forcible oral sodomy and indecent exposure violate the federal and state prohibitions against double punishment.

2. Mr. Hightower was convicted of indecent exposure based on an act that was not alleged in the information and for which he

was not bound over on at preliminary hearing violating the due process clauses of the federal and state constitutions.

3. The trial court's failure to properly instruct the jury on the limited use of other crimes evidence constitutes plain reversible error and requires reversal.

After thorough consideration of Hightower's propositions of error and the entire record before us on appeal, including the original record, transcripts, exhibits, and briefs, we have determined that count three of the Judgment and Sentence of the District Court shall be reversed and remanded for a new trial; the remaining counts shall be affirmed.

In reviewing these propositions, we find that the State introduced evidence alleging two different indecent exposure incidents. The first incident occurred during the summer of 2005 at a garage sale at the victim's home. The second incident was alleged to have occurred on February 13, 2006, when the other crimes also occurred against the same victim.

At trial, Appellant argued that the indecent exposure and the forcible oral sodomy occurring on February 13 merged into one crime, thus he could not be convicted of both. The trial court ruled that the indecent exposure occurred on a separate date during the summer of 2005, thus there were separate incidents.

The Information filed in this case alleges crimes which occurred on or about February 13, 2006. Using this language, the trial court ruled that the summer 2005 incident was on or about February 13, 2006.

In reviewing this entire record, it becomes clear that the State intended to only charge Appellant with acts occurring on February 13, 2006. The State presented evidence, at the preliminary hearing, regarding acts which occurred on February 13, 2006. No evidence was presented about the acts occurring during the summer of 2005. At the conclusion of the preliminary hearing the State was allowed to amend the Information to include the crime of indecent exposure, based on the evidence presented at preliminary hearing (evidence of acts occurring on February 2006 only).[1]

Two weeks prior to trial, the State filed its intent to introduce evidence of other crimes pursuant to 12 O.S.2001, § 2404(B). This notice included the indecent exposure which was alleged to have occurred at the garage sale during the summer of 2005.

Although evidence was presented about both of the indecent exposure incident, the jury was not instructed that the summer 2005 incident could only be used for the relevant purposes outlined in § 2404(B). This failure was the crowning error in this case, and despite the failure to request the limiting instruction, OUJI-Cr 2d 9-9 (Supp. 2000), we find that the failure to give the limiting instruction amounted to plain error, based on the entire record in this case.

The jurors were told by the prosecutor, who based her argument on the ruling of the trial court, that they could consider either the summer 2005

[1] Neither the parties, nor the trial court had the benefit of the preliminary hearing transcript, as it was not transcribed until after this trial concluded. Neither the counsel for the State nor the Defendant were present at the preliminary hearing in this case.

incident or the February 13, 2006, incident in determining whether the elements of indecent exposure had occurred. This argument would have likely led the jurors to believe that they could convict Appellant for indecent exposure for either the 2005 incident or the 2006 incident. This belief would have deprived Appellant of his due process right to be convicted of the offense charged, and not some other offense or theory for which he has no notice that he must be prepared to defend against. *See Patterson v. State*, 2002 OK CR 18, ¶ 23, 45 P.3d 925, 931.

The simple instruction to the jury regarding the use of the prior indecent exposure incident would have cured the error in this case. Therefore, the failure to give the instruction causes this Court to find that plain error occurred and requires this Court to reverse the indecent exposure count and remand the case to the district court for a new trial on that count.

DECISION

Count three of the Judgment and Sentence of the District Court is **REVERSED** and **REMANDED** for a **NEW TRIAL**. The remaining counts are **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2008), the MANDATE is ORDERED issued upon the delivery and filing of this decision.

APPEARANCES AT TRIAL

BERT RICHARD
ASSISTANT PUBLIC DEFENDER
OKLAHOMA COUNTY
320 ROBERT S. KERR
OKLAHOMA CITY, OK 73102
ATTORNEY FOR DEFENDANT

ANGELA MARSEE
ASSISTANT DISTRICT ATTORNEY
OKLAHOMA COUNTY
320 ROBERT S. KERR, SUITE 505
OKLAHOMA CITY, OK 73102
ATTORNEY FOR THE STATE

APPEARANCES ON APPEAL

ANDREA DIGILIO MILLER
ASSISTANT PUBLIC DEFENDER
OKLAHOMA COUNTY
611 COUNTY OFFICE BUILDING
320 ROBERT S. KERR
OKLAHOMA CITY, OK 73102
ATTORNEY FOR APPELLANT

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

OPINION BY: LEWIS, J.

LUMPKIN, P.J.: Concur in Results
C. JOHNSON, V.P.J.: Concur
CHAPEL, J.: Recused
A. JOHNSON, J.: Concur in Results