IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

VAL WILKERSON,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F-2007-909
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

C. JOHNSON, PRESIDING JUDGE:

Appellant, Val Wilkerson, was convicted after a jury trial in Haskell County District Court, Case No. CF-2007-51, of Rape by Instrumentation. The jury assessed punishment at thirty years imprisonment. The trial court sentenced Appellant accordingly. It is from this Judgment and Sentence that Appellant appeals to this Court.

Appellant raises the following propositions of error:

1. The State's excessive use at trial of irrelevant and highly prejudicial "other crimes" evidence was error that rendered the trial fundamentally unfair.

2. Prosecutorial/police misconduct in delivering an evidentiary harpoon on Wilkerson's invocation of his right to remain silent warrants reversal.

3. The trial court denied improperly Wilkerson's motion to correct jury instruction number 18 to conform to the evidence presented at trial.

4. The accumulation of errors in this case rendered the proceedings fundamentally unfair.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the

parties, we affirm Mr. Wilkerson's Judgment and modify his Sentence. As to Proposition I, we find first, that the application of 12 O.S.Supp.2007, §§ 2413 and 2414 to criminal trials for crimes which occurred prior to the enactment of these rules of evidence does not violate the ex post facto clause. *James v. State*, 2009 OK CR 8, ___ P.3d ___.

Next, we agree with Appellant that in order for evidence to be admissible under sections 2413 and 2414, it must be both relevant and, under 12 O.S.2001, § 2403, not unfairly prejudicial. *Horn v. State*, 2009 OK CR 7, ¶ 27, ___ P.3d ___. In the sexual assault context, when balancing the probative value of propensity evidence against its prejudicial effect under section 2403, certain factors are instructive and should be considered.

> [T]rial courts should consider, but not be limited to the following factors: 1) how clearly the prior act has been proved; 2) how probative the evidence is of the material fact it is admitted to prove; 3) how seriously disputed the material fact is; and 4) whether the government can avail itself of any less prejudicial evidence. When analyzing the dangers that admission of propensity evidence poses, the trial court should consider: 1) how likely is it such evidence will contribute to an improperly-based jury verdict; and 2) the extent to which such evidence will distract the jury from the central issues of the trial.

Horn, 2009 OK CR 7, ¶ 40 (citing *United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998)). However, in *United States v. Guardia*, 135 F.3d 1326, 1331 (10th Cir. 1998), the Tenth Circuit Court of Appeals enlarged upon these factors noting additional considerations which may influence an analysis of how probative the evidence is of the material fact it is admitted to prove. These considerations include 1) the similarity of the prior acts to the acts charged; 2)

the closeness in time of the prior acts to the charged acts; 3) the frequency of the prior acts; 4) the presence or lack of intervening events; and 5) the need for evidence beyond the testimony of the defendant and alleged victim. *See also United States v. Bernally*, 500 F.3d 1085, 1090-91. These considerations are instructive and should be included in the section 2403 analysis of sexual propensity evidence.

The record in the present case indicates that the victim of the crime for which Appellant was tried, K.C., testified that Appellant had taken her clothes off and put his finger inside her while she was sitting on his bed. She was not clear about some details surrounding the assault including whether or not her friend, Appellant's daughter, was in the room when it happened. K.C.'s testimony was not corroborated by the testimony of other witnesses or physical evidence. The defense went to great lengths to discredit K.C.'s testimony, calling seven family members who testified that they were in the house at the time that the alleged assault took place and that it could not have happened. Testimony was presented that Appellant and his wife had gone out for the evening and were not home when K.C. claimed to have been molested by Appellant.

In an effort to bolster the case against Appellant, the remainder of the State's case was comprised largely of witnesses who testified about other crimes and bad acts committed by Appellant during the twenty-five years preceding the crime for which Appellant was on trial. First, ten year old C.D., another friend of Appellant's daughter, testified that within the past year she

spent time with Appellant. On one occasion, she sat on his lap in the car so that she could drive, and he put his hand down under her panty line on her crotch. Next, Appellant's first wife, Willie Wilkerson, testified that while she was married to Appellant approximately twenty-five years earlier, she came home early and found Appellant and their fourteen year old neighbor undressed and together on the couch.[1] Finally, C.W., Appellant's step-daughter when he was married to Willie Wilkerson, testified that Appellant molested her numerous times when she was ten to eighteen years old. The molestation started while Appellant was married to her mother and continued after their divorce. C.W. testified that Appellant would give her alcohol to get her drunk and then have sexual intercourse with her after she passed out. He told her that he loved her and that he could be her dad if she would be with him. Their relationship ended approximately fifteen years prior to the crime for which Appellant was on trial.

In addressing Appellant's assertion that the probative value of this propensity evidence was substantially outweighed by its prejudicial effect, we consider the factors set forth in *Horn* and in *Guardia*. We find from the record that prior acts were clearly proved and that given the vigorous defense set forth at trial, the material fact that the crime in this case occurred was seriously disputed. Perhaps the most significant factor to consider in this case, is how probative the propensity evidence was of the material fact it was admitted to

[1] Mrs. Wilkerson subsequently divorced Appellant, who was twenty-eight or twenty-nine years of age at the time, and he married the neighbor girl when she turned fifteen. She was still Appellant's wife at the time of trial.

prove, i.e., that Appellant committed the sexual assault charged in this case. In making this determination, the factors set forth in *Guardia* are particularly instructive. In looking at the propensity evidence admitted at trial, this Court finds that Appellant's prior molestation of C.D. was similar in nature to the act he was alleged to have committed upon K.C, that C.D. was the same age as K.C. at the time of the assault and was also a friend of Appellant's daughter, and that the assault upon C.D. happened around the same time that he was alleged to have committed the assault upon K.C. By contrast, the crimes Appellant was alleged to have committed against his neighbor and C.W. involved sexual intercourse and occurred between fifteen to twenty-five years earlier. There was no evidence of any intervening events between the earlier assaults upon the neighbor and C.W. and the assault upon K.C. Given these factors, the crimes against the neighbor and C.W. can be found to have been far less probative of the material fact to be proved in this case. Finally, in analyzing the dangers of this propensity evidence, it can be found that given K.C.'s unwavering testimony that Appellant had assaulted her, it was unlikely that the propensity evidence contributed to an improperly-based jury verdict. However, the admission of the marginally probative and very prejudicial evidence that Appellant committed very serious sexual assaults fifteen to twenty-five years ago is likely to have been distracting to the jury.

In ruling all propensity evidence admissible, the record does not indicate that trial court weighed the probative value of the relevant evidence. While it is true that at the time of Appellant's trial, the trial court did not have the benefit

of guidance from this Court on how to determine the admissibility of propensity evidence under sections 2413 and 2414, the trial court's carte blanche admission of all propensity evidence constituted an abuse of discretion in this case. While the somewhat similar and contemporaneous assault against C.D. was properly admitted because its probative value was not substantially outweighed by its prejudicial effect, the same cannot be said of the earlier and more serious assaults against the neighbor and C.W. In light of the evidence properly admitted against Appellant, the admission of this improper propensity evidence likely did not affect the jury's finding of guilt. However, the same cannot be said of its effect on the jury's imposition of punishment. This conclusion is supported by the record which reveals that the prosecutor specifically asked the jury to sentence Appellant based in part on the improper propensity evidence. The jury seemingly did so. Accordingly, we remedy this error by modifying Appellant's sentence to fifteen years imprisonment.

With regard to error alleged in Proposition II, we find that while comment on a defendant's exercise of his right to remain silent is error, this error may be cured where objection to the improper comment is made, sustained and the jury admonished to disregard the same. *Garrison v. State*, 2004 OK CR 35, ¶ 96, 103 P.3d 590, 608. In light of the trial court's admonishment and the jury instruction reinforcing the same, the error in this case requires no relief.

Next, we find that the instructions as a whole adequately advised the jury of the applicable law. As the trial court did not abuse its discretion in

instructing the jury, this proposition warrants no relief. *Spence v. State*, 2008 OK CR 4, ¶ 8, 177 P.3d 582, 584.

Finally, we note with regard to error alleged in Proposition IV, that error alleged in Proposition I requires modification of Appellant's sentence. The remaining errors alleged, considered both singly and cumulatively, do not require relief because they did not render his trial fundamentally unfair or taint the jury's verdict. *DeRosa v. State*, 2004 OK CR 19, ¶ 100, 89 P.3d 1124, 1157, quoting *Lewis v. State*, 1998 OK CR 24, ¶ 63, 970 P.2d 1158, 1176.

DECISION

The Judgment of the district court is **AFFIRMED**. Appellant's Sentence is **MODIFIED** from thirty years imprisonment to fifteen years imprisonment. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2009), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF HASKELL COUNTY
THE HONORABLE BRIAN C. HENDERSON, ASSOCIATE DISTRICT JUDGE

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OPINION BY C. JOHNSON, P.J.
A. JOHNSON, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR IN RESULTS
CHAPEL, J.: DISSENT
LEWIS, J.: CONCUR

CHAPEL, J., DISSENTING:

I would reverse and remand this conviction and sentence for a new trial. See my dissent in *Horn v. State*, 2009 OK CR 7 and *James v. State*, 2009 OK CR 8.