IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FRED BENNETT WELCH,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F-2007-993
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

A. JOHNSON, VICE PRESIDING JUDGE:

Appellant Fred Bennett Welch was tried by jury and convicted in the District Court of Rogers County, Case No. CF-2004-174, of First Degree Rape (Count 1) in violation of 21 O.S.Supp.2002, §§ 1111 and 1115, and Rape by Instrumentation (Count 2) in violation of 21 O.S.2001, § 1111.1. The jury fixed punishment at thirty-five years imprisonment on Count 1 and fifteen years imprisonment on Count 2. The Honorable Dynda Post, who presided at trial, sentenced Welch accordingly and ordered the sentences to be served consecutively. From this judgment and sentence Welch appeals, raising the following issues:

(1) whether he received ineffective assistance of counsel because defense counsel failed to call him after promising the jury in opening statement that he would testify;

(2) whether defense counsel was ineffective for other reasons;

(3) whether he was denied the right to testify;

(4) whether he was denied a fair trial by the erroneous admission of other-crimes evidence;

(5) whether he was denied a fair trial because of improper argument by the prosecutor;

(6) whether the trial court erred in excluding evidence;

(7) whether the trial court erred in allowing the prosecutor to discuss a "study" in front of the jury;

(8) whether it was improper for the trial court to order his sentences to be served consecutively;

(9) whether his trial was unfair because the errors committed below cannot be found harmless; and

(10) whether he was denied a fair trial based on an accumulation of error theory.

We find reversal is required for the reasons discussed below.

1. INEFFECTIVE ASSISTANCE OF COUNSEL

At the heart of Welch's first claim lies defense counsel's broken promise that jurors would hear what happened from Welch himself in a case that would be decided in large measure by the jury's assessment of the credibility of the defendant and the prosecutrix. It is unclear whether trial counsel's strategy about Welch testifying changed after opening statement or was always a decision in progress. Defense counsel promised the jury that it would hear from Welch and he reneged on his promise without explaining to the jury why he did so. Turnabouts of this kind may be justified when unexpected developments warrant changes in previously announced trial strategies. *Hampton v. Leibach*, 347 F.3d 219, 257 (7th Cir.2003). There is nothing,

however, in the record to support a finding that some unforeseeable event occurred forcing a change in strategy. The damage from failing to present promised testimony can be particularly acute when it is the defendant himself whose testimony fails to materialize. *Id.* The First Circuit Court of Appeals put it this way:

> When a jury is promised that it will hear the defendant's story from the defendant's own lips, and the defendant then reneges, common sense suggests that the course of trial may be profoundly altered. A broken promise of this magnitude taints both the lawyer who vouchsafed it and the client on whose behalf it was made.

Ouber v. Guarino, 293 F.3d 19, 28 (1st Cir. 2002).

This case is different from those where unforeseen events occurred at trial because the potential disadvantages of Welch's testimony were known at the outset of trial and thus cannot justify defense counsel's decision to renege on his promise to the jury that Welch would testify. Counsel had the opportunity to assess his client's strengths and weaknesses as a prospective defense witness prior to opening statement. If defense counsel had legitimate reasons to conclude that Welch should not testify, it was unreasonable for him to promise the jury that Welch would take the stand.

Finding an error in professional judgment does not end our inquiry. Only if there is a reasonable probability that the error affected the outcome of the case will relief be warranted. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Head v. State,* 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148. Welch's jury was led to believe that Welch had a story to tell that was diametrically opposed to that of his accuser. Welch's jury

was told that it would have the opportunity to evaluate Welch's own credibility in deciding what happened that day. In the end, however, the jury never heard what happened from Welch; it heard only the State's account of events. Welch's unexplained failure to take the witness stand may well have conveyed to the jury the impression that Welch's story to police was unworthy of consideration because he failed to corroborate it on the stand as promised and that the inculpatory testimony of the State's witnesses was essentially correct. We considered this error in conjunction with the admission of improper other crimes evidence, and we find relief is required.

2. OTHER CRIMES EVIDENCE

Evidence that Welch made sexual advances towards his step-daughter when she was eighteen-years-old was admissible to show Welch's motive and intent. There is a visible connection between this bad act evidence and the charged crimes and the evidence was probative of the issue of consent. *See Lowery v. State,* 2008 OK CR 26, ¶ 9, 192 P.3d 1264, 1268. The probative value of this evidence was not outweighed by the danger of unfair prejudice. *Id.* The same cannot be said about the evidence that Welch molested his step-daughter when she was seven or eight-years-old. Molesting a seven-year-old is substantially different in degree than a sex crime against a young woman almost nineteen-years-old. Consent is not an issue with a child. Evidence that Welch was not only a person who abused the trust of young adult women who were like daughters to him, but was also a child molester was extremely

prejudicial. The prosecutor emphasized Welch's inappropriate conduct with a seven-year-old and attempted to maximize the potentially prejudicial impact of this evidence during closing argument. Based on the facts and circumstances of this case, we find that the evidence of child molestation was inadmissible under any of the exceptions to the rule against other crimes evidence and that the trial court committed plain error in admitting this evidence. When this error is considered with defense counsel's deficient performance, relief in the form of a new trial is required.

DECISION

The Judgment and Sentence of the District Court is **REVERSED** and the matter is **REMANDED for a new trial.** Under 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 ROGERS COUNTY
THE HONORABLE DYNDA POST, DISTRICT JUDGE

APPEARANCES AT TRIAL
JONATHAN M. SUTTON
ATTORNEY AT LAW
4401 S. HARVARD
TULSA, OK 74135
ATTORNEY FOR DEFENDANT

PATRICK ABITBOL
ASSISTANT DISTRICT ATTORNEY
ROGERS COUNTY COURTHOUSE
219 S. MISSOURI ST., RM. 111-1
CLAREMORE, OK 74017
ATTORNEY FOR STATE

APPEARANCES ON APPEAL
GLOYD L. MCCOY
MCCOY LAW OFFICE
600 SKYRIDGE TRAIL
NOBLE, OK 73118
ATTORNEY FOR APPELLANT

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

OPINION BY: A. JOHNSON, V.P.J.
C. JOHNSON, P.J.: Concur
LUMPKIN, J.: Dissent
CHAPEL, J.: Concur
LEWIS, J.: Concur in Result

RC

LUMPKIN, JUDGE: DISSENT

Nothing in the record before this Court indicates the fact that Appellant did not testify was the product of anything other than his own deliberate choice. Further, the record does not show that Appellant suffered any prejudice because of his failure to testify or because of counsel's conduct. The record is void of any Rule 3.11 Motion for an Evidentiary Hearing on Sixth Amendment grounds together with affidavits stating that Appellant wanted to testify but was prevented from doing so. In light of the evidence against him, there is no reasonable probability that Appellant's failure to testify or counsel's comments to the contrary contributed to the verdict.

As to the other crimes evidence, I find it admissible under the "greater latitude rule" as codified by the Oklahoma Legislature at 12 0.S.Supp. 2007, §§ 2413, 2414. *See James v. State*, 2008 OK CR 8, ¶ 6, ___ P.3d ___. The alleged molestation of the young step-daughter was a kiss on the mouth which was not the focus of the witness' testimony. The probative value of the evidence was not outweighed by prejudice in light of the trial court's limiting instruction on the evidence and as the kiss was not an act which an average juror would necessarily view as a crime. Under these circumstances, Appellant received a fair trial and no new trial is warranted.