

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

GOLDY ROMEO McNEARY,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

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Case No. F-2018-360

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

OCT 31 2019

JOHN D. HADDEN
CLERK

SUMMARY OPINION

LEWIS, PRESIDING JUDGE:

Goldy Romeo McNeary, Appellant, was tried by jury and found guilty of Counts 1 and 2, lewd acts with a child under 16, in violation of 21 O.S.Supp.2015, § 1123, in the District Court of Oklahoma County, Case No. CF-2016-6236. The jury set punishment at ten (10) years imprisonment on each count. The Honorable Timothy R. Henderson, District Judge, pronounced judgment and ordered the sentences served consecutively, with credit for time served.¹ The trial court also imposed post-

¹ Appellant must serve 85% of his sentence before being eligible for consideration for parole. 22 O.S.Supp.2015, § 13.1(18).

imprisonment supervision and various fees and costs. Mr. McNeary appeals in the following propositions of error:

1. The trial court erred in improperly admitting evidence of other bad acts which denied Appellant a fair trial and constitutes reversible error;
2. The trial court erred by admitting propensity evidence that was more prejudicial than probative in contravention of *Horn v. State* and Appellant's fundamental due process right to a fair trial;
3. The trial court erred by not giving a limiting instruction contemporaneously to the 2404(B) and 2413 evidence introduced at trial in violation of Mr. McNeary's constitutional right to a fair trial;
4. The trial court erred by not allowing evidence about the nature of Speck homes;
5. Trial errors, when considered in a cumulative fashion, warrant a new trial.

In propositions one and two, Appellant attacks the admission of other crimes evidence which was permitted pursuant to 12 O.S.2011, § 2404, and 12 O.S.2011, § 2413. Appellant raised no contemporaneous objections to this evidence at the time it was introduced; therefore, this Court reviews for plain error only. *Andrew v. State*, 2007 OK CR 23, ¶ 24, 164 P.3d 176, 188 (holding that a contemporaneous objection must be made at the time the alleged error is being committed). To prevail under plain error

review, Appellant must show: “1) the existence of an actual error (i.e., deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding.” *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. *See also Simpson v. State*, 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d 690, 694-95, 698. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

Testimony from J.A. was minimally relevant as other bad acts. Admission of the evidence, however, did not rise to the level of plain error, because Appellant cannot show that the error affected the outcome of these proceedings. Even absent this evidence, Appellant’s guilt was clear and uncontroverted.

Evidence from D.R. was relevant and was admissible pursuant to both section 2404(B) and section 2413. Section 2413 provides a more liberal allowance for the introduction of other crimes evidence. The introduction, however, must be weighed against certain dangers which are spelled out in *Horn v. State*, 2009 OK CR 7, 204

P.3d 777. Here, none of the dangers were sufficient enough to suppress this evidence. We find no plain error in the introduction of this evidence.

In proposition three, Appellant attacks the method in which the trial court instructed on the use of other crimes evidence. The trial court told Appellant that it would give limiting instructions prior to the testimony being introduced. The trial court, however, failed to do so and Appellant failed to remind the trial court of its previous ruling. The trial court did give a limiting instruction during J.A.'s testimony telling the jury the limited nature of J.A.'s testimony, as well as, previously introduced D.R.'s testimony. The trial court also gave a written instruction at the conclusion of the trial.

There was no error in the method of instruction and Appellant cannot show that he was harmed by the lack of a contemporaneous instruction. The trial court's section 2404 instruction limited the jury's consideration of D.R.'s testimony more than needed, because it was admissible pursuant to section 2413 as propensity evidence. Clearly, the method of instruction did not constitute reversible error under the standard in 20 O.S.2011, § 3001.1 ("No judgment shall

be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or for error in any matter of pleading or procedure, unless it is the opinion of the reviewing court that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.”).

Appellant’s proposition four also raises an evidentiary issue. Appellant claims the trial court erred by not allowing evidence about the nature of Speck Homes. Appellant preserved this issue by making a proffer during trial. We, therefore, review for an abuse of discretion.

The admission of evidence lies within the sound discretion of the trial court and, when the issue is properly preserved for appellate review, we will not disturb the trial court's decision absent an abuse of discretion. *Pavatt v. State*, 2007 OK CR 19, ¶ 42, 159 P.3d 272, 286. An abuse of discretion is a clearly erroneous conclusion and judgment, contrary to the logic and effect of the facts presented. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

Appellant argues that the evidence is relevant to show why the residents are so closely monitored, and this close supervision shows that the alleged acts could not have happened.

The State argues that the evidence is barred by the rape shield statute.

Oklahoma's rape shield statute limits the admissibility of relevant evidence in rape cases. . . . [W]here consent is not at issue, a defendant should be prohibited from cross-examination regarding the victim's prior sexual relations with others, and such cross-examination is improper when directed to any witness, not just the victim. In addition, the testimony would have been cumulative or of limited relevance at best.

Mitchell v. State, 1994 OK CR 70, ¶ 32, 884 P.2d 1186, 1199, *overruled on other grounds by Mitchell v. Ward*, 150 F.Supp.2d 1194 (W.D. Okla. 1999). Appellant failed to properly introduce this type of evidence by giving proper notice under the statute, 12 O.S.2011, § 2412. “Section 2412(B)(2) permits the introduction of evidence of specific instances of sexual behavior if offered for a purpose other than the issue of consent, including proof of the source of injury.” *Dill v. State*, 2005 OK CR 20, ¶ 5, 122 P.3d 866, 868.

Here, Appellant’s reason for introduction was for a purpose other than the issue of consent. The defense was the lack of

opportunity. Appellant claims that the nature of the residents' reasons for being at Speck Homes was relevant to show that they were closely monitored. The evidence was clear, however, that the residents were closely monitored. Appellant was merely trying to circumvent the rape shield laws and trying to place the victim in a bad light.

Any further evidence regarding the nature of Speck Homes and the residents housed there would have been substantially outweighed by the dangers of needless cumulative evidence and confusion of the issues. See 12 O.S.2011, § 2402. The trial court did not abuse its discretion.

In proposition five, we find that there are no individual errors requiring relief. Reviewing the entire record and the propositions of error in a cumulative fashion, we find that Appellant was not denied a fair trial or sentencing proceeding by egregious or numerous errors. *Bench v. State*, 2018 OK CR 31, ¶ 226, 431 P.3d 929, 981. Proposition five is, therefore, denied.

DECISION

The judgment and sentence is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY THE HONORABLE TIMOTHY R. HENDERSON, DISTRICT JUDGE

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OPINION BY: LEWIS, P.J.
KUEHN, V.P.J.: Concur
LUMPKIN, P.J.: Concur
HUDSON, J.: Concur
ROWLAND, J.: Concur

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