No. 22-7663

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

AARON DAVID WALDON – PETITIONER

VS

STATE OF OKLAHOMA –RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

OKLAHOMA COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

AARON DAVID WALDON

120 CONNER ROAD

HOMINY, OKLAHOMA 74035

QUESTION(S) PRESENTED

I. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING THE ADMISSION OF EVEIDENCE OF A RECORDING BELIEVED TO BE PETITIONER AND AN UNKNOWN MALE AS PROPENSITY EVIDENCE AS IT WAS MORE PREJUDICIAL THAN PROBATIVE IN CONTRAVENTION OF HORN V STATE AND PETITIONERS FUNDAMENTAL DUE PROCESS RIGHT TO FAIR TRIAL.

II. STATES EXHIBIT 1 WAS IMPROPERLY ADMITTED AS EVIDENCE OF INTENT AND/OR ABSENCE OF MISTAKE OR ACCIDENT

III. BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT PETITIONERS CONVICTIONS OF SEXUAL ASSAULT, DUE PROCESS REQUIRES HIS CASE TO BE REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS COUNTS 2 AND 3.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Burks v United States, 437 U.S. 1, 98 S. Ct. 2141, 57 L.Ed. 2d 1 (1978)

Guardia v United States, 135 F.3d 1326 (10th Circuit 1998)

Jackson v Virginia, 443 U.S. 307, 99 S. Ct 2781, 61 L.Ed. 2d 560 (1979)

Kogan v People, 756 P.2d 945 (Colo 1988)

United States v Taylor, 113 F.3d 1136 (10th Cir. 1997)

In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970)

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CASES

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OTHER

NONE

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

FROM STATE COURT

The opinion of the highest state court to review the merits appears at Appendix 1to the petition and is UNPUBLISHED

JURISDICTION

FROM STATE COURT

The date on which the highest state court decided my case was December 8, 2022. A copy of that decision appears at Appendix 1

[X] An extension of time to file the petition for a writ of certiorari was granted to and including May 7, 2023 on March 20, 2023 in Application No 22A827

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitutional Amendment V

United States Constitutional Amendment XIV

United States Constitutional Amendment VI

IN THE SUPREME COURT OF THE UNITED STATES

AARON D WALDON

Petitioner

V **Case No. _____**

STATE OF OKLAHOMA

Respondent

STATEMENT OF THE CASE

Petitioner, Aaron David Waldon, was charged by information in Oklahoma County District Court Case No. CF-2018-3202 with Count 1, indecent or lewd acts with a child under sixteen (16) in violation of 21 OK § 1123 and Counts 2 and 3, sexual battery in violation of 21 OK § 1123(b).

Assistant Oklahoma County Public Defenders Jonathan Neal and Nicole Burns represented Appellant at trial. Oklahoma County Assistant District Attorneys Kelly Collins and Lori McConnell prosecuted the case in the name of the State of Oklahoma.

At a jury trial held on April 26-28, 2021; before Judge Heather E Coyle, the jury found petitioners guilty on all counts. After the second stage of trial, the jury recommended the sentences of twenty-five (25) years to do on count one and five (5) years to do on counts 2 and 3. At formal sentencing held on September 7, 2021, the

Mr. Waldon now appeals these convictions.

STATEMENT OF FACTS

The charges in the present case stem from three (3) occurrences that occurred on March 14, 2017, June 6, 2018, and June 10, 2018. (Tr. 51, 101, 137-138)

Johnathon Hunter testified that on March 14, 2017, he was visiting his former workplace, PaceButler Corporation. He explained that at the time, Tom Pace was his mentor. (Tr. 49-50) According to Mr. Hunter, around lunchtime, he decided to walk home. Mr. Waldon offered him a ride home, and initially Mr. Hunter declined. The witness explained that he eventually accepted the offer because Mr. Waldon kept asking. Mr. Hunter testified that he did not feel comfortable in the car with Mr. Waldon because they were not friends. They were acquaintances. (Tr. 51-55) Mr. Hunter further explained that Mr. Waldon repeatedly offered Mr. Hunter food, and again, Mr. Hunter eventually accepted the offer and agreed to go to Braums. The two gentlemen went inside the restaurant and bought ice cream. According to Mr. Hunter, when they returned to the car, Mr. Waldon asked Mr. Hunter if he wanted a massage. Mr. Hunter explained that he agreed to get a massage and believed that Mr. Waldon would take him somewhere to get a massage. (Tr. 55-58) Mr. Waldon explained to Mr. Hunter that he had gone to school for massaging. According to the witness, Mr. Waldon started massaging Mr. Hunter's left thigh. Mr. Hunter explained that Mr. Waldon was ducking down so that other people in the parking lot could not see him. Mr. Hunter testified that he could not remember everything, but he

remembered Mr. Waldon sticking his hand in Mr. Hunter's pants and touching Mr. Hunter's penis. Mr. Hunter stated that at the time, he was twenty (20) years old, and he had never been touched there before. Mr. Hunter was a virgin. (Tr. 60-62)

According to Mr. Hunter, the entire encounter lasted approximately an hour. Mr. Waldon dropped Mr. Hunter off in Mr. Hunter's driveway. Mr. Waldon continued to touch Mr. Hunter's "legs and stuff" while in the driveway. Mr. Hunter stated that Mr. Waldon told him not to tell Tom Pace, and Mr. Waldon told him, "Don't tell anyone. They won't believe you." Finally, Mr. Hunter explained that Mr. Waldon told him that if Mr. Hunter told anyone, Mr. Waldon would be very angry. (Tr. 63-65) Mr. Hunter testified that he agreed to everything Mr. Waldon said. However, after Mr. Waldon left, Mr. Hunter called three people from PaceButler: Tom Pace and two (2) other individuals. Mr. Hunter spoke to Mr. Pace the next day. Mr. Waldon was present during the conversation. According to Mr. Hunter, Mr. Pace did not want to get the police involved. Mr. Hunter contacted the police and reported what happened. (Tr. 65-66, 69-70)

Mr. Hunter explained that he did not want Mr. Waldon to touch his penis. He also testified that he did not tell Mr. Waldon that he did not want Mr. Waldon to touch him, and he never told Mr. Waldon to stop. (Tr. 66-67, 78)

OCPD master sergeant, Jason Burgess, testified that on March 16, 2017, he was dispatched to a sober living facility located at 2624 North Geraldine

Avenue to receive information in respect to a sexual assault that had occurred a couple days prior. The alleged victim was Johnathon Hunter, and the suspect was Aaron Waldon. (Tr. 38, 40, 43-45)

M. A., III, (M.A.) testified that on June 6, 2018, he was fourteen (14) years old, and he and his two siblings were hanging out at The Village Library. He explained that he was there playing a computer game when he noticed Mr. Waldon. M. A. stated that he recognized Mr. Waldon because Mr. Waldon gave M.A. and a friend a ride to McDonald's on a previous day. (Tr. 101-103) According to M.A., Mr. Waldon was sitting at the computer next to M.A. The witness testified that during their conversation, Mr. Waldon asked M.A. if he needed a job. M.A. responded, "Yeah," and Mr. Waldon began discussing places M.A. could work. According to M.A., Mr. Waldon asked M.A. if he wanted to discuss jobs out in Mr. Waldon's car. M.A. agreed, and the two walked out to Mr. Waldon's car, a white Honda. (Tr. 105-107) (State's Ex. 2)

According to M.A. while he and Mr. Waldon were in the car, Mr. Waldon mentioned making money as a massage therapist, then Mr. Waldon started to touch M.A.'s upper left thigh. (Tr. 108-110) M.A. explained that he just sat there and stared because he did not know what to do. M.A. testified that Mr. Waldon unbuckled M.A.'s belt, unzipped M.A.'s pants, then started touching M.A.'s penis under M.A.'s underwear. M.A. stated that he was in a frozen state of shock. He was just staring and crying. (Tr. 111-112) According to M.A., the incident lasted

approximately seven and a half minutes (7.5).[1] M.A. stated that eventually, he hit Mr. Waldon "real hard" in Mr. Waldon's cheek/neck area, and M.A. got out of the car. The witness explained that he went to the front of the library and sat against a brick beam crying. (Tr. 112-114) M.A. testified that he did not want Mr. Waldon to touch his penis. He also explained that, initially, he did not want to say no to the massage because he did not want to jeopardize his chance of getting a job. M.A. stated that as he sat there crying a woman approached him and asked him what was wrong. According to the witness, at some point Mr. Waldon sped out of the parking lot. (Tr. 113-114, 118)

Juliette Hulen testified at she was at The Village Library on June 6, 2018, and she saw a young man run from the parking lot up to her on the sidewalk yelling and screaming. According to Ms. Hulen, the young man was running toward the entrance of the library. She also explained that the young man told her his first name, and the young man was pointing back at a white vehicle and said, "That man molested me. He molested me." (Tr. 83-85) According to the witness, the young man was trembling, shaking out of control, and he could barely speak after yelling. Ms. Hulen explained that she saw that the young man "was grabbing his pants, his buckle was undone and his pants were unzipped." (Tr. 85) Ms. Hulen explained that she waited with the young man for a while, and he was crying. She saw a new model Honda that eventually backed out of its spot and drove away. She also testified that she and the young man went

[1] M.A. wrote in his statement to the police that Mr. Waldon touched him for "like four to six seconds." (Tr. 119)

inside the library to talk to the librarian. Ms. Hulen explained that the man in the white car had been on the computers. According to the witness, the police eventually arrived. (Tr. 85-87)

Nick Hanson, a corporal with The Village Police Department, was dispatched to The Village Library at around 5:37 p.m. on June 6, 2018. The dispatch was for a sexual assault. The witness made contact with the alleged victim, M.A., III. (Tr. 90-92) According to the witness, M.A. "was very upset. Just staring at the floor kind of shaking. On the verge of tears." (Tr. 92) Corporal Hanson testified that he received a receipt from M.A. that had a handwritten phone number and the name "Aaron." The officer explained that he checked the phone number and found the full name Aaron Waldon. (Tr. 94-96)

Kamron Sellers testified that in June of 2018, he was nineteen (19) years old and working at Dollar Tree located at 2137 West Danforth in Edmond, Oklahoma. According to the witness, Mr. Waldon came to the witness's job three (3) times. During the first and second visits, Mr. Waldon approached him and offered Mr. Sellers a job. (Tr. 126-130, 132) On the third visit, Mr. Waldon still offered Mr. Sellers a job. The witness explained that he told Mr. Waldon that he would think about it, but Mr. Sellers had to close the store. According to the witness, Mr. Waldon waited outside for Mr. Sellers to get off work. Mr. Seller explained that he took the store's deposit/cash to the bank, and when he came back Mr. Waldon was still there. The two men discussed the job opportunity while sitting inside Mr. Waldon's car, a white Honda. According to Mr. Sellers,

Mr. Waldon never actually said what type of job it was he was offering Mr. Sellers. He also explained that Mr. Waldon started naming off jobs that Mr. Sellers could do for Mr. Waldon. (Tr. 130-131)

Mr. Sellers explained that at some point Mr. Waldon started massaging Mr. Sellers shoulders then worked his way down to Mr. Sellers leg. According to the witness, Mr. Waldon eventually started touching Mr. Sellers's penis over Mr. Sellers's clothing. Mr. Sellers testified that he was in Mr. Waldon's car for "about an hour." He also explained that he "was pretty much froze" and did not know what to do. He stated that he told Mr. Waldon to stop, and Mr. Waldon said, "This is getting kind of weird." According to Mr. Sellers, he responded, "Yes, it is cuz you're touching my -- my genital area." (Tr. 132-134) Mr. Sellers also testified that Mr. Waldon told him that Mr. Waldon could be his dad. The witness explained that Mr. Waldon took Mr. Sellers's phone and put Mr. Waldon's phone number into it. According to the witness, Mr. Waldon also put Cashapp on Mr. Sellers's phone and told Mr. Sellers that he could help Mr. Sellers get money. (Tr. 135-136)

Mr. Sellers testified that he did not want Mr. Waldon to touch his penis, but he never attempted to push Mr. Waldon's hand away. According to the witness, Mr. Waldon never made any threats or told Mr. Sellers that he could not leave. (Tr. 139-142)

Any and all other necessary facts will be contained in the relevant propositions of error below.

PROPOSITION I

THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING THE ADMISSION OF EVIDENCE OF A RECORDING BELIEVED TO BE MR. WALDON AND AN UNKNOWN MALE AS PROPENSITY EVIDENCE AS IT WAS MORE PREJUDICIAL THAN PROBATIVE IN CONTRAVENTION OF *HORN V. STATE* AND APPELLANT'S FUNDAMENTAL DUE PROCESS RIGHT TO A FAIR TRIAL.

Darren Gordon, an Oklahoma County District Attorney's Office investigator, testified for the State pursuant to Okla. Stat. tit. 12, § 2413[2] which allows for the admission of other offenses of sexual assault to prove the propensity of the defendant to commit such crimes.[3] (Tr. 207-228) During Mr. Gordon's testimony, the State introduced State's Ex. 1, a disk containing two videos obtained from a recording device found in Mr. Waldon's vehicle. On these videos, the jury could hear the voice of two men discussing sex and sexual acts.[4] Mr. Gordon testified that he believed one voice on the recording to be that of Mr. Waldon.[5] He also stated that he believed the second voice to be that of a very young male. (Tr. 219-221)

The trial court abused its discretion by admitting this evidence as it was not propensity evidence. "This Court reviews a trial court's evidentiary rulings for an abuse of discretion. An abuse of discretion is a conclusion or judgment

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[2] Initially, the trial court admitted the evidence under § 2413 and 2414; however, during the jury instruction conference, the trial court ruled that no evidence was presented related to child molestation and gave only the instruction regarding sexual assault under § 2413. (12/04/2020 Tr. 27-29) (Tr. 258)

[3] Prior to the introduction of this evidence, a hearing was held on the December 1, 2020 and December 4, 2020. (12/01/2020 Tr. 33-55) At the conclusion of the hearing, the trial court ruled that the evidence would come in as propensity and *Burks* evidence. (12/04/2020 Tr. 26-29) Defense counsel renewed his objection prior to the admission of the recordings. (Tr. 220)

[4] Both videos contained the same conversation between the two individuals. (State's Ex. 1)

[5] Mr. Waldon did not testify at trial, so the jury was never able to hear Mr. Waldon's voice. (Tr. 231, 245)

that is clearly against the logic and effect of the facts presented. *Williams v. State*, 2021 OK CR 19, ¶ 6, 496 P.3d 621, 624 (internal citations omitted).

> [When determining the relevance of propensity evidence] trial 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 v. State, 2009 OK CR 7, ¶ 40, 204 P.3d 777, 786.

A. How clearly the prior act has been proved

"The propensity evidence must be established by clear and convincing evidence." *Id.* At both the two-day pretrial hearing and at trial, the State failed to introduce any evidence regarding who the second individual on the video actually was. Instead, the State relied on testimony from Mr. Gordon to establish that the voice sounded like that of a young male. (12/01/2020 Tr. 45-46) (Tr. 218-219, 221) § 2413(A) states: "In a criminal case in which the defendant is accused of an offense of sexual assault, **evidence of the defendant's commission of another offense or offenses of sexual assault is admissible**, and may be considered for its bearing on any matter to which it is relevant." Okla. Stat. tit. 12, § 2413. Under § 2413, the video was only admissible as propensity evidence if the State could establish that it constituted an act of sexual assault. It was clear that the second individual gave full consent to

participate in whatever was occurring on the video.[6] Therefore, under § 2413(D), the State was required to prove that the individual was under sixteen (16) years old in order to prove an actual offense of sexual assault. Without the State establishing the identity and/or the age of the second individual, the State could not prove that the recording was evidence of Mr. Waldon committing another offense of sexual assault. Therefore, the State could not establish the alleged propensity evidence by clear and convincing evidence. The recordings became nothing more than a conversation and consensual acts between to males, not propensity evidence.

B. More prejudicial than probative

This Court also held that evidence that is admitted under Okla. Stat. tit. 12, § 2413 is subject to Okla. Stat. tit. 12, § 2403's balancing test; meaning, that the probative value of any evidence admitted pursuant to § 2413 cannot be outweighed by its prejudicial effect. *Horn*, 2009 OK CR at ¶ 39. In *Guardia v. United States*, 135 F.3d 1326, 1330 (10th Cir. 1998) the Tenth Circuit Court of Appeals held that the trial court must balance the propensity evidence proffered by the prosecution against the, "...danger of unfair prejudice, confusion of the issues, or misleading the jury, or...considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Therefore, the trial court's application of the § 2403 balancing test is not just for unnecessarily prejudicial

[6] The voice Mr. Gordon testified belonged to a young male could clearly be heard saying, "See, it'll be worth it. . . Every time you come see me." (State's Ex. 1, 01:09-01:14)

evidence but also evidence that might be confusing, cumulative, misleading, overly time-consuming or needless under § 2403.

Through Mr. Gordon's opinion testimony and State's Ex. 1, the State was able to introduce highly prejudicial misleading evidence of a conversation even though the State could not prove was an illegal act. Neither, Mr. Gordon, the State, nor the trial judge had any idea who the second voice on the recording actually was. Other than that the recording came from a device inside Mr. Waldon's car, the facts of the situation recorded bear only marginal resemblance to those of the current cases. It was clearly a consensual encounter, but the State was allowed to mislead the jury and say that it was evidence of a prior sexual assault. The prosecutor even told the jury that the "young. . . person [told Mr. Waldon] stop" further misleading the jury.[7] (Tr. 274)

The prejudice caused by the evidence was only made worse by the instruction on propensity evidence given to the jury. Unlike the instruction regarding other crimes evidence, the instruction given to the jury regarding propensity evidence told the jury that they could "consider this evidence for its bearing on any matter to which it is relevant along with all of the the other evidence and give this evidence the weight, if any, [they] deem[ed] appropriate in reaching [their] verdict." (O.R. 364) *See also,* Instruction No. 9-10A, OUJI-CR(2d).

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[7] The only portion of the video where the second individual says anything in the negative occurs after the voice believed to be Mr. Waldon requests a sexual act, the second individual replies, "Nah... . tomorrow." (State's Ex. 1, 00:45-00:48)

Mr. Waldon's jury verdict was improperly based on evidence of this propensity evidence in violation of his due process right to a fair trial. U.S. Const. amends. V, XIV; Okla. Const. art. 2, § 7. As such, he respectfully asks that this Court reverse and remand this matter with instructions to prohibit the introduction of overly prejudicial testimony pertaining to propensity evidence; or in the alternative, grant any further relief this Court deems just and equitable.

PROPOSITION II

STATE'S EXHIBIT 1 WAS IMPROPERLY ADMITTED AS EVIDENCE OF INTENT AND/OR ABSENCE OF MISTAKE OR ACCIDENT.

Mr. Waldon was on trial for charges stemming from events related to M.A., Mr. Sellers, and Mr. Hunter. However, during the course of the trial, the State presented evidence of alleged prior bad acts. A hearing regarding the admissibility of this evidence was held prior to trial. At the hearing, the State introduced testimony from Darren Gordon and State's Ex. 1. (12/01/2020 Tr. 33-55) At the conclusion of the hearing, the trial court ruled that a portion of this evidence, State's Ex. 1, would be allowed in under Okla. Stat. tit. 12, § 2413 and 2414[8] and evidence of lack of accident or mistake under *Burks*.[9] (12/04/2020 Tr. 26-29)

As previously stated, although the situation recorded on the video occurred in a car, nothing else between it and the charged crimes was similar.

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[8] *See* Proposition I, *supra*.

[9] *Burks v. State*, 1979 OK CR 10, 594 P.2d 771, *overruled by Jones v. State*, 1989 OK CR 7, 772 P.2d 922.

This Court has stated that "similarity between crimes, without more, is insufficient to permit admission." *Driskell v. State*, 1983 OK CR 22, ¶ 20, 659 P.2d 343, 349)(internal citation omitted). "The general rule is that 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 on other grounds *Jones v. State*, 1989 OK CR 7, ¶ 8, 772 P.2d 922, 925 (citing *Smith v. State*, 1911 OK CR 37, 113 P. 204 and *Atnip v. State*, 1977 OK CR 187, ¶ 10, 564 P.2d 660, 663).

Okla. Stat. tit. 12, § 2404(B) controls the admission of evidence of other crimes, wrongs, or acts. The statute is clear that such evidence is inadmissible to prove character of a person in order to show action in conformity therewith. Other crimes evidence is only admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Okla. Stat. tit. 12, § 2404(B); *Id.* at n. 1. Evidence of a prior bad act can only be admitted into evidence if it is offered for a purpose specifically identified in §2404(B). *James v. State*, 2007 OK CR 1, ¶ 3, 152 P.3d 255, 257.

This Court has stated that specific factors are necessary for the use of other crimes evidence, and the most important of these were not met by the State in this case. *Id.* "There must be a visible connection between the other crimes evidence and the charged crimes. The evidence must go to a disputed issue and be necessary to support the State's burden of proof, and its probative value must

outweigh the danger of unfair prejudice...." *Id.* See *also Lowery v. State*, 2008 OK CR 26, ¶ 9, 192 P.3d 1264, 1267. When a timely objection has been made, this Court reviews a trial court's decision to allow the admission of other crimes evidence for an abuse of discretion. *Wall v. State*, 2020 OK CR 9, ¶ 5, 465 P.3d 227, 232.

> "An abuse of discretion is any unreasonable or arbitrary action made without proper consideration of the relevant facts and law, also described as a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts." [When a claim is] properly preserved, the State must demonstrate on appeal that admission of the challenged evidence "did not result in a miscarriage of justice or constitute a substantial violation of a constitutional or statutory right."

Bramlett v. State, 2018 OK CR 19, ¶ 19, 422 P.3d 788, 795 (*citing Mitchell v. State*, 2016 OK CR 21, ¶ 13, 387 P.3d 934, 940 and *Welch v. State*, 2000 OK CR 8, ¶ 10, 2 P.3d 356, 366).

A. Visible Connection/ Disputed Issue/State's Burden of Proof

The limiting instruction given in this case lists the exception under which this other crimes evidence was allowed in as proof of intent[10] and absence of mistake or accident." (O.R. 363) (Tr. 205-206) State's Ex. 1 and Mr. Gordon's testimony regarding the recording does not fit into these exceptions.

[10] The trial court never ruled that the State could admit this evidence to prove intent. "And that also under *Burks* as well to show lack of accident or mistake. And so that will be the ruling of the Court." (12/04/2020 Tr, 29)

At the December 4, 2020 hearing where argument was heard regarding the admission of the *Burks* evidence, the State argued that State's Ex. 1 was admissible to counter statements made by Mr. Waldon during his interrogation by detectives. (12/04/2020 Tr. 14)

> . . . I'm sure this Court knows having heard the defendant's interview his -- the defendant's position to the detectives was not that it didn't happen, but he's saying, I did engage in massages sometimes, but anything that happened was accidental and there was no sexual component to it at all. And so what we have here is direct evidence that he has people in his vehicle that are young males, and he is engaging in sexual behavior with them. So it goes to combat the defense that they have which is that this was accidental touching. That it's not sexual touching. Because as the Court knows one of the most important elements that we have to prove is is[sic] the intent. And so this evidence goes directly to the intent of the defendant.

(12/04/2020 Tr. 14) However, at trial, the State did not introduce Mr. Waldon's statements to detectives into evidence. The interrogation video was never discussed at trial by the State or the defense. The defense never made any attempt to argue mistake or accident. The State also had no reason to counter any argument by the defense that Mr. Waldon's actions were not intentional.

This Court has recently extended the "absence of mistake or accident" exception; however, it still only applies when a defendant is arguing that what happened was a mistake or accident. *See, Moore v. State,* 2019 OK CR 12, 443 P.3d 579. Unlike in *Moore*, in the present case, the principal issue had nothing to do with a claim of mistake or accident. *Id.* at ¶ 16, at 584. "The principal issue at trial was whether [Mr. Waldon committed the acts alleged against M.A.

and whether he committed the acts alleged against Mr. Hunter and Mr. Sellers without consent.]" *Id.* Because the defense did not argue mistake, accident, or unintentional, the visible connection between the other crimes evidence and the charge for which Moore was on trial just does not exist in Mr. Waldon's case. *Id* at ¶ 21, at 585.

B. Prejudice Outweighed Probative Value

The prior bad acts evidence in this case was "extensive and prejudicial." *James v. State,* 2007 OK CR at ¶ 4, 152 P.3d at 257. The State compounded the prejudice by the instruction given to the jury. Jury Instruction 21 fails to inform the jury what evidence could be used to show intent and/or common scheme or plan and what evidence went toward absence of mistake or accident. (O.R. 363)

The trial court ruled that State's Ex. 1 would be admitted under *Burks* to show absence of mistake or accident. (12/04/2020 Tr. 29) However at trial, prior to Mr. Gordon's testimony, the limiting instruction informed the jury the evidence was being presented to show "the defendant's alleged intent or lack of mistake or accident." (Tr. 206) During closing arguments, the State told the jury that the evidence could be used to show intent and lack of mistake or accident. (Tr. 274) Since neither of these issues were raised by the defense, the presentation of this evidence and this vague instruction could do nothing but confuse the jury and prejudice the defense.

The misuse of the other crimes evidence and "the minimal relevancy raises the very real possibility that the evidence is not really offered for a proper

purpose, but for the improper purpose under Section 2404(B) that the appellant's true character was revealed in [the recording], and he acted consistently therewith in [the three charged counts]." *Blakely v. State*, 1992 OK CR 70, ¶ 12, 841 P.2d 1156, 1159.

The other crimes evidence in this case was clearly prejudicial, and this prejudice far outweighed any probative value it may have had.

> "When other crimes evidence is so prejudicial it denies a defendant his right to be tried only for the offense charged, or where its minimal relevancy suggests the possibility the evidence is being offered to show a defendant is acting in conformity with his true character, the evidence should be suppressed. Where, as here, the claim was properly preserved, the State must show on appeal that admission of this evidence did not result in a miscarriage of justice or constitute a substantial violation of a constitutional or statutory right.

Lott v. State, 2004 OK CR 27, ¶ 41, 98 P.3d 318, 335 (internal citations omitted).

As in *Blakely*, it is impossible to reach any other conclusion than that "the jury used this inadmissible evidence to determine guilt." 1992 OK CR at ¶ 14, 841 P.2d at 1159. This finding of guilt was based on inadmissible evidence and requires this case to be remanded for retrial. *Id.*

Appellant respectfully submits that the other crimes evidence in this case was not admissible under any of the exceptions to the rule against other crimes evidence; the evidence regarding Mr. Waldon's guilt was not overwhelming especially as it relates to counts 2 and 3; and there is reasonable probability that the improper admission of the evidence had an impact on his conviction; hence,

reasonable inferences and credibility choices that tend to support the trier of fact's verdict. *See Washington v. State,* 1986 OK CR 176, ¶ 8, 729 P.2d 509, 510. Nevertheless, the reviewing court must independently review the record evidence:

> *Winship*...requires more than...a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the fact finder will rationally apply that standard to the facts in evidence. . . . Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt . . . . Under *Winship*, which established proof beyond a reasonable doubt as an essential of Fourteenth Amendment due process, it follows that when such a conviction occurs in a state trial, it cannot constitutionally stand.

Jackson, 443 U.S. at 317-18, 99 S. Ct. at 2788, 61 L. Ed. 2d at 572-73 (footnote omitted). Thus, even cases holding that it is the "exclusive province" of the jury to weigh the facts and resolve conflicts in testimony remain subject to the *Jackson* standard for sufficiency of evidence.[11]

Under the *Jackson* standard, a mere "modicum" of evidence cannot "by itself rationally support a conviction beyond a reasonable doubt." *Jackson,* 443 U.S. at 320, 99 S. Ct. at 2789, 61 L. Ed. 2d at 574. Thus, this Court has overturned a jury's verdict even when there was circumstantial evidence from which the guilt of an accused "might be inferred," where the record evidence raised no more than a suspicion of guilt. *See Palmer v. State,* 1970 OK CR 49, ¶

[11] *See, e.g., Hill v. State,* 1981 OK CR 164, ¶ 10, 638 P.2d 1128, 1130; *Garrett v. State,* 1978 OK CR 126, ¶ 11, 586 P.2d 754, 756; *Enoch v. State,* 1972 OK CR 64, ¶ 7, 495 P.2d 411, 412.

4, 468 P.2d 799, 800; *see also United States v. Taylor*, 113 F.3d 1136, 1144 (10th Cir. 1997) (circumstantial evidence must be substantial and raise more than a suspicion of guilt); *Kogan v. People*, 756 P.2d 945, 950 (Colo. 1988) ("[V]erdicts in criminal cases may not be based on 'guessing, speculation, or conjecture.'") (citations omitted); *Mitchell v. State*, 2005 OK CR 15, ¶ 57, 120 P.3d 1196, 1210-11; *Frazier v. State*, 1981 OK CR 13, ¶ 8, 624 P.2d 84, 86 ("[P]roof amounting only to a strong suspicion or mere probability is insufficient."); *Johnson v. State*, 1977 OK CR 188, ¶ 11, 564 P.2d 664, 666 (same); *Foster v. State*, 1957 OK CR 23, ¶ 14, 308 P.2d 661, 665-66.

No act is a crime unless made so by statute. *Griffin v. State*, 1960 OK CR 109, ¶ 37, 357 P.2d 1040, 1046; *State v. Stegall*, 1953 OK CR 13, 253 P.2d 183. Mr. Waldon was charged with two counts of sexual assault. (O.R. 1) Okla. Stat. tit. 21, § 1123(B) states:

> No person shall commit sexual battery on any other person. "Sexual battery" shall mean the intentional touching, mauling or feeling of the body or private parts of any person sixteen (16) years of age or older, in a lewd and lascivious manner:
>
> 1. Without the consent of that person. . . .

The Oklahoma Uniform Jury Instructions lists the elements of sexual assault as:

> No person may be convicted of sexual battery unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:
>
> First, the defendant intentionally;
>
> Second, **touched/felt/mauled**;
>
> Third, in a lewd and lascivious manner;
>
> Fourth, the **body/(private parts)**;

Fifth, of a person sixteen years of age or older;

Sixth, without **his/her** consent.

Instruction No. 4-130, OUJI-CR(2d). (O.R. 351-352) The State failed to proved that Mr. Waldon without the consent of Mr. Sellers and Mr. Hunter.

The Oklahoma Uniform Jury Instructions explains consent as:

> It is the burden of the State to prove beyond a reasonable doubt the absence of consent to the **(sexual intercourse)/[specify other sexual conduct]**.
>
> Persons need not expressly announce their consent to engage in sexual activity for there to be consent. Consent can be given either through words or through actions that, when viewed in the light of all the surrounding circumstances, would demonstrate to a reasonable person that consent for the specific sexual activity had been given.
>
> Consent is present when the evidence, in whatever form, is sufficient to demonstrate that a reasonable person would have believed that the alleged victim had affirmatively and freely given authorization to the act.
>
> "Consent" means the affirmative, unambiguous and voluntary agreement to engage in a specific sexual activity during a sexual encounter. Consent can be revoked at any time.
>
> Consent cannot be:
>
> 1. Given by an individual who:
>
> a. is asleep or is mentally or physically incapacitated either through the effect of drugs or alcohol or for any other reason, or
>
> b. is under duress, threat, coercion or force; or
>
> 2. Inferred under circumstances in which consent is not clear including, but not limited to:
>
> a. the absence of an individual saying "no" or "stop", or
>
> b. the existence of a prior or current relationship or sexual activity.

> If there is evidence to suggest that the defendant reasonably believed that consent had been given, the State must demonstrate that such a belief was unreasonable under all of the circumstances. If you find that the State has failed to sustain its burden of proof beyond a reasonable doubt, then the defendant must be found not guilty.

Instruction No. 4-138, OUJI-CR(2d)

In the present case, the evidence was sufficient to demonstrate that a reasonable person would have believed that both Mr. Hunter and Mr. Sellers affirmatively and freely gave authorization to the act. First, Mr. Hunter testified that even though he was within walking distance of his home, he got into Mr. Waldon's car. (Tr. 53-54) He then agreed to go get ice cream at the Braum's near Mr. Hunter's home. (Tr. 56) He then explained that he and Mr. Waldon sat in Mr. Waldon's car and had a conversation, and when Mr. Waldon asked him if he wanted a massage, he said yes. (Tr. 57-58) Mr. Hunter never testified that he said anything to Mr. Waldon about going somewhere else for a massage, nor did he testify that Mr. Waldon mentioned anything about giving him money for or a ride to somewhere else for a massage. Then, while these two adult males sat in a car, and Mr. Waldon began to massage Mr. Hunter's leg, Mr. Hunter testified that he neither made a motion or a statement to Mr. Waldon about not wanting the massage, wanting Mr. Waldon to stop, or wanting to get out of the car. (Tr. 66-67) He explained that he was not comfortable being in the car with Mr. Waldon, but he never stated that he told Mr. Waldon that he was uncomfortable or did not want to be in the car with him. (Tr. 55)

Mr. Hunter testified that Mr. Waldon drove him home. He also explained that Mr. Waldon continued to touch him while they were sitting in Mr. Hunter's

driveway. (Tr. 65-66) Again, Mr. Hunter gave no testimony about telling Mr. Waldon to stop or that he did not want Mr. Waldon to touch him. Mr. Hunter testified that the doors on the car were locked, but he did not testify that Mr. Waldon locked the doors so that Mr. Hunter could not get out of the car. (Tr. 77) He also never testified that Mr. Waldon told him that he could not get out of the car. Mr. Hunter also stated that Mr. Waldon told him not to tell anyone at PaceButler, where Mr. Waldon worked. Mr. Hunter explained that Mr. Waldon told him that no one at the job would believe him. (Tr. 64-65) However, even this was not sufficient evidence to establish that it was unreasonable for Mr. Waldon to believe that he had consent when Mr. Hunter consented to getting in the car with him, getting ice cream together, receiving a massage, and finally never asking or demanding that Mr. Waldon stop what he was doing.

Next, Mr. Sellers testified that Mr. Waldon had come to Mr. Sellers's job multiple times. (Tr. 127) On the night of June 10, 2018, Mr. Sellers told Mr. Waldon that he needed to close the store before he could talk to him about a potential job. (Tr. 130) Mr. Sellers testified that after closing the store, he drove to the bank to make a deposit, but then returned to the store to speak to Mr. Waldon. According to Mr. Sellers, he got out of his car and then got into Mr. Waldon's car. (Tr. 130-131) There was no testimony that Mr. Waldon forced him to get into the car or threatened him in anyway. These two adult men were sitting in a car at night. Mr. Sellers explained that Mr. Waldon started talking about giving him a massage. He then started massaging Mr. Sellers's shoulders. He massaged his way down until he reached Mr. Sellers' leg, waist and private

area over Mr. Sellers's clothes. (Tr. 132-133) When Mr. Sellers told Mr. Waldon to stop, Mr. Waldon stopped. (Tr. 134) Mr. Sellers gave no testimony that Mr. Waldon threatened him or started touching him again in any way after Mr. Sellers asked him to stop. Again, based on the testimony, the State failed to prove that Mr. Waldon was unreasonable to think that he had Mr. Sellers consent to touch him. These two men were in a parking lot at night, and based on the testimony, Mr. Waldon touched Mr. Sellers extensively before Mr. Sellers gave any indication to Mr. Waldon that he wanted Mr. Waldon to stop.

When viewed in the light of all the surrounding circumstances, any reasonable person would have believed that he had consent for the specific sexual activity that occurred between Mr. Waldon and the two men. To convict Mr. Waldon of two counts of sexual assault under the circumstances of this case was to deprive him of his right to due process of law and a fair trial. U.S. Const. amends. XIV and VI; Okla. Const., art. 2, §§7, 20. The appropriate appellate remedy for insufficient evidence is dismissal. *See Burks v. United States*, 437 U.S. 1, 11, 98 S. Ct. 2141, 2147, 57 L. Ed. 2d 1 (1978). Accordingly, Mr. Waldon's convictions on Counts 2 and 3 must be reversed and remanded with instructions to dismiss.

CONCLUSION

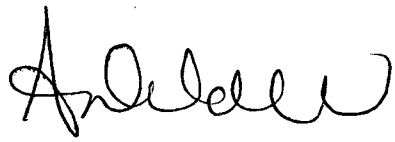
Based on the above and foregoing arguments and authorities, Appellant respectfully asks this Court to reverse and remand his convictions with

trial court sentenced petitioner in accordance with the jury's verdicts. The trial court also ruled that the counts were to run consecutively.

instructions to dismiss, modify his sentence, or grant any and all other relief this Court deems necessary to meet the ends of justice.

Dated this 5th day of May, 2023

Respectfully Submitted,



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