IN THE COURT OF APPEALS FOR THE CHOCTAW NATION OF OKLAHOMA

KALEN LEE PELTS, JR.
APPELLANT

vs.

CHOCTAW NATION OF OKLAHOMA
APPELLEE

NO. ACC-2022-4
APPEALS COURT NUMBER
NO. CF-2021-43
TRIAL COURT NUMBER

Original appeal from the Choctaw Nation of Oklahoma District Court, J. Branam, presiding. This is an appeal from a jury verdict convicting the defendant of three counts of child sexual abuse and the trial court sentencing the defendant to three years on each count consecutively. We find that the court erred in deciding the question of the applicability of the statute of limitations to this proceeding and, more particularly, the date of discovery of the offense. The case is reversed and remanded with instructions.

REVERSED AND REMANDED WITH INSTRUCTIONS

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OPINION BY GOTCHER, J.

This is an appeal from three counts of conviction on child sexual abuse. The court, J. Branam, sentenced the Defendant, Kalen Lee Pelts, Jr., to three years on each count to run consecutively. The record on appeal reveals that the primary issue is whether or not this prosecution and conviction is barred by the Statute of Limitations of the Choctaw Nation of Oklahoma. As is the problem at the case at bar and in other such cases of child abuse, the date of discovery for the purpose of running of the Statute of Limitations is not as clear as a reviewing court would desire. The record discloses that the child victim relates that the abuse occurred during a period of time that lasted about five months. T. Vol. 1, page 212, L. 3-6. The testimony in this case occurred February 1, 2022 through February 2, 2022, went the trial ended with a guilty verdict on all three counts. The incidents of abuse allegedly occurred by three different informations filed by the Nation in the case between January 1, 2016 and December 31, 2017. This wide time frame was narrowed down by the testimony. The victim, M.B., testified that the child of the defendant, Alexandra, was sleeping in the victim's room, both before and after Alexandra had her baby. T. Vol. 1, page 208-209. M.B. further related that the defendant began sleeping in the victims' room after he had back surgery and after Alexandra had started sleeping in the room. T.Vol. 1, page 208. M.B. also testified that the defendant moved out about five months later. T. Vol. 1, page 212, L.3-8. Alexandra Pelts testified for the defense. She is the daughter of the Defendant. Alexandra testified that her baby was born December 21, 2016. T. Vol. 2, page 50, L. 20-22. Alexandra further testified that the defendant moved into the room

with her. Alexandra further testified that M.B. would be in the room but did not stay there. T. Vol. 2, page 51. Alexandra testified that the defendant moved out in mid April, 2017. T. Vol. 2, page 53, L. 17-19. It appears that the evidence taken as a whole indicates that the abuse occurred between December 2016 and April 2017. The sequence of sleeping in the victim's room were generally testified consistently by the victim and Alexandra. It appears that Alexandra would know the date of the birth of her child, so as to be able to establish a time frame for discovery purposes.

The victim was a thirteen year old child, born on December 3, 2003, at the time of the abuse. Granted the victim testified during the abuse that she pretended to be asleep, "I was just scared. I was young. Nobody at that age of 14 should be touched by their cousins or anybody." T. Vol. 1, page 213, Line 13-14. This would indicate that she knew it was wrong to be touched like she testified. M.B. related that she eventually told her Aunt Misty and Cousin Allie. Aunt Misty told her that she would have to tell her grandma. Specifically Aunt Misty asked M.B. if she wanted to tell law enforcement at that time. M.B. related that she told Aunt Misty no because she did not want her grandfather to know about it. T. Vol. 1, lines 22- 1. At this time, if not earlier, M.B. would probably know of the criminal nature of the act. M.B. further related that she told her Aunt Adena about this after a really long time after she told Aunt Misty. T. Vol.1, page 214, Line 10-15. M.B. finally related that a little while after that is when she told "my" counselor, and the counselor contacted law enforcement. T. Vol. 1, page 214, Line16-18. M.B. knew that her counselor would have to call somebody. T. Vol. 1, Page 214, Line 20-25. M.B. testified that she was well aware of the reporting requirements because she had been going to the counselor for several months. T. Vol. 1, page 215, Line 1-5. It is noted by this court that M.B. said she did not

tell her counselor because she was trying to protect her family.

The counselor testified that she had been seeing M.B. since February of 2019. The counselor testified that M.B. told her of the abuse on April 12, 2019. T. Vol. Page 199. Law enforcement was notified on April 12, 2019. T. Vol. 1, page 239, Line 18-20.

The Defendant both pre trial and at trial raised the issue that the Statute of Limitations of the Choctaw Nation prevented the Nation from prosecuting this case. The District Court overruled the pre trial motion to dismiss in the minute order entered January 28, 2022, and found in the record on appeal at page 91, " Defendant's motion to dismiss for failure to charge within the applicable statute of limitations is denied. The court finds a reasonable person would have notice on April 12, 2019 when the alleged victim, minor female was interviewed by Caddo police officer, Josh Lawson." On page 40 of Volume 2, the defendant specifically renewed his motion to dismiss upon the basis of the Statute of Limitations. The court denied the renewed motion to dismiss.

The Statute of Limitation in effect at the time of the prosecution is as follows;

"Section 152. Statue of Limitations

A. Prosecutions for criminal violations of any Choctaw Nation laws shall be commenced within three (3) years after the commission of such violation or the discovery of the violation.

B. The discovery of the violation is the date at which a reasonable person knew or should have known that an offense had been committed."[1]

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[1] The Tribal Council has amended this statute to now read for the crime at issue the prosecution shall be commenced for a child victim by the child's 45th birthday. This amendment came into effect on February 18, 2022.

The information in this case was filed on April 1, 2021. R.O.A. page 1. The continuing offense by the evidence at trial last occurred no later than Mid April, 2017. Thus the issue is when was this offense discovered for purposes of the running of the statutes of limitations.

This is a case of first impression. In reviewing the trial court's order, we are not persuaded by the court's reasoning in the denial of the pre trial motion to dismiss. The court held that a reasonable person would have notice when the child was interviewed by law enforcement. While, due to the amendment of the statute, this could no longer be an issue in sexual child abuse cases, the court's stated reason would extend the statute of limitations indefinitely because it would never run until the victim or other person decided to prosecute, i.e., discovery of the crime occurs when the victim was interviewed by law enforcement.

A Statue of Limitations reflects a legislative intent that, after a certain time, no quantum of evidence is sufficient to convict. *United States v. DeLia*, 906 F. 3d 1212, 1217, (10th cir, 2018). This time limit is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Criminal statutes are to be liberally interpreted in favor of repose. *DeLia,* supra.

The Defendant relied upon the Oklahoma case of *State v. Day*, 882 P.2d 1096, 1994 OK CR 67. In that case, the Oklahoma Court of Criminal Appeals held that discovery of a crime does not occur when the crime is reported to law enforcement, but when any person (including the victim) other than the wrongdoer or someone in pari delicto with the wrongdoer has knowledge of the both the act and its criminal nature. The application of the Statute of Limitations is a jurisdictional issue and, once asserted, the presumption is that it has run and the state has the

obligation to overcome this presumption. *Day*, supra; *Tollett v. State*, 2016 OK CR 15, 387 P. 3d 915; *Cox v. State,* 2006 OK CR 51, 152 3d 244. The ultimate question of law to be determined by the trial court is whether the crime has been discovered. Discovery does not occur during any time that the crimes are concealed by fear or threats made by the wrongdoer. *Tollett*, supra. We find the argument in Day and its progeny to be persuasive. We therefore hold that discovery of a crime does not occur when a police officer interviews the victim as the trial court held in this case, but when any person including the victim has knowledge of both the act and its criminal nature.

We understand that we have the authority to remand this case with instructions to dismiss because the Statute of limitations has run. However like Justice Strubhar in the dissent in *Day* wrote, we are concerned that even though a child victim states that she knew it was wrong to be touched like that and no one the age of 14 should be touched like that, whether or not the child understood the criminal nature of the act should be determined. Further partly due to the court finding that a reasonable person would discover the criminal act when law enforcement interviews the child, the State and Defendant did not make a clear record as to the time when the child told his Aunt Misty and was asked if they should report it to law enforcement. We understand that we could find that the state has failed to meet its burden, but again this being a case of first impression and the court determining the date of discovery is the date law enforcement knew of the crime being error, the court should make new findings in accordance with this opinion. Obviously the child being told about bringing up law enforcement would be information that the act was criminal and discovery might occur. Since the defendant has raised the issue of the statute of limitations, there is a presumption that the Statute of Limitations has

run and it is the burden for the State to show it has not. We are by saying this not trying to limit the range of findings by the trial court on this issue. It is the province of the trial court to hear the evidence and make such finding and order as it deems correct.

Accordingly we reverse this case with instructions for the court to determine when discovery for purposes of the Statute of Limitations has occurred in this case. If the trial court finds that the Statue of Limitations has run, the trial court should dismiss the case. If the trial court determines that the Statue of Limitations has not run, it should enter its factual findings and order for further review by this court.

As to the other issues raised on appeal by the Defendant, this court summarily finds and orders as follows;

The Defendant raises questions concerning Nation's counsel shifting the burden of proof by raising the issue that the defendant did not show motivation for lying by the victims in this case. While the Prosecutor's statements may be close to the line, Defense counsel argued that the witnesses had changed their story and were told to help put the defendant away. Attorneys are given wide latitude in final argument. The statements by the prosecutor in light of the defense argument do not amount to prosecutorial misconduct.

The Defendant complained that the prosecutor made disparaging comments to counsel. This court will not tolerate improper comments especially the disparaging kind made to other counsel in front of a jury. Counsel should always comport themselves with courtesy and respect. Saying that and noting that the record is incomplete due to a change in court reporters, we see nothing that rises to any level of disparaging remarks that would constitute error of any kind in this trial.

Finally the trial court and counsel all failed to adhere to the *Section 926 of the Choctaw Nation Criminal Code* wherein it states that "(I)n all cases of a verdict of conviction for any offense against any of the laws of the Choctaw Nation of Oklahoma, it shall be the duty of the Judge to assess and declare the punishment within the limitations fixed by law and render the judgment accordingly." The court in reading the instructions in the return of verdict instruction (instruction number 22) told the jury that they should determine the proper punishment. It appears that neither party objected to this instruction. Further the court prepared jury verdicts wherein the jury was requested to assess punishment. The actual verdicts were returned recommending three years on each count. The prosecutor did argue for three years on each count. Since the issue of punishment is not relevant to the jury's determination, it is error to argue punishment to the jury. By our tribal code it is the Judge's responsibility to solely decide punishment. These errors were not objected to at trial, waiving all error other than plain error. Again counsel is correct there is no published case on the law concerning the plain error doctrine. Henceforth to be entitled to relief under the plain error doctrine, the defendant must prove: (1) the existence of an actual error (i.e., a deviation from a legal rule); (2) that the error is plain or obvious; and (3) that the error affected his substantial rights, meaning that the error affected the outcome of the proceeding. If these elements are met, this court will correct plain error only if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. While the prosecutor improperly argued punishment to the jury and the court without objection instructed the jury on punishment, it appears that the recommendation of punishment by the jury did not affect the outcome of the proceeding and does not represent a miscarriage of justice. The trial judge rendered the sentences

consecutively. The jury's recommendation of the maximum sentence of three years does not appear to have influenced the judge's sentence since the jury did make any recommendations as to the punishments being concurrently or consecutively. The court sentenced the defendant to the maximum sentence allowed, nine years, and the improper recommendations by the jury did not seem to influence the judge on sentencing. Therefore it is not plain error, and the judgement and sentence is not reversible on this issue.

Accordingly, as set out above, this case is reversed and remanded with instructions.

PHELPS, CONCURS[2]

[2] It is with sad news we must relate that our fellow Judge, Bob Rabon, has died this past February 4, 2022. He was a valued member of this court and his knowledge of the law and vast knowledge and love of the Choctaw Nation of Oklahoma will be sorely missed by this court and all Choctaws everywhere.