

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CRAIG KEELING,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the judge err in refusing to grant a mistrial after the State, through the use of an improper leading question, elicited improper propensity evidence that did not meet an exception under rule 404(b)?

STATEMENT OF THE CASE

In February of 2010, the Berkeley County Grand Jury indicted Keeling for committing or attempting to a lewd act upon a child, indictment #2010-GS-08-0332. On November 1, 2010, Keeling proceeded to jury trial before the Honorable Kristi L. Harrington. Attorneys Debra Littlejohn and Keisha White represented Keeling at trial. The jury found Keeling guilty and Judge Harrington sentenced him to 12 years suspended upon the service of 8 years with 4 years probation. A timely notice of intent to appeal was filed on November 9, 2010. This appeal follows.

ARGUMENT

The judge erred in refusing to grant a mistrial after the State, through the use of an improper leading question, elicited improper propensity evidence that did not meet an exception under rule 404(b).

The jury found appellant guilty of committing or attempting a lewd act upon a child. The incident took place during a Thanksgiving celebration at the minor child's grandmother's house. The appellant, the minor child and the minor child's two minor cousins were all on the front porch just prior to the incident. Prior to the cousins' testimony, appellant moved to exclude their testimony as being irrelevant and highly prejudicial. (R., p. 44, lines 12 – p. 45, p. 46, lines 1-23). The judge ruled, "[B]ased upon my understanding of the facts that will be presented by these two witnesses, the fact that the children are eight or ten is not a factor. The court has found that the two witnesses are competent to testify. If their testimony is relevant, they are allowed to testify. I'm denying your request at this time, Ms. Littlejohn, to exclude the testimony of the two witnesses." (R., p. 49, lines 17-25). Appellant renewed the objection prior to the testimony of the cousins. (R., p. 125, lines 5-10).

During direct examination of one of the cousins, the State asked, "And don't tell us what he said, but did Craig [appellant] say or do anything to you?" (R., p. 136, lines 14-15). The cousin answered, "No." (R., p. 136, lines 16). The State then asked, "Did he whisper in your ear?" (R., p. 136, line 17). The cousin answered, "Yes." (R., p. 136, lines 18). The appellant objected. (R., p. 136, line 19).

Outside of the presence of the jury, appellant objected to the leading form of the question. Additionally, appellant argued that the provided answer elicited from the leading

question was not relevant, was highly prejudicial, was bolstering, and constituted improper propensity evidence in violation of Rule 404(b). (R., p. 137, lines 23 – p. 138, 139, lines 1-6). Based on the improper question, appellant moved for a mistrial. (R., p. 139, lines 6-8). The judge denied the motion for a mistrial. (R., p. 139, lines 9-10).

In ruling the judge stated:

Based upon what I have observed, and as far as the questioning goes, the question from Ms. Williams to Miss Erikson was did he touch you, was that phrase, and then the follow-up question was did he whisper in your ear. The Court finds that did he whisper in your ear is not prejudicial. It is probative as to what was going on on the porch at that time. Ms. Williams cautioned not to say what he said, but it was whether or not it occurred.

I am allowing, under 611, latitude for this witness. I have found her competent. But I am going to allow some latitude, as far as leading questions, under 611(a).

(R., p. 139, lines 12-25).

Appellant then renewed the objection to the testimony as being in violation of Rule 404(b). (R., p. 144, lines 18 – p. 145, line 1). The judge ruled, “I’m going to allow this line of questioning, about the whispering, under 404(b). The whispering may be admissible to show motive, identity, existence of common scheme or plan, the absence of mistake or accident, or intent.” (R., p. 145, lines 24- p. 146, lines 1-3). The judge erred in finding that the testimony was admissible under Rule 404(b).

In State v. Wallace, 384 S.C. 428, 432, 683 S.E.2d 275, 277 (2009), the South Carolina Supreme Court wrote, “Evidence of other bad acts is not admissible to prove the defendant's guilt except to show motive, identity, existence of a common scheme or plan, absence of mistake or accident, or intent. Rule 404(b), SCRE; see also State v. Lyle, 125

S.C. 406, 118 S.E. 803 (1923).” “The process of analyzing bad act evidence begins with Rule 401, SCRE. Pursuant to Rule 401, the trial court must determine whether the evidence is relevant. Upon determining the evidence is relevant, the trial court must then determine whether the bad act evidence fits within an exception of Rule 404(b) as interpreted by our jurisprudence.” Wallace, 384 S.C. at 433, 683 S.E.2d at 277.

The judge found that the whisper in the ear was probative as to what was happening on porch at that time. What was happening at the porch at the time of the whisper in the ear could have been completely harmless and irrelevant to the later touching. The judge erred in not excluding the testimony as irrelevant.

In State v. Smith, 391 S.C. 353, 361-362, 705 S.E.2d 491, 495 (Ct. App. 2011), the South Carolina Court of Appeals wrote:

In order to introduce evidence of some other act of the defendant under one of these exceptions, the State must lay the proper foundation. First, unless the act is the subject of a criminal conviction, the State must prove by clear and convincing evidence that the defendant committed the act. Fletcher, 379 S.C. at 23, 664 S.E.2d at 483.

The second element of the foundation requires the State to articulate the logical connection between the other act and at least one of the five purposes listed as exceptions in the rule. State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006). In order to meet this element, the State must explain how evidence of the other act will assist the judge or the jury in understanding some material issue in the case related to one or more of the Rule 404(b) exceptions. When the State adequately explains how the evidence of the other act logically connects to an issue in the case, it demonstrates how the judge or jury can use the evidence without using it for the prohibited purpose of inferring guilt from the defendant's propensity to commit the crime. See State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (“Stated differently, evidence which is logically relevant to establish a material element of the offense

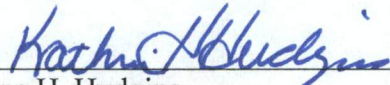
charged is not to be excluded merely because it incidentally reveals the accused's guilt of another crime." (internal citations omitted)).

In the present case the State failed to articulate a logical connection between the whisper in the ear of the cousin and the subsequent act that the jury found to be committing or attempting a lewd act upon a child. According to witnesses, the appellant put his hands inside of the minor's pants, but outside of her underwear, and rubbed her bottom. Whispering in the ear of the cousin does not show motive, identity, existence of common scheme or plan, absence of mistake or accident or intent in regard to appellant putting his hands in the pants of the minor. While in Wallace the Court found a close similarity between the two acts, there is no close similarity between a possibly innocent whisper in the ear and improper touching. The State sought to introduce the whisper in the ear to make the appellant appear creepy and more likely to have committed a lewd act. This is precisely the kind of propensity evidence which is prohibited by rule 404(b).

CONCLUSION

Based on the above argument, the conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of October, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

October 8, 2012



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