

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
Honorable Kristi Lea Harrington, Circuit Court Judge
Appellate Case No. 2010-177466

THE STATE,

Respondent,

vs.

CRAIG DOUGLAS KEELING,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge did not abuse her discretion in admitting testimony that Appellant whispered in Victim's cousin's ear moments before molesting Victim because the "whispering" testimony did not constitute evidence of a prior bad act, did not establish Appellant had a propensity to commit a lewd act, and was relevant and admissible under the res gestae theory to establish the context in which the crime occurred. Furthermore, even assuming the trial judge erred in admitting the challenged evidence, any error was harmless in light of the insignificant and cumulative nature of the "whispering" evidence coupled with the overwhelming evidence conclusively establishing Appellant's guilt for the indicted offense.

STATEMENT OF THE CASE

On November 26, 2009, Appellant Craig Douglas Keeling was arrested following an investigation into an allegation that Appellant inappropriately touched a minor child. In February of 2010, the Berkeley County grand jury indicted Appellant for one count of committing or attempting to commit a lewd act upon a minor child. On November 1, 2010, a jury trial was commenced in the Berkeley County court of general sessions with the Honorable Kristi Lea Harrington, circuit court judge, presiding. At the conclusion of trial, Appellant was convicted as indicted. The trial judge sentenced Appellant to a term of imprisonment of twelve years, and the sentence was suspended upon the service of an eight-year term of incarceration followed by four years of probation. Subsequently, Appellant filed a timely notice of appeal.

STATEMENT OF FACTS

On November 26, 2009, members of seven-year-old Victim's family gathered at Victim's grandmother's house in Berkeley County to celebrate Thanksgiving Day. (R. p. 81; p. 105; p. 128; p. 135; pp. 154-155; p. 188). Close to fifty people attended the gathering, including forty-six-year-old Appellant Craig Douglas Keeling, the son of a friend of the family. (R. pp. 81-82; p. 105; p. 203). During the course of the family gathering, Appellant appeared to focus his attention on Victim and her nine-year-old cousin, Star S. ("Star"), and seven-year-old cousin, Ashley E. ("Ashley"), which concerned Victim's father. (R. p. 106; p. 122; p. 127; pp. 134-135).

As the gathering progressed, Victim and her cousins went to the front porch to eat Thanksgiving dinner. (R. p. 107; p. 128; p. 135; p. 155). Appellant was already on the front porch before the girls arrived and remained there with them even though all the other adults were inside of the house or in the backyard. (R. p. 107; pp. 129-130; p. 136; p. 155). While alone with the children on the porch, Appellant asked Star for a hug, but she would not give him one because Appellant's request made her uncomfortable. (R. p. 129). Appellant then whispered something in Ashley's ear. (R. p. 136; p. 148; p. 156; p. 166). Thereafter, Star and Ashley left the porch, leaving Victim alone with Appellant. (R. p. 129; p. 148; p. 157).

After her cousins left, Victim continued to eat her meal on the front porch. (R. p. 157). As Victim ate, Appellant approached her from behind and began touching and rubbing her "bottom" on the outside of her jeans with his hand. (R. pp. 157-158). Appellant then placed his hand inside of Victim's jeans and began rubbing Victim's underwear. (R. p. 158). Appellant's actions made Victim feel scared and embarrassed. (R. p. 158).

Meanwhile, Victim's uncle was washing his hands at the kitchen sink when he looked out the window and observed Appellant rubbing Victim with his hand in her pants. (R. pp. 83-84; p. 90; pp. 157-158). Victim appeared stunned. (R. p. 90). Furious at what he was seeing, Victim's uncle immediately banged on the window and quickly ran to the front porch. (R. pp. 91-92; p. 158). Appellant responded by fleeing towards his car. (R. p. 92; p. 159).

Victim's father, who was in the backyard, heard the commotion, ran to the front of the house, and spoke with his brother. (R. pp. 110-111). Victim's uncle told Victim's father what he had observed, which led Victim's father to physically restrain Appellant until law enforcement was contacted. (R. pp. 111-112). Officers from the Berkeley County Sheriff's Office then quickly responded to the scene, spoke with Victim's family members, and arrested Appellant. (R. pp. 180-182; p. 201). Appellant was subsequently indicted for committing or attempting to commit a lewd act upon a minor child, and he proceeded to trial. (R. pp. 280-281).

At the outset of trial, defense counsel moved to exclude any testimony in regards to Appellant whispering in one of the girls' ears. (R. p. 2). Defense counsel argued the testimony was irrelevant, was overly prejudicial, constituted hearsay, and was inadmissible propensity or character evidence. (R. p. 2; p. 9). The trial judge refrained from ruling on defense counsel's motion at that time. (R. p. 12; p. 13).

Subsequently, at the beginning of the second day of trial, defense counsel moved to exclude the testimony of Star and Ashley, arguing their testimony was irrelevant, was overly prejudicial, and constituted bolstering. (R. pp. 44-46). The trial judge denied defense counsel's motion and ruled the testimony was admissible if it proved to be relevant to the case. (R. p. 49).

Thereafter, during trial, Victim's family members testified about the events of November 26, 2009, including Victim's cousin Ashley, who testified Appellant whispered in her ear while she and the other girls were on the front porch with Appellant.¹ (R. p. 136). Following Ashley's testimony about Appellant whispering in her ear, defense counsel objected. (R. p. 136). In support of her objection, defense counsel argued the solicitor asked an improper leading question, the testimony was irrelevant, the testimony was "clearly, clearly, prejudicial," the question was asked and answered, the witness' original response was exculpatory, the testimony was bolstering, and the testimony was improper propensity evidence under Rule 404, SCRE. (R. pp. 137-139). Defense counsel then asked the trial judge to grant a mistrial. (R. p. 139). After considering counsel's arguments, the trial judge declined to grant a mistrial while noting the testimony was not prejudicial and was probative to the case. (R. p. 139).

Following the trial judge's ruling, defense counsel argued Ashley's testimony constituted a discovery violation because Victim stated during a forensic interview that Appellant whispered in Star's ear as opposed to Ashley's ear. (R. pp. 140-143). Defense counsel again moved for a mistrial, arguing the testimony was prejudicial, bolstering, irrelevant, and improper under Rule 404, SCRE. (R. pp. 143-144). The trial judge once again denied defense counsel's mistrial motion. (R. p. 144).

Following the trial judge's second ruling, defense counsel repeated her assertion the testimony constituted improper propensity evidence under Rule 404, SCRE. (R. p. 144). In response, the solicitor noted the testimony was not evidence of a prior bad act and, instead, was evidence of what occurred immediately prior to the commission of the

¹ Specifically, the solicitor asked Ashley: "[D]on't tell us what he said, but did [Appellant] say or do anything to you?" (R. p. 136). Ashley responded: "No." (R. p. 136). The solicitor then asked: "Did he whisper in your ear?" (R. p. 136). Ashley responded: "Yes." (R. p. 136).

crime involving Victim. (R. p. 145). After considering defense counsel and the solicitor's arguments, the trial judge ruled the testimony was admissible under Rule 404(b), SCRE. (R. pp. 145-146).

Following the trial judge's final ruling, Ashley again testified Appellant whispered in her ear before she left Victim on the porch alone with Appellant. (R. p. 148). Victim then testified about the incident and identified Appellant as the person who inappropriately touched her at the Thanksgiving gathering.² (R. pp. 154-158). Subsequently, at the conclusion of trial, Appellant was convicted as indicted. (R. pp. 258-259). The trial judge then sentenced Appellant to a term of imprisonment of twelve years and suspended the sentence upon the service of an eight-year term of imprisonment and four years of probation. (R. p. 279).

² Victim also testified Appellant whispered in Ashley's ear. (R. p. 156). No objection was raised to that testimony. (R. p. 156).

ARGUMENT

The trial judge did not abuse her discretion in admitting testimony that Appellant whispered in Victim's cousin's ear moments before molesting Victim because the "whispering" testimony did not constitute evidence of a prior bad act, did not establish Appellant had a propensity to commit a lewd act, and was relevant and admissible under the res gestae theory to establish the context in which the crime occurred. Furthermore, even assuming the trial judge erred in admitting the challenged evidence, any error was harmless in light of the insignificant and cumulative nature of the "whispering" evidence coupled with the overwhelming evidence conclusively establishing Appellant's guilt for the indicted offense.

Appellant contends the trial judge committed reversible error when she permitted Victim's cousin to testify Appellant whispered in her ear before Appellant subsequently sexually molested Victim. Appellant maintains the "whispering" evidence was irrelevant and was improper propensity evidence pursuant to Rule 404(b), SCRE. Contrary to Appellant's contentions, the trial judge properly admitted Victim's cousin's testimony and denied Appellant's mistrial motion because the challenged evidence was not improper propensity or prior bad act evidence. Instead, the "whispering" evidence was relevant and admissible under the res gestae theory because it established the context in which the crime occurred, corroborated other evidence presented during trial, and explained how Appellant came to be alone with Victim on the porch. However, even assuming the trial judge abused her discretion in admitting the evidence, any error was entirely harmless in light of the insignificance of the challenged evidence in relation to the case as a whole, the cumulative nature of the challenged evidence, and the other overwhelming evidence of Appellant's guilt. Appellant's conviction should be affirmed.

A. Admissibility of the "Whispering" Evidence

Only relevant evidence should be admitted at trial. Rule 402, SCRE. "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Alexander, 303 S.C. 377, 380,

401 S.E.2d 146, 148 (1991); see Rule 401, SCRE (“ ‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’ ”). Evidence which could assist the jury in arriving at the truth of an issue is relevant and should be admitted during trial. State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986).

However, pursuant to Rule 404(b), SCRE, “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” “This is so because under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than upon prior criminal or immoral acts.” State v. Hough, 319 S.C. 104, 107, 459 S.E.2d 863, 865 (Ct. App. 1995). Evidence of a defendant’s prior crimes or bad acts is limited to establish motive, intent, the absence of mistake or accident, the existence of a common scheme or plan, or the identity of the perpetrator. State v. Martucci, 380 S.C. 232, 251-252, 669 S.E.2d 598, 608 (Ct. App. 2008).

Furthermore, evidence of a defendant’s prior crimes or bad acts may also properly be admitted if those acts form part of the res gestae of the charged offense. Anderson v. State, 354 S.C. 431, 435, 581 S.E.2d 834, 836 (2003). The res gestae theory recognizes that evidence of other bad acts may be an integral part of a charged crime or may be necessary to aid the fact finder in understanding the context in which the crime occurred. State v. Preslar, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005). To constitute part of the res gestae of an offense, it is important that the prior bad acts have a close temporal proximity to the charged crime. Martucci, 380 S.C. at 258, 669 S.E.2d at 612.

In State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-371 (1996), the Supreme Court explained the res gestae theory:

One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence “furnishes part of the context of the crime” or is necessary to a “full presentation” of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its “environment” that its proof is appropriate in order “to complete the story of the crime on trial by proving its immediate context or the ‘res gestae’ ” or the “uncharged offense is ‘so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other . . .’ [and is thus] part of the res gestae of the crime charged.” And where evidence is admissible to provide this “full presentation” of the offense, “[t]here is no reason to fragmentize the event under inquiry” by suppressing parts of the “res gestae.”

(citations omitted and alteration in original). Thus, where a prior bad act is “inextricably intertwined” with a charged offense, the evidence of the prior bad act is admissible as part of the res gestae of the crime. Id. at 122, 470 S.E.2d at 371.

Significantly, “[a] trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice.” State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995).

Decisions to admit or exclude evidence rest in the sound discretion of the trial judge and will only be reversed on appeal for a prejudicial abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). “Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict.” State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

Likewise, the grant or denial of a mistrial lies within the sound discretion of the trial court, and the trial judge's ruling will not be disturbed on appeal absent an abuse of

discretion or an error of law. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-628 (2000). A mistrial should not be granted unless absolutely necessary, and instead, all other methods to cure any possible prejudice should be exhausted before a mistrial is granted. State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). In determining whether to grant a mistrial, the trial judge should determine whether or not the mistrial is dictated by manifest necessity or the ends of public justice. State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). The burden is on the moving party to establish both error **and** prejudice. State v. Wasson, 299 S.C. 508, 510, 386 S.E.2d 255, 256 (1989). Appellate courts favor the exercise of the wide discretion of the trial judge in evaluating a mistrial request. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988).

In the case at bar, the sole evidence challenged on appeal as improper propensity evidence is the testimony of Ashley indicating Appellant whispered in her ear before she left Victim alone with Appellant on the porch. However, the act of whispering in someone's ear is not a prior bad act or a criminal offense and does not tend to establish a propensity to commit a criminal act. Cf. State v. Michau, 355 S.C. 73, 78-79, 583 S.E.2d 756, 759 (2003) ("The three sentences do not constitute propensity evidence under Rule 404(b), SCRE. The sentences at issue do not refer to any 'crimes, wrongs, or acts' which are generally inadmissible under Rule 404(b)."). Although Appellant contends the testimony made him appear "creepy," the testimony simply did not improperly suggest he had a propensity to commit a lewd act upon a child and does not constitute prior bad act evidence. See State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (finding evidence Haselden tended to golf, fish, or go to his mother's house presented during a murder trial was not evidence tending to prove Haselden had a tendency towards abusing and murdering his son); see, e.g., Perry v. State, 150 Md. App. 403, 433-434, 822 A.2d

434, 451-452 (Md. Ct. Spec. App. 2002) (finding no abuse of discretion in the admission of testimony during Perry's murder trial that Perry refused to sign a fingerprint card after he was arrested and holding the testimony was **not** evidence of prior bad act).

Instead, the testimony regarding Appellant's act of whispering in Victim's cousin's ear merely established what Appellant did moments before he committed the lewd act upon Victim, corroborated the testimony establishing Appellant focused his attention on Victim and her cousins before committing the lewd act, and established how Appellant came to be alone with Victim on the porch. Thus, the testimony was relevant to Appellant's case by helping to explain the circumstances and context of the crime and was necessary for a full presentation of the case. Accordingly, the challenged evidence did not constitute inadmissible prior bad act or propensity evidence pursuant to Rule 404(b), SCRE, and was admissible as part of the res gestae of Appellant's crime. Cf. Anderson, 354 S.C. at 435, 581 S.E.2d at 836 ("Anderson's threatening statement to Glover is not a prior bad act. As such the bar against admitting prior bad acts is not applicable." (citations omitted)). The trial judge did not abuse her discretion in admitting the "whispering" testimony or in denying Appellant's motion for a mistrial. See State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999) ("The granting of a motion for mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way."). Appellant's conviction should be affirmed.

B. Harmlessness of Any Error in the Admission of the Evidence

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). After an error is found, the appellate court must then review the other evidence

considered at trial besides the erroneously admitted evidence. State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). The harmlessness of an error in the admission of evidence generally depends on the materiality of the evidence in relation to the case as a whole. Haselden, 353 S.C. at 196, 577 S.E.2d at 448; see State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) (“No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.”). “When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result.” State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). Thus, when overwhelming evidence of guilt has been presented or when erroneously admitted evidence is merely cumulative to other properly admitted evidence, any trial error may be harmless. See State v. Gathers, 295 S.C. 476, 480-481, 369 S.E.2d 140, 143 (1988) (“[I]n view of the overwhelming evidence of appellant’s guilt, we hold any error harmless beyond a reasonable doubt.”); State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) (“Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence.”).

In Appellant’s case, the sole evidence challenged on appeal was Victim’s cousin’s testimony that Appellant whispered in her ear. In addition to that largely innocuous and inconsequential testimony, Victim directly testified Appellant placed his hand into her pants and rubbed her inappropriately, Victim’s uncle testified he observed Appellant rubbing his hand inside of Victim’s pants, Victim’s uncle stated Appellant attempted to

flee when he was discovered rubbing Victim, Victim's father testified Appellant was focusing his attention on Victim and the other girls in a concerning manner, and Victim's other cousin testified Appellant asked her for a hug and made her feel uncomfortable.

Viewing the challenged evidence in relation to the other evidence of Appellant's guilt presented during trial, any error that possibly could have resulted by virtue of the introduction of the "whispering" evidence was entirely harmless. Most significantly, Victim positively identified Appellant as the person who molested her during trial, and her testimony was fully corroborated by her uncle, who witnessed the unlawful act. That testimony alone overwhelming and conclusively established Appellant's guilt for committing a lewd act upon Victim. Thus, the "whispering" evidence was wholly inconsequential when considered in relation to the other evidence presented during trial. See Haselden, 353 S.C. at 196, 577 S.E.2d at 448 ("The erroneous admission of character evidence is harmless beyond a reasonable doubt if its impact is minimal in the context of the entire record."); see also State v. Forney, 321 S.C. 353, 358, 468 S.E.2d 641, 644 (1996) ("Evidence of the expressed threat to kill Beth Ann is of minimal impact in the context of the properly admitted evidence of appellant's use of a deadly weapon during the North Carolina armed robbery. Accordingly, even if evidence of the expressed threat was improper, its impact was minimal in the context of the entire record and any error is harmless beyond a reasonable doubt.").

Furthermore, to the extent Appellant is contending on appeal the "whispering" evidence was inadmissible because it constituted evidence of his "creepy" behavior, the "whispering" evidence was cumulative to other unchallenged evidence establishing the exact same type of behavior committed by Appellant before he sexually molested Victim. Specifically, Victim's father testified without objection that he observed Appellant

focusing his attention on the girls in an unsettling and concerning manner, Victim's other cousin testified Appellant asked her for a hug in a manner that made her feel uncomfortable, and Victim testified without objection that Appellant whispered in her cousin's ear. Accordingly, assuming the "whispering" evidence constituted evidence of "creepy" behavior, the challenged evidence was entirely cumulative to other properly admitted evidence establishing that "creepy" behavior. See State v. Oglesby, 384 S.C. 289, 293, 681 S.E.2d 620, 622 (Ct. App. 2009) ("[T]he admission of improper evidence is deemed harmless if it is merely cumulative to other evidence.").

In light of the cumulative and inconsequential nature of the challenged evidence when viewed in relation to the other evidence presented during trial conclusively establishing Appellant's guilt, any error in the admission of the "whispering" evidence was entirely harmless and could have had no impact on the ultimate outcome of Appellant's trial. See State v. Garner, 389 S.C. 61, 68, 697 S.E.2d 615, 618 (Ct. App. 2010) ("An insubstantial error is harmless when guilt is proven by competent evidence such that no other rational decision could be reached or when the evidence is merely cumulative of other evidence."). Even assuming the trial judge abused her discretion in admitting the "whispering evidence," Appellant's conviction should not be reversed based on such an insignificant error. See State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) ("[A]ppellate courts will not set aside convictions due to insubstantial errors not affecting the result."). Appellant's conviction should be affirmed.

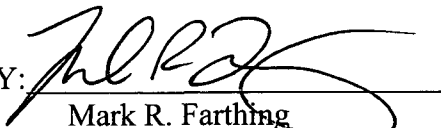
CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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THE STATE,

Respondent,

vs.

CRAIG DOUGLAS KEELING,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

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