292 So.3d 530
District Court of Appeal of Florida, Second District.

Chase WOOLMAN, Appellant,
v.
STATE of Florida, Appellee.

Case No. 2D17-4459
|
Opinion filed March 18, 2020.

Synopsis
Background: Defendant was convicted in the Circuit Court, 10th Judicial Circuit, Polk County, Wayne M. Durden, J., of sexual battery while in position of familial or custodial authority and lewd or lascivious molestation. Defendant appealed.

Holdings: The District Court of Appeal, Black, J., held that:

[1] probative value of defendant's admissions to engaging in sex with victim after dates charged in information was far exceeded by its prejudicial effect;

[2] discussion of sex defendant had with victim after victim had turned 16 was not inextricably intertwined with charged crimes;

[3] trial court's error in admitting prejudicial evidence of defendant engaging in sex with victim after dates charged was not harmless; and

[4] jury instruction which provided definition of custodian as to sexual battery charge was incorrect statement of law and reduced State's burden as to contested element of charged offense.

Reversed and remanded.

Procedural Posture(s): Appellate Review; Trial or Guilt Phase Motion or Objection.

West Headnotes (18)

[1] **Criminal Law** Reception and Admissibility of Evidence
Criminal Law Other offenses
District Court of Appeal's review of a trial court's admission of evidence, including evidence of uncharged collateral crimes, is for an abuse of discretion.
1 Case that cites this headnote

[2] **Criminal Law** Necessity and scope of proof
A trial court's discretion in admitting evidence is limited by the evidence code.

[3] **Criminal Law** Reception and Admissibility of Evidence
A trial court abuses its discretion if its ruling on admission of evidence is based on an erroneous view of the law, including the evidence code, or on a clearly erroneous assessment of the evidence.

[4] **Criminal Law** Relevancy in General
The prerequisite to the admissibility of evidence is relevancy.

[5] **Criminal Law** Relevancy in General
Evidence tending to prove or disprove a material fact is relevant and therefore admissible, unless otherwise precluded by law.

[6] **Criminal Law** Relevancy
Collateral-crime evidence, such as bad acts not included in the charged offenses, is admissible when relevant to prove a material fact in issue.

[7] **Criminal Law** Relevancy in General
Criminal Law Evidence calculated to create prejudice against or sympathy for accused
Relevancy is not the only test for admissibility of evidence; in every case, the trial court must also balance whether the probative value of the relevant evidence is substantially outweighed by

the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

[8] **Criminal Law**Interwoven occurrences in general
Criminal Law Similarity to Crime Charged
Criminal Law Temporal Relation of Events

In some instances, it becomes necessary to admit evidence of other bad conduct to adequately describe the offenses at issue or connect the elements of the offenses because the charged offenses and the other conduct are significantly linked in time and circumstance.

[9] **Criminal Law**Interwoven occurrences in general

In cases where it becomes necessary to admit evidence of other bad conduct to adequately describe the offense at issue, the uncharged collateral crime evidence is inextricably intertwined with the charged offenses; it is necessary to admit the evidence to adequately describe the deeds.

[10] **Criminal Law**Misconduct subsequent to charged offense

Probative value of defendant's admissions to engaging in sex with victim after dates charged in information was far exceeded by its prejudicial effect, and thus should have been excluded in prosecution for sexual battery while in a position of familial or custodial authority and lewd or lascivious molestation; overwhelming majority of recorded call addressed only collateral acts of sex with victim after she had turned 16, very little of call was relevant to charged crimes, and defendant's admissions to sexual relationship with victim after dates charged was precisely type of evidence that had undue tendency to suggest decision on improper basis that inflamed jury or appealed improperly to jury's emotions. Fla. Stat. Ann. §§ 794.011(8), 800.04(5).

[11] **Criminal Law**Sex offenses, incest, and prostitution

Discussion of sex defendant had with victim after victim had turned 16 was not inextricably intertwined with charged crimes of sexual battery while in a position of familial or custodial authority and lewd or lascivious molestation, and thus should have been excluded, where evidence of later sexual conduct was unnecessary to describe charged acts, provide intelligent account of charged crimes, establish context of charged offenses, or describe events leading up to offenses. Fla. Stat. Ann. §§ 794.011(8), 800.04(5).

[12] **Criminal Law**Evidence of other offenses and misconduct

Trial court's error in admitting prejudicial evidence of defendant engaging in sex with victim after dates charged in information was not harmless in prosecution for sexual battery while in a position of familial or custodial authority and lewd or lascivious molestation, where majority of controlled call, in which defendant admitted to having sex with victim after dates charged, addressed uncharged collateral crimes and contained defendant's admissions to those acts, playback of recorded call was requested during jury's deliberations, erroneously admitted evidence was extremely prejudicial, minimally relevant, and clearly significant to jury's determination, and there was no reasonable possibility that error did not contribute to verdict. Fla. Stat. Ann. §§ 794.011(8), 800.04(5).

[13] **Criminal Law**Rulings as to evidence

An erroneous admission of irrelevant collateral crime evidence is presumed harmful.

[14] **Criminal Law**Evidence of other offenses and misconduct

Erroneous admission of irrelevant collateral crime evidence that suggests a defendant has committed other crimes or bad acts can have a powerful effect on the results at trial.

[15] **Criminal Law**Adding to or changing grounds of objection

Defendant failed to preserve for appellate review his claim that trial court provided incorrect definition of custodian in jury instructions as to sexual battery charge, which required proof that at time of offense, defendant was in position of familial or custodial authority to victim, although issue was argued below; instruction error identified by defendant on appeal was not basis for his objection below. Fla. Stat. Ann. § 794.011(8).

1 Case that cites this headnote

[16] **Criminal Law**Elements of offense and defenses

Where a jury instruction pertains to a disputed element of the offense and the error is pertinent or material to what the jury must consider to convict, fundamental error occurs.

[17] **Criminal Law**Elements of offense and defenses

The giving of an inaccurate definition in jury instructions of a disputed element of the crime can rise to the level of fundamental error where the inaccurate definition reduces the State's burden of proof on an essential element of the charged offense.

[18] **Criminal Law**Sufficiency in general
Criminal Law Elements of offense and defenses

Jury instruction, which provided definition of custodian as to sexual battery charge, which required proof that at time of offense, defendant was in position of familial or custodial authority to victim, was incorrect statement of law and reduced State's burden as to contested element of charged offense, and thus constituted fundamental error, where jury was instructed that it could find defendant guilty if he had custody or control or duty to care for victim, and whether defendant had custodial authority over victim was heavily disputed at trial. Fla. Stat. Ann. § 794.011(8).

1 Case that cites this headnote

***532** Appeal from the Circuit Court for Polk County; Wayne M. Durden, Judge.

Attorneys and Law Firms

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Ashley Moody, Attorney General, Tallahassee, and Katherine Coombs Cline, Assistant Attorney General, Tampa, for Appellee.

Opinion

BLACK, Judge.

Chase Woolman challenges his convictions for sexual battery while in a position of familial or custodial authority, in violation of section 794.011(8), Florida Statutes, and lewd or lascivious molestation, in violation of section 800.04(5), Florida Statutes. Following a jury trial, Woolman was convicted and sentenced to concurrent terms of fifteen years in prison to be followed by fifteen years of sexual predator probation on the battery conviction. Woolman raises several issues on appeal, two of which require reversal: the trial court's error in admitting the recording of a controlled phone call which included evidence of uncharged collateral crimes and the trial court's error in instructing the jury on the sexual battery charge. We decline to address the remaining issues raised on appeal.

Uncharged collateral crimes

The information alleged that the crimes occurred between October 1, 2010, and May 3, 2012, when the victim was older than twelve but younger than sixteen and Woolman was older than eighteen. The sexual battery charge was specific to sexual battery by oral penetration while the victim was between twelve and sixteen years of age.

Prior to trial, Woolman filed a motion in limine seeking to exclude any reference to or evidence of sexual activity between the victim and Woolman after the dates alleged in the information. Woolman sought a ruling that a 2015 recorded controlled telephone call between the victim, then eighteen, and Woolman was inadmissible. He argued that the

recorded call was inadmissible because it constituted evidence ***533** only of uncharged collateral crimes and was otherwise irrelevant. Woolman argued that neither the victim nor the "male voice alleged to be that of [Woolman]" specifically mentioned the charged crimes and that the only act specifically discussed on the call was sex occurring after the victim had turned sixteen, which was not a charged crime. Woolman contended that as to the charged crimes the call was vague and that it was not relevant because it did not tend to prove or disprove any material fact at issue. The trial court denied Woolman's motion following a hearing. The court found that the recording of the controlled call, subject to redactions not at issue, was admissible as Woolman's admissions or otherwise as including statements of a party opponent. The court specifically cited as admissions Woolman's references to engaging in sex with the victim after she had turned sixteen. When defense counsel reiterated that those statements were specific to sex after the dates alleged in the information and that such sex was not a charged crime in this case, the court—incorrectly—responded, "Yeah, it certainly is."

During trial, the recording of the controlled call, replete with Woolman's admissions to having engaged in sex with the victim after she had turned sixteen, was published to the jury. During deliberations, the jury requested to listen to the controlled call again; the recording and a CD player were provided to the jury.

Woolman asserts that the trial court abused its discretion in denying his motion in limine with regard to the controlled phone call and therefore in admitting it at trial. Woolman argues that the substance of the call was both irrelevant and unduly prejudicial because it included evidence of uncharged collateral crimes.[1] The State contends that while some of the discussion during the recorded call concerned uncharged collateral acts which occurred after the victim had turned sixteen, Woolman's admissions during the call were relevant and admissible. The State further argues that Woolman's admissions to the uncharged acts are inextricably intertwined with other admissions made during the call and that any prejudicial effect of the evidence of sex after the victim had turned sixteen was "substantially outweighed" by the probative value of the call otherwise. Finally, the State asserts that even if the trial court erred in admitting the recording of the controlled phone call, the error was harmless.

[1] [2] [3] Our review of the trial court's admission of evidence, including evidence of uncharged collateral crimes, is for an abuse of discretion. See Sabine v. State, 58 So. 3d 943, 946 (Fla. 2d DCA 2011); Zerbe v. State, 944 So. 2d 1189, 1193 (Fla. 4th DCA 2006). "The trial court's discretion is limited, however, by the evidence code." Wright v. State, 19 So. 3d 277, 291 (Fla. 2009). And a trial court abuses its discretion if its ruling is based "on an erroneous view of the law," including the evidence code, "or on a clearly erroneous assessment of the evidence." Johnson v. State, 969 So. 2d 938, 949 (Fla. 2007) (quoting Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990)).

[4] [5] [6] [7] [8] [9] "The prerequisite to the admissibility of evidence is relevancy." Wright, 19 So. 3d at 291. Evidence tending to prove or disprove a material fact is relevant and therefore admissible, unless otherwise precluded ***534** by law. Id.; see also §§ 90.401, .402, Fla. Stat. (2016). "Therefore, collateral-crime evidence, such as bad acts not included in the charged offenses, is admissible when relevant to prove a material fact in issue ...." Id. However, "[r]elevancy is not the only test for admissibility. In every case, the trial court must also balance whether the probative value of the relevant evidence is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." Id. at 296; see also § 90.403. And, in some instances, "it becomes necessary to admit evidence of other bad conduct to adequately describe the offense[s at issue] or connect the elements of the offense[s] because the charged offense[s] and the other conduct are significantly linked in time and circumstance." Id. at 292. In such cases, the uncharged collateral crime evidence is "inextricably intertwined" with the charged offenses; "[i]t is necessary to admit the evidence to adequately describe the deed[s]." Sabine, 58 So. 3d at 947 (quoting McGirth v. State, 48 So. 3d 777, 787 (Fla. 2010)).

[10] Here, whatever minimal probative value Woolman's admissions to engaging in sex with the victim after the dates charged in the information may be is far exceeded by its prejudicial effect. The overwhelming majority of the

recorded call addressed only the collateral acts of sex with the victim after she had turned sixteen; very little of the call was relevant to the charged crimes. And Woolman's admissions to a sexual relationship with the victim after the dates charged is precisely the type of evidence that has "an undue tendency to suggest decision on an improper basis," that "inflames the jury or appeals improperly to the jury's emotions," and that should have been excluded. Cf. Wright, 19 So. 3d at 296 (quoting McDuffie v. State, 970 So. 2d 312, 327 (Fla. 2007)).

[11] Not only do we conclude that the discussion of sex after the victim had turned sixteen was unfairly prejudicial, but we also conclude that the discussion was not inextricably intertwined with the charged crimes. Evidence of "later sexual conduct was unnecessary to describe the charged acts, provide an intelligent account of the charged crimes, establish the context of the charged offenses, or describe the events leading up to the offenses." See Sabine, 58 So. 3d at 947; see also Baldino v. State, 225 So. 3d 257, 263 (Fla. 4th DCA 2017) (concluding that uncharged images of child pornography were not inextricably intertwined evidence where "[t]hey did not assist in 'adequately describing the deed' of soliciting a parent for unlawful sexual conduct with a minor, transmission of child pornography, or possession of the charged images of child pornography"; "provide an intelligent account of the other crimes or establish the entire context out of which the crimes arose"; or "describe events leading up to the charged crimes, because the images were accessed after all of the charged crimes occurred" (citation omitted)); Downs v. State, 40 So. 3d 49, 51-52 (Fla. 5th DCA 2010) ("The evidence regarding what occurred in the shower was not inextricably intertwined with the charged crime, as it was not necessary to describe the charged crime or the events leading up to the charged crime. To the contrary, the shower activity occurred about two years after the charged crime."). As in Sabine, the victim testified regarding the sexual battery by oral penetration and lewd or lascivious molestation; evidence of subsequent uncharged acts was not necessary for the jury to understand those crimes.

[12] [13] [14] We also reject the State's argument that the erroneous admission of ***535** the discussion of the sexual activity occurring after the dates alleged in the information was harmless. "An erroneous admission of irrelevant collateral crime evidence is presumed harmful." Sabine, 58 So. 3d at 948 (citing Fitzsimmons v. State, 935 So. 2d 125, 128-29 (Fla. 2d DCA 2006)). "This is because '[e]vidence that suggests a defendant has committed other crimes or bad acts can have a powerful effect on the results at trial.' " Baldino, 225 So. 3d at 264 (alteration in original) (quoting Ward v. State, 59 So. 3d 1220, 1224 (Fla. 4th DCA 2011)). Here, the majority of the controlled call addressed uncharged collateral crimes and contained Woolman's admissions to those acts. A playback of the recorded call was requested during the jury's deliberations. The erroneously admitted evidence was extremely prejudicial, minimally relevant, and clearly significant to the jury's determination. Cf. Sabine, 58 So. 3d at 948. There is no reasonable possibility that the error in this case did not contribute to the verdict. See State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

We do not conclude that the entirety of the recorded controlled phone call must be excluded; on remand, the trial court must ensure that those portions of the call that pertain to uncharged collateral crimes or acts occurring after the dates alleged in the information are redacted.

Instruction on sexual battery

[15] After considerable discussion of the jury instructions, particularly as to the sexual battery charge, the jury was instructed that the State was required to prove "at the time of the offense, the Defendant was in a position of familial or custodial authority to [the victim]." The trial court then provided the jury with the definition of custodian that had been requested by the State: "A 'custodian' is someone who has custody or control of another, or a duty or obligation to care for another."[2]

Woolman had objected to the State's proposed definition, citing Hallberg v. State, 649 So. 2d 1355 (Fla. 1994), and he had suggested an alternative definition. Woolman now argues that the definition provided to the jury in the instruction was overly broad and contradicts Hallberg. He contends that the instruction and definition as provided to the jury advised them that if Woolman had custody or control over the victim then Woolman had custodial authority over her as required by the statute. Woolman asserts that the jury may therefore have found him guilty based solely on the conclusion that the victim was in his custody at the time of the alleged sexual

battery and that such a conclusion would have omitted the essential requirement that Woolman also have had control or authority over the victim at that time.

[16] [17] Although Woolman asserts that the issue was argued below and therefore adequately preserved, we disagree. The instruction error identified by Woolman on appeal was not the basis for his objection below. However, Woolman argues in the alternative that the erroneous instruction amounted to fundamental error. See Ramirez Ramos v. State, 274 So. 3d 395, 397 (Fla. 4th DCA 2019). " '[W]here the instruction pertains to a disputed element of the offense and the error is pertinent or material to what the jury must consider to convict,' fundamental error occurs." Id. (alteration in original) (quoting Haygood v. State, 109 So. 3d 735, 741 (Fla. 2013), receded from on other grounds by ***536** Knight v. State, 286 So. 3d 147 (Fla. 2019)). Similarly, the giving of an inaccurate definition of a disputed element of the crime can rise to the level of fundamental error where the inaccurate definition reduces the State's burden of proof on an essential element of the charged offense. Kennedy v. State, 59 So. 3d 376, 381 (Fla. 4th DCA 2011) (citing Reed v. State, 837 So. 2d 366, 368-69 (Fla. 2002)).

In Hallberg, the supreme court addressed the element of "custodial authority" that is at issue in this case. Hallberg was a junior high school teacher, and the crimes with which he was charged occurred during summer recess. Hallberg, 649 So. 2d at 1355-56. The supreme court determined "that teachers are not, by reason of their chosen profession, custodians of their students at all times, particularly when school is recessed for the summer." Id. at 1357. It then held "that the term 'custodial,' absent a statutory definition, must be construed in accordance with the commonly understood definition as one having custody and control of another." Id. at 1358 (emphasis added).[3]

[18] Hallberg is clear that "custodial authority" means having "custody and control of another." Id. at 1358. It is a conjunctive rather than disjunctive definition, requiring both custody and control, and it does not allow for an alternative of "a duty or obligation to care for another." Here, the jury was instructed that it could find Woolman guilty if he had custody or control or a duty to care for the victim. Whether Woolman had custodial authority over the victim was heavily disputed at trial. The instruction provided to the jury in this case was an incorrect statement of law and reduced the State's burden as to a contested element of the charged offense; as such, it was fundamentally erroneous. See Heathcock v. State, 225 So. 3d 362, 364 (Fla. 5th DCA 2017); see also Ramirez Ramos, 274 So. 3d at 398 ("Given the instruction, and the disputed factual issues, the jury was left to deliberate and convict the defendant based on conduct less than that required by statute for the crime of sexual battery and its consequent life sentence. This is fundamental error." (citing Haygood, 109 So. 3d at 741)); Rodriguez v. State, 174 So. 3d 457, 459 (Fla. 4th DCA 2015) (concluding that where instruction "incorrectly defined a disputed element of the crime in such a way as to reduce the State's burden of proof," fundamental error occurred).

Conclusion

Both the error in admitting the highly prejudicial and minimally relevant majority of the recorded controlled phone call and the error in the instruction on the sexual battery charge require reversal. Accordingly, we reverse the convictions and sentences for sexual battery while in a position of familial or custodial authority and lewd or lascivious molestation and remand for a new trial as to both charges.

Reversed and remanded.

SILBERMAN and LaROSE, JJ., Concur.

All Citations

292 So.3d 530, 45 Fla. L. Weekly D630

Footnotes

[1] Woolman refers to the evidence of sexual activity with the victim after she had turned sixteen as collateral crime evidence. We adopt his usage without comment on or acceptance of its veracity.

[2] The standard jury instruction for sexual battery on a person between the ages of twelve and eighteen by a person in a position of custodial or familial authority does not provide a definition for custodial authority. See Fla. Std. Jury Instr. (Crim.) 11.6.

[3] Although the supreme court agreed with the reasoning of the dissent in this court's decision in Hallberg v. State, 621 So. 2d 693, 705-06 (Fla. 2d DCA 1993) (Altenbernd, J., concurring in part and dissenting in part), which acknowledged that "[c]oncerning a child, [custody] usually implies that the person has some responsibilities *in loco parentis*," Hallberg, 649 So. 2d at 1357, we disagree with Woolman's contention that the definition of custodial authority must include that the defendant stood in the place of the parent under the supreme court's Hallberg opinion.