

IN THE COURT OF APPEALS 12/29/95
OF THE
STATE OF MISSISSIPPI
NO. 94-KA-00626 COA

CURTIS WOODS

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. EUGENE M. BOGEN

COURT FROM WHICH APPEALED: WASHINGTON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

MARTIN KILPATRICK

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: JOLENE LOWRY

DISTRICT ATTORNEY: JOYCE I. CHILES

NATURE OF THE CASE: CRIMINAL/ CAPITAL RAPE

TRIAL COURT DISPOSITION: CONVICTED OF CAPITAL RAPE. SENTENCED TO LIFE IN
THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND ORDERED
TO PAY ALL COURT COSTS, \$192.50.

BEFORE THOMAS, P.J., BARBER, AND DIAZ, JJ.

BARBER, J., FOR THE COURT:

Curtis Woods was indicted and convicted of raping his niece who had been living with Woods and his wife since the death of her mother. Woods' niece was twelve years of age at the time of the rape. Woods was sentenced to life imprisonment. Feeling aggrieved, Woods appeals asserting that the trial court erred in allowing testimony over the defense objection of a subsequent bad act committed by Woods, and therefore he should be entitled to a new trial. We find Woods' argument unpersuasive and affirm the judgment of the trial court.

FACTS

During the winter of 1991-1992, Woods' wife, Doris lived in Greenville with a daughter, and a niece. The niece was twelve years of age and had lived with Doris since the death of her mother, when the child was three years old. Woods and Doris were married in 1987, and lived together in the home with the daughter and the niece through 1991. On February 23, 1992, Doris took her niece, who was complaining of stomach pains, to a hospital in Greenville. The physician on duty diagnosed the niece to be approximately nine weeks pregnant. Initially, the niece claimed that the father of the child was a boy at school, whom she declined to identify.

Before Doris left the hospital with her niece, however, the niece told her that Woods was the father of the baby. The niece also later told social services and investigative personnel that Woods was the father. When Doris confronted Woods about her niece's accusation, he denied the contention. Woods continued to deny the accusations throughout the trial of this case.

According to the niece, Woods had sexual relations with her four or five times a month prior to her pregnancy. Woods contended that his niece had fabricated the accusations because she did not want him in the home, where he and Doris had frequent arguments. According to his trial testimony, Woods "most absolutely had nothing to do with her pregnancy."

Ronald Barwick of Roche Biomedical Laboratories testified that Woods, the niece, and the child of her pregnancy were tested for paternity evaluation by his company. It was his opinion based upon the genetic evidence that Woods was the biological father of his niece's child. According to Barwick, the results of the paternity testing were that there was a 99.84% probability that Woods was the biological father. Also his tests revealed that there was only 1 chance in 622 that Woods was not the father of this child.

At the trial, Doris recounted an incident which occurred in June of 1993, when she found Woods in her home, lying on the living room floor on top of his niece. Defense counsel objected *in limine* to this testimony on the basis that it was evidence of a bad act subsequent to that in question in the indictment which would be more prejudicial than probative and not relevant to the facts of the instant case. The testimony in question (with questions by the district attorney, and answers given by Doris) was as follows:

Q. Directing your attention to June of 1993, did you see the defendant in your home?

A. Yes.

Q. What time of day or night was it when you saw him?

A. It was between three and four . . . in the morning.

* * * *

Q. Where did you see the defendant in your home?

A. In the living room.

Q. Was anyone there with him?

A. Yes.

Q. Who was in there with him?

A. My niece, (name stated).

Q. In what position was the defendant in when you saw him?

A. Well, he was laying down on the floor

Q. Was he laying on the floor?

A. No.

Q. Tell us where.

A. He was laying on her but he say he fell down.

Q. He was laying on your niece . . . ?

Q. Yes.

* * * *

Q. How did you react to seeing the defendant lying on top of your niece at three or four o'clock that morning?

A. I was hurt and I was devastated although he kept trying to convince me that he fell down on her.

The trial court's overruling of the defense objection to this testimony is the basis of this appeal.

ANALYSIS

Woods argues on appeal that the above testimony was objectionable because it was evidence of a *subsequent* bad act on the part of the defendant and therefore, was not admissible under the exceptions stated in Mississippi Rule of Evidence 404(b). Furthermore, Woods asserts that the testimony was more prejudicial than probative and, therefore, should not have been admitted under Rule 403. Rule 404(b) reads as follows:

Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

M.R.E. 404(b).

The comment to Rule 404 adds: "It should be noted that the exceptions listed in Subsection (b) are not exclusive. Furthermore, the court in *Neal v. State*, held that proof of another crime is admissible where the offense offered to be proved is material to prove motive, and there is an apparent relation or connection between the act proposed to be proved and that charged. . . ." *Neal v. State* 451 So. 2d 743, 759 (Miss. 1984).

The Mississippi Supreme Court in *Ford v. State*, held that evidence of subsequent crimes are admissible if the evidence in question meets the other requirements of Evidence Rules 404(b) and 403. *Ford v. State* 555 So. 2d 691, 695 (Miss. 1989). Additionally, the court instructed that in such circumstances the trial court should properly instruct the jury that the evidence of the subsequent crime had a limited purpose. *Id.*

In this case, Woods argued throughout the trial that the results of the paternity testing were a mistake. Furthermore, he stated that his niece was lying about his relationship with her. We find that evidence of the subsequent encounter between Woods and his niece is probative of the probability of mistake, or lack thereof in the results of the paternity testing. Furthermore, we find the evidence of the subsequent encounter probative on the issue of motive. It is possible for one to infer from Woods subsequent actions, that he found his adolescent niece to be sexually attractive. Moreover, it is probative as to whether he could be capable of acting on those feelings. Because of the foregoing reasons, we find that the evidence of the subsequent encounter between Woods and his niece falls within the acceptable parameters of the Rule 404(b) exceptions. It cannot be denied here that there is an apparent relation or connection between the act proposed to be proved and the act charged.

The next issue we must address is whether the testimony given was violative of Rule 403 which dictates that evidence may be excluded if its probative value is substantially outweighed by its prejudicial effect. M.R.E. 403. "The weighing and balancing task assigned by Rule 403 is not one susceptible of mechanical performance. It requires judgment and because such the law gives the circuit court discretion." *Ford*, 555 So. 2d at 695. The circuit court in the case at bar carefully considered the issue of whether the probative value of the foregoing testimony substantially

outweighed its prejudicial effect. In doing so, he found that "in child sex abuse cases, subsequent contact is acutely relevant to whether or not past conduct may have occurred." We cannot agree with Woods that this finding was an abuse of the trial court's discretion.

Finally, we address the issue of whether the jury was properly instructed in accordance with *Ford* as to the scope of relevance to be given this testimony. The jury at Woods trial was given the following instruction:

INSTRUCTION D-7

The court instructs the Jury that you have heard evidence of an incident that occurred in [the child's] home several months after the crime for which Woods is being tried. This was introduced to show motive and intent only and you may not, under any circumstances, use that incident in your deliberations to decide whether or not Woods is guilty of the crime charged. That is, you can not infer guilt of the rape charge by what is said to have happened on the floor of [the child's] home several months later.

We find that these instructions are sufficient to satisfy the requirements in *Ford*.

Accordingly, we find Woods assignment of error to be without merit.

THE JUDGMENT OF THE WASHINGTON COUNTY CIRCUIT COURT OF CONVICTION OF CAPITAL RAPE AND SENTENCE OF LIFE IMPRISONMENT AND ORDER TO PAY ALL COURT COSTS BELOW IS AFFIRMED. COSTS OF APPEAL ARE ASSESSED TO WASHINGTON COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.