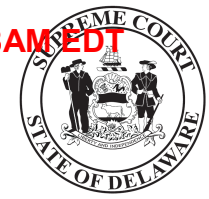

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM HUDSON,	)	
	)	
Defendant-Below,	)	
Appellant,	)	No. 78, 2013
	)	
v.	)	On Appeal from the
	)	Superior Court of the
STATE OF DELAWARE,	)	State of Delaware in and
	)	for New Castle County
Plaintiff-Below,	)	
Appellee.	)	

STATE'S ANSWERING BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

Karen V. Sullivan (No. 3872)
Scott D. Goodwin (No. 4862)
Deputy Attorneys General
820 North French Street
7th Floor
Carvel State Building
Wilmington, DE 19801
(302) 577-8500

Dated: August 12, 2013

TABLE OF CONTENTS

TABLE OF CITATIONS

NATURE AND STAGE OF PROCEEDINGS

On April 12, 2011, Appellant William Hudson was arrested and charged with twenty-three counts of second degree rape. Hudson was indicted on August 1, 2011, charged with one count of endangering the welfare of a child, twenty-five counts of child abuse, and one count of continuous sexual abuse. The twenty-three unindicted charges of second degree rape were dismissed on August 16, 2011. (A1, 3). By superceding indictment, Hudson was charged with the following: one count of endangering the welfare of a child;[1] twenty-five counts of first degree sexual abuse of a child by a person in a position of trust ("SACPPT");[2] one count of continuous sexual abuse of a child;[3] and two counts of violation of privacy.[4]

On February 7, 2012, after a four-day jury trial, Hudson was found guilty of all indicted charges. (A5, 46).

Prior to sentencing, by letter dated June 15, 2012, the State notified the court that the crime of SACPPT did not exist until June 30, 2010; thus, Hudson could not be found guilty of counts 2 through 16 of the superseding

[1] DEL. CODE ANN. tit. 11, § 1102

[2] DEL. CODE ANN. tit. 11, § 778

[3] DEL. CODE ANN. tit. 11, § 776. Hudson's opening brief omits mention of this charge.

[4] DEL. CODE ANN. tit. 11, § 1335

indictment because those counts of SACPPT occurred before that date. The State suggested amending the indictment and verdict sheet to change the fifteen charges from SACPPT to second degree rape. (A9-10). On July 13, 2012, Hudson filed a motion to dismiss the fifteen counts. (A24-26). The court reserved decision on the motion to dismiss and, on January 30, 2013, sentenced Hudson on all counts not addressed in such motion. On March 22, 2013, with leave of the court, the State entered a *nolle prosequi* on the fifteen charges that were the subject of the motion. (A7).

On July 12, 2013, Hudson filed his opening brief, appealing his conviction. This is the State's Answering Brief.

SUMMARY OF ARGUMENT

I. DENIED. Because the disputed evidence was probative of the charge of continuous sexual abuse of a child, Appellant fails to show any error, plain or otherwise, in the admission at trial of the evidence.

STATEMENT OF FACTS

Appellant William Hudson ("Hudson") resided with his wife ("Mrs. Hudson") and their minor daughter (the "victim"), in New Castle County, DE. (B1). In the early spring of 2008, after the victim had gotten her first period, Hudson began urging his twelve-year-old daughter to use a vibrator while the two were alone in her bedroom. (A30). At first Hudson would hold the vibrator over the victim's vagina, outside her underwear, but soon told her to "try it without [her] underwear on." (A30, 31). Initially, Hudson would hold the vibrator on the victim, but later urged her to use it on herself. (A32, 33). By late summer of 2008, after moving their encounters to a futon in the basement, Hudson had started inserting sex toys and his fingers into the victim's vagina and anus. (A32-33).

Between the winter of 2008 and the spring of 2009, Hudson began lying down with the victim, putting his fingers on and in her vagina while moving her hand on his penis to masturbate him. (A34). At least once, Hudson tried to get the victim to put a dildo down her throat, which made her gag. (B6). Hudson also began making the victim use a sybian machine, holding her upright while she sat on a series of vibrating attachments that rubbed and penetrated her vagina. (B6-7).

If the victim resisted Hudson's wishes, he would threaten her, telling her she was "doing the wrong thing." (B8). A few times he also smacked her across the face, and once tied her hands together. (*Id.*). On one occasion, after the victim was unable to insert a penis-shaped sybian attachment completely into her vagina, Hudson became angry, yelling at her and telling her that she "was choosing to do the wrong thing and that there was something wrong with [her]." (A35). Hudson then intimidated the victim by driving her to a mental hospital and threatening to commit her until she acquiesced to his demands. (*Id.*). After the victim tried, again unsuccessfully, to fully insert the attachment, Hudson again became angry, but resorted to using other attachments. (*Id.*).

The victim had participated in swimming sports since childhood. (A29). In April 2011, on the night before a swim meet, Hudson had an argument with the victim and told her she could not go to the meet. (B8). However, the next morning when Hudson asked the victim why she was not preparing for the meet, she reminded him that he had forbidden her. (*Id.*). Hudson became very angry and gave her an ultimatum that she would either go to the meet or would have to go outside naked. (*Id.*). Terrified, the victim took off her clothes and went outside the house, where she stood for several minutes until Mrs. Hudson got her to come back inside. (*Id.*).

Immediately after the swim meet, Mrs. Hudson had an argument with her husband and took the victim to spend the night at the victim's grandparents' house, but she and the victim returned home the next day. (B10).

Shortly thereafter, on April 11, 2011, Officer Ryan Marley responded to an abuse report at the Hudson home, encountering the victim, her parents, and two Department of Family Services (DFS) workers at the scene. (B1). Officer Marley took the victim to the New Castle County Police station, where Detective Hector Garcia interviewed her. (B1-2). Based on that interview, Detective Garcia obtained a search warrant to search the Hudson home for one of the vibrators, which was found in the Hudsons' basement in a dresser with several other sex toys. (B2). After obtaining a second search warrant, various sex toys, including the sybian machine, were collected from the Hudson home. (B3-5).

A forensic DNA analyst from the Medical Examiner's office conducted DNA analysis of the sex toys. (A36-43). On one of the dildos, the analyst found mixed source DNA consistent with the victim and Hudson's respective DNA profiles, to the exclusion of 99.9996% of the population. (A42). Many other items showed DNA mixtures consistent with the victim and a male individual. (A40-42). Several other sex toys showed single source DNA consistent with the victim's profile. (A39).

The victim, who was born in August 1995, testified that she was thirteen when Hudson began inserting things in her vagina. (A30, 35). These sexual activities would occur "a few times a week," not stopping until April 11, 2011, when the DFS workers came to the house. (A35). When the victim was thirteen, Hudson also made secret video recordings of her in the shower. (B8-9).

I. THE SUPERIOR COURT PROPERLY ADMITTED EVIDENCE PROBATIVE OF A CRIME FOR WHICH HUDSON WAS INDICTED.

Question Presented

Did the Superior Court commit plain error in admitting evidence probative of continuous sexual abuse of a child, a charge for which Hudson was indicted, where the evidence was also probative of other crimes that were dismissed after the jury returned its verdict of guilty on all counts?

Scope of Review

Evidentiary issues not raised in the trial court are reviewed only for plain error.[5] Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.[6] Plain error review is "limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."[7]

---

[5] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986); D.R.E. 103(d); *see also* DEL. SUPR. CT. R. 8 ("Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.").

[6] *Wainwright*, 504 A.2d at 1100.

[7] *Id.*

Merits of the Argument

Hudson argues that the evidence regarding the fifteen counts of SACPPT ultimately dismissed by the State was "far more prejudicial than probative" and "should not have gone to the jury." (Op. Brf. at 3). In support of this argument, Hudson characterizes that evidence as "prior bad acts" for which a D.R.E. 404(b) analysis consistent with *Getz v. State*[8] was required. (Op. Brf. at 7-8). Hudson's argument ignores that he was also charged with, and convicted of, continuous sexual abuse of a child. Because the evidence of the fifteen counts of SACPPT that were dismissed was also direct evidence of continuous sexual abuse of a child, the evidence was properly submitted to the jury.

Delaware Rule of Evidence 403 permits, but does not require, the exclusion of otherwise relevant and admissible evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury.[9] On the other hand, D.R.E. 404(b) prohibits the admission of evidence of other crimes, wrongs or acts to prove the character of a person in order to show action in conformity therewith, but allows the admission of such evidence for other purposes,

[8] 538 A.2d 726 (Del. 1988).

[9] D.R.E. 403.

such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.[10] If the "prior conduct" concerns a separate charge properly joined in the indictment, then no analysis under D.R.E. 404(b) is required.[11] Otherwise, an analysis must be performed, using the guidelines set forth in *Getz v. State*, to show how the uncharged prior bad acts are admissible on a theory other than to show action in conformity with such acts.[12]

Hudson was indicted for twenty-five counts of SACPPT, each of the first twenty-four counts spanning a one-month period running from April 2009 through March 2011, and the last count spanning the period from April 1, 2011 until April 11, 2011. Each count of SACPPT differed only as to the time period, otherwise stating, in identical language, that Hudson "did

[10] D.R.E. 404(b).

[11] *Wood v. State*, 956 A.2d 1228, 1232 (Del. 2008) ("If charges are properly joined, there is no longer concern about prior conduct that was never proven. Rather in one trial, the State must prove beyond a reasonable doubt that each set of conduct occurred for the defendant to be found guilty on all counts.").

[12] *See, e.g., State v. Rodriguez*, 2010 WL 1987520 (Del. Super. Ct. May 18, 2010) ("Five guidelines to be considered by trial judges in assessing the admissibility of evidence under Rule 404(b) are set forth in *Getz v. State:* (1) the evidence must be material to an issue in the case; (2) the evidence must be introduced for a purpose sanctioned by Rule 404(b) or any other purpose not inconsistent with the basic prohibition against evidence of bad character or criminal disposition; (3) the evidence of other acts must be proved by plain, clear and conclusive evidence; (4) the other acts cannot be too remote in time; . . . and (5) the court needs to balance the probative value of such evidence against its potential for prejudice under D.R.E. 403. If the evidence is admitted, the judge must instruct the jury about the reason the evidence was admitted."); *see also Getz*, 538 A.2d at 734.

intentionally engage in sexual penetration with [the victim], a child who has not yet reached that child's own 16th birthday and the defendant stands in a position of trust, authority or supervision over the child." (A12-21). Hudson was also indicted for one count of continuous sexual abuse of a child, which charged, among other things, that between April 1, 2009 and April 11, 2011, Hudson "did intentionally engage in three or more acts of sexual conduct with [the victim], a child under the age of 18 years of age over a period of time not less than three months in duration, as set forth in [the twenty-five counts of SACPPT] incorporated herein by reference." (A22).

The language of the continuous sexual abuse charge expressly anticipates that the "sexual conduct" element of the crime will be understood by reference to the sexual penetration alleged in the twenty-five counts of SACPPT. In fact, in reviewing the language of the Superior Court's jury instructions, Hudson's counsel below indicated that the definition of the "sexual conduct" element should be limited only to sexual penetration as defined in the other twenty-five counts of SACPPT. (B11). That the same acts are probative of the two separate types of charges is also reflected in the time frame of the charges, with the single continuous sexual abuse charge covering the exact same time period as the period covered, cumulatively, by

the twenty-five counts of SACPPT. Consequently, evidence that was probative of any count of SACPPT, including the counts that were ultimately dismissed, was also independently probative of the single count of continuous sexual abuse.[13] Therefore, evidence of Hudson's sexual penetration of his minor daughter occurring prior to the enactment of the crime of SACPPT was not evidence of "prior bad acts" or other misconduct unrelated to the charges, which would necessitate an analysis under D.R.E. 404(b) and *Getz v. State*. Rather, such evidence was directly probative of the continuous sexual abuse of a child charge properly before the jury.

As Hudson points out, *Wood v. State* states that "[i]f charges are properly joined, there is no longer concern about prior conduct that was never proven."[14] In that case, this Court declined to perform a *Getz* analysis because the evidence that might otherwise constitute prior bad acts with respect to certain charges was related to other charges that had been properly joined in the indictment. Although Hudson now argues that a *Getz* analysis should have been conducted because the charges in this case were not

[13] On a related point, this Court has repeatedly reaffirmed the longstanding rule that evidence of other crimes is admissible when two crimes constitute proof of one transaction and proof of one requires proof of the other. *See Bantum v. State*, 85 A.2d 741, 745-46 (Del. 1952); *Getz*, 538 A.2d at 730; *Deshields v. State*, 706 A.2d 502, 506 (Del. 1998).

[14] 956 A.2d 1228, 1232 (Del. 2008).

properly joined, Hudson failed to object before trial to either the joinder of the twenty-five counts of SACPPT, or the joinder of the continuous sexual abuse charge to those other charges,[15] thus waiving such objections.[16] Because Hudson cannot now contend that the single count of continuous sexual abuse of a child was improperly joined to the counts of SACPPT, the joinder of such counts obviated the need for any *Getz* analysis. Rather, the State was required to "prove beyond a reasonable doubt that each set of conduct occurred."[17] As such, the evidence of Hudson's sexual penetration of his daughter prior to June 30, 2010 constituted not prior bad acts, but rather acts directly probative of a finding that Hudson had intentionally engaged in three or more acts of sexual conduct with her for a period of not less than three months between April 1, 2009 and April 11, 2011, elements necessary to find Hudson guilty of continuous sexual abuse. As the

[15] Docket (A1-8).

[16] DEL. SUPER. CT. CRIM. R. 12(b)(2) (providing that defenses and objections based on defects in the indictment must be raised prior to trial); DEL. SUPER. CT. CRIM. R. 12(f) ("Failure by a party to raise defenses or objections or to make requests which must be made prior to trial . . . shall constitute waiver thereof."); *State v. Mercer*, 2010 WL 5307842, at *3 (Del. Super. Ct. Dec. 15, 2010).

[17] *Wood*, 956 A.2d at 1232.

probative value of this evidence outweighed any unfair prejudice to Hudson, the Superior Court committed no plain error[18] in admitting the evidence.

[18] Even ignoring the continuous sexual abuse charge, Hudson would not be able to show plain error. First, this Court has upheld the admittance of prior bad acts occurring years before the charged conduct with the same victim. *Vanderhoff v. State*, 684 A.2d 1232 (Del. 1996); *Trump v. State*, 753 A.2d 963, 970-72 (Del. 2000); *compare Gomez v. State*, 25 A.3d 786 (Del. 2011) (evidence of defendant's prior sexual abuse of a different victim in an unrelated, uncharged matter was inadmissible). Second, this Court has held that where, as here, there is strong evidence of guilt, erroneously admitted evidence of prior bad acts was not reversible error. *Wilson v. State*, 950 A.2d 634, 641-42 (Del. 2008); *Hawkins v. State*, 905 A.2d 747 (Del. 2006).

CONCLUSION

Because Appellant has failed to demonstrate any error, plain or otherwise, in the admission of the disputed evidence, the judgment of the Superior Court should be affirmed.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/Scott D. Goodwin
Karen V. Sullivan (No. 3872)
Scott D. Goodwin (No. 4862)
Deputy Attorneys General
820 North French Street
7th Floor
Carvel State Building
Wilmington, DE 19801
(302)577-8500

Dated: August 12, 2013

CERTIFICATE OF SERVICE

I, Scott D. Goodwin, Esquire, do hereby certify that on August 12, 2013, I have caused a copy of the State's Answering Brief to be electronically served, by Lexis-Nexis File & Serve, upon the following:

Anthony A. Figliola, Jr., Esquire
Wilmington, Delaware
Attorney for Appellant

/s/ Scott D. Goodwin
Scott D. Goodwin (No. 4862)
Deputy Attorney General