

SUPREME COURT OF SOUTH DAKOTA

State of South Dakota v. Ernest Albert Fisher, Jr.

State v. Fisher, 2013 S.D. 23 (2013) · No. #26396 · Decided March 13, 2013

SUMMARY

The Supreme Court of South Dakota affirmed Ernest Albert Fisher Jr.'s convictions following a retrial on rape and sexual contact offenses involving his daughter. The court held that evidence of Fisher's attempt to fabricate evidence was admissible to show consciousness of guilt and that alleged defects in the indictment did not warrant dismissal because the indictment and jury instructions adequately apprised him of the charges and caused no prejudice.

CASE DETAILS

COURT	Supreme Court of South Dakota
WRITING FOR THE COURT	Severson, Justice; Gilbertson, Chief Justice; Konenkamp, Justice; Wilbur, Justice; Zinter, Justice
JURISDICTION	South Dakota
DECIDED	March 13, 2013
DOCKET	#26396
DISPOSITION	affirmed
PROCEDURAL POSTURE	Fisher appealed his convictions and sixty-year sentence following a retrial on multiple rape and sexual-contact offenses. He challenged the admission of evidence concerning his subornation of perjury and the denial of his motion to dismiss several indictment counts.
STANDARD OF REVIEW	Evidentiary rulings are reviewed for abuse of discretion. A decision on a motion to dismiss an indictment is also reviewed for abuse of discretion, while the sufficiency of an indictment is reviewed de novo.
PRECEDENTIAL VALUE	Published South Dakota Supreme Court opinion; precedential
PARTIES	Ernest Albert Fisher, Jr. v. State of South Dakota

TOPICS

- evidence
- criminal procedure
- statutory interpretation
- appellate procedure
- preservation of error

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether evidence that Fisher solicited the fabrication of evidence to discredit the victim was relevant and admissible under Rule 404(b), and whether its probative value was substantially outweighed by unfair prejudice.
2. Whether admission of the fabrication evidence denied Fisher his rights to testify and to confront and cross-examine witnesses.
3. Whether Counts 2 and 3 of the indictment were duplicitous because the charged conduct allegedly spanned an amendment to the rape statute.
4. Whether Counts 5 and 6 were fatally defective because the indictment misstated the degree of rape.
5. Whether the court should reconsider issues concerning third-party-perpetrator evidence, uncharged sexual acts, and the sexually explicit DVD cover that had already been resolved in Fisher's prior appeal.

HOLDINGS

1. Evidence that a defendant fabricates evidence in an attempt to conceal the charged crime is relevant consciousness-of-guilt evidence admissible as other-act evidence under SDCL 19-12-5 (Rule 404(b)), provided it relates to a material issue and survives the Rule 403 balancing test.
2. Admission of fabrication evidence, subject to reasonable restrictions, did not deny Fisher the right to testify or his constitutional right to confront and cross-examine Dobras.
3. Counts 2 and 3 were not duplicitous because the indictment charged violations of the pre-amendment rape statute and did not charge both third-degree and first-degree rape in a single count.
4. Counts 5 and 6 were sufficient because the indictment used the statutory language and gave Fisher adequate notice; even if the degree designation was defective, the defect was cured because the statute, jury instructions, and proof established the essential elements of the offense.
5. The court declined to reconsider issues concerning third-party-perpetrator evidence, uncharged sexual acts, and the sexually explicit DVD cover because those issues had already been raised and resolved in the prior appeal and neither the facts nor the law had changed.

KEY QUOTATIONS

“It is generally held that an attempt to fabricate evidence is receivable as evidence of one’s guilt of the main facts charged.” (¶ 17)

“However, this does not mean that the cross-examination must be exactly as a defendant wants it.” (¶ 21)

“An indictment is sufficient if it contains the elements of the offense charged such that it apprises the defendant with reasonable certainty of the accusations against him, and it must enable him to plead an acquittal of conviction as a bar to future prosecutions for the same offense.” (¶ 29)

FACTUAL BACKGROUND

While awaiting the outcome of his first appeal, Fisher asked fellow inmate Tyler Dobras to write a letter and execute an affidavit falsely alleging that Fisher's daughter had fabricated the sexual-abuse allegations. Dobras later admitted the allegations were false, and both Dobras and Fisher were convicted of perjury-related offenses. At Fisher's retrial, the State introduced evidence of Fisher's attempt to fabricate evidence, subject to restrictions barring reference to the former trial, prior conviction, appeal, or detailed circumstances of the subornation conviction.

PROCEDURAL HISTORY

Fisher's original convictions were reversed and remanded for a new trial because the trial court improperly admitted evidence of a prior conviction for sexual contact with a child. Before the retrial, the State sought to introduce evidence that Fisher solicited a false affidavit discrediting the victim; the circuit court admitted the evidence subject to restrictions. A jury convicted Fisher on all charges, the court imposed concurrent sentences totaling sixty years, and the court denied his motion for a new trial. The South Dakota Supreme Court affirmed.

DISPOSITION

affirmed

CASES CITED

- State v. Fisher, 2010 S.D. 44, 783 N.W.2d 664
- State v. Jucht, 2012 S.D. 66, 821 N.W.2d 629
- Ronan v. Sanford Health, 2012 S.D. 6, 809 N.W.2d 834
- State v. Hannemann, 2012 S.D. 79, 823 N.W.2d 357
- State v. Harris, 2010 S.D. 75, 789 N.W.2d 303
- State v. Waters, 529 N.W.2d 586 (S.D. 1995)
- State v. Kleinsasser, 436 N.W.2d 279 (S.D. 1989)
- State v. Carothers, 2006 S.D. 100, 724 N.W.2d 610
- State v. Vatne, 2003 S.D. 31, 659 N.W.2d 380
- State v. Roach, 2012 S.D. 91, 825 N.W.2d 258
- State v. Bruce, 2011 S.D. 14, 796 N.W.2d 397
- State v. Toohey, 2012 S.D. 51, 816 N.W.2d 120
- State v. Wright, 1999 S.D. 50, 593 N.W.2d 792
- St. John v. Peterson, 2011 S.D. 58, 804 N.W.2d 71
- State v. DeGroot, 430 N.W.2d 290 (Neb. 1988)
- State v. Pokorney, 235 P.3d 409 (Idaho Ct. App. 2010)
- Johnson v. State, 263 S.W.3d 405 (Tex. Ct. App. 2008)
- State v. Thompson, 71 S.D. 319, 24 N.W.2d 10 (1946)
- State v. McKinney, 2005 S.D. 73, 699 N.W.2d 471
- Kentucky v. Stincer, 482 U.S. 730 (1987)

- State v. Muhm, 2009 S.D. 100, 775 N.W.2d 508
- State v. Goodroad, 521 N.W.2d 433 (S.D. 1994)
- State v. Smith, 1999 S.D. 83, 599 N.W.2d 344
- State v. Darby, 1996 S.D. 127, 556 N.W.2d 311
- State v. Younger, 453 N.W.2d 834 (S.D. 1990)
- State v. Logue, 372 N.W.2d 151 (S.D. 1985)
- State v. Hoeft, 1999 S.D. 24, 594 N.W.2d 323
- State v. Sprik, 520 N.W.2d 595 (S.D. 1994)
- State v. Lodermeier, 481 N.W.2d 614 (S.D. 1992)
- State v. Anderson, 1996 S.D. 46, 546 N.W.2d 395

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