

SUPREME COURT OF SOUTH DAKOTA

State of South Dakota v. James Big Crow

State v. Big Crow, 773 N.W.2d 810 (S.D. 2009) · No. No. 24949 · Decided September 23, 2009

SUMMARY

The Supreme Court of South Dakota affirmed James Big Crow’s incestuous sexual contact convictions. The court held that evidence of alleged sexual contact involving two other nieces was admissible under SDCL 19-12-5 (Rule 404(b)) to establish a common plan, design, or scheme, and was not too remote or substantially more prejudicial than probative. The court also held that Big Crow waived his challenge to a subpoena involving a tribal member because he did not raise the issue in the circuit court.

CASE DETAILS

COURT	Supreme Court of South Dakota
WRITING FOR THE COURT	Zinter, Justice; Gilbertson, Chief Justice; Konenkamp, Justice; Meierhenry, Justice; Severson, Justice
JURISDICTION	South Dakota
DECIDED	September 23, 2009
DOCKET	No. 24949
DISPOSITION	affirmed
PROCEDURAL POSTURE	Big Crow appealed his jury convictions for incestuous sexual contact, challenging the admission of other-acts evidence and the State's subpoena of a tribal-member witness.
STANDARD OF REVIEW	The admission of other-acts evidence under SDCL 19-12-5 is reviewed for abuse of discretion. An abuse of discretion is discretion exercised to an end or purpose not justified by and clearly against reason and evidence. Unpreserved issues are waived on appeal.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	James Big Crow v. State of South Dakota

TOPICS

evidence

relevance

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PRACTICE AREAS

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QUESTIONS PRESENTED

1. Whether evidence of alleged sexual contact with two other minor relatives was relevant and admissible under SDCL 19-12-5 to prove a common plan, design, or scheme.
2. Whether the other-acts evidence was inadmissible because its probative value was substantially outweighed by unfair prejudice.
3. Whether the temporal remoteness of the other acts rendered the evidence inadmissible.
4. Whether the circuit court abused its discretion by admitting the other-acts evidence.
5. Whether Big Crow could challenge the State's subpoena of a tribal-member witness when he failed to object or move to quash the subpoena at trial.
6. Whether Big Crow preserved a challenge to the jury instruction concerning the burden of proof for the other acts by failing to propose an alternative instruction.

HOLDINGS

1. Other-acts evidence involving similar sexual contact with two other minor relatives was admissible under SDCL 19-12-5 to prove a common plan, design, or scheme, rather than merely to show character or conformity.
2. The circuit court did not abuse its discretion in finding that the probative value of the other-acts evidence was not substantially outweighed by its prejudicial effect.
3. The other acts were not too remote in time to be admissible in this child-sex-abuse case.
4. Big Crow waived his challenge to the State's subpoena of M.H., a tribal member residing on an Indian reservation, because he did not raise the issue, object, or move to quash the subpoena in the circuit court.
5. Big Crow waived his challenge to the absence of a jury instruction requiring proof of the other acts by a preponderance of the evidence because he failed to propose the instruction.

KEY QUOTATIONS

"A "common plan, design or scheme" refers to a larger continuing plan, scheme or conspiracy of which the present crime charged at trial is only a part[.]" (773 N.W.2d at 812)

"By showing that the earlier schemes bore a singular strong resemblance to the pattern of the offense charged, the government establishes a preexisting plan or design which, in turn, tends to show the doing of the act designed." (773 N.W.2d at 813)

"Big Crow's other acts tended to prove a common plan and design to use his status as a family authority figure, when alone with young nieces who were sleeping or resting in familial homes, to force them to fondle his erect penis." (773 N.W.2d at 815)

“We conclude that the circuit court did not abuse its discretion in finding the other acts evidence was relevant and that its prejudicial effect did not substantially outweigh the evidences probative value.” (773 N.W.2d at 816)

FACTUAL BACKGROUND

Big Crow was charged with incestuous sexual contact with his niece, D.P., when she was approximately eight or nine years old. D.P. testified that Big Crow, while acting as a family elder and authority figure, exposed himself, showed her pornography, and caused her to touch his erect penis on multiple occasions. The State also presented testimony from M.H., another niece, and B.M., a great-niece, concerning similar sexual contact when they were minors. Big Crow denied the allegations and objected to admission of the other-acts evidence.

PROCEDURAL HISTORY

Big Crow was charged with two counts of incestuous sexual contact involving his niece. After a hearing, the circuit court admitted evidence of alleged incestuous sexual contact involving two other nieces under SDCL 19-12-5, South Dakota's Rule 404(b). The jury convicted Big Crow, and the South Dakota Supreme Court affirmed, holding that the other-acts evidence was properly admitted and that the unpreserved subpoena challenge was waived.

DISPOSITION

affirmed

CASES CITED

- State v. Chernotik, 2003 SD 129, 671 N.W.2d 264, 274
- State v. Machmuller, 2001 SD 82, 630 N.W.2d 495, 498
- State v. Ondricek, 535 N.W.2d 872, 875-77 (S.D. 1995)
- State v. Champagne, 422 N.W.2d 840, 842 (S.D. 1988)
- United States v. Weidman, 572 F.2d 1199, 1202-03 (7th Cir. 1978)
- People v. Ewoldt, 7 Cal. 4th 380, 393-94, 401-03, 27 Cal. Rptr. 2d 646, 867 P.2d 757 (1994)
- State v. Wright, 1999 SD 50, 593 N.W.2d 792, 800-01
- State v. Christopherson, 482 N.W.2d 298, 299-302 (S.D. 1992)
- State v. Perkins, 444 N.W.2d 34, 36-38 (S.D. 1989)
- State v. Roden, 380 N.W.2d 669, 670-71 (S.D. 1986)
- State v. Werner, 482 N.W.2d 286, 289-90 (S.D. 1992)
- State v. Boston, 2003 SD 71, 665 N.W.2d 100, 109
- State v. Talarico, 2003 SD 41, 661 N.W.2d 11, 23