

FLORIDA LAW WEEKLY SEX CRIMES EDITION BY DENNIS NICEWANDER

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Foreman v. State, 32 Fla. L. Weekly D1946 (Fla. 2d DCA 2007):

Under the statute providing that evidence of a defendant's commission of other acts of child molestation is admissible at a trial for a crime related to child molestation and may be considered for its bearing on any matter to which it is relevant, the similarity of the prior act and the charged offense remains part of a trial court's analysis in determining whether to admit the evidence in two ways; first, the less similar the prior acts, the less relevant they are to the charged crime, and therefore the less likely they will be admissible, and second, the less similar the prior acts, the more likely that the probative value of this evidence will be substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

Evidence that defendant had previously touched child victim on clothed vaginal area between her legs did not constitute an act of child molestation and, thus, was inadmissible at trial for capital sexual battery under statute allowing evidence of a defendant's commission of other acts of child molestation in certain circumstances; evidence was insufficient for a fact finder to determine whether defendant's touching was intentional or inadvertent, lingering or brief, or salacious or accidental.

Probative value of evidence that defendant had previously touched child victim on clothed vaginal area between her legs was substantially outweighed by danger of unfair prejudice at trial for capital sexual battery; prior act and charged acts were substantially different, in that charged acts involved union, penetration, or both between defendant and victim in a bedroom with defendant and victim unclothed from waist down, while prior act allegedly occurred in a common room with other children present.

In assessing whether the probative value of evidence of prior acts of child molestation is substantially outweighed by the danger of unfair prejudice in a case in which a defendant is charged with a crime related to child molestation, a trial court should evaluate (1) the similarity of the prior acts to the act charged regarding the location of where the acts occurred, the age and gender of the victims, and the manner in which the acts were committed, (2) the closeness in time of the prior acts to the act charged, (3) the frequency of the prior acts, and (4) the presence or lack of intervening circumstances.

Evidence that defendant had previously touched child victim on clothed vaginal area between her legs was irrelevant at trial for capital sexual battery; evidence of prior act,

which substantially differed from charged acts, shed not a scintilla of light of defendant's motive, opportunity, intent, preparation, plan, or knowledge, and because defendant denied that events ever took place, no issues were raised as to identity, mistake, or accident.

Rogers v. State, 32 Fla. L. Weekly D1973 (2d DCA 2007):

“The assessment of penetration points is not limited to circumstances where penetration was an element specifically charged in the information. An offense can be one “involving sexual contact that includes sexual penetration” regardless of whether penetration was an element of the offense alleged in the information.”

In lewd or lascivious battery prosecution, penetration was neither required to be found by the jury nor required to be alleged in the information.