

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Marlboro County JUL 15 2013
Honorable Edward B. Cottingham, Circuit Court Judge
Appellate Case No. 2012-213219
S.C. Supreme Court

THE STATE,

Respondent,

vs.

JOHN BERNARD CAMPBELL,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON CERTIORARI

I.

The Court of Appeals correctly affirmed the trial judge's decision to admit evidence of Campbell's prior bad acts involving vulnerable females walking or standing along the side of the road because that evidence was highly probative of Campbell's intent and the existence of a common scheme or plan during his trial on the charge that he attempted to kidnap his most recent female victim, who was also standing alone on the side of the road when Campbell attempted to induce her to get into his vehicle. Furthermore, the Court of Appeals correctly determined the trial judge did not abuse his broad discretion in finding that the high probative value of the prior bad act evidence was not substantially outweighed by the evidence's potential for undue prejudice.

II.

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STATEMENT OF THE CASE

Procedural History

In April of 2009, Petitioner John Bernard Campbell was arrested following an investigation into an incident involving a fourteen-year-old girl. In August of 2009, the Marlboro County grand jury indicted Campbell for one count of attempted kidnapping. On August 10, 2009, a jury trial was commenced in the Marlboro County court of general sessions with the Honorable Edward B. Cottingham, circuit court judge, presiding. At the conclusion of trial, the jury convicted Campbell as charged. Following the verdict, the trial judge sentenced Campbell to a term of imprisonment of fifteen years. Campbell then timely filed and perfected an appeal.

Subsequently, in an unpublished opinion, the Court of Appeals unanimously affirmed Campbell's conviction. State v. Campbell, 2012-UP-481 (S.C. Ct. App. filed

Aug. 8, 2012). Campbell petitioned the Court of Appeals for rehearing, and the Court of Appeals granted the petition, withdrew its previous opinion, and filed a substituted opinion again unanimously affirming Campbell's conviction. State v. Campbell, 2012-UP-481 (S.C. Ct. App. withdrawn, substituted, and refiled Oct. 3, 2012). Campbell then filed a petition for a writ of certiorari in the Supreme Court.

Factual History

On the evening of April 1, 2009, Peggy Ann L. ("Victim"), a fourteen-year-old girl, met her friend, Brittany W. ("Brittany"), at a bench on Main Street in McColl, South Carolina.¹ (R. pp. 57-59). After meeting at the bench, the two teenagers socialized for a period of time before walking towards Brittany's house so Brittany could check in with her mother. (R. pp. 61-62). Once they arrived, Brittany went inside her home, and Victim waited outside on the sidewalk in front of the church next door. (R. pp. 63-65).

While Victim waited on the sidewalk for Brittany to return, Petitioner John Bernard Campbell drove up in his truck, stopped the vehicle in the grass between the sidewalk and the road, and asked Victim if she wanted some money. (R. pp. 67-68; p. 112). Campbell then produced some ten-dollar and twenty-dollar bills and showed them to Victim, but she declined his offer. (R. pp. 68-71). After Victim rejected the monetary offer, Campbell asked her who she was waiting on, and she responded that she was waiting on a friend. (R. pp. 70-71). Campbell then told Victim to get into the truck and he would take her to where her friend was located, but she again declined his offer and asked him to leave her alone. (R. p. 71). Following her response, Campbell drove a short distance away, turned around, drove back by Victim, and asked her if she was coming

¹ Victim indicated she met Brittany uptown around 5:00 p.m. or 6:00 p.m. (R. p. 61). A law enforcement officer investigating the subsequent incident testified it was his understanding the incident occurred at approximately 7:41 p.m. (R. p. 151).

with him. (R. pp. 71-73). Once again, Victim responded in the negative and asked Campbell to leave her alone, and he finally drove away. (R. pp. 71-73).

Frightened and upset by Campbell's behavior, Victim sent a text message to Brittany instructing her to hurry up because a man was trying to pick her up. (R. p. 73; pp. 91-92; pp. 106-107). Having observed Campbell drive up to Victim twice from inside her home, Brittany then hurried outside to rendezvous with Victim. (R. p. 103; p. 106; p. 107). Victim and Brittany then went back to the bench on Main Street and met another friend, Dakota S. ("Dakota"). (R. p. 75; pp. 108-109; p. 122). Additionally, Victim called her stepfather and alerted him of the incident with Campbell. (R. p. 75). During their conversation, Victim's stepfather advised her to get the license plate number from Campbell's vehicle if she saw him again. (R. p. 75).

Thereafter, while Victim, Brittany, and Dakota conversed at the bench, Campbell repeatedly drove back and forth by their location, passing them three times. (R. p. 77; p. 109; p. 123). During one of his passes, Campbell stared at Victim and smiled at her. (R. p. 77; p. 109). He then passed them two more times as he drove up and down Main Street. (R. p. 77). As Campbell continued to drive by the teenagers, they took down his license plate number and provided it to Victim's stepfather. (R. pp. 75-76; pp. 110-111). Victim's stepfather then alerted the police of the incident, and Victim met with Officer Timothy Morris of the McColl Police Department around 8:31 p.m. to recount what had occurred. (R. pp. 78-79; p. 129; p. 131).

During her meeting with the officer, Victim informed Officer Morris about Campbell's repeated attempts to get her into his vehicle. (R. pp. 131-132). Based on the information he obtained, Officer Morris determined the vehicle involved in the incident was Campbell's truck and Campbell was a resident of Bennettsville, South Carolina, as

opposed to McColl. (R. pp. 132-133). Campbell was then contacted and alerted that law enforcement officers needed to speak with him about the incident. (R. p. 133).

Thereafter, Officer Morris met with Campbell several hours later at a laundromat on Main Street, with Campbell arriving in a vehicle matching the description of the truck involved in the incident. (R. p. 133).

After Officer Morris advised Campbell of his rights, Campbell offered several explanations for his encounter with Victim. (R. pp. 142-143). Initially, Campbell indicated he asked Victim for directions to a computer repair store and she responded by “curs[ing] him out.” (R. p. 142). Campbell claimed he then became upset, drove away, came back by, and “shot the bird at [Victim].” (R. p. 142). After speaking with the officer further, Campbell then indicated he was actually attempting to ask Victim out on a date but did not realize how young she was. (R. p. 143). Officer Morris then asked Campbell about the allegation that he offered Victim money, and Campbell responded by admitting he had shown Victim some money while claiming he was attempting to “buy sex” from her. (R. pp. 143-144). Campbell was subsequently arrested and indicted for attempted kidnapping, and he proceeded to trial. (R. p. 145; pp. 243-244).

At the outset of trial, the solicitor requested a hearing on the admissibility of prior bad act evidence pursuant to Rule 404(b), SCRE. (R. p. 1). During the hearing on the matter, Lilly Davis (“Lilly”) recounted the circumstances of her encounter with Campbell on the night of July 10, 1994, while she was walking to the store on a sidewalk. (R. p. 5). Lilly, who was twenty-five years old at the time of the encounter, stated Campbell drove up to her in a car and asked her if she needed a ride, and she got into his vehicle. (R. pp. 5-6). Thereafter, she indicated Campbell drove past the store she was going to, she asked him why he did not stop, and he informed her he needed to get one of his car’s speakers

fixed while continuing to drive on. (R. p. 7). Lilly testified Campbell then drove her to a street, stopped the vehicle, and instructed her to take off her clothes. (R. p. 7). She stated that she refused, Campbell responded by getting out of the car and going to the trunk, and she followed Campbell to see what he was doing. (R. p. 7). When she reached his location, Lilly testified Campbell yelled, "Bitch, I'm going to kill you," and then shot her in the head, stomach, and buttocks with a firearm. (R. pp. 7-8). Lilly indicated she then ran to the nearest house for help, told them she had been shot, and woke up in a hospital. (R. p. 8). Lilly testified she did not know Campbell at the time of the incident but had previously seen him driving around the area on earlier occasions. (R. pp. 9-10).

Patricia Davis ("Patricia") then recounted her experiences with Campbell in the early morning hours of the following day, July 11, 1994. (R. pp. 14-15). Patricia, who was thirty-three years old at the time of the incident, stated she was walking alone on the sidewalk near a store when Campbell approached her in a car.² (R. pp. 15-16; p. 18). She indicated Campbell asked her if she wanted a ride, she responded that she did, she got into his vehicle, and they drove until they passed another woman walking alone down the road. (R. pp. 18-19). Patricia stated Campbell then picked up the other woman, who was named Peggy, and they drove around while drinking alcohol until Campbell stopped the vehicle in a field. (R. pp. 19-20). She testified Campbell then ordered them to take off their clothes, and Peggy disrobed. (R. pp. 20-21). In response, Patricia stated she told Campbell he did not have "to do her like that," and Campbell became angry and pulled out a gun. (R. p. 21). She indicated Campbell then shot her in the head and shoulder and continued firing his weapon until he was out of ammunition. (R. pp. 22-23). Patricia

² During trial, Patricia testified she did not know Campbell at the time of the incident. (R. p. 165).

testified Peggy then ran from the scene, and police officers and an ambulance arrived shortly thereafter. (R. pp. 22-23). Patricia further indicated Campbell was incarcerated based on the incident until December of 2007.³ (R. p. 24).

Peggy Davis (“Peggy”) also testified about the events of July 11, 1994. (R. p. 33). Peggy, who knew Campbell for a brief period of time and was twenty-seven years old at the time of the incident, stated she was in a yard in the early morning hours when Campbell pulled up in his car. (R. p. 33; p. 38). She indicated she got into the car with Campbell and Patricia, they drove somewhere and purchased drugs, and then they drove to a field and smoked them. (R. p. 34). Peggy testified Campbell then pulled out a firearm and ordered them from the car, they went into the field, and Campbell came up behind them. (R. p. 35). She stated Campbell then forced her to strip naked at gunpoint before he was admonished for his actions by Patricia. (R. p. 36). Peggy indicated Campbell then shot Patricia multiple times in the head, and she responded by fleeing and going for help. (R. pp. 36-37). Peggy indicated Campbell was arrested a short time later. (R. p. 37).

At the conclusion of the hearing, the solicitor argued the evidence of Campbell’s prior bad acts was admissible under the common scheme or plan exception to Rule 404(b), SCRE. (R. p. 43). In reply, Campbell contended the prior bad acts were not similar enough, were not relevant, and were overly prejudicial. (R. pp. 44-46). Thereafter, the trial judge ruled the evidence was admissible pursuant to the common scheme or plan exception, noted he balanced the prejudicial effect of the evidence against its probative value, and found the lapse of time between the incidents was explained by

³ During trial, McColl Police Chief Tommy Langley confirmed Campbell was incarcerated until the last part of December of 2007, which was approximately fifteen months prior to the incident involving Victim. (R. pp. 191-192).

the evidence regarding Campbell's intervening incarceration. (R. pp. 46-47; p. 49). The trial judge then ruled: "I'm going to permit the testimony under Lyle, concluding that the jury is entitled to have this under these serious allegations because of the intent, similarity of conduct. I'm going to permit you to illicit that he's been in jail up until 2007. I specifically tell you though not to bring in that prior conviction[.]" (R. p. 50).

Subsequently, during trial, Victim, Brittany, and Dakota testified about their experiences on April 1, 2009, and Officer Morris discussed his meetings with Victim and Campbell. (R. pp. 57-58; pp. 99-100; p. 122; pp. 131-132; pp. 133-134). Thereafter, prior to the introduction of the prior bad act evidence, Campbell renewed his earlier objection to the evidence, the trial judge overruled the objection and instructed the jury that any evidence of Campbell's prior bad acts could only be considered in regard to intent or common scheme or plan and for no other purposes, and the trial judge repeated and emphasized his limiting instructions to the jury before Lilly began her testimony. (R. pp. 151-152). Lilly, Patricia, and Peggy then testified about their encounters with Campbell in July of 1994, and the trial judge reaffirmed his earlier ruling that the prior bad act evidence was admissible under the common scheme or plan and intent exceptions while indicating the probative value of the evidence outweighed its potential prejudicial effect. (R. p. 154; pp. 163-164; pp. 180-182).

Thereafter, at the close of the State's case, Campbell moved for a directed verdict, arguing the State failed to prove he committed a substantial step towards kidnapping Victim. (R. pp. 196-197). However, the trial judge denied the motion. (R. p. 197). The trial judge then charged the jury on the law and again instructed the jury not to consider the prior bad act evidence for any purposes other than intent or common scheme or plan. (R. pp. 204-206). Subsequently, at the conclusion of trial, the jury convicted Campbell of

attempted kidnapping, and the trial judge sentenced him to a fifteen-year term of imprisonment. (R. p. 233; p. 240).

ARGUMENT

I.

The Court of Appeals correctly affirmed the trial judge's decision to admit evidence of Campbell's prior bad acts involving vulnerable females walking or standing along the side of the road because that evidence was highly probative of Campbell's intent and the existence of a common scheme or plan during his trial on the charge that he attempted to kidnap his most recent female victim, who was also standing alone on the side of the road when Campbell attempted to induce her to get into his vehicle. Furthermore, the Court of Appeals correctly determined the trial judge did not abuse his broad discretion in finding that the high probative value of the prior bad act evidence was not substantially outweighed by the evidence's potential for undue prejudice.

Campbell contends the Court of Appeals erred in affirming the trial judge's decision to admit evidence of Campbell's earlier bad acts. In support of that contention, Campbell maintains the prior bad acts were irrelevant to the attempted kidnapping charge and not admissible pursuant to the intent exception of Rule 404(b), SCRE, were not sufficiently similar to be admissible pursuant to the common scheme or plan exception to Rule 404(b), SCRE, and were unduly prejudicial. To the contrary, the testimony of Campbell's earlier victims was highly relevant and probative of Campbell's intent and the existence of a common scheme or plan when he attempted to lure his most recent victim into his vehicle in a manner highly similar to the manner he used to lure his earlier victims into his vehicle before attempting to sexually assault and attacking them. Based on the numerous similarities between the prior bad acts and the charged offense and the probative value of the earlier acts in regard to Campbell's intent during the attempted kidnapping of his most recent victim, the prior bad act evidence was admissible pursuant to the intent exception and the common scheme or plan exception of Rule 404(b), SCRE.

Furthermore, due to the high probative value of the evidence and the trial judge's repeated limiting instructions to the jury, the probative value of the prior bad act evidence was not substantially outweighed by its prejudicial effect. Accordingly, the trial judge did not abuse his discretion in admitting the evidence under the intent exception or the common scheme or plan exception of Rule 404(b), SCRE, or in finding its probative value was not substantially outweighed by its prejudicial effect, and the Court of Appeals committed no error in affirming the trial judge's ruling. Campbell's petition for a writ of certiorari should be denied.

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Decisions to admit or exclude evidence rest in the sound discretion of the trial judge and will only be reversed on appeal for a prejudicial abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

In an appeal from a decision regarding the admission of prior bad act evidence, the appellate court is limited to determining whether the trial judge abused his discretion. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). "If there is any evidence to support the admission of bad act evidence, the trial judge's ruling cannot be disturbed on appeal." State v. Martucci, 380 S.C. 232, 253, 669 S.E.2d 598, 609 (Ct. App. 2008). Furthermore, in reviewing such a ruling, the trial judge's decision regarding the

comparative probative value and prejudicial effect of evidence should be afforded great deference on appeal and should only be reversed in exceptional circumstances. State v. Lyles, 379 S.C. 328, 339-340, 665 S.E.2d 201, 207 (Ct. App. 2008). “If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.” State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 594 (Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

Generally, evidence of prior bad acts is not admissible to prove a defendant’s guilt for the charged crime. State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006). However, under Rule 404(b), SCRE, evidence of prior bad acts may be admissible “to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.” See State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923) (recognizing evidence of other crimes is competent to prove a charged offense if it tends to establish: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) common scheme or plan; or (5) identity).

In determining whether to admit evidence of prior bad acts, the trial judge must first determine if the evidence is relevant. State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). “Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears.” State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE (defining relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence”). If a piece of evidence could assist the

jury in arriving at the truth of an issue, it is relevant and should be admitted during trial. State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986).

After determining the prior bad act evidence is relevant, the trial judge must next determine if the prior bad act evidence falls within one of the permissible exceptions of Rule 404(b), SCRE. Wallace, 384 S.C. at 433, 683 S.E.2d at 277. One such exception is the intent exception. See State v. Strickland, 285 S.C. 361, 362, 329 S.E.2d 759, 760 (1985) (“[E]vidence of other bad acts is admissible to demonstrate state of mind or intent.”). Significantly, in State v. Simmons, 310 S.C. 439, 441, 427 S.E.2d 175, 177 (1993), rev’d on other ground by Simmons v. South Carolina, 512 U.S. 154 (1994), this Court examined and applied the intent exception regarding prior bad act evidence. In that case, Simmons was indicted for murder, first-degree burglary, and petit larceny after he broke into the home of seventy-nine-year-old Josie Lamb and beat her to death. Simmons, 310 S.C. at 440, 427 S.E.2d at 176. During trial, the State introduced evidence establishing Simmons beat and sexually-assaulted three other elderly women in their homes, including his own grandmother, on earlier occasions. Id. at 441-442, 427 S.E.2d at 177. Subsequently, Simmons challenged the admission of the prior bad act evidence on appeal, and this Court affirmed after determining the evidence was properly admitted to establish Simmons’ intent at the time of Lamb’s murder. Id. at 443, 427 S.E.2d at 178. In reaching that conclusion, this Court held that the evidence of Simmons’ earlier assaults against elderly women made his criminal intent more probable at the time of his entry into the home of Lamb, his most recent elderly victim. Id. at 442-443, 427 S.E.2d at 177-178. The Court further held: “It is logical to conclude from the evidence that [Simmons] was chiefly motivated in each case by an intent to violently injure an elderly woman.

This evidence is therefore relevant to the issue of appellant's intent at the time he entered Ms. Lamb's home without her consent."⁴ Id. at 443, 427 S.E.2d at 178.

Another established exception is the common scheme or plan exception, which necessitates a close degree of similarity or connection between the prior bad act and the charged offense. State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998).

Regarding the common scheme or plan exception, the Supreme Court has instructed:

Such evidence is relevant because proof of one is strong proof of the other. When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity. Where the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b).

Although not a complete list, in this type of case, the trial court should consider the following factors when determining whether there is a close degree of similarity between the bad act and the crime charge: (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery. We emphasize that these factors are set out merely for guidance and that other factors may be relevant in weighing the similarities and the dissimilarities between the crime charged and the bad act evidence.

Wallace, 384 S.C. at 433-434, 683 S.E.2d at 277-278 (citations omitted). Thus, the required connection between prior bad acts and a charged offense is established by a

⁴ Although not controlling, the California Supreme Court thoroughly examined the intent exception for the admission of prior bad act evidence in People v. Ewoldt, 7 Cal. 4th 380, 394, n. 2, 867 P.2d 757, 764 (Cal. 1994), instructing: "Evidence of intent is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. 'In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.' For example, in a prosecution for shoplifting in which it was conceded or assumed that the defendant left the store without paying for certain merchandise, the defendant's uncharged similar acts of theft might be admitted to demonstrate that he or she did not inadvertently neglect to pay for the merchandise, but rather harbored the intent to steal it." (citations omitted) (italics in original). The California Supreme Court further instructed: "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. '[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of normal, i.e., criminal, intent accompanying such as act' In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant 'probably harbor[ed] the same intent in each instance.' " Id. at 402, 867 P.2d at 770 (citations omitted) (brackets in original).

close degree of similarity between those acts, and no further connection is required for admissibility. Id. at 434, 683 S.E.2d at 278. “Requiring a ‘connection’ between the crime charged and the bad act evidence is simply a requirement that the two be factually similar and does not add an additional layer of analysis.” Id. at 434, n. 5, 683 S.E.2d at 278.

Finally, after determining the prior bad act evidence is relevant and falls within a permissible exception of Rule 404(b), SCRE, the trial judge must weigh the probative value of the evidence against its prejudicial effect. State v. Mathis, 359 S.C. 450, 463, 597 S.E.2d 872, 879 (Ct. App. 2004). Even if relevant and otherwise admissible, evidence must be excluded from trial if its probative value is substantially outweighed by the danger of unfair prejudice. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); see Rule 403, SCRE (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”). The determination of the probative value of evidence relative to its potential prejudicial effect must be based on the entire record and the result generally hinges on the facts of each particular case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007). Significantly though, “evidence which is ‘logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused’s guilt of another crime.’ ” Wiles, 383 S.C. at 158, 679 S.E.2d at 176 (quoting State v. Green, 261 S.C. 366, 371, 200 S.E.2d 74, 77 (1973)). Furthermore, unfair prejudice does **not** mean damage to a defendant’s case that results from the legitimate probative force of a piece of evidence. State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998). That is true

because all evidence introduced by the State during trial is meant to be prejudicial to the defendant. Id. It is only unfair prejudice that must be avoided. Id.

In the case sub judice, the Court of Appeals correctly affirmed the trial judge's decision to admit the evidence regarding Campbell's prior bad acts because the evidence was admissible pursuant to the intent and common scheme or plan exceptions of Rule 404(b), SCRE. Additionally, the Court of Appeals also correctly affirmed the trial judge's finding that the probative value of the evidence was not substantially outweighed by its potential prejudicial effect because the evidence was highly probative on the issues of Campbell's intent and the existence of a common scheme or plan and because the potential for any undue prejudice was greatly reduced by the trial judge's limiting instructions to the jury.

In Campbell's case, Campbell was charged with **attempted** kidnapping, which meant Campbell's intent was a critical issue during trial. See State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000) (finding attempt is a specific intent crime and requires proof the act constituting the attempt was done with the intent to commit the particular crime). As such, evidence established Campbell's intent was crucial to the proper resolution of his case, and the prior bad act evidence introduced through the testimony of Campbell's earlier victims was highly relevant to that issue. Cf. Simmons, 310 S.C. at 443, 427 S.E.2d at 178 (holding that the probative value of prior bad act evidence establishing Simmons' intent outweighed any potential for undue prejudice where intent was a contested issue during Simmons' trial).

Turning to the substance of the prior bad act evidence, Campbell's earlier victims' testimony established Campbell approached vulnerable females alone on the side of the road and offered them rides in each of the earlier incidents. In each of the incidents, the

testimony further established Campbell drove his victim or victims to an isolated location and attempted to force them into performing sexual acts after initially luring or inducing them to enter the vehicle by offering them something. Critically, that evidence established Campbell was motivated by the intent to use some sort of offer to get vulnerable females into his vehicle so he could force them into providing him with sexual gratification. Just as in Simmons, Campbell's earlier acts were highly probative of Campbell's intent when he repeatedly attempted to persuade and lure Victim to get into his truck under similar circumstances to the way he lured his earlier victims. See id. (“[W]e find the probative value of this evidence outweighs its undue prejudicial effect. The issue of intent was a contested one. The fact that appellant's grandmother was one of several elderly women he violently injured is probative because it demonstrates that even her status as his grandmother did not negate his particular violent intent regarding elderly women.” (citation omitted)). Therefore, as the evidence was highly probative of Campbell's intent and made an issue in dispute more probable, the prior bad act evidence was admissible under the intent exception to Rule 404(b), SCRE. See State v. Steadman, 216 S.C. 579, 599-600, 59 S.E.2d 168, 178 (1950) (finding evidence of the prior performance of other abortions was relevant and admissible for the limited purpose of establishing intent in a subsequent abortion prosecution where “the element of criminal intent [was] an essential ingredient of the offense charged”).

Furthermore, the strong similarities between the earlier incidents and the charged offense further supported the admissibility of the prior bad act evidence on the issue of Campbell's intent. See, e.g., People v. McKibbins, 96 Ill. 2d 176, 186, 449 N.E.2d 821, 825 (Ill. 1983) (“In such a case [where the prior bad act evidence is offered to show the presence of criminal intent], mere general areas of similarity will suffice. If these general

similarities are shown, evidence of the defendant's involvement in another offense may be shown to establish the necessary criminal intent of the defendant in the offense charged."'). All of Campbell's victims were of the same type of victim – lone, vulnerable females walking or standing along the side of the road. In each of the incidents, Campbell attempted to lure the women into his vehicle through an offer of a ride. Additionally, each of the earlier incidents involved an act constituting a kidnapping, which demonstrates the prior bad acts' relevance to the case at bar regarding Campbell's intent.⁵ The strong similarities between the prior bad acts and the underlying offense warranted their admission under the intent exception.

Likewise, those same strong similarities established the admissibility of the prior bad act evidence under the common scheme or plan exception. Critically, all of Campbell's victims were similar in nature as they were all lone females on the side of the road, and Campbell approached each of the victims in a similar manner before offering each of them some inducement to get them to enter his vehicle.⁶ The circumstances of each of the incidents established a clear plan or scheme on the part of Campbell to lure isolated, vulnerable females into his vehicle by offering them some inducement so he

⁵ Establishing that each of the earlier incidents involved a kidnapping, Campbell lured his victim in the first earlier incident into a vehicle by offering to drive her to the store but then drove her past the store and to another location where he ordered her to take off her clothes and shot her. See Ray v. State, 330 S.C. 184, 188, 498 S.E.2d 640, 642 (1998) (finding Ray committed kidnapping when he inveigled his victim into his truck under the pretense of taking her to the hospital and then passed the last exit to the hospital before taking her to the location where he murdered her). Likewise, in the second incident, Campbell offered a ride to each of his victims before taking them to a field and holding them at gunpoint. See S.C. Code Ann. § 16-3-910 ("Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law . . . is guilty of a felony[.]"); see also State v. Hall, 280 S.C. 74, 78, 310 S.E.2d 429, 431-432 (1983) ("Here, appellant procured the prosecutrix's submission by threatening her with a deadly weapon. The threat of serious injury continued until he released her some forty-five minutes later. . . . We hold this restraint constituted kidnapping . . . regardless of the fact that the purpose of this seizure was to facilitate the commission of a sexual battery.").

⁶ Although Victim was somewhat younger than Campbell's earlier victims, the fact that she was younger was explained by Campbell's claim to the investigating officer that he was unaware of how young Victim was when he approached her. (R. p. 143).

could trap them, transport them to another location, and sexually assault them. Importantly, those similarities between the incidents outweighed any dissimilarities, and there was a clear connection between the earlier crimes and the underlying offense. See Wallace, 384 S.C. at 434, 683 S.E.2d at 278 (“A close degree of similarity establishes the required connection between the two acts and no further ‘connection’ must be shown for admissibility.”). Furthermore, many of the dissimilarities between the prior bad acts and the incident involving Victim were simply the result of Victim’s rejection of Campbell’s solicitations to get into his vehicle. Cf. id. at 435, 683 S.E.2d at 278 (“The fact that Victim’s abuse was interrupted before it could culminate in intercourse does not diminish the similarity between the progression the abuse took in each case.”). Based on the similarities between the prior bad acts and Campbell’s most recent crime, the prior bad act evidence was admissible under the common scheme or plan exception.

Finally, based on the high probative value of the prior bad act evidence towards establishing Campbell’s intent and the existence of a common scheme plan, the trial judge did not abuse his broad discretion in finding the probative value of the evidence was not substantially outweighed by its prejudicial effect. Significantly, Campbell’s intent was the key issue in dispute in his case, and the prior bad act evidence was highly relevant towards establishing that intent. See State v. Tuckness, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971) (“The intent with which an act is done denotes a state of mind, and can be proved only by expressions or conduct, considered in the light of the given circumstances. **Intent is seldom susceptible to proof by direct evidence and must ordinarily be proven by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred.**” (emphasis added)). As a result, the probative value of the evidence was exceedingly high, and any potential for undue prejudice that

could have resulted from the evidence was greatly reduced by the trial judge's limiting instructions to the jury. See Hamilton, 344 S.C. at 358, 543 S.E.2d at 593-594 (“A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence.”); see also State v. Cheatham, 349 S.C. 101, 110, 561 S.E.2d 618, 623 (Ct. App. 2002) (“We find no error in the admission of the convictions because the trial court took every precaution to prevent the improper consideration of Cheatham's convictions and to guard against undue prejudice.”).

Critically, the prior bad act evidence introduced during Campbell's trial was **not** introduced to establish his bad character or propensity for criminal acts. See Cheatham, 349 S.C. at 108-109, 561 S.E.2d at 622 (“Propensity evidence is admissible if offered for some purpose other than to show the accused is a bad person or he acted in conformity with his prior convictions.”). Instead, it was offered for the limited purpose of establishing Campbell's intent and the existence of a common scheme or plan, and the jury was repeatedly cautioned to consider the evidence only for that limited purpose. See State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000) (“Here, the prior bad act was not introduced to show a propensity for that type of crime. The State did not argue the evidence that defendant committed a similar crime in the past meant he would be more likely to commit the same crime again.”). The mere fact the prior bad act evidence incidentally revealed Campbell's guilt for other crimes did not render the evidence inadmissible, especially where it was so highly probative of Campbell's intent and the existence of a common scheme or plan. See Green, 261 S.C. at 371, 200 S.E.2d at 77 (“[E]vidence logically relevant to establish a material element of the offense

charged is not to be excluded merely because it incidentally reveals the accused's guilt of another crime."). Therefore, the trial judge did not abuse his discretion in admitting the evidence under the intent exception or the common scheme or plan exception of Rule 404(b), SCRE, or in finding its probative value was not substantially outweighed by its prejudicial effect, and the Court of Appeals committed no error in affirming the trial judge's ruling. See Lyle, 125 S.C. at 417, 118 S.E. at 807 ("If [prior bad act evidence] is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime."); see also Wiles, 383 S.C. at 158, 679 S.E.2d at 176 (finding evidence of a prior prison escape in a prosecution for assault and battery with intent to kill was admissible to establish intent where Wiles, an escapee, rammed a police vehicle during a high speed chase); State v. Sweat, 362 S.C. 117, 126, 606 S.E.2d 508, 513 (Ct. App. 2004) (finding prior bad act evidence of a domestic violence incident between Sweat and his purported wife was admissible to establish intent in a subsequent prosecution of an incident where Sweat attempted to attack his wife and her boyfriend). Campbell's petition for a writ of certiorari should be denied.

II.

The Court of Appeals properly affirmed the trial judge's denial of Campbell's directed verdict motion because substantial evidence was presented during trial establishing each element of the offense of attempted kidnapping, including that Campbell committed an overt act in furtherance of a specific intent to seize, confine, inveigle, decoy, kidnap, abduct, or carry away the victim.

Campbell argues the Court of Appeals erred in failing to reverse the trial judge's decision to deny his directed verdict motion. In support of that argument, Campbell maintains the State failed to present evidence showing he committed an act in furtherance

of a specific intent to kidnap Victim. To the contrary, when viewed in a light most favorable to the State as required, the evidence presented during trial, including the evidence establishing Campbell approached the fourteen-year-old victim and repeatedly offered her different things to entice her into entering his vehicle, established every element of the offense of attempted kidnapping, including that Campbell committed an overt act in furtherance of a specific intent to seize, confine, inveigle, decoy, kidnap, abduct, or carry away Victim. As a result, the trial judge properly denied Campbell's directed verdict motion and submitted the case to the jury, and the Court of Appeals committed no error in affirming the trial judge's ruling. Campbell's petition for a writ of certiorari should be denied.

When presented with a motion for a directed verdict, the trial judge is concerned with the existence or non-existence of evidence and not its weight. State v. Long, 325 S.C. 59, 62, 480 S.E.2d 62, 63 (1997). The trial judge should deny a directed verdict motion and submit the case to the jury if there is any substantial evidence reasonably tending to prove the guilt of the accused or from which guilt may be fairly or logically deduced. State v. Robinson, 310 S.C. 535, 538, 426 S.E.2d 317, 319 (1992). On appeal from the denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). If there is **any** direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must affirm the trial judge's ruling. State v. Cherry, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478 (2004). The appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial judge's ruling. Gaster, 349 S.C. at 555, 564 S.E.2d at 92. "[U]nless there is a total failure of evidence tending to

establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986).

In order to establish a defendant's guilt for an attempted crime, the State must prove both a specific intent to commit the attempted offense and the commission of an overt act. State v. Nesbitt, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001). The overt act must go beyond mere preparation, and there must be an actual or present ability to complete the crime. Id. However, the overt act "need not be the last proximate step leading to the consummation of the offense." State v. Quick, 199 S.C. 256, 259, 19 S.E.2d 101, 102 (1942). That is true because public policy considerations do not favor requiring crimes to be completed and the ensuing harm to be inflicted before a defendant can be prosecuted for an attempted offense. See Nesbitt, 346 S.C. at 234, 550 S.E.2d at 868 (finding it unnecessary for the victims to actually be confronted with a weapon for an overt act to constitute an attempted armed robbery); see also State v. Reid, 383 S.C. 285, 293, 679 S.E.2d 194, 198 (Ct. App. 2009) ("[T]here exists a policy not to punish or convict innocent persons for evil or criminal thoughts alone; on the other hand, a countervailing policy exists to allow law enforcement to prevent criminal conduct before it reaches the point of completion.").

In order to establish a defendant's guilt for the crime of kidnapping, the State must prove the defendant "unlawfully seize[d], confine[d], inveigle[d], decoy[ed], kidnap[ped], abduct[ed] or carr[ied] away any other person by any means whatsoever without authority of law[.]" S.C. Code Ann. § 16-3-910. Thus, the offense requires proof of one of a variety of unlawful acts, including seizure, confinement, inveiglement, decoy, kidnapping, abduction, or carrying away. State v. East, 353 S.C. 634, 637, 578

S.E.2d 748, 750 (Ct. App. 2003). Notably, “[k]idnapping is a continuous offense that commences when one is wrongfully deprived of freedom and continues until freedom is restored.” State v. Porter, 389 S.C. 27, 39, 698 S.E.2d 237, 243 (Ct. App. 2010).

In the case at bar, the trial judge properly denied Campbell’s directed verdict motion because substantial evidence was presented during trial establishing Campbell’s guilt for each element of the offense of attempted kidnapping, including that Campbell had the specific intent to commit the offense of kidnapping and committed an overt act in furtherance of that intent. As a result, the Court of Appeals committed no error in affirming the trial judge’s ruling.

Specifically, the evidence presented during trial established Campbell approached Victim, a young female standing alone on the side of a road, and attempted to entice her to enter his truck by offering her money, offering her a ride to her friend’s location, and asking her if she was getting into the vehicle. Subsequently, the evidence established Campbell continued to repeatedly drive past Victim after she rejected all of his earlier solicitations. Critically, Campbell’s persistent efforts to lure the fourteen-year-old victim into his truck coupled with the fact that he continued to drive by Victim after she refused to accept his solicitations constituted substantial evidence of Campbell’s intent to inveigle Victim into his truck so he could carry her away for some unlawful purpose. See State v. Stokes, 345 S.C. 368, 373, n. 6, 548 S.E.2d 202, 204 (2001) (“Inveigling has also been defined as ‘enticing, cajoling, or tempting the victim, usually through some deceitful means such as false promises.’ ” (citations omitted)); see also BLACK’S LAW DICTIONARY 843 (8th ed. 2004) (defining “inveigle” as “[t]o lure or entice through deceit or insincerity”). Additionally, Campbell’s specific criminal intent to commit the offense of kidnapping was further demonstrated by the variety of excuses he offered to Officer

Morris after being questioned about the incident. Although originally innocuous, Campbell's explanations gradually escalated to him claiming that he was soliciting the fourteen-year-old victim for prostitution. Significantly, Campbell's deceitful and repeatedly-shifting responses to the officer demonstrated an effort to cover up the criminal purpose and intent behind his attempts to inveigle Victim into his truck. Furthermore, Campbell's specific intent to commit a kidnapping was further demonstrated by the evidence of his earlier offenses in which he lured other vulnerable women into his vehicle through offers of a ride before assaulting them. See Strickland, 285 S.C. at 362, 329 S.E.2d at 760 (“[E]vidence of other bad acts is admissible to demonstrate state of mind or intent.”).

In addition to the evidence establishing Campbell's specific intent to commit a kidnapping, Campbell's act of displaying and offering money to Victim and offering a ride to Victim while pulling up next to her location on the sidewalk constituted an overt act in furtherance of his intent to kidnap Victim and a substantial step towards completing the offense. In fact, there was no further step left for Campbell to undertake in order to kidnap Victim by inveigling her aside from the steps he had already undertaken and her compliance with his inducements. Significantly, if Victim had merely accepted Campbell's offers and entered his vehicle, Campbell would have completed the act of kidnapping as he would have deprived Victim of her freedom by inveigling her. Therefore, Campbell took a substantial step towards committing the offense of kidnapping through his solicitations and was only prevented from successfully completing the offense by Victim's refusal to accept those solicitations and get into his truck. Importantly, Victim was not required to get into the truck for Campbell to have attempted to kidnap her, and public policy goals would be greatly frustrated by requiring

Victim to be kidnapped before Campbell could be prosecuted for the offense.⁷ See Nesbitt, 346 S.C. at 234, 550 S.E.2d at 868 (“It should not be necessary to subject victims to face-to-face confrontation with a lethal weapon in order to find the essential element of an overt act.”).

Viewing the evidence in a light most favorable to the State as required, the evidence presented during trial establishing Campbell’s guilt for every element of attempted kidnapping, including that he committed an overt act in furtherance of a specific intent to kidnap the victim by inveigling her into his vehicle. See State v. Owens, 291 S.C. 116, 118, 325 S.E.2d 474, 475 (1987) (“The crime of kidnapping requires proof that the defendant: (1) unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted or carried away; (2) any other person; (3) by any means whatsoever; (4) without authority of law.”); see also State v. Reid, 393 S.C. 325, 329, 713 S.E.2d 274, 276 (2011) (“To prove attempt, the State must prove that the defendant had the *specific intent* to commit the underlying offense, along with some *overt act*, beyond mere preparation, in furtherance of the intent.” (italics in original)). Therefore, as there was substantial evidence of Campbell’s specific intent to commit the offense of kidnapping and substantial evidence of the commission of an overt act in furtherance of that intent, the trial judge properly denied Appellant’s motion for a directed verdict, and the Court of Appeals correctly affirmed the trial judge’s ruling. Cf. Nesbitt, 349 S.C. at 235, 550 S.E.2d at 868-869 (“Viewing this evidence as we must, in a light most favorable to the

⁷ In arguing that the State failed to prove he committed an overt act in furtherance of an attempt to kidnap the victim, Campbell contends the evidence was not sufficient to establish that he committed an overt act because it merely showed “that [he] offered the minor money and a ride and she refused.” (Cert. P. p. 17). However, to the contrary, Campbell’s offer of money to a minor to get into his vehicle is a classic example of an attempt to inveigle a victim into a vehicle in an effort to kidnap that victim. Critically, the mere fact that Campbell was willing to pay money to a minor that he did not know in order to get her into his vehicle alone constituted strong evidence of an unlawful ulterior motive on Campbell’s part.

State, we find there is substantial circumstantial evidence from which Nesbitt's participation in the attempted armed robbery could fairly and logically be deduced.""). Campbell's petition for a writ of certiorari should be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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BY:

A handwritten signature in black ink, appearing to read 'Mark R. Farthing', written over a horizontal line.

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ATTORNEYS FOR RESPONDENT

July 10, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Marlboro County
Honorable Edward B. Cottingham, Circuit Court Judge
Appellate Case No. 2012-213219

THE STATE,

Respondent,

vs.

JOHN BERNARD CAMPBELL,


Petitioner.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 10th day of July, 2013.



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