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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Hon. Eugene C. Griffith, Circuit Court Judge

Appellate Case No. 2023-001872

State of South Carolina . . . . Respondent,

vs

William B. Oswald, ... Appellant

INITIAL BRIEF OF APPELLANT

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Statement of Issues on Appeal

Question I: Did the trial court err in admitting the testimony of Lester Bradley Oswald as to an alleged sexual assault which allegedly occurred fifteen to twenty years before the alleged assault in this case when the prior bad act served no purpose other than to improperly introduce propensity evidence before the jury?

Question II: Did the lower court err in failing to sustain the hearsay objection to what the daughter was told when she allegedly reported the alleged abuse to the Estill police department when the overruling of the objection opened the door to improper opinion testimony from the officer as to the credibility of the witness?

Question III: Did the trial court err in failing to declare a mistrial when a witness for the state testified that William Oswald was willing to take a polygraph examination?

Statement of the Case

Procedural History

William Oswald was arrested on May 9, 2019 and charge with three counts of criminal sexual conduct with a minor, first degree. He was tried before the Honorable Eugene C. Griffith and jury on November 27 to December 1, 2024. He was convicted on all three charges. He was sentenced to twenty years concurrent on two counts and a twenty year consecutive on the other count.

The Notice of Intent to Appeal was filed on December 5, 2024.

Factual History

On March 23, 2019, Faith Hoover, then age 33, and Deborah Buller, then age 31, the two daughters of William B. Oswald, reported to the Lexington and Richland Counties sheriffs' departments that their father had sexually molested them from 1991 until 1996. Def. Ex. 3, Court's Ex. 4. In her March 25, 2019, signed statement, Ms. Hoover stated, "The first time that I remember is when I was in the third grade my dad and I was [sic] the only ones home." Def. Ex. 3. Ms. Buller mentioned incidents in both Richland and Lexington Counties. She also testified "I was forced to sleep in his bed and spoon with him." Rec. on App. at 229, ll 17-18. *See, also* Court's Exhibit 4.[1]

On the Sunday before the trial was to start on Monday, defense counsel was notified that Ms. Hoover had informed the state that the first sexual assault on her started in Estill, SC when she and her family were living in the basement of a church. Court's Ex. 5. In her pre-trial

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[1] In her statement she said the abuse occurred from 1996 until 2001. As she was born in 1985, the abuse allegedly occurred from age 11 until 16. Her testimony at trial was the alleged abuse stopped at age 11.

testimony, Ms. Hoover stated the sexual assault in Estill had happened one time in a house in Furman, SC, near Estill. He did not mention any sexual assault in the basement of the church. In a pre-trial hearing as to the admissibility of evidence under Rule 404b, after describing a sexual assault occurring in the bedroom of the Furman house, she was asked:

> Q. (By Ms. Johns) And any other incidents that happened in Estill you can share with us?
> A. (By Ms. Hoover) Not sexually.
> Rec. on App. at 119, ll 1-3.

In Ms. Hoover's testimony before the jury, after describing a specific sexual act that occurred in the guest bedroom in the house in Furman, she was asked the following:

> Q. (By Ms. Johns) Okay. Now, how many times did this happen in Estill that you can remember?
> A. (By Ms. Hoover) It was regular. I - - I don't have an exact number. That would be, I - - I mean I can't give a number.
> Q. Would it always - -
> A. But it was common.
> Rec. on App. at 168, ll 14-19.

Throughout her testimony, Ms. Hoover never contended that she did not remember the sexual assaults. She says she told her future husband, Jacob, before they were married in 2006. Rec. on App. at 196, ll 7-12. She also testified in 2008 she told a doctor in Dillion, SC when she was 23. Rec. on App. at 206, ll 13-21.[2] Her husband, Jacob, testified she told him about the alleged sexual abuse in 2000, shortly after they met. No police report was filed when she told him. Rec. on App. at 363, ll 14-24. Ms. Hoover further testified that when she was living with

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[2] In response to a leading question, Ms. Hoover testified the doctor she saw did not have to report the incident as she was of age. South Carolina Code § 63-7-310 does not contain an exception if the person reporting it is 18 or older. Rec. on App. at 206, ll 17-25. In later testimony, she stated prior to 2017, she had only told her husband and her grandmother. Rec. on App. at 216, ll 7-10.

her grandmother and was sexually abused by her father, she told her grandmother shortly after the abuse occurred. She testified nothing happened after she told her grandmother. Rec. on App. at 181, ll 1-15.

Ms. Hoover stated she told her mother about the alleged sexual abuse when she was visiting in Orangeburg in 2018 for the funeral for the grandfather of her husband. Her testimony was as follows:

> Q. (By Ms. Johns) All right. So now we're in Orangeburg and Jacob's grandfather died?
> A. (By Ms. Hoover) Yes.
> Q. What happened with regards to your story?
> A. I told my mom.
> Q. How did you tell her?
> A. I talked to her on the phone that we would be down.
> Q. Was she with your father at the time?
> A. Yes.
> Q. Okay
> A. Because I told her that I wanted to see her, but he was not allowed to be there.
> Q. Okay. What happened - - -
> A. So she came to Orangeburg and we sat on the back porch around their table. And I looked at her and I said, "Mom, dad molested me over and over again." And she said, "oh, I already knew."
>
> * * *
>
> A. - - - And let me know that I had not lost it. And I asked her "How did you know?" And she said, "You told your grandmother."
> Rec. on App. at 221, l 8 to 222, l 10.

Rebecca Oswald, the wife of William B. Oswald, and the mother of Ms. Hoover, gave a different account of whether she was told by her mother of the alleged abuse. She testified:

> Q. (By Mr. Lyle) Okay. Did Ms. Hill ever tell you that she was aware that Bill had molested Faith or Deborah or both?
> A. (By Ms. Oswald) No, I don't remember.
> Q. Would you have probably remembered that?
> A. I would've remembered it.
> Q. And how do you think Ms. Hill or Mr. Hill would've responded if they would've found out that Bill had molested?

A. Yes.
Q. I'm sorry. Tell me what that means?
A. Yes, my dad would've responded.
Q. And how would he - - how would he have responded?
A. He would've taken action.
Q. What - - what about Ms. Hill? Would she have taken action?
A. I think she would've too.
Q. Would she have made sure Mr. Hill knew?
A. Yes.
Rec. on App. at 449, l 10 to 450, l 1.

Shortly after the birth of her last daughter in December of 2016, Ms. Hoover began to have serious psychiatric problems. These problems resulted in her losing her ability to walk and speak. Rec. on App. at 214, ll 5-16. She further stated she began hallucinating. In her hallucinations she would see her father, William Oswald, at places he was not present. Rec. on App. at 215, ll 18-24. One such occurrence was when she believed her father came to her house in London, KY in a car she did not recognize. Rec. on App. at 212, l 11 to 213, l 11.

After years of counseling, the counseling records show that on May 22, 2020, she told her counselor that she had been lying to her and that her husband had been abusing her for years. Rec. on App. at 266, ll 16-19; 474, ll 1-8; 483, ll 8-14. Ms. Hoover denied telling the counselor that she had been physically abused by her husband. In response to the counselor's notes of May 22, 2020, which stated Ms. Hoover had made a claim of physical abuse by her husband, she stated, "My husband has never touched me." Rec. on App. at 281, l 20. She further denied ever telling her counselor that her husband physically abused her. Rec. on App. at 281, ll 21-25.

Jacob Hoover, husband of Faith, had numerous text messages exchange with Mr. Oswald. Def. Exhibit. 4. In these exchanges Mr. Hoover stated that both he and Mr. Oswald had abused Faith. When read in context, the abuse refers to physical and not sexual abuse. Mr. Hoover also

denied physically abusing his wife. Rec. on App. at 367, ll 17-21. His text messages with Mr. Oswald appear to contradict this testimony. Def. Exhibit 4, at ___.

Deborah Buller, when first told by her mother her sister had made a claim of sexual abuse, denied she had been sexually assaulted by her father. Rec. on App. at 576, ll 13-15. Her testimony was the thoughts as to her father came flooding back after she had an argument with her husband. Rec. on App. at 578, l 18 to 578, l 3. The argument was in 2019. She testified as a result of these flashbacks, she attempted suicide. She was hospitalized on March -- Rec. on App. at 579, ll 6-8. This was her third suicide attempt.

On March 26, 2019, Ms. Buller filed a telephone report against Mr. Oswald for his allegedly grouping her at Lexington Hospital where she was confined after her suicide attempt. A written report was given on March 27, 2019. Rec. on App. at 490, ll 12-25. In her March 27 written report, she claimed that on March 8, 2019, while she was hospitalized from her suicide attempt, Mr. Oswald came into her hospital room early one morning while she was groggy. She awoke to his fondling her breasts. She claimed she screamed and two nurses came running into the room and escorted Mr. Oswald out of the room. Rec. on App. at 491, ll 2-9.

While the video of the hall outside the room was not introduced, Nicholas Dantzler, the security officer for Lexington Hospital, saw the video and described a different set of facts. He stated:

> A. (By Mr. Dantzler) We reviewed a video from the hallway. We can see the subject [Mr. Oswald] coming to the hospital, see him going to the room to visit, He stays roughly 20 minutes and then leaves. At no point does medical staff enter the room.
> Rec. on App. at 492, ll 6-9.

Mr. Oswald was contacted by Officer Dantzler. He cooperated with the investigation and

gave a statement to the officer. Rec. on App. at 496, ll 8-15. After talking to the nurses involved, who did not confirm the story told by Ms. Buller, the case was closed "due to not having probable cause to present to the judge." Rec. on App. at 501, ll 10-11; 503, ll 15 to 504, l 9.

Ms. Buller had a history of two other suicide attempts. The first was at the age of 11 when she attempted to hang herself with a belt. She disclosed this attempt to Sandy, the youth pastor's wife. Rec. on App. at 537, ll 5-11. She stated she told her father after church one Sunday and he was upset. As a result he beat her with a belt. Rec. on App. at 538, ll 9-14. He allegedly forced her to take a bath with her clothes on. Her mother came home shortly afterwards, went in the bathroom and took the razor out of the bathroom. She claimed her mother did not ask her how she was. Rec. on App. at 539, ll 3-20. Her mother did not testify to such an incident.

As a result of this suicide attempt, she, at her father's request, went to counseling. Rec. on App. at 540, ll 3-7. Her father carried her to the counseling appointment. She testified her father told her, "[T[here are some things that you don't talk about and if you do, there will be consequences." Rec. on App. at 540, ll 12-14. She testified she never discussed anything with the counselor. As she said, "I wasn't going to say anything because if I said the wrong thing, I didn't want to deal with that." Rec. on App. at 540, ll 23-25. She never said anything including small talk. Rec. on App. at 541, ll 3-10. She did not testify as to how long this "counseling" lasted nor did the counselor testify.

She described her mother as being absent. She also testified her mother was in bed a lot. Rec. on App. at 544, ll 14-21. She further described the house as being very dark. Rec. on App.

at 544, l 25 to 545, l 6. She further testified that except for one B, she was a straight A student. Rec. on App. at 550, ll 14-15. She was also active in student activities such as soccer and chorus. She further stated she went through a "goth period". Rec. on App. at 550, ll 20-25.

Her second suicide attempt came after she filed a complaint against a fellow student for rape. This occurred the last day of her freshman year. Rec. on App. at 553, l 22 to 554, l 8. She described this incident as, "It reminded me of what my father did." Rec. on App. at 556, l 21 She first told her mother who later told her father. Rec. on App. at 557, ll 557, l 13 to 558, l 12. Her father, upon being told of the incident, took her into the backyard and left her outside for while. Later he came and got her and took her to the hospital to be examined. Rec. on App. at 559, ll 19-23. Her father denied taking her into the backyard or beating her. Rec. on App. at 720, l 20 to 721, l 5. Her mother did not testified as to this incident.She further testified she did not tell the doctors about her father because she was scared of him. Rec. on App. at 561, ll 4-12. As a result of this incident, she again went to counseling. Rec. on App. at 562, ll 5-7. As a result of the incident, she had her second suicide attempt. She took a bottle of her sister's migraine tablets. Rec. on App. at 564, ll 2-5.

Her father gave her "ipecac or something." Rec. on App. at 564, l 22. What she was given made her vomit and she was taken to Lexington Medical Center. Rec. on App. at 564, ll 23-24. She was treated and released from the Lexington Hospital. She again entered counseling. In these counseling sessions she stated she disclosed the physical abuse by her father but not the sexual assault. Rec. on App. at 565, ll 9-24.[3] The counseling session lasted for about a year.

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[3] Had the physical abuse been disclosed, the counselor would have been required to report the abuse under S.C. Code § 63-7-310. Neither Mr. nor Mrs. Oswald ever testified as to being investigated by the Department of Social Services or the sheriff's department for the

Rec. on App. at 601, ll 14-21. The reason she gave for not disclosing the sexual abuse was, "I was afraid." Rec. on App. at 566, l 8. She apparently was not afraid to disclose the physical abuse. No counselor for Ms. Buller testified. After she recovered from this suicide attempt, she transferred to Ben Lippen School.[4] She excelled academically. Rec. on App. at 566, ll 15-21. After graduation, she attended Columbia College. She graduated in 2009. Rec. on App. at 566, l 25 to 567, l 1.

After her graduation her relationship with her father appeared to be normal. They frequently exchanged text messages as is evidence by the 195 pages of text messages introduced as Defendant's Exhibit 13. The text messages contain references to the children of Ms. Buller spending the night with Mr. Oswald. On January 10, 2019, about two years after the allegations by her sister, Ms. Buller's daughter spent the night with Mr. Oswald. Def. Ex. 13, at 173. Previously he took his grandson to the fair for the day on October 19, 2016. Def. Ex. 3, at 28-30.

Ms. Buller brought charges against her father on March 23, 2019. The charges were originally made in Richland County. Def. Exhibit 3. She also made a report in Newberry County that Mr. Oswald molested eight other children, but she never provided the Newberry officials with the names, times or places. She made a further claim that Mr. Oswald might have molested patients in the ambulance. Rec. on App. at 596, ll 3-13. Finally, she reported that she believed Mr. Oswald had molested her children. Her five year old son Braden was given a

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alleged physical abuse. The state did not introduce any report of abuse.

[4] :A Scottish phrase meaning 'Mountain of Trust,' Ben Lippen School was founded in 1940 by the Columbia Bible College (CBC), now Columbia International University (CIU), and the board of trustees under the guidance of CBC's first president, Robert C. McQuilkin." https://www.benlippen.com/about-us/ (Visited July 3, 2024)

forensic interview. The result exonerated Mr. Oswald and did reveal that he had been molested by a fellow student. Rec. on App. at 596, l 20 to 598, l 12.

In 2020, while Mr. Oswald was out on bond with electronic monitoring, Ms. Buller reported to the police that Mr. Oswald had approached her and spoke to her while she was walking at Nazareth Road horse track. The report was determined to be false. Rec. on App. at 611, l 3 to 612, l 22. The police checked the GPS monitoring device and determined that Mr. Oswald was about seven miles away. Rec. on App. at 750, ll 2-3

In the effort to convict Mr. Oswald, the State introduced the testimony of Lester Bradley "Brad" Oswald, the brother of Mr. Oswald. Brad testified that when his family was living in Columbia, SC, he was sexually assaulted by his older from the time he was about 4 years of age until he was about ten years of age. Brad testified the alleged sexual abuse started when he was "4, 5, 6 maybe. Maybe a little older . . . ." Rec. on App. at 311, l 3. In his initial statement to the police, the police reported he said the sexual abuses continued until he was 16. Rec. on App. at 328, ll 4-15. Mr. Oswald was eight years older than Brad. Rec. on App. at 310, l 8. At the time of the trial Brad was 53 years of age. Rec. on App. at 311, ll 6-7. This meant that the alleged sexual assault occurred from about 1975 until 1980, some fifteen to twenty years before the alleged assaults in this case. Brad also testified he told the police about the alleged assault when he about 16 years of age. Rec. on App. at 327, ll 18-25. He also said both of Mr. Oswald's children were present when he confronted Mr. Oswald. Rec. on App. at 329, ll 13-21. No police report was produced to substantiate this claim.

In a pre-trial motion as to the admissibility of Brad's testimony, Faith Hoover and Brad

Oswald testified.[5] The trial judge found sufficient similarities between the alleged homosexual assault of Brad and the alleged sexual assaults in this case. Trial counsel objected to the admission of the allege 404b testimony. Rec. on App. at 132, l 4 to 135, l 20. The trial judge admitted the testimony from Brad Oswald listing what he perceived to be similarities between the two cases. Rec. on App. at 141, l 1 to 142, l 5.

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[5] The testimony of Deborah Buller was different in that she testified the alleged assaults took place on occasions when other people were present. She did not testify at the *Lyle* hearing. The trial judge did list the act being done when no one was around as a similarity.

Standard of Review

As to Issues I and II, as the trial judge erred as a matter of law in admitting this evidence, the standard of review should be de novo. "Our standard of review in criminal cases is limited to correcting errors of law. We are bound by the facts as the trial court found them, unless they are clearly erroneous." *State v. Green*, 436 S.C. 492, 494, 872 S.E.2d 869, 869–70 (Ct. App. 2022), reh'g denied (June 6, 2022), cert. denied (Mar. 7, 2023). As to Issue III the standard of review is abuse of discretion. "The decision to grant or deny a mistrial is within the sound discretion of the trial judge." *State v. Stanley*, 365 S.C. 24, 33, 615 S.E.2d 455, 460 (Ct. App. 2005)

Argument

Question I

Did the trial court err in admitting the testimony of Lester Bradley Oswald as to an alleged sexual assault which allegedly occurred fifteen to twenty years before the alleged assault in this case when the prior bad act served no purpose other than to improperly introduce propensity evidence before the jury?

As an initial matter in this case, William B. Oswald asks this Court to review and either overturn or modify *State v. Perry,* 430 S.C. 24, 842 S.E.2d 654, (2020), *State v. Durant,* 430 S.C. 98, 844 S.E.2d 49 (2020) and *State v. Cotton*, 430 S.C. 112, 844 S.E.2d 56 (2020). By placing special emphasis on similarity in these cases, this Court has created confusion in both the bench and bar as to what other bad acts in all criminal cases, and not just criminal sexual conduct cases, are admissible in a criminal trial.

No one will doubt the seriousness of child sex abuse. No one will doubt the harm it can inflict on a child. These concerns, however, must not stop us from acknowledging two facts as to

child sex abuse that are absolutely certain. 1. Child sex abuse occurs. 2. Children make up allegations of child sex abuse. For these reasons, the admission of highly prejudicial evidence should be closely examined.

In the trilogy of cases cited above, this Court attempted to clarify the law as to when other acts of criminal sexual conduct are to be admitted. Under the cases, this court concluded that other acts of criminal sexual conduct are admissible if they are sufficiently similar. This court did not explain exactly why the other act of criminal sexual conduct was admissible except to say, as the dissent did in *Perry*, "[I]n my judgment, *Wallace* wrongly rejected the connection test. I would modify Wallace by restoring the connection test to the Rule 404(b) common scheme or plan exception, but allow similarities between the prior bad acts and the crime charged to show that connection." *Id.* at 46, 842 S.E.2d at 666. If showing a connection between the two separate acts is required, and the similarity establishes that connection, then there is no basis for ever keeping a similar act out even after a Rule 403 analysis. What this court has told trial judges to do is look hard for similarities to admit the other act of criminal sexual conduct. To a man with a hammer, everything looks like a nail. To a judge told to look for similarities, everything looks similar. This is simply the wrong approach to take in these cases.

Before a discussion of the error in the trilogy of cases, one needs to look at one of the legally logical consequences of the three decisions. The decisions are not limited to criminal sexual conduct cases. The three cases claim to apply the basic holding of Rule 404b and the long recognized, and never overruled, *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). The trilogy of cases are not limited to criminal sexual conduct cases. The principles established in those case should equally apply to any criminal or civil case.

Do the cases really mean in the most simple of driving under the influence case, the prosecution would be able to admit a previous DUI case as similar because the defendant was driving at night with a high level of alcohol. Or because he was driving the same car to make it similar. In both cases if the defendant unfortunately happened to be leaving the same bar, such similarity should survive a 403 analysis because the similarity is the connection between the two crimes.

In a typical burglary case, if a defendant previously burglarized a residence and the case he is on trial for is a residence, is that similarity sufficient to admit the prior burglary? If the defendant stole weapons in both burglaries, would that make the similarities sufficient if the similarity is the connection?[6]

The unanswered question in *Perry, Durant* and *Cotton* is, "What is the similarity used to prove that is relevant to the case or as this court said in *Lyle*, 'essential'?" The other DUI is not essential to proving the DUI being tried. The other burglary case is not essential to proving the burglary case being tried. And the other alleged criminal sexual conduct case is not essential to prove the criminal sexual conduct case being tried. In excluding most of the other forgeries, the South Carolina Supreme Court in *Lyle* said, "A plan or system common to other crimes was not an essential ingredient of the crime charged." *State v. Lyle*, 125 S.C. 406, ___, 118 S.E. 803, 811 (1923). Was the other criminal sexual conduct allegation by Brad Oswald an essential ingredient of the crime charged? And if one says it is essential, then essential to prove exactly what? Proof of an alleged similar crime is not a basis for admitting the other bad act. *Lyle* very clearly holds

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[6] *See, State v. Kennedy*, 339 S.C. 243, 528 S.E.2d 700 (Ct. App. 2000), aff'd, 348 S.C. 32, 558 S.E.2d 527 (2002)(holding similar burglaries are admissible under a common scheme or plan)

this statement is true. The court in *Lyle* found that the Georgia forgeries were committed "under substantially similar circumstances." *Id.* at 420, 118 S.E. at 808. So, if *Lyle* says "substantially similar" crimes are not admissible, how does this court in *Perry*, *Durant* and *Cotton* determine that the similarity is the connection that makes similar crime admissible.

To discuss the issue, this writer relies primarily upon the dissent in *Perry*. In the opinion of this writer, the dissent in *Perry* became the majority opinion in *Durant* and *Cotton* notwithstanding a proclamation to the contrary. The error in all three cases is the belief that the similarity serves a purpose other than propensity.

The dissent in *Perry* starts out with the very correct statement, "[T]his Court's historic approach to common scheme or plan requires a showing that the prior bad acts are somehow connected to the charged crime." *Id.* at 45, 842 S.E.2d at 665. The dissent then concludes the connection can be the similarity. The dissent said, "[I]n my judgment, *Wallace* wrongly rejected the connection test. I would modify *Wallace* by restoring the connection test to the Rule 404(b) common scheme or plan exception, but allow similarities between the prior bad acts and the crime charged to show that connection." *Id.* at 46, 842 S.E.2d at 666. This statement, when analyzed, contradicts what is said before. If the dissent would modify *Wallace* to require a connection, but if the connection can be established by proving the crimes are similar, then no connection needs to be proven. All that needs to be proven is the crimes are similar. And proving similarities to prove the crimes are connected because they are similar, appears to be a circular argument. The analysis does not answer the question of what is a similar crime being used to prove, other than similarity? The only logical answer is that the other bad act is being used to prove that the defendant had committed another similar crime, which is nothing more

than proving the defendant had a propensity to commit the crime with which he was charged.[7]

The other bad act is not essential to prove the crime charged, unless one deems another bad act as the only way the state can convict the defendant.

In relying upon similarity to prove the connection, the question has to be raised as to what is a similarity. If the acts occur on the property of the defendant does that make them similar? Or must the charged offense and the other bad act occur in the home or the same bedroom to be similar. Unfortunately, in many cases similarity, like beauty, appears in the eye of the beholder. This Court in the trilogy of cases did not instruct the bench and bar how to define or determine similarity. The determination of similarity and dissimilarity is left to the creativity of the solicitor and the defense counsel. This cannot be the basis for a principle of law.

The dissent further says, "[C]riminal sexual conduct cases are typically done under the cover of darkness with no witnesses present other than the alleged perpetrator and alleged victim, often causing the case to develop into a 'he said/she said battle." *Id.* at 62, 842 S.E.2d at 674. This hardly is a reason to admit what can only be described as propensity evidence. One can say with some certainty that many crimes are committed with the intent to hide the identity of the perpetrator. This fact is not a basis to permit the introduction of other similar bad acts of the defendant that fall short of the identity exception to prove the defendant committed the crime.

The dissent further says child sex abuse cases are challenging because, "[C]hild sexual abuse cases commonly involve grooming, secrecy, delayed disclosure and threats of reprisal." *Id.* at 63, 842 S.E.2d at 674. Evidence as to the grooming of the child involved in the case is

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[7] This argument does not prohibit the state from introducing other sexual acts with the complaining witness. This is usually needed to prove the nature of the relationship between the two parties. The actions with a third party does not prove the nature of the relationship.

admissible to tell the compete story. Grooming evidence as to another child is not admissible. Expert testimony as to delayed disclosure is also admissible in trial. The prosecutor is free to argue the impact of secrecy and threats. None of these factors illustrate a need to introduce another alleged similar act allegedly committed by the defendant.

In discussing the meaning of "a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others," the dissent correctly identifies the basic purpose of the rule to be the permitting of other crimes when a defendant commits one of more crimes in furtherance of the crime for which he is charged. *State v. Nix*, 288 S.C. 492, 343 S.E.2d 627 (Ct. App. 1986) is an excellent example of the application of this principle. The connection of the other bad act in *Nix* was not based upon similarity. In rejecting the majority's analysis as to a connection being needed, the dissent stated, "Nevertheless, as the cases demonstrate, the phrase 'similarities' became what I view as a shorthand description to embrace the convergence of similarity and connection." *Perry*, at 54, 842 S.E.2d at 670(Kittridge dissenting). Again, as previously noted, when there is a convergence of similarity and connection, connection ceases to have any meaning. Apparently, this court has now rejected its previous position, "When, as here, the previous alleged bad act is strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced." *State v. Gore*, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984). After *Perry*, *Durant* and *Cotton*, similarity is now king and apparently no degree of similarity can ever be too prejudicial.

The dissent in *Perry* stated, "Although my research is not exhaustive, most jurisdictions allow prior bad acts evidence in criminal sexual conduct cases." *Perry* at 54, 842 S.E.2d at 670. The question is not whether a majority allows other acts of criminal sexual conduct to be

admissible, but whether the other states got it right. A fair number of other states exclude such evidence as being nothing but propensity. *See, e.g. People v. Weinstein*, 2024 WL 1773181 (Ct. App. NY 2024); *State v. Levasseur,* 309 Or. App. 745, 483 P.3d 1167 (2021); *State v. Marquez,* 495 P.3d 1150 (Ct. App. NM 2020); *State v. Sweeney*, 297 Mont. 111, 999 P.2d 296 (2000); *State v. Cox,* 781 N.W.2d 757 (Iowa 2010); *Lannan v. State,* 600 N.E.2d 1334 (Ind. 1992); *Brasher v. Alabama,* 249 Ala. 96, 30 So.2d 31 (1947). When the basis for admitting the evidence is similarity and the similarity proves nothing more than the defendant has committed another similar act, the admission on this basis simply admits propensity evidence under another name. No real connection to the crime charged needs to be proven. The fact that propensity evidence is prohibited in South Carolina was accepted by all the judges in *Perry*. So, the question is, how is similarity, when it is not used to prove identity, not another name for propensity evidence? Similarity does not help prove the charge in a criminal sexual conduct case except to say the defendant has committed a similar crime.

In *Cox,* a case from Iowa, the court held a rule permitting the introduction of other bad acts with a person other than the one for which the defendant was being tried, violated the due process clause of the Iowa constitution. The court, in a very through opinion, ruled the other bad act would have to be relevant to a specific purpose. In rejecting the admission fo the other bad act under the common scheme or plan exception, the court held, "The test for a common scheme or plan is not simply a pattern of prior bad acts. 'Common scheme or plan means more than the commission of two similar crimes by the same person.' 'Evidence of other crimes should never be admitted when it appears the defendant committed them wholly independent of the one for which he is then on trial.'" *Cox,* at 769–70 (Iowa 2010)(internal citations omitted).

Indiana similarly held unconstitutional a specific rule that permitted the state to introduce other acts of sexual misconduct. The court stated, "In the interest of aiding the prosecution, we could of course expand the exception and abrogate the general rule. After all, our empathy for victims of all crimes is considerable. But the general rule prohibiting the state from offering character evidence merely to show the defendant is a 'bad guy' and therefore probably committed the crime with which he is charged remains as fundamental today as ever." *Lannan,* at 1338/

This court should reexamine *Perry*, *Durant* and *Cotton* and hold similarity is not a proper basis to admit other bad acts except as to the identity exception.

Under the Perry Decision the Other Alleged Assault not Admissible.

Notwithstanding the criticism of the *Perry*, *Durant* and *Cotton* decisions, the other alleged assault claimed by Brad Oswald, the brother of Williams Oswald, is not admissible. If similarity is the lynchpin for admissibility, the trial court should have excluded the other alleged assault. First, the major and obvious difference is the fact that the alleged assault upon Brad was an alleged homosexual assault. This alone should make it not similar. Second, the alleged assault occurred when Mr. William Oswald was between 12 and 18 years of age. Mr. Oswald was 33 to 38 years of age at the time of the alleged assault by the complaining witnesses. The state was not able to produce any other alleged improper sexual conduct by Mr. Oswald to establish a continuous pattern of improper conduct. The state offered no proof the two alleged incidents were in any way connected in the mind of Mr. Oswald. The alleged assault with Lester Oswald was anal penetration with his penis. Ms. Hoover never testified as to any anal sex. Ms. Buller, who was not a *Lyle* witness, testified Mr. Oswald placed his finger in her anus. Rec. on App. at 530, ll 14-15. The alleged assault claim by Brad stopped when Mr. Oswald left for college at age 18.

Rec. on App. at 96, l 20. One daughter said the alleged abuse stopped when she started menstruating. Rec. on App. at 120, ll 13-15. The other daughter testified the alleged abuse stopped when she told her father, "I'm not doing this anymore. I'm not comfortable." Rec. on App. at 185, ll 1-2. None of the alleged assaults stopped in the same manner.

The only incident described in detail by Brad occurred on the bathroom floor. Rec. on App. at 89, ll 5-11. He testified, however, that, "It seemed like he -- it wasn't just yeah, the bathroom. The laundry room, or the washroom. The living room. His bedroom, which was on the corner of the house, I remember vividly because they had these -- these the closet and there were like stairs that you could climb on." Rec. on App. at 89, ll 19-23. He did not testify in detail about the other alleged incidents. The use of the bathroom in Brad's alleged assault was not unique. Ms. Hoover testified the alleged incident occurred in the tub in the bathroom. Rec. on App. at 178, l 9 to 179, l 23. The alleged sex in the bathroom was not similar to the alleged sex Brad Oswald said happened to him. There was no anal penetration nor did any alleged sexual act happen on the bathroom floor. Simply put, there are no similarities among the various allegations other than a sexual assault occurred.

Among the alleged similarities claimed by the state, many would be common because of the nature of the alleged crime and not because they are unique. Rec. on App. at 136, ll 17 to 137, l 22. The state claims similarities such as penetration, having their pants pulled down, and both occurred when on one else was home. The state also seemed to argue that as the alleged victims could recall details that made them similar. When arguing the similarities, the state argued, "They can describe whether the sun was shining outside, what the color of the wallpaper was, what the

color of the tile was, whether or not there was parking there."[8] Rec. on App. at 137, ll 7-10. The list of alleged similarities in this case simply establishes that similarities are only limited by the imagination of the prosecutor. The State never made an argument as to the similarities being related to any type of plan by Mr. Oswald. In *Perry,* this court said, "Rather, in our significant collective experience dealing with crimes of this nature, a very high percentage of sexual crimes against children are committed just like Perry's alleged crimes: by father figures, in the home, in a bedroom, beginning in the pre-pubescent years. The fact Perry's crimes fit this general pattern does not give Perry a 'monopoly' on his criminal method." *Perry*, at 40, 842 S.E.2d at 662. Noting in the record here establishes that Mr. Oswald had a monopoly on any alleged criminal method.

The problem with saying similarity establishes the connect and the connection is the similarity, that concept does not tell the bench or bar why the similarity is basis for admitting the other alleged bad act. What is the other bad act used to prove? The court must answer this question before any member of the bar is able to determine when a similar act is admissible and when it is not. If the answer is it is admissible simply because it is similar, then the most minor similarity could be the basis for admitting the other alleged bad act. And the more important the similarities are, the less important the dissimilarities are. For example, in *Durant*, this court admitted another act of criminal sexual conduct even though the act involved an 18 year old adult and not an underage minor which was the act for which Mr. Durant was on trial. *Durant*, Rec. on App. at 40, ll 15-19. How is an act of sexual intercourse with an adult similar to an act of sexual

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[8] The record does not explain what "parking" meant. This may be a case of a poor transcription.

intercourse with a person under the age of 16?

In *Cotton*, this court approved of the admission of another act of forced sexual intercourse. The opinion stated the acts were similar because Mr. Cotton met both online. This Court said, "In this case, Petitioner met a young woman (the victim) online, ..." *Cotton*, at 113, 844 S.E.2d at 57. The record establishes he met the 404b witness one online and met the other through a telephone chat line. *Cotton*, Petition for Rehearing at 4. Further, this court stated both women were met for purposes of going on a date. This simply is not in keeping with the testimony in the case. *Cotton*, Petition for Rehearing at 4. In finding the two cases to be similar, this court in *Cotton,* when the woman gave a reason as to why he should not have sexual relations with her, stated, "Petitioner stated he did not care and would 'fix that,' putting on a condom and continuing with the rape." *Id.* 114, 844 S.E.2d at 57. Again, the record in the case does not support that conclusion. *Cotton*, Petition for Rehearing at 5. No court should make two separate crimes look similar with inaccurate facts. A comparison of the facts in *Perry* with those in *Cotton* makes the facts in *Perry* substantially more similar than the facts in *Cotton*. The conviction in Perry was reversed and the conviction in *Cotton* was affirmed. To a member of the bar honestly trying to learn when other bad acts are admissible, the cases of *Perry*, *Durant* and *Cotton* only add to the confusion.

In this case, to find similarities beyond the general similarities of any such act, this court would have to ignore the obvious dissimilarities. When dissimilarities are ignored, all such crimes become similar. No court should instruct the lower courts to disregard dissimilarities in making a Rule 404b and a 403 analysis. The lower court erred in admitting the alleged act against the brother in this case and the conviction should be reversed.

Question II

Did the lower court err in failing to sustain the hearsay objection to what the daughter was told when she allegedly reported the alleged abuse to the Estill police department when the overruling of the objection opened the door to improper opinion testimony from the officer as to the credibility of the witness?

During the trial, the oldest daughter testified she tried to report the alleged incident to the police department in Estill. Her initial statement was, "I tried to file an [in] Estill and we have been told that we would have two [to] travel to Estill." Rec. on App. at 232, ll 20-21. At that point, defense counsel objected as to the testimony as being hearsay. Obviously what she was told by the Estill police department as to her reporting the alleged crime would be hearsay. The trial judge, however, overruled the objection stating, "She's testified to an event. Yes. I'm going to allow. Objection's overruled." Rec. on App. at 232, ll 24-25. This objection was followed by the following testimony:

> Q. (By Ms. Johns) Okay
> A. (By Ms. Hoover) We - -I spoke with the captain. She was over the -- the department there and there was only two people in the department. And she said that Lexington and Richland County were so large that they had the cases and that by the time they got through with it that Estill would never have a chance to even bring it to court.
> Q. And so ---
> A. Not that she didn't believe me.
> Q. And even though that that's not in that statement in Richland County, did it happen?
> A. Yes, it did.
> Rec. on App. at 233, ll 2-13.

The failure of the trial judge to sustain the hearsay objection enabled the witness to tell the jury the law enforcement officers in Estill believed her as to her allegations of sexual abuse. This court has held, "The rule against hearsay prohibits the admission of out-of-court statements

offered to prove the truth of the matter asserted therein unless an exception to the rule is applicable." *State v. Lewis*, 293 S.C. 107, 110, 359 S.E.2d 66, 67 (1987). "Testifying to an event" does make the statement any less hearsay under Rule 802 nor is it declared not to be hearsay under Rule 803. The trial judge erred in failing to sustain the hearsay objection.

As a result of the failure of the trial judge to sustain the objection, the witness for the state was able to bolster her own credibility by saying the Estill police officer believed her. Had the Estill police officer appeared in court and gave testimony, the officer would not be able to testify that the officer believed the witness. As this court has held, "[A] witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim." *Briggs v. State*, 421 S.C. 316, 324, 806 S.E.2d 713, 717 (2017).

The statement of the witness was improperly admitted. The state was improperly permitted to bolster the testimony of the witness by having her testify that the Estill police officer believed her. This was obviously improper. The jury could have made their decision, even in part, upon the improper belief that the Estill police officer found her to be credible. This testimony was prejudicial to Mr. Oswald.

Question III

Did the trial court err in failing to declare a mistrial when a witness for the state testified that William Oswald was willing to take a polygraph examination?

When the wife of William Oswald was testifying the following occurred:

> Q. (By Ms. Foster)What did Bill say to you when you told him about Faith's accusation?
> A. (By Ms. Oswald) He denied it and said he would take a lie detector test.
> Rec. on App. at 405, ll 10-13.

Defense counsel promptly asked the court for the parties to approach the bench. After a bench conference, the jury was excused from the courtroom and the parties had an extensive discussion as to whether the judge should declare a mistrial. The assistant solicitor stated to the court, "Your Honor, the question was, what did he say? I had no expectations she was going to say anything beyond he denied it." Rec. on App. at 407, ll 3-4. The state then asked for a curative instruction. No mention was made as to whether or not he took a polygraph examination.

This court has long held, "Evidence regarding the results of a polygraph test or the defendant's willingness or refusal to submit to one is inadmissible." *State v. Johnson*, 334 S.C. 78, 90, 512 S.E.2d 795, 801 (1999). The fact the state did not expect the answer does not diminish the prejudice from the answer.

In *State v. McGuire*, 272 S.C. 547, 551, 253 S.E.2d 103, 105 (1979), the court described the facts as to the reference to the polygraph as, "Crosby also testified, in response to questions of the solicitor, that he had made an agreement with the police officer to take a polygraph examination concerning this case. He described the conversation with the officer in which the officer said to McGuire, concerning the polygraph examination, 'well you are next.' McGuire is purported to have replied that he had 'nothing to hide.'" *Id.* at 549, 253 S.E.2d at 104. The opinion list no other references to the polygraph. In holding reference to the polygraph to be prejudicial to Mr. McGuire, the court held:

> The record here presents a close question. From the testimony it is inferable that McGuire was offered a polygraph examination. It left the jury to speculate and to conclude that he refused to take the test. Mention of a polygraph test might arise in any one of many ways. The safer course would normally be to avoid any mention of a polygraph examination. If such is brought out in the testimony, the

trial judge should be meticulous to see that no improper inference is created.
Id. at 551, 253 S.E.2d at 105.

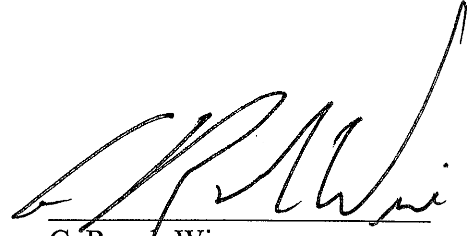
In the present case, the same principles should apply. The jury, after hearing of the willingness of Mr. Oswald to take a polygraph, easily could have concluded that the state would not be prosecuting the case if he passed the polygraph. The trial court correctly was concerned that the offer as to a polygraph was as to the defendant and not a witness. Rec. on App. at 411, ll 24-25. *McGuire* involved an offer by the defendant to take a polygraph. While *Johnson* involved the defendant, the fact should be noted that the case was reversed on another ground so the conclusion as the polygraph was not essential to the decision.

The trial court did give what he considered a curative instruction. Rec. on App. at 417, l 17 to 418, l 18. Notably, in this curative instruction, the judge may have simply made matter worse when he said near the end, "So you all can't discuss that. You know, wonder why, I wonder why. Totally not relevant." Rec. on App. at 418, ll 15-16. The judge telling the jury he wonders why, simply aggravated the problem. The jury could have easily agreed with him. And while the polygraph may not have been discussed in the jury room as per the judge's instructions, an individual juror could have had a difficult time putting that knowledge out of their minds as the judge admitted he was wondering also. One or more individual jurors could have assumed that the state would not be prosecuting the case if Mr. Oswald passed the polygraph. The trial court erred in failing to grant the motion for a mistrial.

CONCLUSION

For the foregoing reasons, this court should reverse the conviction of William Oswald and remand the matter to the lower court for a new trial.

October 23, 2024



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