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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 REPLY BRIEF OF APPELLANT

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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?

The bottom line of the position of the state is that the fact that one alleged sexual assault was a homosexual assault and the other was an alleged heterosexual assault and they were 15 to 20 years apart, is not a sufficient difference to exclude the homosexual assault from being admitted in this case. If this is to be the law in our state, this court needs to simply state any prior sexual assault is now admissible.

In arguing the remoteness of the alleged assault on Brad Oswald was not relevant, the State argued, "Rather, prior acts are admissible if there were committed using the same type of scheme or plan. The existence of a common scheme or plan is probative because it corroborates the testimony of the victim of the crime charged by showing the defendant utilized the same method in the past." Br. of Resp. at 9(emphasis in original). Simply put, the State has urged this court to admit the alleged prior bad act to bolster the testimony of the two daughters. As bolstering testimony has been soundly denounced by our courts, this case should not be the case where such improper use of Rule 404b evidence is permitted. No South Carolina case has been found which permits the use of another crime to be used to bolster the testimony of a witness.

But, see State v. Perry, 430 S.C. 24, 67, 842 S.E.2d 654, 677 (2020)(Kittredge, J. dissenting)[1] "I fail to see how the majority's apparent reliance on uniqueness, rather than a high degree of similarity, remedies its criticism of common scheme or plan evidence. The majority is missing an inferential step—one that is satisfied through either a repeated pattern of highly similar or unique criminal activity—that being 'where there is a pattern of continuous conduct shown, that pattern clearly supports the inference of the existence of a common scheme or plan, thus bolstering the probability that the charged act occurred in a similar fashion.'"

The State further argues, "Repetition of a specific act is evidence of a scheme or plan." Br. at 9. Under this theory, a repeat offender of driving under the influence could have his prior offense admitted, especially if he were leaving the same bar. A convicted drug dealer could have his prior drug dealing admitted in the case for which he is on trial. Would a different drug being sold make a real difference? A defendant convicted of a prior burglary of a house could have his prior conviction admitted if he is charged with a burglary of a house. Other examples are only

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[1] This statement by Justice Kittridge seems to be at odds with cases decided by the South Carolina Supreme Court which have held a hearsay repetition of the complaining witness statement is a ground for reversal as improper bolstering. *Watson v. State*, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006), abrogated by *Smalls v. State,* 422 S.C. 174, 810 S.E.2d 836 (2018) ("This Court has held that the failure to object to improper hearsay testimony in a criminal sexual conduct case because the testimony is merely cumulative to the victim's testimony is not a reasonable strategy where the evidence is not overwhelming or the improper testimony bolsters the victim's testimony.") *Dawkins v. State*, 346 S.C. 151, 157, 551 S.E.2d 260, 263 (2001) ("The testimony of the four witnesses relating what Chambless told them regarding her alleged sexual abuse served only to bolster her credibility.") Evidence of another alleged crime as bolstering is certainly more prejudicial than the repeating of the statement of the minor child.

limited by the imagination of the prosecutor. In its brief, the State limits the admissibility to the common scheme or plan exception. The State does not properly interpret the exception.

In the attempt to show similarities, which are not relevant to admissibility, the state ignores the 8 year difference in ages in the alleged act with the brother of Mr. Oswald when compared to the more than 20 years difference in age with the alleged act with his daughters. When differences are ignored, all such sexual acts can easily become similar. The reason is simple, all acts of criminal sexual conduct with a minor have basic similarities. The state notes on page 11 of its brief that "Oswald was bigger and stronger than his victims." This is true in every single criminal sexual conduct with a minor. This should not be basis for admissibility. While the state did not argue it, they could have said the defendant knew the complaining witnesses. While true, this is also common to every criminal sexual conduct with a minor. Using facts that are common to every criminal sexual conduct with a minor to make the similar simply makes all criminal sexual conduct with a minor similar.

The state argues on page 10 of the brief, "[T]he State is not required to show 'a perfect match between two crimes' to establish a common scheme or plan." This statement simply means that similarity, like beauty, is in the eye of the beholder. Such a standard is not a basis for reasoned admissibility of evidence. The South Carolina Supreme Court has held, "The 'common scheme or plan' exception requires more than mere commission of two similar crimes by the same person. There must be some connection between the crimes. If there is any doubt as to the connection between the acts, the evidence should not be admitted." *State v. Stokes*, 279 S.C. 191, 193, 304 S.E.2d 814, 815 (1983). In the present case there is no connection nor has the state made a valid argument that there is one. The State in an attempt to make a connection

incorrectly argues, "The rapes stopped by the time the victims reached puberty." Br. of Resp. at 10. As to the alleged rape of Mr. Oswald's brother, the testimony was they stopped when Mr. Oswald left home at age 18. The stopping of the alleged rape had nothing to do with puberty. ROA at 310, ll 2-3. While Brad Oswald may have had the opinion he "aged out," there is no proof of that as Mr. Oswald was no longer in the home. Whether Brad Oswald "aged out" is sheer speculation. As noted in the opening brief, one daughter gave a statement that the abuse continued until she was 16. The vagueness of this is certainly not a basis to declare the alleged act similar to the main witnesses in this case. The State did not prove below, nor has the State shown in its brief any connection between the alleged sexual assault of Brad Oswald and the alleged sexual assault of the two daughters.

The supreme court has stated, "For over eighty years after our decision in *Lyle*, this Court consistently adhered to its narrow 'acid test' of 'logical relevancy' or 'logical connection' for admissibility of other crimes." *State v. Perry*, 430 S.C. 24, 34, 842 S.E.2d 654, 659 (2020). In this case, the alleged assault on Brad Oswald does not have any logical relevancy or logical connection to the alleged assault of Mr. Oswald's daughters over 20 years later. The State has argued that the similarities alone provide the logical connection. Br. of Resp. at 11. If this were true, the other bad acts in *Perry* and *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923) would have been admitted. Similarity was not sufficient to pass the "acid test." The State below nor on appeal has argued that Mr. Oswald had a monopoly on the particular type of sexual assault. Even if such a characteristic is shown, it is only admissible to show identity, which is not an issue in this case. The two daughters knew their father.

The attempt of the State to make the fact that Mr. Oswald was the older brother of Brad

and the father of his two daughters proof of a "particularized plan," fails. Such a "particularized plan" is present in virtually any criminal sexual conduct with a minor case. Nothing about these alleged "particularized plan" makes the alleged assault on Brad Oswald pass the "acid test" required by *Perry*. To argue, as the States does, that, "Oswald's method was exploitation of his 'position of . . .authority' over his victims," (Br. of Resp. at 11) is to argue that all such assaults are similar for the same reason. Can there ever be a criminal sexual conduct with a minor where the perpetrator does not exploit their position of authority over the minor? If the parties know each other, this will always be true. The State has further argued that part of the "particularized plan" is when, "[A]buse occurred when the child was under Appellant's physical custody and control and when Appellant was the only adult present." Br. of Resp. at 11. This is present in virtually every criminal sexual conduct with a minor that has ever occurred. And no other adults being present was not consistent in this case. Deborah Buller testified an alleged assault happened when others were present in the den of the house or outside of the house. ROA at 526, ll5-9; 528, ll 1-3; 531, 9-12. As people not being around is typical in any such cases, and is not consistent in this case, how does the claim of no people being around make the Rule 404b evidence more admissible? It does not, which is why looking for similarities is not the basis for admitting evidence under 404b.

Similarity alone being a basis for admitting other similar crimes was refuted by the supreme court when it said, "Assuming that the evidence conclusively proved what the state was undertaking to establish—that on these prior dates this identical defendant under substantially similar circumstances had uttered other forged checks—what connection, other than the similarity in character of crime and method of execution, is there between the Georgia crimes and

the crime charged in the indictment?" *Lyle*, at ___, 118 S.E. at 808. Obviously there must be more than even strikingly similar other acts. What basis is there for admitting the other alleged sexual act than similarity? The State has stated none. *Lyle* prohibits admitting similar other crimes that are substantially similar.

Common scheme or plan typically has never meant committing two or more similar crimes. "The phrase 'common plan, scheme or design' has acquired a common law usage that admits of two different interpretations. In its widely used sense, the phrase relates to evidence of uncharged crimes admissible during trial where one act, plan, or scheme involves the commission of two or more crimes under circumstances that would make it impossible to prove one crime without proving all the crimes." *Sheriff, Washoe Cnty. v. Smith*, 91 Nev. 729, 731–32, 542 P.2d 440, 442 (1975); *State v. Wright*, 191 N.W.2d 638, 641 (Iowa 1971)(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. There must be some connection between the crimes.")(internal citations omitted). The principle of common scheme or plan is illustrated in two South Carolina cases. *State v. Brooks*, 235 S.C. 344, 111 S.E.2d 686 (1959) and *State v. Nix*, 288 S.C. 492, 343 S.E.2d 627 (1986)

In concluding this argument, the State suggest, "Oswald's abuse of his Brother demonstrated his subsequent abuse of his daughters was carried out according to a common design, lending credibility to their testimony." Br. of Resp. at 12. This is simply another way of saying the alleged abuse of his brother makes the testimony of the two daughters credible. This type of propensity evidence is excluded. "To prove a sufficient connection, the State must

demonstrate that there is 'something in the defendant's criminal process that logically connects the 'other crimes' to the crime charged.' This requirement filters permissible evidence of prior acts against veiled attempts to introduce propensity evidence." *State v. Durant*, 430 S.C. 98, 105, 844 S.E.2d 49, 52 (2020).

What in the alleged sexual assault of his brother logically connects this other crime to the crime charged? Is the State suggesting that at age 12-18, Mr. Oswald had a devious plan to abuse his brother and later to abuse his daughters that he did not know he would have? Obviously the answer is no, but the State would need to make such a connection to have the evidence admitted. As the New York court stated, "In order to be admissible, *Molineux* evidence must 'logically be connected to some specific material issue in the case' and be 'directly relevant' to it. The prosecution has the burden of showing this direct relevance. In other words, 'evidence of a defendant's uncharged crimes or prior misconduct is not admissible if it cannot logically be connected to some specific material issue in the case, and tends only to demonstrate the defendant's propensity to commit the crime charged'" *People v. Weinstein*, 42 N.Y.3d 439, 457, 248 N.E.3d 691, 706 (2024)(internal citations omitted). The State has the burden of proving the evidence is admissible. The State has not identified a specific material issue in the case to which an alleged assault by Mr. Oswald on his brother would be relevant. Nor have they explained how it is directly relevant to any issue.

Harmless Error

This case depended solely upon the credibility of the witnesses. Any inadmissible evidence that impacted Mr. Oswald's credibility was not harmless. The determination of harmless error starts with this principle, "[W]e note that our jurisprudence requires us not to

question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict." *State v. Tapp*, 398 S.C. 376, 389–90, 728 S.E.2d 468, 475 (2012). In determining if a bolstering statement is harmless, the Supreme Court has said, "Because the children's credibility was the most critical determination of this case, we find the admission of the written reports was not harmless." *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 95 (2011), Finally, the court noted, "The determination whether a bolstering error is harmless depends on whether the case turns on the credibility of the victim." *State v. Chavis*, 412 S.C. 101, 110, 771 S.E.2d 336, 341 (2015). This case contained no confession. It contained no DNA or other forensic evidence. As noted in the opening brief, the case contained contradictions as to the testimony of the two daughters. The case contained strong evidence that both daughters had experience hallucination as to the seeing of Mr. Oswald. Ms. Buller claimed Mr. Oswald confronted her while out on bond. ROA at 611 l 3 to 612, l 22. Ms. Hoover claimed to have seen Mr. Oswald at her house in Kentucky. ROA at 212, l 11 to 213, l 11. The evidence showed Ms. Hoover told her counselor she had been lying about who had abused her and said her husband did. ROA at 266, ll 16-19; 474, ll 1-8; 483, ll 8-14. At trial, she denied she ever told her counselor her husband abused her. ROA at 281, ll 21-25. She claimed to have told her grandmother at a young age about the abuse. ROA at 221, l 8 to 222, l 10. The testimony established that had the grandmother been told, action would have been taken decades earlier. ROA at 449, l 10 to 450, l 1. Other inconsistencies are noted in the opening brief. In the closing argument the State noted this was a credibility case when she argued, "So, what we have is we have the credibility and the believability of Faith Hoover and Deborah Buller and it wasn't just their that came up her and spoke about it." ROA at 951, 12-14.

Also in closing, the solicitor made references to Brad Oswald on eight occasions. ROA at 917 (3); 918 (3); 919 (2); 949 (2). "This trial involved the credibility of Gray and the alleged victim. The solicitor recognized credibility was a central issue when he asked the jury in his closing argument 'Who do you believe? Who do you think was telling the truth?' Gray's exculpatory story is not so totally transparent or frivolous such that the evidence of guilt against him is overwhelming." *State v. Gray*, 304 S.C. 482, 485, 405 S.E.2d 420, 421 (Ct. App. 1991). The admission of the other alleged sexual assault was not harmless error. The State certainly believed the testimony was needed to secure the conviction or the State would not have introduced the evidence.

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?

The state is in error in contending that this issue was not preserved for review. The State concedes that a timely hearsay objection was made. That was all that was needed to preserve the issue that the statement was improper hearsay. The trial judge overruled the objection based upon "She's testified to an event." This exception is not contained in the exceptions to the hearsay rule. At this point, trial counsel, unless he is truly clairvoyant, would have no way of knowing the witness would testify as she did. The fact that after the hearsay testimony is given he learned it is bolstering is simply a way of explaining why the improper hearsay was prejudicial. Had the trial judge sustained the objection the witness would not have been able to

testify that the officers in Estill believed she was telling the truth. No lawyer should be required to know how a hearsay statement would be prejudicial before the testimony was given.

The State truly has not refuted the argument that the bolstering testimony was prejudicial. The State has argued, "The State did not present any testimony from an Estill officer indicating she believed (or did not believe) Daughter 1's report." Br. of Resp. at 16. This is precisely the problem. Without calling the officer, the State was able to put testimony before the jury that the Estill police officer believed she was telling the truth. The State would never had been permitted to ask the witness directly if the Estill police officer believed her. The State should not be able to have the testimony admitted through an improper hearsay statement to which an objection was raised.

As this statement improperly bolstered the testimony, it was prejudicial to Mr. Oswald. As this is a pure credibility case, this matter should be remanded for a new trial

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?

For a jury to hear a defendant offered to take a polygraph but no testimony was given that he passed the polygraph is not a ground to claim it is proof of the innocence of the defendant. The jury would want to know did he take it and what was the result. The State in an attempt to minimize the impact of the polygraph statement has argued, "Moreover, the comment was made in passing and there was no assertion that Oswald actually took a polygraph, much less failed one." Br. of Resp. at 28. First, based upon the transcript, how the State can contend "the comment was made in passing" simply cannot be explained. One has to assume the jury heard

all the testimony. And claiming Mr. Oswald was not prejudiced because there was no testimony he failed is simply to ignore the reality of what happens in a juror's mind

The State's reliance upon *Bruno v. State*, 347 S.C. 446, 556 S.E.2d 393 (2001) is misplaced. First the reference was to the witness taking the polygraph and not the defendant. Second, the court noted based upon the facts of the case the jury could have believed he failed the polygraph and was still telling the truth as he admitted he lied to the police when he was first interviewed. Those facts are very different from this case.

Mr. Oswald was prejudiced by the reference to his wanting to take a polygraph and this court should reverse. Unfortunately, in this case and many cases, the court is simply left to speculate as to the what any individual juror thought about the mention of the polygraph. This court should reverse this case based upon that comment.

Conclusion

For the foregoing reasons and for the reasons set forth in the opening brief, this court should reverse the conviction of William Oswald and remand for a new trial with instructions to exclude any testimony of any other alleged sexual assault by Mr. Oswald.

March 25, 2025

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CERTIFICATE OF SERVICE

I, Sandy Traynham, hereby Certify that I am the Secretary for the Attorney for the Appellant in the above entitled case. That on March 26, 2025, I did send via e-mail, a copy of the Initial Reply Brief of Appellant to Joshua Abraham Edwards jedwards@scag.gov and Alan Wilson, SC, Attorney General Office at awilson@scag.gov.

March 26, 2025

/s/ *Sandy Traynham*
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