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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2024-00627

Dwayne C. Tallent, #357180 , ... Petitioner,

v.

State of South Carolina, ... Respondent.

BRIEF OF PETITIONER

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October 12 , 2025.

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STATEMENT OF THE ISSUES

1. Did the PCR court err in denying petitioner relief where trial counsel was ineffective for failing to make a contemporaneous objection at the time overly prejudicial evidence of other bad acts was offered?

STATEMENT OF THE CASE

Applicant is incarcerated in the South Carolina Department of Corrections, Broad River Correctional Institution, pursuant to orders of commitment of the Greenville County Clerk of Court. During its January of 2015 term, the Greenville County Grand Jury indicted Applicant for first-degree criminal sexual conduct with a minor (2014-GS-23-11873). During its December 2016 term, the Grand Jury true-billed amended indictments for first-degree criminal sexual conduct with a minor (2014-GS-23-011873), second-degree criminal sexual conduct with a minor (2014-GS-23-011877), lewd act upon a child (2014-GS-23-11875), and contributing to the delinquency of a minor (2014-GS-23-011874).

On July 17-19, 2017, Applicant proceeded to a jury trial, with the Honorable Robin B. Stilwell presiding. Matthew J. Kappel represented Applicant at trial, and Assistant Solicitor L. Mark Moyer of the Thirteenth Circuit Solicitor's Office prosecuted the case. At the conclusion of trial, the jury found Applicant guilty as indicted. The trial court sentenced Applicant as follows: for contributing to the delinquency of a minor, imprisonment for three years; for lewd act on a minor, imprisonment for fifteen years; for second-degree criminal sexual conduct with a minor, imprisonment for twenty years; and for first-degree criminal sexual conduct with a minor, imprisonment for thirty years. All sentences were ordered to run concurrently with credit for time served.

Trial counsel filed a timely notice of appeal. J. Falkner Wilkes ("appellate counsel") was added as additional counsel of record on the appeal. This Court affirmed in State v. Tallent, 430 S.C. 438, 449, 845 S.E.2d 508, 514 (Ct. App. 2020). Rehearing was denied as was the petition for certiorari. The remittitur was issued on March 15, 2021.

On February 2, 2022 Petitioner filed an application for post-conviction relief. An evidentiary hearing was held on January 17, 2024, the Hon. R. Scott Sprouse presiding. J. Falkner Wilkes, represented the Petitioner at the PCR hearing. Assistant Attorney General W. Joseph Maye represented the State. Subsequent to the hearing the court entered an ORDER OF DISMISSAL from which Petitioner filed a petition for writ of certiorari in the supreme court. The case was transferred to this Court which granted the petition and ordered briefing. This brief follows.

STATEMENT OF FACTS

The Appellant was tried on charges of CSC1st, CSC 2nd, and lewd act based on allegations of sexual acts committed against the prosecutrix over an period of approximately eleven years. The Appellant was also tried on a fourth indictment on a charge of contributing to the delinquency of a minor involving the prosecutrix and one of her two brothers.

At the beginning of the trial defense counsel (Counsel) moved to suppress the testimony of the State's 404(b) witness. A. 325. Testimony of the 404(b) witness and the prosecutrix were taken outside the presence of the jury. A. 369-386. Counsel argued against the introduction of Rule 404(b) testimony. A. 401-402. The solicitor argued admissibility based solely on the similarities between the 404(b) allegations and the Petitioner's charges in the present case. A. 402-407. Based on a finding that the similarities between the 404(b) allegations and the charges in the present case the court ruled *in limine* that the 404(b) witness would be allowed to testify. A. 407-410. The trial proceeded with the 404(b) witness being called as the State's fifth witness. A. 649. Counsel failed to raise a contemporaneous objection to the calling of the 404(b) witness or any of the witness's testimony. Counsel admitted the failure to make a contemporaneous objection was an oversight on his part. A. 36. (*Additional facts in Argument*).

ARGUMENT

I. THE PCR COURT ERRED IN DENYING PETITIONER RELIEF WHERE TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MAKE A CONTEMPORANEOUS OBJECTION AT THE TIME OVERLY PREJUDICIAL EVIDENCE OF OTHER BAD ACTS WAS OFFERED.

Standard of Review

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (*citing* Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law *de novo*, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d [**840] at 527 (*citing* Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014))." Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018).

I. THE PCR COURT ERRED IN ITS INTERPRETATION AND APPLICATION OF RULE 404(B), STATE V. WILES AND STATE v. MORALES.

At the beginning of the defense made a motion to suppress 404(b) evidence. A. 325. An evidentiary hearing was held after which the court ruled that the 404(b) testimony was admissible and the trial proceeded. A. 407-410. Through it's fifth witness the State offered the 404(b) testimony without objection from the defense. A. 649. At the PCR hearing defense counsel testified that although he had intended to make a contemporaneous objection to the 404(b) testimony, he simply forgot to do so. A. 36. Lacking a contemporaneous objection at the time the evidence was offered, the issue as to the admissibility of the 404(b) testimony was not preserved for appeal. A ruling *in limine* is not a final ruling on the admissibility of evidence; thus an issue

is not preserved for appellate review unless an objection is made at the time the evidence is offered. *See* State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996).

In his PCR below Petitioner alleged that counsel's failure to preserve the 404(b) issue for appeal constituted ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984). The PCR court denied relief based on a finding that the trial court's ruling *in limine* constituted a final ruling and thus no contemporaneous objection was required to preserve the issue for appeal. In its decision the PCR court relied on State v. Wiles[1], apparently for the proposition that comments by the prosecutor in opening statements, standing alone, are sufficient to find that the trial court intended its ruling *in limine* to be a final ruling. This was error.

In Wiles the trial judge clearly indicated that his ruling was final. In its decision in Wiles the court stated: "Nonetheless, by his actions, the trial judge clearly indicated that his ruling was a final, rather than preliminary, one because he commented **to the jury** about petitioner's escape before any evidence was admitted." State v. Wiles, 679 S.E.2d 172, 383 S.C. 151 (S.C. 2009). (*emphasis in original*). In the present case the evidence was not admitted immediately after the hearing, the trial judge never gave any indication that the ruling *in limine* was intended to be final, nor did he make any comment on the evidence to the jury before the evidence was admitted. Absent any indication by the trial that the ruling was intended to be final, an essential element necessary to the decision in Wiles is clearly missing in the present case. Wiles is therefore distinguishable.

The PCR court's reliance on Wiles rests solely on the solicitor's comments about the 404(B) evidence in opening statements. Again, Wiles remains distinguishable. While the court in

[1]State v. Wiles, 679 S.E.2d 172, 383 S.C. 151 (S.C. 2009).

Wiles considered in its analysis comments made by counsel in their opening statements, in Wiles *both* counsel appeared to have interpreted the court's ruling *in limine* as a final ruling. While the solicitor in the Petitioner's case commented on the 404(b) evidence in opening statements, Counsel avoided any comment that clearly conceded that the jury would hear the 404(b) evidence. While Counsel mentioned the 404(b) witness in his opening statements, he did so to explain that witness' relationship and interactions within the family in general, as he did other witnesses and members of the family. A. 437; 439. Counsel only informed the jury as to what he expected the testimony to be from *defense* witnesses about the 404(b) witness. He did not discuss what the testimony of the 404(b) witness would be. Counsel's opening statement can therefore not be considered under Wiles as an indication that he believed the court's ruling *in limine* was a final ruling and Counsel's testimony at the PCR hearing makes it abundantly clear that he did not. At the PCR, Counsel testified that he intended, yet failed, to make a contemporaneous objection to preserve the issue for appeal. A. 36. As a result, the only portion of Wiles that is applicable to the present case is the general rule: "Generally, a motion *in limine* is not a final determination; a contemporaneous objection must be made when the evidence is introduced." State v. Wiles, 383 S.C. 151, 156, 679 S.E.2d 172, 175 (2009). The PCR court therefore erred in its reliance on Wiles to find that the ruling *in limine* at the commencement of the Petitioner's trial was final, and as such, that a contemporaneous objection was therefore not required when the 404(B) testimony was introduced.

The PCR court further erred in its interpretation of the record from the criminal trial. In what appears to be a citation in support of its decision the PCR court states: "Further, if no evidence is offered between a preliminary ruling and the admission of the evidence ruled upon,

then "the decision is final" and there is no need for an additional objection. State v. Morales, 439 S.C. 600, 889 S.E.2d.551 (2023) (*citing* State v. Jones 435 S.C. at 144, 866 S.E.2d at 56)." Here Morales clearly does not apply. The motion *in limine* in the present case was held prior to opening statements. The 404(b) evidence at issue was offered through the State's fifth witness near the end of the State's case. To the extent that the PCR court also relied on Morales to find that the ruling *in limine* was final, and that no further objection was necessary to preserve the 404(b) issue for appeal, it is again in error.

Counsel was required to make a contemporaneous objection to the introduction of 404(b) evidence to preserve the issue for appeal. He intended to object but simply forgot to make the objection when the 404(b) evidence was offered as evidence. As a result of his failure to make a timely objection, the 404(b) issue was not preserved for appeal. The failure to make a contemporaneous objection at the time the evidence was offered was therefore error on the part of Counsel. The first prong of Strickland is met. The second prong of Strickland requires a showing of prejudice. Prejudice is established by an analysis of the issue had it been raised and preserved for direct appeal.

II. HAD THE 404(b) ADMISSIBILITY ISSUE BEEN PRESERVED THE PETITIONER WOULD HAVE PREVAILED ON DIRECT APPEAL.

A. EVIDENCE OF PRIOR BAD ACTS INADMISSIBLE UNDER STATE V. LYLE, 125 S.C. 406, 118 S.E. 803 (1923), RULE 404(b), SCRE, AND STATE V. WALLACE .

In this case the Petitioner was charged with multiple counts of criminal sexual conduct and lewd act involving a single individual, the prosecutrix in this case. Without objection from the defense the State introduced evidence of other bad acts with a second individual, the 404(b)

witness. The testimony of the witness was allowed as other bad act evidence under the common plan or scheme exception to Lyle and Rule 404. This was error.

Generally, "evidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged." Lyle, 125 S.C. at 415, 118 S.E. at 807. However, there are certain well-established exceptions to this general rule: [E]vidence of other crimes is competent to prove the specific crime charged when it tends to establish, (1) motive; (2) intent; (3) the absence of mistake or accident; (4) 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; (5) the identity of the person charged with the commission of the crime on trial. Lyle, 125 S.C. at 415, 118 S.E. at 807. Motive, intent, and the absence of mistake or accident were not made material issues at the trial. The court therefore addressed the issue of admissibility under Rule 404(b) as evidence of a common scheme or plan.

Common Plan or Scheme

[E]vidence of other crimes is competent to prove the specific crime charged when it tends to establish 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. Lyle; Rule 404(b). "When determining whether evidence is admissible as [a] common scheme or plan [under Rule 404(b)], the [circuit] 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." Wallace, 384 S.C. at 433, 683 S.E.2d at 277-78. Under Wallace "[a] close degree of similarity exists when the similarities outweigh the dissimilarities.'" State v. Scott, 405 S.C. 489, 500, 748 S.E.2d 236, 242

(Ct. App. 2013) (*quoting* Wallace, 384 S.C. at 433, 683 S.E.2d at 278).

"The common scheme or plan exception 'is generally applied in cases involving sexual crimes, where evidence of acts prior and subsequent to the act charged ... is held admissible as tending to show continued illicit intercourse between the same parties.'" Kirton, 381 S.C. at 10, 671 S.E.2d at 117 *citin*g State v. Whitener, 228 S.C. 244, 265, 89 S.E.2d 701, 711 (1955)." Here the other bad act evidence is not between the same parties, instead it involves a third party, and appears to have occurred five years after the offenses charged in the present case. A. 369-373; 390. Other than the occurrence of touching, the alleged offenses and the other bad act evidence bear little material resemblance.

At the evidentiary hearing the prosecutrix testified when she was around five she went in the Petitioner's room and "plopped down on him while he was in bed.". A. 372, l.6. When she did the Petitioner began "rubbing his genitals up against me through the blanket" while she was clothed. A. 372, l. 5-8. She testified that at first Petitioner would touch her with his hands and rub up against her. A. 372. She also testified that they "French" kissed. A. 385, l. 20-23. The prosecutrix testified that the Petitioner would masturbate in front of her and use his fingers to penetrate her. A. 377-378. This eventually progressed to oral sex and full penetration when she was nine. A. 372-373. She testified that when she was fourteen years old he fully penetrated her rectum. A. 383. She further testified that she and the Petitioner performed oral sex on each other. A. 383. The prosecutrix testified that the overwhelming majority of occasions were digital and penile penetration, most of which occurred in the Applicant's bedroom. A. 368-387. The prosecutrix testified that to keep her from disclosing these acts the Petitioner told her that it was something special and that she couldn't tell anyone about it because they wouldn't understand it.

A. 374.

At the evidentiary hearing the 404(b) witness testified that when she was five years old she asked the Petitioner about kissing and that he showed her. A. 392. Around the same time, the Applicant began touching around her with his hand, private parts, her vagina, and on backside although not as much. A. 391. The touching occurred both over and under her clothes. A. 391. She testified that the Applicant's fingers never went inside of her and that the Applicant never touched her with his penis. A. 391. The touching occurred in either her room or her mom and the Petitioner's bedroom. A. 392. While the Petitioner told her that nobody would understand his love for her, she denied that it was intended to stop her from disclosing his actions. A. 393.

At the evidentiary hearing the defense argued that the evidence of other bad acts failed to meet the requirements of Rule 404)(b). A. 395-398. The solicitor argued that the other bad acts involving the 404(b) witness were admissible on the basis of their similarities to the Petitioner's charges in the present case. A. 398-401. The solicitor offered no argument that the 404(b) testimony served any legitimate purpose, or that a logical connection exists between the alleged abuse of the 404(b) witness and the current charges. A. 398-401. The court ruled that the testimony of the 404(b) witness was admissible as evidence of a common scheme or plan. A. 407-410. The only basis stated for the court's ruling was that the "similarities outweigh the dissimilarities". A. 409.

When the testimony of the 404(b) witness was presented before the jury Counsel failed to make a contemporaneous objection and argue the issue under Rule 404(b). A. 649-667. The issue was therefore not properly raised and preserved for appeal. "Generally, a motion *in limine* is not a final determination; a contemporaneous objection must be made when the evidence is

introduced." State v. Jones, 435 S.C. 138, 144, 866 S.E.2d 558, 561 (2021). "To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court." Burke v. AnMed Health, 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011).

Due to the lack of substantial similarities in this case between the testimony of the prosecutrix and the 404(b) witness, the probative value of the other bad act evidence is slight. *See* State v. Kirton, 381 S.C. 7, 9, 671 S.E.2d 107, 117 (Ct.App.2008) (holding a common scheme or plan requires similarity between the prior act and the charged act that increases the probative value of the evidence); State v. Aiken, 322 S.C. 177, 180, 470 S.E.2d 404, 406 (Ct.App.1996) (noting the more similar the prior act is to the charged act, the more likely the evidence will be admissible); State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) (finding prior bad acts are admissible when close similarity between the acts enhances the probative value of the evidence so as to outweigh the prejudice). Here, the prejudice of the 404(b) testimony far outweighs any probative value it may have.

In this case there are no more than generic similarities between the offenses for which the Petitioner was charged and those alleged by the 404(b) witness. Other than some similarity generally in the allegation of "touching" the allegations of the prosecutrix and 404(b) witness are nothing alike. The connection between the prior bad act and the crime must be more than just a general similarity. State v. Timmons, 327 S.C. 48, 488 S.E.2d 323 (1997); State v. Mathis, 359 S.C. 450, 597 S.E.2d 872 (Ct.App.2004); State v. Stokes, 279 S.C. 191, 193, 304 S.E.2d 814, 815 (1983). Generic similarities fail to meet the standard necessary for admissibility. A *close degree of similarity* or connection between the prior bad act and the crime for which the defendant is on trial is required to support admissibility under the common scheme or plan

exception. State v. Cheeseboro, 346 S.C. 526, 546, 552 S.E.2d 300, 311 (2001); State v. Ford, 334 S.C. 444, 513 S.E.2d 385 (Ct.App.1999) *emphasis added.*

The prior bad acts alleged through the testimony of the 404(b) witness fail to establish any common scheme or plan, much less raise to the level of *modus operandi* as argued by the State. "Clear and convincing evidence of prior crimes or bad acts that is logically relevant is ... admissible to prove ... a common scheme or plan that embraces several previous crimes so closely related to each other that proof of one tends to establish the other." State v. Moultrie, 316 S.C. 547, 554, 451 S.E.2d 34, 39 (Ct.App.1994). Here, the prior bad acts fail to do more than establish evidence of propensity and bad character, which is clearly impermissible: "It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad individual." State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987); *see also* State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000) (finding that evidence of prior crimes or bad acts is inadmissible to prove bad character of defendant or that he acted in conformity therewith).

In State v. Fonseca, 681 S.E.2d 1, 383 S.C. 640 (S.C. App. 2009) this Court rejected the State's argument that two incidents that occurred in Fonseca's marital home while his wife was in the other room, demonstrated that the Fonseca had a common scheme or plan to attack the victim while his wife was not present or was in the other room. Fonseca, which was adopted by the supreme court as well reasoned[2], appeared to be the first sign of a slowing of the Wallace juggernaut. Despite the ruling in Fonseca, the rule of Lyle and Rule 404(b), SCRE, against the use of propensity evidence continued to be eroded, virtually to the point of non-existence in

[2]State v. Fonseca, 393 S.C. 229, 711 S.E.2d 906 (S.C. 2011).

criminal sexual abuse cases, especially those involving minors. As pointed out by the dissent in Wallace:

> [O]ur cases holding that evidence of other acts of sexual misconduct is admissible in a trial for criminal sexual conduct with a minor as a "common scheme or plan" under Rule 404(b), SCRE, have, in effect, created an exception to the rule's exclusion of propensity evidence. *Compare, e.g.*, Vogel v. State, 315 Md. 458, 554 A.2d 1231 (Ct.App.1989). We have repeatedly held in non-sexual offense cases that, "the mere presence of similarity only serves to enhance the potential for prejudice," State v. Tuffour, 364 S.C. 497, 613 S.E.2d 814 (Ct.App.2005) vacated on other grounds 371 S.C. 511, 641 S.E.2d 24 (2007) internal citations omitted, yet under the majority's view, similarity is the touchstone of admissibility in child sexual offense cases. In my view, if we are to permit the admission of propensity evidence in these types of cases, then we should propose a new rule of evidence, and encourage public comment. *See e.g.* Rules 413 and 414, Fed.R.Evid.; Rule 404(c), Az. R. Evid. In light of the controversy engendered by these rules in other jurisdictions,[7] I believe that thorough scrutiny is warranted.

State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009) *Justice Pleconies, dissenting*.

In the Petitioner's case, the 404(b) testimony was nothing more than bad character and propensity evidence. Any similarities were merely generic and far outweighed by dissimilarities between the facts surrounding the prosecutrix and the 404(b) witness. The solicitor's only argument was that the 404(b) evidence was "very similar" and therefore admissible. The solicitor failed to offer any argument that the 404(b) testimony established some unique plan or scheme necessary to prove motive, intent, etc., under Lyle. If there were some pattern or scheme of manipulation of the prosecutrix, there was no evidence that the 404(b) witness felt similarly manipulated. The 404(b) testimony was offered only to show that the Petitioner had touched a another young girl five years after the acts for which he was charged. This served only to inflame the jury.

Even if the testimony as to other bad acts was admissible under Rule 404(b), the testimony of the 404(b) witness should have nevertheless been excluded as any probative value it

may have had was substantially outweighed by the danger of unfair prejudice to the defendant. State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001); Beck, 342 S.C. at 135-36, 536 S.E.2d at 683; *see also* 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."). Unfair prejudice means an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one. State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct.App.). State v. Fletcher, 363 S.C. 221, 609 S.E.2d 572 (S.C. App., 2005) The testimony of the 404(b) witness was unnecessary to any element in the State's case. It served only as evidence of propensity. As a result, the 404(b) evidence in this case should have been excluded under both Rules 404 and 403. A timely objection and proper argument by Counsel would have resulted in either the exclusion of the evidence or the issue being preserved for appeal.

B. BUT FOR COUNSEL'S ERROR IN FAILING TO PRESERVE ISSUE FOR APPEAL APPELLANT'S CASE WOULD HAVE BEEN SUBJECT ON APPEAL TO THE HOLDING OF STATE v. PERRY.

Had Counsel entered a contemporaneous objection and properly argued the 404(b) issue the Petitioner's appeal would have still been pending when Wallace was reversed by State v. Perry, 430 S.C. 24, 842 S.E.2d 654 (S.C. 2020). Perry was based on facts indistinguishable from the Petitioner's case. Perry would have been controlling in Applicant's case, requiring a reversal. In Perry the Court noted that: "In any criminal case, however, evidence the defendant committed similar criminal acts has the inherent tendency to show this propensity. In the words of Rule 404(b), it "prove[s] the character of [the] person" and "shows[s] action in conformity" with that

character. Perry. The Perry Court recognized that historically, evidence of other crimes required a logical relevancy or connection between the other crime and some disputed fact or element of the crime charged. Perry. Exactly as in the present case, the State in Perry did not offer any argument that the stepdaughter's testimony served a legitimate purpose, or that a logical connection exists between Perry's abuse of his stepdaughter and the current charges. The State simply relied on Wallace, and argued what it called substantial similarities between the two crimes outweighed any dissimilarities. While the Court in Perry found that there were similarities between the crime charged and the 404(b) evidence, it reasoned that:

> 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 prepubescent years. The fact Perry's crimes fit this general pattern does not give Perry a "monopoly" on his criminal method.

State v. Perry, 430 S.C. 24 *at* 40, 842 S.E.2d 654 *a*t 662 (S.C. 2020).

In the present case the State argued admissibility solely on the basis of similarities between the 404(b) testimony and the Petitioner's charges. The solicitor did not argue that the 404(b) evidence served a legitimate purpose or that there was any logical connection between the 404(b) evidence and the Petitioner's charges. In Perry the court said:

> The State did not offer any argument that the stepdaughter's testimony served a legitimate purpose, or that a logical connection exists between Perry's abuse of his stepdaughter and the current charges. The State simply relied on Wallace , and argued what it called substantial similarities between the two crimes outweighed any dissimilarities. Therefore, the State argued, the stepdaughter's testimony was admissible. We disagree.

State v. Perry, 430 S.C. 24 *at* 37, 842 S.E.2d 654 *at* 667 (S.C. 2020).

The decision in Perry was filed May 6, 2020. The direct appeal in the Applicant's case

was not ruled on by the Court of Appeals until June 10, 2020, after Perry. The remittitur was not entered in the Applicant's case until March 15, 2021. Perry is almost identical in facts to the present case. The Applicant would have been able to supplement his brief and rely on Perry in his direct appeal had the issue been properly raised and preserved for appeal. Counsel's failure to make a timely objection and preserve the issue for appeal therefore constitutes error that prejudiced the Petitioner. The second prong of the Strickland test is met. The PCR court therefore erred in denying Petitioner relief.

Harmless Error Analysis

To deem an error harmless, this court must determine "beyond a reasonable doubt the error complained of did not contribute to the verdict obtained." Taylor v. State, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993) (*citing* Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)) (*internal quotations omitted*). Due to the prejudicial tendency of admitting prior bad act testimony it cannot be said that beyond a reasonable doubt the verdict was not affected by the evidence. *See* State v. Fonseca, 681 S.E.2d 1, 383 S.C. 640 (S.C. App. 2009). Therefore, the erroneous admission of evidence under 404(b) in the Petitioner's case cannot be harmless.

CONCLUSION

Based on the foregoing this Court should reverse the decision of the PCR court.

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Respectfully submitted,

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