

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM YORK COUNTY
Court of General Sessions

S.C. SUPREME COURT

John C Hayes, III, Circuit Court Judge

Opinion 4526 (S C Ct App filed April 02, 2009, and refiled September 29, 2009)

The State

Respondent,

v

Billy Wayne Cope

Appellant

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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v

Billy Wayne Cope, Appellant

Appeal From York County
John C Hayes, III, Circuit Court Judge

Opinion No 4526
Heard September 16, 2008 – Filed April 2, 2009

AFFIRMED IN PART, REVERSED IN PART

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THOMAS, J A jury convicted Cope of murder, two counts of first degree criminal sexual conduct, criminal conspiracy, and unlawful conduct towards a child He was sentenced to life imprisonment, plus thirty years [1] Cope appeals We affirm the convictions for murder, two counts of criminal sexual conduct in the first degree, and unlawful conduct toward a child, and reverse only as to the charge of conspiracy

FACTS/PROCEDURAL HISTORY

Between approximately 2 00 and 4 00 a m on Thursday, November 29, 2001, 12-year-old Child was murdered in her bedroom Billy Cope her father, testified he awoke at 6 00 a m and called out to wake her When she did not respond, he went to her room where he found her body lying on her bed Cope called 911 He told police he did not hear any sounds that night because he sleeps with a sleep apnea machine that makes a loud noise Police checked

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the exterior and interior of the house for any signs of forced entry, including all the doors and windows, but everything appeared to be secured. One of Cope's two younger daughters (Sister) testified she and Child locked both doors before they went to bed that evening.

Cope was standing outside when Jason Dillon, an emergency medical technician (EMT), arrived at the house. Cope advised Dillon and another EMT that Child had been dead "four hours." Dillon did not ask Cope if he meant "for" or "four." Cope told Dillon that Child choked herself with her blanket. He also told him he found Child naked and he dressed her. The forensic pathologist, Dr. James Maynard, arrived and found Child lying on her back on her bed, with her shirt pulled up and her left breast exposed. He testified it appeared she had not dressed herself because her bra was unattached and her pants were pulled up unevenly.

Dr. Maynard performed Child's autopsy and determined she had been beaten, strangled, severely sexually assaulted, and sodomized, most likely with a blunt foreign object such as a broom handle or a dildo. Dr. Maynard testified he believed Child had been repeatedly sexually abused and sodomized over a period of time, not just the night of the murder. He testified it did not appear Child was strangled by her blanket. He further testified some of Child's injuries were consistent with a 300-pound man jumping on her [2]. During the autopsy, Dr. Maynard discovered a bite mark on Child's right breast and took a swab of the area. Upon testing, it was discovered the saliva matched co-defendant James Sanders' DNA. Dr. Maynard testified the bruise on Child's breast was a similar age as the rest of her injuries, which all seemed to be inflicted at approximately the same time. The police also discovered semen on Child's pants, which matched Sanders' DNA. No other semen was found on or near Child's body.

Cope was first interviewed at the police station at about 8:00 a.m. on November 29, 2001. Cope consented to giving samples for a DNA test. Later that same day, about 12:00 p.m., police again interviewed Cope. His story changed slightly in the second interview as to the time his daughters went to bed and whether he had to kick in Child's bedroom door to enter her room that morning. Cope was allowed to leave the station after the second interview. At 10:50 p.m., police picked Cope up from his mother's house to take him back to the police station for a third interview. After the third interview, the officers decided to arrest Cope.

Charlene Blackwelder, detective for Rock Hill Police Department, took the arrest warrant to Judge Margy McNeely between 3:00 and 4:00 a.m. on November 30, 2001. Judge McNeely issued the warrant based on the fact that Cope was the only adult home at the time of the murder, and there was a lack of evidence of forced entry. Cope was placed in a cell at about 2:30 a.m. and he was charged with murder at 4:31 a.m.

Later, on the morning of November 30th, Cope was served with three warrants for unlawful neglect toward a minor child [3]. Blackwelder testified she served Cope with these warrants prior to his transportation to the Moss Justice Center at about 10:00 a.m. for his polygraph examination. Michael Baker, polygraph examiner at York County Sheriff's Office, read Cope his Miranda[4] warnings and Cope voluntarily waived his constitutional rights. After the exam, Baker informed Cope he had failed the polygraph exam. Lieutenant Herring and Baker continued questioning him. Cope gave his first confession at 2:25 p.m. Cope stated he awoke at 3:00 a.m. to use the bathroom, went into Child's room, and masturbated while she was sleeping. Child woke up and said, "gross, daddy," which angered Cope, so he jumped on top of her and began swinging his fists at her head. He slammed her head onto a video game on her bed and strangled her with both hands. He also used the blanket to choke her. Cope then used a broom handle both anally and vaginally on Child. Before going back to bed, he deleted

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temporary internet files from his computer and threw away his dildo

At a bond hearing on December 1, 2001, Cope was approved for representation by a public defender. Later, on December 2, 2001, he told the police he wanted to talk to them again. On December 3, 2001, officers spoke with Cope again and Cope told them his prior statements were incorrect. In his second confession at 9:45 a.m., Cope said he was asleep and had a dream about an old girlfriend that had aborted his child. He got so angry that he jumped on her, beat her, and raped her with the broom. He did not realize it was Child until he fell backwards and was jarred to his senses. He then tried to throw away everything in the house that made him look guilty and he pulled up her pants. He went back to bed and when he woke up, he hoped it was a dream. After his second confession, Cope agreed to go back to his house with the police to reenact the crime on videotape. Cope gave his third confession at 4:55 p.m. when they returned to the police department. In the third confession, Cope confessed he had been going into Child's room since the end of October and "playing with her" by fingering her while she was asleep. That night, when he went into her room, she was asleep on her stomach and he inserted his dildo inside her, waking her. He then attacked and strangled her. He cleaned up, closed her bedroom door, and went to bed.

During Cope's third confession, Cope's appointed counsel arrived. Captain Cabaniss of the Rock Hill Police Department testified he informed Cope an attorney was there to meet with him, but Cope replied he did not want to see the attorney. Cope signed a statement to that effect.

Cope presented an expert who testified he scored Cope's polygraph examination and Cope passed the examination. Cope presented another expert, Dr. Clay Nichols, who testified Child's injuries were not specifically consistent with a 300-pound man jumping on her and there was no indication a broom was used on Child in the assault. Nichols also testified he did not see any signs of chronic sexual abuse. Additionally, Cope presented a locksmith to testify the doors could be opened with either a credit card or driver's license or by picking the lock without showing signs of forced entry.

The jury convicted Cope and this appeal follows.

LAW/ANALYSIS

I EVIDENTIARY ISSUES

"In criminal cases, the appellate court sits to review errors of law only." State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The admission or exclusion of evidence is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. State v. Rice, 375 S.C. 302, 314, 652 S.E.2d 409, 415 (Ct. App. 2007).

A Admissibility of Similar Crimes

Cope argues the trial court erred in refusing to admit evidence of similar crimes in the Rock Hill area allegedly perpetrated by Sanders. Cope argues he should at least have been able to introduce evidence of the other crimes without referring to Sanders as the perpetrator. Cope cites numerous jurisdictions and legal articles indicating when a defendant is attempting to introduce "other crimes" evidence, the court should apply a lower standard of similarity. We disagree.

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The admissibility of "other crimes" evidence is governed in South Carolina by Rule 404(b) of the South Carolina Rules of Evidence, which provides "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE, see State v. Lyle, 125 S C 406, 416, 118 S E 803, 807 (1923) (finding such evidence admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent). To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. State v. Beck, 342 S C 129, 135, 536 S E 2d 679, 682-83 (2000). If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. State v. Fletcher, 379 S C 17, 23, 664 S E 2d 480, 483 (2008). Clear and convincing evidence is more than a mere preponderance, but less than is required for proof beyond a reasonable doubt. Id. at 24, 664 S E 2d at 483.

Although often discussed as similarity between crimes, the separate acts must be more than merely similar in results. There must be "such a concurrence of common features that the various acts are normally to be explained as caused by a general plan of which they are the individual manifestations." State v. Tutton, 354 S C 319, 331, 580 S E 2d 186, 193 (Ct App 2003), State v. Hubner, 362 S C 572, 584, 608 S E 2d 463, 469 (Ct App 2005) (discussing admissibility of "other crimes" in criminal sexual conduct case).

Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rule 403, SCRE (providing that evidence, although relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice), State v. Gillian, 373 S C 601, 609, 646 S E 2d 872, 876 (2007) (applying probative versus prejudicial test of Rule 403, SCRE, to "other crimes" evidence).

Some jurisdictions lower the standard of similarity necessary for admission of evidence of "other crimes" where a defendant is attempting to introduce the evidence. See State v. Garfole, 388 A 2d 587, 591 (N J 1978) (stating "a lower standard of degree of similarity of offenses may justly be required of a defendant using other-crimes evidence defensively than is exacted from the State"), see also United States v. Stevens, 935 F 2d 1380, 1403 (3rd Cir 1991) (applying a lower standard and quoting Garfole), United States v. Cohen, 888 F 2d 770, 776 (11th Cir 1989) (finding standard for admission relaxed when the evidence is offered by a defendant). This is sometimes called the "Reverse 404(b) Rule." Jessica Broderick, Comment and Casenote, Reverse 404(b) Evidence: Exploring Standards When Defendants Want to Introduce Other Bad Acts of Third Parties, 79 U Colo L Rev 587, 587 (2008). Even with a lower standard of similarity, the defendant must still show the other crimes are of a similar nature. See Rivera v. State, 561 So 2d 536, 539-40 (Fla 1990) (recognizing lower standard of admissibility but finding other crimes dissimilar enough to determine trial court did not abuse discretion in excluding evidence).

The State charged Sanders with numerous crimes occurring shortly after Child's death. Cope proffered the testimony of four of Sanders' victims. Victim 1 testified that on December 12, 2001, at about 11:30 p.m., Sanders knocked at her apartment door and asked to use her phone. He pushed her door open, knocked her down, got on top of her, and kissed her. Sanders then raped her, demanded money, and destroyed her phone.

Victim 2 testified that on December 16, 2001, Sanders came to her house at about 1:00 a.m.

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She had fallen asleep on her couch and when she woke, Sanders was standing over her. She did not hear anyone come in the house and her dog did not bark. When she screamed, Sanders put his hand over her mouth and pinned her under a rocking chair. Sanders ran onto her second-floor patio and jumped off when her dog began barking and her daughter called for her.

Victim 3 testified that on December 19, 2001, at about 7:30 p.m., she had just come home when Sanders came through her front door and attacked her. When she tried to crawl to her room, Sanders placed a plastic bag over her head. When she removed the bag, Sanders put a rug over her head and as she was trying to remove the rug, Sanders got on top of her and tried to remove her pants. She grabbed an ink pen from her pocket and stabbed Sanders in the leg. Sanders shoved Victim 3 into one of the bedrooms, closed the door, and left. At some point, he asked her for money.

Victim 4 testified that on January 12, 2002, at about midnight, she was in her room watching a movie when she heard a knock at her door. When Victim 4 opened the door, Sanders pushed the door in and shoved her into the bathroom. The fight continued in the kitchen where Sanders kicked and pushed Victim 4. Sanders also held Victim 4 in a choke hold and tried to get on top of her several times. While Victim 4 was on the floor, Sanders ran into her room and grabbed her purse. As he was trying to leave, Victim 4 grabbed a pan from the stove and hit Sanders with it. He dropped the purse and Victim 4 grabbed her mace. She tried to spray him, but missed. She then saw a small screwdriver on the floor and swung it at him, hitting him at least once in the shoulder.

Mindful of our standard of review, we find no reversible error in the trial court's exclusion of this evidence. Although there are some similarities between the other crimes and Child's assault, there are also many differences. For instance, no other crime resulted in the death of the victim or involved a child. None of the proffered crimes included the brutality of the attack on Child such as anal penetration and assault with a foreign object. Finally, most of the other crimes were not committed as late in the night as the attack on Child. We affirm the trial court's ruling that Sanders' other crimes are dissimilar to these facts and are, therefore, inadmissible under Lyle and Rule 404(b) even if reviewed under a lower standard because proffered by a defendant.

B Testimony of James Hill

Cope argues the trial court erred in excluding testimony from James Hill. We disagree.

Evidence is relevant if it tends to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence. Rule 401, SCRE. All relevant evidence is admissible. State v. Douglas, 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2006). Relevant evidence may be excluded if the prejudicial effect of its admission substantially outweighs the probative value of the evidence. Rule 403, SCRE. The trial court has broad discretion in determining the relevancy of evidence and its decision to admit or exclude evidence will not be reversed on appeal absent an abuse of that discretion and a showing of prejudice. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002).

Cope proffered the testimony of James Hill, who is serving a sentence for burglary. Hill testified he was in his cell in a segregation unit in prison near the end of 2002. Hill recognized Sanders' distinctive voice and overheard Sanders and another inmate laughing about how

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easy it was to get away with crimes Sanders allegedly stated he was "going to get away with what he did to that little girl in Rock Hill " Sanders allegedly "went on to explicitly describe what he had done " Sanders remarked about oral and anal sodomy and smothering the child Finally, Sanders "alluded to the fact that he had got in through a window in the house and that he had left through the same window " Sanders objected to the evidence as irrelevant The court excluded the evidence as irrelevant because there were no identifying characteristics, noting the testimony did not specify time, place, or other circumstances We again look to our standard of review and determine the trial court did not abuse its discretion in excluding Hill's testimony

C Admission of "False Confessions" Expert Testimony

Cope argues the trial court erred in excluding testimony of his false confession expert about two cases of coerced internalized false confessions We disagree

The admissibility of an expert's testimony is a matter within the trial court's sound discretion State v Douglas, 367 S C 498, 507, 626 S E 2d 59, 63 (Ct App 2006) The trial court's decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion Id at 507, 626 S E 2d at 64 "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support " Id To warrant reversal, any error by the trial court in admitting or excluding expert testimony must result in prejudice Id at 508, 626 S E 2d at 64

Rule 702 of the South Carolina Rules of Evidence governs the admissibility of testimony by experts, providing

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise

Rule 702, SCRE

The precise issue of prohibiting an expert from relating case studies to the jury was raised in State v Myers, 359 S C 40, 596 S E 2d 488 (2004) In Myers, the expert[5] was qualified as an expert in social psychology and testified about the psychology of confessions and false or coerced confessions Id at 50, 596 S E 2d at 493 The trial court in Myers prohibited the expert from testifying about the facts of particular cases from Connecticut and Indiana in which people falsely confessed to crimes and were later exonerated Id In affirming the trial court, our supreme court found the expert related some facts about the specific cases but did not use names Id at 51, 596 S E 2d at 494 Furthermore, the court found no prejudice in part because the expert "was able to testify at length about false and coerced confessions " Id Therefore, the court found any error in excluding specific case studies from the expert's testimony was harmless as the evidence was merely cumulative to the expert's other testimony Id

This issue was also addressed in State v Pittman, 373 S C 527, 647 S E 2d 144 (2007) In Pittman, the trial court allowed the defendant to present "a copious amount" of evidence regarding the antidepressant drugs Selective Serotonin Reuptake Inhibitors (SSRIs) 373 S C at 578, 647 S E 2d at 170-171 The defendant was permitted to introduce evidence that SSRIs

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could cause mania and other conditions, and to present anecdotal testimony regarding the antidepressant Paxil by a user of Paxil Id. The trial court excluded anecdotal evidence regarding the antidepressant Zoloft [6] Id.

In affirming the trial court, our supreme court stated

[T]he court was concerned about the reliability of the anecdotal reports compared with the reliability of reports from clinical studies done in a controlled environment. The court was also concerned with the trustworthiness of the sources of the anecdotal testimony, as well as the ability of experts to establish the causal link between the Zoloft and the incidents. Despite these concerns, the trial court permitted the above expert testimony regarding Zoloft obtained from reliable methods, consistent with the South Carolina Rules of Evidence.

The record shows a conscientious decision on the part of the trial court to not admit evidence with questionable reliability where there was an abundance of other admissible evidence found to be reliable. Additionally, the trial court correctly found that the prejudicial effects outweighed the probative value of the anecdotal evidence.

Id.

In this case, Cope presented an expert, Dr. Saul Kassin, who testified regarding false confessions. Dr. Kassin testified as to the interrogation techniques used by the police in obtaining false confessions and the techniques used in this case: (1) false evidence – the officers telling Cope he failed the polygraph, (2) positive confrontation – the officers claiming they knew Cope did it, (3) the officers' refusals to accept Cope's denials of guilt even though he agreed to a polygraph and waived an attorney, (4) minimization – the officers suggesting the crime was accidental, and (5) interrogation while Cope was traumatized and tired.

Dr. Kassin proffered testimony about Peter Reilly, who falsely confessed to murdering and sexually assaulting his mother, and Gary Gauger, who falsely confessed to murdering his parents. In both of these cases, the defendants denied involvement, were administered polygraphs and told they failed, believed they must have somehow committed the crimes, and confessed. The trial court refused to allow Dr. Kassin to testify regarding specific cases of false confession unless they were "on all fours" with this case and ultimately refused to allow the testimony. The trial court in this case conscientiously considered the proffered anecdotal evidence before excluding this testimony. The theories underlying the study of coerced internalized false confessions were exhaustively presented to the jury. Dr. Kassin explained the techniques used by interrogators that can lead to false confessions and informed the jury that there were "innumerable actual cases" of coerced internalized false confessions.

Therefore, we find the exclusion of the testimony regarding the specific details of the Reilly and Gauger cases does not constitute reversible error.

D Admissibility of Cope's Statements

Cope argues the trial court erred in denying his motion to suppress his statements because he was arrested without probable cause. We disagree.

"The fundamental question in determining the lawfulness of an arrest is whether probable

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cause existed to make the arrest " State v Baccus, 367 S C 41, 49, 625 S E 2d 216, 220 (2006) "Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested " Id A magistrate's determination of probable cause should be paid great deference by the reviewing court State v Sullivan, 267 S C 610, 617, 230 S E 2d 621, 624 (1976) (reviewing magistrate's finding of probable cause to issue search warrant)

Whether probable cause exists depends upon the totality of the circumstances State v George, 323 S C 496, 509, 476 S E 2d 903, 911 (1996) (finding probable cause for warrantless arrest) In assessing probable cause, the court looks to whether the facts and circumstances are sufficient for a reasonable person to believe that a crime has been committed by the person to be arrested Id

Judge McNeely testified she issued the warrant based on the fact that Cope was the only adult home at the time of the murder and there was a lack of evidence of forced entry Based on the totality of the circumstances, we agree with the trial court there was probable cause to arrest Cope [7]

Cope next argues the statements he made after the bond hearing on December 1st should have been suppressed because he applied for and was found eligible for representation by a public defender [8]

In State v Council, our supreme court stated

The Sixth Amendment right to counsel attaches when adversarial judicial proceedings have been initiated and at all critical stages The Sixth Amendment right attaches only "post-indictment," at least in the questioning/statement setting When the Sixth Amendment right to counsel has attached, if police initiate interrogation after a defendant's assertion, at an arraignment or other similar proceedings, of his right to counsel, any waiver of the defendant's right to counsel for that police initiated interrogation is invalid **unless the defendant initiates the contact himself**

335 S C 1, 15-16, 515 S E 2d 508, 515 (1999) (internal citations omitted) (emphasis added) Furthermore, a waiver is knowingly and intelligently made where a defendant waives his right to counsel after having been apprised of his Miranda rights State v Howard, 296 S C 481, 494, 374 S E 2d 284, 291 (1988) (citing Patterson v Illinois, 487 U S 285, 296-97 (1988))

Cope argues the bond hearing triggered his right to counsel We need not determine if the bond hearing triggered Cope's right to counsel because we find Cope waived his right to counsel prior to making his second and third statements [9] Cope was charged with murder in the early morning hours of November 30th At approximately 9 00 a m , Cope was served with the child neglect warrants and then taken to the polygraph examination where he was read his Miranda warnings Between 9 30 and 10 00 a m , Cope was transported to the Moss Justice Center for his polygraph examination Baker read Cope his Miranda warnings and Cope voluntarily waived his constitutional rights The polygraph examination began at 11 15 a m After the examination, Baker informed Cope he had failed Lieutenant Herring and Baker continued questioning Cope Cope gave his first confession at 2 25 p m

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On Sunday, December 2, Cope told the Rock Hill police he wanted to talk to the investigating officers again. Officer Herring told the Rock Hill dispatcher to inform Cope they would speak to him the following day. On December 3d, Cope made his second and third confessions and the video reenactment.

We find Cope knowingly and intelligently waived his right to counsel by initiating the contact with the investigating officers prior to his second and third confessions and after receiving Miranda warnings. Accordingly, we find no error by the trial court in denying Cope's motion to suppress his confessions.

II SEVERANCE

Cope argues the trial court erred in denying his motion for severance. Cope complains the evidence of Sanders' other crimes could be admitted as evidence of third-party guilt in a separate trial. We disagree.

A motion for a severance and separate trial is addressed to the sound discretion of the trial judge and the ruling will not be disturbed on appeal absent a showing of an abuse of discretion. State v. Nichols, 325 S C 111, 122, 481 S E 2d 118, 124 (1997). A defendant who alleges he was improperly tried jointly must show prejudice before the appellate court will reverse his conviction. State v. Dennis, 337 S C 275, 281-83, 523 S E 2d 173, 176 (1999).

Criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right. Id., State v. Kelsey, 331 S C 50, 73, 502 S E 2d 63, 75 (1998). This is true even when a defendant's severance motion is based upon the likelihood he and a codefendant will present mutually antagonistic defenses such as accusing each other of committing the crime. State v. Leonard, 287 S C 462, 473, 339 S E 2d 159, 165 (Ct App 1986), reversed on other grounds, 292 S C 133, 355 S E 2d 270 (1987).

Admissibility of evidence under the third-party guilt doctrine is governed by the rule in State v. Gregory, 198 S C 98, 16 S E 2d 532 (1941). The rule states

[E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence, evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.

Gregory, 198 S C at 104-05, 16 S E 2d at 534-35 (internal citations omitted). Evidence of third-party guilt may include (1) facts that are inconsistent with the defendant's guilt, and (2) evidence raising a reasonable inference as to the accused's innocence. State v. Rice, 375 S C at 317, 652 S E 2d at 416. See also Holmes v. South Carolina, 547 U S 319, 331 (2006) (holding that to prohibit, on the strength of the prosecution's case, evidence of third-party guilt proffered by an accused violated the right of the accused to present a complete defense).

Cope sought to introduce evidence of Sanders' other crimes in a separate trial to prove Sanders' guilt and his ability to enter victims' homes without signs of forced entry. The jury in

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this case was aware Sanders was involved in Child's murder due to the presence of his DNA. The jury was also aware the Cope house could have been entered without signs of forced entry as Cope presented evidence by a locksmith that the lock could have been picked or a credit card could have opened the door lock without leaving signs of forced entry. The evidence of Cope's involvement, such as his confessions and the evidence of the lack of forced entry, would still have been admitted in a separate trial. We find the introduction of the evidence of Sanders' other crimes would not have been inconsistent with Cope's guilt, even if admitted in a separate trial, and would not have raised an inference as to Cope's innocence. Accordingly, we find no error by the trial court in denying Cope's motion for severance.

III CONSPIRACY

Cope argues the trial court erred in failing to direct a verdict on the conspiracy charge based on the lack of evidence supporting an agreement between Sanders and Cope. We agree.

"In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury." Kelsey, 331 S C at 62, 502 S E 2d at 69 (1998). "In ruling on a motion for a directed verdict, the trial court is concerned with the existence of evidence, not its weight." Id. In addressing the standard of review where the State relies exclusively on circumstantial evidence and a motion for directed verdict is made, our supreme court has stated

[T]he circuit court is concerned with the existence or nonexistence of evidence, not with its weight. The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. 'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. However, **a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis**

State v. Cherry, 361 S C 588, 594, 606 S E 2d 475, 478 (2004) (emphasis in original) (internal citations omitted)

Criminal conspiracy is defined as "a combination between two or more persons for the purpose of accomplishing an unlawful object or a lawful object by unlawful means." S C Code Ann § 16-17-410 (2003). "The essence of a conspiracy is the agreement." State v. Buckmon, 347 S C 316, 323, 555 S E 2d 402, 405 (2001). "Often proof of conspiracy is necessarily by circumstantial evidence alone." State v. Miller, 223 S C 128, 133, 74 S E 2d 582, 585 (1953). Nevertheless, "the law calls for an objective, rather than subjective, test in determining the existence of a conspiracy." State v. Crocker, 366 S C 394, 406, 621 S E 2d 890, 897 (Ct App 2005). Moreover, in viewing the sufficiency of the evidence to support a charge of conspiracy, an appellate court "must exercise caution to ensure the proof is not obtained 'by piling inference upon inference.'" State v. Gunn, 313 S C 124, 134, 437 S E 2d 75, 81 (1993) (quoting Direct Sales Co. v. U.S., 319 U S 703, 711(1943)).

"The gravamen of the offense of conspiracy is the agreement or combination." Gunn, 313 S C at 134, 437 S E 2d at 80, see also State v. Condrey, 349 S C 184, 193, 562 S E 2d 320, 324 (Ct App 2002) (stating the crime of conspiracy "consists of the agreement or mutual understanding"). "Often proof of conspiracy is necessarily by circumstantial evidence alone."

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Miller, 223 S C at 133, 74 S E 2d at 585 Recognition of this reality, however, does not compromise the standard that a trial court must use in deciding a directed verdict motion when the evidence against an accused is entirely circumstantial, namely, that the case must be submitted to the jury only "if there is substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced " State v Arnold, 361 S C 386, 390, 605 S E 2d 529, 531 (2004)

We agree with Cope that the absence of actual proof of an agreement and of some connection between him and Sanders warranted a directed verdict on the conspiracy charge Here, there was no direct evidence of any association between Cope and Sanders The State's evidence of a conspiracy was entirely circumstantial, consisting of (1) forensic evidence that the bite mark where Sanders' DNA was found was inflicted within the same two-hour time frame as the injuries that Cope confessed to inflicting, (2) Sister's testimony that she and Child locked the doors before they went to bed and testimony that there was no evidence of forced entry, and (3) the fact that the house was full of debris and passage inside, particularly at night, would have been difficult These factors, whether considered individually or collectively, raise at most a suspicion that Cope and Sanders intended to act together for their shared mutual benefit Any inference that they made an agreement to accomplish a shared, single criminal objective would be speculative at best Therefore, because the State failed to prove the element of agreement for the crime of conspiracy, the trial court should have granted a directed verdict as to that charge

CONCLUSION

We affirm the trial court's evidentiary rulings and the denial of Cope's motion for severance As a result, the sentences of life imprisonment for murder, thirty years for criminal sexual conduct in the first degree to run consecutive to the life sentence, plus thirty years concurrent for the second of criminal sexual conduct in the first degree, and ten years concurrent for unlawful conduct toward a child are also affirmed We further hold, however, the trial court erred in declining to direct a verdict of acquittal for Cope on the issue of conspiracy and reverse only as to that charge

AFFIRMED IN PART, REVERSED IN PART

PIEPER, J , concurs SHORT, J , concurs and dissents in a separate opinion

SHORT, J (concurring in part and dissenting in part) I concur in part and respectfully dissent in part

I concur with the majority that the trial court did not err by excluding similar crimes evidence, excluding the proffered testimony of James Hill, limiting the expert's testimony regarding specific cases of coerced internalized false confessions, and admitting Cope's statements I also concur with the majority that the trial court did not err in denying Cope's motion for severance I respectfully dissent, however, regarding the trial court's failure to direct a verdict on the conspiracy charge and would affirm the trial court on this issue

"In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury " State v Kelsey, 331 S C 50,

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62, 502 S E 2d 63, 69 (1998) "In ruling on a motion for a directed verdict, the trial court is concerned with the existence of evidence, not its weight " Id In addressing the standard of review where the State relies exclusively on circumstantial evidence and a motion for directed verdict is made, our supreme court has stated

[T]he circuit court is concerned with the existence or nonexistence of evidence, not with its weight The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty 'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof However, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis

State v Cherry, 361 S C 588, 594, 606 S E 2d 475, 478 (2004) (emphasis in original) (internal citations omitted)

Criminal conspiracy is defined as "a combination between two or more persons for the purpose of accomplishing an unlawful object or a lawful object by unlawful means " S C Code Ann § 16-17-410 (2003) "The essence of a conspiracy is the agreement " State v Buckmon, 347 S C 316, 323, 555 S E 2d 402, 405 (2001) "A formal or express agreement need not be established " State v Crawford, 362 S C 627, 637, 608 S E 2d 886, 891 (Ct App 2005) To prove conspiracy, it is not necessary to prove an overt act State v Crocker, 366 S C 394, 405, 621 S E 2d 890, 896 (Ct App 2005) "It is axiomatic that a conspiracy may be proved by direct or circumstantial evidence or by circumstantial evidence alone " State v Horne, 324 S C 372, 381, 478 S E 2d 289, 294 (Ct App 1996)

"Often proof of conspiracy is necessarily by circumstantial evidence alone " State v Miller, 223 S C 128, 133, 74 S E 2d 582, 585 (1953) "[I]n establishing the existence of a conspiracy or an individual's participation therein, it is permissible for the jury to consider circumstantial evidence because, by its very nature, a conspiracy is conceived and carried out clandestinely, and direct evidence of the crime is rarely available " 15A C J S Conspiracy § 176 (2002) Although mere presence at the scene of a crime may be insufficient to support a conspiracy conviction, presence at the scene of the crime is relevant to prove conspiracy Id at §§ 176 & 187

The State's theory was Cope served up Child to Sanders for their mutual perverse pleasures Forensic evidence indicated the bite mark on Child where Sanders's DNA was found was inflicted within the same time period as the injuries Cope confessed to inflicting on Child Additionally, no evidence existed of forced entry into the house by any of the windows or doors Sister testified she locked the back door that evening and Child locked the front door with a chain lock Viewing the evidence in the light most favorable to the State, a connection and an overt act could be inferred from the circumstantial evidence that Cope allowed Sanders entry into the home wherein Sanders committed unlawful sexual acts upon Child I find the temporal connection of the timing of the injuries and the lack of evidence of forced entry are circumstantial evidence that both Cope and Sanders were inside the house at the same time A circumstantial connection was also made between Cope and Sanders by Cope's confessions and the DNA evidence implicating Sanders Considering the totality of the evidence, I conclude substantial circumstantial evidence, rising above mere speculative inferences, exists to support the trial court's submission of the conspiracy charge to the jury Accordingly, I would affirm the trial court's denial of Cope's motion for a directed verdict on conspiracy

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[1] Cope was sentenced as follows life imprisonment for murder (2002-GS-46-3232) and thirty years for criminal sexual conduct first degree (2002-GS-46-3234), consecutive to the life sentence He was also sentenced to thirty years for criminal sexual conduct first degree (2002-GS-46-3233), five years for conspiracy (2004-GS-46-200), and ten years for unlawful conduct toward a child (2004-GS-46-2614), all concurrent with the other two convictions

[2] At the time of Cope's arrest, he weighed 333 pounds

[3] The trial court severed the charges of unlawful neglect for the two younger children

[4] Miranda v Arizona, 384 U S 436 (1966)

[5] Dr Kassin, the expert in this case, was also the expert in Myers

[6] Pittman changed antidepressants from Paxil to Zoloft shortly before committing a double homicide Id at 543, 647 S E 2d at 152

[7] We also note Cope was served with the warrants for unlawful neglect toward a minor child the morning of November 30th, prior to any of his confessions

[8] Only Cope's first confession, made November 30th, was made prior to the bond hearing

[9] See Rothgery v Gillespie County, Tex., 128 S Ct 2578 (2008) (comprehensively discussing the attachment of the Sixth Amendment right to counsel)

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
APR 16 2009
SC Court of Appeals

APPEAL FROM YORK COUNTY
John C Hayes, III, Circuit Court Judge

Opinion No 4526

The State, Respondent,

v

Billy Wayne Cope, Appellant

PETITION FOR REHEARING

The appellant Billy Wayne Cope petitions pursuant to Rule 221, SCACR, for rehearing of his appeal, decided by this Court on April 2, 2009. In that appeal, the Court reversed for lack of evidence appellant's conviction for criminal conspiracy, but affirmed his convictions for murder, two counts of criminal sexual conduct in the first degree, and unlawful conduct towards a child. *State v Cope*, Opinion No 4526 (S C Ct App April 2, 2009). In so doing, the Court appears to have overlooked that the state's entire theory of prosecution depended on the state's hypothesis that Cope and James Sanders conspired together to sexually abuse and

murder Cope's daughter. The logical consequence of this is that once the insufficiency of the evidence to sustain the charge of conspiracy is acknowledged--- as the Court has now done---the rest of the case against Cope simply collapses. It is a logical impossibility for Cope to be not guilty of a conspiracy and yet guilty of the rape and murder that Sanders unquestionably committed. Accordingly, Cope requests that the Court rehear his appeal and reverse the entire series of charges against him on grounds that no rational trier of fact could find him guilty on the evidence presented. *Jackson v Virginia*, 443 U S 307 (1979). Failing this, he submits that the Court should reconsider each of the remaining claims of error raised in his appeal---including the exclusion of all evidence of James Sanders' pattern of entering without detectable forced entry to rob and assault women in the Rock Hill area, the exclusion of Sanders' in-prison admission to what was obviously the Cope murder, and the denial of Cope's motion to sever his trial from Sanders' ---in light of the fundamental change wrought by the dismissal of the conspiracy count.

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Although the fact is nowhere mentioned in the Court's opinion, this case cannot be understood without appreciating that some nine months elapsed before James Sanders was identified as the source of the saliva and semen found on the

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victim This was, of course, also nine months after Cope had taken sole responsibility for murdering his daughter by giving a series of custodial confessions. The obvious conclusion that should have been drawn from this was that the Rock Hill Police Department had obtained a series of false confessions from an innocent man. But rather than acknowledge its embarrassing mistake, the State instead came up with a bizarre last-gasp theory to harmonize Cope's confessions with Sanders' DNA. That is how there came into existence a "conspiracy" (unmentioned in any of Cope's various versions of the crime) between two men who did not know each other: Cope, a white, obese, socially isolated father of three, and Sanders, a black local burglar and "lone wolf" sexual predator. Fantastic as this notion was, it became the state's entire theory of Cope's guilt because the evidence permitted no other.

The conspiracy was not simply one additional count against Cope, it was, rather, the State's only explanation of how Cope could still be legally accountable for his daughter's murder given the presence of Sanders' semen and saliva on her body. Thus in his opening statement, Assistant Solicitor Thompson told the jury, "[T]he only logical explanation is that Billy Cope served up his daughter for his and James Sanders' own perverse pleasures and took her life. *They did it together.*"

There is no other reasonable explanation” R 915, 20-24 (emphasis added) In closing, then-Deputy Solicitor Brackett hammered home the same point “They can’t both be guilty of these crimes and not have done it together They couldn’t have both been standing in the room doing the same thing and not known, that’s just absurd *If they are both guilty then they did it together* They had to conspire” R 3560, lines 20-25 (emphasis added)

On appeal, the State’s position remains exactly the same Despite its acknowledgment that “the record contains no prior evidence of any existing relationship between” Cope and Sanders, the State argues (correctly) that the bruising and injuries on the victim’s breast where Sanders’ saliva was found prove that Sanders was present in the Cope home at the time of the murder Brief of Respondent at 85 It continues, “[B]ased on the circumstantial evidence *the only logical explanation* is that Cope served up his daughter that fateful night for his and Sanders own perverse pleasures *and did it together*” *Id* (Emphasis added)

The State was (and is) clearly correct that it would have been a logical impossibility for Cope and Sanders to have “done it together” without at least a tacit agreement---that is, without a conspiracy Now that the Court has recognized that the evidence does not support the State’s “only logical explanation,” there remains

just one other Cope's confessions are false, and he is innocent of the sexual assault and murder that James Sanders unquestionably committed

Accordingly, the dismissal of the conspiracy count plainly mandates dismissal of all other charges against Cope. Under the unique circumstances of this case, to leave intact Cope's murder or criminal sexual conduct convictions would violate his rights to due process under the Fourteenth Amendment and S C Const art I, § 3. This is true both because the evidence does not support Cope's convictions, *Jackson v Virginia, supra*, and also because due process would be violated by affirming Cope's convictions on a theory that was never disclosed to Cope or advanced by the State at trial (namely, that both co-defendants somehow acted independently to rape and murder the victim at the same time and place, but without any agreement, coordination or understanding between them) *See Cole v Arkansas, 333 U S 196 (1948)* ("To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court") For both reasons, the Court should grant rehearing to consider the effect of the dismissal of the conspiracy count upon the rest of the case against Cope, and should reverse all of his convictions on the ground that no rational fact-finder could have found him

guilty in light of incontrovertible proof that the true perpetrator was Sanders

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Furthermore, even if the Court were to decline to reconsider the sufficiency of the evidence of Cope's guilt, he submits that each of the issues raised in his brief merits reconsideration in light of the collapse of the state's theory that he conspired with Sanders to rape and murder his daughter. Thus the issue of whether the court erred in excluding abundant evidence of Sanders' opportunistic "lone wolf" modus operandi, with or without severing Sanders' trial, *see* Appellant's Questions I and III, warrants reevaluation in light of the Court's recognition that there is no evidence that Sanders agreed or conspired with Cope to commit this particular crime in a bizarrely different fashion from all his other offenses, as the state contended at trial. The exclusion of Sanders' prison confession to the burglary, rape and murder of "that little girl in Rock Hill"---a confession notable for its lack of any reference to an accomplice---should also be reconsidered now that the absence of a conspiracy makes Sanders' jailhouse admission even more unmistakably relevant to this case. *See* Appellant's Question II. Likewise, the issues surrounding Cope's series of confessions---whether his constitutional rights were violated by the process through which they were obtained, *see* Appellant's Question V, or whether Cope's expert

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should have been allowed to explain the research basis for his opinion by relating the relevant facts of very similar false confession cases, Appellant's Question IV--merit reexamination now that this Court has held that the trial court should have directed a verdict in Cope's favor on the state's entire theory of his guilt¹

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A further issue arising from the Court's opinion is whether the invalidity of the conspiracy count infects the guilty verdicts on the other counts, such that, at a minimum, those other counts must be retried. As discussed earlier, the state's conspiracy allegation was the keystone of the state's entire case against Cope. The Court has now ruled that Judge Hayes committed reversible error when he denied Cope's mid-trial motion to direct a verdict of acquittal on that count. But had he done so, the remainder of the trial would have proceeded quite differently. For having failed to have adduced sufficient evidence to support an allegation of conspiracy, the state would not have been at liberty to argue, as it did, that the

¹ Just last week, the United States Supreme Court issued a powerful reminder of the dangers of false confessions. "[W]e have always known what custodial secrecy leads to [Citation omitted]. No one with any smattering of the history of 20th-century dictatorships needs a lecture on the subject, and we understand the need even within our own system to take care against going too far. '[C]ustodial police interrogation, by its very nature, isolates and pressures the individual,' *Dickerson v. United States*, 530 U.S. [428, 435 (2000)], and there is mounting empirical evidence that these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed, see, e.g., Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. Rev. 891, 906-907 (2004)." *Corley v. United States*, ___ U.S. ___, 2009 WL 901513, slip op. at 11 (April 6, 2009).

presence of Sanders' saliva and semen on the victim's body could only be explained by hypothesizing that Cope deliberately admitted him to the family home, and then "served up [the victim] to Sanders for their mutual perverse pleasures" *State v Cope*, Opinion No 4526 (April 2, 2009) (Short, J, dissenting) In the absence of this theory, the prosecution would have been hard-pressed to identify *any* theory under which Cope would have been guilty along with Sanders The remaining verdicts are all, in this sense, byproducts of the conspiracy count, and it would be fundamentally unfair to leave these verdicts and their ensuing sentences intact now that the foundation on which they were erected has been removed Thus, even if the failure of the conspiracy count did not require that the remaining counts against Cope be dismissed with prejudice, it at least should mandate reversals and retrials of those counts Only in this way will the state be put to its proof without improper reliance on an unsupported charge that should never have been submitted to or considered by the jury to begin with

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Finally, Cope submits that rehearing is warranted because the Court appears to have overlooked the federal constitutional basis of his claims respecting the exclusion of the Sanders modus operandi and prison confession evidence

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(Appellant's Questions I-III) Cope argued in his brief that this wholesale exclusion of the essential elements of his defense violated both South Carolina evidentiary law and the Due Process Clause of the Fourteenth Amendment. See Final Brief of Appellant at 35-37 (citing *Crane v Kentucky*, 476 U S 683, 690 (1986), *California v Trombetta*, 467 U S 479, 485 (1984), *Chambers v Mississippi*, 410 U S 284 302 (1973)), *id* at 56 (citing *Rock v Arkansas*, 483 U S 44, 61-62 (1987)), Final Reply Brief of Appellant at 18 (citing *Chambers, supra*, and *Montana v Egelhoff*, 518 U S 37, 43 (1996)). The Court's opinion fails to address these federal constitutional arguments, which Cope submits mandate reversal of his convictions regardless of the merits of his arguments respecting the admissibility of the excluded evidence under the South Carolina Rules of Evidence and other provisions of state law. See *Holmes v South Carolina*, 547 U S 319 (2006) (applying Due Process Clause of Fourteenth Amendment to reverse South Carolina's application of state law rule governing admissibility of evidence of "third party guilt")

CONCLUSION

For all of these reasons, Billy Wayne Cope requests that the Court rehear each of his five remaining appellate issues, and that it reverse his convictions in their entirety, or, in the alternative, that it vacate his remaining convictions and remand his case for a new trial on all counts except that alleging criminal conspiracy

Respectfully submitted,

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BY 
COUNSEL FOR APPELLANT

April 15, 2009

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM YORK COUNTY
Court of General Sessions

John C Hayes, III, Circuit Court Judge

Case No 2004-GS-46-2614
2004-GS-3232, 2004-GS-46-200, 2004-GS-46-3233,
2004-GS-46-3234

State of South Carolina

Respondent

v

Billy Wayne Cope,

Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Petition for Rehearing in the above-referenced case has been served upon counsel for the Respondent by mailing one (1) copy properly addressed with postage prepaid this 16th day of April, 2009 to

Donald J Zelenka
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211


JILL A RIDER

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM YORK COUNTY
Court of General Sessions
The Honorable John C Hayes, III, Circuit Court Judge**

**04-GS-46-2614-2618
02-GS-46-3232-3234
04-GS-46-200**

STATE OF SOUTH CAROLINA,

Respondent,

v

BILLY WAYNE COPE,

Appellant

**PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC
OF RESPONDENT**

The Respondents, above named, hereby make a petition for rehearing pursuant to SCACR Rule 221 and suggestion for rehearing en banc pursuant to Rule 219(b) in the above-captioned matter from the decision of the panel of the South Carolina Court of Appeals on April 2, 2009 in *State v Billy Wayne Cope Opinion No 4526, 2009 Westlaw 902391 (S C App April2, 2009)* Respondents respectfully submit that the panel decision overlooked and misapprehended certain facts and positions in concluding that a directed verdict of acquittal should have been entered on the crime of criminal conspiracy As properly noted in the concurring and dissenting opinion of Judge Short, there was sufficient circumstantial evidence of the agreement between Mr Cope

and Mr Sanders to warrant the denial of the motion

I

In its opinion, the panel correctly cited the standard of review for denials of motions for a directed verdict and applicable substantive law for criminal conspiracy In addressing the standard of review, relying upon State v Cherry, 361 S C 588, 594, 606 S E 2d 475, 478 (2004) (emphasis in original) (internal citations omitted), it stated where the State relies exclusively on circumstantial evidence and a motion for directed verdict is made, our supreme court has stated

[T]he circuit court is concerned with the existence or nonexistence of evidence, not with its weight The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof However, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis

Id, at *10

On the substantive law of criminal conspiracy, the panel correctly noted its elements

Criminal conspiracy is defined as a combination between two or more persons for the purpose of accomplishing an unlawful object or a lawful object by unlawful means S C Code Ann § 16-17-410 (2003) The essence of a conspiracy is the agreement State v Buckmon, 347 S C 316, 323, 555 S E 2d 402, 405 (2001) Often proof of conspiracy is necessarily by circumstantial evidence alone State v Miller, 223 S C 128, 133, 74 S E 2d 582, 585 (1953) Nevertheless, the law calls for an objective, rather than subjective, test in determining the existence of a conspiracy State v Crocker, 366 S C 394, 406, 621 S E 2d 890, 897 (Ct App 2005) Moreover, in viewing the sufficiency of the evidence to support a charge of conspiracy, an appellate court must exercise caution to ensure the proof is not obtained by piling inference upon inference State v Gunn, 313 S C 124, 134, 437 S E 2d 75, 81 (1993) (quoting Direct Sales Co v U S, 319 U S 703, 711(1943))

The gravamen of the offense of conspiracy is the agreement or combination Gunn, 313 S C at 134, 437 S E 2d at 80, see also State v Condrey, 349 S C 184, 193, 562 S E 2d 320, 324 (Ct App 2002) (stating the crime of conspiracy consists

of the agreement or mutual understanding) Often proof of conspiracy is necessarily by circumstantial evidence alone Miller, 223 S C at 133, 74 S E 2d at 585 Recognition of this reality, however, does not compromise the standard that a trial court must use in deciding a directed verdict motion when the evidence against an accused is entirely circumstantial, namely, that the case must be submitted to the jury only if there is substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced State v Arnold, 361 S C 386, 390, 605 S E 2d 529, 531 (2004)

Id

Despite this appropriate legal basis, the panel either overlooked and misapprehended certain facts and positions in concluding that there was an absence of actual proof of an agreement between Cope and Sanders This conclusion respectfully ignores that “[O]ften proof of conspiracy is necessarily by circumstantial evidence *alone* State v Miller, 223 S C 128, 133, 74 S E 2d 582, 585 (1953) As asserted in the Initial Brief of Respondent through this pleading, Respondents respectfully submit that the evidence, albeit circumstantial was sufficient to support the existence of criminal conspiracy

II

Respondent respectfully submits that the trial judge and Judge Short in the panel correctly analyzed the existence of evidence of criminal conspiracy As Judge Short concluded *a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis* It is this defect in the panel’s analysis which lead to its erroneous conclusion on this issue When properly analyzed

A formal or express agreement need not be established State v Crawford, 362 S C 627, 637, 608 S E 2d 886, 891 (Ct App 2005) To prove conspiracy, it is not necessary to prove an overt act State v Crocker, 366 S C 394, 405, 621 S E 2d 890, 896 (Ct App 2005) It is axiomatic that a conspiracy may be proved by direct or circumstantial evidence or by circumstantial evidence alone State v Horne,

324 S C 372, 381, 478 S E 2d 289, 294 (Ct App 1996)

In error, the panel emphasized that there was “no direct evidence of any association between Cope and Sanders. However, “[I]n establishing the existence of a conspiracy or an individual's participation therein, it is permissible for the jury to consider circumstantial evidence because, by its very nature, a conspiracy is conceived and carried out clandestinely, and direct evidence of the crime is rarely available.” 15A C J S *Conspiracy* § 176 (2002)

In his correct conclusion, Judge Short opined in dissent

The State's theory was Cope served up Child to Sanders for their mutual perverse pleasures. Forensic evidence indicated the bite mark on Child where Sanders's DNA was found was inflicted within the same time period as the injuries Cope confessed to inflicting on Child. Additionally, no evidence existed of forced entry into the house by any of the windows or doors. Sister testified she locked the back door that evening and Child locked the front door with a chain lock. Viewing the evidence in the light most favorable to the State, a connection and an overt act could be inferred from the circumstantial evidence that Cope allowed Sanders entry into the home wherein Sanders committed unlawful sexual acts upon Child. I find the temporal connection of the timing of the injuries and the lack of evidence of forced entry are circumstantial evidence that both Cope and Sanders were inside the house at the same time. A circumstantial connection was also made between Cope and Sanders by Cope's confessions and the DNA evidence implicating Sanders. Considering the totality of the evidence, I conclude substantial circumstantial evidence, rising above mere speculative inferences, exists to support the trial court's submission of the conspiracy charge to the jury. Accordingly, I would affirm the trial court's denial of Cope's motion for a directed verdict on conspiracy.

Cope, id

III

There is evidentiary support for these conclusions of the existence of criminal conspiracy. The mere fact that Cope's series of confessions about the murder and assault by a broom like object upon Amanda and the existence of Sanders DNA from his saliva upon her breast

contemporaneous to the physical assaults and DNA on her pants conclusively eliminate the possibility of a conspiracy as Cope suggests. Although Amanda's body serves as the connection between the two, the door reveals agreement and conspiracy as supported by the circumstantial evidence. Simply put, the connection and overt act are revealed by allowing the entry by Cope of Sanders into the home where Sanders commits acts upon Amanda and Cope combines with him. The mere fact that Cope did not include Sanders in his statements is not dispositive of this issue. The trial court was correct in allowing the jury to consider the evidence and make the decision.

On November 29, 2001, between 2 and 4 am, twelve year Amanda Cope, a 160 pound girl, was forcefully sexually assaulted by an object in her vagina and her rectum, severely beaten and strangled to death. Certain salient factors point to the existence of an agreement and conspiracy between her father and James Sanders to commit the sexual acts which ultimately lead to her death. There is substantial circumstantial evidence to support the existence of the conspiracy.

- 1 Cope tells Jessica that morning that her sister Amanda had been dead for four hours, revealing before any law enforcement involvement his knowledge of the time of death. This four hour time frame is later repeated to law enforcement. It was consistent with the pathologist findings. R. 2083, 9/15/04 Tr p. 48.
- 2 Amanda has a bite mark on her breast with saliva. The mark reveals an injury contemporaneous to other injuries near the time of death between 2 and 4.
- 3 Cope gives statement that he got up at 3 a.m. and checked on the girls, consistent with the range of the time of death. R. 1448-49, 1472-73, 1771-72, 9/13/04 Tr p. 67-68, 91-92. 9/14/04 Tr p. 49-50, 76-77. Video, Exhibit 7.

- 4 Sanders DNA is consistent with the saliva located on the breast of Amanda at the time of the assault and death R 2242, 9/15 904 Tr p 207
- 5 The windows into Amanda room were not disturbed R 1566-69, 9/13/04 Tr p 187-188 The windows and doors around the house reveal no forced entry by the lack of signs of damage or tampering to doors or disturbance of dust, dirt spider webs to the sealed windows and screens R 988-990, 1531, 1538-1580, 9/8/04 Tr p 267-269, R 1237, 9/13/04 Tr p 150, 157- 99
- 6 Jessica specifically recalls Amanda locking the front door by latching the chain on the front door the evening of the incident Jessica locked the back door R 2079, 9/15/04 Tr p 44 The door requires a chain to be unlatched from the inside for entry State Exhibit 41 E (photograph of door and chain) Jessica recalls that the door was already unlocked when the ambulance and police arrived shortly after they awoke that morning and learned her sister had died R 2084, 9/15/04 Tr p 49
- 7 Cope's statements reveal knowledge about factors of the assault and injuries to Amanda consistent with forensic evidence Further, Cope stated that they would not find semen at the crime scene and then later subsequently revealed the presence of a rag he used to masturbate R 1806, 1810, 9/14/04 Tr p 84, 88
- 8 Cope admitted staging the scene to make it appear to be an accident by placing the blanket around his daughter's neck, a historical factor in Cope relationship with his daughter that he had warned her about, something that Sanders would have been unaware of to suggest an accident R 1803, 9/14/04 Tr p 81 Video, State

Exhibit 7 The scene was also staged by the cleanup of the area and body where she was clothed after the rectal assault and the area was cleaned of feces or traces of the assault, and the door were placed together to make it appear to be an accident, something that a sole intruder would have no reason to do, yet Cope would have reason to do should one of his daughters or another arrive at the scene before he wakes up to shed guilt away from himself R 1332, 1803-04, 9/10/04 Tr p 62, 9/14/04 Tr p 81-84

9 The house was full of clutter and debris to make passage difficult once inside and particularly if dark R 1582-94, 9/13/04 Tr p 201-213 (testimony describing photographs of inside house), Video State Exhibit 7 Jessica testified that lights were shut off by her that night R 2079-80, 9/15/04 Tr p 44-45

9 The locked entry by the door was the only manner that Sanders could have entered the house Cope had to assist Sanders entry for the assault by opening the door and showing his way through the clutter to Amanda's room

10 The closet in Amanda's room was too small and cluttered for anyone to hide in R 2076, 9/15/04 Tr p 41 (Jessica testifies that Amanda's closet was messy and had bags of clothes and stuff in it and that she could not get into closet) She also stated that she was in the room with Amanda for 20 minutes after her father had gone to bed R 2078, 9/15/04 Tr p 43

Simply put, the evidence provided by the body of Amanda placed Cope and Sanders together at that time of the assault and death Since the scene was staged subsequently to the death, it is evident that a cover-up had begun before the police had arrived at the scene while Cope was

claiming accident, even though Sanders was present and involved. It is equally powerful circumstantial evidence that locking of the doors required it to be unlocked and opened for someone to be let in.

At the outset of the case in the opening argument, the state laid the foundation for its case on conspiracy. Amanda Cope was brutally penetrated in her vagina and rectum during the hours between 2 and 4 AM. At 6 a.m., law enforcement receives a 911 call where Cope, devoid of emotion states that his daughter is dead - "cold as a cucumber." R. 948, 9/8/04 Tr p. 227, State Exhibit 15. At that time Cope claims he last saw his daughter alive at two o'clock and then changes it to one o'clock. R. 949, 9/9/04 Tr p. 228, l. 7-8. He contended at that time she must have strangled upon a piece of the blanket. He had even claimed he had previously warned her about this fact. *Id.* *A 12 year old female who weighs over 160 pounds was alleged to have wrapped herself in a blanket and choked resulting in her accidental death.* R. 956, 970, 980, 998-99, 1161, 1201, 1284, 1292, 9/8/04 Tr p. 235, 249, 259, 277-278, 9/9/04 Tr p. 149, 189, 9/10/04 Tr p. 13, 21. He initially declared that she had been dead for four hours, albeit claiming inconsistently to being asleep until before 6 a.m., which was consistent with the later determined actual time of death. R. 956, 963, 1159, 9/8/04 Tr p. 235, 242, 9/9/04 Tr p. 147.

Once police and EMS arrive, Cope begins to make a series of inconsistent statements about her state of undress at the time he found her that morning, from being naked when he found her (R. 959, 1159, 9/8/04 Tr p. 238, l. 1-17, 9/9/04 Tr p. 147), to being clothed and straightening her clothes, where evidence revealed that her clothes had been put on her by someone else. The inconsistent statements and obvious staging of the crime scene became a theme to the trial. The was odd behavior when the police found her clothed with the blanket

around her neck when they arrived on the scene R 988, 9/9/04 Tr p 267 Further , while at the hospital during the collection process, Cope told Detective Burris that he knew there would be an autopsy and if his skin was found underneath his daughter's fingernails, it was because she had scratched his back that night R 1205, 9/8/04 Tr p, 193

Cope also initially told the police that the house was secure with the windows closed and there were no signs of any break-in R 1285, 9/10/04 Tr p 14 [This was supported by law enforcement testimony R 1237-38, 9/9/04 Tr p 225-226]

The variety of statements about the event and Cope's demeanor did not make sense that morning Compare, State Exhibit 15 (911 Call), with R 963, 969-70, 971, 994-98, 9/8/01 Tr p 242, 248-249, 250, 274-275, 277 Cope even inquired whether he would be in trouble with the law because his daughter was found dead in the house R 981, 990, 9/8/04 Tr p 260, 269

The pathologist, Dr Maynard came to the scene and the possibility of a sexual assault was evident to him leading to a later autopsy R 1120, 9/9/04 Tr p 108 The autopsy reveals brutal rape and injury where her rectal cavity is bruised by an object like either a dildo or a broomstick being jammed in up to 8 inches R 1116-17, 9/9/04 Tr p 104-105 He opines that this could not be done with a penis [Oddly, Cope claims in the video re-enactment to have tossed out his dildo after the incident, but later a dildo is found in his room [R 1614, 9/13/04 Tr p 233] and Cope is also unable to identify or locate a broomstick that he says he used in the inculpatory confession] According to Dr Maynard, her vaginal area had significant injuries which were done by an object by more force than a normal sexual act R 1080, 9/9/68 No sperm was found in the vaginal area R 1090, 9/9/04 Tr p 69 Amanda also suffered from severe head injuries and brain swelling and there is a bite upon her breast R 1058, 9/9/04 Tr p

46 [The saliva around the bite mark is later determined to be consistent with Sanders] Dr Maynard also opined that her cause of death by strangulation could not have been caused by a blanket R 1057, 9/9/04 Tr p 45 Importantly to the staging concept, her body appeared to have been cleaned up after the assault R 1116-17, 9/9/04, Tr p 104, 105 He noted that it was uncommon that fecal material would not be in the soiled pants and that fecal material would usually be brought out and left around the anal opening in similar assaults R 1117, 9/9/04 Tr p 105 He further stated that when he was at scene he examined the bedding and did not see the presence of any fecal matter Id Importantly ne noted all the injuries to Amanda occurred within a short time prior to her death As to her abdominal injuries, he noted that the they could have been caused by a 300 pound man kneeling on the abdomen or back with sufficient force even if the victim was lying in the bed R 1119, 9/9/04 Tr p 107

In his series of early exculpatory statements, Cope continued his assertion of accident and that he had slept until 6 am R 1208, 1221, 9/9/04 Tr p 196, 209 His room is within close proximity of the victim's room, yet he contended that he would not be able to hear matter based upon his sleep machine noise R 1210-11, 1215, 9/9/04 Tr p 198-199, 203 Although initially stating he slept through the night, he later asserts at some time that he got up at sometime and went to the bathroom and checked on the girls The pathologist ultimately determined that death occurred between 2 and 4 am

Next day, he agrees to take a polygraph test Before the test, he gives an exculpatory statement continuing to assert getting up at 3 a m , but denied checking on Amanda R 1448-49, 9/13/04 Tr p 67-68 After the test, he is advised of the result that he failed R 1461, 9/13/04 Tr p 80 Cope then begins on an evolving series of inculpatory statements R 1469, 1472-76,

9/13/04 Tr p 88, 91-95 At that point the admits killing Amanda and that he jammed a broom inside her rectum and vagina after he had gotten up in the middle of the night with an erection, went to her room, masturbated over her and got enraged after she woke up and saw him doing it and slammed her head into a video game as he straddled his 300 pound body one her, hit her with his fist and described using his hands to choke her Id He stated that she was already dead when he used the broom on her Oddly, he volunteered that he deleted his internet files from his computer after the incident R 1478, 9/13/04 Tr p 97 See also, R 1770-72, 9/14/04 Tr p 49-48-50 (Herring statement - 11/30/01 @ 2 P M)

Days later, Cope changed his story to suggest that he woke up and acted act beating and smothering his daughter and ultimately penetrating her with a broom vaginally and rectally because he was upset with an old girlfriend who had aborted his child R 1798-99, 9/14/04 Tr p 76-77 (Cabiness statement - 12/3/01 @ 9 45 am) This leads to the crime scene video re-enactment where Cope acts out his recollection of the event with revealing force and corrections as he went through the scene and physically demonstrated his violence toward his daughter Video - State Exhibit 7 Subsequently, he gives another statement which provide new corroborative evidence including a towel rag that he masturbated into that was located at the scene R 1808-09, 9/14/04 Tr p 87-88

At 4 55 PM on December 3, 2001, Cope gives his final statement to Cabiness In that statement, he abandoned his “dream concept” and asserted that he woke up about 3 a m and went into Amanda’s room, used a dildo on her and masturbated, cleaned it off the floor with a towel While using the dildo while she was on her stomach, she woke up and he tried to keep her from seeing him and he jumped on top of her and started hit her in the head and strangled her

until she went limp R 1816-1820, 9/14/04 Tr p 94-98 (Dec 3, 2001 Cabiness Statement @ 4 55) He described using the blanket to “make it look like she had strangled herself” After he jumped off the bed, he wiped off the dildo with the towel and put it between the mattress, arranged the doors to Amanda room so that they would lock together so his other daughters would not wake up in the morning and see her Id ¹ State Exhibit 9

Subsequently, the DNA from the saliva upon Amanda’s breast and the semen on her pants comes back connected to James Sanders R 2240-42, 9/15/04 Tr p 205 - 207 ² Cope had not mentioned another else being involved in either the assault or death of Amanda in any inculpatory statement

Sanders lived only about one block away from Cope, but the record contained no prior evidence of any existing relationship between them However, the bruising and injuries on Amanda’s breast where the saliva was found occurred around the time of her death so that there is now a temporal connection with Amanda and Sanders being inside the house together at the time she died Now there is the combination of this evidence linking both Sanders and Cope to the crime that resulted in the criminal sexual conduct of Amanda and ultimately her death by place and time

The state’s theory is that based upon the circumstantial evidence the only logical explanation is that Cope served up his daughter that fateful night for his and Sanders own perverse pleasures and did it together This is more than inference upon inference, *it is the only*

¹Evidence was also presented about disputed writings made by him to Amy Simmons where he stated that “I killed Amanda ” R 1956, 1958, 9/14/04 Tr p 233, 235

²Cope’s DNA was found on the towel he stated he used when he masturbated R 2241, 9/15/04 Tr p 206

logical conclusion from the evidence

Supportive of this concept was the fact that the house itself showed no signs any entry through windows and that the doors were locked before the children went to bed. Further as revealed in the video, the home was in complete chaotic clutter and that anyone entering, particularly in the night hours with lights on or off, would need a guide to get to any room through the clutter and junk on the floor.

Furthermore, the crime scene staged. Why would an unknown intruder wrap a particular item around the victim's neck to make it appear accidental for a 160 pound person, when that item was consistent with what Cope indicated that he had warned her about. How would Sanders know this and why would an unknown intruder even care to do this where the violence would be inevitably revealed. Why would Cope ever want to cover up how Sanders solitary involvement in the case and clean up the scene where there was no evidence of feces from the rectal penetration, remove the object used (broom or dildo). The evidence leads to *the logical conclusion* that Sanders was let in from the previously locked door by Cope while his wife was working the night shift. This evidence leads to *the logical conclusion* that they were together in the event of sexual conduct. This circumstantial evidence leads to a showing of the existence of a conspiracy to commit sexual conduct on his daughter.

There is substantial circumstantial evidence to support the existence of a conspiracy to commit criminal sexual conduct upon Amanda Cope on November 29, 2001. Contrary to the assertions of Cope and the panel, the connection was made in the evidence that Sanders and Cope were both involved in the sexual acts by the admissions (Cope) and the evidence (Sanders). The evidence also supports the fact that Cope admits getting up at 3 am, a time when the assaults

and death are determined to have occurred. The knowledge of particular injuries from the deadly assaults by Cope and the actual DNA connection with Sanders saliva put them together with Amanda. The non-forced entry, circumstantially proven by the earlier chain locked door being unlocked from the inside shows that Cope opened the door for Sanders and led him to his daughter. Cope's admissions of having sexual conduct with Amanda previously while she was asleep since the beginning of October, is further evidence that Cope was not acting as a guardian for his daughter but rather saw her as a tool for his sexual gratification.

This case is far different from the cases cited by Cope involving several individuals who happen to be involved in similar crimes at the same time like Mouzon and Amaker. Here, the act of sexual conduct on Amanda, due to the unique timing of the bruise and saliva could not have occurred without the aid and acquiescence of Cope. His complaint is without merit and must be dismissed. The trial court was correct in allowing this jury to decide whether the state had proved beyond a reasonable doubt its existence. As Judge Short concluded "a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." Again, it is this defect in the panel's analysis which lead to its erroneous conclusion on this issue. This portion must be vacated.

CONCLUSION

For all the foregoing reasons, rehearing and or rehearing en banc must be granted, the portion of the panel opinion concerning the crime of criminal conspiracy must be vacated and the judgement of convictions for murder, criminal sexual conduct and conspiracy must be affirmed

Respectfully submitted,

HENRY D McMASTER
Attorney General

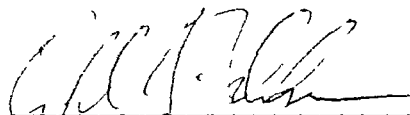
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By



DONALD J ZELENKA
ATTORNEYS FOR RESPONDENT

April 17, 2009

CERTIFICATE OF SERVICE

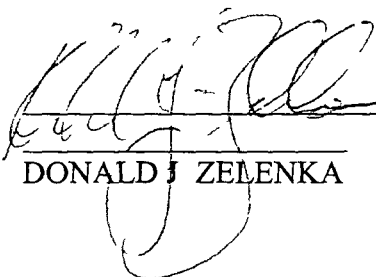
I, Donald J Zelenka, hereby certify that I have served the *Petition for Rehearing and Suggestion for Rehearing En Banc by Respondent* in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following

James M Morton, Esquire	Michael B Smith, Esquire
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Virginia Capital Case Clearinghouse
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357 East Chicago Avenue
Chicago, IL 60611-3069

This 17nd day of April, 2009



DONALD J ZELEENKA



The South Carolina Court of Appeals

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V CLAIRE ALLEN
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September 29, 2009

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Assistant Deputy Attorney General Donald J Zelenka
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Re The State v Cope, Billy Wayne

Dear Counsel

Enclosed is a copy of an Order of the Court Granting the State's Petition for Rehearing and withdrawing the opinion and substituting and refiled the enclosed opinion and denying the

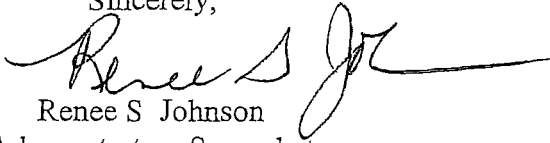
00041

State's Petition for Rehearing En Banc and denying the Appellant Billy Wayne Cope's Petition for Rehearing in the above case

The Remittitur in this case will be held in this Court only so long as required by Appellate Court Rule 221 (b)

Please notify this office, in writing, within ten (10) days from the date of this letter, whether or not you want any of the remaining Records on Appeal and briefs we may have in this case. Also enclose a check payable to the S C Court of Appeals, in the amount of \$7 50, to cover mailing costs. If we have not heard from you within ten (10) days, the Record on Appeal and briefs will be disposed of.

Sincerely,


Renee S Johnson
Administrative Specialist

JFB

JFB/rj

cc Kevin Scott Brackett, Esquire

The South Carolina Court of Appeals

The State,

Respondent,

v

Billy Wayne Cope,

Appellant

The Honorable John C Hayes, III
York County
Trial Court Case No 2002-GS-46-03232
2002-GS-46-03233
2002-GS-46-03234
2004-GS-46-00200
2004-GS-46-02614

ORDER GRANTING PETITION FOR REHEARING

PER CURIAM After consideration of the Petition for Rehearing filed by the State in this case, it is ordered that the opinion heretofore filed, Opinion No 4526, filed April 2, 2009, be withdrawn and the attached opinion be substituted. The Petition for Rehearing is granted without oral argument.

AND IT IS SO ORDERED

Paul G. Short, Jr. J

Paul W. Thomas J

R. Raper J

Columbia, South Carolina

Date September 29, 2009

00043

The South Carolina Court of Appeals

The State,

Respondent,

v

Billy Wayne Cope,

Appellant

The Honorable John C Hayes, III
York County
Trial Court Case No 2002-GS-46-03232
2002-GS-46-03233
2002-GS-46-03234
2004-GS-46-00200
2004-GS-46-02614

ORDER DENYING PETITION FOR REHEARING

PER CURIAM After a careful consideration of the Petition for Rehearing filed on behalf of Appellant Billy Wayne Cope, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing

It is, therefore ordered that the Petition for Rehearing be denied

Paul E. Short, Jr

J

Paul W. Thomas

J

W. Reese

J

Columbia, South Carolina
September 29, 2009

00044

The South Carolina Court of Appeals

The State,

Respondent,

v

Billy Wayne Cope,

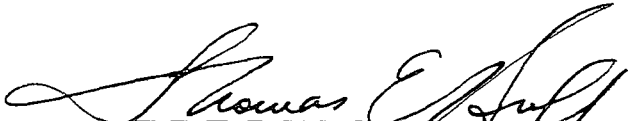
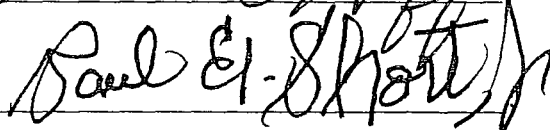
Appellant

The Honorable John C Hayes, III
York County
Trial Court Case No 2002-GS-46-03232
2002-GS-46-03233
2002-GS-46-03234
2004-GS-46-00200
2004-GS-46-02614

ORDER DENYING PETITION FOR REHEARING EN BANC

PER CURIAM After a careful consideration of the Petition for Rehearing En Banc filed by the State, the Court has determined that en banc consideration is not necessary to secure or maintain the uniformity of its decisions, nor is the proceeding one involving a question of exceptional importance. Further, the Court finds no other ground appearing to warrant a rehearing en banc.

It is, therefore, ordered that the Petition for Rehearing En Banc be denied.

00045

H B D O J
Paul H. Thomas J
J. Ripper J
J. H. O J
John W. McIntosh J
James M. Morton J
Rasputin C. C. A J

Columbia, South Carolina

Date September 29, 2009

- cc David I Bruck, Esquire
- James M. Morton, Esquire
- Michael B. Smith, Esquire
- Steven A. Drizin, Esquire
- Allison Flaum, Esquire
- Attorney General Henry D. McMaster
- Chief Deputy Attorney General John W. McIntosh
- Assistant Deputy Attorney General Donald J. Zelenka
- Kevin S. Brackett, Esquire

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State,

Respondent,

v

Billy Wayne Cope,

Appellant

Appeal From York County
John C Hayes, III, Circuit Court Judge

Opinion No 4526
Heard September 16, 2009 – Filed April 2, 2009
Withdrawn, Substituted and Refiled September 29, 2009

AFFIRMED

David I Bruck, of Lexington, Virginia, James M Morton and Michael B Smith, both of Rock Hill, and Steven A Drizin and Allison Flaum, both of Chicago, Illinois, for Appellant

Attorney General Henry D McMaster, Chief Deputy Attorney General John W McIntosh, Assistant Deputy Attorney General Donald J Zelenka, Office of the Attorney General, of Columbia, and Solicitor Kevin Scott Brackett, of York, for Respondent

00047

THOMAS, J A jury convicted Cope of murder, two counts of first degree criminal sexual conduct, criminal conspiracy, and unlawful conduct towards a child. He was sentenced to life imprisonment, plus thirty years¹. Cope appeals. We affirm.

FACTS/PROCEDURAL HISTORY

Between approximately 2:00 and 4:00 a.m. on Thursday, November 29, 2001, 12-year-old Child was murdered in her bedroom. Billy Cope, her father, testified he awoke at 6:00 a.m. and called out to wake her. When she did not respond, he went to her room, where he found her body lying on her bed. Cope called 911. He told police he did not hear any sounds that night because he sleeps with a sleep apnea machine that makes a loud noise. Police checked the exterior and interior of the house for any signs of forced entry, including all the doors and windows, but everything appeared to be secured. One of Cope's two younger daughters (Sister) testified she and Child locked both doors before they went to bed that evening.

Cope was standing outside when Jason Dillon, an emergency medical technician (EMT), arrived at the house. Cope advised Dillon and another EMT that Child had been dead "four hours." Dillon did not ask Cope if he meant "for" or "four." Cope told Dillon that Child choked herself with her blanket. He also told him he found Child naked and he dressed her. The forensic pathologist, Dr. James Maynard, arrived and found Child lying on her back on her bed, with her shirt pulled up and her left breast exposed. He testified it appeared she had not dressed herself because her bra was unattached and her pants were pulled up unevenly.

¹ Cope was sentenced as follows: life imprisonment for murder (2002-GS-46-3232) and thirty years for criminal sexual conduct first degree (2002-GS-46-3234), consecutive to the life sentence. He was also sentenced to thirty years for criminal sexual conduct first degree (2002-GS-46-3233), five years for conspiracy (2004-GS-46-200), and ten years for unlawful conduct toward a child (2004-GS-46-2614), all concurrent with the other two convictions.

Dr Maynard performed Child's autopsy and determined she had been beaten, strangled, severely sexually assaulted, and sodomized, most likely with a blunt foreign object such as a broom handle or a dildo. Dr Maynard testified he believed Child had been repeatedly sexually abused and sodomized over a period of time, not just the night of the murder. He testified it did not appear Child was strangled by her blanket. He further testified some of Child's injuries were consistent with a 300-pound man jumping on her.² During the autopsy, Dr Maynard discovered a bite mark on Child's right breast and took a swab of the area. Upon testing, it was discovered the saliva matched co-defendant James Sanders' DNA. Dr Maynard testified the bruise on Child's breast was a similar age as the rest of her injuries, which all seemed to be inflicted at approximately the same time. The police also discovered semen on Child's pants, which matched Sanders' DNA. No other semen was found on or near Child's body.

Cope was first interviewed at the police station at about 8:00 a.m. on November 29, 2001. Cope consented to giving samples for a DNA test. Later that same day, about 12:00 p.m., police again interviewed Cope. His story changed slightly in the second interview as to the time his daughters went to bed and whether he had to kick in Child's bedroom door to enter her room that morning. Cope was allowed to leave the station after the second interview. At 10:50 p.m., police picked Cope up from his mother's house to take him back to the police station for a third interview. After the third interview, the officers decided to arrest Cope.

Charlene Blackwelder, detective for Rock Hill Police Department, took the arrest warrant to Judge Margy McNeely between 3:00 and 4:00 a.m. on November 30, 2001. Judge McNeely issued the warrant based on the fact that Cope was the only adult home at the time of the murder and the lack of evidence of forced entry. Cope was placed in a cell at about 2:30 a.m. and he was charged with murder at 4:31 a.m.

² At the time of Cope's arrest, he weighed 333 pounds.

Later, on the morning of November 30th, Cope was served with three warrants for unlawful neglect toward a minor child³ Blackwelder testified she served Cope with these warrants prior to his transportation to the Moss Justice Center at about 10 00 a m for his polygraph examination Michael Baker, polygraph examiner at York County Sheriff's Office, read Cope his Miranda⁴ warnings and Cope voluntarily waived his constitutional rights After the exam, Baker informed Cope he had failed the polygraph exam Lieutenant Herring and Baker continued questioning him Cope gave his first confession at 2 25 p m Cope stated he awoke at 3 00 a m to use the bathroom, went into Child's room, and masturbated while she was sleeping Child woke up and said, "gross, daddy," which angered Cope, so he jumped on top of her and began swinging his fists at her head He slammed her head onto a video game on her bed and strangled her with both hands He also used the blanket to choke her Cope then used a broom handle both anally and vaginally on Child Before going back to bed, he deleted temporary internet files from his computer and threw away his dildo

At a bond hearing on December 1, 2001, Cope was approved for representation by a public defender Later, on December 2, 2001, he told the police he wanted to talk to them again On December 3, 2001, officers spoke with Cope again, and Cope told them his prior statements were incorrect In his second confession at 9 45 a m , Cope said he was asleep and had a dream about an old girlfriend that had aborted his child He got so angry that he jumped on her, beat her, and raped her with the broom He did not realize it was Child until he fell backwards and was jarred to his senses He then tried to throw away everything in the house that made him look guilty and he pulled up her pants He went back to bed and when he woke up, he hoped it was a dream After his second confession, Cope agreed to go back to his house with the police to reenact the crime on videotape Cope gave his third

³ The trial court severed the charges of unlawful neglect for the two younger children

⁴ Miranda v Arizona, 384 U S 436 (1966)

confession at 4 55 p m when they returned to the police department In the third confession, Cope confessed he had been going into Child's room since the end of October and "playing with her" by fingering her while she was asleep That night, when he went into her room, she was asleep on her stomach and he inserted his dildo inside her, waking her He then attacked and strangled her He cleaned up, closed her bedroom door, and went to bed

During Cope's third confession, Cope's appointed counsel arrived Captain Cabaniss of the Rock Hill Police Department testified he informed Cope an attorney was there to meet with him, but Cope replied he did not want to see the attorney Cope signed a statement to that effect

Cope presented an expert who testified he scored Cope's polygraph examination and Cope passed the examination Cope presented another expert, Dr Clay Nichols, who testified Child's injuries were not specifically consistent with a 300-pound man jumping on her and there was no indication a broom was used on Child in the assault Nichols also testified he did not see any signs of chronic sexual abuse Additionally, Cope presented a locksmith to testify the doors could be opened with either a credit card or driver's license or by picking the lock without showing signs of forced entry

The jury convicted Cope and this appeal follows

LAW/ANALYSIS

I EVIDENTIARY ISSUES

"In criminal cases, the appellate court sits to review errors of law only " State v Wilson, 345 S C 1, 5, 545 S E 2d 827, 829 (2001) "The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion " State v Clasby, Op No 26705 (S C Sup Ct filed August 17, 2009) (Shearouse Adv Sh No 37, at 29, 34) (citing State v Brazell, 325 S C 65, 78, 480 S E 2d 64, 72 (1997))

A Admissibility of Similar Crimes

Cope argues the trial court erred in refusing to admit evidence of similar crimes in the Rock Hill area allegedly perpetrated by Sanders, contending this evidence was probative in identifying Sanders as the sole perpetrator and in showing a common scheme pervaded both the other crimes and the matter at issue in this appeal. Cope argues he should at least have been able to introduce evidence of the other crimes without referring to Sanders as the perpetrator. Cope cites numerous jurisdictions and legal articles indicating when a defendant is attempting to introduce "other crimes" evidence, the court should apply a lower standard of similarity. We disagree.

The admissibility of "other crimes" evidence is governed in South Carolina by Rule 404(b) of the South Carolina Rules of Evidence, which provides "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE, see State v Lyle, 125 S C 406, 416, 118 S E 803, 807 (1923) (finding such evidence admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent)

To be admissible against a defendant in a criminal proceeding as evidence of identity, "the bad act must logically relate to the crime with which the defendant has been charged." State v Pagan, 369 S C 201, 211, 631 S E 2d 262, 267 (2006). In contrast, to admit evidence about other bad acts against an accused to show the existence of a common scheme or plan, "[a] close degree of similarity establishes the required connection between the two acts and no further 'connection' must be shown for admissibility." State v Wallace, Op No 26703 (S C Sup Ct filed August 17, 2009) (Shearouse Adv Sh No 37, at 18, 22-23)

Some jurisdictions lower the standard of similarity necessary for admission of evidence of "other crimes" when, as here, a defendant is

attempting to introduce the evidence See State v Garfole, 388 A 2d 587, 591 (N J 1978) (stating "a lower standard of degree of similarity of offenses may justly be required of a defendant using other-crimes evidence defensively than is exacted from the State"), see also United States v Stevens, 935 F 2d 1380, 1403 (3d Cir 1991) (applying a lower standard and quoting Garfole), United States v Cohen, 888 F 2d 770, 776 (11th Cir 1989) (finding standard for admission relaxed when the evidence is offered by a defendant) This is sometimes called the "Reverse 404(b) Rule " Jessica Broderick, Comment and Casenote, Reverse 404(b) Evidence Exploring Standards When Defendants Want to Introduce Other Bad Acts of Third Parties, 79 U Colo L Rev 587, 587 (2008) Even with a lower standard of similarity, the defendant must still show the other crimes are of a similar nature See Rivera v State, 561 So 2d 536, 539-40 (Fla 1990) (recognizing lower standard of admissibility but finding other crimes dissimilar enough to determine trial court did not abuse discretion in excluding evidence)

The State charged Sanders with numerous crimes occurring shortly after Child's death Cope proffered the testimony of four of Sanders' victims Victim 1 testified that on December 12, 2001, at about 11 30 p m , Sanders knocked at her apartment door and asked to use her telephone He pushed her door open, knocked her down, got on top of her, and kissed her Sanders then raped her, demanded money, and destroyed her telephone

Victim 2 testified that on December 16, 2001, Sanders came to her house at about 1 00 a m She had fallen asleep on her couch and when she woke, Sanders was standing over her She did not hear anyone come in the house and her dog did not bark When she screamed, Sanders put his hand over her mouth and pinned her under a rocking chair Sanders ran onto her second-floor patio and jumped off when her dog began barking and her daughter called for her

Victim 3 testified that on December 19, 2001, at about 7 30 p m , she had just come home when Sanders came through her front door and attacked her When she tried to crawl to her room, Sanders placed a plastic bag over her head When she removed the bag, Sanders put a rug over her head and as

she was trying to remove the rug, Sanders got on top of her and tried to remove her pants. She grabbed an ink pen from her pocket and stabbed Sanders in the leg. Sanders shoved Victim 3 into one of the bedrooms, closed the door, and left. At some point, he asked her for money.

Victim 4 testified that on January 12, 2002, at about midnight, she was in her room watching a movie when she heard a knock at her door. When Victim 4 opened the door, Sanders pushed the door in and shoved her into the bathroom. The fight continued in the kitchen where Sanders kicked and pushed Victim 4. Sanders also held Victim 4 in a choke hold and tried to get on top of her several times. While Victim 4 was on the floor, Sanders ran into her room and grabbed her purse. As he was trying to leave, Victim 4 grabbed a pan from the stove and hit Sanders with it. He dropped the purse and Victim 4 grabbed her Mace. She tried to spray him, but missed. She then saw a small screwdriver on the floor and swung it at him, hitting him at least once in the shoulder.

Mindful of our standard of review, we find no reversible error in the trial court's exclusion of this evidence. Although there are some similarities between the other crimes and Child's assault, there are also many differences. For instance, no other crime resulted in the death of the victim or involved a child. None of the proffered crimes included the brutality of the attack on Child such as anal penetration and assault with a foreign object. We therefore hold Cope has not shown a close degree of similarity between the other bad acts and the charged offenses, much less any logical relation between the assault on and murder of Child and the other incidents in the vicinity allegedly involving Sanders and other victims. Based on these holdings, we affirm the trial court's ruling that Sanders' other crimes are dissimilar to these facts and are therefore inadmissible under Lyle and Rule 404(b), even if reviewed under a lower standard because proffered by a defendant, to show either identity or the existence of a common scheme.

B Testimony of James Hill

Cope argues the trial court erred in excluding testimony from James Hill. We disagree.

Evidence is relevant if it tends to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence. Rule 401, SCRE. All relevant evidence is admissible. State v Douglas, 369 S C 424, 429-30, 632 S E 2d 845, 848 (2006). Relevant evidence may be excluded if the prejudicial effect of its admission substantially outweighs the probative value of the evidence. Rule 403, SCRE. The trial court has broad discretion in determining the relevancy of evidence and its decision to admit or exclude evidence will not be reversed on appeal absent an abuse of that discretion and a showing of prejudice. State v Gaster, 349 S C 545, 557, 564 S E 2d 87, 93 (2002).

Cope proffered the testimony of James Hill, who is serving a sentence for burglary. Hill testified he was in his cell in a segregation unit in prison near the end of 2002. Hill recognized Sanders' distinctive voice and overheard Sanders and another inmate laughing about how easy it was to get away with crimes. Sanders allegedly stated he was "going to get away with what he did to that little girl in Rock Hill." Sanders allegedly "went on to explicitly describe what he had done." Sanders remarked about oral and anal sodomy and smothering the child. Finally, Sanders "alluded to the fact that he had got in through a window in the house and that he had left through the same window." Sanders objected to the evidence as irrelevant. The court excluded the evidence as irrelevant because there were no identifying characteristics, noting the testimony did not specify time, place, or other circumstances.

We again look to our standard of review and determine the trial court did not abuse its discretion in excluding Hill's testimony. See State v Alexander, 303 S C 377, 380, 401 S E 2d 146, 148 (1991) (reiterating the standard of review of a trial judge's ruling on questions concerning the

relevancy of evidence and looking for guidance to other jurisdictions that have addressed the particular issue concerning relevancy), State v Larsen, 415 P 2d 685, 692 (Idaho 1966) (noting the potential of abuse from ruling "that a bare, out-of-court confession is admissible" and holding "that third-party confessions, made out of court, are admissible only when there is other substantial evidence which tends to show clearly that the declarant is in fact the person guilty of the crime for which the accused is on trial"), People v Cruz, 643 N E 2d 636, 650 (1994) (reciting the rule that "[a]n extrajudicial declaration not under oath, by the declarant, that he, and not the defendant on trial, committed the crime is inadmissible as hearsay, though the declaration is against the declarant's penal interest," but allowing an exception "where there are sufficient indicia of trustworthiness of such extrajudicial statements")

C Admission of "False Confessions" Expert Testimony

Cope argues the trial court erred in excluding testimony of his false confession expert about two cases of coerced internalized false confessions
We disagree

The admissibility of an expert's testimony is a matter within the trial court's sound discretion State v Douglas, 367 S C 498, 507, 626 S E 2d 59, 63 (Ct App 2006) The trial court's decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion Id at 507, 626 S E 2d at 64 "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support " Id To warrant reversal, any error by the trial court in admitting or excluding expert testimony must result in prejudice Id at 508, 626 S E 2d at 64

Rule 702 of the South Carolina Rules of Evidence governs the admissibility of testimony by experts, providing

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness

qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise

Rule 702, SCRE

The precise issue of prohibiting an expert from relating case studies to the jury was raised in State v Myers, 359 S C 40, 596 S E 2d 488 (2004) In Myers, the expert⁵ was qualified as an expert in social psychology and testified about the psychology of confessions and false or coerced confessions Id at 50, 596 S E 2d at 493 The trial court in Myers prohibited the expert from testifying about the facts of particular cases from Connecticut and Indiana in which people falsely confessed to crimes and were later exonerated Id In affirming the trial court, our supreme court found the expert related some facts about the specific cases but did not use names Id at 51, 596 S E 2d at 494 Furthermore, the court found no prejudice in part because the expert "was able to testify at length about false and coerced confessions " Id Therefore, the court found any error in excluding specific case studies from the expert's testimony was harmless as the evidence was merely cumulative to the expert's other testimony Id

This issue was also addressed in State v Pittman, 373 S C 527, 647 S E 2d 144 (2007) In Pittman, the trial court allowed the defendant to present "a copious amount" of evidence regarding the antidepressant drugs Selective Serotonin Reuptake Inhibitors (SSRIs) 373 S C at 578, 647 S E 2d at 170-71 The defendant was permitted to introduce evidence that SSRIs could cause mania and other conditions, and to present anecdotal testimony regarding the antidepressant Paxil by a user of Paxil Id The trial court excluded anecdotal evidence regarding the antidepressant Zoloft⁶ Id

In affirming the trial court, our supreme court stated

⁵ Dr Kassir, the expert in this case, was also the expert in Myers

⁶ Pittman changed antidepressants from Paxil to Zoloft shortly before committing a double homicide Id at 543, 647 S E 2d at 152

[T]he court was concerned about the reliability of the anecdotal reports compared with the reliability of reports from clinical studies done in a controlled environment. The court was also concerned with the trustworthiness of the sources of the anecdotal testimony, as well as the ability of experts to establish the causal link between the Zoloft and the incidents. Despite these concerns, the trial court permitted the above expert testimony regarding Zoloft obtained from reliable methods, consistent with the South Carolina Rules of Evidence.

The record shows a conscientious decision on the part of the trial court to not admit evidence with questionable reliability where there was an abundance of other admissible evidence found to be reliable. Additionally, the trial court correctly found that the prejudicial effects outweighed the probative value of the anecdotal evidence.

Id

In this case, Cope presented an expert, Dr. Saul Kassin, who testified regarding false confessions. Dr. Kassin testified as to the interrogation techniques used by the police in obtaining false confessions and the techniques used in this case: (1) false evidence – the officers telling Cope he failed the polygraph, (2) positive confrontation – the officers claiming they knew Cope did it, (3) the officers' refusals to accept Cope's denials of guilt even though he agreed to a polygraph and waived an attorney, (4) minimization – the officers suggesting the crime was accidental, and (5) interrogation while Cope was traumatized and tired.

Dr. Kassin proffered testimony about Peter Reilly, who falsely confessed to murdering and sexually assaulting his mother, and Gary Gauger,

who falsely confessed to murdering his parents. In both of these cases, the defendants denied involvement, were administered polygraphs and told they failed, believed they must have somehow committed the crimes, and confessed. The trial court refused to allow Dr. Kassin to testify regarding specific cases of false confession unless they were "on all fours" with this case and ultimately refused to allow the testimony. The trial court in this case conscientiously considered the proffered anecdotal evidence before excluding this testimony. The theories underlying the study of coerced internalized false confessions were exhaustively presented to the jury. Dr. Kassin explained the techniques used by interrogators that can lead to false confessions and informed the jury that there were "innumerable actual cases" of coerced internalized false confessions. Therefore, we find the exclusion of the testimony regarding the specific details of the Reilly and Gauger cases does not constitute reversible error.

D Admissibility of Cope's Statements

Cope argues the trial court erred in denying his motion to suppress his statements because he was arrested without probable cause. We disagree.

"The fundamental question in determining the lawfulness of an arrest is whether probable cause existed to make the arrest." State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006). "Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested." Id. A magistrate's determination of probable cause should be paid great deference by the reviewing court. State v. Sullivan, 267 S.C. 610, 617, 230 S.E.2d 621, 624 (1976) (reviewing magistrate's finding of probable cause to issue search warrant).

Whether probable cause exists depends upon the totality of the circumstances. State v. George, 323 S.C. 496, 509, 476 S.E.2d 903, 911 (1996) (finding probable cause for warrantless arrest). In assessing probable cause, the court looks to whether the facts and circumstances are sufficient

for a reasonable person to believe that a crime has been committed by the person to be arrested Id

Judge McNeely testified she issued the warrant based on the fact that Cope was the only adult home at the time of the murder and there was a lack of evidence of forced entry. Based on the totality of the circumstances, we agree with the trial court there was probable cause to arrest Cope.⁷

Cope next argues the statements he made after the bond hearing on December 1st should have been suppressed because he applied for and was found eligible for representation by a public defender.⁸

In State v Council, our supreme court stated

The Sixth Amendment right to counsel attaches when adversarial judicial proceedings have been initiated and at all critical stages. The Sixth Amendment right attaches only "post-indictment," at least in the questioning/statement setting. When the Sixth Amendment right to counsel has attached, if police initiate interrogation after a defendant's assertion, at an arraignment or other similar proceedings, of his right to counsel, any waiver of the defendant's right to counsel for that police initiated interrogation is invalid **unless the defendant initiates the contact himself**

335 S C 1, 15-16, 515 S E 2d 508, 515 (1999) (internal citations omitted) (emphasis added). Furthermore, a waiver is knowingly and intelligently

⁷ We also note Cope was served with the warrants for unlawful neglect toward a minor child the morning of November 30th, prior to any of his confessions.

⁸ Only Cope's first confession, made November 30th, was made prior to the bond hearing.

II SEVERANCE

Cope argues the trial court erred in denying his motion for severance. Cope complains the evidence of Sanders' other crimes could be admitted as evidence of third-party guilt in a separate trial. We disagree.

A motion for a severance and separate trial is addressed to the sound discretion of the trial judge and the ruling will not be disturbed on appeal absent a showing of an abuse of discretion. State v Nichols, 325 S C 111, 122, 481 S E 2d 118, 124 (1997). A defendant who alleges he was improperly tried jointly must show prejudice before the appellate court will reverse his conviction. State v Dennis, 337 S C 275, 281-83, 523 S E 2d 173, 176 (1999).

Criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right. Id., State v Kelsey, 331 S C 50, 73, 502 S E 2d 63, 75 (1998). This is true even when a defendant's severance motion is based upon the likelihood he and a codefendant will present mutually antagonistic defenses such as accusing each other of committing the crime. State v Leonard, 287 S C 462, 473, 339 S E 2d 159, 165 (Ct App 1986), reversed on other grounds, 292 S C 133, 355 S E 2d 270 (1987).

Admissibility of evidence under the third-party guilt doctrine is governed by the rule in State v Gregory, 198 S C 98, 16 S E 2d 532 (1941). The rule states

[E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence, evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. [B]efore such

made where a defendant waives his right to counsel after having been apprised of his Miranda rights State v Howard, 296 S C 481, 494, 374 S E 2d 284, 291 (1988) (citing Patterson v Illinois, 487 U S 285, 296-97 (1988))

Cope argues the bond hearing triggered his right to counsel. We need not determine if the bond hearing triggered Cope's right to counsel because we find Cope waived his right to counsel prior to making his second and third statements.⁹ Cope was charged with murder in the early morning hours of November 30th. At approximately 9:00 a.m., Cope was served with the child neglect warrants and then taken to the polygraph examination where he was read his Miranda warnings. Between 9:30 and 10:00 a.m., Cope was transported to the Moss Justice Center for his polygraph examination. Baker read Cope his Miranda warnings and Cope voluntarily waived his constitutional rights. The polygraph examination began at 11:15 a.m. After the examination, Baker informed Cope he had failed. Lieutenant Herring and Baker continued questioning Cope. Cope gave his first confession at 2:25 p.m.

On Sunday, December 2, Cope told the Rock Hill police he wanted to talk to the investigating officers again. Officer Herring told the Rock Hill dispatcher to inform Cope they would speak to him the following day. On December 3, Cope made his second and third confessions and the video reenactment.

We find Cope knowingly and intelligently waived his right to counsel by initiating the contact with the investigating officers prior to his second and third confessions and after receiving Miranda warnings. Accordingly, we find no error by the trial court in denying Cope's motion to suppress his confessions.

⁹ See Rothgery v Gillespie County, Tex., 128 S Ct 2578 (2008) (comprehensively discussing the attachment of the Sixth Amendment right to counsel)

testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party

Gregory, 198 S C at 104-05, 16 S E 2d at 534-35 (internal citations omitted) Evidence of third-party guilt may include (1) facts that are inconsistent with the defendant's guilt, and (2) evidence raising a reasonable inference as to the accused's innocence State v Rice, 375 S C at 317, 652 S E 2d at 416 See also Holmes v South Carolina, 547 U S 319, 331 (2006) (holding that to prohibit, on the strength of the prosecution's case, evidence of third-party guilt proffered by an accused violated the right of the accused to present a complete defense)

Cope sought to introduce evidence of Sanders' other crimes in a separate trial to prove Sanders' guilt and his ability to enter victims' homes without signs of forced entry The jury in this case was aware Sanders was involved in Child's murder due to the presence of his DNA The jury was made aware of evidence that the Cope house could have been entered without signs of forced entry as Cope presented testimony from a locksmith that the lock could have been picked or a credit card could have opened the door lock without leaving signs of forced entry The evidence of Cope's involvement, such as his confessions and the evidence of the lack of forced entry, would still have been admitted in a separate trial We find the introduction of the evidence of Sanders' other crimes would not have been inconsistent with Cope's guilt, even if offered in a separate trial, and would not have raised an inference as to Cope's innocence Accordingly, we find no error by the trial court in denying Cope's motion for severance

III CONSPIRACY

Cope argues the trial court erred in failing to direct a verdict on the conspiracy charge based on the lack of evidence supporting an agreement between Sanders and Cope We disagree

"In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury " Kelsey, 331 S C at 62, 502 S E 2d at 69 (1998) "In ruling on a motion for a directed verdict, the trial court is concerned with the existence of evidence, not its weight " Id In addressing the standard of review where the State relies exclusively on circumstantial evidence and a motion for directed verdict is made, our supreme court has stated

[T]he circuit court is concerned with the existence or nonexistence of evidence, not with its weight The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty 'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof However, **a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis**

State v Cherry, 361 S C 588, 594, 606 S E 2d 475, 478 (2004) (emphasis in original) (internal citations omitted)

Criminal conspiracy is defined as "a combination between two or more persons for the purpose of accomplishing an unlawful object or a lawful object by unlawful means " S C Code Ann § 16-17-410 (2003) "The essence of a conspiracy is the agreement " State v Buckmon, 347 S C 316, 323, 555 S E 2d 402, 405 (2001) "Often proof of conspiracy is necessarily by circumstantial evidence alone " State v Miller, 223 S C 128, 133, 74 S E 2d 582, 585 (1953) Nevertheless, "the law calls for an objective, rather than subjective, test in determining the existence of a conspiracy " State v Crocker, 366 S C 394, 406, 621 S E 2d 890, 897 (Ct App 2005) Moreover, in viewing the sufficiency of the evidence to support a charge of conspiracy,

an appellate court "must exercise caution to ensure the proof is not obtained 'by piling inference upon inference' " State v Gunn, 313 S C 124, 134, 437 S E 2d 75, 81 (1993) (quoting Direct Sales Co v U S, 319 U S 703, 711(1943))

"The gravamen of the offense of conspiracy is the agreement or combination " Gunn, 313 S C at 134, 437 S E 2d at 80, see also State v Condrey, 349 S C 184, 193, 562 S E 2d 320, 324 (Ct App 2002) (stating the crime of conspiracy "consists of the agreement or mutual understanding") Recognition of this reality, however, does not compromise the standard that a trial court must use in deciding a directed verdict motion when the evidence against an accused is entirely circumstantial, namely, that the case must be submitted to the jury only "if there is substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced " State v Arnold, 361 S C 386, 390, 605 S E 2d 529, 531 (2004)

We recognize that in the present case there was no direct evidence of an agreement between Cope and Sanders. The State's evidence of a conspiracy was entirely circumstantial, including (1) forensic evidence that the bite mark where Sanders' DNA was found was inflicted within the same two-hour time frame as the injuries that Cope confessed to inflicting, (2) Sister's testimony that she and Child locked the doors before they went to bed and testimony that there was no evidence of forced entry, (3) the deduction from the forensic evidence that Sanders was present in a secure private home after the residents had retired for the night, (4) testimony that the house was full of debris and passage inside, particularly at night, would have been difficult for someone not familiar with the residence, (5) statements by Cope revealing knowledge about the factors of the assault and injuries to Child consistent with forensic evidence, (6) evidence that Cope delayed calling the police after he claimed to have fatally strangled and choked Child, and (7) evidence that Cope staged the scene to make Child's death appear to have been an accident

Nevertheless, in the present case, the DNA evidence on Child's body, along with Cope's admissions about his interactions with Child shortly before she died, place Cope and Sanders together at the time of the assault on Child and her resulting death. Likewise, the testimony regarding lack of forced entry and the cluttered condition of the home constitute evidence that Sanders, who had no known connection with Cope's family, received assistance to navigate his way to Child's bedroom. Finally, Cope's staging of the crime scene after Child died is evidence that a cover-up had begun before Cope called the police to his home on the pretext that Child had accidentally strangled herself, notwithstanding compelling forensic evidence that Sanders was present and actively participating during the same time period in which her death was determined to have occurred. Although each of these factors alone may have supported only a mere suspicion of a conspiracy between Cope and Sanders, it is our view that when considered together, they yield the requisite level of proof of "acts, declarations, or specific conduct" by the alleged conspirators to withstand a directed verdict motion on this charge. See State v Hernandez, 382 S C 620, 625, 677 S E 2d 603, 605 (2009) (reversing a conviction for trafficking and noting "the State failed to present any evidence such as acts, declarations, or specific conduct to support [an] inference" that the petitioners had knowledge that drugs were being transported)

CONCLUSION

We affirm the trial court's evidentiary rulings and the denial of Cope's motion for severance. We further hold the trial court properly declined to direct a verdict of acquittal for Cope on the issue of criminal conspiracy. Cope's convictions are therefore

AFFIRMED

SHORT and PIEPER, JJ , concur

15697

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
Honorable John C Hayes, III, Circuit Court Judge

Case No 2004-GS-46-2614
2004-GS-46-3232,200,3233,3234,196-199,

The State,

Respondent,

versus

Billy Wayne Cope,

~~James Edward Sanders~~

Appellant

RECORD ON APPEAL

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ATTORNEYS FOR RESPONDENT

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¹ This Record hereby incorporates the contents of James Edward Sanders' Record on Appeal, including the case exhibits being transported from the York County Clerk's file

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WITNESSES

RHPD/Blackwelder

AMENDED
DOCKET NO 2002-GS-46-3232

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

July 22, Term 2004

ARREST WARRANT NUMBER

H023255

THE STATE

vs

Billy Wayne Cope

ACTION OF GRAND JURY

TRUE BILL

Mary Queen
Foreperson of Grand Jury
7/22/04

Indictment for

VERDICT

MURDER

SC Code 16-3-10
CDR Code 0116

GUILTY
Edward O. O'Neil
Foreperson of Petit Jury
Date *SEPTEMBER 22, 2004*

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)


INDICTMENT

At a Court of General Sessions, convened on July 22, 2004 the Grand Jurors of York County present upon their oath

MURDER

Billy Wayne Cope did in York County, South Carolina on or about November 29, 2001, with malice aforethought, kill Amanda Cope by means of battering and/or strangulation and Amanda Cope died as a result thereof The murder occurred in the City of Rock Hill, all in violation of Section 16-3-10, South Carolina Code of Laws, (1976, as amended)

Against the peace and dignity of the State, and contrary to the statute in such case made and provided


ASSISTANT DEPUTY SOLICITOR

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury

WITNESSES

RHPD/Blackwelder

The State of South Carolina

County of York

Defendant

COURT OF GENERAL SESSIONS

November 14, Term 2002

I hereby appear in my own proper person and plead guilty to the within indictment or to

ARREST WARRANT NUMBER

H023258

Defendant

THE STATE

VS

Witness

CCC PLS AND GS

ACTION OF GRAND JURY

~~FILED~~

Billy Wayne Cope

J. Lindsay Brown
Foreperson of Grand Jury

11-14-02

VERDICT

Guilty

Indictment for

CRIMINAL SEXUAL CONDUCT
FIRST DEGREE

Edward Penick
Foreperson of Petit Jury

Date *SEPTEMBER 22, 2004*

SC Code § 16-3-0652
CDR Code 0160

1.1

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

INDICTMENT

1

At a Court of General Sessions, convened on November 14, 2002 the Grand Jurors of York County present upon their oath

CRIMINAL SEXUAL CONDUCT, FIRST DEGREE

Billy Wayne Cope did in York County on or about November 29, 2001, commit the crime of Criminal Sexual Conduct in the First Degree Billy Wayne Cope committed a sexual battery with his daughter, Amanda Cope, with one or more of the following aggravating circumstances 1 Billy Wayne Cope used aggravated force to accomplish the sexual battery 2 Billy Wayne Cope forcibly confined Amanda Cope to cause her to submit to the sexual battery ^{As of} Billy Wayne Cope penetrated Amanda Cope's vagina with an unknown foreign object, all in violation of Section 16-3-652, *Code of Laws of South Carolina*, (1976), as amended

Against the peace and dignity of the State, and contrary to the statute in such case made and provided



SOLICITOR

--

After being fully advised as to my legal rights I hereby waive presentment to the Grand Jury

WITNESSES

RF PD/Blackwelder

The State of South Carolina
County of York

Defendant

COURT OF GENERAL SESSIONS

November 14, Term 2002

I hereby appear in my own proper person and ple guilty to the within indictment or to

ARREST WARRANT NUMBER

H023262

Defendant

THE STATE

vs

Witness

C C C P L S A N D G S

ACTION OF GRAND JURY

TRUE BILL

Billy Wayne Cope

D. Frazier Brown
Foreperson of Grand Jury
11-14-02

VERDICT

Indictment for

GUILTY

CRIMINAL SEXUAL CONDUCT
FIRST DEGREE

Ernest O. Anderson
Foreperson of Petit Jury
Date SEPTEMBER 22, 2004

SC Code § 16-3-0652
CDR Code 0160

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

INDICTMENT

At a Court of General Sessions convened on November 14, 2002 the Grand Jurors of York County present upon their oath

CRIMINAL SEXUAL CONDUCT, FIRST DEGREE

Billy Wayne Cope did in York County on or about November 29, 2001, commit the crime of Criminal Sexual Conduct in the First Degree Billy Wayne Cope committed a sexual battery with his daughter, Amanda Cope, with one or more of the following aggravating circumstances 1 Billy Wayne Cope used aggravated force to accomplish the sexual battery 2 Billy Wayne Cope forcibly confined Amanda Cope to cause her to submit to the sexual battery ^{He is} Billy Wayne Cope penetrated Amanda Cope's anus with an unknown foreign object, all in violation of Section 16-3-652, *Code of Laws of South Carolina*, (1976), as amended

Against the peace and dignity of the State, and contrary to the statute in such case made and provided



SOLICITOR

The State of South Carolina
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C Hayes, III, Circuit Court Judge

State of South Carolina,

Respondent,

V

Billy Wayne Cope,

Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that a copy of Appellant's Record on Appeal was served on today's date to the following person Donald J Zelenka, Sr Assistant Attorney General, Post Office Box 11549, Columbia, S C 29211-1549

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This 13th day of March, 2007

The State of South Carolina
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C Hayes, III, Circuit Court Judge

State of South Carolina,

Respondent,

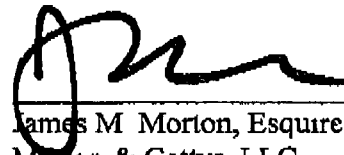
V

Billy Wayne Cope,

Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that a copy of Appellant's Record on Appeal was served on today's date to the following person Donald J Zelenka, Sr Assistant Attorney General, Post Office Box 11549, Columbia, S C 29211-1549



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This 13th day of March 2007