STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JON WYNN JARRARD, SR.,

APPELLANT

INITIAL BRIEF OF APPELLANT

CRAIG R. STANLEY
1824 Bull Street
Columbia, SC 29201
803-761-7083

ROBERT M. DUDEK
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Rules

STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err when it allowed the State to proceed under §16-3655(A)(2) for the sole purpose of circumventing the traditional rules of evidence and to use the Defendants prior conviction, as propensity evidence in violation of due process?

STATEMENT OF THE CASE

On November 18, 2010, the Horry County Grand Jury indicted Appellant for criminal sexual conduct (CSC) with a minor, pursuant to §16-3-655(A)(1) , docket number 2010-GS-26-04574.

On January 27, 2011, Defendant was indicted for the offense of lewd act on a minor child, pursuant to §16-15-140, docket number 2011-GS-26-00365.

On April 28, 2011, the State re-indicted Appellant, based upon the same incident alleged in the first indictment, for the offense of CSC with a minor, pursuant to §16-3-655(A)(2), docket number 2011-GS-26-01335.

On June 11, 2012, Appellant proceed to jury trial before the Honorable Larry B. Hyman relating to lewd act on a minor child charge, and CSC with a minor child, pursuant to §16-3-655(A)(2). Tr. 1. Attorney T. Kirk Truslow represented Appellant at trial. Attorney Candice A. Lively prosecuted the case on behalf of the state. On June 13, 2013 the jury returned verdicts of guilty. On the same date, Judge Hyman sentenced Appellant to serve (1) fifteen years imprisonment for the CSC with a minor conviction and (2) fifteen years imprisonment for the lewd act upon a child conviction. The sentences to run concurrently.

This appeal follows.

STATEMENT OF FACTS

Appellant was charged with having committed a lewd act and criminal sexual conduct upon his eight year old granddaughter, Minor Child. Tr.108 l. 12. During the week of May17th, 2010, Pamela Gause, Minor Child's baby sitter, discovered that Minor Child and Gause's six-year old daughter were in bed under the covers touching each other's vaginas. Tr. 80, l. 23-; 81, l.1. Pamela Gause called Rebecca Ann Jarrard (hereinafter "Rebecca Ann"), Minor Child's mother, and proceeded to question Minor Child. When Gause asked if anyone had touched her before, Minor Child first remained quiet for a time. Tr. p 82, l. 13-17. Upon continued questioning, Minor Child remained silent but later identified her grandpa as someone who had touched her in the past. Tr. p.162 l. 6.

The following day Rebecca Ann took Minor Child to the police station in Ayor, South Carolina where Minor Child gave a statement. Tr . p.105 l. 12-17. A week to two weeks later, Detective Allen Large of the Horry County Police Department interviewed Minor Child. *Id.* Approximately two weeks later, Minor Child was taken to the Children's Recovery Services where she was interviewed and examined by Dr. Carol Rather. Tr. p. 105 l. 25. At trial, Dr. Carol Rather testified that she found no physical evidence of abuse. Tr. p 234 l. 6.

After the opening of the investigation, Rebecca Ann made multiple statements stating that Minor Child recanted her initial accusations and asked for the charges to be dropped. Tr. p 110-12; State's Exhibits 1 & 2. On August 8th, 2010 Rebecca Ann dropped off a notarized statement stating that Minor Child's story had changed, accompanied by a video recording of Minor Child recanting her story to the Horry County Solicitors Office. *Id.;*. State's Exhibit 2. Later on August 27th, 2010, Rebecca Ann went to the Horry County Solicitors Office and signed

an affidavit that stated that what Minor Child had originally told police and investigators was false and that she wished that the charges would be dropped. Tr. p. 131 l. 23 – p. 132 l. 15. At trial, Rebecca Ann disclaimed both of those statements saying that she felt pressure from her mother and brother to have Minor Child's story changed. Tr. p. 113 l. 7-25.

Prior to trial, Appellant moved on a number of grounds to have any reference to his 1997 prior conviction of lewd act on a minor barred or suppressed as evidence in the case. Pretrial Motion April 13th, 2012 (hereinafter "PTM") p. 3-10. This objection was renewed at trial. Tr. p 276 l. 22-25. A redacted version of Appellant's sentencing sheet from his prior conviction was introduced. Tr. p. 277 lines 3-4, State's Exhibit 11. In the Appellant's redacted prior conviction, the entire section of "Other conditions" was blacked out in a non-uniform manner. See State's Exhibit 11. In total the jury deliberated for approximately one hour before convicting Appellant. Tr. p. 347-354.

ARGUMENT

I. Did the trial court err when it allowed the State to proceed under 16-3-655(A)(2) for the sole purpose of circumventing the traditional rules of evidence and to use the Defendants prior conviction, as propensity evidence in violation of due process?

The most fundamental consideration must be due process. A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice. *State v. Hornsby*, 326 S.C. 121, 484 S.E.2d 869 (1997). The court erred when it allowed the State to proceed under 16-3-655(A)(2), allowing the introduction of Appellants' remote 1997 conviction. This conviction was not relevant to his current charge except to unduly prejudice the jury in their determination of the Appellant's guilt. Prior to trial, Appellant moved on a number of grounds to have any reference to Appellant's prior conviction to be barred or suppressed including under the constitutional grounds that due process has been violated and that the conviction would be inadmissible under the traditional rules of evidence. PTM p.3-11, Tr. p 276 l. 22-25.

Under S.C. Code §16-3-655(A) a person is guilty of CSC with a minor first degree if:

> (1) the actor engages in sexual battery with a victim who is less than eleven years of age; or
> (2) the actor engages in a sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or nolo contendere to...an offense listed in Section 23-3-430(C)...

Appellant was initially charged with CSC with a minor under subsection (A)(1) above as the accuser in this case was eight (8) years old at the time of the incident. This indictment was nole prossed after the State received a conviction in this case. Subsequently, after the Appellant obtained a new attorney and exercised his constitutional right to a jury trial, the State indicted the

Appellant to subsection (A)(2) of the statute making the Appellant's prior conviction a required statutory element of the offense. The trial court allowed evidence of Appellant's prior conviction through the introduction of a redacted sentencing sheet from his 1997 Lewd Act on a Minor plea. Tr. p. 277 lines 3-4, State's Exhibit 11. The Court did provide a limiting instruction involving the redaction, but did not conduct an on the record balancing test required by SCRE 403. Tr. 281, l. 5-18.

Due process under the Fourteenth Amendment of the United States Constitution guarantees a defendant the fundamental right to a fair trial. *Estelle v.* Williams, 425 U.S. 501, 96 S.Ct. 1691 (1976); *Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444 (1968); *Chambers v.* Mississippi 410 U.S. 673, 106 S.Ct. 1431 (1986). Article I §3 of the South Carolina Constitution contains our state counterpart to the due process clause. Our courts have likewise recognized the fundamental right to a fair trial. *State v. Kennedy*, 272 S.C. 231, 250 S.E.2d 338 (1978). What defines the parameter of a fair trial is generally understood to be our rules of evidence and case law precedent. The relationship between the United States Constitution and South Carolina Constitution is that the "[s]tate courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution." *State v. Easler,* 327 S.C. 121, 131 n. 13, 489 S.E.2d 617, 625 n. 13 (1997); *see also State v. Forrester*, 343 S.C. 637, 541 S.E.2d 837 (S.C. 2001) *State v. Austin,* 306 S.C. 9, 409 S.E.2d 811 (Ct.App.1991). This relationship is often described as recognition that the federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling. *See Segura v. Texas,* 826 S.W.2d 178,(Tex.App.1992).

The United States Supreme Court has not reached, and instead has expressly reserved, the question of whether a state law admitting propensity evidence violates the Federal Due Process Clause. *Estelle v. McGuire,* 502 U.S. 62, 75 n. 5, 112 S.Ct. 475, 484 n. 5 (1991).In *Spencer v. Texas,* the United States Supreme Court assessed the constitutionality of a Texas procedure where the State could introduce proof of prior offenses in indictments and could introduce proof of prior convictions so long as the court issued a limiting instruction that these prior convictions were not to be taken into account to access the guilt or innocence of the

Defendant under the current charge. *Spencer v. Texas*, 385 U.S. 554, 87 S. Ct. 648 (1967). In a 5-4 decision, the Court concluded that due process did not require a two-stage jury trial, where the jury would determine guilt as to the initial matter and later determine the penalty in light of the defendant's prior conviction. *Id.* at 567-69.The majority grounded its approach in an extremely deferential approach to the state's criminal procedure. *Id.* at 564. However, the majority did note that this evidence would likely have been admissible under a common exception to the introduction of propensity evidence. *Id.* at 560.

In a partial dissent, Chief Justice Warren challenged the majority's due process conclusions stating:

> While this Court has never held that the use of prior convictions to show nothing more than a disposition to commit crime would violate the Due Process Clause of the Fourteenth Amendment, our decisions exercising supervisory power over criminal trials in federal courts, as well as decisions by courts of appeals and of state courts, suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause.
>
> *Id. at 572-74* (Warren, C.J., concurring in part and dissenting in part)(footnotes omitted).

Like the majority, Chief Justice Warren agreed that the admission of propensity evidence is not absolutely barred by due process. *Id.* at 576. Propensity evidence has been traditionally admitted for non-propensity purposes, like for impeachment or to counter defense evidence of the defendant's good character. *Id.* When evidence is admitted for non-propensity purposes, a defendants due process rights can be protected by balancing the probative value of the evidence against the danger of unfair prejudice. *Id.* at 577-578. However, when evidence is introduced for pure propensity purposes, Chief Justice Warren concluded that its admission would necessarily violate the Due Process Clause and require categorical exclusion. *Id.* at 578. Chief Justice Warren reasoned that the admission of this evidence would threaten the foundation of three

fundamental due process principles: the presumption of innocence, proof beyond a reasonable doubt, and prohibition against status crimes. *See* On a Collision Course: Pure Propensity Evidence and Due Process in Alaska, Alaska Law Review, Dropkin, D and McComas, J. 2001 at 193-196.

In *Spencer,* the Chief Justice observed "[e]vidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged." *Spencer* at 575. The presumption of innocence is a core component of due process. *Estelle v. Williams*, 425 U.S. 501, 503 (1976). The use of pure propensity evidence undermines the jury's conceptual ability to meaningfully presume the innocence of the accused and predisposes the mind of juror to believe the accused is guilty. It "compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it." *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), quoting *Com. v. Jackson*, 132 Mass. 16; 44 Am. Rep. 299 note; 8 R. C. L. 198, § 194.

The admission of prior convictions also invariably lowers the states burden of persuasion. Chief Justice Warren recognized "the prejudicial effect of prior convictions evidence has traditionally been related to the requirement of our criminal law that the Sate prove beyond a reasonable doubt the commission of a specific criminal act." *Spencer* at 575.

Lastly, Warren was concerned that "A jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justified because the accused is a 'bad man,' with regard to his guilty of the crime currently charged." *Spencer* at 575. An accused cannot be found guilty because of his criminal status.

In other cases United States Supreme Court has been concerned that the admission of propensity evidence raises questions of fair play:

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt.... The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.
>
> *Michelson v. United States,* 335 U.S. 469, 475-76, 69 S.Ct. 213, 218, (1948).

Similarly, in Old Chief, the Supreme Court held a trial court abused its discretion by admitting the name and factual circumstances of a previous conviction, even though a prior felony conviction was an element of the crime charged. *Old Chief v. United States,* 519 U.S. 172, 191, 117 S.Ct. 644, 655(1997). The defendant was charged with being a felon in possession of a firearm. *Id.* At trial the defendant offered to stipulate the fact that he had suffered a prior conviction making him a prohibited possessor. *Id.* The reason defendant wished to stipulate to his conviction was to preserve his right to be convicted beyond a reasonable doubt on the charge that he was in front of the court for, and moved that any evidence of his prior conviction would be unfairly prejudicial under FRE 403. *Id.* The court, citing *Michelson,* held the evidence was unfairly prejudicial, explaining, " [t]here is, accordingly, no question that propensity would be an ' improper basis' for conviction." *Id.* at181-82. The Court explained that the term "unfair prejudice" in the context of a criminal case "speaks to the capacity of some concededly relevant evidence to lure the fact- finder into declaring guilt on the grounds different from proof specific to the offense charged." *Id.* at 180. The majority explained that the prosecution could not introduce propensity evidence as it "generaliz(es) a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged

(or worse calling for preventive conviction even if he should happen to be innocent momentarily)." *Id.* at 180-181. While not explicitly rooting analysis in due process analysis, it is important to note that FRE 403 has been cited as the means for the courts to assure due process. *See, e.g., United States v. Castillo,* 140 F.3d 874, 883 (10th Cir.1998)("[A]pplication of Rule 403 to Rule 414 evidence eliminates the due process concerns posed by Rule 414.")

Historically, courts have wanted a person to be tried for their acts, not for their bad character. This approach has its roots in Anglo-American jurisprudence prior to the Revolutionary War. See *Hampden's Trial* 9 Cob. St. Tr. 1053 (K.B. 1684), *Harrison's Trial* 12 How, St. Tr. 834 (old Bailey 1692). In 1692, Lord Chief Justice Holt rejected the solicitors admission of propensity evidence in *Harrison's Trial* stating, "Hold, what are you doing now? Are you going to arraign his whole life? Away, away, that ought to not to be; that is nothing to the matter." 12 How, St. Tr. 834 (old Bailey 1692). The leading case exemplifying American common law in this area is People v. Molineux where the New York Court of Appeals developed a framework for the admissibility of uncharged misconduct evidence. *People v. Molineux,* 168 N.Y. 264, 61 N.E. 286 (NY 1901). This case has been cited with approval in almost every state in the union and almost every federal circuit. *See Lyle* 118 S.E. 803 at 808. Molineux was accused of sending a medicine bottle containing the poison cyanide of mercury to a rival. The rival's security took the mislabeled poison and died within twenty four hours. At trial, the government introduced evidence that Molineux poisoned a different rival in a similar fashion. Molineux was found guilty and sentenced him to death.

In reversing the trial court, The Molineux court first noted "[t]he general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not allege in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the charged." *Id.* at 293. The court also found that if there was a substantial question of motive, defendants identify or intent, the possibility of the defendant's participation in a general criminal plan or scheme to commit similar crimes, the prosecution could offer special prior acts of the defendant, provided the prejudicial value of the evidence did not outweigh its probative value. *Id.* at 302.

Other federal and state courts have also addressed the admission of these prior bad acts evidence. In 1995, Congress adopted Federal Rules of Evidence Rules 413 and Rule 414 which apply to sexual assault and child molestation cases, respectively, and permits evidence of the defendant's commission of other offenses of sexual assault and child molestation. Fed.R.Evid. 413 and 414.While, the United States Supreme Court has not addressed the constitutionality of these rules (see *Estelle v. McGuire,* 502 U.S. 62, 75 n. 5, 112 S.Ct. 475, 484 n. 5 (1991)) federal courts have generally upheld the admission of evidence under Rules 413 and 414. *See, e.g., United States v. Castillo,* 140 F.3d 874, 881-83 (10th Cir.1998). *United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir.1998). In both Castillo and Enjay, the courts had reservations about the rule but held admitting prior sexual abuse does not violate due process on its face because of the safeguard of Federal Rule of Evidence 403, which directs the court to exclude the evidence if it "concludes the probative value of the similar crimes evidence is outweighed by the risk of unfair prejudice." Enjady, 134 F.3d at 1433. In Castillo, the Tenth Circuit held that when evidence is "so prejudicial that it violates the defendant's fundamental right to a fair trial "[a]pplication of Rule 403 . should always result in the exclusion of [such] evidence." Castillo, 140 F.3d at 883. Similarly, the Ninth Circuit held in United States v. LeMay, determined the admission of the defendant's other instances of molestation did not violate his due process rights. *United States v. LeMay*, 260 F.3d 1018 (9th Cir.2001)260 F.3d at 1026-27. In holding Rule 414 does not violate the Due Process Clause of the Constitution, the court stated, "[a]s long as the protections of Rule 403 remain in place to ensure that potentially devastating evidence of little probative value will not reach the jury, the right to a fair trial remains adequately safeguarded." *Id.* at 1026.

State courts have also addressed the issue. In State v. Cox, the Iowa Supreme Court held that the admission of prior bad acts evidence involving a different victim in a sexual assault case when admitted solely for the purpose of demonstrating propensity was a violation of the due process clause of Iowa Constitution. *State v.* Cox, 781 N.W. 2d 757 (Iowa 2010). The Iowa Legislature, like the National Congress in FRE 413 and 413, had enacted a provision in their rules of evidence which provided:

> In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

The Iowa Supreme Court narrowed a previous decision holding that previous incidents involving the same victim may be relevant to show the passions and nature of the relationship between the accused and the victim. See *State v. Reyes*,744 N.W.2d 95 (Iowa 2008). In echoing Chief Justice Warren's dissent in *Spencer v. Texas*, the court held

> "the rejection of propensity evidence on "fundamental" concerns of fairness and the presumption of innocence. The policy against admissibility of general propensity evidence stems from a fundamental sense that no one should be convicted of a crime based on his or her previous misdeeds" (internal citations omitted)
>
> *Id.* at 767

Similarly, the State of Missouri (*State v. Ellison,* 239 S.W.3d 603, 607-08 (Mo.2007)) and the State of Washington (State v. Gresham 269 P.3d 207 173 Wn.2d 405 (Wash. 2012) have found the introduction of this type of propensity evidence was in violation of their state constitutions.

South Carolina

South Carolina courts have held that while generally inadmissible, propensity evidence is not prohibited. *State v. Benton* 338 S.C. 151, 156, 526 S.E.2d 228, 230. "Propensity evidence is admissible if offered for some purpose other than to show the accused is a bad person or he acted in conformity with his prior convictions." *Id., see Rule 404 SCRE.* Clear and convincing evidence of other relevant crimes is admissible to prove: (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan that embraces several previous crimes so closely related to each other that proof of one tends to establish the other; or (5) identity. *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), Rule 404(b), SCRE. The comments to S.C. Rule of

Evidence 404(b) note that South Carolina rule is different from the federal rule in that the South Carolina rule limits the admission of evidence to those purposes enumerated in *Lyle.*

In *Lyle*, South Carolina's landmark case on the admission of prior bad acts, the Defendant was charged with forgery and during the trial the state introduced evidence that the Defendant had forged other checks on that same day and on prior occasions. *Id* at 806. The South Carolina Supreme Court held that the forgeries committed on the same day were admissible to rebut the Defendant's alibi defense. *Id.* at 808 However the forgeries that were commuted on the other dates in other locates, even though they were all committed in the exact same way, were not admissible, because no connection between the offenses made them a "continuous transaction." *Id.* at 812. In citing *People v. Molineux* with approval, the Lyle Court went on to state "[p]roof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged Its effect is to predispose the mind of a juror to believe the prisoner guilty, and thus effectually to strip him of the presumption of innocence." *Id. at* 808.

However, even if propensity evidence is otherwise admissible, the evidence is still subject to the traditional rules of evidence. *See Benton* at 156, *State v. James*, 335 S.C. 25, 34, 583 SE2d 745, 748 (2003). Neither the trial judge's traditional role in weighing the probative value of evidence versus its prejudicial effect under Rule 403, nor Rule 401, is displaced by the operation of a statute where an element of an offense is a prior conviction. *Id.*

The issue of the State proving a criminal offense where an element of that offense is a prior conviction has been addressed in the context of the State's burglary statute. South Carolina Code of Laws 16-11-311(A)(2), provides a person may be convicted of first degree burglary if a person enters a dwelling without consent, with an intent to commit a crime and "the burglary is

committed by a person with a prior record of two or more convictions for burglary..." The Supreme Court held in Benton that the admission of two prior burglary convictions offered to prove a statutory element of the of the first degree burglary charge, "not to suggest the defendant was a bad person or committed the present burglary, because he had committed prior burglaries." *Benton at* 156. The court's holding in Benton set forth protective steps to limit the chance of improper conviction where prior acts are admitted as an element of the offense charged. *Benton* at 231. In James, the State entered into evidence certified copies of seven prior burglary convictions of the defendant, under the theory that *16-11-311(A)(2)* read "two or more" prior convictions. The Court held that this was error, and that the probative value of the introduction of an additional five convictions decreases beyond the sufficient evidence to prove the element of the crime. *James* at 750.

Case law supports that the State cannot be forced to accept a defendant's stipulation to prior convictions because that would interfere with the State's right to prove its case with evidence of its own choosing. *State v. Hamilton*, 327 S.C. 440, 486 S.E.2d 512 (Ct. App. 1997). However, while "the State is entitled to submit evidence of "its own choosing" it must do so within the confines of the established rules of evidence." *James* at 750. In James, the Court cautioned that the potential for undue prejudice, for the impermissible interpretation of such evidence as propensity or character evidence, warrants great caution. *Id.*

Like Chief Justice Warren in his partial dissent in *Spencer v. Texas*, South Carolina courts have also recognized the fundamental due process concerns in the context of the presumption of innocence (see *State v. Nelson*, 331 S.C. 1, 501 S.E.2d 716 (S.C. 1998) at 723 citing *State v. Melcher,* 140 N.H. 823, 678 A.2d 146 (1996)), proof beyond and reasonable doubt (see *State v. Baker*, 309 S.C. 436, 424 S.E. 2d 492 (1992), held that the improper definition of reasonable

doubt could "cause a reasonable juror to interpret the charge to allow a finding of guilt based on a degree of proof below that required by the due process clause." at 437) , and the prohibition against status crimes (*State v. Bostick*, 307 S.C. 226, 414 S.E.2d 175 (Ct. App. 1992)- evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate an accused is a bad individual).

South Carolina courts have found that the introduction of remote prior bad acts in sexual misconduct cases unfairly prejudicial and a reversible error. See *State v. Nelson*, 331 S.C. 1, 501 S.E.2d 716 (S.C. 1998), *State v. Fonseca*, 383 S.C. 640, 681 S.E.2d 1 (S.C.App. 2009) (affirmed by *State v. Fonseca*, 393 S.C. 229, 711 S.E.2d 906 (S.C. 2011)). These cases also echo the relationship between Rule 404(b) and Rule 403 as well as the critical importance of the balancing test under Rule 403. *Id.* While not having an explicit due process analysis, South Carolina jurisprudence has recognized how unfairly prejudicial the introduction of this type of evidence is.

In Nelson, the Appellant was accused of a sexual offense against a minor where motive was not made a material issue for trial. In finding that physical evidence of "childlike items" that were introduced to show the defendants propensity to be a pedophile were inadmissible, the Court noted "[a] necessary corollary to the presumption of innocence is that a defendant must be tried for what he did, not for who he is." *Id. citing* State v. Melcher, 140 N.H. 823, 678 A.2d 146 (1996). In Fonseca, the Supreme Court affirmed the Court Appeals reversal against the introduction of testimony two year old bad act against the same victim in a lewd act on a minor. In rejecting the trial courts analysis that the older act served to demonstrate the Appellants motive, intent, or common scheme or plan the Court of Appeals stated:

> Thus, as in Nelson, because Appellant denies that the contact ever occurred, intent was not made a material issue. Furthermore, because intent is an element of most crimes, if we hold this evidence admissible, prior sexual acts would be admissible to prove the required intent in all prosecutions of subsequent sex crimes. Such is a thin disguise for impermissible character evidence and would undermine the protections of Rule 404. Without motive or intent being a material issue, it is error to admit prior bad acts as evidence of the same in a sexual crime.
>
> *Fonseca* at 649 (S.C. App).

At the time of the trial in the instant action, the State would have not been able to introduce this evidence but for the fact that the State elected to disregard his original indictment and proceed under section (A)(2) of the statute. The State cannot articulate any exception under Rule 404(b) or *Lyle*. Here, the State would not have been able to show a common plan or scheme in a subsequent trial because the connection between the prior bad act and the crime must be more than just a general similarity. *See State v. Stokes,* 279 S.C. 191, 304 S.E.2d 814 (1983) (noting the connection between the prior bad act and the crime must be more than just a general similarity); *see also State v. Rivers,* 273 S.C. 75, 254 S.E.2d 299 (1979). It would not fit into a common scheme exception as the prior conviction was fifteen years removed and involved an older child. PTM p. 9-11. Even if the State could have convinced the trial judge that this evidence did fit an exception, under *Lyle* the conviction would have been subject to a Rule 403 balancing test.

Prior to the original indictment being presented to the grand jury in November of 2010 under section (A)(1), the State had knowledge of Appellant's prior conviction that would qualify under section (A)(2), but chose to proceed under the statute with a more significant penalty . No new facts came to light in the case, other than the fact that Appellant exercised his right to a jury trial. There is no dispute that the accuser in the case was under eleven years old, and that an indictment under (A)(1) was proper. No other justification can be given by the State for

proceeding under (A)(2) other than its desire to convict Appellant based upon his prior conviction. The only reasonable inference on the State's election to proceed under 16-3-655(A)(2) is that the State would be able to allow into evidence an otherwise prohibited conviction. Indeed, the State believed that Appellants prior bad acts were so important that it was referenced in both their opening and closing arguments.

While the trial court was correct to provide a jury instruction and limit the disclosure of the prior conviction, the manner in which the court chose to allow the State to disclose the conviction was highly prejudicial. In the Appellant's redacted prior conviction, the entire section of "Other conditions" is blacked out in a non-uniform manner. See State's Exhibit 11. It is clear from the manner of redaction that the entire section of the conditions space for the form was used. The only inference the jury could give this evidence is that the sentence in Appellant's prior condition was substantial. This inference is only enhanced by the fact that the term "years" circled in multiple places.

The trial court also erred in not following the traditional rules of evidence by not conducting an on the record balancing test of the prior conviction under Rule 403. As the Court in *James* noted, there must been an interplay between Rule 403 and the statute providing the prior conviction as an element of the crime. *James* at 748. The court is performing its responsibility as a gate keeper when the trial court does not balance this type of evidence or feels that because of the nature of the statute he is not required to. Particularly with sex crimes, where the danger for prejudice is so great, the court should not be allowed to be forced to shirk its responsibility.

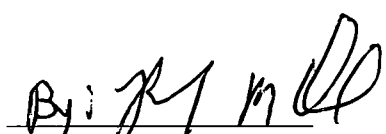
With no physical evidence of the alleged crime introduced at trial and with some questions of credibility relating to the accuser, the introduction of a prior conviction for lewd act

on a minor was fundamentally prejudicial. The introduction of Appellant's prior conviction was fundamentally unfair and stripped him of any of the protections provided by SCRE 403, SCRE 404(b), and the South Carolina Constitution. If the General Assembly is allowed to create a giant exception to our state's history against the introduction of propensity evidence what is stopping them from allowing the exception to swallow the rule? If this court allows the exception to continue, why wouldn't the legislature create a crime called "aggravated DUI" and define it as one having one or more DUI within the past 10 years. What about "aggravated drug sales" by defining it as having one or more drug sales within the past 10 years. "What about "aggravated shoplifting" by the same type law? The General Assembly simply cannot take away the fundamental right to a fair trial by such tactics. The Constitution prohibits it and only the courts can enforce the constitution.

CONCLUSION

Appellant's conviction should be reversed.

Respectfully submitted,

By: 

Craig Stanley
1824 Bull Street
Columbia, SC 29201
(803)-761-7083

Robert M. Dudek

ATTORNEYS FOR APPELLANT

Date: December 30, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JON WYNN JARRARD, SR.,

APPELLANT

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictments: 2010-GS-26-04574, 2011-GS-26-00365, 2011-GS-26-01335
(2) Transcript of pre-trial motions April 13th, 2012: 1-19
(3) Transcript of the proceedings: 1, 35-43,53-54, 62-76, 80-84, 103-119, 157-195, 233-234, 274-277, 281, 285-291, 298-333. 341-342, 347-360
(4) Court's Exhibit #1- (prior conviction)
(5) State's Exhibit #11 (redacted prior conviction redacted);

I certify that this designation contains no matter which is irrelevant to this appeal.

December 30, 2013

CRAIG R. STANLEY
1824 Bull Street
Columbia, SC 29201

ROBERT M. DUDEK
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEYS FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman, Circuit Court Judge

THE STATE,

RESPONDENT,

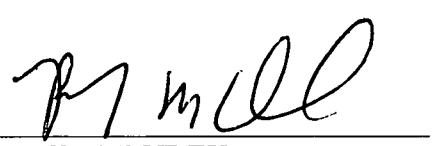
V.

JON WYNN JARRARD, SR.,

APPELLANT

CERTIFICATE OF SERVICE

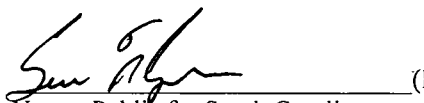
The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 30th day of December, 2013.



CRAIG R. STANLEY
1824 Bull Street
Columbia, SC 29201

ROBERT M. DUDEK
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

SUBSCRIBED AND SWORN TO before me
this 30th day of December, 2013.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.