

STATE OF SOUTH CAROLINA
COURT OF APPEALS
APPEAL FROM BARNWELL COUNTY
COURT OF GENERAL SESSIONS

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SC Court of Appeals

The Honorable Doyet A. Early, III, Circuit Court Judge

Indictments Nos. 2013-GS-06-76, 2013-GS-06-77, 2013-GS-06-78, 2013-GS-06-79

The State of South Carolina Respondent,

v.

Eric VanCleave Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- 1. Did the Trial Judge err in allowing the State to go forward with new indictments that were presented to the Grand Jury in February of 2013, after Appellant had presented his alibi evidence, and almost three years after his arrest?**
- 2. Did the Trial Judge err by allowing into evidence the testimony from two brothers of the alleged victim as to alleged bad acts committed by Appellant on the two brothers at different times and at different locations from those alleged by their victim brother?**
- 3. Did the Trial Court err in not granting Appellant's motions for directed verdict where the evidence presented by the State fell far short of what is required for a jury to return a verdict of guilty beyond a reasonable doubt?**

STATEMENT OF THE CASE

On April 1, 2010 Eric VanCleave was arrested on eight (8) charges emanating from Barnwell County: K-338461 Criminal Sexual Conduct with a Minor 11-14 YOA 2nd Degree; K-338462 Criminal Sexual Conduct with a Minor 11-14 YOA 2nd Degree; K-338463 Criminal Sexual Conduct with a Minor 11-14 YOA 2nd Degree; K-338464 Criminal Sexual Conduct with a Minor Under 16 YOA 2nd Degree; K-338465 Committing/Attempting Lewd Act on Minor; K-338466 Committing/Attempting Lewd Act On Minor; K-338467 Committing/Attempting Lewd Act on Minor; and, K-338468 Committing/Attempting Lewd Act on Minor. (Warrants)

On September 30, 2010 the Grand Jury for Barnwell County returned True Billed indictments for four (4) of the charges: 2010-GS-06-272 for warrant K-338462 Criminal Sexual Conduct with Minor 2nd Degree; 2010-GS-06-273 for warrant K-338464 Criminal Sexual Conduct with a Minor 2nd Degree; 2010-GS-06-274 for warrant K-338466 Lewd Act Upon Minor; and 2010-GS-06-275 for warrant K-338468 Lewd Act Upon a Minor.

On June 26, 2012 Attorney Robert T. Williams, Sr., attorney for Appellant filed and served on the State Motions for Discovery. On July 25, 2012 Attorney for Appellant filed and served a Notice of Motion and Motion for Speedy Trial. On January 16, 2013 Attorney for Appellant filed and served an additional Notice of Motion and Motion for Speedy Trial.

On February 25, 2013 Appellant appeared in Barnwell General Sessions Court, prepared for trial on the September 2010 indictments. On February 25, 2013, four (4) new indictments were true billed by the Barnwell County Grand Jury, Indictment Numbers 2013-GS-06-76, 2013-GS-06-77, 2013-GS-06-78, and 2013-GS-06-79.

The Trial Judge continued the trial of Appellant until April 1, 2013 as a result of the

newly indicted charges.

Appellant was tried over a two (2) day period of April 1, 2013 and April 2, 2013 with a guilty verdict being rendered as to all four (4) February 2013 indictments. The 2010 indictments were never tried. Appellant was sentenced to a term of twenty (20) years on Indictment No. 2013-GS-06-76 for Criminal Sexual Conduct with a Minor - 2nd Degree; fifteen (15) years on Indictment No. 2013-GS-06-77 for Lewd Act Upon a Child Under 16; ten (10) years on Indictment No. 2013-GA-06-78 for Assault and Battery of High and Aggravated Nature; and ten (10) years on Indictment No. 2013-GS-06-79 for Criminal Sexual Conduct - 3rd Degree. All sentences were ordered to run concurrent.

Appellant timely served and filed his Notice of Intent to Appeal on April 10, 2013. The Court Reporter requested and was granted several extensions of time until Appellant's attorney received the transcript on July 23, 2013. Appellant requested and was granted an extension to file his Initial Brief and Designation of Matter until September 23, 2013.

ARGUMENT

I. The Trial Judge erred in allowing the State to go forward with new indictments that were presented to the Grand Jury in February of 2013, after Appellant had presented his alibi evidence and almost three years after his arrest.

Eric VanCleave was arrested on April 1, 2010 and charged with eight (8) counts of sexual misconduct: (1) Criminal Sexual Conduct with a Minor 2nd Degree (Warrant No. K-338461); (2) Criminal Sexual Conduct with a Minor 2nd Degree (Warrant No. K-338462); (3) Criminal Sexual Conduct with a Minor 2nd Degree (Warrant No. K-338463); (4) Criminal Sexual Conduct with a Minor 2nd Degree (Warrant No. K-338464); (5) Committing or Attempting a Lewd Act Upon a Minor (Warrant No. K-338465); (6) Committing or Attempting a Lewd Act Upon a Minor (Warrant No. K-338466); (7) Committing or Attempting a Lewd Act on a Minor (Warrant No. K-338467); and, (8) Committing or Attempting a Lewd Act Upon a Minor (Warrant No. K-338468).

Four (4) of the above stated warrants , K-338462, K-338464, K-338466, and K-338468, were subsequently submitted to the Barnwell Grand Jury on September 30, 2010 resulting in True Billed Indictments. Those indictments incorporated the allegations contained in those warrants specific to dates, times, and places. All four (4) warrants and the resulting indictments alleged sexual crimes allegedly committed by Appellant on Victim 1 on the dates of April 20, 2003 and March 27, 2005 in Barnwell County, South Carolina. Those indictments were for the offenses of Criminal Sexual Conduct with a Minor Second Degree, Criminal Sexual Conduct with a Minor Second Degree, Lewd Act Upon a Minor, and Lewd Act Upon a Minor, respectively.

On July 24, 2012 Appellant's attorney filed and served a Notice of Motion and Motion for Speedy Trial. When no hearing was granted, nor order addressing the trial date was issued,

Appellant's attorney filed and served a second Notice of Motion and Motion for Speedy Trial on January 14, 2013.

Appellant was notified that his case would be tried February 25, 2013. In compliance with Rule 5(e) of the South Carolina Rules of Criminal Procedure, Appellant timely notified the Prosecutor of his intention to offer alibi evidence that would conclusively prove that Appellant could not have been in the County of Barnwell on the two (2) dates alleged in the indictments. This alibi, therefore, would have resulted in an acquittal of all charges that were pending for trial, on the 2010 Grand Jury Indictments in Barnwell County.

On February 25, 2013, the first day of the trial week selected for Appellant, the State presented to the Barnwell Grand Jury four (4) new indictments for warrants K-338463, K-338467, K-338465, and K-338461. These indictments were listed as 2013-GS-06-76 Criminal Sexual Conduct with Minor, 2013-GS-06-77 Lewd Act Upon a Child, 2013-GS-06-78 Assault and Battery of a High and Aggravated Nature and 2013-GS-06-79 Criminal Sexual Conduct Third Degree .

These new indictments, presented almost thirty-five (35) months after Appellant's arrest, now alleged a different and more expanded time frame for the offenses occurring between April 1, 2005 and May 17, 2006 (R. pp. 302-304), for indictment 2013-GS-06-76 and 2013-GS-06-77; and between May 27, 2006 and May 29, 2006 (R. p. 304, l. 22; p. 307, l. 1); for Indictment 2013-GS-06-78 and 2013-GS-06-79.

These new indictments reflected the warrant numbers of those arrest warrants that had previously not been presented before by the Grand Jury, K-338461, K-338463, K-338465, and K-338467: The allegations contained on those warrants were for offenses that allegedly occurred either on April 11, 2004 or March 30, 2002.

These allegations contained in the new indictments expanded the time period Appellant was forced to defend from April 11, 2004, on the Criminal Sexual Conduct with a Minor 2nd Degree, and Lewd Act Upon a Minor to the time period of April 1, 2005 until May 17, 2006. Additionally, the Assault and Battery of a High and Aggravated Nature and Criminal Sexual Conduct in the 3rd Degree Indictments expanded the time period the Appellant had to defend from March 30, 2002 to between May 27, 2006 and May 29, 2006.

Appellant argued that the State should not be allowed to prosecute the new indictments presented on February 25, 2013, the very week Appellant was to be tried, because of the extreme length of time that had elapsed since Appellants arrest; and because the change of the dates of the alleged events was clearly an attempt to circumvent Appellant's timely alibi defense presented. The Appellant was forced to defend himself without the aid of two of his witnesses who would have supported his innocence during the new additional time periods because they had died during this thirty-five (35) month period between arrest and new indictments. (R. pp. 058-072)

The Trial Judge erred by refusing to dismiss the indictments (R. p. 067, l. 3-18) requiring Appellant's attorney to acquiesce in a continuance. (R. p. 066, l. 18; p. 67, l. 18) Appellant did not have the ability to present evidence these two (2) witnesses would have been able to state and thus hamstrung his defense.

The Trial was rescheduled for April 1, 2013. Appellant reiterated his contention that the State should not be allowed to move forward with these four (4) new indictments for the identical reasons stated at the prior hearing. The Trial Judge again allowed the State to go forward. (R. pp. 106-110)

Appellant contends that the delay in trial and the efforts of the State to seek new indictments after being presented with definitive alibi evidence acted to deny Appellant a fair

trial.

The right of an accused to a fair, speedy, and impartial trial was first set forth by the VI Amendment of the United States Constitution and by Article I, Section 14 of the South Carolina Constitution.

The right of trial by jury shall be prescribed inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by counsel or by both.

S.C. Const. art. I, § 14.

The South Carolina Legislature took steps in furtherance of this important protection of the rights of an accused when it enacted Rule 3(c)(d) of the South Carolina Rules of Criminal Procedure and placed a frame work for how the State was to handle warrants.

Within ninety (90) days after receipt of an arrest warrant from the Clerk of Court, the Solicitor shall take action on the warrant by (1) preparing an indictment for presentment to the grand jury, which indictment shall be filed with the Clerk of Court, assigned a criminal case number, *and* presented to the Grand Jury...

(d) Extensions of Time: the Solicitor may petition circuit court for an order delaying action on the warrant, as set forth above, for successive ninety (90) day periods *if* the circuit court specifically finds good cause for such delay for each successive ninety (90) day period.

Rule 3(c)(d), SCRCrimP.

The South Carolina Supreme Court recently dealt with due process, speedy trial issues, and what control the Solicitor, i.e.. The State, has to call a Defendant to trial. State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012).

In State v. Langford the Court determined that § 1-7-330 was unconstitutional in that it

gave the Solicitor exclusive authority as to the order in which cases on the trial docket are called for trial.

Although there was some time spent in State v. Langford dealing with whether the Solicitor engaged in calling certain cases when a particular Judge was available, its true importance is its ongoing discussion as to an accused's right to a speedy trial. State v. Langford, 400 S.C. 421, 735 S.E. 2d 471 (2012), *See also* Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 (1972); *See also* United States v. MacDonald, 456 U.S. 1, 102 S.Ct. 1497 (1982) which set forth what examinations must be done to determine whether an accused's due process rights were violated by his being denied a speedy trial.

The Court in Barker v. Wingo provides the four (4) factors that must be examined to determine whether there has been a denial of a defendant's right to a speedy trial. First, the Court must look to the length of delay. Secondly, the Court must look to the Government's (State's) reasons for delay. Thirdly, the Court must look to the Defendant's assertions of his rights to a speedy trial. Lastly, the Court must look to the prejudice that Defendant has suffered as a result of this delay. Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 (1972). The first factor of delay is apparent in Appellant's case. Appellant was arrested April 1, 2010 and was not *scheduled* for trial until the term of General Sessions Court of February 25, 2013. The delay is obviously thirty-five (35) months or approximately three (3) years.

There is nothing in the Record that excuses this long period of delay. The Solicitor argues as an excuse for the delay that there was: (1) a change of attorneys; (2) other pending charges in Lexington County; (3) only Court in Barnwell County four (4) times a year (R. pp. 063-064). At no point does she say how those three (3) factors caused a delay in Appellant's trial.

As to the third factor referenced in Barker, supra, there is no action undertaken by Appellant to delay his trial up until the week of February 25, 2013 but quite the opposite. He filed a Motion for Speedy Trial on July 24, 2012 and then again on January 14, 2013. (R. p. 61, l. 8-10) (see Motions)

A deliberate attempt by the State to delay the trial as a means of impairing the accuser's ability to defend himself 'should be weighed heavily against the government...' Neutral reasons, which could include overcrowding dockets or negligence are weighted less heavily 'but still count against the State because it bears the ultimate responsibility for these circumstances'.

State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012)

Here, where Appellant filed two (2) Motions for a Speedy Trial, this delay State caused should be weighed heavily against the State. There is nothing in the record that was presented by the Solicitor that indicated any complicating factors as to the facts that were alleged; or lack of availability of any witnesses; or anything further explaining why Appellant had not been tried.

The Appellant has sufficiently presented evidence as to the first three (3) factors set forth by Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 (1972) as elucidated by State v. Langford, supra. Lastly, the Court should look at what prejudice the Appellant has suffered.

After almost three (3) years, after two (2) Motions for a Speedy Trial, after the State is shown that it cannot convict Appellant as indicted, the State informs Appellant of four (4) new indictments. The State sought these new indictments alleging different time periods in his life almost eight (8) years prior to the date of trial. Additional prejudice was caused with the new indictments where Appellant was forced to proceed without those two witnesses to substantiate Appellant's innocence because they were deceased. (R. pp. 062-063)

Appellant further relies upon State v. Lee, 375 S.C. 394, 653 S.E.2d 259 (2007). In Lee,

the Court recognizes that pre-indictment delay is a violation of the Due Process clause of the Fifth Amendment and does not require a Defendant to prove that the State possessed improper motives in order to succeed in a challenge to the State's improper delay in bringing Appellant's case to trial.

The Appellant has been denied his due process rights by his trial not being held in a prompt manner, violating procedures enumerated by the Federal and State Constitutions, the South Carolina Rules of Criminal Procedures, and in contradiction to Federal and State case law and jurisprudence.

II. The Trial Judge erred by allowing into evidence the testimony from two brothers of the alleged victim as to alleged bad acts committed by Appellant on the two brothers at different times and at different locations from those alleged by their victim brother.

Rule 404(b), South Carolina Rules of Evidence provides "evidence of other crimes, wrongs, or acts is not admissible to prove 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."

The State in Appellant's case was permitted to introduce the testimony from the alleged victim's two brothers to support and bolster victim's veracity and assert additional support to the allegations of abuse allegedly committed by Appellant.

Victim 2 was allowed to testify before a jury that he had his private parts grabbed by Appellant while they were on a camping trip to Maggie Valley, North Carolina. (R. pp. 206-208) He further testified that this event occurred either during the Summer of 2005 or Summer of 2006 and that he was 17 at the time. (R. p. 206, l. 8-14) He further testified that he did not report the alleged event, for several years, until after his brother Victim 1, the alleged victim, did. (R. p.

209, l. 15; p. 210, l. 1)

Victim 3 was allowed to testify before a jury that he also had his private parts grabbed by Appellant while he was camping in Cherokee in either 2004 or 2005 when he was either 12 or 13. He further testified that he did not report it until his brother, Victim 1, the alleged victim, came forward in 2010. (R. pp. 190-202)

The alleged victim, Victim 1, testified during an in camera hearing that the assaults began as early as 2000 or 2001. (R. p. 078, l. 15-17) He further testified that assaults occurred on camping trips to Barnwell County, at Appellant's home, at Barnyard Flea Market in Lexington County, as well as at Florida and Auburn football games. (R. p. 080, l. 11-18) Lastly, the victim testified that the alleged abuse was ongoing from ages of 11 to 16. (R. p. 081, l. 21-22)

The Court concluded that the brother's testimonies were admissible because they were, (a) relevant under Rule 401, SCRE; (b) they were are substantial similarities with the allegations raised by the victim; (c) that under a 403 analysis their testimonies were more probative than prejudicial. (R. p. 112, l. 1-15)

The four (4) indictments that Appellant was tried on alleged that Appellant had engaged in a sexual battery with the victim who was between the ages of 14 and 16 and that he committed a lewd act upon that victim while the victim was under the age of 16 during the time span between April 1, 2005 and May 17, 2006 in Barnwell County. The indictments further alleged that the Appellant committed a sexual battery and committed a violent injury to the victim between May 27, 2006 and May 29, 2006 in Barnwell County. (See Indictments 2013-GS-06-76, 77, 78, and 79)

State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009) provides a format for the Trial Judge to use when admitting evidence of other bad acts. The Appellant contends the trial court

erred in its Wallace analogy. In the Wallace case, the Court emphasizes that (1) the evidence must be relevant; (2) the similarities of the testimony must outweigh the dissimilarities; (3) then the issue is then whether the evidence is more prejudicial than probative under such so as to require its exclusion under Rule 403, South Carolina Rules of Evidence. (See State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007))

Additionally, in the review of bad act evidence that does not result in a conviction, it must be “clear and convincing.” State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000); State v. Weaverling, 337 S.C. 460, 523 S.E.2d. 787 (Ct. App. 1999)

If the allegations raised by the victim’s two brothers are to be considered as admissible, those allegations must be demonstrated by clear and convincing evidence.

In this testimony, Victim 2 could not recall if the one-time assault occurred in the Summer of 2005 or 2006 although he does recall he was 17. (R. p. 091, l. 1-14)

In his testimony, Victim 3 could not recall if the two (2) events he recalled being subject to happened in 2004 or 2005. (R. pp. 094-095) He lastly testified that he told no one until after his brother the victim came forward. (R. p. 097, l. 6-18)

Appellant argues that none of the allegations presented by either brother was supported by an arrest and that both alleged events were investigated by the Federal Bureau of Investigation without issuance of any warrant. (R. p. 100, l. 17-24) Obviously the lack of detail offered by both brothers as to the events, failing to testify exactly when it occurred, as well as failing to testify to a time span elapsed, demonstrates a failure of proof shown to be clear and convincing evidence.

The trial court should consider five (5) factors when determining

whether there is a close degree of similarity between the bad act and the crime charged: (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and the manner of the occurrence.

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

When reviewing the similarities of the testimony of the three (3) brothers vs. the dissimilarities and in an attempt to analyze the evidence in accordance with State v. Wallace, the following must be noted: (1) that the age of the victims differed; (2) locations of the alleged assaults differed; (3) there was no alleged coercion or threats linked with any of the allegations; and, (4) the time spans are different.

Although the State argued that all three (3) events allegedly occurred on camping trips, one was reportedly in Cherokee, North Carolina, another one was Maggie Valley, North Carolina, and the victim's allegations involves Barnwell State Park in Barnwell, South Carolina.

Particularly of note, was that there is no alleged coercion nor threats linked with any of the allegations. This lack of coercion go to the weight of any testimony to why these alleged events would go for an extended period of time without being reported and clearly falls short of the standard of clear and convincing.

Lastly, the testimony of the two (2) brothers offered under Rule 404(b) is certainly more prejudicial than probative. Without the improperly admitted testimony, the State would be restricted to testimony of one alleged victim who did not report any alleged abuse for several years; who could not testify with accuracy or specificity as to when the alleged abuse occurred; and a lack of any cooborating testimony.

Appellant denied each and every allegation the alleged victim asserted while having to

resort to the only way of conclusively proving he was innocent, by proving he was not in Barnwell when the events supposedly happened. With the unsupported allegations of the brothers, the State is bootstrapping unsupported evidence to bolster prejudice against the Appellant.

The admission of the testimony of the brothers should have been barred if, one looks to the cases of State v. Tutton, 354 S.C. 319, 580 S.E. 2d. 186 (Ct. App. 2003) and State v. Henry, 313 S.C. 106, 432 S.E.2d. 489 (Ct. App. 1993). There appeared to be a substantial period of time between the uncharged assaults and the charged offenses. There was further no alleged allegations involving the “victim’s” brothers after these isolated allegations.

When the question of evidence admission is a close one, the Appellant should be given the benefit of the doubt. State v Henry, 313 S.C. 106, 432 S.E.2d 489 (Ct. App. 1993)

III. The Trial Court erred in not granting Appellant’s motions for directed verdict where the evidence presented by the State fell far short of what is required for a jury to return a verdict of guilty beyond a reasonable doubt.

Rule 19 of the South Carolina Rules of Criminal Procedure provides the framework for motions for directed verdicts in criminal cases.

On motion of the defendant or on its own motion, the court shall direct a verdict in the defendant’s favor on any offense charges in the indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charge in the indictment. In ruling on the motion, the trial Judge shall consider only the existence or non-existence of the evidence and not its weight.

Rule 19, South Carolina Rules of Criminal Procedure (a)

State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989) reminds us that a trial court should not hesitate to grant a Defendant’s (Appellant’s) motion where the evidence presented merely raises a suspicion of guilt.

Appellant moved for a directed verdict at the end of the State's case; (R. pp. 221-224) and at the conclusion of the entry of all evidence (R. p. 291, l. 13-22); additionally he renewed all prior motions as well as moved for a New Trial at the return of the Jury's Verdict. (R. pp. 316-317) All to no avail.

A review of the testimony is appropriate to consider whether the directed verdict motions should have been granted.

Indictment 2013-GS-06-76 alleges that Appellant committed a sexual battery on Victim 1 in Barnwell County when the victim was between the ages of 14 and 16 sometime during a time span between April 1, 2005 and May 17, 2006. (See Indictment)

Indictment 2013-GS-06-77 alleges that Appellant committed a lewd and lascivious act upon Victim 1 who was under the age of 16 in Barnwell County sometime during a time span between April 1, 2005 and May 17, 2006. (See Indictment)

Indictment 2013-GS-06-78 alleges that Appellant committed an act of violent injury to Victim 1 in Barnwell County between the dates of May 27, 2006 and May 29, 2006. (See Indictment)

Indictment 2013-GS-06-79 alleges that Appellant engaged in a sexual battery on Victim 1 in Barnwell County between the dates of May 27, 2006 and May 29, 2006. (See Indictment)

In its totality, review of the testimony presented indicates that there was, at best, merely a suspicion of guilt and nothing more.

Victim 1, the alleged victim, testified that the sexual assaults began around 2001-2002 in Lexington County. He further alleges the basis of the four (4) indictments Appellant is being tried on are for two (2) events in Barnwell County, Easter of 2005 and Memorial Day 2006. (R. pp. 152-154; p. 158; p. 161; p. 164) This testimony was different from what he previously

provided SLED, when he stated that the assaults occurred every Easter holiday from 2001-2006 at Barnwell State Park. (R. p. 150, l. 15-25) This testimony appears to be further contradicted when considering the photographs introduced over Appellant's objection, which indicated the first trip to Barnwell was either 2004 or 2005. (R. p. 151)

The alleged victim further testified that the first assault occurred on a trip to Barnwell State Park that included Mike Sanders, Eric (Appellant), victim's brothers, Victim 3, Victim 2, and Victim 4. (R. p. 131, l. 8-23) This trip included no photographs, the only photographs offered (Exhibit 1-14), having been introduced over Appellant's objection, were for a trip in 2004 where no alleged assault occurred. (R. pp. 127-128)

The alleged victim testified the second assault in Barnwell County occurred Memorial Day weekend of 2006, or May 28, 2006 - May 29, 2006. (R. p. 153, l. 9-13; pp. 162-164) On this occasion he stated that Victim 2, Victim 3, and Victim 4, his brothers were present. (R. p. 161, l. 22; p. 162, l. 4)

Marshall Richburg, the administrator for Barnwell County State Park testified that Appellant reserved two (2) campsites for the dates of May 27, 2006 - May 29, 2006 but could not testify who stayed at the sites. (R. pp. 172-179)

Mike Sanders testified that he went on two (2) trips to Barnwell State Park, Easter of 2004 (Spring 2004) and Halloween of 2005. He further testified that he never observed anything done improperly in regards to the victim. (R. pp. 181-185)

Victim 3 testified that Appellant assaulted him on a trip to Cherokee when he was 13. (R. pp. 191-194) He admits under cross-examination that he told the police officer that he was between the ages of 10-12. (R. pp. 196-197) He further confirms that this trip was taken along with the Wick family. (R. p. 191)

Victim 2 testified to a similar assault that occurred on a camping trip to Maggie Valley in the Summer of 2005 with Victim 4 and Appellant present, when he was 17. (R. pp. 206-208) Lastly, he admits that if he went to Maggie Valley or Ghost Town he would have been over 18 if it occurred after June 17, 2007 and the Wick family would not have been there. (R. pp. 210-211) When confronted with pictures of the Wicks, himself, Victim 4, and Appellant, he was forced to admit that the Wick family was there. (R. pp. 212-213)

Denneah Wick, the creator of the pictures of the Maggie Valley, Ghost Town, and Cherokee trips, which accurately revealed who was present, testified that this occurred on the July 4, 2007 weekend. Present on that trip was Blair W., Victim 2, Eric VanCleave, Elizabeth W., Jared W., Victim 4, Jackson W., and herself. (R. pp. 229-233) Ms. Wick further denies that Victim 3 was present contrary to his testimony. (R. p. 231, l. 20-25)

Additionally, Denneah Wick testified that she went to Barnwell State Park on that Memorial Day weekend of 2006 along with her husband, four (4) children, Appellant, Victim 2 and Victim 4 but *not* Victim 1, again contrary to his testimony. (R. pp. 228-232)

Eric VanCleave the Appellant, testified that; (1) he never went to Barnwell State Park between the dates of April 1, 2005 and May 17, 2006; (2) he was in Charleston on Easter Weekend of 2005; (3) and he was home listening to the University of South Carolina Football game on the Halloween of 2005 weekend. (R. p. 265; pp. 270-271) He further testified where he was on all of the Holidays between April 1, 2005 and May 17, 2006 and confirming he was not at Barnwell State Park. (R. pp. 271-274)

Appellant testified that on Memorial Day weekend of 2006 he *was* at Barnwell State Park along with Victim 4 and Victim 2 and the Wick family but that Victim 1 was not there (R. p. 277, l. 23; p. 278, l. 22), testimony which is supported by Denneah Wick.

Appellant further testified that on the Cherokee, Ghost Town, Maggie Valley trip Victim 3 was not present (R. pp. 277-278), also supported by testimony by Denneah Wick.

Victim 2 was called in reply to testify that he did not recall going on a camping trip to Barnwell State Park during the Memorial Day weekend of 2006 and to deny that the trip to North Carolina occurred 2007 but that it occurred either 2005 or 2006. (R. p. 289, l. 17-25; p. 290, l. 1-21) This testimony denying the date of the North Carolina trip flies directly in the face of what is definitely shown in the photograph taken on the trip, i.e. July 6, 2007. (R. p. 350) (Defendant's Exhibit 1)

In this present matter, the question is where is there evidence presented more than a suspicion of guilt. No records from Barnwell State Park indicates that Appellant was present during any time other than the Memorial Day weekend of 2006. Appellant and Denneah Wick both testified that Victim 1, alleged victim, was not present on this weekend. Also of note, Victim 4 another one of the victim's brothers who was named present on this weekend never testified.

The alleged assault in 2005 was not substantiated in any way. The alleged victim stated an assault occurred Easter of 2005, outside the indictment period. If it occurred at some later date when Mike Sanders was present it would have had to be Halloween of 2005 to conform to his testimony.

The victim never states that this event occurred over the Halloween 2005 weekend. Indeed, Appellant contends he was in Lexington County listening to a football game. Even if there were any possibility that the victim was mistaken on his dates, and Appellant was incorrect on what he was doing on Halloween 2005, Mike Sanders, the witness in common, stated that he did not observe anything improper.

The attempts by the State to buttress the testimony of their victim through Rule 404(b) evidence are additionally lacking. Victim 3's testimony relies on him being 10-12 to 13; and further that Victim 4 not Victim 2 went with him (R. pp. 191-192) on the trip to Cherokee where he was supposedly assaulted.

Victim 2's testimony that the trip to Maggie Valley and Ghost Town where he allegedly was assaulted also occurred the Summer of 2005 or 2006 not July 4, 2007 weekend as established to be false by Denneah Wick, Appellant, and the front of the photograph showing July 6, 2007. His testimony was at least on one point changed when confronted with the photograph showing that the Wick family was present. (R. pp. 212-213)

The record is void of explanation when considering the trip was to Cherokee, Maggie Valley, and Ghost Town. Specifically, both Victim 2 and Victim 3 neglect to say the other brother was present on this North Carolina excursion.

More importantly, where the alleged abuse of the victim allegedly ends in August of 2006 (R. p. 140, l. 5-12); Victim 1 and Victim 2 both participate in Appellant's wedding in November 3, 2007; and no one reports any type of wrong doing or assault until 2010. (R. p. 145, l. 11; p. 146, l. 20; p. 194, l. 22; p. 195, l. 1; p. 209, l. 15; p. 210, l. 1)

Testimony was offered as to a bias and reason for the allegations. Appellant's father informed the victims' father that he can no longer contribute thirty-one percent (31%) of the church's income, the source of the alleged victim's father's salary (R. pp. 237-248)

Appellant would assert a Directed Verdict should have been granted as there was less than a mere suspicion raised as to guilt. The evidence presented was contradictory at times, not relevant, and certainly more prejudicial than probative.

CONCLUSION

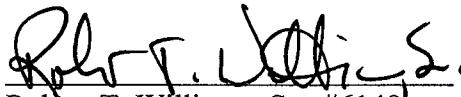
The Trial Judge erred in allowing the State to proceed with new indictments after Appellant had presented alibi evidence disproving a case which had been pending for almost three (3) years.

The Trial Judge further erred in allowing testimony of prior bad acts from other alleged victims where the evidence was less than clear and convincing.

Lastly, the Trial Judge erred by not granting Appellant's Motions for Directed Verdict of Not-Guilty where the evidence presents at best offered a mere suspicion of guilt.

Respectfully submitted,

March 5, 2014



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STATE OF SOUTH CAROLINA
COURT OF APPEALS
APPEAL FROM BARNWELL COUNTY
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The Honorable Doyet A. Early, III, Circuit Court Judge

Indictments Nos. 2013-GS-06-76, 2013-GS-06-77, 2013-GS-06-78, 2013-GS-06-79

The State of South Carolina Respondent,

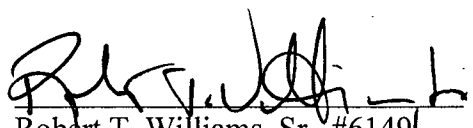
v.

Eric VanCleave Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that three (3) copies of the **Final Brief of Appellant** were served on the Respondent by depositing copies of it in the United States Mail, postage prepaid, on March 5, 2014, and addressed to William M. Blicht, Jr., Assistant Attorney General, Office of the Attorney General, P.O. Box 11549 Columbia, South Carolina 29211-1549, with an additional copy being served on Susanna Ringler, Assistant Solicitor and Jack W. Hammack, Jr., Assistant Solicitor, Second Judicial Circuit, P.O. Box 723 Barnwell, South Carolina 29812; and Alan Wilson, Attorney General, John W. McIntosh, Chief Deputy Attorney General, and Sally W. Elliott, Assistant Attorney General, Office of the Attorney General, P.O. Box 11549 Columbia, South Carolina 29211-1549.

I further certify that all parties required to be served have been served.

Dated: March 5, 2014



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